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INFANTS
TO
WITNESSES

GEORGE FOSTER LONGSDORF, EDITOR
WALTER A. SHUMAKER, ASSOCIATE

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CURRENT LAW

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INFANTS.

§ 1. *Status and disabilities in general.*[1]—Rights and duties as between parent and child,[2] powers and proceedings of guardians,[3] and guardians ad litem,[4] are elsewhere treated, as is also the application to infants of the doctrines of contributory negligence[5] and assumption of risk.[6] Infants are the wards of chancery, both as regards their custody[7] and their property.[8] The citizenship of an infant is determined by the citizenship of his legal custodian.[9] In some states the marriage of an infant removes his disabilities[10] and divests him of rights acquired by virtue of his infancy.[11] The doctrine of estoppel in pais does not apply to infants,[12] nor can they make or authorize to be made for them admissions against their interests.[13]

§ 2. *Custody, protection, support and earnings.*[14]—As a general rule it may be stated that parents are entitled to the custody of their infant children;[15] but infants are wards of the courts[16] of the state in which they reside.[17] The age at

1. See 4 C. L. 92.
2. See Parent and Child, 4 C. L. 873.
3. See Guardianship, 5 C. L. 1603.
4. See Guardians Ad Litem and Next Friends, 5 C. L. 1601.
5. See Negligence, 4 C. L. 764.
6. See Master and Servant, 4 C. L. 533.
7. See post, § 2; also Guardianship, 5 C. L. 1603.
8. See post, § 4.
9. The citizenship of an infant whose custody is awarded to the mother in divorce proceedings is determined by hers so long as he remains with her, for the purposes of jurisdiction of Federal courts. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.
10. In Texas this rule applies to a putative marriage void at common law but creating all the rights of coverture where contracted. Barkley v. Dumke [Tex.] 13 Tex. Ct. Rep. 242, 87 S. W. 1147. A married woman, though a minor, can, when aided and assisted by her husband, sue for partition of property in which she has an interest, without being authorized to do so by the judge on the advice of a family meeting. Tobin v. U. S. Safe Deposit & Sav. Bank [La.] 39 So. 33.
11. Under Ky. St. 1903, § 1707, the marriage of an infant divests her of her homestead rights in her parent's estate. Jones v. Crawford [Ky.] 84 S. W. 568.
12. That he misrepresented his age is no defense to an action. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869. An infant is not estopped by accepting after majority an amount paid his guardian on a life policy in which he was beneficiary, accepted by the guardian in compromise of the claims. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.
13. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.
14. See 4 C. L. 92.

NOTE. Criminal liability for causing death of infant by neglect: A person entrusted with the care and who undertakes the duty of supplying a helpless infant with the necessaries of life and who willfully neglects to discharge such duty is guilty of murder (Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835; Pallis v. State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106), and if such party does an act which might lead to the death of the infant, and which does so, he is guilty of manslaughter (Reg. v. Bubb, 4 Cox C. C. 455).—See note to Johnson v. State [Ohio] 61 L. R. A. 290.

15. See Parent and Child, 4 C. L. 873; also Guardianship, 5 C. L. 1603. Elliott v. Harris, 24 App. D. C. 11.
16. Under Gen. St. 1901, § 7147, the pro-

which an infant shall be competent to do military service depends wholly on legislative enactment.[18] As to which parent is entitled to the custody of children after separation depends upon the best interests of the children.[19] One entitled to the custody of an infant may maintain an action for damages for its abduction.[20]

§ 3. *Statutes for the protection of infants.*[21]—A statute, the manifest purpose of which is to prohibit the employment of infants in certain occupations, applies to all parties connected with the employment.[22]

§ 4. *Property and conveyances.*[23]—Courts of chancery have general jurisdiction over the estates of infants and may authorize the conversion of their realty into personalty,[24] or authorize a lease for a term exceeding the period of minority,[25] or for a long term if future rights of the infants are protected and their best interests subserved.[26] The power to dispose of an infant's real estate is statutory.[27] In Louisiana, an infant's real estate cannot be sold at private sale,[28] unless to effect a partition.[29] In Arkansas, land sold for taxes during minority may be redeemed after majority,[30] and tender of the amount necessary to redeem is not a condition precedent to exercising the right.[31] The owner of the tax title must account for

bate court has jurisdiction to commit to the Industrial School for Girls any girl under 16 years of age who leads a vagrant life. In re Gassaway [Kan.] 79 P. 113. Question as to whether a parent or a society in whose care a child was placed was entitled to its custody remanded for further testimony. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler [La] 38 So. 464. A judge hearing a writ of habeas corpus is not bound to award the custody of infants to either parent. Kirkland v. Canty [Ga.] 50 S. E. 90.

NOTE. Habeas Corpus decree as to custody of an infant is conclusive as to all questions necessarily involved as between the same parties and upon the same state of facts. State v. Bechdel, 37 Minn. 360, 34 N. W. 334, 5 Am. St. Rep. 854; Mercein v. People, 25 Wend. [N. Y.] 64, 35 Am. Dec. 653; Weir v. Marley, 99 Mo. 484; In re Sueden, 105 Mich. 61, 62 N. W. 1009, 55 Am. St. Rep. 435. **Contra.** In re King, 66 Kan. 695, 97 Am. St. Rep. 399. But is not res judicata where different conditions prevail (Lemunier v. McClearly, 37 La. Ann. 133; Edwards v. Edwards, 84 Mo. App. 552; People v. Winston, 72 N. Y. S. 456), nor as between different parties (Taylor v. Neither, 108 Ga. 765, 33 S. E. 420; In re Reynolds, 8 N. Y. S. 172).—See note to In re King [Kan.] 67 L. R. A. 783.

17. Where a New York foundling asylum sent infants to illiterate and vicious half breed Indians in Arizona from whom they were taken by American residents having suitable homes, the asylum was held not entitled to recover them. New York Foundling Hospital v. Gatti [Ariz.] 79 P. 231.

18. A minor over 18 years of age who enlists in the marine corps will not be discharged from the custody of his officers in habeas corpus brought by his father. Elliott v. Harris, 24 App. D. C. 11. See, also, Military and Naval Law, 4 C. L. 640.

19. In awarding a separate maintenance to a wife, it is proper to give her the custody of very young children. Schoop v. Schoop, 115 Ill. App. 343. Courts in the exercise of sound discretion may award the custody to either. Commonwealth v. Strickland, 27 Pa. Super. Ct. 309. See Divorce, 5 C. L. 1026, for a full discussion of this subject.

20. Where niece lived with aunt but on visiting another aunt preferred to remain with the latter providing that she could visit the aunt she formerly lived with, a privilege which the latter refused to allow at first but finally granted, held no abduction. Baumgartner v. Eigenbrot [Md.] 60 A. 601.

21. See 4 C. L. 92; see, also, Master and Servant, 4 C. L. 533, for a full discussion of statutes regulating employment.

22. An employer who knowingly employs a minor under 14 in a factory violates Laws 1903, p. 261, c. 136. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869.

23. See 4 C. L. 92.

24. Where the estate is liable to be sold for taxes and drainage assessments which the owners have no means to pay. King v. King, 215 Ill. 100, 74 N. E. 89.

25. If their best interests are subserved thereby. Ricardi v. Gaboury [Tenn.] 89 S. W. 98.

26. Lease for 99 years, rental to be adjusted every 20 years. Ricardi v. Gaboury [Tenn.] 89 S. W. 98.

27. Statutory authority to sell does not include authority to mortgage. Ball. Ann. Codes & St. §§ 6411-6416, 6460-6469. Wilson v. Wilson [Wash.] 82 P. 154.

28. Parker v. Ricks [La.] 38 So. 687.

29. Succession of Sallier [La.] 38 So. 929. Under Civ. Code, art. 1341, a court may, ex officio, convoke a family meeting to fix terms of credit and security on which the interest of minors in property partitioned may be sold. Tobin v. U. S. Safe Deposit & Sav. Bank [La.] 39 So. 33.

30. Under Kirby's Dig. § 7095, a minor may within two years after attaining majority maintain suit against the state, its vendees and subsequent purchasers to redeem his land sold for taxes during his minority. Hodges v. Harkleroad [Ark.] 85 S. W. 779. This right exists relative to lands sold in 1879. Id. Infant remainderman whose interest may be decreased by birth of other children is an owner within this statute. Id.

31. The right to redeem cannot be defeat-

the rental value after the right to redeem is asserted.[32] Deeds of conveyance executed by an infant are voidable and may be disaffirmed[33] or ratified after he attains majority.[34] Mere lapse of time after attaining majority raises no presumption of ratification if during such time the grantor is under the disability of coverture.[35] A minor co-tenant after attaining majority may waive his right of action to recover his share of an outstanding claim which his co-tenant purchased at foreclosure sale of the property.[36]

§ 5. *Contracts.*[37]—As a general rule an infant's contracts are voidable, not void;[38] but his contracts for necessaries are valid[39] if executed,[40] and in Georgia, by statute, his contracts in connection with a profession, trade or employment in which he is engaged are binding,[41] if he is so engaged by permission of his parent or guardian.[42] His voidable contracts may be disaffirmed within a reasonable time after he attains majority, and if relative to personalty, at any time before.[43] Whether he has used reasonable diligence in disaffirming after attaining majority is a question of fact;[44] but one asserting a ratification has the burden of proof.[45] On timely disaffirmance and restoration of what he has received, he is released from

ed because of failure to tender the amount necessary if the right to redeem is denied. Hodges v. Harkleroad [Ark.] 85 S. W. 779. Under Kirby's Dig. §§ 2759, 2760, an infant, after attaining majority, may redeem from tax sales occurring during minority without affidavit of tender of taxes and value of improvements required by such statute. Id.

32. In a suit to redeem land sold for taxes during minority, he may recover rent accruing subsequent to his attempted redemption but not that accruing prior thereto. Hodges v. Harkleroad [Ark.] 85 S. W. 779.

33. The institution of a suit after attaintaining majority, to cancel a conveyance made during minority is a repudiation of the transaction. Slater v. Rudderforth, 25 App. D. C. 497. A deed by an infant is avoided where after majority he executes another deed of the same premises to a different person. Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919.

34. Errors of form in a partition sale may be ratified after majority. Succession of Sallier [La.] 38 So. 929. A void deed executed after majority is no ratification of a deed executed while a minor. Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919.

35. Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919.

36. Ryason v. Dunten [Ind.] 73 N. E. 74. A minor co-tenant who for several years after attaining majority fails to assert his rights against his co-tenant who had purchased the property at foreclosure sale will not be permitted to assert them as against a bona fide purchaser from his co-tenant. Id.

37. See 4 C. L. 93.

38. His contract of **partnership.** Gordon v. Miller [Mo. App.] 85 S. W. 943.

Agreement to submit to arbitration: Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227. An **antenuptial agreement** with an affianced infant may be valid. Wood v. Reamer, 26 Ky. L. R. 819, 82 S. W. 572.

39. Goods furnished him for use in a trading business are **not necessaries,** though he derives his living solely from such business. Wallace v. Leroy [W. Va.] 50 S. E. 243. A contract with a telegraph company for transmission of a message to his parents, he being practically destitute and in need of money relative to which the message was sent, is one for necessaries. Western Union Tel. Co. v. Greer [Tenn.] 89 S. W. 327.

40. Where he contracts for a course in pharmacy and leaves the school prior to completing it, he may recover the unearned portion of tuition paid. Wallin v. Highland Park Co. [Iowa] 102 N. W. 839.

41. A "linter" in an oil mill is not engaged in a "profession, trade or business" within Civ. Code 1895, § 3650, so as to make him bound by a contract with his employer relative to a claim of damages for personal injuries. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

42. That an infant is collecting the proceeds of his employment does not show permission from his parent to engage in such employment. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

43. Code, § 3189. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 103 N. W. 961. One who loans money to a minor to enable him to redeem his land from a mortgage is not entitled to be subrogated to the lien of the mortgagee, the minor not being legally bound to redeem and redemption not being necessary. Burton v. Anthony [Or.] 79 P. 185.

44. In seeking to set aside a consent judgment. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

45. One seeking to hold an infant bound by his contract on the ground that he retained the consideration after attaining majority has the burden of showing that he possessed the consideration after majority and retained it for such a length of time that a ratification is to be inferred. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788. Evidence that after attaining majority an infant lived in the vicinity of land relative to which a contract on which a judgment sought to be set aside was based, and had notice of improvements being made, is admissible on the question of ratification. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

all liability,[46] even as against innocent third persons.[47] A disaffirmance, accompanied by a surrender of what he has received, releases his surety.[48] Disaffirmance of a contract of employment for a given time is not a bar against recovery on a quantum meruit for the services rendered.[49] On disaffirmance[50] he must restore what he received if he has it,[51] since he cannot be permitted to retain what he received and recover what he parted with;[52] but he is not precluded from rescinding by the fact that during the course of the transaction he received property[53] which he has lost, spent, or squandered.[54] He may plead his infancy as a defense to an action at law without restoring what he has received.[55]

§ 6. *Torts.*[56]

§ 7. *Crimes.*[57]—An infant between the ages of 7 and 12 is presumed incapable of committing crime.[58] This presumption can be rebutted only by affirmative proof that he has capacity to understand the wrongful character of the act complained of.[59] An infant who has reached the age of discretion is responsible for crime, though his contracts would not be enforceable.[60] Inability to make a valid promise of marriage is no defense to the crime of seduction.[61]

§ 8. *Actions by and against.*[62]—An infant may recover damages for injuries

46. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 103 N. W. 961.

47. On a negotiable note in the hands of an innocent purchaser. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 103 N. W. 961.

NOTE. Rights of third persons: Upon repudiating a sale of his property he becomes entitled to it even as against a bona fide purchaser from his vendee. Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409; Miles v. Lingerman, 24 Ind. 385; Jenkins v. Jenkins, 12 Iowa, 195; Downing v. Stone, 47 Mo. App. 144; Searcy v. Hunter, 81 Tex. 644; Hovey v. Hobson, 53 Me. 451; Mustard v. Wohlford's Heirs, 15 Grat. [Va.] 329. He may avoid his negotiable instrument as against a bona fide holder. Howard v. Simpkins, 70 Ga. 322.—See Hammon, Cont., § 175.

48. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 103 N. W. 961.

49. Fisher v. Kissinger, 6 Ohio C. C. (N. S.) 218.

Note: Upon repudiating a contract of hiring and service, an infant may recover on a quantum meruit the reasonable value of the services he has rendered under it. Ray v. Haines, 52 Ill. 485; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; Vehue v. Pinkham, 60 Me. 142; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Vent v. Osgood, 19 Pick. [Mass.] 572; Lufkin v. Mayall, 25 N. H. 82; Medbury v. Watrous, 7 Hill [N. Y.] 110; Francis v. Felmit, 20 N. C. 498; Dearden v. Adams, 19 R. I. 217; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194. By the better opinion the amount so recoverable is not subject to diminution by deducting the damages occasioned by the breach. Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Radley v. Kenedy, 14 N. Y. S. 268. There are cases, however, holding to the contrary. Lowe v. Sinclear, 27 Mo. 308; Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640; Hoxie v. Lincoln, 25 Vt. 206. See Hammon, Contracts, § 175b.

50. Where, after majority, action is brought to set aside an award by arbitrators and it is alleged that the award was made in a collusive and fraudulent suit, it constitutes a disaffirmance of the arbitration and award. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

51. He must return what he has received as a condition precedent to having a sale annulled. Succession of Sallier [La.] 38 So. 929. Where an infant seeks to disaffirm an award by which title to his land passed, he must restore what he received, and if what he received has been invested, he must surrender the property. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

52. An infant partner who agreed to deliver goods belonging to the firm in satisfaction of a balance due thereon cannot repudiate and recover the goods without paying the balance of the price due. Gordon v. Miller [Mo. App.] 85 S. W. 943.

53. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

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

55. Wallace v. Leroy [W. Va.] 50 S. E. 243. Where, in an action against an infant on a contract, property received by him has been attached in the hands of a third person, the establishment of the defense of infancy annuls the contract, defeats the action and dissolves the attachment. Id.

56, 57. See 4 C. L. 94.

58. Pen. Code, § 19. People v. Domenico, 45 Misc. 309, 92 N. Y. S. 390. An infant under 10 years of age is incapable of committing crime. Over 10 and under 14 the state must prove his capacity. Singleton v. State [Ga.] 52 S. E. 156.

59. Plea of guilty does not overcome it. People v. Domenico, 45 Misc. 309, 92 N. Y. S. 390. Nor can their capacity be determined by the court from their appearance and conversation with them and their parents, no evidence as to their capacity having been taken. Id.

60. Procuring money by fraudulent practices on a contract to perform services. Vinson v. State [Ga.] 52 S. E. 79.

61. State v. Brock, 186 Mo. 457, 85 S. W. 595.

62. See 4 C. L. 94.

caused by the negligence of another.[63] Service of process must be made on the infant[64] or one authorized by law to accept service for him;[65] but he can appear and defend only by guardian ad litem[66] duly appointed.[67] It is held that he may appear by attorney for the purpose of a continuance,[68] and failure to appoint a guardian ad litem merely affects the regularity of procedure and not the jurisdiction of the court;[69] but he cannot stand in judgment unless he was represented by a guardian ad litem.[70]

As a general rule infants are excepted from the operation of statutes of limitation,[71] which affect the remedy and not the right[72] as to transactions to which the bar is applicable;[73] but unless specially excepted, such statutes apply to them.[74] The disability of infancy cannot be tacked to the disability of coverture.[75]

The question of jurisdiction of a Federal court where an infant is suing by his guardian depends on the citizenship of the infant.[76]

A complaint for personal injuries should show that the infant sustained the damage complained of.[77] An infant party is not bound by admissions in a pleading of his adult co-defendant.[78] The incompetency of testimony against him cannot be waived by his attorney.[79] A bill in equity cannot be taken for confessed as to him.[80]

Where the interests of a guardian are adverse to those of his ward in property

63. Wilmot v. McPadden [Conn.] 61 A. 1069.

64. A minor is a member of his father's family, and process in an action against him is served by leaving a copy with the father at the father's dwelling. Yerkes v. Stetson [Pa.] 61 A. 113.

65. Service on a guardian ad litem appointed on a defective affidavit (not stating whether or not they had a statutory guardian), held not void. Mullins v. Mullins [Ky.] 87 S. W. 764.

66. A judgment not clearly favorable to him will be reversed where it appears that no guardian ad litem was appointed. Langston v. Bassette [Va.] 51 S. E. 218.

67. See Guardians Ad Litem and Next Friends, 5 C. L. 1601.

68. An appointment of a guardian ad litem at a following term is sufficient to give jurisdiction. Sears v. Duling [Vt.] 61 A. 518.

69. A complaint not alleging such appointment is not demurrable on the ground of want of capacity. Goodfriend v. Robins, 92 N. Y. S. 240. An allegation in a petition by an infant suing by his guardian, that such guardian was duly appointed etc., is not of a jurisdictional fact nor is it a material averment within Ohio Code, providing that such issues may be raised by general denial. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

70. The question of the court's failure to appoint a guardian ad litem may be raised on motion to set aside the judgment. State v. Gawronski, 110 Mo. App. 414, 85 S. W. 126. Unless a guardian ad litem was appointed, a judgment against him is void. Weaver v. Glenn [Va.] 51 S. E. 835. Under Code 1896, § 3180, a partition decree of property in which infants have an interest is erroneous where no guardian ad litem was appointed for them. Edwards v. Edwards [Ala.] 39 So. 82. Under Rev. St. 1899, § 558, after commencement of an action against an infant and service of process upon him, no further proceedings can be taken until the appointment of a guardian ad litem. State v. Gawronski, 110 Mo. App. 414, 85 S. W. 126.

71. Parker v. Ricks [La.] 38 So. 687. Limitations against an action for the recovery of land do not run against infants. Vincent v. Blanton [Ky.] 85 S. W. 703.

72. Code 1902, § 426 is a pure statute of limitation affecting the remedy. Jones v. Boykin, 70 S. C. 309, 49 S. E. 877.

73. Where an infant was a party to an action, was duly served and was represented by a guardian ad litem, and he consented to the judgment rendered and received benefits by reason of the compromise, an action to set aside such judgment is governed by reasonable diligence and not by limitations. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

74. Minors are not exempted from the provisions of Rev. Codes N. D. 1899, § 3491a. Schauble v. Schulz [C. C. A.] 137 F. 389.

75. Adverse possession commenced during minority begins to run against a female infant at the date of her marriage. York v. Hutcheson [Tex. Civ App.] 83 S. W. 895.

76. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

77. A declaration in tort by a next friend, alleging in its commencement that the next friend complains and in its conclusion that the tort was to the damage of the next friend, is irregular and will be stricken. Blonski v. American Enameled Brick & Tile Co. [N. J. Law] 60 A. 1101.

78. Holderby v. Hagan [W. Va.] 50 S. E. 437.

79. Jespersen v. Mech, 213 Ill 488, 72 N. E. 1114.

80. Holderby v. Hagan [W. Va.] 50 S. E. 437. In an action to quiet title as against infants, the plaintiff must prove his title. Id.

in suit, attorneys who appear for a guardian ad litem appointed for him are entitled to reasonable fees out of the infants' estate;[81] but the amount of such fees cannot be declared a lien on the property in controversy.[82]

A judgment against an infant on proper service is not void, but voidable only,[83] and can be set aside only in case of fraud, collusion or prejudicial error,[84] or where it appears that a good defense was not interposed by his guardian ad litem.[85] A judgment will not be set aside because of mere irregularity in the appointment of a guardian ad litem.[86] Equity will entertain a bill by an infant to impeach a decree for errors of law apparent on the face of the record without requiring him to file a bill for review, to apply for a rehearing, or sue out error.[87] Such a bill may be filed at any time during minority or within the period allowed after majority for prosecuting a writ of error.[88] A mere technical rule will not be permitted to defeat the review of a meritorious petition.[89]

INFORMATION; INFORMERS, see latest topical index.

INJUNCTION.

§ 1. *Nature of remedy and grounds therefor.*[90]—Injunctions are known as mandatory or preventive according as they command a defendant to do or to refrain from an act.[91] Mandatory injunctions are used with extreme caution and the relative convenience or inconvenience which would result to the parties from granting or withholding it will be taken into consideration in each case.[92] A preliminary

81, 82. Owens v. Gunther [Ark.] 86 S. W. 851.

83. A minor may assail a judgment for fraud or error only in case he seeks relief within the statutory period after attaining majority. Wilson v. Wilson [Wash.] 82 P. 154.

84. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

85. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023. A judgment in an action in which their guardian ad litem made no defense is not binding on them. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

86. Infant had suffered no substantial injustice. Middleton v. Stokes [S. C.] 50 S. E. 539.

87. A decree declaring lands not subject to partition and requiring a sale and division of the proceeds is a final decree within this rule. Crane v. Stafford [Ill.] 75 N. E. 424.

88. Crane v. Stafford [Ill.] 75 N. E. 424.

89. A rule that a motion for a new trial is indivisible cannot be invoked to defeat a review of a meritorious petition in error by a minor defendant whose guardian ad litem has inadvertently joined with him a mere nominal defendant. Godfrey v. Smith [Neb.] 103 N. W. 450.

90. See 4 C. L. 96. In many of the topics relating to particular matters, e. g., Corporations, 5 C. L. 764, the applicability of injunctive relief is incidentally discussed.

91. Mason v. Byrley [Ky.] 84 S. W. 767.

92. Mason v. Byrley [Ky.] 84 S. W. 767. Mandatory injunctions are granted only in rare instances such as to remove obstructions to easements. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. In Louisiana it seems that injunction is not allowed where mandatory

injunction may be mandatory.[93] A mandatory injunction will issue to compel a quasi-public corporation to perform its public duties without discrimination.[94] A special injunction is one granted for the prevention of irreparable injury when the preventive aid of the court is the ultimate and only relief sought and the primary equity involved in the suit.[95] A common injunction is one granted in aid of, or as secondary to, another equity.[96] An injunction will issue to restrain the parties[97] in the action in which it is granted and also, when so drawn, their attorneys, agents and employees,[98] and also persons acting in collusion or combination with the parties with knowledge of the injunction,[99] but not persons who are not in any way connected with the parties.[1]

As a general rule injunction will only issue when there is a clear and undisputed right, legal or equitable,[2] and where irreparable injury will result from the acts

relief is the essence of the prayer, mandamus being the proper remedy. But an injunction "slightly mandatory," where a mandate is requisite to complete equity as an incident to preventive relief, will issue. Itzkovitch v. Whitaker [La.] 39 So. 499, and cases cited. The distinction so made seems both logical and practical. Under the statutes of Kentucky mandamus issues only to public officers, executive and ministerial. Accordingly mandatory injunction and not mandamus is the remedy to compel a telephone company to install a telephone. Williams v. Maysville Tel. Co., 26 Ky. L. R. 945, 82 S. W. 995.

93. By statute in Kentucky (Civ. Code Prac. § 276). Mason v. Byrley [Ky.] 84 S. W. 767. It is sometimes held that mandatory injunction should not issue pending trial. Injunction restraining defendant's solicitors from using a badge designed to mislead plaintiff's customers held not mandatory. Morton v. Morton [Cal.] 82 P. 664. An injunction to prevent the discontinuance of a railroad station is so far mandatory in its nature that it should not issue preliminarily except under such circumstances as would justify mandatory injunctions. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. Mandatory injunction to obtain letters to prepare evidence for defense of criminal action refused. Smith v. Jerome, 93 N. Y. S. 202.

94. To furnish water to a user on the same terms as it furnishes water to a business competitor of complainant when the conditions of service are practically the same. Wiemer v. Louisville Water Co., 130 F. 251.

95. Injunction to restrain use of a room in violation of a covenant in a lease held to be a special injunction. Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80.

96. Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80.

97. Herzberger v. Barrow, 115 Ill. App. 79.

98. People v. Marr, 181 N. Y. 463, 74 N. E. 431; Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107.

99. Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107. When all the defendants had knowledge of a strike injunction, it was held to be immaterial that some were not parties to the injunction suit nor served with process or with the injunction. O'Brien v. People [Ill.] 75 N. E. 108. An injunction against a corporation binds its officers and agents although they be not parties of record. Town of Adel v. Woodall [Ga.] 50 S. E. 481.

1. Injunction was against city authorities, and a private person not acting as agent, servant or in collusion was held not to be restrained thereby. Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107.

2. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. The right of the complainant to claim specific performance was disputed and injunction refused. Lucas v. Milliken, 139 F. 816. Injunction will be refused when to grant it would be unconscionable, even though a legal right is about to be violated; such a case is presented where the legal right arises out of a decree of court rendered by mistake. Parsons v. Ohio Pail Co., 6 Ohio C. C. (N. S.) 116. Injunction may be refused where it is deemed inequitable, even where the defendant does not raise this point. McConnell v. Hampton [Ind.] 73 N. E. 1092. Where complainant's predecessors in title had covenanted to extend a street through land where defendant's water pipes were laid and defendant took with knowledge of the pipes, it was held he had no greater rights than his grantor's and that he could not come into equity for an injunction to enjoin the maintenance of the pipes. Jayne v. Cortland Waterworks Co., 95 N. Y. S. 227. Where the plaintiff's legal right is not clear or is disputed, equity will not interfere and issue final orders or decrees before the right is established by proceedings at law, unless it clearly appears that no adequate remedy at law exists or that irreparable and permanent injury must result unless the summary process by injunction is not interposed. Williams v. Mathewson [N. H.] 60 A. 687. Not to restrain an action at law on an oral agreement in the absence of fraud, set off, multiplicity of suits or other equitable ground. Waggaman v. Keith Co., 23 App. D. C. 166. It is doubtful whether an injunction will lie to enjoin a husband from disposing of or selling his property in order to avoid payment of alimony. Griswold v. Griswold, 111 Ill. App. 269. Under the laws of Michigan (Comp. Laws, § 7754), providing that money payable to a beneficiary by a benefit society duly organized could not be come at by trustee, garnishment or other process or seized by any legal or equitable process or by operation of law, it was held that the court in a divorce proceeding could not enjoin such payments. Hunt v. Branch Circuit Judge [Mich.] 12 Det. Leg. N. 490, 104 N. W. 724.

complained of,[3] for which there is no adequate remedy at law.[4] Injunction may issue in other cases by force of statute in some states.[5] Whether damages will be regarded by a court of equity as "irreparable" or not depends more upon the nature of the

3. Becker v. Gilbert [N. J. Eq.] 60 A. 29.

Granted: Sale of books of a mercantile agency on levy and also the sale of information contained in them enjoined. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390. Removal of a blacksmith shop to another site in violation of an ordinance enjoined on ground that irreparable damage would be caused by the greater exposure to fire. Patterson v. Johnson, 114 Ill. App. 329. Removal of a wooden building in violation of a city ordinance enjoined on the ground that it would cause irreparable injury to the plaintiff. Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761. To prevent an addition to a building in which the plaintiff had a common easement with the defendant. Piro v. Shipley, 211 Pa. 36, 60 A. 325. Cutting a channel in lands of another by which to turn a steamship around enjoined. Wilkinson v. Dunkley-Williams Co. [Mich.] 103 N. W. 170. In Idaho an injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable and notwithstanding he has other remedies. Price v. Grice [Idaho] 79 P. 387. In Illinois violations of the insurance laws were enjoined although there was an adequate remedy at law, criminally and civilly, and no injury had been suffered. North American Ins. Co. v. Yates, 116 Ill. App. 217.

Refused: A preliminary injunction will not issue to restrain the collection of debts due defendants where it appears that there is no fund to be distributed and no injury will result to the complainant from such collection. Rowland v. Auto Car Co., 133 F. 835. Incurring indebtedness beyond constitutional limit held not to cause irreparable injury to or deprive tax payer of his remedy. Bailey v. Sioux Falls [S. D.] 103 N. W. 16. Injunction refused where an entry which would have been lawful if properly made was effected by force against one wrongfully withholding possession, there being no irreparable injury involved. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353. Loss of the presidency of a corporation by failure to get sufficient stock through breach of contract to sue held not to be irreparable injury where the defendants were able to respond in damages. Lucas v. Milliken, 139 F. 816. Not to prevent laying gas pipes which at one single point only interfered with the complainants' pipes. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750.

4. **Granted:** Cutting off steam supply by landlord enjoined, it being held that it was essential to the reasonable use and enjoyment of the demised premises and that there was no adequate remedy at law. Slack v. Knox, 114 Ill. App. 435. Where commercial ruin was threatened by acts of a combination of brewers in restraint of trade, an injunction issued on the ground that the remedy at law was inadequate, although the statute (anti-trust act—26 Stat. at L. 209, c. 647; U. S. Comp. St. 1901, p. 3201), provided for threefold damages. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161. To prevent the sale of property seized upon process, a motion in the action in which the execution issued being held to be an inadequate remedy. Gale Mfg. Co. v. Sleeper [Kan.] 79 P. 648. Procuring breach of patent medicine contract. Garst v. Charles, 187 Mass. 144, 72 N. E. 839. Relief granted although certiorari and criminal proceedings were possible, where by virtue of an ordinance a railroad obstructed the streets. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831. The remedy afforded by an indefinite succession of lawsuits on account of constant flowings of land can hardly be regarded as adequate. Boglins v. Giorgetta [Colo. App.] 78 P. 612. Mandatory injunction will lie for refusal of a water company to furnish water to the complainant at the same rates as to others, this being the only adequate remedy available. Wiemer v. Louisville Water Co., 130 F. 251. Injunction issued to restrain a lessor of real estate from preventing the owners of certain boilers which they delivered to his lessees under a contract of bailment, and which had been attached to the realty, from repossessing themselves of their property upon the bankruptcy of the lessee. Wetherill v. Gallagher, 211 Pa. 306, 60 A. 905. No adequate remedy at law for wrongful use of water supply by city where it was impossible to ascertain how much water was being used. Turners Falls Fire Dist. v. Millers Falls Water Supply Dist. [Mass.] 75 N. E. 630.

The extraordinary legal remedies, mandamus, prohibition and quo warranto being "legal" should be applied if fully adequate. Compare Mandamus, 4 C. L. 506; Prohibition, Writ Of, 4 C. L. 1084; Quo Warranto, 4 C. L. 1177,

Mandamus held to be the remedy to restrain removal of railroad station. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18.

Refused: Where a water company condemned land under which a gas company ran its pipes, an injunction was refused the latter on the ground that it could remove the pipes to other land at a small expense. Independent Natural Gas Co. v. Butler Water Co., 210 Pa. 177, 59 A. 984. A public improvement will not be enjoined to save a private citizen from some doubtful future injury for which he will have an adequate remedy at law. Simonson v. Richardson, 2 Ohio N. P. (N. S.) 170. Refused where a county was in possession of land in compliance with Texas law (Supp. Sayles' Ann. Civ. St. art 4471), providing for possession after condemnation, as there was an adequate remedy at law to try the right of the county to condemn the land. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501. Not to restrain justices from acting because of interest in the result. National Tube Co. v. Smith [W. Va.] 50 S. E. 717. Court refused to enforce by injunction a covenant not to institute condemnation proceedings against any lands of a railroad company whether the covenant was an easement or not. Morris & E. R. Co. v. Hoboken & M. R. Co. [N. J. Eq.] 59 A. 332. Injunction will not lie to

right injured than upon the pecuniary measure of the loss suffered.[6] The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity.[7] The remedy at law may be inadequate because the resulting damages will not be susceptible of computation[8] or because the defendant is insolvent[9] or in case of fraud,[10] or because requiring a multitude of suits,[11] and in like manner multiplicity of suits,[12] or impossibility of computing damages, may render the injuries irreparable.[13] The issuance of an injunction is not a matter of absolute right, but rests in the sound discretion of the court, to be determined on the consideration of all the special

restrain the service of an execution upon the ground that it was judgment entered by another court by mistake, since that court should be applied to for a correction. Hearn v. Canning [R. I.] 61 A. 602. Dispossession of a tenant by a landlord under claim of right does not present a case of "no adequate remedy at law." Williams v. Mathewson [N. H.] 60 A. 687. An injunction to restrain the surveying and condemning of a right of way over the plaintiff's land refused on the ground that the plaintiff's remedy at law was adequate in the condemnation proceedings. South & W. R. Co. v. Virginia & S. E. Ry. Co. [Va.] 51 S. E. 843. Injunction does not lie to enforce rights acquired under an assignment of part of a contract; the remedy is at law for the breach. New York & Bermudez Co. v. Herrmann, 6 Ohio C. C. (N. S.) 431. Where building restrictions in a deed were mutually misconstrued by both complainant and defendant and the former alone of all the other property owners objected to the defendant's violation of them an injunction was refused and complainant left to an action at law for damages. Righter v. Winters [N. J. Eq.] 59 A. 770. Not to recover possession of mortgaged property attached to enforce a laborer's lien as **replevin** is an adequate remedy. Johnson v. Gillenwater [Ark.] 87 S. W. 439. Refused where plaintiff was amply protected by common-law remedy of **attachment.** Booth & Co. v. Mohr [Ga.] 50 S. E. 173. Remedy at law by **certiorari** deemed to be adequate and an injunction was refused to restrain commissioners from proceeding under Georgia law (Pol. Code 1895, §§ 520-522) to lay out and open a public road. Atlanta & W. P. R. Co. v. Redwine [Ga.] 51 S. E. 724.

5. Rev. St. Mo. 1899, § 3649. Injunction issued to restrain further obstruction to access to a private road. Downing v. Corcoran [Mo. App.] 87 S. W. 114.

6. Injunction granted for obstructing a drainage ditch, although the damages sustained by the back water was only $15. Robertson v. Lewis, 77 Conn. 345, 59 A. 409.

7. Williams v. Neely [C. C. A.] 134 F. 1; Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146; American Plate Glass Co. v. Nicosin, 34 Ind. App. 643, 73 N. E. 625; Watkins v. Tallassee Falls Mfg. Co. [Ala.] 38 So. 756. Injunction granted to prevent the transfer of shares of stock pendente lite on the ground that they were different from ordinary personal property and that equitable relief was more beneficial and complete than legal. Currie v. Jones, 138 N. C. 189, 50 S. E. 560. An action upon forged promissory notes restrained. Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601. The real question is not whether a party is utterly without remedy but whether the legal remedy, if any, is inadequate in the sense that it will not place the parties to the contract in the same positions which they occupied before the attempted breach of contract. Erie R. Co. v. Buffalo, 180 N. Y. 192, 73 N. E. 26. For a full discussion of the general principles, see Equity, 5 C. L. 1144.

8. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368; Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164. Wrongful levy of an execution on subscribers' books of a mercantile agency and threatened disclosure of their contents enjoined. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390. Where a mining contract provided for a royalty on all coal which would not pass through a screen of a certain size, injunction lies to prevent the use of a screen with a larger mesh. Drake v. Black Diamond Coal & Min. Co. [Ky.] 89 S. W. 545.

9. Shields v. Johnson [Idaho] 79 P. 394. In such a case the plaintiff's legal remedy would be inadequate. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368. The question as to the inability of the defendant to respond in damages was held not to be properly raised where there were two defendants and the financial irresponsibility of only one was alleged. Williams v. Mathewson [N. H.] 60 A. 687. Equity will restrain the sale of real estate of a decedent, conveyed away in lifetime in fraud of creditors to knowledge of vendee and estate of decedent is insolvent, but the rule held not to apply to the facts of the case at bar. Monroe v. Monroe, 26 Pa. Super. Ct. 51. Mere insolvency of the defendant does not make the remedy at law inadequate in a suit involving right to possession of land. Martinson v. Marzolf [N. D.] 103 N. W. 937.

10. Injunction against use by defendant's solicitors of a badge similar to plaintiff's and calculated to deceive his customers issued without proof of insolvency. Morton v. Morton [Cal.] 82 P. 664.

11. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368. To prevent cutting off steam connections and supply. Slack v. Knox, 114 Ill. App. 435. Injunction may issue to prevent a multiplicity of suits arising because of the constant flowing of the complainant's lands. Boglino v. Giorgetta [Colo. App.] 78 P. 612. Repeated slight trespasses will be enjoined, though the damage is slight and defendant is solvent. O'Brien v. Murphy [Mass.] 75 N. E. 700; Hornung v. Herring [Neb.] 104 N. W. 1071.

12. Glucose Refining Co. v. Chicago, 138 F.

circumstances of each case.[14] The "balance of convenience or hardship" must be in favor of the complainants.[15] Injunction will not issue to enjoin a speculative or contingent injury[16] nor to preserve rights which may never accrue.[17] An injunction which would be useless will not be granted.[18] The right to an injunction may be barred by laches[19] or by estoppel.[20] Injunction is not appropriate to mandamus proceedings.[21] A common-law court may be given the power to issue restraining orders by the legislature[22] but such power is not an equitable one.[23]

§ 2. *Who and what may be enjoined. A. In general.*[24]—The various grounds whereon equity in general may be invoked[25] and the general nature and office of injunctions[26] have already been discussed. Injunction as a statutory remedy pertains to the particular subject-matter or right whereto the statute relates.[27]

209. Prosecution of a number of actions under a smoke nuisance ordinance. Dispossession of a tenant by a landlord under claim of right was held not to call in the power of equity on the ground of avoidance of a multiplicity of suits. Williams v. Mathewson [N. H.] 60 A. 687.

13. Injunction to restrain collection of a judgment by sale of R. G. Dun & Co. reference books enjoined. Sinsabaugh v. Dun, 114 Ill. App. 523.

14. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658.

15. Hoy v. Altoona Midway Oil Co., 136 F. 483. Injunction against laying railroad tracks refused in doubtful case. Pennsylvania R. Co. v. Inland Traction Co., 25 Pa. Super. Ct. 115. Where complainant's damage would obviously be slight and the defendant's loss from an injunction would be considerable, injunction will not issue. Bill by author to restrain publication because his reputation would suffer by reason of the inferior paper and binding used. Cleveland v. Martin [Ill.] 75 N. E. 772.

16. Fisher v. Georgia Vitrified Brick & Clay Co., 121 Ga. 621, 49 S. E. 679. Not restrain a party from exhibiting drawings and diagrams of inventions, in the absence of showing threats so to do or reasons to expect it. Griffith v. Dodgson, 93 N. Y. S. 155.

17. Not to restrain a sale of land by the guardian of an incompetent until the plaintiff was in a position to bring a bill for the specific performance of a contract for the sale of it to him made by the incompetent. In re Hayden's Estate [Cal. App.] 81 P. 668. An injunction will not lie to restrain a defendant from using property in order that it might be subject to an execution in payment of a prospective judgment. Williamson v. Moore [Idaho] 80 P. 227.

18. To restrain past acts. Shafer v. Fry [Ind.] 73 N. E. 698. Past acts of causing water to set back on plaintiff's land by means of a dam. Bryant v. Frank H. Lamb Timber Co., 37 Wash. 168, 79 P. 622. Sale of shares of stock already made. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846. Performance of an ultra vires contract practically executed. Fisher v. Georgia Vitrified Brick & Clay Co., 121 Ga. 621, 49 S. E. 679. Not to restrain canvass of votes cast for representatives in the National House when the certificates of election have been issued and the House has admitted the holders. Selden v. Montague, 194 U. S. 153, 48 Law. Ed. 915. Where the defendant repeatedly obstructed plaintiff's access to a right of way it was held that the case was not within the rule, although the obstructions were actually erected. Downing v. Corcoran [Mo. App.] 87 S. W. 114. An injunction refused to restrain a railroad company from renewing a bridge lawfully built under an act of congress, where such acts in no manner increased the obstruction to navigation on the ground it would not furnish the remedy sought. United States v. Parkersburg Branch R. Co., 134 F. 969.

19. Diversion of water to injury of riparian owner. Penrhyn Slate Co. v. Granville Elec. Light & Power Co., 181 N. Y. 80, 73 N. E. 566; Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141; City of Elberton v. Pearle Cotton Mills [Ga.] 50 S. E. 977. Injunction refused where there had been a delay of eight years. Taylor v. Erie City Pass. R. Co. [Pa.] 61 A. 992. Refused when nuisance of gas and smoke from a plant had gone on for ten years and thousands of dollars had been spent upon improving the plant. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658. Right to enjoin the maintenance of water pipes in certain land held to be lost by sleeping on one's rights. Jayne v. Cortland Waterworks Co., 95 N. Y. S. 227.

20. Injunction refused where the defendant gas company had requested the plaintiff company to disclose its lines of pipes and it had not only refused so to do but kept a representative on the defendant's line of work who made no objection to it as deviating from the lines prescribed by statute to the injury of the plaintiff. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750.

21. Proceeding to compel county treasurer to make tax sales. People v. Lewis, 102 App. Div. 408, 92 N. Y. S. 642.

22. Pennsylvania Laws (P. L. 331) act of May 29, 1901, § 9, giving the court of quarter sessions jurisdiction of indictments for illegal sales of oleomargarine with power to issue restraining orders, held to be constitutional. Commonwealth v. Andrews, 211 Pa. 110, 60 A. 554.

23. "The remedy provided is not a proceeding in equity * * * and is in consonance with the principle of preventive justice which had early recognition in the common law and which was said by distinguished authority to be preferable in all respects to punishing justice." Commonwealth v. Andrews, 211 Pa. 110, 60 A. 554.

24, 25. See 4 C. L. 100.

26. See ante, § 1.

(§ 2) *B. Actions or proceedings.*[28]—The bringing of actions or suits will be enjoined on the ground of multiplicity,[29] but actions by different persons on distinct and separate grounds do not constitute a multiplicity of suits.[30] Injunction will not lie to restrain an action at law where there is a legal defense,[31] but will issue to permit the assertion of an equitable estoppel.[32] It may issue to protect a judgment and complete the plaintiff's remedy,[33] or to prevent fraud,[34] or to restrain the entry or enforcement of a judgment which would be by reason of matters not available at law, contrary to equity and good conscience,[35] as in case of fraud[36] or con-

27. E. g. that authorized in proceedings to dissolve corporations. See 4 C. L. 100, n. 7.

28. See 4 C. L. 100.

29. American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625; Watkins v. Tallassee Falls Mfg. Co. [Ala.] 38 So. 756.

30. Injunction refused where plaintiff was garnished in 142 different suits. National Tube Co. v. Smith [W. Va.] 50 S. E. 717.

31. Held not necessary to go into equity to show that a lease made to A was really for the benefit of B. Cox v. O'Neal [Ala.] 37 So. 674. Injunction refused to restrain an action at law by a principal against an agent for paying over money collected on a judgment to a third person, it being held that the question of ownership was for a court of law and could not be determined by this process. Moss Mercantile Co. v. First Nat. Bank [Or.] 82 P. 8. Not to restrain collection of a judgment alleged to have been paid and satisfied. Pyle v. Crebs, 112 Ill. App. 480.

32. To restrain an action in ejectment where by conduct and receipt of rents a corporation was held estopped to deny validity of a lease. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419.

33. In an action for the recovery of land and damages for its use an injunction was granted to prevent the subsequent transfer of it by the defendant in evasion of the judgment. Cole v. Jerman, 77 Conn. 374, 59 A. 425. An action in ejectment was enjoined where the owner of an equity of redemption had been induced by fraud to deed away the equity, and it was necessary to go into equity to get the deed canceled to make her defense to the action available. Hudson v. Jackson [Ala.] 39 So. 227.

34. Action on promissory note enjoined on the ground of fraud. Saloon mortgage note. O'Brien v. Paterson Brewing & Malting Co. [N. J. Eq.] 61 A. 437. Injunction to enjoin the prosecution of an action of ejectment and cancel a deed on the ground that it and the record of it had been fraudulently altered was refused, since the court of law could determine the validity of the deed and until it was declared invalid there was no equitable right involved. Wilson v. Miller [Ala.] 39 So. 178.

35. Injunction issued to restrain an action at law on a promissory note to allow of a defense of reduction arising ont of the same transaction, the remedy at law being inadequate. Williams v. Neely [C. C. A.] 134 F. 1. Collection of judgment on notes restrained until the defendant would consent to a new trial in which plaintiff might set up a defense which he had not had an opportunity to use. Headley v. Leavitt [N. J. Err. & App.] 60 A. 963. Collection restrained where judgment was obtained without service. Herzberger v. Barrow, 115 Ill. App. 79. Injunction granted where an indorsement on a note was the result of a mistake. King v. Hart, 116 Ill. App. 33. An action on a building contract held to be within the rule. Watkins v. Tallassee Falls Mfg. Co. [Ala.] 38 So. 756. Injunction issued to restrain enforcement of a judgment not authorized by the summons and complaint. Phillips v. Norton [S. D.] 101 N. W. 727. An injunction will issue at the instance of a bankrupt who has not listed a judgment creditor on his schedules only if he proves the creditor had notice or knowledge of the bankruptcy proceedings in time to prove his claim. Armstrong v. Sweeney [Neb.] 103 N. W. 436. As a general rule a court of equity should not intervene in a litigation pending in a court of law and by injunction transfer it to that court on the ground that in that court alone the equitable right of action or of defense can be recognized or enforced. Kronson v. Lipschitz [N. J. Eq.] 60 A. 819. An injunction to transfer an action at law in which the title to personalty was involved to court of equity on the ground that the doctrine of equitable estoppel was involved, refused. Kronson v. Lipschitz [N. J. Eq.] 60 A. 819. Where an action of ejectment was brought against a tenant by a third party who did not join the landlord, a later grantee who did not allege that the landlord was not aware of the ejectment suit was refused an injunction to prevent a writ of possession issuing in favor of the plaintiff in the ejectment suit. King v. Davis, 137 F. 222. An action at law upon a note will not be enjoined so that a court of equity may order the cancellation of the note without more, since a judgment in favor of the defendant as completely cancels the note as a decree in equity. House v. Oliver [Ga.] 51 S. E. 722. It is a rule that applications for relief in equity against judgments at law will be scrutinized closely and that an injunction to prevent the enforcement of the same will not be granted except on facts which show the clearest and strongest reasons for the interposition of chancery. Opie v. Clancy [R. I.] 60 A. 635. A defendant in an action at law who is severally liable with a party not sued may not have the action enjoined and removed to equity to enable the defendant to establish an equitable set-off when it does not appear that the co-debtor was insolvent. Kewanee Mfg. Co. v. Leigh [C. C. A.] 135 F. 58.

36. When the plaintiff's attorney agreed to continue the case and the plaintiff per-

spiracy,[37] or in a case where one is by accident[38] or through ignorance unmixed with negligence on his part, prevented from making his defense or from taking steps for the preservation of his rights.[39] It must clearly appear that it would be contrary to equity or good conscience to allow the judgment at law complained of to be enforced.[40] Diligence and clear grounds for equitable relief must appear.[41] Thus an injunction will not issue to restrain the collection of a void judgment[42] where that fact is apparent on the face of the record,[43] but it will issue where extrinsic evidence is necessary to show the defect.[44] Injunction will never lie to restrain a levy and sale of personal property[45] unless it is of such peculiar and intrinsic value to the owner that its loss cannot be adequately compensated in damages.[46] It will issue to restrain a sale under an execution which will cast a cloud upon the complainant's title,[47] or to prevent a judicial sale where the legal process is being abused by the judgment creditor.[48] Injunction proceedings to restrain the foreclosure of a mortgage are provided for by statute in some states.[49] By statute Federal courts are forbidden to grant a writ of injunction to stay proceedings in a state court,[50] except in bank-

sonally took a default. Gulf & S. I. R. Co. v. Flowers [Miss.] 38 So. 37. Bill to set aside a decree for sale of land fraudulently obtained. Keith v. Alger [Tenn.] 85 S. W. 71.

37. Actions in regard to canvassing election returns. People v. District Court of Third Judicial Dist. [Colo.] 79 P. 1024.

38. Rhode Island law (Gen. St. 1872, c. 185, § 10, and Gen. St. 1896, c. 228, § 10), providing for the conduct of courts in the absence of the justice, construed. Opie v. Clancy [R. I.] 60 A. 635.

39. Defective work in constructing a sidewalk underground not apparent upon inspection. Chapman v. Salfissberg, 111 Ill. App. 102. Equity will not relieve a party when he has had a plain, speedy and adequate remedy at law, which by his own negligence he has not availed himself of. Presley v. Dean [Idaho] 79 P. 71. Injunction to restrain service of an execution, on the ground that the judgment was entered by mistake, was refused where the mistake could only have happened through the neglect of the plaintiff or his counsel, no fraud being charged. Hearn v. Canning [R. I.] 61 A. 602.

40. Even if it be conceded that the plaintiff took his right to appeal by an unavoidable accident, that does not amount to anything unless the judgment from which he appealed was wrong or there was something which made it inequitable for the defendant to enforce the judgment. Little Rock, etc., R. Co. v. Newman [Ark.] 84 S. W. 727.

41. Not to restrain judgment of a lower court where defendant had ample opportunity to appeal. Henion v. Pohl, 113 Ill. App. 100. Not to restrain the collection of a judgment by one who claimed money held by a garnishee. Radzinzki v. Fry, 111 Ill. App. 645. Not to restrain the prosecution of action to collect taxes against a foreign corporation on the ground that it was not liable therefor. Scottish Union & National Ins. Co. v. Bowland, 196 U. S. 611, 49 Law. Ed. 619.

42. Henman v. Westheimer, 110 Mo. App. 191, 85 S. W. 101. This rule applies only when the judgment creditor threatens to enforce collection and nobody is involved except the judgment creditor and debtor and an injunction issued when a garnishee was involved who was threatened with suits by various claimants. Pfeiffer v. McCullough, 115 Ill. App. 251.

43, 44. Henman v. Westheimer, 110 Mo. App. 191, 85 S. W. 101.

45. Levy on fresh and refrigerated meats held to be within this rule. Florida Packing & Ice Co. v. Carney [Fla.] 38 So. 602.

46. Florida Packing & Ice Co. v. Carney [Fla.] 38 So. 602.

47. Injunction to restrain a sale on a levy was refused where the complainant was the record holder of the title at the time of levy and the land was levied on as the land of another, since it did not raise such a cloud as to require it. Magoffin v. San Antonio Brewing Ass'n [Tex. Civ. App.] 54 S. W. 843.

48. Where at the sale the judgment creditor cast doubts upon the judgment debtor's title to the land being sold, the sale was enjoined until the question of title there raised could be determined on the ground that it was inequitable for the creditor to use legal process to sell and then cheapen it by starting this question as to the res to be sold. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938.

49. Laws of North Dakota (Rev. Codes 1899, § 5845). Tracy v. Scott [N. D.] 101 N. W. 905.

50. U. S. Rev. St. § 720; U. S. Comp. St. 1901, p. 581. A decree of the Federal court restraining the use of property by a party to whom the state court had given the right was held not to be within the statute, since the ownership of the property had changed since the state decision. Oman v. Bedford-Bowling Green Stone Co. [C. C. A.] 134 F. 64; Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441. This section applies so as to prevent the issuing of an injunction, not only to a state court but it also prohibits a restraining order against parties to a suit in a state court. Security Trust Co. of Camden v. Union Trust Co., 134 F. 301. This prohibition extends to the entire proceedings of the state court from the commencement of the suit until the execution issued on the judgment decree is satisfied. Id. Statute

ruptcy cases.[51] A Federal court will not enjoin the prosecution of action in a state court which does not interfere with any property over which the Federal court has acquired jurisdiction.[52] Where proceedings in rem are instituted in both Federal and state courts, the court which first takes possession of the res acquires exclusive jurisdiction.[53] An injunction will issue from a state court to restrain the enforcement of a decree or judgment of a Federal court which was obtained by fraud.[54] The rule that an injunction will not issue from one court which interferes with the judgments or decrees of a court of co-ordinate or concurrent jurisdiction, having equal power to grant the relief sought by injunction, exists by statute[55] and at common law.[56] Injunction, however, may issue in cases of concurrent jurisdiction if equity can give a more perfect remedy or better trial than a court of law.[57] An injunction issued by the court of one state does not control the court of another state,[58] nor will an injunction issue to enforce laws of another state.[59] Injunction will not

held not to apply to proceedings of a state railroad commission which had been held by the highest state court to be only an administrative agency with quasi-judicial powers. Illinois Cent. R. Co. v. Mississippi Railroad Commission [C. C. A.] 138 F. 327. In cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may notwithstanding U. S. Rev. St. § 720 (U. S. Comp. St. 1901, p. 581) restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629. A Federal court enjoined the sale of land on judgments rendered in a state court on causes of action arising after the confirmation of a foreclosure sale, when the decree of sale and confirmation showed that the Federal court intended to retain jurisdiction so far as was necessary to determine all liens and demands to be paid by the purchaser at the sale. Id. While a Federal court will not attempt to restrain a state court in a pending proceeding, the statute may not be construed to limit the power of a Federal court to restrain parties from instituting proceedings in any court. Glucose Refining Co. v. Chicago, 138 F. 209. Statute held not to apply where the judgment in the state court was obtained by fraud, or other equitable grounds existed, where Federal court would have jurisdiction to grant relief were the judgment that of a Federal court. Lehman v. Graham [C. C. A.] 135 F. 39. A Federal court will take equitable jurisdiction to prevent irreparable injury to property, even though its decree may operate incidentally to restrain criminal proceedings in state courts. Glucose Refining Co. v. Chicago, 138 F. 209.

51. Security Trust Co. of Camden v. Union Trust Co., 134 F. 301. In the New Jersey district court of the United States, a referee in bankruptcy has no power to grant an injunction to stay proceedings in a state court. General Orders in Bankruptcy No. 12, § 3, providing that an application for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and determined by the judge and rules of New Jersey district court vesting referees with such jurisdiction as may be delegated under the bankruptcy act and the general orders of the supreme court, construed. In re Siebert, 133 F. 781.

52. Suit in state court was for removal of trustees to whom Federal court had ordered money to be paid. Copeland v. Bruning [C. C. A.] 127 F. 550.

53. A state court will enjoin a sale of property in the possession of receivers appointed by it, under an attachment obtained in a suit in a Federal court prior to the receivership proceedings. Beardslee v. Ingraham, 94 N. Y. S. 937. Where a Federal court and a state court have jurisdiction, the tribunal whose jurisdiction first attaches holds in exclusion of the other until its duty is fully performed, and the jurisdiction involved is fully exhausted. Security Trust Co. of Camden v. Union Trust Co., 134 F. 301. While a state court will not enjoin a party from prosecuting his demands in a Federal court which has acquired jurisdiction (Shaw v. Frey [N. J. Eq.] 59 A. 811), it may compel discovery from such a party, if under its jurisdiction, of matters necessary to a fair trial of the action in the Federal court, and may to that end enjoin the prosecution of the action in the Federal court pending the discovery. Id.

54. The fraud must be extrinsic or collateral to the questions examined. Keith v. Alger [Tenn.] 85 S. W. 71.

55. Kentucky (Civ. Code Prac. section 285). Nairin v. Kentucky Heating Co. [Ky.] 86 S. W. 676. Under the Constitution of Texas it was held that a district court might not enjoin actions at law in the count court within the jurisdiction of the county court. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 83 S. W. 1100.

56. Nairin v. Kentucky Heating Co. [Ky.] 86 S. W. 676.

57. Grafton & B. R. Co. v. Buckhannon & N. R. Co., 56 W. Va. 458, 49 S. E. 532.

58. Injunction will not lie to restrain a garnishee action on the ground that an injunction to restrain the garnishee from paying has issued in another state. National Tube Co. v. Smith [W. Va.] 50 S. E. 717. An injunction will not issue to restrain obedience to orders of a foreign court where it does not appear that that court had no jurisdiction to make them. Johnstown Min. Co. v. Morse, 45 Misc. 110, 91 N. Y. S. 536.

59. Refused to restrain garnishment of

issue to restrain a party from prosecuting an action in a foreign court where the ground for injunction can be set up as a defense in the foreign court.[60] Ministerial officers of the United States may be bound by an injunction issued by a State court having jurisdiction.[61]

(§ 2) *C. Public, official and municipal acts*[62] that are wrongful and unlawful may be restrained as where trespass is committed in the guise of police surveillance,[63] or discretion is being abused[64] or are illegal,[65] or fraudulent contract is being performed,[66] or a wrongful use is being made of municipal property,[67] or the municipal funds are being improperly used.[68] But lawful acts[69] or acts in the execution of lawful administrative[70] or legislative powers, will not be so restrained.[71] Exhibition of the photograph of an innocent person in a rogue's gallery will be restrained.[72] The

wages earned in Pennsylvania which were exempt by the law of that state. National Tube Co. v. Smith [W. Va.] 50 S. E. 717.

60. Prosecution of a proceeding to determine the right to a patent in U. S. Patent Office. Griffith v. Dodgson, 93 N. Y. S. 155.

61. An order by a state court enjoining a creditor from collecting a claim from the United States and appointing a receiver to do so, makes it unlawful for the secretary of the treasury to pay him, and such payment did not discharge the United States and such order does not contravene the United States statute (Rev. St. § 3477) forbidding and making void assignments of claims against the United States. People's Trust Co. v. United States, 38 Ct. Cl. 359.

62. See 4 C. L. 102.

63. Granted where officers interfered with customers by statements of the reputation of the place and threats of possible raids. Delaney v. Flood, 45 Misc. 97, 91 N. Y. S. 672. Stationing officers in saloon and restaurant under plea of inspection but in such manner as to damage plaintiff's business, enjoined. Hale v. Burns, 101 App. Div. 101, 91 N. Y. S. 929. Interference with business of complainant under guise of police inspection. Craushaw v. McAdoo, 47 Misc. 420, 94 N. Y. S. 386. Proper police surveillance will not be enjoined as where the complainant had a restaurant in a court with houses of ill-fame to which there was but one entrance which was guarded by police, who thereby interfered with the restaurant business. Pon v. Wittman [Cal.] 81 P. 984. Injunction to restrain police surveillance which interfered with complainant's restaurant refused where it was not clear from doubt but that the complainant had such relations with the houses of ill-repute, which the police were watching, as to preclude him from coming into equity with clean hands. Id. Injunction against repeated visits of police to ascertain if plaintiff was selling liquor contrary to law refused. Adams v. Chesapeake Oyster & Fish Co. [Colo.] 82 P. 528, following Adams v. Crorlr, 29 Colo. 488.

64. Taking up brick walks in good repair and ordering cement walk relaid, the only object being to correct the grade and slope of the walk, held an abuse of discretion, and injunction would issue. Detmers v. Columbus, 2 Ohio N. P. (N. S.) 657.

65. Contract for street lighting. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146.

66. Where the successful bidder for a contract was allowed materially to change his bid, an injunction was granted at the instance of an unsuccessful bidder. Mohr v. Chicago, 114 Ill. App. 283. Injunction will lie to restrain the execution of a contract for public work awarded under different specifications from those under which bids were advertised and subsequent to the time named for receiving bids. State v. Board of Education, 6 Ohio C. C. (N. S.) 345. Although injunction may be the proper remedy for preventing the award of a contract for public work to another than the lowest bidder, it does not lie where the suit is brought by the lowest bidder, unless he sue in his capacity of taxpayer, or become the beneficiary of a suit brought by a taxpayer whom he may agree to indemnify against costs and expenses. Carmichael & Co. v. McCourt, 6 Ohio C. C. (N. S.) 561.

67. Use of village hall for sale of groceries restrained. Nerlien v. Brooten [Minn.] 102 N. W. 867.

68. Allowing village marshal to spend part of his time as a salesman at village expense enjoined. Nerlien v. Brooten [Minn.] 102 N. W. 867. Injunction issued at the instance of taxpayers to restrain a continued disposition of a school fund contrary to law. Clark v. Cline [Ga.] 51 S. E. 617. Payment to a railroad to induce it to come to a town. Town of Adel v. Woodall [Ga.] 50 S. E. 481. Injunction lies at the instance of a taxpayer to prevent the illegal disposition of public funds. Sears v. James [Or.] 82 P. 14.

69. Enforcement of N. Y. law (Pen. Code, §§ 259, 260, 265), prohibiting public games of baseball on Sunday. Brighton Athletic Club v. McAdoo, 94 N. Y. S. 391. Removal of fruit and flower stands which obstructed travel in public highway upheld. Pagames v. Chicago, 111 Ill. App. 590.

70. Injunction refused to enjoin posting of officers for the inspection of a hotel where liquors were sold. Delaney v. Flood, 45 Misc. 97, 91 N. Y. S. 672.

71. Must be beyond the scope of corporate authority, and the passage of the ordinance must work irreparable injury. Rico v. Snider, 134 F. 953.

72. Itzkovitch v. Whitaker [La.] 39 So. 499.

Contra: See In re Molineux, 177 N. Y. 395, 69 N. E. 727, where the decision was put upon the ground that such photographs constituted a public record whose permanency could not be impaired. See, also, Owen v. Partridge, 40 Misc. 415, 82 N. Y. S. 248.

performance of contracts by municipalities will not be enjoined unless a "clear violation of law" is established.[73]

Acts of boards or officers,[74] executive,[75] administrative,[76] or judicial, will not ordinarily be controlled,[77] yet in case of fraud[78] or irreparable injury,[79] or where action was required to remedy unauthorized acts, such acts may be restrained or compelled.[80] An injunction will issue to restrain a city official from acting under an ordinance where certiorari would not lie to review the proceedings, pending a suit to determine his right so to act.[81] Injunction will lie to protect property in the possession of a court through its officer.[82]

Elections and right to office.[83]—Injunction will issue to restrain interference with the discharge of the duties of a public office by the incumbent found to be in rightful possession thereof.[84] An injunction issued by a Federal court restraining a commissioner's court from publishing an order declaring the result of a local option election does not annul the election.[85]

Taxes.[86]—As a general rule, injunction will not issue to prevent the collection of taxes,[87] but it will, in case of a void tax or assessment,[88] such as one levied under an unconstitutional statute which had not been declared unconstitutional at the time

73. Contract for city lighting upheld. Laws of New York 1891, pp. 199, 243, c. 105, providing for the charter of the City of Buffalo, construed. Stockton v. Buffalo, 95 N. Y. S. 509. A clear case of fraud or mismanagement must be made out and the performance of a lighting contract was upheld. McMaster v. Waynesboro [Ga.] 50 S. E. 122.

74. See 4 C. L. 102.

75. State v. Ross [Wash.] 81 P. 865.

76. Releasing of public land by State land commissioner. State v. Ross [Wash.] 81 P. 865. Injunction will not issue to prevent a municipal board from canvassing the returns of an election. State v. Carlson [Neb.] 101 N. W. 1004. Assessor acting under a valid statute. McConnell v. Hampton [Ind.] 73 N. E. 1092. Injunction will not lie upon the suit of a taxpayer to prevent repair of a bridge by county commissioners, which is located within municipal limits, but not on ground belonging to the city. State v. Carlisle, 2 Ohio N. P. (N. S.) 627. Averments in a bill by a taxpayer to restrain a prison superintendent from making use of public money and convict labor for his own profit, that he threatens to and will continue so to act, do not warrant the issuance of an injunction, since the taxpayer may not intervene until the superintendent's illegal bills are presented to the state and are about to be paid by it. Sears v. James [Or.] 82 P. 14.

77. County commissioners acting as board of equalization for the correction of assessment rolls. Ricketts v. Crewdson [Wyo.] 79 P. 1042.

78. Ricketts v. Crewdson [Wyo.] 79 P. 1042.

79. Under the Washington Law (Code Pub. Instruction [Laws 1897, c. 118, §§ 27, 105]), authorizing the State Board of Education to adopt a uniform system of text books and providing that after adoption books should not be changed for five years, it was held that the plaintiff who had a contract for the supply of books was not entitled to an injunction unless it was irreparably damaged by violation thereof. Westland Pub. Co. v. Royal, 36 Wash. 399, 78 P. 1096.

80. Where a board was illegally constituted and so acted without authority, mandamus was held to be an inadequate remedy and an injunction issued to compel a canvassing board to act. Mason v. Byrley [Ky.] 84 S. W. 767.

81. Removal of fence as being in violation of an ordinance regulating the height of same. Jackson v. Miller [N. J. Eq.] 60 A. 1019.

82. Receiver. Vestel v. Tasker [Ga.] 51 S. E. 300.

83. See 4 C. L. 103.

84. Title to the office may not be tried in a suit for an injunction. Scott v. Sheehan, 145 Cal. 691, 79 P. 353.

85. McHam v. Love [Tex. Civ. App.] 13 Tex. Ct. Rep. 78, 87 S. W. 875.

86. See 4 C. L. 104.

87. Not when the assessor omitted to attach his affidavit to the assessment roll. Douglas v. Fargo [N. D.] 101 N. W. 919. The mere fact that a tax or proposed assessment is or will be illegal does not justify a resort to equity. McConnell v. Hampton [Ind.] 73 N. E. 1092. Since an injunction to restrain levy of a tax refused, action at law was held to be adequate. Torgrinson v. Norwich School Dist. No. 31 [N. D.] 103 N. W. 414. Violation of certain Ohio statutes prohibiting the pollution of streams, etc., by sewerage by a village or its officers or agents, held not to justify an injunction to set aside the sewer assessment. Clencay v. Norwood, 137 F. 962. Not to restrain collection of tax where no complaint to the board of equalization had been made. Ricketts v. Crewdson [Wyo.] 79 P. 1042. Injunction refused where a street improvement assessment was made after valid proceedings on the part of the city, although in the process of grading land of the complainant was unlawfully but unintentionally encroached upon. Davis v. Silverton [Or.] 82 P. 16. Injunction will not issue from a Federal court to restrain collection of a state railroad

the levy was made.[89] Injunction will not issue where part only of a tax is illegal, unless the legal portion has been tendered or paid.[90]

(§ 2) *D. Enforcement of statutes or ordinances*[91] may be restrained if they are invalid.[92] Injunction may issue to restrain the enforcement of an invalid ordinance to avoid multiplicity of suits, where the interests of the complainants and many other persons are identical and injuriously affected by the ordinance[93] and are the same as those of the public in general, within the municipal limits.[94]

(§ 2) *E. Exercise of right of eminent domain*[95] without prior compliance with the requirements of the law, will be prevented.[96]

(§ 2) *F. Acts affecting rights in highways and public or quasi-public places.*[97]—Injunction will lie at the instance of an abutting property owner to prevent an interference with his property rights in a street, which amounts to a public nuisance and by which he is specially injured,[98] or at the suit of the dedicator of

franchise tax. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615.

88. Collection of sewer assessment under W. Va. Laws (acts 1901, c. 151, p. 420) restrained. Cain v. Elkins [W. Va.] 49 S. E. 898. Arkansas statute (Sand. & H. Dig. § 3778), authorizing an injunction against unauthorized taxes, etc., held to give Federal court equitable jurisdiction. Humes v. Little Rock, 138 F. 929. Tax upon the use of trading stamps held to be unauthorized and void. Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765. A tax extended upon an assessment made by a body which had no authority at law to make the assessment was held to be absolutely void and the collection of it enjoined. Chicago & M. Elec. R. Co. v. Vollman, 213 Ill. 609, 73 N. E. 360.

89. Kirkley v. Parker, 6 Ohio C. C. (N. S.) 371. A Federal court will issue an injunction to restrain an improper apportionment and certification of a state tax to the counties, as being unconstitutional. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615. Rhode Island Pub. Laws 1903, p. 33, c. 110, providing for the abolition of school districts and vesting of the property in the towns and for a tax therefor, construed, and, it was held that, since the mandatory requirements of the statute had not been followed, the assessment of the tax was void. Tefft v. Lewis [R. I.] 60 A. 243.

90. Douglas v. Fargo [N. D.] 101 N. W. 919.

91. See 4 C. L. 104. Compare Municipal Corporations, 4 C. L. 720.

92. Roby v. Chicago, 215 Ill. 604, 74 N. E. 768; Glucose Refining Co. v. Chicago, 138 F. 209. Injunction will not lie to restrain a franchise ordinance unless the franchise constitutes a wrongful squandering or surrendering of money or property of a city so that taxation will be increased thereby. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977. Automobile license ordinance. City of Chicago v. Banker, 112 Ill. App. 94. An ordinance granting a railroad the right to allow trains to stand 30 minutes at the intersection of streets enjoined. Gilcrest v. Des Moines [Iowa] 102 N. W. 831. Municipal authorities restrained from a continuous trespass by enforcing an invalid statute. Riley v. Greenwood [S. C.] 51 S. E. 532. Ordinance requiring water company to supply certain institutions with water free and fixing water rates, held to be void. City of Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375. Payment of an increased salary of a city judge by municipality under a statute held to be unconstitutional and enjoined. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082. Ordinance in regard to use of streets by street railways held valid and injunction refused. Roby v. Chicago, 215 Ill. 604, 74 N. E. 768. Ordinance requiring license fee for oil tank wagons upheld and injunction refused. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Injunction refused to enjoin municipal officers from enforcing a building ordinance on the ground that the plaintiff could assert his rights by way of defense at law. City of Sylvania v. Hilton [Ga.] 51 S. E. 744. The action must be beyond the corporate power and must work irreparable injury. Rico v. Snider, 134 F. 953. Various taxpayers need not pay a void tax and bring separate actions for trespass, but may join in one suit to enjoin the collection of the tax. Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765.

93. An ordinance which required a license fee from oil tank wagons was held valid and an injunction refused. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

94. A contract for street lighting enjoined. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146.

95. See 4 C. L. 104.

96. Taking property without due process of law. Riley v. Greenwood [S. C.] 51 S. E. 532. To restrain the laying out of a road over the plaintiff's land where the statute had not been followed and so no valid condemnation of the land. Plowman v. Dallas County [Tex. Civ. App.] 13 Tex. Ct. Rep. 487, 88 S. W. 252.

97. See 4 C. L. 104. See, also, Highways and Streets, 3 C. L. 1593.

98. To restrain a railroad from laying its tracks in a street so as seriously to interfere with, if not destroy, the complainant's easement of access to its property. Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864; Louisville & N. R. Co. v. Cincinnati, etc., P. R. Co., 3 Ohio N. P. (N. S.) 109. To restrain a railroad from trespassing on real estate and unlawful use of streets to the injury of an abutter. Xavier Salty v. Louisiana R. & Nav. Co. [La.] 38 So. 427. Cutting a channel through

a park to restrain diversion to other purposes.[99] One physical construction of a grade crossing authorized by law cannot be enjoined as a public nuisance, but if the railroad company exhibits an intention not to comply with the provisions of law with respect to safe-guarding it, injunction will issue at the instance of the municipal authorities.[1]

(§ 2) *G. Acts of quasi-public and private corporations or associations.*[2]—Injunction will not lie to interfere with the proceedings of a corporation acting regularly under valid by-laws.[3] An injunction will issue at the instance of a minority stockholder to prevent unlawful acts by the majority stockholders,[4] but an injunction will not issue unless it is averred that the complainant has exhausted all the remedy provided by the by-laws and constitution of the society or corporation.[5] A minority stockholder may in a proper case have an action at law against the corporation restrained.[6]

(§ 2) *H. Breach or enforcement of contract or of trust.*[7]—An injunction will not lie to restrain the breach of a personal contract[8] or one relating to personal property[9] or to compel specific performance of such a contract where there is an adequate remedy at law.[10] A mandatory injunction will lie to enforce the specific performance of contracts relating to real estate and interests therein.[11] Injunction will lie to enforce negative covenants in agreements by prohibiting their breach, such as valid

a street enjoined. Wilkinson v. Dunkley-Williams Co. [Mich.] 103 N. W. 170. An injunction was refused to restrain a public nuisance consisting of a building erected in a street at the instance of an owner of land on the opposite side of the street whose damage was not special but the same as that of the public in general. Labry v. Gilmour [Ky.] 89 S. W. 231. Injunction will not lie to restrain the laying of a spur railway track in a public street, where no abutter objects. Herzog v. P., C., C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 527.

99. Bayard v. Bancroft [Del.] 62 A. 6.

1. N. J. Railroad law, § 9226 (P. L. 1903, pp. 650, 659), relating to grade crossings, construed. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303. A preliminary injunction will not issue to restrain a railroad from relocating its roadbed upon a portion of a public highway and changing the location of an established grade crossing. Baldwin Tp. v. Baltimore & O. R. Co., 210 Pa. 86, 59 A. 478.

2. See 4 C. L. 105. Compare title Corporations, 3 C. L. 880.

3. Investigation by Board of Trade directors of charge against a member. Board of Trade of Chicago v. Weare, 105 Ill. App. 289. Stockholders of a corporation may not be enjoined from voting on the ground that the persons for whom they vote to manage it may possibly abuse their trust. Lucas v. Milliken, 139 F. 816.

4. To prevent sale of stock of an insane person for failure to pay an assessment where the holder of a majority of the stock acted fraudulently. Weber v. Della Mountain Min. Co. [Idaho] 81 P. 931. Voting upon the majority stock and the holding of an election of officers until the right to vote on the majority stock was determined, enjoined. Villamil v. Hirsch, 138 F. 690. Abandonment of an ancient community ditch enjoined. Candelaria v. Vallejos [N. M.] 81 P. 589. Bill must contain an averment of collusion or fraud on the part of the managing officers or of a majority of stockholders before equity will interfere to restrain acts of management of a corporation or society. Coss v. Mansfield Lodge No. 56, B. P. O. E., 4 Ohio C. C. (N. S.) 11.

5. Secret society. Coss v. Mansfield Lodge No. 56, B. P. O. E., 4 Ohio C. C. (N. S.) 11.

6. A minority stockholder is entitled to preliminary injunction to restrain a suit at law against the corporation by a firm composed of stockholders who formed a majority of both the stockholders and directors who made and approved the contract, nor is he estopped by the fact that he voted in favor of allowing the defendants to do the work, since the contract did not name the price for the work. Booth v. Land Filling & Imp. Co. [N. J. Eq.] 59 A. 767.

7. See 4 C. L. 106.

8. Newspaper carrier route contract. Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 P. 737. The negative enforcement of contract by restraining the defendant from acts other than those which will result in a specific performance of his agreement will be exercised only when upon a fair construction of the contract it affirmatively appears that the service called for comes under the head of special, unique and extraordinary. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946. Interference with right to use tracks under a contract. Schenectady R. Co. v. United Traction Co., 101 App. Div. 277, 91 N. Y. S. 651.

9. Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 P. 737. Injunction refused to compel specific performance of a contract for purchase of beer exclusively from plaintiff. Seattle Brewing & Malting Co. v. Jensen, 36 Wash. 462, 78 P. 1007.

10. Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 P. 737.

agreements in restraint of trade[12] or covenants in mortgages[13] or agreements restricting the use of real estate,[14] even without proof of present or future financial loss.[15] The right to invoke relief by injunction in such case is not absolute but is to a certain extent discretionary[16] and governed by the same general principles which control the enforcement of specific performance of contracts.[17]

Third persons may be restrained from causing a covenantor to violate his contract.[18] A contract giving the exclusive right to sell articles in a given territory will be protected by injunction against third persons.[19]

(§ 2) *I. Interference with property, business or comfort of private persons.*[20] —Equity will prevent the destruction of the business of an individual by illegal combinations formed to prevent competition.[21] A statute is necessary to give in-

11. Performance of contract for gas in an oil well enforced. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548. Contract by married woman for the sale of her separate estate. Dunn v. Stowers [Va.] 51 S. E. 366. Injunction will lie to compel the specific performance of a lease. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548. Specific performance decreed where plaintiff was allowed to enter under an oral agreement with an agent of a corporation which accepted the agreed rent and allowed the plaintiff to invest a large amount in the property. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419. Where the effect of the restraint sought was practically to compel performance of agreements by the defendant which were not binding upon complainant injunction was refused. Becker v. Gilbert [N. J. Eq.] 60 A. 29. For a full discussion, see the topic Specific Performance, 4 C. L. 1494.

12. Covenant not to engage in a like business for a given time in a given area. Andrews v. Kingsbury, 112 Ill. App. 518; Salzman v. Siegelman, 102 App. Div. 406, 92 N. Y. S. 844. The enforcement of covenants like the one now under consideration is not favored by the law or public policy, and therefore such covenants will be strictly construed. Markert & Co. v. Jefferson [Ga.] 50 S. E. 398. A contract in restraint of track not limited in time or space held to be invalid and injunction refused. Roberts v. Lemont [Neb.] 102 N. W. 770. Not to restrain engaging in a similar business and soliciting old customers where the contract was for the sale of a laundry business without negative and restrictive covenants. Such covenants will not be implied. MacMartin v. Stevens, 37 Wash. 616, 79 P. 1099. Covenants of a negative nature in a jockey apprenticeship indenture held not to be within the rule and injunction was refused. Thomas v. Baird, 94 N. Y. S. 47.

13. Injunction refused where the mortgage recited that failure to buy domestic beer of the mortgagee should work a default but contained no personal covenant so to buy. Anheuser-Busch Brewing Ass'n v. Rahlf, 213 Ill. 549, 73 N. E. 414.

14. Will be enforced where it will not impose an inequitable, unjust and useless burden upon the owner of the lot. Robinson v. Edgell [W. Va.] 49 S. E. 1027. Injunction was refused and complainant left to an action for damages where restrictions in a deed were mutually misconstrued and he alone among the adjacent property owners objected to the defendant's violation of them, the remedy at law not being inadequate. Righter v. Winters [N. J. Eq.] 59 A. 770. Mandatory injunction to enforce building restrictions. Morrow v. Hasselman [N. J. Eq.] 61 A. 369. A covenant against the sale of intoxicating liquor or its manufacture on the land sold may be enforced by injunction, unless the plaintiff has been deprived of his right by his own conduct or laches. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141.

15. Andrews v. Kingsbury, 112 Ill. App. 518; Righter v. Winters [N. J. Eq.] 59 A. 770.

Contra: Damage must be shown to be irreparable. Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. S. 954.

16. Robinson v. Edgell [W. Va.] 49 S. E. 1027.

17. Will be refused if the enforcement would be, through changed circumstances and lapse of time, an unjust, inequitable and useless burden upon the owner of the lot. Robinson v. Edgell [W. Va.] 49 S. E. 1027.

18. Procuring one to break a contract as to the sale of patent medicines enjoined. Garst v. Charles, 187 Mass. 144, 72 N. E. 839. Sale of patent medicine at cut rates and in other than original packages. Dr. Miles Medical Co. v. Goldthwaite, 133 F. 794. Injunction will issue to restrain the employment of another's servant whom the defendant enticed from the other's service for the purpose of learning his trade secrets. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946. Will not issue to prevent the discharge of an employe by an employer by reason of a contract calling for such discharge made with labor unions. Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. S. 185.

19. Corbin v. Taussig, 137 F. 151.

20. See 4 C. L. 107.

21. Where through intimidation of a brewing association whose purpose was to prevent competition and fix prices and control distribution to retail dealers, a company was about to yield to the demands of the association whereby the price at which the plaintiff had purchased its beer would be greatly increased and in all probability they would be shut out by the association from the purchase of it at any price and their business ruined thereby, an injunction issued restraining the doing or continuing of the wrongful acts as specified. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161. An injunction was refused to restrain the

junctive relief against contracts in restraint of trade,[22] since at common law there was no affirmative relief against them, even for one specially injured thereby.[23] An injunction will issue to prevent strikers from interfering with the plaintiff's business or property or intimidating his employes,[24] also to prevent a conspiracy to boycott and injure and destroy his business,[25] but one will not issue to restrain the organization of a strike.[26] An injunction will issue to prevent an improper interference with the plaintiff's business,[27] or to restrain unfair discrimination by a public service company.[28]

Trade[29] *and firm names* will be protected on the ground of unfair competition,[30] but the injunction should not extend further than is necessary to protect the rights of the plaintiff.[31]

members of an association of live stock dealers, established to promote and protect the interest of live stock dealers, which had expelled the defendant for misconduct from refusing to have dealings in accordance with the by-laws of the association on the ground that the association was not a combination in restraint of trade, nor did its action amount to a boycott as provided in the Missouri Law (Rev. St. 1899, § 8879). Gladish v. Bridgeford [Mo. App.] 89 S. W. 77.

22. It was held that in the absence of statute, the Attorney General might not maintain a suit to prevent the performance of a contract establishing insurance rates which was in restraint of trade and so against public policy and that the fact that private corporations were the offenders made no difference. McCarter v. Firemen's Ins. Co. [N. J. Eq.] 61 A. 705.

23. "The common law does not treat agreements in restraint of trade as being illegal in the ordinary sense of the word, but merely as being unenforceable." McCarter v. Firemen's Ins. Co. [N. J. Eq.] 61 A. 705.

24. Ideal Mfg. Co. v. Donovan [Mich.] 102 N. W. 372. Threatening by means of force and violence, use of opprobrious epithets or means of intimidation, whether upon the premises of the complainant or elsewhere, for the purposes of intimidating employes and forcing them to quit another's employ, restrained. Atchison, etc., R. Co. v. Gee, 139 F. 582.

Allegations in a bill to enjoin strikers that the strikers stationed themselves in the approaches to the complainant's place of business and began a system of intimidation by warnings and menaces so that the complainant's employes were so intimidated and frightened that they unwillingly quit work, were held sufficient to charge acts of the defendant to give the court jurisdiction. O'Brien v. People [Ill.] 75 N. E. 108. That a few members of a union indulged in violence during a strike does not authorize an injunction against the union which had passed a resolution deprecating violence. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877.

25. My Maryland Lodge No. 186 v. Adt [Md.] 59 A. 721; Loewe v. California State Federation of Labor, 139 F. 71; Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61. Injunction issued to restrain strikers from maintaining a boycott of the complainant's restaurant and maliciously inducing by persuasion, fraud and coercion patrons and others not to deal with him. Jensen v. Cooks' & Waiters' Union of Seattle [Wash.] 81 P. 1069. A court may in a proper case enjoin acts or conduct which interfere with and injure the trade and business of the complainant, but a court will not order an injunction which alone in general and sweeping terms enjoins a defendant from interfering with or injuring the business of the defendant. Such an order when made is a part of an order for an injunction to restrain certain particular and specified acts. Builders' Painting & Decorating Co. v. Advisory Board Bldg. Trades of Chicago, 116 Ill. App. 264. Injunction restraining "picketing" and "boycotting" unqualifiedly held improper. Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. S. 185.

26. Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. S. 185.

27. Improper use of trading stamps of complainant enjoined. Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 F. 833; Sperry & Hutchinson Co. v. Temple, 137 F. 992. Injunction will lie to restrain an unlawful interference with plaintiff's business by the enforcing of an agreement by members of an illegal combination, viz., causing labor unions to call out union employees of the plaintiff. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353.

28. Discontinuance of service to complainants but not to others on same line held unfair discrimination by a railroad and enjoined. Agee & Co. v. Louisville & N. R. Co. [Ala.] 37 So. 680.

29. See 4 C. L. 108. In an action to restrain unfair competition in trade, no proprietary interest in the words or device is necessary in order to have an injunction issue. Dodge Stationery Co. v. Dodge, 145 [Cal.] 380, 78 Pac. 879. Use of trade name enjoined. Devlin v. Peek, 135 F. 167. Injunction granted to restrain the use of a corporate name so as to deceive the public and exact similitude was held not to be required as a condition of relief. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21. Use by defendant's solicitors of a badge similar to that used by employes of plaintiff. Morton v. Morton [Cal.] 82 P. 664.

30. Will issue to restrain pendente lite the use of a firm name by retiring partner till the right to its use is determined. Steinfeld v. National Shirt Waist Co., 99 App. Div. 286, 90 N. Y. S. 964. Boxes, labels, etc., used by the defendant, held to be so similar to complainants' as to be evidence of an in-

Trade secrets will be protected by mandatory injunction.[32]

Copyrights will be protected by injunction.[33]

Waste[34] may be prevented by injunction.[35]

Incorporeal property.[36]—Injunction will lie to prevent the malicious diversion and waste of subterranean waters.[37]

Easements and rights of way.[38]—An injunction will issue to restrain an unlawful or excessive use of an easement[39] or even any use thereof,[40] and also to restrain an actual or threatened interference with the enjoyment of,[41] or to remove an obstruction of, an easement[42] or right of way.[43]

Nuisance.[44]—Equity has original and statutory jurisdiction to restrain a nuisance[45] at the instance of the public[46] if the nuisance be criminal or public,[47] or to restrain a public nuisance at the instance of a property owner specially affected or injured thereby,[48] despite the fact that certiorari or criminal proceedings may be resorted to.[49] Injunction will also issue to restrain a private nuisance,[50] even where the defendant is solvent,[51] but not for a mere diminution of property value by the

tent to deceive purchasers and to constitute unfair competition. Bickmore Gall Cure Co. v. Karns [C. C. A.] 134 F. 833. For a full discussion, see the topic Trade-Marks and Trade-Names, 4 C. L. 1689.

31. To prevent use of a similar tradename. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

32. Where railroad companies turned over blue prints sent them for inspection by one car company to a rival company, an injunction issued restraining the use of the prints or copies and ordering their return to the owner. Pressed Steel Car Co. v. Standard Steel Car Co. [Pa.] 60 A. 4. Injunction issued to enjoin the use of information as to trade secrets gained from an employe of another whom the defendant had persuaded to divulge the same. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946. A restraining order pendente lite granted against an employe and a company which had enticed him into its employ and to divulge his former employe's trade secrets. Id.

33. Infringement of copyright of a city directory enjoined. Sampson & Murdock Co. v. Seaver-Radford Co., 134 F. 890. See, also, the topic Copyrights, 5 C. L. 761.

34. See 4 C. L. 108.

35. Tenant restrained from removing fixtures to which he had lost his right, at the suit of a purchaser of the real estate. Davis v. Carsley Mfg. Co., 112 Ill. App. 112. See, also, the topic Waste, 4 C. L. 1823. A county which has acquired a tax lien upon real estate is entitled to an injunction to restrain waste thereof by the removal of buildings without first becoming a purchaser at a tax sale. Lancaster County v. Fitzgerald [Neb.] 104 N. W. 875.

36. See 4 C. L. 110.

37. Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849.

38. See 4 C. L. 110, also ante, § 2 F, **acts affecting rights in highways,** etc., and the topic Easements, 5 C. L. 1048.

39. McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N. Y. S. 533.

40. When an office building was erected covering more than the dominant tenement and the tenants in both parts used the easement, any use thereof was enjoined until the building should be so altered as to permit the easement to be used by the dominant estate only. McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N. Y. S. 533.

41. Threatened alteration of a building in which plaintiff had an easement. Piro v. Shipley, 211 Pa. 36, 60 A. 325. Right to use a pipe line. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617.

42. Fire escape over an alleyway. Schmoels v. Betz [Pa.] 61 A. 525.

43. Right of way over a stairway. Bale v. Todd [Ga.] 50 S. E. 990. Under the Missouri law (Rev. St. 1899, § 3649), providing for injunctions when irreparable injury was threatened or no adequate remedy at law existed it was held that an injunction would issue to restrain the obstructions of a right of way. Downing v. Corcoran [Mo. App.] 87 S. W. 114.

44. See 4 C. L. 108. See, also, the topic Nuisance, 4 C. L. 839.

45. Law of Tennessee (Code 1858, § 3403, as amended by Acts 1901, p. 246, c. 139), giving the court discretionary power in actions for damages for a nuisance to grant injunctive relief construed. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658.

46. Pool rooms which disturbed people and injured property in vicinity. Cella v. People, 112 Ill. App. 376.

47. Encroachment upon public street by a building. Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677.

48. House of prostitution next plaintiff's vacant lot. Dempsie v. Darling [Wash.] 81 P. 152. Encroachment upon street by show cases and bay windows. Forbes v. Detroit [Mich.] 102 N. W. 740.

Contra: Remedy at law for damages is the only one in the case of a private individual. Atchison, etc., R. Co. v. Maegerlein, 114 Ill. App. 222.

49. The custom of a railroad of causing trains to stand at the intersection of streets restrained, although authorized by ordinance. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

50, 51. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129.

nuisance without irreparable injury.[52] An injunction will not issue to restrain an act not a nuisance per se and which may never become one.[53] To warrant an injunction against an act, its character as a nuisance must first be determined at law.[54] Injunction will lie to restrain a nuisance, although produced by a lawful business.[55]

Trespass.[56]—An injunction will not issue to restrain a threatened trespass upon real estate, but it will where[57] by reason of the continuous character of the threatened invasion, irreparable injury will result[58] or a multiplicity of actions arise.[59] Courts will be slow, however, to grant an injunction to restrain a trespass committed under color of right or title.[60] Injunction will issue to prevent timber cutting when the complainant has a good title[61] and the defendant is insolvent.[62] By statute in Georgia injunction will issue to restrain the cutting of timber when the defendant is insolvent[63] or the damage would be irreparable,[64] or other circumstances exist

52. Nuisance caused by the maintenance of embankment by a riparian owner. American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625.

Contra: Mandatory injunction will lie to remove a dam, without proof of special damage. Allen v. Stowell, 145 Cal. 666, 79 P. 371.

53. Not to restrain the construction of a wooden building within the fire limits next to the plaintiff's vacant lot. West v. Ponca City Milling Co., 14 Okl. 646, 79 P. 100. A building for storing ice held not to be a nuisance per se. Flood v. Consumer's Co., 105 Ill. App. 559. Not to restrain the erection of a structure on one's own land unless it clearly appears that the business to be carried on therein will be and cannot be so conducted as not to be a nuisance. Id.

54. Flood v. Consumer's Co., 105 Ill. App. 559.

55. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658.

56. See 4 C. L. 109. See, also, the topic Trespass, 4 C. L. 1698.

57. Unless the damage threatened is irremediable and there is no adequate remedy at law. Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484. A mere naked trespass containing no elements of damage which cannot be redressed by an action at law will not be enjoined. Wilson v. Meyer [Ala.] 39 So. 317. Injunction refused where it did not appear that the injury complained of would be repeated or that the dam was being maintained or any threat so to do had been made. Bryant v. Lamb Timber Co., 37 Wash. 168, 79 P. 622. Threats of ouster and destruction of furniture held insufficient grounds for injunctive relief. Kredo v. Phelps, 145 Cal. 526, 78 P. 1044.

58. The mere averment of irreparable damage is futile, without allegations of facts showing that irremediable injury may reasonably be apprehended. Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484. Injunction against a trespass granted upon a bill alleging that the trespass would deprive the plaintiff of the free use of his property and prevent manufacture thereon at a profitable time. Wilson v. Meyer [Ala.] 39 So. 317. Causing overflow of plaintiff's land by obstructing a river with logs, enjoined. White v. Codd [Wash.] 80 P. 836. Mandatory injunction will lie to remove logs floated and left on plaintiff's land. Id. Sweeping debris from a bridge upon plaintiff's premises. Sadlier v. New York, 93 N. Y. S. 579. Eaves projecting over one's line enjoined. Huber v. Stark [Wis.] 102 N. W. 12. Casting of water in any form upon land of another by eaves projecting over one's line, enjoined. Id. To enjoin the diversion of surface water upon one's land by town officials. Smith v. Eaton Tp. [Mich.] 101 N. W. 661. Not in a dispute over a boundary line which was easily to be ascertained and no irreparable injury was involved. Harvey v. Miller, 24 App. D. C. 51. Leaving brushwood cut on plaintiff's land so as to be a menace by reason of forest fires held not to be a continuing trespass and injunction refused. Litchfield v. Bond, 93 N. Y. S. 1016. Taking mineral ore from land found to belong to the plaintiff enjoined and the question as to actual damage was held to be immaterial. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517. Injunction held to be warranted. Roberts v. Heinsohn [Ga.] 51 S. E. 589.

59. Continuous wrongful overflow of land enjoined. Schwarzenbach v. Electric Water Power Co., 101 App. Div. 345, 92 N. Y. S. 187. The inconvenience resulting from repeated slight trespasses is ground for injunction, though nominal damages would compensate for any one of them. O'Brien v. Murphy [Mass.] 75 N. E. 700.

60. Shields v. Johnson [Idaho] 79 P. 394.

61. Loyd v. Blackburn [W. Va.] 50 S. E. 741; Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164; Marcum v. Marcum [W. Va.] 50 S. E. 246. An injunction was granted restraining timber cutting under the North Carolina Law (Acts 1901, p. 900, c. 666), providing that the writ should issue where the plaintiff showed a bona fide claim based upon evidence sufficient to constitute a prima facie title, the court holding the evidence presented sufficient. Moore v. Fowle [N. C.] 51 S. E. 796.

62. Loyd v. Blackburn [W. Va.] 50 S. E. 741. Insolvency makes such cutting irreparable damage. Marcum v. Marcum [W. Va.] 50 S. E. 246. Injunction to restrain a trespass was refused where there was no allegation of insolvency of the defendant or that there would be a continuing trespass or a multiplicity of suits or irreparable injury. Western Tie & Timber Co. v. Newport Land Co. [Ark.] 87 S. W. 432. Refused where plaintiff's title was questioned and defendant was solvent. Curtin v. Stout [W. Va.] 50 S. E. 810.

63. Civ. Code 1895, § 4927, as amended by

which require it, as the prevention of multiplicity of suits, provided[65] the plaintiff has a perfect title to the land or timber.[66]

(§ 2) *J. Crimes.*[67]—Ordinarily an injunction will not lie to restrain the commission of a crime,[68] but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime.[69] Injunction will lie to prevent irreparable injury, even though the effect is to restrain criminal proceedings.[70]

§ 3. *Suits or actions for injunction.*[71]—The bill for an injunction must state facts from which the court can see that the acts alleged were wrongful and done with intent to injure and that they do in the particular and specific way pointed out in the bill injure the complainant. General allegations are insufficient.[72] The verification of the petition for a preliminary injunction need not be made by the com-

acts 1899, p. 39. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164; Fletcher v. Fletcher [Ga.] 51 S. E. 416.

64. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164; Fletcher v. Fletcher [Ga.] 51 S. E. 416.

65. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164.

66. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164; Fletcher v. Fletcher [Ga.] 51 S. E. 418. Injunction refused where the complainant failed to show a "perfect title" to the timber land as provided in Georgia Laws (Civ. Code 1895, § 4927), although the threatened injuries would be irreparable and multiplicity of suits would arise. Lanier v. Hebard [Ga.] 51 S. E. 632; Gray v. Wright [Ga.] 51 S. E. 373; Swindell & Co. v. Saddler [Ga.] 49 S. E. 753.

67. See 4 C. L. 110.

68, 69. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

70. Glucose Refining Co. v. Chicago, 138 F. 209.

Note: One sometimes meets with the broad statement that criminal proceedings cannot be restrained. Stated as a general proposition, this may be regarded as true (Davis v. Am. Soc., 6 Daly [N. Y.] 81, 75 N. Y. 362), and yet it is not without exception. Especially are exceptions noticeable in the more recent decisions, which, on the whole, seem to favor a more liberal construction of this branch of equitable jurisdiction than has heretofore been given. It seems to be now settled that injunction will lie to restrain a criminal prosecution if it is threatened for the purpose of hindering the enjoyment of a right conferred by law (Georgia R. & Banking Co. v. Atlanta, 118 Ga. 486). So also trespass to property if it be continuous in its nature may be enjoined, to prevent a multiplicity of suits. Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244. Likewise, if the threatened trespass consists of but a single act and irreparable mischief would otherwise result, injunction will lie. Wilson v. City of Mineral Point, 39 Wis. 160; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154. As to whether or not the injunctive jurisdiction will be exercised to prohibit the publication of defamatory matter, the authorities are not in harmony. The later English decisions have recognized the authority of equity to restrain publications injurious to trade business or title. Quartz Hill, etc., Co. v. Beall, L. R. 20 Ch. Div. 501, 507. This doctrine has been followed in some of the states (Grand Rapids School Furniture Co. v. Haney School Furniture Co., 92 Mich. 558, 52 N. W. 1009, 31 Am. St. Rep. 611, 16 L. R. A. 721), but is not generally approved in America (Boston Diatite Co. v. Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310). 'Applying these principles to threats of purely personal injury, there would seem to be no room for equity to interfere by way of injunction, as there exist in such cases other appropriate remedies. So injunction has been refused because ample protection could be had upon application to the police or magistrates (Supp v. Keusing, 28 N. Y. Super. Ct. 609), or because the remedy in damages was adequate (Herrington v. Herrington, 11 Ill. App. 121), and in Railroad Co. v. Walton, 14 Ala. 207, it is broadly stated that, "Equity cannot * * * restrain the commission of a personal trespass, although it may be threatened." It is true that the commission of acts threatened by strikers have been enjoined where the effect of such threats was to interfere with the continuation of complainant's business or his right of freedom to contract. Vegelahn v. Gunter, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722; Hutchins' and Bunker's Cas. 764. See, also, 2 Mich. L. R. 321. Here, however, the threatened personal injury does not stand alone but is connected with the violation of property rights.—3 Mich. L. R. 226.

71. See 4 C. L. 111.

72. Builders' Painting & Decorating Co. v. Advisory Board Bldg. Trades of Chicago, 116 Ill. App. 264. The facts and circumstances constituting the alleged grievance must be specifically set out in the bill. South & W. R. Co. v. Virginia & S. E. R. Co. [Va.] 51 S. E. 843. Facts must be disclosed to enable the court to determine therefrom the necessity of awarding the extraordinary remedy of injunction. Shafer v. Fry [Ind.] 73 N. E. 698; American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625. An injunction will not issue unless the bill sets out facts showing the necessity for it and not mere statements of irreparable injury. Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 38 So. 1026. Injunction will not issue when on the face of the bill there is an adequate remedy at law. Williams v. Peeples [Fla.] 37 So. 572. Where a proceeding for the assessment of a tax was void on its face [Vt. Laws 1894, p. 144, No. 165, § 13, as amended by Laws

plainant in person.[73] Injunction will not issue where the bill has no affidavit to support its allegations until after rule to show cause has been issued.[74] When a court of equity obtains jurisdiction, it will hold the same for every purpose and for a complete determination of all the rights involved.[75] Where a court has refused to issue an injunction on the ground of no jurisdiction such action will be reviewed on mandamus,[76] but not where it has granted an injunction claiming jurisdiction.[77] injunction to restrain a nuisance will lie at the instance of one of several persons affected in substantially the same manner[78] against several defendants, whose separate and independent acts cause the nuisance.[79] An injunction should not be issued without notice to the opposing party, except where it is clearly necessary to act without it.[80] As the sole object of a preliminary injunction is to preserve the subject-matter of the controversy in the condition in which it is until the merits can be heard, an injunction should never be issued upon an ex parte application, the effect of which is to deprive the party enjoined of his right of property to the thing in dispute.[81]

The naked averment of irreparable injury unless an injunction issues forthwith is not sufficient to dispense with notice.[82] Notice is sometimes required by statute.[83] An injunction to restrain persons not parties to an action will not be granted on motion.[84] An injunction which is sought as auxiliary and incidental to the ultimate relief will not issue where the ultimate relief is beyond the jurisdiction of the court

1902, p. 278, No. 211 (Laws 1902, p. 288), providing for orders for paving by city councils, construed]. Blanchard v. Barre [Vt.] 60 A. 970. In a suit to prevent by injunction the imposition of a cloud upon the plaintiff's title by a survey and condemnation of a right of way over the plaintiff's land, the bill must show affirmatively the cloud or threatened acts which will impose it. South & W. R. Co. v. Virginia & S. E. R. Co. [Va.] 51 S. E. 843. Where the surveying and condemnation of a right of way were sought to be enjoined for failure to obtain permission from the state corporation commission as provided in the Virginia Code 1904, § 1105e, c. 52, p. 576, the writ was refused since the bill did not allege noncompliance. Id.

73. It is sufficient if made by his general manager of his own knowledge. My Maryland Lodge No. 186 v. Adt [Md.] 59 A. 721.

74. Niles v. U. S. Trust Co., 22 App. D. C. 225.

75. An action at law on a building contract was enjoined because of defenses which could not be set up therein and the order that all matters might be settled in one suit. Watkins v. Tallassee Falls Mfg. Co. [Ala.] 38 So. 756. The court was upheld in its refusal to send a case to jury to determine facts as to whether injunction was still proper after a nuisance had been abated. Tucker v. Edison Elec. Illuminating Co., 100 App. Div. 407, 91 N. Y. S. 439.

76, 77. Chatfield v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 284, 104 N. W. 45.

78. The lands of the various plaintiffs may be separate and distinct from each other. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658.

79. Emission of poisonous gas and smoke. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658. Will issue to enjoin several defendants from jointly contaminating a stream. Warren v. Parkhurst, 45 Misc. 466, 92 N. Y. S. 725.

80. Sprague v. Monarch Book Co., 105 Ill. App. 530. An injunction ought not to issue without notice upon the bare possibility of an injury or mere apprehension not founded upon a substantial basis of fact. Parish v. Vance, 110 Ill. App. 50. Injunction which should not have been granted without notice will not be set aside where it appears that had notice been given the injunction would have been granted and that no harm has in fact resulted. Pfeiffer v. McCullough, 115 Ill. App. 251.

81. An injunction was dissolved which had been granted ex parte, the effect of which was to deprive the defendants of the possession of stock for the purposes of voting and exercising rights of ownership. Lucas v. Milliken, 139 F. 816.

82. This is especially true where the complainant had knowledge of the facts some time previous to the filing of the bill, as where a man had been nominated for a year and another a few days before the election filed a bill to restrain the county clerk from putting his name on the ballot. Commonwealth v. Combs [Ky.] 86 S. W. 697.

83. California Law (Code Civ. Proc. §§ 528, 530), providing that an injunction may not issue after answer except on notice or an order to show cause, but that a restraining order may issue in the meantime. Neumann v. Moretti, 146 Cal. 31, 79 P. 512. Under the California law (Code Civ. Proc. § 532), providing that where an injunction is granted without notice a defendant may move before trial for a dissolution or modification of it, such motion could not be granted where it was for a modification in important particulars without notice to the plaintiff. Cherry Hill Gold Min. Co. v. Baker [Cal.] 82 P. 370.

84. Sale of property held by the receivers

to afford.[85] Injunction will not issue where after the suit is commenced there is a change of circumstances which renders the injunction unnecessary.[86] A permanent injunction will not issue on a motion supported by affidavits.[87] A party who has been refused an injunction may not dismiss the suit and institute another for the same cause and apply again to the same or another judge for an injunction.[88] If a defendant might have obtained an injunction in the original action he may not obtain one in a subsequent action.[89] The party who obtains an injunction may not take any advantage over the other party by reason of it.[90] A counter injunction against the other party will not issue upon an appeal from an order setting aside an injunction, as the effect of the appeal is to hold matters in abeyance.[91] In a suit to try title it is proper for an injunction to issue against both parties restraining them from interfering with each other's property after the award.[92] A demurrer does not admit the truth of the allegation in a bill for an injunction that the injury will be irreparable.[93] In Louisiana an injunction may issue in a petitory action.[94] In Texas a general denial in an injunction suit is not the subject of a general demurrer, and the plaintiff must prove his case.[95] An injunction against the infringement of a patent is not a defense in a suit by a third party for failure to furnish articles under a contract, where before the injunction decree the complainant gained control of the defendant by purchase of its stock.[96] The death of one of two parties restrained by a temporary injunction does not preclude the other from seeking the dissolution of the writ as to him.[97] An appellate court may not issue an injunction restraining one of the parties pending further proceedings in the court below, that being provisional relief to be granted, if at all, by the court of original jurisdiction.[98]

§ 4. *Preliminary injunction. A. Issuance.*[99]—A preliminary injunction may issue to maintain the status quo of property and rights involved until the final determination thereof,[1] where irreparable injury will follow if it is not issued[2] or where

appointed by the state court, by the plaintiff in a Federal action and the U. S. Marshal sought to be enjoined. Strickland v. National Salt Co., 94 N. Y. S. 936.

85. People v. District Court of Denver [Colo.] 80 P. 908.

86. Rule held not to apply where the determination of the validity of a municipal contract and taxation for the payment of it was involved. Patterson v. Barber Asphalt Pav. Co. [Minn.] 101 N. W. 1064.

87. Wickes v. Hatch, 92 N. Y. S. 1017.

88, 89. Maloney v. King [Mont.] 76 P. 939.

90. Where an injunction was in force restraining the publication of the result of an election to determine whether one part of a municipal corporation would be annexed to another under the Arkansas law (Kirby's Dig. § 5522), a franchise granted in that part by the municipal corporation to which it had belonged and which obtained the injunction was held void. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826.

91. Relief was by a writ of sequestration. State v. De Baillon, 113 La. 619, 37 So. 534.

92. In a suit to try title to a quarry and for an injunction, it was held proper while granting one to the plaintiff restraining the defendant at the same time to grant one to the defendant restraining the plaintiff from interfering with the rock awarded to the defendant. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

93. Williams v. Mathewson [N. H.] 60 A. 687.

94. Action to prevent interference with the complainant in his work of lumbering. Dowdell v. Orphans' Home Soc. [La.] 38 So. 16.

95. Under Tex. Rev. St. 1895, art. 3006, authorizing defendant in injunction proceedings to answer as in other civil actions, general denial makes it necessary for plaintiffs to prove their case. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678.

96. McElroy v. American Rubber Tire Co. [C. C. A.] 122 F. 441.

97. It was an interlocutory not a final proceeding. Chatfield v. Clark [Ga.] 51 S. E. 743.

98. On an appeal from a decree annulling a street railroad franchise, the court declined to enjoin the city from removing the tracks pending the determination of the company's rights under an ordinance. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 1026.

99. See 4 C. L. 113.

1. To restrain an entry upon real estate. Massee-Felton Lumber Co. v. Sirmans [Ga.] 50 S. E. 92. Digging an oil well restrained to preserve natural gas pendente lite. Carnegie Natural Gas Co. v. South Penn. Oil Co., 56 W. Va. 402, 49 S. E. 548. Transfer of shares of stock enjoined. Currie v. Jones, 138 N. C. 189, 50 S. E. 560. Voting on majority stock and holding an election of officers enjoined until the right to vote on the majority stock was determined. Villamil v. Hirsch, 138 F. 690. A preliminary

fraud is alleged.[3] In some states a preliminary injunction is provided for by statute in proper cases.[4] Whether or not a preliminary injunction shall issue must be determined entirely by the bill and exhibits filed with it, without regard to the answer,[5] and the right to it must be clearly shown therein.[6] The granting or withholding of a preliminary injunction lies within the sound discretion of the court and will not be reviewed on appeal unless it be clearly shown that the discretion has been abused[7] or that the court below took a wrong view of the situation.[8] The ex-

injunction will issue to preserve the status quo, viz., the right of the majority of stockholders to control, but not to destroy the status quo by giving control to the minority. Lucas v. Milliken, 139 F. 816. Issued to restrain mining operations pendente lite where some of the defendants were insolvent and fraud and conspiracy is alleged. Lockhart v. Leeds, 195 U. S. 427, 49 Law. Ed. 263. Revocation of power of attorney enjoined pendente lite. Rider v. Rider, 114 Ill. App. 202. A preliminary injunction may issue when it can do the defendant no harm in order to preserve the property until the plaintiff's right can be determined in equity or at law. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368.

2. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. To warrant the issuance of an injunction to restrain a corporation from disregarding the conditions and limitations of its charter at the instance of a private party, special damage to him either partially accomplished or threatened must be shown. This was a suit by a rival gas company to prevent another company from laying pipes in street contrary to the provisions of the New Jersey law (P. L. 1876, c. 309, § 21, p. 316). Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750. Preliminary injunction by gas company having contract with city to compel another company pursuant to a contract to furnish it gas denied. American Lighting Co. v. Public Service Corp., 132 F. 794.

3. Fraudulent change of the terms of an oral contract in a written agreement. Woolf v. Barnes, 93 N. Y. S. 961. Injunction granted to restrain the use of a voting trust agreement found to have been procured by fraud. Knickerbocker Inv. Co. v. Voorhees, 100 App. Div. 414, 91 N. Y. S. 816.

4. Bill held insufficient under the New York law (Code Civ. Proc. §§ 603, 604), providing for injunctions pendente lite. Werbelovsky v. Michael, 94 N. Y. S. 156. New York Laws (Code of Civil Proc. § 604, subd. 1), providing for the issuance of a preliminary injunction where the defendant is doing, procuring or suffering to be done acts in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, held not to apply to the facts. Platt v. Elias, 91 N. Y. S. 1079. Under the New York law (Code Civ. Proc. § 1781), providing for accounting, by directors of foreign corporations, of property received by them, the disposition of such property was enjoined pending action as provided in § 1787. Acken v. Coughlin, 34 Civ. Proc. R. 200, 92 N. Y. S. 700. Under the Iowa law [Code, § 2405], if a case of a liquor nuisance is made out, a temporary injunction shall issue on application. Donnelly v. Smith [Iowa] 103 N. W. 776. Under the Idaho law (Rev. St. 1887, § 4288), a party is not under the necessity of waiting until his property has been damaged or destroyed and his business disorganized and his premises encroached upon to the extent of his own ouster and then resort to an action at law for redress. Price v. Grice [Idaho] 79 P. 387.

5. Infringement of trade-mark. Smith Dixon Co. v. Stevens [Md.] 59 A. 401. To warrant the issuance of a temporary injunction, the sources of information and grounds of belief, must appear in the verification of the complaint. Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. S. 954. In order for a preliminary injunction to issue, it is sufficient if in the exercise of sound discretion the court can find from the pleadings, evidence and affidavits in support thereof, a case which presents a proper subject for investigation by a court of equity. Shea v. Nilima [C. C. A.] 133 F. 209; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849. Where aside from the bill and answers the only evidence consists of exhibits and affidavits wholly inconclusive and irreconcilable, a preliminary injunction will issue to preserve the property in litigation. Hoy v. Altoona Midway Oil Co., 136 F. 483.

6. Facts held not to justify the issuance of an injunction (Maryland Acts 1892, p. 500, c. 357, providing for the registration of trade-marks, construed). Smith Dixon Co. v. Stevens [Md.] 59 A. 401. Injunction refused in a suit for an accounting and winding up of a partnership by one claiming to be a partner, where the affidavits did not clearly establish a partnership. Rowland v. Auto Car Co., 133 F. 835. Only in a clear case will a highway be closed by preliminary injunction. Meyer v. Petersburg [Minn.] 104 N. W. 899.

7. Werner Co. v. Encyclopaedia Britannica Co. [C. C. A.] 134 F. 831; Meyer v. Petersburg [Minn.] 104 N. W. 899; McConnell v. Haughton [Ind.] 73 N. E. 1092; Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331; Lehman v. Graham [C. C. A.] 135 F. 39; Hoy v. Altoona Midway Oil Co., 136 F. 483; Shields v. Johnson [Idaho] 79 P. 394; Price v. Grice [Idaho] 79 P. 387; Ellis v. Stewart [Ga.] 51 S. E. 321; Weber v. Della Mountain Min. Co. [Idaho] 81 P. 931; Cranshaw v. McAdoo, 94 N. Y. S. 386; Brighton Athletic Club v. McAdoo, 94 N. Y. S. 391. A preliminary injunction which merely keeps the property in statu quo pendente lite will not be disturbed upon appeal unless it clearly appears that the court issuing it abused its discretion. Shea v. Nilima [C. C. A.] 133 F. 209. A preliminary injunction restraining the transfer of property beyond the jurisdiction of the court upon which the complainant claims a

tent of relief to be granted by injunction is also within the discretion of the court.[9] When a sworn bill presents grave questions of law and it appears that injury to the moving party will be immediate and certain and that no injury will be done to the defendant that cannot be provided against by bond, a preliminary injunction will issue.[10] A preliminary injunction will not issue where it would disastrously affect the defendant where his insolvency is not alleged.[11] Upon the hearing of a motion for a preliminary injunction the rules of evidence are applied less strictly than upon a final hearing of the cause, and consequently, evidence that would not be competent in support of an application for a perpetual injunction may be admitted.[12] Injunction will issue where the allegations in the bill are not denied by the answer filed.[13] Answers filed before the hearing of an application for a preliminary injunction must be considered[14] and if found to deny the equity of the bill in such manner as would authorize its dissolution on motion therefor, the injunction should not be granted,[15] but when they are not responsive to the bill and set up new matter by way of avoidance, a preliminary injunction may issue.[16] A preliminary injunction cannot be issued where the complainant rests on an unsettled and doubtful rule of law,[17] especially in the absence of any allegation that the defendant cannot respond for any amount of damages recovered against him at law.[18] A preliminary injunction will be denied where a court is not satisfied that it has jurisdiction.[19] A preliminary injunction will issue to restrain an act which the defendant has an ultimate right to do but only on the performance of a condition precedent which is within its power to perform.[20] Where, pending decision on an application, amendment of the petition and additional affidavits are received, notice should be given thereof.[21] Defendants who deny the commission of the acts complained of cannot object to an injunction pendente lite.[22]

lien will not be disturbed on appeal unless it is entirely clear from the record that there is no equity in the bill, especially where the removal might work irremediable injury to the complainant and the continuance of the injunction comparatively little harm to the respondent. Coram v. Ingersoll [C. C. A.] 133 F. 226. The discretion of the lower court in issuing or refusing injunctions is not unlimited, since facts may be proved which raise questions of law reviewable on appeal. Penrhyn Slate Co. v. Granville Elec. Light & Power Co., 181 N. Y. 80, 73 N. E. 566. Rule held not to apply where the judge regarded as of controlling importance in issuing a preliminary injunction the fact that an order denying it would not be reviewable on appeal, and the appellate court will in such case determine the right to an injunction on its merits. Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331.

8. Werner Co. v. Encyclopaedia Britannica Co. [C. C. A.] 134 F. 831.

9. Defendant may set up facts happening before or after the action began which bear on or affect the extent of relief to be granted and the sufficiency of them will not be considered on demurrer. Straus v. American Publishers' Ass'n, 92 N. Y. S. 1052.

10. Lehman v. Graham [C. C. A.] 135 F. 39.

11. Napier v. Westerhoff, 138 F. 420.

12. My Maryland Lodge No. 186 v. Adt [Md.] 59 A. 721.

13. Allegations of wrongful use of trading stamps. Sperry & Hutchinson Co. v. Brady, 134 F. 691.

14. Maryland Code Gen. Pub. Laws, art. 25, §§ 1, 12, 86, and acts 1900, p. 1083, c. 685, § 196; p. 1086, c. 685, §§ 205, 208, providing for the opening, altering and closing of roads by county commissioners, construed. Riggs v. Winterode [Md.] 59 A. 762.

15. Riggs v. Winterode [Md.] 59 A. 762.

16. "There may be cases in which the new matter set up would justify the court in refusing to grant an injunction at once. * * * Where the court is satisfied that the plaintiff will not be injured by not having the injunction issue at once and the testimony can be taken in a reasonable time, if the new matter be of a character that would ultimately require the dissolution of the injunction if proven, it would be useless to compel the judge to issue a preliminary injunction. Some discretion must be allowed him in such cases." Riggs v. Winterode [Md.] 59 A. 762.

17. Injunction against use of trading stamps by a merchant who obtained them from customers of the stamp company and not from the company direct, refused. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368.

18. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368.

19. Ordinance providing for examination and licensing of automobile operators. Farson v. Chicago, 138 F. 184.

20. Erection of a viaduct by railroad commissioners enjoined. Erie R. Co. v. Buffalo, 180 N. Y. 192, 73 N. E. 26.

21. Overstreet v. Sylvania Water Supply Co. [Ga.] 52 S. E. 164.

(§ 4) *B. Bonds.*[23]—A court of equity has power to require as a condition precedent to the issuing of an injunction, a bond from the complainants in such amount and with such surety as fully to indemnify the defendant, if he ultimately prevails, against loss or damage resulting from the temporary restraint.[24] In California an injunction must be dissolved where no undertaking to pay damages to the party enjoined as provided by law is given.[25] An injunction bond is not jurisdictional, and a mere defect therein may be remedied by the court.[26]

(§ 4) *C. Dissolution, modification or continuance; reinstatement.*[27]—A common injunction issues without notice on the coming in of the bill and may be dissolved as a matter of discretion upon the filing of the answer,[28] while a special injunction will not be dissolved upon the coming in of the answer if it appears probable that the plaintiff will maintain his primary equity[29] or there is a reasonable apprehension of irreparable loss[30] or it appears reasonably necessary to preserve the plaintiff's right or property in statu quo.[31] An injunction will be dissolved which has been so unfairly used as to amount to an abuse of process.[32] A preliminary injunction will be dissolved when the sworn answer denies the allegations of the bill on which relief is sought.[33] An injunction will not be dissolved on motion by a third person who has an adequate remedy at law.[34] A preliminary injunction will not be dissolved because of mis-statements of ownership where the party has such interest as will entitle him to protection if he establishes his cause.[35] When an injunction is the ultimate relief sought and it is dissolved, the case should be dismissed,[36] but where the injunction is collateral merely and is dissolved, the case should not be dismissed, if other and further proceedings are necessary to give the ultimate relief sought.[37] The relative harm from continuing or dissolving a preliminary injunction will not be investigated when plaintiff is without rights to protect.[37a] Where at the time of trial it is found that the grounds for making a

22. My Maryland Lodge No. 186 v. Adt [Md.] 59 A. 721.

23. See 4 C. L. 117.

24. Hoy v. Altoona Midway Oil Co., 136 F. 483; Currie v. Jones, 138 N. C. 189, 50 S. E. 560. Under the laws of South Carolina (Civ. Code Proc. 1902, § 244), providing that a court may if it seems proper before granting an injunction have the defendant and in the meantime issue a restraining order, it was held that it was not the duty of the judge to require the plaintiff to file an undertaking by reason of the restraining order. Creech v. Long [S. C.] 51 S. E. 614.

25. Code Civ. Proc. § 529. Neumann v. Morettl, 146 Cal. 31, 79 P. 512; Id., 146 Cal. 27, 79 P. 510.

26. Herzberger v. Barrow, 115 Ill. App. 79.

27. See 4 C. L. 117.

28. Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80; Magoffin v. San Antonio Brewing Ass'n [Tex. Civ. App.] 84 S. W. 843.

29, 30, 31. Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80.

32. Where two days before a corporate election an injunction was obtained restraining the defendants from voting, but not served until the meeting had been organized and no opportunity was afforded by means of adjournment to try the merits of the case, with the result that the minority obtained control, the injunction was dissolved. Lucas v. Milliken, 139 F. 816.

33. Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 38 So. 1026. On a motion to dissolve an injunction on answer made the court is confined to matters in denial of the bill's averments and may not consider new matters set up by the answer. Agee & Co. v. Louisville & N. R. Co. [Ala.] 37 So. 680.

34. Damages caused (stopping of work) by an injunction to an employe of the real defendant and the fact that the undertaking filed was too small was held to be no ground for dissolving the injunction as there was an adequate legal remedy against the defendant. Smith v. Alberta & British Columbia Exploration or Reclamation Co. [Idaho] 74 P. 1071.

35. Emery v. Ionia Circuit Judge [Mich.] 101 N. W. 801.

36. Avocato v. Dell'Ara [Tex. Civ. App.] 84 S. W. 443. When a preliminary injunction is dissolved, the bill may be dismissed at the same time for want of equity. Hontros v. Chicago, 113 Ill. App. 318.

37. Held to be error to dismiss a case upon the dissolution of an injunction restraining a sale under a judgment obtained by perjured testimony, the ultimate relief being the annulment of the judgment. Avocato v. Dell'Ara [Tex. Civ. App.] 84 S. W. 443.

37a. Pioneer Min. & Mfg. Co. v. Shamblin, 140 Ala. 486, 37 So. 391.

temporary injunction permanent do not exist, it is proper for the court to refuse a permanent injunction and dismiss the bill.[38] Where an injunction has been superseded by an irregular but not void judgment, a motion to vacate it must be coupled with one to vacate the judgment.[39] In South Dakota an injunction may be dissolved and the action dismissed, but no judgment entered until the defendant's damages are ascertained.[40] An injunction directed against a trespass upon real estate cannot properly be dissolved on bond.[41] It is within the discretion of the court to modify the terms of an injunction as occasion may require.[42] A motion to dissolve an injunction on the ground of the insufficiency of the bill admits no more than would a demurrer to the bill.[43] An injunction restraining a transfer of stock in a bill of interpleader will be dissolved where the plaintiff does not pay into court the amount due upon the stock which he claims.[44]

Costs.[45]—Where an injunction bond expressly provides that the sureties shall pay the defendant's costs if the plaintiffs fail to prosecute the injunction with effect, a decree awarding the defendant costs (the injunction having been dissolved) was held not to defeat his right of action on the bond.[46] Where a temporary injunction properly issued and had fully protected the complainant's rights, but at the time of trial grounds for making it permanent did not exist, it was held proper to dismiss the complaint but that costs should have been awarded to the complainant.[47]

(§ 4) *D. Damages on dissolution and liability on bond.*[48]—A right of action on an injunction bond does not accrue until the main action has been tried and determined.[49] In order to recover damages on an injunction bond, it must appear that the plaintiff was prevented by the injunction from enjoying some right or privilege to which he was entitled.[50] An action may be brought upon an injunction bond upon the voluntary dismissal of the action by the plaintiff[51] but not where the dismissal is by agreement of the parties.[52] Where through failure of parties to act a case is deemed to be abandoned, a previously existing injunction necessarily becomes void.[53] An action on an injunction bond may be brought after judgment before appeal, but if an appeal is taken thereafter the action will be dismissed with-

38. Where before trial a strike had ended and the defendants had abandoned their original purpose of injuring the complainant in his business. Clancy v. Geb [Wis.] 104 N. W. 746.

39. Martinson v. Marzolf [S. D.] 103 N. W. 937.

40. South Dakota Law (Code of Civ. Pro. § 200), providing for a written undertaking to pay the damages which may be sustained by an injunction, construed, and it was held that damages may be assessed although not claimed in the pleadings. Kelley & Co. v. Mead [S. D.] 101 N. W. 882.

41. Xavier Realty v. Louisiana Ry. & Nav. Co. [La.] 38 So. 427.

42. Modification from an order to close a sewer to an order to continue it and abate the nuisance. Phillips v. Du Bignon [Ga.] 50 S. E. 928.

43. Board of Trade of Chicago v. Weare, 105 Ill. App. 289.

44. Quin v. Hart [Miss.] 37 So. 553.

45. See 4 C. L. 119.

46. Jones v. State [Md.] 61 A. 222.

47. Clancy v. Geb [Wis.] 104 N. W. 746.

48. See 4 C. L. 119.

49. Lacey v. Davis, 126 Iowa, 675, 102 N. W. 535.

50. Where an injunction did no harm to defendants who were mere trespassers, no damages were allowed in action on the bond. East Tennessee Tel. Co. v. Anderson County Tel. Co., 24 Ky. L. R. 2358, 115 Ky. 488, 74 S. W. 218. Since an injunction does not operate upon acts already done, there is no damage suffered by reason of them upon a dissolution of the injunction. Xavier Realty v. Louisiana R. & Nav. Co. [La.] 39 So. 6. Parties whose rights were contingent upon payment of purchase money were held to be properly enjoined and to have no cause of action on the injunction bond because they paid at the end of the litigation. Yarwood v. Cedar Canyon Consol. Min. Co., 37 Wash. 56, 79 P. 483. Failure to plead and offer evidence of damages caused by an improvident injunction does not estop the defendant from suing on the injunction bond. McLennon v. Fenner [S. D.] 104 N. W. 218.

51. The plaintiff is held to have confessed that he had no legal or equitable right to the injunction granted. St. Joseph & E. Power Co. v. Graham [Ind.] 74 N. E. 498; Kelley & Co. v. Mead [S. D.] 101 N. W. 882.

52. St. Joseph & E. Power Co. v. Graham [Ind.] 74 N. E. 498.

53. Marks v. Metzger Linseed Oil Co., 113 Ill. App. 475.

out prejudice.[54] Damages consist of money expended or lost by the defendant by reason of the issuance of the writ together with reasonable attorney fees in procuring the dissolution.[55] Dissolution of an injunction upon obedience to it does not make its issuance wrongful and give a right of action on the bond.[56] Injunction bonds should be liberally construed.[57]

Practice in action on bonds.[58]—A complaint on an injunction bond must allege that the damages claimed have not been paid.[59] Upon the dissolution of an injunction the court may in its discretion assess damages actually shown to have been suffered by reason of the injunction[60] or direct a jury so to do.[61]

(§ 4) *E. The appealability*[62] of preliminary orders and of the dissolution, vacation and modification or refusal thereof, is regulated by statute and has been discussed fully elsewhere.[63]

§ 5. *Decree, judgment or order for injunction.*[64]—The commands of an injunction must be direct and specific, not general and sweeping.[65] An injunction issued by a court[66] or by an official, without jurisdiction,[67] is void. A restraining decree which is not void and does not embrace matters fairly in issue upon the bill and answers will not be vacated by mandamus.[68] A temporary restraining order issued at the commencement of a suit does not release property from the custody of the attaching officer or discharge the lien acquired by levy, but stays proceedings while the injunction is in force.[69] In New York, by statute, an injunction order is ir-

54. Tutty v. Ryan [Wyo.] 79 P. 920.

55. McLennon v. Fenner [S. D.] 104 N. W. 218.

56. Yarwood v. Cedar Canyon Consol. Mining Co., 37 Wash. 56, 79 P. 483.

57. Under the Indiana Law (Burns' Ann. St. 1901, §§ 269-273), providing that all persons adverse to plaintiff and necessary parties to effect a complete settlement of matters in issue are proper parties defendant and (§ 1167) providing for an appeal bond, a party admitted as a defendant after the filing of the bond was allowed the benefit of it. Sheets v. Hays [Ind. App.] 75 N. E. 20.

58. See 4 C. L. 121.

59. Bebee v. Jackson [Mont.] 79 P. 1051.

60. Under the laws of Arkansas (Kirby's Dig. § 3998), providing that upon dissolution of an injunction to stay proceedings upon a judgment or final order to assess damages, it was held that the judge was not authorized to enter a decree for the full amount of the judgment sought to be stayed unless damages to that extent were shown to have been sustained. Johnson v. Gillenwater [Ark.] 87 S. W. 439. Under the South Dakota Law (Code Civ. Proc. § 200), providing that damages caused by an improvident injunction may be ascertained by reference or otherwise as the court shall direct, it was held that it was discretionary with the court whether or not damages should be assessed in the action in which the injunction issued and that defendant might waive this remedy and sue on the injunction bond. McLennon v. Fenner [S. D.] 104 N. W. 218. The remedy given by Kentucky statutes (Civ. Code, § 295), for the assessment of special damages by the court upon the dissolution of an injunction to stay proceedings to enforce a judgment, is exclusive and no action may be had upon the injunction bond. Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co., 26 Ky. L. R. 570, 82 S. W. 290.

61. Under the Kansas Law (Rev. St. 1899, § 3639), providing that upon the dissolution of an injunction in whole or part, damages shall be assessed by a jury or the court, it was held that a motion to assess damages might be filed on affirmance of a final judgment dissolving the injunction and dismissing the bill. Wabash R. Co. v. Sweet, 110 Mo. App. 100, 84 S. W. 95.

62. See 4 C. L. 121.

63. See Appeal and Review, 5 C. L. 121.

64. See 4 C. L. 121.

65. Builders' Painting & Decorating Co. v. Advisory Board Bldg. Trades of Chicago, 116 Ill. App. 264.

66. State v. Carlson [Neb.] 101 N. W. 1004.

67. Under the Law of Kentucky (Civ. Code Prac. § 273), providing for preliminary restraining orders by the clerk of court in absence of the judge, it was held that the clerk has no authority to issue mandatory injunctions or an injunction granting the ultimate relief sought, such as an order restraining the placing of the name of a candidate on the ballot on the eve of an election. Commonwealth v. Combs [Ky.] 86 S. W. 697. Under the Arkansas Law (Kirby's Dig. § 1294), providing that in the absence of the Chancellor, the circuit court might issue injunctions after suit is brought, but not before, it was held that a circuit court had no jurisdiction to issue an injunction when that was the ultimate relief sought and that a suit seeking a restraining order to prevent the payment of license fees to the mayor by the city marshal was not within the statute (Kirby's Dig. §§ 3462, 7983), providing for quo warranto and the prevention of usurpation of office, was a suit for an injunction and not within the jurisdiction of the court. Moody v. Lourimore [Ark.] 86 S. W. 400.

regular which does not recite the grounds upon which it is granted[70] but such irregularities may be corrected by amendment.[71] An injunction decree in an infringement case is a defense in an action by a third party for failure to supply articles whose manufacture is enjoined.[72]

§ 6. *Violation and punishment.*[73]—The willful violation of an injunction by a party to the cause is a contempt of court punishable as such.[74] A "willful" disobedience of an injunction is a criminal contempt[75] while a mere disobedience, by which the right of a party to the action is defeated or hindered, is a civil contempt.[76] An injunction must be obeyed in its spirit as well as in its letter.[77] When a contempt is committed without the presence of the court, the affidavit of facts must show on its face a case of contempt in order to give the court jurisdiction.[78] A party may not be punished in contempt proceedings for disregard of a restraining order in a case where there is an adequate remedy at law where the equitable jurisdiction of the court was duly questioned and found wanting.[79] Disobedience to an injunction is not excused by showing that it was subsequently dismissed for an irregularity or want of equity in the bill,[80] but it is excused where there is no legal power in the court to issue the writ.[81] Although the terms of an injunction are broader than the allegations of the bill, that fact is no defense in a contempt proceeding.[82] In Texas the powers of a judge to punish for contempt are controlled by

68. Pere Marquette R. Co. v. Kalkaska Circuit Judge [Mich.] 102 N. W. 951.

69. Johnson v. Gillenwater [Ark.] 87 S. W. 439.

70. N. Y. law (Code Civ. Proc. § 610). Meyer v. Moress, 94 N. Y. S. 771.

71. Werbelovsky v. Michael, 94 N. Y. S. 156.

72. The rule was held not to apply where prior to the entry of the decree the complainant obtained control of the defendant through the purchase of its stock. McElroy v. American Rubber Tire Co. [C. C. A.] 122 F. 441.

73. See 4 C. L. 122. See, also, Contempt, 5 C. L. 650.

74. Sale of goods was held to establish a contempt of court and a fine was imposed. Universal Talking Mach. Co. v. Keen, 136 F. 456. Aiding in the violation of an injunction against the infringement of a patent by taking over and conducting the business in his own name with knowledge of the injunction was held to be a contempt of court and a fine was imposed. Hamilton v. Diamond Drill & Machine Co. [C. C. A.] 137 F. 417. Peace officers acting in good faith held not guilty of contempt of an injunction restraining township officers from interfering with the laying of certain pipes. Public Service Corp. of New Jersey v. De Grote [N. J. Eq.] 62 A. 65.

Injunction against strikes, etc.: A system of "picketing" for more than a year around and near complainant's premises was held to be a contempt of court, even though there was no violence. Atchison, etc., R. Co. v. Gee, 139 F. 582. "The argument seems to be that anything short of physical violence is lawful * * * (as not amounting to intimidation which was enjoined). * * * But peaceful, law abiding men can be intimidated by gesticulations, by menaces, by being called harsh names * * * (scabs) * * * and by being followed or compelled to pass by men known to be unfriendly * * * (engaged in "picketing"). Id. Insults, assaults and beatings by strikers of employes were held to amount to a contempt of court as violating a strike injunction. O'Brien v. People [Ill.] 75 N. E. 108. A defendant will not be adjudged guilty of a contempt unless it clearly appears that he was acting in bad faith in evasion of the court's orders. Sponenburg v. Gloversville, 94 N. Y. S. 264.

75. People v. Marr, 181 N. Y. 463, 74 N. E. 431.

76. The primary object of one is to protect private rights and of the other, to maintain the dignity of the court, and vindicate the authority of the law. People v. Marr, 181 N. Y. 463, 74 N. E. 431. In contempt proceedings for violation of an injunction restraining the defendants from interfering with the water in an irrigation ditch, it was held that the action being civil it could only be maintained by a plaintiff who had suffered actual or special damages. Thompson v. McFarland [Utah] 82 P. 478. Proceedings for contempt under an injunction issued to protect the rights of a private individual are civil and in no sense criminal. Therefore the rule in criminal proceedings for contempt that a sworn answer if sufficient to purge him from contempt may be taken as true does not apply. O'Brien v. People [Ill.] 75 N. E. 108.

77. It was held to be contempt of court for a defendant who had been enjoined from disturbing certain property to bring an action of trespass against the plaintiff pendente lite. Maloney v. King [Mont.] 76 P. 939.

78. Hutton v. Superior Court of San Francisco [Cal.] 81 P. 409.

79. American Lighting Co. v. Public Service Corp., 134 F. 129.

80, 81. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 83 S. W. 1100.

statute.[83] A party to an action who is in contempt of court for violation of an injunction has no absolute right to proceed with the trial.[84] In Illinois defendants in contempt proceedings for violation of an injunction are not entitled to a trial by jury.[85] In a contempt proceeding the defendants are not entitled to a specific bill of particulars setting forth the offenses charged.[86] Matters relating to practice in contempt proceedings are treated elsewhere.[87]

§ 7. *Liability for wrongful injunction.*[88]—Damages for the malicious suing out of an injunction cannot be recovered upon the injunction bond.[89] Since an injunction is not the act of the party applying for it, but of the court, no wrong is committed by the party although it is dissolved, unless he acted maliciously and without probable cause.[90]

INNS, RESTAURANTS AND LODGING HOUSES.[91]

Public regulation.[92]—The power to license inns and taverns is a power commonly, if not universally, exercised by the municipal authorities in cities.[93]

Who is a guest.[94]

Duty to receive guests.—At common law an innkeeper is bound to receive all guests provided he has accommodations and they are not objectionable persons.[95] But he is not obliged to permit all persons to remain as permanent lodgers.[96] An apartment house or family hotel in which suites of rooms are rented upon annual leases, and transient tenants are not solicited, is not a hotel within the meaning of the New York statute, providing that all persons shall have full and equal accommodations and privileges in inns, hotels and restaurants.[97]

Liability for safety of guests.[98]—An innkeeper is held only to the exercise of reasonable care for the safety of his guests;[99] he is not an insurer of their safety.[1] Failure to comply with a statutory building regulation is prima facie negligence.[2] There can be no recovery for the injury or death of a guest unless the negligence alleged was the proximate cause thereof.[3] There can be no recovery for negligence not alleged.[4]

82. O'Brien v. People [Ill.] 75 N. E. 108.

83. Under the Laws of Texas (Rev. St. 1895, art. 3013), providing for punishment for contempt by committing to jail until the party purges himself from the contempt as directed by the court and (art. 1101) providing that the court should have power to punish by a fine not exceeding $100 or by imprisonment not exceeding 3 days, a person in contempt, it was held that a fine of $300 and 15 days imprisonment was not within the jurisdiction of court under either section. Ex parte Margan [Tex. Cr. App.] 86 S. W. 755.

84. Campbell v. Justices of Superior Court [Mass.] 73 N. E. 659.

85. Laws of Illinois 1893, p. 96, providing for a jury trial where a judgment is to be satisfied by imprisonment, so construed. O'Brien v. People [Ill.] 75 N. E. 108.

86. O'Brien v. People [Ill] 75 N. E. 108.

87. See Contempt, 5 C. L. 650.

88. See 4 C. L. 123. In so far as there is an abuse of process, the procuring of an injunction is a tort in some of the states. See Malicious Prosecution and Abuse of Process, 4 C. L. 470; Process, 4 C. L. 1070.

89, 90. Chicago Title & Trust Co. v. Chicago, 110 Ill. App. 395.

91. See 4 C. L. 123.

92. See 4 C. L. 124.

93. The city council of Atlantic City has authority under P. L. 1902, p. 298, to license inns and taverns. Conover v. Gregson [N. J. Law] 60 A. 31.

94. See 4 C. L. 123, and note. See, also, following paragraphs, Liens and Liability for Effects.

95. Crapo v. Rockwell, 94 N. Y. S. 1122. An innkeeper is liable at common law to one who has been refused the privileges of a guest. Cornell v. Huber, 102 App. Div. 293, 92 N. Y. S. 434.

96. Crapo v. Rockwell, 94 N. Y. S. 1122.

97. Laws 1895, p. 974, c. 1042, does not render a landlord of an apartment house liable to a penalty for refusing to accept a certain person as a tenant. Alsberg v. Lucerne Hotel Co., 92 N. Y. S. 851.

98, 99. See 4 C. L. 123.

1. Clancy v. Barker [Neb.] 103 N. W. 446.

2. Failure to have standpipe in hotel building over 100 feet high as required by Building Code of New York City, p. 65, § 102. Acton v. Reed, 93 N. Y. S. 911.

3. Failure to have standpipe in hotel as required by building code, held not to have contributed to death of guest by suffocation. Acton v. Reed, 93 N. Y. S. 911. Fact that door to a stairway was locked was not proximate cause of death by suffocation of guest who did not try to go out by that door and who reached the next floor by a different

It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employes who assist in the conduct of the hotel and in the care and accommodation of the guests.[5] If damages result from such assault, the hotel keeper is liable.[6]

Liens.[7]—At common law an innkeeper has a lien on baggage and effects of the guest brought to the inn to secure payment for lodging and supplies furnished.[8] This lien attaches to property in possession of the guest, title to which is in another, if the innkeeper has no notice of the third person's rights,[9] since a person who furnishes property to a guest is presumed to know that the law gives such lien.[10] The innkeeper has no common-law lien upon property of a mere lodger.[11] The Washington statute gives no lien on property in possession of a guest known by the hotel keeper to belong to a third person.[12] The Texas statute gives a lien on personal property in favor of hotel and boarding house keepers, but not in favor of lodging house keepers.[13]

Public regulation; licenses.[14]—Violation of intoxicating liquor laws by innkeepers is elsewhere treated.[15]

Liability for effects.[16]—At common law an innkeeper is the insurer of property of his guest and is liable for its loss for any cause whatever except neglect of the guest or the act of God or the public enemy.[17] But one seeking to enforce this strict liability must show that the relation of innkeeper and transient guest existed at the time the property was lost,[18] or within a reasonable time preceding;[19] one who is a boarder[20] or a servant[21] cannot enforce it. A guest has a reasonable time in which to remove his property, and thereafter the innkeeper is liable as a bailee

stairway. Id. Even had evidence been sufficient to show failure to keep posted in guest's room a diagram showing exits, halls, stairways, etc., as required by Greater New York Charter, § 762, such failure could not be deemed a proximate cause of death by suffocation of a guest who had been in hotel nine months and was familiar with its arrangement. Id.

4. Rev. St. 1899, § 9036, requiring a rope or rope ladder to be fastened in every room above second story was impliedly repealed by Acts 1901, p. 219, requiring fire escapes to be placed on exterior of hotel buildings. Hence an action based on a violation of the former cannot be maintained, though a violation of the latter is shown. Yall v. Gillham, 187 Mo. 393, 86 S. W. 125.

5. Clancy v. Barker [Neb.] 103 N. W. 446.

6. Infant son of guest lost an eye by accidental discharge of pistol in hands of bellboy, while the latter was off duty, and both were in a room not occupied by any guest; the hotel keeper was held liable. Clancy v. Barker [Neb.] 103 N. W. 446.

Note: The Nebraska court on rehearing adheres to its original decision in this case (see Clancy v. Barker [Neb.] 98 N. W. 440), notwithstanding a contrary decision in a suit based on the same facts by the Federal circuit court of appeals. Clancy v. Barker [C. C. A.] 131 F. 161. Mr. Justice Barnes, however, dissents. Interesting discussions and many authorities will be found in the opinion in the Federal case (where there was also a dissenting opinion), and in the dissenting opinion of Mr. Justice Barnes. See, also, special article, Liability of Master for Assault by Servant, 5 C. L. 275.

7. See 4 C. L. 124.

8. Common-law rule still in force in New York. Horace Waters & Co. v. Gerard, 94 N. Y. S. 702.

9. As where guest had piano under conditional sale, title being in vendor. Horace Waters & Co. v. Gerard, 94 N. Y. S. 702.

10. Horace Waters & Co. v. Gerard, 94 N. Y. S. 702.

11. Lien attaches only to effects of a guest. Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co. [Wash.] 80 P. 563.

12. No lien on traveling salesman's samples, known to belong to his employer. Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co. [Wash.] 80 P. 563. Evidence that hotel men had extensive acquaintance with salesmen and their methods and never knew of an instance where they owned their samples was sufficient to prove a general custom so that the hotel keeper could not claim that he did not know that shoe samples did not belong to salesman, when he had extended credit without inquiry as to ownership. Id.

13. Hardin v. State [Tex. Cr. App.] 84 S. W. 591.

14. See 4 C. L. 124.

15. See Intoxicating Liquors, 4 C. L. 252.

16. See 4 C. L. 123.

17. The common law rule is still enforced except as such liability has been modified by statute. Crapo v. Rockwell, 94 N. Y. S. 1122.

18. Crapo v. Rockwell, 94 N. Y. S. 1122.

19. Complaint must allege that relation existed at the time of loss or a reasonable time preceding. Clark v. Ball [Colo.] 82 P. 529.

20. Woman who had lived 17 months at

in the absence of a special contract.[22] Where one delivers baggage to a hotel at a time when he is not a guest, and thereafter becomes a guest, the presumption is that the baggage was in the possession of the hotel at the time the owner became a guest, and the burden is on the hotel keeper to prove the contrary in an action for its loss.[23] Under statutes of some states, a hotel keeper who has a suitable safe and has posted the notice required by law is not liable as an innkeeper for the loss of valuables not placed therein, unless the guest has offered to deliver such valuables and the hotel keeper has refused to receive or deposit them.[24] Where a guest places a box containing jewelry in the hands of the clerk without disclosing the contents of the box or requesting a deposit of it in the safe, the innkeeper is liable only as a gratuitous bailee for gross negligence.[25]

Offenses.—In Pennsylvania, one who removes his property from a hotel with the intention of defrauding the hotel keeper is guilty of an indictable offense.[26]

INQUEST OF DAMAGES, see latest topical index.

INQUEST OF DEATH.[27]

Only the coroner at the place where the crime was committed or the body found has jurisdiction to hold an inquest.[28] The testimony of a witness subsequently prosecuted for manslaughter, taken at a coroner's inquest in pursuance of a subpoena, the witness not being under arrest or accused of the crime at the time, and there being nothing to indicate that the testimony is involuntarily given, is admissible

an inn which accommodated both transients and boarders, had property there indicating she intended to stay, and made special arrangements for rates, was a boarder. Crapo v. Rockwell, 94 N. Y. S. 1122. As to who is a "boarder," see note 4 C. L. 123.

21. Clark v. Ball [Colo.] 82 P. 529.

22. Clark v. Ball [Colo.] 82 P. 529.

NOTE. Liability of an innkeeper after guest's departure: The general rule is that the guest, by his departure, ceases to be such, and that the hotelkeeper's liability is not that of an innkeeper, but merely of a bailee, where the goods are committed to his charge. Wear v. Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186; Murray v. Marshall, 9 Colo. 482, 13 P. 589, 59 Am. Rep. 152; Brown Hotel Co. v. Burckhart, 13 Colo. App. 59, 56 P. 183; O'Brien v. Valil, 22 Fla. 627, 1 So. 137, 12 Am. St. Rep. 219; Hoffman v. Roessle, 39 Misc. 787, 81 N. Y. S. 291; Whitemore v. Haroldson, 70 Tenn. [2 Lea] 312; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; Id., 28 Vt. 387, 67 Am. Dec. 720. And where the property is left behind without calling the innkeeper's attention to that fact, the owner acts at his own peril, as the host has a right to believe that he has taken it with him, and is therefore no longer responsible for its safekeeping. Glenn v. Jackson, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382; Wintermute v. Clarke, 7 N. Y. Super Ct. [Sand.] 242. In Stewart v. Head, 70 Ga. 449, a guest left a valise in the hotel office, without calling attention thereto, and the clerk, not knowing who the owner was, took it into a room where baggage was kept, and it was subsequently broken open and the contents taken. The landlord was held to be a naked depositary, liable only for gross negligence. The innkeeper's liability does not cease the very instant the guest pays his bill, but he has a reasonable time in which to remove his goods, during which period the extraordinary liability attaches. What is a reasonable time is to be estimated according to the circumstances of the case. Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524; Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444; Maxwell v. Gerard, 84 Hun, 537, 32 N. Y. S. 849.

He may also become liable for property of the guest which arrives at the inn after his departure. So where a landlord promised to forward goods which were expected to arrive after the guest had left, and it was delivered at the hotel, but not forwarded or returned to the sender, the landlord was held liable as an ordinary bailee, the refusal or neglect to return the property on demand making out a prima facie case against him. Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.—From note Johnson v. Chadbourn Finance Co. [Minn.] 99 Am. St. Rep. 587.

23. Oriental Hotel Ass'n v. Faust [Tex. Civ. App.] 86 S. W. 373.

24. Rev. St. 1899, § 7578. Horton v. Terminal Hotel & Arcade Co. [Mo. App.] 89 S. W. 363.

25. Complaint held to state a cause of action against hotelkeeper as bailee where delivery and failure to return were alleged. Horton v. Terminal Hotel & Arcade Co. [Mo. App.] 89 S. W. 363. Instruction defining gross negligence should have been given. Id.

26. Conviction sustained under Act April 20, 1876 (P. L. 45). Commonwealth v. Billig, 25 Pa. Super. Ct. 477.

27. See 4 C. L. 125; also Coroners, 5 C. L. 763.

28. Since the purpose of the inquest is to

against him when placed on trial for the crime.[29] Such testimony is not to be deemed involuntary merely because given in response to a subpoena.[30] In Iowa a physician summoned by a coroner to make an examination may recover compensation for his services from the county.[31]

INSANE PERSONS.[32]

§ 1. *Existence and effect of insanity in general.*[33]—An adjudication that one is insane is conclusive of the fact at that time and prima facie evidence of insanity at a subsequent period,[34] but raises no presumption of previous lunacy.[35] The degree of insanity which will relieve a person from liability on his contracts[36] may not be sufficient to absolve him from liability for crime.[37] The insanity of a husband does not absolve him or his estate from the duty of maintaining his wife,[38] and enforced separation caused by insanity is not ground for divorce;[39] but the husband is not liable at common law for the support of his wife while she is confined in an insane asylum under process of law.[40] On restoration to sanity, the quondam lunatic is entitled to be restored to his civil rights.[41] One seeking to establish a restoration of sanity has the burden of proof.[42] That a party goes in-

secure evidence and to prevent the escape of the guilty person. Young v. Pulaski County [Ark.] 85 S. W. 229. Coroner cannot recover fees for unauthorized inquest. Id. See Coroners, 5 C. L. 763.

29. State v. Finch [Kan.] 81 P. 494.

30. State v. Finch [Kan.] 81 P. 494. See Witnesses (Privileges of) 4 C. L. 1967.

31. Code, §§ 515, 529. Finarty v. Marion County [Iowa] 103 N. W. 772.

32. Insanity as a defense to crime, see Criminal Law, 5 C. L. 883.

33. See 4 C. L. 126.

NOTE: Kleptomania is not ground for the annulment of marriage if the person afflicted with it is otherwise sane and his or her mind is not so affected with this peculiar mania as to be incapable of understanding or assenting to the marriage contract (Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505), but is a complete defense to the crime of larceny (Commonwealth v. Fritch, 9 Pa. Co. Ct. Rep. 164; Harris v. State, 18 Tex. App. 287; In re Castle, 102 L. T. 28; People v. Cummins, 47 Mich. 334, 11 N. W. 184). See, also, Looney v. State, 10 Tex. Ct. App. 520, 38 Am. Rep. 646. In State v. McCullough, 114 Iowa, 532, 89 Am. St. Rep. 382, 55 L. R. A. 378, it is defined as an irresistible desire to steal, arising from a weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse without regard to whether such impulse is inspired by avarice, greed or idle fancy.—Note to State v. McCullough [Iowa] 89 Am. St. Rep. 382.

34. Where, on a prosecution for homicide, defendant was adjudged insane and committed to an asylum and 3 years later his mental condition was found to be the same, on subsequent petition for discharge, he must show by a clear and strong preponderance of evidence that he is not insane and that his release will not be dangerous to the public peace. In re Palmer, 26 R. I. 486, 59 A. 746. In habeas corpus by one declared insane and dangerous in a prosecution for homicide, it is presumed that he continues in the same condition until the contrary is affirmatively proven. Ex parte Brown [Wash.] 81 P. 552.

35. Andrews v. Andrews' Committee [Ky.] 87 S. W. 1080.

36. A person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of the nature and consequence of his or her act in making a contract. Barlow v. Strange, 120 Ga. 1015, 48 S. E. 344.

37. The Florida statutes which prescribe the mode of procedure in adjudging persons insane do not apply to persons charged with a criminal offense who plead insanity. Reyes v. State [Fla.] 38 So. 257.

38. Alimony may be allowed where divorce is granted because of the husband's insanity. Moseley v. Larson [Miss.] 38 So. 234.

39. Absence for the statutory period caused by insanity is no ground for divorce. Andrews v. Andrews' Committee [Ky.] 87 S. W. 1080.

40. Richardson v. Stuesser [Wis.] 103 N. W. 261. See Husband and Wife, 5 C. L. 1731, note.

41. Under Laws 1896, p. 501, c. 545, and Code Civ. Proc. § 2058, providing for a writ of habeas corpus and an appeal from proceedings thereunder, an appeal showing that the alleged lunatic was not insane will not be dismissed merely because the relator was a stranger to the proceeding and had no interest. People v. Bond, 93 N. Y. S. 277.

42. On petition in habeas corpus for discharge from an asylum, evidence held insufficient to show that petitioner was not insane

sane after verdict rendered is no objection to the signing of the findings and judgment.[48]

§ 2. *Inquisitions*[44] of lunacy are statutory and are governed by the statute under which they are had as to notice,[45] venue,[46] and the extent and character of findings to be made,[47] and costs.[48]

§ 3. *Guardianship and support.*[49]—Guardians may be appointed for the persons and estates of insane persons after their lunacy has been established[50] and not before.[51] In the appointment of a guardian the best interest of the lunatic is the controlling consideration.[52]

The estates of insane persons[53] and those whose moral duty it is to support them are generally made liable for the cost of their maintenance in asylums,[54] and methods are provided by law for the recovery of such expense.[55] A state has no common-law right to recover compensation for maintaining a nonresident patient in a state asylum,[56] and such right is not given by a statutory provision that the support of an insane person, a public charge, shall not release their estates or relatives from liability.[57] A husband is not liable for the support of his insane wife who has been removed from his home and is maintained at an insane asylum.[58] The cost for caring for indigent insane is generally imposed on the county of his residence,[59] and is a subject of statutory regulation.[60] A statutory right of one

and that his discharge would not be dangerous to the public peace. In re Palmer, 26 R. I. 486, 59 A. 746. In habeas corpus for the discharge of an insane person as cured, testimony of eminent physicians must be taken at its full value and be regarded as controlling. Id.

43. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

44. See 4 C. L. 126. Ch. 253, p. 612, Laws 1901 (Gen. St. 1901, § 6521), providing for inquests of lunacy, does not embrace more in its body than is expressed in its title. Ex parte Schley [Kan.] 80 P. 631.

45. Under Act June 13, 1836 (P. L. 589), notice of lunacy proceeding on the alleged lunatic is sufficient, without notice to next of kin or friends. Brooke's Estate, 24 Pa. Super. Ct. 430.

46. Lunacy proceedings relative to a person confined in a state asylum may be brought in the county in which the hospital is situated or in the county of the residence of the alleged lunatic. Brooke's Estate, 24 Pa. Super. Ct. 430.

47. Under Code Civ. Proc. § 2325, an inquisition of lunacy is not confined to the sole question of incompetency, but a finding as to the lunatic's property may be made. In re Preston, 46 Misc. 46, 93 N. Y. S. 283.

48. The costs of an inquisition for the determination of the mental capacity of one to manage his property cannot be awarded against his estate when the proceeding resulted in a determination that he was not an incompetent. Code Civ. Proc. §§ 2333, 2334, 2336. Sander v. Larner, 101 App. Div. 167, 91 N. Y. S. 428. An order imposing costs in lunacy proceedings on the lunatic's estate will not be reversed where no testimony was taken and no method of showing the amount to be excessive. Brooke's Estate, 24 Pa. Super. Ct. 430.

49. See 4 C. L. 127; also, Guardianship, 5 C. L. 1603.

50. A finding on an inquisition of lunacy held equivalent to a finding that the alleged incompetent was an imbecile bringing the case within the concurrent jurisdiction of the county and supreme courts, conferred by Code Civ. Proc. § 2320. In re Preston, 46 Misc. 46, 93 N. Y. S. 283.

51. Before a guardian can be appointed and property transferred to him, it must appear that the person is weak minded and is liable to lose his property. In re Bryden's Estate [Pa.] 61 A. 250.

52. In proceedings for the appointment of a committee for an incompetent who is competent to decide the manner of his life and desires to stay in his present abode, the court should order that he be not removed therefrom without authority from the court. In re Cooper, 94 N. Y. S. 270.

53. Where a lunatic is placed in a foreign asylum with the consent of her husband and committee, such asylum can recover from the lunatic's estate the amount allowed by the state of his residence, for his support. Mander's Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

54. Rev. St. 1898, § 604E, into which was incorporated §§ 1500-1505, provides the procedure by which one privately liable for the support of an insane person confined in an asylum may be compelled to pay. Richardson v. Stuesser [Wis.] 103 N. W. 261.

55. An action to enforce the order of the county judge must be commenced in the name of the county in some court having jurisdiction. The county court has not jurisdiction. Richardson v. Stuesser [Wis.] 103 N. W. 261.

56. Such asylums being largely charities. State v. Colligan [Iowa] 104 N. W. 905.

57. Code, § 2297. State v. Colligan [Iowa] 104 N. W. 905.

58. The fact that she is so legally removed from his home does not raise an inference of a refusal to support her therein

county to recover from another for maintenance of indigent insane persons is not a vested right.[61]

§ 4. *Commitment to asylums.*[62]—A statute providing that a person indicted for an offense and acquitted by the jury because he is insane may be committed to prison if his discharge be deemed dangerous to the community is not unconstitutional.[63] It does not prevent the insane person from demanding an investigation at any time of the question of his restoration to sanity.[64] The order of commitment must be certain.[65]

§ 5. *Property and debts.*[66]—Real estate of insane persons may be sold on order of court.[67] The committee of a lunatic is entitled to present possession of the income of his ward's estate.[68] An executory gift which might have been revoked by the donor may be revoked by his guardian on the donor's becoming non compos mentis.[69] The committee of a lunatic who has absolute control of the ward's property is taxable on credits in his hands belonging to his ward in the county of his domicile, though appointed elsewhere.[70] In Illinois the conservator of a lunatic is entitled to administer his estate.[71] In Texas, on the insanity of one spouse, the other may administer and dispose of the community property during his lifetime, but he cannot dispose of the community interest of the insane spouse by will.[72]

§ 6. *Contracts and conveyances.*[73]—As a general rule an insane person's contracts are voidable, not void,[74] but may be void by reason of the nature of the

so as to render him liable for her support in the hospital. Richardson v. Stuesser [Wis.] 103 N. W. 261.

59. Under the New York statutes where an indigent resident of one county, charged with crime in another, is committed to a state lunatic asylum, there is no general liability on the part of the county of his residence to reimburse the county from which he was sent for sums paid out by it on account of his confinement in the asylum. Jefferson County v. County of Oswego, 102 App. Div. 232, 92 N. Y. S. 709.

60. Laws 1896, p. 508, c. 545, § 101, amended by Laws 1899, p. 461, c. 260, expressly provide that the expenses of an inmate of a state asylum, committed there by a court of criminal jurisdiction, and transferred to the Matteawan State Hospital, are to be paid by the county in which the criminal charge arose, if he was then a resident of that county, otherwise by the state. Jefferson County v. County of Oswego, 102 App. Div. 232, 92 N. Y. S. 709.

61. A repeal of the statute discontinues the liability, though the same person continued in the asylum and was maintained. Jefferson County v. County of Oswego, 102 App. Div. 232, 92 N. Y. S. 709. And the fact that his expenses were paid by the county liable under the statute is not such an admission of liability as precludes the right to discontinue payment after the statute is repealed. Id.

62. See 4 C. L. 128.

63. Does not deny **due process,** nor the right to **trial by jury,** nor the **right of counsel,** nor does it inflict **cruel punishment.** Ex parte Brown [Wash.] 81 P. 552.

64. Ex parte Brown [Wash.] 81 P. 552.

65. An order committing to prison one found insane and acquitted on that ground and sent to prison because his discharge was deemed dangerous, "to await further order of the court," is not void for uncertainty. Ex parte Brown [Wash.] 81 P. 552.

66. See 4 C. L. 128.

67. Civ. Code Proc. § 490, subsec. 2, expressly provides that a vested estate in possession owned by two or more may be ordered sold by the court of equity, though the owners be of unsound mind. Mudock v. Loeser [Ky.] 87 S. W. 808.

68. The committee of an incompetent legatee is entitled to rents accruing to his ward without waiting until the administrator of the estate has settled and had approved his annual account. In re Cowen, 94 N. Y. S. 303.

69. Promise to permit his property to be occupied by another rent free, and on the death of the promisor the promisee to become the owner. Buhler v. Trombly [Mich.] 102 N. W. 647.

70. Hurt v. Bristol [Va.] 51 S. E. 223. Under Code 1904, p. 877, § 1702, the committee of a lunatic has absolute control of his ward's estate, though it is his duty to render annual accounts to the court. Id. Code 1904, p. 254, § 492b, relative to payment of taxes from funds in the control of the court, does not apply. Id.

71. Statutes construed. Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329.

72. Rev. St. 1895, art. 2220, does not divest the title of the insane spouse. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282. See, also, Husband and Wife, 5 C. L. 1731.

73. See 4 C. L. 129. See, also, Contracts, 5 C. L. 664; Incompetency, 5 C. L. 1775.

NOTE: Revocation of agency by insanity, see 4 C. L. 1303.

74. A contract by one mentally weak of which fact the other party has notice will not be specifically enforced, especially where the incompetent has returned all he received by virtue of it. Miller v. Tjexhus [S. D.] 104 N. W. 519. An **assignment of a contract**

subject-matter.[75] A marriage contracted by an insane person is void,[76] and in Alabama all his contracts are void.[77] In jurisdictions where the contracts are void, the defense of insanity is not a personal one.[78]

§ 7. *Torts.*[79]

§ 8. *Actions by or against.*[80]—If there is no statutory authority for the

to purchase land is voidable only. Wolcott v. Connecticut General Life Ins. Co. [Mich.] 100 N. W. 569.

Note: As to whether an assignment by an insane person, not under guardianship, involving his right to execute a deed, is void or voidable, the decisions are conflicting. By the weight of authority, however, it is held voidable. Castro v. Geil, 110 Cal. 292, 42 P. 804, 52 Am. St. Rep. 84; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910; McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656; Burnham v. Kidwell, 113 Ill. 425; Johnson v. Harmon, 94 U. S. 371, 24 Law. Ed. 271; Luhrs v. Hancock, 181 U. S. 567, 45 Law. Ed. 1005. Van Deusen v. Sweet, 51 N. Y. 378, only declares deeds void when made by persons absolutely incompetent to act mentally in the transaction. Several American jurisdictions, including two Federal circuit courts, hold the deeds of persons non compos mentis absolutely void when a guardian does not appear to have been appointed. Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Boddie v. Bush, 136 Ala. 560; Beach, The Modern Law of Contract, 1390; German Savings & Loan Soc. v. De Lashmutt, 67 F. 399; Edwards v. Davenport, 20 F. 756. To be distinguished from these, Dexter v. Hall, 15 Wall. [U. S.] 9, 21 Law. Ed. 73, that the power of attorney of one non compos mentis is void. Commitment to an asylum pursuant to statute does not establish incapacity to contract in the person so committed. Leggate v. Clark, 111 Mass. 308; Knox v. Hang, 48 Minn. 58; The Topeka Water-Supply Co. v. Root, 56 Kan. 187; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468. Ratification is presumed by doing nothing toward disaffirmance after becoming sane. Arnold v. Richmond Iron Works, 1 Gray [Mass.] 434. Or by long acquiescence after restoration to sanity. Jones v. Evans, 7 Dana [Ky.] 96. Ratification or disaffirmance may be shown by any acts clearly indicating an intention to ratify or annul a deed made during insanity. Howe v. Howe, 99 Mass. 98.—3 Mich. L. R. 157.

75. A conveyance of the homestead by a husband, insane as to all duties owing his wife, is void. Moseley v. Larson [Miss.] 38 So. 234.

76. The adjudication of lunacy which annuls a marriage contracted while such condition existed is the adjudication in the suit brought to annul such marriage, and the lunatic need not be so adjudged prior to commencement of such action. Statutes construed. Mackey v. Peters, 22 App. D. C. 341.

77. His transfer of a note. Walker v. Winn [Ala.] 39 So. 12.

78. The maker of a note transferred by an insane person may set up the insanity of the transferror in an action by the transferee, under the plea that the plaintiff is not the real party in interest. Walker v. Winn [Ala.] 39 So. 12.

NOTE. Who may disaffirm: The contract of an insane person may be disaffirmed in the incompetent's lifetime by his guardian or committee (McClain v. Davis, 77 Ind. 419; Gibson v. Soper, 6 Gray [Mass.] 279; Reason v. Jones, 119 Mich. 672; Halley v. Troester, 72 Mo. 73; Moore v. Hershey, 90 Pa. 196), or by himself upon entire restoration to reason, or in a lucid interval (McClain v. Davis, 77 Ind. 419; Hovey v. Hobson, 53 Me. 451, 454, 89 Am. Dec. 705; Turner v. Rusk, 53 Md. 65; Gibson v. Soper, 6 Gray [Mass.] 279; Moore v. Hershey, 90 Pa. 1962), or, after his death, by his heirs or legal representatives (Beverley's Case, 4 Coke, 123b; Bunn v. Postell, 107 Ga. 490; Somers v. Pumphrey, 24 Ind. 231; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Evans v. Horan, 52 Md. 602; Rogers v. Blackwell, 49 Mich. 192; Hunt v. Rabitoay, 125 Mich. 137, 84 Am. St. Rep. 563; McAnaw v. Tiffin, 143 Mo. 667; Millison v. Nicholson, 1 N. C. 549; Wigglesworth v. Steers, 1 Hen. & M. [Va.] 70), and an incompetent's conveyance may be avoided by any one who is in privity with him (Cates v. Woodson, 2 Dana [Ky.] 452, 454). But see Hunt v. Rabitoay, 125 Mich. 137, 84 Am. St. Rep. 563. In reference to the law of infancy on this point, see page 254, supra. The sane party is bound by the contract if the other so elects (Matthews v. Baxter, L. R. 8 Exch. 132; Harmon v. Harmon, 51 F. 113; Caldwell v. Ruddy, 2 Idaho, 5, 11; Mead v. Stegall, 77 Ill. App. 679; Allen v. Berryhill, 27 Iowa, 534; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. [Ky.] 236, 239; Howe v. Howe, 99 Mass. 88, 99), and strangers cannot exercise the right to rescind (Eaton's Adm'r v. Perry, 29 Mo. 96). But see Drummond v. Hopper, 4 Har. [Del.] 327. Thus, a surety on a note executed by an insane person cannot interpose insanity as a defense, where the maker has not avoided the instrument (Caldwell v. Ruddy, 2 Idaho, 5; Lee v. Yandell, 69 Tex. 34). And one not in privity with a lunatic who has conveyed away his property cannot avoid the deed, where, at the time of making it, the grantor had not been adjudged insane (Key's Lessee v. Davis, 1 Md. 32, 43; Jackson v. Gumaer, 2 Cow. [N. Y.] 552; Ingraham v. Baldwin, 9 N. Y. 45.) However, it has been held that the fact that the indorser of a negotiable note was insane at the time of the indorsement may be urged as a defense by the maker of the note in an action thereon by the indorsee (Alcock v. Alcock, 3 Man. & G. 268; Bradbury v. Place [Me.] 10 A. 461; Hannahs v. Sheldon, 20 Mich. 278; Burke v. Allen, 29 N. H. 106). Contra, Carrier v. Sears, 4 Allen [Mass.] 336. See Tiffany, Real Prop. § 191.

79. See 4 C. L. 129 and 2 C. L. 458.

80. See 4 C. L. 129.

appointment of a guardian ad litem for an incompetent plaintiff, the action must be prosecuted by his committee,[81] and in case of his disqualification or refusal to prosecute, a new committee should be appointed for that purpose;[82] but it is held that a suit in equity may by leave of court be maintained by the next friend on behalf of a lunatic who has not been so found upon inquisition,[83] and such bill will not be stricken on the application of the alleged incompetent, supported by affidavits of his return to capacity, prior to the judicial determination of such question,[84] and a proceeding to annul a marriage contracted during lunacy is properly brought by a next friend, making the committee a party defendant.[85] Though jurisdiction can be acquired by personal service on an insane person, a guardian ad litem should be appointed to protect his interests at all subsequent proceedings.[86] A cause should not be dismissed because the plaintiff is insane.[87] An insane person is a ward of the court and his committee is subject to its control.[88] Under a pleading sufficient to let in testimony of mental weakness and partial incapacity to attend to business, evidence of total incapacity is admissible.[89] Actions against the estate of a lunatic are governed by the limitations of the state where the estate is located, since the estate can be reached only through the courts of that state.[90]

INSOLVENCY.

This article treats only of the general law of insolvency and insolvency procedure and settlement. Matters pertinent to bankruptcy,[91] assignments for the benefit of creditors,[92] the appointment, rights, and duties of receivers,[93] the discharge of insolvents from imprisonment for debt,[94] the law of marshalling assets,[95] and composition with creditors, are treated elsewhere.[96]

§ 1. *Effect of Federal bankruptcy act on state insolvency laws.*[97]—The national

81. Rankert v. Rankert, 93 N. Y. S. 399. A complaint by a next friend which does not disclose that the insane person has no guardian or why it was necessary for him to sue by next friend may be met by special demurrer. If the special demurrer is not met by appropriate amendment, it is proper to dismiss the action. Stanley v. Stanley [Ga.] 51 S. E. 287.

82. Rankert v. Rankert, 93 N. Y. S. 399.

83. Kroehl v. Taylor [N. J. Eq.] 61 A. 257.

Note: As to the right of lunatics to institute legal proceedings by their next friends either before or after an inquisition of lunacy, see Isle v. Cranby, 199 Ill. 39, 64 L. R. A. 513, and note.

84. Bill to set aside a conveyance and revoke a power of attorney. Kroehl v. Taylor [N. J. Eq.] 61 A. 257.

85. Under Code D. C. § 1286. Mackey v. Peters, 22 App. D. C. 341.

86. Wilson v. Wilson [Minn.] 104 N. W. 300. Under Code Civ. Proc. § 427, a guardian ad litem in foreclosure proceedings should be given authority to appear in surplus money proceedings or another person should be designated to appear. American Mortg. Co. v. Dewey, 94 N. Y. S. 808.

87. The court should appoint a guardian ad litem under the authority conferred by Rev. St. 1898, § 2615. Wiesmann v. Donald [Wis.] 104 N. W. 916.

88. Where there is a formal defect in the pleading of a committee, the court should order an amendment and find facts according to the proof shown by the record. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

89. Miller v. Tjexhus [S. D.] 104 N. W. 519.

90. Action against the committee of a lunatic, resident of Kentucky, for maintenance in a Virginia hospital. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

91. See Bankruptcy, 5 C. L. 367.

92. See Assignments for Benefit of Creditors, 5 C. L. 286.

93. See Receivers, 4 C. L. 1238.

94. See Civil Arrest, 5 C. L. 587.

95. See Marshaling Assets and Securities, 4 C. L. 531.

96. See Composition With Creditors, 5 C. L. 608.

97. See 4 C. L. 129. See, also, Bankruptcy, 5 C. L. 367.

bankruptcy act suspends and supersedes all state insolvency laws which are in their nature bankruptcy acts,[98] except as to cases and persons not within its purview;[99] but it has been held that state laws which are not in the nature of bankruptcy acts are not suspended in any given case until proceedings are actually commenced against the debtor under the Federal act.[1] A distinction must be drawn between the staying of a proceeding to coerce payment of a debt and the supersession of an insolvency or bankruptcy law. A proceeding may be stayed, though based on a law which is neither of these.[2]

§ 2. *Procedure and parties to adjudicate insolvency.*[3]—One is insolvent within the meaning of the Federal bankruptcy act when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be sold or removed with intent to defraud, hinder, or delay his creditors, is not, at a fair valuation, sufficient in amount to pay his debts.[4]

Under the New Jersey act the debtor is only required to present his petition to the court and not to file it, and he is not deprived of his right to a discharge because the judge fails to file it with the clerk within a reasonable time.[5]

§ 3. *Property passing to the assignee*[6] is generally such as might be subjected to the payment of debts.[7] In a suit by an assignee for creditors to recover the price of work done under a contract entered into by the assignor and completed by the assignee, the defendant may set off a claim growing out of mutual dealings between him and the assignor before the date of the assignment.[8]

In Louisiana a mortgage may be enforced by execution process against a syndic to whom has come the debtor's estate in the lands by a cession[9] and he may make all defenses for the creditors.[10]

§ 4. *Adminstration of insolvent estate.*[11]—The affairs of an insolvent corporation will be administered by a Federal court of equity in accordance with its general equity powers rather than by a close adherence to the provisions of the

98. Act of June 4, 1901, which is substantially a bankrupt act, suspended whether proceedings have been begun under Federal act or not, since where states and congress have concurrent power, its exercise by congress does away with state control. Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206. Rev. Laws, c. 147 superseded and remains in abeyance so long as bankruptcy act continues in force. Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956. See, also, In re Alison Lumber Co., 137 F. 643, and cases cited.

99. Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206. Proceedings under state law may be had against farmers, to whom bankruptcy act does not apply. Musser v. Brindle, 23 Pa. Super. Ct. 37.

1. Georgia insolvent traders' act (Civ. Code 1895, §§ 2716-2722) is an insolvency and not a bankruptcy law, and the state courts have jurisdiction to try all cases coming within its purview, in the absence of any proceedings under the Federal statute. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466. State court must, however, yield jurisdiction when either voluntary or involuntary proceedings are begun under Federal act. Id.

2. Note. It is held in In re Hicks, 133 F. 739, that a fire ordinance providing for discharge of firemen on failure to pay personal and household debts is in conflict with the National Bankruptcy Act. While this is plainly laid down, there seems to be an implied qualification of it in the fact that the court calls attention to the pendency of the bankruptcy proceeding, when proceedings were instituted under the ordinance, which as the court found were intended to coerce payment of a scheduled debt. There undoubtedly was a conflict between the two proceedings and in that case the state proceeding must yield (See cases cited in the Opinion, p. 747); but a conflict between the proceedings is not one between the laws out of which they originate and the case seems wrong in so holding. Would it be contended that in the absence of a pending proceeding in bankruptcy or as to debts incurred after discharge the ordinance would have no force?

3. See 3 C. L. 130.

4. See Bankruptcy, 5 C. L. 367, for a full discussion of this question.

5. Stokes v. Hardy [N. J. Err. & App.] 60 A. 403, rvg. [N. J. Law] 58 A. 650.

6. See 3 C. L. 130.

7. See the titles Assignments for Benefit of Creditors, 5 C. L. 286; Bankruptcy, 5 C. L. 367; Fraudulent Conveyances, 5 C. L. 1556.

8. Contract to drill well. Meeder v. Goehring, 23 Pa. Super. Ct. 457.

9, 10. Trezevant v. Levy's Heirs [La.] 38 So. 589.

11. See 4 C. L. 130.

statutes of the state in which it has its domicile.[12] In such case the rules in bankruptcy proceedings should be observed in so far as applicable, particularly where the corporation is one which might have been forced into involuntary bankruptcy.[13]

In Louisiana in the choice of a definitive syndic the opinion of the majority of the creditors in number and amount must prevail.[14] In case one person has a majority in number and another in amount, there is no choice and the court should make an appointment.[15] Each creditor is entitled to only one expression of opinion,[16] and no one of them will be presumed to have abandoned his right because he has been too explicit or lengthy in setting out his claims.[17]

The statutes relating to the filing of claims against insolvents do not apply to claims for indebtedness incurred by the assignee for the benefit of creditors after the making of the assignment.[18] Debts due, but not yet payable, are provable as such;[19] but claims, the existence of which is wholly contingent, are not.[20]

A court of equity, in administering the affairs of an insolvent corporation, will allow a claim to be proven after the expiration of the period limited by a general order for the proof of creditors' claims, and before distribution, provided the claim is an equitable one and the claimant is not chargeable with laches;[21] but it will not postpone the distribution indefinitely for the mere purpose of insuring against loss parties whose contractual relations with the corporation give rise to no present ascertainable debts.[22]

A debtor has a right to prefer a creditor, and a creditor to obtain a preference over other creditors, so long as it is not done to aid a debtor in hindering and delaying his creditors,[23] and there is no violation of the Federal bankruptcy act.[24]

Courts of equity usually seek to put all creditors of an insolvent estate upon the same footing as to the payment of their claims, and allow no preferences between them, unless justice demands it;[25] but the equality which is to be sought is generally rather equality between members of a class than between different classes of in-

12, 13. Conklin v. U. S. Shipbuilding Co., 136 F. 1006.

14. Rev. St. § 1799. Conery v. His Creditors [La.] 38 So. 1005. Transfer of claims held to give transferee right to vote them. Id. Evidence held not to show payment of claim of one of the creditors so as to disqualify him from voting. Id.

15. Conery v. His Creditors [La.] 38 So. 1005.

16. Assignee of several claims cannot express an opinion for each of them. Conery v. His Creditors [La.] 38 So. 1005.

17. Conery v. His Creditors [La.] 38 So. 1005. The word "vote" in Rev. St. § 1797 does not have the effect of changing or modifying § 1799 to such an extent as would justify the court in holding that a creditor who details the different amounts due him in voting has lost all right to be heard, except as to the first amount. Id.

18. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

19. Gen. St. c. 118, § 25. Cruvier v. Williams [Mass.] 75 N. E. 618. Effect of agreement to give defendant credit for net proceeds of certain land conveyed by him to his creditor, with further agreement that defendant would pay any balance remaining due, held to be that debt was due but not payable until after a sale of the land, and hence it was provable. Id.

20. Where it is altogether contingent whether there is a debt or not, as where land is conveyed and accepted in payment in so far as the proceeds thereof will go, coupled with an agreement to make good the loss to the creditor if the land does not sell for the amount of the debt, the claim is not provable and the discharge is not a bar. Currier v. Williams [Mass.] 75 N. E. 618. A contract is not provable so long as it remains wholly uncertain whether it will ever give rise to any actual duty or liability, and there is no means of removing the uncertainty by calculation. Surety on bond of insolvent corporation, who has not been subjected to any loss or required to pay any money, by reason of his liability thereon, has no provable claim merely because of the pendency of a suit against him thereon in which he denies liability. Conklin v. U. S. Shipbuilding Co., 136 F. 1006.

21. Conklin v. U. S. Shipbuilding Co., 136 F. 1006.

22. Not to protect sureties on bond who have not yet been subjected to any loss, and who deny liability in a suit against them. Conklin v. U. S. Shipbuilding Co., 136 F. 1006.

23. Eickstaedt v. Moses, 105 Ill. App. 634. Debtor may prefer his creditors (Schreeder v. Werry [Ind. App.] 73 N. E. 832), and the rule is not changed by the fact that the creditor is the wife of the debtor (Id.).

24. See Bankruptcy, 5 C. L. 367.

dividuals.[26] The state has no right to a preference over other creditors of an insolvent corporation on a simple contract claim, which it has taken no steps to enforce before the appointment of a receiver.[27] Wages due laborers are generally made preferred claims.[28] The Federal statutes give a surety, who has paid the amount due the government under his insolvent principal's bond, a preference in the distribution of the latter's estate,[29] and the statute giving a preference to claims of the government against the estates of insolvents gives it no priority as against such surety, and no such right exists.[30]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.*[31]—The legislature has authority to provide the machinery through which the distribution of the estates of insolvents is to be made,[32] and an act which does so controls any process of collection put in course of execution subsequent to its passage, even though the claim which is sought to be enforced arose prior thereto.[33]

In New Jersey the insolvent is required, as a condition precedent to his right to discharge, to make an assignment to parties nominated by the court, of all his real and personal property not exempt.[34] Such assignment operates upon all the property of the debtor, whether exhibited in the inventory or not,[35] and he is not excused from making it by reason of the fact that the inventory shows only exempt property.[36] The insolvent, however, is not responsible for the act of the court in making the discharge before the inventory is filed, and he should not, by reason thereof, be entirely deprived of his right to a discharge, nor should the sureties on his bond be required to pay his debts.[37]

INSPECTION, see latest topical index.

25, 26. Gilbert v. Endowment Ass'n, 21 App. D. C. 344.

27. Claim under insurance policy. State v. Williams [Md.] 61 A. 297.

28. **In Indiana** before labor claims can stand as preferred debts, it must be shown that the labor was performed in connection with the business in which the insolvent was engaged. Burns' Ann. St. 1901, §§ 7051, 7058, construed. McDaniel v. Osborne [Ind. App.] 72 N. E. 601. Receiver appointed in action to foreclose mortgage is neither an assignee nor receiver within the meaning of Burns' Ann. St. 1901, § 1236, subd. 4, or § 7058, making debts due laborers preferred claims in certain cases. Id.

In Mississippi claims for labor performed for a corporation just before its insolvency and the appointment of a receiver, which was necessary to continue the business and preserve the property, are entitled to preference over the claims of both ordinary and mortgage creditors. L'Hote v. Boyet [Miss.] 38 So. 1.

29. Rev. St. § 3468. Has priority for so much of the government's claim only as he may have paid either voluntarily or under compulsion. United States v. Heaton, 124 F. 699. An individual who has paid money to the government as a surety acquires the same right of priority which belongs to the government, and it may be that the same priority extends to one who has satisfied a moral obligation to the government by responding as surety for a Federal officer or employe who has been guilty of misfeasance. American Surety Co. v. Akron Savings Bank Co., 6 Ohio C. C. (N. S.) 374.

30. Rev. St. §§ 3466-3468. United States v. Heaton, 124 F. 699.

31. See 3 C. L. 131.

32. Musser v. Brindle, 23 Pa. Super. Ct. 37.

33. Musser v. Brindle, 23 Pa. Super. Ct. 37. Where, after passage of insolvency act of June 4, 1901 (P. L. 404), judgment is entered and execution issued upon a bond secured by a mortgage executed prior to passage of act, one to whom defendant subsequently makes assignment for the benefit of creditors is entitled to have the execution on defendant's personalty set aside. Id. Act does not defeat plaintiff of his preference, if he has one, but merely gives assignee control of personalty of the assignor, and is not unconstitutional as depriving plaintiff of vested rights. Id.

34. Insolvent debtor's act, § 11, Gen. St. p. 1728. Stokes v. Hardy [N. J. Err. & App.] 60 A. 403, rvg. [N. J. Law] 58 A. 650.

35. Stokes v. Hardy [N. J. Err. & App.] 60 A. 403, rvg. [N. J. Law] 58 A. 650.

36. Order of discharge set aside. Stokes v. Hardy [N. J. Err. & App.] 60 A. 403, rvg. [N. J. Law] 58 A. 650.

37. Supreme court, on setting aside discharge, should not permit creditors to sue on the bond, but should remand case to the common pleas for further proceedings according to law. Stokes v. Hardy [N. J. Err. & App.] 60 A. 403, rvg. [N. J. Law] 58 A. 650.

INSPECTION LAWS.[38]

Statutes providing for the inspection of factories are a proper exercise of the police power,[39] and are valid if uniform in operation.[40] They do not impose judicial or legislative functions on inspectors by requiring them to make inspections and give certificates of the result thereof to proprietors.[41] Ordinances providing for the inspection of milk and prohibiting the sale of milk which is not of the grade required are valid police regulations,[42] and will be upheld if within the charter powers of the municipality enacting them.[43] Such an ordinance charging a city chemist with the duty of analyzing all specimens of milk submitted to him to determine whether it is of the required grade does not deprive a seller of milk of any constitutional right.[44] A reasonable[45] inspection fee is not a tax upon property and the exaction of such a fee is a valid exercise of the police power.[46]

Under the Wilson act, subjecting to state laws intoxicating liquors shipped into the state and held there for sale or consumption, a state may subject to inspection, and impose an inspection fee upon, beer and other malt liquors shipped into a state, similar domestic products being subject to the same inspection.[47] A decision by the highest state court that such a statute is a valid exercise of the police power, within the provisions of the state constitution, and that it is not objectionable as being a revenue and not an inspection law, though the inspection provided for is inadequate and the revenue produced greater than the cost of inspection, is conclusive on a Federal court and brings the law within the terms of the Wilson act.[48] It is not therefore objectionable as an interference with interstate commerce, even though it deters the shipment into the state of liquors made elsewhere.[49]

Laws regulating common occupations which from their nature afford peculiar opportunity for imposition and fraud are within the police power.[50] Thus the Georgia statute regulating the sale of seed cotton, requiring the written consent of the owner of the land to the sale, and providing for the punishment of persons who buy in violation of the terms of the act, is valid.[51] An indictment following the language of the statute is not demurrable because it fails to describe the land on which the seed cotton was grown.[52]

38. See 4 C. L. 132. Compare Constitutional Law, 5 C. L. 619; Food, 5 C. L. 1436; Health, 5 C. L. 1641.

39. Laws 1901, pp. 197, 198, providing for factory inspectors and for an inspection fee of $1 is valid. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

40. Statute applying to all factories in the state held not to discriminate between factories in cities and those in the country. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

41. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

42. St. Louis ordinance requiring milk to contain, on analysis, seven-tenths per cent. ash is valid. City of St. Louis v. Liessing [Mo.] 89 S. W. 611.

43. St. Louis charter gives power to provide for milk inspection and to license and regulate occupation; hence ordinance providing for reasonable inspection and reasonable fee therefor is valid. City of St. Louis v. Liessing [Mo.] 89 S. W. 611; City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617.

44. The seller may contest the chemist's analysis and decision when prosecuted. City of St. Louis v. Liessing [Mo.] 89 S. W. 611.

45. Fee of $1 for inspecting factory is reasonable. State v. Vickens, 186 Mo. 103, 84 S. W. 908. Requiring annual registration fee of $1 from milk and cream venders, $2.50 per six months from dealers and $25 from wholesalers, is reasonable. City of St. Louis v. Liessing [Mo.] 89 S. W. 611.

46. State v. Vickens, 186 Mo. 103, 84 S. W. 908. Requiring venders of milk and cream to pay a registration fee of $1 per year to pay cost of inspection is proper exercise of police power. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617.

47. Missouri statute upheld. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 Law. Ed. 925.

48. Decision of Missouri supreme court in State v. Bixman, 162 Mo. 1, 62 S. W. 828, held state law valid. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 Law. Ed. 925.

49. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 Law. Ed. 925.

50, 51, 52. Bazemore v. State, 121 Ga. 619, 49 S. E. 701.

INSTRUCTIONS.

The scope of this topic is confined to instructions in civil cases. Instructions in criminal prosecutions are elsewhere treated.[53]

§ 1. *Object and purpose*[54] of instructions is to lay down the law applicable to the facts which the evidence tends to prove.[55] They may be used for the purpose of telling the jury to disregard remarks made by the court during the course of the trial,[56] but not to exclude from consideration evidence admitted without objection.[57] Questions of law should not be submitted.[58]

§ 2. *Province of court and jury.*[59]—It is the exclusive province of the jury to determine all issues of fact;[60] the credibility of witnesses;[61] the weight to be given their testimony,[62] and to find the ultimate facts from all the evidence intro-

53. See Indictment and Prosecution, 4 C. L. 1.

54. See 4 C. L. 133.

55. Not to tell the jury that there is no proof of an allegation except to direct a verdict as to allegations not supported. Chicago & Joliet Elec. R. Co. v. Spence, 115 Ill. App. 465.

56. Chicago City R. Co. v. Jordan, 116 Ill. App. 650.

57. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280.

58. See, also, post, § 2. Morrill v. McNeill [Neb.] 104 N. W. 195. An instruction that "defendant is liable, if without **good cause and validly under the law,** he repudiated his contract," is erroneous. Harmison v. Fleming, 105 Ill. App. 43. Leaving for the jury to decide whether the facts stated and proved give a cause of action. Tracewell v. Wood County Court [W. Va.] 52 S. E. 185. Requiring proof of material allegations without explaining what are material allegations is error. Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537. An instruction authorizing a finding for plaintiff if he made out his case "as laid in the declaration" is not erroneous as authorizing to determine what were the material allegations. Fraternal Army of America v. Evans, 215 Ill. 629, 74 N. E. 689. Where an ordinance has been duly proved and its terms are plain, the court may charge the jury to determine what it is and whether it has been violated. Thomasson v. Southern R. Co. [S. C.] 51 S. E. 443.

59. See 4 C. L. 133.

60. Where facts are disputed, a peremptory charge is properly refused. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076.

Province of the jury is invaded by an instruction that greater care is required in operating cars in cities and on populous streets than in sparsely settled districts or upon streets where there are few travelers (Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045; Indianapolis St. R. Co. v. O'Donnell [Ind. App.] 73 N. E. 163), or by one to the effect that failure to heed certain signals **constitutes negligence** (Wabash R. Co. v. Bhymer, 112 Ill. App. 225). Request that certain acts constitute negligence is properly refused. Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304.

61. The credibility of witnesses is for the jury, not the court. Southern Industrial Institute v. Hellier [Ala.] 39 So. 163. Where weight of the evidence or credibility of witnesses is involved, the cause should be submitted to the jury. Weller v. Hilderbrandt [S. D.] 101 N. W. 1108. An instruction which tends to hamper the jury in the full exercise of its judgment as to the credibility of witnesses is error. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

62. See, also, post, §§ 5, 12. The weight to be accorded evidence is for the jury, and it is error to withdraw it from their control by limiting or defining it. Harman v. Maddy Bros. [W. Va.] 49 S. E. 1009.

Province of jury invaded: An instruction

duced.[63] Hence, if the evidence is conflicting,[64] or even when there is no conflict,[65] if reasonable minds acting within the limitations prescribed by law might reach different conclusions, the issues must be submitted to them.[66] The court may point out inferences which may be drawn from a given state of facts,[67] and where there is no issue of fact, it is the duty of the court to direct a verdict.[68]

The construction of written instruments[69] is for the court.[70]

§ 3. *Duty of instructing. Requests for instructions.*[71]—In some jurisdictions the court is required to instruct on its own motion as to the general features of the law applicable to the material issues.[72] This rule is not complied with by a colloquy between court and counsel.[73] But in other jurisdictions courts are not required to instruct except as requested by the parties.[74] If the court of its own motion gives an instruction which it is not required to give in the absence of a request and such instruction is erroneous it is ground for reversal.[75] The court is not required to give the law governing the entire case.[76] An error of omission is not ground for reversal.[77] If an instruction is not as full as desired[78] in that it omits reference to

as to how to weigh the evidence. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210. That testimony of witnesses having superior opportunities for knowing what took place is entitled to more weight than those who have not such opportunities. Himrod Coal Co. v. Clingan, 114 Ill. App. 568. That certain evidence should be considered with caution as it is subject to much imperfection and possible mistake. Mayer v. Schneider, 112 Ill. App. 628.

63. An instruction that if after considering all the evidence the jury believe the testimony of any one witness, they should find accordingly, invades the province of the jury. Chicago Union Traction Co. v. Shedd, 110 Ill. App. 400.

64. Weller v. Hilderbrandt [S. D.] 101 N. W. 1108.

65. Though there is no conflict in the evidence, the conclusion therefrom is to be drawn by the jury if reasonable persons might differ as to the proper conclusion. Rothrock v. Cedar Rapids [Iowa] 103 N. W. 475.

66. Campbell v. Everhart [N. C.] 52 S. E. 201; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108.

67. Kirkpatrick v. Allemannia Fire Ins. Co., 102 App. Div. 327, 92 N. Y. S. 466.

68. See Directing Verdict and Demurrer to Evidence, 5 C. L. 1004.

Southern R. Co. v. Vaughn [Miss.] 38 So. 500. An instruction that if the jury find that the evidence is evenly balanced on the material issues, they being clearly defined, a verdict must be found for the defendant, is proper. Chicago City R. Co. v. Osborne, 105 Ill. App. 462.

69. See 4 C. L. 134.

70. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386. Submitting the question whether certain writings constitute a contract is erroneous. Ellis v. Block [Mass.] 73 N. E. 475.

71. See 4 C. L. 134.

72. It is the duty of the court to submit issues essential to the disposal of the controversy. Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945. In an action for unliquidated damages, the court must instruct as to the measure. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 84 S. W. 1073.

73. Comp. Laws, §§ 10243, 10246, requiring the court to instruct as to the law of the case. Simons v. Haberkorn [Mich.] 102 N. W. 659.

74. In Illinois the court is under no obligation to instruct of his own motion. Osgood v. Skinner, 111 Ill. App. 606. By statute in New Mexico, a court is under no obligation to instruct, therefore the fact that an instruction is insufficient is not error. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

75. Charging that evidence is competent for a purpose for which it is incompetent. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

76. See post, § 6.

77. An omission in an instruction correct so far as it goes cannot be complained of by a party who requested no instruction supplying the omission. Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404. A correct charge is not to be characterized as erroneous because of omission to charge in connection therewith an additional pertinent principle. Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128. An instruction that a corporation is liable for the negligence of its officers is not erroneous for failure to include acts of its agents, servants and employes. Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783. Error in not submitting a case so as to entitle a recovery against one of several defendants is one of omission. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626. Failure to instruct that a verdict might be returned against one co-defendant is not reversible. Triggs v. McIntyre, 115 Ill. App. 257. Failure to state that facts must be proved "by a fair preponderance of evidence." Mack v. Starr [Conn.] 61 A. 472. Failure to instruct as to measure of damages. Central R. Co. v. Ankiewicz, 213 Ill. 621, 73 N. E. 382. Instruction in an action on an implied contract for services that plaintiff was entitled to recover if he was the owner of his own time and had a cause of action is not erroneous in failing to state what would give rise to a cause of action. Grotjan v. Rice [Wis.] 102 N. W. 551. Failure to charge an applicable principle. Bam-

particular issues,[79] defenses,[80] or theories,[81] or if a party deems an instruction ambiguous[82] or misleading,[83] or not sufficiently explicit,[84] or fears that a correct principle may be misapplied,[85] he should prefer an appropriate request. So also if an instruction is not precisely accurate[86] or technical terms are not defined,[87] or a particular phase of the case is not covered,[88] or if a party desires an instruction on a particular point,[89] or a specific application of a rule,[90] or a limitation on a rule not of universal

berg v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 988. Failure **to withdraw an issue** as to an established fact. International & G. N. R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847.

78. Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780. If amplification of the general charge is desired, an appropriate request should be preferred. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

79. Omission to state all the issues is not ground for reversal, it being the duty of the parties to request special charges covering omitted issues. Boyles v. Texas & P. R. Co. [Tex. Civ. App.] 86 S. W. 936; Stewart v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 310. Though a party is entitled to have an issue submitted, failure to submit it is not reversible error. Kneeland v. Arnold, 88 N. Y. S. 367. No instruction was asked on an issue of **assumed risk.** Lounsbury v. David [Wis.] 102 N. W. 941. Failure to submit issues of **contributory negligence** and assumption of risk is not error in the absence of a request where there is no evidence to support an affirmative finding on such issues. Mueller v. Northwestern Iron Co. [Wis.] 104 N. W. 67. A party cannot complain of failure to submit an issue unless he tendered it. Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945. Unless at the outset of the trial the court announced that it would not submit such issue. Id.

80. Failure to specify certain matters of defense. Georgia R. & Elec. Co. v. Blacknall [Ga.] 50 S. E. 92. An omission to submit some of the grounds of defense. Metropolitan St. R. Co. v. Wishert [Tex. Civ. App.] 13 Tex. Ct. Rep. 799, 89 S. W. 460.

81. An instruction correctly presenting the law as to defendant's theory of the case is not erroneous because not presenting in the same connection the plaintiff's contentions. Edwards v. Capps [Ga.] 50 S. E. 943.

82. A party should request an explanatory instruction correcting a charge from which he apprehends prejudice. Vandiver & Co. v. Waller [Ala.] 39 So. 136.

83. A statement in a charge not altogether plain should be called to the attention of the court. Commonwealth v. Middleby [Mass.] 73 N. E. 208. If the charge is otherwise clear, language susceptible of a construction in conflict therewith should be called to the attention of the court if counsel deems it misleading. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 397; Snedecor v. Pope [Ala.] 39 So. 318.

84. If a party desires a more explicit instruction on a particular issue, he should prefer a request. Mitchell v. Pinckney [Iowa] 104 N. W. 286. If the law applicable to a particular phase of the case is desired explained, a request should be made. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364. If a party desires a more comprehensive charge, he should so request. Missouri, etc., R. Co. v. Hay [Tex. Civ. App.] 13 Tex. Ct. Rep. 27, 86 S. W. 954.

85. Flowers v. Flowers [Ark.] 85 S. W. 242.

86. "If you believe and find from the evidence" is sufficient in the absence of a request for a more accurate instruction, though it does not require plaintiff to prove his case by a preponderance of evidence. Kerr v. Quincy, etc., R. Co. [Mo. App.] 87 S. W. 596. It is the duty of counsel to call attention to an inaccurate statement as to the testimony. Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617. An inadvertent misstatement of the evidence is not ground for reversal where not prejudicial and the attention of the court was not called to it by counsel. Field v. Schuster, 26 Pa. Super. Ct. 82.

87. A party who does not request a definition of a technical term used cannot complain of the omission. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440; Dysart-Cook Mule Co. v. Reed [Mo. App.] 89 S. W. 591. Preponderance of evidence. Schornak v. St. Paul Fire & Marine Ins. Co. [Minn.] 104 N. W. 1087.

88. If instructions given fairly cover the case it is not reversible error that all phases of the case were not covered. Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370. Omission to instruct on a certain phase of the case. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. If a party deems an instruction deficient he should prefer a request supplementing it. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682.

89. Osborn v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879; Warn v. Flint [Mich.] 12 Det. Leg. N. 294, 104 N. W. 37. Failure to charge upon **contributory negligence.** Barklow v. Avery [Tex. Civ. App.] 89 S. W. 417. A party who desires evidence competent on certain issues restricted to such issues. Bird v. Bird [Ill.] 75 N. E. 760. Omission to cover a particular proposition must be made the subject of an appropriate request. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117. If a party desires a particular instruction, he must request it. Johnston v. McNiff, 113 Ill. App. 1.

90. Brinkley Carworks & Mfg. Co. v. Cooper [Ark.] 87 S. W. 645; Freeland v. Southern R. Co., 70 S. C. 427, 50 S. E. 11. That a promise and its nonperformance standing alone do not constitute fraud. McDonald v. Smith [Mich.] 102 N. W. 668. In the absence of a request, a court is not required to **apply statutory rules** to the particular facts. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15. Failure to charge specifically relative to a particular issue. Missouri, etc., R. Co. v. Penny [Tex. Civ. App.]

application,[91] or the attention of the jury directed to specific items of damages,[92] an instruction supplying the omission should be requested.

Limiting number of instructions[93] to be offered is erroneous.[94] Such error is prejudicial where it forces a party to so draft his instructions as to render them confused, misleading, argumentative or otherwise open to criticism;[95] but is not reversible error where the substance of those refused was covered in those given.[96]

Requests for instructions.[97]—A party upon request made is entitled to a clear and distinct instruction upon the rule of law applicable to his theory of the case,[98] if there is any evidence tending to support the issues presented by him;[99] and if he has two distinct defenses, he is entitled to have each fairly presented and submitted.[1] That requests bear the names of the attorneys of the parties making them is not reversible error.[2]

Form and sufficiency of request.[3]—In framing instructions a party need only present the law applicable to his theory of the case. He need not anticipate and negative possible defenses.[4] If several instructions embodying the same proposition in varying language are requested, a party will not be heard to complain because the one considered most important was not given.[5] A requested instruction should be strictly correct,[6] complete in itself,[7] accurately framed,[8] so as to bear

13 Tex. Ct. Rep. 196, 87 S. W. 718. Failure to give specific instruction. Red River, etc., R. Co. v. Reynolds [Tex. Civ. App.] 85 S. W. 1169.

91. Zvonik v. Interurban St. R. Co., 88 N. Y. S. 399. Failure to charge a qualification of a sound proposition given. Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679. Error cannot be predicated on a failure to qualify a correct instruction. San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Modification of instructions must be requested. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113.

92. Alderton v. Williams [Mich.] 102 N. W. 753. If a party deems a charge as to damages not sufficiently distinct, he should request a charge supplying the deficiency. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.], 84 S. W. 401. If a party desires elements of damages to be made more specific. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863. If a party permits the jury to retire without being instructed upon the measure of damages. Central R. Co. v. Ankiewicz, 115 Ill. App. 380.

93. See 4 C. L. 135.

94. It is not ground for reversal, however, unless prejudicial. The Fair v. Hoffmann, 110 Ill. App. 500.

95. Daily v. Smith-Hippen Co., 111 Ill. App. 319.

96. Chicago Union Traction Co. v. Olsen, 113 Ill. App. 303.

97. See 4 C. L. 135.

98. Thomas v. Butler, 24 Pa. Super. Ct. 305; Suburban R. Co. v. Malstrom, 105 Ill. App. 631. A party who has produced proof tending to establish his theory is entitled to have such theory submitted without qualifying words calculated to mislead the jury into believing that though such theory is found to be true, a verdict may be returned for the other party. Brownfield v. Union Pac. R. Co. [Neb.] 104 N. W. 876. A party is entitled to an instruction applying directly and specifically to his theory of the facts which there is evidence tending to prove. Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119. Specific requests applicable and not adequately covered should be given. Wright v. Roberts, 99 App. Div. 38, 90 N. Y. S. 752. Refusal of correct instructions is not harmless on the ground that the jury must have understood the law therein contained without instructions. Grotjan v. Rice [Wis.] 102 N. W. 551. It is error to refuse an instruction submitting a vital issue. Pittsburgh, etc., R. Co. v. Fitzpatrick, 112 Ill. App. 152.

99. Title by adverse possession relied upon by defendant in ejectment. Link v. Campbell [Neb.] 104 N. W. 939.

1. Crow v. Burgin [Miss.] 38 So. 625.

2. Thornton Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

3. See 4 C. L. 136.

4. Kellyville Coal Co. v. Strine [Ill.] 75 N. E. 375.

5. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387.

6. Shafer v. Russell, 28 Utah, 444, 79 P. 559. Request correct only in part may be refused. St. Louis S. W. R. Co. v. Baer [Tex. Civ. App.] 86 S. W. 653. If one of several instructions requested in their entirety is bad, all may be refused. Southern R. Co. v. Douglass [Ala.] 39 So. 268. Requests which do not state correct principles applicable to the facts of the case may be refused. Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37.

7. An instruction, incomplete in that a sentence breaks off apparently in the middle, may be refused. Estate of Shields v. Michener, 113 Ill. App. 18. Requests omitting pertinent facts shown by the evidence may be refused. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

8. The court is not required to reduce an instruction inaccurately framed to proper form. Creager v. Yarborough [Tex. Civ. App.] 13 Tex. Ct. Rep. 77, 87 S. W. 376; Citizens' Nat. Bank v. Cammer [Tex. Civ. App.] 86 S. W. 625. A court is not required to

concretely on the facts of the case,[9] contain definitions for technical terms employed,[10] be clear and intelligible,[11] applicable to the facts of the case,[12] and the issues made by the pleadings,[13] and be presented in conformity to statutory requirements;[14] but a request for an incorrect instruction if sufficient to call the court's attention to the issue requires the giving of a correct instruction upon such issue.[15] Requests stating a mere truision[16] or an abstract proposition,[17] though correct,[18] may be refused, especially where such proposition is not applicable,[19] or is not concretely applied.[20] A fortiori, if the proposition is inaccurate and misleading.[21]

Time of making request.[22]—Instructions must be presented before the commencement of the argument.[23]

Disposition of requests.[24]—A party is entitled to have given a request which in form and substance correctly states the law applicable to the case.[25] This requirement

amend a request stating an erroneous proposition and give it as amended. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161. The court is not required to pick out undisputed facts and rule upon them unless disputed facts are material to the issues. Pierce v. O'Brien [Mass.] 75 N. E. 61.

9. Joyce v. Chicago, 111 Ill. App. 443.

10. Requests containing "burden of proof" without defining it may be refused. Laurence L. Prince & Co. v. St. Louis Cotton Compress Co. [Mo. App.] 86 S. W. 873. A request as to liability if injury was caused by negligence of a fellow-servant is properly refused where no definition of a fellow-servant has been given. Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458.

11. A request, vague in meaning and practically unintelligible, may be refused. Creager v. Yarborough [Tex. Civ. App.] 13 Tex. Ct. Rep. 77, 87 S. W. 376. A request predicated on an instruction so unintelligible that it was refused is properly refused. Id. Under Code 1896, § 3328, requiring requests to be in writing and to be given or refused in the terms written, an unintelligible request is properly refused. Southern Industrial Institute v. Hellier [Ala.] 39 So. 163. Failure of the plaintiff's instructions to refer specifically to each count in the declaration is not misleading where the defendant's given instructions refer in detail to the elements essential to be proved to sustain the different counts. Junction Min. Co. v. Ench, 111 Ill. App. 346.

12. Requests which do not accurately state the law applicable and which are misleading may be refused. Parrish v. Huntington [W. Va.] 50 S. E. 416. A request containing a correct proposition may be refused when the facts on which it was predicated would not make it applicable. Williams v. Finlayson [Fla.] 38 So. 50. Requests not consonant with any theory of the case. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. An instruction predicated on an issue of fact not submitted. Missouri, etc., R. Co. v. Penny [Tex. Civ. App.] 13 Tex. Ct. Rep. 196, 87 S. W. 718.

13. Milhouse v. Southern R. Co. [S. C.] 52 S. E. 41. A charge based on an erroneous theory is properly refused. St. Louis S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 365.

14. An instruction placed on the desk but not called to the court's attention until after the jury had retired is not presented within Rev. St. 1895, art. 1319. Bailey v. Hartman [Tex. Civ. App.] 85 S. W. 829.

15. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477; Texas Loan & Trust Co. v. Angel [Tex. Civ. App.] 86 S. W. 1056; St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 86 S. W. 1059; Nicola Bros. Co. v. Hurst [Ky.] 88 S. W. 1081. A request objectionable as not conforming to the pleadings held sufficient to require the court to present such issue. McNeese v. Carver [Tex. Civ. App.] 89 S. W. 430.

16. The refusal of a request stating a mere truism is harmless. Mack v. Starr [Conn.] 61 A. 472.

17. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1; Chicago City R. Co. v. Enroth, 113 Ill. App. 285. Giving abstract propositions is error where they are apt to mislead the jury. Diefenthaler v. Hall, 116 Ill. App. 422.

18. Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359; Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322; Joyce v. Chicago, 111 Ill. App. 443.

19. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1; Himrod Coal Co. v. Clingan, 114 Ill. App. 568.

20. Abstract propositions not applied may be given or refused. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281; Kehl v. Abram, 112 Ill. App. 77. Abstract propositions not concretely applied have a tendency to confuse the jury and ordinarily should not be given. Baltimore & O. S. W. R. Co. v. Fox, 113 Ill. App. 180. The giving of abstract propositions not concretely applied is not reversible error. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558.

21. Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991.

22. See 4 C. L. 36.

23. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

24. See 4 C. L. 136.

25. Omaha Packing Co. v. Murray, 112 Ill. App. 232. Judgment reversed because of failure of court to charge at the request of a party a rule of law applicable to the facts. Van Vechten v. New York & New Jersey Tel. & T. Co. [N. J. Law] 58 A. 1096. Correct requests not covered should be given. Dambmann v. Metropolitan St. R. Co., 180 N. Y. 384, 73 N. E. 59; Hennessey v. Forty-

is not satisfied by an oral statement of the judge made during the progress of the trial,[26] but is by the giving of instructions not substantially different from those asked.[27] But he is not entitled to have it given in the language used by him.[28] Requests may be modified[29] unless otherwise provided by statute[30] or explained.[31] Special instructions should be given or refused without qualification or comment.[32] Mere failure to mark instructions "given" or "refused" as required by statute is not reversible error.[33]

Repetition.[34]—A requested instruction substantially covered by the charge already given may be refused,[35] though the proposition stated therein is correct;[36] but a court cannot refuse a special instruction grouping the specific facts on which a party relies for a verdict, on the ground that the general charge presented such

Second St., etc., R. Co., 92 N. Y. S. 1058; St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786; Hartman v. St. Louis Transit Co. [Mo. App.] 87 S. W. 86; Crowder v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 166.

26. Does not cure error in refusing to give proper requests. Bloomington & Normal R. Co. v. Gabbert, 111 Ill. App. 147.

27. Slusher v. Hopkins [Ky.] 89 S. W. 244.

28. The judge may give the proposition in terms to suit himself. Jones v. Greenfield, 25 Pa. Super. Ct. 315. Requests which are argumentative or prolix, repeating in different language the same propositions, thereby giving undue prominence to certain phases, should be refused and the propositions be covered in the general charge. Herbert v. Interstate Iron Co. [Minn.] 102 N. W. 451.

29. Tremblay v. Tri-City R. Co., 113 Ill. App. 56. If a request is too broad in its terms it may be modified. Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560.

30. A statute which prohibits the qualifying, modifying or explaining an instruction is not violated by the withdrawal of one. Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553.

31. Code 1896, § 3328, requiring that requests be given in the terms presented, prohibits the court from qualifying the instruction but not from explaining it. Calloway v. Gay [Ala.] 39 So. 277.

32. Columbus Railway v. Connor, 6 Ohio C. C. (N. S.) 361.

33. Chicago Union Traction Co. v. Olsen, 113 Ill. App. 303; Chicago Elec. Transit Co. v. Kinnare, 115 Ill. App. 115.

34. See 4 C. L. 137.

35. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753; Lynch v. U. S. [C. C. A.] 138 F. 535; San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445; City of Battle Creek v. Haak [Mich.] 102 N. W. 1005; Woods v. Wabash R. Co. [Mo.] 86 S. W. 1082; Deland v. Cameron [Mo. App.] 87 S. W. 597; Houston & T. C. R. Co. v. Cluck [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 817; American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908; International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063; Franklin v. St. Louis & M. R. Co. [Mo.] 87 S. W. 930; Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440; Western Union Tel. Co. v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 45, 87 S. W. 1060; Go Fun v. Fidalgo Island Canning Co., 37 Wash. 233, 79 P. 797; Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582; Paxton v. Woodward [Mont.] 78 P. 215; Dunn v. Crichfield 214 Ill. 292, 73 N. E. 386; Chicago North Shore St. R. Co. v. Strathmann, 213 Ill. 252, 72 N. E. 800; Kozlowski v. Chicago, 113 Ill. App. 513; Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622; Feitl v. Chicago City R. Co., 113 Ill. App. 381; Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537; Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359; Omaha Packing Co. v. Murray, 112 Ill. App. 232; Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172; Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242; Village of Wilmette v. Brachle, 110 Ill. App. 356; Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 505; Huey Co. v. Johnston [Ind.] 73 N. E. 996; Hebert v. Interstate Iron Co. [Minn.] 102 N. W. 451; Chicago Union Traction Co. v. Jacobson [Ill.] 75 N. E. 508; Chicago City R. Co. v. Schmidt [Ill.] 75 N. E. 383; Young v. O'Brien, 36 Wash. 570, 79 P. 211; Davis v. Diamond Carriage & Livery Co., 146 Cal. 59, 79 P. 596; Ward Land & Stock Co. v. Mapes [Cal.] 82 P. 426; Virginia Passenger & Power Co. v. Patterson [Va.] 51 S. E. 157; Western & A. R. Co. v. Branan [Ga.] 51 S. E. 650; Young v. Meredith [Tex. Civ. App.] 85 S. W. 32; Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015; Woodley v. Coker [Ga.] 50 S. E. 936; Merriman v. Cover [Va.] 51 S. E. 817; Central of Georgia R. Co. v. Castellow, 121 Ga. 772, 49 S. E. 753; Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105; Richmond Ice Co. v. Crystal Ice Co., 103 Va. 465, 49 S. E. 650; Texarkana & Ft. S. R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375; Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085; Davis v. Braswell, 185 Mo. 576, 84 S. W. 870; Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119; Freymark v. St. Louis Transit Co. [Mo. App.] 85 S. W. 606; Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452; Eckhard v. St. Louis Transit Co. [Mo.] 89 S. W. 602; Stametz v. Mitchenor [Ind.] 75 N. E. 579; Chicago Union Traction Co. v. Sawusch [Ill.] 75 N. E. 797; Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513; Cody v. Market St. R. Co. [Cal.] 82 P. 666; Milhouse v. Southern R. Co. [S. C.] 52 S. E. 41; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Chicago Elec. Transit Co. v. Kinnare, 115 Ill. App. 115; Missouri, etc., R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct.

issues abstractly,[87] and where instructions given would not convey to the mind of a juryman the idea embodied in a request, the request should be given.[88] Repeating the same instruction in different terms is not ground for reversal.[89]

Rep. 370, 87 S. W. 879; Louisville R. Co. v. Johnson [Ky.] 87 S. W. 782; Field v. Field [Tex. Civ. App.] 87 S. W. 726; International & G. N. R. Co. v. Valandingham [Tex. Civ. App.] 85 S. W. 847; Houston & T. C. R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838; San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440; Citizens' R. Co. v. Gossett [Tex. Civ. App.] 85 S. W. 35; Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536; Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278; Cunningham v. Springer [N. M.] 82 P. 232; Lampley v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 773; Galveston, etc., R. Co. v. Roth [Tex. Civ. App.] 84 S. W. 1112; Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47; Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669; Houston & T. C. R. Co. v. Goodman [Tex. Civ. App.] 85 S. W. 492; Trinity & B. V. R. Co. v. Simpson [Tex. Civ. App.] 13 Tex. Ct. Rep. 23, 86 S. W. 1034; Texas Cent. R. Co. v. O'Loughlin [Tex. Civ. App.] 84 S. W. 1104; Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29; Ft. Worth & D. C. R. Co. v. Hagler [Tex. Civ. App.] 84 S. W. 692; Galveston, etc., R. Co. v. McAdams [Tex.' Civ. App.] 84 S. W. 1076; Edger v. Kupper, 110 Mo. App. 280, 85 S. W. 949; Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342; Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452; Shields v. Overall [Tex. Civ. App.] 86 S. W. 373; Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401; St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct. Rep. 911, 89 S. W. 450; Barklow v. Avery [Tex. Civ. App.] 13 Tex. Ct. Rep. 893, 89 S. W. 417; Southern Const. Co. v. Hinkle [Tex. Civ. App.] 89 S. W. 309; Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140; Carpenter v. Jones [Ark.] 88 S. W. 871; Texas & P. R. Co. v. Leakey [Tex. Civ. App.] 13 Tex Ct. Rep. 496, 87 S. W. 1168. After a charge that plaintiff could not recover if he was intoxicated, a charge based on partial or total intoxication may be refused. International & G. N. R. Co. v. Davis [Tex. Civ. App.] 84 S. W. 669. It is unnecessary to state an instruction in the language requested if the substance has been given. Purcell Wholesale Grocery Co. v. Bryant [Ind. T.] 89 S. W. 662. Request that plaintiff could not complain of fraud if he knew of it at the time he entered into the transaction is covered by a charge that he cannot recover if he had such knowledge. Smith v. McDonald [Mich.] 102 N. W. 738. When it is charged that plaintiff must establish certain enumerated propositions by a preponderance of evidence, defining it, it is not necessary to charge to find for defendant if the weight of evidence was in his favor or evenly balanced. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29. After an instruction that recovery can be had only on clear proof, it is not error to refuse to instruct that the proof must be full. Harman & Crockett v. Maddy Bros. [W. Va.] 49 S. E. 1009. Where the court has instructed on all material issues presented by the pleadings and evidence, special request may be refused unless some portion of the charge was erroneous. Hansen v. Haley [Idaho] 81 P. 935.

A charge that plaintiff must prove his case by a preponderance of evidence precludes the necessity of a special charge on the same subject or to find for defendant if the evidence was evenly balanced. International & G. N. R. Co. v. Davis [Tex. Civ. App.] 84 S. W. 669. Request, **as to duty of jurymen,** held covered by charge given. Shaller v. Detroit Union R. Co. [Mich.] 102 N. W. 632. The **converse of an instruction given** should not be charged. Greene v. Louisville R. Co. [Ky.] 84 S. W. 1154. If the issue of **contributory negligence** has been submitted in general terms, a party is not entitled to have the specific facts upon which the defense is based grouped and thus presented if such charge would be liable to mislead the jury. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428; Missouri, K. & T. R. Co. v. Nelson [Tex. Civ. App.] 13 Tex. Ct. Rep. 81, 87 S. W. 706. Requests to charge as to the **credibility of witnesses** had been covered. City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724. Where the court has instructed that the jury are the sole judges of the credibility of witnesses, an instruction that if any have willfully testified falsely, their entire testimony may be disregarded, may be refused. Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560.

36. Seaboard & R. R. Co. v. Vaughn's Adm'x [Va.] 51 S. E. 452; Chicago City R. Co. v. Fetzer, 113 Ill. App. 280; Chicago City R. Co. v. Matthieson, 113 Ill. App. 246; Netcher v. Bernstein, 110 Ill. App. 484; Johnson v. Larcade, 110 Ill. App. 611; Chicago City R. Co. v. Enroth, 113 Ill. App. 285. Requests technically correct may be refused if the general charge has covered the ground in different language. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465. Failure to give a proper instruction is not reversible error when the principle was stated in another instruction. Sweet v. Western Union Tel. Co. [Mich.] 102 N. W. 850.

37. Southern Const. Co. v. Hinkle [Tex. Civ. App.] 89 S. W. 309; Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452. An instruction specifically applying the facts is not improper because the same proposition was charged in general terms. St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324. Error in refusing a specific instruction held not to have been cured by the general charge. City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299.

38. In malicious prosecution an instruction that plaintiff has the burden of proof does not justify the refusal of a request that plaintiff must show that defendant acted without probable cause. Harris v. Thomas [Mich.] 12 Det. Leg. N. 239, 103 N. W. 863.

39. Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549. The repetition in the general charge of a special charge properly given, either before or after argument, is not necessarily erroneous. Smart v. Masters & War-

§ 4. *Assumption of facts.*[40]—The court may not assume the existence of disputed facts or issues,[41] or of facts relative to which there is no evidence,[42] facts not proven,[43] or facts proven not to exist.[44] But admitted[45] or undisputed

dens, etc., Lodge No. 2, 6 Ohio C. C. (N. S.) 15.

40. See 4 C. L. 138.

41. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79; Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440; Abeel v. McDonnell [Tex. Civ. App.] 13 Tex. Ct. Rep. 980, 87 S. W. 1066; Corkings v. Meier, 112 Ill. App. 655; Thomas v. Riley, 114 Ill. App. 520; Himrod Coal Co. v. Clingan, 114 Ill. App. 568. Request assuming facts in dispute properly refused. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Netherlands-American Steam Nav. Co. v. Diamond [C. C. A.] 128 F. 570. Facts relative to which there is conflicting testimony (Hoolas Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052), or facts put in issue by the evidence should not be assumed (Vollman Buggy Body Co. v. Spry, 26 Ky. L. R. 228, 80 S. W. 1092). That deceased was driving on the track in front of the car at the time of the accident. Feitl v. Chicago City R. Co., 113 Ill. App. 381. Assuming one **party's theory to be true** and another's untrue. Cleveland, etc., R. Co. v. Alfred, 113 Ill. App. 236. Assuming a **denial of an averment of the answer.** Adams Exp. Co. v. Gordon, 5 Ohio C. C. (N. S.) 563. That want of care and skill is, to a certain extent, to be reasonably expected. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113. **That a master had furnished a safe place** for his servant to work in. Hall v. West & S. Mill Co. [Wash.] 81 P. 915. That failure to timber a mine was **negligence.** Abbott v. Marion Min. Co. [Mo. App.] 87 S. W. 110. That a certain act is negligence. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

Rule violated: Instruction in an action on an accident policy held to assume that the accident was the sole and proximate cause of the death. Continental Casualty Co. v. Peltier [Va.] 51 S. E. 209. On an issue as to the existence of a partnership, an instruction that a contract to perform services and receive a share of the profits as compensation did not constitute a partnership assumes that the share of profits was received as wages. Rector v. Robins [Ark.] 86 S. W. 667. Instruction in an action against a carrier for loss of goods that the consignee was entitled to recover for injuries to all the goods though some of them belonged to his wife assumes that all the goods were injured. Walter v. Alabama Great So. R. Co. [Ala.] 39 So. 87. That defendant is liable for negligence of plaintiff's co-employes assumes that such co-employes were negligent. Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112. "To find for plaintiff if defendant's servants knew of the dangerous condition of the mine" assumes that the mine was in a dangerous condition. Straight Creek Coal Co. v. Haney's Adm'r [Ky.] 87 S. W. 1114. Instruction held erroneous as withdrawing an issue involved from the consideration of the jury. Durst v. Ernst, 45 Misc. 627, 91 N. Y. S. 13.

Rule not violated: "If the jury believe from the evidence" certain facts, reciting them, is not an assumption of such facts. Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74. A fact left to the jury to be determined from the evidence is not assumed. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. An instruction that "if one was guilty of negligence in omitting to do a certain act" plaintiff could recover, is not on the weight of evidence. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. A charge that if the jury found certain facts they should find for plaintiff does not assume a fact in issue because "if any" was not used in connection with its recital. San Antonio Traction Co. v. Warren [Tex. Civ. App.] 85 S. W. 26. "That if doing certain acts was negligence" plaintiff cannot recover, does not assume such acts to be negligence. Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664. Instruction that if on a certain day plaintiff was employed by defendant, and walked over a path established for use of employes, etc., did not assume that defendant had established a path. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. Instruction in an action for damages for death of animals held not to assume that they were not transported with ordinary care. Texas & P. R. Co. v. Snyder [Tex. Civ. App.] 86 S. W. 1041. Instructions as a whole held not to have been understood by the jury as assuming disputed facts recited therein. Brinkley Car Works & Mfg. Co. v. Cooper [Ark.] 87 S. W. 645. Instruction that it is the duty of a carrier to use ordinary care to prevent injury to a passenger does not assume negligence on the part of the carrier. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. Instruction held not to assume facts submitted by it. Id. A charge in an action for libel that before determining other questions the jury must decide whether the publication constituted libel, an instruction that if libel was published defendants would be liable did not assume that the publication was libelous. Jensen v. Damm [Iowa] 103 N. W. 798. Instruction reciting certain facts held not to assume them. Texas & N. O. R. Co. v. McDonald [Tex. Civ. App.] 85 S. W. 493; St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324. Instruction that if certain facts existed, reciting them, is not erroneous as assuming them to exist. Christy v. Des Moines City R. Co., 126 Iowa, 428, 102 N. W. 194.

42. Instruction assuming facts not in evidence may be refused. Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560. It is error to assume that a conveyance alleged to be fraudulent was made in consideration of a prior indebtedness where there is no evidence of such fact. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38. Facts having no foundation in the evidence should not be assumed. Dexter v. Thayer [Mass.] 75 N. E. 223; Place v. Place [Mich.] 102 N. W. 996.

43. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597.

facts,[46] facts established beyond controversy,[47] or facts assumed by the parties during the course of the trial,[48] may be assumed.

§ 5. *Charging with respect to matters of fact or commenting on weight of evidence.*[49]—As a general rule trial courts are prohibited from charging with respect to matters of fact or commenting on the evidence,[50] or expressing an opinion

44. Assuming a fact shown not to exist is erroneous. American Exp. Co. v. Jennings [Miss.] 38 So. 374.

45. Harrison v. Lakenan [Mo.] 88 S. W. 53. Uncontroverted or admitted facts may be assumed. Chicago Union Traction Co. v. Newmiller, 116 Ill. App. 625.

46. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129; Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112; Quale v. Hazel [S. D.] 104 N. W. 215.

47. Shafer v. Russell, 28 Utah, 444, 79 P. 559; Northern Tex. Traction Co. v. Yates [Tex. Civ. App.] 88 S. W. 283; St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. If the testimony is such that no other conclusion can be reached than that the fact existed, such fact may be assumed. St. Louis S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 365.

48. That a certain thoroughfare was a street. Knight v. Kansas City [Mo. App.] 87 S. W. 1192.

49. See 4 C. L. 140.

50. It is the province of the jury to determine what force is to be given testimony, and as a general rule trial courts are not permitted to express an opinion as to its weight. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Instructions on the weight of evidence properly refused. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47; Abeel v. McDonnell [Tex. Civ. App.] 13 Tex. Ct. Rep. 980, 87 S. W. 1066. Comments on the weight of evidence, insinuations as to the weight of evidence or credibility of witnesses, are erroneous. In re Imboden's Estate [Mo. App.] 86 S. W. 263; Imboden v. Imboden's Estate, Id.

Rule violated: That certain facts were proved or that certain kinds of evidence are entitled to more weight than other kinds. Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37. Held erroneous as withdrawing from the jury facts relevant to the issues. Britton v. Young [Ind. App.] 74 N. E. 905. That a party is bound to prove only certain facts to entitle him to recover. Quint v. Dimond [Cal.] 82 P. 310. That evidence of oral admissions of a party ought to be viewed with caution. Goss v. Steiger Terra Cotta & Pottery Works [Cal.] 82 P. 681. Intimating what weight and effect is to be given any testimony. Bickerman v. Tarter, 115 Ill. App. 278. An instruction which in effect determines the weight of evidence. Campbell v. Everhart [N. C.] 52 S. E. 201. That evidence fails to show a certain fact attempted to be proven. Southern R. Co. v. Douglass [Ala.] 39 So. 268. That if plaintiff's stacks were destroyed by failure of defendant to keep its right of way clear of combustible material, plaintiff can recover. Ft. Worth & R. G. R. Co. v. Dial [Tex. Civ. App.] 85 S. W. 22. To ignore the rush of business and scarcity of cars in an action based on negligence in failing to furnish cars. Texas & P. R. Co. v. Nelson [Tex. Civ. App.] 86 S. W. 616. That if the jury find that the only evidence is that of the parties who swear oath against oath the verdict must be for the plaintiff. Thomas v. Law, 25 Pa. Super. Ct. 19. That a finding that a mule sickened and died a few days after delivery is not sufficient evidence on which to find that the mule was diseased when sold. Moulton v. Gibbs, 105 Ill. App. 104. That a certain fact was established by undisputed evidence. Houston & T. C. R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838. That the undisputed evidence shows a certain fact is erroneous where there is evidence to the contrary. Trinity & B. V. R. Co. v. Simpson [Tex. Civ. App.] 13 Tex. Ct. Rep. 23, 86 S. W. 1034. To charge that there is no evidence of a certain fact. Montgomery St. R. Co. v. Rice [Ala.] 38 So. 857. To charge what facts constitute negligence. Atlanta & W. P. R. Co. v. Hudson [Ga.] 51 S. E. 29. Rehearsing facts and stating that if proved they constitute negligence. Lampley v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 773. An instruction seeking to determine what is negligence invades the province of the jury. Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172. "A railway is negligent if it runs its car at a rate of speed that will not permit its stopping within the distance covered by its own headlight." Jensen v. Philadelphia, etc., R. Co., 24 Pa. Super. Ct. 4. Assuming a fact in issue. Taylor v. Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 1019. Assuming a fact which is a question for the jury. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. R. 421, 88 S. W. 281; Jones-Pope Produce Co. v. Breedlove [Ark.] 83 S. W. 294. That an agent has no authority to do a certain thing. Texas & P. R. Co. v. Ray Bros. [Tex. Civ. App.] 84 S. W. 691.

Rule not violated: "If you believe" reciting certain facts. Houston & T. C. R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089; Patch Mfg. Co. v. Protection Lodge, No. 215, I. A. M. [Vt.] 60 A. 74. An instruction that clearly states the issue and legal principles and leaves the jury free to dispose of the case under the evidence is not partial. Field v. Schuster, 26 Pa. Super. Ct. 82. Withdrawal of an issue which there is no evidence to support. Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991. Held not erroneous as telling the jury what the evidence proved. Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002. The court may state to the jury what as a matter of law constitutes ordinary care. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. That a promise and nonperformance may be considered as evidence in the case is not objectionable as charge that such facts constitute fraud. McDonald v. Smith [Mich.] 102 N. W. 668. An instruction relative to "defects" in a machine which was clearly relevant to "alleged defects." Anderson v. Seropian [Cal.] 81 P. 521. That a

as to its weight;[51] hence a presumption of fact should not be charged where there is evidence tending to rebut it.[52] But this rule is not universally followed,[53] especially in common-law states and states having no constitutional or statutory provision on the subject.[54] Federal courts do not follow the rule,[55] and it is not binding upon state courts of last resort.[56]

certain thing is a sufficient consideration to support a contract is not a charge on the evidence where whether such fact existed was left to the jury. Willoughby v. Willoughby, 70 S. C. 516, 50 S. E. 208. "You know what the actual damages mean (the digging of the holes and the running of wagons over the land)." Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675. "You know what 'actual' means and what 'damages' means. Now in this case what was the actual damages? Figure it out. Now go to the question of punitive damages and figure that out." Phillips v. American Tel. & Tel. Co. [S. C.] 51 S. E. 247. A statement based on admissions in the pleadings. Latour v. Southern R. Co. [S. C.] 51 S. E. 265. Instruction in an action for injuries caused by obstructing a culvert. Shores v. Southern R. Co. [S. C.] 51 S. E. 699. That it is the duty of a street car company to select a reasonably safe place for landing passengers wherever its cars may stop for that purpose does not state what is negligence per se. Macon R. & Light Co. v. Vining [Ga.] 51 S. E. 719. An instruction not to consider mortality tables in evidence if they believed plaintiff not entitled to recover or if they believed his injuries not permanent. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728. "You are to judge of the conduct, the diligence, the negligence and the acts of the plaintiff in this case by that rule," after reciting definition of ordinary care and diligence. Id. Remarks made by the court on objections to evidence. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. That the absence of a debtor from his home without informing his creditor does not authorize the latter to resort to attachment, and that absence under certain circumstances did not amount to absconding within the law. Vandiver & Co. v. Waller [Ala.] 39 So. 136; St. Louis S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 365. A preliminary statement reciting the facts whereon the plaintiff based his cause of action. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 84 S. W. 604. Instruction held not on the weight of evidence as taking an issue of fact from the jury. Houston & T. C. R. Co. v. Copley [Tex. Civ. App.] 87 S. W. 219. "If you believe," reciting certain facts. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046. "That a child of tender years is not held to the same degree of accountability as an adult, but the question of his capacity is for your determination." Texas & P. R. Co. v. Ball [Tex. Civ. App.] 85 S. W. 456. Assuming admitted facts. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Instruction held not on the weight of evidence as charging that certain facts constituted negligence. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853. Instructions relative to fraudulent representations held not to take from the jury the materiality of such representations. Craft v. Barron [Ky.] 88 S. W. 1099. Instruction as to elements of damages which have universal judicial recognition is not on the facts, where the injury for which damages are sought is not disputed. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113. Stating an admitted fact. Id. It is not error for the court in refusing an instruction to say that were it not for a recent decision of the supreme court he would give it. Romick v. Sech. 25 Pa. Super. Ct. 97.

51. Rule violated: Defining the duty of a motorman and stating that he had no right to run upon the person injured. Feitl v. Chicago City R. Co., 113 Ill. App. 381. Instruction held subject to the objection that the court disbelieved the testimony offered to prove the fact to which the instruction related. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Instructing that a verdict may be found for plaintiff if the evidence preponderates in his favor, "though but slightly," is calculated to impress the jury that the court inclines in favor of plaintiff. O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516.

Rule not violated: Instructions held not to contain an expression of opinion of the court. Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908; Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15. A charge that "the duty resting by law on all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending." Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. A charge that it is the duty of a carrier to stop "long enough" at its station for a passenger to alight is not an expression of opinion as to what would be negligence. Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984. Where a court refuses to charge that there is no evidence of a fact, it is not an expression of opinion to charge that there is some evidence of it. Thomason v. Southern R. Co. [S. C.] 51 S. E. 443.

52. That a connecting carrier which completed the carriage will be liable for a deficiency without proof that it was occasioned by its fault. Bibb v. Missouri, etc., R. Co. [Tex. Civ. App.] 84 S. W. 663.

53 See Blashfield, Instructions to Juries, § 38 et seq.

54. The court may express his opinion, comment on the evidence or the witness or parties if he leaves the jury free to determine the case on the evidence. Lappe v. Gfeller, 211 Pa. 462, 60 A. 1049. It is not error for the court to comment on the absence of witnesses which could have been produced by a proper degree of diligence. Oldham v. U. S. Express Co., 25 Pa. Super. Ct. 549.

55. A Federal judge may express his opinion as to the weight of evidence but he cannot direct the jury to ignore evidence that

Conflicting evidence.[57]—Where the evidence is conflicting, the court should call attention to the kinds and character of the testimony offered,[58] and explain the difference between interested and disinterested testimony.[59]

§ 6. *Form and general substance of instruction.*[60]—It is not required that the entire law of the case be stated in a single instruction,[61] but everything essential to the expression of a single rule should be embraced.[62] An instruction correct so far as it goes but which does not assume to point out all the elements essential to a recovery may be supplemented.[63] All of the instructions given are to be taken as a series,[64] but an instruction intended to cover the whole case and which directs the jury to find a certain way should include all the necessary elements involved.[65] Where a case is submitted for a special verdict, only the instructions appropriate to the question to be answered should be given,[66] and where a case is submitted on special issues, it is not necessary to instruct as to the law.[67] The instructions should be stated in as simple, orderly, clear and precise manner as is possible under the circumstances,[68] but it is not essential that they be the most simple and direct that

is admissible. Post v. United States [C. C. A.] 135 F. 1.

56. The fact that the court of last resort has stated in the same case what facts would constitute negligence does not make it proper for the trial court to charge that such facts would constitute negligence. Macon R. & Light Co. v. Vining [Ga.] 51 S. E. 719.

57. See 4 C. L. 142.

58. Pyne v. Delaware, etc., R. Co. [Pa.] 61 A. 817.

59. Should explain the difference between interested and disinterested testimony, and caution the jury as to their duty in weighing and deciding on a conflict. Clark v. Union Traction Co. [Pa.] 60 A. 302.

60. See 4 C. L. 142.

61. See, also, post, § 17, Instructions must be considered as a whole. Omissions in one may be supplemented by other instructions. Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 102 N. W. 793.

62. A charge on the burden of proof should be so framed as to require the plaintiff to prove all facts necessary to entitle him to recover. Metropolitan St. R. Co. v. Wishert [Tex. Civ. App.] 13 Tex. Ct. Rep. 799, 89 S. W. 460. Instructions held bad for failing to hypothesize that contributory negligence referred to therein contributed to the injury complained of. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207. An instruction that a policy of insurance was entered into by the secretary's acceptance of the application and membership fee is erroneous, in not touching upon the authority of the secretary, which was a point in dispute. Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 1230. An instruction based on a theory of a servant being ordered into a dangerous place by his master must not ignore any of the elements essential to a recovery. Wiggins Ferry Co. v. Hill, 112 Ill. App. 475. Request purporting to state the necessary elements of a highway by prescription, but neglecting to require that user must be under a claim of right, properly refused. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

63. One that a street railway company is chargeable with notice that it must use due care to avoid injuring persons on the street is not misleading in failing to charge that such persons must use due care to avoid injury, other instructions having covered this phase of the case. West Chicago St. R. Co. v. Schulz [Ill.] 75 N. E. 495.

64. See post, § 17, Instructions must be considered as a whole.

65. Should be so framed as to leave no doubt as to the facts upon which it is made to depend. Ford v. Hine Brothers Co., 115 Ill. App. 153. An instruction directing a verdict if certain facts are found must embrace all the facts and conditions essential to such verdict. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359. The question here was not only whether plaintiff used ordinary care in getting out of the way of the car, but also whether in getting in the way he used such care. Chicago City R. Co. v. Mauger, 105 Ill. App. 579. An instruction embodying the elements essential to a recovery is not objectionable as attempting to summarize the evidence without including the evidence of both sides. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386. Where the court states that to sustain the burden of proof certain facts must be established but omits a fact essential to a right of recovery, a verdict will be set aside unless the evidence requires a finding adverse to the defendant on such issue. Chicago, etc., R. Co. v. White [Neb.] 103 N. W. 661.

66. General instructions are not proper. Morrison v. Lee [N. D.] 102 N. W. 223.

67. On submission of an issue whether or not certain property is community property, it is not necessary to instruct in what manner or with what funds the property must have been acquired. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

68. A mass of disorderly and unarranged requests should not be read. Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061. The court need not instruct in the language presented by counsel but may choose that mode of expression best adapted to intelligently state the law on the requested subject-matter. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29. The principles charged should not be so connected with each other and confused as to be misleading. Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984. It is erroneous to state in immediate connection with each other, without

can be given.[69] Their meaning is to be determined by what ordinary men and jurors would understand them to mean, under the evidence and circumstances of the trial.[70] Instructions dealing with the evidence should run—"if you believe from the evidence,"[71] but it is not necessary that each thought, element or act pointed out or specified shall be preceded immediately by the requirement that it must be found from the evidence.[72] An admonition, though applicable, need not be repeated in every instruction.[73] Hypothetical instructions should be based on a correct hypothesis.[74] Reading excerpts from opinions of appellate courts is not a desirable method of instructing,[75] as such excerpts are liable to be misleading[76] or argumentative.[77] The language of instructions should be intelligible,[78] clear,[79] and free from ambiguity.[80] Instructions should not be misleading,[81] or tend to impress the

explanation, two distinct rules of law, qualifying the former with the latter. Macon R. & Light Co. v. Streyer [Ga.] 51 S. E. 342.

Approved forms: Relating to liability for goods sold and delivered. Reynolds v. Blake, 111 Ill. App. 53. Relative to **negligence** and contributory negligence held not ground for reversal, though not to be commended. Huey Co. v. Johnston [Ind.] 73 N. E. 996. "If the jury believe from the evidence that the plaintiff while in the exercise of ordinary care was injured by or in consequence of the negligence alleged in the declaration or any count thereof, you can find defendant guilty." Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359. "Plaintiff's case" and "his case" are proper terms to be used in instructions. Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458.

69. If they are such as can be readily understood by the ordinary mind, it is sufficient. Carson v. Old Nat. Bank, 37 Wash. 279, 79 P. 927.

70. Bickel v. Martin, 115 Ill. App. 367. A special charge to the jury to the effect that in order to render an assignment of the contract valid there would have to be a new agreement between the parties "simultaneously" will be interpreted to mean that the new agreement be or exist between the parties simultaneously, and not that it must be made between them simultaneously. Caldwell Furnace Foundry Co. v. Peck-Williamson Heating, etc., Co., 6 Ohio C. C. (N. S.) 629. "While" exercising ordinary care is sufficiently broad to require the jury to find the exercise of such degree of care at and immediately prior to the time of his injury. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. An instruction that the jury should consider an alleged dedicator's acts as proof of his intention to dedicate did not authorize the determination of the question of intention on the alleged dedicator's testimony alone. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

71. "If you believe from the evidence bearing on plaintiff's case" is equivalent to "If you believe from the evidence." Hayward v. Scott, 114 Ill. App. 531. "Under the evidence and the instructions of the court" and "from the preponderance of the evidence in this case and under the instructions of the court" are proper substitutes for "from the evidence." Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263. "The evidence" means all the evidence. Adams v. Pease, 113 Ill. App. 356. Instruction that if the jury find from the evidence "that the plaintiff has made out his case by a preponderance of the evidence as alleged in his declaration," he is entitled to recover, is proper. United States Brewing Co. v. Stoltenberg, 114 Ill. App. 435. Failure to require the jury's belief to be "based on the evidence" held not prejudicial error. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111. "If you believe from the evidence" should not be used. Merrell v. Dudley [N. C.] 51 S. E. 777.

72. Where an instruction contains but one sentence and begins with the requirement to "find from the evidence" the matters therein the direction applies to the entire sentence. Leighton & H. Steel Co. v. Snell [Ill.] 75 N. E. 462.

73. Where instructions inform the jury that carelessness or unskillfulness must have attended all the acts of a defendant, it was not necessary that this admonition be repeated in every instruction. Mernin v. Cory, 145 Cal. 573, 79 P. 174.

74. Refusal of a request that the undisputed evidence showed a fact was proper where the evidence showed a different fact. O'Connor v. Hogan [Mich.] 12 Det. Leg. N. 272, 104 N. W. 29.

75. Thomas v. Butler, 24 Pa. Super. Ct. 305.

76. The practice of presenting an excerpt from an opinion of an appellate court is not commended. Jensen v. Philadelphia, etc., R. Co., 24 Pa. Super. Ct. 4.

77. Language used by the court of last resort, especially where used in the discussion of the facts of a case, is often inappropriate to be used in an instruction. Atlanta & W. P. R. Co. v. Hudson [Ga.] 51 S. E. 29.

78. Unintelligible in language properly refused. Kehl v. Abram, 112 Ill. App. 77. Instruction held unintelligible. Frank v. St. Louis Transit Co. [Mo. App.] 87 S. W. 88.

79. Held confusing: Texas & P. R. Co. v. Ray Bros. [Tex. Civ. App.] 84 S. W. 691; Citizens R. Co. v. Gossett [Tex. Civ. App.] 85 S. W. 35. Vague and confusing instructions should not be given. City of Cleburne v. Gutta Percha & Rubber Mfg. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 108, 88 S. W. 300. Instruction held **not erroneous** as making a carrier liable for any negligence except its own. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

80. Ambiguous instructions are ground for reversal if they are prejudicial. Renn v.

jury with the idea that they may disregard the law and facts of the case.[82] The measure of damages should not be left to the unlimited discretion of the jury,[83] nor should they be misled into allowing double damages.[84] Instructions should not appeal to the sympathies of the jury,[85] nor impose too great a burden of proof.[86]

Tallman, 25 Pa. Super. Ct. 503. Instruction held not ambiguous. Schroeder v. St. Louis Transit Co. [Mo. App.] 85 S. W. 968.

81. Held misleading and ground for reversal. Curry v. Lanning, 94 N. Y. S. 535; Plucker v. Miller, 26 Pa. Super. Ct. 495. That upon a certain showing a presumption of negligence arises is misleading if the jury are not instructed that this presumption is rebuttable. Chicago & E. I. R. Co. v. Crose. 113 Ill. App. 547. Abstract propositions, though correct, should not be given if they are misleading. Chan v. Slater [Mont.] 82 P. 657. Instruction that plaintiff could not recover if his injuries were caused by his own and his foreman's negligence is misleading. The jury might have understood that the foreman's negligence alone would not authorize a recovery. Missouri, K. & T. R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. An instruction that the law raises a presumption of negligence from certain facts is misleading in not stating that such presumption is rebuttable. Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69. Requiring that the jury "should be reasonably satisfied by a preponderance of evidence." Callaway v. Gay [Ala.] 39 So. 277. Request that it takes the same amount of evidence to prove one thing as it does to prove another is properly refused and a requirement that it be proved by a preponderance substituted. Smith v. McDonald [Mich.] 102 N. W. 738. It is erroneous to instruct the jury to use its own knowledge in determining what evidence means. Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066. Instruction as to the effect of admission. Castner v. Chicago, etc., R. Co., 126 Iowa, 581, 102 N. W. 499. A misleading charge is not ground for reversal unless prejudice results. Vandiver & Co. v. Waller [Ala.] 39 So. 136.

Properly refused as too general as well as misleading. Mueller v. Northwestern Iron Co. [Wis.] 104 N. W. 67. Misleading instruction may be refused. Stewart v. Doak [W. Va.] 52 S. E. 95; Texas Cent. R. Co. v. O'Loughlin [Tex. Civ. App.] 84 S. W. 1104; Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183. Instruction that it is not the duty of a railroad company to check the speed of its trains at crossings is properly refused where it appears that the train was running in the limits of a municipality at a speed prohibited by ordinance. Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537. Request from which the jury might have inferred that the burden of proof rested on the wrong party. Brown v. Harris [Mich.] 102 N. W. 960.

Held not misleading: Instruction in an action for false imprisonment, assault and battery and malicious prosecution. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538. Instruction defining circumstantial evidence and preponderance. Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458. Instructions as to the duty of a master to furnish his servants a safe place in which to work. Powley v. Swensen, 146 Cal. 471, 80 P. 722. That the court read to the jury Civ. Code 1895, § 2322, containing two principles, is not ground for a new trial. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791. Instruction to consider and weigh testimony as to what services of an attorney are worth held not misleading. Sexton v. Bradley, 110 Ill. App. 495. That an instruction is in general terms is not ground for reversal unless it is misleading. Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79.

82. That the jury are the sole judges of the facts and that the court does not intend to instruct how they should find any question of fact. Chicago Union Traction Co. v. Straud, 114 Ill. App. 479.

83. The measure of damages in a personal injury action should not be left to the unlimited discretion of the jury. Chicago, etc., R. Co. v. Kuck, 112 Ill. App. 620.

84. When a general measure of damages is stated, it is improper to so frame a charge as to authorize an additional recovery for particular items included in and covered by the general measure. St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 89 S. W. 450. Instructions held not objectionable as misleading the jury into giving double damages. Red River, etc., R. Co. v. Reynolds [Tex. Civ. App.] 85 S. W. 1169.

Not misleading: Instruction as to measure of damages against a connecting carrier. Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085. Instruction as to damages held misleading as not limiting the jury to the allowance of actual damages. La Favorite Rubber Mfg. Co. v. Channon Co., 113 Ill. App. 491. An instruction that such damages may be allowed as the jury believe from the evidence was sustained, not exceeding the amount claimed, is not erroneous because the amount claimed was large. Kellyville Coal Co. v. Strine [Ill.] 75 N. E. 375.

85. In an action for wrongful death, instructing that the case should be decided the same as if the widow and not the brother was plaintiff. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40. **But see** Reiss v. Kienle, 88 N. Y. S. 359, holding that it is not erroneous to charge that defendant will be incarcerated if the verdict goes against him.

86. "By a preponderance of the evidence to the satisfaction of the jury" **is bad form.** Citizens' Nat. Bank v. Cammer [Tex. Civ. App.] 86 S. W. 625. Contributory negligence may be proven by a preponderance of evidence. Proof need not be "clear and convincing." Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679. That the jury must be "satisfied" is erroneous where only a preponderance of evidence is required. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 84 S. W. 1073. Requiring plaintiff to prove his case to the satisfaction of the jury is erroneous. Kelley v. Malhoit, 115 Ill. App. 23.

Instructions should be certain.[87]—They should be direct, accurate and certain,[88] and repetition should be avoided,[89] especially where the evidence is conflicting[90] or evenly balanced,[91] or the case is a close one upon the facts.[92]

Verbal inaccuracies and inelegancies[93] should be avoided,[94] as they constitute ground for reversal if prejudice results,[95] but usually they are considered harmless[96] and not to be complained of by a party who does not at the time call them to the attention of the court.[97]

Requiring too great a burden of proof is erroneous. Ketchum v. Gilmer, 115 Ill. App. 347; Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

Held not to violate the rule: Instruction that plaintiff must make out his case "to the satisfaction of the jury" does not impose too great a burden. Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759. Instruction to find for a party if the evidence preponderates in his favor, though but slightly, is not erroneous. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269; Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458. Unless the jury believe and "can say" from the evidence imposes no greater burden of proof than if "can say" had been omitted. O'Donnell v. Rosenthal, 110 Ill. App. 225. "Preponderates in his favor though but slightly," though subject to criticism is not reversible error. Chicago City R. Co. v. Nelson, 116 Ill. App. 609.

87. See 4 C. L. 143.

88. An instruction permitting the jury to award damages on mere caprice is erroneous. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

Held clear and not open to the objection of being vague. City of Lexington v. Kreitz [Neb.] 103 N. W. 444. Held not vague or uncertain. Dysart-Cook Mule Co. v. Reed [Mo. App.] 89 S. W. 591.

89. The giving of a great number of instructions containing much repetition may be reversible error in a close case. Bartz v. Chicago City R. Co., 116 Ill. App. 554.

90. Where there is a sharp conflict in the evidence, instructions should be clear and accurate. Bloomington & N. R. Co. v. Gabbert, 111 Ill. App. 147; Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113.

91. Where the evidence is conflicting and would have justified a verdict either way. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531. Where there is a sharp conflict and a verdict either way would be sustained, the instructions must be accurate and correct. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

92. Where the case is very close on the facts, it is important that the instructions be accurate. Sardis & D. R. Co. v. McCoy [Miss.] 37 So. 706. The jury should be fully and accurately instructed where the case is close and the evidence conflicting. Buckler v. Newman, 116 Ill. App. 546.

93. See 4 C. L. 143.

94. When a party is seeking to recover on several contracts, it is error to instruct that if he was not in default relative to said contracts "or either of them," he is entitled to recover. Armeny v. Madson & Buck Co., 111 Ill. App. 621. "Corroborated by other credible witnesses" is erroneous when corroboration by a single witness would be sufficient. Weddemann v. Lehman, 111 Ill. App. 231. "A fair preponderance of evidence" is erroneous. Link v. Campbell [Neb.] 104 N. W. 939. "Clear" preponderance is erroneous. Chan v. Slater [Mont.] 82 P. 657. Where it is the duty of the jury to consider certain facts, imperative forms of expression should be used, "must" instead of "may" or "should." Southern R. Co. v. State [Ind.] 75 N. E. 272. Error to use "believed" instead of "knew." Smith v. McDonald [Mich.] 102 N. W. 738.

95. Court making incorrect statements of testimony on dominant questions on a controlling issue in its charge, is ground for reversal. Wuest v. Baltimore, etc., R. Co., 5 Ohio C. C. (N. S.) 619.

96. A statement that a bonding company signed paper as surety, not as an accommodation indorser but for a consideration, followed immediately by a statement of the rights of sureties and that they are favored in the law, held not prejudicial. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572. Slight inaccuracies in the recital of testimony is not ground for reversal. McCosh v. Myers, 25 Pa. Super. Ct. 61. "Strong evidence" instead of "persuasive evidence" held not reversible error. Fry v. Pennsylvania R. Co., 24 Pa. Super. Ct. 147. Use of "defendant" instead of "plaintiff" held not misleading. Bowick v. American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276. An instruction to answer an issue of contributory negligence "no" is bad form, but harmless when there is an entire absence of evidence. Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675. Omission of "preponderance" in a single instance held not prejudicial. Humphrey v. Pope [Cal. App.] 82 P. 223. Omission of "not" in a definition of negligence held not reversible error. Young v. People's Gas & Elec. Co. [Iowa] 103 N. W. 788. Use of "defendant" instead of "plaintiff" is harmless when the instructions as a whole are not misleading. Reupke v. Stuhr & Son Grain Co., 126 Iowa, 632, 102 N. W. 509. Though not perfectly accurate and above criticism, it is not ground for reversal if the jury were not misled. Demmer v. American Ins. Co., 110 Ill. App. 580. Use of "street" instead of "sidewalk" held harmless. Village of Upper Alton v. Green, 112 Ill. App. 439. Refusal to give instruction which was subject to some verbal criticism held error. Chicago City R. Co. v. Meinheit, 114 Ill. App. 497.

97. When a judge drops a word or expression in the course of a long charge which is plainly error and contrary to the theory of the case, counsel should call his

Argumentative instructions[98] should not be given,[99] but the giving of an abstract and argumentative charge is not reversible error,[1] especially if instructions as a whole state the law fully and clearly.[2]

The instructions should be consistent.[3]—Conflicting requests should not be read to the jury without adequate comment or reference to the conflict,[4] and though instructions supplement each other, they should state correct principles and be in harmony.[5] The giving of inconsistent instructions is reversible error,[6] unless they relate to an immaterial issue.[7] An incorrect instruction is not cured by a correct one in direct conflict with it.[8]

§ 7. *Relation of instruction to pleading and evidence.*[9]—Instructions should be predicated on the issues made by the pleadings,[10] which are material,[11] and

attention to the inadvertence and not rely on a general exception. Patch Mfg. Co. v. Protection Lodge No. 215, I. A. M. [Vt.] 60 A. 74.

98. See 4 C. L. 145.

99. McCormick v. Parriott [Colo.] 80 P. 1044; Montgomery St. R. Co. v. Rier [Ala.] 38 So. 857. Requests which are argumentative, suggestive or persuasive should be refused. Cleveland, etc., R. Co. v. Alfred, 113 Ill. App. 236.

Properly refused: Chicago Union Traction Co. v. Nuetzel, 114 Ill. App. 466; Davenport, etc., R. Co. v. DeYaeger, 112 Ill. App. 537.

Held argumentative: Chicago Title & Trust Co. v. Ward, 113 Ill. App. 327; Quint v. Dimond [Cal.] 82 P. 310; Macon R. & Light Co. v. Vining [Ga.] 51 S. E. 719. Singling out certain testimony and stating the effect to be given it. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695. That no one has a right to leap from a moving train in the night time because he is carried past his destination is abstract and argumentative. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207. "The argument is not sound which seeks to trace the immediate cause of the death of 'M' through the previous stages of physical suffering and months of disease and medical treatment to the original accident on the railroad." Id. "A mule of ordinary gentleness as used in the complaint does not mean any particular mule which is ordinarily gentle, but means a mule which is as gentle as ordinarily gentle mules." Western R. Co. v. Cleghorn [Ala.] 39 So. 133. Instruction as to the duty of a railroad company to keep its right of way clear of combustible material held argumentative. Ft. Worth & R. G. R. Co. v. Dial [Tex. Civ. App.] 85 S. W. 22. In stating the contentions of the parties the court should not so mingle them with inferences and deductions from facts in evidence that they are presented in the form of an argument. Smith v. Hazlehurst [Ga.] 50 S. E. 917. That it is a sound rule of law that if a witness willfully swears falsely to a material fact his entire testimony may be disregarded. McClendon v. McKissack [Ala.] 38 So. 1020. A charge that the law abhors fraud. Id.

1. Vandiver & Co. v. Waller [Ala.] 39 So. 136.

2. McCormick v. Parriott [Colo.] 80 P. 1044.

3. See 4 C. L. 145.

Rule violated: Assuming a certain fact and then submitting whether or not it existed is erroneous. Anderson v. Seropian [Cal.] 81 P. 521. Error to give instructions which contradict each other with respect to material matters. Thomas v. Riley, 114 Ill. App. 520. Instructions as to negligence and contributory negligence. Christy v. Des Moines City R. Co., 126 Iowa, 428. 102 N. W. 194. Instruction held contradictory and prejudicial. Quist v. Dimond [Cal.] 82 P. 310.

Rule not violated: Instructions relative to the duty of an agent held not inconsistent. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. Instructions relative to burden of proof held not inconsistent. Pacific Packing & Navigation Co. v. Fielding [C. C. A.] 136 F. 577; McClure v. Feldmann, 184 Mo. 710, 84 S. W. 16; Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452.

4. Shailer v. Vullock [Conn.] 61 A. 65.

5. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113.

6. Inconsistent instructions held prejudicial error. Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061. Giving two instructions so contradictory that both cannot be followed is error. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622. Instruction that if certain facts were found plaintiff was entitled to recover without a qualification "unless he was guilty of contributory negligence" is not cured by a subsequent charge that contributory negligence would bar a recovery. Nickey v. Steuder [Ind.] 73 N. E. 117.

7. Inconsistent instructions relative to an immaterial issue are not ground for reversal. James v. Lyons Co. [Cal.] 81 P. 275. Inconsistent instructions on an immaterial point, where the jury could not have been misled, are not grounds for a new trial. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

8. Rector v. Robins [Ark.] 86 S. W. 667.

9. See 4 C. L. 145.

10. **Instruction not based on the pleadings is erroneous:** Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288; Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984; Dallas Consol. Elec. St. R. Co. v. Hardy [Tex. Civ. App.] 86 S. W. 1053; Word v. Marrs [Tex. Civ. App.] 83 S. W. 17; Texas & P. R. Co. v. Ray Bros. [Tex. Civ. App.] 84 S. W. 691. An instruction upon a theory of recovery not

which remain controverted,[12] and upon the competent evidence[13] introduced in the case,[14, 15] which is sufficient to warrant an instruction,[16] and not upon evidence merely

supported by allegations. Wabash R. Co. v. Burress, 111 Ill. App. 258.

Held erroneous: Where a complaint alleged injuries other than those proved, authorizing a recovery if plaintiff was injured "in whole or in part as alleged" is not a charge on facts not proven, nor does it authorize a recovery for injuries not alleged. Missouri, etc., R. Co. v. Hay [Tex. Civ. App.] 13 Tex. Ct. Rep. 27, 86 S. W. 954. Instruction erroneous as not limiting the question of **negligence** to that alleged in the complaint. Chicago, I. & L. R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. Where a right of recovery is not based on negligence of a coemploye and it is not alleged that the master knew of such negligence nor that plaintiff was ignorant thereof, an instruction relative thereto is not within the issues. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288. Erroneous not to limit the right to recover to negligence charged in the declaration. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234. An instruction authorizing a recovery for negligence should be limited to the acts of negligence alleged. Schroeder v. St. Louis Transit Co. [Mo. App.] 85 S. W. 968. Erroneous as allowing a recovery of damages not prayed for in the complaint. International & G. N. R. Co. v. Logan [Tex. Civ. App.] 81 S. W. 812. Where defendant claimed that, on account of his having incurred expense in the transaction in suit, he had paid plaintiff a certain sum in settlement, but did not request submission of issue of such accord and satisfaction, held, that he was restricted to his plea, and his contention that an instruction for plaintiff precluded consideration of the amount of such expenses was outside the issues. Sayers v. Craven, 107 Mo. App. 407, 81 S. W. 473. An instruction must confine the jury to the consideration of negligence alleged in the declaration. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113. An instruction based upon no count in the declaration is erroneous. Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 123. In an action for services rendered, an instruction authorizing a recovery of damages for breach of contract is not based on the cause of action pleaded and is erroneous. Mengis v. Fitzgerald, 95 N. Y. S. 436. An instruction submitting an issue of fraud not made by the pleadings is erroneous. Beadleston v. Furrer, 102 App. Div. 544, 92 N. Y. S. 879. An issue of discovered peril, in order to be submitted, must be raised by the pleadings. Hawkins v. Missouri, etc., R. Co. [Tex. Civ. App.] 83 S. W. 52. Where the negligence relied on is excessive speed, it is error to instruct on the failure to give warnings. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. Instructions allowing a recovery for negligence not alleged are erroneous. Hartman v. St. Louis Transit Co. [Mo. App.] 87 S. W. 86.

Not erroneous: Instructions held not to deprive the plaintiff of the benefit of any contention made by the pleadings and supported by the evidence. Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128. It is error to refuse to instruct that no negligence other than that alleged in the petition should be considered. Baltimore & O. R. Co. v. Lockwood [Ohio] 74 N. E. 1071.

11. Instructions on an immaterial issue should not be given. Chan v. Slater [Mont.] 82 P. 657. Under § 50 of the Practice Act, it is proper to instruct the jury to disregard counts which would not sustain judgment after verdict. Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664.

12. It is error to instruct on an issue made by the pleadings, but expressly abandoned in open court during the progress of the trial. McWhorter v. O'Neal [Ga.] 51 S. E. 288.

13. That a party does not object to the introduction of incompetent evidence does not preclude him from objecting to its submission to the jury as an element of damages. Lennox v. Interurban St. R. Co., 93 N. Y. S. 230. An instruction based on excluded evidence is erroneous. Foley v. Xavier, 93 N. Y. S. 289. Request based on evidence held inadmissible is properly refused. Chicago Consolidated Traction Co. v. Gervens, 113 Ill. App. 275.

14, 15. Should not be in conflict with the evidence. Tuffey v. Brooklyn Union Gas Co., 102 App. Div. 416, 92 N. Y. S. 489.

Instructions having no foundation in the evidence should not be given. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. Every instruction should be based upon some evidence. Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Chicago Union Traction Co. v. Nuetzel, 114 Ill. App. 466. An instruction not based on evidence is bad. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288; Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305. Must limit the jury to the evidence. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. To justify the submission of the question of fraud, there must be some evidence of it. Lancaster v. Lee [S. C.] 51 S. E. 139. Should relate solely to the facts of the case. Chicago & J. Elec. R. Co. v. Spence, 115 Ill. App. 465. The jury should be confined in their considerations to acts of negligence shown by the proof. Sommers v. St. Louis Transit Co., 108 Mo. App. 319, 83 S. W. 268. Referring the measure of damages to the judgment of the jury without reference to what might be found from the evidence is erroneous. Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. An instruction which predicates a right to recover upon proof made in the case upon a particular count **is proper.** Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172. Instruction to consider all the facts and circumstances proven by the evidence is proper. City of Chicago v. Davies, 110 Ill. App. 427. A refusal to instruct that a verdict might be found upon circumstantial evidence is error. Moulton v. Gibbs, 105 Ill. App. 104.

Error to submit issues not raised by the evidence: Hase v. Schotte [Mo. App.] 84 S. W. 1014; Delta Bag Co. v. Kearns, 112 Ill. App. 269; Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510; Rainey v. Lawrence [Kan.] 79 P. 116; Stew-

offered,[17] and conform to the theory upon which the case was tried.[18] Requests for instructions not so predicated are properly refused,[19] though they state a cor-

art v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562; Chambers v. Chicago, etc., R. Co. [Mo. App.] 86 S. W. 501; Burnley v. Mullins [Miss.] 38 So. 635; Willis v. St. Joseph R. Light, Heat & Power Co. [Mo. App.] 86 S. W. 567; Hollingsworth v. Barrett [Ky.] 89 S. W. 107.

Held erroneous: Submitting the hypothesis of a severe abrasion is error where there is no evidence thereof, though the language of the instruction was used in the petition. St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630. An instruction which leads the jury to believe that they may base their verdict on a fact not supported by the evidence. Rumsey v. Shaw [Pa.] 61 A. 1109. Where a party was struck by a car which he testifies he never saw an instruction as to what he could presume had he seen the car is error. Toohey v. Interurban St. R. Co., 102 App. Div. 296, 92 N. Y. S. 427. It is error to charge that the jury may find a fact which there is no evidence to sustain. Dellapia v. American Ice Co., 95 N. Y. S. 605. Abstract propositions not supported by evidence should not be given. Williams & Co. v. Harris, 137 N. C. 460, 49 S. E. 954. Instruction relative to wanton negligence is erroneous where there is no evidence of such negligence. McCandless v. Phreaner, 24 Pa. Super. Ct. 383. There being no evidence of undue influence, a charge upon that subject is erroneous. Moore v. Boothe [Tex. Civ. App.] 13 Tex. Ct. Rep. 218, 87 S. W. 882. It is error to charge that a certain act is negligence when such instruction has no foundation in the evidence. Marshall v. Holbrook, C. & D. Contracting Co., 95 N. Y. S. 599. Error to submit an issue of negligence not raised by the evidence. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346. As to an element of damages as to which there is no evidence. Davis v. Richardson [Ark.] 89 S. W. 318. It is error to instruct that the fact that a party called no witnesses may be considered where there is no evidence that such party had witnesses whom he could produce. Robinson v. Metropolitan St. R. Co., 92 N. Y. S. 1010. An instruction requiring a jury to find facts of which there is no evidence is erroneous. Schroeder v. St. Louis Transit Co. [Mo. App.] 85 S. W. 968.

Must be based on issues made either by the pleadings or the evidence: Request based on matter not in issue may be refused. Chicago Consolidated Traction Co. v. Gervens, 113 Ill. App. 275; Woods v. Wabash R. Co. [Mo.] 86 S. W. 1082; Walsh v. Jackson [Colo.] 81 P. 258; Patterson v. First Nat. Bank [Neb.] 102 N. W. 765; Diefenthaler v. Hall, 116 Ill. App. 422. Instructions predicated on causes of action not alleged or proven are misleading. Corum v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 143.

It is error to submit an issue not tendered by the pleadings nor litigated in the presentation of the case. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 201. Instruction not based on any matter under consideration properly refused. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856. Introducing into the case a substantial issue not raised by the pleadings nor litigated by consent is reversible error. Dolson v. Dunham [Minn.] 104 N. W. 964. It is error to direct the jury to find on issues not raised by the pleadings or upon the trial. Chicago, etc., R. Co. v. Wheeler [Kan.] 79 P. 673. Instruction upon subject of fellow-servants properly refused where the question does not arise in the case. Wabash R. Co. v. Burress, 111 Ill. App. 258.

Must be based on evidence and pleadings: Schlesinger v. Scheunemann, 114 Ill. App. 459; Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. As a rule it is error to submit to the jury, as a question affecting the rights of the parties, an issue not raised by both the pleadings and the evidence. Missouri, etc., R. Co. v. McAnaney [Tex. Civ. App.] 80 S. W. 1062. Such introduction is ground for reversal if it appears that the jury were misled. Cincinnati Traction Co. v. Forrest [Ohio] 75 N. E. 818.

16. Evidence held to justify an instruction relative to false representations. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641. Where there is evidence affording an inference of a certain fact, an instruction based thereon is warranted. Southern R. Co. v. Douglass [Ala.] 39 So. 268. A scintilla of evidence which would not support a verdict does not call for an instruction on the issue to which it is addressed. Chesapeake & O. R. Co. v. Stock [Va.] 51 S. E. 161.

17. Not on evidence "offered." Henline v. Brady, 110 Ill. App. 75.

18. Morley v. St. Joseph [Mo. App.] 87 S. W. 1013. A party should not be given the benefit of any theory not covered by his pleading. Western & A. R. Co. v. Branan [Ga.] 51 S. E. 650. They should be adjusted to the law and facts of the case on trial. Central of Georgia R. Co. v. Price, 121 Ga. 651, 49 S. E. 683. Instructions predicated on issues not submitted may be refused. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853. Must be based on theories advanced by the pleadings. Himrod Coal Co. v. Clingan, 114 Ill. App. 568.

19. Not within the pleadings: Issues not raised by the pleadings need not be instructed upon. Western Union Tel. Co. v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 45, 87 S. W. 1060. Instruction predicated on contributory negligence not pleaded properly refused. Missouri, etc., R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct. Rep. 370, 87 S. W. 879; Allen-West Commission Co. v. Hudgins & Bro. [Ark.] 86 S. W. 289; O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516; Kimball Co. v. Piper, 111 Ill. App. 82.

Not predicated on the evidence: Request not based on evidence properly refused. Liverpool & L. & G. Ins. Co. v. Friedman Co. [C. C. A.] 133 F. 713; Miller v. Carnes [Minn.] 103 N. W. 877; Quale v. Hazel [S. D.] 104 N. W. 215; City of Indianapolis v. Cauley [Ind.] 73 N. E. 691; Kehi v. Abram, 112 Ill. App. 77; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; German American Ins. Co. v. Brown [Ark.] 87 S. W. 135; Virginia & N. C. Wheel Co. v.

rect proposition of law,[20] as they tend to confuse the jury.[21] An instruction not predicated on issues in the case is not ground for reversal unless it is prejudicial.[22] An instruction should be predicated on all the evidence bearing on the issue to which it relates,[23] and when testimony is stricken the court should upon request instruct that it be disregarded.[24]

§ 8. *Stating issues to jury.*[25]—In submitting the case to the jury, the court should separate and state definitely the issues of fact made by the pleadings,[26] and instruct upon each issue as the nature of the case may require.[27] Where there are no written pleadings, the court should frame the issues from the evidence and present the disputed questions of fact.[28] Attention should be called to material allegations admitted and denied.[29] The court should not read the pleadings and instruct the jury to determine the controversy, and not otherwise define the specific issues.[30] The court should not submit inconsistent theories and authorize a recovery on either.[31] It is not a sufficient statement of the issues to refer the jury to the pleadings,[32] and although it is proper to permit the jury to take the plead-

Harrls, 103 Va. 708, 49 S. E. 991; United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803; Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991; Id., 113 Ill. App. 381; Denison & P. S. R. Co. v. Harlan [Tex. Civ. App.] 13 Tex. Ct. Rep. 207, 87 S. W. 732; Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538; Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850; Ward Land & Stock Co. v. Mapes [Cal.] 82 P. 426; Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; McKenzie v. Mitchell [Ga.] 51 S. E. 34; Houston & T. C. R. Co. v. Cluck [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 817; Harrison v. Lakenan [Mo.] 88 S. W. 53; Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597; Haywood v. Galveston, etc., R. Co. [Tex. Civ. App.] 85 S. W. 433. A special charge that "if plaintiff by her own testimony in support of her cause of action raises a presumption of contributory negligence, the burden rests upon her to remove that presumption" was properly refused where there was no testimony implying negligence on her part. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8. Requests concerning a defense which, as a matter of law is insufficiently supported by the evidence, need not be given. American Surety Co. v. Choctaw Const. Co. [C. C. A.] 135 F. 487. It is not error to refuse to instruct that a woman is subject to the same rules and conditions with respect to negligence that a man is where there is no testimony on the subject. Busch v. Robinson [Or.] 81 P. 237.

20. An instruction, though containing a correct proposition of law, may be refused if there is no evidence before the jury on the subject. Young v. O'Brien, 36 Wash. 570, 79 P. 211. Abstract propositions wholly disconnected from the issues should not be charged. Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga.] 50 S. E. 473.

21. Instructions having no foundation in the evidence, though abstractly correct, tend to confuse the jury. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. A correct abstract proposition not based on evidence is misleading. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364. Abstract propositions without support in the evidence are misleading and should not be given. Fordyce v. Key [Ark.] 84 S. W. 797.

22. Not based on evidence. Burns v. Goddard [S. C.] 51 S. E. 915. Is harmless if it was disregarded. Adams v. Pease, 113 Ill. App. 356. Submitting an issue not raised by the evidence is harmless where the jury could not have found for the opposing party unless on other grounds. Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858. Not based on the pleadings. Missouri, K. & T. R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401.

23. Willis v. St. Joseph R., Light, Heat & Power Co. [Mo. App.] 86 S. W. 567. It is proper to instruct the jury to consider all the facts and circumstances in assessing damages. Chicago City R. Co. v. Sheehan, 110 Ill. App. 492.

24. Walsh v. Jackson [Colo.] 81 P. 258.

25. See 4 C. L. 148.

26. Baltimore & O. R. Co. v. Lockwood [Ohio] 74 N. E. 1071. Instruction held to submit the issue of contributory negligence. Quirk v. Rapid R. Co. [Mich.] 100 N. W. 815. The contentions of a party and the law applicable thereto should be stated. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

27. Baltimore & O. R. Co. v. Lockwood [Ohio] 74 N. E. 1071. Where a complaint is in four paragraphs, radically different in their averments and theories, an instruction that they are substantially the same and that the establishment of either one would entitle a recovery, is erroneous. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288.

28. Coxe v. Singleton [N. C.] 51 S. E. 1019.

29, 30. Baltimore & O. R. Co. v. Lockwood [Ohio] 74 N. E. 1071.

31. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346.

32. But see 4 C. L. 148, n. 81 et seq. The court should point out the issues of fact for the jury to try. An instruction merely referring to the declaration as a statement of plaintiff's case is insufficient and erroneous. It would not, for the average juror, point out either the issues to be tried, or the plaintiff's case. Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

ings to the jury room, it is also proper to set forth in instructions a clear statement of the case and the issues to be determined.[33] Improper reference to a declaration which has been superseded by an amended one is not reversible error when the reference was with respect to allegations substantially the same as in the amended declaration.[34] It is not material in what form issues are presented.[35] It is sufficient if the jury fully understand the questions they are to determine.[36] If more elaborate instructions are desired, an appropriate request should be preferred.[37] It is not required that all the issues be stated in a single instruction,[38] and when the issues have once been stated, a repetition is unnecessary.[39] If the issues are simple and have been stated by counsel, a statement of them by the court is unnecessary.[40] The simplicity of the issues may render any statement of them unnecessary.[41] Issues which involve the recitation of a large amount of testimony,[42] abandoned issues,[43] issues not sustained,[44] issues embodying evidentiary facts only,[45] or issues withdrawn during the trial,[46] need not be submitted. Contentions supported by any evidence,[47] however slight,[48] should be submitted; but those having no foundation in the evidence should not.[49]

§ 9. *Ignoring material evidence, theories and defenses.*[50]—Instructions should

33. Paxton v. Woodward [Mont.] 78 P. 215. It is not error to incorporate the pleadings into the instructions, but it is the better practice for the court to instruct as to the issues. Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 2 N. E. 1027. It is proper to refer the jury to the pleadings. Davenport, etc., R. Co. v. DeYaeger, 112 Ill. App. 537.

34. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209.

35. Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113. It is only required that issues be submitted in such form as when decided they form a basis for the judgment. Wright v. Cotten [N. C.] 52 S. E. 141. Where the points for decision have been clearly stated, it is not error in stating the issues to practically copy the pleadings instead of making a succinct statement of the issues. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361. If facts alleged are sufficient to authorize a recovery it is not error to group them and direct the jury to find for plaintiff if they existed. St. Louis S. W. R. Co. v. White [Tex. Civ. App.] 86 S. W. 71.

36. Failure to refer to the negligence charged in the declaration is not reversible error where the jury could not have understood that the instruction had reference to any other negligence. Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615. On a conflict of evidence as to whether a disease resulted from an injury or other causes, the jury should be informed as to the probable causes from which the disease might result. Clark v. Union Traction Co. [Pa.] 60 A. 302. Where the court has fully stated the issues, it is not ground for a new trial that he refuses to charge that other issues growing out of the evidence are not to be considered except in so far as they bear on the ultimate result. Morrison v. Dickey [Ga.] 50 S. E. 178.

37. In stating the contentions of one party, it is proper to confine the statement to matters which it is necessary for him to prove; if the other party desires instructions as to admissions made in the pleadings, he should prefer a request. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15.

38. See ante, § 6 and post, § 17, Instructions must be considered as a whole.

39. See ante, § 3, Repetition.

40. Cody v. Market St. R. Co. [Cal.] 82 P. 666.

41. Under Ball. Ann. Codes & St. § 4993, subd. 6, requiring the court to charge all matters of law necessary for the information of the jury in finding a verdict, failure to state the issues in a case where they are simple is not error. Lambert v. La Conner Trading & Transp. Co., 37 Wash. 113, 79 P. 608.

42. A party is not entitled to have submitted a question the answer to which involves the recitation of a large amount of testimony. Jenkins v. Beachy [Kan.] 80 P. 947.

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

44. If a plaintiff fails to sustain by evidence a charge of negligence, this feature should be eliminated when stating the issues to the jury. Western & A. R. Co. v. Branan [Ga.] 51 S. E. 650.

45. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015.

46. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361.

47. There being evidence from which a jury might find that there had been waste, the issue of damages should have been submitted. Roby v. Newton, 121 Ga. 679, 49 S. E. 694.

48. It is proper to submit the theory of a party, though supported only by the testimony of one witness. Christy v. Des Moines City R. Co., 126 Iowa, 428, 102 N. W. 194.

49. See ante, § 7. Where there has been no arbitration and no award and no evidence thereof, an instruction to the effect that there has been no arbitration and award is not necessary. Williamson v. North Pac. Lumber Co., 43 Or. 337, 73 P. 7.

50. See 4 C. L. 148.

be so framed as not to ignore or withdraw from the consideration of the jury any meritorious theory,[51] material issue,[52] evidence,[53] or matter of defense;[54] hence the attention of the jury should not be confined to one view of the case if there are more than one which should be considered,[55] and an instruction directed to an issue relative to which there is other evidence and room for other inferences than those enumerated is properly refused;[56] but a particular defense not supported by any evidence may be ignored.[57]

§ 10. *Giving undue prominence to evidence, issues and theories.*[58]—Instructions should not single out and give undue prominence to particular facts[59] or evidence,[60] and requested instructions subject to this vice may be refused;[61] but

51. Reynolds v. Blake, 111 Ill. App. 53. Where the entire case does not hang on a single point, it is error to make the finding of the jury depend upon it. Campbell v. Bates [Ala.] 39 So. 144. Request which ignores theories of recovery contained in the pleadings is **properly refused.** St. Louis & B. Elec. R. Co. v. Erlinger, 112 Ill. App. 506.

52. An instruction eliminating material issues (Mengis v. Fitzgerald, 95 N. Y. S. 436), or which withdraws from the issues a material matter in dispute, **is erroneous** (Tibbits v. Sweet [Neb.] 102 N. W. 255). Instruction erroneous as ignoring the question as to whether a motorman attempted to stop his car in time to avoid collision. Chicago City R. Co. v. Schmidt [Ill.] 75 N. E. 383. Instruction ignoring a **material averment** (Alton Light & Traction Co. v. Oliver [Ill.] 75 N. E. 419), or an issue of negligence (St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428), or other material issue raised by the pleadings, is properly refused (Chicago, etc., R. Co. v. Cains [Tex. Civ. App.] 84 S. W. 682), as is a request for a directed verdict which ignores facts involved which are clearly for the jury (Dietrich v. Lancaster [Pa.] 61 A. 1112).

Held not to ignore a material issue. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728.

53. Material evidence (Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79; Edger v. Knpper, 110 Mo. App. 280, 85 S. W. 949; Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305), or material facts should not be ignored (Dexter v. Thayer [Mass.] 75 N. E. 223). An instruction which takes from the jury the consideration of material evidence **is erroneous** (Rylander v. Laursen [Wis.] 102 N. W. 341) and failure to submit evidence on a material question to jury is **reversible error** (Augsbury v. Shurtliff, 180 N. Y. 138, 72 N. E. 927). Requests ignoring material facts (Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560), or important (Deltring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140), or pertinent evidence (Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322), or omitting reference to material evidence, **properly refused** (Johnston v. Witt Shoe Co., 103 Va. 611, 50 S. E. 153). Should not eliminate the consideration of material evidence. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Instruction ignoring evidence of proximate cause properly refused. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. Reciting the allegations of the complaint and telling the jury that if they have been established, plaintiff is entitled to recover, is proper where opposing evidence merely sought to disprove them. Does not ignore defendants' evidence. Illinois Central R. Co. v. Smith, 111 Ill. App. 177.

54. Defense of **contributory negligence.** Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234; Abbott v. Marion Min. Co. [Mo. App.] 87 S. W. 110. In an action for injuries submitting the sole question and making the verdict depend on whose witnesses were believed, with no instructions on negligence and contributory negligence, is error. Haggerty v. New York City R. Co., 90 N. Y. S. 336. Instruction held erroneous as ignoring a **master's duty** to furnish his employes a safe place in which to work. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. An instruction ignoring the defense of **assumed risk** raised by the pleadings is fatally defective. Montgomery Coal Co. v. Barringer [Ill.] 75 N. E. 900. An instruction that a **principal** is not bound by acts of his agent in excess of his authority is properly refused where it excludes from consideration a **ratification** relied on. Shafer v. Russell, 28 Utah, 444, 79 P. 559. An instruction which ignores a material matter of defense **is erroneous** (Continental Casualty Co. v. Peltier [Va.] 51 S. E. 209; Central of Georgia R. Co. v. Price, 121 Ga. 651, 49 S. E. 683), and **may be refused** (Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853).

Not erroneous as ignoring a defense. Powley v. Swensen, 146 Cal. 471, 80 P. 722.

55. Renn v. Tallman, 25 Pa. Super. Ct. 503.

56. Southern I. R. Co. v. Hoggatt [Ind. App.] 73 N. E. 1096.

57. Robison v. Bailey, 113 Ill. App. 123.

58. See 4 C. L. 150.

59. South Covington, etc., R. Co. v. Schilling [Ky.] 89 S. W. 220. It is error to single out isolated facts. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440. To instruct that the relationship of parties to a transfer raises no presumption of fraud on creditors without noticing the other facts is misleading and erroneous. Merrill v. Merrill, 105 Ill. App. 5. Particular facts disclosed by the evidence should not be emphasized (Atwood Lumber Co. v. Watkins [Minn.] 103 N. W. 332), or singled out and given undue prominence (Scott v. Snyder, 116 Ill. App. 393). Undue prominence should not be given to particu-

this rule is subject to the rule that each party is entitled to instructions hypothetically outlining the evidence and state of the case upon which he relies.[62] Undue prominence is given by directing the jury to consider a certain undisputed fact,[63] or to consider certain particular facts in reaching a conclusion on an ultimate fact,[64] or by singling out a particular witness and confining the attention of the jury to a portion of the testimony,[65] or by singling out one of several important issues in such way as to impress the jury that it is the controlling one.[66] It is also erroneous to single out certain testimony and state the effect to be given it,[67] or permit the jury to magnify its importance;[68] but if there is no evidence to support a certain fact, the court may so instruct.[69] Undue prominence is not given by mere repetition,[70] nor by specifically applying a theory in two ways at the request of the respective parties.[71]

§ 11. *Definition of terms used.*[72]—Technical terms employed in the instructions should be defined.[73] The definition given should be correct;[74] but a failure to define such terms is not generally held prejudicial error unless a definition was requested,[75] and especially is this so as to terms commonly used.[76] A definition need not be given if it would not aid the jury in their deliberations,[77] and failure to give it is harmless where it could not have influenced the verdict.[78]

lar facts and circumstances in evidence. Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

Held not to single out facts. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908.

60. It is erroneous to direct special attention to some phase of the evidence and give it undue prominence. Montgomery St. R. Co. v. Rice [Ala.] 38 So. 857. Certain portions of the evidence should not be singled out and made prominent. Chicago Consolidated Traction Co. v. Gervens, 113 Ill. App. 275. Calling special attention to letters in evidence is erroneous as tending to create an impression that the court attaches special importance to them. Steuben County Wine Co. v. McNeeley, 113 Ill. App. 488.

61. A request which singles out isolated facts and confines the attention of the jury to them is properly refused. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29; Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322.

62. Chicago City R. Co. v. Math, 114 Ill. App. 350.

63. Campbell v. Bates [Ala.] 39 So. 144.

64. Eckhard v. St. Louis Transit Co. [Mo.] 89 S. W. 602.

65. Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305.

66. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183.

67. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695.

68. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

69. Feitl v. Chicago City R. Co., 113 Ill. App. 381.

70. Houston & T. C. R. Co. v. Copley [Tex. Civ. App.] 87 S. W. 219. Defining "negligence" twice held not to give it undue prominence. San Antonio Traction Co. v. Warren [Tex. Civ. App.] 85 S. W. 26.

71. When neither party was satisfied with the generality of the charge and made specific requests. Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858.

72. See 4 C. L. 151.

73. An instruction on willful injury without stating what facts were necessary to prove it is erroneous. Chicago City R. Co. v. Jordan, 215 Ill. 390, 74 N. E. 452. Where "ordinary care," "reasonable diligence" and "reasonable care" are used, an instruction defining "ordinary care" should have stated that the other terms are synonymous. Greene v. Louisville R. Co. [Ky.] 84 S. W. 1154.

74. Erroneous definition of "preponderance of evidence" held prejudicial. Grotjan v. Rice [Wis.] 102 N. W. 551. A definition of a **general agent** as one authorized to transact all his principal's business is not misleading where the jury must have understood it to refer only to the kind of business the principal was authorized to do. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. Instruction that **preponderance** is not necessarily determined by the number of witnesses is not bad where the jury is not told wherein the preponderance consists. Kozlowski v. Chicago, 113 Ill. App. 513. As to what constitutes a preponderance of evidence held proper. Chicago City R. Co. v. Enroth, 113 Ill. App. 285. Definition of **negligence** if inaccurate, was cured by a correct definition. Houston & T. C. R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089.

75. Failure to define "ordinary care" is not error in the absence of an appropriate request. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063. "Proximate cause" may be used without otherwise defining it. Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 102 N. W. 793. A party who does not request a definition of a technical term used in an instruction requested by him cannot object to an inaccuracy in a definition given by the court of its own motion. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

76. "Use" in a question to an applicant for life insurance "Do you use liquor?" Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656. A general objection does not

§ 12. *Rules of evidence; credibility and conflicts.*[79]—The court should instruct that evidence admitted for a certain purpose cannot be considered for any other;[80] that impeaching testimony should not be considered as substantive evidence;[81] and should limit the consideration of testimony to the parties against whom it is admissible.[82] It is proper to instruct that the jury are the judges of the credit to be given the testimony of witnesses,[83] and an instruction that expert testimony must not be disregarded must be given where justice demands it.[84] Refusal to give cautionary instruction as to the weight to be given expert testimony is not reversible error.[85] Instructing that depositions should be given the same weight as if the testimony had been given in open court is proper.[86] Instructions that affirmative is of more weight than negative testimony should be based on the hypothesis of like circumstances of the parties.[87] Where the defendant has raised the issue of contributory negligence, a charge that if the evidence is evenly balanced the issues should be found in his favor is erroneous.[88]

The credibility[89] of witnesses is for the jury,[90] and an instruction on the credibility of witnesses, not supported by evidence or apparent facts but based on metaphysical abstractions which suggest suspicion and invite conjecture, is vicious.[91] Where each party contends that the witnesses of the other are unreliable, it is proper to instruct that the character of the witnesses may be considered.[92] It is error to instruct that the testimony of sworn officers of the law is entitled to the more credit.[93] Instructions to consider the demeanor of witnesses should not be mandatory.[94] Commanding the jury to apply its knowledge of human nature to each witness that they may judge the weight to be given his testimony is vicious.[95]

Falsus in uno falsus in omnibus[96] should be given only when there is sufficient basis in the evidentiary facts and circumstances to show that there was willful false swearing,[97] and whether this rule applies to the evidence of a case is a question for

raise the question as to whether "safe" should have been defined. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779.

77. Where title was claimed by gift, a definition of "gift" need not be given where the only issue is as to which witnesses were to be believed. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597.

78. Failure to define the distinction between "remote" and "proximate" cause is harmless where the jury is told that the negligence must have been the direct cause. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

79. See 4 C. L. 151. Compare Evidence, 5 C. L. 1301; Witnesses, 4 C. L. 1943, where the substantive law is treated.

80. Georgia & A. R. Co. v. Shiver, 121 Ga. 708, 49 S. E. 700; Westfeldt v. Adams, 135 N. C. 591, 47 S. E. 816.

81. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530; Straight Creek Coal Co. v. Hanen's Adm'r [Ky.] 87 S. W. 1114.

82. Admissions by a joint defendant. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530.

83. Illinois Central R. Co. v. Smith, 111 Ill. App. 177.

84. St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630. Instruction as to expert testimony held proper. Smith v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 71.

85. Wood v. Los Angeles Traction Co. [Cal. App.] 82 P. 547.

86. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281.

87. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387.

88. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29.

89. See 4 C. L. 151.

90. See ante, §§ 2, 5. Suggesting that the testimony of a witness may be discredited because he is in the employ of the party calling him is erroneous. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415. That the testimony of one credible witness may be entitled to more weight than that of many others believed to have been mistaken or who knowingly testified falsely and have not been corroborated, is erroneous. Tri-City R. Co. v. Gould [Ill.] 75 N. E. 493.

91. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

92. Harrison v. Lakenan [Mo.] 88 S. W. 53.

93. Durst v. Ernst, 45 Misc. 627, 91 N. Y. S. 13.

94. That it is "the duty" of the jury to consider the demeanor of witnesses. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

95. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

96. See 4 C. L. 152. See, also, Witnesses, 4 C. L. 1943.

the court and not for the jury,[98] and in determining whether the rule is applicable, the court must consider that willful false swearing is not to be imputed to a witness when it appears that discrepancies and conflicts in his testimony are manifestly honest mistakes.[99] The instruction is applicable where a witness has been wholly discredited.[1] The instruction must contain the limitation that the false swearing must have been willfully and corruptly done,[2] and have related to a material fact,[3] and that other testimony remains uncorroborated.[4]

§ 13. *Admonitory and cautionary instructions.*[5]—The jury may be instructed in positive terms that they must accept the law as laid down by the court.[6] It is proper to instruct that the jury "must weigh the evidence fairly and without partiality or passion," but such an instruction is not a matter of right.[7] It is proper to refuse to instruct that the jury have no right to disregard the testimony of any witness where there is nothing to show that any testimony would be disregarded.[8] It is vicious, if not erroneous, to warn a jury that their special findings must be consistent with their general verdict.[9] When jurors are at the time of retirement admonished as to their conduct during separation, it is not necessary to repeat the admonition before separation actually takes place.[10]

§ 14. *Necessity of instructing in writing.*[11]—In some states it is required by statute that instructions be in writing,[12] unless otherwise agreed upon by the parties.[13] Refusal to give an oral request is not ground for a new trial, though made in response to an inquiry of the court if there was anything they desired charged.[14] Where a court verbally instructs not to consider certain remarks of counsel, a party who does request written instructions cannot complain.[15]

§ 15. *Presentation of instructions.*[16]—The court is not required to analyze and connect the numerous requests and indicate in logical sequence how they modify each other.[17] Failure of the judge to sign his name to the charge written by him

97, 98, 99. Pumorlo v. Merrill [Wis.] 103 N. W. 464.

1. Fields v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 134.

2. Sardis & D. R. Co. v. McCoy [Miss.] 37 So. 706. Instruction that "if a witness has testified falsely as to a material fact his entire testimony may be disregarded" is erroneous. Jackson v. Powell, 110 Mo. App. 249, 84 S. W. 1132. Instruction that before the testimony of a witness may be disregarded the jury must believe he has "palpably" testified falsely, is erroneous. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531. An instruction that the testimony of one credible witness may be entitled to more weight than that of many others who have testified falsely and are not corroborated is erroneous in omitting the hypothesis that they knowingly testified falsely and because it limits the corroboration to other credible witnesses instead of to other credible evidence. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760.

3. Bickerman v. Tarter, 115 Ill. App. 278. Instruction that testimony of a witness who had knowingly testified falsely might be disregarded is erroneous when it is given without regard to whether the testimony related to a material issue. Weddemann v. Lehman, 111 Ill. App. 231.

4. An instruction to disregard the testimony of a witness who has sworn falsely without regard to whether he has been corroborated or not is erroneous. Szymkus v. Eureka Fire & Marine Ins. Co., 114 Ill App. 401; Himrod Coal Co. v. Clingan, 114 Ill. App. 568.

5. See 4 C. L. 153.

6. Where a juror insists upon applying his own legal opinion instead of accepting the law from the court. Council v. Teal [Ga.] 49 S. E. 806.

7. Snedecor v. Pope [Ala.] 39 So. 318.

8. Hintz v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 292, 104 N. W. 23.

9. Cleveland, etc., R. Co. v. Sivey, 6 Ohio C. C. (N. S.) 221.

10. Fields v. Dewitt [Kan.] 81 P. 467.

11. See 4 C. L. 153.

12. Hurd's Rev. St. 1903, c. 110, § 53 applies to an instruction directing a verdict. Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515.

13. Under Acts 1903, p. 338, c. 193, § 1, instructions may be given orally with the consent of the parties, but before exception can be taken the portions excepted to must be particularized by number. Strong v. Ross [Ind. App.] 75 N. E. 291.

14. Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719. Otherwise refusal of request will not be considered on appeal. Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322.

15. American Cotton Co. v. Simmons [Tex. Civ. App.], 13 Tex. Ct. Rep. 343, 87 S. W. 842.

16. See 4 C. L. 153.

17. That the main charge and various requests relating to the same subject are not given in strict connection is not reversible

and read to the jury is not reversible error.[18] Failure to send the instructions to the jury room is not reversible error in the absence of an objection.[19]

§ 16. *Additional instructions after retirement*[20] should not be given after the deliberations of the jury have commenced.[21]

§ 17. *Review.*[22]—It is presumed on appeal that instructions given were obeyed,[23] and in determining whether or not they were understood, words used will be given their customary significance.[24] An appellate court is not required to survey the entire testimony of a case in order to ascertain whether a particular instruction should have been given.[25]

Objections and exceptions below.[26]—A general exception to an entire charge is not sufficient where the objectionable element is contained in an instruction that is correct in general.[27] A defect in form in an instruction must be pointed out by specific objection.[28] An exception must point out the portion of the charge claimed to be erroneous,[29] and state wherein it is erroneous,[30] and be made in conformity to statutory requirements.[31] The reasons of a refusal to give an instruction need not be excepted to.[32] An exception to a refusal to give instructions is not waived by proceeding with the trial.[33] An objection to an erroneous charge is not waived by failure to request a proper one.[34]

The record on appeal.[35]—In order that instructions may be reviewed on appeal, they must be set out in full in the record,[36] and the record must state that all the instructions given are included,[37] otherwise it will be presumed that error therein was cured.[38] The record must show that requested instructions were presented at

error. Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549.

18. International & G. N. R. Co. v. Lucas [Tex. Civ. App.] 84 S. W. 1082.

19. Under Code, § 128 (Comp. Laws 1891, § 2685), requiring that all instructions be taken to the jury room, failure to send them is not ground for new trial in the absence of objection to such failure. Cunningham v. Springer [N. M.] 82 P. 232.

20. See 4 C. L. 153. See, also, Special Article on Additional Instructions, 4 C. L. 1718.

21. Under Rev. St. 1895, art. 1321, providing for additional instructions on application of the jury in open court, it is error to recall the jury for such purpose after they had retired and been in deliberation for half an hour. Bailey v. Hartman [Tex. Civ. App.] 85 S. W. 829.

22. See 4 C. L. 154.

23. Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367. One that told them emphatically to disregard a certain portion of the charge. Rudberg v. Bowden Felting Co. [Mass.] 74 N. E. 590.

24. Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489.

25. Beadle v. Paine [Or.] 80 P. 903.

26. See 4 C. L. 154. See, also, Saving Questions for Review, 4 C. L. 1368.

27. McDermott v. Severe, 25 App. D. C. 276.

28. Davis v. Richardson [Ark.] 89 S. W. 318. Special exception must be taken to an instruction which assumes a controverted fact. McElvaney v. Smith [Ark.] 88 S. W. 981.

29. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15.

30. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913.

31. Under Acts 1903, p. 338, c. 193, § 1, an exception to the giving or refusing of instruction **must be dated.** Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Under Acts 1903, p. 338, c. 193, § 1, an exception **must set forth the substance of the instruction excepted to.** Id. Acts 1903, p. 338, c. 193, § 1, providing a memorandum indicating the numbers of instructions given and those refused, shall be signed by the judge, a memorandum signed by counsel does not establish the fact of refusal. Id. Acts 1903, p. 338, c. 193, § 1, does not authorize the taking of an exception to the modification of an instruction. Id.

32. Under Code Civ. Proc. § 1080, amended by Sess. Laws 1901, p. 160, authorizing an exception to a refusal to give instructions, the reason of the refusal need not be excepted to. Chessman v. Hale [Mont.] 79 P. 254.

33. Chessman v. Hale [Mont.] 79 P. 254.

34. Bibb v. Missouri, etc., R. Co. [Tex. Civ. App.] 84 S. W. 663.

35. See 4 C. L. 154. See, also, Appeal and Review, 5 C. L. 121.

36. All instructions must be set out in the record: Pittsburg, etc., R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873; Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154; Village of Wilmette v. Brachle, 110 Ill. App. 356; The Fair v. Hoffmann, 110 Ill. App. 500. Instructions not incorporated into the abstract of appeal will not be reviewed. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140.

37. Netcher v. Bernstein, 110 Ill. App. 484.

38. If the record does not show that all the instructions given are contained, it is presumed that instructions covering those refused were given. Kehl v. Abram, 112 Ill. App. 77.

the proper time.[39] Objectionable instructions must be set out in the brief,[40] and discussed in the argument.[41]

Invited error.[42]—A party cannot complain of instructions given at his own request,[43] nor of error in an instruction given if his own instructions requested[44] or given[45] contain like error. A party who requests the greater portion of instructions cannot complain that the instructions given were too voluminous,[46] and where a counsel states in open court that there is but one issue, an instruction upon some other issue may be refused.[47]

Harmless error.[48]—A party cannot complain of error which was cured by other instructions,[49] or which was not prejudicial to him,[50] nor of one which was to his advantage.[51]

Instructions must be considered as a whole[52] in the light of the evidence intro-

39. Record on appeal must show that instructions refused were tendered before commencement of the argument. Recital that they were presented at the proper time is disapproved. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

40. Error in or refusal to give instructions is deemed waived where not set out in the brief. Huey Co. v. Johnston [Ind.] 73 N. E. 996.

41. Only instructions specifically discussed in the argument will be considered. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386.

42. See 4 C. L. 155. See, also, Harmless and Prejudicial Error, 5 C. L. 1620.

43. Gulf & S. I. R. Co. v. Boswell [Miss.] 38 So. 43. A party cannot contend on appeal that his own instruction was erroneous. City of Ottawa v. Hayne, 214 Ill. 45, 73 N. E. 385. If a requested instruction contains inapt words, other instructions using such words cannot be complained of on that ground by the party making the request. Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489.

44. One cannot complain of an error in an instruction when his own instructions contain a like error. Central R. Co. v. Sehnert, 115 Ill. App. 560; Galveston, etc., R. Co. v. Vallrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279; Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858.

45. People v. Griesbach, 112 Ill. App. 192; Houston & T. C. R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089; Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161; Village of Wilmette v. Brachle, 110 Ill. App. 356; Fraternal Army of America v. Evans, 114 Ill. App. 578; Cleveland, etc., R. Co. v. Alfred, 113 Ill. App. 236. One cannot assert error in an instruction upon a certain theory when an instruction upon the same theory was given at his request. Kimball Co. v. Piper, 111 Ill. App. 82.

46. Heman v. Hartman [Mo.] 87 S. W. 947.

47. Winslow v. Guthrie, 113 Ill. App. 50.

48. See 4 C. L. 155. See, also, Harmless and Prejudicial Error, 5 C. L. 1620.

49. Refusal to give a correct request is cured by giving a substantially identical instruction. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207.

50. The mere recital in an instruction of an uncontroverted fact is harmless. Spencer v. St. Louis Transit Co. [Mo. App.] 86 S. W. 593. Failure to instruct to disregard incompetent evidence is harmless where the court directs a verdict. Uzzell v. Horn [S. C.] 51 S. E. 253. Refusal of a correct instruction is harmless where the verdict shows that such refusal did not affect the issue. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. Error in modifying an instruction is harmless where the elements omitted were covered by other instructions. Coal Belt Elec. R. Co. v. Kays [Ill.] 75 N. E. 498. An erroneous instruction if disregarded in arriving at the verdict is harmless. Cheney v. Field, 114 Ill. App. 597.

51. A party cannot complain of an error favorable to himself. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15. Imposing too great a burden of proof on the opposing party. Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664. Plaintiff cannot complain where only error is in imposing too great a burden on defendant. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505. A party cannot complain of inconsistent instructions favorable to himself. James v. Lyons Co. [Cal.] 81 P. 275. A charge as to facts excusing contributory negligence, although in the opinion of the court unnecessary, is not to the prejudice of the defendant if no contributory negligence existed. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8. A party cannot complain of failure to submit an issue when such failure is favorable to him. Mitchell v. Pinckney [Iowa] 104 N. W. 286.

52. See 4 C. L. 155. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076; Patch Mfg. Co. v. Protection Lodge No. 215, I. A. M. [Vt.] 60 A. 74; Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 102 N. W. 793; United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435; Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547; Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; Reuss v. Monroe, 115 Ill. App. 10; Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621. Instructions given for both parties will be considered together. Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489.

Held not misleading: Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34; Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971; Houston & T. C. R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089; Bowick v. American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276.

Held not erroneous: City of Lexington v. Fleharty [Neb.] 104 N. W. 1056; Beadle v.

duced,[53] and the special circumstances of the case,[54] and if, when so considered, they fairly and correctly present the law applicable to the case,[55] it is not ground for reversal that a single instruction was erroneous[56] or incomplete,[57] or not happily expressed[58] or misleading,[59] or otherwise subject to criticism.[60] But this rule does not apply if as a whole they do not state the law correctly,[61] and if as a whole they are misleading, it is ground for reversal, though no particular portion is erroneous.[62] The correctness of an instruction given is to be determined by considering it in connection with the other instructions.[63] Omissions[64] or errors[65] in one may be supplied or cured by the contents of others.

Curing bad instructions.[66]—As a general rule they cannot be cured by the giving of a correct one,[67] especially where the erroneous one was prominently called to the

Paine [Or.] 80 P. 903; Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536; Central R. Co. v. Sehnert, 115 Ill. App. 560; German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361; Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728; Price v. Denison [Minn.] 103 N. W. 728. Held **not prejudicial** to a party. Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609. Held not to inject into the case a question not litigated. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 397. Held not to allow a recovery for negligence with which the defendant was not chargeable. Houston & T. C. R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838. Held properly to state the law applicable to the degree of care required of carriers of passengers. Hart v. Seattle, etc., R. Co., 37 Wash. 424, 79 P. 954. Held, a fair statement. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429. As to measure of damages, held proper. Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984. Held to properly present the case. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Held not to submit abandoned issues. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863.

53. Humphrey v. Pope [Cal. App.] 82 P. 223.

54. Chicago Union Traction Co. v. Chugren, 110 Ill. App. 545.

55. If the instructions as a whole present the law to the jury with substantial correctness, it is sufficient. Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161. Where the charge as a whole is proper, a particular portion of it which is appropriate to its setting will not be deemed erroneous because the necessary instructions were omitted. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21.

56. Under Burns' Ann. St. 1894, § 670. Indianapolis St. R. Co. v. James [Ind. App.] 74 N. E. 536; Humphrey v. Pope [Cal. App.] 82 P. 223.

57. Mitchell v. Pinckney [Iowa] 104 N. W. 286.

58. Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259.

59. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856. The instructions must be considered as a whole to determine whether the jury were misled by excerpts which if standing alone would be subject to criticism. Templin v. Boone [Iowa] 102 N. W. 789.

60. Taylor v. Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 1019. An instruction impartial and correct as a whole is not objectionable because portions of it if standing alone would be subject to criticism. Guild v. Andrews [C. C. A.] 137 F. 369.

61. Where instructions as a whole do not correctly state the law, the proposition that if as a whole they do state the law correctly, a single erroneous instruction is not ground for reversal, does not apply. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288.

62. Renn v. Tallman, 25 Pa. Super. Ct. 503.

63. Virginia Portland Cement Co. v. Luck's Adm'r, 103 Va. 427, 49 S. E. 577. A part of the charge set out in the "case" on appeal cannot be detached from the rest of it and considered as an independent proposition. Graves v. Norfolk & S. R. Co., 136 N. C. 3, 48 S. E. 502.

64. Toledo, P. & W. R. Co. v. Hammett, 115 Ill. App. 268. It is not necessary to state the entire law of the case in one instruction. Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 504. Omissions in one may be supplied by contents of another. Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69. Instruction which ignores some of the questions involved is not ground for reversal where those questions were fully covered by other instructions. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. If instructions as a whole fully state the law applicable to the case, it is not ground for reversal that particular instructions standing alone did not embody all the law applicable. Anderson v. Seropian [Cal.] 81 P. 521.

65. Defective instruction held cured by the presentation of the case and other instructions. Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127. A defect in one paragraph of the charge in that it assumes disputed facts is cured by another portion placing the burden of proof of such facts. Barklow v. Avery [Tex. Civ. App.] 13 Tex. Ct. Rep. 893, 89 S. W. 417. Instruction defining "ordinary care," if erroneous, held to have been cured by other instructions. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

66. See 4 C. L. 157. See, also, Harmless and Prejudicial Error, 5 C. L. 1620.

67. Sands v. Marquardt [Mo. App.] 87 S. W. 1011; Heard v. Ewan [Ark.] 85 S. W. 240; Fletcher v. Eagle [Ark.] 86 S. W. 810; Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79; St. Louis & N. A. R. Co. v. Midkiff [Ark.] 87 S. W. 446; Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463; Love v. Turner [S. C.] 51 S. E. 101; Shepherd v. St. Louis Transit Co. [Mo.] 87 S. W. 1007. Erroneous instruction in a **bastardy proceeding** not rendered harmless by a prior correct one. Shailer v. Bullock [Conn.] 61 A.

attention of the jury,[68] or the curative one did not refer to the erroneous one.[69] But a contrary rule has been held.[70] An instruction placing the burden of proof on the wrong party is cured by an explicit charge to the contrary,[71] and one subject to criticism in not stating the correct measure of damages may be cured by repeated instructions on the correct measure.[72] A misstatement of a theory may sometimes be cured by a correct statement in another instruction.[73]

INSURANCE.

Matters relating to fraternal benefit[74] and marine insurance are treated elsewhere.[75]

65. An instruction which **states an incorrect principle of law** cannot be cured by any other instruction given. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113. An instruction erroneous in that it **does not correctly state the law** is not cured by other instructions. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908. An **incomplete statement of the law** in one instruction is not cured by a complete statement in another unless it appears that the jury were not misled by the former. Continental Casualty Co. v. Peltier [Va.] 51 S. E. 209.

68. Kelley v. United Traction Co., 88 App. Div. 234, 85 N. Y. S. 433.

69. City of Cleburne v. Gutta Percha & R. Mfg. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 108, 88 S. W. 300.

§ 1. *Insurance laws, regulations and supervision in general.*[76]—The insurance business is of such a nature as to be subject to regulation under the police power of the state,[77] and supervisory and visitorial powers are usually conferred on a state officer.[78]

The general insurance laws do not ordinarily apply to fraternal benefit associations.[79] The character of the company in this regard is to be determined from its policies and not from its name, nor, in the case of foreign companies, from the character given it by the officer admitting it to do business within the state.[80] The character of a foreign company is to be determined by the law of the forum.[81]

§ 2. *Corporations and associations doing an insurance business. A. Corporate existence, character, management, rights and liabilities.*[82]—If the constitution reserves to the legislature the right to amend, alter, annul, or repeal all gen-

70. An erroneous charge that it is the duty of a carrier to deliver freight to the consignee is cured by a charge that the duty is only to give notice of its arrival. Bristow v. Atlantic Coast Line R. R. Co. [S. C.] 51 S. E. 529.

71. Rice v. New York City R. Co., 94 N. Y. S. 326.

72. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114.

73. Where there is small dispute as to facts. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49.

74. See Fraternal Mutual Benefit Associations, 5 C. L. 1523. All cases having to do with the contracts of such associations are there treated even if the general rules of insurance law apply.

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

76. See 4 C. L. 158.

77. Alabama: Code 1896, § 2619, providing that if any person or corporation engaged in the business of fire insurance shall be a member of any tariff association, or have agreements with fire insurance corporations as to rates of premiums, any policy stipulations as to giving notice or proof of loss, etc., shall be void, is a valid police regulation. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204. Is not unconstitutional as discriminating against particular individuals or corporations. Id.

Arkansas: Act Jan. 23, 1905, making it conspiracy for insurance companies to enter into a combination to fix the price of insurance, etc., and prescribing penalties, is valid. Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42.

Iowa: Companies doing business in Iowa are not deprived of rights under the 14th amendment to the Federal constitution by Code 1897, § 1754, making it unlawful for them or their agents to enter into combinations relating to rates, etc. Carroll v. Greenwich Ins. Co., 26 S. Ct. 66.

78. An injunction pendente lite restraining voting trustees from voting plaintiff's stock, but not interfering with their action as officers of the company, does not require the application of the attorney general and approval of the superintendent of insurance. Under Laws 1892, p. 1958, c. 690, § 56. Knickerbocker Inv. Co. v. Voorhees, 100 App. Div. 414, 91 N. Y. S. 816. Under Hurd's Rev. St. 1903, c. 73, par. 3, the Superintendent of Insurance can maintain a bill against foreign insurance companies to restrain them from doing business within the state of Illinois without complying with the insurance laws thereof. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423, afg. 116 Ill. App. 217. Is made applicable to foreign companies by Rev. St. 1874, c. 32, § 26, making foreign companies subject to the same liabilities, restrictions, and duties as domestic ones. Id. Not necessary to show an injury to civil or property rights before bill will lie. Id. For the purpose of avoiding a multiplicity of suits he may maintain a single bill against several such companies which maintain an agency in the state for the transaction of all sorts of fire insurance business except the issuing of policies on property located within the state. Id. Allegation that companies did everything pertaining to carrying on insurance business except to issue policies covering property within the state, held not to exclude the charge that they solicited insurance from citizens on their property outside the state. Id. Bill held not multifarious, the acts complained of being all a part of a common plan or conspiracy. Id.

79. See, also, Fraternal Benefit Associations, 5 C. L. 1523. Missouri statutes prohibiting the defense of suicide (Rev. St. 1899, § 7896) and providing that misrepresentations shall not avoid the policy unless they actually contribute to the death of the insured (Rev. St. 1899, § 7890). Herzberger v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986. The Royal Arcanum is a fraternal order and exempt from the insurance laws of the state. Gilligan v. Supreme Council of Royal Arcanum, 26 Ohio C. C. 42, 5 Ohio C. C. (N. S.) 471.

80. Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

81. Foreign society authorized to issue certificates to representatives of the insured is not a fraternal benefit association within the meaning of Rev. St. 1899, § 1408, and hence is subject to the general insurance laws, though it is such an association under the laws of the state where it is incorporated. Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

82. See 4 C. L. 158. See, also, Associations and Societies, 5 C. L. 292; Corporations, 5 C. L. 764.

eral or special laws, it may amend the special charter of an assessment company even though no such right is reserved in the charter itself.[83]

A company authorized to issue both old line and assessment insurance may, in the absence of a provision to the contrary in its policies or its charter, discontinue the writing of the latter kind, at least as against a policy holder who fails to show that he was in any way injured thereby.[84] An assessment company may change to the old line plan of insurance where power to amend its charter is expressly reserved,[85] or a right to do so is conferred by the statutes or constitution of the state where it is organized.[86] Such a change does not impair the obligations of the contracts of members previously insured, where no attempt is made to repudiate them and the assessments thereon are not thereby rendered unreasonable.[87] The members of such an association have no vested interest in its assets, and hence those who are dissatisfied with the change must seek redress at law and not by a suit in equity to dissolve the association unless it be shown that the affairs of the corporation are grossly mismanaged by those charged with the responsibilities of a proper conservation of its assets.[88] A policy holder electing to cancel his policy and demand a return of the money he has paid is bound to pursue that remedy and cannot thereafter maintain a suit to compel the association to continue business under its original plan.[89]

In Kentucky real estate title insurance companies existing under special acts of the legislature passed prior to the present constitution are nevertheless restricted in their powers by the subsequent legislation relative to such corporations.[90]

Insolvency.[91]—In the settlement of the affairs of an insolvent insurance company, whether it is a joint stock, mutual, or endowment company, ordinary creditors, policy or certificate holders, and stockholders should ordinarily be preferred

83. May authorize change to old line plan. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. Although the act providing for the incorporation of stock life insurance companies may contain no reservation of the right to alter or amend the charters of such companies (Laws 1853, p. 887, c. 463), yet they may be altered or amended where the right to amend the charter of every corporation is reserved by a general statute (1 Rev. St. p. 600, § 8). Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

84. Plaintiff held to have failed to show that the amount of his assessments was increased by the change. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

85. The power to amend the charter of a mutual assessment association gives a right to make any amendment reasonably calculated to accomplish the purpose which the association had in view at the time of its formation. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268. Where the charter of an assessment association specifically reserves to its officers the power of amendment, the association may, by such an amendment, change from the assessment to the old line plan of insurance over the protest of a minority of the policy holders. Particularly where change is authorized by statute. Id. Both under the statute and general principles of law company held authorized to make change at annual meeting without special notice. Id. Evidence held not to sustain charges of fraud and insolvency. Id.

86. Persons who become members of an assessment insurance association pursuant to contracts providing that they shall be controlled by the laws of the state where it is incorporated are presumed to have full knowledge of the provisions of the constitution and laws of such state under which it has a right to change its plan of operations (Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273), and hence their contract rights are not impaired by a change to the old line plan of insurance authorized by the laws of such state (Id.). Change authorized by Laws 1892, p. 1955, c. 690, § 52, as amended by Laws 1901, p. 1779, c. 722. Id. Act of reincorporation as authorized by such laws does not operate to create a new corporation, though a different name is assumed and a new plan of insurance is adopted. Id.

87. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268.

88. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. Record held to sufficiently show that company was not insolvent. Id. Allegations of fraudulent mismanagement not supported by any averment of specific facts cannot be considered as an admission of fraudulent mismanagement by a demurrer to the bill. Id.

89. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268.

90. Such a corporation, by failure to accept the constitution, is not estopped to deny that it is exercising all the privileges granted by its special charter. Act March 19, 1894 (Acts 1894, p. 226, c. 99). Hager v. Kentucky Title Co., 27 Ky. L. R. 346, 85 S. W. 183.

91. See 4 C. L. 160, n. 20-29. See, also,

in the order named.[92] The representatives of a certificate holder in an endowment association who dies before it becomes insolvent are general creditors within this rule, and their claim is entitled to a preference over those of the other certificate holders and stockholders.[93] The liability of certificate holders in an endowment association to pay assessments terminates on its insolvency and the commencement of proceedings to wind up its affairs, and as creditors they become entitled to an accounting as to the present value of their certificates on the basis of their surrender value.[94] The relative rights of the policy holders and the general creditors of an assessment company are to be determined with reference to the provisions of the charter, constitution, and by-laws of the company, and of the statutes, all of which form a part of the contract between the company and the policy holders.[95] In so far as such provisions subject certain assets to the payment of particular liabilities, the prior equities which may be thereby created should be considered in the application and distribution of the assets of the company under the receivership.[96]

Taxation[97] of the property of domestic or foreign companies within the state is governed by the provisions of the general and special revenue laws and is treated elsewhere.[98]

(§ 2) *B. Conditions necessary to engage in insurance business, and certification and withdrawal of right.*[99]—Insurance companies are often required to

Corporations, 5 C. L. 764; Receivers, 4 C. L. 1238.

92. Gilbert v. Endowment Ass'n, 21 App. D. C. 344. Where sale by insolvent endowment association of its entire property to another company was set aside for fraud and want of consideration, and claim of latter company for reimbursement of purchase price was denied until claims of creditors and certificate holders were satisfied, held, that auditor in distributing funds of association, which were insufficient to pay such claims, properly excluded claim of vendee for reimbursement. Id. Imperfections in pleadings in several consolidated actions will not be allowed to stand in the way of the distribution of fund derived from sale of assets of insolvent insurance company. Id.

93. Particularly where it has been reduced to judgment. Gilbert v. Endowment Ass'n, 21 App. D. C. 344.

94. Gilbert v. Endowment Ass'n, 21 App. D. C. 344.

95. Betts v. Connecticut Life Ins. Co. [Conn.] 62 A. 345. Provisions of charter and by-laws held not to render policyholders liable to creditors as partners, the company being a joint stock company, the entire management of which was in the hands of officers and directors chosen by the stockholders only. Id.

96. Betts v. Connecticut Life Ins. Co. [Conn.] 62 A. 345. Neither Gen. St. 1902, § 3546, providing that court may direct application of avails of assets and property equitably in satisfaction of claims proved against company, nor Id. § 3554, providing for application of assets by insurance commissioner, operates to change the rule. Id. Under charter (10 Sp. Laws, p. 616), constitution, and by-laws of assessment company, held, that moneys derived by receiver from judgments against stockholders for amounts due on their stock subscriptions belonged to the working capital, and, it having been reduced below the required amount, the policyholders were entitled to so much thereof as might be necessary to make up such required amount as against the general creditors. Id. Order that receiver of insolvent company should apply principal of fund deposited with state treasurer by the company, together with the interest accruing thereon after the fund was placed in the receiver's custody as a trust fund for the benefit of the policyholders, held proper under Gen. St. 1902, §§ 3607, 3611. Id.

97. See 4 C. L. 161, n. 30.

98. See, also, Licenses, 4 C. L. 428; Taxes, 4 C. L. 1605. Operations of soliciting agent whose duties are to solicit insurance, receive and forward the application, receive the policy and deliver it to the insured and collect the first premium constitute a "doing and conducting of an insurance business" within an ordinance levying a license for the doing and conducting of an insurance business of whatever kind. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578.

A statute forbidding the right of action on any contract in a business when the privilege license has not been paid is not a statute of limitations. Rev. Code 1892, § 3401. Is an absolute bar. North British & Mercantile Ins. Co. v. Edwards [Miss.] 37 So. 748. And hence an amnesty act, removing such bar of recovery, is not a violation of the constitutional inhibition of the revival of rights of action barred by lapse of time or statutes of limitation. Acts 1904, p. 57, c. 75 does not violate Const. § 97. Id. Such constitutional provision relates only to a limitation of time in which suit may be brought existing under the statute or the general law, and not to a contractual limitation. Id. Fact that year in which, under the terms of the policy, a suit could be brought thereon had elapsed before the passage of the amnesty act held not to preclude a recovery after the passage of such act. Company cannot take advantage of the bar in aid of the contractual limitation. Id.

make deposits with the state for the protection of policy holders.[1] Every fire, life, and accident company doing business in Arkansas is required to give a bond to the state conditioned for the prompt payment of all claims arising and accruing to any person during the term of the bond under any of its policies, and to renew the same annually.[2] The bond does not become effective until presented to and approved by the state auditor, but it may, if it expressly so provides, have a retroactive effect so as to cover losses occurring between its date and the date of such approval.[3] The claim is deemed to arise and accrue and the liability of the sureties is fixed when the loss occurs, and not when the amount thereof becomes payable under the terms of the policy.[4]

§ 3. *Foreign insurers and companies.*[5]—Since the power of an insurance company to do business in a state other than that where it was organized is derived from the express or implied will of the legislature thereof,[6] the legislature may absolutely exclude foreign companies,[7] or admit them upon such conditions and subject to such restrictions as it may see fit to impose,[8] provided they are not repugnant to the constitution,[9] and may discriminate between domestic and foreign corporations in its regulations.[10] Thus it may prohibit such companies from becoming members of pools or combinations to fix rates,[11] require them to appoint the insurance commissioner or some other public officer as their agent upon whom process may be served,[12] or to purchase government, municipal, or state bonds and

99. See 4 C. L. 161. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

1. An insurance company is organized for all purposes, except issuing policies, when its charter has been filed and approved by the attorney general, its capital stock subscribed and directors elected. Under the Act of 1869, may proceed with collection of subscriptions, etc., though it has not made deposits required by Hurd's Rev. St. 1901, c. 73, §§ 176, 180, 181. Blinn v. Riggs, 110 Ill. App. 37.

2. Sand. & H. Dig. §§ 4124, 4127, 4130. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

3. S. & H. Dig. § 4130. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93. Bond providing that it should cover the period from March 1, 1900, until March 1, 1901, held to have become effective on the former date and to cover loss occurring March 2, 1900, though not approved until March 16, 1900. Id. Statute requires bond to run for a year, and obligors are presumed to have known that fact and to have bound themselves with reference thereto. Id. Liability of sureties is not affected by the fact that company had previously given a bond running for one year from May 16, 1899. Id.

4. Liability of company on fire policy is fixed when loss occurs, though policy provides that it shall not be payable until 60 days after the receipt of proofs of loss, and liability of sureties becomes fixed with that of the principal. Hence suit is properly brought on bond in force when loss occurs. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

5. See 4 C. L. 161. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523; Foreign Corporations, 5 C. L. 1470.

6. Swing v. Hill [Ind.] 75 N. E. 658; Commonwealth v. Gregory [Ky.] 89 S. W. 168.

7. Commonwealth v. Gregory [Ky.] 89 S. W. 168; Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

8. Continental Ins. Co. v. Parker [Ala.] 39 So. 204; Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42; Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703; Commonwealth v. Gregory [Ky.] 89 S. W. 168; Equitable Life Assur. Soc. v. Host [Wis.] 102 N. W. 579.

9. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

10. May require agents of foreign companies to take out license though agents of domestic companies are not required to do so. Commonwealth v. Gregory [Ky.] 89 S. W. 168.

11. See, also, § 1, ante. Code 1896, § 2619, providing that, if any insurer shall become a member of any tariff association or shall make any agreement with other companies in regard to rates, provisions in its policies relating to notice and proofs of loss, etc., applies to foreign companies and is valid. Continental Ins. Co. v. Parkes [Ala.] 39, So. 204. Act Jan. 23, 1905, prohibiting insurance companies entering into pools or combinations from doing business in the state is valid. Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42. Act prohibits the doing of business in Arkansas by company belonging to trust or pool to fix rates anywhere, though such trust is not created or maintained in that state, and does not fix or attempt to fix rates on property in such state. Id.

12. Such regulations are reasonable and valid and do not violate due process of law clause of Federal constitution. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Insurance commissioner. Laws 1901, p. 66, c. 5; Laws 1899, p. 175, c. 54, § 62 (3). Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

deposit them with a designated state officer for the protection of policy holders,[13] or require them[14] or their agents to obtain a license to do business within the state.[15] It has, however, no power to prohibit citizens from making contracts outside of the state insuring property within its boundaries.[16]

Foreign companies doing business within the state after such conditions have been imposed will be presumed to have assented to them, at least in the absence of pleading and proof to the contrary.[17]

The collection of premiums, payment of losses, making of contracts of insurance, issuance of policies and conducting and maintaining of insurance agencies constitute the transaction of business within the meaning of the insurance laws;[18] but the mere appointment of an agent or the taking of a bond from him does not.[19]

The business of insurance is not commerce, and hence laws regulating foreign companies are not violative of the interstate commerce clause of the Federal constitution.[20]

Foreign companies cannot sue on contracts founded on acts which are at variance with the law or the settled policy of the state of the forum, even though such contracts are made in another state.[21]

The license of a foreign company may be revoked for violation of its charter provisions[22] or of the laws of the forum.[23] A judgment of revocation should not declare policies theretofore issued to be void where none of the policy holders have been made parties to the suit or given a hearing.[24]

13. Under Ohio Rev. St. § 3660, foreign companies are required to invest in and deposit bonds for the protection of local policy holders, before doing business in the state; also, under § 2745, to pay a privilege tax. Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 49 Law. Ed. 619. The bonds so required to be deposited are taxable as personal property. Id.

14. In Indiana: From the auditor of the state, under Rev. St. 1881, § 3765. Wilson v. Ohio Farmers' Ins. Co. [Ind.] 73 N. E. 892.

Louisiana: A separate license may be exacted of a foreign insurance company by every municipality where it does business. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578. Not relieved from liability for municipal license by proof that it has already paid to another city a license predicated on the business done by it throughout the state. Id.

15. See § 4B, post.

16. In suit by trustee for creditors of foreign company to recover statutory liability against policy holders, held no defense that company wrote policies insuring property in Indiana for benefit of citizens of that state, without having complied with its insurance laws, it not appearing that the contracts were made in that state or were to be performed there. Swing v. Hill [Ind.] 75 N. E. 658.

17. Will be presumed to have filed stipulation required by statute authorizing service on insurance commissioner, and hence judgment based thereon does not deny company due process of law. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

18. North American Ins. Co. v. Yates, 116 Ill. App. 217, afd. 214 Ill. 272, 73 N. E. 423. Issuance of policy by foreign company on property within the state and its delivery to the owner constitute a doing business within the state, within the meaning of code, §§ 1721, 1725, 1747, in regard to foreign companies. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524. Foreign company is doing business within a state, so as to confer jurisdiction on Federal courts, where policies covering property therein require it to send its agents there to adjust its losses. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 Law. Ed. 810.

19. Wilson v. Ohio Farmers' Ins. Co. [Ind.] 73 N. E. 892.

20. Statute requiring agents of foreign companies to obtain licenses. Commonwealth v. Gregory [Ky.] 89 S. W. 168. Provision that, if insured is member of tariff association or has made agreement with other companies as to rates, stipulations in its policies requiring notice of loss shall be void. Continental Ins. Co. v. Parker [Ala.] 39 So. 204.

21. Under Comp. Laws 1897, § 5157, prohibiting anyone from soliciting insurance for a foreign company without a certificate and § 10,467, prohibiting foreign corporation from maintaining an action founded on any forbidden act, mutual insurance contract covering property within the state, made between a resident and a foreign company which had not complied with the laws of the state, the insurance having been placed through an agent outside of the state, cannot, on the insolvency of the company, be made the basis of an action for an assessment levied in the insolvency proceedings. Swing v. Western Lumber Co. [Mich.] 12 Det. Leg. N. 188, 103 N. W. 816.

22. The issue of "deferred dividend insurance," whereby the cumulated assets or surplus is to be distributed only in longer periods than 5 years, being authorized by the laws of New York, the license of a New York company to do business in Wisconsin will not be revoked on the ground that its business is unauthorized. See Gen. Laws N. Y. 1872, c. 100 (Rev. St. [Birdseye's Ed.] p. 1849)

A foreign mutual company which executes the bond required of stock companies, instead of that required of mutual companies, and does business in the state as a stock company, using the standard policy, and the sureties on such bond, are estopped to plead that such policies are ultra vires.[25]

§ 4. *Agents and solicitors for insurance. A. Distinctions and kinds of agency.*[26]—One having authority to accept risks, countersign, issue, and renew policies, collect premiums, and the like, is a general agent of the insurer.[27]

By statute in some states any person who solicits insurance and procures the application therefor is declared to be the agent of the company issuing the policy upon such application or any renewal thereof, anything in the application or the policy to the contrary notwithstanding.[28]

One who solicits insurance, receives and forwards applications and delivers the policies to the insured and collects the first premium is an agent and not a mere drummer.[29] One who procures insurance for another through the company's agent is a mere broker;[30] but one who is obligated to solicit insurance for a particular company alone is an agent and not a broker.[31]

An agent who acting as broker procures insurance through the agent of another company is the agent of the one who employs him to secure the insurance and not of the company.[32]

(§ 4) *B. The right to negotiate insurance and regulations thereabout.*[33]—Statutes in many states require agents of foreign companies to be licensed by the state[34] and to give bond.[35]

§ 83. Equitable Life Assur. Soc. v. Host [Wis.] 102 N. W. 579.

23, 24. Equitable Life Assur. Soc. v. Host [Wis.] 102 N. W. 579.

25. Minneapolis Fire & Marine Ins. Co. v. Norman [Ark.] 85 S. W. 229.

26. See, also, Agency, 5 C. L. 64.

27. In modifying contract. German-American Ins. Co. v. Yellow Poplar Lumber Co., 27 Ky. L. R. 105, 84 S. W. 551. Agents having power to solicit and sell insurance, deliver policies, and collect premiums, though the territory in which they operate is restricted. Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500. The local agent of a foreign company, supplied with blank policies signed by the president and secretary, to be filled up, countersigned and issued, has the powers of a general agent as to policies issued by him. Richard v. Springfield Fire & Marine Ins. Co. [La.] 38 So. 563. Evidence sufficient to warrant finding that firm were general agents. Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224, afg. 93 App. Div. 157, 87 N. Y. S. 525.

28. Minnesota: Laws 1895, p. 437, c. 175, § 25. One may become agent by his conduct within meaning of this act, though not regularly appointed. Webster v. Ferguson [Minn.] 102 N. W. 213.

In Iowa any one who solicits insurance or procures applications therefor is regarded as the soliciting agent of the company issuing a policy on such application or a renewal thereof. Code, § 1749. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524. One who requests another to allow him to procure a fire policy on the latter's property and does so is agent. Id.

In South Carolina any person soliciting insurance for a foreign company or doing anything in the making or consummating of a contract of insurance or examining into or adjusting a loss for or in behalf of such company is presumed to be its agent, but such presumption may be rebutted. Civ. Code 1902, § 1810. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

29. Within municipal license law. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578.

30. Fire Ass'n of Philadelphia v. American Cement Plaster Co. [Tex. Civ. App.] 84 S. W. 1115. Agent of one company procuring policy through agent of another company held a mere broker, so that company was not estopped by his fraud. Mahon v. Royal Union Mut. Life Ins. Co. [C. C. A.] 134 F. 732.

31. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578.

32. Defendant not being authorized to issue insurance where the property was situated, procured it through another agent, paying him the premium, but the latter failed to report it to his company, whereupon the policy was canceled; held, that defendant was plaintiff's agent, and was not liable for the premium unless he acted negligently or fraudulently. Marriam v. Robbins, 102 App. Div. 214, 92 N. Y. S. 654.

33. See 4 C. L. 164. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

34. In Iowa agents are forbidden to act for a foreign company in taking risks or transacting business of insurance in the state without having first procured a certificate of authority from the secretary of state to the effect that such company has complied with the statutes. Code, § 1725. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524.

Kansas: Gen. St. 1901, §§ 3381, 3386, providing penalties for acting as agent for foreign companies which have not complied

(§ 4) *C. Rights and liabilities of agents.*[36]—The general rules of contract and agency apply as between the company and its agents.[37] The agent is liable to the company for any loss due to his neglect to follow his instructions[38] or to his fraudulent acts or concealment of facts known to him.[39] He cannot act for himself and the company in the same transaction and as to the same matter.[40] A request from the principal to the agent for action in the line of the agency is equivalent to a demand.[41] Where there is no contractual restraint and no violation of business

with the law, apply to fire companies and their agents. Latham Mercantile & Commercial Co. v. Harrod [Kan.] 81 P. 214.

In Kentucky, under St. 1903, §§ 634, 681, 694, 761, agents of foreign companies are required to obtain licenses and pay fees therefor. Commonwealth v. Gregory [Ky.] 89 S. W. 168. Act does not apply to agents of domestic companies and they are not required to take out licenses. Id. Statute does not violate the Federal constitution as to equal rights of citizens, equal protection of the laws or interstate commerce. Id.

Michigan: Unlawful for any one to solicit insurance for nonresident company without procuring certificate from insurance commissioner that it has complied with the laws of the state. Comp. Laws 1897, § 5157. Swing v. Western Lumber Co. [Mich.] 12 Det. Leg. N. 188, 103 N. W. 816.

35. **In New York** an agent of a foreign company who makes in the state a contract of insurance on property within the state without having filed the bond required by the statute is liable for a penalty. Laws 1892, p. 1989, c. 690, § 135. Ithaca Fire Dept. v. Rice, 95 N. Y. S. 464. Complaint to recover penalty insufficient where it fails to allege that contract was made within the state. Id.

36. See 4 C. L. 164. For power of agents to waive forfeitures see §§ 16 C and 19, post.

37. See, also, Agency, 5 C. L. 64; Contracts, 5 C. L. 664. One appointed agent of life company for the purpose of soliciting insurance from a particular person resigned after the company had declined to issue the policy applied for. Company thereafter issued another policy to such person and agent sued for commissions thereon on the theory that application was procured through his efforts. Held, that evidence that after plaintiff's resignation he had attempted to procure a policy for such person in another company was admissible as tending to show an abandonment of his contract with defendant. New York Life Ins. Co. v. Rilling [Ill.] 76 N. E. 73. Under contract providing that agent shall be allowed commissions on original or renewal cash premiums which shall, "during his continuance as agent" of the company, be received by it, up to and including the fifth year of assurance, should his agency continue so long, on insurance effected by him, agent cannot recover commissions after he ceases to act as such. Chase v. New York Life Ins. Co. [Mass.] 74 N. E. 325. Under further provision that renewal commissions which have not accrued at the termination of his agency shall be placed to his credit as they accrue, provided he is not engaged in the business of life insurance in any capacity for any other company in the state, he cannot recover commissions on renewal premiums paid after his wrongful discharge, where he enters employ of another company in the state. Id. Where a general agent is required to make an "immediate" report on policies held back beyond the contract period, though entitled to a reasonable time to comply, he is not entitled to twenty-four hours, when the report could be made in much less time. State Life Ins. Co. v. Schwarzkopf, 109 Mo. App. 383, 84 S. W. 353. Memorandum on letter heads of state agency of an insurance company reciting that plaintiff is entitled to continuous renewal commissions as long as premiums are paid on all policies placed by him through such agency, and signed by manager as such, held not to be the personal contract of the manager. Anderson v. English, 94 N. Y. S. 200. Extrinsic evidence held to show that contract was made by manager as agent of the company. Id. Could not be construed as engagement on part of manager to answer for debt of company. Id. In any event manager was not liable as no consideration was shown to have passed to him. Id. Placing of insurance with agent prior to the execution by him of a promise to pay renewal commissions on premiums paid does not constitute a sufficient consideration to support such promise. Id.

38. Evidence that agent was directed to reduce amount of risk under binder, that he failed to negotiate with insured for reduction or to give notice of cancellation, and that he never delivered binder executed in behalf of another company, and that company paid its proportion of the loss in accordance with an adjustment under the terms of the policy, held to make out prima facie case. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293.

39. The refusal of the company to allow a clause to be attached to the policy making the loss payable to a bank to which it had been transferred as collateral security, and its instruction to its agent to eliminate such clause, is not a notification to him that it will cancel the policy if the transfer is made, so as to render the agent's acceptance of the transfer, as cashier of the bank, and his failure to notify the bank that it had been made, fraudulent, and make him liable for the amount of the loss, even though it be conceded that company would have canceled policy had it been notified of the transfer. Scottish Union & Nat. Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419.

40. Where the agent procured from his company a policy for himself and, being unable to pay the first premium, his son-in-law paid the premium to him as agent, without the company's knowledge or consent, no part of which premium was ever accounted for or paid over, held, that there was no payment. State Life Ins. Co. v. Harvey [Ohio] 73 N. E. 1056.

secrets imposed in him by reason of his agency, he has the right, after the termination of his agency, to influence policy holders to forfeit or transfer their policies to other companies, regardless of whether they were obtained as the fruits of his own energies or otherwise.[42]

The company is responsible for the fraudulent acts of its agents within the actual or apparent scope of their authority,[43] and a general agent is responsible for the fraud of a soliciting agent who acts for him and not for the company.[44]

An agreement by an insurance broker to keep his principal insured for a certain amount for a term of years, in consideration of a stipulated sum per hundred per year, obligates him to take out a new policy, at his own expense, in place of one canceled;[45] and if he contends that, in case of cancellation, he is entitled to additional commissions and will insist upon them in future, the principal may treat the contract as abrogated.[46] The fact that the principal, having paid the commissions for the first year, asserts during such year that it will not make further payments under the contract, does not put it in default so as to give the broker an immediate right of action for breach of the contract, but his right of action does not accrue until the commissions for the second year become due and are refused.[47] One who employs an insurance broker does not become liable to pay him commissions as such, but at most impliedly agrees to accept the insurance and pay the premiums, thus enabling him to earn his commissions from the company, and in case of a breach, the broker's remedy, if any, is an action for breach of contract and not an action for the commissions.[48]

An agent who negligently fails to procure insurance for his principal's building in accordance with his agreement is personally liable for the resulting loss.[49] One contracting with another who is agent of an undisclosed principal may, on discovery of the principal, resort to him or to the agent at his election;[50] but having once elected to hold the agent he cannot thereafter have recourse to the principal.[51]

One soliciting insurance for a foreign company and delivering its policies impliedly represents that it is authorized to do business in the state and he to act for it,[52] and the insured, in the absence of knowledge to the contrary, is entitled to assume that such is the fact.[53] If the company has not complied with the law the agent will be

41. To reduce amount of company's obligation under binder. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293.

42. American Ins. Co. v. France, 111 Ill. App. 382.

43. In collecting a premium not due, although the company did not authorize or participate in his conduct. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469.

44. Solicitor, acting under a general agent and having no authority from the company to accept notes for premiums, but authorized by the general agent to take notes and turn them in to him, acts as agent for the general agent and not for the policy holder, and the general agent is responsible for his fraud in inducing an applicant to sign a note. Remmel v. Witherington [Ark.] 88 S. W. 967.

45. Tanenbaum v. Federal Match Co., 102 App. Div. 520, 92 N. Y. S. 683.

46, 47. Tanenbaum v. Federal Match Co., 102 App. Div. 524, 92 N. Y. S. 685.

48. Arndt v. Miller, Daybill & Co., 95 N. Y. S. 604.

49. Where plaintiff employed defendant's ex-agent to keep his building insured, but through the latter's negligence no insurance was effected, held under the evidence, that plaintiff relied solely on the agent's individual promise and not on the company. Rounsaville v. North Carolina Home Fire Ins. Co., 138 N. C. 191, 50 S. E. 619.

50. Rounsaville v. North Carolina Home Fire Ins. Co., 138 N. C. 191, 50 S. E. 619.

51. Rounsaville v. North Carolina Home Fire Ins. Co., 138 N. C. 191, 50 S. E. 619. Where plaintiff employed defendant's agent to keep his building insured, but the latter neglected to do so, having told the agent he would look to him for indemnity for his loss and having recovered judgment against him, he thereby elected to treat him as solely liable and could not recover from the company. Id.

52. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524. Is his duty to know that company has complied with statutes. Latham Mercantile & Commercial Co. v. Harrod [Kan.] 81 P. 214.

53. Letter sent with policies held not to require insured to investigate solvency of company so as to relieve insured from liability. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524. Evidence held to sustain finding that insured was not advised that he

held to have guaranteed its solvency to the extent of the statutory requirements for doing business within the state, and is liable to the insured for any loss sustained by him by reason of its insolvency.[54] The policy holder is not, in such case, in pari delicto with the company or its agents.[55] The rule has been held to apply to brokers,[56] in which case actual loss through proof of insolvency of the foreign company is not a prerequisite condition to his liability for the amount of the loss,[57] and it is immaterial that the policy is not rendered void by the company's failure to comply with the law, and that the insured might recover upon it if he could discover the company's domicile.[58] It has also been adopted by statute in some states.[59] One may by his conduct constitute himself an agent within the meaning of such a statute without regard to whether he is the duly authorized agent of any licensed company or the appointed representative of nonlicensed companies,[60] but one acting at the request of the insured is not personally liable unless the latter was deceived by his conduct, having reasonable grounds to believe that the companies involved in the transaction were duly authorized by the state.[61]

In Iowa any agent who solicits with knowledge that the company is insolvent or is doing business in an unlawful manner is guilty of a misdemeanor.[62] The statute of Mississippi requiring an agent transacting business as a "trader or otherwise" to disclose the name of his principal under penalty of making the property used in the business liable for the agent's debts does not apply to a person doing business solely as insurance agent.[63] Under the Kentucky statute a company is not liable for the criminal act of its agent in giving a rebate on a premium, contrary to law, when it did not authorize or assent to the act, but disapproved it.[64]

§ 5. *Insurable risks and interests. Fire insurance.*[65]—The insured must have an insurable interest in the property covered by the policy,[66] not only at the time when the policy is issued but also when the loss occurs,[67] or the contract is void.

would have to take his own risk as to solvency of companies. Id.

54. If company is not worth $200,000 in actual paid-up cash capital, as it must be in order to do business within the state (Code, § 1721), the undertaking of the agent supplies that want for the benefit of the insured, and, if loss occurs, agent must respond to insured and look to company for indemnity. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524. Agents representing several companies who were requested to insure property in a No. 1 company, but placed the insurance with a company not authorized to do business in the state, held liable to the amount of the policy for a loss unpaid on account of company's insolvency. Latham Mercantile & Commercial Co. v. Harrod [Kan.] 81 P. 214.

55. Latham Mercantile & Commercial Co. v. Harrod [Kan.] 81 P. 214.

56. Insurance brokers are charged with the exercise of reasonable care and skill in obtaining information as to the responsibility of the insurer, and are liable for any loss occasioned by the want of such care. Mallery v. Frye, 21 App. D. C. 105. It is the duty of the broker to know whether the insurer has a right to engage in business within the state, and so knowing, not to lend his aid, directly or indirectly, to a violation of the law, and a failure in this regard is negligence. Instruction rendering agent personally liable as a matter of law in such case approved. Id.

57. Mallery v. Frye, 21 App. D. C. 105.

58. Particularly where company's existence anywhere is matter of serious doubt under the evidence. Mallery v. Frye, 21 App. D. C. 105.

59. Laws 1895, p. 437, c. 175, § 87. Webster v. Ferguson [Minn.] 102 N. W. 213.

60. Webster v. Ferguson [Minn.] 102 N. W. 213.

61. Not where insured accepted services with knowledge of the nature of the insurance secured, and acceptance of policies did not depend on whether companies were licensed to do business in the state. Webster v. Ferguson [Minn.] 102 N. W. 213.

62. Code, §§ 1747, 1748. Hartman v. Hollowell, 126 Iowa, 643, 102 N. W. 524.

63. Code 1892, § 4234. Lyons & Co. v. Steele & Co. [Miss.] 38 So. 371.

64. Under St. 1903, § 656, making any company "or" agent giving a rebate liable to a fine. Equitable Life Assur. Soc. v. Commonwealtb [Ky.] 89 S. W. 537.

65. See 4 C. L. 166.

66. Otherwise contract is wagering one. Bennett v. Mutual Fire Ins. Co. [Md.] 60 A. 99.

67. Sale after policy is issued, but before loss, avoids policy. Bennett v. Mutual Fire Ins. Co. [Md.] 60 A. 99. Absolute conveyance cannot be shown by parol to be mortgage in an action at law on the policy, so as to show that insured still retained an interest. Id.

In general, it may be said that any one who will suffer pecuniary loss by its destruction or injury has such an interest.[68]

Life insurance.[69]—The beneficiary in a policy taken out by the insured on his own life and on which the insured himself pays the premium may recover thereon, though he has no insurable interest in the life of the insured, provided the transaction is not a mere cloak for a wager.[70] Life policies issued to one having no insurable interest in the life of the insured are in the nature of wagers, and hence are void as contrary to public policy.[71]

§ 6. *Application.*[72]—If questions in the application, the answers to which become warranties, are ambiguous, they will be construed most strongly against the insurer, and the insured may stand upon the strict form of the question put to him.[73] Thus if a question is dual in character and covers two transactions so coupled as to admit of a single answer, a negative answer is a negation of the proposition as a whole and does not necessarily affirm or deny either of its component parts as an independent proposition, and cannot be said to be false if it is true as to either.[74]

68. Under Civ. Code, § 2546, every interest of such a nature that the contemplated peril might directly damnify the insured. Loring v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025. Anyone having an interest which would be injured if the peril insured against should happen. Hartford Fire Ins. Co. v. McClain, 27 Ky. L. R. 461, 85 S. W. 699.

Held to have insurable interest: Both purchaser of property who paid consideration and mortgagee in whose name he took title, under Civ. Code, § 2546. Loring v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025. The president of a bank loaning money belonging to it and taking as security therefor a note and mortgage running to him personally may, when in possession, insure the property in his own name as mortgagee, and the bank not objecting collect the insurance in case of loss. Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127. A mortgagee in possession. Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127. Vendor of stock of goods, in whose name business is continued and who holds assets to indemnify him against debts contracted in his name. Has material interest in their preservation to the amount of indebtedness for the goods bought in his name, and holds balance as pledgee in trust for the buyer. Hartford Fire Ins. Co. v. McClain, 27 Ky. L. R. 461, 85 S. W. 699. A trustee of an express or an implied trust may effect insurance in his own name for the benefit of the cestui que trust. Id. A vendee in a contract of conditional sale of personalty who is to be held liable for loss or damage by fire, to the amount of his advancements and his liability for possible destruction by fire. Ryan v. Agricultural Ins. Co. [Mass.] 73 N. E. 849. The holder of the legal title to personalty subject to the rights of a purchaser to acquire it by performance of a contract of sale. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76. Mortgagor of personalty in possession. Nugent v. Rensselaer County Mut. Fire Ins. Co., 94 N. Y. S. 605. Both the owner of the mortgaged property and the mortgagee in the absence of an agreement to the contrary. Miller v. Gibbs, 95 N. Y. S. 385.

Held not to have insurable interest: Owner of property who sells it subject to certain deeds of trust thereon and retains a vendor's lien has no insurable interest therein except for the further security of such vendor's lien. Baker v. Monumental Sav. & Loan Ass'n [W. Va.] 52 S. E. 403.

69. See 4 C. L. 166. For necessity of insurable interest in assignee, see post, § 14.

70. Beneficiary living in open concubinage with the insured is entitled to one-tenth of the amount of the policy, though she is not entitled to the balance under the statute (Civ. Code, arts. 1481 and 12). The insured's own interest and that of his children support the policy to the extent of the other nine-tenths, the facts showing that he had not abandoned all interest therein. New York Life Ins. Co. v. Neal [La.] 38 So. 485.

71. Policies procured by false and fraudulent representations by the beneficiaries and the insured that the former are creditors of the latter. Griffin's Adm'r v. Equitable Assur. Soc., 27 Ky. L. R. 313, 84 S. W. 1164.

72. See 4 C. L. 167. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523. Application as part of contract, see post, §§ 7, 9.

73. McKinnon v. Fidelity & Casualty Co. [N. J. Law] 60 A. 180. If questions are of doubtful import, the insurer is bound by an answer to which they are properly susceptible. Mutual Reserve Life Ins. Co. v. Dobler [C. C. A.] 137 F. 550. Where question in application for life policy "Have you now any insurance on your life?" was followed by "Have you any other insurance?" held, that the purpose of the last question was only to inquire whether the insured had fully answered the previous one, and its purport was, "Have you now answered as to all life insurance that you carry?" Id. The word insurance in both questions refers only to life insurance, and insured having answered the first question by setting out his other life policy, there was no breach of warranty, though the second was answered in the negative, by reason of the fact that he had certain other accident policies. Id.

§ 7. *The contract of insurance in general, and general rules for its interpretation.*[75] *Definitions and distinctions.*[76]—An old line policy is a contract whereby the amount to be paid by the assured is fixed and unalterable, and the liability incurred by the company is also fixed, definite, and unchangeable.[77] It is assessment insurance where the payments to be made by the insured are not unalterably fixed by the contract, but the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amounts insured.[78] It has been held that it is assessment insurance though the premium first reserved is a definite sum, if it is further provided that the company may require the payment of a greater sum if its condition at any time renders such a course necessary,[79] but a policy providing for a fixed annual premium from which a certain sum is to be set aside to constitute an emergency fund is not an assessment policy within the meaning of the Missouri statute defining assessment insurance, though it further provides that an assessment may be levied to meet any excess in the death rate over that estimated in the American mortality tables.

A proviso is a stipulation added to the principal contract to avoid the defendant's promise by way of defeasance or excuse.[80] An exception is a proviso which excludes something from a statement or description, so that the promise is only to perform what remains after the part excepted is taken away.[81]

Essentials and validity; acceptance.[82]—An insurance contract is not within the statute of frauds and may be oral.[83] There must, however, be an offer and acceptance[84] and the minds of the parties must meet as to all the essential terms of the contract[85] before the death of the insured or the occurrence of the loss.[86] One mak-

74. Word "insurance" in warranty "no application ever made by me for insurance has been declined, and no accident or health policy issued to me has been canceled, or renewal refused except as herein stated," held to mean life insurance. MacKinnon v. Fidelity & Casualty Co. [N. J. Law] 60 A. 180. Negative answer held not to be false where it was true as to the latter part of the proposition, though plaintiff had previously made an application for a life policy which was declined. Demurrer to plea setting up breach of warranty sustained. Id.

75. See 4 C. L. 167. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

76. See 4 C. L. 167, n. 4.

77. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. Defendant held to be an old line, and not an assessment company. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988.

78. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. Every contract in which the payment of the benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts. Mo. Rev. St. 1899, § 7901. Id. In order to bring a policy within the purview of this section it must show upon its face that the parties to the contract understood that the amount necessary to pay the insurance promised was to be gathered in whole or in part by an assessment upon the holders of policies in the same class or category. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499.

79. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. Although the policy gives a table of quarterly payments to be made opposite to age periods and varying therewith, it does not fix upon it the character of an ordinary life policy contract at a level premium, where other provisions characterize it as a policy under the assessment plan. Such a policy is not subject to the Missouri nonforfeiture act. Id. Reinsurance contract held not to change character of insurance. Id.

80. Cassidy v. Royal Exch. Assur., 99 Me. 399, 58 A. 549. Provision in Maine standard policy covering lumber in several piles, "this policy to attach in each locality in proportion as the value in each bears to that of all. This clause to be inoperative when the lumber piles are less than 100 feet apart," held a proviso. Id.

81. Cassidy v. Royal Exch. Assur., 99 Me. 399, 59 A. 549.

82. See 4 C. L. 167. See, also, Contracts, 5 C. L. 664.

83. German-American Ins. Co. v. Yellow Poplar Lumber Co., 27 Ky. L. R. 105, 84 S. W. 551.

84. Where the agent of a company with whom defendants had previously been insured, in reply to a letter of inquiry, which he considered an application, promised to "bind the risk," until the writer decided what to do, there was a contract. Bradley v. Standard Life & Acc. Ins. Co., 46 Misc. 41, 93 N. Y. S. 245.

85. Deceased applied for policy, paid amount of first premium, and received receipt which was to be received as cash in payment of such premium if policy was issued, but if not then amount paid was to be returned. Policy applied for was not issued, but a different one was tendered and refused. Later a more favorable policy was sent by the company to its agent to be tendered to

ing a claim under a policy procured for him by another without his knowledge thereby accepts it, and becomes bound by all its conditions.[87]

Where insured dies after the termination by its terms of a provisional policy which is to run pending the consideration of his application and providing for the issuance of a permanent policy as soon as may be if his application is accepted, the beneficiary's cause of action does not rest on the provisional policy but solely upon a contract for permanent insurance, created either by the issuance of a policy or the acceptance of the application before the death of the insured giving him a right to demand a policy.[88]

As a general rule the insurance takes effect from the date of the policy,[89] in the absence of a provision that it shall not be effective until certain conditions have been complied with.[90] The date of delivery may be shown to have been different from the date of the policy.[91]

the applicant, but the applicant being sick it was never delivered to him and was returned by the agent to the company after his death. Held, that there was no contract. New York Life Ins. Co. v. McIntosh [Miss.] 38 So. 775. One applying for term insurance until a certain date and a 20-payment life policy from that time, deposited note for first premium in bank in escrow to be delivered to agent when bank turned over a satisfactory policy to him. Premium as fixed by the application was changed by the company and policy at new rate was sent to agents to be delivered on the applicant signing a correction of the application, and agents sent it and correction slip to the bank. Insured died before taking the policy from the bank or examining or accepting it. Held no contract. Aetna Life Ins. Co. v. Hocker [Tex. Civ. App.] 13 Tex. Ct. Rep. 773, 89 S. W. 26. Evidence that the day before his death deceased instructed a third person to take the policy from the bank held not to show that he or anyone for him had examined and accepted it. Id.

86. A valid contract of life insurance cannot be consummated after the death of the insured. Dickey v. Continental Casualty Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 788, 89 S. W. 436. Held no contract where it was stipulated that policy should not be binding until countersigned by the policy writer and delivered, but applicant died before delivery. Id. Evidence held to show death of applicant before consummation of contract. Id. Evidence held not to show verbal contract, where it appeared that applicant was dead when agent signed application and assignment of wages for him as authorized, though company subsequently issued policy and sent it to agent. Id.

87. As to notice of loss, under accident policy. Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009.

88. Affidavit of defense explicitly denying that policy had been issued, or that the application had been accepted, or that defendant so stated, held to go to the whole of plaintiff's claim and to be sufficient. Mutual Life Ins. Co. v. Keen [C. C. A.] 135 F. 677.

89. Unless it is provided that it shall take effect only upon some condition, in which case upon the condition being met, the policy, if delivered, takes effect as of its date. Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762. Where insurance is applied for, a policy subsequently issued and delivered is based on the status of the insured at the time of the application and the insurer assumes the risk from the date of the policy. Is liable where accident occurred before delivery and agent had knowledge of that fact. Id. An accident policy for the term of one year, beginning and ending on a fixed date, is a continuing contract, although not delivered and the premium is not paid at the date of its issue. Contract running from Oct. 23, 1901, and ending Oct. 23, 1902, cannot be held to take effect on Oct. 30, 1901, the date of the payment of the premium. Id.

90. Where application provides that policy shall not take effect until it is delivered to the insured while he is in good health, there is no contract where insured dies before policy is written and issued. Reserve Loan Life Ins. Co. v. Hockett [Ind. App.] 73 N. E. 842. Fact that policy when issued is dated back as of the date of the application is not controlling. Id. Where receipt states that there shall be no liability until policy is issued and court finds that it was not issued until after the death of the insured, it is immaterial whether such receipt modifies the provisions of the application as to the necessity of delivery. Id. Provision that policy shall not be binding upon the company unless upon its date and delivery the insured is alive and in sound health is valid, and the policy does not take effect, and there can be no recovery thereon, unless the insured is alive and in sound health at such times. Barker v. Metropolitan Life Ins. Co. [Mass.] 74 N. E. 945. Where policy provides that it shall not become operative and binding until first premium is paid and policy is delivered during the lifetime and good health of the insured, it does not become effective until such delivery and payment, where the two are concurrent. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731. Where policy provides that it shall not take effect until first premium is paid and accepted, payment is necessary to put the policy in force. State Life Ins. Co. v. Harvey [Ohio] 73 N. E. 1056. If the written application duly signed by the applicant provides that it is to become a part of the contract and that the contract is not to take effect until the first premium is paid, and that the policy is to be accepted subject to the conditions and agreements therein contained,

In the absence of fraud, delivery is conclusive proof that the contract is completed and an acknowledgment that the premium was properly paid during good health.[92] There may be a constructive delivery though the policy is retained by the agent for the insured at his request,[93] or to obtain further information, which has been procured before the loss occurs.[94]

By statute in some states life insurance companies are prohibited from discriminating between insurants of the same class and of equal expectation of life in regard to the amount or payment of premiums or any other conditions of the contract.[95] Any contract made in violation of such a statute is void.[96]

In some states life policies taken out without the knowledge and consent of the insured are void.[97]

Failure to state the amount of the premium in the policy does not affect the validity of the contract where it is shown that it has been paid.[98] The validity of a policy, for want of internal revenue stamps required at the time of its issue, cannot be raised in a state court.[99]

A policy may be issued in a trade name, where the property is owned distributively by persons doing business under that name, each of whom has an insurable interest therein.[1] An error in the middle name of the insured in a life policy, after its acceptance, is no defense to an action on a promissory note for the first premium, unless it affirmatively appears that after discovering the error the insured made a proper request for its correction which was refused.[2]

The Michigan statute providing for a commission to frame a standard form of fire insurance policy is invalid as an unwarranted delegation of legislative power,[3] and hence the parties are not prevented from inserting in their policies provisions other than those contained in the standard policy so framed, notwithstanding a provision therein to the contrary.[4]

Deferred dividend policies are lawful unless forbidden by statute.[5]

the insurance will not take effect until the premium is paid and the policy issued (Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040) and the acknowledgment of the receipt of the premium in the policy, in such case, is not conclusive on the insurer (Id.).

91. Life policy dated in December may be shown not to have been delivered until the following February. Haughton v. Aetna Life Ins. Co. [Ind.] 73 N. E. 592.

92. Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762.

93. Where agent offered to extend credit for the first premium, notified the insured that he held the policy for delivery, and was notified by the insured to hold the policy for him and did so, held, that there was evidence of a constructive delivery of the policy to the insured while in good health. Dargan v. Equitable Life Assur. Soc. [S. C.] 51 S. E. 125.

94. Where fire risk was accepted by an agent, the policy written and signed, the premium paid and the agent represented to the owner that he was insured, the contract was complete, though the agent still retained the policy for a further report to the company, which had been made. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850. Evidence sufficient to support finding that these facts existed. Id.

95. Rev. St. 1898, § 1955o. Urwan v. Northwestern Nat. Life Ins. Co. [Wis.] 103 N. W. 1102.

96. Insurance contract which plaintiff was induced to take out in consideration of his being appointed special agent. Urwan v. Northwestern Nat. Life Ins. Co. [Wis.] 103 N. W. 1102.

97. Premiums paid thereon, in good faith, may be recovered. Griffin's Adm'r v. Equitable Assur. Soc., 27 Ky. L. R. 313, 84 S. W. 1164.

98, 99. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850.

1. Property insured under the name "Crawfordsville Sanatarium." New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668.

2. Held error to allow plaintiff to testify that he complained to agent, who promised to have the mistake corrected. Porter v. Holmes [Ga.] 50 S. E. 923.

3. Act 149, p. 141, Pub. Acts 1881 (Comp. Laws 1897, §§ 5170-5179) held repugnant to Const. art. 4, § 1, vesting legislative power in the senate and house of representatives. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616.

4. Iron safe clause held valid. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616.

5. Mutual companies are not forbidden to issue "deferred dividend insurance" wherein the accumulated surplus is not to be distributed except in longer periods than five years either by the laws of New York or those of Wisconsin. Gen. Ins. Laws of N. Y. §§ 83, 87, Rev. St. (Birdseye's Ed.) pp. 1849,

Conflict of laws.[6]—The contract is governed by the laws of the state where it is completed,[7] which is generally held to be the place where the policy is delivered and the premium paid,[8] though there seems to be some conflict of authority in this regard.[9] The law of the forum controls matters affecting the remedy.[10] Stipulations as to the place of the contract and as to what laws shall govern are valid and binding unless they impair the obligations of a contract, or conflict with the laws of the state where the contract is made.[11]

Construction.[12]—A policy of insurance is a contract of indemnity in which the parties have a legal right to insert any conditions and stipulations which they deem reasonable or necessary, provided no statute or principle of public policy is thereby contravened.[13] It is to be interpreted the same as any other contract,[14] and when unambiguous in its terms it will be enforced as written.[15] If possible

1852, and Wis. Rev. St. 1898, § 1952, construed. Equitable Life. Assur. Soc. v. Host [Wis.] 102 N. W. 579.

6. See 4 C. L. 169. See, also, Conflict of Laws, 5 C. L. 610; Fraternal Mutual Benefit Associations, 5 C. L. 1523.

7. A life policy issued to insured while he was in Missouri by a foreign company admitted to do business, and doing a general insurance business in that state is a Missouri contract and is governed by the laws of that state. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988. Is subject to Rev. St. 1899, § 7397, relative to extended insurance, though containing provisions repugnant thereto. Id. Contract agreed upon in Louisiana, to be executed at the home of the insured, which was in that state, held to have its situs in that state and to be governed by its laws. New York Life Ins. Co. v. Neal [La.] 38 So. 485. A life policy issued in Massachusetts by a company of that state and to be executed there is subject to the laws of that state. Leonard v. State Mut. Life Assur. Co. [R. I.] 61 A. 52. Where a policy does not become effective until countersigned by an agent in a specified place, it is a contract of the place where it is to be countersigned. Hardiman v. Fire Ass'n [Pa.] 61 A. 990. Policy issued by a Connecticut company providing that it should not be valid until countersigned by the agent of the company in the state of New York, where the property was situated, held a New York contract, to be governed by the laws of that state, both as to validity, construction, and discharge, though after being so countersigned it was mailed to the insured at Jersey City. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

8. In reference to payment of municipal licenses for transacting insurance business. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578. The New York statute relative to the forfeiture of life policies forms no part of a contract of insurance made by a New York company, where the application was made and the policy delivered in Texas, and it does not appear that it was sent to be delivered subject to the payment of the premium or of a premium note. Cowen v. Equitable Life Assur. Co. [Tex. Civ. App.] 84 S. W. 404.

9. See 4 C. L. 169, n. 19.

10. As to competency of physician attending insured's sister to testify as to the cause of her death. Doll v. Equitable Life Assur. Soc. [C. C. A.] 138 F. 705.

11. That home office shall be the place of the contract. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. Where a fire insurance binder provided that the insurers assumed the amounts of insurance set opposite their names under the conditions of the New York standard policy, all the conditions of such policy were made applicable, including the right of the insurer to cancel at any time on five days' notice. British-American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293.

12. See 4 C. L. 169. See, also, Contracts, 5 C. L. 664; Fraternal Mutual Benefit Associations, 5 C. L. 1523. This section is designed to state the general rules of interpretation only. Examples of the manner in which they are applied to warranties and the like will be found in the appropriate sections following.

13. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A. 535; Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009.

14. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Intention controls. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 27 Ky. L. R. 1155, 87 S. W. 1115. Like all other contracts it is to be construed in accordance with its general scope and design, and the real intention of the parties as disclosed by an examination of the whole instrument. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A. 535. Court must adopt that construction which in its judgment best corresponds with the intention of the parties. Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009.

15. Courts will not construe plain language so as to make it embrace what was not intended. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. The court must interpret the contract as it finds it, and has no power to add to it or take from it. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A 535. Plain, explicit language cannot be disregarded, nor an interpretation given to the policy at variance with the clearly disclosed intent. White v. Standard Life & Acc. Ins. Co. [Minn.] 103 N. W. 735. As in the case of other contracts should be enforced according to its plain provisions. Nelson v. Traders' Ins. Co., 181 N. Y. 472, 74 N. E. 421, afg. 86 App. Div. 66, 83 N. Y. S 220. Courts should not refuse to enforce forfeitures or limitations in the standard policy which the parties are deemed to have agreed upon. Id. Accepted policy is the contract and, when unambiguous, binds the parties in the absence of fraud or mutual

it should be so construed as to give effect to every part of it.[16] Written provisions control printed ones,[17] and the language used will be given its natural and ordinary meaning,[18] words being taken in their popular sense in the absence of anything to show a contrary intention.[19] The purpose of the contract should be taken into consideration,[20] and if the language is susceptible to an interpretation consonant to the general intention of the agreement, it will be adopted in preference to a literal interpretation which would defeat such intention.[21] So, too, a construction giving it effect will be preferred to one rendering it void.[22]

If the language is susceptible of two meanings it is to be understood in the sense in which the insurer had reason to suppose it was understood by the assured.[23] In case of ambiguity or inconsistency the policy will be given a construction most favorable to the insured,[24] and this is particularly applicable to provisions looking to a forfeiture of the interest of the insured or those claiming under him.[25] There

mistake of facts (Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527), and must be enforced according to its terms as to payment of premiums (Sydnor v. Metropolitan Life Ins. Co., 26 Pa. Super. Ct. 521). Rule that forfeitures are not favored and that ambiguous provisions are to be interpreted in favor of insured does not warrant court in making new contract or construing policy contrary to its plain meaning. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618. The policy is a contract by which must be measured the right of the insured and the obligation of the insurer. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

16. Welch v. British American Assur. Co. [Cal.] 82 P. 964.

17. A special manuscript addition as to the amount of assessments will be presumed to have been separately considered and to express the exact agreement of the parties, and will govern wherever repugnant to the general covenants in the printed form. Moore v. Lichtenberger, 2 Pa. Super. Ct. 268.

18. Welch v. British American Assur. Co. [Cal.] 82 P. 964. Should be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, these terms are to be understood in their plain and ordinary sense. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A. 535.

19. Civ. Code, § 2209. Warranty that insured was not "connected" with the sale of liquor held not violated by occasional sales made for another without compensation. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609. Should be given their ordinary significance. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612.

20. As to meaning of "immediate and total disability." Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

21. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

22. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. Where an injury proximately proceeds from a cause which falls within the limitations of the policy interpreted according to the ordinary understanding of the force of words, that interpretation is to be preferred, rather than one which would defeat the protection of the assured in a large class of cases. Id. Must be presumed that parties intended that which in certain events would mean something and have some effective force. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125.

23. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758.

24. Since insurer makes policy, he is presumed to have employed words which express his real intention. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A. 535; Welch v. British American Assur. Co. [Cal.] 82 P. 964; Patterson v. Ocean Acc. & Guarantee Corp., 25 App. D. C. 46; National Fire Ins. Co. v. Tbree States Lumber Co., 217 Ill. 115, 75 N. E. 450; Travelers' Ins. Co. v. Ayres, 217 Ill. 390, 75 N. E. 506; Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932. When policy is prepared by the insurer. Szymkus v. Eureka F. & M. Ins. Co., 114 Ill. App. 401. Provisions in accident policies requiring notice of injury to be given within a specified time after the accident occurs. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176. Terms in application made a part of the policy. Krell v. Chickasaw Farmers' Mut. Fire Ins. Co. [Iowa] 104 N. W. 364. Doubtful or ambiguous provisions or those favorable to the company. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383. As to when policy takes effect. Stramback v. Fidelity Mut. Fire Ins. Co. [Minn.] 102 N. W. 731; Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762. If meaning is ambiguous or doubtful, will be construed rather against the company than the insured, and doubts should be resolved in favor of the latter, giving, of course, legal effect to the intention if ascertainable, though imperfectly or obscurely expressed. Bray & Franklin v. Virginia F. & M. Ins. Co. [N. C.] 51 S. E. 922. As between inconsistent, conflicting, and incongruous provisions of doubtful and ambiguous significance, it being manifest that the form and all the necessary conditions are the statements, essentially, of the officers, agents, and attorneys of the company, the construction most favorable to the assured will be adopted and applied. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213. As to limitations. Id. As to whether insured was authorized to keep dynamite. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383. Iron-safe clause. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E 812. Where a clause, condition, or warranty admits of two interpretations equally reasonable. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86.

is a conflict of authority as to whether this rule applies where the law prescribes a standard form of policy.[26]

The contract will be presumed to have been made with reference to statutes then in force which become a part thereof,[27] and the insured is chargeable with notice of the terms of a standard policy of his state.[28]

A rider attached to the policy and without which it would be incomplete will be construed as a part of the contract,[29] and is supported by the same consideration as the policy itself.[30]

If the application is made a part of the policy they must be construed together.[31] If the provisions of the two are inconsistent or in conflict, the policy controls.[32] So too a note given for the first premium, the application, and the policy, when forming one transaction, should be read together as the entire contract.[33]

The contract determines the rights and liabilities of the members of a mutual company, and the fact of membership does not alter the relations thus created.[34] The charter and by-laws of all mutual companies are a part of the insurance

25. See, also, § 9, post. Right to examine body of insured. Patterson v. Ocean Acc. & Guarantee Corp., 25 App. D. C. 46. Warranties requiring unconditional and sole ownership. Mallery v. Frye, 21 App. D. C. 105. Iron-safe clause, and clause forbidding assignments. Scottish-Union & Nat. Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419. Conditions which provide for a forfeiture of the interest of the insured, or those claiming under him. Civ. Code, §§ 1442, 1654. Word "insured" held not to include mortgagee to whom policy was made payable. Welch v. British American Assur. Co. [Cal.] 82 P. 964. Iron-safe clause. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350. Court will prevent forfeiture if possible to do so without making a new contract. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730. Conditions rendering policy void if violated construed strictly, and insured should be given benefit of doubt as to meaning. Swank v. Farmers' Ins. Co., 126 Iowa, 547, 102 N. W. 429. Forfeitures not favored. Mettner v. Northwestern Nat. Life Ins. Co. [Iowa] 103 N. W. 112; National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450. For nonpayment of premiums. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011. Every reasonable intendment will be indulged to avoid a forfeiture. Cannot, however, go to the extent of making a different contract for the parties. Fire Ass'n of Philadelphia v. American Cement Plaster Co. [Tex. Civ. App.] 84 S. W. 1115. Clauses, conditions, and warranties in fire policies will be construed most strongly against the insurer where it may be fairly done, in order to avoid a forfeiture or to permit a recovery. Provisions requiring inventory. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Doubts fairly arising will be resolved against the insurer. Id. If policies contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract. Glens Falls Ins. Co. v. Michael [Ind.] 74 N. E. 964. As to forfeiture for nonpayment of premiums. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731. As to when forfeiture for nonpayment of premiums takes effect. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213. Clause allowing 30 days grace for payment of premiums. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932. Warranties as to other insurance held not to cover accident policies. Mutual Reserve Life Ins. Co. v. Dobler [C. C. A.] 137 F. 550.

26. Louisiana: The rule requiring the policy to be interpreted most strongly against the insurer does not apply. Under Acts 1898, No. 105, p. 151, § 22, requiring fire policies to conform to the New York standard form. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87.

Contra: See 4 C. L. 172, n. 56.

27. The New York statute (Laws 1892, p. 2015, c. 690, § 211), requiring consent of insurer to change of beneficiary, becomes a part of a New York policy and controls, though the policy is silent on the subject. Freund v. Freund, 218 Ill. 189, 75 N. E. 925. Provision of Mo. Rev. St. 1899, § 7897 in regard to extended insurance, held a part of policy of foreign company admitted to do business within the state, though policy contains conditions repugnant thereto. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988.

28. Conditions as to vacancy. Hardiman v. Fire Ass'n of Philadelphia [Pa.] 61 A. 990.

29. Iron-safe clause forming part of rider which also described property insured. Court cannot adopt description and reject remainder. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616.

30. By promise of insurer to indemnify the insured. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616.

31. Life policy. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

32. Where application made certain answers warranties but policy described them as stipulations and agreements, held that they would be construed as representations. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

33. Provisions in application and note avoiding policy for nonpayment of note at maturity held part of contract. Fidelity Mut. Life Ins. Co. v. Bussell [Ark.] 86 S. W. 814.

34. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273.

contract and as binding upon the insured as the conditions of the policy itself;[35] but entries upon their books, made in connection with the policy, are not.[36]

There seems to be a conflict of authority as to whether a policy for which a single premium is paid, and which insures different classes of property in separate amounts, is entire or severable.[37]

By statute in some states the application and the by-laws of the company cannot be considered as a part of the policy, even though referred to therein, or be received in evidence unless a correct copy thereof is attached to the policy.[38] If not so attached the case is to be considered and disposed of as if no such paper existed.[39] The rule applies to actions against the insured as well as to those against the insurer,[40] but does not operate to exclude the policy because the application is not attached.[41] It has been held to apply only to the original application on which the policy was issued, and not to an application for renewal after a lapse.[42] The burden is on the company to show that such a copy was attached when the policy was delivered.[43] Evidence of a custom of the company to so attach a copy is inadmissible to show that a copy had been attached to the policy in suit.[44]

By statute in Kentucky in the case of co-operative companies the policy or certificate and the application, constitution, by-laws, or other rules which are made a part thereof are required to be plainly printed, and no portion thereof may be in type smaller than brevier.[45]

§ 8. *Premiums and premium notes, dues and assessments, and payment of the same.*[46]—A premium is the compensation paid a company for the indemnity furnished.[47] An assessment is only the ascertainment by the directors of the amount of the premium or price for insurance which the insured is required to pay.[48] In mutual companies the premium to be paid is dependent upon the amount of the aggregate losses of the members during the period the policy is in force.[49] If the

35. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. The articles of association and by-laws are admissible to determine the obligations and rights of the parties. Id. Rights of the policy holders and the insurer must be determined in connection with the constitution and by-laws and the certificate of insurance. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273.

36. Moore v. Lichtenberger, 26 Pa. Super. Ct. 268.

37. In Louisiana is entire and indivisible. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87.

In New York it is severable. Miller v. Gibbs, 95 N. Y. S. 385.

In Washington it is severable. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

38. Kentucky. St. 1903, § 679. Griffin's Adm'r v. Equitable Assur. Soc., 27 Ky. L. R. 313, 84 S. W. 1164. If any part of the consideration is a statement of the insured made in a written application, it must be stated in the policy or a copy thereof must be indorsed thereon. St. 1903, §§ 656, 679, must be construed in connection with Id. §§ 470, 472. Continental Casualty Co. v. Jasper [Ky.] 88 S. W. 1078.

Massachusetts. Rev. Laws, c. 118, § 73. Holden v. Metropolitan Life Ins. Co. [Mass.] 74 N. E. 337.

Pennsylvania. Act May 11, 1881 (P. L. 20). Moore v. Bestline, 23 Pa. Super. Ct. 6. Applies to fire and life policies. Custer v. Fidelity Mut. Aid Ass'n, 211 Pa. 257, 60 A. 776. If not attached are not admissible to show forfeiture for nonpayment of mortality assessment made as provided therein. Id. Copy of charter of company created by special act of assembly, which is made a part of the policy must be attached to policy, or any defense based on provisions thereof in regard to making assessments and forfeiting policy for their nonpayment must fail. Muhlenberg v. Mutual Fire Ins. Co. of Sinking Springs, 211 Pa. 432, 60 A. 995.

39. Moore v. Bestline, 23 Pa. Super. Ct. 6.

40. To action by receiver of insolvent mutual company to collect assessment. Moore v. Bestline, 23 Pa. Super. Ct. 6.

41. Moore v. Bestline, 23 Pa. Super. Ct. 6. Where the basis rate of assessment in a mutual fire insurance company is in neither the application nor the by-laws it is competent in a suit by a receiver of a mutual company to collect an assessment to prove the same by oral testimony and the records of the company. Id.

42. Holden v. Metropolitan Life Ins. Co. [Mass.] 74 N. E. 337.

43, 44. Custer v. Fidelity Mut. Aid Ass'n, 211 Pa. 257, 60 A. 776.

45. St. 1903, § 679. Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 27 Ky. L. R. 372, 85 S. W. 177. Has no application to old-line insurance companies. Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 27 Ky. L. R. 372, 85 S. W. 177.

46. See 4 C. L. 173. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

rate in a binder is left blank and is to be subsequently fixed by a board of underwriters, both parties are bound to such rate as is subsequently so fixed in due course of business.[50]

Policies generally provide for forfeiture for nonpayment of premiums when due.[51] A mere receipt of the amount of a premium by one who is an agent of the company is not necessarily a payment thereof.[52] A statement by the insured to an agent having no authority to alter or discharge the contract, that he does not intend to continue the contract does not terminate the policy or prevent payment before forfeiture for nonpayment.[53] Under a policy providing that in consideration of the payment in advance of a certain sum, which may be paid in quarterly instalments covering the quarter year's insurance for which the instalment is paid in advance, the company insures the life for one year from date, and in consideration of the payment of a like sum on or before a certain date each year until nineteen years' premiums have been paid, which payments may also be made quarterly subject to the same conditions, the payment of the premium is the condition on which the continued existence of the policy depends, and when the premium is not paid the insurance ceases.[54]

The giving of a notice of the accrual of premiums is a condition prerequisite to a forfeiture for their nonpayment when provided for by the policy[55] or if required by statute.[56] If the insurer sends the notice by mail, properly addressed and stamp-

47, 48, 49. Moore v. Lichtenberger, 26 Pa. Super. Ct. 268.

50. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293.

51. Where contract expressly provided for forfeiture for nonpayment of premiums or assessments, and such default was made, verdict held to have been properly directed for defendant. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. Evidence held to show that policy had lapsed for nonpayment of premium and that extended insurance had expired before the death of the insured, and instruction to find for defendant was therefore proper. Spencer v. Travelers' Ins. Co. [Mo. App.] 86 S. W. 899. A stipulation that the premium shall be paid annually before a specified date, and that the policy shall become void if this is not done is binding upon both the insured and the beneficiary. Failure to make payments as stipulated releases company from all liability unless policy is revived in the prescribed manner. Hutson v. Prudential Ins. Co. [Ga.] 50 S. E. 1000.

52. Where an agent procured a policy on his own life, but being unable to pay the first premium, his son-in-law without the knowledge of the company paid it to him as agent, no part of which premium was ever accounted for or paid over, there was no payment. State Life Ins. Co. v. Harvey [Ohio] 73 N. E. 1056.

53. Statement made during month of grace. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932.

54. On failure to pay premium for third quarter of third year insurance ceases, and there can be no recovery on insured's subsequent death. Inaccurate to call this a forfeiture. Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 27 Ky. L. R. 372, 85 S. W. 177.

55. Reasonable notice of intention to cancel is necessary. Sherrod v. Farmers' Mut. Fire Ins. Ass'n [N. C.] 51 S. E. 910. Mere fact that notice may have been provided for in general terms in the policy but without any reference to the New York law in that regard, either directly or indirectly, or in any other portion of the contract, would not be sufficient to incorporate such law into the same as a part thereof. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404. Evidence held to clearly show that application did not give insured's street and number, and court properly refused to allow an issue of fact to be made on the question. Id.

56. In New York no life policy may be declared forfeited or lapsed for nonpayment of premiums, within one year thereafter unless notice is mailed to the insured of the time when the payment is due, which must inform him that the policy will become forfeited and void unless the premium is paid on or before the day it falls due, to the corporation or to a duly appointed agent or person authorized to collect such premium. It is essential for a company seeking to declare its policy forfeited to establish that the required notice has been mailed to the insured. Laws 1897, p. 92, c. 218, § 2. Instruction held to properly have made mailing of notice, the pivotal question, and not to have made verdict rest upon question of extension of time for payment of premium. Howell v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 87. Laws 1892, p. 1972, c. 690, § 92. Notice simply informing insured that policy would expire the day the premium became due unless it was paid to a named person at a certain address, held insufficient and properly excluded. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. Prefixing words, "the conditions of your policy provide," to that part of the notice which is required to state that the policy will be forfeited unless premium is paid on or before the day it becomes due, does not render it insufficient, though policy in fact

ed, the law presumes that the addressee received it.[57] An alleged unwritten custom as to the manner of notifying the insured of an assessment and of declaring the policy canceled for its nonpayment cannot supersede or take the place of the method provided in the charter, when the latter is made a part of the contract.[58] A failure to give the notice contemplated by the policy does not operate to continue it in force until the next payment becomes due, though no consequences are provided for, but at most only entitles the insured to a reasonable time to pay the premium after it becomes due.[59] Notice need not be given to one to whom a policy has been assigned as collateral in the absence of a provision to the contrary.[60]

A provision allowing a grace of thirty days for the payment of annual premiums gives the insured immunity from forfeiture for nonpayment for a period of thirteen months from the date when the last previous payment became due.[61] The policy is continued in full force during such thirty days and the premium may be paid by the insured within such time, or, in case of his death, by his representatives.[62]

In fire policies the contract is from year to year and is dependent upon yearly renewals by the payment of annual premiums.[63] Some courts hold that, in the case of life insurance, by the payment of the initial premium, a contract is entered into which contemplates an insurance for the entire life of the insured, and the company, for its protection, provides for a forfeiture for nonpayment of premiums at certain times.[64] Others hold that by the payment of the first premium the insured effects an insurance on his life for one year, and purchases a right to continue that insurance from year to year during life at the same rate,[65] the requirement of the payment of subsequent premiums being a mere option, the exercise of which is necessary to keep the insurance in force, and which does not constitute a debt,[66] and that therefore the insurer cannot compel the continuance of the insurance nor payment of subsequent premiums, nor can it collect a note given therefor.[67]

In the absence of a provision therein to the contrary, a life policy stipulating that it shall not become operative and binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health

provides for a forfeiture only in case of nonpayment within thirty days after it becomes due. Nederland Life Ins. Co. v. Meinert, 26 S. Ct. 15, rvg. [C. C. A.] 127 F. 651. Laws 1876, §§ 1, 2, p. 322, c. 341; 3 Rev. St. [8th Ed.] p. 1685. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404. Notice addressed to "Adam B. Cowan" instead of to "Adam Bird Cowen" held sufficient in the absence of evidence that there was any other person of that or a similar name in the city where insured resided. Id.

57. Sherrod v. Farmers' Mut. Fire Ins. Ass'n [N. C.] 51 S. E. 910. This presumption may be rebutted. Id. Even though by-law provides that "any member failing to pay his assessment within sixty days from date of notice, which date shall be the day of mailing said notice, shall forfeit all rights, claims, and privlieges in this association, and his policy shall by such failure be canceled without any further notice," plaintiff may rebut presumption by showing that he never received such notice. Id.

58. Muhlenberg v. Mutual Fire Ins. Co., 211 Pa. 432, 60 A. 995.

59. Policy certainly could not be enforced where it appeared that premium had been repeatedly demanded and that insured had died without paving. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404.

60. Failure to pay premiums after notice to the insured as required by the by-laws of a mutual assessment company held to have avoided the policy, though no notice was given to assignee. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789.

61. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932.

62. No provision by whom it shall be paid, or that insured shall be in good health or living. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932.

63. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932.

64. Each instalment is part consideration for the entire insurance for life, and not consideration for insurance during the next following year. Taylor v. Provident Sav. Life Assur. Soc., 134 F. 932. Life policies are not contracts for insurance for a single year with privilege of renewal for payment of premiums, but they constitute entire contracts of assurance for life subject to discontinuance or forfeiture for nonpayment of any of the stipulated premiums. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731. See, also, Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

65, 66, 67. Union Mut. Life Ins. Co. v. Adler [Ind. App.] 73 N. E. 835.

of the insured does not become effective until the date of such delivery and payment, where the two are concurrent, and the insurance paid for by the initial premium has its inception on the latter date.[68] The insurer may provide that the premium shall be paid in advance of the commencement of the period of insurance covered by such payment,[69] and the policy being an entire contract of assurance for life a provision for forfeiture if the premium is not paid on a specified date will be construed as avoiding the contract only after the expiration of the period already paid for, and as not affecting that part of the insurance for which payment has been made.[70] There seems, however, to be some conflict of authority in this regard.[71]

Payment may be made at any time before the close of the last day of the period limited.[72]

The delivery of a policy reciting that plaintiff is insured in consideration of a specified premium before such payment is actually made will be regarded as an extension of credit to the insured.[73] In the absence of a provision to the contrary a premium note, if accepted, is a payment of the premium.[74] Where the policy and note so provide, a failure to pay the latter at maturity prevents a recovery.[75] A provision that the policy shall be void while the note or any part thereof remains unpaid after maturity operates to suspend the insurance during the continuance

68. That date and not date of policy controls. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731. Rule not changed by the fact that policy further recites that it is made in consideration of payment of premiums on certain specified dates, in view of another provision that premiums may be paid annually, semi-annually, or quarterly in advance, but that in any event policy shall continue in force only for the period actually paid. Id. Policy dated Sept. 8 and not delivered until Sept. 24 could not be forfeited for nonpayment of premium until a year from the latter date. Id. Where the application was made May 5 and the payment was made July 24, the policy ran from the latter date. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

69. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731.

70. Thus, where policy dated Sept. 8, 1902, did not go into effect until Sept. 24 because not delivered until that date, and insurance did not therefore have its inception until the latter date, failure to pay semi-annual premium due by terms of policy on Sept. 8, 1903, did not work a forfeiture until Sept. 24, 1903, and beneficiary was entitled to recover where insured died Sept. 11, 1903. Stramback v. Fidelity Mut. Life Ins. Co. [Minn.] 102 N. W. 731. Where application was made on May 5, 1894, and policy was issued July 10, but did not become effective until July 24, on which date insured accepted it and paid two years' premium, failure to pay premium due by terms of policy on May 5, 1896, held not to work a forfeiture until July 24, 1896, though policy provided that it should become void if premium was not paid when due and beneficiary was entitled to recover where insured died July 3, 1896. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

71. Where the policy provides for quarterly payments on certain specified dates, the payments must be made on those dates notwithstanding a further provision that the policy is not to take effect until the first premium is paid, and the fact that the first premium was not paid until April 26, though the policy was dated March 31. Contract does not contemplate quarterly payments from time when contract takes effect. Sydnor v. Metropolitan Life Ins. Co., 26 Pa. Super. Ct. 521.

72. Where policy provides that premiums shall be paid weekly to a collector, or if not collected they shall be sent to the home office or the agent before they are four weeks in arrears, the policy does not lapse until the close of the last day of the four weeks after the premium becomes due, and premium may be paid at any time on that day. Doney v. Prudential Ins. Co., 99 App. Div. 23, 90 N. Y. S. 757.

73. Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190.

74. Where insured applied for short term insurance until a specified date and a 20-year payment policy from that time and gave note to cover premiums for both payable when the first annual premium was due, held, that such note, on its acceptance, constituted a payment of the premium for the term insurance though the amount thereof was something less than the aggregate of the two premiums. Aetna Life Ins. Co. v. Hocker [Tex. Civ. App.] 13 Tex. Ct. Rep. 773, 89 S. W. 26.

75. Where a premium note and the receipt given therefor provide that the policy shall be void if such note is not paid when due, the policy becomes void if the note is not paid at maturity, no affirmative action cancelling it being necessary, and can only be reinstated by complying with the conditions prescribed therein. Fidelity Mut. Life Ins. Co. v. Bussell [Ark.] 86 S. W. 814. Note given for a premium on a life policy and conditioned for the lapse of the policy in case of its nonpayment does not pay the premium. Union Mut. Life Ins. Co. v. Adler [Ind. App.] 73 N. E. 835. Policy held to have ceased and determined by failure to pay note when due, where both policy and note so provided. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618.

of the default and to relieve the insurer from liability for a loss then occurring.[76] The giving of a note for an entire annual premium will be regarded as an election to pay premiums annually rather than semi-annually or quarterly as permitted by the policy.[77]

Industrial policies providing for insurance for consecutive periods and that the premiums are to be paid from insured's wages by orders on his employer, generally make actual payment of such orders when due a prerequisite to recovery.[78]

Policies sometimes provide that premiums may be paid to a collector,[79] in which case he may exercise his discretion as to the mode of payment.[80]

Under a rule authorizing the superintendent to accept overdue premiums between the date on which they are due and the date when the premium receipt must be returned for cancellation, provided he can certify that the insured is in good health, on nonpayment of a premium when due, after notice, the risk is on the insured that pending the delay permitted by the agents, he may change in health or die, and the policy be forfeited.[81]

Policies frequently provide for an extension of time for making payment after they have been in force for a certain length of time.[82] Provisions as to the method of obtaining such an extension must be complied with.[83]

76. Jefferson Mut. Ins. Co. v. Murray [Ark.] 86 S. W. 813. Subsequent payment revives it and makes it again take effect from the time of payment and continue for the remainder of the period first stipulated. Id.

77. Payments made on such note cannot be treated as quarterly payments, to keep the policy in force for a part of the year. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618.

78. Policy providing that premiums were to be paid out of wages of the insured, and that the insurer should not be liable for loss occurring while the insured was in default, held to have lapsed on failure of insured's paymaster to withold from his wages a sum sufficient to pay an instalment of the premium and to remit same to the company in accordance with an order therefor given by the insured to the insurer. Continental Casualty Co. v. Jasper [Ky.] 88 S. W. 1078. Where accident policy provided for payment of premiums for separate consecutive periods, each premium to apply only to its corresponding period, and that no claim for injuries sustained in any period for which the premium had not been actually fully paid should be valid, and insurer took orders on insured's employer for the premiums to be paid out of his earnings for each period, held, that the insurance for each period was made to depend on the actual payment of the orders out of insured's earnings for the months specified, and on failure of employer to pay one of them because insured had not earned enough during the month, the policy lapsed. Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683. The term "injuries" covers injuries resulting in death, and in case insured is killed during period for which premium is not paid, the beneficiary cannot recover. Instruction approved. Id. No notice necessary before forfeiture. Id.

79. Provision that "all premiums are payable at the home office of the company, but may be paid to an authorized representative of the company" and that "if for any reason the premium is not called for when due by an authorized representative of the company," it shall be the duty of the insured to send it to the home or a district office before it has been in arrears four weeks, held to show that the premium was in fact payable to the collectors of the company. Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202. The magnitude of the expense involved in transmitting weekly premiums as compared to the amount involved in the main transaction may be considered in determining the intention in this regard. Id.

80. Insured having left money with third person for payment of weekly premiums, and collector authorized to receive them having agreed to call there for them, held that policy was not avoided for nonpayment on his failure to do so. Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202.

81. Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345.

82. Provision in mutual policy that, after policy has been in force for five years, and before the expiration of ten years from its date, if "death shall occur within six months from the date of maturity of dues unpaid, or within six months from the date of the mortuary calls which such member has omitted or neglected to pay," the policy shall be payable in the same manner as though such dues and mortuary calls had been paid when due, held to give assured six months' extension of time as to both annual dues and mortuary premiums within which they may be paid, but that policy was forfeited where insured was more than six months behind in his mortuary premiums at the time of his death, though he was not behind at all in his annual dues. Spinks v. Mutual Reserve Fund Life Ass'n, 137 F. 169.

83. Evidence that receipts were sent to collecting agents with instructions to present the same for payment, and, if not paid, to hold them and present them from time to time until recalled, and that receipt was so presented several times to the insured and not paid, and was returned in response to a

A "privilege and condition" in a life policy that if premiums are paid in semi-annual instalments, any instalment necessary to complete the full year's premium at maturity of the contract shall be deducted from the claim, applies only to annual premium policies and not those providing for semi-annual premiums.[84]

Brokers, acting as agents for foreign companies in placing insurance, but having no interest in the premiums payable cannot sue in their own names therefor.[85]

If the insurer erroneously claims a forfeiture by reason of nonpayment, the insured is absolved from liability to tender further premiums, but they should be deducted from the amount found due in an action on the policy.[86] So, too, a certificate holder in an assessment association need not pay an illegal assessment or tender a sum equivalent to a legal one, or give his reasons for refusing to pay, in order to preserve his rights under his contract.[87]

Mutual companies.—A mutual company may, by contract, limit the liability of the insured to assessment.[88] Members of a mutual company are bound by the action of the directors in making assessments unless they can show illegality, fraud, or gross mistake.[89] Charter provisions requiring such companies to set out in their policies what portions of the premiums are to be set aside for expenses must be substantially complied with.[90] If the assured accepts the policy without objection he will be presumed to have assented to the apportionment therein expressed.[91] A change in the classifications of members is invalid as to those not consenting thereto.[92]

§ 9. *Warranties, conditions, and representations.*[93] *In general.*[94]—As in the case of other contracts the parties may make the existence or nonexistence of any fact a condition precedent to the obligation of performance undertaken by either party.[95] In the absence of bad faith the law requires only a reasonable and substantial compliance with the clauses, conditions and warranties of the policy.[96] Ordinarily the falsity of a statement which the parties have expressly warranted

direction of the company on the day before insured's death, held immaterial on the question of extension, it not appearing that an extension had been applied for or granted, under a rule of defendant authorizing an extension on application, or that the agents had authority to grant an extension. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404.

84. Bracher v. Equitable Life Assur. Soc. 92 N. Y. S. 1105, rvg. 42 Misc. 290, 86 N. Y. S. 557.

85. Cortis v. Van Derveer, 91 N. Y. S. 743.

86. Doney v. Prudential Ins. Co., 99 App. Div. 23, 90 N. Y. S. 757.

87. Benjamin v. Mutual Reserve Fund Life Ass'n, 146 Cal. 34, 79 P. 517.

88. May be made part of policy where there is no provision on the subject in the by-laws. Moore v. Lichtenberger, 26 Pa. Super. Ct. 268.

89. Moore v. Lichtenberger, 26 Pa. Super. Ct. 268.

90. Stipulation in policy held a substantial compliance. Porter v. Holmes [Ga.] 50 S. E. 923.

91. Porter v. Holmes [Ga.] 50 S. E. 923.

92. Where insured's certificate and the constitution of an assessment company provide for assessments upon the "entire membership in force at the date of the last death, the same to be apportioned among the members according to the age of each member," subsequent resolutions classifying the members and placing all those entering prior to a certain date subsequent to that at which such certificate was issued in a class by themselves, and requiring them to pay according to the attained age of each at the date of the assessment, but providing that members of other classes shall be assessed as of the age of their entry into the association, are disproportionate, discriminating, unauthorized and in violation of the contract of such certificate holder, and therefore inoperative and void as to him. Benjamin v. Mutual Reserve Fund Life Ass'n, 146 Cal. 34, 79 P. 517.

93. See 4 C. L. 177. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

94. See 4 C. L. 177.

95. Statements made by deceased in his application as to the nonexistence of consumption in his family and that he had not had any serious illness being matters in regard to which he must have known, held warranties, and policy was avoided where they were shown to be false. Doll v. Equitable Life Assur. Soc. [C. C. A.] 138 F. 705.

96. Evidence held to show substantial compliance with requirement that insured keep books of account correctly detailing purchases and sales. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Iron-safe clause. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350.

to be true,[97] or the breach of a promissory warranty avoids the policy,[98] whether actually material to the risk or not.[99] By statute in some states no misrepresentation or false warranty avoids the policy unless it is in regard to a matter material to the risk or unless it is fraudulently made.[1] In others the violation of, or failure to

97. False answers in regard to matters material to the risk made warranties. Act of 1885 does not change rule. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

As to health of applicant: Warranty that applicant had never been declined or postponed by any company, held false where he had been rejected by a fraternal benefit society. Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421. Evidence sufficient to sustain finding that answers to questions in regard to health were not false. Metropolitan Life Ins. Co. v. Moravec, 116 Ill. App. 271. Evidence held to sustain finding that insured did not have diabetes when he made application and had not had it before that time. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Where insured stated in her application that the condition of her health was good, that she had no physical or mental defect and had never suffered from cancer, and the uncontradicted evidence showed that she died of cancer and was in poor health when the application was made, held error to refuse to dismiss the complaint at the close of the evidence. Finn v. Prudential Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697. Where there was undisputed evidence that insured had been attended by a physician and was in poor health when the policy was delivered, it was error to submit those questions to the jury where the application made a part of the policy, warranted that she had not consulted a physician for ten years and provided that the policy should not take effect unless delivered and accepted while she was in good health. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 87 S. W. 889.

As to occupation: Warranty that insured was not "connected" with the manufacture or sale of liquors held not breached by his occasionally waiting on the customers of a saloon, as a mere accommodation. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609.

As to use of intoxicants: Use of liquors to excess before, at the time of, and after the issuance of the policy held to avoid policy, where answers in application, which were made warranties, stated that he did not use liquors at all. Requested instructions improperly refused. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789. Evidence held not to show breach. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Evidence held sufficient to support verdict that warranties were not false. Northwestern Nat. Life Ins. Co. v. Blasingame [Tex. Civ. App.] 85 S. W. 819.

98. Compliance a condition precedent to recovery. Keeping of books and inventory in safe. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Requirement that insured shall produce books, etc., for examination. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86.

99. Where a promise is declared to be a warranty, the question of its materiality is eliminated, and the only concern of the courts, in the absence of contrary statutory enactments, is to see whether or not it has been complied with. St. Landry Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87. A breach of warranty defeats a life policy without reference to its materiality or bearing on the particular risk. Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656.

1. **In Kentucky** no misrepresentations avoid the policy unless they are material or fraudulent. St. 1903, § 639. Hartford Fire Ins. Co. v. McClain, 27 Ky. L. R. 461, 85 S. W. 699. Applies as well to the policy as to the application. To stipulations as to interest and title. Hartford Fire Ins. Co. v. McClain, 27 Ky. L. R. 461, 85 S. W. 699. If the insured has a pecuniary interest in the property equal to, or greater than, the insurance, it is not material to the risk that another person has an interest in the property or that the insured does not own the absolute or unconditional title. Id. Under this statute the insured is not bound by the exact letter of such statements, nor is the policy avoided if matter relevant to the transaction, but not material to the risk, has not been disclosed, particularly where no questions were asked concerning it. As to title and interest of the insured in the premises. Id. The misstatement itself must be material, that is the insured must not materially misstate the facts, and a substantial misstatement in regard to a matter substantially material to the risk avoids the policy, whether made with intent to deceive or not. Provident Sav. Life Assur. Soc. v. Dees, 27 Ky. L. R. 670, 86 S. W. 522. Statute is remedial. Id. Under this statute no immaterial statement is fraudulent, and a statement made in answer to questions which is not substantially the truth is at least constructively fraudulent. Id.

Massachusetts: Under Rev. Laws, c. 118, § 21, no misrepresentations or warranties in negotiations for life policy are deemed material or defeat the policy unless made with actual intent to deceive, or unless the risk is thereby increased. Coughlin v. Metropolitan Life Ins. Co. [Mass.] 76 N. E. 192. Mass. Laws 1894, c. 522, p. 675, as amended by Laws 1895, c. 271, p. 272. Leonard v. State Mut. Life Assur. Co. [R. I.] 61 A. 52. Does not apply to provisions in the policy itself, as a provision that it shall not become binding unless delivered when insured is alive and in sound health. Barker v. Metropolitan Life Ins. Co. [Mass.] 74 N. E. 945. Instructions erroneous as mixing the law applicable to negotiations and that applicable to conditions in the policy. Requested instructions should have been given. Id.

Michigan: Comp. Laws 1897, § 5180, providing that there shall be no forfeiture for breach of conditions unless the insurer is prejudiced thereby, does not apply to cases where the loss occurs during a breach of the contract and while its terms are being violated, and hence does not prevent the policy from being declared void for breach of the iron-safe clause. King v. Concordia Fire

observe, conditions which, by the terms of the policy, render it void, does not defeat a recovery if it appears that such violation or failure did not contribute to the loss.[2]

Warranties are to be strictly construed, and will not be extended so as to include anything not necessarily implied in their terms.[3] In case of ambiguity or doubt answers to questions in the application will be construed as representations rather than warranties.[4] Even though a warranty in name or form be created by the term of the contract, its effect may be modified by other parts of the policy or application, including questions and answers, so that the answers will be construed not as warranties of immaterial facts stated therein, but rather a warranty of insured's honest belief of their truth.[5]

As a general rule false representations avoid the policy only if material to the risk, or fraudulent.[6] The previous health of the applicant,[7] his rejection by other

Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616.

In Missouri misrepresentations do not avoid the policy unless the matters misrepresented shall have actually contributed to the insured's death. Rev. St. 1899, § 7890. Herzberg v. Modern Brotherhood, 110 Mo. App. 328, 85 S. W. 986. Rev. St. 1889, § 5849. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789. Instructions properly refused. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499. False representation that deceased never had syphilis does not avoid policy where there was no substantial evidence that it caused his death. Herzberg v. Modern Brotherhood, 110 Mo. App. 328, 85 S. W. 986. This statute does not apply to assessment companies. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499; Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789.

Rhode Island: Laws 1902, p. 75, c. 997, amending Gen. Laws 1896, c. 244, providing that misstatements made in procuring a policy of life insurance shall not be deemed material or avoid the policy, unless materially contributing to the contingency or event on which the policy is to become due and payable is not retroactive. Leonard v. State Mut. Life Assur. Co. [R. I.] 61 A. 52.

Virginia: Code 1904, § 3344a, providing that no answers to interrogatories made by an applicant shall bar recovery upon any policy issued upon such application, by reason of any warranty in the application or policy, unless it is clearly proved that such answer was willfully false or fraudulently made, or that it was material, applies only to policies issued upon an application in which the insured has answered interrogatories about matters as to which such answer was willfully false or fraudulently made. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Held not to apply to iron-safe clause. Id.

2. **Iowa:** Code, § 1743. Breach of agreement to keep books and of iron-safe clause held not to preclude recovery in absence of pleading or proof that it in any manner contributed to the loss. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. Defense based on change in use or occupancy is good if it renders the risk in fact more hazardous. Krell v. Chickasaw Farmers' Mut. Fire Ins. Co. [Iowa] 104 N. W. 364.

3. See, also, § 7, post. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758. Every reasonable intendment must be indulged in favor of the policy. As to use of Intoxicants. Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656.

4. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529. Courts incline to regard such statements or answers binding only in so far as they are material to the risk, where it is possible to do so without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary. Provident Sav. Life Assur. Soc. v. Pruett [Ala.] 37 So. 700.

5. Pleas averring that application provided, "among other things," that all statements therein were true, and then alleging false statements held bad in failing to allege or show that by the contract, taken as a whole, such answers were warranted to be true, or amounted to more than untrue representations immaterial to the risk, and forming no inducement to the making of the contract. Provident Sav. Life Assur. Soc. v. Pruett [Ala.] 37 So. 700. Where insured stated in his application that he did not have, and never had had, a disease of the liver, and the evidence showed that he had had it but had been permanently cured and was in good health when policy was issued, held, that the fact that the court instructed the jury that if it believed the evidence it must find for the defendant showed that the overruling of the demurrers to the pleas was prejudicial to plaintiff and hence court properly granted new trial. Id.

6. Misrepresentations as to physical condition do not operate to avoid the contract unless they are such as to deceive the insurer in regard to a matter material to the risk, or unless they are warranted as true. Provident Sav. Life Assur. Soc. v. Pruett [Ala.] 37 So. 700. False and fraudulent statements as to matters material to the risk, or the fraudulent suppression of any matter of fact material to the risk made in order to procure the policy, avoid the insurance (German American Ins. Co. v. Brown [Ark.] 87 S. W. 135), but a mere omission to state that the stock was second hand, or that it was bought at a large discount does not, in the absence of fraud (Id.). Instruction approved. Id. False and fraudulent statements as to the value of the property to be insured, made in order to procure the in-

companies,[8] and his habits as to the use of intoxicants,[9] are regarded as material within this rule. If material the motive of the insured in making the representation or his knowledge of the facts cannot be considered.[10] No statement can be a misrepresentation of a fact if it was not made with reference to such fact but with reference to an entirely different though similar one.[11] False answers to specific questions in regard to matters within the personal knowledge of the insured will be deemed fraudulent;[12] but erroneous statements as to mere matters of opinion will not avoid the policy if made in good faith.[13]

If the contract is entire a breach of a condition as to one of the classes of property insured avoids the whole of the insurance,[14] but if severable a breach as to one class does not, in the absence of fraud, the contravention of public policy, or an increase of the risk, avoid the policy as to other classes not affected thereby.[15]

Fire insurance.[16]—Provisions avoiding the policy for any change in the interest, title, or possession of the property,[17] if the interest of the insured in the property is

surance, avoid the policy. Instruction approved. Id. If the policy was obtained by false and fraudulent representations and no policy would have been issued had the truth been known, no contract between the parties ever existed. American Cent. Ins. Co. v. Antram [Miss.] 38 So. 626. In order that false representations made in answer to specific questions may avoid the policy, the insured must have been guilty of actual or legal fraud in making them. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

7. Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421. Answers as to previous illness. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275. Where deceased stated he never had had heart disease, whereas he had been treated for angina pectoris. Rondinello v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293. False statement that applicant had never had heart disease avoids policy, even though she did not have it at the time of making the application. Metropolitan Life Ins. Co. v. Moravec, 214 Ill. 186, 73 N. E. 415. Instruction on the theory that assured had suffered from heart disease warranted by the evidence. Id.

8. Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421.

9. Provident Sav. Life Assur. Soc. v. Dees, 27 Ky. L. R. 670, 86 S. W. 522. Instructions held erroneous. Id.

10. North British Mercantile Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 S. W. 285.

11. Statement of insured's agent, repeated by insured to the insurer that tenant had removed all the rags from the premises when he had in fact only removed those in one building, held not a misrepresentation where the agent believed that such building was the only one covered by the tenant's lease. North British Mercantile Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 S. W. 285.

12. Evidence held to sustain finding that insured was not guilty of fraudulent representations as to his health. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

13. Misstatement as to value. Instruction approved. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. In an application for fire insurance, statements as to the age and value of the buildings are expressions of opinion, not warranties. Home Ins. Co. of New York v. Overturf [Ind. App.] 74 N. E. 47.

14. Where part of the amount is placed on a building and part on a stock of merchandise therein, and policy by its terms becomes void either for breach of warranty as to taking, preserving, and producing inventories, or of condition as to ownership of ground on which building stands, the whole contract is avoided though there is only one such breach. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87.

15. Fact that policy covered piano not owned by insured held not to render it void as to other property on the ground that the interest of the insured was not truly stated, in the absence of all proof of fraud. Will be presumed to have been a mistake. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287. The fact that one item is inserted by mistake of the parties does not affect the validity of the contract as to other items on the ground that there was no meeting of the minds and hence no contract. Id.

16. See 4 C. L. 181.

17. Grunauer v. Westchester Fire Ins. Co. [N. J. Err. & App.] 62 A. 418. The period of interest in the insured embraced in such conditions is from the beginning to the expiration of the policy. Id. Conditions against alienation are ordinarily construed as intended to provide only against changes in ownership which might supply a motive to destroy the property or which would weaken the interest of the insured in protecting it, and hence dealings with the property not calculated to produce such an effect do not avoid the policy. Schloss v. Westchester Fire Ins. Co. [Ala.] 37 So. 701. Word "interest" is not used in sense of insurable interest, and policy is not necessarily rendered void merely because there is a change in the insurable interest of the insured, or because a third person acquires such an interest. Moseley v. Northwestern Nat. Ins. Co., 109 Mo. App. 464, 84 S. W. 1000.

Held to avoid policy: Execution of an agreement to convey accompanied by the putting of the purchaser in possession of the premises. Grunauer v. Westchester Fire Ins. Co. [N. J. Err. & App.] 62 A. 418. A contract for conveyance of land at the ex-

not truly stated,[18] or is other than unconditional and sole ownership,[19] or for the concealment or misrepresentation of insured's interest in the property, or of facts material to the risk,[20] or if the insured property is sold,[21] or removed,[22] or for the

piration of a year, giving the purchaser possession meanwhile, though as a tenant of the vendor without rent, since it makes the purchaser the equitable owner in fee. Brighton Beach Racing Ass'n v. Home Ins. Co., 93 N. Y. S. 654. Transfer from father to son, merely to clear up the title preliminary to another intended transfer. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326. Trust deed, when executed to pay off incumbrances, the residue to go to the owner. Ohio Farmers' Ins. Co. v. Black, 6 Ohio C. C. (N. S.) 132.

Held not to avoid policy: A sale made without any change of possession and attended immediately by a resale of the property, leaving the insured at the end of the transaction with the same title and interest as at the beginning does not prejudice defendant in respect of the risk, nor amount to a change of title, interest, or possession within the meaning of a clause avoiding the policy for such a change or one requiring a statement of such change to be given within 60 days after the fire. Schloss v. Westchester Fire Ins. Co. [Ala.] 37 So. 701. Agreement to sell conditioned on the vendee being able to raise a certain sum on the property, and the execution of a contract and deed to enable him to do so, which were placed in the hands of brokers with instructions not to deliver the same without the vendor's permission, even though sale was completed long after the fire. Swank v. Farmers' Ins. Co., 126 Iowa, 547, 102 N. W. 429. Contract of sale not enforceable under the statute of frauds, as where agent having merely verbal authority makes verbal contract of sale, and gives a receipt for a part of the purchase price, the balance to be paid if title proves good, and owner gives deed to agent to deliver on payment of balance of purchase price. Moseley v. Northwestern Nat. Ins. Co., 109 Mo. App. 464, 84 S. W. 1000. Fact that vendee could have charged land with a lien for what he had paid does not work a change of interest, at least where he makes no attempt to do so. Id.

18. Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127. Statement of insured that his interest was that of mortgagee held true, though mortgage, which ran to him personally, was given to secure loan of money belonging to a bank of which he was president. Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120. Where insured had purchased certain realty and personalty for a lump sum, and a deed therefor was placed in escrow to be delivered on payment of the balance, but at the time of taking out the policy a part had not been paid, the vendee claiming that the title to a part of the property had not been perfected and that the amount paid was the reasonable value of the remaining property, held, that a statement that there was no incumbrance on the property was false and rendered the policy void. Fire Ass'n of Philadelphia v. American Cement Plaster Co. [Tex. Civ. App.] 84 S. W. 1115. In absence of proof as to the value of the personalty it could not be presumed that the amount remaining unpaid represented its value, and hence there was no incumbrance on the realty. Id. Held immaterial that the vice-president of the insured refused to sign the application personally because of these statements, where he knew that the companies would not issue the policies without a written application, and permitted the broker to prepare and forward it. Id. Held immaterial whether person signing application had authority to do so in the first place, since insured ratified his acts by seeking to recover on the policies. Id.

19. Such a provision is material, valid, and binding. Insurance Co. of North America v. Erickson [Fla.] 39 So. 495. A breach of such an express condition prevents recovery, even though the insured made no representations in regard to the matter or any fraudulent concealment of the facts, and no written application. Policy held void. St. Landry Wholesale Mecantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87. Breach renders contract voidable merely and not absolutely void. Glens Falls Ins. Co. v. Michael [Ind.] 74 N. E. 964.

Held to avoid policy: A bond for title or contract for sale, entered into before the taking out of the policy, which renders the vendor no longer an unconditional owner but converts him into a trustee holding the legal title in trust for the vendee as security for the purchase price. Insurance Co. of North America v. Erickson [Fla.] 39 So. 495. Proof that fixtures put in leased building by insured were property of lessor under the lease. Prussian National Ins. Co. v. Empire Catering Co., 113 Ill. App. 67.

Held not to avoid policy: Requirement satisfied where he is equitable owner though he holds title jointly with his wife. Instruction held warranted by the evidence. Mallery v. Frye, 21 App. D. C. 105. The interest of a purchaser of property, which he has unqualifiedly agreed to buy and the vendor has absolutely contracted to sell upon definite terms is sole and unconditional ownership. Insurance Co. of North America v. Erickson [Fla.] 39 So. 495. Contract to sell, which has not been performed at the time of the fire, particularly where it is provided that title and possession shall remain in the vendor. National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450. Proof that plaintiff purchased a part of the destroyed goods under a contract providing that title should remain in the seller until they were paid for, since it does not of itself negative an absolute sale. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. Evidence insufficient to show breach. Id.

20. A fact not actually known to him cannot be concealed, but it may be misrepresented. North British Mercantile Ins. Co. v. Union Stock Yards Co., 27 Ky. L. R. 852, 87 S. W. 285. A trustee of an express or implied trust may effect insurance in his own name for the benefit of the equitable owner, and though the beneficiary be not disclosed

giving of a chattel mortgage on personalty,[23] or for any increase of the hazard,[24] or for keeping certain explosive or inflammable substances on the premises,[24a] or if the insured has or procures any other insurance on any of the property,[25] or for allowing the premises to remain vacant and unoccupied,[26] without the company's

such policy is not void for concealment or misrepresentation of material facts relating to the risk or insured's interest. Hartford Fire Ins. Co. v. McClain, 27 Ky. L. R. 461, 85 S. W. 699. Policy in seller's name procured by one buying a stock of merchandise under an agreement that the business should be conducted in the name of the seller who should hold the assets to indemnify himself against debts incurred by the buyer, held valid though name of buyer was not disclosed to the insurer, where it appeared that the latter knew that the buyer actually attended to the store. Insurance will be held to be for benefit of the buyer to the extent that the property exceeds the seller's liability for goods bought in his name. Id.

21. A condition rendering the policy void in case of a contract of "sale or to sell" requires that the contract be a valid and enforceable one. Swank v. Farmers' Ins. Co., 126 Iowa, 547, 102 N. W. 429. Not violated by agreement to sell conditioned on the vendee being able to raise a certain sum on the property, and the execution of a contract and deed to enable him to do so which were placed in the hands of brokers with instructions not to deliver the same without the vendor's permission. Id. Fact that sale was completed long after the fire is immaterial. Id. The sale must be such as passed title to the property. International Wood Co. v. National Assur. Co., 99 Me. 415, 59 A. 544. Policy on personalty not avoided by sale by receiver under order of court, where sale was never completed in accordance with the order of confirmation, and the sale was thereafter annulled and money returned to the purchaser. Id.

22. Under the Ohio standard policy. Walsh & Co. v. Queen Ins. Co., 6 Ohio C. C. (N. S.) 1. Promise of agent to make entries consenting to removal of goods without avail to the insured where the entries were not in fact made. Walsh & Co. v. Queen Ins. Co., 6 Ohio C. C. (N. S.) 1.

23. Giving of chattel mortgage without the consent of the company indorsed on the policy held to terminate insurance and prevent recovery on policy by the insured or his appointee. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

24. Evidence held sufficient to support finding that risk was not increased by the construction of an asbestos roof. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. Ordinarily vacancy is not such an increase of risk as will avoid a policy without express agreement to that effect. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Presence of small quantity of rags on the premises does not increase hazard as a matter of law, but hazard caused by their presence necessarily depends on their quantity. North British Mercantile Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 S. W. 285. Under a policy providing that it shall be void if the hazard is increased, any such increase suspends the insurance while the forbidden condition continues to exist, and relieves the insurer from liability for a loss occurring during that time, but if the original condition is restored before loss and during the term covered by the policy, the liability of the insurer is also restored, at least where the insurer has retained the premium without complaint. Id.

Effect of increase by tenants or trespassers: Under a policy providing that it shall be void if the hazard is increased by any means within the control or knowledge of the insured, it is not avoided by the misuse of the premises by a tenant in a manner increasing the hazard of which the insured has no knowledge. North British Mercantile Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 S. W. 285. The knowledge of an agent of one of the officers of the insured that a tenant has stored rags in the other buildings is not the knowledge of the insured. Id. Nor is it avoided by the acts of a trespasser of which the insured has no knowledge. Not by failure of tenant to remove rags on termination of lease, or by his storing loose rags on the premises which he had no right to do. Id.

24a. Provision avoiding policy if benzine is kept on the premises refers to its habitual use only, and presence of small quantity for use in cleaning metals does not prevent recovery. Instruction erroneous. Szymkus v. Eureka F. & M. Ins. Co., 114 Ill. App. 401.

25. See, also, § 17, post.

Provisions as to application for additional insurance: Condition requiring application for permit for additional insurance to be made, and to be filed with company, and permit to be indorsed on policy is reasonable and valid, and must be substantially complied with. Monk v. Penn Tp. Mut. Fire Ins. Ass'n, 27 Pa. Super. Ct. 449. Statement by insured to secretary of company on street car that he had taken additional insurance held not sufficient compliance, where he failed to send policy to office for indorsement, as the agent told him to do. Id.

Held not to avoid policy: Failure to state that the applicant has insurance on other property not covered by defendant's policy. Home Ins. Co. of New York v. Overturf [Ind. App.] 74 N. E. 47. Evidence insufficient to show existence of other insurance covering the property destroyed. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76. Where two policies for $3,000 each and one for $2,000 were renewed by the agent, but the insured told him to reduce the insurance to $6,000 and he destroyed the $2,000 one, there was no overinsurance by the writing of the latter policy, in violation of the provisions of other policies as to concurrent insurance. Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127.

Policy held avoided. Heyl v. Aetna Ins. Co. [Ala.] 38 So. 118; Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Minn.] 104 N. W. 560. Provision of policy on stock of goods covering "farm implements," prohibiting additional insurance,

consent, are valid and binding on the insured, and any violation thereof will ordinarily prevent a recovery in case of loss. The same is true of provisions requiring the insured to take inventories[27] and keep books,[28] and to preserve them in an iron

held violated by taking out policy covering "mowing machines and binders," though the latter implements were purchased after the first policy was taken out, since they were protected by it. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. Offered answer held to show violation of such provision which, if proved, would avoid the policy. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47.

26. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Id., 75 N. E. 849. Maine standard fire policy (Laws 1895, p. 14, c. 18) becomes void if the premises become vacant by the removal of the owner or occupant, and so remain for more than thirty days without the written or printed consent of the company, irrespective of whether the risk is thereby materially increased or not. Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co. [Me.] 62 A. 289. Rev. St. 1883, c. 49, § 20, providing that change in occupation of the property shall not affect the policy unless it materially increases the risk, held repealed by § 3 of the act of 1895, repealing all provisions of law inconsistent with the standard policy thereby adopted. Id. Violation of provision of rider attached to policy, as authorized by Rev. St. c. 49, § 4, that policy should be rendered void for vacancy or nonoccupancy continued for more than ten days, held to avoid policy. Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co. [Me.] 62 A. 289.

Meaning of "vacant and unoccupied": Dwelling house becomes vacant and unoccupied when it ceases to be used as a place of human habitation or for living purposes. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Id., 75 N. E. 849. The extent of the time of the vacancy is not of the essence of the contract. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 75 N. E. 849; Id., 73 N. E. 612. Nor is it material that insured did not know that house, which was occupied by a tenant, had become vacant, since he assumes risk of tenant moving out. Id. Farm buildings held to have become "personally unoccupied" where plaintiff's tenant had moved his family to town, though he continued to pay rent therefor, left his cattle and some of his furniture there, and worked on the farm pleasant days, and intended to return there with his family in about two months. Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co. [Me.] 62 A. 289.

Effect of re-occupancy: Fact that premises are reoccupied after they have been vacant for the specified period does not prevent forfeiture. Hardiman v. Fire Ass'n [Pa.] 61 A. 990.

27. Is warranty and compliance is a condition precedent to recovery. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Under a provision that the insured must take an inventory at least once a year during the life of the policy, he has a year from the date of the policy in which to take it, though the policy only runs for one year. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Inventory held sufficient. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Where merely a rough inventory had been taken in pencil and on tablets subject to revision before being copied in ink it was not such a "complete" inventory as was required to be kept in an iron safe, and its destruction by fire before the end of the time given the insured in which to prepare a complete inventory and the consequent failure to produce it did not avoid the policy. St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053, 37 So. 967. Warranty that insured would take, preserve and produce inventory held not complied with where the inventory was not taken within the time specified and was not preserved or produced, though it was alleged, after the loss, that an inventory approximately correct could be made from the books. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87. Condition that inventories should be taken once a year held not to require each inventory to be taken exactly 12 months after the preceding one, and it was sufficient where inventories were taken in April, 1901, and February, 1902, and the fire occurred June 21, 1903. Newton v. Theresa Village Mut. Fire Ins. Co. [Wis.] 104 N. W. 107.

28. Is warranty, and compliance therewith is a condition precedent to recovery. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812; Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. A requirement that the insured shall keep books of account correctly detailing purchases and sales is complied with by keeping such books as will fairly show to a man of ordinary intelligence all purchases and sales. Evidence held to show substantial compliance. Id. There is a substantial compliance where the record of sales and purchases is so kept as of itself to show the business transacted, or where it does so when the entries are explained. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350. Entry of all sales, there being no purchases, in a common manilla book, which contained inventory and which was produced after the fire, held sufficient, failure to keep ledger which contained nothing essential to an understanding of plaintiff's business in safe being immaterial. Instructions approved. Id. Is sufficient if with the assistance of those who kept them or understood the system, the amount of purchases and sales can be ascertained and cash transactions distinguished from credit transactions. Books held sufficient. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Evidence held to justify finding that books were such as were contemplated by the contract. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. Under provision that insured shall make an inventory "within thirty days after the date of the policy," and shall keep a set of books presenting a complete record of business transacted "from the date of the inventory," held, that the insured had 30 days in which to take the inventory and was not required to commence keeping books until it was taken, so that failure to keep books did not prevent recovery where fire occurred within 30 days and no inventory had been taken. Bray v. Virginia

safe,[29] and after the fire to produce all books, bills, accounts and the like for examination as often as may be required.[30] There is no implied condition against the removal of the goods.[31] If the last inventory is actually produced the fact that it was not in the safe at the time of the fire as required by the policy is immaterial.[32]

Life and accident insurance.[33]—A provision that the policy shall be void if at the time of its issue there is any industrial policy in force, issued by the same company upon the life of the insured, unless indorsed with the company's consent, is reasonable and binding unless waived.[34]

Where the policy provides that it shall not take effect if at its date the insured is not in sound health, the actual condition of his health at that time and not his knowledge thereof controls.[35] A warranty or representation as to the condition of

Fire & Marine Ins. Co. [N. C.] 51 S. E. 922. Obligation to keep books held not to arise until after the taking of the inventory. Richard v. Springfield Fire & Marine Ins. Co. [La.] 38 So. 563. Provision requiring insured to keep and preserve set of books clearly and plainly presenting a complete record of all business transacted, including all purchases and sales for cash or credit, does not require the preservation of all books used, and is not violated because ledger does not itemize credit sales. Scottish-Union & National Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419. Held, that evidence admitted of no other conclusion than that there was a substantial compliance, and hence there was no error in failing to submit such issue to the jury. Id.

29. Is a warranty and compliance therewith is a condition precedent to the right to recover on the policy. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. The parties may, in order to preserve exact evidence of the extent of the loss, contract that the books of account and inventory of the insured shall be kept in an iron safe. Contracts for preservation of testimony are valid. King v. Concordia Fire Ins Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616, citing Phoenix Ins. Co. v. Angel, 18 Ky. L. R. 1034, 38 S. W. 1067, as holding to the contrary. Provision requiring insured to keep his books and inventory in an iron safe at night "or at some other place secure against fire in another building" does not require that the other building be safer than the one insured, but merely that the books be kept in a building not exposed to the hazard of the fire which might endanger the property insured. Id. Under policy providing that insured shall keep books, take an inventory, "and shall keep said books and a copy of their last inventory in an iron safe at night, or at some place secure against fire in another building, otherwise this policy shall be void," the failure to keep the books and inventory in a safe or in another building avoids the policy. Not necessary that there be both a failure to keep books at all and a failure to keep them in such a place. Id. A provision requiring insured to keep his books in an iron safe "during the hours said store is not open for business" does not require him to place them in the safe during a temporary absence from his drug store as a physician, before his usual closing time. Major v. Insurance Co. of North America [Mo. App.] 86 S. W. 883.

30. Provision requiring insured, as often as required, to produce his books, etc., for examination at such reasonable place as may be designated, and that no action may be maintained on the policy until such requirement is complied with is a promissory warranty and compliance is a condition precedent to recovery. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Means a reasonable place in the locality or town where the insured property was situated, in the absence of conditions rendering such place unreasonable. City 140 miles from place where property was situated held not a reasonable place, and insured was not chargeable with a breach for failure to produce them there. Id. It is incumbent on the company both to request the information and to designate the place where it shall be produced. Seibel v. Firemen's Ins. Co. [Pa.] 62 A. 101, afg. 24 Pa. Super. Ct. 154. Failure to produce books held no defense where no place was designated, and insurer's principal office was outside the state. Id. When contained in a policy on household goods imposes no obligation on the insured with respect to the property covered by the policy. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271.

31. In the absence of a provision to the contrary in the policy the company is not relieved from liability by reason of the fact that defendant removed a part of his stock of goods before the fire otherwise than in the usual course of selling them. Instruction that such removal would be fraud held error, where only provision in policy is that company shall not be liable beyond three-fourths of the cash value of personal property at the time any loss or damage occurs. Beavers v. Security Mut. Ins. Co. [Ark.] 90 S. W. 13.

32. Evidence held sufficient to show that the inventory produced was the last one. Newton v. Theresa Village Mut. Fire Ins. Co. [Wis.] 104 N. W. 107.

33. See 4 C. L. 184.

34. In view of the circumstances under which the company conducted its business. Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527.

35. Where the policy was dated July 1 and insured died September 23 of hemorrhage induced by cancer, and there was expert evidence to the effect that he could not have been in good health at the time of the delivery of the policy, it was error not to instruct the jury that if he was not in good health then, the policy never became effective, irrespective of whether he knew it or not.

health goes only to the extent of an honest and true statement of the applicant's belief.[36]

Questions propounded to an applicant in relation to illnesses and injuries should, if possible, be interpreted as referring only to such as would affect the risk to be assumed,[37] and it is sufficient if the answers are substantially true.[38] The terms "sickness" and "disease" as used in the application do not include trifling and temporary illnesses which readily yield to treatment and leave no permanent physical injury or disorder calculated or having a tendency to shorten life,[39] but only such serious illnesses as impair the constitution or leave some chronic or organic effect.[40] So, too, in order that a failure to disclose attendance by a physician may be held as a matter of law to be a breach of warranty, it must appear that such attendance was for a substantial disorder and not for a mere functional or temporary indisposition.[41]

Warranties that the insured does not use intoxicating liquors mean that he does not do so as a habit, practice, or custom, and are not broken by an occasional use.[42]

Accident policies frequently provide for double payments in case the insured is injured while riding on a public conveyance.[43]

"Voluntary exposure to unnecessary danger" means the insured must have consciously and of his own volition encountered a risk of injury which he need not have incurred in the performance of his duties with reasonable prudence.[44] The words "unnecessary danger" signify that the danger meant is one not incident to the duty or avocation of insured; and the words "voluntary exposure" signify that

Carmichael v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 587.

36. Metropolitan Life Ins. Co. v. Moravec, 116 Ill. App. 271. In the absence of evidence that insured's attention was called to them unanswered statements in the application held not to constitute such a warranty as will defeat recovery upon a policy, though policy provided that when there was no answer it was agreed that warranty was true without exception. Id.

37. Unless they are in words which exclude such interpretation. Trenton v. North American Acc. Ins. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 781, 89 S. W. 276. Warranties that insured had not been afflicted with certain diseases, "injuries or wounds," nor suffered the loss of certain members, been ruptured or "otherwise injured." Id.

38. Evidence held to sustain finding that insured was not guilty of fraudulent representations. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

39. Not headache, indigestion, etc. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529.

40. Instructions approved. Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161.

41. Consultations with a physician had by insured's mother with or without his knowledge, when he was not suffering from any ailment, held not to constitute breach. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758. Same is true of consultation for slight nervous disorder which did not interfere with his physical vigor or with his ability to attend to his business. Id. Physical examinations of insured to ascertain his physical condition made upon the physician's own initiative without charge and for the sole purpose of rendering a friendly service held not within warranty as to when insured last "consulted" a physician. Mutual Reserve Life Ins. Co. v. Dobler [C. C. A.] 137 J. 550.

42. A negative answer to the question, "Do you use liquors?" is not false because the applicant had drunk liquor, however slight the use. Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656. Verdict that there was no breach sustained on the ground that the evidence being conflicting, the question was for the jury. Id.

43. In an action on a policy providing for double payments in case of injury while a passenger on a street car, the question of whether plaintiff was a passenger at the time of his injury held properly submitted to jury under the evidence. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125.

44. Bateman v. Travelers' Ins. Co., 110 Mo. App. 443, 85 S. W. 128.

NOTE. Voluntary exposure to unnecessary danger: A railroad porter, sent to flag approaching trains, sat down on the track, and involuntarily falling asleep, was killed. In an action on an accident policy, held, his conduct did not constitute voluntary exposure to unnecessary danger. Bateman v. Travelers' Ins. Co., 110 Mo. 443, 85 S. W. 128. Voluntary exposure to unnecessary danger is not synonymous with negligence. Payne v. Frat. Acc. Ass'n, 119 Iowa, 342; Lehman v. G. E. C. & I. Co., 39 N. Y. S. 912. To constitute a voluntary exposure, there must be either a conscious and intentional assumption of a risk which reason and ordinary prudence would pronounce dangerous (Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 13 L. R. A. 267; Keene v. N. E. Mut. Acc. Ass'n, 161 Mass. 149), or gross negligence displaying a spirit of recklessness (Acc. Co. v. Dorgan, 58 F. 945, 22 L. R. A. 620; Johnson v. Guarantee Co., 115 Mich. 86, 40 L. R. A. 440, note), such as really constitutes a voluntary exposure (DeLoy v. Travellers' Ins. Co., 171

he must be exposed to danger with the consent of his will.[45] Though the act of the insured may have exposed him to some risk and have been careless, yet the insurer is not relieved from liability unless he realized the risk and voluntarily incurred it when he was under no necessity to do so.[46]

§ 10. *The risk or object of indemnity.*[47] *Accident and health insurance.*[48]—Many accident policies require visible marks of the injury,[49] and exempt the insurer from liability for death or injuries resulting from the inhalation of gas,[50] or from intentional injuries inflicted by another,[51] or for accidents happening in a wild and uncivilized country.[52] The injury is also generally required to be a violent one.[53] Health policies generally make absolute and necessary confinement to the house a criterion of disability, and hence a condition precedent to recovery.[54]

An injury results from accidental means when it is produced by something unforeseen, unexpected, and unusual in the act preceding it.[55] The fact that the

Pa. St. 1). Dangers incident to the insured's occupation are not unnecessary dangers within the meaning of the policy. National Ben. Ass'n v. Jackson, 114 Ill. 533.—5 Columbia L. R. 474.

45. A train porter sent back to flag a train does not violate such a provision by sitting down on the track and involuntarily going to sleep. Bateman v. Travelers' Ins. Co., 110 Mo. App. 443, 85 S. W. 128. There being no certain proof as to why deceased was lying on the railroad track when struck by a train or that he was to blame for his perilous position, question whether he was killed on account of a "voluntary exposure to unnecessary danger" held one of fact. Id.

46. Bateman v. Travelers' Ins. Co., 110 Mo. App. 443, 85 S. W. 128. Requested instruction properly refused. Id.

47, 48. See 4 C. L. 186.

49. Shrinkage of hip and leg muscles, lameness of the leg, and breaking down of the bones of the joint which was perceptible to digital examination are "visible marks of the injury." United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

50. A provision exempting insurer from liability for death resulting wholly, partly, directly or indirectly from any gas or vapor, has no reference to the asphyxiation of insured by involuntarily inhaling gas escaping into his room while he was asleep. Travelers' Ins. Co. v. Ayers, 217 Ill. 390, 75 N. E. 506. But under a policy relieving insurer from liability for injury caused by the "voluntary or involuntary inhalation of any gas or any anaesthetic," or "resulting from any poison or infection accidentally or otherwise taken, administered, absorbed or inhaled," there could be no recovery for death caused by involuntarily inhaling gas while asleep in a hotel whether accident occurred because of his mistake or the neglect of some other person. Porter v. Preferred Acc. Ins. Co., 95 N. Y. 682.

51. Murder of insured releases company as where he is shot by other parties while in custody of officers. Jarnagin v. Travelers' Protective Ass'n [C. C. A.] 133 F. 892. Though he is shot because of the negligence of officers of the law, who had arrested him and had him in custody in failing to protect him, the shooting and not the negligence was the proximate cause of his death. Id.

52. An accident to insured in a sawmill camp where some 300 persons were residing, about 35 miles distant from a railroad station, in Ontario, Canada, held not within such exemption. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

53. Injury to hand caused by resting the head thereon for some time during sleep and bruising it against the bed rail held a violent one. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. Death from blood poisoning from infection of wound received in a fist fight held direct result of bodily injuries sustained through external, violent, and accidental means. Carroll v. Fidelity & Casualty Co., 137 F. 1012.

54. Such a provision is valid, and insured cannot recover unless so confined. Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 A. 535. Mutual association may frame health policy upon the assumption that confinement to house would be found so irksome that few would submit to it except upon compulsion of severe illness. Id. Policy held to require such confinement. Id. Evidence held to show that "vitis" sometimes requires absolute confinement to the house, and hence such a provision in a policy covering that disease did not render the promised indemnity nugatory and delusive. Id. Where plaintiff's preliminary notice of illness and his physician's testimony showed that he was not necessarily confined to his house or bed, he could not recover under a policy conditioned on his being "necessarily, entirely and continuously confined to the house and subject to the calls of a registered physician." Cooper v. Phoenix Acc. & Sick Ben. Ass'n [Mich.] 104 N. W. 734.

55. The word accident should be given its ordinary and usual signification as being an event which takes place without one's foresight or expectation. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262.

Injuries held accidental: A strain received in the ordinary course of insured's business. Patterson v. Ocean Acc. & G. Corp., 25 App. D. C. 46. Inflammation of periosteum of metacarpal bones of the hand resulting from lying on hand while it was pressed against bed rail during sleep. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. Death from blood poisoning from infection of wound received in fist fight held direct result of bodily injuries sustained through external, violent, and accidental means. Carroll v. Fidelity & Casualty Co., 137 F. 1012.

injury resulting in deceased's death occurred during a fist fight which was a breach of the peace does not preclude a recovery where the policy contains no special clause vitiating it for that reason.[56]

Wholly disabled means disabled from performing substantially the occupation stated in the policy[57] or from doing such work as, considering his ordinary employment, qualifications for affairs, and station in life, could be expected of the insured.[58] Since it must be assumed that the parties intended that which in certain events or contingencies would mean something and have some effective force, it cannot be construed to mean absolute helplessness,[59] even though it is further provided that by wholly disabled shall be understood that the insured is totally unable to perform any part of the duties pertaining to the occupation stated.[60] The test is was his earning power destroyed;[61] and recovery is not prevented by reason of the fact that he was able to do chores or casual business.[62] "Immediately" disabled means presently or on the happening of the accident.[63] "Occupation" implies simply that pursuit which, at the time of the accident, constitutes the assured's principal business or pursuit.[64] The correct test is not so much whether insured had in fact abandoned the occupation stated in his policy, but whether or not at the time of his injury he was in fact engaged in another occupation, not merely incidental, but as a business of a more hazardous classification.[65]

The causes referred to in accident policies are proximate and not remote causes.[66] Where injury or death combines the results of accident and disease or other conditions, the accident must be the sole and proximate cause if the disease be wholly due to the accident,[67] but the insurer is liable even where the disease or other cause

56. Death is not the natural result of such an encounter, though it would be if deadly weapons were used. Carroll v. Fidelity & Casualty Co., 137 F. 1012.

57. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125.

58. Wholly disabled from doing any work, labor, business, or service, or any part thereof. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491. Inability to do all the substantial acts necessary to be done in the prosecution of his business. Where it appeared that insured devoted practically his whole time to obtaining relief from his injury, held, that evidence was sufficient to go to the jury on the question of his having been wholly, continuously, and permanently disabled by the injury alone from carrying on any and every kind of business, and to justify a finding for plaintiff, though he was able to give some attention to his correspondence. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

59. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125; United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

60. Means inability to perform any substantial part of the business. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125.

61. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

62. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491. Mere fact that brakeman went on his run held not to preclude recovery where he hired a substitute. Id. Neither did fact that he went to his farm occasionally to give instructions, and once assisted in assorting strawberries. Requested instructions held erroneous. Id.

63. Could not recover if he was able to perform his duties as brakeman for eight days after the accident. Instructions approved. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

64. Aetna Life Ins. Co. v. Dunn [C. C. A.] 138 F. 629. Though policy described duties of insured, who was a queensware merchant, as "office duties and traveling," held, that it would be regarded as covering generally the entire business of a wholesale and retail queensware merchant, the parties having so interpreted it at the trial by introducing evidence as to whether plaintiff was disabled from performing any of his duties and making no effort to confine such business to the two branches named. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125. Occupation of insured, after destruction of his drug store by fire, held that of supervising farmer, which was specified as a more hazardous risk than that of druggist, his occupation as specified in the policy, and hence, under terms of policy, on his death, beneficiary was only entitled to recover the amount which the premium paid would have purchased at the rate fixed for farmers. Aetna Life Ins. Co. v. Dunn [C. C. A.] 138 F. 629. Fact that for some time after fire he was engaged in collecting insurance and outstanding accounts and intended to resume drug business after obtaining title to farm under homestead laws held not to operate as continuance of his occupation of druggist. Id.

65. Aetna Life Ins. Co. v. Dunn [C. C. A.] 138 F. 629.

66. Continental Casualty Co. v. Loyd [Md.] 73 N. E. 824.

67. Fact that insured did not follow ad-

pre-existed the accident if it was actuated or the consequences were due to conditions set in motion by the accident without which no harm would have come from them.[68] The terms of the policy control and may absolve the insurer if disease contributes even in this secondary causation.[69]

Employers' liability insurance.[70]—If an employer's liability policy is an agreement to indemnify the insured against liability, he has a right of action against the company as soon as his liability is determined by the entry of a judgment against him;[71] but if the indemnity is against loss, the insured has no right of recovery upon the policy until he has suffered a loss by the payment of the claim against him.[72]

A provision insuring the owner of a building against loss arising from his "contingent" liability for injuries resulting from the acts or negligence of contractors is

vice of first physician he consulted held not necessarily to have rendered him guilty of negligence materially contributing to his subsequent diseased condition so that the injury was not the "sole" cause thereof, where it appeared that he did follow the treatment of other physicians, presumably of standing. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176. A policy insuring against loss of business time resulting from bodily injuries effected through external, violent, and accidental means, covers loss of business time by disease proximately caused by a bodily injury occasioned through such means. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. An efficient and adequate cause being found must be deemed to be the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. Injury held proximate cause of inflammation in the absence of showing that it was due to any other cause. Id. Instruction to the effect that if disease was direct result of injuries, and would not have happened but for them, the injuries would be the proximate cause of death, held misleading where it appeared that deceased died from typhoid fever after an accident, and that there was no necessary or natural causal connection between the injuries and the disease. Continental Casualty Co v. Peltier [Va.] 51 S. E. 209. Even if evidence showed that insured by reason of his injuries contracted the disease more readily than he otherwise would have done, instruction was erroneous as ignoring provisions of policy that it covered only injuries which "solely and independently of all other causes necessarily result in death." Id. Where policy covered only injuries which "solely and independently of all other causes necessarily resulted in death," and it appeared that when insured died he had typhoid fever which followed the accident, an instruction leaving it to the jury to infer that, before any other cause than his injuries could be considered by them as a defense, it must appear to have been independent of the injuries, held erroneous, as leaving entirely out of view the provision exempting the company from liability if disease or other cause concurred with the injuries in producing death. Id.

68. Under policy insuring "against accidental bodily injuries caused solely by external, violent, and visible means which shall, independently of all other causes, disable the insured" and against death resulting from accidental bodily injuries as the "actual and direct cause thereof," the company is liable where the accident is the proximate, direct cause of death, though there was a pre-existing diseased condition of the body. Patterson v. Ocean, A. & G. Corp., 25 App. D. C. 46. Injury which might naturally produce death in person of certain temperament or state of health is the cause of his death if he dies by reason thereof, even if he would not have died if his temperament or previous health had been different. Id. Evidence held to warrant submission of question whether accident was actual and direct cause of death, and not to warrant finding as matter of law that it was not. Id. Evidence sufficient to sustain finding that a fall and not a tumor was the proximate cause of death. Continental Casualty Ins. Co. v. Lloyd [Ind.] 73 N. E. 824.

69. Under policy insuring against death resulting solely from injuries which are the proximate cause thereof and exempting the company from liability for accident or death resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disorder, or disease in any form, the company is not liable if at the time of the accident the insured was suffering from a pre-existing disease or bodily infirmity without which the accident could not have caused his death, and he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident. White v. Standard Life & Acc. Ins. Co. [Minn.] 103 N. W. 735. Evidence held to show that diabetes with which insured was afflicted at the time of the accident was a contributing cause of his death and judgment ordered for defendant. Id. Order modified and new trial ordered instead of judgment for defendant. White v. Standard Life & Acc. Ins. Co. [Minn.] 103 N. W. 884.

70. See 4 C. L. 186.

71. Allen v. Gilman, McNeil & Co., 137 F. 136.

72. Policy providing that it was for purpose of indemnifying insured "against loss from liability for damages," and that no action should lie against the insurer as respects any loss under the policy unless the suit be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment. Allen v. Gilman, McNeil & Co., 137 F. 136.

meaningless, and imposes no liability on the insurer.[73] A provision obligating the insurer, as soon as process in a suit against the assured is forwarded to it, to defend the same at its own cost on behalf of and in the name of the assured, is not a contract that it will become a party to the action, nor an agreement that the insured may make it a party for any purpose.[74] Such policies frequently relieve the insurer from liability for injuries to any person employed contrary to law.[75]

Fire insurance.[76]—The interest covered by the policy is only that owned by the insured when it is issued and not a different interest subsequently acquired after the former one has been disposed of.[77]

What property is covered by the policy is a question of intention, to be arrived at by a construction of the policy in accordance with the general rules of interpretation previously stated.[78] The construction of particular policies will be found in the note.[79] The word "fire" is generally held to include the idea of visible light and heat, and hence not to include spontaneous combustion where these elements do not exist.[80] The words "and such other merchandise as is usually kept for sale in a retail hardware store" following an enumeration of specific articles covered mean articles in addition to those mentioned, their kind being only limited by the provision that they be of a sort usually kept in such a store.[81]

73. Insuring owner of a building in construction "against loss from common-law of statutory liability arising from the contingent liability" for damages for injuries accidentally suffered for act or negligence of any contractor or subcontractor. If owner is liable at all, his liability is original and not contingent. Sroka v. Frankfort Amer. Ins. Co., 94 N. Y. S. 501.

74. Particularly where policy further provides that no action shall lie against it until judgment shall have been recovered against the insured. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452.

75. Insurer held not liable for injuries to a child employed contrary to law, whether injury was proximate result of his being employed contrary to law or not. Tozer v. Ocean Acc. & G. Corp. [Minn.] 103 N. W. 509. Provision held not to be ambiguous so that subsequent conduct of parties could be regarded as a practical construction. Id.

76. See 4 C. L. 187.

77. Bennett v. Mutual Fire Ins. Co. [Md.] 60 A. 99. Where property was sold after policy was issued by a deed absolute on its face it could not be shown that grantee on the same day agreed to resell it to the insured on his paying a specified sum for purpose of showing an interest in the insured at the time of the loss, since interest so acquired was a new one and was not covered by the policy. Id. This was particularly true where there was no offer to show any transfer of the policy in accordance with its provisions. Id.

78. See § 7, ante.

79. Policy held to cover **lumber under asbestos roof.** Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. A policy on a **"two story" building** is not avoided by testimony that the building was a story and a half house, where there was no showing that the half story did not make it a two-story house, either in common parlance or within the established usage of underwriters, nor that the alleged misdescription increased the risk, or influenced the insurer in accepting the risk or fixing the rate. Requested instruction properly refused. Mallery v. Frye, 21 App. D. C. 105.

Lumber in "mill sheds" held to mean that contained in sheds detached and distant from the mill and not such as was under roofs projecting from the mill to cover the tracks on either side and not intended as lumber sheds. Wolverine Lumber Co. v. Palatine Ins. Co. [Mich.] 102 N. W. 991. Policy held to be a blanket one not intended to apply specifically to any particular number of bushels of **grain** that might have been in any particular granary when it was issued, but to continue on this class of property even though replaced by other similar grain. Johnston v. Phelps Co. Farmers' Mut. Ins. Co. [Neb.] 102 N. W. 72. A fire policy stating in the typewritten portion that it covered **awnings** attached to the building, and in the printed portion that it did not cover awnings held in storage, embraced awnings stored in the building but attached when required to be used. Wicks v. London & L. Fire Ins. Co., 91 N. Y. S. 1034 [Advance sheets only]. Word "additions" in provision in policy covering "property known as the A. manufacturing company" embracing several buildings, giving the insured the privilege "to make **additions,** alterations and repairs" which were to be covered by the policy, held to have reference to additions to plant and to include entirely new buildings and policy covered them and machinery, fixtures, and materials therein. Arlington Co. v. Colonial Assur. Co., 180 N. Y. 337, 73 N. E. 34, rvg. 84 N. Y. S. 1117. Policy covering building and **"addition"** held to cover addition to be built, there being no addition when it was issued. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Policy covering a **"stock of sugar** and molasses deposited **in the sugar manufactory"** on a certain estate held to cover sugar and molasses coming into the sugar house as the result of the manufacture of a crop growing when the policy was issued where risk under the

Insured cannot recover if he intentionally sets fire to the property or intentionally causes someone else to do so.[82]

The insurer may, by a clause in the policy, exempt itself from liability for loss by theft during the fire,[83] or in case of the fall of the building or any part thereof, except as the result of fire.[84] No recovery can be had for an injury to the insured building by reason of the collision of a fire engine therewith, on its way to a fire.[85]

If the fire breaks out in the insured building before the expiration of the policy and continues to burn thereafter until the property is totally destroyed, the loss is one occurring within the insured period;[86] but if it does not break out until after the expiration of the policy, the insurer is not liable though the loss was seen to be inevitable when the policy expired.[87] Where the policy covers merchandise in a building, if the fire attacks the building before the expiration of the policy term, and by reason thereof it is impossible to remove the merchandise or save it from damage, the loss will be deemed to have occurred during the life of the policy whether the fire was actually communicated to the specific articles within such time or not.[88]

Hail insurance.—In Kansas a mutual association organized to insure its members against injury to growing crops by hail may by its by-laws provide that it shall not be liable for losses to grain left standing after a specified date.[89]

policy was not to attach until more than two months after the date of the policy. Royal Ins. Co. v. Miller, 26 S. Ct. 46.

80. Spontaneous combustion of wool submerged in a flood, with smoke and great heat but no visible flame or glow, held not covered. Western Woolen Mill Co. v. Northern Assur. Co. [C. C. A.] 139 F. 637. Held that there was some evidence to support verdict for plaintiff on theory that wool was destroyed by spontaneous combustion and hence it was not error to overrule demurrer to plaintiff's evidence and to refuse to direct verdict for defendant. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513.

81. Not confined to articles ejusdem generis. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383. Insured held to have a right to carry in stock a small quantity of dynamite, such being the custom among hardware merchants in his vicinity. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383. Evidence of custom held properly allowed to go to the jury and to be sufficient to support finding that there was such a custom. Id. It is not necessary that such a custom should extend to the whole state, but it is sufficient that it is generally recognized and observed by those engaged in the kind of transactions to which it applies in the territory where it is claimed to exist, and it is not essential that it be observed in every individual transaction. Id. The insurer is bound to inform itself of the usages of the particular business insured, and is presumed to know them. Id.

82. Instruction approved. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. Verdict of jury, on conflicting evidence, that he did not do so, held conclusive. Id. Verdict that insured did not set the fire held not so clearly and palpably against weight of evidence as to require it to be set aside on appeal. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302. Evidence held to justify finding that insured did not set the fire. Schornak v. St. Paul F. & M. Ins. Co. [Minn.] 104 N. W. 1087. Evidence held to support finding that fire was of incendiary origin, produced with the knowledge and approval of the officers of the insured. Kirkpatrick v. Allemannia Fire Ins. Co., 102 App. Div. 327, 92 N. Y. S. 466.

83. Otherwise it is liable. Sklencher v. Fire Ass'n [N. J. Law] 60 A. 232. A clause exempting the company from liability for loss caused by theft means such losses incurred during a fire. Sklencher v. Fire Ass'n [N. J. Law] 60 A. 232.

84. Nelson v. Traders' Ins. Co., 181 N. Y. 472, 74 N. E. 421, afg. 83 N. Y. S. 220. Under policy covering stock of goods in store in westerly part of building described as a "three story brick metal roof building," the easterly part of which was occupied as a hotel, and providing that if the building or any part thereof, should fall, except as the result of fire, the insurance on the building or its contents should immediately cease, no recovery could be had where easterly wall fell and fire followed, and goods were damaged though fire did not reach store, the fall referred to being that of the general building or any part thereof and not the particular part used as a store. Nelson v. Traders' Ins. Co., 181 N. Y. 472, 74 N. E. 421, afg. 83 N. Y. S. 220.

85. Fire is not the proximate cause. Foster v. Fidelity Fire Ins. Co., 24 Pa. Super. Ct. 585.

86. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 27 Ky. L. R. 1155, 87 S. W. 1115.

87. Instruction held erroneous. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 27 Ky. L. R. 1155, 87 S. W. 1115.

88. Rochester-German Ins. Co. v. Peaslee-Gaulbert Co. [Ky.] 89 S. W. 3.

89. Corporation organized under Gen. St. 1901, c. 50, art. 5, may limit its liability to losses occurring prior to noon of July 25, although Gen. St. 1901, § 3560 provides that the policies of such companies shall expire on April 1. Kansas State Mut. Hail Ass'n v. Prather [Kan.] 79 P. 1080.

Life insurance.[90]—There is a conflict of authority as to the effect of a provision exempting the company in case of suicide while sane or insane, some courts holding that it avoids the policy in every case,[91] and others that it does not prevent a recovery where insured does not have sufficient mind to render him conscious that he is taking his own life when he commits the act.[92] In Missouri suicide is no defense unless the policy was taken out with that view.[93]

No recovery can be had in case insured is legally executed for the commission of a crime, where the policy contains no provisions in reference thereto.[94]

Title insurance policies generally make actual eviction a condition precedent to recovery.[95]

Reformation of policy for mistake.[96]—In case of a mutual mistake of fact equity may reform the contract and enforce it as it was mutually intended to be made,[97] provided the evidence is clear, convincing, and satisfactory, and there is no

90, 91. See 4 C. L. 188.

92. The act will not then be deemed his, but will be regarded in law as an accidental killing. Masonic Life Ass'n v. Pollard's Guardian [Ky.] 89 S. W. 219. Company is not liable if insured had mind enough to know that the act would probably result in his death and acted with that intention. Instruction held erroneous. Id.

93. Rev. St. 1899. § 7896. Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

94. This is a rule of public policy and the advantage to the insurance company is only incidental. Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 353. Contract cannot be enforced under circumstances which could not be lawfully stipulated for. Id.

95. A condition that "no claim shall arise under the policy, unless the party insured has been actually evicted under an adverse title insured against," is not fulfilled by an adjudication that does not determine the title, as an adjudication on appeal that an order of an orphans' court, confirming a sale of the lands by an administrator to plaintiff be annulled and held for naught. Ocean View Land Co. v. West Jersey Title Guaranty Co. [N. J. Err. & App.] 61 A. 83. Covers only eviction by process of law taken under legal proceedings. Id.

96. See 4 C. L. 187.

97. Where plaintiff claimed that by mistake the wrong building had been described in the policy, but the evidence showed that the company had no intention of insuring any other, the contract could not be reformed. Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589. Where the policy provides that it shall be void in case there is other insurance thereon and there is such other insurance, it is proper for plaintiff in an action thereon to anticipate this defense and ask that it be reformed so as to permit other insurance in accordance with the actual agreement. If no defense is made, there is then no necessity for the correction, and question will not be tried. Kelly v. Liverpool & L. & G. Ins. Co. [Minn.] 102 N. W. 380. A separate action to reform is not necessary but plaintiff may in an action on the policy set up facts showing the mistake and on proof thereof recover the amount of his loss. Misdescription of building. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057. Not necessary to specifically pray for a reformation. Id. Complaint alleging that contract as agreed to was one for the insurance of the property while in a particular building and that by mistake or fraud of defendant's agent, and without plaintiff's knowledge, agreement was misstated in policy, held sufficient to raise issue stated and to render evidence in regard thereto admissible. Id. Question whether agent assented to different contract from that stated in the policy must be determined from what he said and did in the negotiations, and not from any uncommunicated intentions. Id. Where negotiations for a contract of insurance, when reduced to writing, constituted a mere option, evidence that the agents of both parties understood it to be different, held insufficient to establish a mutual mistake warranting a reformation. Barker v. Pullman Co. [C. C. A.] 134 F. 70. Agreement by insurance company to renew defendant's policies, on their expiration, for three years at the same rate and signed by both parties, held to constitute a mere option which did not bind defendant to take the insurance. Barker v. Pullman Co. [C. C. A.] 134 F. 70, afg. 124 F. 555.

Evidence held to warrant reformation: As to name of insured and location of subject-matter of the risk. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917. By elimination of co-insurance clause. Gray v. Merchants' Ins. Co., 113 Ill. App. 537. So as to include provision for concurrent insurance omitted by oversight of agent. Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120. Where the agent issued a fire insurance policy to the mortgagee personally, instead of to him as mortgagee in possession, as was intended, held that there was a mistake of fact authorizing reformation, whether the omission was the result of the agent's carelessness or arose out of a mistaken notion on his part that the policies as written were sufficient to express the understanding. Id.; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127. Renewal policy issued to mortgagee personally without words of qualification instead of to him as mortgagee will be reformed where at time of procuring original policy defendant's agent was informed of the facts, informed that the mortgagee would take possession and put a man in charge to run the business, and insurance to protect mortgagee was

substantial doubt as to the agreement.[98] The right to such relief is based on the principles of equity and not upon the doctrine of estoppel,[99] and defendant may show, if it can, that the policy correctly states the contract agreed upon, or that its agent never assented to the contract which plaintiff alleges was the true one.[1]

The fact that the insured accepts the policy without noticing the mistake does not necessarily preclude him from having it corrected,[2] though it may do so.[3]

The right to reformation may be lost by negligence,[4] and the suit must of course be brought within the time fixed by the statute of limitations.[4a] A previous unsuccessful action at law on the unreformed contract is no bar.[5]

§ 11. *The beneficiary and the insured.*[6]—In determining who are the beneficiaries designated by the policy, the ordinary rules for construing contracts apply.[7]

The beneficiary in a life policy can only be changed by compliance with the statute and the contract provisions in that regard, and with the consent of the company.[8] His rights become fixed on the issuance and acceptance of the policy and cannot be affected by the insured or the insurer except in the manner pro-

asked for, and insured, relying upon knowledge of agent, did not read the policy. Knowledge of agent is that of the company. Dalton v. Agricultural Ins. Co. [Iowa] 102 N. W. 125; Dalton v. Westchester Fire Ins. Co. [Iowa] 102 N. W. 125; Dalton v. Providence-Washington Ins. Co. [Iowa] 102 N. W. 126. By elimination of warranty that premises were occupied exclusively for dwelling purposes by not more than two families. Schuessler v. Fire Ins. Co., 92 N. Y. S. 649. By inserting provision allowing concurrent insurance. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246. Evidence in equitable suit to reform held to show mutual mistake in attaching rider authorizing concurrent insurance in a less sum than intended. Farwell v. Home Ins. Co. [C. C. A.] 136 F. 93.

98. Gray v. Merchants Ins. Co., 113 Ill. App. 537; Farwell v. Home Ins. Co. [C. C. A.] 136 F. 93; Barker v. Pullman Co. [C. C. A.] 134 F. 70, afg. 124 F. 555. Evidence insufficient to warrant reversal of judgment refusing to strike out provision that policy should cover "farm implements," etc. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502.

99. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

1. Where policy insured property while in a particular building and plaintiff alleged that it was intended to insure it in another building, company not estopped to show that policy expressed true contract because agent knew true location. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

2. Held not to have done so where agent declared, when he delivered it, that it was all right. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

3. Fact that the agent failed to insert the street and number of insured's address, so that notice of accruing premiums should be sent there, held to afford no ground for the reformation of the application in the absence of any allegation or proof of fraud, or any explanation of the insured's failure to read and understand the application. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404.

4. Plaintiffs held not guilty of such negligence in failing to read policy and rider in regard to concurrent insurance before the fire as to preclude reformation. Farwell v. Home Ins. Co. [C. C. A.] 136 F. 93.

4a. Statute relative to actions on written contracts applies and not that applicable to actions for relief on the ground of fraud. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

5. A suit in equity to reform a policy and to recover on the policy so reformed may be maintained after an unsuccessful action at law on the unreformed contract. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

6. See 4 C. L. 189. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

7. Policy held to cover interests of both the purchaser of the property, to whom it was payable as his interest might appear, and mortgagee in whose name title was taken and insurance applied for. Loring v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025. The proceeds of a policy payable to "my wife and the heirs of my body" go to the widow and children as individuals in equal shares and not to the personal representatives. Bramlett v. Mathis [S. C.] 50 S. E. 644.

8. Under a provision that no change shall take effect until indorsed on the policy by the company at its home office, no change can be accomplished until such conditions are fulfilled. Freund v. Freund, 218 Ill. 189, 75 N. E. 925. Signing by insured of printed forms requesting change which were prepared by company and furnished to him at branch office, held not to effect the change where the policy provided that insured might change beneficiary at any time by written notice to the company at its home office, such change to take effect on the indorsement of the same upon the policy by the company. Id. Under N. Y. Laws 1892, p. 2015, c. 690, § 211, requiring consent of insurer to change of beneficiaries. Id. The consent of the company to a change is not a merely ministerial act and hence, it not having been indorsed on the policy, equity will not decree a change on the theory that the insured has done everything required of him to effect it when he signs the application therefor. Id. The rights of the beneficiary become fixed at the death of the insured and

vided therein.[9] Thus if the insured mutilates the policy by adding the name of another beneficiary, the original beneficiary may show such mutilation and recover on the contract as originally made.[10] His interest is, however, subject to a right reserved to the insured by the policy to change the beneficiary.[11]

Where the policy provides that if the beneficiary is not living at the death of the insured the proceeds shall be payable to the latter's administrator, he takes any part of the proceeds which the beneficiary is incapable of taking.[12] Children to whom a policy on the life of their father is payable, if their mother is not living, have a vested interest in the proceeds subject to be divested if the mother survives the insured and on the death of one of the children after that of his mother, his interest descends to his heirs.[13]

By statute in many states policies on the life of a husband payable to his wife are her sole and separate property free from the control or disposition of her husband.[14] In New York a policy payable to a married woman or to her and her children may be disposed of by her by will if she dies before it becomes due leaving no children or issue of deceased children.[15]

A gratuitous policy of life insurance is a donation of movables within the meaning of the Louisiana statute rendering persons living together in open concubinage incapable of donating to each other movables in excess of one-tenth part of the whole value of their respective estates,[16] and such policy is void as to such ex-

are not affected by any change contemplated but not perfected by insured according to the terms of the policy and the statutes. Laws N. Y. 1892, p. 2015, c. 690, § 211. The provisions of the policy and the statute cannot be waived by the company after insured's death. Id. A provision that the insured "may with the consent of the company at any time assign it, or before assignment change the beneficiary," and requiring written notice of an assignment to be given to the company, does not require that the company be given notice of a change of the beneficiary or that it consent thereto. Howe v. Fidelity Trust Co. [Ky.] 89 S. W. 521. A trust document executed by the insured, appointing a trustee to administer the proceeds of the policy, held to amount to a change of beneficiary and not to be an assignment, and was valid without the company's consent. Id.

Where an insurance policy was made payable to the wife of insured, in conformity with statutory provisions, so as to be subject to her disposition in case of her death without issue, an agreement by the insurer, on her death without issue, to pay the policy to insured's estate in consideration of his payment of future premiums, did not estop insurer from denying liability to his estate. Bradshaw v. Mutual Life Ins. Co., 95 N. Y. S. 780.

9. Provident Sav. Life Assur. Soc. v. Dees, 27 Ky. L. R. 670, 86 S. W. 522.

10. Provident Sav. Life Assur. Soc. v. Dees, 27 Ky. L. R. 670, 86 S. W. 522. As where father mutilates life policy taken out for the benefit of his daughter, by the insertion of a minor son as a co-beneficiary, notwithstanding he had a right to change the beneficiary with consent of the insurer. Instructions held too favorable to defendant. Id.

11. Howe v. Fidelity Trust Co. [Ky.] 89 S. W. 521.

12. Takes the nine-tenths which the beneficiary, being the concubine of the insured, is incapable of taking under La. Civ. Code, art. 1481. New York Life Ins. Co. v. Neal [La.] 38 So. 485.

13. Proceeds of policy payable to Insured's wife if living, and if not to their children, held, on the death of the wife and one of their two children before that of the insured, to belong one-half to the surviving child and the other half to the children of the deceased child. Michigan Mut. Life Ins. Co. v. Basler [Mich.] 12 Det. Leg. N. 159, 103 N. W. 596.

14. Rev. St. 1898, § 2347. Wife may sue for repudiation of policy payable to her if she survives the Insured or if not then to his heirs, without joining him as a plaintiff. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593. Neither this statute nor Rev. St. 1878, § 2347, to same effect, renders wife's interest nonassignable. Canterbury v. Northwestern Mut. Life Ins. Co. [Wis.] 102 N. W. 1096.

15. A life policy payable to the wife "for her sole use, if living, in conformity with the statute, and if not living, to their children or their guardian for their use," was within Laws 1840, p. 59, c. 80, as amended by Laws 1870, p. 612, c. 227, and Laws 1873, p. 1234, c. 821, relative to policies payable to married women, and in case of her death before her husband, passed under the residuary clause of her will, notwithstanding the fact that it was procured by the husband who paid all the premiums thereon and kept it in his possession (Statute since superseded by Laws 1896, c. 272, p. 215). Bradshaw v. Mutual Life Ins. Co., 95 N. Y. S. 780.

16. Within Civ. Code, art. 1481. New York Life Ins. Co. v. Neal [La.] 38 So. 485. The gratuity as to nine-tenths is prohibited in any form, whether as a donation, a gratuitous stipulation pour autrui, or in the form of an insurance policy, and hence the policy

cess.[17] It being established that the beneficiary was the concubine of the insured, a married man, the burden is on her to show a legal consideration.[18] There is, however, no donation where the concubine herself pays the premiums on a policy on the life of the insured in accordance with its provisions, but in such case she is the owner of the policy and is entitled to the proceeds, to the exclusion of his collateral kin.[19]

Rights of employe under employer's liability policy.[20]—In case a judgment for injuries against one having an employer's liability policy is not paid, on account of the insolvency of the insured, there is no privity of contract between the insurer and the judgment creditor through the insurance contract, that being a matter between the insurer and insured only.[21]

Rights of mortgagee.[22]—In the absence of a provision therein to the contrary,[23] if the policy is issued to the owner, the loss if any being payable to a mortgagee or other third person as his interest may appear, the insurance is to be deemed as running to the owner, and any act of his which would avoid the policy as against him will prevent a recovery by the mortgagee, though he is ignorant of the violation of the contract and does not consent thereto.[24] The only right acquired by the mortgagee is a right to receive so much of any sum as may become due under the policy as does not exceed his interest as mortgagee.[25] This is par-

is not rendered valid by regarding it as a stipulation pour autrui. Id.

17. Under Civ. Code, art. 12, providing that whatever is done in violation of a prohibitory law is void, although the nullity be not formally directed. New York Life Ins. Co. v. Neal [La.] 38 So. 485. Beneficiary in endowment policy, who was concubine of the insured, the latter being a married man and leaving children without support, held entitled to only one-tenth of the proceeds, it appearing that the insured had no property. Id.

18. Presumption is that it was gratuitous. New York Life Ins. Co. v. Neal [La.] 38 So. 485. Evidence held not to show that insured was indebted to the beneficiary. Id.

19. But where the concubine paid all the premiums, as was stipulated with the insurer, rendered faithful service to the deceased and provided him with decent burial, he not expending a cent on the policy, it was not a donation to her, but her own investment, and she was entitled to the proceeds to the exclusion of the insured's collateral kin. Particularly where he was unmarried and left no forced heirs. Succession of Johnson [La.] 38 So. 880.

20. See 4 C. L. 190.

21. Burke v. London Guarantee & Acc. Co., 93 N. Y. S. 652.

22. See 4 C. L. 191. For rights of mortgagee as to appraisal of loss, see § 20, post. Subrogation of insurer to rights of mortgagee, see § 23, post.

23. Where a mortgage clause provides that the insurance shall not be invalidated as to the mortgagee by any act or neglect of the mortgagor, the insured, nor by any change in the title or ownership of the property, the mortgagee is not affected by the mortgagor's failure to give notice to the company of a change in title as required by the policy, and can only be called upon to give such notice himself after having acquired knowledge of the change. Southern Bldg. & L. Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. Notice in the proof of loss held sufficient where it did not appear that mortgagee knew of the change prior to that time. Id.

24. Welch v. British American Assur. Co. [Cal.] 82 P. 964. Such an indorsement commonly called an open mortgage clause does not bring the mortgagee and the insurer into contractual relations with each other, but the contract remains one exclusively between the insurer and the property owner. Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647. Mortgagee's right to take is limited to insurer's liability under the policy, and the policy may become forfeited and the mortgagee deprived of all protection thereunder by any act or default of the property owner before the loss. Id. In the absence of some provision to the contrary, does not create a new contract of insurance with the payee, or abrogate or waive any condition of the policy. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497. Where a policy is void as to the assured for a violation of the condition against other insurance, it is also void as to one, not being a mortgagee, to whom, by subsequent agreement "any loss or damage ascertained and proved to be due the insured" is made payable as his interest may appear. Heyl v. Aetna Ins. Co. [Ala.] 38 So. 118.

25. Is not the "insured" within the meaning of the provision for appraisal of the loss, but owner has full power in that regard, and his acceptance of the award binds mortgagee, though latter had nothing to do with it. Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647. Is not an assignment of the policy and does not divest the insured of his title; it is only a conditional appointment that if the mortgage debt is unpaid at the date of loss the money shall go to the mortgagee. Staats v. Georgia Home Ins. Co. [W. Va.] 50 S. E. 815. Is a

ticularly true when the indorsement is made subject to the conditions of the policy, in which event a loss to be payable to the mortgagees must be one which, under the conditions of the policy, would be payable to the insured in the absence of such indorsement, and whatever would defeat the insured's right to payment in the absence of such indorsement, will still defeat it.[26] Thus where the policy provides that it cannot be modified or any provision thereof waived except in writing, an indorsement making the loss payable to third persons as their interest may appear does not either in terms or by implication consent to an incumbrance created by a chattel mortgage in favor of such persons, or prevent a forfeiture of the policy for the giving of such a mortgage without the company's consent.[27] The appointment of such persons to receive the loss is not inconsistent with the prohibition against chattel mortgages, since it is not necessary that there be such a mortgage, in order to make the appointment valid, or to give the appointees an interest in the loss.[28] It has been held that where the policy contains a further provision to the effect that if, with the consent of the company, any interest shall exist in favor of a mortgagee, the conditions of the policy shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended to the policy, the interest of the mortgagee is freed from all conditions not repeated at the time of the creation of that interest by being at that time again, in substance at least, written upon the policy, or attached or appended thereto.[29] There seems, however, to be some conflict of authority in this regard.[30]

The phrase "as his interest may appear" does not refer to the mortgagee's interest in the property, but to the amount of the mortgage debt,[31] and to such interest in the payment of the loss as may appear when it occurs, without regard to the character of the interest or the time when it may have arisen.[32]

The mortgagee's right of recovery is limited by the extent of his interest in the property,[33] the provisions of the loss payable clause,[34] and the amount of

mere appointee for that purpose. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

26. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497. Such provision and provisions in the policy as to waiver must be read together. Id.

27. Indorsement did not mention mortgage, describe appointees as mortgagees, or show that attention of parties was called to the existence of the mortgage. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497. Allegations of complaint held to mean nothing more than that consent to chattel mortgage was given at time and place when and where provision making policy payable to mortgagees was indorsed on policy and by agents who made the indorsement. Id.

28. Particularly where they were both creditors of the insured and mortgagees of his realty. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

29. Where provision was indorsed on policy that loss should be payable to mortgagee, subsequent sale of premises by mortgagor in violation of a condition of the policy, held not to prevent recovery by mortgagee. Welch v. British Am. Assur. Co. [Cal.] 82 P. 964. Subsequent provisions in policy that it is "made subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon, or added hereto" and that no privilege or permission affecting the insurance shall ever be claimed by the insured unless written on or attached to the policy do not change the rule. Word "insured" held not to mean the mortgagee. Id.

30. Award of appraisers accepted by mortgagor held binding on mortgagee, though policy contained the provision last quoted. Collinsville Savings Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647.

31. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

32. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

33. Where mortgage is a lien on the realty only, his right is limited to amount of insurance on building, and he has no interest in that on personalty contained therein. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

34. Where policies insured buildings and their contents under separate valuations and were indorsed "Loss, if any, on buildings, payable" to a mortgagee as his interest may appear, he was not entitled to any of the insurance on the "contents." Contract held severable. Miller v. Gibbs, 95 N. Y. S. 385.

the mortgage debt,[35] which latter is prima facie determinable from the record of the mortgage;[36] but a mortgagee who is also a trustee may recover the full amount of the policy.[37] The insured is not deprived of his right to sue on the policy,[38] and the mortgagee may maintain an action at law thereon in his own name when the amount of the mortgage debt exceeds the value of the insurance and the mortgage covers all the property destroyed.[39]

In Porto Rico the avails of insurance on mortgaged property, and the crops growing thereon when the policy is issued, inure to the benefit of a mortgagee whose interest is acquired before loss, and he may sue to enforce his rights therein without an assignment or transfer of the policy to him by the mortgagor.[40] He need not first exhaust his remedies against the other property embraced in the mortgage.[41]

Insurance by bailee or agent.[42]

§ 12. *Policy value in cash or loans before loss.*[43]—It has been held that certificates in endowment associations have a surrender value on the insolvency of the company in the same manner as ordinary policies of insurance.[44]

§ 13. *Options and privileges under policy.*[45]—Policies frequently provide that, on default in the payment of premiums after they have been in force for a certain number of years, the insured's share of the reserve fund shall be applied on the amount due,[46] or shall be used to purchase extended insurance.[47] A pro-

35. Where mortgagee insures solely on his own account, if loss occurs before extinguishment of debt the insurer is bound to pay him the amount of such debt, not to exceed the amount of the policy. Baker v. Monumental Sav. & Loan Ass'n [W. Va.] 52 S. E. 403. Where policy issued to mortgagee in possession of a stock of goods is renewed at end of first year, thus indicating that the insurer expected store to continue as a going concern, it cannot contend that he had no interest in the property at the time of the fire on the ground that his debt has been paid by the receipt of the proceeds of sales more than equaling the amount thereof, it appearing that he has, with the consent of the mortgagor, replenished the stock from time to time, and has applied only the net proceeds to the payment of his claim. Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127.

36. Policy is prima facie payable to him to the extent of the mortgage debt as it appears from the records notwithstanding a renewal of the mortgage subsequent to the issue of the policy. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546.

37. Chattel mortgage. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850. Where a chattel deed of trust stipulates that the chattels shall be kept insured for the better security of the debt, and the policy is delivered to the trustee, he has an equitable lien upon the proceeds of the insurance. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325. Trustee in a chattel trust deed, by the delivery to him of the policy, and its indorsement as payable to him as his interest may appear becomes the assignee of the policy, and not merely an appointee to receive payment. Id. His right is not affected by the fact that indorsement was made after the loss, though it was antedated. Id. Judgment in such case will protect the insurer which has no concern with possible claims of mortgagees or unsecured creditors who might impress trust on part of the insurance. Id.

38. Staats v. Georgia Howe Ins. Co. [W. Va.] 50 S. E. 815.

39. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

40. Avails of insurance on sugar and molasses coming into the sugar house on a sugar plantation as the result of the manufacture of a crop growing on mortgaged realty when the insurance was effected inure to the benefit of the mortgagee if the loss occurred after the execution of the mortgage particularly when the mortgage covers both the realty and the fruits thereof, and he may sue to enforce his rights therein without an assignment or transfer of the policy to him by the mortgagor. Under Mortgage Law of 1880, art. 118, and Mortgage Law of 1893, art. 110, providing that mortgage shall cover crops growing, or harvested but not yet removed and warehoused, when the mortgage falls due, and indemnities due the mortgagor for insurance of the realty or the crops. Royal Ins. Co. v. Miller, 26 S. Ct. 46. The fact that the Spanish law gives a summary remedy to enforce a mortgage does not prevent the mortgagee from suing in the ordinary way to enforce the application of the proceeds of the policy to the payment of his mortgage. Id.

41. In Porto Rico. Royal Ins. Co. v. Miller, 26 S. Ct. 46.

42. See 4 C. L. 192.

43. See 4 C. L. 193.

44. Gilbert v. Endowment Assn., 21 App. D. C. 344.

45. See 4 C. L. 193.

46. Under policy providing for equitable division of reserve fund every five years in the form of a bond, and that policy of any

vision for extended insurance "after the policy has been in force three full years" has no application where the insured fails to pay a quarterly instalment of the third year's insurance and the insurance ceases.[48]

Under a policy providing that, on default after the payment of a certain number of premiums, the insured shall be entitled to a paid up policy provided he makes a demand therefor and surrenders his policy within a specified time, the time of making the demand is not of the essence of the contract, and the insured, or the beneficiary after his death, may make it within a reasonable time.[49] The rule is different, however, where the policy further provides that on his failure to surrender it within the time specified the reserve shall be used in the purchase of extended or term insurance, since in such case the insured has two options and is bound to elect between them.[50] In Kentucky five years is held to be a reasonable time in which to make such demand.[51] A surrender or an offer to surrender the lapsed policy is not essential where, upon demand, the company unconditionally refuses to issue a paid up one on the ground that the policy is valueless and no longer in force.[52] The New York statute requiring a demand and a surrender of the policy to be made within six months after forfeiture has no extraterritorial operation.[53] In Kentucky the holder of a life policy is not entitled to any part of the reserve fund while the policy remains in force or until it is surrendered to the company.[54]

member who had paid premiums in advance when due without using any portion of his accumulations in such fund should be nonforfeitable for nonpayment of premiums until all his share therein had been exhausted for that purpose, held, that plaintiff, who had paid premiums for ten years had right to have bonds issued at end of five years applied to payment of premium which he did not pay when due, even though no bonds had been issued to him at the end of the ten-year period. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601.

47. Premiums having been paid for five years, held that, under the contract, if there was anything in the guaranty fund on the day when a premium became due and not paid which had not been used to keep the premiums level, 80 per cent. thereof must be applied to extend the insurance. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166. Where policy provided that certain portion of premiums was to be used to form guaranty fund, and company failed, on notice, to produce its books showing amount of premiums received, held, that it was competent for plaintiff to show cost of insurance by company's sworn reports to two states, the actual mortality reported, and the estimated mortality based on tables in general use, as tending to show that there was sufficient money in the fund to carry the policy to the date of insured's death. Id. Admissions of defendant's officers that general mortality had never exceeded expected mortality held admissible. Id. Evidence that agent told beneficiary when policy was taken out that it was the best kind of a policy because it was nonforfeitable after five years, and that another agent subsequently told her that he had been sent to take up the policy and could give her a better rate if she would take a straight 10-year policy in lieu thereof, held irrelevant and immaterial. Id.

48. Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 27 Ky. L. R. 372, 85 S. W. 177.

49. Under a policy providing that, on default after the payment of premiums for a specified period, the insured shall be entitled to a paid-up nonparticipating stock policy provided he returns his policy and applies therefor within a specified time, and that otherwise the policy shall be void except as to the legal reserve at the end of the last policy year for which the entire premium has been paid, which shall be paid after satisfactory proof of the death of the insured, a failure to demand a paid-up policy within the time specified does not forfeit insured's right to a paid-up policy. Aetna Life Ins. Co. v. Sugg, 27 Ky. L. R. 846, 86 S. W. 967.

50. Aetna Life Ins. Co. v. Sugg, 27 Ky. L. R. 846, 86 S. W. 967.

51. Aetna Life Ins. Co. v. Sugg, 27 Ky. L. R. 846, 86 S. W. 967. Demand for a paid-up policy must be made within five years after default in the payment of premiums, but, the demand having been made in time, an action to compel the issuance of the policy may be brought on the written contract at any time within fifteen years after the cause of action accrues. Barrett v. Mutual Life Ins. Co., 27 Ky. L. R. 586, 85 S. W. 749. There is no laches where the action is brought within the time limited by the statute. Id.

52. Barrett v. Mutual Life Ins. Co., 27 Ky. L. R. 586, 85 S. W. 749.

53. N. Y. Laws 1892, p. 1969, c. 690. Barrett v. Mutual Life Ins. Co., 27 Ky. L. R. 586, 85 S. W. 749.

54. Under St. 1903, § 559, requiring surrender of policy by insured in order to entitle him to the cash surrender value of the policy, and Id. § 659, subd. 3, making it optional with the company, in case of industrial policies where the weekly premiums are less than 50 cents each, to pay the cash

By statute in some states life policies on which a certain number of premiums have been paid become nonforfeitable for subsequent nonpayment, the net value of the policy at the time of default being used to purchase temporary insurance or a paid up policy.[55] The premiums paid by the assured is the basis to be adopted for ascertaining such net value.[56] No allowance need be made for future charges except such as the statute provides.[57] The period for which the policy is continued in force is to be calculated from the date of the policy and not from the date of the lapse.[58] Such provisions do not ordinarily apply to assessment insurance,[59] but the inclusion of an accident clause in a policy does not prevent its being a "policy of insurance on life."[60]

§ 14. *Assignments and transfers of benefits or insurance.*[61] *Life insurance.*[62]—There is a conflict of authority as to the validity of an assignment to one having no insurable interest in the life of the insured,[63] but all courts unite in holding such an assignment void where the transaction is a mere wager.[64] The defense of want of insurable interest cannot be raised in a contest between rival assignees,[65] nor can the assignor question the validity of the assignment because it is not made in the manner required by the policy.[66] In case the assignment is

surrender value or to issue a paid-up policy, and releasing it from further liability on doing either. Jenkins v. Sun Life Ins. Co., 27 Ky. L. R. 1142, 87 S. W. 1143.

55. Under Rev. St. 1899, § 7897, no policies of insurance on life can be forfeited after the payment of three annual premiums thereon for nonpayment of premiums, but net value of policy at time of default shall be computed on actuaries' or combined experience tables of mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other evidences of indebtedness to the company, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988. Mo. Rev. St. 1899, § 7897. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285. Where declaration on life policy counted on statute providing that after policy had been in force for three years the reserve thereof, in case of default, computed with the surrender value, should be taken as a single premium and be applied to continue the policy in force or purchase temporary insurance, held, that finding that replication to a plea to such count was not sustained by the evidence, was not a finding that there was nothing in the guaranty fund, and hence was not inconsistent with a finding in plaintiff's favor. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

56. Policy must be looked to for this purpose. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988.

57. The effect of the statute is to create a paid-up policy and hence no allowance need be made for future charges, other than that made by the statute in allowing the company one-fourth of the net value, and in providing (§ 7899) that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. per annum of all premiums that have been foreborne at the time of the decease including the whole of the year's premium in which the death occurs. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988.

58. Union Mut. Life Ins. Co. v. Adler [Ind. App.] 73 N. E. 835. Paragraph of complaint alleging payment of four premiums held good on demurrer as showing an extension of insurance for over 10 years under the nonforfeiture law. Id.

59. Do not under Mo. Rev. St. 1899, § 7910. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285.

60. Within Rev. St. 1899, § 7897, providing for extended insurance. Moore v. Northwestern Nat. Life Ins. Co. [Mo. App.] 87 S. W. 988.

61. See 4 C. L. 193. See Fraternal Mutual Benefit Associations, 5 C. L. 1523.

62. See 4 C. L. 193.

63. See 4 C. L. 193, n. 3, et seq., also 4 C. L. 236.

Alabama: An assignment by the insured to one having no insurable interest in his life is void as a wager policy. Troy v. London [Ala.] 39 So. 713.

64. Irrespective of whether the holder of a policy on his own life may legally sell and assign it to one having no insurable interest in his life, he cannot make it the subject-matter of a wagering and speculative contract between himself and a person having no interest therein. Quillian v. Johnson [Ga.] 49 S. E. 801. Assignment of policy to one having no insurable interest under agreement whereby the assignee was to pay a past due premium, and assignment and policy were left in hands of third person for 90 days, during which time the assignor was to have the privilege of repaying the premium, in which event the policy and assignment were to be returned to him, but in case he failed to do so then the policy was to go to the assignee, and in case the assignor should die within the 90 days then the assignee was to have the policy on payment of certain sums to the assignee's children and certain notes, held a wagering contract and vold. Id.

65. Connecticut Mut. Life Ins. Co. v. Tucker [R. I.] 61 A. 142. Public policy does not require the court to interpose the defense

declared to be illegal the assignee may recover the amount of premiums paid,[67] and any other payments made for the insured's benefit under the terms of the agreement.[68] In case the insured deposits the policy and an assignment thereof with a third person, in pursuance of the terms of a wagering contract, his executor may recover it under the statute authorizing the recovery of money lost under a gambling contract.[69]

Mere naked possession of the policy is not evidence of ownership, but in the absence of a written assignment the holder must show that he is the bona fide owner and the manner in which he became such.[70]

An assignment of a policy as collateral security vests in the assignee a title sufficient to enable him to collect the proceeds thereof,[71] yet it does not divest the assignor of the general property in the policy, and he still has title thereto subject to the assignee's lien.[72] The assignee may ordinarily enforce the collection of the security to the full amount, holding any surplus above the amount due him for the persons equitably entitled thereto.[73] Before the assignor has a right to control or in any way interfere with its collection he must allege the insolvency of the assignee, or fraud committed or about to be committed by him, or some other substantial reason.[74] A tender of the debt extinguishes the assignee's lien, and entitles the assignor to the possession of the collateral.[75] So too, where the assignee has been paid more than the amount of his debt by the insurance company and declares to the assignor his intention to collect and appropriate the amount remaining due on the policy contrary to his agreement, and the company, being informed of that fact, agrees to hold the balance due on the policy until legally authorized to dispose of the same, the insured has a right of action at law against the company.[76] One to whom a policy in a mutual assessment company is assigned as collateral security takes the same subject to the rules and by-laws of the company and is not entitled to notice of the time of payment of premiums required by them to be given to the insured.[77]

In states where the statute makes a policy payable to a married woman her sole and separate property, she and the insured may assign it without the company's consent.[78] Where the charter of a mutual company provides that a policy for the benefit of insured's wife or children shall not be held or made liable for his debts, a paid-up policy cannot, without consent of the beneficiaries, be assigned to the company as security for a loan,[79] notwithstanding a provision in the policy that it may be assigned at any time with the consent of the company.[80]

of want of insurable interest but only to be satisfied that the contract is not a mere wager. Id.

66. Because not indorsed on the policy. Connecticut Mut. Life Ins. Co. v. Tucker [R. I.] 61 A. 142.

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

68. Entitled to be reimbursed out of proceeds of policy for sums paid in satisfaction of notes of the assignor which the agreement required him to pay in case of the assignor's death. Quillian v. Johnson [Ga.] 49 S. E. 801.

69. Under Code 1895, § 3671. May maintain equitable action to prevent the assignee from collecting the policy, on the happening of the event which, under the contract, makes the assignment absolute. Quillian v. Johnson [Ga.] 49 S. E. 801.

70. Cuyler v. Wallace [N. Y.] 76 N. E. 1; Cuyler v. Wallace, 101 App. Div. 207, rvg, 91 N. Y. S. 690. Son having assigned policy, payable to his representatives, to his father, latter will be presumed to continue to own it until the contrary is shown, and the mere fact that the son was in possession of the policy, claiming to be the owner thereof prior to the father's death, is insufficient to show a reassignment to him. Id. Possession by son raises no presumption of oral reassignment for a valuable consideration. Id.

71, 72, 73, 74, 75. Clark v. Equitable Life Assur. Soc., 133 F. 816.

76. Particularly when the liability to pay on the policy is not in dispute. Clark v. Equitable Life Assur. Soc., 133 F. 816.

77. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789.

78. Rev. St. 1878, § 2347; amd. Laws 1889, p. 299, c. 271, § 1; Laws 1901, p. 482, c. 376. Canterbury v. Northwestern Mut. Life Ins. Co. [Wis.] 102 N. W. 1096, and cases cited.

A provision in an assignment of a paid-up policy to the company as collateral security for a loan that, upon failure to pay the principal or interest of the loan, the company may cancel the policy and apply its cash surrender value to the payment of the loan and interest, is a forfeiture in the nature of a mere penalty for the nonpayment of borrowed money, and hence unenforceable.[81]

In Illinois an insurance policy is not negotiable either by common law or by statute, so as to vest the title in the assignee,[82] and suit thereon must be brought in the name of the assignor for the use of the assignee.[83] All defenses can be interposed to such an action which could have been if the name of the assignee were eliminated.[84]

Policies having an inchoate value pass to the insured's trustee in bankruptcy though they have no cash surrender value.[85] So do policies having no technical cash surrender value at the time of the adjudication but which have a surrender value in which the bankrupt has a contingent interest.[86]

Fire insurance.[87]—Policies of fire insurance are not in their nature assignable before loss without the express consent of the company, and such an attempted assignment puts an end to the contract independently of prohibitory conditions therein.[88] Provisions requiring such consent and prescribing the manner in which it may be obtained, are valid and must be complied with.[89] A clause prohibiting the assignment of the policy before loss is not violated by its transfer and delivery as collateral security for a debt,[90] and a subsequent refusal by the insurer to

79. Act March 19, 1878 (Acts 1877-78, p. 640, c. 545) § 6, construed. Mutual Life Ins. Co. v. Twyman [Ky.] 89 S. W. 178.

80. Such provision is repugnant to the constitution and void. Mutual Life Ins. Co. v. Twyman [Ky.] 89 S. W. 178.

81. Mutual Life Ins. Co. v. Twyman [Ky.] 89 S. W. 178. Particularly where the policy does not provide for the surrender of the policy for its paid-up or cash surrender value, or for a loan thereon from the company to the insured, and the company's charter provides that a policy payable to the insured's wife and children shall not be made liable for his debts. Id.

82, 83. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

84. Words "for the use of" the assignee are mere surplusage. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

85. Policies having a collateral loan value and paid-up insurance value. Bankr. Act July 1, 1898, c. 541, § 70, subd. 5, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), authorizing a bankrupt to retain policies by paying their cash surrender value to the trustee, does not by implication change this rule. In re Coleman [C. C. A.] 136 F. 818.

Note: In Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018, supreme court intimates but does not expressly decide that policies "having a cash surrender value" include policies having a cash value which would be recognized and paid by the insurer on surrender of the policy, though no stipulation as to surrender value is contained therein.

86. Where policy had no cash surrender value, but the insurer voluntarily agreed to pay a certain sum for it, upon a release from the insured and his wife, the bankrupt's interest was assignable and his trustee could sell it and have the bankrupt assign the same. In re Coleman [C. C. A.] 136 F. 818.

87. See 4 C. L. 195.

88. The transfer by one corporation to another of all its insured property, together with the policy, the original corporation continuing its existence, gives the transferee no rights under the policy, in the absence of the insurer's assent to the assignment, particularly where the policy provides that an assignment without the company's consent shall render it void. Miles Lamp Chimney Co. v. Erie Fire Ins. Co. [Ind.] 73 N. E. 107. It appearing that the old corporation still remains in existence, it must appear that the new one has in some lawful way succeeded to its rights in the policy before it can sue thereon. Id.

89. Where assignee of company failed to sign and forward necessary application for the company's consent as required until after the property was destroyed, held that he could not recover. Hall v. Continental Ins. Co., 27 Ky. L. R. 99, 84 S. W. 519. Under provision that policy might be transferred or assigned by obtaining the consent of the secretary, and that any transfer or assignment made without such consent expressed in writing should forfeit all benefits under the policy, held, that policy was forfeited on sale of insured's interest unless it was transferred in the manner specified. Bennett v. Mutual Fire Ins. Co. [Md.] 60 A. 99. Where an averment that a policy of reinsurance procured by a town mutual company has been assigned to plaintiff in due form by order of its board of directors is not denied in the answer, it will be presumed, in the absence of evidence to the contrary, that such board had authority to make the assignment. Cass County v. Mercantile Town Mut. Ins. Co. [Mo.] 86 S. W. 237.

90. Scottish Union & Nat. Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419.

attach a loss payable clause in no way affects the insured's right to make such transfer.[91] An agreement to assign a policy as collateral security for a loan will operate as an equitable assignment though it is not delivered when issued nor actually assigned until after loss, when the borrower is insolvent.[92]

After loss the policy may be assigned without the consent of the company and without in anyway affecting its liability,[93] notwithstanding a provision therein to the contrary.[94] The assignee simply stands in the shoes of the assignor, and any valid defense which could be set up against the insured is available against the assignee.[95] He is not bound by a subsequent adjustment of the loss made by the insurer with the assignor.[96]

§ 15. *Change or substitution of contract, or risk, or of conditions thereupon.*[97]—Although in writing the policy may be changed or modified by parol, notwithstanding a provision therein to the contrary.[98] The acts of the agent in this regard are binding on the company, if within the general scope of his authority.[99]

An agent authorized to consent to the removal of the insured property may do so orally, and the fact that the rate is greater in the new location will not relieve the company from liability provided the insured agrees and holds himself in readiness to pay the additional premium, it being the agent's duty to ascertain the increased rate and demand the same.[1]

When a member of a life association ratifies the transfer of its assets and obligations to another company, he thereby ceases to be a member of the retiring company and releases it from further liability.[2]

§ 16. *Rescission, forfeiture, cancellation and avoidance. A. By agreement.*[3]—The insured's rights are fixed by the contract and he cannot be deprived of them without his consent, except in the manner prescribed thereby.[4] Conditions imposed upon the insurer with respect to giving notice of cancellation will be

91. Company cannot without insured's consent insert additional provisions in the policy after it has been issued. Scottish Union & Nat. Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419.

92. Assignee has lien and assignment after loss is not fraudulent preference so as to constitute act of bankruptcy. Wilder v. Watts, 138 F. 426.

93. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901; Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429. Civ. Code, § 2102, prohibiting transfers without the consent of the company, applies only to assignments before loss, and § 2105 expressly provides that a transfer after loss does not affect the liability of the insurer. Id. Words "subject to the consent" of the company in assignment held mere surplusage, and the result of inadvertence. Id.

94. Such conditions are null and void, as inconsistent with the covenant of indemnity and contrary to public policy. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429.

95. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429.

96. Unless the assignor acted as his authorized agent. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429.

97. See 4 C. L. 196.

98. Provision prohibiting parol modification is a part of the contract and hence it may be changed the same as any other part. German-American Ins. Co. v. Yellow Poplar Lumber Co., 27 Ky. L. R. 105, 84 S. W. 551. The "clear space" clause in a policy of insurance on lumber may be abrogated by agreement, prior to loss, in consideration of an increased premium. Id. Act of agent in abrogating such clause held not a waiver but an additional contract based upon a valuable consideration, and binding on the company, Id. Preponderance of evidence held to sustain finding that abrogation of "clear-space clause" in policy covering lumber was made before the loss. Id.

99. Bound by act of agent, who was authorized to accept risks, countersign, issue and deliver policies, renew risks, and receive premiums, in abrogating clear-space clause in policy covering lumber in consideration of an increased premium. German-American Ins. Co. v. Yellow Poplar Lumber Co., 27 Ky. L. R. 105, 84 S. W. 551.

1. Cooper v. German-American Ins. Co. [Minn.] 104 N. W. 687.

2. Northwestern Nat. Life Ins. Co. v. Hare. 5 Ohio C. C. (N. S.) 348, 26 Ohio C. C. 197.

3. See 4 C. L. 196.

4. Mortgagee held to have had no authority to cancel policy as against the insured, particularly where no notice was given to the latter, and there was no offer to return the unearned premium. Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466.

strictly construed[5] and must be strictly complied with.[6] Where the required notice is given and the insured agrees to the cancellation and that the unearned premium may be applied on other policies, the policy is canceled though it is not surrendered until after the fire, and the premium is not returned.[7] The transmission to the insured of the fact of cancellation, by a special agent of the insurer authorized to cancel on notice, is final, and a subsequent arrangement between him and the insured to let the policy stand is immaterial because a new discretionary act beyond such agent's power.[8]

An unauthorized or fraudulent cancellation is void,[9] and is not ratified by any act or statement of the insured, without full knowledge of the facts.[10]

A cancellation by the company on the request of an agent of the insured having express or implied authority in the premises is valid.[11] An agent, authorized by a corporation to act in its behalf in all matters pertaining to the insurance of its property, cannot delegate his power to cancel policies and make substitutions to another, without his principal's consent, express or implied.[12] An agent of the company may be the agent of the insured for the purpose of selecting the companies in which the insurance shall be placed,[13] and a cancellation and substitution by him is valid, though made without notice, where the insured ratifies his action as soon as he learns of it.[14]

5. Where the policy provides for its cancellation on the giving of five days notice to the assured, and describes the owner as the assured, a mortgagee to whom the loss is payable as his interest may appear cannot surrender the policy for cancellation even though she has possession of it, and notice to her is insufficient. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

6. Held that under terms of policy it could not be canceled without giving five days notice to the insured. Not by secret agreement between company and creditor of insured to whom policy was made payable as his interest might appear. Provident Sav. Life Assur. Soc. v. Georgia Industrial Co. [Ga.] 52 S. E. 289. Company cannot cancel a policy upon its own volition, without notice, where the policy provides for notice. Fowler Cycle Works v. Western Ins. Co., 111 Ill. App. 631. Notice of cancellation served on plaintiff held sufficient and not to have been rendered conditional by expression of opinion therein that companies would remain on risk if certain objectionable clauses were removed. Colonial Assur. Co. v. National Fire Ins. Co., 110 Ill. App. 471. Service on plaintiff of letter of defendant company to its agent directing the latter to cancel its policies of reinsurance held "a notice of cancellation" sufficient to meet the requirements of the policies in that respect, and terminate the liability five days thereafter. Id. Even if it could be construed as a cancellation only on condition that objectionable provisions were not removed within a reasonable time, such time will not, in the absence of an agreement to the contrary, be regarded as extending the time beyond that fixed by the policy in which the notice shall take effect. Id.

7. Though not surrendered until day after the fire eleven days later. Citizens' Ins. Co. v. Henderson Elevator Co., 27 Ky. L. R. 151, 84 S. W. 580.

8. Colonial Assur. Co. v. National Fire Ins. Co., 110 Ill. App. 471.

9. Where the agent embezzles the premium and in order to conceal that fact subsequently obtains the policy from a mortgagee having custody of it, and without the knowledge or consent of the insured, substitutes another policy therefor, the latter is not a valid contract. Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466. Retention of premium not an application of it on second policy, where it does not appear that he made even a nominal application of it or had authority to so apply it. Id.

10. Where through the fraud of the agent a policy was surrendered and canceled and another fraudulently substituted, held, that the cancellation was not ratified by the insured's statement, at the instance of the agent, that he had no insurance with the first company, nor by the commencement of action against both companies, since the rights of the parties were fixed when the loss occurred. Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466.

11. The possession of a policy by a broker implies authority to procure its cancellation; but this implication is rebutted where the company is at the time informed that he has ceased to be the agent of the insured. Fowler Cycle Works v. Western Ins. Co., 111 Ill. App. 631. Letter revoking broker's agency in all respects except that he was to complete work of taking out additional insurance held not to give him implied authority to cancel policies. Id.

12. Cannot delegate authority to cancel and substitute policies and waive notice of cancellation. Insurance Co. v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794. Broker held to have no express authority to cancel or substitute policies (Id.), nor was he clothed with implied authority to do so by a course of dealing (Id.), or by custom (Id.).

13. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917.

14. Where insured enters into agreement with an insurance agent to keep his property insured not specifying the companies he makes such agent his agent for the selection

(§ 16) *B. For breach of contract, condition, or warranty, or misrepresentation.*[15]—The company having assumed the risk of loss and received the consideration therefor can escape liability only by showing that the insured was guilty of some act or omission which in some way contributed to the loss, or which was in violation of the plain and unequivocal terms of the contract.[16] Though forfeitures are not favored they will be enforced unless the party by whose fault they are incurred can show some good ground in the conduct of the other party on which to base a reasonable excuse for such default.[17] The forfeiture occurs upon the breach of the condition on which it is based.[18]

If no right of cancellation is reserved neither party can withdraw from the obligation imposed without consent of the other,[19] and of the beneficiary in case of a life policy,[20] and this rule is not affected by the reservation of a right to change the beneficiary which has never been exercised.[21]

A provision making the policy incontestable after a specified time except for nonpayment of premiums or understatement of age precludes the insurer from defending on the ground that it was induced to issue it through fraud and misrepresentation,[22] but a provision making it incontestable except for nonpayment or fraud does not prevent the company from contesting payment in case the insured is legally executed for murder.[23]

The company is not liable on a policy which it is induced to issue through the fraud of the insured.[24] In the absence of special circumstances equity will not take jurisdiction to cancel a life policy for fraud after insured's death, where suit must be brought thereon within a year, the remedy at law being complete.[25]

One who is induced to take out a policy through false and fraudulent representations on the part of the agent as to what the contract will contain, may on receipt of a contract differing essentially from that agreed on, repudiate it and re-

of companies and the cancellation and substitution of policies. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917.

15. See 4 C. L. 196. See, also, post, §§ 8, 9.

16. Scottish Union & Nat. Ins. Co. v. Andrews [Tex. Civ. App.] 13 Tex. Ct. Rep. 667, 89 S. W. 419.

17. For nonpayment of premiums. Union Mut. Life Ins. Co. v. Adler [Ind. App.] 73 N. E. 835.

18. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

19. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

20. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Where a husband obtains a policy for the benefit of his wife and children, he cannot surrender it without their consent. Id.

21. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

22. See 4 C. L. 197, n. 42. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499.

23. Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 353.

24. Evidence held insufficient to show that another woman was substituted to take the medical examination in place of the insured. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499. The defense of fraud in procuring the insurance is sustained where the insured who died shortly after the policy was issued, from enlargement of his spleen to twenty-six times its normal size, failed to disclose his condition to the examining physician, although three physicians had told him of the bad condition of his health, one of whom refused to pass him for life insurance, another told him he had heart disease, and the third discovered the enlargement; and this is true notwithstanding the examining physician failed to discover his condition and numerous acquaintances testified to his apparent good health. Michigan Mut. Life Ins. Co. v. Whittaker, 7 Ohio C. C. (N. S.) 1. Upon denial of decedent's application for insurance in a certain company its agents applied to defendant's agent for policy on decedent's life. They were furnished with an application which they filled up and signed without notice to or authority from deceased. They also procured the physician who had made the medical examination and certificate on the rejected application a year before to copy the same, and then delivered the application to defendant's agent, who had no notice of the manner in which it was prepared. Defendant issued a policy which was delivered to decedent's wife, who paid for it, believing that it was the policy originally applied for. Held, that the defendant having been induced to issue the policy through fraud was not liable thereon. Mahon v. Royal Union Mut. Life Ins. Co. [C. C. A.] 134 F. 732.

25. Jurisdiction is concurrent and it is discretionary with the chancellor to assume it or not. Des Moines Life Ins. Co. v. Seifert, 112 Ill. App. 277.

cover the premiums paid.[26] He must, however, act promptly and return the policy within a reasonable time, or offer to do so,[27] and the burden is on him to show fraud by clear, strong and convincing proof.[28]

All prior negotiations are presumed to have been merged in the policy, and hence where the application sets forth all the provisions which the policy is to contain, parol evidence is inadmissible to vary its terms.[29] If the insured is able to read he will be presumed to know the contents of the application and is bound by a contract conforming thereto though its terms are in conflict with the misrepresentation of the soliciting agent.[30] By accepting the policy he becomes bound by conditions and provisions appearing on its face.[31] So, too, he is bound by provisions therein and in a binding receipt that the policy cannot issue or take effect until the first premium is paid in full,[32] and is chargeable with the notice contained in the receipt that the agent cannot, without express authority, waive such payment and deliver a valid policy.[33] He is not, however, precluded from insisting on

26. Urwan v. Northwestern Nat. Life Ins. Co. [Wis.] 103 N. W. 1102. An application for insurance and a contemporaneous application for appointment as special agent will, though separate in form, be considered as part of the same transaction and will be construed together for the purpose of determining the rights of the parties in this regard, where, in order to make his appointment as agent effectual, he was bound to continue the payment of premiums for the full term of the policy, and was induced to pay the first year's premium on the policy in order to secure the special agent's contract as well as the policy (Id.), and if the agent's contract differs materially from the one agreed upon, the insured may reject it and demand a return of the money paid (Id.), though he does not thereby acquire a cause of action in tort for deceit (Id.). Complaint held not to allege that the false representations constituted a cause of action for deceit. Id. The fact that the policy and the agent's contract are both void because in violation of a statute prohibiting discrimination between insurants does not render the parties in pari delicto so as to prevent a recovery by plaintiff. Id. Where an illiterate woman was induced to take out a life policy by representations that she could "draw out" at the end of ten years, but the policy as written gave her no right to draw out any sum at that time, held, that she was entitled, on discovery of that fact, to recover the amount paid by her as premiums. Caldwell v. Life Ins. Co. [N. C.] 52 S. E. 252. "Draw out" held to mean that she could draw the amount due her at that time. Id. The measure of damages for inducing one to take out a policy through false representations is the amount of premiums paid with interest. Id.

27. Evidence in action on premium note held insufficient to support verdict that it had been obtained by fraud in that policy was not worded as defendant had been led to believe it would be, it not appearing that defendant ever offered to return the policy. Allen v. Smith [Ala.] 39 So. 615. In action to recover premiums paid on ground that plaintiff was induced to take out policy through false representations, instruction that payment of premiums after discovery of fraud would prevent plaintiff from setting it up later "unless she paid under protest," held not erroneous as not based on the evidence, where it appeared that after discovering that there was something wrong she tried to have the matter adjusted without success. Caldwell v. Life Ins. Co. [N. C.] 52 S. E. 252. A member of a mutual company accepting and retaining a fire policy for over a year, and paying one assessment thereon, cannot, after the rights of innocent third parties have intervened, escape liability for assessments made on the company becoming insolvent, by showing that he was induced to accept the policy and enter into the contract through misrepresentations of the soliciting agent. Moore v. Lichtenberger, 26 Pa. Super Ct. 268.

28. Instructions approved. Caldwell v. Life Ins. Co. [N. C.] 52 S. E. 252.

29. Vette v. Evans [Mo. App.] 86 S. W. 504.

30. Particularly where he makes no objection when policy is delivered. Vette v. Evans [Mo. App.] 86 S. W. 504. As to amount which insured will be entitled to receive. Id. Parol evidence inadmissible to show fraudulent representations as to what the policy was to contain. Id. Evidence held not to sustain allegations of fraud. Id.

31. Is estopped from denying that he assented thereto. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87. Fact that portion of the words of a covenant against vacancy were accidentally covered by revenue stamps held not to sustain claim that insured had no notice thereof, the apparent fact that a part of the printing was covered being sufficient to put him on notice. Hardiman v. Fire Ass'n [Pa.] 61 A. 990.

32. Receipt issued by agent on partial payment of first premium. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040. Receipt held to show that such payment was merely intended to secure company against expense of medical examination in case applicant did not take the policy, and not to have made a binding contract where insured died before the payment of the balance of such premium. Id.

33. Will be held to have knowledge that binding receipt given by agent making insurance in force from date of application is not binding on company. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040.

the rate of premium fixed in the written application by reason of the fact that he fails to read the policy.[34]

If the insurer sells and transfers all its assets without the consent of the insured, the latter may treat his contract as terminated and recover any damages sustained thereby.[35]

If the company wrongfully refuses to receive a premium on the ground that the policy has become forfeited by a breach of one of its conditions, the holder of the policy may either elect to consider the policy at an end, in which case he may recover its just value in a proper action brought for that purpose,[36] or he may institute an equitable proceeding to have the policy adjudged in force, in which the question of forfeiture may be determined,[37] or he may tender the premium, wait until the policy becomes payable by its terms, and then try the question of forfeiture in an action on the policy.[38] On repudiation during the insured's lifetime the measure of damages is the cost of replacing the policy on the same terms in a sound company at the time of the surrender,[39] or, if the insured is not then insurable, the present value of the policy at the time of the breach,[40] to be ascertained by discounting the amount of the policy for the expectancy of life and deducting therefrom the discounted premiums for the same period.[41]

In the absence of fraud on the part of the beneficiary, to constitute a consideration for the payment of premiums, there must be a contract against which at the time of its execution the insurer cannot interpose a valid defense.[42] Premi-

34. Where defendant's written proposal for employer's liability insurance contained a specified rate of premium inserted by plaintiff's agent who promised to attach a copy of the application to the policy but, being found erroneous, the correct rate was inserted in the copy attached to the policy, defendant was entitled to assume that the rate specified was the same as that contained in the proposal. Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co. [Mich.] 102 N. W. 975.

35. Is thereby relieved from liability on a premium note less the value of his insurance from the date of his policy to the date of the transfer. Vette v. Evans [Mo. App.] 86 S. W. 504.

36. See, also Contracts, 5 C. L. 664. If there has been an actual breach and the insurer declines to recognize him as a policy holder, insists that his policy is no longer in force, and wrongfully refuses his tendered premiums. Insured has sufficient interest in the policy for this purpose, particularly where he has procured assignments of the interests of the beneficiaries. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601. This is true though a bond given by the company to the insured operates in law as a payment of the premiums whose nonpayment by the insured when due is claimed by defendant to have avoided the contract. Where policy provided that equitable division of reserve fund should be made every five years in the form of a bond, and that policy of any member who had paid his premiums in advance when due without using any portion of his accumulations in such fund should be nonforfeitable until all his share therein had been exhausted in payment of premiums, and plaintiff tendered bonds previously received in payment of premiums and defendant refused to accept them, held, that he was entitled to treat contract as repudiated. Id. On company's wrongful refusal to perform or to be longer bound, insured may recover premiums paid. Northwestern Nat. Life Ins. Co. v. Hare, 5 Ohio C. C. (N. S.) 348. Where company wrongfully refuses to accept further payments of assessments and declares that insurance has lapsed, and the certificate of membership become forfeited, beneficiary may recover its just value. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593. Cancellation must be alleged and proved to be wrongful, and hence where an assessment policy holder voluntarily ceased payment of assessments and abandoned his policy, he could not recover damages for its cancellation. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

37. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593.

Where a company wrongfully declares a life policy lapsed and refuses to have any further dealings with the insured. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601.

38, 39. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593.

40. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593; Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601.

41. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601. See, also, Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593.

42. Metropolitan Life Ins. Co. v. Felix [Ohio] 75 N. E. 941. The provisions of the policy whereby the insurer has provided for immunity from liability must be looked to to determine whether it has incurred liability, rather than averments in its answer that it intends and is ready and willing to be bound thereby. Id. Premiums paid by wife on policy issued on life of her husband without his knowledge or consent may be re-

ums paid on a void policy[43] or on a policy wrongfully canceled by the insurer may be recovered back by the insured.[44]

In some states an insurer seeking to avoid the policy on the ground of misrepresentations must deposit in court for repayment the premiums paid on the policy.[45]

Failure to make further payments of premiums on an ultra vires contract cannot result in any forfeiture of the right to recover premiums already paid.[46]

(§ 16) *C. Estoppel or waiver of right to cancel or avoid.*[47]—Provisions and conditions in the policy which are for the benefit of the insurer,[48] including provisions in the by-laws of mutual companies which are not prescribed by statute, may be waived by it.[49] So too, the insured[50] or his authorized agent may waive conditions and provisions inserted for his benefit.[51] The beneficiary is not estopped to assert the illegality of an assessment by reason of the fact that the insured previously paid similar assessments without protest.[52]

Policies which are absolutely void cannot be the subject of waiver.[53] The waiver

covered where policy makes application, and consequently the regulations, a part of the contract, and regulations provide that policy shall not bind the company unless person against whose death it insures is aware of the insurance. Id.

43. Metropolitan Life Ins. Co. v. Felix [Ohio] 75 N. E. 941. Premiums paid in good faith on policies void because taken without the knowledge and consent of the insured. Griffin's Adm'r v. Equitable Assur. Soc., 27 Ky. L. R. 313, 84 S. W. 1164. On refusal of the company to perform an ultra vires contract the insured may recover the premiums paid. Northwestern Nat. Life Ins. Co. v. Hare, 5 Ohio C. C. (N. S.) 348. In an action quasi ex contractu. Id. May recover them from company which purchases assets of the insurer, where it assumes all latter's liabilities, etc. Id. Association cannot affirm or reject the terms of a policy in part so as to confine the insured to one of the benefits therein provided for, when he has paid for the right to elect between two benefits therein set forth. Id.

44. May recover the amount of all premiums and dues paid by him, with interest thereon from the date of payment, there being an implied promise on the part of the company to repay the sum so received by it. Is action on implied contract for specific sum within Code, § 385, providing for judgment by default final. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221.

45. Rev. St. 1899, § 7891. Herzberg v. Modern Brotherhood, 110 Mo. App. 328, 85 S. W. 986.

46. Northwestern Nat. Life Ins. Co. v. Hare, 5 Ohio C. C. (N. S.) 348, 26 Ohio C. C. 197.

47. See 4 C. L. 200. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523. For waiver of requirements as to notice and proofs of loss, see § 20, post. Waiver of provisions limiting time within which suit must be brought, § 24 A, post.

48. For nonpayment of premiums: Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

As to who shall be deemed agents: That no person shall be deemed its agent in matters relating to the insurance unless duly authorized in writing. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803.

49. Where statute creating company does not prescribe character of title or interest which insured shall have in the property, a by-law or regulation making void a policy issued to anyone not having a fee simple title may be waived. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730.

50. Notice of cancellation. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917; Insurance Co. v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794.

51. Where agent of defendant, who was also the agent of the insured for the purpose of keeping the property insured without notice to the insured canceled one of the policies previously procured and substituted another in the defendant, which he mailed to insured before the fire, held, that defendant's policy was in force, though policy was not taken from the post office by plaintiff until after the fire. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917.

A broker who was a subagent of the insured and not an agent of the insurer, had no authority to cancel policies and to substitute others, or to waive notice of cancellation. Insurance Co. v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794. Evidence held not to show that plaintiff, through its general agent, held out its subagent to insurance company as having authority to cancel policies and waive notice. Id.

52. Benjamin v. Mutual Reserve Fund Life Ass'n, 146 Cal. 34, 79 P. 517.

53. A policy procured through false and fraudulent representations by the insured. American Cent. Ins. Co. v. Antram [Miss.] 38 So. 626. Receipt of premiums by agent and full knowledge of adjuster of the fraud held no waiver. Instruction erroneous. Id. Instruction that though jury believed that policy had been procured through fraudulent representations they should find for plaintiff if they believed that the agent accepted the premium after the fire and after the adjuster had investigated the fire and the loss and had full knowledge of all the facts held erroneous in the absence of proof that the adjuster, when making his examination, knew of the fraud. Id. The mere fact that he knew the true state of the title and of

of one condition does not relieve the insured from the necessity of complying with the others.[54] The fact that the company waived forfeitures of policies held by other persons is immaterial where it does not appear that insured knew of such waivers, and that his conduct was influenced by such knowledge.[55] Provisions as to the manner of changing the beneficiary cannot be waived after the death of the insured.[56]

Waiver may be the express abandonment of a right,[57] but it is more frequently implied from acts that are inconsistent with its continued assertion.[58] It may be but is not necessarily founded upon an estoppel.[59] Any acts, declarations, or course of dealing by the insurer, with knowledge of facts constituting a breach of a condition in the policy, leading the insured to honestly think that, by conforming thereto, a forfeiture will not be incurred, followed by due conformity on his part,[60] or any conduct on its part inducing the insured to rest on the well founded belief that a strict performance of conditions will not be insisted upon,[61] even though the in-

the insured's interest is insufficient to show that he knew that policy had been obtained through fraudulent representations. Id. The mere fact that contrary to the terms of the policy other insurance has been obtained will not render it absolutely void so as to prevent a waiver or estoppel by subsequent acts. Phenix Ins. Co. v. Grove, 116 Ill. App. 529. Breach of warranty that insured is sole and unconditional owner of the property does not render the policy void ab initio, so as to prevent waiver, but merely voidable. Glens Falls Ins. Co. v. Michael [Ind.] 74 N. E. 964.

54. The waiver of a condition against occupancy by a tenant does not operate as a waiver of a separate and distinct condition avoiding the policy for vacancy (Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Id., 75 N. E. 849), nor does the fact that the insurer knew that the property was occupied by a tenant prevent a forfeiture for vacancy on the theory that the parties must have had in mind the probability that there would be intervals of vacancy between the outgoing of one and the incoming of another tenant (Id.). Under a provision that the insured shall "keep his books and inventory in an iron safe at night, or at some place secure against fire in another building," a waiver of the requirement of the safe, by reason of the fact that the agent knew when the policy was issued that the insured had none, does not relieve the insured from the necessity of keeping his books in another building. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616. Nor is the latter requirement waived by reason of the fact that there is no other safer building in town. Not necessary that the other building be safer. Id.

55. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609.

56. Waiver can only operate in favor of the assured as between him and the company but not as between the company and third persons, as the beneficiaries, whose rights have vested by the death of the insured. Freund v. Freund, 218 Ill. 189, 75 N. E. 925. The filing of a bill of interpleader and payment of the proceeds of a policy into court cannot be construed as a waiver of the conditions prescribed for effecting change. Id.

57, 58. Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339.

59. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

60. For waivers by agents see "Acts and knowledge of agents of insurer," infra, this section.

Fire Insurance: Estops the company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy. Foreman v. German Alliance Ins. Ass'n [Va.] 52 S. E. 337. Repayment, after premises became vacant, of premium previously advanced by agent of both the insured and the insurer, held not a waiver. Id. Forfeiture, on account of the execution of a chattel deed of trust on the property is waived where, after loss, the company's secretary, by request of trustee, endorsed the policy as payable to him, dating the endorsement as of date before the loss, and company, by its subsequent conduct, induced him to incur trouble and expense on the faith of that act. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

Indemnity company, with knowledge of all the facts, assuming the defense of an action for damages against the insured, held estopped to rely on a provision in the policy exempting it from liability in case of injury to a child employed contrary to law. Complaint held to state cause of action. Tozer v. Ocean Acc. & G. Corp. [Minn.] 103 N. W. 509.

Employers' liability insurance: A stipulation in an employer's liability policy providing for indemnity only for sums paid in satisfaction of judgment after trial of the issue is waived where, after notice of a proposed settlement, the company refused to take part or give any advice and the insured makes a settlement in good faith. Bradley v. Standard L. & A. Ins. Co., 46 Misc. 41, 93 N. Y. S. 245.

61. Life insurance: Where the conduct of the company leads the insured to believe that it will receive premiums after they are due, if paid within a reasonable time, it is estopped from insisting on a forfeiture. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601; Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202. Averments of complaint held to show disregard and consequent waiver of provision that if weekly premiums were not called for when

sured may not have thereby been misled to his prejudice or into an altered position,[62] will preclude it from claiming a forfeiture as a bar to recovery. Some courts hold that a breach of condition is waived by the failure of the insurer to claim a forfeiture within a reasonable time after knowledge of the facts,[63] while others require an affirmative act in addition thereto.[64] Slight acts or circumstances on the part

due they should be sent to home or district office. Id. Cannot in good faith afterward set it up as a bar to recovery. Wagaman v. Security Mut. Life Ins. Co., 110 Mo. App. 616, 85 S. W. 117. Where plaintiff had paid 49 premiums, 11 of which had been paid after they were due and defendant refused to accept a premium after due, though within the time when the agent had agreed to receive it, defendant held estopped to object. Course of dealing with plaintiff and other policy holders held waiver. Id. Evidence held to show that company had knowledge that agent was receiving past due premiums and that it was the invariable custom of defendant to receive such premiums. Id. Written statement required to be made when past due premiums were received reciting that the acceptance of past due premium shall not establish a precedent for the acceptance of future payments after they become due, nor waive, or alter, or change any of the conditions of the policy or application does not change the rule. Id. A former waiver of forfeiture for a delay of two days in payment does not estop the insurer from insisting upon forfeiture for nonpayment until 16 days after maturity when the insured was in extremis, particularly when neither company nor agent was informed of the latter fact, and amount paid was tendered back. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609. Evidence insufficient to show custom that agents should collect premiums on ordinary policies at the homes of the insured at a later date than that fixed by the policies. Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345.

Fire insurance: To bind the insurer by waiver of a stipulation rendering the policy void on the procuring of additional insurance it must be shown that the insurer had knowledge of the additional insurance and that thereafter its conduct was such as to imply a purpose on its part not to insist on a forfeiture, in the absence of an agreement to that effect. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271.

Employers' liability policy insured vessel owner against damages for injuries to its employes on its vessels due to its negligence. Vessel was libeled on claim for injuries due to negligence and for breach of implied contract of employment in failing to care for injured seaman, and judgment was rendered against vessel on latter ground only. Insurer was bound to defend the suit and attorneys for the defense, though nominally those of the insured, were in fact the attorneys and agents of the insurer. After judgment for libelant an appeal taken by the insured was dismissed at the instance of the insurer, who agreed to reimburse the insured for the amount of the judgment then paid. Held, no fraud being shown and it appearing that the insurer had a copy of the libel, it was estopped to claim ignorance of the fact that the judgment was based on a ground which relieved it from liability, and it was bound to pay the amount thereof and the subsequently incurred costs. Globe Nav. Co. v. Maryland Casualty Co. [Wash.] 81 P. 826. Fact that it acted under honest mistake as to the ground of the judgment held not to relieve it since, under the circumstances, it was chargeable with the knowledge of its attorneys, and was negligent in not learning the facts. Id. Intent to deceive was not necessary. Id. Under the circumstances held that insured was not equally chargeable with knowledge so as to prevent an estoppel. Id. Insurer having induced insured to abandon his appeal could not be heard to say that the latter was not prejudiced because it did not appear that the judgment would have been reversed on appeal, the right of appeal being absolute. Id.

62. If, after knowledge of all the facts, its conduct has been such as to reasonably imply a purpose not to insist upon a forfeiture, it will be held irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

63. Condition against additional insurance. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271. Held waived by failure to object or cancel the policy after knowledge that other insurance had been procured. Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N. E. 141. Doctrine of waiver in such case is that of estoppel in pais, there being no substantial difference between the two. Id.

Warranty as to sole ownership: Waived unless the insurer, on discovery of the fact that the insured has not such a title, promptly notifies him of its intention to avoid the policy and tenders, or manifests its willingness to restore, the unearned premium. Does not render policy void ab initio, and hence is waived by retention of premium with full knowledge of the facts. Glens Falls Ins. Co. v. Michael [Ind.] 74 N. E. 964.

Other insurance: Failure to cancel policy after knowledge of other insurance tends to show waiver. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

64. Mere neglect to insist upon a forfeiture will not alone constitute a waiver, but there must be some affirmative act on the part of the insurer which induces the insured to rest on the well founded belief that strict performance of a condition will not be insisted upon. Iron safe clause held waived. Rundell v. Anchor Fire Ins. Co. [Iowa] 105 N. W. 112. Mere knowledge by the company of the existence of the breach does not of itself amount to an estoppel or waiver, but it must be accompanied by some positive act of confirmation upon which in connection with the knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived. Held no waiver of breach of condition against vacancy, even if knowledge of agent was knowledge of company. Fore-

of the insurer will be construed as a waiver to prevent a forfeiture, where the condition in the contract is in favor of the company.[65]

No consideration is necessary for a waiver by conduct,[66] and a waiver once made, either by declaration or by acts and conduct, cannot be recalled.[67]

A delivery of the policy as a completed contract under an express or implied agreement that a credit shall be given for the premium is a waiver of a provision that the company shall not be liable on the policy until the premium is actually paid.[68] The acceptance of premiums with knowledge of a breach of a condition avoiding the policy precludes the company from defending on that ground,[69] unless the insured is liable therefor in any event;[70] but mere unsuccessful attempts to collect an overdue premium is not a waiver of the right to insist on a forfeiture for its nonpayment when due,[71] nor can the acceptance by the agent of the amount of

man v. German Alliance Ins. Ass'n [Va.] 52 S. E. 337.

65. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730.

66. Mettner v. Northwestern Nat. Life Ins. Co. [Iowa] 103 N. W. 112. For nonpayment of premiums. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

67. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011; Mettner v. Northwestern Nat. Life Ins. Co. [Iowa] 103 N. W. 112. Where the insurer waives a forfeiture for nonpayment of a premium note, its liability becomes fixed by the death of the insured, and his administrator may sue on the policy without tender of payment of the note. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

68. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Raises a presumption that a credit is intended. Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190. Delivery of policies to insured, or another at his instance, is an express waiver of prepayment of premiums, and company cannot thereafter cancel them except in accordance with their terms and conditions. Provident Sav. L. A. S. v. Georgia Industrial Co. [Ga.] 52 S. E. 289. Mailing of policy to agent held not to constitute an implied delivery waiving immediate payment, in the absence of a showing that the principal had instructed the agent to deliver it without payment of the first premium or while the applicant was in ill health, in open violation of the stipulations of the policy. Neff v. Metropolitan Life Ins. Co. [Ind. App.] 73 N. E. 1041. Evidence sufficient to justify inference of waiver of payment of first premium during good health. Dargan v. Equitable Life Assur. Soc. [S. C.] 51 S. E. 125.

69. Must be with knowledge of the facts: Company held not, in view of the large number of policies issued by it, its manner of keeping records, and fact that premiums on former policy were paid by insured's wife and on later policy by insured himself, chargeable with knowledge that it had a previous industrial policy on insured's life so as to render receipt of premium a waiver of provision rendering policy void under such circumstances unless consent thereto was indorsed thereon. Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527. Where by-laws require notice to be given to company in an application which must be passed upon by the board of directors, fact that insured told its secretary on street car that he had taken out additional insurance held not notice to company, in absence of proof that secretary communicated such information to directors. Monk v. Penn Tp. Mut. Fire Ins. Ass'n, 27 Pa. Super. Ct. 449.

Payment of premiums: Acceptance of past due second premium when insured is in good health is not a waiver as to conditions of policy as to payment of future premiums regardless of the health of the insured when the latter become in default, particularly where the receipt for the second premium provides that it shall not constitute a waiver of any of the conditions of the policy. Sydnor v. Metropolitan Life Ins. Co., 26 Pa. Super. Ct. 521.

Condition as to ownership: A by-law of a mutual company requiring ownership in fee simple held waived where the secretary was notified of change in character of title and he stated that no change in the policy was required, and company continued to levy and receive assessments. Instruction approved. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730. Company also estopped to deny liability. Id.

Occupation of insured: As where the insured engaged in the liquor business, contrary to the terms of the policy, with knowledge of the agent who accepted the premiums. Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500.

Concurrent insurance: The acceptance of premiums after the company has notice that the insured has taken out additional insurance estops the company from defending on the ground that a permit therefor was not indorsed on the policy. Monk v. Penn Tp. Mut. Fire Ins. Ass'n, 27 Pa. Super. Ct. 449.

70. Forfeiture of mutual policy resulting from nonoccupancy of buildings held not waived by subsequent acceptance of an assessment from plaintiff covering losses which occurred before and after the fire, every member of the company being obligated to pay his proportion of the losses during his connection with the company and the company having a lien on the building therefor, and plaintiff not having surrendered his policy prior to the making of such assessment. Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co. [Me.] 62 A. 289.

71. Does not tend to show waiver or extension of time. Cowen v. Equitable Life Assur. Soc. [Tex. Civ. App.] 84 S. W. 404.

a premium which he has previously remitted to the company operate as a waiver by the latter of fraud in procuring the policy.[72] The retention, after default, of a note given for an annual premium and an insistence on its payment is an election to treat the policy as subsisting and valid and is a waiver of the right of forfeiture for nonpayment;[73] but the acceptance of a part payment on an overdue note does not operate as a waiver of forfeiture where the note provides that a failure to pay it at maturity shall forfeit the policy in accordance with its terms, and that in such event the whole amount of the note shall be considered earned and shall be collectible without restoration of the policy.[74] Retention of premiums for more than a reasonable time after a declaration of forfeiture is a waiver thereof,[75] what is a reasonable time being a question of fact.[76]

Requiring proofs of loss is a waiver of breaches of conditions known to the insurer,[77] particularly when the insured is thereby induced to incur expense.[78] A positive refusal to pay the loss is a waiver of the right to examine the insured's books.[79] A refusal to pay for failure to give the required notice of loss is a waiver of all other defenses,[80] but the mere acceptance of proofs of loss does not have this effect.[81] Denial of liability by the insurer under an employer's liability policy is not a waiver of a provision that no action shall lie against the insurer until the injured party shall have recovered judgment against the insured.[82] Unless procured by fraud a settlement of the loss and a contract to pay a particular sum in satisfaction thereof operates as a waiver of all warranties in the policy whether the company knows of their breach or not.[83] Provisions in the policy that it shall become void if the insured is not the sole and unconditional owner of the property and the like, unless consent of the company is indorsed thereon in writing, apply only to changes arising after the policy is issued, and not to an existing state or condition of the property

72. Where the agent remits the premium to the company before he receives it from the insured, his subsequent acceptance of the amount thereof from the latter in liquidation of the private indebtedness thus created cannot operate as a waiver by the company, though at the time of its receipt both the agent and the adjuster had full knowledge of the facts. American Cent. Ins. Co. v. Antram [Miss.] 38 So. 626.

73. Policy and note both contained forfeiture clause making policy void if note was not paid at maturity. Washburn v. Union Cent. Life Ins. Co. [Ala.] 38 So. 1011.

74. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618. Where note provides that in case of default in its payment the full amount of the premium shall be considered as earned, the premium is earned by the risk assumed during the time the policy is in force, so that the acceptance of payment after loss occurring while the policy is suspended, does not render the insurer liable. Jefferson Mut. Ins. Co. v. Murray [Ark.] 86 S. W. 813.

75. Seeking to impose new and unauthorized conditions for reinstatement, retention of premium until after expiration of time for reinstatement and delay in proceedings for reinstatement, without any excuse offered, held to support finding of waiver of forfeiture for nonpayment of premium when due. Mettner v. Northwestern Nat. Life Ins. Co. [Iowa] 103 N. W. 112.

76. Mettner v. Northwestern Nat. Life Ins. Co. [Iowa] 103 N. W. 112.

77. Provision against incumbrances held waived by requiring proofs and requesting a conference for an adjustment. Nugent v. Rensselaer County Mut. Fire Ins. Co., 94 N. Y. S. 605.

78. Breach of iron-safe clause held waived, where the secretary and adjuster, with full knowledge of the breach, told insured's wife that proofs of loss must be sent to the company, and thereby induced insured to incur expense in preparing and forwarding them. Rundell v. Anchor Fire Ins. Co. [Iowa] 105 N. W. 112.

79. Colonial Mutual Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

80. Accident policy. Moore v. National Acc. Soc., 38 Wash. 31, 80 P. 171.

81. Does not ipso facto waive a right of forfeiture for incumbering the property without the consent of the insurer, especially where they give no specific information as to the mortgage. American Ins. Co. v. Walston, 111 Ill. App. 133. Instruction held misleading and inaccurate. Id.

82. Does not thereby subject itself to liability to have payment demanded at an earlier time than that fixed by the policy. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452.

83. Execution of drafts in final settlement of loss on personalty under policy issued to a certain sanitarium held in absence of fraud, to estop company, in an action on such drafts from denying that those composing sanitarium were the real parties in interest. New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668.

when the policy is issued.[84] If the policy is issued with knowledge on the part of the company of facts which under the terms of the contract render it void, it cannot avail itself of them as a defense to an action thereon,[85] and the same rule applies when the company ought to have known the facts constituting the alleged breach.[86] It has, however, been held that under an accident policy relieving the insurer from liability if at the time of the accident the insured was suffering from a pre-existing disease without which death would not have ensued, the liability of the insurer is not in any way affected or changed by the fact that it knew of the existence of such disease when the policy was issued.[87]

If there is no written application, and the assured has an insurable interest in the property, acts in good faith and makes no actual misrepresentation or concealment of his interest therein, and the company issues the policy and accepts and retains the premium without making inquiry concerning his interest, it will be presumed to have knowledge of the condition of his title and to assure the property with such knowledge.[88]

84. Policy held valid though insured held legal title subject to right of third person to acquire it by complying with terms of contract of sale. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76.

85. Fire Insurance. Other insurance: Of fact that there is other insurance on the property. Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224, afg. 93 App. Div. 157, 87 N. Y. S. 525. Knowledge of other insurance when original policy was issued, though mistaken as to its amount, and failure to object to renewal afterward, held to create estoppel. German-American Ins. Co. v. Harper [Ark.] 86 S. W. 817.

Ownership of property: Provision that policy should be void if the insured's interest should be other than unconditional and sole ownership held waived, where condition of the title was stated in the application. Loring v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025. Company cannot rely on condition that policy should be void if subject of insurance was building on property not owned by the insured in fee simple, where applicant informed agent that he did not own the land. Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339. A policy not void because the application for the insurance, which was signed by an agent of the owners, indicated a joint, instead of separate ownership, when the nature of the ownership was fully understood by the agent of the company at the time the application was signed. Farmers' Mutual Fire & Lightning Ins. Co. v. Ward, 5 Ohio C. C. (N. S.) 509, 24 Ohio C. C. 156.

Occupancy by tenant: Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Id., 75 N. E. 849.

Incumbrances: The issuance of a policy and retention of the premium by the insurer with knowledge of the existence of a chattel mortgage on the property is a waiver of a condition against such incumbrances, and a waiver of a provision requiring waivers to be indorsed on the policy, whether the waiver was by the insurer itself or by the agent issuing the policy. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035.

Life Insurance: In the absence of fraud on the part of the insured. Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527.

Warranties as to use of intoxicants: False warranties in the application will not defeat recovery on the policy where the company had knowledge of the facts when the policy was issued. Use of intoxicants. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

As to previous application and health: Delivery of policy after investigating standing of physician making medical examination held not waiver of breach of warranties that applicant had never applied for other insurance, and as to his health, where it was not shown that agent had knowledge of the facts. Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421.

86. Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527. But the plaintiff must show that the company, with knowledge of the facts, dispensed with the observance of the condition. Id. Where it appeared that company issued large number of industrial policies, that it kept its records only by the numbers of the policies, and that the premiums on the previous policy were paid by insured's wife and those on the one in suit by the insured himself, held, that the company was not chargeable with notice that it had issued a previous policy so as to preclude it from setting up a provision in the policy in suit that it should be void if there should be in force upon the life of the insured, an industrial policy previously issued by the same company, unless consent thereto was indorsed thereon. Id.

87. In such case insurer contracts to indemnify insured from accidental injury with the reservation that the insurer will not be liable if the infirmity directly or indirectly co-operates with an accidental injury in causing death. White v. Standard Life & Acc. Ins. Co. [Minn.] 103 N. W. 735.

88. That insured had previously contracted to sell the property. National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450. By issuing the policy with the knowledge, thus imputed, that he has only a life estate, it will be held to have waived a provision that the policy shall be

Provisions requiring all waivers to be in writing and indorsed on or attached to the policy are valid and binding on the insured.[89] It has been frequently held, however, that they are for the company's benefit and hence that it may waive them,[90] that they refer only to express waivers, and not to those claimed to exist by reason of acts of the insurer inconsistent with an intention on its part to enforce the condition,[91] and that they do not prevent the company from becoming estopped by its conduct from insisting on a forfeiture for a breach of condition.[92]

Acts and knowledge of agents of insurer.[93]—In accordance with the general principles of the law of agency the knowledge of the agent, either as to facts existing when the policy is issued[94] or to those subsequently arising, is imputed to the com-

void if the insured's interest be other than unconditional and sole ownership in fee simple, where insured acts in good faith and is ignorant of materiality of that question. Glens Falls Ins. Co. v. Michael [Ind.] 74 N. E. 964. Where insured did not know that the insurer did not insure mortgaged chattels, held that he could recover for a loss, though the policy provided that it should be void if the property was so incumbered. Neher v. Western Assur. Co. [Wash.] 82 P. 166. In case of an oral application the applicant is not required to show the exact condition of his title unless requested to do so, and if he is guilty of no misleading conduct the insurer will be regarded as having assumed the risk of undisclosed incumbrances. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76. Policy describing property as that of the insured held valid though he held legal title subject to right of third person to acquire it by complying with terms of a contract of sale since insurer could not complain of its failure to require a more specific description. Id. Instruction to the effect that, if the agent inserted the description of the property in the policy from his own knowledge acquired while inspecting it for the insurance, the company could not take advantage of inaccuracies therein unless the insured by his conduct led him into making them, held sufficiently favorable to defendant, and finding against it could not be disturbed. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025.

89. See, also, "Acts and knowledge of agents," infra, this section. Pennsylvania Casualty Co. v. Bacon [C. C. A.] 133 F. 907. Are for the benefit of both parties and of the community at large. Atlas Reduction Co. v. New Zealand Ins. Co. [C. C. A.] 138 F. 497.

90. Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N. E. 141; Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500; Phenix Ins. Co. v. Grove, 116 Ill. App. 529. If additional insurance is taken, contrary to the terms of the policy and the company makes no objection after actual knowledge thereof is brought home to it, it is estopped from insisting upon a forfeiture because its consent was not endorsed on the policy, and waives condition requiring such indorsement. Phenix Ins. Co. v. Grove, 116 Ill. App. 529. Issuance of policy and retention of premium with knowledge of existence of chattel mortgage held waiver. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035.

91. Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500. Do not prevent waiver of condition that policy shall be void if insured engages in saloon business by acceptance of premiums by general agent with knowledge of its violation. Id.

92. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546. Thus it will be estopped from claiming a forfeiture for a change of title notwithstanding such provision where it subsequently, and with knowledge of the facts, collects a premium note and assures the insured that his policy is all right. Id. The rule that waivers by agents under such circumstances work an estoppel applies only to acts within the real or apparent scope of their authority, and not to the extension of time on a premium note by a mere collecting agent. Fidelity Mut. Life Ins. Co. v. Bussell [Ark.] 86 S. W. 814.

93. See 4 C. L. 202, n. 97, et seq. See, also, Agency, 5 C. L. 64.

94. **Fire Insurance. As to nature of ownership:** Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339; Farmers' Mut. F. & L. Ins. Co. v. Ward, 5 Ohio C. C. (N. S.) 509. Evidence held not to show that agent knew that the insured did not own the land on which the building insured was situated. St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co. [La.] 38 So. 87.

Other insurance. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502; Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224, afg. 93 App. Div. 157, 87 N. Y. S. 525; Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

Incumbrances: Evidence held to show knowledge of the existence of chattel mortgage. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035.

Life Insurance. Occupation of insured: Knowledge of general agent that insured had engaged in the liquor business. Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500.

Use of intoxicants: Knowledge of the agent taking the application. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

The medical examiner is the agent of the company in making the examination, taking down the answers, and reporting them. Carmichael v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 587. His knowledge thus acquired, and his interpretation of the answers given and errors in recording them are those of the company, which is estopped from taking advantage of what it thus knew and had thus done when accepting the premiums and issuing the policy. Id. Evidence that insured answered questions correctly but that the physician recorded

pany.[95] It must, however, appear that such knowledge was acquired while he was transacting the business of the company as its agent.[96]

Where the same party acts as agent of the company and of one to whom the policy is payable as his interest may appear, knowledge acquired by him in the latter capacity does not bind the company unless it is present in the agent's mind at the time he does the act claimed to constitute the waiver.[97] The burden is on the party relying on the waiver to prove that the knowledge was so in his mind.[98] That fact may be shown by circumstantial as well as by direct evidence.[99] Information imparted to one agent of the company dealing with the insured may be imputed to another agent participating in those dealings, though in fact the latter is ignorant thereof.[1]

The acts of the agent within the apparent scope of his authority are binding on the company,[2] and neither the termination of his authority[3] nor any limitations

them incorrectly is admissible, if pleadings are sufficient. Id.

Accident Insurance: Evidence that premium was paid to, and accident policy delivered by, agent with knowledge that insured had already been injured, held to tend to prove waiver of provision that policy should not take effect unless premium was actually paid previous to any accident under which claim should be made, and to require submission of issue to the jury. Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762.

Effect of Failure of Agent to Record Answers as Given. See 4 C. L. 180, n. 50 et seq.

If the insured in good faith gives true answers, and the agent, without the insured's knowledge, writes false ones in the application, such agent in so doing acts as the agent of the insurer, and the latter is estopped to deny its liability. As to construction of chimneys and ownership of property. Foster v. Pioneer Mut. Ins. Ass'n, 37 Wash. 288, 79 P. 798. Where insured informed agent that he had diabetes and agent stated that such fact was unimportant and failed to record it in the application, held, that company could not avoid policy on the ground of fraud and false representations in that regard. White v. Standard Life & Acc. Ins. Co. [Minn.] 103 N. W. 735. So, too, false statements in an application, known to and made at the suggestion of the agent, do not affect the liability of the company. American Ins. Co. v. Walston, 111 Ill. App. 133. As to incumbrances. Id.

95. Held to be knowledge of company: Knowledge that insured had taken out other insurance. Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N. E. 141. Knowledge of secretary of mutual company that insured had sold fee of property. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730. Knowledge of an agent authorized to solicit insurance, take applications, and collect premiums as to change in title even though he has no authority to issue policies. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546.

Held not knowledge of company: Knowledge as to title obtained by a mere broker from the officers of the assured, while soliciting insurance. Fire Ass'n of Philadelphia v. American Cement Plaster Co. [Tex. Civ. App.] 84 S. W. 1115. Notice to a mere solicitor for insurance of a fact transpiring after the issuance of the policy. His agency ceases when he transmits application to the company, and fact that he says "all right" when notified of execution of mortgage is not a waiver of forfeiture for incumbering property without the insurer's consent. American Ins. Co. v. Walston, 111 Ill. App. 133.

96. Where the agent procured additional insurance in another company, his knowledge was not the knowledge of the first company and did not estop it from claiming a forfeiture on account of additional insurance. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271.

97, 98, 99. Foreman v. German Alliance Ins. Ass'n [Va.] 52 S. E. 337.

1. One obtaining policy from one member of firm of agents after informing another member that he had other insurance may assume that provision requiring fact of other insurance to be indorsed on policy was waived. Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224; afg. 93 App. Div. 157, 87 N. Y. S. 525.

2. Fire Insurance: An agent authorized to issue binds by all waivers, representations or acts unless the insured has notice of the limitation of his power. Richard v. Springfield F. & M. Ins. Co. [La.] 38 So. 563. Whether or not he has authority to issue is not the test of his power to waive. American Ins. Co. v. Walston, 111 Ill. App. 133. Requested instruction properly refused. Id. The company is bound by the acts of its agent in issuing a policy and in inducing plaintiff to believe that he was insured in such company, notwithstanding that the company had as a matter of fact refused to accept the risk and had directed the agent to cancel the policy. Is liable where agent gives no notice to the insured, prior to the fire, that the risk has been rejected. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850.

Iron safe clause: Requested instruction that if it was understood that the inventory offered was not sufficient, and that policy was issued on the understanding that the insured would make a new one, held properly modified by stating that such was the case unless the insured was told by the agent at the time the insurance was issued that the inventory was sufficient. North British & Mercantile Ins. Co. v. Edmund-

thereon are binding on the insured unless he has notice thereof.[4] Limitations in the

son [Va.] 52 S. E. 350. Assent to inventory shown at time of application held waiver of objection thereto. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

Local agent of nonresident company held to have apparent authority to waive by a writing attached to the policy breach resulting from failure, through illness, to make inventory within time required. Richard v. Springfield F. & M. Ins. Co. [La.] 38 So. 563.

Ownership: Action of **agent authorized to solicit insurance,** take applications, and collect premiums in telling insured that a change of ownership did not invalidate the policy and in taking premiums with knowledge of such change held binding on the company, though he has no authority to issue policies. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546. A provision avoiding the policy, if the property is not absolutely owned by the insured is waived by the knowledge of the agent of the change of interest and his written assent to the assignment of the policy. Phenix Ins. Co. v. Lindley, 111 Ill. App. 266.

Life and Accident Insurance: Company bound by all acts within apparent scope of agent's authority. Hutson v. Prudential Ins. Co. [Ga.] 50 S. E. 1000. Even where he disobeys instructions, if the insured has no knowledge of the fact that he has done so. Agreement as to character of policy. Gray v. Merchants' Ins. Co., 113 Ill. App. 537. The test of authority is what he did in the usual course of the company's business. Wagaman v. Security Mut. Life Ins. Co., 110 Mo. App. 616, 85 S. W. 117. An agent to whom the policy is sent for delivery on the payment of the first premium, which has not been paid in advance, is the agent of the insurer until such payment is made. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040. Company is not responsible for fraud of brokers who procure policy through its agents, and hence is not estopped from setting it up. Mahon v. Royal Union Mut. Life Ins. Co. [C. C. A.] 134 F. 732. Waiver is confined to acts done within the scope of the agent's authority and to matters which can be waived. Fidelity Mut. Life Ins. Co. v. Bussell [Ark.] 86 S. W. 814.

Payment of premiums: General agents may ordinarily waive provisions that the policy shall not take effect until the payment of the premium, but subagents have no such authority. Pennsylvania Casualty Co. v. Bacon [C. C. A.] 133 F. 907.

A general agent who is permitted by the company to accept notes payable to himself in lieu of cash, the company looking to him instead of the policy holder, has authority to bind the company by accepting notes, his act in so doing being within the apparent scope of his authority. Mutual Life Ins. Co. v. Abbey [Ark.] 88 S. W. 950. The company is bound by his waiver of a cash payment in such case whether he settles with it for the premium or not. Id. Instruction limiting right to recovery to finding that the general agent accepted the notes in lieu of cash held proper. Id. Evidence held to show that agent accepted four notes for quarterly instalments of first annual premium in lieu of cash when policy was delivered, and extended credit for the first year and not merely for the first quarter, and plaintiff was entitled to recover though insured failed to pay the first three notes where he died before the fourth became due. Id.

Local agent with authority to receive premiums and solicit insurance has authority to waive forfeiture by the receipt of past-due premiums, though the policy limits his authority to the receipt of premiums. Wagaman v. Security Mut. Life Ins. Co., 110 Mo. App. 616, 85 S. W. 117. An **agent** employed or **authorized to collect premiums** does not thereby have authority to grant an extension of the time for their payment. Mettropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345. A **soliciting agent** employed by a general agent of an insurance company cannot bind the company by agreeing that default in paying premiums shall not forfeit the policy (Mutual Life Ins. Co. v. Abbey [Ark.] 88 S. W. 950), nor by accepting notes in lieu of cash for premiums (Id.) But a **general agent,** clothed with authority to transact generally the company's business in the state, can. Id.

Employers' Liability Insurance: The paymaster of the insured's employer on whom he has given orders for the payment of monthly instalments of the premiums on an industrial policy, to be deducted from the insured's wages and forwarded by the paymaster to the insurer, is the agent of the insured to pay over from his wages the agreed amount as it becomes due on the premium and is the agent of the insurer only for the purpose of remitting to it the amounts so paid. Continental Casualty Co. v. Jasper [Ky.] 88 S. W. 1078. Hence where he fails to retain an instalment as required he has no authority to accept a payment of the amount thereof on behalf of the company after the death of the insured, and does not act as its agent in so doing. Payment by beneficiary, after death of insured who had been notified that the policy had lapsed, and delivery to him by paymaster of company's receipt held not to prevent lapse. Id. Under a policy insuring against liability for injuries caused by insured's negligence, providing that the insurer should be notified of suits to enforce claims for such injuries and defend or settle the same, where the attorneys and agents of the insurer, with the assent of the insured, settle a claim for more than the amount of the policy, and the insured pays the same, further provisions prohibiting settlements by the insured without the written consent of the insurer, and that it shall be liable only after final judgment against the insured and the like have no application and are no defense to an action against the insurer for the amount of the policy. New Amsterdam Casualty Co. v. East Tennessee Tel. Co. [C. C. A.] 139 F. 602. The insured having in good faith accepted the agents' assumption of authority to settle a claim on behalf of the insurer, and having paid the amount agreed upon believing that they have acted within their authority, and there being no restrictions on their authority in this regard in the policy, the company can-

policy on the authority of the agent to extend the time for the payment of premiums are binding on the insured,[5] unless the company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver.[6] The same is true of limitations on the right to waive conditions and forfeitures,[7] which are, however, often treated as referring to waivers made after the issuance of the policy, and as not precluding a waiver of conditions entering into the validity of the contract at its inception.[8] The company may also after acquiring full knowledge of the facts,

not defend on the ground that they had no such authority. Evidence held to authorize finding that agents were authorized to settle or defend, or that assured was justified in assuming that they were. Id.

3. Termination of the authority of a general agent authorized to waive provisions of the policy does not relieve the insurer from the effect of a subsequent waiver unless the insured has notice. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271.

4. Hutson v. Prudential Ins. Co. [Ga.] 50 S. E. 1000; Foster v. Pioneer Mut. Ins. Ass'n, 37 Wash. 288, 79 P. 798. Special instructions limiting his authority to accept notes in lieu of cash. Mutual Life Ins. Co. v. Abbey [Ark.] 88 S. W. 950. Company may qualify general agent's authority, and in such case will not be bound by acts beyond the scope of his authority, where person dealing with him has notice of the limitation. Hutson v. Prudential Ins. Co. [Ga.] 50 S. E. 1000. Limitations in an application printed in very fine type are insufficient. Foster v. Pioneer Mut. Ins. Ass'n, 37 Wash. 288, 79 P. 798. This is true though the agent is only a solicitor, unauthorized to accept insurance. Id.

5. Where agent agreed to accept premium on next day, and requested company's assistant superintendent to collect it which he agreed but failed to do, and on such day insured was sick with illness from which she died, held, that company was not estopped from enforcing forfeiture. Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345.

6. Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345.

7. Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339. Binding on the insured and the beneficiary. Hutson v. Prudential Ins. Co. of America [Ga.] 50 S. E. 1000. By accepting policy insured assents to such provision and cannot rely on any agreement with him with regard to a waiver. Id. Acceptance of overdue premium by general agent held not to be waiver of provisions requiring application for revival and proof that insured was in good health. Id. Where policy provides that it cannot be varied or modified and that no forfeiture can be waived and no premiums accepted after they are in arrears except by written agreement signed by an officer of the company, and application that policy shall not take effect until first premium is paid while insured is in good health, agreement by soliciting agent that he would pay premium and that applicant could pay him later is not binding on the company in the absence of proof that it accepted money from the agent or looked to him for payment, and does not constitute payment of the premium or a waiver thereof. Neff v. Metropolitan Life Ins. Co. [Ind. App.] 73 N. E. 1041. Will be conclusively presumed to have read limitations. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609. Acceptance of overdue premiums and agreement that they might be paid after they became due held not binding on company. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609. Under a standard policy containing express stipulations with respect to the authority of agents, where it was within the power of the insured to produce the policy to have an additional insurance permit indorsed thereon and he failed to do so, a mere oral promise of the agent to attend to the matter is his own individual promise and does not bind the company or estop it on his failure to do so. Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. S. 50. Where the policy provides that all waivers must be written upon or attached to the policy, it cannot, in the absence of fraud or mistake, be shown by parol that at the time of indorsing a loss payable clause on the policy the agent knew that the property was incumbered by a chattel mortgage in favor of the indorsees, and intended by such indorsement to consent to such mortgage in behalf of the company. Atlas Reduction Co. v. New Zealand Life Ins. Co. [C. C. A.] 138 F. 497. Knowledge or even statements of the agent in such case are immaterial. Id. It is reasonable and competent for the company to make it a matter of condition in the policy that any consent by an agent to waive or modify any of the express terms of the policy shall be manifested in writing by one of its officers. Pennsylvania Casualty Co. v. Bacon [C. C. A.] 133 F. 907. Such a limited grant of authority is the measure of the agent's power, and any modification or waiver by him not thus manifested is ineffectual, and does not bind the company unless it is shown that he had express authority to dispense with the condition, or that the company subsequently and with knowledge of the facts ratified his action. Id. A subagent has no authority to waive a provision that the policy shall not take effect unless the premium is actually paid prior to any accident on which a claim is made where it appears that the insurer did not charge premiums on policies to its agents until they were actually received. Id. General agent can waive such payment only when it appears that the company held him personally responsible for the premium, or that it was the practice of the company to charge the premium to the agent at the time of delivering to him the premium receipt. Id.

8. Does not prevent knowledge of agent that insured was not the owner of the property on which the insured building was situated operating to estop the company

ratify the acts of the agent done beyond the scope of his authority, and thereby waive the breach and estop itself from relying thereon.[9]

Since all prior negotiations are merged in the policy, the insured cannot show that the agent agreed before, or at the time when, the policy was issued that some of its provisions need not be complied with.[10]

(§ 16) *D. Reinstatement.*[11]—A provision giving the insured the right to restore a policy within a month after forfeiture, on payment of the delinquent premium, with interest, contemplates payment by the insured during his lifetime and not by another after his death.[12] A payment of the principal without the specified interest, does not work a restoration.[13] Additional requirements in a premium note given after default are binding on the insured.[14]

The authority of a special agent to revive a canceled policy will not be presumed but must be proved.[15]

§ 17. *Contracts of reinsurance and concurrent insurance.*[16]—The general rules of construction previously stated[17] apply to provisions authorizing concurrent insurance and to re-insurance.[18] The acceptance of a sum from a co-insurer in satisfaction of its policy is not conclusive on the insured as to the amount of the loss, if it appears that the payment was by way of compromise and did not represent the company's pro rata share thereof.[19]

Reinsurance.[20]—A contract of reinsurance to an amount not exceeding a specified sum, the loss, if any, payable pro rata at the same time and in the same manner as by the original insurers, means that the loss shall be divided according to the proportion which the amount of reinsurance bears to the original insurance.[21] After the contract of reinsurance has been made it cannot be changed except with the consent of both parties, and hence is not affected by any modification of the original policy.[22] Thus the proportion of the loss for which the reinsurer is liable remains the same notwithstanding a reduction in the amount of the original policy.[23] Where

from setting up a provision of the policy that it shall be void "if the subject of the insurance be a building on ground not owned by the insured in fee simple." Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339.

9. Acceptance of overdue premium by company held not a ratification or waiver, where agent informed it that it was paid when due. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609.

10. Cannot show by parol that agent agreed when policy was issued that premiums should not be due until a date later than that fixed by the policy (Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345), or that they were to be payable at the house of the insured contrary to the terms of the policy (Id.).

11. See 4 C. L. 207.

12. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618.

13. Of premium note. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618.

14. Where policy provided for restoration at any time within a month by payment of the premium with interest, but after default insured gave a note providing that policy should determine if it was not paid at maturity, but that it would be restored if note was collected after maturity and satisfactory evidence of good health was furnished, held, that insured was bound by the terms of the note and after default in its payment was only entitled to restoration on furnishing evidence of good health, though policy did not require it. National Life Ins. Co. v. Manning [Tex. Civ. App.] 86 S. W. 618.

15. Fire insurance. Colonial Assur. Co. v. National Fire Ins. Co., 110 Ill. App. 471.

16. See 4 C. L. 207. For conditions against other insurance, see § 9, ante.

17. See § 7, ante.

18. The phrase "$1500 total concurrent insurance permitted, including this policy," indorsed on a fire policy, limits the total amount of insurance to $1,500, and does not allow $1,500 additional insurance. Home Ins. Co. v. Morrow [Ala.] 39 So. 587. Contract of reinsurance and assumption of plaintiff's policy held not to change insurance from assessment to old line. Hayden v. Franklin Life Ins. Co. [C. C. A.] 136 F. 285.

19. While it appeared that the property was insured in another company and that plaintiff had accepted from the latter a small sum, held, that there was evidence authorizing a finding that such sum did not represent a pro rata share of the loss as claimed by plaintiff, and that it was accepted only because plaintiff realized that company was not liable to him in any amount. Georgia Co-op. Fire Ass'n v. Harris [Ga.] 52 S. E. 88.

20. See 4 C. L. 209.

21, 22. Home Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65, afg. 89 App. Div. 1, 85 N. Y. S. 262.

a mutual company partially reinsures a risk in another company and assigns the policy of reinsurance to the party holding the original policy, the latter may, on the occurrence of a loss covered by both policies institute suits on both policies at once, they being independent and there being no provision to the contrary in either of them.[24] The liability of the reinsuring company in such case is not limited to its pro rata share of the loss, in the absence of a provision to that effect in its policy.[25]

A policy holder agreeing to an assumption by another company of the liability on his policy and releasing the original insurer cannot participate in the reserve fund of the latter.[26]

A town mutual insurance company organized under the Missouri statutes may reinsure a similar company organized under the same statute where it could have itself insured the property in the first instance.[27] Such reinsurance not being expressly prohibited, the reinsuring company cannot contend that the contract is ultra vires after it has been fully executed by the other party.[28]

§ 18. *The loss or benefits, its extent and extent of liability therefor.*[29] *Fire insurance.*—The right of a mortgagee to recover on the policy is limited only by his interest in the property[30] and the amount of the mortgage debt,[31] but a mortgagee who is also a trustee may recover the full amount of the loss.[32]

By statute in some states if the total cash value of the property destroyed is less than the total insurance, no provision in the policy can operate to reduce the amount to be paid to a sum less than such cash value.[33] Under a policy providing that the insurer shall not be liable beyond the actual cash value at the time of the loss which in no event shall exceed the then cost to the insured of replacing the same, the measure of damages is what it would cost to replace the property, not instanter, but within a reasonable time.[34] "Cash value" means the cash market value at the time and place where the goods are situated and the fire occurs, or if there is no

23. Where original policy is for $10,000, and reinsurance is for an amount not to exceed $5,000, with the pro rata provision above quoted, on the subsequent reduction of the original policy to $2,000, the reinsurer is liable only for half the amount recovered against the original insurer, and not for the full amount thereof. Home Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65, afg. 89 App. Div. 1, 85 N. Y. S. 262.

24, 25. Cass County v. Mercantile Town Mut. Ins. Co. [Mo.] 86 S. W. 237.

26. Jenkins v. Sun Life Ins. Co., 27 Ky. L. R. 1142, 87 S. W. 1143.

27. Company organized under Act March 21, 1895 (Sess. Laws 1895, p. 200). Cass County v. Mercantile Town Mut. Ins. Co. [Mo.] 86 S. W. 237. Not prevented from doing so by Rev. St. 1889, § 5875, forbidding such companies from doing business on any other plan than that on which they are organized, where reinsurance is on the same plan as the original insurance. Id.

28. Cass County v. Mercantile Town Mut. Ins. Co. [Mo.] 86 S. W. 237.

29. See 4 C. L. 209.

30. See, also, § 11, ante. The right of mortgagee of realty to recover on a policy payable to him as his interest may appear is limited to the amount of insurance on the building. Verdict for amount of insurance on both the building and the personalty therein held excessive where he had no lien on the latter. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

31. Where he insures solely on his own account, if the premises are destroyed before any payment or extinguishment of the mortgage, the insurer is bound to pay him the amount of the debt if it does not exceed the insurance. Baker v. Monumental Sav. & Loan Ass'n [W. Va.] 52 S. E. 403.

32. A mortgagee of chattels to whom the owner has given a bill of sale, to sell them, deduct his claim, pay other debts and turn over any balance, is the legal owner and trustee of an express trust, and may collect the entire insurance thereon, though more than his claim. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850.

33. Rev. St. 1898, § 1943a, providing that no fire policy shall limit the amount to be paid at less than the actual cash value of the property, if within the amount of the insurance for which premium is paid, means the actual cash value of the property destroyed. Newton v. Theresa Village Mut. Fire Ins. Co. [Wis.] 104 N. W. 107. In such case provision that if at the time of the fire the total insurance on the property shall exceed 75 per cent. of the actual cash value of the property, "this policy shall hereby become void in the proportion of such excess to such total insurance," has no effect. Id.

34. Thirty days held to be a reasonable time within which to replace stock of merchandise. Texas Moline Plow Co. v. Niagara Fire Ins. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 4, 87 S. W. 192.

market value there, then at the nearest adjacent markets, or, if that is not shown, its intrinsic value.[35] In determining such value the jury may consider its intrinsic value, its value in adjacent markets, the ease or difficulty of transportation, the demand for such property, the fact that it was second hand, its deterioration, the price paid for it, the opinion of witnesses knowing its value, and all other facts and circumstances in evidence tending to show value.[36] Realized, but not prospective, profits may be considered.[37]

A provision that the insurer shall not be liable for loss caused by neglect of the insured to use all reasonable means to save or preserve the property at or after a fire or when the property is endangered by fire in neighboring premises, only requires the insured to exercise care in saving or preserving the property at or after the fire and prevents a recovery for so much of it as could have been saved by the insured with the exercise of due care and the use of reasonable means.[38] It does not apply to negligent acts before the fire starts,[39] and the insurer is liable even though the negligent act of the insured or his servants, not amounting to fraud, be the proximate cause of the damage.[40]

Several insurers are each liable for the loss up to the amount of their policies, but there can be only one satisfaction.[41]

Valued policies.[42]—Valued policy laws in many states make the insurer liable for the full amount of the insurance specified in the contract in case of a total loss.[43]

Endowments.—A provision adjusting the amount of the endowment according to the number of members in an assessment company will not be cut down by a reduction of the productiveness of an assessment due to the fact that many members have exercised the right to change to a flat premium system.[44]

35, 36. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135.

37. Instructions approved. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135.

38. Beavers v. Security Mut. Ins. Co. [Ark.] 90 S. W. 13. Negligence in this regard does not work a forfeiture of the entire policy, but merely precludes a recovery for such property as could have been saved by the use of reasonable means at the insured's command. Requested instruction properly refused. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. Evidence held to justify finding that insured did not fail to make reasonable effort to save the property. Schornak v. St. Paul Fire & Marine Ins. Co. [Minn.] 104 N. W. 1087.

39. Beavers v. Security Mut. Ins. Co. [Ark.] 90 S. W. 13.

40. Mere carelessness or negligence not amounting to fraud, though the direct cause of the fire, is covered by the policy. Instruction held erroneous and prejudicial. Beavers v. Security Mut. Ins. Co. [Ark.] 90 S. W. 13.

41. Fact that insured has recovered judgment against one of the companies is no defense to a suit against the other. Aetna Ins. Co. v. Sample, 2 Ohio N. P. (N. S.) 629. Payment of one of said judgments and the costs of both suits operates as a satisfaction as to both to the extent of the amount paid. Aetna Ins. Co. v. Sample, 2 Ohio N. P. (N. S.) 629.

42. See 4 C. L. 210.

43. In Arkansas, in case of a total loss, the policy is regarded as a liquidated demand for the full amount thereof, and hence the value of such property is not open to evidence. Kirby's Dig. § 4375. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572.

Mississippi statute applies to a builder's risk policy for more than the builder's interest in the building. American Cent. Ins. Co. v. Antram [Miss.] 38 So. 626.

Pennsylvania: A valued policy is not one which estimates merely the value of the property insured, but is one which values the loss, and is equivalent to an assessment of damages in the event of a loss. Whiteman v. Merion Title & Trust Co., 25 Pa. Super. Ct. 320. Under a policy of title insurance whereby company agrees to "indemnify, keep harmless, and insure" a mortgagee "from all loss or damage, not exceeding $1,500, which the said insured shall sustain by reason of defects or unmarketability of the title of the insured to the estate, mortgage, or interest described, * * * or because of any liens on it or incumbrances, charging the same at the date of this policy," where the insured suffers a total loss by reason of the sale of the property under a prior mortgage, the insurer is liable only for the actual value of the land, and not for the amount of the mortgage insured. Id.

Total loss: Loss held total where building was wholly destroyed except a glass door which was destroyed after its removal. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572.

44. Policy in assessment company provided that if insured paid specified assessments up to a certain date it would pay him a certain sum provided 80 per cent. of an assessment levied on all its members would produce that amount. Held, that he was entitled to such sum at such time though

Employers' liability insurance.[45]—Where the company does not defend the suit against the insured and the insured has to defend and is precluded by the terms of the policy from making a settlement, the company is liable for the costs of such suit in an action on the policy.[46] If the insurer is obligated to defend actions against the insured, it is liable for the entire expense of an action based in part on negligent acts covered by its policy and in part on a contract liability not so covered, in the absence of a showing that the amount expended was not necessary to establish the defense which the insurer was bound to make.[47] Where the exclusive control of compromises is reserved to the insurer it may reject an offer without being liable beyond the amount insured in event of a larger recovery.[48]

§ 19. *Notice, claim, and proof of loss.*[49]—Provisions requiring notice[50] and proofs of loss are conditions precedent and must be complied with before a recovery can be had on the policy.[51] The same is true of a requirement that the insured furnish a certificate of a notary or magistrate if required, where a demand therefor before suit is shown.[52] It has, however, been held that equity having acquired jurisdiction of a suit to compel reinstatement of plaintiff's insurance notwithstanding a forfeiture, and having decreed such reinstatement without an appeal by defendant,

the company, under statutory authority, subsequently changed from assessment to the stipulated premium plan of insurance, and most of the members changed their assessment certificates for stipulated premium policies, where it appeared that 80 per cent. of an assessment on all members, including those who had made the change, would more than equal such sum. Smith v. Northwestern Nat. Life Ins. Co., 123 Wis. 586, 102 N. W. 57. His right of recovery could not be limited to 80 per cent. of an assessment on members who refused to change their certificates for stipulated premium policies. Id. Statute authorizing the change (Laws 1899, c. 270, p. 460) does not have that effect since it provides that no existing contracts shall be annulled, modified, or changed thereby. Id. Nor did reserved right to change by-laws, since that right is expressly limited so that "the amount of the benefit shall not be reduced," and it did not appear that by-laws were changed. Id. Such statute does not require a classification of members so that moneys derived from members entering after the change was required to be exclusively devoted to their insurance and could not be devoted to payment of plaintiff's claim. Id. Cannot be contended that plaintiff is only entitled to what can be collected by assessment, but by taking stipulated premiums from new members company will be deemed to have commuted and collected from them in advance their assessments to meet plaintiff's policy. Id. Plaintiff's right is not affected by consolidation of company with another and reinsurance by latter of all outstanding insurance, at least where there is no proof to limit the assumption by the purchasing company of the other company's liability to plaintiff. Id.

45. See 4 C. L. 211.

46. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

47. Under employer's liability policy indemnifying navigation company against damages for injuries to its employes caused by its negligence, and obligating defendant to defend any action against plaintiff for such damages, held, that defendant was liable for the entire expense of an action based on negligence and on a breach of plaintiff's contract duty to care for an injured seaman. Globe Nav. Co. v. Maryland Casualty Co. [Wash.] 81 P. 826.

48. Rumford, etc., Co. v. Fidelity & Casualty Co., 92 Me. 574, 43 A. 503, cited New Orleans & C. R. Co. v. Maryland Casualty Co. [La.] 38 So. 89.

49. See 4 C. L. 211. See Fraternal Mutual Benefit Associations, 5 C. L. 1523.

50. Accident insurance: Giving of notice of accident within ten days after its occurrence. Johnson v. American Casualty Co. [N. H.] 60 A. 1009.

Fire insurance: Must be affirmatively shown that requirements of immediate notice and that proofs shall be furnished within 60 days have been complied with, or that they have been waived by some officer authorized to represent insurer in the adjustment and settlement of the loss. Conditions are separate and compliance with each must be shown. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Finding that proofs were waived by the conduct of the insurer held to necessarily involve finding that insurer had notice, so that separate finding that it was given was unnecessary. Id.

51. Fire insurance. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Unless waived. Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. S. 50; Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889. Policy is rendered void by failure to present proofs within the time limit. Billings v. National Ins. Co., 6 Ohio C. C. (N. S.) 567. Evidence held to authorize submission to the jury of question whether agents, in receiving insured's proofs of loss, were acting within the scope of their authority. Schloss & Kahn v. Westchester Fire Ins. Co. [Ala.] 37 So. 701.

52. Egan v. Merchants' Fire Ass'n [Wash.] 82 P. 898.

may give judgment for the amount of an endowment becoming due thereunder before trial, though no proofs of loss have been furnished and the policy provides that it shall not be payable until sixty days after such proofs.[53] Failure to give the required notice is not excused because the result of accident, mistake, and misfortune,[54] nor because the insurer has actual knowledge of the facts.[55] By statute in some states all provisions for notice and proofs are made void if the insurer is a member of any association whose object is the fixing of rates for insurance.[56]

A requirement that notice[57] or proofs be furnished within a specified time does not work a forfeiture for noncompliance therewith in the absence of a provision to that effect, but at most only affects the maturity of the claim.[58] They may nevertheless be furnished within a reasonable time, but must be made within such time as will enable the insured to bring his suit within the time limited by the policy.[59] Notice under an accident policy is sufficient if given within the prescribed time after the insured knows that the accident is the cause of the injury.[60] Immediate notice means notice within a reasonable time under the circumstances.[61]

53. Smith v. Northwestern Nat. Life Ins. Co., 123 Wis. 586, 102 N. W. 57.

54. Not because agent failed to inform insured of existence of accident policy. Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009.

55. Not by fact that it has knowledge of loss under fire policy, no waiver being shown. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

56. See §§ 1, 3, ante.

57. There should be a clear and express provision for forfeiture before the courts will enforce it. James v. United States Casualty Co. [Mo. App.] 88 S. W. 125. Provision that no claim should be valid unless the provisions and conditions should be complied with held not an express provision for forfeiture for failure to give such notice. Id.

58. Fire insurance: Instruction approved. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350.

Life insurance: Failure to furnish proofs of death merely postpones the right to sue until proofs have been furnished. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

59. Instruction authorizing recovery if proofs were furnished within a reasonable time and not later than 60 days prior to the end of 12 months after the fire approved. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350.

60. Where neither the insured nor his physicians knew for nearly eight months that his injuries were due to the accident, but supposed that he had rheumatism, the failure to give notice within ten days after the accident did not justify a forfeiture. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

61. Burns' Ann. St. 1901, § 4923. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. Evidence held not so convincing that notice was given within reasonable time as to render harmless an instruction that subsequent denial of liability on another ground, without mentioning the failure to give notice, would amount to a waiver, though question of reasonable time was for the jury under the circumstances. Id. Evidence insufficient to show due diligence in furnishing sworn statement. Parker v. Farmers' Fire Ins. Co. [Mass.] 74 N. E. 286. Delay of four months, when insured was well able to give notice held unreasonable. Dunshee v. Travelers Ins. Co., 25 Pa. Super. Ct. 559.

NOTE. Notice of injury: Plaintiffs were owners of certain mines and Y. Bros., coplaintiffs, were operating said mines, the proceeds being divided between them and plaintiff company. The latter took out with defendant a contract of indemnity insurance in favor of itself and Y. Bros. to cover liability for accidents to employes. Y. Bros. knew nothing of the policy. A man was injured at the mine but was kept from his work by the injury only a day or two, and made no complaint until about eight months thereafter, when he brought suit. Plaintiff company had no knowledge of the accident until the day before suit was commenced. They at once notified the insurance company, which denied liability on the ground that immediate notice of accident was not given in accordance with the terms of the contract. The injured man recovered from the mining company and Y. Bros., who now seek to recoup on the policy. Held, defendant is not liable. Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 P. 135.

Immediate notice is universally construed to mean notice within a reasonable time. And what is a reasonable time is ordinarily a question of fact for the jury, taking into consideration all the circumstances of the case. 2 May, Insurance [4th Ed.] § 462. Ward v. Maryland Cas. Co., 71 N. H. 262, 93 Am. St. Rep. 514; Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. 157, 78 S. W. 320; Mandel v. Fidelity & Cas. Co., 170 Mass. 173, 64 Am. St. Rep. 291; McFarland v. Acc. Ass'n, 124 Mo. 218; Underwood Veneer Co. v. London Guar. & Acc. Co., 100 Wis. 378. In several cases where the policy provided that notice of accident or loss should be given within a certain time specified, notice given after that time has been held sufficient under the circumstances though delay was through no fault of the insurer. Trippe v. Prov. Fund Soc., 140 N. Y. 23, 37 Am. St. Rep. 529, 22 L. R. A. 432; Woodmen's Acc. Ass'n v. Pratt, 62 Neb. 673,

A substantial compliance with the provisions of the policy as to proofs of loss is sufficient.[62] The statements of value made need not be within plaintiff's personal knowledge.[63] If the insured is a nonresident a verification by his agent is sufficient.[64] In order to require the furnishing of new proofs there must be a real, intentional withdrawal of the original ones.[65] A second proof is not ordinarily rendered necessary by an award of appraisers[66] nor is the delivery of proofs affected by reason of the fact that the insured subsequently borrows them.[67]

Under a policy providing that any medical officer of the insurer shall have the right and opportunity, as often as he may desire, to examine the body of the insured in order to ascertain the cause of death, and that any failure to comply with such provision shall operate to defeat the policy, a failure to extend such permission, upon demand made at a reasonable time and place before burial, is a bar to recovery.[68] Such a right does not include a right of autopsy or dissection, or a right of exhumation for that purpose.[69]

False swearing.[70]—In order that false swearing may avoid the policy it must be intentional[71] or the result of a reckless disregard of the truth,[72] must relate to a material matter,[73] and must result in prejudice to the insurer.[74]

89 Am. St. Rep. 777, 55 L. R. A. 291; Kentzler v. Am. Mut. Acc. Ass'n, 88 Wis. 589, 43 Am. St. Rep. 934. But contra, Gamble v. Acc. Ass'n, 4 Ir. R. C. L. 204. The holding in the principal case is no doubt correct and in accord with the great majority of former decisions, though the case of Chamberlain v. Ins. Co., 55 N. H. 249, seems to take precisely the opposite view.—3 Mich. L. R. 241.

62. Instruction requiring absolute compliance properly refused. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350; Prudential Fire Ins. Co. v. Ailey [Va.] 51 S. E. 812.

Proofs held sufficient. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035. Where stock of merchandise was totally destroyed, though failing to give the cash value of each item and the loss thereon. Prudential Fire Ins. Co. v. Ailey [Va.] 51 S. E. 812. Proof held sufficiently specific in describing property destroyed and its value. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

63. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135.

64. Though policy requires it to be sworn to by the insured. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76.

65. Evidence held not to show such withdrawal. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

66. Policy held not to require second proof. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

67. For purpose of copying them. Walker v. Lancashire Ins. Co. [Mass.] 75 N. E. 66. Evidence held to justify finding that proofs of loss were properly delivered. Id.

68, 69. Patterson v. Ocean Acc. & G. Corp., 25 App. D. C. 46.

70. See 4 C. L. 215.

71. A false statement is not a defense in an action for insurance, unless shown to have been made with intent to deceive and that prejudice resulted. Dalton v. Milwaukee Mechanics Ins. Co., 126 Iowa, 377, 102 N. W. 120. Oath by insured that property belonged to him as mortgagee and that no other person had any interest therein except the mortgagor, held not to be false though mortgage was given to him personally to secure loan of money belonging to the bank of which he was president. Id.; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127. Evidence held insufficient to show false swearing as to ownership and condition of title. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. Evidence held to sustain verdict that there was no false swearing. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287. Finding that insured was not guilty of wilful false swearing held not to be against the clear preponderance of the evidence. Newton v. Theresa Village Mut. Fire Ins. Co. [Wis.] 104 N. W. 107. The fraud referred to in a policy as avoiding the contract is actual fraud and requires proof of a fraudulent intent. Brunswick-Balke-Collender Co. v. Northern Assur. Co. [Mich.] 12 Det. Leg. N. 610, 105 N. W. 76. Policy not avoided by mistake in including in proofs property removed before the fire, or in describing insured's interest. Id. False and fraudulent statements in the proofs as to the value of the property knowingly made avoid the policy, but misstatements made in good faith and believing them to be true do not. Instruction approved. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. A mere inadvertent misstatement of loss, based on an erroneous estimate of value, does not constitute false swearing. Nugent v. Rensselaer County Mut. Fire Ins. Co., 94 N. Y. S. 605. Mere overvaluation of the property does not make the proofs fraudulent. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. If a plaintiff falsely and knowingly inserts any single article which was not burned or not in the house, the fraud prevents his recovery on the policy. Evidence held to show fraud in this regard. Rovinsky v. Northern Assur. Co. [Me.] 60 A. 1025. Where the insured warranted his statements as to the accident to be true, an erroneous statement against his own interest, innocently made, is not ground for forfeiting his rights. Wall v. Continental

Examination under oath.[75]—Notice of the intention of a fire insurance company to have an examination of a policyholder whose property has been destroyed is sufficient when it states the time and place of the examination and the name of the person who is to conduct it.[76]

Waiver.[77]—The requirement of notice and proofs of loss is for the benefit of the insurer and may be waived by it.[78] The waiver may be express or it may be implied from any acts or conduct on the part of the insurer reasonably calculated to lead the insured to believe that no proofs will be required,[79] as by a distinct denial of liability on other grounds after having been notified of the loss within the required time,[80] or proceedings looking to an adjustment of the loss;[81] but a failure to furnish proofs

Casualty Co., [Mo. App.] 86 S. W. 491. As to immediate and total disability. Id. Proofs taken as a whole held consistent with the belief that insured was immediately and totally disabled to perform work or business, and not bound to produce a belief to the contrary in the minds of defendant's officers, or such as to conclusively establish the fact that he was not so disabled. Id.

72. Must be willful or careless. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287. Putting such false and excessive valuation on the whole as displays a reckless and dishonest regard of the truth is itself fraudulent and prevents any recovery at all. Evidence held to show fraudulent overvaluation. Rovinsky v. Northern Assur. Co. [Me.] 60 A. 1025. Evidence of plaintiff and his wife held so unreasonable and incredible and so overborne by established facts and circumstances that court was not justified in accepting it as basis of decision. Id.

73. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

74. Dalton v. Milwaukee Mechanics Ins. Co., 126 Iowa, 377, 102 N. W. 120; Dalton v. Germania Fire Ins. Co. [Iowa] 102 N. W. 127.

75. See 4 C. L. 215.

76. Mahoney v. Insurance Co., 3 Ohio N. P. (N. S.) 246.

77. See 4 C. L. 213.

78. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568; Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889.

79. Gray v. Merchants' Ins. Co., 113 Ill. App. 537. Instructions approved. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803. Any acts or conduct which lead the insured reasonably to infer that no proofs will be required. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Acts or conduct evidencing a recognition of liability. Id. The failure to answer a letter from the insured, stating that one claiming to represent the insurer had called after the fire, but did not examine the property, and asking permission to remove the goods saved, did not constitute an admission that the representative who called had authority to adjust the loss and to waive proofs, there being no statement in the letter that the man came as an adjuster. Parker v. Farmers' Fire Ins. Co. [Mass.] 74 N. E. 286.

80. Mutual Life Ins. Co. v. Thomas [Md.] 61 A. 293; Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568; North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350.

Proofs held waived: Evidence held to justify verdict that adjuster waived proofs by denying liability. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. Complaint held to show waiver. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Even if insufficient, ruling that it was held harmless where ample evidence of waiver was admitted without objection. Id. A demand for payment and an offer to make proof of death by one to whom the policy authorizes payment to be made, and a denial to him of liability amounts to a waiver of other proof and authorizes an immediate action on the policy. Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202. Evidence held to show denial, especially as adjuster demanded the execution of a non-waiver agreement by the insured. St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053, 37 So. 967. Evidence showing that refusal to settle was based on sole ground that building was not worth amount for which it was insured, etc., held to justify finding of waiver. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Finding of waiver held not objectionable as being based on letter insufficient in itself to show waiver, since facts therein referred to must be considered in connection with it. Id.

Proofs not waived: By denial of liability by adjuster where it did not appear on what ground liability was denied, and when, with reference to the time for furnishing proofs, the waiver was claimed to have become effective, particularly where no issue as to such waiver was tendered by the pleadings. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035. Where notice was not given within a reasonable time, the fact that the company denied all liability solely on the ground that the policy did not cover the injury held not a waiver of immediate notice. Aetna Life Ins. Co. v. Fitzgerald [Ind.] 75 N. E. 262. Rule does not apply to case where company wrote beneficiary that it would not pay because it appeared from proofs that plaintiff had given false answers to questions in the application in that she swore that insured never had consumption and proofs showed that he was treated for that disease prior to the date of the policy, and plaintiff showed on the trial that proofs had no relation to insured and repudiated them. Mutual Life Ins. Co. v. Thomas [Md.] 61 A. 293.

81. Proceedings for adjustment held waiver of strict compliance with requirement as to notice. Walker v. Lancashire Ins. Co. [Mass.] 75 N. E. 66. An agreement to arbitrate is a waiver of the want of due proofs. Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889. Where insured

on time is not waived by the retention of overdue proofs.[82] There can, however, be no waiver without a full knowledge of the facts.[83] A waiver once made cannot be abrogated without the consent of the insured.[84]

A waiver of proofs is a waiver of the condition that no action can be maintained upon the policy, and no loss is payable under it until a limited time after satisfactory proof of loss has been received by the company.[85] In such case suit may be brought at once upon the denial of liability, although the time limited by the policy after proof may not have expired.[86]

Defects in the proofs are waived by a failure to object thereto within a reasonable time after their receipt.[87]

The powers of an agent are prima facie coextensive with the business intrusted to his care,[88] and will not be narrowed by limitations not communicated to the person with whom he deals.[89] Adjusters are generally held to have power to waive proofs either directly or by their acts or conduct,[90] though there appears to be some conflict of authority in this regard.[91]

claims that arbitration has failed because of fraud he is not required to file proofs before suing to establish the fraud and recover his damages. Id. Where an agreement for arbitration was entered into nine days after the loss, a failure to answer a telegram sent by the insured on the seventeenth day, as to when the insurer's appraiser would come, was not a waiver of proofs required to be made within 60 days after loss, or of appraisal. Providence Washington Ins. Co. v. Wolf [Ind. App.] 73 N. E. 1093, modifying 72 N. E. 606.

82. Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. S. 50.

83. Held no waiver of proofs in absence of evidence that defendant knew or had reason to know that the proofs actually supplied had no relation to the insured. Mutual Life Ins. Co. v. Thomas [Md.] 61 A. 293.

84. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Operates to strike the condition requiring them out of the contract. Id.

85, 86. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803.

87. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350. Evidence that company retained unsigned notice of loss for sixty days without objection, and offered to pay a certain sum as an adjustment of the loss held to warrant a submission to the jury of a waiver of formal proofs. Glaser v. Home Ins. Co., 93 N. Y. S. 524. Failure to furnish certificate of justice held waived where the insurer made no objection to payment on that ground. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306. The retention of proofs of death sent after time limited in the policy. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

88. See, also, § 16 C, ante. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803. Acts of managers of branch office of company organized in a foreign country and doing business in the United States, intrusted with unlimited powers, are equivalent to the acts of the company itself. Evidence held to show that defendant's United States branch office had such powers. Id. Agent not authorized to adjust losses cannot bind the insurer to a waiver by an unauthorized statement that the policy was void and that the insurer would not pay it. Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. S. 50. Agent's denial of liability in the exercise of his authority held waiver. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204. The fact that the agent did not point out any defects in proofs but indicated intention to contest on other grounds, held sufficient to authorize finding of substantial compliance or a waiver. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350. Action of officer to whom accident policy required insured to give notice of injury in refusing to pay for failure to give notice of loss held binding on company. Moore v. National Acc. Soc., 38 Wash. 31, 80 P. 171.

89. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803; Walker v. Lancashire Ins. Co. [Mass.] 75 N. E. 66.

90. Agent with authority to examine and adjust a loss. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Held waived by statement of adjuster that proofs need not be furnished. Gray v. Merchants' Ins. Co., 113 Ill. App. 537. Conduct of defendant, whose adjuster prepared proofs with knowledge of controversy, held a waiver of requirement that proofs should be submitted within a specified time. Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Iowa] 94 N. W. 560.

Denial of liability. St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053, 37 So. 967. Where person alleged to be general agent was served with proofs of loss, and adjuster thereafter proceeded to adjust loss but stopped on ground that he had discovered transfer of title, evidence held to have fairly raised question of waiver, so that it was properly submitted to the jury. Southern Bldg. & L. Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. Acts and declarations of agent and adjuster tending to show denial of liability held prima facie binding on company under Civ. Code 1902, § 1810, prescribing who are agents. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

91. Cannot waive provisions of policy. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36.

There is a conflict of authority as to the effect of provisions in the policy limiting the authority of agents to make waivers and requiring them to be in writing and indorsed on the policy.[92] Some courts hold that they prevent an oral waiver of proofs by an agent,[93] others that they apply only to waivers before loss,[94] and still others that, being for the benefit of the insurer, they may be waived by it,[95] and do not preclude the insured from showing as a fact that the officer, agent, or representative having in charge the adjustment of the loss was invested with the same power, or, in other words, that the restrictions upon his power of waiver had been removed.[96]

§ 20. *Adjustment and arbitration.*[97]—Provisions in regard to arbitration are for the benefit of the company, and on receipt of the proofs of loss it is its duty to take the necessary steps to have the loss adjusted in accordance with the contract.[98] Provisions requiring an appraisal as a condition precedent to suit will be strictly construed against the company.[99] The arbitration provided for in the Minnesota standard policy is not a condition precedent to action, unless a controversy between the parties as to the amount of the loss in fact exists.[1]

In South Dakota, in the case of mutual fire companies, the secretary is required to adjust the loss. If a satisfactory settlement cannot be made he is required to appoint a committee for that purpose, and if they cannot agree, then the insured and the company are each required to choose a disinterested party who, with a third party to be chosen by them if they do not agree, constitute a board of arbitration whose decision is final as to all matters in dispute.[2] The company may waive this provision and does so by failure to prove an offer to the insured to settle the claim, and by failing to appoint an arbitrator and requesting the appointment of one by the insured.[3] Proof that a committee has been appointed and reported to the secretary is inadmissible in the absence of proof that no settlement has been effected.[4]

92. See, also, § 16 C, ante.

93. Since no officer or agent can waive any stipulations except in the manner provided therein. Billings v. National Ins. Co., 6 Ohio C. C. (N. S.) 567.

94. Parol evidence of waiver is admissible. St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053, 37 So. 967.

95. Though policy provides that no agent or adjuster shall have the right to acknowledge or deny liability. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Provisions that no officer or agent of the company may waive any conditions of the policy except those which may by its terms be made the subject of agreement and that the waiver of such conditions must be written upon or attached to the policy. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803. In any event such provisions do not apply to waiver of proofs of loss, where proofs are not included in conditions which may be changed. Id.

96. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803. This fact being proved, the adjuster would have all the authority of the company in the settlement of the loss, including the waiver of the specified provisions relating thereto, notwithstanding the limitations contained in the policy. Id. Unless restricted in his authority, and unless insured has notice of that fact, adjuster has all the power of the company, in the settlement of a loss, to waive any of the conditions of the policy. Id. The waiver of conditions or of the limitations on the agent's authority to waive them may be shown by parol, since the waiver itself may be by parol. Id. As by acts and declarations of the agent appointed to adjust a loss in the course of the performance of his duty. Id.

97. See 4 C. L. 216. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

98. Its duty and not that of the insured to institute the arbitration proceedings. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306.

99. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306. A mutual fire company having issued an old line or standard policy, the insured is entitled to rely on the same, and proceed according to its provisions. May sue thereon after furnishing proofs required thereby, at least where defendant makes no effort to procure statutory arbitration. Id.

1. Kelly v. Liverpool & London & Globe Ins. Co. [Minn.] 102 N. W. 380.

2. Laws 1897, p. 199, c. 70, § 7. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306.

3. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306. Where, after notice of a loss given to a mutual insurance company organized under Laws 1897, p. 199, c. 70, § 7, none of the steps prescribed by the statute for adjustment were taken, it amounted to a waiver of the conditions. Id. Question put to secretary as to whether he had made

A mere naked agreement to arbitrate may be revoked before the arbitrators have agreed upon an award.[5]

A mortgagee to whom, by an open mortgage clause, the policy is made payable as his interest may appear is not the insured within the meaning of provisions for the appraisal of the loss.[6] In the absence of any provision to the contrary he has no right to participate in the adjustment of the loss, and is bound by the action of the owner in accepting the award of the appraisers even though they used an erroneous method of computation.[7]

The agreement for arbitration is collateral to the contract for insurance, and if it fails of accomplishment without fault of parties, they are relegated to their legal rights independent thereof.[8] After a disagreement as to the loss and a request by either party for arbitration both parties are under the duty to act in good faith to have the loss ascertained as provided by the policy,[9] and if either in bad faith prevents such ascertainment by refusing to proceed,[10] or by insisting on the selection of improper arbitrators,[11] or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate.[12] But an arbitration cannot, after it is properly submitted, be defeated by the withdrawal of one of the appraisers during the investigation.[13]

By disinterested is meant fair and unprejudiced.[14] The fact that the appraiser selected by the insured has a preconceived opinion as an expert, derived from a personal inspection of the property, does not disqualify him,[15] nor does the fact that he was previously employed by the insured to make an estimate of the loss and damage, though the latter fact may be considered by the jury in determining whether he is disinterested.[16] Failure to object to the selection of an interested party on acquiring knowledge of the facts is a waiver of the objection.[17] The selection of an interested appraiser by the insured does not estop him from objecting to an incompetent and interested appraiser selected by the insurer.[18]

In cases where the proceedings provided for are not ordinary arbitrations but are merely an appraisal and ascertainment of the amount of the loss, the neces-

a settlement with the insured held incompetent. Id.

4. Norris v. Equitable Fire Ass'n [S. D.] 102 N. W. 306.

5. Agreement for reference held revocable and revoked by commencing suit before award. Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154, afd. 62 A. 101.

6. Term insured held limited to the owner and his legal representatives. Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647.

7. Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647.

8, 9. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

10. Arbitration not in accordance with the terms of the policy having failed, and insured having thereafter requested and insisted upon a proper arbitration which was refused by the company, held, that he could sue on the policy. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853. The right to an appraisal will be waived by the insurer, if its referee with its direct or indirect approval arbitrarily refuses to co-operate in the choice of a third referee, and refuses to further act as referee or if, after disapproval of such action, it refuses to agree to the selection of other referees. O'Rourke v. German Ins. Co. [Minn.] 104 N. W. 900. Facts held to justify a finding of a waiver. Id.

11. Where the umpire and one or more of the arbitrators were partial and incompetent, and the insured, as soon as he learned of it demanded the selection of disinterested and competent ones, but the insurer refused, the insured could break up the arbitration and sue on the policy. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

12. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

13. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915.

14. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129. Evidence insufficient to warrant disqualification of appraisers for bias and partisanship. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915.

15. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129.

16. Instruction approved. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129.

17. Failure of the insurer to object to the selection of the insured's clerk. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

18. Waiver of objection by company does not authorize it to select an incompetent and interested party and conceal that fact from the insurer. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

sity of notice to the parties of the time and place of the meeting of the appraisers depends upon the circumstances surrounding each case, and whether the insured has already furnished all necessary information, or whether he has requested that he be present to make any additional explanation or to hear what may be said by others.[19]

Where the policy provides for arbitration, in case of disagreement, and that the award shall determine the amount of the loss, a valid award thereunder is conclusive as to the amount of the loss.[20] Every reasonable intendment and presumption is in favor of the award,[21] and it should not be set aside unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers.[22] Mere inadequacy alone is not sufficient,[23] but inadequacy so gross and palpable as to shock the moral sense is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias.[24] As in the case of other awards, it can be set aside in an action at law only for causes apparent on its face, and fraud or misconduct on the part of the arbitrators can be availed of only in equity.[25]

If the submission is limited to the ascertainment of the amount of the loss, an award does not prevent an action on the policy.[26]

If the award is invalid and arbitration is made a condition precedent to an action on the policy, plaintiff must ask for another arbitration.[27]

§ 21. *Option to pay loss or restore property.*[28]

§ 22. *Payment of loss or benefits and adjustment of interests in proceeds.*[29]—The ordinary rules as to compromise and settlement[30] and payment and tender ap-

19. Evidence held to show that insured had sufficient notice to enable her to appear and to notify counsel if she desired, and that she was actually present. Sterling v. German American Ins. Co. [N. J. Eq.] 60 A. 200. Held that proceedings were not ordinary arbitration. Id.

20. Held error to open up the award and hear evidence as to the value of the property. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901. The conclusiveness of the award is not affected by the fact that the submission is not under seal. Id.

21. Presumed to have acted in accordance with the law and the terms of the contract, and burden is on those attacking the award to establish the contrary by convincing evidence. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915.

22. Evidence insufficient to warrant setting it aside. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915. All that is required to justify the setting aside of an award on the ground of fraud, bias or undue influence is that the evidence satisfies the jury of the truth of the allegations in the complaint. Not necessary that direct, affirmative or positive proof be given. Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889.

23. Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889. Where there is sufficient evidence to sustain the award, it cannot be attacked, though the valuation be inaccurate, unless so grossly erroneous as to show bad faith or other grounds to set the award aside. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915.

24. Instruction approved. Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889. Difference between award and jury's finding as to the amount of the loss held to justify setting award aside. Id. Difference between estimates of complainant's witness and the award not sufficiently radical to show that appraisers were influenced by improper motives. Sterling v. German-American Ins. Co. [N. J. Eq.] 60 A. 200.

25. In action at law on the policy evidence that the arbitrators were intoxicated is inadmissible. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901. Code 1899, c. 108, § 4, giving court of law power to set aside certain awards for causes not apparent on the face, applies only to awards in pending suits, or where the submission provides that the award shall be returned to a court for judgment or decree, and not to awards in pais such as the one in controversy. Id.

26. Contract in such case is not merged in the award so as to require the action to be on the award, but award is merely evidence in the action on the policy. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901. This is particularly true where it is provided that no action shall be sustained "on this policy" until the provisions in regard to arbitration have been complied with. Id.

27. Submission is still valid. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

28. See 4 C. L. 219.

29. See 4 C. L. 219. See Fraternal Mutual Benefit Associations, 5 C. L. 1523.

30. See, also, Accord and Satisfaction, 5 C. L. 14. Held, that there was no sufficient evidence of the mutuality of the arrangement between the companies and plaintiff to

ply.[31] A settlement for a sum less than the entire claim will not be sustained where the amount due is admitted,[32] nor is there any consideration for the acceptance of a part payment in full satisfaction when based on a contention, not made in good faith, that the policy is void.[33] If a settlement is procured through fraud plaintiff need not tender back the amount paid him, but it may be retained to apply on the amount recovered.[34] If the insurer makes a settlement not legally binding in whole or in some inseparable part, it cannot set off the same as against liability under the policy.[35]

Where policies in favor of beneficiaries having no insurable interest are not absolutely void as wagering contracts, and have been paid by the insurer in good faith to such beneficiaries without knowledge that they had no insurable interest or that the proceeds were claimed by insured's administrator, the beneficiaries will be treated in equity as the assignees or appointees of those entitled thereto,[36] and the administrator cannot compel the company to pay a second time, his remedy, if any, being against the beneficiaries.[37] So, too, a payment in good faith to the person designated as beneficiary and described as insured's wife is a valid payment as against the insured's representative.[38]

The proceeds of a fire policy, taken out in good faith by an administrator, on property believed to belong to his decedent, belong to the estate, though its title is subsequently found to be invalid.[39]

Under a provision that any debt of assured shall be deducted from the face of the policy when paid, the insurer is entitled to credit for an unpaid premium note outstanding at the time of the insured's death, with interest.[40]

A judgment creditor of the insured garnishing the insurer must recover, if at all, upon such right as the debtor may possess against the garnishee.[41]

In many states the proceeds of life policies are exempted from liability for the insured's debts,[42] and when so exempted are exempt under the bankrupt act.[43]

establish a settlement which would be an accord and satisfaction at law. Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Minn.] 104 N. W. 560.

31. See, also, Payment and Tender, 4 C. L. 955. Retention of drafts by plaintiff held not to amount to payment, where it appeared that he held them after discovering that the other companies would not carry out an agreement as to settlement, in hopes that the claims might be eventually settled. Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Iowa] 104 N. W. 560. Tender not including value of certain awnings covered by the policy held insufficient. Wicks v. London & Lancashire Fire Ins. Co., 91 N. Y. S. 1036 [Advance sheets only.]

32. Caine v. Farmers' & Mechanics' Life Ass'n, 115 Ill. App. 307.

33. Northwestern Nat. Life Ins. Co. v. Blasingame [Tex. Civ. App.] 85 S. W. 819.

34. Caine v. Farmers' & Mechanics' Life Ass'n, 115 Ill. App. 307.

35. New Orleans & C. R. Co. v. Maryland Casualty Co. [La.] 38 So. 89. The company cannot deduct from a judgment recovered against the insured for injuries to a minor employe a sum of money paid to his widowed mother in compromise of her claim, though purporting to include his also, she not being his legal tutrix. Id.

36, 37. Griffin's Adm'r v. Equitable Assur. Soc., 27 Ky. L. R. 313, 84 S. W. 1164.

38. Insurer is not bound to determine whether she was legally married to him, or to notify insured's relatives that she was demanding payment. Representative's remedy, if any, is against beneficiary. Metropolitan Life Ins. Co. v. Louisville Trust Co. [Ky.] 89 S. W. 268. It will be presumed that such payment was made in good faith in the absence of pleading and proof that at the time of making it the insurer knew that she was not in fact his wife or had no insurable interest in his life. Id.

39. Premiums paid from the estate. Bloom v. Strauss [Ark.] 84 S. W. 511.

40. Union Cent. Life Ins. Co. v. Spinks, 27 Ky. L. R. 325, 84 S. W. 1160, modifying 26 Ky. L. R. 1205, 83 S. W. 615.

41. Employer's liability. Allen v. Gilman, McNeil & Co., 137 F. 136.

42. California: Under Code Civ. Proc. § 690, subd. 18, all moneys, benefits, privileges or immunities accruing or in any manner growing out of life insurance are exempt from execution if the annual premiums paid do not exceed five hundred dollars. Holmes v. Marshall, 145 Cal. 777, 79 P. 534. Statute should be liberally construed. Id. Such exemption extends to the beneficiary, and exempts insurance money received by the widow from liability for her debts. Id. When payable to and collected by the estate of insured, the proceeds may be set apart for the widow, without first paying decedent's debts and are then exempt as to

§ 23. *Subrogation and other secondary rights of the insurer.*[44]—An insurance company which has indemnified the owner of property for loss incurred by him is entitled to all the means of indemnity which the latter had against the party primarily liable to the extent of the payment,[45] and it may therefore bring a suit against the wrongdoer who has occasioned the loss.[46] The right of the insurer in such cases is solely one of reimbursement, and hence it is only entitled to be indemnified for the amount of the loss actually paid by it,[47] though it has been held that if the insured could have recovered interest the company may recover its pro rata share thereof in addition to the amount actually paid by it.[48]

The payment by the company to the mortgagee, to whom the policy is payable as his interest may appear, of the amount of his debt against the mortgagor is not a discharge of such debt, but the insurer is entitled to an assignment thereof from the mortgagee and may recover the same from the mortgagor.[49]

§ 24. *Remedies and procedure. A. Rights of action and defenses and parties.*[50]—Assumpsit will lie on a policy not under seal.[51] The beneficiary after the death of insured may maintain trover for a policy unlawfully converted, during insured's lifetime, by the agent of the company.[52]

An action on the policy may be brought in any county in which proper service may be had on the company, irrespective of the location of the property destroyed.[53]

her debts. Id. Estate is beneficiary and proceeds are assets exempt from execution, and as such are properly set apart to the widow under Code Civ. Proc. § 1465. Id. The fact that the widow deposits the money in the bank does not so change its character as to render it subject to attachment on execution. Id.

Washington: Laws 1895, p. 336, and Laws 1897, p. 70, providing that the proceeds or avails of all life and accident insurance "shall be exempt from all liability for any debt" is not in conflict with the constitutional provisions of that state as to exemptions. Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018. The act applies to endowment policies and is not restricted to those payable after the death of the insured. Id. It also protects the avails of such insurance from pursuit of the creditors of the insured where the proceeds of the policies are payable to his estate, and from the creditors of the beneficiary. Id.

43. See, also, § 14, ante. By Act July 1, 1898 (30 Stat. at L. 548, c. 541, Comp. St. 1901, p. 3424) § 6, preserving to the bankrupt the exemptions allowed by state laws. Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018. Effect of this section is not limited by § 70a, subd. 5, relating to property passing to the trustee, providing that policies having a cash surrender value payable to himself or his estate shall pass to trustee as assets, unless the bankrupt pays or secures to him a sum equal to such value as ascertained and stated by the company. The purpose of the last section is to confer a benefit on the bankrupt by limiting the character of the trustee's interest in nonexempt policies, and not to cause exempt policy to become assets of the estate. Id.

44. See 4 C. L. 220.

45. Is subrogated to insured's right of action against railroad company negligently causing fire, since it is assignable under Civ. Code, § 1351. Caledonia Ins. Co. v. Northern Pac. R. Co. [Mont.] 79 P. 544.

46. Caledonia Ins. Co. v. Northern Pac. R. Co. [Mont.] 79 P. 544.

47. Under assignment to company by insured, which limited amount to actual value of the property destroyed, and complaint which demanded actual damages, and by virtue of the doctrine of subrogation, action by insurance company against the party causing the fire held not one for treble damages authorized by Pol. Code, § 3344, and hence two-year limitation prescribed by Code Civ. Proc. § 338, in cases of actions upon a liability not founded upon an instrument in writing, applies and not the three-year limitation prescribed for actions on liabilities created by statute. Phoenix Ins. Co. v. Pacific Lumber Co. [Cal. App.] 81 P. 976.

48. Interest recoverable in the discretion of the jury under Civ. Code, § 4281, in case of destruction of property by fire, is an incident of insured's right of action and hence passes with it. Caledonia Ins. Co. v. Northern Pac. R. Co. [Mont.] 79 P. 544.

49. Baker v. Monumental Sav. & L. Ass'n [W. Va.] 52 S. E. 403. Where grantee in deed of trust purchases insurance in grantor's name on trust property for security of his debt, company, on payment of entire debt, is entitled to take assignment thereof and to recover it in same manner as its assignor could have done. Id. This is true though the grantor had, before insurance was taken out and without the grantee's knowledge, sold the property, subject to the trust deed, and reserving a vendor's lien for the purchase price. Id.

50. See 4 C. L. 221.

51. Policy held not a contract under seal, though corporate seal was impressed in upper corner over figures not forming a part of the contract. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

52. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

53. Southern Bldg. & L. Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88.

A resident mortgagor may maintain an action on a fire policy though both the insurer and the mortgagee, made a defendant, are nonresidents, and the policy was taken, and the property is located outside of the state.[54]

There is sufficient privity between two claimants to the proceeds of the same policy to enable the company to maintain a bill of interpleader against them.[55] The fact that one of them has brought suit in another jurisdiction against the insurer will not prevent the maintenance of such a bill by it in a jurisdiction where both are subject to personal service of process.[56]

Parties.[57]—Suit on a life policy payable to the insured can only be brought by his administrator or executor.[58] Under a statute declaring that every life policy payable to a married woman shall be her separate property a husband who has taken out a policy on his life payable to his wife if she survives him and, if not, to his heirs, need not be joined as a party plaintiff in a suit by her against the company for damages for repudiation of the contract.[59] The mortgagee to whom a policy is made payable as his interest may appear is a necessary party to an action thereon by the mortgagor and if he refuses to join as plaintiff may be made a defendant.[60]

Two companies, made liable for an equal amount by a single policy signed by each, are jointly liable and may be sued jointly.[61] So, too, several parties protected by the same policy may sue jointly for losses occurring at the same time.[62]

Process.[63]—Service on the defendant company must be made in conformity to the provisions of the statutes of the state where the action is brought.[64]

54. Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224, afg. 93 App. Div. 157, 87 N. Y. S. 525.

55. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36. Allegations that two persons have preferred claims against the company, that they are both for the proceeds of the same policy, that company has no beneficial interest therein, and that it cannot determine without hazard to itself to which party the proceeds belong, held sufficient to sustain bill of interpleader. Id. Where several parties claim the proceeds of a policy, the special term of the supreme court has jurisdiction to make an order discharging the insurer from all liability on payment of the proceeds into court. Claimant held to have assented that amount paid was all that was due. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. S. 877.

56. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36.

57. See 4 C. L. 222. See, also, Parties, 4 C. L. 888.

58. Wilkinson v. John Hancock Mut. Life Ins. Co. [R. I.] 61 A. 43.

59. Under Rev. St. 1898, § 2347. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593. Husband and wife are not so united in interest as to require that they should be joined as plaintiffs under Rev. St. 1898, § 2604. Id.

60. Code Civ. Proc. §§ 446, 448. Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 74 N. E. 224, afg. 93 App. Div. 157, 27 N. Y. S. 525.

61. Recital that each received half the premiums and provision that each shall pay half the loss applies only between the companies, and does not change rule. Szymkus v. Eureka Fire & Marine Ins. Co., 114 Ill. App. 401.

62. Under § 5005, Rev. St. Farmers' Mut. Fire Ins. Co. v. Ward, 5 Ohio C. C. (N. S.) 509, 24 Ohio C. C. 156. All of the beneficiaries may unite as plaintiffs even though a part is payable to the assured and a part to others. Purchaser of property to whom policy was payable as his interest might appear and mortgagee in whose name title was taken and insurance applied for. Lorling v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025.

63. See 4 C. L. 221. For validity of provisions authorizing service on insurance commissioner in case of foreign companies see § 3, ante. See, also, Process, 4 C. L. 1070.

64. Missouri: Under Rev. St. 1899, § 8092, authorizing service on town mutual companies to be had in St. Louis, if the cause of action originates elsewhere, only by serving the president, secretary, or other chief officer in charge of the company's "principal office," a return showing service in that city by service on the secretary in charge of its "usual business office" does not show good service. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 564.

New York: Under Code Civ. Proc. § 432, subd. 3, service of summons on a resident director of a foreign company is sufficient where the company is doing business within the state, the cause of action arises there, there are no other officers or agents of the company in the state, and it has no office there. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 Law. Ed. 810. Foreign company held bound to pay loss in state where insured resided, and hence cause of action arose there, within the

Limitations.[65]—Suit cannot of course be brought before the time when the loss is payable by the terms of the policy,[66] unless such provision is waived.[67] The action must be brought within the time fixed by the general statute of limitations.[68]

There is a conflict of authority as to whether foreign companies are out of the state within the meaning of the general statutes of limitations,[69] and as to the effect in this regard of provisions authorizing the service of summons on the insurance commissioner in actions against foreign companies.[70]

There is a conflict of authority as to the validity of contract limitations.[71] Some courts hold them to be contrary to public policy if less than the period fixed by the statute of limitations,[72] and others hold them valid if reasonable.[73] The matter is regulated by statute in some states.[74] The question is one of general

meaning of N. Y. Code Civ. Proc. § 432, subd. 3, authorizing service of summons on cashier, director, or managing agent of a foreign corporation in certain cases. Id.

65. See 4 C. L. 222. See, also, Limitation of Actions, 4 C. L. 445.

66. Where policy provided absolutely for proofs of loss and also for a magistrate's certificate if required, and that loss should be payable 60 days after satisfactory proofs of loss, suit brought more than 60 days after proofs were furnished, but less than 60 days after the furnishing of a certificate subsequently demanded, was not premature, the certificate being no part of the proofs. Egan v. Merchants' Fire Ass'n [Wash.] 82 P. 898.

67. A provision that suit shall not be brought for the full amount of an accident policy until after the expiration of two years from the date of the injury is waived by a denial of liability in the answer based on other grounds. Suit within two years held not premature though policy provided that if, after expiration of that time, it should be satisfactorily proven that injuries sustained had continuously disabled, and would alone permanently and entirely disable, the insured during life from any and all occupations, he should receive a sum which, together with sum already paid should amount to a certain sum. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

68. Under the express provisions of Kirby's Dig. § 4381, if plaintiff in an action on an insurance policy suffers nonsuit, he may commence anew within one year thereafter, notwithstanding stipulations to the contrary in the policy. Where policy provides that suit must be commenced within a year, and plaintiff commences it within that time but takes a nonsuit, he may commence another suit within a year thereafter. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572. Prescription of 20 years generally applicable to personal actions in Porto Rico before the Civil Code went into effect in that island governs an action on a fire policy for a loss occurring before such code went into effect. Royal Ins. Co. v. Miller, 26 S. Ct. 46.

69. North Carolina: Under Code, § 162, statute does not run in favor of such companies. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

70. North Carolina: Provision that statute does not run while defendant is out of the state (Code, § 167) is not abrogated or affected in any way by Laws 1901, c. 5, p. 66, or Laws 1899, c. 54, § 62 (3), p. 175, authorizing service on commissioner. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

71. See, also, Contracts, 5 C. L. 664; Limitation of Actions, 4 C. L. 445.

Note: A life policy contained the provision that no suit should be maintained thereon unless begun within one year from the death of the insured. Held, such a clause is in contravention of public policy and void. Union Cent. Life Ins. Co. v. Spinks, 26 Ky. L. R. 1205, 83 S. W. 615. The decision in the principal case is against the overwhelming weight of authority (Farmers' Mutual Fire Ins. Co. v. Barr, 94 Pa. 345; Johnson v. Humbolt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47), and is open to criticism. Statutes must be construed in the light of the common law. At common law there was no limitation, and nothing in the act forbids parties from making their own limitation within the prescribed time. Provisions like the above are almost universally recognized as reasonable conditions precedent and given effect. Riddlesbarger v. Hartford Ins. Co., 7 Wall. [U. S.] 386, 19 Law. Ed. 257.—5 Columbia L. R. 327.

72. Kentucky: A limitation of 30 days after payment of loss by the insured in an employer's indemnity policy is contrary to public policy. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

Nebraska: Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

73. Georgia: A stipulation that no suit shall be brought after one year from the death of the insured is reasonable and valid. Metropolitan Life Ins. Co. v. Caudle [Ga.] 50 S. E. 337.

Illinois: Requirement that suit be commenced within 12 months after fire held valid. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

Federal courts: Provision that no action may be brought on a life policy after the lapse of a year from the death of the insured held valid. Spinks v. Mutual Reserve Fund Life Ass'n, 137 F. 169.

74. Indiana: Burns' Ann. St. 1901, § 4923, makes invalid any condition or agreement for a shorter period than 3 years, and a six months' limitation in a policy is void. Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202.

Rhode Island: Two-year limitation is valid under Rev. Laws 1902, vol. 2, c. 118, § 26, prohibiting shorter limitation, and requires beneficiary to procure suit to be

jurisprudence in regard to which a Federal court will follow Federal decisions even though in conflict with the latest decision of the highest state court.[75]

The cause of action on a policy accrues at the expiration of the time stipulated for payment of the claim.[76] If the receipt and approval of proofs is made a condition precedent to a right of action, the cause of action does not accrue until such condition is complied with, and hence limitations do not begin to run until that time.[77] In computing the time within which the action must be brought the day on which the loss occurs will be excluded, and that on which the action is brought included.[78] Suit is commenced when a praecipe is filed and a summons is issued thereon.[79] Failure to appoint an administrator within the time prescribed does not prevent the running of limitations against a life policy payable to the insured.[80]

The company may waive contract limitations or estop itself from asserting them,[81] but in order to have that effect its conduct must appear to have been such as to prevent the bringing of the action within the stipulated time.[82]

(§ 24) *B. Practice and pleading.*[83]—The general rules of pleading,[84] in-

brought thereon by a competent person within that time. Wilkinson v. John Hancock Mut. Life Ins. Co. [R. I.] 61 A. 43.

75. No statute of limitations being involved. Spinks v. Mutual Reserve Fund Life Ass'n, 137 F. 169. Particularly where the last decision of the state court before the submission of the demurrer raising the question upheld the validity of such provisions, though a subsequent decision held to the contrary. Id.

76. Wilkinson v. John Hancock Mut. Life Ins. Co. [R. I.] 61 A. 43. Where the policy provided for the payment of the sum named within twenty-four hours after proof of death, the cause of action accrued at the expiration of the twenty-four hours and the stipulated limitation of two years began to run. Id.

77. Where policy provides that no action shall be brought against insurer after lapse of two years from the time when the cause of action accrues. Stinchcombe v. New York Life Ins. Co. [Or.] 80 P. 213.

78. Fire insurance. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

79. Colonial Mut. Life Ins. Co. v. Ellinger, 112 Ill. App. 302.

80. Though suit can only be brought by administrator. Wilkinson v. John Hancock Mut. Life Ins. Co. [R. I.] 61 A. 43.

81. Walsh v. Metropolitan Life Ins. Co., 93 N. Y. S. 445. Evidence insufficient to show waiver. Berger v. Aetna Life Ins. Co., 95 N. Y. S. 541. Provision requiring suit to be commenced within 12 months waived by the receipt of proofs of loss without objections or denial of liability, and subsequent negotiations lasting 16 months leading insured to entertain hopes of final payment. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325. An adjuster has no authority to waive a contract limitation. Berger v. Aetna Life Ins. Co., 95 N. Y. S. 541.

82. Where the company denied liability 8 months before the expiration of the limit, and did nothing to deter plaintiff from suing, a failure to sue within the contract time was a bar to recovery. Metropolitan Life Ins. Co. v. Caudle [Ga.] 50 S. E. 337. Where insurer immediately denied liability, but later twice offered to pay $30 to avoid litigation and attendant expense, such offers were not negotiations calculated to prevent plaintiff from bringing suit and did not as a matter of law amount to a waiver of a provision requiring suit to be brought within three months after the right of action accrued, or estop defendant from relying on it. Cooper v. Phoenix Acc. & Sick Benefit Ass'n [Mich.] 12 Det. Leg. N. 487, 104 N. W. 734.

83. See 4 C. L. 224.

84. See Pleading, 4 C. L. 980. Petition held to sufficiently state a cause of action against a reinsurer, as against an objection to the introduction of evidence. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

Must plead facts and not conclusions: A plea that by its terms the contract sued on may be canceled and that defendant canceled it before loss in accordance with its terms is bad on demurrer in failing to set out the terms of the policy in that regard. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204. Plea in action on policy insuring household furniture alleging that policy provided that insured should produce for examination all bills and that she failed to produce bills showing from whom she purchased the household furniture destroyed held bad for failing to aver that plaintiff was under any duty to comply with such provision. Traders Ins. Co. v. Letcher [Ala.] 39 So. 271. Answer merely alleging that plaintiff negligently stood by and permitted the building to be consumed by fire, but averring no particular facts, and not alleging that plaintiff could have prevented the fire or saved the goods, held not to state a defense. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47.

Must be definite and certain: Averment that the interest of the mortgagee was fully disclosed in the proof of loss held sufficient. Loring v. Dutchess Ins. Co. [Cal. App.] 81 P. 1025.

Incorporation of other papers: Allegations held sufficient to make adjuster's agreement a part of the complaint under Burns' Ann. St. 1901, § 365. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814.

As to corporate existence: Name "Georgia Co-Operative Fire Association" by which defendant was sued, taken in connection with the allegations of the petition, held to im-

cluding those as to amendments,[85] the necessity of alleging jurisdictional facts,[86] and the necessity of verification, apply.[87]

The complaint should affirmatively show a performance of the conditions upon which the claim is based, or that performance has been waived.[88] In most states it is sufficient to aver in general terms the performance by the insured of all the terms of the policy.[89] If the complaint alleges both a performance of the conditions of the policy and in addition states facts showing a waiver of the proofs of loss, the former allegation may be treated as surplusage.[90] There is a conflict of authority as to whether waiver may be shown under a general allegation of performance.[91]

Where exceptions are stated in separate clauses of the policy and not in the promising or contracting clause, plaintiff need not negative them, but is only required to set out so much of the contract as he relies on.[92]

In some states a copy of the policy must be attached to the complaint.[93] A

port a corporation, and it was not necessary even as against a special demurrer to allege the corporate existence of the defendant. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429.

As to waiver: Replications seeking to set up waiver of prohibition against additional insurance by failure to object and cancel the policy after the agent had knowledge that additional insurance had been procured held bad in failing to show that such knowledge was acquired by the agent while transacting defendant's business. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271. Replications setting up waiver of right to forfeit policy for procuring additional insurance by failure to object thereto and cancel the policy after notice held sufficient. Id. Replication alleging that general agent of the company, with authority to waive provisions, had knowledge of the facts, and that, if his agency had been revoked, plaintiff had no knowledge or notice of that fact, held sufficient as against the demurrers interposed. Id. Replication attempting to set up waiver by agent after revocation of his authority held bad. Id.

Answer must deny, or confess or avoid: A plea that plaintiff ought not to recover upon the contract sued on by reason of anything alleged in the complaint is bad on demurrer. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204. Certain rejoiners held demurrable as not being answers to replications. Traders' Ins. Co. v. Letcher [Ala.] 39 So. 271.

85. Joinder by amendment of assignee of fire policy as party plaintiff in suit in Porto Rico by mortgagee to enforce his right to proceeds of policy held not a clear abuse of court's discretion, where assignee's rights are alleged to be subordinate to those of the mortgagee, in view of Law of Civ. Proc. for Cuba & Porto Rico, art. 156, providing that causes of action against several persons, or by several persons against one, arising from the same source of title, or based upon the same cause of action, may be joined and brought in one action. Royal Ins. Co. v. Miller, 26 S. Ct. 46.

86. Defect in petition in failing to state that the hay, grain and farm utensils destroyed were located in the barn in D. county and thus show jurisdiction of the court of that county over the subject-matter was cured by verdict under Rev. St. 1899, § 672. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 564.

87. Where the complaint is in code form and implies an action in the name of the insured, a plea that defendant never issued a policy to plaintiff, but that it issued one to a third person with loss payable to a mortgagee, which was subsequently canceled, is in substance and legal effect a plea of non est factum and bad if not sworn to. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

88. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009.

89. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Under Burns' Ann. St. 1894, § 373 (Horner's Ann. St. 1897, § 370). Id. Under Burns' Ann. St. 1901, § 373, averments that insured has fully complied with all the requirements, stipulations, and agreements on her part to be performed, held sufficient. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814. A general averment of the performance of all conditions precedent, and that the loss did not happen by reason of any of the conditions provided against in the policy is sufficient in assumpsit, though policy is set out in haec verba. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

90. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612.

91. In Missouri it may be. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568.

In New York it cannot be. Condition as to time of payment of premiums. Garlick v. Metropolitan Life Ins. Co., 95 N. Y. S. 645.

In Ohio it cannot be. Mahoney v. Insurance Co., 3 Ohio N. P. (N. S.) 246.

92. Though employers' liability policy requires that employes must be over 12 years of age, plaintiff need not allege that person injured was over that age, the fact that he was not being a matter of defense. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

93. Where no objection was made to plaintiff's failure to attach a copy of the policy to the complaint until trial, but the

copy of the policy filed with the declaration may be amended to conform to the original in case of variance.[94] In a suit on the policy it is not necessary to attach copies of the adjustment and of a written promise to pay the amount thereby found to be due.[95]

In an action on a fire policy the complaint must allege that plaintiff owned the property at the time of the fire[96] and the value of the property destroyed.[97]

One to whom a life policy is assigned by the insured as security for any or all sums which the insured may then or thereafter owe him must plead and prove an existing indebtedness in order to recover on the same, there being no presumption that he has an insurable interest.[98]

If arbitration is not a condition precedent to an action on the policy, plaintiff need not allege that it was or was not had, or that it was waived.[99]

The nonexistence of[1] or failure to perform conditions precedent must be specially pleaded.[2]

Defendant may introduce evidence tending to show that plaintiff set the fire under a general denial of an allegation that the fire did not start through the fault or negligence of plaintiff.[3] Where plaintiff alleges ownership in himself, defendant may under a general denial prove ownership in another.[4]

In some states plaintiff is required to file a statement of claim in the nature of a bill of particulars,[5] and where the defense is the failure of the insured to comply with, or his violation of, any clause, condition, or warranty, the defendant is required to file a statement specifying the clause, condition, or warranty not kept or

answer admitted the making of the policy as alleged in the complaint which referred to it by number, and it appeared that defendant had one form of policy and its secretary kept a record of policies, it was proper to treat the complaint as including a copy. Nugent v. Rensselaer County Mut. Fire Ins. Co., 94 N. Y. S. 605.

94. So as to include omitted loss payable clause, and to correct description of building insured. Staats v. Georgia Home Ins. Co. [W. Va.] 50 S. E. 815.

95. Suit held one upon the policies and not upon a written promise to pay the specific amount shown by a written adjustment of the loss. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429.

96. Allegations held sufficient on demurrer. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814. A general averment that plaintiff at the inception of the policy and at the time of the loss was the owner of the property destroyed is sufficient to admit evidence of any interest he may have had. New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668. Must aver an insurable interest in the property at the date of the issuance of the policy, and also at the date of the loss, except where the property has been sold and the policy transferred to the purchaser in the interim with the company's consent, in which case such facts must be stated. Rodgers v. Western Home Town Mut. Fire Ins. Co., 186 Mo. 248, 85 S. W. 369. A reference in the petition to "his frame dwelling" and "his furniture" is a sufficient allegation, after judgment, that assured owned the property. Id.

97. Adjuster's agreement, made a part of the complaint, stipulating that the amount of the loss was conclusively agreed to be a certain sum, when taken in connection with complaint, held to render unnecessary any further allegation as to the value of the property. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814. Where insured's interest is changed from fee to life estate without objection by the insurer, he need not, in case of a total loss, allege that it is of value equal to the insurance. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546.

98. Troy v. London [Ala.] 39 So. 713.

99. It is unnecessary, in an action on the Minnesota standard policy. If controversy in fact exists, defendant may plead failure to arbitrate as a defense. Kelly v. Liverpool & London & Globe Ins. Co. [Minn.] 102 N. W. 380.

1. Unperformed conditions in an accident policy are matters of defense. As the requirement of a visible mark of injury on the body and that the injury shall not have been sustained in a wild country. United States Casualty Co. v. Hanson [Colo. App.] 79 P. 176.

2. Conditions as to notice and proofs of loss. Where performance of conditions precedent is alleged generally in the complaint, general denial is insufficient to put these facts in issue. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568.

3. 4. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

5. The statement of claim required by the statute of West Virginia in an action on a fire policy is not a pleading but is in the nature of a bill of particulars. By Code 1899, c. 125, § 62. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. And is sufficient if it in effect gives defendant reasonable notice of the nature of the plaintiff's claim. Id. Where it notifies defendant that plaintiff will claim to the extent of the face of the policy, the amount of the stock of merchandise covered by the policy and also

violated.[6] The New Jersey statute requiring the opposite party to plead specifically where there is a general averment of the performance of conditions precedent is not complied with by a specification in a written response to a demand for a specification of defenses.[7]

Interest on the claim from the beginning of the action may be awarded under the prayer for proper relief, though not specially prayed in the petition.[8]

Variance.[9]—The usual rules as to variance apply.[10] There is no variance between a plea of full performance of all the terms and conditions of the policy and proof that certain questions, which had apparently been incorrectly answered, were in fact answered correctly and incorrectly recorded by the company's agent.[11] One suing for specific relief to which he is not entitled may have such relief as the facts alleged show that he is in law entitled to.[12]

Practice.[13]—Where a policy of liability insurance bases the premium on the amount of compensation paid by assured to his employes and gives a right to examine assured's books as to such compensation, in an action for a premium the insurer is entitled to an order to produce the books, so far as they relate to such compensation.[14]

(§ 24) *C. Evidence, questions for the jury, instructions. Presumptions and burden of proof.*[15]—The law presumes against suicide,[16] and also that every man is sane until the contrary is shown.[17] When it is proved that the insured committed suicide while sane, no presumption can be indulged in.[18]

the amount of fixtures not covered, the part in regard to the fixtures will be disregarded as surplusage. Id. Statement held to notify defendant that it would be held for everything covered by the policy, and to be sufficient to authorize the admission of the policy in evidence. Id. It cannot be demurred to, but if too vague or otherwise insufficient the remedy is to object to the introduction of evidence under it. Id.

6. Code 1899, c. 125, § 64. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529; Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Plaintiff is not required to prove compliance with any clause, condition or warranty not so specified. Id. No specification having been filed in the trial court of the defense that the policy was forfeited by the assignment of the right of the assured, it cannot be availed of on writ of error. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

7. Practice act § 118 (P. L. 1903, p. 570) not complied with by specification in written response to a demand for a specification of defenses under § 104, which is not a part of the record. McGlade v. Home Ins. Co. [N. J. Law] 59 A. 628. Defendant having failed to comply with such provision held not error to refuse to nonsuit plaintiff for failure to prove the giving of the required notice of loss. Id.

8. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

9. See 4 C. L. 226.

10. See Pleading, 4 C. L. 980. Held no variance in action against agent for failure to comply with instructions to cancel contract of insurance entered into by means of a binder, and to reduce amount of insurance. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293. Variance between allegations and proof held not so material as to authorize reversal. Farmers' Mut. Fire Ins. Co. v. Jockman [Ind. App.] 73 N. E. 730. Slight variance between the petition and the proof as to the mode in which the reinsurer became bound held cured by verdict, where no effort was made to take advantage of it in the statutory way. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

11. As to condition of insured's health, etc. Carmichael v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 587.

12. Though plaintiff sues for loss to machinery on theory that insurance on tobacco has been transferred to it, he is nevertheless, on failure to show such transfer, entitled to recover for loss to tobacco, if the allegations of the complaint are sufficient for that purpose. Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. Complaint held sufficient to authorize recovery for loss of tobacco orlginally covered by the policy, though it was framed on the theory that action was for loss to machinery to which it was alleged that company had agreed to transfer the insurance which claim appeared to be unfounded, and though there was no allegation as to the value of the tobacco at the time of the fire, in the absence of a demurrer or a motion to make more definite and certain. Id.

13. See 4 C. L. 226.

14. United States Casualty Co. v. John N. Robins Co., 95 N. Y. S. 726. Order should not enjoin destruction of or interference with such books, particularly where there is no suggestion that defendant has threatened to do or is about to do anything of that kind. Id.

15. See 4 C. L. 226. See, also, Evidence, 5 C. L. 1301.

16, 17. Masonic Life Ass'n of Western New York v. Pollard's Guardian [Ky.] 89 S. W. 219.

The burden has been held to be on plaintiff to show the performance of conditions precedent,[19] waiver,[20] that the breach of conditions did not contribute to the loss,[21] that the manner of the insured's death was within the terms of the policy,[22] and to negative exceptions.[23] The burden is on the insurer to show breaches of warranty,[24] fraud and false swearing,[25] negligence in failing to use all reasonable means to save the property,[26] that the loss comes within a proviso on which it relies,[27] and to show, in case of a total loss, that the change of the insured's title from an estate in fee to a life estate reduced his interest to an amount below the face of the policy.[28] The execution of the policy must be proved.[29]

Evidence.[30]—The usual rules of evidence apply,[31] including those as to the

18. Where it was proved that insured committed suicide while sane, and there was no conflict in the evidence, held error to give peremptory instruction for the defenddant. Masonic Life Ass'n v. Pollard's Guardian [Ky.] 89 S. W. 219.

19. Must aver and prove performance of conditions precedent, or an offer to perform rejected by defendant, or his readiness to perform until defendant discharged him from so doing, or prevented him from performing. As to notice of accident, Johnson v. Maryland Casualty Co. [N. H.] 60 A. 1009. Compliance with a condition that he submit to an examination under oath concerning the loss. Mahoney v. Scottish Union & National Ins. Co., 3 Ohio N. P. (N. S.) 246.

20. Of conditions requiring notice of other insurance and indorsement of permit therefor on policy. Monk v. Penn Tp. Mut. Fire Ins. Ass'n, 27 Pa. Super. Ct. 449.

21. Under Iowa Code, § 1743, providing that no stipulation avoiding the policy before loss shall prevent recovery if the plaintiff shows that his failure to observe it did not contribute to the loss. Krell v. Chickasaw Farmers' Mut. Fire Ins. Co. [Iowa] 104 N. W. 364.

22. Accident insurance. Continental Casualty Ins. Co. v. Lloyd [Ind.] 73 N. E. 824. Under an accident policy whereby company agreed to pay a certain sum if the insured's injuries "should solely and independently of all other causes necessarily result in his death," the beneficiary has the burden of proving not only that the injuries received by the insured were sufficient to cause his death, but also that they did in fact do so, independently of any other concurring cause. This is true whether disease pre-existed the accident or supervened between the injuries and the insured's death. Continental Casualty Co. v. Peltier [Va.] 51 S. E. 209.

23. Cassidy v. Royal Exch. Assur., 99 Me. 399, 59 A. 549.

24. Life insurance: Is an affirmative defense which defendant is bound to establish. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758; Carmichael v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 587. As to insured's age. Collins v. German-American Mut. Life Ass'n [Mo. App.] 86 S. W. 891. To show by a preponderance of the evidence that the assured made false and fraudulent answers to questions propounded in the application. Logan v. Provident Sav. Life Assur. Soc. [W. Va.] 50 S. E. 529. In action on life policy which makes application a part of it where declaration is filed under Code 1899, c. 125, § 61, and defendant files statement of defense under Id. § 64, alleging fraudulent answers to questions in the application, to which plaintiff replies generally, the burden is on defendant to prove its allegations by a preponderance of the evidence. Id. Not a condition precedent to recovery that plaintiff should prove such answers to be true. Id.

Fire insurance: The burden of showing forfeiture is on the defendant. For breach of iron-safe clause, and procuring other insurance. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855. Where there is some evidence tending to show compliance or waiver, it is error to direct verdict for defendant. Id.

25. Must prove willful fraud and false swearing in proofs of loss by clear and satisfactory evidence. Newton v. Theresa Village Mut. Fire Ins. Co. [Wis.] 104 N. W. 107.

26. Where policy provides that insurer shall not be liable for loss caused thereby. German-American Ins. Co. v. Brown [Ark.] 87 S. W. 135.

27. If defendant relies on a proviso to avoid liability the burden is on him to plead it and to prove that the loss came within it (Cassidy v. Royal Exch. Assur., 99 Me. 399, 59 A. 549), and the same is true of a clause which operates as a partial defeasance or excuse (Id). Has burden of showing that loss came within proviso that apportionment clause should be inoperative when lumber piles covered by policy were less than 100 feet apart. Id. The burden being upon defendant to establish the facts upon which an apportionment clause, by way of a proviso, would attach, held, that he was bound to do so before the referees to whom the loss was submitted to arbitration on failure of the parties to agree, and having failed to do so it was estopped to require plaintiff to submit to another arbitration to obtain them, or to claim that question was still open. Id.

28. Where the insured's interest is changed and the insurer nevertheless continues the insurance. Aside from the provisions of Ky. St. 1903, § 700, making companies liable for the face of the policy in case of total loss. Continental Ins. Co. v. Thomason, 27 Ky. L. R. 158, 84 S. W. 546.

29. Evidence held to fully prove the issuance of the policy by the defendant, and hence the making of the policy was sufficiently proved. Staats v. Georgia Home Ins. Co. [W. Va.] 50 S. E. 815.

30. See 4 C. L. 227. See, also, Evidence, 5 C. L. 1301.

31. See, also, Evidence, 5 C. L. 1301.

admission of expert[32] and opinion evidence,[33] the qualification of experts,[34] judicial

Where plaintiffs testify that adjuster had told them that they need not put in proofs of loss, adjuster should be allowed to deny such conversation. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36.

Accident Insurance: In suit on policy providing for payment of premiums by orders on insured's employer, evidence of the employer that an order was not paid because the sum to the credit of the insured was less than the amount of the premium and the insurer would not accept partial payments, held admissible. Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683.

Fire Insurance. Evidence held admissible: Wife being competent witness under Code D. C. § 1068, her testimony that purchase money of land conveyed to her and her husband jointly was furnished by him alone, and that he had the sole beneficial ownership. Mallery v. Frye, 21 App. D. C. 105. Evidence as to former policy in which there was a recognition of the existence of a chattel mortgage relied on to avoid the policy in suit, where there was some evidence to the effect that the latter policy was a renewal of the former one and was issued by the same agent. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035. That when witness opened door of warehouse smoke came out. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513. Where defense was that plaintiff's president set fire, and defendant introduced evidence as to plaintiff's financial condition, evidence offered by plaintiff as to the value of its assets at the time of the fire, to rebut the presumption of fraud. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. Where defendant alleges false statements in the application as to the date of the inventory, plaintiff may show that such statements were the result of a mistake, both for the purpose of showing his good faith and that defendant had notice of the true facts before issuing the policy. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855.

Evidence held inadmissible: Copy of ex parte affidavit attached to copy of proofs. American Ins. Co. v. Walston, 111 Ill. App. 133. Question as to the time the agent knew what the premium was held immaterial and properly excluded, he having previously testified that he had offered the policy for a certain premium. Wheaton v. Liverpool & L. & G. Ins. Co. [S. D.] 104 N. W. 850.

Harmless error: Though no issue as to waiver was tendered by the pleadings, held not reversible error to admit evidence of insured's attorney that both he and the insured had demanded the amount of the policy, and that the adjuster had denied all liability. Fire Ass'n v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035. Admission by plaintiff that no attempt was made to remove goods when they could have been removed held to render harmless exclusion of evidence as to feasibility of removing them before fire reached them. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

Life Insurance. Evidence held admissible: In action against company for fraud of agent in collecting, through fraudulent representations a premium not due, evidence as to agent's commission on first premium. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469. Where the insurer claimed a breach of warranty that insured was not connected with the liquor business, evidence that he received no compensation for an occasional service rendered to a saloonkeeper was material, as tending to show his relation to the business. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 609. On the issue as to whether insured was suffering from disease and needed medical attention when it was claimed a physician attended him, evidence as to whether he attended his business regularly. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758.

Evidence held inadmissible: Plaintiff having testified that he had ceased to pay his assessments because "he saw he could not keep up," held that his motives and the method of reasoning by which he arrived at his conclusion to abandon his policy were irrelevant. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887. So also was question whether he subsequently took out other insurance in lieu of that abandoned. Id. Where plaintiff contended that receipt for part of first premium created a binding contract held error to admit a different form of binding receipt and to permit witness to explain it, it not being shown that the assured or the plaintiff knew of the existence of such receipt. Admission held harmless. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040. Questions as to whether insured would have paid premium on day it was demanded had she been told that policy would otherwise be forfeited, and whether it was not agent's duty to collect premiums at insured's residence after the time for payment had been extended, held incompetent as calling for conclusions. Metropolitan Life Ins. Co. v. Hall [Va.] 52 S. E. 345.

32. Expert evidence held inadmissible. Fire insurance: Where sole question was whether spontaneous combustion occurred held not error to refuse to admit expert evidence as to meaning of "fire," "ignition point," "ignition," etc., since characteristics of fire are matters of common knowledge. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513. Held not prejudicial to exclude scientific description of characteristics of "wool in the grease" for same reason. Id. As the meaning of the term "pro rata" in contracts of reinsurance has been settled by construction of the courts, testimony of experts as to the use of the term by underwriters. Home Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65. To show that the erection of a building near the insured premises increased the risk. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812.

33. Evidence Held Admissible. Fire insurance: Evidence of witnesses as to the value of the goods destroyed based on what they saw in the building, on the issue of fraud in procuring the policy and false swearing after loss. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Evidence of the cost price of articles and opinions as

notice,[35] secondary evidence,[36] hearsay,[37] the proof of pedigree,[38] the use of memoranda,[39] and the declarations and admissions of agents,[40] decedents,[41] and other

to the value thereof. Glaser v. Home Ins. Co., 93 N. Y. S. 524.

Life insurance: The testimony of nonmedical friends, to show that, at the date of the policy, the appearance of the insured was that of a man in sound health, where one of the issues is whether he had heart disease, from which he died, before the policy was issued, though insurer expressly waives defense of unsoundness of health when policy is issued, and medical testimony is to the effect that insured may have such disease and yet appear to be in sound health. Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293.

34. Wool merchants and manufacturers, who have had years of experience, held competent to give opinions as to the effect of water on a large mass of wool and the probability of spontaneous combustion in it. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513. One having sufficient knowledge thereof to speak with intelligence (Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86), as a salesman who has had experience in merchandising and has inspected a stock of goods, may testify as to value (Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855).

35. Court will take judicial notice of recognized scientific facts and principles as to spontaneous combustion, and as to amount of heat which can be produced without fire. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513.

36. Secondary evidence of contents of defendant's notice offering reward for apprehension of persons setting fire held inadmissible where nothing was offered to show why original could not be produced. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

37. Held hearsay: Receipts given by insured to insurer for amount of loss, in action by insurer against its agent for failure to reduce binder obligation as directed. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293. Question as to whether matters which witness had told detective in regard to fire were common talk about town held irrelevant and hearsay. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

38. Baptismal church registers kept by parish priest in Ireland according to his ordinary course of business and proved to be admissible as evidence of pedigree in the courts of that country are admissible as evidence of pedigree and the facts therein stated for the purpose of showing a breach of warranty as to insured's age, though no statute requires the keeping of such records. Collins v. German-American Mut. Life Ass'n [Mo. App.] 86 S. W. 891. Though evidence of baptism is not evidence of birth, court will take judicial notice that insured was born on some date prior to the date of baptism. Id. Where it is shown that register had been kept from time immemorial by the clergymen of the parish, that it was their duty to keep it, and that the person purporting to make the entries was clergyman of the parish when the entry was made, and has since died, it will be presumed that he made it without proof of his handwriting. Id. Evidence held sufficient to identify person baptised as the insured. Id. Evidence of declaration by persons since deceased, as to the age of a member of a family, is admissible. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

39. Inventories in the nature of memoranda made by the insured's foreman the day after the fire are admissible for the purpose of strengthening his recollection as to the amount and value of the lumber destroyed. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025.

40. Fire Insurance. Evidence held admissible: Where defense is violation of sole ownership clause, admissions of one of plaintiff's officers that plaintiff was a lessee, and the lease under which fixtures destroyed became the property of the lessor. Prussian Nat. Ins. Co. v. Empire Catering Co., 113 Ill. App. 67. Declarations of plaintiff's adjuster, made while engaged in plaintiff's business, in regard to lease. Id. Declarations of solicitor of insurance working for, and under authority of, an agency which was an agent of the insurer, he being an agent of the insurer. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Declarations of the agent of the company through whom the policy was issued. Id. Declarations of agent, made while he still had possession of the policy, as to why it had not been delivered. Part of the res gestae. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850.

Evidence held inadmissible: Where firm which was agent for both insurance company and building and loan association, to whom policy was made payable as its interest might appear, paid a premium for the loan association, the receipt given by such firm on repayment to it of the amount advanced for such premium and other premiums, held not admissible as against the company in a suit on the policy, it not having been given by them as the company's agents. Foreman v. German Alliance Ins. Ass'n [Va.] 52 S. E. 337.

Life Insurance: Where liability is denied on the ground that the policy lapsed for nonpayment of premiums, evidence of a witness that he was told by a person in insurer's office that the last payment of premium was on a certain date is incompetent in the absence of proof that such person was an officer authorized to make an admission binding on the company. Spencer v. Travelers' Ins. Co. [Mo. App.] 86 S. W. 899. Evidence that such person stated the date from a book is inadmissible in the absence of evidence accounting for the nonproduction of the book, which is the best evidence. Id.

41. Accident insurance: Declarations of the insured made to his wife and brother-in-law before his death, tending to show that he was then suffering severe bodily pain and that he had sustained an accidental strain (Patterson v. Ocean Acc. & G. Corporation, 25 App. D. C. 46), and statements made by him to the attending physician on

interested parties.[42] The admission of evidence as to collateral matters is largely discretionary.[43] Parol evidence is inadmissible to contradict or vary the terms of the contract,[44] but is admissible to show that the word "addition" has reference to an addition to be built and not one already in existence,[45] and to explain ambiguous terms.[46] In order that evidence of previous incendiarism by plaintiff may be admissible some real connection between such previous crimes and the alleged incendiarism alleged by way of defense to the policy in suit must appear beyond the allegation that they have both sprung from the same vicious disposition.[47]

Evidence of the insured's physical condition immediately before and immediately after the time in question is admissible on the issue of his condition at the time he made and signed the application, and his own knowledge of the same.[48]

The acts of the parties after the loss are competent evidence as bearing on their understanding as to the existence of the contract.[49]

Evidence is admissible to show the true consideration for the policy and that it was not paid.[50]

the day after the alleged accident tending to show his bodily pain, the particular location of the same, and the symptoms of his malady, are admissible as part of the res gestae (Id.), but not a statement made to the physician that he had received a strain on the day before, to which he attributed his condition (Id.). Too long after the occurrence. Id.

Life insurance: In an action by an executor evidence of declarations of deceased as to the condition of her health when the application was made are admissible against the executor. Finn v. Prudential Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697.

42. In an action by a mortgagee to whom the policy is payable as his interest may appear, admissions by the mortgagor who is made a party defendant are not binding on the insurer. Admissions that plaintiff is entitled to recover full amount of policy covering both building and personalty, where he has no lien on latter. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

43. Court held not to have abused its discretion in excluding evidence that insured had scattered oil on walls of house situated 50 feet from the burned barn, it being a collateral matter. Schornak v. St. Paul F. & M. Ins. Co. [Minn.] 104 N. W. 1087.

44. For purpose of showing that blanket fire policy was only intended to cover grain in the granary and barn destroyed, that there was no danger of destruction of wagons or implements not in such barn or granary, and that when policy was taken out the secretary of the company only examined grain and implements contained therein. Johnston v. Phelps County Farmers' Mut. Ins. Co. [Neb.] 102 N. W. 72. Inadmissible under Rev. Civ. Code, § 1239, to contradict the terms of a written statement, added to application by the agent, that he had issued a binding receipt so as to show it not to be, in fact, a binding receipt. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040. Where property is insured while in a building described, and it is shown that such a building existed but that the property when destroyed was in another building, it cannot be shown by parol that the intention was to insure the property while in the latter building. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

45. Where policy covered building "and addition," evidence of the value of the building after an addition had been built to it. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812.

46. Where a policy expired at "noon" to show that by a well known custom of the place of the contract, the word was used with reference to standard instead of sun time. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 27 Ky. L. R. 1155, 87 S. W. 1115.

47. Where the defense was that plaintiff caused the fire, evidence of statements of the president and manager of plaintiff corporation to his partner 2½ years before, as to their insolvent condition and the advisability of procuring more insurance, and that plaintiff thereafter bought his partner's interest, and that the goods were then destroyed by fire 1½ years before the fire giving rise to the action, held irrelevant. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. Evidence merely showing that other fires had occurred held inadmissible. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

48. Declarations of the insured that he was suffering from effects of a surgical operation made after the issuance of the policy in explanation of his appearance, walk, and smell of drugs about his person, and in connection with the manifestly impaired condition of his health, held admissible as tending to show his knowledge of his physical condition at time of making the alleged false and fraudulent statements. Haughton v. Aetna Life Ins. Co. [Ind.] 73 N. E. 592.

49. Fact that after accident agent did not repudiate liability, and company sent adjuster. Bradley v. Standard Life & Acc. Ins. Co., 46 Misc. 41, 93 N. Y. S. 245.

50. St. 1903, §§ 470, 472. Continental Casualty Co. v. Jasper [Ky.] 88 S. W. 1078. But under St. 1903, §§ 656, 679, if any part of the consideration is a statement of the insured made in a written application, it must be stated in the policy, or a copy thereof must be indorsed thereon. Id.

Where the policy undertakes to pay the value of the property at the time and place of the loss, evidence of its value at some other place and time is incompetent, unless it is also shown that its value at both times and places was practically the same, or unless the difference, if any, is pointed out.[51] The actual value cannot be shown in place of the market value unless a foundation for such a showing is made.[52] If the statements of value are not within the personal knowledge of the party making the proofs, he may show his means of information upon which they were based.[53]

In an action on the policy an arbitration agreement not in accordance with its provisions is inadmissible.[54]

Preliminary proofs of death are merely evidence that the insured has complied with the requirement of the policy.[55] Statements therein will be taken against the claimant as admissions against interest, but he may show that they are without foundation and were inadvertently made.[56] Statements of a physician in the proofs as to prior illnesses of the insured may be contradicted by proof of his subsequent declarations and admissions inconsistent therewith.[57] Where the claimant's affidavit to the proofs is to the best of his knowledge and belief, he is not thereby precluding from showing that his statements therein were based exclusively on information coming from what he had a right to suppose was a reliable source, and that they are not true.[58] A supplemental statement made by a physician in compliance with the company's requirement of more complete proofs is part of the proofs of death.[59] Under a policy providing that statements in the proofs shall be evidence of the facts therein stated in behalf of, but not against the company, it is error to withdraw a physician's statement contained therein from the jury, though plaintiff has introduced evidence to impeach it.[60]

Proofs of loss under a fire policy are not evidence of the amount of loss and are admissible only to show compliance with the requirement of proof of loss.[61]

Questions for the jury.[62]—Whether there has been a breach of warranty,[63]

51. Evidence of value at time of inventory taken at another place before the fire and other evidence of its value at such place held inadmissible. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

52. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

53. Where goods were purchased by plaintiff's partner, since deceased, and plaintiff had not seen them and had no other knowledge of their value, letters and telegrams sent by deceased, from town to which he went to buy the goods, to plaintiff, held admissible. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135.

54. Agreement providing for arbitration between insured and several companies, one appraiser to be the joint selection of all of the latter, and for the appraisal of the loss on a few specified articles only, the estimating of the cost of replacing and repairing the same, and for the prorating of the loss among the several companies, held not in accordance with the policy. Western Assur. Co. v. Hall Bros. [Ala.] 38 So. 853.

55. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

56. Do not estop him from showing the truth. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275. Proofs furnished by the beneficiary are admissible against her. Haughton v. Aetna Life Ins. Co. [Ind.] 73 N. E. 592. Had right to explain admissions therein at the proper time. Id.

57. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

58. Answers to questions as to prior illness of insured. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

59. Baldi v. Metropolitan Life Ins. Co., 24 Pa Super. Ct. 275.

60. Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293.

61. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Not admissible to prove the facts connected with the loss, or the value of the property destroyed or injured. Instruction erroneous. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

62. See 4 C. L. 230. See, also, Questions of Law and Fact, 4 C. L. 1165.

63. Fire insurance: Where there was at least some evidence of a compliance with the iron-safe clause as to the keeping of books, the keeping of the books and inventory in a safe, and their production for inspection, question of compliance. Direction of verdict for defendant held error. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855. Whether there was a breach of warranty by use of feed cooker instead of tank heater. Krell v. Chickasaw Mut. Fire Ins. Co. [Iowa] 104 N. W. 364.

Life insurance: Where defendant relied

the materiality of an answer to a question in the application,[64] whether a paper produced on the trial is the application which plaintiff signed,[65] whether a misrepresentation or warranty is made with actual intent to deceive,[66] whether notice of forfeiture was mailed to the insured,[67] whether insured was in good health when the policy was issued,[68] the cause of the loss,[69] whether there was a change of ownership and possession,[70] whether the insured was totally disabled by the accident,[71] whether there has been an increase of risk,[72] what is the proximate cause of an injury or death,[73] the possibility of spontaneous combustion in certain substances,[74] waiver,[75] and estoppel,[76] the authority of an agent[77] and for which party he acted,[78] whether or not there has been a substantial compliance with the provisions

on breaches of warranties, the evidence being conflicting and leaving inferences and deductions to be drawn in arriving at the ultimate fact, it was error to direct a verdict for defendant, although the weight of evidence was with it. Haughton v. Aetna Life Ins. Co. [Ind.] 74 N. E. 613, Id. 73 N. E. 592. Whether insured used intoxicants. Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656.

64. When doubtful. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

65. Walsh v. Metropolitan Life Ins. Co., 93 N. Y. S. 445.

66. Representation by insured in endowment policy that he was 22 years of age when he was 30. Coughlin v. Metropolitan Life Ins. Co. [Mass.] 76 N. E. 192.

67. Howell v. John Hancock Mut. Life Ins. Co., 95 N. Y. S. 87.

68. Where he was in apparent good health when the insurance was taken, but became ill the next month with cystic disease of the kidneys, whether such condition could have developed within the time. Barker v. Metropolitan Life Ins. Co. [Mass.] 74 N. E. 945.

69. Whether caused by lightning or a windstorm. Warmcastle v. Scottish Union & Nat. Ins. Co., 210 Pa. 362, 59 A. 1105.

70. Where the insured made a transfer to his son of the property covered by a fire insurance policy, without the insurer's consent, but both father and son testified that there was no change of ownership or possession, whether the presumption of delivery and transfer created by the recording of the deed was overcome by their testimony. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326.

71. In absence of conclusive facts. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

72. Fire insurance: By the erection of an asbestos roof over lumber. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. Whether there was in fact any change in the use or occupancy contemplated by the application, and, if so, whether such change made the risk more hazardous. Krell v. Chickasaw Farmers' Mut. Fire Ins. Co. [Iowa] 104 N. W. 364. By presence of a small quantity of rags on premises. North British Mercantile Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 S. W. 285. By the erection of a building near a storehouse. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812.

Accident insurance: Whether injured foot and finger received prior to the application and not disclosed therein were such as increased the risk and were within the contemplation of the parties. Trenton v. North American Acc. Ins. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 781, 89 S. W. 276.

Life insurance: Whether the matter misrepresented or made a warranty increased the risk of loss so as to avoid the policy under the statute. Representation of insured in endowment policy that he was 22 years old when he was 30 cannot be said to increase risk as matter of law. Coughlin v. Metropolitan Life Ins. Co. [Mass.] 76 N. E. 192.

73. Patterson v. Ocean Acc. & G. Corp., 25 App. D. C. 46.

Accident insurance: Where it appears that two or more causes contributed to the injury and there is doubt or the facts are such that equally prudent persons might differ as to which was the efficient, dominant, proximate cause of death. Continental Casualty Ins. Co. v. Lloyd [Ind.] 73 N. E. 824.

74. Where scientific works and the opinions of experts vary widely. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513.

75. Of proofs of loss. Burgess v. Mercantile Town Mut. Ins. Co. [Mo. App.] 89 S. W. 568. Unless the evidence is so convincing that reasonable men could not differ as to the result, in which case the court may declare a waiver as a matter of law. Id. Whether proofs of loss were waived, there being evidence tending to show a denial of liability. L. T. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855; St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053, 37 So. 967.

76. Whether defendant had estopped itself from asserting that the action was not commenced within the time limited by the policy. Walsh v. Metropolitan Life Ins. Co., 93 N. Y. S. 445. Whether insurer has, by its conduct, raised implied agreement to accept premiums after they become due. Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601. In any event its submission was harmless where bonds previously issued to insured operated as payment of premiums as a matter of law. Id.

77. Under the evidence question whether agent had authority to deny liability so as to waive proofs. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

78. Whether or not the agent acted at the instance of plaintiffs in obtaining insurance

as to proof of loss,[79] whether the insurer is connected with a tariff association,[80] whether an appraiser is competent and disinterested,[81] and when the fraud relied on was discovered,[82] have been held to be for the jury on conflicting evidence.

The construction of written instruments is ordinarily for the court.[83] Where an answer in the application is palpably and manifestly material, it is the duty of the court to so charge.[84]

Instructions.[85]—The ordinary rules as to instructions apply.[86] Thus, they should be confined to matters in issue,[87] should not determine questions of fact in issue,[88] and should not withdraw from the jury the consideration of material evidence.[89] A party cannot complain of the submission of an issue suggested or

from companies neither knew anything about. Hartman & Daniels v. Hollowell, 126 Iowa, 643, 102 N. W. 524. Whether an agent, in collecting a premium not due, was agent of the company. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469. Whether the agents who issued the policy were treated by the parties as the agents of the defendant in adjusting the loss. Frost v. North British Mercantile Ins. Co. [Vt.] 60 A. 803.

79. North British & Mercantile Ins. Co. v. Edmundson [Va.] 52 S. E. 350.

80. So as to make provisions as to notice and proofs void under the statute. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

81. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129.

82. Whether plaintiff sued within three years from the time he discovered, or might with reasonable diligence have discovered, the fraud of an agent in collecting a premium not due. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469.

83. The construction of a written application signed by the applicant and a receipt for a part payment of the first premium signed by the agent and accepted in writing by the applicant, and a witness cannot give his opinion as to their meaning. Held error to allow witness to testify as to whether receipt was what was known as a binding receipt, but harmless. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040.

84. Answers as to previous illness belong to this class. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

85. See 4 C. L. 231. See, also, Instructions, 6 C. L. 43.

86. Instructions Approved. Fire insurance: As to fraud and misrepresentations as to value (German American Ins. Co. v. Brown [Ark.] 87 S. W. 135), false swearing as to value (Id.), that insured could not recover if he set the fire or procured others to do so (Id.), and as to the method of arriving at the "cash value" of the property (Id.), and as to amount of recovery and apportionment of loss (Id.). As to a well-known custom or usage governing in determining the meaning of the word "noon," to fix the time of expiration of policy. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 27 Ky. L. R. 1155, 87 S. W. 1115. Instruction held to have placed burden on defendant only as to their affirmative defense that plaintiff set the fire and not objectionable as placing burden on them on the whole case. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. As to incendiary fires and bias of witness. Kirkpatrick v. Allemannia Fire Ins. Co., 102 App. Div. 327, 92 N. Y. S. 466. Not reversible error for the judge to comment on the fact that plaintiff had not called as a witness a physician who declared in the proofs of death that he had treated deceased for angina pectoris prior to the date of the policy. Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293.

Life insurance: As to effect of breach of warranty that insured did not use intoxicants. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789.

Instructions Held Properly Refused. Fire insurance: That wool could not set fire to itself. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513. Defining fire, in view of instruction that there must actually have been fire. Id.

Instructions Held Erroneous. Life insurance: As to notice to pay premiums. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789. As to the liability of a company for the fraudulent action of its agent, as not requiring the jury to determine whether the agent was acting within the scope of his employment. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469.

87. Fire insurance: Instruction that failure to exercise reasonable care in attempting to save the property properly refused in the absence of evidence that insured was in fault in that regard. German American Ins. Co. v. Brown [Ark.] 87 S. W. 135. Instructions as to duty to keep books in safe, or other safe place, held abstract where it did not appear that there was any such agreement or condition in the policy. Beavers v. Security Mut. Ins. Co. [Ark.] 90 S. W. 13.

Life insurance: Where insured warranted that he had never had heart disease, and had not consulted any other physician than one named, but another physician stated in proofs of death that he had treated him therefor before policy was issued, held error for court to tell jury that as deceased was on friendly terms with the physician the latter might not have regarded the incident referred to in the application as a consultation, there being no evidence to support it. Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293. Question of waiver of breaches of warranty as to health held in the case and to have been properly submitted. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 87 S. W. 889.

submitted by his own requested instructions,[90] nor can he ordinarily complain of the failure to give instructions for which he does not ask.[91]

(§ 24) *D. Verdict, findings, judgment, costs and fees.*[92]—The verdict should not, of course, exceed the amount of the loss proven.[93] In a suit on a fire policy covering, in different amounts, a dwelling house and the furniture therein located, a verdict for plaintiff need not specify separately the amounts allowed for loss on each, but may be for a lump sum covering the entire amount of the loss.[94]

Interest, costs, and penalties.[95]—Interest ordinarily runs from the date when the loss becomes payable.[96] The company is liable for interest from the date of the writ notwithstanding adverse claims to the proceeds of the policy where it fails to file a petition of interpleader or pay the money into court.[97]

On paying into court the proceeds of a policy for which there are several claimants, the company is not entitled to costs to be deducted therefrom.[98]

In Missouri if the jury find a vexatious refusal to pay on the part of the insurer, the insured may be awarded statutory damages not exceeding ten per cent and a reasonable attorney's fee.[99]

(§ 24) *E. Enforcement of judgment.*[100]—One recovering a judgment against a mutual company on a policy obtained through a branch thereof cannot hold officers paying claims having no preference over his, and paying salaries to themselves, personally liable thereon, his remedy being to obtain an order, in the original cause, for an assessment as provided by the charter and by-laws.[101]

88. Life insurance: Instruction on the question of "issue" and "delivery" of policy held not objectionable as determining the question in issue. Dargan v. Equitable Life Assur. Soc. [S. C.] 51 S. E. 125.

89. Fire insurance: Charge as to method of determining value of property destroyed held fair and not to preclude consideration of evidence showing depreciation. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429. Instruction that if plaintiff was entitled to recover at all, he was entitled to recover the full amount of his loss, held not improper as withdrawing consideration of defense that insured did not make reasonable effort to save the property, in view of the other instructions and of the fact that there was no evidence as to the value of any property which might have been saved. Schornak v. St. Paul Fire & Marine Ins. Co. [Minn.] 104 N. W. 1087.

90. Where the defendant requested an instruction that a failure to comply with the clause as to keeping books avoided the policy, it could not complain of the court's action in sending the issue of the violation of that clause to the jury, nor the adverse finding of the jury. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025.

91. See Saving Questions for Review, 4 C. L. 1368. The court held not required to define the term "use," where the defense was based on insured's use of liquors, in the absence of a request for an accurately worded special charge. Pacific Mut. Life Ins. Co. v. Terry [Tex. Civ. App.] 84 S. W. 656.

92. See 4 C. L. 232. See, also, Costs, 5 C. L. 842; Interest, 4 C. L. 241; Judgments, 4 C. L. 287; Verdicts and Findings, 4 C. L. 1803.

93. Evidence held to show that loss sustained was greater than the verdict. Georgia Co-op. Fire Ass'n v. Harris [Ga.] 52 S. E. 88.

94. Georgia Co-op. Fire Ass'n v. Harris [Ga.] 52 S. E. 88.

95. See 4 C. L. 232.

96. Where equity, having obtained jurisdiction of a suit to reinstate forfeited insurance, gave judgment for the amount of the policy, and the policy provided that it should be payable 60 days after proofs of loss but no proofs were furnished, and there was no evidence as to when proofs would have been furnished but for the wrong giving the court jurisdiction, interest will be allowed commencing 60 days after the date of the service of the complaint, which gives all needed information for adjustment. Smith v. Northwestern Nat. Life Ins. Co., 123 Wis. 586, 102 N. W. 57.

97. Davis v. National Life Ins. Co. [Mass.] 74 N. E. 330.

98. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. S. 877.

99. Where company stubbornly contested a liability upon a ground not sustained by the evidence, an allowance of ten per cent. statutory damages and $200 attorney fees therefor held not excessive. Evidence held to justify submission of question of vexatious delay and to warrant finding for plaintiff on that issue. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499.

100. See 4 C. L. 232.

101. Could not hold officers either on the ground of making such payments, as he had no lien thereon but was only entitled to be paid out of the proceeds of an assessment, or because of the attempted dissolution which was illegal and ineffective. Perry v. Farmers' Mut. Fire Ins. Ass'n [N. C.] 51 S. E. 1025.

INTEREST.

§ 1. *Right to interest and demands bearing interest.*[1]—Interest is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money.[2] Interest is not recoverable against the government.[3] Claims against a municipal corporation do not bear interest in the absence of an express agreement therefor,[4] except where money is wrongfully obtained and illegally withheld.[5] Interest is not allowable on claims withheld by virtue of legal process,[6] nor on those the payment of which is prevented by law,[7] or by the act of the creditor;[8] but may in proper cases be charged from date of suit where knowing of an adverse claim one withheld payment and did not, as he might have done, interplead the claimants.[9]

It may rest in contract express[10] *or implied.*[11]—Advancements do not bear interest unless there be a clearly manifest intention that they shall do so expressed in the will.[12]

Interest as damages ex contractu is recoverable[13] on liquidated demands improperly withheld,[14] and on moneys received by one for the use of another and re-

1. See 4 C. L. 241.
2. Sayles' Ann. Civ. St. 1897, of Texas, article 3097.
3. Watts v. U. S., 129 F. 222.
4. Where a contract for repairs on a county court house did not provide for payment of interest, but did provide for interest-bearing orders, which orders were void, no interest could be recovered, there being no express contract therefor. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. A city is not liable for interest on money paid to it under protest until judgment rendered for its recovery. Lewis v. San Francisco [Cal. App.] 82 P. 1106.
5. A city is liable for interest on water taxes wrongfully exacted and withheld until recovered in an action at law. City of Chicago v. Northwestern Mut. Life Ins. Co. [Ill.] 75 N. E. 803.
6. Where one summoned as trustee is indebted to the principal defendant for a claim upon which interest is recoverable as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process. Walker v. Lancashire Ins. Co. [Mass.] 75 N. E. 66.
7. By Code Civ. Proc. § 1193, an owner of a building is forbidden to pay the contractor sums due him after he has been served with notice of the claims of subcontractors. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968.
8. One who gives another an option to purchase property but before payments became due, denied the contract cannot, when specific performance is decreed against him, recover interest on such payments. Civ. Code, § 4280. Finlen v. Heinze [Mont.] 80 P. 918. A vendor who refuses to accept the purchase price cannot, when specific performance is decreed, recover interest except from the date he tendered the deed in conformity with the decree. Hughes v. Antill, 23 Pa. Super. Ct. 290.
9. Insurance company against which loss had accrued. Davis v. National Life Ins. Co. [Mass.] 74 N. E. 330.
10. See 4 C. L. 241. An open account, secured by a mortgage providing that on sale of the mortgaged premises the proceeds should be applied to the payment of the debt, interest and costs, draws interest from the date when due. William Mulherin Sons & Co. v. Stansell, 70 S. C. 568, 50 S. E. 497.
11. See 4 C. L. 241. In Pennsylvania a book account for goods sold bears interest from the end of every six months after sale and delivery. Kamber v. Becker, 27 Pa. Super. Ct. 266.
12. Stahl's Estate, 25 Pa. Super. Ct. 402.
13. See 4 C. L. 242.
14. Shaul v. Board of Education of New York, 95 N. Y. S. 479.

Money collected by an attorney for his client bears interest from date of collection (Goodin v. Hays [Ky.] 88 S. W. 1101), and **a balance due an attorney after he is discharged** by his client bears interest from the date of the discharge (Id.). Where a daughter paid her father money on his agreement to buy a home which should be hers at his death, and he thereafter purchased a home for a greater amount and did not secure it for her at his death as he agreed to, she was entitled to interest from the date of the original payment to her father. Leary v. Corvin, 181 N. Y. 222, 73 N. E. 984. A purchaser in possession under a bond for title under an agreement to pay the purchase price when the acreage was ascertained and deed executed is chargeable with interest from the date he took possession. Ewell v. Jackson's Adm'r [Ky.] 88 S. W. 1047.

Interest disallowed on a claim for raising a sunken vessel where there was long delay in prosecuting action to recover it, the claim was made excessive and it was difficult to obtain evidence of the value of the services rendered. Merritt & C. Derrick & Wrecking Co. v. Morris & C. Dredging Co. [C. C. A.] 137 F. 780.

tained without the owner's knowledge.[15] In Illinois, by statute, debts evidenced by a written instrument bear interest from due time,[16] and a note endorsed "no interest to be charged on this note" bears interest after maturity.[17]

Unliquidated demands,[18] the amounts of which are not ascertainable by mere computation,[19] do not bear interest, especially where such demands are subject to counterclaim also unliquidated.[20] An amount is certain if it is ascertainable by mere computation.[21] An overdue open account, the amount of which is ascertained,[22] and an unliquidated demand for breach of contract for the sale of property having a market value,[23] bear interest. Unless equity demands it, interest is not allowable on partnership accounts until there has been a settlement and accounting of the same.[24]

Interest from the date of injury may be allowed in torts,[25] which consist in a diminution of the pecuniary value of property or a withholding of it,[26] if demanded in the complaint and awarded by the verdict.[27] But it is denied in cases of simple negligence[28] and personal injuries.[29]

Verdicts for unliquidated damages do not bear interest before judgment,[30] unless the statute so provides.[31]

Interest ceases with the cessation or tender of the debt or obligation.[32]—A claim for interest falls where payment in full of an obligation is accepted.[33] A

15. Underwood v. Whiteside County Bldg. & Loan Ass'n, 115 Ill. App. 387. An executrix who enforces payment of a debt held by the testator as collateral is liable to the true owner of the debt for interest on the balance due him from the date of collection. Laughlin's Ex'r v. Boughner [Ky.] 84 S. W. 300.

16. Instruction allowing interest in case verdict was returned for plaintiff on a life policy held proper. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. The face of a life policy bears interest from date of proof of death and demand made. Supreme Lodge, Knights & Ladies of Honor v. Rehg, 116 Ill. App. 59.

17. Harnish v. Miles, 111 Ill. App. 105.

18. Bagley v. Stern, 92 N. Y. S. 244; Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248. Water company's claim against a city for water furnished, the amount of which was not ascertained. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729.

Mesne profits or rental value does not ordinarily bear interest, at least until it becomes a liquidated sum. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

A contractor's demand for extras does not draw interest until the amount is ascertained by judgment. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968.

19. A claim for work and labor which was subject to a reduction for damages, and a part of the claim for extra work was in dispute, does not bear interest. Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 73 N. E. 494.

Note: The common-law rule requiring the amount to be liquidated has been modified to the extent that it is allowable if the amount is ascertainable by mere computation. Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 73 N. E. 494.

20. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248.

21. Labor and material furnished at a specified price. Braas v. Springville, 100 App. Div. 197, 91 N. Y. S. 599.

22. Gregory v. New Home Sewing Mach. Co. [Ky.] 86 S. W. 529. An open account bears interest only from date the balance due is ascertained. Erickson v. Stockton & T. C. R. Co. [Cal.] 82 P. 961.

23. Reynolds v. Burr, 93 N. Y. S. 319.

24. Goodwill v. Heim [Pa.] 62 A. 24. A liquidating partner who has been given the control of the business and finances of the firm and has made no claims on his co-partner for moneys withdrawn should not be allowed interest in an accounting. Id.

25. See 4 C. L. 244.

26. On the value of goods unlawfully converted and sold on execution. Johnson v. Gillen [Mich.] 12 Det. Leg. N. 135, 103 N. W. 547. So, also, if one obtains moneys of another by fraud, interest runs from the date of obtaining it. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. But if he obtains it by mistake without fraud, interest does not run until demand for its return. Id.

27. See post, § 3.

28. Missouri & K. Tel. Co. v. Vandervort [Kan.] 79 P. 1068.

29. Under B. & C. Comp. § 4595, interest on unliquidated damages arising out of tort for the infliction of personal injuries cannot be allowed between verdict and judgment. Sorenson v. Oregon Power Co. [Or.] 82 P. 10.

30. Sorenson v. Oregon Power Co. [Or.] 82 P. 10. A verdict for unliquidated damages does not bear interest from date of its finding to rendition of judgment thereon. Clyde Milling & Elevator Co. v. Buoy [Kan.] 80 P. 591.

31. Since 1882, a judgment upon a verdict in an action ex delicto should bear interest from date of verdict if there be one and not from date of judgment. Campbell v. Elkins [W. Va.] 52 S. E. 220.

32. See 4 C. L. 244.

tender to stop interest must be for the full amount of the debt,[34] and under some circumstances the money must be paid into court.[35]

Compound interest[36] is not allowable unless contracted for[37] or exacted as a penalty,[38] and payments on interest bearing obligations are not to be so applied as to compound the interest accrued.[39] A revived judgment does not bear compound interest from date of revival,[40] but interest coupons attached to a bond bear interest after maturity.[41]

§ 2. *Rate and computation.*[42]—A contract is governed as to interest by the law of the place where executed,[43] and the courts of one state will not on a supposed ground of public policy, refuse to enforce collection of sums due on a lawful bond solvable by the laws of a foreign state and not given in evasion of the laws of the state where enforcement is sought, merely because the rate of interest is higher than that allowed by the laws of the state of the forum.[44]

Subject to the laws against usury and those fixing a maximum legal rate,[45] the rate agreed on controls[46] from date until payment;[47] but if no rate is specified, the legal rate will prevail from maturity until payment.[48] An obligation bearing less than the legal rate "until maturity" will bear the legal rate after maturity,[49] and one drawing higher than the legal rate will draw only the legal rate after judgment.[50]

33. Where parties to an account have a settlement and payment is made in full, any possible claim that might have been made for interest falls. Crane v. Brooks [Mass.] 75 N. E. 710. One who accepts the amount of an appropriation made "in full for the principal of a judgment" recovered against the United States is thereafter estopped to claim an unpaid balance of interest. Bloodgood's Case, 39 Ct. Cl. 69.

34. A charterer by an offer to pay less than the charter hire due prior to suit brought does not relieve himself from liability for interest, especially where the offer did not include interest and was not paid into court. Donaldson v. Severn River Glass Sand Co., 138 F. 691.

35. A vendee in an action for specific performance of a contract to sell land, who has had the use of the land since he tendered the price, is chargeable with interest on the amount of the tender where it was not brought into court. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763.

36. See 4 C. L. 244.

37. An obligation providing that if not paid at maturity accrued interest should become part of the principal and bear interest until paid does not authorize the compounding of interest accruing after maturity. Warnock v. Itawis [Wash.] 80 P. 297.

38. An executor is not chargeable with compound interest if it does not appear that he received such interest on moneys of the estate or was guilty of misappropriation of the funds of the estate. In re Castner's Estate [Cal. App.] 81 P. 991.

39. Payments exceeding accrued interest may be deducted when made, and interest computed on the balance from such date, but payments of less than the accrued interest should not be deducted until such times as together with subsequent payments they exceed accrued interest. Hawkins v. Merchants' & Mechanics' Loan & Bldg. Ass'n [Ky.] 89 S. W. 197.

40. Only simple interest from date of the original judgment. Gregory v. Perry [S. C.] 50 S. E. 787.

41. Each matured coupon is a separate promise and gives rise to a separate cause of action to whosoever holds it, and is not while attached to the bond an incident of it. Rice v. Shealy [S. C.] 50 S. E. 868.

42. See 4 C. L. 245.

43. A contract executed and payable in New York and by inference only, delivered in Nebraska, bears the New York rate of interest. Cudahy Packing Co. v. New Amsterdam Casualty Co., 132 F. 623. The rate is governed by the law of the place of performance. Schofield v. Palmer, 134 F. 753.

Note: Whether a contract for the payment of money, which stipulates for interest but does not specify the rate or designate the place of payment, be treated as payable generally, or at the place where it was made, in either case there is ordinarily no basis for a presumption that the parties intended to be governed by any other law than that of the place where the contract was made; and therefore that law governs as to the rate. Butters v. Olds, 11 Iowa, 1; Holley v. Holley, Litt. Sel. Cas. [Ky.] 507, 12 Am. Dec. 342; Hawley v. Sloo, 12 La Ann. 815; Hopkins v. Miller, 17 N. J. Law, 185; Lewis v. Ingersoll, 1 Keyes [N. Y.] 347; Kavanaugh v. Day, 10 R. I. 393. See, also, Varick v. Crane, 4 N. J. Eq. 128.—See note to United States Sav. & Loan Co. v. Beckley, 62 L. R. A. 35.

44. Midland Sav. & Loan Co. v. Solomon [Kan.] 79 P. 1077.

45. See Usury, 4 C. L. 1764.

46. An agreement to pay one and one-half per cent. per month binds the obligor, though the legal rate is subsequently reduced. Johnson v. Pullman State Bank [Wash.] 82 P. 122.

47. Where an obligation bears a specified rate of interest, such rate will prevail from date until payment. Schofield v. Palmer, 134 F. 753.

48. Schofield v. Palmer, 134 F. 753.

A statute fixing a special rate after execution issued and returned "no property found" does not apply prior to judgment.[51]

Interest fixed by contract runs from the date agreed upon,[52] and interest allowed by statute from the date prescribed.[53] An unliquidated claim against the estate of a decedent bears interest only from date of presentation,[54] and a legacy in lieu of dower only from the date it is payable.[55] Circumstances may render a demand necessary to entitle one to interest,[56] as when money is deposited as security.[57] Formal demand, however, may be waived.[58] If no demand is necessary, interest runs from due date.[59] Moneys payable upon the condition of performance of certain services become due when the services are performed.[60]

Technically, the computation of interest is for the jury; practically, it is a matter of evidence.[61] It should be computed by such method as will work justice to the parties,[62] and so as to cover the full interest-bearing period.[63] A judgment should not include interest beyond its date.[64]

49. "Until paid" in a promissory note means "until maturity." Wright v. Hanna, 210 Pa. 349, 59 A. 1097.

50. Thrasher v. Moran [Cal.] 81 P. 32.

51. Licking Valley Bldg. Ass'n No. 3 v. Commonwealth [Ky.] 89 S. W. 682.

52. An escrow bears interest from date of deposit if such was the intention of the parties. Not from the date of the performance of the conditions. Bither v. Christensen [Cal. App.] 81 P. 670.

53. Rev. St. 1898, § 2768 makes no provision for interest, and a garnishee is liable for interest only from the date of the judgment in the original action, not from the date of garnishment. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068. Where in a partition sale property is adjudicated to one who promises to pay the price, he is liable for interest from the date of the district court judgment. Tobin v. United States Safe Deposit & Sav. Bank [La.] 39 So. 33.

54. Claim for board furnished the deceased. Tyndall v. Van Auken's Estate, 94 N. Y. S. 269.

55. Does not bear interest from the death of the testator. In re Martens, 94 N. Y. S. 297.

NOTE. The allowance of interest on the amount due for arrearages of an annuity is discretionary where the annuity is for the widow's maintenance and prompt payment is necessary to her comfortable support (Beeson v. Elliott, 1 Del. Ch. 368; Addams v. Hefferman, 9 Watts [Pa.] 529); or in lieu of dower (Elliott v. Beeson, 1 Harr. [Del.] 106; Seitzinger's Estate, 170 Pa. 531, 32 A. 1101; Houston v. Jamison, 4 Harr. [Del.] 330). But in Isenhart v. Brown, 2 Edw. Ch. [N. Y.] 347, it was held that where payments due on an annuity had been allowed to fall in arrears, no interest was payable on such arrears. Where an annuity was to be paid in provisions delivered at a particular place, the value of which was to be ascertained by testimony, and in the absence of any satisfactory proof of a demand at the place where it was to be paid, or of an agreement to dispense with such demand and convert the same into money, no interest should have been allowed on the arrears thereof. Phillips v. Williams, 5 Grat. [Va.] 259.—See note to Mower v. Sanford [Conn.] 63 L. R. A. 629.

56. Where interest as a penalty is prescribed by law for failure to pay tax bills within a specified period after demand, the date of a demand not established is considered to have been made on the last day of the month during which demand was made. Perkinson v. Schnake, 108 Mo. App. 255, 83 S. W. 301.

57. If the return of a sum of money deposited as security is not demanded, it bears interest only from commencement of action to recover it. Kirkland v. Niagara Gorge R. Co., 95 N. Y. S. 657.

58. A property owner who states to the collector that he will not pay a special assessment tax except at the end of a lawsuit waives formal demand and is liable for penal interest from 30 days after such statement is made. Perkinson v. Schnake, 108 Mo. App. 255, 83 S. W. 301.

59. Where a sale has been made by a commissioner under a decree of court and notes taken for deferred payments, no demand for payment is necessary. Blue v. Campbell [W. Va.] 49 S. E. 909.

60. Under a statute providing that money payable under a written contract bears interest from due time, an attorney's fee dependent on his successful defense of a suit bears interest from final determination of the case. Morrow v. Pike County [Mo.] 88 S. W. 99.

61. Melink v. Coman, 111 Ill. App. 583.

62. Where the plaintiff recovers a verdict but certain items were found for defendant, interest should be computed on the amount found for plaintiff until the items found for defendant became due; such items should then be deducted and interest computed on the balance until judgment. Masterson v. Heitmann & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 8, 87 S. W. 227.

63. Interest on an interest-bearing obligation runs until the date of the verdict, not merely to the date of the writ. Jennings v. Moore [Mass.] 75 N. E. 214.

64. It is erroneous in making a final decree in a suit to foreclose a mortgage to include therein interest on the principal debt to a time beyond the date of the decree. Laflin v. Gato [Fla.] 39 So. 59.

When interest is payable is to be determined from the language of the instrument evidencing the debt.[65]

§ 3. *Remedies and procedure to recover interest.*[66]—The person who owns the debt also owns the interest accrued thereon.[67] Interest cannot be allowed as damages for breach of contract,[68] or as damages in tort[69] unless prayed for in the complaint and awarded by the verdict, and this is the rule, although interest on all moneys due and payable is authorized by statute,[70] but interest may be allowed from commencement of action under a prayer for all proper relief.[71]

INTERNAL REVENUE LAWS.

§ 1. *The tax on liquors and tobacco.*[72]—Internal revenue laws are not like penal laws, to be strictly construed, but should be construed fairly and reasonably in such manner as most effectually to accomplish the intention of congress,[73] and are not to be evaded by mere subterfuge.[74] They apply to the dispensing agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicants,[75] and it is within the constitutional powers of the United States to exact these taxes from them.[76] An assessment by a collector is prima facie valid,[77] and the United States is not bound to produce direct evidence of its validity.[78] Rules and regulations prescribed by the treasury department have no force as rules of evidence.[79] Rules and regulations prescribed by the commissioner of internal revenue must be reasonable[80] and must be conformed to by persons seeking

65. Section 9, c. 74, entitled "Interest," fixing the time when interest shall be computed, does not make it payable annually or otherwise. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

66. See 4 C. L. 245.

67. A pledgee of collateral, assigned to him as security is not entitled to interest thereon as a bonus after the principal debt has been paid in full. Ruberg v. Brown [S. C.] 51 S. E. 96.

68. Breach of contract to furnish cars for the shipment of cattle. Texas & P. R. Co. v. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065.

69. In an action for damages for injuries to a shipment of cattle. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47. A prayer for a certain amount, costs, and general relief does not authorize a recovery of interest on such amount. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337.

70. A statute authorizing interest on all moneys due and payable does not authorize its recovery on a demand sued for unless prayed for in the petition. Morley v. St. Joseph [Mo. App.] 87 S. W. 1013.

71. Need not be specially prayed for. Travelers' Ins. Co. v. Henderson Cotton Mills [Ky.] 85 S. W. 1090. A complaint on a note praying interest from date according to its terms need not specially pray for interest from the filing of the complaint to judgment entered. Thrasher v. Moran [Cal.] 81 P. 32.

72. See 4 C. L. 246.

73. United States v. Cole, 134 F. 697.

74. A druggist who sells a medicinal preparation, 88 per cent. proof spirits or any other per cent. more than sufficient to preserve the medicinal properties of roots or drugs contained therein, is a retail liquor dealer within Rev. St. §§ 3244, 3248 (U. S. Comp. St. 1901, pp. 2096, 2107), defining "retail dealer" and "distilled spirits." United States v. Morfew, 136 F. 491.

75. U. S. Rev. St. §§ 3140, 3232, 3234 (U. S. Comp. St. 1901, pp. 2040, 2091, 2097). State of South Carolina v. U. S., 26 S. Ct. 110. The dispensary system of South Carolina is commercial as well as a police regulation because conducted for profit. State of South Carolina's Case, 39 Ct. Cl. 257.

76. State of South Carolina v. U. S., 26 S. Ct. 110.

77. An assessment under Rev. St. § 3309 (U. S. Comp. St. 1901, p. 2158) on spirits produced and not accounted for, is prima facie evidence of its validity. United States v. Cole, 134 F. 697.

78. A stipulation by a defendant in an action to recover an assessment on unreported spirits alleged to have been distilled from certain fruit, that he had received such fruit but had wholly failed to account for its destruction or for the spirits alleged to have been distilled from it, justifies a finding in favor of the government. United States v. Cole, 134 F. 697.

79. They are for the guidance of officers in the administration of the revenue laws and have no force as rules of evidence in actions to collect assessments. United States v. Cole, 134 F. 697.

80. The rules and regulations prescribed

relief.[81] By Act of Congress, April 12, 1902, a rebate of revenue paid on tobacco was authorized,[82] and strict compliance with the instructions on the back of a blank proof for tobacco rebate, detailing the duties of the witnesses, is not a condition precedent to a right to the rebate.[83] The action of the commissioner on claims for rebates is reviewable by the circuit court.[84] An allowance by the commissioner of internal revenue for the refund of a tax illegally collected is an award upon which an action may be maintained, and is conclusive until impeached for fraud or mistake.[85] A declaration on a distiller's bond, the condition of which is that the principal should in all respects comply with the law and regulations relative to the duties of distillers, must set forth with certainty the laws or regulations violated and the laws authorizing the commissioner to make the regulations broken.[86] The rules of procedure of the Federal court apply in internal revenue proceedings.[87]

§ 2. *Oleomargarine Act August 2, 1886.*[88]

§ 3. *War Revenue Acts June 13, 1898, and March 2, 1901.*[89]—A claim to recover back internal revenue taxes illegally exacted is one founded upon a law of congress and may be enforced by an action directly against the United States under that act, after it has been presented to the commissioner of internal revenue, whether or not it is approved by him and whether it sounds in contract or in tort.[90] An action against the United States upon a claim to recover back internal revenue taxes illegally exacted which has been presented to but not approved by the commissioner of internal revenue is barred after two years.[91] A statement of claim against a collector to recover revenue taxes paid, on the ground that plaintiff is not subject to such taxes, should set out the transactions on account of which they were assessed.[92]

The requirement that certain instruments bear a revenue stamp does not apply to an option to purchase land,[93] and is not binding on state courts.[94]

by the commissioner of internal revenue on April 28, 1902, providing for claims for rebate under act April 12, 1902, c. 500, § 3 (32 Stat. 96), of taxes paid on manufactured tobacco and snuff, are reasonable. Powell v. U. S., 135 F. 881.

81. A bankrupt's trustee is not entitled to recover where there is evidence tending to show that the claim is fraudulent and that the regulations prescribed are not complied with. Powell v. U. S., 135 F. 881.

82. The uncontradicted testimony of four witnesses in a suit for a tobacco rebate as authorized by Act April 12, 1902, is sufficient as against evidence that the space in the store was inadequate to hold the amount of tobacco testified to, offered for the purpose of showing that the claim was fraudulent. Hyams v. U. S., 139 F. 997.

83. Hyams v. U. S., 139 F. 997.

84. A rejection by the commissioner of internal revenue in proceedings to recover a tobacco rebate as authorized by Act Cong. April 12, 1902, the whole claim having accrued since the passage of the Tucker Act March 3, 1887, amended by Act June 27, 1898, is reviewable by the circuit court. Hyams v. U. S., 139 F. 997.

85. Action may be maintained in the court of claims directly against the government. Edison Illuminating Co.'s Case, 38 Ct. Cl. 208.

86. United States v. Zemel Co., 137 F. 989.

87. Under the rule of court that the arrangement of rules under distinct heads is not to prevent their covering every mode of procedure to which they are applicable, a rule under the head "Admiralty" that service on the proctor of a party in admiralty stipulations binds the sureties applies to internal revenue proceedings. United States v. 59,650 Cigars, 138 F. 166.

88, 89. See 4 C. L. 247.

90. Christie-Street Commission Co. v. U. S. [C. C. A.] 136 F. 326.

91. Rev. St. § 3227 (U. S. Comp. St. 1901, p. 2089). Christie-Street Commission Co. v. U. S. [C. C. A.] 136 F. 326. The limitation of two years prescribed by Rev. St. § 3227 for the commencement of actions to recover internal revenue taxes illegally exacted is not inconsistent with and was not repealed by the Act of March 3, 1887, providing that actions under the law must be brought within six years. Id.

92. Haight & Freese Co. v. McCoach, 135 F. 894.

93. Only instruments conveying an interest or title are required to be stamped. Hughes v. Antill, 23 Pa. Super. Ct. 290.

94. The Federal statute requiring a revenue stamp to be placed on a deed need not be complied with in order to render such deed valid in state courts. Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775. The question of want of a revenue stamp on an insurance policy cannot properly be raised in a state court. Wheaton v. Liverpool & L. & G. Ins. Co. [S. D.] 104 N. W. 850.

The legacy tax[95] was not "imposed" and did not become a lien until one year after the testator's death.[96] It did not apply to contingent legacies[97] and was repealed July 1, 1902.[98]

§ 4. *Filled Cheese Act June 6, 1896.*[99]

INTERNATIONAL LAW.[1]

The law of nations applies to decide matters formerly decided by a treaty which by act of one nation has been abrogated[2] and matters resolved from doubt by treaty may thereby again become doubtful.[3] When sovereignty changes, local laws continue in force till changed.[4]

INTERPLEADER.

§ 1. *Nature of remedy and right to it.*[5]—There must be two persons claiming the same thing against complainant adversely to each other, and he must be without beneficial interest in it and unable to determine without hazard who is right.[6] The right to interplead is not in abeyance merely because one of the claimants must

95. See 4 C. L. 248.

96. Where a testator died within one year prior to July 1, 1902, the date the tax was repealed, legacies provided by him are not taxable. Eidman v. Tilghman [C. C. A.] 136 F. 141.

97. To A. "when she is 18 years old" is contingent. Heberton v. McClain, 135 F. 226. An estate to "A." conditioned on his attaining a certain age is contingent. Vanderbilt v. Eidman, 196 U. S. 480, 49 Law. Ed. 563.

98. The legacy tax was not due and payable until one year after the death of the testator, and was repealed July 1, 1902; hence it did not attach to legacies provided by a testator who died within one year prior to the date of repeal. Philadelphia Trust, etc., Co. v. McCoach, 135 F. 866.

99. See 4 C. L. 249.

1. Excludes matters relating to war, prize, etc. (see War, 4 C. L. 1818); aliens (5 C. L. 96), conflict of laws (5 C. L. 610); seamen (see Shipping, etc., 4 C. L. 1450); ambassadors and consuls (5 C. L. 113).

2, 3. Schooner Atlantic, 39 Ct. Cl. 193.

4. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225.

5. See 4 C. L. 249.

6. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36. The tendency is to extend the remedy more freely. Its rise and growth are reviewed in Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575.

Allowed: Where complainant bank held deposits claimed by both principal and agents in the transactions whence the money came. Fidelity Fire Ins. Co. v. Illinois Trust & Sav. Bank, 110 Ill. App. 92. To warehouseman where bailor had given conflicting delivery orders. Beebe v. Mead, 101 App. Div. 500, 92 N. Y. S. 51. Where bank held stocks claimed by several as successors in estate. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183. As to money realized from a sale and claimed against buyer by one as owner and others as mortgagees. Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575. In case of contentious claims by depositor's executors against his assignee of certificate of deposit alleged to hold by an incomplete gift. Harris Banking Co. v. Miller [Mo.] 89 S. W. 629. To the depositary of a specific sum claimed by the depositor and by others as the intended payees. Mercantile Trust Co. v. Calvet-Rogniat, 46 Misc. 16, 93 N. Y. S. 238. All mechanics' lienors were required to come in and litigate and owner was discharged on payment of contract price into court. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968.

Refused: The remedy is bill to vacate for fraud and not interpleader where plaintiff, a tenant, was induced by his creditor to suffer judgment as garnishee for rent after the landlord had parted with his interest, the garnishment plaintiff being innocent of complicity. Belond v. Rayburn [Wash] 80 P. 553.

Legal doubt or hazard: Bill dismissed which showed clear legal obligation to mechanics' lienor as against contractor. Turner v. Miller [N. J. Eq.] 61 A. 741. It will not lie at suit of garnishee where the garnishment proceeding includes all claimants and will decide all questions. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068. As against assignee of judgment, the judgment creditor's receiver does not by mere assertion of a demand create a doubt or hazard. Stock, Grain & Provision Co. v. Haight, 95 N. Y. S. 71. Claim of a receiver of one who had deposited money to secure performance of charter party held not well founded. Hanna v. Manufacturers' Trust Co., 93 N. Y. S. 304.

Hostility to one claimant is not shown by the mere filing of an answer when sued by one. Mercantile Trust Co. v. Calvet-Rogniat, 46 Misc. 16, 93 N. Y. S. 238.

resort to suit necessarily determinative of the doubt before he can recover.[7] The existence of an obligation from complainant to one of defendants of a nature not adjudicable under the bill is fatal.[8] Privity between the adverse claimants if otherwise requisite[9] is not so when they claim from a common source.[10]

Statutory proceedings to implead third persons claiming against a defendant are akin to equitable interpleader,[11] and in New York this may be allowed in the municipal courts;[12] but inferior courts will not do so if issues would thereby be made resulting in an ouster of jurisdiction.[13]

§ 2. *Procedure and relief; discharge of stakeholder; costs.*[14] *Process and pleading.*—Personal jurisdiction of both claimants is essential,[15] but if it can be obtained, the commencement and pendency of a suit by one of them in another jurisdiction is no obstacle.[16]

The contentious claims should be so pleaded as to show a risk in paying either.[17] They need not be set out so particularly that the causes of action asserted would be well pleaded.[18] The prayer should be that defendants be compelled to litigate and settle their titles.[19] The affidavit of noncollusion either in the bill or annexed to it is essential.[20] When there is a sworn denial of collusion and an averment of indifference the inference from the existence of a contract with one defendant is overcome.[21]

Discharge.[21a]—While discharge should not follow immediately on the filing of an amended bill without further answer,[22] it is harmless if naught has been changed but to increase the fund paid into court.[23] When interpleader is allowed on paying into court, the applicant should not only be dismissed but there should be a judgment barring the reassertion of the obligation,[24] and until this is done he may resist a dismissal as to him.[26]

Further proceedings.[26a]—Having allowed the bill the usual practice is to order defendants to litigate their claims[26] and the one claiming against the prima facie right is to be the actor.[27] It is error to enter an ex parte decree nisi for the one prima facie entitled[28] especially when requiring the other to plead in short time and

7. Judgment defendant levied on by judgment plaintiff's creditor may sue to interplead notwithstanding such creditor's inability to proceed except by supplementary proceedings against the judgment defendant. Code Civ. Proc. §§ 717, 721. Water Supply Co. v. Sarnow [Cal. App.] 82 P. 689.

8. Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575. No such duty in case of factor who has money claimed by consignor as owner of goods and by mortgagees. Id.

9. See 4 C. L. 250, n. 98; Fletcher, Eq. Pl. & Pr. § 773.

10. Two claims under same insurance policy. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36.

11. Dexter v. Lichliter, 24 App. D. C. 222.

12. Municipal Court Act, § 187 (Laws 1902, c. 580) so provides. Reichardt v. American Platinum Works, 94 N. Y. S. 384.

13. Equitable issues. Marcus v. Aufses, 94 N. Y. S. 397; Krugman v. Hanover Fire Ins. Co., 94 N. Y. S. 399.

14. See 4 C. L. 251.

15. Publication will not suffice. Dexter v. Lichliter, 24 App. D. C. 222. If attempted, a special appearance to challenge the jurisdiction is proper. Id.

16. Kellogg v. Mutual Life Ins. Co., 35 App. D. C. 36.

17. Bill held to show clear legal duty to pay mechanic's lien and not principal contractor. Turner v. Miller [N. J. Eq.] 61 A. 741.

18. Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575.

19. Chartiers Oil Co. v. Moore's Devisees, 56 W. Va. 540, 49 S. E. 449.

20. Chartiers Oil Co. v. Moore's Devisees, 56 W. Va. 540, 49 S. E. 449. The affidavit of noncollusion is supplied by a suitable averment in a verified bill. Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575.

21. Facts were confessed by demurrer. Byers v. Sansom-Thayer Com. Co., 111 Ill. App. 575.

21a. See 4 C. L. 252.

22, 23. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36.

24. Plaintiff who interpleaded claimants to a judgment should have a judgment declaring same discharged. Bowsky v. Cosby, 94 N. Y. S. 792. Such judgment should not be rendered on appeal, but where remand is in any event necessary should be below. Id.

25. Bowsky v. Cosby, 94 N. Y. S. 792.

25a. See 4 C. L. 252.

26. See Fletcher Eq. Pl. & Pr. § 790.

27. Buck v. Mason [C. C. A.] 135 F. 304.

28. Buck v. Mason [C. C. A.] 135 F. 304. Seven days for claimant at distance to plead is too little. Id.

only on conditions of indemnity. If by agreement all parties are to have their rights decreed, leaving only the disputed claims, the decree cannot go into the adjustment of the dispute.[29] Interpleader being refused, the bill will not support a decree affecting defendants' rights.[30] Injunction against threatened suits will issue in aid of interpleader.[31] Privileges or defenses pertaining wholly to complainant and necessarily forborne by him in interpleading will not be litigated.[32]

Statutory interpleaders are equitable in nature;[33] hence if the code merely gives the remedy and provides no procedure, that of equity should be adopted,[34] and if an order of interpleader be entered in an action, it becomes an equitable one.[35] When a defendant moves for interpleader, the practice is to substitute for him the other claimant and to plead anew or supplementally as the case requires.[36] Leave to plead supplementally should be asked by plaintiff[37] but an admission of "due" service by the new defendant disentitles him to object.[38] Likewise plaintiff by silence may waive objection to the jurisdiction over the new defendant.[39] If the new defendant fails to plead responsively, he may be defaulted.[40]

Costs are taxable against the one who has wrongfully claimed the property.[41]

INTERPRETATION; INTERPRETERS; INTERSTATE COMMERCE; INTERVENTION, see latest topical index.

INTOXICATING LIQUORS.

§ 1. *Control of the liquor traffic; validity of statutes and ordinances.*[42]—No one has an inherent[43] or constitutional[44] right to manufacture or sell intoxicating

29. Buck v. Mason [C. C. A.] 135 F. 304.
30. Interpleader being refused a lessee as against two claimants, it was error to enjoin one from collecting rents. Delaware, L. & W. R. Co. v. Foster [Pa.] 61 A. 571.
31. Mercantile Trust Co. v. Calvet-Rogniat, 46 Misc. 16, 93 N. Y. S. 238.
32. In interpleader by an insurance company, an assignee is not put to proof of interest. Connecticut Mut. Life Ins. Co. v. Tucker [R. I.] 61 A. 142.
33. See ante, § 1.
34. Greenblatt v. Mendelsohn, 92 N. Y. S. 963; Hanna v. Manufacturers' Trust Co., 93 N. Y. S. 304.
35. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.
36. **Under the New York Code the practice is:** When a defendant in an action obtains an order, the plaintiff applies for leave to file a supplemental complaint and to substitute for defendant the adverse claimant on the former's paying or tendering into court the money or property. The supplemental complaint should allege the cause of action as originally pleaded and add allegations showing the interpleader and demand judgment against the new defendant for the money or property and costs. The new defendant may then answer within the regular time. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.
37, 38. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.

liquors even for medical, mechanical or scientific purposes,[45] the traffic being subject to the control of the state through an exercise of its police power.[46] Hence the legislature may prohibit the manufacture and sale of intoxicating liquors in the state or it may impose any conditions, short of prohibition, upon the manufacture and traffic in such liquor, that it deems proper.[47] It may pass laws of local application.[48] The statutes must, however, observe constitutional requirements,[49] such as the distribution of governmental functions[50] and requirements as to title.[51] In some

39. Reichardt v. American Platinum Works, 94 N. Y. S. 384.

40. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.

41. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183. Defeated claimant taxed with costs. Sovereign Camp Woodmen of the World v. Wood [Mo. App.] 89 S. W. 891. Allowance of a percentage of the value of the property is error where complainant claimed no right in it. Beebe v. Mead, 101 App. Div. 500, 92 N. Y. S. 51.

42. See 4 C. L. 253.

43. Barnett v. Pemiscot County Court [Mo. App.] 86 S. W. 575; Sandys v. Williams [Or.] 80 P. 642; Fanning's License, 23 Pa. Super. Ct. 622.

44. The right is not one of the privileges guarantied to the citizens of the United States by the fourteenth amendment to the Federal Constitution. Sandys v. Williams [Or.] 80 P. 642; State v. Durein [Kan.] 80 P. 987.

45. The constitutional rights of a person are not violated by denying him a permit or by canceling such permit after it has been granted. Procedure under Kansas statutes considered. Newman v. Lake [Kan.] 79 P. 675, following State v. Durein [Kan.] 78 P. 152.

46. Sandys v. Williams [Or.] 80 P. 642; Borck v. State [Ala.] 39 So. 580; Hart v. State [Miss.] 39 So. 523; Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016; McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. Exercise of the police power in regulating the sale and consumption of intoxicating liquors, see 1 Abbott, Municipal Corp. § 130, pp. 250 et seq.

47. State v. Durein [Kan.] 80 P. 987. The amendment to the state constitution prohibiting the manufacture and sale of intoxicating liquors except for certain purposes affected the power of the legislature to tolerate only, and did not abridge its power further to restrain or prohibit the liquor traffic. Id.

48. State v. Barrett, 138 N. C. 630, 50 S. E. 506.

49. Code 1892, § 1604, making it a misdemeanor to act as agent of either the seller or purchaser in effecting an unlawful sale of liquor in any territory in which a sale is prohibited is constitutional. Hart v. State [Miss.] 39 So. 523.

50. Chapter 346, p. 626, Gen. Laws 1905, relating to the issuance of liquor licenses by the county commissioners, held not to violate art. 3, § 1, of the Constitution of the state, relating to the distribution of governmental functions. State v. Bates [Minn.] 104 N. W. 709. Laws 1903, p. 749, § 434 making the possession of more than one quart of intoxicating liquor by an unlicensed person prima facie evidence of keeping it for sale, is not unconstitutional as an invasion by the legislative of the judicial department of the government. State v. Barrett, 138 N. C. 630, 50 S. E. 506. Acts of April 28, 1899 (P. L. 67 and 68) are unconstitutional, inasmuch as they seek to delegate the legislative power by requiring that the repeal provided for shall not go into effect unless a majority of duly qualified voters of the borough and county shall vote in favor of said repeal at an election to be held in accordance with the provisions of the act. McGonnell's License, 24 Pa. Super. Ct. 642.

51. Laws 1901, p. 58, c. 4930 is not unconstitutional as embracing two subjects. Caesar v. State [Fla.] 39 So. 470. Act of June 9, 1891 (P. L. 248) held constitutional. Stroudsburg Borough v. Shick, 24 Pa. Super. Ct. 442. The prohibition of the sale of liquor on certain days is pertinent to and naturally connected with the general subject of the sale of intoxicants. Ordinance entitled "Sale of Intoxicating Liquors," and the body of the act prohibiting the opening of licensed saloons on the Sabbath held valid. City of Duluth v. Abrahamson [Minn.] 104 N. W. 682. Restrictions and limitations attached to a license are germane to and properly connected with the subject of imposing license taxes, and consequently they may be embraced in an act with such subject. Schiller v. State [Fla.] 38 So. 706. Provisions for the payment of the license and other taxes, prescribing penalties for doing business without a license and prescribing penalties for failure to comply with the provisions of such licenses, are matters properly connected with the subject of imposing license and other taxes, and they may properly be embraced in one act. Laws 1903, p. 3, ch. 5106, held valid. Id. The title "An ordinance concerning misdemeanors" is sufficiently broad to cover a provision prohibiting any one engaging in any calling on Sunday, or keeping open any place of business, or permitting persons to resort thereto for the purpose of drinking intoxicating liquor on Sunday. Town of Lovilla v. Cobb, 126 Iowa, 557, 102 N. W. 496. The title of an act being "An act to prohibit the sale of" liquors of a given character in a named county, "and for other purposes herein mentioned," authorizes legislation in the body of the act that the prohibition should not become effective until an election was had and a result favoring such prohibition was obtained. Oglesby v. State, 121 Ga. 602, 49 S. E. 706. Acts 1902, p. 64, entitled "An act to prohibit the sale of liquor on Sunday," held valid, though it prohibits Sunday sales, provides a punishment therefor, imposes forfeiture of the license on a

states an act containing subjects not embraced in the title is void only as to such subjects.[52] The state, or its subordinate agent, when duly authorized, may confer the privilege on one class of persons and deny it as to others.[53] The act must not deny anyone the equal protection of the law.[54] An act prohibiting a recovery for liquor bought in another state does not impair the obligation of a contract.[55] Subject to well-defined limitations the legislatures may change the rules of evidence and declare that certain facts or conditions, when shown, shall constitute prima facie evidence of guilt,[56] and in this connection it cannot be said, as a matter of law, that the keeping of more than one quart of liquor in one's possession has no relation to an intent to sell.[57] The legislature cannot change the meaning of the word "sale" so as to evade or enlarge constitutional provisions respecting sales of intoxicants.[58] Where the liquor is an article of interstate commerce[59] it is not subject to state legislation,[60] though this rule has been modified by the "Wilson Bill" so as to render the shipment subject to the state laws upon its "arrival in" the state.[61] Under this law the power of the state does not attach until the liquor is delivered to the consignee,[62] though the state may exact a license fee from one selling liquors

conviction for a second offense within a year, prescribes certain duties of the clerk of court and judge in the event of a second conviction, and provides a penalty for failure of the judge to perform such duties. Borck v. State [Ala.] 39 So. 580.

52. A contention that "An act to regulate the sale of intoxicants" is void because undertaking also to regulate gifts of intoxicants is untenable under Const. art. 3, § 35. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

53. Sandys v. Williams [Or.] 80 P. 642. An ordinance prohibiting a sale of intoxicating liquors in a private room does not, by making an exception in favor of hotels, contravene Const. art. 1, § 21, inhibiting laws granting privileges which on the same terms shall not equally belong to all citizens. Id.

54. Rev. St. c. 29, § 64, prohibiting a recovery for liquor bought in another state, held valid. Corbin v. Houlehan [Me.] 61 A. 131. An act giving a right of recovery on a liquor dealer's bond for selling liquor to minors held valid. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. Rev. Laws 1895, art. 5060l, regulating the sale of liquors, and providing that it shall not apply to wines made from grapes grown in the state while in the hands of the producers, held valid. Douthit v. State [Tex.] 83 S. W. 795. Laws 1903, p. 749, c. 434, making the possession of more than one quart of intoxicating liquor by an unlicensed person prima facie evidence of keeping it for sale, held valid. State v. Barrett, 138 N. C. 630, 50 S. E. 506.

55. Rev. St. c. 29, § 64 construed. Corbin v. Houlehan [Me.] 61 A. 131.

56. Laws N. C. 1903, p. 749, c. 434, making the possession of more than one quart of intoxicating liquor by an unlicensed person prima facie evidence of keeping it for sale, is valid. State v. Barrett, 138 N. C. 630, 50 S. E. 506. Is not unconstitutional as an invasion by the legislative of the judicial department of the government (Id.), nor as depriving the accused of the presumption of innocence (Id.), nor as denying him the equal protection of the law (Id.).

57. State v. Barrett, 138 N. C. 630, 50 S. E. 506. Laws 1903, p. 749, c. 434, making the possession of more than one quart of intoxicating liquor by an unlicensed person prima facie evidence of keeping it for sale, is not void as arbitrarily making a lawful act prima facie evidence of a guilty intent. Id.

58. Act providing that C. O. D. contracts of sale shall be deemed to have been made where the goods are delivered and paid for held unconstitutional. Keller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 264, 87 S. W. 669. See 4 C. L. 271, n. 10.

59. Intoxicating liquors shipped from one state into another on a C. O. D. contract is interstate commerce, and cannot be controlled by state laws. Sedgwick v. State [Tex. Cr. App.] 85 S. W. 813; Donley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 553; Id. [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 554. Where wholesale liquor dealer contracts within a state to sell liquor to be shipped from another state, the shipment is interstate commerce, though the seller is a resident of the state where the sale is made and the whisky is to be delivered. Sloman v. Moebs Co. [Mich.] 102 N. W. 854.

60. Rev. Pol. Code, §§ 2834, 2838, making it an offense for a traveling salesman to take orders for intoxicating liquor without a license, does not violate the interstate commerce clause of the Federal Constitution, State v. Delamater [S. D.] 104 N. W. 537. Code 1892, § 1604, making it a misdemeanor to act as agent of either the seller or purchaser in effecting an unlawful sale, does not violate the interstate commerce clause of the Federal Constitution. Hart v. State [Miss.] 39 So. 523.

61. Wilson Bill is 26 Stat. 613, c. 728. See note Constitutionality of laws affecting interstate commerce, 3 C. L. 711, where the law on this subject is fully developed.

62. Crigler v. Commonwealth [Ky.] 87 S. W. 276. Intoxicating liquors shipped C. O. D. from one state into another state cannot be subjected to seizure under the laws of the latter state while in the hands of the common carrier. American Exp. Co. v. Iowa, 196 U. S. 133, 49 Law. Ed. 417; Adams Exp.

within the state on a boat engaged in interstate commerce.[63] In order to be interstate commerce, the introduction of the liquor into the state must not be for the purpose of an illegal sale.[64] A state inspection law, although producing a revenue and providing an inadequate inspection, will be deemed to have been enacted in the exercise of the state's police power within the meaning of the "Wilson Bill"[65] and such an act is not void as an interference with interstate commerce because it operates to deter shipments into the state,[66] nor does it unlawfully burden such commerce.[67] Congress has no power to penalize the sale of liquor to an Indian who has been emancipated and given the privileges of citizenship.[68] The provision of a local option law excepting sales for sacramental and medicinal purposes from its operation does not violate a constitutional provision requiring the legislature to enact laws whereby the voters may determine, by majority vote, whether the sale of intoxicants shall be prohibited.[69] An act putting the punishment of an offense in the hands of municipal authorities infringes a constitutional provision requiring criminal prosecutions to be based on an indictment.[70] The constitution of Alabama prohibits the passage of local laws unless a notice is published in the locality affected stating the substance of the proposed law.[71] In other states special legislation is prohibited in cases for which provision has been made by an existing general law.[72] Cruel and unusual punishments are prohibited.[73] The constitutionality of an act cannot be contested by one whose rights it does not affect.[74] While repeals by impli-

Co. v. Iowa, 196 U. S. 147, 49 Law. Ed. 424. Nor can the common carrier be rendered liable as for an unlawful sale. Chambers v. Adams Exp. Co. [Iowa] 103 N. W. 152.

63. Foppiano v. Speed, 26 S. Ct. 138.

64. Whisky manufactured and sent by the distiller to another state in order to be reshipped in retail quantities to consumers in local option territory in the state where the distillery is located, whose orders have been taken by the distiller's agents, is not interstate commerce. Crigler v. Commonwealth [Ky.] 87 S. W. 276. Rev. St. c. 29, § 64, prohibiting the maintenance of an action in the courts of the state to recover for intoxicating liquors bought in another state with intent to sell the same in the former state in violation of law, does not impair the interstate commerce clause of the Federal constitution. Corbin v. Houlehan [Me.] 61 A. 131.

65, 66, 67. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 Law. Ed. 925.

68. 29 Stat. at L. 506, chap. 109, penalizing the sale of liquor to an Indian, held not applicable to an Indian to whom an allotment has been made under the act of Feb. 8, 1887, which grants the allottees the privilege of citizenship. In re Heff, 197 U. S. 488, 49 Law. Ed. 848.

69. Const. art. 16, § 20 construed. Ray v. State [Tex. Cr. App.] 83 S. W. 1121.

70. Gen. St. p. 1795, pl. 50, § 2, held unconstitutional. State v. Terry [N. J. Law] 61 A. 148, following State v. Anderson, 40 N. J. Law, 224; Meyer v. State, 41 N. J. Law, 6; Id., 42 N. J. Law, 145.

71. Loc. Acts 1903, p. 392, held unconstitutional. Hudgins v. State [Ala.] 39 So. 717. Notices that application would be made to repeal the law authorizing the establishment of dispensaries, so far as it related to C. county, held ineffectual as not embodying the substance of the proposed law as required by the constitution. Town of Elba v. Rhodes [Ala.] 38 So. 807. Notice "that there will be a petition before the next legislature to repeal the prohibition law for L. beat" held not to authorize law repealing law forbidding the sale of intoxicants "at or within eight miles of the court house of the town of L" only so far as the same applied to the "corporate limits of the town of L." Brame v. State [Ala.] 38 So. 1031. A notice that an application would be made to the legislature to pass a law preventing the sale of spirituous, etc. liquors except in incorporated cities or towns within five miles of the Insane Hospital situated at T. & M., sufficiently states the substance of Loc. Acts 1903, p. 352, prohibiting the sale of spirituous, etc., liquors within five miles of the Alabama State Hospital located at T. & M., except in cities now incorporated or hereafter to be incorporated under the laws of the state. State v. Williams [Ala.] 39 So. 276.

72. Under previous decisions, Acts 1880-81, p. 608, prohibiting the sale of intoxicating liquors within the limits of Jefferson county, is unconstitutional. Edwards v. State [Ga.] 51 S. E. 630.

73. Acts 1903, p. 64, providing that a person convicted twice for violating the Sunday liquor law shall forfeit his license and be debarred from engaging in the liquor business for two years, does not impose a cruel or unusual punishment. Borck v. State [Ala.] 39 So. 580.

74. Where one convicted of selling intoxicants in violation of the license act of 1902 was not affected by the discriminations in the act with reference to cider and wines, as it did not appear that defendant was convicted of selling either cider or wines, he could not assail the validity of the act on the ground of such discriminations. State v. Barr [Vt.] 62 A. 43. A retail liquor dealer cannot object that a statute giving a right

cation are not favored there being an irreconcilable conflict between two laws the later one prevails.[75]

A municipality generally has the power either under statutory enactment[76] or under the general welfare clause in its charter[77] to pass reasonable[78] ordinances restricting or regulating the liquor traffic in such city. The unreasonableness of the ordinance must be determined by considering whether or not a necessity existed for the regulation.[79] Unless expressly stated in the charter to the contrary valid ordinances cannot be ordained when inconsistent with the general state law.[80] Resolutions inconsistent with charter provisions are void.[81] The legislature may, by express enactment, authorize the municipality to provide for the punishment of an act which in its nature affects the health, peace and good order of the community notwithstanding that such act has been made penal under the general law of the state.[82]

A dispensary law may be passed to take effect on the ratification of the same by the people of a county or district.[83] An act authorizing incorporated towns in a certain county to establish and operate dispensaries is not unconstitutional as granting a special privilege;[84] but if the act allows a town board to so do, the members of the board receiving the profits of the business, it is unconstitutional.[85]

of recovery on a liquor dealer's bond for selling liquor to a minor is unconstitutional on the ground that it is provided in the law that it shall not apply to wines produced from grapes grown in the state while the same are in the hands of the producers or manufacturers thereof, in view of a further provision that, when wines produced from grapes grown in the state are in the hands of a retail liquor dealer, they are subject to the same regulation as other liquors, whether produced in the state or not. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

75. There is no conflict between a statutory provision granting an absolute discretion to a probate judge to revoke a druggist's permit at any time and a provision requiring him to investigate the propriety of such revocation upon the presentation of a petition signed by a certain number of residents. Gen. St. 1901, § 2452, construed. Newman v. Lake [Kan.] 79 P. 675. Gen. St. 1901, §§ 2493-2500 are not repealed by Laws 1903, p. 178, c. 122. Stahl v. Lee [Kan.] 80 P. 983. Burns' Ann. St. 1901, § 7283, renders immaterial the words "in less quantities than a quart at a time" contained in § 7283b and by implication repeals that provision. Cahill v. State [Ind. App.] 76 N. E. 182; State v. Kiley [Ind. App.] 76 N. E. 184. The repugnance between the acts of April 10, 1873, and July 30, 1897, is irreconcilable. Sun & B. Pub. Co. v. Bennett, 26 Pa. Super. Ct. 243.

76. Under a statute authorizing municipal corporations to make ordinances to provide for the safety, health, order and comfort of such corporations, a town has authority to pass an ordinance prohibiting anyone from permitting persons to resort to his place of business on Sunday for the purpose of drinking intoxicating liquors. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496. The town of Mansfield has power to rule and regulate, as well as prohibit, the sale of intoxicating drinks and to call an election to determine by ballot questions their grant suggests. Evans v. Police Jury [La.] 38 So. 555.

77. May pass an ordinance prohibiting the keeping of intoxicating liquors for the purpose of unlawful sale. Tucker v. Moultrie [Ga.] 50 S. E. 61.

78. An ordinance prohibiting the sale of intoxicating liquors in any side room, back room, upper room, alcove, booth or box connected with a saloon is a proper exercise of the police power. Sandys v. Williams [Or.] 80 P. 642. Ordinance forbidding the keeping of chairs, or anything for persons, except the bartender or proprietor, to sit on in saloons is reasonable. Pate v. Jonesboro [Ark.] 87 S. W. 437.

79. Sandys v. Williams [Or.] 80 P. 642.

80. A city of the fourth class is not authorized to pass an ordinance requiring applicants for dramshop licenses to obtain yearly the consent of two-thirds of the qualified voters of the entire city. Rev. St. 1899, §§ 2993, 5957, 5978, construed. State v. McCammon [Mo. App.] 86 S. W. 510. A city ordinance providing that native wine shall not be sold within the city, except on premises where the grapes or berries are grown and the wine is manufactured, is void, being contrary to Acts 1899, p. 137. Laws 1901, p. 326, and Const. 1874, art. 12, § 4 considered. City of Morrilton v. Comes [Ark.] 87 S. W. 1024. An ordinance depending for its authority upon Gen. St. 1901, § 2499 and imposing a penalty different from that prescribed by such statute is void. In re Van Tuyl [Kan.] 81 P. 181.

81. A resolution of a city council under which a liquor dealer gave the city his note on an understanding that he might carry on the liquor business until the maturity of the note, when a license was to be issued, held inconsistent with charter provisions and illegal and the note void. Meyer-Marx Co. v. Ensley [Ala.] 37 So. 639.

82. Littlejohn v. Stells [Ga.] 51 S. E. 390.

83. Loc. Acts 1903, p. 137 held valid. Childers v. Shepherd [Ala.] 39 So. 235.

§ 2. *Local option laws.*[86]—In most[87] but not all[88] states the determination of the question of prohibition is left to the electors of the political subdivisions of the state. In the absence of express charter enactment conferring the power, municipalities cannot establish prohibition except under the local option law.[89] The fact that additional territory is added to a political subdivision in which local option has been established does not operate to repeal such local option in the absence of another vote authorizing the sale of liquor therein.[90] In Texas a county can override the option of any subdivision of itself.[91] Local option laws are not repealed by general laws, unless specially mentioned in the general law, or such purpose is made manifest under the plain provisions of the general law.[92] All laws not inconsistent with the local option law remain in force after its adoption.[93]

Submission and elections.[93a]—A petition signed by a certain percentage of the qualified[94] or "registered"[95] voters is generally, though not always, a prerequisite. In North Carolina the aldermen of a city may purge the registration lists of such persons as are not entitled to vote because of the constitutional disqualification of not having paid their poll tax.[96] In some states a designated court may order an election on its own motion.[97] In such states defects in a petition filed are immaterial,[98] and an order being made on a petition, the court may thereafter, on its own motion, order

84. Loc. Acts 1903, p. 137 held valid. Childers v. Shepherd [Ala.] 39 So. 235.

85. Loc. Acts 1903, p. 443 held unconstitutional. Town of Elba v. Rhodes [Ala.] 38 So. 807; Lee v. State [Ala.] 39 So. 720. Acts 1903, p. 87, creating a board of dispensary commissioners to maintain and regulate a dispensary in the town of Abbeville held unconstitutional. Newman v. State [Ala.] 39 So. 648.

86. See 4 C. L. 255.

87. Under Starr & C. Ann. St. 1896, c. 24, par. 63, it is purely discretionary with a city whether or not it will prohibit the sale of liquors or license and regulate the traffic therein. Malkan v. Chicago [Ill.] 75 N. E. 548. The citizens of the town of Mansfield have the right and power to determine for themselves all questions of local option, regardless of the action of the people of the parish as a whole. Evans v. Police Jury [La.] 38 So. 555.

88. Statutes of Kentucky construed and held that the provisions of the local option law are in force in Laurel county by virtue of the "Five Counties Act," although the local option law has never been formally adopted in Laurel county by a vote of the people. Crigler v. Commonwealth [Ky.] 87 S. W. 276.

89. State v. McCammon [Mo. App.] 86 S. W. 510.

90. Ex parte Fields [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 86 S. W. 1022.

91. The fact that all of a certain county was under local option, except two towns therein, at the time a local option election was held to place the entire county under local option, held not to invalidate the election. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

92. Ex parte Neal [Tex. Cr. App.] 83 S. W. 831. Terrell election law (Laws 1903, p. 133, c. 101), requiring notices of special elections to be published or posted 20 days prior to election, did not repeal the local option law (Laws 1899, p. 220, c. 128) in regard to notices. Id. Laws 1903, p. 749, c. 434, § 1, not being irreconcilably in conflict with Laws 1905, p. 495, c. 497, § 13, is not repealed thereby. State v. Parker [N. C.] 51 S. E. 1028. Local Act of April 11, 1866 (P. L. 658), prohibiting the granting of licenses in Potter county, repeals local Act of March 27, 1866 (P. L. 339), prohibiting the issuance of licenses in the borough of Candersport. McGonnell's License, 24 Pa. Super. Ct. 642. The local option law (Laws 1905, p. 41, c. 2) does not supersede Portland City Charter, § 73, subds. 21, 48, giving the council power to regulate the traffic in intoxicating liquors, but it is only a modification thereof when by election its provisions are made applicable to the city. Sandys v. Williams [Or.] 80 P. 642.

93. Held not to repeal a general statute punishing a sale without a license. Commonwealth v. Barbour [Ky.] 89 S. W. 479.

93a. See 4 C. L. 255 et seq.

94. A petition for an election under the Beal Law is sufficient as to the number of signers, when it has been signed by as many qualified electors as equal forty per cent. of those who cast their votes at the last preceding election. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

95. Term "registered voters" as used in an order for an election held not to include all persons whose names were on the permanent registration roll at the preceding municipal election, but only includes those who had paid their poll tax as required and were entitled to vote. Pace v. Raleigh [N. C.] 52 S. E. 277.

96. Pace v. Raleigh [N. C.] 52 S. E. 277.

97. It is competent for the commissioner's court to order an election on their own motion, and in support of their action it will be presumed that they acted on their own motion, notwithstanding the recitations in the order. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19.

98. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

an election at a later date.[99] Jurisdiction of a court to order the election is largely statutory.[1] Immaterial defects in the order will be disregarded.[2] In Texas an order for a local option election may be made either at a regular or special session of the commissioner's court,[3] and an order for an election in a justice's precinct need not show the name of the presiding officer,[4] nor give the metes and bounds of the precinct.[5] It is competent to order a local option election in a county irrespective of the status of some of the precincts in the county as to local option.[6] In Ohio the petition is jurisdictional,[7] and must substantially comply with the law.[8] In Kentucky it is immaterial if the petitioners live in one or more precincts or in one or more counties.[9] Names may be withdrawn from a petition at any time before the election is ordered,[10] and the number of petitioners is to be determined as of the time when action is taken on the petition.[11] The application for the withdrawal of names from the petition should not allege mere conclusions.[12] In the absence of prejudice, a copy of the application may be filed.[13] In Arkansas applications for withdrawal of names from a petition for prohibition under the three-mile law may be introduced in evidence after the matter is argued and submitted to the court.[14] Such applications are filed in time if filed five days before the court takes up the petition for final consideration.[15] The petition for an election is a public document which any citizen or petitioner of the district has a right to inspect,[16] and mandatory injunction is an appropriate remedy to enforce this right.[17] A clerical misprision in copying the petition in the minutes of the court may be corrected on a prosecution for a violation of the local option law.[18] Statutes generally prescribe the length of time notice of

99. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702.

1. Under Const. § 61 and Ky. St. 1903, § 2554, where petition is made for an election in a town lying in two counties, the county court of the county in which the greater part of the town lies has jurisdiction to order it. Early v. Rains [Ky.] 89 S. W. 289.

2. Where other orders showed that the election was held as directed and that there was a majority of votes against the sale of liquor, and taken together established all the jurisdictional facts necessary to a valid election, held, that the mere failure of the order directing the holders of the election to specifically state that the signers of the petition constituted 25 per cent. of the legal voters "in each precinct" of the territory to be affected did not invalidate the election. Ky. St. 1903, § 2554 construed. Commonwealth v. Jones [Ky.] 84 S. W. 305.

3. Koch v. State [Tex. Cr. App.] 88 S. W. 809. An order for a local option election may be made by the commissioners' court at a special term. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702.

4, 5. Fitze v. State [Tex. Cr. App.] 85 S. W. 1156.

6. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19.

7. Brannock Law. In re Petition of Wightman, 3 Ohio N. P. (N. S.) 129.

8. In re Petition of Wightman, 3 Ohio N. P. (N. S.) 129. Is fatally defective where there is a failure to describe any residence district in the city, or to describe the entire city as being a residence district. Id.

9. Early v. Rains [Ky.] 89 S. W. 289.

10. Beal Law election. Petitioner need not have consent of council. Haynes v. Incorporated Village of Hillsboro, 3 Ohio N. P. (N. S.) 17.

11. Council loses jurisdiction to order a Beal Law election when names are withdrawn from the petition to a number less than the requisite forty per cent. before action is taken on the petition. Id.

12. Applications for the withdrawal of names from a petition for prohibition, stating that the signers, "after mature deliberation," wished their names taken off, that they had been "misled," that "unjust means were used to secure signers," and that they were inclined to the belief that the matter had not been fairly presented" to them, when not supported by specific reasons nor proof of facts, held insufficient. Colvin v. Finch [Ark.] 87 S. W. 443.

13. On the hearing of a petition for prohibition under the three-mile law, the admission in evidence of copies of applications to withdraw the names of certain petitioners is harmless, the originals having been filed and the petitioners apprised of their contents and not being misled or prejudiced in any way by the reading of the copies instead of the originals. Colvin v. Finch [Ark.] 87 S. W. 443.

14. Instead of having the same read before the arguments of counsel. Colvin v. Finch [Ark.] 87 S. W. 443. The other petitioners are not prejudiced by the court permitting such petitions to be so introduced where they were not refused permission to be heard by proof or argument on the matter set up in the application. Id.

15. Although they were not filed until two days after the filing of the petition. Colvin v. Finch [Ark.] 87 S. W. 443.

16. Election under Brannock Law. Krickenberger v. Wilson, 3 Ohio N. P. (N. S.) 179.

17. Krickenberger v. Wilson, 3 Ohio N. P. (N. S.) 179.

18. So held where word "sale" was copied

the election must be given,[19] and, while failure to publish is fatal,[20] an irregularity in the publication will not be considered, where it appears that notice to voters of the pendency of the election was so general that more votes were cast than at the last preceding election.[21] The propositions must not be self-contradictory nor misleading,[22] and being severable should be stated separately.[23] Rules as to the formality and regularity of elections should be deducted from the statutes and decisions of the state wherein the election is held.[24] In some states elections under the local option statutes are to be conducted in accordance with the law governing municipal elections.[25] A special election being held, special registration is necessary or the election is not free and equal.[26] In Kentucky special officers must be appointed.[27] In the absence of a showing of fraud or injury, the location of a voting booth just outside a boundary of the district will not invalidate the election.[28] An idiot or insane person cannot vote,[29] but a qualified voter being unable to leave his carriage, it is competent for the judges to go out to his carriage and receive his ballot and deposit it in the ballot box.[30] A ballot not properly marked cannot be counted,[31] and in determining the number of votes cast, only those should be counted upon which the expression of a choice is indicated.[32] The secrecy of the ballot is not violated by the voters being cautioned that ballots other than those furnished by the clerk if cast might be thrown out, the voter being allowed to take two ballots, one for and the the other against prohibition, identical in outward appearance and not being required to disclose which he cast.[33] In Kentucky, while no devices should be used on the ballots, yet if those used are otherwise unobjectionable, and all the ballots have the same devices, it will not justify setting aside the election.[34] Mere irregularity in form, which does not mislead the electors, will not invalidate an election.[35]

"same." Cantwell v. State [Tex. Cr. App.] 85 S. W. 19.

10. Sayles' Rev. Civ. St. art. 3387, providing for 12 days notice of a local option election, is not repealed by the general election law (Acts 1903, pp. 140, 141, c. 101) providing for 20 days notice. McHam v. Love [Tex. Civ. App.] 13 Tex. Ct. Rep. 78, 87 S. W. 875.

20. Failure to publish the notice required by Liquor Tax Law, § 16 renders the submission illegal. In re Electors of Town of La Fayette, 93 N. Y. S. 534, afg. 45 Misc. 141, 91 N. Y. S. 970, on other grounds; the decision of the lower court on this question is reversed.

21. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

22. A proposition reading: "Whether or not spirituous," etc. "liquors shall be sold," etc., "within the town of," etc., "and that the provisions of this law and prohibition shall apply to druggists," held properly worded, and not self-contradicting or misleading. Erwin v. Benton [Ky.] 87 S. W. 291.

23. Under Ky. St. 1903, §§ 2554, 2558, a proposition, "Whether or not spirituous * * * liquors shall be sold, * * * within * * *, and that the provisions of this law and prohibition shall apply to druggists," held proper, the propositions not being severable. Erwin v. Benton [Ky.] 87 S. W. 291.

24. Rather than from the decisions of other states which have special reference to the policy and legislation of such states. In re Petition of Ammer, 3 Ohio N. P. (N. S.) 329.

25. Rev. St. 1899, § 3028. O'Laughlin v. Kirkwood, 107 Mo. App. 302, 81 S. W. 512. See Elections, 5 C. L. 1065.

26. Early v. Rains [Ky.] 89 S. W. 289.

27. Ky. St. 1903, c. 81, § 2555. Erwin v. Benton [Ky.] 87 S. W. 291.

28. The designation, in an order for an election and the proclamation giving notice thereof under the Brannock Law, of a voting place on the opposite side of a street forming one of the boundaries of the proposed district and fifteen feet beyond the center of the street where the boundary line runs, held not a sufficient ground for setting aside the will of the voters as expressed by a decided majority. In re Petition of Ammer, 3 Ohio N. P. (N. S.) 329.

29. One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum or in appointing a guardian for him were proper application made comes well within the class of persons who under the term "idiot" or "insane" are prohibited from voting by the constitution. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

30. Irregularity, if any, is one which should be charged to the election officers rather than to the voter, and is not of a character which would interfere with a free expression of the people's choice. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

31, 32. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

33. O'Laughlin v. Kirkwood, 107 Mo. App. 302, 81 S. W. 512.

34. Erwin v. Benton [Ky.] 87 S. W. 291.

Local option does not take effect on the election day.[36] In Texas the order declaring local option in force must be published for four successive weeks.[37] Failure to immediately publish the order does not render the order invalid but merely postpones the taking effect of the law.[38] The order declaring the result of the election in a justice's precinct need not show the name of the presiding officer,[39] nor give the metes and bounds of the precinct.[40] Unnecessary and unauthorized signatures being affixed to the order declaring local option in force, they will be disregarded.[41] The granting by a Federal court of an order restraining the publication of the order declaring the result of a local option election does not annul the election.[42] It is not necessary that the names of the county judge and the commissioners be attached to the order as published.[43] Where the order for the election, the order declaring the result, and the certificate of the county judge showing the publication thereof, are all in proper form, they constitute sufficient evidence of the fact that local option is in force in the territory covered by the orders.[44]

A local option election will not be held void on collateral attack where a substantial compliance with the provisions of the statute is shown by the petition and the orders entered of record by the county judge.[45]

A contest proceeding[45a] is not an action at law or a suit in equity.[46] It is a special statutory proceeding conferring power which must be exercised within the limits and by the method prescribed by the statute.[47] Such a proceeding cannot be annexed to a suit at law or a case in equity,[48] nor can a suit in equity be converted by amendment into a proceeding for contest under the statute.[49] Equitable relief cannot be sought in the proceeding, and legal relief can only be sought to the extent that the statute authorizes it and no further.[50] Jurisdiction is largely statutory,[51] the legis-

Use of symbol representing the Holy Bible held not to invalidate the election. Id.

35. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373. Even if the Terrell law applies to a local option election to the extent that the ballots should be headed "Official Ballot," and that but one ticket, with "For Prohibition" and "Against Prohibition," should be used, the use of separate ballots, neither indorsed "Official Ballot," does not vitiate the election. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702.

36. An indictment alleging that a local option election was held on a certain day, and thereupon an order prohibiting sales was made, and that defendant "then and there" sold liquor, was subject to a motion to quash as showing a sale on the day the election was held, when it could not have been unlawful. Wolf v. State [Tex. Cr. App.] 85 S. W. 8.

37. Moss v. State [Tex. Cr. App.] 89 S. W. 833; Stephens v. State [Tex. Cr. App.] 89 S. W. 974. Where the fourth publication of the S. W. 834; Ellis v. State [Tex. Cr. App.] 89 S. W. 834; Johnson v. State [Tex. Cr. App.] 89 notice to put a local option law in effect was enjoined and an appeal from an order dismissing the action, in which a supersedeas had been given, was dismissed under a stipulation and the mandate was issued immediately after the expiration of 30 days during which the clerk is required to hold it, held, the publications were continuous. Ex parte Gill [Tex. Cr. App.] 89 S. W. 272. Where, after such an order had been twice published, further publication was prevented by injunction, and no further publication was made until 16 months after the dissolution of the injunction, when the order was published twice, held insufficient. Griffin v. State [Tex. Cr. App.] 87 S. W. 155; Stephens v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 98, 87 S. W. 157.

38. So held where publication was postponed for 11 months after the entry of the order. Rawls v. State [Tex. Cr. App.] 89 S. W. 1071.

39, 40. Fitze v. State [Tex. Cr. App.] 85 S. W. 1156.

41. Commissioners' signatures disregarded and county judge having signed order it was held valid. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702.

42. McHam v. Love [Tex. Civ. App.] 13 Tex Ct. Rep. 78, 87 S. W. 875.

43. Hillard v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 520, 87 S. W. 821.

44. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18. Court may assume in his charge that the law was in force at the time. Id.

45. Commonwealth v. Jones [Ky.] 84 S. W. 305.

45a. See 4 C. L. 258.

46. Ogburn v. Elmore [Ga.] 51 S. E. 641. Petition held to set forth a suit in equity and not a proceeding to contest an election held under the general local option law. Id.

47, 48, 49, 50. Ogburn v. Elmore [Ga.] 51 S. E. 641.

51. Pol. Code 1895, § 1546 confers upon the superior court as a court jurisdiction to hear and determine a contest of an election held under the provisions of that law. Ogburn v. Elmore [Ga.] 51 S. E. 641. Const. art. 5, § 8, as amended in 1891, giving the dis-

lature having power to confer upon persons holding judicial offices the authority to hear contests of elections,[52] and there being no provision of law for a review of their decision, it is final.[53] A mere charge of bias or hostility against a judge will not disqualify him; facts which, if true, would probably operate to prevent his giving a fair trial must be alleged.[54] In order to confer jurisdiction, the requirements of the statute as to serving notice must be complied with.[55] Under the Ohio "Brannock Law" it is not necessary that the petition should be signed by the petitioner and the requirement as to verification is complied with where the petition is sworn to by the petitioner before an officer duly authorized to administer the oath.[56] The general allegation in a petition that the election was illegal is not sufficient for the admission of testimony as to irregularities other than those specified in the petition,[57] and in Ohio amendments cannot be allowed more than twenty days after the election.[58] In Kentucky local option contest cases cannot be docketed, except by consent, before the term at which they stand for trial.[59] The right to appeal is statutory.[60]

The resubmission[60a] of local option questions is entirely statutory.[61] In some states a petition for revocation takes the place of an election.[62] In some states a designated period of time must have elapsed before a second election can be held.[63] The resubmission resulting in a reversal of the existing order of things, statutes generally provide when it shall take effect.[64]

§ 3. *Licenses and license taxes.*[65] *Requirement and fixing of tax.*[65a]—The business of selling intoxicating liquors constitutes an exception to the general rule

trict court jurisdiction over contested election cases, is not self-executing and the district court has no jurisdiction to try such cases save in the manner prescribed by statute. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15. The probate court is clothed with final jurisdiction in a proceeding to contest an election under the Brannock Law without the intervention of freeholders. In re Petition of Wightman, 3 Ohio N. P. (N. S.) 129.

52, 53. Ogburn v. Elmore [Ga.] 51 S. E. 641, and cases cited.

54. In a contested local option election case, an affidavit that the judge "is opposed to the sale and traffic in such liquors to the extent that he has a pronounced bias against it," is insufficient. Erwin v. Benton [Ky.] 87 S. W. 291.

55. That county attorney who was one of the parties had actual notice does not dispense with the necessity of a written notice. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15. Under the Brannock Local Option Law, petition must be stricken from the files where there has been a failure to issue summons upon the mayor for more than twenty days after the election. Short v. Cincinnati, 3 Ohio N. P. (N. S.) 117.

56. Short v. Cincinnati, 3 Ohio N. P. (N. S.) 117.

57, 58. Beal Law. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

59. Laws 1900, Ex. Sess. p. 39, c. 5, § 12 does not apply to such contests. Erwin v. Benton [Ky.] 84 S. W. 533.

60. Under Ky. St. 1903, § 2567, an appeal lies from an order of the contest board setting aside the return of an election as certified by the board of convassers,' showing a majority in favor of prohibition, the contest board further adjudging that, as it was unable to find a majority either for or against the proposition, there was no election and that neither party was entitled to have certified any fact concerning the same. Erwin v. Benton [Ky.] 87 S. W. 291.

60a. See 4 C. L. 258.

61. Under Liquor Tax Law, § 16, resubmission of local option questions must be had to a special town meeting duly called for that purpose, and not to a subsequent general election. In re Electors of Town of La Fayette, 93 N. Y. S. 534, afg. 45 Misc. 141, 91 N. Y. S. 970. Under such section the reason to be shown to the justice is the same reason which rendered the original submission improper. Id.

62. Petitions for revocation of local option prohibition, under Sand. & H. Dig. § 5877, as amended by Laws 1895, p. 86, filed in the county court three days before the expiration of the order of prohibition, the revocation to take effect on the expiration of the prohibitory term, are not premature. Willmans v. Bordwell [Ark.] 84 S. W. 474.

63. Under Sayles' Ann. Civ. St. 1897, art. 3393, two years must elapse before a second election can be held, but an election held more than two years after the last preceding election is not rendered invalid by the fact that the result of the preceding election was published within two years. Ex parte Smith [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 245.

64. Under Sand. & H. Dig. § 4886, a majority vote favorable to the licensing of the sale of liquor does not authorize the issuance of license until on or after the 1st day of January following the election. State v. Fulkerson [Ark.] 83 S. W. 934.

65. See 4 C. L. 258.

65a. See 4 C. L. 258, 259.

that when a license to do a general business has been exacted and paid another license cannot be required and collected for the doing of a particular act or series of acts constituting an integral part of such general business.[66] Hence, in regulating the sale of spirituous, vinous or malt liquors and in the requirement of a license in the doing of the business, the legislature has the power to segregate and require a separate license for each article,[67] and this power the legislature may confer, by grant in the charter, on a municipality, even though the general statutes of the state in reference to licenses and the raising of revenue do not do so.[68] As a general rule municipalities have the right either to forego imposing license taxes at all,[69] or to impose them at any time of the year and for any length of time after the passage of the ordinance,[70] and this without the adoption of a budget.[71] They have the right to add interest and attorney's fees to the license in case of delinquency.[72] A mulct tax exacted from a saloon keeper as a condition of engaging in the liquor business is a tax.[73] The amount of the tax is entirely statutory.[74] In North Carolina a distiller who also operates a rectifying plant is subject to the tax imposed on rectifiers of liquor.[75] In Louisiana a parish having voted no license and a town in the parish having voted license, the police jury has no authority to levy a license tax on the sale of spirituous liquors within the limits of the town,[76] and the power of the parish can be restored only by a vote of the people of the parish.[77]

Application for and granting of license.[78]—No man has a right to a liquor license;[79] he has only the right to apply for a license to the legislature or its delegate.[80] The proceeding to obtain a license is generally held to be a judicial proceeding in the nature of a civil action,[81] the power to grant the license being ordinarily vested in a court, board or municipality.[82] The exercise of such power is ordinarily held

66. Gambill v. Erdrich Bros. [Ala.] 39 So. 297.

67. Gambill v. Erdrich Bros. [Ala.] 39 So. 297. A distiller operating a rectifying plant may be subjected to an increased tax. Arey v. Rowan County Com'rs [N. C.] 51 S. E. 41.

68. Gambill v. Erdrich Bros. [Ala.] 39 So. 297. Birmingham City Charter granting to the municipality full power to license, regulate or restrain the sale of spirituous, vinous or malt liquors, and declaring that the power to license, so conferred, may be used in the exercise of the police powers, as well as for the purpose of raising revenue, and that any person dealing in two or more of the articles so to be regulated, or engaging in two or more of the businesses, etc., for which a license may be required for each, shall take out a license for each line of business, authorizes a tax on the wholesale dealing in beer and another and separate tax for dealing at wholesale in other intoxicating liquors. Id.

69. City of New Iberia v. Moss Hotel Co., 113 La. 1022, 37 So. 913.

70. City of New Iberia v. Moss Hotel Co., 113 La. 1022, 37 So. 913. The fact that an ordinance adopted in 1903, imposing a license for 1904, was invalid, held not to impair power of municipality to pass an ordinance in May, 1904, imposing a license tax from and after July 1, 1904. Id.

71. So held as to the city of New Iberia. City of New Iberia v. Moss Hotel Co., 113 La. 1022, 37 So. 913.

72. City of New Iberia v. Moss Hotel Co., 113 La. 1022, 37 So. 913.

73. Cannot be recovered back when voluntarily paid under mistake of law. Ahlers v. Estherville [Iowa] 104 N. W. 453. The imposition of mulct taxes under Code, § 2433 et seq., is a tax and not a license, and is collectible by summary proceedings. Newton v. McKay [Iowa] 102 N. W. 827.

74. In Virginia one applying for the privilege of manufacturing liquors by fermentation or distillation from pomace for three months beginning Aug. 24th, must pay a tax of $50; Code 1904, § 2253, as amended by Laws 1904, p. 42, not repealing Code 1904, § 555, and the tax of $5 being for the privilege of manufacturing for three months, expiring April 30th. Shiflett v. Grimsley [Va.] 51 S. E. 838.

75. Acts 1903, pp. 340, 341, c. 247, §§ 60, 63 construed. Arey v. Rowan County Com'rs [N. C.] 51 S. E. 41.

76, 77. Evans v. Police Jury of De Soto Parish [La.] 38 So. 555.

78. See 4 C. L. 258, et seq.

79, 80. Fanning's License, 23 Pa. Super. Ct. 622. See, also, ante, § 1.

81. Bryan v. De Moss, 34 Ind. App. 473, 73 N. E. 156.

82. Under Ky. St. 1903, § 3637, subsec. 4, authorizing a city of the fifth class to license such sales as are not "now forbidden by law," and § 2558 providing that local option prohibition shall not apply to wholesalers, held, such a city could impose a li-

to be a judicial act,[83] though the contrary is held in some states;[84] but in no case can such discretion be arbitrarily used.[85] In the absence of valid special legislation, general statutes govern the issuance of a license by a political subdivision.[86] Municipal ordinances must comply with statutory provisions,[87] and must not be unreasonable in their requirements.[88]

Applications.[88a]—As a general rule the application must show that the applicant is a citizen of the United States,[89] and a defect in this regard cannot be cured by a supplemental affidavit of the applicant.[90] It must also specifically describe the location of the place where he desires to carry on the business.[91] The granting of an amendment to the application is purely discretionary,[92] the cases being exceptional where an amendment is justified.[93] An executor with power to sell and authorized, as agent, to rent the premises and take exclusive charge of them is not the duly authorized agent of the owner for the purpose of signing a petition for a license.[94] In Pennsylvania it is not necessary that the good character and temperate habits of the applicant shall be averred in the petition or certified to by twelve reputable qualified electors;[95] but the court has jurisdiction to entertain the application and grant the license upon satisfactory proof of the temperate habits and good moral character of the applicant and of other essential facts.[96] In order that the license may be valid, notice of the application must be given in good faith[97] and in the manner required by law.[98] Posting being required, it must be done in the

cense upon wholesale liquor dealers. Cofer v. Commonwealth [Ky.] 87 S. W. 264.

83. Whissen v. Furth [Ark.] 84 S. W. 500. The discretion vested in the probate judge is a judicial discretion to be exercised only with reference to the facts and circumstances of each case after a full hearing. State v. Durein [Kan.] 80 P. 987. See, also, Fanning's License, 23 Pa. Super. Ct. 622.

84. County Court v. Virginia-Pocahontas Coal Co. v. McDowell County Court [W. Va.] 51 S. E. 1; State v. Williams [Ala.] 39 So. 276.

85. A county court must treat alike all applicants possessing the legal qualifications, and it cannot license favored persons and exclude others possessing similar qualifications. Kirby's Dig. § 5120 considered. Sarlo v. Pulaski County [Ark.] 88 S. W. 953.

86. The general statutes applicable to the issuance of a license to sell intoxicating liquors obtain in Mobile county. State v. Williams [Ala.] 39 So. 276.

87. An ordinance relative to a city license for the sale of intoxicating liquor held to sufficiently comply with the provisions of Rev. Pol. Code, § 2854. City of Centerville v. Gayken [S. D.] 104 N. W. 910.

88. An ordinance of a city having more than 2,000 inhabitants requiring an applicant for a license to yearly procure a petition signed by two-thirds of the qualified petitioners in the entire city is void for unreasonableness. State v. McCammon [Mo. App.] 86 S. W. 510.

88a. See 4 C. L. 259, 260.

89. A petition stating that applicant is a citizen of the United States and that he was born in Ireland, without more is fatally defective. Walsh's License, 24 Pa. Super. Ct. 87.

90. Walsh's License, 24 Pa. Super. Ct. 87.

91. Where streets were named and blocks numbered but houses not numbered, an application describing the place at which the liquors are to be sold as "No. —— Street in the City of G., County of S., State of T.," is sufficient. Douthitt v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 7, 87 S. W. 90. An application describing the place of business as "at No. G. Building in the town of H., County of H., and part of lots No. 11 and 12 in block No. 3, division one," does not necessarily embrace two separate places of business. Cox v. Thompson [Tex. Civ. App.] 85 S. W. 34. Remonstrants not being misled, a description of the premises as follows: "That certain storeroom and dwelling containing storeroom, three rooms and cellar and occupied last year as a wholesale liquor store by your petitioner situate in the eleventh ward, Pittsburg, in said county," being held sufficient. Walker's License, 24 Pa. Super. Ct. 90. An application for a license describing the premises where the business was to be conducted as the lower floor of the front room of a building on a certain street corner, held insufficient, under Burns' Ann. St. 1901, § 7283a, requiring the application to specifically describe the room. Mace v. Smith [Ind.] 72 N. E. 1135. Description describing property as at the corner of two streets without specifying corner is defective. Cramer's License, 23 Pa. Super. Ct. 596.

92, 93. Cramer's License, 23 Pa. Super. Ct. 596.

94. In re McCay, 93 N. Y. S. 401.

95, 96. Sauers's License, 23 Pa. Super. Ct. 463.

97. Where citizens testified that though they looked for notices they saw none and the applicant testified that he went out after dark and put up the notices, held not posted in good faith. Commonwealth v. Redman [Ky.] 88 S. W. 1073.

98. Commonwealth v. Redman [Ky.] 88 S. W. 1073. Under Burns' Ann. St. 1901, § 7278, one publication of the notice in a news-

manner that other notices of like character are posted,[99] and the notice must be securely fastened.[1] The applicant must show that he possesses the character and fitness required by the statute, and, in the event of a contest, the burden of proof is on him.[2] If previously of bad character, the burden is upon him to show that he has reformed.[3] An habitual violator of the laws is not within the meaning of statutes requiring the applicant to be of "good moral character;"[4] but the mere fact that in the past the applicant has habitually violated the laws will not prevent his having a "good moral character" if the evidence shows a real reformation.[5] This restored good moral character is not proved by a mere cessation from violations of the law induced by bench warrants and burning orders.[6] In South Dakota a city council may determine the applicant's unfitness from the personal knowledge of its members and may deny the application without further investigation and without stating the reasons on which their action is predicated.[7] The applicant must intend to use the license legally and in good faith.[8] A license will not issue to sell liquor on property in the title to which there is a restriction against the selling of liquor on the premises.[9] In Arkansas the county court, before granting a license, must determine whether a majority of the votes of the county have been cast in favor of license or not,[10] and while the finding of the court is not conclusive, yet it cannot be overturned by an abstract of the vote filed by the election commissioners, the certificate to which does not cover the vote on the question of license.[11] The issuance of a license by it raises a presumption that the judge found that the majority of the votes were cast in favor of license,[12] and testimony of election commissioners in the negative is incompetent, in the absence of a showing that the original returns of the election could not be procured.[13] The license should be granted immediately after the expiration of the statutory time relative to notices, etc.[14]

Remonstrances.[14a]—A private citizen may appear as remonstrant against a petition for a liquor license,[15] and in those states wherein the court, in denying or granting the license, exercises a judicial discretion, may appeal from an adverse decision.[16] One's signature to a remonstrance may be made by a duly authorized attorney[17] on a typewriter.[18] A remonstrator may revoke his signature within the time limited by law,[19] and having revoked his signature within such time, he cannot be counted.[20]

paper of the class designated at least 20 days before the meeting of the board is sufficient. Perdue v. Gill [Ind. App.] 73 N. E. 844. The publication of the list of applicants in Lycoming county is governed by general Act of July 30, 1897 [P. L. 464], and not by the local act of April 10, 1873. Sun & B. Pub. Co. v. Bennett, 26 Pa. Super. Ct. 243.

99, 1. Commonwealth v. Redman [Ky.] 88 S. W. 1073.

2, 3, 4, 5, 6. Whissen v. Furth [Ark.] 84 S. W. 500.

7. Rev. Pol. Code, §§ 2855, 2857 construed. McCormick v. Pfeiffer [S. D.] 103 N. W. 31. A city council may, on its own knowledge refuse one having a county license, a city license. City of Centerville v. Gayken [S. D.] 104 N. W. 910.

8. Application for wholesale license refused where it appeared that applicant under the cover of the one license intended to run a wholesale liquor business and a bottling works. Ferch's License, 27 Pa. Super. Ct. 92.

9. Fanning's License, 23 Pa. Super. Ct. 622.

10. State v. Songer [Ark.] 88 S. W. 903.

11. Certificate merely certified as to votes cast for candidate for office. State v. Songer [Ark.] 88 S. W. 903.

12, 13. State v. Songer [Ark.] 88 S. W. 903.

14. Under Rev. St. 1899, § 2993 and § 2997, as amended by Laws 1901, p. 142, a petition cannot be allowed to lie idle for months after the expiration of the 10 days and a license then granted for a term of six months from the date of granting. State v. Mulvihill [Mo. App.] 88 S. W. 773.

14a. See 4 C. L. 261.

15, 16. Whissen v. Furth [Ark.] 84 S. W. 500.

17, 18. Ardery v. Smith [Ind. App.] 73 N. E. 840.

19. A remonstrator may by some affirmative act of his own withdraw his name at any time prior to the jurisdictional period of three days before the first Monday of the month in which the application is to be heard. So held where remonstrance was filed by an attorney in fact. Davis v. Affleck, 34 Ind. App. 572, 73 N. E. 283.

Any act of a remonstrator which evinces an intention or desire to withdraw from the remonstrance constitutes an affirmative act within the meaning of the decided cases.[21] As a general rule the remonstrance need not state that it is signed by the required number or that the remonstrants are qualified to sign.[22] Defects in the remonstrance may be cured by reference to the application.[23] The remonstrance alleging a ground for refusing the license, it is error for the court or board to refuse to try the issue thus made.[24]

Appeal and the like.[24a]—In those states wherein it is held that the exercise of the power to grant the license is not a judicial act, prohibition will not lie,[25] nor can the exercise of the power be reviewed by a bill in equity;[26] but mandamus will lie,[27] the procedure being entirely statutory.[28] Certiorari cannot take the place of mandamus to compel the making of a record or part of a record which the inferior tribunal should have made.[29] A judge wrongfully refusing to issue a license is liable for the cost of subsequent mandamus proceedings.[30] In the absence of express statutory provisions, the right to an appeal is dependent upon whether the granting body exercises a judicial discretion or not; if its act is a judicial one, an appeal lies.[31] In some states an appeal to an intermediate appellate court is not tried de novo,[32] and unless an appeal is taken therefrom, the judgment of such court is a final disposition of the cause.[33] In Nebraska in order to take an appeal from such decision a motion for a new trial is unnecessary.[34] Upon appeal, the record being regular, it is presumed that the court below had due regard to the number and character of the petitioners and that the license was refused for a legal reason and not arbitra-

20. Davis v. Affleck, 34 Ind. App. 572, 73 N. E. 283.

21. Davis v. Affleck, 34 Ind. App. 572, 73 N. E. 283. Instrument whereby signers withdrew their signatures from all remonstrances which had been or might thereafter be signed by any agent or attorney in fact, held sufficient to revoke signatures. Id.

22. Under Laws 1895, p. 251, c. 127, § 9, providing that a remonstrance shall be signed by a majority of the legal voters of the township or ward, the remonstrance need not state that it is signed by a majority or that the signers are legal voters of the township or ward. Bryan v. De Moss, 34 Ind. App. 473, 73 N. E. 156.

23. An application being for a license to sell intoxicants in a specific ward, a remonstrance against issuing a license to the applicant to sell intoxicants "in said aforesaid ward" is sufficient. Bryan v. De Moss, 34 Ind. App. 473, 73 N. E. 156; Bryan v. Jones, 34 Ind. 701, 73 N. E. 1135. [In the former case Wiley, J., dissents from this proposition, stating that in his opinion the lower court should have allowed an amendment; in the latter case he gives his reasons for dissenting.]

24. Under Burns' Ann. St. 1901, § 7278, providing for a remonstrance where the applicant is immoral or unfit to be intrusted with the privilege, held error for a court to refuse to try the issue on a remonstrance alleging a prior violation of the law by the applicant. Ardery v. Smith [Ind. App.] 73 N. E. 840.

24a. See 4 C. L. 261.

25. This is true whether the granting body acts within or beyond the power conferred on it. Virginia-Pocahontas Coal Co. v. McDowell County Court [W. Va.] 51 S. E. 1.

26. Under Code Pub. Loc. Laws, art. 24, as amended by Acts 1896, p. 717, c. 411, it is for the clerk of the circuit court to determine whether the law has been complied with by the applicant, and his action in refusing a license cannot be reviewed by a bill in equity. Fooks v. Purnell [Md.] 61 A. 582.

27. State v. Williams [Ala.] 39 So. 276. So held where applicant was qualified and had complied with proper prerequisites. State v. McCammon [Mo. App.] 86 S. W. 510.

28. Kirby's Dig. § 4481 requires 10 days notice after filing petition for mandamus to compel the mayor and recorder of a town to issue a license. Moody v. Rogers [Ark.] 85 S. W. 84.

29. In certiorari to remove to the St. Louis court of appeals the record of the excise commissioner in relation to granting a dramshop license, the court on suggestion of a diminution of the record cannot compel the commissioner to make a record of certain alleged findings and certify them as part of the record. State v. Mulvihill [Mo. App.] 88 S. W. 773.

30. So held as regards a probate judge. Hudgins v. State [Ala.] 39 So. 717.

31. Whissen v. Furth [Ark.] 84 S. W. 500.

32. Appeals to the circuit court from orders of the county court denying a license must be tried on the evidence heard in the county court. Holmes v. Robertson County Court [Ky.] 89 S. W. 106.

33. Paden v. Carson [Okl.] 82 P. 830. After a decision of the board granting a license has been reversed by the district court and the license denied and ordered revoked, there is no authority in the county board to rehear the cause on the same petition and notice, and, after hearing additional testimony, regrant a license. Id.

34. Lee v. Brittain [Neb.] 104 N. W. 1076,

rily.[35] The decision of the lower court will not be disturbed on appeal unless manifestly erroneous.[36] The validity of particular statutes, granting the right to appeal, is shown in the notes.[37]

Renewals are not as a matter of right.[38] An order granting a renewal need not recite the making of the previous order or the granting of a previous license.[39]

By accepting the license the licensee assents to its terms and conditions.[40] He is concluded by the order granting the license and it is original evidence against him in a subsequent prosecution for an illegal sale.[41] On such a prosecution he cannot collaterally attack the validity of his license.[42]

Power to condition grant.—A delegate of the power having the right to refuse license, it may make the grant of the license conditional.[43]

Bonds.[44]—A liquor dealer's bond is statutory and must conform substantially to statutory requirements,[45] but it will be construed so as to carry into effect the intention of the parties if fairly ascertainable from the terms of the obligation;[46] but being defective there is a conflict as to whether it may be enforced as a common-law obligation.[47] In most states the licensing board is limited to a determination of the sufficiency of bonds tendered in compliance with the law.[48] The validity of the bond is not affected by defects in the license or the application therefor,[49] nor by the fact that the taxes were not paid in advance at the time of the issuance of the

following Bennett v. Otto [Neb.] 94 N. W. 807.

35. Shearer's License, 26 Pa. Super. Ct. 34. Record being regular, an appellate court will not reverse the order because names of remonstrants were duplicated. Id.

36. Cramer's License, 23 Pa. Super. Ct. 596.

37. The provisions of the statute of Kansas authorizing an appeal and proceeding in error from the action of the probate judge in refusing a permit are valid and afford ample remedies to those who are wrongfully denied such permits. State v. Durein [Kan.] 80 P. 987.

38. Rev. Laws, c. 100, § 20, as amended by St. 1902, p. 122, c. 171, authorizing the surrendering and cancellation of a license and the issuance of a license for the unexpired term, does not give a licensee any right with reference to the granting of future licenses after the expiration of the term. Tracy v. Ginzberg [Mass.] 75 N. E. 637.

39. State v. Mulloy [Mo. App.] 86 S. W. 569.

40. Terms as to revocation. Malkan v. Chicago, 217 Ill. 471, 75 N. E. 548.

41. State v. Barnett, 110 Mo. App. 592, 85 S. W. 613.

42. On a prosecution for violating the Sunday law, defendant cannot question the validity of his license by attacking the order or judgment of the county court granting the same. State v. Mulloy [Mo. App.] 86 S. W. 569.

43. County court may impose a condition providing for revocation upon violation of the law. Sarlo v. Pulaski County [Ark.] 88 S. W. 953.

44. See 4 C. L. 262.

45. State v. Harper [Tex.] 86 S. W. 920, rvg. [Tex. Civ. App.] 85 S. W. 294. The statute requiring at least two sureties, a bond with only one surety is invalid. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818. A bond conditioned that the principal "shall faithfully observe and comply with all the laws relating to * * * intoxicating liquors and especially with the requirements of Act 25th Gen. Assem. p. 63, c. 62," held enforceable, though the act referred to was repealed or superseded by Code 1897 before the bond was executed. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446.

46. State v. Harper [Tex.] 86 S. W. 920, rvg. 85 S. W. 294. A bond reciting that H. & G. desire to engage in the liquor business, and that they are the principals and signed by them is valid, though conditioned only that H. shall conform to the statute. Id.

47. It may be so enforced. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446. It cannot be so enforced. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818.

48. So held under Comp. Laws § 5386. It cannot require more than two sufficient sureties. Power v. Common Council of Litchfield [Mich.] 12 Det. Leg. N. 484, 104 N. W. 664. Where common council of a village after adopting a resolution requiring four sureties rejected a bond in proper form with two sureties, held, it was shown that it had not attempted to determine, as expressly required by Comp. Laws, § 5386, the sufficiency of the bond. Id. In such case a finding that the common council acted in good faith in determining that the bond did not comply with its resolution requiring four sureties is immaterial. Id.

49. Is not rendered void by issuance of license without a written application (State v. Harper [Tex. Civ. App.] 87 S. W. 878), or by the filing of the same after the issuance of the license (Id.). Is not rendered void because the application in describing the place of business includes two separate places. Cox v. Thompson [Tex. Civ. App.] 85 S. W. 34. That the license, in violation of a statutory requirement, fails to designate the place where the liquor is to be sold does not invalidate the bond. Douthit v. State [Tex.] 83 S. W. 795. Failure of a purchaser

license,[50] nor because the obligation of the bond exceeds the legal requirements.[51] The bond is a contract, the sum stated therein being in the nature of liquidated damages.[52] In Iowa the principal and surety on the bond are liable for the full tax for the quarter in which the former commenced business.[53] A brewing corporation may become liable as surety upon a liquor license bond executed by it to induce the licensee to lease a building from it and deal exclusively in its products.[54] In some states the sureties must be freeholders.[55] Ordinarily neither the death of the principal[56] nor the failure of the public authorities to collect the tax when due[57] will discharge the surety. The surety on a bond under the Iowa mulct law cannot escape liability for taxes accruing after the principal fails to pay the tax on the ground that after such failure the principal is no longer operating under the mulct law.[58] The principal in the bond is deemed to have agreed with his surety that he will conduct the business in accordance with statutory requirements and that he will save the surety from any liability on the bond,[59] and this rule applies to an undisclosed principal.[60]

Payment and collection of fee or tax.[61]—The license fee must be paid in cash.[62] Taxes voluntarily paid under a mistake of law cannot be recovered back.[63] In Iowa a liquor dealer failing to pay the mulct tax the county may proceed by action on his bond,[64] and by criminal prosecution for illegal sales made after the tax became due and unpaid;[65] but such tax is not a personal obligation of the owner of the property, and cannot be enforced by an action at law against him.[66] Though one half of the tax goes to the town in which the saloon is located, the entire tax is payable to the county treasurer.[67] In Pennsylvania where the county treasurer has received moneys belonging to a city as the proceeds of liquor licenses, the city may

of an unexpired license to have the transfer made on the books of the issuing officer and to file an application designating the particular house in which he proposes to conduct his business, and to have such designation made in the license, does not render his bond void. Rev. St. 1895, articles 5056, 5057 construed. Faulkner v. Cassidy [Tex. Civ. App.] 13 Tex. Ct. Rep. 366, 87 S. W. 904.

50. State v. Harper [Tex. Civ. App.] 87 S. W. 878.

51. Validity is not affected because purporting to bind the heirs and legal representatives of the obligors. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

52. City Trust, Safe Deposit & Surety Co. v. American Brewing Co. [N. Y.] 74 N. E. 948. Are assessable before clerk or before the court below under Code Civ. Proc. § 194. Id.

53. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446.

54. So held where the corporation was incorporated to do a general business of manufacture and sale of intoxicating liquors, and to erect suitable buildings for the carrying on of the business to buy, sell, lease, rent, exchange or otherwise handle real estate, and the execution of deeds, leases, bonds, etc. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046.

55. Laws 1895, p. 122, c. 22 is ineffectual as an amendment or repeal of Cobbey's Ann. St. 1903, § 7155. Lee v. Brittain [Neb.] 104 N. W. 1076, following Fidelity & Deposit Co. v. Libby [Neb.] 101 N. W. 994.

56. The liability of the principal and sureties on a liquor dealer's bond conditioned for the payment of judgments for civil damages growing out of unlawful sales is not destroyed by the death of the principal. Bond given under Burns' Ann. St. 1901, § 7288 construed. State v. Soale [Ind. App.] 74 N. E. 1111.

57, 58. O'Brien County v. Mahon, 126 Iowa, 536, 102 N. W. 446.

59, 60. City Trust, Safe Deposit & Surety Co. v. American Brewing Co. [N. Y.] 74 N. E. 948.

61. See 4 C. L. 263.

62. A resolution of a city council under which a liquor dealer gave the city his note on an understanding that he might carry on the liquor business until the maturity of the note, when a license was to be issued, held illegal and the note void. Meyer-Marx Co. v. Ensley [Ala.] 37 So. 639.

63. Where a city had not complied with all the requirements of the mulct law, but plaintiff, without looking the matter up, relied upon the fact that other saloons were being operated and paid the tax, held, it could not be recovered back. Ahlers v. Estherville [Iowa] 104 N. W. 453.

64. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446; Carroll County v. Ley [Iowa] 103 N. W. 101.

65. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446.

66. Code, § 2432 construed. Carroll County v. Ley [Iowa] 103 N. W. 101.

67. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446.

maintain a suit on the treasurer's bond in the name of the county to its own use,[68] and the fact that the money was not received by the treasurer within six years of the commencement of the suit is not a defense, since the obligation to pay is secured by a sealed instrument.[69] All questions referring to the settlement of the county treasurer's accounts respecting the proportion of license taxes payable to cities, boroughs and townships must be determined by the courts.[70] A borough has a right to receive its proportion of the money collected for retail liquor licenses without abatement for commissions to the county treasurer,[71] and if the treasurer deducts such percentage and pays over the balance receiving a receipt therefor, such receipt is merely for payment on account, and the borough may subsequently recover the amount retained.[72] In some states the tax is made a lien on the property in which the traffic is conducted.[73] Such statutes are not unconstitutional, even though the property owner is given no notice of the proceedings and is afforded no opportunity to be heard with reference thereto.[74] Having had all the required notice, the fact that the property owner did not have knowledge of sales of liquor on his premises until after the time within which he might have applied to the board for remission of the tax is immaterial.[75]

Scope and effect of license.[76]—A license is not a contract,[77] but is a mere personal privilege which may be canceled at any time.[78] Its protection extends to employes of the licensee,[79] but is limited by the scope of the license.[80] It affords no protection against a prosecution for a sale in a prohibited territory,[81] nor does it protect the holder from the consequences of unlawful practices on the premises and persons so offending may be liable to a property owner individually damaged.[82]

Surrender, transfer or revocation of license.[83]—A license is not a contract,[84]

68. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. By failing to pay over the money the treasurer fails to perform the condition of his bond requiring him to "faithfully perform the duties of his office." Id.

69. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406.

70. Cannot be referred to county auditors. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. Hence a county treasurer cannot set up against a claim of a city for its proportion of such taxes, an adjudication by the county auditors. Id.

71. Stroudsburg Borough v. Shick, 24 Pa. Super. Ct. 442. The county commissioners have no authority to permit the treasurer to deduct a specified percentage from such moneys. Id.

72. Stroudsburg Borough v. Shick, 24 Pa. Super. Ct. 442.

73. In Ohio this lien is superior to that of a mortgage given and duly entered of record prior to the entry of such tax on the duplicate and prior to the beginning of such traffic on the premises. Pioneer Trust Co. v. Stich, 71 Ohio St. 459, 73 N. E. 520. Such priority is not affected by the fact that at the date of such mortgage no sale of liquor was ever known to have taken place on the premises; that the premises were not adapted to the traffic; that the mortgagee had no knowledge at any time of any sale of liquor thereon, or of any intention to sell on the part of anyone; and that he loaned the money in good faith, and had no reason to suspect or fear that any sales of liquor would ever be made on the mortgaged premises. Id.

74. Code, § 2433 et seq. held valid. Newton v. McKay [Iowa] 102 N. W. 827.

75. Newton v. McKay [Iowa] 102 N. W. 827.

76. See 4 C. L. 263.

77. Sarlo v. Pulaski County [Ark.] 88 S. W. 953.

78. Sarlo v. Pulaski County [Ark.] 88 S. W. 953; Barnett v. Pemiscot County Court [Mo. App.] 86 S. W. 575; Tracy v. Ginzberg [Mass.] 75 N. E. 637.

79. State v. Barnett [Mo. App.] 86 S. W. 572.

80. A municipal license authorizing the maintenance of a saloon at a certain street and number does not entitle the licensee to run one saloon in the basement of the building and another entirely independent saloon, having a separate street door and no inside connection on each floor. Malkan v. Chicago [Ill.] 75 N. E. 548. A certificate issued under Laws 1896, p. 51, c. 112, § 11, subd. 1, as amended by Laws 1897, p. 210, c. 312, § 6, does not authorize the sale of liquors in any other part of the hotel building than the single room described. In re McCoy, 93 N. Y. S. 401. A licensed wholesale liquor dealer who gives an agent one quart of whiskey for each sale by the agent of five gallons of liquor is as to such quart guilty of retailing liquor without a license. Friedman v. Commonwealth, 26 Ky. L. R. 1276, 83 S. W. 1040.

81. Brame v. State [Ala.] 38 So. 1031. A license to sell in a prohibited district is void. State v. Fulkerson [Ark.] 83 S. W. 934.

82. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039.

83. See 4 C. L. 263.

but is a mere personal privilege;[85] hence it is revocable at the will of the granting body[86] whether the license so provides or not,[87] without trial or notice.[88] In the absence of statutory provisions the license is nontransferable[89] and nonassignable.[90] In some states a license is, with the consent of the granting body, transferable.[91] The application for a transfer in such case is addressed to the sound legal discretion of such body,[92] and the exercise of such discretion will not be interfered with on appeal unless clearly abusive.[93] A request from a licensee to transfer his license applies only to the existing license and not to a renewal thereof.[94] Money paid to procure a bankrupt licensee and his trustee to procure the nomination of the payor as the bankrupt's successor belongs to the bankrupt's creditors.[95] A licensee while holding himself out as the responsible owner of the business is liable on the contracts of one whom he permits, by secret agreement, to trade independently under the license.[96] One may become estopped to object that a license is not transferable,[97] or to deny the authority of the transferror to act as agent for a former owner.[98] In revoking a license the court is generally held to act in an administrative and ministerial capacity,[99] and hence no appeal lies from a judgment of revocation.[1] Revocation being in the exercise of the executive powers of a municipality, the action is not reviewable by certiorari,[2] though the converse is true if the authorities act judicially.[3] The licensee keeping a disorderly house[4] or running two saloons under one license,[5] the latter may be revoked. A city has power, under its general welfare clause, to pass an ordinance making a conviction of the licensee, by a court of com-

84. Sarlo v. Pulaski County [Ark.] 88 S. W. 953. See 3 C. L. 263, n. 93.

85. Sarlo v. Pulaski County [Ark.] 88 S. W. 953; Tracy v. Ginzberg [Mass.] 75 N. E. 637; Barnett v. Pemiscot County Court [Mo. App.] 86 S. W. 575. See 3 C. L. 263, n. 95.

86. Sarlo v. Pulaski County [Ark.] 88 S. W. 953; Barnett v. Pemiscot County Court [Mo. App.] 86 S. W. 575.

87. Borck v. State [Ala.] 39 So. 580.

88. Carr v. City Council of Augusta [Ga.] 52 S. E. 300.

89. Tracy v. Ginzberg [Mass.] 75 N. E. 637; Young v. Stevenson [Ark.] 86 S. W. 1000; Sawyer v. Sanderson [Mo. App.] 88 S. W. 151. Where licensee sold out, the bill of sale reciting that the transfer was of all the seller's goods, license, good will, etc., and the business was conducted by the purchaser in the seller's name, held to constitute a transfer of the license. Id. Where a liquor dealer sold his stock and appointed the purchaser his agent, with power to sell liquor under the seller's license, the purchaser could not do business thereunder. Young v. Stevenson [Ark.] 86 S. W. 1000.

90. Tracy v. Ginzberg [Mass.] 75 N. E. 637.

91. The granting of a license to the occupant of premises owned by another does not entitle the owner to demand as a pure legal right that the license be transferred to him upon the removal, whether voluntary or by compulsion, of the licensee from the premises. Stern's License, 27 Pa. Super. Ct. 538.

92, 93. Stern's License, 27 Pa. Super. Ct. 538.

94. Mydosh v. Bayonne [N. J. Law] 60 A. 1111.

95. Is not property received by the trustee to the use of one whose principal had advanced money to pay for the license. Tracy v. Ginzberg [Mass.] 75 N. E. 637.

96. Ruane v. Murray, 26 Pa. Super. Ct. 187.

97. Mortgagee of liquor license held estopped to enjoin sale after default on the ground that the license could not be conveyed. It appeared that the license was transferable. Sullivan v. Bailey, 21 App. D. C. 100.

98. In an action on a liquor dealer's bond where it appeared that defendant accepted an unexpired license and executed a bond and under the authority thereof pursued the occupation, held, he was estopped to deny the authority of the one who made the transfer of the license as agent for the former owner. Faulkner v. Cassidy [Tex. Civ. App.] 13 Tex. Ct. Rep. 366, 87 S. W. 904.

99. State v. Kirk [Mo. App.] 86 S. W. 1099. Barnett v. Pemiscot County Ct. [Mo. App.] 86 S. W. 575.

1. State v. Kirk [Mo. App.] 86 S. W. 1099; Barnett v. Pemiscot County Ct. [Mo. App.] 86 S. W. 575. Rev. St. 1899, §§ 3017, 3018, providing that in the event a dramshop keeper is convicted in the circuit court of any one of the several offenses therein defined, he shall, in addition to a fine, forfeit his license, do not change the rule. Id. Refusal of the county court to grant an appeal from an order revoking a license does not authorize a subsequent sale by the former licensee or his employe. State v. Barnett [Mo. App.] 86 S. W. 460.

2. Carr v. City Council of Augusta [Ga.] 52 S. E. 300.

3. Carr v. City Council of Augusta [Ga.] 52 S. E. 300. Where a city ordinance provided for the revocation of a license on conviction of the licensee for a violation of the law, held, the city council acted in a judicial capacity in revoking the license. Id.

4. State v. Barnett [Mo. App.] 86 S. W. 460.

5. Revocation in such case is not arbitrary. Malkan v. Chicago [Ill.] 75 N. E. 548.

petent jurisdiction, for violating the liquor laws ground for revocation,[6] and an ordinance requiring the clerk of the city council to submit to the council "each and every conviction," contemplates that evidence of the conviction shall be submitted by the clerk.[7] A city council cannot justify a revocation under a general power to revoke at pleasure where it appears from the resolution of revocation that the same was passed under the authority of an ordinance declaring a given act to be cause for revocation.[8] A criminal prosecution does not bar a proceeding to revoke the license on the same evidence,[9] nor does an appeal in such prosecution stay the judgment of revocation.[10] By acquiescence one may waive the fact that the proceeding to forfeit was not embraced in the call of a called term.[11] In New York a liquor tax certificate is subject to cancellation in the hands of a bona fide transferee for violations of the law by the original owner.[12]

Sale without license, or without paying tax.[13]—The offense of selling without a license cannot be properly charged against one selling liquors in territory where prohibition exists under a valid statute;[14] but the rule is otherwise if the statute attempting to provide for prohibition is unconstitutional.[15] Want of authority in the municipal officers to issue a license does not authorize selling without a license or prevent such conduct from being criminal;[16] but a city licensee being wrongfully refused a state license may make sales without being liable to conviction for selling without a license.[17] It is competent for the legislature to provide that one violating the conditions of his license shall be guilty of selling without a license.[18] A city ordinance providing that any person who shall sell or otherwise dispose of any liquors without a license shall be fined is sufficient to include wholesale traffic.[19] In order to constitute the offense, the liquor must be intoxicating.[20] A license protects the licensee's employes.[21] A distiller is not entitled to sell liquor manufactured by him during the term of his license after such term has expired.[22] A brewing company may accept orders in a county in which it has no license and may deliver to the persons ordering.[23] Unless he have a license therefor, a wholesale seller at retail is guilty of selling without a license.[24] In most states a club steward need not have a license.[25] The constructions placed upon various statutes will be found in the notes.[26]

§ 4. *Regulation of traffic.*[27] *Dispensary system.*[28]—A municipality in con-

6, 7, 8. Carr v. City Council of Augusta [Ga.] 52 S. E. 300.

9, 10, 11. State v. Barnett [Mo. App.] 86 S. W. 460.

12. Under Liquor Tax Law 1897, p. 228, c. 312, § 27, forbidding the transfer of a liquor tax certificate by any holder of a certificate who shall have violated the provisions of the liquor tax law. In re Cullinan, 93 N. Y. S. 492.

13. See 4 C. L. 264.

14, 15, 16. Edwards v. State [Ga.] 51 S. E. 630.

17. Under Ky. St. §§ 3704, 4203, it is the absolute duty of the clerk of the county court to issue such state license. Koch v. Commonwealth [Ky.] 84 S. W. 533.

18. Schiller v. State [Fla.] 38 So. 706.

19. Cofer v. Commonwealth [Ky.] 87 S. W. 264.

20. Rev. St. 1895, art. 5060a, construed. Ex parte Gray [Tex. Cr. App.] 83 S. W. 828.

21. State v. Barnett [Mo. App.] 86 S. W. 572.

22. Rev. Code 1852, amended in 1893, p. 420, c. 53, does not authorize such a sale. State v. McNett [Del.] 61 A. 869.

23. Ceraline Mfg. Co. v. Anthracite Beer Co., 25 Pa. Super. Ct. 94.

24. A licensed wholesale liquor dealer who gives an agent one quart of whisky for each sale by the agent of five gallons of liquor is as to such quart guilty of retailing liquor without a license. Friedman v. Commonwealth, 26 Ky. L. R. 1276, 83 S. W. 1040.

25. A foreman of a gang of laborers selling beer to the laborers, without a license, taking payment either in cash or deducting the amount from their wages, the laborers having no title or interest in the beer, held guilty of selling without a license and not a club steward. Commonwealth v. Alfa, 24 Pa. Super. Ct. 454.

26. Chapter 346, p. 626, Gen. Laws 1905, construed, and the word "not" as used in the phrase "in quantities not less than five gallons" as used in § 2, omitted. State v. Bates [Minn.] 104 N. W. 709.

27. See 4 C. L. 265. What ordinances are

ducting a dispensary is exercising a governmental function[29] in the promotion of which public money may be lawfully invested and expended,[30] and the stock of liquors constitutes property used for municipal purposes within the meaning of exemption laws, even though profits may incidentally result to the municipality from the sale of such liquors.[31] In South Carolina the board of directors of the state dispensary have no power to close a county dispensary lawfully established.[32] In Connecticut a town agent has power to appoint suitable subagents when necessary to aid him in carrying on the agency.[33]

Permitting music in saloon.—That the music was allowed by an employe contrary to defendant's express instructions is no defense unless such instructions were given in good faith and not for the purpose of evading the law.[34] Rooms used in connection with the barroom are part of the dramshop.[35]

Prohibition of sale, gift or keeping open at certain times.[36]—Generally the owner of a saloon or dealer[37] in intoxicants is prohibited from keeping his place of business open for traffic[38] or selling liquor on Sunday,[39] and the statute imposing an affirmative duty upon him he is liable for a violation of the law by his employe, though contrary to his express instructions;[40] but if the statute imposes no such affirmative duty, he is not liable for the acts of his employe in violation of orders given in good faith and with the intention and expectation that they should be obeyed;[41] whether the orders were so given is a question for the jury.[42] One may

reasonable, see ante, § 1. Prosecutions for violation of law, see post, § 6 B.

28. For constitutionality of dispensary laws, see ante, § 1.

29, 30, 31. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016.

32. 24 Stat. at L. 485. State v. Board of Directors of State Dispensary, 70 S. C. 509, 50 S. E. 203.

33. Gen. St. §§ 2722, 2726, providing for a town agent in a no-license town of not more than 5,000 inhabitants, construed. State v. Marley [Conn.] 62 A. 85.

34. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

35. So held where there were three rooms all under one roof and separated by thin board partitions through which were door openings. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

36. See 4 C. L. 265. For the operation of general Sunday laws see Sunday, 4 C. L. 1589.

37. A partner is a "dealer" within the meaning of laws upon this subject (Morris v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 832), and is amenable to the law in his individual capacity (Id.).

38. Pen. Code 1895, art. 199, so construed. **Evidence** that defendant kept his place open on Sunday where his regular customers congregated held sufficient to sustain a conviction. Armstrong v. State [Tex. Cr. App.] 84 S. W. 827. Evidence that defendant permitted some acquaintances to enter his dramshop and drink spirituous liquors on Sunday held insufficient to sustain a conviction for keeping a tippling shop open on Sunday in violation of Rev. St. 1899, § 2243. State v. Meagher [Mo. App.] 89 S. W. 595. Where as soon as crowd entered, saloonkeeper ordered them out and there was no sale or attempted sale, held insufficient to warrant a conviction for violating an ordinance requiring Sunday closing. City of Vandalia v. Carracker, 116 Ill. App. 62. The unexplained fact of a saloon being open on Sunday is sufficient to justify a conviction of the keeper thereof for violating a statute requiring all saloons to be closed on Sunday. State v. Grant [S. D.] 105 N. W. 97.

39. Evidence that owner was seen on Sunday taking a bottle of beer into a billiard room adjoining his barroom where there were two men, held insufficient to warrant a conviction, defendant testifying that the liquor was for his own use and the two men were there to collect money due them. Tobin v. District of Columbia, 22 App. D. C. 482. Where witness left money on the bar, held, evidence was sufficient to show a violation of the Sunday law, though defendant claimed that he gave witness the whisky. Morris v. State [Tex. Civ. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 832. Evidence held sufficient to sustain a conviction under an ordinance prohibiting the opening of licensed saloons on the Sabbath. City of Duluth v. Abrahamson [Minn.] 104 N. W. 682.

Under a provision in an act that if the holder of a license to sell liquors sells at times forbidden by the act he shall be guilty of selling without a license, and the time forbidden is between 12 o'clock Saturday night and 12 o'clock Sunday night, the penalty is not for selling on Sunday as such, but for selling in violation of the license. Schiller v. State [Fla.] 38 So. 706.

40. Rev. Pol. Code, § 2847 construed. State v. Grant [S. D.] 105 N. W. 97. Liability of employer for acts of employe, see Clark & Marshall, Crimes [2d Ed.] p. 261. Liability of agent see same work, p. 267.

41. Botkins v. State [Ind. App.] 75 N. E. 298. Where defendant gave instructions to bartenders not to sell on Sunday, but, though he lived in a room adjoining the saloon, made no effort to see that his instructions were observed, held, evidence did not require the

be guilty of such a sale though he has no license[43] or his license is void.[44] Within the meaning of Sunday laws, liquor is merchandise.[45] A sale is unnecessary in order to constitute the offense of keeping open for the purpose of traffic on Sunday,[46] and it is immaterial whether the door stood open or was opened for ingress and egress to parties, and was closed as soon as they went in or out.[47] A single sale on Saturday, the liquor to be delivered on Sunday, does not constitute keeping one's place open for traffic on Sunday;[48] in such a case the fact that the seller violated some of the conditions of his bond does not authorize a conviction for violating the Sunday law.[49] That, owing to irregularities, the election is voidable, is no defense to keeping open on election day.[50] That a Sunday sale was to an officer of the law with his consent[51] and for the purpose of prosecution[52] does not justify the seller. When sale is made by the wife of accused, the presumption is that the wife acted as her husband's agent in so doing.[53] The fact that hotel or restaurant keepers can pursue their occupations on Sunday does not authorize them to furnish liquor with meals, the law prohibiting the sale of liquor on Sunday,[54] though by statute in some states an exception is made in favor of the proprietor of a hotel[55] who is allowed to serve liquor to guests[56] ordering meals.[57] A sale being shown, the burden is on defendant to show that he comes within this exception.[58] Whether sale of a lunch in connection with a purported gift of the liquor is in fact a sale of the liquor is a question for the jury.[59] Defendant's building not coming within the statutory definition of a hotel, the fact that an excise agent told him that it was sufficient to enable him to conduct business as a hotel keeper is no defense.[60]

Prohibition of sale in certain places.[61]—In some states the business must be carried on in one room, such room having but one entrance.[62] A door at the end

court to direct an acquittal. State v. Pierce [Mo. App.] 85 S. W. 663.

42. Botkins v. State [Ind. App.] 75 N. E. 298.

43. Rev. St. 1899, § 2243, prohibiting the keeping open of "any ale or porter house, grocery or tippling shop" on Sunday, provides for the punishment of a dramshop keeper, without license, who keeps his dramshop open on Sunday. State v. Meagher [Mo. App.] 89 S. W. 595.

44. Since Rev. Pol. Code, § 2847, requiring all saloons to be closed on Sunday, does not refer solely to legally licensed saloons, a saloon keeper may be convicted of violating the Sunday law though his license is void. State v. Grant [S. D.] 105 N. W. 97.

45. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

46. Griffith v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 9, 89 S. W. 832.

47. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

48, 49. Crawford v. State [Tex. Cr. App. 89 S. W. 1079.

50. So held where irregularities consisted in the publication of the notice in a newspaper instead of posting the same in three public places, as required by law. Sadler v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 12, 89 S. W. 974.

51, 52. Borck v. State [Ala.] 39 So. 580.

53. Trometer v. District of Columbia, 24 App. D. C. 242. Although husband and wife both testified that she had no authority from him to make the sale and that he had forbidden her to make sales at any time, and there is no affirmative testimony upon the subject of her agency, held proper for the trial court to refuse to direct a verdict for accused. Id.

54. Savage v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 702, 88 S. W. 351.

55. The fact that certain dwellers in a building pay a stipulated weekly or monthly sum for their entertainment does not deprive an establishment otherwise within the terms of the statute of its character as a hotel, as such word is defined in Liquor Tax Laws, § 31, subd. k. Cullinan v. Clark, 46 Misc. 188, 93 N. Y. S. 256.

56. Serving a sandwich costing five cents to a casual visitor who orders liquor does not constitute service to a guest. In re Cullinan, 45 Misc. 497, 92 N. Y. S. 802.

57. Where the evidence showed that liquor was sold on Sunday to persons who announced as their essential purpose the desire to procure liquor and did not desire a meal, a verdict for defendant was against the weight of the evidence, though there was evidence that defendant's waiters insisted on serving with the liquor some trifling refreshments, which were carried away again untasted. Cullinan v. O'Connor, 100 App. Div. 142, 91 N. Y. S. 628.

58. Cullinan v. O'Connor, 100 App. Div. 142, 91 N. Y. S. 628.

59. Savage v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 702, 88 S. W. 351.

60. Cullinan v. O'Connor, 100 App. Div. 142, 91 N. Y. S. 628.

61. See 4 C. L. 266.

62. Such a law is violated by the maintenance of a saloon having a barroom proper connected by a window with other rooms

of a long hall is not an entrance upon a public street.[63] A statute requiring the bar to be in plain view from the street, means plain view from the street or sidewalk when being used by pedestrians in the usual and ordinary way.[64] The use of an "L" or alcove, the space within which is not visible from the street, for a bar, does not constitute a violation of a requirement that retail liquor dealers must keep an open house in which no screen or other device is used to obstruct the view.[65] The laws of some states require that the saloon keeper obtain the consent of the owners of property lying within a certain distance of the building.[66]

Prohibition of sale or gift to certain persons.[67]—Inhibition of the gift of intoxicants to minors in local option territory is a proper exercise of the police power,[68] and such a law is not suspended by the adoption of local option.[69] Local option being in force, one cannot violate a statute prohibiting the sale of intoxicants to minors.[70] To be guilty of selling,[71] giving, or permitting liquor to be given,[72] one must have known or have had reasonable ground to believe that the purchaser was a minor. Allowing a minor to take the liquor without objection constitutes a gift.[73] A statute making it unlawful to give spirituous liquors to a minor without the consent of the latter's parent or guardian authorizes the giving of such consent only in cases of emergency, and a general permission is no defense to a prosecution under the statute.[74] Want of consent by a minor's parents may be inferred from the fact that they were at the time in a distant state, and the minor had been in the city where the saloon was located only a few days.[75] In some states minors are not permitted to enter or remain in a saloon; remaining in this case means loitering.[76] Such a law applies to children of the saloon keeper,[77] and excludes all questions of knowledge;[78] hence in an action for the breach of a bond in permitting

and also connected by a stairway with a basement in which liquors are kept and which in turn is connected with other rooms in the building and through them with a wide street by another and separate flight of stairs. Jones v. Byington [Iowa] 104 N. W. 473.

63. McColl v. Rally [Iowa] 103 N. W. 972.

64. McColl v. Rally [Iowa] 103 N. W. 972. A saloon conducted in the basement of a building with the bar so arranged that it commenced 35 feet from the nearest part of the sidewalk and the tops of the windows were but 4 feet above the walk, held, it did not comply with the law. Id.

65. So held where the dealer merely rented the place and the "L" was the most convenient place therein for the location of the bar. State v. Langran & Co. [Tex. Civ. App.] 87 S. W. 713.

66. Where saloon keeper could not obtain consent of property owners within 50 feet of one end of building and so he constructed a board partition 50 feet from that end of his room, leaving a dead, unoccupied and useless space between it and the wall, held, a mere subterfuge and that defendant did not comply with Code, § 2448, requiring the consent of property owners within 50 feet of the building in which a saloon is located. McColl v. Rally [Iowa] 103 N. W. 972.

67. See 4 C. L. 266.

68, 69. Stephens v. State [Tex. Cr. App.] 85 S. W. 797.

70, 71. Tracy v. State [Tex. Cr. App.] 85 S. W. 1056.

72. Under a statute providing that a liquor dealer shall not sell, give nor permit to be given any spirituous liquors to a minor, a liquor seller is not liable on his bond for permitting another to give liquor to a minor in his place of business where such seller in good faith believed the minor was over age. Holly v. Simmons [Tex.] 13 Tex. Ct. Rep. 811, 89 S. W. 776, rvg. 85 S. W. 325.

Evidence held sufficient to sustain a conviction of the offense of giving and furnishing intoxicating liquors to a minor. State v. Hawkins [Minn.] 104 N. W. 898.

73. Where defendant allowed minor to take liquor from him, without objection, at the suggestion of a third person, held guilty, though defendant did not offer the liquor to the minor. Parker v. State [Tex. Cr. App.] 84 S. W. 822.

74. Shannon's Code, § 6786 construed. Pressly v. State [Tenn.] 86 S. W. 378.

75. Krick v. Dow [Tex. Civ. App.] 84 S. W. 245.

76. A bond, executed under Rev. St. 1895, § 5060g, conditioned that the dealer shall not permit any minor to enter and remain in his place of business, is not breached by his permitting a minor to enter and remain momentarily in his saloon. Douthit v. State [Tex.] 83 S. W. 795.

77. Jones v. Byington [Iowa] 104 N. W. 473.

78. In an action against a liquor dealer for a sale to a minor, the use in an instruction of the word "knowingly" to qualify the word "permit," used in the statute making it a breach of the bond to permit a minor to enter or remain in a saloon, is error. Wakeham v. Price [Tex. Civ. App.] 89 S. W. 1093.

plaintiff's minor son to enter and gamble in the principal's saloon, evidence of the appearance of the minor[79] or of the existence of signs that minors were not allowed to remain in the saloon,[80] is immaterial. Bringing liquor out to one driving up to the saloon constitutes a sale in the seller's place of business.[81]

§ 5. *Action for penalties.*[82]—Statutes authorizing a recovery of liquidated damages by the person aggrieved in case of a breach of the bond are penal in their nature and should be strictly construed or at least should not be so liberally construed as to award damages in doubtful cases.[83] The amount in controversy for jurisdictional purposes is the damage claimed and not the number of breaches of the bond alleged.[84] An action to recover penalties purely statutory cannot be maintained on a bond good only as a common-law obligation.[85] Under a statute giving a right of action to the party aggrieved by a sale to a minor, no one has a right of action except the parent or some one standing in loco parentis.[86] The state may have successive recoveries on the bond until it is exhausted,[87] either by suits in its own behalf or by suits by the parties aggrieved,[88] and the state is not limited to a single penalty for all the violations prior to suit brought.[89] Recoveries for several breaches may be had in one action.[90] In Iowa the county may sue on the bond to recover an unpaid mulct tax[91] without first exhausting the property of the principal[92] and interest may be recovered on a quarterly instalment of mulct tax remaining unpaid.[93] Plaintiff must establish his case by a preponderance of the evidence.[94] In an action on a liquor dealer's bond, proof of breaches occurring a few months prior to the dates specified in the petition is sufficient to support the allegations.[95] The petition alleging several breaches of the bond and that each constituted a separate ground of recovery, plaintiff is entitled to recover under proof of any one of the breaches.[96] Cases dealing with the sufficiency of pleadings[97] and evidence[98]

79, 80. Krick v. Dow [Tex. Civ. App.] 84 S. W. 245.

81. Sale to an habitual drunkard. Douthitt v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 7, 87 S. W. 190.

82. See 4 C. L. 267.

83. Choate v. Vlha [Tex. Civ., App.] 14 Tex. Ct. Rep. 32, 89 S. W. 1082.

84. In an action on a liquor dealer's bond for selling liquors to a minor the petition laying the damages at $1,000 the county court has jurisdiction though the petition alleges five sales to the minor which fact would have entitled the plaintiff to damages in excess of the jurisdiction of such court. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

85. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818.

86. Uncle with whom orphan minor was living held not entitled to sue. Choate v. Vlha [Tex. Civ. App.] 14 Tex. Ct. Rep. 32, 89 S. W. 1082.

87. Under Rev. St. 1895, § 5060g. Douthit v. State [Tex.] 83 S. W. 795; Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839.

88. Rev. St. 1895, § 5060g. Douthit v. State [Tex.] 83 S. W. 795.

89. Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839.

90. Douthitt v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 7, 87 S. W. 190.

91, 92, 93. O'Brien County v. Mahon, 126 Iowa, 539, 102 N. W. 446.

94. Cox v. Thompson [Tex. Civ. App.] 85 S. W. 34.

95. Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839.

96. Wakeham v. Price [Tex. Civ. App.] 89 S. W. 1093. An instruction that the jury should find for defendant if they failed to find that there were any such violations "on said dates" held erroneous, in that the jury might have concluded that the plaintiff was required to prove all the breaches. Id.

97. In an action on a liquor dealer's bond to recover damages because of sales of liquor to plaintiff's husband after notice prohibiting the same, the petition showed that defendant was doing business under a license transferred to him by another, and that, on the day the transfer was made, defendant entered into the bond sued on for the sale of liquors at the place in which it was charged the sales in question took place and, when the bond was executed, defendant was selling liquor at that place and the bond recited that defendant desired to engage in the sale of liquors at the place where the sales in question were charged to have been made, held, the petition was sufficient on demurrer. Faulkner v. Cassidy [Tex. Civ. App.] 13 Tex. Ct. Rep. 366, 87 S. W. 904.

98. In an action on a liquor dealer's bond evidence held to show a violation of the provisions prohibiting a liquor dealer from permitting prohibited games to be played dealt, or exhibited in or about his place of business. Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839.

are shown in the notes. The general rules as to instructions[99] and harmless error[1] apply. Objections cannot be urged for the first time on appeal.[2] In Texas a judgment in favor of the state on a liquor dealer's bond does not bear interest.[3]

§ 6. *Criminal prosecutions. A. Offenses and responsibility therefor in general.*[4]—In the absence of statutory provisions to the contrary, the liquor sold must have been intoxicating,[5] and, as a general rule, must have been sold for use as a beverage.[6] Whether or not the sale is so made is a question of fact for the jury.[7] A statutory definition or enumeration, while conclusive,[8] is not exclusive, the intoxicating qualities of any other liquor being a question of fact.[9] Where the drunkenness is the effect of drugs contained in the preparation and not of any intoxicating

99. Where defendant admitted that if he sold the minor liquor he must have known he was a minor, an instruction that the act must have been knowingly done, held improper. Findley v. Holly [Tex. Civ. App.] 85 S. W. 24. In an action for permitting a minor to remain in a saloon, an instruction "that the term 'remain' is not to be given its restricted sense, but means rather, something that exists and continues after some other time or event or to tarry or loiter," held misleading. Id. In an action on a liquor dealer's bond for selling liquor to an habitual drunkard, in which there was evidence that the drunkard purchased the liquor as agent for a third person, defendant was entitled to an instruction that if the jury believed that defendant delivered the liquor to the drunkard for the third person with the belief that such third person had sent the drunkard for it it would not constitute a sale to the drunkard and a charge submitting in a general way the issue as to whether or not the transaction was a sale to the drunkard was not sufficient. Douthitt v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 377, 87 S. W. 190.

1. Alleged error in sustaining a petition seeking the recovery of more than one penalty is harmless where the jury found but one breach. Douthitt v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 7, 87 S. W. 190.

2. No objection being urged against the verdict on the ground that there was no proof that the principal was a licensed liquor dealer, the objection cannot be urged on appeal. Cox v. Thompson [Tex. Civ. App.] 85 S. W. 34. In an action by the excise commissioner on the bond taken on granting a liquor tax certificate as hotel keeper under Liquor Tax Law, § 31, defendant cannot urge for the first time on review that the certificate and bond were void because of false statements in the application for the certificate showing compliance with regulations applicable to hotel buildings. Cullinan v. O'Connor, 100 App. Div. 142, 91 N. Y. S. 628.

3. Sayles' Ann. Civ. St. 1897, articles 3105, 3097. Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839.

4. See 4 C. L. 267.

5. Rev. St. 1895, art. 5060a, construed. Ex parte Gray [Tex. Cr. App.] 83 S. W. 828. Selling a nonintoxicating liquor in local option territory without a license is not an offense. Reisenberg v. State [Tex. Cr. App.] 84 S. W. 585.

6. On a prosecution for keeping intoxicating liquor for sale without authority as respects preparations having a legitimate use for medicinal or toilet purposes the question is not whether they contain more than 1% of alcohol but whether the articles are sold to be used as a beverage. State v. Costa [Vt.] 62 A. 38.

7. State v. Williams [N. D.] 104 N. W. 546.

8. State v. Calvin [Iowa] 103 N. W. 968. Under Code, § 2382, declaring alcohol to be an intoxicating liquor, proof that liquor used as a beverage contains alcohol is sufficient to establish its character as intoxicating liquor however much the alcohol may be diluted or however weak its intoxicating effect as a beverage may be. Id. The statute defining intoxicating liquors as those that will intoxicate, it is error to charge that "any liquors which contain any percentage of alcohol, if sold as a beverage," are intoxicating liquors. Rev. Codes 1899, § 7598, construed. State v. Virgo [N. D.] 103 N. W. 610. The act of 1902 does not exclude from the term "intoxicating liquor" medicinal preparations, fluid extracts, and toilet articles of which alcohol is the solvent principle. State v. Krinski [Vt.] 62 A. 37. On a prosecution for keeping intoxicating liquors for sale without authority, an instruction that the question was not as to the possibility of an ordinary man drinking enough of the preparation to intoxicate him, held not erroneous, other instructions giving the statutory definition of intoxicating liquors. State v. Costa [Vt.] 62 A. 38. It is not necessary for the state to allege or prove that the liquors named in Pen. Code § 431 are intoxicating. Edwards v. State [Ga.] 52 S. E. 319. The sale of "lager beer" at a time when the sale of malt liquors is prohibited is a violation of Liquor Tax Law, § 2, defining liquors as used in the act to include all distilled or rectified spirits or fermented or malt liquors. Cullinan v. McGovern, 94 N. Y. S. 525. A sale of liquor, whose principal ingredient was lager beer, containing between .74 per cent. and 1.18 per cent. in volume of alcohol, is a violation of Liquor Tax Law, § 2, defining liquors as used in the act to include all distilled or rectified spirits or fermented or malt liquors. People v. Cox, 94 N. Y. S. 526. afg. 45 Misc. 311, 92 N. Y. S. 125. The exception contained in § 66 of the crimes act (P. L. 1898, p. 812) with respect to liquors that are "compounded and intended to be used as medicine" does not relate to the first branch of the section which prohibits the sale of any vinous, spirituous or other ardent spirits, but only to the second branch

liquor, defendant is not guilty.[10] A sale without a license of any compound containing liquors enumerated in a prohibitory statute is unlawful, whether such compound be intoxicating or not.[11] The term "malt liquor" includes lager beer.[12]

The violation of an ordinance is not a crime punishable under the laws of the state.[13] In Ohio a charge for the first offense is a misdemeanor under the Beal Law.[14]

To constitute an illegal sale the seller must be the owner or have rightful possession of the liquor,[15] and must have received therefor a valuable consideration.[16] This consideration may consist of services[17] or property other than cash.[18] It is not necessary that the seller derive a profit from the transaction.[19] Shams or devices to evade the above principles will not be tolerated.[20] One merely lending liquor to be repaid in kind is not guilty of a sale.[21] Where the owner of fruit has it manufactured into liquor, receiving the product of the identical fruit furnished, the distiller is not guilty of a sale of liquor;[22] but if the fruit is exchanged for liquor already manufactured, or if the distiller furnishes the owner of the fruit liquor in advance, the transaction is a sale.[23] Mistake of law is no defense.[24] The sale may be shown by facts and circumstances as well as by direct proof.[25] Ordinarily one purchasing liquor as the agent of another, and having no interest in the transaction nor making any profit therefrom, is not guilty of violating a local option

which prohibits the sale of "any composition of which any of the said liquors shall form the chief ingredient." State v. Terry [N. J. Law] 61 A. 148, following State v. Marks, 65 N. J. Law, 84, 46 A. 757.

9. "Swankey" is an intoxicating liquor within the meaning of the Beal Law. Dominick v. State, 6 Ohio C. C. (N. S.) 192.

10. Pearce v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 727, 88 S. W. 234.

11. Such a sale of a compound containing alcohol is unlawful, whether the compound is intoxicating or not. Bradshaw v. State [Ark.] 89 S. W. 1051.

12. Cullinan v. McGovern, 94 N. Y. S. 525.

13. A charge of "keeping intoxicants for sale within the limits of Ft. Valley, Ga.," in violation of an ordinance of that town, does not charge the commission of a crime punishable under the laws of the state. Little v. State [Ga.] 51 S. E. 501.

14. Dominick v. State, 6 Ohio C. C. (N. S.) 192.

15. A barkeeper serving customers with intoxicating drinks has possession of the liquor dispensed at least while placing it on the bar. City of Topeka v. Kersch [Kan.] 79 P. 681.

16. Adams v. State [Tex. Cr. App.] 85 S. W. 1079.

17. A licensed wholesale liquor dealer who gives an agent one quart of whisky for each sale by the agent of five gallons of liquor is, as to such quart, guilty of retailing liquor without a license. Friedman v. Commonwealth, 26 Ky. L. R. 1276, 83 S. W. 1040.

18. Where brandy was given in exchange for fruit. Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 729, 88 S. W. 804; Id. [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 S. W. 805.

19. State v. Nelson [N. D.] 103 N. W. 609.

20. Where one bought a ticket entitling him to so many bottles of beer, the ticket being so arranged that as each bottle of beer was delivered a punch hole was made to show the fact, held, there was a sale. Harper v. State [Miss.] 37 So. 956. Conviction sustained where prosecutor obtained liquor by getting it himself from defendant's place of business, and leaving the price thereof where defendant could find it, and that defendant did find and accept it. Fitze v. State [Tex. Cr. App.] 85 S. W. 1156. Where resident of local option territory mailed an order to a nonresident and the latter sent the liquor by express and subsequently received a money order from the purchaser in payment, held not a C. O. D. shipment and valid. Ky. St. 1903, § 2557b, subd. 4, construed. Doores v. Commonwealth [Ky.] 89 S. W. 162. The act of a person whose place of business was outside of local option territory in telling a friend residing in such territory that he would gladly sell him liquor cannot be considered a trick or device to evade the local option law where the sale that subsequently took place constituted a sale outside of the local option territory. Id.

21. Hardy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1038.

22. Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 S. W. 805.

23. Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 S. W. 805. An employe in a distillery delivering brandy in exchange for peaches and for the revenue license on the brandy is guilty of a sale. Id. [Tex. Cr. App.] 13 Tex. Ct. Rep. 729, 88 S. W. 804.

24. Evidence that defendant had no intention of violating the law or making a sale held inadmissible. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

25. Adams v. State [Tex. Cr. App.] 85 S. W. 1079. Conviction sustained where prosecutor asked defendant if there was anything around and defendant answered "Maybe so; look and see," and prosecutor went into a smokehouse and found some whisky, took some and left money to pay therefor. Roach v. State [Tex. Cr. App.] 84 S. W. 586. Where alleged buyer asked how much whisky was, received no answer but left some money, held

law,[26] though the rule is otherwise if he acts as agent of the consignor.[27] This matter is now largely regulated by statute.[28] One is not liable for an unauthorized sale by a third person not in his employ.[29]

The place of sale often determines the existence of the criminal offense; in determining this question the intention of the parties governs,[30] the sale generally being held to take place where the order is given and unconditionally accepted,[31] though the place of shipment is sometimes held controlling.[32] The mere manual delivery does not fix the locus of the sale.[33] Liquor being ordered shipped C. O. D.,

sufficient to show a sale. Cable v. State [Miss.] 38 So. 98.

26. Washington v. State [Tex. Cr. App.] 85 S. W. 801. Where one made a business of acting as agent for residents of local option territory in buying liquor in license territory, the buyer agreeing to be liable for loss in transit, held not guilty of violating the local option law. Owens v. State [Tex. Cr. App.] 85 S. W. 794. Where prosecutor gave defendant some money and requested defendant to get him some whisky which he did, held, defendant was not guilty of violating the local option law he having acted as prosecutor's agent. Rector v. State [Tex. Cr. App.] 90 S. W. 41. Defendant having testified that he acted as the agent of the buyer, held proper to charge that if he did he was not guilty. Washington v. State [Tex. Cr. App.] 85 S. W. 801.

Evidence held sufficient to show that defendant sold the liquor, though he claimed that he purchased it from a third person for the prosecutor and acted merely as the friend of the latter. Ledbetter v. State [Ala.] 38 So. 836. Where, without previous arrangements with anyone as to the conditions of disposal, defendant procured two kegs of beer and permitted all who came to drink, the drinkers paying a price fixed by defendant and the latter on one occasion passing the hat, held to show an unlawful sale. State v. Nelson [N. D.] 103 N. W. 609. Defense of agency held unavailable where defendant told B. that he was going to another city for a day and wanted to know if he wanted any whisky and B. gave him $1.00 for a half gallon without agreeing to pay any of defendant's expenses. State v. Johnston (N. C.) 52 S. E. 273. Where one gave defendant a dollar and asked him if he could get him some whisky and defendant returned with the liquor in 10 minutes, held not to authorize the submission of the question of defendant buying the whisky as the buyer's agent. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702. Evidence that defendant accepted and forwarded orders for liquor, which liquor was shipped to him for the buyer, held insufficient to raise the issue of defendant's agency for the liquor company. Harris v. State [Tex. Cr. App.] 85 S. W. 284. Evidence held sufficient as against a claim of agency to sustain a conviction. Cook v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 641.

27. Defendant who gave an order for liquor on an express company can be convicted whether he acted as agent of the consignor or for himself. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19. Where accused furnished blanks, stamped envelopes, etc., held, jury were warranted in finding that he acted as the agent of the sellers. Walker v. State [Ga.] 50 S. E. 994.

28. Where one engaged in the liquor business in Louisiana, took orders for whisky in a city in Mississippi, where the sale was prohibited by law, collecting at the time the purchase price, the whisky being subsequently delivered in Louisiana to an express company for transportation and delivery to the purchaser, held guilty of violating Code 1892, § 1604, making it a misdemeanor for one to act as agent for either the purchaser or seller in effecting an unlawful sale.

29. The fact that defendant is the proprietor of a restaurant or saloon in which whisky is sold, an internal revenue license being posted in his place of business, does not make defendant guilty of a violation of the local option law, the sale in question having been made by a third person. Rawls v. State [Tex. Cr. App.] 89 S. W. 1071.

30. Where as soon as liquor was ordered it was set apart for the purchasers and sent to them the next day with instructions that it was not to be delivered unless paid for, held, sale took place at place of delivery. Cross v. State [Ark.] 87 S. W. 1026. Where defendant told B. that he was going to another city for a day and wanted to know if he wanted any whisky and B. gave him $1.00 for a half gallon without agreeing to pay any of defendant's expenses, held to constitute a sale at the place where the agreement was entered into. State v. Johnston [N. C.] 52 S. E. 273.

31. Where defendant solicited trade in local option county but refused to take any orders and the buyer telephoned to the defendant's bartender outside of the county and ordered liquor to be sent C. O. D., held, sale took place outside of local option county. Fooshee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 522, 87 S. W. 820. An agent taking C. O. D. orders subject to the approval of his house, the sale is made where the order is approved. Sims v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 483, 87 S. W. 689. See, also, Luster v. State [Tex. Cr. App.] 86 S. W. 326; Parker v. State [Tex. Cr. App.] 85 S. W. 1155; Donley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 553; Donley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 554; Coats v. State [Tex. Cr. App.] 89 S. W. 838; Novich v. State [Tex. Cr. App.] 86 S. W. 332; Merriweather v. State [Tex. Cr. App.] 86 S. W. 332; Wright v. State [Tex. Cr. App.] 90 S. W. 24.

32. Where liquor was ordered and paid for in one county and shipped from another county, held, sale was made in latter county. Sims v. State [Tex. Cr. App.] 86 S. W. 1019.

the sale occurs at the time and place of delivery to the carrier;[34] but some courts have refused to follow this general rule of the law of sales, where the transaction is devised to defeat the law,[35] and hold that if any part of the transaction occurs in the prohibition territory, though some essential part is done elsewhere for the purpose of evading the law, the transaction is deemed to have occurred in the prohibition district.[36] Where liquors are shipped to a consignee C. O. D. without his knowledge or consent, but he receipts to the carrier therefor and pays the charges, there is a sale at the point of destination.[37] The legislature cannot change the meaning of the word "sale" so as to evade or enlarge constitutional provisions respecting sales of intoxicants.[38] One receiving money from third persons to get a C. O. D. shipment of liquor with the understanding that such third persons are to receive proportionate shares of the liquor is guilty of a sale.[39] The rule is otherwise, however, if defendant merely borrows the money, the lender getting none of the liquor except in the way of a treat,[40] or if defendant before delivery returns the money and rescinds the sale.[41] The consignee of a C. O. D. shipment giving a third party an order for the liquor is guilty of selling,[42] even though he has not taken possession,[43] and the fact that he has previously instructed the express company not to honor his orders is no defense.[44] The delivery of a bill of lading is tantamount to a delivery of the liquor.[45] One to whom[46] or with whom[47] a C. O. D. shipment is sent or left for

33. Harris v. State [Tex. Cr. App.] 85 S. W. 284.

34. Keller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 264, 87 S. W. 669; Otto v. State [Tex. Cr. App] 13 Tex. Ct. Rep. 470, 87 S. W. 698; Green v. State [Tex. Cr. App.] 87 S. W. 1043; Taggart v. State [Tex. Cr. App.] 85 S. W. 1155. Notwithstanding an oral agreement that the purchaser need not accept the liquor and that the title should remain in the seller until it is paid for. Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Order taken by sample is taken in a local option county. Sedgwick v. State [Tex. Cr. App.] 85 S. W. 813. Order taken subject to acceptance. Luster v. State [Tex. Cr. App.] 86 S. W. 326; Parker v. State [Tex. Cr. App.] 85 S. W. 1155; Donley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 553; Id. [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 554; Coats v. State [Tex. Cr. App.] 89 S. W. 838; Wright v. State [Tex. Cr. App.] 90 S. W. 24. Though buyer paid express charges. Joseph v. State [Tex. Cr. App.] 86 S. W. 326. Where consignee was liable for loss while in transit. Novich v. State [Tex. Cr. App.] 86 S. W. 332; Merriweather v. State [Tex. Cr. App.] 86 S. W. 332.

35. Rules of law governing the construction of contracts have little place in prosecutions of penal actions where a transaction, in itself an offense, is so shaped by the criminal actors as to make it conform in appearance to the letter of law, but it violates it in fact and spirit. Commonwealth v. Adair [Ky.] 89 S. W. 1130.

36. Commonwealth v. Adair [Ky.] 89 S. W. 1130. A sale of beer made by one whose place of business was just outside the corporate limits of a local option city to a person inside the city who ordered the beer by telephone, held made in the local option territory, though the driver of the delivery wagon refused to accept the price of the beer when tendered in the city but induced the buyer to accompany him outside the city limits and there accepted the money. Id.; Adair v. Commonwealth [Ky.] 89 S. W. 1132.

37. Otto v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 470, 87 S. W. 698.

38. Act providing that C. O. D. contracts of sale shall be deemed to have been made where the goods are delivered and paid for held unconstitutional. Keller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 269, 87 S. W. 669.

39. Beall v. State [Tex. Cr. App.] 86 S. W. 334; Hillard v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 520, 87 S. W. 821; Sliger v. State [Tex. Cr. App.] 88 S. W. 243; Holman v. State [Tex. Cr. App.] 89 S. W. 977; Hoyt v. State [Tex. Cr. App.] 89 S. W. 1082 (Second case). Where defendant had no knowledge of shipment until its arrival. Dunn v. State [Tex. Cr. App.] 86 S. W. 326.

40. Beall v. State [Tex. Cr. App.] 86 S. W. 334.

41. White v. State [Tex. Cr. App] 85 S. W. 9.

42. Where liquor had not been ordered. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

43, 44. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19.

45. Where one procured a bill of lading, made out in a fictitious name, for a cask of beer and delivered it to another, held guilty of selling. Price v. State [Miss.] 38 So. 41.

46. Delivery of liquor to an express company addressed to the buyer in care of defendant is to the customer. Harris v. State [Tex. Cr. App.] 85 S. W. 284.

47. Express agent. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 136, 86 S. W. 330. One with whom C. O. D. shipments are left until called for, such person simply collecting the charges on delivery, held not guilty of a sale. Bills v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 93, 86 S. W. 1012.

delivery is not guilty of a sale, though the shipment was not in pursuance of a contract, the deliverer being ignorant of such fact.[48]

In some states keeping a place and selling are distinct offenses.[49] Generally the keeping of intoxicating liquors for the purpose of unlawful sale is a criminal offense.[50]

In most prohibition states or localities, when necessary to the health of a patient,[51] a physician may prescribe or sell intoxicating liquors to him, and in this connection an honest mistake is a defense.[52] A druggist selling liquor for medicinal purposes is also generally protected, but the sale must be made in good faith, and the existence of a physician's prescription is not conclusive evidence of this fact.[53] A druggist is not guilty, though the liquor be ordered for an illegal purpose, if the sale be for a legal purpose.[54] In North Dakota a storekeeper can sell patent medicines, although they may contain alcohol as one of their ingredients.[55]

It is not an offense for a person not authorized to sell intoxicating liquors to keep them for his own use,[56] but in some states possession has been made prima facie evidence that they are kept for unlawful purposes.[57]

In some states sales by a wholesaler or distiller are exempted from the operation of the local option laws.[58] What constitutes a sale at wholesale is generally a ques-

48. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 136, 86 S. W. 330.

49. So held under the Beal Law. Dominick v. State, 6 Ohio C. C. (N. S.) 192.

50. **Evidence** that two jugs containing six or seven gallons of intoxicating liquor were found in the house of the accused, in a "dry" county, and she also had 15 or 20 empty jugs, which apparently had contained whisky, concealed in her house, that the accused admitted that the whisky in the jugs was hers, that certain parties stole a jug of whisky from the house of the accused during her absence, and that 19 persons at different times had given the accused sums of money to "order" whisky for them, held sufficient to sustain a finding that defendant was keeping intoxicating liquors for the purpose of unlawful sale. Watts v. Forsyth [Ga.] 51 S. E. 508. Where one living in a "dry town" has at his home "cased whisky" and "37 pints of liquor in his trunk" and receives, by railroad, whisky by the case billed "Mineral Water," and some of his visitors act "a little strange," others depart with wrapped packages and still others immediately upon leaving, retire to secluded places and drink whisky from a flask, held sufficient to warrant a conviction for keeping liquor for unlawful sale, notwithstanding defendant's statement that the liquors were kept exclusively for his own use. Tucker v. Moultrie [Ga.] 50 S. E. 61.

51. Under Laws 1881, p. 235, c. 128, § 3, as amended by Laws 1885, p. 237, c. 149, § 2; Gen. St. 1901, § 2453, a physician lawfully engaged in the practice of his profession may administer intoxicating liquors to a patient if he deem it necessary to the health of such patient and charge and receive pay therefor. State v. Wilson [Kan.] 80 P. 565. Physician held not authorized to give a man liquor simply because a member of his family was sick. Blakeley v. State [Ark.] 83 S. W. 948.

52. So held in construing an ordinance making it unlawful for a physician to give a prescription for liquor unless absolutely required as a medicine. Commonwealth v. Williams [Ky.] 86 S. W. 553.

53. P. L. 1889, p. 77; Gen. St. p. 1813 construed. State v. Terry [N. J. Law] 61 A. 148.

54. Where a druggist ordered liquor for a customer but, before it was called for, sold nearly all for medicinal purposes and when the customer called the druggist returned his money and gave him the remaining liquor free of charge, held no sale. Blasingame v. State [Tex. Cr. App.] 85 S. W. 275.

55. Rev. Codes 1899, § 7281. State v. Williams [N. D.] 104 N. W. 546. Instruction that sale of patent medicine is unlawful unless made by a registered pharmacist held erroneous. Id.

56. State v. White [Kan.] 80 P. 589. Under Laws 1905, p. 991, c. 800, § 20, making the possession of more than two gallons of spirituous liquor at any one time prima facie evidence that the possessor is engaged in the illegal sale of liquor, the possession of more than the specified quantity is not of itself a distinct and substantive offense, but is merely an evidential fact in a prosecution for an illegal sale under other sections of the act. State v. McIntyre [N. C.] 52 S. E. 63. Laws 1903, p. 144, c. 125, and Laws 1905, p. 987, c. 800, do not make it an indictable offense for one to have in his possession more than two gallons of whisky with intent to sell the same. Id.

57. Laws 1905, p. 991, c. 800, § 20 construed. State v. McIntyre [N. C.] 52 S. E. 63. In Kansas one cannot keep such liquors, except in a dwelling house not used in connection with a place of business, without making out such a prima facie case. State v. White [Kan.] 80 P. 589.

58. Under Ky. St. 1903, § 2558 where a distiller sells five gallons of whisky in the usual course of trade and in good faith, he is not liable for a violation of the local option law though another furnished the purchaser part of the money to pay for the whisky and re-

tion of law for the court.[59] A sale of a quart of native wine is not a sale at wholesale.[60] In Delaware a manufacturer is only authorized to sell liquor on the premises where they are distilled.[61] A statute requiring a traveling salesman to have a license to take orders is violated by the taking of an order by an unlicensed traveling man, subject to acceptance by his principal.[62] A soliciting and collecting agent of a brewing company cannot be convicted under an indictment charging him with "doing business" without a license.[63]

Payment of the Iowa mulct tax does not constitute a bar to proceedings for the unlawful sale of liquors.[64] A conviction under an ordinance prohibiting the keeping of intoxicating liquors for the purpose of unlawful sale is no bar to a conviction for keeping the same liquors for that purpose on a subsequent day.[65]

(§ 6) *B. Indictment and prosecution.*[66] *Jurisdiction.*[67]—Under a statute providing that if a river be a boundary between two counties, the criminal jurisdiction of each county shall embrace offenses committed on the river or any island thereof, a sale of whisky on a boat on a river at a place where it bounds a county is a sale within the county.[68] In some states a mayor of a town has jurisdiction over violations of the liquor laws.[69]

Prosecution in general.[70]—A detective may act as prosecutor for a violation of the local option law.[71] Where two or more laws are violated by accused's act, the commonwealth may elect under which law it will prosecute.[72] In a prosecution for a sale of liquor in a county in which such sales are prohibited, it is not necessary to show the day upon which the sale was made.[73]

Indictment, information or complaint.[74]—In order that an affidavit may constitute a sufficient foundation for an information for selling liquor to a minor, it is not essential that it aver that the sale was on the dramshop keeper's premises.[75] The indictment or information must clearly and distinctly set forth the acts constituting the offense,[76] so as to inform the accused of the nature of the accusation

ceived part of it from the purchaser away from the premises of defendant. Howard v. Commonwealth [Ky.] 89 S. W. 256. One who, in handling the products of a brewer, is conducting a wholesale house on his own account, is not within the protection of Laws 1904, p. 160, c. 76, declaring it unlawful for anyone, "except manufacturers selling liquors of their own make" to sell liquor by wholesale in local option territory. Adair v. Commonwealth [Ky.] 89 S. W. 1132.

59. So held under Rev. Laws, c. 100, § 1, as amended by St. 1903, p. 486, c. 460. Commonwealth v. Poulin [Mass.] 73 N. E. 655.

60. Commonwealth v. Poulin [Mass.] 73 N. E. 655.

61. Rev. Code 1852, amended in 1893, p. 420, c. 53. State v. McNett [Del.] 61 A. 869. Such statute does not authorize a sale by one of the members of the firm as an individual in his store at a place distant from the distillery. Id.

62. Rev. Pol. Code, §§ 2834, 2838, 2852 construed. State v. Delamater [S. D.] 104 N. W. 537.

63. Salter v. Columbus, 121 Ga. 829, 49 S. E. 734.

64. Newton v. McKay [Iowa] 102 N. W. 827.

65. Tucker v. Moultrie [Ga.] 50 S. E. 61.

66. See 4 C. L. 272. See. also, topic Indictment and Prosecution, 5 C. L. 1790.

Witnesses, see topic Witnesses, 4 C. L. 1943; also Examination of Witnesses, 5 C. L. 1371.

67. See 4 C. L. 267.

68. Nickols v. Commonwealth [Ky.] 86 S. W. 513.

69. The mayor of the city of Youngstown has jurisdiction to hear and finally determine misdemeanors, notwithstanding the Act of April 26th, 1904 (97 O. L. 623), where no imprisonment is part of the penalty, and of such character is a charge under section 4364-20a for the first offense. Dominick v. State, 6 Ohio C. C. (N. S.) 192. See 4 C. L. 267.

70. See 4 C. L. 268.

71. Rector v. State [Tex. Cr. App.] 90 S. W. 41.

72. One selling without a license in prohibition territory may be punished for either offense. Commonwealth v. Barbour [Ky.] 89 S. W. 479.

73. State v. Burton, 138 N. C. 575, 50 S. E. 214.

74. See 4 C. L. 272.

75. State v. Essman [Mo. App.] 85 S. W. 955.

76. P. L. 1893, p. 193 does not change the nature of the offense of habitually selling intoxicating liquors contrary to law, nor render the place where such sales are carried on any the less a disorderly house and a public nuisance, but simply requires the indictment to set forth with precision the char-

against him,[77] it ordinarily being sufficient, however, to charge the offense in the language of the statute or in terms equivalent thereto.[78] All the statutory elements of the offense must be alleged.[79] In some states the indictment must name the crime.[80] Where several different acts named in a statute are the means whereby one offense may be committed and are set out in the disjunctive, they may all be charged in one count of an indictment in the conjunctive if they are not repugnant.[81] It is generally sufficient to charge the kind of liquor sold in the alternative.[82] The indictment or information[83] or complaint[84] must not be double. The words used in an indictment or information must be construed according to their usual acceptance in

acter of the acts that constitute the offense. State v. Terry [N. J. Law] 61 A. 148. Under Rev. Codes 1899, § 8047, subd. 7, an indictment otherwise sufficient will be held sufficient when "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended." State v. Erickson, [N. D.] 103 N. W. 389. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on divers and sundry days, and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain as to time. State v. Brown [N. D.] 104 N. W. 1112. An information which alleges that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by Rev. Codes 1899, § 7605, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. Id.

77. Indictment prescribed by Laws 1901, p. 58, ch. 4930, § 8 informs the accused of the nature of the accusation against him. Caesar v. State [Fla.] 39 So. 470.

78. So held as regards an indictment in the language of Ky. St. 1903, § 2557a. Commonwealth v. Jarvis [Ky.] 86 S. W. 556. Indictment for illegal sale on Sunday contrary to provisions of Rev. St. 1899, § 3011 need not use the word "unlawfully." State v. Schleuter, 110 Mo. App. 7, 83 S. W. 1012. Under a statute prohibiting the sale of distilled or rectified spirits or fermented or malt liquors, it is not necessary to allege that the liquor was intoxicating. Liquor Tax Laws (Laws 1897, p. 207, c. 312) § 2, construed. People v. Cox, 94 N. Y. S. 526, afg. 45 Misc. 311, 92 N. Y. S. 125. Laws 1897, p. 207, c. 312, § 2, providing that the term "liquors" shall include all distilled or rectified spirits, wines, fermented or malt liquors, an indictment need not allege that the liquors sold were distilled or rectified spirits, etc. People v. Myers, 95 N. Y. S. 993. An indictment under Laws 1897, p. 233, c. 312, § 31, alleging, in the language of the statute, that defendant sold liquor in quantities less than five wine gallons at a time, held sufficient without stating the exact quantities sold. Id.

79. An indictment under Comp. Laws, § 5409 held fatally defective for failure to charge that the view of the "bar or place in said room" where the liquors were sold was obstructed. People v. Schimmell [Mich.] 12 Det. Leg. N. 406, 104 N. W. 670. An information charging a violation of Gen. Laws 1905, p. 379, c. 159, prohibiting the receiving or soliciting of orders for the sale or delivery of intoxicating liquors in prohibition territory, is fatally defective if it fails to allege that the sale and delivery was to be consummated in prohibition territory. Patterson v. State [Tex. Cr. App.] 90 S. W. 31. Since Burns' Ann. St. 1901, § 7283 renders immaterial the words "in less quantities than a quart at a time," contained in § 7283b, an indictment for a violation of this latter section need not allege, in describing defendant's license, the quantity in which liquor may be sold by him. Cahill v. State [Ind. App.] 76 N. E. 182; State v. Kiley [Ind. App.] 76 N. E. 184.

80. Under Code Cr. Proc., requiring the indictment to name the crime, an indictment charging the crime of offering and exposing for sale fermented liquors and distilled and rectified spirits in violation of Liquor Tax Law, § 31, is sufficient. People v. Seeley, 93 N. Y. S. 982.

81. Under Rev. St. 1899, § 3011, prescribing a penalty for dramshop keepers who keep open their shop or sell, give away or otherwise dispose of any intoxicating liquors on Sunday, an indictment charging the commission of the acts enumerated in the conjunctive, and in one count, is good. State v. Schleuter, 110 Mo. App. 7, 83 S. W. 1012.

82. An indictment charging that defendant sold a "beverage, liquid mixture or decoction" is good on demurrer. Commonwealth v. Jarvis [Ky.] 86 S. W. 556.

83. An indictment for violation of Liquor Tax Law, § 21, charging a sale without a license, and also a sale in a town which had voted that no license should be granted, held not bad for duplicity. People v. Seeley, 93 N. Y. S. 982. An information alleging that the defendant, during a stated time, kept and maintained a nuisance defined and prohibited by Rev. Codes 1899, § 7605, in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. State v. Brown [N. D.] 104 N. W. 1112. An information for a continuing offense, which alleges that the offense was committed "on the 1st day of January, 1904, and on divers and sundry days, and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905, does not allege more than one offense. Id.

84. Affidavit charging the keeping of a place where intoxicating liquors are sold is not bad for duplicity because it charges several distinct offenses of the same kind

common language.[85] A "keeper of a blind tiger," in its general acceptation and understanding, means a person engaged in the unlawful sale of intoxicating beverages.[86] An allegation that the defendant unlawfully kept a place where intoxicating liquors were sold necessarily implies that the sales were unlawful.[87] An indictment charging individuals as a firm will be construed as charging the individuals with violating the law.[88] Allegations which are surplusage not being misleading or prejudicial, will be disregarded.[89] The indictment need not negative a proviso or exception contained in a clause subsequent to that creating the offense.[90] There is a conflict as to whether the indictment need name the purchaser,[91] and in those states where it is not essential, if defendant deems it either expedient or necessary that he should be advised of the name of such person, he should apply for a bill of particulars.[92] A complaint for violating the Sunday law need not specify the particular business defendant was engaged in, but it is sufficient to allege that he was a dealer in wares and merchandise.[93] As a general rule it is not necessary to name the beverage sold.[94] An ordinance may generally be referred to by its title and date of passage.[95] It is necessary to show that the transaction set up in the indictment occurred before the indictment was returned by the grand jury[96] and within the period of limitations.[97] A statutory definition of a word used may be looked to to supply an ele-

and calling for the same punishments. Volk v. Westerville, 3 Ohio N. P. (N. S.) 241.

85. Burns' Ann. St. 1901, § 1805. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039.

86. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039.

87. State v. Erickson [N. D.] 103 N. W. 389. Further allegations negativing lawful sales treated as surplusage, and not being misleading or prejudicial, the indictment was held sufficient. Id.

88. Where an indictment charged "A. and B., a firm," with violation of the local option law, held the words "a firm" would be treated as surplusage. Rawls v. State [Tex. Cr. App.] 89 S. W. 1071.

89. Where it was alleged that defendant unlawfully kept a place where intoxicating liquors were sold, allegations negativing lawful sales disregarded. State v. Erickson [N. D.] 103 N. W. 389. Under a statute declaring it unlawful for a saloon keeper to permit any person to go into the saloon at certain times, an information alleging that defendant did "unlawfully suffer, allow and permit" a certain person to enter the saloon during the prohibited time, held sufficient, the words "suffer" and "allow" being surplusage. Burns' Ann. St. 1901, § 1825, providing that no information shall be quashed because of any surplusage. Botkins v. State [Ind. App.] 75 N. E. 298.

90. An indictment charging the sale of vinous liquors in violation of Pub. Laws 1901, p. 498, c. 347 need not aver that the liquors sold were not manufactured from grapes raised on the lands of defendant. State v. Burton, 138 N. C. 575, 50 S. E. 214. When an act makes penal the sale of intoxicating liquors, and in a subsequent section provides that the prohibition shall not prevent practicing physicians from furnishing such liquors to their patients, it is not necessary, in an indictment for a violation of the act, to allege that the sale was not by a practicing physician. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

91. An indictment for selling liquor in violation of the local option law must allege the name of the purchaser. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 136, 86 S. W. 330. Affidavits, information or indictment must allege the name of the purchaser or that his name is to the affiant, informant or grand jury unknown. Rev. St. 1903, §§ 4364-20b and 4364-20c construed. State v. Ridgway [Ohio] 76 N. E. 95. Except in cases where the identification of the person to whom the liquor was sold may be essential to the defendant for his proper defense, as, for example, where he is charged with having sold liquor to a minor, the information need not allege the name of the buyer. Trometer v. District of Columbia, 24 App. D. C. 242.

92. Trometer v. District of Columbia, 24 App. D. C. 242.

93. Griffith v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 9, 89 S. W. 832.

94. Commonwealth v. Jarvis [Ky.] 86 S. W. 556.

95. Under Pen. Code, § 963, providing that in pleading a private statute it is sufficient to refer to the statute by its title and day of its passage, a complaint for violation of a county ordinance forbidding the handling of intoxicating liquors without a license is sufficient where the title of the ordinance and the date of its passage are set out in the complaint. Ex parte Childs [Cal. App.] 81 P. 667.

96. Where an indictment for an illegal sale was returned Feb. 13, 1904, evidence of a sale "some time in the spring of 1904," is insufficient to support a conviction. Wolf v. State [Tex. Cr. App.] 85 S. W. 1145.

97. In Kentucky an indictment for a misdemeanor must show on its face that it was committed within 12 months before the finding of the indictment, unless it is in lieu of a former indictment, and then it must show that the offense was committed within a year before that indictment was

ment of the offense.[98] Inaccurate expressions are harmless no one being misled thereby.[99] An information may be amended as to matters of substance or form before the defendant pleads,[1] but after that time it can only be amended as to matters of form, and not then unless it can be done without prejudice to the rights of the defendant.[2] Waiving the filing of a written complaint in the police court concludes defendant's rights thereto in the district court after appeal.[3] Defects in the indictment may be cured by verdict.[4] The proof must meet and sustain the allegations of the indictment.[5] Under an indictment charging a sale to persons whose names are to the grand jury unknown, it is proper to show a sale to one person.[6] Under a complaint charging defendant with assisting in keeping a common nuisance, proof that the accused committed the offense unaided by any other person justifies a conviction.[7] Where there is an immaterial variance between the indictment and the evidence, the former may be amended.[8] An indictment cannot be amended so as to cure a variance as to the place of sale.[9] On prosecutions for permitting music in a saloon[10] or for selling without a license,[11] the state may prove the commission of the offense at any time within the period of limitations.

Judicial notice.[12]—The courts will generally take judicial notice of legislative enactments.[13] The intoxicating qualities of beer must be proven.[14] Prohibition being put in force by a vote of the people, there is a conflict as to whether the fact of prohibition must be proved.[15]

found or the prosecution begun. Combs v. Commonwealth [Ky.] 84 S. W. 753. An indictment returned July 20, 1904, charging defendant with having sold liquor without a license on July 18, 1904, and further stating that a former indictment for the offense, filed on November 13, 1903, had been stolen and cannot be found, held bad. Id.

98. Under Rev. St. 1899, § 2990, defining a dramshop keeper as a person licensed to sell intoxicants, an information charging a dramshop keeper with a violation of § 3011, prohibiting any person having a license as a dramshop keeper from keeping his dramshop open on Sunday, is sufficient although it does not state that defendant is a "licensed" dramshop keeper. State v. Barnett, 110 Mo. App. 592, 85 S. W. 613.

99. Under Code Cr. Proc. § 542, informality in an indictment in alleging a sale without a license, instead of a sale without having paid the tax, is not cause for reversal; the crime named at the head of the indictment being a violation of Liquor Tax Law, § 31, and there being a charge that the sale was contrary to the statute in such case made and provided. People v. Seeley, 93 N. Y. S. 982.

1. State v. Bundy [Kan.] 81 P. 459.

2. State v. Bundy [Kan.] 81 P. 459. A charge of maintaining a nuisance under the prohibitory liquor law wherein there is no concurrence in the time of keeping the place and the time of doing the acts in the place necessary to constitute an offense is defective, and an amendment alleging that all the acts were contemperaneous is a matter of substance. Id.

3. City of Topeka v. Kersh [Kan.] 79 P. 681.

4. An information charging the sale of intoxicating liquors, without specifying the kind of liquors sold, and without negativing the circumstances under which cider and wines included in the words "intoxicating liquors" could lawfully be sold, is sufficient after a verdict of guilty; for it will be presumed that the sale was found unlawful. State v. Barr [Vt.] 62 A. 43.

5. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 136, 86 S. W. 330. An indictment alleging an illegal sale is not supported by proof of soliciting or receiving orders for such a sale. Potts v. State [Tex. Cr. App.] 89 S. W. 835. Proof of a sale to L. B. & F. B. constitutes a variance from an indictment charging a sale to M. B., there being no evidence that either L. or F. was known as or called M. O'Reilly v. State [Tex. Cr. App.] 85 S. W. 8. An information alleging that defendant sold liquor to S. in violation of the local option law is not sustained by evidence that defendant sold liquor to M., which S. and M. drank. Arnold v. State [Tex. Cr. App.] 85 S. W. 18.

6. People v. Seeley, 93 N. Y. S. 982.

7. No accessories in misdemeanor. City of Topeka v. Kersch [Kan.] 79 P. 681.

8. P. L. 1898, p. 878, § 34. State v. Ham [N. J. Law] 60 A. 41.

9. State v. Ham [N. J. Law] 60 A. 41.

10. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

11. Though indictment named particular date. Pitts v. State [Ga.] 52 S. E. 147.

12. See 4 C. L. 274.

13. The supreme court will take judicial notice of the local prohibition law known as the "Five Counties Act" (Acts 1883-84, vol. 1, p. 1116, c. 598), and of the operation of the general local option law of 1894 (Ky. St. 1903, c. 81). Crigler v. Commonwealth [Ky.] 87 S. W. 276.

14. Harris v. State [Tex. Cr. App.] 86 S. W. 763; Sullivan v. State [Tex. Cr. App.] 87 S. W. 150; Cassens v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 708, 88 S. W. 229; Potts v.

Presumptions and burden of proof.[16]—The general presumption of innocence applies.[17] Any presumption to be brought into play in construing a contract will be taken in favor of accused.[18] The burden is on the state to show beyond a reasonable doubt that the liquor sold was intoxicating.[19] In most states statutes make certain facts prima facie evidence of others;[20] such statutes mean that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise.[21] In a prosecution for violating the local option law, the order declaring the result of the election is prima facie evidence of its validity,[22] and the burden is on the defense to show that the statutory notices were not posted.[23] The possession of a United States license to sell malt liquor is not prima facie evidence that the licensee is engaged in selling intoxicating liquors.[24] The burden is on defendant to show matters of justification.[25]

Admissibility of evidence.[26]—To be admissible the evidence must be relevant[27] and competent.[28] Evidence of other sales at different times is inadmissible unless

State [Tex. Cr. App.] 89 S. W. 835; Id. [Tex. Cr. App.] 89 S. W. 836.

15. That it must. Election was under general local option law. Nicols v. Commonwealth [Ky.] 87 S. W. 1072. The courts will take judicial notice of the result of a prohibition election, whether the same was held under the general local option liquor law or a local act providing for such election. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

16. See 4 C. L. 274.

17. In a prosecution for violating the local option law, it appearing that defendant, an express agent, who delivered the liquor to the consignee, was not aware that the shipment was not in pursuance of a contract, the presumption is that the transaction was legitimate and the shipment was not unlawful. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 136, 86 S. W. 330.

18. Keller v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 264, 87 S. W. 669.

19. Rutherford v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 636, 88 S. W. 810.

20. Section 3, p. 58, c. 4930 of the Laws of 1901, making proof of delivery of the liquor by defendant and receipt of the money by him prima facie evidence of ownership, modifies the rule laid down in Anderson v. State, 32 Fla. 242, 13 So. 435, and casts the burden of rebutting the presumption on the defendant. Goode v. State [Fla.] 39 So. 461.

21. Rev. Codes 1899, § 7614, providing that the possession of a United States license is prima facie evidence of guilt, so construed. State v. Momberg [N. D.] 103 N. W. 566.

22, 23. Fitze v. State [Tex. Cr. App.] 85 S. W. 1156.

24. Uloth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822.

25. In a prosecution of the sale of liquor to a minor, under Pen. Code 1895, § 444, the burden is on defendant to show written authority from the parent or guardian. Graham v. State, 121 Ga. 590, 49 S. E. 678. A person seeking to justify Sunday sale of liquor in violation of Liquor Tax Law, § 31k, subd. 2, by relying on exceptions contained in said section, must plead and prove the facts bringing him within the exception. In re Cullinan, 45 Misc. 497, 92 N. Y. S. 802. Must show that building has the equipment of a hotel or is constructed as required by Liquor Tax Law, § 31k, subd. 2. Id. Must show that he has a license. Commonwealth v. Wenzel, 24 Pa. Super. Ct. 467.

26. See 4 C. L. 274.

Witnesses, see topic Witnesses 4 C. L. 1943, and Examination of Witnesses, 5 C. L. 1371.

27. In a prosecution for keeping a "blind tiger," evidence that defendant frequently received express packages weighing about 85 pounds, addressed plainly to defendant, with nothing to indicate their contents, held relevant. Goad v. State [Ark.] 83 S. W. 935. In such a case orders on defendant's letter heads being signed by defendant and containing checks in payment held admissible. Id. Also held proper to permit a witness to testify that he had a conversation with C. with reference to certain orders received by him from defendant; that he saw the letters containing the orders for whisky and that later C. gave the letters to witness. Id. Where it was necessary for the state to prove that defendant's store was open for the purpose of traffic, evidence that witness saw a person put something that looked like a bottle of wine in his pocket held relevant. Dillard v. State [Ala.] 39 So. 584. In a prosecution for selling liquor on Sunday, held, evidence that two or three years before defendant had tried to have saloon keepers in town stop selling beer by the can, held irrelevant. State v. Pierce [Mo. App.] 85 S. W. 663. It is not error to refuse to permit the manufacturer of a malt extract found in defendant's place of business to testify as to the percentage of alcohol in the other medicines manufactured by his firm. State v. Costa [Vt.] 62 A. 38.

28. The record of the issuance of the license is secondary evidence and is inadmissible, the licensee having been notified to produce his license. State v. Mulloy [Mo. App.] 86 S. W. 569. Under Rev. St. 1899, § 2990, defining a dramshop keeper as a person licensed to sell intoxicants, the license itself is the best evidence that defendant is a dramshop keeper, and, although defendant cannot be compelled to produce his license, he should be notified so to do in order to lay a foundation for the introduction of sec-

connected with the case[29] or unless it serves to show a system[30] or criminal intent.[31] Evidence of sales[32] or use[33] by others is inadmissible. The fact that defendant has sold the liquor for a legitimate purpose is inadmissible.[34] That one received numerous express packages is inadmissible to show a system or a criminal intent.[35] Evidence that defendant would not let buyer drink the liquor on the premises is admissible to show an intent to sell the liquor for use as a beverage.[36] On a prosecution for violating the Sunday law, it is competent for the state to prove by defendant that he was in the habit of violating the Sunday law.[37] The state is not bound to confine its evidence to the liquor for which it claims a conviction.[38] Hearsay evidence is inadmissible.[39] The general rules as to res gestae apply.[40] Evidence tending to show the intoxicating[41] or nonintoxicating[42] quality of the liquor sold is admissible.

ondary evidence. State v. Barnett, 110 Mo. App. 592, 85 S. W. 613. Order granting license is original evidence against licensee. Id. A list of liquor licenses made by the clerk of the county court in the form of a memorandum to which the licensees were not parties is not original evidence against a particular licensee in an action against him for an illegal sale. Id. A question asked defendant on cross-examination whether he had an internal revenue license is not objectionable as calling for secondary evidence. Collins v. State [Tex. Cr. App.] 84 S. W. 585.

29. Driver v. State [Tex. Cr. App.] 85 S. W. 1056. Evidence of prior sale at a time when defendant was not connected with the business is inadmissible. Rutherford v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 636, 88 S. W. 810. Held error to admit evidence of an illegal sale by the accused more than two years prior to the date of the accusation and to charge the jury that they might "consider these transactions as circumstances in arriving at a proper verdict." Erwin v. State, 121 Ga. 580, 49 S. E. 689. Evidence of prior sales is inadmissible to show intoxicating qualities of liquor sold in the absence of proof that the liquor sold on the prior occasion was of the same kind as that sold on the occasion in question. Rutherford v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 636, 88 S. W. 810.

30. Where prosecutor asked defendant if there was anything around and defendant answered "Maybe so; look and see," and prosecutor went into a smokehouse and found some whisky, took some and left money to pay therefor, held, evidence of former similar transactions were admissible to show a system. Roach v. State [Tex. Cr. App.] 84 S. W. 586. The prosecution may, after having offered evidence of the distinct sales charged in the several counts of the indictment, give testimony tending to prove other sales made by the accused at other times within the period named in the indictment. State v. Barr [Vt.] 62 A. 43.

31. Evidence tending to show that defendant sold a malt extract for use as a beverage in March, 1905, tends to show that he was keeping it for sale as a beverage in June of that year. State v. Costa [Vt.] 62 A. 38.

32. Held proper to exclude testimony of grocers and druggists that they had for a long time sold the preparation in question openly and visibly. State v. Costa [Vt.] 62 A. 38.

33. Held proper to exclude evidence to show that the preparation in question was used by the medical profession and by people generally for the same purposes as certain known proprietary articles, and that a person could not become intoxicated by the use of such articles. State v. Costa [Vt.] 62 A. 38.

34. State v. Costa [Vt.] 62 A. 38; Blasingame v. State [Tex. Cr. App.] 85 S. W. 275.

35. In a prosecution for furnishing whisky to witness, which liquor defendant procured from a C. O. D. express package addressed to himself, evidence that defendant received, during the month prior to the transaction in question, nine packages of whisky by express, is inadmissible to show a system or defendant's intent. Parish v. State [Tex. Cr. App.] 89 S. W. 830.

36. Testimony that defendant told him he would have to go outside to drink the liquor held admissible. State v. Costa [Vt.] 62 A. 38. Evidence tending to show that a purchaser asked defendant to open the bottle for him, but that defendant refused to do so, saying that the purchaser must take it away, held admissible. Id.

37. Morris v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 832.

38. State v. Krinski [Vt.] 62 A. 37.

39. On a prosecution for violating a local option law, it is improper to allow a witness to tell about an analysis of the liquor made by another. Uloth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822.

40. In a prosecution for furnishing whisky to witness, which liquor defendant procured from a C. O. D. express package addressed to himself, evidence that defendant received, during the month prior to the transaction in question, nine packages of whisky by express, is inadmissible as part of the res gestae. Parish v. State [Tex. Cr. App.] 89 S. W. 830.

41. It is proper to permit the amount of alcohol and the other ingredients of the extract found in defendant's place of business to be shown. State v. Costa [Vt.] 62 A. 38. Testimony of a witness that he had taken three drinks of the liquor in question and that it had rendered him intoxicated is admissible on the question as to whether or not the liquor is intoxicating. People v. Seeley, 93 N. Y. S. 982. Also evidence that the witness was intoxicated is admissible. Id. Evidence that beer made boys drunk held admissible. State v. Hawkins [Minn.] 104 N. W. 898 [The court states that it does not want to be understood as holding that the court might not in the absence of evidence of the fact, take

Also the taste and effect of drinking liquor can be considered in determining what kind of liquor it is for the purpose of deciding, whether or not it is one of the kind enumerated in the statute.[43] Police officers after tasting liquor and professing knowledge of its stimulating attributes may testify that it is intoxicating.[44] Copies of the books or records in the office of the internal revenue collector are admissible.[45] In a prosecution for violation of a local option law, evidence of circumstances tending to connect the accused with the commission of the alleged crime, even though inconclusive, is admissible when it tends to throw light upon the real question,[46] consequently its admission rests largely within the judicial discretion of the trial judge,[47] and an appellate court will not disturb his ruling thereon unless clearly erroneous.[48] Circumstances of the search and seizure tending to characterize the place and business are admissible[49] without regard to the legality of the warrant.[50] The finding of other liquors in the same place bears upon the question whether the kind relied upon was kept for illegal sale.[51] The officers making the search may testify as to what they saw,[52] and that they made the search by virtue of a warrant for intoxicating liquor;[53] but the return to the search warrant is inadmissible against defendant.[54] Evidence tending to disprove the claims[55] or evidence[56] of the state is admissible. Evidence showing a mistake of law is inadmissible.[57]

Weight and sufficiency of evidence.[58]—Proof of a single sale is sufficient to establish the charge that the defendant kept a place where intoxicating liquors were sold.[59] In order to convict, circumstantial evidence must be such as to exclude every reasonable hypothesis except the guilt of accused.[60] In a prosecution for

judicial notice that lager beer is intoxicating].

42. Where the liquor sold was "beer" or "Frosty" or "Ino" and there was evidence to show that defendant did not keep beer but kept "Frosty" and "Ino," testimony that such liquids did not taste like beer and were not beer held admissible. Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 150, 86 S. W. 1014.

43. Edwards v. State [Ga.] 52 S. E. 319.

44. State v. Olson [Minn.] 103 N. W. 727.

45. Johnson v. State [Tex Cr. App.] 89 S. W. 834, and cases cited. See 4 C. L. 275, n. 91.

46, 47, 48. Goode v. State [Fla.] 39 So. 461.

49. State v. Krinski [Vt.] 62 A. 37. Held permissible to show that at the time of the search two men, under the influence of liquor, were wrangling over a bottle, during which wrangling defendant came into the room, though it appeared that the bottle was seized and found to contain soda water. Id.

50. Articles found in building and evidence relating thereto held admissible. State v. Krinski [Vt.] 62 A. 37.

51. State v. Krinski [Vt.] 62 A. 37.

52. State v. Barr [Vt.] 62 A. 43; State v. Krinski [Vt.] 62 A. 37.

53. So held where court charged fully and correctly with regard to reasonable doubt and the presumption of evidence. State v. Costa [Vt.] 62 A. 38.

54. State v. Costa [Vt.] 62 A. 38.

55. Where defendant claimed that bottles contained Jamaica ginger, evidence that Jamaica ginger was never put up in bottles of the shape of those seized, held admissible. State v. Krinski [Vt.] 62 A. 37.

56. Where prosecutor testified that he was in defendant's place of business on two specified occasions and bought beer, defendant should be permitted to testify that on one of the dates mentioned by prosecutor the liquor he sold was not intoxicating and that on the other date prosecutor was not at defendant's place of business. Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 150, 86 S. W. 1014. Where defendants claimed to have purchased, carried away and had analyzed some "Malt Rose," which was an article of commerce, held, defendant was entitled to introduce evidence of another chemist who had made an analysis of "Malt Rose" for the purpose of showing its contents. People v. Kastner, 101 App. Div. 265, 91 N. Y. S. 1004.

57. Evidence that defendant had no intention of violating the law or making a sale held inadmissible. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

58. See 4 C. L. 275.

59. Volk v. Westerville, 3 Ohio N. P. (N. S.) 241.

60. Where witness gave defendant 85c. to procure whisky for him and later found a bottle of whisky in his workshop, held, evidence insufficient to warrant a conviction. Nicholson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 477, 87 S. W. 343. Where evidence failed to show that defendant knew of the sale or to connect him with it, held insufficient to sustain a conviction. Pecaria v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 251, 90 S. W. 42. The mere fact that prosecutor gave defendant a dollar and afterwards got a bottle of whisky from a box, without connecting defendant with the box is insufficient to sustain a conviction of violating the local option law. Williams v. State [Tex. Cr. App.] 85 S. W. 1144. Where one procured whisky for another, evidence held insufficient to sustain a conviction under an ordinance making it unlawful for any person to keep liquor for sale

violation of a local option law, the crime may be proved by showing a systematic course of trade by the defendant, as well as by showing a single act.[61] An order granting a license failing to contain the license or to show that it has been actually issued and delivered is not evidence of the issuance of the license.[62]

Trial.[63]—Statutes conferring upon justices jurisdiction to accept pleas of guilty must be taken to contain by implication every provision necessary to make the jurisdiction effective.[64] An objection that there is no evidence that the offense was committed within the state cannot be raised by demurrer to the evidence,[65] nor by a request to charge that the burden is on the state;[66] but the matter is defensive, and defendant may take advantage of it under a plea of not guilty.[67] An objection that the offense was not committed in the county of indictment and trial must be raised by plea in abatement.[68] Absence of a witness may sometimes be made ground for a continuance.[69] Where an information contains several counts, charging the sale of liquors without a license, the state's evidence showing the several offenses charged, it should be required to elect on which count it will rely for a conviction.[70] Defendant may waive trial by jury.[71] One arraigned for the violation of a municipal ordinance is not entitled to a jury trial.[72] The general rules as to harmless error apply.[73] Questions of fact are for the jury; questions of law for the court.[74] The court

or barter or to be given away to induce trade. Patterson v. Batesville [Miss.] 37 So. 560. Evidence that appellant received $1.00 from prosecuting witness and returned him a bottle of whisky held sufficient to sustain a conviction. Hoyt v. State [Tex. Cr. App.] 89 S. W. 1082 (First case). Witness gave defendant 80 cents, and told him to bring him a quart of whisky. Defendant took the money and later defendant found a bottle of whisky in his shop. Defendant was working for witness and the 80 cents was allowed as a credit on work done by defendant. Prosecutor had at the time given other parties money and asked them to get him whisky; held insufficient to sustain a conviction. Bittix v. State [Tex. Cr. App.] 87 S. W. 348. Evidence to show a sale held sufficient to sustain a conviction. Goode v. State [Fla.] 39 So. 461. Evidence held to require submission to jury of question whether transaction was a gift or sale. Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 S. W. 805.

61. Goode v. State [Fla.] 39 So. 461.

62. State v. Barnett, 110 Mo. App. 592, 85 S. W. 613.

63. See 4 C. L. 276.

64. Ex parte Demarco [Vt.] 61 A. 36. Under License Act 1904, § 114, a justice before whom a plea of guilty of selling liquor contrary to the act is entered has implied authority to sentence the offender to imprisonment. Id.

65, 66, 67. State v. Burton, 138 N. C. 575, 50 S. E. 214.

68. Code, § 1194. State v. Burton, 138 N. C. 575, 50 S. E. 214.

69. Where absent witness would have testified that liquor bought was not intoxicating, held, continuance should have been granted. Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 150, 86 S. W. 1014.

70. Though the court ruled that there could be a conviction of no more offenses than there were counts, and that each offense must be found on evidence particularly relating to it. State v. Barr [Vt.] 62 A. 43.

71. Code Cr. Proc. 1895, art. 22. Prosecution for violating local option law. Otto v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 470, 87 S. W. 698.

72. Littlejohn v. Stells [Ga.] 51 S. E. 390; Little v. State [Ga.] 51 S. E. 501.

73. Testimony of an express agent in regard to an order admitted on the trial to have been given, held harmless. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18. The exclusion of bills of lading showing that whisky had been shipped at various times to the prosecuting witness held harmless to defendant prosecuting witness admitting that he had received the whisky. Ray v. State [Tex. Cr. App.] 83 S. W. 1121. Defendant admitting that he had a license admission of evidence on this point held harmless. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615. The offense being shown by defendant's witnesses he is not prejudiced by the court's refusal to allow him to cross-examine a witness for the state who testifies to the fact of the offense alone for the purpose of showing that he was prejudiced against defendant. Id. Defendant being permitted to show what was said or done at the time of the alleged sale, held, any error in overruling question asking witness to state a conversation held at that time was harmless. Collins v. State [Tex. Cr. App.] 84 S. W. 585. Refusal to permit a witness to testify as to whether or not he had made a trade with the grand jury whereby he gave evidence against defendant on condition that he, witness, was not indicted, held harmless, it not being shown that his testimony against defendant was material. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702. In a prosecution for Sunday liquor selling any error in requiring the accused, after he testified that he did not remember making the sale complained of, to state whether he sold liquor on that day, or was accustomed to selling on Sunday, was harmless, he having answered in the nega-

whether requested or not should give appropriate instructions on every substantial issue in the case presented by the evidence.[75] An instruction must not be misleading

tive. Borck v. State [Ala.] 39 So. 580. Where sole question was whether defendant on a certain day sold to prosecutor intoxicating liquor and prosecutor testified that he purchased a drink of intoxicating liquor from defendant on that day, any error in the admission of evidence of sales to other persons on that day is rendered harmless by defendant's testimony that he sold to prosecutor and to other persons certain bitters which the evidence showed to be intoxicating. People v. Seeley, 93 N. Y. S. 982.

74. It is not erroneous to leave to the jury whether the sale of intoxicants had been prohibited in the territory where the liquor was sold. Adams v. State [Tex. Cr. App.] 85 S. W. 1079. When the liquid by common knowledge and observation contains alcohol, the court may so declare; but if the question is doubtful, it is for the jury. State v. Parker [N. C.] 51 S. E. 1028. The question whether a police jury has authority to regulate the sale of intoxicants in a town is judicial. Evans v. Police Jury [La.] 38 So. 555.

75. Where issue was whether accused was agent of the seller or purchaser, held, the failure of the court to instruct on the latter theory was error requiring the grant of a new trial. Walker v. State [Ga.] 50 S. E. 994. There being conflicting evidence as to whether the liquor sold is intoxicating a requested instruction to define "intoxicating liquor" should be given. Uloth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822. It only being proved inferentially that the accused was the agent of the seller, held, the court should have instructed that if accused represented the purchaser he was not guilty. Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Where defendant testifies that if the liquor was intoxicating he did not know it, but that, without any negligence, he made an honest mistake in that respect, a requested instruction covering such question should be given. Id. Where there was evidence that the liquor sold was not an intoxicant, held error to refuse an instruction that if it was a nonintoxicant, or if there was a doubt of its being an intoxicant, defendant should be acquitted. Rutherford v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 636, 88 S. W. 810. Held error to submit state's theory that defendant sold the liquor and refuse to submit defendant's theory that he acted as the purchaser's agent. Driver v. State [Tex. Cr. App.] 85 S. W. 1056. Where the state did not claim that defendant was the agent of the purchaser and defendant claimed that the alleged purchaser stole the liquor from him, held not error to refuse a charge presenting the theory that defendant was the agent of the purchaser. Carter v. State [Tex. Cr. App.] 89 S. W. 835. Where liquor sold was a patent medicine which did not taste, smell or look like an intoxicant, held error to refuse an instruction that defendant was not guilty if the liquor sold was a medical preparation, and was not an intoxicating liquor when drunk in such quantities as could be practically drank. Pearce v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 727, 88 S. W. 234. Where more than a month elapsed from the time prosecutor's father requested him to buy him whisky and gave him money therefor and the time the prosecutor actually bought the liquor and prosecutor denied any agency, held not to present the issue that if the sale of the whisky was to the prosecutor as agent of his father defendant should be acquitted. Gee v. State [Tex. Cr. App.] 89 S. W. 1078. Where there was testimony showing that the liquor sold was not intoxicating, that the distiller so told the defendant and that defendant relied thereon, held, a charge submitting the question of mistake of fact should be given. Mayne v. State [Tex. Cr. App.] 86 S. W. 329. Where there was testimony showing that the liquor sold was not intoxicating, a charge to acquit if the jury had a reasonable doubt whether the article sold was intoxicating should have been given. Id. Where the court charged that defendant was guilty if he received money from prosecutor to get a C. O. D. shipment of liquor with the understanding that prosecutor was to have same, held error to refuse to charge at defendant's request that if defendant gave the money so received to W., and requested him to return it to prosecutor, then defendant was not guilty. White v. State [Tex. Cr. App.] 85 S. W. 9. Where a physician testified that the preparation found was largely used as a proprietary medicine and the court charged that there was no doubt that it was so used and might be so used lawfully, held, defendant's evidence in regard to the medicinal character of the preparation was sufficiently presented to the jury. State v. Costa [Vt.] 62 A. 38. Evidence held insufficient to justify submission to jury of questions as to whether defendant had any pecuniary interest in the sale, and whether he was acting as agent for a certain drug company in making the same. Blasingame v. State [Tex. Cr. App.] 85 S. W. 275. Instruction that defendant may be found guilty if he acted as agent of seller held erroneous, the evidence being insufficient to raise the question of agency. Harris v. State [Tex. Cr. App.] 85 S. W. 284. An instruction submitting certain facts to the jury and stating that if they found them to be true defendant should be found guilty, such facts constituting a sale and having been in evidence, was proper. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19. Where witness testified that defendant borrowed $1.95 and loaned witness some whisky and that defendant had repaid $.50 of the sum borrowed and witness intended to pay back the whisky, held to warrant an instruction that if the transaction was a mere subterfuge to evade the law defendant was guilty. Buckner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 12, 89 S. W. 829. In a prosecution for selling "drinks containing alcohol," an instruction that while it would be insufficient to convict if the drinks sold contained a mere trace of alcohol, it was not required that they contain a sufficient quantity to intoxicate when freely used, but they must contain such an amount as a man of ordinary sense, reason and judgment would say that they "had alcohol in" them, held justified by the

ing[76] or uncertain;[77] it must conform to the allegations and proof,[78] and must not be on the weight of the evidence.[79] It must not leave questions of law to the jury.[80] Unless required by the terms of the statute or by the state of the evidence, on a prosecution for violating the Sunday law, it is not necessary to instruct as to the reason for keeping open,[81] or to define the words "traffic"[82] or "liquor dealer,"[83] In defining a word the court need not give every synonym.[84] The charge must be construed as a whole.[85] A bottle of liquor being offered in evidence and received as an exhibit, it may be allowed, under restrictions not to taste its contents, to go to the

evidence. State v. Parker [N. C.] 51 S. E. 1028. On the trial of an indictment for selling vinous, spirituous, malt or brewed liquors or any admixture thereof, without a license, it being admitted that the liquor sold contained slightly less than one per cent. of alcohol, a charge that if the jury believed that the beverage sold had any alcohol, or any admixture thereof, in it, and also believed that the defendant sold the beverage, they should return a verdict of guilty, held correct. Commonwealth v. Wenzel, 24 Pa. Super. Ct. 467.

76. Where the controlling issue was whether the liquor was intoxicating, a charge that the courts will take judicial notice that fermented wine is intoxicating held misleading. Hall v. State [Ga.] 50 S. E. 59. Instruction held objectionable as authorizing a conviction regardless of where the sale was consummated. Blasingame v. State [Tex. Cr. App.] 85 S. W. 275.

77. Instruction held erroneous because assuming some agency and leaving it uncertain whether the agency was for the purchaser or seller. Blasingame v. State [Tex. Cr. App.] 85 S. W. 275.

78. Under an indictment alleging an illegal sale, a charge authorizing a conviction for soliciting or receiving orders for such a sale is erroneous. Potts v. State [Tex. Civ. App.] 89 S. W. 835. Where the liquor was shipped to appellant and another and appellant took the goods, held, an instruction referring to a shipment to appellant alone held not erroneous. Beall v. State [Tex. Cr. App.] 86 S. W. 334. Where a verbal complaint charged that defendant assisted in committing a common nuisance in a back room on the first floor of a two story building No. 708 Kansas avenue, and the particular room was described by witnesses for the city, held, the court was justified in referring to it in the instructions as "the place described in the evidence." City of Topeka v. Kersch [Kan.] 79 P. 681. Where more than a month elapsed from the time prosecutor's father requested him to buy him whisky and gave him money therefor, and the time the prosecutor actually bought the liquor and prosecutor denied any agency, held to warrant a charge that if the jury should find from the evidence that prosecutor got the bottle of whisky from the accused and paid him for it, it would be a sale to him, prosecutor, whether he was acting for himself or his father. Gee v. State [Tex. Cr. App.] 89 S. W. 1078.

79. An instruction that "in law a sale is the agreed transfer of property having some value to another for a valuable consideration. A sale may be shown by facts and circumstances as well as by direct proof," is not erroneous as being on the weight of the evidence. Adams v. State [Tex. Cr. App.] 85 S. W. 1079.

80. On a prosecution for a violation of the local option law, held immaterial whether the court instructed the jury that the local option law was in force in the county or assumed in the charge that it was in effect. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19. On a trial for violating a local option law, an instruction that the local option law was in effect in the county is correct, unless there is an issue raised by testimony questioning the regularity of the manner of putting the law into effect in the county. Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270. An instruction that the test of where the sale was consummated is whose loss it would have been if lost in transit held properly refused in the absence of some rule by which the jury could ascertain whose loss it would have been. Harris v. State [Tex. Cr. App.] 85 S. W. 284.

81. Held not necessary to instruct that defendant must have kept his place open for the sale and exchange of goods, wares and merchandise, and to acquit if he kept it open for any other cause or reason. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

82, 83. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

84. A charge defining the word "administer" as to mean "to give, supply or dispense" is correct though it fails to contain the word "furnish." State v. Wilson [Kan.] 80 P. 565.

85. An instruction that, if the preparation kept by defendant was bought and used as a beverage because of the intoxicating ingredient contained in it, it was a beverage and an intoxicating one, held not erroneous, other instructions being given as to what liquors were intoxicating and that defendant was not liable unless he kept it to sell as a beverage. State v. Costa [Vt.] 62 A. 38. A charge that if defendant took orders as alleged in the indictment, he was guilty, held not rendered erroneous because the court did not in immediate connection therewith give a charge on agency, it appearing that the court did elsewhere in the charge state the law as to agency in the language of a written request preferred by defendant's counsel. Walker v. State [Ga.] 52 S. E. 319. A charge that if the beverage found is "capable of producing intoxication and may be used for that purpose then it is prohibited," held not erroneous in view of other instructions given, the evident meaning of the court being that a preparation of this kind might in some circumstances be classed with intoxicating liquors, and so come within the prohibition, although not ordinarily used as a beverage. State v. Krinski [Vt.] 62 A. 37.

jury upon its retirement.[86] The verdict must be responsive to the charge.[87] The sentence must be authorized by statute.[88] Imprisonment being erroneously added as part of the punishment, an appellate court may modify the judgment by striking out such part.[89] Imprisonment is not part of the penalty, where it is imposed only to enforce payment of a fine and costs under a police regulation.[90] In Kentucky there is no lien on the property where one makes illegal sales in his own house.[91] The general rules as to what constitutes a ground for a new trial apply.[92]

Appeal.[93]—Witnesses not being cross-examined to test the value of their testimony, it must be assumed on appeal that they recognized the beverage which they described.[94]

§ 7. *Summary proceedings. Searches, seizures and forfeitures.*[95]—In some states the warrant issues as a matter of right.[96] A seizure is tortious if made under a warrant issued by special statutory authority but not showing a complaint to call forth such authority.[97] The officer's authority is limited by the terms of the warrant,[98] and if the officer abuses or exceeds his authority or executes it in an unlawful manner to the injury of another, his bond is liable.[99] A single search warrant cannot be lawfully issued to search more than one place.[1] A demurrer to a complaint and warrant will reach defects in the warrant as well as those in the com-

86. State v. Olson [Minn.] 103 N. W. 727.

87. Where a verbal complaint charged that defendant assisted in committing a common nuisance in a back room on the first floor of a two-story building No. 708 Kansas avenue, a verdict finding defendant guilty of maintaining a nuisance at 708 Kansas avenue, "as claimed in the prosecution," held responsive to the charge. City of Topeka v. Kersch [Kan.] 79 P. 681.

88. Shannon's Code, § 6789 does not authorize imprisonment for giving liquor to a minor. Pressly v. State [Tenn.] 86 S. W. 378. A sentence under an ordinance passed under the authority of Acts 1903, p. 96, providing that the accused shall work upon a city chain gang is without authority. Littlejohn v. Stells [Ga.] 51 S. E. 390.

89. Pressly v. State [Tenn.] 86 S. W. 378.

90. Schlagel v. State, 3 Ohio N. P. (N. S.) 429. Error does not lie to a refusal by a mayor to grant a trial by jury to one charged for the first time under section 4364-20 with allowing a saloon to remain open on Sunday. Id.

91. Ky. St. 1903, § 2557 applies only to rented premises. Commonwealth v. Duncan [Ky.] 84 S. W. 526.

92. Failure to give appropriate instructions on all issues is ground for new trial. Walker v. State [Ga.] 50 S. E. 994. Testimony of defendant's wife that he was at home at the time it was claimed he was at his restaurant and sold the liquor, held cumulative and not newly discovered evidence entitling him to a new trial. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702. Where absent witness would have testified that liquor was not intoxicating and continuance was refused, held, new trial should have been granted. Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 150, 86 S. W. 1014. Where it did not appear from the record that either B. or P. was the prosecuting witness, it is not error for the court to refuse to grant defendant a new trial on the ground that one of the jurors was of kin to one of them. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615. A physician held not entitled to a new trial because of the subsequent discovery of his statutory affidavit filed with the county clerk, authorizing him to furnish liquor to his patients, where he made no attempt at the trial to prove that such affidavit, though lost, had been properly filed, and made no request for a continuance by reason of such loss. Blakeley v. State [Ark.] 83 S. W. 948.

93. See Indictment and Prosecution, 5 C. L. 1790.

94. Cullinan v. McGovern, 94 N. Y. S. 525.

95. See 4 C. L. 277. See Search and Seizure, 4 C. L. 1416.

96. Under Acts 1899, p. 11, a judge has no discretion, but must issue a search warrant on presentation of an affidavit stating that liquors are kept by certain persons contrary to law. State v. Fulkerson [Ark.] 83 S. W. 934. The act applies to sales made openly under claim of license in a prohibited district. Id.

97. Where a justice issued a warrant, under Acts 1902, p. 106, No. 90, § 61, showing that complaint was made by one on his oath of office, but not showing the office, the process was no protection to the officer executing it. Casselini v. Booth [Vt.] 59 A. 833.

98. Under a warrant directing an officer to enter and search the premises and remove any of the described liquor found therein with the casks and other vessels in which it was contained, and all implements of sale and furniture used in the illegal keeping or sale of such liquor and carry them to a place of safety and keep them until final action was had thereon, held, the officer had no authority in plaintiff's absence, to remove from his dwelling an iron safe, which was locked, and, on plaintiff's subsequent refusal to open the same, break it open, there being no evidence that it was used for the storage of liquors. Blackmar v. Nickerson [Mass.] 74 N. E. 932.

99. State constable. Civ. Code 1902, vol. 1, §§ 595, 661, construed. Wieters v. May [S.

plaint.[2] In Kansas intoxicating liquor is property and before it can be destroyed the claimant thereto is entitled to a trial by jury of the question whether it has been used in violation of law.[3]

§ 8. *Abatement of traffic as a nuisance; injunction.*[4]—The jurisdiction of particular courts is statutory.[5] A place being improperly conducted, it may constitute a nuisance.[6] Unlawful sales being made, the fact that the seller has a permit does not exempt the place from being a common nuisance.[7] In construing statutes on this subject the word "place" may mean one or more rooms in a building, an entire building or more than one building within the same place used together for the convenient conduct of the prohibited purpose.[8] There being no statutes making a place where intoxicating liquors are sold a nuisance per se, the erection of screens and other devices to make an illegal sale of liquor more safe does not constitute a nuisance as a matter of law.[9] One who has been engaged in unlawful traffic in intoxicating liquors cannot avoid an injunction by bringing the conduct of his business into conformity with law before the hearing for the writ.[10] In a suit to enjoin the maintenance of a nuisance, it is not necessary to have the existence of the nuisance established by any former adjudication or verdict,[11] nor is defendant entitled to a jury trial as a matter of right.[12] The burden is on the dealer to show performance of all conditions precedent to the opening of the saloon and that the physical aspects of his place of business conform to the requirements of the law;[13] but it is for the complaining party to affirmatively show any violation of the law involving matters of conduct, such as illegal sales, etc.[14] A case being made for an injunction, it is error to refuse the writ,[15] and, in Iowa, for the correction of an error thus committed, an appeal will lie to the supreme court,[16] though it does not appear that the record entry has been signed by the judge.[17] The existence of a criminal action against defendant in the same court, at the same time and on the same facts, is not ground for postponing the civil action.[18]

§ 9. *Civil liabilities for injuries resulting from sale. Civil damage laws.*[19]—Civil damage acts create a cause of action which was unknown at the common law.[20]

C.] 50 S. E. 547; Harrington v. Gideon [S. C.] 50 S. E. 549.

1. If it violates this rule it is invalid. State v. Duane [Me.] 62 A. 80. When a warrant in describing the place to be searched, describes three places, each occupied by a different person though all three places are adjoining, the court cannot read into the warrant words not therein written to show the other two places were named simply as boundaries of the place occupied by the respondent. Id.

2. State v. Duane [Me.] 62 A. 80.

3. Stahl v. Lee [Kan.] 80 P. 983. Gen. St. 1901, § 2496, preserves to the claimant the right of appeal from a judgment of the police court. Id. It follows from this that Gen. St. 1901, § 2499 is not unconstitutional. Id.

4. See 4 C. L. 277.

5. Under Const. art. 6, § 5, a suit under St. 1899, p. 103, c. 88, authorizing the district attorney to bring a civil action in the name of the people to abate a public nuisance, is within the exclusive jurisdiction of the superior court. People v. Wing [Cal.] 81 P. 1103.

6. The sales causing public intoxication and consequent annoyance to the public, the place constitutes a public nuisance. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039. A complaint alleging specific facts tending to show that the tippling house and gambling room complained of is a public nuisance, and that it is so conducted as to be injurious to the health, indecent and offensive to the senses and to interfere with the free use of property and the comfortable enjoyment of life and property in the town, held to sufficiently allege a public nuisance. People v. Wing [Cal.] 81 P. 1103.

7. State v. Erickson [N. D.] 103 N. W. 389.

8. State v. Brown [N. D.] 104 N. W. 1112.

9. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039.

10. Donnelly v. Smith [Iowa] 103 N. W. 776.

11, 12. Cowdery v. State [Kan.] 80 P. 953.

13, 14. Jones v. Byington [Iowa] 104 N. W. 473.

15. Code, § 2405 considered. Donnelly v. Smith [Iowa] 103 N. W. 776.

16. Code, § 4101. Donnelly v. Smith [Iowa] 103 N. W. 776.

17. Code, § 242 construed and held directory only. Donnelly v. Smith [Iowa] 103 N. W. 776.

18. Cowdery v. State [Kan.] 80 P. 953.

19. See 4 C. L. 278.

20. Schulte v. Menke, 111 Ill. App. 213.

There is a conflict as to whether they should be liberally or strictly construed.[21] By these statutes liquor dealers are generally rendered jointly and severally liable[22] for all the natural or proximate consequences of intoxication[23] to which they in any degree contributed.[24] Such liability extends to sureties on their bonds,[25] and in some states to their landlords,[26] and all such persons and their sureties may be joined as defendants in a single action to recover damages.[27] The question of proximate cause is for the jury under appropriate instructions of law.[28] One is not bound to anticipate what is merely possible, nor on the other hand, is he liable for such consequences only as usually follow.[29] It is sufficient if the result ought to have been apprehended according to the usual experience of mankind.[30] It is not the lawful, but the wrongful or negligent, act of a third party intervening, which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act.[31] A recovery cannot be sustained where it appears that death resulted from deceased's own willful and unlawful conduct.[32] In some states while the intoxicating liquor must have contributed as a proximate cause to the intoxication, and the act of the intoxicated person must have been the cause of the injury, it is not necessary that the intoxication should have been the proximate cause of injury or of the act which caused it.[33] In Illinois a saloon-keeper is not liable for the care of one in-

Rev. St. 1903, c. 29, § 58 construed. Currier v. McKee, 99 Me. 364, 59 A. 442.

21. Should be liberally construed so as to effect the beneficent purpose for which they are enacted. Currier v. McKee, 99 Me. 364, 59 A. 442. Are penal in character and should receive a strict construction. Schulte v. Menke, 111 Ill. App. 212.

22. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046. In Illinois each person who assists in rendering one an **habitual drunkard** is liable for the acts of all persons who contributed, by the furnishing of intoxicating liquors, to the creation of such condition. Earp v. Lilly [Ill.] 75 N. E. 552. An instruction that the suit against each of the defendants is a separate suit and that the jury could find the defendants all guilty or all not guilty, or find some of them guilty and some not guilty, as the evidence may show, held not misleading. Id.

23. Schulte v. Menke, 111 Ill. App. 212; Sauter v. Anderson, 112 Ill. App. 580. Section 8 of the dramshop act does not render a saloon-keeper liable for the care of one who, while intoxicated, is injured, not in consequence of the intoxication, but by the willful criminal act of a third person. Schulte v. Menke, 111 Ill. App. 212.

24. Jessen v. Wilhite [Neb.] 104 N. W. 1064. Under Hurd's Rev. St. 1903, c. 43, § 9, any person who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part is liable. Instruction approved. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, afg. 115 Ill. App. 257. It is no defense for defendants to show that the intoxication was principally caused by the sale to the deceased of liquor by one not a defendant to the action. Kelley v. Malhoit, 115 Ill. App. 23.

25. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046. Burns' Ann. St. 1901, § 7288 gives a remedy against the saloon keeper personally or against the sureties on his bond at the election of the person injured. State v. Soale [Ind. App.] 74 N. E. 1111.

26. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, afg. 115 Ill. App. 257.

27. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046.

28. Botwinnis v. Allgood, 113 Ill. App. 188; Currier v. McKee, 99 Me. 364, 59 A. 442. Whether seller is bound to apprehend that intoxication is liable to cause unjustifiable assaults and consequent injury to the assailant is a question of fact for the jury. Id. Whether an attack of gangrene was the result of alcoholism and exposure induced by it, or whether it was a separate and intervening cause of death, held for the jury. Temme v. Schmidt [Pa.] 60 A. 158. Question whether proximate cause of deceased's death was intoxication or an assault by third persons held for the jury. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, afg. 115 Ill. App. 257. Whether sale of liquor caused purchaser to commit the murder held for the jury. Stecher v. People [Ill.] 75 N. E. 501.

29. Currier v. McKee, 99 Me. 364, 59 A. 442. He is not legally liable for consequences which could not have been foreseen or reasonably expected to occur as a direct or natural result of the use as a beverage of the intoxicating liquors sold. Schulte v. Menke, 111 Ill. App. 212.

30. Currier v. McKee, 99 Me. 364, 59 A. 42.

31. Currier v. McKee, 99 Me. 364, 59 A. 442. Where intoxicated person committed an unjustifiable assault and was injured, held, if his intoxication caused the assault and he was injured by the person assailed while the latter was defending himself, the seller of the liquor was liable. Id. It is not a natural and probable result of intoxication that the person intoxicated should come to his death or receive great bodily harm by the willful criminal act of a third party. Schulte v. Menke, 111 Ill. App. 212.

jured by an intoxicated person to whom such saloon-keeper has sold liquor.[34] In Nebraska one is liable for all damages growing out of the disqualification resulting from or contributed to by the sale, without reference to the time through which such disqualification may continue.[35]

A child born after its father's death may sue for loss of support due to its father's death.[36] In Illinois the rights of action of the widow and children are separate and distinct,[37] and a judgment in an action by the former will not bar an action by the latter.[38] The fact that a father's course of conduct tended to encourage his minor son in dissipated habits does not bar him from recovering damages for a sale to his son,[39] though it is competent evidence as tending to show that he was not aggrieved by such sale.[40] Under the statutes of many states one injured by an intoxicated person may maintain an action against the seller of the liquor in his own name.[41] The fact that plaintiff had written one of defendants that she did not object to an occasional sale to her husband does not bar an action for damages but can be considered only in mitigation of damages.[42]

A petition against a surety must allege the granting and issuance of the license.[43] Plaintiff need not prove his case to the satisfaction of the jury.[44] The question of intoxication is ordinarily one of fact for the jury.[45] The proper foundation as to age and general health being first proven, the Carlisle tables of mortality or life expectancy are admissible for the consideration of the jury in determining the probable duration of the life of deceased.[46] The general rules as to the cross-examination of a witness apply.[47] The erroneous admission of evidence may be

32. So held where intoxicated person killed another in self-defense. Sauter v. Anderson, 112 Ill. App. 580.

33. So held under Rev. St. 1903, c. 29, § 58. Currier v. McKee, 99 Me. 364, 59 A. 442.

34. Section 8 of the dramshop act construed. Schulte v. Menke, 111 Ill. App. 212.

35. Jessen v. Wilhite [Neb.] 104 N. W. 1064.

36. State v. Soale [Ind. App.] 74 N. E. 1111.

NOTE. Right of child born after death of father to recover for loss of support: Personal rights of an infant do not occur until birth. Up to that time the personal rights of the infant are not distinguishable from those of the mother. Allair v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 75 Am. St. Rep. 176, 48 L. R. A. 225; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 422; Patrick Gorman v. Budlong, 23 R. I. 169, 49 A. 704, 91 Am. St. Rep. 629, 55 L. R. A. 118. Under the common law, property rights of the infant relate to the time of conception. "Lord Hardwicke, in discussing the same question, held, that a child in the mother's womb is a person in rerum natura, and that by the rules of the civil common law 'she [the child] was to all intents and purposes a child as if born in her father's lifetime.' Speaking of the civil law, which limits the operation of this rule to cases where it is considered for the benefit of the child to be considered born, he says it is to be considered as living for all purposes." Nelson v. Galveston R. Co., 78 Tex. 625, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391; Harper v. Archer, 4 Smedes & M. [Miss.] 99, 43 Am. Dec. 472, and cases cited in the footnotes; Commonwealth v. Parker, 9 Metc. [Mass.] 263, 43 Am. Dec. 396; In re Winne, 1 Lans. [N. Y.] 508; Marsellis v. Thalhimer, 2 Paige [N. Y.] 35, 21 Am. Dec. 66; 1 Blk. Comm. § 130. An infant may recover for the loss of support caused by the wrongful killing of its father by another, although the infant was en ventre sa mere at the time the wrongful killing occurred. Nelson v. Galveston R. Co., supra. Such child is entitled to share equally with other children of the deceased in the benefit of such action. George v. Richard, L. R. 3 Adm. & Eccl. 466; Blake v. Midland R. Co., L. R. 18 Q. B. 93, 21; Quinlen v. Welch, 66 Hun, 684, 23 N. Y. S. 963. By the weight of authority no distinction should be made between the rights of a posthumous child and one born during the lifetime of the parent. This is the doctrine of the celebrated case of Theluson v. Woodford, 2 Ves. Jr. 319.—From State v. Soale [Ind. App.] 74 N. E. 1111.

37, 38. Stecher v. People [Ill.] 75 N. E. 501.

39, 40. Wakeham v. Price [Tex. Civ. App.] 89 S. W. 1093.

41. So held under Ballinger's Ann. Codes & St. § 2945 as regards a married man. Judson v. Parry [Wash.] 80 P. 194.

42. Action under Starr & C. Ann. St. 1896, c. 43, par. 9. Earp v. Lilly [Ill.] 75 N. E. 552.

43. Quist v. American Bonding & Trust Co. [Neb.] 105 N. W. 255.

44. Kelley v. Malhoit, 115 Ill. App. 23.

45. Botwinis v. Allgood, 113 Ill. App. 188.

46. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046.

47. Cross-examination of plaintiff as to her husband's earnings and business does not entitle plaintiff to show that she has children who contribute to the earnings of

cured by an instruction to disregard.[48] There must be proof of injury to person, property or means of support,[49] hence any evidence tending to prove pecuniary loss is admissible.[50] The habits of the deceased as to the drinking of liquor and the effect of such liquor upon him are proper subjects of inquiry.[51] Evidence of the property and financial condition of plaintiff's husband is admissible as showing plaintiff's means of support.[52] In an action by a wife, testimony that plaintiff has children is inadmissible,[53] and it is incompetent to show an aggravation of injuries to plaintiff's feelings by showing the presence of her children when she was informed of her husband's debauch.[54] In an action by a wife to recover, on behalf of herself and children, for loss of support, defendant cannot show in mitigation of the damages that the wife has commenced divorce proceedings.[55] Whether loss of support is permanent or not is a question of fact for the jury.[56] A sale willfully and wantonly made authorizes exemplary damages, although the seller could not anticipate the particular injury suffered by reason of the sale complained of.[57] A sale to an intoxicated person[58] or to an habitual drunkard[59] is deemed to have been willfully and wantonly made, and evidence tending to show that the seller had knowledge of the buyer's condition is admissible.[60] Proof of a right to exemplary damages as against one defendant does not authorize the allowance of such damages against another.[61] The discretion of the jury as to the amount of damages should be properly limited by instructions.[62] The general rules as to instructions apply.[63] Where

the family. Manzer v. Phillips [Mich.] 102 N. W. 292.

48. Error in the admission of testimony as to the amount spent by plaintiff's husband in defendant's saloon is cured by subsequently charging the jury that no recovery can be had for such money. Manzer v. Phillips [Mich.] 102 N. W. 292.

49. Plaintiff's testimony showing that her husband provided for her as well after the debauch as formerly and that the only real difference that the loss of the money spent on the debauch made was that plaintiff would have that much less money if her husband should die before her, held, plaintiff was not entitled to recover for any injury to her person, property or means of support. Manzer v. Phillips [Mich.] 102 N. W. 292.

50. Evidence tending to prove that the minor sons of the deceased were required to devote all their time to the support of themselves and the family of which they were a part, held admissible as tending to prove pecuniary loss. Horst v. Lewis [Neb.] 103 N. W. 460, afg. on rehearing 98 N. W. 1046. Evidence as to the payment of the debts of the deceased from the proceeds of the products raised on the farm held not erroneously admitted. Id.

51. Bear upon question of actual loss and damage sustained. Kelley v. Malhoit, 115 Ill. App. 23.

52. Manzer v. Phillips [Mich.] 102 N. W. 292.

53. Though the admission of the testimony is made indirectly. Manzer v. Phillips [Mich.] 102 N. W. 292.

54. Manzer v. Phillips [Mich.] 102 N. W. 292.

55, 56. Jessen v. Wilhite [Neb.] 104 N. W. 1064.

57. Manzer v. Phillips [Mich.] 102 N. W. 292; Earp v. Lilly [Ill.] 75 N. E. 552.

58. Manzer v. Phillips [Mich.] 102 N. W. 292.

59. Earp v. Lilly [Ill.] 75 N. E. 552.

60. Evidence that plaintiff's husband was drunk frequently and drank liquor in defendants' saloon while intoxicated and was often drunk on the streets of the village, held admissible as tending to show knowledge on the part of defendants that he was an habitual drunkard. Earp v. Lilly [Ill.] 75 N. E. 552.

61. Instruction held erroneous. Corkings v. Meier, 112 Ill. App. 655.

62. Where the jury were required to determine the amount of damages which plaintiffs had sustained from the evidence, and they were instructed as to the proper elements of damage, they were not allowed discretion to impose whatever damages they might choose, and defendant was not harmed by an instruction referring to the amount claimed in the declaration. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, afg. 115 Ill. App. 257.

63. An instruction permitting the jury to award exemplary damages is improper where it does not furnish the jury with any rule or guide for so doing. Pisa v. Holy, 114 Ill. App. 6. An instruction permitting the jury to consider plaintiff's poverty and the fact that she notified the defendant not to sell her husband liquor, in determining the question as to whether such liquor was sold or given and did cause the intoxication complained of is erroneous. Corkings v. Meier, 112 Ill. App. 655. In an action for loss of support due to rendering plaintiff's husband an habitual drunkard, an instruction that the suit against each of the defendants is a separate suit and that the jury can find the defendants all guilty or all not guilty, or find some of them guilty and some not guilty, as the evidence may show, held not misleading. Earp v. Lilly [Ill.] 75 N. E. 552.

an action is brought against a saloon-keeper and his landlord jointly, it is not error, in the absence of a request so to do, to omit to submit a form for a special verdict in case the jury should find one of the defendants not guilty.[64]

§ 10. *Property rights in and contracts relating to intoxicants.*[65]—Where liquor is sold with the intent to enable the buyer to violate the prohibitory liquor law, of which the seller has knowledge, the seller cannot recover on a note given for the purchase price, even though the sale is made without the state.[66] Impurity, vitiation or adulteration of liquors which will constitute a defense in an action for the price of the same must be such as impair their quality or value.[67] Though a lessee covenants that he will not use the premises except for the saloon business, the lease is not rendered illegal nor absolved by the adoption of local option in the county.[68] The inclusion of the seller's license in a sale, for a single and indivisible consideration of a saloon, fixtures and good will, renders the whole contract and the note given therefor void.[69]

§ 11. *Drunkenness as an offense.*[70]—The drunkenness must have occurred in a public place and the indictment or information must so show.[71] By some statutes the offense is limited to intoxicated persons on the public streets.[72]

INTOXICATION; INVENTIONS; INVESTMENTS; IRRIGATION; ISLANDS; ISSUE; ISSUES TO JURY; JEOFAIL; JEOPARDY; JETTISON; JOINDER OF CAUSES, see latest topical index.

JOINT ADVENTURES.[73]

A joint adventure exists where two or more combine their energies or capital in a single enterprise,[74] or where one contributes capital to a business to be repaid from the profits,[75] though as to third persons such facts are often held to constitute a partnership.[76] Absolute certainty as to the nature and extent of the business to be carried on is not fatal.[77] A fiduciary relation exists between the parties involving a duty of full disclosure[78] and entire good faith.[79] Accounting between

64. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, afg. 115 Ill. App. 257.

65. See 4 C. L. 280.

66. M. Levy & Son v. Stegemann [Iowa] 104 N. W. 372.

67. Affidavit of defense failing to so aver held insufficient. Spellman v. Kelly, 27 Pa. Super. Ct. 39. Affidavit of defense averring that liquors were impure, that defendant was a licensed dealer, that he distributed the liquors to his customers when it was discovered that the liquors were impure, and in consequence defendant lost customers and suffered damages, held sufficient. Rheinstrom v. Wolf, 26 Pa. Super. Ct. 559.

68. Houston Ice & Brewing Co. v. Keenan [Tex.] 13 Tex. Ct. Rep. 251, 88 S. W. 197.

69. Sawyer v. Sanderson [Mo. App.] 88 S. W. 151.

70. See 2 C. L. 575.

71. An information for drunkenness, "In a certain public place, to wit, in the town of H., and near the H. public road, at a building known as the 'Old Graves Mill,'" is insufficient in that it does not show that the drunkenness occurred at a public place. Murrey v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 475, 87 S. W. 349. An information for drunkenness, "In a certain public place, to wit, in the town of H., and near the H. public road, at a building known as the 'Old Graves Mill,'" does not authorize a conviction for drunkenness at a place near the H. public road, nor on a public street in the town of H. Id.

72. A person intoxicated when walking on a public street to land adjacent thereto, where he is arrested before complaint is made, is properly convicted of a violation of Comp. Laws 1897, § 11,736, punishing intoxicated persons when on the public streets, etc. People v. Camp [Mich.] 12 Det. Leg. N. 665, 105 N. W. 155.

73. See, also, Clark & M. Corp. § 19; Shumaker, Partn. § 54.

74. Employment of two brokers to procure purchaser held to make them parties to joint adventure. Stotts v. Miller [Iowa] 105 N. W. 127.

75. Agreement to advance money to carry on business and receive share of profits constitutes a joint adventure. Alderton v. Williams [Mich.] 102 N. W. 753. A contract by which money is advanced to carry on a business, the lender to receive a share of the profits, is a joint adventure. Kirkwood v. Smith, 95 N. Y. S. 926. Leasing on shares. Price v. Grice [Idaho] 79 P. 387.

76. See Partnership, 4 C. L. 908.

77. Agreement held not uncertain. Alderton v. Williams [Mich.] 102 N. W. 753.

78. Calkins v. Worth, 215 Ill. 78, 74 N. E. 81; Hinton v. Ring, 111 Ill. App. 369.

parties to a joint adventure are governed by the rules applicable to partnership.[80]

JOINT EXECUTORS AND TRUSTEES; JOINT LIABILITIES OR AGREEMENTS, see latest topical index.

JOINT STOCK COMPANIES.

A joint stock company is a partnership and not a corporation.[81] Every person interested whether as shareholder or creditor is a proper party to a bill to wind up the affairs of a joint stock company.[82] Shareholders may be permitted to surrender their shares towards the payment of debts, liability in addition being reserved if a balance be found due.[83] Shareholders may be permitted to purchase the lands of the association on winding up sale,[84] subject to such conditions as the court may fix.

JOINT TENANCY, see latest topical index.

JUDGES.

This topic excludes the organization[85] and jurisdiction[86] of courts and matters common to the election, salary and tenure of officers generally.[87] It treats only of judges as such and as distinguished from the courts over which they preside.

§ 1. *The office; appointment or election; qualifications and tenure.*[88]—Whether an appointment can be made for an ensuing term before a vacancy exists depends on the statutes.[89] A term of office has been held to begin on the day when the vacancy making possible the appointment arose[90] and ends on midnight of the day "until" which the judge was appointed.[91] In the absence of statute or constitutional limitation, the term is governed by the appointment thereto.[92] Constitutional requirements as to the term must not be infringed, but such requirements are ordinarily held not to apply to the filling of vacancies,[93] and even if they do apply so as to forbid appointments for unexpired terms, such an appointment cannot operate as an appointment for the constitutional term.[94] A judge has

79. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419.
80. Kirkwood v. Smith, 95 N. Y. S. 926.
81. People v. Rose [Ill.] 76 N. E. 42.
82, 83, 84. Randolph v. Nichol [Ark.] 84 S. W. 1037.
85. See Courts, 5 C. L. 870.
86. See Jurisdiction, 6 C. L. 267.
87. See Elections, 5 C. L. 1065; Officers and Public Employes, 4 C. L. 854.
88. See 4 C. L. 280.
89. A judge of the Court of Special Sessions in New York cannot be appointed until there is a vacancy. People v. Fitzgerald, 180 N. Y. 269, 73 N. E. 55.
90. A "term" begins to run from the time a vacancy exists, not from the date of appointment, where the act creating the vacancy fixes the date when the first incumbency shall end. So held as to the preliminary terms of justices of the court of appeals. Harrison v. Colgan [Cal.] 82 P. 674.
91. The term of a judge appointed to hold "until" a certain day expires on midnight of that day. People v. Fitzgerald, 180 N. Y. 269, 73 N. E. 55.
92. State v. Dow [Conn.] 60 A. 1063. A judge elected to fill a vacancy caused by death or resignation holds for the unexpired term only. Nicks v. Curl [Tex. Civ. App.] 86 S. W. 368.
93. The period between the creation of a new circuit and the next general election is a "vacancy" which may be filled by ad interim appointment, and such appointment does not infringe the constitutional provision that circuit judges shall hold office for six years. State v. Burkhead, 187 Mo. 14, 85 S. W. 901.
94. Without determining whether the General Assembly has power to appoint a city judge to fill an unexpired term, in view of the 20th Amendment to the Constitution, providing that such judges shall be appointed for terms of two years, an appointment

no power after the expiration of his term,[95] and all acts which he is required or permitted to do to the exclusion of co-ordinate judges, his successor may do,[96] and where the successor has power to act, he may be substituted in pending mandamus to compel action.[97] If a judge be his own successor his powers continue without interruption.[98]

The acts of a defacto judge are not void if within the jurisdiction of the court over which he presides,[99] but where the invalidity of his appointment arises from the unconstitutionality of the statute authorizing it, acts in the exercise of powers conferred only by such statute are void.[1]

Salaries[2] of judges are fixed by statute or by local fiscal authorities pursuant to statute[3] and their right to allowance for expenses depends likewise on the terms of the statute.[4] Constitutional provisions usually forbid increase or decrease of judicial salaries so as to affect judges in office at the enactment thereof,[5] and if by reason of such a provision the increase is inapplicable to the judges of one court, it is inapplicable to other judges whose salaries are by law conformed to theirs.[6] A constitutional prohibition against increasing salaries of "public officers" during their terms, has been held inapplicable to judges.[7] The Federal statutes provide that on reaching the age of seventy judges may retire on full pay.[8]

§ 2. *Special, substitute and assistant judges.*[9]—Statutes usually provide for the election or appointment of a special judge on the absence or disqualification of the regular judge,[10] for resort to the judge of another district,[11] or for the

expressly to fill an unexpired term cannot be held good as an appointment and void as to its limitation of the term. Either the appointment was wholly invalid or it expired according to its terms. State v. Dow [Conn.] 60 A. 1063.

95. Gordon v. Trainor, 92 N. Y. S. 321.

96. Opening judgment in term. Gordon v. Trainor, 92 N. Y. S. 321.

97. Territory of New Mexico v. Baker, 196 U. S. 432, 49 Law. Ed. 540.

98. Argument in first term and reargument in second. Jewett v. Schmidt, 95 N. Y. S. 631; afg. 45 Misc. 471, 92 N. Y. S. 737.

99. Sellers v. Smith [Ala.] 39 So. 356; State v. Judge of Eighth Judicial Circuit [Ala.] 38 So. 835; Walker v. State [Ala.] 39 So. 242.

1. So held as to equity powers conferred only by an invalid statute creating a new circuit. Alabama Nat. Bank v. Williams [Ala.] 38 So. 240.

2. See 4 C. L. 281.

3. Code Civ. Proc. § 1151, relating to the fixing of the compensation of the judges in Kings County, contemplates that such compensation be fixed in advance. People v. McClellan, 102 App. Div. 21, 92 N. Y. S. 105. A judge who, knowing that no provision had been made, served his entire term without claim for compensation is not entitled to compel the board to fix his compensation therefor. Id.

4. The word "stationery" in a statute fixing the expenses for which a judge is to be allowed does not include postage on official letters. Crook v. Calhoun County Com'rs Court [Ala.] 39 So. 383.

5. The California statute increasing the salary of justices of the court of appeals (St. 1905, c. 249) does not apply to justices in office at the time of its passage. Harrison v. Colgan [Cal.] 81 P. 1010; Id., 82 P. 674. An increase by a statute passed before a judge's term of office begins but not taking effect till after is within the prohibition against increase of salary during a term. Harrison v. Colgan [Cal.] 82 P. 674. A statute providing that no fees should be allowed examining magistrates until after indictment deprives them of fees where the grand jury refuses to indict, and accordingly such statute cannot apply to a judge in office at the time of its passage. Thomas v. Hager, 27 Ky. L. R. 813, 86 S. W. 969.

6. The salaries of the judges of the Court of Appeals being conformed by law to those of the Supreme Court judges, a statute attempting to increase the salaries of the latter judges and void because of a constitutional provision relating to them alone does not increase the salaries of the judges of the Court of Appeals. Harrison v. Colgan [Cal.] 82 P. 674.

7. Under a constitutional provision that judges should receive adequate salaries to be fixed by law, an increase may be made applicable to judges in office, as judges are not "public officers" within a constitutional provision forbidding increase during the terms of public officers (Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961), and if such prohibition applied to judges it would be nullified by the provision as to fixing adequate salaries (Id.). P. L. 175 held to apply to judges in office when it was enacted. Id.

8. The supreme court of the District of Columbia is a "Court of the United States" within such a provision. James' case, 38 Ct. Cl. 615.

9. See 4 C. L. 282.

10. The "absence" of a judge which will permit appointment of an assistant judge is absence from the district and no less absence will permit appointment. Opie v.

calling in of the judge of another court.[12] Where a special judge is appointed on the absence or disqualification of the regular judge, he has the same powers as the regular judge would have had.[13] His powers do not end with the term of court, but he can make such orders in vacation as are proper to be so made and necessary to finally dispose of the case for which he was called,[14] and where his order is reversed, it is his duty to proceed on the mandate without further designation or request,[15] and such duty devolves on his successor.[16] A special judge elected by the bar on failure of the county judge to appear at term need not give bond.[17] A judge of another circuit acting on the disqualification of the local judge need not go into the circuit where the case arose.[18] Authority of a judge of the superior court to "preside" on disqualification of the judge of the city court does not authorize him to attest an affidavit as the basis of a criminal charge.[19] That court was held by an assistant judge when no occasion for his appointment existed is ground of exception to the judgment.[20]

§ 3. *Powers, duties and liabilities.*[21]—Judicial acts must be performed in person and cannot be delegated,[22] and must be performed with the formalities ordinarily attendant on judicial acts.[23]

Powers during vacation or at chambers.[24]—Powers out of term depend on the statutes.[25] They ordinarily extend to all interlocutory and provisional orders[26] but not to judgments or rulings on the merits.[26a] A judge of another circuit to whom a matter is presented on disqualification of the local judge may hear it in chambers if the nature of the case admits of such hearing, provided court is not in session at the time in the circuit where the case arose.[27] Where no pleadings have been filed, the judge has no power in chambers to order service of process by

Clancy [R. I.] 60 A. 635. That the constitution provides for the election of a special judge on disqualification of the county judge and on the failure of the district judge to appear does not invalidate a statute providing for election of a special judge if the county judge fails to appear. Porter v. State [Tex. Cr. App.] 86 S. W. 767. Under a provision for election of a special judge if the county judge does not appear at "the time appointed" to hold court, such an election may be had on the first day of the term without waiting the entire day for the appearance of the regular judge. Id. Such a course is optional as the election would be valid if held on the second day. Scott v. State, 43 Tex. Cr. R. 591, 68 S. W. 178.

11. Glover v. Morris [Ga.] 50 S. E. 956. A judge of one circuit may on request hold court in any other circuit. Salomon v. Chicago Title & Trust Co., 115 Ill. App. 194.

12. It is competent for the legislature to provide that a judge of one court may decide certain questions on the request of another court, though the latter court is given by the Constitution exclusive jurisdiction of such subject. Morgan v. Reel [Pa.] 62 A. 253.

13, 14. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

15, 16. Glover v. Morris [Ga.] 50 S. E. 956.

17. Porter v. State [Tex. Cr. App.] 86 S. W. 767.

18. Glover v. Morris [Ga.] 50 S. E. 956.

19. Edmondson v. State [Ga.] 51 S. E. 301.

20. Opie v. Clancy [R. I.] 60 A. 635.

21. See 4 C. L. 283.

22. Settling bill of exceptions. Gray v. Frontroy [Tex. Civ. App.] 89 S. W. 1090.

23. An order made orally and out of court is not a valid exercise of powers in chambers. In re Kimble [Iowa] 103 N. W. 1009.

24. See 4 C. L. 283.

25. A statute authorizing the issuance in vacation of an order to show cause why prohibition should not issue is valid. Code 1899, c. 110, § 1. Campbell v. Doolittle [W. Va.] 52 S. E. 260. Pleadings cannot be received or any other step taken in a cause in vacation except on statutory authority. Keller v. Keller [W. Va.] 52 S. E. 318. Act April 30, 1900, § 81, continuing in force the previous laws of Hawaii as to "the Civil Courts and their jurisdiction and procedure," continued an act giving certain powers to a judge in chambers. Carter v. Gear, 197 U. S. 348, 49 Law. Ed. 787.

26. An order for temporary alimony may be made in vacation if notice and opportunity to defend be given. Keller v. Keller [W. Va.] 52 S. E. 318. A restraining order in aid of a pending suit may issue in vacation. Reese v. Cannon [Ark.] 84 S. W. 793.

26a. A judge at chambers has no power to pass judgment for contempt not committed in the presence of the court. State v. Scarborough, 70 S. C. 288, 49 S. E. 860. Where his powers are limited to orders which are interlocutory or preparatory for trial (Mills' Ann. Code. § 408), he has no power to deny on the merits a petition for mandamus (People v. Hebel, 19 Colo. App. 523, 76 P. 550), or to render any other judgment (Id.).

27. Glover v. Morris [Ga.] 50 S. E. 956.

publication.[28] In Georgia a statute provides that at a hearing had on prescribed notice the court shall have the same powers in vacation as at term.[29]

Immunities and exemptions.[30]—The judge of a court of superior[31] or inferior[32] jurisdiction is not civilly liable for acts in his judicial capacity, but is charged with the same liability for negligence as other officers in respect to ministerial duties.[33]

§ 4. *Disqualification in particular cases.*[34]—Disqualification disables the judge from any judicial act in the cause.[35] It does not disqualify him to try a challenge to the qualification of his substitute.[36] A case as to which one of the three judges of an intermediate court is disqualified should not be assigned to that court, since on disagreement of the two remaining judges an affirmance pro forma settling the facts against appellant would result;[37] but the sitting of a biased judge is harmless where the bench consisted of three members and the decision was unanimous.[38] As to whether the act of a disqualified judge is void or voidable only the cases are in conflict.[39]

Interest and kinship.[40]—The disqualifying interest need not be pecuniary; any interest which would naturally operate to create a bias is sufficient.[41] A judge who would receive benefits under a bill for the complainant and all others similarly situated is disqualified,[42] the fact that he has a right to come into the suit and receive the benefits of the decree being sufficient irrespective of whether he manifests an intent to do so.[43] That justices of the supreme court issued a rule on an attorney to show cause why he should not be disbarred for misconduct does not disqualify them from hearing the cause in which such misconduct arose.[44] Relationship to a party is a disqualification,[45] but relationship to an attorney in the case is not.[46]

28. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

29. After a judge has by the statutory ten days' notice of the date of hearing acquired the power to hear a case in vacation under the act of 1895 (Civ. Code 1895, § 4323), he may in vacation continue the case from time to time. Glenn v. State [Ga.] 50 S. E. 371.

30. See 4 C. L. 284.

31. A judge of a court of general jurisdiction is not liable civilly for any act done in the exercise of his judicial functions though done maliciously or corruptly. United States v. Bell [C. C. A.] 135 F. 336. A judge who makes a mistake in dismissing a case and is compelled to proceed and try the same by a writ of mandamus is not liable to the plaintiff in damages. Rev. St. 1887, § 4987 does not apply to courts or judges. Hill v. Morgan [Idaho] 76 P. 765.

32. A judge of an inferior court is not civilly liable for acts in good faith beyond his jurisdiction. Rush v. Buckley [Me.] 61 A. 774, collating the authorities pro and con.

33. County judge held negligent in approving guardian's bond with insolvent surety. Commonwealth v. Lee, 27 Ky. L. R. 806, 86 S. W. 990. Degree of care required Id., 89 S. W. 731.

34. See 4 C. L. 285.

35. Allowance of leave to appeal in forma pauperis is a judicial act which cannot be performed by a judge who has been counsel in the cause. Kalklosh v. Bunting [Tex. Civ. App.] 13 Tex. Ct. Rep. 676, 88 S. W. 389.

36. State v. Foster, 112 La. 612, 36 So. 554.

37. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

38. Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371.

39. After a constitutional disqualification is disclosed, though on an unauthorized proceeding, all further proceedings by the judge are void. Disqualification appeared on a motion to transfer the case to another court by reason thereof for which there was no statutory authority. Johnson v. Johnson [Tex. Civ. App.] 89 S. W. 1102. Relationship of the judge to a party renders the judgment void. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913. Disqualification of a judge by interest makes his order voidable only. Prohibition will not lie to prevent enforcement. City of Grafton v. Holt [W. Va.] 52 S. E. 21. Where a trial de novo may be had on appeal, disqualification of the trial judge does not make the judgment void. Bickford v. Franconia [N. H.] 60 A. 98.

40. See 4 C. L. 285.

41. Judge who was a depositor in a bank is disqualified to try one charged with an embezzlement which caused the failure of such bank. Ex parte Cornwell [Ala.] 39 So. 354.

42. Taxpayers' bill to fix water rates. City of Grafton v. Holt [W. Va.] 52 S. E. 21. A statute that no judge shall be deemed disqualified by reason of being a taxpayer in the community does not operate to relieve him of disability to sit in a suit to fix rates for water supply to private consumers, he being such a consumer. Id.

43. City of Grafton v. Holt [W. Va.] 52 S. E. 21.

44. Philbrook v. Newman [Cal.] 82 P. 772.

45. Relationship of the judge to a party within the statutory degree renders the judgment void. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913.

Disqualification because of having been counsel[47] disables the judge to sit in the case, whether it be civil or criminal,[48] and in all subsequent cases between the same parties[49] and involving the same issues.[50] He need not have been the only or principal attorney; it is sufficient if he was consulted as an attorney about the case.[51]

Bias and prejudice.[52]—Only such bias as clearly manifests the impossibility of a fair trial will disqualify.[53]

Procedure and trial of fact of disqualification.[54]—The objection must be promptly[55] and specifically[56] made, and the party alleging disqualification has the burden of proof.[57] A judge to whom objection is made for disqualification should refer the matter to another judge for trial of the facts,[58] and it is the duty of such judge to try the matter as soon as practicable.[59] Objections not amounting to legal disqualification are addressed to the discretion of the judge.[60] In some states it is provided by statute[61] that on the timely filing[62] in any proceeding[63] of an affidavit of prejudice,

46. An appellate judge is not disqualified by the fact that his son was counsel in the court below. People v. Patrick [N. Y.] 75 N. E. 963.

47. See 4 C. L. 285.

48. The New York statute disqualifying a judge to sit in a cause in which he has been counsel applies to civil and criminal cases alike. People v. Haas, 93 N. Y. S. 790.

49. Under a statute disqualifying a judge who has been counsel for "either party," it is sufficient if he has been counsel for one of several co-parties. State v. Dick [Wis.] 103 N. W. 229.

50. One who was attorney for a party in a suit is disqualified to sit in a subsequent suit between some of the same parties involving the same property and issues. State v. Dick [Wis.] 103 N. W. 229. Service as attorney in a suit to partition devised lands does not disqualify from sitting in a contest of the will on the ground of incapacity. In re Glass' Estate [Iowa] 103 N. W. 1013. Having been of counsel for one of the parties in a case involving different issues is no disqualification. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 312, 89 S. W. 552. One who was counsel in a case is disqualified to sit in a subsequent case between the parties in which the judgment in the former suit is pleaded as a bar. Johnson v. Johnson [Tex. Civ. App.] 89 S. W. 1102.

51. Johnson v. Johnson [Tex. Civ. App.] 89 S. W. 1102. One who was attorney for an alleged accomplice of defendant and as such had consulted with defendant about the case is within the statute. People v. Haas, 93 N. Y. S. 790.

52. See 4 C. L. 286.

53. A declaration by a judge that if counsel in a pending case tried it in the same technical manner in which they had tried a previous case they could expect no concessions from the court does not show such bias as will disqualify at common law. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011. A town warden is not disqualified to sit on the trial of one accused of illegal registration by the fact that he had previously, as a member of the Board of Canvassers, approved the registered list with defendant's name thereon, no objection being made thereto. Williams v. Champlin, 26 R. I. 416, 59 A. 75.

54. See 4 C. L. 286.

55. People v. Patrick [N. Y.] 75 N. E. 963; Perry v. Pernet [Ind.] 74 N. E. 609. After several orders have been made by the judge is too late. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509. Is waived by moving for a continuance before the alleged disqualified judge. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

56. An affidavit in a contest over a local option election that the judge was so opposed to the liquor traffic as to have a bias against it insufficiently states the facts showing bias. Erwin v. Benton, 27 Ky. L. R. 909, 87 S. W. 291.

57. Unverified petition not supported by any evidence and denied by the judge properly overruled. McGuire v. Blount, 26 S. Ct. 1. An affidavit on information and belief of relationship between the judge and a party is insufficient to prove the disqualification. Reversal denied where such affidavit was the only evidence in the record and it did not appear on what ground the motion was denied. Davis v. Atkinson [Ark.] 87 S. W. 432.

58. State v. Reid [La.] 38 So. 70.

59. Answer in mandamus to judge held to show adequate reason for delay. State v. Reid [La.] 38 So. 963.

60. People v. Patrick [N. Y.] 75 N. E. 963.

61. The Minnesota statute providing that a judge shall be disqualified ipso facto on the filing of an affidavit of prejudice, does not apply in districts having less than three judges. Proviso to that effect held to apply to entire statute and not merely to the next preceding clause. State v. Webber [Minn.] 105 N. W. 68.

62. Affidavit of prejudice being required to be filed before the day fixed for hearing, no such affidavit is effective to interrupt any hearing final or interlocutory if filed on the day fixed for such hearing. State v. Donlan [Mont.] 80 P. 244.

63. Section 180, Code Civ. Proc. relating to disqualification, applies to probate proceedings, though it is in part 1 of the Code and § 2920 in part 3 provides that except as provided in part 3 the provisions of part 2 shall be the rules of procedure in probate. State v. Donlan [Mont.] 80 P. 244. Rev. St. § 550, providing for the disqualification of a judge for bias or prejudice, applies to a con-

another judge must be called in. An affidavit in the language of the statute is held sufficient notwithstanding a rule of court.[64]

JUDGMENT NOTES, see latest topical index.

JUDGMENTS.

This topic excludes all matters relating to foreign[65] or criminal[66] judgments, the conclusiveness of judgments[67] and the specific modes of enforcing the judgment.[68]

§ 1. *Definition, nature and classification of judgments.*[69]—A judgment is a conclusion of law upon facts found or admitted by the parties or upon their default in the course of the suit.[70] The codes of several states define a judgment to be

tempt proceeding founded on an alleged contempt requiring written charge and trial. Hunt v. State, 5 Ohio C. C. (N. S.) 621. Such an affidavit may be filed to disqualify a judge from hearing a motion for a new trial. State v. District Court of Lewis & Clarke County [Mont.] 82 P. 789. The right to file an affidavit of bias or prejudice under Rev. St. § 550 is not limited to cases where all the judges of the subdivision are disqualified; one particular judge may be disqualified and another judge of the subdivision brought in. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

64. An affidavit setting forth the statutory grounds of disqualification in the language of the statute is sufficient. Hence a rule of court requiring that an affidavit filed under Rev. St. § 550 shall specifically set forth the facts constituting the bias or prejudice is invalid. Hunt v. State, 5 Ohio C. C. (N. S.) 621. The fact that without such statement it is almost impossible to secure a conviction for perjury is insufficient to warrant the sustaining of such rule. Id. Bias and prejudice are states of mind and are not susceptible of a statement specifically showing the facts which constitute them. Rule of court requiring such statement held nugatory. Id.

65. See Foreign Judgments, 5 C. L. 1483.

66. See Indictment and Prosecution, 4 C. L. 1.

67. See Former Adjudication, 5 C. L. 1502.

68. See Creditors' Suit, 5 C. L. 880; Executions, 5 C. L. 1384; Sequestration, 4 C. L. 1420; Supplementary Proceedings, 4 C. L. 1591; etc.

69. See 4 C. L. 287.

This section is definitive in its nature, the manner of taking and the requisites of the various kinds of judgments enumerated being treated later on in this article or in separate articles. See topics Confession of Judgment, 5 C. L. 608; Defaults, 5 C. L. 982, etc.

70. Cyc. Law Dict., "Judgment," p. 507. An order of notice is not a judgment. Smith v. Whaley [R. I.] 61 A. 173. Orders made by judges for elections under the Brannock

the final determination of the rights of the parties in an action or proceeding,[71] and distinctions are sometimes made between judgments, orders and decrees.[72] A judgment is not a contract within the meaning of constitutional provisions prohibiting the impairing of the obligation of a contract.[73]

Judgments on offer, consent, stipulation, or confession.[74]—A consent judgment is a contract of the parties made a matter of record by the court at their request.[75] A judgment under a stipulation is a judgment by consent.[76]

Default and office judgments.[77]

Final and interlocutory judgments.[78]—The word "final" is used of a judgment in several senses, and when used in any qualified sense, that fact must be kept clearly in mind.[79] To be final the judgment must terminate and completely dispose of the action;[80] consequently it is essential to a final judgment in an action at law that it have either a "nil capiat" or an "eat inde sine die" or equivalent words.[81] A provision for costs is not an essential element of a final judgment.[82] A decree in other respects final is not rendered interlocutory by the incorporation of matters in aid of the execution thereof.[83] The New York code defines a final judgment as the final determination of the rights of the parties to the action.[84] Mere judgments

Law are merely ministerial and not judgments of the court, and hence may be reviewed by an associate judge, notwithstanding a rule against the review of the judgments of associate judges. Fulton v. Columbus, 3 Ohio N. P. (N. S.) 358.

71. Code Civ. Proc. § 577. An order denying an alleged widow's petition for a homestead allowance, based on her claim of widowhood, on which issue is joined, is a judgment. In re Harrington's Estate [Cal.] 81 P. 546.

72. See Motions and Orders, 4 C. L. 704; Equity (decrees), 5 C. L. 1144. In New York a special proceeding does not terminate in a judgment. Terminates in a final order. Code Civ. Proc. § 3343, subd. 20 and § 1301 construed. Fenlon v. Paillard, 46 Misc. 151, 93 Y. S. 1101.

73. Laws 1897, p. 52, c. 39, providing that after the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor, and no suit or other proceeding shall be maintained by which the lien of the judgment shall be extended, is not, as to a judgment in an action of tort rendered before its passage, an unconstitutional violation of the obligation of contracts. Gaffney v. Jones [Wash.] 81 P. 1058.

74. See 4 C. L. 288. See, also, Confession of Judgment, 5 C. L. 608.

See Fletcher Eq. Pl. & Pr. §§ 704, 705.

75. Bunn v. Braswell [N. C.] 51 S. E. 927.

76. Pacific Paving Co. v. Vizelich [Cal. App.] 82 P. 82.

77. See 4 C. L. 289. Also see the topic Defaults, 5 C. L. 982, where the mode and manner of taking a default and an office judgment is fully treated; as to the opening of default judgments, see post, § 5.

See Fletcher Eq. Pl. & Pr. § 706.

78. See 4 C. L. 289.

79. What judgments are final for the purposes of appeal or res judicata is treated respectively in Appeal and Review, 5 C. L. 121 and Former Adjudication, 5 C. L. 1502.

A judgment or decree may be final as to some things and not so as to others. See topics just cited.

See Fletcher Eq. Pl. & Pr. § 700.

80. People v. Severson, 113 Ill. App. 496. The suit having been closed by final judgment, no further proceedings can be had in it except such as may be required for the execution of the judgment. Sequestration of property denied. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 441. In an action for an accounting between partners, a judgment overruling exceptions and making the auditor's finding the judgment of the court, being unexcepted to, held final. Hogan v. Walsh [Ga.] 50 S. E. 84. A decree in partition entered after everything had been done in the cause except the settlement of costs, held a final decree. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984. A decree declaring lands not subject to partition and ordering a sale and division of the proceeds held final. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. The order of discharge of an assignee for the benefit of creditors which the court is authorized to make after a hearing and notice is a final judgment. Comp. Laws 1887, § 4675, considered. Freeman v. Wood [N. D.] 103 N. W. 392. A judgment determining the amount due to each of the creditors of an insolvent corporation, adjudging that they are entitled to recover the same from the stockholders and fixing the sum due the creditors, held a final judgment. Childs v. Blethen [Wash.] 82 P. 405.

81. People v. Severson, 113 Ill. App. 496.

82. Childs v. Blethen [Wash.] 82 P. 405.

83. A decree confirming a foreclosure sale of land held final, notwithstanding a subsequent order made at the same term permitting additional pleadings, wherein the defendants sought to subject the plaintiff for the rents and profits of the land alleged to have been received by him between the sale and a prior sale which had been set aside, to be filed. Clement v. Ireland, 138 N. C. 136, 50 S. E. 570.

84. Code Civ. Proc. § 1200. A judgment in an action for the reformation of a contract

for costs,[85] decrees rendered on cross bills,[86] orders sustaining demurrers,[87] or decrees which merely give to the parties an opportunity to carry out offers made by them in open court,[88] are not final judgments. An order that an action be dismissed is an order for final judgment.[89] The filing of a petition of intervention does not prevent the entry of a final decree where the petition in intervention may be abandoned.[90]

A judgment on the merits can only be given where at the close of the whole case the court is of the opinion that plaintiff is not entitled to recover as a matter of law or where the court sustains a demurrer.[91] Defendant resting at the close of plaintiff's case and moving for a dismissal of the complaint and plaintiff moving for judgment, a judgment for defendants involves the merits.[92]

Judgments in personam and in rem.[93]—A judgment in personam is one against the person.[94].

§ 2. *Requisites. A. In general.*[95]—In order to have a valid judgment the court must have jurisdiction of the cause of action,[96] the subject-matter and, except in actions in rem,[97] the parties[98] at the time the judgment was rendered.[99] Having

for the amount due thereunder, for an accounting and for the delivery of stocks and bonds of a corporation which reforms the contract, directs a judgment for plaintiff for a specified sum, orders the transfer of stocks and bonds, requires plaintiff to account, and appoints a referee to take the account, and which recites that it is an interlocutory judgment and reserves all questions as to interest and extra allowance until final judgment, is an interlocutory judgment. Potter v. Rossiter, 95 N. Y. S. 1036.

85. People v. Severson, 113 Ill. App. 496.

86. A decree pro confesso rendered on a cross bill is within Federal Equity Rule 1. Blythe Co. v. Bankers' Inv. Co. [Cal.] 81 P. 281.

87. Order sustaining a demurrer and granting leave to file an amended complaint. Cooke v. McQuaters [S. D.] 103 N. W. 385.

88. Gunning v. Sorg, 113 Ill. App. 332.

89. Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658.

90. East Tennessee Land Co. v. Leeson, 185 Mass. 4, 69 N. E. 351. Such intervention being by a receiver to secure himself for costs of suits instituted by him but in which the insolvent was substituted as nominal plaintiff is abandoned by the receivers' taking a final decree. Id.

91. Municipal Court Act (Laws 1902, p. 1561, c. 580) § 249. Consequently where a judgment is rendered in favor of defendants at the close of plaintiff's case it can only be a judgment of nonsuit. Levy v. Timble, 94 N. Y. S. 3. Judgment "dismissing the complaint on the ground that this action is prematurely brought, the work not being completed according to the contract, and judgment for the defendant on the counterclaim for the sum of $25 without costs," held to show a decision on the merits and defendant was entitled to have it amended to show such fact. Ruegamer v. Cleslinskie, 93 N. Y. S. 599.

92. Is not merely a judgment of nonsuit. Zimmerman Co. v. New York City R. Co., 95 N. Y. S. 598.

93. See 4 C. L. 289.

94. A judgment ordering, adjudging and decreeing that B. have and recover of and from S. Bros. the sum of $2,335, "for which let execution issue," etc., constitutes a personal judgment against S. Bros. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737.

95. See 4 C. L. 290.

96. Judgment held void where petition failed to show an amount involved sufficient to bring the cause within the jurisdiction of the district court. Moore v. Snell [Tex. Civ. App.] 88 S. W. 270. Court cannot enter judgment awarding any relief in an ancillary action after the main action has been dismissed and the order of dismissal allowed to become final. State Bank v. Theweatt, 111 Ill. App. 599. Where the only ground of jurisdiction alleged in a suit to set off cross judgments is defendant's insolvency and proof of insolvency fails, a court of equity cannot render a decree that will terminate the controversy between the parties or prevent an appeal. Whelen v. McMahan [Or.] 82 P. 19.

97. Acts 1895, p. 89, c. 71, in regard to suits to enforce levee taxes, makes the proceeding in the nature of a suit in rem, and the fact that the owner of the property was not a party defendant does not affect the validity of the decree. Ballard v. Hunter [Ark.] 85 S. W. 252. It is competent for the legislature to provide that a lien for taxes may be foreclosed in the courts against the person to whom the land was assessed, whether that person is or is not the owner of the property; and a judgment of foreclosure against property of a resident owner is not void although service was had by publication and the owner's wife was not made a party defendant. Allen v. Peterson, 38 Wash. 599, 80 P. 849.

98. Bickford v. Francouia [N. H.] 60 A. 98; Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125; Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182; Fink v. Wallach, 95 N. Y. S. 872; Hickey v. Conley, 24 Pa. Super. Ct. 388; Chester City v. Baltimore & O. R. Co., 27 Pa. Super. Ct. 206. Appellate judgment. Omaha Nat. Bank v. Robinson [Neb.] 102 N. W. 613. Want of jurisdiction of the lower court appearing on the face of the record, an appellate court must

such jurisdiction the judgment may be erroneous but not void.[1] It follows that there must have been a legal service of valid process,[2] though this fact need not appear of record in order that the court shall have jurisdiction, in the sense of possessing the power, to enter judgment.[3] Personal service is essential to a judgment in personam,[4] and in some states to a default judgment.[5] In Mississippi any error or mistake as to whether the cause is of equity or common-law jurisdiction is immaterial.[6] The declaration must name at least one defendant,[7] but a prayer is unnecessary if the appropriate relief sufficiently appears from the allegations of the complaint.[8] In Washington the complaint need not be filed.[9] Unless represented by or in privity with parties before the court,[10] the judgment is void as to persons not before the court;[11] hence all necessary parties should be brought into the court[12] rendering the judgment.[13] A defect in this regard cannot be waived,[14] and the

reverse; it cannot correct error. Mandamus proceedings. Powell v. People, 214 Ill. 475, 73 N. E. 795.

99. A decree granting letters of administration cannot be upheld by showing that property of the decedent was brought into the state after his death. McCarthy v. Supreme Court of I. O. of F., 94 N. Y. S. 876.

1. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891. The court having jurisdiction of the parties and the subject-matter, a default judgment taken without notice in an action for equitable relief after the defendants had appeared is irregular but not void. Martinson v. Margolf [N. D.] 103 N. W. 937. Mere irregularities do not render the judgment void; it is valid until vacated or reversed. Hickey v. Conley, 24 Pa. Super. Ct. 388; Smith v. Finger [Okl.] 79 P. 759.

2. So held where on scire facias to revive a default judgment it appeared from the return that the service of process was insufficient. King v. Davis, 137 F. 198. Service of summons by publication, directing defendants to appear within 60 days after the date of the first publication, which gives but 19 days between the date of the last publication and the day of judgment, does not give the court jurisdiction to enter a default judgment foreclosing a tax lien. Bailey v. Hood, 38 Wash. 700, 80 P. 559. A resident defendant temporarily absent from the state cannot be properly served, under Rev. Laws, c. 167, § 31, at his last and usual place of abode, and subjected to a judgment by default, without further notice. Porter v. Prince [Mass.] 74 N. E. 256. A justice's judgment is absolutely void where defendant was not served with process more than five days before the rendition of judgment. Comenitz v. Bank of Commerce [Miss.] 38 So. 35. Under a statute authorizing service by leaving a copy at the usual residence of defendant, a judgment based on a return showing service by leaving at the "last" usual place of residence of the defendant is void. Ruby v. Pierce [Neb.] 104 N. W. 1142. It not being essential to the validity of a service by publication that there be a sheriff's return to the effect that defendant cannot be found in the county in which action is brought, a judgment is not void because the return in the action bears a date prior to the commencement of the action. Allen v. Peterson, 38 Wash. 599, 80 P. 849. See topic Process, 4 C. L. 1070.

3. It may supply proof of service after judgment. Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

4. Stone v. Cassidy [Ark.] 87 S. W. 621. Attachment proceeding. French v. White [Vt.] 62 A. 35. See Jurisdiction, 4 C. L. 324, also see 4 C. L. 290, n. 46.

5. Default judgment must be based on personal service of process. Code Civ. Proc. § 426, subd. 4. O'Connell v. Gallagher, 93 N. Y. S. 643. The discovery of a summons and its delivery to defendant by her employe is not such personal service. Id. See topic Defaults, 5 C. L. 932; also Process, 4 C. L. 1070.

6. Personal judgment against the members of a firm for a firm debt rendered in a suit to set aside alleged fraudulent conveyance by them affirmed. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70.

7. Failing to so do action should be dismissed. Poling & Co. v. Moore [W. Va.] 52 S. E. 99.

8. Staton v. Webb, 137 N. C. 35, 49 S. E. 55. A complaint filed by a judgment creditor of a mortgagor stating that defendant mortgagee had sold the mortgaged premises for more than enough to pay his debt, and refused to pay the surplus to plaintiff in satisfaction of his docketed judgments, and in which the evident relief, though not stated, was to require defendant to pay over the surplus to plaintiff, held sufficient. Id. Court states that it is safer and better practice to add a formal prayer for relief. Id.

9. Snohomish Land Co. v. Blood [Wash.] 82 P. 933.

10. Under Gen. St. N. J. p. 2336, § 2, where, in an action on a bond, one of two defendant joint debtors is properly before the court, plaintiff is entitled to a judgment against both joint debtors. Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513. See Former Adjudication, 5 C. L. 1502; Parties, 4 C. L. 888.

11. A decree held void as to assigns not before the court. Collins v. Denny Clay Co. [Wash.] 82 P. 1012. See Former Adjudication, 5 C. L. 1502.

12. Rev. St. 1898, § 2610 considered. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244.

13. A party cannot be brought into the case in the court in which a transcript is filed. Doerr v. Graybill, 24 Pa. Super. Ct. 321.

14. Rev. St. 1898, §§ 2610, 2654, considered. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244.

judgment should be withheld until the situation is such that the persons not before the court will not be liable to be prejudiced.[15] The presence of superfluous defendants does not prevent a plaintiff from obtaining such relief as he is entitled to against the proper defendant.[16] A judgment entered against a minor upon proper service is merely avoidable and, unless attacked within the proper period after the disability of infancy has ceased to exist, continues to be valid as though rendered against persons under no disability whatever.[17] Upon attaining majority and within the time limited either by the rules of common law or by statute, such minors may attack any judgment for fraud or error shown.[18] There is a conflict as to whether a disqualification of the judge renders the judgment void.[19] That the attorney for one of the parties withdrew from the case when it was regularly called for trial does not affect the validity of the judgment rendered.[20] Except in the case of a consent judgment[21] the judgment should be supported by a verdict or findings of fact,[22] though failure to observe this rule does not render the judgment void but merely reversible on appeal or error.[23] Conclusions of law other than the judgment are unnecessary,[24] though in New York, upon the trial of an issue of law, a decision must be filed.[25] In California a final divorce decree must be supported by an interlocutory judgment.[26] An order disposing of money or property in the custody of the court, pursuant to former decrees, need not be supported by pleadings, evidence or findings, the court having knowledge of the facts.[27] Where, in proceedings out of the course of the common law, matters necessary to sustain the judgment do not appear of record[28] or the judgment directed by statute is not entered,[29] the judgment is void. It is not necessary that the judgment be

15. All such persons are necessary parties to a full determination of the litigation and should be brought in by amendment. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244.

16. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838.

17, 18. Wilson v. Wilson [Wash.] 82 P. 154.

19. That it does. Judge of counsel. Johnson v. Johnson [Tex. Civ. App.] 89 S. W. 1102. Where a judge is related within the sixth degree to one of the parties in a cause tried before him, the relationship renders the judgment absolutely void. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913.

Is merely voidable. Where judge was a quasi party to a suit in equity under the description of the bill filed by certain named plaintiffs suing on behalf of themselves and all others similarly situated. City of Grafton v. Holt [W. Va.] 52 S. E. 21. Disqualification of member of tribunal in highway proceedings. Bickford v. Franconia [N. H.] 60 A. 98.

20. So held where a party's counsel, on a motion for a continuance being denied, withdrew from the case, serving on the adverse party and filing with the clerk of the court a notice thereof and refused to participate further in the proceedings. 2 Ball. Ann. Codes & St. § 4771 construed. McInnes v. Sutton, 35 Wash. 384, 77 P. 736.

21. Harniska v. Dolph [C. C. A.] 133 F. 158. There being a consent judgment there need be no waiver of a jury trial. Id.

22. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620; Prowell v. Neuendorf [Mich.] 12 Det. Leg. N. 403, 104 N. W. 666. For conformity of judgment to verdict or findings, see post, next subdivision.

23. The rendition of a judgment without a finding to support it is not void although written findings have been timely requested. It constitutes merely an irregularity or error for which the judgment may be vacated or reversed upon proper proceedings for that purpose. School Dist. No. 3, Carbon County v. Western Tube Co. [Wyo.] 80 P. 155. Where the court simply found the evidence as given by a witness on a disputed question and drew a conclusion that was unsupported by any finding of fact, held, the judgment would be reversed. Dougherty v. Lion Fire Ins. Co. [N. Y.] 76 N. E. 4, rvg. 95 App. Div. 618, 88 N. Y. S. 1096.

24. Roberts v. Hall [Cal.] 82 P. 66.

25. Code Civ. Proc. § 1010. Rowe v. Rowe, 92 N. Y. S. 491.

26. Unless so supported the judgment is absolutely void regardless of any considerations of waiver, consent or acquiescence of the parties. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891.

27. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737.

28. Hickey v. Conley, 84 Pa. Super. Ct. 388. If the complaint and the record in a proceeding under the act of April 3, 1830, omits to set forth the rent reserved by the lease, or that the tenant refused to remove from and deliver up possession of the premises after notice to quit, the judgment is absolutely void. Id.

29. Hickey v. Conley, 24 Pa. Super. Ct. 388. In a proceeding under the Act of April 3, 1830, a judgment in the following form, "After hearing judgment by default for thirty dollars for rent and possession of plain-

enforceable by execution.[30] Where separate and independent judgments may be taken against defendants, the fact that one of the defendants was dead at the commencement of the action does not render a judgment against all void as to the living defendants.[31] The weight of authority seems to support the proposition that the court having jurisdiction, a judgment rendered for or against a party after his death is not for that reason void.[32] A judgment valid on its face[33] being entered in the cause, any subsequent judgment entered before the first judgment is vacated, modified, reversed or disposed of by some means provided by law is void.[34] A judgment must be mutual,[35] must be rendered according to judicial methods and pursuant to established principles of law or equity,[36] and must conform to statutory requirements.[37]

(§ 2) *B. Conformity to process, pleading, proof and verdict or findings.*[38]—Unless the issues are changed by agreement[39] or by a consent decree,[40] the judgment must conform to the pleadings,[41] though under the codes of some states any relief

tiff's property and costs of suit," is fatally defective, inasmuch as the act provides a judgment against the lessee, that the premiees shall be delivered up to the lessor. Id.

30. A general judgment may be rendered against a school district in an action on a warrant drawn against the schoolhouse fund. School Dist. No. 3, Carbon County, v. Western Tube Co. [Wyo.] 80 P. 155.

31. Judgment in tax foreclosure proceedings. Allen v. Peterson, 38 Wash. 599, 80 P. 849.

32. An order dismissing the bill is merely voidable where at the time of its entry the party against whom it was entered was dead, but such fact did not appear of record. Prouty v. Moss, 111 Ill. App. 536.

33. Buffalo Pitts Co. v. Dearing, 37 Wash. 591, 79 P. 1104. If the judgment is void or of no effect there is no objection to the court subsequently entering a valid judgment in the action or proceeding, though the first judgment remains on the record unchallenged. Morrison v. Berlin, 37 Wash. 600, 79 P. 1114.

34. Morrison v. Berlin, 37 Wash. 600, 79 P. 1114; Buffalo Pitts Co. v. Dearing, 37 Wash. 591, 79 P. 1104. Where, on plaintiff's motion for a new trial, judgment is entered for him without setting aside or in any way disposing of the former judgment for defendant, the judgment last entered is void (Id.), and the entry of a subsequent judgment in the same cause is not a method provided by law for disposing of an original judgment (Id.).

35. Judgment in ejectment awarding the possession of the land to plaintiff and decreeing that the sums paid by defendant should be a lien thereon, held mutual. Jamison v. Martin, 184 Mo. 422, 83 S. W. 750.

36. Court cannot do what seems right and just. Washington Loan & Trust Co.'s Case, 39 Ct. Cl. 152.

37. Under Rev. St. 1899, c. 6, art. 1, § 473, a judgment for the penalty of a bond securing the performance of covenants should provide that it shall stand as security for further breaches, and it is error to provide that upon payment of the damages already accrued the payment shall be satisfied. Fidelity & Deposit Co. v. Schuchman, 189 Mo. 468, 88 S. W. 626. Under Mills' Ann. Code, §§ 14, 43, 235-240, the only judgment which can be rendered against a co-partnership on a firm debt or obligation is one against the co-partnership jointly, and the partners summoned or appearing, whether the summons is served upon all or one or more of the defendants. Blythe v. Cordingly [Colo. App.] 80 P. 495.

38. See 4 C. L. 292.

39. Where a petition stated a case in equity to cancel a deed, and by agreement between the parties the deed was recognized as valid, held, a judgment awarding to plaintiff that portion of the purchase money which was held by the court and claimed by defendant as his commission for selling the land was proper. Bailey v. McWilliams [Mo. App.] 85 S. W. 618. Where, in an action against several, the parties make an agreement whereby the interests of all defendants but one are adjusted, a judgment against that one is good, though no formal order of dismissal is entered as against the others. Id.

40. Where by a consent decree defendant agreed to pay certain rents to his divorced wife, he is bound thereby though no such obligation was embraced in the pleadings nor such relief prayed for. Connellee v. Werenskiold [Tex. Civ. App.] 87 S. W. 747.

41. Where bill denies existence of written contract, which court finds in fact existed, plaintiff is not entitled to enforcement of such written contract. Levandowski v. Althouse [Mich.] 99 N. W. 786. Under a complaint to recover damages for breach of a contract for services which contract was void under the statute of frauds, no recovery can be had for the services actually rendered. Banta v. Banta, 103 App. Div. 172, 93 N. Y. S. 393. Where, in a suit to restrain interference with certain ditches, the theory of the complaint is that defendants neither have nor claim any interest in the premises, defendants cannot be enjoined from cutting or draining the ditches on the theory that they are tenants in common and as such cannot lawfully commit waste. Campbell v. Flannery [Mont.] 80 P. 240. Code Civ. Proc. § 1207. Where a complaint seeks to establish a lien on property in plaintiff's hands to satisfy a demand due him, and no answer is filed, plaintiff is not entitled to a money judgment. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. S. 512. Where, in a suit for

consistent with the real issues and the proof may be granted.[42] Failure to observe this requirement renders the judgment erroneous but not void.[43] The granting of the right to appropriate process to enforce the judgment though not asked for is harmless.[44] A judgment will be sustained by a declaration containing one good count which the record affirmatively shows is the basis of the judgment[45] and to which the evidence is applicable, and the judgment responsive.[46] The answer of one of several defendants requiring it, the court may determine the rights of defendants among themselves.[47] A judgment by confession can only be sustained by a warrant authorizing it at the time and in the manner and form in which it is entered.[48] In the absence of statutory provisions to the contrary[49] the judgment

damages for destroying timber and to restrain a trespass on land, defendant only claimed to own two-thirds of the mineral and timber in and on the land, held error to give defendant in the judgment all the mineral and timber. Browning v. Cumberland Gap Canal Coal Co. [Ky.] 89 S. W. 267. On the trial of a feigned issue to determine the ownership of a fund paid into court, it is error to permit a verdict and judgment to be entered against the defendant for a stated sum. The verdict and finding should be for the plaintiff generally. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527. Averment, in petition of a trustee in bankruptcy to enforce a claim against the separate estate of the bankrupt's wife, that $1,000 of the community estate had been expended in improving the separate property of the wife, held sufficient to justify a judgment to the effect that the community estate owned an interest in the improvements to the extent of $300. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432. A prayer "for such other and further relief, general and special, legal and equitable, as to the court shall seem meet and just," in a petition by a trustee in bankruptcy to enforce a claim against the separate property of the bankrupt's wife for the amount of community funds expended in improving the wife's separate property, held to authorize the court to decree a sale of the improvement to satisfy a judgment for the trustee. Id. Where, in a suit on a promissory note, the petition set out the note in haec verba and prayed for judgment for the debt, interest and attorney's fees provided for by the note, together with costs and general relief, held, plaintiff was entitled to a judgment for the aggregate of the items so demanded notwithstanding a general prayer for damages in a sum less than that aggregate. Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776. Where proceedings were brought to escheat property, but failed because of appearance of heirs, and were changed by orders permitting administrator to intervene in a proceeding to marshal assets and to provide for paying fees to the attorney of the administrator and escheator and to sell lands at a time when all parties interested were represented and no objections were made, the judgment will not be set aside as beyond the scope of the pleadings. In re Bugg's Estate [S. C.] 51 S. E. 263. When an execution is levied and a claim interposed and the claimant, in aid of his claim, files an equitable petition praying that in the event the property is found subject, the amount due on the execution be ascertained, offering to pay that amount, and the answer is purely defensive, a decree fixing the amount due by the defendant in execution larger than the total amount due on the execution and charging the land with its payment is unauthorized by the pleadings. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382. Where the complaint demanded judgment for "$51.1898," with interest thereon at 10 per cent. per annum from Sept. 13, 1892, to rendition of judgment (Sept. 12, 1900), also $15 attorney's fees and taxable costs, a judgment for $107.02, enumerating principal, interest and attorney's fees as a part of the $107.02, should be construed as including the principal, interest and attorney's fees, and hence was not objectionable as being for a greater sum than that demanded. Pacific Paving Co. v. Vizelich [Cal. App.] 82 P. 82.

42. The fact that a party proceeds to trial upon a mistaken idea as to the nature of the action and the scope of the issues framed by the pleadings does not deprive him of the right to such relief as is consistent with the real issues and the proof in the case. Logan v. Freerks [N. D.] 103 N. W. 426.

43. Default judgment. Burton v. Loulsville, 27 Ky. L. R. 514, 85 S. W. 727.

44. White v. Wise [Cal. App.] 81 P. 664.

45. In the absence of such a showing the judgment will not be sustained. Judgment for the collection of a municipal assessment. Daly v. Gubbins [Ind. App.] 73 N. E. 833.

46. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114. One of two counts in a petition being sufficient, a motion in arrest will be denied. Carpenter v. Hamilton, 185 Mo. 602, 84 S. W. 863.

47. Where each defendant answers setting up affirmatively his rights and asks to have the same adjudicated, a decree determining the relative rights of the defendants among themselves is within the issues, though defendant's rights were not urged by way of cross complaint. Miller v. Thompson, 139 Cal. 643, 73 P. 583.

48. Eddy v. Smiley, 26 Pa. Super. Ct. 318. A warrant of attorney to confess judgment to "The R. G. Eddy Marble and Granite Company of Meadville" will not sustain a judgment confessed to R. G. Eddy individually. Id. Under a joint warrant of attorney a judgment can only be confessed against all the makers, and in case of the death of one of them no judgment can be confessed against the survivors. Kloeckner v. Schafer, 110 Ill. App. 391. See Confession of Judgment, 5 C. L. 608, also see note, What judgment is authorized by warrant. 5 C. L. 609.

in a joint action must be for or against all of the plaintiffs[50] or defendants[51] or none of them; but the rule does not extend to actions against defendants who are jointly and severally liable.[52] The judgment must also be supported by the proof,[53] and, as to matters of substance,[54] must conform to the verdict[55] or findings,[56] and in this connection it should be remembered that verdicts are to be given a reasonable intendment, and are to be construed in the light of the pleadings.[57] This rule

49. Rule is abrogated in New York. Galligan v. De Lorenzo, 92 N. Y. S. 268 Under Code Civ. Proc. § 578, a judgment may be given for or against one or more of several plaintiffs. Roberts v. Hall [Cal.] 82 P. 66. Code Civ. Proc. § 578, alters the rule, hence where, in an action on a fire insurance policy under the terms of which loss was payable to the mortgagee, a mortgagee refused to be made plaintiff and was made defendant, a judgment in favor of plaintiff for the amount of the policy and interest and that out of such judgment the mortgagee be paid, held valid, though the mortgagee was never served nor appeared. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 P. 719. Va. Ann. Code 1904, p. 1801, allowing judgment against less than all the joint contractors, does not apply where one of the defendants alone files a defense which is not personal, but which goes to the plaintiff's right of recovery against all the defendants. Schofield v. Palmer, 134 F. 753.

50. Where there is a joinder of petitioners for a writ of mandamus, judgment must be for all or for none of them. Sedden v. McBride [Pa.] 60 A. 12.

51. Somers v. Florida Pebble Phosphate Co. [Fla.] 39 So. 61; Schofield v. Palmer, 134 F. 753.

52. Joint tort feasors. Weathers v. Kansas City Southern R. Co. [Mo. App.] 86 S. W. 908. In an action against several defendants for damages for burning grass, plaintiff is entitled to recover against all the defendants or against any one whose liability he establishes. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626.

53. Judgment being against the weight of the evidence, it will be reversed on appeal. Chicago, etc., R. Co. v. Nelson, 115 Ill. App. 432. In order to warrant a joint judgment against several defendants sued jointly for negligence, the evidence must show that the acts of negligence co-operated concurrently or in continuous successive order producing the common result. Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557. Where a contract for the employment of an attorney to defend the county school fund provides for the payment of the attorney out of such fund, a general judgment against the county is erroneous. Morrow v. Pike County, 189 Mo. 610, 88 S. W. 99.

54. In an action of trespass against a township, an entry of judgment "in favor of the defendant" by the prothonotary who signs his own name is not fatally defective, although the verdict of the jury, returned some days before, was, "We find the said defendant township not guilty." Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

55. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Decree held to follow the verdict. Atkins v. Winter [Ga.] 50 S. E. 487. Judgment in an action for interference with water mains held sufficiently supported by the findings. Roberts v. Hall [Cal.] 82 P. 66. Under Code 1896, § 4142, in an action to try the right to property levied on, the real issue is whether the property is subject to execution; and a verdict finding the property to be that of defendant in the writ and liable to plaintiff's execution does not render the judgment thereon invalid on the ground that such verdict fails to find the issue in favor of plaintiff in execution. Johnson v. Citizens' Bank [Ala.] 39 So. 577. A special verdict that plaintiff at the time of taking the note sued on was not aware that the amount was incorrectly stated held a sufficient basis for a judgment declaring a lien on certain property for the amount for which the note was given, though there was a finding that the true consideration of the note was less than stated on its face. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470. A judgment in favor of a transferee of a note, executed for material and labor furnished, for the face amount thereof, held proper, though the special verdict found that the value of the materials and labor performed in the construction of the improvement was less than the sum stated in the note. Id. Where defendant filed a plea in reconvention and the court submitted special issues to the jury in the form of interrogatories which had no relation or reference to the plea in reconvention, held, a judgment reciting that it was based upon the answers to the interrogatories and nevertheless finding for defendant on the plea in reconvention was unauthorized by the verdict. Union Carpet Lining Co. v. George F. Miller & Co. [Tex. Civ. App.] 86 S. W. 651.

56. The decision being in effect a nonsuit only, for failure of proof, a judgment upon the merits is improper. Weeks v. Van Ness, 93 N. Y. S. 337. The fact that the trial court made no express finding on the defense of limitation pleaded by defendant does not render the findings insufficient to support a judgment for plaintiff, where they show the date when the cause of action accrued and it appears therefrom that the action was not barred. Santos v. Silva [Cal. App.] 82 P. 981. In a suit to impress a trust on real estate, plaintiff alleged that one of the defendants was entitled to a certain interest in the property and asked for certain relief for this defendant, but the latter did not answer or seek any relief. An interlocutory judgment was entered establishing the trust and directing a conveyance to plaintiff of an undivided interest in the property with a reference to determine the amounts due the parties. The defendant who did not answer did not appear at the reference, and the referee made no finding as to his interest in the property; held, a judgment declaring him entitled to a certain undivided interest was unauthorized. McWhirter v. Bowen, 92 N. Y. S. 1039.

of conformity is subject to the right of the court to amend the verdict for irregularities appearing on its face.[58] to render a judgment non obstante,[59] and to disregard a verdict contrary to law.[60] An objection that the judgment does not conform to the verdict is a matter for motion in the trial court.[61] The entered judgment must conform to the order authorizing its rendition[62] and to such "interlocutory judgments" as are not subject to revision in the final judgment.[63] The court declining to entertain the case on the ground of comity of jurisdiction, a judgment on the merits is erroneous.[64] Where only one of two joint defendants appeared, a joint default judgment is void.[65] One cannot take advantage of discrepancies in his own favor.[66] Lack of conformity may be waived.[67]

Judgment non obstante.[68]—At the common law judgment non obstante veredicto could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute a defense or a bar to the action,[69] consequently it followed that a judgment non obstante could only be rendered for the plaintiff.[70] This rule has been relaxed and made to apply in favor of the defendant so that it is now generally held that the defendant is entitled to a judgment non obstante veredicto when the plaintiff's pleadings are insufficient to support a judgment in his favor.[71] So, too, if general and special verdicts rendered are inconsistent with each other, the general verdict may in some cases be disregarded and judgment based on the special verdict.[72] Also verdicts contrary to law[73] or which give no right or defense[74] may be disregarded. But in no case is it proper practice to enter a judgment non obstante veredicto unless it appears on the record that the verdict of the jury cannot be supported as matter of

57. Atkins v. Winter [Ga.] 50 S. E. 487. See Verdicts and Findings, 4 C. L. 1803.

58. Mistake in computation of interest corrected and judgment entered on corrected verdict. Gould v. Hartwig [Kan.] 80 P. 976. See Verdicts and Findings, 4 C. L. 1803.

59. See infra this section.

60. Bank of S. W. Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393.

61. Cannot be made for the first time on appeal. Elmer v. Levin, 95 N. Y. S. 537.

62. Where an order provided that a demurrer to the complaint should be overruled with costs to the plaintiff with leave to answer on payment of costs to be taxed, an interlocutory judgment providing that the demurrer be overruled and judgment rendered in favor of plaintiff "as prayed for in the complaint," is erroneous. Smythe v. Greacen, 96 App. Div. 182, 89 N, Y. S. 111.

63. Where, in a partnership accounting, an interlocutory judgment decreed that plaintiff was entitled to a certain number of shares of corporate stock if defendants were in a position to transfer them, it is error for the final judgment to give defendants the option of transferring the stock or paying plaintiff the ascertained value thereof. Reilly v. Freeman, 95 N. Y. S. 1069. Where an interlocutory judgment did not require defendant to transfer to plaintiff any specific shares of corporate stock, the final judgment should not direct the transfer of specific shares. Id.

64. James Freeman Brown Co. v. Harris [C. C. A.] 139 F. 105.

65. Patterson v. Jarmon [Del. Super.] 62 A. 8.

66. Where judgment was rendered for a less sum than that granted by the conclusions of law. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000.

67. Failure to move to set aside a default held to waive a lack of identity between the name of the plaintiff as contained in the process, default and judgment with that contained in the declaration. Edwards v. Warner, 111 Ill. App. 32.

68. See 4 C. L. 298.

69. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620.

70. Chicago City R. Co. v. White, 110 Ill. App. 23. See, also, Hartford Fire Ins. Co. v. Brown, 2 Ohio N. P. (N. S.) 185.

71. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. Where in an action on a fire insurance policy to recover as for a total loss, and the defense was a partial loss and refusal of a demand for appraisement, and the verdict of the jury for plaintiff showed a partial loss, held, the remedy for defendant was a motion for a new trial, not a motion for judgment or in arrest thereof. Hartford Fire Ins. Co. v. Brown, 2 Ohio N. P. (N. S.) 185.

72. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. As to what verdicts are inconsistent, see Verdicts and Findings, 4 C. L. 1803.

73. Bank of S. W. Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393.

74. Where jury found that plaintiff was the owner of the note in suit, held entitled to a judgment notwithstanding a verdict on another issue that the note was executed under a parol agreement that defendant should not be liable thereon. Western Carolina Bank v. Moore [N. C.] 51 S. E. 79.

law.[75] In all other cases the proper practice is to move for a new trial[76] or review the case on writ of error and exceptions.[77] There must be either a general or special verdict to support a judgment or the pleadings must authorize its entry.[78] A judgment non obstante should not be given upon a portion of the special findings returned the rest being ignored.[79] A plea showing want of consideration on its face is bad after verdict and entitles plaintiff to a judgment non obstante veredicto.[80] A judgment non obstante will not be granted on the ground of a variance between the pleadings and proof,[81] or for failure of proof,[82] unless it appears that such defect cannot be cured by amending the pleadings or granting a new trial.

§ 3. *Arrest of judgment.*[82a]—The grounds for, the procedure on, and the effect of a motion for an arrest of judgment, are treated elsewhere.[83]

§ 4. *Rendition, entry and docketing.*[84]—Statutes generally fix the time at which the notice of a motion for judgment must be filed in[85] and returned to[86] the office of the clerk of court. A court does not lose jurisdiction of a motion for final judgment because of the expiration of the judge's term after argument and before rehearing.[87] The judgment must be rendered at a time[88] and place[89] authorized by law for holding court; hence, unless authorized by statute,[90] a judg-

75. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. Rule has not been changed by Laws 1895; p. 729, c. 320. In re Sperl's Estate [Minn.] 103 N. W. 502. Except in clear cases a court is not justified in directing judgment non obstante that a will by a parent in favor of a child was obtained by undue influence. Id. Where the presence of suspicious circumstances is inconsistent with such an entirely clear case, and the trial court is satisfied that the party against whom the verdict is rendered is entitled to some relief, the common-law remedy is to grant a new trial. Id. In determining what judgment shall be entered upon a special verdict, nothing can be looked to by the court except the pleadings and the postea. Borough of Seabright v. New Jersey Cent. R. Co. [N. J. Law] 60 A. 64. Hence the evidence from which a fact might have been found, without any finding of the fact itself, is valueless in a special verdict. Id.

76. Plunkett v. Detroit Electric R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. See In re Sperl's Estate [Minn.] 103 N. W. 502. See also New Trial and Arrest of Judgment, 4 C. L. 810.

77. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. See Appeal and Review, 5 C. L. 121.

78. Plunkett v. Detroit Elec. R. Co. [Mich.] 12 Det. Leg. N. 153, 103 N. W. 620. A verdict for one party cannot be set aside and judgment entered for the other party without a new trial. Prowell v. Neuendorf [Mich.] 12 Det. Leg. N. 403, 104 N. W. 666.

79. Where two sets of interrogatories with answers were returned by the jury, the record showed one set, as stated, of interrogatories submitted to the jury for them to answer, immediately following which were interrogatories with answers purporting to have been submitted to the jury on issues joined on the cross complaint, held, a motion for judgment non obstante on the answers to the interrogatories framed "on the complaint herein," was properly overruled. New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668.

80. Action on bond, plea of accord and satisfaction. Frank v. Gump [Va.] 51 S. E. 358.

81. Chapter 63, p. 74, Laws 1901 considered. Welch v. Northern Pac. R. Co. [N. D.] 103 N. W. 396.

82. Failure of proof as to some essential elements of the cause of action. Laws 1901, p. 74, chap. 63, considered. Welch v. Northern Pac. R. Co. [N. D.] 103 N. W. 396.

82a. See 4 C. L. 298.

83. See New Trial and Arrest of Judgment, 4 C. L. 810.

84. See 4 C. L. 296.

85. A notice of a motion for judgment for money due on contract, under the provisions of § 6, ch. 121, Code 1899, must be filed in the clerk of the court's office before the commencement of the term at which such motion is to be heard; but the length of time between such filing and the commencement of the term is not prescribed. Knox v. Horner [W. Va.] 51 S. E. 979.

86. A notice of a motion for judgment for money due on contract under the provisions of § 6, ch. 121, Code 1899 need not be returned to the clerk of court's office in which the motion is to be made 20 days before the commencement of the term at which the motion is to be heard. Knox v. Horner [W. Va.] 51 S. E. 979.

87. Judge succeeded himself. Jewett v. Schmidt, 95 N. Y. S. 631, afg. 45 Misc. 471, 92 N. Y. S. 737.

88. Judgment rendered at term organized under Gen. Acts 1903, p. 566, fixing time for holding circuit court in Washington county, is void the statute being unconstitutional. Yellow Pine Lumber Co. v. Randall [Ala.] 39 So. 565; Kidd v. Burke [Ala.] 38 So. 241; McMillan v. Gadsden [Ala.] 39 So. 569; Hammond v. Louisville & N. R. Co. [Ala.] 39 So. 736.

89. A trial at a place other than the regular court house and where there was no authority to sit for the trial of the particular case is coram non judice. Trial of fact by stipulation at other place. Armstrong v. Loveland, 99 App. Div. 28, 90 N. Y. S. 711.

90. Under Mills' Ann. St. § 74, providing that when a demurrer is decided either in

ment rendered in vacation is void,[91] and such a judgment is not validated by a subsequent order, entered in term time, purporting only to correct an error in the description of one of the parties.[92] A judgment rendered previous to the date of trial fixed by stipulation between the parties is valid.[93] In the absence of statutory provisions the trial court is entitled to a reasonable time to consider the questions presented to it for decision and to enter such decree or judgment as will reflect its judgment,[94] and it cannot be coerced by mandamus to enter a judgment on motion of counsel before it has had sufficient time to be duly advised and satisfied as to the proper judgment to be entered.[95] So long as the trial judge is permitted to sit in the case, an appellate court, on petition for mandamus to compel him to enter judgment, will not consider his private motives nor his estimate of counsel conducting the trial.[96] In many states statutes prescribe the time for entering judgment,[97] and a judgment entered before the commencement[98] or after the expiration[99] of such statutory period is void. Within the meaning of statutes on this subject the time to which adjournment is taken for the submission of briefs is the time of the submission of the cause.[1] In order to start the running of the statutory time a finding must not be such as will warrant more than one kind of a judgment.[2]

term or vacation the court may proceed to final judgment thereon unless the unsuccessful party plead over as amended, the court may in such a case render judgment in vacation. Hereford v. Benton [Colo. App.] 80 P. 499.

91. Consent decree. Boynton v. Ashabranner [Ark.] 88 S. W. 566. Judgment overruling demurrer, rendered in vacation before appearance term, held void. Toomer v. Warren [Ga.] 51 S. E. 393.

92. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

93. Civil Code, §§ 175, 176 considered. People v. District Ct. [Colo.] 80 P. 1065.

94. Alexander v. Moss [Ky.] 89 S. W. 118.

95. Alexander v. Moss [Ky.] 89 S. W. 118.

NOTE. Mandamus as a remedy to compel the rendition, entry and correction of judgment: Mandamus lies to compel a judge to sign judgment rendered by him (State v. Judge, 28 La. Ann. 451), or his predecessor in office (Life, etc., Ins. Co. v. Wilson, 33 U. S. [8 Pet.] 291, 8 Law. Ed. 106), and is the proper remedy for the refusal of a judge to enter judgment, which it is clearly his duty to enter, where nothing remains to be done but the clerical work of entering it (Corthell v. Mead, 19 Colo. 386, 35 P. 741; O'Brien v. Tallman, 36 Mich. 13; Branford v. Grant, 1 N. M. 579). So where the plaintiff failed to appear it will lie to compel a justice to enter a judgment of nonsuit. Cogney v. Wattles. 121 Mich. 469, 80 N. W. 245. The rule is the same where a jury has been had in a case, and the writ issues to compel a judge to receive and enter a verdict and to give judgment thereon. Munkers v. Watson, 9 Kan. 668; State v. Knight, 46 Mo. 83; State v. Adams, 12 Mo. App. 436; State v. Adams, 76 Mo. 605; State v. Beall, 48 Neb. 817, 67 N. W. 868; Cortelyou v. Ten Eyck, 22 N. J. Law 45; Lloyd v. Brinck, 35 Tex. 1. In Ludlum v. District Ct., 9 Cal. 7, it is held that mandamus will not lie to compel a judge to enter judgment on the report of a referee, thus overruling Russell v. Elliott, 2 Cal. 245. In Dorr v. Hill, 62 N. H. 506, it is held that where a statute provides that when a report of referees is duly made to a justice of the peace without suit he shall enter judgment and issue execution thereon for damages and costs, mandamus will lie to enforce this duty.

Mandamus may issue to correct an erroneously entered judgment. Frederick v. Circuit Judge, 52 Mich. 529, 18 N. W. 343. See also Smith v. Moore, 38 Conn. 105. The writ lies to compel the correction of entries in the docket of a justice of the peace, so as to make it conform to the facts. State v. Whittlet, 61 Wis. 351, 21 N. W. 245. But it will not lie to compel the altering of dates therein. Mooney v. Edwards, 51 N. J. Law, 479, 17 A. 973. That the amendment of the record of an inferior court is a matter of judicial discretion for the court having the custody thereof has been held in Commonwealth v. Hultz, 6 Pa. 169.—From note to State v. Gardner [Wash.] 98 Am. St. Rep. 863, 894.

96. Alexander v. Moss [Ky.] 89 S. W. 118.

97. Under Code Civ. Proc. § 289 a judgment on a report of a referee entered 10 days after the written notice of the filing of the report is not premature. Wood v. Saginaw Gold Min. & Mill. Co. [S. D.] 105 N. W. 101.

98. Under the statutes of California a final divorce judgment entered prior to the expiration of a year from the date of the interlocutory judgment is absolutely void regardless of any considerations of waiver, consent or acquiescence of the parties. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

99. Though attorney for one of the parties consented to an extension of such statutory time. Municipal court judgment. Maggo v. Ocean View Cemetery, 94 N. Y. S. 595.

1. Municipal Court Act, § 230 (Laws 1902, p. 1557, c. 580) construed. Eisenberg Co. v. Janzlik, 92 N. Y. S. 247.

2. Rev. St. 1898, § 2894a, providing that whenever a finding shall be filed or a verdict rendered the successful party shall cause judgment to be entered within 60 days or the clerk shall enter judgment, con-

A judgment is not subject to reversal because not immediately entered on the return of the verdict.[3] Except in the case of a consent judgment,[4] the judgment should not be rendered until an opportunity has been given defendant to be heard in the cause;[5] consequently a default judgment rendered before the expiration of the time to answer is erroneous.[6] In some cases it is improper to render a judgment upon default until there has been an inquest of damages.[7] In Massachusetts where exceptions are taken to the rulings made at the hearing, no final order or decree should be passed before the expiration of the time for filing the exception or until the determination of the questions of law thereby raised[8] and a final decree inadvertently entered while exceptions are pending takes effect only as an order for a decree and does not become operative until the exceptions are disposed of.[9] A judge dying after the rendition of findings his successor may enter judgment.[10] In the absence of prejudice the rendition of judgment as of the wrong term is harmless.[11] In New York final judgment should be rendered against the original parties though one of them dies after the rendition of an interlocutory judgment.[12] The date of a judgment is the date of its filing.[13] In Massachusetts the clerk, as a ministerial officer, has no authority to enter judgment without the sanction of the court.[14] Mere delay in extending the journal entry of a judgment on the records of the court in which it is entered does not affect the validity of the judgment when no fraud is perpetrated upon the parties to the judgment or their privies by reason of such delay.[15]

Form.[16]—The judgment should contain nothing but a statement that the court

strued. Dresser v. Lemma, 122 Wis. 387, 100 N. W. 844.

3. Harris v. Fidalgo Mill Co., 38 Wash. 169, 80 P. 289.

4. Where a warrant to confess judgment authorizes any attorney to appear and confess judgment for an amount named, the defendant has no standing to be first heard before entry of judgment. Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

5. Where cause was retired from docket, held, judgment could not be entered against defendant 4 years thereafter without giving him an opportunity to be heard. King v. Davis, 137 F. 222. Judgment overruling demurrer in vacation before the appearance term is void. Toomer v. Warren [Ga.] 51 S. E. 393. Where defendant was allowed until after December 30th to file a supplemental affidavit of defense and the case was placed on the current motion list for January 4th and was continued by special order with notice to the defendant until January 11th, and on that day, no supplemental affidavit having been filed, judgment was entered for want of a sufficient affidavit of defense, held, defendant could not complain of the entry of judgment as premature, because members of the bar had been notified that "undisposed of cases upon prior current motion lists" would be called for argument on January 18th. McFetridge v. Megargee, 26 Pa. Super. Ct. 501.

6. Under Code Civ. Proc. § 1166 a defendant being entitled to two days after the return to appear or answer where a summons by publication was not completed until May 26th, a default judgment entered on May 28th is erroneous. Quigley v. Ellenwood [Cal. App.] 82 P. 974. Plaintiff having filed a statement from which judgment may be litigated and having served notice of the filing of the statement and no affidavit of defense having been filed within 15 days after notice, judgment may be entered against defendant. Spetz v. Howard, 23 Pa. Super. Ct. 420. See Defaults, 5 C. L. 982.

7. So held in a suit to cancel a deed for fraud and for damages in consequence of the fraud. Code Civ. Proc. § 267 construed. Marion v. City Council [S. C.] 52 S. E. 418 [dicta].

8. Tyndale v. Stanwood, 186 Mass. 59, 71 N. E. 83.

9. Tyndale v. Stanwood, 186 Mass. 59, 71 N. E. 83; Id., 73 N. E. 540.

10. So held where, in an action by trustee process, a claimant of the fund intervened and a finding was made for plaintiff as against the claimant, and the trustee was charged on his answer. Newburyport Inst. for Sav. v. Coffin [Mass.] 75 N. E. 81.

11. Where the court erroneously considered the October term as continuing after the May term had commenced, and rendered judgment during the May term as of the October term. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357.

12. Code Civ. Proc. § 763. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737. Case affirmed 95 N. Y. S. 631 this point not being discussed.

13. Warner v. Miner [Wash.] 82 P. 1033. A decree is not rendered until it has been entered or filed of record. Paltzer v. Johnston, 114 Ill. App. 493.

14. Pub. St. 1882, c. 171, § 1; St. 1885, p. 892, c. 384, § 12 considered. Washington Nat. Bank v. Williams [Mass.] 74 N. E. 470.

15. Gallaway v. Rochester Loan & Banking Co. [Neb.] 104 N. W. 922. Where entry was made before final adjournment of term, held delay was not unreasonable. Id.

16. See 4 C. L. 294.

has made its findings of fact and conclusions of law and then decree the relief granted.[17] It must show with certainty the matters determined.[18] In New York, upon the trial of a demurrer, the decision must direct the final or interlocutory judgment to be entered thereupon, but it is not necessary to make any findings of fact.[19] A signed order for a specific judgment entered on the record and again signed may constitute a valid judgment.[20] It is essential to a final judgment in an action at law that it have either a nil capiat or an eat inde sine die or equivalent words.[21] In New York a decision which fails to separate the findings of fact and the conclusions of law is in the short form.[22] The judgment entry showing that defendant appeared by counsel, further recital in the judgment as to the court's jurisdiction is unnecessary and may be treated as surplusage.[23] In the absence of statutory provisions to the contrary, a judgment is limited to the relief sought by the pleadings, and it need not specify the kind or character of the execution which may be issued for its enforcement;[24] but an award of execution does not invalidate the judgment.[25] As to whether a judgment should be in the alternative for property or its value is largely statutory.[26] Judgments should run to and against parties in the capacity wherein they sue or defend.[27] A contradictory judgment will be reversed.[28] In some states statutes require the signature of the judge,[29] and the insertion of the amount of the costs;[30] in others, costs are taxed by the clerk.[31] The failure of a court to render a judgment in conformity with the law is

Form of decrees, see Fletcher, Eq. Pl. & Pr. §§ 722-724.

17. Recital of facts found stricken out. Beebe v. Mead, 101 App. Div. 500, 92 N. Y. S. 51.

18. Transcript reciting: "Now, April 16, 1901, on motion of [counsel], the court directs judgment for want of an appearance. * * * Whereupon judgment is entered against defendant in the sum of $1,250, with interest from Nov. 14, 1898," sufficiently shows a judgment. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Where a statement of claim embraces two distinct items and a rule is taken for judgment for want of a sufficient affidavit of defense as to one of the items specifying it, the court may give judgment by the simple entry "rule absolute" without filing an opinion designating the item for which judgment is given. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

19. Rowe v. Rowe, 92 N. Y. S. 491.

20. An order for judgment which embodied the final determination of the action made by the trial court and was in the form required for a judgment, but concluded with a direction to enter judgment, signed by the judge and attested by the clerk, was recorded in full in the judgment book, where it was again signed by the judge and clerk, held, that such record was a valid judgment. Hagler v. Kelly [N. D.] 103 N. W. 629.

21. People v. Severson, 113 Ill. App. 496.

22. Jefferson County Nat. Bank v. Dewey, 181 N. Y. 98, 73 N. E. 569. See case for discussion of distinction between two forms.

23. Pacific Selling Co. v. Collins [Ala.] 39 So. 579. See Appearance, 5 C. L. 248.

24. Banning v. Roy [Or.] 82 P. 708. Under B. & C. Comp. § 218, in order to justify an arrest and imprisonment of a defendant upon an execution in a civil action, where he has been provisionally arrested and discharged on bail, it is not necessary that the judgment should show the issuance of the writ or an order therefor, or direct an execution against the person. Id. Laws 1899, pp. 299, 300, § 18 do not require that the judgment order in tax foreclosure proceedings contain a direction to the clerk to make out and enter an order of sale. Warner v. Miner [Wash.] 82 P. 1033. An award of execution adds nothing to the judgment. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

25. State v. Alexander [Tenn.] 90 S. W. 20.

26. Code 1896, § 4144, providing that if the property is not delivered to the officer making the levy and costs paid, an execution shall issue, does not require the judgment to be in the alternative for the property or its value. Johnson v. Citizens' Bank [Ala.] 39 So. 577.

27. A judgment against a receiver should run against him in his official capacity and direct payment in due course of administration. Malott v. Mapes, 111 Ill. App. 340; Malott v. Howell, 111 Ill. App. 233.

28. Judgment dismissing the action for want of prosecution and awarding costs against defendants. Vickers v. Chisholm [Colo. App.] 79 P. 302.

29. The provision of Code, § 242 that the record of the proceedings of the district court "shall be signed by the judge" is directory only. Donnelly v. Smith [Iowa] 103 N. W. 776. Held, under such section an appeal would lie from an order refusing a temporary writ of injunction in connection with an action to abate an intoxicating liquor nuisance, though it did not appear that the record entry had been signed by the judge. Id.

30. Under Municipal Court Act (Laws 1902, p. 1589, c. 580) §§ 341, 342, a judgment is not complete until the costs are inserted. Allen v. Wells, Fargo & Co., 95 N. Y. S. 597.

not a clerical misprision.[32] Technical errors in the form of the judgment are not generally ground for reversal on appeal.[33] The trial court must enter judgment in accordance with an appellate mandate.[34]

Nunc pro tunc entries.[35]—Judgment having been actually rendered by the court,[36] but owing to the misprision of the clerk the judgment so pronounced has not been entered,[37] or has been erroneously entered,[38] the court of rendition has inherent power,[39] and it is its duty[40] at any time[41] on notice and motion[42] or sua sponte[43] to correct the record so as to make it recite the facts without vacating the judgment and entering a new one,[44] and if it refuses to so do the aggrieved party is entitled to mandamus to compel the correction.[45] This power exists even after the expiration of the term of rendition and the taking of an appeal,[46] and even after judgment on appeal, it being apparent that attention was not called to the error on review and the appellate decree being in no way based on such error.[47] By an extension of this doctrine judgments to which one is clearly entitled and which must have been omitted or erroneously framed by mere inadvertence will be entered or

31. State v. Alexander [Tenn.] 90 S. W. 20. See Costs, 5 C. L. 842.

32. Commonwealth v. Ratcliff, 27 Ky. L. R. 297, 84 S. W. 1147. Failure of the court to add an order awarding a capias ad satisfaciendum to a judgment against the sheriff of a county for collecting taxes in excess of the constitutional limit is not a mere clerical misprision. Id.

33. So held where the judgment was for damages instead of, technically, in debt. Weber v. Powers, 114 Ill. App. 411 [dicta]. Mistake in plaintiff's Christian name held immaterial. Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615.

34. In an action to set aside a deed it was ordered that plaintiff give a bond and collect the rents, and the mandate on appeal directed the dismissal of the complaint, held, a judgment against the sureties on the bond was unauthorized. Burnham v. Chase [Wis.] 102 N. W. 940. Where a lower court fails to enter a final decree in accordance with a mandate or rescript of an appellate court, the latter court may order the entry of such decree as the mandate or rescript calls for, to complete the record. Tyndale v. Stanwood [Mass.] 73 N. E. 540. See Appeal and Review, 5 C. L. 121.

35. See 4 C. L. 297.

36. People v. District Ct. [Colo.] 79 P. 1014; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27; Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691; Gagnon's case, 38 Ct. Cl. 10; Finch v. Finch, 111 Ill. App. 481.

37. People v. District Ct. [Colo.] 79 P. 1014; Ex parte Marks [C. C. A.] 136 F. 168. May correct matters of form after term of rendition. Finch v. Finch, 111 Ill. App. 481. Under Acts 1881, p. 68, authorizing the court to allow and charge a lien for attorney's fees, the court may amend its decree in this regard so as to make it speak the truth. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. Where clerk failed to make formal entry of judgment, court may order it entered nunc pro tunc. This though the attorney for the prevailing party has become judge. Stern v. Bennington [Md.] 60 A. 17.

38. People v. District Ct. [Colo.] 79 P. 1014. Judgment not entered in full. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27. Error of computation appearing on the face of the record. Erickson v. Stockton & T. C. R. Co. [Cal.] 82 P. 961. Where findings were duly made, reduced to writing, signed and filed in the cause but by the error, misprision and omission of the clerk were not entered on the judgment, held, they should be entered nunc pro tunc after entry of judgment. School Dist. No. 3, Carbon County, v. Western Tube Co. [Wyo.] 80 P. 155. There is no difference in the power of a court to correct its minutes by entering nunc pro tunc an order made but not entered, and its power to correct its minutes by expunging therefrom an order never in fact made. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194.

39. Ex parte Marks [C. C. A.] 136 F. 168. Id.

40. People v. District Ct. [Colo.] 79 P. 1014; Erickson v. Stockton & T. C. R. Co. [Cal.] 82 P. 961.

41. Ex parte Marks [C. C. A.] 136 F. 168.

42. Phelps v. Wolff [Neb.] 103 N. W. 1062; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27; Erickson v. Stockton & T. C. R. Co. [Cal.] 82 P. 961.

43. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27.

44. Erickson v. Stockton & T. C. R. Co. [Cal.] 82 P. 961.

45. So held where court granted new trial and denied defendant's motion for judgment nunc pro tunc. People v. District Ct. [Colo.] 79 P. 1014.

46. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194. Power of court after proceedings to vacate judgment on motion for a new trial or on appeal or under Code Civ. Proc. § 473 is limited to the correction of mere clerical misprisions on the record, or to the excision of such parts of the record as appear to be or can be shown to be void for lack of jurisdiction or power. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

47. Edinburgh Lombard Inv. Co. v. Walsh [Kan.] 79 P. 688. Such a correction is not the rendition of a new judgment nor the changing of a judgment which has been affirmed by the supreme court. Id.

supplied.[48] A jurisdictional defect cannot be cured by a nunc pro tunc order.[49] Laches in making the motion may bar relief.[50] An entry which is insufficient to constitute a final judgment does not constitute a bar to an application for the entry of a nunc pro tunc judgment.[51] The entry of judgment nunc pro tunc as of the date of the motion for judgment is proper where prejudice would otherwise result from the delay in the decision of the case.[52] Where there has been no change of parties after verdict, the losing party is not prejudiced by a nunc pro tunc entry of judgment even though the court had no power to so enter it.[53] The one causing the error cannot object to its correction after the expiration of the term of rendition.[54] The petition in a suit to correct the record in a case by expunging an order never in fact made need not be supported by affidavit,[55] nor need it tender nor meet the issue covered by the order.[56] Except in those states wherein the judge, in open court, orally directs the clerk to enter up judgment,[57] parol evidence is inadmissible to show that the judgment was actually rendered.[58] On a motion to enter findings nunc pro tunc, the bill of exceptions is competent evidence that the findings were in fact made.[59] A nunc pro tunc judgment must conform to and be no broader in its terms than the judgment actually rendered.[60]

Contents of judgment roll.[61]—At common law the judgment roll was made up of all the papers in the case necessary to support the judgment, and every jurisdictional requisite to a valid judgment was required to be evidenced by some paper incorporated as a part thereof.[62] In Arizona a statement of the evidence is not a jurisdictional part of the judgment roll where a default is taken.[63]

Filing transcript in other courts.—Statutory requirements must be observed.[64]

48. Where after entry of judgment for the amount admitted by the answer to be due, plaintiff after trial resulting in his favor has another judgment for the entire claim, there is simply a clerical misprision which may be corrected on motion. Dersch v. Walker [Ky.] 89 S. W. 233. Technical error in referring an action on a guardian's bond to an assessor to ascertain the sum for which execution shall issue before entering judgment for the penalty of the bond. Donaher v. Flint [Mass.] 74 N. E. 927.

Note. In 15 Enc. Pl. & Pr. 214, citing Doane v. Glenn, 1 Colo. 456, it is said that this extension of the rule is based on the fiction that the omission or misentry was a clerical misprision.

49. So held where there was a failure to properly file the summons, etc., with the clerk as required by Code Civ. Proc. § 442. Fink v. Wallach, 95 N. Y. S. 872.

50. Six months' delay, plaintiff's attorney having succeeded to the judgeship and no other attorney being employed by plaintiff, held, plaintiff was not guilty of laches in moving for an entry of judgment nunc pro tunc. Stern v. Bennington [Md.] 60 A. 17.

51. Entry was made by clerk of court. Phelps v. Wolff [Neb.] 103 N. W. 1062.

52. Judgment so entered where pending reargument for a motion for judgment a child was born who would be a necessary party. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737, afd. 95 N. Y. S. 631.

53. Stern v. Bennington [Md.] 60 A. 17.

54. Clerical error. Ex parte Marks [C. C. A.] 136 F. 168.

55. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194.

56. Where order sought to be expunged purported to allow an appeal without payment or security for costs, held, the petition was not required to tender or meet the issue whether the appellants in the original case were unable to pay the costs or give security therefor. Texas & N. O. R. Co. v. Walker [Tex. Civ. App] 87 S. W. 194.

57. Clerk failed to enter judgment. Stern v. Bennington [Md.] 60 A. 17.

58. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15. Nunc pro tunc entry denied where motion stated that judge had started to write the subject of the entry and had written two words thereof. Id. Naturalization decree. Gagnon's Case, 38 Ct. Cl. 10. The fact that the court gave judgment at the previous term can only be proved by some memorial paper or minute in the case at such former term. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691.

59. School Dist. No. 3, Carbon County v. Western Tube Co. [Wyo.] 80 P. 155.

60. Where the decree so entered contains findings not supported by the evidence introduced on the hearing of the application for its entry, it will be reversed as to such findings. Phelps v. Wolff [Neb.] 103 N. W. 1062.

61. See 4 C. L. 298.

62. Steinfield v. Montijo [Ariz.] 80 P. 325.

63. Rev. St. 1901, §§ 1435, 1443 construed. Steinfield v. Montijo [Ariz.] 80 P. 325.

64. Where a certificate of a judgment, filed Feb. 1, 1898, failed to recite the name of the owner as required by Code 1896, §§ 1920-1922, the judgment did not constitute a lien. Greenwood v. Trigg, Dobbs & Co. [Ala.] 39 So. 361. Acts 1898-99, p. 34, amending such

An abstract is not equivalent to a transcript.[65] In Mississippi a justice's judgment may be enrolled in the circuit court immediately upon rendition.[66]

§ 5. *Occasion and propriety of amending, opening, vacating or restraining enforcement.*[67] *A. Before finality.*[68]—During the term the judgment, unless it be rendered by consent,[69] lies wholly within the control of the court, and the latter, in the exercise of its discretion,[70] can vacate,[71] alter, revise or amend it[72] as it sees fit, short of introducing and adjudicating a new cause of action,[73] even though a transcript be filed in a higher court for the purpose of creating a lien.[74] The discretion must, however, be exercised for reasonable cause and upon such grounds as may reasonably happen to a person in the exercise of ordinary diligence in the protection of his rights.[75] A motion to vacate may prevent finality and a continuance will then extend the power,[76] and to effectuate this purpose the motion may be oral and unaccompanied by a statement of the grounds therefor.[77] If the case goes over by law as undisposed of, no order of continuance is needed.[78] In many states and especially in the case of default judgments[79] statutes extend the time at which the judgment may be set aside and defenses let in, and the weight of authority is to the effect that these statutory provisions are mandatory[80] and apply only to the

code provisions, held prospective in its operation and not to cure such certificate. Id.

65. The filing of an abstract of a justice's judgment in the clerk's office of the circuit court confers no authority upon the clerk of the circuit court to issue execution thereon. Steringer v. John Mackie & Co. [W. Va.] 49 S. E. 942.

66. Even though the five days allowed for an appeal have not elapsed. Code 1892, § 2413 construed. Minshew v. Davidson & Co. [Miss.] 38 So. 315.

67. See 4 C. L. 299. As to Equity Practice see generally, Fletcher, Eq. Pl. & Pr. §§ 729, 732.

68. See 4 C. L. 299. See New Trial and Arrest of Judgment, 4 C. L. 810.

69. The court cannot modify or change the terms of a consent decree. Massey v. Barbee, 138 N. C. 84, 50 S. E. 567.

70. Horn v. United Securities Co. [Or.] 81 P. 1009; Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515; In re Bugg's Estate [S. C.] 51 S. E. 263. B. & C. Comp. § 103. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94. So held where defendant and corroborating witnesses testified as to facts constituting a meritorious defense. Gottlieb v. Middleberg, 23 Pa. Super. Ct. 525.

71. Kloeckner v. Schafer, 110 Ill. App. 391. Default judgment taken before answer day. Rev. St. § 5354, subd. 3 construed. Elyria Milling Co. v. Swartz, 3 Ohio N. P. (N. S.) 251. The court may set aside a verdict and judgment and entertain a motion to dismiss for want of jurisdiction. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Default judgments taken before answer day are irregular within the meaning of Rev. St. § 5354, subd. 3, and hence may be vacated during term of rendition. Elyria Milling Co. v. Swartz, 3 Ohio N. P. (N. S.) 251.

72. Can strike an award of execution against an administrator from the judgment. McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262. Extra allowance of costs made. Bowers v. Male, 102 App. Div. 609, 92 N. Y. S. 183. Defendant held entitled to have a judgment rendered on the merits amended to show such fact. Ruegamer v. Cieslinskie, 93 N. Y. S. 599.

73. An amendment changing the real plaintiff held not permissible. Good Roads Machinery Co. v. Old Lycoming Tp., 25 Pa. Super. Ct. 156.

74. Filing a transcript of a default judgment rendered in a superior court in the district court so as to create a lien on land does not deprive the superior court of power to set it aside. Code §§ 260, 263, 273, 3790 and 4537 considered. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515.

75. Moody v. Reichow, 38 Wash. 303, 80 P. 461.

76, 77. Hartman v. Viera, 113 Ill. App. 216.

78. Harkness v. Jarvis [Mo. App.] 88 S. W. 1025.

79. A defendant served by publication only held entitled at any time within three years after the rendition of the judgment to have the judgment reopened and to be allowed to come in and defend. Gen. St. 1901, § 4511 considered. McKee v. Covalt [Kan.] 81 P. 475. The general provisions of the statute of limitations do not govern suits brought under Burns' Ann. St. 1901, § 609, providing that parties against whom a judgment has been rendered without other notice than by publication may have the same reopened at any time within 5 years of rendition. Hollenback v. Poston, 34 Ind. App. 481, 73 N. E. 162. 2 Ball. Ann. Codes & St. § 5518, providing for the vacation of default judgments based on service by publication, applies only to actions for the recovery of possession of real property and not to a suit to set aside fraudulent conveyances. Jordan v. Hutchinson [Wash.] 81 P. 867. Under Comp. Laws 1897, § 496, the right to appear is absolute and conditional on the payment of costs or securing thereof and the appearing defendant is not required to give any notice to the opposite party except as to subsequent steps. Coffin v. Ontonagon Circuit Judge [Mich.] 12 Det. Leg. N. 219, 103 N. W. 835.

80. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397. Rev. St. 1901,

enumerated grounds.[81] Where a remittitur is entered after judgment, the judgment should be corrected and not allowed to stand for the full amount.[82] In some states an irregular judgment may be set aside after term[83] on a showing of merits.[84] In North Dakota the word "term" as applied to the district court is deemed to have lost its common-law meaning; hence it follows that such court can exercise its inherent power to grant relief, on motion, from an irregular judgment or order at any time unless the time for so doing has been limited by law.[85] An interlocutory judgment may be set aside at any time before final judgment.[86] In some cases when necessary for the furtherance of justice an appellate court on appeal may grant relief,[87] especially against clerical errors[88] and inadvertent omissions.[89]

(§ 5) *B. Right to relief after the judgment has become final as by the expiration of the term of rendition or of the statutory extension thereof.*[90]—In the absence of statutes a judgment cannot be vacated, altered or amended after it has become a finality[91] unless it is void[92] or was procured by fraud,[93] accident[94]

par. 1478 is mandatory and the trial court has no power to vacate, set aside or modify its judgment at a term subsequent to the term of rendition. Id. Under Code Civ. Proc. § 75, requiring the application to be made within six months after adjournment of the term of rendition, the court cannot set aside an irregular or erroneous judgment after the expiration of such time. People v. District Ct. [Colo.] 80 P. 1065. Under Laws 1880, p. 356, c. 232, § 63, an application to open a default judgment whether made in the city or in the county court must be made within 20 days after the rendition of such judgment. Cooper v. Cooper, 94 N. Y. S. 814.

81. A motion to vacate for irregularity may be heard and granted even though more than one year has elapsed since notice of the judgment. Rev. Codes 1899, §§ 5298, 5605 construed. Martinson v. Marzolf [N. D.] 103 N. W. 937.

82. Forcible entry and detainer proceedings. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

83. Code Civ. Proc. § 602. Gavin v. Reed [Neb.] 102 N. W. 455. May be set aside within a reasonable time after the expiration of the term. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221. Code, § 274 applies only to regular judgments. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289. A default judgment entered while there was a good answer and defense bond on file is irregular. Id.

84. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221. Code Civ. Proc. § 602. Gavin v. Reed [Neb.] 102 N. W. 455.

85. Default judgment entered against one not in default may be set aside at any time. Martinson v. Marzolf [N. D.] 103 N. W. 937.

86. A decree pro confesso rendered on a cross bill is interlocutory and within Federal Equity Rule 1 and hence the decree may be vacated on motion after the adjournment of the term. Blythe Co. v. Bankers' Inv. Co. [Cal.] 81 P. 281.

87. While the supreme court will not ordinarily correct irregularities in the judgment on writ of error, it will do so if the statutory time for such correction in the trial court has expired and the judgment debtor is without other remedy. Fidelity & Deposit Co. v. Schuchman, 189 Mo. 468, 88 S. W. 626. See, also, Appeal and Review, 5 C. L. 121.

88. Clerical error in form of judgment. Johnson v. Citizens' Bank [Ala.] 39 So. 577. Mistake in description of land in partition decree. Hanrick v. Hanrick [Tex. Civ. App.] 81 S. W. 795. Where a mistake in the measure of damages is susceptible of mathematical calculation, an appellate court may correct the same. Cox v. Burdett, 23 Pa. Super. Ct. 346.

89. A decree may be amended by supplying an omission to fix a day of sale. Gregory v. Perry [S. C.] 50 S. E. 787.

90. See 4 C. L. 299, 301, 304, 306. Nunc pro tunc entries, see ante, § 4. Statutes extending time before judgment becomes final, see ante, this section, subdivision A.

91. After term of rendition. People v. District Ct. [Colo.] 80 P. 1065; Finch v. Finch, 111 Ill. App. 481; Doremus v. Chicago, 212 Ill. 513, 72 N. E. 403. Where several terms had elapsed between an order of confirmation of an assessment and an order denying the sale of the property benefited, held the order denying the sale did not operate to set aside the judgment of confirmation and hence a subsequent assessment could only be made under Laws 1897, p. 122, § 60. Id. Rev. St. 1901, par. 1478 construed. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397. A court cannot at a later term release a final judgment entered at a former term upon a writ of scire facias upon a recognizance of bail. State v. Boner [W. Va.] 49 S. E. 944. Alleged errors of law cannot be examined and revised on motion entered after term of rendition. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. Federal court has no power after expiration of the term to vacate judgment for fraud in the procurement. King v. Davis, 137 F. 198. So held where the judgment was based on a false return of service of process, plaintiff at law having participated in the fraud. Id., 137 F. 222. A default judgment of forfeiture for an alleged attempt to defraud the customs laws cannot be vacated for irregularities in the procedure after term and more than two years after its entry. United States v. Four Lorgnette Holders, 132 F. 564. After proceedings to vacate or modify a judgment on mo-

or mistake,[95] or unless the vacation or modification is ordered by an appellate court.[96] In many states this rule has been enlarged by statutes providing for the vacation of a judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect.[97] That the judgment is erroneous is no ground for setting it aside[98] except on appeal.[99] Mere irregularities are not grounds for relief[1] and this is true, though the judgment be against an infant, there being no proof that the latter suffered substantial injustice.[2] After the term of rendition courts of law exercise equitable control over judgments by confession.[3] While a Federal law court has no power to vacate its judgment of a former term[4] except for errors of fact such as can be relied on under writ of error coram nobis,[5] for a fact occurring after judgment such as can be relied on audita querela,[6] or for want of jurisdiction shown on the face of the record,[7] still such court has power, equitable in its nature, to so control the execution of its final processes as to prevent a wrong from being done thereby.[8]

In all cases the grant of relief is discretionary with the court[9] and the exercise of this discretion ought to tend in a reasonable degree to secure a determination of

tion for a new trial or on appeal or under Code Civ. Proc. § 473 are ended and the time therefor has expired, the superior court has no power or authority to vacate or modify its judgment in a matter of substance, on account of judicial error in the decision, no matter how apparent such error may be on the face of the decree. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

92. Where judgment was void by reason of the relationship of the judge to one of the parties to the action. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913; Bailey v. Hood, 38 Wash. 700, 80 P. 559; People v. District Ct. [Colo.] 80 P. 1065; Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182; MacFarland v. Saunders, 25 App. D. C. 438; Hickey v. Conley, 24 Pa. Super. Ct. 388. Code, § 3796, providing for opening a default judgment and granting a new trial, does not apply where judgment is void for want of jurisdiction. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125. A default judgment may be directly attacked for the insufficiency of service by publication in a proceeding to set the same aside. Id.

93. Dart v. Richardson [Minn.] 104 N. W. 1094; Arnout v. Chadwick [Neb.] 104 N. W. 942; Wilson v. Wilson [Wash.] 82 P. 154; York County v. Thompson [Pa.] 61 A. 1024. What constitutes fraud, see post, next subdivision.

94. What constitutes accident, see next subdivision.

95. What constitutes mistake, see next subdivision.

96. Doremus v. Chicago, 212 Ill. 513, 72 N. E. 403.

97. Clement v. Ireland, 138 N. C. 136, 50 S. E. 570.

98. Snohomish Land Co. v. Blood [Wash.] 82 P. 933; McInnes v. Sutton, 35 Wash. 384, 77 P. 736. Notice of leave to amend being unnecessary, an erroneous judgment that the return of service to such notice was sufficient is not an error of law justifying a vacation of the final judgment. King v. Davis, 137 F. 198. After proceedings to vacate or modify a judgment on motion for a new trial on an appeal or under Code Civ. Proc. § 473 are ended, and the time therefor has expired, the superior court has no power or authority to vacate or modify its judgment, in a matter of substance, on account of judicial error in the decision, no matter how apparent such error may be on the face of the record. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

99. McInnes v. Sutton, 35 Wash. 384, 77 P. 736.

1. By moving to open a judgment by confession one admits the regularity of the judgment and merely questions the right of plaintiff to recover on the merits. Treasurer of Division No. 168 v. Keller, 23 Pa. Super. Ct. 135.

2. This is especially true where the rights of third persons have become involved. Middleton v. Stokes [S. C.] 50 S. E. 539.

3. Kloeckner v. Schafer, 110 Ill. App. 391.

4. King v. Davis, 137 F. 222; Id., 137 F. 198. A Federal law court has after the end of the term no power to vacate a judgment at law founded on a false but apparently valid return of service of process, whether or not the fraud was induced by plaintiff. Id., 137 F. 222.

5. King v. Davis, 137 F. 222. (Coram "vobis" in opinion evidently a misprint.)

6. King v. Davis, 137 F. 222. See post, § 13.

7, 8. King v. Davis, 137 F. 222.

9. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231; Kjetland v. Pederson [S. D.] 104 N. W. 677; Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695; Walton v. Hartman, 38 Wash. 34, 80 P. 196. Rev. Codes 1899, § 5298. Keeney v. Fargo [N. D.] 105 N. W. 92; Winstone v. Winstone [Wash.] 82 P. 268; Hartman v. Viera, 113 Ill. App. 216. Trial court has power to set aside a default for want of an affidavit of defense. O'Connell v. King, 26 R. I. 544, 59 A. 926. Discretion is governed by equitable principles. Martinson v. Marzolf [N. D.] 103 N. W. 937. While an action to recover land was pending, there was a contest in the Federal land office between the same parties involving the validity of certain homestead filings, which contest resulted in a decision for the defendants in the present action, but there was a petition for review of that decision still pending and undetermined, held,

the rights of the parties upon a trial.[10] Relief will not be granted if the moving party has by conduct or otherwise waived the irregularity, or if his conduct has been such as to render it inequitable to grant relief.[11] Relief will be denied if the applicant has been guilty of unexcused[12] negligence or laches,[13] and in this connection,

that if the petition for review resulted in a decision for plaintiff then an irregular judgment in his favor by the state court should not be vacated, except as to costs, but if the petition resulted in an affirmance, the state judgment should be vacated. Id. Partition decree reopened to allow divorced wife of one of the parties to appear and set up her claims. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865.

Texas: In the absence of sufficient excuse the granting of relief is discretionary. El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660, rvg. [Tex. Civ. App.] 83 S. W. 855.

10. Default judgment. Walsh v. Boyle [Minn.] 103 N. W. 506. Default judgment opened, on condition that defendant pay plaintiff counsel fees, where he had a good defense and was not notified that the case had been assigned for trial, though he was negligent in employing counsel. Miller v. McCormick [R. I.] 60 A. 48

11. Martinson v. Marzolf [N. D.] 103 N. W. 937.

12. In the absence of a sufficient excuse the right is discretionary. El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660, rvg. [Tex. Civ. App.] 83 S. W. 855. Default judgment set aside where it appeared that failure to enter an appearance was an oversight due to the papers in the case getting misplaced. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515. After remittitur from appellate court had been filed, plaintiffs served an amended complaint on the stenographer of defendant's attorneys during their absence and the stenographer failed to call the attorney's attention to the matter. One of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the remittitur, but the clerk failed to do so, and though such attorney met plaintiff's attorney every day the latter never referred to the amended complaint, held default judgment would be set aside. Greene v. Montana Brewing Co. [Mont.] 79 P. 693. Where the answer was served one day after the expiration of the statutory time to answer and the application for leave to answer showed a defense on the merits, reasonable excuse, an attachment of sufficient of defendant's land to protect plaintiff and no delay in trial, the default judgment should be opened. Walsh v. Boyle [Minn.] 103 N. W. 506. Default judgment opened on condition that defendant pay the plaintiff's counsel fees, where he had a good defense and was not notified that the case had been assigned for trial, though he was negligent in employing counsel. Miller v. McCormick [R. I.] 60 A. 48. After injury defendant company prepared for trial, action was not commenced for two years, then defendant turned its evidence, etc., over to an insurance company under contract to defend the same; it failed to do so and a default judgment was entered; held, there being a showing of merits, the default should be opened. Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695. Defendant's rights being fully protected by counsel, the latter's refusal to state that the allowance of an amendment to the complaint surprised him did not entitle defendant to have a judgment against him vacated. Carlisle v. Barnes, 102 App. Div. 582, 92 N. Y. S. 924, afg. 45 Misc. 6, 90 N. Y. S. 810. Five years delay held to bar right to have default judgment opened on mere statement of defendant that "for some unaccountable oversight no affidavit of defense was filed." Burrowes Co. v. Cambridge Springs Co., 26 Pa. Super. Ct. 315. Where landlord had no knowledge of the action against tenant in time to have himself made a party, he is entitled to have a default judgment against the tenant opened. King v. Davis, 137 F. 198. Where defendant's attorney while away from his home city telegraphed to another city where trial was to be had, inquiring of plaintiff's attorney as to when the case would be reached, and plaintiff's attorney replied that it would be impossible to reach the case that week, and that he had written; but instead of writing he telegraphed date of trial to place from which the telegram of defendant's attorney had been sent, defendant's attorney having gone home did not get the telegram and was not present at the trial; held, default judgment would be vacated on the payment of costs. O'Toole v. Phoenix Ins. Co. [Wash.] 82 P. 175. On a motion to vacate a default judgment it appeared that the defense could not be established in the absence of a certain witness. No steps were taken to secure his attendance until June 16th but there was no expectation that the case would be tried until June 15th. The witness had left June 5th, and his attendance could not be secured before June 29th. Defendant had no control over the movements of the witness and it was unsafe to stipulate to go to trial on the 29th whether he was present or not. Held, judgment would be set aside. Richard v. National Distilling Co., 95 N. Y. S. 547.

13. Affidavit showing wanton negligence, default judgment will not be vacated. Gordon v. Gordon [S. D.] 105 N. W. 244. Where bankrupt relied on receiver to interpose his discharge as a defense, held, judgment against him would not be opened. Mack Mfg. Co. v. Van Duerson, 138 F. 953. Application to open a default judgment against a corporation denied where summons was personally served on its secretary. Billingham v. Miller & T. Commission Co. [Mo. App.] 89 S. W. 356. Where defendant's counsel forwarded cross complaint and answer by registered mail but failed to receive receipt of delivery from the post office department and failed to investigate the matter until two days before default was taken, held, default judgment would not be opened. Carr v. First Nat. Bank [Ind. App.] 73 N. E. 947. To warrant a court in setting aside a judgment upon a showing of surprise under Rev. Codes 1899, § 5298, the party must move

in the absence of collusion or fraud,[14] negligence of an agent[15] or attorney[16] is the negligence of the principal. Except in the case of a judgment void for the want of jurisdiction[17] the petitioner must show that he has a meritorious defense[18] at

promptly and within one year after notice. Keeney v. Fargo [N. D.] 105 N. W. 92. In cases of motions to set aside judgments not within the provisions of Rev. Codes 1899, § 5298, application for relief must be made seasonably. Id. Where defendant was in court with his witnesses and one of his attorneys on the day set for trial, but, owing to the illness of another of his attorneys, the case was postponed until the next day, and after the postponement defendant abandoned the case; held, in the absence of any excuse, a default judgment would not be set aside. Brown v. Huber. 92 N. Y. S. 940. Where defendant acquiesced in a default judgment by voluntarily paying it, a motion to set the judgment aside and permit defendant to answer, relief denied where affidavit of his attorney did not include a copy of the proposed answer and showed but slight excuse for the failure to answer in time. Wood v. Hall, 95 N. Y. S. 175. That one of the defendants understood inperfectly the English language and had difficulty in explaining his defense to his counsel held not to excuse 14 months' delay, defendants having been twice notified that the motion for default would be called for hearing. Moody v. Reichow, 38 Wash. 303, 80 P. 461. A landlord knowing of the institution of an action of ejectment against his tenant in time to make defense but failing so to do is not entitled to have the judgment opened. King v. Davis, 137 F. 222. Where a judgment note is not entered up until five years after its date, and no rule is taken to open it until four years after its entry and the testimony taken on the rule to open is contradictory in character, held, the court was justified in refusing to open the judgment. Fryberger v. Motter, 24 Pa. Super. Ct. 317. In New York the mere fact that a defendant not served with summons knows of the action and takes no steps to prevent proceedings therein does not constitute laches, barring his right to have the default judgment set aside. O'Connell v. Gallagher, 93 N. Y. S. 643. Where evidence tended to show deliberate intention on the part of defendant and his attorney to abandon defense and permit plaintiff to take judgment, held, default judgment would not be opened. Peterson v. Crosier [Utah] 81 P. 860. That defendant would have lost his position as an employe of a corporation had he attended the trial is no ground for opening default judgment where he knew of the trial but took no steps to prevent its being tried in his absence. Id. Where facts showing an alleged abandonment of a widow's homestead could have been discovered before the trial of a suit to deprive her thereof, held, there was no reason for vacating the judgment. Moore v. Rogers, 27 Ky. L. R. 827, 86 S. W. 977. Where a party has a meritorious defense and through his own intentional neglect failed to appear for trial, and a judgment was rendered against him, the judgment will not be vacated, for the purpose of allowing him to plead some other meritorious defense which he might have to the action, and which was known to his counsel at the time he filed his answer in the first instance. Peterson v. Crosier [Utah] 81 P. 860. Where there was 10 years delay before commencing action, 5 years more before bringing it to an issue of fact and 15 years more before trying to bring the issue to trial, held, a judgment of dismissal would not be vacated on the petition of persons who had a speculative interest in the result, plaintiff's claim of title resting upon the fact that defendants' remote grantor, who was the husband of one of the plaintiffs and father of the others, executed his deed as an unmarried man. Hoffmeister v. Renton Co-op. Coal Co. [Wash.] 82 P. 127.

14. The supreme court of Washington is not prepared to announce the rule that negligence of one's attorney is no defense as they can conceive exceptions thereto. Winstone v. Winstone [Wash.] 82 P. 268.

15. Failure of agent to pay taxes held no ground for vacating default tax judgments. Warner v. Miner [Wash.] 82 P. 1033.

16. Carr v. First Nat. Bank [Ind. App.] 73 N. E. 947; Peterson v. Crosier [Utah] 81 P. 860; Foster v. Weber, 110 Ill. App. 5. Complaint alleging negligence and financial irresponsibility of attorney held insufficient to warrant vacation of judgment. Jones v. Vane [Idaho] 82 P. 110. Where one of a series of similar cases was decided in favor of plaintiff and defendant's counsel, though in court and ready for trial, refused to proceed with the rest of the cases, held, judgment in one of the latter would not be set aside. Sutter v. New York, 106 App. Div. 129, 94 N. Y. S. 515. Where on the day counsel was notified that his motion to strike out part of the complaint was overruled he prepared and transmitted an answer and wrote plaintiff's counsel asking for advice as to what to do, to which plaintiff's counsel replied he had obtained judgment, held, judgment would not be set aside. Horn v. United Securities Co. [Or.] 81 P. 1009.

The supreme court of Washington is not prepared to announce the rule that negligence of one's attorney is no defense, as they can conceive of exceptions thereto. Winstone v. Winstone [Wash.] 82 P. 268.

17. Suit to restrain enforcement and have decree vacated. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837.

18. Bell v. Thompson [Cal.] 82 P. 327; El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660, rvg. [Tex. Civ. App.] 83 S. W. 855; Weber v. Powers, 114 Ill. App. 411; Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. Default judgment. Foster v. Weber, 110 Ill. App. 5. Motion to set aside a judgment for irregularities. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221. Under Civ. Code Proc. § 521, one who petitions for the vacation of a judgment and for a new trial must plead and prove that he has a defense to the action. Wireman v. Wireman's Adm'r, 27 Ky. L. R. 961, 87 S. W. 319. Decree pro confesso for an accounting will not be vacated where it is made clear to

least to a part of the cause of action;[19] but the fact that he has such a defense is not of itself sufficient to warrant the opening of the judgment.[20] The Code of Colorado does not authorize the granting of relief after the expiration of the term, except where it appears that the party aggrieved has been unable to apply for the relief sought during the term of rendition.[21] In New York a court has no power after final judgment granting an absolute divorce to incorporate a provision in the judgment for the maintenance and education of the children of the marriage.[22] A judgment will not be vacated where the subject of the controversy has been eliminated.[23] The want of notice for lack of which a judgment may be set aside means that notice which is essential to give the court jurisdiction;[24] it does not, in the absence of statutory provisions, mean notice of the time set for trial.[25] Clerical mistakes are not grounds for vacating the judgment.[26] A decree will not be opened on the ground of newly discovered evidence unless the latter changes the aspect of the case.[27] The fact that the petition is prosecuted by persons who have a speculative interest in the result is an element worthy of consideration, especially when the cause of action is at best doubtful or where its successful prosecution will deprive persons of property to which they were morally entitled, and would be legally so but for a mistake of law made at the time they acquired it.[28] The grounds urged must be consistent with the applicant's previous conduct with reference to the case.[29]

the court that defendants are under a duty to account. Tull v. Brooke, 24 Pa. Super. Ct. 426. Where defendant in a default judgment voluntarily paid it, held, relief would be denied, the affidavit not setting forth a copy of the proposed answer. Wood v. Hall, 95 N. Y. S. 175. A complaint to set aside a judgment procured without any fraud on causes of action barred by limitations at the time the suit to set aside the judgment is commenced is fatally defective where it fails to affirmatively show that there was a good defense to the original action. Burbridge v. Rauer, 146 Cal. 21, 79 P. 526. By moving to open a judgment by confession one admits the regularity of the judgment and merely questions the right of plaintiff to recover on the merits. Treasurer of Division No. 168 v. Keller, 23 Pa. Super. Ct. 135.

19, 20. Reed v. Bank of Ukiah [Cal.] 82 P. 845.

21. Held proper to refuse an application for relief after term where the only reason for not making the application during the term was that plaintiff erroneously believed that he was entitled to a new trial as a matter of right. Smith v. Mock [Colo.] 79 P. 1011.

22. Code Civ. Proc. § 1771. Salomon v. Salomon, 101 App. Div. 588, 34 Civ. Proc. R. 113, 92 N. Y. S. 184.

23. A decree for divorce will not after the death of the successful party be set aside on the application of the defeated party on the ground that the court was without jurisdiction. Dwyer v. Nolan [Wash.] 82 P. 746. Personal representative of such decedent cannot consent to the setting aside of such decree nor represent decedent in the action to set aside. Id.

24. People v. District Ct. [Colo.] 80 P. 1065.

25. People v. District Ct. [Colo.] 80 P. 1065.

But see Miller v. McCormick [R. I.] 60 A. 48, where a default judgment was opened on condition that defendant pay plaintiff's counsel fees, where he had a good defense and was not notified that the case had been assigned for trial, though he was negligent in employing counsel.

26. Where judgment gave date of filing as prior to date the cause was heard, held a mere clerical error, the clerk testifying that the latter date was left blank and he filled it in by mistake erroneously. Warner v. Miner [Wash.] 82 P. 1033. In the absence of such a showing the judgment will not be set aside because the clerk of court appointed the guardian ad litem without authority. Id. Nor, in the absence of such a showing, will the judgment be set aside because the case was heard at chambers on the consent of such guardian ad litem. Id.

27. In re Chedsey, 95 N. Y. S. 342. Judgment in habeas corpus for the custody of a child will not be opened to allow the respondent to offer further testimony as to existing facts upon the mere vague intimation that additional evidence might possibly be obtained by further investigation. Ex parte Davidge [S. C.] 51 S. E. 269.

28. Hoffmeister v. Renton Co-op. Coal Co. [Wash.] 82 P. 127. Where plaintiffs in enjectment were under no legal disability at the time the cause of action arose but they delayed 10 years before commencing action, 5 years more before bringing it to an issue of fact and 15 years more before trying to bring the issue to trial, held, a judgment of dismissal would not be vacated on the petition of persons who had a speculative interest in the result, plaintiff's claim of title resting upon the fact that defendants' remote grantor, who was the husband of one of the plaintiffs and father of the others, executed his deed as an unmarried man. Id.

29. Where defendant defaulted and then asked for an extension of time to answer on the ground that it desired to interpose a counterclaim and that the facts constitut-

A motion to set aside a default judgment raises the question of the sufficiency of the declaration to support the same,[30] but not the truth of such allegations.[31] On a motion to vacate the court will not require the same particularity in the pleadings as when they are challenged on trial.[32] Where, pending a motion to vacate based on invalid returns of service of process, a motion to amend is made and the amended return discloses a valid service, the motion will not be granted if the facts stated in the amended return are true.[33]

A court of equity[34] in the absence of statutory provisions[35] has the inherent,[36] discretionary[37] power to set aside or enjoin the enforcement of a judgment rendered in an action at law,[38] even though one action be in the Federal and the other in the state courts[39] for fraud in the procurement of the decree[40] unaccompanied by

ing such counterclaim were known only to an absent witness, and the request was denied and judgment entered for plaintiff, held, it would not be set aside where the answer tendered with the motion did not set up a counterclaim but relied on facts at all times available to defendant. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94. Where basis of petition was the negligence of petitioner's attorney but it appeared that other counsel was secured who made a motion for a new trial but did not appeal from the order refusing to grant a new trial, held, judgment would not be vacated. Divorce decree. Winstone v. Winstone [Wash.] 82 P. 268. Plaintiff is not entitled to have a default opened as a matter of right where the case was twice passed at his request, because of engagement of counsel who it was stated was to try it for him, and an application for further adjournment on the ground that plaintiff's guardian ad litem was to try the case and had a conflicting engagement. Cohen v. Meryash, 93 N. Y. S. 529.

30. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253.

31. Where the complaint in a suit to foreclose a mortgage alleges that the mortgage was given to secure two notes, a default judgment of foreclosure will not be vacated on the ground that the mortgage in fact secured but one of the notes. Twigg v. James, 37 Wash. 434, 79 P. 959.

32. Petition in replevin held sufficient though it did not allege ownership or right to possession, it stating the facts entitling plaintiff to possession. Thompson v. Caddo County Bank [Okl.] 82 P. 927. Petition in replevin pleading the title of plaintiff to be that of mortgagee under a chattel mortgage and stating that deeming itself insecure it took possession, sustained on motion to vacate though it did not particularize plaintiff's special ownership. Id.

33. King v. Davis, 137 F. 222.

34. See 4 C. L. 304-306. Bills of review or bills in the nature of bills of review, see Equity, 5 C. L. 1144. For law, practice and forms see Fletcher, Eq. Pl. & Pr. § 952.

35. Under Civ. Code Proc. § 285, a suit will not lie in the chancery division to enjoin proceedings on a judgment in the law and equity division of the circuit court. Nairin v. Kentucky Heating Co., 27 Ky. L. R. 551, 86 S. W. 676.

36. The power of a court of equity to purge a consent decree for alimony of fraud entering into the procurement thereof is not derived from § 18 of the Divorce Act. Griswold v. Griswold, 111 Ill. App. 269.

37. Is entitled to exercise the same discretion in granting or refusing the relief asked as on application for a bill of review. Fraudulent divorce decree. Kerans v. Kerans [N. J. Eq.] 62 A. 305. Under Gen. Laws 1896, c. 246, § 2, providing that in case of judgment by default or by mistake the court may within six months after entry thereof set aside the same and reinstate the case, the power thus given is discretionary and not subject to review by the supreme court. Opie v. Clancy [R. I.] 60 A. 635. Grant of Federal injunction against state judgment. 26 Stat. 826 considered. Lehman v. Graham [C. C. A.] 135 F. 39.

38. Probate decrees: Court of equity has jurisdiction to set aside a decree of a county court approving and settling the final account of an administrator. B. & C. Comp. § 911 considered. Froebrich v. Lane, 45 Or. 13, 76 P. 351. A decree approving and settling the final account of an administrator is such a final adjudication that equity will set it aside for fraud in its procurement, though the distribution has not been made nor the administrator discharged. Id.

39. State court may entertain bill to restrain enforcement of decree or judgment of a Federal court. Keith v. Alger [Tenn.] 85 S. W. 71. Federal courts can grant relief against state judgment. Rev. St. U. S. § 720 is not to be literally construed. Lehman v. Graham [C. C. A.] 135 F. 39. In such case a preliminary injunction may be issued against the defendants to prevent the collection of the judgment by execution or otherwise. Id.

40. Froebrich v. Lane, 45 Or. 13, 76 P. 351. Consent decree for alimony. Griswold v. Griswold, 111 Ill. App. 269. Will relieve against a default judgment entered on account of fraud. Goldie Const. Co. v. Rich Const. Co. [Mo. App.] 86 S. W. 587. Fraud must have prevented use of defense. White v. Powell [Tex. Civ. App.] 84 S. W. 836. In the Federal courts equity alone can relieve against a judgment procured by fraud. King v. Davis, 137 F. 198. Defendant being free from laches, equity will grant relief from a judgment obtained on a **false return of service of process,** plaintiff at law participating in the fraud. King v. Davis, 137 F. 222. Where the false return of service of process is the sole act of the person making the return and such person is an officer, there is no relief in equity in the Federal courts. Id.

NOTE: Private process server: In Kibbe

unexcused[41] negligence,[42] laches[43] or fault[44] on the part of him who invokes the remedy or his attorney,[45] and in this connection ample means for information is equivalent to knowledge.[46] This remedy cannot be utilized for the correction of errors or irregularities,[47] or where the petitioner had or has an adequate legal remedy.[48] Equity will not grant relief unless it clearly appears that the petitioner

v. Benson, 17 Wall. [U. S.] 625, 21 Law. Ed. 741, by mistake or fraud a private process server, apparently without the connivance of the plaintiff at law, made a false return of service and relief was granted on the ground that the defendant at law had no notice.—From King v. Davis, 137 F. 222.

What constitutes fraud, see post, next subdivision.

41. Petitioner must show fraud, surprise or circumstances beyond his control in order to excuse default. Opie v. Clancy [R. I.] 60 A. 635. Judgment on a note opened on suit by an indorser the latter having relied on the maker's promise to defend the action and the note having been paid which fact was, at the time, known to the maker and holder of the note alone. Johnson v. Chilton [Mo. App.] 85 S. W. 648. Equity will relieve where petitioner was ignorant of his defense at the time of the trial and could not have discovered it by the exercise of reasonable diligence in time to set it up at law. Chapman v. Salfisberg, 111 Ill. App. 102. Party seeking relief must show that he was prevented by accident, mistake or fraud from maintaining his legal rights and that the obstacle preventing him could not have been overcome or avoided by any reasonable diligence on his part. Freeman v. Wood [N. D.] 103 N. W. 392. See, also, White v. Powell [Tex. Civ. App.] 84 S. W. 836.

42. Froebrich v. Lane, 45 Or. 13, 76 P. 351; White v. Powell [Tex. Civ. App.] 84 S. W. 836; Opie v. Clancy [R. I.] 60 A. 635. Evidence held sufficient to sustain finding that plaintiff and his attorney were inexcusably negligent in failing to defend suit. White v. Powell [Tex. Civ. App.] 84 S. W. 836. In order that newly discovered evidence may be available the complaint must show diligence in discovering it. The mere want of knowledge of its existence is not sufficient. Freeman v. Wood [N. D.] 103 N. W. 392.

43. Froebrich v. Lane, 45 Or. 13, 76 P. 351; Opie v. Clancy [R. I.] 60 A. 635. Must show a clear case of diligence. White v. Powell [Tex. Civ. App.] 84 S. W. 836. Complaint must show that petitioner was diligent. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470. Eight months' delay after entry of decree settling administrator's account is not such laches as will preclude setting aside for fraud. Froebrich v. Lane, 45 Or. 13, 76 P. 351.

44. Froebrich v. Lane, 45 Or. 13, 76 P. 351; White v. Powell [Tex. Civ. App.] 84 S. W. 836; Opie v. Clancy [R. I.] 60 A. 635. When a defendant suffers judgment to be taken against him which he might have avoided by pleading and proving his discharge in bankruptcy, he cannot obtain relief therefrom in equity. White v. Powell [Tex. Civ. App.] 84 S. W. 836.

45. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

46. A city denied equitable relief against default judgment on certain warrants where defenses were matters of public record, and the city officials had, for five years before seeking relief against such judgments, ample means of access to such records, though they claimed that it was hard to locate the required papers. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470.

47. Froebrich v. Lane, 45 Or. 13, 76 P. 351. Under Va. Code 1904, pp. 1406, 1728, a rule to plead being unnecessary the fact that no such rule was served, as directed by a court order, is not ground for vacation of a default judgment long after the term at which it was rendered, especially when defendant did not hear of the order until long after final judgment was rendered. King v. Davis, 137 F. 198. Judgment for a license tax is not void and therefore relief by injunction against execution thereon may not be had, though the ordinance forming the basis of the action was penal in its nature and had not been published. Masterson v. Keller [Tex. Civ. App.] 13 Tex. Ct. Rep. 839, 89 S. W. 803.

48. Opie v. Clancy [R. I.] 60 A. 635. Not entitled to redress where he has failed to avail himself of right to appeal. Froebrich v. Lane, 45 Or. 13, 76 P. 351. An independent action to set aside a judgment is not maintainable when the remedy by motion provided by Rev. Codes 1899, § 5298 is available and adequate. Freeman v. Wood [N. D.] 103 N. W. 392. Complaint failing to show that one year had expired after notice of judgment held demurrable for not negativing present availability of the motion. Id. Existence of equitable defense does not bar right. Humphries v. Adkins [Ala.] 38 So. 840, overruling dictum in Hooper v. Birchfield, 138 Ala. 423, 35 So. 351. A bill in equity will not lie to restrain the enforcement of a judgment on the ground of payment. Proper remedy is by writ of audita querela or by motion in the nature of such writ. Pyle v. Crebs, 112 Ill. App. 480. If in the rendition of a decree of foreclosure of a mortgage the court errs in assessing a lien as prior thereto in favor of one of the parties, the mortgagee has a speedy and adequate remedy by appeal or error and equity will not subsequently interpose. Nebraska Loan & Trust Co. v. Crook [Neb.] 103 N. W. 57. Defendant taking no exception and his motion to set aside the judgment being denied, held, not entitled to injunction against enforcement of judgment rendered in an action tried before an assistant justice acting without authority. Gen. Laws 1896, c. 228, § 11 considered. Opie v. Clancy [R. I.] 60 A. 635. Where plaintiff in an attachment suit obtains a judgment against a garnishee, a claimant of the money in the garnishee's hands cannot have the collection of such judgment enjoined, for if he was notified to appear and did not do so he is bound by

has a meritorious defense,[49] was injured by the fraud,[50] and that it will be contrary to equity and good conscience to deny the petition.[51] An unaccepted offer to show a meritorious defense will answer this requirement.[52] To obtain relief the petitioner's hands must be clean[53] and he must himself do equity.[54] A threatened irreparable injury is ground for an injunction.[55] Unless exclusive, statutes affording relief upon enumerated equitable grounds do not bar equitable relief upon grounds not specified.[56] An infant defendant has a right to file by his next friend or guardian[57] at any time during his minority,[58] or within the period allowed after majority for the prosecution of a writ of error,[59] an original bill to impeach a decree either for fraud or for error apparent upon the face of the proceedings.[60] Newly discovered evidence to be successfully presented as a ground for relief must be material, relevant and noncumulative, and such as could not have been discovered in time for use at the first trial by the exercise of proper care and diligence.[61] Equity will enjoin the enforcement of a judgment apparently valid on its face

such judgment, and if he was not so notified his rights against the garnishee are in no wise affected by the collection of the judgment so sought to be restrained. Radzinski v. Fry, 111 Ill. App. 645. See, also, Goldie Const. Co. v. Rich Const. Co. [Mo. App.] 86 S. W. 587.

49. Ople v. Ciancy [R. I.] 60 A. 635; White v. Powell [Tex. Civ. App.] 84 S. W. 836; Keith v. Alger [Tenn.] 85 S. W. 71; Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413. The fact that defendant was a married woman when the action was instituted against her and that her husband was not made a party is no ground for enjoining the enforcement of the judgment against her. Church v. Gallic [Ark.] 88 S. W. 307. A judgment entered on a judgment note payable to the treasurer of a beneficial association will not be opened on an allegation by the defendant that he applied for benefits to the secretary of the executive committee of the association and was informed by that officer that he could secure relief by applying to the vice president; that before receiving such benefits it would be necessary for him to sign a paper in the nature of a receipt, but that no demand would be made for the repayment of money so received, and that upon the faith of this representation he signed the note upon which the judgment was rendered. Treasurer of Division No. 168 v. Keller, 23 Pa. Super. Ct. 135.

50. Keith v. Alger [Tenn.] 85 S. W. 71. Where a vendee of land had procured the setting aside of the sale for fraud and the land was sold as that of the deceased vendor's estate, held, the vendor's heirs could not have the decree set aside on the ground that prior thereto the vendee had conveyed his interest by a secret conveyance. Id.

51. Ople v. Clancy [R. I.] 60 A. 635. Must show that if relief is granted a different result will be decreed. Id. It is not enough that an accident has prevented the losing party from pressing a motion for a new trial based upon technical errors occurring at the trial, even though they might be sufficient to warrant a reversal on appeal. Noe v. Layton [Ark.] 89 S. W. 1005.

52. Where judgment was based on a stipulation signed by an attorney having no right to represent the defendant in the action, held, equity would enjoin its enforcement, applicant offering to show a defense on the merits but the court declined the offer. Goldie Const. Co. v. Rich Const. Co. [Mo. App.] 86 S. W. 587.

53. Equity will not assume jurisdiction to enjoin the enforcement of default judgment against a lottery concern. Pacific Debenture Co. v. Caldwell [Cal.] 81 P. 314.

54. Where mortgage was valid held mortgage foreclosure decree would not be set aside unless the applicant paid what was equitably due with interest. Stull v. Masilonka [Neb.] 104 N. W. 188. In a suit by a city to enjoin a judgment on warrants one of which was confessedly valid and the payee in the other one was entitled to a valid warrant, held, the city was not entitled to relief unless it tendered the just amount due or the warrant to which defendant was justly entitled. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470.

55. The wrongful levy of an execution on the subscribers' books of a mercantile agency and the threatened disclosure of the contents thereof constitute an irreparable injury, to restrain which an injunction will issue. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390.

56. Right to relief in equity for fraud is not affected by B. & C. Comp. § 103, providing for relief of a party by a court of record from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. Froebrich v. Lane, 45 Or. 13, 76 P. 351.

57. Mauzey v. Dazey, 114 Ill. App. 652.

58. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424; Mauzey v. Dazey, 114 Ill. App. 652.

59. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

60. He is not bound to proceed by way of rehearing or by bill of review. Mauzey v. Dazey, 114 Ill. App. 652; Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

61. Freeman v. Wood [N. D.] 103 N. W. 392. A Federal court will not enjoin enforcement of a judgment of a state court on grounds that have been passed upon by the state court, the application being supported by the same affidavits with only cumulative evidence. Bailey v. Willeford [C. C. A.] 136 F. 382.

but rendered without service or appearance;[62] but neither a mere accident unmixed with negligence of the applicant[63] nor a nonjurisdictional irregularity in the entry of a judgment[64] will afford a basis for the granting of relief. Judgments in divorce cases will not be readily set aside, especially in jurisdictions where parties to the divorce action are permitted to marry again.[65] In the absence of fraud or other equitable grounds a surety is not entitled to have the enforcement of a judgment against him enjoined because suit is subsequently brought against his principal and the latter interposes a defense.[66]

(§ 5) *C. Fraud, accident, mistake, surprise and other particular grounds.*[67]—Fraud must lie in the procurement of the decree[68] and must be extrinsic or collateral to the questions examined and determined in the action.[69] It is not necessary

62. Where judgment was based on a stipulation signed by an attorney having no right to represent the defendant in the action. Goldie Const. Co. v. Rich Const. Co. [Mo. App.] 86 S. W. 587.

63. Opie v. Clancy [R. I.] 60 A. 635.

64. Failure to file statement of the evidence as part of the record as required by Rev. St. 1901, § 1435, is not ground for vacating a default judgment. Steinfield v. Montijo [Ariz.] 80 P. 325.

65. Winstone v. Winstone [Wash.] 82 P. 268.

66. Dampskibsaktieselskabet Habil v. U. S. Fidelity & Guaranty Co. [Ala.] 39 So. 54.

67. See 4 C. L. 301, 302, 304, 306. The general doctrines as to fraud, accident and mistake are treated in Fraud and Undue Influence, 5 C. L. 1541; Mistake and Accident, 4 C. L. 674.

68. Judgment by confession set aside where affidavit did not, as required by statute, state the true consideration of the bond. Kleeman v. Blatz Brewing Co. [N. J. Law] 60 A. 408. Where former judgment on same cause of action had been satisfied, held, equity would grant relief against second judgment. King v. Arney, 114 Ill. App. 141. Judgment against a county will be opened where the evidence tends to show that the county has been defrauded and that the party obtaining the judgment was a party to the fraud. York County v. Thompson [Pa.] 61 A. 1024. Judgment on a note opened on suit by an indorser, the latter having relied on the maker's promise to defend the action and the note having been paid, which fact was at the time known to the maker and holder of the note alone. Johnson v. Chilton [Mo. App.] 85 S. W. 648. A divorce decree being obtained by fraud and without notice, the defendant is entitled to have it set aside by petition in the cause, and is not required to resort to a bill of review. Kerans v. Kerans [N. J. Eq.] 62 A. 305. In order that a judgment may be set aside for the fraud of an attorney, it must be proven that the judgment was obtained by reason of such fraudulent acts or practices. Dart v. Richardson [Minn.] 104 N. W. 1094. Evidence held insufficient to warrant setting aside of judgment. Id. Where after foreclosure suit was brought one of defendants suggested to plaintiff's counsel that defendants convey the property in satisfaction of the mortgage debt, and counsel said he would consult his client and let defendant know if the offer was accepted, the fact that he did not communicate with defendant until after a default judgment providing for a deficiency had been taken is not such fraud as authorizes the setting aside of the judgment. Twigg v. James, 37 Wash. 434, 79 P. 959. A finding that by reason of certain facts defendant "fraudulently took and obtained an unfair advantage over plaintiff" did not amount to a finding that the judgment was obtained by fraud. Reich v. Cochran, 94 N. Y. S. 404, rvg. 41 Misc. 621, 85 N. Y. S. 247. Where a judgment note in favor of a firm was given in escrow by a partner to secure the performance of his duties, held a judgment thereon, after dissolution of the partnership, in favor of one of the partners for an alleged balance due him, would be opened. Herman v. Potamkin, 24 Pa. Super. Ct. 11. Judgment on judgment note opened where parol contemporaneous agreement was not performed. Keeler v. De Witt, 24 Pa. Super. Ct. 463. A judgment by confession will be opened where the note on which it was based was executed in the belief that some other document not a note was being signed. Funk v. Hossack, 115 Ill. App. 340. Evidence held not to show fraud in procurement of consent to entry of judgment. Reed v. Bank of Ukiah [Cal.] 82 P. 845. Where, in a suit to quiet title against one in possession under a tax deed, defendant and his counsel discussed making a claim for improvements, but decided that they were not of sufficient value, there was no ground for a charge of fraud or neglect of counsel in not making such claim. Snohomish Land Co. v. Blood [Wash.] 82 P. 933. Where dispossession proceedings were in fact begun before the expiration of the 10 days allowed by statute for the payment of rent after it becomes due, but the judgment was not rendered until the expiration of such 10 days, held no fraud, though the affidavit of service for a demand of rent was false but there was no showing that the affiant or the landlord knew it to be so. Reich v. Cochran, 94 N. Y. S. 404, rvg. 41 Misc. 621, 85 N. Y. S. 247. Where amount of administrator's compensation was limited by agreement with the heirs, and notice of the hearing for the settlement of his account was published in an obscure part of a paper in fine type and the administrator concealed from the heirs the fact that his final account had been filed and he therein charged more than the agreed compensation, held, there was fraud in procuring decree settling account. Froebrich v. Lane, 45 Or. 13, 76 P. 351.

69. Keith v. Alger [Tenn.] 85 S. W. 71.

that actual fraud should be found; it is sufficient if facts and circumstances are proven from which constructive fraud can be inferred.[70] The court must have been influenced and deceived by the fraud and induced to enter a judgment or decree prejudicial to the interests of petitioner.[71] Cases in which the facts are deemed to show "surprise" as the term is used here are shown in the notes.[72] Where it is sought to vacate a decree against a minor on the ground of error shown, said error must be prejudicial, must clearly appear upon the face of the record in the original proceedings, and must be such as would have entitled the minor to a reversal of said decree or judgment upon appeal.[73] In order to strike the judgment there must be irregularity affecting the integrity of the record or the validity of the judgment.[74] A judgment will not be opened on the ground that the defendant was incapacitated on account of habitual drunkenness to make the contract on which the judgment was entered, the evidence being insufficient to show that defendant was entirely incapable of making a contract or transacting ordinary business.[75]

(§ 5) *D. Procedure to amend, open, vacate or enjoin.*[76] *Time for application.*[77]—Application must be seasonably made[78] and within the statutory time.[79]

Parties.[80]—Unless he be the real party in interest,[81] a stranger to the proceedings in which judgment was rendered has no right to institute proceedings to amend or set aside the judgment.[82] Sureties on a replevin bond may attack a judgment in the replevin suit rendered after the death of the plaintiff and without revivor or suggestion of death upon the record.[83] An objection that the applicant was not a party to the judgment which it is sought to reopen may be waived[84] and should be raised by demurrer.[85] A person having a right to set aside a decree

70. Arnout v. Chadwick [Neb.] 104 N. W. 942. Evidence held sufficient to justify court in vacating decree. Id.

71. Petition to vacate for fraud a decree entered against petitioner while a minor. Wilson v. Wilson [Wash.] 82 P. 154.

72. Where plaintiff was given until the 7th day of April to plead and defendants on examination on April 6th found no petition on file, held, default judgment would be set aside. Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518. Plaintiff not being entitled to a summary judgment defendant is entitled to assume that the case will take its regular course on the trial docket, and a summary judgment may be stricken on the ground of surprise. Mueller v. Michaels [Md.] 60 A. 485. A default judgment in ejectment will not be set aside after the term of entry merely because the description in the original petition was imperfect, the description having been amended without notice and the applicant not alleging that he was misled by the description. King v. Davis, 137 F. 198.

73. Wilson v. Wilson [Wash.] 82 P. 154.

74. Bradshaw Electro Sanitary Odor Co. v. Bradshaw, 27 Pa. Super. Ct. 196. Where a judgment is entered by confession defendant may take advantage of the insufficiency of the name of the party plaintiff by a motion to set aside the judgment. Treasurer of Division No. 168 v. Keller, 23 Pa. Super. Ct. 135.

75. Spetz v. Howard, 23 Pa. Super. Ct. 420.

76. See 4 C. L. 307 et seq.

77. See 4 C. L. 307.

78. What constitutes laches, see ante this section, subdivision B.

79. Scott v. Hanford, 37 Wash. 5, 79 P. 481. A judgment valid on its face may not be attacked by motion, supported by affidavit that there was no service on defendant, filed five years after entry of judgment. Id. Default judgment based on publication; three years under Gen. St. 1901, § 4511. McKee v. Covalt [Kan.] 81 P. 475. Under Burns' Ann. St. 1901, § 609, five years. Hollenback v. Poston, 34 Ind. App. 481, 73 N. E. 162. Under 2 Ball. Ann. Codes & St. §§ 5153, 5156, 5157, an application to vacate a judgment on the ground of fraud in obtaining it must be by petition commenced within one year after the judgment was made and on the same notice as to time, mode of service and return as in ordinary actions. Twigg v. James, 37 Wash, 434, 79 P. 959.

80. See 4 C. L. 301.

81. Pier v. Oneida County [Wis.] 102 N. W. 912.

82. Pier v. Oneida County [Wis.] 102 N. W. 912. After judgment in an action against a county to annul tax certificates, the owner of a portion of the certificates, not a party to the action nor seeking to be made such, cannot make a motion to vacate. Id. That decree is collusive makes no difference. Union Waxed & Parchment Paper Co. v. Sevigne Bread Wrapper Co., 138 F. 415. In an action to set aside a decree affecting title to real estate, plaintiff cannot be permitted to recover unless it appears from the pleadings and proof that he has some interest in the title to the property involved. Stuli v. Masilonka [Neb.] 104 N. W. 188.

83. McBrayer v. Jordan [Neb.] 103 N. W. 50.

84. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865.

in a direct proceeding for that purpose may assign the right of action and the assignee may maintain a suit to set the decree aside.[86] Parties to a judgment must be made parties to an action to annul it,[87] and where the necessary parties are not cited in the trial court, the error cannot be corrected by their appearance in the appellate court long after the appeal has been returned and over the objections of the appellants.[88]

Modes and manner of procedure.[89]—A final judgment can be vacated or set aside only on some proceeding authorized by law.[90] Statutes should be consulted and the statutory method followed.[91] Besides error and appeal[92] the common-law remedies were on the law side error coram nobis and audita querela and later motion to vacate during term; and on the chancery side by bill of review or other bill appropriate to the case.[93] Codes and statutes have abolished or superseded some of these and the distinctions are now largely obliterated, leaving in most states only motion and bill in equity or equitable action.[94] A judgment being void on its face or on an inspection of the judgment roll is found to be void will be set aside at any time on motion of a party or by the court on its own motion;[95] but it is held that a motion is not the proper mode of procedure where the judgment is valid upon its face or its infirmity cannot be ascertained by an inspection of the judgment roll;[96] hence where a party is driven to evidence dehors the record to show that a judgment is void, he should be permitted to do so only where the facts upon which he relies may be examined into under the forms and sanction of a regular trial.[97]

85. Is not the proper subject-matter of an answer. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865.

86. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062. Where ejectment was brought against a tenant and the landlord was not joined and had no notice of the action until after judgment had been rendered in favor of plaintiff, the landlord was entitled to convey her rights in the land, including the right to have such judgment opened and be permitted to defend, to a purchaser, innocent or otherwise. King v. Davis, 137 F. 222.

87. Gremaud v. Gremaud [La.] 38 So. 901. In a proceeding to set aside a decree on the ground of fraud perpetrated in its rendition by a plaintiff in the suit on his co-plaintiffs, instituted by a purchaser of the interests of some of the co-plaintiffs, the other co-plaintiffs should be made parties. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062.

88. Gremaud v. Gremaud [La.] 38 So. 901.

89. See 4 C. L. 308.

90. Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658.

91. Kentucky: In case of fraud in obtaining the judgment the remedy is by action under Civil Code, § 518, subsec. 4. Combs v. Johnson, 26 Ky. L. R. 12, 80 S. W. 506.

Massachusetts: A judgment may also be set aside upon a motion by the prevailing party, filed within three months in accordance with the provisions of Rev. Laws, c. 193, § 14. Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658.

Missouri: Under Rev. St. 1899, § 780, a petition for review is the proper method of proceeding to set aside a final default judgment. Rev. St. 1899, § 770, allowing a motion to set aside a default before final judgment, does not apply. Billingham v. Miller Commission Co. [Mo. App.] 89 S. W. 356.

In Oklahoma proceedings to vacate a judgment on the ground of fraud must be by petition verified by affidavit, setting forth the judgment sought to be vacated, the grounds therefor, and the defense to the action, if the applicant was defendant. Wilson's Rev. & Ann. St. 1903, c. 66, art. 22, § 564. Thompson v. Caddo County Bank [Okl.] 82 P. 927. A motion is not the proper remedy. Id.

Washington: Under 2 Ball. Ann. Codes & St. §§ 5153, 5156, 5157, an application to vacate a judgment on the ground of fraud in obtaining it must be by petition commenced within one year after the judgment was made, and on the same notice as to time, mode of service and return as in ordinary actions. Twigg v. James, 37 Wash. 434, 79 P. 959.

92. See Appeal and Review, 5 C. L. 121.

93. See 15 Enc. Pl. & Pr. 253. Audita querela, see post, § 15. Bill of review, see Equity, 5 C. L. 1144.

94. See 4 C. L. 308; 2 C. L. 592.

95. Morrison v. Berlin, 37 Wash. 600, 79 P. 1114; National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397; Prouty v. Moss, 111 Ill. App. 536; Kronenberger v. Heinemann, 104 Ill. App. 156, overruled in part. Civ. Code 1895, § 5362. Union Compress Co. v. A. Leffler & Son [Ga.] 50 S. E. 483.

96. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397. Under Rev. St. 1901, paragraphs 1478, 1088, 1323, where in an action against a corporation the sheriff's return showed service on the local agent of the corporation and there was evidence corroborating the return, the trial court had no jurisdiction to set aside the judgment after the term of rendition. Id.

97. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397.

A judgment cannot be vacated in North Carolina for irregularities except by motion in the cause.[98] An appeal is not the proper method for obtaining relief from a judgment taken through mistake, inadvertence or excusable neglect.[99]

Pleadings and practice.[1]—The name given the pleading is generally immaterial so far as substantial allegations are concerned.[2] All facts necessary to constitute the case against the judgment must be alleged.[3] Fraud being alleged, the facts constituting the alleged fraud must be stated[4] and so must the want of authority of the judge.[5] Allegations of defense must not be pregnant with admissions that counter defenses exist.[6] A denial of facts necessary to support the judgment must ordinarily be positive and not on information and belief.[7] In Oklahoma the petition must be verified if fraud is alleged.[8] An affidavit of merits must be made by the person having personal knowledge of the particular facts stated in the affidavit.[9]

In a bill in equity directed against a judgment at law, the specific grounds of complainant's equity must be distinctly set forth.[10] The bill must show that

In Georgia in order to set aside for irregularities not appearing on the face of the record, one should proceed by petition with rule nisi or process and service upon the necessary parties. Union Compress Co. v. A. Leffler & Son [Ga.] 50 S. E. 483.

98. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221.

99. Proper method is by application to the lower court, under Code Civ. Proc. § 473. Johnston v. Callahan, 146 Cal. 212, 79 P. 870.

1. See 4 C. L. 308, 309.

2. Application by the losing party to have the judgment vacated held a petition to vacate under Rev. Laws, c. 193, § 15, though it was entitled "Motion" and in asking that the case be restored to the docket the word "move" was used instead of "pray." Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658.

3. In a suit to have a judgment for defendant, rendered in an action brought to deprive her of her homestead rights in certain land, set aside, a petition alleging that defendant had taken up her residence on other property held defective in failing to allege that she thereby intended to abandon her homestead in the first mentioned land. Moore v. Rogers, 27 Ky. L. R. 827, 86 S. W. 977. Attack for want of jurisdiction. Cook v. Weigley [N. J. Eq.] 59 A. 1029. Under Civ. Code Proc. § 521 one who petitions for the vacation of a judgment and for a new trial must plead and prove that he has a defense to the action. Wireman v. Wireman's Adm'r, 27 Ky. L. R. 961, 87 S. W. 319.

4. Petition to vacate for fraud a decree entered against petitioner while a minor. Wilson v. Wilson [Wash.] 82 P. 154. A complaint in an action to set aside a judgment on the ground that the affidavit of publication was fraudulent, which alleges that the affidavit was false and fraudulent but which fails to controvert any of the specific allegations of epecific facts contained in the affidavit does not show the falsity of the affidavit in any essential particular and is insufficient. Cargile v. Silsbee [Cal.] 82 P. 1044. Petition must set forth the judgment sought to be vacated, the facts constituting the alleged fraud, and must fully state the facts constituting the defense to the original action. Thompson v. Caddo County Bank [Okl.] 82 P. 927. A petition which sets up only a general denial by way of defense and does not state the facts constituting the fraud is fatally defective. Id.

5. In an action to set aside a judgment upon the ground that the summons was issued by one not a justice of the peace de jure or de facto, the complaint held defective in that it did not sufficiently declare that the justice issuing the summons had not been elected at the general election preceding and had not duly qualified. Kane v. Arneson Mercantile Co. [Minn.] 103 N. W. 218.

6. An allegation in a complaint to set aside a judgment on a note that the note was never signed by any member of a firm of which plaintiff was a member "to his knowledge" leaves it to be presumed in support of the judgment that it was so signed without plaintiff's knowledge. Burbridge v. Rauer, 146 Cal. 21, 79 P. 526. A further allegation that at the date of the commencement of the original action nothing was due or unpaid to defendant's assignor from plaintiff permits of the presumption in support of the judgment that at the date the amount claimed was due and unpaid to defendant who was then assignee and owner of the claim. Id.

7. A denial based on want of information of plaintiff's ownership of the note on which default judgment was entered held insufficient to warrant the setting aside of such judgment, there being no claim that plaintiff was not the owner. Tullis v. McClary [Iowa] 104 N. W. 505.

8. Thompson v. Caddo County Bank [Okl.] 82 P. 927.

9. Moody v. Reichow, 38 Wash. 303, 80 P. 461.

10. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470. General allegations that appellant lost her right of appeal by the loss of a bill of exceptions—an accident unavoidable on her part—held insufficient to warrant equitable interposition. Church v. Gallic [Ark.] 88 S. W. 307. Allegations in petition held so vague and contradictory that the court could not determine whether the judgment sought to be set aside was valid or not. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

the remedy at law is unavailable or inadequate,[11] that the petitioner was free from negligence,[12] that he has a meritorious defense,[13] and newly discovered evidence being made the basis of the application, the bill must show its character[14] and that proper diligence was exercised in its discovery.[15]

In the absence of statutory provisions[16] a motion should state the grounds upon which it is based.[17] As a general rule an affidavit should state facts and not conclusions.[18]

On a scire facias to revive judgment a statute authorizing a defendant to plead as many matters as he shall think necessary allows repugnant pleas.[19]

The proceeding to set aside is distinct and separate from the original case and presents wholly distinct issues.[20] Upon a motion to strike out a judgment in which is alleged irregularity in the proceeding in which the judgment was entered, the whole question of jurisdiction and whether the proper steps have been taken to justify the entry of judgment by the court is open.[21]

Notice, either actual or constructive, of the proceedings must be given the litigants,[22] and if the judgment is set aside without notice, one purchasing after the rendition of the judgment is entitled to a writ of mandamus directing the judge to set aside the order.[23]

In some states a bond must be given.[24]

Burden of proof and evidence.[25]—Unless a defect appears of record the burden is on the movant or petitioner to affirmatively show its existence.[26] All intendments are in favor of the regularity of the proceedings.[27] Parol evidence is admissible

11. Under Rev. Codes 1899, § 5298 must show that one year had expired since notice of judgment. Freeman v. Wood [N. D.] 103 N. W. 392.

12. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470.

13. Bell v. Thompson [Cal.] 82 P. 327.

14. So that court can determine its materiality and relevancy. Freeman v. Wood [N. D.] 103 N. W. 392. Complaint in an application to set aside a judgment discharging an assignee for the benefit of creditors and to secure a new accounting alleging that five years after such judgment was rendered plaintiff "accidentally" discovered that the account was not true in several particulars, held insufficient. Id.

15. Freeman v. Wood [N. D.] 103 N. W. 392.

16. Under Gen. St. 1902, § 762, a motion to set aside a judgment of nonsuit need not specify the particular grounds upon which it was based. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293.

17. Motion for modification. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

18. Affidavit stating that judgment is unjust and excessive and that defendant has a good defense on the merits to the whole of such claim is insufficient. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. Under a statute requiring an affidavit of merits in order to have a default judgment set aside an affidavit of defendant's attorney stating that from his investigations he believed that the accident for which plaintiff sought to recover was not caused by defendant's negligence, held sufficient without setting forth the facts on which such belief was based. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515.

19. Pleas to scire facias to revive a default judgment, denying service of process, declaration and notices in the manner and at the time and places stated in the returns, and alleging service on an unauthorized person, may be joined. Va. Code 1904, p. 1718, construed. King v. Davis, 137 F. 198.

20. Should be tried on the pleadings of the parties in such proceeding separate from the original case. Rev. St. 1895 articles 1375-1378 considered. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454. Such art. 1375 applies to justices' courts. Id.

21. Mueller v. Michaels [Md.] 60 A. 485.

22. Void judgment. Dwyer v. Nolan [Wash.] 82 P. 746. Irregular decree. Vincent v. Benzie Circuit Judge [Mich.] 102 N. W. 369.

23. Vincent v. Benzie Circuit Judge [Mich.] 102 N. W. 369.

24. Under Rev. Laws, c. 193, §§ 15 and 17, no final order can be made on a petition to vacate until a bond is given. Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658.

25. See 4 C. L. 309.

26. On a silent record it is not presumed that an affidavit for publication was not attached to the petition. Stull v. Masilonka [Neb.] 104 N. W. 188. When a judgment defendant moves that judgment be vacated for error of fact, he assumes the burden of proof, and must show satisfactorily that such error existed. King v. Davis, 137 F. 198.

27. In the absence of evidence to the contrary a finding of invalidity of a judgment will be deemed to have been based upon sufficient cause. Morrison v. Berlin, 37 Wash. 600, 79 P. 1114. Where a judgment recites that the court heard proofs, it will be presumed that the proofs showed an oral contract, not that it was erroneously rendered on a written contract without the filing of a copy on motion to set aside. Foster v.

to show fraud in confessing a judgment.[28] When there is evidence of fraud it is error to exclude evidence that the defrauded person was susceptible to the other's arts.[29] Excluding proper evidence is harmless where because of futility of relief a decree must have been refused even had a case been made out.[30] Where the only witnesses other than plaintiff are nonresidents and absent from the state and their affidavits are not obtainable, defendant, on moving to open a default judgment, may by its agent make affidavit of facts narrated to the agent by the absent witnesses.[31] The value of affidavits as proof in particular cases is shown in the notes.[32]

Questions of law and fact.[33]—A motion for leave to open a default judgment, so far as grounded on accident, mistake or misfortune, presents a question of fact for the decision of the trial court.[34]

Judgment or order of vacation and extent and effect thereof.[35]—The imposition of conditions on opening the judgment is discretionary with the court.[36] A legal defense accruing subsequent to the judgment, equity will only restrain enforcement until defendant consents to a retrial of the case at law.[37] When neces-

Weber, 110 Ill. App. 5. In a suit under Burns' Ann. St. 1901, § 609 to open a default judgment based on service by publication, nothing appearing to the contrary it will be presumed that the proceedings were regular and the statute complied with and the publication warranted. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231. Where the court before entry of a default judgment finds that the default of defendants had been duly entered, service of summons and complaint is presumed. Twigg v. James, 37 Wash. 434, 79 P. 959. Parol evidence of defendant and other witnesses that he was absent from the state at the time of the alleged service of summons is not sufficient to overcome the presumptions in favor of jurisdiction from the recitals of personal service in the default judgment and in the return of the officer. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837. Recital in default judgment that summons had been duly served and that more than 20 days had been allowed to elapse since the service but no answer had been served on complainant's attorney and no appearance had been made by defendant. held to show that court had passed on question of default and was conclusive as far as the record of such proceeding was concerned, in an action to vacate such judgment. Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

28. Where a wife attacks a judgment confessed by her husband to his sister on the ground that it was given with intent to hinder and delay the collection of his debt to her, parol evidence is admissible to show the fraud, and its existence is to be determined by a jury from a preponderance of the testimony. Meyers v. Meyers, 24 Pa. Super. Ct. 603.

29. Where the court found that there was no fraud or undue influence in procuring consent to the entry of judgment, the exclusion of evidence relating to the judgment debtor's weakness of mind and susceptibility to fraud is harmless. Reed v. Bank of Ukiah [Cal.] 82 P. 845.

30. In a suit to vacate partition and foreclosure decrees, error in rejecting evidence to show fraud in procuring the partition decree is harmless, there being nothing to authorize vacation of the foreclosure decree which cut off all of complainant's rights. Wilson v. Wilson [Wash.] 82 P. 154.

31. El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660, rvg. [Tex. Civ. App.] 83 S. W. 855.

32. The person making the service filing an affidavit that he had done so, a motion to vacate a default judgment will be denied though the defendant and his wife file affidavits denying the service. Matchett v. Liebig [S. D.] 105 N. W. 170. Where summons was regularly served and read by defendant who neglected to consult counsel, answer or appear, held default judgment would not be set aside though defendant made affidavit that he had made a settlement with plaintiff, this being denied by counter affidavit. Kjetland v. Pederson [S. D.] 104 N. W. 677. Where the affidavit of service stated that affiant served the summons on defendant and knew the person served to be defendant, and the server's affidavit in opposition to a motion to set aside a default judgment stated that before proceeding to make service she was given a description of defendant to enable her to identify her, and the person served answered such description and defendant made an affidavit, supported by that of another, that he was not served, held, judgment would be set aside on the ground that there was no personal service of process. O'Connell v. Gallagher, 93 N. Y. S. 643.

33. See 4 C. L. 310.

34. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

35. See 4 C. L. 310.

36. Walton v. Hartman, 38 Wash. 34, 80 P. 196.

37. The business in which complainant and defendant's son was engaged failed and defendant agreed to pay certain notes of the concern if complainant would pay the others. Defendant fulfilled his part of the agreement and sued complainant as indorser and obtained judgment against him because he had not paid, but merely secured, the notes he was to pay; held, the enforcement of the judgment would be enjoined until defendant consented to a retrial of the action at law on the notes and further consented that complainant might set up the alleged contract as a defense. Headley v. Leavitt [N. J. Err. & App.] 60 A. 963.

sary, liens or other securities should be preserved.[38] Conditions may be waived.[39] A judgment being partially valid[40] or there being a partial defense,[41] it may be modified or vacated pro tanto. A judgment being void a valid judgment may be entered in its place.[42] A motion to open a default can never result in a decision of the issues involved in the controversy.[43] In an action against joint tort feasors, judgment being rendered against all of the defendants the court in setting aside the judgment as against one of them should also dismiss the action as to him.[44] In order to set aside a formal and sufficient judgment there must be an adjudication by the court to that effect.[45]

A judgment being opened generally and without conditions, the trial should proceed as if no judgment had been entered,[46] and defendant is entitled to establish any defense admissible under his pleas.[47] A judgment being opened generally it is inadmissible in evidence against the defendant.[48] In an action against joint tort feasors judgment being rendered against all of the defendants, the setting aside of the judgment as against one does not impair it as against the other.[49]

Appeal or review.[50]—The order opening or vacating a judgment is not appealable unless it is a final judgment in itself or unless the statute has made it reviewable.[51] The order being appealable, either party aggrieved[52] or one not party

38. In a proceeding to open a judgment on which execution has issued, the execution and lien should remain until final determination of the case. Van Cott v. Webb-Miller, 25 Pa. Super. Ct. 51. Proceeding for vacating a default judgment by motion, liens should be preserved, defendant required to answer and plaintiff allowed to reply, and such order made as the verdict warrants. Elyria Milling Co. v. Swartz, 3 Ohio N. P. (N. S.) 251. Where so long as a certain guaranty was kept plaintiff could not enter judgment by confession, held, judgment should be set aside and not allowed to stand as security. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1.

39. Voluntary appearance by the defendants and an application by them, upon the day of trial, for an adjournment, without objection being made to the nonpayment of the costs imposed as a condition for opening the plaintiff's default, held a waiver of such condition, to the extent, at least, of conferring jurisdiction upon the court to hear and determine the case; and hence when upon the adjourned trial day plaintiff tendered the costs in open court, defendants were in no situation to urge that the court had no jurisdiction over their persons. Rickert v. Pollack, 95 N. Y. S. 578.

40. Where a judgment was, in so far as it purported to grant an immediate divorce, void as being entered without any interlocutory judgment, as required by Civ. Code, §§ 131, 132, it was within the power of the superior court at any time, on motion of either party or of its own motion, to vacate so much of the decree as awarded an absolute divorce, leaving the remainder of it, determining that the party was entitled to a divorce, unmodified and unaffected. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

41. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413.

42. Morrison v. Berlin, 37 Wash. 600, 79 P. 1114.

43. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231.

44. Weathers v. Kansas City Southern R. Co. [Mo. App.] 86 S. W. 908.

45. Chambers v. Morris [Ala.] 39 So. 375.

46. Long v. Morningstar [Pa.] 61 A. 1007. The record of the judgment is not competent evidence of its validity. Id.

47. Long v. Morningstar [Pa.] 61 A. 1007. Where a judgment by confession on a building contract is opened generally and without restriction, defendant is entitled to deny the execution of the contract. Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

48. Held inadmissible against a bankrupt on issue of solvency. McGowan v. Knittel [C. C. A.] 137 F. 453, dissenting opinion 137 F. 1015, rvg. In re McGowan, 134 F. 498.

49. Weathers v. Kansas City Southern R. Co. [Mo. App.] 86 S. W. 908.

50. See 4 C. L. 310 and the topic Appeal and Review, 5 C. L. 121, where all the doctrines are fully discussed.

51. While ordinarily there is no appeal from an order vacating a judgment, yet, if it is a final order which affects the substantial rights of the parties, an appeal will lie. State v. Tallman, 38 Wash. 132, 80 P. 272. Under Gen. Laws 1896, c. 246, § 2, providing that in case of judgment by default or mistake the court may, within six months after entry thereof, set aside the same and reinstate the case, the power thus given is discretionary, and not subject to review by the supreme court. Opie v. Clancy [R. I.] 60 A. 635. See, also, cases cited 5 C. L. 137.

There must be an order or judgment setting aside or refusing to set aside the judgment complained of. Chambers v. Morris [Ala.] 39 So. 375.

The "record" must show such order: Bill of exceptions reciting that "said motion coming on to be heard was submitted without argument * * * and on said date the following entry was made * * * on the docket: * * * 'Motion granted; verdict set aside,'" held to affirmatively show that the court made no order setting aside the verdict or vacating the judgment. Chambers v. Morris [Ala.] 39 So. 375.

by name aggrieved by the ruling[53] may appeal. The appeal is separate and distinct from the original action[54] reviewable by modes not necessarily the same.[55] An exercise of the power is not subject to review in another division of the same court,[56] nor being rendered by a Federal court is it open for review in a state court.[57] In Colorado an exception to the ruling is essential.[58] The merits of the original action will not be inquired into.[59] A correct ruling of the trial court will not be reversed, though based on an erroneous ground,[60] nor will the trial court's ruling be reversed unless an abuse of discretion is conclusively and affirmatively shown[61] by appellant.[62] A finding of the trial court reasonably supported by the evidence will be sustained.[63]

§ 6. *Construction, operation and effect of judgment.*[64]—Judgments are interpreted by the pleadings[65] and by the subject-matter of the suit.[66] In construing the judgment the whole context should be considered and in case of doubt preference should be given to that construction which is more in consonance with a proper decree on the law and facts of the case.[67] An appellate judgment implies

52. Either party may appeal from a judgment rendered in a proceeding, under Rev. St. 1895, art. 1375, to set aside a judgment rendered on service of citation by publication in the district or county court. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454. Such article 1375 applies to justices' courts. Id.

53. One aggrieved by a ruling refusing to vacate a default judgment may, under Laws 1901, p. 563, c. 78, § 6, seasonably object, allege exceptions in writing and have them transferred to the supreme court. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

54, 55. On appeal from a judgment in a proceeding under Rev. St. 1895, art. 1375 to set aside a judgment rendered on service of citation by publication, the method of appeal or practice on appeal will be controlled by the judgment appealed from without reference to the judgment in the original case. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454. Such article 1375 applies to justices' courts. Id.

56. Cascia v. Gilbane, 26 R. I. 584, 60 A. 237.

57. Blythe Co. v. Bankers' Inv. Co. [Cal.] 81 P. 281.

58. Smith v. Mock [Colo.] 79 P. 1011.

59. Such questions should be raised by proper pleadings and first presented to the trial court. Lehman v. Graham [C. C. A.] 135 F. 39. On appeal appellant can complain only of the action of the court with respect to the motion. Chambers v. Morris [Ala.] 39 So. 375. Errors in the original judgment cannot be reviewed. Even though the motion was made at the term of entry. Weber v. Powers, 114 Ill. App. 411.

60. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221.

61. Lehman v. Graham [C. C. A.] 135 F. 39; Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518; Kjetland v. Pederson [S. D.] 104 N. W. 677; Keeney v. Fargo [N. D.] 105 N. W. 92; In re Bugg's Estate [S. C.] 51 S. E. 263; Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94; Horn v. United Securities Co. [Or.] 81 P. 1009; Winstone v. Winstone [Wash.] 82 P. 268; Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695; Gottlieb v. Middleberg, 23 Pa. Super. Ct. 625; Foster v. Weber, 110 Ill. App. 5; Hartman v. Viera, 113 Ill. App. 216. Where on the day counsel was notified that his motion to strike out part of the complaint was overruled he prepared and transmitted an answer and wrote plaintiff's counsel asking for advice as to what to do, to which plaintiff's counsel replied that he had obtained judgment, held no abuse of discretion in refusing to set it aside. Horn v. United Securities Co. [Or.] 81 P. 1009.

62. Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 696.

63. Finding of trial court that plaintiff and his attorney were inexcusably negligent in failing to defend, being reasonably supported by the evidence must be adopted by the appellate court as a conclusion of fact. White v. Powell [Tex. Civ. App.] 84 S. W. 836.

64. See 4 C. L. 294, 311.

65. Sharp v. Zeller [La.] 38 So. 449; Burnside v. Wand, 108 Mo. App. 539, 84 S. W. 995. Where, in an action on a bond given for the payment of alimony in the penal sum of $6,000, plaintiff prayed judgment for the penalty of the bond and that execution issue for the sum of $365, with interest, as damages and for costs, and after general denial a trial was had on which judgment was rendered for plaintiff for the penalty of the bond and for damages, held, the judgment for the penalty should be rejected as surplusage and the judgment construed as a mere money judgment for the damages. Id. Where, in an action for damages for obstructing a watercourse plaintiff only asked for past damages and accompanied this demand with a prayer for an injunction, held, the damages awarded were only compensation for the damages which had been sustained. Scheurich v. Southwest Mo. Light Co., 109 Mo. App. 406, 84 S. W. 1003.

66. Sharp v. Zeller [La.] 38 So. 449.

67. Sharp v. Zeller [La.] 38 So. 449. Where the complaint demanded judgment for "$51.-1898," with interest thereon at 10 per cent per annum from Sept. 13, 1892 to Sept. 12, 1900, also $16 attorney's fees and taxable costs, a judgment for $107.02, enumerating principal, interest and attorney's fees as a part of the $107.02, should be construed as

not only that the court had jurisdiction but that it heard and determined that question.[68] A decree 30 years old will be presumed to have been based on proper jurisdictional steps.[69] A consent judgment being a contract must be construed as any other contract.[70] Judgments may be final[71] on the merits[72] in personam[73] or in rem.[74] A judgment may be a unit[75] or it may be severable.[76] Where there are two conflicting judgments in the same case, the later in point of time must prevail.[77]

The doctrines of estoppel by judgment and the merger and bar of causes of action in and by the judgment are treated elsewhere.[78] Defects in the pleadings[79] other than a failure to state a cause of action[80] may be cured by the judgment.[81] A judgment operates to make the judgment debtors joint debtors.[82] The suit having been closed by final judgment no further proceedings can be had in it except such as may be required for the execution of the judgment.[83] A decree pro confesso admits the facts charged in the bill, but not the conclusions drawn therefrom nor the conclusions of law.[84] The members of a firm being jointly and severally

including the principal, interest and attorney's fees and hence was not objectionable as being for a greater sum than that demanded. Pacific Paving Co. v. Vizelich, [Cal. App.] 82 P. 82. Plaintiff being entitled to recover $1,000 and a judgment being entered for $596 against one defendant and $1,000 against three defendants, held to be a judgment for $1,000 and the $596 having been collected, plaintiff could only recover $404 from the other defendants. March v. Barnet [Cal. App.] 82 P. 697.

68. Cook v. Weigley [N. J. Eq.] 59 A. 1029.

69. Smith v. Schwarz, 209 Pa. 79, 57 A. 1129.

70. Bunn v. Braswell [N. C.] 51 S. E. 927. Consent judgment declaring that defendant had "an equity to redeem certain land" held to establish the relation of mortgagor and mortgagee between the parties. Id. A recital that unless defendant pay a certain sum by a certain time he "shall stand absolutely debarred" of all equity in the land, held not to amount to a strict foreclosure. Id. A consent judgment that a basement hall shall be for the common and unobstructed use of the parties, that a space therein used as a stairway shall be for their common use and that said basement hall and stairway shall be used only for ingress and egress by plaintiff to his building, gives plaintiff no right to participate in the use of closets under the stairway, or to have any changes made so that light can be admitted through windows to the stairway. Massey v. Barbee, 138 N. C. 84, 50 S. E. 567.

71, 72, 73, 74. See ante, § 1.

75. A judgment in an action in trespass as well as in all other actions at law is a unit as to all the defendants against whom it is rendered, and if it must be reversed for error as to one it must be reversed as to all. South Side El. R. Co. v. Nesvig, 214 Ill. 463, 73 N. E. 749; Cummings v. Smith, 114 Ill. App. 35; Comenitz v. Bank of Commerce [Miss.] 38 So. 35. Action on the case. North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110.

76. A judgment in receivership proceedings determining the amount due each creditor and fixing the statutory liability of each stockholder held a several judgment against the several stockholders. Childs v. Blethen [Wash.] 82 P. 405. In an action for an accounting between joint adventurers, an interlocutory judgment providing "that plaintiff have judgment against the defendants and each of them, for the shares of stock and sums of money that may be found due him from said defendants and each of them," does not provide for a joint recovery, but for a final judgment against the defendants severally. Spier v. Hyde, 95 N. Y. S. 952. Where title to land is divided into separate undivided interests and a judgment in a tax suit purports to affect all the interests, it may be held valid as to some and void as to others. Eminence Land & Min. Co. v. Current River Land & Cattle Co., 187 Mo. 420, 86 S. W. 145, and cases cited. Where mandamus was brought against a carrier and its president, and the mandate was addressed to the carrier and to its president, "and each of them according to their several and respective powers," and the judgment for costs went against the carrier alone, held, the mandate was not a joint judgment, but should be taken distributively as affecting the president only according to his powers. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

77. Minor's Heirs v. New Orleans [La.] 38 So. 999.

78. See Former Adjudication, 5 C. L. 1502.

79. Defects in reply held cured by finding and judgment. George v. Robinson [Ind. App.] 75 N. E. 607.

80. Bell v. Thompson [Cal.] 82 P. 327.

81. See Pleading, 4 C. L. 980.

82. Symmes v. Cauble [S. C.] 51 S. E. 862. Judgment against maker, surety and guarantor held to render them joint debtors and Civ. Code 1892, § 2841, providing that a joint debtor may make a separate composition with his creditor, applies. Id. Such § 2841 applies to a note executed in December, 1883, where the guaranty was indorsed thereon in March, 1884. Id.

83. Sequestration of property denied. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 441.

84. Perkins v. Tyrer, 24 App. D. C. 447.

liable for its debts, the taking of judgment against one partner, who is alone served, does not release the other partner from his liability for the debt;[85] but in states where a judgment can be rendered against the partnership as such, it will constitute a bar to any suit on the same demand against the partnership.[86]

§ 7. *Collateral attack.*[87]—The rule that a judgment cannot be attacked in a collateral proceeding is a rule of policy and convenience,[88] and may be waived by the parties for whose benefit it exists;[89] and, being waived, the judgment rendered in such attack, being otherwise valid, is binding and conclusive on the parties until set aside in some manner authorized by law.[90]

What is collateral.[91]—A plea to a writ of scire facias is a collateral attack upon the judgment sought to be revived.[92] An objection that an administrator's deed, executed under order of court in fulfillment of a bond for title given by decedent, is void for failure to conform to the description of the land contained in the bond, is a collateral attack on the judgment.[93] An attack on a judgment on the ground that it was procured by fraud is generally deemed direct.[94]

Grounds.[95]—The court having jurisdiction of the parties and the subject-matter, its judgment cannot be collaterally assailed by the parties or their privies.[96] The court having no jurisdiction, its judgment may be collaterally attacked[97] at any time by any person who has not by his conduct estopped himself from questioning its validity,[98] though being a court of general jurisdiction want of jurisdiction must affirmatively appear on the face of the record.[99] The reason for this is that, as to a court of general jurisdiction, all jurisdictional facts as to which the

85, 86. Cowan v. Leming [Mo. App.] 85 S. W. 953.

87. See 4 C. L. 311.

88, 89, 90. In re Clifford, 37 Wash. 460, 79 P. 1001.

91. See 4 C. L. 311.

92. King v. Davis, 137 F. 198.

93. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025.

94. In a suit to enjoin defendant from entering on land claimed by plaintiff under a decree vesting title thereto in him, defendant by way of cross bill alleged that the decree had been procured by the fraud of plaintiff or his co-plaintiffs, through whom defendant claimed as a purchaser subsequent to the rendition of the decree. Both suits were in the same court. Held, that the cross bill was a direct attack on the decree. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062.

95. See 4 C. L. 312.

96. Foreclosure decree. Pinkney v. Weaver, 115 Ill. App. 582. Judgment in condemnation proceedings. Compton v. Seattle, 38 Wash. 514, 80 P. 757. Judgment of probate court setting aside homestead to widow of deceased. Jenkins v. Clisby [Ala.] 39 So. 735. Decree declaring a homestead loan association insolvent, appointing a receiver therefor and directing the collection of its outstanding loans. Broch v. French, 116 Ill. App. 15. A court having jurisdiction to issue a warrant of attachment the validity of the warrant cannot be questioned collaterally. Affidavit objected to as insufficient. Rogers v. Ingersoll, 93 N. Y. S. 140. Dramshop keeper held not entitled to collaterally attack judgment of county court granting license in a prosecution under the dramshop act. State v. Mulloy [Mo. App.] 86 S. W. 569. See Former Adjudication, 5 C. L. 1502.

97. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182; Glos v. Collins, 110 Ill. App. 121; Hickey v. Conley, 24 Pa. Super. Ct. 388. Tax proceeding. Mayot v. Auditor General [Mich.] 104 N. W. 19, citing Rumsey v. Griffin [Mich.] 101 N. W. 571. Order passed in vacation by the judge of the superior court. Callaway v. Irvin [Ga.] 51 S. E. 477. Under Code Civ. Proc. § 2473, a grant of letters of administration can be collaterally attacked for want of jurisdiction. McCarthy v. Supreme Ct. of Independent Order of Foresters, 94 N. Y. S. 876. Proceedings for a street improvement being void because of failure to give the abutting property owners notice of the engineer's report of the final estimate of costs, as required by Burns' Ann. St. 1901, § 4294, may be collaterally attacked. Daly v. Gubbins [Ind. App.] 73 N. E. 833. A void order cannot by inaction of parties become an adjudication. Award of costs which court had no power to make. Sander v. Larner, 101 App. Div. 167, 91 N. Y. S. 423.

98. Callaway v. Irvin [Ga.] 51 S. E. 477.

99. Sodini v. Sodini [Minn.] 102 N. W. 861; Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138; Podesta v. Binns [N. J. Eq.] 60 A. 815; Hickey v. Stallworth [Ala.] 39 So. 267. Appointment of an administrator de bonis non after an estate has been finally settled is void and subject to collateral attack. Id. County court. Wallace v. Turner [Tex. Civ. App.] 89 S. W. 432. Decree admitting will to probate. Upson v. Davis, 110 Ill. App. 375. Change of venue presumed. Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265. Judgment in a suit brought under Rev. St. 1881, § 4277, to enforce a lien for a drainage assessment. Ellison v. Branstrator, 34 Ind. App. 411, 73 N. E. 146. A judgment against a corporation

record is silent will be presumed,[1] and the exercise of jurisdiction warrants the presumption that all necessary facts were proved.[2] The conclusive presumption of validity extends to the return of process upon which the judgment is based,[3] and if the language of the return fairly admits of a construction which will make the return legal and sufficient it should be so construed.[4] Want of jurisdiction may be

cannot be collaterally attacked on the ground that at the time it was rendered the corporation had ceased to do business and transferred its property to a trustee for the benefit of creditors. Temple v. Branch Saw Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 109, 88 S. W. 442. Judgments or decrees of a Federal court whose jurisdiction is involved on the ground of diverse citizenship, which is alleged and admitted cannot be collaterally assailed on the ground that there was in fact no diverse citizenship. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008. A claim due under a contract exceeding the jurisdiction of a justice of the peace was split into several amounts, each of which was within his jurisdiction; held, the judgments therein could not be collaterally attacked. Adams v. Jennings, 103 Va. 579, 49 S. E. 982. Order of sale in probate proceedings held subject to attack, the record showing that the court was without jurisdiction because the application for the sale therein was not made by a "creditor or other person interested in the estate," as required by Rev. St. 1899, § 150. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868. A judgment reciting that defendant has been regularly served and his default regularly entered according to law, it is not void on its face although the only affidavit showing publication of service contained in the judgment roll was filed after the expiration of the statutory time for the service and return of service. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138. Absence of the judge at the time to which the cause was continued does not render a judgment subsequently rendered by him as of that time void, though the party against whom it was rendered was absent at the time of rendition. County judge. Action was not within jurisdiction of a justice of the peace. Bussing v. Taggart [Neb.] 103 N. W. 430.

1. Sodini v. Sodini [Minn.] 102 N. W. 861, citing 2 C. L. 595; Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249; Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025. On collateral attack on a judgment by confession it is not necessary that the cognovit recite that the attorney executing the power is an attorney at law. Weber v. Powers, 114 Ill. App. 411. Judgment by court of general jurisdiction sustaining an attachment is not subject to collateral attack on the ground that the writ of attachment was not served on the defendant. Burris v. Craig [Colo.] 82 P. 944. On collateral attack of bankrupt's discharge it will be presumed that court heard evidence establishing residence as required by statute. Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028. Under Rev. Prob. Code, §§ 26 to 202, 332, making the probate court in effect one of general jurisdiction, an order finding the existence of all facts necessary to constitute a valid sale of real estate and ordering such sale is on collateral attack conclusive of the sufficiency of the petition for the sale. Blackman v. Mulhall [S. D.] 104 N. W. 250. Under such statutes where an order confirming a sale of real estate to pay a decedent's debts recites that the sale was legally made and fairly conducted, it will be presumed on collateral attack that the court had before it proof showing that statutory requirements had been complied with. Id. A finding by such a court that a petition for the sale of land was duly presented by an administrator and administratrix and ordering the sale to be made in the name of both cannot be collaterally attacked on the ground that the petition was made by the administrator alone. Id. On collateral attack on the appointment of an administrator that a petition for the appointment was in fact filed and notice thereof given, the contrary not affirmatively appearing. Id. Justices' court having jurisdiction in matters of contract up to $300 and in matters of damages to personal property up to $100 on a collateral attack of a judgment in an action for over $100 "for the unlawful conversion of money belonging to the plaintiff," held it would be presumed that the action was based on contract. Frank v. Dungan [Ark.] 90 S. W. 17. Petition in dispossess proceedings being insufficient to confer jurisdiction and all proceedings as shown by the record being regular on their face, the judgment could not be collaterally attacked on the ground that the court was without jurisdiction because no demand for the payment of the rent due was in fact made. Reich v. Cochran, 94 N. Y. S. 404, rvg. 41 Misc. 621, 85 N. Y. S. 247. Where, in a partition of stocks and bonds belonging to a succession, minor heirs are represented by tutors ad hoc duly appointed by the court, a defendant, urging the nullity of the proceedings on the ground that the tutors ad hoc were not duly sworn carries the burden of proving the fact affirmatively. The mere absence of such oaths from the record is insufficient to prove that the tutors ad hoc were not duly sworn. State v. Canal Bank & Trust Co. [La.] 38 So. 584.

2. Where a court's right to take jurisdiction depended on facts in pais, it is presumed, in collateral proceedings, if jurisdiction was retained that the court itself inquired concerning the facts and adjudicated them. Cobe v. Ricketts [Mo. App.] 85 S. W. 131. Where suits to dissolve a loan association were commenced in the Federal and state courts the fact that an order attempting to transfer the jurisdiction of the state court to the Federal court was erroneous is no ground for collaterally attacking the Federal court's jurisdiction. Id.

3. Sodini v. Sodini [Minn.] 102 N. W. 861, citing 2 C. L. 595.

4. Sodini v. Sodini [Minn.] 102 N. W. 861, citing 2 C. L. 595. Where the return on which a default judgment in divorce is based shows that the summons and complaint were properly and personally served on the defendant, it is immaterial that the officer making the service also certifies that the name by which the defendant was described

ascertained by the consideration of the whole record.[5] The record of a suit being destroyed it will be presumed that it contained evidence justifying the judgment.[6] Where the question upon which the jurisdiction depends is one of law purely, the jurisdiction over the subject-matter is always open to collateral inquiry.[7] The record showing jurisdiction it cannot be contradicted by evidence aliunde.[8] Where the files in the action have been lost, parol evidence as to the contents thereof is admissible to contradict recitals in the judgment.[9] As a general rule where the jurisdiction of an inferior court depends upon a fact which the court is required to settle and ascertain, if the court has jurisdiction of the parties the decision of the question of fact is conclusive and not subject to collateral attack.[10] The rule being that jurisdiction is never presumed but must appear or the judgment will be void and subject to collateral attack;[11] but when the jurisdiction appears the same rules are applicable as in the case of courts of general jurisdiction.[12] Fraud is not ground for collateral attack.[13] An erroneous judgment[14] or one voidable for mere irregularities of procedure[15] cannot be collaterally attacked. The same general

in the papers served was not his true name but only an alias. Id.

5. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, following Hutchinson v. Shelley, 133 Mo. 400, 34 S. W. 838.

6. Judgment awarded dower to widow, held, it would be presumed that her husband had died before its rendition and that she had a previous claim to unassigned dower as widow. Bloom v. Sawyer [Ky.] 89 S. W. 204.

7. Grannis v. Superior Ct., 146 Cal. 245, 79 P. 891.

8. Collateral attack by a party to the original suit on a judgment of a domestic court of general jurisdiction. King v. Davis, 137 F. 198. Justice court. Reddish v. Shaw, 111 Ill. App. 337. Foreign judgment. Spiker v. American Relief Soc. [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611.

9. Recital that judgment had been served. Eminence Land & Min. Co. v. Current River Land & Cattle Co., 187 Mo. 420, 86 S. W. 145. Where an administrator's deed was executed under order of court in fulfillment of decedent's bond for title and the court records were destroyed by fire, a bond for title offered in evidence, purporting to have been executed by intestate but differing materially from the recitals of the judgment directing the execution of the deed, as stated therein, held insufficient to show that it was the bond on which the court acted, or rebut the presumption that the court had sufficient evidence before it on which to render the judgment on which the deed was executed. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025.

10. Rice v. Travis, 216 Ill. 249, 74 N. E. 801. Under Hurd's Rev. St. 1899, p. 1389, c. 119, § 27, a default judgment of a justice of the peace for plaintiff in a replevin suit, though not expressly finding it, is conclusive between the parties against collateral attack, that the value of the property did not exceed $200, the limit of a justice's jurisdiction, a case within his jurisdiction being stated by the affidavit for replevin alleging the value was $200. Id.

11, 12. Rice v. Travis, 216 Ill. 249, 74 N. E. 801.

13. Earp v. Minton, 138 N. C. 202, 50 S. E. 624. Is no defense in a proceeding by scire facias to revive the judgment. King v. Davis, 137 F. 198.

14. Cobe v. Ricketts [Mo. App.] 85 S. W. 131. Where suits to dissolve a loan association were commenced in the Federal and state courts, the fact that an order attempting to transfer the jurisdiction of the state court to the Federal court was erroneous is no ground for collaterally attacking the judgment of the Federal court. Id. Foreclosure decree. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032. Court having jurisdiction, an erroneous decision as to what facts are put in issue by the pleadings cannot be questioned collaterally. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73. Judgment imposing costs on acquittal in criminal case is conclusive. Miller v. Hastings Borough, 25 Pa. Super. Ct. 569. Where Federal judgment was paid, held any error or mistake by the court in computing interest could not be corrected in an action in a state court. Huntington v. Newport News & M. V. Co. [Conn.] 61 A. 59. A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. Ballard v. Hunter [Ark.] 85 S. W. 252; Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. Under Acts 1881, p. 68, authorizing the court to allow attorney's fees, the allowance of too much or too little is error and not ground for collateral attack. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

15. Lack of notice in foreclosure decree cured by confirmation. Carpenter v. Zarbuck [Ark.] 86 S. W. 299. An irregularity in the revival of a judgment cannot be availed of in a proceeding by creditor's bill filed to enforce the collection of such judgment. Linn v. Downing, 116 Ill. App. 454. A divorce decree having every appearance of a final judgment cannot be collaterally attacked because entered before costs were paid in violation of a rule of court. Baker v. Baker, 26 Pa. Super. Ct. 553. Order of county court discharging an administrator de bonis non and closing the estate is not subject to collateral attack because court erred in making such order without proof of service of citation thereon and before all the debts and expenses had been paid. Wallace v. Turner [Tex. Civ. App.] 89 S. W. 432. The entry of

rules apply to foreign judgments,[16] judgments by confession,[17] judgments against infants,[18] default divorce judgments,[19] and to the decisions of boards acting judicially.[20] In most states probate courts are regarded as courts of general jurisdiction.[21] The doctrine of collateral attack as applied to administration and probate decrees is elsewhere discussed more at large.[22]

§ 8. *Lien.*[23] *When and to what it attaches.*[23a]—The lien of judgment before levy of execution or other like process[24] is under most statutes limited to such interests in land[25] as are vested[26] and not exempt.[27] It may attach to a right of redemption or defeasance.[28] Until levy[29] or until a notice operating as a sort of garnish-

a warning order in a suit to enforce levee taxes not being jurisdictional, failure to enter it is not ground for collateral attack. Ballard v. Hunter [Ark.] 85 S. W. 252. Irregularities in permitting amendments to the bill for the purpose of bringing in other parties and the ordering of publication without formal affidavit and the insufficiency of publication held not grounds for collateral attack. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770. A judgment founded upon a corrected petition without notice other than the original notice is merely irregular and not subject to collateral attack. Stull v. Masilonka [Neb.] 104 N. W. 188. Failure to give notice of a nunc pro tunc entry of judgment made at a subsequent term and based on the certain knowledge of the judge does not render the amended judgment subject to collateral attack. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27. Defendant failing to appear, failure of the court to treat his counterclaim as withdrawn does not render the judgment in the cause subject to collateral attack. Id. Foreign judgment in garnishment proceeding held could not be collaterally attacked on the ground that notice was not given the proper agent. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. Where there is some notice, an irregularity or the sufficiency thereof cannot be questioned in a collateral proceeding. Publication of order of probate court to show cause why real property should not be sold to pay decedent's debts. Rev. Prob. Code § 26 in effect makes the probate court one of general jurisdiction. Blackman v. Mulhall [S. D.] 104 N. W. 250. The fact that the notice published did not order persons interested to appear and show cause as required by Rev. Prob. Code, § 203, does not affect the validity of the sale in a collateral proceeding, where the notice states in accordance with the statute that application has been made for the sale and that hearing will be had at the time designated therein, and the order for the sale recites that all proceedings required by statute have been complied with. Id. Under Rev. Prob. Code, § 26, making the probate court in effect one of general jurisdiction, irregularity in appointing an administrator without petition being first filed cannot be taken advantage of in a collateral attack. Id. In habeas corpus proceedings the regularity of the judgment under which petitioners were imprisoned cannot be impeached for errors or defects not affecting the jurisdiction of the court to render the judgment. Hollibaugh v. Hehn [Wyo.] 79 P. 1044.

16. See Foreign Judgments, 5 C. L. 1483. Cooper v. Brazelton [C. C. A.] 135 F. 476; Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Garnishment proceeding held could not be collaterally attacked on the ground that notice was not given the proper agent. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. The question of jurisdiction is open to inquiry when the judgment of a court of the **state** comes under consideration in a **Federal** court sitting in the same state. Cooper v. Brazelton [C. C. A.] 135 F. 476.

17. Judgment by confession being rendered in term time by the court, the same presumptions will be indulged in support of it as in the case of ordinary judgments. Weber v. Powers, 114 Ill. App. 411.

18. A decree against infant defendants in a case where the court has jurisdiction of both the parties and the subject-matter is protected from collateral attack the same as a judgment against adults. Pinkney v. Weaver, 115 Ill. App. 582.

19. Sodini v. Sodini [Minn.] 102 N. W. 861, citing 2 C. L. 595.

20. In the matter of approving and rejecting claims against the state the board of examiners acts judicially and its decisions in cases where it has jurisdiction are not subject to collateral attack. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

21. County court with reference to probate matters is a court of general jurisdiction. Wallace v. Turner [Tex. Civ. App.] 89 S. W. 432. Probate court of general jurisdiction and jurisdictional facts are presumed. Hickey v. Stallworth [Ala.] 39 So. 267. Orphans' court is a court of general jurisdiction. Podesta v. Binns [N. J. Eq.] 60 A. 815. Order of sale in probate proceedings. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868. Decree admitting will to probate. Upson v. Davis, 110 Ill. App. 375. Rev. Prob. Code, §§ 26, 202, 332, make the probate court in effect one of general jurisdiction. Blackman v. Mulhall [S. D.] 104 N. W. 250.

22. See Estates of Decedents, 5 C. L. 1270.

23, 23a. See 4 C. L. 314.

Enrollment of decree in higher court for the purposes of a lien, see ante, § 4.

24. Execution and attachment liens, see Attachment, 5 C. L. 302; Executions, 5 C. L. 1384. As to what properties are subject to execution, see Executions, 5 C. L. 1384.

25. See 4 C. L. 314.

26. Gift under a will subject to a power of sale held vested. In re L'Hommedieu, 138 F. 606. See Executions, 5 C. L. 1384.

27. Homestead. Davis v. Yonge [Ark.] 85 S. W. 90. See Executions, 5 C. L. 1384, and Homesteads, 5 C. L. 1689.

28. In Oregon the purchaser's title on foreclosure sale is incomplete until time for redemption has passed and a judgment after

ment,[30] judgment liens are general and indefinite. Except where the true owner is estopped from asserting title,[31] the lien of a judgment attaches only to such interest in the debtor's land as he has at the time of its rendition[32] or acquires thereafter,[33] and must be subordinated to the superior equity of a prior specific lien.[34] The lien of a judgment in rem extends only to the interest of defendant in the property involved.[35] In Oregon the lien of a judgment subsequent to foreclosure sale may come in superior to the mortgagor's grantee who redeemed and thus under the laws of that state prevented foreclosure title from accruing.[36] In Mississippi the lien of a justice's judgment attaches as of the date of its enrollment in the circuit court[37] and binds all the property of defendant without regard to its character or description.[38]

Duration of lien.[38a]—The lien of a judgment is a "right accrued"[39] and as such not extinguished by repeal of a statute giving it.[40] A judgment lien does not cease to exist because of the death of the judgment creditor,[41] and it may be enforced in equity without revival.[42] As a general rule such suits must be brought in the county where the land lies; but in construing statutes so providing the courts generally hold that if a court of equity has jurisdiction over any of the land sought to be subjected to the lien it may enforce the judgment lien against land outside the county, even though it finds that the property within the county where suit is brought is not liable.[43] The lien is a mere incident of the debt and ceases to exist when the judgment becomes barred by limitations.[44] The lien is continued in a stay bond and relates back to the rendition of the judgment so as to protect the judg-

foreclosure becomes a lien available if redemption is made. Kaston v. Storey [Or.] 80 P. 217.

29. So held as affecting the judgment creditor's right to redeem from a mortgage foreclosure sale. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

30. The lien of a judgment against a corporate shareholder does not attach to the stock upon the rendition of judgment, but only after notice acting as a sort of garnishment on the corporation or withholding the lien until levy as under Civ. Code 1895, § 3125. Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379.

31. Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379.

32. Glen Morris-Glyndon Supply Co. v. McColgan [Md.] 60 A. 608; Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379.

33. Glen Morris-Glyndon Supply Co. v. McColgan [Md.] 60 A. 608. Where property was devised in trust, the property to be divided among the beneficiaries at a certain time and the trustee was given no power to sell, held, judgments against the beneficiaries became liens on their interests at the time for division. Moll v. Gardner, 214 Ill. 248, 73 N. E. 442.

34. Even though created by a defective mortgage or conveyance. Glen Morris-Glyndon Supply Co. v. McColgan [Md.] 60 A. 608. The lien of a judgment against a corporate stockholder on his stock is inferior to an existing lien arising by virtue of a by-law under Civ. Code 1895, § 2825, even though the plaintiff in fi. fa. had no notice thereof at the time he made the loan, secured the judgment, or gave notice to the corporation under Civ. Code 1895, § 5431. Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379.

35. Judgment in attachment, defendant not appearing in person. Bainbridge v. Allen [N. J. Eq.] 61 A. 706. Judgment in a foreign attachment in which there was no appearance entered by the defendant. Glenny v. Boyd, 26 Pa. Super. Ct. 380.

36. In Oregon a foreclosure decree becomes a lien on the property at the time it is recovered and docketed subject to be determined only by the consummation of such sale by the execution and delivery of a sheriff's deed, or by redemption. B. & C. Comp. §§ 205, 227. Kaston v. Storey [Or.] 80 P. 217.

37. Minshew v. Davidson & Co. [Miss.] 38 So. 315.

38. Held to bind stock of goods and merchandise. Minshew v. Davidson & Co. [Miss.] 38 So. 315.

38a. See 4 C. L. 316.

39, 40. Where judgment was obtained and docketed for personal property taxes and became a lien upon the property in question before Revised Codes of 1895 took effect, such lien continued notwithstanding the repeal of the law under which the lien was acquired. Hagler v. Kelly [S. D.] 103 N. W. 629, overruling Gull River Lumber Co. v. Lee, 7 N. D. 135, 73 N. W. 430.

41. Code 1899, c. 139, § 5, makes it an absolute lien. Laidley v. Reynolds [W. Va.] 52 S. E. 405.

42, 43. Laidley v. Reynolds [W. Va.] 52 S. E. 405.

44. Where a judgment was not rendered until a homestead was set apart and it was barred by limitations before the exemption ceased, a suit to enforce the lien after the exemption ceased and more than 20 years after the issue of execution held barred. Code 1904, §§ 3567, 3573, 3577, 3578 and 3649 construed. Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378.

ment creditor against subsequent liens or conveyances by the judgment debtor.[45] The lien of a judgment obtained during the life of a decedent continues indefinitely against his heirs and devisees[46] or their assignees,[47] subject to the general presumption of payment arising after 20 years.[48] In Mississippi the only way in which the lien of a judgment can be extended is by suit brought within seven years from the date of rendition,[49] and this suit may be brought by an assignee of the judgment in his own name,[50] and in such a case the judgment roll need not show the assignment or that the judgment was based on the original judgment.[51]

Rank and priority of lien.[51a]—The judgment lien on an undivided interest is superior to a subsequent voluntary partition between the co-tenants,[52] and this superiority continues throughout the enforcement of the lien,[53] though the purchaser at the execution sale may if equity requires it be required to take the share set out to the judgment debtor in such partition.[54] A subsequent purchaser takes subject to the judgment lien.[55] As between a judgment creditor and a mortgagee the former is entitled to all the surplus proceeds of the sale after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage or are necessarily incident thereto,[56] and the mortgagor will not be permitted by a subsequent agreement with the mortgagee to give the latter the entire proceeds of the sale, to the exclusion of judgment creditors, under the guise of exorbitant commissions.[57]

The mode of asserting the lien is by execution unless it is sought to reach property not leviable[58] or held subject to voidable though apparently superior liens or titles.[59]

Release.—The lien covering more property than is necessary for the creditor's protection, the debtor may in Connecticut demand a partial release,[60] and plaintiff prevailing on such an application is not entitled to recover damages for defendant's refusal to discharge the lien on demand without alleging and proving facts justifying such recovery.[61]

45. Cook v. Martin [Ark.] 87 S. W. 625.

46. Ziegler v. Schall, 209 Pa. 526, 58 A. 912. By allowing five years to elapse between revivals its priority is lost as to other judgments against the decedent, or as to mortgagees or judgment creditors of devisees, by failure at a revival to give notice to them. Act June 18, 1895 (P. L. 197) construed. Id.

47. Where devisees assigned their interests to secure judgments confessed by them, held, assignees were at most mortgagees and lien of judgment against decedent continued. Ziegler v. Schall, 209 Pa. 526, 58 A. 912.

48. Roberts v. Powell [Pa.] 60 A. 258.

49. Code 1892, § 2743. Street v. Smith [Miss.] 37 So. 837. Code 1892, § 2462, providing for the barring of liens unless a marginal record entry is made, does not apply to judgment liens. Id.

50, 51. Street v. Smith [Miss.] 37 So. 837.

51a. See 4 C. L. 315.

52. Boice v. Conover [N. J. Eq.] 61 A. 159.

53. Judgment creditor may sell undivided interest as if no partition had been made. Boice v. Conover [N. J. Eq.] 61 A. 159.

54. Boice v. Conover [N. J. Eq.] 61 A. 159.

55. Davis v. Yonge [Ark.] 85 S. W. 90.

56, 57. Staton v. Webb, 137 N. C. 35, 49 S. E. 55.

58. In North Carolina, where property is conveyed to a trustee upon a declaration of trust unless the trust is pure and unmixed and it is the right of the cestui que trust to call for the immediate conveyance of the legal title, the lien of a judgment thereon must be enforced by a civil action. Mayo v. Staton, 139 N. C. 670, 50 S. E. 331. So held where land was conveyed to a trustee upon a declaration of trust, and there was no defeasance in the deed, to sell for the payment of debt or to discharge any other duty in which persons, other than the judgment debtor, had an interest, or when for any other reason the judgment debtor could not call for an immediate transfer of the legal title. Id. See, also, Creditor's Suits, 5 C. L. 880.

59. A creditor whose judgment is inferior to a mortgage cannot, by levy of a common-law execution, subject property held by the mortgagee under a title voidable at his own sale under a power. Williams v. Williams Co. [Ga.] 50 S. E. 52. Nor can a judgment creditor of an heir levy upon and sell land formerly belonging to the estate, but held by a voidable title, because of a purchase by the administrator at his own sale. Id.

60. Where on an application for partial release of a judgment lien the judgment creditor's demurrer not reaching the allegation that the land after the partial release prayed for would be worth more than the amount of the judgment, held, the court properly found that the complaint substan-

"Judicial mortgages."—In Louisiana the recording of a judgment for alimony obtained by a wife against her husband in an action for separation from bed and board or divorce creates a judicial mortgage.[62] A judicial mortgagee has a right of action to have a sheriff's return on writ and seizure of sale under a prior general mortgage corrected and to have a judgment decreeing the correct balance if there is a balance.[63]

§ 9. *Suspension, dormancy and revival.*[64]—While a judgment is not by dormancy deprived of all vitality,[65] it is without generative vitality.[66] That it may have efficiency, it must be revived;[67] hence a dormant judgment does not authorize the issuance of execution.[68] The issuance of execution[69] or a writ of possession[70] is generally sufficient to prevent dormancy; but the pendency of ancillary proceedings does not extend the time within which a judgment becomes dormant.[71] In order that an agreement between the parties may prevent dormancy it must have the effect of renewing the debtor's liability.[72] In Virginia a judgment on which execution has issued may be kept alive by other executions issued within the statutory period.[73] Generally dormancy raises a presumption of payment,[74] and after this presumption has once arisen, no act of the creditor or any one assuming to represent the estate of the debtor can have the effect of reviving the judgment.[75] The judgment creditor dying revival is only necessary for the purpose of issuing execution.[76] In the District of Columbia failure to have execution issued within a year and a day after the return of an execution unsatisfied drives plaintiff to an action of debt upon the judgment or to a scire facias to revive it,[77] or to a suit in equity to have a decree for the enforcement of the judgment within the time saved by the statute of limitations.[78] The laws of a state in regard to the revival of a judgment existing at the time of the execution of a contract become a part of the

tially stated that the defendant's judgment lien covers more than sufficient property to reasonably secure his judgment. Byrne v. Kelsey [Conn.] 61 A. 965.

61. Byrne v. Kelsey [Conn.] 61 A. 965.

62. Baker v. Jewell [La.] 38 So. 532.

63. He has a right to safeguard his interest if his debtor will not. Hardy v. Pecot [La.] 36 So. 992.

64. See 4 C. L. 316.

65. Furer v. Holmes [Neb.] 102 N. W. 764.

66, 67, 68. Denny v. Ross [Kan.] 79 P. 502.

69. Under Stat. 1893, § 4337, a judgment against a city of the first class becomes dormant after five years from the date of its rendition, unless the judgment creditor, within such time, causes execution to issue thereon. Beadles v. Fry [Okl.] 82 P. 1041. An entry of the execution on the general execution docket will not prevent the dormancy of a judgment rendered in the superior court, where the execution has not been placed on the execution docket of that court within seven years from the rendition of the judgment. Rountree v. Jones [Ga.] 52 S. E. 325.

70. Under the common law unless a writ of possession be issued on a judgment in ejectment within a year and a day, the judgment must be revived. Virginia Code 1904, p. 1900, fixes the time at one year. King v. Davis, 137 F. 198.

71. So held as regards a proceeding in the probate court in aid of execution upon a judgment in the district court. Denny v. Ross [Kan.] 79 P. 502.

72. An agreement between practically all of the judgment creditors of a city that such city shall pay such creditors in the order of priority of the date thereof instead of paying each judgment creditor his pro rata share, and a resolution of a city council which refers to such agreement, and orders the city treasurer to pay such judgments, according to such contract, do not change the legal status of the city toward any of such creditors, nor do they excuse any judgment creditor from suing out an execution within five years of the date his judgment was rendered, or from securing a revivor of his judgment within one year after it became dormant. Beadles v. Fry [Okl.] 82 P. 1041.

73. Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378.

74. Furer v. Holmes [Neb.] 102 N. W. 764.

75. Brantley v. Bittle [S. C.] 51 S. E. 561. A judgment recovered against a debtor during his lifetime can be revived against the administrator of his estate when the summons for renewal was not issued against the administrator of his estate within 20 years after the death of the judgment debtor and when the right of action on the judgment was barred at the time the summons was issued. Code Civ. Proc. § 309. Id.

76. It is not necessary in order to enforce the lien of the judgment in equity. Code 1899, c. 139, § 5. Laidley v. Reynolds [W. Va.] 52 S. E. 405.

77. Raub v. Hurt, 24 App. D. C. 211.

78. Raub v. Hurt, 24 App. D. C. 211. See post, § 14, Actions on Judgment.

"obligation" of such contract within the meaning of constitutional provisions;[79] it follows that such law is not as to a judgment in an action of tort, rendered before its passage an unconstitutional violation of the obligation of contracts.[80] An affidavit alleging the existence of the judgment, its dormancy and the fact that it is unpaid is sufficient to justify a conditional order of revivor,[81] and, upon proper service and default, to sustain an order making the revivor absolute.[82] In Nebraska a judgment rendered in a justice court may be revived either in that court or in the district court.[83] A writ of scire facias to obtain an execution upon a judgment is a judicial writ,[84] and should issue from, be returned to, and heard and determined by, the court which rendered judgment and has possession of the record.[85] In the Federal courts the procedure on the writ of scire facias should conform as nearly as may be to the state procedure.[86] In Virginia the action on scire facias takes the same course as an ordinary action at law in which a writ of inquiry is dispensed with.[87] In some states personal service is required.[88] A plea to a scire facias must allege the facts which constitute a defense, and must not merely suggest the possibility of the existence of such facts.[89] On scire facias to revive a judgment, no defense can be made except one that has arisen since the judgment.[90] Fraud is no defense to the proceeding.[91] General rules as to parties apply.[92] A proceeding to revive a judgment entered in favor of a co-partnership should after the death of one partner be revived in the name of the surviving partner alone.[93] On scire facias to revive a default judgment it appearing from the return that the service of process was insufficient, the judgment will be held void, under either a motion to vacate or under a plea of nul tiel record, subject, however, to the right of amend-

79. Howard v. Ross, 38 Wash. 627, 80 P. 819. Ball. Ann. Codes & St. §§ 5148-5150, continuing the lien of a judgment for six years and prohibiting any action or other proceeding to revive the lien for a longer period than six years is unconstitutional as impairing the obligation of a contract if applied to a judgment recovered after the passage of such sections on a note executed and delivered prior to their passage, when the laws permitted a revival of such a judgment or the institution of suit thereon. Id. Williams v. Packard [Wash.] 81 P. 710.

80. Gaffney v. Jones [Wash.] 81 P. 1058.

81, 82. Furer v. Holmes [Neb.] 102 N. W. 764.

83. Furer v. Holmes [Neb.] 102 N. W. 764. The fact that the judgment is dormant when transcripted affords no reason for changing the rule. Id. Bussing v. Taggart [Neb.] 103 N. W. 430.

84. As distinguished from an original writ. Kennebec Steam Towage Co. v. Rich [Me.] 60 A. 702.

85. Kennebec Steam Towage Co. v. Rich [Me.] 60 A. 702.

86. King v. Davis, 137 F. 198.

87. Office judgment on default and confirmation thereof. King v. Davis, 137 F. 198.

88. Civ. Code 1895, § 5381, which requires a writ of scire facias to "be served by the sheriff of the county in which the party to be notified may reside, 20 days before the sitting of the court," contemplates personal service, hence service by leaving a copy at the most notorious place of abode of the defendant is not sufficient. Atwood v. Hirsch Bros. [Ga.] 51 S. E. 742.

89. King v. Davis, 137 F. 198. Where in ejectment a landlord claiming title to a part of the premises was not made a party, a plea by his tenant in possession at the time the action was begun, that he was a mere tenant in possession, and that since the judgment his lease had expired and he had surrendered possession and removed from the land, held insufficient to prevent judgment against him. Id.

90. Philadelphia v. Peyton, 25 Pa. Super. Ct. 350. On scire facias to revive a judgment entered upon an original scire facias sur municipal lien, the fact that no evidence is offered that notice was given to the owner of the property to do the work, and that it was done by the city because of his failure cannot operate to defeat the right of the city to a judgment. Id.

91. King v. Davis, 137 F. 198.

92. If at the time judgment is entered upon an original scire facias sur municipal lien there is no registered owner, it is not incumbent upon the city to make the owner who several years after registers his title a party to the scire facias which later issues to continue the lien. Philadelphia v. Peyton, 25 Pa. Super. Ct. 350. Under Act June 1, 1887 (P. L. 289) where land subject to a judgment has been conveyed and thereafter the judgment is revived against the defendant alone without naming the terretenant in the scire facias, the lien of the judgment on the land is lost. Barrell v. Adams, 26 Pa. Super. Ct. 635.

93. Linn v. Downing, 116 Ill. App. 454. Cannot be revived in the names of the surviving partner and the personal representative of the deceased partner. Id. An allegation that L. and S., late partners as L. & S., obtained the judgment in question, cannot be construed as averring that L. and S.

ment of the return in certain cases.[94] The judgment in scire facias is, to a certain extent, a new judgment designed to avoid the statute of limitations by giving a new point for its currency.[95] A recovery on a revived judgment is the amount of the original judgment with interest from the date the latter was rendered.[96] In Texas a judgment creditor whose judgment has been erroneously satisfied of record may, in a suit against the judgment debtor to set aside the satisfaction and revive the judgment, sue out a writ of garnishment to reach a debt due the debtor.[97]

§ 10. *Assignment of judgment.*[98]—A judgment for the recovery of money, even when not assignable by statute, so as to vest the legal title in the assignee, is nevertheless a chose in action, subject to sale and equitable assignment.[99] Such judgment may be assigned by parol as well as by written contract.[1] A written assignment made pursuant to a previous parol agreement assigning the judgment relates back to the time of such agreement.[2] A board having the power to abate or compromise a tax has the power to sell and assign a tax judgment[3] for less than the amount due thereon if the transaction is free from fraud or other illegality.[4] An assignment of a judgment is not generally regarded as an assignment of a right of action,[5] but in any event whether it constitutes a purchase of a litigious right will not be determined on appeal from the judgment,[6] but the remedy of the debtor is to oppose its enforcement.[7] While the court will look to the specific written assignment of the judgment and its terms to determine what passes thereby,[8] the general rule is that an absolute assignment of a judgment passes all the assignor's assignable rights therein to the assignee and gives the latter the right to use every remedy, lien or security available to the assignor as a means of enforcement thereof;[9] but it may be stated, in a particular application of the general rule, that those rights which thus pass by assignment along with a judgment are only such as are vested in the assignor by virtue of that particular judgment and do not include those arising out of another and different proceeding, although such other proceeding be a contest over a particular method of enforcing the judgment assigned,[10] nor does the assignment vest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.[11] In no case are the assignee's rights superior to those of his assignor.[12] The as-

obtained the judgment jointly and not as partners. Id.

94. King v. Davis, 137 F. 198.

95, 96. Gregory v. Perry [S. C.] 50 S. E. 787.

97. Rev. St. 1895, art. 217, subd. 2. Francis Bros. v. Robinson [Tex. Civ. App.] 89 S. W. 803. A judgment satisfied of record cannot be made the basis for the issuance of a writ of garnishment under Rev. St. 1895, art. 217, subd. 3. Id.

98. See 4 C. L. 318.

Debtor's right of set-off, effect of assignment on, see post, § 11.

99, 1, 2. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

3. Board of county commissioners has power to sell and assign a judgment obtained for personal property taxes under the General Revenue Law of 1890. Hagler v. Kelly [N. D.] 103 N. W. 629.

4. Hagler v. Kelly [N. D.] 103 N. W. 629.

5. The assignment of a judgment is not the assignment of a right of action in tort where not till after the assignment was it paid to defendants; any wrongful withholding of the money being a wrong done by them to plaintiff. Reynolds v. Cavanagh [Mich.] 102 N. W. 986.

6, 7. Kuck v. Johnson [La.] 38 So. 559.

8. Crist v. McDaniel [Okl.] 82 P. 991.

9. Crist v. McDaniel [Okl.] 82 P. 991. The assignment of a judgment in writing by a receiver who had power to dispose of the assets of a bank vests in the assignee title to the judgment and the right to such equitable relief as the bank or receiver could have had. Rogers v. Dimon, 106 Ill. App. 201.

10. Crist v. McDaniel [Okl.] 82 P. 991. Assignment of judgment held not to give assignee a right of action on the stay bond given in a suit to enjoin the sale of property levied on under the judgment. Id.

11. Commonwealth v. Wampler [Va.] 51 S. E. 737. The assignee of a judgment is not entitled to maintain an action for damages against an officer and the sureties on his official bond for a breach of the condition thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the

signee is chargeable with the knowledge of his attorney, who negotiated the assignment, concerning litigation affecting the judgment.[13] There is no implied warranty in the mere assignment of a judgment that it is impregnable.[14] The implied warranty is that it is a genuine judgment, that in due form of law a judgment was entered, that the court had jurisdiction to enter it, and that it has not been paid, released or otherwise nullified.[15] If the assignee desires further protection he must have it expressly provided for.[16] It is the duty of the assignee to give the debtor notice of the assignment,[17] and if he fails to do so and the debtor pays the amount of the judgment to the plaintiff, the assignee, in the absence of an estoppel,[18] cannot compel the debtor to make a second payment to himself.[19] In a suit to enforce in equity a defective assignment, only such persons as have an interest in the fund should be made parties.[20] Cases dealing with the sufficiency of evidence to show an assignment are shown in the notes.[21]

§ 11. *Payment, discharge and satisfaction.*[22]—Though there be several judgments there can be but one satisfaction of the debt.[23] An offer to pay a less amount than the face value of the judgment in full payment thereof being accepted by the judgment creditor without protest operates as a satisfaction of the judgment.[24] A subsequent payment of the balance is a gratuity and bears no interest.[25] A note does not generally operate as payment.[26] A judgment against an executor

force of a judgment against the obligors therein. Id.

12. Assignee takes only the title and interest of the assignor. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304. As in sales of other personal property the rule of caveat emptor applies. Id. Judgment had been released of record. Blythe v. Cordingly [Colo. App.] 80 P. 495. An assignee though a bona fide purchaser, takes subject to the defense of payment by the judgment debtor, in favor of persons interested in the property on which the judgment was a lien. Boice v. Conover [N. J. Eq.] 61 A. 159. Takes the same subject to existing equities between the parties. Work v. Prall, 26 Pa. Super. Ct. 104. Where a judgment recovered for the benefit of a firm by a surviving partner thereof is assigned by the latter in payment of his individual debt to one knowing the facts, the assignee takes subject to the rights of the firm creditors. Jones v. Dulaney, 27 Ky. L. R. 702, 86 S. W. 547. The interest in a judgment of attorneys, taking an assignment thereof, over and above their lien thereon for fees due from the judgment creditor, a surviving partner, held in no wise increased by the fact that the estate of the deceased partner subsequently paid them their fees. Id.

13. Boice v. Conover [N. J. Eq.] 61 A. 159.

14, 15. Hinkley v. Champaign Nat. Bank, 216 Ill. 559, 75 N. E. 210.

16. Hinkley v. Champaign Nat. Bank, 216 Ill. 559, 75 N. E. 210. A covenant "that there is now due on said judgment" a specified sum, and that the assignor will not collect nor release the same contains no express warranty that the judgment is unassailable and does not make the assignor liable for damages resulting from the judgment being opened and the action defeated by defendant therein.

17. The entry of the assignment on the records of the court of common pleas is not notice to defendant. Work v. Prall, 26 Pa. Super. Ct. 104.

18. A promise made by the defendant in a judgment to pay an assignee of the judgment the amount thereof will not estop the defendant from asserting subsequently that he had paid the amount of the judgment to the plaintiff without notice of the assignment, if it appears that the assignee's legal position was not changed by reason of the promise, or that he suffered any loss therefrom. Work v. Prall, 26 Pa. Super. Ct. 104.

19. Work v. Prall, 26 Pa. Super. Ct. 104.

20. Where guardian assigned judgment in favor of ward without order of court and the guardian was subsequently removed, held, a complaint by the assignee joining the first guardian, and his sureties, the second guardian and the judgment debtor, was demurrable, in that the first guardian and his sureties should not have been joined. Conservative Sav. & Loan Ass'n v. Omaha [Neb.] 103 N. W. 286.

21. The testimony of two plaintiffs, somewhat corroborated by the testimony of other witnesses, that the judgment had been assigned, held sufficient to establish the assignment as against the testimony of defendant alone. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837. Evidence held insufficient to show an assignment. Ebel v. Stringer [Neb.] 102 N. W. 466.

22. See 4 C. L. 318. Recovery of money paid under a judgment subsequently reversed, see Implied Contracts, 5 C. L. 1756.

23. Judgments on two insurance policies on same goods held payment of one and costs of both suits operates as a satisfaction to the extent of the amount paid on the judgment as to both judgments. Aetna Ins. Co. v. Sample, 2 Ohio N. P. (N. S.) 629.

24. So held where Congress made a partial appropriation "in full for the principal of the judgment." Bloodgood's Case, 39 Ct. Cl. 69.

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

26. Note and renewal thereof held not to extinguish judgment debt. Hayward v. Empire State Sugar Co., 93 N. Y. S. 449.

or administrator is payable only in the due course of the administration of the estate.[27] A judgment is extinguished when it is paid by one who is primarily liable for its satisfaction, and it cannot, after such payment, be kept alive by assignment.[28] Where a judgment is paid by a co-surety, his right to subrogation is not defeated by satisfaction of the judgment.[29] In New Jersey, in an action on a bill or note, payment of a judgment by one secondarily liable does not satisfy a judgment against the maker,[30] but the one paying the judgment is, upon paying the costs incurred by the creditor in obtaining the judgment,[31] entitled to an assignment of the judgment against the maker.[32] A clerk of court has authority to satisfy judgments only in the cases where the statute gives him authority so to do.[33] He cannot do so upon a deposit with him of the amount of the judgment unless authorized to receive payment,[34] and if without such authority the receipt of money for this purpose is not an official act,[35] and hence he cannot be amerced for failure to pay over money paid him for the satisfaction of a judgment on file in his office.[36]

§ 12. *Set-off.*[37] *Occasion for or right of set-off.*[38]—Judgments, although they affect principally the identical parties, are not as a matter of right to be set off against each other, but the legal and equitable rights of all persons interested therein should be considered.[39] In order that judgments may be set off they must be mutual,[40] and a judgment debtor is not bound to claim his right of set-off until his liability is finally determined.[41] A dormant judgment may be set off against a live judgment.[42] In so far as the attorneys have a lien thereon for their fees, a judgment is not subject to a set-off.[43] An assignee of a judgment takes subject to the right of the debtor to set off existing judgments,[44] even though the right to

27. Ball. Ann. Codes & St. § 5697. Collins v. Denny Clay Co. [Wash.] 82 P. 1012.

28. Ebel v. Stringer [Neb.] 102 N. W. 466. A payment by the judgment debtor discharges the judgment as against him and those who hold interests in property subject to the judgment, and as to them it cannot be kept alive by assignment. Boice v. Conover [N. J. Eq.] 61 A. 159.

29. Shaffer v. Messner, 27 Pa. Super. Ct. 191.

30. Gen. St. p. 2538, § 36, and P. L. 1903, p. 543, § 35. McKenna v. Corcoran [N. J. Eq.] 61 A. 1026.

31. McKenna v. Corcoran [N. J. Eq.] 61 A. 1026.

32. Gen. St. p. 2538, § 36, and P. L. 1903, p. 543, § 35. McKenna v. Corcoran [N. J. Eq.] 61 A. 1026.

33. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

34. Clerk of the district court has no such power. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

35. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

36. So held as to the clerk of the district court. Rev. Codes 1899, §§ 5555, 5556 construed. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

37, 38. See 4 C. L. 320.

39. Civ. Code Proc. § 377. A judgment in favor of an assignee for the benefit of creditors for the conversion of assets of the debtor's assigned estate could not equitably be set-off by a judgment allowing unsecured claims against the estate in favor of the party claiming the set-off. First Nat. Bank v. Krieger's Assignee [Ky.] 89 S. W. 733.

40. Where the pledgor of stock becomes insolvent and the pledgee converts the stock, held, a judgment in favor of the pledgee allowing its unsecured claims against the estate cannot be set-off against a judgment for the conversion, since the demands out of which the judgments grew were not mutual. First Nat. Bank v. Krieger's Assignee [Ky.] 89 S. W. 733.

41. That judgment debtor appealed after obtaining assignment of judgment against his creditor and after an affirmance filed a motion of set-off, held, motion was in time even as against assignees of the judgment pending the appeal. Brown & Bro. v. Lapp. [Ky.] 89 S. W. 304.

42. This under Rev. St. § 5071, defining a set-off as a cause of action arising on contract or ascertained by the decision of a court. Oliver v. Canan, 71 Ohio St. 360, 73 N. E. 466.

43. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304. The lien of an attorney for his services and disbursements in an action is superior to that of the parties' right to set-off separate and independent judgments rendered in the same action. Smith v. Cayuga Lake Cement Co., 95 N. Y. S. 236.

44. Debtor had purchased judgment against his judgment creditor before the latter assigned his judgment. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304. The right of set-off under the terms of Rev. St. § 5073 is not destroyed by the fact that one of the judgment debtors assigns his judgment for value, after the rendition of the judgment against him, to a third person who at the time is ignorant of the judgment against his assignor. Oliver v. Canan, 71 Ohio St. 360, 73 N. E.

a set-off had not actually accrued at the time of the assignment; it is sufficient if the liability under which the right subsequently accrues then existed.[45] A judgment debtor obtaining an assignment of a judgment against his judgment creditor is not required to file a notice of the assignment in order to have the right of set-off as against a subsequent assignee of his judgment creditor.[46] A debtor may buy a judgment against his creditor to use it as a set-off,[47] and so may use the same to its full amount regardless of the price paid for it.[48]

Effect of set-off.[49]—When a judgment for the value of a chattel is satisfied by offsetting, the chattel passes to the one cast for its value.[50]

Procedure to claim.[51]—Actions to set-off judgments are equitable in their nature and usually must be brought in a court of chancery.[52] This jurisdiction was assumed by courts of equity at an early date and still exists, but its exercise depends upon the inadequacy of the remedy at law.[53] It is only when there is some supervening equity such as insolvency,[54] or the like, which renders the interposition of the court necessary to protect the rights of the plaintiff, that it will intervene at all.[55] The mere existence of cross demands is not sufficient.[56] The fact that application is not first made in the court of rendition will not prevent equitable relief as "complete justice."[57] In California the court of rendition possesses the power to set-off its judgments one against another on motion.[58]

§ 13. *Interest*[59] is regulated by statute and "judgments" bearing interest are those only which the statute contemplates.[60] Where it is provided by statute that a judgment shall bear interest until paid, it will do so though it contains no provision to that effect.[61] It bears no interest until the performance of conditions

466. Where a wife took an assignment of a judgment in favor of her husband with knowledge that the judgment debtor as surety on her husband's notes would have to pay the same, her husband being insolvent; held an equitable right of set-off existed which was not affected by the assignment. Coonan v. Loewenthal [Cal.] 81 P. 527. Mortgages executed by the husband to indemnify the surety held not to change the rule, their only effect being to make the amount of the judgment debtor's claim, as surety, uncertain. Id.

45. Equity. Coonan v. Loewenthal [Cal.] 81 P. 527.

46, 47. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

48. So held where debtor had an arrangement with his assignor that the judgment should not be paid for until used and then only at a reduced rate. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

49. See 4 C. L. 320.

50. Hildebrand v. Head [Tex. Civ. App.] 13 Tex. Ct. Rep. 599, 88 S. W. 438.

51. See 4 C. L. 320.

52. Judgment of different courts. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

53. Whelan v. McMahon [Or.] 82 P. 19.

54. Whelan v. McMahon [Or.] 82 P. 19; Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85. A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may by proper proceedings in equity be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings. Id. Insolvency held a material allegation of the complaint and unless sustained by proof plaintiff was not entitled to relief. Whelan v. McMahon [Or.] 82 P. 19.

55, 56. Whelan v. McMahon [Or.] 82 P. 19.

57. Failure of a judgment debtor to file a complaint under Gen. St. 1902, § 654, asking a set-off against a judgment for a tort by the court in which it was rendered, does not deprive the court which had taken jurisdiction of the settlement of the affairs of the judgment creditor by receivership proceedings, from allowing the set-off by directing an equitable application of the assets in the hands of the receiver in satisfaction of claims proved. Betts v. Connecticut Life Ins. Co. [Conn.] 62 A. 345.

58. Coonan v. Loewenthal [Cal.] 81 P. 527; Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

59. Interest on the obligation as distinguished from the judgment. See Interest, 6 C. L. 157.

60. A widow's allowance set-off by commissioners from her husband's estate is not a judgment within the statute relating to interest. Does not bear interest from the date of set-off. Field v. Field, 215 Ill. 496, 74 N. E. 443. Under a statute defining interest as the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money, a judgment in favor of the state on a penal bond does not bear interest. Liquor dealer's bond. Sayles' Ann. Civ. St. 1897, articles 3105 and 3097 construed. Hawthorne v. State [Tex. Civ. App.] 87 S. W. 839. A judgment in favor of the trustee in bankruptcy of a husband for community funds expended on the separate property of the wife does not bear interest. To allow interest would be an encroachment on the wife's separate

made precedent to right of payment.[62] In West Virginia a judgment rendered upon a verdict in an action ex delicto should bear interest from the date of the verdict.[63] The rate pertaining to the obligation ceases and that pertaining to judgments applies from the time of rendition.[64]

§ 14. *Enforcement of judgment.*[65]—Executions, other final process and creditors' suits are treated elsewhere.[66] The enforcement of a judgment or the right to withhold its enforcement is a matter primarily within the jurisdiction of the court by which it was rendered.[67] A judgment against a partnership as a corporation cannot be enforced against the partners individually.[68] Matter existing anterior to the judgment cannot be made a ground for supersedeas of an execution issued on such judgment.[69]

§ 15. *Audita querela.*[70]—Audita querela is a form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge and which could not have been, and cannot be taken advantage of otherwise.[71] It follows that a writ of audita querela, or a motion in the nature of such writ, is the proper remedy to restrain the enforcement of a judgment that has been paid.[72] A court having no jurisdiction and its judgment being void, audita querela to vacate the judgment and execution thereon is unnecessary.[73]

§ 16. *Actions on judgment; merger.*[74]—The action must be brought within the period of limitations[75] prescribed by the law of the forum.[76] The legislature may shorten the statute of limitations as to existing causes of action provided a reasonable time is given for the commencement of an action before the bar takes effect,[77] though the laws of a state permitting actions on a judgment existing at the time of the execution of a contract become a part of the "obligation" of such

property. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432.

61. McNeill v. Durham & C. R. Co., 138 N. C. 1, 50 S. E. 458.

62. A decree requiring payment only after tender of certain security does not bear interest until after that date. Moore v. Durnan [N. J. Eq.] 62 A. 327.

63. Code 1899, c. 131, § 16. Campbell v. Elkins [W. Va.] 52 S. E. 220.

64. Under Act May 23, 1889 (P. L. 277), after a lien for taxes has been filed a city may add a penalty of one per cent. per month until judgment entered on the scire facias, but thereafter the judgment bears only six per cent. per annum. Altoona v. Morrison, 24 Pa. Super. Ct. 417.

65. See 4 C. L. 320.

66. See separate articles Creditors' Suits, 5 C. L. 880 and Executions, 5 C. L. 1384.

67. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

68. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390.

69. Jesse French Piano & Organ Co. v. Bradley [Ala.] 39 So. 47.

70. The modern practice is by motion, see ante, § 5.

71. Cyc. Law Dict. p. 77. Where at the time a husband was sued in ejectment, he was in possession by the mere sufferance of his wife, who held the title and resided on the premises, but was not sued, and the husband acquired a life estate in the land by the death of his wife after judgment and before execution, he is entitled by reason of his wife's death to have a judgment by default as to him opened and to be allowed to defend. King v. Davis, 137 F. 222.

72. Bill in equity is not the proper remedy. Pyle v. Crebs, 112 Ill. App. 480.

73. French v. White [Vt.] 62 A. 35.

74. See 4 C. L. 320. Merger of the cause of action in the judgment is treated in Former Adjudication, 5 C. L. 1502.

75. Under Code §§ 3439, 3447, the period within which an action on a judgment may be maintained is 5 years, being the time between the end of 15 years and of 20 years after its rendition. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521. Under Gen. St. Kan. 1901, § 4883, an action on a judgment procured against a decedent in his lifetime must be commenced within one year from the appointment and qualification of his representative. First Nat. Bank v. Hazie [R. I.] 61 A. 171, following Scroggs v. Tutt, 23 Kan. 181.

76. So held in an action on a judgment obtained in another state against the decedent in his lifetime, the state of the forum being where the decedent resided at the time of his death and where his estate was situated and will proved. First Nat. Bank v. Hazie [R. I.] 61 A. 171.

77. Acts 29th Gen. Assem. p. 103, c. 137, allowing 15 months within which actions might be brought on judgments otherwise barred by the amendment, held reasonable as agalnst residents, and nonresidents. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521. See article Limitation of Actions, 4 C. L. 445. Acts 29th Gen. Assem. p. 103, c. 137, providing that Code, §§ 3439, 3447, limiting actions on judgments, should be applicable to all judgments rendered after the taking effect of the Code of 1873 and prior

contract within the meaning of constitutional provisions;[78] but a change in the law is not as to a judgment in an action of tort, rendered before its passage, an unconstitutional violation of the obligation of contracts.[79] A dormant judgment not being revived within the statutory time, it will be treated as barred by the statute of limitations and no recovery can be had thereon.[80] An action upon a joint judgment may be maintained against one of the judgment debtors alone.[81] In New York an action will lie upon a final order in a special proceeding.[82] Statutory proceedings against a co-obligor of a judgment debtor not served in the action nor a party thereto must rest upon a valid judgment.[83]

JUDICIAL NOTICE, see latest topical index.

JUDICIAL SALES.

§ 1. *Occasion for and nature of judicial sales.*[1]—The judicial sales here discussed do not embrace those pursuant to foreclosure decrees or execution, or in proceedings to sell a decedent's lands and the like.[2] In their nature judicial sales are involuntary.[3] Sales of decedents' lands under order of court to pay debts are judicial.[4]

§ 2. *The order, writ or decree.*[5]—A judgment for the sale of land in winding up a corporation is not void for failure to describe the land, but merely erroneous, and the purchaser will not be relieved on that account, if the conduct of the sale was regular,[6] especially where the misdescription was known to the purchaser and he does not complain of being misled;[7] and an erroneous description may be cured

to the taking effect of the Code of 1897 held not unconstitutional for nonuniformity (Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521), nor as depriving a judgment holder of the benefits thereof without due process of law (Id.).

78. Howard v. Ross, 38 Wash. 627, 80 P. 819. Ball. Ann. Codes & St. §§ 5148-5150, containing the lien of a judgment for six years and prohibiting any action or other proceeding to revive the lien for a longer period than six years, is unconstitutional as impairing the obligation of a contract if applied to a judgment recovered after the passage of such sections on a note executed and delivered prior to their passage, when the laws permitted a revival of such a judgment on the institution of suit thereon. Id. Williams v. Packard [Wash.] 81 P. 710.

79. Gaffney v. Jones [Wash.] 81 P. 1058.

80. Courts will deny the aid of mandamus to compel payment of the same. Beadles v. Fry [Okl.] 82 P. 1041.

81. Foreign judgment. Childs v. Blethen [Wash.] 82 P. 405 [dicta] and cases cited.

82. Code Civ. Proc. § 1913 does not affect the case. Fenlon v. Paillard, 46 Misc. 151, 93 N. Y. S. 1101.

83. Proceedings authorized by Gen. St. 1894, §§ 5436-5441 considered. No action can be brought under these sections against such co-obligor subsequent to 10 years from the docketing of such judgment. Brown v. Dooley [Minn.] 103 N. W. 894.

1. See 4 C. L. 321.

2. Those sales have many general points of similarity, but being largely governed by statutory rules, the cases cannot with safety be cited to general principles. The topics cited should be compared.

3. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938.

4. Podesta v. Binns [N. J. Eq.] 60 A. 815, citing 11 Am. & Eng. Enc. Law [2d Ed.] 1111; Pierce v. Vansell [Ind. App.] 74 N. E. 554.

5. See 4 C. L. 321.

6. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

7. A 30-foot lot was erroneously described in the judgment and advertisement as a 60-foot lot, but the error was corrected in a supplemental decree. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808.

by reference to the other proceedings in the cause;[8] nor is an order of sale void because the holder of a lien on the property was not made a party to the proceeding.[9] A judgment directing the sale of land to satisfy a debt directs by implication a sale of only so much as may be necessary.[10]

§ 3. *Levy, seizure, appraisal and the like.*[11]—The valuation and appraisement of land on a judicial sale are for the benefit of the defendant, giving him the right to redeem, which right he can waive.[12]

§ 4. *Notice and advertisement of sale.*[13]—The notice of sale should be published for the prescribed time,[14] and the nature and quantum of estate to be sold should appear or be indicated.[15] A notice of sale which did not state that the lands would be sold in separate parcels was sufficient, though the decree provided for separate sales.[16] Where it appears that the property was sold for less than a fair price, it cannot be said that the failure to publish the advertisement in two newspapers, as required by law, was not injurious to a second mortgagee.[17]

§ 5. *Sale and conduct of it and return.*[18]—Judicial sales are involuntary sales and the rules of sales inter partes do not all apply.[19] Sale is usually by a master.[20] The sale must be such as to afford free and intelligent bidding,[21] must be fair[22] and on full competition.[23] Contracts to abstain from bidding which have a tendency to destroy free competition are contrary to public policy.[24] In the

8. Where the judgment described the property to be sold generally as a house and two lots, and the report of sale and order of confirmation specifically mentioned the house and two lots, such property passed by the sale. notwithstanding the judgment contained also a description by metes and bounds that included only the vacant lots. Ford v. Azbill, 27 Ky. L. R. 347, 85 S. W. 217.

9. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

10. Burks' Adm'r v. Lane Lumber Co. [Ky.] 89 S. W. 686.

11. See 4 C. L. 321.

12. Where no exceptions were filed to the report of sale, until long after the confirmation, the payment of the purchase price and the issue of the deed, the failure of the appraisers to fix the value of the land was unavailable to the owner. Gravitt v. Mountz, 27 Ky. L. R. 945, 87 S. W. 304.

13. See 4 C. L. 321.

14, 15. Rawolle v. Kalbfleisch, 94 N. Y. S. 16.

16. Gen. St. 1901, § 4905, does not require the advertisement to state that the lands will be sold separately. Fraser v. Seeley [Kan.] 79 P. 1081.

17. Polhemus v. Princilla [N. J. Eq.] 61 A. 263.

18. See 4 C. L. 321.

19. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938.

20. NOTE. Mode of selling by master or commissioner: Sales of premises under a decree in chancery are usually made by a master or commissioner, or under the immediate direction of such officer, who may, however, employ an auctioneer merely to conduct the sale in his presence. 1 Barb. Ch. Pr. 525; Heyer v. Deaves. 2 Johns. Ch. [N. Y.] 154. Masters' sales are usually managed by the solicitor for the complainant, and it is held that he is, in all questions which may arise between the vendor and purchaser, to be considered as the agent of all the parties to the suit. Dalby v. Pullen, 1 Russ. & M. 296. Although a residuary legatee or tenant for life or the owner of a reversionary interest may become the purchaser at a sale under order of the court, it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale, and the court will not permit a party having such an order to conduct the sale. 1 Barb. Ch. Pr. 527; Williams v. Attenborough, Turn. & R. 76; Domville v. Berrington, 2 Younge & C. 724. If a master's conduct is grossly oppressive and improper, upon a sale by him it will be ordered to be set aside, and under certain circumstances the costs of so doing and of subsequent proceedings have been taxed against him. Baring v. Moore, 5 Paige [N. Y.] 48.—From Fletcher Eq. Pl. & Pr. § 738.

21. A person claiming title to the land may at the sale state facts relating to the title, possession or alleged right of possession; but a failure to do so will not work an estoppel of the assertion of his right or remedy. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938. It is inequitable, however, for a party having an interest in the land to express an opinion as to the title which injures and prejudices the sale of the interest which the debtor has (Id.), and where the judgment creditor starts a question of title merely to cheapen what he proposes to sell, he will be restrained from making the sale until the question of title is determined (Id.).

22. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

23. Where the sale is attended by circumstances showing that the purchaser desired to prevent fair and open competition, this, coupled with inadequacy of price, is sufficient for setting aside the sale. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682. A fair price only should be taken, and a minimum price fixed by appraisal is not a war-

absence of evidence to the contrary, it must be presumed that on a sale of so much of a tract of 42 acres as was necessary, the land was divisible.[25] The law requiring the sheriff to announce that the sale is made subject to paramount privileges and mortgages does not require an announcement that the purchaser will be authorized to retain the surplus of the price over the seizing creditor's claim to satisfy subordinate mortgages.[26] In Mississippi the land must be parcelled to 160 acres or less.[27] The master may resell where by mistake he sold to a bidder believing him to be the owner of the decree and for that reason forbearing to exact a cash payment.[28] In most jurisdictions the complainant procures and files the master's report of sale.[29] A return of sale at public auction implies a sale to the highest bidder.[30]

§ 6. *Confirmation and setting aside sales.*[31]—While formal confirmation should always be entered of record, yet a formal order is not indispensable, if confirmation can be gathered from the whole record.[32] The confirmation of a judicial sale on the day the report was filed, while unusual is valid in the absence of any showing why it should not be confirmed.[33] Confirmation is largely subject to discretion.[34] While a purchaser will not be compelled to take a doubtful title to what has been offered for sale, because of which rule a title sold as clear and in fee must be so and free from doubt,[35] yet a judicial sale will be confirmed as against the purchaser, though there are tax liens on the land,[36] and since the rule of caveat emptor applies,[37] the purchaser must take such title as the proceedings will show to be subject to sale.[38] A doubt as to how the title came is immaterial if the title is clear and unites all the doubtful sources and chains.[39] The report of sale and the confirmation are prima facie evidence that the land was actually sold;[40] but under a statute providing for confirmation of a judicial sale notwithstanding

rant to the master to accept that if more is offered or could on free bidding have been obtained. Id.

24. Contract held to have had no such tendency when made after full value was bid by the parties who then agreed to buy and divide. Mallon v. Buster [Ky.] 89 S. W. 257.

25. Burks' Adm'r v. Lane Lumber Co. [Ky.] 89 S. W. 686.

26. The purchaser may retain but the announcement need not be made. McLellan v. Rosser [La.] 38 So. 85.

27. A sale of a half section less the unascertained homestead and dower therein is not a sale of a "parcel of 160 acres" or less. Shannon v. Summers [Miss.] 38 So. 345.

28. Slack v. Cooper [Ill.] 76 N. E. 84.

29. Fletcher Eq. Pl. & Pr. § 738. 1 Barbour, Ch. Pr. 529.

30. Fraser v. Seeley [Kan.] 79 P. 1081.

31. See 4 C. L. 321.

32. In this case the deed to the purchaser was produced which was "in all things approved and confirmed by the court." Cowling v. Nelson [Ark.] 88 S. W. 913.

33. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

34. Slack v. Cooper [Ill.] 76 N. E. 84.

35. An unreleased lien is no objection to title when barred by statute. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. And if an innocent purchaser has come in the possibility of new payments is none. Id. Heirs against whom adverse possession has fully run cannot throw any doubt on it. Id. The fact that a sale en masse included infants' interests in some of the parcels is no objection where the money is not yet paid, for then it may still be adjusted. Id. So where a potential dowress was omitted from suit but the husband's share is yet in court. Id. Mere misdescription is no objection. Id. Failure to file a survey which may yet be done is not. Id. Doubt as to ownership of an interest is not, if in any event the owner will be bound by decree and sale. Id.

36. Credit should be allowed the purchaser on the price. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

37. See post, § 8B.

38. Podesta v. Binns [N. J. Eq.] 60 A. 815.

39. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808. As where there were liens between defendants or where one of the owners was dead and her share came either by descent to the other parties or by devise to one of them. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. A title by judicial sale of property of one interdicted is marketable where such person received a sale as security of the property which belonged to a community and the wife made the vendee her universal legatee and the vendee then retroceded to the husband, who soon donated to the legatee an undivided half and then married the legatee who survived him and thereafter executed the first wife's will and held the property for more than 10 years. In re Schmidt [La.] 38 So. 26.

40. Du Hadaway v. Driver [Ark.] 86 S. W. 807. Evidence to rebut it held insufficient. Id.

defects in the advertisement of sale, in case the officer shall certify that the property was sold for a fair price, the burden of proving the price to be fair is on the officer or the purchaser alleging it.[41] Failure to give notice of the sale tends to show fraud.[42]

Setting aside a sale.[43]—An order confirming a judicial sale is a final judgment over which the court making it has no control, after the expiration of the term at which it was entered, except for equitable or statutory grounds.[44] Where the purchaser directed the deed to be made with certain limitations to a third party who accepts the deed, the order of confirmation is res judicata as to the limitations.[45] With respect to judicial sales the court will deal with the purchaser upon equitable principles;[46] hence where he can legally claim that he was misled or deceived by some apparent adjudication of the court and that it is inequitable to enforce his contract of purchase, he is entitled to relief.[47] But a minor's sale of real estate under an order removing his disability, which is valid on its face, cannot, though induced by fraud, be set aside so as to affect innocent purchasers from his grantee.[48]

Inadequacy of consideration, standing alone, is not sufficient reason for setting aside a judicial sale, unless it is gross;[49] but may be when accompanied with fraudulent prevention of competition on the part of the purchaser, or irregularities on the part of officers conducting sale.[50] If there is a right of redemption it is not a ground even where a deficiency will be thus thrown on other property secondarily chargeable.[51]

Application to set aside should be prompt.[52] But he who seeks to set aside a judicial sale is not chargeable with laches until he has acquired knowledge of the facts or of circumstances sufficient to charge him with such knowledge.[53] When sale has been confirmed, all parties being before the court, a special statute of limitation of actions to set it aside runs[54] even though the sale is wholly void and therefore incurable.[55] In Mississippi only chancery sales made in "good faith" are protected after two years' possession by the purchaser, and the statute therefore cannot be invoked by a subsequent bona fide vendee, where the original purchaser did not act in good faith.[56] Equitable relief will not ordinarily be granted to the purchaser where an appeal is pending which may decide the question.[57] Equity

41. Acts 1891, p. 24, § 1. Polhemus v. Princilla [N. J. Eq.] 61 A. 263. Evidence held to show that the price was not fair. Id.

42. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

43. See 4 C. L. 322.

44. Causes mentioned in secs. 518, 340, Civ. Code Prac., regulating the granting of new trials after the term at which judgment was rendered. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

45. Corbett v. Fogle [S. C.] 51 S. E. 884.

46, 47. Podesta v. Binns [N. J. Eq.] 60 A. 815.

48. Disability removed under authority of Sand. & H. Dig. § 1119. Young v. Hiner [Ark.] 79 S. W. 1062.

49. Rawolle v. Kalbfleisch, 94 N. Y. S. 16.

50. Especially when the purchaser is himself the attorney conducting the sale. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682. The omission by plaintiff's attorney to bring lienors into the decree followed by a purchase by him at about the minimum price on the appraised value, a false return by the master as to the amount of cash paid in, the crediting of improper allowance on the bid and the subsequent taking of title to a portion of the property in the name of the master's wife, shows fraud. Id. In a proceeding by a sheriff to compel acceptance of a deed, where the persons who could have been injured by lack of proper advertisement were not made parties and it was probable that the property sold did not bring a fair price, a resale should be ordered. Polhemus v. Princilla [N. J. Eq.] 61 A. 263. $2,490 held not a "fair price" for land having on it $9,000 of improvements and producing $900 yearly and which once sold for $4,500 and earlier for $5,000. Id.

51. Sale of exempt and nonexempt lands in inverse order to satisfy liens. Fraser v. Seeley [Kan.] 79 P. 1081.

52. It is too late after confirmation to object that the commissioner was appointed in vacation, no harm being shown. Sawyer v. Hentz [Ark.] 85 S. W. 775.

53. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

54, 55. Cowling v. Nelson [Ark.] 88 S. W. 913.

must be done.[58] A valid defense to sale as made being essential,[59] the exceptions must show it when considered as on motion to confirm.[60]

If a sale be void, the relief to which defendants are entitled is to recover the land not merely to redeem.[61]

Costs.[62]—Costs and expenses will be allowed a bidder who successfully resists a proceeding to enforce a defective sale of which he had no benefit.[63]

Proceedings on resale.[64]

§ 7. *Completion of sale; deeds, payments and credits.*[65]—When land is sold pursuant to a chancery decree, the fact which vests the purchaser with the beneficial estate is an order confirming the sale. To pass the legal title, a conveyance is necessary.[66] But delivery of a personal asset, like a promissory note, is sufficient to pass title, if made after confirmation of the sale.[67] Where sale is by the court rather than by its officers[68] no formal assignment or transfer by them is essential.[69] A deed executed by one styling himself receiver of an estate and as commissioner, he being in fact a commissioner, is evidence of the facts recited therein.[70] The purchaser being a party to the decree is bound thereby,[71] and as ancillary to its decree a court of equity may put the purchaser into possession as against any who are parties to the decree or in privity to them,[72] and in case of dispute between a first and second purchaser, their rights may therefore be determined on a rule for such relief[73] and if the facts be doubtful they may be referred.[74] Limitations of actions to recover real estate judicially sold have no application to actions to reform the deed for mistake in describing land not sold.[75]

56. Code 1880, § 2693. Shannon v. Summers [Miss.] 38 So. 345.

57. Podesta v. Binns [N. J. Eq.] 60 A. 815.

58. Infants repudiating proceedings must return what they have received. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

59. By adaptation to the rule on application for new trial after term. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

60. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

61. Cowling v. Nelson [Ark.] 88 S. W. 913.

62. See 4 C. L. 322.

63. Polhemus v. Princilla [N. J. Eq.] 61 A. 263.

64. See 4 C. L. 322.

65. See 4 C. L. 323.

66. Cobe v. Ricketts [Mo. App.] 85 S. W. 131. The purchaser has no color of title until the deed is delivered to him. Cowling v. Nelson [Ark.] 88 S. W. 913.

NOTE. Confirmation in chancery: In ordinary sales by auction or private agreement, the contract is complete when the agreement is signed, but a different rule prevails in sales by a master. In such cases the purchaser is not considered as entitled to the benefit of his contract until the master's report of the purchaser's bid is absolutely confirmed. 1 Barbour, Ch. Pr. 529. After the master's report has been filed, the court enters an order that the sale may be confirmed. It is usually provided that the sale may be confirmed unless cause is shown against it within a specified number of days, and if no such cause is shown within that time, the order shall become absolute of course. 1 Barbour, Ch. Pr. 529.—From Fletcher, Eq. Pl. & Pr. § 738.

67. Cobe v. Ricketts [Mo. App.] 85 S. W. 131.

68, 69. Sale held to have been so. Cobe v. Ricketts [Mo. App.] 85 S. W. 131.

Note: The usual practice is for the master to make the deed, that being a merely ministerial act required by the decree, and of the same character as the sale of the property. See 1 Barb. Ch. Pr. 468. The court of chancery in England always acted in personam and not in rem, and consequently, in adjudicating rights of the different parties to a proceeding concerning land, it did not by its decree undertake to transfer the title from one to the other of such parties, but gave relief by ordering one party to make a conveyance, cancel an instrument, or do other acts so as to establish and perfect the rights of the respective parties as adjudicated. This principle of action on the part of courts of equity has, however, been changed by statute in many states of the country, so that instead of requiring the parties to carry out the decree, the court itself does so, acting through a commissioner or other officer, and under some statutes the decree alone, without any further action, is sufficient to transfer the title. As regards land outside the jurisdiction, however, the court must still act in personam. Tiffany, Real Prop. § 465. Pomeroy, Eq. Jur. §§ 134, 135, 170, 1317.

70. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

71. Ex parte Qualls [S. C.] 50 S. E. 646; Corbett v. Fogle [S. C.] 51 S. E. 884; Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

72. Ex parte Qualls [S. C.] 50 S. E. 646; Assistance, Writ of, 5 C. L. 291.

73, 74. Ex parte Qualls [S. C.] 50 S. E. 646.

75. Five-years statute respecting administrator's action to recover land inapplicable. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

A lienor who purchases may not be allowed to credit his demand on the price unless the court ascertains the validity and amount of his lien.[76] Taxes incumbering land sold as clear will be allowed as a credit.[77] All judicial questions as to payment and distribution of proceeds are for the court and not for the master.[78]

An order to complete a purchase is appealable and carries with it an order to attach the bidder for contempt in failing to do so.[79]

§ 8. *Title and rights under sales and under deed. A. Defects and collateral attack.*[80]—Every presumption is in favor of the authority and authenticity of the proceedings,[81] and the title will not be overthrown for mere irregularities or errors,[82] even of jurisdiction[83] or matter making it merely voidable[84] except as to persons with knowledge or notice.[85] A sale which could not in any case be made is, however, void[86] like one where on the record it appears no title ever passed.[87] The acknowledgment of a deed made in open court, is a judicial act and concludes all mere irregularities, however gross, in the process and sale.[88]

(§ 8) *B. Outstanding titles and interests.*[89]—*The rule of caveat emptor* applies to all judicial sales[90] and a greater estate than defendant has and than is in court cannot be sold.[91] The rule also applies to a purchaser at a judicial sale of land described by metes and bounds and as containing a given number of acres more or less, as to any deficiency in the acreage.[92] But courts of equity do not

76. The master canot allow such credit. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

77. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

78. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

79. Podesta v. Moody [N. J. Eq.] 60 A. 939.

80. See 4 C. L. 323.

81. Especially in case of judicial sales made under the Spanish regime in Florida, and they will not be upset by a nice examination into their regularity where transfers of title have since been made. McGuire v. Blount, 26 S. Ct. 1. It will not be presumed that one answering as "guardian" falsely so styled himself. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. In collateral proceedings a decree of a court of general jurisdiction ordering the sale of land is presumed to have been made in a suit in which the court had jurisdiction of both parties and subject-matter. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

82. Failure to appoint guardian for infant heir on administrator's sale is error and the remedy is appeal and not collateral attack on sale. Davidson v. Marcum [Ky.] 89 S. W. 703.

83. Cannot be assailed by a purchaser who is a stranger to the original suit for want of jurisdiction to entertain the suit. Cobe v. Ricketts [Mo. App.] 85 S. W. 131.

84. Where a sheriff's deed is attacked in trespass to try title, plaintiff is not entitled to relief on a showing that the deed was merely voidable. Temple v. Branch Saw Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 109, 88 S. W. 442.

85. Innocent purchasers at a judicial sale, having no notice of any irregularity in the proceedings and judgment, will be protected when it appears that the court had jurisdiction of the parties and proceedings and that the judgment on its face authorized the sale (Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227); but where both the purchaser and his assignee were parties to, and had knowledge of, illegalities in the proceedings leading up to the sale, they are not protected as bona fide purchasers [Under Civ. Code Prac. § 391] (Davidson v. Marcum [Ky.] 89 S. W. 703).

86. Partition sale being allowable only for division, a record showing that it was ordered solely to pay costs is open to attack. Cowling v. Nelson [Ark.] 88 S. W. 913.

87. Where the terms of a decree of sale in partition were not complied with, no money paid, no note for deferred payments given and no commissioner's deed executed, the sale was void and passed no title out of the owners. Liverman v. Lee [Miss.] 38 So. 658.

88. A variation in the date of sale as stated in the sheriff's deed and the return upon the order of sale does not wholly avoid the sale. Temple v. Branch Saw Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 109, 88 S. W. 442.

89. See 4 C. L. 324.

90. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938. The fact that the bidder mistakenly supposed that it was customary for the sheriff to give notice in his advertisements of prior incumbrances will not relieve him in the absence of fraud. He is bound by the record of mortgages. Hartman v. Pemberton, 24 Pa. Super. Ct. 222; Podesta v. Binns [N. J. Eq.] 60 A. 815.

91. The purchaser is bound by the judgment in the case. determining what estate is to be sold. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124. In a sale of corporate property the purchaser takes only such title as the corporation had. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172. The deed passes the same title that a deed of bargain and sale executed by the judgment debtor would pass. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938.

92. Landreth v. Howell, 24 Pa. Super. Ct. 210.

knowingly offer a disputed and litigated title for sale, and in such sales, as distinguished from execution sales, the purchaser has a right to look to the court to protect him,[93] and it seems probable that, when a purchaser before confirmation shows a failure of the title in some material particular, a court of equity may relieve him of a bid, made under a clear misapprehension of fact or law, inducing the bidding.[94] The purchaser of land under order of the court on complying with the terms becomes a party to the proceedings and is bound by notice of all the orders in the case,[95] and by the notice of the sale.[96] The purchaser and his grantees are charged with notice of the amount of land embraced in the order authorizing sale[97] especially if the deed refers to the record thereof.[98]

(§ 8) *C. Rights of parties under sale and in proceeds.*[99]—All the defendant's title, including all his defenses to protect it,[1] passes to the purchaser. Where the purchaser pays only part of the price and takes possession, but fails to pay the balance and the land is sold to another whose purchase is confirmed, the latter purchaser has the legal and the former the equitable title.[2] A purchaser standing in trust, as by an attorney who purchases his client's property at a sale conducted by himself, must affirmatively show that it was done with the utmost good faith;[3] and co-purchasers with such an one are put to like proof.[4] Such may be charged as trustees.[5] When a purchaser of land in his own name is declared a trustee and required to convey to the debtor as having purchased it in trust for him, it is error to require a conveyance "with covenants of general warranty."[6] A sale to the selling officer's agent paid by a credit is not protected as a sale "in good faith."[7]

An invalid judicial sale may be cured by subsequent ratification[8] or defects in title,[9] or deficiencies in quantity not warranted[10] will be waived by acquiescence.

93. Carraway v. Stancill, 137 N. C. 472, 49 S. E. 957. See, also, ante, § 6.

94. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

95. Ex parte Qualls [S. C.] 50 S. E. 646; Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. Having directed deed to a third person and procured a confirmation, he is bound. Corbett v. Fogle [S. C.] 51 S. E. 884. As a violation of Const. 1869, art. 12, § 18, requiring land sold in pursuance of decrees to be divided into tracts not exceeding 160 acres, disclosed in the record. Shannon v. Summers [Miss.] 38 So. 345. Purchasers are charged with notice of the invalidity of a sale pursuant to an arbitration and award, where it appears that the arbitration, award and judgment were entered by consent of parties who were infants. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

96. Where the notice stated that the balance of the bid must be paid to the sheriff at his office, within 10 days without further demand, a bidder who paid the hand money and signed the bid was not relieved because, when he informed plaintiff's attorney and the defendant that he would not perfect the sale, he was not at once notified that he would be held to his bid. Hartman v. Pemberton, 24 Pa. Super. Ct. 222. Nor would notice to the sheriff in such a case relieve him, as no further demand of the purchase money was necessary. Id.

97, 98. See Notice and Record of Title, 4 C. L. 829. Applied where only twelve acres, more or less, were to be sold and the deed covered thirty-nine acres. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

99. See 4 C. L. 324.

1. The right to plead limitation of foreclosure passes with the title to the purchaser. Hopkins v. Clyde, 71 Ohio St. 141, 72 N. E. 846.

2. Ex parte Qualls [S. C.] 50 S. E. 646.

3. Such a sale will not be sustained where the attorney failed to make lienholders parties to the proceedings, so as to conceal the real condition of the title, and others were unable to bid intelligently. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

4. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

5. Where one or more coparceners buy in at a partition sale, they may if proof be clear be charged as resulting trustees. Dooly v. Pinson [Ala.] 39 So. 664. Evidence examined. Id.

6. Hatfield v. Allison [W. Va.] 50 S. E. 729.

7. Code 1880, § 2693 bars action to set aside after two years. Shannon v. Summers [Miss.] 38 So. 345.

8. Podesta v. Binns [N. J. Eq.] 50 A. 815.

9. Where a person entered into possession of land under a judicial deed and lived on the premises for twenty years, he was presumed to have acquiesced in certain limitations in the deed. Corbett v. Fogle [S. C.] 51 S. E. 884.

10. Assumpsit for a deficiency will not lie after acceptance and acquiescence. Landreth v. Howell, 24 Pa. Super. Ct. 210.

Rights in proceeds and on bid.[11]—The proceeds are to be applied and surplus distributed according to principles of equity; hence when several parcels are sold, some clear and others incumbered, the price realized on the clear parcels must be set out before allowing incumbrances.[12] In apportioning proceeds to several tracts, relative value and not acreage is the proper basis.[13] If after confirmation it appears there are liens from one to another judgment plaintiff, the money to discharge same may be paid into court to abide adjudication of their equities[14] which will be ordered.[15]

The purchaser need not look to the distribution of proceeds.[16]

If a sale is reversed or set aside as void, but no actual fraud on the part of the purchasers is shown, they are entitled, upon vacation of the sale, to a return of the purchase price with interest and the value of lasting improvements, less a reasonable rental value with interest.[17] Even under a void sale the bidder having paid off a tax lien is subrogated thereto[18] and should be paid out of a subsequent valid sale.[19]

A defaulting purchaser is not liable on his bid when the second sale is conducted on less advantageous terms and a less valuable title passes by it.[20] The measure of damages is the difference in prices realized.[21]

JURISDICTION.

Scope of title.—This topic deals only with the principles of civil jurisdiction in general. Questions relating to the jurisdiction of criminal courts are treated elsewhere.[1]

§ 1. *Definitions and distinctions.*[2]—The court can make no binding adjudication in an action in which it is without jurisdiction.[3] Jurisdiction is the power to

11. See 4 C. L. 324.
12. Where three parcels of land, two of which were subject to a mortgage, were sold, the proceeds to be apportioned, it was error to charge any part of the mortgage to the parcel not subject thereto when making the distribution. Hogg v. Rose, 94 N. Y. S. 914.
13. Hogg v. Rose [N. Y.] 76 N. E. 38.
14, 15. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.
16. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808.
17. Davidson v. Marcum [Ky.] 89 S. W. 703.
18, 19. Liverman v. Lee [Miss.] 38 So. 658.
20, 21. Pepper v. Deakyne [Pa.] 61 A. 805.
1. See Indictment and Prosecution, 5 C. L. 1790.
2. See 4 C. L. 324.
3. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125.

hear and determine the subject-matter in controversy between the parties to a suit,[4] and it exists if the law confers on the court the power to render a judgment or decree.[5] Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then before the court, but jurisdiction of the class of cases to which it belongs.[6] It does not depend upon the sufficiency of the pleadings,[7] or upon the rightfulness of the decision in a particular case,[8] though it is necessary for a court to obtain cognizance of the particular cause by the requisite process and pleadings before it can determine it.[9] Strictly speaking, questions relating to whether the issues presented for consideration are proper for judicial cognizance in any event, and, if so, whether the facts alleged constitute a cause of action in equity in favor of plaintiff, do not go to the jurisdiction of the court, since judicial power is not involved in doubt but only whether its exercise is permissible in view of the established practice.[10]

The courts have no power to control or supervise legislative or official administrative discretion.[11]

§ 2. *Elements and constituents in general.*[12]—Essential to jurisdiction is a subject-matter upon which adjudication is sought[13] by a competent party, in a competent form,[14] regularly invoked[15] against adversary parties, or in respect to the subject-matter itself, which must at least constructively be in court.[16] Except in actions affecting personal status, or in those partaking of the nature of proceedings

4. O'Brien v. People, 216 Ill. 354, 75 N. E. 108. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000.

5, 6. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

7. If the court has jurisdiction of the subject-matter and the parties, nothing further is required. O'Brien v. People, 216 Ill. 354, 75 N. E. 108. In a suit for an injunction, where defendants are served with process but fail to file answers or demur, the court acquires jurisdiction of the subject-matter and the parties, notwithstanding defects in the bill. Id. If pleading states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide whether the pleading is good or bad. Allegations held to sufficiently charge acts of defendants to give court jurisdiction to pass on sufficiency of bill. Id. Facts essential to invoke jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000. Thus a defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the court to determine the questions it presents, though it may not contain averments entitling complainant to any relief, and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or the plaintiff. Averment in petition in bankruptcy, filed by single creditor, that all the creditors of the alleged bankrupt are less than twelve in number is not one essential to the jurisdiction of the court, but one which is requisite to invoke a favorable adjudication upon the petition. Id.

8. Is not lost because of an erroneous one. Allegations of bill for injunction held to sufficiently charge acts of defendants to give court jurisdication to pass on the sufficiency of the bill, and hence question of jurisdiction to grant injunction not affected by whether decision was correct or incorrect. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

9. Besides having jurisdiction of the class of causes to which a given cause of action belongs. Moore v. Holt, 55 W. Va. 507, 47 S. E. 251.

10. State v. Houser, 122 Wis. 534, 100 N. W. 964.

11. See Constitutional Law, 5 C. L. 627. Compare Elections, 5 C. L. 1073; Highways and Streets, 5 C. L. 1645; Eminent Domain, 5 C. L. 1097; Municipal Corporations, 4 C. L. 720; Public Works and Improvements, 4 C. L. 1124.

12. See 4 C. L. 325.

13. The bankruptcy court, on an involuntary petition against a corporation, and, prior to its being adjudged a bankrupt, has no jurisdiction of a receiver appointed by a state court for such corporation, no relief being sought against him. In re Bay City Irr. Co., 135 F. 850.

14. Though a bill shows want of equity and there is a conflict of jurisdiction as well, the filing of a cross bill may invoke equity and by stipulating for a stay the conflict may be removed. Pending proceedings in the courts of administration to sell decedent's lands for debts, a bill was filed by the purchaser for relief, the administrator filed a cross bill for specific performance and the former proceedings were stayed by stipulation. Podesta v. Binns [N. J. Eq.] 60 A. 815.

15. See Process, 4 C. L. 1070; Appearance, 5 C. L. 248.

16. Federal district court has jurisdiction to inquire by writ of habeas corpus into cause of detention of Chinese persons in another district, where chief Chinese exclusion

in rem, substituted service as against a nonresident can be effected only where, in connection therewith, property in the state is brought under the control of the court, and is subject to its disposition, by process adapted to that purpose.[17] The mere fact that, in an action against two defendants domiciled beyond the territorial jurisdiction of the court of first instance, jurisdiction is acquired as to one, does not of itself authorize the bringing of the other into court by the appointment and citation of a curator ad hoc, even though the appearance of such other defendant be necessary in order to enable the parties already in court, or either of them, to obtain a judgment upon the issues offered for decision.[18] Power is sometimes given to courts to act when not all of these elements are present, as in the case where executive or legislative branches may, upon request, obtain a judicial opinion.[19]

Where the intent of a statute is that a court shall render between litigants a final judicial judgment at law or decree in equity, no breadth of language can enable it to do so except by judicial methods and pursuant to established principles of law or equity.[20]

§ 3. *Legislative power respecting jurisdiction.*[21]—Legislatures can neither limit nor enlarge the jurisdiction of constitutional courts unless expressly authorized by the constitution to which both owe their existence,[22] nor can they restrict

officer for the state, in his return to the writ, admits that they are detained by him, and has entered into and taken the benefit of a stipulation that they need not be produced in open court. Ex parte Fong Yin, 134 F. 938. Petitioner was awarded custody of child on habeas corpus proceedings and an agreement was entered into that he should keep child, pending an appeal, within jurisdiction of the court, which agreement was filed and made an order of court. Held, that his act in removing child into another county of the state did not remove it from the jurisdiction of the court, but circuit court's jurisdiction, for purpose of enforcing or modifying its order, extended to any place in the state where the petitioner might locate. Willis v. Willis [Ind.] 75 N. E. 655.

17. Otherwise due process of law clause of the Federal constitution is violated. West v. Lehmer [La.] 38 So. 969. Action by resident of Mississippi in district court of one parish against a railway company whose agent for service of summons is domiciled in another parish, and against another defendant domiciled in Ohio, to annul a contract to which the plaintiff is neither a party nor a privy, whereby the company has agreed to establish a depot on the land of the other defendant, lying contiguous to that of plaintiff in a third parish, in consideration of the grant of a portion of such land for right of way, etc., is a personal action, not in the nature of a proceeding in rem. Id.

18. West v. Lehmer [La.] 38 So. 969.

19. **In Colorado** the supreme court is required to give its opinion upon important questions upon solemn occasions, when required by the governor, the senate, or the house of representatives. Const. art. 6, § 3. Right to call for opinion is limited to questions which so vitally affect public interest as to render it necessary for public welfare. In re Senate Resolution No. 10 [Colo.] 79 P. 1009. Is required to give opinion, on request of senate, as to whether, on a contest over the office of governor, the general assembly may declare a vacancy to exist in that office. Id.

In Florida the justices of the supreme court are authorized, on the governor's request, to interpret any portion of the constitution that affects his executive powers and duties, but they have no authority, on such request, to interpret or pass upon the constitutionality of statutes affecting such powers or duties. Const. art. 4, § 13, construed. Advisory Opinion to Governor [Fla.] 39 So. 187.

20. Washington L. & T. Co.'s Case, 39 Ct. Cl. 152. Under a statute referring a claim to the court of claims and conferring jurisdiction to hear and determine the question of the liability of the United States, and to render judgment in favor of claimants in the event that the court "shall be of the opinion that the United States are justly liable, under all the circumstances of said case," the court must judge the case according to the principles of law or equity which guide and govern courts, and not upon ethical principles. Id.

21. See 4 C. L. 328.

22. Const. § 168, authorizing the general assembly to provide inferior courts in certain cities and towns in lieu of justices of the peace, and providing that such courts shall have jurisdiction in civil actions where the amount in controversy does not exceed $100, is a limitation upon the power of the legislature to confer on such courts, when established, jurisdiction in excess of that amount. Alford v. Hicks [Ala.] 38 So. 752. Under Ky. Const. § 143, the general assembly has no power to confer upon a police court jurisdiction to try and determine offenses occurring outside of the corporate limits of the city or town in which it is established. Ky. St. 1903, § 3496, held void. Ingram v. Fuson, 26 Ky. L. R. 863, 82 S. W. 606. Const. art. 6, § 18 does not prohibit the legislature from giving to municipal courts the jurisdiction there given to justices of the peace. Attorney General v. Loomis [Mich.] 105 N. W. 4. Acts 1905, No. 70, not unconstitutional as an

the power of the courts to punish for contempt as it existed at common law;[23] but they may enlarge or restrict the jurisdiction of a court as fixed by the common law and the statutes declaring its powers,[24] and may confer upon persons holding judicial offices authority to hear contests of elections.[25] State legislation can neither directly enlarge nor contract the jurisdiction of the Federal courts.[26]

§ 4. *Territorial limitations.*[27]—All jurisdictions are bounded territorially either by the limits of the state,[28] the nation, or by those of the district or circuit in which they are established.[29]

attempt to deprive any justice of the peace of jurisdiction. Id. Municipal courts cannot be authorized to try extra-municipal crimes. Acts 1905, No. 70, establishing a court whose jurisdiction is not limited by the boundaries of the city, cannot be sustained as a provision for the establishment of a municipal court, though that name is used in the act. Id. So much of Code 1892, § 2128, as commits the judicial administration of the game laws to mayors and justices of the peace, whether the act be done in their respective districts or not, is unconstitutional and void. Ex parte Fritz [Miss.] 38 So. 722. The legislature cannot confer chancery powers on the probate courts of a territory where the organic law vests such powers exclusively in the supreme and district courts. Garrett v. London & L. Fire Ins. Co. [Okl.] 81 P. 421. Pennsylvania Act of May 29, 1901 (P. L. 331, § 9), giving the court of quarter sessions jurisdiction to issue an order enjoining defendant from selling oleomargarine without a license, is not invalid as vesting in the court equitable powers in contravention of Const. art. 5, § 1, which merely gives such court judicial powers without limiting them. Commonwealth v. Andrews, 211 Pa. 110, 60 A. 554. Such statute is an exercise of the police power and proceeding is not equitable so as to interfere with exclusive equitable jurisdiction of court of common pleas. Id. The legislature of Texas has power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts, but in case it makes any such change, it must also conform the jurisdiction of the other courts to such change. Const. art. 5, § 22. Gulf, etc., R. Co. v. Fromme [Tex. Civ. App.] 84 S. W. 1054. It may increase the jurisdiction of the county court by giving it jurisdiction over matters embraced within the jurisdiction of the justice courts, and may regulate the right of appeal from the county court to the court of civil appeals, thereby conforming the jurisdiction of the two courts. Act 1895 (Sayles' Ann. Civ. St. 1897, p. 1929) § 3, held valid. Id. Statute is not unconstitutional as embracing more than one subject. Id. The legislature has no power to take away or abridge the constitutional and prerogative powers of the supreme court to review the proceedings of all special statutory tribunals. Meachem v. Common Council [N. J. Law] 62 A. 303. May review by certiorari action of city council in declaring vacant the seat of one of its members, though charter makes council sole judge of the election, return, and qualification of its members. Id. Const. art. 3, § 8, providing that the probate court shall have such jurisdiction of the property of certain persons as shall be provided by law, and shall also have jurisdiction in habeas corpus, does not prohibit the legislature from imposing other and additional judicial duties on such court, not inconsistent with, and the exercise of which would not interfere with, the performance of such constitutional duties. In re Gassaway [Kan.] 79 P. 113. Gen. St. 1901, § 7147, conferring on such court power to commit certain girls to the industrial school, is not repugnant to such section. Id.

23. Power of superior courts to do so is derived from the very constitution of the court, without express statutory aid. Ex parte McCown [N. C.] 51 S. E. 957. See, also, Contempt, 5 C. L. 650.

24. Court of common pleas. Commonwealth v. Andrews, 24 Pa. Super. Ct. 571.

25. Ogburn v. Elmore [Ga.] 51 S. E. 641.

26. Cannot, by giving a procedure, oust a Federal court of its equity jurisdiction. People's Sav. Bank v. Layman, 134 F. 635.

27. See 4 C. L. 328.

28. Decree of Federal court appointing receivers has no effect, proprio vigore, beyond the limits of the state in which it is rendered, and it will not be allowed by the courts of another state to prevail, as a matter of comity, against any remedy which the laws of the latter afford its own citizens against property of the company within its jurisdiction. Gerding v. East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206. New York court has no power, in an action by a New York corporation against two residents of the same state, to restrain defendants from doing acts under authority of orders of the court of Montana in suits in that state to which plaintiff was not a party, it not appearing that the Montana court was without jurisdiction to make such orders. Johnstown Min. Co. v. Morse, 45 Misc. 110, 91 N. Y. S. 586. Action on fire policy may be maintained in any county in the state in which such service may be had on defendant as to bring it legally into court, irrespective of the location of the property destroyed. Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. Batt's Ann. Civ. St. 1895, art. 4577, providing that actions against railroad companies for the penalties provided for discrimination shall be brought in the proper court having jurisdiction thereof in Traverse county, or any other county to or through which such railroad may run, relates to the subject of venue only and not to jurisdiction, and hence court of county to which road does not run has jurisdiction if defendant does not file plea of privilege to be sued elsewhere. San Antonio & A. P. R. Co. v. Stribling [Tex. Civ. App.] 86 S. W. 374. A court having obtained jurisdiction over a domestic corporation does not thereby acquire jurisdiction over a foreign corporation jointly liable on the contract sued on, unless the action is brought at the domicile

§ 5. *Limitations resting in situs of subject-matter or status of litigants.*[30]—The power to adjudicate upon a subject-matter which can have no existence save at a fixed place pertains to the courts erected for that place,[31] and courts of other places may not entertain such jurisdiction,[32] though they may have it for the purpose of adjudicating personal rights of persons present in court, which are in respect to, but

of the domestic company, which, in the case of a railroad, is the place where its public office is located. Rev. St. 1895, art. 1194. St. Louis S. W. R. Co. v. McKnight [Tex.] 13 Tex. Ct. Rep. 1003, 89 S. W. 755. Under Laws 1899, p. 214, c. 125, providing that whenever property has been transported over two or more railroads operating any part of their roads in the state, a suit for damages thereto may be brought in any county in which either of them extends or is operated, a petition in an action for damages brought in a county in which one of three connecting carriers operates, alleging rough handling by each of them and plaintiff's entire damages, fixes the jurisdiction of the court. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. A plea of privilege to the jurisdiction by one of the roads in such case must allege that no part of the damage occurred on its line and that the allegations of the petition showing liability on its part were false and fraudulently made for the purpose of conferring jurisdiction on the trial court, which was a court situated on its line. Id. In order that the court may obtain jurisdiction over a foreign corporation under this statute, it must appear that it operated a part of its road and had an agent in the state, and also that the property has been transported over its line. St. Louis S. W. R. Co. v. McKnight [Tex.] 13 Tex. Ct. Rep. 1003, 89 S. W. 755. Not necessary that it own the tracks over which it operates in the state. Id. Court has no jurisdiction where it appears that foreign company refused to receive the shipment. Id. A Federal court in one state cannot enforce rights given by a statute of another state with respect to the use of so much of a bridge across a river lying between the two states as is situated within the latter state. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

29. Where nothing but the title to land is concerned and the court is called upon to act upon the person of the defendant only, a court of chancery may administer relief in any county where defendant is found. Munger v. Crowe, 115 Ill. App. 189. But where the court is called upon to act directly upon the property, it is essential upon its power to act that the property to be affected be within its territorial jurisdiction. Id. As a general rule a defendant must be sued in the court of his domicile, but the actions of boundary and revendication of real estate are required to be brought before the court within whose jurisdiction the land to be bounded or revendicated is situated. Civ. Code, art. 840; Code Prac. art. 163. Parish of Caddo v. Parish of DeSoto [La.] 38 So. 273. Suit in boundary between two parishes may be brought in either parish, and plaintiff parish may institute suit in the court of her own domicile. Id. A justice of the peace, having jurisdiction of the subject-matter, may, by consent of all the parties, hear the evidence and argument outside of the township in which he resides and for which he was elected. Stark v. Treat, 6 Ohio C. C. (N. S.) 286. Where the alleged lunatic is confined in a state hospital for the insane, lunacy proceedings may be brought in the county in which the hospital is situated, or in the county of the lunatic's residence. Brooke's Estate, 24 Pa. Super. Ct. 430.

30. See 4 C. L. 328.

31. In suit by attorney against nonresident client and treasurer of the United States to enforce lien on fund in treasury belonging to the client, for which check was about to be issued, held that, as between the treasurer and the plaintiff, the fund had a locality in the District of Columbia, and the court of that district had jurisdiction to appoint a receiver of the fund whose receipt would protect the treasurer. Final question of jurisdiction over the fund could only be raised by nonresident defendant who was not bound by decree because not brought before the court by process. Roberts v. Consaul, 24 App. D. C. 551. Under Kirby's Dig. § 6060, circuit court of a county in which land of decedent or any part of it lies has jurisdiction to partition it after the administration on decedent's estate has been wound up and the administrator discharged, even though the estate was administered in another county. §§ 6063 and 6064 have no application to such a case. Cowling v. Nelson [Ark.] 88 S. W. 913. The status of land and immovable property, together with its title and incidents thereof, is subject to the adjudication of the courts of that sovereignty within the boundaries of which it is located. Cook v. Weigley [N. J. Eq.] 59 A. 1029. Court of New Jersey held to have jurisdiction to foreclose mortgage on islands within its boundaries, notwithstanding provision of boundary agreement with New York (Act June 28, 1834, c. 126, 4 Stat. 709) that latter state should retain its then jurisdiction over islands in certain waters, where it does not appear that it had jurisdiction over those in controversy when the act was passed. Id. Court of state in which mortgaged land is situated acquires jurisdiction to foreclose mortgage and cut off rights of foreign mortgagee by service by publication, commencement of foreclosure proceedings and filing of lis pendens. Greenwood Loan & Guarantee Ass'n v. Williams [S. C.] 51 S. E. 272. The court of the county in which a part of the property covered by a deed of trust given by a foreign corporation is situated has jurisdiction of a suit to foreclose such deed and to appoint a receiver to take charge of such property. Rev. St. 1895, art. 1194, subds. 12, 23, art. 1465, subds. 2, 4. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66. Under Code 1899, c. 123, § 1, suit to subject land to a debt must be brought in the county where land is situated. Laidley v. Reynolds [W. Va.] 52 S. E. 405. When suit in equity is brought in one county to enforce a judgment on lots in it and in another county, the

do not affect such subject-matter.[33] Alienage or nonresidence of litigants who are subject to the personal jurisdiction of a court is no obstacle to an action which is transitory and therefore may follow the person,[34] but many statutes exclude courts from jurisdiction over actions where both of the parties are nonresidents, and the

court does not lose jurisdiction to proceed against the land in the latter county because it finds that, under the evidence, the land in the county where the suit is brought is not liable, it having jurisdiction to sell land in any county under Code 1899, c 132, § 1, and because, having jurisdiction for one purpose, it may administer full relief. Id.

32. Where defendant in a divorce suit is not served in the state and does not appear, the court cannot vest in plaintiff any interest in defendant's land in another state. Part of decree seeking to do so is purely proceeding in rem, and res, having its situs in another state, must be controlled by the latter's laws. Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145. Court of one territory will not entertain suit for specific performance of agreement as to oil lease of lands in another to compel transfer of interest in the lease, and operation under the lease, since it would require constant supervision of manner of operation, the agreement being wholly indefinite as to the manner of working and the extent of the operations to be carried on. Wilhite v. Skelton [Ind. T.] 82 S. W. 932. Action by stockholders of foreign corporation to have declared void for fraud an agreement canceling a lease to it from another foreign corporation does not involve the title to land so as to affect the jurisdiction of the courts of a state other than that where the land is situated. Not within Code Civ. Proc. § 1780. Jacobs v. Mexican Sugar Refining Co., 93 N. Y. S. 776. Courts of one state cannot by decree effect the legal transfer of the title to realty situated in other states. Full faith and credit clause of the Federal constitution refers only to personal obligations and duties, contracts and liabilities, other than those affecting interests in realty. Courtney v. Henry, 114 Ill. App. 635.

33. A court of equity, having acquired jurisdiction over the person of the defendant, has jurisdiction to enter any decree which may concern or affect lands in controversy situated in a foreign state to the same extent and as fully as though they were in the state where the court has its situs. To declare defendant a constructive trustee of a mining claim obtained by fraud. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345. The courts of a state in which all the parties to the action reside have jurisdiction of an action for specific performance of a contract for the sale of realty in another state. Rea v. Ferguson, 126 Iowa, 704, 102 N. W. 778. Where receiver of foreign corporation appears in action, court has jurisdiction to cancel for fraud contract relating to lands in foreign country. Code Civ. Proc. § 1780. Pruyn v. Black, 93 N. Y. S. 995. Courts of state have jurisdiction of action by resident stockholders of foreign corporation against another foreign corporation to have declared void for fraud an agreement canceling a lease from defendant to the corporation of which plaintiffs were members. Code Civ. Proc. § 1780. Jacobs v. Mexican Sugar Refining Co., 93 N. Y. S. 776, afg. 45 Misc. 180, 91 N. Y. S. 902.

34. Under D. C. Code, § 1537, an action by a nonresident corporation against another nonresident corporation is maintainable in the District of Columbia when defendant does business and has a place of business there. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1. Statute of Illinois giving single damages by way of compensation for killing of stock by railroad at a point where right of way is not fenced is not penal and may be sued on in Missouri. Stonebraker v. Chicago & A. R. Co., 110 Mo. App. 497, 85 S. W. 631. The courts of a state may determine any question relating to the stock of a domestic corporation. Where plea of nonresident defendant denied that property concerning which relief was sought was located within the state, but failed to deny that it was capital stock of a corporation domiciled therein, held, that court had jurisdiction to proceed against him in respect to it, and that a decree could be made with respect to his interest in the res which would bind him, even though he did not appear after the giving of the required notice. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568. A Georgia corporation doing business in another state may be sued in Georgia by a citizen of such other state for an injury inflicted in that state. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. Liability in a transitory action may be enforced, and the right of action pursued in the courts of any state which can obtain jurisdiction of the defendant, without regard to where the wrongdoer or the person injured resided, or where the injury was inflicted. Of suit for injuries to cattle occurring outside of the state where all parties were nonresidents. Missouri, etc., R. Co. v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871. In a transitory action by a nonresident plaintiff, where a nonresident defendant voluntarily comes into the state and is there served with process as a resident of the county in which he is doing business, the court of such county has jurisdiction of the case. Bowman v. Flint [Tex. Civ. App.] 82 S. W. 1049. A right of action given by the statutes of one state will be enforced by the courts of another state whose statutes give a similar right under the same state of facts. Statutes must be of similar import or character, but need not be precisely the same. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. Courts of Texas, having obtained jurisdiction over the parties, will enforce Kansas Gen. St. 1901, § 5858, making railroads liable for injuries to their servants caused by the negligence of fellow servants, the statutes of the two states being sufficiently similar. Id. Fact that under Kansas statute defendant had a discretionary right to have the jury view the place of the accident held not to deprive Texas court of jurisdiction. Id. Duty of master to furnish

cause of action is of foreign origin,[35] whilst the alienage, or the diversity of citizenship of the litigants, may draw the case into the Federal courts.[36] The residential requirement in divorce actions does not apply to a defendant who files a cross bill, the residence of plaintiff having given jurisdiction.[37]

§ 6. *Limitations resting in amount or value in controversy.*[38]—The division of jurisdiction between courts is often accomplished by statutes fixing a maximum[39] or

safe place to work, etc., substantially the same (Id.), and defendant entitled to special verdict in both states (Id.). Railroad extending into and which is operated in Texas may be sued there on a cause of action arising in Kansas, though it is incorporated under the laws of Kansas and plaintiff is a citizen of that state. Id. Aliens may sue in the court of claims, and this right extends to aliens residing in the colonies of foreign governments, and to corporations as well as to natural persons. U. S. Rev. St. § 1068. Corporation incorporated according to laws of Philippines. The Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225. For purposes of jurisdiction, it is conclusively presumed that all the stockholders of a corporation are citizens of the state under whose laws it was created. Id.

35. Divorce being a proceeding to alter the status of the person, the courts of a state have jurisdiction only when one of the parties has an actual bona fide domicile within its territory, without regard to where the offense for which it is sought was committed. Will not assume jurisdiction if both parties are nonresidents, though offense was committed within the state, and if court otherwise has jurisdiction, is not deprived of it because offense was committed outside the state. Adams v. Adams [Md.] 61 A. 628. Under Code Pub. Gen. Laws 1904, art. 16, §§ 35, 36, where parties lived out of state, and husband committed adultery within the state, and wife left him and established her residence within the state, court of county in which she resided could grant her a divorce, though she had not, at time of filing her bill, resided in state for the preceding two years. Id. In proceedings for the appointment of a receiver for an insolvent corporation, the jurisdiction of the court to allow claims must be determined by the general character of the relief sought, without reference to the character of any particular debt which may be proved before the referee. Holshouser Co. v. Gold Hill Copper Co. [N. C.] 50 S. E. 650. Claim by state which chartered foreign corporation for franchise or annual license fees held provable, Code, § 194 preventing suits by nonresidents against foreign corporation unless cause of action arises in the state or the subject of the action is situated there, not applying to such proceedings. Id. The City Court of Birmingham has no jurisdiction of a suit against a foreign corporation on a cause of action arising outside the state. Dozier Lumber Co. v. Smith-Isburgh Lumber Co. [Ala.] 39 So. 714.

36. See § 11 B, post.

37. Note: An action for divorce was brought by a wife, resident within the jurisdiction, against a nonresident husband. The defendant appeared personally and filed a cross petition for divorce. The trial court dismissed the petition and then dismissed the cross petition for want of jurisdiction. Upon appeal by the defendant, it was held, the statute requiring a period of residence before filing a petition for divorce, did not prevent a nonresident from filing a cross petition and that the appeal would be sustained. Pine v. Pine [Neb.] 100 N. W. 938.

The court in the principal case having jurisdiction over the parties would do full justice upon the merits of the issues. It will not compel obedience by the defendant and at the same time deny him affirmative relief. This seems to be a reasonable construction of a statute denying divorce to nonresident petitioners. Fullmer v. Fullmer, 6 Week. Dig. [N. Y.] 22; Clutton v. Clutton, 108 Mich. 267; Sterl v. Sterl, 2 Ill. App. 223. Massachusetts reaches the same result by a different process of reasoning. Watkins v. Watkins, 135 Mass. 83. Rhode Island and California interpret the statute strictly. Volk v. Volk, 18 R. I. 639; Coulthurst v. Coulthurst, 58 Cal. 239. The purpose of the residence clause being simply to limit the number of divorce suits, the liberal interpretation seems preferable.—5 Columbia L. R. 61.

38. See 4 C. L. 331.

39. Rev. St. c. 79, § 75, providing that the Kennebec superior court "has exclusive jurisdiction of scire facias on judgments and recognizances not exceeding $500," does not in terms or by necessary implication take away the inherent jurisdiction of that court over scire facias to obtain execution upon its own judgments, even though the debt and costs in the aggregate exceed $500. Kennebec Steam Towage Co. v. Rich [Me.] 60 A. 702.

NOTE. Effect of counterclaim: Upon suit in a magistrate's court, the defendant attempted to set up a counterclaim for a sum exceeding the statutory jurisdiction of the court. Held that, as the counterclaim was a new action, the court could not entertain it, since it was not within its jurisdiction. Corley v. Evans, 69 S. C. 520, 48 S. E. 459.

Many courts of limited jurisdiction follow the principal case in holding that they have no jurisdiction over a counterclaim larger than their jurisdictional amount, on the theory that the counterclaim is a new action. Alemeida v. Siegerson, 20 Mo. 497; Guswold v. Pieratt, 110 Cal. 259. The better rule, however, seems to regard the counterclaim as part of the same action, and the amount demanded by the plaintiff once having given the court jurisdiction over the original action, the court's jurisdiction holds over the counterclaim provided there is no statutory prohibition. The N. Y. Code of Civil Procedure, § 2945, as to justices' courts, admits the counterclaim, even though it exceeds the sum for which the court could not take jurisdiction in a new and distinct action. Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1; 4 Columbia L. R. 75.—4 Columbia L. R. 603.

minimum[40] jurisdictional amount or value "involved,"[41] "demanded,"[42] "claimed,"[43]

40. In the case of appeals from justices of the peace, a minimum is usually fixed below which no case is appealable. See Justices of the Peace, 4 C. L. 372. Under Act May 5, 1899 (P. L. 248), providing that appeal from decree of orphans' court on any single claim not greater than $1,500, shall be to superior court, where court disallows two distinct claims, one over and one under that amount, supreme court will review larger claim and remit smaller one to superior court. In re Eslen's Estate, 211 Pa. 215, 60 A. 733.

41. California: An appeal to the court of appeals will be transferred to the supreme court under provisions of constitution and Sup. Ct. rule 32, where, on account of the amount involved, the appeal should have been taken to the latter court in the first instance. Weldon v. Rogers [Cal. App.] 82 P. 352.

Illinois: Supreme court has no jurisdiction to review judgment of appellate court in suit to set aside conveyance of land and subject it to plaintiff's judgment where the amount involved is less than $1,000. Lydston v. Auburgh, 216 Ill. 210, 74 N. E. 796. The amount involved in such a suit is the amount of indebtedness to the payment of which the land is sought to be subjected and not the value of the property. Id. Appeal does not lie to supreme court in suit by assignee of life policy to enjoin payment of tontine dividends amounting to less than $1,000, though paid up policy which admittedly was to be issued to complainant, and the amount of premiums paid by her, together with the indebtedness secured by the assignment, was in excess of $1,000. Brueggemann v. Brueggemann, 215 Ill. 509, 74 N. E. 800.

Louisiana: Where the issues raised and determined in the district court involve an amount over $2,000, exclusive of interest, the supreme court has appellate jurisdiction. Const. 1898, art. 85. Fact that fund for distribution is under that amount does not deprive court of jurisdiction where other issues involving amounts largely in excess of that required were raised and determined below. Succession of Sangfried [La.] 38 So. 593. Whether such issues should properly have been so raised and passed upon is not before the court on a motion to dismiss the appeal. Id. After seizure of certain property belonging to the city had been set aside in district court on ground that property was exempt and judgment had been affirmed on appeal, sheriff, on rule to show cause in district court recovered $385 for keeping such property. Held, that appeal to supreme court would be dismissed because involving less than the jurisdictional amount, there being nothing in claim for costs which by reason of its character, should make it appealable to the supreme court regardless of the amount involved. Wagner Co. v. Monroe, 113 La. 1073, 37 So. 974. Case will be transferred to court of appeal on appellant filing affidavit that appeal was not taken for purposes of delay. Id. No appeal lies to supreme court from judgment homologating an administrator's account which purports to distribute a fund not exceeding $2,000, exclusive of interest, and court will ex proprio motu, take notice of its want of jurisdiction and dismiss the appeal unless appellant makes oath that appeal was not taken for delay (Acts 1904, No. 56), in which case it will be transferred to court of appeal. Succession of Fullerton [La.] 38 So. 151. Has no jurisdiction of action to annul a judgment which was affirmed by the proper court of appeal in the exercise of its conceded appellate jurisdiction. Cause not appealable in amount to supreme court, for the review of a judgment therein cannot be made appealable to it to review judgment rendered in an action of nullity in the same cause. Strain's Heirs v. Lyons [La.] 38 So. 483. In such case jurisdiction cannot be vested in the supreme court by ingrafting on the action in nullity demands for damages, or other collateral and contingent claims dependent on the annulment of the judgment. Id. Where wife sues for damages for personal injuries and husband joins in action, claiming medical and other expenses incurred by reason of her injuries, the test of appellate jurisdiction is the sum total of both demands arising from the same cause of action. La Groue v. New Orleans [La.] 38 So. 160. An appeal involving $310 will be dismissed where the jurisdiction of the supreme court depends wholly on the amount involved. Succession of Glancey [La.] 38 So. 826.

Missouri: In an action on a bond given to secure the payment of alimony, the amount involved for the purpose of determining the jurisdiction of the appellate court is not the penalty of the bond, but the actual damages sustained by reason of the breach. Burnside v. Wand, 108 Mo. App. 539, 84 S. W. 995.

Federal courts: Circuit court has jurisdiction of action for $2,500 damages for preventing plaintiff from exercising right to vote for member of congress. Knight v. Shelton, 134 F. 423. In suit in circuit court by creditors of an insolvent corporation on behalf of themselves and all other creditors similarly situated to recover property alleged to belong to the corporation but to have been fraudulently acquired by defendants, creditors having claims of less than $2,000 may join with those whose claims exceed that sum. Stanwood v. Wishard, 134 F. 959. Suit against state corporation commission to enjoin enforcement of order, alleged to be void as interfering with interstate commerce, by bringing suits for penalties and damages, etc., held to involve more than $2,000. Southern R. Co. v. Greensboro Ice & Coal Co., 134 F. 82. In a suit for injunction, the amount involved is the value of the right to be protected or the extent of the injury to be prevented by the injunction. Anderson v. Bassman, 140 F. 10. Federal circuit court has jurisdiction to enjoin collection of license tax, where license imposed amounts to $2,600 per annum, and it is alleged that it would require more than a year to test the matter in the law courts. Humes v. Little Rock, 138 F. 929. In a suit to enjoin the enforcement of a license tax on complainant's business, alleged to have been intentionally made prohibitory, the amount in controversy is the value of the business. Id. In suit to set aside judgments of a probate court establishing claims against an intestate's estate which are a lien on realty inherited by complainants, on the ground that

"in controversy,"[44] or "recovered,"[45] and these amounts include or exclude costs, interest,[46] and the like, according as the terms of the various statutes provide. Wheth-

they were fraudulently obtained by defendants acting in concert, the value of the matter in dispute is the aggregate amount of the claims whose allowance was procured in furtherance of the fraudulent combination and conspiracy. McDaniel v. Traylor, 196 U. S. 415, 49 Law. Ed. 533. In the absence of proof of such a combination, the claim of each of the plaintiffs must, for jurisdictional purposes, be regarded as separate from all the others. Id. On petition for removal of a cause to the Federal court, the question of the amount in controversy is a jurisdictional fact, and, outside of necessity of making a prima facie case for removal, must be determined by the Federal court. State court must first decide whether record and petition show on their faces a right of removal, but inquiry in that court as to amount in controversy is ended where there is a bona fide demand for more than the jurisdictional amount, any dispute as to the amount recoverable, when not limited by law, being for the Federal court. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655.

42. In actions for unliquidated damages, the amount in controversy is ordinarily the amount which the plaintiff in good faith demands. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655.

43. Alabama: In action in city court "on a moneyed demand," where the recovery is below the minimum amount of the court's jurisdiction as fixed by Code 1896, § 3315, and the amount claimed is not reduced below that of which the court had jurisdiction by a set-off successfully made by defendant, and the statutory affidavit to avoid the setting aside of the judgment and dismissal of the suit is not made, the judgment will be set aside on appeal and the suit dismissed. Smith v. Allen [Ala.] 37 So. 933.

Illinois: In Illinois where there is trial on an issue of fact in the lower court, appeals and writs of error lie from the appellate to the supreme court where the amount claimed in the pleadings exceeds $1,000. Hurd's Rev. St. 1903, p. 569, c. 37, § 8. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. Issue of fact arises where material fact is alleged by the pleadings on one side and denied on the other. Id. None where demurrer to plea is sustained. Id. The amount claimed and not the amount of the judgment governs. Id.

Montana: Demand for $239 with 25 per cent penalty and legal interest is in excess of limit fixed for jurisdiction of justice by Code Civ. Proc. § 66, subd. 1. Oppenheimer v. Regan [Mont.] 79 P. 695.

New York: Municipal court has no jurisdiction of a contract action in which the "sum claimed" exceeds $500. Laws 1902, p. 1487, c. 580, § 1, subd. 1. Cohen v. Lewsen, 92 N. Y. 59. Has no jurisdiction where both summons and complaint claimed $500 with interest. Smith v. Dunn, 92 N. Y. S. 300. May enter judgment for $499, besides costs and allowances. Frenchi v. New York City R. Co., 92 N. Y. S. 771. Has jurisdiction of action for unliquidated damages for breach of contract, where summons stated that if defendant failed to appear plaintiff would take judgment for $500 with interest and costs, plaintiff not being entitled to recover interest on the amount of his alleged loss, and interest on his actual loss being recoverable only as part of the damages. Hamburger v. Hellman, 92 N. Y. S. 1067.

44. Indiana: Under Burns' Ann. St. 1901, § 1337j, it is the amount in controversy, exclusive of interest and costs, as shown by the judgment of the trial court on the merits, that determines the right of appeal from the appellate court to the supreme court under subd. 3, and such right does not lie unless such judgment exceeds $6,000. Avery v. Nordyke & Marmon Co. [Ind.] 73 N. E. 119. In all other cases, except in those specified in which an appeal lies directly to the supreme court, decision of appellate court is final, unless it contravenes a ruling precedent of the supreme court, or involves an erroneous decision of a new question, in which case the losing party may apply to have the case transferred to the supreme court. Id. Appeal authorized only where the amount in controversy, as established by the judgment of the trial court, exceeds $6,000, exclusive of interest and costs. Durbin v. Northwestern Scraper Co. [Ind.] 75 N. E. 1. Does not authorize an appeal where trial court overruled plaintiff's demurrer to appellant's answer, and rendered judgment in plaintiff's answer as against the other defendants, which, in so far as it overruled the demurrer, was reversed by the appellate court with directions to sustain the demurrer. Id. Under Burns' Ann. St. 1901, § 1337f, Acts 1901, p. 566, c. 247, § 6, as amended by Acts 1903, p. 280, c. 156, no appeal in any civil case lies to the supreme or appellate court where the amount in controversy exclusive of interest and costs does not exceed $50, except in the cases specifically designated in § 1337h (§ 8, Act of 1901). Appeal dismissed. Sears v. Carpenter [Ind.] 74 N. E. 244. Where, in action to recover statutory penalty, the amount recovered, exclusive of interest and costs, does not exceed $50, and plaintiff is satisfied with the judgment, and there is no set-off or counterclaim, that sum must be regarded as the "amount in controversy." Hood v. Baker [Ind. App.] 75 N. E. 608.

Kentucky: The court of appeals has no jurisdiction of an appeal from a judgment for $200, the amount sued for, where defendant admits liability for $40 in his answer and offers to confess judgment for that amount, the amount in controversy on the appeal being only $160. United States Health & Acc. Ins. Co. v. Webb's Adm'r [Ky.] 88 S. W. 1108. Court of appeals has jurisdiction of defendant's appeal where his counterclaim for more than $200 is rejected, though plaintiff recovers only $75. Gates v. Davis [Ky.] 89 S. W. 490. Appeal dismissed because amount in controversy was less than $200. Muir v. Muir [Ky.] 87 S. W. 1070. Under St. 1903, § 978, appeals may be taken to the circuit court from all orders and judgments of the fiscal court in civil cases where the value in controversy, exclusive of interest and costs, is over $25. Jefferson County v. Young [Ky.] 86 S. W. 985.

Texas: The county court has no jurisdiction where the amount in controversy does

er the existence of such an amount shall be determined from the pleadings[47] or from

not exceed $200. McRimmon & Co. v. Hart [Tex. Civ. App.] 87 S. W. 881. Where note provided for the payment of 10 per cent on the amount due on a note for attorney's fees in case suit was brought thereon, 10 per cent of total sum due at institution of suit, including interest, should be added to the principal, and county court has jurisdiction if the resulting total exceeds $200. Id. In an action to enforce a carrier's common-law lien for freight charges as enlarged by Rev. St. 1895, arts. 327, 328, 330, authorizing sale to pay freight charges of live stock remaining unclaimed for 48 hours, the value of the stock on which the lien is asserted, and not the amount of the charges, determines the jurisdiction of the trial court. Texas & N. O. R. Co. v. Rucker [Tex.] 13 Tex. Ct. Rep. 185, 87 S. W. 818, afg. [Tex. Civ. App.] 88 S. W. 815. Where carrier also seeks to recover property which has been taken from it wrongfully, value of property to which right of possession is asserted, and not the amount of freight charges, determines jurisdiction of trial court. Id. In action against three railroad companies for damages for injuries to live stock, the aggregate amount claimed against the three determines the question of jurisdiction of the county court, where it is alleged that the defendants were partners and acted as such in handling the shipment, since in such case each was liable for all the damages recoverable against either. International & G. N. R. Co. v. Lucas [Tex. Civ. App.] 84 S. W. 1082. Where petition alleged damages for physical and mental suffering in the sum of $1,000, and as an independent cause of action, 25 cents for sending a telegram, and prayer was that plaintiff have judgment "for all his damages, including his charges paid for the transmission and delivery of said message and cost of suit," held, that the damages asked exceeded $1.000, and county court had no jurisdiction. Western Union Tel. Co. v. Hawkins [Tex. Civ. App.] 85 S. W. 847. A judgment for plaintiff by the district court will be reversed and the case dismissed where it conclusively appears that the amount involved exceeds $200 and is less than $500, and hence was within the jurisdiction of the county rather than the district court. Bigby v. Brantley [Tex. Civ. App.] 85 S. W. 311. Under Laws 1895, p. 57, c. 45, the county court of Goliad county has concurrent jurisdiction with the justice court, and hence has jurisdiction of actions involving less than $200. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 1158. District court held to have jurisdiction of suit on note calling for $200 and attorney's fees. Groesbeck v. Thompson Mill. Co. [Tex. Civ. App.] 86 S. W. 346. In order to give court of civil appeals appellate jurisdiction over contract action appealed from justice to county court, the amount in controversy, or the judgment of the county court, must exceed $100, exclusive of interest and costs. Sayles' Ann. Civ. St. 1897, art. 996. Lacy v. O'Reilly [Tex. Civ. App.] 13 Tex. Ct. Rep. 918, 89 S. W. 640. Surety on note for $100, with interest after maturity and attorney's fees if collected by law, paid same at maturity, the principal having previously agreed to pay note in $5 instalments. One instalment was paid and surety commenced suit in justice court for balance. Judgment was rendered for defendant in justice court and in county court on appeal. Held, court of civil appeals had no appellate jurisdiction, the amount in controversy being less than $100, whether action was based on implied contract or on the express one, since in no event was surety entitled to recover more than the amount paid by him, with interest. Id.

Virginia: In suit involving liability of defendant on stock subscription, the amount in controversy is the par value of the stock. Elliott v. Ashby [Va.] 52 S. E. 383. Supreme court held to have appellate jurisdiction in suit by receiver of insolvent corporation to recover assessment on stock subscribed where amount subscribed for by defendant amounted to $1,000, though the judgment rendered against him was for less than $300. Id.

West Virginia: The test of appellate jurisdiction in the supreme court, when the plaintiff below is the plaintiff in error, and the matter in controversy is pecuniary, is the amount actually demanded in the court below, less the amount recovered, if any, and not merely the amount or additional amount, which he shows himself to be entitled to recover. Wallace v. Leroy [W. Va.] 50 S. E. 243. Where the amount in controversy is sufficient to give appellate jurisdiction, but plaintiff is prejudiced by an error in a sum less than the jurisdictional amount, the judgment will be reversed, but the costs in the supreme court will be adjudged to the defendant in error as the party substantially prevailing. Id.

Washington: Supreme court has no appellate jurisdiction in cases where the original amount in controversy does not exceed $200. National Grocery Co. v. Cann [Wash.] 81 P. 1054. Washington supreme court has no appellate jurisdiction of civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed $200. State v. Coon [Wash.] 82 P. 993. Has no jurisdiction of appeal from judgment awarding mandamus compelling city officials to pay judgment for $115 for costs awarded by the supreme court, where the legal question at issue is whether the city was the real party in interest and therefore liable for the costs, and the right of the court to enforce its own judgments is not involved. Id.

45. Colorado: Supreme court has no jurisdiction of appeals where the judgment below is for less than $2,500, unless it appears that a franchise or freehold is involved, or that a construction of the Federal or state constitution is necessary to a decision of the case. Appeal dismissed. Beam v. Harrington [Colo.] 79 P. 1013.

46. Under U. S. Rev. St. § 1927, providing that justices of the peace in Arizona shall not have jurisdiction in any controversy where the debt or sum claimed exceeds $300, the "debt or sum claimed" includes interest as well as principal, where interest is allowed and sought to be recovered in the action, and hence Ariz. Rev. St. 1901, § 2047, is invalid in so far as it attempts to exclude interest

the facts as against the pleadings, depends largely on the precise words of the statute, as it also does in the case where no value appears on the record. When two or more demands, for each of which a cause of action would lie, are properly joined in one suit, the failure to establish one or more of them will not deprive the court of jurisdiction, though the one established and proven is for a sum less than the jurisdictional amount.[48] Parties will not, however, be allowed to work a fraud on the court

from the amount determining jurisdiction. Brown v. Braun [Ariz.] 80 P. 323. The amount involved in a suit is the amount in controversy between the parties at the time the suit is brought, and interest accruing during the pendency of the suit cannot be added to make up the amount necessary to give jurisdiction to an appellate court Amount of principal and interest due when suit is brought. Lydston v. Auburgh, 216 Ill. 210, 74 N E. 796. Interest to the date of trial should be included in determining the amount in controversy, it being damages for delay and not interest within the meaning of the statute. Gulf, etc., R. Co. v. Fromme [Tex. Civ. App.] 84 S. W. 1054. Computing interest to date of filing suit, amount in controversy held not to be $100. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 854. In a suit for unliquidated damages, a prayer for "$1,000 damages, interest and costs" will be taken as demanding only interest on the judgment and not interest as additional damages, and hence a maximum jurisdiction of $1,000 is not exceeded. Atchison, etc., R. Co. v. Dawson [Tex. Civ. App.] 14 Tex. Ct. Rep. 139. 90 S. W. 65.

47. Where there is nothing to show bad faith, or where there is room for doubt, the pleadings control in determining the amount in controversy. Brown v. Edwards [Ga.] 50 S. E. 110. While Atlanta city court has no jurisdiction to try case within jurisdiction of justice, it has jurisdiction of suit on note for $100 and ten per cent. attorney's fees, where petition filed on return day alleges that notice required by statute in order to recover such fees (Acts 1900, p. 53, Van Epps' Code Supp. § 6185) has been given to defendant. Id. Where plaintiff in action for negligence in justice court only claimed $100 damages, and the evidence would have authorized a finding for a greater or a less amount, held not error to refuse to dismiss because damage proved was greater than the jurisdictional amount. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124. On proceedings in error the amount in controversy is to be determined by the amount claimed by plaintiff in his petition. Robinson v. Lamoureaux [Kan.] 80 P. 595. For the purposes of the appeal the plaintiff is bound by the allegations of his petition as to the value of the property claimed by him, and neither his right to appeal nor the jurisdiction of the court to which the appeal is taken fluctuates with the market value of such property. Real estate. Spremich v. Maurepas Land & Lumber Co. [La.] 38 So. 327. In New York municipal court where the claim for judgment in the summons, there being no written complaint, does not exceed $500, it, and not the bill of particulars, controls, the summons being required to state the amount for which plaintiff will take judgment if defendant fails to answer (Laws 1902, c. 580, § 27). Hamburger v. Hellman, 92 N. Y. S. 1067. If the complaint is in writing, it and not the bill of particulars determines the jurisdiction of the New York municipal court Frenchi v. New York City R. Co., 92 N. Y. S 771. A judgment for plaintiff in the district court is fundamentally erroneous where the petition fails to state a cause of action for the jurisdictional amount. Moore v. Snell [Tex. Civ. App.] 88 S. W. 270. In suit on $600 note, and for a balance of $32.50 on account, and for $250 damages, and petition shows that indebtedness evidenced by the note has been extinguished, district court has no jurisdiction. Id. In suit on note where one secondarily liable in his answer asked for judgment over against the maker for any sum for which he might be adjudged liable, his assertion of a claim for attorney's fees to which he was not entitled could not be considered so as to bring the amount within the appellate jurisdiction of the court of appeals. Franklin Life Ins. Co. v. Blackwell [Tex. Civ. App.] 87 S. W. 361. The "amount in controversy" within the meaning of Sayles' Ann. Civ. St. 1897, p. 1929, Act 1895, p. 57, c. 45, § 3, prohibiting appeals from the county court of Goliad county to the court of appeals "where the judgment or amount in controversy does not exceed $100," is the full amount recoverable by plaintiff under the allegations of his petition, even though the judgment actually recovered is less than $100. Gulf, etc., R. Co. v. Fromme [Tex. Civ. App.] 84 S. W. 1054. The date of the trial in the county court is the time at which the amount of recovery must be ascertained. Id.; Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 854. The ad damnum clause in a petition fixes the jurisdiction of the court when it depends on the amount of the matter in controversy. In action on liquor dealer's bond where the amount of damages laid by the petition was within the jurisdiction of the county court, that court was not deprived of jurisdiction because facts were alleged which would have entitled plaintiff to larger damages had he asked for them. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. It is the amount in good faith claimed and not the amount recovered which establishes the jurisdiction of Federal courts. United States v. Swift [C. C. A.] 139 F. 225. The jurisdiction of suits against the United States conferred on the circuit courts by section two of the Tucker Act extends to all suits of the class described in which the amount claimed in good faith exceeds $1000, although a smaller sum may be recovered. Act March 3, 1887, c. 359 (24 Stat. 505). Id. For purpose of determining whether amount is sufficient to authorize removal to Federal court, amount demanded in complaint controls, particularly in actions for unliquidated damages. Springer v. Bricker [Ind.] 76 N. E. 114. This is true though complaint may show that plain-

by purposely alleging a fictitious amount to be due in order to confer jurisdiction.[49] The suit should also be dismissed if the facts alleged be such as to show no cause of action as to such part of the whole sum sued for as to reduce it below the jurisdictional amount.[50] After jurisdiction has once attached, a party cannot ordinarily defeat it by changing the amount of his claim by amendment or otherwise.[51] In the absence of a statute to the contrary,[52] plaintiff cannot confer jurisdiction by remitting a part of the amount claimed.[53] Separate causes of action in favor of different parties cannot be grouped together by a common assignee so as to bring the amount within the jurisdictional limit.[54] Matters incidental to the main action may be determined regardless of the amount involved therein.[55] Where jurisdiction is

tiff was actually damaged in a larger amount. Id.

48. Western Union Tel. Co v. Siddall [Tex. Civ. App.] 86 S. W. 343. Fact that plaintiff failed to establish cause of action for mental suffering, etc., held not to prevent district court from rendering judgment for 25 cents, the price paid for sending telegram. Id. Where plaintiff sued appellant and another on two obligations, one for $550 and one for $200, the fact that the judgment of the district court exonerated appellant from liability on the former did not preclude it from assuming jurisdiction of the demand against him for the $200, in the absence of a special plea that the assertion of the $550 claim was made merely for the purpose of conferring jurisdiction and was unfounded in fact. Groesbeck v. Thompson Milling Co. [Tex. Civ. App.] 86 S. W. 346. Fact that there is no merit in claim for mental anguish in suit against telegraph company for failure to deliver telegram and that allegations in regard to it are stricken out does not deprive circuit court of jurisdiction, though the amount remaining in controversy is less than $200. Denham v. Western Union Tel. Co. [Ky.] 87 S. W. 788. Where the jurisdiction of the supreme court depends in part upon an amount claimed as damages, the appeal will not be dismissed unless the claim so made is clearly fictitious. Tieman v. Johnston [La.] 38 So. 75.

49. Browne v. Edwards [Ga.] 50 S. E. 110. Will not be presumed, in the absence of an allegation to that effect, that one of two demands joined in one suit, but not established, was fictitious, and was added merely for the purpose of fraudulently conferring jurisdiction on the court. Western Union Tel. Co. v. Siddall [Tex. Civ. App.] 86 S. W. 343.

50. Action in county court against telegraph company properly dismissed where plaintiff was not entitled to recover any of the damages alleged except the expenses of a certain trip, which were less than the jurisdictional amount. Kopperl v. Western Union Tel. Co. [Tex. Civ. App.] 85 S. W. 1018. Where special exceptions to the petition are sustained on the ground that the allegations are insufficient to warrant a recovery of certain items, and the amount remaining is less than $200, the county court is deprived of jurisdiction. Where allegations were insufficient to authorize recovery of statutory penalties. Texas & P. R. Co. v. Butler [Tex. Civ. App.] 86 S. W. 800. Though the amount claimed in the petition may be sufficient to give the court jurisdiction. Carswell & Co. v. Habberzettle [Tex.] 86 S. W. 738.

51. Whether the amount in controversy is sufficient to confer jurisdiction on the Federal circuit court of a suit sought to be removed to it is to be determined by the claim of the complainant as shown by the record at the time of filing the petition for removal (Johnson v. Computing Scale Co., 139 F. 339), and after removal he cannot defeat the jurisdiction of the Federal court by changing his position or the record for that purpose (Id.) A party cannot defeat a removal from a state to a Federal court by an amendment of his pleading diminishing his demand after the petition and bond for removal have been filed. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655.

52. Laws 1902, p. 1562, § 250, permitting a party to an action in the municipal court to remit the excess if "the sum found due exceeds the sum for which the court is authorized to enter judgment," applies only to cases where the court has acquired jurisdiction in the first instance, and not where the amount demanded in the summons and complaint exceeds the jurisdictional amount. Smith v. Dunn, 92 N. Y. S. 300. Where claim of plaintiff is for a judgment of $500, court has jurisdiction, though he establishes a right to recover more than that sum, provided he waives the excess. Hamburger v. Hellman, 92 N. Y. S. 1067.

53. Under U. S. Rev. St., § 1927, providing that justices of the peace in Arizona shall not have jurisdiction where the debt or sum claimed exceeds $300, jurisdiction depends upon the demand which plaintiff makes when suit is brought, and he cannot thereafter confer jurisdiction on the justice by remitting a portion of the amount claimed. Brown v. Braun [Ariz.] 80 P. 323.

54. Claims of coal miners against their employer, constituting separate causes of action and no single one of which exceeds $100, cannot be grouped together by a common assignee so as to bring the amount within the jurisdictional limits of the circuit court. Paris Mercantile Co. v. Hunter [Ark.] 86 S. W. 808.

55. In suit to enforce mechanic's lien arising on defendant's property under contract between his vendor and plaintiff, where vendor was made party and admitted the debt, but claimed that defendant had assumed it, and set up by cross bill a claim against defendant for sums which he had been compelled to pay on the contract, district court had jurisdiction to determine claim set up in cross bill as incidental to the suit, though it was in an amount beneath its jurisdiction. Haberzettle v. Dearing [Tex. Civ. App.] 80 S. W. 539. Where district court obtains jurisdiction of a suit by grantor in deed of trust to re-

conferred or limited on grounds other than the amount in controversy, such amount may be immaterial.[56]

§ 7. *Limitations resting in character of subject-matter or object of action.*[57]—Particularly in respect to courts below those of general original jurisdiction, and in case of appeals, is jurisdiction denied or conferred, where the action involves the title to land,[58] a freehold,[59] constitutional questions,[60] not previously decided by the

strain sale of his homestead included therein, it should retain jurisdiction for all purposes and grant complete relief, and hence should determine the issues raised by a cross petition of the payee of the note secured by the deed praying for a judgment on the note, though the amount thereof is less than $500. Walker v. Woody [Tex. Civ. App.] 13 Tex. Ct. Rep. 957, 89 S. W. 789.

56. An action to cancel contracts executed without authority and procured by fraud is of equitable cognizance, and hence is within the appellate jurisdiction of the supreme court regardless of the form of the judgment or the amount in controversy. Horrell v. California, O. & W. Homebuilders' Ass'n [Wash.] 82 P. 889. Proceedings to set out a widow's award are not ex contractu, and hence the amount in controversy is immaterial. Kroell v. Kroell [Ill.] 76 N. E. 63.

57. See 4 C. L. 334.

58. Mere statement of opinion in verified answer that title to realty will be involved, without stating facts from which such conclusion would follow, is insufficient to authorize certification of case to superior court from justice court. McAlister v. Tindal [Cal. App.] 81 P. 1117. The title to real estate may be involved in an action of trespass quare clausum fregit, but if brought before a justice of the peace, his judgment would not adjudicate the question of ownership of the freehold. It would be a fact in controversy, but not in issue. Appeal lies to supreme not appellate court. Weidner v. Lund, 105 Ill. App. 454. In the absence of a statute to the contrary, the test as to whether title to realty is so directly involved as to deprive a justice of jurisdiction is whether the issues to be litigated demand a judgment affecting title. Title is not directly involved where issues demand a judgment for money only. Pankey v. Modglin, 116 Ill. App. 6. Justice is not deprived of jurisdiction because title is incidentally involved. Id. Justice has jurisdiction of action to recover for breach of a covenant as to title in a deed of conveyance. Id. Where the amount in controversy is less than $200, the title to land must be directly involved and concluded by the judgment in order to give the Kentucky court of appeals appellate jurisdiction. Not sufficient that title is collaterally involved. City of Covington v. McKenna [Ky.] 86 S. W. 689. Not directly involved in suit on apportionment warrant for municipal improvement against property owner in which plaintiff seeks judgment against city if owner is not liable, and in which owner files cross petition against city claiming to own the street, and denying that it is a city street, where judgment was rendered holding that city did not own street and dismissing petition against the property owner, and giving plaintiff judgment against city for less than $200, but expressly reserving cross petition for further adjudication. Id. In an action for land occupied by the way of a railroad and defended by a plea of prescription, questions of taking, expropriation and the statutes thereon are involved. Scovell v. St. Louis S. W. R. Co. [La.] 38 So. 582. Summary eviction proceedings before court commissioner should be dismissed where proof shows that title to land is involved. Meeske v. Miller [Mich.] 101 N. W. 52. Title is not in controversy where defendant is in possession under an agreement making him plaintiff's tenant either at an agreed rent, or at will or sufferance, since he cannot deny landlord's title. Id. Title to lands cannot be tried in prosecution in recorder's court for obstructing the street. People v. Wolverine Mfg. Co. [Mich.] 12 Det. Leg. N. 491, 104 N. W. 725. In order to oust court of jurisdiction there must be a bona fide contention either as to the existence of the highway or the title of the lands where the alleged obstructions are located. Id. Existence of highway held to be so clearly shown as to admit of no bona fide contest, particularly as defendants recognized its existence, and hence court had jurisdiction. Id. Title to realty held clearly involved in suit in which plaintiffs prayed for its possession. Tice v. Hamilton [Mo.] 87 S. W. 497. In suit to enjoin corporation from collecting tolls on a gravel road, where issues tendered were whether charter of company to which defendant had succeeded had expired, and whether defendant had failed to keep its road in repair within statute providing for forfeiture of its charter if it failed to do so, held, that title to realty was not involved. State v. Louisiana, B. G. & A. Gravel Road Co., 187 Mo. 439, 86 S. W. 170. Question whether minors to whom homestead had been set apart should be allowed to retain it during their minority, though it had risen in value until it was worth more than $1,500, or whether it should be sold and $1,500 should be invested for their use and the balance be distributed to the owners of the fee, held to so far involve or affect the title to the realty as to warrant a transfer of the cause from the court of appeals to the supreme court. Brewingon v. Brewington, 110 Mo. App. 569, 85 S. W. 640. The title to realty is involved in proceedings by a city to condemn land for a street and hence the supreme court has appellate jurisdiction. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. In summary proceedings for possession of land, instituted before justice and removed to circuit court, where relation of landlord and tenant is established, title to land is not involved since tenant cannot question landlord's title. Diiks v. Kelsey [N. J. Law] 59 A. 897. The test for determining whether a case is a mere case of boundary is whether there would have been any case had the question of boundary been eliminated. Trespass to try title to establish plaintiff's right to a certain survey, defendants claiming under prior surveys, and plaintiff that such

court of last resort,[61] properly raised and passed upon below,[62] decided adversely to

prior surveys did not embrace any part of the land for which she sued, and that the patents thereto were void, held not a mere "case of boundary" of which supreme court had no jurisdiction, since there would still be a case if the boundary case was eliminated. Mansfield v. Gilbert [Tex.] 86 S. W. 922.

59. An appeal directly to, or a writ of error directly from, the supreme court from or to the trial court lies in Illinois in cases in which a freehold is involved. Van Tassell v. Wakefield, 214 Ill. 205, 73 N. E. 340. A freehold is involved only in cases where either the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. Id.; Douglas Park Bldg. Ass'n v. Roberts, 218 Ill. 454, 75 N. E. 1018; Hursen v. Hursen, 110 Ill. App. 345; City of Mattoon v. Noyes, 113 Ill. App. 111. Appeal must be to appellate court if freehold is not involved in points assigned for error. Douglas Park Bldg. Ass'n v. Roberts, 218 Ill. 454, 75 N. E. 1918.

Freehold held to be involved: Where plaintiff claimed fee of street subject to public easement, and defendant denied this and alleged that fee was in city. Wilder v. Aurora, DeK. & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. Where attachment is levied on land as belonging to defendant, and a third party interpleads and alleges that he, and not the attachment defendant owns the land. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. In judgment of circuit court, on appeal, admitting to probate a will which does not specifically devise realty, where it sufficiently appears from the record that decedent owned realty which passed under the residuary clause of the will. Senn v. Greundling, 218 Ill. 458, 75 N. E. 1020. In suit to set aside and cancel warranty deed for fraud, and court of appeals had no jurisdiction. Hursen v. Hursen, 110 Ill. App. 345. Where the question at issue is whether particular land was dedicated as a street, and this is true whether the alleged dedication was a statutory or a common-law one. City of Mattoon v. Noyes, 113 Ill. App. 111.

Freehold held not to be involved: Bill to set side a conveyance as in fraud of creditors, or to declare premises the title to which stands in one person subject to be sold to pay the debt of another. Brockway v. Kizer, 215 Ill. 188, 74 N. E. 120. In determination of rights accruing under an ordinance authorizing a property owner to construct a platform on a sidewalk, the permission to cease at the end of ten years. Chicago Cold Storage Warehouse Co. v. People, 215 Ill. 225, 74 N. E. 133. By bill in aid of execution for the purpose of subjecting realty to the lien of a judgment and satisfying the execution, even though it seeks to have the legal title standing in the name of another person declared to be in the judgment debtor. Fairbanks v. Carle, 217 Ill. 136, 75 N. E. 360. Not necessarily involved where defendant may defeat the object of the suit, so far as it seeks to disturb his title, by paying off the claim sought to be enforced against it, as where the proceeding is one to enforce a lien. Not where order provided that plaintiff in ejectment should have the option of paying petitioner for improvements on realty a certain sum within a specified time, or in default thereof, petitioner should have the right to enter and remove them. Van Tassell v. Wakefield, 214 Ill. 205, 73 N. E. 340. It is involved in a proceeding to sell a decedent's realty to pay his debts only when some question is raised in regard to the title of the land. Not where it is admitted that decedent owned land, and that his widow is entitled to dower and homestead therein. Roberson v. Tippie, 215 Ill. 119, 74 N. E. 96. In suit to have deed absolute in form declared a mortgage and to permit a redemption therefrom, though the decree sought would necessitate the setting aside of a deed made by the grantee to a third person who took with notice. Eddleman v. Fasig, 218 Ill. 340, 75 N. E. 977. In trespass quare clausum fregit growing out of a taking possession of the premises by a receiver in foreclosure proceedings in which a plea of liberum tenementum is filed, where question of title is not necessarily involved, and case was not tried on theory that it was involved, but the sole question was as to the right to possession. Douglas Park Bldg. Ass'n v. Roberts, 218 Ill. 454, 75 N. E. 1018. In creditor's bill to collect judgment, and to that end to compel the execution of a trust established by a will. Linn v. Downing, 116 Ill. App. 454. In action of trespass quare clausum fregit to recover for alleged encroachment upon premises of plaintiff in putting down sidewalk on public street. McDowell v. Jones, 116 Ill. App. 13.

60. **Colorado:** Supreme court has no jurisdiction to review judgments of district court on appeal from the action of the county commissioners in refusing relief against an alleged unjust assessment, where the only thing necessary to a determination of the case is a construction of statutes. Court of appeals has jurisdiction. Board of Com'rs of Teller County v. Independence Consol. Gold Min. Co. [Colo.] 79 P. 1012.

Illinois: Before the supreme court of Illinois will take jurisdiction upon appeal or writ of error, to review the decree of a superior court, upon the ground that a construction of the constitution is involved, it must appear from the record that such question is involved, and it must be a fairly debatable one, raised in good faith. Griveau v. South Chicago City R. Co., 213 Ill. 633, 73 N. E. 309. Though it may appear that constitutional question was involved in trial court, it will not be considered by supreme court unless it is preserved in the record and the ruling of the trial court thereon is assigned as error. Id. Allegation that ordinance is unjust, unreasonable and oppressive does not raise constitutional question. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439. It must appear that the constitutional question was involved. Id. Bill to restrain construction of railroad in street in front of plaintiff's premises, alleging that he was owner of fee to center of street and that defendant was about to construct road wtihout compensating him and in violation of his constitutional rights,

appellant or in a manner prejudicial to his rights,[63] saved for review,[64] and assigned

held to present constitutional question warranting direct appeal to supreme court. Wilder v. Aurora, DeK. & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. Refusal to allow amendment raising a constitutional question does not raise constitutional question. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439. An ordinance is not a statute within the meaning of the Illinois statute authorizing the supreme court to take jurisdiction of appeals from the circuit court in cases where the validity of a statute is involved. Id. Illinois appellate courts have no jurisdiction to determine the validity of an act of the legislature. Village of Morgan Park v. Knopf, 111 Ill. App. 571.

Indiana: The supreme court has exclusive jurisdiction of appeals involving the constitutionality of a statute. Burns' Ann. St. 1901, § 1337i, Acts 1901, p. 566, c. 247, § 9. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727. Under Acts 1901, p. 566, c. 247, § 8, cases involving the validity of a franchise, ordinance, or statute or the proper construction of a statute, which would be otherwise unappealable under § 6, are appealable directly to the supreme court, for the purpose of presenting the specified matters only. Hood v. Baker [Ind. App.] 75 N. E. 608. Action for penalty for failure to release mortgage of record held to involve construction of penal statute, and transferred from appellate to supreme court. Id. § 8 of the act of 1901 is applicable to civil cases mentioned in § 6 as amended by act of 1901. Id.

Missouri: Question whether homestead was exempt from execution under judgment for alimony rendered prior to Acts 1903, p. 240, providing that no property shall be exempt from execution based on such a judgment, where execution was not issued until after such statute went into effect, certified by court of appeals to supreme court as involving a question of vested constitutional right. Myher v. Myher [Mo. App.] 87 S. W. 116. In proceeding to recover fine for engaging in business as a merchant without obtaining license as required by town ordinance, Federal question properly raised so as to authorize removal from court of appeals to supreme court, where requested instruction that business was interstate commerce and hence could not be taxed was refused, and an exception to such refusal was duly saved and preserved in the bill of exceptions. Town of Canton v. McDaniel [Mo.] 86 S. W. 1092. No constitutional question raised by instruction authorizing a verdict by nine jurors, where it appears from the record that the verdict was unanimous. Shareman v. St. Louis Transit Co., 186 Mo. 323, 85 S. W. 358.

Washington: The supreme court of Washington has jurisdiction to review a judgment in an action involving the validity of a statute regardless of the amount in controversy. Const. art. 4, § 4, and 2 Bal. Ann. Codes & St. § 4650. Shook v. Sexton, 37 Wash. 509, 79 P. 1093. Of case involving validity of city ordinance. Id.

61. If previously passed upon will not sustain a direct writ of error to the superior court, unless special reasons appear for its further consideration. Griveau v. South Chicago City R. Co., 213 Ill. 633, 73 N. E. 309. An appeal having been properly taken to the supreme court on the ground that a constitutional question is involved, that court is not deprived of jurisdiction by reason of the fact that such question is thereafter determined by it in another case. State v. Hemenover [Mo.] 87 S. W. 482; Boling v. St. Louis & S. F. R. Co. [Mo.] 88 S. W. 35.

62. Supreme court has appellate jurisdiction where constitutional question is properly raised below and is decided against appellant, and exceptions to such decision are properly saved. Haag v. Ward, 186 Mo. 325, 85 S. W. 391. Question held sufficiently raised by exceptions to instructions. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. Must have been invoked and denied unless such question is necessarily involved. Hutchinson & Co. v. Morris Bros. [Mo.] 89 S. W. 870. Constitutionality of Rev. St. 1899, § 4277, forbidding suits to foreclose mortgages given to secure debts barred by limitations, held not necessarily involved in controversy as to ownership of surplus arising on foreclosure. State v. Bland, 186 Mo. 691, 85 S. W. 561. Must have been squarely raised below. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. Merely excepting to charge that nine jurors might render a verdict invokes no constitutional protection. Carmody v. St. Louis Transit Co. [Mo.] 87 S. W. 913. No constitutional question involved as to whether amendment authorizing verdict by nine jurors in civil cases was properly adopted, where defendant failed in any manner to refer to such amendment or to point out why it was invalid, but merely claimed in motion for new trial that court improperly authorized such a verdict, "it being contrary to the constitution of the state for a verdict to be rendered by less than all of the panel." Id. Has appellate jurisdiction where record clearly shows that defendant invoked protection of both state and Federal constitutions and pointed out specific section and article of each on which it relied, and constitutional question was decided against it. Shareman v. St. Louis Transit Co. [Mo. App.] 89 S. W. 575. Mere allegation in pleadings that statute under which ordinance was enacted was unconstitutional and void, held insufficient, where ordinance was introduced by appellant himself to show that it was not complied with in the particular case, and trial court had no opportunity to pass on the question. City of Excelsior Springs v. Ettenson [Mo.] 86 S. W. 255. Specific constitutional question alleged to have been infringed must be pointed out, unless question is in record in such form that its decision is necessary to a decision of the case. Id. Question cannot first be raised in court of appeals. Exception to decision of trial judge that relators were lawfully appointed held to sufficiently raise question of constitutionality of statute under which appointment was made, where that question was only one considered by appellate division. People v. Houghton [N. Y.] 74 N. E. 830.

63. State v. Bland, 186 Mo. 691, 85 S. W. 561; Haag v. Ward, 186 Mo. 325, 85 S. W. 391; Shareman v. St. Louis Transit Co. [Mo. App.] 89 S. W. 575. Record must show that

as error in the appellate court,[65] a franchise, taxes or revenues,[66] the title to a public office,[67] certain tort liabilities, and where any kind of equitable relief or cognizance is sought.[68] More often the statute simply provides what jurisdiction inferior courts shall have, impliedly excluding all else.[69] By statute, such jurisdictions as those exercised by the bankruptcy courts,[70] courts of probate and the like, often become

its decision is necessary to the determination of the case, that the point was raised below, and that the protection of the constitution claimed by the losing party was denied him. Hutchinson & Co. v. Morris Bros. [Mo.] 89 S. W. 870. Mere giving of instruction that verdict might be rendered by nine jurors does not raise constitutional question unless it affirmatively appears from the record that such a verdict was in fact rendered. Id. Where verdict read, "We, the jury," etc., it will be presumed to have been unanimous, in the absence of any showing to the contrary. Id. The burden is on appellant to have the record show that it was not unanimous. Id. Under Const. § 88, where the jurisdiction of the supreme court of appeals depends solely upon the fact that the constitutionality of a law is involved, it cannot decide the case on the merits unless the contention of the appellant on the constitutional question is sustained. Postal Tel. Cable Co. v. Umstadter, 103 Va. 742, 50 S. E. 259. Appellants cannot invoke the presence of a constitutional question in a cause as a ground for an appeal from the circuit court of appeals to the supreme court, where, if decree disposed of any such question, it was in their favor. Empire State-Idaho Mln. & Developing Co. v. Hanley, 198 U. S. 292, 49 Law. Ed. 1056.

64. See, also, Saving Questions for Review, 4 C. L. 1368. Proper objection and exception to ruling must have been taken. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329; Haag v. Ward, 186 Mo. 325, 85 S. W. 391. Exception must be preserved by bill of exceptions unless point appears in record proper. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

65. See Appeal and Review, 5 C. L. 121. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439.

66. In Illinois, appeals in all cases relating to the public revenue must be taken directly to the supreme court. Practice Act, § 88. Test is whether revenue will be, or is likely to be, increased or diminished as a result of the proceeding. Sumner v. Milford, 112 Ill. App. 623. Appellate court held to have no jurisdiction of bills to enjoin levying tax for local improvements on ground that ordinance under which assessment was made is invalid. Id. Question as to the sufficiency of the cause of action as filed before a justice of the peace in an action to recover a delinquent poll tax of $3 does not involve a construction of the revenue laws so as to give supreme court appellate jurisdiction. State v. Holland, 186 Mo. 222, 85 S. W. 356. A claim that property is exempt from taxation involves the legality of a tax. Monongahela River Consol. Coal & Coke Co. v. Board of Assessors [La.] 39 So. 601.

67. Under Const. art. 109, the district court has jurisdiction in all cases where the title to office is involved, "or other public position even where no specific amount is in contest." Reynolds v. Carroll [La.] 38 So. 470. Issues arising in contest for office. McClenny v. Webb [La.] 38 So. 558. Supreme court has exclusive appellate jurisdiction in cases involving title to an office under the state. Const. art. 6, § 12. State v. Fasse [Mo.] 88 S. W. 1. Office of school director is such an office. Id. Circuit courts have no original jurisdiction of election contests or recounts, nor authority to prevent by writ of prohibition a person claiming to have been elected to an office from taking the same, and assuming and exercising its powers and duties, or the ground of invalidity of the election or ineligibility of the party claiming the office. By awarding writ in such case, judge subjects himself to writ of prohibition from supreme court. Moore v. Holt, 55 W. Va. 507, 47 S. E. 251. By its writ of prohibition a court acquires no jurisdiction of a controversy concerning the title to an office. Id.

68. Superior court has jurisdiction of exceptions of devisees and legatees to the award of arbitrators in an action against an administrator on a claim against the estate of his decedent, though the ground of exception is fraud and collusion practiced on the arbitrators by the parties. Is of legal jurisdiction. Pepper v. Pepper [Del. Super.] 62 A. 232. A city court has no jurisdiction to grant affirmative equitable relief. Ragan v. Standard Scale Co. [Ga.] 50 S. E. 951. The city court granting such relief its judgment will be reversed. Id. May, however, entertain jurisdiction of an equitable plea purely defensive in its nature, which, if sustained, would result simply in a general verdict in favor of defendant, as the plea of fraud in suit on note. House v. Oliver [Ga.] 51 S. E. 722. Verdict and judgment for defendant in suit on note as effectually cancels note as would a decree in equity, as suit thereon in city court will not be enjoined in order that court of equity may cancel note for fraud. Id. Court of appeals held to have appellate jurisdiction of suit in equity by a firm creditor after the death of one partner against the surviving partner for the settlement of the partnership affairs and to compel survivor to pay back money alleged to have been withdrawn by him after the other partner's death, and to subject the assets to payment of partnership debts, where defendant denied the existence of the partnership, though plaintiff's claim was less than $200. Lapp v. Clark's Adm'r [Ky.] 85 S. W. 717. Equitable action by trustee in bankruptcy to recover a preference is not within the jurisdiction of the city court of city of New York, as defined by Code Civ. Proc. § 315. Dyer v. Kratzenstein, 92 N. Y. S. 1012.

69. See § 9c, post.

70. The circuit court of appeals has no jurisdiction to determine a question of the construction or application of the Federal constitution with reference to the validity of Bankr. Act July 1, 1898, c. 541, § 38, cls.

exclusive, or at least primary.[71] Special statutory jurisdictions are limited to the occasions and objects contemplated by the statutes.[72]

§ 8. *Limitations resting in character or capacity of parties litigant.*[73]

§ 9. *Original jurisdiction. A. Exclusive, concurrent and conflicting.*[74]—When by reason of any of the statutes or rules discussed in the preceding sections, only one court can act authoritatively, its jurisdiction is said to be exclusive.[75] If two or more courts have jurisdiction, either inherent or conferred, this jurisdiction is called concurrent.[76] When of two courts which have concurrent jurisdiction,

2, 4; 30 St. 555, prescribing the jurisdiction of referees in bankruptcy. In re Abbey Press [C. C. A.] 134 F. 51. Circuit court has no jurisdiction of suit in equity against a trustee in bankruptcy to require him to pay over dividends on property claimed by complainant, but sold as assets of the bankrupt estate by the defendant under an order of the court. Cannot interfere with bankruptcy court. Treat v. Wooden, 138 F. 934.

71. Chancery court has complete jurisdiction to determine all matters relating to the administration of estates, and is always open for the hearing of petitions by any one interested asking for the construction of the will of a decedent. Owens v. Waddell [Miss.] 39 So. 459. Though the ordinary jurisdiction of courts of equity over administrations has been taken away and conferred on probate courts or has become obsolete, yet there still remains an auxiliary or supplemental jurisdiction to be exercised in exceptional cases, where the jurisdiction of the probate courts is confessedly inadequate or has been found insufficient. Jurisdiction over purely equitable rights and to administer equitable remedies not taken away merely because interest, right, or remedy grows out of, or is connected with, an estate of a decedent. Lindemann v. Rusk [Wis.] 104 N. W. 119. Under Rev. St. 1898, § 3845, as amended by Laws 1899, p. 7, c. 5, providing that actions may be prosecuted in circuit court against executors when county court cannot afford as adequate or efficient remedy, determination of circuit court that it has jurisdiction will not be disturbed unless clearly erroneous. Id. Circuit court has jurisdiction of suit by executors of deceased director of corporation to wind it up, in which cross bill is filed against executors to recover, as corporate asset, a sum alleged to be due the corporation because of a conversion of its good will by deceased. Id. Circuit court has jurisdiction of bill by administrator of deceased partner against the representatives of another deceased partner, whose estate is in process of settlement in the county court, and a surviving partner, for a partnership accounting, the county court having no jurisdiction either to bring before it, or render judgment against the surviving partner, who was a necessary party. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

72. See post, § 9 C.

73, 74. See 4 C. L. 335.

75. See §§ 4 to 8, ante. Allowance of widow's dower in personalty and extent of her dower in lands, and matters relating to waste and mismanagement of the estate of a decedent during the course of administration are exclusively within the jurisdiction of the probate court. Washington v. Govan [Ark.] 84 S. W. 792. Under Const. art. 6, § 5, giving the superior court original jurisdiction in all cases in equity, and of all special cases and proceedings not otherwise provided for, it has exclusive original jurisdiction of a suit by the district attorney to abate a public nuisance brought under St. 1899, p. 103, c. 88. People v. Wing [Cal.] 81 P. 1103. Under Const. art. 6, § 18, the county courts have exclusive original jurisdiction of proceedings to probate alleged lost wills, and court of equity has no jurisdiction. Beatty v. Clegg, 214 Ill. 34, 73 N. E. 383. The probate court has exclusive original jurisdiction to construe a will when such construction is necessary to the administration of decedent's estate. Appleby v. Watkins [Minn.] 104 N. W. 301. If there be a contest on the filing of an affidavit of inability to pay costs of an appeal or writ of error, and the trial court is not in session, the county judge alone can try the same, but if the trial court is in session, either it or the county judge may do so. Sayles' Ann. Civ. St. 1897, art. 1401, construed. Accousi v. Stowers Furniture Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 362, 87 S. W. 861. The creation of a tribunal within a political party to settle controversies between several conventions, each claiming to be the legal one, no provision being made for a judicial review of its decisions, necessarily makes its jurisdiction exclusive and its decisions unimpeachable except for jurisdictional defects. State v. Houser, 122 Wis. 534, 100 N. W. 964. Jurisdiction of supreme court limited to deciding whether republican state central committee was or is without jurisdiction because of bias or interest of some of its members, or whether its decision is affected by jurisdictional defects. Id. It being an administrative body, bias or prejudice of some of its members does not affect its jurisdiction. Id. A statute allowing the judge of one court at the request of another court to decide equity matters does not impair the exclusive equity jurisdiction of the latter court. P. L. 208. Morgan v. Reel [Pa.] 62 A. 253.

76. Supreme court of District of Columbia has not concurrent jurisdiction with justices of the peace in proceedings for the unlawful detainer of realty, and hence right of removal to supreme court by writ of certiorari exists in such case under D. C. Code, § 8. Brown v. Slater, 23 App. D. C. 51. The existence of concurrent jurisdiction in two states over a river which forms a common boundary vests in each state jurisdiction over all matters of state cognizance occurring on any part of the river. The courts of Missouri have jurisdiction of an unlawful sale of liquor on the Illinois side of the channel of the Mississippi. State v. Seagraves [Mo. App.] 85 S. W. 925. Under a statute organizing a court of common pleas and giving said court concurrent original jurisdiction in all civil

both assume to act, there is a conflict,[77] and the court which has first acquired jurisdiction retains the cause,[78] and it may enforce this by acting on the persons of the litigants,[79] but not by controlling the other court. A state court may entertain a

actions at law with the circuit court of the county, said common pleas court has equitable jurisdiction. Oliver v. Snider, 176 Mo. 63. 75 S. W. 591. Superior court has jurisdiction of an action to establish a lost deed the record of which has also been destroyed. Remedy before the clerk under Clark's Code, § 56, not being exclusive. Jones v. Ballou [N. C.] 52 S. E. 254. Equity jurisdiction conferred upon court of common pleas by Act June 2, 1887, § 3, P. L. 310, in regard to certain water company, was for protection of public interests and to insure performance of public duty, and did not abrogate jurisdiction of law courts to adjudicate questions of damage growing out of contract between company and private individuals. Brace v. Pennsylvania Water Co., 24 Pa. Super. Ct. 249. Where state court authorizes plaintiff to sue its receiver in any court of competent jurisdiction, it is no abuse of the rule of comity to bring the action in the Federal circuit court, it appearing from the pleadings that the jurisdictional requirements exist. James Freeman Brown Co. v. Harris [C. C. A.] 139 F. 105. Federal courts have concurrent jurisdiction with state courts to establish claims against estates of deceased persons. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

77. The question of conflict between courts of concurrent jurisdiction does not arise where another division of the court first assuming jurisdiction determines another branch of the case. Byrnes v. Byrnes [La.] 38 So. 991. Under Const. 1898, art. 134, the civil district court for the parish of Orleans, though it has several divisions, is but a single court of general jurisdiction. Id. Held too late for one of the heirs who had participated in all the proceedings for the partition of succession property in division C. of the civil district court until after a sale, to bring suit to annul proceedings on ground that at time when judgment was rendered in that division the succession which had been opened in division A. had not yet been closed. Id.

78. Rule applies though second court is one of general and superior jurisdiction, and such cause cannot be transferred to the latter court by certiorari. Applies to cases in which justice and supreme court of District of Columbia have concurrent jurisdiction. Brown v. Slater, 23 App. D. C. 51. Where one has, in good faith, instituted suit for divorce in one circuit court, and process has been issued and placed in hands of sheriff for service, another circuit court cannot assume jurisdiction of another suit for divorce by defendant in former suit. Wells v. Montcalm Circuit Judge [Mich.] 12 Det. Leg. N. 301, 104 N. W. 318. Where state court had jurisdiction of parties and subject-matter of suit to wind up affairs of building association prior to a suit for same purpose in Federal court, it had jurisdiction to finally determine the same. Cobe v. Ricketts [Mo. App.] 85 S. W. 131. The Federal circuit court is of restricted but not of inferior jurisdiction, and if it has jurisdiction over the subject-matter of a particular case it may proceed with the cause, if the requisite facts exist to authorize it to exercise its jurisdiction. Id. Where sheriff who held levy under execution on property of one subsequently declared a bankrupt, on application to the Federal court for taxation of his poundage and charges, was disallowed poundage but allowed costs and charges for keepers, held that he could not thereafter move in state court for taxation of poundage, but his remedy was by appeal in Federal court. Is attempt to review decision of court of concurrent jurisdiction. Johnson v. Woodend, 44 Misc. 524, 90 N. Y. S. 43. Act of district judge in chambers of receiving and considering a petition for the appointment of a receiver for a corporation, held an assumption of jurisdiction over the subject-matter of the suit, and subsequent order appointing a receiver related back to the time when the judge began the consideration of the petition. Judgment of court of concurrent jurisdiction foreclosing attachment lien on property in controversy reversed. Worden v. Pruter [Tex. Civ. App.] 13 Tex. Ct. Rep. 461, 88 S. W. 434.

As between state and Federal courts: Federal court having acquired jurisdiction in action at law, state court will not enjoin plaintiff from prosecuting his demands, though items of account involved are so numerous as to endanger a careful consideration by a jury. Shaw v. Frey [N. J. Eq.] 59 A. 811. The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, in which it may be necessary to obtain possession and control of it, retains jurisdiction to the end, free from the interference of any court of co-ordinate jurisdiction. Where state court has acquired jurisdiction over realty in controversy, subsequent proceedings in Federal court will be stayed before property is seized, until proceedings in state court are terminated, or ample time for their termination has elapsed. Williams v. Neely [C. C. A.] 134 F. 1. Where state court has assumed jurisdiction of suit to foreclose railroad mortgage, appointed a receiver, and has power to grant complainants relief with reference to rolling stock on which they claim a lien, etc., Federal court will not assume jurisdiction of bill to enjoin sale of such rolling stock and to protect and enforce such lien. Security Trust Co. of Camden v. Union Trust Co., 134 F. 301. Where the Federal supreme court had allowed an appeal to it from a judgment of a Federal district court denying a writ of habeas corpus asked for in a criminal case and challenging petitioner's conviction on constitutional grounds after affirmance of such judgment by the state supreme court, held, that the Federal courts were the proper tribunals to decide questions concerning custody of the accused pending the appeal and state court would not interfere on petition for writ of habeas corpus to procure a change of custodians. In re Lee Look, 146 Cal. 567, 80 P. 858.

79. Where no Federal question is involved, a state court may restrain a party litigant in a Federal court, over whose person it has

bill to restrain the enforcement of a decree or judgment of a Federal court on the ground that it was procured by fraud.[80]

The pendency of another suit in all respects identical is matter of abatement[81] or stay,[82] and in equity relief may be denied or conditions imposed to avoid a possible conflict, even though the suits are distinct or not precisely identical.[83] A noncitizen stockholder may maintain a suit in the Federal courts to restrain the use of the corporate assets in an alleged ultra vires business, and have the matter adjudicated therein, notwithstanding the pendency of prior suits for similar relief in the state courts, all the suits being in personam, and there being no conflict over the proper-

jurisdiction, until he shall make such discovery of evidence as the rules of equity require. May compel discovery of matters necessary to fair trial of law action in Federal court, and for that purpose restrain prosecution of latter action pending the discovery, where both parties are residents of same state. Shaw v. Frey [N. J. Eq.] 59 A. 811.

80. Keith v. Alger [Tenn.] 85 S. W. 71.

81. See Abatement and Revival, 5 C. L. 1.

82. The pendency in a state court of a prior action between the same parties which involves the same subject-matter as a subsequent action in the Federal court presents no bar, and furnishes no ground for the abatement of the latter action. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650. Cannot be pleaded in abatement. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1. Though the state court has, by proper process, secured the custody or dominion of specific property, which it is one of the objects of the suit in the Federal court to subject to its judgment or decree, the latter action should not be dismissed, but it should proceed as far as may be, without creating a conflict concerning the possession of the property, and then be stayed until the proceedings in the state court have been concluded, or ample time for their termination has elapsed. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650.

83. See Equity, 5 C. L. 1144.

Illustrations: A court will not entertain an action to recover property in the possession of defendant as receiver of another court unless leave to sue its receiver has been obtained from the latter court (Isom v. Rex Crude Oil Co. [Cal.] 82 P. 319), and the want of power in the Federal court to entertain such a suit is held to be jurisdictional (Id.). Federal court held not deprived of jurisdiction of suit against assignee of lease to cancel same by reason of the fact that the property covered thereby was in the hands of a receiver appointed by a state court in a similar action, and that leave had not been obtained from the state court to sue him, he not being a party to the action and the judgment in no way interfering with him. Id. A state court, having property in its possession through its receiver, may, in proper case and as a matter of comity, order him to turn it over to the Federal court in aid of the enforcement of its writ, but such an order in an improper case is error. Order pending appeal from judgment in action in which receiver was appointed held erroneous. Id. Purchaser of railroad under decree of foreclosure by Federal court and receiver appointed by such court can be sued in state court for death of passenger while road was being operated by receiver, where decree of foreclosure provides that purchaser shall take property subject to any liability incurred by receiver, and decree appointing receiver provides that he may be sued in any court of competent jurisdiction, particularly in view of Federal statute authorizing suits against receivers appointed by Federal courts without previous leave of court. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727. In New York the commencement of an action against a receiver without leave does not affect the jurisdiction. Merely constitutes contempt, and action is regular until proceeding is stayed or set aside by the court. Pruyn v. Black, 93 N. Y. S. 995. Action by a trustee in bankruptcy against one holding and claiming as his own money alleged to have been paid by the bankrupt in fraud of creditors may be brought in court of common pleas, since it would have had jurisdiction if bankruptcy had not intervened. Breckons v. Snyder, 211 Pa. 176, 60 A. 575. It is proper for a state court rendering judgment against a receiver appointed by a Federal court to certify such judgment to the latter court to be disposed of as it may see fit. Reardon v. White [Tex. Civ. App.] 87 S. W. 365. A state court, within the exercise of its jurisdiction over a case properly pending before it, has the power to determine the effect of a judgment and decree of a Federal court, and a conveyance made in pursuance thereof, where rights thereunder are asserted in cases pending before it. Federal court is, however, better qualified to determine these facts. Id. Plaintiff attached realty of defendant in an action in the Federal court. Pending the action, insolvency proceedings were instituted against defendant in a state court, and a receiver was appointed, who sold such attached land, the execution of a conveyance therefor, however, being deferred until final settlement of the insolvent's estate. Subsequently plaintiff recovered judgment in the Federal court, on which execution was issued, but the state court then stayed the sale of the attached property, in a suit by the receivers against the plaintiff and the marshal. Held that, in view of the fact that the attachment of realty does not give the court either actual or constructive possession thereof, the Federal court would not enjoin the receivers from further prosecuting their suit but would await the final determination thereof by the state court. Ingraham v. National Salt Co., 139 F. 684. Where pending a suit by creditors in state court to set aside conveyance as fraudulent and before a decree or pleading by the defendant therein, defendant obtained

ty in custodia legis.[84] A court which has the actual custody and possession of property to which another court of concurrent jurisdiction has prior and superior right may lawfully retain the property until the latter court, through its proper officer, requests and offers to receive the actual possession and custody.[85] Where suits are pending between the same parties, which involve the same issues, in two courts of concurrent jurisdiction, it is the first final judgment, although it may be rendered in the second suit, which renders the issues res adjudicata in the other court.[86]

(§ 9) *B. Ancillary or assistant.*[87]—Jurisdiction having attached or being in process of acquisition by a court having jurisdiction, other courts in other places may exercise ancillary or assistant jurisdiction, and the court of principal jurisdiction may also exercise it.[88] An ancillary or assistant jurisdiction can be exercised only where there is, or can be, a principal jurisdiction.[89]

A court having jurisdiction of appeals in criminal cases has by reason thereof appellate jurisdiction of actions to enforce recognizance and appearance bonds given by the defendants in such cases,[90] but not of proceedings to revive a cost judgment against a prosecuting witness.[91]

(§ 9) *C. General or inferior, limited and special jurisdiction.*[92]—General jurisdiction is that which is not within the territorial bounds limited as to nature of subject-matter, amount in controversy, or character of parties.[93] The fact that

a reconveyance of the property and executed a deed of homestead thereon in accordance with the state law, and was thereafter declared a bankrupt, held, that the pendency of the suit in the state court did not deprive the bankruptcy court of jurisdiction nor relieve it of the duty to determine the claim of the bankrupt to his homestead exemption, since such question was not at issue in such suit. In re Allen & Co., 134 F. 620. Where, pending action in Federal court against state bank, assignee was appointed by state court under Pub. St. N. H. 1891, c. 62, in whom assets were vested, held, that Federal court would not interpose summarily by denying execution to plaintiff which might be prejudicial to his rights, in view of the uncertainty of the rights of the parties under such statute, and the fact that defendant has clear remedy at common-law against wrongful enforcement of judgment. Anglo-American Land Mortg. & Ag. Co. v. Cheshire Provident Inst., 134 F. 152.

84. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

85. State and Federal courts. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650.

86. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650.

87. See 4 C. L. 337.

88. Federal circuit court has no jurisdiction of bill which seeks to reach and distribute to those entitled thereto the proceeds of a sale of land to the government on the theory that it is ancillary to an action at law to recover such land from the United States, in which the rival claimants united in procuring final judgment in favor of two of their number, under an agreement that the proceeds of the sale were to be distributed by arbitration. Suit is one on contract. Stillman v. Combe, 197 U. S. 436, 49 Law. Ed. 822.

89. The superior court has no jurisdiction to condemn land for a road, where the county commissioners have no jurisdiction to establish it because of defects in the petition therefor. Chelan County v. Navarre [Wash.] 80 P. 845.

90. Since an appeal in a criminal case in which defendant is charged with a felony lies to the supreme court, proceedings by scire facias to enforce a recognizance bond given by defendant in such a case are within the appellate jurisdiction of that court regardless of the amount involved, they being regarded as merely a continuation of the criminal proceeding. State v. Epstein, 186 Mo. 89, 84 S. W. 1120. The supreme court has jurisdiction of an appeal from a judgment forfeiting an appearance bond regardless of the amount involved, if the bond was given in a criminal proceeding within its jurisdictional power. Matter of the forfeiture is regarded as attached to the prosecution, and this rule may perhaps apply in case of a proceeding to set aside a judgment of forfeiture. State v. Cox [La.] 38 So. 456. Where appearance bond for $300 is adjudged forfeited in a prosecution in which a nolle prosequi is subsequently entered, and in which it would be necessary that the maximum penalty should be imposed in order to entitle the defendant to appeal to the supreme court, no appeal lies to that court from a judgment dismissing a rule to set aside the forfeiture. Id.

91. Proceeding to revive a cost judgment against a prosecuting witness in a criminal proceeding before a justice of the peace is a civil proceeding, and no constitutional question being involved, the supreme court has no appellate jurisdiction where judgment is for less than the jurisdictional amount. State v. French [Mo.] 87 S. W. 451.

92. See 4 C. L. 338.

93. Cyc. Law Dict. "General Jurisdiction." District court has jurisdiction of suit to restrain enforcement of judgment of county court on the ground that it was obtained through fraud and conspiracy. People v. District Court of Third Judicial Dist. [Colo.] 79 P. 1024. Circuit courts of Florida are courts of most general jurisdiction, and the

the parties see fit to include two legally distinct causes of action in one cause does not make them so dependent one upon the other that jurisdiction of the supreme court over the former carries with it jurisdiction over the latter.[94] In Texas the jurisdiction of district courts in the administration of the estates of deceased persons is appellate only.[95]

Statutes conferring jurisdiction upon inferior courts are strictly construed and will not be aided by construction or extended by inference or implication beyond their express terms.[96] The jurisdiction of probate,[97] justice,[98] city,[99] municipal,[1]

amount involved being sufficiently large, and the parties being before the court, all bona fide transitory actions are within its power to hear and determine. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193. District court has jurisdiction of quo warranto proceedings instituted by attorney general to have franchise of municipal corporation declared void, and when he exhibits information to such court it must direct writ to issue as matter of course. Has no discretion. State v. Kent [Minn.] 104 N. W. 948. Even if court has any discretion it exhausts it when it exercises it upon the preliminary application for leave to file the information, but it is not thereby deprived of the right to dismiss the proceedings if it subsequently appears that it acted improvidently or through inadvertence and under a misapprehension of the facts. Id. The district court has jurisdiction to assign dower, it being a matter of which the common law courts had jurisdiction. Swobe v. Marsh [Neb.] 102 N. W. 619.

94. F. sued C. for sum less than $1,000 for breach of warranty of title to land and made B., under whose judgment he had been evicted, a party. C. pleaded in defense, and also pleaded cause of action against B. in his own behalf for foreclosure of a lien on the lot. Held, that two causes of action were legally distinct and supreme court had no appellate jurisdiction over that between F. and C., though it had over that between B. and C. Brown v. Gates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149.

95. Its jurisdiction only extends to determination of questions presented by the appeal. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205. Cannot, on appeal from order of county court removing an administrator, order a sale of the property of the estate. Id.

96. Probate court is a court of special jurisdiction which has only such powers as are expressly granted or can be reasonably and necessarily implied from some express provision. Richardson v. Daggett, 24 App. D. C. 440. The New York city court is a court of limited jurisdiction, having only such powers as have been conferred upon it by statute. Dyer v. Kratzenstein, 92 N. Y. S. 1012.

97. District of Columbia: Probate court has no power to determine question of title between the estate and persons in possession of personal property claiming ownership thereof. Richardson v. Daggett, 24 App. D. C. 440. D. C. Code, § 122, providing for proceedings in the probate court for the discovery of concealed assets, does not confer any such power. Id.

Illinois: County court is not vested with general equitable powers. Hurd's Rev. St. p. 1274, c. 95, par. 23, giving judge of county court authority to issue an order directing the county court to seize household goods covered by a chattel mortgage, does not confer jurisdiction on county court to entertain proceeding to foreclose such mortgage, but circuit court is proper place in which to bring such proceedings. Summers v. Robinson, 116 Ill. App. 489. The equitable jurisdiction of county and probate courts does not include the power to reform a written instrument under seal so as to vary or qualify the language used therein, or to declare a deed absolute upon its face to be a mortgage. Rook v. Rook, 111 Ill. App. 398.

Massachusetts: Probate court has jurisdiction to hear and determine whether inheritance tax is payable and the amount to be paid. Bradford v. Storey [Mass.] 75 N. E. 256.

Nebraska: The county court has jurisdiction to assign dower only when the right thereto is not disputed by the heirs and devisees, or any persons claiming under them or either of them. Swobe v. Marsh [Neb.] 102 N. W. 619.

New York: Surrogate has no power to construe a will in a proceeding and at a time when such construction is not incidental to any power conferred by statute. In re Burdick's Will, 98 App. Div. 560, 90 N. Y. S. 161. May do so whenever it is necessary to accomplish distribution in an accounting in the surrogate's court, though the disposal of the proceeds of realty is involved. In re Keogh, 95 N. Y. S. 191. Cannot determine the validity of a disputed assignment of an interest in the estate of a decedent. In re Losee's Estate, 46 Misc. 363, 94 N. Y. S. 1082.

Ohio: Probate court is without jurisdiction in a proceeding by a municipality to appropriate land to determine whether the preliminary resolution was passed. Erie R. Co. v. Youngstown, 5 Ohio C. C. (N. S.) 332.

Oklahoma: By the organic act all chancery power is vested in the district and supreme courts respectively, and the probate courts do not possess such power. Cannot appoint receiver. Garrett v. London & L. Fire Ins. Co. [Okl.] 81 P. 421.

Pennsylvania: Orphans' court, by virtue of its equity powers, has authority to determine title to money deposited in the name of decedent which is claimed by a third person. In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081. Under Pa. Act June 16, 1836, § 19 (P. L. 792), giving orphans' court jurisdiction over all cases wherein executors may be possessed of or are in any way accountable for any real or personal estate of a decedent, that court has jurisdiction to compel a surviving partner, who is also an executor of his deceased partner's estate, to account for his deceased partner's interest in the firm.

and other inferior courts is fixed by statute, and varies in the different states.[2] The New York court of claims has jurisdiction to hear and determine any private claim against the state, filed within the proper time.[3]

Moore v. Fidelity Trust Co. [C. C. A.] 138 F. 1, afg. 134 F. 489.

Texas: County court is a court of general jurisdiction with reference to probate matters, and its orders are binding on collateral attack unless the record shows want of jurisdiction to make it. Wallace v. Turner [Tex. Civ. App.] 13 Tex. Ct. Rep. 824, 89 S. W. 432. Proceeding to compel executor to correct his inventory of the estate so as to include property belonging to the estate alleged to be in his possession which he failed to embrace therein is not an action for debt against him so as to be beyond the jurisdiction of the county court, but was within its probate jurisdiction under Const. art. 5, § 16; Rev. St. 1895, art. 1840; Batts' Ann. Civ. St. arts. 1973-1975. Moore v. Mertz [Tex. Civ. App.] 85 S. W. 312. Under Hurd's Rev. St. 1903, c. 24, § 557, and c. 37, § 93, county court has jurisdiction to confirm a special assessment and to entertain an application for judgment and order of sale at a probate term. People v. Brown, 218 Ill. 375, 75 N. E. 989.

98. Action against sheriff for damages for nonperformance of an official duty, and to recover penalty imposed by law, not an action on contract within Code Civ. Proc. § 66, subd. 1, fixing the jurisdiction of justices of the peace. Oppenheimer v. Regan [Mont.] 79 P. 695.

99. Alabama: Under Acts 1863, pp. 122, 123, city court of Montgomery has jurisdiction of summary proceedings under Code 1896, §§ 3763-3767, 3810, 3811, against an attorney residing within its territorial jurisdiction, for failure to turn over money collected by him as attorney for the state. McDonald v. State [Ala.] 39 So. 257. Facts set forth in notice and motion held to have given court jurisdiction of subject-matter for statutory purpose of a summary judgment. Id.

Georgia: City court of Americus has jurisdiction to foreclose a lien in favor of the proprietor of a sawmill on the product of the mill for work done on material furnished by another, at least where the principal of the amount claimed does not exceed the jurisdiction of the county court. Acts 1900, p. 93, § 2, and Civ. Code 1895, § 5842 construed. Chambliss v. Hawkins [Ga.] 51 S. E. 337.

1. New York municipal court has no equitable jurisdiction, except that in summary proceedings a person to or against whom a precept is issued may set up an equitable defense. Laws 1902, p. 1490, c. 580, § 2, subd. 2. Kraus v. Smolen, 92 N. Y. S. 329. Cannot reform written instruments. Id. Has no jurisdiction of equitable action to rescind contract. Bellettiere v. Lawlor, 93 N. Y. S. 471. Action by trustee in bankruptcy to recover debt alleged to be due bankrupt, in which alleged assignee of claim was substituted as defendant, held not one in equity. Reichardt v. American Platinum Works, 94 N. Y. S. 384. In action for conversion based on levy on property under execution issued against third person, held, that court did not, in view of the evidence, exercise the powers of court of equity in declaring bill of sale under which plaintiff claimed to be fraudulent, the issue as to whether sale was made in good faith being one of fact. Milella v. Simpson, 94 N. Y. S. 464. Has no jurisdiction of actions to enforce attorneys' liens. Flannery v. Geiger, 92 N. Y. S. 785. Action held one on plaintiff's retainer as for money had and received by defendant to his use, and not one to enforce his lien. Id. Has jurisdiction of actions on judgments only when they were rendered by courts not of record. Laws 1902, p. 1488, c. 580, § 1, subd. 6. Muttart v. Muttart, 93 N. Y. S. 468. Has none of action on judgment of New Jersey court of chancery. Id. Under Laws 1902, p. 1533, c. 580, § 139, has no jurisdiction of actions on contracts of conditional sale of personalty, or of hiring of personalty when title does not vest in the person hiring until the payment of a certain sum, or on chattel mortgages given to secure the purchase price of chattels. Fidelity Loan Ass'n v. Connolly, 92 N. Y. S. 252. Does not apply to chattel mortgage to secure a loan. Id. Action by vendee of piano to recover instalments paid, as authorized by Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, after vendor's assignee had recovered possession of the piano in replevin for nonpayment of instalments due, is action for money had and received and not one arising on contract of conditional sale of personalty. Woodman v. Needham Piano & Organ Co., 94 N. Y. S. 371. Has no jurisdiction of actions for assault. Laws 1902, p. 1487, c. 580, § 1, subd. 14. Rein v. Brooklyn Heights R. Co., 94 N. Y. S. 636. Action by passenger against street railway for damages for assault by conductor held action for negligence and not for assault and battery. Arkin v. Interborough Rapid Transit Co., 95 N. Y. S. 913. Since action for breach of contract of carriage lies for assault by conductor on passenger, plaintiff in action for assault may amend his pleadings so as to make it an action on contract, and where proof warrants recovery therefor, pleadings will on appeal be treated as so amended (Laws 1902, c. 580, §§ 166, 326), and municipal court will be held to have had jurisdiction. Rein v. Brooklyn Heights R. Co., 94 N. Y. S. 636. Complaint held to state cause of action for assault and battery and false imprisonment and not one for breach of contract of carriage. Busch v. Interborough Rapid Transit Co., 93 N. Y. S. 372.

2. Alabama: Provision of Act Dec. 5, 1900 (Acts 1900-01, p. 107), conferring jurisdiction of all cases formerly triable in county court of Walker county on the newly created Walker county court of law and equity, held germane to the title. Norvell v. State [Ala.] 39 So. 357. Even if that part of the act abolishing the county court of Walker county is not a matter referable to or embraced in the subject of the act as expressed in the title, that part of it which creates the new court is valid. Id.

Indiana: Mayor, being given the jurisdiction of a justice of the peace within the city

(§ 9) *D. Original jurisdiction of courts of last resort.*[4]—This includes the prerogative common-law jurisdiction necessary to the proper control and supervision of the courts below,[5] and in its more common sense includes such as the constitution and statutes enumerate.[6] Except in these cases their jurisdiction is appellate only.[7]

(Burns' Ann. St. 1901, § 3497), has jurisdiction of bastardy proceedings against a resident of the city under Id. §§ 990, et seq. Evans v. State [Ind.] 74 N. E. 244. Commissioners' courts have limited powers, and only such jurisdiction as is expressly conferred by statute, or necessarily implied to enable them to carry out the powers expressly granted. Under Burns' Ann. St. 1901, § 5653a, their power is restricted to tiling public open drains already constructed, and they have no power to direct the construction of a tiled drain in new territory. Kemp v. Adams [Ind.] 73 N. E. 590. It is immaterial that the want of jurisdiction relates only to a part of the proposed drain, where it was acted upon as an entirety. Id.

Kentucky: The fiscal court having no jurisdiction over the assessment of property, it has no authority to buy plats to aid the assessor in making assessment. Jefferson County v. Young [Ky.] 86 S. W. 985.

New Jersey: Small cause court has no jurisdiction to try claim of property taken under a distress warrant. P. L. 1903, p. 270, § 62, construed. Bulkley v. Wilkinson [N. J. Law] 60 A. 953.

Ohio: Common pleas court is without jurisdiction over receivers appointed by the probate court to take care of property involved in common pleas suit. American Eng. Spec. Co. v. O'Brien, 2 Ohio N. P. (N. S.) 550.

3. Code Civ. Proc. § 264. Litchfield v. Bond, 93 N. Y. S. 1016. Of claim for damages due to cutting of trees by state engineer while making survey pursuant to a statute (Laws 1902, p. 1125, c. 473), though act did not authorize entry on private property, or provide for compensation for so doing. Id.

4. See 4 C. L. 339.

5. See, also, Appeal and Review, 5 C. L. 121, and the titles of the prerogative writs such as Mandamus, 4 C. L. 506; Prohibition, Writ of, 4 C. L. 1084; Quo Warranto, 4 C. L. 1177, etc. In the absence of apparent jurisdiction over a cause in any appellate court, the supreme court has, under its supervisory jurisdiction, the authority to instruct the court of original jurisdiction, the district court, to reinstate a case dismissed for want of jurisdiction if it is manifest that the court has jurisdiction. Reynolds v. Carroll [La.] 38 So. 470. Where the only issues submitted to the supreme court for decision on an application for a writ of prohibition and certiorari have become abstract questions, or affect, at the utmost, matters over which, presumptively, the court of appeal has appellate jurisdiction by reason of the amounts likely to be involved, the supreme court will not presently take jurisdiction over the matter. Albert Mackie Grocery Co. v. Pratt [La.] 38 So. 250. The fact that two suits for divorce, one by the husband and one by the wife, in which conflicting orders have been made, are pending in different circuit courts, is not ground for a writ of mandamus to settle the conflict in jurisdiction (Wells v. Montcalm Circuit Judge [Mich.] 102 N. W. 1001), but prohibition is the proper remedy to settle the conflict, and to vacate the orders improperly granted (Wells v. Montcalm Circuit Judge [Mich.] 12 Det. Leg. N. 301, 104 N. W. 318). In the absence of express statutory power, or a provision giving them general powers of supervision and control over inferior courts, appellate courts have no authority to issue writs of prohibition or mandamus to inferior courts or judges except in aid of appellate jurisdiction. Dunn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 665, 88 S. W. 532. The court of civil appeals has only such appellate jurisdiction as is conferred on it by law. Id. Has no power to issue writ of prohibition to restrain defendants from asserting rights under restraining order issued by judge of district court. Const. art. 5, § 6, and Sayles' Ann. Civ. St. 1897, arts. 997, 1000, construed. Id. Has no power by mandamus to compel judge to proceed to trial of cause pending before court on motion for new trial, in absence of showing that court has been requested to act on motion or has refused to do so. Id. Provision of art. 1000 that court may issue writ to compel district judge to proceed to trial and judgment "agreeably to the principles and usages of law" refers only to procedure in appellate court. Id. The writ of mandamus cannot be made a substitute for an appeal or writ of error, particularly where the court from which it is sought is given no revisory control over that against which it is asked. Not from supreme court to court of civil appeals. Smith v. Conner [Tex.] 84 S. W. 815.

6. California: The supreme court is the only tribunal which can determine the amount of the salary of the justices of the district courts of appeal. Harrison v. Colgan [Cal.] 81 P. 1010. While the supreme court has both original and appellate jurisdiction of disbarment proceedings, it will decline to entertain the accusation as an original proceeding except when the prosecution has been instituted by a bar association, or other public body, in the public interest. Has jurisdiction under Code Civ. Proc. § 287. In re Ashley, 146 Cal. 600, 80 P. 1030. When the accuser is a private person alleging misconduct prejudicial to himself, it is more convenient and appropriate that the proceeding should be instituted and the issues tried in the superior court of the county where the misconduct is alleged to have occurred, and where it is presumed the witnesses reside. Id. District courts of appeal have exclusive power to admit persons to the bar. Act Feb. 15, 1905. Supreme court has no original jurisdiction, and contested application originating in that court will be transferred to proper district court of appeal. In re Hovey [Cal.] 80 P. 234.

Massachusetts: The supreme judicial court has power to terminate a trust in proper cases. Welch v. Trustees of Episcopal Theological School [Mass.] 75 N. E. 139.

Minnesota: The supreme court has original jurisdiction to issue writs of quo warranto subject to such regulations and condi-

§ 10. *Appellate jurisdiction*[8] depends on the existence of a judgment or order of which the court below has jurisdiction[9] and which by the common law or the statutes is independently of other judgments subject to review.[10] The distribution

tions as it may prescribe. Const. art. 3, § 1, Gen. St. 1894, § 4823. State v. Kent [Minn.] 104 N. W. 948. An application therefor will not be granted if there is a remedy in some other court which is at all adequate, unless under special and exceptional circumstances, as where there will be great injury and inconvenience to the public by reason of the delay incident to commencing suit in the lower court and awaiting a final determination on appeal. Id. The court may exercise its discretion and refuse to order the writ to issue even in a case which comes within the conditions specified. Leave to file information will be denied, if in judgment of court application should have been made to district court. Id.

Missouri: The supreme court has power to interfere by certiorari to prevent the court of appeals from exceeding its jurisdiction. Const. Am. 1884, § 8. As where it attempts to enter final judgment in a case pending before it on appeal from an order dissolving a temporary injunction. State v. Smith [Mo.] 86 S. W. 867.

South Dakota supreme court has original jurisdiction of actions against the state on claims disallowed by the auditor. Michel Brewing Co. v. State [S. D.] 103 N. W. 40. If an issue of fact arises which the court shall deem necessary to be tried by jury, it is required to certify it to the circuit court for that purpose. Rev. Code Civ. Proc. § 27. Id. The parties cannot, after such issues have been so certified with directions that they be tried by a jury, waive a jury, and by consent confer on the circuit court jurisdiction to try them. Id.

Washington: The supreme court has original jurisdiction to issue writs of prohibition only for the purpose of restraining unauthorized judicial and quasi judicial power. Mandatory injunction applied for to prohibit land commissioner from delivering proposed lease of public land and to compel him to advertise a lease of such land for sale at public auction, held in effect a writ of prohibition to prevent act which was neither judicial nor quasi judicial, and supreme court had no original jurisdiction to grant it. State v. Ross [Wash.] 81 P. 865.

Wisconsin: The original jurisdiction of the supreme court extends to all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. Controversy as to which of two bodies was the regular republican convention, and which of two sets of claimants was entitled to place on ballot as republican nominee. State v. Houser, 122 Wis. 534, 100 N. W. 964. Controversy held to be of so grave a character and of such public importance as to warrant court in exercising such jurisdiction. Id. In Texas the raising of an issue of fact deprives the supreme court of original jurisdiction. Gordon v. Terrell [Tex.] 14 Tex. Ct. Rep. 320, 89 S. W. 1052.

7. Arkansas: Supreme court on appeal from a decree annulling a street railway franchise has no authority to restrain city from interfering with tracks pending proceedings to determine company's rights under an ordinance, that being a provisional relief to be awarded by the court in which such proceedings are instituted, subject to review on appeal. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 1026.

Georgia: The supreme court has no original jurisdiction, but is a court alone for the trial and correction of error. Civ. Code 1895, § 5836. In absence of any statutory provision, has no authority to try a traverse to a return of service of a bill of exceptions, or to refer to trial court the issue of fact as to truth of such return, but writ of error will not be dismissed where bill and entries thereon show jurisdiction of supreme court. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15.

Kentucky: The jurisdiction of the court of appeals is appellate only, and it has no original jurisdiction to appoint a receiver to take charge of property involved in cases before it, or to grant restraining orders to protect the rights of parties. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509. Allowance to wife's attorney in divorce suit cannot be made in the first instance by the court of appeals, but can only be reviewed by it after having been made in the circuit court. Muir v. Muir [Ky.] 87 S. W. 1070.

Missouri: On appeal from an order dissolving a temporary injunction, the jurisdiction of the court of appeals is wholly appellate, and it has no power to dispose of the whole case and direct a final judgment. That would involve an exercise of original jurisdiction. State v. Smith [Mo.] 86 S. W. 867.

8. See 4 C. L. 340. See, also, Appeal and Review, 5 C. L. 121.

9. District court, in so far as justice court is concerned, is an appellate court, and has no original jurisdiction in any action appealed from that court, and hence its jurisdiction in such case depends upon that of the justice court. Brown v. Braun [Ariz.] 80 P. 323. If justice's court has no jurisdiction of the subject-matter, district court acquires none on appeal to it. Oppenheimer v. Regan [Mont.] 79 P. 695. Where the objection goes to the jurisdiction of the original tribunal over the subject-matter, the judgment is void, and the appellate tribunal acquires no jurisdiction of the merits on an appeal. Bickford v. Franconia [N. H.] 60 A. 98. Proceedings may be quashed on motion or dismissed. Id. The supreme court has no jurisdiction of a case removed to it from the court of civil appeals by writ of error where the latter court had none. Because appeal bond was not filed in time. El Paso & N. E. R. Co. v. Whatley [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 819.

10. See Appeal and Review, 5 C. L. 130, 146. Appellate jurisdiction is usually confined to the review of actions or proceedings. Court of appeals has no power to review order of appellate division affirming order of county court denying motion to set aside presentment of grand jury censuring board of supervisors, it not being a motion in an

of this jurisdiction as between reviewing courts is fixed by statute where there are courts of intermediate and final or limited appellate and general appellate jurisdiction, and each statute must be consulted, since no general rule can be laid down.[11] Whether the jurisdictional facts exist in the particular case and the tests thereof are considered in preceding sections.[12] Appellate jurisdiction ex ratione materiae is confined to the judgment disposing of such subject-matter and does not follow into litigation consequent on the judgment,[13] but extends to all matters involved in the appeal.[14] In certain classes of cases courts of intermediate appeals are given final jurisdiction, and as to such it is exclusive of the courts of last resort.[15]

In states which have intermediate appellate courts they are required to certify to the court of last resort causes in which their decisions are in conflict with those

action or a civil or criminal proceeding authorized by any statute. Code Civ. Proc. §§ 190, 191, and Code Cr. Proc. §§ 515, 533, construed. In re Jones, 181 N. Y. 389, 74 N. E. 226.

11. California: When a case is such that an appeal from the judgment of the lower court would properly be taken to the district court of appeal, a petition to prohibit the proceeding should be addressed to that court. Petition and brief ordered transferred from supreme court. Supreme court held to have had jurisdiction if it chose to exercise it. Collins v. Superior Court [Cal.] 81 P. 509.

Georgia: The supreme court is a constitutional court of limited jurisdiction. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15.

Louisiana: Acts 1904, No. 56, providing for transfer of causes from supreme court to courts of appeal, and vice versa, cannot be applied to case appealed to wrong court in which time for appeal to proper court expired before it went into effect, since party in whose favor judgment was rendered had acquired vested right therein which could not be devested by legislation. Spremich v. Maurepas Land & Lumber Co. [La.] 38 So. 827. There is no law authorizing the transfer of an appeal from the district court to the supreme court, and an appeal, so called, brought there in that way, must be dismissed. Town of Leesville v. Hadnot [La.] 38 So. 877. Case appealed to supreme court through mistake transferred to court of appeal under Acts 1904, No. 56, on application and affidavit of appellant's counsel, the amount involved being less than $2,000. Schutten v. Schaffhausen [La.] 38 So. 964.

New York court of appeals has only such appellate jurisdiction as is given it by statute. In re Jones, 181 N. Y. 389, 74 N. E. 226. Under Oswego City Charter, § 63, as amended by Laws 1902, p. 551, c. 207, authorizing mayor to remove for cause anyone appointed to office by him, and providing that accused may appeal to supreme court from judgment of conviction, an appeal lies to the special term and not to the appellate division. O'Neil v. Mansfield, 95 N. Y. S. 1009.

New Jersey: Under its constitutional and prerogative powers to review the proceedings of all special statutory proceedings, the supreme court may review by certiorari the action of the common council of a city in declaring vacant a seat of one of its members, though charter makes council sole judge of the election, return, and qualification of its members. Meachem v. Common Council of New Brunswick [N. J. Law] 62 A. 303.

North Carolina: Superior court has no jurisdiction to entertain appeal from order of county commissioners ordering clerk to make out receipt for taxes in accordance with corrected return on refusal to accept return made by taxpayer, or to enter judgment for such taxpayer for amount of taxes paid by him under protest, proper proceeding being by suit in justice court. Murdock v. Iredell County Com'rs, 138 N. C. 124, 50 S. E. 567.

Ohio: The circuit court is without jurisdiction to review on error an order of the court of common pleas removing a guardian for cause made on appeal from the probate court. North v. Smith, 5 Ohio C. C. (N. S.) 495.

Texas: A judgment of reversal and remand by the court of civil appeals which practically settles that fact may be reviewed by the supreme court on writ of error when the petition for the writ alleges that fact. Where it decides that statute of limitations under which action is not barred is the one applicable. Brown v. Cates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149. Since action for less than $1,000 for breach of warranty of title to land could have been brought in county court, decision of court of civil appeals on appeal from judgment of district court therein is final. Id.

In Washington, in an action of equitable cognizance, the jurisdiction of the supreme court does not depend on the amount in controversy. Trumbull v. Jefferson County, 37 Wash. 604, 79 P. 1105.

12. See ante, §§ 4-8.

13. Muntz v. Jefferson R. Co. [La.] 38 So. 586. Where, in a case which is appealable to the supreme court, no appeal is taken, that court has no jurisdiction of an appeal from a judgment subsequently rendered, in an injunction proceeding, on a question of costs incurred in such case in the district court, unless the amount involved exceeds $2,000, exclusive of interest. Id.

14. Constitutional provision giving court of appeals appellate jurisdiction in actions to abate nuisance gives it jurisdiction over whole and every part of the judgment in such an action, and hence, on appeal from judgment directing abatement and awarding less than $300 costs, it is not deprived of jurisdiction by the subsequent abatement of the nuisance. White v. Gaffney [Cal. App.] 82 P. 1088.

of other like courts, or with those of the court of last resort.[16] The supreme court of California has appellate jurisdiction in all matters pending before a district court of appeal which the supreme court shall order to be transferred to itself for a hearing, and has power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and vice versa in its discretion.[17] The discretionary power to order a case transferred from the district court of appeal will be exercised for the purpose of securing a proper distribution of cases, uniformity of decision of doubtful questions of law, a uniform construction of the constitution and statutes, and like purposes, but not for the purpose of revising a decision of such court as to the facts shown to exist by the record.[18]

§ 11. *Federal jurisdiction. A. Generally.*[19]—The supreme court of the United States has original jurisdiction of a controversy between a state and a citizen of another state.[20] A suit against state officers is not one against the state so as to deprive the Federal courts of jurisdiction thereof.[21]

15. See Appeal and Review, 5 C. L. 130, 146.

A writ of error from the supreme court of Texas cannot be allowed to review a judgment of the court of civil appeals in any action appealed from a county court, or from a district court when a county court would have had jurisdiction to try it. Rev. St. 1895, art. 996. Not to review judgment on appeal from district court, where suit was for $1,000, exclusive of interest, and hence could have been brought in county court. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786. The court of civil appeals in that state, when acting in cases in which its judgments are made final, is not inferior to the supreme court, but its judgments are as final and conclusive and as much to be respected by the supreme court as are its own. Smith v. Conner [Tex.] 84 S. W. 815.

16. Missouri: Under the constitution the courts of appeal are required to certify to the supreme court for determination any cause in which any of the sitting judges deems their decision to be contrary to that of any previous decision of one of such courts or of the supreme court. Const. art. 6, as amended 1884, § 6. Ex parte Conrades, 185 Mo. 411, 85 S. W. 160. Cause may be certified when all the judges of a court of appeals regard their decision as contrary to a previous decision of another such court. Rodgers v. Western Home Town Mut. Fire Ins. Co., 186 Mo. 248, 85 S. W. 369. This provision applies to a habeas corpus proceeding instituted in the court of appeals, though the judgment of that court remanding the petitioner to custody was not determinative of his rights, and he might have thereafter made an original application to the supreme court. Ex parte Conrades, 185 Mo. 411, 85 S. W. 160. Nor is the supreme court deprived of jurisdiction to determine the matter by reason of the fact that since the certification of the cause the petitioner has become discharged by operation of law, owing to the expiration of the session of the municipal assembly by whose authority he was detained. Supreme court's jurisdiction is exercised primarily in such cases to procure uniformity of decision, and not merely to determine the rights of the parties. Id.

In Texas when one court of civil appeals fails to concur with an opinion of another such court, it is required to certify the question to the supreme court for its decision. Acts 26th Leg. p. 170, c. 98. Smith v. Conner [Tex.] 84 S. W. 815. Question decided by court of appeals held not shown to be in conflict with other decisions. Id. The act does not require the certification of questions on which there is a conflict between the opinions of the courts of appeals and those of the supreme court. Mandamus will not lie to compel certification of such questions. Id. A conflict requiring certification is not shown by mere differences in judgments as to costs, the allowance of costs being largely discretionary and depending on the facts and circumstances of each particular case. Id. The supreme court has jurisdiction of a case in which the judgment has been reversed and the cause remanded, when a court of civil appeals overrules its own decisions or those of another court of civil appeals, or of the supreme court. Rev. St. 1895, art. 941, subd. 5. Red River, T. & S. R. Co. v. McKerley [Tex.] 86 S. W. 921. It is not necessary in such case that the later decision expressly overrule the former one, but there must be an irreconcilable conflict between the two. Cases held distinguishable, and application for writ of error dismissed for want of jurisdiction. Id.

17. Const. art. 6, as amended in 1904, § 4. Order of transfer from court of appeal may be made before judgment has been pronounced therein, or within thirty days after such judgment shall have become final therein. Statute does not give a right of appeal from district to supreme court, or anything equivalent thereto. People v. Davis [Cal.] 81 P. 718.

18. People v. Davis [Cal.] 81 P. 718.

19. See 4 C. L. 343.

20. Suit by attorney for a state who was resident of the District of Columbia, against the secretary of the treasury and the governor of such state, to which the state itself was not a party, in which plaintiff asserts his right to a lien on the papers of his client, including a warrant given to him in settlement of a claim of the state against the government, and seeks to enjoin the cancellation of such warrant and the issuance of a duplicate, is not a controversy between a state and a citizen of another state. In re Commonwealth of Mas-

The Federal courts inferior to the supreme court can exercise only such jurisdiction and powers as are expressly conferred on them, and cannot take jurisdiction by mere intendment or implication.[22] Since their jurisdiction depends upon the constitution and laws of the United States, it cannot be limited or restricted by state legislation.[23] The elements of Federal jurisdiction being present, a right of action created or enlarged by the laws of a state and made enforceable in its courts of general jurisdiction is equally enforceable in the Federal courts sitting in that state;[24] but notwithstanding the procedure prescribed by the laws of the state, the enforcement in the Federal courts can be by suit in equity only where there is not a plain, adequate, and complete remedy at law according to the distinctions between actions at law and suits in equity prevailing in those courts.[25]

A Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed.[26] It may protect the title which it has decreed as against everyone a party to the original suit, and prevent such a party from relitigating the questions of right which have already been determined.[27]

The general restrictions of the constitution governing the exercise of jurisdiction by the Federal courts within the various states have no operation in the District of Columbia.[28]

The Federal circuit courts have jurisdiction of all common-law suits where the United States, or any officer thereof, under authority of any act of congress, is plaintiff, regardless of the amount involved.[29] It has, however, been held that this does

sachusetts, 196 U. S. 482, 49 Law. Ed. 845.

21. Suit against a state corporation commission to enjoin enforcement of order alleged to be void as an interference with interstate commerce is not one against the state, and is within the jurisdiction of a Federal court. Southern R. Co. v. Greensboro Ice & Coal Co., 134 F. 82.

22. United States v. Barrett, 135 F. 189. The jurisdiction of the United States circuit court is limited in the sense that it has no jurisdiction except that conferred by the Federal constitution and statutes. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404; Anderson v. Bassman, 140 F. 10.

23. Alice E. Min. Co. v. Blanden, 136 F. 252. Thus a nonresident creditor may establish his claim in the Federal courts against the personal representatives of his deceased debtor, the requisite amount and diversity of citizenship appearing, notwithstanding that the laws of the state of the debtor's residence limit the right to establish such claims to proceedings in the proper probate courts of the state. Id. Federal courts have concurrent jurisdiction with state courts. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

24. United States Min. Co. v. Lawson [C. C. A.] 134 F. 769.

25. United States Min. Co. v. Lawson [C. C. A.] 134 F. 769. Right of action given by Utah Rev. St. 1898, §§ 2915, 3511, to quiet title to realty without any previous adjudication of the title in an action at law, and without reference to the possession, can be enforced by Federal court of equity when complainant is in possession and defendant is not, or when both parties are out of possession, because in neither case is there an adequate and complete remedy at law. Id.

26. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008.

27. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008. Where it has decreed a foreclosure in suit in which diverse citizenship was alleged and admitted, and the property was described as lying partly within the state, it may, by ancillary suit, restrain any attack on title of purchaser under the decree by a suit in a state court, brought by a party to the original suit, which proceeds on theory that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which it did not have. Id. One of two corporations bearing the same name but incorporated in different states, will be restrained by an ancillary suit from assailing title of purchaser under decree of Federal court foreclosing a trust deed executed under the common corporate name and describing the property as lying in both states, by a suit in state courts proceeding on theory that corporation which was citizen of same state as plaintiff was real grantor and hence was not and could not have been made a defendant without ousting Federal court of jurisdiction, where purpose of double incorporation was the development of a single plant, and all the proceedings were had on the supposition that there was a single entity, which gave deed as security for its indebtedness. Id.

28. Act March 3, 1887, § 1 (24 Stat. at L. 552, c. 373, Comp. St. 1901, p. 508), providing that no civil suit shall be brought before either the circuit or district court against any person in any other district than that of which he is an inhabitant does not apply to District. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1.

29. By Act March 3, 1815 (3 Stat. 245, c. 101; Rev. St. § 629, subsec. 3, Comp. St.

not apply where the United States is a mere modal or nominal party, and not a real or substantial plaintiff in the controversy out of which the action arises,[30] though there seems to be authority to the contrary.[31] The provision of the act conferring jurisdiction on the Federal district and circuit courts of certain suits against the United States that such jurisdiction shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, does not apply to suits to recover disbursements made by a marshal in paying for the services of court bailiffs.[32]

In suits by or against national banks, Federal circuit and district courts have only such jurisdiction as they would have in cases between individuals of the same state.[33] Hence any legal right which a stockholder in such a bank may have to inspect its books may be enforced by mandamus in the state courts,[34] and a state court has jurisdiction to order the transfer of shares of national bank stock by an executrix to a claimant who shows that deceased held them in trust for her.[35] State courts have no jurisdiction to issue attachments against national banks before final judgment.[36]

The jurisdiction of Federal courts over questions involving trademarks is confined to the trademark as registered.[37]

Matters of pure probate, in the strict sense of the word, are not within the jurisdiction of the Federal courts.[38] Where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will, or to assail probate in a suit in equity, the Federal courts, in administering the rights of citizens of other states or aliens, will enforce such remedies.[39] A Federal court has jurisdiction equally with state courts to enforce

1901, p. 503). Schofield v. Palmer, 134 F. 753. Have jurisdiction of action by receiver of national bank to collect debt due bank, he being an officer of the United States, and the action being one brought under authority of Rev. St. § 5234. Id. Of any controversy in which the United States is plaintiff or petitioner. Act Aug. 13, 1888, c. 866 (25 St. 433, 1 Rev. St. Supp. 1878, p. 611, Comp. St. 1901, p. 508). United States v. Barrett, 135 F. 189.

30. Does not apply to action on bond of government contractor brought under Act Aug. 13, 1894, c. 280 (28 Stat. 278, Comp. St. 1901, p. 2523) in the name of the United States for the use of one furnishing labor and materials in the prosecution of the work, and court has no jurisdiction unless requisite diversity of citizenship and amount in controversy is shown. United States v. Barrett, 135 F. 189.

31. Circuit court has jurisdiction of action under statute last cited irrespective of amount involved. United States v. Churchyard, 132 F. 82.

32. Act June 27, 1898, c. 503, § 2 (30 Stat. 494; Comp. St. 1901, p. 753). Bailiffs are not officers of the United States. United States v. Swift [C. C. A.] 139 F. 225.

33. 25 Stat. at L. 433, c. 866 (Comp. St. 1901, p. 508). See, also, Banking and Finance, 5 C. L. 347. Guthrie v. Harkness, 26 S. Ct. 4. A suit which may be brought in a circuit court by or against a citizen of a state because it arises under the constitution, laws, or treaties of the United States, may, for the same reason, be brought by or against a national bank located in the same state. George v. Wallace [C. C. A.] 135 F. 286.

34. Guthrie v. Harkness, 26 S. Ct. 4.

35. In re Fisher's Estate [Iowa] 102 N. W. 797.

36. U. S. Rev. St. § 5242, Comp. St. 1901, p. 3517. Merchants' Laclede Nat. Bank v. Troy Grocery Co. [Ala.] 39 So. 476.

37. In suit between citizens of same state for infringement of trademark, Federal court has no jurisdiction to determine issue of unfair competition. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. [C. C. A.] 134 F. 571.

38. See, also, Estates of Decedents, 5 C. L. 1183. Since authority to make wills is derived from the states, and requirement of probate is but a regulation to make a will effective. Farrell v. O'Brien, 199 U. S. 89, 50 Law. Ed. —. Where surviving partner was one of the executors of the estate of his deceased partner, the settlement of which was pending in the probate court of the state, which had full equitable jurisdiction to compel an accounting between the executors and by the surviving partner of the interest of the deceased partner in the firm, bill cannot be maintained in the Federal court by a distributee under the will to compel accounting by such surviving partner, and a payment of the amount found due to the executors for distribution. Moore v. Fidelity Trust Co. [C. C. A.] 138 F. 1, afg. 134 F. 489.

39. Farrell v. O'Brien, 199 U. S. 89, 50 Law. Ed. —. By action or suit inter partes is meant an independent controversy and not a proceeding which is merely ancillary to the original probate, and allowed for the purpose of giving to the probate its ultimate and final effect. Proceeding to contest will under Bal.

liens on the interests of defendants in funds belonging to the estate of a decedent in the hands of an ancillary administrator in the state in which the suit is brought.[40] Whatever action it may take, however, is subject to that of the probate court within its proper jurisdiction.[41] It will not enjoin the local probate court from directing that the funds within its control be remitted to the court of probate of the domicile,[42] but will, on a proper showing, enjoin those whose interests are sought to be reached from receiving any portion of the estate under any order of distribution by either the local probate court or that of the domicile.[43] Its decree in such case is necessarily confined to the property localized within its jurisdiction, though personal judgments may be entered against the defendant, to which the liens are incidental.[44] In the exercise of such jurisdiction the Federal courts administer the law of the state of the debtor's residence under the same rules that control local tribunals in the adjustment of claims against the debtor's estate.[45] Short of intermeddling with the possession of a state court, or controlling the administration, the Federal court may, where the requisite diversity of citizenship exists, grant full relief to one suing to obtain the share of a decedent's estate to which he is entitled.[46] It may, if the requisite amount is in controversy, direct the disposition of trust property over which the probate court has no jurisdiction.[47]

The bankruptcy court has no power to administer exempt property, and a creditor having a claim against such property must prosecute it in the state courts, even though the bankrupt has waived his right to such exemption.[48]

In order that a court of admiralty may have jurisdiction of a suit on a contract, it must be maritime in character;[49] but if maritime in character, the court will inquire into all its breaches and all the damages suffered thereby, however peculiar they may be and whatever issues they may involve.[50] State courts have jurisdiction of an action based on a maritime contract to be performed on the high seas.[51] The Federal district court has jurisdiction to entertain petitions for salvage awards, where the government has been benefitted by the salvage service.[52]

Ann. Codes & St. Wash. §§ 6110-6114, is merely ancillary, and Federal circuit court has no jurisdiction, though there is diverse citizenship Id.

40. Ingersoll v. Coram, 136 F. 689.

41. Decree should declare that nothing therein is intended to or shall contravene any action of any probate tribunal in the state of the domicile with reference to distribution, or to any order or judgment remitting to the courts of the domicile. Ingersoll v. Coram, 136 F. 689.

42, 43. Ingersoll v. Coram, 136 F. 689.

44. In suit in Federal court under Rev. St. § 738. Ingersoll v. Coram, 136 F. 689.

45. Alice E. Min. Co. v. Blanden, 136 F. 252. Where such rules violate no right secured by Federal constitution or statutes. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

46. Herron v. Comstock [C. C. A.] 139 F. 370.

47. Where powers and duties of executors under a will are severable, and, prior to the filing of a bill in the Federal court by a beneficiary under the trust, the administration of the personalty by the administrators has been completed, and nothing remains but the management and disposition of the trust, realty remaining unsold for the completion of the trust, such court has jurisdiction to decree an accounting by the trustees and direct final distribution and settlement of the trust, the probate court having no jurisdiction in that regard. Herron v. Comstock [C. C. A.] 139 F. 370. Also has authority to fix compensation of trustees and is not bound by intervening orders of probate court. Id. Ohio Rev. St. 1892, § 6328 only gives probate court authority to settle accounts of testamentary trustees, and does not apply where subject-matter of trust has been drawn into the control of the Federal court by the filing of a bill for settlement and distribution by one of the beneficiaries of the trust. Id.

48. See, also, Bankruptcy, 5 C. L. 367. Trustee in bankruptcy not entitled to exemption of $300, as against creditor who has attached same by attachment execution issued and served within four months prior to the bankruptcy, on a judgment waiving exemption. Sharp v. Woolslare, 25 Pa. Super. Ct 251.

49. See Admiralty, 5 C. L. 35; Shipping and Water Traffic, 4 C. L. 1450. Traffic agreement between railroad company and owner of steamships held not maritime. Graham v. Oregon R. & Nav. Co., 134 F. 454. Contract on the part of a railroad company to furnish cargoes to libelant and on the part of the libelant to carry them is maritime. Graham v. Oregon R. & Nav. Co., 135 F. 608.

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

51. Gill v. North American Transp. & Trading Co., 37 Wash. 694, 79 P. 778.

52. Under Act March 3, 1887, c. 359, §§

The circuit court has no jurisdiction of an original proceeding seeking relief by mandamus.[53]

A circuit court may, by final decree, remove any incumbrance or cloud upon the title to real or personal property within the district as against persons not inhabitants thereof, and not found therein, who do not voluntarily appear in the suit.[54] Thus the requisite amount being in controversy, it has jurisdiction of a suit in equity brought by a citizen of a state in which it sits against citizens of other states, to set aside as fraudulently obtained, judgments of a probate court allowing claims against an intestate's estate, which are a lien on his realty situated within the district and inherited by complainants.[55]

State courts have jurisdiction of actions to have declared illegal, as in restraint of trade, combinations to control the sale of copyrighted books, though it may be necessary to construe the rights of the parties under the copyright law.[56]

State courts have no jurisdiction to determine the mineral or nonmineral character of public land while the claims of the respective parties are pending before the Federal land department.[57]

When the jurisdiction of the Federal land department is once set in motion and it is engaged in determining the mineral or nonmineral character of public land, the courts are precluded from trying or determining that question, and its decision is conclusive.[58]

The Federal courts and judges have jurisdiction to discharge, on habeas corpus, prisoners restrained of their liberty in violation of the constitution of the United States under judgments of state courts;[59] but this power should not be exercised where the judgment of the state court under which the petitioner is confined is reviewable by appeal or writ of error, unless in exceptional cases as where the confinement is for an act done or omitted under the constitution or laws of the nation in pursuance of its authority, or under the laws and authority of a foreign government of which the prisoner is a subject.[60] The rule is not changed by the fact that the petition shows that the state court was without jurisdiction of the proceeding in which the judgment was rendered, or that the term of the petitioner's imprisonment will expire before a hearing can be had in the ordinary course of proceedings upon a writ of error or appeal.[61]

The Federal courts are prohibited by statute from staying by injunction proceedings in state courts,[62] except as permitted by the bankruptcy act.[63] If, however,

1-7 (24 Stat. 505, 506; Comp. St. 1901, pp. 752-755), conferring jurisdiction on them over certain claims against the United States. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455.

53. Not under Act March 3, 1887 (24 Stat. at L. 552, c. 373). United States v. Lake Shore & M. S. R. Co., 197 U. S. 536, 49 Law. Ed. 870. Interstate Commerce Act, §§ 12, 20, does not confer such jurisdiction to compel interstate carrier to make the report which commission is authorized by that act to require. Id.

54. Act March 3, 1875, § 8 (18 Stat. at L. 472 c. 137; Comp. St. 1901, p. 513). McDaniel v. Traylor, 196 U. S. 415, 49 Law. Ed. 533.

55. McDaniel v. Traylor, 196 U. S. 415, 49 Law. Ed. 533.

56. Copyrights not attacked. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. S. 153.

57. Le Fevre v. Amonson [Idaho] 81 P. 71. U. S. Rev. St. § 2326; Comp. St. 1901, p. 1430, in regard to adverse mining claims, confers jurisdiction on state courts only of suits by adverse claimants to same mineral land, but not to determine whether land is mineral or nonmineral, that question being for the land department, and a court has no jurisdiction of a controversy between a mining claimant and a townsite claimant. Wright v. Town of Hartville [Wyo.] 81 P. 649.

58. When protest against grant of patent is filed in land office. Le Fevre v. Amonson [Idaho] 81 P. 71.

59. See, also, Habeas Corpus, 5 C. L. 1615. In re Dowd, 133 F. 747.

60. In re Dowd, 133 F. 747.

61. In re Dowd, 133 F. 747. Petition for writ by one confined for contempt for violation of injunction issued by state supreme court denied. Id.

62. Rev. St. § 720; Comp. St. 1901, p. 581. Decree of circuit court enjoining a party from setting up any claim to the right to use a railroad switch, which the state court

the court has jurisdiction by reason of diversity of citizenship and the necessary amount is involved, it may grant relief against a judgment of a state court obtained by fraud, or on other equitable grounds, in any case in which relief could be granted if the judgment were rendered by a Federal court,[64] and in such case a preliminary injunction may be issued against the defendant to prevent the collection of the judgment by execution or otherwise.[65] The act will not be construed to limit the power of Federal courts to restrain parties of whom it has jurisdiction from instituting proceedings in any court.[66] Nor does the rule apply where the Federal court has first acquired jurisdiction of the subject-matter and the parties.[67] Where the Federal court acts in aid of its own jurisdiction, and to protect title conveyed by it in foreclosure proceedings, and to render its decree effectual, it may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction.[68]

Court of claims.[69]—The jurisdiction of the court of claims is fixed by statute.[70] It has original legal and equitable jurisdiction of all claims arising out of contracts for public work in the District of Columbia,[71] and for work done by the order and direction of the commissioners of the District and accepted by them for its use, purposes, or benefit.[72] Any bill, except those for pensions, providing for the payment of any claim against the United States, or for a grant, gift, or bounty to any person, which is pending in either house of congress, may be referred to it.[73] The

has held that he was entitled to use, does not violate the statute, where, since the decision of the state court, the railroad has sold the switch to a private person at whose instance the injunction was obtained. Oman v. Bedford-Bowling Green Stone Co. [C. C. A.] 134 F. 64, afg. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441. Does not apply to state corporation commission, though it is made a court of record, which has many nonjudicial powers, especially where acts complained of are not judicial acts. As to them, it is a mere state agency. Southern R. Co. v. Greensboro Ice & Coal Co., 134 F. 82. Applies to prevent issuance of injunction to state court or against parties to suits therein, and prohibition extends to entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied. Security Trust Co. v. Union Trust Co., 134 F. 301.

63. Court of bankruptcy has jurisdiction to enjoin the prosecution of a bankrupt fireman for neglect of duty looking to his discharge from the department, because of his nonpayment of a debt from which a pending bankruptcy proceeding will discharge him. In re Hicks, 133 F. 739.

64, 65. Lehman v. Graham [C. C. A.] 135 F. 39.

66, 67. Glucose Refining Co. v. Chicago, 138 F. 209.

68. May prevent attack in state court by party claiming that, by reason of his own untruthful admissions of citizenship, the Federal court assumed a jurisdiction it did not have. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008.

69. See 4 C. L. 345.

70. If claim for refund of Federal tax illegally collected is allowed by the commissioner of internal revenue, and payment is thereafter refused by the accounting officers, suit may be brought directly against the government in the court of claims. Edison Illuminating Co.'s Case, 38 Ct. Cl. 208. Allowance by commissioner is not simple passing of ordinary claim by an ordinary accounting officer, but an award upon which an action may be based, and which is conclusive unless impeached for fraud or mistake. Id. The appropriation act not delegating to the secretary of the interior power to determine what classes of Indians are entitled to participate in a fund appropriated to pay a judgment against the government, he may seek the aid of the court of claims for that purpose either by applying for a further decree, or by invoking the jurisdiction of the Bowman act. Oneida Indians' Case, 39 Ct. Cl. 116. Court of claims has no authority under jurisdictional act June 28, 1898 (30 Stat. at L. 490) to investigate alleged improper and fraudulent use of a national fund by the Cherokee government. Delaware Indians' Case, 38 Ct. Cl. 234. Court has no jurisdiction, on the petition of full blooded Cherokees, to adjudge and decree redress against the alleged unlawful acts of the Cherokee nation. Id. Act Jan. 9, 1883 (22 Stat. at L. p. 401, § 2), providing that claims for horses lost in the military service which are not filed in the proper department within one year after the passage of the act shall be barred and shall not be considered by any department of the government, does not limit the jurisdiction of the court of claims to claims so filed. Hardie's Case, 39 Ct. Cl. 250.

71. Act June 16, 1880. Has equitable jurisdiction to reform contract for street improvements, in order to determine the amount due under the contract to claimant. District of Columbia v. Barnes, 197 U. S. 146, 49 Law. Ed. 699.

72. Act June 16, 1880. May award compensation for work done outside of the original contract. District of Columbia v. Barnes, 197 U. S. 146, 49 Law. Ed. 699.

court has no jurisdiction of any claims referred under this act unless they are claims on which the government is primarily liable.[74]

(§ 11) *B. As affected by diversity of citizenship.*[75]—The circuit courts of the United States have original jurisdiction of controversies between citizens of the state where the suit is brought and citizens of other states,[76] provided the requisite amount is involved.[77] A state is not a citizen within this rule.[78] The parties to the suit on one side, whether consisting of one or more persons, must have a citizenship different from that of the parties on the other side, whether consisting of one or more persons.[79] Thus a cause cannot be removed to the Federal court where one of the defendants is a citizen of the same state as the plaintiff,[80] unless there is a separable controversy as to the nonresident defendant, in which case it may be removed as to him.[81] Separate and distinct causes of action disclosed by the bill or complaint in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the determination of the other, constitute separate controversies.[82] In the absence of any pretense of a scheme to defeat the Federal jurisdiction, the question whether a separable controversy exists must be

73. Act March 3, 1887 (24 Stat. at L. 507, § 14). Bellah's Case, 39 Ct. Cl. 396. Bill simply directing the secretary of war to investigate concerning the alleged taking or destruction of property, and not providing for the payment of a claim to any beneficiary whatever, is not covered by the act and court has no jurisdiction. Id.

74. Act does not extend to claims for Indian depredations for which tribe is primarily liable, and the government's liability is that of guarantor only. Vincent's Case, 39 Ct. Cl. 456. Such claims can be disposed of only in accordance with Act March 3, 1891 (26 Stat. at L. 851). Id.

75. See 4 C. L. 346.

76. Cannot exercise its chancery powers to decide independent controversy between citizens of same state not involving a Federal question. Moore v. Fidelity Trust Co., 134 F. 489, afd. [C. C. A.] 138 F. 1. The fact that an attachment suit in aid of an action at law against a nonresident is equitable in form does not cut off the right of removal where diversity of citizenship exists. Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398.

77. See § 6, ante.

78. A state not being a citizen of any state, an action in which it is the real party in interest cannot be removed to a Federal court solely on the ground of diverse citizenship. Action between state and citizen or corporation of another state. Southern R. Co. v. State [Ind.] 75 N. E. 272.

79. 25 St. 434, § 2; Comp. St. 1901, p. 509. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404. Each plaintiff must be competent to sue, and each defendant liable to be sued in such court, or the jurisdiction cannot be maintained. Circuit court has no jurisdiction of suit against several defendants to enjoin the diversion of water from a stream by means of a ditch in which each of defendants owns an interest, where any one of them is a citizen of the same state as complainant. Anderson v. Bassman, 140 F. 10.

80. See, also, Removal of Causes, 4 C. L. 1277. Where the petition in a tort action states a joint cause of action against a resident and a nonresident defendant, the state court has jurisdiction, and the case is not removable. Against a nonresident railroad and a resident engineer. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714; Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. The circuit court has no jurisdiction over an action for injuries brought by a citizen of the state against both a domestic and a foreign corporation, where there is any right of action or any reasonable ground to claim a right of action, against the domestic corporation, and no separable controversy is claimed to exist. Keller v. Kansas City, etc., R. Co., 135 F. 202.

81. See, also, Removal of Causes, 4 C. L. 1277. If either controversy is wholly between citizens of different states, and can be fully determined as between them, it is removable. Same statutes. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650. Causes of action to avoid prior mortgages for fraud, and to foreclose junior mortgage held separable, and former, being between citizens of one state on one side and of another state on other side, is removable. Id.

82. Within Act March 3, 1887, c. 373, § 2 (24 Stat. 552), and Act Aug. 13, 1888, c. 866, § 2 (25 Stat. 433; 1 Comp. St. 1901, p. 509). Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650. An action of tort which might have been brought against one or more of several persons but is brought against all of them jointly in a state court, contains no separate controversy which will authorize its removal to the Federal circuit court by some of the defendants, even though they file separate answers, set up separate defenses, and allege that they are not jointly liable and that their controversy is a separate one. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225. In action against railroad and a construction company for services under a contract made by plaintiff and the latter, where the citizenship of the latter only was diverse, and plaintiff alleged in a single cause of action that he performed services for the railroad for which the construction company acted as agent, and sought to recover against defendants jointly, held, that complaint did not state severable cause of action, and action was not removable. Lathrop, Shea & Henwood Co. v. Pittsburg, etc.,

determined from the face of the declaration.[83] Where the complaint does not show a separable controversy, the nonresident defendant does not acquire a right of removal by reason of the fact that, after a bona fide prosecution of the case, the court gives a peremptory instruction in favor of the resident defendant.[84] In a suit against a domestic and a foreign corporation, if the liability of the domestic corporation is fairly debatable, plaintiff has the right to a trial in the state court, unless his conduct in joining such corporation amounts to a fraudulent interference with the jurisdiction of the Federal courts.[85] A contention that the controversy is separable and hence removable cannot be considered where the petition for removal is based on other grounds.[86]

Two citizens of different states may sue a citizen of a third state in the Federal circuit court for the district of the latter's residence.[87] The rule that the circuit court has no jurisdiction on the ground of diverse citizenship where there are two plaintiffs who are citizens of and residents in different states, and the defendant is a citizen of and resident in a third state, and the action is brought in the state in which one of the plaintiffs resides, does not apply to a case involving a local action brought to enforce a claim and settle the title to real estate.[88]

Cases removable on the ground of prejudice and local influence are confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states.[89]

Residence and citizenship are entirely different things within the meaning of the constitutional and statutory provisions regulating the jurisdiction of the Federal circuit courts.[90] For jurisdictional purposes a national bank is deemed a citizen of the state in which it is located,[91] and a corporation and its members citizens of the state creating it;[92] but this does not apply to partnership associations[93] or joint stock

R. Co., 135 F. 619. No separable controversy in a suit for an undivided half interest in a single tract of land alleged to be wrongfully held by the two defendants. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

83. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225. Declaration, in action for personal injuries against a nonresident railroad company and a resident company using its tracks, held not to show a separable cause of action against the nonresident company. Id.

84. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225.

85. Allegations of fraudulent interference held not sustained. Keller v. Kansas City, etc., R. Co., 135 F. 202.

86. Keller v. Kansas City, etc., R. Co., 135 F. 202.

87. Under Act March 3, 1887 (24 Stat. at L. 552, c. 373) as corrected by Act Aug. 13, 1888 (25 Stat. at L. 433, c. 866; Comp. St. 1901, p. 508), giving circuit courts original jurisdiction of suits in which there is a controversy between citizens of different states, to be brought in the district of the residence of either the plaintiff or defendant. Sweeney v. Carter Oil Co., 26 S. Ct. 55.

88. Not to suit to partition realty under Bal. Ann. Codes & St. Wash. § 5558. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

89. Does not include cases wherein controversy is partly between citizens of the same state. Act March 3, 1887 (24 Stat. at L. 552, c. 373), as corrected by Act Aug. 13, 1888 (25 Stat. at L. 433, c. 866, § 2; Comp. St. 1901, p. 508), construed. Cochran v. Montgomery Co., 26 S. Ct. 58. It has been held that a defendant who is a citizen of a state other than that in which the suit is brought may remove it for prejudice and local influence, notwithstanding the fact that the plaintiff and some of the defendants are citizens of the state in which the action was commenced (Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650), but this case is apparently overruled by the supreme court case last cited.

90. Steigleder v. McQuesten, 198 U. S. 141, 49 Law. Ed. 986. Evidence held to show that plaintiff was a citizen of Massachusetts, and that her residence in Washington when the suit was brought was merely temporary and without any fixed intention to abandon her citizenship in the other state. Id.

91. Act Aug. 13, 1888, c. 866, § 4 (25 Stat. 436, Comp. St. 1901, p. 514). George v. Wallace [C. C. A.] 135 F. 286; Guthrie v. Harkness, 26 S. Ct. 4.

92. As to manner of pleading citizenship of corporations and associations see § 11 D, post. Members. Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177, 49 Law. Ed. 1003. Corporation. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. A suit is regarded as one by or against stockholders. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

NOTE. Citizenship of de facto corporations: A charter provided that a corporation should not have the power to do business until certain conditions were performed. Before having complied, the corpora-

companies.[94] The presumption may be overcome by proof.[95] A corporation suing in the Federal courts on the ground of diverse citizenship must prove that it is a corporation of the state alleged, when that fact is put in issue by the answer.[96] If plaintiff is a minor suing by his guardian, his citizenship, and not that of the guardian, controls.[97]

In determining whether diversity of citizenship exists, indispensable parties only should be considered.[98] The positions assigned to the parties by the pleader are immaterial, it being the duty of the court to ascertain the real matter in dispute, to arrange the parties on opposite sides of it according to the facts, and then to determine whether a controversy exists between citizens of different states which invokes its jurisdiction.[99] An arrangement of parties which is merely a contrivance to found a jurisdiction which would not otherwise exist will not be allowed to succeed.[1] The fact that the ultimate interest of a corporate defendant may be the

tion brought an action in the Federal court against the defendant for the price of goods supplied, setting forth diversity of citizenship as the ground of Federal jurisdiction. Held, the court did not have jurisdiction, as the corporation must have a de jure existence in order to be a citizen in this regard. Gastonia Cotton Mfg. Co. v. Wells Co. [C. C. A.] 128 F. 369. The question whether a de facto corporation is entitled to standing in a Federal court as a citizen does not seem to have been directly raised. In Tulare Irrig. Dist. v. Shepard, 185 U. S. 1, 46 Law. Ed. 773, and in Commissioners of Douglas County v. Bolles, 94 U. S. 104, 24 Law. Ed. 46, where the action was against the corporation, the court decided against the de facto corporation without looking into the question of jurisdiction. The principal case seems inconsistent with the above case, for if the view therein set forth be adopted, the court in these cases should have disallowed the action. The record would show the absence of jurisdiction, of which fact the court should take notice. Grace v. American Central Ins. Co., 109 U. S. 278, 27 Law. Ed. 932. This view seems to be the logical one.—5 Columbia L. R. 61.

93. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

94. A joint stock company, although a legal entity and suable in its own name under state laws, is not a corporation and cannot be deemed to have citizenship. Not for removal purposes. Saunders v. Adams Exp. Co., 136 F. 494. Where, prior to filing a petition for removal of a cause against a joint stock company, the state court has acquired full jurisdiction over its person by service of process on its agents as authorized by the state statutes, defendant's nonresident president, on entering an appearance, is not entitled to have the suit removed. He is not the defendant and his citizenship cannot be considered. Id.

95. The presumption that stockholders are citizens of the state creating such corporation does not preclude them from asserting their actual citizenship to sustain the jurisdiction of the Federal circuit court of a suit brought by them as such stockholders. Doctor v. Harrington, 196 U. S. 579, 49 Law. Ed. 606.

96. Incorporators held to have become a corporation for purposes of suit, though there had been no compliance with charter provision allowing it to commence business when a certain proportion of capital stock was subscribed and paid for. Wells Co. v. Gastonia Cotton Mfg. Co., 196 U. S. 177, 49 Law. Ed. 1003.

97. Guardian is a mere protector of plaintiff's interest. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

98. Since all other parties may be dismissed and disregarded if their presence would oust or restrict the jurisdiction or the right. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650. The joinder of a citizen of the same state as plaintiff as a defendant defeats jurisdiction if he is a necessary or indispensable party, but not if he is a formal party only. White Swan Mines Co. v. Balliet, 134 F. 1004. In suit to establish trust in favor of plaintiff corporation in money alleged to have been embezzled by one of its officers and deposited with defendant, officer is only a formal party. Id. Railroad companies and bank held not necessary parties for specific performance of contract. Cella v. Brown, 136 F. 439. Since under the statutes of Utah a note made payable to the cashier of a bank as trustee, the consideration for which was furnished by the bank, which is the real owner, may be sued on by the bank in its own name; the citizenship of the cashier is immaterial in determining the jurisdiction of a Federal court in an action thereon in that state. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737.

99. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650; City of Dawson v. Columbia Ave. Sav. Fund, S. D., T. & T. Co., 197 U. S. 178, 49 Law. Ed. 713.

1. City of Dawson v. Columbia Ave. Sav. Fund, S. D., T. & T. Co., 197 U. S. 178, 49 Law. Ed. 713. Circuit court has no jurisdiction of suit against municipality by a nonresident mortgagee of a waterworks company to enforce the latter's contract with the city, where the city and the company are citizens of the same state, the interests of the company and the mortgagee are not antagonistic, and the company is made a defendant instead of a plaintiff solely for the purpose of reopening in the Federal courts a controversy which has been decided against the company in the state courts. Id. Suit by nonresident stockholders to restrain defendants from inducing corpora-

same as that of the complaining stockholders does not require that it be grouped with them for the purpose of determining whether the necessary diversity of citizenship exists, where the bill alleges that the corporation is under a control antagonistic to complainants and has been made to act in a way detrimental to their rights.[2]

The jurisdiction of the Federal court is not affected by the fact that, after judgment has been rendered, a citizen of the same state as plaintiff appears and seeks to have such judgment opened,[3] nor because, after removal of a cause from a state court on the ground of diversity of citizenship, one of the defendants removes to and becomes a citizen of the state where plaintiff resides.[4] Jurisdiction over a suit by a nonresident stockholder to enjoin the alleged use of corporate assets in an ultra vires business is not affected by the fact that plaintiff is acting with other stockholders who are citizens of the same state as the corporation, and that they contribute to the expenses of the suit.[5]

When a case has been removed on the ground of diversity of citizenship, the Federal court is entitled to pass on all questions, including that of jurisdiction over the subject-matter in the state courts, or the sufficiency of the service of mesne process to authorize the recovery of personal judgment.[6]

No Federal circuit or district court has cognizance of any suit on a promissory note or other chose in action in favor of an assignee, unless such suit might have been maintained by the assignor if no assignment had been made.[7] The act, however, does not apply to a case where the cause of action accrues to the assignee and not to the assignor,[8] nor to a bill by a nonresident stockholder of a corporation, who acquired his stock by assignment from a resident of the state where the corporation is domiciled, to restrain the directors and trustees from using the corporate assets for alleged ultra vires purposes, affecting the interests of all the stockholders,[9] nor to suits on judgments recovered in actions on assigned notes in state courts.[10] The term assignee covers anyone who, by virtue of a transfer to him, can claim the bene-

tion's employes to strike held collusive within equity rule 94, where corporation and employes were citizens of same state, and corporation had already sued in state court. Kemmerer v. Haggerty, 139 F. 693.

2. Doctor v. Harrington, 196 U. S. 579, 49 Law. Ed. 606.

3. Where ejectment was brought in a Federal court in which the requisite diversity of citizenship appeared, and after a judgment against a tenant for a part of the land, his landlord, who was not a party to the suit, appeared and sought to have the judgment opened, the court was not ousted of jurisdiction by reason of the fact that he was a citizen of the same state as plaintiff. King v. Davis, 137 F. 198.

4. Where the requisite diversity of citizenship existed when the action was commenced and at the time of its removal. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

5. Such fact does not make suit collusive within equity rule 94. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

6. Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398.

7. Act March 3, 1887, c. 373, § 1 (24 St. 552), as corrected by Act Aug. 13, 1888, c. 866 (25 St. 433, Comp. St. 1901, p. 508). Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363. Suit of nonresident assignee of non-negotiable note, executed by one national bank to another, both of which were residents of Nebraska, against maker and other defendants, most of whom were also residents of that state, cannot be maintained on ground of diversity of citizenship. George v. Wallace [C. C. A.] 135 F. 286.

8. Where, under terms of town vote granting aid to a railroad company, no cause of action therefor ever accrued to the company because it did not complete the road, but did accrue to its receiver or the assignee of his successor who furnished funds for the completion of the road under an assignment of the subscription, the fact that the corporation was of the same citizenship as the town did not deprive the assignee of the right to sue in the Federal court for the amount of such subscription. Paige v. Rochester, 137 F. 663.

9. Right of action is primarily in corporation, and suit is not one to recover the contents of a chose in action. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

10. Judgment creditors of insolvent corporation may sue in Federal court to enforce trust against third person in property alleged to belong to corporation and to have been acquired by defendants in fraud of their rights, where diversity of citizenship appears and requisite amount is involved, though complainants' judgments were recovered in state courts in suits on assigned notes of which Federal court would not have had jurisdiction. Stanwood v. Wishard, 134 F. 959.

ficial interests of the contract.[11] A successor of a receiver is not an assignee.[12] If one of several contracts which are the basis of a suit in equity is clearly within the jurisdiction of the court, it may determine the entire controversy, though the other contracts were acquired by complainant through assignments from persons who could not have sued in such court.[13] If an assignee may sue alone in the Federal courts, he and his assignees may sue together as if no assignment had been made.[14]

(§ 11) *C. As affected by existence of Federal question.*[15]—A Federal question giving jurisdiction to Federal courts exists whenever a Federal statute,[16] a

11. Pledgee of stock cannot, on account of diverse citizenship existing between him and corporation, sue latter in Federal court for the appointment of receiver, where pledgor is resident of state of which corporation is a citizen. Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363.

12. Successor of receiver of railroad who has completed railroad and thereby become entitled to a town subscription. Paige v. Rochester, 137 F. 663.

13. Howe & Davidson Co. v. Haugan, 140 F. 182.

14. Paige v. Rochester, 137 F. 663.

15. See 4 C. L. 348.

16. The circuit courts have jurisdiction of cases arising under the constitution or laws of the United States. Act Aug. 13, 1888, c. 866, § 1 (25 Stat. 434; Comp. St. 1901, p. 514). George v. Wallace [C. C. A.] 135 F. 286. Including suits against insolvent national banks which have gone into voluntary liquidation, to enforce specific liens, or to enforce and judicially administer trusts previously created by contract or arising from the insolvency and liquidation proceedings (George v. Wallace [C. C. A.] 135 F. 286), and suits to enforce the liability of the stockholders of such a bank (Id.). Is a suit under the laws of the United States, and also a suit to wind up the affairs of the bank, which is expressly excepted from the Act of Aug. 13, 1888, by § 4 thereof. Id. May also be enforced by bill in nature of creditors' bill in the circuit court under Act June 30, 1876, c. 156, § 2 (19 Stat. 63, Comp. St. 1901, p. 3509). Id. Act June 30, 1876, c. 156, § 2 (19 Stat. 63; Comp. St. 1901, p. 3059), giving Federal courts original jurisdiction in equity of creditor's bill against stockholders of national bank which has gone into liquidation, held not repealed by Act Aug. 13, 1888, c. 866, § 4 (25 St. 436; Comp. St. 1901, p. 514), providing that all national banks, for the purpose of actions by or against them, shall be deemed citizens of the states in which they are located, but such act relates exclusively to suits against or by banks themselves. Id. Nor is it repealed by Act July 12, 1882, c. 290, § 4 (22 Stat. 163; Comp. St. 1901, p. 3458), providing that the jurisdiction for suits by or against any national bank, except suits between it and the United States, shall be the same as for suits by or against state banks. Id.

Held to present Federal question: Decision of state court that statute of limitations applicable to the right to enforce the individual liability of stockholders in national banks is put in motion by delay of comptroller of the currency in making an assessment. Rankin v. Barton, 26 S. Ct. 29. Decision of state court that statute of limitations governing adverse possession of realty operated to defeat action under Federal statutes to try title to conflicting mining claims, in which defeated party relied on a relocation of forfeited claim under U. S. Rev. St. § 2324, Comp. St. 1901, p. 1426, held to involve a denial of rights under such statute, where state court treated as irrelevant evidence tending to show that premises in dispute were embraced in the forfeited location, and that possession of that claim was held and retained from a time at least contemporaneous with initiation of the conflicting locations almost up to the relocation. Lavagnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119. Contention, on motion for directed verdict, that cession to the United States by New Jersey (N. J. Act March 12, 1846) of strip of land at Sandy Hook vested in it exclusive legislative jurisdiction over littoral waters within the three mile limit, presents question respecting the exclusive legislative power of congress under Const. art. 1, § 8, cl. 17, which will sustain writ of error to supreme court. Hamburg-American S. S. Co. v. Grube, 196 U. S. 407, 49 Law. Ed. 529. Federal circuit court has jurisdiction of suit to enjoin assessment where question of right of taxpayer to an exemption on account of United States bonds owned by him is involved, regardless of the citizenship of the parties. People's Sav. Bank v. Layman, 134 F. 635. Federal circuit court has jurisdiction of a suit by a telegraph company, which has accepted the provisions of Rev. St. § 5263, Comp. St. 1901, p. 3579, to enjoin the threatened removal or destruction of its line by the local authorities. Ohio Postal Tel. Cable Co. v. Sandusky County Com'rs, 137 F. 947. One who has acquired the right to use the water of a nonnavigable stream flowing through the public land for domestic or irrigation purposes by complying with the state statutes is protected in such right by U. S. Rev. St. §§ 2339, 2340, and the Federal circuit court has jurisdiction to determine the conflicting rights of various appropriators, even though their lands and points of diversion are in different states. Anderson v. Bassman, 140 F. 14.

Held not to present Federal question: The decision of a state court as to whether a conveyance by a bankrupt was made with intent to defraud creditors. Thompson v. Fairbanks, 196 U. S. 516, 49 Law. Ed. 577. Contention that congressional consent (Act June 28, 1834, 4 Stat. at L. 708, c. 126) to agreement between New Jersey and New York respecting their territorial limits and jurisdiction vested exclusive jurisdiction in the Federal government over sea adjoining the two states, there being nothing in the agreement or state statutes abdicating rights in favor of the government. Hamburg-American S. S. Co. v. Grube, 196 U. S. 407, 49

treaty, or the Federal constitution[17] is to be construed or their effect or operation is involved; but not if the question is a local one and involves only the state constitution or statutes.[18] Whether a constitutional question was raised and continues to

Law. Ed. 529. Assertion of title of realty under a patent from the United States. Bonin v. Gulf Co., 198 U. S. 115, 49 Law. Ed. 970. Judgment of state court denying the right of possession of real property under a title founded on an act of congress, which rests upon ground that adverse tax title was made good by prescription under state constitution. Corkran Oil & Development Co. v. Arnaudet, 26 S. Ct. 41. Presence of question respecting the construction and application of Federal legislation respecting swamp and overflowed lands gives no right to review judgment in ejectment holding defendant's title invalid on the independent ground, among others, of noncompliance with a state statute. Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 49 Law. Ed. 1108. The mere fact that a suit is brought under the Federal statutes (Rev. St. § 2326; Comp. St. 1901, p. 1430) to try adverse rights to a mining claim does not necessarily involve a Federal question, so as to authorize a writ of error from the Federal supreme court. McMillen v. Ferrum Min. Co., 197 U. S. 343, 49 Law. Ed. 784.

17. Held to present Federal question: Action to recover damages for preventing plaintiff from exercising right to vote for a member of congress is one arising under Federal constitution, and is within jurisdiction of Federal courts where requisite amount is involved. Knight v. Shelton, 134 F. 423. Suit to restrain a state officer from collecting taxes levied under a state constitution and statutes, which it is in good faith claimed deny to complainants the equal protection of the laws, and deprive it of its property without due process of law. Is not a suit against the state. Michigan Railroad Tax Cases, 138 F. 223.

Held not to present Federal question: Mere inequality in taxation not apparently systematic and intentional does not show an unequal protection of the laws. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615. Decision of state court that formalities required by tax laws were fully observed, where there is no contention that such laws are unconstitutional, but merely that the manner of their observance was a denial of due process of law. French v. Taylor, 26 S. Ct. 76. Whether or not the courts of one state should, on principles of comity, permit an action to be maintained on a contract entered into in contravention of the laws of another state. Allen v. Alleghany Co., 196 U. S. 458, 49 Law. Ed. 551. Statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court. Kinney v. Mitchell, 138 F. 270. Whether or not a person has waived a right which he might otherwise have had under the constitution or statutes of the United States by his acts or omissions, as where, by application of doctrine forbidding parties from assuming inconsistent positions, defendant was held to be estopped from asserting it. Leonard v. Vicksburg, etc., R. Co., 198 U. S. 416, 49 Law. Ed. 1108. The mere refusal of a municipal corporation to perform its contract is insufficient to confer jurisdiction on a Federal circuit court on the ground that the resulting suit arises under the Federal constitution. Something else necessary to make a law impairing the obligations of a contract. City of Dawson v. Columbia Ave. Sav. Fund, S. D., T. & T. Co., 197 U. S. 178, 49 Law. Ed. 713. Decree of state court requiring defendants to vacate certain land and enjoining them from further mining thereon in accordance with the prayer of a bill proceeding on the theory that a corporation holding a lease under which defendants justified their occupation as its agents was no longer in existence, does not involve a Federal question on theory that, in determining case without making such corporation a party, it will be deprived of its property without due process of law, since, not being a party, its rights are not affected by the decree. Iron Cliffs Co. v. Negaunee Iron Co., 197 U. S. 463, 49 Law. Ed. 836. Contention that state court, in admitting nuncupative will to probate without notice, violated due process of law clause of Federal constitution, held not to give circuit court jurisdiction of suit to set aside probate, even if such notice was essential, where there was a right to assail the will and its probate after admission, even though no notice was given. Farrell v. O'Brien, 199 U. S. 89, 50 Law. Ed. —. Contention that because realty cannot pass under nuncupative will, the attempt of probate court to exert authority over property of that character by admitting will to probate deprived heirs of such property without due process of law does not give circuit court jurisdiction to pass upon construction and effect of such will, where such question is wholly subordinate to determination of another over which such court has no jurisdiction. Id. The construction by a state court of a statute of another state and its operation elsewhere does not necessarily involve such a Federal question. Whether or not a contract entered into in another state in violation of its laws in regard to foreign corporations is ipso facto void and therefore unenforceable in the state where the action is brought does not present a case under the full faith and credit clause of the Federal constitution. Allen v. Alleghany Co., 196 U. S. 458, 49 Law. Ed. 551.

18. Contention that act deprives school district of local self government guaranteed to all municipalities by the constitution (Attorney General v. Lowrey, 26 S. Ct. 27), that title of act indicates, and the act itself embraces, more than one subject (Id.), and that act is broader than the title, present strictly local questions, not reviewable by Federal supreme court (Id.). Decision of highest state court that a plea does not disclose defense that note in suit was given to foreign corporation in pursuance of business carried on in another state without compliance with the statutory conditions on which its right to do business there depends involves purely a local question. Allen v. Alleghany Co., 196 U. S. 458, 49 Law. Ed. 551. The Federal circuit court has no jurisdiction to de-

subsist pertains to a prior section.[19] There must be a real and substantial dispute as to the effect or construction of the constitution or of some law of the United States, upon the determination of which the recovery depends,[20] and the question must be one of law as stated in the complaint, and not one of fact.[21] If the claim that a Federal question is involved is made in good faith, the court, having acquired jurisdiction, does not lose it by deciding such question against complainant, but may retain the case for the decision of other questions arising on the record.[22]

An amendment to a complaint in the state court which transforms a nonremovable cause into a removable one, allows the suit to be removed into the Federal circuit court, if the defendant acts promptly.[23]

(§ 11) *D. Averments and objections as to jurisdiction.*[24]—A case is presumed to be without the jurisdiction of the Federal circuit court unless the contrary affirmatively appears.[25] An allegation of jurisdictional facts is, however, prima facie true, and the burden of the affirmative averment in a plea in abatement of facts showing such want of jurisdiction is upon the party making such averment.[26]

The facts necessary to give jurisdiction, either on the ground of diversity of

termine the validity of the action of a state supreme court on a purely domestic controversy. Cannot declare judgment of state court void on ground that decision was rendered by a single justice, the others refusing to act because disqualified, where court had jurisdiction over the subject-matter and the parties. Michell Co. v. Matthues, 134 F. 493. The Federal courts have no jurisdiction to interfere in any manner with state proceedings for the execution of a sentence against a convicted criminal, except to prevent the infringement of any of his privileges or immunities under the Federal constitution. Ex parte Rogers, 138 F. 961. In the absence of the requisite diversity of citizenship and amount involved, the Federal courts have no jurisdiction of a case where the question presented relates to the interpretation to be given a state law, and the complaint is that such a law is being misinterpreted and misapplied to the injury of plaintiff in his rights of property. United States v. Bell [C. C. A.] 135 F. 336. Claim founded upon alleged malicious and unlawful acts of defendants committed by them while sitting and acting as judges of a state court and while engaged in administering state laws does not involve Federal question. Id. In a suit to enjoin the enforcement of city ordinances, Federal jurisdiction cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers, such question being one for the determination of the state courts. Glucose Refining Co. v. Chicago, 138 F. 209.

19. See Ante, § 7.

20. United States v. Bell [C. C. A.] 135 F. 336. The mere averment of a constitutional question is not sufficient to give the Federal supreme court jurisdiction of an appeal from the circuit court of appeals, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. Farrell v. O'Brien, 199 U. S. 89, 50 Law. Ed. —.

21. Thus if the facts only are in dispute, and the Federal law governing the case is uncontroverted, or has been determined by the supreme court of the United States, the Federal court cannot take jurisdiction. Action to recover for personal injuries alleged to have been received by reason of defendant's failure to equip its cars with safety appliances is not rendered removable merely by an allegation that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the Federal law. Questions of fact whether defendant is engaged in interstate commerce, and, if so, whether it has complied with the law, are not Federal questions. Myrtle v. Nevada, C. & O. R. Co., 137 F. 193.

22. People's Sav. Bank v. Layman, 134 F. 635. Jurisdiction of a Federal court having been properly invoked for relief against assessments as discriminating against complainant, and as depriving it of the equal protection of the laws though such Federal question is decided against complainant, the bill may be retained to administer relief on other grounds. Michigan Railroad Tax Cases, 138 F. 223. Where an infringement of the Federal constitution is the only ground upon which a plaintiff could come into a Federal court and that ground obviously fails, the court should be very cautious in interfering with a state's administration of its taxes upon other considerations which would not have given it jurisdiction. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615.

23. Myrtle v. Nevada, C. & O. R. Co., 137 F. 193.

24. See 4 C. L. 350.

25. Anderson v. Bassman, 140 F. 10. The jurisdiction must always appear affirmatively of record. Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177, 49 Law. Ed. 1003.

26. Averment in bill that business sought to be protected amounted to $5,000, exclusive of interest and costs, will be treated as prima facie true for purpose of sustaining court's jurisdiction, notwithstanding an allegation in the answer that the amount in controversy was less than $2,000, until defendant sustains burden of showing, during the progress of the case, that the requisite jurisdictional amount is wanting. Pennsylvania Co. v. Bav. 138 F. 203.

citizenship[27] or the existence of a Federal question,[28] must be distinctly alleged and not left to argument or mere inference. So too it must appear from the complaint or petition that the jurisdictional amount is in controversy.[29]

An averment in the bill that the parties are citizens of different states makes a prima facie case of jurisdiction so far as it depends on citizenship.[30] An averment that an individual is a citizen of a named state is sufficient,[31] but a mere averment of residence in a particular state is not an averment of citizenship in that state.[32] An averment that a company or association is a citizen of a particular state is insufficient, unless it is a corporation.[33] If it is a corporation, it is not enough to allege that such corporation is a citizen of a named state, but it must also be alleged that it was created by the laws of such state.[34] If it is an unincorporated association, the citizenship of the individuals composing it must be alleged.[35] When

27. In a suit to partition realty where the bill shows on its face diverse citizenship as between the parties complainant and defendant, that the jurisdictional amount is involved, and that the suit is brought in the district of the residence of either the plaintiff or the defendant, the circuit court has jurisdiction, and no rearrangement of the parties will be made with respect to a subordinate question to defeat that jurisdiction. Where any question affecting the right of plaintiff to a partition, or the rights of each and all of the parties in the land may be put in issue, tried, and determined in such action. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1. Absence of sufficient averments, or of facts in the record showing such diversity, is fatal. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404. In suit in a Federal court to enjoin enforcement of a municipal smoke ordinance, allegation that plaintiff is a foreign corporation and that the amount involved is largely in excess of $2,000, exclusive of interest and costs, held to sufficiently show jurisdiction. Glucose Refining Co. v. Chicago, 138 F. 209.

28. Facts alleged must show nature of suit, and it must plainly appear that it arises under constitution or laws of the United States. United States v. Bell [C. C. A.] 135 F. 336. Mere allegation that defendants were liable under Rev. St. §§ 1979, 1980, prohibiting the deprivation of rights, privileges, and immunities secured by the constitution and laws, held insufficient, those sections not conferring any jurisdiction on circuit court. Id.

29. For manner of determining amount in controversy see § 6, ante. On application to Federal circuit court by shareholder in a national bank for a writ of mandamus to compel association to permit him to inspect its list of shareholders, based on U. S. Rev. St. § 5210, it must appear by the petition that the matter in dispute exceeds the value of $2,000. Large v. Consolidated Nat. Bank, 137 F. 168. Averment that plaintiff is registered owner of ten shares of stock held insufficient. Id.

30. Steigleder v. McQuesten, 198 U. S. 141, 49 Law. Ed. 986.

31. While it is not sufficient to aver that a company or association is a citizen of a particular state, an additional averment that it is a corporation being necessary, this rule does not apply to the case of an individual. Yonkerman Co. v. Fuller's Adv. Ag., 135 F. 613. Allegation that plaintiff is a citizen "of said county of Monroe, in said state of Michigan," held sufficient on appeal in view of the fact that it was accepted and acted upon below. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

32. Steigleder v. McQuesten, 198 U. S. 141, 49 Law. Ed. 986.

33. Averment that partnership association is a corporation held mere conclusion of law. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Partnership association organized under the laws of Michigan (2 Comp. Laws, pp. 1883, 1888, as amended by Pub. Acts 1903, pp. 398-404) held not a corporation. Id. An allegation that a joint stock company is a citizen of the state under whose laws it is organized cannot be considered as an averment which will aid the court in determining the question of jurisdiction. Saunders v. Adams Exp. Co., 136 F. 494.

34. In no other way can it be a citizen of such state for jurisdictional purposes. Allegations of petition for removal held insufficient. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

35. If a partnership association. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

NOTE. Unincorporated association: Suit was brought by a citizen of Michigan against "The Board of Trustees of the Ohio State University," the averment as to the citizenship being that the defendant was created and existed by virtue of the law of Ohio, had power to sue and be sued, to make contracts, hold property, have a seal, etc., and was a citizen of Ohio. Held, there was no jurisdiction, but that if there had been added allegations that all the members of the board were citizens of Ohio, there would be jurisdiction, though the individual members were not made defendants. Thomas v. Ohio State University Trustees, 195 U. S. 207, 49 Law. Ed. 160. It is commonly said that a corporation is a citizen of the state incorporating it. Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 295, 30 Law. Ed. 83; Louisville, etc., R. Co. v. Letson, 2 How. [U. S.] 497, 11 Law. Ed. 193. Mr. Justice Story, however, declared in Muller v. Dows, 94 U. S. 444, 24 Law. Ed. 207, that a corporation was not a citizen of any state and this appears to have been the original view. Bank of U. S. v. Deveaux, 5 Cranch [U. S.] 61, 3 Law. Ed. 194. In the early cases the inquiry seems to have been as to the citizenship of the stockholders, who were nevertheless, except in very early cases (Bank of U. S. v. Deveaux, supra), conclusively presumed to be citizens of the

a co-partnership sues, the citizenship of the parties composing it must be averred, and must be such as to confer the jurisdiction.[36] If the original petition contains the requisite averments as to citizenship, jurisdiction is not lost because an amended petition subsequently filed alleges plaintiff's citizenship in the present tense only.[37]

Jurisdictional as well as other averments may be inserted or reformed by amendment.[38]

Objections as to jurisdiction should be taken in accordance with the practice of the state courts.[39] An objection to the jurisdiction of the circuit court on the ground that neither the plaintiff nor the defendant is a resident of the district in which the action is brought, raised by demurrer, is not waived by appearing at the taking of depositions and cross-examining witnesses without declaring an intention to insist on such objection,[40] nor by stipulating during the taking of such depositions that copies of letters and telegrams may be used by either side in lieu of the originals.[41]

The provision of the Federal statutes that, when jurisdiction is founded on diverse citizenship, suit shall be brought only in the district in which plaintiff or defendant resides, confers a mere privilege on defendant which he may waive,[42] and he does so by removing a case to a Federal court sitting in a district in which neither of the parties resides.[43]

The circuit court of appeals may refer to the whole record to make out the conditions on which jurisdiction may rest.[44]

§ 12. *Federal appellate jurisdiction. A. Inquiry into jurisdiction.*[45]—The circuit court of appeals has no jurisdiction of proceedings in error which involve the single question of the jurisdiction of the circuit court to entertain the action.[46]

incorporating state (Muller v. Dows, supra). In the principal case, since it is undisputed that no incorporated body can be a citizen of a state (Chapman v. Barney, 129 U. S. 677, 32 Law. Ed. 800), and since the court was unwilling to extend the rules as to presumption of citizenship of members of a corporation to members of an association, no diverse citizenship appeared. That there would be jurisdiction if the individual members were alleged to be citizens of Ohio, though they were not parties of record, seems to be deciding the case on the analogy of the early cases of corporations with the difference that no presumptions are entertained as to the citizenship of the members. The court has before determined the point of jurisdiction in cases similar to this one as it was presented in the circuit court (Chapman v. Barney, supra; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 Law. Ed. 842); but it is believed that the further question is decided for the first time.—5 Columbia L. R. 246.

36. Averment that each and every member of a partnership association organized under Mich. Comp. Laws 1897, c. 160, §§ 6079, 6089, held sufficient, such associations being legal entities and quasi corporations. Not necessary to name individual members. Yonkerman Co. v. Fuller's Advertising Ag., 135 F. 613.

37. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

38. Bankruptcy proceedings. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000.

39. Under the Illinois practice, defendant may challenge an averment in the declaration, in an action against a partnership, that the members thereof are all citizens of another state by plea in abatement, unless waived by pleading to the merits. Yonkerman Co. v. Fuller's Adv. Ag., 135 F. 613. An averment of plaintiff's citizenship, in an action in the Federal court in which jurisdiction depends on diversity of citizenship, is a material allegation within the meaning of the Ohio code, and is put in issue under such code by a general denial in the answer (Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48), and a general verdict finding the issues in favor of plaintiff, followed by judgment thereon, is conclusive on such issue as against a defendant who has participated in the trial without objecting to the jurisdiction, or asking any ruling or instruction on the ground of the insufficiency of the evidence on the issue (Id.).

40. Stonega Coal & Coke Co. v. Louisville & N. R. Co., 139 F. 271.

41. Is mere preparation for trial in order to be ready for an adverse decision on question of jurisdiction. Stonega Coal & Coke Co. v. Louisville & N. R. Co., 139 F. 271.

42. Act Aug. 13, 1888, c. 866, § 1 (Comp. St. 1901, p. 508). Burch v. Southern Pac. Co., 139 F. 350.

43. Burch v. Southern Pac. Co., 139 F. 350.

44. May look to original as well as amended petition. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

45. See 4 C. L. 351. See, also, Appeal and Review, 5 C. L. 121.

46. Can only be reviewed upon writ of error taken direct to the supreme court. Halpin v. Amerman [C. C. A.] 138 F. 548.

Evidence bearing on the question of the citizenship of the parties must be examined on appeal to the supreme court, though the motion to dismiss in the circuit court for want of jurisdiction did not distinctly aver the absence of diverse citizenship where that court treated the question as raised, and passed upon it.[47]

(§ 12) *B. Appeals between Federal courts.*[48]—An appeal or writ of error lies directly to the supreme court from the circuit court in cases in which the jurisdiction of the court is in issue, but in such cases only the question of jurisdiction can be certified to the supreme court from the court below for decision.[49] The question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect to its general authority as a judicial tribunal.[50] As a general rule the certificate is an absolute prerequisite to the exercise of jurisdiction by the supreme court, though exceptions have been recognized where the explicit terms of the decree or of the order allowing the appeal might properly be considered as equivalent to the formal certificate;[51] but the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction.[52]

The supreme court, as a general rule and except as to cases arising under the bankruptcy law, cannot review the judgments and decrees of the supreme court of the District of Columbia directly by appeal or writ of error.[53]

The supreme court may review, by writs of error or on appeal, final decisions of the Federal district courts of Porto Rico in all cases where an act of congress is brought in question and the right claimed thereunder is denied.[54]

In cases in which the supreme court possesses neither original nor appellate jurisdiction, it cannot grant prohibition, mandamus, or certiorari as ancillary thereto.[55]

47. Steigleder v. McQuesten, 198 U. S. 141, 49 Law. Ed. 986.

48. See 4 C. L. 351. See, also, Appeal and Review, 5 C. L. 121.

49. Act March 3, 1891, § 5 (26 Stat. at L. 827, c. 517; Comp. St. 1901, p. 549). Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398.

50. Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398. Dismissal by Federal court of suit against foreign executor for want of jurisdiction in state court, from which it has been removed for diversity of citizenship, does not present a question of jurisdiction reviewable on direct appeal to the supreme court. Id. Neither does denial of a motion to remand, where motion does not, in terms, put in issue the power of the court, as a court of the United States, to hear and determine the cause. Id. Same is true of objection that attachment suit in aid of action at law was equitable in form under state statutes. Id. Question of validity of service of process on certain persons as agents of a foreign corporation involves such jurisdiction. Board of Trade of Chicago v. Hammond Elevator Co., 198 U. S. 424, 49 Law. Ed. 1111. Validity of service of subpoena upon resident treasurer of foreign corporation. Kendall v. American Automatic Loom Co., 198 U. S. 477, 49 Law. Ed. 1133.

51. Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398. Has jurisdiction where it clearly appears that the ground of a judgment of the circuit court, dismissing an action which had been removed from a state court, was the absence of service on defendant, and that the plaintiff denied the validity of the attempt to remove. Remington v. Central P. R. Co., 198 U. S. 95, 49 Law Ed. 959.

52. Courtney v. Pradt, 196 U. S. 89, 49 Law. Ed. 398. The writ of error will not be dismissed for irregularities in the bill of exceptions or formal certificate, where the judgment dismissing the action and prior proceedings make it clearly apparent on the record that the only questions decided by the circuit court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment which decided that the court had jurisdiction of the action. No bill of exceptions or formal certificate necessary under such circumstances. Petri v. Creelman Lumber Co., 26 S. Ct. 133.

53. Under Act Feb. 9, 1893 (27 Stat. at L. 434, c. 74), establishing the court of appeals for the District. In re Commonwealth of Massachusetts, 197 U. S. 482, 49 Law. Ed. 845.

54. Act April 12, 1900 (31 Stat. at L. 85, c. 191). Rodriguez v. U. S., 198 U. S. 156, 49 Law. Ed. 994. Overruling of a motion in arrest of judgment in which the accused asserted that the grand jurors were not selected or drawn as required by the Federal statutes presents such a case. Id. A money judgment in Porto Rico which requires that it be satisfied at a different rate of exchange than that established by the Federal statutes denies a right under such statutes and is appealable to the supreme court of the United States. Serralles' Succession v. Esbri, 26 S. Ct. 176.

55. In re Commonwealth of Mass., 197 U.

Where the jurisdiction of the circuit court rests solely on diversity of citizenship, the decision of the circuit court of appeals, on appeal to it, is final, and will not be reviewed by the supreme court.[56] If there are questions relating to the merits as well as to the jurisdiction, the circuit court of appeals may either certify the latter to the supreme court before determining the former, or may decide the whole case in the first instance.[57]

(§ 12) *C. Control over state courts.*[58]—Final judgments of state courts may be reviewed by the Federal supreme court on writ of error, where the validity of a state statute, or any authority exercised under any state, is called in question on the ground of repugnancy to the constitution and laws of the United States, and the decision is in favor of its validity.[59] It must, however, appear that the Federal question was raised and passed upon in the state courts at the time and in the manner required by the state practice, and the decision must have been against the right claimed.[60] It is too late where the Federal question is first raised on a second ap-

S. 482, 49 Law. Ed. 845. Cannot grant mandamus where it has neither original nor appellate jurisdiction. Rev. St. § 716; Comp. St. 1901, p. 580. In re Glaser, 198 U. S. 171, 49 Law. Ed. 1000. Not to compel circuit court to take jurisdiction of action where cause was not of such character that final judgment could be directly reviewed under Act March 3, 1891 (26 Stat. at L. 826, c. 517; Comp. St. 1901, p. 547). Id.

56. Act March 3, 1891 (26 Stat. at L. 828, c. 517, § 6; U. S. Comp. St. 1901, p. 550). Petitory action for real property. Bonin v. Gulf Co., 198 U. S. 115, 49 Law. Ed. 970. As in case of removal for local prejudice. Cochran v. Montgomery County, 26 S. Ct. 58.

Where the jurisdiction of the circuit court is invoked on the ground of diverse citizenship, it will not be held also to rest on the ground that the suit arose under the Federal constitution unless it really or substantially involves a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as good pleading requires. Empire State-Idaho M. & D. Co. v. Hanley, 198 U. S. 292, 49 Law. Ed. 1056. Allegation by party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court that a subsequent decree annulling the first one was void for want of jurisdiction to render it at a subsequent term, for want of notice, and for lack of evidence, does not amount to allegation that he was deprived of his interest without due process of law. Id. If the case is not brought within this rule, the decree of the circuit court of appeals is final. Case held not appealable. Empire State-Idaho M. & D. Co. v. Hanley, 198 U. S. 292, 49 Law. Ed. 1056.

57. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

58. See 4 C. L. 353. See, also, Appeal and Review, 5 C. L. 121.

59. Rev. St. § 709; Comp. St. 1901, p. 575. Allen v. Alleghany Co., 196 U. S. 458, 49 Law. Ed. 551. A judgment reversing the decree in an equity case and remanding the cause for further proceedings in harmony with the opinion is not final within the meaning of this rule. Even though equity cases are heard de novo on appeal in state court and successful party is entitled to decree in that court if he asks for it, where no such decree was asked for or rendered, and newly discovered evidence may be introduced and the pleadings may be amended after remand. Schlosser v. Hemphill, 198 U. S. 173, 49 Law. Ed. 1000. Has exclusive final jurisdiction over the subject of the effect to be given in each state as to the records and judgments of courts of sister states. Hadacheck v. Chicago, B. & Q. R. Co. [Neb.] 104 N. W. 878.

For discussion of what is a Federal question, see § 11 C, ante.

60. The aggrieved party must show that he claimed some right, some interest, which the Federal law recognizes and protects, and which was denied him in the state court. Allen v. Arguimbau, 198 U. S. 149, 49 Law. Ed. 990. Defense in action against maker of promissory note, given in consideration of promise to have certain cigars manufactured at Key West, that it was contemplated that cigars were to be removed from the factory without complying with U. S. Rev. St. §§ 3390, 3393, 3397, does not amount to a special assertion of a right, title, privilege, or immunity under a Federal statute, since defendant could derive no personal rights under those sections to enforce the repudiation of his note, even though it was void as against public policy. Id. The validity, under the ex post facto clause of the constitution of Florida statute, preventing collateral attacks on judgments for disqualifications of judges not appearing of record, held not to have been necessarily involved in the denial of a petition to vacate a decree entered before the act was passed on the ground of disqualification not known at the time it was rendered, and it not appearing from the record that the question was raised or passed on, supreme court had no jurisdiction. Caro v. Davidson, 197 U. S. 197, 49 Law. Ed. 723. Adequate presentation to state court sufficiently appears where record clearly shows that trial court considered that unsuccessful party was specifically claiming rights under the Federal statute authorizing an adverse of an application for a patent to mineral lands, and that the highest state court necessarily acted upon that assumption in delivering its opinion. Lavagnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119. That a statute alleged to deny equal protection of law is superseded by another does not make the

peal,[61] or on a petition for a rehearing, unless, at least, the court grants the rehearing and then proceeds to consider the question.[62] The supreme court has no jurisdiction where the judgment of the state court rests on two grounds, one involving a Federal question and the other not,[63] or where it does not appear on which of two grounds it is based, and the ground independent of the Federal question is sufficient in itself to sustain it.[64]

The certificate on the allowance of the writ of error cannot, of itself, confer jurisdiction on the supreme court,[65] and the petition for writ of error from the supreme court and the assignments of error therein form no part of the record on which to determine whether a Federal question was decided by the state court.[66] No right of review exists where the Federal question has been so explicitly foreclosed by previous decisions of the Federal supreme court as to leave no room for controversy,[67] nor where the decision of the state court construes a state statute so as to remove any question of its repugnancy to the Federal constitution.[68]

The supreme court is not deprived of the right to review the decision of a state court sustaining the validity of a state statute claimed to impair the obligations of a contract, because such court bases its conclusion of the nonexistence of a contract upon a construction of the state constitution and statutes.[69]

§ 13. *Acquisition and divestiture.*[70]—Jurisdiction is acquired by process or appearance. Process includes both personal and constructive service and judicial process against the res,[71] which latter is usually, if not always, a form of constructive process. In suits strictly in rem,[72] or quasi in rem, personal service within the jurisdiction is not necessary,[73] but the decree can only extend to the matter in con-

question moot unless it appears that the parties complaining were relieved of liability under the old law. Campbell v. California, 26 S. Ct. 182.

61. Where claim that service of summons was invalid under Federal constitution was first set up on the second hearing in the trial court after the case had been once appealed, state supreme court may, on second appeal, decline to reopen the question of the validity of the service, which it had upheld on first appeal, without thereby making case for review by Federal supreme court. Western Electrical Supply Co. v. Abbeville Elec. Light & Power Co., 197 U. S. 299, 49 Law. Ed. 765.

62. Too late where, in denying the motion, court made no reference to the question. McMillen v. Ferrum Min. Co., 197 U. S. 343, 49 Law. Ed. 784; Corkran Oil & Development Co. v. Arnaudet, 26 S. Ct. 41; French v. Taylor, 26 S. Ct. 76.

63, 64, 65. Allen v. Arguimbau, 198 U. S. 149, 49 Law. Ed. 990.

66. Corkran Oil & Development Co. v. Arnaudet, 26 S. Ct. 41; French v. Taylor, 26 S. Ct. 76.

67. Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 49 Law. Ed. 1108.

68. As where act was construed as allowing cities to fix reasonable maximum water rates where they could do so without violating the obligations of contracts. Tampa Waterworks Co. v. Tampa, 26 S. Ct. 23.

69. Such a contention overlooks power and duty of supreme court to determine for itself the existence or nonexistence of a contract. Attorney General of Michigan v. Lowrey, 26 S. Ct. 27.

70. See 4 C. L. 355.

71. Judgment against certain defendants granting relief prayed by cross bill held erroneous, where they never appeared in original case nor answered original petition, and were not cited to answer cross bill and did not do so, or appear. Schwartzlose v. Wagner [Tex. Civ. App.] 81 S. W. 70. Suit begun in state court by attachment of property, and removed to Federal court, will not be there dismissed for want of jurisdiction because there has been no personal service on defendant, custody of the res being sufficient to give jurisdiction. Hubbard v. Central of Georgia R. Co., 135 F. 256. When a citizen does not in fact reside within the state in which the rem, or thing in action, is located, his absence does not prevent the courts having jurisdiction of the subject of the action from asserting it in the method prescribed by statute. Jurisdiction of suit to quiet title to realty held to have been regularly acquired by filing affidavit of defendant's nonresidence, and publication of summons, and judgment could only be opened within time prescribed by statute. Hollenback v. Poston, 34 Ind. App. 481, 73 N. E. 162. No valid judgment can be rendered against a defendant in any court unless it first obtains jurisdiction of his person by some of the modes prescribed by law. Fink v. Wallach, 95 N. Y. S. 872.

72. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568.

73. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568. Where suit is brought in a state court by attachment and is removed to a Federal court pending a motion to dissolve such attachment, the seizure of defendant's property is a sufficient basis on which to found subsequent proceedings by the Fed-

troversy,[74] and there can be no adjudication in personam,[75] except as that may be said to be in personam which is at the same time limited in its effects to the res. If the proceeding is strictly in rem, public citation to the world alone is necessary, and the decree binds every one,[76] but if quasi in rem, defendant's interest alone is sought to be affected, and he must be cited to appear, and the judgment is conclusive only between the parties.[77] Constructive service must be complete to give jurisdiction.[78] Personal service or general voluntary appearance only can give jurisdiction in personam.[79] Special appearance may give what is sometimes called jurisdiction to

eral court both in the principal suit and as to the attachment, though no jurisdiction of the persons of the defendants had been acquired. Lebensberger v. Scofield [C. C. A.] 139 F. 380. Such court also has jurisdiction to authorize the issuance and service of an alias summons on a nonresident defendant subsequently moving into the state. Id. Where an action begun by attachment in the state court is properly removed to the Federal court pending a motion for the dissolution of the attachment, the whole cause, including the attachment proceedings, is transferred to the Federal court, which is as fully possessed of the case as if it had been brought therein. Id.

74. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568. Bill to compel transfer of stock of corporation as collateral security for notes made to third person and assigned to plaintiff, held quasi proceeding in rem so that decree could be made with respect to such third person's interest in the res which would bind him, even though he did not appear after giving the required notice. Id.

75. A divorce suit is regarded as a proceeding in rem in so far as it relates to a dissolution of the marital relation, but, where defendant is not served within the state and does not appear, the court cannot enter any binding decree in personam against him. Cannot decree alimony and counsel fees. Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145. A personal judgment is without validity if rendered by a state court in an action upon a money demand against a nonresident proceeded against by publication, but not personally served with process within the state, and not appearing (Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568), even if the defendant has, at the time the action is commenced, property within the state upon which a levy can be made under the judgment (Id.). Act March 3, 1875, c. 137, § 8 (18 Stat. at L. 472; Comp. St. 1901, p. 513), providing for service of summons by publication in certain local suits in regard to land in the Federal circuit court, does not authorize a personal decree against a nonresident defendant who is not personally served within the jurisdiction and does not appear, and the court, in such case, has no jurisdiction of a suit in which such a decree would be necessary for complainant's relief. York Co. Sav. Bank v. Abbott, 139 F. 988. Not of suit to enforce alleged rights under a lease in which personal acts on part of nonresident defendant are necessarily elements. Id.

76. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568.

77. State may provide any reasonable method of imparting notice, which must be complied with, or proceeding will not be due process of law. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568.

78. Under code, § 3535, providing that service of summons by publication must be made by publishing once a week for four consecutive weeks, and § 3536, providing that defendant shall in such case be required to appear as if personally served on the last day of the publication, court acquires no jurisdiction of person or subject-matter where notice requiring defendant to appear on April 12th was first published April 8th. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125. Statutes providing for service of summons by publication are intended as a substitute for personal service, and, being in derogation of the common law, must be strictly observed and fully complied with before jurisdiction is obtained. Failure to file order for publication and papers on which it is based with clerk on or before first day of publication, as required by Code Civ. Proc. § 442, is jurisdictional defect. Fink v. Wallach, 95 N. Y. S. 872.

79. See Appearance, 5 C. L. 248; Process, 4 C. L. 1070. Where defendants' appearance in justice court is limited to the question of the jurisdiction of that court, and they take no further part in the trial there, the court does not thereby acquire general jurisdiction of their persons. Sinsabaugh v. Dun, 114 Ill. App. 523. Where defendant in action brought before justice of the peace appealed to circuit court by having his appeal bond approved by the clerk of that court, but did not cause plaintiff to be brought in by summons and none was issued, and plaintiff did not enter his appearance, circuit court held without jurisdiction to dismiss the suit for want of prosecution. Hecht v. Franklin, 113 Ill. App. 467. Jurisdiction of a special proceeding is not conferred merely by calling the attention of the court to the fact that an indispensable statutory foundation is wholly lacking. Not by appearing specially and showing want of jurisdiction of garnishment proceedings because they were founded on void judgment. McCormick Harvesting Mach. Co. v. Stires [Neb.] 103 N. W. 660. On appeal to common pleas from judgment against railroad company for penalty, court acquires no jurisdiction of another defendant joined as such by an amendment allowed in that court, it not having been served with summons and not having appeared by attorney. Chester City v. Baltimore & O. R. Co., 27 Pa. Super. Ct. 206. A defect in a summons commencing an action in a court of record is not waived by pleading to the merits after the overruling of a motion to quash, to which an exception has been taken and made a part of the record. Appearance not voluntary. Fisher, Sons & Co. v. Crow-

determine the issues thus specially made.[80] Jurisdiction of the subject-matter cannot be conferred by consent.[81]

Acts prescribing special proceedings must be strictly complied with to give the courts exercising the jurisdiction thereby conferred authority to enter judgments under them.[82] Where a special proceeding has been provided for the prosecution of error, a reviewing court acquires no jurisdiction of proceedings brought under the general statute.[83]

Divestiture may be by ouster, termination, or suspension. Ouster of jurisdiction occurs when any plea or condition intervenes which takes away the jurisdiction, transferring it,[84] or showing reasons why it should be transferred, to some other

ley [W. Va.] 50 S. E. 422. Jurisdiction of a foreign corporation owning no property, having no place of business, and transacting no business in the state in which the action is brought, cannot be acquired by service of process on one of its officers who is temporarily within the state on private business. Johnson v. Computing Scale Co., 139 F. 339. Defendant not having been legally served held not to have waived service by filing demurrer to petition after court's refusal, on motion, to vacate the return of service and dismiss the suit, and court had no jurisdiction to pass on the demurrer. Medical College of Georgia v. Rushing [Ga.] 52 S. E. 333.

80. See Appearance, 5 C. L. 248.

81. Baggett v. Mason [Ala.] 39 So. 728. Not by entry of appearance of the parties by answer or otherwise. Bradbury v. Waukegan & Wash. M. & S. Co., 113 Ill. App. 600. Jurisdiction to issue an attachment against a national bank cannot be conferred on a state court by consent of the parties, nor can want of it be waived by any adjudication. Merchants' Laclede Nat. Bank v. Troy Grocery Co. [Ala.] 39 So. 476. Consent of parties cannot give the court jurisdiction of the subject-matter when it has none by law. Ragan v. Standard Scale Co. [Ga.] 50 S. E. 951. Consent can never confer jurisdiction upon a Federal court. Anderson v. Bassman, 140 F. 10.

82. Under Kirby's Dig. § 1294, providing that, when the chancellor is absent from the county, the circuit judge may issue writs of injunction or restraining orders, "after the action has been commenced, but not before," circuit judge has no jurisdiction to issue injunction where petition asks no other relief. Moody v. Lowrimore [Ark.] 86 S. W. 400. Since the only jurisdiction of the court to order a sale of land in partition proceedings is derived from the statute, such jurisdiction must be exercised in conformity to it. Sale under Kirby's Dig. §§ 5785, 5786, 5792, 5793, without report of commissioners showing necessity therefor, is void. Cowling v. Nelson [Ark.] 88 S. W. 913. Under Civ. Code 1895, § 4855, providing that when it becomes impossible to carry out the provisions of a will, the judges of the superior court shall, in certain cases, have power to render at chambers, during vacation, any decree that may be necessary and legal in the premises, jurisdiction of the subject-matter in such cases depends upon the written consent of all persons in interest who are sui juris that the judge may render a decree. Callaway v. Irvin [Ga.] 51 S. E. 477. Consent of married woman who was beneficiary under the will held necessary. Id. General local option liquor law (Pol. Code, 1895, § 1546) confers upon the superior court as a court jurisdiction to hear and determine a contest of an election held under the provisions of such law. Ogburn v. Elmore [Ga.] 51 S. E. 641. Proceeding is not an action at law or suit in equity, but a special statutory proceeding, and the power conferred must be exercised within the limits and by the method prescribed. Id. Acts 1898, pp. 389-395, establishing Baltimore city court and regulating practice therein. Mueller v. Michaels [Md.] 60 A. 485. A court has no original or inherent power to appoint to office, and statute conferring such power must be strictly followed. Appointment of superintendent of poor by county judge under Code 1904, p. 59, § 95, held void. Chadduck v. Burke, 103 Va. 694, 49 S. E. 976. The conditions imposed by the Indian depredation act must be complied with before the court of claims acquires jurisdiction. Under Act March 3, 1891 (26 Stat. at L. 851, § 2), court has no jurisdiction unless claim is presented to the court by petition within three years. Gallegos v. Navajos, 39 Ct. Cl. 86.

83. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206.

84. Where assignee for benefit of creditors brings an action in the circuit court under Ky. St. 1903, § 96, for the settlement of the estate, the county court loses jurisdiction of ex parte proceedings commenced under § 89 for the same purpose, and exceptions to the report of a sale of the land subsequently filed in the county court are properly stricken. Maupin v. Maupin's Assignee [Ky.] 89 S. W. 238. The filing of the requisite petition, accompanied by a legal and sufficient bond, instantly operates to transfer a removable cause from the state to the Federal court, and the jurisdiction of the Federal court at once attaches and that of the state court ceases. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655; Boatmen's Bank v. Fritzlen [C. C. A.] 135 P. 650. If issues of fact arise upon the averments of the petition for removal, the jurisdiction to try them is in the Federal court and not in the state court. Id. On motions to remand and for removal, the question of jurisdiction should be decided by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the Federal courts is a valuable constitutional one, and an erroneous affirmance of the claim to that right may be corrected by the supreme court upon a certificate of the question of ju-

court, but the face of the record must show procedure or reasons efficient to that end.[85] Termination of jurisdiction takes place when there is a final adjudication completed, and beyond the power of the court to recall or alter it,[86] except by original proceeding or what is substantially such. It may also arise from such an interruption in the proceedings as disables the court legally to resume or to effect a continuance of the proceeding.[87] Mere lapse of time does not necessarily show loss of jurisdiction previously acquired.[88]

Where the court has cognizance of the cause made by the complaint as first filed, the jurisdiction will not be ousted by an amendment averring additional matter which the court is not competent to consider, but such new matter will be disregarded as surplusage.[89]

Having acquired jurisdiction of an action to foreclose a mortgage on land situated in two counties, the court cannot lose it by any error committed in the course of the trial or by any erroneous judgment rendered by it and subsequently vacated on discovering the error.[90]

§ 14. *Objections to jurisdiction, inquiry thereof and presumptions respecting it.*[91]—The fundamental facts of jurisdiction must always appear, and courts will at

risdiction, while an erroneous denial of the claim is remediless. Should not be determined by the existence of doubts. Id.

85. If neither the petition for removal nor any part of the record, on its face, shows a removal case, the case in law is not removed, and the state court does not lose jurisdiction nor does the Federal court acquire it. If Federal court acquires no jurisdiction because of defective averment as to citizenship, cannot allow amendment so as to cure defect. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

86. An expression inaptly used does not amount to final judgment when a contrary intent is plain. Where defendant in two creditors' suits asked that one in which he had filed a demurrer be dismissed or consolidated with the other, and decree was entered consolidating the two, the fact that such decree contained a statement that such demurrer was sustained cannot be taken advantage of by him on error to secure a reversal on ground that sustaining demurrer without providing for an amendment put an end to the case, it being a mere inapt expression, contrary to the plain intent of the court. Hawpe v. Bumgardner, 103 Va. 91, 48 S. E. 554.

87. Postponement of case by justice of peace to a later hour of same day, if properly entered on his docket, does not deprive him of jurisdiction, particularly where defendant had ample notice that this would be done. Henion v. Pohl, 113 Ill. App. 100. A county court does not lose jurisdiction of an action not within the jurisdiction of a justice of the peace by reason of the fact that, at the time to which such action has been continued, the county judge is not present in his office and does not appear for more than an hour thereafter. Comp. St. 1903, c. 20, § 28, construed. Bussing v. Taggart [Neb.] 103 N. W. 430. A court does not lose jurisdiction of a motion for final judgment because the argument was brought on during the first judicial term of office of the judge and a reargument was heard after the commencement of his second term. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737. Proceeding to punish executrix for contempt for not paying over money to a corporation as ordered held to have abated on dissolution of corporation and appointment of permanent receiver, and surrogate had thereafter no authority to entertain the application. In re Skelly, 95 N. Y. S. 1076.

88. Where, in receivership proceedings against a bank, the court, having jurisdiction of the stockholders, made an interlocutory order determining who were creditors and who were stockholders, and the amount for which each stockholder was liable, and providing for the enforcement of such liability, retaining jurisdiction for that purpose, held, that the fact that nearly six years elapsed before the entry of final judgment against the stockholders did not show loss of jurisdiction. Childs v. Blethen [Wash.] 82 P. 405. An action in a justice's court is not discontinued from the mere fact that no orders of continuance or other orders are made on the docket therein. Where judgment in justice's court is held void on writ of prohibition, and a second judgment is thereafter rendered, fact that 18 months elapses between the two judgments without any order being made in the action does not work its discontinuance. Thomasson v. Simmons [W. Va.] 50 S. E. 740.

89. If, on appeal to the district court, it has jurisdiction of the claim made in the plaintiff's bill of particulars, jurisdiction will not be abrogated by an amendment joining a separate count with an independent prayer for relief which court is not competent to grant because of the amount involved. Anthony v. Smithson [Kan.] 78 P. 454. Where finding and verdict show that recovery was under first count only, it is immaterial, on appeal, that court undertook to investigate matters beyond its jurisdiction which were alleged in second count. Id.

90. Kent v. Williams, 146 Cal. 3, 79 P. 527. Where plaintiff had lien on land in two counties and sued in one to foreclose on the land therein and judgment was erroneously rendered for sale of that land (Const. art. 6,

all stages inquire thereof or entertain objections thereto.[92] The duty of spontaneously inquiring of their own jurisdiction is particularly emphasized in the Federal courts,[93] and some of the courts of appeal,[94] but it exists in all of the courts.[95] Latent defects consisting of facts lying in proof must be pointed out by

§ 5, and Code Civ. Proc. § 726, requiring lien on both tracts to be foreclosed in single action), which was subsequently vacated, court did not lose jurisdiction to decree sale of both tracts. Id.

91. See 4 C. L. 356.

92. Question of jurisdiction may be raised at any time. State Bank of Chicago v. Thweatt, 111 Ill. App. 599. Want of jurisdiction of the subject-matter of an appeal. Hursen v. Hursen, 110 Ill. App. 345. Parties who, by their petition, present a case of which the court has no jurisdiction may dismiss the same and withdraw from the court, without awaiting the disposition of a motion to dismiss made by their adversaries. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125. On direct appeal the jurisdiction of the lower court must appear on the face of the record. Where want of jurisdiction clearly appears, judgment is a nullity. Trumbull v. Jefferson County, 37 Wash. 604, 79 P. 1105. It is the duty of the Federal circuit court, at any time in the progress of a cause, to dismiss the suit if it is satisfied either that it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the acts of congress. Steigleder v. McQuesten, 198 U. S. 141, 49 Law. Ed. 986; York County Sav. Bank v. Abbot, 139 F. 988. Act March 3, 1875. Anderson v. Bassman, 140 F. 10. It is the duty of the circuit court to stop the proceedings and dismiss the bill, either on objection or on its own motion whenever and in whatever way it appears that jurisdiction is lacking. Under Act March 3, 1875, c. 137, § 5 (18 St. 472, Comp. St. 1901, p. 511). Pennsylvania Co. v. Bay, 138 F. 203. No particular mode is provided in which such fact may be brought to the attention of the court. Must consider affidavits showing want of jurisdiction, though filed after the taking of testimony is closed. Anderson v. Bassman, 140 F. 10. Where defendant raises the question of jurisdiction for the first time after verdict and judgment, on the ground that there is no evidence to support the jurisdictional allegations of plaintiff's pleading, which were properly put in issue, the court may set aside the judgment and inquire into the question, with or without a jury as it may see fit, and unless lack of jurisdiction appears from the evidence or the record, may re-enter the judgment on the verdict. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. If a suit does not involve a dispute or controversy within the jurisdiction of the Federal circuit court, it should be dismissed on a motion for that purpose being filed. Kinney v. Mitchell [C. C. A.] 136 F. 773. Where there is no Federal question and no diversity of citizenship. Id., 138 F. 270. Judgment for want of an affidavit of defense cannot be entered while such a motion is pending. Id. [C. C. A.] 136 F. 773.

93. The court must of its own motion notice its want of jurisdiction over the subject-matter of the action. United States v. Barrett, 135 F. 189. Duty of circuit court of appeals to determine jurisdiction of court from which appeal was taken even if no objection was taken in either court. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Where the record on appeal clearly shows want of jurisdiction for lack of diversity of citizenship, is the duty of the court to deny jurisdiction on its own motion if the question is not raised by appellant. Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363. Absence of averments or of facts in the record showing the required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404; Anderson v. Bassman, 140 F. 10.

94. Georgia: When the supreme court on writ of error discovers from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, it will of its own motion reverse the judgment. Ragan v. Standard Scale Co. [Ga.] 50 S. E. 951. If a ruling of the lower court refusing to entertain the case is properly brought up for review, the court will, on motion or ex mero motu, dismiss the writ of error. Id.

Illinois: A court having no jurisdiction of the subject-matter of a proceeding may dismiss it on its own motion, or on the suggestion of either party or of a stranger. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125. Court of its own motion may interpose the objection at any time. Bradbury v. Waukegan & W. Min. & Smelting Co., 113 Ill. App. 600. If it appears from the record that the appeal should have been taken to the appellate court instead of to the supreme court, the latter will take notice of the question of jurisdiction and dismiss the appeal of its own motion. Immaterial whether motion to dismiss has been made or not, or what action has been taken on such motion. Fairbanks v. Carle, 217 Ill. 136, 75 N. E. 360. Where appellate court only has jurisdiction. Bockway v. Kizer, 215 Ill. 188, 74 N. E. 120. Rule applied in appellate court. Hursen v. Hursen, 110 Ill. App. 345.

Louisiana: Supreme court will, ex proprio motu, take notice of its want of jurisdiction. Succession of Fullerton [La.] 38 So. 151.

Missouri: Jurisdictional questions will be considered on appeal, though not presented by the briefs. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

Montana: Code Civ. Proc. § 685. May be first raised on appeal. Oppenheimer v. Regan [Mont.] 79 P. 695.

North Carolina: Want of jurisdiction noticed on appeal though not raised below. Murdock v. Iredell County Com'rs, 138 N. C. 124, 50 S. E. 567.

Wyoming: Question of jurisdiction will be considered on appeal though waived be-

plea,[96] and mere informalities may be waived, if not seasonably challenged by objection.[97] Jurisdiction cannot be denied by him who has invoked it.[98]

On a motion to strike out a judgment in which is alleged irregularity in the proceeding in which it was entered, the whole question of jurisdiction and whether the proper steps have been taken to justify the entry of such judgment is open.[99] Jurisdictional defects cannot be remedied by nunc pro tunc orders.[1]

Evidence and presumptions.[2]—Courts of general jurisdiction will be presumed to have acted within their jurisdiction, and unless want of jurisdiction appears on the face of the record, it cannot be shown in a collateral proceeding.[3] If the lower

low. Wright v. Hartville [Wyo.] 81 P. 649.

95. Order may be collaterally attacked at any time by any one who is not estopped, where record shows on its face that it was void for want of jurisdiction. Callaway v. Irvin [Ga.] 51 S. E. 477. Want of jurisdiction apparent on the face of the record may be taken advantage of at any time and in any court where the conclusiveness of the record is the subject of judicial inquiry. Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, 25 Pa. Super. Ct. 595.

96. Where want of jurisdiction in a court of general jurisdiction does not appear on the face of the record, it can only be taken advantage of by a plea in abatement. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. The presumption is in favor of jurisdiction, and there must be proper averments of facts accurately and logically stated, excluding every intendment of jurisdiction. Id. Plea held insufficient. Id. Where want of jurisdiction of the county commissioners to act in the construction of drains does not appear upon the face of the petition or the viewer's report, it can only be raised by some sort of plea. Kemp v. Adams [Ind.] 73 N. E. 590. In proceedings before the county commissioners for the tiling of public open drains, written objections, supported by affidavit, demanding that the proceedings be dismissed because part of the ditch described in the petition is not such a ditch, but the construction of an entirely new one is proposed, when presented for the first time on appeal to the circuit court, raises the jurisdictional question in such a manner as to require that court to determine it. Id.

97. Error of court in considering October term as continuing after May term had commenced and in rendering judgment during May term as of the October term held harmless and not to have affected jurisdiction over the subject-matter or the parties. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357. Though parties cannot by consent confer jurisdiction upon a court which has none, they may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject-matter. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865. Failure to object to reopening of decree by one not a party thereto by demurrer or motion to dismiss, to insist upon such objection in court below, where case was heard and determined on its merits, held waiver of right to do so. Id. Where demurrer was based on ground of want of jurisdiction, but there was no suggestion that jurisdiction was challenged on ground that hearing was in vacation, and defendants made no objections to a continuance, took part in taking depositions, etc., and made no application for postponement on the hearing, but joined issue after overruling of their demurrer, and proceeded to trial on the merits, held, that they could not contend on appeal that they were entitled to a delay, or that chancellor was without power to entertain the proceeding and render a decree in vacation. Owens v. Waddell [Miss.] 39 So. 459.

98. One cannot at the same time deny jurisdiction and invoke its exercise. Exception to jurisdiction of one of the divisions of the civil district court, based merely on failure to allot, will be deemed waived, where a decision thereon is not insisted upon before proceeding to the hearing of other matters involving the exercise of such jurisdiction. Richardson v. Johnson [La.] 39 So. 449. Where in an action by trustee in bankruptcy to recover debt alleged to be due bankrupt, the debtor obtained an order of interpleader, substituting an alleged assignee of claim as defendant, who voluntarily appeared and joined issue with plaintiff, plaintiff could not object for first time on appeal that court had no jurisdiction because substituted defendant was foreign corporation (Reichardt v. American Platinum Works, 94 N. Y. S. 384), or that suit was one in equity, and hence municipal court had no jurisdiction (Id.). If a case is removed to a Federal court on defendant's petition, he cannot claim that such court has no jurisdiction unless the state court had none. Jurisdiction which state court acquires by attachment of property of nonresident defendant creates jurisdiction in Federal court on removal, since property is thereby brought into its custody. Wells v. Clark, 136 F. 462. Jurisdiction to remove carries with it jurisdiction to proceed (Id.), and a nonresident defendant, by removing solely on the ground of diverse citizenship an action properly commenced against him in the state court in which attachment of his property has been had, confers on the Federal court jurisdiction of his person (Id.). May proceed to render a personal judgment against him, to be satisfied from the proceeds of the attached property. Id.

99. Mueller v. Michaels [Md.] 60 A. 485.

1. Not the omission to file order for publication of summons and affidavits on which it was based in clerk's office on or before the first day of publication, as required by Code Civ. Proc. § 442. Fink v. Waliach, 95 N. Y. S. 872.

2. See 4 C. L. 357, n. 94-99.

3. See Judgments, 4 C. L. 287. In collateral proceeding it is presumed that court making a decree ordering a sale of land had jurisdiction of the parties to, and the subject-mat-

court had jurisdiction of the subject-matter, it will be presumed on appeal, in the absence of a showing to the contrary, that it acquired jurisdiction over the person of the defendant.[4]

An answer in mandamus proceedings attempting to set up matters which would oust the court of jurisdiction cannot be considered on application for a writ of prohibition.[5]

Hearing and trial of objections.[6]—It is the better practice to try the issue raised by a plea to the jurisdiction separately from those raised by a plea to the merits, but the submission of both issues to the jury on the same trial is no ground

ter of, the action. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. Evidence held sufficient on attempt to enforce foreign judgment to show that parties were resident in state, in view of the presumption in favor of the jurisdiction of the court. Collins v. Maude, 144 Cal. 289, 77 P. 945. Transcript of judgment of circuit court not inadmissible because it shows that pleadings were filed in circuit court of another county, but it will be presumed, if necessary to sustain judgment, that venue was properly changed. Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265. The presumptions in favor of jurisdiction to render a default judgment arising from the recitals of personal service in the judgment itself and the sheriff's return is not overcome by parol evidence of the defendant and others that he was absent from the state at the time of the alleged service. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837. It being shown that the person making the service was at least a de facto officer, the presumption of regularity attaches with reference to his acts without proof of his appointment by the introduction of an official record. Id. Where return of original notice issued by justice indicates that service was had on defendants in township in which the judgment was entered, their residence will, on writ of error, be presumed to have been such as to confer jurisdiction in the absence of anything to the contrary in the justice's record. Herald Printing Co. v. Walsh [Iowa] 103 N. W. 473. After expiration of fifty-nine years, and where court had jurisdiction of subject-matter in suit for divorce, and record shows that defendant entered an appearance, and subpoena was returned "served," it will be presumed that the court, when after the return day it appointed an examiner, had before it a return showing the service to be regular, or that irregularities were waived, and that court had jurisdiction of the parties. Given v. Given, 25 Pa. Super. Ct. 467. Decrees invulnerable on collateral attack. Fisher, Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.

Probate courts: The probate court is a court of superior jurisdiction and within its jurisdictional limits its judgments import absolute verity the same as those of other superior courts. Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044. A judgment of the probate court which shows affirmatively on its face that the court was proceeding in a matter over which it had no jurisdiction, or acting beyond its jurisdictional limits, is void. Id. A confirmation of a sale of lands does not cure jurisdictional defects. Not the fact that sale was made to pay expenses of administration and not to pay debts. Id. Under Code Civ. Proc. § 1330, relative to proceedings to revoke the probate of wills, contestants cannot, in such a proceeding, attack the order admitting the will on the ground of want of jurisdiction because deceased was not a resident of the county, particularly where no such issue was raised in the trial court by the pleadings or otherwise. In re Dole's Estate [Cal.] 81 P. 534. The orphans' court is a superior court of general jurisdiction and its judgments cannot be collaterally attacked. Podesta v. Binns [N. J. Eq.] 60 A. 815. Sale in orphans' court cannot be collaterally attacked where judgment decreeing it recites and petition alleges all jurisdictional facts, and it appears that every step was regular. Id. See, also, Estates of Decedents, 5 C. L. 1183.

Federal courts: Where a court's right to take jurisdiction depended on facts in pais, it is presumed, in collateral proceedings, if jurisdiction was retained, that the court itself inquired concerning the facts and adjudicated them. Even if court decides wrongly, its judgment is effectual unless set aside in a direct proceeding. Cobe v. Ricketts [Mo. App.] 85 S. W. 131. Where after suit to dissolve building association between citizens of different states had been brought in Federal court, state court attempted to transfer its jurisdiction of a similar suit, and Federal court assumed jurisdiction and entered decree for sale of association's assets which was never reversed, such decree was not subject to collateral attack, though it had been previously held by the state supreme court that the order transferring state court's jurisdiction was erroneous. Id. A judgment or decree entered in a suit in a Federal court, whose jurisdiction is invoked on the ground of diverse citizenship which is alleged and admitted, is conclusive, and cannot be upset by either of the parties in any other tribunal on the mere ground that there was in fact no diverse citizenship. Cannot be collaterally attacked when jurisdiction appears on the face of the record. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008.

4. Where mayor has jurisdiction over bastardy proceedings against a resident of the city, it will be presumed on appeal, in the absence of a showing to the contrary, that defendant was such a resident. Evans v. State [Ind.] 74 N. E. 244. Decree in foreclosure proceedings entered in accordance with mandate of court of appeals cannot then be attacked for first time upon petition verified in the most general form, and without evidence of facts on which want of jurisdiction was claimed to rest. Cook v. Weigley [N. J. Eq.] 59 A. 1029.

5. People v. District Court [Colo.] 79 P. 1024.

6. See Abatement and Revival, 5 C. L.

for reversal, where it does not appear that any objection to that method of procedure was made at the trial.[7] On the trial of an issue of fact raised by a plea to the jurisdiction, the burden is on defendant to show that the court is without jurisdiction of the case.[8]

A plea to the jurisdiction depending upon a question of residence, in regard to which the evidence is conflicting, may be left to the jury under proper instructions.[9]

JURY.[10]

§ 1. *Necessity or occasion for jury trial. A. As preserved*[11] *by the constitutions.*[12]—In civil cases the right to a jury trial as it existed at common-law is preserved by the Federal constitution and by the constitutions of the several states.[13] The right is not a privilege or immunity which the states are forbidden by the 14th amendment to abridge.[14] The right attaches only to the trial[15] and not to dilatory pleas,[16] but extends to all the issues of fact involved.[17] Legal issues of fact in

1; Pleading, 4 C. L. 980; Trial, 4 C. L. 1708.

7. Padrosa v. High [Ga.] 50 S. E. 97.

8. Padrosa v. High [Ga.] 50 S. E. 97. In garnishment proceedings, burden is sustained by showing that creditor is a nonresident, and burden is then on plaintiff to show that rule that situs of a debt is at the place of the creditor's domicile does not apply. Id.

9. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

10. Scope of topic: The custody and conduct of the jury during the trial (See Trial, 4 C. L. 1708; Indictment and Prosecution, 5 C. L. 1790), and practice at the rendition of the verdict are elsewhere treated (See Verdicts and Findings, 4 C. L. 1803).

11. As granted by statute or constitution in particular cases, see post, § 1A.

12. See 4 C. L. 358.

13. Not in proceedings to establish a drainage district. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. The North Carolina constitution does not guarantee a jury trial for the assessment of damages for land condemned. State v. Jones [N. C.] 52 S. E. 240.

NOTE: A proceeding in rem to summarily seize and destroy gambling apparatus is not triable by jury. Glennon v. Britton, 155 Ill. 232, 40 N. E. 594; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352; Davidson v. New Orleans, 96 U. S. 97, 24 Law. Ed. 616; Lawton v. Steele, 152 U. S. 133, 38 Law. Ed. 385; 2 Waples, Proceedings in Rem; State and Federal Control of Persons and Property, p. 826.—See note to Woods v. Cottrell [W. Va.] 104 Am. St. Rep. 1011.

14. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting property rights must be by jury. It is sufficient if the trial is had according to the settled course of judicial proceedings. Gunn v. Union R. Co. [R. I.] 62 A. 118. Authorizing a verdict by three-fourths of the jury does not violate any rights under the Federal Constitution. Franklin v. St. Louis, etc., R. Co. [Mo.] 87 S. W. 930.

15. Not to an arraignment and plea in a criminal case. Hollibaugh v. Hehn [Wyo.] 79 P. 1044.

16. Under (U. S. Comp. St. 1901, p. 511), Judiciary Act 1875, § 5, 18 Stat. 472, where the question of jurisdiction, on the ground that there is no evidence to support the jurisdictional allegations, is first raised, after judgment, the court may set aside the judgment and inquire into the question either with or without a jury as it may see fit.

quo warranto to forfeit a franchise[18] and issues in garnishment[19] are triable by a jury; but cases of contempt,[20] special statutory proceedings,[21] the question of benefits in special assessments,[22] and equitable actions,[23] are not. Whether a case is triable to the court or jury is a question for the court.[24] An action triable by jury is not taken from that class because of the nature of the relief demanded.[25]

In criminal cases the right is guaranteed as to all crimes under the Federal

Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

17. In a criminal case, if the court improperly withdraws an issue from the jury on the ground that there is no evidence to authorize its submission to them, it is erroneous as depriving defendant of the right to trial by jury guaranteed by the constitution. State v. McPhail [Wash.] 81 P. 683.

18. In quo warranto under Kirby's Dig. §§ 6749, 6750 to forfeit a franchise of a railroad company for failure to properly maintain its equipment, the company has a constitutional right to a jury trial as to whether it had maintained its property in good repair. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

19. In Massachusetts a claimant of property which has been garnished by trustee process is entitled to a trial by jury of the issue of his title to the fund or property garnished, under the provisions of the Declaration of Rights, art. 15. Hubbard v. Lamburn [Mass.] 75 N. E. 707.

20. One charged with contempt of court, in attempting to obstruct the administration of justice by soliciting a bribe while acting as a juror is not entitled to a trial by jury. O'Neil v. People, 113 Ill. App. 195. Laws 1893, p. 96, providing for a trial by jury in all cases where a judgment is to be satisfied by imprisonment, does not confer the right on a defendant in contempt proceedings brought to coerce the performance of a duty ordered to be performed by the court, though the court may punish such disobedience by imprisonment. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

21. In an action to determine rights to mineral in a vein which extends beyond the vertical boundaries of a mining claim, the parties are not, as a matter of right, entitled to a jury trial. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

22. Where a special tax has been levied under Hurd's Rev. St. 1903, c. 24, § 291, for the construction of sidewalks, a property owner is not entitled to a jury trial on the question of whether his property has been benefited to the extent of the tax levied. Harris v. People, 218 Ill. 439, 75 N. E. 1012. In Illinois the Constitution requires a jury in eminent domain proceedings whenever the taking is not by the state. Stack v. People 217 Ill. 220, 75 N. E. 347; Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354, citing Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440.

23. See Equity, 3 C. L. 1210. Shipley v. Bolduc, 93 Minn. 414, 101 N. W. 952. The determination of the right to a jury trial depends on the nature of the action at its inception. If purely equitable, the right of trial by jury did not exist; if legal in its nature at its inception, although equitable defenses might be interposed, the right of trial by jury would still remain. Where the action as originally instituted seeks equitable relief alone, the interposition of a legal defense does not secure for the defendant the right to a trial by jury of the legal defenses pleaded. Daniels v. Mutual Ben. Ins. Co. [Neb.] 102 N. W. 458. On the trial of an action to enjoin perpetually the maintenance of a common nuisance under the prohibitory liquor law, the defendant is not entitled to a jury trial as of right. Cowdery v. State [Kan.] 80 P. 953. Actions for an **accounting.** Demars v. Hudon [Mont.] 82 P. 952. Partnership accounting. Houston v. Polk [Ga.] 52 S. E. 83; Hogan v. Walsh [Ga.] 50 S. E. 84. Action by a trustee in bankruptcy **to avoid a fraudulent conveyance.** Vollkommer v. Frank, 95 N. Y. S. 324. In a suit **to foreclose a statutory lien** against real estate, the court exercises its equity powers and there is no error in denying a jury trial. Burck v. Davis [Ind. App.] 73 N. E. 192. A plaintiff in an **action to foreclose a mortgage** is not entitled to a jury trial of an issue raised by an answer which prays a money judgment against plaintiff, since such action is an equitable action. Rev. Codes N. D. 1899, § 5420 does not abridge the right to trial by jury, since Comp. Laws 1887, § 5032 did not give the right to trial by jury in such an action. Avery Mfg. Co. v. Smith [N. D.] 103 N. W. 410.

Juvenile courts: A statute conferring on judges of an existing court power to exercise a guardianship over children under a specified age, and authorizing their confinement in institutions of correction, is not unconstitutional as impairing the right to trial by jury, since such jurisdiction is an equitable jurisdiction. Commonwealth v. Fisher [Pa.] 62 A. 198. In a proceeding in a probate court contesting the allowance of an administrator's account, the parties are not entitled to a jury trial. Clifford v. Gridley, 113 Ill. App. 164.

24. Where a case has under the rules of the district court been placed upon the jury calendar by counsel, the court is not concluded by this designation, but may before the beginning of the trial order the same tried to the court if its character requires that disposition. Shipley v. Bolduc, 93 Minn. 414, 101 N. W. 952.

25. Action for breach of contract is triable by jury, though an accounting is prayed for. Hoosier Const. Co. v. National Bank of Commerce [Ind. App.] 72 N. E. 473. An action for goods sold and delivered where the complaint alleges that the defendant claims certain offsets, as to which it is alleged plaintiff has no knowledge and praying an accounting, is a legal action triable by a jury. Hoosier Const. Co. v. National Bank of Commerce [Ind. App.] 73 N. E. 1006.

and most state constitutions, but some do not extend it to misdemeanors or prosecutions under ordinances[26] or offenses punishable only by fine,[27] or fine below a minimum amount.[28] In Pennsylvania the right does not attach to acts declared to be offenses since the adoption of the constitution.[29] A proceeding in which only the nature of the punishment to be imposed is determined is not a trial in which one is entitled to a jury.[30]

Denial of right; conditions.—The right is not denied when it is accorded[31] or allowed on demand[32] or appeal,[33] nor is it denied by a requirement that the demandant first pay the jury fee,[34] though a contrary rule would seem to prevail in Missouri.[35] Though the jury fee be not paid, the court may call a jury.[36] Denial of the right is harmless if the court would have been required to direct a verdict.[37] The right is satisfied if allowed on appeal,[38] though an appearance bond be required.[39] The right is not denied by a statute providing that one who pleads guilty shall be committed until sentenced.[40] The requirement that a jury be called to assess the punishment on a plea of guilty in capital cases does not apply to a plea of guilty of a lesser offense under an indictment charging a capital offense.[41]

26. One arraigned in a municipal court for violation of a municipal ordinance is not entitled to a jury trial. Little v. State [Ga.] 51 S. E. 501. One not charged with a crime against the state but with a violation of a municipal ordinance has no constitutional right to a jury trial. Littlejohn v. Stells [Ga.] 51 S. E. 390.

27. Imprisonment is not part of the penalty, where it is imposed only to enforce payment of a fine and costs under a police regulation; and it follows that error does not lie to a refusal by a mayor to grant a trial by jury to one charged for the first time under section 4364-20 with allowing a saloon to remain open on Sunday. Schlagel v. State, 3 Ohio N. P. (N. S.) 429.

28. Depriving municipal offenders of a jury trial where the penalty cannot exceed $25 is not a deprivation of the constitutional right. Stone v. Paducah [Ky.] 86 S. W. 531.

29. Commonwealth v. Andrews, 24 Pa. Super. Ct. 571; Id,, 211 Pa. 110. 60 A. 554.

30. Trial before a magistrate under Ball. Ann. Codes & St. § 2722, in which the justice could not impose any penalty after conviction but was required to transmit his record to the superior court for final disposition. State v. Packenham [Wash.] 82 P. 597.

31. 2 Ball. Ann. Codes & St. § 6959, providing that a person accused of crime and acquitted on the ground that he was insane at the time the crime was committed, may be confined when it appears his going at large would be dangerous to the community, and also making it the duty of the jury where insanity is a defense to state in their verdict that the acquittal is on such ground, is not unconstitutional as depriving the defendant of the right to trial by jury. Ex parte Brown [Wash.] 81 P. 552.

32. Act April 23, 1903 (P. L. 274) does not deprive juveniles charged with crime of their constitutional right to a jury trial. Commonwealth v. Fisher, 27 Pa. Super. Ct. 175.

33. If a right to a jury trial in eminent domain proceeding is guaranteed by fundamental law, it is fully protected by a right of appeal to a court where issues are tried by a jury. State v. Jones [N. C.] 52 S. E. 240.

34. Act of April 8, 1903 (P. L. p. 505), providing that unless the party demanding a jury "shall at the time of making such demand pay the cost of the venire, the demand for trial by jury shall be deemed waived," is not in contravention of the constitutional provision that the right of trial by jury shall remain inviolate. Humphrey v. Eakley [N. J. Law] 60 A. 1097. The right of the legislature to provide that the expense of a venire shall in the first instance be paid by the party demanding a jury is not an infringement of his constitutional right of a trial by jury. Id.

35. The constitutional right is denied a defendant in a justice court by requiring him to make a deposit to cover the expense of the jury. Missouri statutes do not require it. Scott v. Young [Mo. App.] 87 S. W. 544.

36. It is not error for the trial court, in an action to recover for personal injuries, to call a jury to try the issues, though no jury fee had been paid prior to the calling of the case for trial. Hart v. Cascade Timber Co. [Wash.] 81 P. 738.

37. Combs v. Burt & Brabb Lumber Co. [Ky.] 85 S. W. 227.

38. A provision that a police court shall have jurisdiction to try misdemeanors with a right of appeal does not deprive an accused of a jury trial. State v. Lytle [N. C.] 51 S. E. 66. Gen. St. 1901, § 2496, providing for the seizure of intoxicating liquors and property used in maintaining a common nuisance under the prohibitory law, preserves to the claimant of the property a right of appeal from the police court, hence a jury trial is not denied. Stahl v. Lee [Kan.] 80 P. 983.

39. The constitutional right in criminal cases is satisfied by a statute which allows it only on appeal with bond, for appearance, to one charged with crime in a police court. City of Topeka v. Kersch [Kan.] 80 P. 29.

40. Such plea admits the material allegations of the indictment and leaves nothing to be tried by the jury. Hollibaugh v. Hehn [Wyo.] 79 P. 1044.

41. Under Burns' Ann. St. Ind. 1901, §§ 1903, 1904, authorizing a verdict finding defendant guilty of a lesser offense than that charged in the indictment, where one charg-

The character of jury guaranteed[42] is one selected from qualified persons without discrimination on the ground of race[43] or political faith.[44]

(§ 1) *B. As conferred where the common law did not give it.*[45]—In many states it is provided by statute that certain specific cases are triable by a jury,[46] and that issues of fact in equity cases may be submitted[47] in the discretion of the court.[48] Any court given jurisdiction to hear cases triable by jury has power to empanel a jury.[49] In equity it has long been the practice to send issues to a jury in proper cases.[50]

(§ 1) *C. Demand, loss or waiver of right.*[51]—In Alabama the demand need not be signed.[52]

The right may be waived in civil cases[53] and in prosecutions for misdemeanors.[54] Whether the waiver may be oral or must be reduced to writing depends on

ed with murder in the first degree is permitted with the consent of the county attorney to plead guilty to manslaughter, the case is no longer capital and therefore it is not required that jury shall be called to assess the punishment under above statutes, § 1890. State v. Morrison [Ind.] 75 N. E. 968.

42. See 4 C. L. 361.

43. The court cannot assume that a defendant in a criminal case was deprived of an impartial jury because the panel was composed largely of persons not of his race, but legally qualified to sit as jurors, though the proportion of the persons of his own race in the community was greater than the proportion of such race drawn on the panel. Miera v. Territory [N. M.] 81 P. 586.

44. The provision of the Federal constitution which prohibits a state from denying to any person within its jurisdiction the equal protection of the laws entitles one charged with a crime to be tried by a jury selected from persons possessing the statutory qualifications without discrimination against those of his own political faith because of that fact. Commonwealth of Kentucky v. Powers, 139 F. 452.

45. See 4 C. L. 361.

46. A juvenile offender charged with disturbing a public school in violation of Laws 1903, p. 328, c. 156, § 12 is entitled on trial before a justice to demand a jury under 2 Ball. Ann. Codes & St. § 6668. State v. Packenham [Wash.] 82 P. 597. In an action by creditors to recover unpaid subscriptions on corporate stock, the alleged stockholders are entitled to a jury trial of the issue of their subscription or ownership of the stock. McFarland v. Martin [Tex. Civ. App.] 86 S. W. 639. Disputed questions of fact on appeals from the decisions of the **probate court** must, if either party so asks, be tried by a jury. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

Assessing damages and benefits: A statute authorizing a board empowered to make certain public improvements to determine the benefits, as well as the value of property taken or damaged and to make an assessment for the expense of the improvement on the abutting owners is, so far as it does not include an assessment of value of property taken or damaged, constitutional. Stack v. People, 217 Ill. 220, 75 N. E. 347. The Act of May 29, 1879 and the amendments thereto passed in 1885 relative to the construction of levees and ditches, so far as they authorized the assessment of damages for lands taken and of damages to lands not taken, by commissioners instead of by a jury, are unconstitutional. Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354.

47. In a case in equity for an injunction to stay waste where title is put in issue by the pleadings, it is properly triable by a jury. Lancaster v. Lee [S. C.] 51 S. E. 139. Gen. St. Conn. 1902, § 4053, which gives to either party to an action to quiet title a right to a jury trial of any issue arising upon legal, as distinguished from equitable, claims, is not unconstitutional as being in contravention of either the state or Federal constitution. Dawson v. Orange [Conn.] 61 A. 101.

48. Discretion in refusing to submit issues in an equitable action held not abused. Cochran v. Cochran [Minn.] 105 N. W. 183. In Illinois, in a suit for separate maintenance, the parties are not entitled as of right to a jury trial on the issue of whether or not the parties are married. Pike v. Pike, 112 Ill. App. 243.

49. Where the probate court has jurisdiction to determine a question of fact, it has full power to impanel a jury, if either of the parties to the proceeding is entitled to a jury. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206.

50. See Equity, 5 C. L. 1174. Fletcher, Eq. Pl. & Pr. § 615, et seq.

51. See 4 C. L. 362.

52. Acts 1896-97, p. 808, § 11, requiring the demand for a jury to be indorsed on the complaint, is not mandatory, and the demand need not be signed by plaintiff or his attorney. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. The demand is not a pleading within Rule 4, Code 1896, p. 1186. Id.

53. Prosecutions under the **Illinois Bastardy Act** are civil and not criminal proceedings and the defendant may waive a trial by jury of the issue of paternity. Kanorowski v. People, 113 Ill. App. 468.

54. A defendant in a misdemeanor case may waive a jury trial, whether the same be upon accusation or indictment. Moore v. State [Ga.] 52 S. E. 81. On an appeal by defendant in criminal proceedings from a conviction for a misdemeanor had before a magistrate, the defendant may waive a trial by jury, under Code, § 692, providing that such proceedings on appeal shall be con-

statute.[55] The right being constitutional, a waiver is not to be presumed;[56] but the making it in writing, where essential, may be presumed from a record reciting waiver.[57] A waiver is binding during the life of the litigation and cannot be retracted, except as otherwise provided by law;[58] but the court may in its discretion call a jury after waiver,[59] and under the statutes of Tennessee a waiver in a chancery case does not deprive the party of a right to demand a jury on retrial.[60]

What constitutes waiver.[61]—The right may be waived by express stipulation[62] or it may be implied. Thus failure to demand a jury[63] or pay the jury fee,[64] consenting to a reference,[65] or trial to the court,[66] constitutes a waiver. Whether or not a jury is waived is to be determined by the law in force at the time the proceeding occurred.[67]

§ 2. *Eligibility to and exemption from jury service.*[68]—The statutes of the

ducted in the same manner as proceedings before a justice. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496. Under Code Cr. Proc. 1895, art. 22, a defendant in a prosecution for **violation of a local option law** is entitled to waive trial by jury. Otto v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 470, 87 S. W. 698.

55. Under the express provision of Alaska Civil Code (31 Stat. 363, c. 19), a jury may be waived by **written consent or oral** consent in open court entered on the minutes. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539. Under Hurd's Rev. St. 1903, c. 110, § 102, an oral waiver in a misdemeanor case is sufficient. Jacobs v. People, 218 Ill. 500, 75 N. E. 1034. But accused cannot be imprisoned for nonpayment of the fine unless the waiver is in writing. Hurd's Rev. St. 1903, c. 110, § 102. Jacobs v. People, 218 Ill. 500, 75 N. E. 1034.

56. Where the plaintiff duly demanded a jury trial and after the expiration of the time within which the defendant could have demanded a jury withdrew the demand, the motion of the defendant should be granted. Allworth v. Interstate Consol. R. Co. [R. I.] 60 A. 834.

Waiver by motion for directed verdict: Under Const. S. D. art. 6, § 6, and Code Civ. Proc. § 275, where defendant at the close of plaintiff's evidence, in an action for the recovery of specific personal property, moves for a directed verdict, which motion is denied and he then introduces evidence which would have required the submission of the issue to the jury, the motion not having been renewed at the close of all the evidence, is not a waiver of the right to a jury trial, so as to authorize the discharge of the jury and the making of findings by the judge on the conflicting evidence. Albien v. Smith [S. D.] 103 N. W. 655.

57. Where the record of a court of general jurisdiction recites that the defendant waived a jury, it will be presumed that the waiver was in writing as required by statute. Kanorowski v. People, 113 Ill. App. 468.

58. Tracy v. Falvey, 102 App. Div. 585, 34 Civ. Proc. R. 189, 92 N. Y. S. 625.

59. Fleming v. Wilson [Wash.] 80 P. 1104.

60. Worthington v. Nashville, etc., R. Co. [Tenn.] 86 S. W. 307.

61. See 4 C. L. 362.

62. Where the attorneys to an action or proceeding stipulate that it is of such a nature that it was discretionary with the court to submit any issue therein to a jury, the refusal of the court to submit the issue to a jury cannot thereafter be urged as error. Pike v. Pike, 112 Ill. App. 243. A stipulation construed as a waiver of jury and an agreement for an amicable action under Act June 13, 1836 (P. L. 568). Miller v. Cambria County, 25 Pa. Super. Ct. 591.

63. See 4 C. L. 363, n. 65 et seq. One entitled to a jury trial before a justice, who does not demand it, cannot, when convicted and after the matter has been certified to the superior court for sentence, complain that he was deprived of a jury trial. State v. Packenham [Wash.] 82 P. 597. If the record on appeal does not show that a jury trial was demanded, the judgment should not be reversed on the ground that it was denied. Town of Clinton v. Leake [S. C.] 50 S. E. 541. Where no jury was demanded, it cannot be urged on review that certain issues should have been submitted. West v. Bank of Caruthersville, 110 Mo. App. 490, 85 S. W. 601.

64. See 4 C. L. 363, n. 69 et seq. A party who demands a jury trial and pays the jury fee as required by Municipal Court Act, § 231 (Laws 1902, p. 1557), and thereafter the justice adjourns the case of his own motion, is required to pay a second fee in order to obtain a jury trial on the adjourned date. De Nigris v. Brill, 94 N. Y. S. 505. But he may tax the amount paid as costs, though the Act, § 238, provides that only one jury fee may be taxed. Id. Laws 1903, p. 50, c. 43, providing that a jury trial is waived unless there is an election to have a jury trial and a jury fee deposited with the clerk, applies to determination of compensation in condemnation proceedings. Ball. Ann. Codes & St. § 5620, relative to such proceedings, not providing how a jury may be waived. Chelan County v. Navarre [Wash.] 80 P. 845.

65. The constitutional right is waived where a reference is ordered upon consent and proceeds without objection. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 93 N. Y. S. 849.

66. A jury having been discharged, and a trial had before a justice, with plaintiff's consent, the trial cannot be resumed before a jury, though plaintiff was misled by a statement of the justice as to his views of the law. Simpson v. Hefter, 43 Misc. 608, 88 N. Y. S. 282.

67. Chelan County v. Navarre [Wash.] 80 P. 845.

68. See 4 C. L. 363.

several states have preseribed certain requisites; to wit: residence in the county;[60] a proper age;[70] non-service as a juror within a specified period;[71] assessment for taxes on the last assessment roll;[72] and payment of poll tax;[73] that he must be a freeholder[74] or a householder.[75] Persons to be eligible must be of good moral character.[76] Disqualification because of having been convicted of a felony may be waived.[77] A right to a jury from the vicinage is not violated by authorizing the summoning of jurors from an adjoining county if an unbiased jury cannot be obtained in the county where the prosecution is pending.[78]

§ 3. *Disqualification pertaining to the particular cause.*[79] *Right to an unbiased and unprejudiced jury.*[80]—The right to trial by an impartial jury is guaranteed, hence a partial or biased jury should be discharged.[81]

Political, religious,[82] or race prejudice[83] is not alone ground for disqualification.

Conscientious scruples against capital punishment[84] on circumstantial evidence disqualifies.[85]

Prejudice as to the class of litigants or actions,[86] such as prejudice against the particular crime, does not disqualify,[87] nor does prejudice against the plea of in-

69. Acts 1884-85, p. 726, creating divisions of the circuit court of a county, does not require that jurors live in the division, hence a qualified juror of the county may serve in any division. Nordan v. State [Ala.] 39 So. 406.

70. It is not ground for challenge that a juror is more than 60 years of age. Keeler v. State [Neb.] 103 N. W. 64.

71. Kirby's Dig. § 4529, declaring that no person serving during a jury term shall be eligible for further service during that term or succeeding term of court, disqualifies only persons who have actually served. Humphrey v. State [Ark.] 86 S. W. 431. Under Burns' St. Ind. § 1460, it is a ground of challenge to a juror who is one of the regular panel that he has previously served as a juror within a year preceding the term at which he is challenged. Brooks v. Jennings County Agricultural Joint-Stock Ass'n [Ind. App.] 73 N. E. 951. Ineligibility because of previous service in the same court during the year renders a juror incompetent propter defectum and is ground for challenge, but not cause for new trial, though the fact was not known until after verdict and sentence. Hill v. State [Ga.] 50 S. E. 57.

72. Under Code Civ. Proc. §§ 198, 199, requiring assessment on the last assessment roll, one is not competent until the assessment roll for the current year is completed and certified if he was not on the last. Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972. Under Code Civ. Proc. §§ 198, 199, making it a condition of competency that the person must have been assessed on the last assessment roll of the county, an heir of a decedent whose estate was assessed, is incompetent where it does not appear that any of the property would become his on final settlement. People v. Warner [Cal.] 82 P. 196.

73. Rev. St. 1895, art. 3139, providing that the poll tax requirement may be dispensed with when it "shall be made to appear" that the requisite number of others cannot be found, does not authorize such requirement to be dispensed with on mere belief or probability. Must be made to appear by evidence. San Antonio & A. P. R. Co. v. Lester [Tex.] 13 Tex. Ct. Rep. 813, 89 S. W. 752.

74. A license to lay off an oyster bed in land covered by navigable waters and not subject to grant is not a freehold interest which qualifies the licensee as a juror. State v. Young, 138 N. C. 571, 50 S. E. 213.

75. Need not be a householder under Ball. Ann. Codes & St. § 4741, amended by Laws 1901, p. 32, c. 32. McKnight v. Seattle [Wash.] 81 P. 998.

76. A person who is not of good moral character is not. Manning v. Boston El. R. Co. [Mass.] 73 N. E. 645.

77. Where the matter is not inquired into on the voir dire examination and no objection made until after trial, the objection is deemed waived. Turley v. State [Neb.] 104 N. W. 934.

78. Moseley v. Com. [Ky.] 84 S. W. 748.

79. **Objections** for disqualification, see post, § 8.

80. See 4 C. L. 364.

81. See Trial (discharge of jury), 6 C. L. post. As ground for new trial, see New Trial and Arrest of Judgment, 4 C. L. 810. Error in permitting an incompetent juror to sit is harmless where a verdict is directed. Walton v. Lindsay Lumber Co. [Ala.] 39 So. 670.

82. It is not ground for disqualification that veniremen are Catholics in an action by a Protestant against a Catholic eleemosynary institution. Smith v. Sisters of the Good Shepherd [Ky.] 87 S. W. 1083.

83. Prejudice against the negro race not such as will prevent a person from according a fair trial does not disqualify a venireman who has no prejudice against the prisoner personally. State v. Brown [Mo.] 87 S. W. 519.

84. See 4 C. L. 364.

85. A juror who states that he would not be willing to find a verdict of guilty on circumstantial evidence if the effect would be punishment by death is properly excused. People v. Warner [Cal.] 82 P. 196. A prejudice against capital punishment on circumstantial evidence disqualifies whether or not the case will depend on circumstantial evidence. Calhoun v. State [Ala.] 39 So. 378.

86. See 4 C. L. 364.

sanity where such plea is not interposed.[88] Freedom from prejudice is ordinarily insisted on more strictly in criminal than in civil cases.[89]

Knowledge of issues involved[90] ascertained by service at a former trial of such issues disqualifies.[91]

Opinion on issues involved[92] which will require strong evidence to remove disqualifies,[93] but a general opinion upon some abstract proposition, in accordance with reason and experience,[94] or a qualified opinion based on newspaper reports and hearsay statements, does not disqualify one who states that he can decide the case on the evidence introduced and can give defendant the benefit of a reasonable doubt.[95]

87. Murder. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 740, 88 S. W. 923.

88. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 740, 88 S. W. 923.

89. A juror who states that he has a prejudice against such cases which might require evidence to remove but that he knows nothing about the facts of the particular case and has no predilections concerning it or its merits, and would try the case on its merits, is not disqualified. Denham v. Washington Water Power Co. [Wash.] 80 P. 546. No bias shown in an action for **libel** where a juror stated that he thought such actions speculative; were often unwarranted; that he had the same opinion of any kind of damage suit; that, being a newspaper man, such opinion might create a prejudice but that he would try the case on the evidence. Graybill v. De Young, 146 Cal. 421, 80 P. 618. No bias is shown where a juror states on his voir dire that he knows neither of the parties and nothing about the case; that he would not say that his sympathies were for either, but would favor one; but his verdict would depend on the evidence. Schwarz v. Lee Gon [Or.] 80 P. 110. It is not ground for a new trial that a juror who properly qualified had on his voir dire examination in a previous trial stated that he was biased in a general way against such cases but did not condemn all such cases. Hern v. Southern Pac. Co. [Utah] 81 P. 902.

90. See 4 C. L. 364.

Note: A juror having knowledge of incidental facts or those collateral to the material issues of the case is not thereby rendered incompetent. Delaney v. Salina, 34 Kan. 632, 9 P. 271; People v. Keefer, 97 Mich. 15, 56 N. W. 105; State v. Martin, 28 Mo. 530; Dew v. McDavitt, 31 Ohio St. 139. But if he has such knowledge of material facts as will tend to bias his opinion, he is incompetent. McIntire v. Hussey, 67 Me. 493; Atkins v. State, 60 Ala. 45; Laverty v. Gray, 3 Mart. [La.] 617; Buddee v. Spangler, 12 Colo. 216, 20 P. 760. This rule has been asserted even where a juror swears that he is unbiased. Vance v. State, 56 Ark. 402, 19 S. W. 1066. The application of this rule is addressed to the sound discretion of the court. Burlington & M. R. Co. v. Beebe, 14 Neb. 463, 16 N. W. 747.—See State v. Stentz [Wash.] 63 L. R. A. 807, and note.

91. People v. Mol [Mich.] 100 N. W. 913.

Note: Where the facts sufficiently appear, the cases in which service on a former trial of another defendant has been held ground for disqualification seem regularly to fall into two classes: (1) where there was participation in the offense; (2) where the verdict in both cases depended on proof of the same material fact. Examples of the first class are a joint assault, bribery of one defendant by the other, and participation by both in the same illegal game. People v. Troy, 96 Mich. 530; Brown v. State, 104 Ga. 736; Obenchain v. State, 35 Tex. Cr. App. 490. An instance of the second class was where both defendants had sold liquor to a person of known intemperate habits. As both sales were admitted, the vendee's reputation became the only fact in issue. Smith v. State, 55 Ala. 1. In the principal case there was no participation, and the evidence of the second defendant's guilt was purely corroborative. To raise upon such facts a conclusive presumption of prejudice would seem scarcely necessary. Support is, however, lent the case by a Michigan statute, which, by prohibiting the questioning of jurors concerning their verdict, might render extremely difficult any thorough examination of a juror's professions of impartiality.—18 Harv. L. R. 229, and note to People v. Mol [Mich.] 68 L. R. A. 871.

92. See 4 C. L. 365.

93. One who had talked with jurors who served on a former trial, and with witnesses who testified therein and had formed an opinion which would require strong evidence to overthrow, is disqualified for actual bias. State v. Miller [Or.] 81 P. 363. A veniremen in a murder case who states on his voir dire that he heard part of the testimony on a former trial, had talked with some of the witnesses, and had formed an opinion that would take considerable evidence to remove, is disqualified for actual bias. Id.

94. On the trial of a convict, that he would take the testimony of a convict with distrust, but that he had no prejudice against the convict and would weigh his testimony from the manner in which it was given and surrounding circumstances. People v. Murphy, 146 Cal. 502, 80 P. 709. On the trial of a convict accused of murder committed in pursuance of a conspiracy to escape, a juror is not disqualified because he has an opinion that there was a conspiracy, and that the crime was committed in pursuance thereof, but had no opinion as to the guilt of defendant, and could act impartially. Id.

95. State v. Williams [Nev.] 82 P. 353; Funderburk v. State [Ala.] 39 So. 672; State v. Forsha [Mo.] 88 S. W. 746; Mariow v. State [Fla.] 38 So. 653. A juror who states that the fact that defendant had been held to answer would raise a presumption against him in his mind is not disqualified under a statute providing that an opinion founded on public rumor, newspaper reports, etc., shall not disqualify him if he can act fairly, especially where he states that he has no opinion

Interest[98] exists disqualifying members of an indemnity company in a case to which its client is a party,[97] but servants of an officer[98] or stockholder of a corporation party are not interested.[99]

Acquaintance or relationship[1] do not disqualify unless one is related within certain degrees of consanguinity or affinity.[2] Relationship does not disqualify where the litigant acts only in a representative capacity.[3] Mere friendly relations are not grounds of disqualification.[4]

Proof of disqualification.[5]—It is the province of the court or trier to determine the question of bias,[6] and the finding will not be disturbed unless abuse of discretion is apparent,[7] especially when based on conflicting and evenly balanced evidence.[8]

§ 4. *Discretion of court to excuse juror.*[9]—The court may excuse a juror who is not in fact disqualified,[10] especially if his sitting is reasonably liable to cause a party an apprehension of unfairness.[11] The sufficiency of an excuse upon which to excuse the juror rests in the sound discretion of the court.[12]

on the merits and can give defendant the benefit of a reasonable doubt. People v. Warner [Cal.] 82 P. 196. Under Rev. St. 1899, § 2616, an opinion founded on rumor or newspaper report does not disqualify one who states that he can render an impartial verdict on the evidence. State v. Sykes [Mo.] 89 S. W. 851. An opinion as to the guilt or innocence of a defendant in a criminal action founded entirely on newspaper accounts and mere neighborhood rumors is not a valid ground of challenge in Nebraska under Code of Cr. Proc. § 468, provided it also appears that the juror can and will try the case fairly on the evidence. Barker v. State [Neb.] 103 N. W. 71.

96. See 4 C. L. 366.

97. Persons who are members of a mutual insurance company and liable to an assessment to pay any judgment which might be rendered against it are not qualified to sit as jurors in an action against it. Martin v. Farmers' Mut. Fire Ins. Co. [Mich.] 102 N. W. 656.

98. In an action against a corporation, a servant of another corporation, the president of which was also president of the defendant, is not disqualified. Glasgow v. Metropolitan St. R. Co. [Mo.] 89 S. W. 915.

99. In an action to which a corporation is a party, a person is not disqualified because he is in the employment of a stockholder or manager of such corporation. Dimmack v. Wheeling Traction Co. [W. Va.] 52 S. E. 101.

1. See 4 C. L. 366.

2. A venireman in a murder case who was married to the second cousin of deceased was properly excused because related within the **sixth degree by affinity.** State v. Byrd [S. C.] 51 S. E. 542.

3. In a suit against a county, a brother of one of the county commissioners is not disqualified where it appears that the commissioner was not interested in the result of the action otherwise than as a citizen and in defending the action acted purely in his representative capacity. Pool v. Warren County [Ga.] 51 S. E. 328.

4. Decker v. Laws [Ark.] 85 S. W. 425.

5. See 4 C. L. 366.

6. Trial court's denial of a new trial on conflicting affidavits as to a juror's false swearing on his voir dire, and bias, held not an abuse of discretion. State v. Lauth [Or.] 80 P. 660. Code 1896, §§ 5010, 5018, making it the duty of the court to ascertain a juror's qualifications, authorizing him to sustain a challenge for cause as to one who states that he has no fixed opinion against capital or penitentiary punishment, but admitted that he had sworn to the contrary the day before and that the prior statement was correct. Sanford v. State [Ala.] 39 So. 370; State v. Lauth [Or.] 80 P. 660.

7. A finding of bias by the judge is not reviewable if based on evidence. State v. Byrd [S. C.] 51 S. E. 542. The determination by the trial judge as to a juror's partiality will be interfered with on appeal only when his examination on voir dire shows bias as a matter of law. Graybill v. DeYoung, 146 Cal. 421, 80 P. 618. Misconduct manifestly prejudicial is shown where a venireman falsely states on his voir dire that he had not heard the matter discussed, did not know anything about it, and was not acquainted with any of the witnesses. State v. Lauth [Or.] 80 P. 660.

8. State v. Lauth [Or.] 80 P. 660.

9. See 4 C. L. 366.

10. People v. Lee [Cal. App.] 81 P. 969.

11. Glasgow v. Metropolitan St. R. Co. [Mo.] 89 S. W. 915. It is not an abuse of discretion in an action against a corporation to excuse the servant of another corporation the president of which was also president of defendant. Id.

12. Nordan v. State [Ala.] 39 So. 406. Under Code 1892, § 2357, exempting only persons over 60 years of age and persons who have served on the regular panel within two years, it was not error to excuse one who desired to bid farewell to his son who was departing to a distant land and another who had served a few weeks before, where defendant was not prejudiced. Brown v. State [Miss.] 38 So. 316. Accused cannot complain that the judge, in his discretion, has excused a particular juror on account of sickness, there being present a sufficient number to complete the panel. State v. Voorhies [La.] 38 So. 964. Not an abuse of discretion to excuse one to enable him in an emergency to save his property. Nordan v. State [Ala.] 39 So. 406.

§ 5. *The jury list and drawing for the term.*[13]—The method of selecting the jury list is now generally regulated by statute.[14] Such statutes are generally held directory and substantial compliance is all that is required.[15] At common law, jurors were selected by the sheriff at his discretion. In so doing he exercised an executive and not a judicial function;[16] but laws providing for the appointment of jury commissioners are valid.[17] A list of those to be summoned is now usually required to be made up for each jury term of court or for each year;[18] but one cannot complain of failure to provide a jury list for a day of term before his case was to be called.[19] Where jurors are drawn before quashal of an indictment and a new indictment for the same offense is preferred, it is proper to draw other jurors for trial of the second indictment.[20] A requirement that the list be revised from time to time does not render revision within any particular time after the list is made essential.[21] Official acts of a de facto commissioner are not subject to collateral attack.[22]

The names of persons who are exempt or liable to be excused may be omitted.[23] The drawing must be done by the officer designated by law[24] in the presence of

13. See 4 C. L. 367.

14. Provisions against special laws: Code Civ. Proc. § 204, prescribing the method of selecting the jury list in counties of 100,000 population, does not violate the constitutional provision against special laws regulating practice in courts. People v. Richards [Cal. App.] 82 P. 691. Acts 1892, p. 392, c. 116, if intended as a special law, violates Const. 1890, § 90, prohibiting such laws relative to empaneling and summoning juries, and the general law governs. Burt v. State [Miss.] 38 So. 233. But if it was the intention to adopt the general law and make it applicable to the two districts of Perry County, the amendments of the general law (Acts 1904, p. 208, c. 151) apply to the judicial districts of Perry County. Id.

Subject-matter in title: The title of Pub. Laws 1903, p. 37, No. 31, relative to the practice in the circuit court of Wayne County, is broad enough to cover the drawing of juries. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147.

15. Where statutory provisions as to selecting jurors are directory, they should be liberally construed; substantial compliance therewith is all that is required. People v. Richards [Cal. App.] 82 P. 691. Irregularity in drawing the jury at a time and place different from that prescribed by law does not render a jury so drawn illegal. State v. Teachey, 138 N. C. 587, 50 S. E. 232. Irregularities in the method of selecting the jury lists are to be deemed immaterial unless it appears probable that the person challenging was probably prejudiced thereby. Ullman v. State [Wis.] 103 N. W. 6. Evidence held not to show a prejudicial departure from the statutes in the method adopted for selecting the jurors to serve on a panel. Id.

16. State v. McNay [Md.] 60 A. 273.

17. Acts of Maryland 1904, c. 560, p. 954, authorizing the drawing of grand and petit juries by jury commissioners, is not unconstitutional as conferring on executive officers judicial powers. State v. McNay [Md.] 60 A. 273.

18. It is proper in California to select the jury from the latest available list. Under Code Civ. Proc. § 204, providing that a list of jurors shall serve for the ensuing year or until a new list shall be provided, a jury may be selected from a list returned the preceding year where the list for the current year had not been filed with the clerk as required by §§ 208, 209. People v. Richards [Cal. App.] 82 P. 691.

19. Peel v. State [Ala.] 39 So. 251.

20. Carwile v. State [Ala.] 39 So. 220.

21. Under Rev. St. 1901, par. 2787, requiring county board of supervisors to make a list of persons qualified to serve as jurors at their first regular meeting in January, and from time to time revise the same, there is no necessity of revision within 90 days after the list is made. Ubillos v. Territory [Ariz.] 80 P. 363.

22. A person though ineligible to be a jury commissioner, if appointed and acts, is a de facto officer and the official acts of the board in which he participated cannot be collaterally attacked. Wright v. State [Ga.] 52 S. E. 146. When a person not eligible to the office is appointed as a jury commissioner and duly qualifies and acts as such, his official acts in selecting the jury list are those of a de facto officer filling a de jure office and do not constitute a valid ground for a plea in abatement to an indictment found by a grand jury selected from the lists made up by such grand jury, since such acts are not subject to collateral attack. State v. Sutherlin [Ind.] 75 N. E. 642.

23. The names of all persons exempted by law from jury service as well as those whose business or avocation is such that it is reasonably probable that an excuse from service would be granted, may be omitted from the list. Rawlins v. State [Ga.] 52 S. E. 1.

24. Pub. Acts 1903, p. 37, No. 31, requiring the county clerk of Wayne County to draw juries in place of the jury commissioners, is valid. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147. Pub. Acts 1903, p. 37, No. 31, § 3, provides that the county clerk of Wayne County shall draw the jury, hence a drawing by a member of the board of jury commissioners is not legal. Id.

witnesses if such requirement is essential.[25] The method of drawing must be fair.[26] An unfair selection is a denial of equal protection of the laws,[27] and is not to be presumed from the mere fact that races are not represented in the ratio their numbers bear to the population.[28] The number of names to be drawn[29] and the publication of the list is regulated by statute.[30]

§ 6. *The venire and like process.*[31]—It must be issued as long before court day as the statute requires.[32] Names drawn from the box may be omitted from the venire if the persons are manifestly incompetent.[33] The venire is not "civil process" as to which the serving officer must be bonded.[34] A return showing that certain veniremen were absent from the county need not show diligence to secure their attendance.[35] A return may be amended to speak the truth.[36]

§ 7. *Empaneling trial jury.*[37]—The veniremen are ordinarily drawn or called, accepted or challenged, and examined if challenged and then sworn.[38] A jury need not be sworn on their voir dire in a criminal case until challenged for cause.[39] Where it is provided that names shall be "drawn" from the list unless by consent drawing be waived and the panel "called," a failure to demand a drawing may be a waiver.[40] The panel should be drawn with all the names in the box,[41] and must be so drawn if the statute requires, though some are disqualified;[42] but this may be waived.[43] A full attendance is not essential unless absence prevents the selection of an impartial jury.[44] They should not be called faster than is necessary to keep the panel full.[45] Technical nonprejudicial objections to the method of empaneling are not ground for reversal,[46] and irregularities cannot be

25. Under Act No. 135 of 1898, p. 218, § 4, the presence of two or more competent witnesses at a meeting of the jury commissioners to draw jurors is essential to the validity of the proceedings. State v. Feazell [La.] 38 So. 444.

26. Where a challenge to the array on grounds tending to vitiate the scrolls in the boxes was sustained, the party making it cannot complain that in the revision of the lists for a subsequent drawing such scrolls containing the names of eligible persons were destroyed. State v. Teachey, 138 N. C. 587, 50 S. E. 232.

27. Where jury lists in three different trials of a cause contained almost exclusively the names of persons belonging to a political party hostile to defendant, though qualified veniremen in the locality numbered one-half of the same political faith as defendant. Commonwealth v. Powers, 139 F. 452.

28. Miera v. Territory [N. M.] 81 P. 586.

29. Where a general statute as to qualifications, selections, and drawing of jurors with provisions that the drawing be done by the clerk, is amended by an act restricted in title and body to the drawing by the judge, the amendment makes no change in the number of names for jurors to be drawn by the clerk. Kinchien v. State [Fla.] 39 So. 467.

30. Act No. 135, p. 216, 1898 (the general jury law), does not require the lists of jurors to be published or posted for 30 days or any other particular period. State v. Voorhies [La.] 38 So. 964.

31. See 4 C. L. 368.

32. Under Laws Pa. 1834 (P. L. 333) § 96 and Act April 18, 1876, a venire which was issued more than 30 days before the week during which the jurors are to serve is valid. Stamey v. Barkley, 211 Pa. 313, 60 A. 991.

33. It is not prejudicial error to omit from the venire a name drawn from the box where the person has removed from the state and was a brother in law of defendant's counsel. Marlow v. State [Fla.] 38 So. 653.

34. It is not ground for challenge for cause that the constable to whom the venire in a criminal case was sent for service had not given a bond to serve civil process as required by Rev. Laws, c. 25, § 88. Commonwealth v. Tucker [Mass.] 76 N. E. 127.

35. Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238.

36. A sheriff may be allowed to amend his return so as to speak the truth with respect to certain veniremen. Calhoun v. State [Ala.] 39 So. 378.

37. See 4 C. L. 368.

38. See 12 Enc. Pl. & Pr. 373, 515. Challenging and swearing, see post, §§ 8, 9.

39. Young v. State, 6 Ohio C. C. (N. S.) 53.

40. Failure to demand that a drawn jury be empaneled in the manner prescribed by Mansf. Dig. §§ 2221, 2222, is a waiver of a drawn jury, since the manner of drawing prescribed by § 2223 may be waived. Burroughs v. United States [Ind. T.] 90 S. W. 8.

41, 42. Oates v. State [Tex. Cr. App.] 86 S. W. 769.

43. Where parties announce themselves as ready for trial with notice that some of the jurors had been excused for an hour and proceeded to draw a jury which was suspended after five were drawn, and the names of the excused jurors put in the box, it was not error to refuse to put back the names already drawn, and draw the entire jury anew. State v. Harding, 70 S. C. 382, 50 S. E. 10.

44. Accused cannot complain that a juror duly summoned has failed to appear, where there are present a sufficient number to com-

reviewed on habeas corpus.[47] Re-examination of jurors after a change of plea may be dispensed with if proper instructions be given.[48] If an accepted juror be excused for sickness while the panel is incomplete, it is not necessary to empanel anew[49] and his place may be supplied from the box.[50]

§ 8. *Arraying and challenging. A. Challenge to the array or panel.*[51]—A challenge to the array is an objection to all the jurors collectively because of some defect in the panel as a whole,[52] and is not a proper method of raising an objection to the disqualifications of particular jurors,[53] nor is it any objection that provision was not made for a jury at other parts of the term, the one provided being legal.[54] The challenge must be interposed before the jury is empaneled, accepted,[55] and sworn.[56] In some states no particular form is required[57] and the lack of a form does not signify that this challenge is denied;[58] but in others it is required to be in writing,[59] and to state specifically,[60] and not as a mere conclusion or inferential-

plete the panel. State v. Voorhies [La.] 38 So. 964.

45. Under Mansf. Dig. §§ 2221, 2222, after some of the panel have been disposed of by challenge, no more than the number necessary to complete the panel are to be presented for challenge at one time, whether the list is exhausted or not. Burroughs v. U. S. [Ind. T.] 90 S. W. 8.

46. Method appointed by statute not followed where after part of the evidence was in one juror was excused for sickness. Turner v. Territory [Okl.] 82 P. 650.

47. That defendant's presence in court during the empaneling and swearing of the jury was waived. In re Shinski [Wis.] 104 N. W. 86.

48. Where on the trial of a conspiracy a severance was granted and one of the defendants pleaded guilty, whereupon leave to re-examine the jurors for prejudice by reason of the change of plea, and one juror admitted prejudice, it was not error to refuse a re-examination when another changed his plea to guilty, the court having cautioned the jury that such fact should not be considered. Wong Din v. U. S. [C. C. A.] 135 F. 702.

49, 50. Sanford v. State [Ala.] 39 So. 370.

51. See 4 C. L. 369.

52. Bryan v. State [Ga.] 52 S. E. 298.

53. Such objection should be raised by a challenge to the polls. Bryan v. State [Ga.] 52 S. E. 298. That some of the persons selected do not possess the requisite qualifications is not ground for challenge to the panel. People v. Richards [Cal. App.] 82 P. 691. A challenge to the array is not a proper method of raising the disqualification of individual jurors. Rawlins v. State [Ga.] 52 S. E. 1. A special venire summoned to try defendant at an adjourned term cannot be quashed because some of the veniremen served as regular jurors at the regular term. Peel v. State [Ala.] 39 So. 251.

54. Under Code 1896, § 917, a venire called for the second week of an adjourned term, at which term defendant's case was set for trial, cannot be objected to by defendant because the order of adjournment made no provision for summoning jurors for the first week of the term. Peel v. State [Ala.] 39 So. 251.

55. A motion to quash a special venire is too late when made after the jury has been selected and accepted. Dunn v. State [Ala.] 39 So. 147.

56. A challenge to the panel on the ground that the jurors had not qualified as to relationship will not lie after the jury has been empaneled and sworn. Braham v. State [Ala.] 38 So. 919.

57, 58. In Wisconsin, though the statutes do not provide for a challenge or other objection to a panel, such objection may be raised, and the form in which it is raised is not important. It may be in the form of an objection to the entire panel, or by a motion to quash the return thereof, or may be in the set phrase of a challenge to the array. It is sufficient if it is stated definitely and taken down by the stenographer. Ullman v. State [Wis.] 103 N. W. 6.

59. At common law a challenge to the array was required to be made in writing stating specifically the grounds relied on. An issue of law or fact was then formed in respect thereto, which was tried by the court if one of law and by triers appointed by the court if of fact. Ullman v. State [Wis.] 103 N. W. 6.

60. The grounds of a challenge to the array should be specifically stated. The trial court has some discretion as to how specifically the grounds of the challenge should be stated; the statement should be sufficiently full and definite to inform the trial court and the adverse party reasonably of the precise departure from the legal requirements relied on. The right of challenge to the array should be exercised before commencing the empaneling of the jury, otherwise it will be deemed waived. Ullman v. State [Wis.] 103 N. W. 6. A demurrer to a challenge to the array on the bare ground "that there are a great many negroes in the county fully qualified for jury duty" was properly sustained. Bardwell v. State [Fla.] 38 So. 511. A motion to quash a venire on the ground that the sheriff had not properly executed the writ, and where the court proposed to order attachments for the defaulting jurors, the movant stated that the roads were impassable, and that a fair jury could not be obtained, was properly denied. Starr v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 1023. Motion to quash the venire, made up of nearly one-half of talesmen, which did not allege corruption in the selection of the talesmen, properly overruled. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62. A plea in abatement charging that a jury list was not properly selected by the

ly,[61] the grounds relied on. A challenge resting in fact must be supported by evidence,[62] and the burden must be borne by the party who interposed it.[63] In some states the action of the trial court on the challenge is final.[64] A challenge to the array is not waived by failure to interpose a challenge to the panel.[65] Error in denying a challenge to the panel without permitting proof of the facts upon which the challenge is made is cured by a subsequent offer to permit such proof.[66]

(§ 8) *B. Challenge for cause.*[67]—Objections on the ground of competency must be taken before the juror is sworn.[68] Challenges to the favor must be to the individuals and not to the panel,[69] and must state the grounds of challenge.[70] Objections on the ground of bias are deemed waived if known at the time of trial,[71] but not if the venireman swore falsely[72] and a new trial will be granted.[73] A ruling on challenge for implied bias is not exceptionable in Montana.[74]

Right to list of jurors.[75]—In some states an accused is entitled to be served with a correct copy of the venire.[76]

(§ 8) *C. Peremptory challenges and standing jurors aside. Peremptory challenges*[77] secure the right to reject, not to select, a juror,[78] and were not allowed by the common law in the trial of misdemeanors.[79]

officer or officers charged with that duty must be certain. State v. McNay [Md.] 60 A. 273.

61. Starr v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 1023. A motion to quash a venire on the ground that it was not drawn and summoned according to law states a mere conclusion and is insufficient. Peel v. State [Ala.] 39 So. 251.

62. A motion to quash a venire because the jury was not properly drawn must be supported by evidence. Morris v. State [Ala.] 39 So. 608.

63. Where there was no evidence before the court, a motion to discharge was properly denied. State v. Jones [Mont.] 80 P. 1095. A denial of a challenge to a panel drawn in accordance with the provisions of a statute purporting to regulate the matter, though unconstitutional, is not error, where the defendant examined the jurors and accepted them and they possessed the necessary qualifications, since such jury was at least a de facto jury. People v. Ebelt, 180 N. Y. 470, 73 N. E. 235.

64. Under Cr. Code, § 281, the decision of the trial court in the matter of the selection of a jury from an adjoining county is not subject to exception and cannot be reviewed on appeal. Moseley v. Com. [Ky.] 84 S. W. 748.

65. Where an objection to the array has been seasonably interposed and overruled, the party making the objection is not deemed to have waived it by failure to object to the trial jury impaneled as a whole. Ullman v. State [Wis.] 103 N. W. 6.

66. People v. Lee [Cal. App.] 81 P. 969.

67. See 4 C. L. 369.

68. An objection that a juror who was sworn was not on the jury list. State v. Matheson [Iowa] 103 N. W. 137. A rule that challenges must be made when a juror appears and before he is sworn is not violated where the court on excusing one of four jurors drawn from the box after eight had been sworn required another to be drawn before the three were examined. People v. Lee [Cal. App.] 81 P. 969.

69. O'Donnell v. Weiler [N. J. Law] 59 A. 1055.

70. The ground must be such that if proven would be sufficient to sustain the challenge. O'Donnell v. Weiler [N. J. Law] 59 A. 1055. "Challenged for cause" is insufficient on appeal. State v. Forsha [Mo.] 88 S. W. 746.

71. Alleged disqualification of one of the jurors who tried the case is not ground for a new trial where it does not appear that the facts were not known at the time of trial. Rhodes v. State [Ga.] 50 S. E. 361.

72. Nothing is waived where a juror who conceals his bias is accepted. The parties may rely on his sworn statements on his voir dire examination. Healsey v. Nichols [Wash.] 80 P. 769.

73. Where a juror swears falsely and conceals his bias on his voir dire examination the aggrieved party is entitled to a new trial as of right. Healsey v. Nichols [Wash.] 80 P. 769.

74. Under Pen. Code, § 2170, providing that in criminal cases defendant may except to the disallowance of a challenge to the panel or to an individual juror for implied bias, no exception lies to the sustaining of a challenge in the latter case. State v. Jones [Mont.] 80 P. 1095.

75. See 4 C. L. 369.

76. A defect in the copy of the venire required to be served on accused under Code 1896, § 5273, is not within § 4997, providing that no objection can be taken to any venire except for fraud, nor § 5007, declaring that a mistake in the name of a person summoned, either in the list of jurors or venire, is not ground for quashal. Carwile v. State [Ala.] 39 So. 220. Code 1896, § 5273, requiring that a copy of the venire to try the case be served on the accused, is not complied with by service of a copy containing the name of a person as a regular juror who has not been summoned. Id. Such a defect is not harmless error. Id. A venire is not defective, though made up in part of a jury filled as provided by Code 1896, § 5011, after three of the veniremen summoned failed to appear. Nordan v. State [Ala.] 39 So. 406.

77. See 4 C. L. 370.

The number allowed[80] is prescribed by statute,[81] likewise the question whether each of joint parties may challenge the full number or may do so only in the aggregate;[82] but adverse parties, though joined, are sometimes entitled to the number allowed each.[83] If two defendants each claim the full number instead of joining, the rule in Georgia is to allow the state twice as many as ordinarily.[84] The number allowed in "felonies" is not reduced because in a crime essentially a felony the accused because of his infancy is punishable unlike ordinary felons.[85] The policy of the legislation relative to the District of Columbia has been to restrict the number allowed defendant in a criminal prosecution and increase those allowed the state.[86] Error in disallowing the full number is harmless where the number allowed was not exhausted and it did not appear that an objectionable juror was permitted to sit.[87] Allowing an additional peremptory challenge for the purpose of curing error is not ground for reversal in the absence of prejudice.[88]

Time for challenge.[89]—A party cannot be required to exercise a peremptory challenge unless the panel is full;[90] but should interpose it after the voir dire examination and before another juror is called for examination,[91] and the right may be lost if it is not seasonably exercised.[92] The South Carolina rule that the solicitor should exercise the state's right before the juror is accepted by defendant has no statutory sanction, and a technical violation of it is not ground for setting aside a verdict.[93]

The order of challenges,[94] unless otherwise prescribed by law, rests in the discretion of the court;[95] but no favor may be shown either party.[96]

78. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

79. Commonwealth v. Evans [Pa.] 61 A. 989.

80. See 4 C. L. 370.

81. Under Cr. Code, § 55, on an indictment for forgery, the state is entitled to five peremptory challenges. State v. Murray [S. C.] 52 S. E. 189. On a prosecution for carnal abuse of a female under the age of 16 years, the defendant is entitled to only 10 peremptory challenges, as it is to be distinguished from a prosecution for rape. State v. Cannon [N. J. Law] 60 A. 177.

82. In Arizona where two or more defendants are jointly tried, only the number of peremptory challenges each would have been entitled to if tried separately are allowed. Statutes construed. Booth v. Territory [Ariz.] 80 P. 354. Under Code D. C. § 918, several defendants joined in a prosecution for an offense punishable by imprisonment in the penitentiary have 10 peremptory challenges to be shared between them. Lorenz v. U. S., 24 App. D. C. 337. A statute requiring that where there are several parties on a side they must join in a challenge applies to peremptory challenges made in a **condemnation proceeding,** where it was sought to condemn several parcels of land belonging to different owners. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

83. Where joint defendant carriers in an action for loss of freight both denied the loss and asserted that the other was responsible, they are adverse parties and entitled to three peremptory challenges each, under Rev. St. 1895, art. 3213. International & G. N. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113.

84. Rawlins v. State [Ga.] 52 S. E. 1.

85. Under the Kansas statute the offense of rape is a felony and punishable by imprisonment in the penitentiary, and a boy charged with such offense, though but 16 years of age, and who therefore could not be sent to the penitentiary, is entitled to exercise six peremptory challenges. State v. Davidson [Kan.] 80 P. 945.

86. Lorenz v. U. S., 24 App. D. C. 337.

87. See Harmless and Prejudicial Error, 5 C. L. 1620; Indictment and Prosecution (Harmless Error) 5 C. L. 1790.

88. State v. Bonar [Kan.] 81 P. 484.

89. See 4 C. L. 370.

90. A party to an action cannot be required to exercise a peremptory challenge or for cause unless there are twelve jurors in the box for examination. A refusal to allow a peremptory on the ground that defendant had refused to exercise it while only eleven jurors were in the box for examination is reversible error. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280.

91. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

92. Under Pa. Acts July 9, 1901, where a juror has been first examined by defendant and no cause for challenging discovered and no peremptory challenge interposed, and on being turned over to the state for cross-examination is accepted by the state without cross-examination, he cannot then be peremptorily challenged by the defendant. Commonwealth v. Evans [Pa.] 61 A. 989. That after trial counsel learns of facts concerning a juror which if known at the time would have caused him to exercise a peremptory challenge is not ground for new trial. Hern v. Southern Pac. Co. [Utah] 81 P. 902.

93. State v. Harding, 70 S. C. 395, 50 S. E. 11.

(§ 8) *D. Examination of jurors and trial and decision of challenges. Scope of examination.*[97]—The examination of jurors rests largely in the discretion of the court,[98] and while the parties have a right to ascertain whether or not a juror is interested or biased, the examination should be limited strictly to questions tending to elicit such information.[99] Questions as to partiality should be limited to the particular case and the parties thereto.[1] It is proper to ask a juror if he will consider all the testimony fairly and impartially and give it such weight as in his best judgment he deems it entitled to;[2] but not to ask if weight will be given to particular testimony.[3] Questions the sole purpose of which is to aid in the exercise of the right of peremptory challenge,[4] or questions propounded for an illegitimate purpose,[5] may be refused; but the motive of counsel in asking questions is to be considered only when such questions are incompetent.[6] The right to reject a juror is not waived by defendant where after examination he turns him over to the state for cross-examination.[7]

Review of trial of challenges.[8]—A decision that a challenge for actual bias is substantiated is reviewable on a record containing, not all the evidence, but sufficient to show that he was disqualified.[9]

Improper overruling of a challenge is not ground for reversal[10] if a right of peremptory challenge remained when the jury was finally accepted[11] and its exercise would have removed all objectionable jurors,[12] or if no obnoxious person was

94. See 4 C. L. 370.

95. He may require that the partles alternate. but failure of either to challenge shall not be a waiver of one of the number allowed by law. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

96. It is error to allow the state to peremptorily challenge a juror after he has been accepted and a full panel tendered to defendant and then refused to allow the defendant to peremptorily challenge another after he had been accepted by both parties but before final acceptance of the panel. Cook v. State [Miss.] 38 So. 113.

97. See 4 C. L. 370.

98. The court is not bound to put to the juror any question which counsel may request, no challenge having been interposed, for the purpose of eliciting information to enable counsel to determine whether he shall interpose a peremptory challenge. Handy v. State [Md.] 60 A. 452. Refusal to allow a question to juror on his voir dire intended to elicit information as to whether the juror was prejudiced against the defendant is not reversible error where at the time the defendant had not exhausted any of his peremptory challenges. Such question was proper however. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280. There being no general challenge of the jurors for impartiality, it is no ground for reversal that the court refused to allow three questions to be propounded to them, one of which was improper. Sullivan v. Padrosa [Ga.] 50 S. E. 142.

99. The examination should be unaccompanied by statements by court or counsel which tend to prejudice a juror. Faber v. Reiss Coal Co. [Wis.] 102 N. W. 1049. Where several prosecutions are pending against the same person, he is entitled to question jurors who have heard evidence in a prior trial if they would have an opinion if it should transpire that the evidence in the two cases were similar. Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 S. W. 805.

1. Sullivan v. Padrosa [Ga.] 50 S. E. 142.

2. People v. Warner [Cal.] 82 P. 196.

3. Testimony of defendant in a criminal case. People v. Warner [Cal.] 82 P. 196.

4. Dimmack v. Wheeling Traction Co. [W. Va.] 52 S. E. 101.

5. "Do you know 'J,' attorney for the Fidelity Insurance Company in this case" is erroneous. Cunningham v. Heidelburger, 95 N. Y. S. 554.

6. A question in a personal injury case "are any of the jurymen interested as agents or stockholders in any insurance company insuring corporations against liability for negligence" is proper. Grant v. National R. Spring Co., 100 App. Div. 234, 91 N. Y. S. 805.

7. Commonwealth v. Evans, 25 Pa. Super. Ct. 239.

8. See 4 C. L. 371.

9. State v. Miller [Or.] 81 P. 363.

10. See 4 C. L. 371.

11. Errors in overruling challenges to jurors for cause not ground for reversal unless shown that objectionable juror was forced upon party after he had exhausted peremptory challenges. National Bank of Boyertown v. Schufelt [Ind. T.] 82 S. W. 927. Overruling a challenge for cause and compelling a party to resort to a peremptory challenge does not prejudice him, where when the jury is accepted, he still has peremptory challenges not used, but if by overruling a challenge for cause anything could be inferred in the cause prejudicial to the rights of the party interposing the challenge compelling him to exhaust a peremptory on persons liable to challenge for cause, such overruling would be error. Martin v. Farmers' Mut. Ins. Co. [Mich.] 102 N. W. 656.

12. Where the court overrules a challenge to one of four jurors, equally disqualified to act as jurors in the cause, the fact that the party challenging does not exhaust his two

in consequence forced on the party,[13] and the erroneous exclusion of a juror on the state's challenge in a criminal case is not ground for reversing a conviction.[14] It is not prejudicial to excuse a juror on the challenge of one party, though the other party concurs in the challenge.[15]

§ 9. *Talesmen, special venires and additional jurors.*[16]—Special venires may be issued in various emergencies.[17] They should not contain names of those who were jurors at the regular term[18] but will not be quashed for that reason,[19] and in making up an additional venire the name of a person who lives at a distance need not be summoned;[20] but in Texas, where the statute requires that the regular list be included, it is mandatory[21] and the regular and special names must all be put in the box, though some are disqualified by previous service.[22] A special venire should be seasonably issued,[23] but a mere statutory direction as to time leaves power in the court to issue it after term begun.[24] The return must show a diligent service of the venire or else facts excusing failure to serve it.[25] In Illinois the court may depute any person to summon talesmen.[26] An objection that talesmen were unfairly selected must plead the particulars of unfairness with certainty.[27]

§ 10. *Special and struck juries and juries of less than twelve.*[28]—Special juries may be called in cases prescribed by law.[29] They must be selected in the manner prescribed by law,[30] and the statutory rules strictly complied with.[31]

remaining peremptory challenges does not constitute a waiver of his objection to the four jurors. Martin v. Farmers' Mut. Ins. Co. [Mich.] 102 N. W. 656.

13. Decker v. Laws [Ark.] 85 S. W. 425. It is prejudicial error to overrule challenges to disqualified jurors, and ground for reversal when the trial was compelled to be had before obnoxious jurors. San Antonio & A. P. R. Co. v. Lester [Tex.] 13 Tex. Ct. Rep. 813, 89 S. W. 752.

14. Fishburn v. Com. [Va.] 50 S. E. 443.

15. People v. Warner [Cal.] 82 P. 196.

16. See 4 C. L. 371.

17. When a defendant in homicide demanded that a venire be drawn in equal numbers from each of two judicial districts alternately, and the box for one district had become exhausted, it was proper to direct the summoning of an equal number from that district to serve on a special venire. Brown v. State [Miss.] 38 So. 316. In Texas if the list made up by the commissioners for the county court is rendered inadequate by an emergency the court may order other jurors summoned. Where, after the list had been made, a large number of indictments were returned by the grand jury. Martin v. State [Tex. Cr. App.] 90 S. W. 29.

18, 19. Peel v. State [Ala.] 39 So. 251.

20. Loc. Acts 1900-01, p. 2002, § 10 authorizes the court, in a homicide case, where the jury is incomplete and the venire exhausted, to order that a person drawn who resides more than two miles from the court house be not summoned. To summon him might cause delay. Sanford v. State [Ala.] 39 So. 370.

21, 22. Code Cr. Proc. 1895, art. 647, providing that when a special venire is ordered the names of all persons selected to do service during the term shall be used, must be followed where defendant is charged with a capital offense, though names outside the box are those of persons manifestly incompetent. Oates v. State [Tex. Cr. App.] 86 S. W. 769.

23, 24. Ky. St. 1903, § 2244, providing that the judge may not more than 10 nor less than 5 days before the beginning of a special term direct the summoning of a jury, is not mandatory and the order may be entered after the beginning of the term. White v. Commonwealth [Ky.] 85 S. W. 753.

25. A recital in the sheriff's return to a special venire, showing that certain of the venire were absent from the county, recites facts rendering unnecessary any amount of diligence to secure the attendance of such persons. Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238.

26. Under Hurd's Rev. St. 1903, c. 78, § 13, the court may appoint any person whether an officer or not, to summon talesmen; the fact that the appointee is acting as a constable at the time is immaterial. Carroll County v. Durham [Ill.] 76 N. E. 78.

27. An objection to talesmen summoned after the venire is exhausted, on the ground that they were all summoned in a certain city but not showing that they all lived in such city, is insufficient. Starr v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 103.

28. See 4 C. L. 372.

29. Laws 1901, p. 1465, c. 602, § 5, authorizing a special jury where "important or intricate" questions are involved, applies to an action for damages to the holder of railroad bonds for breach of contract as to reorganization of the road, the measure of damages depending on the value of the road and its appurtenances as a going concern. Industrial & General Trust v. Tod, 95 N. Y. S. 44.

30. Under Code Civ. Proc. § 1065, the commissioner is required to select the names in the presence of the parties or their attorneys, and where the list is selected in their absence, it may be set aside. Industrial & General Trust v. Tod, 34 Civ. Proc. R. 287, 93 N. Y. S. 725.

31. The proceeding under Code Civ. Proc. §§ 1063-1069, for the selection of a special jury is special and must be strictly complied with. Industrial & General Trust v. Tod, 34

In making up a struck jury, the names must be stricken by the parties entitled.[32] Under the rule that members of a struck jury cannot be challenged for any cause except bias or interest as to the particular case, the court must upon request examine the jurors as to relationship.[33]

According to the treaties and subsequent legislation under which Alaska was incorporated into the United States, it is unconstitutional to try misdemeanors with six jurors.[34]

§ 11. *Swearing.*[35]—Unless controlled by statute the swearing on the voir dire may be individually or as a body.[36]

§ 12. *Custody and discharge of jurors and jury.*—The court must keep the jury together under such circumstances that a true and fair verdict shall be facilitated.[37] It is in some states allowable to excuse a juror for disqualifying or disabling cause and to proceed with eleven[38] or to supply another,[39] especially when all consent.[40]

§ 13. *Compensation, sustenance, and comfort of jurors.*[41]—The expense of a jury is properly chargeable to the county, whether they sit in a criminal[42] or a civil case,[43] and whether they be regular or special jurors.[44]

JUSTICES OF THE PEACE.

§ 1. *The office.*[1]—The organization of justices' districts,[2] the number of justices to be appointed or elected for each district,[3] their appointment[4] or election,

Civ. Proc. R. 287, 93 N. Y. S. 725. The court at special term may set aside a special jury for an irregularity in their selection which may render the proceeding a nullity. Id.

32. Where a struck jury was demanded but a regular drawing waived, the action of the court in allowing the parties to strike from a panel of 21 is not ground for error where it does not appear from the record who struck the names. Flowers v. Flowers [Ark.] 85 S. W. 242. A contestant in a will contest on an issue hostile to the proponent as well as other contestants cannot be compelled in the striking of a jury to exercise his challenges jointly with other contestants. Id.

33. Refusal to do so held not harmless error. Kansas City, etc., R. Co. v. Ferguson [Ala.] 39 So. 348.

34. Rassmussen v. U. S., 197 U. S. 516, 49 Law. Ed. 862.

35. See 4 C. L. 372.

36. Under Mansf. Dig. § 2223, providing that by consent the drawing may be waived and "the whole panel may be sworn, examined and disposed of," the whole panel need not be sworn in the first instance; the court may call to the box the number of men necessary to fill the jury. Burroughs v. U. S. [Ind. T.] 90 S. W. 8.

37. See Trial, 4 C. L. 1708.

38. Where during a trial a juror expresses his opinion as to the weight to be attached to evidence properly received and declares that he will not consider it, it is error for the court to refuse to excuse the juror and proceed with eleven jurymen, on motion of the party introducing the evidence. Chicago City R. Co. v. Brecher, 112 Ill. App. 106. Not where it appears that he answered all questions touching his qualifications fully and fairly, though had the party moving for his discharge made diligent inquiry he would have discovered facts entitling him to a peremptory challenge. Having failed to discover such facts, all cause to complain for this reason is waived. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

39. Code 1896, §§ 5019, 5020, authorizing the court to excuse a juror for cause, authorizes him to supply a juror in place of one excused, without empaneling another jury. Sanford v. State [Ala.] 39 So. 370.

40. Irregularity in excusing one juror and proceeding with the trial with eleven by consent of all the parties cannot be reviewed on habeas corpus. In re Shinski [Wis.] 104 N. W. 86.

An objection to continuing the trial with jurors who had heard part of the evidence

and their term of office,[5] is a matter of statutory regulation. A justice's right to office is not open to collateral attack,[6] nor are his judicial acts as a de facto officer.[7] His judicial acts are not reviewable by mandamus.[8] In eminent domain proceedings he acts ministerially.[9] A justice though a party to the action is not disqualified from performing purely ministerial duties in no way connected with the trial.[10] He may act as attorney for suppliants at the bar of the court over which he presides,[11] and for his services as such he is entitled to a reasonable compensation.[12] Where he tenders an unqualified resignation[13] to the proper authority and it is accepted,[14] it cannot afterwards be withdrawn though it was not to take effect until a future date and an attempt to withdraw is made prior to such date.[15]

§ 2. *Compensation, duties, and liabilities.*[16]—The right to fees rests entirely in legislative enactment.[17] Statutes providing for compensation must be in con-

before one of their number has been excused for sickness may be waived. Turner v. Territory [Okl.] 82 P. 650.

41. See 4 C. L. 372.

42. The service they render is not solely for the state, and following an immemorial rule the cost thereof may properly be made a charge against the county wherein the crime was committed. State v. Davies, 6 Ohio C. C. (N. S.) 621.

43. The service rendered by jurors in civil cases between private litigants is not solely a private service, but is in part for the public benefit, and the provision of section 5182 for the payment of the per diem and mileage of jurors out of the county treasury is a constitutional provision as applied to civil cases. State v. Davies, 6 Ohio C. C. (N. S.) 621.

44. A juror, even though called for a special case, is not paid by the case but by the day; and the only difference between a regular juror and a juror called for a single case is that the former receives mileage and the latter does not. State v. Davies, 6 Ohio C. C. (N. S.) 621.

1. See 4 C. L. 373.

2. Rev. St. 1899, § 3805, requiring townships of more than 100,000 population to be divided into justice's districts, applies only to townships having such population at the time the law was enacted. State v. Mosman [Mo. App.] 87 S. W. 75. Laws 1895, ch. 8, p. 16, reorganizing the city of East Grand Forks, did not abolish the office of justice of peace provided for by Sp. Laws 1887, ch. 45, p. 602, and such office was recognized and continued and the qualifications of justices and the commencement of their term are regulated by the later act. Kane v. Arneson Mercantile Co. [Minn.] 103 N. W. 218. Under Rev. St. 1887, § 1759, subds. 2, 3, a board of county commissioners has power to establish, abolish or change justices' precincts in incorporated cities. Johnston v. Savidge [Idaho] 81 P. 616. The action of a board of county commissioners with power to do so, in creating justices' precincts, can only be reviewed by appeal. Quo warranto will not lie. Id.

3. Const. art. 6, § 17, fixing the number of justices in a township as not to exceed four, and providing that the legislature may increase the number in cities, does not fix minimum number for cities. Attorney General v. Loomis [Mich.] 105 N. W. 4. Sess. Laws 1891, p. 60, providing that at each general election there shall be elected two justices in each justice's precinct, except in wards in incorporated cities, does not prohibit the board of county commissioners from establishing precincts within such cities and for the election of two justices in such precincts. Johnston v. Savidge [Idaho] 81 P. 616.

4. Acts 1905, No. 70, providing for the appointment of an associate judge of the municipal court, to have no jurisdiction except in case of vacancy or to avoid delay, and constituting him ex officio a justice of the peace, cannot be sustained as a provision for the appointment of a justice. Attorney General v. Loomis [Mich.] 105 N. W. 4.

5. The term of justices elected at the general city election, November, 1901, for the ensuing two years, began the first Monday after the first Tuesday in January, 1902, and expired on the qualification of their successors, elected in 1903. Kane v. Arneson Mercantile Co. [Minn.] 103 N. W. 218.

6. State v. Miller [Kan.] 80 P. 947.

7. His judicial acts are not open to collateral attack because he had prior thereto accepted the office of city attorney and was also acting in that capacity. State v. Miller [Kan.] 80 P. 947. Under the statutes of Georgia, a justice who has resigned and whose resignation has been unconditionally accepted remains a de facto officer until his successor is appointed and has qualified. Bates v. Bigby [Ga.] 51 S. E. 717.

8. The action of a committing justice in refusing to punish a witness for contempt. Farnham v. Colman [S. D.] 103 N. W. 161.

9. Hence, his actions may be controlled by mandamus. Sullivan v. Yazoo & M. V. R. Co. [Miss.] 38 So. 33.

10. A judgment plaintiff, on succeeding the justice who tried the case, may certify the transcript to the district court so as to make it a judgment thereof. Hass v. Leverton [Iowa] 102 N. W. 811.

11, 12. Brancecum v. Simmons, 116 Ill. App. 98.

13. Murray v. State [Tenn.] 89 S. W. 101.

14. Under Shannon's Code, § 442, providing that resignation shall be tendered to the county court, the county judge of the justice's county is the proper officer to receive and act upon a resignation. Murray v. State [Tenn.] 89 S. W. 101.

15. Murray v. State [Tenn.] 89 S. W. 101.

16. See 4 C. L. 373.

17. There is no statute in Texas authorizing a justice to receive fees for holding

formity with constitutional provisions,[18] and where regulated on the basis of population it must be determined according to the last official census.[19]

For erroneous judicial acts in a cause of which he has jurisdiction, he is not personally liable,[20] nor is he liable if he had no jurisdiction where no injury was suffered in consequence of his act.[21]

§ 3. *Civil jurisdiction.*[22]—The court of a justice of the peace is not a court of record.[23] It is a court of limited[24] and special jurisdiction[25] which cannot be extended beyond constitutional limitations.[26] Though he may not administer in equity, the owner of an equitable title may sue in his court.[27] Jurisdiction of ancillary proceedings depends on jurisdiction of the principal action.[28]

Residence determining jurisdiction.[29]—His jurisdiction is generally limited to the county of which defendant is a resident,[30] but it is co-extensive with such county.[31]

The amount in controversy[32] is the sum demanded,[33] with interest and penalties.[34] A complaint for a certain sum "and damages" does not oust the justice of jurisdiction where it appears from the record that the sum allowed as damages did

examining trials in misdemeanor cases. Ex parte Way [Tex. Cr. App.] 89 S. W. 1075.

18. St. 1897, p. 536, c. 277, is void as in violation of the constitutional provision that compensation shall be fixed in proportion to duties. Millard v. Kern County [Cal.] 82 P. 329.

19. Cothran v. Cook, 146 Cal. 468, 80 P. 699.

20. Hearing a cause for assault and fining the accused on Sunday. Kraft v. De Verneuil, 105 App. Div. 43, 94 N. Y. S. 230.

21. Under Code Civ. Proc., § 1138, no action lies against a justice who, beyond his jurisdiction, issues a search warrant and delivers it to the sheriff where no steps had been taken to enforce it. Until steps had been taken to enforce it there was no "question of difference" between the parties. De Lucca v. Price, 146 Cal. 110, 79 P. 853.

22. See 4 C. L. 374.

23. See 4 C. L. 373, n. 11. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182. Acts April 22, 1863, June 11, 1885, and April 29, 1891, allowing costs to garnishees in attachment executions, issued out of courts of record, do not apply to writs of attachment issued by a justice. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

24. **In West Virginia** justices' courts are statutory courts of limited jurisdiction. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182.

25. Under Const. art. 5, § 21, and Code Civ. Proc. 1902, § 71, a magistrate has jurisdiction of all cases therein enumerated against all persons subject to the process of the court or who voluntarily appear. Best v. Sea Board Air Line R. Co. [S. C.] 52 S. E. 223. Code Civ. Proc. 1902, § 155, construed in connection with Const. art. 5, § 21, and Code Civ. Proc. 1902, § 71, gives a magistrate jurisdiction of an action against a foreign corporation, having property in the state, to recover a **penalty** by due service of process. Id. A breach of contract to return goods held as bailment gives rise to an action **ex contractu** of which a justice has jurisdiction under Civ. Code 1895, § 5856. Bates v. Bigby [Ga.] 51 S. E. 717. An action against a sheriff for damages for nonperformance of an official duty and for the penalty imposed by law for such nonperformance is not an action on a contract that a justice has jurisdiction of under Code Civ. Proc. § 66, and Civ. Code, § 2090. Oppenheimer v. Regan [Mont.] 79 P. 695. **In Georgia** a justice has no jurisdiction of an action to recover property, or its value, which has been wrongfully converted. Southern R. Co. v. Born Steel Range Co. [Ga.] 50 S. E. 488.

26. Ex parte Fritz [Miss.] 38 So. 722.

27. Walker v. Miller [N. C.] 52 S. E. 125.

28. A justice who has no jurisdiction of a principal action because it was not brought in the county of defendant's residence acquires no jurisdiction by garnishment of a debtor of defendant resident in the county where the action was brought. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182.

29. See 4 C. L. 375.

30. In West Virginia. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182. Under Rev. St. 1899, § 3839, providing that the cause of action therein described may be sued on in any township in the county where defendant may be found, the return of the constable that the writ was served in the township where the action is brought is conclusive evidence that the court had jurisdiction. Kerr v. Quincy, etc., R. Co. [Mo. App.] 87 S. W. 596.

31. In South Carolina it is not limited, under Const. art. 5, § 23, to actions in the township where defendant resides. Wise v. Werts [S. C.] 51 S. E. 547.

32. See 4 C. L. 375. The statutory amount fixed by U. S. Rev. St. § 1927 (Organic Act of Colorado and Arizona) cannot be altered by local statutes. Brown v. Braun [Ariz.] 80 P. 323.

33. Reynolds v. Philips [S. C.] 51 S. E. 523. The amount claimed and not the amount due is the amount in controversy. Brunson v. Furtick [S. C.] 52 S. E. 424. Where there is evidence authorizing a recovery for an amount within or in excess of jurisdiction but the complaint demanded an amount within the jurisdiction, it was proper to refuse to dismiss. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124.

34. A claim for **interest on unliquidated damages** is a part of the amount in con-

not make the amount in controversy exceed the jurisdiction.[35] As to whether a portion of a demand may be remitted so as to give jurisdiction, there is a conflict of authority.[36] Under a rule that jurisdiction may be extended beyond the statutory amount by consent, the extending agreement is strictly construed.[37]

Title to realty.[38]—A justice has no jurisdiction of an action in which title to real estate is involved[39] unless it is involved only incidentally.[40] The test is, will the judgment demanded by the issues affect the title.[41] An allegation as a conclusion that title will be brought in issue does not justify a removal of the cause from the justice court.[42] In Minnesota title must be brought in issue on the evidence,[43] but in Indiana a verified plea is sufficient.[44] If title is properly put in issue, the cause must be certified to a court having jurisdiction,[45] and if he refuse to certify no jurisdiction is acquired by appeal,[46] but an improper certification ousts both courts of jurisdiction.[47]

troversy. Texas & P. R. Co. v. Walter Hunt & Co. [Tex. Civ. App.] 85 S. W. 1168. If the demand with interest and penalties to which plaintiff is entitled exceeds the statutory amount, the justice has not jurisdiction. Oppenheimer v. Regan [Mont.] 79 P. 695. Interest is included in the amount involved under Rev. St. § 1927. Brown v. Braun [Ariz.] 80 P. 323.

35. Porter v. Duncan, 23 Pa. Super. Ct. 58.

36. That it can be remitted: Before or at the time of rendition of judgment an amount in excess of jurisdiction may be remitted. Webb v. McPherson & Co. [Ala.] 38 So. 1009. Provision for attorney's fees remitted by oral amendment to the pleadings in an action on a promissory note. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 90 S. W. 61.

Contra: After the institution of suit the plaintiff can not remit so much of his demand as to bring the remainder within the jurisdiction of the justice. Brown v. Braun [Ariz.] 80 P. 323.

Note: It has been frequently held that a creditor may voluntarily relinquish a part of his demand for the purpose of bringing it within the jurisdiction of the justice (Carpenter v. Wells, 65 Ill. 451; Witt v. Hereth, 6 Biss. 474; Matlock v. Lare, 32 Mo. 262; Bowditch v. Salesbury, 9 Johns. [N. Y.] 366; Barber v. Kennedy, 18 Minn. 218), and that he may waive the excess over the jurisdictional limit of the inferior court and maintain an action therein for the balance (Wharton v. King, 69 Ala. 365; King v. Dougherty, 2 Stew. [Ala.] 487; Litchfield v. Daniels, 1 Colo. 268; Hapgood v. Dougherty, 8 Gray [Mass.] 373; Dalton v. Webster, 82 N. C. 279; Mabry v. Little, 19 Tex. 339). Some cases make the character of the claim the criterion as to the right to remit a part of it. That it must be unliquidated. Perkins v. Rich, 12 Vt. 595; De Camp v. Miller, 44 N. J. Law, 617; Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494; Fuller v. Sparks, 39 Tex. 136; Burke v. Adoue, 3 Tex. Civ. App. 494. The rule is not applicable to actions in which the value of the property in suit is made the test the jurisdiction. Butler v. Ervie, 30 Mo. 478; Noville v. Dew, 94 N. C. 43; Shealor v. Amador County Super. Ct., 70 Cal. 564; Ballerino v. Bigelow, 90 Cal. 500. But see Henderson v. Desborough, 28 Mich. 170; Thornily v. Pierce, 10 Colo. 250. The remission of interest is allowed where remission of a portion of the principal would not be. Wood v. Lovett, 1 Penn. [Pa.] 51; Bower v. McCormick, 73 Pa. 427; Bates v. Buckley, 7 Ill. 389; Bentley v. Wright, 3 Ala. 607; Kirk v. Grant, 67 Md. 418. **Contra.** Van Giesen v. Van Houten, 5 N. J. Law, 822; St. Amand v. Gerry, 2 Nott. & McC. [S. C.] 487.

The earlier cases deny the right of remission. Simpson v. Rawlings, 2 Ill. 28; Moore v. Thompson, 44 N. C. 221; Ramsom v. Barrett, 50 N. C. 409; Bower v. McCormick, 73 Pa. 427.—See note to Hunton v. Luce [Ark.] 28 L. R. A. 221.

37. A stipulation on two separate notes extending the jurisdiction beyond the statutory amount does not apply where one action is brought on the two notes. Hannasch v. Hoyt [Iowa] 103 N. W. 102.

38. See 4 C. L. 376.

39. Under Code, §§ 836, 837, where title is put in issue the case is properly dismissed. Hudson v. Hodge [N. C.] 51 S. E. 955.

40. That title to realty may be incidentally involved does not oust the justice of jurisdiction. Pankey v. Modglin, 116 Ill. App. 6. He may entertain an action to recover damages for breach of covenant as to title. Id.

41. Pankey v. Modglin, 116 Ill. App. 6.

42. Code Civ. Proc. § 838, requires the facts from which such conclusion follows to be alleged. McAlister v. Tindal [Cal. App.] 81 P. 1117.

43. A justice has no power under Gen. St. 1894, § 4991, to certify a cause to the district court until title comes in issue on the evidence. That the pleadings show such issue is insufficient. Sorenson v. Torvestad [Minn.] 103 N. W. 15.

44. A complaint for possession of land from a tenant wrongfully holding over and an answer denying that defendant held as tenant, but as equitable owner and stating the source of plaintiff's claim to title puts the title in issue under Burns' Ann. St. 1901, § 1501. Deane v. Robinson, 34 Ind. App. 468, 73 N. E. 169.

45. By statute in Indiana must certify the cause to the circuit court. Deane v. Robinson, 34 Ind. App. 468, 73 N. E. 169. That a third person should be made a party is no objection to the right of the defendant to a transfer of the cause to the circuit court, under Burns' Ann. St. 1901, § 1501, on filing a verified answer putting title to realty in issue. Id.

Objections to the jurisdiction[48] are waived by pleading and going to trial on the merits of the cause,[49] and one who appears specially and moves to dismiss for want of jurisdiction of the person, based on specific grounds, cannot on appeal urge other grounds not presented before the justice.[50]

§ 4. *Procedure in justices' courts*[51] is regulated by statute.[52] A justice having jurisdiction of the subject-matter may, by consent of all the parties, hear the evidence and argument outside of the township in which he resides and for which he was elected.[53] A defendant who withdraws where his demurrer to the jurisdiction of the justice is overruled cannot object to subsequent proceedings.[54]

Postponement, continuance, and discontinuance.—He must try cases at the regular terms of his court. He has no authority to postpone a case of his own motion during vacation,[55] but a postponement from morning until afternoon does not oust him of jurisdiction, especially where the parties had ample notice that this action would be taken.[56] The granting of a continuance does not oust him of jurisdiction until the time arrives to which the case has been continued.[57] An action is not discontinued from the mere fact that no orders of continuance or other orders are made on the docket therein.[58] A discontinuance[59] deprives the justice of jurisdiction to render any judgment except one of nonsuit,[60] and entitles plaintiff to commence a new action though the judgment of nonsuit is not formally entered.[61]

46. Deane v. Robinson, 34 Ind. App. 468, 73 N. E. 169.

47. The only order the district court can make in such case is one of dismissal. Cannot remand the case for trial. Sorenson v. Torvestad [Minn.] 103 N. W. 15.

48. See 4 C. L. 376.

49. An objection to the jurisdiction because of the amount involved is waived where the party goes to trial on the merits, and on appeal to the circuit court participates in the selection of the jury and permits witnesses to be called before raising it. Thayer v. Gibbs [Mich.] 12 Det. Leg. N. 93, 103 N. W. 526. A special appeal on the ground that the justice had no jurisdiction is waived by going to trial on the merits on the general appeal after the special one was dismissed. McCall v. Van Dusen [Mich.] 12 Det. Leg. N. 340, 104 N. W. 326.

50. People v. Court of Appeals [Colo.] 79 P. 1017.

51. See 4 C. L. 376.

52. A **notice of the time and place of trial** to a party's attorney who notifies his client is sufficient compliance with Code Civ. Proc. § 850. Grant v. Justice's Court of Second Tp. [Cal. App.] 82 P. 263. Civ. Code 1895, § 4130, providing the **mode of proof and defense** in a suit on an open account does not apply to an action for loss of or damage to property by a common carrier even though the cause of action is set out in detail, attached to the summons, and verified. Lowe Co. v. Central of Georgia R. Co. [Ga.] 51 S. E. 653. Under a rule that the **mode of procedure** shall be governed by the statutes relative to district or county courts, if not otherwise provided, a statute authorizing an application for a new trial within two years after rendition of judgment on service by publication applies to justices' courts. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454.

53. Stark v. Treat, 6 Ohio C. C. (N. S.) 286.

54. Cotton v. Johnson [S. C.] 51 S. E. 245.

55. Under Rev. Code 1892, § 2399, where his regular term is on July 4, and on an erroneous supposition that such day is a legal holiday, he of his own motion continues a case and enters judgment by default the following day, such judgment is void. Alabama Great Southern R. Co. v. Dalton [Miss.] 38 So. 285.

56. Henion v. Pohl, 113 Ill. App. 100.

57. A judgment rendered during the term at which the continuance is granted is erroneous but not void. Field v. Peel [Ga.] 50 S. E. 346. A claimant to a fund brought into court by a summons of garnishment issued on such judgment cannot question its validity so long as the same is acquiesced in by the party against whom it was rendered. Id.

58. A judgment in an action before a justice was on writ of prohibition held void. Then a second judgment was rendered. A period of 18 months during pendency of the prohibition and afterwards, elapsed between the two judgments without any order in the action. This did not work a discontinuance. Thomasson v. Simmons [W. Va.] 50 S. E. 740.

59. Under Comp. Laws 1897, § 836, providing that a judgment of nonsuit with costs shall be rendered against a plaintiff, who discontinues or withdraws his action or is nonsuited at the trial, a plaintiff is entitled as of right to discontinue or submit to a nonsuit at any time before verdict. Burkart v. Blaumann [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81.

60. And where after a new trial was granted plaintiff discontinued, the justice was deprived of all jurisdiction to render any judgment except one of nonsuit. Burkart v. Blaumann [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81.

61. Plaintiff was thereafter entitled to commence a new action in any court having jurisdiction, though the justice neglected to formally enter the judgment of nonsuit.

The docket and other records[62] need not be kept with the particularity required in courts of general jurisdiction,[63] but statutory requirements must be complied with.[64] Facts constituting a cause of action[65] and appellate jurisdictional facts[66] must be recited, but omission to keep the docket as required by statute is a mere irregularity and does not avoid the judgment.[67] The entry of judgment on the docket is conclusive evidence of the facts therein recited.[68] An appellate court may require the docket to be corrected.[69]

Change of venue[70] to a named justice confers upon no other jurisdiction to hear the cause.[71] In Iowa a change of venue cannot be granted after the trial is commenced,[72] and error in granting it is not waived by going to trial.[73]

Transfer of causes.[74]—In New York, by statute, if a new action is commenced after an action before a justice is discontinued, only the same cause of action and defenses may be set forth in the pleadings as were made before the justice.[75]

Contempt.[76]—Statutes giving a justice power to punish for contempt are strictly construed.[77]

Attachment and garnishment[78] are fully treated in other topics.[79]

Burkart v. Blaumann [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81.

62. See 4 C. L. 376.

63. Record of justice stating "Plaintiff and defendant present. Plaintiff claims adjournment until April 15, 1905. Plaintiff present. Defendant does not appear. After hearing allegations and proofs of plaintiff, etc., I hereby render judgment against defendant. Judgment entered. April 15, 1905," shows date of rendition of judgment and that it was rendered on the date adjourned to. Bowden v. Dasey [Del. Super.] 61 A. 945.

64. A record stating that the justice "heard the proofs in the case" does not comply with a statute requiring it to state that he heard "plaintiff's proofs and allegations." Patterson v. Jarmon [Del. Super.] 62 A. 8. Rev. St. 1899, § 4481, provides that if defendant in an attachment proceeding does not appear to the action at the return of the writ the justice must enter an order in his docket requiring plaintiff to give him notice by publication (Cheeseman v. Fenton [Wyo.] 80 P. 823), and the fact that defendant is out of the state does not relieve plaintiffs of the necessity of issuing summons where service is to be obtained by publication (Id.).

65. The record of a justice stating a cause of action "action on account. Plaintiff claims $7.00," **sufficiently states a cause of action** (Bowden v. Dasey [Del. Super.] 61 A. 945), but a statement in an action for breach of warranty on an exchange of property "This was an action to recover in the trading of a cow. Plaintiff demanded $20.00," is **insufficient to state a cause of action** (Warrington v. Holt [Del. Super.] 61 A. 966).

66. In order to confer jurisdiction upon the district court on appeal from a justice's judgment, his docket must affirmatively show not only **that a bond was executed** within the prescribed time but that it was delivered to the justice to be entered upon his records. Caster v. Scheuneman [Neb.] 104 N. W. 152.

67. Failure to enter the time when process was issued, when the parties appeared, and time of trial as required by Rev. St. 1899, § 3844. Henman v. Westheimer, 110 Mo. App. 191, 85 S. W. 101.

68. Town of Chalmers v. Tandy, 111 Ill. App. 252.

69. In Georgia the superior court may direct that an irregularity in an entry of the case on the justice's docket be corrected in accordance with the facts. Bates v. Bigby [Ga.] 51 S. E. 717. A statute authorizing the appellate court to correct any omission or mistake in the docket entries of the justice authorizes such court to supply an omission to enter an oral remittitur upon proof that such remittitur was made in order to determine the right to appeal. Henry v. Chicago, etc., R. Co. [Iowa] 103 N. W. 793.

70. See 4 C. L. 377.

71. Miltimore v. Hoffman [Wis.] 104 N. W. 841.

72. A trial is commenced when an issue of law raised by a motion relative to the answer is heard and determined by the court. Columbus Junction Tel. Co. v. Overholt, 126 Iowa, 579, 102 N. W. 489.

73. Change of venue erroneously granted to defendant. Columbus Junction Tel. Co. v. Overholt, 126 Iowa, 579, 102 N. W. 498.

74. See 4 C. L. 377.

75. Under Code Civ. Proc. § 2957, a defendant who in the justice court pleaded facts involving title to realty and made no other defense cannot when the case was recommenced in the county court, amend so as to set up a counterclaim. Moisen v. Burr, 102 App. Div. 248, 92 N. Y. S. 435.

76. See 4 C. L. 377.

77. Under the South Dakota statutes he has no power to punish, as for contempt, the refusal of a witness to produce documents called for by a subpoena duces tecum. Farnham v. Colman [S. D.] 103 N. W. 161.

78. See 4 C. L. 377.

79. See Attachment, 5 C. L. 302; Garnishment, 5 C. L. 1574. Rev. St. 1899, § 4478, expressly provides that where a writ of attachment in an action before a justice is issued at the commencement of the action, it is required to contain the substance of the summons and no summons is necessary, but if issued after summons it must be made returnable at the same time as the summons. Cheeseman v. Fenton [Wyo.] 80 P. 823. Rev. St. 1899, § 4452, expressly provides that in civil actions, before a justice, plaintiff on certain grounds may have a writ of attachment only at or after commencement of the

JUSTICES OF THE PEACE—Cont'd.

Process or appearance[80] is essential to the commencement of an action.[81] An action should not be dismissed for mere irregularities in process which can be remedied by amendment without prejudice to the substantial rights of the parties.[82]

Pleadings and issues.[83]—There must be pleadings[84] complying with statutory requirements[85] and they must be sufficient to advise the opposite party of what he is charged and to bar another action,[86] but are not required to be in any particular form[87] and are to be liberally construed.[88] It is sufficient if they are in such form as to enable a person of common understanding to know what is intended.[89] Technical rules of pleading do not apply.[90] Pleadings may be oral.[91] No reply is necessary.[92] In Missouri if the action is on a contract, the subject-matter of which may be stated in an account, the case may be stated as an account, the contract being evidence of it,[93] and a complaint is sufficient if it shows what the action is for, on what account it is brought, and gives enough of the particulars to enable a defense to be prepared.[94]

Trial by jury[95] as a matter of right or propriety is elsewhere treated.[96]

Verdict and judgment.[97]—A judgment rendered in a cause of which he has not jurisdiction is void,[98] though it will support an appeal triable de novo so as to confer jurisdiction on the appellate court.[99] A judgment authorized by statute may be ren-

80. See 4 C. L. 377.

81. Rev. St. 1899, § 4331, expressly provides that civil actions before a justice shall be commenced by summons or by appearance without summons. Cheeseman v. Fenton [Wyo.] 80 P. 823.

82. A summons in a justice court which contained a partnership name without showing the christian name of each partner is not a nullity but is merely irregular and may be cured by amendment. Morgridge v. Stoefer [N. D.] 104 N. W. 1112. Rev. Codes 1899, § 5297, relating to the correction of mistakes in pleading, process, or proceeding, applies to justice court. Id.

83. See 4 C. L. 378.

84. Where there appears to have been no pleadings either before the justice or in the circuit court, the judgment will be reversed and the cause remanded for proper pleadings to be filed therein and to be properly heard and determined. Longacre Colliery Co. v. Creel [W. Va.] 50 S. E. 430. In an action before a justice to justify a recovery in favor of the defendant there must be some account or claim filed by him upon which to base such recovery. Id.

85. Under Code Civ. Proc. 1895, § 5082, a plea that the justice has not jurisdiction must show that another court in the state has. Akers v. High Co. [Ga.] 50 S. E. 105.

86. A printed form of back tax bill used in case of personal property, changed with pen to show that the claim is for poll tax but not showing that defendant is indebted to the collector, is insufficient. Sone v. Wallendorf, 187 Mo. 1, 85 S. W. 592.

87. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73. Under Rev. St. 1899, § 3852, a statement of a cause of action and an account are sufficient if they advise the opposite party of what he is charged and bar another action for the same subject-matter. Darnell v. Lafferty [Mo. App.] 88 S. W. 784.

88. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73. A statement for commissions for selling separate property of a married woman that the services were for the benefit of the separate property and that the amount was reasonable sufficiently alleged those facts. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375.

89. Code Civ. Proc. 1902, § 88, subd. 5. Hall v. Sullivan, 70 S. C. 397, 50 S. E. 27. Amended complaint on a promissory note held sufficient. Brunson v. Furtick [S. C.] 52 S. E. 424. Though a defendant is entitled to have the specific acts of negligence relied on alleged, a complaint alleging negligence in general terms is good on oral demurrer made after the trial before the justice was ended and at the trial upon an appeal to the jury. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124.

90. Conclusions may be pleaded. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73.

91. A plea of breach of warranty or recoupment to an attachment for purchase money need not be in writing. Casey v. Crane & Co. [Ga.] 50 S. E. 92.

92. Millington v. O'Dell [Ind. App.] 73 N. E. 949.

93. Statement held sufficient under Rev. St. 1899, § 3852. Standard Scale & Foundry Co. v. Kansas City Furnace Co. [Mo. App.] 88 S. W. 108. Statement of account held sufficient to notify defendants that they were sued for the items of the account under Rev. St. 1899, § 3853. Allen v. Goodrich [Mo. App.] 85 S. W. 910.

94. Complaint to recover damages for injuries to a passenger held sufficient. Barr v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 107.

95. See 4 C. L. 379.

96. See Jury, 4 C. L. 358.

97. See 4 C. L. 380.

98. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182. A default judgment rendered within five days after service of summons is void. Comenitz v. Commerce [Miss.] 38 So. 35.

99. See post, § 5.

dered,[1] but if he is limited to the rendition of a specific judgment in a particular proceeding he may render no other.[2] Inconsistent judgments may not be rendered in the same cause.[3] A judgment by default against one joint defendant vitiates a joint judgment against both.[4] Judgment may be confessed by an attorney on behalf of his client in a justice court the same as in a court of record.[5] The judgment becomes a lien when enrolled in a court of record as provided by law.[6]

Unless void on its face a judgment may not be collaterally assailed,[7] and where jurisdictional facts are recited it cannot be collaterally attacked for fraud.[8] A default judgment where the justice had jurisdiction of the person is conclusive on collateral attack as to every defense that might have been properly made.[9] If jurisdiction depends on a fact which the justice is required to ascertain and settle if he has jurisdiction of the parties, the decision of the question of fact is not subject to collateral attack,[10] nor is an erroneous decision as to what facts are put in issue by the pleadings,[11] nor is a judgment erroneous because of defective service of process.[12] Where a creditor splits a claim so as to give jurisdiction and secures several judgments, such judgments cannot be collaterally assailed after the lapse of several years.[13] On collateral attack a judgment susceptible of a construction showing it to be within his jurisdiction will be so construed.[14]

Execution[15] may issue from a court of record on the justice's transcript, where execution issued by the justice is unavailing,[16] and a sale on execution cannot be collaterally attacked because the justice's execution was returned before the return day.[17] Whether a return of nulla bona must be made to execution issued by the justice prior to execution issued on a transferred judgment depends upon statute.[18]

1. Pub. Acts 1899, p. 309, No. 199, expressly provides that a justice may render judgment against one co-defendant though the other be found not liable. Wilson v. Medler [Mich.] 12 Det. Leg. N. 103, 103 N. W. 548.

2. In a proceeding under the act of April 3, 1830, the only judgment a justice is authorized to enter is one that the premises shall be delivered up to the lessor. Hickey v. Conley, 24 Pa. Super. Ct. 388.

3. A justice having on the trial before him rendered judgment for plaintiff, cannot on a trial before the jury grant a nonsuit. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124.

4. Patterson v. Jarmon [Del. Super.] 62 A. 8.

5. Town of Chalmers v. Tandy, 111 Ill. App. 252.

6. Under Code 1892, § 2413, providing that after enrollment in the circuit court the judgment is a lien on all property of defendant in the county and that it may be enrolled in cases where appeal is taken, it is a lien though enrolled before the time within which appeal may be taken expires. Minshew v. Davidson & Co. [Miss.] 38 So. 315.

7. If facts which authorize the exercise of jurisdiction are alleged in the petition, jurisdiction of the subject-matter is acquired and the judgment is evidence thereof until set aside in a direct proceeding. Rice v. Travis, 216 Ill. 249, 74 N. E. 801.

8. Justice's judgment recited that defendant had been duly and legally cited to appear and that he had appeared by his attorney under appointment of the court. Defendant claimed to have been a resident of the state to plaintiff's knowledge but that summons was served by publication. Scudder v. Cox [Tex. Civ. App.] 80 S. W. 872.

9. That the value of property in a replevin suit was within his jurisdiction though not expressly found so by the judgment. Rice v. Travis, 216 Ill. 249, 74 N. E. 801.

10. Value of goods in controversy. Rice v. Travis, 216 Ill. 249, 74 N. E. 801.

11. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73.

12. The enforcement of a judgment rendered in a case where the summons gave defendant one day less within which to appear than he was entitled to will not be enjoined. Kerr v. Murphy [S. D.] 102 N. W. 687.

13. Adams v. Jennings, 103 Va. 579, 49 S. E. 982.

14. Frank v. Dungan [Ark.] 90 S. W. 17.

15. See 4 C. L. 381.

16. A return to a justice's execution "By returning this writ no other property found upon which to levy this writ" is a sufficient return nulla bona and authorizes issuance of execution from the circuit court on the justice's transcript under Rev. St. 1899, § 4019. Ables v. Webb, 186 Mo. 233, 85 S. W. 383.

17. Under Rev. St. 1899, § 4019, authorizing issuance of execution from the circuit court on the justice transcript in case of a return of nulla bona on the justice's execution, an execution so issued cannot be collaterally attacked because the justice's execution was returned before the return day. Ables v. Webb, 186 Mo. 233, 85 S. W. 383.

18. Where a judgment exceeding one hundred dollars is transferred to another

Costs[19] are generally awarded to the prevailing party[20] in the court of last resort.[21]

§ 5. *Appeal and error.*[22]—Appeal and not error is the remedy of one aggrieved by a justice's judgment entered after trial on the merits.[23] The right to appeal is statutory[24] but is to be implied from a statute fixing the requisites of an appeal bond.[25] In granting an appeal a justice acts judicially.[26] There must be an appealable judgment[27] of an unremitted[28] amount sufficient to give the appellate court jurisdiction.[29] The appeal must be properly entitled[30] and must be taken within the prescribed period,[31] and if not so taken remedies extraordinary are not available.[32] There must be a notice of appeal conforming to statutory requirements[33] signed as required by law,[34] but that it asks more than appellant is entitled to does not ren-

county it is not a necessary prerequisite to execution to show a return of "no goods" in the county where the judgment was recovered. Mougenot v. Vernon, 23 Pa. Super. Ct. 165.

19. See 4 C. L. 381. See, also, Costs, 5 C. L. 842.

20. Under Rev. St. §§ 5348, 5349, the party in whose favor judgment is rendered is entitled to costs. Gordon v. Steinmetz, 71 Ohio St. 372, 73 N. E. 512. **On dismissal** of the action on appeal because of want of jurisdiction in the justice, costs are properly awarded against the plaintiff under Rev. St. 1898, § 2925. Miltimore v. Hoffman [Wis.] 104 N. W. 841.

21. Where plaintiff in an action for the recovery of money only recovers judgment, but on appeal defendant sets up a counter claim not due at the time of the trial in the justice's court and recovers thereon an amount in excess of the plaintiff's recovery, he is entitled to all his costs in both courts. Gordon v. Steinmetz, 71 Ohio St. 372, 73 N. E. 512. Under Shannon's Code, § 4935, a surety on an appeal bond from a justice to a circuit court is liable for all costs adjudged against his principal at any time during the progress of the cause, to the extent of the penalty of the bond. Hite v. Rayburn [Tenn.] 85 S. W. 1105.

22. See 4 C. L. 381.

23. Simmons v. Chicago, etc., R. Co. [Iowa] 103 N. W. 954.

24. Shannon's Code, §§ 4873, 4874, relative to appeals from the justice court was not repealed by § 4875. Louisville & N. R. Co. v. Haynes [Tenn.] 85 S. W. 403. A statute prohibiting an appeal in certain cases on questions of fact does not prevent an appeal on questions of law. Chicago, etc., R. Co. v. Tompkins [Okl.] 82 P. 832.

25. Wolfer v. Hurst [Or.] 80 P. 419.

26. If the legality of his adjudication on that point is challenged in the common pleas he should be ruled to certify the facts so as to correct any imperfections or irregularities apparent in the transcript before such adjudication is reversed. Lazarus v. Martling [N. J. Law] 62 A. 188.

27. In Pennsylvania interlocutory orders are not appealable while the action remains undisposed of before the justice. United States v. Bernard, 24 App. D. C. 8. A judgment in favor of the garnishee in an attachment proceeding may be appealed from by the defendant in the original attachment proceeding. Gilray v. Metropolitan Nat. Bank, 113 Ill. App. 485.

28. Under a statute providing that no appeal lies if the amount in controversy does not exceed a specified sum, a remittitur before judgment of all claims in excess of such amount precludes appeal though judgment is entered for a sum in excess of it. Henry v. Chicago, etc., R. Co. [Iowa] 103 N. W. 793.

29. Where the plaintiff's claim is wholly disallowed and judgment rendered against him on a demand of defendant, the amount which determines appellate jurisdiction is the sum claimed by plaintiff plus the amount of the judgment against him. Longacre Colliery Co. v. Creel [W. Va.] 50 S. E. 430.

30. An appeal entitled the same as the action was entered on the justice's docket is responsive to the judgment from which it was taken and is sufficient. Miltimore v. Hoffman [Wis.] 104 N. W. 841.

31. An appeal not taken within the period prescribed by law should be dismissed. Guthrie v. Costello, 116 Ill. App. 500. Under Starr & C. Ann. St., c. 57, §§ 18, 19, an appeal in forcible entry must be prayed and bond filed within five days from rendition of judgment. Saxton v. Curley, 112 Ill. App. 450.

32. Where ample opportunity is had to appeal from a justice's judgment, injunction will not lie to restrain its enforcement. Henion v. Pohl, 113 Ill. App. 100. One is not entitled to a writ of review under a rule allowing it where there is no appeal nor any plain, speedy, and adequate remedy where he neglects to appeal within the time prescribed. Grant v. Justice's Court of Second Tp. [Cal. App.] 82 P. 263.

33. In Minnesota the notice of appeal must state specifically the ground upon which the appeal is taken. Merely stating that defendant appealed from the judgment and the whole thereof and that a new trial of said action was demanded in the district court is insufficient. Bule v. Great Northern R. Co. [Minn.] 103 N. W. 11. In Missouri the notice of appeal must specify the judgment appealed from. Notice held sufficient to satisfy the requirements of Rev. St. 1899, § 4074. Igo v. Bradford, 110 Mo. App. 670, 85 S. W. 618.

34. A statute requiring notices of appeal to be signed is complied with by a signing in the manner customarily employed in signing other papers. "A. & B., Attorneys for plaintiff" is sufficient. Igo v. Bradford, 110 Mo. App. 670, 85 S. W. 618.

der the entire notice inoperative.[35] It is not essential that the steps be taken in their regular order.[36] A party who has performed all acts necessary to perfect an appeal cannot be deprived of his right by the arbitrary act[37] or inadvertent omission of the justice.[38] If a party desiring to appeal is prevented from doing so by the act of the justice, an appeal may be allowed nunc pro tunc.[39] But the appellate court will not interfere if failure to enter the appeal in time was due to lack of diligence on the part of the party desiring it.[40]

Bonds.[41]—A bond or other security for costs is generally required,[42] but a judgment for costs only may be appealed from without filing a bond.[43] If the bond appear to be regular in form and execution and the surety sufficient, it is the duty of the justice to approve it without regard to captious objections raised on behalf of the opposite party.[44] The bond confers jurisdiction only upon the court to which the appeal is taken.[45] The sureties must justify if their sufficiency is objected to,[46] unless such action on their part is waived.[47] In North Dakota the service of an appeal bond on the opposite party within the statutory period is a jurisdictional prerequisite.[48]

Process or appearance[49] in the appellate court is essential to give it jurisdiction of one made a party by amendment of the record.[50]

The transcript[51] should be certified as required by law[52] and filed in the appellate

35. That the notice of appeal asked a trial de novo to which appellant was not entitled does not deprive him of an appeal on questions of law to which he was entitled. Doughty v. Picott, 105 App. Div. 339, 94 N. Y. S. 43.

36. The fact that the undertaking on appeal was presented to the clerk of the district court and his approval indorsed thereon before notice of appeal and undertaking were served is not such an irregularity as invalidates the appeal. Thompson v. Fargo Plumbing & Heating Co. [N. D.] 104 N. W. 525.

37. A party who files a sufficient appeal bond which is all he is required to do in order to perfect his appeal cannot be deprived of his right of appeal by the arbitrary refusal of the justice to indorse his approval on the bond. Redus v. Gamble [Miss.] 37 So. 1010.

38. An appellant who has done everything required of him in order to perfect an appeal cannot be deprived of his right after trial in the appellate court because of the inadvertent failure of the justice to sign the return of the appeal. Under Code § 879, the justice could have been summoned to sign the return at any time during the trial or after judgment. Hawks v. Hall [N. C.] 51 S. E. 857.

39, 40. Patterson v. Gallitzin Bldg. & L. Ass'n, 23 Pa. Super. Ct. 54.

41. See 4 C. L. 382.

42. Code Civ. Proc. § 926 providing for the deposit with the justice of a sum of money in lieu of an undertaking, in all civil cases arising in a justice's court authorizes a deposit in lieu of bond for costs on appeal. Laws v. Troutt [Cal.] 81 P. 401.

43. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454.

44. Slight omission in the name of the surety, but it was apparent who was meant. Bundy v. U. S., 25 App. D. C. 459.

45. An appeal bond reciting that the appeal is taken to the county court is insufficient to confer jurisdiction on the district court. Gulf, etc., R. Co. v. Lyons [Tex. Civ. App.] 86 S. W. 44; Fort Worth & D. C. R. Co. v. Henry [Tex. Civ. App.] 13 Tex. Ct. Rep. 591, 88 S. W. 399.

46. Where an undertaking is filed within 30 days after entry of judgment and the adverse party excepts to the sufficiency of the sureties, the appellant, under Rev. St. 1887, § 4842, may cause his original sureties or other sureties to justify before the justice within five days, and at the time of justifying other securities may execute a new undertaking and justify thereto. Snyder v. Wooden [Idaho] 81 P. 377.

47. Where respondent excepts to the sufficiency of the sureties on an appeal bond, he may thereafter waive the justification of sureties or accept a new undertaking in lieu of the original and waive justification of the new sureties. Snyder v. Wooden [Idaho] 81 P. 377.

48. Under the North Dakota statute regulating appeals from justices' courts, the undertaking must be served and service must be made within 30 days after judgment is rendered. Lough v. White [N. D.] 104 N. W. 518.

49. See 4 C. L. 383. Under Rev. St. 1899, § 4075, if appellant fails to give notice of appeal, the cause may, at the option of appellee, be tried at the first term if he appears on or before the second day thereof. Where such appearance is entered, appellant is not entitled to a continuance because the case was not at issue until plaintiff appeared. Keylon v. Missouri, etc., R. Co. [Mo. App.] 89 S. W. 337.

50. Where on appeal an amendment to the record was allowed adding the name of another party, but such party was never summoned nor appeared, no judgment could be entered against him. Chester City v. Baltimore & O. R. Co., 27 Pa. Super. Ct. 206.

51. See 4 C. L. 383.

court[53] within the prescribed time,[54] but if the statute is not mandatory a delayed filing is not ground for dismissal in the absence of prejudice,[55] especially where the delay is not the fault of the parties.[56] An imperfect transcript, timely filed, confers jurisdiction on the appellate court.[57] If the transcript is imperfect, either party may secure a perfect record by certiorari.[58]

The record[59] must affirmatively show jurisdictional facts.[60] If the justice had not jurisdiction an appellate court acquires none by appeal,[61] except where the case is tried de novo.[62] The record should contain everything essential to a review of the proceeding.[63] An oral amendment to the pleadings not inconsistent with the judgment may be proven by testimony of the justice.[64] The justice's statement of the evidence is no part of his return on appeal.[65] The record cannot be amended so as to make a new party subject to the judgment.[66]

Dismissal.[67]—The appellate court may dismiss the appeal for want of prosecution[68] if it has jurisdiction of the parties,[69] and should dismiss the action if the justice had not jurisdiction originally.[70]

52. A statute requiring that on appeal from a justice's judgment he shall deliver "A duly certified transcript of all the docket entries in the case" is complied with by a certificate to a return that it was a full and true copy of all the entries of the record. Marshall v. Reed [Del. Super.] 61 A. 945.

53. A justice who fails to comply with a rule requiring him in case of appeal to transmit his record to the appellate court may be enforced to do so by the appellate court. Redus v. Gamble [Miss.] 37 So. 1010.

54. Rev. Codes 1899, § 6771a, providing that the district court may dismiss an appeal from the justice court for failure on the part of the appellant to cause the transcript to be transmitted is not mandatory. De Foe v. Zenith Coal Co. [N. D.] 103 N. W. 747.

55. Where the transcript was filed before the motion to dismiss was granted and the record affirmatively showed that respondent had not been prejudiced by the delay, it was error to dismiss for failure to file the transcript in time. De Foe v. Zenith Coal Co. [N. D.] 103 N. W. 747.

56. Under a statute requiring the justice to transmit the record to the circuit court on or before the first day of the next term, where a justice died before an appeal was perfected and the statutory requirements in such case were complied with, the circuit court acquires jurisdiction if the record is transmitted by the successor of the deceased justice to the next term after he qualified. Brennan v. Straas [Miss.] 37 So. 956.

57. Woods v. Oregon Short Line R. Co. [Or.] 81 P. 235.

58. Brown v. Dutton [Tex. Civ. App.] 85 S. W. 454. Where the appellate court has acquired jurisdiction of the appeal, it may compel the justice to amend and correct his certificate so as to show the facts. Woods v. Oregon Short Line R. Co. [Or.] 81 P. 235. The mere fact that the transcript sent up fails to show that a written notice of appeal signed by or on behalf of the appellant had been filed with the justice, and that the appeal bond had been filed, does not afford legal ground for dismissing the appeal. Lazarus v. Martling [N. J. Law] 62 A. 188.

59. See 4 C. L. 383.

60. Pleadings in two actions against the same defendant held to show that he was a resident of the county in which the actions were tried. Hall v. Sullivan, 70 S. C. 397, 50 S. E. 27. In a statutory proceeding. Hickey v. Conley, 24 Pa. Super. Ct. 388. Under Rev. St. 1899, § 3839, giving a justice of the township, in which an injury to stock by railroads happened, jurisdiction, that the injury occurred in the township where the action was brought, is jurisdictional. Shaw v. St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611. Record held to show jurisdiction. State v. Mosman [Mo. App.] 87 S. W. 75.

61. Southern R. Co. v. Born Steel Range Co. [Ga.] 50 S. E. 488; Oppenheimer v. Regan [Mont.] 79 P. 695.

62. Under the rule that an appeal on questions of law or fact must be tried de novo the appellate court acquires jurisdiction by such an appeal, though the justice rendered the judgment appealed from without having acquired jurisdiction. Armantage v. Superior Court of Los Angeles County [Cal. App.] 81 P. 1033.

63. To enable the district court to review the proceedings before a justice, relating to a motion to quash the service of a summons made by a person specially deputed for the purpose, the summons, motion, affidavits used in support of the motion, an agreement of counsel respecting the facts, and the justice's ruling must all be preserved in the bill of exceptions. Madden v. Riedel [Kan.] 80 P. 45.

64. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 14 Tex. Ct. Rep. 144, 90 S. W. 61.

65. Vinson v. Knight, 137 N. C. 408, 49 S. E. 891.

66. Where a judgment has been recovered against the husband alone, the record cannot be amended in the court of common pleas by adding the name of the wife as a party. Doerr v. Graybill, 24 Pa. Super. Ct. 321.

67. See 4 C. L. 384.

Pleadings on appeal[71] may be filed at any time within the prescribed period.[72] Amendments not changing the cause of action but only perfecting the one originally attempted to be stated,[73] or making clear an ambiguous pleading,[74] should be allowed if filed within the statutory period,[75] but a different cause of action cannot be substituted,[76] nor can a pleading be varied or contradicted by an indorsement on its back.[77] In Pennsylvania if the statement shows a good cause of action the defendant is required to file an affidavit of defense,[78] and defects in one sufficient to bar another action for the same cause are waived by going to trial on the merits.[79]

A case is usually tried de novo where appealed[80] providing there were issues joined in the justice court,[81] hence a judgment transcending jurisdiction may be appealed from,[82] but if no trial was had in the justice court there can be no trial de novo on appeal.[83] On a trial de novo the same theory will be adopted as prevailed in the justice court.[84] The procedure is governed by the rules of the appellate court.[85] A variance between the summons and complaint cannot be availed of in the appellate

68. It is not an abuse of discretion for the circuit court to dismiss an appeal from the justice court for want of prosecution. Equitable Fire Ins. Co. v. Fishburne [S. C.] 51 S. E. 528.

69. Where an appeal is perfected but appellee is not summoned and does not appear, the appellate court is without jurisdiction of the person of appellee and cannot dismiss for want of prosecution. Hecht v. Franklin, 113 Ill. App. 467.

70. See 4 C. L. 384, n. 21 et seq. Where the appellate court has the same power to examine the cause and render the same judgment the justice should have rendered, if it is found that the justice had no jurisdiction the action as distinguished from the appeal should be dismissed. Miltimore v. Hoffman [Wis.] 104 N. W. 841. Where a justice dismissed an action because title to realty was put in issue, an appeal from the justice should likewise have been dismissed. Hudson v. Hodge [N. C.] 51 S. E. 955.

71. See 4 C. L. 385.

72. Last answer day, where the appeal is from a justice of the peace to the common pleas, is the third Saturday after the return day of the summons and a default judgment taken prior to such date is irregular. Elyria Milling Co. v. Swartz, 3 Ohio N. P. (N. S.) 251.

73. Witt v. Willis [Ky.] 85 S. W. 223. Amendment to the statement held not to be a substitution of a different cause of action. Allen v. Goodrich [Mo. App.] 85 S. W. 910.

74. Where on appeal it appears that though the action is in trespass the statement was ambiguous as to whether the action was in tort or on contract, and the defendant pleaded nonassumpsit and went to trial on the merits, the appellate court will permit the statement to be amended. Brown v. Kirk, 26 Pa. Super. Ct. 157.

75. Code § 4568, providing that if an appeal be taken from a default judgment defendant may before noon of the second day of the term at which the appeal is triable, file any necessary pleadings, is discretionary as to the time, and it is an abuse of discretion to refuse to permit the filing of an answer after such time but before the case was reached for hearing. Edwards Loan Co. v. Skinner [Iowa] 102 N. W. 828.

76. Rev. St. 1899, § 3853, does not authorize a statement alleging a cause of action for goods sold so as to charge a cause against a carrier for injuries to goods in transit. Adler v. St. Louis & S. F. R. Co., 110 Mo. App. 339, 85 S. W. 948.

77. A statement in the form of an account for goods sold cannot be amended on appeal to state a cause for injuries to goods in transit because of an indorsement "damages for injuries to goods in transit as per statement hereto attached." Adler v. St. Louis & S. F. R. Co., 110 Mo. App. 339, 85 S. W. 948.

78. Spetz v. Howard, 23 Pa. Super. Ct. 420.

79. Where the statement on appeal is defective and would not have sustained a summary judgment for want of a sufficient affidavit of defense, yet if defendant answers and goes to trial on the merits he waives such defects if the statement is sufficient to bar another action. Siegel v. Hirsch, 26 Pa. Super. Ct. 398.

80. See 4 C. L. 385. On appeal to the superior court all litigated questions are tried de novo. Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945.

81. Code Civ. Proc. § 3068 provides that in certain cases if issue of law or fact is joined the appellant may in his notice of appeal demand a new trial in the appellate court. Held, where defendant suffered a default and no issue of law or fact was joined, he was on appeal only entitled to be heard on questions of law. Doughty v. Picott, 105 App. Div. 339, 94 N. Y. S. 43. A defendant who suffers a default and appeals from the judgment against him cannot ask a trial de novo nor a new trial in a justice court, under Code Civ. Proc. § 3064, unless there was an issue of law or fact made in the justice court. Doughty v. Picott, 105 App. Div. 339, 94 N. Y. S. 43, overruling Thorn v. Roods, 47 Hun [N. Y.] 433.

82. State v. Mosman [Mo. App.] 87 S. W. 75.

83. Clement v. Breaux [La.] 38 So. 900.

84. Jerome v. Rust [S. D.] 103 N. W. 26.

85. On appeal from the justice court the case stands for trial de novo and the procedure is governed by the practice in the appellate court. Slaughter v. Strouse [Colo. App.] 79 P. 972.

court.[86] Where the trial is not de novo the ordinary rules as to saving questions for review[87] and review of questions of fact[88] apply. Where an appeal is tried by the court a transcript of the justice's record is admissible.[89] On writ of error from the district to the justice court, issues of law only may be determined,[90] and these must appear from the record and proceedings as returned by the justice.[91] An issue of fact as to the jurisdiction of the justice may not be first raised on writ of error to the district court and there tried.[92]

Judgment.[93]—The fact that a cause originates in a justice court does not affect the conclusiveness of the judgment in an appellate court.[94] Where the justice made no ruling except to enter judgment after a hearing on the merits, the district court cannot, on dismissing a writ of error, enter judgment.[95]

Further appeal or error[96] may be had only from appealable judgments[97] and orders,[98] and the court of second appeal may not review the proceedings in the justice court.[99]

§ 6. *Certiorari.*[1]—Certiorari is allowable if a justice wrongfully denies an appeal,[2] but not if there is another appropriate remedy.[3] The action of an appellate court which has jurisdiction, in dismissing an appeal from the justice court cannot

86. The summons had served its purpose by bringing him into court. Jerome v. Rust [S. D.] 103 N. W. 26.

87. An irregularity in the judgment not having been taken advantage of by motion to set aside cannot be taken advantage of on a trial de novo in the appellate court (Jerome v. Rust [S. D.] 103 N. W. 26), but a motion to require a plaintiff to elect which of two causes of action for the same wrong alleged in his complaint he will pursue may be made for the first time on appeal (Harvey v. Southern Pac. Co. [Or.] 80 P. 1061).

88. A verdict based on conflicting evidence is conclusive. A verdict in a justice's court on conflicting evidence will not be set aside on certiorari (Williams v. Mangum [Ga.] 50 S. E. 110), and a judgment cannot be reversed because against the weight of evidence unless it is so palpably so that it could not have been reasonably arrived at (Brewer v. Califf, 92 N. Y. S. 627). Code Civ. Proc. § 3063, as amended by Laws 1900, p. 1277, c. 553, justifies a county court in reversing because against the weight of evidence only when so plainly so that the justice could not have reasonably reached his decision. Clinton v. Russell, 95 N. Y. S. 321.

89. Keylon v. Missouri, K. & T. R. Co. [Mo. App.] 89 S. W. 337.

90. Herald Printing Co. v. Walsh [Iowa] 103 N. W. 473.

91. The district court cannot try the case de novo nor permit proof of facts not shown by the return to establish error relied on. Herald Printing Co. v. Walsh [Iowa] 103 N. W. 473.

92. Herald Printing Co. v. Walsh [Iowa] 103 N. W. 473. Where a return to the original notice indicated that service was had on the defendants in the township in which judgment was entered, in the absence of anything to the contrary in the justice's return to a writ of error it is presumed that their residence was such as to have conferred jurisdiction. Id.

93. See 4 C. L. 386.

94. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73.

95. The cases in which judgment may be entered, under Code § 4576, are those in which the writ has been sustained, and in such cases only where no trial is necessary to a determination of the case. Simmons v. Chicago, etc., R. Co. [Iowa] 103 N. W. 954.

96. See 4 C. L. 386.

97. A judgment of the court of common pleas reversing the judgment of a justice in an action of trespass is not appealable. Minogue v. Ashland Borough, 27 Pa. Super. Ct. 506. A judgment of the court of common pleas on a certiorari to a justice, where the record shows that the justice had jurisdiction and that the cause of action was within the act of 1810 as amended by the act of 1879, is not appealable. Phoenix Iron Works Co. v. Mullen, 25 Pa. Super. Ct. 547.

98. An order of the district court sustaining a motion to dismiss an appeal from the justice court is not appealable to the supreme court. Code Civ. Proc. § 1722. Franzman v. Davies [Mont.] 80 P. 251.

99. On appeal from the district court the supreme court cannot directly review proceedings in the cause before the justice. Simmons v. Chicago, etc., R. Co. [Iowa] 103 N. W. 954.

1. See 4 C. L. 386. Where a recordari is granted by the superior court as a substitute for an appeal and is not docketed at that or the succeeding term, it may at a subsequent term be docketed and dismissed. Clark's Code [3rd Ed.] p. 731. Johnson v. Grand Fountain of United Order of True Reformers, 135 N. C. 385, 47 S. E. 463.

2. If a justice deny an appeal in forcible entry after statutory requirements have been complied with, the judgment may be reviewed on certiorari. Saxton v. Curley, 112 Ill. App. 450.

3. Where the judgment of the justice determines an issue of fact only an appeal to the jury and not certiorari is the proper remedy. Macon, etc., R. Co. v. Wright [Ga.] 50 S. E. 466.

be reviewed on certiorari.[4] A petition for certiorari must allege error so specifically and distinctly that the reviewing court may understand the ground of error relied on.[5] A justice's return to the writ is conclusive.[6] The recitals of the record cannot be contradicted by parol.[7] A justice's judgment clearly right, will not be disturbed on certiorari though the reasoning by which it was reached was erroneous.[8] Certiorari to compel the transmission of the transcript is not to review error, hence the bond is not required[9] and the parties are not deprived of their right of a trial de novo.[10] Final judgment may be rendered within the discretion of the court.[11] On certiorari to a justice the case may, in the discretion of the reviewing court, be finally disposed of[12] if the error complained of is one of law which must finally govern the case.[13]

§ 7. *Criminal jurisdiction and procedure.*[14]—The power of a justice to issue warrants, and as a committing magistrate, and the procedure looking thereto,[15] and his jurisdiction of prosecutions for crime,[16] and the procedure therein,[17] are elsewhere fully treated.

KIDNAPPING.

The taking is regarded as forcible if consent was procured by fraud or artifice or if the child was too young to consent.[18] The Georgia penal code requires that the kidnapping of a child below eighteen years should be "from its parent or guardian"[19] and the indictment must so allege or that there was neither parent nor guardian.[20] The intent to detain from its lawful custodian is essential to the crime of "child stealing."[21] Any detention with purpose of exacting money as the price of liberation is within the Iowa statute,[22] though it might also exhibit the feature of robbery.[23] No particular length of time of detention or perfection of plan is essential,[24] but the lack of plan or its nonexecution may be evidence on intent.[25] While the kidnapper must be clearly identified, yet it is for the jury, and minor discrepancies in the evidence will not overthrow the verdict.[26]

Labels; Labor Unions; Laches; Lakes and Ponds, see latest topical index.

4. Andrews v. Cook [Nev.] 81 P. 303.

5. A petition setting forth all the evidence and alleging that the verdict is contrary to the weight thereof and is without evidence to support it is sufficient. Mathews v. Parker [Ga.] 52 S. E. 322.

6. Wetmore v. Dean [Mich.] 103 N. W. 166.

7. Webb v. McPherson & Co. [Ala.] 38 So. 1009.

8. Berry v. Robinson [Ga.] 50 S. E. 378.

9, 10. Redus v. Gamble [Miss.] 37 So. 1010.

11. See 4 C. L. 388, n. 92.

12. Civ. Code of 1895, § 4807. Even though the evidence before the justice be conflicting on the controlling issues. Susong v. McKenna, 121 Ga. 97, 48 S. E. 695. See 2 C. L. 1253, n. 68.

13. Where certiorari was sustained because all the evidence submitted by defendant in certiorari on trial before the magistrate was inadmissible, it was proper to refuse to render final judgment and to remand the case for new trial. Bass Dry Goods Co. v. Electric Storage Battery Co. [Ga.] 51 S. E. 579.

14. See 4 C. L. 388.

15. See Arrest and Binding Over, 5 C. L. 264.

16, 17. See Indictment and Prosecution, 5 C. L. 1790.

18, 19, 20. Sutton v. State [Ga.] 50 S. E. 60.

21. Pen. Code, § 278. People v. Black [Cal.] 81 P. 1099. Evidence that one dissuaded girls from going unprotected into a large city and in doing so persuaded them to go to a near by summer resort where he left them free to come or go held insufficient. Id.

22, 23. Acts 29th Gen. Assem. p. 105, c. 142. State v. Leuth [Iowa] 103 N. W. 345.

24, 25. State v. Leuth [Iowa] 103 N. W. 345. Evidence held sufficient where person was lured from home by a ruse and then detained. Id.

26. State v. Leuth [Iowa] 103 N. W. 345.

LANDLORD AND TENANT.[27]

§ 1. *Definitions and distinctions.*[28]—A tenant as distinguished from a guest of an innkeeper or lodging house keeper,[29] an agent of the landowner in possession,[30] or others in or upon the land,[31] is that the tenant by terms of his letting

27. Scope of topic: "Leases" of Chattels are excluded to Bailment, 5 C. L. 342.

28. See 4 C. L. 389.

29. See 2 C. L. 608.

30. A question arises sometimes as to whether a person in possession of land under a contract with the owner is his agent or his lessee, or in other words whether the relation is that of principal and agent or landlord and tenant. This depends as in other cases upon the construction of the contract and the intention of the parties. The question may arise when it is sought to charge one or the other of the parties for repairs, improvements, and the like, made at the instance of the party in possession, and in many other cases. Hawley v. Curry, 74 Ill. App. 309; Ragsdale v. Meridian Land & Industrial Co., 71 Miss. 284.

Where a person occupied land under an agreement with the owner for a fixed period, and had the right to receive and dispose of the rents and profits as he saw fit, it was held that the relation was that of landlord and tenant, though no rent was reserved, and that the holding was not consistent with a contention that an indebtedness incurred by the party in possession for repairs, etc., was incurred by him as agent of the landowner. Hawley v. Curry, 74 Ill. App. 309. In a Mississippi case it appeared that a person claiming to be the agent of the lessee of certain land and fixtures had charge of the property at first under a power of attorney; that he remained in control of the property after the lessee had become financially embarrassed, and successfully resisted the attempt of creditors to secure possession; that he proved a claim for advances made under the rent contract against the estate of the lessor; that as compensation he received a portion of the profits derived from the business carried on upon the property; that he designated himself and the original lessee in various instruments as lessees; that on the purchase of a claim of the original lessee he was vested with authority by the latter to sue thereon in his name, and it was stipulated that the assignee should be saved harmless for the costs and damages. It was held that the relation of principal and agent did not exist, but that the alleged agent was a lessee or assignee of the term. Ragsdale v. Meridian Land & Industrial Co., 71 Miss. 284.—From Clark & Skyles, Agency, § 11.

31. See Licenses to Enter on Land, 4 C. L. 432; Tenants in Common, and Joint Tenants, 4 C. L. 1672; Life Estates, Reversions and Remainders, 4 C. L. 438. A grant to a corporation, its successors, etc., without limit of time, of "all the oil," under its agreement to drill a well on the premises within 6 months or thereafter to pay $160 annually, until such well is drilled or the property reconveyed, and a further agreement that

enters and has the use and possession of the land for a period less than life, title remaining in the landlord which the tenant acknowledges.[32] The test whether an agreement is a lease or a license is whether it gives exclusive possession of the premises against the world, including the owner, in which case it is a lease; or whether it merely confers a license to occupy under the owner.[33] The word "use" when applied to the land as signifying or coupled with "benefit" imports a lease and not a license.[34] The word "grant" does not necessarily import that more than a chattel interest is given.[35] An instrument whose terms demise all coal in, under and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place, whether the purchase price is a lump sum, a certain rent or a royalty, and notwithstanding a specified time for taking out the coal.[36] But in Ohio an exclusive lease or right to enter upon, mine, and remove coal from a tract of land, was held to be a lease and not a sale of the property, and the royalties provided therein to be in fact rentals and no more.[37] Persons are not landlord and tenant who have merely agreed to make a lease.[38]

§ 2. *The contract of lease and creation of tenancy. How created or established.*[39]—No particular words are necessary to constitute a lease or to create the relation of landlord and tenant;[40] but any language by which possession is transferred for a limited time, for a stipulated return, creates a tenancy and is in effect a lease.[41] It is not necessary that the words "lease," "let" or "rent" should be used,[42] nor is any particular form of contract required.[43] The relation may be created by a stipulation in a contract of sale in the nature of a forfeiture for nonpayment of the purchase price.[44] Taking possession is conclusive proof of ac-

the corporation may at any time remove its property and reconvey the premises, is a lease at an annual rental of $160, after the 6 months, at the option of the lessee only. Central Ohio Nat. Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281.

Renter of desk room not a tenant. Swart v. Western Union Tel. Co. [Mich.] 12 Det. Leg. N. 609, 105 N. W. 74.

32. See 2 C. L. 608; 4 C. L. 389; 1 Tiffany Real Property §§ 35, 54, 57, 60; 18 Am. & Eng. Enc. Law [2d Ed.] 163.

33. An instrument by the owner letting "his ice business and privileges in * * * with the use and benefit of his ice houses," for a certain term, held to be a lease of the ice houses and the land under them. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523. A turpentine lease for value, part paid in cash and the rest afterward paid to the administratrix, which conveyed the timber and right of way for the purpose of exercising the privilege of boxing and under which parties were put into possession, could not be considered a mere license revoked by the death of the maker. Gex v. Dill [Miss.] 38 So. 193.

34. Though the word "use" is ordinarily employed when the owner contracts to give another a right to occupy as a licensee, yet the words "use and benefit of" are of wider application and mean the entire beneficial interest in the property, as granted in a lease. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523.

35. "Granted and leased" meant only quiet enjoyment. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

36. The fact that the instrument is called a lease and the parties are described as lessor and lessee does not change the legal effect. Dorr v. Reynolds, 26 Pa. Super. Ct. 139.

37. Cleveland Trust Co. v. Columbus & Hocking Coal & Iron Co., 3 Ohio N. P. (N. S.) 424.

38. Henderson v. Schuylkill Valley Clay Co., 24 Pa. Super. Ct. 422.

Entry is necessary. Browder v. Phinney, 37 Wash. 70, 79 P. 598; Schlumpf v. Sasake, 38 Wash. 278, 80 P. 457.

39. See 4 C. L. 390.

40. Pickering v. O'Brien, 23 Pa. Super. Ct. 125.

41. Granting the right to maintain bill boards on land creates the relation of landlord and tenant. Pickering v. O'Brien, 23 Pa. Super. Ct. 125. A contract which "granted and leased" certain land as long as it was used for the purpose of a gas well was a lease terminable on the ceasing of the use of the property for gas. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

42. Merki v. Merki, 113 Ill. App. 518.

43. Any arrangement or understanding by which one party holds for or under another is sufficient. Cobb v. Robertson [Tex.] 86 S. W. 746. But one who rents desk room of a tenant of an office is not a tenant and obtains no interest in the real estate, his right of occupancy ceasing with that of the tenant and his remaining thereafter not operating to continue the tenant's lease. Swart v. Western Union Tel. Co. [Mich.] 12 Det. Leg. N. 609, 105 N. W. 74.

44. Where notes were given for several annual instalments of the purchase price, each stipulating that in case of failure to pay at maturity, $80 was to be paid as rent and the relation of landlord and tenant

ceptance of the lease.[45] The lease is neither the contract nor the term, but merely the written evidence of the one and the muniment of title to the other.[46] A seal being unnecessary to a lease, if placed thereon, is immaterial and does not make the contract a specialty.[47] The term "demise" does not necessarily import a sealed instrument, but may include a parol lease as well.[48] An agreement to give a lease is not a lease unless followed by occupation,[49] and vests no estate in the proposed lessee.[50]

The lease is the best evidence,[51] but secondary proof is admissible if it be lost.[52] The parties may if their words so intend verbally work a novation of the terms.[53]

The statute of frauds[54] is satisfied by a written agreement which necessarily implies a lease,[55] and when too vague of itself an actual entry may be required to give it meaning.[56]

Parties to the lease.[57]—The owner of real estate may transfer his land by a lease executed by him alone, although the lease contains covenants to be signed and sealed by the lessee, for they may be waived by the lessor.[58] Under the Real Property Law of New York a lease of lands may be signed and executed by the lessor alone, but, if accepted by the lessee, its covenants are binding upon him.[59] Partners prosecuting the firm business[60] and properly authorized agents,[61] including

should exist with all the rights and remedies to enforce collection, the effect, on default, was to create the relation of landlord and tenant. Rose & Co. v. Woods [Ala.] 39 So. 581.

45. Schlumpf v. Sasake, 38 Wash. 278, 80 P. 457.

46. The destruction of the lease as a paper by consent of the parties does not necessarily affect the term. Duncan v. Moloney, 115 Ill. App. 522.

47. Woolsey v. Henke [Wis.] 103 N. W. 267.

48. Snedecor v. Pope [Ala.] 39 So. 318.

49. Where it was sought to enforce as a lease a mere contract to lease storerooms to plaintiffs for three years it was incumbent on plaintiffs to show that they took possession thereunder to establish part performance. Browder v. Phinney, 37 Wash. 70, 79 P. 598. Where defendant contracted to lease premises from a certain date but refused to accept the premises or accept or sign the lease, the lease was not consummated. Schlumpf v. Sasake, 38 Wash. 278, 80 P. 457.

50. Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422.

51. Where the parties had reduced the lease contract to writing it was error in a criminal prosecution based thereon to permit the state to prove its terms by parol. Wilson v. State [Ala.] 39 So. 776.

52. The written agreement having been destroyed or mislaid, secondary evidence of its contents was introduced. Pickering v. O'Brien, 23 Pa. Super. Ct. 125.

53. An agreement to "go back to the old lease" held to simply modify the later one in respect to amount of rent and not to restore an omitted provision for termination of the lease or to effect a new lease. Security Trust & Life Ins. Co. v. Cogsweli, 96 N. Y. S. 87.

54. See 4 C. L. 390, and Frauds, Statute of, 5 C. L. 1550.

55. A written contract, conveying for a specified consideration an interest in the saloon business and fixtures, given by the lessee of a hotel, to continue for the remainder of his term, was sufficient to satisfy the statute of frauds. Lamb v. Hall [Cal.] 81 P. 288.

56. Where an instrument was a mere agreement to lease premises for three years which were so indefinitely described as not to be identifiable from the description itself, was not signed by lessees and did not purport to obligate them as lessees, it was necessary for plaintiffs, in order to have it construed as a lease, to show part performance of it, under the statute of frauds, by a taking possession of the premises thereunder. A mere allegation in defendant's answer that it was agreed that the tenancy which plaintiffs claimed under the instrument should be terminated was not an admission that plaintiffs took possession under the instrument. Browder v. Phinney, 37 Wash. 70, 79 P. 598.

57. See 4 C. L. 389.

58. A lease was drawn in duplicate, and the lessor executed it, but the lessee struck out the covenant requiring him to insure the buildings, with consent of the lessor and in his presence, and then executed it. Held, that the lessor waived execution of any covenants except those signed by the lessee. Braman v. Dodge [Me.] 60 A. 799.

59. Where the lessee is a corporation not yet organized, but the lease is meanwhile placed in the hands of a committee for the corporation, by which it is afterward accepted and ratified, it becomes binding on such corporation. Applying L. 1896, p. 592, c. 547, § 207. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113.

60. The leasing of premises in which to publish a local newspaper is within the general scope of such business and a partner has prima facie authority to bind his firm

a co-tenant representing the others,[62] may make, execute and change or cancel

therefor. Woolsey v. Henke [Wis.] 103 N. W. 267.

61. NOTE. Authority of Agents: Where a lease is of such a nature that it is required to be under seal, authority to make it must also be under seal; but where the lease need only be written, and is not required to be under seal, the authority to make the same may be given by parol (Lake v. Campbell, 18 Ill. 106); and where an agent is authorized to lease he may enter into an agreement to lease, which will be binding on the principal, whether such agreement be for the agent's own benefit or for the benefit of his principal, for in either case the principal would be entitled, as against the agent, to the benefit of the contract (Taylor v. Salmon, 4 Mylne & C. 138).

It is not necessary that an agent's authority to lease or rent should be given to him expressly; but it may be implied as reasonably necessary and proper for carrying out some other general power granted to him, or it may be implied from the acts of the principal in recognizing or holding the agent out as possessing such authority. Hitchens v. Ricketts, 17 Ind. 625; Amory v. Kamnoffsky, 117 Mass. 351, 19 Am. Rep. 416; Ecker v. Chicago, B. & Q. R. Co., 8 Mo. App. 223; Gillis v. Bailey, 17 N. H. 18. But see Howard v. Carpenter, 11 Md. 259, where it is held that an attorney either at law or in fact has no authority to make a lease or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal or client, unless authority for such purpose is expressly given. Thus, where an agent was engaged to carry on a mercantile business, to do which it was necessary to rent a house, the principal was bound for the rent thereof, whether he expressly authorized the agent to make the contract or not, since an agent, to conduct a given business, necessarily has authority to do everything which is essential to the performance of his duty. Baldwin v. Garrett, 111 Ga. 876. So the powers of a general agent of the owner of a railroad are such as will warrant him in executing a lease of property to be used as a ticket office for the railroad. Ecker v. Chicago, B. & Q. R. Co., 8 Mo. App. 223. But the general agent of a corporation cannot, by virtue of his general authority to manage the affairs of the corporation, make a lease for the purpose of trying title to land; and the fact that he has been accustomed to make leases of lands in the possession of the corporation, without objection by the latter, is not sufficient evidence of authority to make such lease to try a disputed title. Gillis v. Bailey, 17 N. H. 18. So an authority to make a new lease or to change one already made will not be implied from a power to collect rent (Indianapolis Mfg. & Carpenters Union v. Cleveland, C., C. & I. R. Co., 45 Ind. 281; Weil v. Zodiag, 34 La. Ann. 982; Davidson v. Blumor, 7 Daly [N. Y.] 205; Tryon v. Davis, 8 Wash. 106) or from the fact that the agent had previously rented the same property or had given his receipt for rent due (Weil v. Zodiag, 34 La. Ann. 982); nor will the fact that an agent is a general one at the place where he resides and has general power to transact business relating to the principal's property give such agent power to alter the terms of a sealed lease, accepting a less amount for the rent of the property and changing the time of payment thereof (Halladay v. Underwood, 90 Ill. App. 130).

The authority of an agent authorized to lease his principal's land extends not alone to what is necessary therefor, but to that which is "proper, usual, and reasonable," as well as necessary. Durkee v. Carr, 38 Or. 189. Thus, where an agent has authority to lease he also has implied power to accept a surrender of (Amory v. Kamnoffsky, 117 Mass. 351, 19 Am. Rep. 416) or to renew, a lease (Emerson v. Goodwin, 9 Conn. 423). So such an agent may make representations or warranties as to the condition of the property which he is authorized to lease (Matteson v. Rice, 116 Wis. 328), and the fact that the agent believed the representations to be true, and had no intention of deceiving the lessor, does not affect the principal's liability. But such an authority carries no authority to cancel the lease (Faville v. Lundvall, 106 Iowa, 135) nor to surrender it, where the agent's authority was to create, convey, or assign the lease (Ramsay v. Wilkie, 36 N. Y. St. Rep. 864), where it is held that under the New York statute of frauds declaring that no estate or interest in lands, other than a lease for a year, shall be created, assigned, surrendered, or declared unless by act or operation of law, or by deed subscribed by the party creating, etc., by his lawful agent thereunto authorized by writing, the lawful agent must be specially authorized in writing to surrender the lease; nor can such an agent enter into a covenant to repair or rebuild a house which he has leased (Halbut v. Forrest City, 34 Ark. 246). Authority to lease farms and collect rents does not give the agent implied power to license telegraph companies to erect poles in the highway in front of such farms. American Tel. & Tel. Co. v. Jones, 78 Ill. App. 372. An agent to lease lands has no authority to subject the rents thereof to the lien of advancements of agricultural supplies made to the tenant, by one who believed the lands belonged to the agent, if the principal did nothing to produce such belief or otherwise mislead the parties to the transaction. Loftin v. Crossland, 94 N. C. 76.

As a general rule an agent must lease only for the period for which he is authorized (Antoni v. Belknap, 102 Mass. 193; Page v. Wight, 96 Mass. 182), and if he exceeds his authority in that respect the lease will be good only for the period for which he had the power to make it (Alexander v. Alexander, 2 Ves. Sr. 644. Compare Roe v. Prideaux, 10 East, 158). Thus a lease of land for years, given during the absence of landowner from the country by an agent having authority only to "take charge of the land while he was gone, and make it pay the best way he could," is terminable by the landowner on his return. Antoni v. Belknap, 102 Mass. 193. So an agent, authorized to negotiate for or make a lease for three years, has no authority to make one for three years with the privilege to the lessee of a renewal for two years more.

leases. Where a party, as lessor, executes a lease as the agent of an undisclosed principal, he is personally responsible thereon, unless superseded by his principal, and he may sue to recover possession and for damages for failure to quit and surrender at the expiration of the term,[63] and the rule that an undisclosed principal is liable for the contract of his agent does not apply in the case of a lessee in a lease under seal.[64] Tenants in common may by express agreement establish the relation of landlord and tenant between them;[65] but such relation will not be implied in the absence of any well-defined intention to create it.[66]

There may be a novation to the sublessee if he is party to a new lease.[67] The vendee of leased property steps into the shoes of the lessor.[68] The provisions of the New York Real Property Law, relative to the power of a trustee to make a lease of real estate during the lifetime of the beneficiary, were intended to extend rather than restrict the power.[69]

Construction of leases and proof of the terms of tenancy.[70]—A lease must describe the land at least so as to be ascertainable[71] and define the term,[72] and parol

Schumacher v. Pabst Brewing Co., 78 Minn. 50.

If, however, no limitation is put upon the time for which he may lease, he may use his discretion in the matter, and lease for such a time as all the circumstances of the particular case would seem to warrant. Thus, where such authority is given to him, without any restriction as to the period for which he is to lease, a lease for a year made by him will be binding on the principal. Babin v. Ensley, 14 App. Div. 548, 43 N. Y. S. 849. Where a person seeks to establish a lease to him by an agent, the burden of proof is on such person to show that the agent had authority to make a lease for the term which he seeks to establish. Weil v. Zodiag, 34 La. Ann. 982.

Where an agent is employed to lease property, he has no implied authority to make representations as to the title of the same (Tondro v. Cushman, 5 Wis. 279), nor can he make his nonconsenting principal a joint lessor with the agent of the latter's property (La Point v. Scott, 36 Vt. 604; Loftin v. Crossland, 94 N. C. 76). Authority to make representations respecting the leased property, however, may be expressly given to an agent; and authority to make representations to any person bearing a letter from the landlord instructing him to show the premises to the bearer also authorizes him to make such representations to one who presents himself, as a prospective purchaser, without such a letter (Briggs v. Dunne, 168 Ill. 226).—From Clark & Skyles, Agency, §§ 248-252.

Estoppel to deny agency: Where the owner authorizes an agent to lease property and receives rent therefor, he is estopped to deny the execution of the lease. Niles v. Gonzales [Cal. App.] 82 P. 212.

62. Where one of several co-owners, with the approval of another and no apparent objections by the rest, leased the premises and the lessee entered, held possession and paid rent, it was presumed that the lease was made with the knowledge and consent of all the owners. Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582.

63. An affidavit and bond for a writ of sequestration in aid of such suit may be properly made by him. Hunter v. Adoue [Tex. Civ. App.] 86 S. W. 622.

64. Where the lessee in such a lease allowed another party to carry on business in the premises, which he conducted as her agent, the landlord could not treat such third person as the undisclosed principal of the lessee in the lease and recover from her for use and occupation of the premises. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593.

65. See 4 C. L. 389.

66. A bankrupt occupied premises for several years, belonging to him and his wife's father in common; the latter deeded to the bankrupt, who subsequently deeded to claimant, his wife's mother. Neither consideration for the conveyances nor any intention to change the bankrupt's actual relation to the property was apparent. Held, that there was no implied promise on his part to pay rent which would support a claim therefor against his estate. In re Miller, 132 F. 414.

67. Where rent was payable under a lease at the end of each month, the fact that a sublessee insisted that its rent was due on the 15th of each month negatived any claim that the sublessee had assumed the position of the original lessee. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873.

68. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

69. Laws 1896, p. 573, c. 547, § 86. Under this section a 5 year lease with an option of a 5 year renewal is enforceable against the trustee, subject to the contingency of termination by the beneficiary's death during the term. Weir v. Barker, 93 N. Y. S. 732.

70. See 4 C. L. 391.

71. The failure to give in the body of a lease the state and county where the demised lands lie does not affect the validity of the lease, where they are duly recited at the head of the lease and the lease was acknowledged and recorded in the county so named, and the premises were otherwise identified. Gex v. Dill [Miss.] 38 So. 193.

72. Where a turpentine lease for three years did not fix the time of beginning or ending, but work was begun under it within two years, the lease was unobjectionable

evidence is rejected[73] except to clear up an ambiguity.[74] Erasures, interlineations and alterations on the face of the lease may be explained and shown to have been made before execution,[75] and a seal placed upon a lease does not make it a specialty and preclude extrinsic proof that, although signed by an individual, it was signed on behalf of a partnership, of which he was a member.[76] A lease will be construed as a whole.[77] General words in the description of the premises will be restricted and limited in their operation by clauses following them.[78] Where a lease is susceptible of two constructions, the one most favorable to the lessee must prevail;[79] but this rule cannot be invoked where the intention of the parties can be determined from the language used, in connection with surrounding conditions and circumstances.[80] Courts construe with considerable strictness the provisions of oil and gas leases requiring work to be done within a certain time, as well as those provisions requiring continuous operation.[81] An independent contract, though contemporaneous, cannot be read into and made a part of a written lease, when it was not a part thereof,[82] and in the absence of fraud or mutual mistake in not including some agreement in the writing,[83] although an independent, subsequent oral agreement varying the lease may be shown.[84] A written lease may be varied by an executed oral agreement.[85]

The question as to the meaning of the description of premises in a lease[86] and whether it is a lease or a license,[87] is for the court.

The exercise by the lessee of one of two alternative options, within the time limited in his lease, bars his right to the other.[88] Where one enters into posses-

as tending to create a perpetuity. Gex v. Dill [Miss.] 38 So. 193. Where the vendee of a tenant, under a lease containing a forfeiture clause in case of assignment, entered into a written agreement with the landlord for the payment of an increased rent from Nov. 1, 1896, when he took possession, but designating the term as beginning May 1, 1896, it was held that that was the term contemplated by the parties and not a new term commencing Nov. 1. Spring v. Lorimer, 25 Pa. Super. Ct. 340.

73. Tucker v. Bennett [Okl.] 81 P. 423; Rhodes v. Purvis [Ark.] 85 S. W. 235.

74. Parol evidence is admissible to identify land described in a written lease in general terms, provided such general description is sufficient, in the light of the parol evidence, to clearly identify the property. Wellmaker v. Wheatley [Ga.] 51 S. E. 436. Parol evidence as to what was said and done before and after the execution and delivery of a lease admitted to show intent. Parish v. Vance, 110 Ill. App. 57.

75. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069.

76. Woolsey v. Henke [Wis.] 103 N. W. 267.

77. Spring v. Lorimer, 25 Pa. Super. Ct. 340.

78. A lease of the "north side" of a building, "consisting of a storeroom and five rooms on the second and third floors of the same, together with access to the same through the hallway and porch," did not give an exclusive right to a bathroom on the north side, always used by all occupants of the building. Needy v. Middlekauff [Md.] 62 A. 159.

79. Where the terms are ambiguous or self-contradictory. Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422.

80. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

81. Chapple v. Kansas Vitrified Brick Co. [Kan.] 79 P. 666.

82. Where a written lease was given and a mortgage to secure the faithful performance of its covenants, and neither one made any allusion to another contemporary contract, the latter cannot be construed as a part of the lease. Neumann v. Moretti, 146 Cal. 27, 79 P. 510. Neither the alleged features of a contract relative to the exclusive right to sell liquors in an adjoining hotel nor the violation thereof had anything to do with the question of possession under a lease of a saloon in a hotel. Quandt v. Smith, 38 Wash. 93, 80 P. 287. Where the same paper on which a lease was executed also contained a guaranty of payment of rent and an agreement of the lessor to make certain improvements, they were separate instruments and not part of the lease. Woodbury v. Sparrell Print [Mass.] 73 N. E. 547.

83. Thomas v. Brin [Tex. Civ. App.] 85 S. W. 842.

84. Evidence tending to prove a subsequent agreement for erecting a building by the lessee, whose cost should be applied on the rent, erroneously excluded. Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481.

85. Under Civ. Code, § 1698. A written reservation of all the pasture was held to have been varied by an oral agreement that tenant's cattle should be pastured free, and which had been executed by pasturing cattle thereunder until the end of the term. Hanse v. Phillips [Cal. App.] 82 P. 1127.

86. Needy v. Middlekauff [Md.] 62 A. 159.

87. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523.

88. Where he was given the privilege of

sion of property under a contract for a lease and refuses to accept such lease when tendered, he cannot, by cross bill, in an action against him to recover possession, claim any rights by virtue of provisions that would have been in the lease, if it had been accepted.[89]

The law of the place governs leasehold interests in land.[90]

Covenants[91] are construed with the attendant circumstances,[92] specific covenants being discussed hereafter.[93] Covenants struck out of the landlord's duplicate of the lease by consent are waived though remaining in the other copy which the tenant did not sign.[94] Where a bond is conditioned for compliance with certain covenants of a specified lease, such covenants are as much a part of the bond as if set forth therein.[95] A covenant to pay rent on the part of the lessee in a lease renewable forever runs with the land,[96] and a covenant to pay taxes, in such a case, is not a collateral covenant, but adheres to the enjoyment of the thing demised.[97] But a covenant in a lease, relating to a thing not in esse does not run with the land and does not bind the heirs and assigns of the covenantor, when they are not named therein.[98]

Deposits as security for performance.—A tenant cannot recover back a deposit to secure performance of all the covenants of the lease until the end of the term,[99] and where he alleges that he has performed all the conditions of his lease, which is denied by the landlord, the burden is on him to make prima facie proof of such performance.[1]

Reformation.[2]—A lease may be reformed for fraudulent omission of covenants.[3]

Breach of agreement to make lease.[4]—The return stipulated for in an agreement for a lease cannot be recovered as rent, but an action for a breach of the agreement may be maintained by either party against the one in default.[5] If the proposed lessee has taken possession, the action by the proposed lessor for a breach, in the absence of special damages, is substantially an action for use and occupation.[6] Where a deposit was made on a lease to be taken in the future with certain conditions, including the security of two months' rent, the deposit was made as security for the fulfillment of the agreement to take the lease, and not

erecting a new store front and making other improvements, or erecting a new building to be purchased by lessor or leased to him for another term, having made the improvements and the limit having expired, he could not claim the benefit of the other option in a new lease. Martin v. Babcock & Wilcox Co., 95 N. Y. S. 1057.

89. Livesley v. Muckle [Or.] 80 P. 901.

90. Where the demised premises were located in Ohio and both lessor and lessee resided there at the time of the execution of the lease and of their death, the lease was essentially an Ohio contract. Broadwell v. Banks, 134 F. 470.

91. See 4 C. L. 391, n. 61 et seq.

92. Rubens v. Hill, 115 Ill. App. 565.

93. See post, §§ 5-8.

94. Braman v. Dodge [Me.] 60 A. 799.

95. McCullough v. Moore, 111 Ill. App. 545.

96. A devisee of land subject to a perpetual lease is an assignee of the lessor as to such a covenant and may, under the Ohio Code of Civil Procedure sue the lessee or his representatives for breach of the covenant. Broadwell v. Banks, 134 F. 470.

97. The devisee of the lessor may under the Ohio Code of Civ. Proc. sue thereon in his own name. Broadwell v. Banks, 134 F. 470.

98. As a covenant by the lessor to pay at the end of the term for buildings erected by the lessees during the term. Ovington Bros. Co. v. Henshaw, 93 N. Y. S. 380.

99. Mirsky v. Horowitz, 92 N. Y. S. 48.

1. Goldberg v. Freeman, 92 N. Y. S. 237.

2. See Reformation of Instruments, 4 C. L. 1264.

3. Where the landlord, either by mistake or by taking advantage of the confidence or want of education of the tenant, fails to insert in a lease prepared by himself any reservations of improvements placed by lessee on the premises, equity will reform the lease. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780.

4. See 4 C. L. 390.

5. Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422. Where the owner of property merely agrees to give possession of property to a prospective tenant "as soon as vacated by the present occupants," but is unable to eject them as soon as expected, he is not liable for failure to deliver possession before such vacation. Rhodes v. Purvis [Ark.] 85 S. W. 235.

6. Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422.

as liquidated damages or penalty for failure to do so;[7] and the real estate owner could retain such deposit, in case of refusal to take the lease, only where he suffered actual damages, to be pleaded and proved in an action to recover the deposit.[8] But in Washington it is held that the forfeiture of such deposit as stipulated damages is the extent of the owner's remedy for a breach of the contract.[9]

§ 3. *The different kinds of tenancies and their incidents.*[10] *Periodical tenancies.*[11]—It is the general rule that, where a tenant enters under a void lease and pays a periodical rent, a periodical tenancy is created;[12] and to determine the terms of such periodical tenancy, reference may be had to the invalid lease and its stipulations applicable to a periodical tenancy.[13] A lease for one year with the privilege of continuing it from year to year so long as the parties thereto agree creates a tenancy from year to year,[14] and the fact that the lease gives to the lessee an option of renewal will not affect its character as a lease for a fixed period.[15] Where the original letting is for one month, or where monthly payments, begun and continued without express agreement, are clearly referable to terms of that duration, a tenancy from month to month will be inferred;[16] but, when monthly payments are made under circumstances repellant to such a relationship, the court will not imply it as a matter of fact.[17] Under a statute which declares that a renting of premises for an indefinite time with a monthly rent reserved shall be a tenancy from month to month, and shall continue until terminated by notice, the tenancy is a continuous one and not a new one at the beginning of each month.[18]

At common law an estate for years, even though for a longer period than the tenant's prospect of life, is personal property; but by a statute of Ohio, personal leasehold estates renewable forever are made subject to the law of descents governing estates in fee.[19] In New York a leasehold interest in real estate for ten years is a chattel real.[20]

Tenancy at will.[21]—A tenancy at will is essentially undeterminate by its own terms, and will not end at any certain time by its own mere force.[22] Where a party enters and retains possession of premises by permission of the owner,[23] or where the minds of the parties do not meet, either on a written or on a parol lease, the tenant in possession is a mere tenant at will.[24] In Massachusetts one whose estate is created by a parol lease is a tenant at will.[25]

7, 8. Weinberg v. Greenberger, 93 N. Y. S. 530.

9. Schlumpf v. Sasake, 38 Wash. 278, 80 P. 457.

10. See 4 C. L. 392. The several kinds of tenancies discussed historically. Wolfer v. Hurst [Or.] 82 P. 20.

11. See 4 C. L. 392.

12. Lease of land owned by husband and wife and a third party, executed by the husband alone, was void as against the third party and the community of the husband and wife. Snyder v. Harding, 38 Wash. 666, 80 P. 789.

13. Division of the crops determined by stipulations contained in the invalid lease. Snyder v. Harding, 38 Wash. 666, 80 P. 789.

14. Hatfield v. Lawton, 95 N. Y. S. 451.

15. Reccius & Bro. v. Columbia Finance & Trust Co., 27 Ky. L. R. 880, 86 S. W. 1113.

16. Under a lease for one month, providing that after such term, upon breach of any condition of the lease, the lessee shall be a mere tenant at sufferance, the lessee becomes a tenant from month to month and not from year to year. Hood v. Drysdale, 27 Pa. Super. Ct. 540.

17. Where a life tenant leased the premises for five years, at a yearly rental payable in equal monthly instalments, and died during the term, the mere fact that lessee continued the monthly payments first to the remaindermen and then to their grantee did not make him a tenant from month to month. Bernstein v. Demmert [N. J. Law] 62 A. 187.

18. Ward v. Hinkleman, 37 Wash. 375, 79 P. 956.

19. Swan's St. 1841, p. 289, § 1. Broadwell v. Banks, 134 F. 470.

20. Under the Real Property Law (Laws 1896, p. 607, c. 547, § 240), and a mortgage covering it need not be refiled as a chattel mortgage. Westchester Trust Co. v. Hobby Bottling Co., 102 App. Div. 464, 92 N. Y. S. 482.

21. See 4 C. L. 392.

22. Reccius & Bro. v. Columbia Finance & Trust Co., 27 Ky. L. R. 880, 86 S. W. 1113.

23. Hayden v. Collins [Cal. App.] 81 P. 1120.

24. Proprietors of a hotel leased space in their hotel for a branch telegraph office, but the terms were never fixed, though tenant

Tenancy at sufferance.[26]—A tenancy at sufferance is created where one enters into possession under a lawful demise, and his retention of possession after the expiration of his term is by the mere laches or neglect of the owner to take possession.[27] But a person who enters into the possession of premises under a deed, claiming title thereto in good faith, cannot be summarily evicted as a tenant at sufferance.[28]

§ 4. *Rights and interests remaining in the landlord. A. Reversion,*[29] *seisin and right of re-entry.*[30]—All the estate save that demised is the landlord's[31] and he may recover for any injury to it.[32] The tenant's possession is attracted to the landlord's title[33] to make his seisin, and hence may always be shown when the question of the landlord's possession is involved.[34] At the termination of the lease or tenancy and sooner if the lease be forfeited,[35] he may re-enter by virtue of his reversion[36] and in so doing he is in his own right not of privity to the tenant who has quit.[37]

(§ 4) *B. Estoppel of tenant to deny title.*[38]—During the continuance of a tenancy the lessee is estopped[39] and those in privity to him[40] from denying the landlord's title or the title of either of joint landlords[41] or attorning to a third person,[42] and consequently cannot collude with persons out of possession in order to defeat the possession of his landlord;[43] and this rule applies with full force in summary proceedings to recover possession.[44] It is not a denial to say that the

occupied the space. Swart v. Western Union Tel. Co. [Mich.] 12 Det. Leg. N. 609, 105 N. W. 74.

25. Pub. St. 1882, c. 120, § 3. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544.

26. See 4 C. L. 393.

27. Sharpe v. Mathews [Ga.] 51 S. E. 706; Reccius & Bro. v. Columbia Finance & Trust Co., 27 Ky. L. R. 880, 86 S. W. 1113.

28. Sharpe v. Mathews [Ga.] 51 S. E. 706.

29, 30. See 4 C. L. 393.

31. See 2 C. L. 673; 4 C. L. 393.

32. Where land in possession of a tenant is taken by the government for a military camp and such extraordinary use impairs its value, the reversioner may recover for the damage done. Alexander's Case, 39 Ct. Cl. 383. The landlord may maintain an action for a trespass on the leased property. Bright v. Bell, 113 La. 1078, 37 So. 976.

33. See post, § 4 B, Estoppel, etc.

34. To sustain an action of trespass vi et armis. Vanderslice v. Donner, 26 Pa. Super. Ct. 319.

35. See post, § 8.

36. See post, §§ 8, 10.

37. Where a tenant and not a landlord was sued in ejectment and before execution, the tenant removed from the land, the landlord entering either personally or by another tenant, neither the landlord nor the subsequent tenant claimed through or under the first tenant, and the landlord was therefore **not bound by the judgment.** King v. Davis, 137 F. 198. The landlord in such a case can have a judgment opened, which was entered against the tenant by default, and be allowed to defend, where he had no knowledge of the action of ejectment in time to be made a party. Id.

38. See 4 C. L. 393.

39. Stover v. Davis [W. Va.] 49 S. E. 1023; Hodges v. Waters [Ga.] 52 S. E. 161. If the tenant enters under the title of another and holds by permission or at sufferance, he is estopped to deny such title. Cobb v. Robertson [Tex.] 86 S. W. 746. So held in a criminal prosecution under section 1761 of the North Carolina Code, making it unlawful for a tenant to injure a tenement house of his landlord. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

40. When once the relation of landlord and tenant is established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessors as if they were his own. Stover v. Davis [W. Va.] 49 S. E. 1023. Such estoppel extends to his executors. Steuber v. Huber, 95 N. Y. S. 348. Widow of tenant cannot assert homestead rights in lands occupied by husband, possession not having been surrendered to the landlord. Merki v. Merki, 113 Ill. App. 518.

41. Where a lease binds the tenant to pay rent to two persons as lessors, he cannot deny their title by showing that one had no interest in the premises, although the lease was not signed by him when executed by the tenant. Moore v. Gair, 95 N. Y. S. 475.

42. Stover v. Davis [W. Va.] 49 S. E. 1023. Payment of rent by an occupant of premises to another claiming to own the same constitutes attornment. Cummings v. Smith, 114 Ill. App. 35.

43. Stover v. Davis [W. Va.] 49 S. E. 1023. The character of the relation cannot be changed by an illegal attornment or a mere disclaimer, not amounting to an actual disseizin, unless the landlord elects to consider it as such. Cobb v. Robertson [Tex.] 86 S. W. 746.

44. Dilks v. Kelsey [N. J. Law] 59 A. 897. In unlawful detainer a lessee who admits that he entered under a lease signed by the plaintiff as owner cannot dispute his title. Houck v. Williams [Colo.] 81 P. 800.

landlord's title was held in another's interest.[45] In order to deny a landlord's title, a tenant must surrender to him the possession which he has received from him and re-enter under some other person.[46] Where the tenant denies the landlord's title, the landlord may treat it as a diseissin and the tenancy is thereby terminated without notice to quit.[47] But the rule that a tenant cannot deny the title of his landlord applies only to the title that existed when he went into possession as tenant, and not when the landlord's title has expired, been extinguished by operation of law or his own act, or has changed for the worse since the tenant entered into the contract,[48] and while holding under one person, the tenant may, for a good consideration, agree to pay rent to another party and will be bound by the agreement, and be estopped to deny the title of either.[49] But the estoppel raised by the second contract to pay rent is no broader in its operation than the contract provides, and after the expiration thereof the tenant is no longer estopped to deny his liability to the payment of rent thereunder,[50] and when duress[51] or fraud is shown to have entered into the procurement of the lease, or where the lease has since become tainted with it, by a fraudulent sale of the premises for the purpose of ousting the tenant of his rights, the tenant may dispute his landlord's title.[52] Where the landlord assigns the lease to another party, the acceptance of a receipt for rent from such party by the tenant, without objection, operates as an attornment to him as tenant's landlord, and he cannot deny the assignee's title.[53]

The possession of the lessee is the possession of the lessor,[54] and the running of the statute of limitation in the landlord's behalf is not interrupted by any mere disclaimer on the part of his tenant, or by the tenant's negotiations with other parties;[55] but a judgment in favor of a third party against the landlord, in a contest over title to the land, does not of itself make the possession of the tenants that of such party.[56]

A tenant cannot acquire title to property occupied by him as such tenant by adverse possession.[57]

§ 5. *Mutual rights and liabilities in demised premises. A. Occupation and enjoyment.*[58] *Right to enter.*—The landlord must deliver possession[59] seasonably

45. In an action for rent, an averment in defendant's answer that plaintiff executed the lease for another party, to whom the rent had been paid up to the time of the sale of the premises to defendant's wife, and a denial that plaintiff ever was the owner of the premises, and the admission of evidence to support the answer was not in furtherance of an attempt of a tenant to dispute a landlord's title. Niles v. Gonzales [Cal. App.] 82 P. 212.

46. Hodges v. Waters [Ga.] 52 S. E. 161.

47. Schwoebel v. Fuglna [N. D.] 104 N. W. 848; Stover v. Davis [W. Va.] 49 S. E. 1023, citing several authorities, Barnewell v. Stephens [Ala.] 38 So. 662. Where the lessee asserted his right to hold the premises under a quitclaim deed from the husband of his lessor, he thereby denied her title and was not entitled to notice to quit before suit for possession. Cook v. Penrod [Mo. App.] 85 S. W. 676.

48. Sadler v. Jefferson [Ala.] 39 So. 380.

49. The escape from litigation is a good consideration. Hodges v. Waters [Ga.] 52 S. E. 161.

50. Hodges v. Waters [Ga.] 52 S. E. 161.

51. The evidence not being sufficient to show duress at the time of the first payment of rent and defendant having recognized plaintiff as landlord for many years by payment of rent he could not deny plaintiff's title in an action for rent. Mineral R. & Min. Co. v. Flaherty, 24 Pa. Super. Ct. 236.

52. Where the lease provided that the lessor might sell, either subject to the lease or thereby terminating it, but gave the lessee the preference as purchaser, and the owner made a fictitious and collusive sale to a third person merely to deprive the lessee of his right of purchase. Ogle v. Hubbel [Cal. App.] 82 P. 217.

53. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

54. Such is the case, whatever may be the relation of the landlord to other parties or the rights of the landlord and tenants among themselves. Cobb v. Robertson [Tex.] 86 S. W. 746.

55, 56. Cobb v. Robertson [Tex.] 86 S. W. 746.

57. A subsequent occupant under conveyance from such tenant cannot avail himself of their possession to establish a claim of title by adverse possession. Gill v. Malan [Utah] 82 P. 471.

58. See 4 C. L. 394.

59, 60. There is an implied contract on

according to the terms agreed[60] or at least he must do nothing to hinder taking possession[61] and until all is delivered an entry is not binding.[62] For failure to do so the lessee may recover as damages the market value of the leasehold interest,[63] measured by the difference between the price he agreed to pay and the rental value.[64] Yet the tenant may, by negotiations with the one in possession, waive the landlord's implied covenant to deliver possession.[65]

Reservations and conditions of use.[66]—The lease may fix the conditions of use and enjoyment.[67] A specification in a lease that the premises are to be used for a particular purpose amounts to a covenant not to use them for any other purpose.[68] But where the restriction relates rather to the manner in which a particular business is to be conducted, the premises may then be used for any other lawful business,[69] as well as the one specified if properly conducted.[70] A forbidden business cannot be conducted in connection with some other.[71] A covenant not to increase insurable hazard may disentitle the lessee to use the premises for their designed purpose.[72] The statute of California, providing that, when a thing is let for a particular purpose and used for another, the letter may treat the contract as rescinded, is applicable to the letting of real property.[73] The right of a lessee to use the leased premises in the manner contemplated in the lease cannot be affected by a subsequent lease to another party.[74] Wholly independent of the relation of landlord and tenant the parties may contract respecting the enjoyment or use of the premises.[75]

the part of the lessor to deliver the premises to the lessee at the moment he is entitled to take possession, and a breach thereof releases the lessee from the obligation to take the premises. Miller v. Innis, 3 Ohio N. P. (N. S.) 50. A tenant is justified in refusing to accept the premises, when tendered long after the stipulated time and when material changes have been made in the arrangement and condition of the building since the execution of the lease, though such changes were made by a prior tenant, unknown to the landlord. Rosenstein v. Cohen [Minn.] 104 N. W. 965.

61. A landlord is not required to place his tenant in possession, yet he should give a legal right of entry unincumbered by any act of his own. Mirsky v. Horowitz, 92 N. Y. S. 48.

62. Acceptance of a part of the premises is not a waiver of the right to abandon the lease for failure to deliver all the premises. Miller v. Innis, 3 Ohio N. P. (N. S.) 50.

63. Birch v. Wood, 111 Ill. App. 336.

64. Andrews v. Minter [Ark.] 88 S. W. 822.

65. Defendant rented premises knowing them to be in possession of a third person and made arrangements with him permitting him to remain another month, meanwhile paying the rent stipulated by himself to the landlord. Held, that the implied covenant for possession was waived. Rieger v. Welies, 110 Mo. App. 166, 84 S. W. 1136.

66. See 4 C. L. 394.

67. Agreement among railroad companies leasing terminal facilities from a union depot company, relative to the improvement of the property and the transaction of business thereon, construed. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

68. Lease of a building for a saloon. Houston Ice & Brewing Co. v. Keenan [Tex.] 13 Tex. Ct. Rep. 251, 88 S. W. 197.

69. As where it was understood that the building was to be used for the purpose of "conducting a first-class saloon." San Antonio Brewing Ass'n v. Brents [Tex. Civ. App.] 88 S. W. 368.

70. A provision in a lease that the premises were to be used for "conducting a first-class saloon" was a restriction on the manner of conducting the business and not a restriction of the use of the premises to saloon purposes. San Antonio Brewing Ass'n v. Brents [Tex. Civ. App.] 88 S. W. 368.

71. A covenant by the lessor not to rent any portion of the building in which lessee's premises are located for the purpose of wholesaling or retailing cigars and tobacco, prevented the leasing for the purpose of carrying on such business, though conducted in connection with a general grocery business. Waldorf-Astoria Segar Co. v. Saiomon, 95 N. Y. S. 1053.

72. A covenant not to do any act which would increase insurance rates did not merely prohibit any change in the lessee's business which would have that effect, but prohibited the maintenance of vats for storing varnish, although they were there when the lease was executed and had been for many years before. King v. Murphy Varnish Co. [Mass.] 74 N. E. 290.

73. Civ. Code, § 1930. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

74. The leasing of terminal facilities to a railroad company by a union depot company. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

75. Landlord agreed to keep his oattle from tenant's fields and was held liable for breach without proof of tenancy. Gloor & Co. v. West [Tex. Civ. App.] 89 S. W. 783.

A covenant by the lessor not to let any part of his premises to any other person to carry on the same business as the lessee's will be enforced by a court of equity against the landlord and such third person if he took with knowledge of such covenant.[76] But such a covenant is not broken by a lease for another purpose, although such other tenant uses his premises for the same purpose as the first lessee.[77] To establish a waiver of an express condition in a lease, relative to leasing to other parties, the facts relied upon must show a clear intent to waive it.[78]

Whatever is necessary or essential to the proper enjoyment of the estate granted passes as an appurtenance thereto.[79] Although, in the absence of stipulations to the contrary, the lessee of a building for business purposes acquires title to the whole building, including the outer walls, which he may use for legitimate advertising purposes, yet this rule cannot apply in case of many tenants occupying rooms in the same buildings, especially where they are restricted to the use of the windows for advertising purposes, by the terms of their leases.[80] The lease will not include mining rights by bare implication.[81]

In the absence of a clearly expressed intention otherwise, a reservation from a lease is limited to some part of the lessor's estate.[82] Reservations are construed according to the fair import of their terms.[83] Where a lease of land for park purposes reserved the right to grant a right of way through the park for street railway purposes, such reserved power was not exhausted by a mere acquiescence in a prior entry of a street railway company at the instance of the lessees and the use of a part of the premises as a station.[84] But the lessors could exercise the reserved right in such location only as would not unreasonably interfere with the arrangement of the park.[85]

Condition of premises.[86]—In the absence of statute,[87] express agreement,[88] or fraudulent concealment,[89] the landlord is not answerable to the tenant for the

76. Waldorf-Astoria Segar Co. v. Salomon, 95 N. Y. S. 1053.

77. Premises were let to the first lessee for a commissary, and for a camp to the second lessee, who established a commissary in competition with the first lessee. Lucente v. Davis [Md.] 61 A. 622.

78. Where a Grange of Patrons of Industry leased its rooms to a Masonic lodge with the understanding that the rooms should not be leased to any other lodge "without a two-thirds majority of both lodges," that condition was not waived by the fact that, by common consent, the lessor allowed a "Pomona Grange" and the lessee a chapter of the "Eastern Star" to use the rooms, those being affiliated orders respectively, so as to permit the lessor to rent the rooms to the "Ladies of the Maccabees" without the consent provided for. Portage Grange v. Masonic Lodge, No. 340 [Mich.] 12 Det. Leg. N. 464, 104 N. W. 667.

79. Electric light held to be an appurtenance to the leased premises. Parish v. Vance, 110 Ill. App. 50.

80. Neither the landlord nor an advertiser on the outer wall is liable in damages to a tenant because his advertisements lack aesthetic character or, by their showiness, dimmed the luster of tenant's signs, in the absence of any showing of substantial damage to tenant's business. Fuller v. Rose, 110 Mo. App. 344, 85 S. W. 931.

81. A lease of lands without any reference to minerals, mines or quartz is a lease of the superficies of the soil only. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

82. A lease of lands with a reserved right to flood the same did not relieve defendant from damages for flooding other lands owned by the plaintiff. Stadler v. Missouri River Power Co. [C. C. A.] 139 F. 305.

83. An electric railway operated beyond the limits of a city and into a town incorporated for the mere maintenance of a park adjacent to the city was a street railway, within a power reserved in a lease of lands for park purposes to grant a right of way through the land "for street railway purposes." Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

84, 85. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

86. See 4 C. L. 394, and post, §§ 5 C, 5 E.

87. In Georgia a landlord is required to keep leased premises in repair. Civ. Code 1895, §§ 3118, 3123. Veal v. Hanlon [Ga.] 51 S. E. 579; Ross v. Jackson [Ga.] 51 S. E. 578.

88. No action lies by a tenant against a landlord on account of the condition of the premises in the absence of an express warranty or of active deceit. Howell v. Schneider, 24 App. D. C. 532.

89. The declaration must allege that the defective condition was known to the landlord and concealed by him. Miles v. Tracey [Ky.] 89 S. W. 1128. While the failure by

condition of the demised premises, since a rule similar to that of caveat emptor applies,[90] and there is no implied warranty that the property is suitable for the purpose intended.[91] For breach of express covenants respecting the condition of the premises, the measure of damages, in the absence of special circumstances, is the difference between the value of the use of the premises as contracted to be and their actual rental value[92] and special circumstances coming to the knowledge of the lessor after the making of the lease do not take the case out of the general rule.[93] Continued occupation may raise a presumption of continued tenantability,[94] but is not conclusive evidence thereof.[95]

A covenant for quiet enjoyment is implied from the usual words of demise,[96] which signifies that the tenant shall not be evicted by title paramount,[97] and that his possession shall not be disturbed by the acts or wrongful omissions of the lessor.[98] The lessor is bound to protect the lessee in the quiet enjoyment of the property leased, as against persons claiming a right thereto,[99] but his covenant, whether express or implied, does not protect the lessee from the act of a stranger or one holding without paramount right,[1] nor from the lawful act of the landlord in making a different use of his property not demised.[2] For wrongful eviction or breach of covenant for quiet enjoyment, a tenant may recover the damages proxi-

the landlord to reveal dangerous conditions may not constitute actual fraud or misrepresentation, it may in some cases amount to such culpable negligence of duty as to afford ground of action against him. Howell v. Schneider, 24 App. D. C. 532.

90. Howell v. Schneider, 24 App. D. C. 532. The doctrine of caveat emptor applies to one leasing a building that is unsafe, and the contract of a lease is entered into subject to the superior right of the state to order the building razed in the event that it becomes a menace to the public. Liebschutz v. Black, 3 Ohio N. P. (N. S.) 393. Where the lessee knowingly covenants that he has received the premises in good repair and will keep them so, he takes the premises as he finds them. Fowler Cycle Works v. Fraser, 110 Ill. App. 126.

91. Lazarus & Cohen v. Parmly, 113 Ill. App. 624; Martin v. Surman, 116 Ill. App. 232. There is no implied contract on the landlord's part that leased premises are tenantable or will remain so. Carpenter v. Stone, 112 Ill. App. 155; Siggins v. McGill [N. J. Err. & App.] 62 A. 411. The lease of a theater building was no warranty of its fitness for that purpose. Taylor v. Finnigan [Mass.] 76 N. E. 203.

92. Land was leased for the dairy business with a covenant to furnish pasture for 100 head of cattle and clear land enough to provide feed, the business being new and both parties having equal knowledge of the condition and character of the premises. Held, that damages for depreciation of cattle, expense of feeding and loss on butter and milk product were too remote in an action by tenant against landlord for breach of covenant. Kellogg v. Malick [Wis.] 103 N. W. 1116. Nor could the lessees, who remained in possession after the lessor's breach of covenant, refusing to pay rent until their eviction therefor, recover for work done on the premises after knowledge of the breach. Id.

93. Kellogg v. Malick [Wis.] 103 N. W. 1116.

94. A tenant cannot claim that the premises were rendered untenantable by a storm, when he remained in possession as tenant and occupant for twenty days after the storm. Ernst v. Wheatley, 93 N. Y. S. 1116.

95. It may be rebutted by proof to the contrary, where a lease makes specific provisions relative to rent payment in case of damage to the premises by fire, so as to make them untenantable. Weinberg v. Savitzky, 93 N. Y. S. 485.

96. The words, "granted and leased" in a contract for the use of certain lands for a gas well were merely a covenant for quiet enjoyment. Shenk v. Stahl [Ind. App.] 74 N. E. 538. The landlord is under a positive duty to his tenant that he shall have quiet enjoyment of the premises. Nahm v. Register Newspaper Co., 27 Ky. L. R. 887, 87 S. W. 296.

97. Osmers v. Furey [Mont.] 81 P. 345. If the lessee is kept out of possession by one having a paramount title, the lessor is liable on his covenant for quiet enjoyment and the lessee is released from the rent charge. Duncan v. Moloney, 115 Ill. App. 522.

98. Osmers v. Furey [Mont.] 81 P. 345.

99. Lessor recovered damages for destruction of hedge and trees, and trimming other trees without his consent, while the premises were in possession of lessees, done by commissioners to improve a highway, who assumed the right to do so. Bright v. Bell, 113 La. 1078, 37 So. 976.

1. Duncan v. Moloney, 115 Ill. App. 522; Bright v. Bell, 113 La. 1078, 37 So. 976; Tucker v. Du Puy [Pa.] 60 A. 4. Unless it can be shown that a contemplated covenant to that effect was omitted from the lease by mistake or fraud. Thomas v. Brin [Tex. Civ. App.] 85 S. W. 842.

2. The lease of the rest of the building in which plaintiff had leased offices for the practice of medicine, to be used as a hotel with a bar, did not violate any express or implied covenant of plaintiff's quiet enjoyment. Tucker v. Du Puy [Pa.] 60 A. 4.

mately resulting therefrom.[3] A tenant who has been wrongfully dispossessed under a claim of violation of his lease has an adequate remedy at law, and is not entitled to the aid of a court of equity in regaining possession of the premises.[4] The remedy by injunction lies to prevent the landlord from interfering with the premises, when the remedy at law is not adequate and complete.[5]

Eviction.[6]—An eviction may consist of the exclusion of the tenant from a substantial portion of the demised premises,[7] or of damage to the premises by fire, destroying their usefulness.[8] Entry to make repairs after the tenant has abandoned

3. Where the tenant was ejected from the leased premises by the landlord, the measure of his damages was the reasonable rental value of the land for the remainder of the term and any other loss directly caused by the eviction, such as the expense of removal to another place. Campbell v. Howerton [Tex. Civ. App.] 13 Tex. Ct. Rep. 171, 87 S. W. 370. It cannot be said, as a matter of law, that a tenant, who is unlawfully evicted from a farm in January cannot recover as damages both the cost of removal to temporary quarters and to permanent quarters. McElvaney v. Smith [Ark.] 88 S. W. 981. It must appear that the rental value of the land was greater than the amount he had agreed to pay for it. Id. A charge that the measure of tenant's damages for a wrongful eviction was the reasonable market value of the crops that tenant and his family might reasonably have expected to raise, less rents due to the landlord, amounts that would have been expended for help and such an amount as he and his family earned since the eviction, was approved. Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404. Where the tenant was prevented by the landlord from clearing and grubbing lands in accordance with the terms of the contract between them, the measure of the tenant's damages was the contract price less the reasonable cost of the work to him. Campbell v. Howerton [Tex. Civ. App.] 13 Tex. Ct. Rep. 171, 87 S. W. 370.

4. Complaint held not to show danger of multiplicity or financial irresponsibility of both defendants. Williams v. Mathewson [N. H.] 60 A. 687.

5. The remedy was inadequate where the threatened injury was the shutting off of the steam supply necessary in the conduct of a restaurant. Slack v. Knox, 114 Ill. App. 435.

6. See 4 C. L. 394, 402.

7. As where the lessee of the "exclusive" privilege of quarrying limestone was excluded from the premises by the grantee of the lessor who had reserved the right of taking limestone to be burned on the premises. Arkley v. Union Sugar Co. [Cal.] 81 P. 509. Entry and making of improvements in back yard held eviction. Osmers v. Furey [Mont.] 81 P. 345. Claim of eviction was based upon an alleged refusal to permit the lessee's coachman to move into sleeping rooms in the stable and put a gasoline stove there, next to the hay mow, and the alleged refusal to permit lessee to use certain appliances on the premises. Question held one of fact and jury's finding of no eviction sustained. Rubens v. Hill, 115 Ill. App. 565.

NOTE. What is disturbance or eviction: The defendant leased to the plaintiff premises partly built under the street by a license from the City of New York which owned the fee therein. Subsequently the city granted the use of the street for the purpose of a subway and the plaintiff was evicted. Held, the defendant is not liable for a breach of his covenant for quiet enjoyment, since the plaintiff was chargeable with knowledge that the defendant was a mere licensee and took the lease at his peril. Pabst Brewing Co. v. Thorley, 32 N. Y. Law J. 1707.

A covenant for quiet enjoyment merely insures against disturbances due to defects in the lessor's title. Coddington v. Dunham, 45 How. Prac. [N. Y.] 40; Knapp v. Marlboro, 34 Vt. 235. Since it does not cover premises to which the lessor notoriously claims no title (McLarren v. Spalding, 2 Cal. 510), an eviction of the lessee by the owner is no breach of the lessor's covenant (Id.). And likewise had the lessor in the principal case owned the entire premises and the lessee been evicted by the city under its police powers (Connor v. Bernheimer, 6 Daly [N. Y.] 295), or its right of eminent domain (Frost v. Earnest, 4 Wheat. [Pa.] 85), such eviction would have been no breach of the lessor's covenant.—5 Columbia L. R. 329.

Defendant leased a room to plaintiff for saloon purposes. By a city ordinance a license could be obtained only with the consent of half the abutting property owners. The defendant owned other abutting lots, and refused his consent, thus defeating the plaintiff's petition for a license. Held, this was not an eviction. Kellogg v. Lowe, 38 Wash. 293, 80 P. 452. An actual expulsion from leased premises is not necessary to constitute an eviction. Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322. Any act of the landlord done with the intention and having the effect of depriving the tenant of the beneficial enjoyment of leased premises will amount to eviction. Denison v. Ford, 7 Daly [N. Y.] 384; 2 McAdam, Landlord & Tenant, § 404. Where premises were leased for a brewery and the landlord refused to give the written consent required by statute, the court found a constructive eviction. Grabenhorst v. Nicodemus, 42 Md. 236. This doctrine seems more equitable and better founded in authority than that maintained in the principal case. Silber v. Larkin, 94 Wis. 9; Duff v. Hart, 16 N. Y. S. 163. —5 Columbia L. R. 548.

8. Where a hole 3x5 was burned in the floor above the furnace, small holes cut by the firemen, but the floors, though otherwise burned, were firm, some damage done to a chimney and side wall and glass broken in a skylight, it was held that the premises were not rendered untenantable. Bowen v. Shackter [N. J. Law] 60 A. 1111.

the premises is neither an acceptance of a surrender nor an eviction.[9] Neither the entry by a landlord to make repairs required by a municipal department, after the refusal to make the same by the tenant in compliance with his covenant to do so,[10] nor the landlord's refusal to send back to the tenant the keys which he sent to the landlord, on abandoning the premises,[11] nor a sale of the premises and delivery of possession by the landlord,[12] constitutes an eviction which will relieve the tenant from the payment of rent; nor will such sale avail him as a defense to the payment of a rent note, where it was made subject to the lease and under such circumstances as to be of no damage to him.[13] To constitute a constructive eviction so as to suspend payment of rent, it must affirmatively appear that by his intentional and wrongful act the landlord has deprived the tenant of the beneficial use and enjoyment of all or a part of the leasehold.[14] Although the presence of odors rendering premises uninhabitable have been held to be a constructive eviction, yet never in a case where the tenant had full opportunity to inspect the premises before leasing and actually did so.[15] A tenant cannot claim an eviction because of the premises being made untenantable by a storm, when he occupied them as tenant for twenty days after the storm.[16]

The landlord has no more right to invade the premises of the tenant than an outsider has;[17] nor has the grantee of leased lands, for he takes only the estate of the lessor and not that of the lessee.[18] Although the landlord is not guilty of trespass in entering the premises after the end of the term, yet he may make himself liable by acts of violence or unnecessary force after he enters.[19]

Nature of tenant's estate.—A person entitled to the possession of premises under a lease from the owner may bring an action of forcible detainer for them.[20] In Massachusetts, a tenant at will under a parol lease[21] is entitled to damages to

9. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

10. Markham v. David Stevenson Brewing Co., 93 N. Y. S. 684.

11. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

12. Smucker v. Grinberg, 27 Pa. Super. Ct. 531. A sale of part of the premises does not disturb the lessee's possession and enjoyment, but entitles the grantee to an apportionment of the rent. Stern v. Sawyer [Vt.] 61 A. 36.

13. As where the property was a summer hotel and the season was past, and instead of being valuable the property would require the expense of some one to care for it. Finch v. Mishler [Md.] 59 A. 1009.

14. An order of a building inspector requiring the lessee of a theater building to provide additional means of egress, in the absence of any covenant requiring the lessor to do so is not an eviction. Taylor v. Finnigan [Mass.] 76 N. E. 203. Where the landlord rented a room on a certain lot to be used as a saloon, but afterward, as owner of other lots, united with other lot owners in a protest against the issue of a license, whereby the tenants were prevented from carrying on the business for which they had leased the premises, the landlord's action did not constitute an eviction. Kellogg v. Lowe, 38 Wash. 293, 80 P. 458.

15. Flannery v. Simons, 93 N. Y. S. 544.

16. Ernst v. Wheatley, 93 N. Y. S. 1116.

17. Snedecor v. Pope [Ala.] 39 So. 318. Entering the premises during the tenant's possessory right and putting a lock on the door of the building did not give the landlord possession, but was an invasion of the tenant's rights. Hayward v. School Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999. He cannot without the tenant's consent tear off the roof preparatory to building another story, without being responsible for consequent injury to the tenant's goods; and he is not relieved from responsibility by contracting with another to do the work. Nahm v. Register Newspaper Co., 27 Ky. L. R. 887, 87 S. W. 296. Where a landlord, during a tenant's absence and without his consent, moved the dwelling house, dug a cellar and built another house on the lot, the tenant was entitled to a verdict in an action for trespass. Maney v. Lamphere [Mich.] 102 N. W. 974. In an action of trespass by the tenant against the landlord, the measure of tenant's damages is the injury done to the leasehold and personal injuries, and not the damage to the freehold of the landlord. Snedecor v. Pope [Ala.] 39 So. 318.

18. Where lessee was granted the "exclusive" right to quarry limestone on the premises but, in another part of the lease the lessor reserved a qualified right to take limestone for burning on the premises, the grantee of the lessor could not totally exclude the lessee from the premises in the exercise of the reserved right to take limestone. Arkley v. Union Sugar Co. [Cal.] 81 P. 509.

19. Snedecor v. Pope [Ala.] 39 So. 318.

20. Floersheim v. Baude, 110 Ill. App. 536.

21. Pub. St. 1882, c. 120, § 3. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544.

his estate by a change of street grade.[22] A tenant for 999 years can, while in possession, enjoin a third person trespassing on his easement.[23]

(§ 5) *B. Assignment and sub-letting.*[24]—At common law the power of assignment is incident to a leasehold estate,[25] if not denied by the terms of the lease, in which case an assignment without the assent of the landlord is not void, but voidable at the latter's option.[26] But an option of purchasing the premises, given to the lessee "but no other person" is personal and not assignable.[27] A covenant not to sell or assign a lease is not broken by an assignment by operation of law.[28] The assignee of a lease is bound by its covenants.[29] Where there is no restriction to the original lessees of the right to renew a lease, a renewal can be compelled, under the terms of the lease, by the assignee of the lessees.[30] As between assignor and assignee the latter's term is ascertained in the usual way.[31] To rescind it equity must be done or the consideration tendered back.[32] The lease may by partial assignment become firm assets.[33]

The right to underlet may be prohibited by conditions in the lease[34] or by statute.[35] The subletting of premises leased for a particular purpose, to be used

22. Under St. 1890, c. 428, § 5, amd. by St. 1891, c. 123, § 1, providing for compensation for such changes. Sheehan v. City of Fall River, 187 Mass. 356, 73 N. E. 544. Such compensation includes injuries to a building substantially annexed to the soil, which, as between the tenant and landlord, is a tenant's fixture, which may be removed; and he is not precluded from claiming compensation by a settlement made with the landowner, who asserted no title to the building. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544.

23. Erection of a fire escape, by the owner of a theater on the other side of the alley, over the alley which plaintiff was entitled to use. Schmoele v. Betz [Pa.] 61 A. 525.

24. See 4 C. L. 395.

25. As to rent and payment in such case, see post, §§ 6, 9. A lessee in possession under a verbal lease, unrestricted as to right to assign or sublet, may give another the right to occupy the premises so long as the rent is paid pursuant to the lease. Martin v. Sexton, 112 Ill. App. 199. A contract necessarily for a longer lease than two years does not require the consent of the landlord for a transfer of the tenant's interest therein. Pierce, Cequin & Co. v. Meadows, 27 Ky. L. R. 870, 86 S. W. 1127.

26. An alleged contemporaneous parol agreement permitting subletting is not established by the evidence of the lessee, contradicted by the lessor, and when a paper attached to the lease gives the lessee the right of subletting only a portion of one story for a particular purpose. Fidelity Trust Co. v. Kohn, 27 Pa. Super. Ct. 374.

27. The lessor is not estopped from asserting it to be a mere personal privilege where he warned the assignee before the latter had done anything under the assignment, but he nevertheless put in an engine and pump to remove the water from a mine on the premises. Phinney v. Foster [Mass.] 75 N. E. 103.

28. It does not apply to an assignment by a receiver appointed for the lessee. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 157

29. Where a lease was made by individuals for the benefit of a corporation not yet organized and was afterwards duly adopted by the corporation, the corporation was presumed to be the assignee of the lease and liable for rent thereunder. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113. Where the tenant assigned the lease to contractors as security for a certain contract, assignees, on taking possession, were limited in their enjoyment of the property by the terms of the lease. Pierce, Cequin & Co. v. Meadows, 27 Ky. L. R. 870, 86 S. W. 1127.

30. Blount v. Connolly, 110 Mo. App. 603, 85 S. W. 605.

31. Where the tenant was to erect a building on the leased premises to be paid for by rent instalments, and assigned his lease as security to contractors for the erection of the building, upon his default they were entitled to occupy the building long enough at the stipulated rate, to reimburse themselves. Pierce, Cequin & Co. v. Meadows, 27 Ky. L. R. 870, 86 S. W. 1127.

32. An assignment of a leasehold by a lunatic can be avoided only by payment or tender of the consideration, after proper reduction for rents and profits, where the assignee acted in good faith. Miller v. Barber [N. J. Law] 62 A. 276.

33. Under an assignment by the lessee of a hotel of a one-half interest in a buffet for the remainder of his term, the right to occupy the premises for such time became a partnership asset, and the lessee could not have recovered possession from his partner during the continuance of the lease (Lamb v. Hall [Cal.] 81 P. 288), and where the lessee afterward assigned his remaining interest to a third party, thereby dissolving the partnership, the right to occupy the premises for the rest of the term vested exclusively in the surviving partner for the purpose of closing the partnership (Id.). Such assignment was binding on the lessee's trustee in bankruptcy, and he could not recover possession as against the assignee. Id.

34. A condition against underletting is not a single condition, as it is susceptible of more than one breach during the term. Fidelity Trust Co. v. Kohn, 27 Pa. Super. Ct. 374.

for an entirely different purpose affords sufficient grounds for some relief, either legal or equitable.[36] A covenant not to sublease cannot be evaded by quit-claim deeds from third parties who have no valid title.[37] A waiver of the right of re-entry on the breach of a covenant not to underlet is not a waiver of that right on a subsequent underletting; and a consent by the lessor to the occupancy of the premises by a third party for a specified business, under the lessee, is a restricted waiver applying only to such third party and to his specified business.[38] A subtenant is not liable upon the covenants of the contract between the owner and the lessee, unless he has contracted to become so.[39]

(§ 5) *C. Repairs and improvements; waste.*[40]—In the absence of statutory provisions[41] or express agreement, the landlord is not bound to make repairs[42] or to keep the building inhabitable.[43]

Where the lease contains an agreement by the landlord to make certain improvements in the property, he is liable for a breach of the same, the measure of damages being the difference in rental value between the property as actually constructed and as the lessor agreed to construct it,[44] or the actual cost of making the improvements.[45] An entry into possession and the payment of rent is a waiver of failure to make repairs prior to entry, as covenanted by the landlord;[46] but if the tenant, relying upon the covenant, has paid the stipulated rent, he may recover back the excess paid above the actual rental value.[47] A subsequent promise by the landlord to repair, not forming a part of the original contract and operating as an inducement for the plaintiff to take the tenement, and not accompanied by a threat by the tenant to quit if not made, was without consideration;[48] but an oral modification of a lease by a promise by the landlord to make necessary changes, though not contemplated when the lease was made and forming no inducement for its execution, if based on a good consideration is valid and enforceable.[49] A covenant to repair on the part of the landlord carries with it a right to enter and have possession for that purpose.[50] Where the lease provides that repairs shall be borne equally by both parties, and the lessor sells the annual rental to one party and the

35. Under the statutes of Texas the landlord, in case of a subletting by the tenant, may elect to treat the lease as forfeited or to let it continue. Wright v. Henderson [Tex. Civ. App.] 86 S. W. 799.

36. Complaint alleged the leasing of premises, to be used as a Masonic hall, and the subleasing of them to a labor union, after their abandonment for Masonic purposes; held not demurrable as showing no cause of action. Independent Steam Fire Engine Co. v. Richland Lodge, 70 S. C. 572, 50 S. E. 499.

37. White v. Johnson [Idaho] 79 P. 455.

38. Fidelity Trust Co. v. Kohn, 27 Pa. Super. Ct. 374.

39. Not being a party to the contract, he cannot be sued in assumpsit for rent by the landlord. James v. Kurtz, 23 Pa. Super. Ct. 304.

40. See 4 C. L. 396.

41. In Georgia, by Civ. Code 1895, §§ 3118, 3123, a landlord is required to keep leased premises in repair. Veal v. Hanlon [Ga.] 51 S. E. 579. Ross v. Jackson [Ga.] 51 S. E. 578. Sections 863, 864, Wilson's Rev. & Ann. St. 1903, were copied from the statutes of the territory of Dakota, and the clause "for occupation of human beings" was held not to apply to the leasing of buildings for the purpose of business or trade. Tucker v. Bennett [Okl.] 81 P. 423.

42. Lazarus v. Parmly, 113 Ill. App. 624; Martin v. Surman, 116 Ill. App. 282; Phelan v. Fitzpatrick [Mass.] 74 N. E. 326; Rhoades v. Seidel [Mich.] 102 N. W. 1025; Burke v. Hulett, 216 Ill. 545, 75 N. E. 240; Cooper v. Lawson [Mich.] 12 Det. Leg. N. 34, 103 N. W. 168; Barron v. Liedloff [Minn.] 104 N. W. 289; Tucker v. Bennett [Okl.] 81 P. 423.

43. Fowler Cycle Works v. Fraser, 110 Ill. App. 126.

44. Oliver v. Bredl, 25 Pa. Super. Ct. 653; Beakes v. Holzman, 94 N. Y. S. 33; Barron v. Liedloff [Minn.] 104 N. W. 289; Gorman v. Miller, 27 Pa. Super. Ct. 62.

45. Beakes v. Holzman, 94 N. Y. S. 33; Barron v. Liedloff [Minn.] 104 N. W. 289.

46. Rubens v. Hill, 115 Ill. App. 565.

47. Gorman v. Miller, 27 Pa. Super. Ct. 62.

48. Bennett v. Sullivan [Me.] 60 A. 886; Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Rhoades v. Seidel [Mich.] 102 N. W. 1025; Tucker v. Bennett [Okl.] 81 P. 423.

49. The benefit to the leasehold estate for the rest of the term is sufficient consideration to support such a promise by the lessor to furnish additional means of egress from a theater building, so as to comply with Rev. Laws, c. 104, § 36. Taylor v. Finnigan [Mass.] 76 N. E. 203.

50. Barron v. Liedloff [Minn.] 104 N. W. 289.

realty to another, the lessee may deduct one-half of the repairs from the annual rental before paying it over to the party entitled thereto.[51]

A tenant is bound not only to commit no waste,[52] but to make fair and tenantable repairs necessary to prevent waste and decay of the premises;[53] but he need not improve premises unless the lease so provides.[54] In the absence of any express covenant, the law implies a covenant on the part of the lessee so to treat the premises that they may revert unimpaired, except by usual wear and tear and uninjured by any willful or negligent act of the lessee.[55] He must when so agreed do what is necessary to comply with public regulations[56] under such terms as are specially agreed upon if any.[57] When the parties have by express contract fixed their duties in that respect the tenant's implied duty to keep up fences becomes immaterial.[58] Where a lease covenants for the surrender of the premises in as good condition as when received, except as to reasonable wear and tear and damage by the elements, and for compliance with municipal regulations, the tenant must make needful repairs and improvements ordered by the municipal departments.[59] But a lease limiting the tenant's liability under municipal regulations to those made for the correction, prevention and abatement of nuisances or other grievances does not make him liable for the cost of a fire escape.[60] While the ordinary measure of damages, in an action by a landlord against his tenant for removal of improvements, is the difference in the value of the land when it was delivered to the tenant and when it was surrendered by him, yet compensation will not be denied when there is no market value by which to measure damages, but some other measure will be resorted to.[61]

Where a bill in equity was maintainable to enjoin the lessee of a mine from committing waste and destroying the property as a mine, the court, to prevent a multiplicity of suits, retained the bill for further relief and to cancel the lease as a cloud on the title, quiet the title and determine the right of possession.[62] In Pennsylvania the common-law writ of estrepement still lies to stay or prevent present or threatened waste.[63]

51. Hamaker v. Manheim Light, Heat & Power Co., 25 Pa. Super. Ct. 484.

52. The weakening and impairment of the foundation walls by cutting holes for furnace pipes and the removal of partitions that support the upper floors are substantial acts of waste. Smith v. Chappell, 25 Pa. Super. Ct. 81.

53. Smith v. Chappell, 25 Pa. Super. Ct. 81; Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802. The tenant, in the absence of an agreement by the landlord to repair, is under obligation to repair a skylight broken during his tenancy. Forrester v. O'Rourke Engineering Const. Co., 95 N. Y. S. 600.

54. A lease of a lot "to be used as a cattle feeding lot" does not require the lessee to put in cross fences, or piping, or troughs, or sheds, but merely gives him permission to do so and the right to remove them at the end of the lease. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

55. Smith v. Chappell, 25 Pa. Super. Ct. 81.

56. A covenant to comply with the orders of "municipal departments of the city of New York" included the tenement house department, although not created until a date subsequent to the execution of the lease. Palmieri v. Antinozzi, 95 N. Y. S. 865. Under a covenant by the lessee to obey all orders of the municipal departments of a city, or pay an indemnity to the lessor for any loss arising from his neglect, the lessee has not a mere option to obey such orders or pay the indemnity, but it is his duty to obey. Id.

57. Where there was a subsisting violation of the tenement house regulations a provision that the lessee would begin work at once to remove what there was and would comply with all regulations and begin work within 15 days after notice of any violation, the 15 day clause applied to future violations and not to the one pending. Solomon v. Waldstreicher, 95 N. Y. S. 551.

58. Agreement by landlord to keep cattle out of fields. Gloor & Co. v. West [Tex. Civ. App.] 89 S. W. 783.

59. And where the landlord makes repairs ordered by the building department after the tenant's refusal to do so and surrender of the premises, the landlord may recover therefor from the tenant. Markham v. David Stevenson Brewing Co., 93 N. Y. S. 684.

60. Kalman v. Cox, 92 N. Y. S. 816.

61. As to the deterioration in value of such property as houses, fences and other improvements opinion evidence is competent. Sydney Webb & Co. v. Daggett [Tex. Civ. App.] 87 S. W. 743.

62. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

(§ 5) *D. Insurance and taxes.*[64]—When adherent to the enjoyment of the land a covenant to pay taxes runs therewith.[65] Such a covenant is not one of indemnity and the cause of action to recover the same accrues to the lessor or his assigns upon the mere failure to pay the taxes.[66] The lessor may recover from the lessee for enhanced taxes paid and which were a lien on the land, the lessee having caused them by improvements to the realty which as between them were regarded as personalty.[67] A lessee with right of purchase and under covenant to pay taxes has a "different agreement" within a statute entitling him to recover for taxes paid unless there is a different agreement.[68]

(§ 5) *E. Injuries from defects and dangerous condition.*[69]—In general the rule of caveat emptor applies,[70] and the tenant takes the risk of safe occupancy.[71] This rule also applies to the members of his family.[72]

In the absence of a covenant to repair, the landlord is not liable for damages resulting to the tenant by reason of the premises being out of repair;[73] but a landlord is liable for injuries from fraudulently concealed defects,[74] or those which he states are not dangerous,[75] or such as he knows or should know of and are not open to the observation of the tenant,[76] as well as for those occasioned by his own negligent use or care of the premises.[77] A mere voluntary and gratuitous attempt by a land-

63. Smith v. Chappell, 25 Pa. Super. Ct. 81.

64. See 4 C. L. 397.

65. So of such a covenant in a perpetual lease. Broadwell v. Banks, 134 F. 470.

66. The fact that covenants in a lease do not contain the words "assign or assigns," in reference to the obligations of the covenantor does not make the lease any less obligatory upon his heirs or administrator. Broadwell v. Banks, 134 F. 470. Where the term was terminated for breach of conditions in September, the lessee was liable for taxes assessed in August and relating back to May 1, though not payable until October. Richardson v. Gordon [Mass.] 74 N. E. 344. And the defense was not open to the lessee that before the taxes were assessed the property had been sold for prior taxes and had not been redeemed by the lessor. Id.

67. Phinney v. Foster [Mass.] 75 N. E. 103. **Note:** See Contribution, 5 C. L. 751; Subrogation, 4 C. L. 1583, and notes to Lampleigh v. Braithwait, 1 Smith Lead. Cas. 277, on the principle involved.

68. Phinney v. Foster [Mass.] 75 N. E. 103.

69. See 4 C. L. 397.

70. Bennett v. Sullivan [Me.] 60 A. 886; Carpenter v. Stone, 112 Ill. App. 155; Lazarus v. Parmly, 113 Ill. App. 624; Ruhens v. Hill, 115 Ill. App. 565; Martin v. Surman, 116 Ill. App. 282; Phelan v. Fitzpatrick [Mass.] 74 N. E. 326; Flannery v. Simons, 93 N. Y. S. 544; Howell v. Schneider, 24 App. D. C. 532.

71. Miles v. Tracy [Ky.] 89 S. W. 1128. The owner of private property owes to a prospective lessee no duty to ascertain and advise him of unknown defects, where such lessee has an equal opportunity to ascertain them. Bennett v. Sullivan [Me.] 60 A. 886; Howell v. Schneider, 24 App. D. C. 532.

72. A daughter who was caused to fall from a platform by the breaking of a railing. Phelan v. Fitzpatrick [Mass.] 74 N. E. 326. A three-year old child who fell through a defective floor. Cummings v. Ayer [Mass.] 74 N. E. 336. It was assumed that the landlord owed the same duty to a child visting in a tenant's family that it did to the tenant and his family. Dalin v. Worcester Consol. St. R. Co. [Mass.] 74 N. E. 597.

73. Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Carpenter v. Stone, 112 Ill. App. 155; Lazarus v. Parmly, 113 Ill. App. 624; Martin v. Surman, 116 Ill. App. 282; Siggins v. McGill [N. J. Err. & App.] 62 A. 411; Rhoades v. Seidel [Mich.] 102 N. W. 1025; Burke v. Hulett, 216 Ill. 545, 75 N. E. 240. Even if parol evidence is admissible to show an agreement to repair, not incorporated in the written lease, such agreement cannot be given the effect of a special warranty, covering the improvements made and the general safety of the premises. Howell v. Schneider, 24 App. D. C. 532.

74. Lazarus v. Parmly, 113 Ill. App. 624; Barron v. Liedloff [Minn.] 104 N. W. 289; Smith v. Donnelly, 45 Misc. 447, 92 N. Y. S. 43. This liability, however, **does not rest upon the relation of landlord and tenant,** but is founded upon the maxim that every person must so use his own premises as not to injure others rightfully therein. Fowler Cycle Works v. Fraser, 110 Ill. App. 126.

75. An assurance by a landlord to a tenant that a porch is all right and perfectly safe relates only to its condition at the time of the lease and does not cover a period in the future nor bind the landlord to keep it safe for the entire term. Ousley v. Hampe [Iowa] 105 N. W. 122.

76. Rhoades v. Seidel [Mich.] 102 N. W. 1025.

77. Removal of doorsteps while repairing the underpinning, without notifying the tenant. Lambert v. Hamlin [N. H.] 59 A. 941. Evidence of notice to a landlord in time to have repaired a defective roof and that a portion of the ceiling fell and injured the tenant on account of the failure to repair, presented a prima facie case of negligence for the jury. Frank v. Simon, 95 N. Y. S. 666. Lessee's servant was injured by the collapse of the roof, caused by the accumulation

lord to make repairs on the leased premises is not an admission of liability and imposes none upon him;[78] nor does the fact that he has been in the habit of making all repairs, without any covenant on his part to do so.[79] A promise to repair, made subsequently to the lease, being without consideration, does not render him liable for negligence in making such repairs.[80] A landlord, however, who lets portions of a building to different tenants is responsible for the condition of such other portions of the premises as are retained in his possession and control for the common use of the tenants,[81] after he has had actual or constructive notice of their dangerous condition.[82] But the landlord is not an insurer, and he is bound to exercise only reasonable care in the construction and maintenance of those portions of the premises under his control.[83] The landlord is not liable for injuries received from the defective condition of mere conveniences which the tenant is gratuitously permitted to use,[84] or of such parts of the premises as are not intended for use by the tenants and where they are, at the most, mere licensees,[85] yet an implied invitation to use such parts of the premises may arise from long continued permission.[86] An agreement in the lease that the landlord shall not be liable for defects in an elevator maintained by him for common use by his tenants does not relieve him from liability to a tenant's servant, the latter being no party to the agreement.[87] The doctrine of assumed risk is not involved in the relations existing between a landlord and a tenant's servant.[88]

A landlord is not liable to one tenant for the negligence of a co-tenant,[89] but an

of rain to the depth of two feet six inches. Judgment for plaintiff against lessor sustained. Leithman v. Vaught [La.] 38 So. 982.

78. Phelan v. Fitzpatrick [Mass.] 74 N. E. 326.

79. Weber v. Lieberman, 94 N. Y. S. 460.

80. Rhoades v. Seidel [Mich.] 102 N. W. 1025.

81. Passageways, stairways and the like. Siggins v. McGill [N. J. Err. & App.] 62 A. 411; Ryan v. Delaware, L. & W. R. Co. [N. J. Err. & App.] 62 A. 412.

Landlord liable: Plaintiff injured by falling into an unprotected elevator shaft. Shoninger Co. v. Mann [Ill.] 76 N. E. 354. Negligence in construction and maintenance of the railing upon a stairway. Merchants Loan & Trust Co. v. Boucher, 115 Ill. App. 101. Defective condition of the carpet on the common stairway; and plaintiff's going down in the dark, knowing the carpet was ragged, was not contributory negligence as a matter of law. Lee v. Ingraham, 94 N. Y. S. 284.

Landlord not liable: A platform connected with a tenement, used for storing fuel and on which the water-closet was located, held to be a part of the premises and the landlord not required to keep it in repair, although it was connected by stairways with other tenements. Phelan v. Fitzpatrick [Mass.] 74 N. E. 326. A separate flue built into a chimney and accessible to the tenant is not an appurtenance common to the entire premises and as such wholly within the landlord's control. Tenant held negligent in not cleaning flue. Cooper v. Lawson [Mich.] 12 Det. Leg. N. 34, 103 N. W. 168. A municipal ordinance which imposed the duty of cleaning chimney flues on owner and occupant alike, whether it could be invoked by any other than the public or was purely a penal statute did not fix the duty of cleaning as between owner and occupant, so as to render the owner responsible. Id. An allegation that the landlord retained control and possession of the walls and foundations of the building did not bring the case within this rule. Miles v. Tracey [Ky.] 89 S. W. 1128.

82. Burke v. Hulett, 216 Ill. 545, 76 N. E. 240; Wright v. Perry [Mass.] 74 N. E. 328.

83. Merchants Loan & Trust Co. v. Boucher, 115 Ill. App. 101.

84. Platform connected with another tenant's part of the premises. Bennett v. Sullivan [Me.] 60 A. 886.

85. A child visiting in tenant's family was killed by a fall through a skylight in a roof where tenant's children had often played, the inclosure having been removed for repair of the roof. Dalin v. Worcester Consol. St. R. Co. [Mass.] 74 N. E. 597.

86. In view of the natural characteristics of young children, a landlord who had long permitted his tenants' children to use the tenement porches as a playground was held responsible for injuries to a child 6½ years old, who was precipitated from the porch by the breaking of a defective railing. Widing v. Penn. Mut. Life Ins. Co. [Minn.] 104 N. W. 239. But neither the mere removal of inclosures in making repairs, nor the fact that children had been seen playing on a roof near a skylight constituted an invitation or permission from the landlord. Dalin v. Worcester Consol. St. R. Co. [Mass.] 74 N. E. 597.

87. Shoninger Co. v. Mann [Ill.] 76 N. E. 364.

88. The tenant's servant did not assume the risk of an elevator shaft being left unguarded, which was under the control of the landlord for the common use of tenants. Shoninger & Co. v. Mann [Ill.] 76 N. E. 354.

89. Cooper v. Lawson [Mich.] 12 Det. Leg. N. 34, 103 N. W. 168. Where a landlord

action will lie by one tenant against another for damages resulting from the latter's negligence.[90]

Where the landlord agrees to keep the premises in repair, he has the right of entry and possession for that purpose, and is liable to persons lawfully on the premises and not guilty of contributory negligence[91] for injuries caused by his failure to repair.[92] Even where the landlord has covenanted to make repairs and fails to do so, the tenant cannot wait an unreasonable time and enhance his damages, but is bound to use diligent effort to reduce them by making necessary repairs.[93] In Georgia, under statutory provisions, a landlord is bound to keep premises in repair which he has rented to another.[94] Hence a landlord is liable for damages to a tenant or a member of his family,[95] or to one lawfully present on the rented premises by invitation of the tenant,[96] for injuries arising from defective construction or failure to keep the premises in repair, where such defect is known to the landlord, or might have been known by the exercise of reasonable diligence;[97] or for injuries resulting from the landlord's failure to repair after notice and the lapse of a reasonable time,[98] provided that in such cases the plaintiff is himself without fault.[99] The landlord, however, is under no duty to inspect the premises while the tenant is in possession, in order to keep himself informed as to their condition; but the tenant, being entitled to exclusive occupancy during his term, must notify the landlord of the defective condition of the premises.[1] Unless the liability for a negligent condition of premises depends in some way on the relation an allegation by way of description that one was landlord followed by proof that he was a tenant is good.[2]

To stranger.[3]—Where the landlord lets premises in good repair,[4] and is not bound by the lease to keep them so, the tenant is liable to a stranger for an injury resulting from failure to repair;[5] and satisfaction made by the landlord for such

leased a farm and, under the reserved privilege, leased the land for oil and gas, the landlord under the facts in the case was not liable to his first tenant for the loss of cattle that broke from their field into the premises of the other tenant, became sick and died. Brimner v. Reed, 23 Pa. Super. Ct. 318.

90. Plaintiff was injured in escaping from a burning building through a window, because defendant, who occupied a lower floor, had negligently caused an obstruction of the stairway. Cohn v. May [Pa.] 60 A. 301.

91. A tenant cannot recover where he retains possession of the premises and voluntarily exposes himself to the danger. Martin v. Surman, 116 Ill. App. 282. But a tenant, injured by the fall of a part of the ceiling, was not guilty of contributory negligence in remaining in the room after she had paid her rent, although she knew the ceiling was sagging, where the landlord had been notified and promised to repair, and had had sufficient time to do so before the accident. Frank v. Simon, 95 N. Y. S. 666.

92. Barron v. Liedloff [Minn.] 104 N. W. 289. The declaration must allege the violation of an agreement to repair. Cummings v. Ayer [Mass.] 74 N. E. 336.

93. Damages caused by water coming into the premises through defective pipes. Beakes v. Holzman, 94 N. Y. S. 33. Where by an inconsiderable outlay a tenant could have provided heat for the premises, which the landlord had covenanted to heat, he could not remain in willful idleness for 17 days, and then claim damages for "loss of earning capacity." Ireland v. Gauley, 95 N. Y. S. 521.

94. Code 1895, §§ 3118, 3123. Veal v. Hanlon [Ga.] 51 S. E. 579.

95. Veal v. Hanlon [Ga.] 51 S. E. 579.

96. Ross v. Jackson [Ga.] 51 S. E. 578.

97. Accident caused by the giving way of a porch flooring, resulting in permanent injuries. Ross v. Jackson [Ga.] 51 S. E. 578.

98. Veal v. Hanlon [Ga.] 51 S. E. 579.

99. A nonsuit is proper in an action by tenant's wife for damages when it is affirmatively shown that she had knowledge of the defect in a step and might, by the exercise of ordinary care, have avoided injury. Veal v. Hanlon [Ga.] 51 S. E. 579.

1. Ross v. Jackson [Ga.] 51 S. E. 578.

2. Cohn v. May [Pa.] 60 A. 301.

3. See 4 C. L. 398.

4. Where premises have been let to a tenant for six years, it will not be presumed that a defective condition of a window existed at the time of the letting. Hirschfield v. Alsberg, 93 N. Y. S. 617.

5. The sidewalk in front of the premises. Lindstrom v. Pennsylvania Co. for Ins. on Lives & Granting Annuities [Pa.] 61 A. 940. The grating in a sidewalk in front of tenant's show window. Weber v. Lieberman, 94 N. Y. S. 460. Insufficient repairs made by a tenant to a broken floor. Mayer v. Schrumpf [Mo. App.] 85 S. W. 915. Plaintiff was struck by glass falling from a defective window on the tenant's premises. Hirschfield v. Alsberg, 93 N. Y. S. 617. A bridge from the

injuries is no bar to an action against the tenant, they not being joint feasors.[6] The fact that the landlord has been in the habit of making all repairs,[7] or such as he has deemed necessary,[8] does not relieve the tenant from liability. The tenant may become liable to a stranger by negligently suffering the demised premises to become dangerous.[9] But the several lessees of a building, who use a common freight elevator under no contract obligations as to its care, are not liable for injuries to the customers or licensees of other tenants for failure to properly guard the shaft.[10] An express agreement by the landlord to keep the premises in repair must be distinctly proved.[11]

There is an exception to the general rule of the nonliability of the landlord where he retains control[12] or joint control with his tenant over that portion of the premises where the injury was sustained;[13] but there must be evidence of something more than the mere fact of joint use to render him liable.[14] Another exception to the general rule is where there is a defect in the premises, constituting a nuisance, which it is the duty of the landlord to abate, in which case the landlord is liable as author, and the tenant as continuor, of the nuisance.[15] If the nuisance existed when the premises were demised, the landlord is not discharged because the tenant has covenanted to keep in repair;[16] and this is true though the term be for 95 years without right of re-entry for condition broken, if there be other remedies for breach of covenant.[17] Where the premises are in a dangerous or unsafe condition for the avowed purpose for which they are let, especially if let for public entertainment, the landlord is liable for injuries to strangers caused thereby.[18]

(§ 5) *F. Emblements and fixtures.*[19]—It is waste to remove trees[20] or minerals[21] except as expressly permitted or customarily implied. If the tenancy is terminated by the tenant's own act before the crop can mature, the tenant cannot hold it as emblements;[22] and one who rents land pending foreclosure proceedings

porch to the sidewalk held to be part of tenant's premises, for the condition of which the landlord was not liable. Ward v. Hinkleman, 37 Wash. 375, 79 P. 956.

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

7. Weber v. Lieberman, 94 N. Y. S. 460.

8. Ward v. Hinkleman, 37 Wash. 375, 79 P. 956.

9. Plaintiff was injured by the breaking of a defective grating in front of tenant's show window, which let her leg go through. Weber v. Lieberman, 94 N. Y. S, 460.

10. Neither the sublessees of the fourth floor nor the lessees of the first floor and basement. Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802.

11. Ward v. Hinkleman, 37 Wash. 375, 79 P. 956.

12. Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802.

13. Plaintiff, lawfully on the premises to do business with a subtenant, fell into an unguarded elevator well, controlled by the lessee, subtenant's landlord. Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802.

14. Where a faucet was physically within the portion of the premises sublet by defendants, but was used by both the sublessor's and defendants' employes, the mere happening of an overflow under such circumstances did not establish a prima facie case of negligence against defendants. Aschenbach v. Keene, 92 N. Y. S. 764.

15. Burner v. Higman & Skinner Co., [Iowa] 103 N. W. 802. Rotten eaves trough over sidewalk, which broke from sliding snow and ice and injured passerby. Keeler v. Lederer Realty Corp., 26 R. I. 524, 59 A. 855.

16, 17. Keeler v. Lederer Realty Corp., 26 R. I. 524, 59 A. 855.

18. Ward v. Hinkleman, 37 Wash. 375, 79 P. 956.

19. See 4 C. L. 398. See post, **special article Fixtures as Between Landlord and Tenant.**

20. An agreement that the tenant "may clear up ten acres of woodland on lot 158 each year and may have the wood cut off said ten acres and crop next year," and upon full and complete performance may have the refusal of the farm at price and privileges for three successive years, on its face gave the tenant the right to cut wood only on lot 158, and under conflicting extraneous evidence, it was no abuse of discretion to grant an injunction against waste on other lots. Jones v. Gammon [Ga.] 50 S. E. 982.

21. Any severance and removal of minerals by a tenant under a lease of the superficies of the soil only is waste. Oil is a mineral and as such is a part of the realty. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

22. Where a tenant from year to year abandoned the land before the end of the year, notifying the landlord that he would not take it another year, but reserving a

and after lis pendens filed takes the same risks as if he had been a party to the action, so far as a claim to the crops planted is concerned.[23]

Manure.[24]—Where lands are rented for agricultural purposes, the manure, at the conclusion of the lease, belongs to the landlord.[25] While it is common practice in leasing farms to treat hay and straw as manure is treated at common law, that is, as a fixture of the farm, and such a provision was incorporated in the lease to the defendant, yet in construing a subsequent contract terminating the lease, the provision thereof that the defendant was to harvest his crops and remove them by December 1 must be construed as giving him the right to remove the straw.[26]

Fixtures.[27]—The rule as to the removal of trade or domestic fixtures is applicable in cases of landlord and tenant.[28] The general rule is that trade fixtures may be removed before the expiration of the term; but a tenant waives his right to remove fixtures where he takes a new lease which neither reserves nor recognizes his right to remove them under the former lease, but covenants to keep and yield up the premises in as good condition as when received.[29] This rule applies, however, only where the second lease is in writing and complete in itself, naturally indicating that all the prior agreements of the parties have been merged therein;[30] and the rule has not been followed in Iowa.[31] As a general rule, fixtures attached to the realty by a lessee must be removed before the latter yields possession to his lessor, or the right of removal by the lessee will be lost; but this rule does not apply when the lessor forcibly and violently prevents the lessee from removing them;[32] nor does the dispossession of the lessee by summary proceedings terminate his right to remove a building erected on the premises, under permission to remove the same at any time or on leaving the premises;[33] and in Iowa it is held that the tenant must ordinarily remove fixtures at least within a reasonable time after the expiration of his lease.[34] The tenant owns buildings erected by him on leased lands in furtherance of the purpose for which the premises were leased;[35] and may remove the same during his tenancy, or, if his tenancy terminates on a contingency, within a reasonable time after termination.[36] The statute of Michigan providing that no school district shall build a frame school house on any site to which it has no title in fee or a lease for 50 years, without reserving the privilege of removing the building,[37] does not intend that such building shall belong to the landowner, in the absence of such reservation, and prevent the removal thereof by the school district.[38] The question whether fixtures attached to the real estate shall be regarded as person-

crop of rye he had sowed in the fall before, he could not hold it as emblements where such reservation was not assented to by the landlord. Hatfield v. Lawton, 95 N. Y. S. 451.

23. He is not entitled to a crop planted by him, under such circumstances, and standing on the premises on the day of sale. Tittle v. Kennedy [S. C.] 50 S. E. 544.

24. See 4 C. L. 398.

25. A leasing of a dwelling house and about 20 acres of land, for which the tenant agrees to pay rent in lint cotton and cotton seed, is a renting for agricultural purposes. Roberts v. Jones [S. C.] 51 S. E. 240.

26. Garrett v. Brant, 6 Ohio C. C. (N. S.) 509.

27. See 4 C. L. 398. See post, **special article Fixtures as Between Landlord and Tenant.**

28. Gas fixtures, being easily removable and generally without injury to the freehold, may be removed by a tenant in the absence of any stipulation to the contrary. Wolff v. Sampson [Ga.] 51 S. E. 335.

29. Davis v. Carsley Mfg. Co., 112 Ill. App. 112.

30. A mere letter notifying the tenant that he might occupy the premises for 18 months longer, without imposing any new terms, does not constitute such a lease. Lynn v. Waldron, 38 Wash. 82, 80 P. 292.

31. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 180.

32, 33. Miller v. Hennessy, 94 N. Y. S. 563.

34. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780.

35. Hayward v. School Dist. No. 9 [Mich.] 102 N. W. 999.

36. A school district owning a schoolhouse on leased land, after the termination of the tenancy by contingency of closing the school. Hayward v. School Dist. No. 9 [Mich.] 102 N. W. 999.

37. Comp. Laws 1897, § 4673. Hayward v. School Dist. No. 9 [Mich.] 102 N. W. 999.

38. Hayward v. School Dist. No. 9 [Mich.] 102 N. W. 999.

alty or realty is largely governed by the intention of the contracting parties;[39] and when a house is erected on the land of another, with the distinct understanding that it is to be deemed personal property, the tenant is not bound to remove it before the expiration of his tenancy,[40] but may do so within such time thereafter as may have been agreed upon;[41] or, in the absence of such agreement, within a reasonable time after the expiration of the tenancy;[42] and a reservation of such right to remove, in a deed to a grantee of the lands with notice, is unnecessary.[43] The lessee is entitled to property placed in his lessor's building by himself during his occupancy and not forming a part of, and not attached to, the premises leased.[44] The tenant's interest in the land and buildings owned by him thereon is such as to support a mechanic's lien for work or materials contributed to such buildings.[45]

(§ 5) *G. Options of purchase or sale*[46] sometimes found in leases are in so far as they can be regarded as a separate contract treated elsewhere.

§ 6. *Rent and the payment thereof,*[47] *and actionable use and occupation.*—Rent can be recovered only where the conventional relation of landlord and tenant exists, by virtue of a contract express or implied.[48] There must be occupation by the tenant, actual or constructive,[49] or the assignee in his stead.[50] The statute of Massachusetts providing that tenants at sufferance, in possession, shall be liable to pay rent for such time as they may occupy or detain the premises, does not apply unless the tenant has occupied with the assent of the plaintiff or one under whom he claims.[51] While a tenant remains in possession, his obligation to pay rent reserved is absolute, unless suspended by a breach of the lessor's covenant of quiet enjoyment.[52] The lease may provide a money rent payable only on certain conditions.[53] The fact that rent was to be paid in services cannot be proved by

39. Lynn v. Waldron, 38 Wash. 82, 80 P. 292.

40, 41, 42, 43. Adams v. Tully [Ind.] 73 N. E. 595.

44. The lessee having been prevented from removing certain articles by lessor, who claimed them under the lease, as "embellishments" or "reconstructions," and they having been destroyed by fire, lessee recovered the value thereof in an action against lessor. Morris v. Pratt [La.] 38 So. 70.

45. NOTE. Interest of tenant in buildings owned by him as supporting mechanics' liens: In a note to Zabriskie v. Greater America Exposition Co. [Neb.] 62 L. R. A. 375, it is said that the theory supporting the recognition of such liens is that the tenant has an interest in the land also subject to the lien. Such a lien was allowed in the Zabriskie Case supra against a contention that the buildings were merely removable fixtures. Other cases cited in the note referred to as upholding the general rule are: Deatherage v. Sheidley, 50 Mo. App. 490; Montana Lumber & M. Co. v. Obelisk Min., etc., Co., 15 Mont. 20. 37 P. 897; Judson v. Stephens, 75 Ill. 255; Badger Lumber Co. v. Malone, 8 Kan. App. 121, 54 P. 692; Dean v. Pyncheon, 3 Chand. [Wis.] 9; McCarty v. Burnet, 84 Ind. 23; Forbes v. Mosquito Fleet Yacht Club, 175 Mass. 436, 56 N. E. 615; Ombony v. Jones, 19 N. Y. 234; Rothe v. Bellingrath, 71 Ala. 550. The right is however limited to the tenant's interest and subject to the conditions attached to it. See the cases cited 62 L. R. A. 376, 377. Various statutes pertinent to this question have been construed in cases cited 62 L. R. A. 378 et seq.

46. See Vendors and Purchasers, 4 C. L. 1769.

47. See 4 C. L. 399.

48. Matthews v. Carlton [Mass.] 75 N. E. 637; Rosenberg v. Sprecher [Neb.] 103 N. W. 1045. An oral contract which is void under Rev. Laws, c. 127, § 3, is not sufficient. Matthews v. Carlton [Mass.] 75 N. E. 637.

49. Where under an oral agreement to rent premises beginning July 1, a party during June moved some goods in, with the consent of the tenant in possession, but removed them before July 1 and notified the owner of his intention not to take the premises, held, that there was no occupation. Matthews v. Carlton [Mass.] 75 N. E. 637.

50. Where the assignment of the lease to defendants was recorded and they had paid rent to plaintiff for several years, they were in possession under the assignment and liable for rent. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069.

51. Rev. Laws, c. 129, § 3. Applied in a case where the wife owned the property occupied by her husband and herself and continued to be occupied by the husband and family after the wife left him. She gave a written lease to a third party for the purpose of collecting rent. Verdict for defendant under instruction of the court sustained. Carpenter v. Allen [Mass.] 75 N. E. 622.

52. Taylor v. Finnigan [Mass.] 76 N. E. 203.

53. A provision that no rent should be paid for a feeding lot if lessee should accept proposal to buy lessor's distillery slop held not to determine lease but to extinguish

evidence that the previous tenant so paid it under a different lease.[54] Rents to be fixed by appraisal must rest on appraisal of such values as properly belong to the property.[55] Equity will make an appraisal where a nominated appraiser is dead.[56]

For many purposes the term of a lease is regarded as indivisible, and the rent also, as applying to the whole term,[57] and what has been agreed for the premises must be given if the lessee remains under the lease as an entirety,[58] yet in modern leaseholds it is frequently necessary to divide the rent.[59] In Massachusetts, where a lease is made determinable upon a contingency and such contingency happens during a rent period, the landlord is entitled to a part of the rent proportionable to the expired part of the last rent period.[60]

A tenant cannot relieve himself from liability to pay rent by vacating the premises during his term and sending the keys to his landlord.[61] But where the landlord serves notice on his tenant to vacate on or before a certain date, rent ceases when the tenant vacates.[62] A lessee is not relieved by turning possession over to another, unless his landlord assents,[63] and the mere acceptance of payments from another is not of itself a substitution of other parties.[64] Where the tenant, with full knowledge of his landlord's breach of covenant, without duress or coercion, pays his rent, he cannot recover the same, but may sue for such breach, the payment of rent being no waiver of the right to sue.[65] A landlord is not bound, in relief of his tenant who has abandoned the premises, to rent them to any one who may apply, but may rent them and hold the tenant for the difference in rent, unless he has accepted the surrender.[66] A covenant to make good any loss if the lease should be forfeited and premises released accrues when release is made.[67] Where a deposit is made as security, to be held "during the continuance of" the lease, and the land-

rent for that year. Lilliard v. Kentucky Distilleries, etc., Co. [C. C. A.] 134 F. 168.

54. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850.

55. Where a lease provided that the lot, exclusive of buildings, should be appraised, for the purpose of fixing the rent at a certain percentage of its cash value, evidence of the net income of the buildings is not competent to show such value. Springer v. Borden, 112 Ill. App. 168.

56. Where the rental to be paid on the exercise of an option in the lease was to be determined by certain appraisers, which arrangement could not be carried out, owing to the death of one of the appraisers, equity had jurisdiction to make the determination. Weir v. Barker, 93 N. Y. S. 732.

57. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

58. Where an oil and gas company, besides paying royalties, as an additional rent covenanted to furnish lessor with natural gas for heat and light during the term of the lease, there being no forfeiture clause or stipulations as to number or depth of wells, beginning of operations or finding gas in paying quantities, the lessee could not discharge its obligation by ceasing operations when the yield of gas ceased from a single well it had drilled. Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339.

59. Where a lease for a term of three years, with a privilege of renewal for five years, was canceled by the lessor for an unwarranted use of the premises by the lessee, under statutory provisions therefor (Civ. Code, § 1930) the contract was treated as executed with reference to the expired period, so that it was not necessary to return the rent paid as a condition precedent to cancellation. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

60. Rev. Laws, c. 129, § 8. The purchase of the land by the lessee under the provisions of the lease is such a contingency. Withington v. Nichols [Mass.] 73 N. E. 855.

61. Shand v. McCloskey, 27 Pa. Super. Ct. 260.

62. Plaintiff waived his right to a continued tenancy for the month by asking defendant to quit at any time before the beginning of the next month and defendant took him at his word. Cornelius v. Rosen [Mo. App.] 86 S. W. 500.

63. A corporation of which lessee was manager went into possession of the premises. Shand v. McCloskey, 27 Pa. Super. Ct. 260. Where the premises were occupied by a partnership composed of the lessee and others, the fact that the lessor traded with the firm on credit did not, in the absence of an agreement that his indebtedness should apply on the rent, make the partnership directly responsible and release the original lessee. Fryszka v. Prybeski [Mich.] 102 N. W. 977.

64. Hartz v. Eddy [Mich.] 12 Det. Leg. N. 251, 103 N. W. 852.

65. Oliver v. Bredl, 25 Pa. Super. Ct. 653.

66. Entry to make repairs is not an acceptance. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

67. Agreement by the lessee to pay the loss caused by the premises remaining unleased or being let at a lower rent, if the lease should be determined by the lessor for lessee's breach of covenant. Woodbury v. Sparrell Print [Mass.] 73 N. E. 547.

lord recovers possession for default, he cannot retain the deposit as security for any deficiency under the reletting.[68]

One who has the right of possession can sue for rent due from one holding under it and give a valid acquittance for the same.[69] In the absence of statutory provisions, rents that accrued during the lessor's lifetime are personal property and pass to the personal representatives as assets of the estate; and in the absence of statutory or testamentary provisions all subsequently accruing rents go to his heirs or devisees.[70] The lessee is discharged by payment of rent to the lessor, who is an agent of the owner, until notified of the revocation of his agency,[71] and where a notice to quit or pay rent is given by an agent of the landlord and served on the premises, the tenant has a right to treat such agent as having authority to receive the rent and discharge his obligation by making payment.[72] The retaining and cashing of a check, sent in settlement of rent due, from which the cost of certain repairs had been deducted, is an acquiescence in the settlement and a payment of the rent.[73] If a lessor accepts a sublessee's rent note, as a proportionate payment on lessee's rent note, he releases the lessee from further liability as to so much of his rent;[74] and even if the lessor accepts such rent note merely as security, and then compromises with the sublessee, he also releases his lessee from liability as indorser of the sublessee's rent note.[75]

Defenses, set-offs and reductions.[76]—Proof of a surrender of the premises and its acceptance by the landlord is a defense to an action for rent for the remainder of the term.[77] Eviction by the landlord is a complete defense to any action for rent;[78] but so long as the tenant does not abandon the premises, but remains in possession, a constructive eviction by the landlord is no defense.[79]

Where a lease provided for a reduction of rent, upon certain conditions, in case of the partial overflow of the leased premises, a substantial compliance with the conditions was sufficient.[80] Specific provisions relative to the nonpayment of rent or the termination of the lease in case of damage or destruction by fire, may supersede statutory provisions on that subject,[81] and the rent ceases while the premises are untenantable, in accordance with such provisions, though the premises are not

68. Yannuzzi v. Grape, 92 N. Y. S. 819.

69. Claim of rent for occupation of buildings by the military authorities of the United States during the war with Spain. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225.

70. Broadwell v. Banks, 134 F. 470. See, also, Descent and Distribution, 5 C. L. 995.

71. Strafford v. Walter, 24 Pa. Super. Ct. 498.

72. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522.

73. Cornelius v. Rosen [Mo. App.] 86 S. W. 500.

74, 75. Crow v. Burgin [Miss.] 38 So. 625.

76. See 4 C. L. 400.

77. Such surrender and acceptance can be shown by evidence of plaintiff's admissions in another action. Hillman v. De Rosa, 92 N. Y. S. 67.

78. Entry of landlord on the back yard without tenant's consent, excavating and constructing building, removal of steps to yard, destruction of chimney used by tenant's lodgers, and driving away lodgers by the noise and confusion, held to constitute an eviction. Osmers v. Furey [Mont.] 81 P. 345.

What is an eviction, see ante, § 5 A.

79. The breach of a valid agreement by the lessor to furnish additional means of egress from a theatre building, so as to comply with Rev. Laws, c. 104, § 36, although the premises are unfitted for use, is not a defense to an action for rent, so long as lessee remains in possession. Taylor v. Finnigan [Mass.] 76 N. E. 203.

80. Notice sent by registered letter on April 7 was a sufficient compliance with the requirement of a notice to the lessor on June 1. Lacy Bros. v. Morton [Ark.] 89 S. W. 842. If the parties could not agree upon the reduction of the rent, lessors were to receive a share of the crops and the use of a certain building and machinery. Held, that the fact that the lessees continued to use them and did not gather certain grass did not deprive the lessees of the benefit of reduced rent, but they would be responsible to lessors for such use and their share of the grass. Id. Where the evidence showed a partial overflow, damage to the crops and notice to the lessors, it was error to direct a verdict for plaintiffs in an action to recover the cash rent. Id.

81. The Real Property Law of New York (Laws 1860, p. 592, c. 345; Laws 1896, p. 589, c. 547, § 197). Weinberg v. Savitzky, 93 N. Y. S. 485.

surrendered as contemplated by the statute.[82] But even where the tenant makes the usual covenants as to delivery of the premises at the end of the term in good condition and to make all repairs required by the municipal departments, he is not deprived of the benefit of that law.[83] In an action for rent the tenant can counterclaim for damages caused by the landlord's failure to make repairs according to his covenant,[84] or to properly light and heat a building;[85] and he may set off counterclaims against the rent demanded in an action on a bond given by tenant on appeal from a judgment for possession,[86] and damages can also be recovered by the tenant under a counterclaim where it appears that plaintiff connived with another to injure the tenant in the possession and quiet enjoyment of the premises.[87] Where the lease provided that repairs should be borne equally by both parties and the lessor sold the realty and the annual rental to different parties, the lessee could deduct from the annual rent one-half the cost of repairs.[88] The lease must be valid or there is no consideration,[89] though voidability which the tenant is estopped to assert by his having entered into and held possession is no defense to an action for rent, either by himself or his executors.[90] Where the tenant defended on the ground that the lease was invalid as part of a scheme to create a monopoly, the question of whether the purpose of the parties thereto was such was properly left to the jury.[91] Mere inadequacy of the rent is not enough to render a lease null and void.[92] The adoption of the local option prohibition law in a county does not absolve a tenant from the payment of rent for premises leased for saloon purposes.[93] Judgments in actions to recover possession of land or to determine rights of parties under a lease do not bar actions for rent, unless the question of rent was involved.[94] Neither the adjudication of the lessee as a bankrupt, nor his discharge absolves him from the payment of rent accruing after the petition in bankruptcy.[95]

Actionable use and occupation[96] presupposes the relation of landlord and tenant[97] and lies on the implied covenant to pay rent. It does not lie against one

82. Weinberg v. Savitzky, 93 N. Y. S. 485.

83. Markham v. David Stevenson Brewing Co., 93 N. Y. S. 684.

84. Such counterclaim need not allege tenant's diligence to reduce the damages by making repairs himself, that being a matter of proof, rather than pleading. Beakes v. Holzman, 94 N. Y. S. 33.

85. Such a counterclaim is not established by proof of slight defects in wiring and that complaints of insufficient heating and lighting were made from time to time. Ireland v. Gauley, 95 N. Y. S. 521.

86. McMichael v. McFalls, 23 Pa. Super. Ct. 256.

87. Main action was for rent. Harmont v. Sullivan [Iowa] 103 N. W. 951.

88. Hamaker v. Manheim Light, Heat & Power Co., 25 Pa. Super. Ct. 484.

89. A lease of a railroad which is ultra vires and contrary to public policy cannot be the foundation of any recovery of rentals. Cox v. Terre Haute & I. R. Co. [C. C. A.] 133 F. 371. And where the lessee operated the road without paying the rental, prior to its being placed in the hands of a receiver in a suit to which the lessor was not a party, a claim for such rental was not an equitable lien upon the earnings while in the receiver's hands, no part of the rental withheld having come into his hands. Id.

90. Steuber v. Huber, 95 N. Y. S. 348.

91. Hartz v. Eddy [Mich.] 12 Det. Leg. N. 251, 103 N. W. 852.

92. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

93. It being a contingency liable to happen under existing laws, for which lessee should have provided in his lease. Houston Ice & Brewing Co. v. Keenan [Tex.] 13 Tex. Ct. Rep. 251, 88 S. W. 197. Where it was understood that the premises were to be used in "conducting a first class saloon" the restriction related rather to the manner of conducting that business and the premises could be used for any other legitimate business; hence the tenant was not absolved. San Antonio Brewing Ass'n v. Brents [Tex. Civ. App.] 88 S. W. 368.

94. Where an action to recover possession of land was decided in favor of the tenant on other grounds than default of rent, the judgment is not res judicata as to a claim for rent due prior to such action. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522. In certain litigation relative to rights under an oral lease, held, that there had been no adjudication barring either an action for rent or recovery on the counterclaims thereto. Harmont v. Sullivan [Iowa] 103 N. W. 951.

95. Such claims are not provable claims against his estate, and he is discharged from liability for provable claims only. Watson v. Merrill [C. C. A.] 136 F. 359.

96. See 4 C. L. 390.

97. Where the lessee in a lease under seal allowed another party to carry on business in

holding over,[98] though in Kansas the fact that one holds and uses the premises after the expiration of his lease, without consent of the owner, does not prevent a recovery for use and occupation.[99] One who goes into possession of the real estate of another is presumed to be a tenant, in the absence of proof to the contrary;[1] but the mere occupancy of premises for a long time does not establish the relation between such occupant and one who, during the time, owned an interest in the premises, for the occupant may have been in adverse possession or a tenant of one claiming adversely.[2] Where the government officers in charge of a work of river or harbor improvement legally occupy private property for purposes incidental to the work, a contract in the nature of a tenancy should be implied.[3] But where there is no actual use and occupation, but merely damages caused by the illegal acts and intimidations of such officers, no such contract can be implied.[4] The rescission of a contract of purchase of lands leaves the parties thereto in the same relation as if there never had been any contract between them, and any claim for use and occupation thereof by a third party belongs to the vendor.[5]

Ground rents and perpetual leases.—A covenant to pay rent in a perpetual lease runs with the land[6] and binds the lessee personally during the term, and an assignee of the term, so long as he holds the legal estate;[7] but the assignee of a recorded mortgage on the leasehold, after payment and execution of a valid release, though not recorded, was not liable for breach of such covenant by the holder of the equity of redemption.[8] Death of the lessee does not convert the term into a life estate, but the lessor can pursue the lessee's estate for the accruing rentals so long as assets can be found subject thereto.[9]

the premises, which he conducted as her agent, that did not establish the relation of landlord and tenant between the owner and such third person so as to make her liable to an action for use and occupation. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593. The assignee of a lease assigned to defendant, but the defendant was not in any way recognized by the lessor, though he remained in possession for about two months, when he was locked out without notice. Benedict v. Jennings, 93 N. Y. S. 464. An action for use and occupation will not lie against a corporation on a lease executed before its organization and on which its agents are personally liable. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113. Defendant's sons, who only assisted her in running the farm, were not responsible with her for use and occupation. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

98. He is either a trespasser or liable under the implied renewal of the old lease. Rosenberg v. Sprecher [Neb.] 103 N. W. 1045.

99. Under Gen. St. 1901, § 3864, making an occupant without special contract liable for the rent. Benton v. Beakey [Kan.] 81 P. 196.

1. Heddieston v. Stoner [Iowa] 105 N. W. 56. Where the land of a citizen, not within the area of war is taken and occupied for a military camp, an implied contract arises. Alexander's Case, 39 Ct. Cl. 383.

2. Cummings v. Smith, 114 Ill. App. 35. When title is shown in plaintiff and occupation by defendant, an obligation to pay rent is generally implied; but not if the entry was not under plaintiff or is adverse to him. Sharpe v. Matthews [Ga.] 51 S. E. 706. The relation of landlord and tenant was not created by an agreement that the mortgagors should occupy and cultivate the land, paying $300 a year, all of which over the mortgage interest and taxes was to be applied in paying the mortgage, notwithstanding such payment was called "rent." Sadler v. Jefferson [Ala.] 39 So. 380.

3. Willink's Case, 38 Ct. Cl. 693.

4. As where the claimant was prevented from the use of his river frontage beyond a certain line by threats of prosecution. Willink's Case, 38 Ct. Cl. 693.

5. Graham v. Beaver Hill Coal Co., 135 F. 611. Plaintiff, while in possession of land under contract of purchase, erected buildings thereon which were occupied by defendant. Plaintiff thereafter rescinded the contract and relinquished to the vendor all the rents, issues, and profits theretofore arising from the land, and recovered from him all moneys paid by him on the contract of purchase. Held, that the profits derived from the use and occupation of the buildings belonged to the vendor, and he having demanded that defendant attorn to him therefor, plaintiff could not recover them. Id. The fact that buildings were constructed while plaintiff was defendant's manager and were paid for with defendant's money was a good defense, they being defendant's property as against plaintiff. Id.

6. Broadwell v. Banks, 134 F. 470.

7. An adjudication of bankruptcy in a case where there was no rent due at the time of the filing of the petition in bankruptcy does not constitute a breach of the covenants to pay rents accruing thereafter. Watson v. Merrill [C. C. A.] 136 F. 359.

8. Horner v. Chaisty [Md.] 61 A. 283.

9. Broadwell v. Banks, 134 F. 470.

§ 7. *Rental on shares.*[10]—From a leasing on shares are to be distinguished cropping contracts,[11] which amount to a joint adventure in the raising of a crop. It is a general rule that where a term is created, possession given to the occupant and produce is to be paid as rent, then the instrument is to be regarded as a lease,[12] and the title to the crops remains in the landlord until he has received his due proportion;[13] but it is also a general rule that where the occupant covenants to deliver to the owner a portion of the crops, the agreement is held to be a cropping contract and the parties are tenants in common of the crops.[14] Where the tenant agrees to pay his landlord a certain share of a crop, the title to the whole is in the tenant;[15] but it is otherwise when the landlord, by express contract, reserves title in the crops, to be grown on the rented land,[16] and where the landlord has an interest in the tenant's share of the crops and the latter authorizes him to sell the whole and collect and apply the proceeds, the agency being coupled with an interest cannot be revoked at the tenant's pleasure.[17] Although the tenant enters into possession under a void lease, becoming a periodical tenant by the payment of a periodical rent, reference may be had to such lease to determine the division of crops as between tenant and landlord.[18] The lessee on shares is usually required to furnish the labor necessary to carry on the farming operations.[19]

§ 8. *The term, termination of tenancy, renewals, holding over.*[20]—The term is impliedly for the period for which rent is paid.[21] It may be fixed by the happening of events uncertain in time.[22]

Besides expiration of the term[23] there may be a termination[24] by rescission or

10. See 4 C. L. 400.

11. See Agriculture, 5 C. L. 94.

12. Adams v. Thornton [Cal. App.] 82 P. 215. A contract for the payment of two-thirds of the income of a farm where any produce is sold, the toll to be first deducted, and for turning over certain proportions of the milk, eggs and increase of the poultry, is a lease and establishes the relation of landlord and tenant. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522.

13. Rector v. Anderson [Minn.] 104 N. W. 884; Loveless v. Gilliam, 70 S. C. 391, 50 S. E. 9.

14. Adams v. Thornton [Cal. App.] 82 P. 215. Where the owner of an orchard contracted to let defendant a house, furnish all materials, and implements for curing and marketing the fruit, new trees to replace missing ones, one-half of boxing materials and preparation of fruit for market, the second party to have one-half the crop for his labor, the contract was a mere cropping contract and not a lease, and the parties were tenants in common of the crops. Id. Parties held to be tenants in common of the crops under the contract. Rector v. Anderson [Minn.] 104 N. W. 884.

15. Where the lease provides that, when the crops are ready for division the tenant shall deliver the landlord's share at a particular place, the tenant can divide the crops and sell his share. Hill v. Page, 95 N. Y. S. 465. A tenant who cultivates a farm under an agreement that entitles him to one-half the crops raised may before division, mortgage his interest subject to the landlord's rights. Denison v. Sawyer [Minn.] 104 N. W. 305. The widow of a tenant, to whom a part of the crop had been set apart as a year's support, could recover the same in trover from one to whom the landlord delivered it in payment of a debt owed such party by the deceased, although such delivery and conversion were made before the assignment to the widow. Neal v. Smith [Ga.] 50 S. E. 922.

16. Neal v. Smith [Ga.] 50 S. E. 922.

17. The landlord's interest was founded on a verbal agreement that he should have a lien on the tenant's share of crops, for signing tenant's notes as security. Big Four Wilmington Coal Co. v. Wren, 115 Ill. App. 331.

18. Snyder v. Harding, 38 Wash. 666, 80 P. 789.

19. Where the lessee on shares was to "do the farming and all labor in good workmanship manner," the wife of the lessee could not recover from the lessor for manual labor voluntarily rendered her husband and with no expectation at the time that she was to receive compensation from the lessor. Rathbone v. Rathbone, 23 Pa. Super. Ct. 297.

20. See 4 C. L. 401.

21. A provision in a lease for one month that upon breach of any condition the lessee "shall be a mere tenant at sufferance" cannot be construed to make the lessee a tenant from year to year, in such case, but from month to month. Hood v. Drysdale, 27 Pa. Super. Ct. 540. See, also, cases cited ante, § 3.

22. In a unilateral agreement to lease a hotel, of which the occupancy should "commence as soon as vacated by the present occupants," there is nothing so uncertain about the commencement of the proposed tenancy as to require parol evidence for its explanation or submission to a jury. Rhodes v. Purvis [Ark.] 85 S. W. 235.

23. Where defendant worked complain-

forfeiture for breach of the lease,[25] by operation of stipulated conditions therein,[26] and by the purchase of the premises by the lessee, under stipulations therefor.[27] A lease of lands for a gas well, having been terminated under its provisions by a ceasing of the flow of gas, is not revived by a subsequent discovery of gas in the well in sufficient quantities for use.[28] In New York, the statute fixing the termination of certain tenancies at May 1 applies to cases where there has been an agreement of hiring, without any particular specification of duration.[29] A subtenant's rights are measured by those of his immediate landlord, the original tenant, and the cancellation of the latter's lease under its own terms is a cancellation as to both.[30]

Surrender, abandonment and eviction.[31]—A surrender of a lease may be made by parol, although the lease is under seal,[32] by an abandonment of the premises and entry by the lessor,[33] by an executed agreement to surrender,[34] by the execution of a new lease with the tenant's consent and the entry of the new tenant, by a contract to release the old tenant and accept a new one for the rent, or by a continued

ant's land for 1900 on shares, nearly the whole tract being seeded to grass with the crop of grain, at complainant's expense, and for 1901 a new arrangement was made by defendant to cut the hay, but no further arrangements were made, defendant's rights in the premises ceased after the second season and he was a trespasser in interfering thereafter. Kenney v. Apley [Mich.] 102 N. W. 854.

24. Modes of terminating the various tenancies at common law discussed. Wolfer v. Hurst [Or.] 82 P. 20.

25. See, ante, § 5 as to what is a breach, post this section as to forfeiture. The landlord cannot afterward retain the deposit made "to be held during the continuance" of the lease, to secure himself against deficiency of rent in the re-letting. Yannuzzi v. Grape, 92 N. Y. S. 819.

26. Where the lease provides that, in case of sale of the premises, the tenant will quit and surrender upon 30 days' notice, the lease is terminated by the sale. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85. A lease may contain a stipulation for an amount to be paid by the lessee to terminate the lease, and, unless this is "vile" and insufficient, the lessor must resort to the courts to have the contract annulled. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Contemporaneously with a contract for the purchase of distillery slop, the purchaser leased to the distillery company a lot to be used as a "feeding lot," at an annual rent. The lease provided that the lessor should have the refusal of the slop for any year, and, in case he took it, no rent should be paid for the lot. Held, that the exercise of the option did not terminate the lease or change the relation of the parties, but exempted the lessee from rent while furnishing the slop. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. A provision that on a certain contingency the lessee agrees to cancel the lease is equivalent to an agreement that the lease may be canceled and does not contemplate any act by the tenant to complete the cancellation. Bruder v. Geisler, 94 N. Y. S. 2.

27. In Massachusetts such a purchase is a contingency terminating the lease and, if happening during a rent period, entitles the landlord to rent for the unexpired portion of such term, under Rev. Laws, c. 129, § 8. Withington v. Nichols [Mass.] 73 N. E. 855.

28. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

29. Stein v. Sutherland, 92 N. Y. S. 314. Where a lease terminated on October 15, but the tenant continued in possession with the landlord's consent, the new term so created could not be terminated prior to October 15 the following year, notwithstanding the statute. Furman v. Gaianopulo, 92 N. Y. S. 730.

30. Bruder v. Geisler, 94 N. Y. S. 2.

31. See 4 C. L. 401.

32. But a mere parol agreement to surrender his term on a certain date does not operate as such where it is not executed and the tenant remains in possession with the landlord's acquiescence. Duncan v. Moloney, 115 Ill. App. 522.

33. Duncan v. Moloney, 115 Ill. App. 522. Where a lease from year to year beginning April 1, 1901, was abandoned in March, 1904, and the landlord leased it to another party from April 1, 1904, the first lease terminated at that date. Hatfield v. Lawton, 95 N. Y. S. 451. Where the lessee who was justified in vacating the premises, notified the lessor's agent and requested him to take care of the house, he promising to do so, there was a surrender, so far as giving up the premises was concerned. Rogers v. Babcock [Mich.] 102 N. W. 636. The fact that, while serving a sentence to jail, lessee let one of his lessors have the key to the premises for the purpose of seeing that the contents of the building were intact and while in the building lessor attempted to make it more secure, did not constitute a surrender of possession under the lease. Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582.

34. Duncan v. Moloney, 115 Ill. App. 522. An agreement, modifying somewhat the terms of a tenancy from year to year but not constituting a complete contract of leasing, and without any surrender or agreement to surrender the existing tenancy, does not have that effect or create a new tenancy. McCaw v. Cox [Neb.] 103 N. W. 76.

change of possession by the mutual consent of the parties.[35] The surrender must be the mutual and voluntary action of the parties thereto,[36] must be accepted by the lessor,[37] and must be assented to by a third party that has a beneficial interest in the contract.[38] The acceptance of a surrender of a lease terminates the relation of landlord and tenant, and is a bar to recovery for a breach of covenant.[39] The cancellation of the lease may be a sign of surrender, but it is not the surrender itself;[40] but the destruction of the lease by consent of both parties, before possession taken, is effectual as a surrender, as the lessee had no possession to surrender.[41] A lease may also be surrendered by operation of law.[42] An eviction is any act which either deprives the tenant of possession or destroys his quiet enjoyment.[43]

Destruction of premises.[44]—The destruction of a building on leased premises, without the fault of either party and in the absence of a covenant requiring the landlord to rebuild will not terminate the lease or release the tenant from his obligation to pay rent.[45] Although, unless otherwise agreed, the lessee may terminate the lease in case of destruction of the building during his term, without his fault,[46] yet the lessor cannot terminate the lease, where the building was only partially destroyed, without injury to the lessee's premises, and he continues his occupancy as before.[47]

Forfeiture.[48]—The general rule is that forfeitures are discountenanced by the courts;[49] but even equity will enforce rights dependent on a forfeiture already complete.[50] But the courts, for the sake of avoiding a forfeiture, cannot disregard the contract made by the parties, though it is harsh, where it contravenes no rule of public policy;[51] and forfeitures of gas and oil leases, for neglect to perform the conditions requiring work to begin within a certain time and continuous operation

35. Duncan v. Moloney, 115 Ill. App. 522.

36. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873.

37. A tenant for years cannot relieve himself from liability by vacating the premises during the term and sending the key to the landlord. Smucker v. Grinberg, 27 Pa. Super. Ct. 531. The burden of proof of assent is on the lessee. Id. Conflicting evidence of conversation between one of the defendants and one of the plaintiff's attorneys held not to show a surrender. Steuber v. Huber, 95 N. Y. S. 348.

38. Where a brewing association becamc guarantor of the payment of rent, upon consideration that no beer or malt liquors except those manufactured by the guarantor should be sold on the premises and that the building should be used for no other purpose than a saloon, guarantor had such a beneficial interest in the lease that the lessee could not surrender it without guarantor's consent. St. Louis Brewing Ass'n v. Kaltenbach, 108 Mo. App. 637, 84 S. W. 151.

39. Where, after the tenant's bankruptcy the landlord accepted a surrender, he assented to the termination of the lease by the bankruptcy proceedings, and he could not enforce a provision making rent immediately due and payable in case of breach of covenant. In re Winfield Mfg. Co., 137 F. 984.

40, 41. Duncan v. Moloney, 115 Ill. App. 522.

42. Where a tenant accepts a new lease for the same premises, as he is thereby estopped from asserting that the old one is in force. Duncan v. Moloney, 115 Ill. App. 522.

43. See cases cited ante, § 5 A.

44. See 4 C. L. 402.

45. Moran v. Bergin, 111 Ill. App. 313. The destruction by fire of ice-houses on leased premises. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523. The razing of a building by authority of a building inspector on account of its unsafe condition is not an eviction by title paramount, and in the absence of a covenant broad enough to survive such action creates no liability against the landlord. Liebschutz v. Black, 3 Ohio N. P. (N. S.) 393.

46. Under Ky. St. 1903, § 2997. Jones v. Fowler Drug Co., 27 Ky. L. R. 558, 85 S. W. 721.

47. Jones v. Fowler Drug Co., 27 Ky. L. R. 558, 85 S. W. 721.

48. See 4 C. L. 402.

49. Wright v. Henderson [Tex. Civ. App.] 86 S. W. 799. Forfeitures are to be strictly construed in an action to resume possession and not directed toward setting aside the contract of lease. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

50. While equity will not actively interfere to enforce a forfeiture, yet where a lease had been forfeited by the conveyance by the lessee of his interest by a deed of trust, proceedings begun to foreclose and a receiver appointed, in which the lessor intervened asking cancellation of the trust deed, it was proper on certain conditions to declare the lease forfeited. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870.

51. Where a contract for a lease provided for five payments at a fixed time, which was made of the essence of the contract, with

are favored,[52] and in Louisiana, although a clause reserving to lessee the right to dissolve an oil lease upon payment of a certain sum might be considered a potestative condition,[53] yet where the contract contains all the essentials of a lease, has been to some extent executed and rights and equities may have arisen under its clauses, it cannot be annulled by the effect of the potestative condition, in a mere possessory action.[54] Forfeiture cannot be effected by a landlord without rendering to the tenant that for which the lease calls in such an event.[55] To deny title is a disseisin working forfeiture,[56] and the assignment of a lease that by its terms is not assignable,[57] works a forfeiture of the lease; but a breach of an implied covenant does not forfeit a lease, unless it is expressly so provided, and a direct action must be brought to set aside such a lease.[58] Where a lease provided for re-entry in case of nonpayment of rent, and a receiver was appointed after such default, the lessor could not forfeit the lease until it appeared that the receiver was unwilling or unable to pay the overdue rent.[59] Mere delay[60] or failure to pay rent as provided will not of itself work a forfeiture.[61]

When a lease has become liable to forfeiture for breach of some condition, it nevertheless remains in force and binding upon the lessee until terminated by the lessor according to law.[62] By failing to make the requisite demand of the rent, the lessor loses his right to enforce forfeiture therefor;[63] but where the landlord had the right to re-enter for nonpayment of rent and it was the tenant's duty to yield possession on demand, the fact that the tenant was induced to leave the premises by artifice was immaterial.[64] The retaking of the premises by the lessor releases the lessee from payment of all subsequently accruing rents, unless otherwise provided in the contract.[65] A landlord may waive a forfeiture, or elect to insist upon it;[66] but he must take a stand and hold it.[67] The waiver may be either express or implied from acts inconsistent with insistence upon a forfeiture.[68] The right of waiver of

certain additional sums as rent, and also that, if such payments were made, the lessee should have an option to purchase, but upon failure to make any payment both the lease and option should terminate, the payment of all the instalments was a condition precedent to the right to purchase, which, upon failure to make the last payment, was forfeited. Carpenter v. Thornburn [Ark.] 89 S. W. 1047. In such case the failure of the lessor to tender a deed was no excuse for a failure to make the last payment, for the lessor was not required to make a deed until all payments had been made. Id.

52. Chapple v. Kansas Vitrified Brick Co. [Kan.] 79 P. 666.

53. Within the terms of Louisiana Civil Code, art. 2034. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

54. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

55. Where plaintiff leased defendants for five years so much land as they might clear up, with an option after one year to take back the lands which had been cleared, upon payment of a certain sum per annum for each acre cleared, and the defendants had partially cleared a part of the land, plaintiff could not retake it without first tendering the amount to which defendants were entitled for the labor performed. Bunch v. Williams [Ark.] 88 S. W. 588.

56. See ante, § 4 B. A disclaimer and denial of the landlord's title, or the open and notorious assertion by the tenant of an adverse claim. Barnewell v. Stephens [Ala.] 38 So. 662.

57. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873.

58. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

59. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 157.

60. Oil lease, conditioned upon commencement of operations or payment of rent, does not annul the lease. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

61. Parsons v. Crocker [Iowa] 105 N. W. 162.

62. Method of enforcing forfeiture. Hartford Wheel Club v. Travelers' Ins. Co. [Conn.] 62 A. 207, citing several authorities.

63. Hartford Wheel Club v. Travelers' Ins. Co. [Conn.] 62 A. 207.

64. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522.

65. Watson v. Merrill [C. C. A.] 136 F. 359.

66. A provision in a lease for a definite term that it shall become void upon the nonpayment of rent does not create a limitation of the term, but merely a condition subsequent for the breach of which the lessor may, at his option, terminate the lease. Hartford Wheel Club v. Travelers' Ins. Co. [Conn.] 62 A. 207.

67. Wright v. Henderson [Tex. Civ. App.] 86 S. W. 746.

forfeiture for nonpayment of rent, before entry, belongs absolutely to the lessor, independently of any action by the tenant; but, after the lessor's election to enforce the forfeiture has been declared by entry, the lessor's right to waive the forfeiture depends upon the action of the lessee also, for he may insist upon the termination of the lease and his release from its obligations.[69]

Notice to vacate and demand of possession.[70]—No notice is necessary to terminate a tenancy for a fixed period;[71] but such tenancy may be coupled with an option for renewal, which may be conditioned that it shall not be exercised if the lessor gives notice for an agreed length of time that the tenancy is to cease, in which case such notice must be given, but it may be oral, unless otherwise stipulated.[72] Nor is notice necessary where the tenant denies the landlord's title, for that terminates the tenancy.[73] In other cases the tenant's possessory interest must be terminated by notice before written demand can be made for delivery of possession.[74] But the notice to quit, prescribed by statute for terminating a tenancy at will or by sufferance, is not an essential part of the procedure for forcible entry and detainer.[75] It is required only as a condition of legally terminating the tenancy, and may be waived by the tenant;[76] and when so waived, the action of forcible entry and detainer may be brought without any notice to quit being served upon the tenant.[77] The necessity of giving the statutory notice may also be superseded by the terms of the lease.[78] Notice before suit of the lessor's intention to re-enter is required in a case where the lease reserves a right of re-entry for the lessee's "default of a sufficiency of goods and chattels whereon to distrain for satisfaction of rent due,"[79] or where the lease provides for such a notice; but it is not required where the lease has come to an end and the lessor has become reinstated in his right to possession by agreement of the parties, upon the happening of a particular event.[80] The

68. Where the landlord demanded a share of the profits of a subletting by his tenant, he waived forfeiture of the lease by such subletting. Wright v. Henderson [Tex. Civ. App.] 86 S. W. 799. The acceptance of after accruing rent at any time before entry for non-payment, or even an unqualified demand for such rent, is a waiver. Hartford Wheel Club v. Travelers' Ins. Co. [Conn.] 62 A. 207. Where a lease provided for a surrender of the premises at the expiration or other termination of the lease, waiving demand for rent, re-entry, notice to quit and other formalities, such waiver only authorized the lessor to commence action for possession without demand or re-entry, but did not preclude the tenant from relying upon the landlord's waiver of forfeiture by the acceptance of rent subsequently accruing. Id. But where the ground of forfeiture of a mining lease was the continued failure to work the mine in a workmanlike manner and to support the ground, and such violations continued up to the time of a temporary injunction restraining the further operation of the mine, the acceptance of rent or royalties after notice of forfeiture did not waive the forfeiture. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279. Where a landlord withheld notice of forfeiture for failure to repair defects in drainage but procured a notice to be sent to tenant by the board of health and the tenant made the repairs, it was a waiver of the landlord's right to declare a forfeiture of the lease. Hasterlik v. Olson, 218 Ill. 411, 75 N. E. 1002.

69. Hartford Wheel Club v. Travelers' Ins. Co. [Conn.] 62 A. 207.

70. See 4 C. L. 403.

71. Reccius & Bro. v. Columbia Finance & Trust Co., 27 Ky. L. R. 880, 86 S. W. 1113. In California. Code Civ. Proc. § 1161, subd. 1. Craig v. Gray [Cal. App.] 82 P. 699. In Indiana, Burns' Ann. St. 1901, § 7094. Millington v. O'Dell [Ind. App.] 73 N. E. 949. In Missouri one holding over willfully and without force is not entitled to notice to quit, but proceedings for possession may be begun against him at once. Rev. St. 1899, § 3321. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

72. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

73. Schwoebel v. Fuglna [N. D.] 104 N. W. 848.

74. Code 1896, § 2127. Barnewell v. Stephens [Ala.] 38 So. 662.

75. Sec. 5755, B. & C. Comp. Wolfer v. Hurst [Or.] 82 P. 20.

76, 77. Barnewell v. Stephens [Ala.] 38 So. 662.

78. Where the lease provided that the lessee would quit and surrender the premises on 30 days' written notice in case of sale, the grantees of the lessor were not required to give in addition the three days' notice prescribed by Code Civ. Proc. § 1161, to make the tenant guilty of unlawful detainer, but only the 30 days' notice after termination of the lease by sale. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

79. Laws 1846, p. 369, c. 274; Code Civ. Proc. § 1505. Palmieri v. Antinozzi, 95 N. Y. S. 865.

80. The tenant's failure to comply with the orders of the tenement house department.

receipt of rent for a new term or part thereof by a landlord, after notice to quit, amounts to a waiver of his right to demand possession under the notice; but the receipt of rent for the current month pending the notice to quit cannot have that effect.[81]

A tenancy can be terminated by such notice only as provided by law.[82] A statute merely prescribing the length of notice to be given to terminate a tenancy from year to year does not otherwise change the common-law requisites of the notice.[83] The notice must be in writing[84] and should describe the premises with reasonable certainty for identification and require the tenant to remove on a specified day,[85] which must be the last day of some rental period.[86] But in the District of Columbia a thirty days' notice to quit need not specify the day of the termination of the lease, if dated and served full thirty days before the end of the term.[87] A landlord cannot, in a notice to quit, specify the rent demanded as a penalty for the further occupation of the premises.[88] The notice may be given by the landlord, or by his agent or attorney who has special authority therefor or authority to let the premises;[89] but when a demand for possession of the premises is made by an agent or attorney, the evidence should show that he was in fact the agent or attorney when the demand was made; the mere bringing of suit in his name afterward raises no such presumption.[90] A notice to quit given without authority of the landlord cannot be subsequently ratified by him, as the tenant must act upon the notice at the time it is given and it must be such a notice as he can act upon with security.[91] Where a party permits a notice to quit, signed by an agent, to be offered in evidence without objection, he admits the agent's authority;[92] but he does not thereby admit the sufficiency of the notice, which it is the province of the court to determine.[93] Where no notice to quit is produced on the trial, nor any evidence given of its contents or date, the case will be treated as if no notice was given, although defendant testifies that he received notice.[94] A conveyance of leased premises by the lessor, without reservation, carries with it, by operation of law, the grantor's right to terminate the tenancy by a notice to quit,[95] and the lessor cannot thereafter give in his own name a notice which will be effectual to terminate it;[96] but the tenant's right to have the notice issued in the landlord's name may be waived by accepting a lease containing stipulations to that effect.[97] Where a ninety-

Palmieri v. Antinozzi, 95 N. Y. S. 865. Where, in case of default in payment of rent, the lessor is empowered at his own election to declare the lease at an end and to reenter, after the demand of the due and unpaid rent, no notice is necessary to terminate the lease. Gunning v. Sorg, 113 Ill. App. 332.

81. Byrne v. Morrison, 25 App. D. C. 72.

82. A tenancy from year to year by written notice served at least sixty days prior to the end of the term. Ranson v. Ranson, 115 Ill. App. 1. A tenancy from month to month, by a tenant's giving thirty days' notice and fixing a time when he has a legal right to quit. He should name the last day of the current month. Weber v. Powers, 114 Ill. App. 411. In Pennsylvania a tenant from year to year is entitled to three months' notice to quit before the close of the year. Pickering v. O'Brien, 23 Pa. Super. Ct. 125. A letter offering to renew a lease at an increased rent, but without any notice that if the offer was not accepted the lease would be terminated did not terminate a tenancy stipulated to continue from year to year until four months' previous notice of intention to terminate. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

83. Code 1899, c. 93, § 5. Arbenz v. Exley, Watkins & Co. [W. Va.] 50 S. E. 813.

84. B. & C. Comp. § 5756. McClung v. McPherson [Or.] 82 P. 13.

85. McClung v. McPherson [Or.] 82 P. 13.

86. A letter from the tenant to the landlord, notifying him that he has vacated and surrenders the premises, though accompanied by a vacation and a defense of a former action for rent, denying liability, does not operate as a termination of the tenancy. Arbenz v. Exley, Watkins & Co. [W. Va.] 50 S. E. 813.

87. Code, § 1219. Byrne v. Morrison, 25 App. D. C. 72.

88, 89. McClung v. McPherson [Or.] 81 P. 567.

90, 91. Barnewell v. Stephens [Ala.] 38 So. 662.

92, 93. McClung v. McPherson [Or.] 82 P. 13.

94. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

95, 96. McClung v. McPherson [Or.] 81 P. 567.

nine year lease is to be terminated under the statute for default of the lessee, it is not necessary for the lessor's wife, who executed the lease merely to release her dower, to join in the notice.[98] In ejectment a denial only that plaintiff signed the notice to quit does not put in issue the service of such notice.[99]

Under a notice to quit for nonpayment of rent, the tenancy terminates at the expiration of the time limited in the notice.[1] It is not necessary that a formal demand be made on the premises to terminate a tenancy.[2]

Renewal under express agreement.[3]—Unless otherwise provided a renewal is for the term and according to the conditions of the original agreement.[4] Where a lease secured by a surety of unquestionable solidity is renewable "upon the same terms and conditions," the lessee must furnish for renewal a surety equally as safe,[5] or the landlord is released from his agreement and may let the premises to another.[6] The deposit of a personal check in a bank is not a compliance with a condition in a lease requiring a deposit of money as a condition precedent to renewal.[7] Where premises are leased to two tenants jointly for a definite term with the privilege of an additional term, the option must be exercised jointly.[8] In the absence of any restriction of the right of renewal to the first lessees, a covenant for renewal runs to the assignees of the lessee.[9] Where by its own provisions a lease is continued in force from term to term, with all its provisions and covenants, an option of purchase contained therein is also renewed from term to term.[10]

Holding over without agreement.[11]—A holding over without a new lease is presumed to be upon the conditions of the expired agreement[12] and creates a ten-

97. Stipulations that, in case of sale of premises, the lease might be terminated by 60 days' notice, so construed. McClung v. McPherson [Or.] 81 P. 567.

98. Gunning v. Sorg, 113 Ill. App. 332.

99. Hayden v. Collins [Cal. App.] 81 P. 1120.

1. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873.

2. Comp. Laws 1897, § 11,164. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522.

3. See 4 C. L. 404.

4. Where the lease provided for "the privilege of two additional years on the same terms," a holding over after the term was an election to hold for the entire extended term. Henderson v. Schuylkill Valley Clay Mfg. Co. 24 Pa. Super. Ct. 422. An agreement that the tenant should continue as tenant by the month, and have one month's notice to quit, created a tenancy from month to month with the option of renewal at the beginning of each monthly period, unless one month's notice was given by the landlord. Reccius & Bro. v. Columbia Finance & Trust Co., 27 Ky. L. R. 880, 86 S. W. 1113. Where, before the expiration of a term, the lessor executed a lease for another term to begin at the expiration of the first, the lessee was entitled to continue in possession as though the first lease had been made for a term including the renewal term (Ely v. Collins, 45 Misc. 255, 92 N. Y. S. 160), and where, between the execution of the new lease and the expiration of the old one, the lessee's rights were cut off by foreclosure of a mortgage, the lessee's right to reimbursement out of the surplus on foreclosure sale was superior to the rights of the owners of the equity of redemption (Id.).

5, 6. Piper v. Levy [La.] 38 So. 448.

7. A condition precedent to the renewal of a gas and oil lease, that 25 cents per acre be deposited in a certain bank each year in advance, to the credit of lessor. Chapple v. Kansas Vitrified Brick Co. [Kan.] 79 P. 666.

8. Their intention may be expressed jointly or by both independently; or by remaining in possession; but where one refused to extend the lease jointly and so notified the owner and his co-tenant, the owner could recover possession although the other tenant decided to remain. Tweedie v. Olson Hardware & Furniture Co. [Minn.] 104 N. W. 895.

9. Where the habendum clause ran to the lessees and their assigns and they covenanted for themselves and their assigns to pay rent, a covenant by the lessor to renew could be enforced by the assignee of the lessees. Blount v. Connolly, 110 Mo. App. 603, 85 S. W. 605.

10. An option of purchase "at the end of the said term" construed to give the right of purchase at the end of each renewal term as long as the lease remained in force. Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. [Md.] 62 A. 633.

11. See 4 C. L. 404.

12. City of Plattsmouth v. New Hampshire Sav. Bank [C. C. A.] 139 F. 631, citing numerous authorities. Where the tenant holds under a written lease, its terms are renewed by such holding over even to the extent of a power to confess judgment contained therein. Weber v. Powers, 114 Ill. App. 411. But where an accident occurred while a tenant of a ferry was holding over and the landlord, though an old man, went a long distance in the winter to the ferry to investigate and showed much concern, it justified a finding that the former tenant was then acting only as a servant of his for-

ancy from year to year where the tenancy is recognized by the landlord.[13] But this is only a rule of presumption, which is rebutted by proof of a different agreement or of facts inconsistent with the presumption.[14] The landlord has an election to treat one holding over as a tenant or a trespasser, and such election is conclusive against both parties.[15] But this rule has no application where the lease makes provision for continuing the tenancy from year to year for a specified number of years, on terms more favorable to the tenant, and he exercises the power by remaining in possession,[16] nor does it apply where a subsequent agreement is made modifying the terms of the original agreement.[17] Where the tenant retains possession wrongfully after the termination of his tenancy, he is liable, not merely for the rent under his terminated lease but for the value of the use and occupation of the premises.[18] A holding over by a subtenant beyond the tenant's term is a holding over by the tenant, and subjects the tenant to the statutory penalty of double rent.[19] Although the landlord may treat a subtenant so holding over as his own tenant and proceed against him as such, either for rent or possession, yet he is not compelled to do so, but may still look to the person with whom he dealt as his

mer landlord and not as a tenant. Wilson v. Alexander [Tenn.] 88 S. W. 935.

13. West v. Lungren [Neb.] 103 N. W. 1057. Under sec. 5528, Ball. Ann. Codes & St. Snyder v. Harding, 38 Wash. 666, 80 P. 789. Notwithstanding the provisions of the statute limiting the duration of indefinite tenancies in New York City. Furman v. Galanopulo, 92 N. Y. S. 730. The payment and receipt of rent after holding over creates a tenancy for one year at least. Evidence held not to rebut the presumption that the holding over was on the same terms as the original lease. Weber v. Powers, 114 Ill. App. 411. Where a lease expired on March 1 and a summons in unlawful detainer was issued and served on the 28th day of the same month, there was no holding over from year to year. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109. One who has the right to maintain billboards on land for one year, if he holds over becomes a tenant from year to year. Pickering v. O'Brien, 23 Pa. Super. Ct. 125. Under a lease for a definite term, with a covenant to surrender possession at the end thereof, upon breach of the covenant, a judgment in ejectment may be entered, notwithstanding a further provision that a lawful continuance of the tenancy beyond the term should be deemed a renewal for one year, for there could be no lawful continuance without consent of the lessor. Sweeney v. McDonnell, 25 Pa. Super. Ct. 69.

14. Rosenberg v. Sprecher [Neb.] 103 N. W. 1045; West v. Lungren [Neb.] 103 N. W. 1057. Where a lease was terminated by the lessee in the manner provided in the lease and he held over under an agreement for a new lease which the landlord failed to execute, he did not become a tenant from year to year, but, having paid the rent up to the time of his leaving the premises, the landlord had no further claim upon him. Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422. A mere notification by the tenants that they would occupy the premises after their term only as tenants from month to month is not enough to rebut the presumption; there must be some showing of assent on the part of the landlord. Abeel v. McDonnell [Tex. Civ. App.] 87 S. W. 1066. Where the conduct of the tenant is such as to induce the plaintiff to believe that he will keep the premises, he is liable for another year. Id. Where the conduct of the landlord's agent is such as to induce the tenant to believe that his demand for certain improvements will be complied with, the tenant's continued occupancy for a reasonable time, awaiting the agent's action, will not bind them for another year. Id. The agent's acquiescence in the tenant's notification that he would hold only from month to month, unless improvements were made, and in the demand for improvements, may be inferred from his acceptance of the first month's rent with such notification. Id. Where the defendant in unlawful detainer defended on the ground of an alleged parol extension of the lease for an indefinite term, an instruction that, unless a new lease was entered into for one year, plaintiff was entitled to recover, was not error, for it was based on defendant's own claim. Houck v. Williams [Colo.] 81 P. 800. Proofs held to show a subsequent new agreement between the parties. West v. Lungren [Neb.] 103 N. W. 1057.

15. Rosenberg v. Sprecher [Neb.] 103 N. W. 1045. This is so, regardless of an increased rent. Stein v. Sutherland, 92 N. Y. S. 314. The right of the landlord to elect to continue the tenancy is not affected by the fact that the tenant has refused to renew the lease and has given notice that he has hired other premises. Stover v. Davis [W. Va.] 49 S. E. 1023.

16. City of Plattsmouth v. New Hampshire Sav. Bank [C. C. A.] 139 F. 631.

17. Where the evidence shows that the tenant agreed to remain in case the heating appliances were made good and he received assurances to that effect, which were not carried out, he was relieved from paying further rent on leaving the premises for that reason. Rogers v. Babcock [Mich.] 102 N. W. 636.

18. Schwoebel v. Fugina [N. D.] 104 N. W. 848.

19. The tenant cannot evade this penalty by any arrangement by which the possession

tenant.[20] Where a tenant had been given notice to quit, the service on him of a further notice that rental of $20 per day would be charged and collected if he continued to occupy the premises did not create a new tenancy from year to year.[21]

§ 9. *Landlord's remedies for recovery of rent. Parties and procedure generally.*[22]—To sustain a distress warrant proceeding,[23] or an action for the recovery of rent,[24] the relation of landlord and tenant must be shown to exist. Where the landlord, upon obtaining restitution of the premises, has an election to recover their rental value in a suit on defendant's appeal bond to the circuit court, or to sue defendant in trespass or case to recover treble damages for the unlawful detainer,[25] an election of the remedy on the bond prevents a resort to the action for treble damages.[26] When forfeiture as of a certain day is declared on, the recovery of rent if any must be limited to that time.[27] Neither rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy, nor damages for breach of payment thereof, are favorable claims against the bankrupt's estate.[28] Under a provision that in case of the bankruptcy of the lessee, the rent for the entire term shall become due and payable and the landlord may proceed as in case of a breach, the landlord has no priority for his claim of rent for the unexpired portion of the term, under the Federal bankruptcy law, although he might under the state insolvency laws.[29] In an action for rent, where it appeared that all of defendant's dealings were with plaintiff, an amendment was allowed, striking from the record words following plaintiff's name, indicating that it was the lessee of another corporation.[30]

Stipulated right to relet.[31]—Where the lessor has the right, under the lease, in case of breach of covenants, to terminate the contract or to relet the premises at the risk of the lessee who is to be liable for the rent for the entire term, the lessor is bound to manifest such election within a reasonable time and exercise reasonable care in reletting.[32]

Distress.[33]—In general, at common law, all goods and chattels upon the premises were liable to distress for rent.[34] Distress for rent will lie only where the rela-

is not actually in him, but in another claiming under him. Fletcher v. Fletcher [Ga.] 51 S. E. 418.

20. Fletcher v. Fletcher [Ga.] 51 S. E. 418.

21. McClung v. McPherson [Or.] 81 P. 567.

22. See 4 C. L. 405.

23. Where the proceeding was based on an affidavit by one party, "as agent of" another, that the tenant was indebted "to him" for rent, on which a warrant was issued in the name of affiant "as agent of" the other, the proceeding was by the affiant, the words "as agent of" etc., being merely descriptive; and the relation between him and defendant not being that of landlord and tenant, verdict was properly for defendant. Stephens v. Hooks [Ga.] 50 S. E. 119.

24. Where a lessee under a gas lease mingled the gas from the demised premises with that of other parties so as to constitute a confusion of goods and had to account to such parties for the value of all the gas, the lessor is in no such privity with the other parties as to enable him to collect from them the royalty on his gas which was mingled with theirs. Aiken v. Zahn, 23 Pa. Super. Ct. 411.

25. Comp. Laws Mich. 1897, c. 308, §§ 24, 25. Schellenberg v. Frank [Mich.] 102 N. W. 644.

26. The legislature has power to compel a landlord to make such an election. Schellenberg v. Frank [Mich.] 102 N. W. 644.

27. Rent to a later period will not be awarded even though tendered, the election being against the tender. Williams v. Mangum [Ga.] 50 S. E. 110.

28. Act July 1, 1898, c. 541, § 63, cls. "a," "b" (30 Stat. at L. 562, 563; 3 U. S. Comp. St. 1901, p. 3447). Watson v. Merrill [C. C. A.] 136 F. 359.

29. In re Winfield Mfg. Co., 140 F. 185.

30. Mineral R. & Min. Co. v. Flaherty, 24 Pa. Super. Ct. 236.

31. See 4 C. L. 406.

32. International Trust Co. v. Weeks [C. C. A.] 139 F. 5. Where, in such a case of reletting, the rental was greater than that paid by the original lessee, the latter could not be credited with the excess over his rental, in an action by the lessor for rent accruing before the breach. Richardson v. Gordon [Mass.] 74 N. E. 344. Nor for loss of rent resulting from a re-lease to lessee's sublessee at a lower rent, when it did not appear that a greater rental could have been

tion of landlord and tenant exists.[35] The proceedings by which a landlord seizes goods under a distraint being statutory must be strictly pursued.[36] If the seizure is irregular it is trespass;[37] if regular, but the subsequent steps do not conform to the statute, the landlord becomes a trespasser ab initio.[38] As far as the liability for a tortious sale is concerned, it is immaterial whether the property belongs to a tenant or to a stranger.[39] For a wrongful distress, a tenant may bring replevin.[40] A constable who distrains and sells under a landlord's warrant is the agent of the landlord and not a public officer, and the presumption in favor of the legality of the proceedings of officers of the law does not apply in such cases.[41] A waiver of exemptions as against levy and sale for arrears and rent applies only to proceedings by distress and not generally to all debts for rent without regard to the process of collection.[42]

Attachment.[43]—The appropriation, otherwise than by attachment or execution, of furniture or other property found on demised premises, does not amount to an election by the landlord to hold the agent rather than the principal for the balance of unpaid rent.[44]

Liens and securities for payment of rent.[45]—Aside from liens acquired by process or distraint[46] various statutes give a lien to the landlord under certain prescribed conditions.[47] A landlord's statutory lien upon the crops may be asserted against the products or the purchaser thereof;[48] but the receipt by the landlord knowingly of part of the proceeds of an alleged wrongful sale of cotton by his tenant, on which he had a lien, constituted a ratification of the sale, depriving him of the right of possession as against the purchaser,[49] and where a landlord assents to his tenant's parol agreement to furnish a quantity of rice to secure the payment of a loan to assist in raising the same, he may become liable for interference with the tenant's performance by appropriating the rice himself.[50] The surrender of

obtained, or that reserved was not a fair rental. Id.

33. See 4 C. L. 406.

34. Furniture in a leased house, specifically bequeathed to a daughter, who with other children and an aunt occupied the house, was not exempt from distraint for rent that accrued after the death of testatrix, on the ground that it was in the custody of the law for purposes of administration. Fidelity Trust Co. v. Cook, 25 Pa. Super. Ct. 142.

35. Where the entry was under one holding adversely to another, the latter is not the landlord of the tenant. See Civ. Code 1895, § 3116. Sims v. Price [Ga.] 50 S. E. 961. The goods of a boarder are not liable to distraint for rent due from the boarding house keeper. Oliver v. Wheeler, 26 Pa. Super. Ct. 5.

36. Oliver v. Wheeler, 26 Pa. Super. Ct. 5; Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

37. Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

38. Oliver v. Wheeler, 26 Pa. Super. Ct. 5; Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

39. Oliver v. Wheeler, 26 Pa. Super. Ct. 5.

40. Affidavit of defense to action of replevin held insufficient for failure to include copy of assignment of leasehold interest. Strafford v. Walter, 24 Pa. Super. Ct. 498.

41. Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

42. Schock v. Waldelich, 27 Pa. Super. Ct. 215.

43. See 4 C. L. 407.

44. Smart v. Masters & Wardens, etc. Lodge No. 2, 6 Ohio C. C. (N. S.) 15.

45. See 4 C. L. 407.

46. In Illinois the landlord's lien for rent past due, except as to growing crops, does not arise until the goods are distrained. Springer v. Lipsis, 110 Ill. App. 109.

47. In Alabama a rent contract for a year need not be in writing to give the landlord a lien. Wilson v. State [Ala.] 39 So. 776. Under Rev. St. 1901, par. 2695, a landlord has no lien on crops grown on land which is not a homestead. Hoopes v. Brier [Ariz.] 80 P. 327.

48. In an action by a landlord to recover cotton purchased from a tenant, on which cotton the landlord claimed a lien, a complaint alleging the lien, the purchase, notice of the lien soon after the purchase, demand of the cotton and refusal to deliver, and refusal to allow inspection of the books required to be kept on purchase of cotton, states a cause of action. Parks v. Laurens Cotton Mills, 70 S. C. 274, 49 S. E. 871. One who appropriates cotton, on which a landlord has a statutory lien, soon after it is removed from the premises, without the landlord's consent, is liable to the landlord to the full amount of his lien. Thomas v. Tucker, Zeve & Co. [Tex. Civ. App.] 89 S. W. 802.

49. Noe v. Layton [Ark.] 89 S. W. 1005.

50. As he assumes nothing more than that he will not interfere with the tenant's performance, his act is not an agreement to

tenant's note in which he agreed to deliver a certain amount of cotton, however, was not, as a matter of law, an extinguishment of the landlord's lien for any balance due on the rental contract.[51] The landlord's lien for rent precedes any lien for money furnished to a receiver to gather a crop planted by a tenant,[52] and his priority in the distribution of a fund raised by sheriff's sale of the tenant's goods is not defeated by the fact that no notice of the claim for rent was given at or before the sale,[53] for a creditor of a tenant, by a levy upon the tenant's crop, can acquire no higher or superior right therein than that possessed by the tenant at the time of the levy.[54] But where the tenant has placed the crop in the possession of the landlord as security for his indebtedness, the tenant's interest can be reached by garnishment.[55] Crops of a tenant indebted to his landlord for rent, supplies or advances are considered in the landlord's possession so long as they remain on the rented premises,[56] and he may prevent their removal by a creditor of the tenant,[57] but the landlord has no right of possession as against the tenant.[58] The lessee cannot without the lessor's consent remove from the premises chattels thereon pledged for the rent.[59] The landlord's lien for rent yields to the lien of a mortgagee for the purchase money for property taken by a tenant on the leased premises.[60] The mere fact that the landlord has a special lien on a crop for his rent does not put the title in him, and he cannot acquire title thereto by simply taking possession of the same.[61] If for any reason the landlord's lien for rent does not attach, other claims upon the property are enforceable in the order of their precedence.[62]

A landlord's claim for rent may be assigned[63] by parol, mere delivery of the rent note or by appropriate words in a mortgage, which, so far as the assignment is concerned, need not be recorded;[64] and such assignment gives the assignee a lien on the crops which he, by taking possession, may convert into a legal title.[65]

Where the lien on tenant's furniture is imposed by the terms of the lease to secure the payment of instalments of rent only, the furniture cannot be seized and

answer for the debt, default or miscarriage of another within the statute of frauds. Groesbeck v. Thompson Mill. Co. [Tex. Civ. App.] 86 S. W. 346.

51. Wilson v. State [Ala.] 39 So. 776.

52. Parties furnishing money in such a case can have no lien on other cotton raised on the leased premises, but their claim must be settled by the receiver and accounted for to the court in the settlement of his account. Goodwin v. Mitchell [Miss.] 38 So. 657.

53. Wadas v. Sharp, 27 Pa. Super. Ct. 233.

54. It yields to the landlord's lien for rent, under Rev. St. 1895, art. 3108, which prohibits the removal of any of the crop by the tenant, without the landlord's consent, until all amounts due the latter have been paid. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.

55. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct. Rep. 659, 88 S. W. 889.

56. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.

57. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct, Rep. 659, 88 S. W. 889.

58. A levy on the tenant's interest, where the crop is not removed is valid. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct. Rep. 659. 88 S. W. 889.

59. The fact that adequate security remains is immaterial. Millot v. Conrad, 112 La. 928, 36 So. 807.

60. Arnold v. Hewitt [Iowa] 104 N. W. 843. A steam thresher being within the meaning of the term "farming utensils," Art. 3259, Civ. Code, the vendor's privilege on the proceeds of the sale thereof is superior to that of the lessor of the land for rent. Laporte v. Libby [La.] 38 So. 457.

61. A landlord in such a case cannot take possession of a crop after the tenant's death and apply tenant's share even to the payment of a debt owed by the latter, as against the widow to whom a part of the crop has been assigned as a year's support. Neal v. Smith [Ga.] 60 S. E. 922.

62. Where the landlord does not avail himself of the statutory lien and enforce it as prescribed by Code 1896, § 2717, but sues in assumpsit, no lien attaches to the property before the issue and levy of execution, and is preceded by an older mortgage lien. Howard v. Deens [Ala.] 39 So. 346. Where the landlord waives his lien, a mortgage of the crop is superior to the title of a subsequent purchaser. Rose & Co. v. Woods [Ala.] 39 So. 581.

63. Code Ala. 1896, § 2706. Bennett v. McKee [Ala.] 38 So. 129.

64. Words: "I hereby grant, bargain, sell and convey to the said I. A. Agee * * * all rents that may be due me during the current year, 1900," in a mortgage, held sufficient assignment of rent. Bennett v. McKee [Ala.] 38 So. 129.

65. Bennett v. McKee [Ala.] 38 So. 129.

sold to pay for repairs stipulated to be made by tenant.[66] In Alabama the lien given a landlord for advances embraces everything of value for the sustenance of the family and for carrying on his agricultural operations.[67] When a landlord suing to foreclose his lien is cast in judgment on a counterclaim for the full value of the chattels, the title to the chattels passes by satisfaction of such judgment and they are not thereafter subject to the lien.[68] A deposit made by a tenant as security for the performance of the covenants of his lease is generally to be treated merely as a security and not as a provision for liquidated damages, and a provision that it is to be treated as liquidated damages under certain circumstances is not necessarily controlling as to the character of the deposit.[69]

§ 10. *Landlord's remedies for recovery of premises.*[70] *Right of re-entry and remedies appropriate thereto.*[71]—When the relation of landlord and tenant exists, the landlord may, in a proper case, maintain forcible detainer to recover possession of the demised premises.[72] The statute of Oregon relative to forcible entry and detainer creates a species of constructive force where none in fact exists,[73] so that a tenant, notified to quit, but refusing to surrender possession and holding over after the expiration of his lease, within the meaning of the statute is guilty of holding by force, as much so as if he held by actual force.[74] The action is designed as a summary proceeding to give speedy and prompt relief and it is essentially civil in character.[75] The action for forcible entry will not lie where defendant was in possession when plaintiff's alleged possession began;[76] but where defendants attorn to plaintiff's agent, plaintiff can maintain an action against them for a subsequent unlawful withholding.[77] Summary proceedings will lie against a tenant for breach of covenant to pay taxes, though the lease gives the landlord the right to re-enter on such default.[78] There is no privity between the lessor and a sublessee, and the latter is a stranger to lessor's action against his lessee for restitution of the premises;[79] but where a subtenant holds over beyond the term of the tenant's lease, the landlord may resort to summary proceedings to oust both tenant and subtenant.[80] A person who executes a lease in his own name as owner can maintain unlawful detainer without joining persons beneficially interested.[81] In Washington the action of forcible entry and detainer may be maintained by "the person entitled to

66. Osmers v. Furey [Mont.] 81 P. 345.

67. Code 1896, § 2703, held to include a set of blacksmith tools used by the tenant in the making and repair of implements and appliances. Holladay v. Rutledge [Ala.] 39 So. 613. Pasturage furnished by a landlord, under the rent contract, for the work stock owned and used by the tenant in working the leased farm and for the cows from which the tenant obtained milk for his family, while he was cultivating the farm, is included under the head of supplies for which the landlord has a statutory lien. Thomas v. Tucker, Zeve & Co. [Tex. Civ. App.] 89 S. W. 802.

68. Hildebrand v. Head [Tex. Civ. App.] 13 Tex. Ct. 599, 88 S. W. 438. Judgment that they be sold to satisfy the lien was erroneous. Id.

69. Where a deposit was made as such security, to be forfeited as liquidated damages in case the lease should "be terminated by reason of any act on the part of the tenant before the period mentioned," for nonpayment of rent or violation of other covenants, and the tenant covenanted to quit and surrender the premises in as good condition as when received, except reasonable use and wear, the deposit was liquidated damages only where the term should be cut short by the tenant's act, and did not cover damages arising from his holding over. Wolf v. Dembosky, 95 N. Y. S. 559.

70, 71. See 4 C. L. 408.

72. Where the lessee, or any person under him, holds possession without right, after the determination of the lease. Merki v. Merki, 113 Ill. App. 518.

73. Sec. 5755, B. & C. Comp. Wolfer v. Hurst [Or.] 82 P. 20.

74, 75. Wolfer v. Hurst [Or.] 82 P. 20.

76, 77. Barnewell v. Stephens [Ala.] 38 So. 662.

78. Crosby v. Jarvis, 92 N. Y. S. 229.

79. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873.

80. In such case, a judgment in favor of plaintiff should be entered against both for possession and against the original tenant only for the statutory double rent. Fletcher v. Fletcher [Ga.] 51 S. E. 418.

81. Under Civ. Code, § 5, as trustee of an express trust. Houck v. Williams [Colo.] 81 P. 800.

the rent."[82] In Missouri the grantees of land are entitled to the same remedies against persons guilty of unlawful detainer before the grant as the grantor was.[83] The trustee in bankruptcy of the lessee of a hotel cannot recover possession of a portion thereof as against an assignee in good faith.[84] The right to re-enter for rent remaining unpaid, given by the lease, is not waived by the mere fact that the lessor, after the default, received rent from the lessee's receiver while he was in possession.[85] The right to resume possession of lands leased for oil cannot arise until default has been made in both exploring and payment of the rent stipulated in case of delay.[86] Where it did not appear that the lessee rented the premises for the purpose of illegally selling liquor thereon, the fact that he afterward did so did not entitle the owner to revoke possession without legal proceedings,[87] and where a lease was made pending partition proceedings, but the lessee's interest was not adjudicated therein and he was not ordered to surrender possession, the purchaser under the decree could not forcibly oust him, though wrongfully in possession.[88] A lessor cannot put aside his lease and sue to remain in possession and to be quieted therein, unless it is manifest that the lease is void.[89] Under the reserved right to re-enter in case of the breach of covenant by the lessee, the lessor may bring ejectment in case of such a breach.[90] A court of equity has no jurisdiction of a petition which, in effect, merely seeks to recover possession of demised premises after a declaration of forfeiture by the lessor.[91]

Procedure.[92]—The action of unlawful detainer is a purely possessory action and does not go to the title,[93] as the tenant cannot question the landlord's title;[94] nor can any secret equities between the parties be investigated or decided;[95] nor can an equitable right to an extended term be set up in such action.[96] An affidavit in a proceeding to dispossess a tenant holding over, that fails to allege facts from which the existence of the relation of landlord and tenant may be inferred and the term of the lease, is defective.[97] A complaint in unlawful detainer which alleges

82. Under Sec. 1170, subd. 3, Pierce's Code; Ball. Ann. Codes & St., § 5527, subd. 3. Allegation that after the leasing the premises were decreed to belong to plaintiff and he is the owner thereof and entitled to the rent, held to be a sufficient allegation of ownership. State v. Pittenger, 37 Wash. 384, 79 P. 942.

83. Rev. St. 1899, § 3352. In this case the lease was made by mistake to the grantor, who assigned it to his grantee. Barada-Ghio Real Estate Co. v. Heidbrink [Mo. App.] 86 S. W. 1109.

84. An assignment of the buffet and the right to occupy it for the remainder of lessee's term. Lamb v. Hall [Cal.] 81 P. 288.

85. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 157.

86. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

87, 88. Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582.

89. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

90. Breach of covenant to comply with orders of board of health and other municipal departments. In such case the reasonableness of the requirements cannot be questioned by lessee. Palmieri v. Antinozzi, 95 N. Y. S. 865.

91. Gunning v. Sorg, 113 Ill. App. 332.

92. See 4 C. L. 408.

93. Stover v. Davis [W. Va.] 49 S. E. 1023; Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

94. Dilks v. Kelsey [N. J. Law] 59 A. 897. The tenant, by accepting the lease had precluded himself from showing want of title in his landlord. Stover v. Davis [W. Va.] 49 S. E. 1023.

95. Defendant, separated from her husband, deeded property to plaintiff. Having united with her husband again she occupied the land, making payments "in the nature of rent" under an agreement by plaintiff to deed her the land when a certain amount was paid, She finally repudiated the agreement, claiming that the deed to plaintiff was invalid because it was not signed by her husband and was only intended as a mortgage. Held, that such questions could not be determined in unlawful entry and detainer proceedings to oust her as a tenant. Clark v. Bourgeois [Miss.] 38 So. 187.

96. Where defendant, as assignee of the original lessees, claimed an equitable right to renew the lease under the lessor's covenant therefor, he properly resorted to equity to enjoin the unlawful detainer proceedings and to enforce specific performance. Blount v. Connolly, 110 Mo. App. 603, 85 S. W. 605.

97. Under § 2548, Rev. Code 1892. The affidavit set forth merely that "a tenant for a part of" a year "holds over * * * after the expiration of his term, without permis-

a holding over after the expiration of the term fixed in the lease is not defective for failing to allege the giving of a notice to quit;[98] but a complaint for the cancellation of a lease for fraudulent procurement, in an action brought against an assignee thereof, which failed to allege that assignees had knowledge or notice of the fraud, was fatally defective.[99] The plaintiff must show that the lease is an absolute nullity or is forfeited under some provision therein.[1] In Pennsylvania an inquisition in a landlord and tenant proceeding must show that the defendant's term had fully expired when the proceedings were instituted.[2] Insufficiency of the amount of rent cannot be sustained in a suit exclusively for possession.[3] In an action for unlawful detainer a deed was admissible to show the extent of plaintiff's possession, though it did not cover all the premises claimed in the complaint.[4] The procuring of a liquor license for the rented premises in the name of one person does not estop the landlord from asserting that the tenancy is in another.[5] In summary proceedings based upon nonpayment of rent and nonpayment of taxes, proof of the former alone is enough to sustain an order in favor of the landlord.[6] The objection that the action to recover possession of real property was prematurely brought for insufficiency of notice to quit must be raised by plea in abatement and is waived by answering to the merits.[7] In proceedings to dispossess a tenant for nonpayment of rent, it is no defense that the landlord has violated his agreement to keep a liquor license in force for the tenant.[8] In such actions counterclaims or set-offs are not admissible, but the tenant may set off counterclaims against the rent demanded, in an action by the tenant on a bond on appeal from a judgment for the possession of the property.[9] In unlawful detainer defendant may show that plaintiffs hold the lease under a fictitious and collusive sale of the premises intended to deprive defendant of his right of purchase under the lease.[10] Where the defendant in summary proceedings to recover possession claims under an alleged new parol lease, the burden of establishing the same is on defendant.[11] In forcible entry and detainer to recover possession, plaintiff can have judgment for only what rent was due when the action was brought and was claimed in the complaint.[12] The judgment against a tenant who is unsuccessful in his appeal from a judgment in favor of his landlord for possession should be for intervening damages to the property and for use and occupation.[13] The rental value of the premises during the time detained is the proper measure of damages, in an action for unlawful detention.[14] In California the statutory provisions relative to trebling the rent due, in case of tenants holding over after notice to quit do not warrant the award of treble the value of rent and profits as damages in an action of unlawful detainer.[15] In New York, where a verdict in summary proceedings is set aside by the justice as against

sion of the landlord." Bowles v. Dean, 84 Miss. 376, 36 So. 391.

98. Where the term is specifically fixed in the release, no notice is necessary under sec. 1161, subd. 1, Code Civ. Proc. Craig v. Gray [Cal. App.] 82 P. 699.

99. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

1. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La] 38 So. 932.

2. Under the act of 1772. Seidel v. Sperry, 26 Pa. Super. Ct. 649.

3. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

4. Barnewell v. Stephens [Ala.] 38 So. 662.

5. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791.

6. Peabody v. Long Acre Square Bldg. Co., 94 N. Y. S. 507.

7. McClung v. McPherson [Or.] 82 P. 13.

8. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791.

9. McMichael v. McFalls, 23 Pa. Super. Ct. 256.

10. Ogle v. Hubbel [Cal. App.] 82 P. 217.

11. Weinhandler v. Eastern Brewing Co., 92 N. Y. S. 792.

12. Unless a supplemental or amended complaint shall be filed. State v. Pittenger, 37 Wash. 384, 79 P. 942.

13. Byrne v. Morrison, 25 App. D. C. 72.

14. Millington v. O'Dell [Ind. App.] 73 N. E. 949.

15. Civ. Code, §§ 3334, 3345; Code Civ. Proc.

the evidence, he cannot direct a verdict, but only order a new trial.[16] Where it is made to appear that the sheriff did not dispossess the defendant in forcible entry proceedings, as shown by his return, an alias writ of possession may be issued.[17] In New York, any person claiming to be in possession of the premises as undertenant may intervene in summary proceedings to recover possession and answer;[18] and the lessor, who has commenced forcible entry and detainer proceedings upon the lessee's breach of conditions by the conveyance of his leasehold by trust deed is entitled to intervene in proceedings to foreclose the trust deed, to obtain a cancellation thereof, as he could not acquire possession as against the receiver appointed.[19]

Where a lease shows on its face that the term has expired, no affidavit or proof of the expiration of the term is necessary to authorize the entry of an amicable action of ejectment and confession of judgment under the power contained in the lease.[20] In an amicable action under an ejectment clause in the lease, the lessee cannot attack the validity of a lease under which he went into possession on the ground that the owner's agent had no written authority to execute the lease.[21] Where judgment has been entered under an ejectment clause in a lease, no second judgment can be entered although such judgment may have been premature or voidable from matters outside the record.[22] A release of errors with the warrant of attorney to enter judgment of ejectment for violation of the covenants of a lease operates only on errors or irregularities in the proceedings apparent on the record and does not reach the defect of lack of authority to proceed.[23] In trespass to try title, where defendant claims a lease from plaintiff and damages for eviction under a writ of sequestration in the action, while the burden of proof is on defendant to show his damages, yet the plaintiff cannot recover without showing by a preponderance of evidence his right to possession.[24]

§ 11. *Liability of third persons to landlord or tenant.*[25]—In an action for enticement of a tenant to leave the premises without sufficient cause,[26] the sufficiency of the cause for leaving is a question of law;[27] and the measure of damages is the value of the rent lost and damages for land lying uncultivated.[28] While a landlord may recover for the removal and conversion by a third party of produce delivered for him in payment of rent, he cannot maintain either trover, trespass or case for the removal of produce which has never been delivered to or for him by his tenants, and to which he has but an equitable title.[29] The lessor cannot recover for property sold by him to the lessee on credit and taken away by a third party, in the absence of any showing of damages.[30] The lessor has a right of action for a trespass on the

§ 1174. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

16. Kiernan v. Cashin, 92 N. Y. S. 255.

17. Smith v. Hardwick [Ky.] 89 S. W. 724.

18. Under Code Civ. Proc. § 2244. The fact that he described himself as undertenant, when in fact he claimed under a new lease to himself was immaterial. Kiernan v. Cashin, 92 N. Y. S. 255.

19. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870.

20. Sweeney v. McDonnell, 25 Pa. Super. Ct. 69.

21. Gleadall v. Kenney, 23 Pa. Super. Ct. 576.

22, 23. Philadelphia v. Johnson, 23 Pa. Super. Ct. 591.

24. A requested charge that, if defendant failed to discharge his burden, the verdict should be "for the plaintiff" went too far and was properly refused. Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404.

25. See 4 C. L. 410.

26. Laws of 1900, Miss. p. 140, c. 102. Petty v. Leggett [Miss.] 38 So. 549.

27. Failure of the landlord to furnish the tenant meat and clothing is insufficient cause for abandoning a lease unless the landlord was under a legal obligation to furnish such articles. Petty v. Leggett [Miss.] 38 So. 549.

28. Wagner v. Ellis [Miss.] 37 So. 959.

29. Court below directed the general affirmative charge for plaintiff and directed the inclusion in the verdict of articles not delivered for the plaintiff, on which he would have a lien for rent only in case the other articles were insufficient, which was not shown; judgment reversed. Baker v. Cotney [Ala.] 38 So. 131.

30. Claiming a lien for the purchase price

leased property.[31] The tenant can recover according to his interest in the premises, for damages caused by a third person, although he may not be required to repair the injuries,[32] and the tenant is entitled to compensation for the taking of his possession for public use.[33] While the tenant has a right of action for a trespass committed upon the leased premises, such right does not extend to a trespass committed after the expiration of his term, in the absence of any arrangement for further occupation.[34]

§ 12. *Crimes and penalties.*[35]—A party cannot be convicted of the offense of enticing away and employing the tenant of another under yearly contract, without proof of knowledge of such contract, some enticement and employment of such tenant.[36] In Alabama it is a criminal offense to sell personal property with intent to defraud the landlord of his lien for rent.[37] Under a similar statute of Iowa, each separate sale or disposal constitutes a complete offense.[38] In North Carolina, to convict a tenant of the offense of injuring a tenement house of his landlord, the relation of landlord and tenant must be established and a willful and unlawful damage or injury shown to have been done by the tenant during his term.[39]

LAND PATENTS, see latest topical index.

FIXTURES AS BETWEEN LANDLORD AND TENANT.[40]

[SPECIAL ARTICLE.]

§ 1. *General rule.*—The general rule of law applicable to fixtures is always construed with much greater latitude and indulgence between landlord and tenant in favor of the tenant than between any other class of persons. Under the history of the law of fixtures[41] it appears how the old, strict rule of the common law was gradually modified and excepted to in favor of the tenant,—how, first, an exception was made in favor of the tenant, out of considerations of public policy, as to fixtures devoted to purposes of trade, then extended to fixtures used for purposes of domestic convenience, and finally to annexed articles of ornament. In this respect, the general rule is, in the absence of a special agreement, that the tenant is permitted to remove all his erections and annexations of chattels to the realty of his

under Code 1896, § 2703, lessor sued for a mule taken away from lessee, but failed to show the price for which he sold it to lessee or whether any part of the price had been paid. King v. Henderson & Bruce [Ala.] 38 So. 118.

31. Bright v. Bell, 113 La. 1078, 37 So. 976.

32. Moeckel v. Cross & Co. [Mass.] 76 N. E. 447.

33. Military Camp. Alexander's Case, 39 Ct. Cl. 383.

34. Plaintiff sued defendant for turning cattle into a pasture with his cattle, after the expiration of his term. Held, that he could show damages to his high grade cows from contact with defendant's scrub bulls, but he could not prove damages to the pasture. Baldwin v. Richardson [Tex. Civ. App.] 13 Tex. Ct. Rep. 189, 87 S. W. 746.

35. See 4 C. L. 410.

36. Evidence held utterly insufficient to sustain the allegations of the affidavit. Haney v. State [Miss.] 38 So. 284.

37. Code 1896, § 4757. Evidence which showed that the proceeds of the property were paid over to the holder of a mortgage, conveying the property sold, executed by defendant and the party claimed to have been defrauded, was not sufficient to support a conviction. Smith v. State, 139 Ala. 115, 36 So. 727.

38. Acts 29th Gen. Assem. p. 106, c. 146. State v. Ashpole [Iowa] 104 N. W. 281.

39. Code, § 1761. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

40. From Bronson on Fixtures. Copyright 1904. By Harrison A. Bronson. Annotated with references to Current Law, vols 1-6.

41. See Bronson, Fixt. chapter 2.

landlord which were so placed for purposes of trade, domestic convenience, or for ornamental uses, provided that such annexed articles are removable without material injury to the freehold, or to the essential characteristics of themselves.[42] The original ground for these exceptions arose from the desire to foster trade and commerce, and the subsequent exceptions in favor of domestic and ornamental fixtures were founded upon reasons of public policy; for, manifestly, a tenant annexes his domestic and ornamental fixtures merely for purposes of temporary convenience, and a rule that would pass to the landlord such fixtures the moment that they are annexed would work great hardship to tenants, without any practical advantages to landlords.[43]

§ 2. *Nature and application of the rule.*—This rule of law, as especially applied between landlord and tenant, has reference only to what might be termed the "tenant's removable fixtures," and should not be confused with the right of a tenant to remove annexed chattels which are purely chattels. Thus, all those articles annexed by the tenant which, from the application of the recognized tests in the law of fixtures, could not be said to have become a part of the realty, are personal property, and, as such, are removable, absolutely, by the tenant, the same as by other persons standing in different relations to the owner of the realty.[44] But chattels which are so attached to the freehold by the tenant for trade, domestic, or ornamental purposes as ordinarily, under the law of fixtures, to become a part of the realty, are nevertheless, under certain conditions and circumstances, removable by the tenant. These chattels are properly the tenant's removable fixtures, and, by the weight of authority, are considered as realty until severed,[45] although there is

42. Ewell, Fixt. p. 96; Tyler, Fixt. p. 150; Taylor, Landlord & Tenant, § 544 [2 C. L. 681; 4 C. L. 398, supra, 6 C. L. 366]; Elwes v. Maw, 3 East, 38; Wall v. Hinds, 4 Gray [Mass.] 270, 64 Am. Dec. 64; Hanrahan v. O'Reilly, 102 Mass. 201; Murray v. Moross, 27 Mich. 203; Friedlander v. Ryder, 30 Neb. 783; Chase v. New York Insulated Wire Co., 57 Ill. App. 205; Collamore v. Gillis, 149 Mass. 578. The cases are not in harmony in respect to the provisions that annexed chattels must be removed without injury to the premises or to themselves. See post, § 4, "Trade Fixtures."

43. Poole's Case, 1 Salk. 368; Seeger v. Pettit, 77 Pa. 440; Ewell, Fixt. p. 127; Wall v. Hinds, 4 Gray [Mass.] 270, 64 Am. Dec. 64.

44. See Fixtures, 5 C. L. 1431; Bronson, Fixt. c. 3, "Requisites and Tests of a Fixture." Thus, a blacksmith shop moved to a farm by a tenant for temporary use and resting on the runners by means of which it was hauled to the farm, is personal property. Smyth v. Stoddard, 203 Ill. 424.

45. In Bliss v. Whitney, 9 Allen [Mass.] 114, 85 Am. Dec. 745, Gray, J., said: "Fixtures annexed to real estate become part of it. * * * If annexed by a tenant for purposes of trade, or some other immediate or temporary uses, or for ornament, he may, indeed, while remaining in possession, sever them from the land, and thus change their character back again from realty to personalty; but if, without having done so, he voluntarily quits the premises at the expiration of his term, without any special agreement with his landlord, neither he nor his vendee can afterwards claim them against the owner of the land." "For many, if not most, purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet, until so severed, it remains a part of the realty." Ewell, Fixt. p. 77, and notes there cited [The law presumes that a tenant does not intend to make trade fixtures part of the realty, 5 C. L. 398].

An oyster and trench counter and a bar nailed to the floor are a part of the realty so long as annexed. Guthrie v. Jones, 108 Mass. 191.

So, a counting room built within a store, and a trade fixture, is a part of the realty so long as annexed to the freehold. Brown v. Wallis, 115 Mass. 158.

See Raddin v. Arnold, 116 Mass. 270; Freeman v. Dawson, 110 U. S. 270, 28 Law. Ed. 141; Sampson v. Camperdown Cotton Mills, 64 F. 939; First Nat. Bank of Joliet v. Adam, 138 Ill. 483; Treadway v. Sharon, 7 Nev. 37; Stout v. Stoppel, 30 Minn. 56; Pemberton v. King, 13 N. C. 376; Donnelly v. Thieben, 9 Ill. App. 495; Preston v. Briggs, 16 Vt. 129; Darrah v. Baird, 101 Pa. 265.

In Griffin v. Ransdell, 71 Ind. 440, it was held that a dwelling house erected by the tenant was a part of the realty, as between the landlord and the tenant, and that a third party must show a change in its character in order to maintain a personal action.

So, in Kile v. Giebner, 114 Pa. 381, it was held that a stationary saw mill, though a trade fixture because erected by the tenant as accessory to his trade, was a chattel real during the continuance of the term of the tenant.

a noticeable lack of harmony and a variance of opinion in the decisions upon this point.[46] The reason assigned for so considering such articles a part of the realty is that the tenant indicates, by the mode in which he attaches them, that they are to be a part of the freehold during the continuance of his interest in the property.[47] This distinction is of practical importance in determining the right of a tenant to remove his fixtures after the expiration of his term, or after the surrender of possession,[48] and, in certain cases, in determining the remedies of trover and replevin.[49]

§ 3. *Nature of the tenant's interest.*—As to fixtures erected by the tenant upon his lessor's realty, which, from the applied tests of fixtures, are removable at any and all times[50] by the tenant, and are personalty, the tenant, of course, possesses the same right to and interest in the same as in any personal property. But where articles are substantially annexed to the freehold by the tenant for trade, domestic, or ornamental purposes, and are removable by him only within a certain time and

46. There are many decisions treating trade fixtures, while annexed, as personalty, but in many instances the term has been inadvertently applied by reason of the fact that the remedy sought was of a personal kind. On this, Tyler, in his work on Fixtures (page 223), says: "Fixtures of this kind have often been spoken of by courts in the United States as personal property, even while attached to the soil. As they were the personal property of the party attaching them to the soil before they became fixtures, and as he has the right to remove them at any time and again convert them into personal property, courts have sometimes seen proper to hold them all the time as such. Under this view of the case, actions of trover have been sometimes sustained for fixtures that were never removed or detached from the freehold. In all these cases, the courts call the things which are the subject of litigation personal property; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them."

So, in many New York cases, trade fixtures of a tenant have been considered as the personal property of the tenant. See Walker v. Sherman, 20 Wend. 636; Cook v. Champlain Transp. Co., 1 Denio, 91; Kelsey v. Durkee, 33 Barb. 410; Moore v. Wood, 12 Abb. Pr. 393.

So in Pennsylvania, see Lemar v. Miles, 4 Watts, 330; Hey v. Bruner, 61 Pa. 87; Heffner v. Lewis, 73 Pa. 302; Watts v. Lehman, 107 Pa. 106; Kile v. Giebner, 114 Pa. 381.

"It seems clear, upon principles well founded in reason and public policy, that the rule of law is well established that buildings placed upon leased premises by the tenant, to be used for the purpose of trade and business, are in law deemed personal property, and may be mortgaged as chattels, or levied on as personalty, and sold upon execution, and that the purchaser at such sale has the right to enter upon the premises to remove them." Gantt, J., in Lanphere v. Lowe, 3 Neb. 131. See, also, Bartlett v. Haviland, 92 Mich. 552; Bircher v. Parker, 43 Mo. 443; Torrey v. Burnett, 38 N. J. Law, 457; Belvin v. Raleigh Paper Co., 123 N. C. 138.

So, in regard to railroads, it is held in many cases that they come within the rule regarding trade fixtures, and are therefore not an accessory to the enjoyment of the freehold, nor in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. So, being accessory merely to the business, they must be regarded as personal property. In Wagner v. Cleveland & T. R. Co., 22 Ohio St. 563, 10 Am. Rep. 770, the court says: "The general principle to be kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises and the premises, or locus in quo. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to real estate, retain the personal character of the principal, to which they appropriately belong and are subservient." So, in Northern Central Ry. Co. v. Canton Company of Baltimore, 30 Md. 347, the court said: "A railway is certainly quite as essential to the trade and business of a railway company as a steam engine, and the house which may cover it, or any other fixture, can be to the miller or the miner. * * * Prima facie, a house with its foundation planted in the soil is real property; yet when it is accessory to trade, and in law a trade fixture, we find all the authorities regard it as personal property." Quoted in St. Louis, etc., R. Co. v. Nyce, 61 Kan. 394, 48 L. R. A. 241. See, also, Western North Carolina R. Co. v. Deal, 90 N. C. 110; Albion River R. Co. v. Hesser, 84 Cal. 435, 24 P. 288; Oregon Ry. & Nav. Co. v. Mosier, 14 Or. 519, 13 P. 300, 58 Am. Rep. 321; Jones v. New Orleans & S. R. Co. & I. Ass'n, 70 Ala. 227; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28; Newgass v. Railway Co., 54 Ark. 140, 15 S. W. 188; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Perkins v. Swank, 43 Miss. 349.

47. Boyd v. Shorrock, L. R. 5 Eq. 78 [Fixtures, 5 C. L. 1431.] Ewell, Fixt. p. 32.

48. Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467; Talbot v. Whipple, 14 Allen [Mass.] 177; Bliss v. Whitney, 9 Allen [Mass.] 114, 85 Am. Dec. 745; Beckwith v. Boyce, 9 Mo. 560; State v. Elliot, 11 N. H. 540.

49. Shapira v. Barney, 30 Minn. 59; Davis v. Jones, 2 Barn. & Ald. 165. See Bronson, Fixt. § 109, "Trover," and § 110, "Replevin."

50. [He has a reasonable time, 2 C. L. 681, n. 60; ante, 6 C. L., Landlord and Tenant, § 5 F.]

under certain circumstances,[51] the nature of his interest is somewhat different. It is not, distinctively, an interest in land, for it is not within the statute of frauds, so as to require a note or memorandum in writing by the tenant in order to pass title to such fixtures to a purchaser.[52] Yet his interest in such fixtures is not the same as that in an annexed chattel treated as purely personalty, for in all cases the personal actions of trover and replevin will not lie.[53] His interest is absolutely neither an interest in chattels nor an interest in land, but rather it is a chattel interest in things for the time being affixed to land. This interest is peculiar, in that it partakes both of the character of personalty and realty.[54] In some aspects his interest is a defeasible interest in land during the continuance of his term,[55] and his right to remove these fixtures is considered rather as a privilege allowed the tenant than an absolute right to the things themselves.[56] The landlord, however, acquires his interest in such fixtures by reason of the fixtures being part and parcel of the land which he owns, and as to him, of course, they are real estate. During the continuance of the tenancy he possesses a defeasible interest in them as realty; after the termination of the tenancy, and upon their nonremoval, his interest becomes absolute. It may be stated that under the present status of the law of fixtures and the present tendency of the various courts in relation to the same, this distinction in respect to the tenant's interest is rather artificial and too finely drawn for practical purposes, for the reason that the courts are tending towards a recognition of all removable fixtures as personal property, while annexed, so that the difference is practically now a historical difference, which a few courts still recognize.[57]

§ 4. *Trade fixtures.*—Articles attached to or erected upon the realty by the tenant for the purpose of assisting him in carrying on a trade are removable by him during his tenancy. The rise of this exception to the common-law rule, that whatever is annexed to the soil becomes a part thereof, and hence irremovable, has a more general pertinency than this article.[58] It is of importance, however, to note that there is a divergence of opinion among the courts as to the application of this rule, and as to what is included within its terms. The English decisions, particularly those of an early date, accorded to the tenant the right to remove his trade fixtures during his term, provided that they were not so annexed as to materially injure the realty in their removal, or to cause the articles themselves to be reduced to a mere mass of crude materials, or to be destroyed.[59] This general principle is followed in its general tenor by the American decisions,[60] although there is a con-

51. [Not removable as against grantee of landlord without notice, 2 C. L. 681, n. 56.]

52. Hallen v. Runder, 1 Cromp., M. & R. 266; Lee v. Gaskell, 1 Q. B. Div. 700; South Baltimore Co. v. Muhlbach, 69 Md. 395.

53. Roffey v. Henderson, 17 Q. B. 574.

54. Tyler, Fixt. p. 165 et seq. [In consequence of this dual character a mechanic's lien may attach, see ante, 6 C. L. Landlord and Tenant, § 5 F.]

55. Tyler, Fixt. p. 166.

56. Taylor, in his work on Landlord & Tenant, § 551, speaks of this right of removal of the tenant as a privilege allowed, rather than an absolute right to the things themselves, and, as such, it must be exercised before the tenant's interest expires, or the landlord's defeasible right and title become absolute.

57. See Bronson Fixt. c. 6, note 4.

58. See Bronson Fixt. c. 2, "Fixtures Historically Treated."

59. Poole's Case, 1 Salk. 368; Whitehead v. Bennett, 27 Law J. Ch. 474, 6 Wkly. Rep. 351; Martin v. Roe, 7 El. & Bl. 237. In the last cited case, in regard to injury by removal, Lord Campbell said: "In all cases of this kind, injury to the freehold must be spoken of with less than literal strictness. A screw or a nail can scarcely be drawn without some attrition; and when all the harm done is that which is unavoidable to the mortar laid on the brick walls, this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle, the criterion of injury to the freehold would be idle."

60. Wall v. Hinds, 4 Gray [Mass.] 271, 64 Am. Dec. 64; Hanrahan v. O'Reilly, 102 Mass. 201; Collamore v. Gillis, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150; Capen v. Peckham, 35 Conn. 88; Linahan v. Barr, 41 Conn. 471; Chase v. New York Insulated Wire Co., 57 Ill. App. 205; Roth v.

siderable respectable authority giving the right of removal of a trade fixture to a tenant, irrespective of the fact that the articles, by their removal, may lose their essential characteristics as chattels, or be practically destroyed.[61] This holding is upon the principle that the landlord cannot be affected by injury done by the tenant to his own property so long as the freehold is not damaged; for the fixture so removed may still be valuable to the tenant, even though he may be put to extra expense to repair or rebuild it.[62] Thus, in cases where a brick chimney, a brick vault, a baker's oven, or other chattel must be taken down in pieces in order to effect its removal, the fact of demolition is immaterial so long as the resulting mass is of value and of use for other trade or commercial purposes.[63] Respecting

Collins, 109 Iowa, 501, 80 N. W. 543; Stockwell v. Marks, 17 Me. 455, 35 Am. Dec. 266; Shapira v. Barney, 30 Minn. 59, 14 N. W. 270; Murray v. Moross, 27 Mich. 203; Conrad v. Saginaw Min. Co., 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; Bartlett v. Haviland, 92 Mich. 552, 52 N. W. 1008; Powell v. McAshan, 28 Mo. 70; Chandler v. Oldham, 55 Mo. App. 139; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; Dubois v. Kelly, 10 Barb. [N. Y.] 496; Ombony v. Jones, 21 Barb. [N. Y.] 520, afd. 19 N. Y. 234; Conner v. Coffin, 22 N. H. 538; Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; Cubbins v. Ayres, 72 Tenn. [4 Lea] 329; McDavid v. Wood, 52 Tenn. [5 Heisk.] 96. [See Fixtures, 2 C. L. 9; 3 C. L. 1432; 5 C. L. 1431.]

A building and shed that are so erected and so attached to the premises as to be not removable without material injury to the premises are a part of the realty and irremovable. Powell v. McAshan, 28 Mo. 70.

In Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700, it was held that a frame addition, 24x20, two stories in height, placed upon wooden posts set in the ground, and attached to the main building by cutting off the eaves and taking out the windows of the main building, was not removable by the tenant because the addition was "of such a character, and was so annexed to the main building, that its removal would greatly injure the demised premises." The court said: "The modern decisions are to the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession." Citing Lanphere v. Lowe, 3 Neb. 131; 1 Washburn, Real Property, c. 1, § 27; Taylor, Landlord & Tenant, § 550; Whiting v. Brastow, 4 Pick. [Mass.] 311.

And so, a hanging floor in a business house, suspended by iron rods attached to the joists of the floor above, and by joists let into the walls on two sides of the building, was held to be irremovable. Chase v. New York Insulated Wire Co., 57 Ill. App. 205.

61. In the United States supreme court there is a broad statement in Van Ness v. Pacard, 2 Pet. 137, quoted in the text above, and in the case of Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 35 Law. Ed. 1055, the statement is made obiter, that "it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purpose of trade, may not be removed at the end of the term."

In Moore v. Wood, 12 Abb. Pr. [N. Y.] 393, a brick chimney sunk three feet into the ground for a foundation, and not removable without being taken down and to pieces, was held to be removable by the tenant.

The court here said: "The rigor of the ancient law of fixtures has yielded, and must continue to yield, to the contingencies of modern times. The law must take notice of trade and manufactures and their wants, and afford to them adequate and appropriate protection."

In Dostal v. McCaddon, 35 Iowa, 318, a vault built for banking purposes within a building, and a safe built within the vault, and too large to be removed without tearing down the vault, were both held to be removable as trade fixtures.

So, in Dubois v. Kelly, 10 Barb. [N. Y.] 496, a shed, stable, storeroom, and barn so erected and built upon and in a side hill as to be removable only upon being taken down, were considered to be trade fixtures. See, also, Cromie v. Hoover, 40 Ind. 49; White's Appeal, 10 Pa. 252.

In Baker v. McClurg, 198 Ill. 28, 59 L. R. A. 131, where the tenants placed, in a building used as a bakery, ovens upon brick foundations of their own, an engine and a boiler, the latter encased in a brick masonry jacket, it was held that the same were removable, as trade fixtures, even though, by the removal, they would be more or less injured, and would have to be taken down in pieces.

But in Massachusetts the English rule is followed. In the case of Collamore v. Gillis, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150, where a baker's oven, consisting of about 12,000 bricks, was built into a leased building by the tenant, and was not capable of removal intact, the court said: "We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed or reduced to a mere mass of crude materials. In the case before us, the oven was not like a machine or a structure, the parts of which are fitted to each other, and can be taken apart and put together again at pleasure in some other place. It had, so to speak, no removable identity, but when taken down it necessarily lost its character as an oven, and, with the exception of the iron lining and door, became mere bricks and mortar."

the injury done to the realty by the removal of fixtures erected for trade purposes, there is a noticeable tendency in the decisions to interpret the general rule more freely in cases of trade fixtures than otherwise, and in favor of the tenant. In Van Ness v. Pacard,[64] a leading case on the subject of trade fixtures, the court stated, in reference to trade fixtures: "The question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large, as well as a small, messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose." This presents the extreme view of the American cases on the question of injury by removal. As a rule, it is too broad, and, in many cases, it is not strictly correct, for chattels that are attached for trade purposes, and so annexed to the realty as to be an integral part of the premises, or articles that have been substituted for other articles that were a part of the realty, do not thereby become trade fixtures, subject to removal, but they are a part of the freehold.[65] The effect of the modern decisions, however, in respect to the question of injury by removal, seems to grant to the tenant the right to remove those trade fixtures whose removal will not materially injure the premises, or put them in a worse condition than they were in when he took possession.[66] [In applying the foregoing tests the question generally becomes one of fact.[67]]

What constitutes a trade.—The term "trade," as used in connection with trade fixtures, has a much broader signification than the literal and customary use of the word; for within the term of "trade fixtures" are included not only occupations ordinarily designated as "trade," but numerous other occupations, having a resemblance or affinity to a trade, though scarcely to be included within the ordinary definition of that term. In fact, it seems that the term, in this connection, covers any calling exercised for the purpose of pecuniary profit, provided that it is not exclusively agricultural in its nature, and it matters not whether the article attached or annexed to the freehold is used solely for a trade purpose or not; it is sufficient if it is used partly for a trade purpose, thus constituting a mixed case.[68]

62. Baker v. McClurg, 198 Ill. 28, 59 L. R. A. 131.

63. Dostal v. McCaddon, 35 Iowa, 318; Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Baker v. McClurg, 198 Ill. 28; Dubois v. Kelly, 10 Barb. [N. Y.] 496. But see Collamore v. Gillis, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150.

64. Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374.

65. In Fletcher v. McMillan, 103 Mich. 494, 61 N. W. 791, a tenant removed the pillars, partitions, sewers, and floors in a building occupied by him, and replaced them by others, more expensive and better suited to his business, and it was held that the substituted materials were not trade fixtures. So, in Pond & Hasey Co. v. O'Connor, 70 Minn. 266, 73 N. W. 159, a steam heating plant, consisting of a steam boiler set in and on a cement and brick foundation, and encased in brick masonry, which was substituted for a prior plant, was held to be a part of the realty. In Hay v. Tillyer [N. J. Eq.] 14 A. 18, where glass furnaces in a manufactory were worn out by the tenants, and they substituted and built new ones in their places, such new furnaces were not trade fixtures, but a part of the realty. But see Beers v. St. John, 16 Conn. 322, where a shop was substituted for an old one, the material and construction being different, so as, in reality, to furnish a building distinct from the old one, and not a reconstruction, it was held that the same was not a part of the freehold. In Camp v. Chas. Thacher Co., 75 Conn. 165, where new plumbing was put into a hotel by the lessee, replacing old plumbing of a different kind, it was held that the same was a part of the realty.

66. Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; Lanphere v. Lowe, 3 Neb. 131; Whiting v. Brastow, 4 Pick. [Mass.] 311; Moore v. Smith, 24 Ill. 513; Baker v. McClurg, 198 Ill. 28; Collamore v. Gillis, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150.

67. See 4 C. L. 399, n. 19.

68. In Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374, where a building was erected by the tenant for the purpose of carrying on the business of a dairyman, and where, at the same time, the tenant used the building as a residence, the court said: "Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants was or might be of very great utility and impor-

In this sense of the term, as aforementioned, an innkeeper or hotel proprietor exercises a trade;[69] likewise a livery stable keeper;[70] so, a lumber company manufacturer;[71] likewise a railroad company;[72] so, a saloon proprietor;[73] so, a proprietor of a laundry;[74] so, a store keeper;[75] and so a nursery man, planting and growing trees and shrubs, has been held to carry on a trade.[76]

What are trade fixtures.—To constitute any chattel that has been attached to the freehold a trade fixture, it is only necessary that it be devoted to what is known in the law of fixtures as a trade purpose, and, as the majority of the courts require, be removable without material injury to the premises, or to the essential characteristics of itself as a chattel.[77] The form or size of the annexed chattel is immaterial. Large buildings, such as stores, barns, and ice houses, and heavy machinery, such as engines, boilers, and all kinds of manufacturing machinery, have been held trade fixtures.[78] So, articles which, most apparently, are a part of the realty, such as

tance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception." So, in Holmes v Tremper, 20 Johns. [N. Y.] 29, 11 Am. Dec. 238, a cider mill erected by a tenant for the purpose of making cider on the farm was held to be removable, it being a mixed case, involving, in part, the exercise of a trade.

69. A ballroom erected by a tenant on the leased premises for use by him in connection with his hotel or restaurant is a trade fixture. Ombony v. Jones, 19 N. Y. 234. Likewise, a barn placed by an innkeeper on an adjoining lot is removable. Dubois v. Kelly, 10 Barb. [N. Y.] 496. So, an office counter and iron safe in a hotel and restaurant. Cubins v. Ayres, 72 Tenn. [4 Lea] 329. So, an oyster counter in restaurant. Guthrie v. Jones, 108 Mass. 191. Likewise, a cistern, gas and water pipes in a boarding house. Wall v. Hinds, 4 Gray [Mass.] 256, 64 Am. Dec. 64.

70. A building erected by a tenant on a vacant lot for the purposes of a livery stable is a trade fixture. Firth v. Rowe, 53 N. J. Eq. 520.

71. A gang edger in a saw mill is a trade fixture. Stokoe v. Upton, 40 Mich. 581, 29 Am. Rep. 560. So, a building placed by a lumber company on leased premises, for use as a lumber office for its employes, is a trade fixture. Security Loan & Trust Co. v. Willamette Steam Mills, L. & M. Co., 99 Cal. 636. See, also, Macdonough v. Starbird, 105 Cal. 15, 38 P. 510.

72. A depot erected by a railroad is a trade fixture. Carr v. Georgia R. Co., 74 Ga. 74.

73. A building placed on a beach by the lessee on leased premises for saloon purposes, and resting on sills supported on blocks buried in the sand, is a trade fixture. Lewis v. Ocean Navigation & Pier Co., 125 N. Y. 341. So, bar counters. Asheville Woodworking Co. v. Southwick, 119 N. C. 611; Berger v. Hoerner, 36 Ill. App. 360.

74. A steam heating plant placed in a building by the lessee for the purposes of a laundry, and for heating purposes, is a trade fixture. President, etc., of Insurance Co. of North America v. Buckstaff [Neb.] 92 N. W. 755.

75. A counting room placed in a store by a tenant is a trade fixture. Brown v. Wallis, 115 Mass. 156. So, platform scales set in the ground. Bliss v. Whitney, 9 Allen [Mass.] 114, 85 Am. Dec. 745; Allen v. Kennedy, 40 Ind. 142. Likewise an awning built of wood in front of a store. Devin v. Dougherty, 27 How. Pr. [N. Y.] 455.

76. A greenhouse erected by a nurseryman for the purposes of his business is a trade fixture. Free v. Stuart, 39 Neb. 220, 57 N. W. 991. So, plants and trees grown by the nurseryman for the purposes of his trade. Miller v. Baker, 1 Metc. [Mass.] 27; Whitmarsh v. Walker, 1 Metc. [Mass.] 313; King v. Wilcomb, 7 Barb. [N. Y.] 263.

77. See ante, this section "Trade Fixtures," notes 59-61.

78. The following articles annexed have been held to be trade fixtures and removable: An awning and shed (Devin v. Dougherty, 27 How. Pr. [N. Y.] 455); a bark mill (Heermance v. Vernoy, 6 Johns. [N. Y.] 5); bar, counter, and shelf (Berger v. Hoerner, 36 Ill. App. 360); belting (Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Hey v. Bruner, 61 Pa. 87); boilers (Kelsey v. Durkee, 33 Barb. [N. Y.] 410; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Davis v. Moss, 38 Pa. 346; Hey v. Bruner, 61 Pa. 87; Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Lacey v. Giboney, 36 Mo. 320, 88 Am. Dec. 145); boiler placed by tenant upon a foundation of brick and cement (Cooper v. Johnson, 143 Mass. 108, 9 N. E. 33); boiler and engine placed upon brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches (Conrad v. Saginaw Min. Co., 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817); bowling alley (Hanrahan v. O'Reilly, 102 Mass. 201); brewing vessels (Kelsey v. Durkee, 33 Barb. [N. Y.] 410); building placed upon vacant lot for the purpose of a livery stable (Firth v. Rowe, 53 N. J. Eq. 520); building erected

plants and trees grown by a nurseryman, have been considered trade fixtures.[79] But chattels that are so attached by the tenant to the freehold as to become an integral part thereof, and chattels that are so substituted by the tenant for other articles that are inferior or worn out, are not trade fixures.[80] The main and important test in determining a trade fixture is the purpose to which it is devoted. The degree and mode of annexation of the article is apparently not material except so far as it determines the injury resulting to the premises, or, possibly, to the ar-

by a railroad company for a depot (Carr v. Georgia R. Co., 74 Ga. 74); building annexed for a ballroom (Ombony v. Jones, 21 Barb. 520, 19 N. Y. 234); building used as a warehouse (Austin v. Hudson River R. Co., 25 N. Y. 334); building erected as a covering for machinery (Smith v. Whitney, 147 Mass. 479; Brown v. Reno Elec. Light & Power Co., 55 F. 229); building erected by a lumber company for use as a lumber office (Security Loan & Trust Co. v. Willamette Steam Mills, L. & M. Co., 99 Cal. 636; Macdonough v. Starbird, 105 Cal. 15, 38 P. 510); but not a building substantially erected, and used for an office in connection with other purposes (Burkhardt v. Hopple, 6 Ohio Dec. 127); building placed on a beach upon sills supported by blocks buried in the sand, and used for the purpose of a saloon (Lewis v. Ocean Navigation & Pier Co., 125 N. Y. 341); building erected by tenants for miners to live in, standing on posts or walls of dry stone, piled together, and intended to be merely accessory to mining operations, and not to the soil (Conrad v. Saginaw Min. Co., 54 Mich. 249, 52 Am. Rep. 817); building (large wooden) used for an ice house (Antoni v. Belknap, 102 Mass. 193); building used for a balloon frame (Cowden v. St. John, 16 Iowa, 590); building erected by railway company for depot purposes (Carr v. Georgia R. Co., 74 Ga. 74); building, twenty feet square, with foundation of mud sills laid upon the surface of the ground (Macdonough v. Starbird, 105 Cal. 15, 38 P. 510); building (an engine house built of brick) used as a protection for the engine of the tenant (Smith v. Whitney, 147 Mass. 479, 18 N. E. 229); chimney (brick) (Moore v. Wood, 12 Abb. Pr. [N. Y.] 393); cider mills (Holmes v. Tremper, 20 Johns. [N. Y.] 29); cisterns of a refinery (Bidder v. Trinidad Petroleum Co., 17 Wkly. Rep. 153); coal bin (Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452); colliery machines (Lawton v. Lawton, 3 Atk. 13); corn mill (Lacey v. Giboney, 36 Mo. 320, 88 Am. Dec. 145); counter (Guthrie v. Jones, 108 Mass. 191); counters and shelving in a drug store (Roth v. Collins, 109 Iowa, 501, 80 N. W. 543); distillery fixtures (Reynolds v. Shuler, 5 Cow. [N. Y.] 323; Moore v. Smith, 24 Ill. 512; Smith v. Moore, 26 Ill. 392; Terry v. Robins, 5 Smedes & M. [Miss.] 291); electric plant, with dynamos and boiler built upon stone foundations (Brown v. Reno Electric Light & Power Co., 55 F. 229); engines (Cook v. Champlain Transp. Co., 1 Denio [N. Y.] 91; Kelsey v. Durkee, 33 Barb. [N. Y.] 410; Lemar v. Miles, 4 Watts [Pa.] 330; Lawton v. Lawton, 3 Atk. 13; Dudley v. Warde, 1 Amb. 113; Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Merritt v. Judd, 14 Cal. 59; Lacey v. Giboney, 36 Mo. 320; Hey v. Bruner, 61 Pa. 87; Davis v. Moss, 38 Pa. 346); furnaces (Kelsey v. Durkee, 33 Barb. [N. Y.] 410; gas fixtures (Lawrence v. Kemp, 1 Duer [N. Y.] 363; Guthrie v. Jones, 108 Mass. 191; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471); greenhouse used in gardening and florist work (Free v. Stuart, 39 Neb. 220, 57 N. W. 991); heating plant in laundry (steam) (President, etc., of Insurance Co. of North America v. Buckstaff [Neb.] 92 N. W. 755); hydraulic press (Finney v. Watkins, 13 Mo. 291); iron rails in a mine (Heffner v. Lewis, 73 Pa. 302); machinery worth $10,000 placed in a sugar mill by a tenant (Cook v. Folsom, 2 Lanc. Law Rev. 185); machinery in woolen mill (Walker v. Sherman, 20 Wend. [N. Y.] 636); machinery in cotton mill (Buckley v. Buckley, 11 Barb. [N. Y.] 43); mill stones (Moore v. Smith, 24 Ill. 512); ovens placed in a leased building by a tenant for carrying on the bakery business (Baker v. McClurg, 198 Ill. 28, 59 L. R. A. 131); oyster and lunch counter (Guthrie v. Jones, 108 Mass. 191); partitions and box stalls in a saloon (Dingley v. Buffum, 57 Me. 381); platform scales (Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; Allen v. Kennedy, 40 Ind. 142; Bliss v. Whitney, 9 Allen [Mass.] 114, 85 Am. Dec. 745); railroad rails (Mott v. Palmer, 1 N. Y. 564; Ford v. Cobb, 20 N. Y. 344); railroad iron, spikes, bolts, etc. (Northern Cent. R. Co. v. Canton Co. of Baltimore, 30 Md. 347); salt pans (Lawton v. Salmon, 1 H. Bl. 259, note; Kelsey v. Durkee, 33 Barb. [N. Y.] 410; Reynolds v. Shuler, 5 Cow. [N. Y.] 323; Mansfield v. Blackburne, 6 Bing. N. C. 426); shafting (Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Hey v. Bruner, 61 Pa. 87); sheds (Devin v. Dougherty, 27 How. Pr. [N. Y.] 455); shelves in a store (Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452); shrubs planted for sale (Penton v. Robart, 2 East, 88; Miller v. Baker, 1 Metc. [Mass.] 27); stationary saw mill (Kile v. Giebner, 114 Pa. 381, 7 A. 154); stills (Reynolds v. Shuler, 5 Cow. [N. Y.] 323; Raymond v. White, 7 Cow. [N. Y.] 319; Burk v. Baxter, 3 Mo. 207; Heermance v. Vernoy, 6 Johns. [N. Y.] 5); trees planted for sale (Penton v. Robart, 2 East, 88; Miller v. Baker, 1 Metc. [Mass.] 27; King v. Wilcomb, 7 Barb. [N. Y.] 263).

79. A nurseryman may remove such trees, shrubs, and plants as are salable as such in his trade of nurseryman, on the ground that he is carrying on a species of trade (King v. Wilcomb, 7 Barb. [N. Y.] 263; Maples v. Millon, 31 Conn. 598; Brooks v. Galster, 51 Barb. [N. Y.] 196; Fox v. Brissac, 15 Cal. 223); but not trees cultivated and used by a tenant, a market gardener, for the fruit they yield (Wardell v. Usher, 3 Scott [N. R.] 508).

80. See ante, note 65.

ticle itself, by its removal from the realty. The intention of the party making the annexation, a test that is ordinarily, in the law of fixtures, of prime importance, and the ultimate consideration in determining the removability of an annexed chattel, would seem to be immaterial in those states where a trade fixture is regarded as a part of the realty until severed, for the reason that the right of removal exists independently of the fact that the article is a part of the realty. But the cases, even in those states where a trade fixture is regarded as a part of the realty, do not so treat the question of intention; for, if the intention of the tenant making the annexation clearly appears to make the articles annexed a permanent accession to the freehold, his right to remove them as trade fixtures apparently has been waived, and his expressed intention will control.[81] But, in the absence of an expressed intention, the legal presumption is that the tenant who erects fixtures upon his lessor's land for purposes of trade intends to remove them before the expiration of his term, and only upon his leaving the premises without removing his trade fixtures is the intention of making them a gift to his landlord imputed to him.[82]

§ 5. *Domestic fixtures.*—The term "domestic fixtures" is applied to those articles of domestic convenience which are annexed to the premises by the tenant for the more advantageous use of the premises, and such fixtures are removable by the tenant, provided that no material injury thereby results to the realty, or to the substantial characteristics of the articles themselves.[83] This rule, or, rather, exception to the old common-law rule in favor of the landlord, developed later, as a further indulgence allowed the tenant beyond the exception stated in favor of "trade fixtures." The grounds of this rule are based on the fact that these fixtures are erected only for temporary purposes, and as a matter of convenience, while the tenant occupies the premises, and are not intended to become a part of the realty, and that it would be extremely harsh and disadvantageous to tenants to require that all articles annexed by the tenant for his better domestic convenience should immediately become the property of the landlord.[84] It will be noted that the reason for the rule is different from that asserted for "trade fixtures." Under the head of "domestic fixtures" the early cases included mostly annexed chattels that were purely personalty in their nature, such as were useful and convenient for domestic purposes in and about a house, and often the personal nature of these articles was the principal ground upon which they were protected as removable. Most of the articles falling within this class of fixtures are utensils and machines, perfect chattels in themselves, and serving as substitutes for mere movable furniture.[85] Thus, ranges and stoves fixed in brickwork, fixed beds and tables, furnaces, gas fixtures, pumps, clocks, window blinds, bath tubs, water closets, and other

81. In Linahan v. Barr, 41 Conn. 471, where a tenant erected a brick building on foundation walls, upon which a leased building had been previously destroyed by fire, it was held that his declarations to the effect that he knew his erection would belong to the landlord, and that he did not intend to remove the same at the expiration of his tenancy, were admissible as showing his intention. See, also, Wall v. Hinds, 4 Gray [Mass.] 271, 64 Am. Dec. 64; Morey v. Hoyt, 62 Conn. 553; Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; Carver v. Gough, 153 Pa. 225.

82. In Hill v. Sewald, 53 Pa. 271, the court said that "the same want of Intention to convert is imputed to a tenant who attaches to the land fixtures for the use of his business, the law presuming, in favor of trade, that he meant to remove them before the end of his term; and it is only on leaving without removal that the intention to make a gift of them to the landlord is imputed to him." [See, also, 4 C. L. 398, n. 15.]

83. Hayford v. Wentworth, 97 Me. 347.

84. "The reason of the relaxation of the rule is found in the public policy and convenience which permit the tenant to make the most profitable and comfortable use of the premises demised that can be obtained consistently with the rights of the owner of the freehold." Gaffield v. Hapgood, 17 Pick. [Mass.] 192. See Tyler, Fixt. p. 385; Ewell, Fixt. p. 127.

chattels annexed for convenience, have been considered "domestic fixtures."[86] But, apparently, the cases have never extended the doctrine as to "domestic fixtures" so as to include large articles, such as a house built by a tenant for habitation, a barn, or other building; for such an article, being of a substantial size, and not temporarily constructed, is deemed to have been annexed perpetui usus causa, and is not removable, although, if the same had been erected for the purposes of a trade, the contrary rule would obtain.[87] In determining what fixtures are removable under this rule, nearly the same principles of law are applicable as in the case of "trade fixtures," although the law is much more strictly applied to this class of fixtures than to "trade fixtures." The usual tests applicable to fixtures—the nature of the article annexed, its mode and degree of annexation, the purpose to which it is put, and its adaptability to that purpose, together with the intention of the party making the annexation—are all co-ordinately and effectively applied in determining the removability of the article as a "domestic fixture."

§ 6. *Ornamental fixtures.*—The same principles and rules apply to articles annexed for ornamental purposes as to "domestic fixtures," and the same reason for the extension of the exception in the common-law rule in favor of the tenant exists. Such articles, when devoted to purposes of mere ornament by the tenant, and when severable without material injury to the freehold or to themselves, are removable. There are not many modern decisions on this particular topic, for the reason, perhaps, that the great majority of modern ornamental articles are of a chattel na-

85. Amos & Ferard, Fixt. § 84.

86. See Tyler, Fixt. p. 366 et seq., and Ewell, Fixt. p. 137, as to the English cases holding that stoves, ranges, ovens, boilers, chimney pieces, pier glasses, and furnaces, together with other household articles, are removable. A fire frame fixed in a common fireplace, with bricks on the sides, laid in between the sides of the fire frames and the jambs of the fire places, are domestic fixtures. Gaffield v. Hapgood, 17 Pick. [Mass.] 192, 28 Am. Dec. 290. So, a "wash-down siphon water closet" and its appurtenances, placed in a business office, in the customary way, and connected with the soil pipe, by a tenant at will for his own use, is removable by the tenant. Hayford v. Wentworth, 97 Me. 347. So, a porcelain bath tub, standing on four legs, connected with soil pipes and a hot-water heater, in a dwelling house. Philadelphia Mortg. & Trust Co. v. Miller, 20 Wash. 607, 44 L. R. A. 559, 72 Am. St. Rep. 138. The following have been held removable as "domestic fixtures": Cisterns and sinks (Wall v. Hinds, 4 Gray [Mass.] 256, 64 Am. Dec. 64); gas fixtures (Wolff v. Sampson [Ga.] 51 S. E. 335, cited ante, Landlord and Tenant, § 5 F.) just as, in the early history of the law, candelabra, chandeliers, and other apparatus for lighting purposes were removable by the tenant as fixtures erected by the tenant for domestic convenience, so, gas fixtures have universally been held to be removable, on the ground that they are merely substitutes for the lamps, candlesticks, and chandeliers formerly used to hold candles. In Capehart v. Foster, 61 Minn. 132, 63 N. W. 257, the court said that this doctrine was rather doubtful in principle, but was too well established as the law of the country generally to be overturned, and that the rule must be regarded as rather an arbitrary exception to the general rule. In this case, two hundred and sixty-eight gas fixtures, consisting of gas chandeliers and burners, screwed onto the ends of gas pipes projecting from the walls, were held removable, while one hundred and eighty-four steam radiators, attached to the steam pipes at the floors on which they rested, by being screwed to those pipes, and an electric annunciator attached to the wall and to the wires of the electric bell system, were held to be a part of the realty. These fixtures that are removable include, generally, the chandeliers and burners, although the rule has been extended to gas stoves (Vaughen v. Haldeman, 33 Pa. 522), to a gasometer, and an apparatus for generating gas (Hays v. Doane, 11 N. J. Eq. 84), but not to gas pipes (Gas Company v. Hunter, 2 R. I. 157); but where gas pipe was passed through the floors and partitions, and held to the walls by metal bands, and was removable without injury to the building, it was held removable (Wall v. Hinds, 4 Gray [Mass.] 256). See Lawrence v. Kemp, 1 Duer [N. Y.] 363; Beardsley v. Sherman, 1 Daly [N. Y.] 325; Freeland v. Southworth, 24 Wend. [N. Y.] 191; Shaw v. Lenke, 1 Daly (N. Y.) 487; Funk v. Brigaldi, 4 Daly [N. Y.] 359; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; Guthrie v. Jones, 108 Mass. 191 (gas pipes); Towne v. Fiske, 127 Mass. 125 (portable iron furnace); Rogers v. Crow, 40 Mo. 91; Montague v. Dent, 10 Rich. Law [S. C.] 135; Jarechi v. Philharmonic Soc., 79 Pa. 403; McCracken v. Hall, 7 Ind. 30 (pump); Bank v. North, 160 Pa. 303, 28 A. 694 (steam radiators). Contra, Capehart v. Foster, 61 Minn. 132, 63 N. W. 257.

87. Ewell, Fixt., p. 133; Buckland v. Butterfield, 2 Brod. & B. 54; Jenkins v. Gething, 2 Johns. & H. 520; Ombony v. Jones. 19 N. Y. 234.

ture. The following articles have been considered ornamental fixtures: Hangings, tapestry, and pier glasses nailed to the walls or panels of a house, marble chimney pieces, cornices, etc.[88]

§ 7. *Agricultural fixtures.*—Fixtures erected by a tenant for agricultural purposes, and for the better enjoyment of the immediate profits of the land, were early held, in the leading case of Elwes v. Maw,[89] to be irremovable by the tenant, and the doctrine laid down in that case has been followed, mainly, in the United States decisions, although there have been numerous opinions, by way of obiter dicta and otherwise, criticising the doctrine enunciated in that case, and apparently extending the right of removal to and including this class of fixtures,[90] but it may be noted that in nearly all of the cases where the rule stated is attacked, the removability of the fixture at issue is decided upon the fact that it comes within

88. In Buckland v. Butterfield, 2 Brod. & B. 54, a conservatory constructed with sliding glasses and paved with Portland stone, was attached to a house by cantilevers let nine inches into the wall. The removal of this conservatory exposed the side of the house to which it had been attached. The question arose as to whether this article of ornament was removable. The court said: "On the one hand it is clear that many things of an ornamental nature may be, in a degree, affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is that, where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time, this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed that they are exceptions only, and therefore, though to be fairly considered, not to be extended." See, also, D'Eyncourt v. Gregory, 15 Wkly. Rep. 186, where pieces of statuary were considered, not mere articles of ornament, but as belonging to the architectural design of the house. In re De Falbe, 70 Law J. Ch. 286, 1 Ch. 523, 84 Law T. 273, 49 Wkly. Rep. 455.

89. Elwes v. Maw, 3 East, 38. In this case, a tenant for years erected upon a farm, consisting of a messuage, barns, stable, outhouses, and other buildings, a beast house, a carpenter shop, a fuel house, a cart house, a pump house, and a fold yard. These buildings of the tenant were of brick and mortar, and tiled, and the foundations of them about a foot and a half deep in the ground. The question arose as to the right of the tenant to remove them. Lord Ellenborough delivered the opinion of the court, and said: "This was an action on the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant. * * * The general rule on the subject of fixtures is that which is laid down in the Year Book. * * * to the following effect, namely: that when a lessee, having annexed anything to the freehold during his term, takes it away, it is waste; but upon this rule certain exceptions have at various times been attempted to be engrafted in favor of trade. The principal one of such exceptions is the tenant's right to remove those utensils which he may set up in relation to his trade; * * * but no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself, who built them during his term. * * * But the case of buildings for trade has been always put and recognized as a known, allowed exception from the general rule which obtains as to other buildings, and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favor of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlord and tenants; but its danger or probable mischief is not so popularly a consideration for a court of law as whether the adoption of such a doctrine would be an innovation at all, and, being of opinion that it would be so, and contrary to the uniform current of legal authorities upon the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

90. In Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374, the court said, in reference to the case of Elwes v. Maw: "The court there decided that, in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate.

the recognized exception in favor of trade, domestic, or ornamental fixtures.[91] Thus, in Van Ness v. Pacard, a house erected and occupied by a tenant with his family was removable for the reason that it came within the exception in favor of

* * * It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law." In Dubois v. Kelly, 10 Barb. [N. Y.] 496, the court said: "This distinction [between trade and agricultural fixtures], although it may not have been, in any single instance, broken down by any adjudged case, has not, I am persuaded, been regarded with much favor in this country, if, indeed, it has in England. The foundation upon which it rests is narrow and artificial. The general policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed without the consent of the owner of the inheritance, applies as well to erections for agricultural and other purposes as to erections for the purposes of trade." But see Ombony v. Jones, 19 N. Y. 234. In Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742, the court said: "The interest of the owner of the soil, as well as public policy, in America, required that erections for agricultural purposes, put upon the land by a tenant, should receive the same protection in favor of the tenant that was extended by the common law of England to fixtures made for the purposes of trade." This, however, is a mere dictum, for in this case a cog wheel let into the ground, and connected with a turning lathe, was held to be a part of the realty, as between vendor and vendee. See, also, Davis' Adm'r v. Eastham, 81 Ky. 116. In Wing v. Gray, 36 Vt. 261, where hop poles were held removable by a tenant, the court alluded to the criticisms made in this country to the principle laid down by Elwes v. Maw, 3 East, 38, in respect to erections for agricultural purposes. In McMath v. Levy, 74 Miss. 450, the court said: "The simple question presented by this appeal is, may a purchaser from a tenant who bought and put upon leased premises—a plantation—a gin, condenser, etc., with the intention of removing them at pleasure, remove and hold them against the landlord? The question is easily answered. Against the general doctrine of fixtures made by one upon the premises of another, there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. The placing of gins, condensers, etc., on plantations cultivated largely in our staple product, cotton, are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against their landlords, are not to be doubted." See, also, Carver v. Gough, 153 Pa. 225. In Perkins v. Swank, 43 Miss. 349, where an engine and other saw-mill machinery were held to be a part of the realty as between the parties standing in the relationship of vendor and vendee, the court said: "The English courts seem to have made no relaxation in favor of erections for agricultural uses; but it is otherwise in the United States." The court cites in support of the statement Van Ness v. Pacard, 2 Pet. [U. S.] 147, 7 Law. Ed. 374, where the tenant was allowed to remove the fixture in question on the ground that it was a "mixed case." By St. 14 and 15 Vict. c. 25, § 3, it is provided that if any tenant of a farm or land shall, after the passing of that act, with the consent in writing of the landlord, for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agricultural (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, etc., shall be the property of such tenant, and removable by him, notwithstanding the same may consist of separate buildings, or the same or any part thereof may be built in or permanently affixed to the soil; so as the tenant making any such removal do not in any wise injure the land or buildings belonging to the landlord, or otherwise do put the same in like or as good plight and condition as the same were in before the erection of the things so removed. Before removal, however, every tenant must give to the landlord, or his agent, a month's notice in writing of his intention, and the landlord may thereupon elect to purchase the things so proposed to be removed, whereupon the right to remove shall cease. The value is to be ascertained by two referees (one chosen by each party) or their umpire, and is to be paid or allowed in account by the landlord. See, also, to a similar effect, 38 and 39 Vict. c. 92. See, also, Davis' Adm'r v. Eastham, 81 Ky. 116. Dicta extending the rights of removal: "Whatever erections he [the tenant] made while in possession of the premises for the more beneficial enjoyment of the same he had a right to remove before the expiration of the term, provided they could be severed without material injury to the freehold. As between landlord and tenant, the rule in regard to the removal of fixtures is most liberally construed in favor of the latter. As the landlord pays nothing for the improvements put up by the tenant, policy and justice demand that the tenant should be allowed to remove the additions or improvements unless the removal would operate to the prejudice of the inheritance by leaving it in a worse condition than when he took possession." Bircher v. Parker, 40 Mo. 118. Also Lacey v. Giboney, 36 Mo. 320. See Ross v. Campbell, 9 Colo. App. 38; Hedderich v. Smith, 103 Ind. 203, 53 Am. Rep. 509.

91. In Dubois v. Kelly, 10 Barb. [N. Y.] 496, the building was held removable on the ground that the landlord had, by express agreement, given the privilege to the tenant, or that it might be regarded as an erection for purposes of trade. See Whiting v. Brastow, 4 Pick. [Mass.] 310. See, also, McMath v. Levy, 74 Miss. 450, where it was held that a cotton gin could be removed by one purchasing it from a tenant. The court here stated: "Against the general doctrine of fixtures made by one upon the premises of

trade.[92] So, in Holmes v. Tremper, a cider mill and press were held removable as coming under the head of a mixed case, being partly devoted to the enjoyment of the land, and partly to the exercise of a trade.[93] In this connection there is no distinct rule in regard to agricultural fixtures apart from the law of fixtures generally, but rather the exception granted to tenants in favor of their trade, domestic, or ornamental fixtures has never been extended so as to include articles attached by the tenant for mere agricultural purposes. As stated in a Pennsylvania case,[94] there are strong reasons why these exceptions granted to the tenant should not be extended to agricultural fixtures, on the ground that the best interests of agriculture would be greatly retarded; furthermore, such an exception would serve to obliterate entirely the law of fixtures as far as the landlord and tenant are concerned. The liberality with which the courts have construed the term "trade" as applied to fixtures, and the general principles and tests used in determining a fixture, has prevented any great injustice from arising to agricultural tenants. As the general rule of the law of fixtures applies to agricultural fixtures, it is needless to advert to specific instances of such fixtures.

Manure.—However, under this head, the question as to when manure made on the demised premises belongs to the landlord, and when to the tenant, is particularly noteworthy. Manure made on the farm, and from the produce of the farm, is generally considered a part of the realty;[95] but manure not made in the course of

another, there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. The placing of gins, condensers, etc., on plantations cultivated largely in our staple product,—cotton,—are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against their landlords, are not to be doubted." See Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Wing v. Gray, 36 Vt. 261.

92. Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374.

93. Holmes v. Tremper, 20 Johns. [N. Y.] 29.

94. In the case of McCullough v. Irvine's Ex'rs, 13 Pa. 440, the court said: "The exceptions have been carried very far by some decisions in the Eastern states, particularly in Whiting v. Brastow, 4 Pick. [Mass.] 310; Holmes v. Tremper, 20 Johns. [N. Y.] 29, and also in Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374. It is, however, in somewhat loose expressions of the court in those cases, and not from the cases themselves, that the principle asserted by the court below derives some countenance. The first, where the dicta is the most latitudinarian, was merely the removal of a padlock and some loose boards, about which there never could have been any reasonable doubt. The second was the removal of a cider press by the tenant; and there no reasonable doubt of its being an implement for the manufacture of cider would be entertained. The last case runs to a little more magnitude, for it was removing a sort of a house, but a house erected for the purpose of manufacturing a commodity, * * * and the decision goes expressly on the ground of its not being a dwelling house. But none of these cases, either expressly or by implication, overrule or impeach the case of Elwes v. Maw, 3 East, 38, in which it was held that an agricultural tenant could not remove, during the continuance of his lease, a beast house, carpenter shop, and fuel house, etc., erected for the use of the farm, even though he left the premises as he found them. In that case the whole law on that subject was ably reviewed; and although it is an English case, I believe it to be the law of Pennsylvania, and for the very same reason that the court below give for a contrary opinion. In my judgment, that is a rule which tends to promote the interests of agriculture, whilst its converse would tend to retard and impede its progress. We must have many tenancies for life in Pennsylvania by will, by deed, and by descent; and if the tenant, after having enjoyed the fruits of the land during perhaps a long life, may, just before his death, strip it of the fences he has built, and the house and barn he has erected, because the advance in the improvement and commerce of the country would leave the land of as much intrinsic value as when he took possession, and convert it into a solitary waste for the winds to moan over, the tenant of a new generation will have to take the land as it was a generation before, and commence improvements de novo. This, I apprehend, would be a slovenly mode of promoting the interests of agriculture."

95. Manure made under a farming lease in the usual course of husbandry is a part of the realty, and irremovable by the tenant. Middlebrook v. Corwin, 15 Wend. [N. Y.] 169; Perry v. Carr, 44 N. H. 118; Gallagher v. Shipley, 24 Md. 418, 87 Am. Dec. 611; Plumer v. Plumer, 30 N. H. 558; Lewis v. Lyman, 22 Pick. [Mass.] 442; Lewis v. Jones, 17 Pa. 262. [Ante, Landlord and Tenant, § 5 F.] Contra, Smithwick v. Ellison, 24 N. C. 326, 38 Am. Dec. 697. Likewise as to manure made upon a dairy farm under a lease. Lewis v. Lyman, 22 Pick. [Mass.] 437; Wain v. Connor, 5 Clark [Pa.] 164. It is immaterial that such manure is lying about in heaps about the barn or yard. Lassell v.

husbandry, or from produce obtained elsewhere, or upon demised premises that are not agricultural, or made in connection with some trade, as in a livery stable, is removable by the tenant.[96]

Straw.—So, straw, being a part of the crop, is removable by the tenant.[97]

§ 8. *Mixed cases.*—Where chattels are annexed to the freehold by the tenant partly for purposes of trade, and partly to enjoy the profits of the land, or for domestic convenience, there is constituted a "mixed case," as it is generally termed. In such cases, the same principles of law are applicable as to trade fixtures, if it is clearly discernible that the annexed article is in some manner used for carrying on a species of trade. This principle was early recognized in the English cases, first, in respect to steam engines and machinery used in collieries, where it was evident that the annexed articles were used both for the enjoyment of the estate and for carrying on a species of trade, and then to a cider press and mill.[98] So, the principle has been extended to machines and erections placed by a tenant upon the realty for the purpose of procuring or preparing minerals, lime, alum, pottery, and manufacturing bricks.[99] So, it extends to hothouses, greenhouses, trees, shrubs, etc., placed by a nurseryman or gardener on or in the realty.[100] It includes buildings erected by the tenant on the demised premises, and used partly for trade purposes, and partly for domestic purposes. In Van Ness v. Pacard,[101] a tenant for

Reed, 6 Me. 222; Sawyer v. Twiss, 26 N. H. 345. Or that it is made from the hay of the tenant raised upon the demised premises. Wetherbee v. Ellison, 19 Vt. 379. Manure made from some hay and some grain brought upon the premises from without, does not entitle it to be removed by the tenant if it be commingled with manure made from the produce of the land. Lewis v. Jones, 17 Pa. 262, 55 Am. Dec. 550; Lassell v. Reed, 6 Me. 222. But manure not made in the usual course of husbandry, and in connection with some trade, is removable by the tenant. So held in Gallagher v. Shipley, 24 Md. 418, 87 Am. Dec. 611, where the land was used for a corral for herding large numbers of cattle brought there to be slaughtered for use in the armies of the United States, and the cattle were fed with fodder from abroad. [Accords, 2 C. L. 681, n. 52.] Likewise in Carroll v. Newton, 17 How. Pr. [N. Y.] 189, where a tenant of a house, barn, grocery, and garden used the barn for keeping 18 or 20 head of horses, and fed them with provender brought from without. Manure made upon premises in connection with a livery stable is removable. Daniels v. Pond, 21 Pick. [Mass.] 367, 32 Am. Dec. 269. Manure made by the cattle of a tenant from hay brought from the tenant's own farm is removable. Corey v. Bishop, 48 N. H. 146. Manure made in the business of raising hogs, which are not fed upon the products of the land, is removable. Snow v. Perkins, 60 N. H. 493, 49 Am. Rep. 333. See, also, Elting v. Palen, 60 Hun, 306, 14 N. Y. Supp. 607; Bonnell v. Allen, 53 Ind. 130.

96. See preceding note. Manure produced on the leased premises by stock fed on fodder produced elsewhere, in excess of that maintainable by the products of the premises, is removable. Pickering v. Moore, 67 N. H. 533, 31 L. R. A. 698.

97. Straw, being part of the crop, and there being no general usage requiring that it revert to the land, is removable by the tenant. Fobes v. Shattuck, 22 Barb. [N. Y.] 568; Fletcher v. Herring, 112 Mass. 382; French v. Freeman, 43 Vt. 93; Bonnell v. Allen, 53 Ind. 130.

[Straw is not to be considered as manure where provisions for removal of crops forbid such implication. Garrett v. Brant, 6 Ohio C. C. (N. S.) 509, cited ante, Landlord and Tenant, § 5 F.]

98. See Lawton v. Lawton, 3 Atk. 13; Dudley v. Warde, Amb. 113; Elwes v. Maw, 3 East, 38. In Holmes v. Tremper, 20 Johns. [N. Y.] 29, a cider mill and press, erected by a tenant holding from year to year, at his own expense, and for his own use, was removable by a tenant as being an accessory to the trade of making cider.

99. In Merritt v. Judd, 14 Cal. 560, a steam engine and pump, used for the purpose of working a quartz ledge in the getting out of gold, the engine and pump being fastened in and to the ground, were held removable. So in Beckwith v. Boyce, 9 Mo. 556, sheds erected by the tenant upon posts set in the ground for the purpose of manufacturing brick were removable. See Tyler, Fixt. pp. 321-327; Amos & Ferard, Fixt. p. 60.

100. Miller v. Baker, 1 Metc. [Mass.] 27; King v. Wilcomb, 7 Barb. [N. Y.] 263; Brooks v. Galster, 51 Barb. [N. Y.] 196; Maples v. Millon, 31 Conn. 598; Fox v. Brissac, 15 Cal. 223.

101. In Van Ness v. Pacard, 2 Pet. [U. S.] 137, 7 Law. Ed. 374, Justice Story said; "It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade

years, a carpenter by trade, erected a building for the purpose of carrying on the business of a dairyman and of a carpenter, and for a place of residence for his family and servants engaged in the business. The court there stated that the fact that the building was used as a residence, as well as for trade purposes, did not invalidate the exception in favor of tenants as to trade fixtures. [The most recent application of these rules has been to a school house erected by the public on leased ground.[102]]

LARCENY.

§ 1. *Common law larceny.*[1]—Larceny is the felonious taking and carrying away[2] of the personal property[3] of another[4] without his consent,[5] and with intent

or not. A tenant may erect a large, as well as a small, messuage, or a soap boilery of one or two stories high, and on whatever foundation he may choose. * * * Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was 'that the defendant erected the building before mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.' The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operation of this trade. Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and, unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception."

102. [Hayward v. School Dist. [Mich.] 102 N. W. 999 discussed ante, Landlord and Tenant, § 5 F.].

1. See 4 C. L. 410.

Definitions: Larceny is a felonious taking and carrying away of the personal goods or chattels of another with intent to deprive the owner of his property therein and to appropriate the same to the use of the taker. Ladeaux v. State [Neb.] 103 N. W. 1048, citing 2 C. L. 696. The felonious stealing, taking, carrying, leading or driving away the personal property of another. People v. Cleary [Cal. App.] 81 P. 753. The felonious stealing or taking away of the personal property of another. People v. Proctor [Cal. App.] 82 P. 551.

2. Asportation a necessary element. Ladeaux v. State [Neb.] 103 N. W. 1048. A trespass is essential to constitute larceny, while in embezzlement this is not necessary, but a fiduciary relation must be shown. State v. Finnegean [Iowa] 103 N. W. 155; State v. Browning [Or.] 82 P. 955.

3. Crude turpentine which has run from the trees into boxes cut into them to serve as receptacles therefor is a chattel, and hence is the subject of larceny. Dickens v. State [Ala.] 39 So. 14. One who by his wrongful acts converts a fixture into personalty and, with larcenous intent, forthwith carries it away without the consent of the owner, is guilty of larceny. Rule was different at common law. Junod v. State [Neb.] 102 N. W. 462. One cutting or tearing away wire, attached to posts for the purpose of fencing public land for temporary use as a pasture, particularly where evidence shows that it never became a fixture. Id.

4. Must be ownership in some person other than defendant. People v. Cleary [Cal. App.] 81 P. 753. Master of vessel accountable to owner and crew held to have a special property in funds stolen within the meaning of Rev. Laws, c. 219, § 9. Commonwealth v. McDonald [Mass.] 73 N. E. 852. The possession of a carrier constitutes sufficient ownership as against the wrongdoer. State v. Mintz, 189 Mo. 268, 88 S. W. 12.

5. Nonconsent necessary. Ladeaux v. State [Neb.] 103 N. W. 1048.

to convert it to the use of the taker.[6] There is no larceny where the taking is under a bona fide claim of ownership,[7] but it is larceny if one takes his own property from another to whom he has delivered it upon any bailment, with intent to charge the bailee with its value.[8] One pledging hired property, with the intention of redeeming and restoring it to the owner, and having a fair and reasonable intention of so doing, is not guilty of larceny.[9] It is not necessary that there be a sale of the property in order to establish a conversion.[10]

One receiving stolen property from the thief knowing it to have been stolen, but without having in any way participated in the crime, cannot be convicted of larceny,[11] and one slaughtering hogs stolen by another is not a principal, but an accessory.[12]

The distinction between larceny and false pretenses is that to constitute the former the owner must not have intended to part with his title to the property, while in the case of the latter crime he does intend to part with his title, but such intention is brought about through fraud.[13] The offense is larceny though the taking is

6. A felonious intent to convert the stolen property to the defendant's own use is a necessary element. Ladeaux v. State [Neb.] 103 N. W. 1048, citing 2 C. L. 696. No theft where defendant took pig at prosecutor's request, and afterwards told him that it was his, and he could have it if he desired Womack v. State [Tex. Cr. App.] 86 S. W. 1015. Where the defendant entertained the felonious intent of stealing the property and directed another person to do such acts as would result in obtaining it, without informing him as to his intent, and by reason of the commission of such acts obtained possession of the property and converted it to his own use, he was guilty of larceny though the person acting as his instrument had no felonious design or intent. Intent of defendant, in such case, accompanies the other person's acts. State v. Mintz, 189 Mo. 268, 88 S. W. 12.

7. Miller v Territory [Ariz.] 80 P. 321; Patterson v. State [Ga.] 50 S. E. 489; State v. Wasson, 126 Iowa, 320, 101 N. W. 1125.

Held not to be larceny: If defendant dipped turpentine under the honest belief that it was within his employer's land line. Dickens v. State [Ala.] 39 So. 14. Taking of lightning rods openly and under claim of right under a written contract in accordance with the terms of which they were put up. Brokaw v. State [Tex. Cr. App.] 85 S. W. 801. Evidence showing that defendant's mother, during his absence, authorized her son-in-law to sell a cow to prosecutrix, which he did, that defendant on his return demanded that the cow be delivered to him by the purchaser, informed the latter that the cow was his and that he was coming after it, went to the purchaser's house in the daytime and demanded it, and got possession of it under a claim of ownership, held not to show a fraudulent taking, and hence not to sustain a conviction. Matura v. State [Tex. Cr. App.] 89 S. W. 648. Taking cattle in good faith under the mistaken belief that one is entitled to do so by virtue of an agreement which in fact refers to certain other cattle. State v. Strodemier [Wash.] 82 P. 915.

8. Defendant may be convicted of larceny of oil from pipe line under indictment laying the property in the pipe line company as owner, though the company holds a part of it as bailee for defendant's wife, of whose wells he is the manager. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

9. Is not a conversion. Failure to so instruct held error. Blackburn v. Commonwealth [Ky.] 89 S. W. 160.

10. Place of theft of horses which one hires on a false pretext as to where he is going to drive them, and with intent to appropriate them to his own use, is where he obtains possession of them, and not where he attempts to sell them, such attempt being merely evidence of his intent and purpose at the time of obtaining possession of them. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831.

11. State v. Bartlett [Iowa] 105 N. W. 59.

12. Wesley v. State [Tex. Cr. App.] 85 S. W. 802.

13. The fact that the owner intends to part with the title to the property and not merely the possession, marks the distinction. Williams v. State [Ind.] 75 N. E. 875. Defendant held not guilty of larceny where he procured loan of money from one to whom he was engaged to be married through fraudulent representations as to his property and as to value of automobile for which he gave bill of sale as security, title to the money having been transferred to him. People v. Proctor [Cal. App.] 82 P. 551. It is larceny if possession is obtained with felonious intent through fraud, conspiracy, or artifice, where the title remains in the owner, but false pretenses if the title as well as the possession is parted with. People v. Delbos, 146 Cal. 734, 81 P. 131. Defendant held guilty of larceny where she made a bargain with owner of house to sell it to prosecutrix for $90, represented to her that she had purchased it for her for $500, and at her request got $400 from a trustee of prosecutrix for purpose of making a part payment, and thereafter delivered a bill of sale, previously prepared by the owner, purporting to sell the house to prosecutrix, it appearing that it was defendant's intention from the beginning to convert all but $90, and that prosecutrix did not intend to part with her title to the money. Id.

with the consent of the owner, if defendant, at the time of coming into possession of the property, entertains the felonious intent not to return it, but to wholly appropriate it or convert it to his own use,[14] or if possession is obtained for a particular purpose, with a fraudulent intent, then existing, to use such possession as a means of converting the property to the use of the taker, followed by such a conversion,[15] or if the possession is obtained through fraud, or a trick, or device, or under a false pretense of a bailment, with intent on the part of the person obtaining it to convert the property to his own use and the owner intends to part with his possession only, and not with his title.[16] So, too, one having the bare charge or custody of goods belonging to another may be guilty of larceny by fraudulently converting the same to his own use, though he had no fraudulent intent when he received them, since the legal possession in such case remains in the owner.[17]

The same act may sometimes amount to larceny at common law and embezzlement under the statute in which case the defendant may be prosecuted under either charge.[18] If the accused in the same transaction commits both simple larceny and larceny after trust, he may be prosecuted and convicted for the former.[19] If the

14. As where defendant hired a horse by false pretenses with such intent, and immediately disposed of the same. Bradley v. State [Ind.] 75 N. E. 873. Evidence held to show felonious intent. Id. If one obtains possession of property through fraud with a design to steal it. Williams v. State [Ind.] 75 N. E. 875. There must, however, exist at the time an animus furandi. Id.

15. Blackburn v. Commonwealth [Ky.] 89 S. W. 160. An actual conversion must be shown as well as such a fraudulent intent. Failure to give instruction requiring jury to find such a conversion held error. Id.

16. If the possession is fraudulently obtained with intent on the part of the person obtaining it to convert the property to his own use, and the owner intends to part with his possession merely and not with his title. State v. Mintz, 189 Mo. 268, 88 S. W. 12. Held larceny where defendant procured one who had previously been employed by a dray company, authorized to receive goods from a common carrier for a particular consignee, and who was known to the servants of the carrier to have been so employed, to go to the depot of the carrier, after his employment by the dray company had ceased, and procure a load of shoes belonging to such consignee, and to deliver them to another person, the shoes having been delivered by the carrier under the mistaken belief that such person was still in the employ of the dray company. Id. Cannot be contended that, in delivering the goods, the carrier surrendered its entire or special ownership, and hence that the offense was false pretenses, since carrier was only authorized, and only intended, to deliver a bare possession for the purpose of having the goods delivered to the consignee. Id. If one obtains possession of goods or money by trick or fraud, or under false pretense of a bailment, with intent to appropriate the same to his own use, and the owner intends to part with the possession but not the property, the possession is obtained unlawfully and the subsequent appropriation in pursuance of the original intent is larceny. Conversion of money given defendant to settle criminal prosecution, which he said he had done. Martin v. State [Ga.] 51 S. E. 334. When persons conspire to cheat another under color of a bet, and he simply deposits a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money, commit larceny, even though they are afterwards, by fraud, made to appear to win. Prosecutor's evidence held to bring the case within the rule. Instructions approved. Johnson v. State [Ark.] 88 S. W. 905. If, however, he bets his money to win or lose, intending to part with its title and possession, even though induced to do so by false representations pursuant to a conspiracy, the subsequent taking of it is not larceny. Instructions held to protect defendant's rights in this regard. Id. His consent, after the race which is the subject of the bet has been run, that the stakeholder may keep the money until it can be run over again does not prevent the crime from being larceny if given after the consummation of the crime, but if procured before its consummation, and as a matter of false inducement up to that point, the rule is otherwise. Instructions approved. Id. Defendant held guilty of larceny where, through fraud and artifice, he obtained possession of money for the ostensible purpose of holding it as a stakeholder on a bet, but with the intention of appropriating it to his own use in any event. State v. Ryan [Or.] 82 P. 703.

17. Williams v. State [Ind.] 75 N. E. 875. Finder of purse delivered it to defendant's wife, who promised to return it if it did not belong to defendant. Defendant claimed it and kept it, when in fact it did not belong to him. Held guilty of larceny, both the title and legal possession being in finder as against him. Id. Persons inducing public to subscribe money to be used in a wheat deal are bailees for a particular purpose, and if they misappropriate it, are guilty of larceny, since title remains in bailor. People v. Kellogg, 94 N. Y. S. 617.

18. People v. Kellogg, 94 N. Y. S. 617.

19. Where evidence shows him guilty of that offense, and common-law rule of merger of crimes, where one is a misdemeanor and the other a felony, does not prevail. Martin v. State [Ga.] 51 S. E. 334.

taking is at one time, or if the articles are all taken as the result of a single purpose or impulse, though the asportation is at intervals to better suit the convenience of the taker, the value of all articles taken may be added together in estimating the degree of the offense,[20] but if the takings are separate and distinct the rule is otherwise.[21] The nature of the transaction must determine whether there was one or a series of offenses.[22]

§ 2. *Statutory larceny, theft, etc.*[23]—In many states statutes especially provide for the punishment of persons stealing domestic animals,[24] or privily stealing from the person.[25] In some states embezzlement of the property of another,[26] the conversion of personalty obtained under a contract of hiring, or under false pretenses,[27] or the selling or disposing of the annual products of farm lands upon which there is a landlord's lien, is made larceny.[28]

§ 3. *Indictment and prosecution.*[29] *A. Indictment.*[30]—As in the case of other crimes, the indictment must charge only a single offense.[31] All the neces-

20, 21. Weaver v. Commonwealth, 27 Ky. L. R. 743, 86 S. W. 551.

22. Instruction held erroneous. Weaver v. Commonwealth, 27 Ky. L. R. 743, 86 S. W. 551.

23. See 4 C. L. 412.

24. Stealing of a female colt is covered by Pen. Code, § 444, making it grand larceny to steal a mare. Miller v. Territory [Ariz.] 80 P. 321. Sess. Laws 1895, p. 104, c. 20, art. 1, § 1, providing that anyone stealing certain animals shall be guilty of a felony, creates a purely statutory crime distinct from larceny as defined by statutes of 1893. Woodring v. Territory [Okl.] 81 P. 631. 2 Ball. Ann. Codes & St. § 7113, making it an offense to steal certain named animals and providing a punishment therefor, is not repugnant to § 7108, defining grand larceny, and does not operate to repeal it so as to make the stealing of such animals a separate offense. State v. Klein, 38 Wash. 475, 80 P. 770.

25. In order to convict under Cr. Code, § 152, it must appear that the property was secretly and privately taken from the person. State v. Major, 70 S. C. 387, 50 S. E. 13.

26. See, also, Embezzlement, 5 C. L. 1093, B. & C. Comp. § 1805, providing that one embezzling the property of another shall be guilty of larceny, classifies embezzlement as statutory larceny, and hence it is cognizable by a municipal court having jurisdiction of prosecutions for larceny. State v. Browning [Or.] 82 P. 955.

27. That a prosecution may be maintained under Pen. Code 1895, art. 877, providing that one fraudulently converting personalty of which he has obtained possession under a contract of hiring shall be guilty of theft, does not prevent its being maintained under Id. art. 861, making one disposing of another's personalty obtained under false pretenses, or with intent to deprive the owner of its value and to appropriate the same to his own use guilty of theft. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831. The same transaction may be an offense under both articles, the distinction between them being that under art. 861 the fraudulent intent must exist at the time of obtaining possession of the property, while under art. 877 it may be formed later. Id.

28. In Iowa a tenant of farm lands who, with intent to defraud, sells or disposes of any of the grain or other annual products thereof upon which there is a landlord's lien for rent, without the landlord's consent, is guilty of larceny. Acts 29th Gen. Assem. p. 106, c. 146, § 1. State v. Ashpole [Iowa] 104 N. W. 281. Each sale or disposal constitutes a separate offense. Id.

29. See, also, Indictment and Prosecution, 4 C. L. 1.

30. See 4 C. L. 412.

31. Where the statute prohibits the charging of more than one offense in an indictment, the state will be required to elect between counts charging larceny by the embezzlement of money by a bailee and larceny of the money by feloniously stealing, taking, and carrying it away, notwithstanding a statute declaring embezzlement by a bailee to be larceny. The two crimes are essentially different. State v. Finnegean [Iowa] 103 N. W. 155. Under Acts 29th Gen. Assembly, p. 106, c. 146, § 1, declaring that any tenant of farm lands who, with intent to defraud, sells or disposes of any grain or other annual products thereof on which there is a landlord's lien for rent without the landlord's consent, is guilty of larceny, each sale is a separate offense, and hence an indictment charging a sale of grain on a certain date, "and at various and other times and dates," without charging that such dispositions were a part of the same transaction, and in furtherance of a single design to defraud, is bad for duplicity. State v. Ashpole [Iowa] 104 N. W. 281. Indictment, the first four counts of which charge embezzlement, made larceny by the code, the next two counts being the same except that they allege ownership of the money to have been in a corporation instead of individuals, the seventh count charging common-law larceny, and the eighth the obtaining of the money pursuant to a conspiracy, held not to charge more than one crime within Code Cr. Proc. §§ 278, 279, permitting same crime to be charged in separate counts, all the counts specifying the larceny of the same money and naming the same persons as defendants. People v. Kellogg, 94 N. Y. S. 617. Indictment charging defendant with grand larceny for the theft of sheep of a value exceeding $30 is not bad for duplicity as charging two separate offenses, one the stealing of personalty of the value of $30 or more,

sary elements of the crime must be alleged[32] in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.[33]

The property must be described with reasonable certainty.[34] A general description is sufficient if accompanied by an allegation that a more particular one cannot be given for some sufficient reason.[35] If the larceny of several articles is charged, a conviction may be had on proof of the taking of any one of them.[36]

The stealing of articles belonging to two or more persons at the same time and place constitutes but one offense, and may be so charged.[37] It must, however, be alleged that the larcenies were committed at the same time and place.[38]

The ownership of the property, if known, must be laid in some person or persons[39] other than the defendant,[40] and must be proven as alleged.[41] If there be

declared to be grand larceny by 2 Ball. Ann. Codes & St. § 7108, and the other the stealing of animals, made an offense by Id. § 7113. The two are not separate offenses. State v. Klein, 38 Wash. 475, 80 P. 770.

32. An indictment under Acts 29th Gen. Assem. p. 106, c. 146, § 1, prohibiting the fraudulent sale by a tenant of farm lands of any product thereof on which there is a landlord's lien for rent must aver that the tenancy is one of farm lands (State v. Ashpole [Iowa] 104 N. W. 281), though the grain is alleged to have been grown "on the premises known as the Watts farm." Cannot be aided by intendment, but the essential facts must be set out and averred (Id). Indictment held on its face to have sufficiently set forth, with technical precision, enough to charge the defendant with larceny. Commonwealth v. McDonald [Mass.] 73 N. E. 852.

33. Code, § 5280. State v. Finnegean [Iowa] 103 N. W. 155. Under Rev. Laws c. 218, § 38, it is sufficient to aver directly that the person accused did steal, without descriptive averments of asportation, or the means used to obtain possession of the property. Commonwealth v. McDonald [Mass.] 73 S. E. 852. B. & C. Comp. § 1805, providing that one embezzling the property of another shall be guilty of larceny, does not blend those crimes so as to require indictment charging embezzlement to aver that defendant "took, stole, and carried away" the goods converted. State v. Browning [Or.] 82 P. 955.

34. Indictment charging the fraudulent taking and carrying away of "one bill of the lawful currency of the United States of America, of the denomination of $50, the personal property of" a named person, sufficiently describes the property. Knight v. State [Ala.] 39 So. 592. Stolen watch held sufficiently described, and larceny properly alleged, the indictment following the language of Pen. Code 1895, § 155. Patterson v. State [Ga.] 50 S. E. 489. No variance where it was alleged that defendant stole "one double-case silver watch" and evidence showed that watch was being repaired, that works had been taken from the case, and that defendant removed both the works and the case. Id. Proof of the larceny of bank notes held not a fatal variance from an indictment charging larceny of "certain money, the same being the lawful money of the United States," of a specified value. State v. Finnegean [Iowa] 103 N. W. 155. Words "of the United States" may be disregarded as surplusage. Id. Information describing property as "two certain mares" of a specified value, then and there being the property of a named person, held sufficient under Ball. Ann. Codes & St. § 6840. State v. Shuck, 38 Wash. 270, 80 P. 444.

35. Description of steer, "a more particular description of which the informant was not then able to give," held sufficient. State v. Mumford [Kan.] 79 P. 669.

36. Proof of the felonious taking of the property to an amount greater or less than averred will sustain a conviction. Larceny of numerous articles, feloniously taken in same transaction, may be charged in the same count, and defendant convicted on proof of such taking of any one of them. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. In cases of theft from the person it is sufficient to show that any part of the money alleged in the indictment to have been stolen was taken. Fact that all of that alleged was not taken does not constitute a variance. Green v. State [Tex. Cr. App.] 86 S. W. 332.

37. State v. Clark [Or.] 80 P. 101.

38. Is no presumption that they constitute a single crime because they are charged to have been committed on the same day and in the same county. State v. Clark [Or.] 80 P. 101. Indictment for stealing horses from two persons held sufficient in this regard. Id.

39. Buffington v. State [Ga.] 52 S. E. 19; State v. Wasson, 126 Iowa, 320, 101 N. W. 1125; State v. Loomis [Iowa] 105 N. W. 397. In alleging ownership it is not necessary to use the exact words of the statute, equivalent ones being sufficient. Indictment under Act March 3, 1875, 18 St. 479; Supp. Rev. St. v. 1, (2d Ed.) p. 88, c. 144; Comp. St. 1901, p. 3675, charging defendant with stealing money "belonging to" the United States, held sufficient. Dimmick v. U. S. [C. C. A.] 135 F. 257.

40. People v. Cleary [Cal. App.] 81 P. 753. Allegation that defendant unlawfully and feloniously took certain money "from the person and possession" of a certain person by force held insufficient to show ownership, notwithstanding provision of Code Civ. Proc. § 1963, subd. 11, that it is presumed that things which are possessed by a person are owned by him, since indictment can never be aided by presumptions. Id.

41. Larceny of logs as defined by Code,

any question as to the ownership, it is proper to insert counts charging it in as many ways as there are parties interested.[42] Evidence of larceny from an unnamed person will support an indictment charging larceny from a named person and divers unknown persons.[43] If ownership is alleged in a partnership, the names of the parners composing the firm must be given.[44] Goods in the hands of a bailee may be described either as his or as those of the bailor.[45]

Unless of the essence of the offense, no allegation of value is necessary.[46] The venue[47] and the purpose of the taking, if charged, must be proved as alleged.[48] Under the Missouri statute providing for the punishment of persons bringing stolen property into the state, the indictment need not allege that it was stolen elsewhere and brought into the state.[49]

Time need not be proven as laid provided the theft is shown to have been committed before the presentment of the indictment.[50] An indictment charging the

§ 4834. State v. Loomis [Iowa] 105 N. W. 397. Held no prejudicial variance between allegation that stolen goods belonged to the "G. E. C. Store," and evidence that they belonged to a partnership bearing another firm name, it appearing that the former was the name in which it advertised, did business and frequently indorsed checks. State v. Bartlett [Iowa] 105 N. W. 59. Where the evidence leaves it in doubt as to whether the stolen hog belonged to defendant, the prosecutor, or another, a charge authorizing acquittal in case of a reasonable doubt as to whether it belongs to prosecutor or defendant, without reference to the possibility of its belonging to a third person, is erroneous. Armstead v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 507, 87 S. W. 824. Mere fact that father of alleged owner of animal was looking after it for his son, while in its customary range, held not to show a special ownership in him so as to prevent conviction under indictment alleging possession in the son. Parks v. State [Tex. Cr. App.] 89 S. W. 1064.

42. Averment is for purpose of identifying property. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

43. Though there is no evidence of larceny from the person named particularly under Code Cr. Proc. § 281, providing that an erroneous allegation as to the person injured is immaterial. People v. Kellogg, 94 N. Y. S. 617. Under same statute it is immaterial that ownership is alleged to have been in corporation which was not in fact the owner. Id.

44. Otherwise it is fatally defective. Buffington v. State [Ga.] 52 S. E. 19. Name "Stewart & Reece" imports a partnership, and indictment alleging ownership in them, without anything further, is bad on special demurrer directed to that defect. Id.

45. State v. Brown [N. J. Law] 60 A. 1117. Proof that the person alleged to be the owner has a special property in the stolen goods or holds them to do some act upon them, or in trust for the benefit of another, or for the purpose of conveyance, is sufficient to support the allegation of ownership. Id. Indictment for receiving silk stolen from a firm held supported by proof that they were "silk commission throwsters," who received raw silk from owners for purpose of dressing, finishing, reeling, and preparing it for shipment. Id.

46. In indictment for stealing domestic animals under Sess. Laws 1895, p. 104, c. 29, art. 1, § 1, no allegation of value is necessary. Woodrig v. Territory [Okl.] 81 P. 631. Information for grand larceny charging that defendant stole "about $80, lawful money," etc., held sufficiently certain as to value under Pen. Code §§ 957, 959, 960, nor could it be said that it failed to charge the larceny of more than $50, particularly in the absence of a special demurrer. People v. Peltin [Cal. App.] 82 P. 980.

47. That cow was stolen in P. county held not proved by evidence showing only that animal was accustomed to range there, and was seen there at certain time, followed by proof that she was long afterwards found in defendant's possession in another county, and that he then falsely claimed her as his own. Armstrong v. Territory [Ariz.] 80 P. 319.

48. If the indictment charges that the property was taken for a particular purpose, a conviction cannot be had on evidence showing a taking for a different purpose. As where indictment charges theft of appearance bond by a surety for the purpose of avoiding a forfeiture and enforcement of its terms. Counts v. State [Tex. Cr. App.] 89 S. W. 972.

49. Under Rev. St. 1899, § 2362, providing that, where goods are stolen in another state and brought into Missouri, the person guilty of the larceny may be punished therefor in the latter state, and that in such case the larceny may be charged to have been committed, and that every such person may be indicted and punished, in any county into or through which the property may have been brought, held that where goods were stolen in Illinois and brought into Missouri it was not necessary for the information to allege those facts. State v. Mintz, 189 Mo. 268, 88 S. W. 12.

50. Where prosecutrix was not definite as to the time when the theft was committed, fixing it both before and after the presentment of the indictment, but her husband fixed it definitely at a date before the indictment, held, there was no variance, and the court properly refused to direct a verdict for defendant. Green v. State [Tex. Cr. App.] 86 S. W. 332. Instruction using the language "at or about the time charged in the indictment," in referring to the taking, held not

commission of the crime on divers days but specifying only one of them is good.[51]

A false pretext may be proved under an ordinary indictment for theft.[52]

Clerical errors will be disregarded.[53] If the information sufficiently alleges the offense of which defendant is convicted, he cannot complain that it does not sufficiently charge a higher offense of which he is not convicted.[54]

A count charging the receiving of stolen goods may be joined with one charging the larceny of the same goods by the same defendant.[55]

(§ 3) *B. Admissibility of evidence.*[56]—The ordinary rules of criminal evidence apply,[57] including those governing the admission of evidence as to defendant's identity,[58] his conduct on being accused,[59] his statements and admissions,[60]

erroneous, where it appeared that theft occurred prior to the presentment, and no circumstances were shown making necessary the designation of a more specific time. Id.

51. A certain day being mentioned, the continuendo may be rejected as surplusage. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

52. Indictment under Pen. Code 1895, art. 861, need not allege it. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831.

53. Fact that indictment for fraudulent conversion charges defendant with converting property to "is" own use instead of to "his" own use, held immaterial. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159.

54. Cannot complain that it does not sufficiently charge robbery, where he is convicted of pocketpicking. State v. Miller [Kan.] 80 P. 947.

55. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

56. See 4 C. L. 414.

57. Evidence held admissible: Where defendant was accused of the larceny of money given to her to buy house for prosecutrix, she having previously made a bargain with the owner to sell it to prosecutrix for a much smaller sum, and there was evidence tending to show that defendant herself purchased it with the intention of reselling it to prosecutrix, question asked the latter on cross-examination tending to elicit statement whether she purchased from defendant or the owner, held improperly excluded. People v. Delbos, 146 Cal. 734, 81 P. 131. On trial for larceny of horse, where defendant claimed that he represented the owner in obtaining possession thereof from one who had taken it up as an estray, evidence of conversations between him and the owner tending to prove that defense. George v. U. S. [Ind. T.] 89 S. W. 1121. On prosecution for larceny of scarf pin, where evidence tended to show that defendant and two others blocked steps of a car from which prosecutor was alighting, and one of the others took the pin, evidence that defendant and the latter were acquainted prior to the theft. State v. McGee, 188 Mo. 401, 87 S. W. 452. Where defendant obtained money by representing that he needed it to pay the express charges on a corpse which he was bringing into the state, testimony of express agent that he did not transport a corpse on that day, without producing the books of the express company. Bink v. State [Tex. Cr. App.] 89 S. W. 1075. On trial for theft of mule, testimony that on the night of the theft defendant came to her house, that on being refused admission he went toward the road, and that later she heard someone in the road say "whoa," and someone pass on horseback. Burch v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 265, 90 S. W. 168. Where evidence showed that stolen hog was a black sow, and meat corresponding to that of the lost animal was found in a tub on defendant's premises, together with the meat of a red hog which defendant testified belonged to the same litter as the black sow which he admitted killing, evidence as to the meat of the red hog and its weight, which was much greater than that of the stolen sow, to show the improbability that the two were of the same litter. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 299, 87 S. W. 148. Where defendant testified that he went to the mint at unusual hours to check up pay rolls held competent for prosecution to show the length of time necessary to perform such work. Dimmick v. U. S. [C. C. A.] 135 F. 257.

Evidence held inadmissible: Of payment for hog made by defendant or his alleged accomplices in order to avoid threatened prosecution. Armstead v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 507, 87 S. W. 824.

58. Testimony of prosecutor on question of identification held admissible for what it was worth, though it did not fully identify defendant. Trevenio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 566, 87 S. W. 1162. Evidence that defendant was seen driving the stolen horse held not open to the objection that the witnesses did not sufficiently describe or identify him. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174.

59. On trial for theft from the person evidence as to silence of defendant when accused held admissible. State v. Major, 70 S. C. 387, 50 S. E. 13.

60. In prosecution for theft of watch from person, where it appeared that defendant snatched it from prosecutor's hands and was caught by an officer while running away, testimony of prosecutor and officer that former told latter, in defendant's presence of the theft and that defendant was the thief, and that defendant then said he was at a saloon and did not commit the theft, held admissible as res gestae. Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 627, 88 S. W. 807. Testimony of prosecutor as to what the saloon keeper said respecting the investigation then made by him and the officer held properly excluded, the saloon keeper being present as a witness. Id. Evidence of defendant's witness as to statements of defendant and one of his companions to the prosecutor,

and those of the prosecuting witness,[61] as to the commission of other crimes,[62] as to motive,[63] and the admission of expert evidence as to value.[64]

Evidence that defendant was in debt when the crime was committed[65] or that he had no money just before that time is admissible;[66] but not evidence that his credit was good, and that he could have borrowed money.[67]

Notice to produce is not necessary to enable the state to give secondary evidence of the contents of a bond last seen in defendant's possession and which he is charged with having stolen.[68]

Property shown to have been with that stolen when the crime was committed and to have been found in defendant's possession when he was arrested is admissible, though not included in that described in the indictment.[69]

The state may prove possession of the fruits of the crime by either of the co-defendants, even after the termination of an alleged conspiracy between them.[70]

(§ 3) *C. Effect of possession of stolen property.*[71]—Some courts hold that

that they had killed the hog at a certain place, and that they proposed to go to that place and that prosecutor declined to do so, held original evidence of a different state of facts than that testified to by the prosecutor, though it also tended to impeach the latter's testimony, and a ruling limiting its effect to impeachment purposes was erroneous. Armstead v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 507, 87 S. W. 824.

61. Statement of prosecutor that he had been robbed, but that he did not know where, or how anyone could have done it, held erroneously excluded. State v. Lockhart, 188 Mo. 427, 87 S. W. 457. In prosecution for stealing cattle, evidence that prosecutor told defendant that if he would take up four cattle left on the range the previous winter, he could have one of them, or 25 per cent of their proceeds, held admissible without proof that they were the identical cattle that he is charged to have stolen for purpose of showing absence of felonious intent. State v. Strodemier [Wash.] 82 P. 915. Questions in regard thereto held proper cross-examination, being directly connected with matters testified to by the witness on his examination in chief. Id.

62. Proof of extraneous crimes is admissible only when there is a dispute as to the identity of defendant, or some controversy as to his intent or motive, or to establish system or res gestae of the transaction. On prosecution for bringing stolen property into the state, admission of evidence that defendant had obtained money from another person in the same manner, held error, where his fraudulent intent was not controverted, and there was no controversy as to the method or system whereby he accomplished his fraudulent purpose. Bink v. State [Tex. Cr. App.] 89 S. W. 1075; Davenport v. State [Tex. Cr. App.] 89 S. W. 1077; Bink v. State [Tex. Cr. App.] 89 S. W. 1077; Davenport v. State [Tex. Cr. App.] 89 S. W. 1078. In prosecution for larceny under color of a bet on a foot race, evidence of similar acts by defendant and his co-conspirators, both before and after the commission of the offense charged, held admissible to show criminal intent. Johnson v. State [Ark.] 88 S. W. 905. In prosecution for stealing appearance bond on which defendant was surety, evidence as to his living in adultery with the principal on the bond held inadmissible. Counts v. State [Tex. Cr. App.] 89 S. W. 972. Where several felonies are connected together, forming part of one transaction, the one is evidence to show the character of the others. In prosecution for stealing oil from pipe line, evidence showing that oil pumped from wells of defendant's wife, of which he was the manager, was not their natural production, but that their apparent production included large quantities wrongfully taken from the pipe line, and showing the manner of such taking, etc., held admissible. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

63. The existence or nonexistence of a motive is immaterial where the guilt of the accused is clearly established, but such evidence is admissible as tending to show the intent with which the crime was committed. Dimmick v. U. S. [C. C. A.] 135 F. 257.

64. In a prosecution for larceny of a colt it is proper to allow experienced stockmen to state their opinion based on experience and observation of the conduct of the particular animals toward each other that it belongs to a particular mare which it has been following. Miller v. Territory [Ariz.] 80 P. 321.

65. As tending to show motive. Dimmick v. U. S. [C. C. A.] 135 F. 257.

66, 67. People v. Peltin [Cal. App.] 82 P. 980.

68. Appearance bond. Counts v. State [Tex. Cr. App.] 89 S. W. 972.

69. A mutilated and counterfeit coin clearly identified as having been taken from the cash register, from which the money is alleged to have been stolen, at the time the crime was committed, and found on defendant's person when he was arrested shortly thereafter, is admissible to connect defendant with the offense, though it is not lawful money of the United States which defendant is alleged to have taken. People v. Peltin [Cal. App.] 82 P. 980.

70. Prosecution for bringing stolen property into the state after having acquired it elsewhere by theft. Bink v. State [Tex. Cr. App.] 89 S. W. 1075.

71. See 4 C. L. 415.

NOTE. Effect of possession of stolen money: Possession of money of the same kind

the exclusive[72] possession of the stolen property immediately after the theft raises a presumption of guilt[73] and is sufficient to warrant a conviction, unless the attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt in regard to the matter.[74] Others hold that a failure of defendant to explain his possession may be taken as evidence against him,[75] and that a reasonable explanation in his favor may be used as the basis of an acquittal unless it is shown to be false.[76]

(§ 3) *D. Sufficiency of evidence.*[77]—As in the case of other crimes the corpus delicti,[78] venue,[79] and the fact that the defendant committed the crime, may be shown by circumstantial evidence.[80] It is not necessary that the property alleged to have been stolen, or any part thereof, be shown to have been found in the defendant's possession.[81]

The nonconsent of the owner may be proved by circumstantial evidence or by admissions or confession of the accused,[82] or by evidence other than that of the owner, where his absence is satisfactorily accounted for.[83] Where the property is taken from the possession of an agent, proof that it was taken without his consent, in connection with other evidence satisfying the jury that it was taken without the owner's consent, is sufficient without the owner's testimony.[84]

as that stolen is generally of slight, if any, weight as evidence to prove guilt, if money of that kind is in general circulation at that place; but it is of much greater significance if that kind of money is rarely seen in circulation at that place, and its value as evidence is further increased when both the money found and that stolen consists of a combination of pieces of such money. People v. Getty, 49 Cal. 583. See, also, People v. Melvane, 39 Cal. 614. Where money is not marked in any way, no presumption of law arises from its possession, but the fact is a circumstance which may be considered in connection with other circumstances as evidence of guilt. United States v. Candler, 65 F. 308. Such evidence is admissible, but it alone does not warrant a conviction. Kaiser v. State, 35 Neb. 704, 53 N. W. 610. See also State v. Nesbit, 4 Idaho, 548, 43 P. 66, Barker v. State, 126 Ala. 69, 28 So. 685, Thompson v. State, 35 Tex. Cr. R. 511, 34 S. W. 629.—From note to State v. Drew [Mo.] 101 Am. St. Rep. 482.

72. Held exclusive. Flanagan v. People, 214 Ill. 170, 73 N. E. 347.

73. State v. Wasson, 126 Iowa, 320, 101 N. W. 1125. Code 1897, § 4836 does not raise a presumption of guilt from the mere finding of marked logs in defendant's possession, but their wrongful taking and ownership must first be established as alleged before any presumption arises. State v. Loomis [Iowa] 105 N. W. 397.

74. Presumption held not overcome. Flanagan v. People, 214 Ill. 170, 73 N. E. 347. Not necessary that his explanation be satisfactory. State v. Bartlett [Iowa] 105 N. W. 59.

75. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174.

76. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174. Instruction to the effect that, if defendant's explanation of the finding of the stolen property in his possession was reasonable and probably true, it should be taken as true and go to his acquittal, held to be in defendant's favor and not to erroneously state the law. Hilscher v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 713, 88 S. W. 227. Charge held to properly require the state to prove the falsity of defendant's explanation, if the same was reasonable and probable, and not to have imposed a greater burden on defendant than that imposed by law. Id. Evidence held to justify charge upon explanation given by defendant of the possession of recently stolen property. Parks v. State [Tex. Cr. App.] 89 S. W. 1064. Requested charge that accused was not called upon to explain his possession of the stolen horse, if such possession should be found, and therefore he would not be guilty, held properly refused, particularly where the evidence showed that he gave a false explanation. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174.

77. See 4 C. L. 416.

78. Dimmick v. U. S. [C. C. A.] 135 F. 257.

79. McCoy v. State [Ga.] 51 S. E. 279. Under Pen. Code 1895, § 155, making cattle stealing simple larceny, and providing that the thief may be indicted in any county into which he may carry the stolen goods, venue held sufficiently proven where accused was shown to have been unlawfully in possession of cattle in county where crime is alleged to have been committed, the day after the theft, even though it was not shown that they were actually taken while in that county. Id.

80. Dimmick v. U. S. [C. C. A.] 135 F. 257.

81. Money. Dimmick v. U. S. [C. C. A.] 135 F. 257.

82. State v. Bjelkstrom [S. D.] 104 N. W. 481.

83. Where owner could not be located, evidence showing that defendants took money from his pocket while he was drunk, and that he subsequently charged them with the crime and identified one of them, held to warrant conviction. Jones v. People [Colo.] 79 P. 1013.

84. Evidence held sufficient State v. Bjelkstrom [S. D.] 104 N. W. 481.

Where a national bank bill is produced at the trial and identified as a part of the money alleged to have been stolen, no proof of its value other than its introduction in evidence is necessary.[85]

Cases turning on the sufficiency of the evidence to support a conviction will be found in the note.[86]

(§ 3) *E. Instructions.*[87]—The usual rules as to instructions apply.[88] As in other criminal cases they should not assume the existence of facts in issue,[89] unless admitted or uncontroverted,[90] go to the weight of the evidence,[91] or express

85. Court will take judicial notice of their value. Joiner v. State [Ga.] 52 S. E. 151.

86. Evidence held sufficient to sustain conviction. Dimmick v. U. S. [C. C. A.] 135 F. 257. Burglary and larceny. Flanagan v. People, 214 Ill. 170, 73 N. E. 347. Simple larceny. Martin v. State [Ga.] 51 S. E. 334. To connect defendants with the crime and to sustain a conviction. Junod v. State [Neb.] 102 N. W. 462. Though circumstantial. Joiner v. State [Ga.] 52 S. E. 151. For privily stealing from the person. State v. Major, 70 S. C. 387, 50 S. E. 13. Clothing. Martin v. State [Ark.] 88 S. W. 962. Petit larceny of cloak. State v. Harrington [Mo. App.] 86 S. W. 274. Coffee. Williams v. State [Tex. Cr. App.] 85 S. W. 1142. Hog. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 299, 87 S. W. 148; McGaha v. State [Ark.] 88 S. W. 983. Davis v. Territory [Ariz.] 80 P. 389; Woodrig v. Territory [Okl.] 81 P. 631. Evidence that defendant obtained possession of horses on a false pretext as to where he was going to drive them, that he drove them in another direction to a point out of the state, and there attempted to dispose of them for less than their value, held to warrant conviction of theft under Pen. Code 1895, art. 861. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831. Money. Ware v. State [Tex. Cr. App.] 84 S. W. 1065. By bailee for a particular purpose. People v. Kellogg, 94 N. Y. S. 617. Steer. State v. Mumford [Kan.] 79 P. 669. Theft of watch from the person. Aladin v. State [Tex. Cr. App.] 86 S. W. 327; Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 627, 88 S. W. 807. Scarf pin. State v. McGee, 188 Mo. 401, 87 S. W. 452. Court held, under the evidence, not to have abused his discretion in refusing to set aside verdict of guilty of stealing tobacco. Gaines v. State [Ga.] 52 S. E. 78.

Evidence held sufficient: To establish ownership of cow. Armstrong v. Territory [Ariz.] 80 P. 319. To show felonious intent. Miller v. Territory [Ariz.] 80 P. 321. Evidence as to ownership of personal property stolen and possession of house from which it was taken held to sustain allegations. Patterson v. State [Ga.] 50 S. E. 489. On prosecution for bringing stolen money into the state, to show with reasonable certainty that defendant brought in $50 of such money. Bink v. State [Tex. Cr. App.] 89 S. W. 1075. To authorize submission of case to jury. Horse stealing. State v. Shuck, 38 Wash. 270, 80 P. 444.

Evidence held insufficient to sustain conviction: For larceny of cattle. Winchester v. State [Tex. Cr. App.] 85 S. W. 1073. Hogs. Wesley v. State [Tex. Cr. App.] 85 S. W. 802; Womack v. State [Tex. Cr. App.] 86 S. W. 1015. Lightning rods. Brokaw v. State [Tex. Cr. App.] 85 S. W. 801. Money in house of prostitution, notwithstanding the fact that amount lost was returned by one of the defendants when threatened with arrest. State v. Lockhart, 188 Mo. 427, 87 S. W. 457.

Evidence held insufficient: To show that crime was committed, and ownership of logs. State v. Loomis [Iowa] 105 N. W. 397. To show that defendant did any act showing an intent either to take or convert the horse to his own use, and hence not to sustain conviction. Ladeaux v. State [Neb.] 103 N. W. 1048. To show that certain witnesses who bought the coffee from defendant were accomplices. Williams v. State [Tex. Cr. App.] 85 S. W. 1142. To show any guilty participancy or knowledge on the part of defendant of the taking of hose by another. Canaday v. State [Tex. Cr. App.] 87 S. W. 346.

87. See 4 C. L. 416.

88. Instructions approved: As to right to convict of simple larceny under indictment charging larceny from the house. Patterson v. State [Ga.] 50 S. E. 489. As to claim of taking watch under bona fide claim of right. Id. As to obtaining money through trick with intent to appropriate it being larceny. State v. Ryan [Or.] 82 P. 703. Instruction held not open to the objection that it made the intent to appropriate sufficient to authorize a conviction without showing an actual appropriation. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831. As to circumstantial evidence. Dimmick v. U. S. [C. C. A.] 135 F. 257. As to necessity of finding stolen money in defendant's possession. Id.

Instructions held erroneous: As calculated to give the impression that mere knowledge that crime was in contemplation would constitute an aiding or abetting. State v. Bartlett [Iowa] 105 N. W. 59. Instruction as to effect of possession of stolen property criticised. State v. Bartlett [Iowa] 105 N. W. 59.

89. In prosecution for fraudulent conversion of horse of which defendant obtained possession under contract of hiring, charge held not objectionable as assuming the existence of such a contract. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159.

90. Instruction that there was no question as to the ownership of the property held proper under the evidence. Commonwealth v. Cramer, 25 Pa. Super. Ct. 141. Statement in charge that the prosecuting witness had testified on hearing before justice that defendant had denied the taking held justified. Id.

91. Instruction limiting effect of evidence of another crime to purposes of impeach-

an opinion as to its truth or falsity,[92] or comment on the failure of the accused to testify,[93] nor should they be vague, confusing, or misleading.[94]

They must be predicated on evidence in the case,[95] and submit all defenses as to which there is any evidence.[96] The charge will be construed as a whole.[97]

Holdings as to the necessity or propriety of giving instructions as to felonious intent,[98] the purpose for which the property was taken,[99] admissions and confessions,[1] accomplice testimony,[2] circumstantial evidence,[3] the presumption arising from the possession of stolen property,[4] principals and accessories,[5] and lesser degrees of the crime charged,[6] will be found in the note.

ment held objectionable. Counts v. State [Tex. Cr. App.] 89 S. W. 972.

92. Instruction held not to involve expression of opinion as to truth of state's evidence. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

93. Statement that no one had denied the correctness of a witness' statement of a conversation with accused held not such a comment. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

94. Charge as to evidence of reputation held not misleading. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. Instruction as to effect of an explanation by defendant of fact that stolen goods were found in his possession held not to be vague, confusing, or misleading. Hilscher v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 713, 88 S. W. 227.

95. Evidence held to warrant finding that defendant, in pursuance of previous understanding, joined with others in engaging attention of storekeeper, so as to give another an opportunity to steal tobacco, which he did, and hence court did not err in charging as to law bearing on that theory of the case. Gaines v. State [Ga.] 52 S. E. 78. On trial for larceny of horse, instruction that if jury should find that defendant was one of several interested in the larceny it would make no difference that the others were not indicted or on trial, held prejudicial error, there being no evidence on which to base it. George v. U. S. [Ind. T.] 89 S. W. 1121. There being no evidence of joint action in the commission of the alleged larceny, instruction calculated to impress jury with idea that it was the result of a criminal conspiracy held erroneous. State v. Lockhart, 188 Mo. 427, 87 S. W. 457.

96. Charge held not prejudicial as withdrawing the questions of intent and mistake, where they were fully and correctly submitted by other portions of the charge. State v. Bjelkstrom [S. D.] 104 N. W. 481. Charge held sufficiently broad to embrace defendant's defense that he was a receiver and did not participate in the actual theft. Williams v. State [Tex. Cr. App.] 85 S. W. 1142. Charge held to properly submit defense based on theory that third person hired the horse from the owner and disposed of it to defendant. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159.

97. In prosecution for larceny of colt, instruction referring to jury's knowledge of business of raising stock held not objectionable as authorizing them to base their verdict on their own knowledge rather than on the evidence. State v. Bjelkstrom [S. D.] 104 N. W. 481.

98. Where defendant's evidence showed that he lawfully took up hogs to keep them out of his cornfield, and subsequently formed the intent to appropriate them, refusal to charge that, if such was the case, he could not be convicted, held error. Veasly v. State [Tex. Cr. App.] 85 S. W. 274. Where evidence showed that if horse was stolen by defendant's alleged accomplice, he was a guilty participant in the taking, and that he afterwards joined said accomplice in stating untrue facts as to the ownership and control of it, held not error to refuse to instruct that, if accused did not intend to appropriate the horse to his own use, he should be acquitted. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174.

99. Evidence being circumstantial, held error not to instruct that defendant could not be convicted if he took the property for any other purpose than that stated in the indictment. Counts v. State [Tex. Cr. App.] 89 S. W. 972.

1. Charge on admissions or confessions held not called for by defendant's statements before the grand jury in nature of an alibi and entirely exculpatory. Trevenio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 566, 87 S. W. 1162.

2. A mere showing that certain witnesses purchased the stolen coffee from defendant because it was cheap held not to require such a charge. Williams v. State [Tex. Cr. App.] 85 S. W. 1142.

3. There is no error in failing to charge on circumstantial evidence where a witness testifies that he saw defendant take the watch from prosecutor's pocket. Aladin v. State [Tex. Cr. App.] 86 S. W. 327. In prosecution for fraudulently converting a horse of which defendant obtained possession under a contract of hiring, where the contract and defendant's possession are shown by positive evidence, the mere fact that owner sent horse to defendant by a servant, and cannot positively testify that it was delivered to defendant, does not require a charge on circumstantial evidence. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159. Evidence that defendant was found in possession of the hog, without any showing as to how, when, or where he got possession, makes a case of circumstantial evidence and calls for a charge on that subject. Armstead v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 507, 87 S. W. 824. Failure to charge on subject of circumstantial evidence held error where state's case depended mainly on such evidence to show taking. Veasly v. State [Tex. Cr. App.] 85 S. W. 274.

4. Refusal to instruct that presumption was overcome by evidence of defendant's good character held proper in view of the

(§ 3) *F. Trial, sentence and review.*[7]—The taking being proved, the intention with which it was done is for the jury.[8]

One indicted for robbery may be convicted of larceny,[9] and one charged with larceny from the house of simple larceny.[10]

A verdict of guilty need not specify the amount or value of the property stolen.[11]

The punishment for larceny is fixed by the statutes of the various states.[12] In order that defendant may avail himself of a statute providing for a lighter punishment in case the stolen property is voluntarily returned, the return must be voluntary and must have been made before he was detected as the thief and found in possession of the property.[13] Cases holding the punishment inflicted to be excessive will be found in the note.[14]

LASCIVIOUSNESS; LATERAL RAILROADS; LATERAL SUPPORT; LAW OF THE CASE; LAW OF THE ROAD; LEASES; LEGACIES AND DEVISES; LEGAL CONCLUSIONS; LEGATEES; LETTERS; LETTERS OF CREDIT; LEVEES; LEWDNESS, see latest topical index.

evidence. People v. Peltin [Cal. App.] 82 P. 980. In view of evidence held proper to instruct as to effect of possession. Id.

5. Charges given held to render unnecessary a charge that evidence must show that defendant was a party to the original taking, and that fact that he might have been an accomplice, accessory, or receiver of the stolen property would not warrant his conviction for the theft. Trevenio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 566, 87 S. W. 1162. Where the only evidence was circumstantial, consisting of evidence that the stolen property was found in the joint possession of several persons, instruction that all persons acting together in the commission of an offense are principals, whether all are actually present when the offense is committed or not, held reversible error. Armstead v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 507, 87 S. W. 824. Failure to charge that if jury should find that defendant was not connected with the original taking they should acquit him held not reversible error, where evidence conclusively showed that if defendant's alleged accomplice took the horse, defendant was a guilty participant in the taking. Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 S. W. 174.

6. On prosecution for theft of coffee, failure to charge on misdemeanor theft of property of value of less that $50 held not error, where uncontradicted evidence showed that the value of the stolen property exceeded that amount. Williams v. State [Tex. Cr. App.] 85 S. W. 1142. Evidence and indictment held to require instruction upon the offense of petit larceny. Weaver v. Commonwealth, 27 Ky. L. R. 743, 86 S. W. 551.

7. See 4 C. L. 417.

8. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. Whether defendant took crude turpentine under the honest belief that it was within his employer's land line, and whether the taking was felonious, though done openly, are questions for the jury. Dickens v. State [Ala.] 39 So. 14. Question whether defendant had taken the property on a purchase from a person whom he, in good faith, and on reasonable grounds, believed to be the owner, or on a colorable purchase with notice that it belonged to the prosecuting witness, held for the jury under the evidence. Commonwealth v. Cramer, 25 Pa. Super. Ct. 141.

9. Under Code, § 4753, making it robbery to steal and take from the person of another with force and violence, or by putting in fear, any property that is the subject of larceny. State v. Wasson, 126 Iowa, 320, 101 N. W. 1125. Defendant may be convicted of pocketpicking or stealing from the person under an information charging robbery. State v. Miller [Kan.] 80 P. 947.

10. Where he is charged with "wrongfully, fraudulently, and privately taking the property from the house and carrying it away with intent to steal the same." Patterson v. State [Ga.] 50 S. E. 489. Defendant having been found guilty of simple larceny, the question of larceny from the house is out of the case, and assignments complaining of rulings on that subject need not be considered on appeal. Id.

11. Where indictment charges the taking of 2,000 barrels of oil. Commonwealth v. Dingman, 26 Pa. Super Ct. 615.

12. Act 1902, No. 107, § 5, p. 162, is constitutional in so far as it grades the offense of petty larceny and makes the same punishable by imprisonment in the parish jail, though unconstitutional in so far as it makes the larceny of objects of the value of $20 or over punishable by imprisonment at hard labor in the penitentiary. State v. Eubanks, 114 La. 428, 38 So. 407. Under this section no sentence of imprisonment in the penitentiary can be imposed for petit larceny of property less in value than $5. State v. Williams, 114 La. 940, 38 So. 686. As relates to the theft of property worth less than $5, treated by the statutes as a misdemeanor, the act is constitutional. Id. The right to impose a sentence of 2½ years for an attempt to commit larceny from the person held not affected by the indeterminate sentence act, St. 1895, p. 624, c. 504. Commonwealth v. O'Neil [Mass.] 74 N. E. 592.

13. Proof must show that he was aware of the detection. Ware v. State [Tex. Cr. App.] 84 S. W. 1065. Held no voluntary return where defendant denied to the owner and an officer that he had money, found under circumstances charging him with no-

LIBEL AND SLANDER.

§ 1. *Definition and distinctions, nature of tort, and persons liable.*[15]—Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.[16] To maintain an action for libel it is not necessary that an indictable offense should be imputed to the plaintiff.[17] To maintain an action for slander the words must either have produced a temporal loss to the plaintiff, by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offense involving moral turpitude.[18] To hold a principal responsible for slanderous words spoken by his agent, it must appear that the latter acted within the scope of his employment, and also that the words were spoken whilst the agent was employed in the actual performance of the duties of his principal.[19] Slanderers by concert may be sued jointly or severally,[20] but to hold an organization and its members the latter must as individuals have participated.[21] A corporation may be slandered or libeled in its business.[22] An action for slander or libel is personal and abates with the death of either party thereto,[23] but the cause of action merges in a judgment for plaintiff and does not thereafter abate on the death of defendant pending an appeal.[24]

§ 2. *Elements of tort. A. Actionable words.*[25]—Words may be actionable because they are defamatory on their face when they are actionable per se and without proof of actual damage, because of injury presumed, such as words imputing a crime,[26] or want of chastity,[27] words exposing one to scorn, ridicule or contempt,[28]

tice as to who was the owner, and only returned it when threatened with arrest. Id.

14. Sentence to 10 years in penitentiary for stealing horse worth $40 held excessive. George v. U. S. [Ind. T.] 89 S. W. 1121. Sentence of imprisonment for five years for stealing $40 worth of wire held excessive under the circumstances, and reduced to two years and a half, under authority given supreme court by Crim. Code, § 509a. Junod v. State [Neb.] 102 N. W. 462.

15. See 4 C. L. 418.

16. Statutory definition. Rev. Codes 1899, § 2715. Lauder v. Jones [N. D.] 101 N. W. 907. Other definitions. Raymond v. United States, 25 App. D. C. 555; Farley v. Evening Chronicle Pub. Co. [Mo. App.] 87 S. W. 565.

17. Barron v. Smith [S. D.] 101 N. W. 1105; Prewitt v. Wilson [Iowa] 103 N. W. 365; Dowie v. Priddle, 116 Ill. App. 184.

18. Barron v. Smith [S. D.] 101 N. W. 1105; Sharp v. Nolan, 27 Ky. L. R. 326, 84 S. W. 1168.

19. International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129.

20. Green v. Davies, 182 N. Y. 499, 75 N. E. 536.

21. Where an action is brought against an exchange and certain individual defendants, stating a cause of action against the exchange for publishing a written notice prohibiting plaintiff from representation on the floor of the Exchange, but there is no allegation that the individual defendants requested or procured the notice to be posted, it does not show the act of the exchange to be that of the individual defendants making them liable in an action for libel. Gutkes v. New York Produce Exch., 46 Misc. 133, 93 N. Y. S. 254.

22. Gross Coal Co. v. Rose [Wis.] 105 N. W. 225.

23, 24. Miller v. Nuckolls [Ark.] 89 S. W. 88.

25. See 4 C. L. 418.

26. Words clearly defamatory on their face, unambiguous and incapable of an innocent meaning. Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243. The word "thief" in its ordinary acceptation imputes the crime of larceny and is actionable per se, but if the word be spoken of the plaintiff in relation to a past act or transaction known to the hearers and which was not larceny or in-

or words injuring one in his business or occupation.[29] Words may be defamatory

dictable as a crime the use of such word is not actionable. Merrill v. Marshall, 113 Ill. App. 447.

Element of crime lacking: At common law an action for slander will lie for malicious publication of a false accusation, although made in general words, if it imports that the person accused is guilty of a felony or other crime for which an indictment would lie. Feast v. Auer [Ky.] 90 S. W. 564. Under Pen. Code Cal. § 618, declaring every person who willfully opens or reads any sealed letter not addressed to himself, without being authorized so to do, guilty of a misdemeanor, a statement falsely charging plaintiff with having opened and read a letter addressed to defendant, without charging the same to have been willfully done, does not charge plaintiff with a crime and is not slanderous per se. Greene v. Murdock [Cal. App.] 81 P. 993.

A notice sent in compliance with law to plaintiff by county treasurer, auditor, and tax-ferret, stating that the officers had been apprised that moneys of plaintiff had been omitted from taxation and requiring her to appear and show cause why the same should not be assessed, held not libelous. O'Connell v. Shontz, 126 Iowa, 709, 102 N. W. 807.

Held actionable per se. Statement that a person had been "bribed" to testify as a witness. Atlanta News Pub. Co. v. Medlock [Ga.] 51 S. E. 756. Words importing felonious fraudulent breach of trust. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005. That the sheriff of the county, who is a candidate for re-election, had obtained from the county a certain sum of money upon a false and "imaginary" account for expenses, which he had never incurred Farley v McBride [Neb.] 103 N. W. 1036. "He is a thief." Line v. Spies [Mich.] 102 N. W. 993. "He (meaning plaintiff) is and has been behind the bars." Herhold v. White, 114 Ill. App. 186. A statement "I know I never got all my rent corn off of the ground that Joe Grimes had rented. The corn that Joe Grimes sold to Teidgen was my corn, and I am satisfied that Grimes stole my corn," made by defendant concerning plaintiff, did not necessarily mean that plaintiff was defendant's tenant on shares, and that the corn referred to had been in his possession, as tenant, undivided, and hence imported a larceny and was slanderous per se. Grimes v. Thorp [Mo. App.] 88 S. W. 638. Where an alleged libel, published of and concerning plaintiff, recited "She went to a prison for an operation. She sank so low. She said it cost five dollars and that her screams were heard all over the block," the word "prison" being substituted by mistake for "person," the obvious meaning of the charge was that plaintiff had submitted to a criminal operation on account of which she had been sent to prison, and was libelous per se. Wuest v. Brooklyn Citizen, 102 App. Div. 480, 92 N. Y. S. 852. A charge that plaintiff stole material belonging to defendant is slanderous per se, and is not relieved from its slanderous import by a further statement that plaintiff used the material on some one else's work. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863. To charge the disbursement of excessive sums of money in promoting a campaign for public office with such words as "price paid," "bought and paid," and "cost." Scofield v. Milwaukee Free Press [Wis.] 105 N. W. 227. Newspaper article animadverting on the frequency of fires in plaintiff's building, and stating that another fire would cause his arrest if his explanation was unsatisfactory. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634. Words "I have a man to prove that H. struck S. in front of his place of business, that he had two witnesses who had tracked the blood stains from H's shop to the place where S. fell unconscious; and that he had proof that H. was guilty of the murder of S." Haub v. Freiermuth [Cal. App.] 82 P. 571. "It would be interesting to know how far the money [political disbursements] went on its return journey," held to carry a libelous meaning. Scofield v. Milwaukee Free Press [Wis.] 105 N. W. 227.

Held not actionable per se. Statement that husband and wife were engaged in a conspiracy to cheat and defraud is not slanderous in so far as it charges conspiracy. Merrill v. Marshall, 113 Ill. App. 447. Calling a woman "a dirty, vile woman" does not charge her with adultery and is not actionable. Feast v. Auer [Ky.] 90 S. W. 564.

27. Under Rev. St. (Mo.) 1899, § 2863, declaring it actionable to publish falsely that any person has been guilty of fornication or adultery, a false charge of the commission of unlawful intercourse is slander, although the charge is made in language technically inaccurate in that it charges unmarried persons with adultery. Brown v. Wintsch, 110 Mo. App. 264, 84 S. W. 196. Under this statute it is actionable per se to falsely and maliciously charge a woman with being a whore. Israel v. Israel, 109 Mo. App. 366, 84 S. W. 453.

Calling a woman a "low woman" and a 'half negress" does not impute a want of chastity and is not slanderous per se. Kenworthy v. Brown, 45 Misc. 292, 92 N. Y. S. 34.

28. Defamatory per se. A complaint for libel based on defendant having charged plaintiff with having "held a war dance" and with having "carried on at a rate that would be a disgrace to the Comique or the worst dance hall in the city," which fails to show by way of inducement, colloquium, or innuendo the character or reputation of the "Comique" and the dance halls of the city, is bad. Wright v. Daniel [Wash.] 82 P. 139. Just prior to the general election in November, 1904, defendant published an article concerning plaintiff, who was president of the Democratic city committee of P., and others, members of such committee, first declaring plaintiff an eminent exemplar of "Democratic sentiment and Republican affiliations," stating that there was something radically wrong with Republican institutions and election methods when individuals of this character (referring to plaintiff and his associates) can, through election machinery, say to thousands of respectable voters that they cannot have their choice, etc., and asking "what respectable citizen is there that would select these men,

by reason of some special circumstances attending their publication, in which case special damages must be proved.[30] Words which are harmless in themselves may be libelous in the light of extrinsic facts.[31] It is not necessary to render words defamatory and actionable that they shall make the charge in direct terms. It may be made indirectly, and is not for that reason the less actionable.[32] The libelous ar-

who tell them who they must vote for, to represent him in a business transaction," held that such article was rather an indictment of the people at large than of the plaintiff and was not libelous. Barr v. Providence Telegram Pub. Co. [R. I.] 60 A. 835. A publication charging that plaintiff was a strike breaker, etc., and that he had accepted money from a labor organization in a certain city on an agreement to leave the city during a strike, but, after going outside the corporate limits, had immediately returned, tended to blacken plaintiff's reputation and excite ridicule or wrath against him. Farley v. Evening Chronicle Pub. Co. [Mo. App.] 87 S. W. 565. To publish in a newspaper of a white man that he is colored. Flood v. News & Courier Co. [S. C.] 50 S. E. 637. Calling plaintiff "a liar and a poltroon." Byrne v. Funk, 38 Wash. 506, 80 P. 772. Published statements that an owner of injured cattle had hitched a team to them and dragged them some distance "breaking bones not already broken," and had left them in a dying condition for some time until they were killed by an officer of the society for the prevention of cruelty to animals. Saunders v. Post Standard Pub. Co., 94 N. Y. S. 993. A publication alleging that a piano had been sold to a certain miner's union, which required great financiering, and that the agent thought it a great thing to bribe a committee, or officers, so as to sell a piano, and that such was the case, held libelous. Barron v. Smith [S. D.] 101 N. W. 1105. In a publication referring to plaintiff twice as a detective, and stating that when plaintiff was attacked by robbers he showed great cowardice and attempted to hide under the seat of the vehicle, the tendency of the words was to hold him up to scorn as a detective. Holland v. Flick, 212 Pa. 201, 61 A. 828. Publication stating that the subscribers were well acquainted with plaintiff and would not believe him under oath. Prewitt v. Wilson [Iowa] 103 N. W. 365. Article, which was wholly false, referring to an alleged intended marriage between plaintiff and G, and stated that all preparations having been made and the guests having assembled in a hall, the bridegroom failed to appear, whereupon plaintiff fell to the floor with a scream and the guests made a rush for the tables, which the waiters by virtue of their training cleared in "double quick time" and thereby saved the same. Kirman v. Sun Printing & Publishing Co., 99 App. Div. 367, 91 N. Y. S. 193.

29. Any written words are libelous which in any manner are prejudicial to another in the way of his employment or trade. Holland v. Flick, 212 Pa. 201, 61 A. 828. A complaint for libel, charging that plaintiff was a horseshoer and carriage manufacturer, and that defendant published of the plaintiff and certain others, who were members of the democratic city committee of P., a statement derogatory to them as politicians and containing an interrogatory asking what respectable citizen would select these men, who tell them who they must vote for, to represent them in a business transaction, etc., but containing nothing intimating that plaintiff was not skilled or competent in his business, was not libelous within Act 1647 (1 R. I. Col. Rec. p. 184), defining libel as a disparagement of a man in his trade or business. Barr v. Providence Telegram Pub. Co. [R. I.] 60 A. 835. A false publication, impairing the credit of a merchant or trader by imputing insolvency, dishonesty, or trickery touching his trade or occupation, is libelous per se. Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60. To say of one that he is a swindler when it is not spoken of him in his office or calling is not slanderous. Kuhne v. Ahlers, 45 Misc. 454, 92 N. Y. S. 41.

30. Where a person with fraudulent design or intent makes a false imputation for the express purpose of injuring the business of another, and where injury results as the natural and probable results thereof, an action will lie notwithstanding the words spoken are not in themselves defamatory. American Ins. Co. v. France, 111 Ill. App. 382. When the words spoken are susceptible in connection with other facts in evidence of a meaning other than the imputation of a felony, it is a question for the jury whether such words were intended to impute felony. Merrill v. Marshall, 113 Ill. App. 447. When the plaintiff in an action for libel has, by innuendo, put a meaning upon the alleged libelous publication which is not supported by its language or by proof, the court may nevertheless submit the case to the jury if the article is libelous per se. Wuest v. Brooklyn Citizen, 102 App. Div. 480, 92 N. Y. S. 852.

31. A publication which imputes to one language which is known to those among whom he lives to contain statements which are false is libelous. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68. A publication of an advertisement of an insurance company containing a person's picture and a statement that the person has policies of insurance with the company, and is pleased with his investment, when in fact he has no such policies, is libelous, as having a tendency to create the impression among those who know the facts that the person whose picture is reproduced told a willful falsehood. Id. In an action for slander words are, in the first instance, to be taken in their natural sense, and the burden is on the defendant to show that they were spoken innocently. Israel v. Israel, 109 Mo. App. 366, 84 S. W. 453.

32. Lauder v. Jones [N. D.] 101 N. W. 907. Language which in the circumstances under which it was used, would reasonably cause one to understand that it was intended to impute a crime. Line v. Spies [Mich.] 102 N. W. 993. The fact that a person's name was not mention-

ticle must refer to the plaintiff in its description or identification such as to lead those who know, or know of plaintiff, to believe that the article was intended to refer to plaintiff.[33] Falsity is essential.[34] The owner of property has a right of action against anyone who falsely and maliciously publishes statements in regard to the same or the title of plaintiff thereto.[35] Thus in respect of a corporation it is actionable per se to charge that it took advantage of a scarcity to exact unconscionable prices for its commodities.[36] A person claiming to have an interest in land being sold at a judicial sale may at such sale state facts as to the property about to be sold when such facts relate to title, possession, or the alleged right of possession thereof and such statements cannot be deemed a slander of the title.[37] An advertisement may be libelous if it falsely depreciates another's wares.[38]

(§ 2) *B. Publication*[39] is essential,[40] but the author of a libel is not liable for any damages caused by the publication of the same by the party libeled.[41] Every person is entitled to receive, inspect, and circulate a public document and one who gives or loans such document to another incurs no liability for the publication of a libel.[42]

ed in a publication, alleged to be a libel on him, does not render it the less libelous so long as the publication would be understood to refer to him. Barron v. Smith [S. D.] 101 N. W. 1106. A declaration for libel alleging the publication of a letter wherein the writer stated that his wife, with his child, had left him and had been "seen in the company of one C, a ticket agent" at a station named. "Couple this fact with the circumstance that my little girl was found in the home of the mother of this man C and then read between the lines for a moment and it is not hard for a person of ordinary intelligence to figure out the facts in the case"—with proper innuendoes, is sufficient on demurrer. Cross v. Flood, 77 Vt. 285, 59 A. 1018.

33. Butler v. News-Leader Co. [Va.] 51 S. E. 213.

34. Where insurance company advertised a quick "settlement" of a certain loss and another company advertised that though the loss had been "settled" it had not been "paid," and drew as a moral that it was better to insure in the latter company, held not libelous. P. L. Hennessey & Bro. v. Traders' Ins. Co. [Miss.] 39 So. 692.

35. If the owner in possession of property is damaged or annoyed by persons setting up adverse title to his own, he may bring an action for slander of title. Bossier's Heirs v. Jackson, 114 La. 707, 38 So. 525. In suit for slander of title, mere possession by the plaintiff will suffice as against one defendant disclaiming title and another defendant setting up a tax title absolutely null. Posey v. Ducros [La.] 39 So. 26. Where the alleged libelous writings are not libelous per se, there can be no recovery in the absence of proof that the plaintiff has sustained pecuniary injury by reason of their publication. Walker v. Best, 107 App. Div. 304, 95 N. Y. S. 151.

36. Gross Coal Co. v. Rose [Wis.] 105 N. W. 225.

37. Brady v. Carteret Realty Co., 67 N. J. Eq. 641, 60 A. 938.

38. Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103.

Note: Other cases of libel in advertisements, see St. Louis Clothing Co. v. J. D. Hail Drygoods Co., 156 Mo. 393, 56 S. W. 1112; Riley v. Lee, 88 Ky. 603, 21 Am. St. Rep. 358; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Smith v. Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52.

39. 40. See 4 C. L. 423.

NOTE: What is or is not a publication is often a vexed question. The mere sending of a letter is not a publication. 4 C. L. 423, n. 42. Yousling v. Dare 122 Iowa, 539, 98 N. W. 371. Nor the sending of a postcard if the plaintiff is not sufficiently connected with the defamatory matter. Sadgrove v. Hole 2 K. B. 1. But it is publication if the libelous communication is given to a member of plaintiff's family, as to a daughter (4 C. L. 423, n. 42), or to a father (Gaines v. Gaines, 109 Ill. App. 226). So also if the third person is an agent or confidential stenographer or clerk of defendant or plaintiff (Sun Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692; Gambrill v. Schooley, 93 Md. 48, 48 A. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87). So when the defendant discloses the matter to a friend (Snyder v. Andrews, 6 Barb. [N. Y.] 43), or where plaintiff turns over a libelous letter to an employer as the letter was directed jointly to plaintiff and employer (Schmuck v. Hill, 2 Neb. Unoff. 79, 96 N. W. 153); or plaintiff himself by reason of his illiteracy has the letter read by another to him (Allen v. Wortham, 89 Ky. 485, 13 S. W. 73). And it is also publication where the actionable words are given to those whose business it is to transmit or spread them, as telegraphers and printers (Monson v. Lathrop, 96 Wis. 386, 65 Am. St. Rep. 54; Baldwin v. Elphinston 2 W. Bl. 1037).—3 Mich. L. R. 78.

41. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850. Where an alleged libelous letter was written concerning plaintiff's character as a clergyman, defendants were not responsible for any damages resulting from plaintiff's publication of such letter by reading it from the pulpit of his church before the congregation. Id.

42. De Arnaud v. Ainsworth, 24 App. D. C. 167.

(§ 2) *C. Malice.*[43]—Either legal or actual malice must exist.[44] Actual malice though necessary at common law, if the words be not per se defamatory,[45] is eliminated by the statutory definition in Washington.[46] Legal or implied malice is shown by mere proof of the unathorized use of the defamatory words charged. Actual malice may be shown by the acts or conduct of the defendant immediately accompanying the utterance of the words or by the utterance at other times of other and similar defamatory words having reference to the subject-matter of the words charged.[47] Malice is presumed from utterance of words defamatory per se.[48] The acts of a wife in the absence of her husband are not binding on him for the purpose of showing malice on his part against plaintiff in an action for libel.[49] When a defamatory charge is made upon an unprivileged occasion, the law implies malice, but when the publication is privileged, the publication is presumed to have been made in good faith.[50]

§ 3. *Privilege and justification.*[51]—An absolute privilege is confined to cases where the public service or the due administration of justice requires that a party speak his mind freely, and no action can be maintained therefor, even though the words be false and maliciously spoken.[52] An official communication pursuant to law,[53] or the testimony of a witness in a judicial proceeding, which is pertinent to the issues, cannot be made the subject of an action for defamation.[54] Occasions when the privilege is qualified extend to a variety of communications made in good faith and from honest motives, upon any subject in which the party communicating has an interest or in reference to which he has a duty to some one having a like interest or duty. On such occasions a speaker is exempt from liability only so far as he speaks honestly and for some common good.[55] The characteristic feature of abso-

43. See 4 C. L. 421.

44. Lauder v. Jones [N. D.] 101 N. W. 907.

45. See 4 C. L. 421.

46. 2 Ball. Ann. Codes & St. § 7087. Byrne v. Funk, 38 Wash. 506, 80 P. 772.

47, 48. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863; Prewitt v. Wilson [Iowa] 103 N. W. 365; Farley v. Evening Chronicle Pub. Co. [Mo. App.] 87 S. W. 565; Israel v. Israel, 109 Mo. App. 366, 84 S. W. 453. A charge that if the libel was published in good faith the jury should consider such matters in mitigation of damages held erroneous. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634. Words charging one of being guilty of larceny are actionable per se and carry with them the legal imputation of malice. Shockey v. McCauley [Md.] 61 A. 583.

49. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

50. Lauder v. Jones [N. D.] 101 N. W. 907.

51. See 4 C. L. 421.

52. Dictum in Young v. Lindstrom, 115 Ill. App. 239.

Note: The absolute privilege extends to both legislative and judicial documents, especially since statutes passed in consequence of Stockdale v. Hansard, 9 A. & E. [Eng.] 1; Odgers Libel [3d Ed.] 191. In 18 Harv. L. R. 143, the opinion is ventured that an exhibition of such a report or document for mere motives of scandal or malice ought not to be covered by the rule of absolute privilege, and by analogy cites Searles v. Scarlett, 2 Q. B. [Eng.] 56. The absolute privilege attaching to public, judicial, or legislative proceedings, is distinct from the qualified privilege attaching to reports of such proceedings. See 18 A. & E. Enc. Law, [2 Ed.] 1023, 1042, 1045. See, also, post, note 58. Of the category of judicial proceedings absolutely privileged are testimony of a witness falsifying facts which, however, were relevant (Cooley v. Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. R. 823, 60 L. R. A. 139. Contra, Ruohs v. Bocker, 6 Heisk. [Tenn.] 395, 19 Am. Rep. 598) and allegations in a pleading pertinent to the issues (Crockett v. McLanahan, 109 Tenn. 517, 72 S. W. 590, 61 L. R. A. 914, quoted 97 Am. St. Rep. 831, citing many cases, and see note Gorsuch v. Swan [Tenn.] 97 Am. St. Rep. 836).

53. O'Connell v. Shontz, 126 Iowa, 709, 102 N. W. 807. Official communications made by government officers pursuant to law and within their authority are absolutely privileged. De Arnaud v. Ainsworth, 24 App. D. C. 167.

54. Lauder v. Jones [N. D.] 101 N. W. 907.

55. Young v. Lindstrom, 115 Ill. App. 239; Echard v. Morton, 26 Pa. Super. Ct. 579.

Held qualified: Charge of larceny made in causing arrest of employe held qualifiedly privileged. Young v. Lindstrom, 115 Ill. App. 239. Defendant in an action for slander had claimed that the borough authorities had entered upon his land without right. A deed was exhibited by the clerk of the council which it was alleged had been executed by defendant and under which the borough claimed the right to occupy the land. This deed purported to be acknowledged before plaintiff as justice of the peace. Defendant denied that he ever executed the deed in presence of plaintiff. Held that the denial was privileged. Echard v. Morton, 26 Pa.

lute, as distinguished from conditional, privilege, is that in the former the question of malice is not open and all inquiry into good faith is closed,[56] but in words of qualified privilege they must be shown.[57] Unless the court forbids publication or matter be unfit for publicity there is no harm in fairly reporting judicial proceedings,[58] but mere pleadings cannot be published without liability.[59] Defamatory communications made by a volunteer, without interest, confidential relation, or other duty than a moral or social one, are never privileged unless made in good faith and in an honest

Super. Ct. 579. An attorney at law has a qualified or conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and the conduct of the parties in connection therewith as in his judgment seems proper. Atlanta News Pub. Co. v. Medlock [Ga.] 51 S. E. 756. The publication of proceedings of a college board of trustees, in the investigation of charges against one connected with the college, held qualifiedly privileged. Gattis v. Kilgo [N. C.] 52 S. E. 249. Where a railway company discharges a conductor, and it comes to its knowledge that there are still in his possession tickets of the company which were delivered to him while in its employment, which he at that time had a right to sell, and which he refuses or fails to surrender, the company has the right, in order to protect its own interest, to take such precautions as are reasonably necessary to prevent the use of tickets by persons not entitled to use them, and a publication under such circumstances, to persons whose knowledge is necessary to its protection, is authorized. Sheftall v. Central of Georgia R. Co. [Ga.] 51 S. E. 646. Where defendant wrote a letter concerning plaintiff to the elders of a church, the pastorate of which plaintiff was about to assume, charging plaintiff with certain specific acts of impropriety, the letter was quasi privileged and defendant was, therefore, not liable for libel in the absence of proof that the charges were false and malicious. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

56. Atlanta News Pub. Co. v. Medlock [Ga.] 51 S. E. 756.

57. Where an alleged libelous newspaper article contained no statement that the plaintiff was guilty of burglary, and only purported to state the acts and theories and representations of the officers of the law in relation to plaintiff's pursuit, arrest, trial, and acquittal of such offense, and that she had associated with burglars and was connected with certain burglaries, the matter being quasi privileged, was not libelous per se. McClure v. Review Pub. Co., 38 Wash. 160, 80 P. 303

58, 59. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005. Ordinarily the publisher of a newspaper has no privilege as to what appears therein, but is liable for the same as any other person. The publisher of a newspaper, however, is authorized to publish a fair and honest report of the proceedings of a judicial trial, and is not liable on account of such publication in the absence of express malice. Atlanta News Pub. Co. v. Medlock [Ga.] 51 S. E. 756.

Note: The whole **doctrine** of privilege as applied **to newspaper reports** of proceedings is well summed up by Neil, J., in American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005.

"Unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication (Newell, Def., S. & L. p. 548, § 150) any one may, without incurring liability for damages, publish the proceedings of courts of justice (Newell, on Def., S. & L. p. 544, § 147); and the owners of newspapers occupy in respect of such publications the same status as that accorded to other persons, in no respect higher or different (Fenstermacker v. Tribune Pub. Co., 11 Utah, 439, 43 P. 112, 35 L. R. A. 611; Upton v. Hume, 24 Or. 420, 33 P. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Newell, Def., S & L. p. 552, § 158; Brett, L. J., 46 L. J. C. P. [Eng.] 407; Bramwell, L. J., 5 Ex. D. [Eng.] 56; Salmon v. Isaac, 20 L. T. [Eng.] 886, 3 Times L. R. 245).

"The right to publish is subject to the limitation that the report must be a fair one, made in the interest of the public, and without malicious purpose. Newell, Def., S. & L. p. 558, § 166; Ackerman v. Jones, 37 N. Y. Super. Ct. 42; Newell, p. 544, § 148, subd. 3; Saunders v. Baxter, 6 Heisk. Tenn.] 369; Stevens v. Sampson, 5 Ex. D. [Eng.] 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782; Newell, p. 556, § 162, subd. 7; Waterfield v. Bishop of Chicester, 2 Mod. [Eng.] 118; Newell, p. 556, § 9; Salmon v. Isaac, 20 L. T. [Eng.] 885; Newell, p. 556, § 10. Such report should not be mingled with comment, either in the body of it or in the heading, as in such case the presumption of malice would the more easily arise; the place for criticism of this character is in the editorial columns (Newell, Def., S. & L. c. 20, § 19; Merrill's Newspaper Libel, 184); and even then the comment should be fair and reasonable (Newell, Def., S. & L. c. 20, § 18; Woodgate v. Ridout, 4 F. & F. [Eng.] 223; Reg. v. Tanfield, 42 J. P. [Eng.] 424).

"The report need not be a verbatim one, but it must contain the substance of the thing it undertakes to present, or the whole purport of any special, separable part. Newell p. 552, § 156; Id. p. 554, § 161; Salisbury v. Union & Advertiser Co., 45 Hun (N. Y.) 120; Newell, 545; McBee v. Fulton, 47 Md. 403; 28 Am. Rep. 465; Flint v. Pike, 4 B. & Cr. [Eng.] 473; 6 D. & R. 528; Kane v. Mulvany, Irish Rep. 26, 2 C. L. 402; Newell p. 553, § 160, subd. 3; Lewis v. Walter, 4 B. & Ald. 605; Newell, p. 553, § 160, subd. 4. It must not give undue prominence to inculpatory facts, and depress or minify such facts as would explain or qualify the former (Salisbury v. Union & Adv. Co., supra; Newell p. 554, § 161; Thomas v. Croswell, 7 Johns. [N. Y.] 264, 5 Am. Dec. 269; Newell p. 557; Grimwade v. Dicks, 2 Times L. R. [Eng.] 627; Newell p. 555; Haywood & Co. v. Haywood & Sons, 34 Ch. D. [Eng.] 198; 56 L. J. Ch. 287; 35 W. R. 392; 55 L. T. 729; Newell, p. 555; Dodson v. Owen, 2 Times L. R. [Eng.]

belief in their truth and with an honest intent to perform the duty.[60] A communication between officers of a corporation on the subject of the conduct of one of its servants is privileged,[61] and the privilege is not lost by the officer receiving it and disclosing its contents to another servant as a reason for discharging the servant about whom it was written.[62] The official acts of public officers may lawfully be made the subject of fair comment and criticism, but charges imputing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith.[63] Fair comment pertaining to candidates is governed by a like rule.[64]

111; Newell, p. 556, S. S. 8), and must not omit material points in favor of the complaining party, or introduce extraneous matters of an injurious nature to him (Cooper v. Lawson, 8 A. & E. [Eng.] 746; 1 W. W. & H. 601; 2 Jur. 919; 1 P. & D. 15; Newell, p. 558; Clement v. Lewis, (Exch. Ch.) 3 Br. & B. [Eng.] 297; 3 B. & Ald. 702; 7 Moore 200; Bishop v. Latimer, 4 L. T. [Eng.] 775; Newell, p. 558).

"In short, the report must be characterized by fair-mindedness, honesty and accuracy. Newell, Def., S. & L. p. 551, § 155; Stanly v. Webb, 4 Sandf. [N. Y.] 21; Edsall v. Brooks, 17 Abb. Pr. [N. Y.] 221; Id., 26 How. Pr. [N. Y.] 426; Newell, p. 545.

"If it be found of this character, it is not material that the matter it contains is injurious to the persons involved or referred to therein, since it is of the highest moment that the proceedings of courts of justice should at all times be open to fair inspection, to the end that the public may have the means of knowing how the duties of their officers are performed, whether faithfully and intelligently or otherwise. In the presence of this public requirement mere private interests must give way. R. v. Wright, 8 T. R. [Eng.] 298; Wason v. Walter, L. C. 4 Q. B. [Eng.] 87; 8 B. & S. 730; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 418; Newell, p. 554, § 147; Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318.

"Where the published matter is plainly unambiguous, the question of its meaning and character is for the court, but where the meaning is ambiguous, where the words used are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one. Newell, Def., S. & L. c. 15, §§ 1, 5.

"In these cases," says Newell, "there may be two distinct questions for the jury: (1) Is the report fair and accurate? If so, it is prima facie privileged; if not, the verdict must be for the plaintiff. (2) Was the report, though fair and accurate, published maliciously? Was it published solely to afford information to the public and for the benefit of society, without reference to the individuals concerned; or was it published with the malicious intention of injuring the reputation of the plaintiff? The second question, of course, only arises when the first has been already answered in the affirmative.

"And, of course, there is in each case the previous question for the court, is there any evidence to go to the jury of inaccuracy or of malice? Where there is no suggestion of malice and no evidence on which a reasonable man could find that the report is not absolutely fair, the judge should direct a verdict for the defendant. Thus where the report is verbatim or nearly so, or corresponds in all material particulars with a report taken by an impartial shorthand writer. But, if anything be omitted in the report which could make any appreciable difference in the plaintiff's favor, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the trial judge will not direct a verdict for either party." Id. pp. 558, 559, § 166.

"It is generally agreed that the privilege, the right to publish without liability for damages, does not extend to mere pleadings filed in court, as, for example, bills in equity upon which there has been no judicial action. Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318; Barber v. St. Louis Dispatch Co., 3 Mo. App. 377. The reason for this rule is stated in Park v. Detroit Free Press Co., supra.

"Of publications of pleadings containing injurious matter at the mere incipiency of the litigation it is said: They possess no privilege, and the publication must rest on either nonlibelous character or truth to defend it. 72 Mich. 568, 40 N. W. 734.

"However, the rule of privilege, in general, covers proceedings which are in their nature only preliminary if any judicial action has been had thereon. Newell, Def., S. & L. c. 19, § 149, note; Id. 152, 153, and notes; Odgers on Libel and Slander, (3d Ed.) pp. 278, 279; Townsend on Slander and Libel, p. 361; note to McAllister v. Detroit Free Press Company, 15 Am. St. Rep. 363, 364; McBee v. Fulton, 47 Md. 334, 28 Am. Rep. 465; Metcalf v. Times Publishing Co., 20 R. I. 674, 40 A. 864, 78 Am. St. Rep. 900."

60. Where the defendant denied all knowledge of the alleged libelous letters and did not claim that they were sent in good faith or under a sense of duty, it was proper for the court to refuse to charge on the subject of privileged communications. McGarry v. Healey [Conn.] 62 A. 671. Letter scurrilously attacking officials not privileged, though addressed to their superiors. Raymond v. United States, 25 App. D. C. 555.

61, 62. Denver Public Warehouse Co. v. Holloway [Colo.] 83 P. 131.

63. Byrne v. Funk, 38 Wash. 506, 80 P. 772; Farley v. McBride [Neb.] 103 N. W. 1036. A publication in a newspaper referring to plaintiff, a public officer, as "a liar and a poltroon," is in excess of the privilege of fair comment and criticism of a public officer, and hence it was not error to refuse to submit the question of its being privileged to the jury, though it was in answer

The fact that the publishers of a libel merely expressed their personal belief and had reasonable grounds to sustain them in such belief, while it may be shown in mitigation of damages, is not a defense to an action for libel.[65] To make a defense of privilege complete good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons, must all appear.[66] Where the expressions employed are allowable in all respects, the manner of publication may take them out of the privilege.[67] Whether a writing was a libel, under the circumstances under which it was published, was to be determined by the jury, after taking into consideration the terms of the writing, the circumstances of the publication, their knowledge of the meaning of the words employed, and the impression the use of such words would make upon the mind of a person of average intelligence, and it was not incumbent upon the plaintiff to prove by witnesses what he understood the writing to mean.[68]

Truth is a defense in actions for slander or libel,[69] and reasonable grounds for belief coupled with good faith may be shown.[70] No exemplary damages being claimed, evidence that the publication was made in good faith and without ill will is inadmissible.[71] That the publisher of a libel was mistaken as to the identity of the person libeled is no defense.[72]

§ 4. *Damages and the aggravation and mitigation thereof.*[73]—The damages recoverable in an action for libel or slander are punitive and compensatory. Punitive damages cannot be recovered without proof of malice, express or implied. Where the words used are not libelous per se, punitive damages cannot be recovered in absence of express malice as distinguished from implied malice;[74] but where the words used are libelous per se, damages are presumed and need not be proved.[75]

to attacks on the writer made by plaintiff in the newspapers. Byrne v. Funk, 38 Wash. 506, 80 P. 772.

64. A publication in the form of an affidavit made during the course of a political campaign which stated that the subscribers would not accept the oath of plaintiff, who made statements derogatory to a certain candidate, is not absolutely privileged. Prewitt v. Wilson [Iowa] 103 N. W. 365.

65. Prewitt v. Wilson [Iowa] 103 N. W. 365.

66. Sheftall v. Central of Georgia R. Co. [Ga.] 51 S. E. 646; Walker v. Best, 107 App. Div. 304, 95 N. Y. S. 151. One may publish by speech or writing whatever he honestly believes is essential to the protection of his own rights or those of another, provided the publication be not unnecessarily made to others than to those whom the publisher honestly believes are concerned in the subject-matter of the publication, but the statement must be no broader and the publication no wider than the interest to be subserved demands. Sheftall v. Central of Georgia R. Co. [Ga.] 51 S. E. 646.

67. Sheftall v. Central of Georgia R. Co. [Ga.] 51 S. E. 646. Mere publication to a stranger will not always destroy the privilege if it appears that the communication, prima facie privileged, was made in the hearing of third persons not legally interested and whose presence was merely casual and not sought by the publisher. Id.

68. Sheftall v. Central of Georgia R. Co. [Ga.] 51 S. E. 646.

69. Ukman v. Daily Record Co., 159 Mo. 378, 88 S. W. 60. Evidence in an action for slander on the following words, "He whilst a councilman defrauded the borough out of money by having a private sewer constructed in his place for which the borough paid," held to sustain the truth of the charge and a judgment for defendant. Fleer v. Reagan, 24 Pa. Super. Ct. 170.

70. In an action by a public official against a newspaper for libel, where defendant pleads justification, it may show good faith and that the circumstances were such as to give reasonable grounds for believing the charges made. Ferber v. Gazette & Bulletin Pub. Ass'n, 212 Pa. 367, 61 A. 939.

71. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

72. Defendant published an article concerning a certain person, whose name was the same as plaintiff's, holding him up to ridicule as a foe to labor organizations and having been engaged in certain dishonorable conduct. Attached to the article was printed a picture of plaintiff which the publisher of the paper procured from the newspaper's collection, and printed over the words "Boss James Farley." Plaintiff had never engaged in strike breaking, was not the strike breaker in question, and his picture which was printed had been obtained by the newspaper for use in another connection. Held, that the article was libelous as to plaintiff, regardless of the editor's mistake. Farley v. Evening Chronicle Pub. Co. [Mo. App.] 87 S. W. 565.

73. See 4 C. L. 423.

74. Walker v. Best, 107 App. Div. 304, 95 N. Y. S. 151.

75. Jensen v. Damm [Iowa] 103 N. W. 798; Prewitt v. Wilson [Iowa] 103 N. W. 365; Shockey v. McCauley [Md.] 61 A. 583; Saun-

Exemplary damages may be recovered if there was actual malice, though defendant's servants made the publication without his knowledge.[76] In some states where the publisher of a libel is liable to both a criminal prosecution and a civil action, the damages recoverable are only compensatory and no exemplary damages can be assessed.[77] Mental suffering is an element of damage in an action for slander or libel,[78] but physical sickness cannot be reckoned as general damages.[79] Where the libel of a business house is of such a character as to defame the proprietor individually, the damages recoverable are not limited to those affecting the business.[80] Mitigating circumstances are those which while not proving the truth of the charge, do yet tend in some appreciable degree toward such proof, and thus permit an inference that defendant was not actuated by malice in his charge. They must be of such a nature as to show that defendant, though mistaken, believed the charge to be true when it was made.[81] They are proper to be heard on the question of punitive damages[82] or actual damages.[83] Evidence of the publication of retractions is admissible in mitigation of damages.[84] Appellate courts will not interfere with the amount of damages awarded by the jury unless that amount is so grossly inadequate or excessive as to raise a reasonable presumption that the jury was actuated by passion or prejudice.[85]

ders v. Post-Standard Pub. Co., 94 N. Y. S. 993. The slandered person being a minister of the gospel, and the language used being actionable per se, recovery may be had without proof of special damages. Instructions held erroneous. Flanders v. Daley [Ga.] 52 S. E. 687. In such a case a charge, that, if the jury should find that plaintiff had not suffered any damage to his reputation it should find for defendant, held objectionable. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634. Where a telegram, which grossly libels a woman widely and favorably known, and who could have been easily reached, is published without inquiry as to the truth of the statements therein contained, it is for the jury to determine whether there was such a wanton disregard to the plaintiff's rights as to justify an award of punitive damages. Post Pub. Co. v. Butler [C. C. A.] 137 F. 723.

76. Note: See cases of Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722, with note citing Bruce v. Reed, 104 Pa. 415, 49 Am. Rep. 586; Morgan v. Bennett, 44 App. Div. 325, 60 N. Y. S. 619; McMahon v. Bennett, 31 App. Div. 16, 52 N. Y. S. 390; O'Brien v. Bennett, 59 App. Div. 623, 69 N. Y. S. 298; Bennett v. Salisbury, 78 F. 769; Mallory v. Bennett, 15 F. 374; Buckley v. Knapp, 48 Mo. 152; Dunn v. Hall, 1 Ind. 355; Youmans v. Paine, 86 Hun, 479, 35 N. Y. S. 50. But the principal is not always liable. Smith v. Ashley, 11 Metc. [Mass.] 367, 45 Am. Dec. 216; Eviston v. Cramer, 57 Wis. 579; Detroit Post Co. v. McArthur, 16 Mich. 447; Scripps v. Reilly, 38 Mich. 10; Robertson v. Wylde, 2 Moody & R. 101.

77. White v. Sun Pub. Co. [Ind.] 73 N. E. 890.

78. Finger v. Pollack [Mass.] 74 N. E. 317. In an action for slander, evidence that the plaintiff cried, "looked bad," and did not sleep as well as before, was admissible on the issue of mental suffering. Id. In an action for slander a charge permitting the jury to allow damages for mortified feelings was proper on the issue of punitive damages. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863; Ott v. Press Pub. Co. [Wash.] 82 P. 403.

Erroneous instruction that plaintiff could not recover for mental suffering held **harmless,** the article being found to be true. Ott v. Press Pub. Co. [Wash.] 82 P. 403.

79. Butler v. Hoboken Printing & Pub. Co. [N. J. Law] 62 A. 272.

80. Civ. Code, §§ 3300-3333. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

81. Brown v. McArthur, 94 N. Y. S. 537.

82. The motives and intentions of a defendant in a slander suit are to be taken into account only in determining whether to allow punitive damages. Israel v. Israel, 109 Mo. 366, 84 S. W. 453. The fact that slanderous words were uttered under the influence of passion or excitement, or under circumstances of great provocation, cannot be considered in mitigation of damages, unless the passion or provocation was attributable to plaintiff. Shockey v. McCauley [Md.] 61 A. 583.

83. Under Ballinger's Ann. Codes & St. § 4939, evidence of mitigating circumstances is admissible as affecting actual damages. Ott v. Press Pub. Co. [Wash.] 82 P. 403.

84. White v. Sun Pub. Co. [Ind.] 73 N. E. 890; Lauder v. Jones [N. D.] 101 N. W. 907. A second publication, unrequested and in the nature of a correction, may be a proper circumstance to be considered by the jury in mitigation of damages in an action for libel, but its significance is entirely a question for the jury to determine. Post Pub. Co. v. Butler [C. C. A.] 137 F. 723.

85. A verdict of $7,000 held not to be excessive, where punitive damages are allowable, when a judge of the district court had been charged with corruption in office. Lauder v. Jones [N. D.] 101 N. W. 907. In an action for slander, in that defendant, on a public street, charged plaintiff, a painter by trade, with having stolen material belonging to defendant, and with having used it in some one else's work, a verdict of $300 actual damages, and $500 punitive damages, was not excessive. Carpenter v. Ham-

§ 5. *Actions and procedure. A. Conditions precedent.*[86]—By statute in some states a demand for public retraction is required, and, if such a retraction is made, plaintiff is only entitled to recover the actual damage sustained.[87]

(§ 5) *B. Pleading.*[88]—The complaint in a libel suit should put the court in possession of the libelous matter published, the language used, with such innuendoes as are necessary to explain what was meant by the language, and to whom it applied.[89] The declaration should identify plaintiff with the description in the libel so as to show that the libelous words were spoken of him, but it is not necessary to identify plaintiff with every description in the libel.[90] Where the meaning of an alleged libel does not plainly appear in the words used, the extrinsic facts should be alleged by way of inducement, and the libelous charge should be followed by an innuendo applying the words to the matter pleaded.[91] The sufficiency of them

ilton, 185 Mo. 603, 84 S. W. 863. That the plaintiff in an action for libel is entitled, as a matter of law, to nominal damages, affords no ground for the reversal of a judgment for the defendant. White v. Sun Pub. Co. [Ind.] 73 N. E. 890.

86. See 4 C. L. 425.

87. Post Pub. Co. v. Butler [C. C. A.] 137 F. 723. Rev. St. Ohio, § 5094, declares that if a libel shall be published in good faith through a mistake of fact, with reasonable ground to believe that the statements were true, and the publisher on demand, and within a reasonable time publishes a full and complete retraction, etc., the presumption of malice shall thereby be rebutted. Held that, under Const. Ohio, Art. 1, § 16, declaring that all the courts shall be open, and every person, for an injury done him in his person or reputation, shall have a remedy by due course of law and justice administered without denial or delay, section 5094 should be construed so as to become operative only upon a demand being made for a retraction; and it is optional with the person libeled to stand upon his rights under the old law or to waive a part by demanding and accepting a retraction under the law as amended. Id.

88. See 4 C. L. 425.

89. A complaint alleging that defendant printed in his legal directory a certain libelous statement and publication concerning plaintiff, the "substance and effect" of which was that plaintiff was a second rate lawyer, was demurrable for failure to set out the alleged libel in haec verba. Kirby v. Martindale [S. D.] 103 N. W. 648. A complaint alleged that defendant willfully and maliciously, and without justifiable cause, printed and published a certain libelous publication, in that plaintiff's name, age, and the year of his admission to the bar, were published in defendant's directory without a rating, and that by reason of the premises plaintiff was greatly injured in his professional and business standing, was insufficient for failure to allege that the absence of any rating meant anything derogatory to plaintiff's personal or professional character or ability. Id. A complaint in libel alleged the publication of a newspaper article making plaintiff ridiculous and charging him with membership in a society of assassins, blackmailers, and kidnappers, and that he had tattooed on his back the "Black Hand," the name of such society. Held, that the complaint was good, though the article in question bore no such meaning. Lambertini v. Sun Printing & Pub. Co., 47 Misc. 174, 95 N. Y. S. 329. Where in an action against a newspaper for libel, the complaint set out mere excerpts from the publication, it was not error for the court to compel plaintiff to make the complaint more definite and certain by incorporating copies of the entire articles in which the alleged libelous matter appeared. McClure v. Review Pub. Co., 38 Wash. 160, 80 P. 303. A declaration which charges the speaking of slanderous words in the Italian language, but which does not aver that the hearers understood the meaning of such words, is defective, but after verdict is sufficient. Rich v. Scalio, 115 Ill. App. 166.

90. Butler v. Carter & R. Pub. Co. [C. C. A.] 135 F. 69. A declaration in an action for libel by the publication of an article set out, and which related to a woman described therein as widely known as "Annie Oakley," and as having been a famous rifle shot who had given public exhibitions, etc., which, in addition to an allegation that the libel was published of and concerning plaintiff, further alleges that plaintiff had acquired great skill in shooting with a rifle and had given public exhibitions, and was widely known by the name of "Annie Oakley," sufficiently shows on its face that the article related to plaintiff. Id.

91. Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60; Kenworthy v. Brown, 45 Misc. 292, 92 N. Y. S. 34. In an action for slander the declaration averred that defendant, contriving and maliciously intending to injure plaintiff, in a certain discourse had concerning plaintiff falsely and maliciously said to one S, "Don't you want to go and help catch a thief?" meaning thereby that plaintiff was a thief, and had stolen wood from defendant and still had it in his possession, capable of detection and exposure, and that said S was desired to go with defendant and help catch plaintiff in possession of the wood which he had stolen from defendant. Held to state a cause of action. Blount v. Mason [Mich.] 12 Det. Leg. N. 69, 103 N. W. 525. The declaration in an action for slander averred that defendant, intending to injure plaintiff, in a certain discourse had of and concerning plaintiff with one S. spoke and published of and concerning the plaintiff as follows: "I (meaning defendant) saw Fred Blount (meaning plaintiff)

cannot be challenged after answering to the merits.[92] A libel per se set out in terms need not be accompanied by an allegation pointing out which words were defamatory.[93] An innuendo cannot extend the meaning of words beyond their natural import, it can only serve to explain some matter already expressed. It may show the application but cannot add to or enlarge or change the sense of words.[94] An innuendo wrong in its conclusion may be ignored when the words are per se libelous.[95] The same words declared on as libelous per se, and otherwise, calls for two counts.[96]

The action cannot be joined with malicious prosecution even if they originated simultaneously,[97] and declaring on them both as acts in a conspiracy will not accomplish it if two causes are substantially pleaded.[98]

The general rules of pleading as to definiteness and certainty apply.[99] Where it is alleged under a videlicet that slanderous words were spoken at a particular place, it is not essential to a recovery that proof be made that such words were in fact spoken at such place, it is sufficient if the speaking of the words be established at any place,[1] and failure to declare on a time within limitations is cured by verdict.[2] Where a complaint in libel singles out a meaning and complains of that

take wood from off my pile, and he has it now on his wagon, and I (defendant) want you (S) to go with me to the mill and see it unloaded;" defendant meaning thereby to impress said S that plaintiff had stolen defendant's wood and had it on his wagon, and that defendant desired said S to go with him to the mill and witness the exposure of the crime. Held to state a cause of action as against a demurrer on the ground that there was no colloquium, inducement, nor statement of facts showing that the words were spoken of and concerning plaintiff, nor that they imputed a crime to him, nor connecting the words nor the speaking thereof with plaintiff. Blount v. Mason [Mich.] 12 Det. Leg. N. 69, 103 N. W. 525. A complaint alleging that defendant produce exchange posted a notice denying plaintiff representation on the floor of the exchange, and stating that any member of the exchange who should transact business for plaintiff would be deemed guilty of a violation of the by-laws, etc., but not alleging that the notice conveyed any meaning not apparent on its face, did not state a cause of action for libel, the notice not being defamatory per se. Gutkes v. New York Produce Exch., 46 Misc. 133, 93 N. Y. S. 254. When plaintiff in a libel suit alleged that defendant, in certain mercantile reports, published that plaintiff had sold his stock in trade for $1, "meaning to charge that plaintiff had transferred his business for a nominal consideration," it was an enlargement of the meaning as set forth in the innuendo to claim that the words signified dishonesty in a business way. Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60.

92. In an action for libel, where the alleged defamatory matter in its application to plaintiff depends on extrinsic facts not pleaded, and the allegation that the matter was published by plaintiff is denied by the answer, a motion to dismiss the complaint, as not stating facts constituting a cause of action, will be denied. Bianchi v. Star Co., 46 Misc. 486, 95 N. Y. S. 28.

93. Where an entire newspaper article, containing an alleged letter written by plaintiff, was charged to be false, and, if the letter were fabricated, the article, taken as a whole was libelous per se, and was not a privileged publication, it was error to sustain a demurrer to the complaint for its failure to point out the libelous portion of the publication charged as libelous. Leonard v. McPherson, 146 Cal. 616, 80 P. 1084.

94. Feast v. Auer [Ky.] 90 S. W. 564.

95. Scofield v. Milwaukee Free Press [Wis.] 105 N. W. 227. A publication in a newspaper stated that there had been a hearing before a magistrate, in the case of plaintiff, charged with keeping a disorderly house, and that she had been in trouble with the police before. Held not to justify an innuendo that on previous occasions she had been charged with keeping a disorderly house, and that she was guilty of the present charge, and plaintiff could only fall back upon the true meaning of the words that she had had trouble before with the police. Hilder v. Brooklyn Daily Eagle, 45 Misc. 165, 91 N. Y. S. 983.

96. Where plaintiff in libel wishes to fall back on the natural meaning of the words published, his complaint should set forth in one count the article with the innuendo, and the other, the article without the innuendo. Hilder v. Brooklyn Daily Eagle, 45 Misc. 165, 91 N. Y. S. 982.

97. Green v. Davies, 182 N. Y. 499, 75 N. E. 536.

98. Pleading held double and bad. Green v. Davies, 182 N. Y. 499, 75 N. E. 536.

99. Where a count for libel alleged that defendant composed and published at specified places, prior to a certain date, the matter complained of, a motion to compel plaintiff to state separately and number his several causes of action if he relied upon several, and to make the complaint more definite and certain if be intended to rely only on one publication, should have been granted. Cerro De Pasco Tunnel & Min. Co. v. Haggin, 94 N. Y. S. 593.

1. Herhold v. White, 114 Ill. App. 186.

2. A declaration in an action of slander which fails to state the time when the slanderous words charged were spoken, so as to show affirmatively that the action is brought within the period authorized by statute, is good after verdict. Dubois v. Robbins, 115 Ill. App. 372.

only, and in that way excludes all other meanings, it is based on and limited to the meaning so complained of only,[3] and an innuendo so tendered need not be met with any particular denial of other meanings.[4]

The falsity of a defamatory charge is always presumed, and the defendant who relies upon the truth as a defense must plead it, whether the statements were made upon privileged occasions or not.[5] In North Dakota the truth and mitigation may both be pleaded by defendant.[6] The truth of the alleged defamatory matter, as well as the facts in mitigation, are new matter and must be pleaded.[7] A plea of justification in an action for libel must be of the very matter alleged in the declaration; the very matter which was published; it must be complete and allege the facts which show the truth.[8] In pleading mitigation, belief and good faith must be laid with certainty to defendant, not to the community.[9]

In actions for slander the rule that the probata must correspond to the allegata is eminently applicable.[10] The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged.[11] Equivalent words or words of similar import will be insufficient; nor will his cause of action be sustained by proof of words that might produce an impression similar to that which the words alleged would produce,[12] but proof of enough of such words to constitute a cause of action is sufficient.[13] Under a plea of the general issue in an action for libel, defendant is not entitled to prove specific acts of misconduct, but is confined to proof of his general bad character,[14] neither can he be permitted to show, under the general issue and upon a claim of mitigating the damages, facts which tend to cast suspicion of plaintiff's guilt of the very charges which he has declined to under-

3. Lambertini v. Sun Print. & Pub. Co., 47 Misc. 174, 95 N. Y. S. 329.

4. Where a complaint in a libel alleged a publication that plaintiff, arrested by the police, "had been in trouble with the police before," and that the innuendo with the words meant that the plaintiff had been charged with keeping a disorderly house, defendant was not required to plead as a defense that plaintiff had had trouble with the police before, for whatever cause it might have been. Hilder v. Brooklyn Daily Eagle, 45 Misc. 165, 91 N. Y. S. 983.

5. Lauder v. Jones [N. D.] 101 N. W. 907.

6. Under § 5289, Rev. Codes, N. D. 1899, the defendant in a libel case is authorized to plead, as a complete defense, the truth of the matter charged to be defamatory, and also to plead any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the mitigating circumstances. Lauder v. Jones [N. D.] 101 N. W. 907.

7. Lauder v. Jones [N. D.] 101 N. W. 907.

8. Where the alleged libelous article charged that the plaintiff, as mayor of a city, protected gamblers, a plea of justification to be sufficient should set up facts showing how, when, where, and what the plaintiff did or said in so protecting gamblers. Commercial News Co. v. Beard, 116 Ill. App. 501; Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243.

9. In an action for libel with malice, a defense in mitigation of damages, alleging that the things stated in the complaint were reported and believed, prior to the time of publication, in the neighborhood where the parties resided, but not alleging that defendant heard the reports and believed them to be true and published them with such belief, stated no defense. Brown v. McArthur, 94 N. Y. S. 537.

10. Haub v. Freiermuth [Cal. App.] 82 P. 571. In slander, plaintiff must prove the slanderous words as alleged, and not other words of like import, and defendant is not allowed to plead that he used other words, and justify them. Tharp v. Nolan, 27 Ky. L. R. 326, 84 S. W. 1168. In a prosecution for verbal slander the words charged to have been spoken were "He forged that deed," and the evidence showed that defendant had said prosecutor "had changed the consideration in a deed." Held, that the proof was insufficient. State v. Fenn [Mo. App.] 86 S. W. 1098.

11. Haub v. Freiermuth [Cal. App.] 82 P. 571.

12. Haub v. Freiermuth [Cal. App.] 82 P. 571. Allegation that defendant said: "I have a man to prove that H. struck S. in front of his place of business, that he had two witnesses who had tracked the blood stains from H's shop to where S. fell, and that he had proof that H. was guilty of the murder of S., held not sustained by proof that defendant, in addition to saying that he had a witness who saw H. strike S., said to one person "H. might have killed him anyhow," and to another "If you will follow up H. pretty closely, you will find that this man's death came that way," and "he might have something to do with it," and to another "the S. case was a murder." Id.

13. Dubois v. Robbins, 115 Ill. App. 372.

14. Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243.

take to prove.[15] Where the defendant in an action for libel wishes to justify the language used as true, he must admit the publication as charged by plaintiff and assume the burden of establishing its truth.[16] A plea of privilege in libel is in the nature of confession and avoidance, and the admission of the publication, to be of any avail, must be as broad as the charge.[17]

Bills of particulars[18] are not allowable to develop mere evidence.[19]

(§ 5) *C. Evidence.*[20]—The effect of privilege is to cast on the plaintiff the burden of showing malice on the part of defendant,[21] but where the words used were actionable per se, malice is presumed and the burden is on the defendant to prove matters in mitigation.[22] Facts tending to establish malice or the lack of it,[23] and surrounding circumstances and the connection in which the words were used,[24] are admissible. Evidence as to the circumstances which induced a press association to send out a libelous telegram is immaterial in an action brought by the party libeled against a newspaper, which published the dispatch without knowledge of the circumstances of its origin.[25] Evidence of plaintiff's standing and general reputa-

15. Commercial News Co. v. Beard, 116 Ill. App. 501. In an action for libel against a newspaper company, special defenses in the answer, following a general denial, alleging, respectively, that the publication referred to a person other than plaintiff, and that the publication was a news item received in the usual course of business and published in good faith, are demurrable, both defenses being admissible under the general issue. Butler v. Evening Leader Co., 134 F. 994.

16. Prewitt v. Wilson [Iowa] 103 N. W. 365.

17. Prewitt v. Wilson [Iowa] 103 N. W. 365; Saunders v. Post-Standard Pub. Co., 94 N. Y. S. 993. A petition charging a libel contained a writing embodying three separate affidavits, one of which constituted the gist of the defamatory matter complained of, while the others were set up by way of inducement. The answer alleged the signing of one of the affidavits, set out by way of inducements, and further alleged that the affidavit was made and published by them in good faith and without malice for the information of the electors of the county. Held that the answer was not sufficient to constitute a good plea of privilege. Prewitt v. Wilson [Iowa] 103 N. W. 365.

18. See 4 C. L. 426.

19. Under N. Y. Code Civ. Proc. § 531, providing that the granting or withholding of a bill of particulars is within the discretion of the court, held, in an action for libel, where the defendant pleaded in mitigation that the article published was founded upon statements of residents of the police precinct, of which plaintiff was captain, to a reporter of defendant, who believed them to be true, that a bill of particulars, containing the name and address of reporter and residents of plaintiff's precinct, was properly refused. Knipe v. Brooklyn Daily Eagle, 101 App. Div. 43, 34 Civ. Proc. R. 44, 91 N. Y. S. 872.

20. See 4 C. L. 426.

21. Gattis v. Kilgo [N. C.] 52 S. E. 249; Denver Public Warehouse Co. v. Halloway [Colo.] 83 P. 131; Echard v. Morton, 26 Pa. Super. Ct. 579. Strong and violent language, disproportionate to an occasion otherwise privileged, may raise an inference of malice. Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644.

22. Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243.

23. While evidence of intention and motive is admissible on the question of malice and exemplary damages, such evidence should not be considered as a defense to the utterance of the words, nor to reduce the compensatory damages. Grimes v. Thorp [Mo. App.] 88 S. W. 638. For the purpose of showing actual malice in publishing a libel, the plaintiff may prove that, prior to the commencement of the action, defendant published the same words, or similar words, relating to the same subject-matter and imputing the same general charge as that sued upon, but may not introduce evidence which merely tends to show general malice or to show the publication of a distinct calumny. Lauder v. Jones [N. D.] 101 N. W. 907. Under a general issue for damages in an action for slander by an employe against his employer, it was error to receive evidence of a subsequent discharge of the servant. It was also error to instruct the jury that they might take into consideration the fact of such subsequent discharge, and the manner of its execution. Metcalf v. Collinson [Minn.] 103 N. W. 1022.

24. Line v. Spies [Mich.] 102 N. W. 993.

25. Post Pub. Co. v. Butler [C. C. A.] 137 F. 723. An anonymous letter, stated in the libelous article sued on to have been written by the plaintiff and sent to himself, is incompetent when offered by the plaintiff in the absence of a plea of justification having been interposed by the defendant. Lodge v. Hampton, 116 Ill. App. 414. Where defendants were alleged to have written a letter derogatory to plaintiff's character as a clergyman, which referred the addressees to other persons for information, evidence of the contents of letters written by others than those referred to in the alleged libelous matter was inadmissible in an action for libel. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850. In an action for libel,

tion in the community in which he lives is admissible,[26] but evidence of his professional achievements is not unless it tends to disprove the libel or show some element in the tort.[27] Evidence as to how the hearers of alleged slanderous words understood them is admissible.[28] Where a particular portion of an article counted upon as libelous is offered by the plaintiff, the defendant may introduce the entire article.[29] Where failure to produce the original draft of the alleged libel is sufficiently accounted for by the plaintiff, he may identify and put in evidence the printed copy which was given to the public.[30] Other articles than those counted upon as libelous are incompetent to prove the libel charged,[31] but by introducing them himself plaintiff may disable himself to object.[32] What a reporter did after the publication does not impute notice of the untruth of a publication to his employer.[33] The evidence must show that the defendant published the libel.[34]

(§ 5) *D. Trial.*[35]—An action for libel should be tried in the county in which the newspaper is published and circulated.[36]

Either party to an action for libel has a right to read to the jury the entire article alleged to contain the libelous matter.[37]

The privileged character of a communication is for the court, but malice in making it is for the jury.[38] The questions of good faith, fair report or criticism, belief in the truth of an alleged slanderous statement, and of the existence of actual malice, are for the jury.[39] The meaning of words is for the court, unless they may

evidence held insufficient to justify a verdict finding that the alleged defamatory matter was published of and concerning plaintiff. Bianchi v. Star Co., 46 Misc. 486, 95 N. Y. S. 28. Under Code Civ. Proc. § 460, a publication libeling the "B. Paint Company" held sufficiently shown to be a libel on plaintiff, where it was alleged and proved that it was published of plaintiff, who was the sole proprietor of the "B. Paint Company." Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

26. Saunders v. Post-Standard Pub. Co., 94 N. Y. S. 993. In an action for libel, based upon a general attack made upon the plaintiff's character, it is competent under a plea of justification only to prove the general reputation of such plaintiff, and proof of specific wrongful acts is not competent. Dowie v. Priddle, 116 Ill. App. 184.

27. Where an alleged libelous letter, written concerning plaintiff's character and habits in his capacity as a clergyman, stated that he used tobacco and liquor, was untruthful, and that his family was not a credit to any town or community, evidence of the financial condition of the church, and number of members admitted under plaintiff's pastorate, was inadmissible either to disprove the truth of the charges or show malice. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

28. Merrill v. Marshall, 113 Ill. App. 447. It is competent to permit a witness, who heard alleged slanderous words used, to state the name of the person against whom they were intended to be applied, notwithstanding such testimony may not be predicated upon what was said. The sources of the knowledge of such witness as to who was intended, may be inquired into upon cross-examination. Scott v. Snyder, 116 Ill. App. 393.

29. Lodge v. Hampton, 116 Ill. 414.

30. Prewitt v. Wilson [Iowa] 103 N. W. 365.

31. Lodge v. Hampton, 116 Ill. App. 414. Evidence that a wife had made statements derogatory to the character of plaintiff and his family to a third person and that she did not attend plaintiff's church after a difficulty arose therein, was not evidence that she signed a libelous letter alleged to have been written by her husband concerning plaintiff, and purporting to have also been signed by her. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

32. Where plaintiffs introduced in evidence the entire copy of the paper containing the article complained of and similar articles against other people, held plaintiffs could not claim that the admission of papers of other dates, containing similar articles against others, was prejudicial error. Ott v. Press Pub. Co. [Wash.] 82 P. 403.

33. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005.

34. Where, in an action for libel, consisting of a letter alleged to have been written by defendants, husband and wife, concerning plaintiff, there was no evidence that the letter was signed by the wife, a judgment against her was erroneous. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

35. See 4 C. L. 427.

36. Where complaint alleged that newspaper was published in the city of P, D county, and that said paper was of general circulation in that city and vicinity, held there was no allegation that there was a publication of the libel outside of D county. MacCormac v. Tobey, 96 N. Y. S. 302.

37. Dowie v. Priddle, 116 Ill. App. 184.

38. Young v. Lindstrom, 115 Ill. App. 239; Echard v. Morton, 26 Pa. Super. Ct. 579;

have either a harmless or a defamatory meaning, then it is for the jury to say which is carried.[40] In accord with the usual rules the jury is excluded from deciding those facts of which there is no evidence.[41]

In the case of privilege claimed for a report of judicial proceedings, a charge on the effect of malice must show when malice becomes important,[42] and "good faith" must be specifically defined.[43] It is proper to refuse a charge on slight inaccuracies when a charge on whether a report was fair and substantially accurate meets the issues.[44] It is error to assume the defamatory character of a doubtful article,[45] or that defendant was its author,[46] or to combine in a misleading way several issues presenting diverse principles,[47] or to require more strict proof of the words

Denver Public Warehouse Co. v. Holloway [Colo.] 83 P. 131.

39. Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644. Whether a privilege relied on in justification of an alleged libel was not exceeded, and the publication made with actual malice, was a question for the jury. Prewitt v. Wilson [Iowa] 103 N. W. 365; Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644. Where a critic published of a book and its author that they were a "Scandal" and "Shameless," and that the author was "prurient," under circumstances that would not justify the charges beyond question, it was for the jury to say whether the inferences drawn by the critic from the facts were reasonably possible, and therefore permissible. MacDonald v. Sun Printing & Pub. Ass'n, 45 Misc. 441, 92 N. Y. S. 37. Whether a report of an injunction with a synopsis of the bill was fair, is for the jury. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005.

40. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005. Whether a libelous meaning was conveyed by words which may be libelous, is a jury question. Scofield v. Milwaukee Free Press [Wis.] 105 N. W. 227. A publication stating that plaintiff swore out an information and caused the arrest of a certain person on a criminal charge, and afterwards on trial retracted everything that had been said at the preliminary trial, made a statement on the witness stand directly opposite to what had been said in the presence of a number of people before the trial, and gave a false answer to a question as to why certain advice had not been obtained before the institution of the criminal proceedings, was fairly capable of being construed as libelous, and being ambiguous, it was proper to submit the question of its construction to the jury. Jensen v. Damm [Iowa] 103 N. W. 798. Where the language of an alleged libel is fairly susceptible of a construction which renders it defamatory, and therefore actionable, even though it is also susceptible of a construction which would render it innocent, the complaint states a cause of action, and it is for the jury to determine whether the words were used in an innocent or defamatory sense. Lauder v. Jones [N. D.] 101 N. W. 907. In an action for publication of a newspaper article concerning the conduct of the counsel to a county board of supervisors, held that whether the publication was libelous was a question for the jury. Vincent v. Onderdonk, 95 N. Y. S. 347. In an action for libel, the question whether the publication referred to plaintiff, whose name was not mentioned in it, is for the jury. Barron v. Smith [S. D.] 101 N. W. 1105.

41. Where there is no evidence of injury to plaintiff in his profession, it is error to leave that question to the jury. Line v. Spies [Mich.] 102 N. W. 993.

42, 43, 44. American Pub. Co. v. Gamble [Tenn.] 90 S. W. 1005.

45. Where in an action for libel, the court charged that the jury, before determining other questions, must decide as a matter of fact whether or not the publication complained of was libelous, an instruction that if defendants made and published the libel they would be liable, etc., was not objectionable as assuming that the publication was libelous. Jensen v. Damm [Iowa] 103 N. W. 798.

46. In a suit for libel a charge that if the language used imputed dishonesty to the plaintiff, and was untrue, it would be presumed that it was published by defendant in malice, is erroneous, as such facts cannot raise a presumption of defendant's authorship of the libel. Sands v. Marquardt & Sons [Mo. App.] 87 S. W. 1011.

47. In an action for slander the following instructions: "Even though the evidence might establish that the defendant said to certain persons each of the words charged as having been uttered and that such words are ordinarily construed to mean that the persons they refer to have been guilty of fornication, she would not be guilty under this declaration if from a preponderance of the evidence you find that her hearers did not give her words the construction contended for and did not understand her to charge that plaintiff had sexual relations with some man; if you find from the evidence that the defendant spoke words charged in the declaration of and concerning the plaintiff and that they were spoken about and in relation to a known act which was known to the hearers at the time and such words did not then and there give the hearers to understand that the defendant was thereby charging the plaintiff with unlawful, sexual intercourse with a man, your verdict should be for the defendant," are erroneous in an action for slander when a number of occasions were testified to during which the slanderous words were used as to some of which there was an absolute denial by the defendant, and as to others of which the defense was merely that ex-

alleged than is necessary to sustain the action.[48] Under statutes in some states the jury has the right to determine the law and fact in suits for libel, and the jury has the right to make its own law, untrammeled by the instructions of the court, on the question of libel, but must assess damages according to settled rules of law.[49] The court may, however, direct a nonsuit.[50]

A general verdict for plaintiff is not necessarily overthrown by a special finding of no malice.[51]

§ 6. *Criminal libel and slander.*[52] *The offense.*[53]—In Louisiana slander is an offense in itself, and all slanders or defamations form one grade or rank in the category of crimes.[54] In a prosecution for "slander of a female," who has lately moved from one place to another, defendant is entitled to the benefit of the female's bad reputation in the neighborhood from which she came, as well as in that in which she is living.[55] A letter to public officials, scurrilous in its character, and making false and unwarranted charges of malfeasance in office, beyond the limits of honest criticism, against certain other officials, is a criminal libel.[56] As a general rule in the prosecution for criminal libel, the truth of the article, when established, is a perfect defense.[57]

The prosecution.—By statute in some states one who is charged with criminal libel can be prosecuted in any county in which the libel circulates.[58] Where the libel consisted in the publication, among other things, of a statement that a public official was shielding a defaulter, it need not be alleged in such indictment that it was the duty of such official to prosecute such defaulter.[59] In criminal libel or slander other slanders may be shown to prove intent,[60] but not subsequent ones.[61] Peaceable and orderly character of accused is not relevant.[62] In a prosecution for slander of a female it is not necessary for defendant, in order to entitle him to an acquittal on the ground of the female's general reputation, to prove beyond a reasonable doubt that her reputation for chastity is bad.[63]

planatory words were employed which gave to the language actually used a different meaning. Ketchum v. Gilmer, 115 Ill. App. 347.

48. Instructions that would lead the jury to understand that the plaintiff, in order to recover, must prove all the slanderous words charged precisely as alleged, are erroneous; it is sufficient if enough of the words charged are shown to have been used as charged to establish a right of action. Ketchum v. Gilmer, 115 Ill. App. 347.

49. Sands v. Marquardt & Sons [Mo. App.] 87 S. W. 1011.

50. Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60. In a civil action for slander, an instruction that the jury were themselves the judges of the law, as well as of the facts, was error. Grimes v. Thorp [Mo. App.] 88 S. W. 638.

51. Under 2 Ballinger's Ann. Codes and St. Wash. § 7087, defining libel, but not expressly making malice an ingredient thereof, a publication which tends to expose a person to public hatred, contempt, or ridicule, is libelous without regard to the existence of actual malice, and hence a finding that defendant in the action was not actuated by malice is not inconsistent with a general verdict awarding recovery for the libel charged. Byrne v. Funk, 38 Wash. 506, 80 P. 772.

52, 53. See 4 C. L. 428.

54. State v. Hicks, 113 La. 845, 37 So. 776.

55. Ballew v. State [Tex. Cr. App.] 85 S. W. 1063.

56. Raymond v. U. S., 25 App. D. C. 555.

57. Razee v. State [Neb.] 103 N. W. 438.

58. Where the proprietor of a newspaper printed a libel therein, and sent copies to his subscribers by mail through the state, he was punishable in the county into which such copies were sent, as well as in that where the libel was published, under Rev. Code. Cr. Proc. (S. D.) §§ 72, 73, providing that, when a public offense is committed, partly in one county and partly in another, the offense is punishable in either of such counties. State v. Huston [S. D.] 104 N. W. 451.

59. Collins v. People, 115 Ill. App. 280.

60. Collins v. State, 39 Tex. Cr. Rep. 30, 44 S. W. 846, cited 62 L. R. A. 230.

61. United States v. Crandell, 4 Cranch C. C. 683, Fed. Cas. 14,885, cited 62 L. R. A. 230.

62. Commonwealth v. Irwin, 1 Clark [Pa.] 344, cited 103 Am. St. Rep. 900.

63. Ballew v. State [Tex. Cr. App.] 85 S. W. 1063.

JUSTIFICATION, EXCUSE, AND MITIGATION OF LIBEL AND SLANDER.*

[SPECIAL ARTICLE BY GEO. F. LONGSDORF.]

§ 1. *Truth of the publication.*—At common law the truth of a publication could not be shown as a defense in a criminal prosecution for libel, as the offense was not punished merely because of the injury to the reputation of the person libeled, but because of the tendency of the libel to induce violent retaliation and thus result in a breach of the public peace.[1] But the same rule does not apply where a person who has been libeled or slandered brings a civil action to recover damages for the wrong. In such an action the defendant may show that the publication was true, and this will constitute a complete justification and defense, whatever may have been his motive or intent, for "the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess."[2]

To sustain a plea of justification on the ground that the publication is true, the defendant must prove "truth in substance, that is, he must show that the imputation made or repeated by him was true as a whole and in every material part thereof."[3] The very charge made must be proved to be true in substance and effect in every material particular. If the defendant fails in this he does not sustain the plea, although he may prove facts of the same description.[4] To sustain a plea justifying a charge of crime, every essential element of that crime must be proved;[5] and it is necessary to prove the particular crime charged, and not some other crime, although of the same nature and equally as wicked.[6] As a rule a general charge can-

1. Clark & Marshall on Crimes, [2d Ed.] 649.

2. Littledale J. in McPherson v. Daniels, 10 Barn. & C. 263, 272. And see Pollock on Torts (Webb's Ed.) 323-325; Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127, Chase's Cas. 132; Baum v. Chase, 5 Hill (N. Y.) 199; Cooper v. Greeley, 1 Denio (N. Y.) 347, Burdick's Cas. 218; Joannes v. Jennings, 6 Thomp. & C. (N. Y.) 138, Erwin's Cas. 358; Gilman v. Lowell, 8 Wend. (N. Y.) 573, 24 Am. Dec. 96; Golderman v. Stearns, 7 Gray (Mass.) 181, Chase's Cas. 116; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204, Paige's Cas. 386; Perry v. Man, 1 R. I. 263; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514; McCloskey v. Pulitzer Pub. Co., 152 Mo. 339; and late cases cited 2 C. L. 723, note 1; Id. 724, text 18; 6 C. L. 421. "It is not that uttering truth always carries its own justification, but that the law bars the other party of redress which he does not deserve. Thus, the old rule is explained that where truth is relied on for justification, it must be specially pleaded; the cause of action was confessed, but the special matter avoided the plaintiff's right." Pollock on Torts, supra. As to the effect of statutes, see Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127, Chase's Cas. 132. And Compare Neilson v. Jenson, 56 Neb. 430, 76 N. W. 866.

3. Pollock on Torts, (Webb's Ed.) 325, 326; Fleming v. Dollar, 23 Q. B. Div. 388; Weaver v. Lloyd, 3 B. & C. 678; Morris v. Curtis, 20 Ky. L. R. 56. 45 S. W. 86; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527; Young v. Fox, 26 N. Y. App. Div. 261; Collis v. Press Pub. Co., 68 N. Y. App. Div. 38; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Coffin v. Brown, 94 Md. 190; Rutherford v. Paddock, 180 Mass. 289; Clifton v. Lange, 108 Iowa, 472. He cannot justify part of a statement, and admit liability for part, without distinctly severing that which he justifies from that which he does not. Pollock on Torts, supra.

4. Weaver v. Lloyd, 2 B. & C. 678. A charge that a counsellor at law offered himself as a witness, in order to divulge the secrets of his client, is not justified by showing that he disclosed matters communicated to him by his client which had no relation to the cause in which he was engaged and which the counsellor, therefore, was not bound to keep secret. Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145. Compare, however, Moore v. Terrell, 4 B. & Ad. 871.

5. McKinley v. Rob, 20 Johns. (N. Y.) 351, Erwin's Cas. 352; Young v. Adams, 113 Mich. 199; Murphy v. Olberding, 107 Iowa, 547. Thus, under a plea justifying a charge of perjury, the defendant must prove that the plaintiff, in giving his evidence, willfully and corruptly swore falsely. It is not enough to prove merely that the facts sworn to by him were not true. McKinley v. Rob, supra.

6. Thus, a charge of stealing a horse cannot be justified by showing the stealing of a hog. Dilland v. Collins, 25 Grat. (Va.) 343. And a charge of stealing hogs is not justified by proof of stealing one hog. Swan v. Rary, 3 Blackf. (Ind.) 298. For other

*ANNOTATED TO PREVIOUS VOLUMES OF CURRENT LAW. CURRENT CASES WILL BE FOUND IN LIBEL AND SLANDER, §§ 3, 4, ANTE, THIS VOLUME.

not be justified by showing a single instance of misconduct.[7] And a charge of misconduct in a particular instance, or under particular circumstances, cannot be justified by showing such misconduct in another instance or under other circumstances.[8]

A charge of a crime with circumstances of moral aggravation, which circumstances would in themselves be libelous, is not justified by a plea averring the commission of the crime without such circumstances, although in law they may add nothing to the offense.[9]

To sustain a plea justifying a charge of perjury, the defendant can prove the truth only by two witnesses, or by one witness and strong corroborating circumstances, as on an indictment for perjury.[10] Some of the courts go further than this and hold that to sustain a plea justifying a charge of any crime, it is necessary that the defendant shall prove the crime by the same amount of evidence as would be necessary to convict the plaintiff on an indictment for the offense, and therefore, that he must prove the truth beyond a reasonable doubt.[11] Other courts repudiate this doctrine and hold that it is sufficient if the defendant prove the charge by a preponderance of the evidence, as in other civil actions, allowing the plaintiff, however, the full benefit of the presumption of innocence. "If the words," said the Maine court, "impute to the plaintiff the commission of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent, and to do this he must furnish evidence enough to overcome, in the minds of the jury, the natural presumption of innocence, as well as the opposing testimony. But to go further, and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of an issue between the state and a person charged with crime and exposed to penal consequences if the verdict is against him."[12] The English cases holding a different rule may perhaps be explained on the ground

cases see Young v. Adams, 113 Mich. 199; Downs v. Hawley, 112 Mass. 237; Phillips v. Beene, 16 Ala. 720.

7. Thus, a charge of being "a libelous journalist" is not justified by proof of plaintiff's conviction of libel on a single occasion. Wakley v. Cooke, 4 Exch. 511. And a charge that a lawyer is a pettifogger and without character is not justified by showing a single instance of misconduct. Fitch v. Lemmon, 28 U. Can. Q. B. 273. In an action for slander in calling a woman a "whore," proof that she had sexual intercourse with her affianced husband before marriage does not amount to a justification. Sheehey v. Cokley, 43 Iowa, 183, 22 Am. Rep. 236, disapproving Alcorn v. Hooker, 7 Blackf. (Ind.) 58. Calling a woman a "whore" is not justified by proof merely that she committed adultery. Rutherford v. Paddock, 180 Mass. 289.

8. Thus, a charge of sexual intercourse with A. is not justified by showing intercourse with B. Walters v. Smoot, 11 Ired. (N. C.) 315. For other cases in which the proof as to unchastity or immoral conduct was held no justification of the particular charge made, see Smith v. Wyman, 4 Shep. (Me.) 13; Ridley v. Perry, 4 Shep. (Me.) 21; Tharp v. Stephenson, 12 Ired. (N. C.) 348; Burford v. Wible, 32 Pa. St. 45.

9. Helsham v. Blackwood, 11 C. B. 128. In this case the declaration set up a libel imputing to the plaintiff, an officer in the army, the murder of his opponent in a duel, and stating that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honor. It was held that this was not answered by a plea alleging merely that the plaintiff killed his antagonist, and was tried for murder and acquitted. The defendant, it was held, was bound to justify also the matter of aggravation. See, also, Rutherford v. Paddock, 180 Mass. 289.

10. Byrket v. Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; Newbit v. Statuck, 35 Me. 315, 58 Am. Dec. 706; Woodbeck v. Keller, 6 Cow. (N. Y.) 118.

11. Wilmett v. Harmer, 8 Car. & P. 695; Chalmers v. Shackill, 6 Car. & P. 475; Fountain v. West, 23 Iowa, 9, 92 Am. Dec. 405; Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131; Wintrode v. Renbarger, 150 Ind. 556.

12. Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204. Paige's Cas. 386. And see, to the same effect, McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329; Atlanta Journal v. Mayson, 92 Ga. 640, 44 Am. St. Rep. 104 (by statute). Anderson v. Savannah Press Pub. Co., 100 Ga. 454; Finley v. Widner, 112 Mich. 230; Hearne v. DeYoung, 119 Cal. 670. It is sufficient if the evidence introduced by the plaintiff himself shows the truth by a preponderance of the evidence. Anderson v. Savannah Press Pub. Co., supra.

that by statute penal consequences might follow a verdict for the defendant on a plea of justification in an action for libel or slander.[13]

§ 2. *Good faith and belief in the truth of the publication.*—Although it is generally said that malice is an element of libel and slander, this does not mean that it is necessary in all cases to prove actual malice. The malice technically necessary to support an action is implied as a matter of law from the publication of defamatory matter without legal justification or excuse.[14] It follows that where defamatory words are published concerning another, not under circumstances rendering the publication justifiable or excusable, the fact that the defendant made the publication in good faith and in the honest belief that it was true, however reasonable his belief may have been, is no excuse. Although some cases to the contrary may be found in the reports, this rule is established by the overwhelming weight of authority.[15]

The defendant's good faith and honest belief in the truth of his statement, however, may be material under the defense that the statement was fair comment on a matter which was properly open to public criticism,[16] or under the defense that the circumstances were such as to render his communication a privileged one. And, by the weight of authority, even when there is no such justification or excuse, he may prove his good faith and belief in the truth of the charge for the purpose of defeating or reducing the recovery by the plaintiff of exemplary damages,[17] provided the words were not published recklessly or wantonly and without reasonable grounds for believing them to be true.[18] The defendant cannot on the question of good faith and in mitigation of damages prove facts of which he had no knowledge when the libel was published.[19]

13. The plaintiff could be arraigned and put upon his trial for felony upon that verdict, without indictment by a grand jury. Cook v. Field, 3 Esp. 133.

14. Ante, Libel and Slander, § 2 B, 6 C. L. and cases there cited.

15. Bromage v. Prosser, 4 Barn. & C. 257, Bigelow's Lead. Cas. 137, Chase's Cas. 128; Campbell v. Spottiswoode, 3 B. & S. 769; King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126; Byam v. Collins, 111 N. Y. 143, 7 Am. St. Rep. 726, Chase's Cas. 139; Holmes v. Jones, 147 N. Y. 59, 49 Am. St. Rep. 646; Mattson v. Albert, 97 Tenn. 232; Smith v. Johnson, 69 Vt. 231; Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Joannes v. Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738; Lathrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Fountain v. West, 23 Iowa, 9, 92 Am. Dec. 405; Park v. Detroit Free Press Co., 72 Mich. 560, 16 Am. St. Rep. 544; Callahan v. Ingram, 122 Mo. 355, 374, 43 Am. St. Rep. 583, 595; Tribby v. Transcript Pub. Co., 74 Minn. 84, 73 Am. St. Rep. 330. Good faith is mitigatory but not defensive. See 4 C. L. 423, n. 48.

16. See Libel and Slander, § 3, ante, 6 C. L.

17. Gilman v. Lowell, 8 Wend. (N. Y.) 573, 24 Am. Dec. 96; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Fountain v. West, 23 Iowa, 9, 92 Am. Dec. 405; Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307; Davis v. Maxhausen, 103 Mich. 315, Paige's Cas. 383; Fowler v. Fowler, 113 Mich. 575; Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583; Hoey v. Fletcher, 39 Fla. 325; Storey v. Earley, 86 Ill. 461; Folwell v. Providence Journal Co., 19 R. I. 551; Henn v. Horn, 56 Ohio St. 442. Honest belief in the truth of the words may be heard in mitigation. See 4 C. L. 424, n. 63; 2 C. L. 724, text 18. But not for the purpose of mitigating the actual damages. Sickra v. Small, 87 Me. 493, 47 Am. St. Rep. 344; Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583; Buckstaff v. Hicks, 94 Wis. 34, 59 Am. St. Rep. 853. They are immaterial if none but compensatory damages are asked. See 2 C. L. 724, text 21. If the plea is solely not guilty, mitigative matter goes only to punitive damages. See 2 C. L. 724, n. 19.

18. Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303. See, also, Edwards v. San Jose Printing Soc., 99 Cal. 431, 37 Am. St. Rep. 70; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. Rep. 860. That the words were a jest is no defense, see 4 C. L. 423, text 50. The pendency of defective indictments will not tend to prove truth. See 2 C. L. 724, n. 19. General rumor according with truth may be shown. See 2 C. L. 724, text 20.

19. Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 20 Am. St. Rep. 730; Grant v. Herald Co., 42 N. Y. App. Div. 354; Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 411; Edwards v. San Jose Printing Soc., 99 Cal. 431, 37 Am. St. Rep. 70; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. 925, 40 C. C. A. 163. Mitigation must rest in something known to and relied on by defendant at the time of publication. See 4 C. L. 424, text 72. In this connection matters of mitigation must be distinguished from elements of damage the former being referable to the mind or purpose of the defamer and the latter to the harm actually wrought. Compare Damages, 5 C. L. 908, 913.

§ 3. *Repetition and reports.*—The publication of defamatory matter is not the less the speaker's or writer's own act, and makes him none the less liable, in the absence of a statute, because he only repeats what he has heard or seen from others. The repetition of defamatory matter, except in certain cases of privilege, is just as unjustifiable and inexcusable as an original publication, and it can make no difference that it is done in good faith and without actual malice.[20] And it makes no difference, according to the weight of authority, that the person so publishing the matter expresses doubt or disbelief as to its truth,[21] or that he repeats it merely as a rumor, or as coming from some other person, even though he may give the name of the original publisher or speaker,[22] for "tale bearers are as bad as tale makers."[23]

Libel or slander may consist in a fair report of statements which were actually made, and on an occasion which then and there justified the original speaker in making them.[24]

While the fact that the defendant, in publishing a libel or slander, merely repeated in good faith what he had seen or heard, from another, is no justification, it tends to show that the publication was not made with actual malice, and for this reason, according to the weight of authority, it may be shown in mitigation of damages, if the pleadings are in proper form.[25] But the defendant must show that his informants were possessed of such character and standing as would command a belief in the truth of their utterances.[26]

§ 4. *Ignorance or mistake.*—Ignorance or mistake on the part of the defendant may be a good excuse and defense in an action for libel, if not due to negligence. A newsdealer, or book-seller, not being the publisher, who sells a newspaper, book, or periodical containing a libel, in ignorance of such fact, is not liable to an action in the absence of negligence.[27] The same is true of a porter who, in the course of

20. Pollock on Torts (Webb's Ed.) 315, 316; Purcell v. Sowler, 2 C. P. Div. 215; Watkin v. Hall, L. R. 3 Q. B. 396; De Crespigny v. Wellesley, 5 Bing. 392, Bigelow's Cas. 180, Bigelow's Lead. Cas. 151; Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475; Branstetter v. Dorrough, 81 Ind. 527; Kenney v. McLaughlin, 5 Gray (Mass.) 3, 66 Am. Dec. 345; Stevens v. Hartwell, 11 Met. (Mass.) 542; Bishop v. Journal Newspaper Co., 168 Mass. 327; Dole v. Lyon, 10 Johns. (N. Y.) 447, 6 Am. Dec. 346; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328; Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; Haines v. Campbell, 74 Md. 158, 28 Am. St. Rep. 240; Upton v. Hume, 24 Or. 420, 41 Am. St. Rep. 863; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527. Copying from another paper is no defense. See 4 C. L. 423, text 47.

21. Branstetter v. Dorrough, 81 Ind. 527.

22. Pollock on Torts (Webb's Ed.) 316; De Crespigney v. Wellesley, 5 Bing. 392, Bigelow's Cas. 180, Bigelow's Lead. Cas. 151; McPherson v. Daniel, 10 B. & C. 263; Watkin v. Hall, L. R. 3 Q. B. 396; Dole v. Lyon, 10 Johns. (N. Y.) 447, 6 Am. Dec. 346; Inman v. Foster, 8 Wend. (N. Y.) 602; Kenney v. McLaughlin, 5 Gray (Mass.) 3, 66 Am. Dec. 345; Stevens v. Hartwell, 11 Metc. (Mass.) 542; Bishop v. Journal Newspaper Co., 168 Mass. 327; Sans v. Joerris, 14 Wis. 663; Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737. No defense that the article professes to be on information of one named therein. See 2 C. L. 723, text 3. There are some decisions to the contrary in the case of slander, but they are contrary to the weight of authority. See Davis v. Lewis, 7 T. R. 17; Miller v. Kerr, 2 McCord (S. C.) 285, 13 Am. Dec. 722; Tatlow v. Jacquett, 1 Harr. (Del.) 333, 26 Am. Dec. 399; Haynes v. Leland, 29 Me. 233.

23. Branstetter v. Dorrough, 81 Ind. 527.

24. Pollock on Torts (Webb's Ed.) 316; Purcell v. Sowler, 2 C. P. Div. 215 (holding that, although ex parte charges at a meeting of poor-law guardians, of misconduct against a medical officer, were privileged, the privilege did not extend to a publication of a report of such proceedings).

25. Bennett v. Bennett, 6 Car. & P. 586; Saunders v. Mills, 6 Bing. 213; Farr v. Rasco, 9 Mich. 353, 80 Am. Dec. 88; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527; Calloway v. Middleton, 2 A. K. Marsh. (Ky.) 372, 12 Am. Dec. 409; Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; Hart v. Reed, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179; Hewitt v. Pioneer-Press Co., 23 Minn. 178, 23 Am. Rep. 680; Hinkle v. Davenport, 38 Iowa, 355; Storey v. Early, 86 Ill. 461; Cook v. Barkley, 2 N. J. Law, 169, 2 Am. Dec. 343; Hoboken Printing & Pub. Co. v. Kahn, 58 N. J. Law, 359, 55 Am. St. Rep. 609; Upton v. Hume, 24 Or. 420, 41 Am. St. Rep. 863; Callahan v. Ingram, 122 Mo. 355, 43 Am. Dec. 583. Copying an apparently true report is mitigatory. See 4 C. L. 424, text 69.

26. Edwards v. San Jose Printing Soc., 99 Cal. 431, 37 Am. St. Rep. 70.

27. Pollock on Torts (Webb's Ed.) 309; Emmons v. Pottle, 16 Q. B. Div. 354, Bigelow's Cas. 141; Chubb v. Flannigan, 6 Car. &

business, delivers parcels containing hand-bills, in ignorance of their contents.[28] Even the publisher of a newspaper, book, or periodical may be excused on the ground of ignorance. The publisher of a newspaper who publishes therein an advertisement or other communication from a third person, which is in fact a libel, is not liable to the person defamed if he did not know the article was defamatory, and there is nothing on its face to render him chargeable with such knowledge.[29]

If a person is guilty of negligence in selling or otherwise publishing a libel which by the exercise of reasonable care he would discover, particularly where there are circumstances which should reasonably put him on inquiry, his ignorance of fact is no defense.[30] If a publication is made libelous by the negligence of its publisher, as by carelessness in setting type, or in the use of words, etc., he cannot successfully defend an action on the ground of mistake.[31] It has been held that if one writes a privileged communication to another, disparaging the character of a third person, and by mistake in exchanging envelopes sends it to a different person, with reference to whom the communication is not privileged, he is excused on the ground of mistake.[32] The soundness of this decision, however, is doubtful.[33]

§ 5. *Provocation.*—Unless the case is one of privilege on the ground of defense against a libelous attack,[34] it is no justification, so as to constitute a bar to an action for libel or slander, that the publication by the defendant was provoked by the words or conduct of the plaintiff.[35] The law, however, where injury is done to the character of another, as well as where it is done to his person, makes allowance for the infirmities of human nature, and for what is done in the heat of passion produced by the improper conduct of the person injured; and allows the defendant, in an action for libel or slander, to show in mitigation of damages, although not in bar of the action, that the defamatory words were uttered or published by him in heat of passion or excitement, under the provocation of defamatory or insulting attacks by the plaintiff upon him at or about the time of the publication.[36] But to render evidence of defamatory publications by the plaintiff concerning the defendant admissible as showing provocation, they must have been made immediately before the defendant's

P. 431; Street v. Johnson, 80 Wis. 455, 27 Am. St. Rep. 42. The rule applies to the proprietor of a circulating library who circulates a book in ignorance of its containing a libel, the ignorance not being due to negligence. Vizetelly v. Mudie's Select Library, (1900) 2 Q. B. 170.

28. Day v. Bream, 2 M. & R. 54.

29. Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216, where it appeared that the defendant understood a story published in his newspaper to be a fictitious story, not intended to apply to the plaintiff or any other person. See, also, Dexter v. Spear, 4 Mason (U. S.) 115.

30. Chubb v. Flannigan, 6 Car. & P. 431; Vizetelly v. Mudie's Select Library (1900) 2 Q. B. 170; Curtis v. Mussy, 6 Gray (Mass.) 261.

31. Shepherd v. Whitaker, L. R. 10 C. P. 502; Blake v. Stevens, 4 F. & F. 232. Compare Sulling v. Shakespeare, 46 Mich. 408, 41 Am. Rep. 166. It is no defense that defendant did not intend to make charge he did make. See 4 C. L. 423, text 49.

32. Tompson v. Dashwood, 11 Q. B. Div. 43.

33. Pollock on Torts (Webb's Ed.) 309. And see Hebditch v. MacIlwaine (1894) 2 Q. B. 54.

34. But a retort provoked or necessitated by occasion to defend one's self from counter defamation is privileged. See 2 C. L. 722, text 90. Mere irritations will not necessitate such an answer. Id. An exchange of epithet and opprobrium is not actionable. Id.

35. Hosley v. Brooks, 20 Ill. 115, 71 Am. Dec. 252; Mousler v. Harding, 33 Ind. 176, 5 Am. Rep. 195; Poissenet v. Reuther, 51 La. Ann. 965; Simpson v. Robinson, 104 La. 180. That plaintiff has libeled defendant does not defeat the action. See 4 C. L. 423, text 51.

36. Trapley v. Blaby, 7 Car. & P. 395; 2 Bing. N. C. 437; Watts v. Fraser, 7 Adol. & El. 223, 7 Car. & P. 369; Avery v. Ray, 1 Mass. 12; Walker v. Flynn, 130 Mass. 152; Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Gould v. Weed, 12 Wend. (N. Y.) 22; Rochester v. Anderson, 1 Bibb (Ky.) 428; Moore v. Clay, 24 Ala. 235, 60 Am. Dec. 461; Jauch v. Jauch, 50 Ind. 135, 19 Am. Rep. 699; McClintock v. Crick, 4 Iowa, 453; Newman v. Stein, 75 Mich. 402, 13 Am. St. Rep. 447; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527; DeCamp v. Archibald, 50 Ohio St. 618, 40 Am. St. Rep. 692; Simons v. Lewis, 51 La. Ann. 327; Simpson v. Robinson, 104 La. 180. Prior counter libels by plaintiff are mitigatory. See 4 C. L. 424, text 67. Irritating conduct by plaintiff may be shown. See 2 C. L. 724, n. 22.

publication, or so near to it in point of time as to constitute a part of the res gestae. Such provocation given by the plaintiff on other occasions, and which has no apparent connection with the publication of the defendant, cannot be given in evidence even in mitigation of damages.[37]

§ 6. *Bad character of the plaintiff.*—The fact that a person has a bad character or reputation in the community is no justification for making it worse by defamation which is false, and in an action for libel or slander, therefore, the general bad character of the plaintiff cannot be pleaded or proven in bar of the action.[38] The character of the plaintiff, however, is material on the question of damages. When a person brings an action for libel or slander, and thus seeks to recover damages for injury to his character, he puts his character in issue, both generally and as to the particular kind of misconduct imputed to him, and that evidence of his general bad character in either respect is admissible in mitigation of damages under the general issue, or, in most jurisdictions, where the defendant has pleaded the truth in justification and failed to sustain his plea.[39] "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence."[40]

The evidence of general character which is admissible in mitigation of damages, is not confined to the plaintiff's character with respect to acts of the particular kind imputed by the defendant, but extends to his character generally,[41] for, as was said in a Kentucky case, "a man who is habitually addicted to every vice, except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character."[42] But the evidence is limited to proof of general reputation, and the defendant cannot introduce evidence of specific acts.[43] Nor can he show

37. Makley v. Johnson, R. & M. 422; May v. Brown, 3 B. & C. 113; 4 D. & R. 670; Rochester v. Anderson, 1 Bibb (Ky.) 428; Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Avery v. Ray, 1 Mass. 12; Sheffill v. Van Deusen, 15 Gray (Mass.) 485, 77 Am. Dec. 377; McAlexander v. Harris, 6 Munf. (Va.) 465; Moore v. Clay, 24 Ala. 235, 60 Am. Dec. 461; Porter v. Henderson, 11 Mich. 20, 82 Am. Dec. 59; Quinby v. Minnesota Tribune Co., 38 Minn. 528, 8 Am. St. Rep. 693. See, also, Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474.

38. Wood v. Durham, 21 Q. B. Div. 501; Sun Printing & Pub. Assn. v. Schenck, 98 Fed. 925, 40 C. C. A. 163, and cases in the notes following.

39. ——— v. Moor, 1 Maule & S. 284; Sikra v. Small, 87 Me. 493, 47 Am. St. Rep. 344; Sawyer v. Eifert, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633; Eastland v. Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668; McGee v. Sodusky, 5 J. J. Marsh. (Ky.) 185, 20 Am. Dec. 251; Root v. King, 7 Cow. (N. Y.) 613; Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616; Gilman v. Lowell, 7 Wend. (N. Y.) 573, 24 Am. Dec. 96; Remsen v. Bryant, 47 N. Y. App. Div. 503; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244; Stone v. Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Clark v. Brown, 116 Mass. 509; Cox v. Strickland, 101 Ga. 482; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Finley v. Widner, 112 Mich. 230; Anthony v. Stephens, 1 Mo. 254, 13 Am. Dec. 497; Waters v. Jones, 3 Port. (Ala.) 442, 29 Am. Dec. 261; Byrket v. Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; Tracy v. Hacket, 19 Ind. App. 133, 65 Am. St. Rep. 398; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; B——— v. I———, 22 Wis. 372, 94 Am. Dec. 604; Candrian v. Miller, 98 Wis. 164. Bad character of plaintiff may be shown to mitigate or reduce damages. See 4 C. L. 424, text 71.

40. Lord Ellenborough in ——— v. Moor, 1 Maule & S. 284.

41. Sawyer v. Eifert, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633; Eastland v. Caldwell, 2 Bibb (Ky.) 20, 4 Am. Dec. 668; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Stone v. Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Sikra v. Small, 87 Me. 493, 47 Am. St. Rep. 344, and other cases cited in the notes preceding.

42. Eastland v. Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668. And see the reasoning of Nott, J., in Sawyer v. Eifert, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633.

43. Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Sawyer v. Eifert, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633; Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Shehan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Folwell v. Providence Journal Co., 19 R. I. 551; Robertson v. Hamilton, 16 Ind. App. 328; Meutze v. Tuteur, 77 Wis. 236, 20 Am. St. Rep. 115; Tribune Ass'n v. Follwell, 107 Fed. 646, 46 C. C. A. 526. General bad character of plaintiff may be shown. See 2 C. L. 724, text 23. It cannot be shown, however, that he forbore to sue for previous libels. See 2 C. L. 724, n. 23. Nor can specific acts be shown. Id., n. 24.

general bad character subsequent to the publication of the alleged libel or slander,[44] even though such character could not possibly have been caused thereby.[45]

Some of the courts have held that it is competent for the defendant to show that, when the defamatory matter was published, the plaintiff's character had been disparaged by reports in the neighborhood that he had been guilty of practices similar to those imputed to him,[46] but on this point there are a number of decisions to the contrary.[47]

§ 7. *Retraction and apology.*—The fact that after the publication of a libel or slander the defendant retracted the same and apologized to the plaintiff is no justification, and cannot be pleaded or proven in bar of the action.[48] But the person libeled may release his right of action;[49] and even when there is no such release, a full and fair retraction of the libel and apology for its publication, made before action and in good faith, may be shown in mitigation of damages.[50]

In England, and in some of the United States, there are statutes, either general or relating particularly to libels published in newspapers, expressly allowing a retraction and apology, if full and fair, to be shown in mitigation of damages.[51]

LICENSES.

§ 1. *Definition and nature.*—A license is a mere permit to do something that without it would be unlawful.[64] A license granted under the police power of the state does not constitute a contract between the licensee and the municipality granting it, or confer upon him any vested right of property;[65] and its abrogation, as provided by law, does not deprive him of any immunity or privilege conferred upon him by the constitution.[66] But a board that is authorized by statute to grant li-

44. Thompson v. Nye, 16 Q. B. 175; Douglass v. Tousey, 2 Wend. (N. Y.) 252, 20 Am. Dec. 616.

45. Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616 (where the charge imported was that the plaintiff was a thief, and it was sought to show that she was subsequently reputed to be a common prostitute).

46. Leicester v. Walter, 2 Camp. 251; ——— v. Moor, 1 Maule & S. 285; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Calloway v. Middleton, 2 A. K. Marsh. (Ky.) 372, 12 Am. Dec. 499; McGee v. Sodusky, 5 J. J. Marsh. (Ky.) 185, 20 Am. Dec. 251; Nelson v. Evens, 1 Dev. (N. C.) 9; Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244. Compare Sanders v. Johnson, 6 Blackf. (Ind.) 50, 36 Am. Dec. 564; Gray v. Elzroth, 10 Ind. App. 587, 53 Am. St. Rep. 400.

47. Gilman v. Lowell, 8 Wend. (N. Y.) 573, 24 Am. Dec. 96; Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173; Alderman v. French, 1 Pick (Mass.) 1, 11 Am. Dec. 114; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Pease v. Shippen, 80 Pa. St. 513, 21 Am. Rep. 116.

48. Tresca v. Maddox, 11 La. Ann. 206, 66 Am. Dec. 198; Williams v. McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Lehrer v. Elmore, 100 Ky. 56; Davis v. Maxhausen, 103 Mich. 315, Paige's Cas. 383.

49. Boosey v. Wood, 3 H. & C. 484. Although a person who has been libeled may release his claim for damages, a bare expression of satisfaction at a recantation and apology by the libeler will not operate as a release of his right of action. Tresca v. Maddox, 11 La. Ann. 206, 66 Am. Dec. 198.

50. Tresca v. Maddox, 11 La. Ann. 206, 66 Am. Dec. 198; Cass v. New Orleans Times, 27 La. Ann. 214; Davis v. Maxhausen, 103 Mich. 315, Paige's Cas. 383. A retraction of a libel, if not published until suit has been brought, cannot be considered in mitigation of damages. Evening News Ass'n v. Tryon, 42 Mich. 549, 36 Am. Rep. 450. Contra, Turner v. Hearst, 115 Cal. 394. An offer to retract mitigates if in time before action. See 4 C. L. 424, text 70.

51. See Lafone v. Smith, 3 H. & N. 735; Gray v. Times Newspaper Co., 74 Minn. 452, 73 Am. St. Rep. 363.

64. License to conduct games of faro and roulette. Littleton v. Burgess [Wyo.] 82 P. 864.

65. Statutes under which licenses have been granted may be repealed without impairing the obligation of contracts, or depriving the licensees of property without due process of law. Littleton v. Burgess [Wyo.] 82 P. 864.

66. Lowell v. Archambault [Mass.] 75 N. E. 65; Littleton v. Burgess [Wyo.] 82 P. 864.

censes cannot revoke the same, when unreservedly given, and where the statute confers no power of revocation.[67] The payment by a foreign corporation of the conventional price, or bonus, for the privilege of entering the state to do business, does not give it the absolute right to do business exempt from further license taxes.[68] Where the license is in its nature personal, it cannot be transferred, and affords no defense to one who claims to be a transferee.[69] A corporation cannot avail itself of licenses issued to other corporations whose property it has bought.[70] A license has only a local application[71] and affords no protection beyond the jurisdiction of the officer who issues it,[72] but an ordinance imposing a license charge upon telegraph poles and wires[73] or one imposing such a charge on the pipes of a gas company[74] is not void, because not limited in express terms to those located in the public streets and highways of the municipality, but will be so construed in their application.

§ 2. *Power to require and validity of statutes.*[75]—License regulations are ordinarily justified as an exercise of the police power.[76] The elements which enter

67. A board of health having granted a permit under Rev. Laws, c. 102, § 69, to use a building for a stable, could not after the expenditure of considerable money by the licensee, revoke the permit upon the petition of certain citizens, though it was improvidently granted. But such a permit is subject to such reasonable regulations as may be made by the board. Lowell v. Archambault [Mass.] 75 N. E. 65.

Note: Of this it is said in 4 Mich. L. R. 229: "The soundness of this decision may be questioned and we regret that the dissenting opinions do not appear. However, the peculiar facts of the case may justify it. Defendant claims the board of health had authority to issue the license under Statute of 1895, Ch. 213, but that said statute contains no provision for its recall. Further, that he secured the license before expending money on building, and, therefore, had a constitutional right to protection. See Hirn v. State, 1 Ohio, 15. After a license, containing no conditions for forfeiture, has been granted, it cannot be revoked except by the legislature. In Grand Rapids v. Braudy, 105 Mich. 670, 55 Am. St. Rep. 472, 32 L. R. A. 116, it was held that a license granted by the city council could not be revoked unless a reservation of such right was stated in the license. However, a legislative act which revokes a license does not impair the obligation of a contract, for a license is not a contract. Commonwealth v. Brennon, 103 Mass. 70, and Lantz v. Hightstown, 46 N. J. Law, 102. The board of health had a right to state conditions in the license for violation of which it might be revoked and should have done so in this case. Schwuchow v. Chicago, 68 Ill. 444. Failing to place such conditions in the license the board could not revoke it arbitrarily after the defendant had expended money relying upon it. In Commonwealth v. Moylan, 119 Mass. 109, it was held that a license cannot be revoked either arbitrarily or because it was injudiciously granted. A license can be revoked only by the action of the legislature or because the licensee has broken one or more of its conditions. See Mayor v. 3rd Ave. R., 33 N. Y. 42. Also, Shuman v. City of Fort Wayne, 127 Ind. 109, holding that the power to revoke licenses lies wholly with the legislature."

68. Section 65, Sess. Laws 1902, p. 73, c. 3, imposing an annual license tax on the capital stock of foreign corporations, is not void as ex post facto legislation or as an impairment of the obligation of a contract. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

69. Where, as under Rev. Laws, c. 102, §§ 1-6, 9, the licensing board has discretionary powers to grant or refuse an application for a common victualer's license, with powers of revocation in certain cases, the license is a personal one. Commonwealth v. Lavery [Mass.] 73 N. E. 884.

70. Southern Car & Foundry Co. v. Calhoun County, 141 Ala. 250, 37 So. 425.

71. State v. Cobb [Mo. App.] 87 S. W. 551. Act of Congress, July 1, § 7, par. 36, imposing a license tax upon brewers' agents is a purely municipal regulation and not intended to regulate the commercial intercourse between the District of Columbia and the states so as to require the solicitor of a New York brewery to take out a license. Beltzell v. District of Columbia, 21 App. D. C. 49.

72. Under Laws 1903, p. 163, § 4, a party desiring to operate an automobile over county roads must take out a license in each county. State v. Cobb [Mo. App.] 87 S. W. 551.

73. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

74. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355.

75. See 4 C. L. 428.

76. City Council of Montgomery v. Kelly [Ala.] 38 So. 67; People v. Van De Carr, 26 S. Ct. 144.

Applications of this rule: A borough may require a license of **persons canvassing for the sale of goods** under the police power delegated by the general borough law of Apr. 3, 1851, P. L. 320. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. Erie City held to have authority under its general police power to impose an annual license tax of $25 on each **street car** operated in the city. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77. Act of June 7, 1901, P. L. 493, licensing **plumbers** in second class cities, is constitutional as within the police power. Beltz v. Pittsburg [Pa.] 61 A. 78. But Laws

into a municipal tax are the necessary, or probable, expense of the issuing of the license and of such inspection, regulation, and police surveillance as the municipal authorities may lawfully prescribe[77] and it is immaterial whether the amount fixed for this purpose is designated as a license tax, a license fee, or a police charge.[78] While a municipality may, in advance, fix the license charge high enough to cover any reasonably anticipated expense of police supervision,[79] it cannot act arbitrarily or unreasonably,[80] but the risk may rightfully be cast upon the licensee,[81] and the

1896, p. 1052, c. 803, making it unlawful for a firm in New York City to carry on the **plumbing business,** unless each member thereof has been examined and licensed as a plumber, is not a valid exercise of the police power. Schnaier v. Navarre Hotel & Importation Co., 182 N. Y. 83, 74 N. E. 561. St. 1903, p. 507, c. 473, requiring registration of **automobiles** and display of registration number and mark is a valid regulation under the state's police power. Commonwealth v. Boyd [Mass.] 74 N. E. 255. An ordinance licensing and regulating the handling of **inflammable oils** from tank wagons **on the streets** of Chicago is a valid exercise of police powers conferred by the City and Village Act (Hurd's Rev. St. 1903, p. 291), art. 5, § 1, subds. 4, 9, 15, 20, 41, 66, 78, 96. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. The provisions of § 33, c. 43, Comp. St. 1901, the act of 1873, regulating **insurance** companies (Gen. St. 1873, p. 443, c. 33), whereby a retaliatory tax and license fee is imposed upon companies of other states in certain cases, are valid, such imposition being a condition of their admission and continuance to do business in the state. State v. Insurance Co. [Neb.] 99 N. W. 36. The fact that such license fee is required only of companies of other states, the laws of which discriminate against outside companies, does not make it arbitrary or unreasonable, or contrary to sec. 1, art. 9 of the state constitution. Id. Nor does the fact that the requirement may not be made in advance of the company's coming into the state affect its validity. Id. A provision requiring **venders of cream and milk** to register with the health commissioner and pay a registration fee is a valid police regulation, under charter authority to provide for inspection of milk and licensing and regulating occupations. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617. The Act of Congress, Feb. 28, 1887 (24 Stat. at L. 427, c. 272), prohibiting the employment of **steam engineers** without licenses is a police regulation for the protection of lives and property. Smoot v. District of Columbia, 23 App. D. C. 266. Laws 1897, pp. 498, 499, c. 415, §§ 180, 184, requiring persons practicing the trade of **horseshoing** to be examined and licensed, is not a valid exercise of the state's police power, but an arbitrary interference with personal liberty and private property without due process of law. People v. Beattie, 96 App. Div. 383, 89 N. Y. S. 193. An ordinance requiring a license and payment of $600, for the sale of goods and merchandise to merchants by selling them **trading stamps,** and also requiring a license and payment of $100 from merchants using the stamps, held not to be a tax on the sale of the goods, but a license and tax on a peculiar method of doing business. Oilure Mfg. Co. v. Pidduck-Ross Co., 38 Wash. 137, 80 P. 276.

77. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343; Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544; City Council of Montgomery v. Kelly [Ala.] 38 So. 67. The registration fee of $2 required of owners of automobiles by St. 1903, p. 507, c. 473, is a license fee and not a tax. Commonwealth v. Boyd [Mass.] 74 N. E. 255. A registration fee of $1, required of venders of cream and milk, is not a tax but an inspection fee designed as a compensation for the service rendered. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617.

78. Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544; Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355.

79. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343. License tax imposed by municipal ordinance on telephone companies held reasonable. Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544. A charge of $1 per pole and $2.50 per mile of wire, annually on telegraph companies, held reasonable in connection with an annual inspection, counting of poles, and calculation of miles of wire, with lookout for dangerous poles and wires (Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346), but a city cannot under its general authority to regulate its streets, impose an annual license tax of $1 per pole on telephone companies, authorized by state law to use public highways (Rev. St. 1898, § 1778), to be paid into its general fund, where the aggregate amount so sought to be collected was greatly in excess of the cost of supervision (Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009). A license fee of $10 per annum for each tank wagon used in handling oils on the streets of Chicago was not so high as to justify the court in holding the ordinance void therefor. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

80. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343. A municipality cannot, under the guise of license or regulation, place a license so high as to be prohibitive of the transaction of the business sought to be engaged in, but a license is not prohibitive merely because it is burdensome. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188.

NOTE. Prohibitory fees: Defendant was prosecuted for violation of a city ordinance forbidding the issuing of trading stamps without a license. Held that such ordinance was unconstitutional and void. City Council of Montgomery v. Kelly [Ala.] 38 So. 67. This decision is based upon the highest principles of justice and is supported by good authority. Under the police power, municipalities have power to require licenses, but

charge cannot be avoided[82] or any excess be recovered back because the charge subsequently appears to be somewhat in excess of the actual expense of the supervision.[83] The burden is on the licensee to show excessiveness of the fee,[84] not by comparison of other license fees, or of the value of the thing licensed,[85] but by evidence pertinent to the necessity and character of the regulation and supervision imposed.[86] The fact that some classes of persons are excepted does not make the police regulation void.[87] The fact that a business is a lawful one does not exempt it from reasonable police regulations.[88] If the purpose of an ordinance is police regulation, and it tends to accomplish that object,[89] then the ordinance may be sustained under the power to regulate[90] although the charter does not, in express words, confer authority to

such licenses are merely allowed as a means of regulation and their amount cannot exceed the cost of supervision. Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85. The state has the right to select certain occupations and throw the burden of taxation on them, but if an arbitrary classification, without a reasonable basis to support it, is established, the tax is void. Judson, Taxation, § 459; Tiedeman's Limitations of Police Power, p. 273. The power to levy such a heavy tax on a business or occupation as to discourage or even break it up is also well recognized; but useful occupations, not detrimental to the public, cannot be unduly restricted or substantially prohibited under the guise of police regulations; the rules apply only to trades or occupations that are hurtful to public morals or injurious to the public welfare. State v. Smith, 67 Conn. 541, 52 Am. St. Rep. 301; State v. Moore, 113 N. C. 697; Cache Co. v. Jense, 21 Utah, 207; Tiedeman's Police Power, pp. 270, 277, 278; Cooley's Taxation [3d Ed.] 24. In Lawton v. Steele, 152 U. S. 133, 38 Law. Ed. 385, it was held that the legislature may not, under the guise of a police regulation and of protecting the interests of the public, arbitrarily interfere with public business or impose unusual or unnecessary restrictions upon lawful occupations. While absolute equality in taxation is unattainable, yet, when, for any reason, the tax becomes discriminative upon the individuals of the class taxed and selects some for an exceptional burden, it is deprived of the necessary element of legal equality. Cooley's Taxation [3rd Ed.] 259, 260; Commonwealth v. Fowler, 96 Ky. 166, 33 L. R. A. 839; Railway Co. v. Clark, 60 Kan. 826. Moreover a city cannot divide a single taxable privilege and require a separate tax for each of its elements. 2 Cooley's Taxation [3rd Ed.] 1103 and note I; Ex parte Simms, 40 Fla. 432; Canora v. Williams, 41 Fla. 509. Here a heavy license was required from trading stamp companies, so that the present license was seemingly within this rule. The use of trading stamps has been upheld as lawful, and the right to give them away is unquestionable. See 2 Mich. L. R. 224; 3 Mich. L. R. 233.—3 Mich. L. R. 662.

81. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343; Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355.

82. 83. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343.

84. The borough is not bound in the first place to prove the tax reasonable, but the burden is on the licensee to show that it is unreasonable. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355. Unless the court can determine from judicial cognizance, or the facts ascertained, that the license fee is grossly in excess of what was necessary to cover the reasonably anticipated expenses of police supervision, it is not justified in interfering. Id.

85. The unreasonableness of a license charge, imposed on telegraph poles and wires, could not be shown by proving the cost or value of the property, the space occupied by poles and value of abutting properties and rate of their taxation, the cost of reconstructing the line, its ordinary depreciation and present value, the license fees of other municipalities, and the capital stock, bonded indebtedness, net earnings, and poles and wires of the entire system. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343.

86. But it was admissible to show the careful construction and maintenance of the line, its location in a sparsely settled community so as not to impede the public, its frequent inspection and regular repair, the cost of such inspection, and that the borough made no inspection, nor paid out money, nor incurred any expense therefor. Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343. But such evidence must cover the whole period for which license fees are claimed and must show the nature, extent, and cost of inspection and supervision of its lines by the company. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

87. An ordinance imposing a license fee or tax upon the keepers of conveyances for carrying persons or property for hire is not invalid because it does not include the livery business, the difference in the vehicles used, and the extent of their use of the streets forming a proper basis for classification. City of Des Moines v. Bolton [Iowa] 102 N. W. 1045. Singling out the milk business in a city as a proper subject of regulation is not a denial of the equal protection of the laws, where all milk dealers are treated alike. People v. Van De Carr, 26 S. Ct. 144.

88. The selling of milk and cream may be so regulated. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617. Municipal authorities in Pennsylvania cannot grant exemption from this police supervision, it being prohibited by Const. art. xvi. § 3. Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544.

license;[91] for the grant of power to a municipality to regulate confers the power to license, when regulation cannot otherwise be accomplished.[92] But a municipality that has not the authority to license cannot, under the guise of regulating its streets, impose an annual tax per pole upon a telephone company for the purpose of collecting a revenue.[93] The fact, however, that the license tax required by an ordinance is paid into the city treasury, and incidentally augments the revenues of the city, does not show that the ordinance was enacted to raise revenue by taxation.[94] If, on the other hand, the ordinance is adopted ostensibly as a police measure, but used as a mere subterfuge for the purpose of raising revenue, it will not be sustained.[95] It is no objection to an act that it applies more stringent license regulations to the cities of larger size and denser population.[96] License regulations must not infringe the privilege of citizens to carry on legitimate business by the use of legitimate means,[97] nor infringe any provision of the state constitution,[98] but the provision claimed to be violated by the requirement of the license must be specifically pointed out.[99] Congress is bound not to invade any guarantees of citizens in legislating for the District of Columbia.[1]

License laws, however, are often passed in the exercise of the taxing power,[2]

89, 90, 91. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355.

92. Section 170, Detroit City charter, conferring power to regulate the manner in which the streets, etc., shall be used and enjoyed, held to authorize an ordinance regulating the speed of automobiles in the streets by a system of registration and numbering. People v. Schneider [Mich.] 12 Det. Leg. N. 32, 103 N. W. 172.

93. Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009.

94. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77.

95. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355. An annual license tax of $1 per pole, to be paid into the general fund, there being nothing in the ordinance to indicate that it was for supervision, and the amount sought to be collected greatly exceeding the expense of supervision, held to be a revenue measure and not warranted by the charter. Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009.

96. Act of June 7, 1901, P. L. 493, relating to the examination and licensing of plumbers is constitutional. Beltz v. Pittsburg [Pa.] 61 A. 78.

97. Ex parte Snyder [Idaho] 79 P. 819; City Council of Montgomery v. Kelly [Ala.] 38 So. 67. An ordinance imposing an annual license tax of $600 on persons selling **trading stamps** to merchants, and a tax of $100 per year on merchants using such stamps, was intended to prohibit the use of them and is void under the fourteenth amendment to the federal constitution. Ex parte Hutchinson, 137 F. 949; Humes v. City of Little Rock, 138 F. 929. Laws 1896, p. 1052, c. 803, making it unlawful for any firm in New York city to carry on the business of **plumbing** unless each member thereof has passed examination and been registered as a plumber, is unconstitutional so far as it interferes with the right to form partnerships for carrying on that business. Schnaier v Navarre Hotel & Importation Co., 182 N. Y. 83, 74 N. E. 561. Kirby's Dig. § 6886, prohibiting persons, whether owner, manufacturer, or agent, from traveling in any county and **peddling** certain wares, but exempting resident merchants, violates the 14th amendment of the federal constitution. Ex parte Deeds [Ark.] 87 S. W. 1030. The equal protection of the laws was not denied to the managing agent of a nonresident **meat-packing house** by requiring of him a license tax on the domestic business done by him where the same tax was levied on the agents of domestic and foreign houses alike (Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663), nor is the imposition of such a tax any impairment of the obligation of his contract of employment (Id.). Acts 1903, p. 344, imposing a license tax on **emigration** agents, does not conflict with the 14th amendment to the federal constitution. Kendrick v. State [Ala.] 39 So. 203.

98. Acts 1903, p. 344, imposing a license tax on emigration agents, does not conflict with Const. § 31, providing that emigration shall not be prohibited. Kendrick v. State [Ala.] 39 So. 203. An ordinance exempting from an occupation tax such persons as practice professions temporarily within the city, if they do not advertise or solicit other business therein, does not conflict with Const. § 3, forbidding exclusive privileges. Evers v. Mayfield, 27 Ky. L. R. 481, 85 S. W. 697.

99. State v. Cobb [Mo. App.] 87 S. W. 551.

1. Although the 14th amendment to the federal constitution does not in terms extend to the United States authority, yet congress may not disregard its guaranties in legislating for the District of Columbia. Lappin v. District of Columbia, 22 App. D. C. 68. The right to pursue any legitimate calling, subject to reasonable regulations, cannot be denied to the citizens of the District. Id.

2. The tax imposed on the capital stock of foreign corporations, by Sess. Laws 1902, p. 73, c. 3, § 65, is an excise tax on the business of such corporations, levied for the purpose of state revenue, the capital stock being simply the standard by which the amount is computed (American Smelting &

and as such must conform to the constitutional provisions relating to taxation;[3] but a privilege tax, levied upon certain business callings, is held not to be subject to the constitutional limitations, either as to amount or uniformity.[4] When the fee required is only such as will cover the expense of enforcing the regulation, it is under the police power of the state, but when it is larger than required for such purpose and is exacted for the purpose of revenue, the license is issued under the taxing power of the state.[5] The courts now recognize the right to so combine the police regulation and the taxing power as to levy a license tax to discourage or break up a business, but this applies only to such kinds of business as, though tolerated, are recognized as hurtful to public morals, productive of disorder, or injurious to the public.[6] The legislature can confer upon cities and towns the power to impose a license tax upon business and professions,[7] but there must be express authority therefor,[8] or necessary implication,[9] and it is never easily implied.[10]

Refining Co. v. People [Colo.] 82 P. 531), and the fact that only a part of the capital stock is employed, and only a small portion of its property is situated within the state, does not relieve a foreign corporation from the payment of such a tax (Id.). Such tax is not invalid as being a license levied under the police power and, therefore, in conflict with the purpose of the act which is declared by its title to relate to "public revenue." Id. The yearly license fee or tax on corporations, imposed by Act N. J. 1884 (P. L. 1884, p. 234, § 4), is imposed arbitrarily as a condition precedent to the continued existence of the corporation and is not a tax upon corporate franchises (Duryea v. American Wood Working Mach. Co., 133 F. 329), but is an imposition which subsequently organized corporations by their charters contracted to pay (In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858). It is valid, though imposed on an insolvent corporation in the hands of a federal receiver and constitutes a preferred claim against the assets in the hands of the receiver. Duryea v. American Wood Working Mach. Co., 133 F. 329; In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858. The fact that the payment of an occupation tax is evidenced by a receipt which is called a "license" does not render the tax any less a tax for revenue (Kendrick v. State [Ala.] 39 So. 203), nor does the fact that it is provided for by a special act, instead of being included in the general revenue act (Id.).

3. Sess. Laws 1902, p. 73, c. 3, § 65, imposing an excise tax on the business of foreign corporations, based on their capital stock, does not conflict with Const. art. 10, § 3, that provision being applicable only to direct ad valorem tax on property. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Section 18 of the town charter of Suffolk authorizing the imposition of an occupation tax, as applied to a railroad company, does not conflict with Const. art 10, § 4 (Va. Code 1904, p. cclxii, § 170), authorizing the legislature to lay a license tax on any business that cannot be reached by an ad valorem tax. Norfolk & W. R. Co. v. Suffolk, 103 Va. 498, 49 S. E. 658. Act No. 47 of 1904, imposing a license tax on trading stamp companies, is not unconstitutional for failing to graduate the tax to be collected. State v. Merchants' Trading Co., 114 La. 529, 38 So. 443.

4. City Council of Montgomery v. Kelly [Ala.] 38 So. 67; Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188; Kendrick v. State [Ala.] 39 So. 203. The tax of $10 per mile on railroad franchises in Mississippi, without regard to conditions, business, earning capacity, or value, is not a property tax but a privilege tax. Gulf & S. I. R. Co. v. Adams [Miss.] 38 So. 348.

5. City of Des Moines v. Bolton [Iowa] 102 N. W. 1045. An annual license charge of $25 for each street car run or operated upon any road in the city held to be a license tax and not a tax upon business or property. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77.

6. City Council of Montgomery v. Kelly [Ala.] 38 So. 67. The business of selling intoxicating liquors is such a business. Gambill v. Erdrich Bros. [Ala.] 39 So. 297. The business of an emigration agent is not such an occupation as to justify discriminative legislation under the police power with a view to suppressing it. Kendrick v. State [Ala.] 39 So. 203.

7. Gamble v. City Council of Montgomery [Ala.] 39 So. 353. In Washington, cities of the first class have power, under their charters, to grant licenses for the purpose of revenue as well as for police regulation. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188. The town charter of Suffolk, § 18, authorizes the imposition of a license tax on any business, trade, or occupation on which the state requires a license, and warrants the imposition of such a tax upon a **railroad** company. Norfolk & W. R. Co. v. Suffolk, 103 Va. 498, 49 S. E. 658. An ordinance which taxes **professions** practiced within the city but exempts persons temporarily therein, who do not advertise or solicit other business, is not unreasonable. Evers v. Mayfield, 27 Ky. L. R. 481, 85 S. W. 697. An occupation tax of $400 on merchants using **trading stamps** not shown to be unreasonable (Gamble v. City Council of Montgomery [Ala.] 39 So. 353), but the imposition of $50 per week as a license tax upon the selling of **trading stamps** to merchants is void as unreasonable (Humes v. City of Little Rock, 138 F. 929).

8. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355. Code, § 4123, and Acts 1900-01, p. 2635, authorizing county commissioners to add not exceeding 50 per cent to the state license

Express statutory authority must also be shown for the imposition of a state license tax.[11]

While the state may select certain occupations and require those who engage in them to pay a license tax,[12] classifying the various business vocations for the purpose of levying such taxes,[13] yet it cannot make a classification which is arbitrary and has no just or reasonable basis,[14] nor can it discriminate among members of the same natural class,[15] and congress in legislating for the District of Columbia is restrained by the same principles.[16] While there must be uniformity within each

tax for county purposes, permit it only in the county where the license is issued. Southern Car & Foundry Co. v. Calhoun County, 141 Ala. 250, 37 So. 425; Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381. The city of Johnstown, being of the third class, is authorized to impose a license tax on **telephone** companies under par. 3, clause iv, art. v, Act of May 23, 1889. Code, § 754, authorizing cities to regulate, license, and tax **vehicles kept for hire,** is not confined to such as are let out, but authorizes an ordinance imposing a license fee or tax on conveyances kept for carrying persons or property for hire. City of Des Moines v. Bolton [Iowa] 102 N. W. 1045. The charter of Minneapolis authorizes an ordinance imposing the payment of a license fee on the business of maintaining a **theater** or place for theatrical performances, whether an admission fee is charged or not, the clause "for which money is charged" referring only to "museums." State v. Scaffer [Minn.] 104 N. W. 139. The city of Montgomery, being empowered by Acts 1894-95, p. 635, § 10, to license all **kinds** of business not prohibited by the constitution and laws of Alabama, is not prevented by Amended Code 1896, §§ 1116, 1119, 1120, from imposing a license fee of $100 on orders like the Union Mutual **Aid Association** of Mobile. City Council of Montgomery v. Shaddax [Ala.] 36 So. 369. The commissioners of the District of Columbia were authorized by Act of Congress, Jan. 26, 1887, to regulate by license the storing of **gasoline** in the city of Washington. District of Columbia v. Weston, 23 App. D. C. 363. Section 170, Detroit City charter, confers power on the common council to pass an ordinance requiring registration and numbering of **automobiles** using the city streets and imposing a fee of $1. People v. Schneider [Mich.] 12 Det. Leg. N. 32, 103 N. W. 172. The requirement of registration and numbering of automobiles in such ordinance is justified as a proper method of identification. Id. Act 222, Pub. Acts 1901, pp. 345, 348, §§ 4, 12, does not authorize city boards of plumbing examiners to charge, beyond the prescribed fee of $2, a percentage on the cost of **new plumbing** work done within the city as a condition precedent to the issue of a permit for the work. People v. Decker [Mich.] 12 Det. Leg. N. 408, 104 N. W. 615. Sand. & H. Dig., Ark. § 5132, relative to **"gift enterprises,"** contemplates schemes into which some element of chance enters and does not warrant the adoption of an ordinance imposing a license tax upon the selling of **trading stamps.** Humes v. City of Little Rock, 138 F. 929. An ordinance which prohibits a **farmer** from selling his products, excepting milk, fish and game, without a license, violates § 8 of the general law for licensing hawkers, peddlers, and solicitors. Sess. Laws 1901, p. 156. Ex parte Snyder [Idaho] 79 P. 819.

9. See 4 C. L. 430.

10. Gambill v. Erdrich Bros. [Ala.] 39 So. 297. A city cannot, under its authority to "prevent and suppress **gaming and gambling houses,"** make such places lawful by licensing them. State v. Nease [Or.] 80 P. 897.

11. Commonwealth v. Real Estate Trust Co. [Pa.] 60 A. 551, afg. 26 Pa. Super. Ct. 149. The railroad commission of Mississippi, having once classified railroad companies for taxation, cannot reclassify or back classify them under Acts 1898, p. 23, c. 5, § 66, so as to make them liable for a privilege tax for the past years. Gulf & S. I. R. Co. v. Adams [Miss.] 38 So. 348. Nor has the revenue agent any power under Acts 1894, pp. 29, 30, c. 34, §§ 2-4, to have railroads so back classified as those sections refer to ad valorem taxation exclusively. Id. Act 1904, p. 393, c. 226, requiring the licensing of barbers, does not apply to persons engaged in that business when the act was passed. State v. Tag [Md.] 60 A. 465.

12. City Council of Montgomery v. Kelly [Ala.] 38 So. 67.

13. Kendrick v. State Ala.] 39 So. 203. The expediency and abstract justice of making these classifications is not a matter of judicial inquiry or determination. Lappin v. District of Columbia, 22 App. D. C. 68.

14. City Council of Montgomery v. Kelly [Ala.] 38 So. 67.

15. Kendrick v. State [Ala.] 39 So. 203. A city ordinance which discriminates against merchants giving trading stamps, by imposing an additional license fee of $100 upon them, is void under Const. §§ 1, 35. City Council of Montgomery v. Kelly [Ala.] 38 So. 67. A municipal ordinance, in imposing occupation tax, cannot discriminate between residents and nonresidents in the same class. Evers v. Mayfield, 27 Ky. L. R. 481, 85 S. W. 697. Kirby's Dig. § 6886, prohibiting any person, except resident merchants, from traveling through any county and peddling certain wares, unlawfully discriminates among citizens, contrary to Const. art. 2, § 18. Ex parte Deeds [Ark.] 87 S. W. 1030. An ordinance of Seattle held not to operate as a discrimination in favor of local merchants as to peddling within a certain district. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188. Sec. 5007, Iowa Code, does not discriminate against a retail tobacco dealer by the tax imposed on cigarette selling, in excepting from the tax jobbers and wholesalers doing an interstate business with customers outside of the state. Cook v. Marshall County, 196 U. S. 261, 49 Law. Ed. 471.

class, a greater tax may be imposed upon one class than another;[17] and the legislature, and not the courts, is charged with the duty of fixing the amount of license to be imposed,[18] as well as the expediency and justice of imposing different burdens upon the constituents of the different classes.[19] In a license or business tax upon corporations, however, the state may discriminate against a foreign, and in favor of a domestic, corporation, though it may not between a resident and nonresident natural person.[20] While, as a general rule, when a license to do a general business has been exacted and paid, another cannot be required for doing a particular act or series of acts constituting an integral part of such general business, yet the selling of intoxicating liquors as a beverage is an exception, and the legislature may require separate licenses for the several kinds of liquors and may authorize municipalities to exact the same.[21]

In respect to some professions and skilled trades, the granting of licenses is often referred to boards of examiners,[22] and the exercise of their discretion, in the determination of credits upon examination, will not be reviewed by the courts,[23] but in case of refusal or neglect to act, such board will be compelled by mandamus to perform their duty,[24] and discretionary power is often conferred upon administrative boards to grant or withhold permission to carry on a trade or business, which is the proper subject of police regulation.[25] The granting of permits to insurance companies to engage in business within the state is usually left to the discretion of some state officer.[26] Ordinances imposing regulations and requiring licenses are not invalid as delegations of legislative power because they submit the approval of certain required appliances[27] or refer the propriety of the storage of inflammable oils in a particular building[28] to some municipal officer, nor are

16. A license tax of $500 annually on the Washington Stock Exchange, in lieu of a tax on its members for business done on the exchange, is reasonable, but an annual tax of $250 on general brokers and only $100 on members of a regular exchange outside of the District of Columbia is an arbitrary discrimination. Lappin v. District of Columbia, 22 App. D. C. 68.

17. Gamble v. City Council of Montgomery [Ala.] 39 So. 353; Cook v. Marshall County, 196 U. S. 261, 49 Law. Ed. 471.

18. The court declined to consider whether a license tax of $5,000 on a trading stamp company that did an annual business of less than $100,000 was prohibitive. State v. Merchants' Trading Co., 114 La. 529, 38 So. 443. The court had not the data from which it could say that a license tax on emigration agents, imposed by Acts 1903, p. 344, was so discriminative as to be beyond the constitutional power of the legislature. Kendrick v. State [Ala.] 39 So. 203.

19. Lappin v. District of Columbia, 22 App. D. C. 68.

20. Discriminations in Sess. Laws 1902, p. 73, c. 3, § 65, held valid. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

21. The city of Birmingham by ordinance required a separate license for selling beer at wholesale. Sustained under its charter powers. Gambill v. Erdrich Bros. [Ala.] 39 So. 297.

22. In New York a person not licensed as a dentist prior to Aug. 1, 1895, is not entitled to registration without a license from the regents of the university, under Laws 1895, p. 419, c. 626, § 160. State v. Jacobs, 92 N. Y. S. 590. See, also, Attorneys, etc., 5 C. L. 319; Medicine and Surgery, 4 C. L. 636.

23. State v. Board of Dental Examiners of Wash., 38 Wash. 325, 80 P. 544.

24. Held that petitioner failed to show that he had been refused a license because he declined to sign a certain code of ethics. State v. Board of Dental Examiners of Wash., 38 Wash. 325, 80 P. 544.

25. A provision of the sanitary code of New York City conferring discretionary power on the health board, within reasonable limits, to grant or withhold permits to sell milk in the city, does not conflict with the guaranty of due process of law. People v. Van De Carr, 26 S. Ct. 144.

26. Under Laws 1902, p. 65, c. 59, the issue of a permit by the insurance commissioner is a condition precedent to the doing of business of an insurance company or its agents (Fikes v. State [Miss.] 39 So. 783), and that act was intended to include all kinds of insurance companies and includes a foreign association that pays sick and burial benefits (Id.).

27. An ordinance for the regulation and licensing of the handling of highly inflammable oils from tank wagons required the use of drip pans and devices to prevent the spilling of oil, subject to the approval of the commissioner of public works. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

28. The regulations by the commissioners of the District of Columbia refer such questions to the inspector of buildings and the chief engineer of the fire department, upon whose "recommendation," used in the sense of report, the license is issued. District of Columbia v. Weston, 23 App. D. C. 363.

they invalid as delegations of judicial power because they provide for revocation of licenses by the mayor, upon proof of violation.[29]

A license tax which imposes a burden upon interstate commerce is repugnant to the federal constitution and invalid,[30] and it will not be presumed that congress, in enacting license laws for the District of Columbia, intends to disregard the interstate commerce provisions of the federal constitution.[31] A person, partnership, or corporation, engaged in both intrastate and interstate commerce, is not exempt from liability to tax on intrastate business,[32] but a local license tax cannot be imposed upon such business of a local nature as is merely incidental to interstate business.[33]

Equity has discretion to enjoin the collection of a license tax until the parties are heard on the question of its validity,[34] and where a city is attempting to enforce an ordinance, which imposes a license tax and is alleged to be invalid, against numerous persons of identical interests, such persons may file a bill in behalf of themselves, and all others interested, to restrain such enforcement;[35] but the enjoining of the collection of any tax is prohibited in some states, and provisions are made for the recovery of invalid taxes paid under protest.[36] A license tax voluntar-

29. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

30. An ordinance of the city of Johnstown imposing a license tax on telephone companies held valid. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381. Conviction for hawking and peddling without a license, where a part of the goods shipped from without the state were not delivered in the original packages, affirmed. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. An ordinance requiring a license and a payment of $600, before selling goods and merchandise by the sale of trading stamps to merchants, and requiring a license and a payment of $100 from the merchants, was not void as an interference with interstate commerce law. Oilure Mfg. Co. v. Pidduck-Ross Co., 38 Wash. 137, 80 P. 276. A person who sells sewing machines shipped from the factory in another state and delivered in the original, unbroken package, is not subject to a license tax imposed by the state and parish. Henderson v. Ortte, 114 La. 523, 38 So. 440. The exemption of interstate commerce from local license taxation includes the retail as well as the wholesale trade. Id. Where orders were taken for groceries in Mississippi and were filled by wholesale grocers in Illinois, but were shipped in large packages which were broken open for delivery, and deliveries were to be made to such purchasers only as paid for them, the sales were made in Mississippi, were not interstate commerce transactions, and were subject to a merchant's license tax. Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092. The tax imposed on cigarette selling by § 5007, Iowa Code, held not to conflict with interstate commerce when applied to retail sales of packages in pasteboard boxes, sealed and stamped and shipped loose to the retailers. Cook v. Marshall County, 196 U. S. 261, 49 Law. Ed. 471. Where a state statute imposing a license tax upon resident managing agents of nonresident meat packing houses, regardless of the fact that a large proportion of their business is interstate business, has been construed by the highest state court to apply only to intrastate business, it does not conflict with the federal constitution. Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663. See, also, Commerce, 5 C. L. 599.

31. A solicitor for a New York brewery taking orders to be filled and shipped directly to customers is not a brewer's agent within the Act of Congress, July 1, 1902, § 7, par. 36, requiring an annual license tax of $250. Beitzell v. District of Columbia, 21 App. D. C. 49.

32. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381; Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467. A telegraph company cannot claim exemption from municipal license taxes because it is engaged in interstate commerce, has accepted the act of congress relative to construction of lines over post roads, and has paid all general taxes under the laws of the state. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346. An annual license tax imposed by a state on a foreign corporation engaged in interstate business for the privilege of doing business within the state, is not a tax on interstate commerce. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

33. As where a consignee refuses to take goods shipped of a perishable character like meat, and the only way of disposing of them is by sales to local dealers. Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663.

34. Schwarz v. National Packing Co. [Ga.] 50 S. E. 494.

35. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

36. In South Carolina a license tax imposed by a municipality is a tax in the ordinary acceptation of that term and its collection cannot be enjoined, even though it is extortionate and invalid, but may be recovered as provided by law. Code Laws 1902, §§ 412, 413. Western Union Tel. Co. v. Winnsboro [S. C.] 50 S. E. 870. In North Carolina an alleged invalid license tax paid as a dealer in horses and mules, under Acts 1903, p. 333, c. 247, § 35, cannot be recovered from the sheriff but can be recovered only as provided by § 30, c. 558, p. 795, Acts 1901, for

ily paid under a void law cannot be recovered.[37] Mere threats of prosecution to recover a license tax do not render its payment involuntary,[38] but a payment made to prevent prosecution after arrest is not voluntary, even though the validity of the tax could be contested in that proceeding.[39]

§ 3. *Interpretation of statutes and ordinances and persons subject.*[40]—Since license laws are penal and change the common law, they are to be strictly construed,[41] and one cannot be convicted thereunder, unless clearly of the class of persons designated by the act.[42] A doubt as to the construction of a municipal ordinance

the recovery of taxes paid under protest. Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701. A receipt given by the sheriff for an alleged invalid license tax, reciting that it was paid under protest and reserving the right to test its validity, is not a promise by the sheriff to hold the money. Id.

37. A payment of a tax imposed by Laws 1897, p. 203, c. 72, on nonresidents for wholesale liquor establishments in the state, made because required by the officers of the state, was not made under duress and could not be recovered, though the law was afterward declared unconstitutional. Michel Brewing Co. v. State [S. D.] 103 N. W. 40.

38. Tax demanded of a nonresident wholesale liquor dealer, under Laws 1897, p. 203, c. 72. Michel Brewing Co. v. State [S. D.] 103 N. W. 40. Tax demanded for a license to operate a toll bridge. Southern R. Co. v. Florence, 141 Ala. 493, 37 So. 844.

39. District of Columbia v. Chapman, 25 App. D. C. 95.

40. See 4 C. L. 430.

41. Schnaier v. Navarre Hotel & Importation Co., 182 N. Y. 83, 74 N. E. 561. All statutes imposing restrictions or levying taxes upon business, or the common occupations of the people, are strictly construed. Lockwood v. District of Columbia, 24 App. D. C. 569.

42. Illustrations: A person engaged in selling trading stamps is not subject to punishment as engaging in a **gift enterprise** without a license. Humes v. City of Little Rock, 138 F. 929. Act 1904, p. 393, c. 226, for licensing **barbers,** held not to apply to persons engaged in the business when the statute took effect. State v. Tag [Md.] 60 A. 465. A person who takes orders for goods, as an employe, and who sometimes delivers them, although included within the definition of a **peddler** in an ordinance is not liable to the license tax imposed by such ordinance on peddlers **with pack or vehicle.** State v. Smithart [Iowa] 105 N. W. 128. Farmers selling their own products cannot be classed among **"hawkers and peddlers"** in a city ordinance requiring licenses. Ex parte Snyder [Idaho] 79 P. 819. An officer of a foreign corporation who hires laborers in the state to work for the corporation in another state and for no one else, and who receives no compensation for taking the laborers out of the state, is not engaged in the business of **emigrant agent** and liable to the license tax therefor. Lane v. Rowan County Com'rs [N. C.] 52 S. E. 140. A man who is hiring laborers for himself is not an "agent" and is not "doing the business of an **emigrant agent,**" so as to subject him to the penalties of Acts 1903, p. 344, for not procuring a license. Kendrick v. State [Ala.] 39 So. 203. One who solicits orders for a brewery in New York to be filled and shipped directly to the customer is not a **brewer's agent** within Act of Congress, July 1, 1902, § 7, par. 36, requiring an annual license tax of $250. Beitzell v. District of Columbia, 21 App. D. C. 49. Ordinary steam heating plants do not come within the scope of chap. 91, p. 92, Gen. Laws 1899, providing for the licensing of persons operating **"steam boilers** and steam machinery of any kind." State v. Justus [Minn.] 102 N. W. 452. A corporation engaged in cutting, storing and furnishing in car load lots only its own natural **ice,** and having no store for the sale of the same is not liable for the mercantile license tax imposed by Act of May 2, 1899, P. L. 184. Commonwealth v. Pocono Mt. Ice Co., 23 Pa. Super. Ct. 267. A trust company incorporated under Act of April 29, 1874, P. L. 73, and supplements thereto, though authorized to transact a real estate business, is not liable to the state license tax as a **real estate broker** under Acts of May 27, 1841, P. L. 396, April 10, 1849, P. L. 570, May 15, 1850, P. L. 772, and May 2, 1899, P. L. 184. Commonwealth v. Real Estate Trust Co. [Pa.] 60 A. 551, afg. 26 Pa. Super. Ct. 149. The words "any **individual or copartnership"** in the Act of May 27, 1841, P. L. 396, do not include corporations, and other acts do not extend its provisions to corporations. Id. A traveling salesman, paid a salary and expenses, who carries samples and solicits orders for his employers, who shipped the goods to the purchasers, is not a **"transient merchant"** within an ordinance requiring such persons to take out a license. State v. Nelson [Iowa] 105 N. W. 327. Act 49 of 1904, amending § 12, Act 103, p. 164, of 1900, is broader than its title and unconstitutional so far as it purports to levy a license tax on **transient merchants,** etc., selling by samples or taking orders. Beary v. Narrau, 113 La. 1034, 37 So. 961. An owner of goods accustomed to travel from place to place to sell them held to be a **transient merchant** liable to pay a license tax under Act May 15, 1901 (Acts 1901, p. 466, c. 208; Burns' Ann. St. 1901, §§ 7231a-7231i), although he made a temporary arrangement with a local merchant for the sale of goods. Simoyan v. Rohan [Ind. App.] 76 N. E. 176. Under Rev. St. 1899, § 8540, a party to whom goods are shipped by wholesale merchants out of the state, to be delivered to certain purchasers on payment for the same, is a **merchant** within a town ordinance requiring a license. Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092. An automobile storer and repairer, who had been refused a license to store and sell **gasoline** on his premises did not violate the ordinance prohibiting such storage and sale without a license by filling the tanks of his patrons' machines from a licensed storage tank located elsewhere, whenever they or-

imposing a license tax should be resolved in favor of its validity,[43] hence, if there is nothing in the language of an ordinance indicative of an intention to tax interstate commerce business, such intention will not be presumed.[44] It is not necessary that it should appear by the express terms of the ordinance or statute that the tax is imposed only upon business done within the state,[45] but the courts cannot depart from the plain language of a statute imposing a license tax, in order to subserve convenience or to maintain its constitutionality.[46] Where a license is required for the carrying on of a business, single or occasional acts[47] are not within the statute.[48] Where both state and municipality tax a business, one engaged therein must pay both taxes,[49] and an exemption from payment of the state license tax does not relieve one from payment of the municipal license.[50] A separate license may be required of a foreign insurance company by every municipality within which it does and conducts an insurance business.[51] The provisions of law relative to license and registration must be strictly complied with.[52] A mere inaccurate designation of the officer to whom the license fees are to be paid will not necessarily invalidate an ordinance,[53] but a license law, expressed in terms that have no fixed or reasonably certain signification, and containing no definitions of its own, is void for uncertain-

dered them made ready for use. Weston v. District of Columbia, 23 App. D. C. 367. The gasoline remaining unconsumed in the automobile tanks could not be considered as stored on the premises within the meaning of such an ordinance. Id. A person who solicits insurance, receives and forwards applications, receives and delivers the policies, and collects the first premiums, is an agent **"doing and conducting" insurance** business within the terms of an ordinance requiring a license for such business. City of Lake Charles v. Equitable Life Assur. Soc., 114 La. 836, 38 So. 578.

43. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381; Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. In case of doubt as to the intention of a municipal council to restrict its imposition of a license charge on telegraph poles and wires to such as are located on public highways within its own jurisdiction, the courts will so restrict its application. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346. Also in the case of a license tax on gas pipes. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355. Unless the court can say from judicial cognizance, or the facts determined, that the ordinance is a revenue measure under the guise of a police regulation, it is not justified in interfering. Id.

44. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381.

45. Ordinance. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381. Statute. Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467. St. 1903, pp. 447, 450, c. 437, §§ 66, 67, 75, requiring certain foreign corporations to pay an annual excise tax was presumed not to include corporations maintaining places of business solely for use in interstate commerce. Id.

46. Ex parte Deeds [Ark.] 87 S. W. 1030.

47. Laws 1903, p. 337, c. 247, § 47, is not intended to require a license for a single act of putting up lightning rods, but for carrying on the business of putting them up. State v. Sheppard, 138 N. C. 579, 50 S. E. 231. Single or occasional sales do not constitute a person a merchant within laws imposing a license tax upon the business of a merchant. Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

48. In a prosecution for violation of a statute requiring a license to carry on the business of putting up lightning rods, where only one act was proved, it was error to charge that if defendant had in his possession more rods than were necessary for that one house, he should be found guilty. State v. Sheppard, 138 N. C. 579, 50 S. E. 231.

49. The charter of the town of Suffolk, § 18, authorizes the imposition of a town license on any business, trade, or occupation for which a state license is required. Held that a railroad company must pay a license tax so imposed, although liable to a fine under Code §§ 1200, 1201, for not transacting business, and also amenable to a common-law liability. Norfolk & W. R. Co. v. Suffolk, 103 Va. 498, 49 S. E. 658.

50. A grant of a free license to peddle, under Pol. Code 1895, § 1649, did not relieve the licensee from the payment of a license fee to Atlanta, as required by the city under charter provisions. Justice v. Atlanta [Ga.] 50 S. E. 61.

51. Section 16, Act 171, p. 417, 1898. Payment of a license in one city, though based on all the business done in the state, does not relieve the company from payment in another city. City of Lake Charles v. Equitable Life Assur. Soc., 114 La. 836, 38 So. 578.

52. Laws 1895, p. 419, c. 626, § 160, requiring a person not licensed as a dentist prior to Aug. 1, 1895, to have a license from the regents of the university, such person is not entitled to registration upon a diploma from a dental college out of the state. State v. Jacobs, 92 N. Y. S. 590.

53. Where the statute created the office of license collector to receive the fees and issue the licenses, but the ordinance made them payable to the city collector, there being no such officer, it was presumed that the license collector was meant. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617.

ty.[54] The word "peddler" is a well-known, common-law term, and licenses are usually required of such persons by name.[55] Municipalities cannot impose license taxes upon traveling salesmen by including them among "transient merchants" or "hawkers and peddlers."[56] Beef from animals raised and slaughtered by a farmer on his farm are farm products, within the terms of a statute permitting the sale of such products without a license.[57]

§ 4. *Assessment and recovery; prosecutions for failure to pay.*[58]—The provisions of the statutes must be strictly followed in fixing license fees.[59] In Louisiana the license on the business of insurance is based on the gross annual amount of premiums, and not on the number of agents or agencies in the state.[60] The value of a trade-mark owned by a foreign corporation may be considered in determining its capital stock in order to fix its franchise tax.[61] A classification of certain railroads as of the first, second, and third classes, by the railroad commission of Mississippi, thus exempting them from the privilege tax of $10 per mile, is a judicial act, concluding everything comprehended or involved in it.[62] Where the county tax commissioners are authorized to receive from the tax collectors a ten per cent fee on delinquent license taxes reported by them and collected,[63] the right of suing for such fees is primarily in the county entitled to collect the tax.[64] Counts to recover the delinquent license taxes and the fees due commissioners may be joined.[65]

When one is licensed to carry on a particular business, his servants or agents are not liable to prosecution for carrying on the business without license.[66] An indictment for violating an act, requiring any person desiring to operate an automobile to obtain a license, is sufficient if it substantially follows the language of

54. Par. 46, § 7, Act of Congress of July 1, 1902, imposing a tax of $25 on "claim agents," without defining such agents, is too uncertain and vague to be enforced (Lockwood v. District of Columbia, 24 App. D. C. 569), and the expression "other contractors" in the same paragraph, imposing an occupation tax of $25 upon "building and other contractors," is too vague to be enforced against a wood and coal dealer who occasionally furnishes wood and coal on contract to the general and municipal governments (District of Columbia v. Chapman, 25 App. D. C. 95).

55. A petition for a penalty for retailing oil without a license, making no reference to peddlers, will be deemed to have been filed under the act requiring a license for engaging in that business (Ky. St. 1903, § 4224), and not under the peddlers' act. Commonwealth v. Standard Oil Co., 27 Ky. L. R. 1073, 87 S. W. 1090.

56. Code, § 700, confers upon municipalities no authority to declare persons merchants who are not considered to be such in the business world. State v. Nelson [Iowa] 105 N. W. 327. Act 49 of 1904, amending § 12 of Act 103, p. 164, of 1900, which attempted indirectly to tax drummers or traveling salesmen by extending the definition of "hawkers and peddlers" to include "transient merchants," etc., was held unconstitutional as being broader than its title. Beary v. Narrau, 113 La. 1034, 37 So. 961.

57. Ex parte Snyder [Idaho] 79 P. 819.

58. See 4 C. L. 431.

59. Where the Tax Law (Laws 1896, pp. 856, 864, c. 908), §§ 181. 195, provided for an increase of license fee in case of increase of capital, or within one year after fixing a fee, upon application of a taxpayer or of the attorney general, the comptroller could not of his own motion, without any such increase of capital or application within a year, increase a license fee. People v. Kelsey, 93 N. Y. S. 971. Act 1904, p. 65, c. 76, § 27, assesses a privilege tax on the oil mill and not on the capital of the corporation operating it, and hence, only the capital actually used in the oil mill business is to be considered in fixing the tax. Senatobia Oil Co. v. Poag [Miss.] 38 So. 741.

60. Defendant herein was simply an agency through which two companies did a joint business and not an independent corporation, and where the two companies had paid all the license fees on all the business done by them, including the joint business, the state could demand no more. State v. Philadelphia Underwriters, 112 La. 47, 36 So. 221.

61. People v. Kelsey, 93 N. Y. S. 971. See, also, Taxes, 4 C. L. 1605.

62. The railroad commission could not back classify such roads so as to make them liable to pay the privilege tax for the past year. Gulf & S. I. R. Co. v. Adams [Miss.] 38 So. 348.

63, 64. Act Feb. 21, 1899, Acts 1898-99, p. 195. Southern Car & Foundry Co. v. Calhoun County, 141 Ala. 250, 37 So. 425.

65. Southern Car & Foundry Co. v. Calhoun County, 141 Ala. 250, 37 So. 425.

66. Common victualer, under Rev. Laws, c. 102, § 1. Commonwealth v. Lavery [Mass.] 73 N. E. 884. Defendant found to be the proprietor and not a mere servant. Id.

the act;[67] but an affidavit charging generally that defendant "did unlawfully assume to act as an insurance agent," and failing to specify the particular act charged, is fatally defective, where the statute prohibits numerous acts and prescribes different penalties.[68] In an indictment for violation of a statute requiring a license for carrying on the business of putting up lightning rods, an allegation that defendant "sold" rods was surplusage.[69] Where an information in a single count alleges breaches of several provisions disjunctively mentioned in a section of an ordinance requiring registration and a license fee of venders of milk and cream, it is error to quash it if any of the provisions are valid.[70] It is not necessary to show criminal intent in prosecutions under these police regulations.[71] In a prosecution for selling pistol cartridges without a license, where it was not shown when the sales took place, it was error to give the general charge for the state.[72] An acquittal in a prosecution under a state law, for violating a town ordinance prohibiting the engaging in the business of a merchant without a license, is not a bar to a civil action by the municipality to recover a penalty for violating the ordinance.[73] Where the tax is an annual one on the carrying on of a business, a conviction of doing business without a license bars further prosecution for carrying on such business during the same license year,[74] but there is no bar unless the indictments cover the same period of time.[75] Where the authority to prescribe the penalty for violation of the ordinance involves legislative discretion, it must be fixed by the common council and cannot be left to the magistrate.[76] An action to recover a license fee imposed under an ordinance is abated by the repeal of the statute authorizing the adoption of the ordinance.[77]

§ 5. *Effect of failure to obtain.*[78]—It is generally held that no recovery can be had by an unlicensed person on a contract for the doing of an act for which a license is required,[79] and there can be no agency for such a purpose.[80] Under the

67. The omission of the word "desire" was immaterial as it was not descriptive of the offense. State v. Cobb [Mo. App.] 87 S. W. 551.

68. Fikes v. State [Miss.] 39 So. 783.

69. Laws 1903, p. 337, c. 247, § 47. State v. Sheppard, 138 N. C. 579, 50 S. E. 231.

70. City of St. Louis v. Grafeman Dairy Co. [Mo.] 89 S. W. 617.

71. Prosecution for carrying on the business of common victualer without the license required by Rev. Laws, c. 102, §§ 1-6, 9. Commonwealth v. Lavery [Mass.] 73 N. E. 884.

72. Reid v. State, 141 Ala. 578, 37 So. 922.

73. Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

74. Prosecution under St. 1903, § 4224, requiring an annual license on each wagon used in retailing oil. Commonwealth v. Standard Oil Co., 27 Ky. L. R. 1116, 87 S. W. 1090 (second case).

75. Appellant was convicted under an indictment returned Sept. 28, for unlawfully selling oil in June. The indictment pleaded in bar was returned May 10, for unlawful selling in April. The earlier conviction was held no bar to the later as the two indictments did not cover the same period of time. Standard Oil Co. v. Com., 27 Ky. L. R. 1131, 87 S. W. 1092.

76. The determination of the penalty that will deter persons from engaging in certain business without a license is purely a legislative question. City of Lambertville v. Applegate [N. J. Law] 62 A. 270.

77. County ordinance imposing a license tax on the business of raising, grazing, herding and pasturing sheep. Flanigan v. Sierra County, 196 U. S. 553, 49 Law. Ed. 597; Wheeler v. Plumas County, 196 U. S. 562, 49 Law. Ed. 599.

78. See 4 C. L. 432.

79. See 4 C. L. 432. Where parties engage in the business of selling goods in any manner requiring a license and the payment of a license, such as a trading-stamp scheme, the courts will leave them where they have illegally placed themselves. Oilure Mfg. Co. v. Pidduck-Ross Co., 38 Wash. 137, 80 P. 276. In quo warranto proceedings to forfeit corporate franchises for failure to pay an annual state license tax, the corporation cannot question the validity of a provision in the law that the failure to pay the tax may be pleaded as an absolute defense to all actions brought by a corporation, till the tax is paid. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

80. **Note:** Among the contracts of agency which are illegal because of a statutory prohibition are contracts with a person practicing a particular trade or profession without a license. Thus, where a statute prohibits any person from practicing as an attorney at law without a license or diploma, etc., a contract by which a person is employed to render services as an attorney, in violation of the statute, is illegal and void, and he cannot maintain an action to recover for its breach or for his services, unless there is something to show that the legislature did not intend to make contracts in violation

provisions of the statute of California, forfeiting the charters of corporations failing to pay the annual license tax imposed, while the tax becomes delinquent on the first Monday of August, yet the penalty of forfeiture does not attach until the governor has made proclamation thereof.[81]

§ 6. *Disposition of license moneys.*—Boroughs and cities in Pennsylvania have the right to receive their respective proportions of the money collected for retail liquor licenses, under the state law, without abatement for commissions to the county treasurer.[82] An ordinance which purports to impose a license tax as a police regulation is presumed to be what it professes to be, and is not invalidated by the use to which the license fee is subsequently applied.[83] The appropriation of license money for strect improvements is legal in New Hampshire.[84]

LICENSES TO ENTER ON LAND.

§ 1. *Nature, creation and indicia of a license and distinction from easements and other estates.*[85]—A license is an authority given to do some one act or series of acts on the land of another, without passing any estate in the land.[86] It is a mere personal privilege, not an estate[87] and lies in parol;[88] and in these respects differs from an easement which lies only in grant.[89] It exempts the licensee from an action for trespass for acts done under it,[90] and vests in him a property interest in realty converted into personalty by virtue of it.[91] It cannot be converted

of the statute illegal and void. Ames v. Gilman, 10 Metc. [Mass.] 239; Hall v. Bishop, 3 Daly [N. Y.] 109; Hittson v. Browne, 3 Colo. 304. Compare Yates v. Robertson, 80 Va. 475; Harland v. Lilienthal, 53 N. Y. 438. The same is true of a contract for the services of a stock broker (Cope v. Rowlands, 2 Mees. & W. 149; Hustis v. Pickands, 27 Ill. App. 270), commercial broker or agent (Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737. And see Singer Mfg. Co. v. Drafer, 103 Tenn. 262), real estate broker or agent (Buckley v. Humason, 50 Minn. 195, 36 Am. St. Rep. 637; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46), etc., who is transacting business without a license in violation of a statute or city ordinance. Where a valid city ordinance prohibits transaction of business by unlicensed real estate brokers within the city limits, a broker negotiating a sale of real estate in violation of the ordinance cannot recover his commissions. Buckley v. Humason, 50 Minn. 195, 36 Am. St. Rep. 637, 16 L. R. A. 423.

81. Act March 20, 1905 (St. 1905, p. 493, c. 386, § 2). Ukiah Guaranty Co. v. Curry [Cal.] 82 P. 1048.

82. Under Act of June 9, 1891, if the treasurer deducts a percentage and pays over the balance, it is considered a payment on account and the amount retained may be collected by the municipality. Stroudsburg Borough v. Shick, 24 Pa. Super. Ct. 442.

83. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77.

84. Hett v. Portsmouth [N. H.] 61 A. 596.

85. See 4 C. L. 432.

86. A mere traveler on a private way is a licensee. Weldon v. Prescott [Mass.] 73 N. E. 536.

87. Howes v. Barmon [Idaho] 81 P. 48. License to mine ore confers only a property in ore mined under it. Clark v. Wall [Mont.] 79 P. 1052.

88. Howes v. Barmon [Idaho] 81 P. 48.

Held licenses: An **oral gift of land** for the purpose of erecting a building. Shipley v. Fink [Md.] 62 A. 360. A privilege to convey water from a spring. Clark v. Strong, 93 N. Y. S. 514. A verbal agreement authorizing one to enter a mining claim and extract ore during the owner's will and pleasure. Clark v. Wall [Mont.] 79 P. 1052. A verbal permission to use a stairway in consideration of a right to erect a porch over lands of the licensor. Howes v. Barmon [Idaho] 81 P. 48. A parol sale of standing timber creates a mere license to enter, cut and remove. Hodsdon v. Kennett [N. H.] 60 A. 686; Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

The sale of a theater ticket creates a mere revocable license. Horney v. Nixon [Pa.] 61 A. 1088.

89. See Easements, 5 C. L. 1048. Howes v. Barmon [Idaho] 81 P. 48.

90. A licensee is not liable for injuries resulting from the exercise of the license up to the time of its revocation. Sherman Line Co. v. Glens Falls, 101 App. Div. 269, 91 N. Y. S. 994.

91. A license to dig ore exempts the licensee from an action for trespass for an entry made under it and gives him the title to the ore actually mined under it. Clark v. Wall [Mont.] 79 P. 1052. Timber cut before revocation of the license is the property of the licensee. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

into a corporeal right by the mere exercise of the privileges it confers,[92] nor can a licensee acquire rights by adverse possession.[93] Whether an agreement for the use of land confers a mere license or creates an estate depends upon whether it gives exclusive possession against the world.[94] The nature of the right created is a question of law.[95] An oral agreement to impress realty with a servitude is presumed to have been made with knowledge of the statute of frauds, and a license not an easement intended.[96] A private way acquired by adverse user is a vested right, not a mere license.[97] A license may be given by an agent without written authority.[98] A license is revocable at the pleasure of the licensor[99] whether or not it is based on a consideration[1] and notwithstanding expense incurred by virtue of it,[2] especially where a right to revoke is reserved.[3] Acts done by the licensee after revocation render him liable as a trespasser.[4] It is held that a license to remove soil cannot be revoked by notice to quit the premises[5] and that an executed

92. The erection of bridge abutments on land under a parol license granted for such purpose does not convert the license into a corporeal right. Nicolai v. Baltimore [Md.] 60 A. 627.

93. Adverse possession does not run until ouster. Nicolai v. Baltimore [Md.] 60 A. 627.

94. If the latter, it is a lease. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523.

Held to create an estate: An instrument executed by the fee owner by which he lets "his ice business * * * with use and benefit of his ice houses," for a specified term, held to be a lease. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523. An instrument in form a deed by which the grantors "grant, bargain, sell and convey * * * a right of way for a pipe line over certain lands * * * and the right to divert water from Woods Creek * * * to have and to hold * * * forever," held a grant of an easement, and not a mere license. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617. Instrument in form a conveyance, containing full covenants of warranty held to convey a right of way, not a mere license. Alderman & Son's Co. v. Wilson [S. C.] 50 S. E. 643. The privilege of retaining the way after the expiration of such period did not affect the rights granted. Id. Instrument conveying timber and right of way, the purchase price of which has been paid, conveys an estate and is more than a license. Gex v. Dill [Miss.] 38 So. 193. A landowner who for a money consideration allows a strip of land to be used as a road without restriction as to time will be presumed to have granted a way and not a mere license. Power v. Dean [Mo. App.] 86 S. W. 1100. A lease of the wall of a building for advertising purposes creates a right in the nature of an easement. Levy v. Louisville Gunning System [Ky.] 89 S. W. 528.

Held to confer a license: A written agreement under which a carrier constructs a side track over the land of another for the convenience of the latter, though silent as to time, creates a mere license. Rodefer v. Pittsburg, etc., R. Co. [Ohio] 74 N. E. 183. A conveyance of a tract of coal land "the purchaser not to sell any coal, only what he hauls himself or have hauled" and not to sell the tract to any person except the seller, his heirs or assigns, creates a mere license which expires with the death of the licensee. Chalfant v. Rocks, 212 Pa. 521, 61 A. 1105. Agreement between property owners and sewer commissioners for the use of land as a sink hole held to create a mere license and not to amount to a dedication. Sherman Line Co. v. Glens Falls, 101 App. Div. 269, 91 N. Y. S. 994.

95. As to whether it was a license or a lease. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523.

96. Howes v. Barmon [Idaho] 81 P. 48.

97. Power v. Dean [Mo. App.] 86 S. W. 1100.

98. Oral sale of standing timber. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

99. Entwhistle v. Henke, 113 Ill. App. 572; Howes v. Barmon [Idaho] 81 P. 48; Clark v. Wall [Mont.] 79 P. 1052. Under Hurd's Rev. St. 1903, p. 1833, c. 131a, providing that street railways in crossing rivers should not interrupt navigation, and Hurd's Rev. St. 1903, p. 292, c. 24, giving the city of Chicago power to deepen the channel of a river, a license to a street railway company to construct a tunnel under a river may be revoked and the tunnel ordered removed, though such right was not reserved in granting the license. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

1. Kommer v. Daly, 93 N. Y. S. 1021.

2. Entwhistle v. Henke, 113 Ill. App. 572; Shipley v. Fink [Md.] 62 A. 360.

Note: It has been held that an executed parol license cannot be revoked (Rerick v. Kern, 14 Serg. & R. [Pa.] 267, 16 Am. Dec. 497), but the better view is that such license may be revoked, since to hold otherwise would, in effect, be granting an estate by parol (Housten v. Laffee, 46 N. H. 505). See 6 Columbia L. R. 280.

3. License granted by a city to encroach on the street by constructing bay windows may be revoked, though it results in considerable loss to the licensee without his fault. Forbes v. Detroit [Micb.] 102 N. W. 740.

4. Hodsdon v. Kennett [N. H.] 60 A. 686.

5. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

Note: This proposition seems wrong in principle, and since the case arose under an eminent domain statute it is probable, though the court did not so state, that the rule rests upon the statute.

license for a term, based on a consideration, is not revocable at will.[6] Equity will not protect the privilege of a licensee who parted with no consideration, suffered no irreparable damages, and upon whom no fraud was perpetrated.[7] A license is revoked by a subsequent conveyance of the fee[8] or by the death of the licensor,[9] notwithstanding the fact that the license was based on a consideration,[10] but one coupled with an interest is not revoked by a subsequent lease.[11]

Licenses coupled with an interest.[12]

§ 2. *Rights and liabilities of licensees.*[13]—A licensee must not use the premises in such manner as to render them dangerous to other licensees,[14] nor in such manner as to interfere with rights of the licensor.[15] On revocation of a license to construct a building the licensor must compensate the licensee for the building if the license has been exercised,[16] and a licensee is entitled, as against a subsequent purchaser from the licensor, to a reasonable time within which to remove improvements erected by virtue of the license.[17] For revocation of the license created by the sale of a theater ticket, the purchaser has an action for breach of contract but not for tort.[18] A licensee cannot recover for injuries caused by existing defects.[19]

LIENS.

§ 1. *Definition and nature.*[20]—A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge[21] which must ordinarily pertain to the property held.[22] Particular kinds of liens other than the general classes enumerated in the following section are discussed in particular topics.[23]

§ 2. *Common-law, equitable, and statutory liens. A. Common-law liens*[24] which are merely the right to keep possession[25] do not exist in favor of a corporation upon the shares of stock held by its stockholders, for debts owing by them to the corporation;[26] such a lien must be created by statute, charter or by-laws.[27] The lien which bailees for hire have for compensation for services, labor, or skill in imparting additional value to an article, does not extend to one who performs services as a mere servant.[28]

6. License to use the wall of a building for advertising purposes. Levy v. Louisville Gunning System [Ky.] 89 S. W. 528.

7. Howes v. Barmon [Idaho] 81 P. 48.

8. Entwhistle v. Henke, 113 Ill. App. 572.

9. Hodsdon v. Kennett [N. H.] 60 A. 686.

10. Clark v. Strong, 93 N. Y. S. 514.

11. A license based on a consideration for the use of a wall of a building for advertising purposes is not revoked by a lease of the building without mention of the license. Levy v. Louisville Gunning System [Ky.] 89 S. W. 528.

12, 13. See 4 C. L. 433.

14. Electric company stringing wires under a sidewalk next to a play ground must provide against injuries to children who crawl under the sidewalk in play. Commonwealth Electric Co. v. Melville, 110 Ill. App. 242.

15. The proprietor of an elevator erected on a railroad right of way under license operates same subject to the right of the railroad company to handle its trains on the track. Chicago, etc., R. Co. v. Giffen [Neb.] 96 N. W. 1014.

16, 17. Shipley v. Fink [Md.] 62 A. 360.

18. Horney v. Nixon [Pa.] 61 A. 1088.

19. Weldon v. Prescott [Mass.] 73 N. E. 536.

20, 21. See 4 C. L. 434.

22. A person furnishing money for gathering a crop of cotton cannot claim a lien therefor on other cotton grown on the same leased premises. Goodwin v. Mitchell [Miss.] 38 So. 657. The foundation of a vendor's lien and that which sustains it is unpaid purchase money. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

23. See an enumeration of them in 4 C. L. 423, n. 8.

24, 25. See 4 C. L. 434.

(§ 2) *B. Equitable liens.*[29]—A contract showing an intention to charge

26, 27. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685.

28. Civ. Code, §§ 3051, 3052, re-enact and extend the common law relating to liens; and one who works for wages in the manufacture of brandy from grapes has no lien on the product for unpaid wages. Michaelson v. Fish [Cal. App.] 81 P. 661.

29. See 4 C. L. 434.

NOTE. Equitable liens on land: "At common law there was no lien upon a thing owned by one person in favor of another except when accompanied by possession, and, furthermore, there could be no lien upon land, but only on things of a personal nature. 2 Spence, Eq. Jur. 796. In equity, however, there are certain rights in regard to land, as well as to personalty, not based on possession, yet of a character analogous to common-law liens, and known as 'equitable liens.' These rights consist of personal obligations upon the owners of land, which equity will enforce against the land, and which will follow the land into whosesoever hands it may pass, until it reaches those of a purchaser for value without notice. Pomeroy, Eq. Jur. §§ 165-167, 1233 et seq.; article by Prof. C. C. Langdell, 1 Harv. L. R. 65, 66, 70.

"Equitable liens do not confer 'proprietary' or 'real' rights, but, * * * they merely constitute a means by which equity enforces a personal obligation. Consequently, the owner of the obligation has, in theory, no rights in the land until the decree subjecting the land to his claim. See 1 Harv. L. R. 65, 66; Gilman v. Brown, 1 Mason, 221, Fed. Cas. No. 5,441; Hutton v. Moore, 26 Ark. 382; Sparks v. Hess, 15 Cal. 186. It is on this theory, apparently, that a vendor's lien is in some states regarded as personal to the vendor, and not assignable, and, on the same theory, the right to enforce the lien may well be regarded as barred by the fact that the statutory period has run against the claim (Borst v. Corey, 15 N. Y. 505; Kirchwey's Cas. 758), whatever be the rule in the case of a formal mortgage.

"Express charges on land: An 'equitable lien' is created by provisions, in a conveyance inter vivos or in a will, charging the land with the payment of debts or legacies. See 2 Jarman, Wills, 1387 et seq.; Bigelow, Wills, 312. Equitable liens of this class, as well as other such liens, are admirably treated in 3 Pomeroy Equity Jurisprudence, §§ 1233-1267. So, land may be charged by will, or in a family settlement, with the payment of an annuity (In re Tucker, 2 Ch. 323; Merritt v. Bucknam, 78 Me. 504; Gallaher v. Herbert, 117 Ill. 160; Glenn v. Spry, 5 Md. 110; Hines v. Hines, 95 N. C. 482; In re Pierce's Estate, 56 Wis. 560), or the support of some person other than the owner (Bell v. Watkins, 104 Ga. 345; Donnelly v. Edelen, 40 Md. 117; Commons v. Commons, 115 Ind. 162; Outland v. Outland, 118 N. C. 138; Dickson v. Field, 77 Wis. 439).

"Under the common-law rule that lands were not liable for the simple contract debts of a decedent, the question frequently arose whether his will expressed an intention to the contrary,—that is, charged his land with the payment of debts in favor of creditors. With the change in the law, making land as well as personalty liable for debts of the decedent,—a rule which prevails in all the states,—these questions have become of comparatively little importance, so far as the creditor is concerned. The question may still arise, however, whether, under a particular will, the land is charged with debts, so as to render it primarily liable for the payment thereof, thus reversing the ordinary rule that the personalty is the primary fund for that purpose. This concerns, not the creditor, but the devisees or heirs of the land on the one side, and the legatees of the other persons entitled to share in the personalty on the other. The question also frequently arises whether land is charged with the payment of a particular legacy, so as to make it liable for this purpose, either before the personalty, which is ordinarily alone so liable, or pari passu with the personalty. In the absence of such charge, the legacy must rebate in case of insufficiency of personal assets.

"Since land is ordinarily the primary fund for the payment of both debts and legacies, the presumption is always to that effect, and a clear intention is necessary to charge the land. Bigelow, Wills, 313; Wright v. Denn, 10 Wheat. [U. S.] 204, 6 Law. Ed. 303; In re Powers, 124 N. Y. 361; Heslop v. Gatton, 71 Ill. 528; Owens v. Claytor, 56 Md. 129; Shenk v. Shenk, 150 Pa. 521; Lee v. Lee, 88 Va. 805. An intention that the land shall be charged with the payment of debts or legacies may be expressly stated, as by use of the word 'charge' or by a devise to A. 'on condition that' he pay a certain debt or legacy. McFait's Appeal, 8 Pa. 290; Merritt v. Bucknam, 78 Me. 504; Gardenville Permanent Loan Ass'n v. Walker, 52 Md. 452; Sistrunk v. Ware, 69 Ala. 273; Couch v. Eastham, 29 W. Va. 784. See Baker's Appeal, 59 Pa. 313. Moreover, such an intention is usually inferred from the fact that, in the same clause with a devise of land, there is a direction to the devisee to pay a debt or a legacy. Bigelow, Wills, 318; Potter v. Gardner, 12 Wheat. [U. S.] 498, 6 Law. Ed. 706; Brown v. Knapp, 79 N. Y. 136, 143; Henry v. Griffis, 89 Iowa, 543; Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285; Merrill v. Bickford, 65 Me. 118; Dudgeon v. Dudgeon, 87 Mo. 218; Chase v. Warner, 106 Mich. 295; Carter v. Worrell, 96 N. C. 358, 60 Am. Rep. 420; Yearly v. Long, 40 Ohio St. 27; Buchanan v. Lloyd, 88 Md. 642; Wyckoff v. Wyckoff, 49 N. J. Eq. 344.

"In this country the use of general words directing the payment of debts does not usually have the effect of charging the debts on land devised, such words being found in most wills, and being merely a direction for the doing of what the law compels. Starke v. Wilson, 65 Ala. 576; Decker v. Decker, 121 Ill. 341; Hamilton v. Smith, 110 N. Y. 159; Harmon v. Smith, 38 F. 482; White v. Kauffman, 66 Md. 92. **Contra.** Tuohy v. Martin, 2 MacArthur [D. C.] 572; Bishop v. Howarth, 59 Conn. 455, 465. In England, on the other hand, a mere direction by the testator that his debts shall be paid charges the land with the debts, though a direction that they shall be paid by his executors charges only the land devised to such executors. 2 Jarman,

identified property with a debt or other obligation creates an equitable lien thereon.[30] The property intended to be charged with an equitable lien should be identified with a reasonable degree of certainty,[31] and also the contract on which the lien is predi-

Wills, 1390; Theobald, Wills [5th Ed.] 725, 726; Hawkins, Wills [2d Am. Ed.] 282.

"A legacy is charged on land by a devise of the land 'after' the payment of such legacy. Pond v. Allen, 16 R. I. 171; Pendleton v. Kinney, 65 Conn. 222; Smith v. Cairns 92 Tex. 667. See Smith v. Fellows, 131 Mass. 20. Likewise, if, after the gift of a pecuniary legacy or legacies, there is a gift of the 'residue' or 'remainder' of testator's property thereby blending the real and personal property into one fund, the legacy or legacies are charged upon the land, since the term 'residue' or 'remainder' could in such case only refer to what remains after the payment of the previous gifts. Greville v. Browne, 7 H. L. Cas. 689; In re Dyson [1896] 2 Ch. 720; Lewis v. Darling, 16 How. [U. S.] 1, 14 Law. Ed. 819; Turner v. Laird, 68 Conn. 198; Stevens v. Flower, 46 N. J. Eq. 340; Reid v. Corrigan, 143 Ill. 402; Hutchinson v. Gilbert, 86 Tenn. 464; Hill v. Bean, 86 Me. 200; Peebles v. Acker, 70 Miss. 356; Bennett's Estate, 148 Pa. 139. See Lee v. Lee, 88 Va. 805; Hoyt v. Hoyt, 85 N. Y. 142. In one or two states, however, such a disposition of testator's property is regarded as insufficient to show an intention to charge the land when unaccompanied by other evidence of such an intention. Pearson v. Wartman, 80 Md. 528; Brill v. Wright, 112 N. Y. 129; Morris v. Sickly, 133 N. Y. 456.

"Lien for improvements: As before stated, one who makes improvements on land in the mistaken belief that he is the owner thereof is given, by equity, a right to compensation for such improvements as against the true owner coming into equity to assert his rights, and this right to compensation is regarded as constituting a lien on the land. Hannibal & St. J. R. Co. v. Shortridge, 86 Mo. 662; Hatcher v. Briggs, 6 Or. 31; Field v. Moody, 111 N. C. 353; Preston v. Brown, 35 Ohio St. 18; 2 Story, Eq. Jur. § 1237; 3 Pomeroy, Eq. Jur. § 1241.

"An owner of an undivided interest in land who is entitled to contribution from his cotenants on account of repairs or improvements made by him has a lien on their interests to secure such contribution. Baird v. Jackson, 98 Ill. 78; Prentice v. Jenssen, 79 N. Y. 478; Alexander v. Ellison, 79 Ky. 148; Kelly v. Kelly, 54 Mich. 30; 3 Pomeroy, Eq. Jur. § 1240. See Houston v. McCluney, 8 W. Va. 135. Likewise, a life tenant under a will who completes improvements begun by his testator is entitled to compensation therefor, and a lien to secure such compensation. Hibbert v. Cooke, 1 Sim. & S. 552; Sohier v. Eldredge, 103 Mass. 345, 351; Broyles v. Waddel, 11 Heisk. [Tenn.] 32; Gavin v. Carling, 55 Md. 530; 2 Story, Eq. Jur. § 1237.

"According to a few decisions, a tenant under a lease providing that he shall be compensated, at the end of the term, for any improvements made by him, has a lien on the land for the value of such improvements. Berry v. Van Winkle's Ex'rs, 2 N. J. Eq. 269; Conover v. Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247; Ecke v. Fetzer, 65 Wis. 55. Usually, however, his right to a lien is denied. Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 136; Beck v. Birdsall, 19 Kan. 550; Watson v. Gardner, 119 Ill. 312; Coffin v. Talman, 8 N. Y. 465; Hite v. Parks, 2 Tenn. Ch. 373. See Speers v. Flack, 34 Mo. 101, 84 Am. Dec. 74.

"Lien for owelty of partition: When, by a decree for the partition of land, one of the parties is directed to pay to another a certain sum or 'owelty of partition,' the property received by him on the partition is subject to a lien for such sum until paid. Freeman, Cotenancy, § 507; Davis v. Norris, 8 Pa. 125; McCandless' Appeal, 98 Pa. 489; Baltimore & O. R. Co. v. Trimble, 51 Md. 99; Dobbin v. Rex, 106 N. C. 444; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726."—From Tiffany, Real Property, p. 1278 et seq.

Equitable Mortgages are treated in Mortgages, 4 C. L. 677, and see note in Mortgages, 6 C. L.

30. An agreement in writing, by a married woman, to secure the compensation to be paid her counsel for services in obtaining her a divorce by a trust deed on certain city lots in case they secured them for her. Patrick v. Morrow [Colo.] 81 P. 242. The fact that she had the word "homestead" entered on the margin of the record of the decree, in the clerk and recorder's office, did not affect their lien. Id. Where the deed of land bought for partnership purposes was taken in the name of one partner, and expressly retained a lien on the land to secure the payment of the purchase money notes, and, after that partner's death, the land was assigned in partition proceedings to the surviving partner, who executed his personal note for the balance due, reciting that it was for the balance of the purchase money and was a lien on the land, he was estopped to deny the lien on the land. Hamilton's Ex'rs v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093. Supplies and money advanced to carry on farming operations under agreement that the crops should be turned over for sale and deduction of advancements from proceeds. Schermerhorn v. Gardenier, 107 App. Div. 564, 95 N. Y. S. 494. The fact that such crops were turned over by the farmer's executrix, to the party making the advancements, to be sold by him as a produce dealer, and without any intention of fulfilling the contract, did not affect the lien. Id. To give a bank such a lien on an insurance policy in its possession for any debt due it from the owner, it must be shown that there was a contract, either express or implied, for such lien, and that the credit was given on the faith of such lien. First Nat. Bank v. Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337. A clause in a warranty deed that the grantee took the title "subject, however, to existing mortgages, liens, taxes, and claims of any and every description," does not create such a charge, but its purpose is to except such liens, etc., from the warranty of the deed. Cameron v. Sexton, 110 Ill. App. 331.

cated.[32] A debt for purchase money, whether in the form of a judgment or evidenced by notes will be recognized and preserved by equity to prevent injustice.[33] A party making improvements or payments on real estate, in reliance on a parol agreement that is not fulfilled, has an equitable lien on such real estate for such improvements or payments.[34] But such liens will not be extended beyond the property contemplated in the agreement.[35] While it cannot be successfully contended that any promise or agreement alone will authorize the court to say a lien by implication of law attaches to real estate, yet such promise or agreement may be considered by the court, with other circumstances, in determining the real intention of the parties as to the lien.[36] A vendee going into possession of land takes it charged with an equitable lien in favor of the vendor to secure the balance of unpaid purchase money.[37] And this rule holds good not only as against the vendee and his heirs, but also against all subsequent purchasers having notice that the purchase money remains unpaid.[38]

Equity will, in the absence of an express agreement, create a lien when the

31. A payment made as a portion of the future purchase price of corn still in the field, no particular corn being set apart or identified, does not create an equitable lien on the crop. Hazenwinkle Grain Co. v. McComb, 116 Ill. App. 541. Money paid into court on condemnation proceedings represents the land condemned, and is subject to the liens and incumbrances on the land in their order of priority. Kansas City v. North American Trust Co., 110 Mo. App. 647, 85 S. W. 681.

32. Evidence of contract of sale of a sewing machine, and breach thereof, held to be of too uncertain a character to establish an alleged lien thereon for delinquent payments. Singer Mfg. Co. v. Horowitz, 88 N. Y. S. 349.

33. Notes given upon a release of a judgment of foreclosure of a vendor's lien held, under the circumstances, not to have created a new debt. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

34. Where a mother paid part of the purchase price of a dwelling bought by her son, upon an oral promise that she should have a life estate therein, in common with him. Long v. Scott, 24 App. D. C. 1. Where a daughter paid money to her father on his promise to buy a home, which should be hers after her parents' death, but he bought a house without carrying out such agreement. Leary v. Corvin, 181 N. Y. 222, 73 N. E. 984. Where one entered upon lands and made improvements thereon upon a promise of a deed of the same (Burks' Adm'r v. Lane Lumber Co. [Ky.] 89 S. W. 686), and after the death of such party and his wife, leaving no personal estate, except such as was exempt, to an only infant daughter, all parties interested being before the court, the material man who furnished the lumber for the house built was subrogated to deceased's lien and had it enforced (Id.). Where two parties exchanged parcels of land by parol agreement, and one made valuable improvements while the other cut a large quantity of wood on the parcels so exchanged, the successor of the party making improvements was entitled to a lien on the land therefor. Craig v. Armstrong, 26 Ky. L. R. 726, 82 S. W. 453. Where parties in good faith enter upon and improve lands, under an unenforceable oral agreement of purchase with the owners of the equity of redemption, they have an equitable claim as against the owners of the equity of redemption, subject to the prior claim of the mortgage. Schneider v. Reed, 123 Wis. 488, 101 N. W. 682. In a suit to establish a lien on land, on the ground that plaintiff's mortgagor had a title bond when the mortgage was executed, and that he had subsequently paid the purchase price, though he had received no deed, evidence held insufficient to show such payment. Comb's Adm'x v. Krish, 27 Ky. L. R. 154, 84 S. W. 562.

35. Where defendant agreed to convey a part of a tract of land to plaintiff on condition that he would make certain improvements on the land, plaintiff was entitled to a lien on that part of the land but not on the whole. Robards v. Robards, 27 Ky. L. R. 494, 85 S. W. 718. A contract for the sale of fruit trees, which provided that the sellers should have certain crops of fruit therefrom, gave them no lien on the land which they could enforce and recover money, but simply entitled them to the fruit contemplated in their contract. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204. Where plaintiff sold certain machinery, taking notes therefor and reserving title, and plaintiff claimed that the same was so attached to the realty as to become a part thereof, but the evidence failed to support that theory, a judgment for a lien on all the property, both personal and real, was erroneous (Smith v. Ellis [Tex. Civ. App.] 87 S. W. 856); and where the vendor of the land involved intervened, and sought to foreclose his vendor's lien expressly reserved by him, he should have been allowed to recover, with foreclosure for the amount (Id.).

36. An understanding of the parties that the vendor's lien should continue, after a release of judgment of foreclosure, to enable the vendee to effect a loan on the land. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

37. Borrer v. Carrier, 34 Ind. App. 353, 73 N. E. 123, and cases cited Vendor and Purchaser, 4 C. L. 1793.

38. Borrer v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

rights of the parties cannot be otherwise secured.[39] The fact that defendant purchased land after the creation of his debt to plaintiff, without recording the deed, did not entitle plaintiff to a lien on the land and a sale thereof for his claim, though by proper proceedings the land might be subjected to the payment of the debt.[40]

(§ 2) *C. Statutory liens.*[41]—To acquire a statutory lien, the terms of the statute, as well as any contract by virtue of which such a lien is created, must be strictly followed,[42] and the property on which the lien is claimed must be identified with reasonable certainty.[43] Defects in proceedings to acquire statutory liens cannot be cured by amendment, in the absence of provisions therefor.[44] A statutory agister's lien is not affected by the mere fact that there was a contract between the parties for pasturage of the cattle in a manner, for a time, and at a price agreed on.[45]

Construction.[46]—The statutes are to be construed so as to be rendered effective if possible,[47] and given a liberal construction in favor of the lienholder.[48] Some statutory provisions are construed in the notes.[49]

§ 3. *Rank and priorities of liens.*[50]—A general lien must be subordinated to the superior equity of a prior specific lien.[51] As between equitable liens, priority

39. An allowance to the wife in divorce proceedings for the care and custody of children, under B. & C. Comp. § 513, will be impressed as a lien on all the husband's real estate, except such as he may be required to convey to the wife. Taylor v. Taylor [Or.] 81 P. 367. In a proceeding for alimony and separate maintenance, the award of alimony was declared to be a lien upon the husband's interest in real estate left by his father, who died intestate. Walker v. Walker [Iowa] 102 N. W. 435. A divorced wife has a lien on a life insurance policy assigned to her by her husband during the marriage, for any premiums thereon paid by her individually, but no other interest therein (Hatch v. Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411); and in litigation involving the ownership of such policy, in which the insurance company was codefendant, the latter was given a lien on the policy for its attorney fees (Id.). Although an assignment of a bid at a sale of lands to pay debts was void for fraud in its procurement, yet the assignee was entitled to a lien on the land for the amount of a debt of the estate paid in securing the assignment. Daniels v. Daniels, 27 Ky. L. R. 882, 86 S. W. 1116. One who has bought in lands for another, and has paid out money to discharge incumbrances, has a right to be reimbursed as a condition of redemption. Cupp v. Lester [Va.] 51 S. E. 840. Where a brick company secures a judgment against a paving contractor for brick furnished him, and, upon the return of an execution unsatisfied, files a bill in equity to reach sums due such contractor by the city, it thereby acquires an equitable lien upon such funds. Case v. McGill [N. J. Eq.] 60 A. 569.

40. Sewell v. Drake, 27 Ky. L. R. 571, 85 S. W. 748.

41. See 4 C. L. 435.

42. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273. An agreement in writing among land owners for the construction, by trustees, of levees to protect their lands from tide overflow, the expense of which was to constitute a lien on the lands under Civ. Code § 2881, did not authorize the construction of a drainage ditch and pumping plant, to be made a lien on the lands (Stone v. Harris, 146 Cal. 555, 80 P. 711), nor was the adoption of a resolution by all the owners sufficient authority therefor (Id.).

43. 2 Ballinger's Ann. Codes & St., § 5936, A general description of a crop of wheat on which a lien was claimed was held too indefinite. Dexter v. Olsen [Wash.] 82 P. 286.

44. There is no statutory authority for the amendment of a defective statement of a lien on farm products. Dexter v. Olsen [Wash.] 82 P. 286. A defective claim for lien cannot be amended so as to apply to one who purchases the premises sought to be charged with the lien after the contract was made. Rev. St. ch. 82 (Mechanic's Lien Act). Richardson v. Central Lumber Co., 112 Ill. App. 160.

45. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

46. See 4 C. L. 435.

47. Mott v. Wissler Min. Co. [C. C. A.] 135 F. 697.

48. Said of the mechanic's lien law. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273. But that law should be liberally construed only after the lien has attached, for the purpose of fulfilling its objects. There is no reason for giving it a liberal construction in determining whether a lien attaches. Cincinnati, etc., R. Co. v. Shera [Ind. App.] 73 N. E. 293.

49. The Virginia statute giving a lien for **supplies furnished to a manufacturing company** includes only such supplies as are necessary to its output, and not to material or machinery necessary to the construction, equipment, or completion of the plant. Code Va. Supp. 1898, § 2485. American Wood-Working Machinery Co. v. Agelasto [C. C. A.] 136 F. 399. A mill superintendent, who oversees the operations of the mill, conducts a commissary store, and keeps the books, not performing any manual labor, is not a **"laborer"** within Code, § 1255, carrying into effect Const. art. 14, § 4, and giving laborers a lien on the subject-matter of their labor. Moore v. American Industrial Co., 138 N. C. 304, 50 S. E. 687.

is determined by the equities of the case.[52] The assignee from the owner of one or more of a series of notes secured by mortgage lien is entitled to preference over the other notes retained by the assignor,[53] at least the guarantying of payment has such an effect.[54] On an issue of priorities between chattel mortgages, the acceptance of a new note and mortgage before the first becomes due will not be deemed to have discharged the prior security, unless so intended by the parties.[55] Statutory liens being involved, the priority is often dependent upon the nature of the lien.[56] Statutory preferences do not retroact[57] but apply only to cases embraced by their terms.[58] The rank and precedence of liens on personal property may be determined by the law of the state where they accrue.[59] Priority often depends upon record,[60] or

50. See 4 C. L. 435.

51. In this case the mortgage was executed before the judgment lien attached. Glen Morris-Glyndon Supply Co. v. McColgan [Md.] 60 A. 608.

52. The equitable lien established by proceedings in aid of an execution, to reach sums due a paving contractor for brick furnished him individually, in ignorance of any partnership between him and others, has priority over any claims arising out of the partnership. Case v. McGill [N. J. Eq.] 60 A. 569. A claim for permanent injury to property by the construction of railroad tracks in the street in front of it is a claim for the taking of property and a lien upon the corpus of the railroad, superior to either prior or subsequent mortgage, and cannot be defeated by a foreclosure sale unless the lien holder is made a party to the foreclosure proceedings. Kentucky & I. Bridge & R. Co. v. Clemmons, 27 Ky. L. R. 875, 86 S. W. 1125.

53. Perry v. Dowdell [Tex. Civ. App.] 84 S. W. 833.

54. The court says the assignor "waives" his lien. Anderson v. Perry [Tex.] 85 S. W. 1138, afg. Perry v. Dowdell [Tex. Civ. App.] 84 S. W. 833.

55. The question of such intent is a proper one for the jury. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

56. The **lien of a corporation on** the **stock** of a member, under by laws adopted in accordance with Civ. Code 1895, § 2825, to secure his indebtedness to the corporation, is superior to a **judgment lien.** Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379. In Arkansas the lien of a **laborer** who assists in raising a crop is superior to that of a **mortgage** executed before the crop was produced. Law of 1895 (Acts 1895, p. 217, No. 146) amending the laborer's lien law. One taking a mortgage on crops is charged with knowledge of the fact that labor is necessary to produce crops and that the statutes provide for laborers' liens. Sheeks-Stephens Store Co. v. Richardson [Ark.] 88 S. W. 983. In the distribution of a fund arising from a sheriff's sale of goods, the landlord's lien for **rent** takes precedence of claims of **execution creditors.** Act of June 16, 1836. Wadas v. Sharp, 27 Pa. Super. Ct. 233. The rent is to be reckoned up to the date of the levy made on the execution which is the last to participate in the distribution. Id. The lien that a person may have for **money** furnished **to gather a crop** is subordinate to the landlord's **lien for rent.** Goodwin v. Mitchell [Miss.] 38 So. 657. The lien of a **purchase-money mortgage** on property taken by a tenant on the leased premises is superior to the landlord's lien for subsequently accruing **rent.** Arnold v. Hewitt [Iowa] 104 N. W. 843. The **purchaser** of cotton subject to a laborer's lien, who merely credits the price on a past due account, is not a bona fide purchaser as against the **laborer.** Sheeks-Stephens Store Co. v. Richardson [Ark.] 88 S. W. 983. The special **lien** given **on animals** for food and care by livery stable keepers, under Sayles' Ann. Civ. St. 1897, arts. 3319, 3326, does not interfere with other liens and is inferior to a **mortgage** lien of which the keeper has constructive notice. Masterson v. Pelz [Tex. Civ. App.] 86 S. W. 56. The purchaser, at a sale for default in the payment of a school fund mortgage in Indiana, takes a title superior to tax liens subsequent to the execution of the mortgage, and due at the time of the sale. Hood v. Baker [Ind. App.] 75 N. E. 608.

57. A claim for taxes assessed by a township since the passage of the Act of June 1901, P. L. 364, does not take priority over a mortgage recorded prior to such act, in the distribution of the proceeds of sale on levari facias. Caner v. Bergner, 27 Pa. Super. Ct. 220. The statute of Pennsylvania, giving municipal liens priority over mortgage liens, does not apply to mortgages executed before the passage of that act. Act of June 4, 1901, P. L. 364. A paving lien. Martin v. Greenwood, 27 Pa. Super. Ct. 245.

58. Comp. St. 1887, div. 5, § 707, making a judgment against a railway company for injuries to person or property a lien superior to the lien of any mortgage or trust deed, applies only to steam railroads. Daly Bank & Trust Co. v. Great Falls St. R. Co. [Mont.] 30 P. 252.

59. The superiority of an agister's lien on cattle surreptitiously taken from him, over a prior chattel mortgage, under the law of Kansas, was recognized in Missouri where the action was brought, although no such superiority exists under the law of Missouri, or of Illinois, where the cattle were sold. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

60. The lien of a mortgage recorded before the commencement of improvements on the property precedes a mechanic's lien for material furnished for such improvements. Eckels v. Stuart, 212 Pa. 161, 61 A. 820. A claim for ties, necessary to the preservation of a railroad, furnished within six months of the appointment of a receiver, is not entitled to preference over a mortgage lien created and recorded prior to the contract for ties in the absence of any special circumstances, besides the use of them by the

acts completed by records or filings,[61] or possession may be the determining principle.[62] Priority secured by one of two or more creditors in violation of good faith will not be sustained.[63] Receivers of corporations engaged in public service, whose operations cannot be interrupted without public inconvenience, may be authorized to issue certificates of indebtedness to raise money which may be made prior in lien to the mortgage indebtedness.[64]

In the settlement of estates of decedents, insolvents, and bankrupts, certain preferences are established, which pertain rather to such matters.[65]

§ 4. *Waiver, extinguishment, discharge, and revival.*[66]—A lien created by deed continues in full force until released of record, discharged by payment of the lien debt, or barred by the statute of limitations.[67] A foreclosure of a vendor's lien and sale of the property thereon to a bona fide purchaser, if there is no redemption, defeats the lien as to any unsatisfied part of the judgment or debt.[68] Courts will not permit a merger of a vendor's lien, when injustice will likely result, even though all the essential elements of a technical merger may be present,[69] and such lien having once attached can be defeated only by the voluntary act of the holder thereof, unless the rights of innocent purchasers without notice intervene.[70] Possession is generally necessary to unwritten liens, but a parting with possession against one's

receiver. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 Law. Ed. 717.

61. The lien given by Code Va. 1887, § 2485 (Code 1904, p. 1246), for supplies furnished to a mining or manufacturing company, attaches at the time the supplies are furnished, so that an adjudication in bankruptcy between such time and the recording of the sworn statement of the claim does not cut off right of priority of claim. Mott v. Wissler Min. Co. [C. C. A.] 135 F. 697. A mechanic's lien cannot have priority over a purchase-price mortgage, where the only contract for the building was made before the purchase of the land, and the work done before purchase was without the owner's consent, no notice of any intended claim for lien being given him and the mortgage being contemporaneous with the deed. Rochford v. Rochford [Mass.] 74 N. E. 299. A mechanic's lien properly perfected has priority over all liens suffered or created subsequently, except the liens of other mechanics and materialmen, among whom there is no priority. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

62. Where a devisee takes a present interest, but possession is postponed, judgment liens attaching prior to the time he acquires possession are superior to his subsequent deed. Swerer v. Trustees of Ohio Wesleyan University, 6 Ohio C. C. (N. S.) 185. In Illinois the landlord's lien for rent past due does not arise until goods are distrained, and cannot be made to attach by distraint after the chattel mortgagee has reduced the property to possession. Springer v. Lipsis, 110 Ill. App. 109.

63. Where in violation of an agreement between two creditors, who were sharing pro rata the rents of a debtor's lands, that neither would sue without notice to the other, the creditor in possession of the lands caused an attachment to be levied thereon, and then the other creditor did the same, whereupon the first creditor agreed that the two judgments should stand equal, it was held that the proceeds of the sale of the lands, after reimbursement of the first creditor for taxes paid, should be applied pro rata on the two judgments. Montgomery v. Black [Ark.] 86 S. W. 1006. When two or more creditors have concurrent liens on a fund which stands to pay all their claims ratably, no one creditor can in any way equitably take the whole fund and apply it solely to the satisfaction of his claim. Stiles v. Galbreath [N. J. Eq.] 60 A. 224. In such case the common fund must be accounted for to those who are entitled to have it ratably applied to the payment of their debts. Id.

64. Wiggins v. Neversink Light & Power Co., 93 N. Y. S. 853.

65. See Assignments for Benefit of Creditors, 5 C. L. 286; Bankruptcy, 5 C. L. 367; Estates of Decedents, 5 C. L. 1183; Insolvency, 6 C. L. 38.

66. See 4 C. L. 436.

67. Hamilton's Ex'rs v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093.

68. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

69. Where the vendor released a judgment of foreclosure of a vendor's lien, to enable the vendee to effect a loan on the land, on the understanding that vendee's notes for the judgment should represent the unpaid purchase price, and vendor's lien should continue, held that the lien was not so merged in the judgment as to be lost on its release. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

70. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. Although the deed retaining a lien to secure the payment of the purchase-money note shows that more than the statutory period of limitation has elapsed since the note matured, yet the lien still exists if payments have been made on the note keeping it alive (Hamilton's Ex'r v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093), and renewing the purchase-money note from time to time has the same effect (Id.).

will and consent will not affect his lien.[71] If a vendor once fairly waives or abandons his lien, it is gone, and equity will not restore it.[72] One may waive his lien, expressly or by implication[73] by acts incompatible with the claim of lien.[74] An equitable lien on the assets of a defunct corporation, for a debt due from it, is extinguished when the debt becomes barred by limitation.[75] In Pennsylvania a release or extinguishment of any charge on land is presumed, where no payment or recognition thereof has been made within twenty-one years.[76] A landlord's priority for rent in the distribution of a fund arising from a sheriff's sale of a tenant's goods is not lost by the fact that no notice of his claim was given before or at the sale.[77] Although the holder of a lien on real property may be deprived of the benefit of his lien, his claim cannot be taken away without due process of law.[78] Under the Pennsylvania law, while the entry of a judgment note in the prothonotary's office within five years after the maker's death may not create a valid judgment, yet the entry is the equivalent of the filing of a copy or statement of the debt and will continue the lien of the debt on the real estate of the maker for a further period of five years from the filing.[79] And where, before the expiration of the five years, the terre-tenant and owner of the land confessed judgment for the sum of the debt and there were subsequent revivals of the judgment, there was no break in the continuity of the lien.[80]

§ 5. *Enforcement and protection of liens.*[81]—An agister, whose lien is made by statute superior to that of a prior mortgage, where the owner of cattle surreptitiously turns them over to the mortgagee, can recover for their conversion of an innocent commission merchant who sells them and turns the proceeds over to the mortgagee.[82] Ejectment will not lie to enforce the payment of a lien existing upon the land at the time of its conveyance, where the deed conveys an absolute, unconditional title.[83] When a statutory laborer's lien is declared to be subordinate to all prior subsisting liens, a chattel mortgagee has an adequate remedy at law by replevin, when the

71. The owner of cattle took them from an agister's pasture without his knowledge or consent and without paying his bill, and turned them over to a mortgagee. Held that the agister's lien was not lost. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

72. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

73. Landlord not found to have waived his lien for rent by agreeing that a claim for advances to gather a crop should first be paid out of the crop. Goodwin v. Mitchell [Miss.] 38 So. 657.

74. Where a vendor prosecutes his action at law for the collection of unpaid purchase money, and levies an execution on the land and causes it to be sold thereunder, he waives his lien. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. A warehouseman who demanded a sum in excess of the contract price for his services, and refused to give up the goods without payment thereof, thereby waived both lien and tender of his just claim before replevin. Stephenson v. Lichtenstein [N. J. Law] 59 A. 1033. The **taking of independent or additional security,** or the acceptance of a mortgage on the real estate conveyed by the vendor, will amount to a waiver. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

75. Houston Ice & Brewing Co. v. Stratton [Tex. Civ. App.] 13 Tex. Ct. Rep. 887, 89 S. W. 1111.

76. Section 7, Act of April 27, 1855, P. L. 368. An allusion to dower charges, in a mortgage given by the grantee of the lands charged, within the 21 years is not sufficient recognition to prevent the running of the statute. DeHaven's Estate, 25 Pa. Super. Ct. 507.

77. Wadas v. Sharp, 27 Pa. Super. Ct. 233.

78. Section 58 of the chancery act of 1902, P. L. p. 531, providing that holders of unrecorded liens on mortgaged premises are bound by the foreclosure proceedings, is a statute of convenience only and does not determine ultimate rights or destroy equitable interests in the proceeds of the sale, but they are bound only "so far as the property is concerned" (Stiles v. Galbreath [N. J. Eq.] 60 A. 224); and the statute applies regardless of the knowledge of the complainants that there are such unrecorded liens, it not being necessary that such lienholders be made defendants in the foreclosure proceedings (Id.).

79. Under Sec. 24, Act of Feb. 24, 1834, P. L. 70; Purdon's Digest, 12th Ed. p. 591. Sleeper v. Hickey, 26 Pa. Super. Ct. 59.

80. Sleeper v. Hickey, 26 Pa. Super. Ct. 59.

81. See 4 C. L. 437.

82. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

83. Adams v. Barrell, 26 Pa. Super. Ct. 641.

property is attached to enforce a laborer's lien and cannot resort to equity to stay proceedings.[84] In an action against a bank for the conversion of an insurance policy in which the bank pleaded that it held the policy as collateral security under an express contract, it could not defend on the ground of an equitable lien.[85] Nor could the bank defend on such ground without setting up the facts upon which it relies to establish its equitable lien.[86] One who purchases land subject to a lien cannot defeat the enforcement of the lien on the ground of failure of consideration for the lien.[87]

Statutory proceedings to enforce or foreclose.[88]—Where the relation of landlord and cropper exists, the latter is entitled to foreclose his special laborer's lien upon the completion of the contract.[89] Other lienors, who are not made parties to proceedings to foreclose a mechanic's lien, if their claims were actually or constructively known to complainant, are not bound by the proceedings.[90] The fact that the foreclosure of a vendor's lien is included in the same judgment as a mortgage foreclosure does not impair it or take away its characteristics.[91] While no lien exists or can be enforced in admiralty under the general law, for repairs or supplies to a vessel in her home port, yet, where a state statute gives a lien to be enforced by a process in rem, for such repairs or supplies, it is in the nature of a maritime lien and may be enforced in admiralty and the jurisdiction of the United States district courts sitting in admiralty is exclusive.[92] Under a constitutional provision that an action to foreclose a lien on real estate may be commenced in the county where the land, or any part thereof may be situated, and a statutory provision that there can be but one action for the recovery of a mortgage debt,[93] the court acquiring jurisdiction does not lose it by reason of the vacation of its judgment for error found.[94]

Equitable remedies and procedure.[95]—Liens constitute a subject matter inherent in equitable jurisdiction[96] which will apply any of its remedies or principles to protect them.[97] Where a state court has assumed jurisdiction of proceedings to foreclose a railroad mortgage, has appointed a receiver and entered a decree directing a sale, and has power to protect the interests of complainants who claim a lien on certain rolling stock, a federal court will not assume jurisdiction of a bill to declare and enforce the lien.[98] In a suit to establish a lien on land under a mortgage, all persons against whom any relief is sought should be made parties.[99] In an action on a return of nulla bona to attach the interest of the debtor in his mother's estate, it is not necessary that the petition should specifically describe each piece of property, but the averments must be so definite that anyone reading it can learn what property

84. Kirby's Dig., § 5011. Johnson v. Gillenwater [Ark.] 87 S. W. 439.

85, 86. First Nat. Bank v. Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337.

87. By recorded contract the price of trees sold to the vendor of the land was made a lien thereon, and the defense by the vendee was that the vendor was imposed upon and the trees were not what he contracted for. Stark v. Hicklin [Mo. App.] 87 S. W. 106.

88. See 4 C. L. 437.

89. Where the contract was completed save as to a part of the crop ungathered, which was seized on valid process against the landlord, it was error to dismiss the cropper's case on the ground that the contract had not been completed. Lewis v. Owens [Ga.] 52 S. E. 333.

90. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

91. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123.

92. Pennsylvania Act 1858 (P. L. 363), giving such a lien, applies to vessels engaged in trade or commerce but does not apply to a mere dredge boat without any motive power but used only for supporting and transporting dredging machinery. Fredericks v. Rees & Sons Co. [C. C. A.] 135 F. 730.

93. Const. art. 6, § 5, and Code Civ. Proc. § 726. Kent v. Williams, 146 Cal. 3, 79 P. 527.

94. Kent v. Williams, 146 Cal. 3, 79 P. 527.

95. See 4 C. L. 437.

96. See 5 C. L. 1151, n. 81.

97. See Creditors' Suits, 5 C. L. 880; Foreclosure of Mortgages, etc., 5 C. L. 1441; Marshaling Assets, etc., 4 C. L. 531, and like topics.

98. Security Trust Co. of Camden v. Trust Co., 134 F. 301.

99. Comb's Adm'x v. Krish, 27 Ky. L. R. 154, 84 S. W. 562.

was intended to be made the subject of the litigation.[100] In an action to enforce a lien on only one of two parcels of land covered by it, commenced within the statute of limitations, the addition by amendment of a prayer to the complaint for a foreclosure of the lien on the other parcel also is not the introduction of a new cause of action but merely a prayer for additional relief.[101] Where defendant agreed to convey a part of a tract of land to plaintiff in consideration of his making certain improvements on the land, the fact that the land was defendant's homestead was no defense to an action for the value of the improvements and to enforce a lien therefor.[102]

LIFE ESTATES, REVERSIONS AND REMAINDERS.

§ 1. *Nature and definition.*[1]—*A life estate is a freehold limited to determine with the life or lives of particular persons, or at an uncertain period which may continue for life.*[2] Under the Ohio statute subjecting leasehold estates renewable forever to the law of descents governing estates in fee, a lease, renewable forever, containing a covenant on part of the lessee to pay rent during the term, is not converted into a life estate by the death of the lessee.[3]

A reversion is an estate remaining by operation of law in the grantor or his heirs to commence in possession after a particular estate granted out by him is determined.[4] It may rest on a contingency.[5]

A remainder is an estate expressly limited to take effect in possession immediately on the expiration of the particular estate,[6] *not in derogation thereof and created by the same instrument.*[7]

A remainder is vested if there is a present right to future enjoyment,[8] and is contingent when limited to a dubious or uncertain person[9] or upon a dubious and

100. Wilkerson v. Phillips, 26 Ky. L. R. 440, 81 S. W. 691. An averment that the purpose of the suit was to subject the interest of the defendant in the estate of his mother, held sufficient. Id.

101. Such relief might have been granted, under Code Civ. Proc. § 580, without such amendment. Kent v. Williams, 146 Cal. 3, 79 P. 527.

102. Robards v. Robards, 27 Ky. L. R. 494, 85 S. W. 718.

1. See 4 C. L. 438.

2. See 4 C. L. 438. In Georgia the homestead is not a life estate in the full sense of that term. A beneficiary who does not reduce the rents and profits to possession, while the homestead estate is in existence, cannot recover them. Rowan v. Combs, 121 Ga. 469, 49 S. E. 275.

3. Hence the estate of the lessee is liable for rentals. Broadwell v. Banks, 134 F. 470.

4. See 4 C. L. 438.

5. Under Burns' Ann. St. 1901, § 2628, providing for a reversion, when a deed is based on a consideration of love and affection, and the grantee dies intestate, etc., the fact that the consideration was love and affection only must plainly appear. Wagner v. Weyhe [Ind.] 73 N. E. 89. Question held for the jury where a deed was from father to a son, who stayed with and cared for him after attaining majority. Id.

6. See 4 C. L. 439. Estate to "A and his children" gives A a life estate, remainder in fee to his children, born and unborn. Hall v. Wright [Ky.] 87 S. W. 1129.

7. See 4 C. L. 439. One holding under a deed excepting a life claim has a remainder. Senterfeit v. Shealy [S. C.] 51 S. E. 142.

8. Laws 1896, p. 559, c. 547, declaring future estates vested where there is a person in being who would have an immediate right to possession on the ceasing of the precedent estate, makes vested an estate to A for life, to B for life, remainder to be sold and divided among certain persons. In re Yerks' Estate, 94 N. Y. S. 1121.

9. A grant to two persons with a cross remainder to the survivor creates a joint tenancy and contingent remainder in fee to the survivor. Cover v. James, 217 Ill. 309, 75 N. E. 490. A remainder limited to the life tenant's children, and the children of such as are dead, is contingent. Latham v. Roanoke R. & Lumber Co. [N. C.] 51 S. E. 780. A remainder limited to children surviving at the death of the life tenant is contingent. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834. Estate to A for life "and at her death to be divided among my then living

uncertain event.[10] A remainder is not rendered contingent by the uncertainty of the time of enjoyment.[11] The right and capacity of the remainderman to take possession if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not certainty that it will happen during the lifetime of the remainderman, determines the character of the estate.[12]

In some states a remainder less than a fee in either realty or personalty cannot be created on an estate for the life of any person other than the grantee of such estate, nor can a remainder be created on such an estate in a term of years unless it be for the whole residue of such term.[13]

In the construction of instruments creating estates, vested remainders are favored,[14] and will never be held contingent when they can be held vested consistently with the intention of the testator or grantor.

There can be no merger of life estate and remainder so long as uncertainty as to identity of persons entitled exists.[15]

Remainder interests may be rendered inalienable by the terms of the instrument by which they are created.[16] At common law a contingent remainder was not considered an estate but merely a possibility coupled with an interest, and hence not subject to conveyance,[17] but an attempt to convey operates by way of assignment or estoppel[18] and is enforceable in equity.[19] The interests of contingent remaindermen not in esse may be protected by the court where justice requires a settlement of the estate.[20] The sale of contingent interests is in some states authorized by statute.[21]

Personalty may be limited in life estates and future estates[22] and the property

children or their heirs" creates a life estate and contingent remainders. Scheirich v. Maxwell [Ky.] 89 S. W. 4.

10. An estate dependent on the death of a person without leaving issue. Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315. An estate to A and B for life, cross remainders to the survivor for life, and if B died first remainder in fee to G, but if A died first, to E, gives G and heirs a contingent remainder. Morton's Guardian v. Morton, 27 Ky. L. R. 661, 85 S. W. 1188.

11, 12. Nelson v. Nelson [Ind. App.] 72 N. E. 482.

13. Laws 1896, c. 547, p. 565, § 34; Laws 1897, p. 508, c. 417, § 2. Requests held void. In re Bogardus' Estate, 43 Misc. 473, 89 N. Y. S. 478.

14. See Wills, 4 C. L. 1863; Deeds of Conveyance, 5 C. L. 964.

15. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

16. The provisions of Civ. Code, § 492, declaring that no sale of property forbidden by the instrument under which it is held to be sold shall be ordered, are mandatory, and a sale cannot be had, though consented in by life tenant and remainderman. Morton's Guardian v. Morton, 27 Ky. L. R. 661, 85 S. W. 1188.

17. See 4 C. L. 445, n. 79, et seq. See Tiffany Real Property, § 129b.

18, 19. Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315.

20. A suit to foreclose a mortgage in which there are life estates and remainders, vested and contingent, cannot be defeated by the probability of children being born who would have an interest in the fund. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 501, 104 N. W. 777.

21. Gen. St. c. 63, art. 6, § 1, authorizing a sale of remainder and contingent interests, authorizes a sale of a contingent remainder in fee as well as a defeasible fee. Scheirich v. Maxwell [Ky.] 89 S. W. 4. Proceedings for such a sale may be instituted by infant owners. Id.

22. See 4 C. L. 441.

NOTE. Executory devise of personal property: The testator devised the residue of his estate, real and personal, to his wife for life, and thereafter to the defendants. Held the wife was entitled to the property during her life, and no trust of the personal estate arose. Walker v. Hill [N. H.] 60 A. 1017.

Executory devises of personal property after a life or other interest now seem everywhere protected. But the courts differ in the theory of protection. By the weight of authority if the devise is of specific chattels, the first devisee has the custody and use for life, like a bailee, while the legal title is in the executory devisee. Executors of Moffatt v. Strong, 10 Johns. [N. Y.] 11; Vachel v. Vachel [1669] 1 Ch. Cas. 129; Burnett v. Roberts, 4 Dev. L. [N. C.] 79, 81. Contra semble, Horry v. Glover, 2 Hill Eq. [S. C.] 515. If, however, the devise is of the residuary estate, as in the principal case, the general rule would seem to be that the property should be sold, the proceeds given to trustees to pay the income to the first devisee during life, and then the capital to the executory devisee (Healey v. Toppan, 45 N. H. 243; Howe v. Earl of Dartmouth, 7 Ves. 137), unless the will evinces a contrary in-

placed beyond the reach of the creditors of the legatee.[23] The estate of the life tenant is responsible to the remainderman for the amount of the fund.[24]

§ 2. *Mutual and relative rights and remedies of life tenants, future tenants, and their privies.*[25]—A life tenant should not deal with the estate in a manner prejudicial to the remaindermen.[26] Power in a life tenant to use the corpus of the estate for his support is not a power to encumber the remainder.[27] Improvements made by the life tenant[28] or those claiming under him[29] are a part of the corpus of the estate, and cannot be recovered for from the remainderman.[30] Property purchased by the life tenant with the corpus of the estate belongs to the remainderman.[31] Damages in eminent domain proceedings belong to the reversioner.[32] In Ohio a life tenant, by joining in a petition for a street improvement, binds the property for the amount of the assessment.[33] A statute entitling a life tenant, under a will, to his income from the death of the testator does not apply when he receives it by virtue of a compromise between contestants and proponents of the will.[34] In New Jersey by statute when money is paid into court on foreclosure proceedings, a life tenant may apply for a gross sum in lieu of the estate, and consent of the remaindermen to such payment is not necessary.[35]

A life tenant in premises upon which no mines had been opened at the time of the vesting of his estate has no interest in subsurface minerals,[36] and when pursuant to agreement the land is sold, on partition of the purchase price, he is not entitled to any portion of the price arising from the probable existence of such minerals;[37] but in Texas it is held that where minerals are discovered on land, which at the time the life estate took effect was agricultural, the life tenant is entitled to interest on the proceeds of the sale of such minerals, the principal to the remainderman.[38]

Where an entire estate is charged with a life annuity, remaindermen cannot, without consent of the annuitant, claim that a portion of the estate is unnecessary to secure the annuity and should be distributed among them.[39] To bar a life an-

tention (Pickering v. Pickering, 4 Myl. & Cr. 289).—5 Columbia L. R. 553.

23. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

24. The amount of a life policy in which one has only a life interest may be recovered by the remainderman from his estate. Montgomery v. Brown, 25 App. D. C. 490.

25. See 4 C. L. 441.

26. The assent of a life tenant in a trust fund, to the impairment of the fund, is not binding on remaindermen. Bennett v. Pierce [Mass.] 74 N. E. 360.

27. Where one is given the entire estate of a testator "to use at her pleasure for her sole use," remainder over, a debt contracted by the life tenant for work on the estate is not a valid claim against it after her death. it not appearing that it was contracted for her maintenance or could not have been paid out of the profits. Tyson's Estate, 24 Pa. Super. Ct. 533.

28. Heidelberg v. Behrens [Tex. Civ. App.] 85 S. W. 1029.

29. Gray v. Soden, 27 Ky. L. R. 673, 86 S. W. 515.

30. As to rights of life tenants under occupying claimants' acts, see Tiffany, Real Property, § 32, p. 74.

31. Where the life tenant purchases property with the corpus of the estate, the remainderman is entitled to such property at the death of the life tenant as against such tenant's heirs. Heintz v. Dennis, 216 Ill. 487, 75 N. E. 192.

32. A reversioner may recover damage where the premises are taken by the government for a military camp and put to extraordinary use, which impairs its value. Alexander's Case, 39 Ct. Cl. 383.

33. Such assessments are levied upon the corpus of the property, not upon the title by which it is held. Herman v. Columbus, 3 Ohio N. P. (N. S.) 216.

34. Rev. Laws, c. 141, § 24. Hastings v. Nesmith [Mass.] 74 N. E. 323.

35. Leach v. Leach [N. J. Eq.] 61 A. 562.

36. Hill v. Ground [Mo. App.] 89 S. W. 343. Where a contract for the opening of mines was entered into between life tenant and remainderman, but was subsequently abandoned, the abandonment restored the status that existed before the contract was made. Id.

37. Hill v. Ground [Mo. App.] 89 S. W. 343.

38. This rule applies to the wife's estate in lands of her deceased husband under Rev. St. 1895, art. 1689, since art. 3258 makes the common law continue the rule of decision. Swayne v. Lone Acre Oil Co. [Tex.] 86 S. W. 740.

39. If such proceeding can be considered as one under Act Feb. 23, 1853, P. L. 98, for the exoneration of a part of the trust estate, the discretion of the orphan's court in

nuitant of a specified amount per annum "and as much more as she may need for her comfort, support and maintenance," the evidence must be clear and satisfactory, that she has forfeited such right.[40]

A remainderman entitled to a home on the premises may maintain an action for damages if he is deprived of his rights,[41] but cannot maintain ejectment during the life of the life tenant.[42] A contingent remainderman cannot maintain an action for trespass or for waste.[43]

A conveyance in trust for one for life, remainder over, attaches the trust only to the life estate.[44] The remainder estate is a legal one,[45] hence the trustee does not represent the remaindermen and a judge at chambers cannot, on the application of the trustee, authorize a sale of the remainder,[46] and the possession of one claiming under such sale is not adverse to the remaindermen during the life of the life tenant,[47] and mere knowledge of the illegal decretal order and sale thereunder does not estop the remaindermen from asserting title after the termination of the life estate;[48] nor can they be held to have ratified such sale unless, with full knowledge of the facts, they did something to indicate their adoption and approval of it.[49] An administrator is not a trustee for remaindermen devisees of his testator.[50]

Taxes, incumbrances, and contribution.[51]—The life tenant must keep down interest on incumbrances[52] and taxes,[53] and where he becomes the purchaser at a tax sale, the deed is void and the purchase amounts only to the payment of taxes.[54] This also is the result where his wife becomes the purchaser.[55] He is bound to pay only his proportionate share of assessments for permanent improvements,[56] and in paying a valid assessment is not a mere volunteer, where it appears that general taxes, which he was bound to pay, were refused, unless the assessment was also paid,[57] and having made such payment is subrogated to the lien thereof.[58]

The possession of the life tenant is not adverse.[59]—A reversioner[60] or remainderman has no right of entry during the existence of the life estate, consequently limitations do not run against him during such period,[61] and statutes of limitation are construed in view of this rule.[62] The fact that a remainderman is made a

refusing exoneration will not be interfered with unless abused. McCoy's Estate, 23 Pa. Super. Ct. 282.

40. Evidence insufficient where the annuitant made herself personally liable for a loan made out of moneys of the estate, which loan was never returned. Winter's Estate, 26 Pa. Super. Ct. 643.

41, 42. Stiles v. Cummings [Ga.] 50 S. E. 484.

43. Latham v. Roanoke R. & Lumber Co. [N. C.] 51 S. E. 780.

44. Smith v. McWhorter [Ga.] 51 S. E. 474.

45, 46, 47. Smith v. McWhorter [Ga.] 51 S. E. 474; Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

48, 49. Smith v. McWhorter [Ga.] 51 S. E. 474.

50. An adjudication between an administrator and another in favor of one claiming possession is not binding on a remainderman devisee of such property. Pryor v. Winter [Cal.] 82 P. 202.

51. See 4 C. L. 442.

52. Where the life tenant neglects to do so, the amount may be deducted from his share of the proceeds of a sale on foreclosure. Stark v. Byers [Pa.] 62 A. 371.

53, 54, 55. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747.

56. See Tiffany Real Property, § 32, p. 75.

57. Eddy v. Leath, 6 Ohio C. C. (N. S.) 249.

58. Although such assessments were paid without protest and no demand was made on the owner of the remainder interest. Eddy v. Leath, 6 Ohio C. C. (N. S.) 249.

59. See 4 C. L. 442.

60. Limitation does not run against a reversioner during the existence of a dower estate. Callaway v. Irvin [Ga.] 51 S. E. 477.

61. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183; Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044; Bolen v. Hoven [Ala.] 39 So. 379; Senterfeit v. Shealy [S. C.] 51 S. E. 142; Bechdoldt v. Bechdoldt, 217 Ill. 537, 75 N. E. 557. Not against the heirs of a married woman in favor of one claiming under a deed from such woman's husband, and consequent cessation of his estate by the curtesy. Wilson v. Frost, 186 Mo. 311, 85 S. W. 375. A right of entry in the remainderman does not exist during the existence of the particular estate. Pryor v. Winter [Cal.] 82 P. 202.

62. Code Civ. Proc. § 318, providing that an action for the recovery of real property shall not be maintained unless the plaintiff, etc., was seised of the property within five years prior to the commencement of the action, does not apply as between life tenant and remainderman. Pryor v. Winter [Cal.]

party to a suit to foreclose a mortgage on the particular estate does not start limitations against him in favor of the purchaser at the sale.[63] Possession under a tax deed of the title of the life tenant is not adverse to the remainderman.[64] The relation of debtor and creditor does not exist between life tenant and remainderman as such,[65] hence the possession of the life tenant[66] or those claiming under him[67] is not adverse until the termination of the life estate[68] unless his rights are assailed and he has a right to maintain an action;[69] accordingly where the remaindermen have a joint right of possession with the life tenant the possession of a stranger to the title is adverse to both,[70] and possession under a void administrator's sale of property, subject to a life estate and remainder, is adverse as to the remainderman from date of the void sale.[71]

Increment to funds.[72]—Income belongs to the life tenant.[73] As between life tenants and remaindermen of corporate stock, a cash dividend is to be regarded as income and a stock dividend as capital.[74] This rule was adopted as a guide to

82 P. 202. Code Civ. Proc. § 1452, providing that heirs or devisees may maintain an action against any one except the administrator, means only those who have a present right of possession and not a remainderman devisee. Id.

63. His is a paramount title and not subject to litigation in such suit. Pryor v. Winter [Cal.] 82 P. 202.

64. Smith v. Proctor [N. C.] 51 S. E. 889. A tax sale under Laws 1874-75, p. 213, c. 184, of the interest of the life tenant, does not pass the interest of remaindermen. Id. Such deed is not color of title as against them. Id.

65. Moore v. Idlor, 6 Ohio C. C. (N. S.) 19.

66. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747; McCormack v. Coddington, 46 Misc. 510, 95 N. Y. S. 46.

67. The possession of the wife of the life tenant who became purchaser at a tax sale. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747. One holding under a life tenant does not hold adversely to the remainderman, though he pays taxes and makes improvements. Weigel v. Green, 218 Ill. 227, 75 N. E. 913. A grantee of a part of the remaindermen does not hold adversely to a remainderman not joining in the deed while the life tenant lives. Bullin v. Hancock, 138 N. C. 198, 50 S. E. 621.

68. Rights of remaindermen held barred. Bechdoldt v. Bechdoldt, 217 Ill. 537, 75 N. E. 557; Smith v. Proctor [N. C.] 51 S. E. 889.

69. As where a probate court authorized a sale of the fee for the payment of debts of the estate of the person who created the estates. Lindsey v. Fabens [Mass.] 75 N. E. 623. A remainderman who waits 28 years after his rights are interfered with, during which period he is entitled to bring an action, and three years after the death of the life tenant is barred by laches. Id.

70. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84.

71. Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044.

72. See 4 C. L. 443.

73. Surplus and undivided profits of bank stock. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084.

74. Smith v. Dana, 77 Conn. 543, 60 A. 117. A stock dividend is part of the estate and goes to the remainderman. Billings v. Warren, 216 Ill. 281, 74 N. E. 1050.

Note: To determine correctly the respective rights of life tenants and remaindermen to stock dividends or extraordinary cash dividends, on shares of corporate stock held in trust, is a perplexing problem, and one concerning which there is great conflict. The English courts, following the rule first announced in Brander v. Brander, 4 Ves. Jr. 801, hold that an ordinary dividend, whether of cash, stock, or property, belongs to the life tenant, while an extraordinary dividend goes to the remainderman. The Supreme Court of Massachusetts, in the case of Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705, ruled that all cash dividends should be regarded as income and all stock dividends as capital, and this irrespective of their origin and amount. This rule has been followed in a number of states, but an inspection of the following cases will show how difficult it is to make any satisfactory classification: Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Spooner v. Phillips, 62 Conn. 62, 16 L. R. A. 461; Gibbons v. Mahon, 4 Mackey [D. C.] 130, 54 Am. Rep. 262; Richardson v. Richardson, 75 Me. 570, 46 Am. Rep. 428; Greene v. Smith, 17 R. I. 28, 19 A. 1081; DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587. On the other hand, there is a line of cases of which Earp's Appeal, 28 Pa. 368, is the progenitor, and of which McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, is representative, which hold that it is for the court to ascertain the origin of the funds out of which the dividend is declared and apportion it according to the rights of the parties at that time, regardless of the nature and time of the dividend itself. Many courts have adopted the principles underlying this rule. Hite v. Hite, 93 Ky. 257, 40 Am. St. Rep. 189, 19 L. R. A. 173; Peirce v. Burroughs, 58 N. H. 302; Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 33 L. R. A. 856; Thomas v. Gregg, 78 Md. 545, 28 A. 565, 44 Am. St. Rep. 310; Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796. But see Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 53 L. R. A. 169. The rule of Minot v. Paine is admittedly a rule of convenience which is liable to work hardship, but finds its justification in that it furnishes a simple guide for a trustee. It is claimed for the rule last above given that it is an equitable rule and that its application will secure justice in every instance. In the principal case

trustees in discharge of their duties without resort to harassing and expensive litigation.[75] It does not yield whenever it appears that its application will not accomplish what may be conceived as exact justice on the basis of a theoretical view of ultimate rights.[76] The fact that undistributed profits or surplus in any form have been invested by the corporation in permanent work or improvements, does not render a cash dividend, declared out of the proceeds of a sale of such improvements, capital instead of income.[77] The distribution of such dividend as income does not prejudice the remaindermen where capital stock constituting the corpus of the estate remained worth three times as much as when the trust took effect.[78]

§ 3. *Rights and remedies between third persons and life tenants, remaindermen, or reversioners.*[79]—A purchaser from a life tenant acquires no greater estate than his grantor had[80] though the deed purports to convey the fee,[81] and a remainderman is not estopped by recitals in a deed by the life tenant.[82] A purchaser from a life tenant in personalty takes only his seller's title if he has notice of its nature.[83] In an action for nuisance a life tenant can be required to litigate only accrued damages.[84]

LIFE INSURANCE; LIGHT AND AIR, see latest topical index.

LIMITATION OF ACTIONS.

This title relates to the general statutes of limitation and relegates to more specific titles the various special limitations (which are not purely limitation statutes) pertaining to particular actions,[85] and to those proceedings which do not

the court reviewed some of the above cases which are considered as leading, and followed and approved the rule of Minot v. Paine. See 2 Wilgus' Corp. Cas. 1638; Cook, Stock & Stock Holders & Corporation Law, §§ 552 et seq.—3 Mich. L. R. 677. See, also, Helliwell, Stocks and Stockholders, § 319 et seq.

75. Smith v. Dana, 77 Conn. 543, 60 A. 117, citing the leading case Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705.

76. Smith v. Dana, 77 Conn. 543, 60 A. 117.

77. Smith v. Dana, 77 Conn. 543, 60 A. 117. The conversion into cash of certain branches of its business, which amount was used in declaring a cash dividend, does not warrant a holding that such dividend was capital, where the amount of the capital stock remained unchanged. Id. The rule "once capital, always capital" does not apply to surplus invested in permanent work or improvements. Id.

78. Smith v. Dana, 77 Conn. 543, 60 A. 117.

79. See 4 C. L. 444.

80. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747. The grantee of the life tenant, and one of two remaindermen, acquires a life estate and a right to one-half the value of the remainder. Id.

81. Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

82. Recitals that the grantor is the fee owner. Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

83. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

84. Cannot be compelled to submit to an adjudication of damages based on the jury's speculations as to his probable length of life. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

85. See Estates of Decedents, § 6 B (statutes of nonclaim), 5 C. L. 1183; Bankruptcy, § 14 (statutes of nonclaim), 5 C. L. 367; Corporations, § 16 (stockholder's liability), 5 C.

fall within the general meaning given to the terms "actions" and "suits."[86] The doctrine of laches is elsewhere treated.[87]

§ 1. *The statutes, validity and application generally.*[88]—Subject to the constitutional guaranties of property, contracts, and vested rights.[89] the legislature may prescribe limitations on actions,[90] and if retroactive legislation is allowable[91] and a reasonable period is prescribed within which to bring actions[92] may make such statutes apply to existing causes.[93] But following the usual rule of statutory construction,[94] the intention to make the statute retroactive must be clearly manifest.[95]

A statute will be construed according to the plain meaning of its terms,[96] and in construing a particular provision, all provisions on the subject are to be considered and construed in view of the presumption that legislators act with reference to well settled principles of law.[97] A provision that if the period prescribed has already run as to accrued causes, an action may be maintained within one year from the time the statute goes into effect, serves its purpose after one operation and does not again become operative on re-enactment.[98]

Statutes of limitation are statutes of repose, not of extinguishment,[99] yet where they bar a liability they may thereby fulfill a contract of indemnity against that liability;[1] and where the limitation is an inherent part of a right created by statute, such limitation affects the right rather than the remedy.[2] They apply to actions,[3] not to defenses,[4] consequently, so long as a court will hear a plaintiff's cause, time cannot bar the defendant's answer[5] if it sets up a defense that can be adjudicated

L. 764; Death by Wrongful Act, 5 C. L. 945.

86. See Appeal and Review, 5 C. L. 121; New Trial and Arrest of Judgment, 4 C. L. 810; and similar titles. See Actions, 5 C. L. 32, as to definition of "action."

87. See Equity, 5 C. L. 1144.

88. See 4 C. L. 445.

89. See generally, Constitutional Law, 5 C. L. 619.

90. The legislature may prescribe a period within which suits by a city to collect taxes must be brought. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

91. See Constitutional Law, 5 C. L. 619.

92. A retroactive statute giving one year within which to bring action is reasonable. Schauble v. Schulz, 137 F. 389. Six months is not unreasonable especially where the statute is enacted one year prior to going into effect. Fitzgerald v. Scovil Mfg. Co., 77 Conn. 528, 60 A. 132.

93. Rev. Codes N. D. 1899, § 3491a, is retroactive in that it gives effect to adverse possession and payment of taxes preceding its enactment. Schauble v. Schulz [C. C. A.] 137 F. 389.

94. See Statutes, 4 C. L. 1522.

95. Not retroactive. Code Civ. Proc. § 2253, providing a 20 year limitation within which to file a petition to determine rights to escheated property. In re Pomeroy's Petition [Mont.] 81 P. 629. Shannon's Code Supp. p. 692, limiting actions for the recovery of usury. Slover v. Union Bank [Tenn.] 89 S. W. 399. Sess. Laws 1899, p. 235, No. 155, § 1, prescribing the period of limitation for causes of action for personal injuries. Hathaway v. Washington Milling Co. [Mich.] 103 N. W. 164. Code § 989, prescribing the period within which an action may be brought to question the legality of improvement bonds or certificates. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471.

96. Gen. St. 1902, § 1119, limiting actions against a municipal or other corporation for injury to one year from date of injury supersedes Pub. Acts 1897, p. 883, c. 189, allowing 6 years within which to bring an action against municipal, railway, or street railway corporation. Fitzgerald v. Scovil Mfg. Co., 77 Conn. 528, 60 A. 132.

97. Provision that actions for the recovery of land must be brought within a specified period from the time the plaintiff or his predecessor was seised thereof and that heirs and devisees may sue does not apply to a remainderman prior to the termination of the particular estate. Pryor v. Winter [Cal.] 82 P. 202.

98. Tyee Consol. Min. Co. v. Jennings [C. C. A.] 137 F. 863.

99. Do not create presumptions or extinguish obligations; it merely bars the remedy. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

1. Morris v. Hulme [Kan.] 81 P. 169.

2. Jones v. Boykins, 70 S. C. 309, 49 S. E. 877.

3. A proceeding for leave to issue execution on a judgment charging lands with owelty is an action within the meaning of the statute. Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

4. Code Civ. Proc. § 338, subd. 4, prescribing a three-year period within which to seek relief on the ground of fraud, does not apply to fraud relied upon purely as a defense to the enforcement of a judgment. McColgan v. Muirhead [Cal. App.] 82 P. 1113. An action by the owner of the legal title to land to recover possession is not barred because an action against him for the purchase price is. Doris v. Story [Ga.] 50 S. E. 348.

5. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137. So long as an action to recover

in the hearing of the cause.[6] The statutes may not be used as a weapon of attack.[7] They pertain to the remedy, not to the right,[8] consequently it is competent for the legislature to change the period as to existing causes[9] if a reasonable time is given for the commencement of an action before the bar takes effect.[10] In determining whether the time allowed is reasonable, the period between the passage and date of taking effect should be considered.[11]

Special statutes are applicable only where specifically made to apply,[12] but where applicable are exclusive.[13]

The statutes do not run against the state[14] and hence will not bar an action to abate a public nuisance,[15] nor against a municipal corporation in respect to property held by it for public use[16] or its right to exercise a governmental function,[17] nor as against a right to compel such action.[18] If an obligation is such that it cannot be satisfied except by payment, the general statute does not apply to it.[19]

Limitation is governed by the law of the forum,[20] but it is provided by statute in some states that the law of the place where the cause accrued shall control.[21]

on a contract is not barred, a defense of nonperformance is not. Enterline v. Miller, 27 Pa. Super. Ct. 463. The defense of reduction or recoupment which arises out of the same transaction as the promissory note or claim survives as long as the cause of action on the promissory note or claim exists, although an affirmative action upon the subject of the defense may be barred. Williams v. Neely [C. C. A.] 134 F. 1.

6. The statute does not apply to a defense of fraud set up by way of confession and avoidance by a reply to a plea setting up a release though an action to assail the release for fraud was barred. Under Rev. St. 1899, § 654, authorizing releases pleaded in bar to be avoided for fraud. State v. Stuart [Mo. App.] 86 S. W. 471.

7. Where in an action for reconveyance of land conveyed to one to secure him against loss on a recognizance bond signed by him, setting up the statute as against defendant's liability on the bond is not pleading it as a weapon but only as showing defendant's liability. Morris v. Hulme [Kan.] 81 P. 169.

8. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521; Bickerdike v. State, 144 Cal. 681, 78 P. 270. Hence, a statute authorizing a suit against the state for claims already barred is not a gift of public money. Id. Code 1902, § 426, limiting a right of action to recover land sold by the sheriff to two years is a pure limitation statute and does not run against infants. Jones v. Boykin, 70 S. C. 309, 49 S. E. 877.

9. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521.

10. 15 months is reasonable. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521.

11. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521.

Note: The court in Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521, say that while there is some conflict in the decisions, the great weight of authority is to the effect that such time should be considered, citing Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715; Smith v. Morrison, 22 Pick. [Mass.] 430; Duncan v. Cobb, 32 Minn. 460, 21 N. W. 714; Eaton v. Supervisors, 40 Wis. 668; Hedger v. Rennaker 3 Metc. [Ky.] 255; Hart v. Bostwick, 14 Fla. 180; Korn v. Browne, 64 Pa. 55; Clay v. Iseminger, 190 Pa. 580, 41 A. 38; O'Brien v. Gaslin, 30 Neb. 347, 30 N. W. 274.

Contra: Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118.

12. Code § 989, does not apply to a reassessment. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471. Special limitation on proceeding to cancel tax certificate does not apply where it is wholly void. Hamar v. Leihy [Wis.] 102 N. W. 568. Special statutes apply only to the causes of action specifically provided for. Bickerdike v. State, 144 Cal. 681, 78 P. 270. Rev. St. 1898, § 3844, prescribing the time within which claims against estates of decedents shall be presented does not apply to an action for accounting of a partnership estate cognizable by equity and governed by § 4221. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

13. Code Civ. Proc. § 2253, prescribing a twenty-year period within which to file a petition to determine rights to escheated property. In re Pomeroy's Petition [Mont.] 81 P. 629.

14. See 4 C. L. 464, n. 99. The rule that limitations run against the state was abolished in Indiana in 1881 and a complaint which does not show that the bar was complete at that date does not show a bar of the statute. McCaslin v. State [Ind. App.] 75 N. E. 844.

15. Weiss v. Taylor [Ala.] 39 So. 519.

16. Streets. City of Chicago v. Pooley, 112 Ill. App. 343; Wakeling v. Cocker, 23 Pa. Super. Ct. 196.

17. To remove obstructions from public streets. Pew v. City of Litchfield, 115 Ill. App. 13.

18. Pew v. City of Litchfield, 115 Ill. App. 13.

19. The lien of municipal taxes cannot be removed in Washington except by payment. State v. Mutty [Wash.] 82 P. 118, citing other states in accord.

20. See 4 C. L. 448. An action on a judgment obtained against a decedent in his lifetime is governed by the statute of the state in which he died, and where his estate is located and the action brought and not by the statute of the state in which the judgment was obtained. First Nat. Bank v. Hazie [R. I.] 61 A. 171.

21. An action accruing against a foreign

Such statutes are strictly construed.[22] Where a cause of action accrues in a state where it cannot be enforced the statute of the state where it can be enforced governs.[23]

Admiralty[24] *and equity*[25] are not bound by, but usually act in analogy to statutes of limitation.[26] In some jurisdictions, equity must give effect to the statutes.[27]

Contractual limitations.[28]—Parties to a contract may stipulate the period within which an action accruing thereon must be brought,[29] but such period must under all the circumstances be reasonable.[30] Such stipulations are governed as to validity by the law of the forum,[31] and when in a by-law of an association must rest on one to which the member is legally bound.[32] A limitation provision in a policy of insurance cannot be waived by agents without express authority from the managing officers.[33]

The defense of the statute may be waived,[34] but the agreement to do so must be clear and distinct[35] but need not be in writing.[36] Such agreement can be taken advantage of only by bringing action on it or pleading it as a foundation of an estoppel.[37]

§ 2. *Classes of actions and the respective periods.*[38]—The period within which an action must be brought is expressly prescribed by the statute, and the only difficulty rests in determining which statute is applicable to the particular cause.[39]

corporation in Kansas where such corporation cannot plead the statute is not barred when sued on in Missouri where the contrary rule prevails. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506.

22. The Kentucky statute St. 1903, § 2542, providing that when a cause of action accrues in a foreign state between residents thereof or between them and residents of another state and is barred by the laws of the state where it accrued, it cannot be enforced in Kentucky, does not apply where a cause accrues in a foreign state against a citizen of Kentucky. Manders' Committee v. Eastern State Hospital, 27 Ky. L. R. 254, 84 S. W. 761.

23. Manders' Committee v. Eastern State Hospital, 27 Ky. L. R. 254, 84 S. W. 761.

24. See 4 C. L. 448; Admiralty, 5 C. L. 35.

25. See 4 C. L. 448; Equity, 6 C. L. 1144.

26. Unless unusual conditions or extraordinary circumstances render it inequitable a suit will not be stayed before and will be stayed after the period of limitations has expired. Williams v. Neely [C. C. A.] 134 F. 1; Barrett v. Mutual Life Ins. Co., 27 Ky. L. R. 586, 85 S. W. 749; Columbian University v. Taylor, 25 App. D. C. 124.

27. See 4 C. L. 448, n. 21. When pleaded. Baldwin & Co. v. Williams [Ark.] 86 S. W. 423.

28. See 4 C. L. 450, n. 40. As to validity of contractual limitations, see Contracts, 5 C. L. 689, n. 62 et seq.

29. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. In a life policy. Metropolitan Life Ins. Co. v. Caudle [Ga.] 50 S. E. 337. Code Civ. Proc. § 414, expressly provides that parties to a written contract may stipulate for a limitation period shorter than that allowed by the statute. Butler v. Supreme Council A. L. H., 93 N. Y. S. 1012. **But see** 4 C. L. 450, n. 41.

30. Six months **held unreasonable** in this case because the measure of damages sustained was not ascertainable until the entire period had elapsed. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. A stipulation in a policy of insurance that no action shall be maintained unless within one year from the death of the insured **is reasonable.** Metropolitan Life Ins. Co. v. Caudle [Ga.] 50 S. E. 337. Where a contract for carriage stipulates that an action thereon must be brought within a specified time, the burden is on the carrier to show that such period is reasonable. Missouri, etc., R. Co. v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871.

31. Missouri, etc., R. Co. v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871.

32. A by-law of a fraternal order prescribing the period within which actions must be brought on the policies is not binding on the beneficiaries of a member who took his policy prior to the adoption of such by-law. Butler v. Supreme Council, A. L. H., 93 N. Y. S. 1012.

33. Metropolitan Life Ins. Co. v. Caudle [Ga.] 50 S. E. 337.

34. Makers of a promissory note may stipulate therein that they will waive the statute. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

35. Not sufficient where an indorser requested the holder of a note to try and collect from one previously liable and agreeing to pay the balance. Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002.

36. An agreement not to plead the statute as against a debt is not an acknowledgment of it nor a promise to pay it, hence is not within the statute requiring an acknowledgment or promise to be written. Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002.

37. Newell v. Clark [N. H.] 61 A. 555.

38. See 4 C. L. 449.

39. See also Contracts, 5 C. L. 664; Mortgages, 4 C. L. 677; Trespass, 4 C. L. 1698, and like topics.

Different periods are prescribed for actions for the recovery of land[40] or to enforce charges on real estate,[41] to foreclose mortgages[42] or redeem from foreclosure,[43] to enforce mechanic's liens[44] or set aside tax sales;[45] actions on judgments[46] to recover a penalty;[47] actions against public officials;[48] actions on written instruments[49]

40. Under Code §§ 3447, 3448, limiting actions on written instruments and for the recovery of land to ten years, an action to reform a deed is barred after sixteen years. Garst v. Brutsche [Iowa] 105 N. W. 452. Code Civ. Proc. § 318, limiting actions for the recovery of real property to five years from the time the plaintiff, his ancestor, predecessor, or grantor was seised or possessed thereof, applies to an action by a widow to recover land conveyed by her deceased husband during his lifetime, through fraud and undue influence of the grantee. Page v. Garver, 146 Cal. 577, 80 P. 860. Under the North Carolina statutes where a decree charging lands with owelty in partition was confirmed in 1862, a proceeding for leave to issue execution to recover the owelty, instituted in 1903, was barred. Ex parte Smith, 134 N. C. 495, 47 S. E. 16. Under Code 1892, § 2731, prescribing a ten-year period as to one "claiming land in equity" it is immaterial whether defendants have been in adverse possession. Jones v. Rogers [Miss.] 38 So. 742. The one year referred to in the thirty-year statute for the recovery of land is simply a saving clause in favor of persons who might be affected at the time the law was enacted and does not confer any rights. Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. An action by a purchaser at execution sale to try title to land as against one who asserts title under a fraudulent conveyance is one for the recovery of land and not barred by Rev. St. 1895 art. 3358, the four-year statute. Rutherford v. Carr [Tex.] 13 Tex. Ct. Rep. 119, 87 S. W. 815.

41. A voluntary deed to one heir by the others charging a sum of money on the land, interest to be paid to the widow for life, principal to the heirs. A claim for the principal if not asserted within 21 years after the death of the widow is barred by Act April 27, 1855, P. L. 368. DeHaven's Estate, 25 Pa. Super. Ct. 507.

42. Foreclosure of mortgages is governed by the ten-year statute. Bruce v. Wanzer [S. D.] 105 N. W. 282. Code § 152, subsec. 3, bars an action to foreclose a mortgage in ten years after the last payment on the debt. Bunn v. Braswell [N. C.] 51 S. E. 927. A grantee of mortgaged premises may add to the time the statute has run in his favor since he acquired the land, the time it had run in favor of his grantors. Paine v. Dodds [N. D.] 103 N. W. 931.

43. One seeking to redeem from a foreclosure sale based on a tax lien must bring his action within two years from the date of the tax sale. Clifford v. Thun [Neb.] 104 N. W. 1052.

44. In Arkansas an action to enforce a mechanic's lien for work done in the construction of a railroad must be brought within one year. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395.

45. Rev. St. 1898, § 1210h, limiting actions to set aside tax sale or to cancel a tax certificate, etc., to one year, applies to tax sales and certificates issued for local improvements. Hamar v. Leihy [Wis.] 102 N. W. 568.

46. Under Gen. St. Kan. 1901, § 4883, an action on a judgment against a decedent must be commenced within one year from the qualification of his representative, not within one year from the death of decedent. First Nat. Bank v. Hazie [R. I.] 61 A. 171. Code § 3439, prohibiting an action on a judgment for 15 years after rendition and § 3447 requiring actions thereon to be brought within 20 years limits the time in which an action may be brought to 5 years, the difference between 15 and 20 years after rendition. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521. Since a justice's judgment filed in a court of record is virtually a judgment of such court, the limitations controlling such judgments govern, hence a judgment barred by the terms of Code 1897, § 3470, when such statute was enacted are within Acts Gen. Assem. p. 103, c. 137, and an action brought thereon within one year from the passage of such act is timely. Haugen v. Oldford [Iowa] 105 N. W. 393. The amendments to Code Civ. Proc. §§ 376, 382, subd. 7, made by Laws 1894, p. 556, c. 307, changing the limitation on justice's judgments which are "hereafter docketed" or "shall be filed" does not apply to a judgment already docketed. McMahon v. Arnold, 94 N. Y. S. 775. A judgment of allowance of a claim against the estate of a decedent is not a judgment within Comp. Laws, 1897, § 2914, prescribing the limitation period for judgments. Gutierrez v. Scholle [N. M.] 78 P. 50. Code 1904, § 3577, bars an action on a judgment after twenty years though it could not be enforced during such period because the debtor's land was exempt. Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378.

47. The action under Laws 1895, c. 163, § 7, to recover for timber taken from state lands, enhanced damages being recoverable, is controlled by the three-year statute. Gen. St. 1894, § 5136. State v. Buckman [Minn.] 104 N. W. 240.

48. An action by a county to recover from the clerk of court witness fees paid him is not on a demand arising out of the exercise of its governmental functions and is governed by Shannon's Code, § 4473, requiring actions against public officials to be brought within ten years. Hamblen County v. Cain [Tenn.] 89 S. W. 103.

49. A cause of action **on a note and to foreclose a mortgage** is governed by Rev. St. 1899, § 3454, providing that actions upon a specialty or any agreement, contract or promise in writing must be brought within five years. Ingersoll v. Davis [Wyo.] 82 P. 867. Under Civ. Code 1895, § 3767, an action for breach of a **written contract** is not barred until six years from date of the breach. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. An **action by a surety for contribution** if brought upon the written evidence of indebtedness is governed by the period applicable to the instrument and if brought

sealed[50] or unsealed;[51] on express[52] or implied[53] contracts or implied trusts;[54] actions in tort;[55] or mistake or fraud;[56] to enforce rights accruing by virtue of statute,[57]

on the implied contract is governed by the period controlling implied assumpsit. Bigby v. Douglas [Ga.] 51 S. E. 606. An **ordinance** under which a city earned fees and salary is not a written contract within the four-year statute. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49. A written agreement by an insured to transfer to the insurer his right of action against any third person for causing the loss is sufficiently certain so that the action thereon is on a written contract. Egan v. Boston Ins. Co., 110 Ill. App. 1.

50. The South Dakota statutes abolishing the distinctions between sealed and unsealed instruments did not reduce the limitation period on sealed instruments, 20 years, prescribed by Code Civ. Proc. § 58. Gibson v. Allen [S. D.] 104 N. W. 275. It is not necessary that the seal be impressed upon wax or other adhesive substance in order to bring it within the twenty-year limitation governing sealed instruments. The written word "seal" is sufficient. Philip v. Stearns [S. D.] 105 N. W. 467. An action against a county which acquired a road under the Free Turnpike Act, to enforce payment of **bonds** issued by the road is governed by the five-year statute and an action against the company by the fifteen-year statute. Roush v. Vanceburg, etc., Turnpike Co., 27 Ky. L. R. 542, 85 S. W. 735. Ky. St. 1903, § 2514, prescribing a fifteen-year period for actions on bonds applies to a bond taken by a court commissioner to secure payment of purchase money for lands of a decedent. French v. Bowling, 27 Ky. L. R. 639, 85 S. W. 1182. An action upon an implied promise to pay an attorney for services rendered under a sealed **power of attorney** is not upon a sealed instrument and is not governed by the twenty-year limitation period applicable thereto, Pierce v. Stitt [Wis.] 105 N. W. 479.

51. The Arkansas five-year statute covering unsealed instruments applies to unsealed city **warrants** or warrants to which the seal has been affixed without authority of law. Condon v. Eureka Springs, 135 F. 566.

52. An action to recover **money loaned** is barred by Code Ala. 1896, § 2796, six-year statute. Dacovich v. Schley [C. C. A.] 134 F. 72. On **promissory notes,** six years. Iowa Loan & Trust Co. v. Schnase [S. D.] 103 N. W. 22. A **mortgage** is affected by the limitation applicable to contracts and not to judgments where a previous foreclosure was solely against the land and only partially, if at all efficient as to that. Brown v. Cates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149. The seven-year statute bars an **action against a surety** regardless of the obligee's knowledge of the suretyship. Weller v. Ralston [Ky.] 89 S. W. 698. The personal **liability of shareholders of a National Bank** under U. S. Rev. St., § 5151, for the obligations of the bank, is not a contract liability within Ball. Wash. Code § 4800, subd. 3. McClaine v. Rankin, 197 U. S. 154, 49 Law. Ed. 702. A loss under an insurance policy which occurred prior to the Royal Decree of 1889 extending the Civil Code to Porto Rico, is governed by the twenty-year period prescribed by the Spanish law. Royal Ins. Co. v. Miller, 26 S. Ct. 46. **A tax** not being a debt nor founded upon contract, express or implied, does not come within either the general or special statutes of limitation of Massachusetts. Bradford v. Storey [Mass.] 75 N. E. 256. The statute runs against an action on a **contract to waive limitations** as upon any other. Newell v. Clark [N. H.] 61 A. 555.

53. An action to recover an **assessment for local improvements** is barred after six years from the date of the judgment annulling it. Dennison v. New York, 182 N. Y. 24, 74 N. E. 486. The three-year statute, Code 1892, § 2739, applies to an **obligation to return usurious interest** payment of which was coerced. Buntyn v. National Mut. Bldg. & Loan Ass'n [Miss.] 38 So. 345. The five-year statute applies to an **action by a surety who has paid the debt,** to recover from the principal. Usher v. Tyler, 27 Ky. L. R. 354, 85 S. W. 166. Assumpsit **by a county to recover court costs** is upon an implied contract and is barred after five years. Fulton County v. Boyer, 116 Ill. App. 388. An action **for services** is barred in three years. Boogher v. Roach, 25 App. D. C. 324.

54. Code § 158, bars an action to recover funds held on implied trust, after ten years where no demand is made. Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212. Persons entitled to funds held on an implied trust are barred in three years after demand and refusal. Id.

55. The section of the Alaska Civil Government Act prescribing a two-year limitation for actions for libel, etc., or any injury to the person or rights of another not arising on contract, applies to an action for **deceit.** Tudor v. Ebner, 93 N. Y. S. 1067. Pub. Acts 1895, p. 297, c. 224, bars an action to recover damages for **injuries to land** caused by constructing a railroad, after five years. Stack v. Seaboard Air Line R. Co. [N. C.] 51 S. E. 1024. The one-year period prescribed for actions ex delicto applies to an action for damages for **trespass** in cutting down and carrying away timber. Gilmore v. Schenck [La.] 39 So. 40. A prosecution for **obstructing a highway** is barred after five years. Richardson v. State [Tex. Cr. App.] 85 S. W. 282.

56. Code Civ. Proc. § 338, subd. 4, prescribing a period of three years for relief on the ground of mistake or fraud, does not apply to an action to quiet title against a deed alleged to have been executed as a mortgage. DeLeonis v. Hammel [Cal. App.] 82 P. 349. Code Civ. Proc. § 338 subd. 4, prescribing a three-year period for relief on the ground of fraud and § 343 prescribing a four-year period for all other actions not otherwise provided for, bars an action for relief on the ground of fraud not brought within such period. Matteson v. Wagoner [Cal.] 82 P. 436.

57. Civ. Code 1895, § 3766, prescribing a twenty-year period for causes accruing to individuals under statutes or by operation of law applies only where a liability thus created is in favor of an individual as distinguished from one arising under the general law in favor of the public at large. Bigby v. Douglas [Ga.] 51 S. E. 606. Under Code Civ. Proc. § 343, prescribing a period of four years

and an omnibus clause covering all actions not otherwise expressly provided for.[58]

§ 3. *Accrual of cause of action and beginning of period.*[59]—The statute commences to run from the accrual of a cause of action and not before.[60] A cause of action accrues when there exists a demand capable of present enforcement,[61] a

for actions not otherwise provided for and § 338, subd. 1, prescribing a three-year period for actions upon a statutory liability other than penalty, mandamus to compel one's admission to the office of policeman is barred after nine years. Farrell v. San Francisco County Police Com'rs [Cal. App.] 81 P. 674. A petition for the appointment of viewers to assess damages for vacation of a street must be presented within six years after confirmation of the plan vacating the street, Act April 21, 1858, P. L. 385, and Act of March 27, 1713, 1 Sm. L. 76. Tabor St., 25 Super. Ct. 355; Butler St., 25 Pa. Super. Ct. 257.

58. An action by a lower riparian owner for injuries for **pollution of a water course** is within the one-year statute. Code 1896, § 2801, subd. 6. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762. It was error to refuse to instruct that damages done more than one year prior to action commenced could not be recovered for. Id. Under the equitable doctrine of subrogation, an action to **establish and enforce a lien of an assessment paid** is neither an action at law nor upon contract, nor upon a liability created by statute, and is, therefore, governed by the ten-year limitation prescribed by § 4985, Eddy v. Leath, 6 Ohio C. C. (N. S.) 249.

59. See 4 C. L. 453.

60. 2 Gen. St. p. 1976, § 6, barring an action upon a sealed instrument upon which no payment is made within sixteen years does not apply until a cause of action on such instrument accrues. Acton v. Shultz [N. J. Eq.] 59 A. 876. Does not apply where a cause of action does not accrue within sixteen years. Id. Under Rev. Codes N. D. 1899, § 3491a, the prescribed period begins to run with adverse possession, and not on the date of the first payment of taxes, accompanied by adverse possession. Schauble v. Schulz [C. C. A.] 137 F. 389. Where a wife loaned money to her husband and the circumstances showed that there was no understanding that it should be repaid immediately it was held a question for the jury as to when a cause of action to recover it accrued. Wilcox v. Wilcox [Mich.] 102 N. W. 954. Act March 3, 1887, c. 359, § 1, 24 Stat. 505, begins to run against a **suit by a marshal to recover fees** or disbursements from the time the service was rendered or disbursement made, and not from the expiration of his term of office. Walker v. U. S., 139 F. 409. The limitation of two years is an essential condition of the right to bring an **action for wrongful death,** and begins to run at once against the beneficiaries. Archdeacon v. Cincinnati Gas & Elec. Co., 3 Ohio N. P. (N. S.) 45. The statute runs against a **purchaser at delinquent tax sale** from the day he was entitled to present his certificate to the county auditor and receive a deed. Wolcott v. Holland, 5 Ohio C. C. (N. S.) 604. A cause of **action by a share holder to recover a tax dividend** declared by a bank accrues at the time the taxes are payable. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796. Where, notwithstanding a guardian's removal, he continued to act until his ward's majority, at which time his **final settlement** was confirmed by the probate court, a cause of action on his bond to recover an amount due accrues at such time. Wallace v. Swepston [Ark.] 86 S. W. 398. An action to recover usury upon a **series of transactions** accrues only when all the transactions are closed. Slover v. Union Bank [Tenn.] 89 S. W. 399. A cause of action **to recover an assessment loan** conditioned to become absolute when all stockholders paid their assessments does not accrue until a reasonable time has elapsed within which to collect such assessments. Steck v. Bridgeport Water Co., 24 Pa. Super. Ct. 188.

61. A right of action in one who acquires from the state land in the adverse possession of another, does not accrue until the date of the grant. Lindsay v. Austin [N. C.] 51 S. E. 990. If the settlement of a guardian's account is not final a cause of action to falsify it does not accrue until the probate court orders the amount paid over. Wallace v. Swepston [Ark.] 86 S. W. 398. A cause **to enforce the individual liability of stockholders of a National Bank** accrues as to a state statute when the amount has been ascertained and assessed by the Comptroller of Currency and not before. Rankin v. Barton, 26 S. Ct. 29. An agreement by an insured to assign to the insurer his right of action against any third person whose act shall cause a loss is broken when insured himself recovers on such right of action. Egan v. Boston Ins. Co., 110 Ill. App. 1. Creditor might have sued insolvent estate at any time between 1857 and 1880. Nutt v. Brandon [Miss.] 38 So. 104. Limitations do not begin to run against an **action against a city for the wrongful diversion of a special fund** designated for the payment of improvement warrants until the holder has notice of such diversion. Hemen v. Ballard [Wash.] 82 P. 277. **A cause of action on city warrants** does not accrue until a fund is provided for their payment. Barnes v. Turner, 14 Okl. 284, 78 P. 108.

Note: The decision purports to proceed upon the rule that when payment of town warrants is to be made out of a particular fund, the cause of action does not accrue until that fund is provided. This proposition is based upon an interpretation of the city's promise as one to pay when the money is available, and though denied in some jurisdictions, it may possibly be regarded as established. Lincoln County v. Lunning, 133 U. S. 529, 33 Law. Ed. 766. Contra. Wilson v. Knox County [Mo.] 28 S. W. 896. In most of the cases, however, it seems a fair inference from facts not always clear that it never rested with the warrant-holder to determine when the funds should be available; for the warrants were payable only out of money derived from the general taxes and appropriated to the special purpose, and the creditor had no remedy on the warrants if the revenues were disbursed in other ways.

suable party against whom it may be enforced,[62] and a party who has a present right to enforce it,[63] hence, on an obligation payable on demand, a cause of action accrues at its date;[64] but if an extension is granted no cause of action accrues until its expiration,[65] and if an obligation matures upon the happening of a contingency, no cause accrues until it happens.[66] A permissive condition for accelerated maturity does not accelerate the accrual of the cause of action,[67] but an absolute one does.[68] A cause of action for wrongful act, based on consequential as distinguished from direct damages, and which involves an act which might have proved harmless, accrues only upon the actual occurrence of damage,[69] hence, when a nuisance is not necessarily

See Sawyer v. Colgan, 102 Cal. 283. In the Oklahoma case the plaintiff could plainly have compelled the provision of the fund at any time by instituting mandamus proceedings. Goldman v. Conway County, 10 F. 888. The case seems, therefore, a questionable extension of the general principle relied on. See, however, Davis v. Commissioners of Lincoln County, 23 Nev. 262.—18 Harv. L. R. 230.

Note: The right of action of a vendee to recover payments made under a parol contract for the sale of land does not accrue until the vendor repudiates the contract. Collins v. Thayer, 74 Ill. 138; Walker v. Walker, 21 Ky. L. R. 1521, 55 S. W. 726; Lyttle v. Davidson, 23 Ky. L. R. 2262, 67 S. W. 34.—From note to Durham v. Wick [Pa.] 105 Am. St. Rep. 797.

62. A cause of action on a guardian's bond to recover an amount due from the guardian accrues at the time the guardianship is terminated if there be a person capable of suing therefor. Wallace v. Swepston [Ark.] 86 S. W. 398. Under Rev. St. 1898, §§ 4221, subd. 4, 4251, where at the time a cause of action cognizable in chancery accrues, there is no person in existence authorized to sue, the action is not barred until 20 years. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

63. There is no person in existence to bring an action in favor of the estate of a decedent which arises after his death until an executor or administrator is appointed. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

64. On demand paper. Luther v. Crawford, 116 Ill. App. 351. On city warrants payable on demand, at the date of delivery.. Condon v. Eureka Springs, 135 F. 566. A right of action against sureties on demand paper accrues on the date of delivery. Newell v. Clark [N. H.] 61 A. 555. An action to recover money deposited with one to be delivered to another accrues at the date of delivery though the beneficiary is ignorant of the delivery. Commonwealth Title Ins. & Trust Co. v. Folz, 23 Pa. Super. Ct. 558. One who, intrusted with another's money, negligently loans it to an insolvent is not liable to the owner unless demand is made within the period of limitations. Hitchcock v. Casper [Ind.] 73 N. E. 264. A cause of action **for contribution among joint tort feasors** accrues when one pays the whole. The Conemaugh, 135 F. 240.

65. Iowa Loan & Trust Co. v. McMurray [Iowa] 105 N. W. 361. Where an indorser of demand paper waives demand for payment at the time it was to have been paid, a cause of action against him does not accrue until subsequent demand and notice within a reasonable time. Hampton v. Miller [Conn.] 61 A. 952.

66. On a contract made to become due on the happening of a contingency. Noyes v. Young [Mont.] 79 P. 1063.

67. That default in payment of interest shall mature the obligation at the option of the holder. Blakeslee v. Hoit, 116 Ill. App. 83. A cause of action on a note payable in instalments, though the entire note might be paid at any time, accrues at the maturity of each instalment. Bissell v. Forbes [Cal. App.] 82 P. 698. A provision in a mortgage accelerating maturity upon failure to pay instalments of interest when due is for the benefit of the mortgagee only and limitations do not run from default but only from maturity according to terms. White v. Krutz, 37 Wash. 34, 79 P. 495.

68. Snyder v. Miller [Kan.] 80 P. 970, holding that such provision is for the benefit of both parties and either is entitled to any advantage arising by virtue of it.

69. A cause of action against a register of deeds who fails to correctly register a conveyance accrues when the vendee is deprived of his property by reason thereof and not at the time the mistake was made. State v. McClellan, 113 Tenn. 616, 85 S. W. 267.

NOTE. Against public officials: The principal case is noteworthy in that the question involved as to the time of accrual of the action has never before been passed upon by this court. And the authorities upon the doctrine enunciated are conflicting. State v. Grizzard, 117 N. C. 105; Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264, in which latter case a strong dissenting opinion supports the holding in the principal case. These decisions seem to overlook the essential elements necessary to actions against public officers. Mechem, Public Officers, § 674. The case of Wilcox v. Plummer, 4 Pet. [U. S.] 172, 7 Law. Ed. 821, is frequently cited as opposed to the principal holding. But this action was based upon a breach of contract arising out of the relation of attorney and client, and did not involve a neglect of official duty. Hence, it was held a cause of action immediately resulted from the breach which is consistent with the general rule. So, too, Kerns v. Schoonmaker, 4 Obio, 331, and Lathrop v. Snellbaker, 6 Ohio St. 276, are cited as contrary to the principal case; but a distinction is to be noted here, in that the plaintiffs in these cases could have themselves determined the invalidity of the bonds in suit; and upon execution issued their right of action against the defendant justices of the peace would have been complete. Steel v. Bryant, 49 Iowa, 116; followed in Moore v. McKinley, 60 Iowa, 367; Hartford v. Waterman, 26 Conn. 324; People, to the Use of

injurious but becomes so, and inflicts intermittent damage, the cause of action accrues at the time the injury is inflicted and not before.[70] A creditor's cause of action to assail a fraudulent conveyance does not accrue until he reduces his claim to judgment[71] and the purchaser takes adverse possession of the property.[72] A cause of action in a remainderman relative to the estate does not accrue during the continuance of the life estate[73] unless he has a right to maintain an action.[74] Actions accrue on divisible accounts for labor at the time the service is performed unless a contrary intention is shown,[75] but when there is an undertaking or agency which requires a continuation of services, the statute does not run until the termination of the agency or undertaking.[76] If a right be either in action or in possession, the bar does not run against the action while the right of, or remedy by, possession is being exercised.[77] Thus it does not run in favor of a mortgagee in possession[78] nor against the right to redeem from a mortgage so long as the relation of mortgagor and mortgagee exists.[79]

Tritch v. Cramer, 15 Colo. 155, are relied on in the decision of the principal case, and seem to represent the weight of reason, if not of authority.—3 Mich. L. R. 674.

70. Damage caused to adjacent lands by failure to keep a ditch open. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846. A cause of action for injuries to property because of smoke from railroad premises accrues as each successive injury occurs. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. In an action for damages to real property from a private nuisance continuous but not permanent in character, the five-year statute does not commence to run at the beginning of the nuisance but only from occurrence of damage. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872. Damage for five years may be recovered though the nuisance and damage began more than five years before action was brought. Id. Where an injury to crops and land is caused by the negligent construction of a railroad embankment which arrested and held upon said lands the flood waters of a natural stream, the cause of action accrues at the date of the injury and not at the date of the construction of the embankment. Chicago, etc., R. Co. v. Mitchell [Neb.] 104 N. W. 1144.

71. Watt v. Morrow [S. D.] 103 N. W. 45, and cases cited. Since an action in the nature of a creditor's bill to reach property fraudulently conveyed cannot ordinarily be maintained until the claim has been reduced to judgment, limitations do not run until judgment is obtained. Ainsworth v. Roubal [Neb.] 105 N. W. 248, disapproving Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302.

72. Not where the change of possession was colorable only, the grantor remaining in possession claiming to be agent of his wife who asserted that she was tenant of the purchaser who it does not clearly appear was bona fide. Baldwin & Co. v. Williams [Ark.] 86 S. W. 423.

73. Bechdoldt v. Bechdoldt, 217 Ill. 537, 75 N. E. 557; Pryor v. Winter [Cal.] 82 P. 202; Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044. Right of possession. Hubbird v. Goin [C. C. A.] 137 F. 822. Not against the heirs of a married woman in favor of a grantee of her husband of land belonging to the married woman until the death of her husband and consequent cessation of his tenancy by the curtesy. Wilson v. Frost, 186 Mo. 311, 85 S. W. 375. Not in favor of one holding under a life tenant as against the remainderman until the death of the life tenant. Holders of a tax deed conveying only the life estate. Smith v. Proctor [N. C.] 51 S. E. 889. Not against a reversioner until the expiration of the intermediate estate. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

74. As where the premises are in the adverse possession of a stranger. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84. Where infant remaindermen have a right of action to have their interests determined, limitations run during the existence of the particular estate. Hubbird v. Goin [C. C. A.] 137 F. 822.

75. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395. The right of action of a principal to recover money collected for him by an agent whose duty it is to remit without an accounting accrues at the date of the collection. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059. An account for services rendered during a period of twenty years the items of which are made up from letters received during such period is not a book account current within Rev. St. 1899, § 4278, providing that a cause of action on an account current does not accrue until the date of the last item. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

76. Continuous service as attorney for seventeen years. Wilson v. Miller [Va.] 51 S. E. 837.

77. When the refusal to purchase or sell a tract of land is given in consideration of a loan for which the note is executed, with the agreement that the right thus accorded is to be terminated on payment of the note, held that the agreement of the parties is the law of the case and that under the agreement the prescription of the note was not its payment and that moreover the agreement embodying as it did a **species of pledge** operated as a constant interruption of prescription. Succession of Darton, 113 La. 875, 37 So. 861.

78. One in possession under a void foreclosure sale is a mortgagee in possession.

As between stockholder, corporation, and creditors.[80]—On a stock subscription, contract not payable in full presently but subject to calls, limitations do not run until a call is made,[81] and a call need not be made within the statutory period from date of subscription.[82] The levy of an assessment which is afterwards rescinded does not start limitations as to a subsequent assessment.[83]

Mistake and fraud.[84]—A cause of action for mistake[85] or fraud[86] accrues at the time it was, or by the exercise of ordinary diligence should have been discovered; and a party who has at hand means by which fraud could have been readily discovered, and such means would have been used by a person of ordinary diligence, is held in law to have notice of everything which such means would have disclosed,[87] but the period is not extended as to others than the parties to the fraud and their privies.[88]

Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

79. This rule applies as to one holding under a mortgagee who was placed in possession as such. Catlin v. Murray, 37 Wash. 164, 79 P. 605.

80. See 4 C. L. 456. See, also, Corporations, 5 C. L. 764.

81. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. Under Civ. Code § 332, subd. 1, a cause of action does not accrue on the liability of stockholders on unpaid stock until levy of an assessment. Union Sav. Bank v. Leiter, 145 Cal. 696, 79 P. 441.

82. Cook v. Carpenter, 212 Pa. 165, 61 A. 799.

83. Union Sav. Bank v. Leiter, 145 Cal. 696, 79 P. 441.

84. See 4 C. L. 457.

85. See 4 C. L. 457. Cause of action for mistake accrues at the time the mistake was, or by the exercise of ordinary diligence should have been, discovered. Ky. St. 1903, §§ 2515, 2519. German Security Bank v. Columbia Finance & Trust Co., 27 Ky. L. R. 581, 85 S. W. 761. A cause of action to reform a deed for mistake accrues at the time such mistake is discovered. Garst v. Brutsche [Iowa] 105 N. W. 452.

86. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48. Must be brought within four years from the discovery of fraud or such facts and circumstances as are indicative thereof and if followed up would lead to its discovery. Weckerly v. Taylor [Neb.] 103 N. W. 1065. Where a tax is refunded in reliance on a fraudulent certificate that it had been worked out, an action does not accrue until the money is refunded and the fraud discovered. Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716. Where one standing in a fiduciary relation to another practiced fraud upon him and concealed the facts. Barnes v. Huffman, 113 Ill. App. 226. Code 1904, art. 57, § 14, applies to a fraudulent transaction and a subsequent concealment of it from the defrauded party by the person who practiced the fraud. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469. Code § 155, applies only when the ground of the action is fraud or mistake and runs from the discovery of the fraud or mistake and not from the discovery of rights hitherto unknown. Bonner v. Stotesbury [N. C.] 51 S. E. 781. Right to assail a fraudulent conveyance. Fidelity Nat. Bank v. Adams, 38 Wash. 75, 80 P. 284. Burns' Ann. St. 1901, § 301, suspending the general statute in cases of fraud until the fraud is discovered, applies to an action by a ward, after the termination of her guardianship by marriage, to recover funds remaining in his hands, §§ 2557, 2558, special statutes relative to final settlements do not. Roberts v. Smith [Ind.] 74 N. E. 894.

Concealed fraud, if not within the statutory exception does not suspend the statute. Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342.

Note: In construing statutes of limitations containing no exemption clauses, some courts have been inclined to deny the defense to one who has concealed the existence of the plaintiff's cause of action for the statutory period. Cf. First, etc., Corporation v. Field, 3 Mass. 201. Several of these decisions, however, may perhaps be explained on the ground that in their jurisdiction there were no equity courts to relieve the plaintiff against its effect. And the better opinion certainly holds that no exception can be read into such a statute. Board, etc. of Somerset v. Veghte, 44 N. J. Law, 509. When, as in the present case, the legislature has provided that causes of action based upon fraud, which have been concealed, shall not be deemed to have accrued until discovered, it would seem clear that according to a well recognized canon of statutory construction causes of action not based on fraud should not be entitled to the same exemption. See Amy v. City of Watertown, 22 F. 418, 420. The present case, therefore, seems preferable to a contrary decision reached under a similar statute in Iowa. Cf. District etc., of Boomer v. French, 40 Iowa 601.—18 Harv. L. R. 623.

87. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48. One induced by fraud to execute a conveyance of land in which he had a remainder interest under a will is barred where he does not maintain action for 23 years during the whole of which period he could have ascertained the fraud from the records of the probate court. Id. Evidence held to show that one induced by fraud to purchase bank stock should have discovered the fraud more than the statutory period before action was brought. Meehan v. Peck [Ky.] 89 S. W. 491. Whether a defrauded party sued within the statutory period after he discovered or by the exercise of ordinary diligence should have discovered fraud in the conduct of an insurance agent, held a question for the jury. New England Mut. Life Ins. Co. v. Swain [Md.] 60 A. 469.

§ 4. *Time tolled and computation of period.*[88]—Besides the circumstances enumerated in the statute as postponing or interrupting it,[89] the commencement of an action in a court of competent jurisdiction tolls the statute[91] as to the cause of action stated, but not as to others for the same subject-matter.[92] An action by a ward against her former guardian, and a surety on his bond to falsify and surcharge his account, does not toll the statute as to the heirs and administrator of a deceased surety not a party.[93] It is tolled by a recognition of the obligation and attempt to perform it.[94] The giving of securities in conditional payment of a debt tolls the statute as to a right of action on the debt during the currency of the securities.[95] An agreement extending time of payment suspends the operation of the statute,[96] but a request for an extension is insufficient in the absence of an acceptance.[97] Where a judgment is severed and a portion only appealed from, the appeal does not suspend the statute as to the portion from which no appeal was taken.[98] The issuance of execution on a judgment tolls the statute as to an action to enforce it.[99] A judgment against a widow and heirs, establishing a debt against a decedent whose estate had not been administered, tolls the statute as to such debt.[1] The statute is tolled where in a partition suit a party consents to a decree recognizing a lien on his interest in the tract.[2] Where a note and mortgage stipulate for an accelerated maturity of postponed payments in case of default of payment of taxes, on the mortgaged premises or earlier instalments of the debt, and default is made, the statute is started to run and is not tolled by the payment of taxes by a purchaser from the mortgagor who did not assume the mortgage.[3] The death of a co-mortgagor does not toll the statute as to the surviving mortgagor.[4]

§ 5. *What is commencement of action. A. In general.*[5]—An action is commenced by filing a complaint and the issuance of summons.[6] The filing must be bona fide[7] but the complaint need not be verified[8] and the summons need not be delivered to the sheriff for service.[9] A cause of action timely brought attaches timeliness as to the parties to all proceedings therein which do not assert a new cause

88. Bill alleging "divers persons" combined to defraud does not show a right to sue after the termination of the statutory period. Jones v. Rogers [Miss.] 38 So. 742.

89. See 4 C. L. 458.

90. See post, § 6.

91. Jurisdiction dependent on the amount in controversy is fixed by the ad damnum clause of the complaint. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

92. The commencement of an action in ejectment does not toll the statute as to a cause of action for the same land based on title subsequently acquired. Covington v. Berry [Ark.] 88 S. W. 1005.

93. Such action in equity did not lift the estate out of the probate court. Wallace v. Swepston [Ark.] 86 S. W. 398.

94. Where drainage commissioners recognize their obligation to alter a certain outlet. Kreiling v. Northrup, 116 Ill. App. 448.

95. Davis' Adm'x v. Davis [Va.] 51 S. E. 216.

96. An extension agreement executed by a mortgagor is binding on his subsequent grantee. White v. Krutz, 37 Wash. 34, 79 P. 495.

97. Woolwine v. Storrs [Cal.] 82 P. 434. Evidence held to show that a requested extension had not been granted and that there had been no written acknowledgment of the debt within the statutory period. Id.

98. Britton v. Matlock [Tex. Civ. App.] 14 Tex. Ct. Rep. 55, 89 S. W. 1092.

99. Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378.

1. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

2. Moon's Adm'x v. Highland Development Co. [Va.] 52 S. E. 209.

3. By payment of such taxes he did not waive his right nor estop himself to plead the statute against an action to foreclose. Snyder v. Miller [Kan.] 80 P. 970.

4. Hibernia Sav. & Loan Soc. v. Boland, 145 Cal. 626, 79 P. 365.

5. See 4 C. L. 459.

6. The filing of the praecipe and the issuance of the summons. Colonial Mutual Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

7. Handing the clerk a petition with instructions to indorse upon it an entry of filing and to issue process but "to hold it" until further notice is not the filing of a suit or commencement of an action under Civ. Code 1895, § 4973, until the instructions are withdrawn. Jordan v. Bosworth [Ga.] 51 S. E. 755.

8. Under Ky. St., 1903, § 2524, providing that an action is commenced when the first process is issued in good faith and Code Civ. Prac. § 39, that it is commenced by filing the petition and causing a summons to issue, the petition need not be verified when filed. City of Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136.

of action,[10] but where a mortgagee in foreclosing does not claim all the relief he is entitled to, he cannot, after the bar of the statute is complete, have a decree for the remainder.[11] If the record of appeal does not show the date of commencement of the action, it will be deemed commenced at the date of filing an amendment, which date appears.[12]

(§ 5) *B. Amendment of pleading.*[13]—An amendment founded on the same wrong and pleading the same substantial facts as the original complaint, but in different form,[14] or containing a re-statement of the cause in different terms,[15] or which eliminates needless particularity,[16] or corrects a defect in the original complaint,[17] or states additional reasons for defendant's liability,[18] or claims a different measure of damages,[19] and which does not change the cause of action originally relied upon,[20] for the purpose of limitations, relates back to the date of filing the original complaint; but one setting up a different cause of action,[21] or which sets up a claim not asserted in the original complaint,[22] or an amendment to a com-

9. Rich v. Scallo, 115 Ill. App. 166.

10. A supplement to a petition filed after the bar of the statute was complete held not to set up a different cause of action. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471. Limitations do not run against the rights of non purchasing stockholders of a joint stock realty association to compel stockholders who had purchased assets of the association and their vendees to refund, during the pendency of a suit to wind up the affairs of the company. Randolph v. Nichol [Ark.] 84 S. W. 1037. A suit to foreclose a mortgage if timely commenced is not barred as to one who acquired title from the mortgagor who intervenes after the bar is complete. Less v. English [Ark.] 87 S. W. 447. A proceeding to revise a joint judgment is commenced when some of the plaintiffs have been made parties to the petition in error and have appeared and commenced as to all persons united in interest who have not been made parties. Snider's Ex'rs v. Young [Ohio] 74 N. E. 822. A reorganized corporation which has covenanted to save receivers harmless from liability incurred by them in the management of the road cannot plead limitation to an action on a judgment for injuries recovered in an action against the receivers. Baer v. Erie R. Co., 95 N. Y. S. 486.

11. Dubois v. Martin [Neb.] 99 N. W. 267.

12. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395.

13. See 4 C. L. 460.

14. Terre Haute & I. R. Co. v. Zehner [Ind.] 76 N. E. 169. An amendment which differs from the original only in the allegations as to the manner in which the negligence took place, relates back. Town of Cicero v. Bartelme, 114 Ill. App. 9. Original complaint and amendment held not to allege that the accident complained of occurred at different places. Id. Amendment to a cause of action for negligence in so operating a street car as to collide with plaintiff held not to set up a different cause of action. South Chicago City R. Co. v. Kinmare, 216 Ill. 451, 75 N. E. 179.

15. Merchants Loan & Trust Co. v. Boucher, 115 Ill. App. 101; Wabash R. Co. v. Bhymer, 112 Ill. App. 225.

16. Eliminates needless particularity in describing the tort complained of and the means adopted in effecting it. Hopkins v. St. Louis, B. & S. R. Co., 112 Ill. App. 364.

17. Changing the name of the payee in a promissory note sued on. Ball v. Lowe [Cal. App.] 81 P. 1113. An amendment striking out the words "as executors" after the names of defendants does not set up a different cause of action. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723.

18. City of Louisville v. Robinson's Ex'r 27 Ky. L. R. 375, 85 S. W. 172.

19. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930.

20. A complaint alleging that one injured by the negligence of defendant was defendant's servant may be amended to allege that he was the servant of a third person. Herbstritt v. Lackawanna Lumber Co., 212 Pa. 495, 61 A. 1101. Where the original claim filed against a decedent's estate is based on a judgment and an amended one upon a check and money loan, such amendment relates back where it is made to appear that the original and amended claims pertain to the same transaction. Carter v. Pierce, 114 Ill. App. 589.

21. A complaint alleging certain acts of negligence cannot be amended after the period has elapsed by alleging other acts. Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879. Amendment to a petition to enforce the payment of bonds held to set up a different cause of action. Roush v. Vanceburg, etc., Turnpike Co., 27 Ky. L. R. 542, 85 S. W. 735. A complaint alleging an unconditional promise to pay cannot be amended to allege a conditional promise. Rogers v. Byers [Cal. App.] 81 P. 1123. Does not relate back, and, though allowed, the statute may be set up. Serrell v. Forbes, 106 App. Div. 482, 94 N. Y. S. 805. An amendment bringing in new parties after the cause against them is barred cannot be allowed. City of Louisville v. Robinson's Ex'r, 27 Ky. L. R. 375, 85 S. W. 172. A new party defendant cannot be brought in by amendment after the statute has run. Anderson v. Atchison, etc., R. Co. [Kan.] 80 P. 946. **But see** Snider's Ex'rs v. Young [Ohio] 74 N. E. 822, holding that a petition in error may be amended by adding names of persons who have been omitted and such amendment may be made after the limitation period has elapsed.

22. A complaint alleging negligence by

plaint which did not state a cause of action,[23] does not, and, if filed after the statute has run, is open to demurrer.[24] Whether an amendment sets up a different cause of action is a question of law.[25] A reply filed after the bar is complete relates back to the commencement of the action.[26]

(§ 5) *C. After nonsuit or dismissal.*[27]—In many states it is provided by law that if an action fail otherwise than on the merits, a new action may be commenced within a prescribed period.[28]

§ 6. *Postponement, interruption, and revival. A. General rules.*[29]—Subject to the rule that "time does not run against the sovereignty"[30] the statutes are applied generally and in all cases where exception to their operation is not specifically made by statute,[31] and after they have once commenced, run over all subsequent disabilities and intermediate acts and events[32] unless otherwise expressly provided.[33] Disabilities cannot be tacked.[34] An apparent exception to the general rule is where a mortgagee or pledgee is in possession, the true reason being that there is no accrual of the cause of action to either party so long as the possession continues to be rightful.[35]

Revival of statute-barred causes[36] will not be read from a statute unless it is so provided in express terms.[37]

(§ 6) *B. Trusts.*[38]—The statute does not run in favor of the trustee of an ex-

defendant's contractor cannot be amended to allege negligence by defendant. Fleming v. Anderson [Ind. App.] 76 N. E. 266.

23. Strojny v. Griffin Wheel Co., 116 Ill. App. 550.

24. Clifford v. Thun [Neb.] 104 N. W. 1052.

25. Merchants Loan & Trust Co. v. Boucher, 115 Ill. App. 101.

26. State v. Coughran [S. D.] 103 N. W. 31.

27. See 4 C. L. 461.

28. Shannon's Code §§ 4025, 4026, 4027, 4028, providing that an action for injuries does not abate by the death of the injured person; that an action may be maintained by his widow, etc.; that if deceased had commenced an action it shall proceed without revivor,—do not create a new right of action in the widow but preserves to her rights under an action commenced by her husband and she can dismiss such action and commence another within one year under the provisions of Shannon's Code, § 4446. Stuber v. Louisville & N. R. Co., 113 Tenn. 305, 87 S. W. 411. The purpose of Wilson's Rev. & Ann. St. 1903, § 4221, is to save to plaintiff in an action timely commenced, "a right to commence a new action, within one year if he fails in such action otherwise than on the merits for the same cause as the prior one and not for a cause accruing subsequent to the cause set forth in the original action. Hatchell v. Hebelsen [Okl.] 82 P. 826. Kirby's Dig. § 4381, expressly provides that if plaintiff suffers a nonsuit he may commence a new action within one year. This applies where the period is prescribed by contract. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572. It is a nonsuit within Rev. St. 1899, § 4285, declaring that a nonsuited plaintiff may maintain a new action within one year where dismissal results from failure to furnish additional security for costs. Wetmore v. Crouch [Mo.] 87 S. W. 954.

29. See 4 C. L. 447, n. 5 et seq.

30. See ante, section 1.

31. See post, § 3. Act of 1895, c. 82, § 7, does not apply to an action by a contractor to enforce a mechanic's lien. Central Bldg. Co. v. Karr Supply Co., 115 Ill. App. 610. Prohibition from enforcing a judgment because the lands on which it is a lien are exempt does not suspend the operation of the statute. Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378. Failure to appoint an administrator of the estate of a deceased mortgagor and debtor does not prevent the statute running in favor of the mortgagor's heirs against an action to foreclose. Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

32. That a wife becomes subrogated to the rights of a mortgagee of her husband's land does not suspend the operation of the statute which had already begun, as to the right to foreclose. Charmley v. Charmley [Wis.] 103 N. W. 1106.

33. Ky. St. 1903, § 2552, providing that the period prescribed as to sureties shall not include time during which the surety hindered suit, applies where an executor of a surety induced a creditor to stay suit in reliance on the surety's promises. Hamilton's Ex'r v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093.

34. Disability of coverture cannot be tacked to the disability of minority. Franklin v. Cunningham, 187 Mo. 184, 86 S. W. 79. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84.

35. See ante, § 3.

36. See 4 C. L. 462.

37. Laws 1896, c. 910, providing that an action to recover a local assessment which has been annulled by judgment may be maintained within one year from date of judgment, does not revive causes already barred. Dennison v. New York, 182 N. Y. 24, 74 N. E. 486.

38. See 4 C. L. 450.

press,[39] active,[40] or continuing[41] trust, until repudiation thereof by the trustee and notice brought home to the beneficiary.[42] The trusts intended by equity not to be affected by the statute are those technical and continuing trusts not at all cognizable at law,[43] hence the statute runs against an implied[44] or constructive trust.[45]

(§ 6) *C. Insanity and death.*[46]—The statute does not run against insane persons during the continuance of the disability[47] unless otherwise specifically prescribed by law.[48] Death does not toll the statute unless such exception is expressly provided,[49] but the death of a debtor may extend the period fixed by the general statute as to debts not barred at the date of his death.[50]

(§ 6) *D. Infancy and coverture.*[51]—Infants[52] and married women[53] are generally exempted from the operation of the statute, but the exemption rests upon express provision, not upon any fundamental doctrine of the law,[54] and a statute not expressly exempting them applies to them.[55] Coverture does not suspend the statute

39. Not against an express trust until it is repudiated and notice of such repudiation brought home to the beneficiary. Dawes v. Dawes, 116 Ill. App. 36. Not so long as the relation is acknowledged or the trust agreement exists. Stanton v. Helm [Miss.] 39 So. 457. Action to recover money left on deposit. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41. One holding the bare legal title for the equitable owner. McCarthy v. Woods [Tex. Civ. App.] 87 S. W. 405.

40. Not as against the right of one to recover from his financial agent and trusted advisor. Pierce v. Perry [Mass.] 75 N. E. 734.

41. Moore v. Idlor, 6 Ohio C. C. (N. S.) 19; Hitchcock v. Cosper [Ind.] 73 N. E. 264. Not as between partners. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41.

42. Under Rev. Codes 1892, § 2763, prescribing a ten-year period for bills of relief in case of a trust not cognizable by courts of common law. Stanton v. Helm [Miss.] 39 So. 457. When the trustee openly repudiates the trust and unequivocally sets up a right adverse to the beneficiary. Hitchcock v. Cosper [Ind.] 73 N. E. 264. Selling the trust estate with the full knowledge of the beneficiary and destroying a letter containing a recognition of the trust in his presence is a repudiation. Stanton v. Helm [Miss.] 39 So. 457.

43. The relation of a principal and an agent whose duty it was to collect and remit money is not after the relation has terminated such a trust as suspends the statute. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059.

44. Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212.

45. Money placed in the hands of one to be delivered to another. Commonwealth Title Ins. & Trust Co. v. Folz, 23 Pa. Super. Ct. 558.

46. See 4 C. L. 451.

47. Not in favor of one claiming under a deed executed by one mentally unsound, or mentally weak and under the undue influence of the grantor while such conditions exist. Howard v. Carter [Kan.] 80 P. 61.

48. Persons under interdiction cannot be prescribed against except in cases specifically prescribed by law. Sallier v. St. Louis, etc., R. Co., 114 La. 1090, 38 So. 868.

49. The four-year statute governing actions to set aside fraudulent conveyances is not tolled by the death of the fraudulent grantor. Lesieur v. Simon [Neb.] 103 N. W. 302.

50. Where notice of the qualification of executors has not been given until the general statute has run. Alice E. Min. Co. v. Blandon, 136 F. 252. Under Code Civ. Proc. § 312, prescribing a four-year period for all actions on written contracts and § 353 providing that if a debtor die before the period expire an action lies against his representatives within a year after letters issued, where a debtor dies before the cause accrues the statute does not run until letters are issued. Heeser v. Taylor [Cal. App.] 82 P. 977.

51. See 4 C. L. 451.

52. Infants: Not against the right of infants to recover land. Vincent v. Blanton, 27 Ky. L. R. 489, 85 S. W. 703. Code Civ. Proc. § 375, suspends the running of the statute the operation of which has commenced where a right of action to assert title devolves upon an infant. Mills v. Thompkins, 47 Misc. 455, 95 N. Y. S. 962. Where at the time of the settlement of a guardian's account the ward was a minor, an action to recover an amount due from the guardian was not barred until ten years after his majority under Mansf. Dig. & St. §§ 4484, 4489. Wallace v. Swepston [Ark.] 86 S. W. 398. Where a record of appeal showed that certain parties were minors and it did not appear that others were not, the appeal will not be dismissed. Civ. Code Prac. § 745, providing that an appeal by persons under disability may be taken one year after such disability was removed. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

53. Married women: Limitations as against married women can be established only by proof that the statute commenced to run prior to marriage, or has run since the disability of coverture has been abolished. Broom v. Pearson [Tex.] 85 S. W. 790. Not as against a married woman when the disability existed at the time the cause accrued. Franklin v. Cunningham, 187 Mo. 184, 86 S. W. 79. Not against married women during coverture. Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

54. Schauble v. Schulz [C. C. A.] 137 F. 389.

55. Rev. Codes N. D. 1899, § 3491a, applies

as to the claim of a woman against her husband, where she is given a right of action against him.[56]

(§ 6) *E. Absence and nonresidence.*[57]—It is generally provided that absence or nonresidence shall suspend the operation of the statute,[58] but in order to have this effect it must be expressly so provided.[59] The absence must be continuous.[60] Such exceptions apply to an action to foreclose a mortgage,[61] but in some states the absence of the mortgagor, after he has parted with his title to the mortgaged property, does not prevent the statute from running in favor of his grantee.[62] The rule that a mortgagor's absence will not extend the time as against subsequent purchasers and lienors has no application to those who are antecedent,[63] and an attachment levy, though posterior in time, is reckoned as of the time of the claim on which it is founded.[64] Nonresidence does not suspend the statute if personal service may be had in the state,[65] but it is otherwise held in North Carolina, where it is said that the

to causes of action in favor of infants. Schauble v. Schulz [C. C. A.] 137 F. 389. Code § 3447, contains no exception in favor of married women and is applicable to them. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825. Rev. St. Utah, 1898, § 2870, prescribing the period within which to bring an action to set aside an executor's conveyance in probate proceedings runs during the minority of a complainant. Williamson v. Beardsley [C. C. A.] 137 F. 467.

56. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825.

Note: By statute in several jurisdictions husband and wife are enabled, subject to certain restrictions, to make contracts generally with each other which will be enforced at law. Rice, Stix & Co. v. Sally, 176 Mo. 107; Bea v. The People, 101 Ill. App. 132; McDougall v. McDougall, 135 Cal. 317. But in some states it has been held that the common-law disability of a married woman to contract with her husband has not been abrogated by statutes enabling her to contract generally. Whitney v. Closson, 138 Mass. 49; Hendricks v. Isaacs, 117 N. Y. 411. In other states the common law has been relaxed only so far as to enable the wife to manage and enjoy her separate business or estate. Kedly v. Petty, 153 Ind. 179; Naylor v. Nincock, 96 Mich. 182. An interesting question has arisen under this legislation in states where married women are not expressly excepted from the operation of the statute of limitations as to whether the statute runs against a married woman's claim against her husband during coverture. The authorities are not in harmony on this point. In some jurisdictions it is held on grounds of public policy which discourages controversies between husband and wife that the statute will not run during coverture. Alpaugh v. Wilson, 52 N. J. Eq. 424; Barnett v. Harshberger, 105 Ind. 410; Beloit Second Nat. Bank v. Merrill, 81 Wis. 151, 29 Am. St. Rep. 877. In other states it is held as in the principal case that the statute will run from the time the right of action accrues. Sabel v. Slingsluff, 52 Md. 132; Muus v. Muus, 29 Minn. 115.—3 Mich. L. R. 586.

57. See 4 C. L. 452.

58. Absence from the state tolls the statute. Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929. The departure from and establishment of a foreign residence tolls the statute, Rev. Codes 1899, § 5210, to the effect that absences of one year or more shall toll the statute refers to one who has not established a foreign residence. Paine v. Dodds [N. D.] 103 N. W. 931.

59. The exception provided by Rev. Code 1852, c. 123, § 14, does not apply to act May 28, 1897, limiting the time within which an action for personal injuries shall be brought. Lewis v. Pawnee Bill's Wild West Co. [Del. Super.] 61 A. 868. Burns' Ann. St. 1901 § 609 providing that judgments entered in an action in which service was procured by publication may be opened within five years is not subject to the exceptions contained in §§ 297, 298, that the period of disability or nonresidence extends the period until two years after the disability is removed. Hollenback v. Poston, 34 Ind. App. 481, 73 N. E. 162.

60. Under Code Civ. Proc. § 401, providing that if one against whom a cause of action has accrued departs from and remains continuously absent from the state for one year or more, such time shall not be counted, continuous absence is not interrupted by occasional visits to the state. Lawrence v. Hogue, 93 N. Y. S. 998.

61. An action to foreclose a mortgage on land is in personam and comes within Rev. Codes 1899, § 5210, excepting from the limitation period the time during which the person against whom the cause accrued is absent from the state. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929; Paine v. Dodds [N. D.] 103 N. W. 931. The exception in the Illinois statute relative to absence from the state applies to actions to foreclose a mortgage. Blakeslee v. Hoit, 116 Ill. App. 83.

62. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915 (Young, J., dissenting).

63, 64. Perkins v. Bailey, 38 Wash. 46, 80 P. 177.

65. Where the nonresident against whom the cause accrued has a local office or agency where process may be served. Green v. Snyder [Tenn.] 84 S. W. 808. A foreign corporation which maintains an office and agent in the state on whom service of process may be made is not a nonresident within Rev. St. 1899, § 4282, suspending the statute as against a debtor who was a resi-

statutory requirement of a local agent was not intended to affect the exception.[66] One who asserts absence from the state has the burden of proving it.[67]

(§ 6) *F. A new promise to pay, or acknowledgment of the obligation,*[68] which in some states must be in writing,[69] tolls the statute or revives the cause already barred. Acknowledgment must be express, clear, direct, and unequivocal,[70] unaccompanied by any conditions or qualifications inconsistent with a promise to

dent at the time a cause of action accrued and thereafter departed from the state. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150. A foreign corporation which has been doing business and has had an agent upon whom process could be served in the state during the entire limitation period, can avail itself of the statute. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

66. Nonresident insurance company, though summons may be served on the Insurance commissioners. Green v. Hartford Life Ins. Co. [N. C.] 51 S. E. 887.

67. Evidence insufficient. Ingersoll v. Davis [Wyo.] 82 P. 867.

68. See 4 C. L. 459.

69. Under Rev. St. 1899, § 4294, the acknowledgment or promise must be in writing. Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002. A letter by an agent to his principal "I have used the money and want to turn out my property to make you all right" is a sufficient written acknowledgment of a debt to postpone the statute under Comp. Laws 1897, § 9740. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059.

To revive cause: Code Civ. Proc. § 395, providing that a written acknowledgment or promise to pay is essential is satisfied by a letter acknowledging liability on a bill rendered a third person. Serrell v. Forbes, 106 App. Div. 482, 94 N. Y. S. 805. Code Civ. Proc. § 395, is satisfied by a letter written in response to a statement of claim promising payment within a short time. Levy v. Popper, 94 N. Y. S. 905. Letter held to contain an unqualified admission. Walker v. Freeman, 110 Ill. App. 404. Under Code Civ. Proc. § 395, in order to take the items of a running account out of the operation of the statute, such items must be assented to in writing in a stated account. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129.

NOTE. What constitutes a writing within the statute: Letters written by the debtor to the creditor are generally the writings shown to prove the acknowledgment or new promise. Rumsey v. Settle's Estate, 120 Mich. 372, 79 N. W. 579; Yarbrough v. Gilland, 77 Miss. 139, 24 So. 170. In Liberman v. Gurensky, 27 Wash. 410, 67 P. 998, it was held that the writing is sufficient if written at the direction of the debtor, even though not signed by him personally. And in Re Deep River Nat. Bank, 73 Conn. 341, 47 A. 675, a letter dictated to a stenographer, typewritten by the latter and signed with the name of the dictator by means of a rubber stamp, was held to be a writing signed by the person dictating the letter. In Barnard v. Bartholomew, 22 Pick. [Mass.] 291, it was said that the amount of the debt or date of the letter need not be in the writing, but could be supplied by other evidence. In Goodrich v. Case, 68 Ohio St. 187, 67 N. E. 295, the payee of the note died, and the note being old, the maker at the request of the executor delivered a true copy of the note to him and the original note was thereupon destroyed. The court held that the substituted note was not a written acknowledgment of the old note nor a promise in writing to pay the same. In Hill v. Hill, 51 S. C. 134, 28 S. E. 309, letters were held to constitute a written acknowledgment of a debt due an estate, though addressed to the administrators as individuals, or though addressed to only one of two administrators. And in Manchester v. Braedner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829, an order drawn by the debtor in favor of the creditor, requesting a third person to pay the creditor a sum named in such order was held a sufficient acknowledgment under the New York statute. In Rowe v. Thompson, 15 Abb. Pr. [N. Y.] 377, it is held that there is a sufficient signing of an instrument, calculated to save the debt from the operation of the statute of limitations, if it is evident from any part of the instrument that the debtor named in it has given to it his assent. In Blanchard v. Blanchard, 122 Mass. 558, 23 Am. Rep. 397, there was an indorsement in the handwriting of the debtor, but not signed, of a payment of part of a promissory note. The court, however, held that it was not a sufficient writing to prevent the operation of the statute if no money or valuable consideration actually passed, even though it was orally agreed that the amount stated as having been paid be deemed a payment. In McLaren v. McMartin, 36 N. Y. 88, it was held that where the statute provides that the writing "be signed by the party to be charged thereby," the signing by any other party is not sufficient. In Stiles v. Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986, the court held that a stated account, not signed by the party, would not operate as an acknowledgment, and it also held that mere entries by a party in his own book of accounts would not constitute an acknowledgment which would defeat the statute. —From note to Warren v. Cleveland [Tenn.] 102 Am. St. Rep. 759.

70. Hazlett v. Stillwagen, 23 Pa. Super. Ct. 114. A letter by an Indorser asking for the note and all the credits, and stating his understanding of the payments thereon held insufficient. Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002. A note shown by parol to be for unpaid interest on another note is not such a written admission as will satisfy Code § 3456, and revive a barred cause of action on the prior note. Kleis v. McGrath [Iowa] 103 N. W. 371. Statement by a debtor to a creditor that he did not have the money to pay but that his farm was big enough to pay the bill is not an acknowledgment sufficient to revive the debt. Schuchler v. Cooper [Del. Super.] 62 A. 261. Letters written by a debtor to the attorney of his creditor, referring to a note "will pay

pay.[71] It must be such as if declared upon would support an action[72] certain as to amount[73] and certain as to the debt to which it applies.[74] The acknowledgment of a debt of gratitude, not a legal obligation, does not raise the bar of the statute.[75] A statute-barred obligation may be revived by an express promise to pay[76] or by a conditional promise with performance of the condition.[77] The giving of a promissory note constitutes a new promise,[78] but the giving of a new note for a portion of a debt does not toll the statute as to the right of action on the original note for the balance.[79] No new promise on the part of an assignor is to be implied from the act of an assignee in allowing a dividend out of the assigned estate.[80] An indorsement of a barred negotiable instrument revives it as to the indorser.[81]

(§ 6) *G. A partial payment*[82] tolls the statute and starts it running anew,[83] but it must be made with authority from the debtor;[84] hence, a payment by a joint maker of a note, from his own funds and without the knowledge of the other makers, tolls the statute as to him but not as to his co-makers.[85] Payment of interest by a life tenant, with a conditional fee in reversion, tolls the statute as to a right to foreclose a mortgage on the premises as to a contingent remainderman not in being.[86] The rule that a partial payment by a principal tolls the statute as to a surety applies only where principal and surety are jointly liable, and not where the surety is secondarily liable.[87] A payment on an open account tolls the statute as to all the items thereof.[88] Payments on, or renewal of, a note toll the statute as to the right to enforce a lien securing it.[89]

as soon as I can" and after offering a part in compromise "It's either that or wait until I get it" is sufficient to revive the cause under Comp. Laws § 2926. Cleland v. Hostetter [N. M.] 79 P. 801.

71. Hazlett v. Stillwagen, 23 Pa. Super. Ct. 114.

72. "I enclose you check for $15. It is the best I can do for you at present" is insufficient. Bank of Union v. Nickell [W. Va.] 49 S. E. 1003.

73. "To secure to H, as executor of the last will and testament of H the payment of whatever amount C may owe him as executor on such settlement" is not a new promise sufficient to remove the bar. Holley's Ex'r v. Curry [W. Va.] 51 S. E. 135.

74. Hazlett v. Stillwagen, 23 Pa. Super. Ct. 114.

75. A legacy "in consideration of her care for my invalid mother," etc., does not imply a debt, but a bounty. McNeal v. Pierce [Ohio] 75 N. E. 938.

76. Walker v. Freeman, 110 Ill. App. 404. An **appropriation act** is a new promise and operates to revive a barred claim **against the public.** Galm's Case 39 Ct. Cl. 55.

77. Walker v. Freeman, 110 Ill. App. 404.

78. The giving of a due bill, in effect a promissory note. Dacovich v. Schley [C. C. A.] 134 F. 72.

79. Woolwine v. Storrs [Cal.] 82 P. 434.

80. Walter A. Wood Mowing & Reaping Mach. Co. v. Harris [Pa.] 61 A. 996.

81. An indorsement on a barred obligation payable in cotton. Conly v. Hampton [Tex. Civ. App.] 13 Tex. Ct. Rep. 425, 87 S. W. 1171.

82. See 4 C. L. 459.

83. Brown v. Puller [Ark.] 88 S. W. 838. Partial payments on a note **by indorsers** which only extinguishes the debt pro tanto. Jefferson County Nat. Bank v. Dewey, 181 N. Y. 98, 73 N. E. 569. A payment on a note **to one holding it for collection.** Warnock v. Itawis, 38 Wash. 144, 80 P. 297. Where land is acquired by a partnership with firm funds and a mortgage thereon assumed by the firm and after dissolution it remains liable for firm debts, a partial payment by either partner tolls the statute as to all. McKee v. Covalt [Kan.] 81 P. 475. A payment on a note under direction from the maker. Walker v. Cassels, 70 S. C. 271, 49 S. E. 862.

84. Where a trustee in a trust deed containing a power of sale sells the land and applies the proceeds to the payment of the debt it does not toll the statute as to the original debtor (mortgagor) who had conveyed the land to one who assumed the mortgage. Regan v. Williams, 185 Mo. 620, 84 S. W. 959.

85. Old Dominion Min. & Concentrating Co. v. Daggett, 38 Wash. 675, 80 P. 839.

86. Pinkney v. Weaver, 115 Ill. App. 582; Id., 216 Ill. 185, 74 N. E. 714.

87. As where a principal on a note secured by a mortgage conveys the land to a grantee who assumes the debt, a payment of interest by such grantee does not toll the statute as to his grantor. Regan v. Williams, 185 Mo. 620, 84 S. W. 959. Payments made by the maker of a note do not toll the statute as to an action against an indorser on his independent contract of indorsement. Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002.

88. See 4 C. L. 458, n. 16 et seq. An open running account upon which payments have been made within the statutory period is not barred as to any of the items. Brazel v. Thompson Smith's Sons [Mich.] 12 Det. Leg. N. 599, 104 N. W. 1097.

89. Lien reserved in a deed to secure the purchase money. Hamilton's Ex'r v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093.

§ 7. *Operation and effect of bar. A. Bar of debt as affecting security.*[90]—There is a conflict of authority as to whether the bar of the principal obligation bars an action to foreclose the security,[91] and vice versa.[92] The better rule would seem to be that an action to foreclose a mortgage is a remedy distinct from the ones by which the personal obligation for the debt secured may be enforced and may be barred, even though the debt is not.[93]

(§ 7) *B. Against whom available.*[94]—All persons in privity to the parties are bound by the bar, thus, the bar of the trustee bars the beneficiary,[95] and the bar of a grantor bars his grantee.[96]

(§ 7) *C. To whom available.*[97]—Though the defense is a personal privilege, yet the rule does not apply where the statute bar of one action is pleaded as a mere fact in the predicate for the action at bar;[98] and a purchaser of land covered by a mortgage may set it off as against an action to foreclose, so far as the subjection of the land to the payment of the debt is sought.[99] One may be estopped to assert the bar of the statute,[1] but that the mortgaged premises are conveyed subject to the mortgage, and are the primary fund for the payment of the debt, does not

90. See 4 C. L. 463. See, also, Foreclosure of Mortgages on Land, 5 C. L. 1447 and exhaustive note on page 1448.

91. See 4 C. L. 463, n. 88 et seq.

That it does. Stone v. McGregor [Tex.] 87 S. W. 334; Houston Ice & Brewing Co. v. Stratton [Tex. Civ. App.] 13 Tex. Ct. Rep. 887, 89 S. W. 1111; Ackiss' Ex'rs v. Satchel [Va.] 52 S. E. 378; French v. Bowling, 27 Ky. L. R. 639, 85 S. W. 1182.

That it does not. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

92. A mortgage is not barred so long as the debt secured is enforceable. Iowa Loan & Trust Co. v. McMurray [Iowa] 105 N. W. 361. **Contra.** Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

93. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

94. See 4 C. L. 464.

95. See 4 C. L. 451, n. 52 et seq. Kirkman v. Holland [N. C.] 51 S. E. 856. Where the statute has run against the right of a city to collect taxes a plea that the application of the statute would affect the bondholders is without merit. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49. Where a life tenant (trustee) has the legal title, and is barred by limitations from recovering it, remaindermen in the equitable title are also barred. Johnson v. Cook [Ga.] 50 S. E. 367.

96. If the right to bring an action of forcible entry and detainer is barred as against the grantor, it is likewise barred as against the grantee. Weatherford v. Union Pac. R. Co. [Neb.] 104 N. W. 183.

97. See 4 C. L. 464.

98. In action to redeem from mortgage given as indemnity, the plaintiff may plead that the contract of indemnity is fulfilled by the bar of all liability covered by it. Morris v. Hulme [Kan.] 81 P. 169.

99. Blakeslee v. Holt, 116 Ill. App. 83.

1. As where an executor induces a creditor of the estate not to file his claims. Hamilton's Ex'r v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093. That a taxpayer's son and general agent is city attorney **does not estop** the taxpayer to plead the statute against a claim for city taxes, where collusion is not shown as between them. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

Note: A party may be estopped from relying on the statute. Davis v. Ramage, 23 Ky. L. R. 1420, 65 S. W. 340; Lamb v. Clark, 5 Pick. [Mass.] 193; Lenger v. Hazelwood, 79 Tenn. 539; Park v. Prendergast, 4 Tex. Civ. App. 566, 23 S. W. 535. Thus, where a grantee accepts a deed in which he assumes a mortgage (Christian v. John, 111 Tenn. 92, 76 S. W. 906), and where a toll road corporation ceases to operate its toll road, it cannot set up the statute as against the right of the original owner of the land to recover land on which it erected a toll house (Cynthiana, etc., Turnpike Co. v. Hutchinson, 22 Ky. L. R. 1233, 6 S. W. 378), and where payment is provided for out of a particular fund or in a particular way the debtor cannot plead the statute without showing that the particular fund has been provided or the method pursued (Davis v. Simpson, 25 Nev. 123, 58 P. 146, 83 Am. St. Rep. 57; Sawyer v. Colgan, 102 Cal. 283, 36 P. 580).

The fact that the party invoking the statute may have put it in motion by his own default in the performance of a contract is no obstacle to its operation (San Antonio, etc., Loan Ass'n v. Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864), but on the other hand it is said that the participant in the breach of a trust cannot plead it (Duckett v. National Mechanic's Bank, 86 Md. 400, 38 A. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84). Thus, it is held that where a county misappropriates school funds it cannot set up the statute in an action for their recovery. Board v. State, 106 Ind. 531, 7 N. E. 254.

The plea will not be allowed where it would be inequitable and would perpetrate a fraud upon the creditor in the face of the oral promise not to plead the statute. Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481; Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555. In the same manner an agreement to arbitrate the claim may estop the debtor. Davis

preclude the grantee from pleading limitations as a defense to an action to foreclose, though the debt is not barred.[2] A purchaser pendente lite cannot invoke the bar of the statute, which became complete between the date of commencement of an action and the date of the amendment to the pleading, making him a party.[3] An action barred as to one joint obligor may be barred as to all.[4]

§ 8. *Pleading and evidence.*[5]—The statute to be available as a defense must be pleaded.[6] This rule applies to contractual limitations,[7] and, as a general rule, must be pleaded by answer[8] but in equity,[9] or if the complaint shows on its face that the cause stated is barred,[10] it may be raised by general demurrer; and where a statute creating a right prescribes the limitation period, a defense that the period has elapsed is available, though not pleaded,[11] as is also an act which extinguishes the claim.[12] The plea must state facts showing that the cause is barred[13] in its entirety,[14] and if directed to certain items of an open account should go to the specific items against which it is claimed the statute has run.[15] The allowance during trial of an amendment setting up the statute rests in the discretion of the court.[16] A plea of the statute is not a technical plea of confession and avoidance.[17]

A complaint for an apparently barred cause must allege facts showing that it falls within an exception,[18] but though it shows upon its face that the cause is barred, it is not demurrable unless it also shows that the action is not within any of the exceptions to the statute;[19] and a complaint, not on its face showing that the cause

v. Dyer, 56 N. H. 143.—See note to Hopkins v. Clyde [Ohio] 104 Am. St. Rep. 746.

2. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929; Paine v. Dodds [N. D.] 103 N. W. 931.

3. City of Louisville v. Jacobs, 27 Ky. L. R. 175, 84 S. W. 772.

4. Where in an action against joint defendants some of them successfully plead the statute a judgment dismissing the action will not be disturbed. Somers v. Florida Pebble Phosphate Co. [Fla.] 39 So. 61.

5. See 4 C. L. 464.

6. Kreiling v. Northrup, 116 Ill. App. 448; Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. In an action for slander, evidence of slanderous words spoken, an action for which would be barred, is admissible. Dubois v. Robbins, 115 Ill. App. 372. In order to be available as a defense, the statute must be pleaded as required by Rev. St. 1898, § 2651. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

7. A stipulation in a contract that an action thereon must be brought within a specified time must be pleaded as a defense. Gaston v. Modern Woodmen of America, 116 Ill. App. 291.

8. Not by demurrer or motion in arrest of judgment. Rich v. Scalia, 115 Ill. App. 166. Cannot be raised by demurrer. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

9. May be pleaded by demurrer to a bill barred on its face. Wieczorek v. Adamski, 114 Ill. App. 161.

10. Ordinarily limitations as a defense must be pleaded but a complaint showing on its face that the cause stated is barred is demurrable. French v. Bowling, 27 Ky. L. R. 639, 85 S. W. 1182. Under B. & C. Comp. § 68, an objection that a complaint shows on its face that the cause of action stated is barred must be raised by demurrer, otherwise it is deemed to be waived. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. Whether this rule applies where the period is prescribed by contract is not decided. Id.

11. Code § 3836, providing for the recovery of double the amount of usurious interest paid if the action be commenced within two years. Tayloe v. Parker, 137 N. C. 418, 49 S. E. 921.

12. The Act of April 27, 1855, P. L. 368, limiting actions to recover a charge on land may be availed of though not specially pleaded. DeHaven's Estate, 25 Pa. Super. Ct. 507.

13. A plea of the statute and facts rendering it applicable followed by an allegation that the action was not brought within the period prescribed after it accrued is sufficient. Tudor v. Ebner, 93 N. Y. S. 1067.

14. A general plea to a complaint containing counts not barred is not good. Meyers v. Meyers, 141 Ala. 343, 37 So. 451.

15. A plea that all the items are barred is not sufficient. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129.

16. Refusal is not an abuse of discretion. De Hihns v. Free, 70 S. C. 344, 49 S. E. 841.

17. If the plea is not good, plaintiff is not entitled to judgment on motion. Webber v. Ingersoll [Neb.] 104 N. W. 600.

18. Bill to foreclose a mortgage brought after the period has expired and not showing facts which would suspend the statute is barred. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770. If a complaint shows on its face that the cause of action stated is barred but alleges facts sufficient to excuse the delay, an answer pleading the bar is demurrable. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. If limitations is pleaded as a bar, the plaintiff, in order to avoid it by an exception in the statute, must specially allege it in his bill or reply. Pierce v. Perry [Mass.] 75 N. E. 734.

stated is barred, is not demurrable on the ground that a certain portion of the sum claimed was barred.[20] If fraud is relied on the complaint must allege fraud and the facts constituting it;[21] that it was committed by defendant or some one in privity with him;[22] that it was concealed from complainant by defendant or his privies;[23] that it was not discovered until within the statutory period before the action was brought;[24] and that it could not with reasonable diligence have been discovered sooner.[25]

One who asserts that the operation of the statute was prevented by disability has the burden of proving it.[26] When the cause sued on accrued in another state, defendant has the burden to show that it was barred by the statutes of such state.[27]

LIMITED PARTNERSHIP; LIQUIDATED DAMAGES, see latest topical index.

LIS PENDENS.[28]

General rule.[29]—A purchaser or creditor pendente lite acquires only such rights as his grantor[30] or debtor[31] had, and takes the same subject to all subsequent proceedings in the action,[32] and to the judgment rendered therein,[33] and the con-

19. Concealment of the cause attempted to be stated. Roberts v. Smith [Ind.] 74 N. E. 894.

20. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850.

21. Jones v. Rogers [Miss.] 38 So. 742. One seeking to avoid the bar on the ground of fraud must allege the facts upon which he relies and they must be sufficient to entitle him to relief. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48.

22, 23. Jones v. Rogers [Miss.] 38 So. 742.

24. Jones v. Rogers [Miss.] 38 So. 742. A pleading for relief on the ground of fraud must show that the fraud was not discovered until a time within the period of limitations. Waters v. Waters [Ga.] 52 S. E. 425; German Security Bank v. Columbia Finance & Trust Co., 27 Ky. L. R. 581, 85 S. W. 761.

25. Jones v. Rogers [Miss.] 38 So. 742. Complaint held insufficient to show that fraud had not been discovered until within the statutory period. Jones v. Rogers [Miss.] 38 So. 742.

26. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84. Evidence of nonpayment, and the instrument evidencing the indebtedness, does not show that a cause of action barred on the face of the complaint is not barred and does not cure error in overruling a demurrer to the complaint. Hibernia Sav. & Loan Soc. v. Boland, 145 Cal. 626, 79 P. 365. Where a complaint shows that the cause stated is barred the plaintiff has the burden of proving that the operation of the statute has been suspended a sufficient length of time to avoid the bar. Paine v. Dodds [N. D.] 103 N. W. 931.

27. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506.

28. Scope: Lis pendens in the sense of another suit pending as ground for abatement of an action, see Abatement and Revival, 5 C. L. 1.

29. See 4 C. L. 466.

30. Takes subject to the right of other parties to the suit. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984. A writ of possession will issue against a purchaser from a landlord pending a suit of ejectment against the tenant, the landlord having notice of such suit. King v. Davis, 137 F. 222.

31. Creditors of an insolvent corporation becoming such pending a creditors' suit against the corporation held entitled to participate only in such assets as remained after the payment of claims existing at the time the creditors' bill was filed. Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503.

32. Depositions of witnesses. Morris v. Linton [Neb.] 104 N. W. 927.

33. Purchaser of mortgagor pending foreclosure suit. Deskins v. Big Sandy Co., [Ky.] 89 S. W. 695. Mortgagee of property pending litigation which must necessarily determine the mortgagor's rights in the premises. Parrotte v. Dryden [Neb.] 102 N. W. 610. One who acquires title to, or a lien upon, or an interest in mortgaged real property after the commencement of a foreclosure suit is bound by the decree. Kaston v. Storey [Or.] 80 P. 217. One not a party to an ejectment suit but who went into possession of the premises after the suit was brought, held subject to removal under the writ of possession issued under the judgment for plaintiff, he not having clearly shown that he did not obtain possession from one of the defendants. Baum v. Roper [Cal. App.] 82 P. 390. The fact that ejectment does not lie for a mere easement or other incorporeal hereditament does not prevent an officer, in executing a writ of possession under a judgment in ejectment, from ousting from a track of land persons who are unlawfully using a right of way over the same under purchase from defendants in the ejectment suit pendente lite. King v. Davis, 137 F. 222. Where the holder of an independent title to land sued for in ejectment, not a party to the suit, acquired possession through purchase from defendants in the action pendente lite, although without actual notice, he

sequences flowing therefrom,[34] irrespective of notice,[35] and whether or not he becomes a party to the action,[36] though he may be relieved from this burden by a subsequent payment thereof by or for the judgment debtor,[37] even though the judgment be kept alive by assignment.[38] In other words one who, pending litigation affecting property, assumes rights or liabilities toward such property, stands as though he were a party to the action.[39] Such a person, however, is only held chargeable with knowledge of the facts of which the record in the suit as it existed at the time of his purchase would have informed him, and he cannot be charged with knowledge of facts afterward brought into the case,[40] nor be bound by proceedings had therein and affecting the property after a final decree and which are beyond the jurisdiction of the court.[41] The doctrine of lis pendens applies only where a third person attempts to intrude into a controversy by acquiring an interest in the matter in litigation pending the suit;[42] consequently it does not apply where pending litigation concerning mortgaged property the mortgagee takes a new

is subject to the execution of a writ of possession in favor of plaintiff in such action, notwithstanding his independent title has not been adjudicated. Id.

34. Purchaser of mortgagor pending foreclosure suit held to take subject to purchaser at foreclosure sale providing the latter bought on his own account and not for the mortgagor. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. The interest of one who acquires title to, or a lien upon or an interest in, mortgaged realty after the commencement of a foreclosure suit is effectually cut off and barred by such decree, if a sale takes place thereunder and such sale ripens into a title by the execution and delivery of a sheriff's deed. Kaston v. Storey [Or.] 80 P. 217.

35. Tice v. Hamilton, 188 Mo. 298, 87 S. W. 497. The pendency of a suit to foreclose a mortgage is constructive notice to all parties of the rights claimed by defendant. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770.

36. Matteson v. Wagoner [Cal.] 82 P. 436; Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

37, 38. Boice v. Conover [N. J. Eq.] 61 A. 159.

39. Where a foreclosure has been commenced and a lis pendens filed, a **subsequent renter** of the mortgaged property is not entitled to a crop planted by him and standing on the land on the day of sale. Tittle v. Kennedy [S. C.] 50 S. E. 544. Innocent purchasers pendente lite being bound by the record, a defective return of service of **process** is **amendable** against them. King v. Davis, 137 F. 222.

40. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

NOTE. Amendments to pleadings: It is also necessary, where the pleadings are filed, that they, at the time of a pendente lite transfer or encumbrance, disclose the fact that the property subject thereto is involved in the pending suit. A party acquiring an interest in property during the pendency of a litigation affecting it is not thereby charged with notice of any fact that a complete knowledge of the contents of such pleadings would not disclose to him or at least incite inquiry respecting. During the progress of a cause it may be found necessary to amend the pleadings to state some new cause of action, or to perfect a description of the property subject thereto, or to bring in new parties. Third persons are not charged with notice of facts brought before the court for the first time by the amendment of the pleadings made after they have acquired some interest in the subject-matter of the litigation. As to any new cause of action introduced by an amendment and as to property first described thereby, there is no lis pendens prior to the date of the filing of the amendments. Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Stone v. Connelly, 1 Metc. [Ky.] 652, 71 Am. Dec. 499; Jones v. Lusk, 2 Metc. [Ky.] 356; Clarkson v. Morgan, 6 B. Mon. [Ky.] 441; Dudley v. Price, 10 B. Mon. [Ky.] 88; Holland v. Citizens' Sav. Bank, 16 R. I. 734, 8 L. R. 553; Wortham v. Boyd, 66 Tex. 401. An amendment may bring in new parties. If so, persons acquiring title from them prior to such amendment are not bound to the final judgment, and in those cases in which a notice is required to be filed or recorded in some public office, the bringing in of a new party renders necessary the filing of a new notice to affect purchasers under it. Marchbanks v. Banks, 44 Ark. 48; Curtis v. Hitchcock, 10 Paige [N. Y.] 399. It is sometimes necessary to plead facts occurring subsequently to the filing of the original complaint and answer. If the original pleadings disclosed the property affected thereby, it became subject to respond to the final judgment or decree, and if the substantial object of the suit is not changed by the supplemental pleadings, they do not render necessary the filing of any new notice of the pendency of the action. Stoddard v. Myers, 8 Ohio, 203; Gibbon v. Dougherty, 10 Ohio St. 365.—From note to Stout v. Phillippi Mfg. etc. Co. [W. Va.] 56 Am. St. Rep. 853, 867.

41. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984. Where a final decree of partition was rendered, held, a purchaser pendente lite was not bound by subsequent proceedings by which a part of the land was sold to pay the costs assessed against it. Id.

42. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661, quoting from Hopkins v. McLaren, 4 Cow. [N. Y.] 667-679.

mortgage in renewal and extension of the old one.[43] A lis pendens can have no effect beyond the purposes of the suit.[44] A suit affecting title to property in a Federal court is constructive notice of lis pendens with respect to all property in the district and division.[45] In Ohio the doctrine of lis pendens does not apply to sales of lands for taxes.[46] The fact that it was made pending litigation affecting the property does not affect the validity of the sale.[47] Purchasers pendente lite are proper parties to the action.[48]

Essential elements.[49]—The lis pendens is not commenced until the summons or subpoena has been served.[50] The action must not be for a mere money judgment.[51]

Property within the rule.[52]

Statutory lis pendens.[53]—The office of a lis pendens is to give notice to subsequent purchasers or incumbrancers,[54] and a statutory notice is generally required to be filed in some designated public office.[55] Under the statutes of most states it is generally held that where, at the time the notice is filed, the party entitled to the benefit of the lis pendens has equitable notice of rights outstanding under a superior unrecorded instrument, the statutory provision has no application;[56] but this rule does not apply where the instrument is inferior to the claimant's right.[57] In other words it only applies to cases where the claimant under the unrecorded instrument would not be affected if made a party to the action.[58] In New York a lis pendens may be filed in an action brought to recover a judgment affecting the title to, or the possession, use or enjoyment of, real property.[59] The Virginia statutory lis pendens has no reference to Federal courts sitting in the state.[60]

43. So held where mortgagee had no actual notice of suit. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661.

44. A purchaser pending a suit for the specific performance of a contract and for the confirmation of a partition, held entitled to attack a deed under which the plaintiff's children claimed, plaintiff having died and the suit being revived in the names of his children as heirs. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

45. Creditors' suit against an insolvent corporation. Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503.

46. Under Rev. St. 1892, § 2838, the lien of the state for taxes is paramount to all other liens, and under § 2880, the lien of the state is transferred to the purchaser at a tax sale; held, the purchaser's claim upon such lien is not affected by the fact that at the time of the sale a suit is pending to foreclose and extinguish the title of the owner, to which suit the purchaser is not a party. Security Trust Co. v. Root [Ohio] 74 N. E. 1077.

47. Mere knowledge by the purchaser at a partition sale of pending litigation does not invalidate his purchase so long as the decree for sale remains unrevoked. Tobin v. Larkin, 187 Mass. 279, 72 N. E. 985.

48. Suits to cancel notes and mortgage for fraud and to impose certain liens on the land. Matteson v. Wagoner [Cal.] 82 P. 436.

49. See 4 C. L. 467.

50. Courtney v. Henry, 114 Ill. App. 635.

51. The pendency of a bill in chancery, filed by an heir at law for the removal of the administration of the estate into chancery for distribution among the heirs, and not seeking to fix any lien, charge or incumbrance on the land, and on which an ordinary money decree is rendered, is not lis pendens so as to affect the title to land sold under execution issued on the decree rendered. Moragne v. Moragne [Ala.] 39 So. 161.

52, 53. See 4 C. L. 468.

54. The lien gained by creditors prosecuting a suit to set aside a fraudulent transfer by their debtor is created, as between the parties to the action, by the commencement of the action. Wahlheimer v. Truslow, 94 N. Y. S. 137.

55. Arkansas: Under Kirby's Dig. § 5149 in order to give an action to enforce the specific performance of a contract for the sale of land the effect of lis pendens, it is necessary to file a notice of the pendency of the action in the office of the recorder of deeds of the county where the land affected is situated. Steele v. Robertson [Ark.] 87 S. W. 117.

56. 2 Ball. Ann. Codes & St. § 4887 construed. Payson v. Jacobs, 38 Wash. 203, 80 P. 429.

57. Where defendant's claim under an unrecorded deed was subordinate to a mortgage, held, he was bound by a decree of foreclosure against his grantor in an action in which a lis pendens was duly filed. Payson v. Jacobs, 38 Wash. 203, 80 P. 429.

58. Payson v. Jacobs, 38 Wash. 203, 80 P. 429.

59. Code Civ. Proc. § 1670. Notice cannot be filed where a judgment was demanded in the nature of a mandatory injunction, requiring defendants to remove a brick wall on their premises which encroached on plaintiff's property. McManus v. Weinstein, 108 App. Div. 301, 95 N. Y. S. 724. It seems that a suit to enforce a vendee's lien is one brought to recover a judgment affecting the title, possession, use or enjoyment of the premises. Smadbeck v. Law, 94 N. Y. S. 797.

If there be any doubt as to the right to file the notice, the merits should not be decided on a motion to cancel it.[61]

Continuity of lis pendens.[62]—Even as against purchasers pendente lite claiming under the parties to the suit, a lis pendens is notice only when the suit is prosecuted in good faith and with all reasonable diligence and without unnecessary delay.[63] While a judgment or decree in a lower court against the right claimed does not necessarily and at once terminate the lis pendens, yet in order to retain the benefit thereof an appeal must be taken and prosecuted without delay and with such diligence as is required by the circumstances of the case.[64] Circumstances may render the full limit of the time for an appeal an unreasonable delay.[65] A voluntary abandonment or discontinuance of the action destroys the lis pendens.[66]

LITERARY PROPERTY; LIVERY STABLE KEEPERS; LIVE STOCK INSURANCE; LLOYD'S; LOAN AND TRUST COMPANIES; LOANS; LOCAL IMPROVEMENTS AND ASSESSMENTS; LOCAL OPTION; LOGS AND LOGGING; LOST INSTRUMENTS; LOST PROPERTY, see latest topical index.

LOTTERIES.

What constitutes.[67]—A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance.[68] Statutes frequently forbid the issuing of obligations which are,

60. This largely because the Federal courts have no power to enforce the registration of the statutory memoranda. King v. Davis, 137 F. 222.

61. Suit to enforce vendee's lien, held lis pendens should not be canceled on motion, although it is not alleged that the vendee is in possession. Smadbeck v. Law, 94 N. Y. S. 797.

62. See 4 C. L. 468.

63. Voice v. Conover [N. J. Eq.] 61 A. 159. See 4 C. L. 647, n. 41, 42.

64. Boice v. Conover [N. J. Eq.] 61 A. 159.

65. Boice v. Conover [N. J. Eq.] 61 A. 159. Three years delay held to bar right. Id.

66. Dismissal of that portion of a garnishment proceeding by which plaintiff demanded that the judgment be made a lien on real estate held to terminate the lis pendens. Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94.

67. See 4 C. L. 469. See, also, Betting and Gaming, 5 C. L. 417; Gambling Contracts, 5 C. L. 1571.

68. Whether called a lottery, raffle, or gift enterprise, or by some other name. Gen. St. 1894, § 6576. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

Schemes held to be lotteries: Laws 1903, p. 9, c. 5106, § 19, licensing various slot machines and similar devices, will not be construed as licensing the operating of a slot machine in which the element of chance largely predominates, particularly in view of Const. art. 3, § 23, prohibiting lotteries. State v. Vasquez [Fla.] 38 So. 830. Suit club whose members contribute a certain sum weekly to a tailor and hold weekly drawings, the holder of the lucky number receiving a suit of clothes, held a lottery prohibited by Comp. Laws 1897, § 11,344, though members could withdraw at any time and receive credit on clothing purchased to the amount contributed by them. People v. McPhee [Mich.] 12 Det. Leg. N. 41, 103 N. W. 174. Company investing none of its funds, but distributing money collected from its patrons, less a commission, in accordance with priority in the number of a certificate given each of them, held to be engaged in a lottery business or in one in the nature of a lottery, where it appears that the priority of such numbers is determined by chance, and redemption is also dependent upon the chance of the company's solvency based upon the writing of new contracts and the lapsing of old ones. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556. Express company engaged in interstate commerce will not be compelled to carry them. Id. Guessing contest where part of the amount contributed by each person is used for subscription for newspaper, and balance is to be divided among those guessing nearest to the total vote cast for candidates for a state office at an election (Stevens v. Cincinnati Times-Star Co. [Ohio] 73 N. E. 1058), and a similar contest in which there is to be no subscription, and prizes promised are definite amounts, held within the condemnation of Rev. St. 1892, §§ 6929-6931, against lotteries and schemes of chance (Id.) Offering of premiums to persons holding coupons taken from packages of a cereal which would spell a certain word, each coupon bearing a certain letter, and a necessary letter being placed on only one coupon in 500. United States v. Jefferson, 134 F. 299.

Schemes held not to be lotteries: Contract requiring company to pay coupons attached to it, in accordance with a given table, during the time plaintiff was making certain monthly payments to it, it not appearing from the contract that the order of payment was based on any chance or hazard. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090. The business of issuing trad-

by their terms, to be redeemed in numerical order, or in an arbitrary order of precedence without reference to the amount previously paid thereon.[69] One devoting his time to the business of selling lottery tickets, employing agents for that purpose, distributing winning lists, and paying prizes, is guilty of aiding and assisting in establishing a lottery business as an avocation or business in the state, though the drawings take place outside of the state.[70] The Federal statutes prohibit the carrying of lottery tickets and the like from one state to another.[71] An agreement between the holders of lottery tickets to divide their winnings is contrary to public policy and unenforceable.[72]

Policy.[73]—Statutes generally prohibit the establishment or operation of policy games.[74]

Indictment and prosecution.[75]—An indictment following the form of the statute is sufficient.[76] The usual rules as to evidence[77] and instructions apply.[78]

ing stamps, there being no element of chance, whether holder is required to select article to be given in exchange therefor when he receives the first stamp, or allowed to do so later. Ex parte Drexel [Cal.] 82 P. 429. Such a chance as the uncertainty in regard to the number of contracts that will be allowed to lapse or the number of new contract takers who will come into the scheme is not such a scheme as makes it a lottery. Attorney General v. Preferred Mercantile Co. of Boston [Mass.] 73 N. E. 669. Diamond leases, providing for redemption of contracts, etc., held not a lottery within Rev. Laws, c. 214, § 7, since money or property was not thereby disposed of with intent to make the disposal thereof depend upon, or connected with chance, by lot, dice, numbers, gain, hazard, or other gambling device. Id.

Note: A lottery is a scheme for the distribution of prizes by chance. State v. Dalton, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775; State v. Kansas Mercantile Ass'n, 45 Kan. 351, 23 Am. St. Rep. 727, 11 L. R. A. 430. See, too, Ballock v. State, 73 Md. 1, 25 Am. St. Rep. 559, 8 L. R. A. 671; State v. Boneil, 42 La. Ann. 1110, 21 Am. St. Rep. 413, 10 L. R. A. 60; People v. Elliott, 74 Mich. 264, 16 Am. St. Rep. 640, 3 L. R. A. 403; note to Yellowstone Kit v. State [Ala.] 16 Am. St. Rep. 42-48. It has been said that the three essential ingredients of a lottery are consideration, prize, and chance. Equitable Loan, etc., Co. v. Waring, 117 Ga. 593, 97 Am. St. Rep. 177. That consideration is a necessary element, see Loiseau v. State, 114 Ala. 34, 62 Am. St. Rep. 84. For cases where investment schemes have been attacked as lotteries, see State v. Interstate Sav., etc. Co., 64 Ohio St. 283, 83 Am. St. Rep. 754; 52 L. R. A. 530; Equitable Loan etc. Co. v. Waring, 117 Ga. 599, 97 Am. St. Rep. 177.—From note to State v. Nebraska Home Co. [Neb.] 103 Am. St. Rep. 711.

69. Rev. Laws, c. 73, §§ 7, 8, prohibiting the issuing of such obligations, and providing for the forfeiture of the charter of any domestic corporation doing so, is constitutional. Attorney General v. Preferred Mercantile Co. [Mass.] 73 N. E. 669. Issuing of "diamond leases" held violation of this statute. Id.

70. State v. Miller [Mo.] 89 S. W. 377. Evidence held sufficient to justify conviction for aiding and assisting in making and establishing the business of a lottery. Id.

71. Coupons were placed in packages of a certain cereal each bearing a certain letter, and company offered premiums to persons holding those which would spell a certain word, a necessary letter being placed on only one coupon in 500. Held, that the scheme was a lottery and the coupons were within Act Cong. March 2, 1895, c. 191, 28 St. 963, Comp. St. 1901, p. 3178, prohibiting any person from causing to be carried from one state to another any paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in, or dependent upon, the event of a lottery, so-called gift concern, or other similar enterprise offering prizes dependent upon lot or chance. United States v. Jefferson, 134 F. 299. This is true notwithstanding the fact that the sales of such commodities in packages containing coupons may be lawful. Id.

72. Where establishment of lotteries and sale of lottery tickets is forbidden by statute. Crutchfield v. Rambo [Tex. Civ. App.] 86 S. W. 950.

73. See 4 C. L. 470.

74. Evidence in prosecution for aiding and assisting "in making and establishing a policy as a business and avocation," in violation of Rev. St. 1899, § 2219, held sufficient to sustain a conviction. State v. Cronin, 189 Mo. 663, 88 S. W. 604.

75. See, also, Indictment and Prosecution, 4 C. L. 1.

76. Indictment under Rev. St. 1899, § 2219, held not objectionable for failure to describe in what manner a "policy" was made or established or what is meant by a "policy." State v. Cronin, 189 Mo. 663, 88 S. W. 604. Indictment need not charge how or in what manner defendant aided or assisted in maintaining or establishing lottery or what the lottery was. State v. Miller [Mo.] 89 S. W. 377. Indictment charging that defendant knowingly, willfully, and feloniously committed the acts charged need not also use the word "unlawfully." Id.

77. Tickets, sheets, and lists of drawings held sufficiently connected with defendant to make them admissible. State v. Miller [Mo.] 89 S. W. 377.

78. Instruction held not objectionable as assuming that defendant sold lottery tickets, where it is admitted that he did so. State v. Miller [Mo.] 89 S. W. 377.

It is unnecessary to use the word feloniously in an instruction pointing out the facts constituting the offense.[79] The verdict must be responsive to the issues presented to the jury.[80]

MAIMING; MAYHEM.

The indictment must allege that the act was willfully and maliciously done.[81]

MALICE; MALICIOUS ABUSE OF PROCESS, see latest topical index.

MALICIOUS MISCHIEF.[82]

In some states anyone maliciously depositing, exploding, or attempting to explode, any explosive at, in, under, or near places where human beings usually assemble, or which they frequent, with intent to destroy them or to injure, intimidate, or terrify any person, or by means of which any person is injured or endangered, is guilty of a felony.[83]

It is sufficient if the offense is charged in the language of the statute.[84] An indictment charging the damage resulting from the malicious destruction of property, in an amount in excess of that necessary to constitute a felony, also includes a charge of misdemeanor, and whether the offense is the one or the other depends upon the value of the property destroyed.[85] If the state in such case joins with the defendant in waiving a jury, it thereby abandons so much of the indictment as alleges a felony.[86]

The usual rules of evidence[87] and as to instructions apply.[88] Evidence of

79. Instruction held sufficient. State v. Cronin, 189 Mo. 663, 88 S. W. 604; State v. Miller [Mo.] 89 S. W. 377.

80. In a prosecution under Rev. St. 1899, § 2219, for aiding and assisting "in making and establishing a policy as a business and avocation," a special verdict finding defendant guilty of aiding and assisting in establishing a policy, but failing to find that he did so as a "business or avocation," and a judgment based thereon, are fatally defective. State v. Cronin, 189 Mo. 663, 88 S. W. 604; State v. Miller, 189 Mo. 673, 88 S. W. 607. Omission immaterial where defendant is found guilty as charged in the indictment. State v. Miller [Mo.] 89 S. W. 377.

81. An indictment charging that defendant made an assault on prosecutor, and then and there unlawfully and maliciously set fire to a cannon cracker held by prosecutor, which exploded and destroyed prosecutor's hand, held insufficient. Neblett v. State [Tex. Cr. App.] 85 S. W. 813.

82. Note: Malicious mischief is the wanton or reckless destruction of, or injury to, property. Flora First Nat. Bank v. Burkett, 101 Ill. 391, 40 Am. Rep. 209; State v. Foote, 71 Conn. 741; State v. Watts, 48 Ark. 56, 3 Am. St. Rep. 216; Commonwealth v. Williams, 110 Mass. 401.

This crime is distingulshed from larceny by the absence of lucri causa,—the intent to profit by the conversion of the property. State v. Hawkins, 8 Port. [Ala.] 461, 33 Am. Dec. 294; Pence v. State, 110 Ind. 95; State v. Pike, 33 Me. 361; State v. Leavitt, 32 Me. 183; State v. Weber, 156 Mo. 249; People v. Woodward, 31 Hun [N. Y.] 57; State v. Butler, 65 N. C. 309.

Malicious mischief is sometimes called "malicious trespass," but it is to be distinguished from the ordinary trespass in that it is both without color or pretense of right and without hope or expectation of gain. Dawson v. State, 52 Ind. 478; State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661; People v. Smith, 5 Cow. [N. Y.] 259.

At the common law, as well as now quite generally by statutory provisions, malicious mischief extended to real property as well as to personalty. State v. Watts, 48 Ark. 56, 3 Am. St. Rep. 216; State v. Wilson, 3 Mo. 125; State v. Batchelder, 5 N. H. 549; Loomis v. Edgerton, 19 Wend. [N. Y.] 419. Consult the local statute.—From Bronson, Fixtures, § 112b, p. 398.

83. Malicious depositing and exploding of dynamite in a mine held within Act March 12, 1887, § 8 (St. 1886-87, p. 112, c. 195). In re Mitchell [Cal. App.] 82 P. 347. Evidence held sufficient to warrant committing magistrate in holding defendant for trial. Id.

84. Information charging defendant with wantonly and without right breaking down a fence in violation of Rev. St. 1899, § 1958, held sufficient, though it failed to describe the land on which the fence stood. State v. Gift [Mo. App.] 86 S. W. 593.

85. Under Crim. Code § 192, making the offense a felony if the damage exceeds $15, and a misdemeanor if it does not. Dallman v. People, 113 Ill. App. 507.

86. Jury cannot be waived in case of a felony, but may be if offense is a misdemeanor. Dallman v. People, 113 Ill. App. 507.

87. Where evidence was circumstantial, held that the court properly confined witnesses, testifying to horse tracks near the scene of the crime, to a description of the

ill-will on the part of the defendant toward the prosecuting witness,[89] and of his offers to pay for the damage inflicted, is admissible.[90] On a prosecution for maliciously serving and carrying away another's fruit trees, malice must be proved,[91] but proof that defendant intentionally injured or destroyed the property, without just cause or excuse, is sufficient, without proof that he was actuated by specific ill-will against the owner.[92] Cases dealing with the sufficiency of the evidence to support a conviction will be found in the note.[93]

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

§ 1. *Nature and elements of the wrong. A. Malicious prosecution.*[1]—A malicious prosecution is one that is begun in malice, without probable cause to believe that it can succeed, and which finally ends in failure.[2] An action for the tort is usually based upon a criminal prosecution,[3] but may be founded upon a civil action when instituted simply to harass and oppress.[4] Malice is the root of the action but standing alone, even when extreme, is not enough.[5] Want of probable cause[6] and termination of the proceeding against the plaintiff[7] must coexist.

(§ 1) *B. Abuse of process*[8] is the employment of process legally and properly issued for a wrongful and unlawful purpose which it was not intended by law to effect.[9] Probable cause,[10] malice,[11] or termination of the proceeding in which it is-

peculiarities of the tracks and the corresponding peculiarities of the feet of defendant's horse. State v. Wideman, 68 S. C. 119, 46 S. E. 769.

88. Instruction as to effect of finding fruit trees, alleged to have been maliciously severed and carried away, on defendant's land, held proper when taken in connection with other instructions. State v. Roscum [Iowa] 104 N. W. 800.

89. To show motive. State v. Wideman, 68 S. C. 119, 46 S. E. 769.

90. Declarations that he did not commit the crime, but that he would pay the damages in order to end the lawsuit. State v. Wideman, 68 S. C. 119, 46 S. E. 769.

91. State v. Roscum [Iowa] 104 N. W. 800.

92. Instructions approved. State v. Roscum [Iowa] 104 N. W. 800.

93. Evidence held sufficient to sustain a conviction for the malicious destruction of goods and chattels. Dallman v. People, 113 Ill. App. 507. On prosecution for malicious mischief in burning cord wood, held that denial of motion for a new trial, based on ground that evidence was not sufficient to support a verdict, was not an abuse of discretion. State v. Wideman, 68 S. C. 119, 46 S. E. 769.

Evidence held insufficient to sustain a conviction for maliciously pulling up, carrying away, and severing from the land of the owner, certain fruit trees. State v. Roscum [Iowa] 104 N. W. 800.

1. See 4 C. L. 471, Exhaustive monograph on the subject.

2. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495. Evidence held to show that defendant was the prosecutor in a criminal proceeding against plaintiff for receiving and holding stolen property, that such proceedings resulted in plaintiff's arrest and were terminated by dismissal of the indictment. Cook v. Pioskey [C. C. A.] 138 F. 273.

3. See 4 C. L. 472.

4. See 4 C. L. 473, n. 8, et seq.

5. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

6. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495. Probable cause and malice must coexist. Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Young v. Lindstrom, 115 Ill. App. 239.

7. Malice, want of probable cause, and termination of the action must coexist. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

8. See 4 C. L. 474, n. 15 et seq.

9. Complaint held to set forth a cause of action for malicious abuse of process in seizing goods under a distress warrant. Mullins v. Matthews [Ga.] 50 S. E. 101. Illegal and improper use of a writ of capias ad respondendum gives a cause of action but is no ground for quashing the writ. Powell v. Perkins, 211 Pa. 233, 60 A. 731.

sued[12] are not essential elements of the tort. A warrant valid on its face is not a defense.[13] Under a rule that malicious prosecution does not lie for the wrongful prosecution of a civil action, but the remedy is for malicious use of civil process, malice, want of probable cause, and termination of the action, are essential elements.[14] The malicious prosecution of a civil action in which neither person nor property was interfered with will not support the action.[15] Equity will restrain the unlawful use of process.[16]

§ 2. *Responsibility of defendant for the prosecution or suit and his participation therein.*[17]—A master is not liable for a prosecution instigated by his servant if such act is without the scope of the servant's employment,[18] and the master is not personally concerned in the proceeding;[19] but a corporation is liable for a prosecution instituted by a branch manager where the general officers are notified that such prosecution is unwarranted but state that the manager has full charge.[20] An attorney who on facts disclosed believes there is probable cause for a criminal prosecution and who in good faith advises the institution of proceedings, is not liable,[21] nor is an agent who at the command of his principal reveals information upon which a prosecution is based, but who takes no part in the proceedings.[22]

§ 3. *The prosecution of the plaintiff.*[23]—A void proceeding may be made the basis of the action,[24] but a contrary rule prevails in some jurisdictions.[25] Though

Mere participation in procuring an erroneous order is not a tort. The Eliza Lines [C. C. A.] 132 F. 242. Where there is no abuse of process in a suit in rem against a vessel for collision, the respondent vessel cannot maintain a cross bill for damages for seizure and detention. The Amiral Cecille, 134 F. 673.

10. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015. A libelant who in good faith and on advice of counsel proceeds in rem against a vessel but fails to establish a maritime lien is not liable in damages. The Alcalde, 132 F. 576. Abuse of process is not shown where a landlord instituted summary proceedings against a tenant but discontinued them immediately on ascertaining that rent had been paid. Weeks v. Van Ness, 93 N. Y. S. 337. **But see** Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571, holding that probable cause is an essential element.

11. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

12. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571. An action for malicious abuse of process may be maintained before the action in which such process was issued has terminated. Mullins v. Matthews [Ga.] 50 S. E. 101; Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015.

13. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015.

14. Mullins v. Matthews [Ga.] 50 S. E. 101, and cases cited.

15. Abbott v. Thorne, 34 Wash. 692, 76 P. 302.

Note: The jurisdictions in this country appear to be about evenly divided upon this question. Georgia, Iowa, Maryland, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington and Wisconsin have adopted the English rule holding that the assessment of costs against an unsuccessful plaintiff in such an action is sufficient compensation for the injury suffered by the defendant. Such states ignore the important difference between the fixed statutory costs prevailing in this country and the more liberal and flexible English rule, leaving the assessment of costs largely to the discretion of the court. 2 Columbia L. R. 124, 3 Columbia L. R. 479, 498. On the other hand, California, Colorado, Connecticut, Indiana, Illinois, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Tennessee and Vermont permit a recovery where it can be shown that the suit complained of was brought maliciously and without probable cause. For the historical development of this see Kolka v. Jones, 6 N. D. 461.—4 Columbia L. R. 516. See full discussion, 4 C. L. 472 et seq.

16. Where execution is being used to harass or where levied on land in which the judgment debtor has no interest. Barrell v. Adams, 26 Pa. Super. Ct. 635.

17. See 4 C. L. 480.

18. A credit clerk has not by virtue of his position implied authority to criminally prosecute one for an offense against his master. Staton v. Mason, 94 N. Y. S. 417.

19. Staton v. Mason, 94 N. Y. S. 417.

20. The expenses of the prosecution were paid by the corporation. Nickelson v. Cameron Lumber Co. [Wash.] 81 P. 1059. Knowledge of a corporation that a prosecution instigated by its general manager was pending may be shown by evidence of interviews between the officers of the corporation and plaintiff's counsel. Id.

21. Nothing to show malice or bad faith in anything he said or did. Miller v. Metropolitan Life Ins. Co. [Ky.] 89 S. W. 183.

22. He was a mere passive actor. Miller v. Metropolitan Life Ins. Co. [Ky.] 89 S. W. 183.

23. See 4 C. L. 483.

24. One who wrongfully and without probable cause sues out an attachment is liable in damages for its levy, though it

the latter rule prevail it does not follow that one injured has no remedy.[26] That the warrant for plaintiff's arrest was erroneous in that it did not give plaintiff's correct name,[27] or that the complaint contained a faulty description of the offense,[28] is no defense.

§ 4. *Termination of prosecution in plaintiff's favor.*[29]—The prosecution must have terminated in plaintiff's favor prior to the commencement of the action.[30] A prosecution may be regarded as terminated when it has been disposed of in such manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings do novo.[31] A nolle prosequi procured by the accused[32] or made in consequence of a compromise to which he was a party[33] is not such a termination as entitles him to maintain the action, but if such entry was the act of the prosecuting attorney induced solely by the advice of the court, it is.[34] Discharge by a grand jury is prima facie a termination.[35] Termination of the prosecution may be established by the docket entries therein.[36]

§ 5. *Want of reasonable and probable cause.*[37]—Want of probable cause is an essential element of the tort,[38] hence if admitted facts amount to probable cause, a verdict should be directed.[39] Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense with which he is charged.[40] It does not mean the want of any cause,[41] and does not depend upon the guilt or innocence of the accused,[42] but upon the want of any reasonable ground of suspicion such as would induce an ordinarily cautious man to believe in the truth of the charge.[43] The substance of all definitions of it is "a reasonable ground for belief."[44]

The question as to whether a certain state of facts exists is for the jury;[45] but

issued from a court without jurisdiction. Ailstock v. Moore Lime Co. [Va.] 52 S. E. 213.

Note: See 4 C. L. 484, n. 24, citing numerous authorities and stating that the weight of authority so prevails.

25. A void proceeding cannot be made the basis of the action. Forrest v. McBee [S. C.] 51 S. E. 675.

26. See Conversion as Tort, 5 C. L. 753; Trespass, 4 C. L. 1698.

27, 28. Cochran v. Bones [Cal. App.] 82 P. 970.

29. See 4 C. L. 485.

30. Schaefer v. Cremer [S. D.] 104 N. W. 468.

31. Dismissal of a criminal prosecution with costs against the prosecutor on his failure to produce evidence is a sufficient termination of the prosecution. Graves v. Scott [Va.] 51 S. E. 821.

32, 33, 34. Lamprey v. Hood [N. H.] 62 A. 380.

35. Wells v. Parker [Ark.] 88 S. W. 602.

36. The docket entries are admissible. Lamprey v. Hood [N. H.] 62 A. 380.

37. See 4 C. L. 489.

38. See ante, § 7.

39. Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Scott v. Dewey, 23 Pa. Super. Ct. 396. Where facts are sufficient to rebut the presumption of want of probable cause arising from the termination of the cause against plaintiff favorably to him, the court should direct a verdict for defendant. Carroll v. Central R. Co., 134 F. 684.

40. Price v. Denison [Minn.] 103 N. W. 728; Cook v. Proskey [C. C. A.] 138 F. 273. It is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting defendant in the manner complained of. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495. It is a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief. Scott v. Dewey, 23 Pa. Super. Ct. 396.

Probable cause held to exist where an agent of the humane society instituted a prosecution after an investigation. Bryant v. Kuntz, 25 Pa. Super. Ct. 102. Probable cause held to appear from plaintiff's own evidence. Scott v. Dewey, 23 Pa. Super. Ct. 396. Evidence held sufficient to show probable cause for prosecuting an action for infringement of a trade-mark and procuring a temporary injunction. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

41. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

42. Humphreys v. Mead, 23 Pa. Super. Ct. 415. Probable cause does not depend on the actual state of the case in point of fact but upon the honest and reasonable belief of the party prosecuting. Scott v. Dewey, 23 Pa. Super. Ct. 396.

43. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495. It depends upon appearances deduced from known facts of such a character as to produce belief in the mind of a reasonably prudent man. Humphreys v. Mead, 23 Pa. Super. Ct. 415.

44. Bryant v. Kuntz, 25 Pa. Super. Ct. 102.

the question of probable cause is one of law,[40] hence whether a certain state of facts constitutes probable cause is to be determined by the court,[47] and inferences to be drawn from undisputed facts or facts found by the jury to exist are inferences of law.[48] A contrary rule, however, was held in New York.[49] Leaving the question of probable cause to the jury is harmless where the question is rightly decided.[50]

The burden is upon the plaintiff to show[51] at least prima facie want of probable cause[52] and malice.[53] All evidence bearing on the question is admissible.[54] It is competent to show that acquittal was the result of a compromise.[55] Generally evidence of threats against the prosecutor not communicated to him until after he instituted the proceeding is not admissible,[56] but where the prosecuting witness himself testifies to an overt criminal act within his own knowledge, which is denied, corroborative evidence consisting of facts subsequently ascertained is admissible.[57]

Representations made by persons who have made an investigation or who have opportunities for knowledge may be probable cause,[58] but mere floating rumors are not.[59] The binding over by the committing magistrate to await the grand jury is prima facie but not conclusive evidence of probable cause.[60] A discharge by an examining magistrate is prima facie evidence of want of probable cause.[61] The acquittal of plaintiff is not conclusive evidence of want of probable cause,[62] especially where it is the result of a compromise,[63] and the rule that discharge or acquittal is prima facie evidence of want of probable cause does not apply where probable cause appears from plaintiff's evidence.[64]

An order for a temporary injunction is only prima facie evidence of probable

45. Young v. Lindstrom, 115 Ill. App. 239; Bryant v. Kuntz, 25 Pa. Super. Ct. 102.

46. Bryant v. Kuntz, 25 Pa. Super. Ct. 102.

47. Young v. Lindstrom, 115 Ill. App. 239; Scott v. Dewey, 23 Pa. Super. Ct. 396. The question of probable cause is a mixed one of law and fact; what facts exist and whether they are true is for the jury; whether they amount to probable cause is for the court. Cooper v. Flemming [Tenn.] 84 S. W. 801; Carroll v. Central R. Co., 134 F. 684. Instructing the jury to determine what belief a person of ordinary caution would have entertained from all the facts known to the defendant, upon a matter determinative of the question of probable cause, is erroneous. Atchison, etc., R. Co. v. Allen [Kan.] 79 P. 648.

48. Atchison, etc., R. Co. v. Allen [Kan.] 79 P. 648, and cases cited.

49. When a criminal prosecution is instituted and carried on without legal authority or justification, the questions of good faith and probable cause are questions of fact not of law. Long Island Bottlers' Union v. Seitz, 180 N. Y. 243, 73 N. E. 20.

50. Nickelson v. Cameron Lumber Co. [Wash.] 81 P. 1059.

51. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538; Young v. Lindstrom, 115 Ill. App. 239.

Evidence sufficient to show want of probable cause. Price v. Denison [Minn.] 103 N. W. 728. Evidence held to show want of probable cause for a charge of larceny preferred. McFadden v. Lane, 71 N. J. Law, 624, 60 A. 365. Evidence insufficient to show probable cause for belief that one received stolen goods with guilty knowledge. Cook v. Proskey [C. C. A.] 138 F. 273.

52. Cunningham v. Moreno [Ariz.] 80 P. 327.

53. Scott v. Dewey, 23 Pa. Super. Ct. 396.

54. Where want of probable cause is attempted to be shown by evidence that plaintiff had purchased the goods alleged to have been stolen from defendant's agents, it is competent for defendant to show that such articles had been stolen. Freeland v. Southern R. Co., 70 S. C. 427, 50 S. E. 11. In proving want of probable cause plaintiff is not confined to facts he can affirmatively show were within the actual knowledge of defendant; he may prove such facts as he might have discovered by proper investigation and inquiry. Price v. Denison [Minn.] 103 N. W. 728.

55. Evidence not contradictory to the record is admissible for such purpose. Carroll v. Central R. Co., 134 F. 684.

56. Schroeder v. Blum [Neb.] 103 N. W. 1073. The inquiry as to probable cause goes back to the commencement of the action and relates to facts then known and as they then appeared. Bryant v. Kuntz, 25 Pa. Super. Ct. 102.

57. Schroeder v. Blum [Neb.] 103 N. W. 1073.

58, 59. Bryant v. Kuntz, 25 Pa. Super. Ct. 102.

60. Wells v. Parker [Ark.] 88 S. W. 602.

61. Shifts the burden to defendant to rebut it. Scott v. Dewey, 23 Pa. Super. Ct. 396.

62. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538.

63. An acquittal in the prosecution against plaintiff which is the result of a compromise is not conclusive of plaintiff's innocence or want of probable cause. Carroll v. Central R. Co., 134 F. 684.

cause to begin a civil suit.[65] A judgment procured by undue means, such as fraud,[66] conspiracy, false testimony or subornation,[67] is not proof of probable cause.

§ 6. *Malice.*[68]—Malice is an essential element of the tort.[69] It may be inferred from zealous participation in the prosecution[70] or from want of probable cause.[71] The inference is one of fact.[72]

If probable cause is shown the question of malice is immaterial.[73]

§ 7. *Advice of private counsel, prosecuting attorney or magistrate.*[74]—That the prosecution was instituted on the advice of the prosecuting attorney[75] or private counsel of good standing[76] after a full and fair statement of all the facts known to the defendant[77] is a complete defense,[78] and where there are two prosecutions, one

64. Scott v. Dewey, 23 Pa. Super. Ct. 396.

65. Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

Note: It is held by the United States supreme court that a final judgment of a court of superior jurisdiction is conclusive evidence of probable cause though reversed on appeal. Crescent City Live Stock Co. v. Butcher's Union, 120 U. S. 141, 30 Law. Ed. 614. Some states follow the same rule (Spring v. Besore, 12 B. Mon. [Ky.] 551; Griffis v. Sellars, 20 N. C. 315; Whitney v. Peckham, 15 Mass. 243; Herman v. Brookerhoff, 8 Watts [Pa.] 240), and in Georgia it has been extended to an ex parte order granting an injunction and appointing a receiver pendente lite (Short & Co. v. Spragins, Buck & Co., 104 Ga. 628, 30 S. E. 810). In New York a judgment of a justice of the peace subsequently reversed on appeal is only prima facie evidence of probable cause. Burt v. Place, 4 Wend. [N. Y.] 591; Nickolson v. Sternberg, 61 App. Div. 51, 70 N. Y. S. 212. See, also, Palmer v. Avery, 41 Barb. [N. Y.] 290.—See Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

66. Allegations in a complaint for malicious prosecution held to show bad faith and dishonesty in procuring a judgment. King v. Estabrooks, 77 Vt. 371, 60 A. 84.

67. A conviction by a court of competent jurisdiction is not conclusive of probable cause where the judgment is subsequently reversed and appears to have been procured by undue means. Gilmore v. Mastin, 115 Ill. App. 46.

Note: A conviction procured by undue means, as by fraud, conspiracy, false testimony, or subornation, is not conclusive of probable cause. Womack v. Circle, 32 Grat. [Va.] 324; Blucher v. Yonker, 19 Ind. App. 615; Adams v. Bicknell, 126 Ind. 210; Phillips v. Kalamazoo, 53 Mich. 33; Ross v. Hixon, 46 Kan. 550; Lawrence v. Cleary, 88 Wis. 473; Murphy v. Ernst, 46 Neb. 1; Hartshorn v. Smith, 104 Ga. 235; Burt v. Place, 4 Wend. [N. Y.] 591; Spring v. Besore, 12 B. Mon. [Ky.] 551; Welch v. Railroad Co., 14 R. I. 609; Boogher v. Hough, 99 Mo. 183; Holliday v. Holliday, 123 Cal. 26; Page v. Cushing, 38 Me. 523.—See Gilmore v. Mastin, 115 Ill. App. 46.

68. See 4 C. L. 498.

69. Gabriel v. McMullin, 127 Iowa, 426, 103 N. W. 355. Express malice must be shown. Freeland v. Southern R. Co., 70 S. C. 427, 50 S. E. 11.

70. Where one applied to a magistrate for a summons, made oath to the complaint, employed counsel and by appearing to push the case. Cook v. Proskey [C. C. A.] 138 F. 273.

71. Cunningham v. Moreno [Ariz.] 80 P. 327; Merrell v. Dudley [N. C.] 51 S. E. 777; Humphreys v. Mead, 23 Pa. Super. Ct. 415. In criminal prosecutions actual malice need not be shown. Price v. Denison [Minn.] 103 N. W. 728. In the absence of either guilt or probable cause to charge guilt, a sworn accusation of larceny intentionally made as the basis of a criminal prosecution may reasonably be found to be malicious. McFadden v. Lane, 71 N. J. Law, 624, 60 A. 365.

72. The want of probable cause therefore is evidence of malice, the existence of which is to be determined by the jury. Humphreys v. Mead, 23 Pa. Super. Ct. 415.

73. Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Scott v. Dewey, 23 Pa. Super. Ct. 396.

74. See 4 C. L. 500.

75. That the prosecution was instituted on the advice of the prosecuting officer after a full and fair statement of all the facts known to defendant is a complete defense. Brinsley v. Schulz, 124 Wis. 426, 102 N. W. 918.

76. Advice of counsel on a full and fair disclosure is a defense. Cooper v. Flemming [Tenn.] 84 S. W. 801. A party who consults with competent legal counsel in good faith to ascertain what course to pursue in reference to acts done by another is not liable. Abel v. Downey, 110 Ill. App. 343. Advice of counsel based on full and fair disclosure is a defense. Young v. Lindstrom, 115 Ill. App. 239.

77. The defendant must have stated all facts within his knowledge to the prosecuting attorney. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538. In order to make the advice of counsel available by way of defense, it must be shown that the party gave to his counsel a full and fair statement of the facts within his knowledge, or which he had reasonable grounds to believe he could prove, and that he used reasonable diligence to ascertain the facts, and that he acted in good faith upon the advice received. Humphreys v. Mead, 23 Pa. Super. Ct. 415. Advice of a justice is no defense where material matters known were not disclosed. Cochran v. Bones [Cal. App.] 82 P. 970. Testimony of one defendant that he fully stated all the facts to the prosecuting attorney and of another that he stated all facts within his knowledge is sufficient to show that all facts known were stated. Brinsley v. Schulz, 124 Wis. 426, 102 N. W. 918.

under an original and one under an amended complaint, advice of counsel as to the amended complaint is a defense pro tanto,[79] but advice of a magistrate[80] or other person not learned in the law[81] is not a defense, and advice of counsel is no defense if the prosecution was instituted and conducted to harass, oppress and coerce.[82] Whether defendant acted under advice of counsel[83] and whether he made a full and fair disclosure[84] are questions of fact. That the defendant made a full disclosure is not established by his statement of such fact as a conclusion.[85]

§ 8. *Damages.*[86]—The measure of damages depends largely on the nature of the prosecution.[87] For abuse of process without probable cause actual damages may be recovered.[88] Legitimate expenses incident to the suit and defense are proper elements,[89] and where malice is shown, punitive damages may be recovered.[90] Evidence of statements bearing on the question of special damages is not admissible unless it appears that such statements were made prior to the commencement of the action.[91] Instructions as to the measure of damages must be predicated on the evidence.[92]

§ 9. *General matters of pleading and practice.*[93]—The gist of the action is the tort charged, not the conspiracy alleged as part of the means employed in its commission.[94] A complaint for malicious prosecution must set out all the essential elements of the tort. Facts showing want of probable cause must be alleged,[95] and it must affirmatively appear that the prosecution has terminated in plaintiff's favor,[96] or that plaintiff was in some way deprived of his right to assert a de-

78. It shows absence of malice, and the existence of probable cause as a matter of law. Brinsley v. Schulz, 124 Wis. 426, 102 N. W. 918.

79. Error to exclude evidence of it. Schroeder v. Blum [Neb.] 103 N. W. 1073.

80. That defendant before beginning the prosecution made a full and fair disclosure to a magistrate and acted in good faith on his advice does not rebut the inference of malice arising from want of probable cause where it does not appear that the magistrate was learned in the law. Cook v. Proskey [C. C. A.] 138 F. 273.

81. Evidence of a police officer's advice held incompetent on the question of malice. Flynn v. Coolidge [Mass.] 74 N. E. 342.

82. Freeman v. Wright, 113 Ill. App. 159.

83. Wells v. Parker [Ark.] 88 S. W. 602.

84. Wells v. Parker [Ark.] 88 S. W. 602. Whether he made a full statement is a question of fact not of law. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538.

85. Testimony should be as to facts stated to the prosecuting attorney and not that he told him all he knew about the case. Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538.

86. See 4 C. L. 503.

87. Damages for injuries to feelings may be recovered where replevin is wrongfully and maliciously sued out for the purpose of extorting money. Harris v. Thomas [Mich.] 12 Det. Leg. N. 239, 103 N. W. 863.

88. Where one sues out attachment with knowledge that nothing was owed him, want of probable cause is shown and actual damages may be recovered. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

89. In an action for wrongfully suing out attachment expenses in defending the suit, the value of plaintiff's time and the use of his team on trips to consult counsel relative to defense of the suit are elements. Tullis v. McClary [Iowa] 104 N. W. 505.

90. Where an attachment is wantonly, recklessly and willfully sued out for the purpose of coercing the payment of money not owed, malice may be inferred and punitive damages recovered. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

91. Where refusal of a third person to rent plaintiff a barn was asserted as an element, statements by such person tending to show that the prosecution was not the cause of his refusal. Flynn v. Coolidge [Mass.] 74 N. E. 342.

92. An instruction to give plaintiff whatever the jury thought would be fair compensation "and also whatever would reimburse him for any consequent expenses or losses" is too broad, and there being no evidence of such expenses or losses, is reversible error. Gilmore v. Kane [N. J. Law] 60 A. 181.

93. See 4 C. L. 505.

94. Allegations as to the conspiracy are surplusage. Gilmore v. Mastin, 115 Ill. App. 46.

95. Otherwise it is demurrable. King v. Estabrooks, 77 Vt. 371, 60 A. 84. A complaint alleging that a judgment against plaintiff was fraudulently obtained and that plaintiff was arrested thereunder is insufficient unless it shows facts constituting the fraud. Schofield v. Thackaberry, 115 Ill. App. 118.

96. A complaint from which it is not ascertainable that plaintiff was discharged by the magistrate or that he secured his liberty otherwise than by giving bail is insufficient. Schaefer v. Cremer [S. D.] 104 N. W. 468.

fense.[97] Allegations of facts from which malice and want of probable cause will be inferred are tantamount to specific allegations of malice and want of probable cause.[98]

An allegation of malicious seizure of goods by unlawful process is not an allegation of malicious excessive seizure and a nonsuit will be granted where the evidence shows lawful process but excessive seizure.[99]

The order of proof is within the discretion of the trial judge.[100]

The declarations of the defendant at the time he instituted the proceedings and accompanying the act are a part of the transaction and admissible.[101]

Instructions should be technically correct[102] and not misleading.[103]

MANDAMUS.

§ 1. *Nature and office of remedy in general.*[1]—Mandamus is a common-law[2] remedy to compel action;[3] injunction is the equitable remedy to prevent action.[4] But the remedies of mandamus and mandatory injunction are closely analogous.[5] While in most states mandamus is now considered a civil action, it is not a suit of a civil nature at law or in equity within the meaning of statutes regulating the removal of causes from the state to the Federal courts,[6] nor when brought against

97. Risser v. Liberman Bros., 102 App. Div. 482, 92 N. Y. S. 942.

98. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

99. Lane v. Sayre Land Co., 211 Pa. 290, 60 A. 792.

100. Evidence of damages may be admitted before want of probable cause is shown. Cunningham v. Moreno [Ariz.] 90 P. 327.

101. A declaration of defendant to a justice at the time of applying for a warrant for arrest for larceny of a shovel that when defendant asked plaintiff to return the shovel, plaintiff used certain insulting language, held admissible. Merrell v. Dudley [N. C.] 51 S. E. 777.

102. An instruction that facts which existed prior to the institution of the criminal proceeding cannot be considered if they were unknown to prosecuting witness is erroneous where evidence thereof is admissible in corroboration. Schroeder v. Blum [Neb.] 103 N. W. 1073.

103. An instruction that malice may be inferred from want of probable cause or from "other circumstances" is not objectionable as requiring both a total want of probable cause and corroborating circumstances to show malice. Merrell v. Dudley [N. C.] 51 S. E. 777.

1. See 4 C. L. 506.

This section contains only the general rules, the specific applications to various duties being treated in the next section.

2. Is a common-law writ. Sedden v. McBride [Pa.] 60 A. 12. Is a legal action. State v. Ross [Wash.] 81 P. 865.

3. State v. Ross [Wash.] 81 P. 865; State v. Board of Com'rs [La.] 39 So. 842. It is a general rule that whenever a statute gives power to or imposes an obligation on a particular person to do some particular act or duty and provides no specific legal remedy for nonperformance, the court will, in order to prevent a failure of justice, grant mandamus to command the doing of such act or duty. Douglas v. McLean, 25 Pa. Super. Ct. 9.

4. See Injunction, 6 C. L. 6.

5. The right, if any, of the public to compel a railroad to maintain a station at a certain point is enforceable by mandamus; injunction will not lie. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. See Injunction, 6 C. L. 6.

6. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

county officials is it deemed a suit against a state within the inhibition of the Federal constitution.[7]

Mandamus was originally a prerogative writ and does not now issue as a matter of legal right,[8] but at the discretion of the court;[9] this discretion is a judicial one[10] and is exercised upon equitable principles.[11] The writ will not issue where it will introduce confusion or disorder,[12] or aid illegal acts or business,[13] or compel respondent to violate the law,[14] and in this connection it is the spirit of the law that is looked to.[15] Nor will a court ordinarily command the doing of an act which another court of competent jurisdiction has enjoined.[16] The proceedings must not have been tainted with fraud or corruption,[17] the relator's hands must be clean,[18] he must

7. Mandamus to compel county auditors and treasurers to levy a tax to pay a judgment on township bonds though such officers had been forbidden by the state legislature to exercise any such power. Graham v. Folsom, 26 S. Ct. 245.

8. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

9. People v. Rock Island, 215 Ill. 488, 74 N. E. 437; People v. Olsen, 215 Ill. 620, 74 N. E. 785; Clute v. Ionia Circuit Judge [Mich.] 102 N. W. 843; Sherwood v. Rynearson [Mich.] 12 Det. Leg. N. 395, 104 N. W. 392; Dancy v. Clark, 24 App. D. C. 487.

NOTE. Nature of writ: In the growth of the law of mandamus it must be conceded that the writ has come to be looked on more and more as a writ of right as contradistinguished from one of mere prerogative. When the King of England in his own royal person issued the writ from the King's Bench (People v. Common Council, 78 N. Y. loc cit. 61) it was a highly prerogative writ and necessarily and entirely one of discretion. Chief Justice Marshall in the great case of Marbury v. Madison, 1 Cranch [U. S.] 137, 2 Law. Ed. 60, borrowed and used approvingly Lord Mansfield's dictum in King v. Baker, 3 Burrows, 1266, thus: "This writ ought to be used on all occasions where the law has established no specific remedy and where in justice and good government there ought to be one." In State v. Cook, 41 Mo. 593 Judge Wagner overlooked or refused to follow the dictum of Lord Mansfield and held on authority that the writ could not cover a casus omissus. In State v. Fraker, 166 Mo. loc. cit. 140, 65 S. W. 720, the doctrine of the text of High, Extr. Leg. Rem. [3d Ed.] § 430, is adopted, treating mandamus as an ordinary writ of right, which issues as of course on proper showing made. The correct rule, deduced from modern practice, seems to be that mandamus, while no longer a mere prerogative writ, is yet somewhat of a discretionary writ and should be issued, not in the exercise of an arbitrary or capricious discretion, but in the exercise of a sound legal discretion in accordance with the established rules of law. 19 Am. & Eng. Ency. Law [2d Ed.] 751.—From State v. Gibson [Mo.] 86 S. W. 177, 181.

10. Shepard v. Oakley, 181 N. Y. 339, 74 N. E. 227, rvg. 102 App. Div. 617, 92 N. Y. S. 1145; McCarthy v. Boston [Mass.] 74 N. E. 659; State v. U. S. Exp. Co. [Minn.] 104 N. W. 556; State v. Richards [Fla.] 39 So. 152. Will be allowed only in furtherance of justice upon a proper case presented. State v. Barret [Mont.] 81 P. 349.

11. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

12. People v. Olsen, 215 Ill. 620, 74 N. E. 785. An order denying mandamus to prevent county clerk from extending taxes as provided by 4 Starr & C. Ann. St. 1902, p. 1125, c. 120 held proper where 70 per cent. of the work had been done and the granting of the writ would have required the preparation of new books at an expense of $125,000. Id.

13. Mandamus to compel a township clerk to certify the amounts due upon a county order given in payment for a road roller, denied where it appeared that the county supervisor had received compensation for his services in procuring the order for the machine. First Nat. Bank v. Clerk of Union Tp. [Mich.] 12 Det. Leg. N. 461, 104 N. W. 771.

14. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556. Lottery concern held not entitled to have a writ of mandamus to compel a common carrier to carry certain packages. Id. Mandamus does not lie to compel the issuance of a salary voucher which has not been authorized or ordered issued by the county board as provided by statute. Knopf v. Corcoran, 112 Ill. App. 320. Mandamus will not lie on the relation of the county commissioners to compel the clerk to do an illegal act. State v. Stewart [Fla.] 38 So. 600. The erection of county bridges is regulated by statute and all the statutory provisions must be complied with in order to make the proceeding effective, particularly when it is sought to compel the county commissioners by mandamus to construct the bridge at the expense of the taxpayers. Commonwealth v. Baker, 212 Pa. 230, 61 A. 910. In proceedings under Act June 13, 1836 (P. L. 551), relating to the construction of county bridges, it is necessary to have the concurrence of the grand jury, the court and the county commissioners, which concurrence must be reasonably continuous; held where there was an interval of four years from the filing of the petition to the concurrence of the county commissioners, mandamus to construct the bridge would be denied. Id.

15. A court will not compel a technical compliance with the letter of the law, when such compliance will violate the spirit of the law. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

16. Mandamus will not issue to compel magistrate to issue a warrant for the arrest of certain persons, their arrest having been enjoined by an injunction issued against the

not have contributed to the condition of which he complains,[19] and he must have a clear legal right to the writ;[20] consequently the writ will be denied where relator shows that he is only entitled to partial relief without showing what part.[21] The act sought to be coerced must be one of absolute obligation on the part of the respondent,[22] the writ generally lying to compel the performance of an act which the law specifically enjoins and not to undo an act already done.[23] It is ordinarily held that the writ will not be granted unless its issuance will serve some useful legal purpose,[24] and be of some benefit to the relator;[25] but when it appears that a legal

county attorney. State v. Snelling [Kan.] 80 P. 966.

17. If they have been the relief will be denied, however meritorious the application may be on other grounds. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

18. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556. Mandamus will not issue to compel a common carrier to accept packages offered it for transportation by a lottery concern. Id. An answer to an alternative writ to compel a telegraph company to sell and deliver to relator market quotations, held sufficient, it showing that defendant desired them for use in a bucket shop. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

19. Where lessee of public land had lease canceled, and the land commissioner leased it to another, mandamus will not lie to compel the commissioner to reinstate the first lease on the ground that it was good for five years more. Nevell v. Terrell [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 971. Where an applicant for a writ of mandamus to compel a judge to dissolve a temporary injunction requested and procured the postponement of the trial of the injunction suit, he cannot procure the issuance of the writ on the ground of irreparable injury resulting from delay in the trial of the injunction suit. Chatfield v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 284, 104 N. W. 45.

20. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556; State v. Malheur County Court [Or.] 81 P. 368; State v. Richards [Fla.] 39 So. 152; Lewis v. Union Drainage Com'rs, 111 Ill. App. 222; Knopf v. Corcoran, 112 Ill. App. 320; People v. Helt, 116 Ill. App. 391; Chicago City R. Co. v. People, 116 Ill. App. 633; Douglas v. McLean, 25 Pa. Super. Ct. 9. Where premises had been formerly used as a poolroom, held, mandamus would not lie to compel telephone company to furnish service unless assured that it would not be used for illegal purposes. Cullen v. New York Tel. Co., 94 N. Y. S. 290. Mandamus to vacate an order denying a motion to quash a capias on the ground that the affidavit was not sworn to on affiant's personal knowledge denied where relator admitted that the facts shown by the records are true, but contested only the conclusion drawn by the affiant therefrom. Robinson v. Branch Circuit Judge [Mich.] 12 Det. Leg. N. 623, 105 N. W. 25.

21. Mandamus will not lie to compel a city to appropriate to the payment of interest on bonds taxes collected indiscriminately for interest and sinking fund. City of Austin v. Cahill [Tex. Civ. App.] 88 S. W. 536.

22. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556.

23. In the absence of a statute making it the duty of a county clerk to expunge from the register the name of a duly licensed dentist, mandamus will not lie to compel him to cancel a registration made by his predecessor in office on the ground that it was procured on an insufficient license and affidavit under Laws 1895, p. 418, c. 626. State v. Jacobs, 92 N. Y. S. 590.

24. Mandamus will not issue to compel the payment of a dormant judgment. Beadles v. Fry [Okl.] 82 P. 1041. A party being entitled to appear and have a decree opened, mandamus will not issue to arrest the proceedings, though the original defendants, who were not necessarily entitled to appear, had been permitted to do so. Coffin v. Ontonagon Circuit Judge [Mich.] 12 Det. Leg. N. 219, 103 N. W. 835. Where city charter required school tax to be levied on or before the second Monday in May, 1903, a petition for mandamus to compel a subsequent levy presents a mere moot question and is demurrable. Board of Education v. Common Council [Cal. App.] 82 P. 89. Mandamus will not issue where respondent performs the act sought to be compelled, before the writ is issued. Chemung Min. Co. v. Morgan [Idaho] 81 P. 384.

25. Dancy v. Clark, 24 App. D. C. 487. Mandamus does not lie where it appears that the relator has no right to the relief which it is his ultimate object to obtain, and that the writ will serve no purpose except that of enforcing a mere abstract right, unattended by any substantial benefit. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717. Mandamus will not lie to compel the secretary of state to issue a certificate of incorporation under a name the use of which may be enjoined by an existing company. People v. Rose [Ill.] 76 N. E. 42. Mandamus will not issue to compel clerk to deliver to petitioner certain testimony where respondent answered that he had let the solicitor for the circuit take the same and after diligent search, he could not find it. Gray v. Lindsey [Ala.] 39 So. 927. Mandamus will not lie to compel the state land commissioner to lease lands which he has already released. State v. Ross [Wash.] 81 P. 865. Mandamus to compel the fixing of a supersedeas bond on appeal by plaintiff in a suit to enjoin the destruction of certain buildings denied where it appeared that the buildings had already been destroyed. State v. Irwin [Wash.] 82 P. 420. The provision in Act April 7, 1903 (P. L. p. 733), authorizing the payment of a certain sum when a certain act shall have been judicially determined to be constitutional, authorizes the state comptroller to withhold his warrant on the state treasurer until it could be honored in order-

duty has not been performed, there is no abuse of discretion in issuing the writ, though it is doubtful if it will result in any substantial benefit.[26]

Other adequate remedy.[27]—Mandamus will not lie where there is a plain, specific, speedy, adequate remedy at law.[28] An equitable remedy does not bar the writ.[29]

Limitations and laches or delay.[30]—The right to the writ may be barred by limitations[31] or delay.[32] The question of laches or delay is dependent upon the facts of each case.[33]

§ 2. *Duties and rights enforceable by mandamus. A. Judicial procedure and process.*[34]—While mandamus will not issue to control discretion or revise judicial action,[35] it is the proper remedy to compel a court to proceed and try a cause when it refuses to do so upon the erroneous decision that it has no jurisdiction;[36]

ly course. Trustees of Rutgers College v. Morgan, 71 N. J. Law, 663, 60 A. 205. One applying for a writ of mandamus to compel a license board to reduce to writing the testimony taken on the hearing of an application for a license to sell intoxicating liquors must show, not only that he has a right to have the evidence reviewed in the district court, but that he intends to have it thus reviewed. State v. McGuire [Neb.] 105 N. W. 471. That a railroad occupying a street left a space sufficiently wide to fully accommodate public travel unobstructed is a circumstance to be considered by the court in exercising its discretion in granting or denying a writ of mandamus to compel the railroad to remove its structures from the street. People v. Rock Island, 215 Ill. 488, 74 N. E. 437. In such a case a writ of mandamus at the suit of a private relator suing as a citizen and taxpayer held properly denied. Id.

26. Mandamus to compel the United States Board of Labor Employment to register an applicant though the relator may possibly not receive any substantial benefit from such registration. United States v. Bowyer, 25 App. D. C. 121.

27. See 4 C. L. 509.

28. Wells v. Montcalm Circuit Judge [Mich.] 102 N. W. 1001; State v. McGuire [Neb.] 105 N. W. 471; State v. Richards [Fla.] 39 So. 152; Douglas v. McLean, 25 Pa. Super. Ct. 9. Will issue only when there are conditions of necessity or exceptional circumstances, where there would otherwise be a failure of justice. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556. In a controversy between a citizen and a school board all remedies provided by the school law of 1903 (P. L. p. 21) must be exhausted before he will be entitled to mandamus. Stockton v. Board of Education of Burlington [N. J. Law] 59 A. 1061.

29. Douglas v. McLean, 25 Pa. Super. Ct. 9.

30. See 4 C. L. 509.

31. Under Code Civ. Proc. § 338, subd. 1 and § 343, mandamus to require relator's reinstatement as a policeman brought nine years after his removal is barred by limitations. Dodge v. Board of Police Com'rs [Cal. App.] 82 P. 699. Where drainage commissioners recognized rights of owners to additional drainage and endeavored to secure it for them, held, limitations did not run against the right of the owners to compel the commissioners to supply the necessary drainage. Kreiling v. Northrup, 215 Ill. 195, 74 N. E. 123, afg. 116 Ill. App. 448.

32. Over a year's delay in applying for mandamus to settle a bill of exceptions held to bar right though the case was one of several in which defendants had agreed to be bound by the result in one. State v. Gibson, 187 Mo. 536, 86 S. W. 177. Mandamus by a holder of warrants issued in payment for the construction of a ditch, brought six months after abandonment of the project by the county commissioners, to compel the commissioners to levy a special assessment to pay the warrants, is not barred by laches. Espy Estate Co. v. Board of Com'rs [Wash.] 82 P. 129.

33. State v. Gibson, 187 Mo. 536, 86 S. W. 177.

34. See 4 C. L. 509.

35. Richland Drug Co. v. Moorman [S. C.] 50 S. E. 782. Mandamus to compel district judge to enforce injunction denied. Xavier Realty v. Louisiana R. & Nav. Co., 114 La. 967, 38 So. 695. Mandamus will not lie to compel the court to set aside an order refusing to set aside a default. Gorman v. Calhoun Circuit Judge [Mich.] 12 Det. Leg. N. 139, 103 N. W. 567. Mandamus will not lie to compel the court to vacate the conditions upon which it opened a default. Hallwood Cash Register Co. v. Mandell [Mich.] 102 N. W. 625. Circuit court cannot review by mandamus action of committing magistrate in refusing to punish a witness for contempt. Farnham v. Colman [S. D.] 103 N. W. 161. Mandamus does not lie to compel a court to issue a peremptory writ. State v. Board of Com'rs [La.] 39 So. 842. Mandamus will not lie to compel district judge to order the court stenographer to furnish certain testimony unless the stenographer be paid directly in cash. State v. St. Paul, 113 La. 1066, 37 So. 972. The discretion of probate judges as to the appointment of jail matrons cannot, in the absence of gross abuse, be directed or controlled by mandamus. State v. Robeson, 3 Ohio N. P. (N. S.) 5.

36. In the absence of apparent jurisdiction over a cause in any appellate court, the supreme court may compel the district court to reinstate a case dismissed for want of jurisdiction, it being manifest that the court has jurisdiction. Reynolds v. Carroll, 114 La. 610, 38 So. 470. Mandamus will lie to compel a trial court to hear and pass upon the merits of a motion which it has juris-

but assuming jurisdiction and proceeding with the cause, mandamus will not lie because an intermediate appellate court erroneously determines that the lower court had no jurisdiction,[37] nor will the writ lie to correct an erroneous assertion of jurisdiction.[38] Purely ministerial duties imposed by law[39] may be controlled by mandamus. The duty of the court must be clearly apparent,[40] and action must have been requested and improperly refused.[41] While a judicial officer can be compelled to move, proceed and take action in the performance of a duty under the law,[42] a court cannot be coerced by mandamus to enter a judgment or order on motion of counsel before it has sufficient time to be duly advised and satisfied as to the proper judgment or order to be entered.[43] It must be apparent that the writ will accomplish some good.[44] Mandamus will lie where there is no other adequate legal remedy,[45] as by appeal or writ of error.[46] Upon an appeal being

diction to entertain, and which it declined to entertain on the sole ground that it had no such jurisdiction. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717.

37. State v. Mosman [Mo. App.] 87 S. W. 75.

38. Mandamus will not lie to correct an erroneous assertion of jurisdiction by a court. Roberts v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 72, 103 N. W. 512. So held where judge refused to dissolve temporary injunction on the ground that there was equity in the bill. Id.

39. Mandamus allowed in garnishment proceedings to compel settlement and signing of case made. Cadillac State Bank v. Wexford Circuit Judge [Mich.] 102 N. W. 667. Writ lies to correct improper refusal of an appeal or supersedeas. Albright v. Territory [N. M.] 79 P. 719. Supreme court may issue a peremptory writ of mandamus directing the signing of a bill of exceptions after the expiration of the time therefor. State v. Gibson, 187 Mo. 536, 86 S. W. 177. Mandamus lies to compel a justice of the peace to approve an appeal bond, though there be an immaterial defect in the name of the proposed surety. Bundy v. U. S., 25 App. D. C. 459. Mandamus lies to correct an improper or unauthorized refusal to settle or certify a bill of exceptions. Miller v. American Cent. Ins. Co. [Cal. App.] 83 P. 289. Mandamus will lie to compel the probate court to grant letters of administration to the person designated by statute. State v. Guinotte [Mo. App.] 86 S. W. 884. Nor is this changed by the fact that it required evidence to show the relationship of relator to deceased. Id. After a valid interlocutory decree of divorce has been entered a year the trial court may be compelled by mandamus to make and cause to be entered a final decree on refusal of an application therefor. Claudius v. Melvin, 146 Cal. 257, 79 P. 897. Supreme court may compel circuit court to certify certain copies of lost or stolen indictments on sufficient proof of their authenticity. State v. Beadle County Circuit Ct. [S. D.] 104 N. W. 1048. Under Code 1896, § 4074, the duty of the court of probate to issue a tax deed is ministerial. Roach v. State [Ala.] 39 So. 685. A justice of the peace acts ministerially in presiding in an eminent domain proceeding, and his actions therein may be controlled by mandamus. Sullivan v. Yazoo & M. R. Co. [Miss.] 38 So. 33. Under Rev. St. 1899, § 731, providing for signing by an acting or succeeding judge, mandamus will not lie to compel a judge whose term has expired to sign a bill of exceptions. State v. Gibson, 187 Mo. 536, 86 S. W. 177.

NOTE. Mandamus as a remedy to compel the rendition, entry and correction of judgment, see Judgments, 6 C. L. 214.

40. Mandamus cannot issue to compel a magistrate to issue his warrant of ejectment against an alleged trespasser after five days' service of notice to quit, under Civ. Code 1902. § 2972, there being no evidence that plaintiff was the owner of the premises and defendant was a trespasser. Richland Drug Co. v. Moorman [S. C.] 50 S. E. 792.

41. Edinburg Coal Co. v. Humphreys [C. C. A.] 134 F. 839. Mandamus to compel a judge to enter judgment denied where it appeared that the hearing was pending and the court was at all times ready to dispose of the motion but no application therefor had been made; held, petition was premature. Presthus v. Gogebic Circuit Judge [Mich.] 12 Det. Leg. N. 664, 105 N. W. 154. Mandamus to compel judge of district court to proceed to trial only lies where such judge improperly refuses so to do. Const. art. 5, § 6 and Sayles' Ann. Civ. St. 1897, art. 1000 construed. Dunn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 665, 88 S. W. 532.

42. Richland Drug Co. v. Moorman [S. C.] 50 S. E. 792.

43. Alexander v. Moss [Ky.] 89 S. W. 118. See note Mandamus as a remedy to compel the rendition, entry and correction of judgment, Judgments, 6 C. L. 214. So long as the trial judge is permitted to sit in the case and is not required to vacate the bench in accordance with the statute, the court, on petition for mandamus to compel him to enter judgment in a cause, will not consider his private motives, nor his estimate of counsel in the case. Alexander v. Moss [Ky.] 89 S. W. 118.

44. Where after the jury had disagreed an information was quashed and it did not appear that a different result would be reached on another trial, held, mandamus would not lie to compel the court to set aside the order quashing the information. Clute v. Ionia Circuit Judge [Mich.] 102 N. W. 843.

45. Conceding that the superior court of one county has no power or discretion to order a change of venue in garnishment proceedings, mandamus is the proper remedy to compel it to proceed with the trial though it has ordered a change of venue. The fact

taken from a nonappealable decree, mandamus can be awarded to vacate said decree if the matter complained of cannot be remedied by a final decree.[47] A judge may interpose as a defense grounds for the ruling complained of which he did not assign as reasons for the ruling when made.[48]

The writ of supervisory control[49] is one to be seldom issued and then only when other writs may not issue and other remedies are inadequate and when the acts of the court complained of as threatened will be arbitrary, unlawful and so far unjust as to be tyrannical.[50] The writ will not issue while the lower court is proceeding within and before it has exceeded its jurisdiction.[51]

(§ 2) *B. Administrative and legislative functions of public officers.*[52]—The writ lies only to enforce a purely ministerial duty.[53] In the absence of abuse[54] it

that the proceedings may eventually reach the supreme court on appeal from the superior court of the county to which they have been transferred is not an adequate remedy. State v. Superior Ct. [Wash.] 82 P. 875.

46. Mandamus will lie to compel a nunc pro tunc entry of judgment. People v. District Ct. [Colo.] 79 P. 1014. Where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the action without prejudice on plaintiff's motion, mandamus will lie to require the court to reinstate the cause and determine defendant's motion, as an appeal from a judgment of dismissal would not raise for review the question of defendant's right to such judgment. State v. District Ct. [Mont.] 79 P. 546. Mandamus will not lie to correct an order erroneously striking certain affidavits in support of a new trial from the files. Gay v. Torrance, 143 Cal. 169, 76 P. 973. Mandamus does not lie to compel a circuit judge to vacate an order dismissing an appeal from a judgment of a circuit court commissioner. Lemon v. Oakland Circuit Judge [Mich.] 12 Det. Leg. N. 243, 103 N. W. 843. Mandamus will not lie to compel the circuit judge to vacate an order denying a motion for leave to file an amended declaration. Jones v. Mandell [Mich.] 12 Det. Leg. N. 463, 104 N. W. 692. The fact that two suits for divorce, one by the husband and the other by the wife, in which conflicting orders have been made, are pending in different circuit courts, is not ground for a writ of mandamus to settle the conflict in jurisdiction. Wells v. Montcalm Circuit Judge [Mich.] 102 N. W. 1001. Mandamus will not lie to show cause why a default judgment should not be set aside, the court below ascertaining and retaining jurisdiction and relator claiming that the facts show want of jurisdiction. Valley City Desk Co. v. Wolcott [Mich.] 102 N. W. 651. The supreme court cannot, by mandamus, direct a judge of a lower court to vacate a decree dismissing a bill for want of equity, made in a regular manner in a case within the jurisdiction of the judge and which can be revised on appeal from the final decree. Ex parte Merritt [Ala.] 38 So. 183. A decree awarding affirmative relief to defendant, not being void and not embracing matters not in issue cannot be partially vacated on mandamus. Pere Marquette R. Co. v. Kalkaska Circuit Judge [Mich.] 102 N. W. 951. Court cannot by mandamus vacate a part or the whole of a decree on the merits. Id. Under Comp. Laws 1897, § 10,642, an order quashing a writ of garnishment and releasing the garnishee from further liability with costs to defendant is a final judgment reviewable on error and hence mandamus does not lie to review such order and to vacate the same. Recor v. St. Clair Circuit Judge [Mich.] 102 N. W. 643. Mandamus does not lie to determine the validity of an order appointing a receiver pending bankruptcy proceedings nor the effect of a subsequent order of dismissal. Edinburg Coal Co. v. Humphreys [C. C. A.] 134 F. 839. A motion to dismiss in opposition to an application for administration of estate of deceased contestant of a will, held to be, in effect, a motion to dismiss for want of jurisdiction and an order overruling the motion is not reviewable by mandamus. Roberts v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 72, 103 N. W. 512.

47. Where an authentic transcript of the proceedings was before the court, respondent having spread a motion on the docket before the case was submitted, asking for a mandamus, rule nisi would issue to the lower court to show cause why a writ of mandamus should not issue commanding him to vacate the decree. Brady v. Brady [Ala.] 39 So. 237.

48. State v. Mosman [Mo. App.] 87 S. W. 75.

49. See, also, Prohibition, 4 C. L. 1084.

50, 51. State v. District Ct. [Mont.] 81 P. 345.

52. See 4 C. L. 512.

53. Van Dorn v. Anderson [Ill.] 76 N. E. 53, afg. 117 Ill. App. 618. Where an executive officer refuses to perform a plain duty, unmixed with discretion, the remedy is by mandamus. Hager v. New South Brewing Co. [Ky.] 90 S. W. 608. Applicant being qualified and having complied with all prerequisites, mandamus lies to compel mayor and board of aldermen to grant liquor license. State v. McCammon [Mo. App.] 86 S. W. 510. Mandamus will lie to compel borough council to examine and revise assessment list and duplicate and to return the corrected duplicate to the assessor. P. L. 1899, p. 534, and P. L. 1903, pp. 406, 410, §§ 19, 25 construed. Cooper v. Cape May Point [N. J. Law] 60 A. 516. A county superintendent of schools has no power to antedate a teacher's certificate and may be compelled by mandamus to date it correctly. Van Dorn v. Anderson [Ill.] 76 N. E. 53, afg. 117 Ill. App. 618. Mandamus will lie against a road dis-

never lies to interfere with a legitimate exercise of discretion by executive or administrative officers,[55] though it may lie to compel them to act in the premises and

trict supervisor to compel him to keep his roads in repair. Burns' Ann. St. [1901] § 6818 considered. Rodenbarger v. State [Ind.] 76 N. E. 398. Under Comp. Laws 1897, § 4194 the purchase price of road machines being payable out of the highway tax of the district or districts for which the purchases are made, mandamus lies to compel the proper authorities to perform the ministerial duties required of them in relation to a levy and collection of a tax to pay for the same. Pape v. Benton Tp. [Mich.] 12 Det. Leg. N. 116, 103 N. W. 591. Under Tax Law (Laws 1896, pp. 847, 848, c. 908), §§ 150, 151, a county treasurer is subject to mandamus to compel bim to sell real estate on which taxes for three successive years remain unpaid. People v. Lewis, 102 App. Div. 408, 92 N. Y. S. 642. Mandamus held to lie to compel treasurer of school district to pay an order given for school supplies, the treasurer's answer stating that though a member of the school board giving the order he had no knowledge of any contract or resolution authorizing the purchase. Commonwealth v. Johnson, 24 Pa. Super. Ct. 490. Where proceedings for the construction of a ditch were abandoned, held, holder of warrants issued in payment of the work done could sue to compel the establishment of a ditch fund and the levy of assessments to pay the warrants. Espy Estate Co. v. Board of Com'rs [Wash.] 82 P. 129. Mandamus lies to compel county auditors and treasurers to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the state constitution and its corporate agents removed. Graham v. Folsom, 26 S. Ct. 245. Mandamus lies against a drainage district to compel it to pay a judgment where it appears that in the suit in which the judgment in question was rendered, it was adjudicated, among other things, that the commissioners either had money on hand or had levied a tax more than sufficient to pay the same. Lewis v. Union Drainage Com'rs, 111 Ill. App. 222. Where the commissioner of the General Land Office erroneously treats relator's lease as void, mandamus will lie to compel relator's recognition as lessee. McDowell v. Terrell [Tex.] 13 Tex. Ct. Rep. 115, 87 S. W. 668. Where articles of incorporation substantially comply with the statute, the secretary of state may be compelled by mandamus to file and record them. McChesney v. Batman [Ky.] 89 S. W. 198. Where congress has appropriated money to pay a finding of a court of claims, mandamus will lie to compel the treasurer of the United States to pay the same. Roberts v. Consaul, 24 App. D. C. 551. The members of the United States Board of Labor Employment are ministerial officers and their duty to register an application for employment does not cease to be ministerial because they rest their refusal of registration on the determination of a pure question of law involving the ascertainment of no fact whatever. United States v. Bowyer, 25 App. D. C. 121. Mandamus will lie where their refusal rests solely upon the ground that the applicant is not a citizen of the United States, although a resident of Porto Rico and owing allegiance to the United States. Id.

54. If, however, such judgment or discretion is abused or there is a mistaken view of the law taken as applied to the admitted facts of the case, the writ will issue to compel action according to law. Douglas v. McLean, 25 Pa. Super. Ct. 9. Discretion of drainage commissioners as to whether they would petition court for an assessment to clean out a drain. Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466; State v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544. Allegations of fraud being unsupported by proof, held case was properly dismissed. Id.

Note: Even in such a case the action of the court is in reality based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed, because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself, it has not strictly, as is frequently said, "abused its discretion" —a term which is responsible for some confusion of ideas on this subject—but, in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted for the honest discretion demanded by the law. In such cases the law will by mandamus compel the tribunal to act honestly and fairly, or, in other words, to exercise its discretion.—State v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544.

55. City of Chicago v. People, 114 Ill. App. 145; Douglas v. McLean, 25 Pa. Super. Ct. 9; State v. Richards [Fla.] 39 So. 152. Mandamus will not lie to compel the town board to give its consent to a contract proposed by the highway commissioner. People v. Early, 94 N. Y. S. 640. Mandamus will not lie to compel the return of money deposited to secure the performance of a city contract to the satisfaction of the director of public works. Commonwealth v. Philadelphia, 211 Pa. 85, 60 A. 549. Mandamus does not lie to compel board of commissioners to repair a bridge. Glenn v. Moore County Com'rs [N. C.] 52 S. E. 58. Under Acts 1874, p. 234, § 14, the board of education is vested with discretion in the allowanee of contractor's claims. Keefe Mfg. & Inv. Co. v. Board of Education [Colo.] 81 P. 257. Mandamus will not lie to compel drainage commissioners to petition the court for an assessment to provide funds for cleaning out a drain, where it is not shown that the refusal is an unjust discrimination against the landowner making the application. Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466. The state board of examiners not having authority to "entertain for a second time a demand against the state once rejected by it, unless such facts are presented as in suits between individuals, would furnish sufficient ground for granting a new trial (Pol. Code, § 670), mandamus does not lie to compel the allowance of a claim which the board has

exercise their judgment and discretion.[56] The relator must have a clear legal right to the performance of a duty imposed by law,[57] and which the respondent has improperly refused to perform,[58] and such refusal must clearly appear.[59] A demand and refusal is sufficient to authorize the issuance of the writ.[60] The writ will not

once rejected. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

56. Douglas v. McLean. 25 Pa. Super. Ct. 9.

57. State v. Richards [Fla.] 39 So. 152; State v. Malheur County Ct. [Or.] 81 P. 368. Alternative writ of mandamus to compel county court to declare result of local option election held insufficient, it not alleging all the facts necessary to constitute a valid election. Id. Mandamus will not lie to compel recorder of deeds to record an invalid instrument. Dancy v. Clark, 24 App. D. C. 487. Mandamus will not lie to compel the secretary of state to file articles of incorporation not entitled to be filed. State v. Nichols [Wash.] 82 P. 741. The secretary of state is under no duty to file a certificate of amendment changing the name of a corporation so as to include the word "trust" in violation of Laws 1903, p. 367, c. 176, relating to trust companies. State v. Nichols, 38 Wash. 309, 80 P. 462. Mandamus will not lie to compel the secretary of state to issue a certificate of incorporation under the name of an existing corporation, which it is claimed is an undomesticated foreign corporation, where it is doubtful whether the existing concern is a foreign corporation or a mere partnership. People v. Rose [Ill.] 76 N. E. 42. A city having repealed the ordinance granting an appropriation, mandamus will not lie to compel the city treasurer to make payments under the ordinance. Commonwealth v. Barker [Pa.] 61 A. 253. A highway commissioner cannot be compelled to incur expenses in repairing a bridge where there are no funds available for such purpose. People v. Early, 94 N. Y. S. 640. Mandamus will not issue to compel the state treasurer to pay a warrant issued by the auditor for stenographer's services after the exhaustion of the appropriation made by the legislature. State v. Barret [Mont.] 81 P. 349. Under Const. § 230 and Ky. St. 1903, §§ 138, 139, 143, 4001, subsec. 4, the state auditor cannot be compelled to draw his warrant for sums due the relator as clerk in his office during certain years, where the funds appropriated for such purpose had been expended, and no agreement on the part of the auditor so to do is binding on the state. Hager v. Shuck, 27 Ky. L. R. 957, 87 S. W. 300. Mandamus held to lie to compel district attorney to bring an action to have a certain named person declared to be illegally intruding into or unlawfully holding and exercising the office of parish superintendent of public instruction. State v. Theus, 114 La. 1097, 38 So. 870. Mandamus does not lie to compel Lee county to pay apportioned debts of counties from which it was created until the full apportionment is made by the commission appointed under 23 Stat. at L. 1194. State v. Durant [S. C.] 51 S. E. 146. Where excess taxes were paid by a mistake which was not discovered until claim for a refund was barred and an allowance was made by the county board, held, mandamus would not lie to compel county auditor to draw warrant therefor. Murphy v. Bondshu [Cal. App.] 83 P. 278. Writ denied where petitioner alleged that his salary had been fixed by law, and that he was entitled to mandamus to compel the board of estimate to fix his salary at that sum, but argued that the board had no power to fix said salary, as it had already been fixed by law. Hamburger v. Board of Estimate & Apportionment, 96 N. Y. S. 130. In the absence of a statute making it the duty of a county clerk to expunge from the register the name of a duly licensed dentist, mandamus will not lie to compel him to cancel a registration made by his predecessor in office on the ground that it was procured on an insufficient license and affidavit under Laws 1895, p. 418, c. 626. State v. Jacobs, 92 N. Y. S. 590. Where relator obtained a final order for the full contract price of a public drain, held not entitled to compel the certification of a special assessment roll to the supervisor of a township prior to the completion of the drain. Sherwood v. Rynearson [Mich.] 12 Det. Leg. N. 395, 104 N. W. 392. Petition to compel township treasurer to credit school district with amount of taxes collected should allege, among other things, that such school district has not received the full amount of such taxes to which it is entitled and that at the time of his refusal to make such credit he had sufficient proper funds to so do. People v. Helt, 116 Ill. App. 391.

58. Writ to compel register to issue letters of administration refused where hearing in probate proceedings had not been finished. Miller v. Henderson, 212 Pa. 263, 61 A. 913. An owner of property may, in a proper case, procure a writ of mandamus to compel the construction by the municipal authorities of a street which has been laid out adjacent to his property. Five years delay in constructing street held insufficient to warrant relief. McCarthy v. Boston [Mass.] 74 N. E. 659. The office of a mandamus is not to compel action by the building department in advance of the preparation and adoption of proper plans, but only to compel action when plans affording no legitimate ground of objection have been arbitrarily or unreasonably condemned. Hartman v. Collins, 94 N. Y. S. 63. Held erroneous to grant peremptory mandamus requiring the superintendent of buildings to approve certain plans without prejudice to his right to point out specifically any lawful requirements in respect to stairways, galleries or otherwise and require them to be complied with. Id.

59. Miller v. Henderson, 212 Pa. 263, 61 A. 913. Eleven years' delay without paying warrants held to show refusal. Espy Estate Co. v. Board of Com'rs [Wash.] 82 P. 129.

60. It is not essential that a judgment creditor of a drainage district shall first ascertain if there are sufficient funds in its treasury to pay his claim, and if such is the fact, to demand payment; but if such is not the fact, to demand a tax levy and then aft-

issue where relator has an adequate legal remedy,[61] or the performance of the duty will not accomplish some good purpose or have a beneficial effect.[62] It will not issue in aid of illegal acts.[63] The same general rules apply to licensing boards.[64] The duty being imperative, the fact that respondent acted in good faith is immaterial.[65] Mandamus will not lie to compel a general course of official conduct,[66] nor to determine upon which of several public officers rests the duty of performing a certain public function.[67] Though mandamus will not lie to try title to a public office, the mere fact that such title is incidentally involved will not bar relief when the writ is invoked to enforce a specific duty.[68]

The governor of a state constitutes one of the co-ordinate departments of the government and cannot be compelled by mandamus to perform any act which devolves on him as governor,[69] and this has been held to be true whether the act is ministerial, executive, or political,[70] though there is a conflict on this point.[71] A session of a state legislature having adjourned, it cannot be reconvened upon the mandate of the judicial power.[72]

er the funds have been so raised, demand the money. Lewis v. Union Drainage Com'rs, 111 Ill. App. 222.

61. State v. Richards [Fla.] 39 So. 152. Mandamus will not lie to compel a tax assessor to place lands upon the tax rolls, where the lands have been previously sold to the state for nonpayment of taxes and they are not included in the lists of lands certified by the comptroller to the assessor for assessment, it not being shown that an application under the law has been made to the comptroller for relief. Id. Mandamus will not lie to compel a sheriff and city marshal to enforce the laws and prosecute violators thereof, Ball. Ann. Codes & St. § 7252 providing a punishment for failing to do so. State v. Brewer [Wash.] 80 P. 1001.

Note: This last case is to be distinguished from the case of Moores v. State [Neb.] 99 N. W. 249, 4 C. L. p. 512, n. 51, in that the statutes of Nebraska require the mayor and chief of police of a city to actively interfere to prevent an open violation of the law.

62. Mandamus will not lie to compel the secretary of state to issue a certificate of incorporation under a name the use of which may be enjoined by an existing company. People v. Rose [Ill.] 76 N. E. 42. Mandamus to compel board of commissioners to grant application to transplant oysters held properly denied if there was no territory within the county to which the application could apply. McIntosh County Com'rs v. Aiken Canning Co. [Ga.] 51 S. E. 585. Bill having been properly audited by county board of supervisors, mandamus to compel them to audit the bill will be denied. People v. Saratoga County Sup'rs, 94 N. Y. S. 1012. Where the governor of a state is a member of a board which cannot act except by the participation of all its members, mandamus will not lie to compel the other members of the board to act. State v. Frazier [Tenn.] 86 S. W. 319.

63. Mandamus to compel a township clerk to certify the amounts due upon a county order given in payment for a road roller denied where it appeared that the county supervisor had received compensation for his services in procuring the order for the machine. First Nat. Bank v. Clerk of Union Tp. [Mich.] 12 Det. Leg. N. 461, 104 N. W. 771.

64. Mandamus does not lie where it is alleged that a licensing board has performed a judicial duty in an unfair and arbitrary manner to petitioner's injury. Board of Registration in Dentistry. Kenney v. State Board of Dentistry, 26 R. I. 538, 59 A. 932. Mandamus does not lie to compel the Board of Registration in Dentistry to produce for inspection the examination papers of a rejected applicant and to compel the issuance of a certificate to such applicant. Id. On mandamus to compel a state board of dental examiners to issue a license to relator, the determination of the credits to which relator's answers to the questions propounded were entitled held within the exclusive jurisdiction of the board. State v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544.

65. Mandamus to compel common council of a village to accept a liquor dealer's bond. Power v. Common Council of Litchfield [Mich.] 12 Det. Leg. N. 484, 104 N. W. 664.

66. Mandamus will not lie to compel a sheriff and city marshal to enforce the laws and prosecute the violators thereof. State v. Brewer [Wash.] 80 P. 1001.

67. Held, mandamus would not lie to prevent mayor, city council and superintendent of streets to care for the public school houses. Fowler v. Brooks [Mass.] 74 N. E. 291.

68. Mandamus is maintainable to compel a state auditor to issue a warrant on the treasurer for relator's salary as superintendent of a water division, after relator's alleged improper removal from office. State v. Grant [Wyo.] 81 P. 795.

69. State v. Frazier [Tenn.] 86 S. W. 319.

70. Cannot be compelled to act on a board created by the legislature. State v. Frazier [Tenn.] 86 S. W. 319.

71. Mandamus will lie to compel the governor to approve pay rolls for the state guard. Cochran v. Beckham [Ky.] 89 S. W. 262.

72. French v. State Senate, 146 Cal. 604, 80 P. 1031.

Duties relating to allowance and payment of claims against municipalities.[73]—Ministerial[74] but not discretionary[75] duties connected with the payment of claims against a municipality may be enforced by mandamus. The relator must have a clear legal right,[76] and there must not be an existing adequate legal remedy.[77] Whether the duty to provide for the payment of the liabilities of a municipal corporation be specifically enjoined or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be equally enforced by mandamus.[78] That no appropriation for the fund has been made, or if made has been lawfully exhausted, is a good defense.[79] One may in the same proceeding have his right to an office determined and enforce the payment of back salary.[80]

Duties of election officers and boards.[81]—The writ will not issue unless it will accomplish a beneficial result.[82] Mandamus will lie to compel committees of political organizations to act.[83]

Enforcement of right to public office.[84]—The right to an appointment being absolute, mandamus will issue.[85] It is also the proper remedy where one has been

73. See 4 C. L. 516.

74. Mandamus lies to compel the board of health of the City of Detroit to act on a bill presented to it for allowance or disapproval. Boyd v. Board of Health [Mich.] 12 Det. Leg. N. 135, 103 N. W. 605. Where water commissioners appointed under Laws 1900, p. 1119, c. 451, enter into a contract for the construction of a water plant, the duty of the town under the act to raise the money necessary for the payment of the plant under the contract may be enforced by mandamus in case of nonaction on the part of the town. Holroyd v. Indian Lake, 180 N. Y. 318, 73 N. E. 35, afg. 85 App. Div. 246, 83 N. Y. S. 533. Mandamus will lie at the suit of a claimant to compel a board of town auditors to make out and file with the town clerk the certificate of the rejection of the claim required by § 162 of the town law (Laws 1890, p. 1233, c. 569), as amended by Laws 1897, p. 619, c. 481. People v. Page, 105 App. Div. 212, 94 N. Y. S. 660.

75. Mandamus denied to compel award of pension to discharged police officer. McGann v. Harris, 114 Ill. App. 308.

76. Mandamus denied to compel award of pension to discharged police officer. McGann v. Harris, 114 Ill. App. 308. Mandamus will not be granted to compel municipal authorities to levy and collect a tax to pay an invalid judgment alleged to be held against the municipality. Meyer v. Jordan [Ga.] 51 S. E. 602. Where the right of a janitor of a public school building to an increased salary was controverted on questions of law and fact, mandamus will not lie to compel the board of education to put his name on the pay roll at the increased rate. People v. Board of Education, 93 N. Y. S. 300.

77. Where the right of a janitor of a public school building to an increased salary was controverted on questions of law and fact, mandamus will not lie to compel the board of education to put his name on the pay roll at the increased rate. People v. Board of Education, 93 N. Y. S. 300.

78. Douglas v. McLean, 25 Pa. Super. Ct. 9.

79. Mandamus will not lie to compel the superintendent of police of a city to pay a salary to an employe of his department, when the city council has made no appropriation for the salary. Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, afg. 114 Ill. App. 168. Where the Constitution provided that public school certificates should be paid out of the proceeds of certain bonds, held mandamus would not issue to compel the issuing and sale of additional bonds to pay belated certificates issued by the city council after the exhaustion of the bond issue. State v. Board of Liquidation of City Debt [La.] 39 So. 448.

80. City of Chicago v. People, 111 Ill. App. 594.

81. See 4 C. L. 517.

82. Mandamus proceedings to require defendant to compare the vote and declare the result of an election are rendered unnecessary, so far as the merits are concerned, by the induction into office of the relator. State v. Frazier [Tenn.] 86 S. W. 319. Where it will not change the result, mandamus will not issue to compel the counting of the vote of a precinct illegally excluded. Gilliam v. Green [Ga.] 50 S. E. 137. Mandamus will not issue to require a clerk of the superior court to deliver certain ballots and voters' lists to named persons when it affirmatively appears that these ballots and lists are not in his possession. Id. Petition praying that superintendents of election be required to reconsolidate the vote of a county but not requiring that the precinct managers be required to return to the consolidating superintendents excluded ballots denied, the superintendents having no power to consolidate any votes except those returned by the precinct managers. Id.

83. Mandamus will lie to compel a county political committee to hold an election for committee members at the appointed time. In re Chester County Republican Nominations [Pa.] 62 A. 258.

84. See 4 C. L. 518.

85. Under Laws 1904, p. 8, c. 9, providing for preference of honorably discharged soldiers and sailors of the Civil War in appointment, employment and promotion, held such a person applying for a public office and being entitled to a preference over other applicants is entitled to mandamus to compel his appointment. Shaw v. City

elected and qualified as a member of a governmental body but is denied the right to participate in the proceedings of such body, no other person claiming the office,[86] and this is true though relator has not received his certificate of election.[87] One being unlawfully denied the right to a hearing, mandamus will lie.[88] The relator's right must be clear,[89] and only beneficial relief will be decreed.[90] Though mandamus will not lie to try title to a public office,[91] the mere fact that such title is incidentally involved will not bar relief when the writ is invoked to enforce a specific duty.[92] The right of relator to his office may be adjudicated in mandamus to compel the payment of his salary.[93] Mandamus will not issue to prevent one's successor from performing the duties of the office on the ground that an ordinance under which relator and his successor were appointed was illegal.[94]

(§ 2) *C. Quasi public and private duties.*[95]—The remedy by mandamus is only effective to command the doing of an act which it is the corporate or official duty of the defendant to perform.[96] It will lie to compel public service corporations to perform their duty,[97] to compel a railroad to maintain a station at a certain point,[98] and is the usual and proper remedy for enforcing a decree of a railroad commission.[99] The grant of power to Federal courts to issue mandamus against a corporate common carrier to prevent discrimination necessarily embraces power to act on the officers in control of such corporation.[1]

It will lie to enforce the right of a stockholder[2] or director[3] to inspect the

Council of Marshalltown [Iowa] 104 N. W. 1121.

86. So held where one was elected and qualified as a member of a borough council and entered upon the duties of his office and a majority of the council after reorganization has refused to permit him to take part in the proceeding. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

87. Where relator had been lawfully elected to fill a vacancy in a borough council. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

88. Petition alleging reduction in office and salary without a hearing held to require the issuance of an alternative writ. Shepard v. Oakley, 181 N. Y. 339, 74 N. E. 227, rvg. 102 App. Div. 617, 92 N. Y. S. 1145. Mandamus is the proper remedy to procure the reinstatement of an employe of the fire department of the city of New York removed by the commissioner without an opportunity to explain. People v. Hayes, 94 N. Y. S. 754.

89. In mandamus to compel the applicant's reinstatement as a police officer, an answer showing an admitted violation of a rule which, by another rule, was made ground for removal, held sufficient. People v. Lindblom, 215 Ill. 58, 74 N. E. 73. In order that a discharged patrolman may be entitled to reinstatement by mandamus, he must establish that at the time of his discharge he was an officer de jure. Moon v. Champaign, 116 Ill. App. 403.

90. Where petitioner's right to an office from which he was illegally ousted is not established until after the expiration of his term of office, the writ of mandate will direct the payment of his salary from the time of the ouster until the expiration of the term, but will not direct his recognition as an officer. Davenport v. Los Angeles, 146 Cal. 508, 80 P. 684.

91. Mandamus will not lie to compel county treasurer to determine which of two rival bodies were the legal directors of a school district. State v. Gentry [Mo. App.] 87 S. W. 68.

92. Mandamus is maintainable to compel a state auditor to issue a warrant on the treasurer for relator's salary as superintendent of a water division, after relator's alleged improper removal from office. State v. Grant [Wyo.] 81 P. 795.

93. So held where question was whether a police patrolman was entitled to the office claimed by him under the Civil Service Act. City of Chicago v. People, 111 Ill. App. 594.

94. Cunningham v. Daly [Mass.] 74 N. E. 925.

95. See 4 C. L. 518.

96. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18.

97. Mandamus lies by an individual to compel water company to furnish him water. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

98. Mandatory injunction will not lie. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18.

99. Is the remedy provided by Civ. Code 1902, § 2119. Railroad Com'rs v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 641.

1. This power exists independent of Act Cong. Feb. 19, 1903, c. 708, § 2, 32 Stat. 848, relating to interstate commerce. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

2. Writ granted minority stockholders. Neuhert v. Armstrong Water Co. [Pa.] 61 A. 123. Stockholder desiring to sell his stock held entitled to the right in order to obtain information to ascertain the value of his stock. Garcin v. Trenton Rubber Mfg. Co. [N. J. Law] 60 A. 1098. Stockholder who was induced to exchange valuable properties for stock held entitled to the writ on allegations of fraud. State v. Pan-American Co. [Del. Super.] 61 A. 398. Where relator in

corporate books. The writ will not be granted for speculative grounds but only for reasonable purposes to protect the interests of the petitioner,[4] the right being largely dependent upon the facts of each case.[5] That the stockholder's holdings are small is no defense.[6] A written demand being deposited in the post-office with postage prepaid, it will be presumed to have reached its destination.[7] The petitioner being competent, a certified public accountant will not be appointed to conduct the examination.[8]

The writ will not be granted to enforce contractual rights.[9]

§ 3. *Jurisdiction and venue.*[10]—The court is without the power to issue its final process against a body not lawfully served with its original process and which has not submitted itself to its jurisdiction.[11] The jurisdiction of appellate courts is usually confined to the supervision of those courts over which they are immediately superior,[12] and they will not act as original triers of fact.[13] The writ is issued after a trial by the court and never in vacation by the judge,[14] though a court in vacation may issue restraining orders in aid of a pending mandamus suit.[15] In Georgia when a petition for mandamus nisi is presented to a judge of a circuit wherein the cause of action originated and the judge certifies that he is disqualified, the applicant may present his petition to a judge of any circuit in the state without consulting the presiding judge of the first circuit,[16] and the second judge assuming jurisdiction has power and authority to hear and determine the application at chambers, no question of fact being involved and the court in the county where the case arose not being in session.[17] This jurisdiction remains with such second judge, and passes to his successor[18] until the case is fully determined or until the judge of the circuit in which the case arose becomes qualified to hear and determine the same.[19]

proceedings to compel inspection of corporate books alleged fraudulent misrepresentations by the president of the corporation, the return showing that the representations were made by the alleged party while acting for the corporation and not denying their falsity it is insufficient to prevent the issuance of the peremptory writ though it alleges that such third person had not been elected president. Id. Writ granted where stockholder claimed he was induced to buy his stock by the president of the corporation; that he had been unable to ascertain the condition of the corporation; that no dividends had been paid; that the corporation did not seem to be doing any business; and that no report had been made during the three years of the corporation's existence, although the president stated that he had told the petitioner that the corporation had lost money and that he had answered all reasonable inquiries and that the petitioner was hostile to him. In re O'Neill, 47 Misc. 495, 95 N. Y. S. 964.

3. A director of a corporation is entitled to a peremptory writ to examine the corporation's books of account, records, and papers. People v. Columbia Paper Bag Co., 92 N. Y. S. 1084.

4. State v. Pan-American Co. [Del. Super.] 61 A. 398. Stockholder who was induced to exchange valuable properties for stock held entitled to the writ on allegations of fraud. Id.

5, 6. In re O'Neill, 47 Misc. 495, 95 N. Y. S. 964.

7. Neubert v. Armstrong Water Co. [Pa.] 61 A. 123.

8. Garcin v. Trenton Rubber Mfg. Co. [N. J. Law] 60 A. 1098.

9. City of Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515.

10. See 4 C. L. 520, 521.

11. Mandamus will not issue against a state senate which has adjourned and will be composed of different persons and will be a different body when it reconvenes. French v. State Senate, 146 Cal. 604, 80 P. 1031.

12. Under Const. § 7, articles 4 and 14, the supreme court has no jurisdiction to issue a writ of mandamus directing a probate judge to enter a nunc pro tunc order granting an appeal to the circuit court, it being a matter exclusively for the circuit court. Featherstone v. Folbre [Ark.] 88 S. W. 554.

13. Where the allegation by an applicant for school lands that at the time of making the application he was an actual resident upon the land for the purpose of making it his home an issue of fact is raised which deprives the supreme court of jurisdiction. Gordon v. Terrell [Tex.] 14 Tex. Ct. Rep. 320, 89 S. W. 1052.

14. Hager v. New South Brewing Co. [Ky.] 90 S. W. 608.

15. Order issued to restrain removal of county seat pending appeal. Reese v. Cannon [Ark.] 84 S. W. 793.

16, 17, 18. Glover v. Morris [Ga.] 50 S. E. 956.

19. The first judge being still disqualified and the second judge's decision being reversed on appeal it is the latter judge's right and duty to issue a decision in conformity with the mandate on appeal and it is not necessary for the disqualified judge to des-

A corporation is generally subject to the jurisdiction of the courts of a county wherein it transacts business.[20]

Federal courts.[21]—A Federal court has power to issue a mandamus only in the exercise of a jurisdiction to which it is an ancillary proceeding;[22] it has no jurisdiction of original proceedings seeking relief by mandamus.[23] Congress undoubtedly has power to change this rule.[24] A court cannot grant mandamus as ancillary to cases over which it has neither original nor appellate jurisdiction.[25] The jurisdictional amount must be involved.[26]

§ 4. *Parties. A. Parties plaintiff.*[27]—A writ of mandamus can be issued only on affidavit on the application of the party beneficially interested.[28] A private individual cannot maintain mandamus to compel the performance of a purely public duty, unless he can show some peculiar interest greater than that which he has with the general public.[29] One representing the real party in interest has only the rights of the latter.[30]

(§ 4) *B. Parties defendant.*[31]—All persons whose rights will be affected by the coercive proceedings are necessary defendants.[32] Other interested parties may be

ignate him or to request that he continue to act in the case. Glover v. Morris [Ga.] 50 S. E. 956.

20. Court of common pleas of county where corporation has its plant and transacts most of its business has jurisdiction though the corporation's principal office is in another county. Acts June 8, 1893 (P. L. 345), and March 19, 1903 (P. L. 32). Neubert v. Armstrong Water Co. [Pa.] 61 A. 123.

21. See 4 C. L. 520.

22. Large v. Consolidated Nat. Bank, 137 F. 168.

23. United States v. Lake Shore & M. S. R. Co., 197 U. S. 536, 49 Law. Ed. 870. 24 Stat. at L. 552, chap. 373, does not alter the rule. Id.

24. See United States v. Lake Shore & M. S. R. Co., 197 U. S. 536, 49 Law. Ed. 870.

25. Supreme court of the United States. In re Commonwealth of Mass., 197 U. S. 482, 49 Law. Ed. 845; In re Glaser, 198 U. S. 171, 49 Law. Ed. 1000.

26. On an application to a federal court by a shareholder in a national bank for a writ of mandamus to compel the defendant to permit him to inspect its list of shareholders, the pleadings must show that the matter in dispute exceeds the value of $2,000. Averment that the plaintiff is the registered owner of 10 shares of the capital stock of defendant held insufficient. Large v. Consolidated Nat. Bank, 137 F. 168.

27. See 4 C. L. 521.

28. Ballinger's Ann. Codes & St. § 5756. A rejected applicant for a lease of state land held not entitled to institute mandamus proceedings against state land commissioner to compel him to lease land. State v. Ross [Wash.] 81 P. 865.

29. Mandamus lies by an individual to compel a water company to furnish him water. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136. An owner of property may, in a proper case, procure a writ of mandamus to compel the construction by the municipal authorities of a street which has been laid out adjacent to his property. Five years delay in constructing street held insufficient to warrant relief. McCarthy v. Boston [Mass.] 74 N. E. 659. An owner of real estate abutting upon a street in a city of the second class, who is liable for paving assessments, has a special interest in the improvements that will enable him to institute a proceeding in mandamus, if his interest be involved. Carey Salt Co. v. Hutchinson [Kan.] 82 P. 721. The correctness of a canvass of the votes of a county being unassailed, a private citizen and taxpayer, in the absence of statute, is not entitled to mandamus to compel a second canvass on the ground that the original one was not made by the officers authorized by law. In re Scofield, 102 App. Div. 358, 92 N. Y. S. 672. An abutter, who, for a consideration, has granted to a railroad the right to use the street for railroad purposes, cannot, in his individual capacity, successfully maintain mandamus proceedings to compel the railroad to remove its structures from the street, but may, as a citizen, enforce by mandamus any right which the public has in the street, in which case his success in the proceeding is dependent on the continued existence of the public right. People v. City of Rock Island, 215 Ill. 488, 74 N. E. 437.

30. Attorney general, seeking to enforce by mandamus the payment of his stenographer's salary. State v. Barret [Mont.] 81 P. 349.

31. See 4 C. L. 522.

32. Mandamus to compel civil service commissioners to strike certain names from the list of eligibles for appointment to a certain office, one of the alleged ineligibles, who had been appointed to the position, is a necessary party defendant. Powell v. People, 214 Ill. 475, 73 N. E. 795. Proceedings to procure a peremptory writ of mandate against a water master, commanding him to distribute waters from a different stream from that named in the decree under which he is making distribution. Stethem v. Skinner [Idaho] 82 P. 451. Holders of refunding bonds held necessary parties where holders of unrefunded bonds sought to compel the application of taxes raised for the refunding bonds to the payment of interest on the unrefunded bonds. City of Austin v. Cahill [Tex. Civ. App.] 88 S. W.

properly joined though they are not necessary.[33] The absence of a necessary party is jurisdictional,[34] hence the defect cannot be waived by any of the other parties,[35] and the writ will not issue until such person is made a party.[36] All whose duty it is to perform the act demanded may be made parties defendant though some of them may not have refused to act.[37]

§ 5. *Pleading and procedure in general.*[38]—Proper practice requires the pleader to state the facts growing out of a writing exhibited and upon which he relies as constituting a cause of action or defense.[39] Where the matter is collateral to the essential fact, it suffices to allege generally that an election was duly held, or that an officer was duly elected and qualified;[40] but where the fact itself must appear, it is insufficient to say that it has been duly performed.[41] Statutes govern the necessity and length of notice.[42] The various steps in the proceeding are treated in chronological order in the succeeding sections.

§ 6. *Petition or affidavit.*[43]—The petition must allege every material fact necessary to show that it is the plain duty of the party sought to be coerced to act in the premises.[44] Allegations on information and belief are no proof of the fact alleged, no grounds for the information or belief being stated.[45] The application must not have two functions one of which is the counterpart or converse of the other,[46] nor must its allegations be inconsistent.[47] As a general rule, the relator

536. A receiver in actual possession of the property of a traction company is a necessary party to a proceeding to compel it to accept a certain fare in exchange for carriage. Chicago City R. Co. v. People, 116 Ill. App. 633. Under Code 1896, § 4074, a reputed owner of lands sold at a tax sale held not a necessary party to a proceeding by the purchaser to compel the judge of probate to issue a tax deed. Roach v. State [Ala.] 39 So. 685. In mandamus to compel county commissioners to establish a ditch fund and make a special assessment to pay warrants issued for the construction of a ditch, the county is a proper, though not a necessary, party. Espy Estate Co. v. Board of Com'rs [Wash.] 82 P. 129.

33. One who is president of a common carrier and of a coal company is a proper party to proceedings by a competitive coal company to stop discrimination by the railroad in the matter of supplying cars. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

34, 35. Powell v. People, 214 Ill. 475, 73 N. E. 795.

36. State v. Richards [Fla.] 39 So. 152.

37. In proceedings to compel the levy of a tax by a town to pay a judgment all of the officers whose action is necessary to the levy of such tax may properly be joined as defendants, although some of them may not have refused to act. McKle v. Rose, 140 F. 145.

38. See 4 C. L. 523.

39. Answer simply setting out contract in full held defective. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

40. State v. Malheur County Ct. [Or.] 81 P. 368.

41. State v. Malheur County Ct. [Or.] 81 P. 368. Alternative writ of mandamus to compel county court to declare result of local option election held insufficient it not alleging all the facts necessary to constitute a valid election. Id.

42. Kirby's Digest §§ 4481, 5158 requires 10 days' notice after filing the petition before the motion for mandamus is made. Moody v. Rogers [Ark.] 85 S. W. 84.

43. See 4 C. L. 523.

44. People v. Helt, 116 Ill. App. 391. Petition to compel township treasurer to credit school district with amount of taxes collected should allege, among other things, that such school district has not received the full amount of taxes to which it is entitled and that at the time of his refusal to make such credit he had sufficient proper funds to so do. Id. A petition to compel county commissioners to order an election prayed for in a petition to them to order an election to repeal "existing stock law or stock laws" in a precinct held bad, the petition to the commissioners not showing what stock law is intended to be repealed or that any stock law actually exists in the precinct. State v. Lovejoy [Ala.] 39 So. 126. Also as showing that the stock district is only a part of a precinct and the prayer being for an election in the entire precinct. Id.

45. Code Civ. Proc. §§ 2067, 2070, so held on an application for mandamus to compel the cancellation of tax sales, though opposed by an affidavit insufficient to raise any issue. People v. Grout, 94 N. Y. S. 1101.

46. Application for mandamus to restrain a state land commissioner from releasing certain land and to compel him to advertise a sale of a lease of the land to the highest bidder, on the ground that the re-lease was in excess of his legal authority is objectionable. State v. Ross [Wash.] 81 P. 865.

47. An averment of a petition for mandamus to compel the reinstatement of petitioner's name to the police pension roll, that the board of pension trustees found that petitioner's husband died from the immediate effects of an injury received by him in the discharge of duty as a police officer, is not overcome by a further averment of the petition that petitioner's husband

may use the name of the state or of the United States[48] as a matter of course without resort to the intervention of the state or United States attorney, but the use of such name is not now held essential to the petition.[49] In proceedings to compel the inspection of corporate records it being impossible for the relator to know or tell what particular books or papers will furnish the information desired, it is sufficient if he states the object and purpose of the inspection and what he desires to know.[50] The general rules as to amendments apply.[51]

§ 7. *Alternative writ.*[52]—Where issues of fact are raised by denials of allegations of the petition, an alternative, not a peremptory writ, should issue.[53] In some states the alternative writ takes the place of a declaration at law, and it is essential that it should show a clear prima facie case in favor of the relator.[54] In order to make out a prima facie case the writ should allege all the essential facts which show the duty and impose the legal obligation on the respondent to perform the acts demanded of him,[55] as well as the facts that entitle the relator to invoke the aid of the court in compelling the performance of such duty or obligation.[56] In the federal courts the power to issue the writ being derived from statute, the strict rule of the common law in respect to amendments is not applicable.[57]

was stricken down and became physically ill by reason of physical efforts exerted in the discharge of his duty. Eddy v. People, 218 Ill. 611, 75 N. E. 1071.

48. Bundy v. U. S., 25 App. D. C. 459.

49. Bundy v. U. S., 25 App. D. C. 459; Dancy v. Clark, 24 App. D. C. 487.

NOTE. Necessity of name of the state or people: A remnant of the ancient distinction enjoyed by the writ of mandamus is still found in the style or name of the proceedings. In some jurisdictions it is still the common and better approved practice to bring the action in the name of the sovereign power, on relation or complaint of the party beneficially interested. Higgins v. Galesburg, 96 Ill. App. 471; State v. Curler [Nev.] 67 P. 1075; Rider v. Brown, 1 Okl. 244, 32 P. 341; Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245; State v. County Court, 47 W. Va. 672, 35 S. E. 959. Of course, if the duty sought to be enforced is due the state as such, then the proceedings should be in the name of the state. State v. Carey, 2 N. Dak. 36, 49 N. W. 164. But the courts are now pretty generally agreed that private persons may move for a mandamus to enforce even a public duty, not due to the government as such, without the intervention of the government law officer. Chicago, etc., R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; Hall v. Mann, 96 Ill. App. 659; Windsor v. Polk County, 115 Iowa, 738, 87 N. W. 704; Pumphrey v. Baltimore, 47 Md. 145, 28 Am. Rep. 446; Attorney General v. Boston, 123 Mass. 460, 479; Elliott v. Detroit, 121 Mich. 426, 84 N. W. 820; State v. Weld, 39 Minn. 426, 40 N. W. 561; State v. Nash, 66 Ohio St. 612, 64 N. E. 558; Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539; Union Pac. R. R. Co. v. Hall, 91 U. S. 343, 355, 23 Law. Ed. 428.

When mandamus is invoked for the enforcement of a purely private right, it would seem clear, at least under the reformed procedure, that the proceedings may be conducted in the name of the actual parties in interest, and that the state is not a necessary party. State v. White, 116 Ala. 202, 23 So. 31; Stoddard v. Benton, 6 Colo. 508; Lord v. Bates, 48 S. C. 95, 26 S. E. 213. Indeed, in such cases, it would seem that the proceedings should not be entitled in the name of the state on the relation of the real party in interest, but he should be named as the plaintiff. Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; Howard v. Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Heintz v. Moulton, 7 S. D. 272, 64 N. W. 135. Not only should such an action be brought in the name of the real party in interest, without the use of the name of the people, but perhaps it must be so brought. People v. Pacheco, 29 Cal. 210; State v. Board of County Com'rs, 11 Kan. 66; State v. Wright, 67 Kan. 847, 73 P. 50. Some authorities hold, however, that notwithstanding the application is made in the interest of a private citizen, it is proper to bring the proceedings in the name of the state on the relation of the party beneficially interested. State v. Spicer, 36 Neb. 469, 54 N. W. 849; State v. Carey, 2 N. D. 36, 49 N. W. 164; State v. Pacific Brewing etc. Co., 21 Wash. 451, 58 P. 584, 47 L. R. A. 208.—From note to Powell v. People [Ill.] 105 Am. St. Rep. 117, 122.

50. State v. Pan-American Co. [Del. Super.] 61 A. 398.

51. In mandamus to enforce the right to inspect books of a corporation where petition shows that the purpose was to ascertain the value of the stock owned by petitioner, the court may allow an amendment so as to include a specific prayer for that purpose. Neubert v. Armstrong Water Co. [Pa.] 61 A. 123.

52. See 4 C. L. 523.

53. In mandamus to compel the reference of a franchise ordinance to use city streets to the board of estimate and apportionment on its first reading as required by Greater New York Charter, Laws 1901, p. 38, c. 466, § 74, where there is an issue of fact as to the procedure of the board of aldermen which is necessary to properly bring such an ordinance to a first reading, it cannot be held as a matter of law that there was a first reading of the ordinance and only an alternative writ may issue. Manhattan &

Effect as stay.—The writ operates as a stay of all proceedings inconsistent with its scope.[58]

§ 8. *Demurrer to petition or writ; answer or return; subsequent pleadings.*[59]—Where a good and sufficient alternative writ has been issued and served, and no jurisdictional question is involved, it is the duty of the defendant to file his answer in the first instance,[60] and, in those states where the answer is substituted for the return in the English courts and pleadings other than the alternative writ and answer, the defendant should assign in his answer any legal reasons, as well as plead the facts, if any exist, on which he relies to defeat the issuance of the peremptory writ.[61] In such states neither can be attacked by demurrer; and where a general demurrer is filed to an alternative writ, the court should treat it as an admission of the facts alleged and apply the law to such facts.[62] It follows that in such states where a defendant files a motion to quash which is in the nature of a general demurrer, the court will treat such pleading as an answer admitting the facts recited in the alternative writ and apply the law thereto.[63] In Indiana the return to the writ is the same as an answer in a civil action,[64] and is not withdrawn by the filing of an answer.[65] The answer or return must state positive and definite facts; the conclusions of the pleader are not sufficient.[66] It must be positive, explicit, and responsive in its recitals of facts, and must state the same in such a specific and substantial but not argumentative manner as upon a fair and reasonable construction can be called certain without recurring to possible facts that do not appear or that are left to inference,[67] and, failing to answer important facts al-

B. Elec. Co. v. Fornes, 47 Misc. 209, 95 N. Y. S. 851.

54, 55, 56. State v. Richards [Fla.] 39 So. 152.

57. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198. On mandamus to stop discrimination of service by a common carrier held court was authorized to amend alternative writ to conform to facts found. Id.

58. A writ commanding that a trial judge forthwith secure the services of some other judge to preside at a certain trial or to show cause why he should not do so before the supreme court operates as a stay of all action on his part until the rendition of the judgment of the supreme court and the entry of the remittitur on such judgment in the superior court. In re Smith [Cal. App.] 83 P. 167.

59. See 4 C. L. 524.

60, 61. Beadles v. Fry [Okl.] 82 P. 1041.

62. Beadles v. Fry [Okl.] 82 P. 1041.

Note: There are authorities to the contrary where the statute is silent as to such pleading or expressly authorizes it. Elliott v. Oliver, 22 Or. 44, 29 P. 1. The Oklahoma statute [St. 1893, § 4603] absolutely prohibits it.—From Beadles v. Fry [Okl.] 82 P. 1041.

63. Beadles v. Fry [Okl.] 82 P. 1041.

64. Burns' Ann. St. 1901, § 1185. Where an order book entry shows that defendants' demurrer was overruled and they excepted and filed their return, their contention on appeal that the trial was without issue as to them, held not sustained. Parscouta v. State [Ind.] 75 N. E. 970.

65. Where an order book entry showed that defendants filed an answer, but the answer copied into the transcript was that of only one of the defendants, held not to withdraw the return of all the defendants previously filed. Parscouta v. State [Ind.] 75 N. E. 970.

66. City of Chicago v. People, 215 Ill. 235, 74 N. E. 137. A city, to avoid a writ of mandamus to make appropriations for a debt on the ground that it is doing all in its power to liquidate it, must by its answer set out clearly and definitely, in detail, all its items of receipts and expenditures. Id. In mandamus against a court the return, to be effective, must show that the act was a judicial one. A mere statement that it was judicial is insufficient. So held in proceedings to compel probate court to grant letters of administration. State v. Guinotte [Mo. App.] 86 S. W. 884. A statement in the return that respondent heard witnesses, whose evidence justified his action, and which made it a judicial hearing, involving judicial discretion, without stating and proving the import of such evidence held insufficient. Id.

67. Douglas v. McLean, 25 Pa. Super. Ct. 9. On a petition by a constable for mandamus against a controller to compel the latter to approve the former's bills, a return is insufficient in which the controller avers that he had scrutinized and audited the bills, that the only evidence of the justice of the claims presented to him in his official capacity were the bills themselves and the files in the various cases; that he is not satisfied that the claims are honest or just, that his refusal is a capricious one but based upon information and knowledge which he does not deem it advisable to set forth in the answer. Id. In proceedings to compel a county to pay relator certain costs, an allegation that the county court had previously appropriated a large sum of money for the benefit of relator to pay

leged in the petition, every intendment and presumption will be made against the return.[68] The answer must generally be verified.[69] A motion by relator for a peremptory writ upon the pleadings is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defense.[70] In Washington a demurrer to the complaint amounts to a motion to quash the peremptory writ and is permissible.[71] After a demurrer to an answer has been overruled, the sufficiency of an answer cannot properly be brought in question by a motion to enter a judgment in favor of the plaintiff based on the ground that the answer sets forth no defense.[72] The Michigan practice does not authorize either a replication or rejoinder.[73] All material allegations of the petition not denied or traversed are considered true,[74] and presumptions will be indulged in their favor.[75] A demurrer admits all material allegations of the pleading demurred to.[76] On demurrer the writ must be construed most strictly against the pleader.[77] In Louisiana by answering to the merits respondent does not waive an exception that he was not notified of the intention to make the application.[78]

§ 9. *Trial, hearing, and judgment. A. Trial and hearing.*[79]—It appearing

similar claims for which the county was not liable held too vague and uncertain to present an issue of fact. State v. Alexander [Tenn.] 90 S. W. 20. An argumentative return is bad. State v. Pan-American Co. [Del. Super.] 61 A. 398. Where, in mandamus by a stockholder to compel inspection of corporate books, at the issuance of the alternative writ a corporate by-law allowed every stockholder holding 100 shares the right of inspection, held a return setting up an apparently inconsistent by-law at the time of filing the return and without stating the time of its adoption, is bad. Id.

68. State v. Alexander [Tenn.] 90 S. W. 20.

69. Where an answer is not properly verified but respondent, on his attention being called to it, made no application to amend, the answer cannot be regarded as controverting the facts stated in the petition. People v. District Ct. [Colo.] 79 P. 1014.

70. State v. Alexander [Tenn.] 90 S. W. 20.

71. State v. Brewer [Wash.] 80 P. 1001.

72. Mineral Bluff Board of Education v. Mineral Bluff [Ga.] 51 S. E. 577.

73. Lewis v. Board of Education [Mich.] 102 N. W. 756. Under circuit court rule No. 46, subd. c, in determining an issue raised by petition and answer, it is assumed that all averments of fact in the answer and all material allegations of the petition not specifically answered by the respondent, are true as alleged. Id.

NOTE. Michigan practice: The Michigan practice in mandamus is designed to be simple and expeditious. The only pleadings contemplated are relator's petition and respondent's answer or return. If relator desires to controvert the facts stated in the answer, issues may be framed under the direction of the trial court. Just v. Wise Tp., 47 Mich. 511, 11 N. W. 294; People v. Nankin Board of Registration, 15 Mich. 156. While, for the purpose of framing these issues, the trial court may permit relator to file a replication (see Wagner v. Circuit Judge, 131 Mich. 129, 91 N. W. 155), the more common and expeditious practice is to dispense with the replication altogether and to state such issues in the form of questions on the coming in of the answer. See Just v. Wise Tp., supra. The answer should not be contradicted by affidavits. If the relator desires to dispute the answer, issues should be settled and tried in an orderly manner. Webster v. Wheeler, 119 Mich. 601. If no issues are framed, the proceeding is disposed of on the issue raised by the petition and answer. In determining this issue, it is assumed that all averments of fact in the answer (see Loomis v. Rogers Tp., 53 Mich. 135, 18 N. W. 596, and numerous cases cited in 2 Abbott's Michigan Prac., p. 1239, § 1649), and "all material allegations of the petition * * * not specifically answered by the respondent," are "true as alleged." See circuit court rule 46 subd. c.—From Lewis v. Board of Education [Mich.] 102 N. W. 756 and Abbott's Michigan Prac. ch. LXX.

74. City of Chicago v. People, 215 Ill. 235, 74 N. E. 137; People v. Lindblom, 215 Ill. 58, 74 N. E. 73; State v. Alexander [Tenn.] 90 S. W. 20; City of Chicago v. People, 114 Ill. App. 145; People v. Board of Education 93 N. Y. S. 300.

75. In mandamus proceedings to compel a state senate to reinstate expelled members it will be presumed, in the absence of direct allegation to the contrary, that the petitioners had notice of the expulsion proceedings which appear spread upon the journals of the senate, and that they were allowed as members to participate therein. French v. State Senate, 146 Cal. 604, 80 P. 1031. The petition alleging the making of an appropriation for the purpose of paying the petitioner and others, it will be presumed the contrary not appearing and the fact of the appropriation being established that the municipality has the money to pay the petitioner in its possession. City of Chicago v. People, 111 Ill. App. 594.

76. Petition. Lewis v. Union Drainage Dist. Com'rs, 111 Ill. App. 222. Return. Commonwealth v. Baker, 212 Pa. 230, 61 A. 910.

77. State v. Malheur County Ct. [Or.] 81 P. 368.

78. Dugue v. Levy [La.] 38 So. 902.

79. See 4 C. L. 526.

from the answer that material issues of fact are involved in the case it is erroneous to grant a mandamus absolute without submitting such issues to a jury.[80] The application being tried by the court it is not required to make findings on special issues of fact.[81]

Abatement and dismissal.[82]—Proceedings against federal officers do not abate by reason of the respondent's death, retirement, or resignation or removal from office; but, when necessary, the proceedings may be continued against his successor in office.[83] Under the statutes of most states the alternative writ cannot be quashed on motion for any matter involving the merits.[84]

(§ 9) *B. Judgment. Scope of relief.*[85]—In mandamus against a municipality to compel the payment of a claim, a judgment against the municipality and its controller is proper.[86] There being a joint judgment[87] all of the defendants must be under an obligation to perform the duty.[88] The court may deny relief, respondent complying with named conditions,[89] or it can grant other relief than that prayed for.[90] While the relief should be limited to the necessities of the case,[91] it is not limited by the prayer.[92] In proceedings against a common carrier to prohibit discrimination in the distribution of cars, there being nothing to indicate any threatened or probable change in conditions, the court may determine the percentage to which relator is entitled.[93] Injunction is inappropriate to mandamus proceedings.[94]

80. McIntosh County Com'rs v. Aiken Canning Co. [Ga.] 51 S. E. 585.

81. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

82. See 4 C. L. 526.

83. 30 Stat. at. L. 822, c. 121. The successor in office of a territorial judge may be substituted in place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of a case. Territory of N. M. v. Baker, 196 U. S. 431, 49 Law. Ed. 540.

84. Under Code Civ. Proc. § 2075 whether relator was entitled to an opportunity to make an explanation before removal from a public office cannot be determined on a motion to quash. People v. Hayes, 94 N. Y. S. 754.

85. See 4 C. L. 527.

86. City of Chicago v. People, 111 Ill. App. 594.

87. Where proceedings were brought against a carrier and its president to prohibit discrimination, a mandate addressed to the railroad company and to its president and "each of them according to their several and respective powers," held not joint but should be taken distributively, as affecting the president only according to his powers. Judgment for costs went against the carrier alone. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

88. Judgment being joint and requiring a joint act it will be reversed where it appears that one of the defendants thereto cannot be required to perform. Chicago City R. Co. v. People, 116 Ill. App. 633.

89. Where all but 67 cents of a bill presented to the county board of supervisors was improper, held permissible for the court to deny a writ of mandamus to compel the board to audit the bill on condition of the payment by the board of the item due. People v. Saratoga County Sup'rs, 94 N. Y. S. 1012.

90. Where, in proceedings by a holder of warrants issued in payment for the construction of a ditch to compel the county commissioners to levy a special assessment, it was shown that the project was abandoned, the court could direct the commissioners to proceed to levy an assessment, or it could require them to proceed immediately to acquire by condemnation the property necessary to the completion of the ditch and then levy the assessment. Espy Estate Co. v. Board of Com'rs [Wash.] 82 P. 129.

91. A peremptory writ of mandamus allowing a director, his attorney, accountant and assistants without limitation in number, to examine the books and records of the corporation for a period of three months, modified so as to authorize such examination to be made by the director and one accountant during four weeks, with a provision for an extension of time, if necessary, on application to the court. People v. Columbia Paper Bag Co., 92 N. Y. S. 1084.

92. On mandamus to compel superintendents of election to meet and consolidate a vote, the judge has power to direct on what date it should be executed, and to instruct the respondents that, if the original certificate and tally sheets could not be produced, they might use properly certified copies from the executive department as evidence of the vote received by the applicant. Glover v. Morris [Ga.] 50 S. E. 956.

93. In proceedings to prohibit discrimination in the distribution of cars among certain coal companies, held the court had the power to fix the percentage of cars which the carrier should distribute to relator in proportion to the present output of relator's mine. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

94. In mandamus to compel a county treasurer to advertise and sell certain real estate for delinquent taxes, an injunction cannot be granted restraining him from selling land bid in by the county at a tax sale for one of the years for which the property

Costs[95] follow the judgment.[96]

§ 10. *Peremptory writ.*[97]—The peremptory writ should be issued against the person or persons who have the power to perform the duty commanded.[98] The joining of unnecessary parties[99] or the fact that the alternative writ asks too much[1] will not invalidate the peremptory writ. Where there is a joinder of petitioners, the peremptory writ must be for all of them or for none of them.[2] A peremptory writ cannot issue where a sufficient answer or return is on file.[3] In Louisiana the fact that respondent fails to make or return an answer does not require the court to make the writ peremptory.[4] The writ cannot be any more specific than the petition.[5]

§ 11. *Performance.*[6]—A refusal to obey constitutes a contempt.[7]

§ 12. *Review.*[8]—There must be a final judgment to be reviewed.[9] The jurisdiction of particular courts is statutory,[10] and, in some states, an appeal being taken to the wrong court the case will be certified to the proper court.[11] Except as to jurisdictional facts,[12] all presumptions are in favor of the regularity of the proceedings below,[13] and technical errors will be disregarded.[14] In the federal courts in the absence of a written stipulation waiving a jury, it will be presumed that a jury trial was had.[15] The general rules as to harmless error apply.[16]

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sought to be sold was delinquent. People v. Lewis, 102 App. Div. 408, 92 N. Y. S. 642.

95. See 4 C. L. 527.

96. A probate judge is properly taxable with the costs of mandamus proceedings brought to compel him to issue a liquor license which he wrongfully refused to issue on application being made therefor. Hudgins v. State [Ala.] 39 So. 717.

97. See 4 C. L. 527.

98. State v. Pan-American Co. [Del. Super.] 61 A. 398. Under Laws 1896, p. 468, title 2, § 5, and p. 478, c. 425, title 3, § 20, a writ of mandamus to compel the common council to grant a certificate of election should be directed to the persons who were members of the council at the time the election was held and not to their successors in office. People v. Burns, 94 N. Y. S. 196.

99. State v. Pan-American Co. [Del. Super.] 61 A. 398; People v. Early, 94 N. Y. S. 640.

1. People v. Early, 94 N. Y. S. 640.

2. Sedden v. McBride [Pa.] 60 A. 12.

3. Motion to make mandamus absolute denied where answer had not been stricken. Mineral Bluff Board of Education v. City of Mineral Bluff [Ga.] 51 S. E. 577.

4. State v. Board of Com'rs [La.] 39 So. 842. Under Code Proc. arts. 841, 843, where respondent fails to answer, the proper practice is to fix the case for trial and if the respondent still declines to answer the remedy is to hear and try the issues presented without answer, on such proof as may be offered and admitted. Id.

5. State v. Brewer [Wash.] 80 P. 1001.

6. See 4 C. L. 527.

7. An order of a trial judge constituting an exercise of jurisdiction in a case before a judgment of the supreme court refusing a mandamus to compel him to call in another judge becomes final by the filing of a remittitur held to constitute a technical contempt. In re Smith [Cal. App.] 83 P. 167.

8. See 4 C. L. 527.

9. An order granting a motion to quash an alternative writ of mandamus, but allowing relator to amend as he may be advised, is not such a final judgment as will support a writ of error. State v. Landis [Fla.] 39 So. 15. Appellate court has no jurisdiction to pass upon an assignment of error complaining of the overruling of a demurrer to an answer, the trial court holding that the answer presents an issue of fact and refers the issue of fact to a jury and when there has been no final judgment thereon. Mineral Bluff Board of Education v. Mineral Bluff [Ga.] 51 S. E. 577. Appellate court has jurisdiction to pass upon an assignment of error complaining of a refusal to sustain a motion to make the mandamus absolute, because, if this motion had been granted, it would have finally disposed of the case. Id.

10. No appeal lies to the superior court from a judgment in mandamus proceedings commanding the defendants to permit the plaintiffs to inspect the books of a corporation. Neubert v. Armstrong Water Co., 26 Pa. Super. Ct. 608. Objection that an appeal will not lie to the superior court in any mandamus case, not sustained. Id.

11. Under the act of 1895, § 9, where an appeal is erroneously taken to the superior instead of to the supreme court, the writ will not be quashed, but the case will be certified to the supreme court for hearing and determination. Neubert v. Armstrong Water Co., 26 Pa. Super. Ct. 608.

12. Decree in favor of relator will be reversed for want of necessary parties appearing on the face of the record. Powell v. People, 214 Ill. 475, 73 N. E. 795.

13. Where on appeal from an order denying a motion to quash an alternative mandamus, the petition on which the writ was granted not being in the record, it will be presumed that the writ was properly granted. People v. Hayes, 94 N. Y. S. 754.

14. An appeal by a township from a mandamus directing the supervisors to draw an order for the payment of money on the

MARRIAGE.[17]

§ 1. *Nature of marriage; capacity of parties; fraud and duress.*[18]—Marriage is a civil contract by which a man and woman are bound to each other for the discharge to each other and to society of the duties and obligations which by law flow from such contract,[19] and in the absence of statute[20] it is not essential that there should be any form of ceremony.[21] The contract must contain the elements essential to the validity of any other contract.[22] The parties must be competent[23] and possess the qualifications prescribed by statute.[24]

A marriage contracted while either party has a husband or wife living is void,[25] but in Texas this rule does not apply to a woman, who in good faith and without knowledge, contracts marriage with a man who is under the impediment of an existing marriage.[26] A promise to marry is not avoided by the fact that one of the parties is married.[27] In some states it is provided by statute that a marriage illegal at the time it was solemnized becomes legal if the parties continue to live together

township treasurer will not be quashed merely because the township and not the supervisors is named appellant. Marcy v. Springville Tp., 24 Pa. Super. Ct. 521.

15. Where the order setting the cause for hearing showed a waiver of jury trial, held the only questions of law reviewable on error were the sufficiency of the alternative writ or of the finding to support the judgment though the record failed to disclose any written stipulation waiving a jury as required by statute. West Virginia Northern R. Co. v. U. S. [C. C. A.] 134 F. 198.

16. In mandamus to compel a judge of probate to issue a tax deed the sustaining of a demurrer to the answer and the admission of certain evidence held harmless. Roach v. State [Ala.] 39 So. 685. In a mandamus proceeding to compel drainage commissioners to improve a drain so as to convey the water from petitioner's land, the question whether drainage increased the value of the land is immaterial. Kreiling v. Northrup, 215 Ill. 195, 74 N. E. 123, afg. 116 Ill. App. 448. The granting of a rule to show cause though irregular is harmless, respondents answering the rule and evidence being taken. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404. The overruling of a motion to strike out parts of an alternative writ of mandamus does not constitute reversible error. Cheney v. State [Ind.] 74 N. E. 892.

17. This topic relates strictly to the law of marriage; the law of Alimony (see 5 C. L. 101), Divorce (see 5 C. L. 1026), and Husband and Wife (see 5 C. L. 1731), being separately treated.

18. See 4 C. L. 528.

19. In re Imboden's Estate [Mo. App.] 86 S. W. 263.

20. See post, § 2. A common-law marriage.

21. Not necessary that a clergyman should be present to authorize and confirm the contract. Reaves v. Reaves [Okl.] 82 P. 490.

22. It must be free from fraud and duress, see post, § 4.

23. Must be sane, see post, § 4.

24. Laws 1905, p. 194, prohibiting marriage by a divorced person within one year, expresses its subject-matter in its title. Olsen v. People [Ill.] 76 N. E. 89. Laws 1905, p. 194, prohibiting to marry, a person who has within one year been granted a divorce on the ground of cruelty or desertion, and Laws 1905, p. 317, prohibiting, under penalty the issuance of license to a legally incompetent person, are not ex post facto nor retrospective. Id. Laws 1905, p. 194, prohibiting to marry, within one year, a person who has been granted a divorce on the ground of cruelty or desertion, and Laws 1905, p. 317, prohibiting under penalty the issuance of license to one legally incompetent, apply to persons divorced before the act took effect. Id. Pub. Acts 1895, p. 667, c. 325, forbidding marriage by an epileptic while the woman is under 45 years of age, is valid. Gould v. Gould [Conn.] 61 A. 604.

25. A marriage with a slave was legalized by the Texas constitution of 1869, hence, subsequent cohabitation by a slave wife with another than her husband is invalid. Lee v. Bolden [Tex. Civ. App.] 85 S. W. 1027. Under the rule that a marriage is void if contracted by a person whose husband or wife by a former marriage is living, and a rule that no final judgment of divorce shall be entered until three months after the filing of the decision of the court, an interlocutory judgment does not dissolve the contract, and a marriage entered into before entry of final judgment is void. Pettit v. Pettit, 93 N. Y. S. 1001.

26. She has all the property rights of a lawful wife. Barkley v. Dumke [Tex.] 13 Tex. Ct. Rep. 242, 87 S. W. 1147.

27. An antenuptial contract to marry is not void, because of the fact that the husband has a living wife by a prior marriage, where the woman is ignorant of such fact.

as husband and wife after the impediment is removed.[28] Such a statute applies whether the removal of the impediment is known or unknown.[29] Slave marriages were legalized by act of congress.[30] A marriage may be avoided for duress which will avoid an ordinary contract.[31] Subsequent cohabitation does not validate a marriage entered into through duress,[32] especially in the absence of issue.[33] A void marriage cannot be ratified,[34] and a decree of nullity is not necessary to dissolve it,[35] but where provided for by statute will be granted where the ends of justice so demand;[36] and equity may declare null a void, but apparently valid ceremonial marriage which was not followed by cohabitation.[37]

§ 2. *Essentials of a contract of marriage.*[38]—It is the duty of an officer who issues a license to make inquiry as to the competency of the parties.[39] A license signed in blank by the judge of probate and left with a magistrate, who thereafter filled in the names of parties to a marriage, is void.[40] A formal solemnization under a void license does not constitute a statutory marriage.[41]

A common-law marriage[42] is a contract by which the parties agree to become husband and wife.[43] No particular form of ceremony is necessary.[44] If what is said and done evidences an intention to assume the marriage status and the parties thereupon enter into the relation of husband and wife, it is sufficient.[45] An informal marriage by contract per verba de praesenti constitutes a common-law marriage,[46] but a formal consent to a void ceremony, not followed by cohabitation, does not.[47] A contract for a future marriage is not a marriage, and such a contract does not constitute a present marriage;[48] but two contracts, one constituting a present marriage and one for a future celebration, are not inconsistent.[49] Common-law marriages are forbidden in some states,[50] but statutes regulating marriage are usually directory, merely, and

Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

28, 29. Turner v. Turner [Mass.] 75 N. E. 612.

30. A slave marriage is established under the Act of Congress, February 8, 1879, by evidence that the parties who were owned by different owners lived together as man and wife before the war and were recognized as husband and wife by their masters, other slaves, and people in the vicinity, and had children who recognized each other as brothers and sisters. Howard v. Evans, 24 App. D. C. 127.

31. Evidence sufficient to show duress where a man 55 years of age, devoid of physical or other attractions, married a girl of 14 in a strange country when she was without friends or money. Avakian v. Avakian [N. J. Eq.] 60 A. 521.

32, 33. Avakian v. Avakian [N. J. Eq.] 60 A. 521.

34. Pettit v. Pettit, 93 N. Y. S. 1001, **overruling** Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979, holding that though a marriage is invalid owing to an existing marriage of one of the parties, it will not be annulled where they have confirmed the contract by cohabiting after the obstacle to a legal marriage has been removed.

35, 36. Pettit v. Pettit, 93 N. Y. S. 1001.

37. Hawkins v. Hawkins [Ala.] 38 So. 640.

38. See 4 C. L. 529.

39. Laws 1905, p. 317, prohibiting under penalty the issuance of license to a person legally incompetent to marry, and Laws 1905, p. 194, prohibiting to marry within one year persons who have been granted a divorce on the ground of cruelty or desertion, make it the duty of the clerk issuing the license to make inquiries as to competency under the divorce act. Olsen v. People [Ill.] 76 N. E. 89.

40, 41. Hawkins v. Hawkins [Ala.] 38 So. 640.

42. See 4 C. L. 529.

43. A contract between persons competent to marry, by which it is mutually agreed to become husband and wife, constitutes a valid marriage. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

44. Travers v. Reinhardt, 25 App. D. C. 567. When a man and woman intend to marry and live together as husband and wife, but their intent is frustrated by some unknown impediment, when such impediment is removed and it is shown that the same intent continues, a marriage is established. Chamberlain v. Chamberlain [N. J. Err. & App.] 62 A. 680.

45. "I give you my word of honor we can stay man and wife, I am your husband and I am satisfied," with an assurance that no other ceremony was necessary, followed by cohabitation, constitutes a marriage. Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079. Where competent parties agree to be husband and wife and live together as such, and hold out to the world that such relation exists between them, a common-law marriage results. Reaves v. Reaves [Okl.] 82 P. 490.

46. Travers v. Reinhardt, 25 App. D. C. 567.

47. Hawkins v. Hawkins [Ala.] 38 So. 640.

48, 49. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

50. Tennessee. The provisions of Shan-

must expressly prohibit common-law marriages in order to render them void.[51] In Tennessee common-law marriages are not recognized, but it is said that there may be an "estoppel" to deny marriage, which status has for a long time been held out to the world.[52]

Evidence of marriage.[53]—If the fact of marriage is a matter of record it may be proved by the records,[54] but if not entered into in the manner prescribed by law, or solemnized according to the rites of any religious denomination or order, the contract is to be proven like any other contract.[55] A widow of an intestate is not a competent witness on the question of their marriage.[56] She is also incompetent to testify to collateral facts from which marriage could be inferred.[57] An antecedent marriage, the existence of which would defeat a subsequent one and bastardize issue thereof, must be established as a fact, by "strict proof."[58] "Strict proof" as here used means to a moral certainty.[59] A marriage certificate containing the names of the parties is insufficient without proof of identity,[60] and the identity of the parties cannot be established by their own declarations, or conclusions to be derived therefrom.[61] Where a common-law marriage is asserted by one party and denied by the other, the whole conduct, life, and character of the parties during the period in controversy is open to inquiry.[62] On the question of whether the relations of parties cohabiting together are matrimonial or meretricious, the declarations of the parties during such period are admissible.[63] The intention of the parties is to be gathered from what took place at the time the marriage was entered into, not from mental reservations or secret intentions of either of the parties.[64] More evidence is required to establish marriage to a dissolute woman than in the case of a woman of chaste character.[65] Secret marriages are not favored and there is a presumption against

non's Code, §§ 4189-4200, are mandatory. Smith v. North Memphis Sav. Bank [Tenn.] 89 S. W. 392. Laws 1901, p. 933, c. 339, prohibited common-law marriages, and a common-law marriage entered into while such law was in force was void. Pettit v. Pettit, 93 N. Y. S. 1001.

51. Not forbidden by the Organic Act of Oklahoma. Reaves v. Reaves [Okl.] 82 P. 490.

52. Smith v. North Memphis Sav. Bank [Tenn.] 89 S. W. 392.

Note: The practical result of the reasoning in this case is the same as though common-law marriages were recognized. The elements of reliance on the apparent state of facts and resulting prejudice (see Estoppel, 5 C. L. 1285) are as between the parties somewhat lacking, and it is not easy to believe that the public either "relied" or was "prejudiced" so as to raise a true estoppel.

53. See 4 C. L. 529, n. 19 et seq.

54. A duly authenticated certificate of marriage, granted by an officer authorized to solemnize a marriage, does not constitute marriage but is the highest and best evidence of it. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Proof of the signature of a marriage certificate and of the authority to perform a marriage of the person who signed it is necessary to prove the certificate. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

55. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Evidence insufficient to show a common-law marriage. Pike v. Pike, 112 Ill. App. 243. A common-law marriage may be proved by testimony of the witnesses to the agreement or by admissions of the parties, or such other facts with respect to the actions of the parties or their conduct toward each other as tend to show the fact. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Evidence as to whether support was given is admissible on the question of marriage. McPhelemy v. McPhelemy [Conn.] 61 A. 477.

56. Bowman v. Little [Md.] 61 A. 223. One party to a common-law marriage is not competent to testify to the existence of such marriage after the death of the other. Rev. St. 1899, § 4652. In re Imboden's Estate [Mo. App.] 86 S. W. 263.

57. Bowman v. Little [Md.] 61 A. 1084.

58. Bowman v. Little [Md.] 61 A. 223. Cannot be established by cohabitation for a short period and that the wife's mother visited them. Id.

59, 60, 61. Bowman v. Little [Md.] 61 A. 1084.

62. The alleged husband may show illicit relations with other men as tending to establish the nature of her relations with him. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163.

63. Reaves v. Reaves [Okl.] 82 P. 490.

64. In re Imboden's Estate [Mo. App.] 86 S. W. 263.

65. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163.

their existence.[66] Cohabitation and repute are strong presumptive evidence of the fact[67] but not conclusive,[68] and are no evidence of an express contract per verba de praesenti[69] or ceremonial marriage.[70] Consent to the contract cannot be inferred from cohabitation alone.[71] Meretricious relations once shown to exist are presumed to continue,[72] but it is of no consequence that the original relations of the parties were illicit if a subsequent contract be established.[73] Evidence of a contract of marriage followed by a cohabitation is strengthened by the fact that the parties were competent and that no illicit relations had existed between them.[74]

§ 3. *Validity and effect.*[75]—If a marriage is lawful where the parties were domiciled and where the husband died, it is valid elsewhere.[76] A marriage contracted by a person forbidden by law to marry is not void.[77] One properly qualified may testify as to the validity of a foreign marriage.[78]

§ 4. *Proceedings for annulment.*[79]—A court will not take jurisdiction in equity to annul a marriage for fraud where the statute relating to divorce provides an ample remedy.[80] The New Jersey chancery court has jurisdiction to annul a contract of marriage for fraud.[81] Such jurisdiction is not derived from the divorce statute[82] but is based on the original, inherent, and general jurisdiction over questions arising out of contracts.[83]

A judgment for the wife in a suit for separation is res adjudicata as to the validity of the marriage and bars a subsequent suit for annulment by the husband.[84]

66. Where there has been no cohabitation, admissions of the parties or other evidence, the unsupported testimony of one of the parties after the other is dead is insufficient to establish a marriage. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

67. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Marriage may be shown by cohabitation and repute during the life of the person whose marital relations are in dispute, or during the life of one of them. Id. Long cohabitation, holding out as husband and wife and signing conveyances as such, held to establish a common-law marriage. Travers v. Reinhardt, 25 App. D. C. 567. A presumption of the existence of a marriage arises from cohabitation and a holding out of each other to the world as husband and wife. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

68. That a man and woman cohabit together and the woman introduces the man to her famiy as her husband, and signs a bail bond as his wife, held insufficient to show marriage. State v. Wilson [Del. Gen. Sess.] 62 A. 227.

69. Where an express contract per verba de praesenti, followed by occasional cohabitation and the furnishing of provisions and money, is sought to be established, declarations of the husband tending to show, that he was not married are admissible to rebut evidence of marriage, but evidence of his repute among his friends, and his conduct toward other women and girls, is not. In re Imboden's Estate [Mo. App.] 86 S. W. 263.

70. One who sets up an antecedent ceremonial marriage to avoid a subsequent one, cannot prove a marriage by repute. Bowman v. Littie [Md.] 61 A. 223.

71. Evidence insufficient to show a marriage within Comp. St. Neb. 1903, c. 52, § 1. Brisbin v. Huntington [Iowa] 103 N. W. 144.

72. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163. Pike v. Pike, 112 Ill. App. 243. Hence an allegation of such fact in a proceeding to restrain a woman from holding herself out as the wife of complainant is relevant. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411. As is also an allegation that complainant had a lawful wife living at the time his relations with the defendant began. Id. A divorce from one woman, procured after marriage to another is admissible on the question as to whether a contract of marriage existed with the latter. Drew v. Provost [Me.] 60 A. 794.

73. Travers v. Reinhardt, 25 App. D. C. 567.

74. Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079.

75. See 4 C. L. 530.

76. Traverse v. Reinhardt, 25 App. D. C. 567.

77. Gould v. Gould [Conn.] 61 A. 604.

78. That a religious marriage does not constitute a valid marriage in a foreign country may be testified to by a qualified witness. Massucco v. Tomassi [Vt.] 62 A. 57.

79. See 4 C. L. 531.

80. Rhode Island statute denominates suit for annulment "divorce." Selby v. Selby [R. I.] 61 A. 142.

81. Boehs v. Hanger [N. J. Eq.] 59 A. 904.

82. Avakian v. Avakian [N. J. Eq.] 60 A. 521.

83. This court has jurisdiction to annul for duress a marriage contracted in England between a citizen of Massachusetts and a foreigner bound for New Jersey, where the bill was brought shortly after her arrival, and personal service is had on the defendant. Avakian v. Avakian [N. J. Eq.] 60 A. 521.

The grounds of annulment are in many states prescribed by statute,[85] and in some states a residence condition is imposed.[86] A marriage will not be annulled for any fraud except that which operates upon the very essentials of marriage,[87] and never when the effect of an annulment is against sound public policy.[88] A marriage will not be annulled for concealment of pregnancy if such fraud was condoned by the husband after discovery,[89] nor on the ground of insanity after a long lapse of time.[90] After a marriage, illegal at the time it was solemnized, has become valid by virtue of statute after the impediment is removed, it will not be annulled because of fraudulent representations as to the impediment.[91] A marriage will not be annulled on any but clear and convincing evidence.[92]

In an action to annul a marriage on the ground of impotency of the husband, the court may order a physical examination of the defendant.[93] In the absence of special circumstances there need not be a reference to conduct such proceeding.[94] The procedure in such case not being prescribed by statute, the matter is largely discretionary. But the examination should be made during the progress of the trial, or the taking of evidence on default, in order that the whole proceeding may be under the immediate direction of the court.[95]

A woman seeking to annul a marriage on the ground that the husband was insane when it was contracted, is not entitled to the rights of a wife under a valid marriage;[96] but it was otherwise held where annulment was sought on the ground of impotency.[97]

A decree annulling a marriage will not be set aside on the ground of mistake

84. The husband could have pleaded invalidity as a defense, if not as a counterclaim, in the action for separation. Durham v. Durham, 99 App. Div. 450, 34 Civ. Proc. R. 141, 91 N. Y. S. 295.

85. Code Civ. Proc. §§ 1743, 1745, authorizing the annulment of a marriage if either party at the time it was celebrated had a living spouse, applies, though the prior marriage was not in force at the commencement of the action. Hervey v. Hervey, 92 N. Y. S. 218. Code Civ. Proc. §§ 1743, 1745, authorizing the annulment of a marriage, if either party at the time it was celebrated had a living spouse, does not apply where the marriage sought to be annulled was contracted in good faith after the spouse of the party previously married had been absent five years without being known to be alive within such period, and, though living at the time of the marriage, was dead at the commencement of the action. Id.

86. Gen. St. 1894, § 4792, requiring a residence of one year by plaintiff in divorce, applies also to proceedings to annul a marriage for fraud under §§ 4785-4789. Action to annul held prematurely brought. Wilson v. Wilson [Minn.] 104 N. W. 300.

87. Where husband had been recently divorced and was competent to marry, his statement that he had never been married before was not ground for divorce. Boehs v. Hanger [N. J. Eq.] 59 A. 904. The fact that marriage with a divorced person was prohibited by complainant's religious faith did not avail her when knowledge of such fact by defendant was not shown. Id.

88. Boehs v. Hanger [N. J. Eq.] 58 A. 904.

89. Evidence held to show condonation by cohabitation. Lenoir v. Lenoir, 24 App. D. C. 160.

90. A marriage will not be annulled because of insanity at the time of its solemnization, where relief is not sought for 33 years, during which period the party had notice. Price v. Price [Ala.] 38 So. 802.

91. Turner v. Turner [Mass.] 75 N. E. 612.

92. Evidence insufficient to show insanity at the time of marriage where the parties were 60 and 75 years of age respectively and the husband discovered the insanity only when sued for support after his wife ceased to live with him. Van Haaften v. Van Haaften [Mich.] 102 N. W. 989. Evidence insufficient to annul for deception a marriage contracted through a matrimonial agency. Beckley v. Beckley, 115 Ill. App. 27. Under Code D. C. § 964, a default decree of annulment cannot be granted on the uncorroborated testimony of one of the parties. Lenoir v. Lenoir, 24 App. D. C. 160. A marriage will not be annulled in an undefended action on the uncorroborated testimony of the plaintiff. Bange v. Bange, 46 Misc. 196, 94 N. Y. S. 8.

93, 94, 95. Gore v. Gore, 103 App. Div. 168, 93 N. Y. S. 396.

96. In New York the supreme court has not jurisdiction to award her counsel fees and alimony pendente lite. Jones v. Brinsmade [N. Y.] 76 N. E. 22.

97. A wife who brings an action to annul a marriage, on the ground of impotency at the date of its celebration, may be allowed counsel fees pendente lite. Gore v. Gore, 92 N. Y. S. 634.

where the only effect it would have would be to give dower to the plaintiff, who was given all she was entitled to at the time it was entered.[98]

§ 5. *Criminal offenses.*[99]

MARRIAGE SETTLEMENTS, see latest topical index.

MARSHALING ASSETS AND SECURITIES.[1]

The doctrine[2] of marshaling assets and securities is that where there are two funds, one creditor having security in both and another in one of them, equity will compel the former to first exhaust the security in which his interest is exclusive.[3] This rule is subject to this, among other qualifications, viz.: that both funds must be within the jurisdiction and control of the court, except in rare cases in which it is clear that the creditor having the two funds will sustain no loss, delay or additional expense if required to resort first to the fund without the jurisdiction.[4] There must be some primary and secondary liability,[5] and the one invoking the doctrine must have an equitable right thereto.[6] The rule does not apply where it will be injurious to any person whose equity is superior to the claimant's upon the single fund[7] or where it will operate to the injury of the party having the double lien, and this rule has, in substance, been made part of the bankruptcy law.[8] The burden is on the junior incumbrancer to show that the common fund is insufficient to satisfy both,[9] and that the senior incumbrancer has some other security.[10]

Partnership assets.—Where there is no contest between individual and partnership creditors, the doctrine of marshaling assets does not apply.[11]

Inverse order of alienation.—As between purchasers of different parcels of land, the whole of which is subject to a prior lien, the land is chargeable in equity in the inverse order of alienation.[12]

MARSHALING ESTATE, see latest topical index.

98. Golden v. Whiteside, 109 Mo. App. 519, 84 S. W. 1125.

99. See 4 C. L. 531.

1. See 4 C. L. 531. As to rank and priority of liens, see Liens, 6 C. L. 451.

2. See 4 C. L. 531.

3. Sternberger v. Sussman [N. J. Eq.] 60 A. 195.

Applications of rule: Mortgagee and judgment creditors. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760. Lienholder and judgment creditors attaching property. Jones v. Dulaney, 27 Ky. L. R. 702, 86 S. W. 547. Where one of two tracts of land owned by a debtor is incumbered by several mortgages, a prior judgment creditor must first exhaust by execution the unincumbered land. Bailey v. Wood [S. C.] 50 S. E. 631. A grantee in a deed from a trustee acting under trust deeds subsequent in time to another trust deed held to acquire a right if necessary to compel the creditors secured by the prior deed to first proceed against the security on which the grantee had no lien. Dickson v. Sledge [Miss.] 38 So. 673.

4. Relief denied in case involving first and second mortgages. Sternberger v. Sussman [N. J. Eq.] 60 A. 195.

5. Payee of notes secured by trust deeds held entitled, the maker being dead, to proceed against the interests of the sureties under trust deeds executed by them without postponement to the foreclosure of a trust deed given by decedent alone, and the exhaustion of the collection, through probate proceedings, of his estate. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643.

6. Purchaser of one of two tracts covered by a mortgage held not entitled to compel the mortgagee to pay the balance due and secured on the second tract on a judgment which had been decreed to be paid out of the tract sold. Bailey v. Wood [S. C.] 50 S. E. 631.

7. Stiles v. Galbreath [N. J. Eq.] 60 A. 224.

8. Where a creditor was properly allowed to prove his claim as against a bankrupt indorser as an unsecured claim, held, he was not required to credit the proceeds of collateral securities held by him against the maker of the obligation before being allowed to participate in the estate of the indorser. Gorman v. Wright [C. C. A.] 136 F. 164, rvg. In re Matthews, 132 F. 274, 4 C. L. 532, n. 56.

9. Staniels v. Whitcher [N. H.] 59 A. 934.

10. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

11. Evans v. Superior Steel Co., 114 Ill. App. 505.

12. 14 Am. & Eng. Enc. of Law [1st Ed.] p. 707. Rule applied where judgment charging payment of legacies was sought to be enforced on land sold by an executrix to several defendants, the executrix having ap-

MASTER AND SERVANT.

§ 1. *The relation; statutory regulations.*[13]—The relation of master and servant rests upon contract, express or implied, and its existence is to be determined by reference to the principles applicable to other contracts,[14] and to the facts of each particular case.[15] Whether the relation created is that of master and servant or employer and independent contractor depends upon the terms of the contract, the test being the degree of control exercised by one over the other, in the performance of the particular service or work contracted for.[16] Where rendition of services is continued after the expiration of the contract term, no new contract being made, it is presumed that the terms of the original contract continue in force.[17]

Termination of the relation.[18]—Death of the employer terminates the relation, in the absence of a contrary agreement.[19] The relation is also terminable at the will of either party,[20] subject, however, to the consequences fixed by law in case such

plied the consideration to her own use and become insolvent. Mallery v. Facer, 181 N. Y. 567, 74 N. E. 487, rvg. 90 App. Div. 610, 85 N. Y. S. 1137.

13. See 4 C. L. 533.

14. See Contracts, 5 C. L. 664; Implied Contracts, 5 C. L. 1756.

15. Where porter was uncertain who paid him, and other positive testimony was to the effect that he was not an employe of defendant, a finding that he was such employe was not justified. Vandegrift v. West Jersey & S. R. Co., 71 N. J. Law, 637, 60 A. 184.

16. The subject of Independent Contractors is separately treated. See 5 C. L. 1782. See also, post, § 4, Liability for injuries to third persons.

17. Continued service of same kind after contract for year had expired, presumed to have been rendered under original contract. Fitch v. Martin [Neb.] 104 N. W. 1072. Terms and conditions of contract for a year held to have been continued for another year where parties continued their relations into another year without change or new agreement. Morgan v. McCaslin, 114 Ill. App. 427. A contract for hire of services may be continued by reconduction. National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co. [La.] 39 So. 738.

18. See 4 C. L. 534.

termination is without legal justification.[21] Fraud in the inception of the contract,[22] incompetency,[23] disobedience of orders,[24] insubordination and disrespectful conduct,[25] and failure to perform services contracted for[26] in a proper and careful manner,[27] have been held to justify a discharge of the servant by the master. Illness of the employe, unless prolonged for an unreasonable time,[28] is a sufficient excuse for failure to fully perform.[29] Where the contract is, by its terms, made terminable by the master for certain reasons, a discharge by another employe is not justifiable.[30] Refusal to accept the services of an employe, except on conditions violative of the terms of the contract of employment, is equivalent to a discharge.[31] An employe's breach may be impliedly waived by the employer.[32]

Actions for wrongful discharge.[33]—For his wrongful discharge[34] a servant has a right of action for damages which accrues at the moment of discharge[35] and becomes a vested right which cannot be affected by the employe's subsequently entering the service of another, or by his refusal to return to the employment from which he has been discharged.[36] In such action the discharged employe must usually allege and prove full performance by himself,[37] but in some cases an allegation of partial performance, and of a legal excuse for failure to fully perform, is sufficient.[38] Proof of a sufficient excuse for not performing does not sustain an allegation of performance.[39] A willful failure to perform an express agreement bars a

19. Costs v. Murray [Or.] 81 P. 883.

20. In the case of the hire of services (where there is no question of custom) the services end at the will of either party. National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co. [La.] 39 So. 738.

21. See following paragraphs on actions for wrongful discharge and for breach by employe. Employer may discharge employe at any time, but is liable in damages for wrongful discharge. Berlin v. Cusachs, 114 La. 744, 38 So. 539.

22. An employer who, intending to hire only single women, is induced by deception practiced upon him to employ a married woman, may terminate the contract at any time. Parks v. Tolman [Mo. App.] 87 S. W. 576. False representations as to location and equipment of plaintiff's office which induced his employment by defendant were ground for rescission by defendant. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895.

23. Court held to have correctly charged what would constitute such incompetency of a mill superintendent as would justify his discharge. Eubanks v. Alspaugh [N. C.] 52 S. E. 207.

24. Refusal of salesman to report for duty at store at 8 o'clock, when not traveling. Costet v. Jeantet, 108 App. Div. 201, 95 N. Y. S. 638. Error to submit to jury whether employer's order was reasonable. Id.

25. Discharge justified where servant abused employer in presence of a guest. Parker v. Farlinger [Ga.] 50 S. E. 98.

26. Where employe failed to produce marketable rubber sponges his discharge was justifiable and he could not recover wages agreed upon. Franklin v. Empire Rubber Mfg. Co. [N. J. Law] 60 A. 186.

27. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895.

28. What is a reasonable time is a question of fact. Spindel v. Cooper, 92 N. Y. S. 822. Sickness of a millinery trimmer for a day and a half held not to justify her discharge, and she was entitled to recover damages therefor. Gaynor v. Jonas, 93 N. Y. S. 287.

29. Spindel v. Cooper, 92 N. Y. S. 822.

30. The employer is to be the sole judge of the reasons for discharge. Lipshutz v. Proctor, 95 N. Y. S. 566.

31. As where one employed as general manager of a department was treated as a mere clerk. Curtis v. Lehmann & Co. [La.] 38 So. 887.

32. As where employer, after employe's absence caused by sickness, told him to report and resume work on a certain day. Spindel v. Cooper, 92 N. Y. S. 822.

33. See 4 C. L. 534.

34. See preceding paragraph for grounds of discharge.

35. Curtis v. Lehmann & Co. [La.] 38 So. 887. A right of action for wrongful discharge arises immediately upon the discharge and refusal of the employer to proceed with the contract. Menage v. Rosenthal [Mass.] 73 N. E. 537.

36. Employe had refused to accept services agreed upon and insisted upon performance of other services. Curtis v. Lehmann & Co. [La.] 38 So. 887.

37. Spindel v. Cooper, 92 N. Y. S. 822. One who contracts to perform services for a certain term cannot recover wages for a period during which he was sick and unable to perform the services contracted for. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895. One who contracts to give his whole time and attention and best endeavors to the service of his employer is not justified in giving any of his time to another even though his duties to his employer are not thereby interfered with. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895.

38. Allegation of illness as cause for nonperformance held sufficient. Spindel v. Cooper, 92 N. Y. S. 822.

recovery though the unperformed agreement is not of the essence of the entire contract.[40]

The measure of damages recoverable by the discharged employe is the agreed compensation for the entire term,[41] less payments, and what he has earned at other employment[42] or could have earned with reasonable diligence.[43] The employe, however, is only bound to seek other employment similar to that called for by his contract,[44] and the burden is on defendant to show that plaintiff might have obtained such employment.[45] Where an action is brought before expiration of the contract term, no allegation that plaintiff would be unable to procure other employment is necessary.[46] Prospective profits, when properly proved, and which it is reasonably certain would have been realized by the employe, may be recovered, though necessarily uncertain in amount.[47] Where a discharged employe is offered the same or like employment to that from which he has been discharged, for the same period and upon the same terms, and before he has sustained any injury by reason of the discharge, no damages are recoverable by him by reason of his discharge.[48] The employer is not liable for collateral damages in the absence of special features giving rise to an independent cause of action.[49] The employe may recover for services actually performed though his discharge was not wrongful.[50] Sums due on account from the employe may be set off by the employer.[51]

Plaintiff must prove the contract of employment.[52] The contract and the discharge by defendant being shown, the burden is upon defendant to prove justification.[53] Holdings as to the admissibility of evidence[54] to prove the terms of the

39. Franklin v. Empire Rubber Mfg. Co. [N. J. Law] 60 A. 186.

40. No recovery by farm manager who failed to return an accurate expense account as he had agreed. Sipley v. Stickney [Mass.] 76 N. E. 226.

41. Under Civ. Code, § 2749, discharged employe may recover agreed compensation for entire term. Berlin v. Cusachs, 114 La. 744, 38 So. 539. Wrongfully discharged salesman may recover salary he would have earned, but not traveling and living expenses after discharge. Cross v. Florsheim, 102 App. Div. 498, 92 N. Y. S. 832.

42. Though employe is only bound to seek similar work, his damages should be reduced by what he has actually earned at any work. Tenzer v. Gilmore [Mo. App.] 89 S. W. 341. Discharged salesman's damages were amount he would have earned under contract, less what he earned in other employment. Roth v. Spero, 96 N. Y. S. 211.

43. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895. Instruction upheld as correctly stating the law. Julius Kessler & Co. v. Ellis, 27 Ky. L. R. 1042, 87 S. W. 798. The measure of damages recoverable for breach of a contract of employment is not the salary promised but the difference between that promised and what the employe could have earned in some other occupation. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. Damages held excessive because not allowing sufficient amount for reasonable earnings of discharged servant from use of secret process which he owned and claimed was very valuable. Franklin v. Empire Rubber Mfg. Co. [N. J. Law] 60 A. 186. Where an employe declares on a breach of the contract he may sue at once, and if the contract term has expired at the time of trial, he may recover for the entire term, less payments and what he could have earned by reasonable effort. Morgan v. McCaslin, 114 Ill. App. 427.

44. Though what he has actually earned at work of any kind should be deducted from his damages. Tenzer v. Gilmore [Mo. App.] 89 S. W. 341.

45, 46. Tenzer v. Gilmore [Mo. App.] 89 S. W. 341.

47. Salesman's commissions. Roth v. Spero, 96 N. Y. S. 211.

48. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995.

49. Berlin v. Cusachs, 114 La. 744, 38 So. 539.

50. In the absence of injury caused by deception practiced by employe, which was reason for discharge, employer must pay for services performed. Parks v. Talman [Mo. App.] 87 S. W. 576.

51. Plaintiff employed under separate contract for each year, his contracts being similar, sued for compensation for two years. Held, that a sum due from him on account for a different year could be set off against his claim. Wrought Iron Range Co. v. Young [Ark.] 88 S. W. 586.

52. Whether a contract existed between the parties was for the jury. Julius Kessler & Co. v. Ellis, 27 Ky. L. R. 1042, 87 S. W. 798. Evidence sufficient to show contract made with salesman by corporate officer who had authority to make it. Thomas v. International Silver Co., 96 N. Y. S. 218.

53. Eubanks v. Alspaugh [N. C.] 52 S. E. 207. Plea in action for wrongful discharge held demurrable because not setting out facts constituting alleged negligence by the servant, nor facts constituting failure to perform duties. Mitchell Square Bale Ginning Co. v. Grant [Ala.] 38 So. 855. Evidence as to efficiency and services of super-

contract,[55] that the discharge was wrongful,[56] and the damages suffered,[57] are given in the notes.

Actions by employer for breach by employe.[58]

Labor laws.[59]—The New York statute limiting the hours of work in bakeries is held unconstitutional as an arbitrary interference with freedom to contract, and not justifiable as an exercise of the police power.[60] The Nevada statute imposing a penalty upon anyone working more than eight hours per day in a mine, smelter, or mill for the reduction of ores, is valid.[61] In a prosecution under this statute, evidence that defendant's business is not injurious to the health of employes is inadmissible.[62]

§ 2. *The right of the master in services of the employe and compensation therefor; assignments of wages; trade secrets; statutory provisions.*[63]—The right to compensation for services must rest upon contract, express[64] or implied.[65] Where there is an express contract, the amount of compensation recoverable depends upon its terms;[66] if the contract is implied, the reasonable value of services rendered may

intendent of printing sufficient to go to jury on issue whether his discharge was justifiable. Sun Print. & Pub. Ass'n v. Edwards [C. C. A.] 136 F. 591.

54. Must relate to issues made by pleadings. Mitchell Square Bale Ginning Co. v. Grant [Ala.] 38 So. 855.

55. Evidence of terms of contract between employe and a third person inadmissible. Shall v. Old Forge Co., 96 N. Y. S. 75. Evidence as to terms of other similar contracts between the parties inadmissible. Id.

56. Pay roll, made by plaintiff, admissible in action for wrongful discharge to show he had performed duties in the line of his employment. Sun Print. & Pub. Ass'n v. Edwards [C. C. A.] 136 F. 591.

57. What salesman earned selling goods of the same kind for another concern inadmissible on issue of damages. Roth v. Spero, 96 N. Y. S. 211. Where a contract of employment was for such time as certain work undertaken by the employer should last, evidence as to the length of time defendant's work would require was admissible to show plaintiff's damages by reason of the breach. Prescott v. Puget Sound Bridge & Dredging Co. [Wash.] 82 P. 606.

58, 59. See 4 C. L. 536.

60. N. Y. Laws 1897, c. 415, art. 8, § 110, limiting hours in bakeries to 60 per week and 10 per day is unconstitutional. Lochner v. People, 198 U. S. 45, 49 Law. Ed. 937, rvg. New York court of appeals. See People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773.

61. St. 1903, p. 33, c. 10 is upheld as a health regulation. Ex parte Kair [Nev.] 80 P. 463. It neither violates Const. Nev. art. 1, § 1, which guarantees the right to acquire and possess property, nor the Eighth amendment to the Federal constitution, prohibiting excessive fines and cruel and unusual punishments. Id. It does not deprive a miner of liberty or property without due process of law. Ex parte Kair [Nev.] 82 P. 453.

62. It is a matter of common knowledge that labor in the places named in the statute is unhealthful. Ex parte Kair [Nev.] 80 P. 463. Evidence that the mine in question was healthful is inadmissible. Id. [Nev.] 82 P. 453.

63. See 4 C. L. 537.

64. Contract for services made by corporation officer held to have been ratified so that employe could recover compensation thereunder. Reupke v. Stuhr & Son Grain Co., 126 Iowa, 632, 102 N. W. 509. Employe presented form of contract to employer, who approved it, and employe went to work under it; held, there was a completed contract and the employe could recover the compensation stipulated for. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30. The execution and delivery of a promissory note to a creditor, who, as a part of the same transaction, enters into a written contract to employ the maker until the note becomes due six months thereafter, and for a further period of six months if the note is not paid at maturity, the two papers will be construed as a contract whereby the maker is to be employed until enabled to pay the note with his wages, and that his wages shall be applied on the note, and not that he shall be permitted to draw his wages as they become due and pay the note at maturity. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593.

65. Claim against estate for services to decedent cannot be sustained when no contract for compensation is shown. Piersol's Estate, 27 Pa. Super. Ct. 204. Whether services were rendered under an implied agreement for compensation was for the jury where plaintiff's evidence tended to show that he did not intend to perform them as a gratuity but was acting under a mistake as to his rights. Blowers v. Southern R. Co., 70 S. C. 377, 50 S. E. 19. Where an old friend nursed deceased, the members of his family being also with him, and no compensation was stipulated for, no promise to pay for such services should be implied. Teawalt v. Ramey's Ex'x, 103 Va. 42, 48 S. E. 505.

66. There can be no implied contract to pay what services are reasonably worth, if an express contract for a certain compensation is shown. O'Connell v. King, 26 R. I. 544, 59 A. 926. One who employs another to sell goods on a commission basis does not impliedly contract to conduct his business with reasonable skill and diligence. Salesman cannot recover commissions he would

be recovered.[67] The presumption is that services performed by an employé are within the contract of employment,[68] and extra compensation, beyond that stipulated, cannot be recovered.[69] Unless the employe has been wrongfully discharged,[70] he may recover only for services actually performed.[71] Where a contract is entire, and the employe is rightfully discharged, he cannot recover for partial performance.[72] But there may be a recovery for partial performance where the employe quits the service with the employer's consent,[73] or for a legally sufficient cause, as for a breach by the employer.[74] In an action to recover compensation the complaint should allege that services were in fact rendered,[75] and that the compensation agreed upon was due.[76] The contract must be proved as alleged.[77] The terms of contracts with other employes cannot be proven to show the terms of the contract sued upon.[78]

Assignments of wages.[79]—Future earnings may be assigned if there is a subsisting contract.[80]

have earned had his employer so conducted his business. Byrns v. United Telpherage Co., 93 N. Y. S. 906. Evidence conflicting as to compensation agreed upon; question for jury. O'Connell v. King, 26 R. I. 544, 59 A. 926. Deduction from singer's salary for a night when no performance was given because other actors were absent, held not justifiable under contract. Wentworth v. Whitney, 25 Pa. Super. Ct. 100. Contract for management of "City Ice Business" construed, and employe's share of "net profits" determined. Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419. Evidence held not to show an agreement to increase plaintiff's salary. Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132. Second contract with salesman held to include provision that commissions paid him in cases where goods were returned or the account lost should be returned. Morrison Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016. Evidence held to show agreed compensation of one employed to improve a building to be $5 per day without commissions on amount of pay roll. Shall v. Old Forge Co., 96 N. Y. S. 75. Salesman's contract allowed him 7½% commission on sales, and 10% of the net profits, and provided that he might draw $100 per week for his maintenance, and expense money. This contract was held not to give him an absolute right to $100 per week during the term of employment, but such allowance was an advance on account of his commissions and percentage of profits. Menage v. Rosenthal [Mass.] 73 N. E. 537. Contract of salesman, wrongfully discharged, provided for payments of $10 per week while traveling, and $20 per week while at home, and that he should travel according to his employer's direction. Held, he could recover $20 per week for remainder of term. Schreiber v. Klingenstein, 95 N. Y. S. 549.

67. In fixing the value of services rendered, the time consumed in the performance of the service is only one of the elements to be considered. Duhme Jewelry Co. v. Hazen, 6 Ohio C. C. (N. S.) 606.

68. Evidence insufficient to show that certain services were extra or to show their value. Cooper v. Brooklyn Trust Co., 96 N. Y. S. 56.

69. Mere fact that additional services were performed at the employer's direction does not raise implied promise to pay additional compensation. Murray v. Griffiths, 48 Misc. 398, 95 N. Y. S. 573.

70. As to rights of wrongfully discharged employe, see ante, § 1.

71. Under contract for a term, no recovery for time when employe was sick and unable to perform. Hughes v. Toledo Scale & Cash Register Co. [Mo. App.] 86 S. W. 895. A servant who continues in the employment is entitled to wages until discharged, and whether acts of the master constitute an implied discharge is a question of fact. Mee v. Bowden Gold Min. Co. [Or.] 81 P. 980. Contract with baseball player construed as something more than one for personal services only, the defendant being bound not to discharge the player; recovery of salary by player up to the time he was released upheld, though the player did not play ball all the season on account of illness, but performed other duties as manager. Egan v. Winnipeg Baseball Club [Minn.] 104 N. W. 947.

72. Parker v. Farlinger [Ga.] 50 S. E. 98.

73. In action to recover for services, plaintiff having left before performance in full, the evidence was held sufficient to show consent to his leaving by his employer's wife, ratified by the husband, and an apportionment was warranted. Trawick v. Trussell [Ga.] 50 S. E. 86.

74. Where a contract of employment provides for payment to the employe of a share of the net profits of the business, refusal of the master to pay such share when due justifies the employe in quitting the employment, and he may recover such sums as became due to him under the contract while he was employed. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386.

75. Complaint held sufficient. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850.

76. Averment that services were worth $30 per month does not amount to an averment that that sum was to be paid monthly. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850.

77. Complaint in action for salary alleged a contract for the term of one year from a certain date, but the evidence showed a continuation from that date of a prior contract; held, variance fatal. Treffinger v. Groh's Sons, 100 App. Div. 433, 91 N. Y. S. 837.

78. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30.

Trade secrets and inventions.[81]—The obligation of an employe to assign to his employer an invention made in the course of his employment does not arise from the existence of the relation of employer and employe alone; there must be a contract to assign.[82] The disclosure by a servant of trade secrets learned by him in the course of his employment,[83] and the use of such secrets by a competitor which has enticed such servant away from his employment[84] may be enjoined by a court of equity. Where a contract of service does not provide for the performance of special, unique or extraordinary services, but only for the performance of such services as may be assigned the servant by the master,[85] a court of equity will not enjoin the servant from entering the service of another, in the absence of an agreement by the servant not to do so.[86] But a competitor which has enticed the servant away from his employment in an effort to learn trade secrets in possession of such servant, will be enjoined from employing such servant or retaining him in its service.[87]

Medical treatment.[88]—An action for damages alleged to have resulted from a premature discharge of an injured employe from a hospital, where he was being cared for pursuant to an agreement for hospital services in consideration of a monthly deduction from his wages, is an action for breach of contract, and not for a tort.[89] The measure of damages for breach of such contract is the reasonable cost of benefits which plaintiff lost by his premature discharge.[90] Such a contract contemplates the continuance of benefits to an injured or sick employe so long as his injury or sickness required.[91] Rules regarding hospital benefits adopted subsequent to a servant's employment and not called to his attention prior to his injury are not binding upon him.[92]

Statutory regulations.[93]—In Arkansas railroad companies are required to pay discharged employes on the day of their discharge.[94]

§ 3. *Master's liability for injuries to servants. A. Nature and extent in general.*[95]—The master is not an insurer of the safety of his servants; the law imposes only the duty of ordinary or reasonable care for their safety,[96] that is, that degree of

79. See 4 C. L. 539.

80. An assignment of wages to be earned under an existing contract of employment for the period of six months, founded upon a valuable consideration, and not made to hinder or defraud creditors, is valid. Quigley v. Welter [Minn.] 104 N. W. 236.

81. See 4 C. L. 539.

82. Evidence held not to show a contract to assign an invention. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403.

Note: Many authorities are examined and discussed in the opinion in the case above cited. It is held that the employer was entitled to nothing more than a shop right or license to use the invention, under the facts and circumstances disclosed, a distinction being drawn between such a license and absolute property rights in an invention. This distinction is said to have been observed in many cases cited and discussed.—Ed.

83. Employe who had been taught processes of making steel enjoined from disclosing such processes to a competitor. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

84. Competitor of steel manufacturer enjoined from using secret processes of steel making which they might learn from servant of complainant. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

85. Contract held not to call for special or extraordinary services. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

86. Even though the servant knew valuable trade secrets, the terms of the contract not referring to special services in connection therewith. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

87. The obtaining of trade secrets in the process of steel manufacture would constitute irreparable injury, giving equity power to interfere. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

88. See 4 C. L. 539.

89. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930.

90. Complaint claiming damages as for a tort is demurrable. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930.

91, 92. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930.

93. See 4 C. L. 540.

94. Railroad company held liable to penalty imposed by Sand. & H. Dig. § 6243 for failure to pay discharged employes on day of discharge where employe consented to wait for check 3 days, but had to wait 9, though he called on cashier for pay three times. St. Louis S. W. R. Co. v. Brown [Ark.] 86 S. W. 994.

95. See 4 C. L. 540.

96. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6; Choctaw, etc., R. Co. v. O'Nesky

care used by ordinarily prudent men under similar circumstances.[97] Thus, a master is not responsible for injuries which could not reasonably have been foreseen and guarded against,[98] nor for injuries resulting from pure accident[99] or an act of God.[1]

[Ind. T.] 90 S. W. 300; Snowdale v. United Box Board & Paper Co. [Me.] 61 A. 683; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549; Texas & P. R. Co. v. Hemphill [Tex. Civ. App.] 86 S. W. 350; Missouri, K. & T. R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401; Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012. The master is not an insurer so as to excuse want of ordinary care on part of employe. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6. Master only bound to furnish "reasonably safe" partition in coal bin, not "absolutely safe." Mueller v. Northwestern Iron Co. [Wis.] 104 N. W. 67. Appliances required to be reasonably, not absolutely, safe. Charping v. Toxaway Mills, 70 S. C. 470, 50 S. E. 196. Not absolute duty, but duty to use ordinary care, to keep passageway in mine reasonably safe. Himrod Coal Co. v. Clingan, 114 Ill. App. 568. Duty of master to furnish reasonably safe place is not absolute; he is held to the duty of exercising ordinary care to that end, under Civ. Code §§ 1970, 1971. Thompson v. California Const. Co. [Cal.] 82 P. 367. Only ordinary care to furnish reasonably safe place required. Roth v. Eccles, 28 Utah, 456, 79 P. 918. No liability where piece of slate flew off and struck fireman who was breaking coal, since railroad company was not under the duty of furnishing absolutely safe coal. Vissman v. Southern R. Co. [Ky.] 89 S. W. 502. Master bound only to use ordinary care to ascertain whether carboys containing acid were properly stoppered so as to prevent injury to employe handling them, himself in exercise of due care. Collins v. Louisville & N. R. Co., 27 Ky. L. R. 825, 86 S. W. 973. **Instructions** held as a whole to state degree of care correctly. Willis v. Cherokee Falls Mfg. Co. [S. C.] 51 S. E. 538. Instruction prejudicially erroneous. Harry Bros. Co. v. Brady [Tex. Civ. App.] 86 S. W. 615. Instruction erroneous because leaving to jury inference that master's duty to provide safe appliances was absolute. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908. Instruction that railway company owed locomotive engineer duty of "high degree of care" to keep its roadbed safe, erroneous. Van Blarcom v. Central R. Co. [N. J. Law] 60 A. 182. Instruction that it is master's duty to furnish "safe and suitable" tools and appliances upheld. Anderson v. Southern R. Co., 70 S. C. 490, 50 S. E. 202. Instruction that master must furnish "safe and suitable" appliances upheld, no qualification being requested, and a subsequent instruction using the expression "reasonably safe and suitable." Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679. Only ordinary care in view of the circumstances is required, hence an instruction that the law requires the highest degree of responsibility for the care and protection of an infant employe was erroneous. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362.

97. Snowdale v. United Box Board & Paper Co. [Me.] 61 A. 683. Standard is conduct of ideal prudent man. Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769. The care required of a master is that which ordinarily prudent men engaged in the same business use under like circumstances. Rule as to care required in employment of servants. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. It is duty of master to guard against injuries which a reasonably prudent person would anticipate and guard against. St. Louis S. W. R. Co. v. Pope [Tex.] 86 S. W. 5. Master is not held to that high degree of care which a prudent man would use for his own safety. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Instruction that duty owed by railway company to employes was that which a master would use to guard against a personal danger to himself, held erroneous because not correct in principle and inapplicable to railroad companies. Southern Pac. Co. v. Gloyd [C. C. A.] 138 F. 388.

98. Where an accident is unusual and not reasonably to be anticipated in the light of experience in the use of appliances furnished, there is no culpable negligence. Use of smooth board clamps in lacing rubber belt not negligence, when such clamps were ordinarily used with safety. Standard Pottery Co. v. Mouôy [Ind. App.] 73 N. E. 188. Defective tug not proximate cause of driver's injury where, when it broke, he put his foot on a street railway rail, where it was run over by the wagon, his team suddenly starting. Foley v. McMahon [Mo. App.] 90 S. W. 113. Where bottles of mineral water had never before exploded and an explosion could not reasonably have been anticipated, the master was not liable for injuries resulting from an explosion because he failed to provide a mask for the employe's use. Dullnig v. Duerler Mfg. Co. [Tex.] 87 S. W. 332. Railway company which builds bridge of standard width, used by it and other companies without previous known injury like the one in issue, cannot be held negligent as to a brakeman who was struck and killed by a part of the bridge when leaning out from a passing train. Cleveland, etc., R. Co. v. Haas [Ind. App.] 74 N. E. 1003. Railroad company which had used open culverts of the kind customarily used in that part of the country for 30 years, without resulting fires or injuries to employes, was not negligent in performance of its duty to furnish a brakeman a safe place, though the culvert in question was on a grade where trains had to be split at times. Southern Pac. Co. v. Gloyd [C. C. A.] 138 F. 388. No recovery where negligence of the master was not shown but it appeared an unintelligent act or mistake of judgment of the servant caused his injury. Illinois Steel Co. v. Rolewicz, 113 Ill. App. 312.

99. Where fireman was struck in the eye by a splinter from a file which he was holding and the engineer striking while repairing the engine, the master was not liable.

Whether ordinary or reasonable care has been exercised by the master in a particular instance is a question of fact[2] to be determined by reference to the nature of the employment and the exigencies and circumstances of the case.[3]

Gulf & S. I. R. Co. v. Blockman [Miss.] 39 So. 479. Where railway company had track patrolled in rainy weather, and sent a trackman ahead of the train, it was not liable for the death of a locomotive engineer caused by a landslide, this being a pure accident. Kinzel v. Atlanta, K. & N. R. Co. [C. C. A.] 137 F. 489.

1. Whether an accident was caused by an act of God is usually a question of fact. Where heavy rains washed out track, it could not be said as matter of law that act of God caused the accident which resulted in engineer's death. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. App. 153, 87 S. W. 395.

2. Whether master or his representative was negligent, held a question for the jury: Whether dangerous condition of sprocket chain constituted negligence. Berg v. U. S. Leather Co. [Wis.] 104 N. W. 60. Whether machinery was operated too fast when belt was put on. Dolson v. Dunham [Minn.] 104 N. W. 964. Whether reasonable care required a derailing switch at place where accident occurred. Smith v. Fordyce [Mo.] 88 S. W. 679. Whether railroad company was negligent in allowing sides of cut to become dangerous, a landslide resulting and causing an employe's death. Fisher's Adm'r v. Chesapeake & O. R. Co. [Va.] 52 S. E. 373. Whether automatic current breakers were in common use on electric machines like the one in question, and whether defendant was negligent in not supplying one. Kremer v. New York Edison Co., 102 App. Div. 433, 92 N. Y. S. 883. Whether reasonable care had been exercised in furnishing appliances for handling melting pitch. Motzing v. Excelsior Brewing Co., 94 N. Y. S. 1118. Whether, in collision accident, engineer of standing train was negligent in having it outside the limits fixed by an order. Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310. Whether milling company which used cars placed boards on top of them so as to render them dangerous to brakemen. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. Whether defect in frame which caused it to start automatically was due to master's neglect in making inspection and repairs. Fountaine v. Wampanoag Mills [Mass.] 75 N. E. 738. Whether railway split switch was in fact defective and a proximate cause of brakeman's death. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225. Whether engineer was negligent in not taking up slack of line used to haul logs on cars, whereby plaintiff, a fellow-servant, was injured. Hart v. Cascade Timber Co. [Wash.] 81 P. 738. Whether a railroad company was negligent in overcrowding car in which employes were being carried home from work, causing some to ride on top of the car, where one was killed by a viaduct. Chicago Terminal Transfer Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133. Where brakeman was injured by switch engine. Biles v. Seaboard Air Line R. Co. [N. C.] 52 S. E. 129. Car inspector caught between cars. Texas Cent. R. Co. v. Phillips [Tex. Civ. App.] 13 Tex. Ct. Rep. 2, 87 S. W. 187. Employe killed by explosion of throttle valve of steam engine. Johnston's Adm'r v. Moore Lime Co. [Va.] 52 S. E. 360. Quarryman injured by explosion of dynamite which had been left in rock. Di Stefeno v. Peekskill Lighting & R. Co., 107 App. Div. 293, 95 N. Y. S. 179. Employe injured by explosion of molten iron poured into alleged defective mold. Haslin v. National Foundry Co., 94 N. Y. S. 101. Employe injured by premature dynamite explosion in quarry. Kopf v. Monroe Stone Co. [Mich.] 12 Det. Leg. N. 319, 104 N. W. 313. Where defendants hauled employes to place of work on a push car attached to a train, and the car left the track and ran over plaintiff. DeMase v. Oregon R. & Nav. Co. [Wash.] 82 P. 170. Brakeman struck by engine while walking between tracks. Loomis v. Lake Shore & M. S. R. Co., 182 N. Y. 380, 75 N. E. 228. Injury to operative of "shavings baler" alleged to be due to loose and defective roller. Shalgren v. Red Cliff Lumber Co. [Minn.] 104 N. W. 531. Negligence alleged was furnishing defective roller crusher and failing to give notice of starting it, whereby plaintiff's hand was caught while he was oiling it. Westby v. Washington Brick, Lime & Mfg. Co. [Wash.] 82 P. 271. Where section boss took a hand car out when he knew a train was due, the jury was warranted in finding he was guilty of gross negligence rendering the company liable for an injury to a hand caused by a collision with the expected train, the injured hand being himself in the exercise of due care. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709. The fact that the boss ordered the men to jump when he saw the train coming, did not relieve him from the consequences of such negligence. Id. Foreman of a hand car ran the car on the time of a train and a hand, trying to stop the car when the train suddenly appeared, fell off the car. Whether the foreman was guilty of gross negligence such that the company was responsible for the injury was properly submitted to the jury. Louisville & N. R. Co. v. Bishop [Ky.] 89 S. W. 221. Train dispatcher held not negligent in making statements and inquiries concerning a certain train; but evidence sufficient to go to jury on issue of his negligence regarding other trains. Ricker v. Central R. Co. [N. J. Law] 61 A. 89. Where conflicting evidence might have warranted finding that defect in steam pipe which exploded could have been discovered by a careful inspection, it was error to direct a verdict for defendant. Koehler v. New York Steam Co. [N. Y.] 75 N. E. 538. Requested instruction excluding issue whether other warning than ringing of bell should have been given properly refused. Ft. Worth & D. C. R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 34, 87 S. W. 371. Though fireman on roughly built railroad used in lumbering assumed incidental risks, the master owed him reasonable care under the circumstances, and a verdict that negligence of the master caused collapse of a trestle, timbers of

The common-law duties of the master to use ordinary care to provide a reason-

which were rotted, would not be reversed, when based on conflicting evidence. Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012.

3. Snowdale v. United Box Board & Paper Co. [Me.] 61 A. 683. The master must exercise reasonable care in view of the situation of the parties, the nature of the business, character of machinery, and appliances used, all surrounding circumstances and conditions, and the exigencies requiring vigilance and attention. Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012. High degree of care imposed on telephone companies, owing to dangerous nature of electricity. Scott v. Iowa Tel. Co., 126 Iowa, 524, 102 N. W. 432. The degree of care required of the master varies with the dangerousness of the work required to be done. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787. Ordinary care is such care as reasonable and prudent men use under like circumstances in providing generally for the servant's safety having regard to the work and attendant difficulties and dangers. Fisher's Adm'r v. Chesapeake & O. R. Co. [Va.] 52 S. E. 373. Owner of logging railroad, not used for freight or passengers, is not held to same degree of care as owner of commercial railroad, in constructing and maintaining the road. Demko v. Carbon Hill Coal Co. [C. C. A.] 136 F. 162. A track on which a derrick car is run must be reasonably safe for that particular purpose; safety of ordinary tracks used for ordinary purposes is not the test. Texas Cent. R. Co. v. George [Tex. Civ. App.] 14 Tex. Ct. Rep. 59, 89 S. W. 1091.

Master held negligent: General superintendent of electric railway held negligent in leaving cars on a spur track and not notifying operatives of work train of the fact. Milbourne v. Arnold Elec. Power & Station Co. [Mich.] 12 Det. Leg. N. 177, 103 N. W. 821. Finding that pile driver was negligently operated warranted by evidence. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. Finding of negligence justifiable where engineer said he would fix step or have it fixed and failed to do so, and the fireman was injured. Gulf, etc., R. Co. v. Garren [Tex. Civ. App.] 84 S. W. 1096. Failure to fasten car door as result of which a timber projecting from the car struck a fireman standing beside his engine, held negligence. St. Louis & S. F. R. Co. v. Bussong [Tex. Civ. App.] 14 Tex. Ct. Rep. 189, 90 S. W. 73. Where plaintiff was struck in the eye by a particle of steel while operating a power steel punch and die, the evidence was held to warrant a finding that the use of unannealed steel by defendant was negligence and that this negligence caused the injury. Arnold v. Harrington Cutlery Co. [Mass.] 76 N. E. 194. Tender of cage in mine held negligent in allowing cage to fall, injuring a miner. Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751. Evidence sufficient to sustain charges of negligence where young switchman in employ of construction company was caught in a switch frog and struck by an engine. Mace v. Boedker & Co., 127 Iowa, 721, 104 N. W. 475. Master liable where foreman in charge of train, who knew servant's dangerous position on the edge of a trestle on which the train was standing, ordered the train to start without warning, causing servant to fall. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842. Brakeman in charge of switching operations and acting as vice-principal held negligent in ordering a man to catch a car, when a collision resulted with another car, knocking employe off. Struble v. Burlington, etc., R. Co. [Iowa] 103 N. W. 142.

Master held not negligent: While boy of 12 was in elevator carrying goods to another floor, a companion threw his hat off and the boy was injured while trying to get it. There was no evidence that the elevator was defective or was negligently handled. Held, no recovery warranted, no negligence on the part of defendant being shown. Hendrix v. Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561. Proof that a saw had occasionally been stopped while the operator was waiting for material was not proof that to permit it to run was negligence. Witten v. Bell & Coggeshall Co., 27 Ky. L. R. 580, 85 S. W. 1094. The fact that a member of a construction crew was jerked off a tender on which he was riding did not alone show negligence on the part of the engineer or fireman, the construction train not having such an equipment that jerks could be prevented. Yates v. Miller's Creek Const. Co. [Ky.] 89 S. W. 241. Engineer not negligent in running engine too fast when plaintiff was on the front with a lantern and could have signalled to slow up. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173. Master not liable where he ordered servant to throw a pick over a partition, and servant did so in a negligent manner injuring an employe on the other side, since the order contemplated the doing of the act in a proper and careful manner. Desautels v. Cloutier [Mass.] 75 N. E. 703. Negligence of company not shown where train went off track while going round a properly constructed curve at the rate of 45 miles an hour, no defect in train or track being shown. Southern Ind. R. Co. v. Messick [Ind. App.] 74 N. E. 1097. Failure to have lights on switch engine was not actionable when injured brakeman testified that he saw the engine coming. Wise Terminal Co. v. McCormick [Va.] 51 S. E. 731. Where brakeman while off duty at night tried to board a switch engine and was hurt, defendant was not negligent in having an oil can on the footboard or in not having a rule forbidding such practice. Id. Where an employe was killed by being thrown from a scaffold, owing to a collision between it and a truck, and it appeared that the scaffold was properly constructed, and that the master had watchmen on duty in the street, negligence of the master was not shown. Sheridan v. Interborough Rapid Transit Co., 101 App. Div. 534, 91 N. Y. S. 1052. Where an employe, at work in the yards, stepped back from a freight engine from which hot steam came as it started, and on to another track where a passenger train struck him, it was

ably safe place of work,[4] reasonably safe tools and appliances,[5] and a sufficient number of competent servants to do the required work,[6] to provide suitable methods of work and to make and promulgate reasonable rules and regulations,[7] and to warn and instruct servants,[8] are more fully discussed and illustrated in succeeding paragraphs. These duties are personal to the master and cannot be delegated so as to relieve him from liability for their nonperformance.[9]

Statutes.[10]—Violations of statutes requiring dangerous machinery to be guarded,[11] limiting the number of hours of continuous service by railway employes,[12] or prohibiting the employment of children under a certain age,[13] injury having resulted therefrom, have been held to constitute negligence per se for which a recovery may be had against the master. Whether a statute has been violated[14] and whether a

held that neither the act of stopping the freight where it was stopped, nor the excessive speed of the passenger train, nor failure to ring the bell or to whistle, there being no crossing there, constituted negligence. Fore v. Chicago & A. R. Co. [Mo. App.] 89 S. W. 1034. Evidence held not to show engineer negligent in not stopping the engine sooner after discovering something was wrong. Hover v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 57, 89 S. W. 1084. Railroad company not negligent in employing as brakeman, a boy of 19 who looked like a man of 22 or 25 years. Moore v. St. Louis, etc., R. Co. [La.] 38 So. 913. Where brakeman, in his sworn application, stated he was 21 years of age, and had a man's physique, his minority was not to be considered in an action for injuries to him. Williams v. Illinois Cent. R. Co., 114 La. 13, 37 So. 992. No breach by stevedore of duty to furnish safe place and appliances where employe fell through hatchway which was a part of the vessel and did not belong to stevedore's equipment. Hyde v. Booth [Mass.] 74 N. E. 337. Engineer, running steam hoist, not negligent in failing to keep lookout when he had no reason to anticipate that injured man would place himself in position of danger as he did. Campbell Creek Coal Co. v. Lewis [Ky.] 89 S. W. 504. Evidence insufficient to go to jury on defendant's negligence where employe was killed by engine running backwards on track to pick up parted train. Baltimore & O. R. Co. v. State [Md.] 61 A. 189.

4, 5. See post, § 3 B.

6. See post, § 3 E.

7. See post, § 3 C.

8. See post, § 3 D.

9. One to whom such duties are delegated is a vice-principal. See post, § 3 E.

10. See 4 C. L. 541.

11. Failure to guard pulleys and belts which could have been guarded as required by Rev. St. 1899 § 6433, is negligence per se. Stafford v. Adams [Mo. App.] 88 S. W. 1130. Violation of statutory duty to guard machinery is negligence per se. Huey Co. v. Johnston [Ind.] 73 N. E. 996. Failure to guard cog wheels as required by Laws 1903, p. 40, c. 37, § 1, is negligence per se. Hansen v. Seattle Lumber Co. [Wash.] 83 P. 102. Failure to provide belt shifters as required by Laws 1903, p. 40, c. 37, § 1, is negligence per se. Whelan v. Washington Lumber Co. [Wash.] 83 P. 98.

12. Proof that Laws 1897, p. 464, c. 415, § 7 (providing that railway employes who have been on duty for 24 hours consecutively shall not be required to do any more work until they have had 8 hours rest), has been violated, and that an injury has resulted, is proof of negligence, and gives a right of action to the injured party. Pelin v. New York, etc., R. Co., 102 App. Div. 71, 92 N. Y. S. 468. Where freight crew had been on duty more than 24 hours and failed to note signals for a second section of a train, a collision resulting, there was a recovery for a fireman's death. Id. The intention of the employers and the fact that it was not anticipated that the work assigned would require more than 24 hours time, does not affect liability. Id.

13. Employment of child under 14 contrary to Labor Law § 70, is negligence per se. Lee v. Sterling Silk Mfg. Co., 93 N. Y. S. 560. A recovery may be had under Hurd's Rev. St. 1903, c. 48, § 33, prohibiting employment of children under 14 in certain occupations, though the employer did not know the child's age, and though the child falsely represented that his age was above the statutory limit. American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766, afg. 116 Ill. App. 121. A violation of Burns' Ann. St. 1901, § 7087b, prohibiting the employment of children under 14 in manufacturing or mercantile establishments, and § 7087y, making a violation thereof a misdemeanor, is negligence per se, as where boy under 14 was employed in sawmill. Nickey v. Steuder [Ind.] 73 N. E. 117.

14. Laws 1903, p. 261, c. 136, prohibiting the "hiring out" of children under 14 in factories, etc., is violated by an employer who knowingly employs or retains a child under the age of 14. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869. A violation of Laws 29th Gen. Assem. p. 108, c. 149, § 2, requiring saws to be guarded, and prohibiting employment of children under 16, is actionable negligence, even though the employer has not been given the notice by the bureau of labor provided for in § 4. Woolf v. Nauman Co. [Iowa] 103 N. W. 785. Calling upon a boy of 16 to hold a belt while it was being repaired is not a violation of Labor Law § 81, providing that boys under 18 shall not be permitted or required to clean machinery while in motion. Scialo v. Steffens, 94 N. Y. S. 305. The statute (Rev. St. c. 48) prohibiting the employment of children under 16 in extra hazardous employments, applies only to the particular place where the servant is to work, hence evidence of the danger incident to

recovery may be had in a particular case[15] must be determined from the language of the act involved. Though violation of a statute enacted for the benefit of the general public may not be negligence per se as to a servant, such violation may be shown in an action by a servant and considered by the jury on the issue of negligence.[16]

Statutes relating to appliances or the place of work,[17] and those creating liability for acts of co-employes,[18] are elsewhere treated.

The relation of master and servant must exist.[19]—To warrant a recovery for injuries caused by an alleged breach of a master's duties, it must appear that the person injured was at the time the defendant's servant,[20] and was engaged in performing, in a reasonable and proper manner,[21] duties within the scope of his employment.[22] One rightfully on the master's premises after his day's work was over,[23] and railway

work in other parts of a plant is inadmissible in an action under the statute. Miller v. National Enameling & Stamping Co., 116 Ill. App. 99.

15. Laws 1902, c. 600, gives no cause of action to a resident of another state against a corporation of that state, for an injury which occurred there. Kleps v. Bristol Mfg. Co., 107 App. Div. 488, 95 N. Y. S. 337. Recovery for instantaneous death of a servant is authorized by St. 1887, c. 270, as amended by St. 1892, c. 260, § 1. Oulighan v. Butler [Mass.] 75 N. E. 726. Rev. Laws, c. 106, § 73, gives a widow or next of kin a right of action for the death, instantly or without conscious suffering, of an employe. § 72 gives a right of action to representatives for a death preceded by conscious suffering; damages recoverable under § 73, $4,000, under § 72, $5,000. Held, where widow sued as administratrix under § 72, she could also maintain an action as widow under § 73. Smith v. Thomson-Houston Elec. Co. [Mass.] 74 N. E. 664.

16. Ordinance requiring ringing of locomotive bell inside city limits held to apply to yards which were closed to the general public and required ringing of the bell of an engine moved in the yard. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Employe at work on track with push car within hearing distance of a whistling post, was entitled to the benefit of the statutory signals by a train. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063. Rev. Laws, c. 104, § 27, providing that elevators shall be equipped with a device to prevent persons being caught between the floors of the building and of the elevator cabs, unless the omission of such device is sanctioned by the building inspector. Held, that violation of the statute does not conclusivey show negligence but may be considered by the jury on that issue. Finnegan v. Samuel Winslow Skate Mfg. Co. [Mass.] 76 N. E. 192.

17. See post, § 3 B.

18. See post, § 3 E.

19. See 4 C. L. 542.

20. Whether boy was servant of mill company, or was employed by one who was an independent contractor, held for jury. Johnson v. Crookston Lumber Co. [Minn.] 103 N. W. 891. Whether plaintiff was employed by defendant or by an independent contractor employed by defendant held for jury. Caron v. Powers-Simpson Co. [Minn.] 104 N. W. 889. Evidence insufficient to take to jury question whether relationship of defendant and plaintiff was that of master and servant. Condon v. Schoenfeld, 214 Ill. 226, 73 N. E. 333. Evidence held sufficient to sustain finding that defendant acted as principal in hiring plaintiff, and not as agent for a town. Bulduzzi v. James Ramage Paper Co., 140 F. 95. Where by a traffic arrangement between several railroads occupying the same street, a watchman was employed, paid, and controlled by one to perform the services of watchman for all the roads at the point in question, the watchman was the servant only of the road which employed and paid him. Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418. Though the highway agent and selectmen of a town have power to hire men to work on the highway, and to pay them wages, the relation of master and servant does not exist between a town and a man so employed. O'Brien v. Derry [N. H.] 60 A. 843. Where no contract of apprenticeship exists, the refusal of a foreman to permit a minor employe to leave his work for medical aid, except at the risk of discharge, is a breach of duty not growing out of the employment and the master is not liable for fatal consequences resulting. Rohrer v. Culbertson, 3 Ohio N. P. (N. S.) 197.

Stevedore whose duties required him to be on vessel continuously while en route was not a passenger but an employe. Lambert v. La Conner Trading & Transp. Co., 37 Wash. 113, 79 P. 608. A **porter** on a sleeping car owned by a separate company is not the servant of the railroad company which hauls the car. Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705.

21. Railroad company not liable where baggageman got down on car step to throw off a message while the train was moving when he could have thrown it from the car door. McTaggart v. Maine Cent. R. Co. [Me.] 60 A. 1027. Where brakeman's duties did not require him to be on the side of a car while passing a bridge he could not recover for injuries caused by being knocked off by the bridge. Krebbs v. Oregon R. & Nav. Co. [Wash.] 82 P. 130. Where a reasonably safe exit has been provided, the master owes a servant who does not use that provided only the duties owed to a licensee. Haber v. Jenkins Rubber Co. [N. J. Err. & App.] 61 A. 382.

22. Member of steam shovel crew held not to have been in performance of duties at

employes being carried to and from their place of work[24] with the consent of the company[25] have been held employes; while a railway employe returning home on a velocipede, which he was allowed to use, was held a mere licensee.[26] One who in good faith enters upon the master's work, at the request of a servant in apparent charge of such work, is not a trespasser, but assumes temporarily the relation of servant;[27] and one who assists the servant of another, at the request of such servant,

time he was killed. Baker's Adm'r v. Lexington & E. R. Co. [Ky.] 89 S. W. 149. No recovery where servant was injured by coming in contact with a machine which he did not operate and near which his duties did not require him to be. Fox v. Clearfield Wooden Ware Co. [Pa.] 61 A. 245. Nonsuit properly entered where slate breaker was injured in elevator machinery to which his duties did not call him, and it was not shown how the accident occurred. Jones v. Scranton Coal Co. [Pa.] 61 A. 117. No recovery for injury where servant was assisting an independent contractor and was not engaged in his own duties. Busby v. Anderson Water, Light & Power Co. [C. C. A.] 136 F. 156. Master owes to servant no duty with respect to instrument or machinery which the servant is forbidden to use. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Held not within the scope of baggage master's duties to carry a message from the station agent to a workman employed along the right of way, and to throw it from his car while passing the place where such workman was employed, hence no recovery for his death resulting from falling or being knocked from the car. McTaggart v. Maine Cent. R. Co. [Me.] 60 A. 1027. Where a railway bridge builder was injured while returning home on a railway velocipede from his place of work, the velocipede being struck by a switch engine, and his complaint did not show that such use of the velocipede was an incident of his service under his contract of employment, he could not recover as for an injury to an employe. Wabash R. Co. v. Erb [Ind. App.] 73 N. E. 939. Where a little girl, whose duties did not require her to be near a mangle, put her fingers on its rollers to see if they were hot, and another child then started the machine, the master was not liable for the resulting injury. Evans v. Josephine Mills [Ga.] 52 S. E. 538. Evidence did not show brakeman was not acting in the line of his duty when he was knocked off a car by a low bridge. Taliaferro v. Vicksburg, S. & P. R. Co. [La.] 39 So. 437. Plaintiff, who was employed in the bottling department of a brewery and knew that his foreman had no power to put him to work in any other department, was injured while at work in the wash house, a different department from the bottling department. He could not recover as a servant. Freeman v. San Antonio Brewing Co. [Tex. Civ. App.] 85 S. W. 1165.

23. Where servant is permitted to eat his lunch on the master's premises, the relation of master and servant continues while he goes to get his dinner pail after his day's work is over. Taylor v. Bush & Sons Co. [Del.] 61 A. 236.

24. An employe being carried home on a work train after his day's work is an employe, not a passenger. Southern Ind. R. Co. v. Messick [Ind. App.] 74 N. E. 1097. It is the duty of a railroad company which makes a practice of carrying its employes to and from their place of work to exercise ordinary care for the safety of such employes while so doing, though such employes are not to be considered as passengers. Chicago Terminal Transfer Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133.

25. Where conductor stopped train and picked up track men to carry them to their place of work, the company did not owe such employes the duty of ordinary care unless conductor's act was in the scope of his employment. Chicago Terminal Transfer R. Co. v. Schiavone, 216 Ill. 275, 74 N. E. 1048.

26. The company owed him the duty of ordinary care to avoid injuring him. Complaint held to state cause of action for injury from being struck by switch engine. Wabash R. Co. v. Erb [Ind. App.] 73 N. E. 939.

27. This seems to be the weight of authority. Aga v. Harbach, 127 Iowa, 144, 102 N. W. 833. Whether a servant had power to employ a substitute, and whether the master ratified his employment held questions for jury. Id.

NOTE. Status of substitute or assistant not employed by master: "It may be conceded that, generally speaking, a servant who is engaged to perform a given labor is not authorized to bind his master by the employment of a substitute or assistant. The relation of the master to a servant is one involving both responsibility and risk, and is not to be imposed by the act of another without authority or consent, express or implied. But in most lines of business the master cannot always remain, in person or by vice principal, in immediate supervision of the servant; and it not infrequently happens that some unforeseen contingency arises, rendering it necessary, in the master's interest, that the servant have temporary assistance. In many such cases it has been held that the servant has implied authority to engage such temporary service, and that the substitute or assistant, if not in the law the employe of the master, is at least entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance. Johnson v. Ashland W. Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Railroad Co. v. Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; Goff v. Railroad Co., 28 Ill. App. 529; Sloan v. R. Co., 62 Iowa, 728, 16 N. W. 331; Barstow v. Railroad Co., 143 Mass. 535, 10 N. E. 255; Marks v. Railroad Co., 146 N. Y. 190, 40 N. E. 782; Cleveland v. Spicer, 16 C. B. (N. S.) 399. It is also held that the substitute or helper employed and paid by the servant with the knowledge or acquiescence of the master is not a trespasser or mere volunteer, and, while engaged in the work of the master, the latter is bound

for the purpose of expediting his own business or that of the master, is not regarded as a trespasser or mere volunteer,[28] though the relation of master and servant be not established.[29] A servant who has been sent to perform work for another person, with whom a contract for its performance has been made by his master, does not, by that fact alone, become the servant of the latter.[30] Where work is being done for two employers, under the direction of a common foreman, both owe to employes engaged in such work the duties of a master;[31] and a failure of the common foreman to perform this duty renders both, or either, liable to an employe for damage suffered in consequence thereof.[32]

A general employer does not owe the duties of a master to one who is an independent contractor[33] nor to the servants of an independent contractor,[34] but liability to servants of another may arise from breach of a contract[35] or statutory[36] duty. An employer may owe the duties of a master in some respects to one who is in other respects an independent contractor.[37] A master is not liable to his servants

to exercise reasonable care for his safety. Rummell v. Dilworth, 111 Pa. 343, 2 A. 355, 363; Anderson v. Guineau, 9 Wash. 304, 37 P. 449. He occupies the same relation, and becomes subject to the same rules, including the operation of the fellow-servant rule, as do those who are directly employed by the master, even though he may not be entitled to recover wages. See cases already cited; also Mayton v. Railroad Co., 63 Tex. 77, 51 Am. Rep. 637; Eason v. Railroad Co., 65 Tex. 577; 57 Am. Rep. 606; Osborne v. Railroad Co., 68 Me. 49, 28 Am. Rep. 16. Stated from another standpoint, the master has quite often been held liable to third persons for injuries occasioned by the negligence of persons performing his work at the request or employment of a servant to whom such work was intrusted. Booth v. Wister, 7 Car. & P. 66; Haluptzok v. Railroad Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; Althorf v. Wolfe, 22 N. Y. 355."—From opinion in Aga v. Harbach [Iowa] 102 N. W. 833.

28. One of three partners who bought a threshing machine engine, was not a trespasser or volunteer, in assisting a servant of the seller, at his request, in setting up the engine. Meyer v. Kenyon-Rosing Mach. Co. [Minn.] 104 N. W. 132.

29. Meyer v. Kenyon-Rosing Mach. Co. [Minn.] 104 N. W. 132.

30. Ouligban v. Butler [Mass.] 75 N. E. 726. What relation existed between the parties during the performance of the services contracted for may be a question of fact. Whether general servant of contractor became servant of defendant, and whether a person in charge of repairs to powder magazine was defendant's servant, held for jury. Id.

31. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842.

32. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842. A person hired by one of such parties, ordered by his foreman to assist in the work, which pertained to the plant of his employer, was held justified in assuming that the work was being done under his contract of employment and that his foreman had authority to order him to engage therein. Id.

33. See title Independent Contractors, 5 C. L. 1782. One who is an independent contractor cannot recover as servant. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452.

34. Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 N. Y. S. 1. Relation of master and servant does not exist between contractor and servant of subcontractor. Larson v. Centennial Mill Co. [Wash.] 82 P. 294. Servant of an independent contractor employed by city is not an employe of the city and cannot recover from the city for injuries received in his work in a dangerous place. Engler v. Seattle [Wash.] 82 P. 136. Owner of manufacturing plant agreed to run it entirely for defendant's work for a specified time, making all repairs and paying all expenses and being paid therefor by defendant. Held, the owner was an independent contractor, and defendant was not liable for an injury to an employe in the manufactory. Kirby v. Lackawanna Steel Co., 109 App. Div. 334, 95 N. Y. S. 833. Stevedore who employed man to assist in loading ship was under duty of seeing that tackle was properly used and he, and not the ship, was liable for an injury caused by an improper use of the tackle supplied. Carlson v. Comeric Co., 140 F. 109. Where the owner of the premises employs an independent contractor to do work thereon the owner does not owe the duties of a master to the contractor's servants, but owes them only the duties of such owner. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. See Independent Contractors, 5 C. L. 1782; Negligence, 4 C. L. 764.

35. Where plaintiff was employed by a carriers' association as a grain scooper, and defendant was under contract with the association to furnish appliances for the work, defendant was liable to plaintiff for injuries caused by unsafe appliances supplied him. O'Keefe v. Great Northern Elevator Co., 93 N. Y. S. 407.

36. Recovery from owner under Labor Law § 20, for death of employe of contractor who fell into shaft left unguarded in violation of the statute. Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 N. Y. S. 1.

37. If contract required employer to furnish a block and tackle he was under the duty of furnishing one reasonably safe, and would be liable to the contractor for a

for failure to supply suitable appliances for the use of employes of an independent contractor,[38] nor is it the master's duty to inform his servants that a person employed by him is an independent contractor to whom the master is not bound to furnish suitable appliances.[39] The independent contractor is alone liable for his own negligence.[40] An employer is not liable for negligence of servants of another.[41]

The duties of the master to his servant arise out of the condition or status created when the latter is accepted as the employe of the former, and an action for damages for injuries is not a suit on a contract.[42] Hence, the doctrine that one cannot repudiate a contract and at the same time recover benefits under it does not apply where an infant employe sues for injuries but disaffirms an agreement to observe the master's rules.[43]

Where a minor is employed in a dangerous business without his father's consent, his father has a right of action for loss of the son's services through injury to him.[44] The father's right to recover in such case is not affected by facts which would defeat a recovery in an action by the son.[45] The mere fact that a father consented to the employment of the son will not preclude a recovery;[46] but if the father consented to the son's employment, and the son knew and appreciated the danger, the father cannot recover.[47]

The master's negligence must have been the proximate cause[48] *of the servant's injuries.*[49]—What was the proximate cause of an injury is ordinarily a question of fact to be determined by the jury, except in those few cases, where the facts are undisputed and such that only one reasonable conclusion can be drawn therefrom.[50]

breach of that duty, though the contractor had his own men and was not a servant in other respects. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452.

38. The employer of a general contractor may assume that the contractor will supply his own servants with reasonably safe appliances. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089.

39. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089.

40. Employer not liable to his servant injured because of use of unsafe appliance by servants of independent contractor. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089. Persons who agreed to furnish materials and work for roofing and who were to do it according to their own methods were independent contractors and not mere employes, and were liable for injuries to an employe caused by their negligence. Miller v. Merritt, 211 Pa. 127, 60 A. 508.

41. An independent contractor is not liable to his servants for negligence of servants of another independent contractor at work on the same building. Penner v. Vinton Co. [Mich.] 12 Det. Leg. N. 381, 104 N. W. 385. Master not liable for injury to loom operator caused by negligence of an employe of an independent contractor employed by the master to put in a sprinkler system. Smith v. Naushon Co., 26 R. I. 578, 60 A. 242. Independent contractor who put man at work repairing a boiler in its switching yards was not responsible for negligence of the trainmen. Breeze v. MacKinnon Mfg. Co. [Mich.] 12 Det. Leg. N. 195, 103 N. W. 908.

42. Alabama Great So. R. Co. v. Bonner [Ala.], 39 So. 619.

43. Defendant pleaded such agreement and its violation by plaintiff and plaintiff set up infancy; demurrer to reply overruled. Alabama Great So. R. Co. v. Bonner [Ala.] 39 So. 619.

44. Boy of 18 injured while employed as section hand. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W. 1095.

45. That the injury was caused by a fellow-servant's negligence is no defense. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W. 1095.

46. Action for death of minor son. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362.

47. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W. 1095.

48. For discussion of doctrine of proximate cause, see Negligence, 4 C. L. 770.

49. See 4 C. L. 544. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209; Baltimore & O. R. Co. v. State [Md.] 61 A. 189. Instruction erroneous because permitting recovery upon a state of facts which did not require a finding of negligence by the master causally connected with the injury. St. Louis & N. A. R. Co. v. Midkiff [Ark.] 87 S. W. 446. Though a master is guilty of negligence per se by violating a statute, he is not liable for an injury unless such negligence is the proximate cause thereof. Nickey v. Steuder [Ind.] 73 N. E. 117. No recovery for failure to guard ripsaw unless it is shown that its unguarded condition was proximate cause of injury. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899.

50. When the facts are undisputed, what constitutes proximate and remote cause in matters of negligence becomes a question of law. Roots Co. v. Meeker [Ind.] 73 N. E. 253. If from the testimony, from which negligence of the defendant may reasonably be inferred, different minds

If the act or omission of the master is one from which he ought to have anticipated, in the exercise of ordinary care, that injury was liable to result, he is liable for an injury resulting therefrom though such injury is unusual and was not in fact foreseen.[51] If an injury would not have resulted but for negligence of the master, he is not relieved from responsibility by the fact that an independent cause for which he was not responsible,[52] such as an act of God[53] or negligence of a fellow-servant,[54] concurred in producing the injury or damage. These principles are further illustrated by holdings grouped in the note.[55]

might honestly draw different conclusions as to the cause of the accident, that question is for the jury. Ferguson v. Central R. Co., 71 N. J. Law, 647, 60 A. 382.

Proximate cause held a question for jury: Miner injured by explosion in entry. Moore v. Grachowski, 111 Ill. App. 216. Whether defective hook caused chain and block to fall. O'Keefe v. Great Northern Elevator Co., 93 N. Y. S. 407. Whether slippery condition of ground or failure to guard shafting was cause of injuries. Hoveland v. Hall Bros. Marine R. & Shipbuilding Co. [Wash.] 82 P. 1090. Whether failure to stop cars caused injury to brakeman who was coupling other cars. Southern Const. Co. v. Hinkle [Tex. Civ. App.] 89 S. W. 309. Whether insufficient number of men, or manner of making repairs on shafting, or failure to warn, was cause of injury. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592. Whether belt was caused to wind round shaft and thus jerk a machine out of place by defective key. Kalker v. Hedden [N. J. Err. & App.] 61 A. 395. How far defective plank on trestle on which railroad employe stepped from car contributed to his injury. Wazenski v. New York, etc., R. Co., 180 N. Y. 466, 73 N. E. 229. Whether failure to have an attendant at a mine door was the proximate cause of injury to a driver who had to open the door as he drove through and was injured because he did not stoop low enough. Indiana & C. Coal Co. v. Neal [Ind. App.] 75 N. E. 295. Whether failure to mark as dangerous, and to prop, a dangerous room in a mine, as required by Illinois mines act, was proximate cause of miner's injury. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375. Whether negligence of defendant in leaving a car close to main track was cause of accident. Boyce v. Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563. Whether death of servant resulted from injuries received by getting caught in switch-frog and struck by wheel. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. Whether failure to guard ripsaw was proximate cause of injury to employe who slipped and fell upon it. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Whether death of brakeman was caused by unsafe condition of handhold on manhole of engine tender. Wood's Adm'x v. Southern R. Co. [Va.] 52 S. E. 371. Whether fall of plaintiff from hand car was caused by a sudden application of the brake by another man on the car. Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112. Where engine left the track injuring fireman, and it appeared stones and gravel had been washed on crossing where accident occurred. Ferguson v. Central R. Co., 71 N. J. Law, 647, 60 A. 382. Whether the opening of the door of a machine, through which plaintiff put his hand, being thereby injured, was caused by a defective condition of the machine, or by plaintiff's negligence or by the act of a fellow-servant. Lack v. Hargraves Mills [Mass.] 76 N. E. 235. Where engine was derailed, injuring fireman, as a result of a defect in the track caused by wreck of preceding train, attempted stop signals not being sufficient, whether the injury was caused by negligence of fellow-servants. Wabash R. Co. v. Bhymer 214 Ill. 579, 73 N. E. 879.

51. A master is liable for a negligent breach of a statutory duty to guard machinery, if by the exercise of reasonable care it might have been foreseen that injury of some kind might be caused to the operative, even though the identical injury which did occur, could not have been reasonably anticipated. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Where handcar had a defective wheel which caused it to jar, thereby causing a hand thereon to lose his balance, so that he had to jump, and the foreman could not stop the car in time to avoid striking him owing to a defective brake, the defective brake might be found the proximate cause of the injury. Foster v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422. Inadequacy of space in which wares were piled is not shown to be proximate cause of injury to servant on whom a pile of wares fell unless it appears that a person of ordinary prudence would have foreseen such an injury as a probable consequence. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282.

52. Smith v. Fordyce [Mo.] 88 S. W. 679. Where an employe, though exercising due care, stumbled and fell on the track so that the train crew could not stop in time to prevent injury to him, the master was nevertheless liable since his servants had been negligent in starting the train. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863.

53. Though heavy rain storm be considered act of God, if rottenness of ties contributed to cause wreck and death of engineer, master would be liable. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Whether the condition of the ties did contribute to cause the death was for the jury. Id. Only such a combination of circumstances as could not have been foreseen and overcome by the exercise of reasonable prudence, care, and diligence, constitutes an act of God which will excuse discharge of the master's duty. Id. See, also, Negligence, 4 C. L. 764.

54. See § 3 E, post. Where an accident would have been prevented by a current breaker on an electrical machine, the absence of the current breaker was the proxi-

Contractual exemption from liability.[56]—A statutory liability cannot be restricted by contract,[57] and contracts relieving masters from all common-law lia-

mate cause of the accident though negligence of a fellow-servant was the immediate cause of the injury. Kremer v. New York Edison Co., 102 App. Div. 433, 92 N. Y. S. 883. If chain and block would not have fallen if hook had not been defective, defendant was liable for injury even though a sudden jerk of the chain by a fellow-servant caused it to fall when it did. O'Keefe v. Great Northern Elevator Co., 93 N. Y. S. 407.

55. Negligence of master, or one representing him, held proximate cause of injury: Defective coupler held a proximate cause of brakeman's death. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225. Evidence sufficient to prove lack of ventilation as cause of miner's death. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Proximate cause of injury held to be failing of slab of earth caused by a seam in a bank opened by frost, plaintiff being at work on a ledge below. Gibson v. Freygang [Mo. App.] 87 S. W. 3. Failure of freight conductor to remove from the track a heavy casting which fell from a car in his train was the proximate cause of the death of the fireman of a passenger train wrecked by the casting. Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140. Cause of injury held to be collapse of scaffold caused by spreading of legs of trestles on which it was built. Neves v. Green [Mo. App.] 86 S. W. 508. Evidence warranted finding that cause of employe's death was defect in scaffold supplied him. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905. Evidence held sufficient to support finding that broken chain supporting spout of water tank was proximate cause of fireman's injury. Missouri, K. & T. R. Co. v. Dickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 229, 90 S. W. 507. Proximate cause of employe's being struck by a log while loading lumber held to be failure to keep man on duty to signal engineer of stationary engine when to start and stop it. Aleckson v. Erie R. Co., 101 App. Div. 395, 91 N. Y. S. 1029. Failure to warn boilermaker held proximate cause of his death by the falling of a casting upon him. Faith v. New York, etc., R. Co., 109 App. Div. 222, 95 N. Y. S. 774. Dangerous condition of shaft, the collar of which was broken, leaving a projecting screw, held proximate cause of injury to sawyer who was caught while cleaning sawdust away from the saw. Smith v. Minden Lumber Co., 114 La. 1035, 38 So. 821. Injuries to brakeman who fell between cars held to have been proximately caused by violation of a rule requiring cars left on sidings to be coupled, together with negligence of the engineer in suddenly stopping cars on which brakeman was walking. St. Louis S. W. R. Co. v. Pope [Tex.] 86 S. W. 5. Where through negligence of employes of defendant, a collision of cars was about to take place, and plaintiff seeing only one way to escape from the danger, jumped away across another track and was struck by another train, the negligence of defendant's employes, which placed him in the dangerous position, was the proximate cause of his injury. Western & A. R. Co. v. Bryant [Ga.] 51 S. E. 20. Where employe slipped on oil on the floor and fell on machine and was injured before he could stop it, the slippery condition of the floor was not the proximate cause of the injury, but rather the failure of the master to instruct how machine could be stopped. Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932. Where windows of cab in engine were boarded up instead of being replaced, so that engineer, in observing signals had to get close to water gauge, the company's negligence in regard to the windows was the proximate cause of an injury inflicted by the explosion of the water gauge, though there was no negligence relative to the condition of the gauge. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857.

Negligence of master held not proximate cause: Lack of driver brakes on engine was not cause of loss of control of train where water brakes, shown to be just as good, were used. Denver & R. G. R. Co. v. Scott [Colo.] 81 P. 763. Evidence insufficient to show that injuries to operator of "edger" were caused by defects in machine. Trigg v. Ozark Land & Lumber Co., 187 Mo. 227, 86 S. W. 222. Where door of coal bin was out of repair and employes used rope to fasten it and plaintiff fell over the rope, the lack of repair of the door was not the proximate cause of his injury. Chicago, etc., R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 123, 89 S. W. 1117. Plaintiff was injured while crew was removing a hand car from the track to avoid collision with an approaching train, the weight of the car being thrown upon him when a fellow-servant stumbled and lost his hold. The failure of the foreman to order the car removed sooner was held not to be the proximate cause of the injury. Andrews v. Chicago & G. W. R. Co. [Iowa] 105 N. W. 404. Failure of defendant to have three brakemen on a train was not the proximate cause of a brakeman's death by being caught between the two portions of a train which had parted and which deceased and the conductor were trying to join, since the presence of a third brakeman could not have prevented the accident. Keefe v. New York, etc., R. Co., 109 App. Div. 180, 95 N. Y. S. 828. Proximate cause of death of brakeman in collision held to be his own failure to give warnings to following train according to the rules, and not the improper make-up of the following train nor the defective engine of his own which delayed his train. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. Failure to have telegraph stations within 10 miles of each other as required by statute held not proximate cause of collision between stations, where one train was delayed by a defective engine. Id. Proximate cause of switchman's injuries held not defective condition of a car which caused it to run slowly, but his own negligence in unnecessarily getting on a track where he was struck. Terminal Railroad Ass'n v. Larkins, 112 Ill. App. 366. Where employe working near unguarded cogwheels slipped on a piece of shafting which rolled under his feet, and in

bility are void as against public policy.[58] The subject of releases is elsewhere treated.[59]

(§ 3) *B. Tools, machinery, appliances, and places for work.*[60]—It is the duty of the master to use ordinary care to furnish machinery, tools, and appliances[61] which are reasonably safe and suitable[62] for the purpose for which they are intended to be used,[63] or for a use to which they are customarily put by employes.[64] Instrumentalities of the kind ordinarily used by those engaged in the same business are reasonably safe within the meaning of this rule,[65] which does not require the latest, safest, or

trying to save himself from a fall, put his hand in the cogs, and it appeared that he might have stood on a bare spot free from debris, the proximate cause of his injury was his slipping, and not a failure to guard the cogs, as required by Factory Acts, Acts 1899, p. 234, c. 142. Roots Co. v. Meeker [Ind.] 73 N. E. 253. Where an employe, standing on a 9 inch space between the edge of a trestle and the side of a car, his duties requiring his presence there, was knocked off by the sudden starting of the car, the proximate cause of his death was not the narrowness of the space where he stood but the sudden starting of the train. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842. Failure to have headlight on engine lighted and to give signal before starting it was not shown to be proximate cause of injury to employe who got off the engine in the dark to get sand and fell down with his hand on the rail, where it did not appear what made him fall, nor that the injury would not have occurred had the headlight been lighted and the signals given. Walker v. Louis-Werner Sawmill Co. [Ark.] 88 S. W. 988.

56. See 4 C. L. 545. See, also, Assumption of Risk, § 3 F.

57. A contract which provides that claims for injuries shall be presented to a railway claim agent within 30 days, and that a failure to do so shall bar the right to sue thereon, violates the provision of Code § 2071, that the liability imposed by that act cannot be restricted by contract. Mumford v. Chicago, etc., R. Co. [Iowa] 104 N. W. 1135. The provision of Code § 2071 (imposing liability on railways for negligence of employes engaged in operation) that no contract restricting the liability imposed by the act shall be valid or binding, is constitutional. Id.

58. Johnston v. Fargo, 98 App. Div. 436, 90 N. Y. S. 725.

Note: "This is a step in advance of any previous decision in this state. A similar result reached in Purdy v. R. W. & O. R. R., 125 N. Y. 209, 21 Am. St. Rep. 736, was based on lack of consideration. In Kenney v. New York C. R. Co., 125 N. Y. 422, the contract was overthrown because of the absence of express words releasing liability. In Alabama, such a stipulation, being in contravention of statutory provisions, was discredited as opposed to public policy. Hissong v. R. & D. R. Co., 91 Ala. 514. The English courts, notwithstanding the existence of the employers' liability statutes, permit a servant to contract away his claim for compensation in such a case. Griffith v. Earl of Dudley, 9 Q. B. Div. 357. This right is also recognized in Georgia. W. & A. R. Co. v. Strong, 52 Ga. 461."—5 Columbia L. R. 327.

59. See 4 C. L. 1270.

60. See 4 C. L. 546.

61. In New York a scaffold is held to be an appliance, not a place. Hutton v. Holdrook, C. & D. Contracting Co., 139 F. 734. Derrick to assist workmen in construction of stone wall is an appliance which it is the duty of the master to maintain in a safe condition. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115. A box used by a railroad-crossing watchman as a place of shelter when not signaling trains, is an appliance furnished him which it is the master's duty to keep reasonably safe, and it is a breach of this duty to place it so near the track that an engine will strike it in passing. Philadelphia, etc., R. Co. v. Devers [Md.] 61 A. 418.

62. Burns v. Ruddock-Orleans Cypress Co., 114 La. 249, 38 So. 157; Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982. Master does not guarantee that appliances are absolutely safe. Butler v. Frazee, 25 App. D. C. 392. Railway company owes employes duty of reasonable care to provide them with reasonably safe appliances, and the same degree of care to keep such appliances in that condition. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519.

63. Master not liable where servant voluntarily used scaffold for a purpose for which it was not intended. Lobstein v. Sajatovich, 111 Ill. App. 654. Not negligence to furnish iron shovel to man employed to shovel snow on elevated, when work did not require contact with third rail, charged with electricity. Smith v. Manhattan R. Co., 48 Misc. 393, 95 N. Y. S. 529. No negligence with respect to a locomotive bell cord where fireman lost his balance while ringing the bell and the cord broke, allowing him to fall, since the cord was not intended or required to sustain any such weight. Illinois Cent. R. Co. v. Mercer [Ky.] 88 S. W. 1054. That a ladder slipped on a granitoid floor did not show that it was unsafe, though it had no prongs or hooks. Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103.

64. Where handhold on manhole in engine tender was customarily used by brakemen in getting on and off tender, the company was under the duty of using due care to keep it in suitable condition for that purpose. Wood's Adm'x v. Southern R. Co. [Va.] 52 S. E. 371.

65. Boop v. Laurelton Lumber Co., 212 Pa. 523, 61 A. 1021. Machinery and appliances should be safe and suitable and such as are approved and in general use. Pressly v. Dover Yarn Mills [N. C.] 51 S. E. 69. Employer must adopt and use all approved

best obtainable to be provided.[66] Whether due care in this respect has been exercised in a given case is ordinarily a question of fact.[67] The master, having provided reasonably safe and suitable machines or appliances, is not liable for injuries re-

appliances which are in general use. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Where employe is injured by use of defective flywheel in sawmill, which had been repaired and retained in use, the test of negligence is not whether the flywheel was repaired in the ordinary manner, but whether it was customary to use repaired flywheels at all. Boop v. Laurelton Lumber Co., 212 Pa. 523, 61 A. 1021.

Contra: The test is whether appliances furnished were reasonably safe and suitable, not whether they are of the character ordinarily in use. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113.

66. Wabash R. Co. v. Burress, 111 Ill. App. 258; Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; Wolf v. New Bedford Cordage Co. [Mass.] 76 N. E. 222. No duty to adopt every new invention, though an improvement. Smith v. Fordyce [Mo.] 88 S. W. 679. Railway company does not owe duty of furnishing latest, safest, or best appliances. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519. Master not bound to provide every new appliance or supposed improvement. Buttner v. South Baltimore Steel Car & Foundry Co. [Md.] 60 A. 597.

67. Question of negligence held one for jury: Whether master was negligent in furnishing a defective rail hook. Drake v. San Antonio & A. P. R. Co. [Tex.] 89 S. W. 407, rvg. [Tex. Civ. App.] 85 S. W. 447. Whether device substituted for brake on drum of log-loading appliance was unsuitable and unsafe. Hart v. Cascade Timber Co. [Wash.] 81 P. 738. Whether it was negligence to furnish a block with a spliced rope too large to work through it without a strain. Wallace v. Henderson, 211 Pa. 142, 60 A. 574. Whether defendant negligently furnished a defective step on a car. Smith v. Thomson-Houston Elec. Co. [Mass.] 74 N. E. 664. Operator of wire spring machine hurt, evidence tending to show "guides" defective, and that operator had not been instructed as to how to "set up" machines. Peterson v. Morgan Spring Co. [Mass.] 76 N. E. 220. Use of set screw is not negligence per se. Aurora Boiler Works v. Colligan, 115 Ill. App. 527. Court cannot assume that it is negligence not to have a particular kind of brake. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566. Evidence sufficient to go to jury on issue whether master was negligent in furnishing a maul not properly wedged on handle, where the maul flew off the handle and struck plaintiff. Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982. Evidence sufficient to go to jury on issue whether belt and pulley by which wool picking machine was run was defective by reason of the master's foreman's negligence. Lynch v. Stevens & Sons Co. [Mass.] 73 N. E. 478. Complaint alleging negligence in having a pilot on engine tender, which narrowed space in which coupling had to be done, whereby a brakeman was injured in attempting, in course of his necessary duties, to apply air to brakes, held to present question for jury. Moore v. Illinois Cent. R. Co. [C. C. A.] 135 F. 67.

Master held not negligent: Appliances for loading hold of vessel. Tydeman v. Prince Line, 102 App. Div. 279, 92 N. Y. S. 446. Not negligence to have a mangle of a certain make unguarded. Ward v. Daniels, 114 Ill. App. 374. Step on caboose consisting of iron bar held reasonably safe. Texas & P. R. Co. v. Hemphill [Tex. Civ. App.] 86 S. W. 350. Master not negligent in failing to supply set screws to hold plates in place, while plaintiff was working on vault. Dolan v. Herring-Hall-Marvin Safe Co., 105 App. Div. 366, 94 N. Y. S. 241. Failure to furnish engine of sufficient power to move train on schedule time, held not negligence. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. No recovery for injuries caused by use of waste instead of metal cap to stop oil can, where it was not shown that such use of waste was negligent under the circumstances. Bateman v. Atchison, etc., R. Co. [Kan.] 81 P. 190. The existence on the collar of a revolving shaft of a small set screw, having a head ¼ inch in diameter and projecting only 1-16 of an inch held not negligence as to an employe whose duty does not bring him in contact with the shaft. Cowett v. American Woolen Co. [Me.] 60 A. 703. An untempered steel hammer not being dangerous when used to pound soft coal, the master was not under the duty of looking out for the safety of a servant working near another using such a hammer. Lynn v. Glucose Sugar Refining Co. [Iowa] 104 N. W. 577. Evidence held not to show any defect in planer which plaintiff operated. Erickson v. Cummer Mfg. Co. [Mich.] 12 Det. Leg. N. 194, 103 N. W. 828. Evidence insufficient to show negligence in furnishing employes a bolt used to hold a beam temporarily, where the bolt broke causing the beam to fall, injuring plaintiff. Furber v. Kansas City Bolt & Nut Co., 185 Mo. 301, 84 S. W. 890.

Master held negligent: Using engine which was defective. Missouri, etc., R. Co. v. Henserlang [Tex. Civ. App.] 86 S. W. 948. Failure to provide safe elevator, or to keep it in repair. Moylon v. McDonald Co. [Mass.] 74 N. E. 929. Guard on loom to prevent flying out of shuttles was too long to work properly. Chambers v. Wampanoag Mills [Mass.] 75 N. E. 1093. Failure to provide safe brace for ladder on which employe stood to clean vat. Haidt v. Swift & Co. [Minn.] 102 N. W. 388. Failure to guard machinery in pulp mill. Erickson v. Northwest Paper Co. [Minn.] 104 N. W. 291. Failure to provide a safe step in engine cab for use of fireman. Fry v. Great Northern R. Co. [Minn.] 103 N. W. 733. Failure to furnish safe and suitable "dogs" to handle logs while being sawed. Moses v. Grant Lumber Co., 114 La. 933, 38 So. 684. Recovery sustained for injury caused by breaking of skidder used in loading cars. Williams v. Levert Lumber & Shingle Co., 114 La. 805, 38 So. 567. Arrangement of belts and pulleys which made starting of machine dangerous.

sulting from their negligent use by an employe,[68] or from their use for a purpose for which they were not intended,[69] or from the selection by an employe of such as are defective, others, reasonably safe, having been provided.[70] Instrumentalities are not provided for the servant's use, within the meaning of this rule, unless they are placed where he can control them if he, not his master, thinks they are needed.[71]

The duty of the master with reference to instrumentalities applies to such as are used and controlled by him, though owned by others.[72] It does not apply to an instrumentality not supplied by him.[73]

Stratton v. Mattingly [Ky.] 89 S. W. 513. Evidence showed injury caused by vibration of saw. Jancko v. West Coast Mfg. & Inv. Co. [Wash.] 82 P. 284. Where saw "wabbled" and caused plaintiff's hand to be caught. Prior v. Eggert [Wash.] 81 P. 929. Where evidence showed chisel used by plaintiff, a sliver from which struck his eye, was furnished by defendant and was made of unsuitable material. Crilley v. New Amsterdam Gas Co., 94 N. Y. S. 102. Piledriver, a piece of which was broken off and struck plaintiff, held defective. Hazzard v. State, 108 App. Div. 119, 95 N. Y. S. 1103. Where plaintiff was directed to use a stick in cleaning rollers of a machine, a finding that the master was negligent in supplying an improper appliance was warranted. Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434. Evidence warranted finding that hand car might have been stopped in time to avoid injury to hand who fell from it, if brake had been in good condition. Foster v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422.

68. Braunberg v. Solomon, 102 App. Div. 330, 92 N. Y. S. 506. Where suitable smooth board clamps were supplied for use in lacing rubber belts, and an employe was careless in adjusting them to the belt being repaired, the master was not liable for a resulting injury. Standard Pottery Co. v. Moudy [Ind. App.] 73 N. E. 188. Reasonably safe and suitable rollers for use in unloading lumber from cars having been supplied, use and application thereof are duties of the workmen, and negligent use of an unsuitable roller does not warrant recovery from the master for a resulting injury. Walsh v. Smith, 26 R. I. 554, 59 A. 922. Where the master had furnished a properly constructed machine and a competent foreman for certain work on a trestle, and proper instructions had been given, he was not liable for an injury resulting from the improper adjustment of a snatch-block, which caused the machine to fall. McQueen v. Delaware, etc., R. Co. 102 App. Div. 195, 92 N. Y. S. 585. Sufficient supply of lamps and oil having been furnished, master not liable for injury caused by working with only one lamp in hold of ship. Earle v. Clyde S. S. Co., 92 N. Y. S. 839. Where the master furnished a sufficient number of lights, and one who did not have charge of the premises or represent the master directed that they should be turned out, the master was not liable. Zilner v. Robert Graves Co., 94 N. Y. S. 714. Employe engaged in hauling logs with trailing grabs was injured because the grabs broke, not on account of defects, but because the load was too heavy. The employe himself selected the logs to be hauled. Held no negligence by the master was shown. Justice v. Ritter Lumber Co. [Ky.] 89 S. W. 171.

69. Illinois Cent. R. Co. v. Mercer [Ky.] 88 S. W. 1054.

70. Wolf v. New Bedford Cordage Co. [Mass.] 76 N. E. 222. Master not liable where foreman directed use of hoisting rope which workmen objected to as unsafe and which broke, injuring plaintiff, where suitable and safe rope was provided and could have been obtained and used by foreman. Vogel v. American Bridge Co., 180 N. Y. 373, 73 N. E. 1. Master not liable for supplying an unsafe steel frame for a "snubbing post," the selection of the one used being a mere detail of the employes' work. Ebbitt v. Milliken, 92 N. Y. S. 1033. Where defendant furnished a sufficient number of suitable pike poles for handling telephone poles, it was not liable for injuries to plaintiff caused by the use of a dull pike by plaintiff's fellow-servant. Towne v. United Elec. Gas & Power Co., 146 Cal. 766, 81 P. 124. Selection of a particular instrumentality for a mere detail of the work, where suitable instrumentalities have been provided, is not the act of the master, whatever the grade of the servant making the selection. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592.

71. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592.

72. A street railway company which uses a city bridge for its tracks thereby adopts such bridge as a part of its equipment, and if one of its employes is injured when in performance of his duties, and in the exercise of due care, by reason of the defective condition of the bridge, of which it had or was charged with knowledge, it would be liable to such employe. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691. Railway company held liable for defect in freight car used, but not owned, by it. Wood v. Rio Grande Western R. Co., 28 Utah, 351, 79 P. 182.

Note: "The defense in this case was conducted on the theory that inasmuch as this car was the property of another company, the only duty defendant owed to its employes was that of inspection and that no liability could be imposed upon the defendant because the negligence of the car inspector was the negligence of a fellow-servant. Mackin v. B. & A. R. Co., 135 Mass. 201; Baldwin v. C. R. I. & P. R. Co., 50 Iowa, 680; Railroad Co. v. Fitzpatrick, 42 Ohio St. 318; Dewey v. Railroad Co., 97 Mich. 329, 56 N. W. 750; 37 Am. St. Rep. 348, 22 L. R. A. 292; Ballou v. C., M. & St. P. R., 54 Wis. 257, 41 Am. Rep. 31. By the clear weight of authority, however, it is held that the duty of the master to furnish safe appliances is of such a nature that it cannot be

Temporary appliances; scaffolds.[74]—In regard to temporary structures, such as scaffolds, built and used by the employes in the course of their ordinary duties, the master fully performs his duty by supplying a sufficient quantity of suitable material, and he is not liable for injuries caused by negligent construction[75] or failure to use the suitable material supplied.[76] But this rule does not apply where the structure used is complicated and requires a plan for its development with the progress of the work, and is of such a character that the ordinary employes using it do not understand it nor appreciate the danger of using it.[77] If the master fails to supply suitable materials,[78] or if his representative directs the use of defective materials[79] and an injury results, he is liable therefor. If the master undertakes to furnish to the employes a completed structure, he owes them the same degree of care as in respect to other appliances.[80]

In New York a statute requires the person who procures work to be done to provide a scaffold, or similar contrivance needed for such work, which is safe.[81]

delegated. Under such decisions the fellow-servant rule would be inapplicable. It is the duty of the master to furnish safe cars, and this duty extends not only to those owned by the master but to all those actually used in the business. Cowan v. C. M. & St. P. R. Co., 80 Wis. 284, 50 N. W. 180; Budge v. L. & T. R. Co., 108 La. 349, 32 So. 535, 58 L. R. A. 333; C. B. & Q. R. Co. v. Avery, 109 Ill. 314; Youngblood v. R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; Bender v. R. Co., 137 Mo. 240, 37 S. W. 132; St. Louis & S. E. R. Co. v. Valirius, 56 Ind. 511; Union Stockyards v. Goodwin, 57 Neb. 138, 77 N. W. 357; T. P. R. Co. v. Archibald, 170 U. S. 665, 42 Law. Ed. 1188; Goodrich v. N. Y. C. & H. R. R. Co., 116 N. Y. 398. The railroad company must see that the cars are safe or refuse to take them."—3 Mich. L. R. 589.

73. Where a ladder was not furnished by the master but was picked up by plaintiff on the premises and used by him in the condition in which he found it, the master was not liable for an injury caused by its slipping. Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103.

74. See 4 C. L. 548.

75. Carlson v. Haglin [Minn.] 104 N. W. 297. An employer may leave to employes the erection of temporary stagings, and if he does so, and is not negligent in selecting such servants, he is not liable if a staging proves defective. Rapson v. Leighton [Mass.] 73 N. E. 540. Where suitable materials are furnished and servants construct therefrom a temporary staging in their own way, they assume the risk of defects therein. Feeney v. York Mfg. Co. [Mass.] 75 N. E. 733. Where master furnished reasonably suitable materials in sufficient quantities for a movable platform to be used in building railroad embankment, and men put it together themselves, he is not liable for an injury resulting from its collapse. Fukare v. Kerbaugh [N. J. Err. & App.] 61 A. 376. Where superintendent in charge of building construction ordered a staging to be moved, he was under no duty to inspect it after it had been moved, its construction being a part of the employes' work. White v. Unwin [Mass.] 74 N. E. 924.

76. See 4 C. L. 549, n. 69.

77. Master liable where complicated movable staging used in building a grain elevator collapsed, killing a man employed thereon. Carlson v. Haglin [Minn.] 104 N. W. 297.

78. If iron beams were used on scaffold because wooden ones were not available, the wooden ones being safer, the master would be liable for a death caused by the use of iron beams. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905.

79. As where one who could be found to be a superintendent directed men who were building staging to use a defective board. Rapson v. Leighton [Mass.] 73 N. E. 540.

80. Where master builds scaffold he must use ordinary care to make it reasonably safe. Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359. Evidence sufficient to warrant finding that a suspended scaffold furnished employe was not reasonably safe. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905. Prior use for two weeks of a staging, without injury, held not to rebut inference of negligence from use of defective board, which broke while staging was being used. Rapson v. Leighton [Mass.] 73 N. E. 540. If a completed structure is furnished by the master's representative, servants may rely on the presumption that the master has furnished one which is reasonably safe. Feeney v. York Mfg. Co. [Mass.] 75 N. E. 733. Where stage was built by riggers for use of men employed to load vessel, and foreman of latter looked at the stage and accepted the statement of the riggers that it was safe, without further inspection of it, and it fell by reason of its negligent construction, weak timbers being used, the master was liable. Ingham v. Honor Co., 113 La. 1040, 37 So. 963. Gang of painters were required by foreman to work upon scaffold previously erected by a stranger, and while thus engaged the scaffold fell by reason of the inherent weakness of one of the timbers. Master liable for injury sustained thereby. Spieker Co. v. Ferguson, 7 Ohio C. C. (N. S.) 13.

81. Construction of New York statute: Under New York Laws of 1897, c. 145, p. 467, §§ 18, 19, a person procuring any kind of labor in the erection, repairing, altering, or painting of a house, building, or structure, is required to furnish a safe scaffold or other similar contrivance to be used by such per-

Places for work.[82]—It is the duty of the master to use ordinary care to provide a reasonably safe place of work,[83] and this duty includes provision of a reasonably safe mode of entrance and exit.[84] What constitutes due care in this respect depends

son. The statute imposes upon a master, whose work requires the use of a scaffold, the absolute duty of furnishing one that is safe. Hutton v. Holdrook Cabot & D. Contracting Co., 139 F. 734. But it imposes no liability where he has furnished one which is safe, or safe materials from which the workmen are to build it in the course of their work, and where an injury then results from its negligent use or construction by the workmen themselves. Fellow-servant rule applies in such case. Hutton v. Holdrook Cabot & Daly Contracting Co., 139 F. 734. Defendant's duty under statute is to erect safe scaffold regardless of customary manner of construction. Siversen v. Jenks, 102 App. Div. 313, 92 N. Y. S. 382. Certain work on a scow held to constitute altering or repairing a structure, within the statute, and a platform used held to be a mechanical contrivance furnished and erected by defendants. Madden v. Hughes, 93 N. Y. S. 324. Carpenter, employed on erection of building, was told to get planking wherever he could, and went on a platform to get lumber there piled, when platform fell. Held, master liable. Swenson v. Wilson & B. Mfg. Co., 102 App. Div. 477, 92 N. Y. S. 849. Where ladder broke, precipitating deceased on a revolving shaft, evidence held sufficient to warrant finding that statute had been violated. McConnell v. Morse Iron Works & Dry Dock Co., 102 App. Div. 324, 92 N. Y. S. 477. Whether scaffold furnished workmen employed to build dock was safe, within the meaning of the statute, held for jury. Siversen v. Jenks, 102 App. Div. 313, 92 N. Y. S. 382. The statute has no application to a staging, 4 to 6 feet from the floor of a room, used to put in fixtures, and the employer is not liable for an injury occurring in its use, unless he would be liable on common law grounds. Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 563. A "buggy," a two wheeled mechanical device for moving heavy timbers, is not within the terms of the statute. Pluckham v. American Bridge Co., 93 N. Y. S. 748.

82. See 4 C. L. 551.

83. Endies v. Marshall, 3 Ohio L. R. 358; Spieker Co. v. Ferguson, 7 Ohio C. C. (N. S.) 13; Barnett & Record Co. v. Schlapka, 110 Ill. App. 672; Libby v. Banks, 110 Ill. App. 330; Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209. Evidence that mine entry was in "fair" condition does not prove it was "safe." Junction Min. Co. v. Ench, 111 Ill. App. 346.

Application of rule to roadbed, right of way, and premises of railroad companies: Tracks, switches, and grounds of switching yards. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. The fact that switch yards were rendered unsafe by the acts of another company, allowed to use them, did not relieve the owner. Ft. Worth & D. C. R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 34, 87 S. W. 371. Duty as to safe place owed to section hand. Indiana, etc., R. Co. v. Otstat, 113 Ill. App. 37. Company liable for death of fireman caused by presence of ice near the rails. Neagle v. Syracuse, etc., R. Co., 109 App. Div. 339, 95 N. Y. S. 884. Railroad company must maintain safe roadbed, with undecayed and sound crossties, and rails in proper position and level. Fuller v. Tremont Lumber Co., 114 La. 266, 38 So. 164. Railroad company owes brakeman duty of ordinary care to provide reasonably safe roadbed when he is engaged in shifting cars. Smith v. Boston & M. R. Co. [N. H.] 61 A. 359. Failure to use due care to prevent landslides in railroad cuts would render company liable to servant injured by a landslide. Fisher's Adm'r v. Chesapeake & O. R. Co. [Va.] 52 S. E. 373. Recovery for death of brakeman sustained where death was caused by a low bridge striking him while on a car, the telltale being too high to give warning. Taliaferro v. Vicksburg, etc., R. Co. [La.] 39 So. 437. Duty of railroad company with respect to switching yards used by it are the same as if it owned such yards. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. Where a hand car struck torpedoes on the track and plaintiff's intestate was thrown off the car and killed, a finding that leaving the torpedoes on the track was negligence was warranted. Illinois Cent. R. Co. v. Leisure's Adm'r [Ky.] 90 S. W. 269. Railway company is not negligent in placing posts of coal chute close to track, making it dangerous for a person to ride by on a car, when it is necessary to place them there and employes are properly warned of the danger. Mobile & O. R. Co. v. Valiowe, 214 Ill. 124, 73 N. E. 416. A railway tunnel, so far completed that a temporary track has been laid in it which is only a few inches from the regular grade, is a completed place within the rule that due care must be used to render it reasonably safe. Recovery sustained where plaintiff was injured by rock falling on him from side of the tunnel. McRae v. Erickson [Cal. App.] 82 P. 209. Finding that railway company was negligent in furnishing a safe place to work warranted where it appeared that roadbed in front of station was made in part of rubbish and sweepings, and that water from the roof was permitted to flow on the track, and that a brakeman slipped on such place while making a coupling and was injured. Atchison, etc., R. Co. v. Stanley [Kan.] 81 P. 176. Complaint held sufficient which set out failure to maintain track in safe condition, and that culvert was inadequate and built of poor material and that defendant had not warned engineer of danger. Western R. of Ala. v. Russell [Ala.] 39 So. 311. Since a railroad company must use ordinary care to keep its track reasonably safe, an instruction requiring culverts to be maintained in such condition as to take care of rain storms such as may reasonably be anticipated is proper, whether or not Rev. St. 1895, art. 4436, imposing substantially the same duty, is for the protection of employes. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395.

84. Haber v. Jenkins Rubber Co. [N. J. Err. & App.] 61 A. 382.

upon the nature of the work,[85] and the question is usually one of fact.[86] The rule that it is the master's duty to provide a reasonably safe place is held not to apply

85. Master assumes obligation to provide servant a reasonably suitable and safe place to work, having reference to the kind of work he is engaged in. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708. The law only requires reasonable care to provide a place as safe as the character of the work will permit, where the servant, by the exercise of care, can perform his work with safety, subject only to the risks necessarily incident to the work. Zeigenmeyer v. Charles Goetz Lime & Cement Co. [Mo. App.] 88 S. W. 139.

86. **Whether master was negligent as to providing place of work held for jury.** Kalker v. Hedden [N. J. Err. & App.] 61 A. 395. Where defendant left ditch along track open and unguarded. Hebert v. Interstate Iron Co. [Minn.] 102 N. W. 451. Where a board fell from a scaffold upon plaintiff, working underneath it, the only apparent cause being the jarring and vibration caused by a stationary engine. Iesief v. New York, etc., R. Co., 102 App. Div. 168, 92 N. Y. S. 342. Employe injured by bank of earth falling on him while working on foundation, blasting during the noon hour having loosened the soil. Kohout v. Newman [Minn.] 104 N. W. 764. Whether guard rail was properly placed with reference to other rail. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 44, 86 S. W. 928. Whether construction and erection of column which fell on plaintiff was negligent. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787. Whether construction and location of coal chute and tracks was negligent. Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621. Whether master was negligent in allowing mill floor to become oily and slippery. Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977. Evidence held to raise issue whether premises were properly lighted. Chicago, etc., R. Co. v. Jackson [Tex. Civ. App.] 13 Tex. Ct. Rep. 123, 89 S. W. 1117. It is not negligence as a matter of law for a master to have work on a sprinkler system done by an independent contractor in a room where a loom operator was at work. Smith v. Naushon Co., 26 R. I. 578, 60 A. 242.

Master held negligent: Defendant negligent in leaving hole in temporary floor unguarded and in not warning servants. Merril v. Pike [Minn.] 102 N. W. 393. Negligence to allow mine to become dangerous through lack of proper ventilation. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Mining company liable for injuries caused by accumulation of gas due to improper ventilation. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440. Miner recovered for injuries caused by explosion in mine when mine boss made a negligent inspection and reported the mine safe when it was not so. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779. Electric companies must keep wires perfectly insulated at places where linemen are required to go to perform their duties. Recovery for death of lineman killed by electric shock. Paducah R. & Light Co. v. Bell's Adm'r, 27 Ky. L. R. 428, 85 S. W. 216. Recovery for injury from defective window of which master had notice, but servant had not. Macon County Tel. Co. v. West, 116 Ill. App. 435. Cutting a large hole in the floor of a dressing room used by employes, and failing to guard it, was gross negligence. Day v. Emery-Bird-Thayer Dry Goods Co. [Mo. App.] 89 S. W. 903. Negligence to have an unguarded electric fan so close to place where man had to work that there was danger of his coming in contact with it. Fouts v. Swift & Co. [Mo. App.] 88 S. W. 167. Master liable where superintendent of repairs on building ordered a pier, built to sustain floors, used before cement in it was dry, in consequence of which it collapsed. Nugent v. Cudahy Packing Co., 126 Iowa, 517, 102 N. W. 442. Flat cars used in hauling gravel had forked stakes on the sides in which side boards were placed while cars were being unloaded and were returning to pit. A workman leaning on a plank was injured because one end was not in the fork but merely rested on standard, and hence fell. Held, master liable. Brimer v. Chicago, etc., R. Co., 109 Mo. App. 493, 85 S. W. 653. Master liable where plaintiff carrying molten metal stepped into a hole which had just previously been dug in pathway used by him, he not having been notified. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. Recovery for injury caused by failure to use reasonable care to keep rock quarry reasonably safe. Norfolk & W. R. Co. v. Coffey [Va.] 52 S. E. 367. Where boy of 11 employed as a sweeper in a factory was injured because the waste box was dangerously near machinery. Willis v. Cherokee Falls Mfg. Co. [S. C.] 51 S. E. 538. Defendant liable where plaintiff was injured while at work on barge by hot water from steamship which was being cooled by defendant. Corrigan v. Oceanic Steam Nav. Co., 94 N. Y. S. 19. Master liable for not providing safe place where whip of boy, employed to drive hogs, caught on overhead revolving shaft left unguarded. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721. The owner of a lumber yard who allows lumber to be piled in a dangerous manner is guilty of actionable negligence, though the piling was originally done by servants for whose negligence he would not be liable. Brooks v. Joyce Co., 127 Iowa, 266, 103 N. W. 91. Where an employe was injured by the falling of a crust of a pile of ore from which he was removing ore, evidence held to tend to show that master was negligent in not removing such crust. Illinois Steel Co. v. Olste, 214 Ill. 181, 73 N. E. 422. Where employe was repairing elevator doors, and was obliged to work while standing partly inside the elevator, and the employer neither caused the elevators to stop running nor provided an adequate system of warnings, a finding of negligence in providing a place to work was justified. Western Elec. Co. v. Hanselmann [C. C. A.] 136 F. 564. Evidence showing that a loose stone was left on a sloping embankment, near plaintiff's place of work, sufficient to show negligence. Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 73 N. E. 933.

Master held not negligent: Defendant

where the work consists in making a dangerous place safe,[87] nor where the place is, for some other reason, inherently dangerous,[88] and necessarily changes from time to time as the work progresses,[89] nor where the servant is employed to make his own place in which to work.[90] There can be no recovery for failure of the master to

held not negligent in lighting factory. Chisholm v. Donovan [Mass.] 74 N. E. 652. That floor was worn uneven, not breach of master's duty to provide safe place. McLaughlin v. Atlantic Mills [R. I.] 61 A. 42. No negligence of master shown where employe, digging post holes, was injured by fall of pile of bricks on the other side of a lattice fence. Meixner v. Philadelphia Brewing Co. [Pa.] 60 A. 259. Employer not liable where piece of brick dropped by masons fell through a window aperture and struck plaintiff. Roth v. Eccles, 28 Utah, 456, 79 P. 918. Evidence insufficient to support charge that freight elevator and guards of elevator shaft were not reasonably safe and suitable for boy employed to sweep. Purcell v. Tennent Shoe Co., 187 Mo. 276, 86 S. W. 121. Evidence insufficient to warrant finding that crowded condition of table, as alleged, caused injury to plaintiff. Smith v. Hammond Packing Co. [Mo. App.] 85 S. W. 625. Evidence did not show negligence of defendant where plaintiff was struck by rock sliding down hill in a quarry, and plaintiff himself said he had observed the slope and had not noticed any dangerous condition likely to result in an accident such as that which occurred. Thompson v. California Const. Co. [Cal.] 82 P. 367. Master, working clay bank, held not negligent in not removing top or keeping watchman to give warning of a landslide, the nature of the bank being such that a landslide would not reasonably be anticipated. Reilly v. Troy Brick Co., 94 N. Y. S. 576. Where gangway connecting two floors, one of which was higher than the other, had long been maintained without side rails, no accidents having occurred, cleats being used on the gangway to prevent slipping, failure to have hand rails was not negligence. Baker v. Empire Wire Co., 102 App. Div. 125, 92 N. Y. S. 355. Where building burned and brick vault shaft was left standing, it being apparently sound, failure of the person in charge of salvage work to raze the shaft was not a breach of his duty to furnish his employes a safe place. Gans Salvage Co. v. Byrnes [Md.] 62 A. 155. Where the amount of light in a mill at the time a machinist was testing rollers was the same as when he had repaired and restarted the machinery, want of sufficient light was not actionable negligence warranting a recovery for an injury to the machinist's fingers while making the test. Carey v. Samuels & Co. [Ky.] 88 S. W. 1052.

87. Jennings v. Ingle [Ind. App.] 73 N. E. 945. As where experienced carpenter was sent to re-enforce shoring of dangerous embankment. Henson v. Armour Packing Co. [Mo. App.] 88 S. W. 166. Railway company not liable for failure to provide safe place, where employe was killed by stone from mountain side while engaged in clearing away from track debris from a landslide. Florence, etc., R. Co. v. Whipps [C. C. A.] 138 F. 13.

88. As where employe is hired to blast in mine and is required to inspect for unexploded charges. Poorman Silver Mines v. Devling [Colo.] 81 P. 252. Rule as to duty to provide safe place not applicable where work consisted of tearing out interior of building. Barrett v. Reardon [Minn.] 104 N. W. 309. The ordinary rule as to the master's duty held not applicable where servant was at work removing earth from a bank, he being on a ledge with a bank of earth and other workmen above him, since the place of work was inherently dangerous and was constantly being changed by the work being done. Gibson v. Freygang [Mo. App.] 87 S. W. 3.

Contra: That a place of work is inherently dangerous does not relieve the master from the duty of exercising ordinary care to keep it reasonably safe in view of the circumstances. Illinois Steel Co. v. Olste, 116 Ill. App. 303. The duty to provide a reasonably safe place applies where the work consists in wrecking buildings damaged by fire but is to be considered in view of the work to be done. Pressed Steel Car Co. v. Herath, 110 Ill. App. 596.

89. Poorman Silver Mines v. Devling [Colo.] 81 P. 252. As where employes are engaged in laying a track. Meehan v. St. Louis, etc., R. Co. [Mo. App.] 90 S. W. 102. Where servant was engaged in tearing down a trestle, the place of work was necessarily dangerous and changed as his work progressed, hence, he was not entitled to the protection of the rule as to a safe place. Gravson-McLeod Lumber Co. v. Carter [Ark.] 88 S. W. 597. Where the place of work, as a rock quarry, is constantly changing in character, and the dangers are as readily observable by the servant as by the master, the master is not liable for injuries unless he knew of the causal defects, or ought to have known, or urged the servant to stay after such knowledge. Thompson v. California Const. Co. [Cal.] 82 P. 367. Where in course of construction of building plaintiff was ordered to assist another in removing certain timbers, and was injured by the falling of a truss on which he stood, which had not been placed in a permanent position, the master was not liable for failure to provide a safe place or negligently ordering such work to be done. McElwaine-Richards Co. v. Wall [Ind.] 76 N. E. 408. The master is not required to furnish a safe place where the danger is temporary only, and when it arises from the hazard and progress of the work itself. Master not liable for injury to quarryman struck by rock thrown by a blast, the usual warning having been given. Zeigenmeyer v. Charles Goetz Lime & Cement Co. [Mo. App.] 88 S. W. 139.

90. The place of work being the result of labor for which he was employed,. Poorman Silver Mines v. Devling [Colo.] 81 P. 252. Complaint which alleged that a stone in a quarry was in a dangerous condition, liable to fall, and that defendant knew of the danger and deceased was ignorant thereof, was

maintain the place in a reasonably safe condition when that duty devolved on the injured employe,[91] or where the place was rendered unsafe by the act of a third person.[92]

Inspection; repairs; knowledge of defects.[93]—The master's duty is not fully performed by providing reasonably safe tools and appliances and a reasonably safe place; he must use ordinary care to maintain them in such condition,[94] and the duty of maintenance necessarily includes that of reasonable inspection[95] and repair.[96] Whether due care in this respect has been used in a given instance is a question of fact[97] to be determined by reference to the character of the place or appliance, the length of time it has been used, and the nature of such use.[98] Where the nature of the business requires it, a system of inspection should be provided,[99] which should re-

not demurrable on the theory that it showed a place of work, not furnished by the master but created by the servant. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 51 S. E. 831.

91. Operator of printing press whose duty it was to prevent accumulation of paper around the press could not recover from the master if that condition caused his injury. Newport News Co. v. Beaumeister [Va.] 52 S. E. 627.

92. Master not liable when place is made unsafe by servants of an independent contractor. Penner v. Vinton Co. [Mich.] 12 Det. Leg. N. 381. 104 N. W. 385.

93. See 4 C. L. 548, 552.

94. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115; Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982.

95. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115; Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Transfer company which switched cars for milling company not relieved from liability for injury to a brakeman, caused by boards left on the car by the milling company, since it was the duty of the transfer company to inspect its cars and see that they were reasonably safe. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. Rev. St. Ariz. 1901, par. 2767, making corporations liable for negligence of employes, provided the corporation had previous notice of the incompetency, carelessness, or negligence of the employe in question, does not change the common-law duty of the master to inspect, nor the rule that such duty is non-delegable. El Paso & S. W. R. Co. v. Vigard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457.

Rule not applicable: Defendant, consignee of coal unloaded in its sheds, did not owe its servants engaged in unloading the duty to inspect the cars on which the coal was shipped. Dunn v. Boston & N. St. R. Co. [Mass.] 75 N. E. 75.

96. Defendant held not to have kept guy wires on derrick in reasonable state of repair. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115. Evidence sufficient to show injury caused by want of proper repairs on folding machine. O'Neil v. Ginn [Mass.] 74 N. E. 668. Allowing belt to become worn and out of repair so that it shifted from one pulley to another and automatically started a machine which plaintiff was cleaning, held a breach of master's duty. Petrarca v. Quidnick Mfg. Co. [R. I.] 61 A. 648.

97. Care of ordinarily prudent person is test whether it was negligence not to make an inspection, or whether inspection made was sufficient. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452. Whether master was negligent in allowing ladder to become defective, held for jury. Carroll v. Metropolitan Coal Co. [Mass.] 75 N. E. 84. Whether defendant was negligent in allowing bolts which held crane support to become weak, causing crane to fall, for jury. Harris v. Putnam Mach. Co. [Mass.] 74 N. E. 287. Whether a reasonable inspection of freight elevator would have disclosed a defect was for the jury. Finnegan v. Winslow Skate Mfg. Co. [Mass.] 76 N. E. 192. What sort of inspection of elevator was required was for jury. Instruction as to expert testimony held erroneous as limiting province of jury. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. Where brakeman was injured by the giving way of a handhold owing to the loss of a nut, whether the inspection of the car had been sufficient to relieve the master was for the jury. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Evidence showed negligence of defendant in inspecting poles on which light trimmer had to work. Dawson v. Lawrence Gaslight Co. [Mass.] 74 N. E. 912. Where foreman examined a scaffold and told workmen to go ahead and use it, master was liable for injuries caused by defects in it. Condon v. Schoenfield, 114 Ill. App. 468. If mine owner trimmed roof after a blast and had no knowledge of a loose rock, it would not be liable for injury caused by rock falling. Abbott v. Marion Min. Co. [Mo. App.] 87 S. W. 110. Ship held to have used due care in inspecting a cable used to unload vessel. The Tresco, 128 F. 780. Where the customary manner of testing and inspecting bolts as used by the manufacturer was shown, and no better method was suggested, the inspection could not be held negligent. Furber v. Kansas City Belt & Nut Co., 185 Mo. 301, 84 S. W. 890.

98. Finnegan v. Samuel Winslow Skate Mfg. Co. [Mass.] 76 N. E. 192.

99. The duty of inspection cannot be properly discharged without providing some system of inspection. Crawford v. United R. & Elec. Co. [Md.] 61 A. 287. If an employe is injured through a want of inspection, evidence of a lack of any system of inspection is evidence of negligence. Chambers v. Wampanoag Mills [Mass.] 75 N. E. 1093.

quire timely inspection,[1] and safe custody of the thing inspected during any substantial interval between its inspection and its use.[2] It must appear that an inspection was made by a competent servant who exercised due care.[3] A master is not liable for injuries resulting from defects of which he had no notice[4] and which a reasonable inspection would not have disclosed;[5] but notice will be presumed if the defect is one which such an inspection would have disclosed,[6] though actual notice,

1. Crawford v. United R. & Elec. Co., [Mo.] 61 A. 287; Endres v. Marshall, 3 Ohio L. R. 358.

2. Defendant liable for injury to street car conductor, owing to broken handhold, where car was inspected about 2:30 a. m. and left standing on track in the street, unguarded and unlighted for several hours. Crawford v. United R. & Elec. Co. [Md.] 61 A. 287.

3. Southern Kansas R. Co. v. Sage [Tex.] 84 S. W. 814.

4. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010. Knowledge of defective condition of switch necessary to make company liable if switch was reasonably safe when put in. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908. Instruction that defendant must be shown to have actual or implied knowledge of alleged defect in furnace, held proper. Bannon v. Buffalo Union Furnace Co., 109 App. Div. 324, 95 N. Y. S. 891. Evidence insufficient to show that master had knowledge of dangerous condition of roof in mine entry. Choctaw, etc., R. Co. v. O'Nesky [Ind. T.] 90 S. W. 300. Mere proof that a defective swivel was used is not proof that the master had notice of the defect, the master having made no personal use of the swivel. George Doyle & Co. v. Hawkins, 34 Ind. App. 514, 73 N. E. 200. Where defect in machine which caused injury had existed only a few minutes before the injury occurred, and no notice had been given anyone except a fellow-servant, the master was not liable. Hughes v. Russell, 93 N. Y. S. 307. Evidence of defendant's knowledge of a defect in a machine sufficient to take issue of negligence to jury. Franke v. Hanly, 215 Ill. 216, 74 N. E. 130. Recovery for injuries, caused by vicious horse furnished servant, where evidence showed master knew horse was vicious and had tried to get rid of her. Farmer v. Cumberland Tel. & T. Co. [Miss.] 38 So. 775. Nonsuit erroneous where evidence showed defective condition of saw was reported to foreman, who, with this knowledge, put boy to work at it. Sink v. The Sikes Co., 134 F. 144. To recover from a railway company for injuries to an employe from being struck by a pole near the track, proof that the railway company participated in placing the pole where it was is unnecessary, where it appears that the company had actual or implied notice of the pole and continued to run its trains without change. South Side El. R. Co. v. Neevig, 214 Ill. 463, 73 N. E. 749.

5. Evidence held to show that a proper inspection of the wheel of a tender had been made and that a defect which caused it to break was one not discoverable by the use of ordinary care. Hover v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 57, 89 S. W. 1084. Where plaintiff was injured by breaking of a stone which had an invisible defect, and the plaintiff had the same opportunity to inspect as the master, and the master had made an inspection through his agent, there was no liability. Bedford Quarries Co. v. Turner [Ind. App.] 75 N. E. 25. Telephone company not liable for injuries to lineman, who fell because of defect in a cross arm, where the defect was not one which a careful inspection would disclose. Southern Bell Tel. & T. Co. v. Starnes [Ga.] 50 S. E. 343. Master not liable for injury caused by falling of bricks from wall in engine room where wall was well built and the defect was an unusual one, not observable by the use of ordinary care. Snowdale v. United Box Board & Paper Co. [Me.] 61 A. 683. Evidence insufficient to show defect in walk had existed so long that defendant was charged with notice. Dolan v. New York Sanitary Utilization Co., 93 N. Y. S. 217. Defect in car couplers not being visible, a plaintiff injured because of such defect, while making a coupling, must show that the master had notice of the defect or would have had notice if he had exercised ordinary care. Buttner v. South Baltimore Steel Car & Foundry Co. [Md.] 60 A. 597. Failure to inspect being the breach of duty specifically relied on, plaintiff must show that the defective condition which caused the injury would have been discovered by such an examination as it was the master's duty to make under the circumstances. George Doyle & Co. v. Hawkins, 34 Ind. App. 514, 73 N. E. 200. Where draft chain parted, allowing ore car in mine to go down grade and strike plaintiff, evidence that there was a flaw in the broken link, not discoverable before the break, was insufficient to show the master negligent. Diamond Coal & Coke Co. v. Allen [C. C. A.] 137 F. 705.

6. Master is presumed to know unsafe conditions surrounding place of work. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294. Knowledge of a latent defect in an appliance is imputed to the master unless he can show that he would not have discovered it by the exercise of ordinary care. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113. Master liable where reasonable inspection would have disclosed hole in saw fender, through which a piece of wood flew, striking operator. Burns v. Ruddock-Orleans Cypress Co., 114 La. 247, 38 So. 157. Railway company liable for defects which a reasonable inspection of cars would disclose; not liable for such as are not discoverable by such inspection. Belt R. Co. v. Confrey, 111 Ill. App. 473. Master liable for defective condition of shaft which caused injury, when he knew or ought to know its condition. Smith v. Minden Lumber Co., 114 La. 1035, 38 So. 821. Finding that defendant negligently furnished an unsafe place warranted, where it appeared that defendant knew that the insulation on wires by which power was transmitted to the

in accordance with rules of the master, has not been given.[7] Actual or implied notice will not render a master liable unless he has had a reasonable time to warn the servant or make repairs.[8] Ordinarily, the servant is under no duty to inspect his appliances or place of work, but may rely on the assumption that the master has performed his duty with respect thereto;[9] but this is not the rule with respect to appliances made by the servant[10] or under his complete control,[11] or which it is a part of his duty to keep in repair.[12] The servant is charged with notice of a defect discoverable by the use of ordinary care in the performance of his usual duties[13] and he should report such defects to the master,[14] unless the latter already has actual or implied knowledge thereof.[15] The master cannot escape liability on the ground that it was the servant's duty to make certain repairs, when the appliance was known to be defective when furnished,[16] or when the making of repairs by the servant has been prevented by the master.[17]

mill had been destroyed, so that certain lead pipes became charged with electricity by which employe was killed. Irish v. Union Bag & Paper Co., 92 N. Y. S. 695. The doctrine that a master is not liable for injuries resulting from latent defects in machinery, bought by him complete from a reputable maker, has no application to a case where a temporary staging was furnished which was unsafe and the defects in which could have been discovered by ordinary care. Feeney v. York Mfg. Co. [Mass.] 75 N. E. 733. Evidence held sufficient to show that engine had not been inspected, that a proper inspection would have disclosed a defect in the shaker bar, and that this defect was the proximate cause of injuries to a fireman who fell off the engine when the bar gave way. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511.

7. To charge a railway company with notice of a defective car, notice need not necessarily be given to the official designated in its rules for that purpose. Chicago & A. R. Co. v. Walters, 217 Ill. 87, 75 N. E. 441.

8. Mine operator not liable for injury caused by defect in mine roof unless he knew of the defect in time to have repaired it before the accident. Abbott v. Marion Min. Co. [Mo. App.] 87 S. W. 110. A master is not negligent in failing to repair until a sufficient length of time has elapsed, after actual or constructive notice of the defect, to enable him to make the repairs or notify the servant of the danger. Malott v. Sample [Ind.] 74 N. E. 245.

9. Macon County Tel. Co. v. West, 116 Ill. App. 435; Peck v. Peck [Tex.] 87 S. W. 248. Duty to inspect engine held to rest on company, not on fireman. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511. Duty to inspect rope used with tackle held to devolve on master, not on servant. Texas Short Line R. Co. v. Waymire [Tex. Civ. App.] 13 Tex. Ct. Rep. 907, 89 S. W. 452. Servant need not make critical examination of place of work but may assume it is reasonably safe. Barnett & Record Co. v. Schlapka, 110 Ill. App. 672. A derrick used in building a stone wall is not an appliance which it is a servant's duty to keep in repair. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115. No duty on part of employe to carefully inspect a belt when its condition was not such that it would not be proper to use it under any circumstances. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

10. Where master furnished suitable materials and left work of making molding flasks to workmen, it was not his duty to inspect the flasks so made. Leishman v. Union Iron Works [Cal.] 83 P. 30.

11. Employe who was in complete control of kettle used in candy making, and had full opportunity to discover defects, and knew that the inspection by the foreman was only a superficial one, could not recover for injuries caused by an explosion of the kettle. Hollingsworth v. National Biscuit Co., [Mo. App.] 88 S. W. 1118.

12. If the duty to repair is a mere detail of the work of the servant using an appliance, the master is not liable for a failure to keep in proper repair. Grams v. Reiss Coal Co. [Wis.] 102 N. W. 586. While it is not ordinarily incumbent on the employe to ascertain whether appliances furnished by the master are safe and suitable, yet where it is his duty to keep appliances in repair, by the terms of his contract, he cannot recover for injuries caused by a lack of repair. Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549.

13. A painter is under the duty of inspecting the scaffold used by him, but need only exercise reasonable care and may recover for injuries caused by a defect not discoverable by him by the exercise of such care, but which was known or should have been known to the master. George Weidemann Brewing Co. v. Wood, 27 Ky. L. R. 1012, 87 S. W. 772.

14. It is the duty of a servant in charge of a machine to report defects which may occur at any time, and knowledge of defects discoverable by the use of ordinary care while using it will be imputed to him. Negligence in reporting defects or in failing to discover them will preclude a recovery. Buey's Adm'x v. Chess & Wymond Co., 27 Ky. L. R. 198, 84 S. W. 563.

15. It is not the duty of a miner to report to the operator the presence of gas in the mine when the operator knew or ought to have known of its presence. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779.

16. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113.

17. The claim that a defect in a machine

Statutes.[18]—The Federal automatic coupler act applies only to cars engaged in interstate commerce.[19] Holdings under various statutes, relating to appliances or the place of work, are grouped, by states, in the note.[20]

was one which the servant should have remedied himself cannot be made where the servant has tried to repair it but has been unable to get the necessary materials, and the master has assured him that it would be safe to proceed until he had made repairs. Anderson v. Seropian [Cal.] 81 P. 521.

18. See 4 C. L. 549.

19. Automatic coupler act inapplicable where fireman was injured in switching operations in yards, there being no evidence that cars switched were engaged in interstate commerce. Rosney v. Erie R. Co. [C. C. A.] 135 F. 311.

20. Arkansas: Kirby's Dig. § 5340, relating to the ventilation of mines, requires that air should be carried to every place in the mine where men are required to work and that the entire mine should be free from gas. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440.

Illinois: Mining companies must perform common-law as well as statutory duties. Junction Min. Co. v. Ench, 111 Ill. App. 346. Any conscious violation of the Illinois mining law is a willful violation within the meaning of that act. The presence of an evil intent is not necessary. Under Laws 1899, p. 324, § 33. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294. Notice to mine manager and mine examiner, or to either, is notice to the owner within the meaning of the statute. Id. The purpose of Hurd's Rev. St. 1903, p. 1261, c. 93, § 19, cl. "e," requiring permanent mine doors to be so arranged as to close automatically, was not only to secure proper ventilation but also to prevent injury to miners in closing them. Madison Coal Co. v. Hayes, 215 Ill. 625, 74 N. E. 755. A door intended to be maintained so long as coal is mined in that part of the mine is a "permanent door," within the statute, without regard to the amount of coal to be mined. Id. Whether a doorway is a "principal doorway" within cl. "f," which requires that an attendant be placed at all such dorways, is a question of fact. Id., afg. 116 Ill. App. 94. A statute of Illinois provides that it shall be unlawful for a mine owner to employ as mine manager any person who has not been given a certificate of competency by the state board of examiners. A miner in the employ of defendant mining company was killed through negligence of a licensed mine manager. Held that defendant was not relieved from liability arising from defaults of its manager. Fulton v. Wilmington Star Min. Co., 133 F. 193.

Note: Following is a comment on Fulton v. Wilmington Star Min. Co., supra: "In selecting a manager the mine owner is restricted to a limited class of men—those who have been declared competent by the state. It was argued that in thus restricting the employer's choice and compelling him to employ one of a class, the legislative intent must have been to exempt the owner from the defaults of such managers. The general rule is that 'when a person or corporation is compelled by law to employ an individual in a given matter, no liability attaches for his tortious or negligent acts.' Durkin v. Kingston Coal Co., 171 Pa. 193, 33 A. 237, 50 Am. St. Rep. 801, 29 L. R. A. 808; Williams v. Thacker Coal Co., 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812. Similarly it has been held that a ship owner is not liable for injuries arising from the fault of a compulsory pilot (Homer Ramsdell Co. v. La Compagnie Generale, 182 U. S. 406, 45 Law. Ed. 1155; Crisp v. Steamship Co., 124 F. 748); and that a city is not liable for default of a contractor when it is compelled to let contracts to the lowest bidder. James v. City of San Francisco, 6 Cal. 529, 65 Am. Dec. 526. The Federal court refused to follow these cases but adopted the rule as laid down in Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. 733, and Riverton Coal Co. v. Shepherd, 207 Ill. 395, on the theory that the certificate of the examiners was mere prima facie evidence of competency. This case was differentiated from those in which the master is compelled to employ a certain individual. Here he may choose from a class. This class, if the examinations are properly conducted, must embrace all the competent men in the profession. The mine owner would be restricted to the employment of such men for mine managers even at common law."—3 Mich. L. R. 415.

Indiana: Burns' Ann. St. 1901, § 7087i, requiring machinery of certain kinds to be guarded, does not apply to an emery belt, a spark from which flew off and struck plaintiff in the eye. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277. Failure to guard a ripsaw, which it was possible and practicable to guard, is negligence. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Failure to provide a belt shifter is not a violation of Burns' Ann. St. 1901, § 7087i, unless the factory inspector has required one to be supplied. Robertson v. Ford [Ind.] 74 N. E. 1. Directing drivers to open and close mine doors is not a compliance with Burns' Ann. St. 1901, § 7487, requiring an attendant to be assigned to each door. Indiana & C. Coal Co. v. Neal [Ind. App.] 75 N. E. 295. Employes are entitled to protection given by the statute, if observed, and may recover for its violation, even though the injury did not result from improper ventilation. Id.

Kentucky: A violation of Ky. St. 1903, § 2731, requiring mine owners or operators to provide suitable and efficient ventilation in mines, is negligence per se as to a miner injured by such violation. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233.

Massachusetts: Since an appliance does not become a part of the "ways, works or machinery" until it has become a part of the permanent structure or plant, a master is not liable under St. 1887, p. 899, c. 270, § 1, where an employe is injured by the falling of a casting which he is preparing to attach to an elevator gate. Nye v. Dutton [Mass.] 73 N. E. 654. Hatchway, being a part of a vessel's equipment, is not a part

(§ 3) *C. Methods of work, rules and regulations.*[21]—Whether a method of doing the work provided by the master is reasonably safe depends upon the character of the work and the danger to be apprehended.[22] The question is usually one of fact for the jury.[23] Failure to provide a sufficient number of servants to do the

of a stevedore's "ways, works and machinery" under Rev. Laws, c. 106, § 71, cl. 1. Hyde v. Booth [Mass.] 74 N. E. 337. Where longshoreman himself placed a section of a hatchway in such a position that it would bear no weight, the stevedore was not liable for the injury resulting therefrom under Rev. Laws, c. 106 § 71, cl. 2. Id. Temporary staging, furnished complete to employes, is no part of the "ways, works and machinery." Feeney v. York Mfg. Co. [Mass.] 75 N. E. 733. But a recovery may be had under the statute if employes are negligently ordered to use an unsafe temporary staging. Id. Where servants took two ladders furnished them and tied them together, the extension ladder so used was not a part of the defendant's ways, works and machinery, and defendant was not liable for an injury caused by the breaking of the rope used. Higgins v. Higgins [Mass.] 74 N. E. 471. Evidence regarding belt and pulley of machine held sufficient to go to jury on issue whether foreman had notice of a defect which he failed to remedy, under Rev. Laws, c. 106, § 71, cl. 1. Lynch v. Stevens & Sons Co. [Mass.] 73 N. E. 478. Cars on which coal is shipped are not a part of the "ways, works or machinery" of the consignee on whose premises the coal is unloaded, and the consignee is not liable to his servants for injuries caused by defects therein. Dunn v. Boston & N. St. R. Co. [Mass.] 75 N. E. 75. Rev. Laws, c. 111, §§ 203, 209, prohibiting railroad companies, while moving traffic, from using cars not equipped with automatic couplers, does not apply to a car being taken to the repair shop to be repaired. Taylor v. Boston & M. R. Co. [Mass.] 74 N. E. 591.

Missouri: Failure to guard pulleys and belts which could have been guarded, as required by Rev. St. 1899, § 6433, is negligence per se. Stafford v. Adams [Mo. App.] 88 S. W. 1130. Rev. St. 1899, § 8822, requiring mine owners to keep a sufficient supply of timber on hand for the propping of workings when necessary, does not make such owners insurers, but places on them a high degree of care commensurate with the danger. McDaniels v. Royal Min. Co., 110 Mo. App. 706, 85 S. W. 679.

New York: Laws 1897, p. 480, c. 415, does not require shafting 8 feet above the floor to be guarded. Scialo v. Steffens, 94 N. Y. S. 305. Master not liable, under Laws 1886, p. 629, c. 409, as amended by Laws 1892, p. 1372, c. 673, § 8, for failing to guard a revolving shaft 15 feet above the floor which could be reached only by a ladder. Dillon v. National Coal Tar Co., 181 N. Y. 215, 73 N. E. 978. Under Laws 1899, p. 353, c. 192, § 81, providing that machinery shall be kept guarded, failure to replace guards renders the master liable, though the superintendent ordered them replaced, and the servant so ordered failed to do so. McManus v. St. Regis Paper Co., 94 N. Y. S. 932.

Pennsylvania: Mining act June 2, 1891, requiring the presence of an attendant at mine doors to prevent their being kept open longer than is necessary, has reference only to proper ventilation of the mine, and imposes no duty to employes who use the doors. Allen v. Kingston Coal Co., 212 Pa. 54, 61 A. 572.

Washington: Failure to provide belt shifters, as required by Laws 1903, p. 40, c. 37, § 1, is negligence per se. Whelan v. Washington Lumber Co. [Wash.] 83 P. 98. Since a failure to guard cog wheels, in violation of Laws 1903, p. 40, c. 37, § 1, is negligence per se, an instruction that it was the employer's duty to provide appliances to prevent injury "so far as this could possibly be done" was not prejudicial. Hansen v. Seattle Lumber Co. [Wash.] 83 P. 102. Failure to guard swiftly revolving shafting, having couplings on which clothing was liable to be caught, was violation of Laws 1903, c. 37. Hoveland v. Hall Bros. Marine R. & Shipbuilding Co. [Wash.] 82 P. 1090. Master held not liable for failure to guard machinery, as required by Laws 1903, p. 40, c. 37, where a guard was put on mangle to prevent the operator's hands getting into rollers, but the operator's fingers got caught in an apron string and were drawn over guard and into the rollers, no similar accident having occurred. Daffron v. Majestic Laundry Co. [Wash.] 82 P. 1089.

21. See 4 C. L. 553.

22. Precautions taken to prevent injury in switch yards held sufficient as to persons exercising due care. Lewis v. Vicksburg, S. & P. R. Co., 114 La. 161, 38 So. 92. Negligence of defendant in allowing two trains to run without proper orders was not available to a motorman whose duty it was to look out for other trains. Vinson v. Los Angeles Pac. R. Co. [Cal.] 82 P. 53. Removal of tackle from a beam was not actionable negligence when temporary bolts had been put in place to hold it and it fell because one of these bolts broke. Furber v. Kansas City Belt & Nut Co., 185 Mo. 301, 84 S. W. 890. Merely requiring plaintiff employed to clean engines, to carry a white light, and requiring engineer to inspect engine before taking it out, held not sufficient to protect plaintiff while under engine. Lane v. New York, etc., R. Co., 94 N. Y. S. 988.

23. Whether railway company was negligent in giving orders to engineer who ran his train into cars on the main track. International & G. N. R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847. Whether it was negligence to require machines to be cleaned while in motion, mill being short of hands and work being behind. Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769. Boy of 14 was jerked from a telephone pole by a horse running into a wire which hung across the street and was attached to the boy, the general manager being present. Anderson v. Cumberland Tel. & T. Co. [Miss.] 38 So. 786. Ordering outbound trains to use tracks of incoming trains

work in safety is negligence.[24] The master is not liable for injuries resulting from an unauthorized departure from the method provided by him,[25] but failure to direct a servant, seen to be employing a dangerous method, to use a safer method, is actionable negligence.[26] The adoption of the ordinary and customary method of doing certain work is not negligence.[27] Thus, the operation of trains through a train dispatcher,[28] who, in giving orders, relies on information supplied by local agents,[29] is not negligence; nor will the giving of particular orders by a train dispatcher be regarded as actionable negligence, where he adopted the only reasonable and practicable plan available for the handling of certain trains.[30] Delaying train orders may constitute negligence.[31]

It is the duty of the master to use ordinary care to promulgate and enforce reasonable rules and regulations for the safety of servants, when the nature of the work or business requires it.[32] The necessity for rules,[33] whether they have in fact

was not negligence per se. Sanks v. Chicago & A. R. Co., 112 Ill. App. 385.

24. Where evidence warranted finding that manager did not have enough men at work to make unloading of timbers safe, finding of negligence of master was warranted. Alabama Great Southern R. Co. v. Vail [Ala.] 38 So. 124. Having a force for removing telephone poles inadequate to do the work safely in the manner chosen might constitute negligence though force would be adequate if the work was done in another way. Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 P. 539. Evidence insufficient to take to jury question of negligence in providing insufficient help on switching train, and in providing a competent yard crew. Rosney v. Erie R. Co. [C. C. A.] 135 F. 311.

25. Master not liable for injury resulting from negligent departure by fellow-servant from usual custom in blasting. Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515. Where a train was started properly made up but the conductor afterwards turned the engine around and ran the caboose ahead of it, the railway company was not liable for a resulting collision, the change having been made without authority. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. Master not under duty to supply men enough to prevent an injury resulting from improper use of suitable rollers in unloading lumber. Walsh v. Smith, 26 R. I. 554, 59 A. 922.

26. Where a general manager saw a servant tamping dynamite with a steel rod, his failure to direct the servant to perform his work in a safer manner was not negligence as to a mere detail of the work, but was negligence for which the master was responsible. O'Brien v. Buffalo Furnace Co. [N. Y.] 76 N. E. 161.

27. Whether throwing belt off pulley by a stick was the ordinary and customary way of doing it held for jury, the evidence being conflicting. Sweigert v. Klingensmith [Pa.] 60 A. 253. Where, in action for death of brakeman while switching, the evidence did not show that the system of signals used was unsafe and dangerous or was not that ordinarily used by railroad companies, there was no recovery. McGregor v. Pennsylvania R. Co., 212 Pa. 482, 61 A. 1017.

28. The movement of freight trains by telegraphic orders, based on information relative to the location of the trains upon a railroad, gathered and telegraphed by local operators or station agents to the train dispatcher, is a rational, careful, and approved method of operating a railroad. Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 737.

29. It is not negligence for a train dispatcher to rely on information furnished by a local operator, that a train had not passed his station, though such information, if true, would show the train was several hours late. Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 737.

30. Rules of a railroad company that meeting orders should not be sent to the train of superior right at the points of execution if this can be avoided, and that there should be at least one telegraph office, if possible, between those at which opposing trains meet, do not constitute an absolute command and prohibition. Hence a dispatcher was not negligent in sending orders to the train of superior right at the point of execution or to send meeting orders to opposing trains at points between which there was no telegraph office, where there was no other practical or reasonable way to operate the trains in question. Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 737.

31. Train dispatcher negligent in delaying train orders after he knew a certain train was running ahead of time, a collision occurring as a consequence. Santa Fe Pac. R. Co. v. Holmes [C. C. A.] 136 F. 66.

32. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85. When rules are necessary for servant's safety, failure to adopt them is negligence. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280. The duty to prescribe rules for the orderly and safe conduct of a business arises only where the work is in fact complicated and dangerous. Deye v. Lodge & S. Mach. Tool Co. [C. C. A.] 137 F. 480. Danger in repairing a machine held such as to require rules for giving signals to start and stop it while being repaired. Sirois v. Henry [N. H.] 59 A. 936. Where two companies use the same tracks in the same yards, running engines and cars thereon both in the daytime and nighttime, reasonable care on the part of the owner of the yards requires the promulgation of rules and regulations for the safety of employes in the yard. Virginia Iron, Coal & Coke Co. v. Lore [Va.] 51 S. E. 371. Where railroad

been adopted[34] and whether they were known to employes,[35] are ordinarily questions of fact; the construction of rules[36] is for the court.[37] Rules should be clear and explicit,[38] must be brought to the notice of employes,[39] and must be enforced.[40] The existence of reasonably safe rules will not excuse the master if he has failed to provide competent servants to execute them.[41] A rule which has been habitually violated[42] with the knowledge or acquiescence of the master,[43] actual or implied,[44] is regarded as waived or abrogated. A custom may have the force of a regularly adopted rule.[45]

(§ 3) *D. Warning and instructing servant.*[46]—It is the duty of the master to properly warn and instruct young[47] and inexperienced[48] employes as to the dangers

company is engaged in repairing track, thereby creating temporary dangers to brakemen engaged in shifting cars, it owes them the duty to make rules and regulations for their protection while in the performance of such duties. Smith v. Boston & M. R. Co. [N. H.] 61 A. 359. Where coal trimmers, working in bins, were liable to be killed by coal dumped on them from cars, it was the master's duty to provide reasonable rules and regulations for the protection of men so engaged. Burns v. Palmer, 107 App. Div. 321, 95 N. Y. S. 161. Where one of two men operating a winch used to lower freight into hold of vessel was injured by reason of the temporary absence of the other man, the evidence was held insufficient to take to the jury the issue whether the work was such as to make necessary a rule that two men were to be always present during operation of the winch. Johnson v. Prime Line, 93 N. Y. S. 273.

33. Necessity of rules to protect workman under engine cleaning out ash pan. Lane v. New York, etc., R. Co., 94 N. Y. S. 988.

34. Whether proper rules for protection of coal trimmers had been made. Burns v. Palmer, 107 App. Div. 321, 95 N. Y. S. 161. Whether railway company had a rule requiring the dispatcher to notify crews of regular trains of the presence of work trains on the main track was properly submitted in an action for injuries suffered in a collision where negligence of the dispatcher may have concurred with negligence of a flagman sent out from the work train to cause the collision. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29.

35. Whether employe knew of rule prohibiting riding on locomotives. Denver & R. G. R. Co. v. Maydole [Colo.] 79 P. 1023.

36. Rule requiring inspection of track by section foreman during heavy wind, rain, and snow storms held to apply where track was rendered unsafe by heavy rains. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Giving roadmaster authority over construction work generally did not give him authority to control the running of trains so as to relieve the motorman of his duty to look out for other trains. Vinson v. Los Angeles Pac. R. Co. [Cal.] 82 P. 53.

37. The construction of a rule prohibiting persons other than employes in discharge of their duties from riding on locomotives was for the court. Denver & R. G. R. Co. v. Maydole [Colo.] 79 P. 1023.

38. Rule reciting that yard limits were designated by signs and providing that a train occupying the main track within the limits of the yard at a certain place is not required to protect itself by flagmen except during the time that a first-class train is expected is sufficiently clear and explicit. Rosney v. Erie R. Co. [C. C. A.] 135 F. 311.

39. Rule prohibiting flying switches will not prevent recovery for injury in making one, if such rule was not brought to notice of person injured. Humphries v. Raritan Copper Works [N. J. Law] 60 A. 62.

40. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85.

41. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29.

42. Evidence insufficient to show that a rule requiring repairers to put out signals on cars under which they were working had been customarily violated. Canadian Pac. R. Co. v. Elliott [C. C. A.] 137 F. 904.

43. A master is not deprived of the benefit of a rule made by him because it has been habitually violated unless he knew or ought to have known of such violation. Himrod Coal Co. v. Clingan, 114 Ill. App. 568. Evidence as to violation of rules for operation of trains is inadmissible unless knowledge by the company of such violation is also shown. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. Whether rules as to signals for protection of car repairers had been disregarded with master's knowledge and acquiescence was for jury. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85.

44. When a rule has been violated so frequently and openly and for such a length of time that the employer could, in the exercise of ordinary care, have discovered its nonobservance, it is regarded as waived and abrogated; violation of it does not then constitute contributory negligence by the employe. Biles v. Seaboard Air Line R. Co. [N. C.] 52 S. E. 129.

45. Evidence of a custom of notifying late regular trains of the presence of work trains on the track admissible. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29.

46. See 4 C. L. 555.

47. Where 16 year old boy was briefly instructed on manner of running machine but not as to manner of putting on belt, master was liable for injury to boy while putting it on. Noden v. Verlenden Bros., 211 Pa. 135, 60 A. 505. Where a boy of 9 was put to work near a saw, without instruction or warning, and had two fingers cut off after less than two hours' work, a finding of negligence of the employer was warranted. Fries v. American Lead Pencil Co. [Cal. App.] 83 P. 173. Dangers of operating

of their employment which they do not know and appreciate.[49] It is also his duty to warn or instruct his servants as to special or unusual risks arising during the course of the employment,[50] and as to hidden or latent dangers, known, or which ought to be known, to the master,[51] and unknown to the servant.[52] Instructions should be

an intricate wool carding machine held not obvious to a boy of plaintiff's age; hence failure to instruct him was negligence. Rudberg v. Bowden Felting Co. [Mass.] 74 N. E. 590. Duty to properly instruct inexperienced boy who was told to clean machinery. Small v. Brainerd Lumber Co. [Minn.] 103 N. W. 726. Boy of 16 allowed to recover for injuries received from a dangerous saw near which he had been put to work without warnings or instruction. Gracia v. Maestri Furniture Mfg. Co., 114 La. 371, 38 So. 275. Recovery for death of boy while assisting in switching cars by the "chain switch" method, the boy not having been instructed and warned as to the danger of doing his work. Parker v. Crowell & S. Lumber Co. [La.] 39 So. 445. Master owed to boys employed to clear away scrap from machines, duty of keeping place where they stood free from scrap from the machines, so that they would not be endangered by overhead machinery and to instruct boys as to this danger. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829.

48. Master owes inexperienced machine operator duty of instructing as to proper manner of shifting belt. Sweigart v. Klingensmith [Pa.] 60 A. 253. Master liable where inexperienced servant was injured by a planing machine, he having received no warning or instruction, and the adjustment of the knives having been changed without notice to him. Texarkana Table & Furniture Co. v. Webb [Tex. Civ. App.] 86 S. W. 782. Directing an inexperienced employe to adjust a belt on a pulley shaft, without instructing him as to a collar and set screws projecting on the shaft whereby the servant was injured, was negligence. Mountain Copper Co. v. Pierce [C. C. A.] 136 F. 150. Master bound to warn inexperienced servant and instruct him as to particular dangers, so that servant may decide whether he will assume ordinary risks of the employment. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708.

49. The duty to instruct is imperative unless the child not only knows the danger incident to the discharge of his duties but also apreciates it and knows how to avoid it. Noden v. Verlenden Bros., 211 Pa. 135, 60 A. 505. It is the master's duty to warn and instruct a young and inexperienced employe even as to dangers open to observation if such dangers are not appreciated by the servant. Fletcher Bros. Co. v. Hyde [Ind. App.] 75 N. E. 9. Even though an inexperienced minor employe knows there is some danger, it may yet be the master's duty to instruct him; whether such is the case is for the jury. Wood v. Texas Cotton Product Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 534, 88 S. W. 496. Master negligent when servant was told to clean rollers with a stick and was not warned not to use a stick which was too thick. Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434.

50. Inference of negligence warranted where signalman was withdrawn. Aleckson v. Erie R. Co., 101 App. Div. 395, 91 N. Y. S. 1029. Failure to put down torpedoes to warn engineer of coming train held negligence. Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310. Where plaintiff was not notified that a hole had been dug in a pathway used by him in carrying molten metal, he could recover for a resulting injury. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. Foreman of switching crew held negligent in failing to warn engineer that there was a car on a side track in consequence of which cars collided injuring a brakeman who was making a coupling. Kennedy v. Kansas City, etc., R. Co. [Mo.] 89 S. W. 370. Duty to warn employe of approach of train on track where he was at work was a part of master's duty to keep place of work safe. D'Agostino v. Pennsylvania R. Co. [N. J. Law] 60 A. 1113. Where servant was put to work in a place made dangerous by a traveling crane which he could not see or hear while at work, the master owed him the duty of warning him of the danger. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Evidence held sufficient to show defendant negligent in failing to warn miner of danger from gases when another part of the mine was on fire. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449. Jury justified in finding foreman in mill negligent in changing adjustment of saws without notifying servant employed on such saws. Johnson v. Crookston Lumber Co. [Minn.] 103 N. W. 891. When dangers arise from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the particular servant is engaged, the master is bound to employ the necessary means to give timely warning of such dangers. Western Elec. Co. v. Hanselmann [C. C. A.] 136 F. 564. Failure to warn a servant placed in a dangerous position by the act of a fellow-servant under orders of a vice-principal renders master liable. O'Brien v. Page Lumber Co. [Wash.] 82 P. 114; Dossett v. St. Paul & Tacoma Lumber Co. [Wash.] 82 P. 273.

51. Foreman of a boilermaker held negligent in failing to warn employe as to dangerous condition of casting on which the employe went to work with the foreman standing by. Faith v. New York, etc., R. Co., 109 App. Div. 222, 95 N. Y. S. 774. Failure to warn crew of one train of dangerous make-up and proximity of another train held not negligence because defendant had no notice of these facts. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. Signals not required to warn repairman of starting of machine the injury not being one which would be anticipated by ordinary care. Dickey v. Dickey [Mo. App.] 86 S. W. 909. If a brakeman, while giving signals to his engineer, was in a place where the presence of persons ought reasonably to

given to servants directed to perform services outside those contracted for[53] if the attendant risks are not known to the servant,[54] and where a dangerous course of conduct, pursued for the master's benefit, is permitted and acquiesced in by him, he owes the duty of giving proper warning and instruction.[55] A master who gives assurances of safety to a servant known to be inexperienced and ignorant of dangers is liable for resulting injuries.[56]

No instruction is necessary as to incidental risks, assumed by the contract of employment,[57] nor as to obvious dangers[58] fully known to the employe[59] or as well known to him as to his employer,[60] or which ought to have been known to him by reason of his experience[61] or by the exercise of ordinary care.[62]

have been anticipated, switching crew ought to have given warning signals; otherwise such signals were not necessary. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523.

52. It is the master's duty to warn servant of latent defects or dangers unknown to the servant but known or which ought to be known to the master. Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13. No duty to warn employe working on elevator door that repairs were being made above him, when he knew that such repairs were going on. Nye v. Dutton [Mass.] 73 N. E. 654.

53. Where mill employe, who usually worked in packing department, but was sometimes directed to clean and oil machinery, was injured while oiling a line shaft, he could not recover on the theory that he was directed to do work outside the scope of his contract, without instructions. Hathaway v. Washington Milling Co. [Mich.] 103 N. W. 164.

54. A declaration alleging the death of an employe while engaged in work he was directed to do outside the service he had contracted for, and failure of the foreman to warn him of the attendant dangers, is demurrable when it does not set up ignorance of such dangers by the employe, his inexperience, or immaturity. O'Connor v. Atchison, etc., R. Co. [C. C. A.] 137 F. 503.

55. Where it appeared that laundry employes were permitted to remove pieces from machine rollers, without stopping the machine, the master owed duty of warning to young girl. Manning v. Excelsior Laundry Co. [Mass.] 75 N. E. 254.

56. Fletcher Bros. Co. v. Hyde [Ind. App.] 75 N. E. 9.

57. No duty to warn against possible negligence of a fellow-servant. Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13. Railway company need not warn brakeman of position of bridge piles which are at standard and usual distance from track. Cleveland, etc., R. Co. v. Haas [Ind. App.] 74 N. E. 1003.

58. Danger from flying pieces of steel in making certain repairs on machine being obvious to experienced machinist, instructions were not necessary. Wolf v. New Bedford Cordage Co. [Mass.] 76 N. E. 222. No need to instruct servant as to danger attending cutting down of tree. Anderson v. Columbia Imp. Co. [Wash.] 82 P. 1037. No duty to warn as to danger of wheeling truck into open elevator shaft when cage was not in place. Gallagher v. Snellenberg & Co. [Pa.] 60 A. 307. Failure to instruct plaintiff, an experienced, intelligent workman, as to the danger of removing telephone poles, was not negligence. Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 P. 539. No negligence in failing to warn employe of dangerous condition of a pile of acid which he was engaged in moving with a wheelbarrow, as its condition and liability to fall on him was obvious. Martin v. Royster Guano Co. [S. C.] 51 S. E. 680. Failure to warn employe of ordinary intelligence of obvious danger of getting caught in rollers when passing between two machines held not negligence. Dickenson v. Vernon, 77 Conn. 537, 60 A. 270. Where an experienced workman was ordered to clean up a room, the master had the right to assume that instruction as to the work was unnecessary, in view of the nature of the work and the fact that defects in the floor were obvious. O'Keeffe v. Squire Co. [Mass.] 74 N. E. 340. No duty to warn and instruct employe engaged in tearing down a trestle, since the employe knew the circumstances and the danger was obvious, it not being made to appear that the master knew that the employe did not appreciate the danger. Grayson-McLeod Lumber Co. v. Carter [Ark.] 88 S. W. 597. Employe in shoe factory, who had worked in room many years and at same machine several months, was not entitled to warning or instruction as to existence of obvious covered shaft running along the floor. Chisholm v. Donovan [Mass.] 74 N. E. 652.

59. No duty to warn boy of 17, intelligent and physically well developed, as to dangers which he already appreciated. Walton v. Lindsay Lumber Co. [Ala.] 39 So. 670. Failure to instruct boy of 18 on operation of simple machine not negligent when he testified he understood it. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010. When girl knew danger of getting hair caught in machine, instruction relative thereto was unnecessary. Daniels v. New England Cotton Yarn Co. [Mass.] 74 N. E. 332.

60. No duty to warn as to dangers equally apparent to master and servant. Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13. No duty to warn as to an obvious incidental danger as well known to the servant as to the master. Reynolds v. Grace, 115 Ill. App. 473. Where danger from revolving shaft was as obvious to the servant as to the master, the latter was under no duty to warn the former. Dillon v. National Coal Tar Co., 181 N. Y. 215, 73 N. E. 978.

61. Where the place of work assigned a

Whether warnings or instruction should have been given in a particular instance,[63] and whether warnings or instructions given were sufficient,[64] are questions of fact to be determined by reference to the character of the risk or danger in issue, and the age, experience and capacity of the employe concerned.[65] A warning should be sufficiently specific to apprise the servant of the particular danger to be guarded against.[66]

(§ 3) *E. Fellow-servants.*[67]—The master is charged with the duty of exercising ordinary care to employ and retain only such servants as are reasonably competent to perform their intended duties.[68] He is accordingly liable for injuries re-

servant of full age, good intelligence, and experience, is not necessarily dangerous, and no injury would occur if the servant did not expose himself to unnecessary dangers, the master is not bound to foresee and warn against such unnecessary dangers. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6.

62. No negligence in failing to instruct servant as to change in machinery whereby wheels were caused to revolve in opposite direction, the change being made while employe was sick, where he worked several weeks before his injury, and must have known of the change, had he exercised ordinary care. Bryant v. Great Northern Paper Co. [Me.] 60 A. 797. Where boy of 17, told to assist in lifting a piece of iron, lifted it alone and was injured by the strain, he could not recover from the master on the theory that he had failed to warn the boy as to the weight of the iron. Texas & N. O. R. Co. v. Sherman [Tex. Civ. App.] 87 S. W. 887. Where employe shoveling snow in freight yard where trains frequently passed was expected to look out for himself, the master was not bound to give warnings, and was not liable for an injury to the employe by being struck by an engine. Riccio v. New York, etc., R. Co. [Mass.] 75 N. E. 704.

63. Whether master was negligent in failing to instruct young, inexperienced, and dull employe in operation of complicated machine was for jury. O'Neill v. Lowell Mach. Shop [Mass.] 75 N. E. 744. Whether failure to warn employe of approach of cars on side track in a shop was negligence, held for jury. Hickey v. Solid Steel Casting Co., 212 Pa. 255, 61 A. 798. Whether failure of foreman to keep lookout was negligence, was for jury. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. The mere fact that warnings had been given a car inspector on former occasions does not show a duty to give such warnings. St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324.

64. Question of machine operator's experience and sufficiency of instruction given him as to proper manner of shifting belt, held for jury. Sweigart v. Klingensmith [Pa.] 60 A. 253. Telling a servant that a machine could be stopped by stepping on a certain lever, and neglecting to tell him that it could not be so stopped when materials were passing through held actionable negligence. Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932. Telltale signal to warn trainmen of bridges held not a compliance with Act No. 39, p. 51 of 1882 because not low enough to strike and warn brakeman on ordinary box car. Tallaferro v. Vicksburg, etc., R. Co. [La.] 39 So. 437.

65. If instructions to boy, directed to clean machinery, were not sufficiently plain, which was for jury, the master would be liable for a resulting injury. Small v. Brainerd Lumber Co. [Minn.] 103 N. W. 726. Whether there is a duty to instruct depends upon the circumstances, and the age and experience of the servant are to be considered in connection with the question whether dangers are obvious. Shickle-Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444. Instructions to boy should be such as would satisfy reasonably careful person that boy understood danger. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869. Ordinarily the master may assume, in the absence of notice to the contrary, that his servants understand English and that a warning in that language will be understood and acted upon. Lobstein v. Sajatovich, 111 Ill. App. 654.

66. General warning did not relieve master where engineer ran into a washout caused by a defective culvert as to which he had not been warned. Western R. Co. v. Russell [Ala.] 39 So. 311.

67. See 4 C. L. 557.

68. Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13; Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Master does not guaranty competency of employes but is only responsible for reasonable care in selecting them. City of Mobile v. Mobile Light & R. Co., 141 Ala. 442, 38 So. 127. It is master's duty to employ competent servants, and negligence of an incompetent servant is not an assumed risk. Anderson v. Southern R. Co., 70 S. C. 490, 50 S. E. 202. Employers are liable to employes for injuries resulting from a failure to exercise reasonable care in selecting their co-employes, or for retaining such co-employes when their incompetency is known or by the exercise of reasonable care ought to be known. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. No negligence in employment of stationary engineer where careful inquiry disclosed that man was careful and experienced and sober in his habits. El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660. Negligence in employment of men not shown when it appeared they had done similar work many years and had been previously careful and had caused no accidents. Grams v. Reiss Coal Co. [Wis.] 102 N. W. 586. St. Louis ordinance requiring competent persons to be employed to run power elevators does not mean that only one person shall be permitted to run it or that the operator shall

sulting proximately from the incompetency of a fellow-servant[69] if he had either actual or implied knowledge of such incompetency.[70] It is his duty to discharge a servant when he knows, or by the exercise of reasonable diligence would have known, that the servant has become incompetent.[71] The care required in learning of a servant's incompetency is not that degree of care required in the original employment,[72] since the master may rely on the presumption of competency of a servant in the employment of whom he has exercised ordinary care, until he has notice or knowledge to the contrary.[73] Habitual negligence or carelessness of a servant constitutes incompetency within the meaning of this rule;[74] and the competency of a servant may be a material issue though it was an act of negligence which caused the injury complained of.[75]

A master who has used due care in the selection of servants is not at common law[76] liable to his employes for injuries resulting from the acts[77] or negligence of fellow-servants,[78] such acts or negligence being an assumed risk.[79] But negligence of

perform no other service. Purcell v. Tennent Shoe Co., 187 Mo. 276, 86 S. W. 121.

69. Master liable for death of servant caused by incompetency of co-employe, when both were engaged in repairing electric wire. Scott v. Iowa Tel. Co., 126 Iowa, 524, 102 N. W. 432. Employe repairing electric wire did not assume risk of fellow-servant's incompetency, nor of the master's sending an incompetent servant to assist him. Id. Where an injury was alleged to have been caused by the incompetency of a fellow-servant, the cause of such incompetency was immaterial, and it was not error to refuse a charge as to defendant's liability in case it failed to instruct such servant as to the danger to others if he did not perform his duties with due care. Krueger v. Brenham Furniture Mfg. Co. [Tex. Civ. App.] 85 S. W. 1156.

70. Owing to high degree of care imposed on one using electricity, he will be charged with knowledge of the incompetency of a servant employed by him where by reason thereof another servant is killed. Scott v. Iowa Tel. Co., 126 Iowa, 524, 102 N. W. 432.

71. By acquiring a habit or character of negligence, drunkenness, or lack of skill. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272.

72. Since careful and skillful men grow more careful and skillful, ordinarily, by continuing in an employment. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272.

73. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Servants presumed competent until contrary is made to appear. Grams v. Reiss Coal Co. [Wis.] 102 N. W. 586.

74. Servants assume the risk of occasional acts of negligence of their fellow-servants, but may, by notice, cast the risk of habitual negligence of co-employes on the master. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. In determining the competency of a hoisting engineer, his care and diligence in running the engine are to be considered as well as his skill and knowledge as an engineer. Staunton Coal Co. v. Bub, 218 Ill. 125, 75 N. E. 770.

75. Competency of a brakeman as a brakeman was a material issue though the act which caused the collision and injury complained of was his falling asleep when sent out to flag a train. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

76. For modification of this principle by statute, see post, "Fellow-servant statutes."

77. At common law a master is not liable to an employe for wanton, willful, reckless or intentional acts of fellow-servants, if he himself did not direct such acts and was not negligent. Tennessee Coal, Iron & R. Co. v. Bridges [Ala.] 39 So. 902.

78. When the master has used due care to select a sufficient number of competent servants, he is not liable for negligence of one resulting in injury to another. Hyland v. Southern Bell Telep. & Tel. Co., 70 S. C. 315, 49 S. E. 879. Master not liable if personally free from wrong, and act of fellow-servant causes injury. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733. No recovery for injury caused by iron casting slipping from a pile, where the pile was made by a fellow-servant in the performance of one of the details of his work. Deye v. Lodge & S. Mach. Tool Co. [C. C. A.] 137 F. 480. Where a servant was injured by being struck by a bale of hay thrown by a fellow-servant, after his day's work was done, but while he was on the master's premises and going for his dinner pail, he could not recover. Taylor v. Bush & Sons Co. [Del.] 61 A. 236. No recovery for injury from slipping on floor if slippery condition was caused by fellow-servant, and was not brought to notice of master, and had not existed for so long a time that he was charged with notice. Venhuor v. Lafayette Worsted Mills [R. I.] 60 A. 770. No evidence to show servant by whose negligence plaintiff was injured was vice-principal. Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370. No recovery where employe was killed by falling through hatchway, the covering of which had been removed by fellow-servants. Earle v. Clyde S. S. Co., 92 N. Y. S. 839. Master not liable where plaintiff was in a position of danger and fellow-servants gave hasty and confusing signals to him. Illinois Steel Co. v. Ralewicz, 113 Ill. App. 312.

79. Deye v. Lodge & S. Mach. Tool Co. [C. C. A.] 137 F. 480; Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13; Dolese & Shepard Co. v. Johnson, 116 Ill. App. 206; Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751; Atchison & E. Bridge Co. v.

the fellow-servant must have been the sole proximate cause of injury;[80] if concurring negligence of the master and a fellow-servant was the proximate cause of injury, so that it would not have resulted had the master exercised due care, he is liable.[81]

Determination of relation. Common-law rules.[82]—What facts are essential to the existence of the fellow-servant relation between two or more employes is a question of law for the court;[83] the existence of such facts in a particular case is for the

Miller [Kan.] 80 P. 18; Dana & Co. v. Blackburn [Ky.] 90 S. W. 237; Louisville & N. R. Co. v. Dillard [Tenn.] 86 S. W. 313.

80. Master not liable if fellow-servant's negligence was sole proximate cause. Gila Valley, etc., R. Co. v. Lyon [Ariz.] 80 P. 337. If an act of fellow-servants was the sole proximate cause of an injury, the master is not liable whether or not their act was negligent. Chicago, etc., R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 123, 89 S. W. 1117. Where servants made an extension ladder out of two furnished them, and used a defective rope for that purpose which broke, thereby injuring plaintiff, the proximate cause of the injury was the negligence of fellow-servants. Higgins v. Higgins [Mass.] 74 N. E. 471.

81. Gila Valley, etc., R. Co. v. Lyon [Ariz.] 80 P. 337; Kremer v. New York Edison Co., 102 App. Div. 433, 92 N. Y. S. 883; Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787; Chicago Union Traction Co. v. Sawusch, 218 Ill. 130, 75 N. E. 797; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Chicago City R. Co. v. Enroth, 113 Ill. App. 285; Dutro v. Metropolitan St. R. Co. [Mo. App.] 86 S. W. 915; Sirois v. Henry & Sons [N. H.] 59 A. 936; Venbuvr v. Lafayette Worsted Mills [R. I.] 60 A. 770; Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466; Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85. Master liable though negligence of fellow-servant concurred with that of a vice-principal. Moseley v. Schofield Sons Co. [Ga.] 51 S. E. 309. Where act of vice-principal contributes to produce injury, fellow-servant rule does not apply. Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615. A servant injured by concurring negligence of the master and a fellow-servant may recover from either if he was himself without fault. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592. Where pile driver furnished was defective, concurrent negligence of a co-employe was no defense. Hazzard v. State, 108 App. Div. 119, 95 N. Y. S. 1103. Where rope used with an appliance was unsafe, the act of a foreman directing it to be used was held, at most, concurrent negligence, and master was not relieved. Pluckham v. American Bridge Co., 93 N. Y. S. 748. Master liable if negligent in furnishing block too small for spliced rope used with it, though another servant was negligent in the manner in which it was used. Wallace v. Henderson, 211 Pa. 142, 60 A. 574. If defective construction of elevator entrance contributed to cause injury to employe riding in the elevator, defendant was liable though the act of another employe who threw plaintiff on the floor also contributed. Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 75 N. E. 1053; Id., 115 Ill. App. 56. Where negligence alleged was failure to have guards on a table across which shingles were pushed while being loaded into hold of vessel, the fact that fellow-servants were responsible for leaving hatchway, into which plaintiff fell, open, was no defense. Olsen v. Gray [Cal.] 81 P. 414. Where engineer loaded a lumber train in such a negligent manner that the brakes would not work and the train was deralled while running at a high rate at a place where the rails spread because the ties were decayed, the fireman could recover for injuries sustained. Fuller v. Tremont Lumber Co., 114 La. 266, 38 So. 164.

Note: "The defense in Fuller v. Tremont Lumber Co., supra, was that the injury was caused by the negligence of the engineer in improperly loading the cars. If this were the sole cause of the accident, then under the fellow-servant rule there could be no recovery against the master. But the injury complained of was caused by the concurrent negligence of the master and the fellow-servant, for the master was bound to furnish a reasonably safe track and equipment. Under such circumstances the mere fact that the negligence of the fellow-servant contributed to the injury does not relieve the master from liability. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Thomas v. Smith, 90 Minn. 379, 97 N. W. 141; Grant v. Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535; 100 Am. St. Rep. 883; Cudahy Packing Co. v. Anthes [C. C. A.] 117 F. 118; Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739. This is the rule even though due care on the part of the fellow-servant would have prevented the injury. Cone v. D. L. & W. R. R. Co., 81 N. Y. 206, 37 Am. Rep. 491. A few of the authorities hold that the master is liable only if his negligence is the proximate cause of the injury. Phil Iron Co. v. Davis, 111 Pa. 597, 56 Am. Rep. 305; Luts v. A. & P. R. R. Co., 6 N. M. 496; Trewatha v. Buchanan Gold Min. Co., 96 Cal. 494; Little Rock R. Co. v. Barry, 84 Fed. 944, 43 L. R. A. 349. The great weight of authority, however, is to the effect that in cases of concurrent negligence the master is liable."—3 Mich. L. R. 670.

82. See 4 C. L. 559, and note, p. 560, on conflict in authorities.

83. Wilkinson Co-op. Glass Co. v. Dickinson [Ind. App.] 73 N. E. 957. The existence of the relation is for the court if the facts are conceded, and only one reasonable inference can be drawn therefrom. Stephens v. Deatherage Lumber Co., 110 Mo. App. 398, 86 S. W. 481; Aurora Boiler Works v. Colligan, 115 Ill. App. 527; Bentley, Shriver & Co. v. Edwards [Md.] 60 A. 283. Instructions on fellow-servants erroneous because they failed to tell jury what constituted the relation. Illinois Steel Co. v. Rolewicz, 113 Ill. App. 312.

jury.[84] The Federal courts treat the question as one of general law and need not follow the rules laid down by state courts.[85]

A rule frequently applied is that employes of a common master[86] engaged in the same common enterprise,[87] performing duties tending to the accomplishment of the same general end or purpose,[88] are fellow-servants, though not at the time engaged in the same operation or on the same particular piece of work.[89]

84. Wilkinson Co-op. Glass Co. v. Dickinson [Ind. App.] 73 N. E. 957. Unless the facts admitted or proved beyond dispute show the existence of relation of fellow-servants in a given case within the established rule of law, the question is for the jury. Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615. Whether certain employes in iron and steel works were fellow-servants held for jury. Shickle-Harrison & H. Iron Co., 112 Ill. App. 444. Whether molder and his helper were fellow-servants while latter was engaged in repairing crane held for jury. Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462. Instruction assuming that plaintiff and person causing his injury were fellow-servants error when from the evidence the contrary conclusion was possible. Norman v. Middlesex & S. Traction Co., 71 N. J. Law, 652, 60 A 936.

85. Spring Valley Coal Co. v. Patting, 112 Ill. App. 4. See, also, 4 C. L. 559.

86. Persons employed by different masters are not fellow-servants. Bentley-Shriner & Co. v. Edwards [Mo.] 60 A. 283. Servant in employ of general employer, and servant of subcontractor, are not fellow-servants. Wagner v. Boston El. R. Co. [Mass.] 74 N. E. 919. Watchman employed by one road is not fellow-servant of train crew of another road. Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418. Longshoreman, engaged in hold of barge, unloading, is not fellow-servant of winchman, being employed by different masters. The City of San Antonio, 135 F. 879. Plaintiff, employed by A., was rightfully on a wharf sewing sugar bags, and was injured by negligence of a servant of B., engaged in unloading cargo from a lighter owned by C. whose captain was also engaged in the work. There was no arrangement whereby plaintiff became temporarily the servant of B. or C. Held, the defense that negligence of a fellow-servant caused plaintiff's injury was not available to B. Ford v. Arbuckle, 94 N. Y. S. 1097. The servants of two railway companies between whom there is a traffic contract permitting one to run its cars over the tracks of the other are not co-employes. Chicago Terminal Transfer R. Co. v. Vandenberg [Ind.] 73 N. E. 990.

Contra: Where two street railway companies contract for the use of each other's tracks under the authority conferred by 31 Stat. at L. 270, c. 718, servants of the two companies are fellow-servants in the use of the common appliances and all the employes using them are fellow-servants. Looney v. Metropolitan R. Co., 24 App. D. C. 510.

Fellow-servant doctrine applies only as between master and servant, and not as between a servant and a third party. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558. Fellow-servant doctrine not applicable where suit is not against common master but against a third person. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

87. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733; Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079. Mine boss is fellow-servant of miner. Purkey v. Southern Coal & Transp. Co. [W. Va.] 50 S. E. 755. Switchman was fellow-servant of brakeman when both were engaged in making a flying switch. Stevick v. Northern Pac. R. Co. [Wash.] 81 P. 999. Employe, foreman, and railroad roadmaster, all engaged in removing debris of landslide from track, are fellow-servants. Florence & C. C. R. Co. v. Whipps [C. C. A.] 138 F. 13. Men employed by a consignee of iron to unload and pile it held fellow-servants. Weizinger v. Erie R. Co., 94 N. Y. S. 869. Two employes engaged in tamping furnace floor, one holding block which other struck, are fellow-servants. Wilkinson Co-op. Glass Co. v. Dickinson.[Ind App.] 73 N. E. 957. Two helpers in machine shop, and an engine tester, all working on the same engine and under the same foreman, were fellow-servants. Millett v. Puget Sound Iron & Steel Works, 37 Wash. 438, 79 P. 980. Employes in gypsum mine, one of whom loosened rock by blasting, which the other removed, were fellow-servants. Hendrickson v. U. S. Gypsum Co. [Iowa] 105 N. W. 503. Coal shoveler and truckman assigned to duty on the same tram car at a coal elevator, was engaged in same work, and were fellow-servants, neither being superior to the other, though the truckman occasionally gave signals. Dana & Co. v. Blackburn [Ky.] 90 S. W. 237. Where a foreman and two employes were engaged together in lacing a belt under the foreman's direction, they were all fellow-servants, and one of the employes could not recover for an injury resulting from a negligent adjustment of the clamps to the belt. Standard Pottery Co. v. Moudy [Ind. App.] 73 N. E. 188.

88. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733. All employes of the same master, engaged in the same general business, and whose efforts tend to promote the same general purpose and accomplish the same general end, are fellow-servants. Atchison & E. Bridge Co. v. Miller [Kan.] 80 P. 18. Roustabout who negligently started machine was fellow-servant of repairman. Dickey v. Dickey [Mo. App.] 86 S. W. 909. Plaintiff, an employe of lighterage company, and an engineer in charge of a winch owned by defendant but hired by the hour by the lighterage company, were fellow-servants while engaged in unloading sugar from a lighter to the dock. Quinn v. National Sugar Refining Co., 102 App. Div. 47, 92 N. Y. S. 95.

89. Two employes engaged on steam shovel were fellow-servants, though one

The rule most frequently applied is that it is not the rank of an employe, nor his authority over other employes, but the nature of the duty or service he performs, which determines whether he is a vice-principal or a fellow-servant.[90] The duty of the master to use ordinary care to provide for the safety of his servants being personal and nondelegable,[91] any person charged with, or engaged in the performance of, any part of that duty is a vice-principal, for whose negligence in the performance of such duty the master is liable.[92] Thus, persons charged with, or engaged in the performance of, the duty of the master to provide a reasonably safe place[93] or reasonably safe appliances,[94] or a sufficient number[95] of competent employes,[96] or to warn[97]

was engineer and other was shoveler and leveler; the latter, struck by bucket through engineer's negligence, could not recover. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733. Where carpenter shop was part of molding department of foundry, foreman of molding department being superior of carpenter foreman, the latter was the fellow-servant of molders who used flasks made by the carpenter. Leishman v. Union Iron Works [Cal.] 83 P. 30. Kitchen boy and ship's carpenter are fellow-servants. The Esperanza, 133 F. 1015. Engineer on steamship is fellow-servant of oiler in engine room. McCarron v. Dominion Atlantic R. Co., 134 F. 762. Section hand working on dump car, and employes operating engine attached to the car are fellow-servants. O'Connor v. Atchison, etc., R. Co. [C. C. A.] 137 F. 503. Elevator boy and boy employed to stamp and address envelopes held fellow-servants. Zilver v. Robert Graves Co., 94 N. Y. S. 714.

90. Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079; Page v. Battle Creek Pure Food Co. [Mich.] 12 Det. Leg. N. 615, 105 N. W. 72; Poorman Silver Mines v. Devling [Colo.] 81 P. 252; Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85. Nature of employment not rank, or power to employ or discharge men, is the test. Hjelm v. Western Granite Contracting Co. [Minn.] 102 N. W. 384. Mere superiority in rank, or authority to direct, does not alone make a servant a vice-principal. Dill v. Marmon [Ind.] 73 N. E. 67. "Boss" and employe held fellow-servants. Martin v. Royster Guano Co. [S. C.] 51 S. E. 680.

91. Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589.

92. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733; Alabama Great Southern R. Co. v. Vail [Ala.] 38 So. 124; Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079; Illinois Steel Co. v. Olste, 116 Ill. App. 303. A vice-principal is one who represents the master in the discharge of those duties which the master owes to his servants. Dill v. Marmon [Ind.] 73 N. E. 67. The master is liable for injuries resulting from a breach of any of his duties, regardless of the rank, grade, or department of the servant to whom such duties were delegated. Atchison & E. Bridge Co. v. Miller [Kan.] 80 P. 18. If an act or omission causing an injury is one pertaining to the duties owed by the master to the servant, the master is responsible for the manner of its performance without regard to the rank of the servant to whom the duty is intrusted. Larson v. Le Doux [Idaho] 81 P. 600.

93. The duty to provide a reasonably safe place cannot be delegated. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91; Kalker v. Hedden [N. J. Err. & App.] 61 A. 395; Schiglizzo v. Dunn, 211 Pa. 253, 60 A. 724. Where repairers placed watchman's box so near the track that it was struck by an engine, the negligence was that of the master. Philadelphia, etc., R. Co. v. Devers [Mo.] 61 A. 418. Where master agreed to furnish and place cars for plaintiff to load, one who placed the cars was performing a delegated duty and for his negligence the master was responsible. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49. Failure of an employe to place a guard around a hole in the floor of a dressing room used by employes rendered the master liable, though such employe disobeyed orders. Day v. Emery-Bird-Thayer Dry Goods Co. [Mo. App.] 89 S. W. 903. Man employed to clean fire box of engines, working in a pit, is not a fellow-servant of one who negligently causes the engine on which he was working to move, thereby injuring his hand. Mullin v. Northern Pac. R. Co., 38 Wash. 550, 80 P. 814. In placing a freight train on a side track a heavy casting was knocked from a car onto the main track, and was not removed before a passenger train came, the result being a wreck and death of the fireman on the passenger engine. A rule made it the duty of employes in charge of trains to report obstructions at once and to make repairs, taking charge of the work, to prevent accidents. This rule made the freight conductor a vice-principal and for his failure to remove the casting the company was responsible. Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140. The fact that as to other duties the crews of the freight and passenger trains were fellow-servants would not affect the operation of the rule as to duties of the master intrusted to employes. Id. Declaration held to state cause of action for injuries caused by backing of train under order of conductor while plaintiff, a brakeman, was between cars. Lorain Steel Co. v. Hayes, 6 Ohio C. C. (N. S.) 353.

Duty to maintain held delegable: When the master has used ordinary care to furnish a reasonably safe place and reasonably safe appliances, he may commit their maintenance in that condition to agents carefully selected for competency and fitness. Person whose duty it was to see that mine roof was kept reasonably safe held fellow-servant of injured miner. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898.

94. Duty to provide reasonably safe appliances is nondelegable. Butler v. Frazee, 25

or properly instruct[98] employes, or to inspect[99] and keep in repair[1] the place and appliances supplied, or to promulgate and enforce reasonable rules and regulations,[2] have been held vice-principals for whose failure to perform the duties intrusted to them, or for whose negligence in the performance thereof, the master has been held responsible. On the other hand, when a master has performed his duties, he may properly intrust the details of his work to employes,[3] and if the act or omission com-

App. D. C. 392; Pluckham v. American Bridge Co., 93 N. Y. S. 748; Siversen v. Jenks, 102 App. Div. 313, 92 N. Y. S. 382. Master held liable where foreman directed use of rope which broke, injuring plaintiff. Pluckham v. American Bridge Co., 93 N. Y. S. 748. Duty to provide reasonably safe staging held nondelegable where staging was complicated and plan had to be followed in its use and construction. Carlson v. Haglin [Minn.] 104 N. W. 297. One who helped build a scaffold was not fellow-servant of one who was later directed to use it. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905. The duty of the master to supply a reasonably safe scaffold for a painter held nondelegable though it was painter's duty to use ordinary care to discover defects in it. George Weidemann Brewing Co. v. Wood, 27 Ky. L. R. 1012, 87 S. W. 772. Duty of providing reasonably safe derrick and keeping it in that condition cannot be delegated even to a fit and competent agent so as to escape liability for nonperformance. Rincicotti v. O'Brien Contracting Co., 77 Conn. 617, 60 A. 115. Duty to furnish reasonably safe machinery is personal, continuing and nonassignable. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. Foreman in printing office who failed to replace guard rail on press, whereby a press feeder was injured, was not the latter's fellow-servant, the statute requiring a guard rail. Pinsdorf v. Kellogg & Co., 108 App. Div. 209, 95 N. Y. S. 617. Servant whose duty it was to deliver cars to crews represented the master and latter was liable for injury resulting from delivery of car with defective motor handle so that car could not be reversed. Chicago Union Traction Co. v. Sawusch, 218 Ill. 130, 75 N. E. 797. Negligence of employes in constructing appliances to be used by plaintiff, the construction being in charge of the foreman, was negligence for which the master was responsible. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842.

95. Duty of seeing that a sufficient number of men are employed to do the work in hand with safety is nondelegable. Alabama Great Southern R. Co. v. Vail [Ala.] 38 So. 124. Foreman, in deciding how many men were needed to repair certain shafting was performing a duty of the master, and the latter was liable if injury resulted because two were not enough. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592.

96. Duty of selecting competent employes is nondelegable. Alabama Great Southern R. Co. v. Vail [Ala.] 38 So. 124.

97. Duty to warn of danger from the doing of work by other employes cannot be delegated. Western Elec. Co. v. Hansalmann [C. C. A.] 136 F. 564. Duty to warn so that place of work may be safe is nondelegable. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Negligence of servants whose duty it was to keep lookout and give warnings made master liable. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523. Duty to give timely warning of explosion of blast in quarrying held nondelegable. Hjelm v. Western Granite Contracting Co. [Minn.] 102 N. W. 384. Failure of foreman to warn employe working on track of approach of train was negligence imputable to the master. D'Agostino v. Pennsylvania R. Co. [N. J. Law] 60 A. 1113. Negligence of a sawyer in charge of a machine in failing to warn a "dogger" after he was placed in danger was negligence for which the master was liable. O'Brien v. Page Lumber Co. [Wash.] 82 P. 114; Dossett v. St. Paul & Tacoma Lumber Co. [Wash.] 82 P. 273.

98. Master responsible for instructions given by foreman. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. Where employe was injured because of lack of instructions as to use of machine he was told to operate, the master was liable regardless of rank of person who failed to instruct. Flickner v. Lambert [Ind. App.] 74 N. E. 263.

99. Duty of inspection is nondelegable. Crawford v. United R. & Elec. Co. [Md.] 61 A. 287; El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457; Koehler v. New York Steam Co. [N. Y.] 75 N. E. 538. Duty to properly inspect freight elevator. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. Engineer, in charge of engine, and whose duty it was to inspect it and keep it in repair on the road was as to such inspection the vice-principal of the fireman injured by the explosion of the boiler. Illinois Cent. R. Co. v. Quirey [Ky.] 89 S. W. 217.

1. Duty to keep machinery in repair is not delegable; notice of a defect to one whose duty it is to repair is notice to the master. Odin Coal Co. v. Tadlock, 216 Ill. 624, 75 N. E. 332. Duty to keep cage in mine in proper repair cannot be delegated to cage tender so as to relieve master from liability for tender's negligence. Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751. Where a foreman promised a servant to replace a defective belt and failed to do so, the foreman's negligence was that of a vice-principal and not a fellow-servant. Maryland Steel Co. v. Engleman [Md.] 61 A. 314. Failure of foreman to repair belt and pulley as he had promised held negligence for which master was responsible. Lynch v. Stevens & Sons Co. [Mass.] 73 N. E. 478.

2. Duty to make and enforce reasonable rules and regulations cannot be delegated. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85.

plained of does not pertain to any duty of the master, but is a mere detail of the work which it is the duty of his employes to perform, it is the act or omission of a fellow-servant,[4] regardless of the rank or authority of the employe charged therewith.[5]

3. When the master has performed his duties, he may commit details of the work to servants, and negligence in the performance of a detail is that of a fellow-servant. Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589. Miners were properly required to make their own inspection for unexploded charges before drilling for blasts. Poorman Silver Mines v. Devling [Colo.] 81 P. 252.

4. Servant who used a dull pike pole in holding pole on which plaintiff was at work, whereby it fell, was a fellow-servant of plaintiff, there being plenty of suitable pikes available. Towne v. United Elec. Gas & Power Co., 146 Cal. 766, 81 P. 124. Where master furnished suitable materials for molding flasks, used in foundry, and provided competent employes whose duty it was to put the materials together and construct flasks, defects in the flasks caused by negligence of the employes in putting the materials together did not make the master liable. Leishman v. Union Iron Works [Cal.] 83 P. 30. Where rules required miners to inspect for unexploded charges before commencing to drill, the act of a foreman in examining a hole and pronouncing it not a "missed shot" was the act of a fellow-servant. Poorman Silver Mines v. Devling [Colo.] 81 P. 252. If the act or omission pertains to a mere detail of the work of employes, and is a part of their duty, it is the act or omission of a fellow-servant for which the master is not liable. Larsen v. Le Doux [Idaho] 81 P. 600. Act of foreman in turning on blower in oven which plaintiff was repairing, in order to cool the oven, thereby blowing ashes in plaintiff's eyes, was that of a fellow-servant. Page v. Battle Creek Pure Food Co. [Mich.] 12 Det. Leg. N. 46, 105 N. W. 72. Act of station agent in lowering a movable platform used in loading milk cans on a car was the act of a fellow-servant of a freight conductor who was injured by coming in contact with it while on the side of a car. Henry v. Ann Arbor R. Co. [Mich.] 12 Det. Leg. N. 232, 103 N. W. 846. Act of foreman in directing use of unsafe hoisting rope, whereby another was injured, was the act of a fellow-servant, and not the performance of a delegated duty of the master. Vogel v. American Bridge Co., 180 N. Y. 373, 73 N. E. 1. Failure of operator of steam winch to stop it at the proper time was negligence of a fellow-servant of a man working in hold of vessel. Tydeman v. Prince Line, 102 App. Div. 279, 92 N. Y. S. 446. A servant who agreed to watch while another workman was working in a manhole, and who neglected to so do, whereby an injury resulted, was a fellow-servant. Wooton v. Flatbush Gas Co., 102 App. Div. 294, 92 N. Y. S. 380. Where master ordered foreman to shut down machinery while belts were being put on, disobedience of his orders was negligence of a fellow-servant of an injured employe and the master was not liable. Foster v. International Paper Co. [N. Y.] 75 N. E. 933. Where the master has done his whole duty in providing the means of lighting the place of work, he is not liable for failure of employes to avail themselves of the means provided. Id. A competent foreman and a sufficient number of men were sent out to string wires, arrangements having been made whereby any one of the gang could turn off the current of electricity. The foreman was selected by the men. Held, he was a fellow-servant of the others, and the master was not responsible for his failure to turn off the current or give warning. Anglin v. American Construction & Trading Co., 96 N. Y. S. 49. Conductor who changed the make-up of his train without authority was in so doing the fellow-servant of a brakeman of a preceding train killed in a collision. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000. Superintendent of electric plant was fellow-servant of a repairman while engaged in testing dynamo and changing armature. Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589. Where the master had employed competent servants to give warnings of dangers arising in the course of the work, he was not liable for injuries caused by failure of such servants to give warning. Biggers v. Catawba Power Co. [S. C.] 51 S. E. 882. The duty to repair or readjust derricks used in unloading coal being a part of the duty of the persons employed to unload, negligence in making such repairs or readjustment was that of a fellow-servant. Grams v. Reiss Coal Co. [Wis.] 102 N. W. 586. Where manager of construction of building directed certain employes to build a scaffold, and told one of them how to do it, and furnished suitable material, negligence of such servant in selecting an unsafe cross piece was negligence of a fellow-servant of plaintiff who helped make the scaffold and was later injured by its collapse. Larsen v. Le Doux, [Idaho] 81 P. 600.

5. Foreman of gang of day laborers was fellow-servant of member of the gang while directing the manner in which scrap iron should be removed from a pile, and there could be no recovery from the master for an injury caused by the falling of the pile. Lach v. Burnham, 134 F. 688. Master of vessel, who ordered libelant to take two more turns of a hawser around the capstan, as a result of which the capstan broke, injuring libelant, was libelant's fellow-servant, both being engaged at the time in ordinary navigation of the vessel. The Westport [C. C. A.] 136 F. 391. Engineer in charge of men employed on steam shovel was, as to the manner in which he operated the machinery, a fellow-servant of an employe whose duties related to the track on which the apparatus worked; and for negligence of the engineer, the trackman could not recover. Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079. Foreman who told plaintiff to place his ladder in a dangerous place was performing a mere detail of the work. Date v. New York Glucose Co., 93 N. Y. S. 249. At common law, failure of a superintendent to replace guards on machinery is negligence of a fellow-serv-

But the authority conferred upon and exercised by employes is often applied as a test by which to determine whether they are vice-principals.[6] Thus, employes who are placed in the absolute control or management of an entire business, or of a distinct department of the business,[7] or who have authority to give orders to other employes,[8] or to employ them,[9] or who have charge of a particular piece of work with authority to direct and control the men engaged thereon,[10] are held to represent the master. It has been held that an employe who has such authority does not lose his representative character by engaging in work temporarily as a common laborer;[11] but it is usually held that the act[12] or negligence of such an employe renders the master liable only when it arises out of and is the direct result of the authority conferred on him by the master,[13] and that he does not represent the master, while engaged as a co-laborer,[14] in the performance of a mere detail of the work.[15] An em-

ant. McManus v. St. Regis Paper Co., 94 N. Y. S. 932. Foreman of gang of men employed to clear right of way for telegraph company was fellow-servant of men under him while prosecuting the work. Brabham v. American Telep. & Tel. Co. [S. C.] 50 S. E. 716. The master is not liable for the act of a mere foreman in giving directions concerning the work to a servant working under him, where the place and appliances furnished by the master are proper. Owner of mill and elevator not liable where employe was injured while pushing a car on a sidetrack, his foreman having directed him to do so. Dill v. Marmon [Ind.] 73 N. E. 67.

6. "Straw boss" of section gang, who was in charge of hand car, held to have had such authority over men that he was a vice-principal, and master was liable for his violation of orders. Warren v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 585. Captain of vessel and ordinary seaman are not fellow-servants. Woods v. Globe Nav. Co. [Wash.] 82 P. 401. A bricklayer is a fellow-servant of a common laborer over whom he has no further control than to signal for brick or mortar. Boldt Glass Co. v. Harris, 6 Ohio C. C. (N. S.) 86.

7. Mallhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733. A general manager having entire charge of the business of the master is a vice-principal. Alabama Great Southern R. Co. v. Vail [Ala.] 38 So. 124. General superintendent and manager of electric railway was a vice-principal for whose negligence an employe engaged in construction work could recover. Milbourne v. Arnold Elec. Power & Station Co. [Mich.] 12 Det. Leg. N. 177, 103 N. W. 821. One who is given complete charge of a business or a branch of it is a vice-principal. New v. Milligan, 27 Pa. Super. Ct. 516. Exclusive manager of store told unskilled workman to put caustic soda in a water closet, and workman left some on the lid, and another workman directed to the closet by the manager was burned. The master was held liable. Id.

8. Conductor of one train is not a vice-principal as to brakeman on another train, the former having no authority to give orders to the latter. Louisville & N. R. Co. v. Dillard [Tenn.] 86 S. W. 313. No question of fellow-servant involved where foreman instructed operator to take orders from a certain other employe, which he did. Jancko v. West Coast Mfg. & Inv. Co. [Wash.] 82 P. 284.

9. Workman employed in unloading vessel and foreman who employed him were not fellow-servants. Ingham v. Honor Co., 113 La. 1040, 37 So. 963. A superintendent or foreman with authority to employ workmen and in charge of work is a vice-principal. Moseley v. Schofield Sons Co. [Ga.] 51 S. E. 309. One given authority to hire, discharge and direct servants is, while exercising such authority, a vice-principal. Baier v. Selke, 112 Ill. App. 568.

10. Foreman in general control of work of remodeling building was vice-principal. Barrett v. Reardon [Minn.] 104 N. W. 309. Foreman who had charge of taking down a telephone pole, and stood by and directed every movement of the men, was not a fellow-servant of men under his orders. Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 P. 539. Brakeman, who in conductor's absence had switching list and directed operations, was a vice-principal, and an employe injured through his negligence could recover from the company. Struble v. Burlington, etc., R. Co. [Iowa] 103 N. W. 142. Engineer in charge of a drill engine, and also in control of the work of drilling a well and of the workmen engaged, was a vice-principal as to the men under him. Galveston, etc., R. Co. v. Roth [Tex. Civ. App.] 84 S. W. 1112.

11. Foreman remained vice-principal, though he took a pick from a workman and used it while the employe was doing something else. Barrett v. Reardon [Minn.] 104 N. W. 309.

12. The servant's acts must be not only within the scope of his employment but also committed in the accomplishment of objects within the line of his duties, or in and about the business or duties assigned him by his employer. Palos Coal & Coke Co. v. Benson [Ala.] 39 So. 727. Mining company not liable for assault on a car driver by superintendent of mines, there being no evidence to show that the superintendent was acting in the line of his duty. Id.

13. Illinois Southern R. Co. v. Marshall, 112 Ill. App. 514. Foreman authorized to construct a scaffold was a vice-principal, and, for his negligence in building it, master was liable. Neves v. Green [Mo. App.] 86 S. W. 508.

14. Illinois Southern R. Co. v. Marshall, 112 Ill. App. 514; Neves v. Green [Mo. App.] 86 S. W. 508.

15. Where two men were engaged in un-

ploye may thus be the fellow-servant of another as respects certain duties, and a vice-principal as respects others.[16]

In some states it is held that employes are not fellow-servants unless engaged in the same department,[17] but this doctrine has been repudiated in other jurisdictions,[18] and, in Tennessee, is applied only in the case of railway employes.[19] In Kentucky it is held that the doctrine that employes in different departments are not fellow-servants rests upon the theory that such servants cannot exercise upon each other any influence promotive of caution;[20] hence, the doctrine is held inapplicable where a plant or business is small or of such a nature that servants may be closely associated, though engaged in technically different departments or kinds of work.[21] In Kansas it is held that such a close association is not essential to the fellow-servant relation,[22] and that the fact that employes are engaged in separate departments of the same general enterprise does not change their relation as fellow-servants, unless such departments are so far disconnected that each may be considered a separate undertaking.[23]

In Illinois the rule is that employes are fellow-servants if they are directly co-operating with each other in a particular business in the same line of employment,[24] or if their duties are such as to bring them into habitual association, so that they may exercise on one another an influence promotive of caution;[25] hence, one who

loading timbers from a car, the act of one in releasing one end of a timber too soon was the act of a fellow-servant of the other, regardless of any difference in their authority. Stephens v. Deatherage Lumber Co., 110 Mo. App. 398, 86 S. W. 481.

16. Sawyer held fellow-servant of "dogger" in performance of work in which both joined. He was a vice-principal while giving "dogger" orders as to handling logs. O'Brien v. Page Lumber Co. [Wash.] 82 P. 114.

17. Employes in different departments are not fellow-servants. Levens v. Bancroft, 114 La. 105, 38 So. 72. Members of switching crew held not fellow-servants of crew of a water train. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523.

18. Classification of servants into different departments to determine their relation no longer obtains in Missouri. Dickey v. Dickey [Mo. App.] 86 S. W. 909.

19. Mere superiority in dignity, grade, or compensation, is immaterial in applying the railroad department rule. Louisville & N. R. Co. v. Dillard [Tenn.] 86 S. W. 313. Conductor of passenger train and brakeman on freight train are not engaged in different departments but are fellow-servants. Id. Watchman at street crossing is not fellow-servant of crew of passing train, not engaged in switching. Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418. Foreman of water supply department of a railroad division, who has care of water tanks, is not the fellow-servant of an engineer in charge of a detached engine on which the foreman was riding in the course of the performance of his duties, and he did not assume the risk of the engineer's negligence. Stuber v. Louisville & N. R. Co., 113 Tenn. 305, 87 S. W. 411.

20. Dana & Co. v. Blackburn [Ky.] 90 S. W. 237.

21. Coal shoveler on tram car and engineer in charge of elevator, both engaged in work in connection with coal elevator, were fellow-servants, the plant being small and operatives few in number. Dana & Co. v. Blackburn [Ky.] 90 S. W. 237.

22. It is not essential to the fellow-servant relation between employes of the same master that they should have an opportunity to become acquainted with each other, or to observe each other's conduct, or to take precautions against each other's negligence, or to influence each other in the formation of habits of foresight and care. Atchison & E. Bridge Co. v. Miller [Kan.] 80 P. 18.

23. Atchison & E. Bridge Co. v. Miller [Kan.] 80 P. 18. Member of pile driving crew, and machinist employed to repair and run stationary engines, used in different places in the work of building falsework for reconstruction of bridge, both men being engaged in that general work and under same master, were fellow-servants. Id.

24. Chicago & A. R. Co. v. Brooks, 115 Ill. App. 5. Men working together in quarry held fellow-servants. Dolese & Shepard Co. v. Johnson, 116 Ill. App. 206. Coal miners working a few feet apart were fellow-servants. Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515. Two employes engaged together in drilling holes in a boiler were fellow-servants. Aurora Boiler Works v. Colligan, 115 Ill. App. 527.

25. Chicago & A. R. Co. v. Brooks, 115 Ill. App. 5; Spring Valley Coal Co. v. Patting, 112 Ill. App. 4. The terms of the fellow-servant rule imply and presuppose the existence of such circumstances that the servants can exercise an influence on each other promotive of proper caution. Wells v. O'Hare, 110 Ill. App. 7, citing many cases. Fireman and engineer on same train are fellow-servants. Sanks v. Chicago & A. R. Co., 112 Ill. App. 385. Mine cage tender is not fellow-servant of miners whom he takes into and out of the mine in the cage. Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751, afg. 115 Ill. App. 455. Miner did not assume risk of negligence of cage operator. Illinois Third Vein Coal Co.

is ordered to do work outside his usual employment, and is brought into contact with different employes, is not the fellow-servant of such employes, though temporarily engaged with them.[26]

Railway employes, going to or from their place of work, are fellow-servants of operatives of the train.[27] There is a conflict as to the relation between operatives of different trains.[28] A train dispatcher is a vice-principal as regards train operatives.[29] A local operator who sends information to the dispatcher is a fellow-servant of such operatives.[30]

Fellow-servant statutes.[31]—The operation of the common-law rule that there can be no recovery for negligence of a fellow-servant has been limited by statute in many states, the limitation being frequently confined to employes of railroad corporations.[32] Other statutes supply tests by which it may be determined whether an employe charged with negligence is the fellow-servant or vice-principal of the injured employe. Decisions under such statutes are grouped in the note.[33] To bring a case within the operation of a fellow-servant law, the negligent act of the fellow-

v. Cioni, 115 Ill. App. 455. Engineer in charge of engine which ran cages in mine, and a miner going to work in a cage, are not fellow-servants. Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196. Coal miner and mine engineer not fellow-servants where they did not know each other and they were not engaged in the same work, and their duties did not require their co-operation. Spring Valley Coal Co. v. Patting, 112 Ill. App. 4. Men on train ahead of the one on which plaintiff was working held not his fellow-servants where it did not appear that their usual duties habitually brought them into consociation. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. Section hand not fellow-servant of hostler when they work in different departments, under different foremen. Indiana, etc., R. Co. v. Otstat, 113 Ill. App. 37. Man loading and hauling ore from a pile was not fellow-servant of foreman in charge of work. Illinois Steel Co. v. Olste, 116 Ill. App. 303. Servant working under the direct orders of a superior on floor of a building was not a fellow-servant of one engaged at other work on an upper floor. Wells v. O'Hare, 110 Ill. App. 7.

26. Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615.

27. Baltimore & O. S. W. R. Co. v. Clapp [Ind. App.] 74 N. E. 267.

28. Fireman on one of two colliding trains is fellow-servant of employes on each of the two trains. Rosney v. Erie R. Co. [C. C. A.] 135 F. 311. Fireman on railroad passenger engine and conductor of passenger train, coming from the opposite direction, are fellow-servants. Crosby v. Lehigh Valley R. Co. [C. C. A.] 137 F. 765. Conductor of a train is not vice-principal as to brakeman on another train, having no authority to give him orders. Louisville & N. R. Co. v. Dillard [Tenn.] 86 S. W. 313. Switching crew held not fellow-servants of crew of a water train. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523.

29. Train dispatcher is vice-principal, not fellow-servant of engineer of train running under his orders. Santa Fe Pac. R. Co. v. Holmes [C. C. A.] 136 F. 66.

30. Local telegraph operator, whose duty it is to send information regarding trains passing his station to the train dispatcher, is a fellow-servant of train operatives in giving such information; hence, a fireman could not recover for injuries received in a collision caused by an erroneous order based on false information given by local operator. Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 737.

31. See 4 C. L. 566.

32. As to constitutionality of such laws, see 4 C. L. 567.

33. Arkansas: Under Kirby's Dig. §§ 6658, 6659, an instruction that plaintiff, an engine hostler's helper, and the hostler were fellow-servants, unless they had "control over each other in the way of discharging or employing each other," was erroneous. Fordyce v. Key [Ark.] 84 S. W. 797. Plaintiff, injured while coaling engine, might have been found to be a fellow-servant of the hostler, under the statute. Id.

California: Civ. Code § 1970, makes a master liable for negligence of a co-employe only when in performance of a duty owed by the master to the servant, or when the master has been negligent in selecting the employe who has been guilty of negligence. Under this statute, employes may be fellow-servants, though not of the same grade nor employed in the same department. Leishman v. Union Iron Works [Cal.] 83 P. 30.

Colorado: Acts 1893, p. 129, c. 77, gives railway employes a right of action for injuries caused by negligence of a servant in charge of a train on the railroad. Verdict for plaintiff set aside on appeal where negligence of conductor was submitted to jury, but evidence showed that conductor had turned the train over to a brakeman. Denver & R. G. R. Co. v. Vitello [Colo.] 81 P. 766.

Georgia: Under Civ. Code 1895, § 2323, if plaintiff's injury was caused by negligence of another employe, the fact that they were fellow-servants would not bar a recovery. Hence, whether one who caused injury in this case was vice-principal, was not a material issue. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15.

Indiana: Burns' Ann. St. 1901, § 7083, subd. 2, makes corporations liable for injuries to employes resulting from negligence of persons whose orders the injured employe was bound to obey. An employe who is

servant must pertain to the duties which he was employed to perform,[34] and the ac-

obeying an order at the time of his injury comes within the terms of the act. Clear Creek Stone Co. v. Carmichael [Ind. App.] 73 N. E. 935. When his presence at a certain place is incidental to his performance of an order, he is deemed to be in such place pursuant to the order given him. Id. The care required of one to whose orders a servant is bound to conform is that of an ordinarily prudent person. Thus the fact that such a one did not actually know of a servant's presence in a place where he had gone to perform an order, did not excuse him or relieve the master, the place proving to be dangerous. Id. Superintendent who orders servant into a place of danger is charged with knowledge of the danger. Clear Creek Stone Co. v. Carmichael [Ind. App.] 76 N. E. 320, afg. [Ind. App.] 73 N. E. 935, supra. An order to assist another in removing certain timbers, neither man being assigned to particular work, is not a special order for an injury in performing which there may be a recovery under the statute. McElwaine-Richards Co. v. Wall [Ind.] 76 N. E. 408. Corporation not liable where superintendent was striking block on piston rod held by servant and accidentally struck the servant. Rainbow Coal & Min. Co. v. Martin [Ind. App.] 74 N. E. 902.

Iowa: Code, § 2071, provides that corporations operating railways shall be liable for injuries caused by negligence of employes connected with use or operation of the railway. A car repairer, who kept his tools in the yard and repaired cars there was entitled to the protection of the statute when struck by switch engine in yard. Hughes v. Iowa Cent. R. Co. [Iowa] 103 N. W. 339. Failure of engineer to give warning after he saw car repairer in place of danger would be negligence. Id. A railway construction company, running trains over a temporary track in connection with its work of construction, is "operating a railway" within the meaning of the statute. Mace v. Boedker & Co., 127 Iowa, 721, 104 N. W. 475. Whether a servant's employment is such as to bring him within the terms of an employer's liability act is generally a question of fact for the jury (Hughes v. Iowa Cent. R. Co. [Iowa] 103 N. W. 339), but where the facts are undisputed, and the inferences which may be drawn therefrom are such that reasonable minds cannot differ with respect thereto, the question is one for the court. Id.

Kansas: The Kansas statute makes railroad companies responsible, for any mismanagement of engineers or other employes, to any person sustaining damage thereby. It is sufficiently similar to the statute of Texas so that it will be enforced in the latter state. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401.

Massachusetts: St. 1887, c. 270, § 1, cl. 2, gives a right of action to a servant injured by the negligence of one who is a superintendent. One who saw servants engaged in moving a heavy tool on a truck, and took charge of the work, adopting the servants' method, continued to be acting as a superintendent. Meagher v. Crawford Laundry Mach. Co. [Mass.] 73 N. E. 853. He did not cease to be a superintendent by assisting the men in moving the truck and for his negligence in so doing, as a result of which plaintiff was injured, the master was liable. Id. Where a truss was being raised by an engine, the act of a foreman in ordering the engine to start at a particular time was an act of superintendence, though he was also doing manual work at the time. McPhee v. New England Structural Co. [Mass.] 74 N. E. 303. He was negligent in ordering the engine started when the truss was caught, thereby increasing the strain on the rope and causing it to break. Id. Where superintendent ordered brakeman to couple air hose, and told him he would look out for him, and there was evidence of a general custom to give such orders, knowledge of such custom was held imputable to the company, and it was liable for the superintendent's negligence in failing to make good his assurance. Edgar v. New York, etc., R. Co. [Mass.] 74 N. E. 911. Whether chief duties of a factory foreman were those of "superintendence," held a question for the jury. Peterson v. Morgan Spring Co. [Mass.] 76 N. E. 220.

Minnesota: Gen. St. 1894, § 2701, applies to a mining corporation which uses a short line of railroad to handle its ore, since the law applies "to all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against." Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147. The Minnesota fellow-servant law, construed as applicable to all persons and corporations operating railroads incident to which are the hazards and risks intended to be guarded against, is constitutional. Id. The statute exempts only incomplete roads on which public traffic has not commenced; a narrow gauge road used for dump cars in the work of stripping a mine is within the operation of the statute. Minnesota Iron Co. v. Kline, 26 S. Ct. 159. The statute as so construed is constitutional. Id. Minnesota statute held not applicable where member of steam shovel crew was struck by the gravel bucket owing to the engineer's negligence, the shovel being operated on a temporary movable track not connected with a regular railroad. The men were not engaged in "operating a railway." Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079. Where plaintiff was knocked off cars by a jar, while switching, held evidence did not show engineer negligent. Phillips v. Great Northern R. Co. [Minn.] 102 N. W. 378. Evidence insufficient to prove that engineer was negligent in suddenly increasing speed of engine when switchman attempted to board it. Martyn v. Minnesota & I. R. Co. [Minn.] 104 N. W. 133.

Missouri: The fellow-servant act does not apply to street railways. Dutro v. Metropolitan St. R. Co. [Mo. App.] 86 S. W. 915. Section hand injured while riding on a hand car is entitled to the protection of the fellow-servant act. Overton v. Chicago, etc., R. Co. [Mo. App.] 86 S. W. 503. Where undisputed fact was that employes were working on the track it was the duty of the court to instruct that negligence of a

tion must in other respects be brought strictly within the terms of the statute.[35] If

fellow-servant would render the master liable. Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112. Where the facts are in dispute, whether servants were engaged in operating a road is a question of law and fact for the jury. Id. Master liable for negligence of section boss who violated orders, whereby section hand was injured. Warren v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 585.

Mississippi: Complaint alleging that plaintiff, a brakeman, was injured between a car and the engine of a train in charge of a conductor and engineer, who were plaintiff's superior officers, by reason of engineer's negligence, held to state a cause of action under Const. Miss. 1890, § 193, and Code 1892, § 3559, giving railway employes right of action for negligence of superior agent or officer, or one having power to direct or control. Moore v. Illinois Cent. R. Co. [C. C. A.] 135 F. 67.

New York: Under the New York act of 1902, the master is liable for negligence of a foreman, whose principal duty is that of superintendence, to the same extent as for his personal negligence. Hayward v. Key [C. C. A.] 138 F. 34. Foreman in general charge of blasting, whose duty it was to direct the men and set off the blasts, was acting as superintendent while setting off the blast, and for his negligence in so doing an employe could recover. McBride v. New York Tunnel Co., 101 App. Div. 448, 92 N. Y. S. 282. Directing plaintiff to use a cutting machine on a table not intended for its use, whereby plaintiff was injured, was an act of superintendence. Braunberg v. Solomon, 102 App. Div. 330, 92 N. Y. S. 506. Foreman, directing boiler repairs in superintendent's absence, was superintendent as to men under his direction. Faith v. New York, etc., R. Co., 109 App. Div. 222, 95 N. Y. S. 774. Foreman, who told quarryman that it was safe to break a rock which the workman said he was afraid of, in breaking which the workman was injured by an explosion, could not be held a fellow-servant as a matter of law. Di Stefeno v. Peekskill Lighting & R. Co., 107 App. Div. 293, 95 N. Y. S. 179. One who had charge of men unloading cars, and who assisted them and checked cars, held not a superintendent as to men engaged with him. Miller v. Solvay Process Co., 109 App. Div. 135, 95 N. Y. S. 1020. Servant whose duty it was to signal a crane operator, and give instructions for execution of supervisor's orders, was not a superintendent. Quinlan v. Lackawanna Steel Co., 94 N. Y. S. 942. Negligently turning on a current of electricity held not an act of superintendence. Id. Where passenger conductor violated his train orders, as a result of which a head-on collision occurred in which the fireman of the other train was killed, the conductor was not then "acting as superintendent" within the meaning of Laws N. Y. 1902, p. 1749, c. 600, and the company was not liable. Crosby v. Lehigh Valley R. Co. [C. C. A.] 137 F. 765. No action can be maintained under Laws 1902, p. 1749, c. 600, § 2, unless the required notice of the time, place, and cause of the injury has been given the employer as required by the act. Grasso v. Holbrook, Cabot & Daly Contracting Co., 102 App. Div. 49, 92 N. Y. S. 101.

North Carolina: Priv. Laws 1897, p. 83, c. 56, § 1, gives an employe of a railroad company "operating" in the state, a cause of action for injuries sustained through a fellow-servant's negligence. The act does not apply where an employe is injured while engaged in railroad construction several miles from the completed track, and even farther from the track where trains are run. Nicholson v. Transylvania R. Co. [N. C.] 51 S. E. 40. Recovery by railroad employe injured by negligence of two fellow-servants. Mabry v. North Carolina R. Co. [N. C.] 52 S. E. 124.

Oregon: Laws 1903, p. 20, makes railroads liable for injuries to employes caused by wrongful acts of agents or officers superior to the injured employe. Under the statute a company is liable to a common laborer, in a construction crew, for injuries caused by negligence of the foreman of the crew. Sorenson v. Oregon Power Co. [Or.] 82 P. 10.

Texas: Sayles' Ann. Civ. St. 1897, art. 4560f, makes corporations operating railroads liable for injuries to servants caused by negligence of fellow-servants. A railroad used by a lumber corporation solely to transport its own lumber is within the statute. Lodwick Lumber Co. v. Taylor [Tex. Civ. App.] 7 S. W. 358. The operation of a hand car is the operation of a railroad within the meaning of Rev. St. 1895, art. 4560f, and a foreman on a hand car, injured by negligence of the men running it, may recover. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62. Fireman who had fixed headlight and was returning to engine cab when struck by a timber projecting from a passing car was engaged in "operating" a railroad. St. Louis & S. F. R. Co. v. Bussong [Tex. Civ. App.] 90 S. W. 73. The Texas statute, applied so as to permit a recovery for death of an engineer in a collision between two trains, both engaged in interstate commerce, does not violate the Federal constitution by imposing a burden on interstate commerce. Missouri, etc., R. Co. v. Nelson [Tex. Civ. App.] 13 Tex. Ct. Rep. 81, 87 S. W. 706. By Laws 1891, p. 25, c. 24 (Sayles' Ann. Civ. St. 1897, art. 4560g), which applies only to railway employes, such employes are fellow-servants only when engaged in the common service of the master and in the same grade, neither being in superintendence over the other; engaged in the same department, at the same time and place, working to a common purpose; and (by amendment of 1897) engaged at the same character of work and at the same piece of work. Where employes were divided into squads for the work of removing bales of cotton from one portion of a platform to another, the members of one squad were not, while rolling a bale of cotton, the fellow-servants of the members of another squad, since they were not engaged on the "same piece of work." International & G. N. R. Co. v. Still [Tex. Civ. App.] 13 Tex. Ct. Rep. 372, 88 S. W. 257. The

the fellow-servant laws of two states are substantially similar, the courts of one state will enforce the statute of the other.[36]

(§ 3) *F. Risks assumed by servant. Nature of defense.*[37]—Assumption of risk is a matter of contract; contributory negligence is a question of conduct.[38] The assumption of a particular risk will not defeat a recovery for other negligence of the master which was not assumed.[39] But negligence of the servant in the doing of a particular act, which contributes to the cause of injury, bars recovery notwithstanding other negligence of the master.[40] The two defenses are closely related and at times blend; but a careful observance of the distinctions between them would avoid much of the confusion which has resulted, in some jurisdictions, from a careless use of terms.[41]

While it is commonly said that incidental risks are assumed by the contract of

statute thus construed is constitutional. Id. Railroad employes to whom the control of other employes is entrusted are vice-principals. A foreman who had charge of the "rustling" gang in railroad yards did not cease to be a vice-principal, within the meaning of the statute, by assisting the men in moving a tool box. Missouri, etc., R. Co. v. Dean [Tex. Civ. App.] 13 Tex. Ct. Rep. 989, 89 S. W. 797. Failure of foreman who saw approaching train to warn employes, who were trying to get a push car off the track, was negligence for which an employe injured in a resulting collision could recover. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063. Whether employes were negligent in rolling bale of cotton on plaintiff's foot, held for jury. International & G. N. R. Co. v. Still [Tex. Civ. App.] 13 Tex. Ct. Rep. 372, 88 S. W. 257. Evidence sufficient to show that foreman on hand car with plaintiff was negligent in keeping a lookout, whereby car struck an obstruction and plaintiff was injured. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 13 Tex. Ct. Rep. 123, 87 S. W. 867. Evidence sufficient to show switching crew negligent in failing to warn engine wiper, who was caught between pilot and drawhead of car. Ft. Worth, etc., R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 34, 87 S. W. 371. Where one of several servants engaged in moving a boiler across tracks was injured by reason of a timber being left on a track and struck by an engine, whether the negligent employes were fellow-servants was for jury. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466. Instruction held to correctly charge that where foreman on a hand car saw a plank on the track ahead and ordered the men to stop the car, they were under duty of using all the means at hand to stop it consistent with their own safety. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62. Whether the men were negligent in failing to stop the car in time was, under the evidence, for the jury. Id.

34. Where plaintiff's injury resulted from a section hand stooping to put his hat on the platform of the car, such act did not pertain to his duties and plaintiff could not recover. Overton v. Chicago, etc., R. Co. [Mo. App.] 86 S. W. 503.

35. This principle is fully illustrated in the cases collected above.

36. Railroad fellow-servant law of Kansas will be enforced in Texas. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401.

37. See 4 C. L. 568.

38. Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; Choctaw, etc., R. Co. v. O'Nesky [Ind. T.] 90 S. W. 300.

39. St Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324. Brakeman did not assume risk of a particular defect in a track unless he had actual or implied knowledge of it, regardless of his knowledge of defects at other points. Mumford v. Chicago, etc., R. Co. [Iowa] 104 N. W. 1135. By negligently or voluntarily exposing himself to known dangers, a servant does not assume others which are not known and which the exercise of reasonable care would not have disclosed. Holmes v. Chicago, etc., R. Co. [Neb.] 103 N. W. 77.

40. St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324.

41. NOTE. Assumed risk and contributory negligence: As pointed out by Judge Goode in Adolff v. Columbia Pretzel & Baking Company, 100 Mo. App. 206, 73 S. W. 323: "The defense of assumption of risk * * * must be founded on contract and treated by the principles of contract law, or, if there was no contract relationship between the parties which included the fatal hazard," then it rests on the maxim, volenti non fit injuria, which expresses assent as well by other methods as by contract. And again: "The two defenses of assumption of risk and contributory negligence are unlike, because of the different states of mind in which they are rooted. It is palpable that an act done willfully and upon full information is not done negligently, and this distinction is recognized throughout the law of torts. Negligence is the result of inattention or oversight, whereas consent to a risk implies knowledge of the danger of the act to be performed, and the performance of the act understandingly and without constraint."

Judge Thompson in his work on Negligence, vol. 4, 4611, points out the distinction as follows: "Many of the earlier and some of the later decisions confuse the two subjects of an acceptance by the servant of the risks of employment and his contributory negligence. The two subjects lie close to each other, and in some cases blend; but in other cases they are distinct subjects. Nevertheless the judges frequently

employment,[42] and that a servant who remains in an employment after he has knowledge of a defect impliedly contracts to assume the risk arising therefrom,[43] perhaps a more exact statement of the law would be that by the contract of employment, a relation or status is created, by virtue of which the law imposes on the master the duty of ordinary care for the servant's safety, and upon the servant the duty of avoiding dangers incident to or inherent in the employment.[44]

It is usually held that the defense of assumption of risk is not available where the negligence complained of is a breach of a positive statute,[45] though there is authority to the contrary.[46] The Federal automatic coupler act expressly excludes the defense where a breach of its provisions is relied on.[47]

use the words 'contributory negligence' where they really mean an acceptance of the risk. In other instances they use the words 'an acceptance of the risk' where they really mean contributory negligence."

The law of assumption of the risk rests upon agreement or assent, which can arise in no other manner than through the free and voluntary action of the mind. No part of it rests upon such negative state of mind as inattention, oversight, want of care, lack of prudence, or neglect. No part of it rests upon nor is imbedded in the negligence of the servant, and no part of the law covering the question rests upon the law of contributory negligence. "The question of assumption of risk is quite apart from that of contributory negligence." Choctaw & Okl. Ry. Co. v. McDade, 191 U. S. loc. cit. 68, 48 Law. Ed. 96. "Assumption of the risk rests in contract; contributory negligence rests in tort." St. Louis Cordage Co. v. Miller [C. C. A.] 126 F. 495, 63 L. R. A. 551; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 Law. Ed. 235; Adolff v. Columbia Pretzel Co., 100 Mo. App. 206, 73 S. W. 321.—See Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12, from which above is taken.

42. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12.

43. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857. Doctrine of assumed risk does not depend on care or want of care of servant but grows out of contract of employment or continuance in service without objection after knowledge of danger. Consolidated Barb Wire Co. v. Maxwell, 116 Ill. App. 296.

44. Note: It has been said that the servant's assumption of risk is a hazard imposed by the law upon him and he has a legal noncontractual duty to guard against all ordinary risks of his employment. It is not properly based on an implied promise to assume them, as many courts have said. See "Implied Contracts in Assumption of Risk" a note in 5 Columbia L. R. 158.

The recent case of Hempstock v. Lackawanna Iron & Steel Co., 98 App. Div. 332, 90 N. Y. S. 663, follows the leading case of Farwell v. Boston, etc., R. Co., 4 Metc. [Mass.] 49, 38 Am. Dec. 339, which first laid down the "implied promise" doctrine. The writer of the note, supra, adverts to the instances of risk assumed by persons disabled to contract and cites Dresser, Employers' Liability, §§ 10, 11, 82; Ruchinsky v. French, 168 Mass. 68; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Taylor v. Wootan, 1 Ind. App. 188, 50 Am. St. Rep. 200. He also cites Osborne v. K. & L. R. Co., 68 Me. 49, 28 Am. Rep. 16, and Chicago & N. W. R. Co. v. O'Brien [C. C. A.] 132 F. 593, wherein risk was assumed by a volunteer and an express messenger, neither of whom bore any contractual relation to the tort feasor.

45. The defense of assumed risk is not available to a master who has violated Laws 1903, p. 40, c. 37, requiring dangerous machinery to be guarded, even though the injured servant knew that the law was being violated. Hall v. West & S. Mill Co. [Wash.] 81 P. 915; Daffron v. Majestic Laundry Co. [Wash.] 82 P. 1089; Hoveland v. Hall Bros. Marine R. & Shipbuilding Co. [Wash.] 82 P. 1090. The requirement of Laws 1903, p. 40, c. 37, § 1, that belt shifters must be provided, cannot be waived by an employe, and the risk arising from a violation of the act cannot be assumed. Whelan v. Washington Lumber Co. [Wash.] 83 P. 98. Mine operator not having marked a room as dangerous, as required by Laws 1899, p. 317, § 18, a miner could recover for an injury therein though he knew there was an overhanging rock which was lose and dangerous. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375. Under St. 1887, c. 270, § 1, cl. 2, making a master liable for the negligent act of a "superintendent," a servant does not assume the risk of negligence of a superintendent. Meagher v. Crawford Laundry Mach. Co. [Mass.] 73 N. E. 853. No issue of assumed risk in the case where Rev. St. 1899, § 6433 had been violated by a failure to guard pulleys and belts. Stafford v. Adams [Mo. App.] 88 S. W. 1130. Child under 14 employed contrary to Labor Law, § 70 does not assume risk of employment Lee v. Sterling Silk Mfg. Co., 93 N. Y. S. 560. Priv. Laws 1897, p. 83, c. 56, § 2 provides that any contract, express or implied, by which an employe waives the benefit of § 1, making railroads liable for negligence of fellow-servants, shall be void. Hence the defense of assumed risk, which is a matter of contract, is not available in an action under the statute. Biles v. Seaboard Air Line R. Co. [N. C.] 52 S. E. 129. Servant does not assume risk of failure of master to guard rip saw, thereby violating Burns' Ann. St. 1901, § 7087i, even though he knew the saw was unguarded. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Assumed risk no defense where mining statute was violated, though servant knew of the violation. Indiana & C. Coal Co. v. Neal [Ind. App.] 75 N. E. 295.

Note: "There is much authority for the position taken in this case. Narramore v. Railway Co. [C. C. A.] 96 F. 298, 48 L. R. A.

Dangers incidental to business.[48]—The servant assumes the risks ordinarily incident to the employment in which he engages,[49] and this is so though the employment is necessarily dangerous.[50] Ordinary risks are such as arise from the per-

68. However, the cases are far from being unanimous in this view. Knisley v. Pratt. 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. For a fuller discussion, see 4 Michigan Law Review, 165."—4 Mich. L. R. 241.

46. See 4 C. L. 569, n. 25; also note to Indiana & C. Coal Co. v. Neal, supra. A penal statute making a failure to guard machinery, or the use of unguarded machinery, a criminal offense, does not change the common-law doctrine of assumption of known risks, so as to change the rights of the parties to a civil action for damages for injuries caused by unguarded machines. Laws Wash. 1903, p. 40, c. 37 did not preclude defense of assumed risk, when employe operated a saw known to him to be unguarded, being paid extra for Sunday work. Nottage v. Sawmill Phoenix, 133 F. 979.

47. Act of March 2, 1893, c. 196, 27 U. S. St. 531. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225.

48. See 4 C. L. 570.

49. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12; Smith v. Hammond Packing Co. [Mo. App.] 85 S. W. 625; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 328; Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; St. Louis National Stock Yards v. Morris, 116 Ill. App. 107; Bedford Quarries Co. v. Turner [Ind. App.] 75 N. E. 25; Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708; Charping v. Taxaway Mills, 70 S. C. 470, 50 S. E. 186; Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466; St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786; Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012; McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829.

Illustrations: Employe repairing boiler on a railroad track in the master's switching yards assumed the risk of injury from trains. Breeze v. MacKinnon Mfg. Co. [Mich.] 12 Det. Leg. N. 195, 103 N. W. 908. Risk of fire from inflammable material used in work is assumed. O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516. Employe assumed risk of using frames which he found in cordage plant. Wolf v. New Bedford Cordage Co. [Mass.] 76 N. E. 222. Where section crew, to facilitate loading of ties on a car, made a temporary platform of ties and planks at the end of the car, a member of the crew engaged in the work assumed the risk of a plank slipping or of his slipping and being injured by a tie he was loading. Dunn v. Oregon Short Line R. Co., 28 Utah, 478, 80 P. 311. Plaintiff, at work on brick building in course of construction, assumed risk of brick, dropped by masons, falling on him. Roth v. Eccles, 28 Utah, 456, 79 P. 918. Man experienced in work of unloading and piling iron beams assumed risk of beams slipping from pile. Weizinger v. Erie R. Co., 94 N. Y. S. 869. Wheelbarrow man employed to haul acid from piles assumed incidental risk of a pile, in which an excavation had been made, falling on him. Martin v. Royster Guano Co. [S. C.] 51 S. E. 680. Dining car conductor charged with duty of taking his car to a junction to turn it around, assumed the incidental risk of pushing the car instead of hauling it, with the switch engine, even if he used this method under direction of the yard master. Southern R. Co. v. Logan [C. C. A.] 138 F. 725. Brakeman assumed risk of falling into an open culvert of the kind generally used by his company and others in that part of the country. Southern Pac. Co. v. Gloyd [C. C. A.] 138 F. 388. Locomotive engineer assumed, as one of the risks of his employment, the danger of a landslide in the mountains through which his train went in rainy weather. Kinzel v. Atlanta, etc., R. Co. [C. C. A.] 137 F. 489. General laborer, of ordinary intelligence, employed to slack lime to be used in whitewashing new building, assumed risk of lime being thrown out of vessel into his face, too little water being used. Roessler v. Hasslacher Chemical Co. v. Peterson [C. C. A.] 134 F. 789. Freight brakeman assumes risks incident to performance of his duties, of which he was informed or would learn in the exercise of ordinary care. Miller v. Boston & M. R. Co. [N. H.] 61 A. 360. Danger of timber slipping from roller when being unloaded from car held incidental to such work. Walsh v. Smith, 26 R. I. 554, 59 A. 922. Brakeman assumes risks incidental to chasing and coupling cars. Kennedy v. Kansas City, etc., R. Co. [Mo.] 89 S. W. 370. Risk of injury from unevenness of track then being laid was assumed. Meehan v. St. Louis, etc., R. Co. [Mo. App.] 90 S. W. 102. Where locomotive fireman lost his balance while ringing the bell at a curve, and, the bell cord breaking, fell, his injury was the result of an assumed risk. Illinois Cent. R. Co. v. Mercer [Ky.] 88 S. W. 1054.

50. Servant assumes incidental risks when he has been informed that work is dangerous. Biggers v. Catawba Power Co. [S. C.] 51 S. E. 882. Perils attending work of cleaning up a dangerous room in a mine assumed. Jennings v. Ingle [Ind. App.] 73 N. E. 945. Risk of being struck by stone thrown by blast assumed by quarryman. Zeigenmeyer v. Charles Goetz Lime & Cement Co. [Mo. App.] 88 S. W. 139. Mucker in mine whose duties require him to clear the way for the men who do the timbering assumes the risks incident to his dangerous work, and must use due diligence to avoid falling rocks or ore while at work. Smith v. Hecla Min. Co., 38 Wash. 454, 80 P. 779. Railroad employe assumed risk of working in cut in mountains, clearing away debris at night resulting from a landslide, and there could be no recovery for his death caused by being struck by a falling stone. Florence & C. C. R. Co. v. Whipps [C. C. A.] 138 F. 13. If one accepts employment upon, about, or with machinery or appliances which he knows are not safe by reason of defects, or if such defects are so obvious that he must be taken as a matter of law to know their unsafe condition, he assumes the risk of

manent, open, visible conditions of the master's business.[51] The occasional negligence of fellow-servants is an assumed risk within the meaning of this rule.[52] Unusual or extraordinary risks,[53] which the exercise of ordinary care on the part of the master would have obviated,[54] or which are encountered outside the service which the employe was hired to perform,[55] and which a performance of his ordinary duties in a reasonably careful manner would not disclose,[56] are not assumed. Risks arising from latent defects, not discoverable by the use of ordinary care on the part of the master, and unknown to him, are assumed, though no knowledge of the defect or appreciation of the danger by the servant is shown, such risks being classed as incidental to the employment.[57]

Known or obvious dangers.[58]—Risks which are actually known to the servant,[59]

using such defective appliances as one of the risks of his service. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519.

51. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. The servant by his contract of employment assumes the natural and ordinary risks that are incident to or arise out of the work which, under his contract, he is called upon to perform. Leach v. Oregon Short Line R. Co. [Utah] 81 P. 90.

52. See ante, § 3 E.

53. Only the ordinary and usual risks of a dangerous employment are assumed. Staubley v. Power Co., 21 App. D. C. 160. Collision of two trains on a straight track and on a clear day is not an ordinary, incidental risk assumed by a locomotive fireman. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. Servant did not assume risk of all accidents that might happen by breaking of "skidder" used in loading cars. Williams v. Levert Lumber & Shingle Co., 114 La. 805, 38 So. 567. Car repairer did not assume risk of the car on which he was at work on the main track being struck by a runaway car from a side track. Smith v. Fordyce [Mo.] 88 S. W. 679. Employe riding home from work on top of house car, with road-master's consent, did not assume risk of injury by collision with cars on a spur track. Milbourne v. Arnold Elec. Power & Station [Mich.] 12 Det. Leg. N. 177, 103 N. W. 821. Plaintiff did not as a matter of law assume risk of some one starting engine while he was under it cleaning out ash pan. Lane v. New York, etc., R. Co., 94 N. Y. S. 988. Plaintiff working on a ledge with a bank of earth above him assumed the ordinary risk, but not the risk of a large slab of earth loosened by frost, a fact unknown to him, falling upon him owing to the operations of the men at work above him. Gibson v. Freygang [Mo. App.] 87 S. W. 3. Engine wiper did not assume risk of injury because of negligence of a switching crew. Ft. Worth, etc., R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 34, 87 S. W. 371. Risk of 2,000 pound machine, fastened to floor with 5-inch screws, being torn up and thrown four feet against workman at another machine, not assumed. Kalker v. Hedden [N. J. Err. & App.] 61 A. 395.

54. The ordinary risks and hazards of the employment are such risks as are usual and ordinary therein after the employer has taken reasonable care to discover and prevent such risks. Wells v. O'Hare, 110 Ill. App. 7.

55. Young employe did not assume risk of running machine he was not employed to operate, and as to which he was not instructed. Flickner v. Lambert [Ind. App.] 74 N. E. 263. Where a roustabout in a flour mill and elevator was directed to assist in pushing a car on a siding, there was not such a change in his duties or service as to relieve him from the assumption of ordinary risks. Dill v. Marmon [Ind.] 73 N. E. 67.

56. Servant does not assume unusual or extraordinary risks unless he knows or has reasonable means of knowing the precise danger to which he is exposed. Hocking v. Windsor Spring Co. [Wis.] 104 N. W. 705. Servant who did not assist in securing derrick, and whose ordinary duties did not cause him to inspect the anchoring of the guy ropes, did not assume the risk of a defectively anchored rope, the defect not being obvious. Lounsbury v. David, 124 Wis. 432, 102 N. W. 941. Electric light trimmer whose duty did not require him to inspect poles did not assume risk of a pole falling with him. Dawson v. Lawrence Gaslight Co. [Mass.] 74 N. E. 912. Where fireman had not watered his engine at a water tank since the time when the evidence showed a chain supporting the spout was broken, and he testified that he did not know of the defect, he did not assume the risk as a matter of law. Missouri, etc., R. Co. v. Dickson [Tex. Civ. App.] 90 S. W. 507. Servant assumes only obvious incidental dangers. Moylon v. McDonald Co. [Mass.] 74 N. E. 929. Such risks as the servant's opportunities for inspection would disclose are assumed. Bedford Quarries Co. v. Turner [Ind. App.] 75 N. E. 25. Unusual dangers not assumed unless known or so obvious that they ought to have been known. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076.

57. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Fireman assumed risk of being struck by piece of slate while breaking coal for his engine, since the exercise of ordinary care by the master would not have obviated that risk. Vissman v. Southern R. Co. [Ky.] 89 S. W. 502. Where stone which broke, injuring plaintiff, had been inspected by the proper servant, not shown to be incompetent, the defect not being visible, the master was not liable. Bedford Quarries Co. v. Turner [Ind. App.] 75 N. E. 25. Workman employed in unloading ship assumed risk of defect in wire cable used, when the cable had been carefully inspected before the work began and the defect not then observed, and when

or which are so obvious[60] that a person of the same age, capacity and experience, ex-

the workman had observed the defect during the progress of the work and had failed to report it. The Tresco, 128 F. 780.

58. See 4 C. L. 571.

59. St. Louis National Stock Yards v. Morris, 116 Ill. App. 107. Servant assumed risk of using planer in its known condition. Erickson v. Cummer Mfg. Co. [Mich.] 12 Det. Leg. N. 194, 103 N. W. 828. Employe held to have known conditions and to have assumed risk of using defective ladder to go to cellar. Davitt v. Metropolitan St. R. Co., 94 N. Y. S. 790. Risks pointed out by the master are assumed. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708. Where a carpenter was given a warning as to a scaffold, which he could have heard, his use of the scaffold thereafter was at his own risk. Lobstein v. Sajatovich, 111 Ill. App. 654. Employe who knew rope slings were used to load lumber on vessel assumed risk of use of rope rather than chain or wire. Henne v. Steeb Shipping Co., 37 Wash. 331, 79 P. 938. Employe attempting to move car into car barn, went between the car and the wall when the car started and killed him. Held, he assumed the risk. Laffan v. Metropolitan St. R. Co., 108 App. Div. 288, 95 N. Y. S. 705. Plaintiff, who had full knowledge of danger of third rail on elevated, having worked on electric repair gang, assumed risk of shoveling snow on elevated with iron shovel. Smith v. Manhattan R. Co., 48 Misc. 393, 95 N. Y. S. 529. Machine operator who knew block had been substituted for box used to stand on when attaching connection assumed risk of the block's tipping and throwing him into gearing. Minnie v. Mueller [Mich.] 12 Det. Leg. N. 75, 103 N. W. 524. Employe, inside a brick oven repairing it, assumed risk of having ashes blown in his eyes, when he knew the air was to be turned on through blower. Page v. Battle Creek Pure Food Co. [Mich.] 12 Det. Leg. N. 615, 105 N. W. 72. Evidence held to show that mill employe knew how skids were made and logs handled and assumed risk of working with them in mill. Carnes v. Guelph Patent Cask Co. [Mich.] 12 Det. Leg. N. 331, 104 N. W. 322. Miner who had known dangerous condition of roof of entry in mine for some weeks assumed the risk. Choctaw, etc., R. Co. v. O'Nesky [Ind. T.] 90 S. W. 300. Servant who knew lumber was piled in dangerous manner in yard where he worked assumed the risk. Brooks v. Joyce Co., 127 Iowa, 266, 103 N. W. 91. Locomotive engineer assumed risk of running engine which he knew did not have lubricator shields. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519. Expert machinist who had repaired and started mill machinery assumed the risk of testing rollers in a way which he knew was dangerous. Carey v. Samuels & Co. [Ky.] 88 S. W. 1052. Servant assumed risk of doing work with the appliances furnished and without a helper, since he knew what would be furnished when he began work. Blundell v. Miller Elevator Co., 189 Mo. 552, 88 S. W. 103. If street railway employe knew of defective condition of bridge over which tracks were laid, he assumed the risk of injury from such defect. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691. Servant employed to run cars on elevated platform on coal dock who knew the system of lighting the dock at night, and knew that there was no railing on the platform, assumed the risks. Faber v. Reiss Coal Co., 124 Wis. 554, 102 N. W. 1049.

60. **Risks held obvious and assumed.** Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. Obvious defects or perils, such as are open to ordinary, careful observation are regarded as perils incident to the service and are assumed. Jennings v. Ingle [Ind. App.] 73 N. E. 945. Danger of employe putting his hands under moving cogs to clean the floor. Wofford v. Clifton Cotton Mills [S. C.] 51 S. E. 918. Danger of using ladder too short for work to be done with it. Duncan v. Gernert Bros. Lumber Co., 27 Ky. L. R. 1039, 87 S. W. 762. Risk of getting caught between load of lumber and post. Krickeberg v. St. Paul & Tacoma Lumber Co., 37 Wash. 63, 79 P. 492. Danger of getting hand caught between rollers and steam chest of mangle. Ward v. Daniels, 114 Ill. App. 374. Danger from working on uneven floor. McLaughlin v. Atlantic Mills [R. I.] 61 A. 42. Boy of 17 assumed risk of using a stick 6 inches long to clean a trough under a circular saw, and putting his hand under the saw. Martin v. Detroit Lumber Co. [Mich.] 12 Det. Leg. N. 486, 104 N. W. 692. Danger of working near unguarded cog wheels which were in plain view, and the danger from which was obvious, assumed by employe 17 years old. Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977. Boy of 17 who had worked 4 weeks assumed risk of slipping on slippery floor when managing levers on his machine. Bender v. New York Glucose Co. [N. J. Err. & App.] 61 A. 388. Servant assumed risk of tree he was cutting down falling on him, and of being struck by branches of other trees broken off by its fall. Anderson v. Columbia Imp. Co. [Wash.] 82 P. 1037. Presence of oil on floor being obvious, machinist assumed risk of slipping on it. Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932. The danger of operating a machine being obvious plaintiff could not recover for an injury, when it did not appear that any practicable means of lessening the danger had been omitted. Zevin v. Goldman, 94 N. Y. S. 35. Mill employe directed to clean and oil machinery assumed the risk of getting caught in open gearing which was plainly visible. Hathaway v. Washington Milling Co. [Mich.] 12 Det. Leg. N. 47, 103 N. W. 164. Fireman assumed risk of use of water brakes instead of driver brakes since the fact that the former were used was readily observable by him. Denver & R. G. R. Co. v. Scott [Colo.] 81 P. 763. Employe in shoe factory assumed risk of falling over cover for shafting on the floor. Chisholm v. Donovan [Mass.] 74 N. E. 652. Employe assumed risk of cleaning away saw dust while saw was in motion, since he must be held to have known and appreciated danger of so doing. Beltz v. American Mill. Co., 37 Wash. 399, 79 P. 981. Experienced railroad man, employed in switch yards seven months, assumed risk of unblocked switches. Hynson v. St. Louis S. W. R. Co. [Tex. Civ.

ercising ordinary care, would have known of them,[61] are also assumed. But mere knowledge of a defective condition will not alone charge a servant with the assumption of a risk; it must also appear that he knew and appreciated the danger arising from the defect.[62] Knowledge of the danger will, however, be implied from knowledge of the defect, if it would be apparent to a person of ordinary intelligence.[63] Dangers which are as well known to the servant as to the master, or which the servant has an equal opportunity with the master to observe, are assumed.[64] Risks

App.] 86 S. W. 928. One familiar with work of handling scrap iron and rails assumed the danger of trying to load a heavy iron "bolster" with the assistance of only one other man. International & G. N. R. Co. v. Figures [Tex. Civ. App.] 89 S. W. 780. Employe engaged in clearing up debris of burned building assumed risk of danger from a brick vault shaft, left standing during the salvage work, falling and injuring him. Gans Salvage Co. v. Byrnes [Md.] 62 A. 155 Employe stood on a ledge of rock extending from an embankment, under order of his foreman, and fell and was killed. Held, the danger of his position was obvious and he assumed the risk. Kane v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 571.

61. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708; St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786; Buey's Adm'x v. Chess & Wymond Co., 27 Ky. L. R. 198, 84 S. W. 563. Whether servant understood danger must be determined from his age, intelligence, capacity and experience. Reynolds v. Grace, 115 Ill. App. 473. Servant assumed risk of cutting groove in cable wheel with a hand tool though his foreman directed him to do so, since the danger was obvious to one of his experience. Consolidated Barb Wire Co. v. Maxwell, 116 Ill. App. 296. If brakeman knew of close proximity of posts of coal chute to track, or if he was chargeable with such knowledge, he assumed the risk of being struck by the posts while passing on a car. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. Roundhouse employe who knew that stalls generally had pits was charged with notice that stall in which he was at work had a pit. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 85 S. W. 28. Section hand who had worked two years and had used rail hooks assumed risk of using a hook which was straightened, worn, and too small to hold, since he must have known danger. San Antonio & A. P. R. Co. v. Drake [Tex. Civ. App.] 85 S. W. 447. Switchman assumed risk of injury from frogs when 25 or 30 were maintained in the yard, and he had worked there six months. Riley v. Louisville & N. R. Co. [C. C. A.] 133 F. 904. Where a scraper rolled down a grade and its tongue was cracked, a fact which some of the men sent to bring it back discovered and commented on, plaintiff, one of such employes, assumed the risk of drawing it up by the defective tongue, since he ought to have known of the defect. Griffiths v. Craney, 38 Wash. 90, 80 P. 274.

62. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12; Mace v. Boedker & Co., 127 Iowa, 721, 104 N. W. 475; Peck v. Peck [Tex.] 87 S. W. 248; Chicago, etc., R. Co. v. Bryan [Ind. App.] 75 N. E. 678; Omaha Packing Co. v. Murray, 112 Ill. App. 232; Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900. A servant does not assume a risk by his conduct unless he knows of and appreciates the danger to which he is voluntarily exposing himself. Moylon v. McDonald Co. [Mass.] 74 N. E. 929. Danger as well as defect must be known. Henrietta Coal Co. v Campbell, 112 Ill. 452. Boy held not to have appreciated unusual danger of running saw in a defective condition. Sink v. The Sikes Co., 134 F. 144. The mere fact that a servant knew of a defect in an appliance will not bar a recovery; the case is nevertheless for the jury. Roach v. Haile Gold Min. Co. [S. C.] 50 S. E. 543. Mere fact that street car conductor knew track was rough and uneven did not charge him with assumption of risk of derailment of car. Osterhout v. Jersey City, etc., R. Co. [N. J. Law] 62 A. 190. Where elevator boy knew and reported that elevator was not running right, but had not inspected it, and did not know and appreciate the full risk, he did not, as a matter of law, assume risk of injury by a violent jerking of it. Moylon v. McDonald Co. [Mass.] 74 N. E. 929. Young girl, injured by attempting to remove a piece stuck to a roller of a mangle, without stopping the machine, held not to have assumed the risk as a matter of law, it appearing that she had seen others do the same thing. Manning v. Excelsior Laundry Co. [Mass.] 75 N. E. 254.

63. Where the conditions are not complex, and the circumstances such as to be easily comprehended, an employe who knows the facts and conditions and circumstances, is bound and conclusively presumed to know the dangers arising therefrom. Green v New York, etc., R. Co., 5 Ohio C. C. (N. S.) 497. The law will presume knowledge of dangers which are obvious and necessarily arise from a defect. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Employe held to have assumed risk of coal falling through hole in chute. Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900. That employe does not realize all possible consequences of danger, or that danger is not as obvious to him as to an experienced workman, is immaterial, if danger would be obvious and sufficiently appreciated by one of average intelligence. Dickenson v. Vernon, 77 Conn. 537, 60 A. 270.

64. Danger to one digging post holes, of pile of bricks on other side of open fence falling on him, was an assumed risk. Meixner v. Philadelphia Brewing Co. [Pa.] 60 A. 259. If a danger is open and obvious to master and servant alike and equally, it is an assumed risk. Tham v. Steeb Shipping Co. [Wash.] 81 P. 711. Section hand assumed risk of defective wheel on hand car when he had an equal if not better chance to know of the defect than the master. Foster

which are unknown to the servant, and which due care on his part would not disclose, and which are not among those risks which are classed as incidental, are not assumed.[65] Whether a particular risk was known or ought to have been known to the servant, within the meaning of these rules, is ordinarily a question of fact[66] to be determined by reference to the age, capacity, experience and intelligence of the employe[67] and the circumstances of each particular case.[68]

v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422. Where servant had better opportunities than the master to observe the dangers of his work, because his duties required him to go to different parts of the yard, the master could not be charged with liability because a place where the servant happened to be at a particular time was temporarily rendered unsafe. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089. Where miner, notified of the presence of two "missed shots," found one but not the other, which was concealed by a covering of water, which he could have, but failed to, remove, he assumed the risk of drilling, since he knew the danger as well as did the master. Dickson v. Newhouse [Colo.] 82 P. 537.

65. Only those dangers which servant actually knows or ought to know are assumed. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829; Sirois v. Henry [N. H.] 59 A. 936. Servant assumes only risks which are known or apparent and obvious to persons of his experience and understanding. New Omaha Thomson-Houston Elec. Light Co. v. Dent [Neb.] 103 N. W. 1091. Danger of using platform furnished for repairmen on scow held not obvious. Madden v. Hughes, 93 N. Y. S. 324. Plaintiff did not assume risk of method of coupling adopted by him unless it was obviously dangerous. Denison & P. S. R. Co. v. Binkley [Tex. Civ. App.] 87 S. W. 386. Brakeman held not chargeable with knowledge of defective condition of track in front of station. Atchison, etc., R. Co. v. Stanley [Kan.] 81 P. 176. Danger of using stage built by other men held not apparent and hence not assumed. Ingham v. Honor Co., 113 La. 1040, 37 So. 963. Engineer did not assume risk of falling into hot water well the cover of which had been negligently adjusted by another during the engineer's absence. Levens v. Bancroft, 114 La. 105, 38 So. 72. Plaintiff did not assume risk of operating a particular defective machine, with which she had had no experience, though she was an experienced laundress. Bradford v. Taylor [Miss.] 37 So. 812. Mere knowledge of the existence and general location of a scale box is not sufficient to charge a switchman with knowledge of the increased hazard from maintaining it close to the track. Texas & P. R. Co. v. Swearingen, 196 U. S. 50, 49 Law. Ed. 382. Brakeman held not to have had such knowledge or means of knowledge of a trestle as to have assumed the risk of being struck thereby. Pittsburg, etc., R. Co. v. Lamphere [C. C. A.] 137 F. 20. Claimant, who had worked only a short time, held not to have had knowledge of defect in piledriver by which he was injured. Hazzard v. State, 108 App. Div. 119, 95 N. Y. S. 1103. Brakeman held not to have had such knowledge of the position and character of a low bridge as to have assumed risk of being struck by it. Taliaferro v. Vicksburg, etc., R. Co. [La.] 39 So. 437. Workman did not assume risk of making repairs on shafting in a certain way when he was not aware of the danger unless it was such that he would have known and appreciated it if he had used due care. Hamel v. Newmarket Mfg. Co. [N. H.] 62 A. 592. Danger of using poorly built scaffold held not so glaring that plaintiff assumed risk. Neves v. Green [Mo. App.] 86 S. W. 508. Failure to give customary warning of approach of trains on track where workman was employed was not an obvious risk. D'Agostino v. Pennsylvania R. Co. [N. J. Law] 60 A. 1113. Brakeman who was struck and killed by overhead bridge the first time he passed over a certain part of the road did not assume the risk. Miller v. Boston & M. R. Co. [N. H.] 61 A. 360. Employe who had been on different floors in a building in course of construction, in performance of duties, was not chargeable with notice that elevator shafts were unguarded, so that he assumed the risk of falling through. Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 N. Y. S. 1.

66. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280. If evidence is harmonious and consistent, question of assumed risk may be one of law. Consolidated Barb Wire Co. v. Maxwell, 116 Ill. App. 296.

67. The mental capacity and intelligence of an employe may properly be considered on the issues of assumption of risk. Drake v. San Antonio & A. P. R. Co. [Tex.] 89 S. W. 407. In determining whether a servant assumed a given risk his age and experience, and the necessity for instruction are to be considered. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. Whether boy assumed risk of using defective drift pin depended on the extent of his knowledge and appreciation of the danger. Wood v. Texas Cotton Product Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 534, 88 S. W. 496. The question of assumed risk is particularly one for the jury where the servant is young and inexperienced or is ignorant, when there is room for doubt as to whether he appreciated the danger. Mace v. Boedker & Co., 127 Iowa, 721, 104 N. W. 475. Boy of 17 assumes only such risks as would be obvious to a person of his age, experience and intelligence. Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977.

68. Whether risk assumed held for jury: Car inspector caught between cars. Texas Cent. R. Co. v. Phillips [Tex. Civ. App.] 13 Tex. Ct. Rep. 2, 87 S. W. 187. Employe injured by negligent operation of pile driver. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. Plaintiff was being taken to place of work on a push car, hauled by a train, and the push car

Reliance on care of master.[69]—In the absence of knowledge to the contrary, the servant has a right to rely on the assumption that the master has used due care to supply a reasonably safe place,[70] and reasonably safe appliances,[71] and need not

left the track and ran over him. De Mase v. Oregon R. & N. Co. [Wash.] 82 P. 170. Miner injured by fall of part of mine roof. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898. Roundhouse employe caught in switch frog and foot injured by wheel. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. Employe knew something was wrong with freight elevator but could not see hoisting machinery. Finnegan v. Samuel Winslow Skate Mfg. Co. [Mass.] 76 N. E. 192. Boy of 14 injured by being caught between elevator and floor. Siegel, Cooper & Co. v. Track, 218 Ill. 559, 75 N. E. 1053. Elevator operator caught between bar on cage and block through which cable ran. Question was whether he ought to have known of the danger. Peck v. Peck [Tex.] 87 S. W. 248. Employe did not assume risk of cave-in while working in ditch, as a matter of law. Overbaugh v. Wieber, 94 N. Y. S. 644. Brakeman did not as a matter of law assume risk of being struck by projecting board on another car. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. Servant held not to have assumed as a matter of law risk of using defective scaffold used in building dock. Siversen v. Jenks, 102 App. Div. 313, 92 N. Y. S. 382. Whether operator of punch machine assumed risk of being struck by splinter because of defective knife and screw in machine. Hocking v. Windsor Spring Co. [Wis.] 104 N. W. 705. Whether employe assumed risk of projecting nail in sprocket chain on machinery. Berg v. United States Leather Co. [Wis.] 104 N. W. 60. Whether section hand assumed risk of block falling off front of car and wrecking it. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786. Whether employe knew increased danger of using steel rather than wooden rod to tamp dynamite. O'Brien v. Buffalo Furnace Co. [N. Y.] 76 N. E. 161. Whether defect in rail hook was so obvious that employe knew or ought to have known of it. Drake v. San Antonio & A. P. R. Co. [Tex.] 89 S. W. 407. Whether boy of 17 assumed risk of slipping on oily mill floor, being thereby caused to fall on cogwheels. Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977. Whether plaintiff had such knowledge of danger of tearing down brick archway that he assumed risk. Consolidated Kansas City Smelting & Refining Co. v. Sharber [Kan.] 81 P. 476. Whether mangle operator assumed risk of slipping on defective plank on which she stood and of falling on machine. Busch v. Robinson [Or.] 81 P. 237. Whether danger of cleaning rollers of machine with a stick was so obvious that employe assumed the risk, though he was told to use a stick. Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434. Whether defect in pneumatic riveting tool was such that employe assumed risk of using it, after he had complained of it and foreman had told him it was repaired. Hayward v. Key [C. C. A.] 138 F. 34. Whether carpenter knew that other men were at work near him, and that their signals might be mistaken for his, and whether he assumed the risk of such mistake. Siroi's v. Henry & Sons [N. H.] 59 A. 936. Whether defective key used to fasten pulley wheel to revolving shaft was an obvious and assumed risk. Kalker v. Hedden [N. J. Err. & App.] 61 A. 395. Whether weaver assumed risk, which was not obvious, of shuttle flying out and striking him on account of a guard not being properly fitted to loom. Chambers v. Wampanoag Mills [Mass.] 75 N. E. 1093. Whether locomotive engineer had such knowledge of the habitual negligent running of engines in a railroad yard that he assumed the risk of being struck by one while returning to his engine. Arenschield v. Chicago, etc., R. Co. [Iowa] 105 N. W. 200. Whether plaintiff assumed risk of being struck by bundle of shingles sliding off a table which had no guard rails, while he was assisting in loading the ship. Olsen v. Gray [Cal.] 81 P. 414. Whether boys employed to tend shearing machines understood danger of coming in contact with wheels overhead if they allowed scrap to accumulate in passage where they worked. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. Whether boy driving hogs up a chute should have known of a revolving shaft overhead, and whether he assumed risk of getting his whip caught on it. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721. Whether brakeman assumed risk of coupling cars one of which had a defective coupler. Taylor v. Boston & M. R. Co. [Mass.] 74 N. E. 591. Whether experienced telephone and telegraph lineman assumed risk of insulation breaking on wire he was fastening. New Omaha Thomson-Houston Elec. Light Co. v. Dent [Neb.] 103 N. W. 1091. Whether brakeman had previous notice of close proximity to track of posts of a coal chute by which he was struck. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. Where fireman was injured by derailment of engine caused by defect in track created by wreck of preceding train, no signals to stop being given, whether the risk of such injury was assumed. Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879. Whether car repairer had such knowledge of the necessity of rules for his protection, of the promulgation of such rules and of their habitual violation, that he assumed the risk of repairing cars without displaying signals. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85. Section hand did not as a matter of law assume risk of being thrown from hand car by a sudden stop caused by defective gearing, though he had known of the defect for a week. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Where plaintiff requested a foreman to "set up" his machine and foreman told him he ought to be able to set it up himself, whereupon plaintiff attempted to do so and was injured, whether plaintiff assented or assumed that he was ordered to set up the machine was for the jury. Peterson v. Morgan Spring Co. [Mass.] 76 N. E. 220.

make an inspection to discover latent defects.[72] In other words, negligence of the master, or of his representatives, is not one of the ordinary risks of the employment, which the servant assumes,[73] ordinary risks being only those which due care on the

69. See 4 C. L. 574.

70. Servant may assume place of work is safe and does not assume risk of its being unsafe unless he knows of the danger. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721. Danger from presence of ice near rails not assumed by fireman. Neagle v. Syracuse, etc., R. Co., 109 App. Div. 339, 95 N. Y. S. 884. Passenger engineer may rely on presumption that track is being maintained in reasonably safe condition. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Miner may rely on mine owner's care and doee not assume risk of danger from gases which accumulate through lack of proper ventilation. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Watchman did not assume risk of injury from having his box located too near track by repairers. Philadelphia, etc., R. Co. v. Devers [Md.] 61 A. 418. Risk of falling into hole in pathway used by foundry employe while carrying molten metal was not assumed. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. Brakeman, going between cars to couple them, automatic coupler being out of order, did not assume risk of stumbling over clinker left on track. Missouri, etc., R. Co. v. Keefe [Tex. Civ. App.] 84 S. W. 679. Brakeman who had only taken a certain trip two or three times before and had no knowledge of danger, did not assume risk of being struck by bridge uprights while passing around outer railing of baggage car at night, since he had a right to rely on the master's care for his safety while in performance of his duties. Leach v. Oregon Short Line R. Co. [Utah] 81 P. 90. A brakeman does not assume risk of defect in the track, but may rely on presumption that it is kept reasonably safe. Northern Ala. R. Co. v. Shea [Ala.] 37 So. 796. Railroad employe does not assume risk arising from telegraph pole being placed too close to track. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. Brakeman did not assume risk of defective condition of blocking between main and guard rail, of which he had no knowledge. Pierson v. Chicago & N. W. R. Co., 127 Iowa, 13, 102 N. W. 149. Risk of running into washout caused by defective culvert not assumed by engineer unless he was warned or the danger obvious. Western R. Co. v. Russell [Ala.] 39 So. 311.

71. Bates Mach. Co. v. Crowley, 115 Ill. App. 540; McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641. Risk of defective machine in laundry not assumed. Bartholomew v. Kemmerer, 211 Pa. 277, 60 A. 908. Risk of using handbold defective because of loss of nut not assumed. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Employe did not assume risk of defects in machinery which ran elevator which was not visible. Finnegan v. Samuel Winslow Skate Mfg. Co. [Mass.] 76 N. E. 192. Locomotive fireman did not, as a matter of law, assume risk of using defective step in the cab of his engine. Fry v. Great Northern R. Co. [Minn.] 103 N. W. 733. Servant did not assume risk of using defective "dogs" which failed to hold logs on saw carrier. Moses v. Grant Lumber Co., 114 La. 933, 38 So. 684. A servant does not assume the risk of viciousness on the part of an animal furnished him by the master, unless he has knowledge of such viciousness. Hagen v. Ice Delivery Co., 2 Ohio N. P. 592. Negro boy of 17 did not necessarily assume risk of piece of wood flying from a saw through a hole in a fender and striking him; he had a right to rely on the reasonable safety of the fender. Burns v. Ruddock-Orleans Cypress Co., 114 La. 247, 38 So. 157. Servant did not assume risk of falling through hole in temporary floor built for use of workmen. Merril v. Pike [Minn.] 102 N. W. 393. Boilermaker had right to rely on safety of casting which fell on him, the foreman having observed the preliminary work and failed to warn him. Faith v. New York, etc., R. Co., 109 App. Div. 222, 95 N. Y. S. 774. When brakeman did not know that a tender was not equipped with automatic coupler until he attempted to couple it to a car, he did not assume the risk as a matter of law. Bryce v. Burlington, etc., R. Co. [Iowa] 104 N. W. 483. Though a foreman, in charge of the work of unloading cylinders with a derrick, is under the duty of using due care in the use and arrangement of the appliances, his master owes him the duty of ordinary care to supply a reasonably safe derrick car and track, and he may assume that this duty has been performed. Texas Cent. R. Co. v. George [Tex. Civ. App.] 14 Tex. Ct. Rep. 59, 89 S. W. 1091.

72. See, also, ante, § 3 B. Western R. Co. v. Russell [Ala.] 39 So. 311; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596; Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463; Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818; Flockhart v. Hocking Coal Co., 126 Iowa, 576, 102 N. W. 494; Louisville & E. R. Co. v. Poulter's Adm'r, 87 Ky. L. R. 193, 84 S. W. 576; Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12; Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 44, 86 S. W. 928; Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401; Peck v. Peck [Tex.] 87 S. W. 248.

73. Pressed Steel Car Co. v. Herath, 110 Ill. App. 596; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Mace v. Boedker & Co., 127 Iowa, 721, 104 N. W. 475; Warren v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 585; St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786; Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466; Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85. Existence of master's negligence excludes implication of assumption of risk. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905. Rule as to assumed risk not applicable where master has been negligent in furnishing suitable appliances. Chambers v. Wampanoag Mills [Mass.] 75 N. E. 1093. Brakeman does not assume risk of foreman's negli-

part of the master would not have obviated.[74] But this rule is usually limited in its application to breaches of the master's duty unknown to the servant.[75] If a neglect of duty by the master is known to the servant,[76] or is discoverable by the exercise of ordinary care in the performance of his own duties,[77] and he continues in the employment without complaint,[78] he assumes the risk of so doing, notwithstanding such

gence. Kennedy v. Kansas City, etc., R. Co. [Mo.] 89 S. W. 370. Brakeman did not assume risk of negligent order by conductor to suddenly stop cars upon which he had ordered the brakeman to go. Pittsburgh, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Negligence of foreman in dropping a rod on plaintiff's fingers was not assumed. St. Louis & S. F. R. Co. v. Vestal [Tex. Civ. App.] 86 S. W. 790. Employe did not assume risk of machine starting automatically when she had been told it had been fixed, she having previously complained. O'Neil v. Ginn [Mass.] 74 N. E. 668. Employe loading lumber did not assume risk of withdrawal of signalman when he was injured immediately after such withdrawal. Aleckson v. Erie R. Co., 101 App. Div. 395, 91 N. Y. S. 1029. Railway workman, employed on track, did not assume risk from failure of foreman to give customary warning of approach of trains. D'Agostino v. Pennsylvania R. Co. [N. J. Law] 60 A. 1113. Workman on railway track could rely on warnings by foreman when trains approached, and did not assume risk of foreman's failure to give a warning. Id. Servant, who worked in remodeling building, assumed incidental risks but not the risk of the superintendent's ordering floors to be let down on a pier before it had solidified so that it could sustain the weight. Nugent v. Cudahy Packing Co., 126 Iowa, 517, 102 N. W. 442. Though brakeman assumes ordinary risks of stopping "cut-off" cars in switching, he may assume that the work will be done in the ordinary manner and does not assume risk of conductor's ordering engine stopped before the car on which he has been sent is cut off. Pittsburgh, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Section hand working with crew using mauls to drive spikes assumed the risk of mauls flying off handles on which they had been properly wedged, but not the risk of being struck by mauls from handles improperly wedged. Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982. Where operating gear of elevator became clogged with refuse matter and defendant knew of its condition, plaintiff did not assume the risk of injury from such condition. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486.

74. [See, also, supra, "Dangers incidental to business."] National Enameling & Stamping Co. v. Fagan, 115 Ill. App. 591; Barnett & Record Co. v. Schlapka, 110 Ill. App. 672; Illinois Steel Co. v. Olste, 116 Ill. App. 303; Black's Adm'r v. Virginia Portland Cement Co. [Va.] 51 S. E. 831. Master's negligence is not an incidental risk. Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621. Servant assumes only such incidental risks as remain after master has exercised due care. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280. The servant may assume that the master will exercise for his safety that degree of care imposed on him by law under the circumstances and assumes only such risks as would not be obviated by the exercise of such care. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787.

75. Dangers known to the master and unknown to the servant, and not obvious, are not assumed. Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462.

76. In addition to the incidental risks assumed by the contract of employment, the servant, either by entering or continuing in the service, and using without compiaint defective appliances and machinery, assumes the hazards of such defective appliances and machinery, provided he knew of the defects and also appreciated the danger. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. This doctrine is based on maxim volenti non fit injuria. Id. Negligence of master is assumed, if known. Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012. One who knew that employes engaged in piling lumber were incompetent and had seen defective piles, and had fixed one up, assumed risk of injury from a pile falling upon him. Hull v. Northern Pac. R. Co. [C. C. A.] 136 F. 153. Employe who knew the kind of inspection of a candy making kettle which his employer made, assumed the risk arising therefrom though a different sort of inspection would have made his work less dangerous. Hollingsworth v. National Biscuit Co. [Mo. App.] 88 S. W. 1118.

77. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Though servant may assume that his place of work is reasonably safe and need not make a critical examination, he must exercise ordinary care and observe obvious defects. Erie & W. Transp. Co. v. Gaines, 112 Ill. App. 189. In the case of risks arising from negligence of the master, the servant assumes only such as are obvious, knowledge of which he must necessarily have acquired in the proper performance of his duties. Peck v. Peck [Tex.] 87 S. W. 248. Experienced driver in mine assumed risk of unballasted condition of track when a casual inspection would have disclosed its condition. Flockhart v. Hocking Coal Co., 126 Iowa, 576, 102 N. W. 494. Servant may recover for injuries resulting from defective scaffold unless defects were obvious to a person of his experience and understanding, or were actually known to him. Louisville & E. R. Co. v. Poulter's Adm'r, 27 Ky. L. R. 193, 84 S. W. 576. If a car inspector would have discovered that brakes on a car were not set by the exercise of ordinary care in performing his own duties, he assumed the risk of going between it and another while switching was being done. St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324.

78. St. Louis National Stock Yards v. Morris, 116 Ill. App. 107; McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641; Alton Roller Milling Co. v. Bender, 112 Ill.

neglect of duty by the master,[79] unless he was justified in believing that he could continue with safety, by exercising due care,[80] the danger not being so obvious and imminent that an ordinarily prudent person would not have encountered it by remaining.[81] The doctrine that a servant assumes the risk of a known defect, if he continues without complaint, does not apply where the master expressly agrees to assume responsibility for such defect.[82]

App. 484; Chicago City R. Co. v. Enroth, 113 Ill. App. 285; Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85; Leach v. Oregon Short Line R. Co. [Utah] 81 P. 90; Purkey v. Southern Coal & Transportation Co. [W. Va.] 50 S. E. 755; Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. Quarryman assumed risk of injury in blasting operations. Zeigenmeyer v. Charles Goetz Lime & Cement Co. [Mo. App.] 88 S. W. 139. Experienced mangle operator 22 years old assumed risk of working on mangle with improperly adjusted finger guard, the defect being plainly visible. Butler v. Frazee, 25 App. D. C. 392. Loom operator assumes risk of negligence of a servant of an independent contractor at work in same room, when he continues to work, knowing such other person was also at work. Smith v. Naushon Co., 26 R. I. 578, 60 A. 242. Where employe worked at oiling machinery several months, he assumed risk of injury from unguarded cog wheels. Bryant v. Great Northern Paper Co. [Me.] 60 A. 797. Where employe continued to work with defective "dogs" used with derrick to hoist stones, though four stones had been dropped by the "dogs" on two successive days, and was injured by a stone so dropped on the third day, he could not recover, even though he told the foreman of the defect, the foreman saying no new dogs would be furnished. Talbot v. Sims [Pa.] 62 A. 107. A servant who knows, or by the exercise of ordinary care ought to know, of the neglect of the master to furnish safe machinery or a sufficient number of competent men, and appreciates the danger of continuing to work under those conditions, assumes the risks arising therefrom. Smith v. Armour [Tex. Civ. App.] 84 S. W. 675.

79. One who continues in the employment without complaint after notice of a defect which increases the risk of his work assumes the increased risk. Anderson v. Seropian [Cal.] 81 P. 521. A servant who actually knows of defects and continues to work without complaint or notice to the master assumes the increased hazard in addition to the ordinary risks of his employment. Buey's Adm'x v. Chess & Wymond Co., 27 Ky. L. R. 198, 84 S. W. 563. An employe who with actual or implied knowledge of a defect continues in the employment without protest or promise to repair is held to have acquiesced in, consented to, and assumed the risk. Mumford v. Chicago, etc., R. Co. [Iowa] 104 N. W. 1135.

80. Negligence of master not assumed if servant believed he could continue with safety if he used ordinary care. Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; Shepherd v. St. Louis Transit Co., 189 Mo. 362, 87 S. W. 1007. Whether plaintiff was justified in believing he could continue to work near an unguarded pulley with safety by exercising due care was for jury. Stafford v. Adams [Mo. App.] 88 S. W. 1130.

81. Risk of continuing not assumed unless obvious and imminent. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Hicks v. Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703; Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769. Employe does not assume risk unless risk is obviously so great that inherent probability of injury is greater than that of safety. Jones v. American Warehouse Co. [N. C.] 51 S. E. 106. Knowledge of the incompetency of a fellow-servant will not defeat an action for injuries caused thereby unless the danger was so obvious and imminent that a reasonably prudent man would not have remained. Adams v. McCormick Harvesting Mach. Co., 110 Mo. App. 367, 86 S. W. 484. Employe, injured by sudden starting of spinning frame which he was repairing did not assume the risk though he knew the frame was not equipped with a belt shifter. Pressley v. Dover Yarn Mills [N. C.] 51 S. E. 69. Where servant knew treadle was defective but had called foreman's attention to it and adopted expedient to avoid danger whether he assumed risk was fact question. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010. The servant may be released from the assumption of risk by reporting the defects to the master if the danger of continued use is not such that no prudent person would encounter it. Buey's Adm'x v. Chess & Wymond Co., 27 Ky. L. R. 198, 84 S. W. 563. A mechanic had promised to fix a machine several times but had failed to do so. Whether employe was negligent in continuing to work, knowing that the machine was dangerous, was for the jury. Maines v. Harbison-Walker Co. [Pa.] 62 A. 640. A risk not assumed by the contract of employment but arising during the employment is not necessarily assumed by a servant who remains with knowledge of the danger; the question is ordinarily one of fact. Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769; Whaley v. Coleman [Mo. App.] 88 S. W. 119. Laws 1902, p. 1750, c. 600, § 3, provides that a servant does not necessarily assume a risk by continuing in the employment after discovery of a danger; hence whether a quarryman, who told foreman he was afraid there might be powder in a rock he was told to break, and was assured it was safe, assumed the risk, was for the jury. Di Stefeno v. Peekskill Lighting & R. Co., 107 App. Div. 293, 95 N. Y. S. 179. If the danger is obvious or imminent so that a servant cannot continue to work with safety even though he uses due care, he assumes the risk. Shepherd v. St. Louis Transit Co., 189 Mo. 362, 87 S. W. 1007; Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103. Miner assumed risk of using steel drill instead of gas pipe with a wooden

The servant may also assume that work will be done in the customary manner[83] and that rules will not be violated.[84]

Reliance on orders or assurances of safety.[85]—Unless the danger is obvious and imminent and such that a reasonably prudent person would not have encountered it,[86] a servant does not assume the risk of executing an order of a superior,[87] or of continuing in the employment after an assurance of safety by a superior.[88]

plug to pack powder in hole in blasting and could not recover for injuries in explosion caused by spark from drill. Whaley v. Coleman [Mo. App.] 88 S. W. 119. The doctrine of assumed risk does not apply to a servant confronted with an emergency which does not give him an opportunity to elect whether or not he will remain in the employment in which he is then engaged. Isley v. Wabash R. Co., 5 Ohio C. C. (N. S.) 669.

82. Where foreman induced engineer to take out an engine with cab windows boarded up, assuring him it was all right and that company would be responsible for anything that happened, engineer did not assume risk. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857.

83. Switchman had right to rely on presumption that usual custom of slowing down when approaching him would be followed and did not, as a matter of law, assume risk of being struck. Graham v. Minneapolis, etc., R. Co. [Minn.] 103 N. W. 714.

84. Brakeman, at work on cars on a siding, did not assume risk of violation by other employes of a rule requiring cars left on sidings to be coupled together. St. Louis S. W. R. Co. v. Pope [Tex.] 86 S. W. 5.

85. See 4 C. L. 576.

86. Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 73 N. E. 933. A servant does not assume the risk attendant upon obedience of orders unless the danger was such that no ordinarily prudent person would encounter it. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280. Following direction of superintendent in passing between two machines did not relieve employe from assumption of known risk of getting caught in rollers, even though he consented from fear of losing his position. Dickenson v. Vernon, 77 Conn. 537, 60 A. 270. Employe who put his hand in a box wherein a screw with sharp blades was revolving knowing that cement falling through a chute was liable to push his hand upon the screw, assumed the risk, though the act was at the foreman's suggestion. Vaughn v. Glens Falls Portland Cement Co., 93 N. Y. S. 979. Railroad bridge carpenter with six months experience, who, when ordered to do so by foreman, attempted to haul hand-car by holding on to it with one hand while holding rail of caboose on rear of train with the other, assumed the risk, the danger being obvious. Lee v. Northern Pac. R. Co. [Wash.] 81 P. 834. Where miners were required by rules to inspect for unexploded charges before drilling for a blast, plaintiff was not entitled to rely on a foreman's examination of a hole, made in plaintiff's presence, and on his direction to proceed, but assumed the risk of striking an old charge in the hole. Poorman Silver Mines of Colo. v. Devling [Colo.] 81 P. 252. Employe assumed risk of cutting stay wire which held load of telephone poles in place on a flat car, even though directed by foreman to cut it. Shaver v. Home Tel. Co. [Ind. App.] 75 N. E. 288. When the danger is obvious and the servant has ample time to see and comprehend it, the fact that he is executing an order does not relieve him. Id. Plaintiff, who, with three others, was directed by foreman to carry a heavy timber, objected that four men were not enough, but obeyed the foreman's order. It was held that he knew the danger and assumed the risk of injury, and the order of the foreman did not relieve him. Haywood v. Galveston, etc., R. Co. [Tex. Civ. App.] 85 S. W. 433.

87. Risks involved in carrying out the master's orders are not assumed unless the danger is obvious and such that no prudent man would encounter it. Pressed Steel Car Co. v. Herath, 110 Ill. App. 596. Servant ordered to use dangerous planer did not assume risk. Wells & French Co. v. Kapaczynski, 218 Ill. 149, 75 N. E. 751. Danger of executing a direct command not assumed where servant reasonably believed that he could execute it without injury by exercising due care. Kapaczynski v. Wells & French Co., 110 Ill. App. 477. A servant has the right to presume, in the absence of warning and notice, that in conforming to the order of a foreman he will not be subjected to injury. Shaver v. Home Tel. Co. [Ind. App.] 75 N. E. 288. Where the employer knows of a danger and nevertheless directs an employe to work, the risk is not assumed by the employe unless the danger is obvious and imminent. Illinois Cent. R. Co. v. Keebler, 27 Ky. L. R. 305, 84 S. W. 1167. Girl operator 17 years old did not assume risk of operating machine in a dangerous manner under instructions from the foreman, unless the danger was obvious to one of her age, intelligence, and experience. Mergenthaler-Horton Basket Mach. Co. v. Lyon [Ky.] 89 S. W. 522. Evidence sustained finding that employe did not assume risk of negligence of foreman in charge of remodeling of building, while he was performing the foreman's order. Barrett v. Reardon [Minn.] 104 N. W. 309. Where employe had been accustomed to place a belt on a pulley while it was stationary and was directed to put it on while the pulley was in motion, whether he assumed the risk was for jury. Jones v. American Warehouse Co. [N. C.] 51 S. E. 106. Employe of electric company, ordered to haul up a cable, without being warned as to danger of coming in contact with a switchboard near, did not as a matter of law assume the risk of injury from such contact. Staubley v. Potomac Power Co., 21 App. D. C. 160.

Note: "A servant does not assume the risk involved in carrying out a direct command of the master as to the method of performing certain work, unless he acts as no rea-

Reliance on promise to repair, after complaint.[89]—Where the servant has complained of a defective condition, and the master or his representative has promised to render it safe by proper repairs, the servant may continue in the employment, without assuming the risk,[90] for such length of time as is reasonably necessary for the making of the required repairs[91] unless the appreciated danger is so imminent that a man of ordinary prudence would refuse to encounter it.[92] To bring a case within the operation of this rule, it must appear that a promise was in fact made,[93] and was

sonably prudent person would act under like circumstances. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 657; Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14; Patterson v. Railroad Co., 76 Pa. 389; Snow v. Railroad Co., 8 Allen [Mass.] 441; Keegan v. Kavanaugh, 62 Mo. 230. The servant must know the risks as well as the defects. Consolidated Coal Co. v. Hoenni, 146 Ill. 614. On principle, it would seem that a servant has a right to assume that the master with his superior knowledge of working conditions will not expose him to unnecessary perils and he should not be held to have assumed the risk in obeying a direct command."—3 Mich. L. R. 244.

88. Where a servant complains of a defect and is assured of safety and in reliance on the assurance continues in the employment he does not assume the risk as a matter of law. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857. After a promise to repair a machine and a direction to continue work, a servant may rely to a reasonable extent on the implied assurance that the machine is reasonably safe. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. Servant had right to rely on foreman's assurance that a belt and pulley, complained of as defective the day before, had been repaired. Lynch v. Stevens & Sons Co. [Mass.] 73 N. E. 478. Where the operator of a steel punch struck an unusually hard piece of steel and told his manager who said he would probably strike no more of that kind, the operator did not assume the risk of injury from a particle of steel from a similar hard piece which he struck the next day. Arnold v. Harrington Cutlery Co. [Mass.] 76 N. E. 194. Miner, knowing his place of work was unsafe, not justified in relying on assurance of mine boss that place was safe, the boss being a fellow-servant. Purkey v. Southern Coal & Transp. Co. [W. Va.] 50 S. E. 755.

89. See 4 C. L. 577.

90. Burch v. Southern Pac. Co., 140 F. 270; Anderson v. Seropian [Cal.] 81 P. 521; Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991; Simpson v. Weir & C. Mfg. Co., 116 Ill. App. 286. Fireman did not assume risk of using defective step on cab which engineer had said he would fix. Gulf, etc., R. Co. v. Garren [Tex. Civ. App.] 84 S. W. 1096. Servant, injured while using a defective truck in reliance on a promise made to him to repair it, the injury occurring in a dark place, could recover without proof of ignorance of the defect. Odin Coal Co. v. Tadlock, 216 Ill. 624, 75 N. E. 332. Promise to repair hand car brakes two days before accident, caused by failure to stop car in time, relieved servant of assumption of risk. Foster v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422.

91. Burch v. Southern Pac. Co., 140 F. 270; Foster v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422; Simpson v. Weir & C. Mfg. Co., 116 Ill. App. 286. Servant may continue for a time within which performance of the promise might be reasonably anticipated. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519. A servant is justified in remaining for such a period of time as would be a reasonable allowance for performance of the promise. Maryland Steel Co. v. Engleman [Md.] 61 A. 314.

Question of fact: Where servant complained about a defective roller and worked with it 10 days after a promise to repair it, whether he assumed risk was for jury. Shalgren v. Red Cliff Lumber Co. [Minn.] 104 N. W. 531. Whether 8 or 9 days was reasonable time to allow for putting shields on lubricator of engine held properly left to jury. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519.

92. Burch v. Southern Pac. Co., 140 F. 270; Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519; Simpson v. Weir & C. Mfg. Co., 116 Ill. App. 286; Anderson v. Seropian [Cal.] 81 P. 521; Maryland Steel Co. v. Engleman [Md.] 61 A. 314. Where employe knew and appreciated danger of operating a "jointer" without a guard, he assumed the risk notwithstanding a promise to repair and an express direction to use it. Sattley Mfg. Co. v. Wendt, 116 Ill. App. 375. Promise to repair does not relieve servant when appliance is simple and thoroughly understood by him. McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641. Whether the danger is such that to remain in the employment after a promise to repair constitutes negligence is a **question of fact.** Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. Where servant remained after promise by foreman to replace defective belt and was injured by the bursting of the belt, whether he assumed risk was for jury. Maryland Steel Co. v. Engleman [Md.] 61 A. 314.

93. The rule does not apply where no promise to repair is made. Talbat v. Sims [Pa.] 62 A. 107. A complaint does not relieve the servant of the assumption of the risk if no promise to repair is made. Alton Roller Milling Co. v. Bender, 112 Ill. App. 484. Plaintiff told foreman, "Someone will get caught there yet," and foreman answered, "It takes lots of red tape to do a thing around this corner or around this place rather." Held, this was not a promise to repair on which plaintiff had a right to rely. Simpson v. Weir & C. Mfg. Co., 116 Ill. App. 286.

relied upon by the servant, who was induced by it to continue in the employment.[94] That the servant did rely upon the promise to repair may be inferred from the circumstances.[95] To entitle the servant to rely upon it, the promise must be positive and definite,[96] and must be made by one having authority to make it,[97] but need not be made directly to the servant injured,[98] and need not specify a definite time within which repairs will be made.[99] If no time is fixed, it is presumed that the promise is to make the repairs within a reasonable time.[1] Where a promise is to repair by a definite time, and the time passes without performance, the employe cannot be regarded as remaining in the service thereafter in reliance on the promise.[2]

Risks created by servant.[3]—A servant who unnecessarily adopts a dangerous method of doing work,[4] or violates instructions or orders[5] or fails to perform his own duties,[6] assumes the risk of the resulting danger.

94. Anderson v. Seropian [Cal.] 81 P. 521. It must appear that the employe apprehended danger to himself and relied upon and was induced to remain by the promise to repair. Alton Roller Milling Co. v. Bender, 112 Ill. App. 484. Allegations that defendant promised to make repairs but failed and "refused" to do so are not inconsistent with the theory that the promise to repair induced the servant to remain. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991.

95. Such inference held warranted where plaintiff was injured by defective stamping press, after a promise by defendant to repair it. Anderson v. Seropian [Cal.] 81 P. 521.

96. Where promise was to repair machine after plaintiff had turned out work enough to keep other men going until repairs could be made, the promise was sufficiently definite and certain, and plaintiff could recover where injury occurred the same day the promise was made. Anderson v. Seropian [Cal.] 81 P. 521. Where locomotive engineer complained that there were no lubricator shields on his engine, whether the foreman's statement, "Well, they must be fixed," was a definite promise to repair on which the engineer could rely, was for the jury. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519.

97. Complaint alleging promise to repair held not demurrable for failure to allege what particular agent or officer made the promise. Burch v. Southern Pac. Co., 140 F. 270.

98. Servant may rely on a promise to repair made in his hearing and presence though he has not personally made complaint. Gunning System v. La Pointe, 113 Ill. App. 405. A promise to repair may be relied on though not made directly to the employe injured, if communicated to him by others. Odin Coal Co. v. Tadlock, 216 Ill. 624, 75 N. E. 332.

99. Employe complained of unguarded electric fan and foreman promised to fix it as soon as he could get around to it. Risk not assumed. Fouts v. Swift & Co. [Mo. App.] 88 S. W. 167.

1. A complaint alleging a promise to repair a defective appliance, and a failure to do so, is not fatally defective for not alleging a definite time within which defendant promised to make the repairs, since if no time is stated a reasonable time will be implied. Burch v. Southern Pac. Co., 140 F. 270.

2. Cincinnati, etc., R. Co. v. Robertson [C. C. A.] 139 F. 519.

3. See 4 C. L. 578.

4. Where safe, lighted way out of place of work was provided and servant selected another way out, he assumed the risk of so doing. Geis v. Tennessee Coal, Iron & R. Co. [Ala.] 39 So. 301. Kitchen boy on steamship, ordered to go below for kindling assumed risk of falling, when he unnecessarily opened hatchway. The Esperanza, 133 F. 1015. One who abandoned the ordinary and safe way to get on a car and tried a new way which was liable to become dangerous, assumed the risk. Southern R. Co. v. Lambert, 116 Ill. App. 52. Foreman of switching crew assumed risk of going between cars to couple them, when he was not ordered to do so. Whalin v. Illinois Cent. R. Co., 112 Ill. App. 428. Brakeman assumed the risk where, in giving signals, he stood too close to the track, so that he was caught by a car and crushed. Chicago, etc., R. Co. v. Bryan [Ind. App.] 75 N. E. 678. Employe who knew belt shifter was broken and shaft unguarded assumed the risk of attempting to adjust a belt by climbing up on a ladder, when he was not ordered or directed to do so, and the act was not shown to be a part of his duty. Robertson v. Ford [Ind.] 74 N. E. 1. Where engineer knew bridge was weak and was told to send his engine across alone but nevertheless stayed on the engine, which went through the bridge, he assumed the risk. Welton v. Genesee Lumber Co., 114 La. 842, 38 So. 580. Servants assumed risk of blasting when the method used was within their own control. Hjelm v. Western Granite Contracting Co. [Minn.] 102 N. W. 384. Plaintiff assumed risk of voluntarily adopting a new method of work which was obviously dangerous. Mullins v. Manhattan Brass Co., 93 N. Y. S. 635. Where employe chose path between machinery which he knew to be obstructed, instead of safer route open to him, he assumed the risk. Carbury v. Eastern Nut & Bolt Co. [R. I.] 60 A. 773.

5. Machine operative who was told how to put on and take off cotton, assumed risk of attempting to clear machine, when clogged, without shifting belt. Aziz v. Atlantic Cotton Mills [Mass.] 75 N. E. 73. Brakeman who violates rules and special instructions by going between cars assumed risk. Moore

(§ 3) *G. Contributory negligence. Nature of defense.*[7]—Negligence of a servant which is the sole[8] or a contributing proximate cause[9] of his injury defeats a recovery,[10] though the master was also negligent,[11] and even though the master's negligence exceeded in degree that of the servant.[12] But in some states contributory negligence does not defeat recovery but must be considered by the jury in mitigation of damages.[13] It is usually held that contributory negligence is available as a defense even though the action be based upon a violation of a statutory duty,[14] but the contrary is held in some states.[15] The defense is available in an action brought

v. St. Louis, etc., R. Co. [La.] 38 So. 913. Switchman who violated rule by going between cars to couple them assumed risk even though coupler was defective. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 44, 86 S. W. 928.

6. Where foreman slipped on defective cleats on a gangway and was killed, it being his duty to keep such cleats in repair, and he having worked in the place over 3 years, he was held to have assumed the risk. Baker v. Empire Wire Co., 102 App. Div. 125, 92 N. Y. S. 355.

7. See 4 C. L. 578. See, also, Negligence, 4 C. L. 773.

8. Want of due care by plaintiff held cause of injury from electric shock. Cosgrove v. Kennebec Light & Heat Co., 98 Me. 473, 57 A. 841. Negligence of a yard foreman in placing cars on tracks held the cause of an injury to him by timbers sliding off a loaded car which was struck by others during switching. Wagnon v. Houston & T. C. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 919, 89 S. W. 1112.

9. Negligence of a servant is no defense unless it contributed with defendant's negligence as a proximate cause of the injury. Anderson v. Southern R. Co., 70 S. C. 490, 50 S. E. 202. The servant's negligence must have proximately contributed to produce the injury. St. Louis S. W. R. Co. v. Rea [Tex.] 87 S. W. 324. Instruction that contributory negligence, to defeat recovery, must have proximately contributed to produce the injury sustained. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Charge held to require jury to find that plaintiff's negligence must have been proximate cause of injury to defeat his action. Missouri, etc., R. Co. v. Purdy [Tex.] 86 S. W. 321. Though plaintiff violated a rule by going between cars, this was not the proximate cause of his injury where other employes, with knowledge of his dangerous position, negligently gave the signal to move the cars. Alabama Great Southern R. Co. v. Bonner [Ala.] 39 So. 619. Where section hand was injured by being thrown from a car which stopped suddenly, owing to defective gearing, his failure to use a brake on the car could not have contributed to produce his injury. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. An employe, who is injured by a machine left unguarded in violation of law, cannot be held guilty of contributory negligence, unless his injury was caused by a negligent act of his own and not by the danger created by the violation of law. Hall v. West & Slade Mill Co. [Wash.] 81 P. 915.

10. Instruction charging rule held not misleading or erroneous. Drugalis v. Northwestern Imp. Co. [Wash.] 83 P. 101. Instructions reviewed and held to correctly lay down rule as to contributory negligence. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728. Instruction on master's liability erroneous because omitting qualification that contributory negligence would defeat a recovery. Nickey v. Steuder [Ind.] 73 N. E. 117. Charge held not to authorize verdict against plaintiff unless he himself was found negligent, and not to charge him with responsibility for negligence of his crew. Missouri, etc., R. Co. v. Purdy [Tex.] 86 S. W. 321.

11. The defense of contributory negligence is available, though negligence of the master in furnishing a defective machine shown. Hicks v. Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703; Pressly v. Dover Yarn Mills [N. C.] 51 S. E. 69; Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549. Even though defendant could be considered negligent in precautions taken by it, negligence of employe who walked in front of cars in switch yards was proximate cause of injury. Lewis v. Vicksburg, etc., R. Co., 114 La. 161, 38 So. 92.

12. The comparative negligence doctrine does not obtain in Kansas. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. Instruction to jury laying down "comparative negligence" rule, held erroneous. Denver & R. G. R. Co. v. Maydole [Colo.] 79 P. 1023. Contributory negligence will defeat a recovery, though defendant was negligent, and it is immaterial which party was the more negligent. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173.

13. Instruction that contributory negligence "may" be considered is erroneous, such negligence "must" be considered. Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418.

14. See 4 C. L. 579, n. 90. Engineer, after being on duty 16 hours, was asked to make another run immediately and did so, and after being on duty 15 hours more, was injured in a collision because he had his train on the main instead of a side track. It was held he could not recover, notwithstanding the statute making it a misdemeanor to require more than 16 hours continuous service of railway employes. Smith v. Atchison, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 414, 87 S. W. 1052.

15. Defense of contributory negligence not available against a child under 14 employed in violation of Labor Law § 70. Lee v. Sterling Silk Mfg. Co., 93 N. Y. S. 560. Contributory negligence is no defense to an action for violation of Hurd's Rev. St. 1903, c. 48, § 33, prohibiting employment of children under 14 in certain occupations. American Car & Foundry Co. v. Armen-

under a fellow-servant act.[16] Distinctions between the defense of contributory negligence and that of assumption of risk have already been pointed out.[17]

Degree of care required of servant.[18]—Only ordinary care is required,[19] that is, such care as ordinarily prudent persons would exercise under the same circumstances.[20] Whether that degree of care was exercised in a particular instance is

traut, 214 Ill. 509, 73 N. E. 766; Id., 116 Ill. App. 121. Contributory negligence is no defense to an action based on a willful violation of the mines act. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294. Where mine operator failed to comply with Laws 1899, pp. 315, 317, §§ 16, 18, the fact that a miner went into a room known to him to be dangerous was no defense to an action for his injuries. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375.

Note: "The Illinois courts in a long line of decisions have consistently adhered to the position above taken. The great weight of authority, however, is contrary to the Illinois view. Railway Company v. Craig [C. C. A.] 73 F. 642; Taylor v. Manuf'g Company, 143 Mass. 470, 10 N. E. 308; Holum v. Railway Co., 80 Wis. 299, 50 N. W. 99; Coal Co. v. Muir, 20 Colo. 320, 38 P. 378. Many of the Illinois cases cited in the principal case confuse the doctrines of contributory negligence and assumed risk. See 4 Mich. L. R. 165. The distinction is well brought out in Railway Co. v. Baker [C. C. A.] 91 F. 224. There a federal statute required railroad companies to furnish certain appliances and expressly provided, that on injury resulting from failure to do so, the defence of assumed risk should not be available to the railroad company. The court nevertheless permitted the defence of contributory negligence to be introduced."—4 Mich. L. R. 241. See, also, note on distinction between assumption of risk and contributory negligence, supra.

16. Defense of contributory negligence is available in actions under the North Carolina railroad fellow-servant law. Biles v. Seaboard Air Line R. Co. [N. C.] 52 S. E. 129.

17. See § 3 F, supra.

18. See 4 C. L. 579.

19. Passenger engineer required only to exercise ordinary care for his own safety. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Brakeman, standing on track giving signals to engineer, was under duty of using ordinary care to look out for other trains. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523.

20. Person with defect in his walk is not required to exercise a higher degree of care than others, but must observe that degree of care which ordinarily prudent persons would exercise under the same circumstances. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863.

Servant held guilty of contributory negligence: Where injury to miner due to an accumulation of gas was proximately contributed to by his own failure to make a "breakthrough" to secure ventilation, he could not recover. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440. Where girl had worked at table in bakery where machines were guarded, and was changed to one where they were unguarded, a fact readily observed, and while there put her arms into such machinery unnecessarily she could not recover. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6. Motorman whose duty it was to look out for other trains so as to pass them safely was negligent in running through a fog without knowing the whereabouts of a train coming towards him. Vinson v. Los Angeles Pac. R. Co. [Cal.] 82 P. 53. Employe negligent in going upon a truss to remove certain timbers in course of construction of building, when, if he had used ordinary care, he would have seen the truss was liable to fall. McElwaine-Richards Co. v. Wall [Ind.] 76 N. E. 408. Signal telegraph operator, who had been carried to place of work, knew his train was late and that another train could not easily be seen or heard on account of the noise or darkness. He was also warned, but he stepped on another track and was struck and killed. He could have alighted on the other side. He was guilty of contributory negligence. Baltimore, etc., R. Co. v. Clapp [Ind. App.] 74 N. E. 267. Servant who knew lumber pile was dangerous was guilty of negligence in voluntarily removing lumber from it. Brooks v. Joyce Co., 127 Iowa, 266, 103 N. W. 91. Where plaintiff slipped on board remnants which he had himself placed on the floor and fell on a saw, his own negligence caused his injury. Witten v. Bell & Coggeshall Co., 27 Ky. L. R. 580, 85 S. W. 1094. Employe negligent in not getting out of the way of a timber which swung against him while being raised by a derrick. Carmony v. Louisville & N. R. Co., 27 Ky. L. R. 948, 87 S. W. 319. No recovery where employe walked in front of train while crossing switch yards, keeping no lookout for trains. Lewis v. Vicksburg, etc., R. Co., 114 La. 161, 38 So. 92. Where brakeman's own carelessness caused him to be injured while turning the switch in making a running switch, he could not recover, even though running switches were forbidden by the rules when avoidable. Williams v. Illinois Cent. R. Co., 114 La. 13, 37 So. 992. Evidence held to show operator of ripsaw guilty of negligence in not standing in the proper place. Dutchowski v. Handy Things Co. [Mich.] 104 N. W. 358. Baggageman killed by switch train, while transferring baggage from one train to another, held negligent as matter of law in getting in the way of the switch train. Greenlaw v. Louisville & N. R. Co. [Tenn.] 86 S. W. 1072. Plaintiff, who knew machine had knives in it, and who used his hands instead of a scoop to clear away shavings, was negligent. Nashville Spoke & Handle Co. v. Thomas [Tenn.] 86 S. W. 379. Employe, at work under a bridge which was being repaired, who heard signal to get out from under it but paid no attention to it, could not recover for injuries caused by the bridge being let down on him, though he did not know it had been jacked up. Robinson v. Fort Worth, etc., R. Co. [Tex.] 13 Tex. Ct. Rep. 118, 87 S. W. 667. Servant who walked into lye vat and was fatally

ordinarily a question of fact for the jury.[21] In determining the question, the sur-

injured held guilty of contributory negligence, where it appeared he had worked on premises six years and was familiar with them and with the working of the vat, whether the vat was obscured by clouds of steam at the time or not. Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 13 Tex. Ct. Rep. 359, 85 S. W. 1006. Section hand, who had been a railroad man for years and had gotten on and off cabooses of the kind in question many times, was negligent in stepping off on a dark night without finding out what kind of a step it had. Texas & P. R. Co. v. Hemphill [Tex. Civ. App.] 86 S. W. 350. No recovery by brakeman who, while off duty, tried to board switch engine at night by standing on the track and jumping on running board as engine came toward him. Wise Terminal Co. v. McCormick [Va.] 51 S. E. 731. Where operator of printing press went into a pit under it to make repairs, and though familiar with the place, and knowing that he could not stand up in it, attempted to do so and got his hair caught, an injury resulting, his own negligence was held the proximate cause of his injury. Newport News Pub. Co. v. Beaumeister [Va.] 52 S. E. 627. Employe of shipbuilder negligent when he voluntarily stood under a heavy suspended steel plate. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089. No recovery for death of brakeman, making a flying switch, where he gave the signal to go ahead and to the switchman to turn the switch before he had uncoupled the car he was on. Stevick v. Northern Pac. R. Co. [Wash.] 81 P. 999. Intelligent employe who knew there were knives in a machine, though he did not know their location, was negligent in putting his hand inside. Gardner v. Paine Lumber Co., 123 Wis. 338, 101 N. W. 700.

Servant held not guilty of contributory negligence: Where plaintiff was injured by falling of crust of pile of ore in which he was digging, evidence tending to show freedom from contributory negligence held sufficient to support judgment of lower court. Illinois Steel Co. v. Olste, 214 Ill. 181, 73 N. E. 422. Where during engineer's absence an employe in another department took water from a hot water well and did not properly replace the cover, the engineer was not negligent in stepping on it on his return, thereby going through and being scalded. Levens v. Bancroft, 114 La. 105, 38 So. 72. Failure to ask for a plug to hold a belt shipper would not defeat a recovery, under Rev. Laws, c. 106, § 77, where employe had not been told of use of plug, and a plug would not have prevented the injury if used. Lynch v. Stevens & Sons Co. [Mass.] 73 N. E. 478. Servant held not negligent in manner of handling joist at time he was injured by falling through hole in temporary floor. Merril v. Pike [Minn.] 102 N. W. 393. Evidence sufficient to show due care by plaintiff, injured by defective brace for ladder on which he stood to clean vat. Haidt v. Swift & Co. [Minn.] 102 N. W. 388. Employe held not negligent in coming in contact with unguarded electric fan. Fouts v. Swift & Co. [Mo. App.] 88 S. W. 167. Evidence held sufficient to show brakeman, struck and killed by overhead bridge the first time he went over the line, was exercising due care, though there was no direct evidence to show his conduct at the time. Miller v. Boston & M. R. Co. [N. H.] 61 A. 360. Employe, injured while repairing spinning frame which he knew did not have a belt shifter, the machine starting suddenly, was not negligent merely because he did not entirely remove the belt. Pressly v. Dover Yarn Mills [N. C.] 51 S. E. 69. An engineer after discovering that cattle are on the track, doing all that a man of ordinary prudence can do to avoid an accident, is not guilty of contributory negligence. Isley v. Wabash R. Co., 5 Ohio C. C. (N. S.) 669. When engineer was injured in collision with cars on the main track, evidence held sufficient to show he was not negligent in ascertaining the place where he was to stop. International & G. N. R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847. Brakeman held not to have knowledge of defect in brake rod and not to have been negligent in using it to set brakes. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21. Employe injured by negligent operation of pile driver. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. Employe held not negligent as matter of law in crossing track in yards without stopping to look and listen when no bell was rung. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Brakeman not negligent in using handhold on manhole of engine tender which gave way and caused him to fall under tender. Wood's Adm'x v. Southern R. Co. [Va.] 52 S. E. 371.

21. Contributory negligence held a question for the jury: Whether employe was guilty of negligence in using pneumatic riveting tool, after he had told foreman it was out of repair, and foreman had promised to repair it and later told him it had been repaired. Hayward v. Key [C. C. A.] 138 F. 34. Operator of boring machine injured by bit. Buehner Chair Co. v. Feulner [Ind.] 73 N. E. 816. Boy of 14 injured by being caught between elevator and floor where an entrance left an open space. Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 75 N. E. 1053. Where a railroad company carried its employes to and from work in one of its trains, it was not negligence per se on the part of an employe to go on top of the car, with others, the car being overcrowded, Whether he was justified in so doing being for the jury. Chicago Terminal Transfer Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133. The mere fact that telltales were hung to give warning that a viaduct was being approached was not a bar to a recovery for the servant's death by being struck by the viaduct, whether deceased knew of the viaduct being a disputed question. Id. Whether molder's helper, who had not had much experience, was negligent while making repairs on a crane. Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462. Miner injured while leaving cage at bottom of shaft. Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751. Car repairer struck by switch engine in yards. Hughes v. Iowa Cent. R. Co. [Iowa] 103 N. W. 339. Boy of 16 injured while operating

rounding circumstances,[22] the respective duties of the master and servant,[23] and the

unguarded saw. Woolf v. Nauman Co. [Iowa] 103 N. W. 785. Roundhouse employe caught in switch frog and injured by wheel. Schroeder v. Chicago, etc., R. Co. [Iowa] 103 N. W. 985. Whether servant, told to use a stick to clean rollers, was negligent in using one too thick to go between the rollers. Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434. Boy driving hogs up chute got whip caught on revolving shaft overhead. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721. Section hand who stood sidewise on car owing to its crowded condition and lost his balance as he turned his head, not negligent as matter of law. Foster v. Chicago, etc., R. Co., 127 Iowa, 84, 102 N. W. 422. Weaver struck by shuttle flying off, guard on loom being defective. Chambers v. Wampanoag Mills [Mass.] 75 N. E. 1093. Brakeman injured while attempting to cut off car with defective coupler. Taylor v. Boston & M. R. Co. [Mass.] 74 N. E. 591. Whether deceased was guilty of contributory negligence in use of car step while switching cars. Smith v. Thomson-Houston Elec. Co. [Mass.] 74 N. E. 664. Injury to employe cleaning exposed gears of frame. Fountaine v. Wampanoag Mills [Mass.] 75 N. E. 738. Where plaintiff was injured by iron bar rolling off truck in the course of work being done under direction of a superintendent. Meagher v. Crawford Laundry Mach. Co. [Mass.] 73 N. E. 853. Employe riding on top of a house car on his way from work, the roadmaster consenting to his being there to watch the tools, was not guilty of negligence as a matter of law, so as to prevent a recovery for injuries caused by a collision on a spur track. Milbourne v. Arnold Elec. Power & Station Co. [Mich.] 12 Det. Leg. N. 177, 103 N. W. 821. Whether boy of 16 was negligent in operation of saw, the adjustment of which had been changed. Johnson v. Crookston Lumber Co. [Minn.] 103 N. W. 891. Whether brakeman was negligent in going between cars to uncouple them, the coupler being defective, but rules prohibiting going between cars. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225. Plaintiff injured while putting belt on pulley, using his foot to save himself from injury. Dolson v. Dunham [Minn.] 104 N. W. 964. Brakeman injured by board having been left on top of car. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. Where miner walking home fell into unguarded ditch near the track. Hebert v. Interstate Iron Co. [Minn.] 102 N. W. 451. Boy of 17 injured while operating elevator, which had defective cable and gearing, the boy having followed method of former operators. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Bridge builder fell from scaffold where iron instead of wooden beams were used. Shore v. American Bridge Co. [Mo. App.] 86 S. W. 905. Section hand knew of defect in car gearing a week before he was injured. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Miner, injured by fall of mine roof, had knocked out a prop the day he was hurt. Wojtylak v. Kansas & T. Coal Co., 188 Mo. App. 260, 87 S. W. 506. Employe injured in trying to pull a stick out of an unguarded pulley, the stick knocking his hand on a saw. Stafford v. Adams [Mo. App.] 88 S. W. 1130. Whether brakeman, coupling moving cars, should have known of another car with which they collided. Kennedy v. Kansas City, etc., R. Co. [Mo.] 89 S. W. 370. Plaintiff was injured by fall of platform which he knew had been built by a servant known to him to be incompetent, he having failed to inspect or test the structure. Adams v. McCormick Harvesting Co., 110 Mo. App. 367, 86 S. W. 484. Where servant was injured in switching operation. Holmes v. Chicago, etc., R. Co. [Neb.] 103 N. W. 77. Experienced lineman killed by breaking of insulation on wire he was fastening. New Omaha Thomson-Houston Elec. Light Co. v. Dent [Neb.] 103 N. W. 1091. Employe at work in ditch killed by cave-in. Overbaugh v. Wieber, 94 N. Y. S. 644. Plaintiff injured, while under engine to clean ash pan, by another servant starting the engine. Lane v. New York, etc., R. Co., 94 N. Y. S. 988. Whether railroad employe could have seen a defect in a trestle plank on which he stepped in time to avoid injury. Wazenski v. New York, etc., R. Co., 180 N. Y. 466, 73 N. E. 229. Brakeman struck by engine while walking between tracks. Loomis v. Lake Shore & M. S. R. Co., 182 N. Y. 380, 75 N. E. 228. Whether deceased exercised due care in crossing track in shop where he was killed by train. Hickey v. Solid Steel Casting Co., 212 Pa. 255, 61 A. 798. Where ignorant girl was injured in mangle the first time she used that particular machine. Bartholomew v. Kemmerer, 211 Pa. 277, 60 A. 908. Inexperienced, uninstructed operator of planer had fingers cut off while working on cross grained timber. Texarkana Table & Furniture Co. v. Webb [Tex. Civ. App.] 86 S. W. 782. Plaintiff's fingers injured while assisting foreman in fitting driving rod of engine to cross head. St. Louis & S. F. R. Co. v. Vestal [Tex. Civ. App.] 86 S. W. 790. Car inspector caught between cars. Texas Cent. R. Co. v. Phillips [Tex. Civ. App.] 13 Tex. Ct. Rep. 2, 87 S. W. 187. Elevator operator hurt by getting arm between bar on cage and block through which cable ran. Peck v. Peck [Tex.] 87 S. W. 248. Whether bell of switch engine was rung, and whether engine wiper, struck by cars, heard, or ought to have heard, it. Ft. Worth, etc., R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 34, 87 S. W. 371. Whether switchman who claimed his foreman had promised to keep a lookout was negligent in failing to keep a lookout or give signals himself. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. Whether brakeman was negligent in attempting to mount a car in the way he did. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Brakeman injured while coupling cars. Southern Const. Co. v. Hinkle [Tex. Civ. App.] 89 S. W. 309. Brakeman, piloting engine through yards on dark night injured by collision with cars. Missouri, etc., R. Co. v. Purdy [Tex.] 86 S. W. 321. Employe killed by explosion of throttle valve of steam engine. Johnston's Adm'r v. Moore Lime Co. [Va.] 52 S. E. 360. Whether employe was negligent in assisting to move cars to place

age, experience, and capacity of the servant,[24] are to be considered. Mere knowledge of a defective condition does not charge a servant with negligence as a matter of law,[25] unless the danger was obvious and imminent.[26]

Choice of methods.[27]—Needless exposure to danger is negligence;[28] hence, a

of safety, the train having been stopped by a landslide. Fisher's Adm'r v. Chesapeake & O. R. Co. [Va.] 52 S. E. 373. Where it was customary in yards of a furnace to leave a switch open while making a trip with slag down a track, whether decedent and his fellow-servant were negligent in doing so on the occasion in question was for the jury. Virginia Iron, Coal & Coke Co. v. Lore [Va.] 51 S. E. 371. Engineer killed in collision. Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310. Common laborer in mill got hand caught in unprotected cog wheels. Hansen v. Seattle Lumber Co. [Wash.] 83 P. 102. Employe injured while loading logs on cars because of alleged defective loading appliance. Hart v. Cascade Timber Co. [Wash.] 81 P. 738. Where lineman spliced electric wire without informing superintendent, who was testing dynamo. Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589.

22. Surrounding circumstances and instinct of self preservation must be considered. Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37.

23. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. Where it was foreman's duty to keep cleats on gangway, there could be no recovery for his death where he slipped on defective cleats. Baker v. Empire Wire Co., 102 App. Div. 125, 92 N. Y. S. 355. If death of miner was caused by his failure to prop the mine, as his duty and instructions of his boss demanded, his representative could not recover. Straight Creek Coal Co. v. Haney's Adm'r, 27 Ky. L. R. 1117, 87 S. W. 1114. In action for injuries in street car collision, whether servants were negligent in failing to report violation of general orders, or in relying on special order, for jury. Nagle v. Boston & N. St. R. Co. [Mass.] 73 N. E. 1019. Under Laws 1902, p. 1750, c. 600, § 3, failure of an operator of a machine to inform the employer of a defect does not bar recovery, if the superintendent knew of the defect. Keating v. Coon, 102 App. Div. 112, 92 N. Y. S. 474. Employe in laundry, with supervisory power over girls working at machine with her held not chargeable with care of machine, hence, she could recover for an injury caused by slipping on a defective plank on which she was obliged to stand. Busch v. Robinson [Or.] 81 P. 237.

24. Boy must use care required of a reasonably prudent person of his age, judgment, and experience. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869. Care required of boy of 17 is that ordinarily exercised by persons of the same age, experience, and intelligence. Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977. Boy only chargeable with degree of care ordinarily exercised by boys of his age, experience, and capacity. Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664. There is a prima facie presumption that a child under 14 cannot be guilty of contributory negligence. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. Jury should be charged, in action for injuries to a boy, that his age and appearance should be considered on the issue of contributory negligence, and whether he had been sufficiently instructed. Keating v. Coon, 102 App. Div. 112, 92 N. Y. S. 474. Instruction that plaintiff, 20 years of age, was bound to use that degree of care ordinarily used by men of his "age and experience" held proper. Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112. Where plaintiff had not been instructed as to the use of a machine, and was young and inexperienced, and was injured by placing his hand too near the rollers of a dangerous machine, he was not guilty of contributory negligence as a matter of law, though a proper use of his eyesight and judgment would have shown him the danger. Flickner v. Lambert [Ind. App.] 74 N. E. 263.

25. If servant is justified in believing he can continue and avoid injury by due care, he is not negligent. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. One who works with a defective appliance is not necessarily negligent in so doing. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857. Elevator boy who knew elevator was not running right, but did not know nature of defect or danger, was not negligent as a matter of law in operating it. Moylon v. McDonald Co. [Mass.] 74 N. E. 929. Whether employer who stepped through a hole in the floor of which she had notice, though it had been there only two days, was negligent, was for jury. Day v. Emery-Bird-Thayer Dry Goods Co. [Mo. App.] 89 S. W. 903. Employe in sawmill was directed to clear away debris, the accumulation of which was caused by the breaking down of a machine, and in so doing got his foot caught in cogs, partially covered by the debris. Whether he was guilty of contributory negligence was a question of fact, though he knew the cogs were there, since forgetfulness of the fact might be excusable under the circumstances. Viohl v. North Pac. Lumber Co. [Or.] 80 P. 112.

26. To continue in an employment in the face of obvious or imminent danger is negligence. Shepherd v. St. Louis Transit Co., 189 Mo. 362, 87 S. W. 1007; Blundell v. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103.

27. See 4 C. L. 581.

28. Employe who unnecessarily got off an engine in the dark to get sand, which was not required, and fell with his hand on the track so that the engine ran over it, could not recover. Walker v. Louis-Werner Sawmill Co. [Ark.] 88 S. W. 988. Servant who put his hand under a stone, which was being unloaded from a car with a crane, held negligent. Culver Const. Co. v. McCormack, 114 Ill. App. 655. Employe working in yards, who was struck by a train on a track upon which he voluntarily stepped, could not recover. Fore v. Chicago & A. R. Co. [Mo. App.] 89 S. W. 1034. Servant familiar with machine held negligent in attempting, unnecessarily, to repair a machine while in

voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is available, is negligence,[29] though other servants adopt the same method.[30] But choice of a customary method is not ordinarily negligence.[31] Choice of a certain method is not negligence if the servant does not know of a safer method,[32] or if the one chosen is made dangerous by negligence of a superior.[33]

Reliance on master's care.[34]—A servant is not negligent in relying upon the presumption that the master has performed his duties with respect to the place of work and appliances[35] unless he has actual or implied knowledge to the contrary.[36] He

motion. Corley v. Paducah Cooperage Co. [Ky.] 89 S. W. 512. No recovery for death of member of steam shovel crew when it was not shown that it was necessary for him to be at the place where he was when killed. Baker's Adm'r v. Lexington & E. R. Co. [Ky.] 89 S. W. 149. No recovery where danger from contact with revolving fan was obvious and plaintiff got closer to it than necessary. Electrical Installation Co. v. Kelly, 110 Ill. App. 334. Employe who without necessity and carelessly stepped on a wheel just as engine started could not recover. El Paso & S. W. R. Co. v. Kelley [Tex.] 13 Tex. Ct. Rep. 60, 87 S. W. 660. Repairman held negligent in putting his hand between piston and cylinder, being caught by the machine suddenly starting. Dickey v. Dickey [Mo. App.] 86 S. W. 909. Servant who voluntarily undertook to put belt on moving shaft, though he was warned by fellow-servants, and lost an arm, could not recover. Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 135 F. 216.

29. Covington v. Smith Furniture Co., 138 N. C. 374, 50 S. E. 761. Selection of unsafe method when safe way is open, under no direction from employer, is negligence. Leard v. International Paper Co. [Me.] 60 A. 700. Plaintiff was negligent in voluntarily adopting a new method of work which was dangerous. Mullins v. Manhattan Brass Co., 93 N. Y. S. 635. Where dining car conductor had car pushed by an engine to a junction, when he might have placed the engine ahead, he could not recover for injuries received in a collision. Southern R. Co. v. Logan [C. C. A.] 138 F. 725. Where employe chose dangerous way to fix a belt when he could have done it safely, he was negligent. Stratton v. Nichols Lumber Co. [Wash.] 81 P. 831. Employe who attempted to clean out sawdust receptacle while saw was in motion, though saw could have been stopped, could not recover for resulting injury. Beltz v. American Mill Co., 37 Wash. 399, 79 P. 981. Workman employed by contractor on steamship attempted to use a ladder, which had been temporarily used and left hanging on ship's side, instead of going on board by gangway as he was told to do. The Patria, 135 F. 255. No recovery where servant took dangerous path between machines obstructed with boxes, and continued after lights went out. Carbury v. Eastern Nut & Bolt Co. [R. I.] 60 A. 773. Plaintiff properly nonsuited where she put her hand into a dangerous machine to clean it while in motion though she knew that to do so was dangerous, and had formerly cleaned it when not in motion. Owens v. Thomas Kent Mfg. Co., 211 Pa. 406, 60 A. 987. Employe held negligent in attempting to change the adjustment of a saw without stopping it, where the circumstances were such that he knew or ought to have known of the danger. Hubler v. Johnson-McLain Co. [Neb.] 105 N. W. 247. Where miner used steel drill instead of customary gas pipe with wooden plug to pack powder, he could not recover for injuries caused by explosion, resulting from a spark being struck off by the drill on rock. Whaley v. Coleman [Mo. App.] 88 S. W. 119. Machinist who chose a dangerous way to test rollers when he could have made the test in a safe manner could not recover for an injury to his fingers by being caught in the rollers. Carey v. Samuels & Co. [Ky.] 88 S. W. 1052. Where employe rode on engine pilot instead of on cars, as he might have done, he could not recover for injuries sustained while getting off before the train stopped. Burns v. Chronister Lumber Co. [Tex. Civ. App.] 87 S. W. 163. Brakeman who sat on engine tender floor and let his legs hang between that and next car, though directed to sit in cab, could not recover for injury resulting. Demko v. Carbon Hill Coal Co. [C. C. A.] 136 F. 162. No recovery by employe being carried on flat car who hung legs over car and shifted them so he was struck by cattle guard, which was of safe construction. Chicago Terminal Transfer R. Co. v. Schiavone, 216 Ill. 275, 74 N. E. 1048. Where plaintiff was struck and injured by a cross rail on an ore car, while walking along track on a path which a rule of the company prohibited use of, there being three other exits which he could have used, and the one chosen being obviously dangerous, he could not recover. Tkac v. Maryland Steel Co. [Md.] 60 A. 618.

30. The fact that a servant adopts an unsafe method of doing work, in conjunction with other servants, does not relieve him from responsibility. Leard v. International Paper Co. [Me.] 60 A. 700.

31. Miner not negligent in using cage in the usual way to go to his work. Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196, Foundry employe who fell into a hole in a pathway while carrying molten metal in a foundry was not negligent in walking backwards, that being the customary manner of doing the work. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440.

32. Plaintiff not negligent in making a coupling in a certain way when he did not know of another safer way. Denison & P. S. R. Co. v. Binkley [Tex. Civ. App.] 87 S. W. 386.

33. Rule does not apply where method chosen is rendered dangerous by a foreman's negligence. St. Louis & S. F. R. Co. v. Vestal [Tex. Civ. App.] 86 S. W. 790.

34. See 4 C. L. 582.

35. Chicago & A. R. Co. v. Bell, 111 Ill.

may also rely upon an assurance of safety by a superior,[37] and may assume that execution of an order given by a superior will not expose him to any unusual danger,[38] unless he has knowledge of the danger involved, and such known danger is one which an ordinarily prudent person would not encounter under the same circumstances.[39]

App. 280. In the absence of obvious and patent defects, a servant may use a scaffold supplied by the master without first inspecting it. Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359. Employe not negligent in using ladder one rung of which was bent, since he was justified in relying on master's care. Carroll v. Metropolitan Coal Co. [Mass.] 75 N. E. 84. Employe, who leaned on a plank on a gravel car without looking to see whether both ends were in the forks of the standards, was not negligent as a matter of law. Brimer v. Chicago, etc., R. Co., 109 Mo. App. 493, 85 S. W. 653. Switchman not negligent as matter of law when he was struck by a train which he supposed would slow down on approaching him according to the usual custom. Graham v. Minneapolis, etc., R. Co. [Minn.] 103 N. W. 714. Plaintiff bad right to rely on reasonable safety of platform used in repairing scow, and was not negligent in using it. Madden v. Hughes, 93 N. Y. S. 324. Boilermaker, killed by falling casting, was not negligent where foreman had observed preliminary work and did not warn him of danger. Faith v. New York, etc., R. Co., 109 App. Div. 222, 95 N. Y. S. 774. No negligence on part of servant in failing to take precautions against a defective shaft, the condition of which he did not know. Smith v. Minden Lumber Co., 114 La. 1035, 38 So. 821. Plaintiff held not negligent in using scaffold, the defects not being obvious. Neves v. Green [Mo. App.] 86 S. W. 508. Where folding machine had been repaired on employe's complaint, she was not negligent in supposing it would not start of itself, and in acting on that theory. O'Neil v. Ginn [Mass.] 74 N. E. 668. Clerk who leaned into elevator shaft in answer to employer's call, and to get instructions from him, it being customary to talk through the shaft, was justified in assuming that the elevator would not be moved upon her. Guthrie v. Carney, 27 Ky. L. R. 861, 86 S. W. 1126. Where a workman, in the discharge of his duty has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning is given, whether he was negligent cannot be decided against him by the court. D'Agostino v. Pennsylvania R. Co. [N. J. Law] 60 A. 1113. Failure to observe the gradual wearing out of a belt and a tendency to slip off its pulley, the defect not having become obvious, was not contributory negligence. Petrarca v. Quidnick Mfg. Co. [R. I.] 61 A. 648. Brakeman who fell between cars which were suddenly separated was not negligent in assuming that a rule requiring cars to be coupled when left on sidings had been observed, and the cars looked as though they were coupled. St. Louis S. W. R. Co. v. Pope [Tex.] 86 S. W. 5.

36. Plaintiff who had knowledge of another servant's incompetency had no right to rely on a presumption that platforms set up by such servant were properly built. Adams v. McCormick Harvesting Co., 110 Mo. App. 367, 86 S. W. 484. Employe who fell through unguarded hoisting shaft in building in course of construction cannot be held guilty of negligence as a matter of law, merely because his duties had caused him to visit different floors of the building for several days. Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 N. Y. S. 1.

37. Servant may believe statement of boss that place of work is safe. Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664. Where superintendent in charge ordered building to be let down from jack screws on a pier, and assured the servant so ordered that the pier was safe, the servant was not negligent in doing as he was told. Nugent v. Cudahy Packing Co., 126 Iowa, 517, 108 N. W. 442. Where a hole was loaded during a quarry employe's absence, and on his return he asked the superintendent if it was loaded, and was told it was not, the employe was not negligent in drilling in the hole, since he had a right to rely on the superintendent's assurance. Lane Bros. & Co. v. Bott [Va.] 52 S. E. 258. Fireman held not negligent in using step on cab which engineer had said he would have fixed. Gulf, etc., R. Co. v. Garren [Tex. Civ. App.] 84 S. W. 1096.

38. Brakeman not negligent in obeying order to catch car while switching where a collision with another car resulted. Struble v. Burlington, etc., R. Co. [Iowa] 103 N. W. 142. Evidence sustained finding of no contributory negligence where employe was obeying foreman's orders. Barrett v. Reardon [Minn.] 104 N. W. 309. Engineer directed by foreman to clean appliance for handling hot pitch, was justified in relying on presumption that it was safe for him to proceed as directed. Motzing v. Excelsior Brewing Co., 94 N. Y. S. 1118. Member of construction crew held not negligent in going between cars to couple air hose without notice to train crew of his position, when he acted under orders of a foreman of the crew. Sorenson v. Oregon Power Co. [Or.] 82 P. 10. To recover for alleged negligence in ordering plaintiff into a place of danger, plaintiff must prove by a preponderance of evidence that he was acting under orders which he was bound to obey, that his superior knew of the danger and that he did not, and that he was exercising due care. Wiggins Ferry Co. v. Hill, 112 Ill. App. 475.

39. Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 73 N. E. 933. Where employe was assured by superintendent that his assistant was competent and relied thereon, he was not negligent in remaining at work unless the incompetency of the servant and the danger therefrom were such that an ordinarily prudent man would not have continued. Bell-Coggeshall Co. v. Lewis [Ky.] 89 S. W. 135. Employe who, at foreman's suggestion, put his hand in a box wherein he knew a screw with sharp blades was revolving, knowing also that his hand was liable to be pushed against the knives

Disobedience of orders or rules.[40]—Disobedience or nonobservance of orders, instructions, or warnings,[41] or reasonable,[42] existing[43] rules,[44] is ordinarily held negligence and will defeat a recovery if an injury resulted proximately therefrom.[45]

Emergencies.[46]—One exposed to sudden and unexpected danger, caused by negligence of the master, is not responsible for an error of judgment in attempting to escape.[47] Whether one exposed to such danger used due care is a question of fact.[48]

by cement falling through the chute, was negligent. Vaughn v. Glens Falls Portland Cement Co., 93 N. Y. S. 979. Where an employe complained that an appliance was defective and the superintendent informed him it was safe, whether he was negligent in using it was for the jury. Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549. Where servant objected to going on stone pile because he thought it unsafe, and foreman told him to go on and get stone, and workman did so and was injured, whether he was guilty of contributory negligence in continuing to work was for the jury. Schiglizzo v. Dunn, 211 Pa. 253, 60 A. 724. Where servant complained of defective roller, and after a promise to repair it was made to him, worked 10 days before he was injured, his negligence was for the jury. Shalgren v. Red Cliff Lumber Co. [Minn.] 104 N. W. 531. Whether operator of machine was negligent in working after he knew treadle was defective, but had told foreman about it and had adopted expedient to lessen danger, was for jury. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010.

40. See 4 C. L. 583.

41. Where servant failed to follow warning and instruction in blasting in slate quarry, he was guilty of negligence and could not recover. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708. Girl who wore hair in long braid, contrary to warning notices posted in factory, could not recover for injury by being caught by hair in a machine. Daniels v. New England Cotton Yarn Co. [Mass.] 74 N. E. 332. Plaintiff could not recover for alleged negligence, consisting in improper instruction on operation of machine, where the evidence showed that the accident must have occurred because he failed to follow the instructions given. Thayer v. Utica Knitting Co. [N. Y.] 75 N. E. 577.

42. A rule pursuant to R. S. 1901, 1219, § 31, making it unlawful for miners to violate rules, must be reasonable. Junction Min. Co. v. Ench, 111 Ill. App. 346. A rule that miners should never leave their place of work is unreasonable. Id. Leaving the place of work on account of sickness is not a willful violation. Id.

43. Where evidence tended to show that rules designed for protection of car repairers had been habitually disregarded, whether deceased was guilty of contributory negligence in failing to display a signal on cars he was working on, was for jury. Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85.

44. Disobedience of rules of the employer resulting in the injury is generally held to constitute contributory negligence. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225; Biles v. Seaboard Air Line R. Co. [N. C.] 52 S. E. 129. If employe injured by fall of elevator was using it at the time contrary to orders, he could not recover. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. In action for death of engineer caused by washout, whether he had been negligent in that he failed to take precautions required by rules in case of heavy rains was for the jury. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Where car repairer was at work under a car without having displayed a blue signal as required by a rule of the company in such case, there could be no recovery for his death resulting, while he was so engaged, from the car being pushed by others which were being switched. Canadian Pac. R. Co. v. Elliott [C. C. A.] 137 F. 904. When conductor in charge of train which became stalled on a grade failed to comply with rule requiring him to send back a flagman, he was guilty of negligence and there could be no recovery for his death resulting from a collision. Burris v. Minneapolis, etc., R. Co. [Minn.] 103 N. W. 717.

45. A warning not to dig ore at a particular place in the pile will not prevent recovery for injury from falling of a crust, when the employe was assisting in moving a barrow of ore along a track at a different point. Illinois Steel Co. v. Olste, 214 Ill. 181, 73 N. E. 422. Where engineer of work train took water on the main track on the time of a passenger train, in violation of rules, he was not negligent, since he gave notice by sending out a flagman with a torpedo and turning the switch light. Illinois Cent. R. Co. v. Stith's Adm'x, 27 Ky. L. R. 596, 85 S. W. 1173.

46. See 4 C. L. 583.

47. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566. Where one is placed in a place of danger through the master's negligence, he is not chargeable with contributory negligence in placing himself in a more dangerous position in an endeavor to escape. Junction Min. Co. v. Ench, 111 Ill. App. 346. Plaintiff held not negligent where, to avert a threatened collision, he attempted to reverse his cars according to his foreman's orders, and then jumped across another track, where he was struck by another train. Western & A. R. Co. v. Bryant [Ga.] 51 S. E. 20. Where a workman in a tunnel was placed in a dangerous place by the master's negligence, the fact that he jumped the wrong way in an effort to escape a falling rock did not show contributory negligence as a matter of law. McRae v. Erickson [Cal. App.] 82 P. 209. Employe not negligent as a matter of law where, knowing that a telephone pole was about to fall, and hearing a warning by his foreman, jumped away and was injured, though he would not have been injured had he remained where he was. Sandquist v. Independent Telephone Co., 38 Wash. 313, 80 P. 539. Where the injury complained of is the result of an effort to escape a sudden and impending danger, result-

Discovery of servant's peril; intervening negligence.[49]—Though a servant has been guilty of negligence in placing himself in a position of peril, the master will be liable for an injury resulting from a want of ordinary care to avoid injury to him.[50] The doctrine of discovered peril has no application where the person causing the injury has no actual knowledge of the peril of the person injured in time to prevent the injury by means within his reach.[51]

(§ 3) *H. Actions.* 1. *In general.*[52]—Only questions of procedure peculiar to actions to recover for personal injuries to servants are here treated. The general principles which govern procedure in all actions of this nature are elsewhere discussed.[53]

Notice of the action is required under some statutes.[54]

(§ 3H) 2. *Parties.*—The law as to parties to the action is the same as that applicable to other actions and need not be here stated.[55]

(§ 3H) 3. *Pleading and issues. The complaint or petition*[56] must show the existence of the relation of master and servant,[57] and the existence and breach of a duty owed by the master to the servant at the time of the injury alleged.[58] A mere

ing from negligence of the master, the fact that the person injured might have escaped by pursuing some other available course is not alone proof of contributory negligence. Dolson v. Dunham [Minn.] 104 N. W. 964. The fact that a brakeman might have used a safer method of coupling cars than he did use did not make him negligent as a matter of law, where he was acting in an emergency which he had not anticipated. Chicago & A. R. Co. v. Walters, 217 Ill. 87, 75 N. E. 441.

48. Whether one exposed to sudden danger exercised that degree of care that a prudent and reasonable man would exercise under like circumstances. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566. The degree of care required depends upon circumstances. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12.

49. See 4 C. L. 584.

50. Master liable if he knew or ought to have known of servant's peril and negligently injured him. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842. Evidence held insufficient to show wanton negligence of engineer and firemen on switch engine after discovering brakeman's dangerous position, and hence an instruction on that theory was error. McGillis v. Duluth & N. M. R. Co. [Minn.] 104 N. W. 231.

51. Cardwell v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 458, 88 S. W. 422. Though a locomotive engineer knew the conductor was riding on the pilot of the engine, he was not bound to anticipate an injury by his falling off while the train was being operated in the usual way, since he had the right to assume that the conductor knew the danger of his position and would act accordingly. Cardwell v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 458, 88 S. W. 422. Where employe voluntarily rode on engine pilot and was injured in getting off, the mere fact that the engineer saw him getting off and then tried to stop the train did not raise the issue of discovered peril. Burns v. Chronister Lumber Co. [Tex. Civ. App.] 87 S. W. 163. Whether engineer of standing train could have moved it so as to prevent a collision, after notice of the coming of another train, was for jury. Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310. No recovery on theory of negligence after discovery of peril where brakeman, off duty at night, tried to board switch engine coming toward him. Wise Terminal Co. v. McCormick [Va.] 51 S. E. 731.

52. See 4 C. L. 584.

53. See Damages, 5 C. L. 904; Evidence, 5 C. L. 1301; Parties, 4 C. L. 888; Pleading, 4 C. L. 980; Instructions, 6 C. L. 43; Trial, 4 C. L. 1708; Verdicts and Findings, 4 C. L. 1803; Venue and Place of Trial, 4 C. L. 1797; etc.

54. No notice of action for wrongful death, under Code Civ. Proc. § 1902, is required, and though a complaint under that act alleges the giving of the notice required by the employer's liability act, proof of such notice is not required to warrant a recovery. Holm v. Empire Hardware Co., 102 App. Div. 505, 92 N. Y. S. 914. Notice by administratrix of deceased employe, more than 60 days after her appointment, is insufficient under Laws 1902, p. 1748, c. 600, § 2. Id. Notice of injury held insufficient where the first name of the person injured was incorrect, and the notice stated that the alleged defective machine was "all out of plumb" of which there was no proof, and no attempt was made to prove that defendant was not misled by the notice. Hughes v. Russell, 93 N. Y. S. 307. Notice held insufficient because not showing with certainty the place and cause of injury. Miller v. Salvay Process Co., 109 App. Div. 135, 95 N. Y. S. 1020.

55. See Parties, 4 C. L. 888; Death by Wrongful Act, 5 C. L. 945.

56. See 4 C. L. 585; also Pleading, 4 C. L. 980.

57. Allegation that plaintiff was employed as boss or foreman sufficiently alleged the nature of the employment. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566.

58. Complaint held not to show a breach of duty by one of two defendants sued. Jones v. Klawiter, 110 Ill. App. 31. Complaint which failed to allege existence of relation of master and servant, or facts showing that defendant owed plaintiff any

allegation of duty is insufficient. Facts showing a duty to exist must be pleaded.[59] Allegations of negligence must be sufficiently certain and specific to inform the defendant of the nature of plaintiff's claim,[60] though a general averment of negligence is sufficient, on demurrer, if the facts alleged disclose a legal duty and a violation thereof.[61] Knowledge of a defective or dangerous condition by the master must be made to appear.[62] A complaint is demurrable if it shows on its face that

duty held insufficient. Walton v. Lindsay Lumber Co. [Ala.] 39 So. 670. Complaint insufficient to charge breach of duty to warn and instruct, when it merely alleged that plaintiff was 14 years of age, and failed to allege facts showing he was ignorant or inexperienced. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277. Complaint demurrable because not showing that plaintiff was required by his duties to be near a pile of wares which fell on him. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. In action for injury to pressman, complaint held to show that plaintiff's duties while trying to discover defect required him to be in a pit under the press where he was when injured. Newport News Pub. Co. v. Beaumeister [Va.] 52 S. E. 627. Complaint alleging use of defective and rotten rope sling for loading lumber into vessel, held to state a breach of duty by defendant, though it also erroneously alleged that defendant owed plaintiff the duty of furnishing the best and safest slings available. Henne v. Steeb Shipping Co., 37 Wash. 331, 79 P. 938.

59. Allegations sufficient, after verdict, to show relation of master and servant existed. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. It need not be alleged that a certain act or line of conduct was a duty imposed on the master by law. The legal duty is implied if the required facts are stated. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91.

60. In an action based on an injury to plaintiff's hand, caught in rollers of a machine, complaint held to sufficiently allege the respect in which the machine was defective, in what particulars defendant had failed to exercise reasonable care in putting plaintiff to work upon it (failure to instruct), and that negligence alleged caused the injury. Anderson v. U. S. Rubber Co. [Conn.] 60 A. 1057. An allegation that in making a coupling the engine ran from 10 to 15 miles an hour, and just before hitting the cab stopped abruptly, causing plaintiff to fall and to receive his injury, stated a cause of injury as against a general demurrer. Louisville & N. R. Co. v. Hairston [Ga.] 50 S. E. 120. Complaint charging negligence in failure to properly support mine roof, held sufficiently definite and certain. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. Complaint held sufficient to charge defendant with negligence in using a defective guy on a derrick, which caused a stone to be rolled from a dump car on to decedent, who was pushing the car. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695. Complaint alleging inexperience and ignorance of danger, and that servant was assured of safety by the master, and was injured in consequence of the master's negligence, held sufficient. Fletcher Bros. Co. v. Hyde [Ind. App.] 75 N. E. 9. Complaint alleging negligence in leaving switch open, resulting in engineer's death, held sufficiently specific as to defects charged. Cleveland, etc., R. Co. v. Snow, [Ind. App.] 74 N. E. 908. In action based on injuries from defective machinery, complaint held, after verdict, to sufficiently allege the nature of the defect. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. A charge that a bolt was not inspected does not alone charge negligence, when it is not alleged that the bolt was defective. Furber v. Kansas City Bolt & Nut Co., 185 Mo. 301, 84 S. W. 890. Petition for injuries to brakeman not defective for failure to give name of conductor or number or description of car. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21. A declaration setting up several acts of negligence, and alleging that each was the proximate cause of the injury, is not demurrable, but defendant may, under Va. Code 1904, § 3249, have the declaration made more specific. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449. Complaint alleging that a saw was defective, that plaintiff complained and defendant promised to repair it, and that plaintiff was thereafter injured before repairs were made, held to allege negligence with sufficient certainty. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991. Complaint charging negligence in the employment and retention of an incompetent engineer, and setting up two prior occasions when he had been negligent, held sufficient against demurrer. Conover v. Neher-Ross Co., 38 Wash. 172, 80 P. 281.

61. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. General allegation of negligence is sufficient to withstand demurrer for want of facts. Remedy is by motion to make more specific, if more facts are desired. Nickey v. Steuder [Ind.] 73 N. E. 117.

62. When a recovery is sought for alleged negligence in providing a safe place, knowledge of the defect by the master must be alleged. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838. Complaint based on failure to repair held insufficient, because not directly alleging that master had notice of the defect, nor setting up necessary facts to show constructive notice. Malott v. Sample [Ind.] 74 N. E. 245. Where the action is based on a defective appliance, knowledge of the defect by the master must be alleged. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010. Complaint in action for injuries to telephone lineman, who fell from cross arm of pole, which alleged that he carefully examined the cross arm and discovered no defect, the cross arm being painted, but which did not allege that defendant knew of the defect but only that it ought to have known it, was insufficient. Southern Bell Telep. & Tel. Co. v. Starnes [Ga.] 50 S. E. 343.

Contra: Where the declaration alleges in-

the servant assumed the risk[63] or was guilty of contributory negligence,[64] or that the act of a fellow-servant caused the injury.[65] There is a conflict as to the necessity of positive averments of want of contributory negligence[66] and nonassumption of risk. Thus, in some states, an allegation by plaintiff of want of knowledge of a defect causing the injury is unnecessary;[67] in others, such an allegation is essential.[68] A general allegation of lack of knowledge by plaintiff includes constructive as well as actual notice.[69] An allegation that plaintiff was ignorant of the danger is unavailing, where the facts alleged show that he must have known the danger.[70] It must appear from the pleading that the negligence alleged was the proximate cause of the injury.[71] An allegation that plaintiff was placed in a position of peril is sufficient without alleging the facts causing the peril.[72]

jury by reason of the failure of the master to provide a safe place, it need not be alleged that the master knew the place of work was unsafe. Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142.

63. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. A complaint which alleged that plaintiff had no knowledge or opportunity of learning of the capacity of a hand car did not show as a matter of law that he assumed the risk of riding on a car on which ten men were riding. Anderson v. Great Northern R. Co. [Minn.] 103 N. W. 1021. Complaint alleging that a mangle operator was injured by reason of a defective plank on which she was required to stand, and which caused her to slip, and fall on the mangle, held not objectionable, after verdict, as showing an assumption of the risk. Busch v. Robinson [Or.] 81 P. 237.

64. Complaint alleging injury by fall of piece of iron because appliance used to handle it was insufficient, held not to disclose contributory negligence. Moseley v. Schofield Sons Co. [Ga.] 51 S. E. 309. Allegations of complaint sufficient to show brakeman, struck by cars while switching, was in the exercise of due care. Pope v. Great Northern R. Co. [Minn.] 103 N. W. 331.

65. Complaint alleging an injury due to the wagon, in which plaintiff was riding at the direction of defendants, falling into an excavation left unguarded by defendants, held insufficient because not showing that the driver was not plaintiff's fellow-servant, nor that the driver did not know of the existence of the excavation. Marker v. Mishawaka [Ind. App.] 74 N. E. 19.

66. Under a common-law count plaintiff must allege and prove freedom from contributory negligence. Junction Min. Co. v. Ench, 111 Ill. App. 346. Plaintiff need not allege want of contributory negligence. Newport News Pub. Co. v. Beaumeister [Va.] 52 S. E. 627.

67. In Missouri a plaintiff need not allege that the defect complained of was unknown to him. Adams v. McCormick Harvesting Mach. Co., 110 Mo. App. 367, 86 S. W. 484.

68. Want of knowledge of defect in place must be alleged. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838. Complaint not alleging ignorance of unsafe condition of switch tracks, held defective. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. Ignorance of defects must be alleged in order to negative assumption of risk. Complaint held sufficient. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. An allegation that plaintiff believed a place would be safe is not equivalent to an allegation of want of knowledge of a defect. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838. Complaint held sufficient to negative knowledge and assumption of risk of defective derrick and guy. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695. Where employe was struck by train as he was alighting from another, an allegation that deceased did not know the train which hit him was approaching was sufficient to negative knowledge of danger. Baltimore, etc., R. Co. v. Clapp [Ind. App.] 74 N. E. 267. Servant suing for injuries received while at work in a pit under the track must allege and prove want of knowledge of facts which rendered the place dangerous. Chicago & A. R. Co. v. Bell, 111 Ill. App. 280. Plaintiff must allege and prove that he was not aware of the danger. Willie v. East Tennessee Coal Co., 27 Ky. L. R. 335, 84 S. W. 1166.

69. In action for injuries due to use of defective swivel used to tighten cable, allegation that plaintiff "had no knowledge whatever of said defects, cracks, or the old and worn condition of said swivel," held sufficient. George Doyle & Co. v. Hawkins, 34 Ind. App. 514, 73 N. E. 200. An allegation of want of knowledge of defective condition of mine roof held to negative not only actual but implied or constructive notice or knowledge of such condition. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818.

70. Shaver v. Home Tel. Co. [Ind. App.] 75 N. E. 288.

71. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277. Complaint must show causal connection by direct averment of facts. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. Complaint which failed to show alleged defective condition was caused by defendant's negligence, held insufficient. Walton v. Lindsay Lumber Co. [Ala.] 39 So. 670. Complaint alleging in substance that a scaffold furnished was defective, that it collapsed while being used by plaintiff, he being in the exercise of due care, held sufficient after verdict, no demurrer being interposed, though it contained no specific averment that the scaffold collapsed because of its defective condition. Illinois Terre Cotta Lumber Co. v. Hanley, 214 Ill. 243, 73 N. 373. Complaint in action for death of mine watchman, who was shot and killed by convict miner, alleging negligence in that convict was allowed to carry a pistol and allowed to escape, held not to show negli-

Pleading statutory causes of action.[73]—A party who relies on a statutory cause of action must by positive and direct averments of facts show that the action falls within the particular statutory provision upon which he relies.[74] If from the general averments of a complaint it clearly appears that it counts upon a statute, it need not specifically refer thereto in order to state a cause of action thereunder.[75] If a complaint states both a statutory and common-law cause of action, plaintiff may recover upon either and cannot be compelled to elect before trial.[76] Where the statutory notice is alleged, but the cause of action stated is one at common law and not under the statute, the allegation of notice may be regarded as surplusage.[77] Other decisions as to pleadings in actions brought under statutes are treated in the note.[78]

The answer.[79]—The defenses of contributory negligence[80] and assumption of

gence of defendant to be the proximate cause of death of watchman, an independent cause having intervened. Thomas v. Sloss-Sheffield Steel & Iron Co. [Ala.] 39 So. 715.

72. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566.

73. See 4 C. L. 589.

74. Complaint held not to show cause of action under any provision of Burns' Ann. St. 1901, § 7083. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. A party who seeks to maintain an action under a statute must state or allege specifically and fully every act requisite to bring his cause of action within the provisions of the statute on which he relies. No omission in this respect will be supplied by intendment. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277.

75. Complaint alleging negligence in failing to guard a ripsaw held to state a cause of action, under Burns' Ann. St. 1901, § 7087i, requiring machinery and appliances to be guarded, and not to be based on the common law. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288. Complaint alleging that machine was dangerous because knives were left unguarded, that it was practicable to guard them, and that defendant negligently failed to do so, and that such negligence caused plaintiff's injury, states cause of action under Burns' Ann. St. 1901, § 7087i, and not at common law. Huey Co. v. Johnston [Ind.] 73 N. E. 996.

76, 77. Kleps v. Bristol Mfg. Co., 107 App. Div. 488, 95 N. Y. S. 337.

78. Alabama: Complaint under Code 1896, § 1749, subsec. 5, defective because it did not allege that the person charged with negligence was in charge of an engine on a railroad. Tennessee Coal, Iron & R. Co. v. Bridges [Ala.] 39 So. 902. Count held insufficient because not showing that engine was on any track. Id. A count drawn under the mines law (Code 1896, p. 555, c. 43) following substantially the language of the statute, and alleging that a mine roof was defective and that a part of it fell, as a proximate result of which plaintiff was injured while in a place where he had a right to be, is sufficient. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898.

Indiana: A complaint alleging that a shaft was left unguarded does not charge negligence under Burns' Ann. St. 1901, § 7081l, unless the necessity of guarding it in order to protect the workmen is shown. Robertson v. Ford [Ind.] 74 N. E. 1. A complaint under Burns' Ann. St. 1901, § 7087i, alleging a failure to guard an emery belt, held insufficient because not showing that such belt could be properly guarded without rendering it useless. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277. Complaint based on failure to guard ripsaw as required by Burns' Ann. St. 1901, § 7087i, need not allege that plaintiff did not know that saw was unguarded, or that he did not see and comprehend such danger as arose from its condition. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288. Pleading held to allege sufficiently that plaintiff was injured through negligence of a person in the service of defendant to whose orders to make certain repairs plaintiff was bound to, and did, conform, and to state cause of action under Burns' Ann. St. 1901, § 7083, subd. 2. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838. Complaint held to allege sufficiently that injury complained of was caused by negligence of a person in defendant's service, to whose order plaintiff was bound to and did conform, though it did not allege that such person knew of plaintiff's presence in the place where he was injured, such knowledge being implied from the giving of the order. Clear Creek Stone Co. v. Carmichael [Ind. App.] 73 N. E. 935. Complaint insufficient under Burns' Ann. St. 1901, § 7087b, prohibiting employment of children under 14, etc., which alleges that plaintiff was 14, but fails to allege that defendant did not keep a register or obtain an affidavit as required by the act. La Porte Carriage Co. v. Sullender [Ind.] 75 N. E. 277.

Massachusetts: Complaint founded on Rev. Laws, c. 106, § 71, cl. 1, requiring ways, works and machinery to be kept in order, held not to charge negligence in allowing elevator gate to get out of repair. Hill v. Iver Johnson Sporting Goods Co. [Mass.] 74 N. E. 303. A count alleging negligence of a superintendent, under Rev. Laws, c. 106, § 71, cl. 2, is improperly joined with a count alleging a defect in ways, works, or machinery, under § 71, cl. 1. Hyde v. Booth [Mass.] 74 N. E. 337.

Wisconsin: Complaint held to state cause of action under Wisconsin fellow-servant statute, where injury to brakeman, who had fallen on the track while engaged in switching operations, was alleged to have been caused by foreman's negligence in failing to stop cars before they struck him. Pope v. Great Northern R. Co. [Minn.] 103 N. W. 331.

79. See 4 C. L. 588.

risk[81] must be specially pleaded. A plea of contributory negligence may be sufficient though it does not expressly admit that defendant was negligent.[82] But such a plea is insufficient unless the facts claimed to constitute contributory negligence are set out.[83] A plea that the risk arising from a defect was assumed must allege that the servant was warned or that the danger was open and obvious.[84]

Issues, proof, and variance.[85]—Negligence must be proved as alleged.[86] There can be no recovery for negligence other than that alleged,[87] and proof of negligence not alleged is inadmissible.[88] If several acts of negligence are sufficiently al-

80. Laws 1887, p. 81, c. 33, requires defendant to plead and prove contributory negligence. Where there is no such plea, and a prima facie case of negligence of defendant, the case should go to the jury. Stewart v. Raleigh & A. Air Line R. Co., 137 N. C. 687, 50 S. E. 312. In an action for injuries alleged to have been caused by incompetency of a servant, the defense that plaintiff knew of such incompetency, and was negligent in remaining in the service in view of such knowledge, must be specially pleaded. Adams v. McCormick Harvesting Co., 110 Mo. App. 367, 86 S. W. 484.

81. Issue of assumption of risk held sufficiently raised by answer so that it was properly submitted to jury. Charping v. Toxaway Mills, 70 S. C. 470, 50 S. E. 186. A plea that plaintiff knew that unusual and heavy rains had rendered roadbed defective, so that it might become dangerous, notwithstanding defendant's care, and that plaintiff's injury was a risk which he voluntarily assumed, held sufficient to raise the issue of assumption of risk. Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858.

82. Plea sufficient which alleged that servant negligently placed too great a weight on a certain crossbeam of a scaffold, since there was a sufficient implied admission of weakness of the crossbeam. Charping v. Toxaway Mills, 70 S. C. 470, 50 S. E. 186.

83. Plea of contributory negligence insufficient in action for death of engineer by running into washout. Western R. Co. v. Russell [Ala.] 39 So. 311.

84. Plea of assumption of risk insufficient in action for death of engineer by running into washout. Western R. Co. v. Russell [Ala.] 39 So. 311. Plea insufficient because not alleging that defect was known or obvious. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566.

85. See 4 C. L. 588.

86. Where complaint charges defects in machinery and that defendant had notice thereof, proof that saws wobbled, without proof of knowledge thereof by defendant, is insufficient. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. No recovery could be based on an allegation of failure to provide a safe place where the entire complaint showed that the injury was caused by a defective appliance. Moseley v. Schofield Sons Co. [Ga.] 51 S. E. 309. While injury in loading trucks is alleged and the proof shows injury in loading wheels of truck, the variance is not fatal. Roundtree v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 231. Complaint in action for injuries caused by fall of scaffold construed and held that gravamen of cause stated was not the partial driving of nails in a brace; hence, recovery possible, though that fact was not proved. Neves v. Green, 111 Mo. App. 634, 86 S. W. 508. Where it was alleged that a belt shifter was defective so that a machine started automatically, and thereby crushed plaintiff's hand, proof that there could have been no accident unless machine had been defective did not warrant recovery. McGinn v. U. S. Finishing Co. [R. I.] 60 A. 677. No recovery on ground of negligence in retaining incompetent servant, who started machinery while plaintiff was inside, where proof showed that such servant had been found asleep and was occasionally drowsy but it did not appear that he was in such condition when he started the machine. Burnos v. American Sugar Refining Co., 94 N. Y. S. 1104. Where a car repairer was injured by a runaway car on a switch track, and the petition charged negligence in leaving the car where it could start and in not having a derailing switch, and leaving the car in such condition that it could not be stopped when started, the proof was held sufficient, though the evidence showed the car had been started by employes and that it could not be stopped because timbers had been placed where they interfered with the brakes. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679.

87. Right of recovery should be restricted to the specific act of negligence pleaded. Gibson v. Midland Bridge Co., 112 Mo. App. 594, 87 S. W. 3. When the declaration is based on a breach of a common-law duty, there can be no recovery under a statute. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49. Failure to make rules and regulations could not be relied on because not pleaded. Jemming v. Great Northern R. Co. [Minn.] 104 N. W. 1079. Where plaintiff charged that his injury was caused by a piece of the hammer he was using flying off and striking his eye, proof that his injury was so caused was essential to recovery. Proof that a chip from the boiler, rivet, or firebox struck him would not warrant recovery. Lachappelle v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 90 S. W. 349. Where complaint charged negligence in failing to warn and instruct a young and inexperienced employe who was put to work on dangerous machine, want of repair not being alleged, there could be no recovery where the evidence showed that the machine was dangerous because out of repair. Chall v. Detroit Stove Co. [Mich.] 12 Det. Leg. N. 73, 103 N. W. 513.

88. Where the complaint specifies grounds of negligence, the proof will be confined to the facts pleaded. Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915. Allegation that drawbar and appliances for coupling were defective, etc., held broad

leged in the complaint, proof that the injury complained of was caused by one or more of such acts will justify a recovery.[89] When a complaint charges negligence generally and contains also specific acts or omissions constituting the same kind of negligence, proof of acts or omissions not specified in the complaint will not warrant recovery.[90] When two or more proximate causes contribute to produce an injury, and more than one of such causes are pleaded, proof of any one cause for which the master is responsible is sufficient.[91] A variance may be cured by an amendment after verdict.[92]

(§ 3H) 4. *Evidence. Burden of proof and presumptions.*[93]—The burden is upon plaintiff to prove negligence of the master as alleged,[94] and that such negligence was the proximate cause of the injury or damage suffered,[95] and that the relation of master and servant existed.[96] It is held by many courts that mere proof

enough to admit evidence of absence of grab iron and purpose of such an appliance. Belt R. Co. v. Confrey, 111 Ill. App. 473. Evidence of a failure to warn plaintiff that a train, on which he was a fireman, must be stopped is inadmissible, under a declaration alleging failure to warn him of the displacement of a rail caused by a wreck. Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879. Ordinance inadmissible when it tended to support a theory other than that relied on. Lobstein v. Sajotovich, 111 Ill. App. 654. Where complaint alleged failure to maintain the roof of a mine entry in reasonably safe condition, but did not allege failure to inspect, evidence of a want of inspection was inadmissible. Choctaw, etc., Co. v. O'Nesky [Ind. T.] 90 S. W. 300. Where failure to give "necessary and suitable" orders is charged, evidence of the giving of improper or negligent orders is inadmissible. Sanks v. Chicago & A. R. Co., 112 Ill. App. 385. Where failure to furnish props for a mine roof was not complained of, evidence of a general shortage of props and that other miners had failed to obtain them when they asked for them was inadmissible. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506. Evidence that chain or wire slings are customarily used in loading lumber and are safer than rope slings is inadmissible where the negligence charged is use of a defective rope sling, and it appears that the employe knew of and did not object to use of rope. Henne v. Steeb Shipping Co., 37 Wash. 331, 79 P. 938. Where negligent use of defective and rotten rope sling for loading lumber was alleged, evidence that the sling was overloaded was admissible. Id. Where complaint alleged that deceased was employed in a dangerous place and a dangerous occupation, plaintiff could prove that deceased was directed to do work outside the scope of his employment and was so engaged when fatally injured. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. Under a general allegation of negligence in operating a train, evidence as to whether the engineer caused the whistle to be blown before entering a cut is admissible. Louisville & N. R. Co. v. Jones [Fla.] 39 So. 485. Negligence in giving signals being charged, evidence that the man giving them had knowledge of plaintiff's position was admissible. Alabama Great Southern R. Co. v. Bonner [Ala.] 39 So. 619.

89. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. Defective handle on handcar, and broken cog wheel, alleged. Proof of defective handle alone warranted recovery. Southern I. R. Co. v. Hoggatt [Ind. App.] 73 N. E. 1096.

90. Where complaint charged failure to instruct operative and failure to guard machine, proof that the treadle of the machine was defective would not warrant recovery. Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010.

91. Where defect in turntable, and negligence of fellow-servant in operating it, were alleged, proof of the first charge warranted recovery. Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915.

92. Where complaint alleged an injury to have been caused by a defective head or top of a planing machine, and the proof showed a defective lock screw holding the top to have been the cause, an amendment alleging that the lock screw was defective cured the variance and was properly allowed after verdict. Franke v. Hanly, 215 Ill. 216, 74 N. E. 130.

93. See 4 C. L. 590; also Evidence, 5 C. L. 1301.

94. Burden is on plaintiff to show existence of defects and that injuries resulted therefrom. Trigg v. Ozark Land & Lumber Co., 187 Mo. 227, 86 S. W. 222. Burden on plaintiff, a brakeman injured by stepping in hole in track bed made in course of repairs to prove absence of rules and regulations for his protection. Smith v. Boston & M. R. Co. [N. H.] 61 A. 359. The competency of servants is presumed, and the burden is upon the servant to prove a fellow-servant incompetent, and that the master had notice of it. Fact that servant told superintendent he had never worked in a factory does not show notice of incompetency to strike a block held by another servant while tamping a floor. Wilkinson Co-op. Glass Co. v. Dickinson [Ind. App.] 73 N. E. 957.

95. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506; Kennedy v. Kansas City, etc., R. Co., 190 Mo. 424, 89 S. W. 370; Hendrix v. Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; Missouri, etc., R. Co. v. Greenwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 10, 89 S. W. 810. Defendants not liable for injury to plaintiff by breaking of plank on which he stepped when evidence did not in any way connect defendants with the plank or its being in the place where plaintiff would walk on it. Hogan v. Strauss, 93 N. Y. S. 850.

96. Burden is on plaintiff to show he was

of the occurrence of an accident does not alone raise a presumption of negligence on the part of the master,[97] and that the doctrine res ipsa loquitur is inapplicable in an action by a servant against the master to recover for personal injuries.[98] Other courts hold that proof of the fact of injury is sufficient to take the issue of negligence to the jury,[99] though it does not relieve plaintiff of the burden of proof

defendant's servant. Larson v. Centennial Mill Co. [Wash.] 82 P. 294.

97. Vissman v. Southern R. Co. [Ky.] 89 S. W. 502; Fuller v. Ann Arbor R. Co. [Mich.] 12 Det. Leg. N. 348, 104 N. W. 414; Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482; Venbuvr v. Lafayette Worsted Mills [R. I.] 60 A. 770. Mere happening of accident raises no presumption of negligence; plaintiff must show how accident happened by a fair preponderance of evidence. Jones v. Scranton Coal Co. [Pa.] 61 A. 117. Breaking of cable used in unloading vessel not alone evidence of negligence on part of ship. The Tresco, 128 F. 780. Mere fact of explosion of compressed air tank is not proof of negligence of master. Omaha Packing Co. v. Murray, 112 Ill. App. 233. Mere fact that maul flew from handle and struck plaintiff does not warrant finding that defendant was negligent in furnishing tools. Deckert v. Wabash, R. Co., 111 Mo. App. 117, 85 S. W. 982. Verdict properly directed for defendant where staging fell, injuring plaintiff, but there was no other evidence of negligence. Bergman v. Altman, 127 Iowa, 693, 104 N. W. 280. Doctrine res ipsa loqultur not applicable where plaintiff was struck by rock sliding down a hill in a quarry. Thompson v. California Const. Co. [Cal.] 82 P. 367. Mere fact that freight elevator fell killing a servant is not proof of the master's negligence. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. Fact that handle on milk can gave way not alone sufficient to prove defendant's negligence. Schapiro v. Levy, 101 App. Div. 444, 91 N. Y. S. 1044. Mere proof that pulley fell from shaft, striking plaintiff, not proof of defendant's negligence. Griffin v. Flank, 95 N. Y. S. 546. When presence of railroad torpedo on a car was not explained, the master was not as a matter of law liable to a car repairer injured by an explosion caused by throwing a wrench down on the torpedo. Fuller v. Ann Arbor R. Co. [Mich.] 12 Det. Leg. N. 348, 104 N. W. 414. The existence of a defect in an engine causing it to move of itself, and knowledge thereof by defendant, must be proved; negligence will not be inferred from the happening of an injury by the starting of the engine. Fordyce v. Key [Ark.] 84 S. W. 797. The mere fact that a coal shoveler was injured on a car is not evidence of negligence of a vice-principal or even of a fellow-servant and does not place on the employer the burden of explaining how the injury was caused. Dana & Co. v. Blackburn [Ky.] 90 S. W. 237. Where brick vault shaft, apparently sound, was left standing after building burned and while debris was being cleared up, the mere fact that it fell, injuring plaintiff, was not evidence of negligence on the part of the employer. Gans Salvage Co. v. Byrnes [Md.] 62 A. 155. Where evidence showed only that brakeman was found dead on the track having been last seen on a car, there being no evidence of negligence in the switching operations, a recovery by plaintiff was unwarranted. Griffin v. Minnesota Transfer R. Co. [Minn.] 102 N. W. 391.

98. Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 737.

NOTE: "The doctrine, 'res ipsa loqultur,' is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow-servants and the other ordinary dangers of the work, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's, and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow-servants and latent and undiscoverable defects in place or machinery, which may have produced it. Chicago & N. W. R. Co. v. O'Brien [C. C. A.] 132 F. 593, 596, 598; Westland v. Gold Coin Mines Co. [C. C. A.] 101 F. 65; Texas & Pac. R. Co. v. Barrett, 166 U. S. 617, 41 Law. Ed. 1136; Patton v. Texas & P. R. Co., 179 U. S. 658, 45 Law. Ed. 361; O'Connor v. R. Co., 83 Iowa, 105, 48 N. W. 1002; Brownfield v. R. Co., 107 Iowa, 254, 77 N. W. 1038; Brymer v. Railroad Co., 90 Cal. 497, 27 P. 371; Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; Wormell v. Railroad Co., 79 Me. 397, 10 A. 49, 1 Am. St. Rep. 321; Grant v. Railroad Co., 133 N. Y. 659, 31 N. E. 220. The happening of the accident and the absence of contributory negligence of the servant constitute no substantial evidence of the causal negligence of the master and are insufficient to support a finding or judgment against him for the injury which resulted from it."—From opinion in Northern Pac. R. Co. v. Dixon [C. C. A.] 139 F. 740.

See, also, 18 Harv. L. R. 391, where Chicago, etc., R. Co. v. O'Brien, cited above, is commented on and the rule laid down criticized.

99. Fact that elevator fell and injured servant is proof of negligence sufficient to go to jury. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Where operative stopped machine to clean it by shifting the belt and the machine started while he

or raise any presumption in his favor.[1] Negligence may, as in other cases, be inferred from the fact of injury, taken in connection with other surrounding facts and circumstances.[2] The doctrine res ipsa loquitur is never to be applied except where it not only supports the conclusion contended for, but excludes every other.[3] Where an accident may have resulted from more than one cause, for some of which the master would be liable while for others he would not be responsible, plaintiff must allege and prove that it in fact resulted from a cause for which the master is responsible.[4] This must be shown with reasonable certainty;[5] if the real cause of an injury is left a matter of conjecture, there can be no recovery.[6]

was so engaged, and it appeared the shifter was too wide for the belt and a block of wood was used to remedy this, which might have fallen from its place, the case was for the jury, under the res ipsa loquitur doctrine. Ross v. Double Shoals Cotton Mills [N. C.] 52 S. E. 121. Where engineer, running under telegraphic orders and a "clearance card," was killed in a head-on collision, it was held that such facts raised a presumption of negligence sufficient to take the case to the jury. Stewart v. Raleigh & A. Air Line R. Co., 137 N. C. 687, 50 S. E. 312. Held, also, that there was sufficient evidence of negligence by the dispatcher or a local operator to take the case to the jury. Id. The fact of injury from a defective appliance is prima facie evidence of negligence sufficient to go to the jury though the employe knew of the defect. Roach v. Haile Gold Min. Co. [S. C.] 50 S. E. 543.

1. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562; Ross v. Double Shoals Cotton Mills [N. C.] 52 S. E. 121.

NOTE. Operation of res ipsa loquitur rule: "Whether the defendant introduces evidence or not, the plaintiff will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury even in the absence of any additional evidence. Womble v. Grocery Co., 135 N. C. 474, 47 S. E. 493; 2 Labatt, Master & Servant, § 834; 4 Wigmore, Evidence, § 2509. In all other respects the parties stand before the jury just as if there was no such rule. The judge should carefully instruct the jury as to the application of the principle, so that they will not give to the fact of the accident any greater artificial weight than the law imparts to it. Wigmore, in the section just cited, says the following considerations ought to limit the doctrine of res ipsa loquitur: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected, unless from a careless construction, inspection, or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrence must have happened irrespective of any voluntary action at the time of the party injured. He says further that the doctrine is to some extent founded upon the fact that the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged, and perhaps inaccessible to the party injured."—From opinion in Stewart v. Van Deventer Carpet Co. [N. C.] 50 S. E. 562.

2. Negligence is never presumed from mere fact of injury, but may be inferred from surrounding facts and circumstances. Libby v. Banks, 110 Ill. App. 330. In an action for death of a brakeman under a Florida statute, where deceased was shown to have been free from contributory negligence, negligence of the railway company was presumed, and the burden was upon it to show how the death occurred. Louisville & N. R. Co. v. Jones [Fla.] 39 So. 485. See, also, 4 C. L. 591, n. 84.

3. Allen v. Kingston Coal Co., 212 Pa. 54, 61 A. 572.

4. Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Shore v. American Bridge Co., 111 Mo. App. 278, 86 S. W. 905; Purcell v. Tennent Shoe Co., 187 Mo. 276, 86 S. W. 121.

5. The evidence must be sufficient to lead a fair and reasonable mind to conclude that the negligence alleged actually caused the injury. Where evidence did not show whether a baggageman was struck by an appliance near the track, as alleged, or fell from the car step where he was standing, when the train increased its speed, there was no recovery for his death. McTaggart v. Maine Cent. R. Co. [Me.] 60 A. 1027. Plaintiff need only show that it is more probable that defendant's negligence caused the injury than that it was caused in some other way. Wood's Adm'x v. Southern R. Co. [Va.] 52 S. E. 371. Where the evidence shows negligence of the defendant as the cause of injury, a recovery is warranted though the exact way in which the accident occurred is not made to appear. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. A theoretical possibility, wholly unsupported by proof or probability, that an injury was caused by some means other than negligence of the master, will not outweigh proof which carries conviction to the ordinary mind that negligence of the master caused the injury. Burns v. Ruddock-Orleans Cypress Co., 114 La. 247, 38 So. 157. Evidence sufficient to show master's negligence in furnishing defective scaffold which caused employe's death. Shore v. American Bridge Co., 111 Mo. App. 278, 86 S. W. 905. Where it is proved that a failure of one or the other of two appliances caused an injury and also that one of such appliances was defective, the jury may infer that it was a failure of the defective appliance that caused the injury. Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549. No recovery where there was no substantial evidence to support plaintiff's theory as to how he was thrown

Contributory negligence is usually held an affirmative defense which the defendant must establish[7] by a preponderance of the evidence.[8] But in some jurisdictions, plaintiff must show he was exercising due care.[9] In Iowa due care by the employe will be presumed when there is no evidence as to the manner in which the accident occurred.[10] In New York a plaintiff cannot recover without some affirmative evidence of want of contributory negligence.[11] It is commonly held that a plaintiff must

from a hand car. Morelock v. Chicago, etc., R. Co., 112 Mo. App. 640, 87 S. W. 5. No recovery warranted where plaintiff was struck in the eye by a sliver from a steel pin he was striking, when the evidence did not show whether the cause of the accident was a slanting blow struck by the plaintiff or the fact that the pin was not properly tempered. Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338. Verdict against weight of evidence where injury was alleged to have been caused by slipping on floor, thereby causing employe's hand to become injured in machine. Venbuvr v. Lafayette Worsted Mills [R. I.] 60 A. 770. The fact that a section boss gave an order to hasten certain work and said a train was coming does not show that he saw or heard the train. International & G. N. R. Co. v. McVey [Tex.] 87 S. W. 328. Evidence insufficient to show that switchman's injury was caused by getting his foot caught between rails defectively blocked. Neal v. Chicago, etc., R. Co. [Iowa] 105 N. W. 197. Evidence insufficient to show that injury was caused by alleged defects in wire. Muench v. Standard Brewery, 113 Ill. App. 512. Evidence insufficient to show negligence of defendant as cause of fall of plaintiff, a lineman. Lincoln Gas & Elec. Light Co. v. Thomas [Neb.] 104 N. W. 153. Evidence insufficient to prove either that employes were directed to use a defective boom, used in moving machinery, or that its defective condition could have been discovered by ordinary care. Holm v. Empire Hardware Co., 102 App. Div. 505, 92 N. Y. S. 914. Evidence insufficient to support verdict based on finding of general negligence, though proof tended to show that plaintiff was a minor and had been directed to clean machinery while in motion, contrary to statute. Fish v. Utica Steam & Mohawk Valley Cotton Mills, 109 App. Div. 326, 95 N. Y. S. 673. Evidence did not show that no instructions were given employe as to manner of handling logs where witnesses testified only that they did not hear any given, and it appeared they might have been given when such witnesses could not have heard them. Carnes v. Guelph Patent Cask Co. [Mich.] 12 Det. Leg. N. 331, 104 N. W. 322. Where brakeman was seen at front of train as it came in to station, and after it stopped was seen dead between the cars, he having given no notice that he was about to uncouple cars, the cause of death, and freedom from contributory negligence, were not shown. Donaldson v. New York, etc., R. Co. [Mass.] 74 N. E. 915.

6. Walker v. Louis-Werner Sawmill Co. [Ark.] 88 S. W. 988. When the manner in which a servant was caught by a machine and killed was left speculative by the evidence, a recovery for the death could not be sustained. Stratton v. Nichols Lumber Co. [Wash.] 81 P. 831. Where evidence failed to show manner of death of miner found at the door of the mine, but left open several explanations of his death, negligence of the mine owner was not shown. Allen v. Kingston Coal Co., 212 Pa. 54, 61 A. 572. The mere fact that an engine which a hostler started to take to another track went the wrong way when he pulled the lever and ran into a pit, injuring the hostler, is not proof that defendant was negligent; the cause of the accident being left a matter of conjecture, plaintiff cannot recover. Green v. Southern R. Co. [S. C.] 52 S. E. 45. Evidence held to leave cause of injury conjectural and not sufficient to take issue of negligence to jury where miner was killed by the alleged defective condition of the cable used to lower men into the mine. Owen v. Retsof Min. Co., 102 App. Div. 130, 92 N. Y. S. 270. Verdict against defendant for death of employe set aside where evidence left it conjectural whether death was caused hy a defective guard rail or by negligence of the employe in going too close to the wheel, there being no affirmative proof of freedom from contributory negligence. Wilson v. New York Mills, 94 N. Y. S. 1090. Where evidence did not show with reasonable certainty that plaintiff's theory of cause of brakeman's death was correct, but the manner of his death was left open to speculation, a judgment for plaintiff was reversed. Missouri, etc., R. Co. v. Greenwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 10, 89 S. W. 810.

7. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063. Burden of proving contributory negligence is on defendant unless plaintiff's pleadings or evidence affirmatively discloses it. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Hence jury should be instructed that they may look to all the evidence in passing on the issue. Id. Under Burns' Ann. St. 1901, § 359a, contributory negligence is matter of defense and plaintiff need not show want of it. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818.

8. Instruction that proof of contributory negligence must be "clear and convincing" erroneous; preponderance is sufficient. Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679.

9. Iowa rule. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721.

10. Applied where boy of 16 was injured while operating an unguarded saw. Woolf v. Nauman Co. [Iowa] 103 N. W. 785.

11. Scialo v. Steffens, 94 N. Y. S. 305. The rule that freedom from contributory negligence must be shown is not changed by Laws 1902, p. 1748, c. 600, § 3, which requires the issue of contributory negligence to go to the jury. Wilson v. New York Mills, 94 N. Y. S. 1090. Where employe was killed by electricity which leaked from an uninsulated wire, the facts were held to

prove want of knowledge of a defect alleged to have caused an injury.[12] But the plea of assumption of risks not naturally and usually incident to the employment when properly conducted is an affirmative one, and the burden of establishing it is on the employer.[13] The law presumes that all employes in the common employment of the same master are fellow-servants, though different in rank, and the burden is on one claiming damages by reason of negligence of a servant so employed to show that he was a vice-principal.[14]

Admissibility in general.[15]—Evidence must of course be competent[16] and relevant to the issues in the case.[17] On the issue of the master's negligence, evidence

warrant an inference of freedom from contributory negligence. Irish v. Union Bag & Paper Co., 92 N. Y. S. 695. In action for death caused by fall of a telephone pole, evidence held insufficient to show deceased free from contributory negligence. Voorhees v. Hudson River Tel. Co., 109 App. Div. 465, 95 N. Y. S. 703.

12. Servant must prove want of knowledge of defect, and that he did not have equal opportunity with master to know of it. Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900. Servant, suing for injuries caused by vicious animal, must prove he had no knowledge of its viciousness. St. Louis National Stock Yards v. Morris, 116 Ill. App. 107.

13. Arenschield v. Chicago, etc., R. Co. [Iowa] 105 N. W. 200. When the servant shows that an injury arose from a risk not ordinarily incident to the employment, arising out of the master's negligence, the burden is upon the master to show that the servant knew and understood the increased danger. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. After plaintiff has shown a mine to be unsafe through lack of proper ventilation, the burden was on the mine owner to prove that the miner killed had knowledge of the danger. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Knowledge of danger by the servant will not be presumed; burden of showing it is on master. Pressed Steel Car Co. v. Herath, 110 Ill. App. 596.

14. Mollkoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733.

Contra: Burden of establishing existence of fellow-servant relation is on master. Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196.

15. See 4 C. L. 592; also title Evidence, 5 C. L. 1311, 1312.

16. Under Ky. St. 1903, § 2725, reports and official certificates of the mine inspector, or proper copies, are admissible in evidence in an action for death of a miner caused by lack of proper mine ventilation, and are prima facie evidence of the facts recited. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233.

17. Held relevant: Testimony by plaintiff that foreman told him to run just before a telephone pole fell on him admissible to rebut inference of contributory negligence. Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 P. 539. Evidence that brakeman could have occupied position of safety, instead of standing on main track, while giving signals, was admissible. Cincinnati, etc., R. Co. v. Hill's Adm'r [Ky.] 89 S. W. 523. Conversation between a servant and one shown to be a vice-principal at time servant was put to work admissible. Flickner v. Lambert [Ind. App.] 74 N. E. 263. In action for injuries caused by defective hook used to support a swing scaffold, evidence regarding the identity and condition of the hook used and the kind of scaffold used, was admissible. Lewes v. Crane [Vt.] 62 A. 60. Evidence that train dispatcher knew where trains were admissible on issue of his negligence in notifying regular train of presence of work train on the track. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. On issue whether proper inspection of engine tender had been made, testimony of the inspector that his son was a fireman and that he knew that the son was going out on the engine he was inspecting was competent. Hover v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 57, 89 S. W. 1084. In action for injuries to electric lineman caused by failure to turn current off or to properly instruct engineer, evidence that engineer said he would not turn current off without orders from the foreman was admissible. City of Austin v. Forbis [Tex. Civ. App.] 86 S. W. 29. Evidence of acts of operator of turntable in presence of foreman tending to show table defective admissible. Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915. In action for death of engineer in washout, evidence regarding heavy rains in neighboring sections of the country was admissible to show that the storm which caused the washout ought reasonably to have been foreseen and guarded against. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. In an action for death of a miner in November, a mine inspector's notice showing the mine was unsafe in October was held admissible to show the plan of ventilation defective and that it had been in operation for such a length of time that the master ought to have known that it was defective. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Exclusion of physician's testimony that employe was below average in intelligence was not prejudicial when there was no evidence that the lack of intelligence was observable by the agent who employed her or those who controlled her. Daniels v. New England Cotton Yarn Co. [Mass.] 74 N. E. 332.

Held irrelevant: Letters of recommendation and fact that alleged negligent servant had made an invention immaterial on issue of his competency. Staunton Coal Co. v. Bub, 218 Ill. 125, 75 N. E. 770. In action under Miners' Act, evidence as to where miners got powder for blasting was im-

of previous injuries from the same cause, and complaints thereof, is admissible.[18] The fact that no other injury had resulted from the alleged defective condition cannot be shown.[19] Evidence of subsequent repairs is usually excluded.[20] Evidence of a custom followed by the defendant[21] or by others in the same business[22]

material. Chicago Virden Coal Co. v. Rucker, 116 Ill. App. 425. Where the evidence showed that neither of two rules designed to prevent collisions was enforced, evidence as to which was the safer was immaterial. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. In action based on automatic starting of frame, evidence that another frame was similarly defective was inadmissible. Fountaine v. Wampanoag Mills [Mass.] 75 N. E. 738. Issue being whether partition in particular ore bin was reasonably safe, whether partitions in other bins had fallen was immaterial. Mueller v. Northwestern Iron Co. [Wis.] 104 N. W. 67. The extent of responsibility of a servant is not shown by the fact that he receives higher pay than others. Powley v. Swensen, 146 Cal. 471, 80 P. 722. Where failure to warn child was charged, evidence by other employes that they never heard foreman give warning or instruction to anyone was inadmissible. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. What manager said to a workman about the manner of performing his work was not relevant to issue whether sufficient number of men were employed. Alabama G. S. R. Co. v. Vail [Ala.] 38 So. 124. Evidence that employe told foreman he thought turntable was unsafe inadmissible to prove defect but competent on question of notice. Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915. Expert opinion inadmissible on speed of engine and distance in which it could be stopped when not based on similar conditions and engines of similar construction. Wise Terminal Co. v. McCormick [Va.] 51 S. E. 731.

18. In action for injuries caused by defective machine evidence that a former employe had been injured by the same machine and had notified defendants of the defect in question was admissible. Franke v. Hanly, 215 Ill. 216, 74 N. E. 130. Evidence of previous injuries caused by same cog wheels, and complaints thereof, admissible to show their dangerous condition and that employe knew of such condition. Hansen v. Seattle Lumber Co. [Wash.] 83 P. 102.

19. Evidence that a coal chute by which a brakeman was struck had been in same place close to track for 5 or 6 years and that no injury had resulted from it, inadmissible. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. Evidence that device had been used a number of years without injury held immaterial. Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621.

20. Proof that railway company cleared away weeds and rubbish from a switch after an accident inadmissible. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173. Evidence as to condition of a saw a week after an accident and of repairs to it thereafter was admissible in rebuttal of testimony on the other side as to the condition of it before and after the accident. Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991.

21. Testimony as to whether it was customary for engineer to whistle at a particular curve, and whether another witness had heard engines whistle there, admissible. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477. Where child was fatally injured while working near machinery, evidence that defendant allowed children in the place where the accident occurred was admissible; but evidence that children were allowed to go into other dangerous places was inadmissible. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. That material furnished for movable platform used in construction of railroad embankment was similar to that which had safely been used for several months in the same work and for a long time in similar work, was sufficient proof that the materials used were suitable. Fukare v. Kerbaugh [N. J. Err. & App.] 61 A. 376. Railroad rulebook admissible to show that section foreman was required to inspect track, and to show that deceased engineer was warranted in relying on presumption that such inspection had been made and was therefore not negligent. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Railroad rule requiring employes in charge of trains to report and remove obstructions and make necessary repairs to prevent accident to other trains held admissible in action for death of fireman in wreck caused by freight conductor's failure to remove an obstruction. Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140. Where car repairer was hurt by reason of a car running from a side track on the main track and striking the car on which he was working, evidence that derailing switches were in use by defendants, but that there was not such a switch at the place where the accident occurred was admissible. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679.

22. Evidence that an inspection of an engine tender was of the same kind as railroads generally used was admissible. Hover v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 57, 89 S. W. 1084. Evidence of usual and customary manner of fastening bolts used to hold links of chain admissible. Berg v. United States Leather Co. [Wis.] 104 N. W. 60. Testimony as to head sawyer's duties in other mills held properly admitted. Dossett v. St. Paul & T. Lumber Co. [Wash.] 82 P. 273. Where negligence in construction and erection of column which fell on plaintiff was relied on, evidence of the usual and customary manner of such construction was inadmissible. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787. In action for injuries by unblocked switch frog evidence that blocked frogs were common safety devices was relevant. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. In action under Miners Act, evidence that blowout shots were not uncommon was immaterial. Chicago Virden Coal Co. v. Rucker, 116 Ill. App. 425.

is sometimes relevant. There is authority to the effect that evidence of a settlement with another employe, injured at the same time as plaintiff, is admissible as tending to show an admission of negligence.[23]

Evidence of specific acts of negligence known to the master, or so notorious that he would have known of them if he had exercised ordinary care, is admissible to prove the habit or character for incompetency of a servant who is employed with due care.[24] But specific acts of negligence, of drunkenness, of lack of skill, or of incompetency, of which the master had no notice, cannot be shown to prove incompetency for which a servant should have been discharged.[25] The general reputation of an employe for competency may be shown on the issue of care used in employing or retaining him.[26] The proper proof of habit and character in such case is by the testimony of witnesses qualified to speak of them, subject to proper cross-examination relative to the facts upon which their testimony is based.[27] But reputation among a particular class, which obviously includes only a part of those acquainted with him or his work, is inadmissible.[28]

On the issue of contributory negligence, proof of the usual course of conduct of employes, approved or acquiesced in by the master,[29] and of the duties of the injured servant,[30] is admissible.

23. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401.

24. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Incompetency of sawyer being alleged, it was not error to admit evidence as to a previous injury caused by him, when a serious accident was narrowly averted, and that it was generally talked about in the mill at the time. Dassett v. St. Paul & Tacoma Lumber Co. [Wash.] 82 P. 273. Evidence of prior specific acts of negligence of engineer admissible to show general incompetence and that master had notice thereof. Conover v. Neher-Ross Co., 38 Wash. 172, 80 P. 281.

25. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Evidence of specific acts of incompetency is inadmissible unless coupled with evidence that they were brought to the attention of the master, or that the circumstances were such that he ought to have had knowledge of them. Date v. New York Glucose Co., 93 N. Y. S. 249. On issue of competency of hoisting engineer, evidence of other complaints and injuries caused by his acts was properly excluded. Staunton Coal Co. v. Bub, 218 Ill. 125, 75 N. E. 770. Specific acts of negligence may be shown on the issue of a servant's competency only when knowledge of such acts by the master is also shown. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. Evidence that a brakeman had split a switch, and that at another time he had been off the right of way talking to a farmer when sent to flag a train admissible, when it was also shown that it was the conductor's duty to report such misconduct to the company. Id. Where brakeman fell asleep when sent to flag a train, evidence that he had been out until 4 o'clock the night before was inadmissible, when it was not shown that the persons who sent him on such duty knew of the fact. Id.

26. General reputation of a brakeman among railroad men. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. After proof of incompetency, proof of the servant's general reputation among those acquainted with him or his work is competent to prove that the master had notice of his incompetency. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272.

27, 28. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272.

29. Where a railroad yardmaster was knocked from the car by a car negligently left on a switch too close to the main track, evidence of a custom of yardmasters and switchmen to ride on the ladders of freight cars is admissible. Boyce v. Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563. Evidence by employe that they followed a certain course of conduct tends to show approval of such conduct by the master. Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462. Testimony that an employe had taken pieces from rollers of mangle while in motion admissible to show course of conduct by employes permitted by employer. Manning v. Excelsior Laundry Co. [Mass.] 75 N. E. 254. Where it was charged that plaintiff violated rules by going between cars, evidence tending to show the rule was never enforced was admissible. Alabama G. S. R. Co. v. Bonner [Ala.] 39 So. 619. Where violation of rule was charged, and plaintiff claimed the rule was not enforced, evidence that it was impossible or impracticable to perform his duties without violating the rule was admissible. Id.

30. A servant may testify what his duties were and under whose orders he acted, though he had not been long in the employment. Leighton & Howard Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462. Where evidence of an employe's ordinary duties was admitted, it was error to exclude questions tending to show his duties with respect to the observance of defects in his appliances. Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941. Where a section foreman was injured in an effort of his crew to avoid a collision with a train at a curve, testimony as to whether the curve was of the kind requiring the foreman to send a flagman ahead was admis-

Expert and opinion evidence.[31]—If witnesses are shown to be properly qualified[32] they may testify as experts in regard to matters requiring special skill or knowledge.[33] But mere conclusions[34] and opinion evidence are inadmissible when all the facts can be ascertained and made intelligible to the jury.[35]

sible on the issue of contributory negligence. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477.

31. See 4 C. L. 597; also Evidence, 5 C. L. 1301.

32. Witness who had worked around switch frogs 15 years qualified to testify whether blocked switch frogs were common safety devices. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. One who had been in mill and lumber business for a long time and was familiar with machinery use could testify as an expert though he had not run a machine with four saws like the one in question. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. Miner who had not worked in mine in question and was not shown to be familiar with its rules or customs could not testify to miner's duties, from his knowledge of other mines. Smith v. Hecla Min. Co., 38 Wash. 454, 80 P. 779.

33. Whether certain timbers could properly be used to prop mine roof. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375. Whether use of unannealed steel under steel punch and die was dangerous and how great the risks were. Arnold v. Harrington Cutlery Co. [Mass.] 76 N. E. 194. Experienced railroad man may properly testify regarding purpose of derailing switches and where they should be placed. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679. Where incompetency of servants was in issue, the expert opinions of those who had examined the men concerned with a view of promoting them were competent. Lake St. El. R. Co. v. Fitzgerald, 112 Ill. App. 312. Experienced railroad men may testify to freight conductor's duties and whether a stop signal should be given in switching cars before a car which a brakeman is to stop has been cut off. Pittsburg, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Experts may testify whether switch frogs are dangerous when unblocked and whether blocked switch frogs were common safety devices. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. Machine operators may testify whether machinery was working properly at a particular time. Scarlotta v. Ash [Minn.] 103 N. W. 1025. Captain of vessel, qualified as expert, could testify whether he could have prevented collision after he saw projection in bridge. Lambert v. La Conner Trading & Transp. Co., 37 Wash. 113, 79 P. 608. Expert in railway management may testify, in action for injuries to brakeman struck by overhead trestle, what good railroad management required in the way of telltales at each end of such trestles. Pittsburg, etc., R. Co. v. Lamphere [C. C. A.] 137 F. 20. Experienced painter who had used swing stagings could testify as to weight which a certain hook would sustain. Lewes v. John Crane & Sons [Vt.] 62 A. 60. Persons who have worked in and operated sawmills may testify that when flywheels are broken they should be discarded and not repaired. Boop v. Laurelton Lumber Co., 212 Pa. 523, 61 A. 1021. Expert machine operative may testify how a person would have to get his hands into a machine in order to be injured by it. Wofford v. Clinton Cotton Mills [S. C.] 51 S. E. 918. Where servant was killed by fall of elevator, and after the accident the safety device was seen to be defective, expert testimony was competent to show how the device worked when in proper condition, and how long it would take to make it defective as it was, and whether that condition could have been caused by the falling of the elevator which caused the servant's death. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821.

34. In action for injuries caused by defective hook used to hold staging, evidence of what defendant would have done if he had known of the condition of the hook was inadmissible. Lewes v. John Crane & Sons [Vt.] 62 A. 60. Testimony as to whose duty it was to secure cars on a down grade, and what witnesses would have done if they had been in charge of train incompetent. Denver, etc., R. Co. v. Vitello [Colo.] 81 P. 766. Error to allow nonexperts to testify that mangle was very dangerous machine to allow children to be near. Evans v. Josephine Mills [Ga.] 52 S. E. 538.

Held admissible: Where engineer who had control of a train swore that he would have stopped it if he had known of the presence of a work train in time to prevent a collision, it was not error to permit the brakeman and conductor to testify as to what they would have done if they had been notified. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. Not error to allow employe to testify that it was dispatcher's duty to notify regular trains of the presence of work trains on the track. Id. Witness may testify within what time a mine roof could have been propped or made secure. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898.

35. As whether machines should have been guarded. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6. Whether door of elevator entrance was properly placed to make it safe. Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 75 N. E. 1053. Whether work on vault, putting in steel plates, could be done safely without set screws. Dolan v. Herring-Hall-Marvin Safe Co., 105 App. Div. 366, 94 N. Y. S. 241. Opinions on safety of rule requiring work trains to flag regular trains inadmissible. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. Expert opinion on whether iron and steel could be distinguished from their appearance inadmissible. Wolf v. New Bedford Cordage Co. [Mass.] 76 N. E. 222. Opinion evidence improper on incompetency of mine boss. Purkey v. Southern Coal & Transp. Co. [W. Va.] 50 S. E. 755. No error to refuse to allow opinion evidence on question whether car in which employes were being carried was overcrowded. Chicago Terminal Transfer Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133. In an action for death

Questions of law and fact.[36]—Unless the evidence is so conclusive that only one inference can reasonably be drawn therefrom, the issues of negligence of the master,[37] contributory negligence of the servant,[38] assumption of risk,[39] and proximate cause,[40] are for the jury. What facts are essential to the existence of the fellow-servant relation is a question of law; the existence of such facts is for the jury.[41]

(§ 3H) 5. *Instructions.*[42]—Only a few illustrative holdings are here given, the general principles governing the giving of instructions being fully treated elsewhere.[43]

Instructions must be confined to the issues raised by the pleadings[44] and the evidence.[45] All the acts of negligence relied on by the plaintiff and supported by

by the falling of a derrick, the opinion of a witness that a guy rope anchor pulled out because not weighted heavily enough was incompetent. Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941. A machinist, whose duty it was only to see that machines were in good running order, could not testify that in his opinion certain machines should have been safeguarded. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6. Expert testimony is incompetent on question whether it is dangerous for boy of 12 to hang on a sill over a belt and start the belt with his feet. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. Expert opinion as to whether certain hoisting machinery was reasonably suitable and safe was erroneously admitted where the machinery was simple in construction and could have been intelligently described to the jury, and the evidence as to its state of repair was conflicting. Coe v. Van Why [Colo.] 80 P. 894.

36. See 4 C. L. 598; also preceding sections where various issues are particularly discussed. Also Questions of Law and Fact, 4 C. L. 1165.

37. Powley v. Swensen, 146 Cal. 471, 80 P. 722; Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769. Negligence is ordinarily for the jury and a finding will be disturbed by the court only in extreme cases. McRae v. Erickson [Cal.] 82 P. 209. Instruction erroneous which in effect stated that certain facts would constitute negligence. Evans v. Josephine Mills [Ga.] 52 S. E. 538. There being some evidence tending to show machinery used to control cars on elevator siding was defective, it was error to take that theory of the case from the jury. Dill v. Marmon [Ind.] 73 N. E. 67. Whether handhold on street car was broken before or after conductor took car out, held for jury. Crawford v. United R. & Elec. Co. [Md.] 61 A. 287. Facts being undisputed, negligence may be a question of law. Cleveland, etc., R. Co. v. Haas [Ind. App.] 74 N. E. 1003.

38. Shickle-Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444; Arenschield v. Chicago, etc., R. Co. [Iowa] 105 N. W. 200; Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893. Finding of trial judge on issue of contributory negligence will not be disturbed unless clearly wrong. Smith v. Minden Lumber Co., 114 La. 1035, 38 So. 821. It is only where there is no dispute as to the controlling facts, and no room for different conclusions upon the part of reasonable minds as to the question of contributory negligence that it becomes a question of law for the court. Buehner Chair Co. v. Feulner [Ind.] 73 N. E. 816; Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. By Laws 1902, c. 600, § 3, the issue of contributory negligence must be submitted to the jury in an action under the act. McBride v. New York Tunnel Co., 101 App. Div. 448, 92 N. Y. S. 282; McConnell v. Morse Iron Works & Dry Dock Co., 102 App. Div. 616, 92 N. Y. S. 477. Though contributory negligence must go to jury under Laws 1902, p. 1750, c. 600, § 3, a verdict on that issue contrary to the weight of evidence may be set aside on appeal. Vaughn v. Glens Falls Portland Cement Co., 93 N. Y. S. 979.

39. Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893; Chicago, etc., R. Co. v. Bryan [Ind. App.] 75 N. E. 678. Though assumed risk must go to jury under Laws 1902, p. 1750, c. 600, § 3, a verdict contrary to the weight of evidence on that issue may be set aside on appeal. Vaughn v. Glens Falls Portland Cement Co., 93 N. Y. S. 979; Baker v. Empire Wire Co., 102 App. Div. 125, 92 N. Y. S. 355. Where facts were undisputed and showed assumption of risk, a directed verdict for defendant was proper. Brooks v. Joyce Co., 127 Iowa, 266, 103 N. W. 91.

40. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857. Whether proximate cause is question of law or fact depends upon the state of the evidence. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899. Whether employe was injured while cleaning a machine while in motion, contrary to orders, held for jury, the evidence being conflicting; but whether his disobedience was the proximate cause of his injury held for the court. Hicks v. Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703.

41. Illinois Southern R. Co. v. Marshall, 112 Ill. App. 514.

42. See 4 C. L. 606.

43. See Instructions, 6 C. L. 43.

44. Requested instruction not properly limited to charges made in complaint held correctly refused. Scarlotta v. Ash [Minn.] 103 N. W. 1025. Instruction submitting assumed risk properly refused because not pleaded. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Instruction submitting defense not pleaded, properly refused. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 13 Tex. Ct. Rep. 123, 87 S. W. 867.

45. Wood v. Texas Cotton Product Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 534, 88 S.

evidence should be submitted.[46] The defendant is entitled to proper instructions on the issues of contributory negligence,[47] assumption of risk,[48] and the existence and effect of the fellow-servant relation,[49] when these defenses are relied on and supported by proof.[50] The instructions given must be warranted by the evidence.[51] They should not be on the weight of the evidence[52] and should not assume as proved facts in issue.[53] They should not confuse the issues[54] or otherwise mislead the jury.[55] In actions based on statutes, instructions may properly follow the statutory language.[56]

W. 496. Where the evidence is unsatisfactory, the giving of an instruction on the duty to provide a safe place, when the issue is negligence in furnishing a defective appliance, is reversible error. George Doyle & Co. v. Hawkins, 34 Ind. App. 514, 73 N. E. 200. Instruction held within issues in action for injuries alleged to have been caused by defective condition of elevator cable. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Instructions should be confined to issues of negligence shown by evidence. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173. Reversible error to submit negligence of foreman when evidence did not raise the issue. International & G. N. R. Co. v. Still [Tex. Civ. App.] 13 Tex. Ct. Rep. 372, 88 S. W. 257.

46. Evidence held to warrant special requested charge on negligence, hence, such charge should have been given. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786. Negligence of engineer in charge of drill engine properly submitted to jury, as the issue was generally pleaded and sustained by evidence. Galveston, etc., R. Co. v. Roth [Tex. Civ. App.] 84 S. W. 1112. Where in action for death of brakeman, the negligence charged was that the train was run in a negligent manner, and that a rock was negligently left on the track, a requested instruction which wholly ignored the second charge was properly refused. El Paso & N. E. R. Co. v. Whatley [Tex. Civ. App.] 85 S. W. 306.

47. Failure to instruct on contributory negligence was error. Abbott v. Marion Min. Co., 112 Mo. App. 550, 87 S. W. 110.

48. Instruction ignoring defense of assumed risk is prejudicial error. Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900.

49. Instruction on fellow-servant doctrine proper, where vital issue in case was whether fall of scaffold was caused by three employes working together, contrary to orders. Charping v. Toxaway Mills, 70 S. C. 470, 50 S. E. 186.

50. Defendant is entitled to have his defenses affirmatively submitted. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173. Instruction erroneous because ignoring a defense. Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13. Where the declaration did not negative assumption of risk, but the issue was raised by evidence introduced under the general issue tendered by defendant, it was error to ignore such issue in the instructions. Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243, 73 N. E. 373. Not error to fail to submit issues of assumed risk, and contributory negligence, when there was no request for their submission and no evidence warranting an affirmative finding thereon. Mueller v. Northwestern Iron Co. [Wis.] 104 N. W. 67.

51. New trial granted where instructions were in part inapplicable to evidence and failed to submit defendant's theory of the case. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Instruction erroneous because warranting a finding not shown by evidence. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506. Instruction erroneous because not requiring a finding of the facts alleged to constitute negligence. Id. Instruction erroneous because ignoring issue of proximate cause and also taking another issue of fact from the jury. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Instruction properly refused because warranting finding contrary to undisputed evidence. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 13 Tex. Ct. Rep. 123, 87 S. W. 867.

52. Instruction that mere fact of injury to a fireman by the giving way of a shaker bar was not proof of negligence held erroneous, because on the weight of evidence. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 90 S. W. 511.

53. El Paso & N. E. R. Co. v. Whatley [Tex. Civ. App.] 85 S. W. 306. Instruction erroneous because it assumed that a mine was dangerous. Straight Creek Coal Co. v. Haney's Adm'r, 27 Ky. L. R. 1117, 87 S. W. 1114. Where there was evidence tending to show that it was not practicable to timber a mine at a place where an accident occurred, an instruction assuming that failure to timber it was negligence, was erroneous. Abbott v. Marion Min. Co., 112 Mo. App. 550, 87 S. W. 110. Instruction under fellow-servant act held erroneous because it assumed that fellow-servants of plaintiff were negligent. Stanley v. Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112. Where uncontradicted evidence showed that it was negligence to leave a car door unfastened, the assumption of that fact was not error. St. Louis & S. F. R. Co. v. Bussong [Tex. Civ. App.] 90 S. W. 73.

54. Instructions confusing the issues made by the pleadings and evidence, and stating law inapplicable to real issues, held reversible error. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288.

55. An instruction embodying part of Illinois Miners' Act, but not applying it concretely to facts, held misleading. Chicago Virden Coal Co. v. Rucker, 116 Ill. App. 425. Charge that if engineer, who jumped from engine to avoid injury in collision, failed to exercise due care under the circumstances, the verdict must be for defendant, held to

(§ 3H) 6. *Verdicts and findings.*[57]—A general verdict will be disregarded when inconsistent with special findings.[58] Where a master and servant are sued jointly for damage resulting solely from negligence of the servant, a verdict in favor of the servant discharges the master, and a verdict against the latter will be set aside.[59]

§ 4. *Liability for injuries to third persons. A. In general.*[60]—The master is liable for the acts of his servant within the general scope of his employment, while about his master's business,[61] though the act be negligent, wanton, willful or malicious,[62] and though the servant exceeds his actual authority and violates express instructions.[63] He is not liable for unauthorized acts, outside the course or scope of

correctly state the law and not to be misleading though negative in form. San Antonio & A. P. R. Co. v. Lester [Tex.] 13 Tex. Ct. Rep. 813, 89 S. W. 752.

56. In action based on violation of mines law, an instruction following the language of the act relative to the duties of mine examiners is not improper. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375.

57. See 4 C. L. 608, also Verdicts and Findings, 4 C. L. 1803.

58. General verdict for plaintiff inconsistent with special findings that he did not come in contact with shaft intentionally or knowingly, and did not do so accidentally. Stratton v. Nichols Lumber Co. [Wash.] 81 P. 831. In an action based on a failure to guard cogwheels, a special verdict that the cause of injury was plaintiff's slipping on a piece of shafting on the floor is inconsistent with a general verdict for plaintiff, and such general verdict may be disregarded. Roats Co. v. Meeker [Ind.] 73 N. E. 253. Special findings that plaintiff knew or ought to have known of the danger of operating a machine in the way he did, and that his injury would have been avoided if the master had properly instructed him and he had used due care, held ambiguous and to neutralize each other, hence general verdict for plaintiff sustained. Flickner v. Lambert [Ind. App.] 74 N. E. 263. Where special findings of fact showed that injury would not have occurred but for negligence of plaintiff, a general verdict for plaintiff should on motion be set aside and judgment entered for defendant. National Brass Mfg. Co. v. Rawlings [Kan.] 80 P. 628.

59. Action against railway company and its master mechanic, by whose negligence the death of a brakeman was alleged to have been caused. Verdict in favor of the master mechanic discharged the company, hence, verdict against the latter was set aside. Stevick v. Northern Pac. R. Co. [Wash.] 81 P. 999.

60. See 4 C. L. 608.

61. Rooney v. Woolworth [Conn.] 61 A. 366. The master is liable for torts of his servants done with a view to the furtherance of the master's business, and in the line of duty. Crandall v. Boutell [Minn.] 103 N. W. 890. Master liable where teamster who delivered a load of lumber negligently dumped it on the side of a hill so that it slid down and struck plaintiff—the purchaser. Dumontier v. Stetson & P. Mill Co. [Wash.] 81 P. 693. Special deputy sheriff, paid by street railway company, put off a passenger for refusal to pay fare, being directed to do so by the conductor, and struck the passenger in so doing. Company held liable. Foster v. Grand Rapids R. Co. [Mich.] 12 Det. Leg. N. 311, 104 N. W. 380. Employer who authorized collector to go to plaintiff's rooms after furniture was liable for an assault on plaintiff by the collector. Peddie v. Gally, 109 App. Div. 178, 95 N. Y. S. 652. Servant sent to collect for furniture or take the goods held to have been trying to carry out his master's instructions when he made an assault on the purchaser. Ziegenhein v. Smith, 116 Ill. App. 80. Where servants sent to put up a stove purchased of defendant informed the purchaser that the chimney was blocked with refuse and agreed to remove it but failed to do so, as a result of which the purchaser was asphyxiated when a fire was started, the seller was liable. Crandall v. Boutell [Minn.] 103 N. W. 890. Where man was knocked from his bicycle by a vehicle, evidence held sufficient to warrant finding that the driver was defendant's servant, that vehicle belonged to defendant, and that driver was at the time engaged in his master's business and acting within the scope of his employment. Louisville Water Co. v. Phillips' Adm'r [Ky.] 89 S. W. 700. Saloon keeper would be liable to a customer to whom his servant served a drugged drink, while acting in the course of his employment. Tway v. Salvin, 109 App. Div. 288, 95 N. Y. S. 653. Evidence, however, insufficient to show defendant was proprietor of saloon where drink was served. Id.

62. Rule applied where freight conductor threw a boy stealing a ride off the train, causing him to fall under wheels. Chicago, etc., R. Co. v. Kerr [Neb.] 104 N. W. 49. The master is liable for his servant's act done in the course of his employment and to further his master's purposes, though the act was willful and deliberate. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015. If an act done by a servant is within the scope of his employment, the master is liable even though the act is willful, wanton, or done in an excessive manner. Bowen v. Illinois Cent. R. Co. [C. C. A.] 136 F. 306. Defendant liable where its agent had plaintiff arrested without legal cause in order to get him out of the way while defendant's poles were being placed on plaintiff's land. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015. Railway company liable if its servant, in charge of an engine willfully permitted it to run down a person, without warning. Greene v. New York, etc., R. Co., 102 App. Div. 322, 92 N. Y. S. 424.

63. Crandall v. Boutell [Minn.] 103 N. W. 890. Master liable for injuries caused by running away of a horse in charge of his delivery boy, the horse having been

the servant's employment.[64] If a servant, having completed his duty to his master, then proceeds to prosecute some private purpose of his own, the master is not liable for his acts;[65] but if the servant, while engaged about his master's business, merely deviates from the direct line of duty to accomplish some personal end, the master's responsibility may be suspended, but it is re-established when the servant resumes his duty.[66] A deviation, even if in violation of express orders, is not an abandonment of the master's service.[67] When the object of the servant's temporary departure from the master's service has been accomplished, and the servant re-engages in the discharge of his duty, the master's responsibility instantly attaches.[68]

negligently left untied, even though the boy had been ordered to tie the horse, and had been furnished with a hitching strap and weight for the purpose. Healy v. Johnson, 127 Iowa, 221, 103 N. W. 92.

64. A person came to railway office to inquire about freight charges, and was told by station agent, as he had turned and was about to go, that there was a package for him. He turned to window, and agent gave him a book to sign, and then shot him while signing. The company was not liable for the agent's act, resulting in death of the person shot. Bowen v. Illinois Cent. R. Co. [C. C. A.] 136 F. 306. Act of bell boy in opening door of elevator for waitress was not the act of his master, he having nothing to do with the elevator. Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698. Son of automobile dealer, employed as clerk, on a day when he was given a holiday, took out a machine without his father's knowledge and took a friend driving. The father was held not liable for injuries resulting from a runaway, caused by the machine. Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946. Use of beer, and passing of bottles among band men, was not within the scope of their employment as musicians, and a spectator, injured by a bottle which was dropped, could not recover from owner of amusement park. Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783. In action for unlawful arrest by defendants' servants, plaintiff must prove that the servants had express or implied authority to make the arrest. Vara v. Quigley Const. Co., 114 La. 261, 38 So. 162. Authority to cause the arrest of persons on a charge of violating a labor contract is not implied in the employment of agents or clerks to run a commissary store and to collect amounts due by laborers to a construction company. Id. Under Civ. Code art. 2320, the responsibility of masters is confined to damages caused by servants in the "exercise of the functions in which they are employed," and they are not liable for collateral torts committed while the servants are engaged in their employments. Id. Conductor who called a policeman to arrest two "crooks" on his car, as a joke on the policeman, was acting outside the scope of his employment, and company was not liable for an injury to the policeman on the car. Berry v. Boston El. R. Co., 188 Mass. 536, 74 N. E. 933. It is not within scope of motorman's employment to eject a boy from a car. Drolshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344. If defendant's watchman was not acting under orders in ejecting plaintiff from a car defendant was not liable for servant's act in shooting plaintiff. Howard v. Terminal R. Ass'n, 110 Mo. App. 574, 85 S. W. 608. Hotel employe who accidentally shot a boy who was a guest at the hotel, while they were playing together, the employe being off duty at the time, was not acting as a servant or within the scope of his employment at the time. Clancy v. Barker [Neb.] 103 N. W. 446. Defendant not liable for malicious prosecution instituted by credit clerk when evidence did not show the clerk's act was authorized or was within scope of his employment. Staton v. Mason, 94 N. Y. S. 417. A chauffeur who takes out his master's automobile contrary to the owner's instructions is not while so doing acting within the scope of his employment. Stewart v. Baruch, 93 N. Y. S. 161. Drivers of automobile held not to be engaged in business of the owner at time of an accident and owner not liable. Clark v. Buckmobile Co., 94 N. Y. S. 771. Company not liable where trainman threw bricks at a dwelling house near the track. Davenport v. Charleston & W. C. R. Co. [S. C.] 51 S. E. 677. Acts of floorwalker in accusing plaintiff of having stolen goods, and making it appear that she had done so, and then assaulting and imprisoning her, all for the purpose of extorting money from her, were outside the scope of his employment. Cobb v. Simon, 124 Wis. 467, 102 N. W. 891.

65. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210. An act done by a servant while engaged in his master's work but not done as a means or for the purpose of performing that work is not to be deemed the act of the master. Where elevator man stepped from elevator and assaulted a passenger he had carried up, master was not liable. Fairbanks v. Boston Storage Warehouse Co. [Mass.] 75 N. E. 737.

66. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210.

67, 68. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210. Railway employe was placed in charge of a steam pump and was also under duty of procuring fuel for the same along the right of way, being supplied with a tricycle for that purpose. He went for fuel at a certain spot but before getting it, carried a sick friend to a station beyond. On his way back, and before he reached the place where the fuel was, he struck and injured plaintiff on a trestle. It was held that he had resumed the discharge of his duties and that the master was liable. Id.

Note: A writer in the Michigan Law Review comments on the case above cited as follows: "The principle is well settled that the master is not liable for the negligent act

A master who intrusts custody and control of a dangerous appliance or agency to a servant cannot avoid responsibility for injuries inflicted thereby on the plea that the servant was acting outside the scope of his employment in the doing of the particular act complained of.[69] Whether a particular appliance or agency is dangerous within the meaning of this rule may be a question of fact.[70]

A messenger company impliedly contracts that messengers furnished by it are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons.[71] If special and peculiar service is required different from that ordinarily required of such messengers, and the company is not informed of the fact, no special arrangement being made, it is not liable to the employer for a breach of trust by the messenger, either as a master,[72] or as a common carrier.[73]

The doctrine respondeat superior is of course inapplicable unless the relation of master and servant existed at the time between the defendant and the person charged with the wrongful act or omission.[74] Thus, an employer is not liable for

of the servant done outside the apparent scope of the master's business and the servant's employment. Bishop, Non-Contract Law, § 612; Mechem, Agency, §§ 737 et seq.; Smith, Master & Servant, p. 339. But however apparently simple and easy of comprehension the rule may be, it is sometimes found difficult of application, though the difficulty in each particular case arises not from any uncertainty in the rule itself but in ascertaining whether the act complained of was done in the execution of the master's business, and within the scope of the agent's employment. Various tests have been suggested for the purpose of solving this troublesome question, but in each one this inquiry is predominant: Was the agent engaged at the time in serving the principal? Lima R. Co. v. Little, 67 Ohio St. 91; Holler v. Ross, 68 N. J. Law 324, 96 Am. St. Rep. 546, 59 L. R. A. 943. If the servant was at the time when the injury was inflicted, acting for himself and as his own master, pro tempore, the master is not liable. If the servant steps aside from his master's business for however short a time to an act not connected with such business, the relation of master and servant is for the time suspended. Morier v. Railroad Co., 31 Minn. 351, 47 Am. Rep. 793; Krzikowsky v. Sperring, 107 Ill. App. 493; Stephenson v. Southern Pacific Co., 93 Cal. 558, 27 Am. St. Rep. 223, 15 L. R. A. 475; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909. In the recent case of Loomis v. Hollister, 75 Conn. 718, the court said: "When the servant takes his master's team in pursuance of his employment and, abandoning the purpose for which he started, goes off on some business of his own, he may thus take his master's team into his own possession without authority, for the transaction of his own business, and in such case his acts are not in the execution of his master's business and his master is not liable for his negligence." The leading cases on this subject are cited and commented upon in both the majority and dissenting opinions in the principal case, but the conclusions arrived at are in conflict. We believe the conclusion of the majority cannot be sustained in law, and that the error into which the court has fallen is in confusing deviation from the master's service with a total departure therefrom. In the language of the dissenting chief justice, 'The principle here stated is fraught with great danger. With all deference I greatly fear that this decision will certainly return to plague the court.' "—3 Mich. L. R. 670.

69. Rule applied where railway servant intrusted with tricycle ran down a person on a trestle. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210. Where a railroad employe who is the custodian of a railway torpedo negligently placed it on the track where it was likely to be removed or knocked into the street, or left it in the street, the master is liable for injuries to a child who picked it up. Merschel v. Louisville & N. R. Co., 27 Ky. L. R. 465, 85 S. W. 710.

70. Whether railroad tricycle was dangerous should have been submitted to the jury. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210.

71. Where boy appropriated money he was sent to collect, there was no evidence of negligence in employing him, and no liability on that ground. Haskell v. Boston Dist. Messenger Co. [Mass.] 76 N. E. 215.

72. While performing such special service, as collecting money which the messenger appropriated, the messenger is the servant of the employer though in the general employ of the company. Haskell v. Boston Dist. Messenger Co. [Mass.] 76 N. E. 215.

73. The messenger company is not an insurer of everything intrusted to the messenger. Haskell v. Boston Dist. Messenger Co. [Mass.] 76 N. E. 215.

74. The fact that a person is seen operating the machinery of a carrier is sufficient, if entirely unexplained, to warrant the inference that such person was the carrier's servant. Wilson v. Alexander [Tenn.] 88 S. W. 935. Where a railway company owned cabs and horses and rented them to drivers at a certain rental per day, under certain regulations, but otherwise intrusting the use of the property to the discretion of the drivers, the company and drivers were not master and servants but bailor and bailees.

acts of an independent contractor.[75] An independent contractor is one who undertakes to do a piece of work according to his own methods, being subject to the control of his employer only as to the result.[76] One who is subject to the control of his employer as to the means to be employed as well as to the result is a servant, and not an independent contractor.[77] In determining whose servant a person was at a particular time, authority to control is the test.[78]

Duties owed by property owners to the public are absolute and delegation of such duties to a servant does not relieve the owner from responsibility.[79] Those who visit public places in response to invitation made generally or otherwise have a right to personal protection from assault by agents or servants of the person or corporation extending such invitation.[80] One who is invited upon premises where a public building is being constructed assumes ordinary risks but not the risk of incompetency or negligence of servants there engaged.[81]

Damages.[82]—Exemplary damages cannot be awarded unless the acts of the servant are willful, wanton, or malicious.[83]

Liability of servant.—A master who has been compelled to pay damages caused by negligence of a servant has a right to recover from the servant.[84] A servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance.[85]

Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241. A person being driven by another is prima facie liable for his driver's act whether he is the owner or bailee of the vehicle which is subject to his control. Kelton v. Fifer, 26 Pa. Super. Ct. 603.

75. Parrott v. Chicago G. W. R. Co., 127 Iowa, 419, 103 N. W. 352. Abutting owner not liable for negligence of contractor employed to build sidewalk. Massey v. Oates [Ala.] 39 So. 142. Owner of property is not responsible for the negligence of a person acting independently in the execution of some undertaking in connection therewith, when the owner does not have the right to control and does not control the method of execution. Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241.

76. Parrott v. Chicago G. W. R. Co., 127 Iowa, 419, 103 N. W. 352. One who contracted to do a job of paper hanging at a certain price, furnishing his own material, tools and labor, was an independent contractor. Southwestern Tel. & T. Co. v. Paris [Tex. Civ. App.] 13 Tex. Ct. Rep. 194, 87 S. W. 724.

77. Contract for grading and filling construed and held to create relation of master and servant between railway company and contractor and former held liable for damage caused by latter. Parrott v. Chicago G. W. R. Co., 127 Iowa, 419, 103 N. W. 352.

78. Where teamster, employed by one whose business it was to hire out teams, received a notice from defendant of the arrival of freight, together with charges, and was requested to haul it, and the teamster turned the money and notice over to his employer, and thereafter was told to haul the freight for defendant, the teamster was, while unloading the freight, under the control of his employer, and not of the defendant for whom the hauling was being done. Bentley, Shriver & Co. v. Edwards [Md.] 60 A. 283. Hence he was not a fellow-servant of a teamster employed by defendant. Id. In action to recover a statutory penalty for ejection from a race course, whether the persons who ejected plaintiff were servants of defendant or of a detective agency, an independent contractor, was for the jury, the evidence being conflicting. Greenberg v. Western Turf Ass'n [Cal.] 82 P. 684.

79. The duty of the owner of a building to maintain it in a reasonably safe condition as to the public is absolute and the owner is not relieved from responsibility by delegating it to a servant, even though he exercises due care in selecting such servant. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. Rule applied when passerby was struck by window cap which fell from building. Id.

80. Assault by guard on person who came to see races, while he was crossing the race track. Brooks v. Jennings County Agricultural Joint-Stock Ass'n [Ind. App.] 73 N. E. 951.

81. Negligence or incompetency of elevator man held not assumed. De Haven v. Hennessey Bros. & Evans Co. [C. C. A.] 137 F. 472. Where plaintiff had frequently been invited on premises where public building was being built by the foreman in charge, it was a question of fact whether another employe, who, in the foreman's absence, invited plaintiff into the building, was acting as a vice-principal, and in the scope of his employment. Id.

82. See 4 C. L. 610.

83. Evidence held not to warrant exemplary damages in collision case. Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 74 N. E. 738.

84. The right of action does not accrue until payment by the master has been compelled; and the master has two years thereafter in which to bring suit under Ball. Ann. Codes & St. § 4805. Gaffner v. Johnson [Wash.] 81 P. 859.

85. Complaint held not to show injury as

(§ 4) *B. Procedure. Pleading.*[86]—If counts are inconsistent, plaintiff may be required to elect.[87]

Evidence.[88]—The burden is upon the plaintiff to prove that the negligence charged was the proximate cause of the injury,[89] and that the person charged therewith was a servant of the defendant.[90]

Questions of law and fact.[91]—If the facts are undisputed, the question whether a servant is acting within the scope of his employment is for the court; if there is a conflict as to the facts, the question is for the jury.[92]

Actions against master and servant jointly.[93]—At common law the master and servant cannot be sued jointly where the former's liability is predicated solely upon negligence of the latter.[94] Where in such case a joint action is permitted by statute, as in Indiana,[95] a verdict in favor of the servant and against the master is self-contradictory and cannot stand.[96]

§ 5. *Civil liability for interference with relation by third person.*[97]—The right to dispose of one's labor and to have the benefit of one's lawful contracts can be lawfully interfered with only by one acting in the exercise of an equal or superior right which comes in conflict with the other.[98] The malicious and unjustifiable procurement of a breach of an existing contract of employment, resulting in damages, is an actionable wrong.[99] Interference by a third person is not actionable if the party rescinding the contract has a legal justification therefor.[1] An intentional interference without lawful justification is malicious in law, even if it is from good motives and without express malice.[2] The fact that a contract of employment is terminable at will does not affect the right of recovery from one who unlawfully interferes with such employment, though it does affect the amount of damages recoverable.[3] A contract between an employer and a labor union, whereby the former agrees not to retain in its employ any person objectionable to the union, does not, as against an employe not a member of the union, justify interference with his employment by one representing the union;[4] nor is interference by a union with the employment of one not a member, on the sole ground of nonmembership, justifiable as a kind of competition.[5]

direct and proximate result of wrongful act of one alleged to be the agent of the railway company. Ellis v. Southern R. Co. [S. C.] 52 S. E. 228.

86. See 4 C. L. 611.

87. Counts held inconsistent in complaint for death of boy ejected from car by motorman. Drollshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344.

88. See 4 C. L. 611.

89. Prinz v. Lucas [Pa.] 60 A. 309.

90. Where there was no direct evidence to show that brick which injured plaintiff was caused to fall by servants of defendant, a nonsuit was properly entered. Laven v. Moore, 211 Pa. 245, 60 A. 725.

91. See 4 C. L. 611.

92. Barmore v. Vicksburg, etc., R. Co. [Miss.] 38 So. 210. When facts are undisputed and act is clearly outside the scope of servant's employment, it is the duty of the court to so declare. Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241. Whether false imprisonment was caused by servant while acting for his master or for his own private purposes held for jury. Jackson v. American Tel. & T. Co. [N. C.] 51 S. E. 1015. Whether driver of team was acting within scope of employment at time of injuries caused by his negligence, held for jury. Brough v. Towle [Mass.] 73 N. E. 851. Whether a servant is acting within the scope of his authority in the commission of a wrongful and willful act is a question for the jury. Green v. New York, etc., R. Co., 102 App. Div. 322, 92 N. Y. S. 424.

93. See 4 C. L. 611.

94. McNemar v. Cohn, 115 Ill. App. 31.

95. Burns' Ann. St. 1901, § 314; and see Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183; 4 C. L. 611, n. 88.

96. Indiana Nitroglycerin & Torpedo Co. v. Lippencott Glass Co. [Ind.] 75 N. E. 649.

97. See 4 C. L. 612.

98. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603.

99. As where combination of employers procured union men to leave the shop of one who refused to remain in the combination or abide by its rules. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353.

1. The act of a third person in inducing an employer to discharge an employe is not actionable if the employer had the right to discharge him. Holder v. Cannon Mfg. Co., 138 N. C. 308, 50 S. E. 681, granting rehearing; see 135 N. C. 392, 47 S. E. 481. Evidence in-

§ 6. *Crimes and penalties.*[6]—The Georgia statute making it illegal to procure an advancement on a contract for services with intent to defraud is held constitutional.[7] The act does not provide for imprisonment for debt.[8] The provision that certain proof shall be presumptive evidence of a fraudulent intent is not an assumption of judicial functions by the legislature.[9] The act applies to a cropper who is himself to perform services.[10] A minor who has reached the age of criminal responsibility may be convicted under the act though his contract is not civilly enforceable.[11] An accusation under the act must set forth at least in substance a contract definite and certain as to its terms and duration.[12] To warrant a conviction, the proof must sustain the charge[13] as laid in the accusation.[14]

In South Carolina, also, violation by an employe of a contract for labor under which money has been advanced is a criminal offense.[15] A contract under which money is advanced to stop a prosecution of the employe for violation of another contract is void,[16] and for violation of such void contract the employe cannot be convicted.[17]

Proof that the laborer himself contracted with the employer is indispensable to a conviction under the Mississippi statute penalizing the act of inducing an employe to break his contract for labor with another.[18] Under the similar Georgia statute, there can be no conviction where the proof fails to show that accused knew that a contract existed between the employe and the prosecutor, or that accused enticed, decoyed or persuaded the employe to leave his employment.[19]

MASTERS AND COMMISSIONERS.[20]

§ 1. *Office, eligibility, appointment, and compensation.*[21]—A master in chan-

sufficient to show discharge procured by agents of defendants while acting within the scope of their authority. Holder v. Cannon Mfg. Co., 138 N. C. 308, 50 S. E. 681.

2, 3, 4, 5. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603.

6. See 4 C. L. 612.

7. Laws 1903, p. 90. Title is sufficient, and act does not contain more than one subject-matter. Banks v. State [Ga.] 52 S. E. 74. The act is not repugnant to the constitution of Georgia or the United States. Townsend v. State [Ga.] 52 S. E. 293.

8. Prohibited act is made criminal, and imprisonment is for crime. Banks v. State [Ga.] 52 S. E. 74.

9. Proof of contract, of procuring of money or other thing of value, of failure to perform service or return advancement, and loss to the hirer, is presumptive evidence of fraudulent intent. Banks v. State [Ga.] 52 S. E. 74.

10, 11. Vinson v. State [Ga.] 52 S. E. 79.

12. An accusation which fails to state when a contract was to begin or end is fatally defective. Wilson v. State [Ga.] 52 S. E. 82. There can be no conviction when the term of service has been left indefinite and unascertainable from the agreement. McCoy v. State [Ga.] 52 S. E. 434.

13. Evidence insufficient to support conviction under statute. Glenn v. State [Ga.] 51 S. E. 605. Conviction not sustained where proof failed to show contract relation between accused and prosecutor. Townsend v. State [Ga.] 52 S. E. 293.

14. Where the accusation charged a contract with Mrs. M. E. Drake and the evidence showed W. E. Drake to be the employer who sustained loss, a conviction could not be sustained especially where the evidence was unsatisfactory as to the fraudulent intent of the minor employe, there being evidence that he was compelled to quit the employment by his mother. Williams v. State [Ga.] 52 S. E. 156. An accusation charging that accused procured from the hirer "money, shoes and clothes of the value of $13, with intent not to perform such service, to the loss and damage of the hirer in the sum of $4" is not sustained by proof that the hirer advanced "in money, clothes, etc., $13.50" and that accused owed the hirer $4 on account of advancements. Banks v. State [Ga.] 52 S. E. 74.

15. Where a contract made March 14 was violated March 16, the violation was punishable under Act 1904, taking effect March 16. State v. Robinson, 70 S. C. 468, 50 S. E. 192.

cery is an assistant or minister to the court appointed by the court if no rule or statute provides for it. He must be impartial and is usually bonded.[22]

The character of the duties performed by the master being inferior to those of the chancellor, the compensation should be correspondingly lower.[23] Except where fixed by statute[24] the amount of the master's fees is discretionary with the court[25] and is not subject to review unless abused.[26] The basis should be just compensation for the time which one having the requisite qualifications to serve in that capacity would, in view of the volume of testimony to be considered and of the principles of law to be applied, necessarily be required to devote in order to reach a conclusion as to the questions of fact and principles of law involved, and to place such findings and conclusions in proper shape to present to the court.[27] Members of the bar, masters in chancery, and others having knowledge gained from experience, are competent to testify with reasonable certainty as to the time required,[28] but evidence of the usual and customary compensation of masters is inadmissible.[29] The claim of the master should be so itemized as to distinctly show the service for which he claims the right to make a charge,[30] and if the parties who are called upon to pay the demands of the master object to the claim as presented, the master should be required to support his claim with proof.[31] A master's report being suppressed, the master should not be allowed any fee for services connected therewith[32] unless his report of the testimony is, by consent of the litigants, availed of on re-reference, in which case he should be allowed fees for taking and reporting the proof.[33] An order allowing the master's fees is not of itself a final, appealable order,[34] and the master should not be made a party to a writ of error to review the allowance of his fees,[35] though in some states the right of appeal extends to the master.[36] In the absence of a certificate of evidence it will be presumed on appeal that the amount fixed was reasonable and just.[37]

16, 17. State v. Robinson, 70 S. C. 468, 50 S. E. 192.

18. Under Acts 1900, c. 102, p. 140, proof that the contract of a minor who was enticed away was made by the natural guardian of the minor, is insufficient. State v. Richardson [Miss.] 38 So. 497.

19. Construing Pen. Code 1895, § 122. Evidence held insufficient. McAllister v. State [Ga.] 50 S. E. 921.

20. This article includes all matter relating to masters in chancery and court commissioners. Analogous matter may be found in the titles Reference, 4 C. L. 1257; Restoring Instruments and Records (examiners of title under burnt record acts), 4 C. L. 1294; Notice and Record of Title (referees under Torrens act), 4 C. L. 829, and Partition, 4 C. L. 898. Also see Arbitration and Award, 5 C. L. 250, and Depositions, 5 C. L. 988.

For a full discussion of the law and practice on this subject, including forms, see Fletcher Eq. Pl. & Pr., §§ 582-614.

21. See 4 C. L. 614.

22. Fletcher, Eq. Pl. & Pr. 592.

23. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430. Court should not allow compensation per diem equal to that of the judge of the court, if reduced to a per diem basis, for the working days of the year. Id.

24. When the statute specifies a fee the master is restricted thereto. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

25, 26. Symms v. Chicago, 115 Ill. App. 169.

27, 28, 29. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

30. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430. Claim of master for examining questions of law and fact and reporting conclusions thereon should show time necessarily employed in such work. Id.

31. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430. The proof should show the services rendered, the time actually and necessarily devoted by the master to the work, and such other facts as will enable the court to intelligently determine the rights of the master and the proper obligations of the litigants. Id.

32. Where master allowed one of the attorneys to draw up the report. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

33. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

34, 35. Symms v. Jamieson, 115 Ill. App. 165.

36. So held where a referee or master commissioner presents a claim for fees and expenses in the matter of the examination of a complicated guardian's account, and the claim is disallowed. In re Guardianship of Gorman, 2 Ohio N. P. (N. S.) 667.

37. Symus v. Chicago, 115 Ill. App. 169.

§ 2. *Powers and duties in general and subjects of reference.*[38]—The court may order a reference when the issues are intricate[39] or the taking of an account is involved,[40] or where it desires an investigation of contemptuous conduct,[41] and it is said that there is scarcely any proceeding where a master may not be appointed,[42] but the master is a ministerial officer and the exercise of judicial power cannot be delegated to him.[43]

§ 3. *Proceedings on reference and hearing by master.*[44]—It is irregular to proceed before a master without a joinder of issues,[45] but this irregularity may be waived.[46] In proceedings before a master, ex parte affidavits are not competent evidence.[47] A party may at any time before the master makes his report amend his pleadings so as to conform to the proof,[48] but he cannot, as a matter of right, after the hearing has been concluded, insist upon being allowed to offer evidence to sustain an amendment introducing new and distinct issues of fact.[49] A Federal court has no power to order an examiner to remove books and documents, which have been produced before him by witnesses within the district, obedient to subpoenas duces tecum, to another district for use there in examining witnesses.[50]

§ 4. *Report of master, exceptions and objections.*[51]—The master should prepare the report himself.[52] The report is limited by the scope of the reference.[53] The general rules of construction apply.[54] Except as to errors apparent on the face of the report,[55] errors cannot be taken advantage of without exception.[56] The

38. See 4 C. L. 614, § 2.

39. Where the issues are intricate, involving not only the weighing of the testimony of witnesses but a careful and accurate application of this evidence to the facts, the cause should be referred to a master rather than to a jury. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729.

40. Whenever, under the state code, complicated accounts can be referred to a referee, a suit in equity lies in the **federal courts** to enable the chancellor to refer such matter to a master in chancery. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295. Where a bill foreclosing trust deeds involved the adjustment of many different accounts, covering transactions with a number of different parties for a period of eight or nine years, the court should not proceed to a final hearing until an account has been stated by a master in chancery, and objections thereto settled by him. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430, and citing 6 Ill. Cyc. Dig. 1060, 1061. A reference requiring the master to state the accounts between the parties may be ordered, where a bill alleging that a partnership existed and asking for an accounting is filed and the answer admits everything essential to order such an accounting. Wilcoxon v. Wilcoxon, 111 Ill. App. 90.

41. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914.

42. Fletcher Eq. Pl. & Pr. 593.

43. A contempt not being committed in open court and being punitive in character and not subject to an appeal, the judgment on the facts is a matter for the personal attention of the chancellor. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914. Master's report in divorce case considered. Edgar v. Edgar, 23 Pa. Super. Ct. 220; Rishel v. Rishel, 24 Pa. Super. Ct. 303.

44. See 4 C. L. 615.

45. Patterson v. Johnson, 114 Ill. App. 329.

46. Held waived, no injury appearing, and the complaining party neither objecting to the reference nor to the proceedings before the master, and all the parties treating the issues as properly formed. Patterson v. Johnson, 114 Ill. App. 329.

47. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

48, 49. First State Bank v. Avera [Ga.] 51 S. E. 665.

50. Pepper v. Rogers, 137 F. 173.

51. See 4 C. L. 615.

52. Report prepared by one of the attorneys, and accepted by the master with only a few unimportant changes in phraseology, suppressed. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

53. A commissioner appointed to report all the facts connected with the title to property, in a suit to enjoin the prosecution of the purchase price therefor, held justified in reporting what portion of the price was due. Dunn v. Stowers [Va.] 51 S. E. 366.

54. Where a wife purchased at a foreclosure sale of a mortgage given by her husband, and in a suit to set aside the deed to her the master found that she gave no consideration but that shortly after foreclosure she executed a mortgage for substantially the amount due on the original mortgage, held the fair construction of the report was that she paid the proceeds of the second mortgage to the first mortgagee. Hesseltine v. Hodges, 188 Mass. 247, 74 N. E. 319.

55. Bank of Union v. Nickell [W. Va.] 49 S. E. 1003.

56. So held where it was claimed that evidence was insufficient to support findings. Bank of Union v. Nickell [W. Va.] 49 S. E. 1003.

object of an exception is to specify the objections which the exceptant makes, either to the whole report or to specified parts thereof, with some statement of the grounds on which the exception is based.[57] Exceptions which state no reason for criticism of the whole report, specify no items of which the exceptant complains, and no particulars wherein the master is alleged to have erred, cannot be entertained.[58] Where the exceptions involve a consideration of the evidence, it is incumbent on the party excepting to set forth in connection with each exception the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or to at least point out to the court where such evidence is to be found in the brief of the evidence prepared and filed by the auditor.[59] While the court should not hear exceptions not previously filed as objections before the master,[60] still there are a few exceptions to this rule, but even in the case of an exception to the rule it is the better practice to refer the case back to the master to review his report, so that the parties may have an opportunity of there excepting to it.[61]

§ 5. *Powers of court and proceedings on review.*[62]—The opinion of the master is merely advisory to the court, and the latter may accept or disregard it in whole or in part.[63] It is not intended that the court shall abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon one of its officers.[64] Reports are intended to take up the whole case for the court to make final disposition. It should not come up by instalments.[65] While ordinarily a partial report will be discharged,[66] still in a few cases such a report will be entertained by the court.[67] Where nothing is reported except the evidence which bears upon the acceptance or rejection of the report, all the court is authorized to do is to sustain or overrule the exceptions.[68] The chancellor, after the master has reported and at the hearing, has power to investigate whether unauthorized alterations have been made in the transcript filed by the master.[69] The burden is on the exceptant to prove that the master was wrong,[70] and except in the case of fraud, clear

57. Merritt v. Jordan, 65 N. J. Eq. 772, 60 A. 183.

58. Merritt v. Jordan, 65 N. J. Eq. 772, 60 A. 183. Exceptions to the allowance by the auditor in an accounting of items of office expenses, aggregating specified sums covering specified dates, upon the ground that on the evidence before him he should have disallowed such items, held too general. Waggaman v. Earle, 25 App. D. C. 582.

59. First State Bank v. Avera [Ga.] 51 S. E. 665.

Note: This case must not be taken as overruling the case of White v. Reviere, 57 Ga. 386, as this latter case was decided with reference to the procedure which obtained prior to the passage of Laws 1894, p. 123. It follows that strictly speaking this case belongs primarily in "Reference," the Code analogy to reference to a master q. v. (the court recognizes this by citing 4 C. L. 1261 in support of the proposition), but, as the court says, this ruling is in accord with the equity practice.

60, 61. George Green Lumber Co. v. Nutriment Co., 113 Ill. App. 635.

62. See 4 C. L. 615.

63. Master appointed in divorce proceedings under Act of March 10, 1899, P. L. 8. Edgar v. Edgar, 23 Pa. Super. Ct. 220.

64. Act of March 10, 1899, providing for the appointment of a master in divorce proceedings, considered. Edgar v. Edgar, 23 Pa. Super. Ct. 220. Where master's report was hastily examined, referred back and part of the testimony lost, held court could not enter divorce decree. Rishel v. Rishel, 24 Pa. Super. Ct. 303.

65. LaForest v. Blake Co. [Me.] 60 A. 899. Where a hearing was had before a single justice upon exceptions to the master's report, and thereupon, without any ruling or decision by the sitting justice, it was reported to the law court "for decision upon said exceptions," it being stipulated that "all further issues of law and fact necessary for a final decision of this cause" be before a single justice whose decision "shall be accepted as final," held irregular. Id.

66. LaForest v. Blake Co. [Me.] 60 A. 899.

67. So held where parties stipulated that, after decision of law court upon the exceptions to the master's report, all further issues of law and fact are to be determined finally by a single justice. LaForest v. Blake Co. [Me.] 60 A. 899. The court states, however, that this is not to be regarded as a precedent of practice. Id.

68. LaForest v. Blake Co. [Me.] 60 A. 899.

69. Bolter v. Kozlowski, 112 Ill. App. 13.

70. Christopher v. Mattlage [N. J. Eq.] 60 A. 1124.

error or manifest lack of due consideration the master's findings of fact are to be taken as true;[71] and this is especially true where they have been confirmed by the chancellor and an appeal taken.[72]

§ 6. *Re-reference.*[73]—When necessary the report may be re-referred to the master.[74] A master's report being irregular, a re-reference should be to another master.[75] Unless the parties consent that the evidence reported by the first master shall be used on re-reference, the case should be referred anew for proofs and report.[76]

MASTERS OF VESSELS, see latest topical index.

MECHANICS' LIENS.

§ 1. *Nature of lien and right to it in general.*[77]—The right on which mechanics' liens on real property are founded is purely statutory[78] and is to be distinguished from the lien given at common law to one retaining in his possession property on which he has expended labor or material in enhancing its value.[79] A lien is to be construed in accordance with principles of substantial justice,[80] and while liberality should be exercised in construing the rights of parties under a mechanic's lien when it has once attached, the statute must be strictly followed in securing the lien.[81] The mechanics' lien laws are not unconstitutional as taking property without due process of law, for the owner thereof has obtained something for which he should be compelled to pay to the person furnishing it.[82]

71. So held, where the evidence other than certain exhibits was not before the court. Atlas Nat. Bank v. Abram French Sons Co., 134 F. 746.

72. Union Trac. Co. v. Grubb, 24 Pa. Super. Ct. 345; Torrey v. Dickinson, 111 Ill. App. 524. Findings of fact by the auditor of the lower court are to be taken as presumptively correct, and, unless some obvious error has intervened in the application of the law, or some serious and important mistake has been made in the consideration of the evidence, a decree ratifying a report by him should be permitted to stand. Consaul v. Cummings, 24 App. D. C. 36.

73. See 4 C. L. 615.

74. Findings and conclusions of commissioner, affirmed by trial court, reversed and sent back, where it could not be ascertained to what extent a repealed law, supposed to be in force, had affected the decision. Richtman v. Haley [C. C. A.] 121 F. 353.

75. So held where master allowed one of the attorneys to prepare the report. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

76. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933, rvg. 110 Ill. App. 430.

77. See 4 C. L. 616.

78. Este v. Pennsylvania R. Co., 27 Pa. Super. Ct. 521.

79. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51.

80. Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632.

81. Lapham v. Ransford, 5 Ohio C. C. (N. S.) 577; Martin v. Gavigan, 107 App. Div. 279, 95 N. Y. S. 14. Federal Bankruptcy Courts will follow the construction given to

§ 2. *Services, materials, and claims for which liens may be had.*[83]—Two things are essential that a materialman may avail himself of the statute, materials must be furnished and must be for the particular building on which the lien is filed.[84] It is not necessary that materials should be actually used in a building or structure but that they should be furnished for that purpose.[85] Thus a lien was allowed for a temporary scaffold used in plastering a building[86] and for dynamite used in blasting[87] and for a sidewalk laid in front of property[88] and for permanent fixtures installed in a house,[89] but not for a temporary bridge subsequently removed,[90] or for timber used in removal of an old building where another was erected in its place.[91] A charge for drayage may be added to the lien where by the agreement this was to be added to the price of materials.[92]

In nearly every state one furnishing labor in the construction of a building is entitled to a lien therefor.[93] Thus an architect has a right to a lien,[94] and a railroad construction contract is construed as one for "work and labor,"[95] but in some states where a lien is given on a railroad for labor rendered the remedy is not available to a subcontractor furnishing the labor.[96] A debt for labor or materials becomes a lien as soon as it becomes a debt.[97] Where the code gives a lien to "all persons, etc.," it includes corporations,[98] but it is a good defense that the corporation is not licensed to do business in the state,[99] but not that an individual does business under a designation prohibited by law.[1] One who lays pipes in the streets for the conveyance of steam from a central heating plant is entitled to a lien on the generating plant itself.[2]

§ 3. *Properties and estates therein which may be subjected to the lien.*[3]—A mechanics' lien for work and materials attaches to the land though in fact the building erected thereon is destroyed,[4] but not when the destruction was without fault and before the lien was filed,[5] and the assignee of a leasehold willfully destroy-

the state mechanic lien laws by the state courts. In re Grissler [C. C. A.] 136 F. 754.

82. Gardner & Meeks Co. v. New York, etc., R. Co. [N. J. Err. & App.] 62 A. 416.

83. See 4 C. L. 617.

84. Iowa Code, § 3089. Where materials were used for one house by a contractor representing that they were for another, the owner of the latter is not liable. Hobson Bros. v. Townsend, 126 Iowa, 453, 102 N. W. 413.

85. Hobson Bros. v. Townsend, 126 Iowa, 453, 102 N. W. 413. The fact that materials purchased by a contractor for use in a railroad had not actually gone into the construction of the road does not deprive the seller of his lien. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193; Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26.

86. Gates v. O'Gara [Ala.] 39 So. 729.

87. Schaghticoke Powder Co. v. Greenwich & J. R. Co. [N. Y.] 76 N. E. 153.

88. An "improvement" within meaning of statute, see 4 C. L. 617, n. 76. Leiper v. Minnig [Ark.] 86 S. W. 407.

89. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. Installation of counters and partitions. Mandary v. Smartt [Cal. App.] 82 P. 561. Installation of elevator and heating plant. Otis Elevator Co. v. Dusenbury, 47 Misc. 450, 95 N. Y. S. 959.

90. Temporary bridge erected to prevent penalty accruing by delays in erection of permanent bridge. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 P. 357.

91. A "no lien" clause contained in the contract. Craig v. Commercial Trust Co., 211 Pa. 7, 60 A. 317.

92. Page v. Grant, 127 Iowa, 249, 103 N. W. 124.

93. Md. Acts. 1898, p. 1169, c. 502 subjects buildings to a lien for work done on or about the same but gives no lien for materials furnished. While a contractor furnishing certain carved marble work is not entitled to a lien, the subcontractor who furnishes the labor for the carving of the same may have a lien. Evans Marble Co. v. International Trust Co. [Md.] 60 A. 667.

94. Friedlander v. Taintor [N. D.] 104 N. W. 527; Richardson v. Central Lumber Co., 112 Ill. App. 160.

95. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

96. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883.

97. P. L. 1898, p. 583. Stiles v. Galbreath [N. J. Eq.] 60 A. 224.

98. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

99. Iowa Falls Mfg. Co. v. Farrar [S. D.] 104 N. W. 449. And see New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808.

1. Individual using the name of "Vandergraff & Co." Vandegrift v. Bertron, 83 App. Div. 548, 82 N. Y. S. 153.

2. Wells v. Christian [Ind.] 76 N. E. 518.

3. See 4 C. L. 618.

4. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94.

ing buildings subject to a lien is liable for the value of the buildings.[6] Whether fixtures in a building are lienable articles depends largely on the intention of the parties.[7] Where labor and materials are furnished to two separate and unconnected houses, a separate lien must be filed on each,[8] and it is a question of fact whether a double house is in fact one building or two;[9] but where all the work is done under one contract on two adjoining houses on adjacent lots held by the owner under one conveyance, one lien can cover both.[10]

Sale of property.[11]—A change of ownership while work is in progress does not defeat the lien,[12] and similarly where a mechanics' lien exists against buildings on leased land the assignee takes subject to the lease.[13]

Homestead.[14]—A mechanic's lien cannot be foreclosed against a building on land held under the United States Homestead Law, for a lien cannot be enforced against a building unless the owner has some interest in the land which may be sold to satisfy the lien,[15] and in Texas, where a lien can be placed on a homestead only for improvements and purchase money, attorney's fees in foreclosure cannot be added to the amount due.[16] Where persons are entitled who perform labor in erection of a manufactory, etc., a steam heating plant is classed as a manufactory.[17]

Public buildings.[18]—Unless expressly provided, the mechanics' lien law does not apply to state and municipal buildings;[19] but statutes are becoming common which require a bond to secure mechanics and materialmen.[20]

§ 4. *The contract supporting the lien and the privity of the landowner thereto. A. In general.*[21]—A mechanics' lien arises out of some contractual relation between the owner of the land or one having some interest therein and the person claiming the lien,[22] and to hold the owner estopped to deny the contractual relation it is necessary to show his knowledge of the improvements or bad faith on his part.[23] Where a deed is shown to a certain person and there appears no deed of record conveying the title from him, the lien claimant is justified in regarding him as the

5. Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 P. 30.

6. Hammond v. Darlington, 109 Mo. App. 333, 84 S. W. 446.

7. In the absence of evidence showing a contrary intent, gas fixtures are not subject to a mechanics' lien. Frank Adam Elec. Co. v. Gottlieb, 112 Mo. App. 226, 86 S. W. 901. Machinery in a mill fastened to the ground but not to the walls. Roof of building enlarged to accommodate it. Held a fixture. Pflueger v. Lewis Foundry & Mach. Co. [C. C. A.] 134 F. 28.

8. McElroy v. Keiley [R. I.] 60 A. 679. Where materials furnished three houses under one contract containing nothing to specify how much is done on each house each is liable for the whole amount of the existing indebtedness. Guarantee, Sav. Loan & Investment Co. v. Cash [Tex. Civ. App.] 87 S. W. 749.

9. Union Trac. Co. v. Grubb, 24 Pa. Super. Ct. 345.

10. Woolf v. Schaefer, 93 N. Y. S. 184.

11. See 4 C. L. 619.

12. Billings Co. v. Brand [Mass.] 73 N. E. 637.

13. Hammond v. Darlington, 109 Mo. App. 333, 84 S. W. 446.

14. See 4 C. L. 620.

15. Green v. Tenold [N. D.] 103 N. W. 398. See, also, note in Landlord and Tenant, 6 C. L. 368, text 45.

16. Cooper v. Brazelton [C. C. A.] 135 F. 476.

17. Wells v. Christian [Ind.] 76 N. E. 518.

18. See 4 C. L. 620.

19. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581.

20. See 4 C. L. 1138.

21. See 4 C. L. 620.

22. Contractual relation must be shown. Egan v. Cheshire St. R. Co. [Conn.] 61 A. 950; Entenman v. Anderson, 94 N. Y. S. 45; Hengstenberg v. Hoyt, 109 Mo. App. 622, 83 S. W. 539. To maintain a mechanics' lien for material furnished, it is necessary that the items should be furnished on request of the owner or his duly authorized agent. Snyder & Co. v. Sparks [Neb.] 103 N. W. 662. The affidavit for a mechanics' lien must show that the material was furnished to, and under a contract with, the owner of some interest in the land, in order to bind the interest of such owner. Lapham v. Ransford, 5 Ohio C. C. (N. S.) 577.

23. Snyder v. Monroe Eckstein Brewing Co., 107 App. Div. 328, 95 N. Y. S. 144. Where a vendor in the presence of the vendee gives orders for new plumbing to be done in a building, the latter is bound thereby. Getz v. Brubaker, 25 Pa. Super. Ct. 303. Where a husband orders work on his wife's buildings and she is present and knows and sees the improvements, her property is subject to the lien. Schummer v. Clark, 107 App. Div. 207, 95 N. Y. S. 836.

owner.[24] No claim for a mechanic's lien arises till a payment is actually due[25] and the principal contract is substantially complied with,[26] and it is immaterial if subsequent to filing his lien the contractor has fulfilled his contract obligations.[27] In Illinois to entitle one to a lien it must appear from the principal contract that the work is to be completed and the final payment to be made within one year from the date thereof,[28] and an implied contract is not sufficient basis for a mechanic's lien;[29] but the furnishing of extra materials or extra work is often regarded as modification of the principal contract.[30]

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.*[31]—There is no such privity between the lessee and the owner as to allow interest of the latter to be bound by contracts for improvements made by the tenant,[32] and similarly in the case of a licensee[33] or the holder of a recorded mortgage. As between the owner and subsequent grantees with notice a mechanic's lien claimant is not required to file any notice,[34] and a vendee who in absence of representations of the contractor purchases while a building is in process of construction takes subject to his lien though the lien is not recorded and he has no notice thereof.[35] The vendee is not constituted agent of the vendor in the purchase of material for buildings to go upon the land under a contract for transfer of the land after erection of the

24. Badger Lumber Co. v. Muehlebach, 109 Mo. App. 646, 83 S. W. 546.

25. Where an architect's certificate is a prerequisite to payment, the owner cannot pay contractor after notice till it is obtained. Daly v. Somers Lumber Co. [N. J. Eq.] 61 A. 730; Nesbit v. Braker, 93 N. Y. S. 856. Where an architect is to be paid on the completion of a building according to a per cent. basis, he has no lien till the building is actually completed. Richardson v. Central Lumber Co., 112 Ill. App. 160.

26. See Building and Construction Contracts, 5 C. L. 455. Rainey v. Freeport Smokeless Coal & Coking Co. [W. Va.] 52 S. E. 473; Derr v. Kearney, 46 Misc. 148, 93 N. Y. S. 1099. Where the contract for shingling a roof provides for payment on completion of the work, no just claim for a lien exists on delivery of the shingles. Woolf v. Schaefer, 93 N. Y. S. 184. No lien exists for repair of a roof where it continues to leak. Terrell v. McHenry [Ky.] 89 S. W. 306. Approval by the architect and owner is conclusive as to substantial compliance with the contract. Toan v. Russell, 111 Ill. App. 629; Otis Elevator Co. v. Dusenbury, 47 Misc. 450, 95 N. Y. S. 959. Where by a fraudulent agreement between claimant and former owner the admissions of the latter are not conclusive against one purchasing from him. Chamberlain v. Golden, 27 Ky. L. R. 686, 86 S. W. 521. Where time goes to the essence of a contract, a delay in completion prevents such substantial compliance as to entitle the contractor to a lien. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625. Generally, however, delay in completion is no defense. Central Bldg. Co. v. Karr Supply Co., 115 Ill. App. 610. Where the cellar windows are out of plumb, there is not such substantial compliance as to entitle the contractor to a lien. Schindler v. Green [Cal. App.] 82 P. 341. A lien exists though there are certain defects in the construction of a heating plant. Otis Elevator Co. v. Dusenbury, 47 Misc. 450, 95 N. Y. S. 959.

27. Aex v. Allen, 94 N. Y. S. 844.

28. Cooke v. Haungs, 113 Ill. App. 501; George-Green Lumber Co. v. Nutriment Co., 113 Ill. App. 635. No mechanics' lien can exist except from a contract which provides (1) a time within which work must be completed; (2) a time within which final payment is to be made; (3) the material furnished; and (4) work to be done. Henry v. Applegate, 111 Ill. App. 13. Contract must fix time of completion and payment. Bolter v. Kozlowski, 112 Ill. App. 13; Smith v. Central Lumber Co., 113 Ill. App. 477.

29. Henry v. Applegate, 111 Ill. App. 13; Burke v. Coyne, 188 Mass. 401, 74 N. E. 942. Amount due must be liquidated. Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 73 N. E. 494.

30. Extra radiator installed at request. Otis Elevator Co. v. Dusenbury, 47 Misc. 450, 95 N. Y. S. 959; Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632.

31. See 4 C. L. 621.

32. Ga. Code 1895, § 2801, Amended Act 1899, p. 33. Pittsburgh Plate Glass Co. v. Peters Land Co. [Ga.] 51 S. E. 725; Seklir v. Krizer, 96 N. Y. S. 74. Where a lienor had foreclosed a leasehold interest but before entry it was forfeited to the lessor for breach of conditions, he cannot after entry by the lessor set up any claim thereto. Stetson & P. Mill Co. v. Pacific Amusement Co., 37 Wash. 335, 79 P. 935. Where the lessor authorizes the lessee to make permanent improvements, he is bound and the lessee acts as his agent. Dougherty-Moss Lumber Co. v. Churchill [Mo. App.] 90 S. W. 405.

33. A sale of a bridge and abutments, in foreclosure of a mechanic's lien, described as "bridge and masonry" to the purchaser alone and not to his heirs and assigns, does not convey the land on which the abutments rest where the occupation thereof was by license only. Nicolai v. Baltimore [Md.] 60 A. 627.

34. Guarantee Sav., Loan & Investment Co. v. Cash [Tex. Civ. App.] 87 S. W. 749.

35. Billings Co. v. Brand [Mass.] 73 N. E. 637.

buildings; and the interest of the vendor is not liable to the materialman;[36] but a vendee who subsequently acquires title may subject the property to a mechanic's lien,[37] but he is not bound by contracts of his vendor made subsequent to his option of which he had no notice.[38] One tenant doing work on the premises cannot cut out his co-tenant by the foreclosure of a mechanic's lien.[39]

(§ 4) *C. Subcontractors and materialmen.*[40]—Original contractors are those dealing directly with the owner.[41] Where a contractor can only recover the difference between the contract price and the amount owed by him to subcontractors after demand by them, he may have a lien only for that difference.[42] One who furnishes labor or materials to a contractor for use in a building generally has a lien for the value thereof upon the building.[43]

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice and demand, statement to acquire lien.*[44]—A notice to owner[45] with sworn statement of claim is generally required.[46] This notice must show substantial compliance with the statute[47] and show when the contract was to be terminated and when the last payment was due thereof[48] and the date thereof,[49] and what material[50] and to whom it was furnished,[51] and must allege the necessary facts conjunctively and not in the alternative as set forth in the statute.[52] The amount claimed for labor and materials need not be separately stated in the notice to the owner.[53] The true owner

36. Lapham v. Ransford, 5 Ohio C. C. (N. S.) 577.

37. Builders' Supply Co. v. North Augusta Elec. & Improvement Co. [S. C.] 51 S. E. 231; Stewart Contracting Co. v. Trenton & N. B. R. Co., 71 N. J. Law, 568, 60 A. 405. A vendor endorsing the contract of a prospective vendee authorizes work done upon the premises though the latter fails to carry out his agreement. Sands v. Stagg [Va.] 52 S. E. 633.

38. Where a building contract is made after an option for the sale of property, a purchase-money mortgage made by the vendee thereof not having notice of the contract is prior to a mechanics' lien. Rochford v. Rochford, 188 Mass. 108, 74 N. E. 299.

39. Burnett v. Kirk [Wash.] 80 P. 855.

40. See 4 C. L. 622.

41. Sands v. Stagg [Va.] 52 S. E. 633.

42. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal 281, 79 P. 968.

43. Vickery v. Richardson [Mass.] 75 N. E. 136; Getz v. Brubaker, 25 Pa. Super. Ct. 303; Evans Marble Co. v. International Trust Co. [Md.] 60 A. 667. Applies to laborers of a subcontractor engaged in building a railroad. Pere Marquette R. Co. v. Baertz [Ind. App.] 74 N. E. 51. A subcontractor does not come under the provision giving a lien on a railroad to laborers for work done in the construction thereof. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883. Where a contract runs to one person but is performed by another, the latter has a right to enforce the lien. Littell v. Saulsberry [Wash.] 82 P. 909. A lessee authorized by the lease to make repairs has not the remedy of a contractor and those acting by his direction are original contractors and not subcontractors. Dougherty-Moss Lumber Co. v. Churchill [Mo. App.] 90 S. W. 405.

44. See 4 C. L. 623.

45. Prior to Ga. St. 1899, p. 33 and under Civ. Code 1895, § 2801, a lien must be asserted if at all against the true owner who is entitled to the notice required by law. Reaves v. Meredeth [Ga.] 51 S. E. 391.

46. Where the statute provides that the claim, statement must be verified, an acknowledgment thereof is insufficient. Schenectady Contracting Co. v. Schenectady R. Co., 94 N. Y. S. 401. A verification of a claim of a corporation may be made by manager or agent. Parke & Lacey Co. v. Inter Nos Oil & Development Co. [Cal.] 82 P. 51. Verification on information and belief is insufficient. Western Plumbing Co. v. Fried [Mont.] 81 P. 394.

47. Grant v. Cumberland Valley Cement Co. [W. Va.] 52 S. E. 36; Este v. Pennsylvania R. Co., 27 Pa. Super. Ct. 521; Rainey v. Freeport Smokeless Coal & Coking Co. [W. Va.] 52 S. E. 473.

48. Smith v. Central Lumber Co., 113 Ill. App. 477.

49. Nofziger Bros. Lumber Co. v. Shafer [Cal. App.] 83 P. 284.

50. A notice reciting that the labor performed is "plumbing and gas fitting and certain material furnished certain premises" is sufficient. Gilmour v. Colcord [N. Y.] 76 N. E. 273. Where the statute provides that the notice shall set forth the kind and amount of labor and material furnished, a notice setting forth the contract and specification is insufficient. Toop v. Smith, 181 N. Y. 283, 73 N. E. 1113.

51. A notice showing lumber furnished N. & Son (a corporation) when in fact furnished N. & Son (a partnership) is fatally defective. Sawyer Goodman Co. v. Neagle, 110 Ill. App. 178.

52. Lien statement showing "agreed price or value is $25" is fatally bad. Siegel v. Ehrshowsky, 92 N. Y. S. 733. Where the notice says "The name of the person by whom the lienor is employed or to whom he furnishes materials or is to furnish materials is X. And the person with whom the contract was made is X." it is good although the allegation is in the alternative. Martin v. Gavigan Co., 107 App. Div. 279, 95 N. Y. S. 14.

of the property must be named in the notice and the name of the record owner is insufficient,[54] and some intention to claim and hold a lien must appear from the notice.[55]

Service of notice on owner.[56]—The notice should be served on the owner,[57] and where the statute provides that in case of filing a lien against a railroad notice shall be served on it, such notice must be served personally on one of the officers, and service on agents as in other actions is insufficient,[58] and where liens are sought for materials used in road construction on the officer in control of such matters.[59] Generally by statute, where a notice of claim of lien is served on an owner, he is liable for any payments made thereafter to the contractor,[60] and where there is provision that on ten days' notice by a subcontractor to the owner he is to retain unpaid balances in his hands, this includes all unpaid balances due to him at the time of notice,[61] and in some states, in the absence of formal notice, where he knows that the amounts due to subcontractors or materialmen remain unpaid.[62] Where by the mechanic's lien law no lien can be had by a subcontractor unless the owner has, at the time of notice, money owing to the contractor in case of an attachment of money due by the sheriff, a subcontractor loses all right thereto,[63] but in such case where the owner is compelled to make an outlay to complete the building he may deduct this sum from the amount he owes the contractor as available for subcontractors,[64] and where a subcontractor has accepted a note extending payment till after the statutory period, his demand on owner to withhold payments to the principal contractor may be disregarded.[65] In advance of notice of subcontractor's claim an owner may in good faith pay his contractor in full,[66] but where the owner prematurely pays the contractor he is liable to the subcontractor to the extent of such payment,[67] and a payment without the contractor procuring the architect's certificate is not a premature payment, for this certificate is for the benefit of the owner and not of the unpaid

53. Martin v. Gavigan, 107 App. Div. 279, 95 N. Y. S. 14.

54. Lang v. Adams [Kan.] 80 P. 593.

55. A notice entitled "claim of lien" or "claim of benefit under mechanic's lien law" is substantial compliance with the statute which requires a notice of intention to claim a lien to be served. Mandary v. Smartt [Cal. App.] 82 P. 561.

56. See 4 C. L. 624.

57. Service on architect insufficient. Drummond v. Rice, 27 Pa. Super. Ct. 226.

58. Dalton v. St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610.

59. Chairman of road committee. Rockland Lake Trap Rock Co. v. Port Chester, 102 App. Div. 360, 92 N. Y. S. 631.

60. Lee v. Williams, 26 Pa. Super. Ct. 405; Spring Brook Lumber Co. v. Watkins, 26 Pa. Super. Ct. 199. Where by the principal contract the owner is bound to withhold 15% of the contract price, a subcontractor on giving notice has a lien on the portion unpaid. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

61. McDonald Stone Co. v. Stern [Ala.] 38 So. 643. On the receipt of notice of default of the principal contractor, the owner is liable to the extent of further payments made to him as well as money remaining unpaid in his hands. Nichols v. Dixon [Tex. Civ. App.] 85 S. W. 1051.

62. Where an owner knows that the subcontractors of the principal contractor are unpaid he is not justified in making payments to the contractor to the prejudice of the subcontractors. Page v. Grant, 127 Iowa, 249, 103 N. W. 124. That the claimant has knowledge that the owner is about to pay the contractor while he has a claim against the building does not estop him from afterwards asserting his claim. Mivelaz v. Genovely [Ky.] 89 S. W. 109. Where the statute provides that a subcontractor, filing his lien after 30 days from the date of furnishing the last item of material, can only recover up to the amount owed by the owner to the principal contractor, payment by the owner with knowledge of the claim of the subcontractor is not a good defense. Iowa St. § 3094. Empire Portland Cement Co. v. Payne, Bradshaw, McMahon & Co. [Iowa] 105 N. W. 331.

63. Morgan v. Alderman & Sons' Co., 70 S. C. 462, 50 S. E. 26. When there is something due a contractor, the subcontractors have a right thereto, though the contract has been abandoned. Miller v. Calumet Lumber & Mfg. Co., 111 Ill. App. 651; Fitzner v. Noullet, 114 La. 167, 38 So. 94. Rights of subcontractors are fixed and determined at the death of the principal contractor, unless the personal representative undertakes to complete the work. Bergin v. Braun, 3 Ohio N. P. (N. S.) 150.

64. Page v. Grant, 127 Iowa, 249, 103 N. W. 124.

65. Taylor v. Wahl [N. J. Law] 60 A. 63.

66. Somers Brick Co. v. Souder [N. J. Eq.] 61 A. 840.

67. Daly v. Somers Lumber Co. [N. J. Eq.] 61 A. 730.

subcontractor.[68] The owner is not bound to give materialmen and subcontractors information as to the amount still owing by him to the contractor.[69]

(§ 5) *B. Filing and recording claim and statement thereof.*[70]—Most statutes require that the mechanic's lien statement be filed in the clerk's or register's office within a certain time after the furnishing of the last item of material or labor.[71] The filed statement must show substantial compliance with the law.[72] The description of the property sought to be charged with the lien is bad if it appears that it could apply to other property of the same owner on the same street,[73] but where a full description of a building is given it may be unnecessary to include a description of the land on which it stands.[74] That the notice describes more property than can be lawfully held is not sufficient to render the lien void if it is legal as to any part thereof.[75] One failing to show a debt or a premature payment to a contractor is bad.[76] Where the notice is insufficient the fraudulent grantees of the owner may contest the lien.[77] Where the joinder of persons having claims of less than a hundred dollars is alone authorized by law, a statement showing a claim of over that amount is not invalid because joined with others.[78] In Kansas the claimant must, in his lien statement, state whether he claims as contractor or subcontractor,[79] but an allegation that work was done by the plaintiff as original contractor is not bad where it appears that he did the work as lessee by direction of the owner.[80] Where a ten days' notice is required before the filing of a lien, it is immaterial if in the notice it states a lien will be filed in less time if in fact ten days does elapse between the day of filing and notice.[81] The statement must show the amount due[82] and how much due for materials and how much for labor,[83] but a statement of too small an amount[84] or an excessive claim due to mistake[85] is not fatal. Where a contractor's notice is willfully false and untrue his lien will fail,[86] but unless fraudulently made a statement including nonlienable items will not defeat a lien.[87]

68. Valley Lumber Co. v. Struck, 146 Cal. 266, 80 P. 405.

69. Reaves v. Meredeth [Ga.] 51 S. E. 391. Where by the terms of a mortgage the mortgagee may pay off liens on the premises and add them to the mortgage debt, a claim for lumber cannot be so added in the absence of any declaration on part of the dealer that he intends to assert his right to a lien. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274.

70. See 4 C. L. 626.

71. An inchoate right to a lien ceases after 60 days if no notice is given or statement filed. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274. Where mill machinery is furnished the time does not begin to run till the installation and adjustment are completed. Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632.

72. Grant v. Cumberland Valley Cement Co. [W. Va.] 52 S. E. 36. A paper reciting "To amount due under written contract for erection of house" is sufficient to comply with the statutory requirement for filing statement of amount due. McPherson v. Greenwell [R. I.] 61 A. 175. A statement entitled "Statement for account or demand for which lien is claimed" is sufficient to entitle the claimant to a lien. Anderson v. Silverman [R. I.] 61 A. 52.

73. Security Bldg. & Sav. Union v. Colvin, 27 Pa. Super. Ct. 594.

74. Newell v. Brill [Cal. App.] 83 P. 76.

75. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94.

76. Nason v. John [Cal. App.] 82 P. 566. Must show a debt. Kirschner v. Mahoney, 96 N. Y. S. 195.

77. Toop v. Smith, 181 N. Y. 283, 73 N. E. 1113.

78. Van Slyck v. Arsenau [Mich.] 12 Det. Leg. N. 130. 103 N. W. 571.

79. Western Sash & Door Co. v. Heiman [Kan.] 80 P. 16.

80. Dougherty-Moss Lumber Co. v. Churchill [Mo. App.] 90 S. W. 405.

81. Faulkner v. Bridget, 110 Mo. App. 377, 86 S. W. 483.

82. A statement showing a claim of $925 less $75 will be construed as a statement of $850 due. Held v. New York, 83 App. Div. 509, 82 N. Y. S. 426.

83. Alexander v. Hollender, 94 N. Y. S. 796. But see Woolf v. Schaefer, 93 N. Y. S. 184. Where a lien is given for labor only, a contractor who is to furnish labor and materials for a lump sum, where it is impossible to determine how much is for labor and how much is for material, has no right to a lien. Evans Marble Co. v. International Trust Co. [Md.] 60 A. 667. An item in the claim for "extra work done on said house" is insufficient, since the number of days' labor should have been specifically set forth. McPherson v. Greenwell [R. I.] 61 A. 175.

84. Sorg v. Pfalzgraf, 113 Ill. App. 569.

85. Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632.

86. Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21.

87. Kittrell v. Hopkins [Mo. App.] 90 S.

The account attached to the affidavit must show the relation of debtor and creditor between the owner of some interest in the land and the party claiming a lien upon the interest of such owner.[88] Where it is shown that the materials were furnished at such a time as to give the claimant a right to a lien, it is unnecessary to give the dates of the furnishing of the items.[89]

§ 6. *Amount of lien and priority thereof.*[90]—A prior recorded mortgage is paramount to all mechanics' liens[91] even though the consideration therefor passes after the completion of the work,[92] and, similarly, a subsequent purchase-money mortgage made by one holding an option on the property prior to the commencement of the work is prior to the liens,[93] but where the mortgage is made to include after-acquired property it takes that subject to prior liens.[94] Except as to recorded mortgages and other mechanics' liens such lien when perfectly recorded takes precedence over all other liens.[95] As among co-claimants all mechanics' liens are equal,[96] but this applies only when the liens are filed as provided by law in the time given by the statute,[97] and failure on part of all but one claimant to give the statutory notice to the owner gives him a preference over all other claimants.[98] Under statutes giving a subcontractor filing after 30 days from the time of furnishing the last item, a lien only on the unpaid balance due the contractor, as between two subcontractors so filing, the prior prevails.[99] So creditors of a head contractor are entitled to priority over a subcontractor where they secure their claims prior to the giving of notice by the subcontractor to the owner.[1]

§ 7. *Assignment or transfer of lien.*[2]—Mechanics' liens are generally held to be assignable,[3] but the assignee is bound by all defenses good against the assignor.[4]

§ 8. *Waiver, loss, or forfeiture of lien, or right to acquire it.*[5]—A builder may agree to waive his right to mechanics' liens,[6] and such waiver binds subcontractors having notice.[7] Such notice is in many states by law constructively given by filing the contract containing a waiver in the register's or clerk's office,[8] and where the contract filed refers to plans and specifications in the possession of the contractor it is sufficient.[9] Where the owner fails to file his contract, his liability is not limited

W. 109; Palmer v. McGinness, 127 Iowa, 118, 102 N. W. 802.

88. Lapham v. Ransford, 5 Ohio C. C. (N. S.) 577.

89. Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

90. See 4 C. L. 628.

91, 92. Eckles v. Stuart, 212 Pa. 161, 61 A. 820.

93. Rochford v. Rochford, 188 Mass. 108, 74 N. E. 299.

94. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353.

95. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273. Where by statute, in cases of assignment for the benefit of creditors, claims for labor are to be regarded as preferred, the trustee for the creditors nevertheless takes subsequent to mechanics' lien claimants. McDaniel v. Osborne [Ind.] 75 N. E. 647.

96. Stiles v. Galbreath [N. J. Eq.] 60 A. 224.

97. Nichols v. Dixon [Tex.] 13 Tex. Ct. Rep. 927, 89 S. W. 765.

98. Nichols v. Dixon [Tex. Civ. App.] 85 S. W. 1051.

99. Iowa Code §§ 3092, 3094, 3095. Lindsay & Phelps Co. v. Zoeckler [Iowa] 104 N. W. 802.

1. Bergen v. Braun, 3 Ohio N. P. (N. S.) 150.

2. See 4 C. L. 629.

3. Endorsement of time check sufficient evidence of assignment. Pere Marquette R. Co. v. Baertz [Ind. App.] 74 N. E. 51. Transfer of a note given for materials carries the right to foreclose the lien on nonpayment. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470.

4. The assignee of a contractor who has, prior to the assignment, waived his right to a lien, cannot enforce a lien on his own account. Kent Lumber Co. v. Ward, 37 Wash. 60, 79 P. 485.

5. See 4 C. L. 629.

6. Gray v. Jones [Or.] 81 P. 813.

7. A notice posted on the front of a building and also on the first floor on the stairway is sufficient to warn materialman. Marshall v. Cardinell [Or.] 80 P. 652. Where notice limiting responsibility is posted, it is presumed it remained posted for a sufficient length of time. Id. But not in absence of notice. Gardner & Meeks Co. v. New York, etc., R. Co. [N. J. Err. & App.] 62 A. 416.

8. In California all building contracts involving more than $1,000 are void unless filed (Civil Code § 1183). Where the aggregate items stated in a contract amount to over $1,000, the contract is void unless filed. Smith v. Bradbury [Cal.] 82 P. 367.

9. Thirsk v. Evans, 211 Pa. 239, 60 A. 726.

to the amount due the contractor,[10] but the liability is limited only as to persons standing in privity with the contractor.[11] Where the contract on which the work progresses is a different one from that which is filed, the subcontractor is not bound by the waiver.[12] In the absence of fraud, where the right to a lien is once lost, no subsequent delivery of materials will revive it.[13] Where the statute provides that on demand of the owner or lessee each person claiming a lien shall furnish a written statement under penalty of forfeiture of the lien, on failure so to do the penalty must be enforced, though the owner is not prejudiced thereby.[14] A contractor giving a surety bond against the filing of mechanics' liens is estopped to enforce a lien on his own account,[15] but a materialman who is a surety on such a bond is not so estopped.[16] A lien is waived by the acceptance of notes in payment of claim maturing after the time when a lien statement must be filed,[17] but not where they mature prior to that time.[18] Where repairs were made on a building the fact that it was to be used for an illegal purpose did not vitiate the right to a lien.[19] In some states a mechanic's lien may be disallowed by showing that the work was done relying on payment by the contractor rather than on credit of the building.[20]

§ 9. *Discharge and satisfaction.*[21]—Where a mechanic's lien claimant accepts other security for the payment of his claim, the lien is discharged,[22] and where a bond is given by the owner to dissolve a lien, his sureties may be called upon to pay without the appointment of an administrator for the principal,[23] and on suit on such a bond where the lien has been litigated the sureties have none of the defenses that would have been good originally against the claimant.[24] An attempted settlement not involving a tender does not discharge a lien, although an offer was made that was more than could be recovered.[25]

§ 10. *Remedies and procedure to enforce lien. A. Remedies.*[26] *Time of bringing action.*[27]—Generally a suit must be brought within a limited time after the filing of a mechanic's lien, and on failure to do so the lien lapses,[28] but that an interval of thirty days occurs in the construction of a building does not affect the lien thereon.[29] The statute of limitation has no bearing on mechanics' liens in some states.[30]

Concurrent remedies.[31]—Where because of some irregularity one fails to establish his lien, a right to a personal judgment is frequently given,[32] but this has no application where there is no personal relation between the owner and the claimant,[33]

10. Schmidt v. Eitel [N. J. Eq.] 62 A. 558.
11. Stewart Contracting Co. v. Trenton, etc., R. Co., 71 N. J. Law 568, 60 A. 405.
12. Contract different from the one on file. Spring Brook Lumber Co. v. Watkins, 26 Pa. Super. Ct. 199; Lee v. Williams, 26 Pa. Super. Ct. 405.
13. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26.
14. Comp. Laws § 10717. Frolich v. Beecher [Mich.] 102 N. W. 736.
15. Kent Lumber Co. v. Ward, 37 Wash. 60, 79 P. 485. But see Badger Lumber Co. v. Muehlebach, 109 Mo. App. 646, 83 S. W. 546.
16. Badger Lumber Co. v. Muehlebach, 109 Mo. App. 646, 83 S. W. 546. But see Miller v. Taggart [Ind. App.] 76 N. E. 321.
17. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26; Woolf v. Schaefer, 93 N. Y. S. 184.
18. Woolf v. Schaefer, 93 N. Y. S. 184.
19. Doyle v. Franks [Kan.] 81 P. 211.
20. Rider-Ericsson Engine Co. v. Fredericks, 25 Pa. Super. Ct. 72.
21. See 4 C. L. 630.
22. Cosgrove v. Farwell, 114 Ill. App. 491.
23. Holmes v. Humphrey [Mass.] 73 N. E. 668.
24. Ruggles v. Bernstein, 188 Mass. 232, 74 N. E. 366.
25. Palmer v. McGinness, 127 Iowa, 118, 102 N. W. 802.
26. See 4 C. L. 630.
27. See 4 C. L. 631.
28. Somers Brick Co. v. Souder [N. J. Eq.] 61 A. 840; McKnight v. Bank of Acadia, 114 La. 289, 38 So. 172.
29. Billings Co. v. Brand [Mass.] 73 N. E. 637.
30. Central Bldg. Co. v. Karr Supply Co., 115 Ill. App. 610.
31. See 4 C. L. 631.
32. Schindler v. Green [Cal. App.] 82 P. 631; Western Plumbing Co. v. Fried [Mont.] 81 P. 394.
33. Owner and subcontractor. Siegel v. Ehrshowsky, 92 N. Y. S. 733; Alexander v. Hollender, 94 N. Y. 796. Where the lien falls

and there must be personal service of the notice upon the party sought to be made liable,[34] and when personal notice is given to the owner of an undivided portion of the premises, only his part can be foreclosed by the lienor,[35] but no personal judgment can be had unless some debt is shown.[36]

(§ 10) *B. Parties.*[37]—The original contractor is a necessary party in a suit to foreclose a lien brought by a subcontractor, laborer, or a materialman,[38] and the owner of the property must be a party to a suit to foreclose,[39] and if not so made he is not bound by the decree,[40] and the same rule applies to all others of whom the lien claimant has notice of their claiming an interest in the property.[41] A concurrent lienor is a necessary party,[42] and where a statute provides that all parties claiming a lien prior to the commencement of foreclosure proceedings should be joined as plaintiffs or defendants, and all subsequent lienors as intervenors, it is proper to deny the application of one of the latter to be made a defendant.[43] Where by statute an owner served with a subcontractor's notice is bound to withhold the amount due the junior contractor, he may bring all interested parties into court and have their claims adjudicated.[44]

(§ 10) *C. Pleading, practice, and evidence. Pleading.*[45]—In the complaint to foreclose a mechanic's lien the plaintiff need only allege the statutory requirements and that he comes under them,[46] and where it is alleged that the materials were furnished in proper time it is unnecessary to give the date of delivery of each item.[47] The complaint must show the time when payment should have been made and of the time of completion of the contract,[48] and an allegation of agreement to pay the reasonable value of work and labor done should be alleged in the absence of an express agreement.[49] That the lien statement must be verified does not necessarily mean a verification is required on the complaint to foreclose.[50] Where a discharge is relied upon as a defense a general denial is insufficient,[51] but it is not necessary to set forth the time of payment of each item in such case.[52] A complaint alleging that an existing balance is due the contractor from the owner is not bad because it fails to allege that there was such a balance due at the date of the notice to the former.[53] A complaint need not allege that the action was begun in the prescribed time.[54] Where an action on a mechanic's lien is brought on the ground that the plaintiffs were subcontractors, it is not supported by evidence of materials furnished directly to the owner of the building.[55] An attempt to foreclose a mechanic's lien

because of the failure of the cause of action. Aex v. Allen, 94 N. Y. S. 844.

34, 35. Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

36. Kirschner v. Mahoney, 96 N. Y. S. 195.

37. See 4 C. L. 632.

38. Foreclosure of laborer's lien against a railroad. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883.

39. Lang v. Adams [Kan.] 80 P. 593.

40. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

41. Unrecorded mortgage of which the lienor has notice. Stiles v. Galbreath [N. J. Eq.] 60 A. 224. Plaintiff in pending action to quiet title. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273. Owners of prior liens. Grant v. Cumberland Valley Cement Co. [W. Va.] 52 S. E. 36. Where a married woman is in possession of property and her name appears as owner upon the recorded plat, the lien claimant has notice of her interest. Krotz v. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

42. Hinkle v. Sullivan, 108 App. Div. 316, 95 N. Y. S. 788.

43. Lavanway v. Cannon, 37 Wash. 593, 79 P. 1117.

44. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968.

45. See 4 C. L. 633.

46. Arnold v. Farmers' Exch. [Ga.] 51 S. E. 754.

47. Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

48. Smith v. Central Lumber Co., 113 Ill. App. 477.

49. Newell v. Brill [Cal. App.] 83 P. 76.

50. Parke & Lacy Co. v. Inter Nos Oil & Development Co. [Cal.] 82 P. 51.

51. Cosgrove v. Farwell, 114 Ill. App. 491.

52. Easterling v. Shaifer [Miss.] 38 So. 230.

53. Los Angeles Pressed Brick Co. v. Los Angeles Pac. Boulevard & Development Co. [Cal. App.] 83 P. 292.

54. Sands v. Stagg [Va.] 52 S. E. 633.

55. Page v. Grant, 127 Iowa, 249, 103 N. W. 124.

and an equitable lien in one action is not bad on the ground of multifariousness.[56]

Practice.[57]—Where an answer is filed denying the facts set forth in a proceeding to foreclose a mechanic's lien, the plaintiffs must prove their case though the defendants fail to appear at the trial.[58] Where a good defense exists at law, a court of equity will not restrain lien claimants from prosecuting their actions.[59] A foreclosure of a mechanic's lien is a final process till arrested by a counter affidavit, and execution may issue thereon.[60] On appeal one cannot raise for the first time the question of jurisdiction of the court[61] or a change of ownership of the property.[62]

Evidence.[63]—Where a statute provides that a lien statement must be filed ten days after the date thereof, the date on the statement is not conclusive and the true date may be supplied by parol evidence.[64] To make out a prima facie case a subcontractor must show that there is a balance due the contractor.[65] Where a mortgagee seeks to add payments made by him to protect the mortgaged premises, the burden of proof is on him to show that the payments were in satisfaction of liens.[66]

(§ 10) *D. Judgment, costs, and attorney's fees.*[67]—A demand for extras does not draw interest until the amount thereof is ascertained by a judgment of the court, where payment is prevented by the filing of notice of mechanics' liens.[68] Where a lien is foreclosed and the sale of the property is insufficient to satisfy the amount of the judgment, the lienor is entitled to a deficiency judgment for the unsatisfied balance,[69] and a deficiency judgment is barred by the period of limitation on contracts running from the time of sale.[70]

Costs and attorney's fees.[71]—In addition to the amount of the judgment the court may award costs[72] and attorney's fees[73] as provided by statute. Where by statute a lien can be placed on a homestead only for improvements and purchase money, attorney's fees cannot be added to the amount of the lien.[74] Where a lien is attempted to be foreclosed on a portion of a railroad, on the ground that a railroad is a public agency, a court may in the place thereof enter a personal judgment against the corporation.[75]

§ 11. *Indemnification against liens.*[76]—Laborers and materialmen may maintain an action on a bond given to secure the performance of a contract, wherein the contractor agrees to pay their claims, when the parties evidently intended to secure them as well as the owner, even though they are not specifically named, and no consideration passes directly from them to the surety.[77] But some evidence of in-

56. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26.
57. See 4 C. L. 633.
58. Schlachter v. St. Bernard's Roman Catholic Church of Hoven [S. D.] 105 N. W. 279.
59. Wolf v. Glassport Lumber Co., 210 Pa. 370, 59 A. 1105.
60. Moultrie Lumber Co. v. Jenkins, 121 Ga. 721, 49 S. E. 678.
61. Hess v. Peck, 111 Ill. App. 111.
62. Gordon v. Sorg, 113 Ill. App. 522.
63. See 4 C. L. 634.
64. Cutter v. Pierson, 26 Pa. Super. Ct. 10.
65. Stevens v. Georgia Land Co. [Ga.] 50 S. E. 100.
66. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274.
67. See 4 C. L. 634.
68. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968.
69, 70. Durkee v. Koehler [Neb.] 103 N. W. 767.
71. See 4 C. L. 634.
72. Where by statute an action to foreclose a mechanic's lien is regarded as an equitable action, and by another statute in equitable actions the court may in its discretion allow costs, the court has authority to allow partial costs in the foreclosure of a mechanic's lien. Wis. Rev. St. 1898, § 3323. Charles v. Godfrey [Wis.] 104 N. W. 814.
73. Provision as to attorney's fees not unconstitutional. Peckham v. Fox [Cal. App.] 82 P. 91; Littell v. Saulsberry [Wash.] 82 P. 909. In California it is held that attorney's fees should only be allowed where an answer is entered only to harass the plaintiff. Hooper v. Fletcher, 145 Cal. 375, 79 P. 418.
74. Cooper v. Brazelton [C. C. A.] 135 F. 476.
75. Pere Marquette R. Co. v. Baertz [Ind. App.] 74 N. E. 51.
76. See 4 C. L. 635.
77. Wellman v. Smith, 114 La. 228, 38 So. 151; Towle v. Sweeney [Cal. App.] 83 P. 74.

tention must appear.[78] Where a bond has been given by a contractor for the fulfillment of his contract, it is not such a bond for the payment of workmen and materialmen as required by the statute in order to release the owner from liability,[79] and a surety thereon cannot be called upon to defend a suit by a materialman against the owner in the absence of a showing of a settlement between the owner and the contractor.[80] The sureties on indemnity bonds are discharged on overpayment of the contractor by the owner.[81] In the case of an indemnity bond for the construction of public works it must appear that notice of the default of the contractor has been given.[82]

MEDICINE AND SURGERY.

§ 1. *Public regulation of the business of treating disease.*[83]—The right to practice any branch of the art of healing is subject to such reasonable regulations or conditions as the state, in the exercise of the police power, may prescribe.[84] Thus, statutes prohibiting the practice of the art by those who have not obtained a license or certificate from the designated authorities are valid.[85] Whether all practitioners shall be required to comply with the same requirements is discretionary with the legislature; and the fact that a particular school of medicine or system of healing is or is not given special recognition by a statute does not render it unconstitutional.[86] Thus, a statute which commits the licensing power to a board of physicians who shall be graduates of some medical school in good standing is not class legislation as to one who does not believe in the use of drugs,[87] nor is it unconstitutional as practically prohibiting the pursuit by him of his chosen calling by imposing qualifications not adapted to or required by the method of healing used by him.[88]

Need not be specifically mentioned. Lichtentag v. Feitel, 113 La. 931, 37 So. 880.

78. Hughes v. Smith, 114 La. 297, 38 So. 175.

79, 80. Act No. 180, p. 223 of 1894. Lhote Lumber Mfg. Co. v. Dugue [La.] 39 So. 803.

81. Tinsley v. Kemery [Mo. App.] 84 S. W. 993.

82. Huggins v. Sutherland [Wash.] 82 P. 112.

83. See 4 C. L. 636.

84. Territory v. Newman [N. M.] 79 P. 706; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063. Requirements of Ohio statutes are reasonable. Id.

85. Acts 1901, p. 115, c. 78, which prohibits the practice of medicine without a license, is constitutional. O'Neil v. State [Tenn.] 90 S. W. 627. Statutes prohibiting the practice of medicine for fees by those who do not have the prescribed qualifications are valid. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063. Sess. Laws 1903, c. 40, requiring all who practice medicine (construed to mean all who practice the healing art by any method) to obtain a license, is valid. Territory v. Newman [N. M.] 79 P. 706. Congress has power to regulate the practice of medicine in the District of Columbia and had power to prescribe the qualifications required by 29 Stat. at L. 198, c. 313, and to create a local board and give it power to revoke licenses for the causes therein mentioned. Czarra v. Board of Medical Supervisors, 25 App. D. C. 443.

86. Acts 27th Leg. p. 12, c. 12, creates boards of medical examiners of the allopathic, homeopathic and eclectic schools of medicine, and requires practitioners to obtain a certificate from one of such boards. The act is held constitutional, though no recognition is given the physio-medical school. Stone v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 85, 86 S. W. 1029. The Ohio statutes do not discriminate against Christian scientists by not exempting them from the qualifications required of other practitioners, though they prescribe special qualifications for those practicing osteopathy. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063. In Alabama osteopathy cannot be legally practiced by one who has not obtained a license from the state board of medical examiners. Ligon v. State [Ala.] 39 So. 662, afg. Bragg v. State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925.

87. Sess. Laws 1903, c. 40 is valid. Territory v. Newman [N. M.] 79 P. 706.

Statutes which do not recognize Christian scientists as a distinct school but subject them to the same provisions of law as apply to others practicing medicine are not invalid as interfering with the rights of conscience and of worship.[89] In some states there are special statutory provisions regulating the practice of osteopathy.[90] That portion of the Washington dental law which requires an examination by and a license from the dental board before a person may practice dentistry is valid;[91] but that portion of it requiring such examination and license before one may own, run or manage a dental office is not a proper exercise of the police power.[92]

Regulatory statutes are to be liberally construed so as to reasonably effectuate their purposes, to prevent fraud, and to conserve the public health.[93] They must be complied with by all who come within their terms. Thus, the fact that a practitioner is a graduate of a reputable medical college does not exempt him from the operation of such laws.[94] It is competent for the legislature to define what shall constitute the practice of medicine within the meaning of an act regulating the same.[95] The terms of the particular statute and the facts of the particular case must be looked to to determine whether an act applies in a given instance.[96]

88. Territory v. Newman [N. M.] 79 P. 706.

89. Ohio statutes valid. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.

90. Special provision in Ohio. See State v. Marble, 72 Ohio St. 21, 73 N. E. 1063. In Missouri, is declared not to be the practice of medicine and surgery. See Rev. St. 1899, c 128, art. 55. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

NOTE. Regulation by state of practice of osteopathy: "There seems to be no doubt as to the power of the state to regulate the practice of osteopathy therein by statute providing that one practicing such system of healing shall be possessed of certain qualifications of fitness and shall obtain a license permitting him to practice. State v. National School of Osteopathy, 76 Mo. App. 439; Hayden v. State, 81 Miss. 299, 33 So. 653, 95 Am. St. Rep. 471; State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791; State v. McKnight 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187. This has been done in at least four states, California, Indiana, Missouri and Ohio, where the practice of osteopathy is regulated by statute as a treatment separate from medicine by requiring a certain amount of study or a diploma from a certain school before a person can practice such system of healing or curing disease. Cal. St. 1901, p. 113, c. 99; State v. National School of Osteopathy, 76 Mo. App. 439; State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791. One who has an established practice in the healing of disease by the method known as osteopathy may be, by statute, required to conform to such reasonable standard respecting qualification therefor as the legislature may prescribe, having in view the public health and welfare. State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791. A statute permitting the licensing of osteopaths, while excluding those engaged in 'mental healing' has been held not an unlawful discrimination which will render the statute void. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190. But a legislative enactment which discriminates against osteopaths by requiring them to hold diplomas from a college requiring four years of study as a condition to their obtaining limited certificates which will not permit them to prescribe drugs or perform surgery, while not requiring such time of study from those contemplating the regular practice as a condition to their obtaining unlimited certificates for the practice of medicine and surgery, is as to such discrimination, void, and compliance therewith cannot be exacted of those who practice osteopathy. State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791."—From State v. Biggs [N. C.] 98 Am. St. Rep. 751.

91. Laws 1901, pp. 314-318, c. 152, making it a crime to practice dentistry without a license, is constitutional. State v. Sexton, 37 Wash. 119, 79 P. 634; State v. Brown, 37 Wash. 97, 79 P. 635; State v. Brown, 37 Wash. 106, 79 P. 638.

92. Laws 1901, p. 314, § 8 is invalid. State v. Brown, 37 Wash. 97, 79 P. 635.

93. Gen. St. 1894, § 7896, imposing a fine or imprisonment upon unlicensed practitioners, construed. State v. Oredson [Minn.] 105 N. W. 188.

94. Does not exempt one from compliance with Gen. St. 1894, § 7896. State v. Oredson [Minn.] 105 N. W. 188. A physio-medical practitioner who practices without a certificate from one of the three boards of examiners created by Acts 27th Leg. c. 12, violates that act, though he holds a diploma from a medical college of respectable standing. Stone v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 85, 86 S. W. 1029.

95. Laws 1903, p. 206, c. 176, § 21, providing that persons attaching the title "Dr." or other equivalent letters, used in a medical sense, to their names, professing to be physicians, and prescribing drugs or agencies for the care or cure of disease or ailments shall be regarded as practicing within the meaning of the act, is valid. State v. Yegge [S. D.] 103 N. W. 17.

96. [See note 4 C. L. 636, "what constitutes 'practice of medicine' under regulating statutes."]

Idaho: Under the Medical Law of 1899,

A corporation cannot "practice medicine,"[97] and is not such a person as can be legally licensed to do so.[98] Hence a corporation composed of qualified and licensed physicians, which contracts for services of its members and other licensed physicians, and furnishes medical services under such contracts, is not engaged in the practice of medicine and does not violate the law forbidding such practice without a license.[99]

The action of the Rhode Island Board of Registration in Dentistry in refusing a certificate to an applicant after an examination is not subject to review by the courts,[1] and mandamus does not lie to compel the board to produce the examination papers for inspection by expert dentists to be appointed by the court.[2] In Washington the action of a dental board in refusing defendant a license after examination cannot be questioned in a prosecution for violation of the dental act.[3] It is held

§ 5, the Board of Medical Examiners has no power to call for the diplomas of applicants for licenses who were engaged in the practice of medicine under the terms of the act of 1887. State v. Cooper [Idaho] 81 P. 374. Where an applicant for a license to practice medicine was a resident of the state engaged in practicing medicine under the terms of the law of 1887, and had complied fully with the provisions of the Law of 1899, it was not criminal for him to continue to practice though the Board of Examiners refused to issue a license to him. Id.

Illinois: A person practicing medicine before Laws 1899, p. 276, § 9 took effect, and not obtaining a license under the act, nor holding an unrevoked license previously obtained, is liable to the penalty imposed by the act upon persons practicing medicine without a certificate from the state board of health. People v. Langdon [Ill.] 76 N. E. 387.

Michigan: One who was already practicing medicine in violation of Pub. Acts 1899, p. 370, No. 237, not having applied for a certificate, is required to apply for a certificate under the amendment of 1903 (Pub. Acts 1903, p. 270, No. 191), though the amendment requires all persons who "wish to begin" to practice to apply. Hooper v. Batdorff [Mich.] 12 Det. Leg. N. 463, 104 N. W. 667.

New Jersey: P. L. 1898, 123 prohibits practice of dentistry by one not licensed, and § 8 exempts from the operation of the act registered students of licensed dentists assisting preceptors in the latter's presence and under their direct and immediate personal supervision. Held, mere proof that a person was a student of a regularly licensed dentist is not sufficient to show him entitled to the benefit of § 8. State Board of Registration & Examination in Dentistry v. Terry [N. J. Law] 62 A. 193.

Nevada: St. 1899, p. 88, c. 73; Comp. Laws, § 1542, regulating practice of medicine and providing for issuance of temporary licenses until the next board meeting, is repealed by St. 1905, p. 87, c. 63, and the board cannot be compelled by mandamus to issue a temporary license. State v. Lee [Nev.] 82 P. 229.

New York: Under Laws 1895, p. 419, c. 626, § 160, one not licensed as a dentist prior to Aug. 1, 1895 is required to procure a license from the regents to entitle him to registration. State v. Jacobs, 92 N. Y. S. 590. Under Laws 1895, c. 626, § 162, a registration of a dentist is void if obtained on an affidavit giving the name, age and address of the affiant and stating that his authority to practice is a diploma granted by a college of another state. Id.

Ohio: Giving Christian Science treatment, for a fee, for the cure of disease, is practicing medicine within the meaning of the Ohio Statutes. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.

South Dakota: A person who used the title "Dr." on his signs and notices, and was engaged in fitting glasses to the eye, but who did not use drugs or operations was practicing medicine within the meaning of Laws 1903, p. 206, c. 176, § 21, and could not legally practice without a license. State v. Yegge [S. D.] 103 N. W. 17.

Tennessee: One who diagnoses disease by the microscopic examination of the blood, and treats it by means of light rays from an electric arc light and by prescribing medicines, practices medicine within the meaning of Acts 1901, p. 115, c. 78, requiring practitioners to have a license, and is not an "optician" within the meaning of the exception in the statute. O'Neil v. State [Tenn.] 90 S. W. 627.

97. The qualifications of medical practitioners are personal and such as will enable them to diagnose, prescribe and treat disease. These qualifications a corporation cannot possess. State Electro-Medical Institute v. State [Neb.] 103 N. W. 1078.

98. State Electro-Medical Inst. v. State [Neb.] 103 N. W. 1078.

99. Comp. St. 1901, c. 55, § 7 held not violated by defendant. State Electro-Medical Inst. v. State [Neb.] 103 N. W. 1078; State Electro-Medical Inst. v. Platner [Neb.] 103 N. W. 1079.

1. Kenney v. State Board of Dentistry, 26 R. I. 538, 59 A. 932.

2. Under Gen. Laws 1896, p. 468, c. 155, as amended by Pub. Laws 1897, p. 43, c. 470, the mode of examination, and the standard of proficiency to be required, are discretionary with the Board and courts will not interfere with its action. If it is claimed that a fair and impartial examination was prevented by prejudice against the applicant, an action against individual members, not mandamus, would be the remedy. Kenney v. State Board of Dentistry, 26 R. I. 538, 59 A. 932.

in New Hampshire that the duties of the state dental board are judicial in character, but must be performed in the manner provided by law.[4] Action not so taken is reviewable by the courts, if a proceeding for the purpose is properly brought.[5]

A license to practice medicine cannot be revoked without some reasonable and sufficient cause.[6] The determination of the question, what acts shall constitute such cause, cannot be wholly delegated to a local board; the law making power must define the causes with reasonable certainty.[7]

Prosecutions for violations of regulatory acts.[8]—Where violation of a statute prohibiting the practice of medicine by unlicensed persons is made a crime, the gist of the offense is the practice of medicine without a license.[9] That an unlicensed person has for a fee prescribed for the treatment of a disease is evidence of guilt, but is not the exclusive substance of the offense.[10] The Washington statute making records of the office of county clerk prima facie evidence of the existence or nonexistence of a license to practice medicine is valid.[11] One may be convicted of "practicing medicine"[12] or "dentistry" if he ministers to patients as is common in those professions.[13] The prosecution must, of course, be instituted before the running of limitations.[14] It need not be proved that the offense was committed

3. State v. Brown, 37 Wash. 106, 79 P. 638.

4. Pub. St. 1901, c. 134, §§ 1, 2, 3, makes the duties of the state dental board judicial in character. Where an examination of an application was by only one member, who alone approved the papers and issued a certificate, the proceeding and license issued were void. At least two of the three members must act. Brown v. Grenier [N. H.] 62 A. 590.

5. Under Pub. St. 1901, c. 204, § 2, the supreme court has jurisdiction of a proceeding to cancel a license to a dentist issued by only one member of the dental board without the approval of any other member. But such proceeding can be brought only by the attorney general. The dental board is a necessary party defendant, but cannot maintain the proceeding. Brown v. Grenier [N. H.] 62 A. 590.

6. Czarra v. Board of Medical Sup'rs, 24 App. D. C. 251. Employment of fraud and deception in passing required examinations, chronic inebriety, practice of criminal abortion, and conviction involving moral turpitude, are sufficient causes for revocation of a license, as declared in 29 Stat. at L. 198, c. 313. Id. Conviction of distributing obscene and indecent literature is sufficient ground for revocation of license under the act. Id. The facts that a medical practitioner was accused of distributing obscene literature, that he had forfeited collateral in the police court where he was so accused, and that he had admitted such distribution in a conversation with complainant, do not show unprofessional or dishonorable conduct within 29 Stat. at L. 198, c. 313, warranting the board of medical supervisors to revoke a license to practice. Id. Hence a revocation by the board on that ground, in that the physician circulated obscene literature, is void. Id. Where a license is revoked on the ground that acts done subsequent to the act of Cong. of June 3, 1896 (29 Stat at. L. 198, c. 313) constituted unprofessional and dishonorable conduct within the meaning of that law, it cannot be claimed that the practitioner was convicted under an ex post facto law. Id., 25 App. D. C. 443.

7. It is doubtful whether Congress can delegate to a board the power to determine what is "unprofessional or dishonorable conduct" such as to warrant revocation of a license to practice; such conduct should be defined. Czarra v. Board of Medical Sup'rs, 24 App. D. C. 251. A local board has no such discretion in revoking a license as it has in determining the qualifications of one who applies for a license. Id., 25 App. D. C. 443. So much of 29 Stat. at L. 198, c. 313, as authorizes revocation of a license for "unprofessional and dishonorable conduct," without defining the acts which shall constitute such conduct, is unconstitutional because too vague and uncertain. Id.

8. See 4 C. L. 637.

9, 10. State v. Oredson [Minn.] 105 N. W. 188.

11. State v. Lawson [Wash.] 82 P. 750.

12. Evidence held to warrant a conviction for practicing medicine or offering to practice without a license within the meaning of Sess. Laws 1903, c. 40, though defendant did not believe in or profess to use drugs. Territory v. Newman [N. M.] 79 P. 706.

13. Evidence sufficient to support conviction of crime of practicing dentistry without a license under Laws 1901, c. 152, where it appeared defendant cleaned the teeth of the person named and examined them to estimate cost of other contemplated work. State v. Sexton, 37 Wash. 110, 79 P. 634. Taking an impression of a patient's jaws, the making of false teeth, and fitting the same to the jaws, held a "correction of malposition of the jaws," within the meaning of the dentistry act. State v. Newton [Wash.] 81 P. 1002.

14. Conviction for practicing dentistry without a license set aside where the great weight of the evidence showed that the acts charged had been done more than a year before the filing of the information

on the exact date alleged,[15] or that a separate fee was charged for any specific act alleged,[16] or that payment was made immediately after the rendition of the services.[17] Cases dealing with the sufficiency of the evidence to sustain a conviction will be found in the note.[18]

§ 2. *Malpractice.*[19]—The implied contract of the physician or surgeon is not to cure, but to treat the case with that degree of diligence and skill ordinarily used by the average physician in good standing, in the same or similar localities, having regard to the state of the medical profession at the time.[20] An erroneous diagnosis may[21] but does not necessarily constitute negligence.[22]

A surgical operation performed by a physician without the consent of the patient is wrongful and unlawful,[23] even though performed with skill and care, and without any evil intent.[24] Consent may in some cases be implied from circumstances.[25] The amount of recovery for an operation performed without such consent depends on the character and extent of injury suffered, which is to be determined by reference to the nature of the malady and the results of the operation, whether beneficial or otherwise. The good faith of the defendant should also be considered.[26]

It is a good defense to an action for malpractice that negligence of the patient

since prosecution therefor was barred by the statute of limitations. State v. Newton [Wash.] 81 P. 1002.

15. State v. Brown, 37 Wash. 106, 79 P. 638.

16. It is sufficient if the charging of a fee for a series of acts in violation of Laws 1901, c. 152, be shown. State v. Brown, 37 Wash. 106, 79 P. 638.

17. Proof of payment within a year before filing of the information is sufficient. State v. Brown, 37 Wash. 106, 79 P. 638.

18. Evidence held sufficient. State v. Brown, 37 Wash. 106, 79 P. 638. Evidence held sufficient to warrant finding that defendant had no license to practice medicine where county clerk's records did not show one, such records being prima facie evidence on the question under the statute. State v. Lawson [Wash.] 82 P. 750.

19. See 4 C. L. 638.

20. Wohlert v. Seibert, 23 Pa. Super. Ct. 213. Physician does not guaranty good result, but promises by implication to use the skill and learning of the average physician in the locality, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result. MacKenzie v. Carman, 92 N. Y. S. 1063; Wood v. Wyeth, 94 N. Y. S. 360. Evidence insufficient to show improper care of a fractured arm by one of two physicians who had charge of the case. MacKenzie v. Carman, 92 N. Y. S. 1063. Physician held not liable for death of boy on whom he operated to prevent blood poisoning, the chloroform administered having caused his death. Wood v. Wyeth, 94 N. Y. S. 360. The fact that the patient was severely burned by X-rays, together with other evidence by experts, held sufficient to warrant finding that treatment of appendicitis by X-rays was improper. Shockley v. Tucker, 127 Iowa, 456, 103 N. W. 360. Complaint held to state a cause of action for negligence in performing an operation on a boy which caused his death, and not for a wrongful operation not consented to; hence it was not error to compel plaintiff to prosecute the suit as one for negligence. Wood v. Wyeth, 94 N. Y. S. 360.

Specialists are required to bring to the treatment of a case that degree of skill and care used by average members of the profession specializing in the same branch, in the same or similar localities, having regard to the state of the science at the time. Beadle v. Paine [Or.] 80 P. 903. Hence an instruction that failure to use an X-ray machine in a surgical case was not negligence unless such machines were usually employed in such cases by specialists in the same or similar localities was not error, construing all the instructions together. Id.

21. Plaintiff entitled to go to jury in malpractice case where defendant treated for dislocation and evidence tended to show incipient hip disease and not partial dislocation. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

22. Evidence held not to show want of required skill and care in treatment of plaintiff's eyes, where defendant diagnosed as conjunctivitis what was really glaucoma, the latter being very rare, and the symptoms of the two very similar, except to specialists. Wohlert v. Seibert, 23 Pa. Super. Ct. 213.

23, 24. Mohr v. Williams [Minn.] 104 N. W. 12.

25. Where operation on patient's right ear was decided upon and consented to, but after the patient was made unconscious by the anaesthetic, an operation on the left ear was decided upon and performed, the patient's family physician being present and making no objection, it was held that there was no express consent, and whether consent could be implied was for the jury. Mohr v. Williams [Minn.] 104 N. W. 12.

26. New trial granted where verdict of $14,322.50 was rendered for unauthorized operation on ear, performed with skill, and shown to have been beneficial or at least not harmful. Mohr v. Williams [Minn.] 104 N. W. 12.

conduced or contributed to produce the injury complained of;[27] but subsequent negligence, not conducing to the injury primarily caused by negligence of the physician or surgeon, but merely serving to aggravate the injury so caused, will not defeat the action, though it may be shown in mitigation of the damages.[28] It must appear that the injuries complained of resulted proximately from the defendant's negligence,[29] but if this appear, it is no defense that the disease would have produced equally serious consequences, if the treatment complained of had not been given.[30]

A properly qualified witness may testify on a question of science or skill, which is independent of the practice of any school of medicine, regardless of the school to which he belongs.[31] Evidence to show negligent treatment by defendant in other cases is inadmissible.[32]

Malpractice by nonmedical practitioners.[33]—In an action against an osteopath for malpractice, expert medical witnesses belonging to different schools of medicine are competent to express opinions as to the diagnosis made by the defendant,[34] and also as to any scientific fact that is, or ought to be, known to every physician or surgeon of every school or system;[35] but they are not competent to express opinions as to the treatment given by defendant unless it appears that the schools to which the witnesses and defendant belonged advocated the same treatment for the disease in question.[36]

§ 3. *Recovery of compensation.*[37]—There must be an express or implied promise to pay for the services, relied on by the physician.[38] The person contracting for the services is liable therefor.[39] A contract by a corporation, composed of qualified and licensed physicians, for medical services to be furnished by its members or other licensed physicians, is not contrary to law or public policy, and for services rendered thereunder the corporation may recover compensation.[40] A physi-

27. Beadle v. Paine [Or.] 80 P. 903.

28. Giving of instructions on this branch of a case held not erroneous. Beadle v. Paine [Or.] 80 P. 903.

29. No recovery for malpractice where evidence showed that eye disease would have resulted in blindness and would have caused some pain and suffering even had defendant correctly diagosed and treated it. Wohlert v. Seibert, 23 Pa. Super. Ct. 213.

30. Where evidence showed treatment for incipient hip disease and partial dislocation was improper and caused permanent injury, it was no defense that hip disease would have produced the same results. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

31. Whether a use of X-rays in treating a patient for appendicitis, the patient being badly burned, was negligent, was a question of science and skill, independent of the practice of any particular school of medicine; hence persons properly qualified may testify on the question though belonging to a different school from defendant. Shockley v. Tucker, 127 Iowa, 456, 103 N. W. 360. Admission of testimony as to whether treatment of appendicitis by X-rays was proper was not prejudicial, where issue submitted was negligence in the manner of using the X-rays. Id.

32. In a malpractice action for burns from use of X-rays in treatment of appendicitis, admission of testimony by another physician that he had treated two other patients who had been injured by use of X-rays by defendant, was prejudicial error. Shockley v. Tucker, 127 Iowa, 456, 103 N. W. 360.

33. See 4 C. L. 639.

34. Whether diagnosis of hip trouble was correct, and whether or not there was a partial dislocation. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

35. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

36. Physicians belonging to other schools incompetent to give opinions on osteopath's treatment of hip disease or dislocation unless all schools used same treatment. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114.

37. See 4 C. L. 638.

38. Dorion v. Jacobson, 113 Ill. App. 563.

39. Physician, called by one employe to attend another who was injured, decided a dentist was needed and asked corporation manager who would pay bill. Manager said a casualty company was liable for expenses caused by accidents to employes. Held, employment of physician was not ratified, though manager did not expressly deny liability of corporation. Mohlman Co. v. American Grocery Co. [N. J. Err. & App.] 60 A. 950. Mother liable for expense of operation on son contracted for by her alone, though he was of age, when an estate in which he was interested had not been divided and he and his brother customarily charged expenses of this kind to their share of the estate, the mother making payments. Best v. McAuslan [R. I.] 60 A. 774.

40. State Electro-Medical Inst. v. Platner [Neb.] 103 N. W. 1079.

cian cannot recover for services which proved to be worthless if he knew they would be worthless, or was uncertain as to his ability to improve the patient's condition and failed to so inform him, or if he was unskillful, negligent or unfaithful in performing the services.[41] Customary and reasonable charges for services of the same nature in the same locality is the rule by which to determine the value of medical services.[42]

§ 4. *Negligent homicide by physician.*[43]

§ 5. *Regulation of the keeping and sale of drugs and medicines.*[44]—The Vermont statute is in part unconstitutional.[45] An indictment charging the vending of drugs without a license is sufficient if it follows the statutory language.[46]

§ 6. *Tort liability of druggists.*—Druggists must exercise the highest degree of care for the safety of the public dealing with them.[47] A violation of a statute regulating the sale of poisons gives a right of action to one specially damaged thereby.[48] Contributory negligence of a person whose death was caused by the administration of the wrong drug would bar a recovery by the estate; but negligence of a third person in administering the drug would not relieve from liability a druggist by whose negligence the poisonous drug was delivered in place of the one ordered.[49] Where a customer relies on a druggist's representations that a drug delivered is the same as that ordered, he may recover from the dealer the damage caused by use of the drug.[50] A retail druggist who refuses to furnish the medicine called for by

41. Instructions held to be substantially correct. Logan v. Field [Mo.] 90 S. W. 127.

42. $300 held proper charge for certain operation, $500 being held excessive. $5 for house calls and $3 for office visits held not excessive for eye, ear, and throat specialist. Best v. McAuslan [R. I.] 60 A. 774.

43. See 4 C. L. 639; Homicide, 5 C. L. 1702.

44. See 4 C. L. 638.

45. V. S. § 4662, as amended by Acts 1902, p. 125, No. 112, prohibits practice of pharmacy by one not licensed, and prohibits retail sale of drugs unless business is conducted by licensed pharmacist. § 4662 is made not applicable to widows or administrators of deceased licensed pharmacists, and § 4663 permits sale of drugs by dealers in general merchandise who do not employ licensed pharmacists. Held, last two provisions are unconstitutional, there being no reasonable basis for the discrimination. State v. Abraham [V't.] 61 A. 766.

46. An indictment charging the vending of drugs and poisons without license, which contains all the necessary allegations under Cr. Code 1895, § 480, and all the necessary exceptions under Pol. Code 1895, § 1499, is sufficient to withstand a demurrer. Carter v. State [Ga.] 50 S. E. 64.

47. Druggist liable for negligence in giving strychnine in place of morphine if death of patient resulted from such negligence. Sutton's Adm'r v. Wood, 27 Ky. L. R. 412, 85 S. W. 201. Druggist held not negligent in putting up a certain prescription, and evidence held not to show that poisoning was caused by overdose of morphine. Laturen v. Bolton Drug Co., 93 N. Y. S. 1035.

Note: "In a business so hazardous, having to do directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer is required. And that degree of care exacted of such dealer will be required also of each servant intrusted by him with the conduct of his calling. Smith v. Middleton, 112 Ky. 588, 66 S. W. 388, 99 Am. St. 308. See, also, as having a bearing on the liability of druggists for sales of poisons and deleterious drugs, Smith v. Hays, 23 Ill. App. 244; Gwynn v. Duffield, 66 Iowa, 708, 24 N. W. 523, 55 Am. Rep. 286; McCubbin v. Hastings, 27 La. Ann. 713; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Wohlfahrt v. Beckert, 92 N. Y. 490, 44 Am. Rep. 406; Beckwith v. Oatman, 43 Hun [N. Y.] 265; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Brunswig v. White, 70 Tex. 504, 8 S. W. 85; Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695; and authorities cited in monographic note to Howes v. Rose [Ind.] 55 Am. St. Rep. 255, on the liability of apothecaries and druggists for negligence in compounding or selling drugs."—Crane v. Bennett [N. Y.] 101 Am. St. Rep. 767.

48. Druggist liable where strychnine was given in place of drug desired—morphine—and St. 1903, § 2630 was not complied with, the strychnine package being unlabelled, and no inquiry being made as to what it was to be used for. Sutton's Adm'r v. Wood, 27 Ky. L. R. 412, 85 S. W. 201.

49. Negligence of nurse would not relieve druggist who gave strychnine for morphine, death of patient resulting. Sutton's Adm'r v. Wood, 27 Ky. L. R. 412, 85 S. W. 201.

50. Vaccine virus was ordered and a blackleg virus was delivered by another firm to which the order was sent. The buyer notified the dealer of the fact and was informed that the two medicines were the same, and thereupon used the blackleg virus on horses and mules, relying, as the jury found, on the druggist's representation. Held, the buyer could recover from the

a prescription and also refuses to return the prescription is liable for the damages thereby caused.[51]

MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.

[Special Article by Oscar Hallam.*]

§ 1. *The general doctrine.*—It is now established that mental suffering may constitute a proper element of damages. This is on the principle that the mind is no less a part of the person than the body, indeed that the sufferings of the former are oftentimes more acute and lasting than those of the latter.[1] Such damages are compensatory. They have sometimes been spoken of as punitive,[2] but this is contrary to the generally accepted rule.[3] Though the above doctrine is well recognized, much conflict has arisen as to the extent of its application. The subject suggests a variety of considerations which will be here treated.

§ 2. *In actions for breach of contract.*—According to the weight of authority, mental suffering is not a proper element of damage in actions for breach of contract, except in the case of breach of contract to marry. The rule of damages in actions on contract is that a party who breaks a contract is liable only for the direct consequences proceeding immediately therefrom and also for such as may fairly and reasonably be considered, either as arising naturally, that is, in the usual course of things, from such breach, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it,[4] and it is held that mental suffering is not a proximate or probable consequence of the breach of a contract, that damages therefor are too remote and could not have been in the contemplation of the parties at the time the contract was made.[5] Upon this proposition, however, the authorities are not unanimous. It has been stated that "The true principle is not the arbitrary exclusion of damages for mental suffering in actions upon contract, but the recoverability of damages for such element being made to depend upon whether or not mental pain and suffering are natural and probable consequences of the breach of contract.[6] It

druggist the loss resulting from death of the horses and mules so treated. Mann-Tankersly Drug Co. v. Cheairs [Ark.] 88 S. W. 873.

51. Druggist put up the medicine but refused to deliver it or the prescription because the purchaser would not pay the price demanded. White v. McComb, City Drug Co. [Miss.] 38 So. 739.

1. Seger v. Barkhamsted, 22 Conn., 290; McKinley v. C. & N. W. R. Co., 44 Iowa, 314. See, also, Damages, 5 C. L. 904; 3 C. L. 997, 1 C. L. 833. May be allowed wherever it is a natural consequence of the injury whether or not there is physical injury. 3 C. L. 1003, n. 4.

2. Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S. W. 564.

3. Head v. Georgia Pac. Railway Co., 79 Ga. 358, 7 S. E. 217; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Lunt v. Philbrick, 59 N. H. 59; Curtis v. Sioux City, etc., R. Co., 87 Iowa, 622, 54 N. W. 339.

4. Hadley v. Baxendale, 9 Exch. 341.

5. Walsh v. Chicago, etc., R. Co., 42 Wis., 23; Stone v. C. & N. W. R. Co., 47 Iowa, 88; Francis v. Western Union Tel. Co., 58 Minn., 252, 59 N. W. 1078; Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345; Wilcox v. Richmond & D. R. Co., 52 F. 264; Hamlin v. Great Northern R. Co., 1 Hurl. & N. 408.

*Judge of the District Court of Minnesota.

was accordingly held in one case that recovery might be had for mental suffering on account of delay in the transportation of a corpse.[7] In another case an undertaker had agreed to keep the body of plaintiff's deceased daughter in a vault until such time as plaintiff might be ready to inter it. The contract was broken by his taking or allowing it to be taken therefrom and buried or otherwise disposed of. It was held that plaintiff's mental suffering was a proper element of damage, and that such a case "rests upon the reasonable doctrine that where a person contracts to do a particular thing, the failure to do which may result in anguish or distress of mind on the part of the other party contracting, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of contract on his part."[8] In another case quite unique in its facts, it was held that in computing damages for breach of the contract of a fashionable milliner to furnish the dresses for the trousseau of a bride of wealth and high social standing, mental suffering resulting from the breach of contract is a proper element, and the court may take into consideration the disappointment of the bride in not having the dresses in time for the wedding, and her mortification and humiliation in going to her husband unprovided with a suitable trousseau, and also the fact that entertainments had been planned in her honor on her wedding tour, and at her arrival at the home of her husband, which entertainments she would have to forego for want of dresses.[9] It was denied in an action by the groom under substantially similar circumstances.[9a] In another case where plaintiff purchased tickets over defendant's road for himself and family, and where, by reason of defendant's failure to carry them through, they suffered several days' delay and were obliged to reach their destination over another road and were there detained for some time waiting for their baggage, it was held that mental suffering was a proper element of damage.[10] On the other hand, it was held, in the Federal court, under a similar state of facts, that there could be no recovery "for distress of mind, anxiety, mortification and suspense," because of delay in starting a special train engaged to take plaintiff to the bedside of a relative dangerously ill, there being no personal injury and no pecuniary loss.[11] Recovery has been allowed in some states and denied in others for mental suffering caused by nondelivery of a telegram, treating such default as a breach of contract,[12] though recovery for such cause, where allowed, is usually placed on the ground that the failure constitutes a tort.[13] The general subject of liability of a telegraph company for mental suffering on account of failure to deliver a message will be reserved for another article.[14]

§ 3. *Passenger cases.*—As will be presently seen, mental suffering is frequently a proper element of damage in an action by a passenger against a carrier for personal injuries. The liability of the carrier in such cases does not properly come under the head of breach of contract. Such liability, though arising out of a contract relation, is essentially in tort. "It is an action brought upon the theory that legal rights growing out of a contract have been violated, or legal duties resting

6. 8 Am. & Eng. Enc. Law, 672.

7. Hale v. Bonner, 82 Tex. 33, 17 S. W. 605. See Wells Fargo & Co.'s Express v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824. Sale of coffin and burial robe. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576. See 5 C. L. 915, n. 14.

8. Renihan v. Wright, 125 Ind. 536, 25 N. E. 822.

9. Lewis v. Holmes, 109 La. 1030, 34 So. 66, 61 L. R. A. 274.

9a. Eller v. Carolina & W. R. Co. [N. C.] 52 S. E. 305.

10. St. Louis, etc., R. Co. v. Berry (Tex. App.) 15 S. W. 48.

11. Wilcox v. Richmond & D. R. Co., 52 F. 264; Turner v. Great Northern R. Co., 15 Wash. 213, 46 P. 243.

12. Blount v. Western Union Tel. Co., 126 Ala. 105; Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1. Contra. Connell v. Western Union Tel. Co., 116 Mo. 34, 22

thereupon neglected. As applied to a carrier, the contract it makes with a passenger gives him the right to be carried safely and put down at the place he has designated; the failure to do either is a tort. The carrier is engaged in an employment which devolves a duty upon him; an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement."[15]

§ 4. *Mental suffering in tort actions.*—The question of the right to recover for mental suffering commonly arises in tort actions. There is want of harmony among the cases as to when recovery for mental suffering may be had in this class of cases. One line of cases holds that mental suffering is recoverable in but two classes of cases: (1) Where there is a negligent act causing a physical hurt; recovery being had for the mental anguish which is the result of the physical hurt, not of the negligent act. "For the agonies of mind the plaintiff suffered while the train bore down upon him with his foot caught in the frog, not one cent; but damages are allowable only for the mental anguish resulting from the fact that he must go through life a cripple." (2) In the other class of cases, of which malicious prosecution, seduction, and libel are illustrative, the wrongful act is affirmative, is one of commission, not merely of omission, is the product of intent or malice, express or implied.[16] It will be observed that a distinction is drawn between negligent and willful torts.

Mental suffering incident to physical injury.—In negligent torts resulting in physical injury to the person, it is generally agreed that the mental suffering which is incident to such physical injury is a proper element of damage,[17] but it is sometimes difficult to determine what mental suffering is incident to physical injury within the meaning of this rule. The strict rule is that, in connection with bodily pain, compensation may be had for "so much of mental suffering as may be indivisibly connected therewith."[18] But it has been held that however small the bodily injury may be, yet if it was in itself a ground of action, and caused or was necessarily attended with mental suffering to the plaintiff, that mental suffering is a part of the injury for which the plaintiff is entitled to damages.[19] And to constitute bodily injury it is not necessary that there should be a bruise or wound or even impact, as where the train struck plaintiff's carriage, and threw him to the ground, though not inflicting any physical hurt,[20] and where a carriage was struck and carried along for some distance, though the occupants were not thrown out.[21]

Torts causing directly only mental shock, physical injury resulting.—Where the negligent tort causes fright or mental suffering alone, it is generally agreed that there can be no recovery; but where such fright or mental shock subsequently re-

S. W. 345; Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078.

13. Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1.

14. See Telegraphs and Telephones, 6 C. L.

15. Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911.

16. Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846. The dissent from this doctrine will hereafter appear. None for mere mental suffering without physical injury. See 5 C. L. 923, n. 81. For carrying beyond station it is not allowed unless there was physical injury or unless it might have been contemplated. See 1 C. L. 845, n. 43. None for fright from collision without injury. See 1 C. L. 845, n. 46.

17. Pittsburgh, etc., R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582. Personal injuries. See 5 C. L. 927, n. 32, 37; 3 C. L. 1019, n. 55, et seq; 1 C. L. 855, n. 82.

18. Johnson v. Wells, Fargo & Co., 6 Nev. 224.

19. Canning v. Williamstown, 1 Cush. [Mass.] 451; Curtis v. Sioux City, etc., R. Co., 87 Iowa, 622, 54 N. W. 339.

20. Warren v. Boston, etc., R. Co., 163 Mass. 484, 40 N. E. 895.

21. Consolidated Traction Co. v. Lambertson, 59 N. J. Law, 297, 36 A. 100.

In these cases there was a technical trespass to the person of the plaintiff, and in Warren v. Boston, etc., R. Co., 163 Mass. 484, 40 N. E. 895, it is specifically held that it is a physical injury to the person to be thrown out of a wagon, even though the harm consists mainly in nervous shock.

sults in some bodily ailment, the case is not so clear. In England the weight of recent authority sustains the right of recovery in such cases.[21a] In the United States the weight of authority is against it.[22] There is, however, a respectable line of dissenting authorities in the United States which allow recovery in such cases.[22a]

21a. English authorities: In the much quoted early case of Lynch v. Knight, 9 H. L. Cas. 577, 598, it is said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone;" and in Allsop v. Allsop, 5 Hurl. & N. 534, Pollock, C. B., said: "We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it." Both these actions were for slander. In both it was held that the words uttered were not actionable, and the cases are authority only to the point that there can be no recovery for mental suffering on account of the utterance of words not actionable in themselves.

The case of Victorian R. Com'rs v. Coultas, 13 App. Cas. 222, is in point. It held that damages were not recoverable for illness resulting from a nervous shock or mental injury caused by defendant's negligence in permitting the plaintiff to cross its track when it was dangerous to do so. Although this case is followed in Henderson v. Canada Atl. R. Co., 25 Ont. App. 437, it is discredited in later English decisions and can no longer be considered an authority there.

In Bell v. Great Northern R. Co., 26 L. R. Ire. 428, it was held that fright caused by negligence of a railroad company, in permitting a train to run down an incline, and then stop with a jerk, and which causes injury to health, furnishes a basis of recovery. In Wilkinson v. Downton, [1897] 2 Q. B. 57, defendant by way of a practical joke falsely represented to plaintiff that her husband had met with a serious accident. Plaintiff believed it to be true and in consequence suffered a violent nervous shock which rendered her ill. It was held that these facts constituted a cause of action, and Victorian R. Com'rs v. Coultas, 13 App. Cas. 222, was disapproved. The decision is placed on the ground that "the defendant has * * * willfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action. * * * This willful injurla is in law malicious, although no mallcious purpose to cause the harm * * * is imputed to the defendant."

In Dulieu v. White [1901] 2 K. B. 669, defendant's servant negligently drove a van through the window of a room where plaintiff was sitting. It was held there might be a recovery for the physical consequences of the shock and fright to plaintiff. The court disapproved Victorian R. Com'rs v. Coultas, 13 App. Cas. 222, and approved Bell v. Great Northern R. Co., 26 L. R. Ire. 428, and it is said: "Let it be assumed that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? 'As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration.'" See, also, Fitzpatrick v. Great Western R. Co., 12 U. C. Q. B. 645; Pugh v. London, etc., R. Co., [1896] 2 Q. B. 248.

22. American rule: In the United States the prevailing rule is otherwise. There is some conflict of authority, but in most jurisdictions it is held that a negligent act producing immediately only nervous shock or fright affords no cause of action although the nervous shock or fright results in sickness, insanity or death; in other words, that there is no legal, causal connection between the negligence which causes the mental shock and the physical injury that results from it. Mitchell v. Rochester, etc., R. Co., 151 N. Y. 107, 45 N. E. 354; Spade v. Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88; Id., 172 Mass. 488, 52 N. E. 747; Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 40 Am. St. Rep. 577; Braun v. Craven, 175 Ill. 401, 51 N. E. 657; Chicago v. McLean, 133 Ill. 148, 24 N. E. 527; Ewing v. Pittsburgh, etc., R. Co., 147 Pa. 40, 23 A. 340; Gatzow v. Beuning, 106 Wis. 1, 81 N. W. 1003; Gulf, etc., R. Co. v. Trott, 86 Tex. 412, 25 S. W. 419; Scheffer v. R. R. Co., 105 U. S. 249, 26 Law. Ed. 1070; Haile's Curator v. Texas & P. R. Co. [C. C. A.] 66 F. 557; Cleveland, etc., R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917.

In Mitchell v. Rochester, etc., R. Co., 151 N. Y. 107, the facts were that plaintiff was standing upon a cross-walk of a city street, awaiting a car. Just as she was about to step upon it, the team attached to another car drew near and turned and came so close to her that from fright and excitement she became unconscious and the result was a miscarriage. It was held that there could be no recovery. The court said: "If fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom," and that any other rule "would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation."

In Spade v. Lynn, 168 Mass. 285, the facts were that defendant's conductor in removing a drunken man from a car, jostled another drunken man who was standing in front of plaintiff and threw him upon her. The fall upon her was a trifling matter taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury,. It was held that persons merely frightened should not be compensated for fright and its consequences where there is no contemporaneous

physical injury and that there could be no recovery. In Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, the defendant, dressed in woman's clothes, went to the residence of plaintiff, whom he frightened by following her into the house and striking the floor with a parasol; the fright, it was alleged, caused a miscarriage. There was no attempt to do bodily injury and the defendant intended no wrong or injury. It was held that this evidence showed no assault, that fright unaccompanied by physical injury is not a basis for damages, and accordingly there could be no recovery. This case, in its facts, closely resembles the English case, Wilkinson v. Downton [1897] 2 Q. B. 57, supra, but the opposite conclusion was reached.

In Braun v. Craven, 175 Ill. 401, 51 N. E. 657, defendant, the landlord of plaintiff's sister, entered the house, the door being ajar, to collect rent, and went into plaintiff's bedroom where she was sitting on the floor packing her goods prior to moving. Defendant waived his hands and shouted in an angry and loud tone and boisterous manner. "What are you doing here? I forbid you moving. If you attempt to move I will have a constable here in five minutes." Plaintiff asked damages for a severe nervous shock claimed to have been suffered thereby, which resulted in St. Vitus dance. It was held that the action was "purely one of negligence," that in case of mere negligence "a liability cannot exist consequent on mere fright or terror which superinduces nervous shock" and that it could not be said that defendant's manner, language or gestures, or declared purpose were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant.

In Gulf, etc., R. Co. v. Trott, 86 Tex. 412, 25 S. W. 419, through the negligence of defendant, plaintiff's team was frightened so that it broke his wagon, putting him in fear and fright and causing him great mental suffering. It was held that no action would lie for damages based upon tortious and negligent conduct, where the wrongful act caused no physical injury to his person nor any other element of personal damage.

In Haile's Curator v. Texas & P. R. Co., [C. C. A.] 66 F. 557, plaintiff was a passenger upon a train which plunged through a burning bridge. The physical injury was inconsequential, but it was alleged that the fright and mental shock caused insanity. It was held there could be no recovery.

In Scheffer v. R. R. Co., 105 U. S. 249, 26 Law. Ed. 1070, plaintiff's intestate received injuries through the negligence of defendant of so severe a character that insanity resulted, and while in that condition he committed suicide. The court said, "His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each [both] of these are casual or unexpected causes, intervening between the act which injured him, and his death."

22a. Dissenting American authorities: The doctrine of the foregoing cases has not been universally followed. In one case Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281, it was said, "The doctrine thus approved is so manifestly unjust, and so out of harmony with the general spirit of the law, that many courts have wholly repudiated it, while still others have limited and modified it by important exceptions." There are well-considered cases holding that, if physical injuries are a natural and proximate result of a nervous condition, and the nervous condition is a natural and proximate consequence of defendant's negligence, there may be a recovery in damages accordingly, irrespective of bodily hurt at the time of the mental shock; that in such cases the act which caused the nervous condition set in motion the agencies by which the injury was produced and is the proximate cause of such injury. Purcell v. St. Paul, etc., R. Co. 48 Minn., 134, 50 N. W. 1034, 16 L. R. A. 203; Sloane v. Southern R. Co., 111 Cal. 668, 44 P. 320; Ephland v. Missouri Pac. R. Co., 57 Mo. App. 147; Razzo v. Varni, 81 Cal. 289, 22 P. 848; Davis v. Tacoma, etc., Power Co., 35 Wash. 203, 77 P. 209.

In Ephland v. Missouri Pac. R. Co., 57 Mo. App. 147, plaintiff sustained injury by reason of fright from a panic among passengers, caused by a false alarm of danger by the brakeman of the defendant's train. It was held that the physical injury traceable to the fright was a legal consequence of the negligence causing the fright.

In Sanderson v. Northern Pac. R. Co., 88 Minn. 166, 92 N. W. 542, 60 L. R. A. 405, it is said: "The great weight of authority sustains the doctrine that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury. * * * This rule, as thus broadly stated, has not been accepted by this court," and the rule of that court is stated, in substance, to be that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant, but if it is the result of such a legal wrong, recovery should be allowed.

The application of this rule is illustrated by two other cases in that state. In one the facts were that the defendant shot a dog in the highway. Plaintiff, a woman, standing near, whom the defendant did not see at the time he fired, was so seriously frightened that a miscarriage resulted. It was held she could not recover, since the fright was not the result of any legal wrong to her. Renner v. Canfield, 36 Minn. 90, 30 N. W. 435. In the other case, the defendant so negligently managed its street cars that a collision seemed inevitable. The fright sustained by plaintiff, who was a passenger on one of the cars, resulted in a miscarriage. It was held that plaintiff was entitled to recover, although there was in fact no collision and no impact. Purcell v. St. Paul City R. Co. 48 Minn. 134, 50 N. W. 1034, supra. This was on the principle above stated that the fright was the proximate result of a legal wrong against the plaintiff by the defendant; that is, that the negligent management of the cars and the threatened collision was a legal wrong to plaintiff.

It would probably not be contended, however, that the mere fact of negligent management of the car and a threatened collision or even the fact of an actual collision would alone give a right of action, even for nominal damages (See Wyman v. Leavitt,

Jumping to avoid injury.—While the doctrine of these cases is not generally accepted, it must be conceded that it borders closely on the rule of a well accredited line of cases in which it is held that where a person, in terror and alarm at the prospect of a threatened danger, dodges, jumps from a train or makes other effort to escape from such threatened danger, and in doing so is injured, there may be a recovery both for the fright and nervous shock and for the physical injuries resulting therefrom.[23]

Proximate consequences.—It will be observed that in the two lines of cases noted there is a difference not only in the result but in the test applied to determine what are "proximate consequences" in tort actions.[24]

§ 5. *Willful torts without physical injury.*—It has been said that as far as pecuniary elements of damage are concerned, the right of recovery is wholly independent of the motive which induced the act or omission.[25] The weight of authority, however, supports the doctrine that in determining whether mental suffering is an element of damage, there is a distinction between willful and negligent torts; that the prevailing rule heretofore stated "has no application to wanton or intentional wrongs, nor the acts done with gross carelessness or recklessness, showing utter

71 Me. 227); that is in the above case, with the element of fright and the resulting injury eliminated, there was no legal **actionable** wrong. Accordingly, under the doctrine of this case, it is **not necessary** that the right to recover for the consequences of fright should rest upon a distinct and **independent cause of action.**

23. Buchanan v. West Jersey R. Co., 52 N. J. Law, 265, 19 A. 254; Buel v. N. Y. Cent. R. Co., 31 N. Y. 314; Dyer v. Erie R. Co., 71 N. Y. 228; Stokes v. Saltonstall, 13 Pet. [U. S.] 181, 10 Law. Ed. 115; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, 14 N. W. 797; Mack v. South Bound, etc., R. Co., 52 S. C. 323, 29 S. E. 905; Jones v. Boyce, 1 Starkie, 493.

In Spade v. Lynn, etc., R. Co., 168 Mass., 285, 47 N. E. 88; Id., 172 Mass. 488, 52 N. E. 747, supra, however, this doctrine is harmonized with the doctrine of the court in that case, by holding that it is "a physical injury to the person to be * * * compelled to jump out, even although the harm consists mainly of nervous shock." Really the chain of consequences is the same whether the person in peril jumps or faints, and the substantial difference between injuries which result from jumping and those which result from fainting is that which arises from the greater opportunity for imposition and fraud in the latter case. The difference is not one so much of principle as one of practical difficulties.

24. In Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, the rule is stated that "When the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury." This is in accordance with the rule often stated that "He who is responsible for a negligent act must answer 'for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force'" (Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1), although such resulting injury **could not have been foreseen** or contemplated as a probable result of the act done (Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356), and that "it is the unexpected rather than the expected that happens in the great majority of the cases of negligence" (Stevens v. Dudley, 56 Vt. 158).

On the other hand, it was held in Spade v. Lynn & B. R. Co., 168 Mass. 285, supra, that a carrier is not obliged to anticipate or guard against an injurious result which would only happen to a person of peculiar sensitiveness. In Mitchell v. Rochester R. Co., 151 N. Y. 110, supra, it is said "Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected."

In Braun v. Craven, 175 Ill. 401, supra, it was said that the plaintiff must show a damage, naturally and reasonably arising from the negligent act and reasonably to be anticipated as a result. Citing many cases.

In Ewing v. Pittsburgh, etc., R. Co., 147 Pa. 40, supra, the court said. "If the injury was one not likely to result from the collision, and one which the company could not have **reasonably foreseen,** then the accident was not the proximate cause." In Chicago, etc., R. Co. v. Elliott [C. C. A.] 55 F. 949, it was said, "An injury that could not have been **foreseen** or reasonably **anticipated** as the probable result of an act of negligence is not actionable," and in Scheffer v. R. R. Co., 105 U. S. 249, it was said, "The suicide * * * was not the natural and probable consequence (of the negligence) and could not have been **foreseen** in the light of the circumstances attending the negligence," and hence was not to be considered.

25. Sutherland, Damages, par. 98; Krom v. Schoonmaker, 3 Barb. [N. Y.] 647; Bridgewater Gas Co. v. Home Gas Fuel Co., 59 F. 40; Indianapolis, etc., R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310; note to Gilson v. Delaware & H. Canal Co., 36 Am. St. Rep. 819. See Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 17, 49 L. R. A. 475.

indifference to consequences when they must have been in the actor's mind,"[26] and that "while the current of authority supports the doctrine that there can be no recovery for mental suffering where there has been no physical injury, in ordinary actions for negligence, yet that is not the law as applied to a willful injury committed against the complaining party."[27] In the case of willful torts, attended with malice, express or implied, the rule is uniform that mental suffering is a proper element of damage, though there is no bodily injury, and that, where the manner of commission of the act is such as, naturally, to cause mental suffering, damages for mental suffering may be recovered, as where the tort feasor has been actuated by wantonness or malice or has proceeded with willful or positive disregard of the plaintiff's rights in the premises.[28] It is accordingly held that mental suffering is a proper element of damages in actions for libel and slander,[29] in crim. con. by a husband,[30] assault and battery,[31] assault without battery,[32] malicious prosecution,[33] even of a civil suit,[34] false imprisonment,[35] for wrongful arrest, in the presence of family and friends,[36] and the fact that because of his arrest plaintiff's mother swooned, thereby causing him greater anxiety, may be considered.[37] And a parent may recover for mental suffering in an action for abduction of a child,[38] or for seduction of a daughter,[39] and in such case the anxiety of the parent for other children in the family may be considered.[40] The theory of this latter class of actions is loss of service, but damages are awarded largely as compensation for wounds inflicted on the mind. It is also held that a passenger, wrongfully ejected, may recover for the effect of insult and indignity to the feelings, as compensatory damages, though the facts do not warrant punitive damages,[41] and even though no physical force or violence was used.[42] There are authorities, however, to the effect that where the injury is not willful, mental suffering such as is produced by circumstances of indignity, contumely and consequent disgrace cannot be recovered in an action for damages for ejectment of a passenger.[43]

§ 6. *Active torts without malice.*—In the foregoing cases, the tort was accompanied by malice, express or implied. Some courts have also sustained the recovery of damages for mental suffering in a class of torts consisting of some positive act, although there is no express or implied malice or intentional insult or oppression. The correct rule has been said to be that "mental suffering or nervous shock may be recovered for, whenever it is the natural and proximate result of the wrong done, if such wrong gives the injured party a cause of action."[44]

26. Spade v. Lynn & B. R. Co., 168 Mass. 285, 172 Mass. 488; Fillebrown v. Hoar, 124 Mass. 580; Lombard v. Lennox, 155 Mass. 70; Hawes v. Knowles, 114 Mass. 518.

27. Kline v. Kline, 158 Ind. 602, 6 N. E. 9.

28. Moyer v. Gordon, 113 Ind. 282; Byrne v. Gardner, 33 La. Ann. 8. Wrongful expulsion from an association. See 3 C. L. 1014, n. 84.

29. Finger v. Pollack, 188 Mass. 208, 74 N. E. 317; Osborn v. Leach, 135 N. C. 628. See 3 C. L. 1018, n. 52; 1 C. L. 927, n. 30.

30. Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79.

31. Lucas v. Flinn, 35 Iowa, 9.

32. Barbee v. Reese, 60 Miss. 906; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364.

33. Parkurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Fisher v. Hamilton, 49 Ind. 341, and see 5 C. L. 924, n. 91; 1 C. L. 849, n. 94.

34. Cohn v. Saidel, 71 N. H. 558. 53 A. 800.

35. Stewart v. Maddox, 63 Ind. 51. See 3 C. L. 1014, n. 73; 1 C. L. 849, n. 89, 93.

36. Shatto v. Crocker, 87 Cal. 329, 25 P. 921; Gibney v. Lewis, 68 Conn. 392, 36 A. 799.

37. Flam v. Lee, 116 Iowa, 289, 90 N. W. 70.

38. Magee v. Holland, 27 N. J. Law, 86.

39. Phillips v. Hoyle, 4 Gray (Mass.) 568; Lunt v. Philbrick, 59 N. H. 59; Barbour v. Stephenson, 32 F. 66.

40. Stephenson v. Belknap, 6 Iowa, 96.

41. Smith v. Pittsburg, etc., R. Co., 23 Ohio St. 10; Quigley v. Central Pac. R. Co., 11 Nev. 350; Hays v. Houston, etc., R. Co., 46 Tex. 272; Willson v. Northern Pac. R. Co., 5 Wash. 621, 32 P. 468. Wrongful ejection of a passenger. See 5 C. L. 920, n. 61; 3 C. L. 1010, n. 18 et seq.; 1 C. L. 845, n. 41.

42. Sloane v. Southern Cal. R. Co., 111 Cal. 668, 44 P. 320, 32 L. R. A. 193; Shepard v. Chicago, etc., R. Co., 77 Iowa, 54, 41 N. W. 564.

43. Illinois Cent. R. Co. v. Sutton, 53 Ill. 397.

44. Sutherland, Damages, § 943. In line with this, it was held in Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L.

§ 7. *Actions of tort for injury to property.*—Mental suffering is not ordinarily allowed as an element of damage for negligent injury to property, no insult or contumely or any intentional violation of plaintiff's rights being shown, for mental distress is not, in general, a natural or probable consequence of such torts.[45] For example, it was held that there is no liability for mental suffering arising from negligent blasting on adjoining premises which resulted in throwing rocks on plaintiff's land,[46] or negligently running cars off the track and against plaintiff's dwelling.[47] The contrary has been held.[48] In another case it was held that the jury might consider the insults and indignities to the wife of plaintiff offered by employes of defendant while negligently dumping earth against plaintiff's house,[49] and in an action for damages for negligent destruction of a furnace it was held that anxiety for a sick child might be considered;[50] and mental suffering, due to violent conduct, is properly considered in aggravation of damages for trespass.[51] In one case the defendant was held liable for causing nervous prostration, by trespassing in the nighttime.[52] In some jurisdictions mental suffering has been held a proper element of damages for illegal issuance of an attachment against property,[53] and also for wrongful eviction under void process;[54] but it has been held otherwise,[55] and it was held in one case that mental suffering was a proper element of damage in an action by the owner for damages for the willful beating of an old horse of little or no value.[56]

§ 8. *Elements of damage.*—Where mental suffering is recoverable, it is held that the jury may consider not only such mental suffering as is a direct result of the physical injuries, but also that condition of mind caused by insults and indignities in connection therewith.[57] The prevailing rule is that mental anguish or mortifi-

R. A. 85, that a wife might recover damages for mental suffering on account of the dissection of the corpse of a deceased husband, though there was no other element of substantial damage. Mitchell, J., said: "There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion * * * placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. * * * But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. * * * That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument."

In another case it was held that the removal of the body of a child from the lot in which it was rightfully buried to a charity plot gives the parent a right to recover for injury to his feelings. In this case, the action was nominally trespass, but the only substantial element of damage was mental suffering (Meagher v. Driscoll, 99 Mass. 281), and in another case a physician took a nonprofessional unmarried man with him to attend a case of confinement, and permitted him to remain in the room, because there was no other shelter from a prevailing storm, and then permitted and in fact requested him, to assist him without any sufficient necessity therefor. It was held that both were liable for damages, although there was no wrong motive in the act (DeMay v. Roberts, 46 Mich. 160, 9 N. W. 146).

45. White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454; White v. Sander, 168 Mass. 296, 47 N. E. 90; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Smith v. Grant, 56 Me. 255; Wolf v. Stewart, 48 La. Ann. 1431. Allowed for nuisance. See 3 C. L. 1016, n. 14.

46. Wyman v. Leavitt, 71 Me. 227.

47. Ewing v. Pittsburgh, etc., R. Co., 147 Pa. 40, supra.

48. Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953.

49. Ft. Worth, etc., R. Co. v. Smith (Tex. Civ. App.) 25 S. W. 1032.

50. Vogel v. McAuliffe, 18 R. I. 791, 31 A. 1.

51. Hickey v. Welch, 91 Mo. App. 12. Trespass on lands accompanied by abusive and violent conduct. See 1 C. L. 853, n. 46.

52. Watson v. Dilts, 116 Iowa, 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559.

53. Byrne v. Gardner, 33 La. Ann. 6; City Nat. Bank v. Jeffries, 73 Ala. 183.

54. Rauma v. Bailey, 80 Minn. 336, 83 N. W. 191; Fillebrown v. Hoar, 124 Mass. 580.

55. Anderson v. Taylor, 56 Cal. 131.

56. Kimball v. Holmes, 60 N. H. 163.

cation from disfigurement of person is a proper element of damage.[58] But there as good authority to the contrary.[59] Where mental suffering is allowed as an element of damage, the jury may consider not only past and present, but such as is reasonably certain to follow in the future.[60] This does not allow consideration of mental anguish from contemplation of what merely might occur.[61] But it has been held that a person bitten by a dog may recover for mental suffering caused by fear of hydrophobia.[62] There can be no recovery for mere inconvenience,[63] or mere "lack of personal enjoyment,"[64] but there may be for loss of intellectual capacity and mental vigor, on principles analogous to recovery for loss or diminution of earning capacity.[65]

§ 9. *Mental suffering must proceed from tort to plaintiff.*—The mental suffering considered must proceed from and be caused by the act or neglect which produced the physical damage. Sorrow, disappointment on account of loss of offspring, following a miscarriage caused by negligent injury, are not part of the pain naturally attending the injury and are too remote.[66] Apprehension that the injured person may not be able to support his family is not an element of damage.[67] And the general rule is that the physical injury must be to the person who suffers the mental pain. Hence a wife cannot recover for mental pain resulting from unlawful imprisonment of her husband,[68] or from his wrongful indictment,[69] or from abusive language toward the husband,[70] nor can a father recover for parental grief and anxiety on account of mere physical injuries sustained by a child; the only mental anguish recoverable in such cases is that of the infant himself.[71] Nor can a father recover because of solicitude for the child's safety.[72] In an action by a father for damages for loss of his infant son's services, by reason of personal injuries, it was held that the jury cannot consider either the distress of mind or the disappointed hopes of the parent,[73] and in a malpractice case, brought by a husband, for injuries done to his wife during a surgical operation which resulted in her death, but which were not willfully inflicted, it was held that no recovery could be had for his mental suffering, as such cause of action must be restricted to the person who received the injury.[74] On the other hand, in an English case, it was held that the husband

57. Smith v. Holcomb, 99 Mass. 552; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; Wadsworth v. Treat, 43 Me. 163; Prentiss v. Shaw, 56 Me. 427; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381.

58. Newbury v. Getchel & M. Lumber & Mfg. Co., 100 Iowa, 441, 69 N. W. 743; Power v. Harow, 57 Mich. 107, 23 N. W. 606; Sherwood v. Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773; Wilson v. Young, 31 Wis. 574; Nichols v. Brabazon, 94 Wis. 549, 69 N. W. 342; Heddles v. Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115; Cameron v. Bryan, 89 Iowa, 214, 56 N. W. 434; Schmitz v. St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472; Stewart v. Maddox, 63 Ind. 51; Ballou v. Farnum, 11 Allen [Mass.] 73; Atlanta, etc., R. Co. v. Wood, 48 Ga. 565; The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572.

59. Chicago, etc., R. Co. v. Caulfield [C. C. A.] 63 F. 396; Chicago, etc., R. Co. v. Hines, 45 Ill. App. 299.

60. Kendall v. Albia, 73 Iowa, 241, 34 N. W. 833.

61. Illinois Cent. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275.

62. Warner v. Chamberlain, 7 Houst. [Del.] 18.

63. Jenson v. Chicago, etc., R. Co., 86 Wis. 589, 57 N. W. 359.

64. City of Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65.

65. Wade v. Leroy, 20 How. [U. S.] 34; Wallace v. Western N. C. R. Co., 104 N. C. 442.

66. Bovee v. Danville, 53 Vt. 190; Augusta, etc., R. Co. v. Randall, 85 Ga. 297, 322.

67. Atchison, etc., R. Co. v. Chance, 57 Kan. 40, 45 P. 60; Texas Mex. R. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77.

68. Ellis v. Cleveland, 55 Vt. 358.

69. Hampton v. Jones, 58 Iowa, 317, 12 N. W. 276.

70. Bucknam v. Great Northern R. Co., 76 Minn. 373, 79 N. W. 98; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607.

71. Flemington v. Smithers, 2 Car. & P. 292; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 92; Cowden v. Wright, 24 Wend. [N. Y.] 429, 35 Am. Dec. 633; Whitney v. Hitchcock, 4 Denio [N. Y.] 461; Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec., 586; Maynard v. Oregon R. & N. Co. [Or.] 78 P. 983, 68 L. R. A. 477.

72. Keyes v. Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888; Texas Mex. R. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77.

73. Pennsylvania R. Co. v. Kelly, 31 Pa. 372.

74. Hyatt v. Adams, 16 Mich. 179, 197.

might recover for distress of mind suffered on his wife's account from the time of an accident which caused death till the moment of her dissolution.[75]

§ 10. *Mental suffering in actions for death by wrongful act.*—In actions for death by wrongful act, there can generally be no compensation for wounded feelings of the survivors, or the deceased.[76] Where by statute the right of action survives, there is the same recovery for injured feelings of the deceased as he would have had himself, but if death were instantaneous and there could accordingly have been no mental suffering, there can be no recovery on that ground.[77]

MERCANTILE AGENCIES.[52]

MERGER IN JUDGMENT; MERGER OF CONTRACTS; MERGER OF ESTATES, see latest topical index.

MILITARY AND NAVAL LAW.

§ 1. *Military and naval organization, maintenance, and enlistment. A. Regular army and navy. Enlistment.*[53]—No person under the age of twenty-one years can be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, if he has any entitled to his custody or control.[54] A minor enlisting without such consent cannot be discharged under a writ of habeas corpus, issued after his arrest for desertion, where, after the arrest and after the issuance of the writ, but before judgment or final hearing and within a reasonable time, formal charges of desertion and fraudulent enlistment and receipt of pay and allowances are preferred against him by the military authorities.[55] In such case he will be left in their custody until he has answered or satisfied the charges against him, without prejudice to his father's right to thereafter demand his discharge from the army, and to enforce the same by appropriate remedy.[56]

In the navy, minors over the age of eighteen may be enlisted without such consent,[57] and the marine corps is a part of the navy.[58]

Pay and subsistence.[59]—By act of congress naval officers are entitled to the same pay and allowances, except forage, as are received by officers of corresponding rank in the army;[60] hence a naval officer, who, in time of war and pursuant to orders issued by competent authority, exercises a command above that pertaining to his grade, is entitled to receive the pay and allowances of the grade appropriate to the command so exercised, the same as an army officer would be under similar circumstances.[61] Naval officers on shore duty are entitled to the same allowances as are

75. Baker v. Bolton, 1 Camp. 493.

76. Blake v. Midland R. Co., 18 Q. B. 93; Donaldson v. Mississippi, etc., R. Co., 18 Iowa, 280; Southern Cotton Press Mfg. Co. v. Bradley, 52 Tex. 587, 601; Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 24 P. 303. Allowed for wrongful death. See 1 C. L. 857, n. 94.

77. Kennedy v. Standard Sugar Refinery, 125 Mass. 90; Moran v. Hollings, 125 Mass. 93; Muldowney v. Ill. Cent. R. Co., 36 Iowa, 462; Moe v. Smiley, 125 Pa. 136, 17 A. 228; Maher v. Philadelphia Traction Co., 181 Pa. 617, 37 A. 571; The Robert Graham Dun, 33 U. S. App. 297.

52. No cases have been found for this subject since the last article. See 2 C. L. 890.

53. See 4 C. L. 640.

54. Rev. St. § 1117; Comp. St. 1901, p. 813. Elliott v. Harris, 24 App. D. C. 11.

55, 56. In re Lessard, 134 F. 305.

57. Rev. St. §§ 1418, 1419; Comp. St. 1901, p. 1007, construed. Elliott v. Harris, 24 App. D. C. 11.

58. Elliott v. Harris, 24 App. D. C. 11.

59. See 4 C. L. 640.

60. Act March 3, 1899 (30 St. L. 1007), § 13. Thomas's Case, 39 Ct. Cl. 1.

61. Increased pay of army officers authorized by Act April 26, 1898 (30 St. at L. 365), § 7. Thomas's Case, 39 Ct. Cl. 1. Held that command of vessel in Philippines after

given to army officers of corresponding rank,[62] hence a naval surgeon on detached recruiting service is entitled to commutation of quarters.[63] It is further provided that such act shall not operate to reduce the pay which, but for its passage, would have been received at the time of its passage or thereafter.[64]

The pay proper of all officers serving in the insular possessions of the United States, and in Alaska, or beyond the limits of the United States, is increased ten per cent over and above the rates as fixed by law in times of peace.[65] Pay proper means compensation which may be described or designated as pay as distinguished from allowances, commutations for rations, and the like,[66] and includes longevity pay.[67]

A higher rate of pay is allowed to naval officers when performing sea duty than when engaged on shore duty.[68] The navy department cannot, in disregard of the statute, deprive an officer of sea pay by assigning him to a duty mistakenly qualified as shore duty, but which is in law sea duty.[69] An officer assigned to sea duty is entitled to sea pay, though called upon, without change in his assignment, to perform merely temporary service ashore.[70] Where the assignment expressly imposes upon the officer the continued discharge of his sea duties, and qualifies his shore duty as merely temporary and ancillary thereto, it will be presumed that such shore duty is temporary and that it is not incompatible with his sea duty so as to prevent his being entitled to sea pay.[71]

Naval constructors may be detailed by the secretary of the navy to inspect army transports,[72] and are not entitled to additional compensation for so doing.[73]

Musicians in the band of the marine corps are not entitled to increased pay for length of service.[74]

Volunteer officers and enlisted men are entitled to be paid up to the time of

treaty of peace with Spain, but during the Philippine insurrection, was "in time of war." Id.

62. Act March 3, 1899, § 13 (30 St. L. 1007). Anderson's Case, 39 Ct. Cl. 316.

63. Anderson's Case, 39 Ct. Cl. 316.

64. Act March 3, 1899, § 13 (30 St. L. 1007), as amended by Act June 7, 1900 (2 Supp. R. S. 1451, par. 2). Terry's Case, 39 Ct. Cl. 353. Effect of act is to entitle officer to pay he would have received but for its passage. Thus, an officer entering the service before the passage of the Act of 1899, promoted from captain to rear admiral after the passage of the act, and embraced in the nine lower numbers of that grade and assigned to shore duty, is entitled to the old naval pay of a rear admiral on shore duty as fixed by Rev. St. § 1556, and not that fixed by § 7 of the Act of 1899. Id. The fact that the Act of 1899 abolished the grade of commodore, to which grade claimant would otherwise have been promoted instead of that of rear admiral, does not change the rule or render the measure of his compensation what he would have received as commodore. Id. Question what rank he would have occupied, but for the passage of the act of 1899, cannot be considered. Id.

65. Acts May 26, 1900 (31 St. L. 211, c. 586), and March 2, 1901 (31 St. L. 903, c. 803. Comp. St. 1901, p. 896). United States v. Mills, 197 U. S. 223, 49 Law. Ed. 732.

66. United States v. Mills, 197 U. S. 223, 49 Law. Ed. 732.

67. Longevity pay authorized by Rev. St. § 1262, Comp. St. 1901, p. 896, should be added to minimum pay for officer's grade prescribed by § 1261 (Comp. St. 1901, p. 893), and the increase figured on the total. United States v. Mills, 197 U. S. 223, 49 Law. Ed. 732. Term "current yearly pay" as used in § 1262 means the same as "pay proper." Id. Fact that Congress distinguishes between "pay proper" and "additional pay for length of service" in Act March 15, 1898 (Army appropriation act, 30 St. L. 318, c. 69), is immaterial both because the form of appropriations was changed in all subsequent acts, and because the act applies only to enlisted men. Id.

68. Rev. St. 1556, 1571; Comp. St. 1901, pp. 1067, 1079, applies to chief engineers. United States v. Engard, 196 U. S. 511, 49 Law. Ed. 575, afg. 38 Ct. Cl. 712.

69. United States v. Engard, 196 U. S. 511, 49 Law. Ed. 575, afg. 38 Ct. Cl. 712.

70. Naval regulations, pars. 1154, 1168. United States v. Engard, 196 U. S. 511, 49 Law. Ed. 575, afg. 38 Ct. Cl. 712.

71. Where there is nothing in the record to the contrary. United States v. Engard, 196 U. S. 511, 49 Law. Ed. 575, afg. 38 Ct. Cl. 712.

72. Is duty of navy to give army all necessary assistance when it becomes necessary for latter to use ships. Stocker's Case, 39 Ct. Cl. 300. Statute creating office is broad enough to include such duties, and hence inspection does not burden officer with duties not incident to his office. Id.

73. Is prohibited by Rev. St. § 1765, and there is nothing authorizing it in Act March 9, 1898, 30 St. L. 274, making an appropriation for the national defense. Stocker's Case, 39 Ct. Cl. 300.

74. Act March 3, 1899, § 24 (30 St. L. 1007), supersedes Rev. St. § 1284 in this particular. Giacchetti's Case, 39 Ct. Cl. 381.

their discharge or muster out,[75] and to be discharged or mustered out at the place where they were enrolled.[76] A staff officer ordered to his home, there to be discharged, is entitled to his regular pay until he reaches home, though delayed by sickness necessitating his detention in military hospitals.[77]

Volunteer officers and enlisted men are, on their discharge, entitled to one or two months extra pay according to whether they served within or beyond the limits of the United States.[78] Such officers or men who served during the war with Spain and were mustered out without furlough were given the same extra pay,[79] and staff officers were placed on the same footing as line officers in this regard.[80] An officer or soldier subject to the orders of superior authority, or by order under medical or surgical treatment in a hospital, or otherwise subject to the orders of the medical staff, cannot be deemed to have been on furlough within the meaning of these acts.[81] The furlough will be deemed to have been withheld or suspended whenever it appears that orders by superior authority have interfered with the personal freedom of the officer or soldier to dispose of his own time.[82] Any part of the furlough period during which he was neither subject to duty, nor waiting or responding under orders for duty, is to be considered as furlough pro tanto, and operates to diminish the extra pay pro rata.[83]

Under the Act of February 24, 1897, a person duly appointed or commissioned to be an officer of volunteers during the civil war, and subject to the mustering regulations at that time applicable to members of the volunteer service, is deemed to have been mustered into the service in the grade named in his appointment or commission from the date from which he was to take rank under its terms, whether the same was actually received by him or not, and is entitled to pay, emoluments, and pension as if actually mustered at that date, provided his command had been recruited to the minimum number required by law and the army regulations, or had been assigned to duty in the field.[84] In order that an officer may take advantage of this act it is not necessary that the records of the war department show that he was mustered into the service or was assigned to active duty in the field,[85] but where it appears that his command was below the minimum, it is sufficient if it is proven by any competent evidence that he was commissioned and actually performed active duties in the field under proper orders.[86] Orders and reports of commanding generals contemporaneous with the services rendered are admissible for that purpose.[87] Upon the remuster of an officer, under this act, his heirs are entitled to the pay and

75, 76. Daggett's Case, 39 Ct. Cl. 209.

77. Delay cannot be counted as part of leave which was given him by order directing his discharge two months after its date. Daggett's Case, 39 Ct. Cl. 209.

78. Act Jan. 12, 1899 (30 St. L. 784), provides for two months' extra pay to volunteers thereafter mustered out and discharged. Before the passage of this act the same result was accomplished by orders of the war department giving a leave of absence for a like period after arrival at the place of discharge. Daggett's Case, 39 Ct. Cl. 209.

79. And this act was later extended so as to entitle those previously mustered out without furlough to the same extra pay. Act May 26, 1900, 31 St. L. 217. Daggett's Case, 39 Ct. Cl. 209; Magurn's Case, 39 Ct. Cl. 416.

80. By Act May 26, 1900 (31 St. L. 217), providing that the act of 1899 shall extend to all volunteer officers of the general staff who have not received waiting orders prior to their discharge. Daggett's Case, 39 Ct. Cl. 209. Thus, a staff officer who received only a part of the leave of absence to which he was entitled under the orders of the war department may recover waiting orders pay for the balance of such time. Id.

81. Under Act May 26, 1900. Magurn's Case, 39 Ct. Cl. 416. Officer who did not receive leave of absence but was detained for and actually performed duty during the furlough period, except when on sick leave, held entitled to full two months extra pay. Id.

82, 83. Magurn's Case, 39 Ct. Cl. 416.

84. Act Feb. 24, 1897, 29 St. L. 593. Brewington's Case, 39 Ct. Cl. 399.

85. Brewington's Case, 39 Ct. Cl. 399.

86. Such orders operate as an assignment to duty in the field. Brewington's Case, 39 Ct. Cl. 399.

87. One part of the res gestae. Brewington's Case, 39 Ct. Cl. 399.

emoluments to which he would have been entitled had he been actually mustered on the date of remuster, and the settlement of his accounts must relate back to that date.[88] Under the Acts of July 22, 1861, and July 5, 1862, an enlisted man was only entitled to bounty if he served for the period of two years,[89] and hence an officer, who enlisted as a private and was subsequently promoted, remustered under the act of 1897, loses his right thereto if the remuster is as of a date antecedent to the expiration of that period.[90] So, too, the right of a veteran volunteer re-enlisting to subsequent instalments of the bounty provided for by the orders of the war department, as subsequently ratified by congress, ceased when he was promoted to be a commissioned officer,[91] and a remuster carrying back the date of his muster as an officer, to a time antecedent to the payment of an instalment of such bounty, deprives him of his right thereto.[92] The bounty paid in such cases is a set-off to the amount found due under the act of 1897, and may be deducted therefrom.[93]

Commutation for quarters.[94]—Army officers on detached recruiting service at stations where there are no public quarters, or where such quarters are inadequate, are entitled to commutation for quarters.[95] They are on duty without troops, though enlisted men may be on duty with them in the capacity of guards, orderlies, and the like.[96]

Traveling expenses and mileage.[97]—The travel pay and commutation of substance allowed an officer in the civil war, honorably discharged after the passage of the income tax law of 1862, was subject to its provisions to the extent of any surplus over and above his actual traveling expenses, and where he failed to render an account thereof, to the extent of the whole amount received,[98] and the right of the government to the tax was not taken away by the repealing act.[99] Such tax may be deducted from an account first presented under the Act of March 3rd, 1901, appropriating money for arrears of pay of volunteers during the civil war.[1] That act relieves the officer's claim from the operation of the statute of limitations.[2]

Compensation for lost equipment.—Horses lost in the military service are paid for by the government, provided the loss results from any exigency or necessity of such service and is not caused by the fault or negligence of its owner.[3]

88. 24 St. L. 993. Application by heirs for benefits of the act operates to reopen the settlement made with decedent. Reynolds's Case, 39 Ct. Cl. 74.

89. 12 St. L. 268, § 5, and Id. 509, § 6. Reynolds's Case, 39 Ct. Cl. 74.

90. Was promoted and mustered in as a commissioned officer, and remustered under the act of 1897 as of an anterior date. Reynolds's Case, 39 Ct. Cl. 74.

91. Bounty provided for by Gen. Orders of the War Dept. Nos. 191, 324, of 1863, as ratified by Joint Resolution of Jan. 13, 1864, 13 St. L. 400. Mahan's Case, 39 Ct. Cl. 97.

92. Mahan's Case, 39 Ct. Cl. 97.

93. Reynolds's Case, 39 Ct. Cl. 74; Mahan's Case, 39 Ct. Cl. 97. Different rule applies to first instalment of $25 of the $60 bounty earned by re-enlistment under Gen. Orders of 1863, Nos. 191, 324, particularly where it is not averred that claimant was paid $25 or any other sum, under the acts of 1861 and 1862, in addition to the $60. Id.

94. See 4 C. L. 642.

95. Anderson's Case, 39 Ct. Cl. 316.

96. Under general order of secretary of war issued pursuant to Act March 2, 1901 (31 St. L. 901), authorizing him to determine what shall constitute duty without troops. Anderson's Case, 39 Ct. Cl. 316. The act did not change the former law as to commutation for quarters (Acts June 18, 1878, 21 St. L. 145, and June 23, 1879, 21 St. L. 30), nor Army Regulations § 1336, made pursuant thereto, limiting the right to such commutation to officers serving without troops. Id.

97. See 4 C. L. 643.

98. Act July 1, 1862, 12 St. L. 472, § 86. Galm's Case, 39 Ct. Cl. 55.

99. Act July 14, 1870, 16 St. L. 261, § 17. Galm's Case, 39 Ct. Cl. 55.

1. 16 St. L. 1179. Galm's Case, 39 Ct. Cl. 55.

2. Galm's Case, 39 Ct. Cl. 55.

3. Rev. St. § 3482, as amended by Act June 22, 1874 (1 Supp. Rev. St. 37). Hardie's Case, 39 Ct. Cl. 250. Act Jan. 9, 1883 (22 St. L. 401, § 2), providing that all claims for horses lost in battle, etc., shall be barred, unless filed within one year after the passage of the act, does not operate to deprive the court of claims of jurisdiction to allow such claims subsequently accruing, but its object was to extend a limitation expiring Dec. 31, 1875. Id. Horse killed on transport going to Manila was lost through an exigency of the service, and it being in charge of a government veterinary surgeon and not of its owner, it could not be contended that loss was due to his negligence. Id.

Retirement.[4]—A retired enlisted man is not entitled to the increase of pay given enlisted men in time of war.[5]

(§ 1) *B. Militia.*[6]—In the absence of statute a municipal corporation is under no liability to pay for supplies furnished to armories of the national guard located therein.[7] Statutes authorizing such expenditures must be strictly complied with.[8]

An appropriation "to promote the efficiency of the state guard" is one "for defraying the necessary expenses of government" within the meaning of the Arkansas constitution, and hence may be made by a majority vote of the legislature.[9]

The duty of the governor of Kentucky to approve the pay rolls of the state guard is ministerial merely, and hence mandamus will lie to compel him to perform it.[10]

§ 2. *Regulations and discipline; promotion and discharge.*[11]—An officer in the navy may be promoted for eminent and conspicuous conduct in battle, when the number of the higher grade is full, only with the advice and consent of the senate.[12] The constitutional power of the president to fill vacancies during the recess of the senate is operative only when there is an existing office and a vacancy therein, and does not authorize him to create vacancies by making such promotions to a grade in which there are no vacancies.[13] Such a promotion is ineffective and creates no vacancy to which officers below the one advanced can be promoted.[14]

The act providing for medals of honor for distinguished services during the civil war applies only to those who distinguished themselves in action, and not to one rendering services as a spy or military expert.[15]

§ 3. *Military and naval tribunals.*[16]—Courts-martial are courts of inferior limited jurisdiction.[17] No presumptions are indulged in favor of their judgments, but before they will be given effect it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that the judgment imposed is conformable to the law.[18] They have jurisdiction to try and punish persons in the military service for murder and certain other crimes only in time of war, insurrection, or rebellion, and such a condition must be shown to have existed in order to sustain their judgments in such cases.[19] The existence of a state of war must be determined by the political department of the government, and courts take judicial notice of such determination and are bound thereby.[20]

4. See 4 C. L. 644.

5. Twenty per cent increase given by Act April 26, 1898, 30 St. L. 364. Murphy's Case, 39 Ct. Cl. 178.

6. See 4 C. L. 645.

7. Lewis v. New York, 94 N. Y. S. 710.

8. In order to hold city of New York for such supplies mode prescribed by Military Code, § 134, (Laws 1898, p. 563, c. 212, as amended by Laws 1901, p. 843, c. 314), for contracting for such supplies, must be strictly complied with. Lewis v. New York, 94 N. Y. S. 710. Such section construed with New York charter § 1565 (Laws 1901, p. 645, c. 466), requires contracts to be let to lowest bidder after due advertisement except in case of an emergency and hence contract for coal made by private negotiation imposes no obligation on the city. Id.

9. Act March 17, 1905, held valid under Const. art. 5, §§ 30, 31, though it also recites that the appropriation is made necessary in order to receive the support of the Federal government under certain acts of congress. State v. Moore [Ark.] 88 S. W. 881. Act March 17, 1905, making an appropriation to promote the efficiency of the state guard does not violate Const. art. 5, § 30, requiring appropriations to be made by separate bills, each embracing but one subject, because it includes an appropriation for the benefit of the adjutant general, thereby in effect repealing Kirby's Dig. § 5295. Id.

10. Duty imposed by St. 1903, § 2705. Cochran v. Beckham [Ky.] 89 S. W. 262.

11. See 4 C. L. 645.

12. Rev. St. §§ 1506, 1507. Peck's Case, 39 Ct. Cl. 125.

13, 14. Peck's Case, 39 Ct. Cl. 125.

15. Act March 3, 1863 (12 St. at L. 751, c. 79). De Arnaud v. Ainsworth, 24 App. D. C. 167.

16. See 4 C. L. 647.

17. Hamilton v. McClaughry, 136 F. 445.

18. Hamilton v. McClaughry, 136 F. 445. Where a respondent in habeas corpus alleges that he holds the petitioner under a judgment of conviction by a court-martial, he must show a valid exercise of the power conferred on such courts. Id.

No commander of a fleet or squadron in the waters of the United States may convene a naval court-martial without express authority from the president.[21] The accused must be furnished with a true copy of the charges with the specifications at the time he is put under arrest.[22] The arrest referred to is the one made after charges have been formulated and a court-martial ordered, and not to the preliminary arrest or detention consequent upon the commission of an offense.[23] The expressed satisfaction of the accused with the court is a waiver of any objections to its personnel.[24] In order to be effective the sentence must be affirmed by the proper officer.[25] The temporary suspension of a naval officer from duty is not such a punishment for the offense leading up thereto as will prevent further proceedings against him by court-martial.[26]

§ 4. *Civil status, rights and liabilities of the military and navy.*[27]—When the armed forces of the government are, by lawful authority, commissioned to enforce its lawful demands against a foreign country, or to protect the lives of its citizens stationed there, or its accredited representatives, there exists military jurisdiction and power to enforce discipline.[28] Persons in the military service who commit crimes while stationed in a foreign country are not amenable to, nor are the offenses committed in violation of, the latter's laws, whether such occupation is with the consent of the foreign country or not.[29] If offenses at all, they are offenses committed in violation of the military laws of this country.[30]

§ 5. *Martial law.*[31]

§ 6. *Soldiers' homes and indigent soldiers.*[32]

MILITIA, see latest topical index.

MILLS.

A "public grist mill" is one at which grain is ground by the grist, and a mill which receives grain and gives the owner proportionate amount of flour and bran from stock on hand is not within the statute regulating tolls.[32a]

19. Under 58th article of war. Hamilton v. McClaughry, 136 F. 445.

20. Hamilton v. McClaughry, 136 F. 445. Boxer uprising in China in June 1900, held to constitute a time of war within the meaning of this article. Id.

21. Rev. St. § 1624, art. 38. United States v. Smith, 197 U. S. 386, 49 Law. Ed. 801, rvg. 38 Ct. Cl. 257. "Waters of the United States" mean waters within the continental limits of the United States and do not include Manila bay, and court-martial ordered by commander of fleet stationed there shortly after the treaty with Spain is legal, though not expressly authorized by the president. Id.

22. Rev. St. § 1624, art. 43, Comp. St. 1901, p. 1117. United States v. Smith, 197 U. S. 386, 49 Law. Ed. 801, rvg. Smith's Case, 38 Ct. Cl. 257. Naval Regulation Act April 23, 1800, 2 St. at L.50, 51, c. 33. Bishop v. U. S., 197 U. S. 334, 49 Law. Ed. 780, afg. 38 Ct. Cl. 473.

23. Service on day after naval court-martial was ordered held sufficient, though accused had been in irons for some time previously. United States v. Smith, 197 U. S. 386, 49 Law. Ed. 801, rvg. 38 Ct. Cl. 257. Service need not be made where he is temporarily placed under arrest for the preservation of good order and for purposes of investigation, and is subsequently released, but it is sufficient if he is served on the day when he is re-arrested on the convening of a court-martial for the trial of the charges against him. Bishop v. U. S., 197 U. S. 334, 49 Law. Ed. 780, afg. 38 Ct. Cl. 473.

24. Precludes collateral attack on ground that as many officers as could be convened without injury to the service were not summoned, as required by Act July 17, 1862, art. 11 (12 St. at L. 603, c. 204). Bishop v. U. S. 197 U. S. 334, 49 Law. Ed. 780, afg. 38 Ct. Cl. 473.

25. Confirmation of sentence of naval court-martial by the officer convening it was not required by Act July 17, 1862, arts. 19, 20 (12 St. at L. 605, c. 204), where the sentence extended to dismissal from the service, but only approval by the president. Bishop v. U. S., 197 U. S. 334, 49 Law. Ed. 780, afg. 38 Ct. Cl. 473. Confirmation by president held to sufficiently appear from statement in letter of secretary of the navy dismissing the accused from the service, and president's signed approval of the brief of the findings of the court. Id.

26. Suspension for a day for intoxication held not a punishment within the meaning of Navy Regulations 1865, par. 1205, and order restoring him to duty to await an opportunity for time to investigate the case held not to have "entirely discharged" the accused within the meaning of the same paragraph. Bishop v. U. S., 197 U. S. 334, 49 Law. Ed. 780, afg. 38 Ct. Cl. 473.

27. See 4 C. L. 649.

28, 29. Hamilton v. McClaughry, 136 F. 445.

30. Hamilton v. McClaughry, 136 F. 445. Thus, a soldier committing murder during the presence of the American troops in China, during the Boxer uprising, must be

MINES AND MINERALS.[33]

§ 1. *General common-law principles. A. Public ownership*[34] seldom arises as a live question in respect of lands in the public domain.[35]

(§ 1) *B. Private ownership; right of freehold tenants of less than fee.*[36]—Minerals in place in the earth are realty,[37] but when severed therefrom by artificial causes become personalty.[38] Oil[39] and natural gas are minerals within this rule and become personalty only when reduced to possession.[40] They constitute a part of the land and belong to the owner of the fee in the sense that he has the exclusive right to reduce them to possession by operations on his own land, and to grant such right to others.[41] He is not limited to any particular territorial area beneath the surface, but may draw oil from the underlying reservoir generally.[42] Until so reduced to possession, however, they may be taken by any other person by proper operations on his own land.[43] The shaft drilled from the surface to the gas bearing rock is a part of the realty.[44]

One owning the fee to land within the limits of a country highway, subject

punished under the articles of war or not at all. Id.

31. See 4 C. L. 649, and note in 98 Am. St. Rep. 773.

32. See 4 C. L. 649.

32a. Crawshaw v. Curtis, 119 Ill. App. 42.

Water power and mill-dam privileges, see Waters and Water Supply, 4 C. L. 1824.

33. As to the cases anterior to Current Law, see Barringer and Adams Mines.

34. See 2 C. L. 893.

35. See post, § 2 et seq.; Public Lands, 4 C. L. 1106.

For a discussion of this matter, see Barringer & Adams Mines, p. 178 et seq.

36. See 4 C. L. 650.

37. Brooks v. Cook, 141 Ala. 499, 38 So. 641; Smoot v. Consolidated Coal Co., 114 Ill. App. 512. Is land and subject to conveyance as such. Huss v. Jacobs, 210 Pa. 145, 59 A. 991.

38. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

39. Petroleum oil is a mineral and when in place is realty and a part of the land itself. Preston v. White [W. Va.] 50 S. E. 236. Is part of the freehold. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317. Becomes personalty only when brought to the surface. Peterson v. Hall [W. Va.] 50 S. E. 603.

40. Natural gas is mineral, and when in place is part of the land itself. Preston v. White [W. Va.] 50 S. E. 236. Becomes personalty only after being mined and reduced to possession. Shenk v. Stahl [Ind. App.] 74 N. E. 538. When extracted from the earth and put in a pipe line is personal property, and hence may be the subject of conversion. Conversion where pipe is opened and gas extracted and consumed without the owner's knowledge and consent. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15.

41. Richmond Nat. Gas Co. v. Davenport [Ind. App.] 76 N. E. 525; Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

42. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

43. Richmond Nat. Gas Co. v. Davenport [Ind. App.] 76 N. E. 525. Owners of surface have collectively an exclusive ownership in the oils. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

44. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

only to the public easement, has a legal right to quarry and remove the underlying stone, so long as he does not unnecessarily interfere with the rights of the public.[45]

Rights of life tenants and lessees.—A life tenant coming into possession of land from which the owner of the fee has previously taken oil or gas by means of wells, or after he has granted the right to do so to another, may enjoy the use of such wells or the royalties therefrom during such tenancy as profits and income from the land in the condition in which it comes to him;[46] but where no such operations have been carried on by the owner of the fee, or his grantee or lessee, and he has not conveyed such right by lease or grant during his ownership, a tenant for life has no right himself to operate for oil or gas or to give authority to another to do so,[47] and such a taking by him constitutes waste,[48] notwithstanding the fact that all the gas or oil will be taken by operations on neighboring lands before the remainderman comes into possession.[49]

An ordinary lease not referring to mines, minerals, quartz, or oil, is a lease merely of the superficies of the soil and does not authorize the removal of underlying oil,[50] and its unauthorized severance and removal by the lessee is waste.[51]

Rights of co-owners and tenants in common.—Joint owners of oil and gas only, not owning the surface, cannot have partition in kind by lines upon the surface, but only by a sale of the oil and gas and a division of the proceeds.[52]

The basis of accounting between tenants in common, joint tenants, and coparceners, for waste effected by the extraction of oil from the common property under circumstances making it reasonably certain that the party so taking it acted without fraud and under the belief of good title in himself to the whole of the property, though not without notice of defect of title, is the value of all the oil produced from the land, less the whole cost of its production, including the cost of drilling producing wells.[53] If one co-tenant executes an oil lease purporting to cover the entire property under which the lessee produces oil, delivering a part thereof to the lessor as royalty, it is proper to require the lessor and lessee jointly to make reparation to the injured co-tenant,[54] and to order satisfaction of the decree against them to be made out of proceeds of the oil in the hands of a special receiver appointed in the cause.[55] Rentals received by the lessor, under the provisions of the lease for delay in drilling, constitute no part of the damages and should not be included in the decree, nor are they to be accounted for as rents and profits unless the lease is ratified or acquiesced in by the other co-tenant.[56] A mere demand for discovery as to, and an accounting for, such rentals, in a bill expressly denying the title of the lessor and the validity of the lease, does not amount to a ratification or adoption of such lease.[57]

§ 2. *Acquisition of mining rights in public lands. A. What lands may be located.*[58]—In order to be valid the location must be upon unappropriated government land.[59] A junior location, however regular in form, is of no effect as against the

45. Town of Clarendon v. Medina Quarry Co., 102 App. Div. 217, 92 N. Y. S. 530. Should only be required to keep a passageway open upon the surface of the ground, or by bridges, sufficiently wide to enable teams to pass, and not to full legal width of highway. Should also be required to give bond to protect town against loss from personal injuries, and to complete work within reasonable time. Id.

46, 47, 48, 49. Richmond Nat. Gas Co. v. Davenport [Ind. App.] 76 N. E. 525.

50. Lease for purposes of erecting tenement building held not to authorize removal of oil. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

51. Authorizes rescission of contract under Civ. Code § 1930. Isom v. Rex Crude Oil Co. [Cal.] 82 P. 317.

52. Where one party owns all the surface and one-eighth of the oil and gas, and other party the balance. Preston v. White [W. Va.] 50 S. E. 236.

53, 54, 55, 56, 57. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

58. See 4 C. L. 650.

59. Cunningham v. Pirrung [Ariz.] 80 P. 329; McWilliams v. Winslow [Colo.] 82

rights conferred upon a prior locator, so long as the prior location is subsisting.[60]

Land once located may become unappropriated by a forfeiture or abandonment of the rights of the original locator.[61] So, too, land attemped to be located is unappropriated if the attempted location is invalid.[62]

(§ 2) *B. Who may locate.*[63]—A location by an alien is not void, but voidable only, and cannot be attacked by anyone except the government.[64] It is rendered valid by his subsequent grant thereof to a citizen.[65]

§ 3. *Mode of locating and acquiring patent. A. Making and perfecting location.*[66]—Under the Federal statutes no location can be made until the discovery of the vein or lode within the limits of the claim located.[67] This, however, merely means that the fact of discovery must exist prior to the vesting of that right of exclusive possession which attends a valid location, and, if there are no intervening rights, it is immaterial whether the discovery is made before or after the performance of the other acts necessary to perfect the location.[68] The same discovery cannot be used for two locations, nor can a location be based on a discovery within the limits of another existing and valid location.[69]

The location must be distinctly marked on the ground so that its boundaries can be readily traced.[70] If a discovery is made and a proper notice of location is filed, it is sufficient if the boundaries are marked on the ground before the accrual of intervening rights.[71] The locator, however, delays at his peril, since he as-

P. 538. A placer location can only be made on vacant and unoccupied public land. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139. One cannot go upon a valid prior placer location and locate another placer claim thereon unless the original locator has abandoned his claim, waived the trespass, or has, by his conduct, estopped himself to complain. Id.

60. Zerres v. Vanina, 134 F. 610.

61. See § 3 C. post.

62. Cunningham v. Pirrung [Ariz.] 80 P. 329.

63. See 4 C. L. 651.

64, 65. Stewart v. Gold & Copper Co. [Utah] 82 P. 475.

66. See 4 C. L. 651.

67. Rev. St. § 2320, 5 Fed. St. Ann. p. 8. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501; Score v. Griffin [Ariz.] 80 P. 331. Evidence held sufficient to show existence of vein or lode at time of defendant's location, and a compliance with statutory requirements. Id. Evidence, in suit to determine adverse claims to a strip of ground as between a placer and a lode location, held sufficient to show that locator of lode claim had discovered valuable mineral-bearing rock therein, ores whose value was shown having been sufficiently identified as coming therefrom. San Miguel C. G. M. Co. v. Bonner [Colo.] 79 P. 1025. Evidence in action to support adverse claim held sufficient to support findings with respect to location and discovery of mineral. Stewart v. Gold & Copper Co. [Utah] 82 P. 475. The statute is made applicable to the location of lands chiefly valuable for petroleum or other mineral oils. 29 Stat. at L. p. 526, c. 216, provides for entry of such lands under laws applicable to placer claims, and Rev. St. § 2329, making laws relating to lode claims applicable to placer claims. Chrisman v. Miller, 197 U. S. 313, 49 Law. Ed. 770. In order to sustain a location of petroleum lands there must be such a discovery of oil as gives reasonable evidence of its existence, and as would justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. Evidence held to sustain finding that there was no such discovery. Chrisman v. Miller, 197 U. S. 313, 49 Law. Ed. 770.

68. Discovery is only one of the steps necessary to a valid location, and the order in which such steps are taken is immaterial as against the government. Creede & C. C M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S 337, 49 Law. Ed. 501.

69. Location held not invalid on ground that discovery was made while working in an existing mine, where locator testified that he found quartz at different points on the ledge outside of the tunnel. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517. A location based upon a discovery within the limits of an existing and valid location is void. Sullivan v. Sharp [Colo.] 80 P. 1054.

70. U. S. Rev. St. § 2324, 5 Fed. St. Ann. 19. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736. Attempt to make location by posting notice on house in which they claimed to have located mineral claim held insufficient and not to entitle plaintiffs to recover possession where no attempt was made to distinctly mark boundaries on ground. Malececk v. Tinsley [Ark.] 85 S. W. 81.

71. Brockband v. Albion Min. Co. [Utah] 81 P. 863. Though boundaries were not fully marked on day location notice was posted because of deep snow, where notice contained full description of claim by courses and distances from the discovery monument where it was posted, and claim was relocation of one covering same ground, the corners of which were still substantially in place, location held at least sufficient to entitle the locator to perfect it within a reasonable

sumes the risk of intervening rights of third parties.[72] One relocating an old claim may adopt corner monuments formerly placed on the ground, where their locations correspond with the calls in the notice, by repairing or reconstructing them,[73] and his notice of location may be made to refer to the boundary monuments or stakes of the previous location.[74]

Location notices and statutes prescribing their contents will be liberally construed,[75] and a substantial compliance with the statute is sufficient.[76] It is sufficient if the claim is so described that a person of reasonable intelligence can readily identify it.[77] In Arizona in case of the relocation of forfeited or abandoned claims, the certificate must state that the claim is located as forfeited or abandoned property;[78] but this rule does not apply where the subsequent locator bases his right on the contention that the prior locator never made a valid location under the law.[79]

The Federal statutes do not require the notice of location to be recorded,[80] but provide that all records of claims must contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim,[81] and thereby clearly imply that recording will be required, either by the local laws, rules, or regulations of the miners, or by state statutes.[82] A statute requiring the claim to be recorded within a specified time does not work a forfeiture for noncompliance in the absence of a provision therein to the contrary.[83] Statutes in some states require the filing of a verified declaratory statement describing the claim.[84]

Locations may be amended without the loss of original rights, except those in-

time, or before the rights of others intervened. Id.

72. Brockband v. Albion Min. Co. [Utah] 81 P. 863.

73. Where plaintiff had old monuments repaired and boundaries marked with posts in stone monuments at each corner, held, that location became complete, and subsequent locators were bound to take notice of his rights. Brockband v. Albion Min. Co. [Utah] 81 P. 863.

74. Brockband v. Albion Min. Co. [Utah] 81 P. 863.

75. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736. Notice. Zerres v. Vanina, 134 F. 610.

76. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736. Notice held a substantial compliance with Nev. Comp. Laws 1900, § 208, though not giving the distance on each side of the discovery point on the claim, or the general course of the vein. Zerres v. Vanina, 134 F. 610. Evidence held to sustain findings that notices were sufficient. Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207.

77. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736. Notices held sufficient, and properly admitted in evidence. Id.

78. Rev. St. 1901, § 3241. Otherwise certificate is invalid and not admissible in evidence. Cunningham v. Pirrung [Ariz.] 80 P. 329; Score v. Griffin [Ariz.] 80 P. 331. Act applies either in case of a forfeiture or abandonment, though in terms it refers only to the latter. Cunningham v. Pirrung [Ariz.] 80 P. 329.

79. In such case he makes an original location, and only issue is the validity of the original location. Cunningham v. Pirrung [Ariz.] 80 P. 329.

80. Zerres v. Vanina, 134 F. 610.

81. U. S. Rev. St. § 2324, 5 Fed. St. Ann. 19. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736. The sufficiency of the location with reference to natural objects or permanent monuments is a question of fact. Id. Stakes driven into the ground are sufficient where there are no permanent monuments or suitable natural objects, or where, owing to the condition of the surrounding country, they are the best means of identification. Id. Location held invalid and insufficient to authorize recovery of possession, where notice did not contain such a description. Malececk v. Tinsley [Ark.] 85 S. W. 81.

82. Rev. St. § 2324, Comp. St. 1901, p. 1426, providing what the record shall contain, and authorizing miners to make regulations governing the location, manner of recording, etc., not inconsistent with the state or Federal statutes. Zerres v. Vanina, 134 F. 610.

83. Zerres v. Vanina, 134 F. 610. Nev. Comp. Laws 1900, § 210, requiring claim to be recorded within 90 days after posting notice of location, is directory merely in so far as it relates to the time for making the record, if no adverse rights have intervened in the meantime, and even if adverse rights have intervened, unless they are founded on a valid location and compliance with the law. Id.

84. Laws 1873 (Ex. Sess.) p. 83, requiring the filing of a verified declaratory statement describing his claim in the manner provided by the Federal statutes, is not in conflict with U. S. Rev. St. § 2324. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806. Statement is fatally defective where verification omits date of location. Id.

consistent with the amendment,[85] but new rights cannot be added which are inconsistent with those acquired by other locations in the meantime.[86] By statute in Colorado a locator may file an additional certificate of location if he apprehends that his original location is defective or erroneous, or that the requirements of the law in making the location were not complied with, or in case he desires to change the surface location of his claim, or to take in any part of an overlapping claim which has been abandoned.[87] This applies only in case there has been a valid but imperfect location, and hence the filing of an additional certificate confers no rights on one whose original location was void because embraced within the limits of a valid existing location.[88]

(§ 3) *B. Maintaining location; forfeiture, loss or abandonment.*[89]—To enable one to maintain his right to a claim after it is acquired, he must continue substantially to comply with valid state and Federal statutes, and valid rules established by miners in force in the district where his claim is situated.[90] Under the Federal statutes in order to hold his claim the locator is required to perform labor and make improvements in a designated amount each year,[91] and a failure in this regard renders the claim open to relocation as though never located,[92] even though the original locator remains in possession.[93] The period within which the work is to be done commences on the first day of January next succeeding the date of the location of the claim.[94]

Work done outside the boundaries of a claim is available if in reasonable proximity thereto and done for the purpose of its development,[95] and it is immaterial whether the improvement is upon vacant or occupied[96] or patented or unpatented property, except in so far as that fact may throw light on the intention of the party doing the work.[97] The true test is does the work benefit or tend to benefit the claim, and was it done for the purpose of developing it,[98] the question of benefit

85, 86. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

87. Mills' Ann. St. § 3160. Sullivan v. Sharp [Colo.] 80 P. 1054.

88. Sullivan v. Sharp [Colo.] 80 P. 1054.

89. See 4 C. L. 653.

90. Zerres v. Vanina, 134 F. 610.

91. Rev. St. § 2324, Comp. St. 1901, p. 1426. Malone v. Jackson [C. C. A.] 137 F. 878. Evidence in action to support adverse claim held sufficient to support findings with reference to performance of assessment work. Stewart v. Gold & Copper Co. [Utah] 82 P. 475. Evidence in suit to quiet alleged possessory right to claims held to sustain finding that defendants had done required assessment work. Lauman v. Hoofer, 37 Wash. 382, 79 P. 953.

92. U. S. Rev. St. § 2324. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

93. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

94. On claims located since May 10, 1872. Act Jan. 22, 1880, c. 9, 21 St. 61, Comp. St. 1901, p. 1427. Malone v. Jackson [C. C. A.] 137 F. 878. Where claim was located Dec. 6, 1898, period for annual work commenced Jan. 1, 1899, and continued until Dec. 31, 1899, and hence claim was not open to relocation for locator's failure to do required work until after the latter date. Id.

95. Construction of tunnel on property outside the claim but solely with reference to its development. Godfrey v. Faust [S. D.] 105 N. W. 460, former opinion 101 N. W. 718. Work done in a tunnel for the purpose of developing the claim, and which has a tendency to develop it, may be applied as assessment work on such claim, regardless of the contiguity or noncontiguity of the territory from the portal of the tunnel to the claim sought to be developed. U. S. Rev. St. § 2324, as amended by Act Feb. 11, 1875 c. 41, 18 Stat. at L. 315 (5 Fed. St. Ann. pp. 19-21) construed. Hain v. Mattes [Colo.] 83 P. 127.

96. The fact that the territory between a tunnel and the claim to be developed is vacant and unoccupied, or owned by another person, is important only in so far as it may have a bearing on the ultimate question whether the tunnel does or does not develop the claim. Owner of claim need not own a continuous strip from portal of tunnel to exterior boundaries of claim. Hain v. Mattes [Colo.] 83 P. 127.

97. Godfrey v. Faust [S. D.] 105 N. W. 460, former opinion 101 N. W. 718.

98. Hain v. Mattes [Colo.] 83 P. 127. Evidence held sufficient to warrant finding that whole of road work was done as work on a claim other than the one in controversy. White River Min. & Nav. Co. v. Langston [Ark.] 88 S. W. 971. Where witness testified that road work had been done as work on claim in controversy, held, that certified copies of affidavits filed in land office showing that such work had been applied on another claim were admissible to contradict him. Id.

being one of fact for the jury.[99] One claiming under a subsequent location is in no position to urge that a trespass was committed in doing such work.[1]

The test for determining the value of the work is its reasonable value and not the contract price or the price actually paid for it.[2]

If a part owner of a claim fails or refuses to contribute his proportion of the cost of the required work after a personal notice or notice by publication to do so, his interest becomes the property of his co-owners who have made the required expenditures.[3] The right to give such notice is limited to a co-owner who has performed the labor or made the improvements required.[4]

Actual possession is not essential to the validity of the title obtained by a valid location, but, until such location is determined by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof.[5]

Abandonment[6] is a matter of intention,[7] and takes place when the claimant of the claim goes away with no intention of returning to it, and with the intention of leaving it open to the next applicant.[8] By an abandonment the occupant loses all interest in the claim and leaves it free to relocation by the next comer.[9] An abandonment by a part owner before title has been acquired from the government does not vest any right or title to his interest in his co-owner.[10]

Forfeiture.[11]—A forfeiture takes place after the lapse of the statutory period by a failure to perform those acts by which mining claims are held, or to comply with the requirements of mining regulations, and is complete when some one enters with intent to relocate.[12] A forfeiture can only be established by clear and convincing evidence,[13] the burden being upon the party asserting it.[14]

99. Whether a tunnel does or does not tend to develop the claim. Hain v. Mattes [Colo.] 83 P. 127.

1. Because done on an adjoining claim to which corporation doing the work had no title. Godfrey v. Faust [S. D.] 105 N. W. 460, former opinion 101 N. W. 718.

2. Rate of wages and cost of work are strong elements in establishing its value, but are not conclusive. Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 P. 817. Evidence held to support finding that work was of reasonable value of $100, notwithstanding evidence as to time occupied in performing it and as to the prevailing rate of wages. Id. Reasonable value governs, but amount paid may be shown as bearing on such value. McCormick v. Parriott [Colo.] 80 P. 1044.

3. Rev. St. § 2324, Comp. St. 1901, p. 1426. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

4. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838. Where co-owners, after having done required work, conveyed the entire claim to a corporation in consideration of substantially all its capital stock, which they retained, held, that notice signed by both them and the corporation was sufficient to work a forfeiture, and to vest forfeited interest in such corporation. Id.

5. Where defendant performed necessary work for previous year, fact that he was absent from claim and that some of his location stakes had fallen down did not vitiate his location, or authorize a relocation by others, but he was entitled to re-enter for the purpose of doing the assessment work for the next year, there having been no abandonment or forfeiture. Zerres v. Vanina, 134 F. 610.

6. See 4 C. L. 654.

7. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139. Where original locators claimed to have done required assessment work, and posted notices that they made such claim, mere fact that witnesses testified that, in their opinion, $300 worth of work had not been done held not to show abandonment. Id. Intent is to be determined by the acts and conduct of the parties. Evidence held to negative the idea of an intention to abandon or surrender that portion of the claim in controversy, there being no question of statutory forfeiture involved. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

8. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139; Cunningham v. Pirrung [Ariz.] 80 P. 329.

9. His interest reverts to the government. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

10. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

11. See 4 C. L. 653, n. 55 et seq.

12. Cunningham v. Pirrung [Ariz.] 80 P. 329.

13. For failure to do assessment work. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

14. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23; Malone v. Jackson [C. C. A.] 137 F. 878; Zerres v. Vanina, 134 F. 610. Plaintiffs in ejectment, who had relocated claim, held not to have established, by a preponderance of the evidence, their right to possession as against the original locator. Id.

(§ 3) *C. Relocation.*[15]—Relocation is the appropriation of mining ground by location where a former claim has been lost by abandonment or forfeiture, and the ground is consequently restored to the public domain.[16] A relocation impliedly admits a valid prior location.[17]

Mining claims are not open to relocation until the rights of a former locator have been abandoned or forfeited, or have otherwise come to an end.[18] A relocation on lands actually covered at the time by another and subsisting location is void not only against the prior locator but against all the world.[19] One making such a void relocation does not, by continuing in possession after the claim becomes subject to relocation, without then relocating it, acquire any rights against a person subsequently making a peaceable adverse entry and a valid relocation.[20] Such entry deprives him of the right of possession so that he cannot maintain ejectment against the person making it on the ground that the latter is a mere trespasser.[21]

The area of conflict between two locations does not, upon forfeiture of the senior location, become unoccupied mineral land of the United States, so as to give a relocator thereof the right to assail the title of the junior locator in adverse proceedings.[22]

One making a location on land on which he finds evidences of a prior location, or when he has actual knowledge of an attempted prior location, has the burden of proving either that such attempted location was invalid, or, if valid, that the rights acquired thereunder were subsequently forfeited or abandoned.[23]

(§ 3) *D. Proceedings to obtain patent; adverse claims.*[24]—The decision of

15. See 4 C. L. 655.

16. Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207.

17. Can be no relocation unless there has been such a prior location or something equivalent thereto. Zerres v. Vanina, 134 F. 610; Cunningham v. Pirrung [Ariz.] 80 P. 329; Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207. Cannot be contended that relocations are invalid, because notices are posted on old location stakes, where location certificates declare that they are relocations of old claims. Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207. Only inquiry in such case is whether the former locator performed the necessary labor. Id.

18. Zerres v. Vanina, 134 F. 610; Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915. Land once located may become unappropriated land subject to relocation by reason of the forfeiture or abandonment of a valid prior location. Cunningham v. Pirrung [Ariz.] 80 P. 329. Valid prior location is a bar to subsequent one unless latter is made as a relocation of abandoned or forfeited ground. Score v. Griffin [Ariz.] 80 P. 331. Where immediately after a judgment in a suit to recover possession of certain claims that neither party was entitled to possession, plaintiffs relocated the claims and thereafter did the required assessment work and remained in possession, held that evidence sustained finding that relocations were made on unoccupied government land. Lauman v. Hoofer, 37 Wash. 382, 79 P. 953. A relocator is not a discoverer of the mineral but an appropriator thereof, and can only hold the ground upon proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. Zerres v. Vanina, 134 F. 610.

19. Malone v. Jackson [C. C. A.] 137 F. 878; Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

20. His possession is not such as to prevent an entry peaceably and in good faith for the purpose of securing, by relocation, a right to the exclusive possession and enjoyment of the property. Malone v. Jackson [C. C. A.] 137 F. 878. Plaintiff made relocation in July, 1899, which was void because time for doing work under original location did not expire until Dec. 31, 1899. He remained in actual possession during 1900, 1901, and part of 1902, making various expenditures and improvements. Defendant relocated the claim Jan. 1, 1902. Held that defendant acquired exclusive right to possession until Jan. 1, 1903. Id.

21. Malone v. Jackson [C. C. A.] 137 F. 878.

22. Rev. St. §§ 2319, 2324, are qualified to this extent by § 2326, relating to adverse claims. Lavagnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119. Junior locator is entitled to patent if senior locator fails to adverse his application therefor, or fails to prosecute his adverse claim, and hence same result must arise from forfeiture of senior location before application for patent is made by junior locator, and the consequent impossibility of the senior locator successfully adversing after the forfeiture is complete. Id.

23. Cunningham v. Pirrung [Ariz.] 80 P. 329. In suit to quiet title, where plaintiffs had knowledge of prior location and did not locate the ground as abandoned ground in accordance with Rev. St. 1901, § 3241, held that it was proper to dismiss complaint and render judgment for defendant, where he failed to prove that former location was invalid. Id.

24. See 4 C. L. 655.

the proper officers of the interior department in matters within its jurisdiction upon questions of fact is conclusive upon the courts in the absence of fraud, perjury, or some such vice,[25] and the same presumptions of regularity attach to such decisions as to those of courts of record, the burden being upon those attacking them to show their invalidity.[26] The issuance of a patent is a conclusive adjudication that all the steps required by the Federal statutes to perfect a valid location have been taken,[27] but there seems to be a conflict of authority as to whether it is conclusive as to compliance with state statutes.[28] A patent when issued is generally regarded as relating back to the date of location.[29] It has, however, been held that the doctrine of relation is a fiction of law, and that whether a patent relates to the date of location is to be determined by the facts of each particular case,[30] and that unless all the requirements of the law have been complied with there is no location, and hence no date antecedent to the application for a patent to which it can relate.[31] The patent is also conclusive as to all matters which were, or might have been, the subject of an adverse claim.[32]

An application for a patent to one of two or more conflicting claims presents the question, which is the superior claim within the overlapping surface boundaries, and the inclusion of the area in conflict within a patent to one of the claims is necessarily a determination that, at the time of the patent proceedings, such area is a part of that claim.[33] It does not, however, necessarily determine the priority of location, and where it does not appear that that question was put in issue and actually determined in the course of the patent proceedings, the owner of the other claim is not estopped from asserting the priority of his claim in a subsequent controversy respecting extralateral rights, not necessarily following the surface conflict and hence not involved in the former proceedings.[34] So, too, the issuance of a patent is not necessarily conclusive as to the order in which the steps necessary to a valid location were taken,[35] and hence does not preclude the owner of a tunnel site, claiming that his location was made prior to the discovery of the lode on which the application for the patent was based, from showing when the discovery was in fact made.[36]

The possessor of a lode may hold it either with or without a patent.[37] After

25. As to whether notice of contemplated cancellation of mining entries was given and received. Mineral Farm Min. Co. v. Barrick [Colo.] 80 P. 1055.

26. Decision of commissioner of general land office, that sufficient notice of cancellation of mining entries has been given, cannot be reviewed where some of the evidence upon which it was based is not in the record, even if it would be in any event. Mineral Farm Min. Co. v. Barrick [Colo.] 80 P. 1055.

27. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501; Hickey v. Anaconda Copper M. Co. [Mont.] 81 P. 806.

28. Montana: Its issuance is not conclusive that verified declaratory statement required by state statutes was in fact valid (Hickey v. Anaconda Copper M. Co. [Mont.] 81 P. 806), and a patentee seeking to show that, notwithstanding the date of his patent or receiver's final receipt, his title relates back to the date of his location, must show affirmatively a location valid under the laws of the state where the claim is situated (Id.).

Federal Courts: See dictum in Creede & C. C. M. &. M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501.

29, 30. Hickey v. Anaconda Copper M. Co. [Mont.] 81 P. 806.

31. If there is no valid location by reason of a failure to comply with the requirements of state statutes, there is no date antecedent to the application for a patent to which it can relate. Hickey v. Anaconda Copper M. Co. [Mont.] 81 P. 806.

32. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501. Is an adjudication of all questions respecting such matters. Hickey v. Anaconda Copper M. Co. [Mont.] 81 P. 806. Is not conclusive as to the priority of location in a suit to determine the ownership of minerals at the point of union or intersection of veins, since that is not the subject of such a claim. Id.

33. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

34. No estoppel in such case, where it is not shown whether there was an adverse suit, nor, if so, what questions were in fact presented and determined therein, nor upon what ground the superior right to the area in controversy was asserted or sustained in the patent proceedings. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

instituting proceedings to obtain a patent he may abandon the same and continue to hold by right of possession.[38] So, too, the mere cancellation of a mineral application and entry for a patent by the officers of the land department does not divest the applicant's title, nor of itself operate to restore the land to the public domain and render it subject to relocation, but merely operates to check or terminate the patent proceedings, and relegates the applicant to such possessory rights as he had prior to the commencement of the proceedings, or as he may have subsequently acquired.[39]

As long as a final certificate of purchase remains uncanceled, the claim is not subject to forfeiture for nonperformance of assessment work, and is not subject to relocation.[40] The commissioner of the general land office or the secretary of the interior may, upon due notice, of his own motion cancel entries for failure to comply with some statute or rule of the department, even though no adverse claim or protest has been filed.[41] The jurisdiction of the land department is not, however, an arbitrary and unlimited one, to be exercised without notice to the parties interested,[42] and the secretary of the interior has no authority to order a retroactive cancellation of a certificate without notice to the bona fide holders thereof, so as to cut out their rights for defects for which they are not to blame.[43]

Suits to determine adverse claims.[44]—Under the Federal statutes, one filing an adverse claim on application for a patent must, within thirty days thereafter, commence proceedings in a court of competent jurisdiction to determine the question of the right to possession and prosecute the same with reasonable diligence to final judgment, and a failure to do so is a waiver of his adverse claim.[45] This provision only confers jurisdiction on the courts of suits between adverse mining claimants to the same unpatented mineral land,[46] and hence they have no jurisdiction of such suits where one party claims under the laws applicable to the disposal of mineral land, and the other under those relating to the disposal of nonmineral land, or, in other words, to determine the mineral or nonmineral character of the land, that being a question exclusively within the jurisdiction of the land department.[47]

A tunnel is not a mining claim within the meaning of this statute, but is merely a means of exploration,[48] hence the owner of a tunnel right, who simply seeks to

35, 36. Creede & C. C. M. & M. Co. v. Ulnta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501.

37, 38. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

39. Rejection of application for patent and nothing more does not affect original location, and locator has same rights as if application had never been made. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

40. Southern Cross Gold Min. Co. v. Sexton [Cal.] 82 P. 423.

41. For defects in the proof. Mineral Farm Min. Co. v. Barrick [Colo.] 80 P. 1055. U. S. Rev. St. § 2325, providing that if no adverse claim is filed at end of 60 days from date of publication it shall be assumed that applicant is entitled to a patent on payment of the purchase price, must be construed with other statutes in pari materia, and does not change the rule. Id.

42. Southern Cross Gold Min. Co. v. Sexton [Cal.] 82 P. 423.

43. Southern Cross Gold Min. Co. v. Sexton [Cal.] 82 P. 423. Owing to mistake of officers, certificate did not sufficiently describe premises, but certificate was nevertheless issued. About five years later commissioner of general land office ordered publication of supplemental notice, which was done after time to do so had been extended. Subsequently, secretary of interior, without a hearing to the applicants, ordered the certificate canceled as of the date when the republication was ordered. Held that his action in so doing was unauthorized, and cancellation was effective only from date of notice thereof to applicant, and conferred no rights on one claiming under an entry made 15 years after date of original entry and basing his right solely on default of original claimant to do necessary annual labor. Id.

44. See 4 C. L. 656.

45. Rev. St. § 2326, 5 Fed. St. Ann. 35, Comp. St. 1901, p. 1430. Keppler v. Becker [Ariz.] 80 P. 334.

46. Wright v. Hartville [Wyo.] 81 P. 649.

47. Has not jurisdiction of action in support of adverse claim where controversy is between mining company and town site claimant. Wright v. Hartville [Wyo.] 81 P. 649. Petition held not one to quiet title and not to sustain decree doing so. Id.

protect his tunnel and has as yet discovered no lode claim, is not required to adverse an application for a patent of a lode claim through which the line of his tunnel runs, the lode of which has been discovered on the surface.[49]

The form of the action may be either at law to recover possession or one in the nature of a suit to quiet title,[50] but in either case the plaintiff must allege facts entitling him to possession of the land in controversy as against the government, as well as against the defendant.[51] As in other cases, if the complaint fails to state a cause of action it will not arrest the running of the prescribed limitation, and an amendment made after the expiration of the thirty days is too late.[52] The complaint need not allege that the adverse was filed or the suit commenced within the prescribed time.[53] It is incumbent on plaintiff to show, as one of the material facts necessary to establish the validity of his location, that the ground he sought to locate was unoccupied and unappropriated public mineral domain, subject to location.[54] The oath of one of the locators accompanying the recorded notice of location as to their citizenship is prima facie evidence of that fact, and is sufficient unless contradicted.[55] If it appears from the testimony of plaintiff that the land was, at the time he initiated his claim, claimed by others, and there is some evidence of a compliance with the law by the latter, the court should assume for the purposes of the suit that the land is covered by a valid and subsisting location or entry, and the plaintiff, in order to make out his prima facie case, must show that it is vacant and unappropriated.[56] It will be presumed that the vein on which a valid lode location has been made extends through the entire length of such location, unless such presumption is overcome by a preponderance of the evidence to the contrary,[57] and this rule is equally applicable, though the controversy is between a lode and a placer claim.[58]

If plaintiff fails to establish a valid discovery and location, it is proper to grant a nonsuit and to then permit defendant to prove his title.[59] The proceedings then become ex parte, and plaintiff has no standing to interpose objections.[60] If title to the ground in controversy is not established by either par-

48, 49. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 49 Law. Ed. 501.

50. Keppler v. Becker [Ariz.] 80 P. 334.

51. Keppler v. Becker [Ariz.] 80 P. 334. Complaint failing to allege facts entitling plaintiffs to possession under the Federal mineral laws, or to allege that the ground in controversy was mineral land subject to location, held bad on demurrer. Id.

52. Does not relate back to time of filing the original. Keppler v. Becker [Ariz.] 80 P. 334.

53. Need not allege that adverse claim was filed in land office within 60 days of publication, or that suit was commenced within 30 days thereafter, as required by U. S. Rev. St. § 2326. Hain v. Mattes [Colo.] 83 P. 127. Objection that suit was not commenced in time is waived by going to trial without specially raising it by demurrer or answer. Id.

54. McWilliams v. Winslow [Colo.] 82 P. 538. In order to make out a prima facie case, must show, in addition to the other requirements of the law, that the ground was not covered by a prior location, or if it appears from his testimony that it was, that such location was invalid, or had been abandoned, or that the original locator's rights thereto had been forfeited by failure to comply with the law. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139.

55. Under U. S. Rev. St. § 2321, 5 Fed. St. Ann., 13, in an adverse action proof of citizenship in the case of an individual may consist of his own affidavit thereof. Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 P. 817. Evidence and admissions of defendant held sufficient to show citizenship of plaintiffs. Id.

56. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139.

57. San Miguel C. G. M. Co. v. Bonner [Colo.] 79 P. 1025.

58. Instruction approved. San Miguel C. G. M. Co. v. Bonner [Colo.] 79 P. 1025.

59. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139. Nonsuit held properly granted where plaintiff failed to prove that land was open to location, and his evidence showed that it was claimed by others, that certificates had been filed, the claims staked, and some work done by them. Id.

60. Cannot object to instructions, or contend that defendant has no standing to participate in the trial, because it has not complied with the laws in regard to corporations. Moffatt v. Blue River Gold Excav. Co. [Colo.] 80 P. 139.

ty the jury is required to so find, and judgment must be entered accordingly.[61] This provision, however, does not prevent the granting of a nonsuit where plaintiff fails to make out a prima facie case and defendant does not seek an affirmative judgment in his favor, but asks for a dismissal.[62]

The judgment in such a suit merely determines the right to possession, and the successful party must still do the required work, make an independent application, and conform to the Federal statutes and the rules of the land department before he is entitled to a patent,[63] hence, in order to entitle plaintiff to judgment, it is not necessary for him to show that he has performed sufficient work to entitle him to a patent.[64]

§ 4. *Ownership or estate obtained by claim, location, and patent; apex and extralateral rights.*[65]—In case of a conflict between claims, the area in conflict is usually awarded to the senior claim,[66] but this is not necessarily the case, since acts or circumstances entirely consistent with the true order of location may have intervened, which require it to be awarded to the junior.[67] Seniority is determined by the order of location, whether the claims have been patented or remain unpatented.[68] A junior locator may, for the purpose of acquiring extralateral rights, extend his surface location over prior locations where their owners do not object,[69] but not otherwise.[70] In determining whether such objection was made, only the acts of the parties at the time of the making of the junior location are to be considered.[71]

The title to everything within the surface lines of the claim is prima facie in the patentee, or if unpatented, in any qualified locator in actual possession and engaged in mining thereon.[72] The locator has the exclusive right of possession and enjoyment of all the surface included within the lines of his location,[73] and of any lodes or veins apexing within its exterior boundaries, which he may, as long as he complies with the requirements of the act, protect against invasion by any subsequent locator.[74] A prospector going upon a subsisting location for the purpose of making his discovery is guilty of trespass, and every subsequent act of his in attempting to perfect a location is an additional trespass.[75]

61. U. S. Rev. St. § 2326. McWilliams v. Winslow [Colo.] 82 P. 538. Where evidence was such as to authorize finding that neither party had made a valid location, held proper to instruct the jury that, if such was the case, they might find accordingly. San Miguel C. G. M. Co. v. Bonner [Colo.] 79 P. 1025. In any event instruction was harmless where jury found for defendant. Id.

62. Provision only prescribes what shall be found by the jury if a verdict is returned. McWilliams v. Winslow [Colo.] 82 P. 538.

63. Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 P. 817.

64. Object of suit is to defeat defendant's application for a patent by showing that he is not in possession and not entitled to it. Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 P. 817.

65. See 4 C. L. 657.

66. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

67. An in the case of an estoppel by the determination of the question in previous patent proceedings. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

68. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

69, 70. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

71. Evidence held not to show that objections were then made. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

72. His claim of ownership of any body of ore within his lines, as against the owner of any other surface claim, must be presumed to be in good faith. Ophir Silver Min. Co. v. Superior Court [Cal.] 82 P. 70.

73. Rev. St. § 2322, Comp. St. 1901, p. 1425. Malone v. Jackson [C. C. A.] 137 F. 878. In suit to quiet title having for its object the determination of extralateral rights, evidence held insufficient to support finding that plaintiff's claim was located prior to those of defendant, and that his patents were issued prior to defendant's. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806. A valid and subsisting location made in accordance with the provisions of the Federal statute has the effect of the grant by the United States of the present and exclusive possession of the lands so located, and operates to bar a subsequent location of the same. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

74. U. S. Rev. St. § 2322, Comp. St. 1901, p. 1425. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

75. Peoria & C. M. & M. Co. v. Turner [Colo. App.] 79 P. 915.

As in the case of grantees under the general land laws of the United States, limitations begin to run against the claimant of a mining claim only from the date when he acquires the title, and an occupancy by another prior to that time is not adverse as to his title.[76] It is generally held that title does not pass until the patent issues, and hence that limitations do not begin to run until that time.[77]

Mineral discovered on public land, by an employe of one who has not entered thereon for the purpose of mining or extracting minerals, belongs to the finder.[78]

Apex and extralateral rights.[79]—The locator owns only so much of the apex of the ledge as lies within his surface lines.[80] Where the ledge consists of a mineral-bearing zone or belt without distinct walls, rather than a well defined ledge, the practical mode of determining its legal width is by the lines beyond which ore is not found, or beyond which such indications of it do not exist, which would encourage the miner to continue his explorations with the expectation of compensation.[81]

The owner of the ledge may follow the dip of the vein continuously and indefinitely between vertical planes drawn through the parallel end lines extended indefinitely in their own direction,[82] except where intersected or crossed by the ledge

76. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 136 F. 124. Rule does not rest alone upon the ground that ejectment cannot be maintained in Federal courts by entryman before a patent issues, and hence is not affected by the fact that, in Alaska, ejectment may be maintained by one who has acquired equitable title. Id. Estate of locator of mining claim on public lands, who has complied with all the conditions necessary to entitle him to a patent, is not perceptibly different from that acquired by entrymen of agricultural land. Id. Possession, to be adverse, must be adverse to all the world, and an occupant cannot hold adversely while he admits title to be in the United States. Hence, there being no adverse possession, there is no disseisin, and the statute does not begin to run until disseisin. Id. Carter's Codes of Alaska, § 1042, p. 354, approved June 6, 1900, providing that the uninterrupted adverse, notorious possession of realty for seven years or more shall be conclusively presumed to give title thereto, except as against the United States, does not apply to action brought Dec. 24, 1900, in view of Id. § 4, p. 146, extending the right of action for a period of one year from the approval of the act, and § 368, p. 432, providing that no person shall be deprived of any existing legal right or remedy by reason of the passage of the act. Prior to that time the limitation was ten years. Id. Or. Code Civ. Proc. § 4, providing that in all cases where cause of action has already accrued, and period within which action may be brought under such code has expired, or will expire within one year from the approval of the act, an action may be brought thereon within one year from the date of such approval, operated to its full extent in Alaska when first introduced into the Alaska law by Act Cong. May 17, 1884 (c. 53, 23 St. 24), making laws of Oregon applicable to that territory, and did not again become operative on being re-enacted into the Alaska Code Civ. Proc. by Act Cong. June 6, 1900 (c. 786, 31 St. 321). Tyee Consol. Min. Co. v. Jennings [C. C. A.] 137 F. 863.

77. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 136 F. 124; Tyee Consol. Min. Co. v. Jennings [C. C. A.] 137 F. 863.

78. Pocket of gold discovered by employe while engaged in grading public land for a mill site belongs to him, since first taker has title to minerals under U. S. Rev. St. § 2319. Burns v. Schoenfeld [Cal. App.] 81 P. 713. Evidence held to sustain finding that defendant had not, when gold was discovered, entered upon the land for the purpose of appropriating minerals, but that excavation was solely for purpose of grading a mill site. Id.

Note: A person appropriating public lands, either with or without a location or entry, for other purposes than mining, acquires, before patent granted, no title to the minerals in the land, as to which the land may still be regarded as public domain. McClinton v. Bryden, 5 Cal. 97, 63 Am. Dec. 87. A person discovering and appropriating metals or minerals on the public domain has absolute title to the material removed. U. S. Rev. St. 2319; Forbes v. Gracey, 94 U. S. 762, 24 Law. Ed. 313; Johnston v. Harrington, 5 Wash. St. 73. As the plaintiff was not employed by the defendant to prospect, but to grade merely, the defendant could not bring his claim within the rule relating to finding by a servant in the course of employment. The plaintiff therefore was an original discoverer.—5 Columbia L. R. 550.

79. See 4 C. L. 659.

80, 81. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

82. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268. The extralateral right is bounded by the prolonged planes of the legal end lines. Id.

NOTE. Right to tunnel under another's claim: The defendant, for the purpose of reaching and working a vein which apexed in his, and extended under the plaintiff's claim, projected a tunnel through the latter's land. Held that an injunction should be granted restraining the further prosecution of the tunnel. St. Louis, etc., Co. v.

or underground rights of a prior locator, and may resume and follow the same beyond such intervening right.[83] It is immaterial that in following the ledge between the planes of such lines it is followed more upon its strike than upon its dip.[84] If two or more veins unite, the prior location takes the vein below the point of union including all the space of intersection.[85] Where two or more claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines.[86]

Under the Federal statutes now in force, in order to carry extralateral rights the end lines of the claim must be parallel,[87] but this rule does not apply to claims patented under locations made under former statutes.[88] That part of the vein to which the locator's extralateral rights extend is as much a part of his mining ground as is the land within the surface lines of his location.[89] Where the true owner is in possession of the surface, claiming title to the entire claim, his possession in legal contemplation extends to everything which is a part of the claim, whether vertically beneath the surface or within his extralateral rights, which is not in the actual possession of another holding adversely.[90]

Montana Mining Co., 194 U. S. 235, 48 Law. Ed. 953.

The decision of this case established two propositions: First that, except as limited by the statute, the land lying vertically beneath a surface location belongs to the owner of that location, and second, that the statute does not grant the right to enter upon or tunnel another's land, except within the bounds of a vein. The first point has been repeatedly affirmed by the state and federal courts. Doe v. Min. Co., 54 F. 935. Such decisions, together with the statutes under which they were decided, show a long prevalent tendency to increase the property rights of the owner of a mining claim. The movement reaches its culmination in the present case, which establishes what virtually amounts to a common-law ownership. In regard to the second point also, the interpretation of the court appears to be in accord with the prevailing opinion. Parrot, etc., Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491. Since the statute is in plain derogation of the common-law principles of the ownership of property, the court seems justified in adhering to a strict interpretation of its terms.—18 Harv. L. R. 68.

83. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

84. Right is not limited to 45 degrees, or any other particular variation, from the true dip. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

85. U. S. Rev. St. § 2336, 5 Fed. St. Ann. 50. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

86. United States M. Co. v. Lawson [C. C. A.] 134 F. 769. Evidence held to show that ore bodies within the claimed spaces of intersection, created by cross-fissures, were not susceptible of identification and separation from those in limestone stratum and were parts of a single broad vein or lode, and not parts of distinct and independent cross-fissure veins. Id.

87. Under the act of congress of May 10, 1872, Rev. St. §§ 2320, 2322, 5 Fed. St. Ann. pp. 8, 13. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 79 P. 834. Decree awarding extralateral rights within territory of adjoining claim within planes extending in fan shape, held erroneous. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

88. U. S. Rev. St. § 2322, Comp. St. 1901, p. 1425, expressly provides that the repeal of the former laws shall not affect existing rights, nor any rights affected under the act of 1866, and law did not previously require such lines to be parallel. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 79 P. 834. This is true, though money was not paid nor the survey finally approved by the surveyor-general until after the passage of the act. Id. The acceptance of a patent reciting that it is issued in pursuance of the Act of July 26, 1866, and the amendatory act of July 9, 1870, and showing, in conjunction with the public records in evidence, that it was issued prior to the passage of the Act of 1872, and purporting to grant a specified number of linear feet of the original vein throughout its entire depth between the end lines continued in their own direction, is not a waiver or renouncement of any extralateral rights given by the two former acts, though the patent also recites that it is issued in pursuance of the act of 1872, and, in accordance with the express provisions of that act, purports to grant, in addition to the vein or lode originally located, the right to all other veins or lodes apexing within the surface lines of the location, with the accompanying extralateral rights given by that act. Fact that he may not be entitled to any extralateral rights in other veins or lodes not embraced in the original location, and the right to which was first given by the act of 1872, because his end lines were not parallel, does not affect his rights in vein covered by original location. Id.

89. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 79 P. 834.

90. United States M. Co. v. Lawson [C. C. A.] 134 F. 769.

Boundary lines and monuments.[91]—In ascertaining boundaries definitely established monuments control courses and distances.[92] If the monuments are not definitely established and identified, courses and distances must be followed if not irreconcilable,[93] but if irreconcilable, courses prevail over distances.[94] A monument established by the locators of adjoining claims, as the point through which the dividing line between them shall run, is not binding on subsequent purchasers, unless so made of record as to give notice to them of the agreement.[95] Cases fixing the boundaries of particular claims will be found in the note.[96]

§ 5. *Right to mine on private land thrown open to the public.*[97]

§ 6. *Private conveyances or grants of mineral rights in lands.*[98]—In the absence of an express reservation, a conveyance of land carries the minerals therein contained.[99] The contrary is true where land is taken for public use.[1] But if by condemning a right of way over oil lands the reservation of the oil to the fee owner is rendered of no value because of the appropriation of the surface, the railroad must pay the full value of the fee as oil land.[2]

One having a mere verbal license to work a mine has no permanent interest, property, or estate in the land itself, but only the property in the ore actually dug by him, and in that as personalty.[3] Such a license is revocable at any time at the pleasure of the licensor.[4] Licensees admitting that they hold under the plaintiff

91. See 4 C. L. 661. See, also, Boundaries, 5 C. L. 430.

92. Meyer-Clarke-Rowe Mines Co. v. Steinfield [Ariz.] 80 P. 400.

93. Meyer-Clarke-Rowe Mines Co. v. Steinfield [Ariz.] 80 P. 400. In suit to determine boundary line of patented claim, findings making claim a rectangular parallelogram held inconsistent with findings making one end line 600 feet, and the other 655 feet long, and with the finding as to the location of the northwest corner, and those fixing the north side line. Id.

94. Meyer-Clarke-Rowe Mines Co. v. Steinfield [Ariz.] 80 P. 400.

95. Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 F. 268.

96. In suit for damages for trespass and for an injunction, evidence held to sustain findings fixing boundaries of claims. Keystone Milling Co. v. Equity Min. Co. [Or.] 83 P. 190.

97. See 4 C. L. 662.

98. See 4 C. L. 663.

99. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 79 P. 834. Deed purporting to convey that portion of certain sections of land lying east of the grantor's claim does not include that portion thereof through which a vein apexing on such claim, and lying between its end line planes, has its dip. Id.

1. A railroad company, which by condemnation proceedings acquires an easement for a right of way across lands, acquires only the permanent and exclusive control of the surface, and takes no title to underlying minerals or oil, and no right to dig for or appropriate them, such right remaining in the owner of the fee, subject only to the duty of furnishing sufficient support for the easement imposed. Same rule applies in case of oil as in case of minerals. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

2. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

Measure of value: But the railroad company may show that the fee owner's right to take it out is not lost by virtue of being deprived of a part of the surface of his land, or that his beneficial interest is only to some extent diminished, and in such case the value of such beneficial ownership must be taken into consideration as something separate from the value of the easement, and the value of the easement alone assessed against the condemning party. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961. Appropriation of surface of oil-bearing lands does not necessarily destroy all right of the fee owner to the oil, as, for instance, where, by virtue of owning adjoining lands, he is able to remove the oil. Id. It is permissible to show, on the issue of value, a progressive decrease in the productiveness of the oil field upon which the land in question is situated. Id. The market value may also be shown by expert testimony. Expert may testify as to matters which would influence him from the standpoint of a contemplating buyer in determining the market value of such land, such as the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom, and the general relation of outlay to income, and such testimony is not objectionable as conjectural and speculative. Id. Further testimony that he would consider what he could pay for it and have sufficient margin for speculation during at least five years is incompetent on the question of market value. Id.

3. Verbal agreement authorizing defendants to enter claim and remove ore during plaintiff's will and pleasure, and revocable whenever he might desire, held a mere license. Clark v. Wall [Mont.] 79 P. 1052.

4. Particularly when the agreement so provides. Clark v. Wall [Mont.] 79 P. 1052.

cannot contend that the complaint shows that plaintiff has no title to the property and hence cannot maintain a suit to enjoin them from removing ore after termination of the license.[5]

The owner of land containing minerals may separate it into two or more estates and convey the surface to one person and the minerals to another, or may reserve either to himself and convey the other.[6] So too the owner of an entire estate containing several distinct and separate minerals may, by apt conveyances, create a distinct and separate estate in each.[7] After a severance the owners of the respective estates hold them as estates in land, their rights and titles depending upon their conveyances.[8] Under the tax laws of West Virginia when the surface is owned by one person and the oil in place by another, a sale for taxes in the name of the former will pass the oil owned by the latter if his estate therein is not charged on the tax books.[9]

A deed or lease of specified minerals passes no title to other minerals, separate and distinct in their essence, not mentioned therein,[10] even though the latter are regarded as waste when the grant is made,[11] and if the grantee removes them he will be liable to account to the grantor for their value.[12]

Deeds and contracts for the conveyance of mineral rights will be construed so as to effectuate the intention of the parties.[13] A construction rendering the contract binding and enforceable will be preferred to one which would make it unenforceable.[14] Where a contract provides that the shipments of ore are to be deter-

5. Clark v. Wall [Mont.] 79 P. 1052.

6. Huss v. Jacobs, 210 Pa. 145, 59 A. 991; Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924. Deed reserving coal held to give grantee a fee simple in the surface only, and to reserve a fee in the coal in the grantor. Huss v. Jacobs. 210 Pa. 145, 59 A. 991. A sale of underlying coal works a severance and makes the purchase money payable under the terms of the contract personal property. Rent due under lease construed as absolute sale is personalty subject to operation of intestate laws and the will of the owner. Dorr v. Reynolds, 26 Pa. Super. Ct. 139. The conveyance of coal in place beneath the surface operates to create a distinct and separate estate in the grantee, entirely independent of the estate and rights of the owner of the surface. Smoot v. Consolidated Coal Co., 114 Ill. App. 512. There may be separate and distinct estates in different persons in the surface of land and oil and other minerals in it. Peterson v. Hall [W. Va.] 50 S. E. 603. Petroleum oil and natural gas may be severed from the ownership of the surface by grant or exception, and when this is done they become a separate corporeal hereditament and their ownership is attended with all the attributes and incidents peculiar to ownership of land. When thus severed, owners own two separate interests and are not co-owners. Preston v. White [W. Va.] 50 S. E. 236. Deed reserving seven-eighths of all oil and gas in land with full right to grantor and his heirs and assignees to develop and operate the same, held to except oil and gas in place so that they remained vested in grantor as an actual, vested estate and property and they were not an incorporeal hereditament in him, nor did he have a mere license to produce them, nor was grantor's title in abeyance to vest only when oil and gas were brought to the surface. Id.

7. Coal and iron pyrites. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

8. Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924. A conveyance of the coal in general terms by the owner of the whole fee, with a reservation of the residue of the tract, gives to the purchaser the title to the coal, with a right to mine and remove it. Id. A conveyance of underlying coal with the privilege of removing it effects a severance of the right to the surface from the right to the coal, and makes them distinct corporeal hereditaments. Wallace v. Elm Grove Coal Co. [W. Va.] 52 S. E. 485. The presumption that one in possession of the surface has possession of the subsoil also does not exist when these rights have been severed. Id.

9. Code 1899, c. 31, § 25. Peterson v. Hall [W. Va.] 50 S. E. 603.

10. Neither mineral will pass as appurtenant to the other unless particularly designated. Smoot v. Consolidated Coal Co., 114 Ill. App. 512. Coal and iron pyrites held separate and distinct minerals. Id. Deed to all the coal in a certain tract held not to pass title to iron pyrites separated from the coal in order to make the latter merchantable, but title thereto remained in the grantor. Id.

11, 12. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

13. To effectuate intention of maker. Jones v. American Ass'n, 27 Ky. L. R. 804, 86 S. W. 1111. Deed held to pass coal banks reserved to grantor by a former deed, though they were referred to only in the habendum clause. Id. Reservation in habendum clause of all the "coal banks" held to reserve all the coal veins on the land whether opened or not. Id.

14. Option contract for sale of oil and minerals will be construed so as to require grantees to develop property where it would

mined from the shipping receipts, the burden is on one seeking to discredit them to justify deductions made by him.[15] Even if, under such a contract, royalty is only to be paid for clean or refined ore, and not on dirt, the burden is on the shippers to show that dirt was actually shipped to the extent of the deductions made.[16] If clauses or parts of a deed are conflicting or repugnant, the intention to be gathered from the whole instrument must control.[17] A description is sufficient if it can be made certain.[18] A deed purporting to convey that portion of certain sections lying in a given direction from the grantor's claim does not convey that portion of those sections through which the vein apexing on the grantor's claim, and lying between its end line planes, has its dip.[19]

A reservation of minerals and mining rights is construed as an actual grant thereof,[20] and such a reservation from a grant followed by a grant to another of all that was first reserved vests in the second grantee an estate as broad as if the entire estate had first been granted to him, with a reservation of the surface.[21] Though a reservation is to be construed most strictly against the grantor, there will be retained in him all that it was the clear meaning and intention of the parties to reserve from the conveyance.[22] The intent controls, it being immaterial whether the word used is "except" or "reserve."[23] Reservations and exceptions, though contained in the habendum clause, will be enforced as fully as though set out in the granting clause when on the whole instrument the intention of the parties to that effect is sufficiently expressed.[24]

The usual rules as to the essentials of contracts[25] and as to their modification[26]

otherwise be a mere nudum pactum. Berry v. Frisbie, 27 Ky. L. R. 724, 86 S. W. 558.

15. Are not conclusive. Sharp v. Behr, 136 F. 795. Where plaintiff was entitled to royalty on all ore shipped by defendants, the amount of the shipments to be determined from the railroad shipping receipts, his failure to object to account rendered by them, held not waiver of right to claim that deductions made by them were improper, where statements of shipments were without specification, and plaintiff had no figures with which to verify the account. Id.

16. Evidence held insufficient. Sharp v. Behr, 136 F. 795.

17. Exception of all the granite on the premises in the habendum clause held not void for repugnancy because not referred to in the granting clause. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Where administrator's deed recited authority to sell land "with the exception of all the granite" thereon, but in the granting clause failed to refer to the granite, it will be presumed that he did not undertake to exceed his authority, and that there was no intention to pass title to the granite. Id.

18. Coal banks held sufficiently described by reference to former deed reserving them to the grantor. Jones v. American Ass'n, 27 Ky. L. R. 804, 86 S. W. 1111.

19. Particularly where there is nothing in the surrounding circumstances to show such an intention. Central Eureka M. Co. v. East Cent. Eureka M. Co., 146 Cal. 147, 79 P. 834.

20, 21. Preston v. White [W. Va.] 50 S. E. 236.

22. Preston v. White [W. Va.] 50 S. E. 236. Deed conveying realty "with the exception of all the granite on said lot of land," held to reserve title to all of the granite and not merely that which was exposed when deed was made, and owner could remove any subsequently becoming exposed. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Deed held to convey everything but the granite, and hence owner of latter had no right to disturb surface whether it was arable or cultivatable or not. Id. In construing reservations and grants each case must be decided on the language used, the surrounding circumstances, and the intention of the grantor if it can be ascertained. Deed reserving to the grantor "all mines and minerals which may be found" on the land, with the right to enter to dig and carry the same away, held not to reserve a right to limestone on the premises and to conduct open quarrying for the purpose of taking possession thereof. Brady v. Smith, 181 N. Y. 178, 73 N. E. 963, rvg. 88 App. Div. 427, 84 N. Y. S. 1119.

23. Preston v. White [W. Va.] 50 S. E. 236.

24. Jones v. American Ass'n, 27 Ky. L. R. 804, 86 S. W. 1111.

25. Evidence on counterclaim for specific performance held sufficient to sustain finding that plaintiff orally agreed to sell his interest in a certain mine to defendant. Finlen v. Heinze [Mont.] 80 P. 918. Defendant held not estopped to claim such contract existed because, in pursuance of the agreement between them, he brought suit in plaintiff's name to restrain a third person from working the mine. Id.

26. Failure of plaintiff to reply to letter suggesting reduction of royalty due under contract, and failure for 2½ months to object to account in which royalty was figured at reduced rate, held not to preclude him from subsequently claiming royalty at contract rate. Sharp v. Behr, 136 F. 795.

or termination,[27] the expiration of option contracts,[28] the recovery of payments made by mistake,[29] and the effect of deeds on interests afterward acquired by the grantor, apply.[30] The construction of particular deeds[31] and contracts of sale will be found in the note.[32]

After a severance has taken place title to the underlying minerals may be acquired by adverse possession,[33] but possession and occupancy of the surface in such

27. Where contract for conveyance of realty provided for payment of royalties to grantor for specified term unless he should previously leave the employment of the grantees, and that if grantees made default in payment, grantor should be entitled to a reconveyance of premises on payment of cost price thereof, held, that action of grantor, after being discharged by grantee, in giving notice of forfeiture for nonpayment of royalties and in bringing suit to enforce it, was an election to terminate the contract, and precluded him from recovering subsequent damages. Sharp v. Behr, 136 F. 795. Plaintiff being only bound to reimburse defendants as a condition of reconveyance was not bound to tender the amount necessary therefor in advance of a settlement of the accounts. Id.

28. Option for purchase of coal held to have expired by failure to accept tendered deed, and to have been surrendered by grantee, so that his assignee, who was informed that grantee claimed no interest in the land, took nothing by the assignment. Notley v. Shoemaker, 25 Pa. Super. Ct. 584.

29. Though payment of royalty was made by defendants by mistake, held, that their conduct in allowing it to go unquestioned for a year after discovery of mistake, and in subsequently crediting them with such royalty at a reduced rate, and in making a payment, constituted a confirmation of such royalty, precluding them from thereafter claiming that plaintiff was not entitled thereto. Sharp v. Behr, 136 F. 795. Where plaintiff was credited by defendants with royalty on ore mined from two farms, and credits and cash were permitted to remain in their possession as a loan, interest being paid on semi-annual balances, and account having been reduced by one payment, held, that they were not entitled to thereafter repudiate the transaction on the ground that the royalties were not justified. Id.

30. Deed reciting that grantors "have sold, and released, and quitclaimed" an undivided interest in certain claims held by the grantors under lode locations and warranting against prior incumbrances by the grantors, held, not to pass interest afterwards acquired by grantors under a placer location after abandoning the lode location. Wells v. Chase [Ark.] 88 S. W. 1030. Kirby's Dig. § 734, providing for passing of after-acquired title to the grantee affects only interests which grantor has conveyed or which his deed purports to convey. Id.

31. Conveyance held to have passed mineral and timber to the top of a certain mountain. Browning v. Cumberland Gap Cannel Coal Co. [Ky.] 89 S. W. 267. Where defendant agreed to sell and convey or cause to be conveyed the coal in and under certain tracts "hereinafter described and referred to, and as stated in the contract of sale, options and deeds hereinafter named," and one of the options did not specify any particular kind of coal, held, that the purchaser was not entitled to reject such option on the ground that the coal underlying the land covered by it was not the kind intended to be purchased, where he had an opportunity to investigate the matter between the time when his contract with defendant was signed and the date of making the payment which converted the option thereby given him into an absolute contract of purchase. Shackelford v. Fulton [C. C. A.] 139 F. 97.

32. Option on oil and mineral rights giving plaintiffs four months in which to determine whether they would accept the grant, and two years from date of acceptance in which to prospect for and locate for minerals, etc., and further providing that if minerals, etc., were found in paying quantities defendant would make a deed for the rights covered by the option, and should receive certain royalties on the product as compensation for the privileges granted, held when accepted within four months, to bind plaintiffs to explore land within two years by actually sinking wells upon it, and if minerals, etc., were found in paying quantities to diligently work and operate the same, and in no event were plaintiffs entitled to the deed provided for until gas, oil, or minerals were found in paying quantities. Berry v. Frisbie, 27 Ky. L. R. 724, 86 S. W. 558. Agreement selling a certain tract of coal for a specified sum and providing that the vendee "is not to sell any coal, only what he hauls himself or have hauled," and that the vendee cannot sell any of the tract to anyone but the vendor, or his heirs, or assigns, held a mere personal license, revoked by the death of the licensee. Chalfant v. Rocks, 212 Pa. 521, 61 A. 1105. Even if considered as a conveyance, nothing passed to grantee's heirs since there were no words of inheritance. Id. Where plaintiff conveyed realty to defendants on their agreement to pay royalty on ore shipped from certain mines thereon if they obtained possession of them, and that on default plaintiff should be entitled to a reconveyance on repayment of the cost price, held, that defendants, not having acquired possession because of an outstanding lease, were, on repudiation of the contract, entitled to interest on cost price. Sharp v. Behr, 136 F. 795. Contract whereby defendants contracted to convey half interest in claim in consideration of plaintiff's sinking three holes to bed rock in certain places, held not to require entire bottom of each hole to show bed rock, but that it was sufficient if any part of each hole went to such rock. Meehan v. Nelson [C. C. A.] 137 F. 731. Evidence held sufficient to sustain finding of performance. Id.

33. Must be an open, visible, notorious, exclusive, and hostile occupation for a period of 21 years, and must be actual as dis-

case is insufficient.[34] The owner of the minerals does not lose his right or possession by any length of nonusage,[35] but in case the grantor of the surface reserves the minerals, he may by his acts or conduct abandon his rights therein or estop himself from insisting thereon as against his grantee.[36]

Since minerals in the earth are a part of the realty[37] any instrument by which they are conveyed must be executed in accordance with the law governing conveyances of land.[38]

Like other contracts for the sale of land, contracts for the sale of mining property may be specifically enforced.[39]

Rights as between surface and subterranean owners.[40]—The rights of the owner of underlying minerals are subject to the natural right of the owner of the surface to absolute support of his land,[41] and all existing structures thereon,[42] and he is liable for any damage resulting to the surface by reason of his operations, whether resulting from his negligence or not.[43] The rule does not apply where the same person owns both estates,[44] nor where the right to support has been done away with by a custom so ancient that the memory of man runneth not to the contrary,[45] or has been released by apt words;[46] but such burden will not be escaped by implication

tinguished from constructive. Huss v. Jacobs, 210 Pa. 145, 59 A. 991. Evidence held insufficient to show title by adverse possession to underlying coal reserved in deed. Id.

34. Wallace v. Elm Grove Coal Co. [W. Va.] 52 S. E. 485. Even if title to coal became forfeited by nonentry on assessor's books, it would not pass to owner of surface under Const. art. 13, § 3, and Code c. 31, § 40, since he never had possession. Id. Nor would it pass to him if forfeited for nonentry. Id.

35. To lose his right owner of underlying coal must be disseised, and there can be no disseisin by an act which does not actually take the coal out of his possession. Wallace v. Elm Grove Coal Co. [W. Va.] 52 S. E. 485.

36. Evidence held insufficient to show abandonment of reserved coal, or an estoppel. Huss v. Jacobs, 210 Pa. 145, 59 A. 991.

37. See § 1 B, ante.

38. Mining lease authorizing lessees to extract and appropriate mineral is a conveyance of a part of the realty. Brooks v. Cook, 141 Ala. 499, 38 So. 641. Lease witnessed by beneficiaries held void. Id.

39. See, also, Specific Performance, 4 C. L. 1494. Finlen v. Heinze [Mont.] 80 P. 918. Is not a matter of right, but rests entirely in judicial discretion, to be exercised according to settled equitable principles so as to reach the ends of justice. Decree for specific performance of contract to convey half interest in claim in consideration of plaintiff's sinking certain holes to bed rock, held proper. Meehan v. Nelson [C. C. A.] 137 F. 731. Contract for sale of oil and minerals cannot be specifically enforced if performance is optional with one party. Berry v. Frisbie, 27 Ky. L. R. 724, 86 S. W. 558. Consideration of $1 is insufficient to authorize decree of specific performance. Id.

40. See 4 C. L. 662, n. 70, et seq.

41. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Where surface is owned by one person and underlying minerals by another, the latter cannot remove minerals without leaving sufficient natural or artificial support to sustain the surface. Western Ind. Coal Co. v. Brown [Ind. App.] 74 N. E. 1027. Right of surface owner is not an easement or right depending on a supposed grant, but is of natural right and is a part of the estate reserved to him. Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924. Owner of surface has absolute right to have land supported. Allshouse's Estate, 23 Pa. Super. Ct. 146. Under estate owes a servitude of sufficient support to the upper estate. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559. Indemnity obligation given by grantor of underlying coal vein to grantee indemnifying latter from liability for damage to the surface "by reason of the skillful and careful mining and taking away of the said coal," held not to impose on the grantee the duty of leaving proper and sufficient supports for the surface, but the grantor was bound to indemnify it against any damage it might be compelled to pay the surface owner though it removed all the coal, provided its manner or method of mining was skillful and careful. Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924.

42. Western Ind. Coal Co. v. Brown [Ind. App.] 74 N. E. 1027.

43. Is immaterial whether mining is conducted skillfully or negligently or carelessly. Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924.

44. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559.

45. Evidence and findings held to show that no such custom existed. Allshouse's Estate, 23 Pa. Super. Ct. 146.

46. Not where parties have agreed upon a different rule. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559. Reservation in conveyance of surface held to deprive grantee of right to surface support. Id. Authority given to executors by will to sell underlying coal "with the usual mining privileges," held not to authorize them to waive and release the right of surface and

from language not necessarily importing such result.[47] The rights of the grantee of the surface cannot of course be affected by the provisions of a subsequent mining lease exempting the lessee from liability for injuries thereto,[48] nor will a release relieve the owner of the subjacent minerals from liability for injuries caused by his own negligence.[49]

If it is impossible to remove the mineral without disturbing the surface and completely destroying the benefits accruing to the owner of the surface, the owner of the mineral can only remove such part of it as becomes exposed from one cause or another, by the removal of the surface soil.[50] The fact that the owner of the minerals cannot take possession of them does not, however, deprive him of his right thereto,[51] and if he has absolute title to all of them, he may remove any becoming exposed in the future.[52]

The act of the lessee of a mine in removing all of the support is prima facie the cause of the subsequent subsidence of the surface, and the burden is on him to show that it would not have subsided but for the additional weight of buildings erected subsequent to the lease.[53]

§ 7. *Leases. What constitutes.*[54]—No precise words are necessary to create a lease, but any language is sufficient which shows an intent on the part of the owner of the land to surrender possession to another for a determinate time for a consideration.[55] In Pennsylvania it is held that an instrument which is in its terms a demise of all coal in, under, and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place, whether the purchase price is a lump sum or a certain rent or royalty, and notwithstanding the fact that the coal is required to be removed within a specified time.[56] The fact that the instrument is called a lease, the parties lessor and lessee, and the consideration rent, is immaterial.[57] The right of voluntary forfeiture does not change the nature of the interest acquired[58] nor is a provision for the support of the roof inconsistent with the theory of a sale of the coal.[59] Though such agreements are called sales, yet the rules applicable to sales are not to be applied indiscriminately to them, but each is to be construed like any other contract by its own terms.[60]

lateral support. Allshouse's Estate, 23 Pa. Super. Ct. 146.

47. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559; Allshouse's Estate, 23 Pa. Super. Ct. 146.

48, 49. Western Ind. Coal Co. v. Brown [Ind. App.] 74 N. E. 1027.

50. As in the case where one person owns the surface and another the underlying granite. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

51, 52. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

53. Western Ind. Coal Co. v. Brown [Ind. App.] 74 N. E. 1027.

54. See 4 C. L. 665.

55. Shenk v. Stahl [Ind. App.] 74 N. E. 538. Instrument granting right to remove minerals held a valid and binding lease, vesting lessee with interest in the minerals specified and right to remove same, subject only to expressed condition that developments in mining be made within three years, the latter provision being a condition subsequent, which, if not performed, would defeat the estate altogether. Connell v. Pierce, 116 Ill. App. 103. Provision that prospecting should begin when it was settled that railroad was to be built, held a covenant for the breach of which an action at law would lie. Id. Lease held not ambiguous so as to permit the introduction of parol evidence. Id.

Lease or grant: Contract whereby defendant "granted and leased" land to plaintiffs "for the purpose of a gas well so long as it is used for the same," in consideration of a certain interest in the well, held a mere lease, which terminated when land ceased to be used for the purpose specified. Shenk v. Stahl [Ind. App.] 74 N. E. 538. Words "granted and leased" held merely a covenant for quiet enjoyment, or the passing of the land to the lessees for the time and on the conditions stipulated. Id.

Lease or sale: An exclusive lease or right to enter upon, mine, and remove coal from a tract of land, held a lease and not a sale of the property, and the royalties provided therein are in fact rentals and no more. Cleveland Trust Co. v. Columbus & Hocking Coal & Iron Co., 3 Ohio N. P. (N. S.) 424.

56. Particularly true where no time is fixed within which coal must be removed, and lessee is bound to pay for quantity stipulated to be mined, whether it is actually mined or not. Dorr v. Reynolds, 26 Pa. Super. Ct. 139.

Interpretation and effect.[61]—The mutual understanding and intent of the parties as to the purpose, scope, and ultimate object to be obtained by the contract is controlling.[62] As in the case of other agreements, the rights of the parties are to be determined by the terms of the contract[63] taken as a whole.[64] That construction should be adopted which is most in consonance with the paramount purpose of the parties at the time of executing the same.[65] Where an oil and gas contract purports in its beginning to be an absolute grant of all such substances in the land for an indefinite period, and then provides that it is made on the "terms" thereafter following, that word is broad enough to include consideration or conditions.[66]

Mistake and fraud.—Leases may be reformed,[67] and transfers thereof avoided for mutual mistake,[68] and one may avoid a note, given in part payment for an oil lease, procured through misrepresentations as to the flow of oil from the wells at the time of the sale.[69]

Interests under a lease.[70]—If the contract authorizes deficiencies in the amount mined in any one year to be made up in succeeding years, the lessor still has the legal title to the coal not actually mined and removed and until it is so mined and removed,[71] and such title is subject to the lien of a judgment against him and may

57, 58, 59. Dorr v. Reynolds, 26 Pa. Super. Ct. 139.

60. Though agreement leasing all the coal in certain lands and giving the lessee the right to remove a certain number of tons annually, on payment of an annual rental, until all is removed, unless the term is sooner ended for nonpayment or breach of other conditions. Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 62 A. 94.

61. See 4 C. L. 667.

62. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. Intention of the parties, to be ascertained from the language used, will govern. Shenk v. Stahl [Ind. App.] 74 N. E. 538. In construing such contract the court should consider the object to be attained, the situation of the parties, and all the surrounding facts and circumstances. Oil and gas lease. Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084. Courts generally, in gas and oil states, have come to place **oil and gas leases in a class by themselves,** and to look critically into such instruments for the real intention of the parties, since it so frequently happens that they cannot, on account of incongruous provisions, be enforced according to the strict letter of the contract. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. **Lease of** premises containing **brick clay.** Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 P. 446. Fact that ore was found in pockets and not in stratified layers, and is therefore more difficult to mine, held not to authorize abandonment of lease of right to mine **phosphate rock,** where ore was sufficient in quantity in either form, particularly where it appeared that lessees had made frequent examinations before lease was executed. McGavock v. Virginia-Carolina Chemical Co., 114 Tenn. 317, 86 S. W. 380.

63. Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N. E. 222. Whether an actual estate in the minerals or a mere right to take them is created depends on the instrument under which they are claimed. Is to be construed by the four corners. Preston v. White [W. Va.] 50 S. E. 236.

64. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906.

65. Should be given that construction which will best adapt the agreement to facilitate the accomplishment of the ends evidently sought to be attained. Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 P. 446.

66. Logansport & W. V. Gas Co. v. Null [Ind. App.] 76 N. E. 125.

67. In action for rentals under gas lease providing that "the consideration for each well shall be the sum of $400, payable quarterly in advance," where lessor claimed that the words "per annum" had been by mistake omitted after the word "dollars," evidence held to sustain verdict for lessee, particularly as lessor failed to read the lease. Snyder v. Phillips, 25 Pa. Super. Ct. 648.

68. Where oil lease provided that test well should be sunk to first sand, and, unless it proved fruitful, lease should be void and lessees salted well before reaching sand, and one of them sold his interest to defendants, who in good faith conveyed a part of their interest to plaintiffs, both believing that oil had been struck, held, that plaintiffs were entitled to a cancellation.. Rowland v. Cox [Ky.] 89 S. W. 215. Defendants could not defend on the ground that, if well was sunk to first sand, it might produce oil, lessees having abandoned well before it became productive and lease having thereby become void so that nothing passed to their grantees or to plaintiffs. Id. The fact that the property is speculative in character does not change the rule. Purchasers take the risk of how much oil will be produced, but are not speculating as to whether oil will be struck or not. Id.

69. Evidence held insufficient to warrant submission of question whether note was procured through misrepresentations. Jack v. Hixon, 23 Pa. Super. Ct. 453.

70. See 4 C. L. 666, et seq.

71. Under contract providing that, if less than the maximum amount is mined in any one year, the deficiency may be made up at any time during the succeeding six years

be sold at execution sale.[72] The purchaser acquires all the rights of the former holder of such title, including the royalties, which, under such agreement, are to be regarded as pro tanto purchase-money payments for the coal in place, if mined and removed within the stipulated time.[73]

A lease for oil confers no actual estate until oil is found, but only a right to explore and produce oil,[74] and is subject to abandonment before that time.[75] Hence a lessee under an ordinary oil lease for years has no vested taxable estate in the oil still in the ground, either before or after he has found paying wells, but it is taxable in the name of the surface owner,[76] and a sale for taxes assessed against the surface owner passes the oil to the purchaser.[77]

Where the lease requires the lessee to complete a well in every period of ninety days from the completion of the first well, if it proves to be a paying one, or to surrender the lease, excepting ten acres for each paying well, but fails to further describe such ten-acre tracts, the lessor is not entitled to arbitrarily set off such tracts and have his title quieted to the balance, but the lessee may choose them.[78] The obligation of the lessees under such a lease to continue to drill wells is fixed when the first well proves to be a paying one, and they are then bound to make a choice between, and pursue, one of the alternative courses indicated by the contract.[79] The contract not having certainly prescribed how many wells were to be drilled, or indicated their exact location, and the lessor having for a long period accepted his share of the oil produced from the wells actually drilled and not having objected to the failure of the lessees to further develop the property, he is bound to make a demand upon them to exercise their choice before resorting to the courts to enforce a forfeiture.[80] Where a gas lease exempts a part of the property to be designated by the lessor, the latter is not bound to make such designation until notified by the lessee to do so, but it is sufficient if it appears that he was ready and willing to do so.[81]

while the contract remains in force, coal not worked out is under continuing contingency of reverting to lessor on forfeiture of the lease, and land reverts on its expiration. Money paid in any one year belongs to lessor as rental if lease is forfeited thereafter, the right to make up deficiencies applying only while the lease continues in force. So, too, if such deficiency is not made up and title to coal acquired by actually mining it within six years, the money paid belongs to the lessor as rental for the land which has been occupied by the lessee, though not used and occupied by it as it had a right to use it. Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 62 A. 94.

72. Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 62 A. 94.

73. Title thereto is acquired by using royalties within the stipulated period of six years during the continuance of the lease as payments for coal actually taken out and away. Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 62 A. 94.

74. Peterson v. Hall [W. Va.] 50 S. E. 603. A contract leasing the exclusive right for two years to enter upon and operate for and procure oil and gas from certain land, the lessee to pay a certain sum annually for each gas well drilled and a certain portion of the oil produced, to complete a well within a specified time, and after a specified date to pay a certain sum per acre per year for each piece of land on which wells have not been drilled and operated, and providing that if oil or gas is found the lease shall continue as long as either is found in paying quantities and as the well shall be operated, gives the lessee a right to enter on the premises for the purpose of exploring and to operate if oil or gas is discovered. Rawlings v. Armel [Kan.] 79 P. 683.

75. Rawlings v. Armel [Kan.] 79 P. 683. Further provision that lessee may surrender lease after two years if oil or gas is not found in paying quantities does not imply that title shall vest before oil or gas is found and produced. Id. Provision for rent is not an alternative which lessee may adopt and thereby relieve itself from drilling and operating, but its purpose is to incite speedy development of the property. Id.

76, 77. Peterson v. Hall [W. Va.] 50 S. E. 603.

78. Monaghan v. Mount [Ind. App.] 74 N. E. 579. Lessor cannot, on default, quiet title to all the land except such ten-acre tracts, there being no evidence as to any method or agreement for determining the description of such tracts. Jones v. Mount [Ind. App.] 74 N. E. 1032.

79, 80. Monaghan v. Mount [Ind. App.] 74 N. E. 579.

81. Lessee held liable for prescribed rental on failure to bore well, where evidence showed that he was ready and willing to mark boundaries of reserved tract, and designated a place where a well might be drilled. Indianapolis Gas Co. v. Pierce [Ind. App.] 76 N. E. 173.

Assignments and conveyances.[82]—A purchaser of leased land takes the estate of the lessor and not that of the lessee.[83] One to whom the lease is assigned, with the consent of the lessor, becomes bound by all its conditions.[84] An option to purchase given to a lessee, but to no other person, is a mere personal privilege which is not assignable.[85]

Rents and royalties.[86]—The covenant to pay rent for land not drilled is not dependent upon the provision relating to the time when the drilling is to begin and is not affected by extensions of such time.[87] Mining leases containing a covenant for the payment of a minimum rent or royalty either require such payment as a dead rent irrespective of produce, in which case the lessee is liable for rent even if nothing can be got by mining, or the ore or other material is exhausted before the expiration of the term,[88] or require that, on failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid, in which case the lessee is excused from further payment if the material is exhausted before the expiration of the stipulated term.[89] Under a lease providing that rentals may be paid directly to the lessor or by depositing them in the bank to his credit, a deposit in the bank within the prescribed time is a payment of the rent when it is accepted by the bank and placed to the lessor's credit, whether made in lawful money or in checks or drafts.[90] Where the lessee mingles gas from the demised premises with gas belonging to other persons, and is compelled to account to the latter for the whole mass under the doctrine of confusion of goods, the lessor is in no such privity with them as will enable him to collect from them the royalty due him under the lease.[91]

The lessee is not relieved from his obligation to furnish gas for heating and lighting purposes by ceasing or suspending operations on the demised premises after drilling a single well and operating it to exhaustion,[92] and if he violates his agreement in this regard is liable to the lessor for the reasonable cost of gas purchased by him which was reasonably necessary for such purposes.[93]

82. See 4 C. L. 667, n. 24.

83. Where lease grants exclusive privilege of quarrying lime rock, but reserves privilege of quarrying to the lessor, purchaser from latter cannot escape liability for excluding lessee from the premises on ground that covenants in lease do not run with the land. Arkley v. Union Sugar Co. [Cal.] 81 P. 509.

84. General assignment of "all live leases" belonging to assignor held to render assignee liable on lease which had two more years to run, though it was not shown on lessor's register which purported to show all live leases, but was included in a package marked "abandoned leases" and did not come to knowledge of assignee until after the transfer, particularly where evidence showed that assignee later recognized it as being valid. Indianapolis Gas Co. v. Pierce [Ind. App.] 76 N. E. 173.

85. Mining lease. Myers v. Stone [Iowa] 102 N. W. 507. Lessor held not estopped from claiming that option did not pass to an assignee of the lease, where he did nothing but collect the rents from the assignee of the lease, and informed latter, before anything was done in reliance on the option, that the lessee had no right to assign the lease. Id. Improvements made by assignee, including the placing of a pump and engine in the mine, held not of such a character as to indicate to the lessor his intention to exercise the option, in view of fact that lease required the lessee to keep the mine and machinery in repair. Id.

86. See 4 C. L. 667.

87. Rawlings v. Armel [Kan.] 79 P. 683.

88. Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 P. 446.

89. Under lease of premises containing brick clay for five years, providing for payment of royalty on all brick manufactured, payments for any year not to be less than a certain sum, and that lessee should not use premises for any other purpose than that of a general brick business, held, that making of brick from the clay was the subject-matter of the contract, and lessee was not liable for rent after clay was exhausted. Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 P. 446. Fact that lease provided for its termination by several methods held not to change the rule. Id.

90. Lafayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 7.

91. Aiken v. Zahn, 23 Pa. Super. Ct. 411.

92. Where the lease provides that as part of the rental the lessee shall furnish free of charge and during the term of the lease sufficient natural gas to heat and light the premises of the lessor, the lessee is not relieved from this obligation by ceasing or suspending operations after drilling a single well and operating it to exhaustion. Obligation not contingent on production of

If a right to possession for operating purposes has been acquired by a successful search for the product, the lessee becomes answerable for the stipulated rental according to the terms of the agreement, and is relieved from such liability only by showing payment, or that he has given written or verbal notice of abandonment to the lessor.[94] Agreed standards for basing royalties cannot be changed.[95] Where the amount of royalty depends on the quantity of coal of a certain size mined, the methods of preparation used by and known to coal operators at the time the lease was executed will be presumed to have been in the contemplation of the parties, and the amount produced by those methods must determine the quantity on which royalty must be paid during the continuance of the lease.[96] The lessee may adopt new methods of preparation so as to meet the market demands for smaller sizes of coal, but, if he does so, must account and pay for the same proportionate part as the terms of the lease required under the method in use at the time it was executed.[97] Where the lease requires the lessee to work all the coal carefully and skillfully, to the extent at least of the minimum annual quantity specified, and to permit no waste in mining or preparing it, he is not entitled to credit for coal formerly abandoned as waste, or left in the mine because not marketable, which has subsequently become available.[98] If the lease requires the payment of a royalty on all coal over a certain size mined and removed, the lessee must account for royalty coal used by him for the generation of steam, in the absence of a provision to the contrary.[99] Lessors are not estopped from collecting royalties for coal mined and not accounted for by the receipt of the minimum royalty due under the terms of the lease in the absence of a showing that, at the time, they had knowledge of the mining of any excess of royalty coal over the amount paid for.[1]

Time as a condition.[2]—A provision requiring the lessee to pay an annual rental on failure to drill a well within a designated period is valid and enforceable.[3] Where the lessee agrees to drill a well within a specified time or thereafter pay for

gas from leased premises. Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339.

93. In action for breach of covenant of lease to furnish gas to heat and light house, where it is admitted that gas was not furnished and court determines as matter of law that defendant is bound to furnish it, plaintiff is entitled to judgment in the absence of a clear, distinct, and unequivocal denial that gas purchased by plaintiff was reasonably necessary to heat and light his premises, or that the price paid therefor was reasonable. Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339. Affidavit of defense held insufficient. Id.

94. Mere ceasing to operate wells is insufficient. Wilson v. Philadelphia Co. [Pa.] 60 A. 149. The question of notice is for the jury. Id. Evidence held to support finding that there was no notice. Id.

95. If the lease requires the lessees to pass all coal over a bar screen of a certain mesh and to pay royalty on all lump coal that does not pass through it, they have no right, without the lessor's consent, to substitute a shaker screen of a larger mesh. Drake v. Black Diamond Coal & Min. Co. [Ky.] 89 S. W. 545. Evidence held to show that bar screen produced more lump coal than shaker screen. Id. Since change was a violation of the contract, lessees cannot contend that shaker screen should be allowed to remain because they had expended large sums in making the change. Id. Evidence as to test making comparison between result of use of bar screen in adjacent mine and shaker screen put in by defendant held admissible. Id.

96. Amount so produced furnished basis of lessor's consideration for the lease. Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 A. 885.

97. Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 A. 885. Where lease provided for royalty on all coal which would pass over a five-eighths of one inch square mesh screen, and method of preparation was so changed that much larger quantity passed through such screen. Id. Evidence held to justify finding as to the proportion of waste and the quantity of coal for which defendant should account. Id. Where evidence showed that changed methods greatly diminished amount of coal on which larger royalty, and increased amount on which smaller one, was paid, held that, on suit for an accounting, the court should have determined the proportionate quantity of the different sizes produced by both methods, and that the evidence was sufficient to enable him to do so. Myers v. Consumers' Coal Co., 212 Pa. 193, 61 A. 825.

98, 99. Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 A. 885.

1. No accounts settled and no receipts given. Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 A. 885.

2. See 4 C. L. 667.

3. Gas lease. Indianapolis Gas Co. v. Pierce [Ind. App.] 76 N. E. 173.

further delay a quarterly rental until the well is drilled, the law implies a provision that the well must be drilled within a reasonable time at the option of the landowner.[4] The lessor may waive performance indefinitely, and if he accepts a valuable consideration for postponement is as much bound by it as if the end of the paid period was the time limit stipulated in the original contract.[5] If, after accepting a number of payments, the lessor desires to insist on the drilling of the well, he must give notice to the lessee to that effect, and cannot forfeit the lease until the latter has had a reasonable time thereafter in which to perform,[6] and the same is true if the lease provides that it shall continue in force, though the contemplated wells are not drilled or utilized, on payment of the well rental stipulated therein.[7] A refusal to accept a payment of rent operates as a notice to the lessee that the lessor objects to any further delay in the exploration and development of the land,[8] and the lessee thereupon becomes bound to proceed within a reasonable time to sink a well on the premises in question.[9] The failure of the lessee to commence operations after he has been notified by the lessor that the contract is at an end cannot be regarded as a lack of diligence resulting in a forfeiture.[10]

Forfeitures and cancellations and abandonment.[11]—In order to declare a forfeiture and re-enter on the premises without resort to the courts, the lessor must

4. New American Oil & Min. Co. v. Troyer [Ind.] 76 N. E. 253, rvg. [Ind. App.] 74 N. E. 37. A grant for a valuable consideration of all the oil and gas under certain premises with the right to enter thereon for the purpose of drilling and operating for oil and gas, excepting and reserving to the grantor a certain part of all the oil produced and saved from the premises, implies an engagement on the part of the grantee to develop the premises for oil and gas. Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N. E. 222. One dollar is a sufficient consideration and lease is not void for want of mutuality. Id.

5. New American Oil & Min. Co. v. Troyer [Ind.] 76 N. E. 253, rvg. [Ind. App.] 74 N. E. 37. Where the contract provides that the grant shall become void in case no well is completed within a specified time unless the grantee on demand shall pay a certain sum yearly to the grantor, the acceptance of such sum postpones the time for the performance of the implied agreement to develop the property so that it does not begin to run until the end of the year for which such payment is accepted. Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N. E. 222. A refusal to accept a payment for the next year does not eo instanti terminate the lease, but leaves the rights of the parties in regard to the implied agreement as they were when the lease was executed. Id.

6. Failure to drill well within period last paid for does not put an end to lessee's rights. New American Oil & Min. Co. v. Troyer [Ind.] 76 N. E. 253, rvg. [Ind. App.] 74 N. E. 37. Action of lessor in commencing suit to quiet title ten days after expiration of last quarter for which rent had been paid, without previous notice, held inequitable and unsustainable. Id. Land was leased on March 29, 1888, for 12 years and so long thereafter as petroleum, etc., could be produced in paying quantities "or the payments hereinafter provided for are made according to the terms and conditions attaching thereto," and lease further provided that lessee should commence operations within a year or "in lieu thereof, for delay in commencing such operations thereon, pay" a certain sum annually in advance until operations were commenced and a well was equipped, and that a deposit of the money in a certain bank should operate as a payment. No wells were in fact drilled, but the lessor received payments up to and including the year 1899, and rental for year ending March 28, 1901, was deposited without any notice that it would not be received or that lessor would insist on a well being drilled. On April 5, 1900, lessor notified lessee that lease had expired, and requested that it be canceled. Lessee did not comply with such notice, but continued to deposit payments until March, 1903. Held, that lessor could not maintain action commenced Feb. 13, 1903, without further notice. Indiana Natural Gas & Oil Co. v. Beales [Ind.] 76 N. E. 520, rvg. [Ind. App.] 74 N. E. 551.

7. Must notify lessee that he will refuse to accept payments in the future, and lessee then has a reasonable time in which to explore the premises. LaFayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 7.

8. Under lease providing that well should be commenced within a specified time or else that a specified yearly rental should be paid until well was drilled. Logansport & W. V. Gas Co. v. Seegar [Ind.] 74 N. E. 500.

9. Unexcused delay held unreasonable, and to justify lessor in commencing action to quiet title. Logansport & W. V. Gas Co. v. Seegar [Ind.] 74 N. E. 500.

10. Where lessor notified lessee that lease was terminated and that he would proceed to quiet his title, and that if lessee placed any stakes on the premises he would be guilty of trespass, he could not contend that time elapsing between date of notice and time of commencing suit was reasonable time in which appellant could have commenced operations. LaFayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 7.

be able to point out specifically some clear act in violation of the terms of the lease authorizing such forfeiture.[12] A general forfeiture clause is to be strictly construed for the benefit of the lessor, and the lease may be forfeited for nonpayment of rent in the absence of a stipulation making time of the essence of the contract, if, under all the circumstances, it would not be inequitable or unconscionable to do so.[13] Where the lease provides for the exploration of the premises within a certain time or for the payment of a certain sum quarterly in case of delay, the lessor has no right to resume possession until there has been a default in both particulars.[14] Where one grants and guarantees to another only the right to drill for oil and gas with a right of entry for such purpose only, subject to certain conditions, such right is an incorporeal hereditament incapable of livery of seisin, and hence there is no right of re-entry for breach of condition.[15] Acts unaccompanied by re-entry will suffice if there has been a breach and the lessee has never been put in possession.[16] The real consideration for oil and mineral leases is the development of the property in the near future.[17] Hence, if the lessee is not bound to do any particular amount of work on the premises or to commence work at any particular time, the agreement will be regarded as a mere license,[18] revocable at the will of either party;[19] but a lease for development on certain terms and operation on different ones may make the right of cancellation differ therewith.[20] The lessee is bound to de-

11. See 4 C. L. 669, 670.

12. Evidence held sufficient to show that complainant was justified in declaring a forfeiture. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

13. Rawlings v. Armel [Kan.] 79 P. 683.

14. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

15. Monaghan v. Mount [Ind. App.] 74 N. E. 579.

16. Where the lease provides for a yearly rental until a well is drilled, that a failure to pay the rental when due is to be construed by both parties as the act of the grantee for the purpose of surrendering the rights granted, that in default of rental payments the contract is to be null and void, and that the grantee may at any time reconvey and thereby render the grant void, and the grantee never makes any entry on the land, the grantor is not bound to accept the rental when tendered after it becomes due, and his refusal to do so is a sufficient declaration of his intention to regard the grant as void. Grantor never having parted with possession, it is not necessary for him to make an impossible re-entry. Grant becomes void by its terms for failure to make payment when due. Logansport & W. V. Gas Co. v. Null [Ind. App.] 76 N. E. 125.

17. Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253.

18. Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253. Joint lease by owners of adjoining tracts for 99 years for purpose of prospecting, boring, and excavating for oil, gas, etc., for the consideration of one dollar and certain royalties on all oil, gas, or minerals produced, each party to have one-third of the royalty accruing from the land of the other, and which did not bind lessee to do any work on the premises, held a mere permit or license. Id. Lease of mineral rights for 10 years whereby lessee is bound to commence operations within six months or pay a certain sum quarterly in advance for each additional three months such operations are delayed until an oil well is completed, and whereby gross yield of oil and gas is to be shared in certain proportions is not void upon its face for want of mutuality. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Delays in offering to pay rent held not to make contract void. Id. If rent is not so inconsiderable as to render it "vile" and a mere nothing, its insufficiency alone cannot be considered in suit for possession. Id. Consideration held sufficient. Id. Further provision giving lessee the right to cancel the lease at any time on payment of a certain sum is not such a potestative condition as renders the contract void under Civ. Code, art. 2035. Id. Insufficiency of such sum cannot be considered in possessory action if it is not so inconsiderable as to render it vile and a mere nothing. Id.

19. Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253. Where other owner thereafter enjoined original lessees from entering on his premises and then sold a part of his land to plaintiffs, held, that plaintiffs took title free from the first lease and were not affected by the subsequent compromise of the injunction suit, and the recognition by the owner of the original lease in a modified form. Id. Such a joint lease executed by adjoining landowners held abandoned and terminated by execution of new lease by one of them. Id.

20. Under a gas lease providing that it shall commence when signed and terminate when natural gas ceases to be used generally for manufacturing purposes in the county or on failure to pay the stipulated rental, and requiring the lessee to pay a certain sum yearly for each well drilled, or, if he fails to drill a well, a specified annual rent to be increased if no well is drilled in five years, the rights of the parties as

velop the property diligently and within a reasonable time, and a failure to do so operates as an abandonment.[21]

Under a provision requiring the operator to drill and complete other wells in case oil is found in paying quantities in a test well, the question whether oil is found in such quantities is to be determined exclusively by the operator acting in good faith and upon his honest judgment.[22] Such a provision requires the drilling of additional wells only in the event that oil is found in such quantity as would, taken in connection with other present conditions, induce ordinarily prudent persons engaged in like business to expect a reasonable profit on the full sum required to be expended in the prosecution of the enterprise.[23] Fraud on his part will not be presumed, but must be pleaded and proved.[24]

The question of abandonment is one of fact depending upon intention and conduct.[25] If the lease is to run for a specified time or as long as oil or other minerals are obtained in paying quantities, the lessee has the right to determine when he is no longer obtaining them in such quantities,[26] and, upon so determining, may abandon the contract.[27] If the leased land is in fact abandoned, the lease is subject to cancellation.[28] The mode of ascertaining and fixing exhaustion as a fact warranting abandonment may be stipulated.[29]

The burden is on the lessee to show facts overcoming any apparent ground of forfeiture[30] or breach of terms of the lease.[31]

Breaches may be waived[32] and the lessor may estop himself to object to the as-

to its continuance and determination are not the same before and after the development of the property. Lease runs from year to year. Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 659.

21. Bay State Petroleum Co. v. Penn Lubricating Co., 27 Ky. L. R. 1133, 87 S. W. 1102. Where lease recited consideration of $1, and provided only for payment of royalty, failure to continue search after first well was unsuccessful, held an abandonment. Id.

22. Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084.

23. In action to recover penalties for failure to drill additional wells, instructions authorizing recovery if oil was found in sufficient quantity to pay a profit, however small, in excess of the cost of pumping it, excluding the cost of sinking and equipping the well, held erroneous. Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084.

24. Under the pleadings, held error to submit question of whether oil was found in paying quantities to the jury. Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084.

25. Oil and gas lease. Evidence held to sustain finding of abandonment. Rawlings v. Armel [Kan.] 79 P. 683. Need not be by word of mouth, but may be inferred from his conduct. Bay State Petroleum Co. v. Penn Lubricating Co., 27 Ky. L. R. 1133, 87 S. W. 1102.

26, 27. Bay State Petroleum Co. v. Penn Lubricating Co., 27 Ky. L. R. 1133, 87 S. W. 1102.

28. Rawlings v. Armel [Kan.] 79 P. 683. Under an oil and gas lease providing that it shall become void if no well shall be completed within six months from its date, unless the lessee pays a certain sum in advance for each six months thereafter that such completion is delayed, the abandonment of the enterprise by the lessee after drilling an unsuccessful well within the period for which a payment is made, and the failure to make the advance payment for the next six months puts an end to the contract. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. Where similar oral contract was later entered into between the parties, and lessee built another well, but on finding it unprofitable stopped operations and removed its machinery, etc., and paid no money and did nothing further for more than seven months, held, that its rights under the second contract also ceased. Id.

29. A provision authorizing the lessee to cancel the lease if phosphate rock of a specified quality becomes exhausted before the end of the term, and that if the quality is at any time called in question by the lessee the same shall be referred to and settled by one of several named referees in a designated order makes a determination of the inferiority of the rock in the manner specified a condition precedent to the right of the lessee to terminate the contract on that ground. McGavock v. Virginia-Carolina Chemical Co., 114 Tenn. 317, 86 S. W. 380.

30. In a suit by the lessor to quiet title against the lessee, the burden is on the latter to prove tenders of rentals on which he relies. Oil and gas. Logansport & W. V. Gas Co. v. Seegar [Ind.] 74 N. E. 500.

31. In an action for royalties claimed to be due under a lease requiring the lessee to mine a certain quantity of ore each month provided there was and continued to be that much merchantable ore on the land capable of being mined at a reasonable cost, the burden is on the lessee to show that there was not any such ore on the land in order to excuse his default. Big Stone Gap Iron Co. v. Olinger [Va.] 51 S. E. 355.

32. Evidence held to show waiver of breaches of mining lease such as would have

signment of the lease.[33] The receipt of royalties is not a waiver of the continuing breach of the covenants of a lease,[34] nor is the receipt of royalties after the institution of a suit to recover the property.[35]

Reinstatement.—A lease which has, by its terms, terminated because the well actually ceased to be used as a gas well, is not revived by the subsequent discovery therein of gas in sufficient quantities for use, and its use.[36] The continued use of gas from the lessee's pipes by the lessor in accordance with the terms of the contract after the lessee has exercised its right to terminate the lease, does not impose on the latter the consequences of a part performance and prevent such termination from taking effect.[37] A lessee who forfeits his rights by failing to complete a successful well or to pay the stipulated rent within the stipulated time cannot renew them after such time by entering the land and commencing another well over the lessor's objections.[38] A subsequent tender of overdue rent will not restore the lessee's rights against the will of the lessor.[39] If the lessor, after an abandonment has taken place, acquiesces in a re-entry by the lessee, he is thereby estopped to deny the lessee's rights under the contract;[40] but such estoppel only prevents him from complaining of what the lessee is then doing, and, if the latter again abandons the property, does not preclude him from denying his right to return a second time.[41]

§ 8. *Working contracts.*[42]—An agreement between two or more persons to locate claims for the joint benefit of all is not within the statute of frauds and may be oral.[43] One party to such an agreement may compel the other to transfer to him his proportionate interest in any claim so located, or of the proceeds thereof,[44] upon payment of his share of the expense necessarily incurred in procuring and caring for the property.[45] One seeking to enforce such a contract must show, however, that he has complied with the agreements and conditions thereof on his part to be performed.[46] The ordinary rules of construction apply to grub-stake contracts.[47]

entitled plaintiff to a forfeiture. Myers v. Stone [Iowa] 102 N. W. 507. And see 4 C. L. 670.

33. Lessor held estopped to object to assignment of mining lease. Myers v. Stone [Iowa] 102 N. W. 507.

34. Not where ground of forfeiture is continued failure of defendant to mine in a workmanlike manner and to support surface. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

35. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

36. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

37. Where under the law of the case the lessee had a right to terminate the lease, a finding that after electing to do so it furnished free gas to the lessor as required by the lease, held not a finding of such part performance on the part of the lessee as prevented it from exercising its right of termination. Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 659.

38. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. Where lease was terminated by abandonment and failure to make required payments to keep it in force, subsequent parol agreement whereby lessee was permitted to renew operations on payment of back rentals on terms similar to those in original lease held not a waiver of the forfeiture but a new contract. Id.

39. Rawlings v. Armel [Kan.] 79 P. 683.

40, 41. Bay State Petroleum Co. v. Penn Lubricating Co., 27 Ky. L. R. 1133, 87 S. W. 1102.

42. See 4 C. L. 671.

43. Mack v. Mack [Wash.] 81 P. 707. Evidence held to show oral contract to prospect for mines, and to locate, hold, and work them for the joint benefit of all. Id.

44. Mack v. Mack [Wash.] 81 P. 707. Where defendant transferred claim to corporation, for a cash payment, and certain shares of its capital stock, held that plaintiff was entitled to one-third of such stock, which defendant would be regarded as holding in trust for him. Id.

45. Defendant held to have lien on stock for which claim was sold for one-third of the sum necessarily expended by him, and one-third of the value of his services in caring for, looking after, and managing the property. Mack v. Mack [Wash.] 81 P. 707.

46. Civ. Code § 1439. Cameron v. Burnham, 146 Cal. 580, 80 P. 929. Plaintiff and defendants entered into an agreement for purpose of leasing mining rights on certain land, each party agreeing to contribute a certain sum and to share in the profits in proportion to his contribution, it being provided that any one who did not pay when called upon should forfeit his interest. The right to mine on the property was procured, but plaintiff refused to pay and repudiated his contract. Held that he was not entitled to be decreed a part owner in a mine sub-

§ 9. *Mining partnerships and corporations.*—The ordinary rules apply for determining whether several persons working a mine are partners.[48]

A mining partnership differs from an ordinary partnership in that no contract between the partners is necessary to create it, and there is no delectus personarum.[49] A partner may sell his interest to whomsoever he wishes without the knowledge or consent of the other partners,[50] and without thereby dissolving the partnership.[51] When the members cannot agree, those having a majority interest control its management in all things necessary and proper for its operation.[52] In order that equity may decree a dissolution of the partnership and a sale of the property, the bill must show clear and good grounds therefor.[53]

A "mining" corporation has ordinarily no power to engage in manufacturing.[54]

§ 10. *Public mining regulations.*[55]—Matters relating to the liability of mine owners for injuries to their employes, including statutory provisions as to appliances and the like, are treated elsewhere.[56]

§ 11. *Statutory liens and charges.*[57]—Statutes in many states give liens to persons furnishing labor or materials for use in or about a mine or mill,[58] or for materials used in the construction of a well,[59] or to persons furnishing supplies to

sequently discovered by defendant, it making no difference whether agreement between defendants and the land owner was a lease or a "mining privilege," and the statute of frauds had nothing to do with the matter. Id.

47. Grub-stake contract held not breached by landing plaintiff at a particular point on the Siberian coast. Nielsen v. Northeastern Siberian Co. [Wash.] 82 P. 292. As in other contracts, prior negotiations are merged in written contract. Id.

48. See, also, Partnership, 4 C. L. 908. Where it appeared that two of the defendants had contracted with the third that when he had sunk a shaft on their property to a certain depth he was to have a half interest in the property, and that if during that time he struck ore on the first level he was to have a half interest in the net profits, instruction, in action seeking to hold them as partners for supplies furnished, that contract did not make them partners unless the two defendants accepted the work done thereunder by the third as a performance, and thereupon agreed with him that he should have the half interest, held erroneous, since no additional agreement was necessary. Tamblyn v. Scott [Mo. App.] 85 S. W. 918. Partnership might also result from sharing net profits of strike on first level (Id.), or from acts of the parties independent of the contract (Id.). Fact that contract required the defendant doing the work to pay for the supplies would not necessarily prevent them from being partners as to third persons without notice. Id. In action against defendants on an account for purchases of supplies made by one of them, instruction that if defendants were jointly engaged in mining on certain lots, and each was to share in the profits and losses according to their respective interests therein, then they were partners, though there was no express agreement that they should be partners or share in the profits and losses, held proper. Dale v. Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929. Evidence held insufficient to establish an oral mining partnership entitling plaintiff to an accounting for the proceeds of properties acquired by defendant. Thompson v. Walsh, 140 F. 83.

49. Depends only on ownership of shares. Blackmarr v. Williamson [W. Va.] 50 S. E. 254.

50, 51, 52. Blackmarr v. Williamson [W. Va.] 50 S. E. 254.

53. Allegation that there is a lack of harmony as to the further operating of a lease, held insufficient. Blackmarr v. Williamson [W. Va.] 50 S. E. 254.

54. While production of natural gas is "mining," yet mining company cannot manufacture artificial gas. And even the express power to "manufacture" natural gas into a domestic or fuel product gives no power to make artificial gas. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

55. See 4 C. L. 672.

56. See Master and Servant, 6 C. L. 521.

57. See 4 C. L. 672. See, also, Mechanics' Liens, 6 C. L. 451.

58. Under Cutt Comp. Laws Nev., §§ 3881, 3883, 3899, giving lien on mine for labor or materials used in construction of any building, or for material used in or about the mine, and on mill manufactory or hoisting works for labor or machinery, or materials for its construction or operation, and providing that lien shall attach to the land occupied by the building, and a convenient space about the same, or so much as may be required for its convenient use and occupation, held that lien for furnishing and installing machinery in mill did not extend to electric power plant situated at a distance from the mine and on land not connected therewith, though power for operation of mill is supplied by it. Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632. Lien held to extend to entire group of mines constituting property on which mill is situated, and to work the ores from which it was built. Id.

59. Complaint in action to foreclose mechanics' liens on a "well," alleging that materials were furnished a certain "oil de-

mining companies necessary to their operation.[60] As in the case of other lien statutes they will be liberally construed so as to give full effect to the remedy intended to be secured thereby.[61] In Oregon, one performing labor for a lessee has a lien on the leased property, unless the lease is recorded before the work is begun.[62]

In cases where the lien is given by the general mechanics' lien law, the method of foreclosure is the same as that prescribed for the foreclosure of other mechanics' liens.[63] The right to a lien is a privilege which may or may not be exercised, and hence it may be waived.[64] The filing of a lien within the prescribed time is a condition precedent to the preservation of the inchoate right of lien which the laborer has by reason of performing the work, and the lien is lost unless so filed.[65] As in other cases the time is reckoned by excluding the first day and including the last of the period prescribed.[66]

A substantial compliance with the statutory requirements as to the notice of lien is sufficient.[67] The lien notice must contain a true statement of the demand, after deducting all just credits and off-sets.[68]

In Oregon all persons personally liable for the payment of a sum due for labor performed in operating or developing a mine must be made parties to a suit to foreclose a lien therefor.[69] This provision is for the benefit of the mine owner and may be waived by him,[70] and a waiver results from his failure to demand that such persons be brought in.[71] In a suit to foreclose liens on leased property for debts contracted by the lessee, the burden is on the claimant to show that no payment has been made on account of the liens since their filing.[72] Where ownership by defendants is admitted and there is no issue as to the identity of the property, it is

velopment company" to be used in the "drilling, construction and operation" of said well, held not objectionable as showing that only materials furnished were machinery for the drilling and construction of an oil well, and hence, only lien law applicable is that relating to liens on mining claims which gives no lien for materials, even if oil wells are not within Code Civ. Proc. § 1183, giving lien to anyone furnishing materials to be used in the construction of any well, at least where no such objection was made in trial court. Clarke & Lacy Co. v. Inter Nos Oil & Development Co. [Cal.] 82 P. 51.

60. Lien given by Va. Code 1887, § 2485 (Code 1904, p. 1246), attaches at the time the supplies are furnished and not at the time of the filing and recording of the claim, which must, under Id., § 2486 (Code 1904, p. 1249), be done within 90 days after furnishing the last item, so that adjudication in bankruptcy against the debtor between the date of maturity of the last item of the account, and the filing and recording of the claim, does not destroy the claimant's right to priority in the distribution of the bankrupt's estate. Mott v. Wissler Min. Co. [C. C. A.] 135 F. 697.

61. Mott v. Wissler Min. Co. [C. C. A.] 135 F. 697; Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 F. 632; Castagnetto v. Coopertown M. & S. Co., 146 Cal. 329, 80 P. 74.

62. B. & C. Comp. § 5668. Lewis v. Beeman [Or.] 80 P. 417. Instrument held a lease and not a contract of sale. Id.

63. See Mechanics' Liens, 6 C. L. 611.

64. By failing to comply with statutory requirements. Horn v. U. S. Min. Co. [Or.] 81 P. 1009.

65. In Oregon must be filed with county clerk of county where the mine is situated within 60 days after he has ceased to labor therein. Horn v. United States Min. Co. [Or.] 81 P. 1009.

66. Horn v. U. S. Min. Co. [Or.] 81 P. 1009.

67. Notice stating the name of the reputed owner, who is found to be the true owner, and that labor was done at the request of a named person, who was then the superintendent of the company operating the mine, is sufficient under Code Civ. Proc. § 1187. Need not state the title of such company, or its relation to the owner. Castagnetto v. Coopertown M. & S. Co., 146 Cal. 329, 80 P. 74. Notice stating that labor was performed by the day, at a certain agreed price per day, between designated dates and that the amount claimed was justly due and owing, held to be a sufficient statement of the "terms, time given, and conditions of the contract." Id. Notice stating that work was performed on a certain copper mine, and claiming a miner's lien on said mining claim, held to sufficiently show that labor was performed "in a mining claim." Id.

68. Failure to give credit for groceries belonging to employer and sold by claimant, held to render notice insufficient. Lewis v. Beeman [Or.] 80 P. 417.

69. B. & C. Comp. § 5672. Lewis v. Beeman [Or.] 80 P. 417.

70. Lewis v. Beeman [Or.] 80 P. 417.

71. By not objecting to defect of parties, resulting from failure to join lessees for whom the labor was performed, until after the taking of the testimony. Lewis v. Beeman [Or.] 80 P. 417.

72. Claim disallowed where he failed to do so. Lewis v. Beeman [Or.] 80 P. 417.

unnecessary to introduce the record of the claims referred to in the lease and the lien notices, or certified copies thereof.[73]

In many states a reasonable attorney's fee is allowed on foreclosure.[74]

§ 12. *Mining torts.*[75]—The owner of a mine may recover damages for the act of another in wrongfully depriving him of possession.[76] Whether defendant's acts in mining ore belonging to another results in actual damage is immaterial, except as to the amount of damages which may be awarded.[77]

The owner of an interest in land from which oil is taken without his consent is entitled to a like interest in the oil produced, less his proportionate share of the expense incurred in producing, transporting, and preserving the same, and if sold, of the sale.[78]

The measure of damages for the conversion of iron pyrites necessarily removed in removing coal, which defendant has the right to remove, is its value at the mouth of the pit, less the cost of digging and separating it from the coal.[79]

In an action of trespass for the wrongful removal of coal underlying plaintiff's land, a survey of the mine should be granted on the application of the party out of possession for the purpose of disclosing the direction of the excavation and the quantity of coal extracted.[80]

§ 13. *Remedies and procedure peculiar to mining rights.*[81]—Trover will lie for the wrongful conversion of mineral severed from the earth by artificial causes,[82] but not to recover the value of mineral in deposit in the earth.[83] There can be no recovery of ore in specie, or of its value in an action of trover, when it has been taken from land in possession of defendant under claim and color of title asserted in good faith.[84]

Equity has jurisdiction to enjoin the commission of waste and the destruction of the property as a mining property, even though plaintiff is not in possession,[85] and, having obtained possession for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and remove a cloud upon the title, quiet title, and determine the right of possession.[86] Injunction will lie to prevent a life tenant from taking or granting to others a right to take underlying gas or oil, where the fee owner has not previously operated for them or granted to others the right to do so,[87] and to prevent trespass,[88] and is the only

73. Lewis v. Beeman [Or.] 80 P. 417.

74. Held that, on the record, the appellate court could not say that allowance of $75 for attorney's fees in each of 12 separate liens was an abuse of discretion. Castagnetto v. Coopertown M. & S. Co., 146 Cal. 329, 80 P. 74.

75. See 4 C. L. 661, n. 56 et seq.

76. On hearing to determine damages for wrongfully keeping plaintiff from possession of a mine, evidence held to justify finding that such dispossession extended to a certain date. Empire State-Idaho M. & D. Co. v. Hanley [C. C. A.] 136 F. 99.

77. Defendant held properly restrained, though he claimed that whatever ore he mined was left in tunnel or on the dump and the value of the mines was thereby increased. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

78. Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253.

79. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

80. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769. Evidence, in action by church trustees for trespass for removal of coal underlying the church property, held sufficient to sustain finding that title to land was in church. Id.

81. See 4 C. L. 673.

82, 83. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

84. Claim of ownership, by owner of surface, of body of ore within surface lines is presumed to be in good faith when made against owner of another surface claim. Question of title in such case is fundamental and cannot be litigated in a personal and transitory action. Ophir Silver Min. Co. v. Superior Court [Cal.] 82 P. 70.

85. Bill held sufficient. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279. Evidence held sufficient to sustain finding that mining operations were carried on in disregard of covenant in lease that land should be so supported that there would be no caving. Id.

86. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

87. Constitutes waste. Richmond Nat. Gas Co. v. Davenport [Ind. App.] 76 N. E. 525.

proper remedy in case a lessee passes coal over a different screen from that provided for by the lease.[89] On revocation of a license to extract ore from a mining claim, the licensor is entitled to an injunction against insolvent licensees who refuse to surrender the claim, and continue and threaten to continue to mine ore, thereby destroying the substance of the estate.[90] Where, at the instance of the owner of the underlying granite, the owner of the surface is enjoined from interfering therewith, it is proper to also enjoin the owner of the granite from interfering with the rights of the surface owner.[91] Persons adjudged to have a right to an interest in a claim as tenants in common, contingent on the payment of a certain sum to the other owners, are properly enjoined from extracting ore therefrom if they do not pay or tender such sum when the other owners seek to oust them,[92] and such injunction does not become wrongful, so as to entitle them to sue on the injunction bond, by their subsequent payment at the conclusion of the suit.[93]

In a possessory action the plaintiff is bound to prove his possession and its disturbance by defendant, and the question of the latter's title, whether as owner or lessee, can be made an issue only by consent and to the extent of the consent.[94] A lessor cannot maintain a possessory action against the lessee unless the lease is void,[95] and a direct action must be brought to set aside a lease which does not contain in express terms a clause authorizing a forfeiture.[96]

In some states good title and actual possession are necessary to the maintenance of a bill in equity to remove a cloud on the title to land.[97] In some states possession is not necessary to the maintenance of a suit to quiet title,[98] while in others it is,[99] and the latter rule generally prevails in the Federal courts.[1] The right of action given by the laws of some states to quiet title to realty without a previous adjudication of the title in an action at law, and without reference to the possession, is, however, enforceable by a suit in equity in the Federal courts when the complainant is in possession and the defendant is out of possession, or where both parties are out of possession, there being in either case no adequate or complete remedy at law.[2] To

88. Finding that defendant had unlawfully ousted plaintiff and taken possession of his property, and decree enjoining him, held sustained by the evidence. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517. Where defendant only claimed to own two-thirds of the mineral and timber on certain land held error, in suit for damages for destroying timber on the boundary thereof and to restrain further trespass, to give defendant all the mineral and timber in and on the entire boundary. Browning v. Cumberland Gap Cannel Coal Co. [Ky.] 89 S. W. 267.

89. Both on account of the multiplicity of actions that would otherwise be required, and because of the impossibility of arriving at a correct estimate of the amount of damages sustained. Drake v. Black Diamond Coal & Min. Co. [Ky.] 89 S. W. 545. Held impossible in such case to fix plaintiff's damages. Id.

90. Clark v. Wall [Mont.] 79 P. 1052.

91. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

92, 93. Yarwood v. Cedar Canyon Consol. Min. Co., 37 Wash. 56, 79 P. 483.

94, 95. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

96. Forfeitures strictly construed in possessory action. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

97. Owner of surface has no possession of coal which has previously been severed by deed, and no title thereto. Wallace v. Elm Grove Coal Co. [W. Va.] 52 S. E. 485.

98. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

99. An action will lie to quiet the title of an owner of land as against a claim under a contract purporting to grant the oil and gas under its surface, with the right to enter for the purpose of seeking and taking the oil and gas, where such claim is unfounded because of the original insufficiency of the contract or because of the termination of the rights and interests created thereby in some manner recognizable as sufficient to work a determination of such rights and interests. Monaghan v. Mount [Ind. App.] 74 N. E. 579.

1. The surreptitious running of a drift from one claim underneath the surface of an adjoining one does not constitute such possession of the latter as will sustain an equitable suit to quiet title against one in open and adverse possession of the surface and of the workings therefrom, both because it is acquired secretly by trespassing and unfair means, and because it is not actual or constructive possession of the whole claim. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

2. Right of action given by Utah Rev. St. 1898, §§ 2915, 3511. United States M. Co. v.

enable the court to quiet title to land or to adjudge a forfeiture of an interest therein under a lease or a grant, or to enforce a conveyance of land, the complaint must describe the property with certainty and exactness.[3] So too, the evidence must show the description of the property with certainty.[4] In a suit to quiet title to a mining claim, plaintiff makes out a prima facie case by proof of his citizenship, the discovery of mineral on the land, and a location according to law, and is not called upon to make further proof that the land was unoccupied mineral land of the United States.[5] The burden is then upon defendant to show that the location under which he claims is prior in time and superior in right.[6] If defendant shows a valid prior location, plaintiff may then show that the claim became subject to relocation by reason of defendant's failure to do the required assessment work, though the complaint contains no allegations of forfeiture of abandonment.[7] The defense of forfeiture of the interest of a co-owner, failing to contribute to assessment work by proceedings for that purpose under the Federal statutes, is an affirmative one, and must be pleaded where the opportunity to do so is afforded.[8] In a suit to quiet title to ores in a vein, to which plaintiff claims extralateral rights, the parties are not entitled, as a matter of right, to a trial by jury.[9] In a suit to quiet title and for an injunction and damages, plaintiff is entitled to a jury trial on the issue of ownership when properly raised by the pleadings, and their general verdict is conclusive on the court, except as he has power to set it aside and grant a new trial.[10] Where plaintiff claims ownership and right to possession and prays that he be adjudged to be such owner, and defendant denies such ownership and claims ownership in himself, the issue of ownership is presented, and the jury having found for plaintiff, judgment is properly entered accordingly.[11] The dismissal of a bill to quiet title to a mining claim does not carry with it the dismissal of a cross-bill alleging facts not alleged in the original bill, which are directly connected with the subject-matter of the original suit, and praying affirmative, equitable relief directly connected with and arising out of the matters of the original suit and germane to the same.[12]

Lawson [C. C. A.] 134 F. 769. Principal object of suit being to obtain a determination of defendants' adverse claim to the remaining ore bodies, and not merely to recover possession of the workings through which defendants have removed ore, or the value of the ore removed, and complainant being in possession of such remaining ore bodies, and defendants out of possession, held that complainant had no adequate remedy at law. Id.

3. In suit to quiet title against oil and gas lease which required lessee to complete a well within every period of 90 days from the completion of the first well, if it proved to be a paying one, or to surrender the lease, excepting ten acres for each paying well, complaint held insufficient in failing to state facts which would enable the court to describe such ten acre tracts to be excepted, and hence to describe any tracts to which it could quiet the title. Monaghan v. Mount [Ind. App.] 74 N. E. 579.

4. Title cannot be quieted where contract does not itself furnish any description of ten acre tracts not sought to be forfeited, or of remaining land, and evidence does not show any method or agreement by which parties could determine such facts. Jones v. Mount [Ind. App.] 74 N. E. 1032.

5. Presumption is that all public land is unoccupied, and plaintiff need not prove, in first instance, that defendant's prior location was abandoned or forfeited by failure to do required assessment work. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

6, 7. Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

8. Complainant held in no position to claim prejudice, by reason of failure of cross-bill to set up such forfeiture, where original bill to quiet title alleged that defendant claimed title by virtue of forfeiture proceedings alleged to be void, and proofs were taken on that issue without objection. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

9. Suit to quiet title and for an injunction. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

10. Under Code Civ. Proc. § 592, providing that in actions for recovery of specific real or personal property, issues of fact must be tried by jury. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

11. Under Code Civ. Proc. § 580, providing that the court may grant any relief consistent with the case made by the complaint and embraced within the issue. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

One seeking in a court of equity to recover an interest in mining property, of which he claims to have been deprived through fraud, must act promptly and without unreasonable delay,[13] and must establish such fraud by clear proof.[14]

Where no lien is reserved to secure the payment of royalties under a mining lease, the lessor is not entitled to maintain a bill in equity to declare and enforce a prior lien on the property of the lessee in the hands of his assignee for creditors, but his remedy is by an action at law.[15]

One who has relocated a claim may maintain ejectment against a prior locator, entering on the premises for the purpose of doing assessment work, to determine his rights therein.[16] In ejectment to recover possession of a mining claim where the sole issue raised by the pleadings is one of forfeiture of plaintiff's claim for failure to do the required assessment work, plaintiffs cannot, after issue is joined and the case is before the jury, rely on adverse possession.[17] A claim to recover treble damages for wrongfully mining and converting coal on another's property, and single damages for injuries to the mine caused by negligence in mining the coal so removed, may be joined in one action where both grow out of the same trespass.[18] One may show title to a mineral interest in land by showing an unrestricted title to the land wherein the mineral is contained.[19]

An action to recover merely the value of ore or timber removed from the land by one having no right thereto is transitory, notwithstanding the fact that plaintiff may be compelled to prove title to the land, and any court whose process will reach the persons of the defendants has jurisdiction thereof.[20] If, however, recovery is sought for injury to the freehold, the action is local, and is only cognizable by the courts of the state where the land is situated.[21]

The usual rules of pleading and evidence apply in actions for damages for trespass to mineral lands,[22] the conversion of minerals,[23] to recover possession of land,[24] to recover royalties,[25] suits for the cancellation of leases,[26] to quiet title,[27]

Claim for damages cannot affect the result of the trial of the issue of ownership, particularly where none are awarded. Id.

12. Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 F. 838.

13. Equity rule requiring prompt action is peculiarly applicable, where title to mining property is involved, because of its fluctuating and speculative character. Hall v. Nash [Colo.] 81 P. 249. Plaintiff, who was stockholder in mining company, held barred by laches from objecting to acts of its officers in surrendering lease and obtaining other leases for their personal benefit. Id.

14. Hall v. Nash [Colo.] 81 P. 249. Evidence held insufficient to show that surrender of lease by company, in which plaintiff was a stockholder, was procured through fraud, but to show that plaintiff in effect consented to the surrender by failing to make payments for his stock when notified to do so. Id.

15. For royalties not paid by lessee and those not paid by assignee after taking possession. Etowah Min. Co. v. Wills Valley Min. & Mfg. Co. [Ala.] 39 So. 336. Code 1896, §§ 4183, 4184, authorizing proceedings in chancery against trust estates for services rendered to, or debts incurred by, the trustee if he has become insolvent, does not apply, particularly where there is no allegation of insolvency. Id.

16. Zerres v. Vanina, 134 F. 610.

17. White River Min. & Nav. Co. v. Langston [Ark.] 88 S. W. 971.

18. Amendment to statement of claim held properly allowed. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

19. Granite. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

20. Ophir Silver Min. Co. v. Superior Court [Cal.] 82 P. 70.

21. Action for wrongful removal of ores, in which injunction and accounting was sought, held local. Ophir Silver Min. Co. v. Superior Court [Cal.] 82 P. 70.

22. In action to recover treble damages for unlawfully mining coal on another's land, statement of claim held not broad enough to admit evidence to show that defendants, in mining coal on their own land, violated Act June 2, 1891 (P. L. 176), art. 3, relating to barrier pillars between adjoining mines. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

23. Complaint held to state cause of action for conversion of natural gas in pipe line, at least when first questioned on appeal. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15.

24. Affidavit made by one under whom defendant claimed, while such person was in possession of the land, wherein he admitted that he did not own the "rock or granite" interest therein, held not rendered inadmis-

and for injunctions.[28] So also the ordinary rules as to instructions are applicable.[29]

On an issue as to the value of assessment work, the jury may be allowed to view the premises,[30] and they may use the knowledge so acquired in understanding, applying, and weighing the evidence.[31]

A ruling of a state court necessarily involving a denial of rights claimed under the Federal statutes, authorizing the relocation of forfeited claims, raises a Federal question so as to authorize a writ of error from the Federal supreme court.[32]

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sible because affiant was dead, nor because it was used in previous litigation concerning the property to which defendant was not a party. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. On the issue of who owned the granite in a certain lot of land, testimony of a witness that granite belonged to person who quarried it held incompetent. Id.

25. In suit to recover royalty under mining lease making no requirements as to the quality of the ore to be taken, evidence on that point held properly excluded. Brooks v. Cook, 141 Ala. 499, 38 So. 641. In suit to quiet title, evidence as to ownership and possession held to support verdict and judgment for plaintiff. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

26. In an action for cancellation of oil and gas lease on ground of abandonment and nonpayment of rent, question as to purport of extensions of time to commence operations held properly excluded, the extensions being in writing. Rawlings v. Armel [Kan.] 79 P. 683. Question as to results of drilling on land other than that in controversy, and after the rights of the parties became fixed, held properly excluded. Id. Question as to whether lessee had abandoned lease held improper, as usurping the functions of the judge. Id.

27. Pleading: An allegation in a complaint in a suit to quiet title against an oil and gas lease that defendant's claim is without right, and unfounded, and a cloud against plaintiff's rights, is good on demurrer. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. An allegation that complainant is the owner of the claims of which the ore bodies in dispute are a part, and in possession of them, and engaged in working them as one property for mining purposes, is a sufficient allegation of his possession of the ore bodies as well as of the surfaces of the claims. United States M. Co. v. Lawson [C. C. A.] 134 F. 769. A further allegation that defendants, through underground workings, have wrongfully entered the ore bodies and extracted ore therefrom, and are threatening to extend such workings and to continue to extract ore, even if deemed an admission of allegation of an ouster or dispossession of the complainant in respect of the ore bodies actually embraced in defendant's underground workings, leaves the allegation of complainant's possession unimpaired as to ore bodies not penetrated by defendant and remaining in place and undisturbed. Id.

Evidence: In suit to quiet title as against an oil and gas lease, question as to amount expended in constructing three wells held properly excluded, where evidence showed that only two had been drilled before the commencement of the suit. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. In a suit to quiet title to claims where issue was the validity of an alleged prior location, decree in former suit adjudging it invalid held admissible, the parties to both being in privity. Bonanza Consol. M. Co. v. Golden Head M. Co. [Utah] 80 P. 736.

28. A bill to enjoin a lessee from committing waste and destroying the property as a mining property, and to cancel the lease as a cloud on the lessor's title, is not objectionable as being a bill to enforce a forfeiture, where it is further alleged that complainant has already declared a forfeiture for breach of conditions before filing the bill. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279. Such a bill is not demurrable on the ground that complainant has an adequate remedy at law by an action of forcible entry and detainer. Such remedy would not be as complete or efficient, since it would not prevent extraction of ore and removal of earth, or the continuous cavings of the surface. Id. Complaint in suit by lessees, to enforce their rights in gas well, held defective in failing to state facts showing that the lease had not expired, or that it was in full force and effect, or that plaintiffs had not parted with their interest in the premises. Shenk v. Stahl [Ind. App.] 74 N. E. 538.

29. In action to recover royalties under a mining lease, where evidence showed that lease was abandoned because land did not contain merchantable ore capable of being mined at a reasonable cost, and sole question was whether the lessee made a bona fide effort to discover and mine the ore, instructions authorizing a consideration of the question whether lessee rescinded contract under a clause authorizing it to do so in any event, on payment of a year's royalty, held erroneous, there being no evidence tending to show such a rescission. Big Stone Gap Iron Co. v. Olinger [Va.] 51 S. E. 355. Requested instruction that if cost of mining on leased premises exceeded cost at other mines, jury could find from that fact that such cost was not a reasonable one, held properly refused as leaving out of consideration the difference that might exist in the known conditions in such other mines. Id. Where lease required certain amount of ore to be mined each month if merchantable ore capable of being mined at a reasonable cost was found on the land, requested instruction, limiting the jury to a consideration of expert evidence on the question of merchantableness, held properly refused. Id.

30, 31. McCormick v. Parriott [Colo.] 80 P. 1044.

MISTAKE AND ACCIDENT.

§ 1. *Definitions; elements.*[33]—A mistake of law is the misapprehension of a principle of law and the failure of the party to appreciate his rights under that principle.[34] A mistake of the law of a foreign country, or even the misapprehension of the private statutes of a state are not mistakes of law, but mistakes of fact.[35] Ignorance of the facts on both sides is not a mistake. There must be a positive belief, shared by both parties, either that something is true which is not true in fact, or that something is untrue which is true in fact.[36] The codes of some states define mistake of fact.[37]

§ 2. *Relief against.*[38]—Relief is always granted in cases of mutual mistake, either of fact or of mixed law and fact;[39] but neither law nor equity will relieve against mistakes unless they are mutual,[40] except where the mistake goes to the subject-matter of a contract or is essential to its terms,[41] or there is a mistake on one

32. Decision that statute of limitations in regard to adverse possession of realty operates to defeat an action brought under U. S. Rev. St. § 2326, to try title to conflicting mining claims in which defeated party relies on relocation under Id. § 2324, where court treated as irrelevant and immaterial evidence tending to show that premises in dispute were embraced in the forfeited location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the conflicting locations almost up to the relocation. Lavagnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119. Federal question is adequately presented where record clearly shows that trial court considered that unsuccessful party was claiming rights under § 2326, and highest state court necessarily acted upon that assumption in delivering its opinion. Id.

33. See 4 C. L. 674.

34, 35. Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615.

36. Landreth v. Howell, 24 Pa. Super. Ct. 210. Where a lower rate than was intended by a railroad company was offered by its agent, who was misled by an erroneous telegram received from the company, if there was no error on the face of the message and the shippers accepted it in good faith, there was a binding contract. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469.

37. Rev. Civ. Code, § 1206. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. Civ. Code, § 3853, Rev. Codes 1899. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

38. See 4 C. L. 675.

39. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028. A settlement between partners, whereby one was paid more for his interest than he was entitled to, through errors made by the bookkeeper whom both trusted to make the computation, was reformed on the ground of mutual mistake. House v. Wechsler, 93 N. Y. S. 593. Where, by mistake of defendant's agent, more land was described in a contract of sale than was intended to be conveyed, held, that there was a mistake for which equity would either reform or rescind the contract as circumstances might require. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405. Where, after discovering the mistake, defendant proposed its correction by the acceptance of a deed for the land intended to be conveyed only, and plaintiff made no direct answer, but paid the balance of the purchase price, accepted the deed offered, and his conduct was calculated to induce a belief that he had assented to defendant's proposal, and to cause the latter to forego resort to equitable relief, held, that he would not be allowed to deny that he had accepted such proposal, and could not recover damages for breach of the contract. Id. A settlement of damages for injuries received, executed under mutual mistake of both parties that the injuries were not serious, will be vacated. Great Northern R. Co. v. Fowler [C. C. A.] 136 F. 118.

40. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463. Reformation of a written instrument will be decreed only where the mistake is mutual. Fritz v. Fritz [Minn.] 102 N. W. 705; Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. An insurance policy cannot be reformed on the ground of a mistake in the building insured, where the evidence shows that the agent examined and the company intended to insure the building actually described, although the owner intended to have another building insured. Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589. Equity will not afford relief for the mistake of one party to a contract. Landreth v. Howell, 24 Pa. Super. Ct. 210.

41. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028. An administrator's sale will be set aside at the instance of the purchaser, where it did not include a tract of land and a building, which had always been used as a part of the premises, which the purchaser had good reason to believe were included and without which the premises sold could not be used to advantage. Biddison v. Aaron [Md.] 62 A. 523. Where the wife's land, deeded by the husband and wife as security for a loan, was reconveyed by mistake to the husband, they not under-

side and fraud or inequitable conduct on the other.[42] The courts, however, may decline to enforce the execution of a contract although the mistake is confined to the party refusing to perform,[43] provided it is such a mistake as furnishes a good defense,[44] and it can be corrected without injustice to the other party,[45] and the party seeking the rescission or asserting the mistake has not been guilty of such negligence or laches as to prevent his doing so.[46] Equity will not grant relief for the mistake of one party resulting from his own negligence,[47] and where it could have been avoided by reasonable diligence.[48] Thus, failure to read a written instrument executed by a party precludes relief,[49] unless he was unable to read, or the other party was guilty of fraud.[50] Still this is not a hard and fast rule, but must in each case depend upon the attending circumstances.[51] And mere failure to avail one's self of the means of knowledge does not bar relief from mistake, where there is no neglect of a legal duty.[52]

For a mistake of law alone there is generally no relief.[53] Mistake of law is not

standing the transaction, her grantors were entitled to hold the land as against the husband's judgment creditor. Huot v. Reeder Bros. Shoe Co. [Mich.] 12 Det. Leg. N. 98, 103 N. W. 569. Where a mortgagee foreclosed and in good faith bid in the property and went into possession in ignorance of the existence of children of the deceased mortgagor, his mistake was one for which equity would grant relief. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

NOTE. Rescission for unilateral mistake: The plaintiff by mistake put in a lower bid for a contract than he had intended making. The defendant accepted the bid, without notice of the mistake. Held, that equity will rescind the contract. Board of School Com'rs v. Bender [Ind. App.] 72 N. E. 154. Equity will give rescission for a unilateral mistake against a donee. Andrews v. Andrews, 12 Ind. 348. In an analogous case, rescission has been granted of a conveyance in which by a unilateral mistake the grantee is getting what he did not expect, and what the grantor clearly did not mean to convey. Brown v. Lamphear, 35 Vt. 252. Such relief may also be had where the defendant in accepting an offer of conveyance knowingly took advantage of the plaintiff's error. Garrard v. Frankel, 30 Beav. 445. But with these exceptions, the great weight of authority is that equity will not give rescission for a mere unilateral mistake. Moffett, etc. Co. v. Rochester, 91 F. 28. Contra. Harris v. Pepperell, L. R. 5 Eq. 1 (semble). Much may be said in favor of the exercise of the jurisdiction to rectify mistakes in a case where nothing has been done under a hard bargain which the plaintiff did not intend to make; but the difficulty of deciding what is a sufficiently damaging mistake, and the fact that a door would be opened to the admission of all manner of excuses for improvident contracts, as a matter of policy, perhaps justify a denial of relief.—18 Harv. L. R. 624.

42. Fritz v. Fritz [Minn.] 102 N. W. 705; Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463.

43. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469.

44. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Where the vendor was maintaining a bulkhead erected without right on land not owned by him and the vendee honestly believed that he would have the use and enjoyment of the same, it was held to be a defense to a bill for specific performance. Cawley v. Jean [Mass.] 75 N. E. 614. But the burden is on the defendant to make out such defense. Id.

45. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469.

46. As to mistake as furnishing a basis for defense or for equitable relief, see Civ. Code 1895, §§ 3535, 3660, 3981-85, 3974. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469.

47. Snyder v. Phillips, 25 Pa. Super. Ct. 648; Fritz v. Fritz [Minn.] 102 N. W. 705. Section 1206, Rev. Civ. Code. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22.

48. Defendant sold land to plaintiff, and under the impression that all the pine had been cut off, struck out of the printed form of contract the clause reserving pine and mineral rights. Held, that it could not rescind the contract for mistake. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028.

49. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328. Plaintiff signed a gas lease without reading it. Snyder v. Phillips, 25 Pa. Super. Ct. 648.

50. Where an illiterate man, relying upon another, was induced to sign a note and mortgage for more than he supposed it to be and more than he owed. Ray v. Baker [Ind.] 74 N. E. 619.

51. Where the grantor relied on the information of his attorney, who said that the deed was "all right and according to a memorandum" which the grantor had furnished, he was not guilty of such negligence in failing to read the deed as to preclude reformation on account of mutual mistake. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539.

52. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

53. A wife who signs a trust deed which is explained to her cannot have it set aside merely because she did not understand its legal effect. McDaniels v. Sammons [Ark.] 86 S. W. 997. Pavement contract made under the mistaken idea that certain acts amendatory of the charter were valid, held void, and plaintiff not entitled to recover balance

of such nature as to be equivalent to that lack of notice essential to make one a bona fide purchaser.[54]

Money paid under a mistake of fact may be recovered,[55] but not where plaintiff delays until rights of other parties have become fixed.[56] And the fact that the person making the payment has the means of information at hand and overlooks the same inadvertently is immaterial if the party receiving the money is not entitled to it.[57]

Mistakes in the records and proceedings of courts may be corrected, if no one was misled or injured by them.[58] The supreme court may recall a mandate issued through mistake of fact.[59] Although generally a judgment by a court of competent jurisdiction, rendering a question res judicata between the parties, cannot be reexamined in the court of claims in a case referred under the Tucker Act,[60] yet where it is clearly shown that a mistake in the former proceedings occurred, materially affecting the judgment, and the other court has lost jurisdiction of the case, the court of claims may consider the question.[61]

§ 3. *Procedure to obtain relief.*[62]—It is the peculiar province of courts of equity to relieve from mistakes and omissions in contracts.[63] Where a mortgagee forecloses and in good faith purchases and goes into possession in ignorance of the existence of the children of the deceased mortgagor, his proper course to correct the mistake is to file a petition for vacation of the proceedings and for leave to file an amended complaint, making the children parties.[64]

It must be alleged that the mistake existed when the agreement sought to be annulled or avoided was made.[65] A pleading, based on the theory that an agree-

due. City of Plattsmouth v. Murphy [Neb.] 105 N. W. 293. If one, with knowledge of the facts but by mistake of law, regards his title to real estate better than another's, he cannot claim for permanent improvements made thereon. Yock v. Mann [W. Va.] 49 S. E. 1019.

For discussion of mistake of law as a ground for relief in equity, see 5 C. L. 1153.

54. Dictum in German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

55. Money paid to defendant as attorney for the person entitled to it, after the relationship of attorney and client had been terminated. Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615. Interest paid on note and mortgage, the payment of which had been assumed under the honest belief that the incumbrance was valid and the payer's title to the property was good could be recovered as a counterclaim in an action on the note. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22.

56. Where in perfect good faith on both sides a master in partition sold a tract of land, according to the description in the ancient title papers and said to contain a certain amount of land, at a fixed price per acre, and no complaint of shortage was made for about a year, after the master's report was filed and the money paid to the parties entitled to it, the purchaser could not recover in assumpsit for the deficiency, which was less than ten per cent. Landreth v. Howell, 24 Pa. Super. Ct. 210.

57. Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615.

58. See, also, Judgments, 6 C. L. 214. Where the petition for the incorporation of a borough was directed inadvertently to be filed in the office of the prothonotary instead of that of the clerk of the quarter sessions, the court could correct the error. La Porte Borough, 26 Pa. Super. Ct. 333.

59. See, also, Appeal and Review, 5 C. L. 121. Where by mistake of fact a stipulation for the dismissal of an appeal as to one of the parties was signed, the supreme court has power, during the term, to recall its mandate after its transmission to the trial court. The stipulation was signed upon the false statement of the party that he had settled all matters with appellant. Livesley v. Johnston [Or.] 82 P. 854.

60. Act of March 3, 1887 (1 Supp. Rev. St. 559). Le More & Co.'s Case, 39 Ct. Cl. 484.

61. By mistake the clerk omitted a portion of the evidence on file, from the printed record, and the court would have reviewed its decision had the error been discovered and motion made during the term. Le More & Co.'s Case, 39 Ct. Cl. 484.

62. See 4 C. L. 676.

63. Where the right to recovery depends upon the date of the instrument sued on, a court of law could not disregard the day on the ground that it was erroneous, but a reformation in equity was necessary. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n, 93 N. Y. S. 916.

64. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

65. An answer which alleges that certain timber was bought, but, by mutual mistake of the parties and of the scrivener, only a part of the timber was specified in the agreement, in effect alleges that the mistake existed at the time the agreement was made. Doell v. Schrier [Ind. App.] 75 N. E. 600.

As to method of pleading accident or mis-

ment had been incorrectly reduced to writing and was signed without reading, which does not allege any excuse for such failure to read it, or that it was incorrectly read to the signer, fails to show any reason for rescinding the agreement.[66] An allegation that plaintiff entered into a contract through mistake superinduced by defendant's conduct presents an issue of fraud only and not of mistake.[67]

To alter a written contract on the ground of mistake, the evidence must be clear, precise and indubitable,[68] and must show that the mistake was shared by the defendant or was known to him.[69] Mere preponderance of testimony is not sufficient,[70] but the law does not require proof so convincing as to leave no doubt resting on the minds of the jurors; it is enough if there be evidence to satisfy an unprejudiced mind beyond reasonable doubt.[71]

Evidence of a parol agreement is admissible on the issue of mistake, though the agreement itself would have been invalid because not in writing.[72]

MONEY COUNTS; MONEY LENT; MONEY PAID; MONEY RECEIVED; MONOPOLIES; MORTALITY TABLES, see latest topical index.

MORTGAGES.

Scope of topic.—This article is devoted to the mortgage as an instrument and the substantive rights growing from it. The procedure by which mortgages are foreclosed[73] has been fully treated in an earlier topic. The doctrine of notice and

take in equity, see Fletcher's Equity Pl. & Pr. p. 130.

66. Hoerger v. Citizens St. R. Co. [Ind. App.] 76 N. E. 328.

67. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463.

68. Snyder v. Phillips, 25 Pa. Super. Ct. 648. Conflicting evidence held insufficient to sustain a decree for the reformation of the description in a deed for alleged mistake. Heffron v. Fogel [Wash.] 82 P. 1003. Where it was claimed that parties were mistaken in supposing that a certain mortgage was paramount to the homestead claim when it was not, because of an alleged fatal defect in the acknowledgment, proof of a mere unsubstantial clerical error therein, was not sufficient to establish the claim. Reed v. Bank of Ukiah [Cal.] 82 P. 845.

69. Evidence insufficient to show that the other party had knowledge of plaintiff's mistake in the value of stock transferred by him in exchange. Wilson v. Wyoming Cattle & Investment Co. [Iowa] 105 N. W. 338.

70. Fritz v. Fritz [Minn.] 102 N. W. 705.

71. Evidence of the omission by mistake of the words "per annum," in the statement of rent in a gas lease, held sufficient. Snyder v. Phillips, 25 Pa. Super. Ct. 648.

72. Where it was claimed that, by mistake, notes given in settlement of an indebtedness included interest in excess of seven per cent. for which there was no written agreement, and hence that a judgment entered thereon by consent should be set aside, evidence of a parol agreement to pay such excess held admissible to show that there was no mistake, though such agreement was invalid. Reed v. Bank of Ukiah [Cal.] 82 P. 845.

73. See Foreclosure of Mortgages on Land, 5 C. L. 1441.

the operation of the recording acts,[74] the application of the statute of frauds,[75] the effect of a mortgage as an incumbrance,[76] and the purchase of land subject to mortgage,[77] are elsewhere treated. Mortgage within this topic means only those of land or interests therein.[78]

§ 1. *Nature and elements of mortgages.*[79]—A mortgage is a conveyance by way of pledge to secure the payment of a debt[80] or obligation;[81] hence the relation of debtor and creditor must ordinarily exist between the parties.[82] A mortgage may be made to secure future advances.[83] It is only collateral security and a satisfaction of it is not a discharge of the obligation of the contract secured unless the debt is satisfied.[84] The fact that a mortgage is void does not nullify the obligation of the contract secured,[85] and an attempted foreclosure of an invalid mortgage does not extinguish the debt.[86] No particular form of words is necessary to create a mortgage,[87] and the fact that a certain instrument is a mortgage may be established be parol evidence.[88] In most states it does not alienate an estate,[89] but creates a mere lien.[90] A parol trust may attach to a mortgage that the mortgagee shall hold it in trust for his own benefit and for the benefit of another.[91]

Property subject to mortgage.[92]—It may be said that any estate in land may be mortgaged, hence an easement is a mortgageable interest.[93] A purchaser in a conditional sale[94] or a vendee in a contract of sale who has paid a portion of the purchase price[95] has a mortgageable interest. A mortgage may cover after-acquired property[96] and crops not in esse may be the subject of an equitable mortgage and

74. See Notice and Record of Title, 4 C. L. 829.

75. See Frauds, Statute of, 5 C. L. 1550.

76. See Covenants For Title, 5 C. L. 875; Vendors and Purchasers, 4 C. L. 1769.

77. See Vendors and Purchasers, 4 C. L. 1769. See, also, post, § 10.

78. See Chattel Mortgages, 5 C. L. 574; Railroad Mortgages, see Railroads, 4 C. L. 1181.

79. See 4 C. L. 678.

80. See Cyc. Law Dict., "Mortgage." Under Civ. Code, §§ 2042, 2044, defining a mortgage and declaring every transfer other than in trust, executed as security, to be a mortgage an instrument reciting the existence of a debt and conveying land to secure its payment construed to be a mortgage though designated a trust deed. Langmaack v. Keith [S. D.] 103 N. W. 210.

81. Mortgage to secure performance of contract to support. See 5 C. L. 1442, n. 96.

82. A mortgage can be enforced only when it secures payment of a debt. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167.

83. Lamm v. Armstrong [Minn.] 104 N. W. 304.

84. Sale under a mortgage held not a satisfaction of the bond secured. Stricker v. McDonnell [Pa.] 62 A. 520.

85. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852. Invalidity of the mortgage does not render the debt unenforceable. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891.

86. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891.

87. A conveyance as security is a mortgage regardless of the letter of the instrument. Smith v. Pfluger [Wis.] 105 N. W. 476. Building and loan contract providing for re-entry in case of default by the borrower and for rights of a mortgagee in the association, held to be a mortgage and subject to foreclosure as such. Preston v. D'Ambrosio, 46 Misc. 523, 95 N. Y. S. 70.

88. Either written or parol evidence. Smith v. Pfluger [Wis.] 105 N. W. 476.

89. A mortgagor in possession may maintain an action against the mortgagee to establish his title under Ky. St. 1903, § 11, providing that any person having legal title and possession may maintain such action. Sheffield v. Day [Ky.] 90 S. W. 545. The taking of a mortgage is not a purchase, location or holding of real property within Civ. Code, § 299, prohibiting a corporation until it has complied with certain conditions from purchasing, locating or holding. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. An indemnity mortgage to a surety gives him no interest in the land. Dyer v. Jacoway [Ark.] 88 S. W. 901.

90. Rev. St. 1829, § 57, tit. 1, c. 5, p. 312, pt. 3, vol. 2, taking from the mortgagee the right to bring ejectment, restricts his interest to a lien. Becker v. McCrea, 94 N. Y. S. 20. It does not transfer title. It is a mere lien for security (First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485); hence a judgment against a mortgagor acquired before his equity of redemption has expired is a lien on the premises until a foreclosure decree ripens into title (Kaston v. Storey [Or.] 80 P. 217).

91. First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485.

92. See 4 C. L. 678.

93. A franchise to maintain watermains in streets is an easement which may be mortgaged. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661.

94. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

95. McWhorter v. Stein [Ala.] 39 So. 617.

become impressed with a lien as soon as they come into existence.[97] In Texas a homestead cannot be mortgaged[98] except for "materials," etc., and then only when there is an express written contract executed by husband and wife showing that they are for the benefit of the homestead.[99] It may be part of the deed of trust.[1]

§ 2. *General requisites and validity.*[2]—A mortgage must be executed by one who has some interest[3] or apparent interest in the property[4] or authority to mortgage it,[5] and though a mortgagor appears to have an interest, if a mortgagee has actual notice that he has none, he acquires no lien;[6] otherwise, however, if he takes in good faith.[7] A mortgage on after-acquired property charges it when acquired with an equitable lien.[8]

96. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

97. Creech v. Long [S. C.] 51 S. E. 614.

98. Dignowity v. Baumblatt [Tex. Civ. App.] 85 S. W. 834. A subsequent abandonment would not give validity to the mortgage. Id.

99, 1. Walker v. Woody [Tex. Civ. App.] 13 Tex. Ct. Rep. 957, 89 S. W. 789.

2. See 4 C. L. 679.

3. A mortgage by one who surreptitiously obtained an undelivered deed to himself and recorded it is void. Kay v. Gray, 24 Pa. Super. Ct. 536. A mortgage executed by one in possession under no claim of right and having no title to secure a loan used to pay the purchase price creates only an equitable lien inferior to the rights of bona fide subsequent purchasers. Donovan v. Twist, 93 N. Y. S. 990. An unauthorized mortgage by one who holds the property in trust for himself and others is valid as to himself but void as to others. Sternfels v. Watson, 139 F. 505.

4. Where one takes title to a tract but is bound to deed a portion of it to another, but before doing so mortgages the entire tract, the mortgage is binding on the portion he is bound to convey for a balance of the debt remaining after applying the proceeds of a sale of the tract belonging to the mortgagor. Hart v. Issaacsen, 56 W. Va. 314, 49 S. E. 254. A bona fide purchaser from a grantee in a deed intended as a mortgage acquires a good title. Bean v. Venable, 27 Ky. L. R. 927, 87 S. W. 262.

5. A trustee with power to "take charge of, manage and control, and use for the benefit of" a person named has power to mortgage. Ely v. Pike, 115 Ill. App. 284. Trustees with power to do all things necessary for the proper care of the trust property have authority to mortgage it for funds with which to settle a contest of the trust. Fidelity Trust Co. v. Hawkins [Ky.] 90 S. W. 249. Authority in the directors of a corporation to mortgage all its property is authority to mortgage after-acquired property. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353. A bank organized under the state banking act has authority under Rev. Codes 1899, § 3230, to receive a mortgage to secure past indebtedness as well as for contemplated advances agreed upon. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760. Where land is conveyed to one for the benefit of herself and another and she mortgages it to obtain funds to pay off a lien thereon, the interests of both are bound by the mortgage. Hentig v. Williams [Cal. App.] 82 P. 546.

NOTE. Agent's authority to mortgage: Power to mortgage authorizes the execution of mortgage with a power of sale if it is the custom of the country to include such power in mortgages. Leigh v. Lloyd, 35 Beav. 455; Wilson v. Troup, 2 Cow. [N. Y.] 195. But he has not power to insert provisions not usually inserted. Jessup v. City Bank of Racine, 14 Wis. 331; Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 7 Sawy, 61, 8 F. 852. Thus a power to mortgage to secure a specific debt does not authorize the insertion of a provision for attorney's fees. Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 7 Sawy. 61, 8 F. 852. A power to mortgage does not imply a power to give a second mortgage (Skaggs v. Murchison, 63 Tex. 348), nor give a power to mortgage for his own benefit or that of a third person (Nippel v. Hammond, 4 Colo. 211; Wolfey v. Rising, 8 Kan. 297; Greenwood v. Spring, 54 Barb. [N. Y.] 375). Nor does such power authorize him to sell the property (Coppage v. Barnett, 34 Miss. 621), nor to execute a note for the amount of the mortgage (Mylins v. Copes, 23 Kan. 617. Compare Taylor v. Hudgins, 42 Tex. 244). See 1 Clark & Skyles on Agency, p. 593, et seq.

6. A mortgage by a husband on lands belonging to his wife creates no lien. One who accepts such a mortgage with notice that the deed whereby the title was held was erroneously made out to the husband and wife jointly acquires no lien. Bates v. Frazier, 27 Ky. L. R. 576, 85 S. W. 757. Where an agent by fraud induces an ignorant principal to deed land to him, the title of the principal is superior to mortgages executed by the agent to persons with notice of the circumstances under which he acquired title. DeLeonis v. Hammel [Cal. App.] 82 P. 349. One who with notice that the deed to his mortgagor is voidable takes a mortgage to secure an antecedent debt acquires no lien as against heirs and representatives of the grantors of the mortgagor. Rogers v. Tompkins [Tex. Civ. App.] 13 Tex. Ct. Rep. 161, 87 S. W. 379.

7. The lien of one who takes a mortgage without notice that the land is the separate property of the mortgagor's wife is not affected by subsequent notice of such fact. Barrett v. Eastham Bros. [Tex. Civ. App.] 86 S. W. 1057. One who acquires title to property by fraud and undue influence may give a valid mortgage to a bona fide mortgagee. Swanstrom v. Day, 93 N. Y. S. 192. Mental incapacity of an undue influence exercised upon a mortgagor's grantor does not affect the rights of a bona fide mort-

It is not essential to the validity of a mortgage that there should be a written application for the loan it was intended to secure,[9] nor if there were such application, that it contain a description of the property.[10] The parties must be designated,[11] but a mortgage unenforceable at law because of the insufficient designation of the mortgagee is good in equity.[12]

Description.[13]—A description by which the premises may be identified is sufficient.[14]

The consideration.[15]—A mortgage like other contracts must be based on a consideration.[16] The consideration must be legal or the mortgage is unenforceable;[17] but where the consideration is made up of several distinct transactions, some of which are legal and others illegal, the mortgage may be upheld for such consideration as was legal if it is separable,[18] and if the mortgage was based on a legal consideration it is no defense to an action to foreclose that an assignment of it as security was based on an illegal consideration.[19] Where the original consideration is valid and is contracted prior to the execution of the note, a mortgage given to secure the debt is valid though the note is void for want of a revenue stamp.[20]

Execution.—Noncompliance with conditions essential to entitle the instrument to record does not render it void.[21] A defectively executed mortgage may be ratified.[22] A mortgagor may be estopped to deny ratification of a defectively executed mortgage.[23] The signature[24] must be genuine.[25] A mortgage on the homestead must be joined in by the wife.[26] Delivery is essential,[27] acknowledgment[28] is not.[29]

gagee. Parsons v. Crocker [Iowa] 105 N. W. 162.

8. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353.

9, 10. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946.

11. Corporation held to be the beneficiary of a trust deed in which its secretary and treasurer was named as beneficiary. Collier v. Alexander [Ala.] 38 So. 244. That a deed runs to the manager of a corporation instead of to the corporation itself does not impair its validity as a mortgage in the corporation's favor. Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077.

12. Where it was made to a partnership without the individual names of the partners. Carpenter v. Zarbuck [Ark.] 86 S. W. 299.

13. See 4 C. L. 679. See, also, Deeds of Conveyance, for fuller treatment. 5 C. L. 964.

14. Description in a trust deed held sufficient. Scott v. Gordon [Mo. App.] 83 S. W. 550. "72 acres situated near Hamlin, the same bought of Land Company, also twelve and one half acres also situated near Hamlin and the same conveyed to B. F. Curry by James F. Carroll Jr." and like description of two other tracts, held a sufficient description. Holley's Ex'r v. Curry [W. Va.] 51 S. E. 135.

15. See 4 C. L. 679; see, also, Contracts, 5 C. L. 679.

16. Extension of time for payment of a debt is sufficient. First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485. A mortgage to secure an overdue debt of a third person is based on a sufficient consideration. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. A note and mortgage are presumed to rest on a sufficient consideration. First Nat. Bank v. Bennett, 215 Ill. 398, 74 N. E. 405. Evidence sufficient to show that the consideration for a mortgage was advanced by the mortgagee and not by a firm composed of the mortgagee and mortgagor. Hubbard v. Mulligan [Colo.] 82 P. 783. Evidence sufficient to show that a mortgage was based on a sufficient consideration. Dodsworth v. Sullivan [Minn.] 103 N. W. 719.

Evidence sufficient to show that a bond and mortgage were executed without consideration. First Nat. Bank v. Robinson, 105 App. Div. 193, 94 N. Y. S. 767. Evidence held to show that a note and mortgage were executed without consideration and should be canceled. Campbell v. Miller [Neb.] 103 N. W. 434.

17. Compounding a felony. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216. That the consideration was to stop a threatened criminal prosecution is no defense unless an agreement not to prosecute if the mortgage was given is shown. Moyer v. Dodson, 212 Pa. 344, 61 A 937.

18, 19. Conradt v. Lepper [Wyo.] 81 P. 307.

20. Morris v. Linton [Neb.] 104 N. W. 927.

21. Rev. St. 1899, § 2741, amended by Sess. Laws 1905, p. 20, c. 24, requiring mortgages to be executed in the presence of one witness, does not affect the validity of an unwitnessed mortgage as between the parties. Conradt v. Lepper [Wyo.] 81 P. 307. Such act is only necessary to entitle the instrument to be recorded. Id.

22. The act of a scrivener in filing in and delivering an executed blank mortgage is ratified and confirmed where the mortgagor subsequently and with full knowledge of the fact executed and delivered a confirmatory mortgage. Carr v. McColgan [Md.] 60 A. 606.

23. As where he accepts the benefits of

Recordation.[30]—A mortgage is a conveyance within the recording statutes,[31] but as a general rule recordation is not necessary as between the parties nor as to third persons with actual notice,[32] but only to preserve the rights of the mortgagee as against subsequent bona fide purchasers.[33] In some states it is provided by statute that a mortgage must be recorded.[34] The rule requiring mortgages to be recorded within a certain period cannot be evaded by mere subterfuge.[35] An absolute deed intended as a mortgage is properly recorded in the book provided for the record of deeds.[36]

§ 3. *Absolute deed as mortgage.*[37]—An absolute deed, intended by both parties as security for a debt, is a mortgage[38] and does not pass the legal title.[39] It must have been intended as a mortgage at its inception,[40] and the relation of debtor and creditor must exist between the parties.[41] A deed may be made to secure present indebtedness and future advances, though no fixed sum is mentioned.[42] Whether a deed was intended as a mortgage must be determined from all the circumstances.[43]

Mortgage or conditional sale.[44]—If the nature of the transaction is doubtful, a mortgage will be favored in construction;[45] but there must be an intention to

the loan, pays interest thereon, asks indulgences and participates in the mortgage sale without suggesting a defect in the mortgage. Carr v. McColgan [Md.] 60 A. 606.

24. See 4 C. L. 680.

25. Evidence insufficient to show that the mortgagor's signature was a forgery. Bennett v. Edgar, 93 N. Y. S. 203.

26. Bates v. Frazier, 27 Ky. L. R. 576, 85 S. W. 757.

27. Evidence sufficient to show a delivery. Dodsworth v. Sullivan [Minn.] 103 N. W. 719; Firth Co. v. South Carolina Loan & Trust Co. [C. C. A.] 122 F. 569. Payment of a portion of the debt is an acknowledgment of the delivery of the mortgage. Moyer v. Dodson, 212 Pa. 344, 61 A. 937.

28. See 4 C. L. 680; see, also, Acknowledgments, 5 C. L. 29.

29. As between the parties a mortgage is good without acknowledgment. Lynch v. Cade [Wash.] 83 P. 118.

30. See 4 C. L. 680. See, also, Notice and Record of Title, 4 C. L. 829.

31. Corbett v. Woolverton [Mont.] 81 P. 4.

32. Girard Trust Co. v. Baird, 212 Pa. 41, 61 A. 507.

33. Under the rule that a mortgage creates a lien only and not an estate, a mortgagee who does not record a purchase-money mortgage until after the mortgagor becomes bankrupt has no priority over general creditors. In re Lukens, 138 F. 188.

34. Rev. Code Civ. Proc. § 637 expressly provides that a mortgage and its assignment must be recorded to entitle the mortgagee or assignee to foreclose. Langmaack v. Keith [S. D.] 103 N. W. 210.

35. Not by a renewal of the mortgage every 45 days. In re Noel, 137 F. 694.

36. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760.

37. See 4 C. L. 682.

38. Where it clearly appears that a deed was made to secure a loan, it will be treated as a mortgage regardless of the form of the contract. Garvin's Adm'x v. Vincent, 27 Ky. L. R. 1076, 87 S. W. 804. Where one executes a mortgage and at the same time and as part of the same transaction a deed to be placed in escrow and delivered on default in payment of the debt, such deed is a mortgage. Plummer v. Ilse [Wash.] 82 P. 1009.

39. Absolute deeds intended as mortgages create only a lien, not an estate. Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077. Persons with notice claiming through the grantee acquire no rights as against the mortgagor. De Leonis v. Hammel [Cal. App.] 82 P. 349.

40. Subsequent transactions are important only as authorizing inferences of the intention at the time. Wilson v. Terry [N. J. Eq.] 62 A. 310. Admissions by the grantee made subsequent to the execution of the deed must be very clear and convincing. Id. The intention of the parties is the controlling consideration. James v. Mallory [Ark.] 89 S. W. 472. Evidence of the intention with which the grantee received the property is admissible. Laub v. Romans [Iowa] 105 N. W. 102.

41. It must appear that the relation of debtor and creditor existed. Rankin v. Rankin, 111 Ill. App. 403. The test is, does the relation of debtor and creditor exist? Samuelson v. Mickey [Neb.] 103 N. W. 671. The principal test is whether the relation of debtor and creditor existed after the transaction. Plummer v. Ilse [Wash.] 82 P. 1009.

42. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760.

43. Where on maturity of a mortgage the mortgagor executed a deed to the mortgagee and at the same time a contract was executed reciting that the deed was intended as better security and that on payment of the deed the land should be reconveyed but the grantee went into possession, made improvements, paid taxes and interest for more than seven years and the grantor did not pay interest on the debt or taxes, the deed was held an absolute one. Hesser v. Brown [Wash.] 82 P. 934. The intention of the parties gathered from all the surrounding circumstances is the test. Miller v. Miller [Md.] 61 A. 210.

44. See 4 C. L. 683.

45. Where it is doubtful whether a con-

create a mortgage and not a deed,[46] and the relation of debtor and creditor must exist.[47]

Once a mortgage always a mortgage.[48]—A mortgage cannot be rendered anything else by contemporaneous agreement,[49] and in order to sustain a transaction by which the equity of redemption is cut off it must be fair and free from imposition practiced by the mortgagee.[50]

The proceeding to establish a mortgage is equitable,[51] but can be maintained only in courts of general jurisdiction.[52] Equity may declare a deed absolute a mortgage,[53] even though the mortgagor did not at the time have title to the land, and the title when acquired was put in the name of a third person,[54] and may ascertain the obligation it was intended to secure if it is not described in the deed,[55] even though the manner of creating a mortgage is prescribed by statute.[56] The grantee in an absolute deed intended as a mortgage who quitclaims to the grantor and retains a vendor's lien is not estopped by foreclosing the lien to assert that the transaction was only a mortgage.[57] The nature of the instrument is the only issue in such a proceeding.[58] Two parties having the same interest in having a deed de-

veyance and contract for resale was a mortgage or conditional sale, a mortgage will be favored in construction. Rankin v. Rankin, 111 Ill. App. 403. Where a creditor refused to make further loans unless his debtor made him a deed but stated that all he wanted was his money and would reconvey on payment of the debt, the transaction amounted to a mortgage. Gerson v. Davis [Ala.] 39 So. 198. Transaction by which one took title under an agreement to reconvey on payment of the debt held a mortgage. Sheffield v. Day [Ky.] 90 S. W. 545.

46. A transaction by which one who refused to take a mortgage takes absolute title and gives a bond for reconveyance upon terms and conditions set forth is not a mortgage. Conner v. Clapp, 37 Wash. 299, 79 P. 929. Where a deed was intended as a conveyance of the fee in satisfaction of a pre-existing debt, a contemporaneous agreement for an immediate resale on credit for the amount of the debt does not show the deed to be a mortgage. Hays v. Emerson [Ark.] 87 S. W. 1027. A quit-claim deed by a mortgagor and a contract by the mortgagee to reconvey on payment of the debt do not constitute an equitable mortgage. Bailey v. St. Louis Union Trust Co., 188 Mo. 483, 87 S. W. 1003. Where one purchases land for another and takes title in his own name, agreeing to convey on payment of the purchase price, the transaction does not constitute a mortgage. Kean v. Landrum [S. C.] 52 S. E. 421.

47. A transaction by which a mortgagee in an overdue mortgage of premises of less value than the debt takes an absolute deed and cancels the debt but agrees to reconvey on payment of the debt, accrued taxes and interest within three years is not a mortgage. Dabney v. Smith, 38 Wash. 40, 80 P. 199. An absolute deed given in partial satisfaction of a debt and a contemporaneous parol agreement that notes given for the balance should be canceled if the property enhanced in value to a certain extent within a given time, does not constitute a mortgage. Pearson v. Dancy [Ala.] 39 So. 474.

48. See 4 C. L. 683. A provision in a consent decree constituting a mortgage that defendant shall stand debarred absolutely does not amount to a strict foreclosure. Bunn v. Braswell [N. C.] 51 S. E. 927.

49. A mortgage cannot be made anything else by agreement of the parties made at the time of the execution of the deed. Plummer v. Ilse [Wash.] 82 P. 1009.

50. Day v. Davis [Md.] 61 A. 576.

51. See 4 C. L. 684. A reconveyance of property held under an absolute deed intended as a mortgage will not be decreed until all sums secured have been paid or tendered. Merchants State Bank v. Tufts [N. D.] 103 N. W. 760. A suit to have a deed declared a mortgage is not barred by laches in 10 years. Gerson v. Davis [Ala.] 39 So 198. Code Civ. Proc. § 338, subd. 4, requiring action for relief on the ground of fraud to be brought within 3 years, does not apply to an action to quiet title against a deed intended as a mortgage. DeLeonis v. Hammel [Cal. App.] 82 P. 349.

52. The county and probate courts have not jurisdiction to declare a deed to be a mortgage. Rook v. Rook, 111 Ill. App. 398.

53. Hurd v. Chase [Me.] 62 A. 660. An absolute deed may be shown to be a mortgage to secure future advances and the performance of contractual obligations. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

54. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

55. Hurd v. Chase [Me.] 62 A. 660.

56. Civ. Code, § 2922, providing that a mortgage can only be created by a writing executed with the formality required in case of deeds, does not prevent an absolute deed being declared a mortgage. Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077. The indebtedness intended to be secured may also be shown. Id.

57. James v. Mallory [Ark.] 89 S. W. 472.

58. Allegations in respect to usury in a bill to have a deed declared a mortgage are immaterial. Gerson v. Davis [Ala.] 39 So. 198. In a suit to have a deed declared a mortgage, where the defendant asserts also a tax title, the plaintiff is not required to allege and prove payment or tender of the taxes as required by statute where it is

clared a mortgage, who own the land jointly and are liable for the debt the deed was given to secure, may join in a suit to have it declared a mortgage[59] and a husband who executed a deed intended as a mortgage and thereafter conveyed the property to his wife is a necessary party to a suit to have such deed declared a mortgage.[60]

Evidence.[61]—One who asserts an absolute deed to be a mortgage has the burden of proving it.[62] The evidence must be clear, satisfactory and convincing.[63] As a general rule the fact may be established by parol evidence;[64] but in Pennsylvania, by statute, there must be a written defeasance[65] recorded within sixty days from date.[66]

§ 4. *Equitable mortgages.*[67]—An equitable mortgage is a transaction to which equity attaches the character of a mortgage.[68] An equitable mortgage results where

sought to enjoin collection or sale of property for taxes. Shepard v. Vincent, 38 Wash. 493, 80 P. 777.

59. Gerson v. Davis [Ala.] 39 So. 198.

60. Marbury Lumber Co. v. Posey [Ala.] 38 So. 242.

61. See 3 C. L. 684.

62. Hays v. Emerson [Ark.] 87 S. W. 1027.

63. Rankin v. Rankin, 111 Ill. App. 403; Hurd v. Chase [Me.] 62 A. 660; Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561. An absolute deed will not be declared a mortgage upon mere conjecture, however reasonable, or upon unsubstantial evidence, however suggestive. Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017.

Evidence insufficient to show that a deed from husband to wife was intended as a mortgage. Wilson v. Terry [N. J. Eq.] 62 A. 310. To show that a deed was intended as a mortgage. Steele v. Steele, 112 Ill. App. 409; Miller v. Miller [Md.] 61 A. 211; Samuelson v. Mickey [Neb.] 103 N. W. 671; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763; To show that the relation of mortgagor and mortgagee existed. Allen v. Ellis [Wis.] 104 N. W. 739.

Evidence sufficient to show that a deed was intended as a mortgage. Day v. Davis [Md.] 61 A. 576; McCorkle v. Richards, 112 Ill. App. 495; Hoskins v. Hoskins, 27 Ky. L. R. 980, 87 S. W. 320. To show that an assignment of rights under a contract for the purchase of land was for the purpose of security. Laub v. Romans [Iowa] 105 N. W. 102. Conflicting evidence as to whether a deed was given as security held to raise a **question for the jury.** Tappen v. Eshelman, 164 Ind. 338, 73 N. E. 688.

64. Miller v. Miller [Md.] 61 A. 211. Parol evidence is admissible notwithstanding the statute of frauds. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

65. Sterck v. Germantown Homestead Co., 27 Pa. Super. Ct. 336; Bank of Commerce v. Peace, 27 Pa. Super. Ct. 643.

66. Safe Deposit & Title Guaranty Co. v. Linton [Pa.] 62 A. 566.

67. See 4 C. L. 685.

68. An assignment by a vendor of an executory contract of sale as security for the payment of a debt due the assignee amounts to a mortgage on the assignee's interest to the extent of the purchase price unpaid. Lamm v. Armstrong [Minn.] 104 N. W. 304. A contract whereby money advanced was to be used in buying land to be taken in the name of a third person as security for the repayment of the price and other advances, held an equitable mortgage. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561. Where land was contracted to be conveyed under an oral agreement that if the vendee paid the amount of his note to the bank from which he borrowed the money to pay for the land the deed was to run to him, otherwise to the bank, the bank has a lien on the premises. Beer v. Wisner [Neb.] 104 N. W. 757. A consent judgment that defendant "has an equity to redeem" and on failure to do so shall stand debarred establishes the relation of mortgagor and mortgagee. Bunn v. Braswell [N. C.] 51 S. E. 927. A lien reserved in a conveyance to secure payment of a balance may be treated as a mortgage. Conveyance of irrigation works. Almeria Irr. Canal Co. v. Tzschuck Canal Co., 67 Neb. 290, 93 N. W. 174. Purchaser for debtor at judicial sale held entitled to retain possession where debtor practiced fraud in procuring him to purchase. Cupp v. Lester [Va.] 51 S. E. 840.

NOTE. Agreements for security (equitable mortgages): In equity, any agreement in writing, made upon a valid consideration, however informal, by which an intention is shown that certain land shall be a security for the payment of money, creates an equitable lien upon that land. 3 Pomeroy, Eq. Jur. § 1237; Walker v. Brown, 165 U. S. 654, 41 Law. Ed. 865; Ketchum v. St. Louis, 101 U. S. 306, 25 Law. Ed. 999; Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Bell v. Pelt, 51 Ark. 433, 14 Am. St. Rep. 57, 4 L. R. A. 247; Love v. Sierra Nevada Lake Water & Min. Co., 32 Cal. 639, 91 Am. Dec. 602; Cotterell v. Long, 20 Ohio, 464; Pinch v. Anthony, 8 Allen [Mass.] 536; Cummings v. Jackson, 55 N. J. Eq. 805; Wayt v. Carwithen, 21 W. Va. 516. See Perry v. Missions of Protestant Episcopal Church, 102 N. Y. 99, Kirchwey's Cas. 135. To such an agreement the term "equitable mortgage" is frequently applied, the instrument being, for most purposes, at least, equivalent to a regular mortgage in the view of a court of equity, though utterly null and void at law. Accordingly, one may create an equitable lien on land by an agreement in terms pledging or giving a lien on the land (Chase v. Peck, 21 N. Y. 581), and may, by a mere indorsement on a note to the effect that it is a charge on land, make it such in legal effect

one refuses to execute a mortgage pursuant to his agreement to do so,[69] or where

(Peckham v. Haddock, 36 Ill. 38). So, a power of attorney authorizing one to collect the rents of land belonging to the donor of the power, and to apply them on a debt, or for other specific purposes, has been regarded as creating an equitable lien on the land (Joseph Smith Co. v. McGuinness, 14 R. I. 59; Spooner v. Sandilands, 1 Younge & C. 390; Cradock v. Scottish Provident Institution, 63 Law J. Ch. 15; Abbott v. Stratten, 3 Jones & L. 603). A power to sell land and apply the proceeds on a debt has also been regarded as creating such a lien (American Loan & Trust Co. v. Billings, 58 Minn. 187), as has an agreement that a certain debt shall be paid out of the price to be paid for certain land (Johnson v. Johnson, 40 Md. 189; Pinch v. Anthony, 8 Allen [Mass.] 536).

An assignment, for purposes of security, by a vendee of land, of his contract rights in the land, is regarded as creating a lien on the land, or, rather, on his equitable interest in the land. Hays v. Hall, 4 Port. [Ala.] 374, 30 Am. Dec. 530; Gamble v. Ross, 88 Mich. 315; Russell's Appeal, 15 Pa. 319; Hackett v. Watts, 138 Mo. 502. Likewise, when one who furnishes the money for the purchase of land by another, by agreement with the latter, takes the title from the vendor, to hold until his advance is repaid, he has an equitable lien to secure such repayment. Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57; Dryden v. Hanway, 31 Md. 254; Barnett v. Nelson, 46 Iowa, 495.

An agreement to give a mortgage on land is also regarded in equity as creating a lien on the land, on the principle that equity regards that as done which ought to be done. Bridgeport Electric & Ice Co. v. Meader [C. C. A.] 72 F. 115; Sprague v. Cochran, 144 N. Y. 104; In re Petition of Howe, 1 Paige [N. Y.] 125, 19 Am. Dec. 395; Remington v. Higgins, 54 Cal. 620; Carter v. Holman, 60 Mo. 498.

The term "equitable mortgage" might well be restricted to these cases of equitable liens arising from a contract to make a legal mortgage, since in such a case there is a right to have the contract specifically performed by the execution of a legal mortgage, in which respect this class of equitable liens differs from the other classes described in this note. Marshall v. Shrewsbury, 10 Ch. App. 250, 254; Matthews v. Goodday, 31 Law J. Ch. 282. In this country, however, where a legal mortgage is foreclosed usually by sale, and not by a decree of strict foreclosure, there would be no great advantage in exchanging such an equitable lien for a legal mortgage.

An important application of the principle that equity will carry out the intention to give a security is seen in the case of an instrument intended as a valid and legal mortgage, which though insufficient as such, owing to some defect of form or execution, will, in equity, be regarded as creating a lien or "equitable mortgage." Burgh v. Francis, Finch, 28, Kirchwey's Cas. 24; Love v. Sierra Nevada Lake Water & Min. Co., 32 Cal. 639, 91 Am. Dec. 602; Peers v. McLaughlin, 88 Cal. 294, 22 Am. St. Rep. 306; Price v. McDonald, 1 Md. 414, 54 Am. Dec. 657; McQuie v. Peay, 58 Mo. 58; Gale v. Morris, 30 N. J. Eq. 285; Sprague v. Cochran, 144 N. Y. 104; Bank of Muskingum v. Carpenter's Adm'rs, 7 Ohio, 21, 28 Am. Dec. 616; Delaire v. Keenan, 3 Desaus. [S. C.] 74, 4 Am. Dec. 604. Such a case arises when the mortgage is without the proper seal (Sanders v. McDonald, 63 Md. 503; Bullock v. Whipp, 15 R. I. 195; McClurg v. Phillips, 49 Mo. 315), or is not witnessed as required by the statute (Moore v. Thomas, 1 Or. 201).

In order that an equitable lien be thus created on land by agreement, it is necessary that the land itself be specified in the instrument creating the lien (Mornington v. Keane, 2 De Gex & J. 292; Borden v. Croak, 131 Ill. 68, 19 Am. St. Rep. 23; Adams v. Johnson, 41 Miss. 258; Lee v. Cole, 17 Or. 559), and that the intention clearly appear that the land is to be security for the performance of the obligation.

Deposit of title deeds: In England it is a well-established doctrine that if the title deeds to land are deposited by a debtor with his creditor, such deposit is evidence of an agreement to create a charge on the land, which equity will enforce. Story, Eq. Jur. § 1020; Russel v. Russel, 1 Brown Ch. 269, 1 White & T. Lead. Cas. Eq. 931, Kirchwey's Cas. 110. The deposit of the deeds does not itself create a charge, but is merely evidence, with other circumstances, of an intention to create one. Norris v. Wilkinson, 12 Ves. 192; Chapman v. Chapman, 13 Beav. 308; Ashburner, Mortgages, 26. Consequently, a deposit merely to enable the lender to prepare a regular mortgage is not sufficient to create a lien (Norris v. Wilkinson, 12 Ves. 192; Lloyd v. Attwood, 3 De Gex & J. 614, 651; Hutzler v. Philips, 26 S. C. 136, 4 Am. St. Rep. 687), and is regarded as a part performance taking the agreement out of the Statute of Frauds (Russel v. Russel, 1 Brown Ch. 269, Kirchwey's Cas. 110).

A lien of this character has been recognized in a number of judicial opinions in this country, usually, however, in cases not directly involving the validity of such a lien. Richards v. Leaming, 27 Ill. 431; Hall v. McDuff, 24 Me. 311; Gale's Ex'rs v. Morris, 29 N. J. Eq. 224; Rockwell v. Hobby, 2 Sandf. Ch. [N. Y.] 9; Chase v. Peck, 21 N. Y. 584, Kirchwey's Cas., 124; Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 51; Hackett v. Reynolds, 4 R. I. 512; Hutzler v. Phillips, 26 S. C. 137, 4 Am. St. Rep. 687; Jarvis v. Dutcher, 16 Wis. 307. In others, such a deposit is not regarded as creating a lien, on the ground that the contrary view is inconsistent with the system of conveyancing and registration in force in this country, and also involves a violation of the Statute of Frauds. Lehman v. Collins, 69 Ala. 127; Vanmeter v. McFaddin, 8 B. Mon. [Ky.] 437; Gardner v. McClure, 6 Minn. 250 (Gil. 167); Hackett v. Watts, 138 Mo. 502; Bloomfield State Bank v. Miller, 55 Neb. 243; Shitz v. Diffenbach, 3 Pa. 233; Meador v. Meador, 3 Heisk. [Tenn.] 562.

It would seem that, as between the original parties, and as against purchasers with notice, the only possible objection to an agreement for a lien evidenced by such a deposit of title deeds lies in the fact that

a mortgage is not executed in the manner prescribed by law,[70] but not from an agreement to execute an agricultural lien.[71]

§ 5. *Nature and incidents of trust deeds as mortgages.*[72]—A deed of trust passes the legal title,[73] but the refusal or disability of a trustee to perform his trust is equivalent in equity to a renunciation of it.[74] In those states wherein trustees and beneficiaries are treated as bona fide purchasers for value,[75] they take free from all prior secret liens and equities and all subsequent alienations of and incumbrances on the trust property.[76] In Alabama a married woman may with the consent of her husband execute a trust deed of her property to secure her debts.[77] The beneficiary is not affected by a subsequent agreement, made without his knowledge, by his grantor with the grantee in a second trust deed to protect the latter's interest.[78] A provision for the appointment of a substitute trustee in case of absence of the original trustee or his refusing to act justifies such appointment in case of absence[79] without request on the original to execute his trust.[80] Authority to appoint a substitute trustee cannot be delegated.[81] An instrument executed by a corporation substituting a trustee need not be under the corporate seal.[82]

Powers and duties of the trustee.[83]—A trustee is the mere agent of the parties to carry into effect the contract between them,[84] and has no powers except those specifically conferred by the deed.[85]

it is not evidenced by a writing complying with the statute of frauds. If an agreement for a lien is so evidenced, the fact that there is a simultaneous deposit of title deeds does not affect the validity of the agreement as creating a lien; and the English cases merely take the further step of regarding the deposit as sufficient part performance to take the agreement out of the statute.—From Tiffany, Real Property, p. 1282, et seq.

69. One who refuses to execute a mortgage to secure overdue debts as he has agreed to do cannot complain of a decree charging the indebtedness on the land. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535. Where one advances money for the purpose of purchasing a certain tract of land under an agreement that the purchaser will execute a mortgage when he acquires title, and the purchaser refuses to comply with his agreement, an equitable mortgage is created. Foster Lumber Co. v. Harlan County Bank [Kan.] 80 P. 49.

70. Not executed in the presence of witnesses. Conradt v. Lepper [Wyo.] 81 P. 307. A writing in all respects sufficient as a deed of trust except that it is not under seal is an equitable mortgage. Holley's Ex'r v. Curry [W. Va.] 51 S. E. 135.

71. Creech v. Long [S. C.] 51 S. E. 614.

72. See 4 C. L. 686.

73. Collier v. Alexander [Ala.] 38 So. 244.

74. Hence the removal of one who has absconded or removed from the jurisdiction, impairs no vested or contractual right. Marshall v. Kraak, 23 App. D. C. 129.

75, 76. Gilbert Bros. & Co. v. Lawrence Bros., 56 W. Va. 281, 49 S. E. 155.

77. The Married Woman's Act of 1887 conferred power on a married woman to execute a deed of trust of her property to secure her debts her husband evidencing his consent by joining. Collier v. Alexander [Ala.] 38 So. 244. Under this act it is not necessary that a non-resident husband join. Id.

78. Title acquired under sale under first deed not affected by grantor's failure to pay off first deed or to notify grantee in second deed of foreclosure proceedings. New York Store Mercantile Co. v. Thurmond, 186 Mo. 410, 85 S. W. 333.

79. Justifies such appointment on undisputed evidence of residence in another state prior to the maturity of the note, as continued residence there is presumed. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751.

80. A provision for the appointment of a substitute trustee to make a sale if the trustee is absent from the county justifies such appointment in case of absence without request on the original trustee to make the sale. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751.

81. Authority in the holder of the note secured to appoint a substitute trustee does not authorize an agent of the holder to make the appointment. Evidence held to show that the appointment was made by an agent. Wilder v. Moren [Tex. Civ. App.] 14 Tex. Ct. Rep. 51, 89 S. W. 1087.

82. Brown v. British American Mortg. Co. [Miss.] 38 So. 312.

83. See 4 C. L. 686.

84. Hence no property right is impaired by a statutory provision that the legal title shall not descend to his heirs. Marshall v. Kraak, 23 App. D. C. 129. Service by publication is not necessary to support a decree substituting a trustee in place of one who has absconded or departed from the jurisdiction. Under D. C. Code, §§ 534-538. Id.

85. Cannot receive payment of the debt and discharge the debtor unless such power is conferred by the deed. Miller v. Mitchell

Sale of premises.[86]—A sale cannot be demanded by the beneficiary after he has parted with his interest.[87] In Alabama a substitute trustee cannot make a sale until the instrument substituting him has been recorded.[88] The provision requiring the sale to be made in subdivisions may be waived.[89]

The security deed[90] is peculiar to the state of Georgia.[91] A provision for accelerating maturity should not be so construed as to work hardship on the borrower where he has made a bona fide effort to comply with his covenant.[92] A covenant that the borrower is to keep the buildings insured, the policies to be payable to the lender, is not a covenant to pay premiums in advance.[93] A transfer of the debt by the grantee does not in the absence of a conveyance pass to the transferee title to the land,[94] but he acquires an equitable interest in the security effectuated by the deed.[95] After the debt has been transferred the grantee holds title for the benefit of the transferee.[96] Before execution on the debt is levied against the grantor the grantee must reconvey the land and have the deed recorded,[97] and where execution is levied and the land sold prior to reconveyance, the grantor may have the deed set aside without tendering the amount of his debt.[98]

§ 6. *Construction and effect of mortgages in general.*[99]—A mortgage covering property in part not subject to mortgage is valid as to the portion which may be mortgaged.[1] Invalidity may be asserted at the time enforcement is sought.[2] That a mortgage was made to an alien for the purpose of avoiding payment of taxes does not render it unenforceable on the ground of public policy.[3] A provision that foreclosure shall not be had until a certain portion of the holders of the bonds secured so request does not render it void.[4] The lien of the mortgage continues until the expiration of the period after a cause of action to enforce it has accrued.[5] Recitals are prima facie evidence of the facts related,[6] but are subservient to those in the instrument evidencing the debt secured.[7] An ambiguity may be explained by

[W. Va.] 52 S. E. 478. A provision in a trust deed that in case of inability or refusal of the trustee to act the creditor might appoint a substitute trustee and providing that recitals in the deed of certain facts relative to the sale should be prima facie evidence thereof, held not to give the trustee power to create evidence of his power to act. Such recitals are not evidence of such fact. Ward v. Forrester, 35 Tex. Civ. App. 319, 80 S. W. 127.

86. See 4 C. L. 687; also for fuller treatment see Foreclosure of Mortgages on Land, 5 C. L. 1441.

87. Collier v. Alexander [Ala.] 38 So. 244.

88. Act 1896, p. 105, ch. 96 is complied with where a sale under a deed of trust by a substituted trustee is contemporaneous with the recording of the instrument of substitution. Brown v. British American Mortg. Co. [Miss.] 38 So. 312. The instrument is of record from the time it is delivered to the clerk for recordation. Id.

89. If so provided in the deed the land may be sold in bulk. The Code provision requiring it to be sold in subdivisions may be waived. Brown v. British American Mortg. Co. [Miss.] 38 So. 312.

90. See 4 C. L. 687.

91. Where at the request of a purchaser a seller makes the deed to a third person who advances the money, the transaction creates a security deed. Doris v. Story [Ga.] 50 S. E. 348.

92, 93. Provident Sav. Life Assur. Soc. v. Georgia Industrial Co. [Ga.] 52 S. E. 289.

94, 95, 96. Clark v. Havard [Ga.] 50 S. E. 108.

97. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162. The transferee of a note secured by a security deed may after he has reduced his note to judgment obtain a special lien on the land by having the holder of the legal title execute a reconveyance to the debtor, and levying his execution thereon. Maddox v. Arthur [Ga.] 50 S. E. 668.

98. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

99. See 4 C. L. 688.

1. Dignowitz v. Baumblatt [Tex. Civ. App.] 85 S. W. 834.

2. One holding the legal title is not guilty of laches preventing him from asserting the invalidity of a mortgage because he waits until an action to foreclose is commenced. Burns v. Cooper [C. C. A.] 140 F. 273.

3. McKinnon v. Waterbury, 136 F. 489.

4. Hasbrouck v. Rich, 113 Mo. App. 389, 88 S. W. 131.

5. Under Code 1902, § 2449, the lien of a mortgage is good for 20 years after the note becomes due, though the mortgage is more than 20 years old from date of execution. Lyles v. Lyles [S. C.] 51 S. E. 113.

6. A mortgage in the form of an absolute deed reciting that it is subject to the claim of the Anglo Californian Bank, Limited, is prima facie evidence that such bank is a corporation. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

7. As to consideration. Gray v. Bennett [Iowa] 105 N. W. 377.

parol,[8] and parol evidence is admissible to show that a mortgage was given for a purpose not disclosed in the condition.[9] A mortgage by a grantee to a grantor executed the same date as the deed is presumed to be a purchase-money mortgage.[10] Special provisions will be construed as for the benefit of the persons intended.[11] Stipulations for attorney's fees are valid[12] to the extent that they are equitable[13] and will be denied if it can clearly be seen that the debtor was misled or thrown off his guard;[14] but in any case the debtor must do equity by tendering what is due.[15] Provision for such fees must be found in the mortgage.[16] Such fees become part of the mortgage debt,[17] and the stipulation becomes binding as soon as the mortgage is placed in an attorney's hands.[18] A provision for accelerated maturity, if in the nature of a penalty, will not be enforced if the condition has been substantially complied with.[19] Such provisions, if optional with the mortgagee, are for his benefit alone and he may waive them;[20] but if absolute they inure to the benefit of the mortgagor and those claiming under him.[21] Such provisions are construed according to the plain import of their terms.[22] A provision for accelerated maturity for breach of covenant of warranty matures the mortgage at date if the mortgagor has only a life estate.[23] A demand for performance of the condition may not be necessary to constitute a default.[24] The bringing of foreclosure on default is an irrevocable election to declare the mortgage due.[25] In a mortgage to a surety to se-

8. It is not error to permit the introduction of parol testimony to explain the words "unless otherwise satisfied" found in the mortgage. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145.

9. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

10. Harrow v. Grogan [Ill.] 76 N. E. 350. A mortgagor's widow is not entitled to dower as against a purchase-money mortgage though she did not sign it. Id.

11. A provision in a mortgage by a corporation that the mortgagor shall pay all liens on the property and if on failure to do so the trustee should pay them he should be reimbursed does not inure to the benefit of mechanic lienors. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353.

12, 13, 14. Scott v. Carl, 24 Pa. Super. Ct. 400. Solicitor's fees and accrued interest included in the note are to be allowed. Pitzele v. Cohn, 217 Ill. 50, 75 N. E. 392.

15. Scott v. Carl, 24 Pa. Super. Ct. 460.

16. Staton v. Webb, 137 N. C. 35, 49 S. E. 55.

17. A provision for attorney's fees in case of nonpayment at maturity becomes part of the debt, and where it becomes necessary to employ an attorney and the mortgagor refuses to recognize the mortgagee the opposition is a "suit" within a provision that the attorney's fees shall be five per cent of the amount sued for. Hayward v. Hayward, 114 La. 476, 38 So. 424.

18. Is enforceable if the mortgage has been placed in an attorney's hands though he has done nothing towards collecting it. Easton v. Woodbury [S. C.] 55 S. E. 790.

19. A provision in an instalment mortgage accelerating maturity for failure to produce tax receipts on or before a certain date will not be enforced if the taxes are paid before execution issues. Fox v. Helmuth, 27 Pa. Super. Ct. 81.

20. A provision for accelerated maturity on failure to pay interest cannot be taken advantage of by the mortgagor or those claiming under him for the purpose of limitations. White v. Krutz, 37 Wash. 34, 79 P. 495. Where a mortgage provides for accelerated maturity for failure to pay interest within six months after it is due, the mortgagee may enforce payment of interest when it becomes due or wait six months and declare the principal due, and a waiver of the first is not a waiver of the second right. Arnot v. Union Salt Co., 96 N. Y. S. 80.

21. Limitations commence to run against an action to foreclose from date of default. Snyder v. Miller [Kan.] 80 P. 970.

22. A mortgagee in a mortgage securing liability against paper indorsed for the accommodation of the mortgagor which provides that on default in the payment of any note the mortgagee may declare all notes due, the mortgagee may on default in payment of one note pay all the notes and hold the mortgage as security as against a subsequent mortgagee. Mead v. Hammond, 107 App. Div. 575, 95 N. Y. S. 241.

23. A mortgage warranting title and providing that for breach of covenant the debt should become due at the option of the mortgagee, where it appears that the mortgagor had only a life estate, the mortgagee is entitled to foreclose at any time. King v. King, 215 Ill. 100, 74 N. E. 89.

24. Where a mortgage provides for accelerated maturity for failure to pay interest, a demand for payment is not necessary to constitute a default where a fund sufficient to meet the interest is not at the place of payment and demand was withheld at the request of the mortgagor. Arnot v. Union Salt Co., 96 N. Y. S. 80.

25. The stipulation for a bonus in case the mortgage was paid before due was thereafter ineffective and its payment by the mortgagor in order to procure the discharge of the mortgage was involuntary and could

cure the payment of the debt, the creditor has an interest which the surety cannot destroy.[28] But if the mortgage is made only to indemnify the surety it does not in the first instance attach to the debt but whatever equity may arise in favor of the creditor arises afterwards and in consequence of the insolvency of the parties principally liable for the debt.[27] Mortgagors in a mortgage given to secure the notes of a third person are sureties to the extent of their interest in the land, though they did not join in the notes.[28]

Conflict of laws.[29]—The laws of the place where payable govern as to validity of consideration.[30]

Property and interests conveyed.[31]—A mortgage creates a lien on all property falling fairly within its terms[32] and intended to be embraced.[33] An abstract of title delivered to the mortgagee may be regarded as part of the security.[34] A mortgage covering after-acquired property covers such property acquired under a conditional sale.[35] A mortgage by a life tenant does not cover the remainderman's interest.[36] Under the civil law a mortgagee may sue for the avails of insurance subject to his mortgage without exhausting his remedy against other property,[37] and the existence of a summary remedy to enforce the mortgage does not prevent him from suing in the ordinary way for it.[38]

Debts secured.[39]—A mortgage secures all existing debts and future advances it is intended to secure,[40] but one to secure future advances secures only those made

be recovered back. Kilpatrick v. Germania Life Ins. Co. [N. Y.] 75 N. E. 1124.

26. Dyer v. Jacoway [Ark.] 88 S. W. 901.

27. Until this equity arises the surety may release the security. Dyer v. Jacoway [Ark.] 88 S. W. 901.

28. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643.

29. See 4 C. L. 688.

30. Where a mortgage is executed in one state on land in another and no place of payment is designated and the parties live in the state where it is executed, it is deemed payable there and the laws of such state govern as to validity of consideration. Conradt v. Lepper [Wyo.] 81 P. 307.

31. See 4 C. L. 688.

32. Mortgage by a water company to cover after-acquired property held to cover a new plant equipped with machinery from the old one, though nominally constructed and owned by a different company. New England Waterworks Co. v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 521. Mortgage on buildings, dry docks, wharves, franchises, etc., held to cover the entire plant. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495. Under the Porto Rico Mortgage Law the **avails of insuraace** on sugar and molasses made from a crop growing on the mortgaged premises when the mortgage was effected held to inure to the benefit of the mortgagee. Royal Ins. Co. v. Miller, 26 S. Ct. 46. Deed and purchase-money mortgage construed and held subject to a certain volume of water, though the description thereof was erroneous. Schmidt v. Olympia Light & Power Co. [Wash.] 82 P. 184.

33. Evidence insufficient to show that a mortgage of land also embracing a ditch was intended to cover the mortgagor's stock in a water company. Bank of Visalia v. Smith, 146 Cal. 398, 81 P. 542.

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

35. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

36. Pryor v. Winter [Cal.] 82 P. 202.

37, 38. Royal Ins. Co. v. Miller, 26 S. Ct. 46.

39. See 4 C. L. 689.

40. A deed to secure a note "and any other liability or liabilities * * * which may be hereafter contracted" will secure advances for enterprises other than that in which the mortgagor was engaged at the time. Huntington v. Kneeland, 102 App. Div. 284, 92 N. Y. S. 944. A mortgage in the form of an absolute deed made to secure any indebtedness that might subsequently become due secures a balance due on a note after exhausting special security. Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077. A deed of trust to secure future advances to enable the grantor to make his crop secures all advances made for such purpose and is not limited to those made before the crop is harvested. Hamilton v. Rhodes [Ark.] 83 S. W. 351. A mortgage to secure a loan not to exceed a specified sum by discounting the mortgagor's notes payable in three months secured demand notes which referred to the mortgage and were treated by the parties as secured. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319. Evidence sufficient to show that a deed given as a mortgage was given to secure future advances as well as present indebtedness. Huntington v. Kneeland, 93 N. Y. S. 845; Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1081. In an equitable action the court may find that a deed given as a mortgage was to secure future advances as well as existing debts, where the mortgagee so testifies though the mortgagor testifies to the contrary. Huntington v. Kneeland, 102 App. Div. 284, 92 N. Y. S. 944.

under contract express or implied,[41] and one to secure future advances and all other indebtedness and authorizing the mortgagee to pay off incumbrances does not authorize the purchase of obligations disconnected from the mortgage or premises and hold them as secured.[42] A clause authorizing the mortgagee to pay off incumbrances and add the amount to the amount secured does not authorize the payment of a claim, not an incumbrance.[43] A deed given as security for a certain debt may by subsequent agreement be made to stand as security for other debts.[44]

§ 7. *Title and rights of parties.*[45]—A mortgagor's interest is subject to sale on execution,[46] though the mortgage passes the legal title.[47] A purchaser of an equity of redemption can maintain ejectment against the mortgagor,[48] but not as against the mortgagee in possession.[49] The mortgagor's right to a surplus on foreclosure sale is not affected by a decree that the surplus shall remain subject to the further order of the court.[50] Subject to the prior liens judgment creditors have an equity in the surplus[51] after satisfaction of the debt by sale, such that the owner of the equity cannot transfer it to a prior lienor for a fictitious consideration.[52]

The mortgagee's lien attaches to the premises mortgaged[53] and no other.[54] His right to participate in an insurance fund must be found in the terms of the policy.[55] A mortgagee whether in or out of possession cannot acquire a tax title and hold it for the purpose of destroying the title of his mortgagor.[56] A mortgagee may maintain a bill in equity to preserve the property.[57] A mortgage by a water company of all its property, which passes the legal title, gives the mortgagee the right to ask the appointment of a receiver to prevent waste or impairment of value, though there has been no default in payment of principal or interest.[58] A mortgagee of a franchise creating an easement cannot be deprived of his security by a judgment revoking the franchise entered in a suit to which he was not a party.[59]

Right of possession.[60]—When a mortgage passes the legal title and contains

41. Payment of a debt of the mortgagor without his knowledge held not to constitute a secured advancement. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274.

42. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274.

43. Provident Mut. Bldg. Loan Ass'n v. Shaffer [Cal. App.] 83 P. 274. A mortgagee authorized to pay off incumbrances and add the amount to the debt secured has the burden to prove that a claim paid was an incumbrance. Id.

44. Huntington v. Kneeland, 102 App. Div. 284, 92 N. Y. S. 944.

45. See 4 C. L. 690.

46. Under the express provisions of Code, § 750, subd. 3, a mortgagor's equity of redemption may be sold on execution. Mayo v. Staton, 139 N. C. 670, 50 S. E. 331.

47. Under the express provisions of Code 1896, § 1890, an equity of redemption is subject to sale on execution. Carter v. Smith [Ala.] 38 So. 184.

48. The mortgagor cannot set up the outstanding title of the mortgagee against him. Carter v. Smith [Ala.] 38 So. 184.

49. Carter v. Smith [Ala.] 38 So. 184.

50. Easton v. Woodbury [S. C.] 50 S. E. 790.

51, 52. Commissions as agent for sale of land to pay the debt were to entitle mortgagee to any excess over his debt. Staton v. Webb, 137 N. C. 35, 49 S. E. 55.

53. One who insures the title to the mortgagor is liable only for the value of the land if title fails and not for the amount of the mortgage debt. Whiteman v. Merion Title and Trust Co., 25 Pa. Super. Ct. 320.

54. Where a trustee in bankruptcy received no part of the proceeds of mortgaged premises disposed of by a receiver prior to the institution of bankruptcy proceedings, the mortgagee has no claim on the fund in the hands of the trustee. In re Alison Lumber Co., 137 F. 643.

55. Where an Insurance policy had indorsed thereon "Loss payable to C. as his mortgage interest may appear" and such mortgage was not again mentioned, it was held that an ascertainment of the loss found by appraisers was binding on the mortgagee though he had nothing to do with it and the appraisers adopted an erroneous method of computation. Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647.

56. Especially under 3 Ball. Ann. Codes & St. Supp. 1739, giving him a right to pay delinquent taxes and retain a lien therefor. Shepard v. Vincent, 38 Wash. 493, 80 P. 777.

57. May enjoin interference with streets by which access to the property is had. Wilkinson v. Dunkley-Williams Co. [Mich.] 12 Det. Leg. N. 19, 103 N. W. 170.

58. A decree depriving the company of power to longer operate its plant is ground for such appointment. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661.

59. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661.

no provision that the mortgagor may remain in possession, the mortgagee has a legal right to the property and may demand possession of it at any time.[61] In such case a mortgagee is within a provision of a city charter entitling the owner or occupant of any right or interest claimed in any ground or improvements to damages in condemnation proceedings,[62] and if he is satisfied with the award made, may file a bill to establish his claim against the fund awarded.[63] But the mortgagor is a necessary party, especially where the extent of the claim depends on the state of accounts between the mortgagor and mortgagee.[64] Where the mortgage so provides, the right to enter and take possession on default is immediate, but if receivers hold the property it is in legal custody and order of court is necessary.[65]

Assumption of possession by mortgagee.[66]—Consent of the mortgagor to the taking of possession by the mortgagee may be express or implied.[67] A mortgagee who obtains lawful possession under his mortgage cannot be ousted by the mortgagor without redemption.[68] Under the rule that a mortgage passes the legal title a mortgagor in possession is required by law to apply rents and profits to the debt;[69] hence it is immaterial that an agreement to do so was not based on a consideration.[70] The relation of landlord and tenant does not exist between mortgagor and mortgagee in possession, though possession is retained under an agreement that the mortgagor shall pay a certain sum denominated rent to apply on the debt.[71]

Accounting.[72]—The mortgagee in possession need not account for rents where the hostile attitude of mortgagor dissuaded tenants and no rents were earned.[73] The amount of rents and profits for the time that the mortgagee had possession under a since reversed judgment ancillary to a foreclosure reversed at the same time should be credited.[74] When future instalments are declared due at the mortgagee's option, their present worth should be taken[75] and in case of the ordinary savings loan future unearned premiums and dues are excluded as amounting to a penalty if enforced.[76] No credit is allowed for voluntary payments.[77] The trustee

60. See 4 C. L. 691.

61, 62, 63, 64. City of Hagerstown v. Groh [Md.] 61 A. 467.

65. The rights date from the filing of the petition. Baker v. Hill [Md.] 59 A. 275.

66. See 4 C. L. 690.

67. Evidence sufficient to show that a mortgagee took possession by consent of the mortgagor. Becker v. McCrea, 94 N. Y. S. 20.

68. Becker v. McCrea, 94 N. Y. S. 20.

69, 70. Sadler v. Jefferson [Ala.] 39 So. 380.

71. The mortgagor may deny the mortgagee's title. Sadler v. Jefferson [Ala.] 39 So. 380. Rents received by the mortgagee should be applied to the mortgage debt. Crebbin v. Deloney [Ark.] 86 S. W. 829.

72. See 4 C. L. 690, n. 69 et seq.

NOTE. Equitable mortgages. Right to rents and profits: Held, that an equitable mortgagee who has received rents from a tenant of the equitable mortgagor, cannot be compelled to refund them at the suit of the tenant. Finck v. Tranter, 1 K. B. 427.

In jurisdictions where a mortgagee holds legal title, the estate of the mortgagor is peculiar. He is not a tenant at will, for he is not entitled to emblements. See Moss v. Gallimore, 1 Doug. 279, 283. Nor is he like a receiver, for he need not pay rent, nor account to the mortgagee for rent received. Ex parte Wilson, 2 Ves. & B. 252. But the mortgagee may, by ejectment, obtain possession of the land, or require a tenant to pay him the rents. Ex parte Bignold, 4 Deac. & Ch. 259. He would, however, be entitled to rents and profits flowing from his own lawful possession. Re Gordon, 61 L. T. R. (N. S.) 299. And if he has received the rents, the mortgagor or his assignee in bankruptcy cannot take them from him. Sumpter v. Cooper, 2 B. & Ad. 223. Nor should the tenant in the principal case get any relief, for he has a good equitable defense to an action by the lessor, and paid with knowledge of all the facts, being mistaken only as to the law. See Higgs v. Scott, 7 C. B. 63.—18 Harv. L. R. 545.

73. La Forest v. Blake Co. [Me.] 60 A. 899.

74. Crebbin v. Deloney [Ark.] 86 S. W. 829.

75. How computed: Under Rev. 1902, § 56, "legal" interest means the contract rate, and should be computed for the time between exercise of the option and the due date. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341.

76. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341.

77. Deductions from the proceeds of a loan by a building and loan association on account of the initial payment of fees, dues and premiums are regarded as voluntary payments and no credit is allowed on the principal or interest. State Mut. Bldg. & Loan Ass'n v. O'Callaghan, 67 N. J. Eq. 103, 57 A. 496.

will not be charged with loss of discounts by the tardy payment of taxes until it is shown what was the rate and time of payment.[78] A mortgagee holding as trustee for creditors may be required at the suit of a creditor to account and distribute the proceeds of his trust.[79]

An extension of time for payment of the debt[80] must be based on a consideration[81] and a full knowledge of all material facts.[82] An agreement for an extension founded on a valuable consideration is binding though the mortgagor refused to sign a formal agreement, asserting that the letter was sufficient.[83]

§ 8. *Lien and priorities.*[84]—Holders of notes secured by the same mortgage may agree as to the order in which their liens shall take priority.[85] A purchase-money mortgage may by its terms be made subservient to judgment liens.[86] A mortgage to secure future advances takes priority as to all advances made without notice of subsequent liens,[87] but not as to advances made after notice.[88] Mechanics' liens take priority over the mortgage according to time.[89] The lien of a mortgage given to secure the payment of alimony terminates on the death of the husband.[90] The lien of a mortgage properly claimed may be preserved in the fund where the property is judicially sold.[91] Junior lienors cannot compel a senior to satisfy his claim out of an accommodation mortgage where the debtor has guarantied the payment of the debt.[92] In a suit to have a purchase-money mortgage decreed a prior lien, the purchaser is a necessary party though he has conveyed to one who assumed the mortgage.[93] The personal representatives of the mortgagee who took in a representative capacity are also necessary parties.[94]

§ 9. *Assignments of mortgages.*[95]—A mortgage is not negotiable,[96] hence an

78. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228.

79. First State Bank v. Sibley County Bank, 93 Minn. 317, 101 N. W. 309.

80. See 4 C. L. 693.

81. A mere promise by a beneficiary in a trust deed to extend the time of payment is not binding. Sturgeon v. Mudd, 190 Mo. 200, 88 S. W. 630.

82. An extension granted where the debtor concealed the fact that the premises were subject to prior liens is not binding. Sturgeon v. Mudd, 190 Mo. 200, 88 S. W. 630.

83. Macaulay v. Hayden, 96 N. Y. S. 64.

84. See 4 C. L. 693.

85. On foreclosure to satisfy one the sale may be made subject to the lien of the other if third persons are not injuriously affected. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032.

86. Mortgage expressly so provided. Stover v. Hellyer [N. J. Err. & App.] 62 A. 698.

87. Advances made prior to notice of a judgment obtained against the grantor take precedence as against such judgment. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760.

88. An absolute deed intended as a mortgage made to secure future advances does not take priority as to advances made after actual notice of subsequent liens. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760.

89. See Mechanics' Liens, 6 C. L. 611. Provisions that the mortgagor shall not suffer a mechanic's lien prior to the mortgage on the property and that after-acquired property should be subject to the mortgage are not inconsistent, and a lien on after-acquired property has priority. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353.

90. Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236.

91. Where the lien of a first mortgage is set up in a suit to sell property to pay debts, it must be preserved in the fund realized from the sale; but if the mortgage is not set up, the lien is cut off, and the mortgagee becomes a general creditor. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

92. Where a mortgage is given to secure the debt of another which the debtor at the time guaranties to pay but thereafter confesses judgment, junior lienors of the estate of the debtor cannot require the creditor to satisfy his claim through the mortgage. Bradley v. Bond [Md.] 61 A. 504.

93. The purchaser is a necessary party to a suit to have a purchase-money mortgage decreed a prior lien to a subsequent mortgage executed by him though a grantee of the purchaser assumed the mortgage. Cumberland Trust Co. v. Padgett [N. J. Eq.] 61 A. 837.

94. Where a purchase-money mortgage taken by an executrix was canceled so as to give precedence to a mortgage executed by the purchaser and the purchaser then conveyed to one who assumed the mortgages in an action to reinstate the canceled mortgage as first lien, the purchaser and representative of the deceased executrix are necessary parties. Cumberland Trust Co. v. Padgett [N. J. Eq.] 61 A. 837.

95. See 4 C. L. 695.

96. Hillard v. Taylor, 114 La. 883, 38 So. 594.

assignee takes subject to all defenses available against his assignor.[97] A provision against assignment does not operate to the prejudice of an assignee under an assignment effected by operation of law or order of court.[98] A tenant in common of the mortgaged premises is entitled to have the mortgage assigned to one who for his benefit pays the debt secured,[99] and a tenant under a lease providing for payment by him of interest on an antecedent mortgage may if the enforcement of such mortgage would work injury to him compel an assignment after suit on the mortgage when no interest is due.[1] A purported assignment without the debt secured is a nullity.[2] A mortgage cannot be assigned by indorsement,[3] but the transfer of the note secured by indorsement operates as an assignment of the mortgage,[4] and where a mortgage passes the legal title a deed by the mortgagee conveys it and operates as an assignment of the mortgage debt.[5] A reassignment cannot be effected by erasing the name of the assignee and delivery back to the original mortgagee.[6] An assignment must be from the owner[7] or apparent owner[8] of the mortgage, or from one with authority to assign,[9] and the assignee must take in good faith.[10] The assignment must describe the mortgage.[11] An assignee must insist on the production of the mortgage and the instrument evidencing the debt,[12] or must exercise more than ordinary diligence to ascertain their whereabouts.[13] An assignee who has recorded his assignment is not estopped to assert his lien because he delayed until his assignor had become insolvent.[14] It may be shown by parol that an assignment of a mortgage in the hands of an attorney for collection should so remain.[15] Matured benefits promised by the mortgagor to one of the debtors but not assumed by the assignee will not be set off as against the mortgage on the other debtor's land, though the promisor is insolvent[18] but the set-off will be only against what personal liability the first debtor may incur.[17]

97. Takes subject to an oral agreement between mortgagor and assignor for an extension though he had no notice of it. Quackenbush v. Wheaton, 46 Misc. 357, 94 N. Y. S. 823.

98. A provision in a mortgage that it shall be non-negotiable and uncollectible in the hands of any person except the mortgagee. Scaife v. Scammon Inv. & Sav. Ass'n [Kan.] 80 P. 957.

99. Simonson v. Lauck, 93 N. Y. S. 965. Where one acting for a tenant in common of the premises tenders the amount of the debt and requests an assignment, the fact that other co-tenants do not object to the foreclosure proceedings does not preclude the court from ordering an assignment. Id.

1. Wunderle v. Ellis [Pa.] 62 A. 106.

2. Miller v. Berry [S. D.] 104 N. W. 311. A purchaser of a mortgage who does not also acquire the debt is presumed to know that he acquires nothing and hence cannot claim that he was prejudiced by the fact that an assignment of the mortgage was not recorded. Richards Trust Co. v. Rhomberg [S. D.] 104 N. W. 268.

3. Hodge v. Hudson [N. C.] 51 S. E. 954.

4. Huitink v. Thompson [Minn.] 104 N. W. 237; Miller v. Berry [S. D.] 104 N. W. 311. Under the statutes of Oregon a mortgage may be assigned by indorsement of the mortgage note. Barringer v. Loder [Or.] 81 P. 778.

5. A subsequent sale under the mortgage is void. Sadler v. Jefferson [Ala.] 39 So. 380.

6. Carter v. Smith [Ala.] 38 So. 184.

7. Evidence insufficient to show that a claimant had title to a mortgage by assignment from the true owner. Merager v. Madson [S. D.] 103 N. W. 650.

8. Where one holding title to a mortgage which in fact belongs to another, and with a general power of attorney assigns the same, the final holder may rely on the bona fides of the transaction between the vendor and his assignor. Friend v. Yahr [Wis.] 104 N. W. 997.

9. Delivery of notes and mortgage by a corporation mortgagee to an assignee shows authority on the part of the officer who made the assignment to make the same or amounts to a ratification of his act. Mathews v. Nefsy [Wyo.] 81 P. 305.

10. Assignment of a mortgage held bona fide as to the assignee. Friend v. Yahr [Wis.] 104 N. W. 997.

11. An assignment describing the mortgage by the names of the parties and the book and page of the record where it is recorded sufficiently describes the mortgage. Mathews v. Nefsy [Wyo.] 81 P. 305.

12. An assignee of a bond and mortgage who accepts the mortgage without the bond is charged with notice of a former assignment in which the bond but not the mortgage had been delivered. Syracuse Sav. Bank v. Merrick, 182 N. Y. 387, 75 N. E. 232.

13. Richards Trust Co. v. Rhomberg [S. D.] 104 N. W. 268.

14. Cornish v. Woolverton [Mont.] 81 P. 4.

15. Easton v. Woodbury [S. C.] 50 S. E. 790.

An assignment may be rescinded for false representations as to the value of the land mortgaged.[18] The assignee may rescind on suspicion of falsity of the representations.[19] An assignee is not required to rescind at once on discovery that false representations had been made to him where the facts discovered warranted him in believing the debt still well secured.[20]

An assignment is a conveyance within the meaning of the recording statutes,[21] and must be recorded to preserve rights under it as against subsequent purchasers;[22] but failure to record does not estop the assignee from asserting title as against one who took a void assignment,[23] and a purchaser of a note and mortgage whose name is filled in as assignee of the mortgage and indorsee of the note and who reduces the instruments to actual possession is not required to record as against subsequent purported assignees.[24]

§ 10. *Transfer of title of mortgagor and assumption of debt.*[25]—A grantee acquires all the mortgagor's rights[26] and is bound by his liabilities charged on the land.[27]

Assumption of the mortgage.[28]—A purchaser of the land is not liable for the mortgage unless he expressly or impliedly assumes the same.[29] The mortgage may be assumed without its being expressly so provided,[30] but in the absence of a written assumption the evidence must be clear and show that the assumption was in fact made.[31] A grantee who accepts a deed containing an assumption clause is bound by it.[32] The lien in favor of the grantor created by the assumption of a void mortgage as part of the purchase price inures to the benefit of the mortgagee and may be enforced regardless of the invalidity of the mortgage.[33] Failure of a grantee who assumes a mortgage to pay the debt when due does not give a cause of action to cancel the deed.[34] An assumption clause is not within a provision of the statute of frauds requiring undertakings not to be performed within one year to be in writing and signed by the party to be charged.[35] A promise by the grantee to pay a mortgage is not a covenant running with the land.[30]

16, 17. American Guild of Virginia v. Damon, 94 N. Y. S. 985.

18. Simonds v. Cash [Mich.] 99 N. W. 754. Assignor of mortgage held responsible for representations in appraisements of the mortgaged premises. Id.

19. Simonds v. Cash [Mich.] 99 N. Y. 754.

20. Simonds v. Cash [Mich.] 99 N. W. 754. Two months held not unnecessary delay in rescinding an assignment of a mortgage for false representations as to the value of the mortgaged premises, where assignor and assignee lived in different states widely separated. Id.

21. Huitink v. Thompson [Minn.] 104 N. W. 237.

22. Friend v. Yahr [Wis.] 104 N. W. 997. The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another. Id.

23. One who took an assignment of the mortgage without mention of the debt secured. Miller v. Berry [S. D.] 104 N. W. 311.

24. Richards Trust Co. v. Rhomberg [S. D.] 104 N. W. 268. An assignee whose name is filled in as indorsee of the note and as assignee of the mortgage who leaves the papers with her husband as agent is not negligent in failing to make inquiries of him as to their whereabouts. Id.

25. See 4 C. L. 696.

26. An agreement for an extension may be availed of by a grantee of the premises who assumed the mortgage. Macaulay v. Hayden, 96 N. Y. S. 64.

27. A contract for extension made by the mortgagor is binding on a subsequent grantee whether he takes with or without notice of it. White v. Krutz, 37 Wash. 34, 79 P. 495.

28. See 4 C. L. 697.

29. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460. A grantee in a quitclaim deed who does not assume a mortgage does not by executing new interest notes become principal debtor so as to relieve the mortgagor from liability for a deficiency judgment. Id.

30, 31. Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56.

32. Though the grantee in a deed containing an assumption clause does not sign it, yet, if he accepts the instrument and places it on record with knowledge of its contents, he is bound thereby as effectually as though he had done so. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

33. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852.

34. Thurmond v. Thurmond [Tex. Civ. App.] 13 Tex. Ct. Rep. 146, 87 S. W. 878.

35. Higgins v. Evans, 188 Mo. 627, 87 S. W. 973.

The legal nature of the liability created by such assumption is the subject of a contrariety of opinion.[37] Some hold that if the purchase price is abated on account of the mortgage the grantee must indemnify the mortgagor against the mortgage.[38] Others hold that a grantee who assumes the mortgage is personally liable for the debt;[39] but not one on whom title is cast by operation of law,[40] and to create a personal liability where the debt is not assumed, it must appear that the amount of the debt was deducted from the purchase price agreed upon.[41] Only as in favor of a grantee for value of a portion of the premises will equity throw the burden on the portion retained.[42]

Status of mortgagor as surety.[43]—A grantee who assumes a mortgage becomes principal debtor, the mortgagor a surety;[44] but unless a mortgagee agrees to a substitution he may sue the mortgagor alone or he may accept the purchaser's assumption and sue him.[45] An extension of time granted by a grantee without the mortgagor's consent releases him;[46] but an extension granted to a grantee who assumes a mortgage does not release a subsequent grantee who also assumes it.[47]

§ 11. *Transfer of premises to mortgagee and merger.*[48]—The question of merger when mortgage lien and fee are united in one person is one of intention[49]

36. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460.

37. See 20 Am. & Eng. Enc. Law [2d Ed.] 993 et seq.

38. Where one purchases an equity of redemption and the price is abated on account of the mortgage debt, the purchaser is bound to indemnify the mortgagor against the mortgage without regard to the value of the property. Lowy v. Boenert, 110 Ill. App. 16. Where the purchaser of an equity of redemption receives the possession and profits, he is bound to indemnify the mortgagor against the mortgage to the extent of the value of the land. He may relieve himself by returning the land. Id.

39. Blakeslee v. Hoit, 116 Ill. App. 83.

40, 41. Lobdell v. Ray, 110 Ill. App. 230.

42. Where there is a paramount mortgage on land part of which is conveyed, equity will throw the burden on the portion that remains where the grantee has paid full value or the grantor has covenanted against incumbrances. But the rule will not obtain in favor of a purchaser at foreclosure sale. Sternberger v. Sussman [N. J. Eq.] 60 A. 195.

43. See 4 C. L. 698.

44. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22; Scholten v. Barber, 217 Ill. 148, 75 N. E. 460. Owners of the equity who assume a mortgage in consideration of an extension for the time of payment of the debt become primary obligors and cannot recover from the mortgagor the amount of a deficiency judgment though he consented to the extension. Winslow v. Stoothoff, 93 N. Y. S. 335.

45. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460.

46. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. An extension given by the mortgagee to the owner of the equity if without the mortgagor's consent releases him from his obligation to the extent of the value of the land. Winslow v. Stoothoff, 93 N. Y. S. 335.

47. Higgins v. Evans, 188 Mo. 627, 87 S. W. 973.

48. See 4 C. L. 698.

49. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

NOTE. Intention and interest of mortgagee: Although, ordinarily, when it is a matter of indifference, and the one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter, this is not necessarily so, but, on the contrary, when it is not the intention of the parties that it shall merge, or when it is not to the interest of the mortgagee that such merger should take place, the mortgage continues to subsist for the protection of the owner of the fee from subsequent or intervening encumbrances, or liens. Hines v. Ward, 121 Cal. 115, 53 P. 427; Meacham v. Steele, 93 Ill. 136; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241; Moore v. Harrisburg Bank, 8 Watts [Pa.] 138. If there is no expression or intention on the part of the mortgagee at the time he acquires the fee, it must be presumed that he intended to do that which was most advantageous to himself, and if this is that the two estates should not merge, no merger will take place. Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Patterson v. Mills, 69 Iowa, 755, 28 N. W. 53; Freeman v. Paul, 3 Greenl. [Me.] 260, 14 Am. Dec. 237; Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241. If the legal ownership of land and the absolute ownership of an encumbrance upon it become vested in the same person, the intention governs the question of merger, and if the owner has an interest in keeping such interests distinct, there will be no merger unless he expressly wishes it. Title Guarantee Co. v. Wrenn, 35 Or. 62, 56 P. 271, 76 Am. St. Rep. 454. There is no merger of the mortgage as against subsequent encumbrances, when the mortgagor conveys the land to the mortgagee, when it would be inequitable or where there is an express agreement of the parties that the lien shall remain alive. Shattuck v. Belknap Bank, 63 Kan. 443, 65 P. 643; Collins v. Stocking, 98 Mo. 290, 11 S. W. 750; Fitch v. Applegate, 24 Wash. 26, 64 P. 147; Gilchrist v. Foxen, 95

and will not be implied where there is an intervening claim;[50] but an intention that a merger should not result will be presumed if it would be disadvantageous to the owner.[51] A mortgage is not as to other lienors merged in the sheriff's deed on foreclosure.[52] The execution of leases by a constructive mortgagor does not indicate an intention to abandon rights as mortgagor.[53] A purchaser of one of two tracts covered by a mortgage cannot on obtaining an assignment of the mortgage satisfy it out of the other tract where there is no agreement to that effect.[54]

§ 12. *Payment, release or satisfaction.*[55]—Payment of the debt extinguishes the mortgage without satisfaction of record,[56] or the preparation and delivery of a satisfaction piece.[57] Payment must be made to the owner[58] or record owner of the mortgage.[59] The fact that the mortgage is not produced at the time of payment may or may not be a controlling circumstance in determining the good faith of the mortgagor.[60] Payment to an agent of the holder is sufficient[61] if he has authority to accept payment.[62] The scope of his authority must be ascertained by the debtor.[63]

Wis. 428, 70 N. W. 585. Nor is there such merger when the interest and situation of the parties clearly indicate that there is no intention to let in subsequent liens ahead of the mortgage, even though the satisfaction of the mortgage is entered of record, and the secured notes are surrendered. Walker v. Goodsell, 54 Mo. App. 631.

When the mortgagee purchases the fee to the mortgaged premises, no merger of the mortgage will occur when the intention of the mortgagee is otherwise, or such merger is against his interests. Smith v. Swan, 69 Iowa, 412, 29 N. W. 402; Tower v. Devine, 37 Mich. 443; Davis v. Pierce, 10 Minn. 376; Andrus v. Vreeland, 29 N. J. Eq. 394; Van Nest v. Latson, 19 Barb. [N. Y.] 604. And the rule is the same at law as in equity; Hutchins v. Carleton, 19 N. H. 487. This rule as to the intention or presumed intention of the parties or of the mortgagee is not affected by the fact that the mortgage includes other estates of which the mortgagee is not the owner. Knowles v. Carpenter, 8 R. I. 548. If a mortgagor conveys a portion of the premises to a third person, and afterward the mortgagee purchases the remaining portion from the mortgagor, if it is intended to keep the mortgage alive as against the rights of such third person, equity will treat the two estates as coexisting in the mortgagee. Meacham v. Steele, 93 Ill. 135. If a mortgagee takes a conveyance of the mortgaged land under a mistaken impression that the lien of his mortgage is lost, but without any intention of releasing the mortgage, it is not merged or discharged. Edgerton v. Young, 43 Ill. 464. Of course, if the mortgagor conveys the mortgaged land to the mortgagee by deed expressly reciting that it shall not operate to merge the mortgage, there is no merger. Abbott v. Curran, 98 N. Y. 665.—See note to Forthman v. Deters [Ill.] 99 Am. St. Rep. 162.

50, 51. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

52. Citizens' State Bank v. Jess, 127 Iowa, 450, 103 N. W. 471.

53. Conkey v. Rex, 111 Ill. App. 121.

54. Bailey v. Wood [S. C.] 50 S. E. 631.

55. See 4 C. L. 699.

56. Friend v. Yahr [Wis.] 104 N. W. 997. The payment of the mortgage debt extinguishes the mortgage and the legal title (if held by the mortgagee) revests in the mortgagor, notwithstanding that a release was not recorded. Horner v. Chaisty [Md.] 61 A. 283. Services rendered the mortgagee by the mortgagor constitute a good consideration for the satisfaction of a mortgage. Sherman v. Matthieu, 94 N. Y. S. 565. Evidence insufficient to show that a mortgagee had exercised an option to purchase an interest in the property and had surrendered the note and mortgage as paid. Smith v. Leavenworth [Or.] 80 P. 1010. Evidence insufficient to show an agreement between mortgagor and mortgagee that notes deposited as collateral for the secured debt should be credited in payment thereof. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319. Contract construed as one to pay off certain mortgages and not one of indemnity. Cudaback v. Hay, 134 F. 120.

57. A mortgage having been extinguished by payment of the debt, it is not necessary to valid record evidence thereof that a satisfaction piece shall be executed by the actual or apparent owner of the debt for delivery to the mortgagor or that there should be delivery. Friend v. Yahr [Wis.] 104 N. W. 997.

58. The satisfaction of a mortgage assigned as collateral by the mortgagee, by a deed from the mortgagor to the mortgagee's wife, does not release the lien of the mortgage. Ruberg v. Brown [S. C.] 51 S. E. 96.

59. Where the mortgagor paid the debt to the record assignees of the mortgage, the nonproduction of the instruments by the assignee held not notice to the mortgagor that the mortgage was held by another. Weinberger v. Brumberg [N. J. Eq.] 61 A. 732.

60. Weinberger v. Brumberg [N. J. Eq.] 61 A. 732. A mortgagor who in good faith conveyed the mortgaged premises in payment of the debt held entitled to equitable relief as against the true owner of the debt. Id.

61. An agent who has collected interest for five years has authority to receive the principal and discharge the mortgage. Pennypacker v. Latimer [Idaho] 81 P. 55. In such case the principal is estopped to deny such authority. Id.

If the agent has authority[64] the fact that the amount received does not reach the owner of the mortgage is immaterial.[65] A mortgage may be kept alive by agreement notwithstanding payment in full,[66] and where the mortgaged premises are conveyed in payment of the debt, the deed may recite that the conveyance effects a payment and the mortgage left of record as part of the title while the debt is canceled.[67]

A redemption from foreclosure sale by a subsequent mortgagee extinguishes his mortgage if property exceeds in value the amount of his debt together with what be paid in redeeming,[68] and where a new mortgage has been executed in lieu of a temporary one, the mortgagor is entitled to have the temporary mortgage returned to him and discharged of record;[69] but a release of parts of the mortgaged premises from the lien on a sale of such parts pursuant to terms of the first mortgage promotes and does not release the lien of second mortgages containing no such terms.[70]

No particular form of words is necessary to create a release,[71] but a mutual release of obligations between the parties in order to effectuate the release of a mortgage must have been so intended.[72] A release is effective for no other purpose than evidence of the satisfaction of the mortgage.[73] A guardian may release a mortgage to him as such,[74] but the owner of one of several notes secured by a deed of trust may not enter satisfaction though all the notes are paid,[75] and the satisfaction of a mortgage to trustees, before maturity, requires the united action of all trustees.[76] Extinguishment is prima facie established by a receipt of payment and release in a deceased mortgagee's handwriting.[77] A release fraudulently obtained is ineffective for any purpose,[78] and one executed under mistake of fact may be set aside if rights of third persons have not intervened.[79] A release will not be set

62. Authority in an agent to collect interest on a mortgage debt is not authority to collect the principal and discharge the mortgage. Cornish v. Woolverton [Mont.] 81 P. 4.

63. Cornish v. Woolverton [Mont.] 81 P. 4.

64. A person in possession of a note and mortgage with authority to collect may take from the mortgagor a new mortgage on the same premises for the purpose of providing means with which to pay the one he holds and, after he realizes on such subsequent mortgage the first is extinguished. Friend v. Yahr [Wis.] 104 N. W. 997.

65. Friend v. Yahr [Wis.] 104 N. W. 997.

66. Where future advances are made, subsequent creditors with notice are bound by the agreement. Girard Trust Co. v. Baird, 212 Pa. 41, 61 A. 507.

67. Weinberger v. Brumberg [N. J. Eq.] 61 A. 732.

68. Work v. Braun [S. D.] 103 N. W. 764.

69. Callahan v. Mercantile Trust Co., 188 Mass. 393, 74 N. E. 666.

70. Mt. Adams, etc., R. Co. v. Central Trust & Safe Deposit Co., 2 Ohio N. P. (N. S.) 529.

71. "The within mortgage is hereby released and discharged and the clerk of the court is authorized to satisfy the same of record" releases the mortgage as against a subsequent mortgagee. Werber v. Cain [S. C.] 51 S. E. 123.

72. Mutual release of obligations between partners on dissolution of the firm held not intended as a release of a mortgage by one to the other executed prior to the organization of the firm. Hubbard v. Mulligan [Colo.] 82 P. 783.

73. Where the beneficiary appends a release to a warranty deed of the premises such release is not a quitclaim deed but operates as a mere extinguishment of his claim. Stevens Lumber Co. v. Hughes [Miss.] 38 So. 769. Such release operates to the benefit of the grantor and the grantee is not subrogated to the rights of the beneficiary. Id.

74. Werber v. Cain [S. C.] 51 S. E. 123.

75. Under the statute only the payee or his assignee is authorized to do so. Busby v. Compton, 112 Mo. App. 569, 87 S. W. 109.

76. Vohmann v. Michel, 96 N. Y. S. 309.

77. Sherman v. Matthieu, 94 N. Y. S. 565. The fact that a mortgagee who had had explained the necessity of having a release recorded did not do so is not inconsistent with an inference of release from finding one signed by her among her effects. Id.

78. A release fraudulently obtained from a depositary and recorded without payment of the debt is ineffective both as to the original parties and subsequent bona fide purchasers. Franklin v. Killilea [Wis.] 104 N. W. 993. One who takes a mortgage on faith of a forged satisfaction piece does not acquire a lien superior to the mortgage purported to be discharged. Vohmann v. Michel, 96 N. Y. S. 309.

79. Doxey v. Western State Bank, 113 Ill. App. 442. Bill to set aside a satisfaction of a mortgage on the ground of mistake not maintainable against one who purchased at execution sale against the mortgagor, where

aside though executed and recorded prior to the maturity of the indebtedness at the instance of an assignee of the debt as against a bona fide subsequent incumbrancer.[80]

A bill to compel the satisfaction of a mortgage must clearly allege payment and the evidence must clearly establish the allegation.[81] An action to cancel a mortgage is one to relieve the real estate from its operation and not one upon the bond secured.[82] Where a building and loan association in the hands of a receiver has loaned money on property in a state other than that of its domicile, the borrower may maintain an action to cancel the mortgage, on payment of the loan, without leave of the court appointing the receiver, where he has neither actual nor constructive possession of the property.[83]

Release by bar of limitations.[84]—An indemnity mortgage is satisfied where limitations have run against the obligation it indemnified against.[85]

Penalties for failure to release.[86]—Statutes authorizing the recovery of a penalty for failure to release a mortgage of record are to be strictly construed[87] and apply only where the mortgage of record is an enforceable one.[88]

§ 13. *Redemption*[89] from the mortgage must not be confused with redemption from foreclosure sale.[90]

The right to redeem[91] is not affected by a void foreclosure sale[92] but may be cut off by limitations.[93]

Procedure to redeem.[94]—Redemption must be sought in an appropriate proceeding.[95] A husband who executes a deed intended as a mortgage and thereafter conveys the premises to his wife is a necessary party to a suit by her to redeem.[96] In Maine a bill to redeem authorized by statute cannot be maintained without full compliance with statutory conditions.[97] A bill not alleging compliance with statutory conditions cannot be maintained,[98] but an amendment supplying such allegations may be allowed when it appears that otherwise the bill could not be seasonably commenced before the mortgage would be forever foreclosed.[99] In an action upon the breach of an equitable mortgage the court may determine the amount necessary to redeem and direct that unless it be paid the decree of the court shall operate as a conveyance.[1] Where an administrator seeks to redeem from a mortgage

the mortgagee is not a party and the purchaser is not shown to have connection with the satisfaction agreement other than record knowledge thereof. Barco v. Doyle [Fla.] 39 So. 103.

80. Havighorst v. Bowen, 116 Ill. App. 230.

81. Dinner v. Van Dyke, 25 Pa. Super. Ct. 433.

82. An equitable owner may in his own name maintain a bill to cancel a mortgage on the premises given by another after he has paid the mortgage and it is no defense that the bond secured is a sealed instrument. Whelpley v. Ross, 25 App. D. C. 207.

83. Egan v. North American Loan Co., 45 Or. 131, 76 P. 774. Complaint for cancellation of a building and loan association mortgage on the ground that the debt had been paid held not to state a cause of action. Darr v. Guaranty Sav. & Loan Ass'n [Or.] 81 P. 565.

84. See 4 C. L. 701, also Foreclosure of Mortgages on Land, 5 C. L. 1441.

85. Morris v. Hulme [Kan.] 81 P. 169.

86. See 4 C. L. 703.

87. In order to recover the penalty prescribed by Burns' Ann. St. 1901, § 1105, it must appear that the debt or obligation has been paid, lawfully tendered or discharged. Hood v. Baker [Ind. App.] 75 N. E. 608.

88. Where a note embodied in a mortgage is left blank as to amount the mortgage was unenforceable and was not an instrument contemplated by Code 1896, § 1066, prescribing a penalty for failure to enter satisfaction of a mortgage. Duke v. Chandler [Ala.] 39 So. 567.

89, 90. See 4 C. L. 701. See Foreclosure of Mortgages on Land, 5 C. L. 1441.

91. See 4 C. L. 702.

92. Chace v. Morse [Mass.] 76 N. E. 142.

93. A mortgagee who lawfully obtains and retains possession during a period greater than that allowed for redemption acquires title. Becker v. McCrea, 94 N. Y. S. 20.

94. See 4 C. L. 702.

95. A mortgagor cannot enforce redemption in trespass to try title. He must sue for that purpose alleging equities authorizing recovery. Parks v. Worthington [Tex. Civ. App.] 13 Tex. Ct. Rep. 204, 87 S. W. 720.

96. Marbury Lumber Co. v. Posey [Ala.] 38 So. 242.

97, 98, 99. Doe v. Littlefield, 99 Me. 317, 59 A. 438.

1. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

of several parcels some belonging to himself and some to the estate, the amount necessary to redeem each parcel should be ascertained.[2] By statute in Maine if a greater sum than is due has been paid it may be recovered.[3] A decree that the plaintiff is entitled to redeem on payment of the amount due and that the cause be referred to the register to ascertain the account between the parties is a final determination.[4] Under a rule allowing an appeal from an interlocutory decree it is not essential that such a decree be entered.[5]

§ 14. *Subrogation.*[6]—One with no interest in the premises who voluntarily pays the mortgage debt is not entitled to be subrogated to the rights secured,[7] unless such payment was made under an agreement that it should constitute a lien or to protect an interest in the premises;[8] but one who pays upon request is not a mere volunteer.[9] A widow is not subrogated to mortgage lien discharged in part with her separate means,[10] but a wife who pays off a mortgage on the homestead without intending to relinquish her right to repayment but solely for the purpose of protecting her homestead rights is entitled to be subrogated to the rights of the mortgagee.[11] Ordinarily a junior mortgagee is not entitled to be subrogated to a lien which did not exist when his mortgage was taken.[12] A grantee of land subject to a mortgage, who agrees with the grantor to pay said mortgage as part of the purchase price, after payment of the mortgage is not entitled to be subrogated to the rights of the mortgagee as against the lienholders.[13]

MOTIONS AND ORDERS.[14]

The office of a motion[15] is distinct from that of a judgment in that it is not primarily to try the facts.[16]

Making and submitting and filing motion.[17]—It is not essential that the motion be offered or filed in writing if entered of record.[18] Submission of motions by correspondence is improper,[19] especially when a rule requires written motions filed with the clerk.[20] In such case the proper practice is for the judge to turn them over to the clerk with directions to notify the movant.[21] Affidavits to support a rule requiring an allocatur should make a prima facie case.[22]

Notice[23] is not required if no right of an adverse party is to be affected,[24] but

2. Smith v. Goethe [Cal.] 82 P. 384.
3. Under Rev. St. 1903, § 23, c. 92, providing that if a greater sum than is due is paid to redeem it shall be refunded, evidence held to show that the mortgagor had paid more than was due and was entitled to recover the excess. Hagerty v. Webber [Me.] 61 A. 685.
4. Is appealable. Gentry v. Lawley [Ala.] 37 So. 829.
5. In a suit to redeem and for an accounting it is not essential that an interlocutory decree from which an appeal may be taken be entered as provided by Code Civ. Proc. § 963, as such statute gives a right of appeal from such decree only when one is made. Smith v. Goethe [Cal.] 82 P. 384.
6. See 4 C. L. 703.
7. Doxey v. Western State Bank, 113 Ill. App. 442.
8. Blydenburgh v. Seabury, 93 N. Y. S. 330.
9. One who tenders the full amount due under a mortgage at the request of a tenant in common of the premises. Simonson v. Lauck, 93 N. Y. S. 965.
10. Hickey v. Conine, 6 Ohio C. C. (N. S.) 321.
11. Charmley v. Charmley [Wis.] 103 N. W. 1106.
12. Anthes v. Schroeder [Neb.] 103 N. W. 1072.
13. Dieboldt Brewing Co. v. Grabski, 7 Ohio C. C. (N. S.) 221.
14. This topic does not treat of particular motions but only of matter common to all. See New Trial, etc., 4 C. L. 810; Pleading, 4 C. L. 980, and similar topics.
15. See 4 C. L. 704, n. 3-7.
16. Smith v. Whaley [R. I.] 61 A. 173.
17. See 4 C. L. 704, n. 11 et seq.
18. Motion to set aside judgment. Hartman v. Viera, 113 Ill. App. 216.
19, 20, 21. In re Kinney [C. C. A.] 135 F. 340.
22. O'Malley v. Times Pub. Co., 135 F. 909.
23. See 4 C. L. 704.
24. Not necessary on a motion for nunc pro tunc entry to correct records, especially if made from judge's recollection. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27.

a motion designed to rectify jurisdiction over parties requires it.[25] A motion for an indefinite stay is of the character which even independent of court rules requires notice.[26] Notice may be by entry on the record of which notice is charged.[27] One party cannot complain that another disconnected in interest had no notice.[28]

Hearing and rehearing and relief.[29]—A motion in a cause should be addressed to the court which has the cause and at the county where it is triable, except as the statute permits otherwise.[30] A rule to show cause may be heard in open court without being placed on calendar.[31] Under a statutory power to judges to make orders in any part of the state, if they are of the kind made out of court without notice, a rule to show cause may be made where the judge resides, returnable in another county where respondent resides.[32] Pending motions are carried over the term by a general continuance.[33] The mere filing at a term does not carry the motion over to the next.[34] A motion not heard on the day set may be specially continued to any day certain, notwithstanding a general rule of court to take up undisposed-of motions on a later day.[35] A motion of a kind not recognized may be overruled.[36] Procuring a decree on the same matter while a motion pends concludes the movant.[37]

Renewals.[38]—Ordinarily a motion denied by one judge should not be renewed before another without leave.[39]

The order.[40]—It must be made pursuant to a pending action or the pleadings therein, or there must be independent process on the motion.[41] Casual statements out of court are not to be regarded as orders of a judge authorized to make orders in writing.[42] It is better practice to file a decision with an order,[43] and in New York it is essential when an issue of law is decided,[44] but findings are not required by a statute applying only to judgments on issues of fact.[45] When the court is in session, an order signed by the judge in his chambers adjoining the court room, an open door connecting the two, is signed in open court.[46]

Operation and effect of orders.[47]—An order void on its face may be collaterally attacked at any time.[48] An order entered when a party was dead, but of which fact the record is silent, is voidable only.[49]

Nunc pro tunc orders[50] supply only the record, not the order,[51] hence it must be shown that the order was made.[52]

25. Motion to amend return to process. King v. Davis, 137 F. 222.

26. Delahunty v. Canfield, 106 App. Div. 386, 94 N. Y. S. 815.

27. Motion for alimony. Jones v. Jones, 111 Ill. App. 396.

28. Motion to order assignment of mortgage to party tendering payment and to dismiss was not served on movant's co-defendants, and complainant objected. Simonson v. Lauck, 93 N. Y. S. 965.

29. See 4 C. L. 705.

30. So by statute. Code Civ. Proc. § 769. Delahunty v. Canfield, 106 App. Div. 386, 94 N. Y. S. 815. Motion for judgment in real action to reform deed follows the venue. Tefft v. Greenwich & J. R. Co., 47 Misc. 26, 95 N. Y. S. 205.

31, 32. State v. Cape Fear Lumber Co. [S. C.] 51 S. E. 873.

33. It is a "cause or proceeding." R. S. 1901, 552, 567. Hartman v. Viera, 113 Ill. App. 216.

34. Klein v. Southern Pac. Co., 140 F. 213.

35. Continued from 4th to 11th, whereas general rules would have carried it over to 18th. McFetridge v. Megargee, 26 Pa. Super. Ct. 501.

36. Motion to change a finding. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000.

37. Mellerio v. Freeman, 211 Pa. 202, 60 A. 735.

38. See 4 C. L. 705.

39. Garner v. Hellman, 93 N. Y. S. 431.

40. See 4 C. L. 705.

41. State v. Pendergast [Wash.] 81 P. 324.

42. Advice by probate judge to guardian. In re Kimble, 127 Iowa, 665, 103 N. W. 1009.

43, 44. Code Civ. Proc. §§ 1010, 1021. Vincent v. Stearns, 93 N. Y. S. 482. Order overruling demurrer and directing judgment held sufficient. Id.

45. McCoy v. Brooks [Ariz.] 80 P. 365.

46. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

47. See 4 C. L. 105, n. 45. See, also, Former Adjudication, 5 C. L. 1502; Judgments, 6 C. L. 214.

48. Callaway v. Irvin [Ga.] 51 S. E. 477.

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

50. See, also, Judgments, 6 C. L. 214.

51. Finch v. Finch, 111 Ill. App. 481; Klein v. Southern Pac. R. Co., 140 F. 213. Insertion in record of order that administrators give notice to claimants, held proper. Smith v. Whaley [R. I.] 61 A. 173.

Amendment and vacation.[53]—A void order may be set aside after term.[54] Orders taken in absence of counsel, if the same be excusable, may be set aside and rehearing ordered.[55] The court may ordinarily vacate an order made by the judge.[56] An order wholly void may be set aside on motion.[57] A separate action is necessary if none of the statutory grounds for vacation on motion exist.[58]

Costs[59] should not be allowed on denial of a motion unopposed by the other party.[60] Statutory costs will go only when the order is of the kind specified.[61]

MULTIFARIOUSNESS; MULTIPLICITY; MUNICIPAL AIDS AND RELIEFS, see latest topical index.

MUNICIPAL BONDS.

"Municipal bonds" includes all public bonds, but not warrants for the payment of public money.[62]

§ 1. *Power to issue.*[63]—To authorize the issue of bonds by municipalities, the power must be conferred on them by the constitution[64] or by statute.[65] Such statutes will be strictly construed,[66] and in determining their validity the Federal

52. That the judge started to write it is not enough (Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15), and there should be a memorandum or at least more than mere oral evidence (Id.).

53. See 4 C. L. 706.

54. MacFarland v. Saunders, 25 App. D. C. 438.

55. Motions for new trial. Whitney v. Superior Ct. of San Francisco [Cal.] 82 P. 37; Vinson v. Los Angeles Pac. R. Co. [Cal.] 82 P. 53.

56. Order of examination made by judge may be vacated on motion to special term under Code Civ. Proc. § 772. In re Schlotterer, 93 N. Y. S. 895.

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

58. Dunsmuir v. Coffey [Cal.] 82 P. 682.

59. See 4 C. L. 706, n. 61.

60. In re Collins' Estate, 93 N. Y. S. 342.

61. Those authorized on denial not allowable on grant of motion. Rev. Code Civ. Proc. § 550. Schlachter v. St. Bernard's Roman Catholic Church of Hoven [S. D.] 105 N. W. 279.

62. See Municipal Corporations, 4 C. L. 720; Counties, 5 C. L. 857, etc.

63. See 4 C. L. 706.

64. Where the constitution directed the payment of public school certificates that might thereafter be issued by the city council out of the proceeds of the sale of constitutional bonds of a certain issue, previously authorized for the liquidation of a city debt, and where all of the bonds thus authorized had been disposed of by the board of liquidation, it was held that mandamus would not lie to compel the issuance of additional bonds to pay belated certificates issued by the council after the exhaustion of the bond issue. If the fund has proved insufficient the remedy is legislative, not judicial. State v. Board of Liquidation of City Debt [La.] 39 So. 448.

65. Laws 1895, p. 65, authorizing cities of the 4th class to borrow money on bonds for the purpose of establishing electric light works if two-thirds of the voters assented thereto, did not repeal by implication Rev. St. 1889, art. 2, c. 31, empowering cities to incur indebtedness and issue bonds for any purpose authorized by the charter on the assent of two-thirds of the voters, and consequently the former act was not the only statutory warrant of authority for the issue of electric light bonds. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873.

66. The City of Placerville, which had been incorporated under a special act, was authorized by Act April 3, 1863, to issue bonds. By act of April 6, 1863, the city was reincorporated and there was an express provision repealing the act incorporating the city and all amendatory acts, which was held to repeal the bond act and to render the bonds issued thereunder void. Wichman v. Placerville [Cal.] 81 P. 537. In the act authorizing "bonds in ald of internal improvements, improving streets, highways, etc.," the phrase beginning with the word "improving" limits the preceding one, and confines the aid to the works enumerated in such phrase. State v. Weston [Neb.] 96 N. Y. 668. Amendment providing that limitation shall not apply to liquidation bonds for payment of debts existing when act was passed. Smith v. Vicksburg [Miss.] 38 So. 301.

MUNICIPAL BONDS—Cont'd.

courts will adopt the construction put upon them by the highest state court at the time the bonds were issued.[67] Constitutional provisions requiring statutes to contain but one subject,[68] and as to the passage of local and special laws[69] and the like, must, of course, be complied with.[70] Authority to the mayor and council to issue bonds authorizes the council to issue them over the mayor's veto.[71] Bonds may be issued only for public purposes.[72] The fact that a city is authorized to issue municipal bonds for school purposes does not deprive a school district embracing it of the power to issue school bonds in the manner prescribed by statute.[73] An act authorizing the issue of bonds is a revenue bill.[74]

Refunding bonds.[75]—The legislature may require a county to fund its debt, not leaving it any discretion,[76] and may authorize the funding of a debt incurred for current expenses.[77] Where refunding bonds are issued, the original debt is merged therein.[78]

Railroad aid bonds.[79]—Counties which issue bonds for railway stock do not hold the latter in a governmental capacity but subject to the same rights and liabilities as private corporations and individuals.[80] A town cannot complain that its

67. 91 Ohio Laws, p. 543, which authorized counties of a certain population to levy an extra tax and to issue bonds in anticipation for improvement of public roads, was not a law of a general nature within the meaning of Ohio Const. art. 2, § 26, providing that "all laws of a general nature shall have a uniform operation throughout the state" as such provision was construed by the state courts originally although they had subsequently changed their construction. Rees v. Olmsted [C. C. A.] 135 F. 296. See 4 C. L. 707, n. 73.

68. Act Feb. 25, 1903 (Acts 1903, p. 59), authorizing cities and towns to issue bonds is not invalid as containing more than one subject, because it contains provisions for an election and the issuance of bonds in accordance with the result thereof. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

69. Act Feb. 25, 1903 (Acts 1903, p. 59) is not rendered a local act by the provisions of § 10 exempting certain cities from its operation. Blakey v. City Council of Montgomery [Ala.] 39 So. 745. A special act authorizing the appointment of a board of county road commissioners, and making them a body corporate, does not render the act invalid under the constitutional limitation that no special act shall be passed conferring corporate powers, as at most such a body is a local organization for the purpose of civil administration. Rees v. Olmsted [C. C. A.] 135 F. 296.

70. Const. § 222, empowering the legislature to pass "laws" authorizing the issuance of municipal bonds, does not require the passage of more than one law to confer such power on a city or town. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

71. Where the town council has authority to pass an ordinance by a two-thirds vote over the mayor's veto. Diefenderfer v. State [Wyo.] 80 P. 667.

72. Bonus bonds for building a factory invalid. Schmid v. Frankfort [Mich.] 12 Det. Leg. N. 473, 104 N. W. 668. May be issued for drainage purposes. Sisson v. Board of Sup'rs of Buena Vista County [Iowa] 104 N. W. 454.

73. Power conferred on city of Los Angeles by its charter is not exclusive and does not prevent school district comprising that city and contiguous territory from issuing school bonds in accordance with the provisions of Pol. Code, §§ 1880-1887. Los Angeles City School Dist. v. Longden [Cal.] 83 P. 246.

74. Where they must pass three several readings, a bill authorizing bonds may be amended after the second reading by striking out a provision authorizing the county commissioner to purchase bonds before they became due, since that did not increase the tax or materially change the bill. Chatham County Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862.

75. See 4 C. L. 707.

76. Certain phrases of the act "If the bonds authorized are issued" construed and held not to show that the act was not mandatory. Jones v. Madison County Com'rs, 137 N. C. 579, 50 S. E. 291.

77. Chatham County Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862. Where a city was authorized to fund its existing indebtedness it cannot, three years later, fund a floating indebtedness of substantially the same amount, as part of it was not the same as existed at the time the law was passed, though the revenues and expenditures of the city had been substantially equal since. Smith v. Vicksburg [Miss.] 38 So. 301.

78. After proceedings have been started to issue bonds for outstanding warrants, no action can be maintained on the latter, but if the sale of the bonds and the payment of the warrants was unreasonably delayed, an action might be maintained to vacate the proceedings. De Roberts v. Cross [Okl.] 82 P. 735.

79. See 4 C. L. 708.

80. Where it has representatives in the directorate it is bound by their action. Hinds & Adams Counties v. Natchez, J. & C. R. Co., 85 Miss. 599, 38 So. 189.

bonds have been turned over by the railroad to a construction company under an illegal contract.[81]

Limitation of indebtedness.[82]—The amount that may be borrowed is usually limited in some way, as to a certain percentage of the last preceding assessment,[83] or to such a sum as will not increase the annual rate of taxation.[84] So too, the amount of indebtedness which a municipality may incur is often limited to a certain percentage of the assessed value of the taxable property.[85] The legislature cannot authorize or compel a city to increase its indebtedness beyond the constitutional limit.[86] Bonds expressly payable only out of a special tax do not constitute a debt within the constitutional meaning.[87]

Curative acts.[88]—The legislature may cure what it could originally have authorized and the act may operate retrospectively.[89] Constitutional provisions that acts shall be confined to a single subject[90] and against special legislation must, of course, be complied with.[91]

81. The contract if void because the board of directors of the two companies were the same, was ratified by the lapse of 14 years. Rice v. Shealy [S. C.] 50 S. E. 868.

82. See 4 C. L. 708. See, also, Municipal Corporations, 6 C. L. 714; Counties, 5 C. L. 857.

83. Bonds issued June 17, 1890, were within the 10% limit on the basis of the assessment of 1889, but exceeded the limit on the basis of the assessment of 1890, which was completed June 12, 1890, but which the board had the right to modify until July 10, and they were held valid in the hands of innocent purchasers. Platt v. Hitchcock County [C. C. A.] 139 F. 929.

84. Const. art. 10, § 11, authorizes a tax of 50 cents for city purposes without requiring a vote therefor, section 12 provides that no city shall become indebted in a greater amount than its annual revenue without the assent of two-thirds of the voters, and it was held that where bonds were issued with the assent of two-thirds of the voters for the establishment of an electric light plant, a levy of a tax of 25 cents, in addition to the 50 cent tax, to pay the interest on the bonds, was legal. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873.

85. Amendment to Vicksburg city charter providing that city may issue bonds for purpose, among others, of liquidating existing indebtedness not to exceed a certain limit, but that such limit shall not be applicable to bonds issued for the purpose of liquidating any indebtedness existing when the amendment becomes operative, does not authorize their issue to pay a portion of the floating debt not actually existing when the amendment was adopted, but contracted afterwards for the payment of ordinary current expenses which were not paid out of current revenues because the latter were used to pay deficits from former years, when the bonded debt would thereby be made to exceed the prescribed limit. Smith v. Vicksburg [Miss.] 38 So. 301. Constitutional amendment of Feb. 8, 1901, providing that limitation on indebtedness of cities shall not apply to bonded indebtedness incurred by certain cities where proceeds are applied solely for the purchase of water works, construed, and held that the provision therein that the revenue from such waterworks shall be devoted solely to the maintenance and operation of the same applies only to the city of Georgetown and not to the city of Columbia. Seegers v. Gibbes [S. C.] 52 S. E. 586. Such amendment repeals, as to such cities, Const. art. 10, § 5, providing that several political divisions or municipal corporations, covering the same territory, possessing the power to levy a tax or collect a debt shall so exercise their power to increase their debts that the aggregate debt upon any territory shall never exceed 15 per cent of the value of all taxable property therein. Id.

86. Even for the purpose of meeting the cost of public improvements, as of a bridge on a public highway, the duty of making which is imposed by legislature upon the city. In re Opinion of the Justices [Me.] 60 A. 85.

87. Board of supervisors of county were authorized to issue drainage bonds which should declare on their face that they were only payable out of a tax to be levied and assessed on the lands benefited. Sisson v. Board of Sup'rs of Buena Vista County [Iowa] 104 N. W. 454. The city purchased two boilers for its electric light plant, but provided that an appropriation therefor should be made the next year, but that said city should in no way obligate itself to pay for said boilers until an appropriation was made. A taxpayer was refused an injunction to restrain the incurring of the indebtedness. Bailey v. Sioux Falls [S. D.] 103 N. W. 16.

88. See 4 C. L. 709.

89. May validate bonds notwithstanding that the polls were open at only two of the three polling places, that the election was called by resolution and not by ordinance, and that certain ballots were rejected by the officers of election, but the legislature may not validate election carried on by bribery and the votes of infamous persons. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

90. Act validating a railroad stock subscription and authorizing the issue of bonds to pay for the subscription, and providing for the payment of the bonds. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

91. Special legislation as to municipal corporations is not prohibited by constitu-

§ 2. *Conditions precedent; submission to vote; provision for payment.*[92]—Where bonds may be issued if a given fact exists, it is not necessary as a condition precedent that a declaration should be made that such fact exists, but the fact that action is taken by the body authorized to issue the bonds is sufficient.[93] A resolution to issue bonds and defining their terms is sufficient, though it does not set out the form of the bonds.[94]

Assent of voters or taxpayers.[95]—It is frequently a constitutional or statutory requirement that no bonds can be issued except pursuant to a majority vote of the citizens,[96] or to the assent of two-thirds of the qualified voters.[97] Whether a majority of all those voting, or only a majority of those voting on the particular proposition, is required, depends on the statute under which the question is submitted.[98] The North Carolina constitution requires a popular vote for the creation of a debt other than that for the necessary expenses of a municipal corporation.[99] The voters must assent to the incurring of the debt as well as to the issue of bonds.[1] Where submission of the question to the voters is necessary, it must be done by the proper legal officers of the corporation,[2] and by an ordinance duly passed and published,[3] at a legally called meeting.[4] Mere irregularities in the election which do not affect

tional provision that the legislature shall not suspend any law for the benefit of any individual. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

92. See 4 C. L. 709.

93. City council was authorized to issue bonds, when it found upon the estimates of the engineer that the proposed work would cost more than fifty cents per front foot. A resolution determining that bonds should be issued without recitals was sufficient. Chase v. Trout, 146 Cal. 350, 80 P. 81.

94. The resolution prescribed that the bonds should be serial, extending over 10 years, an equal part payable annually on Jan. 2d, bearing interest at 7% per annum, payable on July and Jan. 2d. Chase v. Trout, 146 Cal. 350, 80 P. 81.

95. See 4 C. L. 710.

96. Ala. Const. § 222. But the issuance of interest-bearing warrants by the commissioners' court on the county treasurer, payable at stated times in the future, for the amount of the debt incurred in building a court house is not an issuance of bonds. Tally v. Commissioners' Court of Jackson County [Ala.] 39 So. 167. Where the county debt was created prior to the adoption of the present constitution, the county could issue bonds without submission. Hawkins v. Nicholas County [Ky.] 89 S. W. 484.

97. Where no provision for registration at special elections is made, reference must be had to the tally sheets and not to the registration list of the last preceding annual election. City of Thomasville v. Thomasville Electric Light & Gas Co. [Ga.] 50 S. E. 169.

98. Pub. Laws 1903, p. 327, § 73, when construed in connection with Gen. Election Law (P. L. 1898, p. 319), § 185, requires only that the issue of bonds be approved by a majority of persons voting on that proposition, and not by a majority of those voting on that and other questions. Murphy v. Long Branch [N. J. Law] 61 A. 593.

99. An act authorizing a city to issue bonds for a waterworks plant and sewage system, and to enable it to grade and pave streets, does not come under the constitutional provision, as such expenses are necessary. City of Greensboro v. Scott, 138 N. C. 181, 50 S. E. 589.

1. Where the city had been running behind in its expenses for a series of years, the voters could not by a two-thirds vote authorize an issue of bonds to raise a fund for the payment of such indebtedness. City of Macon v. Jones [Ga.] 50 S. E. 340.

2. Where school trustees were divided into three classes, two being elected each year for a term of three years, and in consequence of there having been no annual election for three years, all the trustees were elected in 1905, said trustees had power to submit the question of issuing bonds to the electors. Lee v. Trustees of Shepherdsville Graded Common School Dist. No. 4 [Ky.] 88 S. W. 1071.

3. Where by statute the recording of an ordinance in the book of ordinances was made prima facie evidence, evidence of its due publication or posting, the burden was on the town to show the ordinance was void for want of publication or posting. Town of Fletcher v. Hickman [C. C. A.] 136 F. 568.

4. Where orders for special meetings of county commissioners are required to specify the business to be transacted at such special meeting, an order calling a meeting "for the purpose of raising funds to purchase a site for a new court house, and erecting a court house in said county," is sufficient to authorize the board to submit to the electors the question whether bonds shall be issued to purchase a site, erect a court house and jail, and furnish the same, where it is shown the jail was to be a room in the court house. Shoshone County v. E. H. Rollins & Sons [Idaho] 82 P. 105. Semble, the court apparently lays stress on the fact that all the members were present at the special meeting. Id. The presumption is in favor of the regularity of the meeting. A regular adjourned meeting of the town board was adjourned to June 5, when, no quorum being present, the meeting was adjourned to June 8, at which a quorum was present, and the bonds were authorized, and it was held that though the regular meeting had died

its result or fairness do not necessarily render it invalid or justify an injunction against the issuance of the bonds.[5]

Notice of election.[6]—The notice must specify the rate of interest exactly and definitely.[7] Provisions as to what shall be set forth in the notice have been held to be directory only when the voters have not been misled;[8] consequently, immaterial errors will be disregarded.[9] Sometimes the mode and terms of the payment of the bonds must be submitted to the voters,[10] but usually this is not required.[11] In the absence of a provision to the contrary it is not necessary that the minutes of the city council show that the notice was given.[12] In Georgia the fact that the notice is silent as to the collection of an annual tax does not prevent the validation of the bonds,[13] but if an illegal provision in this regard forms a part of the call for an election, or the notice thereof, or the authority for holding such election, so as to affect the election itself with illegality, the rule is otherwise.[14]

Providing for payment of bonds.[15]—It is frequently required that the municipality at the time of issuing bonds shall make provision for the payment of principal and interest.[16]

§ 3. *Execution.*[17]—Bonds must be executed by the legally qualified and acting

because of the absence of a quorum, it would be presumed in favor of bona fide holders that the meeting was a special one. Town of Fletcher v. Hickman [C. C. A.] 136 F. 568.

5. Blakey v. City Council of Montgomery [Ala.] 39 So. 745. In the absence of a contest, it will be presumed on collateral attack that election held under Act Feb. 25, 1903 (Act 1903, p. 59), was held in accordance with law, and will not be held invalid merely because no returning officer was elected or appointed. Id. Allegation of bill to restrain city from issuing bonds that minutes of city council fail to show that any returning officer was elected for such election, held not equivalent to an averment that no such officer was in fact appointed or elected by the council. Id.

6. See 4 C. L. 711.

7. "Not to exceed six per cent per annum" is insufficient, as it is indefinite. City of Thomasville v. Thomasville Electric Light & Gas Co. [Ga.] 50 S. E. 169.

8. Acts 1903, p. 91, § 2, required that the notice of special election to be issued by the probate judge shall state the place of the election, but where this was omitted the election was nevertheless held valid, as the same act in §§ 4 and 5 provided that the election should be held in each beat or polling place in the county, and consequently the voters were chargeable with notice thereof. Wilson v. Pike County [Ala.] 39 So. 370.

9. Registration commissioners styled themselves "commissioners of election" in the election notice. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

10. Where the election notice had a copy of the proposition to be submitted attached, which contained both the question of issue and payment, the submission was of an indivisible proposition. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

11. Const. art. 10, § 12, providing that a city incurring an indebtedness requiring the assent of the voters shall provide for the collection of an annual tax to pay the same, is self-enforcing, and a levy of such tax is mandatory without a direct vote of the people on the levy itself. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873.

12. Under Act Feb. 25, 1903 (Acts 1903, p. 59) it is not necessary. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

13. But such provision must be made before the bonds are sold. Woodall v. Adel [Ga.] 50 S. E. 102.

14. But here the inadequate provision for the payment of the bonds was made by a separate ordinance, and it was held that if the city made proper provision the bonds might be validated. Oliver v. Elberton [Ga.] 52 S. E. 15.

15. See 4 C. L. 711.

16. Where ample provision for the payment of both principal and interest was made by the levy of an adequate tax, it is immaterial that the first interest would fall due before the first taxes were collected. Jermyn v. Scranton [Pa.] 62 A. 29. In Georgia "at or before the time of incurring the bonded indebtedness" provision must be made for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of the debt in 30 years. Civ. Code 1895, § 5894. Oliver v. Elberton [Ga.] 52 S. E. 15. It is not enough that provision is made for a tax sufficient to pay interest and to raise a sum which if invested would pay off the principal at maturity, though provision was made that if there should be any deficiency it should be met by taxation in the year the bonds fell due. Id. If the election was legally held, a failure to provide for payment of the bonds before instituting proceedings for validation does not prevent such validation, but lawful provision for that purpose must be made before the bonds are issued. Id. Even after the bonds have been validated a provision for an annual tax must be made before the bonds can be sold and the debt be thereby actually incurred. Woodall v. Adel [Ga.] 50 S. E. 102.

17. See 4 C. L. 712.

officers, and are void if they show on their face that they were executed by different persons as officers.[18]

§ 4. *Form and requisites.*[19]—It is sometimes prescribed that the bonds shall be payable annually[20] or that they shall be registered, and failure to comply with the requirement will render the bonds void.[21] Where bonds are required to bear the date of issue they cannot be antedated,[22] and they must run for exactly the term required by statute.[23] Coupons may bear the lithographed signatures of the officers.[24] A warrant is not a negotiable instrument and so not a municipal bond.[25] It is often provided that mere irregularities in the proceedings, or the omissions or neglect of any officer, charged with duties in relation thereto, shall not affect the validity of the bonds.[26]

Validation proceedings.—Notice of the time and place set for the hearing of the petition for validation must be given in the manner prescribed.[27] The judgment of validation determines that the municipality has the right to incur a debt and has complied with the provisions authorizing the issue of bonds.[28]

§ 5. *Issue and sale.*[29]—The fact that a better bid is received does not authorize a town to ignore its previous acceptance of a buyer's proposal,[30] and where the second sale is made on condition that the first one be set aside, it may accept as final a judgment against it in a suit by the first purchaser.[31] In Ohio, bonds which have once been offered at public sale and remain unsold may be afterwards disposed of at private sale.[32]

18. Bonds were prepared and dated Dec. 30, 1890, and the coupons bore the lithographed signature of the person who was then secretary. Eighteen months later, after the secretary had died, the bonds were delivered signed by his successor in office, but the coupons were unchanged, and it was held that the bonds were void if considered as issued when prepared because they were not signed, and they were void if considered as issued when delivered because they were antedated. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

19. See 4 C. L. 712.

20. And a tax is levied so as to pay the amount that falls due each year. P. L. 1901, 40 amended by P. L. 1901, 586, applying to cities of the second class in Pennsylvania, except as to funding bonds. Jermyn v. Scranton [Pa.] 62 A. 29.

21. By constitution and statute it was required that bonds should bear the certificate of the secretary and auditor of state before they were issued, and in default of this they were nonenforceable in an action at law. Frank v. Butler County [C. C. A.] 139 F. 119.

22. For the effect would be to make the bonds payable within a shorter time than that authorized by law. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

23. Bonds were authorized for 20 years, they were dated Dec. 30, 1890, and made due Jan. 1, 1911, and this was held bad. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

24. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

25. Though in form payable to bearer. Field v. Highland Park [Mich.] 12 Det. Leg. N. 340, 104 N. W. 393.

26. Act Feb. 25, 1903 (Acts 1903, p. 59). Blakey v. City Council of Montgomery [Ala.] 39 So. 745. Hence fact that ordinance calling the election provides that bonds shall be either registered or coupon at the option of the holder, while act requires them to be coupon bonds, does not render them invalid in the absence of an allegation that the bonds whose issue is sought to be enjoined are registered. Id.

27. Where, at time and place set for hearing, it appeared that notice had only been published once instead of twice as required by Acts 1897, p. 84, § 6, but the city had been served with the rule and had answered, held that the court was not wholly without jurisdiction, but had authority to reassign the hearing for another time and place by order, and to cause a new publication to be made reciting the continuance and giving notice of such time and place. Oliver v. Elberton [Ga.] 52 S. E. 15.

28. But even after they are validated provision must be made for their payment before the bonds can be sold. Woodall v. Adel [Ga.] 50 S. E. 102.

29. See 4 C. L. 712.

30. Neither bid was made in response to the advertisement for bids. Diefenderfer v. State [Wyo.] 80 P. 667.

31. The authorities took no appeal but proceeded as far as possible to comply with the judgment, except as they were prevented by the refusal of the mayor and clerk to perform mere ministerial duties. Diefenderfer v. State [Wyo.] 80 P. 667.

32. Where bonds were advertised for sale, and bids received, but before an award was made sale was enjoined and bids withdrawn, and demurrer to the petition in the injunction suit sustained by agreement, held bonds had been once offered according to law and "remained unsold" within the provisions of § 97, Municipal Code, and a bona fide private sale is valid. Vodakin v. Crilly, 7 Ohio C. C. (N. S.) 341, afg. 3 Ohio N. P. (N. S.) 609; affirmed by the supreme court without report, 73 Ohio St.

Statutes in some states require the election of a commissioner to sell waterwork bonds and to build and control the waterworks.[33]

§ 6. *Rights and liabilities arising out of illegal issue.*[34]—Municipal officers are presumed to act within the scope of their powers until the contrary appears,[35] and so illegal bonds may be binding on the municipality when in the hands of a bona fide purchaser, but it is incumbent on him to prove that he purchased them for value and in good faith.[36] A city cannot recover taxes to pay interest on, and to create a sinking fund for, void bonds.[37] A taxpayer in behalf of himself and others may sue to recover sums collected by taxation to pay illegal bonds,[38] or he may enjoin their further collection, but the bondholders are necessary parties.[39] Equity will not interfere to require a public officer to certify and register bonds after long laches on the part of the holder.[40] Bonds issued by a de facto corporation, in conformity to the law authorizing their issuance by de jure corporations, and subsequently assumed by a succeeding de jure corporation in conformity with a statute authorizing such assumption, are valid obligations of the latter corporation.[41]

§ 7. *Transfer.*[42]—Purchasers must take notice of the constitution and laws of the state and must see that they have been complied with,[43] and cannot recover if the bonds show on their face that they were not issued in conformity to the law under which they were issued.[44] It is a question for the jury whether the holder is an innocent purchaser.[45] Testimony of the original owner of an illegal bond that he did not impart his knowledge of its character to the purchaser is prima facie evidence that the latter was a bona fide purchaser.[46]

33. Act March 2, 1896, Civ. Code §§ 2008, 2009, requiring that, at elections for the purpose of deciding whether waterworks bonds shall be issued, a commissioner of public works shall be elected to sell the bonds and to build and control the waterworks, applies only to cities in which there are no waterworks. Civ. Code §§ 2021, 2022, governs elections for the purpose of issuing bonds to extend waterworks already established, and in such case no commissioner need be chosen. Seegers v. Gibbes [S. C.] 52 S. E. 586.

34. See 4 C. L. 713.

35. Suit on county warrants. Board of Com'rs of Greer County v. Gregory [Okl.] 81 P. 422.

36. Bonds given in aid of a private enterprise. Schmid v. Frankfort [Mich.] 12 Det. Leg. N. 473, 104 N. W. 668.

37. But the taxpayer must prove conclusively that the bonds are void in the hands of any holder. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex.] 86 S. W. 750.

38. But not where the county has paid the money over to its creditors, as in such case the amount of recovery must be paid by the taxpayers themselves. Hawkins v. Nicholas County [Ky.] 89 S. W. 484.

39. Bradford v. Westbrook [Tex. Civ. App.] 13 Tex. Ct. Rep. 550, 88 S. W. 382.

40. The state auditor had refused, the holder claimed wrongfully, to certify to bonds in 1880, but under state laws he had the right to secure a review of the matter by mandamus within four years, and it was held that after 20 years it was too late to invoke the aid of a court of equity. Frank v. Butler County [C. C. A.] 139 F. 119.

41. Where a de facto corporation reincorporated and assumed to pay them, notwithstanding the fact that it had less than 1,000 inhabitants when the bonds were issued. Bradford v. Westbrook [Tex. Civ. App.] 13 Tex. Ct. Rep. 550, 88 S. W. 382.

42. See 4 C. L. 714.

43. Where funding bonds can only be issued by an ordinance duly passed the purchaser must see that the ordinance is regularly passed and authorized the issue, but he is not charged with notice of other parts of the record. City of Tyler v. Tyler Building & Loan Ass'n [Tex.] 86 S. W. 750.

44. Bona fide holders are chargeable with notice of the law under which the bonds were issued and cannot recover if the bonds show on their face that they were not issued in conformity thereto, as where they were required to bear the date of issue and both bonds and coupons to be signed by the secretary, the bonds were signed by the person who was secretary at the time they were delivered, and the coupons bore the lithographed signature of the person who was secretary at the time they were printed. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

45. There was evidence that a former holder had mailed a letter to plaintiff informing him that the bonds were issued in aid of a private enterprise, but plaintiff denied ever receiving it. Schmid v. Frankfort [Mich.] 12 Det. Leg. N. 473, 104 N. W. 668.

46. Evidence that the original purchaser had stated that he had made the bonds payable at the bank, the alleged innocent purchaser, to indemnify it against signing a bond for the erection of the factory for which the bonds were given, not made in the presence of any representative of the bank, or evidence that the original purchaser had stated that he intended to go through

Recitals.[47]—A bond issued under a statute prescribing a public record as determinative of the amount of authorized issue, which on its face exceeds the limit of the entire issue under such record, is void as to such excess in the hands of a bona fide purchaser for value, notwithstanding recitals therein of compliance with all legal requirements and the payment of instalments of interest thereon.[48] The fact that in such case the auditor falsely certifies to the purchaser that the assessable property is sufficient to support the issue is immaterial.[49]

Estoppel.[50]—As a rule general recitals in municipal bonds that they have been issued in compliance with all requirements of the law and in proper form estop the municipality, as against bona fide holders, to deny their validity.[51] In some states, however, a contrary rule prevails.[52] Where interest has been paid for many years

the form of putting the bonds in the hands of a bona fide holder. is inadmissible. Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694. The test is not whether the purchaser had notice of such facts as would lead a prudent man to make inquiry, but whether the facts were such as to make it bad faith not to make inquiry. Id.

47. See 4 C. L. 714, and Special Article, 4 C. L. 714.

48. Where statute provides that bonds shall not exceed ten per cent of the taxable value of the realty according to the assessment roll of the preceding year. Corbet v. Rocksbury [Minn.] 103 N. W. 11. The assessment roll was admissible in evidence to show the bonds exceeded the limit, notwithstanding the name of the town was incorrectly given, or that it included some land that was not in the town and omitted other that should have been included, and although there were many interlineations and it had not been signed and sealed by the county auditor as required by law. Id.

49. Corbet v. Rocksbury [Minn.] 103 N. W. 11.

50. See 4 C. L. 714.

51. City held estopped to deny validity of funding bonds, notwithstanding invalidity of bonds which they were issued to refund, where ordinance authorizing their issue recited that city was legally indebted on outstanding bonds, and bonds were approved by attorney general, which approval was by statute (Rev. St. 1895, art. 918f) made prima facie evidence of their validity, and bonds themselves recited the purpose of their issue and everything necessary to be done in issuing them or the bonds refunded had been legally done. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex.] 86 S. W. 750. The recitals of officers estop the corporation with respect to any condition which they have power to perform or to determine, or as to failure to comply with any rule of action relative to the mere time or manner of procedure. Platt v. Hitchcock County [C. C. A.] 139 F. 929. Where the officers have authority to make recitals, they are binding in favor of innocent holders. The county commissioners had authority to appoint the road commissioners with power of removal, and the latter, in issuing bonds, were simply the agents of the former, who were thereby precluded from any defense based on the irregularity of their proceedings. Rees v. Olmstead [C. C. A.] 135 F. 296.

52. In Missouri a general recital, that "all acts, conditions and things required to be done precedent to and in the issuance of this bond have been properly done in regular and due form and time as required by law, and that the total indebtedness of the city, including this bond, does not exceed the constitutional or statutory limitation" is regarded as a mere self-serving narration estopping no one, and bars no road to the investigation of the legality of the bonds. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873.

Note. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873, follows previous rulings of the courts of the same state which say that such recitals are neither prima facie nor conclusive evidence of the required authority to issue the bonds and that they do not dispense with the necessity of proving what they recite when an action is brought on the bond. The steps required to be taken, or acts done, in order to confer authority must be shown to have been taken by evidence outside mere recital on the face of the bonds, and if a record is required by law to be kept, such record is the best evidence of the facts, and primarily none other is admissible. Thornburg v. School District, 175 Mo. 12; Heard v. School District, 45 Mo. App. 660. This view is not without support in other states. Cagwin v. Town of Hancock, 84 N. Y. 532; Lippincott v. Pana, 92 Ill. 24; Veeder v. Lima, 19 Wis. 298. The federal courts uniformly hold that where a city has power, under the constitution and laws, to issue certain bonds and such bonds are issued containing recitals representing that everything required by law to be done has been done, before issuing the bonds, purchasers have the right to assume that such recitals are true. Hackett v. Ottawa, 99 U. S. 86, 25 Law. Ed. 363; Ottawa v. National Bank, 105 U. S. 342, 26 Law. Ed. 1127; Evansville v. Dennett, 161 U. S. 434, 40 Law. Ed. 760; Waite v. Santa Cruz, 184 U. S. 302, 46 Law. Ed. 552; City of Huron v. Savings Bank, 86 F. 272, 49 L. R. A. 534; Clapp v. Village of Marice City, 111 F. 103; Board of Com'rs v. Vandriss, 115 F. 866. And a majority of the state courts have followed the rule established by the supreme court of the United States. Thompson v. Village of Mecosta, 127 Mich. 522; South Hutchinson v. Barnum 63 Kan. 872; Fulton v. Town of Riverton, 42

the court will sustain the bonds, unless some insuperable legal obstacle exists.[53] There can be no estoppel by conduct or ratification where there is a want of power.[54]

§ 8. *Payment.*[55]—In the absence of constitutional or statutory provisions, territory detached from a municipality is not liable to taxation for payment of the debts of the municipality.[56] The bondholder is protected by the contract clause of the federal constitution where, in the contract for the issue, the city stipulates to levy a certain tax.[57] Though the option is reserved in state bonds to pay and retire them before they are due, the exercise of that option is a legislative, not an executive, power.[58] It is not necessary to make specific provision as to the method of notifying holders of outstanding bonds as to the exercise of the option to redeem.[59] A coupon bears interest after maturity.[60]

Payment from special fund or tax.[61]—To anticipate the collection of instalments of special assessments, cities frequently are authorized to issue bonds payable out of such assessments,[62] which fact should be stated on their face.[63] The levy of a tax to pay bonds can be compelled by mandamus where the authorities have omitted to levy one.[64] Where taxes have been collected for the payment of bonds, the officer holds them as trustee for the bondholders and may be required to pay them over.[65] Where provision is made for a fund for payment it cannot be diverted,[66] but that need not be the exclusive mode of payment.[67] Repeals by implica-

Minn. 395; Supervisors v. Brown, 67 Miss. 684; Kerr v. Cory, 105 Pa. St. 282; State v. Commissioners, 37 Ohio St. 526.—3 Mich. L. R. 671.

53. Where the last preceding assessment controlled, and by that of 1889 the bonds were within the limit, and by that of 1890 they exceeded it. The assessment of 1890 was completed on June 12, 1890, but the board had power to modify it until July 10, the bonds were issued on June 17, 1890, and they were sustained, as the officers who made the recitals had the power to make the assessment of 1889 the last one. Platt v. Hitchcock County [C. C. A.] 139 F. 929; Tolman v. Onslow County Com'rs, 140 F. 89.

54. Bonds issued under an act of April 3, 1863, which was held to be impliedly repealed by an act passed three days later Wichman v. Placerville [Cal.] 81 P. 537.

55. See 4 C. L. 715.

56. Statute providing for detaching of territory constitutional, and the inhabitants of such detached territory are not subject to taxation to pay for the bonds, though they agreed to pay their share, as authority to levy taxes is not the subject of agreement. Miller v. Pineville [Ky.] 89 S. W. 261.

57. Legislation limiting the taxing power without providing a substantial equivalent is void. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

58. Case of state bonds, and it was held that the governor had no right to retire them with money in the treasury where the legislature had made no appropriation for that purpose, but had merely provided for the payment of interest. Colbert v. State [Miss.] 39 So. 65.

59. But council finally made such provision here. Diefenderfer v. State [Wyo.] 80 P. 667.

60. Rice v. Shealy [S. C.] 50 S. E. 868.

61. See 4 C. L. 716.

62. An act authorizing the issue of bonds to anticipate the second and succeeding instalment does not authorize the issue of bonds payable out of the first instalment, but an abutting property owner cannot complain as he is not injured. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

63. Drainage bonds were required to state on their face that they were only payable out of a special tax to be levied on lands drained. Sisson v. Board of Sup'rs of Buena Vista County [Iowa] 104 N. W. 454.

64. This may be done, though it makes the levy for the present year exceed the constitutional limit, provided that such levy when added to the levy for the year when it should have been made does not make the levy for the past year exceed the limit. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

65. But where the officer is restrained by an injunction issued by a state court in a proceeding in which the bond holders are not parties, the officer will not be required to disobey the state court. Tolman v. Onslow County Com'rs, 140 F. 89.

66. Provision had been made for the levy of a tax for an interest and sinking fund to pay refunding bonds, and it was held that the holders of the original bonds, who had refused to exchange them for refunding bonds, could not by mandamus compel the city to appropriate part of these funds for the benefit of the holders of the original bonds. City of Austin v. Cahill [Tex. Civ. App.] 88 S. W. 536, afd. Id. [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542. The holders of the refunding bonds were necessary parties to any such proceeding. Id.

67. Though the city had provided for the payment of refunding bonds and could not divert the same, it might, under general provisions of its charter authorizing it to raise money to pay all bonded debts, make a necessary levy. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

tion of such provisions are not favored.[68] Where the bonds have been declared illegal, a tax levied therefor is also illegal.[69] If the bonds are payable only out of a special assessment, the municipality is not the debtor but merely the agent or statutory trustee for their collection,[70] and it makes no difference in its liability that an extension of time for payment of such assessments is given as authorized by statute.[71] The holder is entitled only to his proportion of the money collected, less what had been already paid him.[72]

§ 9. *Scaling overissue.*[73]—Bonds issued in excess of the statutory limit are void only as to such excess.[74]

§ 10. *Enforcement of improvement bonds against abutters.*[75]—In order that assessment bonds may be valid there must have been a valid assessment,[76] and they are rendered void by the subsequent vacation of the assessment.[77] The legislature may provide that the bonds after their issuance shall be conclusive evidence of the regularity of all proceedings and of the validity of the lien on the property out of which they are payable.[78] The invalidity of special assessment bonds, though preventing the existence of a subsisting lien, does not prevent the acquiring of a lien by proper proceedings.[79] The lien of such bonds is paramount to all mortgages.[80] Property owners benefited by an improvement cannot object to the confirmation of an assessment because unauthorized bonds have been issued payable out of such assessment.[81]

68. Act 1888 (20 St. at L. p. 12) delegating to the fiscal officers of the county the power to fix the tax levy to pay township bonds was not repealed by Civ. Code 1902, § 799, requiring the county commissioners to make an estimate of expenses for the comptroller general to be submitted to the general assembly. Rice v. Shealy [S. C.] 50 S. E. 868.

69. Where the levy was for "public school improvement bonds (1899)," the year could not be considered as surplusage so that the levy could be sustained for the bonds of 1889. Hellman v. Los Angeles [Cal.] 82 P. 313.

70. But the municipality may be liable for failure to properly perform this duty. It is not liable for delinquent assessments where it has turned the same over to the county treasurer for collection, though nothing has been collected, and it was only liable for the interest it actually received on the funds collected and in its hands. Jewell v. Superior [C. C. A.] 135 F. 19.

71. The bondholder had knowledge of the law authorizing the extension, and his lien was not lost. Jewell v. Superior [C. C. A.] 135 F. 19.

72. The maxim that equity aids the vigilant and not the slothful was not applicable here. Jewell v. Superior [C. C. A.] 135 F. 19.

73. See 4 C. L. 716.

74. Corbet v. Rocksbury [Minn.] 103 N. W. 11.

75. See 4 C. L. 717.

76. See, also, Public Works and Improvements, 4 C. L. 1124. Sometimes the petition of the owners of a majority of feet fronting on the improvement is a condition precedent. After the passage of the resolution of intention to make the improvement and the issue of bonds, the evidence was conclusive that the persons whose names appeared on the petition were owners of a majority of the frontage. Chase v. Trout, 146 Cal. 350, 80 P. 81.

77. City council vacating an assessment for a street improvement on appeal to it under St. 1885, p. 156, c. 153, § 11, has no authority to rescind its action, and bonds issued on an assessment vacated on such appeal cease to be a lien on the property, notwithstanding the fact that the council attempts to reinstate the assessment as of its original date by rescinding its previous action. Creed v. McCombs, 146 Cal. 449, 80 P. 679.

78. It cures objections as to details of advertising and receiving bids, the letting and execution of the contract, the supervision of the work, and in fact everything except such jurisdictional requirements as the legislature could not have dispensed with originally. Chase v. Trout, 146 Cal. 350, 80 P. 81. The law was subsequently amended by providing that the bonds should only be prima facie evidence of regularity of proceedings. This was held to change only the burden of proof. Creed v. McCombs, 146 Cal. 449, 80 P. 679.

79. The invalidity arose from the council erroneously attempting to rescind its action in sustaining an appeal and to reinstate an assessment which had been vacated. Creed v. McCombs, 146 Cal. 449, 80 P. 679.

80. Though later in time it covered the entire estate and was paramount to all liens of a private nature. Chase v. Trout, 146 Cal. 350, 80 P. 81.

81. The statute limited the rate of interest to five per cent on the deferred instalments, so their burden is not increased by the issuance of bonds payable out of the first instalment of the assessment. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

MUNICIPAL CORPORATIONS.

Scope of article.—This article is designed to treat, as strictly as may be proper, the law of municipalities as distinguished from that of streets and other public ways,[82] parks and public grounds,[83] bridges,[84] public utilities, works and improvements,[85] health and sanitation,[86] buildings and injuries therein and building regulations,[87] the local taxing power,[88] licenses and licensing,[89] the granting of franchises,[90] and the law of public officers generally.[91] The particular applications of the general law of municipalities to these several subjects should be sought in the titles just cited. There also will be discussed cases under laws and regulations peculiar to streets and the like. The body of laws relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into those respective titles relating to the subject-matter of such powers and duties.

§ 1. *Nature, attributes and elements.*[92]—The term municipal corporation as ordinarily applied includes all corporations created for the local exercise of delegated governmental functions.[93] The powers of a municipal corporation are wholly delegated,[94] but in the exercise of its powers so conferred it is subject only to constitutional limitations.[95] Its functions are of two classes, governmental and private, the distinction being chiefly important in determining liability for tort.[96]

82. See Highways and Streets, 5 C. L. 1645.
83. Parks and Public Grounds, 4 C. L. 876.
84. Bridges, 5 C. L. 439.
85. Public Works and Improvements, 4 C. L. 1124; Sewers and Drains, 4 C. L. 1429; Waters and Water Supply, 4 C. L. 1824.
86. Health, 5 C. L. 1641.
87. Buildings and Building Restrictions, 5 C. L. 487.
88. Taxes, 4 C. L. 1605, and see Public Works and Improvements, 4 C. L. 1124, for local assessments.
89. Licenses, 6 C. L. 436.
90. Franchises, 5 C. L. 1518.
91. Officers and Public Employes, 4 C. L. 854.
92. See 4 C. L. 721.
93. The school board of Detroit being created as a body corporate, authorized to hold property and sue and be sued, is a municipal corporation and not liable for acts of its employes. Whitehead v. Board of Education of Detroit [Mich.] 102 N. W. 1028.
94. See post, § 7.
95. See post, §§ 7, 9, 10.
96. See post, § 11.

§ 2. *Creation and corporate existence. A. Creation and organization.*[97]—The creation of municipal corporations by special act being prohibited by the constitutions of most states,[98] the usual method of incorporation is for the inhabitants of the locality desiring to incorporate to avail themselves of the provisions of a general law[99] which laws ordinarily provide conditions precedent of population, area or physical characteristics.[1] Acceptance thereof is usually signified by an election ordered by a county officer or board, on a petition signed by a portion of the residents of the territory proposed to be incorporated, the number and qualification of the signers being fixed by statute[2] as are the requisites of the petition.[3] The officer to whom the petition is presented on determining that it is sufficient in point of contents and signature, which determination is usually held to be final,[4] orders the election, prescribing the time of holding the same and the notice thereof to be given.[5] Record entry of his action in this regard is usually required, but it has been held that he may make this nunc pro tunc of his own motion.[6] After the election, the holding of which is governed largely by general election laws,[7] the incorporation is consummated by an official declaration of the result.[8] The lands included in a municipality are those mentioned in the petition, though the election notice misdescribed them.[9] Incorporation of a city does not deprive a railroad of rights acquired by location on property within the limits of the city as established.[10]

97. See 4 C. L. 721.

98. See post, § 3.

99. The general municipal corporation act (Act 1898, No. 136) took effect in all municipalities within its scope without any acceptance. Browne v. Providence, 114 La. 631, 38 So. 478.

1. Whether the determination of the officer ordering the election is final as to such conditions, see State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912; People v. Loyalton [Cal.] 82 P. 620. Where the statute prohibits the incorporation of territory not intended for town purposes, whether the territory included in a proposed incorporation is so intended is a question of fact. Attempted incorporation including large tracts of uninhabited grazing and swamp lands held invalid. State v. Merchant [Tex. Civ. App.] 85 S. W. 483.

2. Persons temporarily moving into territory sought to be incorporated and persons to whom land is conveyed to qualify them to sign are not "electors owning land and residing in the territory sought to be incorporated." People v. Stratton [Colo.] 81 P. 245.

3. Petition for incorporation need not state that there is a town within the proposed boundaries, the statute not so requiring. People v. Loyalton [Cal.] 82 P. 620. A plat attached to a petition for organization will be considered part of the petition so as to supply deficiencies of description. People v. New, 214 Ill. 287, 73 N. E. 362.

4. A finding by the county judge on petition to order an election that the proposed territory contained the requisite number of inhabitants is conclusive. State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912. In the absence of fraud the finding of the board of supervisors that the proposed territory contained the requisite number of inhabitants and that the signers of the petition were residents thereof is conclusive. People v. Loyalton [Cal.] 82 P. 620. And evidence that they mistakenly believed certain territory to be within the proposed limits and acted under such mistake is inadmissible. Id. It is not the duty of the county judge to determine whether the proposed territory is of a proper character for incorporation. If it is not the incorporation is void. State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912. Where the statute provides that "any portion of a county containing not less than 500 inhabitants" may be incorporated, the extent and character of the territory to be included is entirely in the discretion of the supervisors. People v. Loyalton [Cal.] 82 P. 620.

5. Where the notice of election was altered as to the proposed boundaries after signature by the judge of the order for election, the election had pursuant thereto did not authorize incorporation. State v. Merchant [Tex. Civ. App.] 85 S. W. 483. Where the statute requires only four notices of an election and the board ordered five but had one posted outside the proposed limits, the election was valid. People v. Loyalton [Cal.] 82 P. 620.

6. The county judge having failed to enter on his minutes an order for an election on the question of incorporation may of his own motion enter it nunc pro tunc after the election is held. State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912.

7. See Elections, 5 C. L. 1065. Evidence held insufficient to show that enough votes were cast by persons outside the proposed limits to affect the result. People v. Loyalton [Cal.] 82 P. 620. In the absence of statutory prohibition, an election may be held on a holiday. Id.

8. That incorporation takes effect from the declaration and does not relate back to the time of the election. See Little Rock Ry. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826.

9. People v. New, 214 Ill. 287, 73 N. E. 362.

(§ 2) *B. Consolidation, succession and dissolution.*[11]—Consolidation of municipalities is permissible only by legislative authority, and special laws authorizing consolidation are ordinarily prohibited by the constitution.[12] Consolidation is usually effected by a special election initiated and held in manner similar to those for incorporation.[13] A statute extending rules relative to part of a consolidated municipality does not operate to extend such rules to parts of the municipality to which they are not applicable.[14] Alteration or dissolution of a municipal corporation by the legislature does not impair existing municipal contracts.[15] Obligations of a de facto municipality assumed by the succeeding de jure municipality under a statute authorizing such assumption become valid debts.[16]

(§ 2) *C. Classes and classification.*[17]—Municipalities may be classified for purposes of legislation provided such classification is reasonable and based on real and substantial differences of population or situation.[18]

(§ 2) *D. Attack on corporate existence; quo warranto.*[19]—The validity of the organization of a de facto municipality cannot be collaterally assailed,[20] quo warranto[21] against the officers of the municipality[22] being the proper remedy. Invalidity of the act incorporating a municipality may be raised by bill to enjoin officers from an official act,[23] and a decree in such a suit is not objectionable as a judicial dissolution of a municipality.[24]

§ 3. *The charter; adoption, amendment, repeal and abrogation.*[25]—Charters like all other legislative acts are of course subject to all constitutional limitations, such as the requirement of uniformity in taxation,[26] and those relating to the subjects and titles of acts.[27] Special charters while formerly very common are now quite generally forbidden.[28] Special charters antedating the constitutional pro-

10. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

11. See 4 C. L. 722.

12. Indiana Act 1903, p. 201, c. 105, providing for consolidation of cities having a population between 6,000 and 7,000 is invalid as special, the classifications being arbitrary. Town of Longview v. Crawfordsville, 164 Ind. 117, 73 N. E. 78. An act providing for the annexation of one city to another is an act "regulating the affairs" of municipalities within the constitutional provision as to special legislation. Act April 20, 1905, authorizing the consolidation of contiguous cities, is special legislation, there being but two contiguous cities in the state. Sample v. Pittsburg [Pa.] 62 A. 201.

13. Under a statute providing that on a vote in favor of consolidation the council shall declare the result and the consolidated territory shall then constitute a municipal corporation, the **consolidation takes effect** from such declaration and does not relate back to the time of the vote. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826.

14. Under Gr. N. Y. Charter, §§ 56, 1068, adoption by the board of education of an existing rule as to salaries of janitors of public schools in certain boroughs, held not an adoption of such rule as to all of Greater New York. People v. Board of Education of New York, 93 N. Y. S. 300.

15. Graham v. Folsom, 26 S. Ct. 245.

16. Bradford v. Westbrook [Tex. Civ. App.] 13 Tex. Ct. Rep. 550, 88 S. W. 382.

17. See 4 C. L. 722.

18. See Statutes, 4 C. L. 1527.

19. See 4 C. L. 723.

20. State v. Birch, 186 Mo. 205, 85 S. W. 361; Levitt v. Wilson [Kan.] 83 P. 397.

21. The supreme court has, but the district court has not, a discretion to refuse leave to file an information in the nature of quo warranto to avoid the franchise of a municipality. State v. Village of Kent [Minn.] 104 N. W. 948, exhaustively discussing the remedy by quo warranto as it exists in Minnesota. Discretion exercised by allowing the information to be filed is exhausted and the court must proceed as in other cases. Id.

22. Where the mayor and council are made parties and answer in their official capacity, the municipality need not be joined. Campbell v. Bryant [Va.] 52 S. E. 638. Quo warranto against officers is a proper remedy to litigate the validity of the incorporation of a town. People v. Stratton [Colo.] 81 P. 245. The town is not a necessary party. Id.

23. Bill to enjoin collection of taxes. Campbell v. Bryant [Va.] 52 S. E. 638.

24. Campbell v. Bryant [Va.] 52 S. E. 638.

25. See 4 C. L. 723.

26. A provision in a special act incorporating a municipality exempting the inhabitants thereof from certain taxes infringes the constitutional requirement of uniform taxation (Campbell v. Bryant [Va.] 52 S. E. 638), and where such exemption was one of the principal inducements to the acceptance of the charter, it invalidates the whole act (Id.).

27. Title of act chartering city held to embrace but one subject though it enumerates the numerous provisions of the act. Bass v. Lawrence [Ga.] 52 S. E. 296.

28. Special act held to contain such de-

hibition remain in force,[29] and are usually held subject to special amendments which are strictly germane to the original enactment.[30] Where a city existing under a special charter adopts a part of the general charter, its charter becomes pro tanto general.[31] By coming under the general law a special charter is repealed only so far as it is inconsistent.[32] In New Jersey it is held that a general law relating to municipalities repeals all inconsistent provisions in special charters.[33] Where cities are governed by general act, amendments must be within the constitutional limitation as to special acts.[34] An act curing defects in a bona fide attempt to incorporate under the general law is not a special act of incorporation.[35] A charter reincorporating a town as a city impliedly repeals the town charter.[36] Existing ordinances are not repealed by the taking of a new charter[37] or by accepting the general municipality law in lieu of a special charter,[38] and a saving clause in general terms is effective.[39] Grant to a municipality of power to frame its own charter does not warrant the inclusion therein of charter powers not ordinarily appertaining to a municipality.[40] Power of a municipality to adopt its own charter is not exhausted by adopting a charter thereunder, but a new and amended charter may be subsequently adopted.[41] Where it is provided that the board of freeholders appointed to draft a charter shall receive no compensation but may employ and compensate an attorney, a member of the board cannot be employed.[42]

Municipal charters will be judicially noticed.[43]

§ 4. *The territory.*[44] *Annexations.*[45]—Requirements as to contiguity and physical characteristics of the territory to be included are sometimes imposed by statute, but in the absence of statute the matter rests in the discretion of those

partures from the general municipality law as to make it special legislation. Campbell v. Bryant [Va.] 52 S. E. 638.

29. Existing corporations continued under special charters. Butler v. Lewiston [Idaho] 83 P. 234, discussing at length the operation of the prohibition against special charters.

30. Amendment of special charters must be germane to the subject-matter of the original. Butler v. Lewiston [Idaho] 83 P. 234.

31. Subject to amendment. Hay v. Baraboo [Wis.] 105 N. W. 654.

32. Trustees of Schools v. Board of School Inspectors, 115 Ill. App. 479.

33. Borough Law of 1897 repealed all inconsistent special charters. Smith v. Hightstown, 71 N. J. Law, 536, 60 A. 393. Section 96 of the Borough act of 1897, prescribing existing powers of borough, applies only to defacto boroughs and does not prevent the repeal of inconsistent powers in valid special charters. Id. A general law conferring power to license certain employments supersedes all licensing power of municipalities within its scope under special charters. Id.

34. Cahill v. Hogan, 180 N. Y. 304, 73 N. E. 39.

35. State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912.

36. Wright v. Overstreet [Ga.] 50 S. E. 487.

37. Change of organization from a district to a city does not repeal existing ordinances. Ferrell v. Opelika [Ala.] 39 So. 249.

38. Municipal ordinances in force when the municipality accepts the municipal code need not be republished. Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015.

39. On reincorporating a town into a city it is permissible to invest the city with all the powers of the town by a bare enactment to that effect. Wright v. Overstreet [Ga.] 50 S. E. 487. Title of act chartering city held not to embrace a provision continuing the ordinances of the town. Bass v. Lawrence [Ga.] 52 S. E. 296. A saving clause in a charter preserving existing ordinances is effective. Ferrell v. Opelika [Ala.] 39 So. 249.

40. Insertion in charter of power to regulate charges of public service corporations unauthorized. State v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41.

41. Morrow v. Kansas City, 186 Mo. 675, 85 S. W. 572.

42. Young v. Mankato [Minn.] 105 N. W. 969.

43. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405. The length of time during which a city has been incorporated and that its charter has been amended from time to time will be judicially noticed. City of Houston v. Dooley [Tex. Civ. App.] 89 S. W. 777.

44. See 4 C. L. 724. Municipal boundaries cannot be changed by special act. Davenport v. Ham [Kan.] 83 P. 398; Leavitt v. Wilson [Kan.] 83 P. 397.

45. See 4 C. L. 724. See, also, ante, § 2 B, Consolidation of municipalities. The act of April 23, 1902 (95 O. L. 259), providing for detaching unplatted farm lands from cities and incorporated villages, and for attaching them to adjacent townships, is not in conflict with any provisions of the constitution of the state of Ohio. Village of Grover Hill v. McClure, 6 Ohio C. C. (N. S.) 197. This act does not confer legislative

charged with determining the propriety of annexation.[46] The questions of reasonableness and propriety are to be considered in view of the entire situation,[47] and no particular circumstances are conclusive unless made prerequisite by statute.[48] Provision for objection or remonstrance and hearing thereon is customarily made.[49] Reasonable certainty only is required in the description of the annexed territory.[50] An ordinance extending the municipal limits is invalid as to a provision therein that agricultural lands included by the extension shall not be subject to city taxes while retaining their agricultural character,[51] but such invalidity does not affect the remainder of the ordinance.[52] Territory added to a city becomes ipso facto subject to municipal ordinances then in force,[53] but an extension of boundaries does not affect a previously made contract for water supply so as to require the water company to furnish water throughout the territory as enlarged.[54] The validity of a statute authorizing the annexation of territory to a municipality is not ordinarily open to collateral attack,[55] but equity will restrain at the suit of a taxpayer, the attempted annexation of the municipality to another under an unconstitutional statute.[56] Where one is prosecuted for an offense committed in territory not legally included within the municipal limits, prohibition is the proper remedy.[57]

Severances.[58]—It is frequently provided that territory to be disconnected must lie upon the border of the municipality[59] and must not be platted[60] or have streets

powers upon the judiciary nor does it impair the system of local self-government guaranteed by the constitution. Id. The phrase "in his discretion" contained in said acts refers to the judicial discretion of the court, and not to the legislative discretion. Id.

46. In the absence of statutory provision to the contrary, territory may be added which is not contiguous to that part of the city laid out in lots and streets. State v. Birch, 186 Mo. 205, 85 S. W. 361. Agricultural lands may be added. Leavitt v. Wilson [Kan.] 83 P. 397. The discretion of municipal officers in the exercise of a power to extend or diminish the city limits is not subject to judicial review. State v. Birch, 186 Mo. 205, 85 S. W. 361. Ruling on objections to extension will not be disturbed on questions of fact in the absence of abuse of discretion. Order sustaining objections to extension covering very sparsely settled tract upheld. City of Orlando v. Orlando Water & Light Co. [Fla.] 39 So. 532.

47. The primary considerations are the extensions of the benefits of municipal existence to the included territory and the benefit to the inhabitants of the original territory from the extension of police and fire protection to the surrounding districts. Forbes v. Meridian [Miss.] 38 So. 676. In determining the reasonableness of an extension of territory the proposed extension must be considered as an entirety and not as to whether each particular tract, considered separately, should have been included. Id.

48. The fact that part of the included land is marshy, that some of the inhabitants of the included territory object to the extension or that some additional taxes will be imposed on the included territory do not necessarily make the extension unreasonable. Forbes v. Meridian [Miss.] 38 So. 676. The revenue which will be derived from the included territory is no criterion of the reasonableness of the extension. Id.

49. The filing of objections to a proposed extension is sufficient to stay proceedings though the objectors do not obtain the order for stay which the statute says shall be made upon such filing (City of Orlando v. Orlando Water & Light Co. [Fla.] 39 So. 532), but the first ordinance is not rendered void by the delay of publication (City of Bardstown v. Hurst [Ky.] 89 S. W. 724).

50. An ordinance taking in additional territory and describing the city boundaries as they will be when enlarged is sufficient though it does not segregate or separately describe the new territory. State v. Birch, 186 Mo. 205, 85 S. W. 361. Where municipal limits were extended a specified distance from a certain well, the extension is to be measured from the center of the well. Hardesty v. Mt. Eden, 27 Ky. L. R. 745. 86 S. W. 687. An ordinance extending the limits "one-third of a mile from" a designated point is sufficiently definite and calls for an extension in the form of a square. Id.

51. Infringes constitutional requirement of uniform taxation. State v. Birch, 186 Mo. 205, 85 S. W. 361.

52. State v. Birch, 186 Mo. 205, 85 S. W. 361.

53. Ordinance not invalid because providing that it should apply to territory subsequently added. Truesdale v. Newport [Ky.] 90 S. W. 589; Trustees of Schools v. Board of School Inspectors, 115 Ill. App. 479.

54. Turners Falls Fire Dist. v. Millers Falls Water Supply Dist. [Mass.] 75 N. E. 630.

55. Act March 13, 1890, authorizing annexation to City of Des Moines, held constitutional. McCain v. Des Moines [Iowa] 103 N. W. 979.

56. Sample v. Pittsburg [Pa.] 62 A. 201.

57. Proceedings to include the locus in quo had been stayed by filing of remonstrance. City of Bardstown v. Hurst [Ky.] 89 S. W. 147.

58. See 4 C. L. 724.

59. The "border" of a municipality on which lands to be disconnected must lie is

laid out therein.[61] The usual practice to initiate proceedings for severance is by petition of the inhabitants of the territory to be severed.[62] A requirement that an ordinance changing boundaries be published four times in a weekly newspaper contemplates publication in consecutive weeks and a publication at irregular intervals over a period of two months relieves a remonstrator from filing remonstrance within 30 days after the ordinance as required by statute.[63] Under some statutes a petition for the severance of outlying territory is addressed to the sound discretion of the court,[64] while under others, when the facts specified by the statute have been established, it is mandatory to grant the petition.[65] It is permissible for the legislature to provide that only the inhabitants of the territory to be eliminated may object to a reduction of the city limits and to restrict the defenses of such persons to a showing that unjust burdens will be imposed on them.[66] An agreement by residents of territory disconnected from a municipality to pay their share of previously incurred debts is nugatory.[67] A school district cannot either in its corporate capacity or as representing the taxpayers sue for an injunction to restrain a village from separating itself from the district.[68]

Plats.[69]—If a plat conforms to the statute the council has no discretion to refuse approval of it.[70]

§ 5. *Officers and employes.*[71]—This subject is fully treated in another topic.[72] Municipal officers have only such powers as are conferred on them by the charter,[73] but within such powers they have official discretion.[74] The power to fix the duties of minor administrative officers is usually conferred on the legislative department.[75]

the city limits, not the portion in actual use. An irregular strip 1,500 feet long and averaging 600 feet wide, having only 150 feet contiguous to the municipal limits, is not on the border. Anaconda Min. Co. v. Anaconda [Colo.] 80 P. 144.

60. Subdivision held platted into lots and blocks so it could not be disconnected under Laws 1901, c. 106, § 2. Town of Fruita v. Williams [Colo.] 80 P. 132.

61. Under a provision that territory in which the municipality maintains "streets" cannot be disconnected, maintenance of a single street is fatal to the right to disconnect. Anaconda Min. Co. v. Anaconda [Colo.] 80 P. 144. A petition for disconnection is not defective because it states that the city has not maintained any streets, alleys "or" other public utilities instead of being in the conjunctive as is the statute. Town of Fletcher v. Smith [Colo.] 81 P. 256.

62. If the statutory two-thirds of the property owners join in a petition to disconnect, it is sufficient. Town of Ormond v. Shaw [Fla.] 39 So. 108. A petition giving the names of the owners "as shown by the last tax roll" and referring to them as owners, sufficiently alleges ownership. Id. Though the husband of a landowner may not be a necessary party to a petition to disconnect territory, his joinder does not render the petition defective. Id. The widow and executrix of a deceased landowner is prima facie a proper party to a petition to disconnect. Id.

63. City of Bardstown v. Hurst [Ky.] 89 S. W. 147.

64. Outlying district which would probably be soon needed for residence property. Petition held properly denied. Johnson v. Forest City [Iowa] 105 N. W. 353.

65. Anaconda Min. Co. v. Anaconda [Colo.] 80 P. 144.

66, 67. Miller v. Pineville [Ky.] 89 S. W. 261.

68. Union Free School Dist. No. 1 v. Glen Park, 96 N. Y. S. 428.

69. See 4 C. L. 724.

70. Giltner v. City Council of City of Albia [Iowa] 105 N. W. 194.

71. See 4 C. L. 725.

72. See Officers and Public Employes, 6 C. L. —.

73. Under Gr. N. Y. Charter, § 149, the comptroller may in good faith settle a claim for municipal lighting by agreeing to pay the same prices that the city had paid the previous year, on the lighting companies agreeing to waive interest, though such prices were 20 and 40 per cent. higher than those paid in other cities, and less than the prices charged for private consumption. Hearst v. McClellan, 102 App. Div. 336, 92 N. Y. S. 484. President of municipal water board has no authority to compromise claims against it. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405.

74. See post, § 7, for judicial review of official acts.

75. Where the ordinance directing the duties of a police officer declared that he should traverse the streets of the city daily, a contention that it should be considered that his duties were confined to service during the daytime held of no merit; it not appearing that any hours had been adopted regulating his time of service or confining them to the daytime. Morran v. Common Council [N. J. Law] 61 A. 13. Where the statute leaves the duties of an office to be fixed by the city council, duties not naturally pertaining to the office may be imposed.

Where a minimum salary is fixed by statute, a less salary cannot be awarded by ordinance.[76] Local self-government in the appointment or election of officers is usually granted[77] though the paramount power of the state is sometimes retained.[78] The acts of defacto municipal officers are binding.[79] On the expiration of an official term the office eo instanti devolves on the elected successor without the formalities of inauguration.[80] The fact that the members of a legislative body hold until their successors are qualified does not authorize the body to act after the time fixed by law.[81] The Indiana Statute, requiring that the certificate of election of town trustees be filed before any valid ordinance can be passed by them, applies only to the first election of trustees on organization of the town.[82] Commissions and departments are often independently incorporated to control certain municipal functions, and it is generally held that the municipality is not except under an express charter provision liable for their acts.[83]

§ 6. *Municipal records and their custody and examination.*[84]

§ 7. *Authority and power of municipality.*[85]—The powers of a municipality being wholly derivative, they are only such as are expressly granted or necessarily implied,[86] such for instance as are essential to the exercise of a granted power,[87] and this is peculiarly true with respect to the taxing power.[88] However derived, they are restricted in operation to the municipal limits.[89] The powers ordinarily granted being numerous, general grants are necessary, and they will not be strictly

Jailer required to perform janitor service in several public buildings. City of Paducah v. Evitts, 27 Ky. L. R. 864, 86 S. W. 1123. Where the exclusive duty of acting in certain matters is vested by ordinance in a certain department, no city officer can employ any other person to perform such duty. Employment of attorney, city having legal department. Hope v. Alton, 214 Ill. 102, 73 N. E. 406.

76. City of Paducah v. Evitts, 27 Ky. L. R. 864, 86 S. W. 1123.

77. Laws 1893, c. 661, § 20, providing that on failure to fill vacancies on the municipal board of health within 30 days the county judge shall fill the same, is violative of Const. art. 10, § 2, providing that city officers shall be appointed by "such authority thereof" as the legislature may designate. People v. Houghton, 102 App. Div. 209, 92 N. Y. S. 661.

78. The legislature may provide for the appointment of municipal officers by the governor and for their compensation by the municipality. Horton v. City Council of Newport [R. I.] 61 A. 759. The legislature has plenary jurisdiction over the constabulary, and such control extends to the police of a municipality. Statute providing for appointment of city police commissioners by governor does not infringe local self-government (Horton v. City Council of Newport [R. I.] 61 A. 759, following Newport v. Horton, 22 R. I. 196, 47 A. 312), nor can it alienate any part of its power in this regard (Id.). Police department primarily under control of state and municipality has only delegated power. City of Cleveland v. Payne, 72 Ohio St. 347, 74 N. E. 177.

79. Greene v. Rienzi [Miss.] 40 So. 17.

80. People v. Fitzgerald, 180 N. Y. 269, 73 N. E. 55.

81. Devlin v. White [R. I.] 61 A. 172.

82. Low v. Dallas [Ind.] 75 N. E. 822.

83. See post, § 14, and the topic Public Contracts, 4 C. L. 1089. A municipality is not liable as for breach of contract on the unauthorized discharge of a police officer by the police commission. Gibbs v. Manchester [N. H.] 61 A. 128.

84, 85. See 4 C. L. 728.

86. McAllen v. Hamblin [Iowa] 105 N. W. 593; Donable's Adm'r v. Harrisonburg [Va.] 52 S. E. 174; Gambill v. Erdrich Bros. [Ala.] 39 So. 297; Porter v. Vinzant [Fla.] 38 So. 607.

87. Power to borrow money must be expressly granted or be necessary to the exercise of a granted power. Luther v. Wheeler [S. C.] 52 S. E. 874. A town or city has no power to become a part stockholder in a waterworks or other corporation, or to borrow money by issuing bonds or otherwise to pay for such stock, unless express authority to do so is given by some statute. Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208.

88. Held to have no power to tax personalty. Adams v. Ducate [Miss.] 38 So. 497; Gambill v. Erdrich Bros. [Ala.] 39 So. 297.

89. A lot outside of a municipality cannot be claimed by it as subject to a projection of a street. Calhoun v. Faraldo, 114 La. 760, 38 So. 551. No implied power to maintain rock quarry outside city limits. Donable's Adm'r v. Harrisonburg [Va.] 52 S. E. 174. Municipality maintaining public water works has no power to contract to maintain a specified pressure for fire protection at a place outside the city limits. Contract to furnish fire protection on military reservation. United States v. Sault Ste. Marie, 137 F. 258. A power to operate gas works given before the discovery of natural gas in the state gives no power to operate natural gas wells and pipe lines from without the municipal limits. Quinby v. Consumers' Gas Trust Co., 140 F. 362.

limited by accompanying specific grants.[90] Municipal acts pursuant to a granted power will not ordinarily be so construed as to preclude the municipality from the further exercise of such power.[91] Paramount power remains in the state.[92]

Judicial control over exercise of powers.[93]—The acts of municipal officers in the exercise of administrative[94] or legislative discretion[95] are not subject to judicial review. Where the action is judicial in its character it may be reviewed by appeal or error only when so provided by statute,[96] the remedy otherwise being by certiorari.[97] It has been held, however, that a city council is no part of the legislative department of the state and its administrative acts though in the form of ordinances are subject to judicial review.[98] That a municipality exceeds its charter powers is no ground for Federal interference. A municipal act cannot be said to infringe the Federal constitution if it would not infringe were it ratified by the legislative power of the state.[99] A taxpayer suing not in his own right but in the interest of a public service corporation has no standing in court.[1] Where judicial interposition is unwarranted, prohibition lies to prevent it.[2]

§ 8. *Legislative functions of municipalities and their exercise. A. Nature and extent of legislative power.*[3]—A municipality has only such legislative power

90. Power to pass ordinances against cruelty to animals held to be given by general grant. Porter v. Vinzant [Fla.] 38 So. 607.

91. See Franchises, 5 C. L. 1518, for a full discussion of the grant and effect of exclusive franchises. Grant of an exclusive water franchise does not disable a municipality to own and operate its own water plant. Knoxville Water Co. v. Knoxville, 26 S. Ct. 224.

92. The legislature may require the opening of streets and the building of bridges at the expense of a municipality if public benefit results therefrom. Wheelwright v. Boston, 188 Ill. 521, 74 N. E. 937.

93. See 4 C. L. 731.

94. The action of the council of a municipality in granting to street railway company a franchise in a street which crosses a steam railroad at grade is not the subject of judicial review, where it does not appear that in so doing council exceeded its power, or that its action was induced by fraud. Nor would a review be authorized by a showing to the effect that a safer crossing could be made on another street. Cleveland, etc., R. Co. v. Urbana, etc., R. Co., 5 Ohio C. C. (N. S.) 583. Courts will not interfere in the business management of a city except in a clear case of illegality, mismanagement or fraud. McMaster v. Waynesboro [Ga.] 50 S. E. 122. The selection of a site for a new court house is an administrative function which cannot be controlled by the judiciary. Dupuy v. Police Jury of Parish of Iberville [La.] 39 So. 627. The discretion of municipal officers in the exercise of a power to extend or diminish the city limits is not subject to judicial review. State v. Birch, 186 Mo. 205, 85 S. W. 361. No appeal lies to the circuit court from an administrative act of a city council. Refusal of building permit. Ex parte Evans [S. C.] 52 S. E. 419. It is only when a city council acts in a judicial capacity that certiorari will lie to review its acts. Revocation of liquor license held not judicial. Carr v. City Council of Augusta [Ga.] 52 S. E. 300. Power to vacate streets. Ponischil v. Hoquiam Sash & Door Co. [Wash.] 83 P. 316.

95. Action on a petition for the formation of a reclamation district is a legislative act which cannot be enjoined. Glide v. Superior Court of Yolo County [Cal.] 81 P. 225. Equity cannot at the suit of a taxpayer enjoin a valid exercise of the legislative power. Recognizing validity of previous acts purporting to extend street railroad franchise. Roby v. Chicago, 215 Ill. 604, 74 N. E. 768.

96. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254.

97. A city council acting in a judicial capacity is not a court and accordingly its decision cannot be made final without denying a remedy by due course of law. Certiorari held to lie in election contest, there being no provision for error or appeal. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254.

98. Grant of franchise in street set aside as procured by fraud. State v. Gates [Mo.] 89 S. W. 881.

99. Owensboro Waterworks Co. v. Owensboro, 26 S. Ct. 249.

1. A taxpayer suing under favor of Section 1778, Revised Statutes, to enjoin the corporate officers from selling municipal bonds, whose sole purpose of bringing the suit is to favor a water company as against the municipality, and prevent the municipality from building its own waterworks, such taxpayer having been by agreement with said water company indemnified from the payment of costs and expenses of such suit if it should fail, has no standing in court and said suit should be dismissed. Vadakin v. Crilly, 7 Ohio C. C. (N. S.) 341, afg. 3 Ohio N. P. (N. S.) 609; affirmed by the supreme court without report, 73 Ohio St.

2. Prohibition lies to prevent an injunction against a municipal legislative act in violation of Civ. Code, §§ 3423, forbidding such injunctions. Glide v. Superior Court of Yolo County [Cal.] 81 P. 225.

as it is granted, and doubts are to be resolved against the existence of the power.[4] In practice the legislative power of municipalities is confined chiefly to the enactment of police regulations,[5] the functions of the legislative department in the initiation of public contracts and improvements[6] and in the fiscal management of the municipality[7] being largely of an administrative character. The ministerial powers of a legislative assembly may be delegated,[8] but not its legislative or judicial powers.[9]

(§ 8) *B. Meetings, votes, rules, and procedure.*[10]—Where the term of a legislative body expires by law at a stated hour, it has no power to act after that time, though the members hold office until their successors are elected and qualified,[11] nor can resolutions of such a body be sustained as the acts of a defacto council.[12] The charter of Omaha does not require that the notice of a special meeting state the object of the meeting,[13] but does require that the object be stated when the meeting convenes. If the notice states the object, the spreading of the same on the journal is a sufficient compliance with this provision.[14] Where the object of the proposed meeting is the passing of a particular ordinance, the introduction thereof serves as a sufficient statement.[15] A majority of a quorum present is ordinarily sufficient,[16] but where a majority of the whole body[17] or more than a majority vote is required by the charter, no less vote will suffice.[18] The charter providing that if no quorum is present notice shall be given to the absentees, and if they fail to attend an adjournment to the next regular meeting shall be had, if no such notice is given the members present may adjourn to a date other than the next regular meeting.[19] The charter requirement that all ordinances for the grant of a franchise shall on the first reading be referred to the board of estimate for an inquiry as to the compensation to be made is imperative,[20] and the publication required of such ordinances should be after and not before such reference.[21] What is a first reading is to be determined according to the usual rules of procedure of the council,[22] and if the matter is in doubt, peremptory mandamus to compel reference will not issue in the first instance.[23] In the absence of charter provisions, the ordinary rules of parliamentary procedure apply,[24] but technical violations thereof do not invalidate the action taken.[25] A vote may be reconsidered and annulled at the same meeting,[26] and a time to which a regular meeting is adjourned is a con-

3. See 4 C. L. 731.

4. City of Elkhart v. Lipschitz, 164 Ind. 671, 74 N. E. 528.

5. See post, § 10.

6. See post, § 12; also Public Contracts, 4 C. L. 1089, and Public Works and Improvements, 4 C. L. 1124.

7. See post, § 13.

8. The council having power to renumber streets may delegate such power. Van Ingen v. Hudson Realty Co., 94 N. Y. S. 645.

9. When the council is required to consider an objection to proposed action, consideration by a committee is insufficient. Lambert v. Paterson [N. J. Law] 61 A. 1131.

10. See 4 C. L. 732.

11, 12. Devlin v. White [R. I.] 61 A. 172.

13, 14, 15. Richardson v. Omaha [Neb.] 104 N. W. 172.

16. Dougherty v. Excelsior Springs, 110 Mo. App. 623, 85 S. W. 112.

17. Reed v. Woodcliff [N. J. Law] 60 A. 1128. "A majority of all the members elected" means a majority of the entire number of members which under the charter constitutes the council. Wood v. Gordon [W. Va.] 52 S. E. 261.

18. Where a certain majority of the entire membership is required, an ordinance by a less vote is invalid. Blood v. Beal [Me.] 60 A. 427. An order authorizing a contract under which payments would become due from the municipality is one "authorizing expenditure" within a rule requiring a two-thirds vote in such cases. Id.

19. Duniway v. Portland [Or.] 81 P. 945.

20, 21, 22, 23. Manhattan & Bronx Elec. Co. v. Fornes, 47 Misc. 209, 95 N. Y. S. 851.

24. A motion that certain business be "continued on the table" is to be construed as a motion to lay over and not as a motion to lay on the table. Duniway v. Portland [Or.] 81 P. 945. Kirby's Dig. 5473, requiring ayes and noes to be called and recorded applies only to an ordinance to enter into a contract. White v. Clarksville [Ark.] 87 S. W. 630.

25. Passing ordinance for improvement after committee report that protest was insufficient is a virtual adoption of the report. City of Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

26. Stiles v. Lambertville [N. J. Law] 62 A. 288. The action of the board of council-

tinuation of such meeting within this rule.[27] Mandamus will lie to compel the presiding officer to put a motion duly made.[28] It will be presumed that meetings and adjournments were regular.[29]

(§ 8) *C. Records and journals.*[30]—The record may be amended by resolution at a subsequent meeting attended by the same members who passed the original ordinance.[31]

(§ 8) *D. Titles and ordaining clauses.*[32]—While the constitutional provisions relating to titles of statutes have no application to ordinances,[33] similar provisions are usually contained in the charter and are given the same interpretation, that all parts of an ordinance must be germane to the same subject-matter, which must be expressed with reasonable certainty by the title.[34]

(§ 8) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*[35]—Voting on two or more ordinances at the same time is not necessarily a fatal irregularity.[36] A requirement that the mayor "sign" all ordinances, there being no requirement of approval by him, involves a mere ministerial act, and such signing is not requisite to the validity of the ordinance.[37] The act of March 27, 1897, requiring approval by the mayor does not apply to cities existing under a previously adopted freeholders charter containing no such requirement.[38] To be effective as passed over the mayor's veto, the ordinance must be substantially the same as that vetoed.[39] Less formality is required in the passage of measures of a temporary nature.[40]

Publication[41] is usually required after the passage of ordinances,[42] and some-

men of a municipality in voting down a resolution adopted by the board of aldermen does not prevent it from reconsidering its action and passing the resolution at its next regular meeting held several days after the one at which the resolution was defeated, where it does not appear that, in the meantime, the board of aldermen had reconsidered and annulled their action in adopting the resolution, or that rights have vested in pursuance of the first action taken by the board of aldermen. And this rule applies, notwithstanding the legislative authority of the municipality is vested in the two boards, and the concurrence of both is necessary to the adoption of a resolution or the passage of a law. Adkins v. Toledo, 6 Ohio C. C. (N. S.) 433.

27. Stiles v. Lambertville [N. J. Law] 62 A. 288.

28. Motion that council proceed to appoint standing committees. People v. Brush, 96 N. Y. S. 500.

29. Duniway v. Portland [Or.] 81 P. 945.

30. See 4 C. L. 733.

31. To show that ordinance was read three times. White v. Clarksville [Ark.] 87 S. W. 630.

32. See 4 C. L. 733.

33. Harris v. People, 218 Ill. 439, 75 N. E. 1012.

34. Illustrations: The title "an ordinance to license and regulate the sale of milk and provide for the inspection thereof" embraces a requirement that vendors register and pay a registration fee. City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617. The title "an ordinance relating to obstructions of or injuries to streets" covers a prohibition against leaving horses unhitched in the street. Healy v. Johnson, 127 Iowa, 221, 103 N. W. 92. A title stating that the object of an ordinance was to "grant certain rights" to a telephone company sufficiently expresses the grant to such company of rights in the streets, and penal provisions designed to protect the grant. State v. Nebraska Tel. Co., 127 Iowa, 194, 103 N. W. 120. The title "sale of intoxicating liquors" embraces a prohibition against sale on Sunday. City of Duluth v. Abrahamson [Minn.] 104 N. W. 682.

35. See 4 C. L. 734.

36. Contractor can recover for work done under ordinance so passed. Weatherhead v. Cody, 27 Ky. L. R. 631, 85 S. W. 1099.

37. Commonwealth v. Williams, 27 Ky. L. R. 695, 86 S. W. 553.

38. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069.

39. People v. Geneva, 45 Misc. 237, 92 N. Y. S. 91.

40. A resolution allowing an electric light company to maintain its wires for 20 days on condition that it will then install them in the manner required by existing ordinances is "temporary." Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 38 So. 1026.

41. See 4 C. L. 734.

42. A statute requiring ordinances to be published in two newspapers of "opposite politics" does not permit of an award of such advertising to an independent newspaper which acknowledges allegiance to no political party. Rev. St. § 1536-619 construed. City of Columbus v. Barr, 6 Ohio C. C. (N. S.) 151. The statute providing that ordinances shall take effect from publication, their effectiveness is not postponed by delay in recording. Commonwealth v. Williams, 27 Ky. L. R. 695, 86 S. W. 553.

times after their introduction and before they are put on passage.[43] Failure to publish is cured by re-enactment and publication thereon.[44] Municipal ordinances in force at the time of the acceptance of the municipal code by the city need not be republished.[45] Publication on Sunday does not invalidate an ordinance.[46] An ordinance can only be amended by another ordinance passed with like formalities.[47] Subsequent inconsistent ordinances work an implied repeal to the same extent as inconsistent statutes.[48] Every presumption of regularity is in favor of an ordinance duly recorded.[49]

(§ 8) *F. Construction and operation of ordinances.*[50]—An ordinance duly passed has the effect of law within the city limits.[51] A charter provision continuing all ordinances then in force does not invest such ordinances with the effect of statutes or charter provisions.[52] Practical interpretation is admissible to explain an ambiguous ordinance, but no amount of permitted violations can alter the meaning of one which admits of no ambiguity.[53]

(§ 8) *G. Pleading and proving ordinances and proceedings.*[54]—Ordinances are not judicially noticed.[55] Passage may be shown by parol if there is no record of its passage,[56] and an attested copy of an ordinance is presumptive evidence that the ordinance was duly passed.[57] Averment of approval of resolution by mayor without averment that it was presented for his approval within 48 hours as required, is insufficient.[58] A printed compilation of ordinances, purporting by its title page to have been issued by authority of the council, is admissible.[59]

(§ 8) *H. The remedy against invalid legislation.*[60]—While the courts are without power to review the exercise of legislative discretion,[61] invalidity resulting from violation of constitutional or charter limitations is ground for judicial interposition. But since ordinances, unlike statutes, often bear a private rather than a governmental aspect, persons brought into private relation with the municipality by an ordinance and receiving benefit therefrom may be estopped to deny its validity.[62] The validity of an ordinance cannot be collaterally attacked,[63] but resistance

43. A charter provision requiring ordinances to be advertised after introduction and before final action does not preclude amendments after advertisement. City of East Orange v. Richardson, 71 N. J. Law, 458, 59 A. 897. Requirement that notice of the introduction of an ordinance shall be published "at least as many as ten days before the adoption of the ordinance" is satisfied by one publication made at least ten days before the adoption of the ordinance. Smith v. Atlanta [Ga.] 51 S. E. 741.

44. Muir's Adm'rs v. Bardstown, 27 Ky. L. R. 1150, 87 S. W. 1096.

45. Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015.

46. City of Denver v. Londoner [Colo.] 80 P. 117.

47. Chicago, etc., R. Co. v. Salem [Ind.] 76 N. E. 631; Hope v. Alton, 116 Ill. App. 116.

48. Ordinance selecting one site for public building impliedly repeals a prior ordinance selecting another site. Dupuy v. Police Jury [La.] 39 So. 627.

49. Regularity of special meeting and due publication presumed. Town of Fletcher v. Hickman [C. C. A.] 136 F. 568.

50. See 4 C. L. 735.

51. Hope v. Alton, 214 Ill. 102, 73 N. E. 406.

52. City of New York v. Knickerbocker Trust Co., 93 N. Y. S. 937.

53. City of Sylvania v. Hilton [Ga.] 51 S. E. 744.

54. See 4 C. L. 735.

55. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

56. Weatherhead v. Cody, 27 Ky. L. R. 631, 85 S. W. 1099.

57. Weatherhead v. Cody, 27 Ky. L. R. 631, 85 S. W. 1099. To make a certified copy admissible, the certificate must show publication or posting and that the facts respecting the same are of record. Illinois Central R. Co. v. Kief, 111 Ill. App. 354.

58. Cordilla v. Pueblo [Colo.] 82 P. 594. Averment of ultimate facts as to passage of resolution held sufficient. Id.

59. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49; Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

60. See 4 C. L. 736.

61. See ante, § 7.

62. Illustrations: Where a public service corporation, occupying the streets by legislative authority receives from the city added rights operating to the detriment of the public, such rights are without any validity and cannot estop the corporation to dispute regulations based thereon. Farmer v. Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078. Company using streets under ordinance accepted by it is estopped to attack condition thereby imposed. Provision re-

of an attempt to enforce it is not collateral attack.[64] Only total want of power in the legislative body will be ground for quo warranto[65] or prohibition,[66] and only in case of irreparable injury[67] or to avoid multiplicity of proceedings[68] is injunction available. In New Jersey certiorari will lie to an ordinance which is wholly invalid,[69] but one which is general and not invalid as to all persons affected cannot be suspended by certiorari.[70] In such case, one as to whom it is invalid may enjoin its enforcement against him.[71] That an ordinance exceeds the charter power is no ground for interference by the Federal courts.[72]

§ 9. *Administrative functions, their scope and exercise.*[73]—In their administrative functions municipal officers so long as they act within the charter and in good faith exercise a discretion which is not subject to judicial control,[74] nor do their acts in the administration of the public duties of the municipality give rise to any liability in tort.[75] The administrative powers of officers include all that is necessarily incident to their duties,[76] but powers of one department as to mat-

quiring guarding of overhead electric wires. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. That a taxpayer has given the municipal authorities reason to believe that he will not oppose an ordinance does not estop him to attack it before any rights have accrued under it. Coker v. Atlanta, etc., R. Co. [Ga.] 51 S. E. 481. Railroad company which occupied streets for many years under ordinance estopped to deny its validity. Jersey City v. North Jersey St. R. Co. [N. J. Law] 61 A. 95.

63. That town trustees are incapacitated to act because the certificate of their election has not been filed cannot be raised in a collateral attack on an ordinance passed by them. Defense to action to foreclose a street assessment lien for improvement ordered by trustees. Low v. Dallas [Ind.] 75 N. E. 822.

64. The reasonableness of an ordinance is subject to judicial review in a proceeding to enforce it. State v. Birch, 186 Mo. 205, 85 S. W. 261.

65. No objection to an ordinance except lack of power to pass it can be tried on quo warranto. Quo warranto against telephone company occupying street by virtue of ordinance alleged to be defective as to title. State v. Nebraska Tel. Co., 127 Iowa, 194, 103 N. W. 120.

66. Where a municipality has general power to make ordinances on a subject but a particular ordinance is void as a taking of property without due process, injunction and not prohibition is the remedy. Ordinance requiring removal obstruction from alleged alley which was in fact private property. Riley v. Greenwood [S. C.] 51 S. E. 532.

67. Where the invalid portion of an ordinance is enforceable only by criminal prosecution, injunction will not issue, for the invalidity may be asserted by way of defense to such a prosecution. City of Sylvania v. Hilton [Ga.] 51 S. E. 744.

68. A bill will lie by persons against whom an invalid ordinance is sought to be enforced and others similarly situated to enjoin its enforcement. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

69. Certiorari will lie to a void ordinance before it is published, as publication follows of course on passage. Reed v Woodcliff [N. J. Law] 60 A. 1128.

70, 71. Jackson v. Miller [N. J. Eq.] 60 A. 1019.

72. Glucose Refining Co. v. Chicago, 138 F. 209.

73. See 4 C. L. 736.

74. See ante, § 7. A taxpayer's action to restrain improvident expenditure of public funds is maintainable only for fraud, collusion, bad faith or illegality. Hearst v. McClellan, 102 App. Div. 336, 92 N. Y. S. 484. Settlement of claim for public service or basis of contract for former year not improper though price was much higher than that paid for similar service in other cities. Id. The discretion of municipal officers in the exercise of administrative powers is not subject to judicial review. Borrowing money. Lincoln School Tp. v. Union Trust Co. [Ind. App.] 73 N. E. 623.

Oppressive police surveillance: A number of cases in the New York supreme court have upheld the power of the courts to enjoin oppressive picketing and visitation by police officers of places where gambling, illegal sale of liquor, etc., were suspected. See Cullen v. Bourke, 93 N. Y. S. 1085; Craushaw v. McAdoo, 47 Misc. 420, 94 N. Y. S. 386. The court of appeals has, however, since held that equity has no jurisdiction to interfere with the administrative discretion in this respect. Delaney v. Flood [N. Y.] 76 N. E. 209. The holdings in other states are at variance. See, in addition to the following cases those cited in Injunction, 6 C. L. 14. May patrol entrance to building inhabited chiefly by disorderly persons, accost persons approaching and notify them of character of place (Pon v. Wittman [Cal.] 81 P. 984), and one operating a lawful business in such locality to obtain the patronage of such disorderly persons is not entitled to complain of injury to his business from such supervision (Id.). Sending officers into a restaurant to inquire if liquor is sold there and who threaten arrest for such sale will not be restrained though there is no ordinance forbidding such sales. Adams v. Chesapeake Oyster & Fish Co. [Colo.] 82 P. 528.

75. See post, § 14. Injunction against keeping picture in rogues' gallery sustained. Itzkovitch v. Whitaker [La.] 39 So. 499.

76. Highway commissioners required to repair streets and keep them in fit condition

ters primarily within the jurisdiction of another are limited to the purposes of the grant.[77] The police department derives its authority from the state and the municipality has only such power over it as may be delegated.[78]

§ 10. *Police power and public regulations.*[79]—This section deals only with matters peculiar to municipal police power, general rules as to the extent and exercise of the police power being treated in topics descriptive of the subjects thereof.[80]

(§ 10) *A. In general.*[81]—Power to make needful police regulations is a proper subject of legislative delegation,[82] and a grant in general terms, as of the power to make all regulations requisite to the general welfare of the municipality, is efficient,[83] but a power to pass such ordinances other than those specially authorized as are necessary to carry out the purposes of the corporation gives no power to make mere police regulations.[84] The power to make police regulations is subject to a general limitation that they shall be reasonable[85] which includes freedom from unjust discrimination;[86] but a constitutional provision that all laws shall have uniform application does not apply to municipal police regulations.[87] The burden is on one asserting that an ordinance is unreasonable.[88] Though invalid in part, if a regulation is severable it will be sustained as to the valid part.[89] Police regulations requiring the destruction of existing property are of doubtful validity and such regulations are ordinarily to be given only a prospective operation.[90] Where the police power is inadequate, a municipality may not resort to equity on behalf of its citizens.[91]

(§ 10) *B. For public protection.*[92]—If power to legislate on the subject has been granted, a municipality may regulate or prohibit gaming and the keeping of gaming places or implements,[93] sale of intoxicants,[94] and forbid structures or prac-

for travel are charged with the duty of removing rubbish. Connor v. Manchester [N. H.] 60 A. 436.

77. The control of the streets being by the charter vested in the aldermen, the police commissioner has no power to close a street to travel. Peace v. McAdoo, 92 N. Y. S. 368. The power given to the police department to regulate travel in the streets being simply the power to supervise according to momentary exigencies. Charter (Laws 1901, c. 466), §§ 50, 375. Id.

78. City of Cleveland v. Payne, 72 Ohio St. 347, 74 N. E. 177; and see Horton v. City Council of Newport [R. I.] 61 A. 659.

79. See 4 C. L. 737.

80. See Buildings and Building Restrictions, 5 C. L. 487; Exhibitions and Shows, 5 C. L. 1405; Health, 5 C. L. 1641; Intoxicating Liquors, 6 C. L. 165; Licenses, 6 C. L. 436, and like topics.

81. See 4 C. L. 737.

82. Grant to a municipality of power to make needful police regulations is not an invalid delegation of the legislative power. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648. Constitutional direction to legislature to suppress gambling warrants delegation of power to municipality. Town of Ruston v. Perkins, 114 La. 851, 38 So. 583.

83. Keeping of intoxicants for unlawful sale may be prohibited. Tucker v. Moultrie [Ga.] 50 S. E. 61.

84. Not to prohibit slaughter houses in city limits. City of Elkhart v. Lipschitz 164 Md. 671, 74 N. E. 528. No power to prohibit slaughter houses in city limits under power to regulate such business, nor under general power to make such regulations as are necessary to purposes of corporate organization. Id.

85. Regulation of bill boards held unreasonable as going beyond the necessity of protection. City of Chicago v. Gunning System, 214 Ill. 628, 73 N. Y. 1035.

86. An ordinance providing for garbage collection is not invalid because it makes the amount of the charge therefor dependent on the character of the building from which garbage is removed and not directly on the quantity removed. Ex parte Zhizhuzza [Cal.] 81 P. 955.

87. Ex parte Zhizhuzza [Cal.] 81 P. 955.

88. Ex parte Berry [Cal.] 82 P. 44.

89. An ordinance forbidding "peddling or in any other manner selling" merchandise in the streets is severable, and the provision against peddling is good though the prohibition of other sales may be invalid. Ex parte Henson [Tex. Cr. App.] 90 S. W. 874.

90. Ordinance forbidding erection of wooden fences over a certain height within the fire limits held not to apply to fence previously built. Jackson v. Miller [N. J. Eq.] 60 A. 1019.

91. A municipality has no power to sue in the interest of its citizens to abate a public nuisance affecting no property right of the municipality. Belleville Tp. v. Orange [N. J. Eq.] 62 A. 331.

92. See 4 C. L. 738. See, also, Buildings and Building Restrictions, 5 C. L. 487; Fires, 5 C. L. 1424, and like topics.

93. Under a constitutional provision that the legislature shall pass laws to suppress gambling it may delegate such power to

tice causing danger of fire[95] or explosion,[96] provided the regulation goes no farther than is required by the reasonable necessities of the occasion.[97]

(§ 10) *C. Health and sanitation.*[98]—Reasonable ordinances requiring the prompt removal of dead animals are valid,[99] but an ordinance which devests the owner of his property in the carcass and invests it in a public contractor is void.[1] With regard to the collection of garbage,[2] however, regulations requiring destruction by a public contractor are sustained though the garbage has some value[3] and the expense of such destruction may be cast on the householder.[4] Such regulations do not deny due process of law or take property without compensation,[5] nor does the appointment of an official garbage collector and the forbidding of others to engage in such employment create a monopoly.[6] Charter power to abate nuisances authorizes a municipality to declare with reasonable limitations that the emission of dense smoke is a nuisance.[7]

(§ 10) *D. Regulation and inspection of business.*[8]—Regulations restrictive of the conduct of business are justified only by considerations of the public comfort, health or safety; but in the protection of such interests reasonable[9] regulations may be made[10] and the power to inspect and approve safety devices,[11] and to revoke

municipalities. Town of Ruston v. Perkins, 114 La. 851, 38 So. 583. Power to suppress "billiard tables" includes power to suppress pool tables. City of Clearwater v. Bowman [Kan.] 82 P. 526. See, also, Betting and Gaming, 5 C. L. 417.

94. Under a general welfare clause the keeping of intoxicants for unlawful sale may be prohibited. Tucker v. City of Moultrie [Ga.] 50 S. E. 61. See Intoxicating Liquors, 6 C. L. 165, for a full discussion.

95. Regulations designed to prevent the spilling of inflammable oils in the street from tank wagons handling the same are within the police power. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Construction or removal of wooden buildings may be requested. Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761.

96. Municipal corporations may adopt ordinance forbidding storage or transportation of nitroglycerine within municipal limits. Walter v. Bowling Green, 5 Ohio C. C. (N. S.) 516.

97. Held unreasonable: Restriction in size and requirement of noncombustible materials without discrimination as to localities; requiring consent of three-fourths of the residents of the block; requiring a license fee of 50c per square foot, shown to amount to nearly twice the gross revenue derived from the bill boards. City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035. While insecure or otherwise dangerous bill boards or those bearing improper advertisements may be prohibited, a general prohibition of bill boards merely because they are unsightly is invalid. Bryan v. Chester, 212 Pa. 259, 61 A. 894.

98. See 4 C. L. 738. See, also, Health, 5 C. L. 1641.

99, 1. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265.

2. Broken victuals discarded from the table are "house offal" within an ordinance. State v. Robb [Me.] 60 A. 874.

3. Gardner v. Michigan, 26 S. Ct. 106. If a garbage collection ordinance is invalid so far as it regulates the disposal by one of his own garbage, such invalidity does not affect the part forbidding him to collect that of others. State v. Robb [Me.] 60 A. 874.

4. A general power to make needful sanitary regulations authorizes the grant of an exclusive privilege of destroying garbage by cremation, and a requirement that garbage be delivered to the crematory and destroyed at the expense of the person delivering it. California Reduction Co. v. Sanitary Reduction Works, 26 S. Ct. 100. A city has power to prescribe that it have the exclusive right of collecting garbage and to exact a small fee from householders therefrom. Ex parte Zhizhuzza [Cal.] 81 P. 955. One charged with collecting garbage in violation of such an ordinance cannot assail the provision for such fee. Id.

5, 6. State v. Robb [Me.] 60 A. 874; Gardner v. Michigan, 26 S. Ct. 106.

7. Glucose Refining Co. v. Chicago, 138 F. 209. A smoke ordinance is not invalid because while allowing the emission of smoke during a certain time each day while fire boxes are being cleaned it gives no more time to those having several fire boxes than to those having but one. Id.

8. See 4 C. L. 739. See, also, Licenses, 6 C. L. 436.

9. Requirement of watchman at crossing during specified hours when no trains were run during a part of the time specified is unreasonable as to the hours when no trains were run, and being indivisible is entirely invalid. Southern Ind. R. Co. v. Bedford [Ind.] 75 N. E. 268. Though an ordinance prohibiting rock quarries within the city limits does not interfere with the right of a landowner to make proper excavations on his land, it is unreasonable and void as being a virtual deprivation of property in rock. Ex parte Kelso [Cal.] 82 P. 241.

10. Regulations upheld: Under general grant of power to provide for health, comfort and safety may prohibit keeping open of saloons on Sunday. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496. Regulation of the handling of inflammable oils from tank wagons and licensing of wagons

licenses for violation of regulations,[12] may be delegated to administrative officers. A power usually conferred on municipalities is that of licensing occupations for the purpose of regulation,[13] license for revenue as well being occasionally authorized. License fees must be reasonable[14] and not unjustly discriminating.[15] A municipality authorized by an act "respecting licenses" may not only require licenses but regulate the business of licensees.[16] Prohibitory regulations are only justified by a clear grant of power,[17] but if the power exists it may be exercised as to an occupation licensed by state laws,[18] and if the prohibition be justified by reasonable necessity it is no objection that it renders certain property valueless.[19] No power to impose penalty for usury exists without express grant,[20] and a provision for forfeiture of a money lender's occupation license for usury is invalid,[21] but such a provision in a license law does not invalidate the provisions for license,[22] nor does an invalid provision requiring the giving of a bond by the licensed person.[23] Though a city has power to regulate factories generally, it cannot declare a particular factory to be a nuisance unless it is a public nuisance or a nuisance per se.[24] Except in the strict exercise of the police power, a municipality has no power to regulate public service corporations deriving their authority from the state,[25] but where the franchise is derived from the regulatory ordinance, the corporation may be estopped to attack the ordinance even if it is invalid.[26]

so engaged is valid. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

11. Requirement that drip pans on tank wagons handling inflammable oils shall be subject to approval of commissioner of public works is not a delegation of legislative authority to the commissioner. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

12. Provision for revocation of license by mayor for violation of its terms does not confer judicial power on mayor. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

13. The subject of licenses is more fully treated in another topic. See Licenses, 6 C. L. 436. The borough act of 1897 superseded all licensing power of boroughs inconsistent with or more extensive than was granted by such act. Smith v. Hightstown, 71 N. J. Law, 536, 60 A. 393.

14. $10 per year on each tank wagon engaged in handling inflammable oils is not unreasonable. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

15. A classification of occupations under a power to license will not be disturbed unless unreasonable and arbitrary. Requirement of greater license from lenders on personal security than from those lending on real property, stocks, etc., is not unreasonable. City Council v. Clark & Co. [Ga.] 52 S. E. 881. Under the power to license occupations merchants issuing trading stamps may be taxed $400.00 per year though other merchants are taxed only $24.00 a year. There was no evidence to show the profits of the trading stamp business or indicate that the tax was prohibitive. Gamble v. City Council of Montgomery [Ala.] 39 So. 353.

16. Atlantic City v. Brown, 71 N. J. Law, 81, 58 A. 110.

17. Under authority to regulate the storage of explosive oils within the corporate limits, such storage may be prohibited. City of Crowley v. Ellsworth, 114 La. 308, 38 So. 199. A city authorized to regulate or prohibit certain occupations and regulate certain others cannot prohibit an occupation of the latter class. City of Elkhart v. Lipschitz, 164 Ind. 671, 74 N. E. 528.

18. A state law licensing peddlers does not prevent a municipality under a proper grant of power from prohibiting peddling in the municipal limits. Ex parte Henson [Tex. Cr. App.] 90 S. W. 874.

19. Prohibition of storage of explosive oils in city limits is not invalid because it renders valueless structures erected for oil storage. City of Crowley v. Ellsworth, 114 La. 308, 38 So. 199.

20, 21, 22, 23. City Council v. Clark & Co. [Ga.] 52 S. E. 881.

24. Wood working factory held not a nuisance. City of New Orleans v. Lagasse, 114 La. 1055, 38 So. 828.

25. Where all the privileges of a telephone company in the streets are under legislative grant, the municipality has no power to impose a license fee. License regulation held a revenue measure. Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009. Regulation of charges of a public service corporation is not a power generally appertaining to a municipality and is not implied from a grant of power to a city to frame its own charter. State v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41. Where a public service corporation occupies the streets under legislative authority, the municipality has no power to fix its charges. Farmer v. Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078. The control which the municipality has over the Interborough Rapid Transit Company which is by statute declared part of the street does not give the street officers power to remove advertisements, etc., from the stations. Interborough Rapid Transit Co. v. New York, 47 Misc. 221, 95 N. Y. S. 886. Invalidity of a provision requiring an omnibus driver to carry any person desiring carriage does not invalidate the entire ordinance but only serves as a defense if a penalty is sought to be imposed for a justified rejection. Atlantic City v. Brown [N. J. Err. & App.] 62 A.

(§ 10) *E. Control of streets and public places.*[27]—Paramount authority over municipal streets remains in the state, which may delegate such powers as it sees fit.[28] The legislature in the exercise of this paramount authority may grant franchises in the streets and authorize structures therein.[29] Under a delegated power to regulate the use of the streets, the municipality may regulate the operation of automobiles therein,[30] regulate railroad street crossings,[31] require overhead electric wires to be guarded,[32] regulate the vending of explosive oils in tank wagons,[33] require precautions in the operation of street cars,[34] prohibit the running at large of horned cattle,[35] and charge abutters with the duty of cleaning sidewalks.[36] Power to regulate the planting and protection of shade trees does not authorize an ordinance requiring persons having trees in any street to cut them down on notice.[37] No use of streets or public places inconsistent with the public easement therein can be authorized.[38]

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*[39]—As incident to the power to make police regulations, power to punish their breach is conferred, and in the exercise of such power acts made penal by state law may be punished;[40] but such ordinances are justifiable only by express legislative authority.[41] In defining offenses[42] or prescribing procedure[43] a municipality cannot

428. An ordinance establishing a uniform omnibus fare within the city limits without regard to distance is not unreasonable. Id.

26. See ante, § 871.

27. See 4 C. L. 739. See, also, Franchises, 5 C. L. 1518; Highways and Streets, 5 C. L. 1645.

28. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941.

29. Elevated railroad. Turl v. New York Contracting Co., 46 Misc. 164, 93 N. Y. S. 1103. Under the charter of Memphis its streets remain the property of the state and the city has only such power over them as is granted while the legislature may grant such franchise therein as it sees fit. City of Memphis v. Postal Tel. Cable Co., 139 F. 707.

30. Under power to regulate use of streets may require licensing of automobiles and carrying of registered number. License law held valid. People v. Schneider [Mich.] 12 Det. Leg. N. 32, 103 N. W. 172. An ordinance forbidding the operation of automobiles on country roads between sunset and sunrise is not unreasonable. Ex parte Berry [Cal.] 82 P. 44. May regulate speed and require safety devices but cannot impose additional restrictions on those using machines for pleasure only. City of Chicago v. Banker, 112 Ill. App. 94.

31. Regulation of width and depression sustained. Hughes v. Arkansas & O. R. Co. [Ark.] 85 S. W. 773.

32. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

33. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

34. A requirement that the person operating a street car shall keep a vigilant watch for danger and at the first appearance thereof shall stop the car is a valid police regulation. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648.

35. Under a power to regulate cattle running at large, the running at large of horned cattle may be prohibited. City of Doniphan v. White, 110 Mo. App. 504, 85 S. W. 400.

36. Under a statute authorizing the city to require "owners" of abutting premises to keep sidewalks clean, the duty may be imposed on occupants and tenants. City of Helena v. Kent [Mont.] 80 P. 258. In Illinois municipalities have no such power. City of Chicago v. McDonald, 111 Ill. App. 436.

37. Sproul v. Borough of Stockton [N. J. Law] 62 A. 275.

38. See post, § 11.

39. See 4 C. L. 740. Procedure in prosecutions under municipal regulations, see Indictment and Prosecution, 5 C. L. 1876.

40. An ordinance declaring drunkenness in public places to be a nuisance is not in conflict with a statute providing that drunken persons may be arrested and bound over to keep the peace. Town of Dewitt v. La Cotts [Ark.] 88 S. W. 877. Municipalities may be authorized to provide for the punishment of acts which are already forbidden by penal statutes. Littlejohn v. Stells [Ga.] 51 S. E. 390. The fact that an act is punishable under state law does not prevent an ordinance prohibiting it under the same penalty. Incorporated Town of Avoca v. Heller [Iowa] 105 N. W. 444.

41. Ordinance against keeping places resorted to for gaming held invalid. Thrower v. Atlanta [Ga.] 52 S. E. 76.

42. Under a power to punish vagrancy the city may define vagrancy but in so doing cannot go beyond the generally accepted meaning of the word. Inclusion of persons found trespassing on private property without giving a good account of their conduct is unauthorized but does not invalidate remainder of ordinance. State v. McFarland [Minn.] 105 N. W. 187.

43. Authority to arrest, fine and imprison for certain offenses does not authorize establishment of procedure therefor other than that established by law. Ordinance for arrest without warrant invalid. Gunderson v. Struebing [Wis.] 104 N. W. 149. The procedure for arrest and binding over being fixed by statute, a municipality has no power

depart from the established meaning of words and the settled rules of procedure. The extent of punishment which may be imposed is usually regulated by the charter.[44]

§ 11. *Property and public places.*[45]—The law upon this subject is fully treated elsewhere,[46] only a few cases based on the peculiar status of municipalities being here treated. A municipality may acquire property in any lawful manner, as by adverse possession,[47] though as a general rule adverse possession will not run against municipal property held for public use.[48] A municipality may devote its property to any use consistent with its position as trustee for the benefit of its inhabitants,[49] but cannot sanction a use inconsistent with the public use[50] or amounting to a public nuisance.[51] By the weight of authority injunction will lie to prevent it from so doing.[52] Diversion from one public use to another is ordinarily upheld.[53] While a municipality may recover for negligent injury to its property, if the injury is inflicted by one operating under a franchise, recovery can be had only for

to authorize policemen making arrests to accept a deposit in lieu of bail. Richardson v. Junction City, 69 Kan. 664, 77 P. 691.

44. Though a provision for imprisonment where the city is authorized to punish by fine only is invalid, it may be rejected as surplusage. City of Clearwater v. Bowman [Kan.] 82 P. 526. Where the only limitation on the power of a municipality to punish crime was that the penalty should not be less than that prescribed by statute for the same offense, the municipality may provide that convicted offenders shall be worked in a chain gang on the streets. City of second class. Stone v. Paducah, 27 Ky. L. R. 717, 86 S. W. 531. Where the charter provides that penalties for the violation of ordinances may be imposed "to the extent of" specified fine and imprisonment penalties whose maximum equals that specified are authorized. State v. Marciniak [Minn.] 105 N. W. 965. Where the authority to fix a penalty involves only legislative discretion, it cannot be delegated to the judiciary by fixing only a maximum and minimum. City of Lambertville v. Applegate [N. J. Law] 62 A. 270.

45. See 4 C. L. 741.

46. See Parks and Public Grounds, 4 C. L. 876. See, also, Highways and Streets, 5 C. L. 1645.

47. A municipality may acquire land by adverse possession. Murphy v. Commonwealth [Mass.] 73 N. E. 524.

48. See Adverse Possession, 5 C. L. 46.

49. A grant to a railroad company of the right to lay tracks on a public wharf is a grant for a public purpose. Murray v. Allegheny [C. C. A.] 136 F. 57. A municipality may lease its lands for private use. Murphy v. Commonwealth [Mass.] 73 N. E. 524. Land under a city bridge, which is owned by the city, and is used as a support for the bridge, and is not adapted to use as a street or highway, and has never been so used, cannot be regarded as a public street, and the city may lease it for any purpose not inconsistent with its use as a support for the bridge. Ricard Boiler & Engine Co. v. Toledo, 6 Ohio C. C. (N. S.) 501.

50. A municipality cannot authorize any use of the streets inconsistent with the public use. Lease of street for private purposes. Lahry v. Gilmour [Ky.] 89 S. W. 231; City of Chicago v. Pooley, 112 Ill. App. 343; Pew v. Litchfield, 115 Ill. App. 13. And an obstruction pursuant to such an authorization is a public nuisance. One not specially damaged cannot have injunction. Labry v. Gilmour [Ky.] 89 S. W. 231. A municipality cannot authorize such an occupation of the streets as seriously interferes with the public use thereof. Third railroad track in street. Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864. And an abutter whose ingress and egress are impeded is entitled to an injunction. Id. The board of public service is not authorized by 75 V. 115, § 8324 (Smith & Benedict, § 5) to grant to the lessee of the Cincinnati Southern Ry. Co. the right to occupy the streets of the city of Cincinnati. Louisville, etc., R. Co. v. Cincinnati, etc., R. Co., 3 Ohio N. P. (N. S.) 109. Ordinance authorizing conduct of business so as to substantially obstruct sidewalk invalid. Pagames v. Chicago, 111 Ill. App. 590. Water frontage dedicated to a city to afford public access to the water cannot be disposed of for private purposes. Murray v. Allegheny [C. C. A.] 136 F. 57. Erection of a slaughter house is not a "market purpose" within a conveyance of land to a city. Bird v. Grout, 94 N. Y. S. 127. Projections beyond the building line cannot be authorized. McMillan v. Klaw & E. Const. Co., 107 App. Div. 407, 95 N. Y. S. 365.

51. Street Fair. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998.

52. A taxpayer is not entitled to sue to restrain improper use of property conveyed as a park. Bancroft v. Bancroft [Del.] 61 A. 689; Bayard v. Bancroft [Del.] 62 A. 6. Diversion of public lands from the purpose for which they are held may be enjoined at the suit of a taxpayer. Bird v. Grout, 94 N. Y. S. 127. The use of the public property for private purposes will be enjoined at the suit of a taxpayer. Public officer allowed to use part of city hall for his private business and to have assistance of public employe therein. Nerlien v. Brooten [Minn.] 102 N. W. 867. Maintenance of street fair by license of city enjoined. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998.

53. A city which has condemned property for park purposes, paying for it from the general fund, may divert it to other municipal purposes. Seattle Land & Improvement Co. v. Seattle, 37 Wash. 274, 79 P. 780.

injury from negligent operation and not for that resulting naturally from use of the franchise.[54]

§ 12. *Contracts.*[55]—Contracts by public governmental bodies are fully treated in a separate article.[56] Practically the only questions arising upon such contracts which are peculiar to municipalities and proper to be here treated are those relating to unauthorized contracts and the implications and estoppels resulting therefrom. It results necessarily from the limited and delegated character of municipal authority that a municipality can contract only to the extent and in the manner expressly authorized,[57] and contracts for an unauthorized purpose or not executed in the prescribed manner are invalid.[58] Where benefits have been received under an invalid contract, it has been held that on principles of implied contract or estoppel[59] the municipality is liable, but on the other hand it has a been held that neither implied contract[60] nor estoppel will arise,[61] persons dealing with a municipality being bound at their peril to take notice of the legal limitations of its power. Where the charter provides that no debt or obligation can be created except by ordinance, neither custom[62] nor ratification other than by ordinance can

54. Electrolysis: A street railway company, operating a single trolley electric system under a franchise manifestly contemplating such a system, is liable for injury to the water pipes of the city from the return current only to the extent that its operation of the system has been negligent. Dayton v. City R. Co., 6 Ohio C. C. (N. S.) 41. Where a number of companies are operating in the same city under the same system, each of which is responsible in part for the injury occurring to water pipes from electrolysis, such fact constitutes no defense to an action brought by the municipality against one of the companies on account of such injury. Id. Equity will not compel a change of a single trolley street railway system to avoid electrolysis to water pipes when there is a sharp conflict in the evidence as to whether the system in use is a proper system. Id.

55. See 4 C. L. 743.

56. See Public Contracts, 4 C. L. 1089.

57. Cordilla v. Pueblo [Colo.] 82 P. 594.

58. No liability arises on a contract made by a municipal officer without authority. Jersey City Supply Co. v. Jersey City, 71 N. J. Law, 631, 60 A. 381. A bond executed by the mayor under authority to execute a "note" does not bind the city. Gutta Percha & Rubber Mfg. Co. v. Attalla [Ala.] 39 So. 719. Resolution held to authorize only a test and not a contract. For purchase of grading machine. Fleming Mfg. Co. v. Franklin [Iowa] 103 N. W. 997.

59. Money borrowed by a town without authority and used for public purposes may be recovered by the lender as money had received. Luther v. Wheeler [S. C.] 52 S. E. 874. Where a city bound by law to provide food for prisoners maintains no station house, an implied contract arises to reimburse the sheriff to whose custody city prisoners are committed and by whom they are fed. City of Kokomo v. Harness [Ind. App.] 74 N. E. 270. Though city officer take possession of a building by a trespass, if it is used for a purpose for which it was proper for the city to lease a building, the city is liable for the reasonable value of such use. Bodewig v. Port Huron [Mich.] 12 Det. Leg. N. 567, 104 N. W. 769. While a city is liable for service actually rendered under a contract with one of its boards, no contract is implied in the absence of actual rendition of the services. City not liable for breach of contract on unauthorized discharge of police officer by police commission. Gibbs v. Manchester [N. H.] 61 A. 128.

60. No implied contract can arise from benefits received under an ultra vires act. Use of goods purchased by a city department without authority. Jersey City Supply Co. v. Jersey City, 71 N. J. Law, 631, 60 A. 381. There can be no recovery for services rendered at instance of a board when there was a city officer whose duty it was to render them. Legal services to board of health which corporation attorney should have rendered. Reynolds v. Ossining, 102 App. Div. 298, 92 N. Y. S. 954.

61. Unanimous consent of taxpayers will not validate a contract which is forbidden by the constitution. Railroad aid. Town of Adel v. Woodall [Ga.] 50 S. E. 481. Approval by a citizens' mass meeting of an unauthorized borrowing of money does not estop taxpayers to dispute the validity of a note given by municipal officers therefor. Luther v. Wheeler [S. C.] 52 S. E. 874. A city cannot be estopped to deny the validity of a contract made by its officer in direct violation of an ordinance. Employment of attorney, ordinance providing that no attorney outside the regular legal department should be employed. Hope v. Alton, 214 Ill. 102, 73 N. E. 406. Not estopped by receiving benefit to assert invalidity under ordinance prohibiting obligations of the kind involved. Id., 116 Ill. App. 116. An agreement by a public service corporation giving a municipality power to purchase its plant is ultra vires (Quinby v. Consumers' Gas Trust Co., 140 F. 362), and since it would disable the corporation from performing its duties to the public, no estoppel can arise to prevent it from asserting the invalidity of such contract (Id.).

62. Custom of vesting management in certain officers. Paul v. Seattle [Wash.] 82 P. 601.

impose any liability,[63] nor will receipt of benefits under an improperly executed contract operate as an estoppel.[64] Where a private person has on contract with a public agency rendered services of benefit to a municipality, it is competent for the legislature to discharge the contracting agency and make the benefitted municipality liable.[65] Citizens have no individual right of action on contracts made by the city for the benefit of its citizens.[66] Where the construction of public works is committed wholly to an independent board, the municipality being charged only with the duty of raising the money to pay for the work, it is not liable on the contracts of the board,[67] but the duty of raising money for the work may be enforced by mandamus.[68] Where a contract for public service is made for a certain term, the power to contract for such service is exhausted during the duration of the service made,[69] nor can an appropriation in aid of a private enterprise covering the same subject-matter be sustained.[70]

§ 13. *Fiscal affairs and management.*[71]—Municipal bonds are treated in a separate topic,[72] and such questions as the consent of electors to an indebtedness, which arise usually with special reference to bonded indebtedness, will be found more fully treated there. Public funds can be devoted only to public purposes.[73] The power to issue bonds is only given for particular purposes and the municipality has no power to use the proceeds for other purposes.[74] The state may recognize and order payment of moral obligations,[75] even though the same be disputed,[76] for instance, city warrants drawn by the mayor and endorsed by the treasurer payable in the future to cover estimates by the city engineer but exceeding the debt limit.[77]

63, 64. Paul v. Seattle [Wash.] 82 P. 601.

65. Applied to contract by drainage commissioners pursuant to which municipal swamp lands were drained. Act April 8, 1903. O'Neill v. Hoboken [N. J. Law] 60 A. 50.

66. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

67, 68. Holroyd v. Indian Lake, 180 N. Y. 318, 73 N. E. 35.

69. Electric lighting contract. Village of Morrice v. Sutton [Mich.] 12 Det. Leg. N. 19, 103 N. W. 188.

70. Village of Morrice v. Sutton [Mich.] 12 Det. Leg. N. 19, 103 N. W. 188.

71. See 4 C. L. 746.

72. See Municipal Bonds, 6 C. L. 704.

73. A fireman's relief and pension fund is a legitimate municipal purpose to which public funds may be appropriated. Commonwealth v. Barker [Pa.] 61 A. 253. Municipal liquor dispensaries are a public object and public money may properly be expended to promote them (Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016), and such dispensaries and the stock therein are public property not subject to execution (Id.). It is only those actions against an officer for his official acts in which the public has a concern, the expenses of which can be made a public charge. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81. The borough authorities have no authority to expend public money in defense of borough officers, indicted under the law, when the borough itself is not involved. Miller v. Hastings Borough, 25 Pa. Super. Ct. 569. A borough policeman was arrested and prosecuted for assault and battery. While the suit was pending the borough council in regular session moved "that our police be supported with all that council command in case now pending in court." Policeman was acquitted but one-half of the costs was imposed on him. Held motion of council was not a sufficient basis for a suit by the policeman against the borough to recover his costs and attorney's fees. Id. The payment of a city railroad aid subscription to the stock of a railroad does not constitute a lending of the city's credit. There was no constitutional duty on the part of the authorities to submit to the voters the question of the mode of payment of the subscription. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016. Section 135 of the Municipal Code giving the council authority to provide for the deposit of public funds in a bank at competitive bidding is not unconstitutional on the ground that it is a loan of the public fund to the bank. State v. Bowers, 4 Ohio C. C. (N. S.) 345.

74. Where bonds of Chicago were issued under an ordinance to be used solely for permanent improvements, the treasurer could not by mandamus be forced to pay warrants issued for permanent improvements made before the ordinance was passed, as the ordinance was not retroactive. People v. Hummel, 215 Ill. 71, 74 N. E. 78. Where the general act under which Chicago was incorporated contained no express provision as to the use of money derived from waterworks or waterworks bonds, it did not repeal the former special law that all funds derived from the sale of water bonds or from water rents should be kept separate and used exclusively for the city's water supply, and consequently a city ordinance transferring the surplus to the general fund was void. Id.

75, 76, 77. Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703.

Where two cities charged with the duty of keeping up a bridge between them permit it to fall into disrepair, the legislature may by an agency created by it repair such bridge and impose the cost thereof upon such cities,[78] but it cannot do so if the cost so imposed would make the municipal indebtedness exceed the constitutional limit.[79] As a safeguard against official improvidence it is frequently provided by charter that no indebtedness shall be incurred unless provision for its payment be then made, or until appropriation has been made for unpaid liabilities[80] or to an amount exceeding the current revenue,[81] and to the same end is a common provision that no extraordinary expense[82] shall be incurred unless authorized by popular vote[83] at an election duly called,[84] a two-thirds vote being required in Kentucky.[85] Proceedings for examination into fiscal affairs are sometimes provided.[86]

Funds and appropriations.[87]—Money derived from special assessments is held as a trust fund for the payment of warrants, and the municipality cannot withhold the same because of any invalidity in the contract or assessment resulting from violation of provisions designed for the protection of taxpayers.[88] The holder of a

78, 79. In re Opinion of the Justices [Me.] 60 A. 85.

80. A statute forbidding the incurring of liability until appropriation for unpaid liabilities has been made contemplates only unpaid liabilities actually incurred and not estimated expenses. Estimated expenses of work ordered held not within statute. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639. A dedication of a certain percentage of the current expense tax to payment for a public improvement is a sufficient provision for payment in view of a statute declaring that such appropriations shall continue in force ten years if necessary. Dupuy v. Police Jury [La.] 39 So. 627.

81. Though a municipality is restricted in contracting debts for public improvements to sums which may be repaid from current revenue, if the improvement is made in good faith and the cost exceeds the estimate of revenue, the indebtedness is valid. Luther v. Wheeler [S. C.] 52 S. E. 874. Const. art. 11, § 18, as amended in 1900, providing that the city and county of San Francisco may pay claims for labor and materials for public works out of the revenue of succeeding years is permissive, and the municipality may in its discretion refuse to pay except from the revenues of the year when the work was done. Weaver v. San Francisco, 146 Cal. 728, 81 P. 119.

82. The proposition of a municipality to incur indebtedness for the purpose of a water or light plant need not be submitted to a vote of the qualified voters of such municipality. Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029. Payment of public improvement bonds is a "necessary expense" which need not be submitted to popular vote. City of Greensboro v. Scott, 138 N. C. 181, 50 S. E. 589.

Held extraordinary expenses: Garbage crematory. Mander v. Coleman, 109 App. Div. 454, 95 N. Y. S. 696. Any expenditure for a purpose not expressly authorized by the charter is an "extraordinary expenditure" within a requirement that such be submitted to popular vote. Purchase of voting machines. People v. Geneva, 45 Misc. 237, 92 N. Y. S. 91.

83. A resolution at a mass meeting of citizens cannot dispense with a constitutional requirement of submission of proposed indebtedness to popular vote at an election. Town of Wadley v. Lancaster [Ga.] 52 S. E. 335. Where debts other than temporary loans may under the constitution be incurred only by popular vote, votes given by a municipality for the purchase price of supplies are invalid (Id.), even in the hands of a bona fide purchaser (Id.). Payment of several of the notes and benefits from use of the property purchased do not estop the municipality to set up the invalidity. Id.

84. A notice of an election to submit a proposed indebtedness stating the interest at "not to exceed" a certain per centum does not comply with a requirement that the "terms of the contract" be stated. City of Thomasville v. Thomasville Elec. Light & Gas Co. [Ga.] 50 S. E. 169.

85. Const. § 157, requiring assent of "two-thirds of the voters" to incur an indebtedness above current revenues means two-thirds of those voting on the proposition, not two-thirds of those voting at the election. Board of Education of Winchester v. Winchester, 27 Ky. L. R. 994, 87 S. W. 768. Ky. St. 1903, § 3490, so far as it seeks to add anything to this requirement, is nugatory. Id., overuling Belknap v. Louisville, 99 Ky. 474, 36 S. W. 1118.

86. Examination and correction of the tax roll by the borough council will be compelled by mandamus. Cooper v. Cape May Point [N. J. Law] 60 A. 516. A justice who has made an order under P. L. 1898, p. 155, for an examination of municipal expenditures, is not required on application to investigate the truth of the averments in the affidavit on which the order was made. Borough of Park Bridge v. Reynolds [N. J. Law] 62 A. 190. One suing under Code Civ. Proc. § 1925, to prevent improvident expenditure, need not give the bond required of one suing under Laws 1881, c. 431. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81.

87. Fines collected for violation of municipal ordinances are "fines for breach of the penal laws" which belong to the school fund. Const. art. 9, § 5. Board of School Directors of Buncombe County v. Asheville, 137 N. C. 503, 50 S. E. 279.

88. Red River Valley Nat. Bank v. Fargo [N. D.] 103 N. W. 390.

special assessment voucher by its terms payable from the proceeds of the particular assessment is not entitled to have a special assessment levied if there prove to be a deficiency,[89] but the levy and collection of the original assessment may be compelled by mandamus.[90] The amount with which the city is chargeable for crossings, etc., is part of the special fund for a street improvement and chargeable with warrants thereon.[91] The duty to provide for the payment of the liabilities of a municipal corporation may be enforced by mandamus.[92] An appropriation of the moneys received from a particular source goes only to the amount, and it is not necessary that the identical money be kept on hand to meet the appropriation.[93] Money collected from taxes and paid into the treasury without appropriation for any particular purpose becomes an asset usable for any legitimate purpose.[94] Sprinkling of streets is within a power to pay for "repairs and improvements" to streets from the general fund.[95] A city is liable to the state for money obtained from the state school funds by fraudulent reports as to the scholastic population of the municipality.[96] The decree therefor is to be satisfied from general revenue or by a special tax, not from the school fund.[97] An ordinance appropriating a certain sum for "permanent street improvements" is not so uncertain as to amount to a delegation of legislative power where previous proceedings show clearly what improvements were intended.[98]

Warrants.[99]—A municipal warrant shows a prima facie claim against the city,[1] and it will be presumed that a legal duty to make necessary levies has been performed.[2] A city is not liable on a warrant payable out of a certain fund because it fails to collect the assessment for such fund.[3] Where the statute provides that municipal warrants shall be received in payment of all debts to the municipality, an ordinance that they shall not be so received if prior warrants are outstanding is invalid,[4] and a statement on the face of the warrant that by acceptance it was agreed that it should not be so received is unavailing.[5] Warrants void in their inception because the debt limit was exceeded cannot be validated by ratification or estoppel.[6] A warrant signed by the assistant auditor instead of the auditor, and across the face instead of at the foot, is presumptively valid.[7] Municipal warrants are not negotiable unless made so by statute,[8] but may pass by endorsement so as to entitle the assignee to sue in his own name, subject to defenses and equities between the original parties.[9] In an action to restrain the treasurer from paying certain obligations from the general fund unless there is a surplus therein, holders of outstanding warrants of previous years are necessary parties.[10]

89. Village of Wilmette v. People, 214 Ill. 107, 73 N. E. 327.

90. Where highway commissioners are authorized to contract for supplies to be paid for out of a certain fund, mandamus to compel the levy of taxes and collection of such fund is the proper remedy. Pape v. Benton Tp. [Mich.] 12 Det. Leg. N. 116, 103 N. W. 591.

91. Hemen v. Ballard [Wash.] 82 P. 277.

92. Whether such duty be specifically enjoined or whether it results from the general powers and nature of the corporation. Douglas v. McLean, 25 Pa. Super. Ct. 9.

93. Hett v. Portsmouth [N. H.] 61 A. 596.

94. Blood v. Beal [Me.] 60 A. 427.

95. McAllen v. Hamblin [Iowa] 105 N. W. 593.

96, 97. State v. Knoxville [Tenn.] 90 S. W. 289.

98. Hett v. Portsmouth [N. H.] 61 A. 596.

99. Laws of 1903, c. 382, p. 690, relating to warrants is not double in its title. Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703.

1, 2. State v. Mutty [Wash.] 82 P. 118.

3. City of Denver v. National Exch. Bank [Colo.] 82 P. 448.

4, 5. Ex parte Willis [Ark.] 86 S. W. 300.

6. Eddy Valve Co. v. Crown Point [Ind.] 76 N. E. 536.

7. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

8. Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109. Village warrants are not negotiable instruments, and defenses available against the payee are not cut off by transfer. A warrant in payment of an incompleted improvement was issued to a contractor in excess of the assessment and so unauthorized. It was not validated by transfer to an innocent holder, nor by its subsequent renewal. Field v. Highland Park [Mich.] 12 Det. Leg. N. 340, 104 N. W. 393.

9. Morrison v. Austin State Bank, 113 Ill. App. 651.

Limitation of indebtedness.[11]—Almost without exception municipalities are prohibited from incurring indebtedness above a certain sum,[12] usually fixed at a percentage of the assessed valuation.[13] In Maine temporary loans are excepted from the operation of this provision.[14] All indebtedness for which a municipality is liable,[15] or which operates as an incumbrance on its property,[16] is to be included in determining the amount of indebtedness. The execution of a contract which creates a liability exceeding the debt limit will be enjoined,[17] but a preliminary injunction is discretionary, since the creditor contracts with full notice of the limitation and no rights are lost to the taxpayer.[18]

§ 14. *Torts and crimes.*[19]—A municipal corporation exercises functions of two classes, private and governmental.[20] In respect to matters of the former class it is liable for the negligent torts of its officers and employes in the due course of their duty to the same extent as a private corporation. In the exercise of its governmental functions the municipality possesses the attributes of sovereignty and is not liable in tort in the absence of statute imposing such liability.[21] Under this rule a municipality is not liable for negligence connected with the operation of its fire,[22] health,[23] and police departments,[24] or the maintenance of its school system,[25] nor

10. Pendleton v. Ferguson [Tex.] 13 Tex. Ct. Rep. 1013, 89 S. W. 758.

11. See 4 C. L. 747.

12. Held to apply to bonded indebtedness of the city of Columbia. Seegers v. Gibbes [S. C.] 52 S. E. 586. It is immaterial that a contract is for a legitimate purpose if it creates a liability exceeding the constitutional debt limit. Blood v. Beal [Me.] 60 A 427.

13. A constitutional prohibition of municipal indebtedness above a certain percentage of the taxable valuation is self executing. Const. art. 11, § 3. Halsey & Co. v. Belle Plaine [Iowa] 104 N. W. 494. The words "taxable value" in a prohibition of municipal indebtedness above a certain percentage of such value means actual value, and not the assessment value provided by a statute requiring property to be assessed at 25% below its actual value. Id. Where bonds were issued after the current assessment had been made, but before the time for modifying it had expired, the assessment of the preceding year is the basis for determining whether the debt limit is exceeded. Platt v. Hitchcock County [C. C. A.] 139 F. 929. In determining whether a municipal corporation has reached or exceeded the limit of its bonding capacity, the statute contemplates the aggregate bonded indebtedness whether issued before or since said enactments, and if such aggregate equals or exceeds the extreme eight per cent limit above noted, then no further bonds may be issued until said aggregate has been reduced below said limit. Griffith v. Tiffin, 7 Ohio C. C. (N. S.) 41.

14. A temporary loan within the exception in the Maine Constitution is one paid within the year in which it is made out of taxes assessed and collected within the same year, and a loan paid after the year, though from that year's taxes, is not temporary. Blood v. Beal [Me.] 60 A. 427. If a loan temporary in its inception is carried over the year it loses its temporary character. Id.

15. A resolution for the purchase of supplies, under a contract that no warrant shall be issued to the seller until a proper appropriation has been made, does not create a debt. Bailey v. Sioux Falls [S. D.] 103 N. W. 16. Bonds expressly payable only out of a special tax are not indebtedness. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

16. Where a municipality purchased property subject to a mortgage, such mortgage is part of the municipal indebtedness, though the municipality did not assume or agree to pay it. Eddy Valve Co. v. Crown Point [Ind.] 76 N. E. 536.

17. Blood v. Beal [Me.] 60 A. 427.

18. Bailey v. Sioux Falls [S. D.] 103 N. W. 16.

19. See 4 C. L. 747.

20. Keeley v. Portland [Me.] 61 A. 18; Mains v. Ft. Fairfield, 99 Me. 177, 59 A. 87; Hourigan v. Norwich, 77 Conn. 358, 59 A. 487.

21. A statute making municipalities liable for **injuries by mobs** is valid though the municipality could not have prevented the injury. City of Iola v. Birnbaum [Kan.] 81 P. 198. A statute making municipalities liable for injury "to life or limb" by mobs includes all bodily injuries and not merely those causing death or loss of a limb. Id.

22. Not liable for trespass by fire department horse. Cunningham v. Seattle [Wash.] 82 P. 143. Not to member of fire department injured by vicious horse. Lynch v. North Yakima, 37 Wash. 657, 80 P. 79. The maintenance of a fire station is a ministerial duty and a city is liable for damages from its failure to furnish a safe place for its employes. Bowden v. Kansas City, 69 Kan. 587, 77 P. 573.

23. A city is not liable in damages for the seizing and use of a building for public use where it did not authorize or ratify the tort, though it received the benefit of the use of the building. Bodewig v. Port Huron [Mich.] 12 Det. Leg. N. 567, 104 N. W. 769.

24. Not to member of fire department infected with contagious disease by germ brought into the fire house by police officer. Lynch v. North Yakima, 37 Wash. 657, 80 P. 79. A municipality in maintaining a

the erection and maintenance of its public buildings, unless the same are so maintained as to constitute a nuisance.[26] With respect to facilities designed for the use and benefit of the public, the municipality is not liable for any matter growing out of the plan of the work,[27] but is liable for failure to keep such facilities in repair,[28] or for negligence in the actual execution of its public works.[29] With respect to street lighting,[30] and the construction and operation of sewer systems there is some conflict of authority.[31] Dangerous places in grounds or ways for public use must be guarded with reasonable prudence.[32] A city is not liable to one whose property is destroyed by fire through failure to furnish adequate water supply,[33] and no such liability can be imposed by the city by contract upon one to whom the

prison and its officers in arresting and confining alleged criminals therein act in a governmental capacity, so that there is no liability by reason of the unsanitary condition of the prison. Mains v. Ft. Fairfield, 99 Me. 177, 59 A. 87. Unsanitary condition of prison. Shaw v. Charleston [W. Va.] 50 S. E. 527; Carty's Adm'r v. Winooski [Vt.] 62 A. 45.

25. Not liable to pupil for injury by defect in school building. Clark v. Nicholasville, 27 Ky. L. R. 974, 87 S. W. 300.

26. A prison whose unsanitary condition affects only inmates thereof is not a nuisance so as to give a right of action to one confined therein, for no damage can result except by the intervention of the governmental act of the city in confining him. Mains v. Ft. Fairfield, 99 Me. 177, 59 A. 87. Where error of judgment in executing a plan for a public work results in a nuisance the city is liable. Overflow of creek by negligent use as trunk sewer. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555.

27. In determining what portion of a street it will improve, a city acts in its delegated governmental capacity, and while so acting is not liable to an individual as for a neglect of duty. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168. A municipality is not liable for damages caused by defects in a sewer due to the original plan and not to failure to keep the sewer in repair. Keeley v. Portland [Me.] 61 A. 180. Changing grade of street governmental. Not liable for freezing of water pipes left inadequately covered by lowering of street level. Miller v. Kalamazoo [Mich.] 12 Det. Leg. N. 231, 103 N. W. 845. A city is not liable for damages caused by the fall of a building due to defects in the building code adopted by the council. McGuinness v. Allison Realty Co., 46 Misc. 8, 93 N. Y. S. 267. The providing of water supply by means of authorized public waterworks is a governmental function. United States v. Sault Ste. Marie, 137 F. 258.

28. Liable for failure to keep public wharves in repair. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. Bound to use reasonable diligence to keep bridge in repair. (City of Indianapolis v. Cauley, 164 Ind. 304, 73 N. E. 691), and to use ordinary care to select reasonably skillful servants to perform such duty. Held negligent. Id. A municipality is liable for damages to one injured from contact with a telephone or telegraph pole, which has been so placed in a public street as to become a nuisance or dangerous, and the municipality has knowledge thereof or in the exercise of ordinary care and prudence should know of its existence. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229.

29. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168. The enlargement of a city water plant is a municipal function and the city is liable for negligence of its servants engaged therein. Hourigan v. Norwich, 77 Conn. 358, 59 A. 487. A contract provision prohibiting use of dynamite except in rock excavation may be waived, so as to render a city liable for injury to a building caused by its use, by a provision putting the work under the control of commissioner. City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46. When a municipal corporation contracts for the making of a public improvement under the supervision of its own engineer or other proper officer, and subject to his orders, the corporation is liable for damages caused by negligence of the contractor. As where commissioner of public works retained absolute control and supervision of the work and consented to use of dynamite in making excavations. Id.

30. Lighting streets ministerial. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68. **Contra.** City of Vincennes v. Spees [Ind. App.] 74 N. E. 277.

31. Not liable for injury to property by overflow of stream used as trunk sewer where extraordinary freshet was proximate cause. O'Donnell v. Syracuse [N. Y.] 76 N. E. 738, rvg. 102 App. Div. 80, 92 N. Y. S. 555. While provision for drainage of surface water by a municipality is a duty purely judicial in its nature, for the breach of which it has been held no liability attaches, the duty of keeping a sewer in proper condition is of a ministerial character, and where the sewer is inadequate to carry off the refuse and filth, which under certain conditions are backed onto the property of an abutting owner, the municipality is chargeable with the damages resulting. City of Cincinnati v. Frey, 3 Ohio N. P. (N. S.) 627. Construction of sewer is a governmental function. Rome v. Worcester, 188 Mass. 307, 74 N. E. 370.

32. Bound to properly protect a reservoir in a public place but this duty is satisfied by the erection of proper barriers and the city is not liable for injury to a child who climbed over the barrier. Carey v. Kansas City, 187 Mo. 715, 86 S. W. 438.

33. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, exhaustively collating the cases and overruling Planters Oil Mill v. Monroe Waterworks & Light Co., 52 La. Ann. 1243, 27 So. 684. See, also, note, 4 C. L. 748.

duty of furnishing water is let.[34] A municipality is liable in damages for an assault committed by the custodian or caretaker of a public park, where the assault is committed by such employe while acting in the line of duty.[35] Where a municipality engages in any work for profit, it is liable for negligence therein,[36] provided it was authorized to engage in such an enterprise.[37] To charge a municipality with liability for the defective condition of any of its public places or facilities, it must have had actual or constructive notice thereof;[38] but a statute requiring written notice to a city of a defective condition before it shall be liable for injuries therefrom is invalid as destroying a right of action.[39] A city is not liable for the acts of an independent contractor engaged in the construction of a public work,[40] unless the matter involved is one of positive duty to an individual, in its nature nondelegable,[41] or unless the work is intrinsically dangerous or liable to create a nuisance.[42] Commissions created by statute to conduct municipal departments are ordinarily regarded as independent contractors,[43] and that they perform without authority duties devolving on the municipality creates no privity between their employes and the municipality.[44]

§ 15. *Claims and demands.*[45]—Statutes or charters usually require that notice be given to municipalities within a limited time of demands for injuries received by reason of defective streets or sidewalks,[46] and occasionally such notice is required of all claims for personal injury.[47] Apart from these statutes, as a

34. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

35. Bloom v. City of Newark, 3 Ohio N. P. (N. S.) 480.

36. Quarry operated by city for profit. City of Boston v. Brooks [Mass.] 73 N. E. 206. Private profit. Operating ferry. Davies v. Boston [Mass.] 76 N. E. 663.

37. Not liable for injury to employe on work which municipality had no authority to undertake. Rock quarry outside municipal limits. Donable's Adm'r v. Harrisonburg [Va.] 52 S. E. 174.

38. Evidence that one with whose knowledge the city was not chargeable observed a defect before the accident is admissible to show its discoverable character. City of Ottawa v. Hayne, 214 Ill. 45, 73 N. E. 385. That an electric wire fell at one place does not charge the municipality with the duty of inspecting the entire system and accordingly is not admissible in an action for injuries by the subsequent fall of another wire. Fox v. Manchester [N. Y.] 75 N. E. 1116. Declarations of municipal officers not made in the course of their duties are not admissible to show notice. Id. Municipality not liable for dangerous condition caused by fall of electric wires unless it had notice thereof. Id.

39. MacMullen v. Middletown, 92 N. Y. S. 410.

40, 41, 42. Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

43. Municipality not liable to employe of street commission for injury from defective appliance. Connor v. Manchester [N. H.] 60 A. 436. The bureau of buildings of the Borough of Manhattan is not a department of the city of New York so as to charge the city with its negligence. McGuinness v. Allison Realty Co., 46 Misc. 8, 93 N. Y. S. 267. Park commissioners appointed under the charter and whose duties are exclusively for the benefit of the city are city officers. City of Denver v. Spencer [Colo.] 82 P. 590. Boards are not liable for negligence unless made so by statute. School board injuring property by negligent excavation. Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N. E. 646.

44. Cleaning streets held not outside the duties of commissioners required to repair streets and keep them in fit condition for travel. Connor v. Manchester [N. H.] 60 A. 436.

45. See 4 C. L. 751.

46. See Highways and Streets, 5 C. L. 1645, for rulings under statutes relating wholly to streets.

47. An action for death by wrongful act is an action for personal injuries within a statute requiring notice of claim as a condition precedent to suit. Crapo v. Syracuse [N. Y.] 76 N. E. 465. A statute requiring the filing of a claim before action for "negligent injury" to person or property does not apply to actions for injury by the maintenance of a nuisance. Gerow v. Liberty, 94 N. Y. S. 949. The requirement of notice of injury on streets or public works does not apply to the case of a city employe injured by failure to provide him a safe place to work. Kelly v. Faribault [Minn.] 104 N. W. 231. A claim against a city for injuries is not defective because verified before one who subsequently acted as attorney for plaintiff in a suit therein, though attorneys are by statute forbidden to administer oaths in cases in which they are professionally engaged. Allen v. West Bay City [Mich.] 12 Det. Leg. N. 70, 103 N. W. 514. Presentation to the president and the clerk of the council is a sufficient presentation to the council. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555. The notice being required to state the time, place, cause and extent of the injury, the claimant is

matter of municipal accounting, presentation of all claims for audit and allowance to the proper officer in due course[48] is required, and provision is occasionally made for hearing on the merits of disputed claims.[49] A claim once rejected by the county supervisors on the merits cannot be presented to a succeeding board.[50] One who presented an amended bill after disallowance of the original cannot deny the power of the town auditors to pass thereon.[51] The statute requiring the filing of an abstract of claims allowed and a certificate of disallowance as to those disallowed, an abstract of allowed claims stating one as disallowed is not a sufficient disallowance.[52] Mandamus will lie to compel a proper certificate.[53] In the absence of statute or ordinance to the contrary a creditor of a municipality may assign his claim.[54] A remedy by appeal to the court of original jurisdiction on bill of exceptions from the rejection of a claim is cumulative and the claimant may proceed by original suit.[55]

§ 16. *Actions by and against.*[56]—The power and discretion as to suits by the municipality is vested in the municipal officers,[57] and it is rarely that a taxpayer is authorized to sue for the municipality[58] or to compel the bringing of suits[59] or the setting up of particular defenses.[60] Actions against a municipality must be brought in the county where it is situated.[61] It cannot be sued by attachment in a foreign state,[62] nor is it subject to garnishment except by virtue of express statute.[63] Substantial compliance with the statute requiring presentation of claim must be alleged but a copy of the claim need not be annexed.[64] A declaration against a city for trespass defective for failure to sufficiently allege by what municipal author-

not precluded from recovery of a greater sum as damages than is specified in the notice. Mackay v. Salt Lake City [Utah] 81 P. 81. Actions for equitable relief against a continuing nuisance are not within a statute requiring presentation of claims. Lamay v. Fulton, 96 N. Y. S. 701; Lamay v. Fulton, 96 N. Y. S. 703.

48. Procedure under § 149 of the Greater New York Charter by which a city officer who has approved a bill presented to his department sends it to the comptroller is not a compliance with § 261, requiring a demand of the comptroller 30 days before suit. Ruprecht v. New York, 102 App. Div. 309, 92 N. Y. S. 421.

49. The comptroller of the city of New York is authorized by statute to examine orally persons presenting claims. The right of examination extends to officers of a corporation claimant. In re Grout, 34 Civ. Proc. R. 231, 93 N. Y. S. 711. It authorizes only questions in good faith relevant to the city's liability. Questions as to organization of complainant, value of its plant, etc., held irrelevant (Id.), and is terminated by commencement of suit on the claim (Id.). Code Civ. Proc. § 856 authorizing commitment for contempt on an ex parte showing of refusal to answer on such an examination is invalid. Id.

50. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81.

51. In re Weeks, 94 N. Y. S. 468.

52, 53. People v. Page, 105 App. Div. 212, 94 N. Y. S. 660.

54. Gordon v. Jefferson, 111 Mo. App. 23, 85 S. W. 617.

55. Pylant v. Purvis [Miss.] 40 So. 7.

56. See 4 C. L. 753. Judicial review of municipal acts, see ante, § 7.

57. The provision of section 1777, empowering the city solicitor to sue in the name of the city "whenever an obligation or contract made on behalf of the corporation, granting an easement or creating a public duty is being evaded or violated," authorizes a suit by the city solicitor to enjoin traction companies from refusing to give or receive transfers in accordance with the grant to the lessor company. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489.

58. Taxpayer not party to municipal contract. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. Suit by taxpayer for the collection of an account against the municipality not authorized. Ohio v. Roebuck, 2 Ohio N. P. (N. S.) 688.

59. A city solicitor is entitled to a reasonable time to investigate the probable merits of a suit before a taxpayer can compel him to bring it. In determining what is a reasonable time the city attorney's pressure of official duties should be considered. Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489. Especially is this true where the taxpayer having been in a position for some months to make the request makes it at a time when there is an unusually large amount of business to be attended to by the city attorney. Id.

60. Equity cannot at the instance of a taxpayer require the city to set up a particular defense in a pending suit against it. Roby v. Chicago, 215 Ill. 604, 74 N. E. 768.

61. City of Nashville v. Webb, 114 Tenn. 432, 85 S. W. 404.

62. Parks Co. v. Decatur [C. C. A.] 138 F. 550.

63. Under Laws 1901, c. 96, salary of officer or employe of municipal corporation is subject to garnishment. Mitchell v. Miller [Minn.] 103 N. W. 716.

64. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

ities the acts complained of were directed is cured by an answer alleging a prescriptive right in the city and entry thereunder.[65] Judgments against a municipality become dormant in the same manner as those against an individual.[66] Payment of a judgment may be enforced by mandamus if there are funds available.[67] In the absence of statutory prohibition execution may issue against a municipality, though on grounds of public policy it cannot be levied on the general revenue or on any property needed for governmental purposes.[68]

MUNICIPAL COURTS; MURDER; MUTUAL ACCOUNTS; MUTUAL INSURANCE, see latest topical index.

NAMES, SIGNATURES AND SEALS.

§ 1. *Names.*[69]—The middle initial is no part of one's name and is ordinarily of no importance.[70] The addition or omission of the abbreviation "Sr." is ordinarily immaterial.[71]

There is no variance between a christian name and a commonly accepted abbreviation or nickname therefor,[72] particularly where the two are shown to have been used to describe one and the same person.[73] So, too, the fact that the patentee of land is described by his christian name in the patent and by the initials of his christian and middle names in a power of attorney authorizing the sale of the land is immaterial where it appears that the same person is referred to.[74]

If, in the country of plaintiff's nativity, a child bears the family name of both his father and his mother, he may sue in his full name, though he has borne in this country only the paternal family name, and notwithstanding that the suit is for divorce and that he was married under the latter name alone.[75]

Where the service is personal, a defendant sued in the wrong name is bound by the judgment even though he does not appear,[76] particularly where his name is

65. City of Owensboro v. Brocking, 27 Ky. L. R. 1086, 87 S. W. 1086.

66. Agreement between municipal creditors held not to prevent judgment from becoming dormant. Beadles v. Fry [Okl.] 82 P. 1041.

67. Lewis v. Drainage Com'rs of Union Drainage Dist., 111 Ill. App. 222.

68. Beadles v. Fry [Okl.] 82 P. 1041.

69. See 4 C. L. 754.

70. No such dissimilarity between names "William Barker" and "William S. Barker" so as to render record of the conviction of the latter for a felony inadmissible to impeach witness having former name. State v. Loser [Iowa] 104 N. W. 337. Mere fact that witness denied ever having gone by latter name and denied that he had ever been convicted of crime held not to change the rule. Id.

71. Held immaterial that grantor, who was named in a deed as S. W. Sholars and signed that name thereto was described in the certificate of acknowledgment as S. W. Sholars, Sr., where the notary certifies that the person acknowledging the deed was the same person who executed it. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937.

72. No variance between name "Davey S. P." appearing to have been appointed foreman of the grand jury and name "David S. P." indorsed on an indictment as such foreman, "Davey" being a diminutive or nickname for David. Lamb v. People [Ill.] 76 N. E. 576.

73. Certified copy of deed executed by "Fannie C." as wife of the grantor, held admissible though his wife's true name was "Frances C." and there was no proof that they were one and the same person, particularly where the deed was in the chain of title and notary's certificate stated that "Fannie C." was the wife of the grantor. Chrast v. O'Connor [Wash.] 83 P. 238.

74. Discrepancy between name "N. C. Cordrey" described in a power of attorney as the patentee of certain land thereby authorized to be sold, and name "Nathan Cordrey" in the patent held immaterial, it sufficiently appearing that they were one and the same person. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937.

75. Code Prac. art. 172, requires petition to give plaintiff's name, which means his real name. DeRenzes v. His Wife [La.] 39 So. 805.

76. Defendant named "Francis" served with process in which he was called "France." King v. Davis, 137 F. 198.

properly spelled in a notice that leave to amend will be asked, which notice, it is not denied, reached the defendant.[77]

Idem sonans.[78]—The fact that names are not spelled the same in legal documents or proceedings does not ordinarily constitute a fatal variance if they have substantially the same sound when pronounced,[79] but this rule does not operate to render the record of conveyances executed by,[80] or judgments rendered against, a person constructive notice to persons holding under instruments executed under a name having a similar pronunciation, but commencing with a different letter.[81]

Change of name.—In Alabama it is a criminal offense for any person to change or alter his name, except in the manner provided by law, with intent to defraud or to conceal his identity, or to avoid the payment of any debt.[82] In a prosecution for a violation of this act with intent to avoid the payment of a debt, it is immaterial whether the debt was contracted before or after the passage of the act.[83] The usual rules of evidence apply.[84] A denial by defendant, while testifying in his own behalf, that he ever changed his name at all, dispenses with the necessity of proof by the state that the change was not made in the manner prescribed by law.[85] The state may, for the purpose of showing fraudulent intent, prove that defendant owed other debts than the one alleged in the indictment.[86]

Business and corporate names.[87]—Under the New Jersey corporation act one corporation may enjoin another from using a corporate name so nearly similar to its own as to lead to uncertainty or confusion.[88] The certificate or reply of the corporation clerk as to whether any other corporation has adopted a particular name, or one so similar thereto as to lead to confusion, concerns only objections apparent in the name itself, and one acting thereon does so at his own risk when the adoption of such name is properly brought in question.[89]

The assumption of a corporate name by any individual or unincorporated company or association in any sign or advertisement for the purpose of soliciting business thereunder is forbidden in Illinois.[90] The object of this statute is to pre-

77. King v. Davis, 137 F. 198.

78. See 4 C. L. 755.

79. Names not idem sonans: "Max" and "Matt." Vincendeau v. People [Ill.] 76 N. E. 675. Instruction tending to induce jury to disregard the difference held erroneous. Id. "Frank Rock" and "Frank Rex." State v. Lee [Mont.] 83 P. 223. Where information charged robbery from "Frank Rex," and evidence showed that his name was "Frank Rock," and there was no description in the information tending to make it certain that they were one and the same person, held, that there was a fatal variance, notwithstanding Pen. Code, § 1838, providing that when an offense involves the commission of a private injury and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material. Id. "McCinney" and "McKinney." Grimmer v. Nolen [Ala.] 40 So. 97.

80. Record of mortgage executed in name of "McCinney" is not notice that it was executed by "McKinney," and in action for conversion of property claimed by defendant under mortgage executed under latter name, plaintiff's alleged prior mortgage executed under the former name is inadmissible. Grimmer v. Nolen [Ala.] 40 So. 97.

81. Where records show that title is held by "Cheffey," a mortgagee is not bound to look for judgments against "Sheffey," though the two names are, or may be, pronounced alike, but may rely on the records as written. Boyd v. Boyd [Iowa] 104 N. W. 798.

82. Act Oct. 10, 1903 (Gen. Acts 1903, p. 438) is a proper exercise of the police power, and does not violate the constitutional prohibition against imprisonment for debt. Morris v. State [Ala.] 39 So. 973.

83. Morris v. State [Ala.] 39 So. 973.

84. It having been shown that defendant was employed in certain railway shops, held, that evidence that the railway company as garnishee in a suit by witness against defendant in justice court answered that it had no one by defendant's name in its employ was hearsay and inadmissible to show that defendant was employed under a false name. Morris v. State [Ala.] 39 So. 973.

85. Even if such proof would otherwise be necessary. Morris v. State [Ala.] 39 So. 973.

86. Morris v. State [Ala.] 39 So. 973.

87. See 4 C. L. 755.

88. Evidence held not to warrant enjoining the use of defendant's corporate name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

89. Is of no weight on the question of violation of a trade-mark or trade-name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

vent persons from obtaining a fictitious credit by advertising themselves as being a corporation when in fact they are not, and there must be at least some evidence tending to show such a fraudulent use.[91]

Mandamus will not lie to compel the secretary of state to issue a certificate of incorporation under a name the use of which could be enjoined by an existing company.[92]

Matters relating to trade-marks and trade-names are treated elsewhere.[93]

§ 2. *Signatures.*[94]—The effect of the words "agent,"[95] "trustee,"[96] "executor"[97] and the like, following a signature, is treated elsewhere.

To prove the execution of an instrument by a subscribing witness, it is necessary to show that it was signed in his presence.[98] Where witnesses to a will are not required to sign in the presence of each other, the fact that a witness whose signature was proved signed after the name of another does not prove the signature of the latter.[99]

A witness may become qualified to speak as to handwriting to be proved either by having seen the party write,[1] or by having seen letters or documents in his handwriting,[2] or by comparison of handwritings by an expert.[3] In the first two cases the witness must have acquired his knowledge by his own observation of facts occurring under his own eye, and without having regard to any particular person, case, or document.[4] Only an expert can qualify himself to testify as to handwriting in a particular case,[5] and his evidence is inadmissible unless all the writings compared are produced.[6] Whether one is qualified to testify as an expert is largely a matter in the discretion of the trial court, and his ruling allowing a witness to testify will not be disturbed unless it clearly appears that he was not qualified.[7]

§ 3. *Seals.*[8]—Any impression, flourish, or mark will be a good seal if so intended,[9] and the word "seal"[10] or the letters "L. S." are sufficient.[11] The modern tendency is to minimize the old distinctions between sealed and unsealed instru-

90. Starr & C. Ann. St. 1896 (2d Ed.) p. 1332. par. 368, prescribes a penalty for so doing. People v. Rose [Ill.] 76 N. E. 42. Penalty prescribed is exclusive and contracts of those violating the statute are not thereby rendered invalid. Id.

91. It is the deception or improper use of the name and not merely the name itself which constitutes the offense. People v. Rose [Ill.] 76 N. E. 42.

92. Where use could be enjoined on ground that it was thereby intended to deceive the public and fraudulently obtain the business of the existing company. People v. Rose [Ill.] 76 N. E. 42.

93. See Trade-marks and Trade-names, 4 C. L. 1689.

94. See 4 C. L. 756.

95. See Agency, 5 C. L. 64.

96. See Trusts, 4 C. L. 1727.

97. See Estates of Decedents, 5 C. L. 1183.

98. Signature of power of attorney held insufficiently proven to render it admissible in evidence. Schaffer v. Emmons, 103 App. Div. 399, 92 N. Y. S. 993.

99, 1, 2, 3. In re Burbank's Will, 104 App. Div. 312, 34 Civ. Proc. R. 247, 93 N. Y. S. 866.

4. Witnesses incompetent to prove signature of witness to an alleged lost will, where knowledge was acquired with reference to the particular case. In re Burbank's Will, 104 App. Div. 312, 34 Civ. Proc. R. 247, 93 N. Y. S. 866.

5. In re Burbank's Will, 104 App. Div. 312, 34 Civ. Proc. R. 247, 93 N. Y. S. 866.

6. In re Burbank's Will, 104 App. Div. 312, 34 Civ. Proc. R. 247, 93 N. Y. S. 866. Witnesses who had never seen or known party and had never seen him write held not competent to prove signature of a witness to an alleged lost will because 14 years before they had seen a signature to the will purporting to be his and during the progress of the proceedings had seen signatures proved to be his. Id.

7. Admission of opinion of bank officers and clerk of court as to whether body of will, the signature thereto and name of an attesting witness were written in the same ink as that of another witness, and as to which was the older writing, held not error. Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

8. See 4 C. L. 757.

9. Hazleton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456.

10. Hazleton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456. In most states it is no longer necessary that a seal be impressed upon wax or other adhesive substance, but the printed word "Seal" following the signature is sufficient if the instrument recites that it is executed under the party's hand and seal. Instrument held a sealed one within the statute of limitations. Philip v. Stearns [S. D.] 105 N. W. 467.

11. Printed after signatures to judgment note, and surrounded by a scroll. Hazleton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456.

ments.[12] Thus, it is now generally held that a release under seal may be avoided on the ground of fraud in an action at law.[13] Where, in an instrument signed by both a husband and his wife, a seal is affixed to his signature but none is affixed to hers, but the instrument recites that it is "given under our hands and seals," it will be presumed that the seal was adopted by her also.[14]

NATIONAL BANKS; NATURAL GAS; NATURALIZATION, see latest topical index.

NAVIGABLE WATERS.

The rights of riparian owners,[15] the ownership of subaqueous lands,[16] consuming uses of the water,[17] and matters relating to navigation, are treated elsewhere.[18]

§ 1. *What are navigable.*[19]—At common law waters were navigable only where the tide ebbed and flowed.[20] It is now, however, generally held that waters which are navigable in fact are navigable in law.[21] They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water,[22] and are navigable waters of the United States, as distinguished from the navigable waters of the states, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway, over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.[23] It is not necessary that they be capable of continuous use for purposes of navigation at all times of the year,[24] nor is it necessary that the waters be navigable in all their parts in order that the public may have a right of navigation where they are deep enough and fit for that purpose.[25]

§ 2. *Relative, public and private rights.*[26]—Absolute property in, and dominion and sovereignty over, the soil under tide waters belongs to the state in which

12. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

13. Formerly the only remedy was in equity. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

14. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

15, 16. See Riparian Owners, 4 C. L. 1310.

17. See Waters and Water Supply, 4 C. L. 1824.

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

19. See 4 C. L. 757.

20. Streams above tide water were not deemed navigable. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783; McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

21. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. Those rivers are public navigable rivers in law which are navigable in fact. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42.

22. Averments of bill for an injunction to prevent obstruction of river by boom company held to sufficiently show that river was actually used in navigation. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42. A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. The fact that there is water enough in places for rowboats or small launches, or that hunters or fishermen pass over the water with boats ordinarily used for that purpose does not render the waters navigable. Id. Are navigable if capable, in their natural state, of being used for the purpose of commerce, no matter in what mode it may be conducted. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351. Stream capable of transporting rafts of railroad ties for several months in the spring, without the aid of men on the banks, is navigable. Id. Lake held navigable in fact. Madson v. Spokane Valley Land & Water Co. [Wash.] 82 P. 718.

23. River held navigable water of the United States. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42.

24. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

25. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

26. See 4 C. L. 758.

the land is situated. There is, however, a conflict of authority as to the ownership of the soil under nontidal waters lying wholly within a state, it being held in some states to belong to the state for the benefit of the public, and in others to belong to the riparian proprietors subject only to the public right of navigation.[27]

The public have an easement for the purpose of navigation in waters which are navigable in fact regardless of the ownership of the underlying soil,[28] and neither persons using them for that purpose[29] nor the owners of adjoining lands have a right to obstruct them or to interfere with their use by others,[30] any such obstruction being a public nuisance.[31] Persons navigating such waters have not, however, a right to willfully and maliciously destroy fishing appliances therein, even if placed there without lawful authority,[32] nor to trespass upon the lands of riparian owners.[33] The right to hunt and fish is not an incident to the right of navigation, but belongs exclusively to the owner of the underlying soil.[34]

The right to build tunnels under[35] or to bridge navigable streams is subject

27. See Riparian Owners, 4 C. L. 1310. See, also, 4 C. L. 758, 759.

28. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783; McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351. Right of one owning fee of land between high and low water mark is subject to public right of navigation. McGunnegle v. Pittsburg, etc., R. Co. [Pa.] 62 A. 988. A navigable stream is not a highway in the sense in which the word is used in S. C. Const. art. 3, § 34, forbidding the enactment of local or special laws to lay out, open, alter, or work roads or highways. Manigault v. Springs, 26 S. Ct. 127.

29. Persons using navigable waters owe a duty to the public not to create a nuisance in the way of an obstruction to navigation, and are liable for injuries resulting from their negligence in so doing. Moran v. Merritt & Chapman D. & W. Co., 135 F. 863. Respondent held not liable for injury to tug caused by line becoming entangled in her screw. Even if line was that used by respondent in raising sunken vessel, which had been made fast to pier and weighted to bottom, there was no negligence shown. Doctrine of res ipsa loquitur does not apply since proper precautions were taken. Id.

30. For purpose of floating ties. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 357. No landowner has right to put any structure or filling between high and low water mark which would obstruct the use of that part of the river for navigation. McGunnegle v. Pittsburg, etc., R. Co. [Pa.] 62 A. 988. Municipality through which a navigable stream flows has no authority to impede its free navigation or to grant right to do so to others. People v. West Chicago St. R. R. Co., 115 Ill. App. 172.

31. Obstruction of stream is prima facie a public nuisance, and no one has a right to obstruct it unless he has authority of law for so doing. Simpson v. Kelley [Ky.] 90 S. W. 241. Bridge over river so constructed as to prevent passage of plaintiff's boats held a public nuisance. Viebahn v. Board of Com'rs [Minn.] 104 N. W. 1089.

32. If he does so he is liable for the resulting damages. Fowler v. Harrison [Wash.] 81 P. 1055. Evidence held to establish that defendants deliberately, wantonly, and purposely ran steamer into plaintiff's fish nets, traps, and dolphin (Id.), and that such appliances were not an obstruction to navigation (Id.). Admission in evidence of certificate of secretary of war authorizing maintenance of appliances held not error even if insufficient authority, particularly where plaintiff had also secured license from the state. Id. Verdict held not excessive. Id.

33. The owner of lots abutting on a stream may enjoin the cutting of a channel or basin thereon by another for the purpose of enabling him to turn a steamer which is too large to turn in the stream. Evidence held to sustain finding that bank was platted as claimed by complainant and that defendant cut into his lots. Wilkinson v. Dunkley-Williams Co. [Mich.] 12 Det. Leg. N. 19, 103 N. W. 170. Rule applies though his interest is, in equity, that of a mortgagee. Id. He may also restrain a similar encroachment on a street whereby access to his property is destroyed. Evidence held to sustain finding that street was platted for purpose of giving complainant access to his property, and that defendant encroached thereon. Id.

Floating logs: One using a navigable stream for the purpose of floating logs has no right to allow them to accumulate so as to obstruct the flow of the water thereby causing it to flood the lands of a riparian owner and to deposit logs thereon, and to wash and wear away the soil, interfering with and obstructing its cultivation. White v. Codd [Wash.] 80 P. 836. Defendant held not to have acquired prescriptive right to flood plaintiff's land. Id. The measure of damages in such cases is the difference in the value of the land before and after the acts complained of. Osborn v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879. Failure to give instruction fixing the measure of damages at the decreased rental value (Id.), or that the cost of restoring the land was the proper measure of damages if less than the difference in value, held not error where defendant made no request for such instructions. Id.

34. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

35. Right of traction company, granted by city ordinance, to maintain tunnel under navigable stream is subject to the condition that it shall not thereby interrupt naviga-

to the condition that they be so constructed and maintained as not to unnecessarily interrupt navigation,[36] and the same is true of the right to reconstruct bridges already built.[37] So, too, a railroad company which, by reason of the negligent and careless operation of its trains, breaks a drawbridge and thereby obstructs navigation, is liable in damages to private individuals specially injured thereby.[38] The original negligent breaking, and not obstructions due to repairing operations, is the proximate cause of the injury in such case.[39]

The right given by the statutes of Alabama to owners of land fronting on bays to plant and gather oysters confers on them no exclusive right to the use of the waters for all purposes, but only such a right to the reasonable use thereof for passage and freight as will enable them to best enjoy the rights granted, which they must exercise in such a manner as will interfere as little as possible with the like rights of others.[40] They may, however, compel persons crossing their oyster beds to use designated channels for that purpose.[41]

Right of access.[42]—The proprietors of lands upon navigable waters are entitled to access to their navigable parts,[43] but the owner of upland has no right to trespass upon land lying between high and low water mark which belongs to another person for the purpose of reaching the navigable waters beyond.[44]

The rights of wharfage[45] and reclamation of one owning land fronting on a cove in a river in such a manner that lines drawn at right angles to the channel of

tion, particularly when the ordinance so provides, and it is not entitled to compensation when compelled to lower or remove it when it becomes necessary to deepen the channel. People v. West Chicago St. R. R. Co., 115 Ill. App. 172. City is not estopped by consent to construction of tunnel to compel its abatement when it interferes with navigation. Id. Company's tunnel is no less an obstruction to navigation because there are other tunnels below it which are also obstructions, but mandamus to compel its removal will not be executed until the others have been removed. Id.

36. Pharr v. Morgan's L. & T. R. & S. S. Co. [La.] 38 So. 943.

37. Evidence held to sustain finding that this duty was not violated. Rogers Sand Co. v. Pittsburg, etc., R. Co. [C. C. A.] 139 F. 7.

38. Where obstruction was such that barges could pass but steamboats could not, held that company was liable for the cost of an extra steamboat rendered necessary to enable plaintiff to transport cane from his plantation to his refinery. Pharr v. Morgan's L. & T. R. & S. S. Co. [La.] 38 So. 943. Damages claimed for delay in operating refinery held too remote and uncertain. Id.

39. Where usual channel was closed by breaking of bridge, and company drove piling across the other channel for purpose of repairing bridge and facilitating traffic. Pharr v. Morgan's L. & T. R. & S. S. Co. [La.] 38 So. 943.

40. Code 1896, c. 84, granting to owners of lands fronting on bays the right to plant and gather oysters for a distance of 600 yards from shore. Cain v. Simonson [Ala.] 39 So. 571.

41. Code 1896, c. 84 gives owners of land fronting on a bay the right to plant oysters to a distance of 600 yards from the shore. Complainant owned land on each side of a narrow mouth of a bay, and maintained oyster bed in such mouth less than 1200 yards wide. Held, that defendant, who owned land fronting on the bay at a distance from its mouth, would be restrained from sailing out of the bay over such oyster bed to its irreparable damage, and would be required to use a channel through the mouth of the bay marked out and agreed upon by the parties. Cain v. Simonson [Ala.] 39 So. 571.

Note: At common law the public right of navigation to high-water mark was paramount to all other rights in navigable waters (Williams v. Wilcox, 8 Ad. & El. 318; Atty. Gen. v. Woods, 108 Mass. 436, 11 Am. Rep. 380), and redress for damage to fisheries caused by navigators was restricted to cases of negligence or wilfulness (Colchester v. Brook, 7 Q. B. 339). But the power of the legislature to limit channels or otherwise regulate navigation is unquestioned. Flanagan v. Philadelphia, 42 Pa. 219, and cases there cited. It would seem therefore not unreasonable to imply in the plaintiff a right to prevent unnecessary navigation which was injurious to the fishery privileges conferred by the Alabama statute.—From 6 Columbia L. R. 282.

42. See 4 C. L. 760.

43. Construction of railroad across mouth of cove held not to materially impair right of access, in view of the situation and limited extent of the cove and the shallowness of its waters and plaintiff held only entitled to nominal damages. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

44. Town owning fee of strip on which owner of upland has erected dock will not be enjoined from removing it. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

45. See 4 C. L. 762.

the river on opposite sides of the cove would embrace such frontage are confined to the cove.[46] A city has only such right to build wharves as is granted to it by its charter,[47] and the grant to it of such a right does not authorize it to interfere with or destroy vested rights previously granted by it to others.[48]

§ 3. *Regulation and control.*[49]—Congress has power to pass laws for the navigation of public waters and to prevent any and all obstructions therein.[50] Until it acts, however, the states have plenary powers of control over navigable waters lying wholly within their boundaries, and hence may authorize the erection of bridges[51] or dams,[52] or the alteration of the course of streams.[53] The expenditure of money by the Federal government for the improvement of such waters does not evidence an intent on its part to exclude the state from all control over them.[54]

The right to build and maintain a railroad bridge necessarily carries with it the right to construct and repair it when necessary[55] and to construct and maintain for a reasonable time such temporary structures in the stream as may be necessary to prevent the interruption of traffic.[56] The Federal statutes prohibiting the construction of bridges or the creation of obstructions in navigable waters without the consent of congress are not applicable to the rebuilding of a bridge lawfully in existence when they were passed.[57] The provision of a state constitution that all navigable waters shall forever remain public highways does not prevent the legislature from authorizing a dam across such a stream for drainage purposes.[58] The Federal statutes require any one desiring to build wharves, bridges, and the like in navigable waters, or to change the course of navigable streams, to obtain a permit from the secretary of war.[59] The secretary has, however, no authority to order and

46. See, also, Wharves, 4 C. L. 1862. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

47. Vallejo Ferry Co. v. Vallejo, 146 Cal. 392, 80 P. 514.

48. Construction of wharf in such a manner as to render navigation of ferry, operating under franchise previously granted by the city, dangerous, unless company should spend large sums in changing its slip, will be enjoined. Vallejo Ferry Co. v. Vallejo, 146 Cal. 392, 80 P. 514.

49. See 4 C. L. 760.

50. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42. Act Cong. Sept. 19, 1890, c. 907 (26 St. 454), prohibiting the maintenance of obstructions to navigation in navigable streams, is not inconsistent with Act March 3, 1899, c. 425 (30 St. 1151), prohibiting the erection of such obstructions and hence is not repealed thereby. Id. Hence the passage of the latter act does not prohibit the bringing of a suit under the former one, particularly where the cause of action accrued prior to its passage since the repealing clause of the act of 1899 (§ 20) provides that previously accrued rights of action shall not be affected thereby. Id. Bill alleging that defendant maintained and continues to maintain an obstruction to navigation in the navigable waters of said river held not open to the objection that it fails to allege facts showing that the cause of action accrued prior to the passage of the act of 1899, where evidence as to the dates of construction of booms complained of and the period of their maintenance was admitted without objection. Id.

51. The states have unlimited authority to authorize the erection of bridges over navigable streams, subject only to the paramount authority of the Federal government. Pharr v. Morgan's L. & T. R. & S. S. Co. [La.] 38 So. 943. Railroad bridge built under authority given by state prior to Federal legislation on the subject is a lawful structure. Rogers Sand Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 139 F. 7.

52. In the absence of legislation by congress a state has power to improve its lands and promote the general welfare by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. Manigault v. Springs, 26 S. Ct. 127.

53. If Act March 3, 1899, c. 425, § 10, 30 St. 1151, authorizing secretary of war to issue permits to alter course of navigable streams is invalid, state of Illinois had power to authorize drainage district to change direction of Chicago river and introduce current therein. Corrigan Transit Co. v. Sanitary Dist. [C. C. A.] 137 F. 851. If valid, district having obtained permit is not liable for resulting damages. Id. If that portion of the section is invalid, the prohibitory part is also invalid, and cannot be regarded as a taking control of the river by congress. Id.

54. River wholly within a state. Corrigan Transit Co. v. Sanitary Dist. [C. C. A.] 137 F. 851.

55, 56. Rogers Sand Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 139 F. 7.

57. Act March 3, 1899, c. 425, §§ 7, 10 (30 St. 1150, 1151). Rogers Sand Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 139 F. 7.

58. Is a proper exercise of the police power. Manigault v. Springs, 26 S. Ct. 127.

compel the commissioners of a county to remove an established bridge over a navigable river wholly within the limits of the state, and rebuild it in such a manner as to change the course of the river by straightening the same at the point in question,[60] nor can he require them to tear down such bridge upon the ground that it is an unreasonable obstruction to the free navigation of such river without tendering compensation therefor.[61] The Federal statute authorizing the secretary of war in his discretion to remove obstructions from navigable waters of the United States does not invest him with exclusive jurisdiction over such matters, or prevent the removal of such obstructions by the local authorities if he fails or declines to act.[62]

The right of a municipality to condemn private property for the purpose of enlarging or creating a harbor on navigable water depends upon the statutes of the various states.[63] The impairment of navigation and the interruption of access to lands by the erection of a dam under a statute enacted in the exercise of the police power for the purpose of draining lowlands is not such a taking as to require the payment of compensation in order to afford due process of law.[64]

§ 4. *Remedies for injuries relating to.*[65]—It is not necessary in order to justify the interference of the United States to prevent the obstruction of navigable water within a state that the commerce thereon actually extends to or affects other states.[66] Thus the Federal courts may enjoin the erection and maintenance of a boom in a navigable stream without a showing that it is actually used for interstate commerce,[67] and have jurisdiction to determine whether a boom is constructed and maintained in a navigable stream in compliance with a state law authorizing its construction in such a manner as not to interfere with navigation, when such law is relied on as a justification for its creation and continuance.[68]

A person has no right to remove obstructions placed in a navigable stream by another on his own land unless they interfere with his rights of navigation.[69]

59. Act March 3, 1899, c. 425, § 10 (30 St. at L. 1151, 6 Fed. St. Ann. 813). Act does not operate to prevent removal of obstructions without such consent. People v. West Chicago St. R. Co., 115 Ill. App. 172. Provision in permit authorizing sanitary district to change the course of the Chicago river that the district shall "assume all responsibility for damages" by reason of an introduction of a current in the river merely obligates it to save the government harmless in such cases, and is not an undertaking to pay damages to outsiders for which they would otherwise have no cause of action, and it is not liable for damages or delay to shipping caused by the introduction of such a current. Corrigan Transit Co. v. Sanitary Dist. [C. C. A.] 137 F. 851. District could not be held liable on account of rate of current on day when injury occurred when there was no averment in regard to such rate in the libel. Id. Grant held not conditioned on keeping the flowage within a certain maximum, or at a certain rate. Id. Only reference to rate of flowage is in preamble, which cannot be resorted to since grant is unambiguous. Id. In any event the only reference to rate therein is in a recital of district's purpose in asking an earlier grant of permission to correct and regulate the cross section of the river, and it thereby neither bound itself to do the work nor guarantied the resulting rate nor covenanted to remove abutments and piers of bridges which it had no right to touch. Id. Even where it was at liberty to correct the cross-section for the purpose of securing a certain maximum velocity, it did not undertake to secure the specified limit when a large part of the cross-section was taken up by a barge. Id.

60. Thereby throwing channel 50 feet to the east. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469.

61. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469.

62. Act Cong. March 3, 1899, c. 425, § 19 (30 St. 1154) clothes him with discretionary power only, which he may exercise or not. Hagan v. Richmond [Va.] 52 S. E. 385.

63. A grant to a city of the right to condemn private property for the improvement of watercourses does not authorize such condemnation for the purpose of enlarging or creating a harbor upon navigable water. Pub. Acts 1899, Act No. 136, c. 25, § 1, p. 191, confers no such right. City of South Haven v. Van Buren Probate Judge [Mich.] 12 Det. Leg. N. 71, 103 N. W. 521. Pub. Acts 1899 (Act No. 136, c. 25, § 1, p. 191), and Comp. Laws 1897, § 3143, authorizing certain cities to construct wharves, etc., and to condemn land for that purpose, does not authorize the condemnation of land for the purpose of enlarging or creating a harbor upon navigable water. Id.

64. Manigault v. Springs, 26 S. Ct. 127.

65. See 4 C. L. 764.

66, 67. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42.

68. Whether boom interferes with navi-

The impairment of navigation being a matter of public and not of private detriment, a private individual cannot recover damages therefor[70] or enjoin the same unless he is specially injured thereby.[71] A mandatory injunction, pending suit, requiring the removal of logs which defendant has floated onto plaintiff's land and left there is proper where defendant has no conceivable right to do so in any view of the case.[72] A taxpayer may enjoin county commissioners from carrying out an order of the secretary of war, directing the reconstruction of a bridge which is wholly within the county and was constructed before congress attempted to confer authority on the secretary.[73]

The usual rules of pleading apply to actions for damages[74] and suits for injunctions. The obstruction being prima facie a public nuisance, defendant, in an action for damages therefor, must plead any authority on which he relies for maintaining such obstruction[75] and facts showing that the obstruction was within such authority.[76]

gation within meaning of Hill's Ann. Codes & St. Wash. § 1592. United States v. Wishkah Boom Co. [C. C. A.] 136 F. 42.

69. Boom erected in stream by one owning both banks. Winsor v. Hanson [Wash.] 82 P. 710.

70. Is a matter of public and not of private detriment, and a riparian owner cannot recover damages therefor. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

71. As in the case of other public nuisances, an individual who suffers a special or peculiar damage not common to the public by reason of the obstruction of a navigable stream may maintain a private action therefor. Viebahn v. Board of Com'rs [Minn.] 104 N. W. 1089. Thus persons previously engaged in operating a steamboat line on a navigable river may recover damages for the unlawful construction and maintenance of a bridge of such a character as to prevent the passage of their boats. Bridge constructed by county without authority of law and in contravention of the Federal statutes. Id.

NOTE. Obstruction of steamboat traffic as special injury: The complainant owned and used a steamboat for the sole purpose of navigating a particular creek. He had entered into a traffic contract with another common carrier and had built up a good business. The county commissioners erected a bridge across the creek, which so obstructed it that complainant's boat could not pass. In a suit to abate the obstruction, held, that equity could not interfere. Thomas v. Wade [Fla.] 37 So. 743.

A private person cannot maintain a suit to enjoin or abate a public nuisance unless he shows some injury peculiar and special to himself. Cooley on Torts, 46; Clark v. Chicago & N. W. R. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187; Jarvis v. Santa Clara R. Co., 52 Cal. 438. By the great weight of authority it is considered that the right of navigation being a public right, any obstruction thereof affects all equally and cannot be abated at the suit of an individual. Gould on Waters, § 172; Swanson v. Mississippi River Boom Co., 42 Minn. 532; Steamboat Co. v. Railroad Co., 30 S. C. 539, 14 Am. St. Rep. 923, 4 L. R. A. 209 and note; Lownsdale v. Gray's Harbor Boom Co., 117 F. 983. On the other hand it has been held that the owner of a boat used along a definite route, the passage of which is obstructed, suffers a special injury, it being immaterial whether or not others own boats engaged in the same business. Farmers' Co-operative Mfg. Co. v. Albemarle & R. R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700; Enos v. Hamilton, 27 Wis. 256 (distinguished in Clark v. Chicago & N. W. R. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187). See, also, Stetson v. Faxon, 19 Pick. [Mass.] 147, 31 Am. Dec. 123. Such cases are to be distinguished from those wherein there is an interference with complainant's right of access to his land. Glover v. Powell, 10 N. J. Eq. 211; Whitehead v. Jessup, 53 F. 707. The general rule is followed in the present case.—3 Mich. L. R. 485.

72. White v. Codd [Wash.] 80 P. 836.

73. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469.

74. Any defect in petition for damages for obstructing navigable stream by means of boom held cured by answer denying that it was defendant's duty to keep channel open or to pass plaintiff's logs as soon as possible, and affirmatively alleging that he was only required to use reasonable diligence which he has done. Simpson v. Kelley [Ky.] 90 S. W. 241. Whether defendant was required to let logs through at once, or only to use reasonable diligence, is a question of law, and hence he was not entitled to judgment on the pleadings for want of a reply thereto. Id. Complaint held to state a cause of action for recovery of damages for injuries to plaintiff's property caused by wrongful acts of defendants in allowing logs to accumulate in river. Osborn v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879.

75. Simpson v. Kelley [Ky.] 90 S. W. 241. Where the petition charges defendant with obstructing such a stream by means of a boom, thereby preventing plaintiffs from getting out their ties, defendant is not entitled to judgment on the pleadings for failure to reply, where he fails to allege any such authority. Id. Rule is not changed by fact that he files in the record an order of the county court granting him such authority. Id.

The court will take judicial notice of the navigability of tide waters, and of large streams whose navigability is a matter of common knowledge,[77] and that a particular river is a tidal stream,[78] but with these exceptions the question of navigability is one of fact for the jury,[79] and the burden of establishing it is on the party alleging it.[80] Under the Federal statute limiting the liability of the owner of a vessel lost without his privity or knowledge to the extent of his interest therein, he cannot be held personally responsible for expense incurred by local authorities in removing the wrecked vessel from their harbor.[81]

NE EXEAT.

Though the writ is not available in case of mere debt by reason of a prohibition against imprisonment for debt, it will issue to secure payment of alimony,[82] and may be issued after application for alimony and before allowance thereof.[83] Under its statutory power to make such orders and issue such process as may be necessary to carry out the provisions of the bankruptcy act, a court of bankruptcy may issue a writ of ne exeat against the bankrupt.[84]

NEGLIGENCE.

Scope of title.—This article treats generally of the subject of negligence, and includes, for the most part, only such specific applications of the general principles as are not included within the subject-matter of other topics.[85]

§ 1. *Definitions.*[86]—To constitute *actionable negligence,* there must be a violation of a legal duty to exercise care[87] resulting in damage. The phrases "due

76. Simpson v. Kelley [Ky.] 90 S. W. 241.
77. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.
78. Passaic river. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.
79, 80. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.
81. Act Cong. March 3, 1899, c. 425, § 19, 30 St. 1154, and U. S. Rev. St. § 4283. Hagan v. Richmond [Va.] 52 S. E. 385. Code 1887, §§ 2011 (as amended by Acts 1889-90, p. 624, c. 371) 2012-2014, and Richmond city ordinances, c. 77, § 8, authorizing removal of obstructions at owner's expense are invalid, where loss does not occur with his privity or knowledge. Id.
82, 83. Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763.
84. Affidavit held to warrant writ. In re Cohen, 136 F. 999.
85. For other applications of principles see Animals, 5 C. L. 113; Bridges, 5 C. L. 439; Carriers, 5 C. L. 507; Corporations, 5 C. L. 764; Counties, 5 C. L. 857; Electricity, 5 C. L. 1086; Explosives and Inflammables, 5 C. L. 1405; False Imprisonment, 5 C. L. 1413; Fires, 5 C. L. 1424; Gas, 5 C. L. 1584; Highways and Streets, 5 C. L. 1645; Independent Contractors, 5 C. L. 1782; Inns, Restaurants and Lodging Houses, 4 C. L. 123; Intoxicating Liquors, 4 C. L. 252; Landlord and Tenant, 4 C. L. 389; Master and Servant, 4 C. L. 533; Medicine and Surgery, 4 C. L. 636; Mines and Minerals, 4 C. L. 649; Nuisance, 4 C. L. 839; Party Walls, 4 C. L. 927; Railroads, 4 C. L. 1181; Shipping and Water Traffic, 4 C. L. 1450; Street Railways, 4 C. L. 1556; Telegraphs and Telephones, 4 C. L. 1657. Compare also Torts, 4 C. L. 1682.
86. See 4 C. L. 764.
87. Thaney v. A Friederick & Sons Co., 44 Misc. 134, 89 N. Y. S. 787. It must appear not only that defendant was negligent, but that there was a violation of some duty owed the person injured. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. Some obligation or duty owed plaintiff and left unperformed by defendant must be shown. Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416. The declaration must show a legal duty of the defendant to the plaintiff, the failure to discharge which caused the injury. Hortenstein v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. In an action by an employe against a foreman—who was plaintiff's fellow-servant—a complaint alleging injury as a result of the manner in which the foreman's orders were executed did not state a cause of action. Brabham v. American Tel. & T. Co. [S. C.] 50 S. E.

care," "reasonable care," and "ordinary care" are used interchangeably[88] to denote that degree of care which an ordinarily prudent person would use under the same or similar circumstances.[89] A failure to exercise such care is negligence.[90] It may consist either of acts or omissions.[91] The theory that there are three degrees of negligence, described by the terms "slight," "ordinary," and "gross," has been generally discarded, the attempted distinctions being held impracticable and illogical.[92] But where such distinctions are recognized by statutes, they must be made by the courts.[93]

Willful or wanton negligence[94] is such a gross want of care and regard for the rights of others as to justify a presumption of willfulness or wantonness;[95] or a

716. Express company unloading express upon a truck in Union depot held to owe no duty to a messenger boy riding on steps of rear car on train backing into station, by permission of pilot, and hence not liable for injuries caused by collision with truck. United States Exp. Co. v. Everest [Kan.] 83 P. 817. No breach of duty by contractor who failed to guard excavation on private premises when license to use land was not connected with him. Crimmins v. United Engineering & Contracting Co., 96 N. Y. S. 1032. Independent contractor for mason work in a building being constructed owed no duty to an employe of a contractor for lighting of building to keep the building free from accumulations of brick and mortar, or to guard elevators in building. No recovery where employe of lighting contractor was last seen at top of ladder, and was found dead at bottom of elevator shaft. Thaney v. A. Friederick & Sons Co., 44 Misc. 134, 89 N. Y. S. 787.

88. Raymond v. Portland R. Co. [Me.] 62 A. 602.

89. "Reasonable care" is such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. Raymond v. Portland R. Co. [Me.] 62 A. 602. Ordinary care and diligence is that care and diligence which every prudent man takes under the same or similar circumstances. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728. What a person of ordinary prudence would or would not do under the particular circumstances is the true test of negligence. Houston & T. C. R. Co. v. Everett [Tex. Civ. App.] 86 S. W. 17. Common or ordinary diligence is that degree of diligence which men generally use in respect to their own concerns. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113. Ordinary care is such as an ordinarily prudent person exercises upon any and all occasions; not such as such a person usually exercises. Chicago City R. Co. v. Schuler, 111 Ill. App. 470. An instruction that "ordinary is such care as persons of ordinary prudence and intelligence exercise under the same or similar circumstances" held inaccurate, though not fatally erroneous, in omitting after the word "intelligence" the word "ordinarily" or "usually" or "customarily." Coppins v. Jefferson [Wis.] 105 N. W. 1078.

90. Raymond v. Portland R. Co. [Me.] 62 A. 602; Goldstein v. People's R. Co. [Del.] 60 A. 975; Jones v. American Warehouse Co. [N. C.] 51 S. E. 106; Wofford v. Clifton Cotton Mills [S. C.] 51 S. E. 918; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Negligence is the failure to use the care demanded by the situation. Kelly v. Malott [C. C. A.] 135 F. 74.

91. Instruction on negligence held not objectionable as excluding from consideration matters of omission. Struble v. Burlington, etc., R. Co. [Iowa] 103 N. W. 142. A definition that negligence is a failure to exercise that degree of care and diligence which an ordinarily prudent person would exercise in his own affairs under like circumstances is not objectionable as failing to include acts of commission as well as of omission. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361.

92. Raymond v. Portland R. Co. [Me.] 62 A. 602. There are degrees of care, but not of negligence. "Negligence" is a word of denial; "care" is the positive word. Kelly v. Malott [C. C. A.] 135 F. 74.

Contra: Slight negligence is not incompatible with ordinary care, and one who has used ordinary care, though slightly negligent, has used the degree of care required by law. Harvey v. Chicago & A. R. Co., 116 Ill. App. 507.

93. In an action against a corporation for wrongful death, under Rev. Laws, c. 171, § 2, negligence of defendant and gross negligence of its servant are separate issues and should be separately submitted to the jury. Oulighan v. Butler [Mass.] 75 N. E. 726. There are degrees of care by virtue of Rev. Laws, c. 111, § 267, providing for recovery of a fine—to be paid an executor or administrator—from a railroad corporation when death of a passenger is caused by its negligence or the unfitness or gross negligence of its agents or servants. Dolphin v. Worcester Consol. St. R. Co. [Mass.] 75 N. E. 635. "Gross negligence" in a case where the highest degree of care is required means gross failure to exercise that degree of care. Id. A failure to exercise the highest degree of care is slight negligence. Id.

94. See 4 C. L. 765.

95. "Wantonness or willfulness is such gross want of care and regard for the rights of others as show a disregard of consequences or a willingness to inflict an injury," held proper instruction. Cleveland, etc., R. Co. v. Ricker, 116 Ill. App. 428. Wanton or willful negligence is such a gross want of care and regard for the rights of others as to imply a disregard of consequences or willingness to inflict injury. Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416. It is not wanton or willful negligence to run a train without a good and sufficient

want of ordinary care to avoid injury after discovery of the peril of the person injured.[96] Some courts hold that "negligence" and "willfulness" are contradictory terms,[97] and that the reckless or willful conduct of a person sometimes inaccurately called "gross" or "willful" negligence,[98] which warrants a recovery by one injured thereby without proof of due care on his part,[99] differs from ordinary negligence in kind as well as in degree,[1] being essentially a willful, intentional wrong.[2]

§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.*[3]—The degree of care required by law is such as an ordinarily prudent person would use under the same or similar circumstances.[4] Whether the required degree of care has been exercised in a particular instance depends upon the circumstances[5] and the danger to be apprehended.[6]

brake on the last car and without a trusty and skillful brakeman stationed on that car, though a statute is thereby violated. Id. Where the evidence does not warrant a finding that a motorman saw a child on the track in time to avoid an injury to it, nor a finding that he intentionally ran the car against her, a charge of wanton negligence is not sustained unless such gross want of care is proved that wanton or willful conduct may be implied. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177. To show willful or wanton injury to a person on a railroad track it must appear that the engineer knew of his danger and that he would not get out of the way, and failed to use means available to avoid injuring him. McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262.

96. "Willful negligence," which results in liability regardless of contributory negligence of the person injured, consists in a want of ordinary care to avoid accident after discovery of the peril of the person injured. Teal v. St. Paul City R. Co. [Minn.] 104 N. W. 945. If motorman saw child of 5 on platform of car, or ought to have seen him if exercising ordinary care, and could have prevented an injury to him but failed to do so, or if, knowing his danger, the motorman frightened him so that he jumped or fell off, the motorman was guilty of gross negligence, and defendant would be liable for the child's death. Goldstein v. People's R. Co. [Del.] 60 A. 975.

97. Negligence is "failure" to use care; willfulness is positive. Kelly v. Malott [C. C. A.] 135 F. 74.

98. Banks v. Braman, 188 Mass. 367, 74 N. E. 594.

99. Banks v. Braman, 188 Mass. 367, 74 N. E. 594. See post, § 4.

1. Instruction held not to have made proper distinction, so as to give jury a correct idea. Banks v. Braman, 188 Mass. 367, 74 N. E. 594. An inadvertent failure to use due care is mere negligence; an advertent or conscious failure to use due care is wantonness or willfulness. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. Willful or wanton conduct exists only where defendant was conscious of his conduct and knew that resulting injury was probable and nevertheless recklessly and intentionally persisted in such conduct. Montgomery St. R. v. Rice [Ala.] 38 So. 857.

2. Banks v. Braman, 188 Mass. 367, 74 N. E. 594.

3. See 4 C. L. 766.

4. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

5. What is ordinary care depends upon the circumstances. Illinois Central R. Co. v. Keegan, 112 Ill. App. 28. The facts and circumstances of each case must be considered in determining whether ordinary care has been used in a given case, but the law of negligence does not change with circumstances. Bartz v. Chicago City R. Co., 116 Ill. App. 554. A torpedo company which fails to use proper appliances or the skill and care ordinarily used in shooting oil wells and injures a well by exploding a torpedo at the wrong point, is liable for the resulting damage. Donnan v. Pennsylvania Torpedo Co., 26 Pa. Super. Ct. 324. Evidence held insufficient to show negligence of defendant where a car on its private road escaped down a grade, running into a car on which a person was at work, causing his death. Herbstritt v. Lackawanna Lumber Co., 212 Pa. 495, 61 A. 1101. Driver of wagon held negligent in making a sharp turn whereby the tailboard projected over a walk and crushed a boy against a lamp post. Prinz v. Lucas [Pa.] 60 A. 309. Contractor who had mortar bed in street during building operations, with city's permission, not liable for injury to a third person who was struck with a piece of lime which flew from hoe of contractor's servant. White v. Roydhouse, 211 Pa. 13, 60 A. 316. Supervising architects are bound to use ordinary care and diligence in supervising construction. Straus v. Buchman, 96 App. Div. 270, 89 N. Y. S. 226. The fact that a building was partially constructed when supervising architects were employed did not relieve them from duty of ordinary care in inspecting work already done. Id. Where architects allowed beams in partially constructed building to rest on stud partition in violation of an express statute, they were negligent, though the beams had been placed there between two inspections made by the architects, and other work concealed the defect. Id. Where the city contracted with plaintiffs to dig a trench and place water mains therein, and subsequently contracted with others for another part of the work of putting in a water and sewer system, the latter contractor finished a trench and water from it percolated into plaintiffs' trench, causing damage. Held, city was not negligent in letting second contract. Kelly v. New York, 94 N. Y. S. 872. Held further, that under plaintiffs' contract, they were themselves bound to take care of sur-

Violation of a public safety regulation or a positive duty imposed by law is prima facie evidence of negligence,[7] and is sometimes held negligence per se.[8]

Livery stable keepers who let horses and carriages for hire are not common carriers but owe to patrons only the duty of ordinary care for their safety.[9]

Act of God.—Nothing less than a fortuitous gathering of circumstances which could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence constitutes an act of God which will excuse the discharge of a legal duty.[10] A pure accident, without negligence, is not actionable.[11]

Joint and several liability.[12]—Where negligent conduct of several persons at the same time and place combine and concur to produce a single injury, such persons are jointly and severally liable, though their combined acts or omissions were not preconcerted.[13]

face water. Id. Again, the second contractor was an independent contractor for whose acts the city was not liable. Id.

6. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. One cannot be lawfully held guilty of negligence by reason of an act or omission which would not lead an ordinarily prudent, observant man, giving the matter thought, to apprehend danger from it. Cowett v. American Woolen Co. [Me.] 60 A. 703. Where wire rope used on hoisting apparatus slipped from its socket, injuring plaintiff, there was no liability where it appeared that such an accident had never before occurred, and was not reasonably to be anticipated. McMullen v. New York, 104 App. Div. 337, 93 N. Y. S. 772. Railroad company could not be held negligent in construction of fence along its property which abutted on a street where a crowd of trespassers on its property pushed against it causing it to fall on a passerby. Grogan v. Pennsylvania R. Co. [Pa.] 62 A. 924. Defendant not liable where children climbed into wagon used to haul stone and one was injured, wagon being in charge of skillful and prudent driver, the driver's invitation to the children being unauthorized, and the wagon not being so dangerous or attractive to children as to render defendant liable on that ground. Foster-Herbert Cut Stone Co. v. Pugh [Tenn.] 91 S. W. 199.

7. Violation of ordinance requiring fenders on street cars is prima facie evidence of negligence. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359. Violation of a valid city ordinance requiring electric wires to be properly insulated and overhead conductors to be properly guarded is prima facie evidence of negligence. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. Proof that a train was running at an excessive and unlawful rate of speed raises only a prima facie, rebuttable presumption of negligence. Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69. In an action for death of a person standing on the sidewalk caused by the falling of a stone sill from a building in course of construction, an ordinance requiring sheds to be built over the walks where buildings are being erected was properly admitted in evidence, the jury being instructed that failure to have such a shed would not be negligence unless a reasonably prudent man would have had one under the circumstances. Riegert v. Thackery, 212 Pa. 86, 61 A. 614. Regulations concerning "traction engines" do not apply to steam rollers used in making public improvements. No liability for failure to warn. City of New Albany v. Stier, 34 Ind. App. 615, 72 N. E. 275. A violation of the statute requiring elevator shafts or openings in buildings in course of construction to be guarded is not conclusive evidence of negligence; the question is for the jury. Kiernan v. Eidlitz, 109 App. Div. 726, 96 N. Y. S. 387.

8. Violation of a duty created by statute may be negligence per se. Huey Co. v. Johnston, 164 Ind. 489, 73 N. E. 996. Running a train through a city at a rate of speed prohibited by ordinance is negligence per se. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136. Violation of ordinance regulating speed of trains is negligence per se. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Failure to sound bell or whistle while approaching a public crossing, as required by Burns' Ann. St. 1901, § 5307, is negligence per se. Greenawaldt v. Lake Shore, etc., R. Co. [Ind.] 73 N. E. 910. Failure of electric company to protect an overhead conductor which carries a current of electricity dangerous to human life, thereby violating an ordinance, is negligence as to the employe of another company required to work near such unprotected wire. Commonwealth Elec. Co. v. Rose, 114 Ill. App. 181. See, also, Master and Servant, 4 C. L. 533.

9. Defendant not liable for injuries resulting from accident caused by defective neck yoke unless the defect was discoverable by the use of ordinary care under the circumstances. Stanley v. Steele, 77 Conn. 688, 60 A. 640.

10. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. Rain which overflowed roadbed and washed out part of an embankment could not be considered an act of God excusing the want of a sufficient drainage system unless the company could not have anticipated such a storm and such consequences by the exercise of ordinary care and prudence. Id. That a stream or body of water may constitute an extraordinary flood it is not necessary that it should be the greatest flood within memory; comparison with the usual volume of floods ordinarily occurring is the test. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456.

11. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

12. See 2 C. L. 997; also Torts, 4 C. L. 1682.

(§ 2) *B. Use of property in general.*[14]—One must so use his own property as not to cause unnecessary injury to others.[15]

Dangerous machinery and substances. Liability of manufacturers.[16]—One who makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented as refreshing and harmless, is liable to a consumer for injuries caused by foreign substances introduced into the beverage by the maker, though there is no privity of relationship between the consumer and the manufacturer.[17] A contractor who places an elevator in a building is not liable for injuries caused by defects in it, unless the contractor had actual notice of such defects.[18] The

13. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973; Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56; Demarest v. Forty-Second St., etc., R. Co., 104 App. Div. 503, 93 N. Y. S. 663; Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. In an action against several defendants for burning grass, plaintiff could recover against any one against whom he proved negligence. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626. Where the negligence of two or more persons, acting independently, concurrently results in injury to a third, the latter may maintain an action for the entire loss or damage against any one or all the negligent parties. Where poorly insulated feed wire of a traction company came in contact with an iron spike in a telephone pole, and the spike and a guy wire were charged, whereby an employe of a third company, using the telephone pole, was injured, the traction and telephone companies were both liable. Draves v. City & Suburban Tel. Ass'n, 132 F. 387. Where two railway companies used the tracks of a third, under whose orders they ran their trains, and negligence of the two companies, together with negligence of the third in giving orders was alleged to have caused a collision of two trains, the three companies would be jointly and severally liable for the injury resulting if the alleged negligence of each was established. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Owner of powder magazine which blew up while repairs were being made, and owner of explosives which had not been moved away far enough pending the repairs, held jointly and severally liable for explosion of all the explosives resulting in death of plaintiff's intestate. Oulighan v. Butler [Mass.] 75 N. E. 726. In an action for wrongful death for negligence of a corporation or gross negligence of its servant, under Rev. Laws, c. 171, § 2, joint tort feasors may be joined in one suit, though there can be but one satisfaction of any judgment obtained. Id. Where a passenger jumped from a car to escape injury in a collision with a railroad train, and it appeared that if the trainmen had kept a proper lookout, the car would have been seen and the speed of the train reduced, and if a signal had been given by the trainmen, the car would have slackened its speed, and if the car had stopped before crossing, as required by ordinance, the injury would also have been prevented, both companies were liable. Galveston, etc., R. Co. v. Vallrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. Where a pleading undertakes to show wherein defendants failed to exercise due care for plaintiff's safety, and sets out a negligent act by one of the defendants, it states no cause of action against the other. Jones v. Klawiter, 110 Ill. App. 31. A building and loan association which furnished money for the construction of a building did not thereby become a joint tort feasor with the contractor who removed support from a neighboring building. Henry v. Stuart [Tex. Civ. App.] 13 Tex. Ct. Rep. 492, 88 S. W. 248. Nor was the association the real contractor. Id.

14. See 4 C. L. 767.

15. Defendant liable in damages where blasting operations threw rocks and other objects on plaintiff's land causing injuries to his property, whether or not the blasting was negligently done. Langshorne v. Wilson [Ky.] 91 S. W. 254. Negligent use of a defective boiler, resulting in an explosion, gives a right of action to one thereby injured. Davis v. Charleston & W. C. R. Co. [S. C.] 51 S. E. 552. There is a distinction between locomotive whistles designed to scare animals off the track and stationary whistles designed to give notice to employes or others. Whistles of the latter kind ought not to be such as to produce unnecessary or frightening noises such as will frighten horses of ordinary gentleness. Powell v. Nevada, etc., R. Co. [Nev.] 82 P. 96.

16. See 4 C. L. 768.

17. Defendant liable for injuries to plaintiff caused by swallowing broken glass contained in a bottle of soda water. Watson v. Augusta Brewing Co. [Ga.] 52 S. E. 152.

18. Simons v. Gregory, 27 Ky. L. R. 509, 85 S. W. 751.

NOTE. Liability of manufacturer: The manufacturer or vendor of a tool, machine, or appliance, which is not in its nature intrinsically dangerous, is not ordinarily liable for defects therein to one not in privity with him. This has been held to be the law in respect to a land roller (Kuelling v. Roderick Lean Mfg. Co., 88 App. Div. 309, 84 N. Y. S. 622), a drop press (McCaffrey v. Mossberg, etc., Mfg. Co., 23 R. I. 381, 50 A. 651, 91 Am. St. Rep. 637, 55 L. R. A. 822), a threshing-machine cylinder (Heizer v. Kingsland, etc., Mfg. Co., 19 S. W. 630, 110 Mo. 605, 33 Am. St. Rep. 482, 15 L. R. A. 821), a balance wheel (Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543), a steam boiler (Losee v. Clute, 51 N. Y. 474, 10 Am. Rep. 638), a hoisting apparatus (Burke v. De Castro, 11 Hun [N. Y.] 354), a gasoline pear burner (Talley v. Beever [Tex. Civ. App.] 78 S. W. 23), a passenger elevator (Field v. French, 80 Ill. App. 78), or a freight elevator (Zieman v. Kieck Elevator Mfg. Co., 90 Wis. 497, 63 N. W. 1021). But the constructor of an elevator,

degree of care required of persons operating threshing machine engines is commensurate with the danger to property from the lawful operation and use of such engine.[19]

(§ 2) *C. Use of lands, buildings and other structures.*[20]—The owner or occupant of premises[21] owes to persons present thereon by express or implied invitation the duty of ordinary care[22] to protect them from injury.[23] An invitation to go upon premises may be inferred from some act or line of conduct of the owner, or surrounding facts and circumstances.[24] Where the owner employs an independent

while in possession of and operating it to ascertain why it does not work well, is liable to a stranger for injuries caused from its negligent and unsafe construction. Necker v. Harvey, 49 Mich. 517, 14 N. W. 503. And, generally, where machinery is originally defective when delivered and accepted, and thereafter the contractor or manufacturer is in charge of it for the purpose of making repairs or improvements, he must be held responsible to a third person for injuries from such defect or from his own negligence. Empire Machinery Co. v. Brady, 164 Ill. 58, 45 N. E. 486.—Note to Woodward v. Miller [Ga.] 100 Am. St. Rep. 200.

19. Martin v. McCrary [Tenn.] 89 S. W. 324. In an action for destruction of grain by fire started by sparks from an engine, defendants must show not only that engine did not emit sparks more copiously than was natural for any engine of similar kind and construction, but that they had taken precautions which were usual at the time. Thus failure to make a daily inspection was negligence. Id.

See, also, topic Fires, 5 C. L. 1424.

20. See 4 C. L. 768.

21. See Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848, for distinction between liability of owner and of landlord to invitees on premises. See, also, Landlord and Tenant, 4 C. L. 389.

22. Defendant was bound to have structure on which he served meals to the public reasonably safe. Schnizer v. Phillips, 108 App. Div. 17, 95 N. Y. S. 478. Lessee of building who sublet to tenants and retained control of elevator owed to a teamster on the premises delivering goods to a tenant the duty to maintain the premises and elevator in reasonably safe condition. Wright v. Perry, 188 Mass. 268, 74 N. E. 328. The owner of a building is held to the exercise of reasonable care and skill only and is not an insurer of the safety of the building. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. His duty includes that of a reasonable inspection, but he is not liable for a defect not discoverable by a reasonable inspection in time to make repairs before an accident. Id. The owner owes to invitees the duty to warn them of any danger in coming upon the premises, of which he knows or ought to know, and of which they are not aware. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Where independent contractor's servant was injured by electric current passing through wires near staging on which he was at work, a finding that the owner of the premises and of the wires owed such servant the duty to warn him of danger from a current of electricity was warranted. Id. Evidence insufficient to show negligence of store owners where teamster fell into elevator well. Swanson v. Boutell [Minn.] 103 N. W. 886. Evidence insufficient to show stairway in store slippery and unsafe. Reeves v. Fourteenth St. Store, 96 N. Y. S. 448. Not negligence per se for store owner to maintain a well lighted stairway leading into the basement of his store. Accousi v. Stowers Furniture Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 362, 87 S. W. 861. Owner of lot held not negligent in using chains to guard gateway. McCandless v. Phreaner, 24 Pa. Super. Ct. 383. Where evidence showed only that plaintiff slipped on ice on defendant's premises, but did not show how long the ice had been there, negligence of defendant was not shown. Vassin v. Butler, 94 N. Y. S. 14. Railway company owes to teamsters engaged in unloading freight in its yard the duty of ordinary care in the management of cars and engines to avoid injuring them. Finding of negligence warranted where steam was allowed to escape from engine causing team to back up suddenly, thus injuring teamster. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29. Finding of negligence on part of lessee and manager of building warranted where evidence showed a hole in the floor near the elevator and that elevator and automatic gate did not work well, a teamster having fallen into the elevator well, believing the elevator was in place. Wright v. Perry, 188 Mass. 268, 74 N. E. 328. Where a poorly insulated feed wire had long been in contact with a spike in a telephone pole, notice of the existence of the condition would be implied. Graves v. City & Suburban Tel. Ass'n, 132 F. 387.

23. Stevens v. United Gas & Electric Co. [N. H.] 60 A. 848. Owner owes to one on premises by express or implied invitation ordinary care to provide for his safety. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883.

24. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. Where tracks have been openly and habitually used as footpaths for several years, with the knowledge and acquiescence of the company, one walking on such tracks is not a trespasser but a licensee to whom the company owes the duty of ordinary care to avoid injury. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. Evidence held to warrant inference that public had implied invitation to use footpath along defendant's right of way. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. Consent of a landowner for the public to use a path across his land may be inferred from continued use of such path by the public

contractor to do work upon the premises the servants of the contractor are ordinarily deemed to be upon the premises by implied invitation of the owner.[25] To such servants the owner is liable for injuries resulting from a dangerous condition if such condition and injury therefrom were reasonably to be apprehended from the usual and ordinary manner of doing the work contracted for.[26] Owners of bathing resorts are not only under the duty of keeping the premises in a reasonably safe condition, but where the conditions are such that bathers may get into danger,[27] it is their duty to have in attendance some suitable person with appliances to effect rescues, and to act promptly and make all reasonable efforts to search for and recover persons who are reported to be missing.[28] The duty owed by owners of premises to invitees[29] or to the public[30] cannot be delegated to a servant or independent contractor so as to relieve the owner from responsibility.

without objection by the owner for some time past; and the owner, under such circumstances owes a legal duty to the public to protect it against hidden dangers which may be incurred in such use. Etheredge v. Central of Georgia R. Co. [Ga.] 50 S. E. 1003. Owner of store and premises held negligent where an excavation was dug in a path used by the public to come to and enter his store by the rear door, and plaintiff fell into such excavation while rightfully using the path to enter the store. Rooney v. Woolworth [Conn.] 61 A. 366. Where defendant ginned and baled cotton for one who requested plaintiff to go with him after the cotton, and plaintiff drove the wagon to the place indicated by defendant to receive the cotton, plaintiff was on defendant's premises by invitation. Northern Tex. Const. Co. v. Crawford [Tex. Civ. App.] 87 S. W. 223. Where an electric company carried mail in boxes on the cars from which mail carrier removed it, the company was under the duty of furnishing the carriers a safe mode of access to the cars. Recovery where carrier fell into pit in car barn when he was going after mail in a box on a car. Young v. People's Gas & Elec. Co. [Iowa] 103 N. W. 788. Where complaint alleged that plaintiff was struck and injured by something protruding from a passing engine while he was standing on a sidewalk near the depot platform, six feet from the main track, it was not objectionable as showing that defendant owed him no duty; he had a right to be where he was. Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. Where expressman went to defendant's factory after freight to be hauled and asked for the shipper and was told he was upstairs, the jury was warranted in finding he was not a trespasser in going upstairs to find the shipper, there being also evidence that it was customary for the expressman to go after the shipper, as he did when injured by falling into a hatchway. Mallock v. Derby [Mass.] 76 N. E. 721. One who went into a building intending to rent an office, and found a sign on the superintendent's door directing him to see the engineer in the building, and who thereupon went to the basement to find the engineer and fell into an ash pit in the boiler room, was not a trespasser, though there was a "no admittance" sign on the boiler room door. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328. Since prospective tenants were invited to seek the engineer wherever he was on the premises, the owner owed them the duty of ordinary care to prevent injury in the ash pit. Id.

25. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Defendant owed plaintiff, a servant of an independent contractor constructing a building for defendant near its tracks, the duty of ordinary care to avoid injuring him. Sack v. St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79. Employe of subcontractor working on defendant's elevated road was a licensee to whom defendant owed duty of ordinary care to avoid injuring him by negligence in the running of its surface cars. Wagner v. Boston El. R. Co., 188 Mass. 437, 74 N. E. 919. City owed to servant of a contractor hired to haul sand only the duty to avoid injury to him by ordinary care in regard to the city's premises. McMullen v. New York, 104 App. Div. 337, 93 N. Y. S. 772. Plaintiff rightfully on a wharf engaged in work did not assume risk of injury from servants of the owner of the wharf. Ford v. Arbuckle, 94 N. Y. S. 1097.

26. Where, in erecting a brick building, a contractor used an outside staging, near which electric wires passed, and an employe working on the staging was injured by an electric current passing through the wires, it was held that a finding was warranted, that the use of an outside staging, and injury from a current of electricity, was reasonably to be apprehended by the owner. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Defendant was not negligent as to the servant of a contractor in failing to guard a hatchway on a part of the premises where the servant's work did not call him. Hutchinson v. Cleveland-Cliffs Iron Co. [Mich.] 12 Det. Leg. N. 457, 104 N. W. 698.

27. As from deep water, sudden storms, or other causes. Larkin v. Saltair Beach Co. [Utah] 83 P. 686.

28. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. Where no limits or warning signs were used, and boys got beyond their depth, and were blown out into the lake by a storm, and the management made no effort to recover them, though asked to do so and informed they were missing, the owners were held liable for the death of one of the boys by drowning. Id.

29. That a contractor knew of the danger from electric wires to an employe at work on a staging did not relieve the owner of the duty to warn such employe. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848.

30. The duty resting upon owners of fix-

A bare licensee[31] or trespasser[32] takes the risks as he finds them, and the owner owes to such a one no duty except to refrain from wanton or willful injury;[33] and

ed property to exercise reasonable car for the safety of the public is absolute and cannot be delegated to a servant so as to relieve the owner of responsibility. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. Defendants having been given control of sidewalk during building operations, it was their duty to maintain it in a reasonably safe condition and this duty could not be delegated to an independent contractor. Lubelsky v. Silverman, 96 N. Y. S. 1056. Where work to be done is intrinsically dangerous no matter how skillfully it is done, a principal cannot relieve himself from liability for a breach of duty owed the public with reference to such work by employing an independent contractor. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Applied where work on streets was done by contractor. Id.

31. Boy who went with his mother to a tenement building where the mother was employed to wash, her employer consenting to the boy's coming, was a mere licensee. Dalin v. Worcester Consol. St. R. Co., 188 Mass. 344, 74 N. E. 597. Obstructions along a street where a walk was being put in, made visible by a burning building and an electric light near, held to have negatived any implied invitation to use the walk; hence plaintiff, who fell into a rollway while watching the fire was a mere licensee and could not recover for injuries. McClain v. Caribou Nat. Bank [Me.] 62 A. 144. Longshoreman was requested by dock company's foreman to remain near dock, as employment was expected, and longshoreman walked on dock while waiting, knowing its dangerous condition. Dock company held not liable for an injury to him, since he was a mere licensee, though not a trespasser, and company owed him no active duty. Oats v. New York Dock Co., 109 App. Div. 841, 96 N. Y. S. 813.

32. In the absence of circumstances showing an implied invitation, one using the private property of another for purposes of his own is a licensee or trespasser. Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 61 A. 401. Where steel girders for use in building were piled in the street, in the exercise of the adjoining owner's right, persons who walked or sat on them, and the injured child who played on them, were only licensees or trespassers. Id. The question whether a person was a trespasser upon a railway right of way was not affected by the fact that it was hard to tell where the highway ended and the right of way began; the intent of the person is immaterial. Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416. An implied invitation to use a path across land does not place on the owner the duty to keep the entire premises safe from hidden dangers, and he would not be liable for injuries to one who strayed out of the path and fell into a ditch. Etheridge v. Central of Georgia R. Co. [Ga.] 50 S. E. 1003. Where boy of 5 or 6 strayed from a path used by the public and fell into a ditch when not using such path, and there was no evidence of any invitation, express or implied, to go upon the premises outside the path, he could not recover from the owner for injuries suffered. Id. Roof of car barn had an enclosure where children living in adjoining tenement house played. The fence was down in one place while repairs were being made, but children had been ordered to stay off part of roof not enclosed. Held, the fact that the fence was down, and that defendant's employes knew children had gone outside did not amount to an invitation to do so, and there could be no recovery for death of a boy who went outside and fell through a skylight. Dalin v. Worcester Consol. St. R. Co., 188 Mass. 344, 74 N. E. 597. A railway company is not, as to one who has no business to transact with it, but who goes to its station at the instance of a third person to look after some private property, which he has without the company's permission stored in a warehouse which it has practically abandoned and allowed to become out of repair, under any duty to keep the building and its approaches in a safe condition for use by persons entering or leaving the same. Chattanooga So. R. Co. v. Wheeler [Ga.] 50 S. E. 987. Street crossing being blocked for an unreasonable time, a person desiring to cross in a hurry owing to the extreme cold, is not a trespasser because he goes upon the railroad's property to get around the blockade. Chicago & A. R. Co. v. Mayer, 112 Ill. App. 149.

33. McAllister v. Jung, 112 Ill. App. 138. A trespasser goes upon premises at his own risk. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. Only duty owed trespasser is not to willfully or wantonly injure him and to use reasonable care to avoid injury to him after discovery of his peril. Id. The owner of premises owes to a mere licensee only the duty to avoid wanton injury or setting a trap for him. Dalin v. Worcester Consol. St. R. Co., 188 Mass. 344, 74 N. E. 597. Owner of property is liable to trespassers only for malicious injury or gross negligence after discovery of the peril of the trespasser. Driscoll v. Clark [Mont.] 80 P. 1. It is the duty of railroad companies to avoid wanton, willful or intentional injury to trespassers on the track. Alabama G. S. R. Co. v. Guest [Ala.] 39 So. 654. Railroad company owes licensee or trespasser no duty except to avoid wanton or willful injury to him. McLaughlin v. Chicago R. I. & P. R. Co., 115 Ill. App. 262; Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416. Trespasser on train cannot recover for mere negligence. Chicago & G. T. R. Co. v. McDonough, 112 Ill. App. 315. Where plaintiff's horse was at large on defendant's land, contrary to the provisions of an ordinance, and was killed by falling in a well, defendant was not liable unless he was guilty of gross negligence in maintaining the well where he did. McCutchen v. Gorsline [Tex. Civ. App.] 86 S. W. 1044. Where an electric company maintained electric wires under a sidewalk, by authority from the city, it was liable for injuries to a boy, who, under the circumstances, was a licensee, if by its negligence the place was rendered dangerous, its cable becoming charged owing to a defect. Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242.

this is the rule though the trespasser is a child.[34] But to this rule there is the exception that one who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though such child is a trespasser.[35] To bring a case within this exception, it must appear that the premises were in fact attractive to children[36] who did in fact customarily resort thereto,[37] that the owner had actual or implied knowledge thereof[38] and failed to take proper precautions to prevent injury.[39] The

34. That one who is a trespasser is a child of tender years does not impose any duty on the owner not owed to an adult trespasser. Etheridge v. Central of Georgia R. Co. [Ga.] 50 S. E. 1003. Owner owed boy of 5 or 6 who strayed from path used by public and fell into a ditch containing hot water no duty not owed to adults under the same circumstances. Id. Railroad company owes a trespasser on its right of way only the duty to refrain from wanton or willful injury, and this is the rule though the trespasser is a child of 7. Kinnare v. Chicago & N. W. R. Co., 114 Ill. App. 230. Where child of 2 was improperly on tracks on defendant's premises and was struck by coal cars when motorman was adjusting trolley, held, no evidence of gross negligence, and nonsuit should have been granted. Estep v. Webster Coal & Coke Co. [Pa.] 62 A. 1082.

35. This is the doctrine of the so-called "turntable" cases. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443; McAllister v. Jung, 112 Ill. App. 138. Where a railroad company maintains a turntable upon its right of way, close to a traveled path along its track, which people, old and young, have been accustomed to use, without objection, for many years as a traveled way, and further permits children to play upon such turntable, it is its duty to guard such turntable or so securely fasten it that children of tender years will not be injured while playing upon it. Recovery for injury to boy of 6. Wheeling & L. E. R. Co. v. Harvey, 7 Ohio C. C. (N. S.) 57. Doctrine held applicable where railroad employes put dynamite where children could get at it, knowing that they wanted some of it (they had asked for a stick) and that the children knew where it was placed. Boys got a stick and one was killed and another injured by the resulting explosion. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443. Where child was hurt on turntable where he was playing, and the evidence showed that a locking device was being used, pending repairs, which children could move, and also tended to show that this had been the case for some time, and that children had played with it before, negligence of defendant was for the jury. Berg v. Minneapolis & St. L. R. Co. [Minn.] 104 N. W. 293. Where boy 8 years old reached through a fence and took hold of a live wire hanging from a tree in the adjoining yard, and was injured, the defense that the boy was a trespasser was held not available to the owner of the wire. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148.

36. A company owning and maintaining an elevated railway whereon a live rail is used is only under the duty of ordinary care to prevent children from climbing upon it and coming in contact with the live rail. McAllister v. Jung, 112 Ill. App. 138. Company held not negligent for failure to construct means of keeping children off, or to put up warning signs at places where there was no probability that persons would climb upon it. Id.

37. A three-year old infant strayed away from home upon defendant's land and climbed upon or fell into a pile of hot soot. The land had been used as a soot dumping ground several years, was unfenced, was not customarily used as a playground for children, and had nothing on it to attract. Held, defendant was not negligent in failing to guard against such an injury. Fitzmaurice v. Connecticut R. & Lighting Co. [Conn.] 62 A. 620. Where boy of 10 climbed upon an elevated railroad structure to get a ball and was injured by the third live rail, it was held that defendant could not be held liable on the theory that it maintained an attractive and dangerous structure and took no means to prevent injury to children, especially since it did not appear that children were in the habit of climbing upon it. McAllister v. Jung, 112 Ill. App. 138.

38. Owner of premises is liable for injuries to young children caused by dangerous machinery maintained on premises only when there was an express or implied invitation to come upon the premises; and to constitute the latter, it must appear that the dangerous machinery was attractive and alluring to children, and that the owner knew that fact or was chargeable with knowledge thereof. Driscoll v. Clark [Mont.] 80 P. 1. In an action for injuries to a child while playing on an abandoned turntable, an instruction authorizing a recovery if the jury believed that children were in the habit of playing on the turntable, and if it was unfastened, and if plaintiff was injured thereon while exercising due care, was erroneous because failing to require a finding that defendant knew or ought to have known that it was unfastened and that children played there. Edwards v. Metropolitan St. R. Co., 112 Mo. App. 656, 87 S. W. 587.

39. Defendant company was moving through the streets machinery which attracted children, who were repeatedly warned to keep away. Notwithstanding the warning, a boy ran between two machines and was hurt. Held, the company had performed its duty and was not liable for such injury. Case Threshing Mach. Co. v. Burns [Tex. Civ. App.] 86 S. W. 65. Keeping powder magazines in the woods 150 yards from the road, and 6 feet from a path

doctrine of the "turntable cases" has been criticized by some courts,[40] which refuse to extend it to other situations,[41] and by some it is absolutely repudiated.[42] Thus, in New Jersey, it is held that the attractiveness of private property to children may properly be considered on the issue of due care by a child,[43] but gives a child attracted by such property no rights against the owner since the mere fact of attraction is not equivalent to an invitation.[44] In Texas, a distinction is made between those cases where injury results to children from such things as are ordinarily in use throughout the country,[45] and those where injury results from things which are specially and unusually attractive and dangerous, such as turntables.[46]

§ 3. *Proximate cause.*[47]—The law looks to the proximate, not the remote cause of an injury, and unless the negligence charged was the proximate cause there is no liability.[48] A proximate cause is that which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the injury complained of, and without which such injury would not have occurred.[49] It need not be the

seldom used, held not gross or willful negligence, though door of magazine was left open, where the powder was caked and would not explode, having been wet; and defendant was not liable where a child set fire to the powder, as a result of which he was burned. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170. Owner of premises held not liable for injury to child, who was a trespasser, caused by fall of pile of stones, where the pile was knocked down by children at play, and there was nothing to indicate that it would be dangerous, even to trespassers. Kane v. Erie R. Co., 110 App. Div. 7, 96 N. Y. S. 810.

40. See Driscoll v. Clark [Mont.] 80 P. 1. Complaint for injuries to a child trespassing on defendant's premises held not to state cause of action by showing breach of duty to exercise ordinary care for a child's safety after discovery of its peril. Driscoll v. Clark [Mont.] 80 P. 373.

41. Doctrine of turntable cases held not applicable where child was injured in revolving door. Harris v. Cowles, 38 Wash. 331, 80 P. 537.

42. The doctrine of the turntable cases that one who maintains upon his premises for his own purposes that which is alluring or tempting to little children is held to the duty of exercising care with respect to their safety, in anticipation of the probability that they may be tempted to make use of his property for purposes of play, is repudiated in New Jersey. Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 61 A. 401.

43. Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 61 A. 401.

44. Where child played on pile of steel girders in the street and was injured, the owner was held not liable, since he owed the child no duty to keep the pile of girders safe as a place on which to play. Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 61 A. 401.

45. Such as pools of water, haystacks, wood piles, etc. Denison & P. S. R. Co. v. Harlan [Tex. Civ. App.] 13 Tex. Ct. Rep. 207, 87 S. W. 732.

46. Evidence held sufficient to support verdict for child of 5 injured on turntable maintained close to street, left unlocked, and unfenced, and which children were in the habit of using. Denison & P. S. R. Co. v. Harlan [Tex. Civ. App.] 13 Tex. Ct. Rep. 207, 87 S. W. 732.

47. See 4 C. L. 770.

48. Byrd v. Southern Exp. Co. [N. C.] 51 S. E. 851; MacFeat v. Philadelphia W. & B. R. Co. [Del.] 62 A. 898. If an injury has resulted from a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause and refuse to trace it to that which was more remote. Alabama G. S. R. Co. v. Vail [Ala.] 38 So. 124. Though owner of mare violated ordinance in allowing her to be at large on the streets, negligence of defendant's driver just before discovering mare was held proximate cause of injury to mare. Ensley Mercantile Co. v. Otwell [Ala.] 38 So. 839.

49. Strojny v. Griffin Wheel Co., 116 Ill. App. 550; St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 86 S. W. 1059. A proximate cause is one from which injury follows as a direct and immediate consequence. It is the dominant cause; the one that sets the others in operation. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

Illustrations: Sudden turning of horses across a street car track, and not speed of car, held proximate cause of collision. North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110. If driving on a street car track was contributory negligence it was not the proximate cause of a collision with an electric car running with the power on and without an attendant. Chicago City R. Co. v. Eick, 111 Ill. App. 452. Where company negligently sent out engine with cab windows broken and boarded up, in consequence of which the engineer had to stand up in the cab to see conductor's signals, thereby causing his face to be near the water gauge, such negligence was the proximate cause of his injury by the explosion of the gauge, though there was no negligence with respect to the condition of the gauge. Cleveland, etc., R. Co. v. Patterson [Ind. App.] 75 N. E. 857. In an action against an owner of premises for injuries to an employe of an independent contractor who fell from a staging upon electrically charged wires near, the evidence was held to warrant a finding that maintaining a high vol-

sole cause[50] nor the one nearest in time to the injury;[51] it is sufficient if it is an efficient concurring cause.[52] Thus, if negligence of a defendant is an efficient concurring cause of an injury, he is liable, though other causes or conditions for which he is not responsible contribute to produce the injury,[53] provided, of course, the

tage of electricity in the wires so near the staging was the proximate cause of plaintiff's injury. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. An express wagon, driven by defendant's servant, struck the hind wheel of another wagon which was being loaded from the sidewalk, and forced it on the horse, and the horse, being unhitched, ran away. Plaintiff, standing near a pile of lumber in the street, jumped to escape the runaway horse, which ran up on the walk, and broke his leg over the pile of lumber. Held, the proximate cause of plaintiff's injury was the act of defendant's servant, and if that was negligent, plaintiff could recover. Collins v. West Jersey Exp. Co. [N. J. Err. & App.] 62 A. 675. Where complaint in action based on crossing accident alleged that plaintiff was unavoidably delayed in crossing the track by her horse, and that no signals were given to indicate the approach of the train, which deceived her, so that the train struck and killed the horse and injured her, it showed negligence of defendant to be the proximate cause of injury. Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910. Where plaintiff's house was burning and three streams of water were playing on it, and a motorman drove his car over a hose, cutting it and causing one stream of water to cease, the jury was justified in finding that the cutting of the hose was a direct and proximate cause of the loss of plaintiff's furniture. Little Rock Traction & Elec. Co. v. McCaskill [Ark.] 86 S. W. 997. Where defendant negligently permitted the floor of its powder magazine to become soaked with nitroglycerine and, though informed of this condition, kept a large quantity of explosives there, and sent an inexperienced man to make repairs, its negligence was an efficient cause of an explosion which took place while repairs were going on. Onlighan v. Butler [Mass.] 75 N. E. 726. Where a servant was told that a machine could be stopped by a lever, but was not told that it could not be so stopped while materials were going through it, and he slipped on oil on the floor and fell on the rollers and was hurt before he could stop it, his slipping on the oil was the originating but not the efficient cause of his injury. Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932. Where guest in hotel was suffocated by smoke, failure to have standpipe and hose in building was not a proximate cause of guest's death when they could not have been used before the fire department arrived so as to have prevented such death. Acton v. Reed, 104 App. Div. 507, 93 N. Y. S. 911. Nor was failure to post diagrams of exits and stairways a proximate cause of such death, since the guest had been in the hotel several months and was familiar with the arrangement of the rooms, etc. Id. Nor was the fact that a stairway door was locked the cause, where it appeared he descended to the lower floor by another door. Id.

50. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466; Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56. It is not essential that a judicial cause be a sole cause. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. A cause need not act alone to constitute a proximate cause; it is a proximate cause if it concurs with another cause to produce an injury. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279.

51. Responsibility as a legal cause does not depend upon the sequence in time of the wrong charged. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. A proximate cause need not be the immediate cause. Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932. Proximate cause need not be nearest in point of time, if without it injury would not have occurred. Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56. The proximate cause is not necessarily the last cause or the one nearest the injury, but such act, wanting in ordinary care, as actively aided or concurred in producing the injury. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466.

52. Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002.

53. Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002. Where an injury results from negligence of defendant and an inevitable accident or an inanimate thing has contributed with defendant's negligence to cause the injury, plaintiff may recover, if the negligence of defendant was an efficient cause of the injury, and the injured or deceased party was in the exercise of ordinary care for his own safety. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. When damage complained of is the result of the wrong of defendant and a third person, and could not have been produced in the absence of either, the defendant's wrong is, in law, a proximate cause of the injury. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. Where negligence concurs with an act of God, and but for the negligence an injury would not have occurred, the person guilty of negligence is liable. Moffatt Commission Co. v. Union Pac. R. Co., 113 Mo. App. 544, 88 S. W. 117. If negligence of defendant was an efficient cause of the injury, concurring negligence of a third person will not relieve defendant from liability. Negligence of driver of team behind which plaintiff was riding would not defeat recovery for injuries of which negligence of defendant was a proximate cause, if plaintiff himself was in the exercise of due care. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. Where conductor carried passenger past her destination and then directed her how to walk back to it, she being thus placed in a dangerous situation, the conductor's act was the proximate cause of her falling through a bridge, though the darkness of the night was a concurring cause. Indianapolis & E. R. Co. v. Barnes [Ind. App.] 74 N. E. 583. Where a telephone

person injured was himself in the exercise of due care.[54] An injury must be the natural and probable consequence of the negligence charged.[55] But it is not essential that the precise injury which resulted should have been foreseen;[56] it is sufficient if it was to be reasonably expected that injury might be inflicted[57] upon some per-

company allowed unused wires to become defective and broken, and a storm caused a broken wire to come into contact with a highly charged electric light wire, the storm and the telephone company's negligence were concurrent causes of injury to one who came in contact with the broken, charged wire, and the company was liable. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. Negligence in starting a car while a passenger was boarding it and throwing him down is the proximate cause of injuries occurring to him by being run over by a truck while down, though the truck driver was also negligent. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. S. 43. Where street car struck a truck and knocked it against plaintiff, negligence of the truck driver would not relieve the street railway company from responsibility for negligence of the motorman. Demarest v. Forty-Second St., etc., R. Co., 104 App. Div. 503, 93 N. Y. S. 663. Where two boys were riding in elevator and one threw the other down so that he got his foot caught in an open space negligently left at an entrance, negligence in leaving such space was a proximate cause of the injury, notwithstanding the act of the other boy. Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56. Manager of gas company, on discovering a leak in gas pipes in a house, negligently turned off the house valve instead of the street valve, thus allowing gas to escape into the cellar of the house through the leak. The gas was ignited by a plumber while searching for the leak, the plumber not being a servant of the gas company. Held, negligence of the manager was a concurring cause of the explosion which resulted, and the company was liable for damages thereby caused. Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002. If driver's act in suddenly turning his team on a street car track was the sole cause of a collision with a car, defendant was not liable for injury to occupant of carriage; but if negligence of motorman contributed, defendant was liable. Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119.

54. See Contributory Negligence, § 4.

55. Such a consequence as, under the circumstances, might or ought to have been foreseen by the negligent person. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. Negligence is the proximate cause of an injury when it appears that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attendant circumstances. Schwarzschild & Sulzberger Co. v. Weeks [Kan.] 83 P. 406. Injury to grain from an unprecedented flood was not the natural and probable consequence of delay in shipping the grain. Moffatt Commission Co. v. Union Pac. R. Co., 113 Mo. App. 544, 88 S. W. 117. Defendant's domestic chicken escaped and was pursued by his servant into a public park. The chicken turned in an opposite direction, when pursued, and flew through a window of plaintiff's store. Held, such result was not one to be reasonably anticipated, and defendants were not liable. Maiony v. Bishop [Iowa] 105 N. W. 407. Defendant's servant pulled down a dumb waiter or elevator and plaintiff's head was caught, she having in some way placed it therein while putting milk bottles in it. Held, plaintiff's act was not one which the servant could reasonably anticipate, and defendant was not liable. Smith v. Borden's Condensed Milk Co., 95 N. Y. S. 900. Defendant left a cart in the street—contrary to an ordinance—and children played in it, and one was injured. Children had played with it before, and no one apprehended danger, and in this case, the mother of the injured child had seen him playing and had allowed him to remain. Held, defendant was not liable, as the accident was not one which ought reasonably to have been foreseen. Lopes v. Sahuque, 114 La. 1004, 38 So. 810. Where a carrier, unable to ship stock over the lines agreed upon, owing to floods, shipped via another road, and the stock was placed in yards of the connecting line, and while there an unprecedented flood occurred, causing a loss, the act of the initial carrier in changing the route was held not the proximate cause of the loss of stock, such result not being one which could reasonably have been anticipated. Empire State Cattle Co. v. Atchison, etc., R. Co., 135 F. 135. Where two boys used a stone lying on path by the roadway to jar an electric light pole in order to light the lamp, and the finger of one was caught between the post and the stone, such injury was not reasonable and probable consequence of leaving the stone in the street. Marsh v. Giles, 211 Pa. 17, 60 A. 315.

56. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143; Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225; Davis v. Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002; Coolidge v. Hallauer [Wis.] 105 N. W. 568. Applied to conduct of plaintiff. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924.

57. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. Man carrying ice on his shoulder stumbled, and piece of ice fell to the ground, bounded, and struck a child sitting on the curb. Held, the accident was not so extraordinary that it could not reasonably have been foreseen and guarded against. Slattery v. Laurence Ice Co. [Mass.] 76 N. E. 459. The liability of a person charged with negligence does not depend on question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of, but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission. Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. The proximate cause of an

son engaged in exercising a legal right in an ordinarily careful manner.[58] An independent, efficient cause, intervening between defendant's negligence and the injury, is deemed the proximate cause, and relieves the defendant of liability;[59] but an intervening cause will not be deemed the proximate cause if it could reasonably have been anticipated.[60]

§ 4. *Contributory negligence.*[61]—Contributory negligence is a want of ordinary care by a plaintiff or person injured, which, concurring or co-operating with negligence of the defendant,[62] was a proximate cause of the injury complained of.[63]

injury is one which produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

58. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. Defendant not liable where workman attempted to squeeze through between bars on elevator shaft which had not been placed permanently, since the employe's act could not reasonably have been foreseen. Hartman v. Clarke, 104 App. Div. 62, 93 N. Y. S. 314.

59. Terminal R. Ass'n v. Larkins, 112 Ill. App. 366. If an efficient and adequate cause is shown it may be considered the real or proximate cause unless another, not incidental to it, but independent thereof, appears to have intervened and caused the accident or injury in controversy. Davis v. Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899. Where servants of a construction company put up a stove in a building owned by plaintiff and built fires in it, without his consent, such act of trespass was not the proximate cause of a fire which consumed the building and contents, the fire being started by the unauthorized use by the men of gasoline taken from defendant's storehouse. Bellino v. Columbus Const. Co., 188 Mass. 430, 74 N. E. 684. Nor was the act of defendant in keeping gasoline on the premises in an unlocked building, where the men could get at it, negligence per se. Id. Farmer after driving team 17 miles with load of garden truck hitched one of them to hitching rail in front of a store in his usual manner, using an apparently sound halter. A boy, turning over the rail, struck one of the team with his foot frightening the team and causing a runaway and collision with plaintiff's buggy, injuring plaintiff. Held, boy's act and not negligence of farmer was proximate cause of injury. Stephenson v. Corder [Kan.] 80 P. 938. Act of lessor in abandoning a house during the term and leaving it unlocked was not the proximate cause of its destruction where another person entered and set fire to it. Winfree v. Jones [Va.] 51 S. E. 153. No recovery for loss of cattle which drank water from stream flowing through oil field, where it was not shown who let down the bars through which the cattle got onto the land. Brimner v. Reed, 23 Pa. Super. Ct. 318. Concurring negligence in maintenance of sewers would not render defendant liable for damage to property if an extraordinary flood would have produced it independently. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456.

60. The mere fact that another cause intervened between defendant's negligence and plaintiff's injury will not relieve defendant from liability if the intervening act was of such a nature that its happening was to have been apprehended. Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. Where there was evidence that a snow fence was negligently constructed, the mere fact that plaintiff and his brother, the same day plaintiff was hurt by a falling board, had picked up the board and placed it on the fence, would not defeat a recovery based on the defective construction. Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. Where a railway company negligently failed to provide an appliance for locking a switch, and a boy turned it, and a collision occurred, the act of the boy did not relieve the company from liability for resulting injuries to a passenger. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

61. See 4 C. L. 773.

62. A defendant is entitled to the benefit of the defense of contributory negligence though he has also been negligent. Louisville & N. R. Co. v. Sights [Ky.] 89 S. W. 132. Plaintiff's negligence need not be the sole cause of injury, to defeat a recovery. Though defendant's negligence was a proximate cause of the injury, plaintiff cannot recover if his negligence contributed thereto. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. An instruction that the jury could find for defendant on the issue of contributory negligence only if they found that plaintiff was injured by reason of his own negligence and not by reason of defendant's negligence was erroneous. Sack v. St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79. It is immaterial which party was the more negligent or which contributed most to produce the injury; contributory negligence bars recovery. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173.

63. Negligence of plaintiff will not prevent a recovery if it was only a remote cause or a condition of the injury. Short v. Spokane [Wash.] 83 P. 183. Contributory negligence exists only when negligence of both parties combines and concurs in producing the damage. Ensley Mercantile Co. v. Otwell [Ala.] 38 So. 839. Contributory negligence must concur with negligence of defendant and must proximately contribute to produce the injury. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 90 S. W. 343. Negligence of a plaintiff will not defeat a recovery unless it contributed to produce the injury; that is, unless the injury would not have occurred but for his negligence. South Covington & C. St. R. Co. v. Nelson [Ky.]

When shown it is, in most jurisdictions, a complete defense;[64] but in some it serves only to reduce the amount of plaintiff's recovery.[65] Usually the defense is available though the negligence charged is a violation of a statute or public safety regulation;[66] but the contrary is held in some jurisdictions in actions based on particular statutes.[67]

Due care by a plaintiff[68] or person injured is that usually exercised by ordinarily prudent persons under the same circumstances,[69] and whether the required degree of care has been exercised in a particular instance depends upon the facts.[70]

89 S. W. 200. To show contributory negligence, some act or omission, of which a person of ordinary prudence would not have been guilty under the circumstances, must be shown which caused or contributed to the injury. Williams v. Ballard Lumber Co. [Wash.] 83 P. 323. One whose negligence directly contributed to his injury cannot recover damages from another whose negligence concurred to cause it, even though the carelessness of the latter was the more proximate cause of it. Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315. Instruction held to charge properly that contributory negligence must have directly contributed as a proximate cause of the injury. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. Instruction that plaintiff could recover provided that he did not contribute "materially" to his injury approved. Indianapolis & M. Rapid Transit Co. v. Edwards [Ind. App.] 74 N. E. 533. An instruction that unless plaintiff had shown by a preponderance of the evidence that he was not guilty of a failure to exercise ordinary care, or that, if he was, his negligence in no way contributed to his injury, he could not recover, was correct, and did not authorize a recovery though plaintiff was guilty of slight negligence. Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434. If a plaintiff's failure to keep up his own fences was the proximate cause of the death of his horses on a railroad track, he could not recover; it need not be further shown that the natural and probable result of allowing his fences to get out of repair was that his horses would get on the railway track. Wabash R. Co. v. Warren, 113 Ill. App. 172.

64. MacFeat v. Philadelphia & W. & B. R. Co. [Del.] 62 A. 898; Weaver v. Pennsylvania R. Co., 212 Pa. 632, 61 A. 1117; St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173. The law places on all persons the duty to exercise ordinary care to avoid injury. Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698. Negligence of plaintiff which produced or contributed proximately to injury defeats recovery. Bridges v. Jackson Elec. R., Light & Power Co. [Miss.] 38 So. 788. Court may give affirmative charge for defendant where evidence clearly shows negligence of plaintiff which contributed to the injury. Brawley v. Birmingham R., Light & Power Co. [Ala.] 39 So. 919. Instruction authorizing recovery for death notwithstanding contributory negligence of deceased was properly refused. Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991. Pleas of contributory negligence are not demurrable when filed to counts charging only simple negligence. Brawley v. Birmingham R. Light & Power Co. [Ala.] 39 So. 919.

65. See 4 C. L. 776, n. 78; also Comparative Negligence, post.

66. Though a train was being run through a city at a rate of speed prohibited by ordinance, which was negligence per se, pedestrians were nevertheless bound to use ordinary care to avoid injury. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136. The violation of an ordinance does not necessarily carry with it the abrogation of the application to particular cases of the rules of contributory negligence, or other questions affecting defensively the liability of the defendant for damages. Lopes v. Sahuque, 114 La. 1004, 38 So. 810. Where concurrent causes are the immediate and efficient cause of an injury, it is not competent to take one of them away from the other, and say that it and not the other was the proximate cause of the accident. Thus, negligence of machine operative will bar a recovery for his injuries though statute requiring machine to be guarded has been violated. Ziehr v. Maumee Paper Co., 7 Ohio C. C. (N. S.) 144.

67. Contributory negligence is no defense to an action based on a willful violation of a mining law. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294.

68. See 4 C. L. 773.

69. Instruction that finding should be for plaintiff if he exercised the care to avoid danger that a person of ordinary prudence would "usually" exercise under the same or similar circumstances is proper. Chicago Union Traction Co. v. Chugren, 110 Ill. App. 545. Where plaintiff was injured at a railway crossing, the necessity of his crossing was not the test of his conduct, but whether he acted as an ordinarily prudent person would have acted. St. Louis S. W. R. Co. v. Everett [Tex. Civ. App.] 13 Tex. Ct. Rep. 890, 89 S. W. 457. An instruction that ordinary care "is that degree of care which an ordinarily prudent person, with deceased's knowledge or means of knowledge of electrical affairs and situated as deceased was, before and at the time of the accident, would exercise for his own safety," held not erroneous. Commonwealth Elec. Co. v. Rose, 114 Ill. App. 181. An instruction which restricts inquiry as to due care by plaintiff to the instant when the accident occurred is erroneous. Illinois Cent. R. Co. v. Kief, 111 Ill. App. 354. Ordinary care in avoiding a defect in a walk, on the part of a person with defective eyesight obliged to use colored glasses, is a greater degree of care than would be required of a person with perfect eyesight, not troubled by the glare of sunlight on the walk. Kaiser v. Hahn Bros., 126 Iowa, 561, 102 N. W. 504.

70. It is not negligence as a matter of

A voluntary and unnecessary[71] exposure to obvious danger,[72] or a failure to act,[73]

law for one to cross a street railway track between two motionless cars. Fitzgerald v. New York City R. Co., 92 N. Y. S. 732. Plaintiff, who fell into an excavation in a path leading into defendant's store, used by the public with the owner's knowledge, held not negligent in using the way. Rooney v. Woolworth [Conn.] 61 A. 366. Electric lineman employed by one company held not necessarily negligent for failure to wear rubber gloves and a safety belt while working near wires of another company. Commonwealth Elec. Co. v. Rose, 114 Ill. App. 181. Where plaintiff's time was fully occupied trying to save other property from fire, he was not necessarily negligent for failing to herd and move his cattle. Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225. Not contributory negligence as matter of law to pass down railroad station steps covered with snow and ice without taking hold of rail. Illinois Cent. R. Co. v. Keegan, 112 Ill. App. 28. Surrounding circumstances and instinct of self-preservation may be considered in determining whether a plaintiff used due care. Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37. Whether person is negligent in crossing railroad tracks depends upon the circumstances. Chicago & E. I. R. Co. v. Olson, 113 Ill. App. 320. Where plaintiff's testator was sitting on a trunk in the rear of a covered express wagon, where he could not see an approaching car, he was not chargeable with contributory negligence in not warning the driver. Penna v. Interurban St. R. Co., 48 Misc. 647, 96 N. Y. S. 208. Teamster engaged in unloading freight on dray in railroad yards held not negligent in manner of doing his work or placing his team and dray, where team was frightened by escaping steam from engine, and he was injured. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29. No contributory negligence where plaintiff was struck by board knocked from a wagon. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8. Where there was no direct evidence to show deceased's conduct at the time he was struck by a train, the jury was entitled to consider the probable effect on his conduct of the instinct of self-preservation. Davenport, etc., R. Co. v. De Yeager, 112 Ill. App. 537. Held not error to leave it to jury to say whether facts and circumstances under which plaintiff stepped into open elevator shaft were such as to lull him into a sense of security, by leading him to think the cab was there to receive him. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581. Engineer not negligent in leaving engine to inquire as to other train and could recover for injuries caused by being struck by switch engine of defendant company. Mintram v. New York, etc., R. Co., 104 App. Div. 38, 93 N. Y. S. 331. Where farmer left coil of wire hanging in front of mirror in pump house, one end of wire being attached to ground wire of telephone, and was injured by lightning while standing before the mirror, the jury was warranted in finding him negligent, even though he did not know of such connection with the ground wire. Owen Portage Tel. Co. [Wis.] 105 N. W. 924. Boys bathing at resort held not negligent where they did not go beyond the places ordinarily used by bathers, and there were no limits or warning signs, and a sudden wind blew them out into the lake where one was drowned. Larkin v. Saltair Beach Co. [Utah] 83 P. 686.

71. Servant of a contractor at work in a mill could not recover where he went to a part of the mill where his duties did not require him to be and fell into a hatchway. Hutchinson v. Cleveland-Cliffs Iron Co. [Mich.] 12 Det. Leg. N. 457, 104 N. W. 698. A person who unnecessarily places himself in a well-known position of danger, and by reason thereof is injured, cannot recover though defendant was grossly negligent, if the latter's act was not wanton or willful. Chicago City R. Co. v. Albrecht, 114 Ill. App. 474. Person who placed his hand under a heavy rock and was injured by its fall could not recover. Culver Construction Co. v. McCormack, 114 Ill. App. 655. One who knows the dangerous condition of a street and voluntarily goes upon it and exposes himself to danger is guilty of negligence. Village of Lockport v. Licht, 113 Ill. App. 613. Baggageman held guilty of contributory negligence in stepping too close to train to which he was about to transfer baggage. Greenlaw v. Louisville & N. R. Co., 114 Tenn. 187, 86 S. W. 1072.

72. One who voluntarily takes a dangerous position assumes the risk of all danger incident to remaining there, of which he either knows or would know, if he used due care. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Plaintiff held guilty of contributory negligence as a matter of law where he got on a street car inside the barn after the signal to start had been given and it was obvious that he would be caught in the doorway unless he got inside the car before the doorway was reached. Kroeger v. Seattle Elec. Co., 37 Wash. 544, 79 P. 1115. Where plaintiff's agent who was hauling an engine and boiler across a bridge, knew that it was unsafe, plaintiff could not recover for loss of engine and boiler which went through the bridge. Johnson v. Denning, 94 N. Y. S. 532. Plaintiff who fell into a rollway in a walk while watching a fire held guilty of contributory negligence, since there was light enough to disclose the unfinished state of the walk and obstructions piled near. McClain v. Caribou Nat. Bank [Me.] 62 A. 144. To attempt to ride on the bumper of an electric car is negligence. Columbus R. Co. v. Muns, 6 Ohio C. C. (N. S.) 236. Where owner of horses knew fences along railroad right of way were rotten and unsafe and nevertheless turned his horses into a pasture along the right of way and the horses broke down the fence and were killed on the track, the owner could not recover, even though the company was under contract to keep up the fences. Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15. If an employe exposes himself to danger recklessly in an attempt to save his employer's property which was burning, there can be no recovery for his death. It must be shown that he used such care and caution as an ordinarily prudent person would have used under the same circumstances. Pegram v. Seaboard Air Line R. Co. [N. C.] 51 S. E. 975. Workman who stood partly within and partly without an elevator while waiting for the operator, and

or to use one's senses or opportunities to observe and avoid danger,[74] constitute contributory negligence. Mere knowledge or notice of the existence of a fact or condition is not conclusive on the issue;[75] it must also appear that the danger was appreciated.[76] A mere error of judgment in attempting to escape from sudden and impending danger does not charge one with contributory negligence,[77] and one who is injured in an attempt to save another from injury will not be held negligent unless he rashly exposed himself to danger.[78]

was killed by the sudden starting of the elevator, was guilty of negligence. Green v. Urban Contracting & Heating Co., 94 N. Y. S. 743.

73. Failure to act as well as positive acts may constitute contributory negligence. No practicable distinction can be drawn between positive and negative negligence. Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679. Person who saw a truck coming in time to get out of its way but remained where he was and was injured was negligent. Luzzi v. Haff Co., 96 N. Y. S. 456.

74. Plaintiff negligent where he walked up a track at night, without looking to right or left, but with head down, though he knew a train was due, and was struck by it. Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89. No recovery for death at railroad crossing where deceased used no effort to learn whether train was approaching or to avoid danger while crossing. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860. Where plaintiff was struck by cars while driving through an alley, it was held that facts showed he did not use his available opportunities to look out for the car and did not use reasonable care to avoid danger. Chicago, etc., R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101. Pedestrian, walking on track, and knowing a car was coming, held guilty of contributory negligence in not avoiding being struck by the car. Garvick v. United R. & Elec. Co. [Mo.] 61 A. 138. Plaintiff guilty of contributory negligence in not looking out for timbers when he was between two piles and driver of team was backing a load between them. Mannebach v. Stevens, 71 N. J. Law, 368, 58 A. 1089. Failure to observe a handcar on a straight unobstructed track on a clear day held contributory negligence. Chicago & A. R. Co. v. Vremeister, 112 Ill. App. 346. Milkman who chose to drive out through an entrance barred by chains, without stopping to look for them, another way being open to him, could not recover from property owner for injuries to horses. McCandless v. Phreaner, 24 Pa. Super. Ct. 383. Where plaintiff entered elevator through a door opened by a bell boy who did not run it, and did not disclose her presence to the operator who had his back toward her, she was negligent and could not recover. Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698. Evidence held to show contributory negligence where teamster walked into elevator shaft in store. Swanson v. Boutell [Minn.] 103 N. W. 886.

75. Mere knowledge by plaintiff that there was a hole in a platform would not bar a recovery for injuries received by falling into it. Day v. Emery-Bird-Thayer Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903. Mere knowledge that there was some danger, without an appreciation of it, will not alone preclude recovery. Ward v. Dampskibselskabet Kjoebenhaven, 136 F. 502.

76. It must appear that the danger was known and appreciated or that an ordinarily prudent man under the same circumstances would have acquired such knowledge and appreciation. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Whether an employe of an independent contractor, working on a staging near which electric wires ran, knew or ought to have known that a dangerous current of electricity was liable to be passed through the wires, held a question for the jury under the evidence. Id.

77. Where the harm complained of is the result of an effort to escape a sudden and impending danger, resulting from negligence of the person sought to be charged, contributory negligence is not made out as a matter of law by showing that the person injured might have escaped by pursuing a different course. Dolson v. Dunham [Minn.] 104 N. W. 964. Employe was not chargeable with contributory negligence as a matter of law where in attempting to escape imminent danger from falling rock he jumped in the wrong direction. McRae v. Erickson [Cal. App.] 82 P. 209. One who is placed in sudden peril is not held to the use of the best judgment but only to good faith and reasonable prudence. Russell v. Westmoreland County, 26 Pa. Super. Ct. 425. One confronted with sudden danger is not required to use the same degree of foresight and deliberation which might be required in ordinary circumstances. Chicago Union Traction Co. v. Newmiller, 116 Ill. App. 625. An act done to escape impending danger is not contributory negligence as a matter of law, though it contributes to the injury. Ward v. District of Columbia, 24 App. D. C. 524. Where girl ran in front of car to save a boy of 4 or 5, she was not chargeable with contributory negligence in electing a mode of escape from the danger which was more perilous than one she might have chosen. Manzella v. Rochester R. Co., 93 N. Y. S. 457. Law does not demand that one placed in a position of danger shall exercise the highest degree of self-possession, coolness, and skill, but only such as an ordinarily careful and prudent man would exercise under like circumstances. Thus, a bicyclist, caught between a street car and a vehicle, was not negligent as a matter of law in placing his hand on the side of the moving car. South Chicago City R. Co. v. Kinnare, 216 Ill. 451, 75 N. E. 179. One suddenly placed in a position of peril is not responsible for an error of judgment in selecting a mode of escape. Thus, where an employe jumped from a moving car to avoid peril, whether he was negligent, considering the circum-

Children.[79]—A child of very tender years is presumed incapable of negligence under any circumstances;[80] but a child not of tender years is required to exercise such care as children of the same age, capacity and experience use under like circumstances.[81] Whether a child is sui juris is ordinarily a question of fact.[82]

Comparative negligence.[83]—The doctrine of comparative negligence,—that if plaintiff's negligence was slight as compared with defendant's, recovery may be had,—is generally disapproved;[84] but contributory negligence is no defense to a charge of wanton or willful negligence or wrongdoing.[85]

stances, was for the jury. Pierson Lumber Co. v. Hart [Ala.] 39 So. 566.

78. Verdict for plaintiff, in action for death of her husband, sustained, where deceased was killed by a train after pushing or warning a boy off the track. Mobile & O. R. Co. v. Ridley, 114 Tenn. 727, 86 S. W. 606. Where girl ran in front of street car to save a boy of 4 or 5 who was in danger and as she stepped back was struck by a car on the other track, she was not chargeable with contributory negligence. Manzella v. Rochester R. Co., 93 N. Y. S. 457.

79. See 4 C. L. 774.

80. Children under 7 are not capable of contributory negligence. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234. Child under 6. Chicago & E. I. R. Co. & Western I. R. Co. v. Eganolf, 112 Ill. App. 323. Child 6 years and 10 months old. Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69. Child a little over 5 could not be guilty of contributory negligence, and the fact that she ran across the street into defendant's wagon would not defeat recovery if driver could have avoided accident with reasonable care. American Tobacco Co. v. Polisco [Va.] 52 S. E. 563.

81. Holmes v. Missouri Pac. R. Co., 190 Mo. 98, 88 S. W. 623. Youth of person injured is to be considered both on issue of his own due care and on care used by defendant. Wilmot v. McPadden [Conn.] 61 A. 1069. The care required of infants is that degree of care exercised by children of the same age, of ordinary care and prudence, under similar circumstances. Goldstein v. People's R. Co. [Del.] 60 A. 975. Ordinary care, which is that of every prudent man, is not the standard to be applied to the conduct of a child. Due care according to age and capacity is all that the law requires of children of tender years. Stewart v. Southern Bell Tel. & T. Co. [Ga.] 52 S. E. 331. A child is bound to use such reasonable care as one of his age, mental capacity and experience is capable of using; and a failure to do so is negligence. Fitzgerald v. Chicago, etc., R. Co., 114 Ill. App. 118; Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664; Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304. Child of 7. Kinnare v. Chicago & N. W. R. Co., 114 Ill. App. 230. Child of 10. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177. Boy of 12, who had attended school 3 years, and understood the running of railway cars, and who did not claim that he did not know it was dangerous to climb on cars, held guilty of contributory negligence in climbing on moving freight cars. Fitzgerald v. Chicago, etc., R. Co., 114 Ill. App. 118. A young child is required to exercise for its own safety that degree of care to be expected from one of its age and experience. Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. Girl of 9 must use that degree of care reasonably to be expected of children of her age. Young v. Small, 118 Mass. 4, 73 N. E. 1019. If child between 6 and 7, sitting on the curb, moved along when told to do so by ice man, and was injured by a piece of ice which he dropped and which bounded against her, she was not negligent as a matter of law. Slattery v. Lawrence Ice Co. [Mass.] 76 N. E. 459. Mere fact that child 6 years and 8 months old was playing with others in the street does not bar recovery for negligence of ice man dropping a piece of ice which struck the child. Id. The standard of care of an infant plaintiff, if found capable of going on the public ways unattended, depends upon his age and intelligence. Id. Girl of 9, playing in the street, ran across without paying any attention to use of the street by others, and was struck by a horse, which she would have seen if she had looked about her. She could not recover. Young v. Small, 188 Mass. 4, 73 N. E. 1019. The test for a minor's responsibility for conduct charged to have been negligent is the caution usually displayed by ordinary children of the same age and capacity. Fry v. St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960. A child is only required to exercise that degree of care to be reasonably expected of a child of his age. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746. Children of 5 are not chargeable with "ordinary care" in use of walks, as that term is used in the case of adults. Parrish v. Huntington [Va.] 50 S. E. 416. Boy of 12, crossing street, bound to use all the care he might reasonably have exercised by employing his faculties. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895.

82. Held a fact question in action for death of child at railroad crossing, contributory negligence being alleged. Holmes v. Missouri Pac. R. Co., 190 Mo. 98, 88 S. W. 623. A child 6 years and 8 months old may be permitted to go upon the public ways without negligence being conclusively imputed to her father or grandmother with whom she lived. Slattery v. Lawrence Ice Co. [Mass.] 76 N. E. 459. It is proper to submit to the jury the age and capacity of a minor in passing on the question of contributory negligence. Edwards v. Metropolitan St. R. Co., 112 Mo. App. 656, 87 S. W. 587.

83. See 4 C. L. 775.

84. The doctrine of comparative negligence has been repudiated in Missouri. Ross v. Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144. Comparative negligence doctrine does not prevail in Kansas. Missouri, etc., R. Co. v. Kellerman [Tex. Civ.

Last clear chance doctrine.[89]—The fault of the one who can at the time, but who does not, prevent an injury, is its sole legal cause, however the dangerous situation was created.[87] Thus, negligent failure to avoid injury, after discovery of plaintiff's peril, renders defendant liable, though plaintiff was guilty of negligence;[88] and, similarly, plaintiff cannot recover, if subsequent to defendant's negligence, he negligently fails to avoid injury.[89] The doctrine of discovered peril has no application in the absence of actual knowledge on the part of the person causing the injury of the peril of the person injured in time to prevent the injury by the use of means within his reach.[90]

Imputed negligence.[91]—Where the relation of master and servant or principal and agent does not exist, negligence of one person is not imputable to another who is injured, unless the former was subject to the latter's control at the time of the injury.[92] Thus, negligence of the driver of a vehicle is not imputable to a person riding therein, who exercises no control over the driving, whether such person be the guest of the driver,[93] or one who has hired the vehicle and driver;[94] but if the

App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401. Nor in Wisconsin. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. Instruction erroneous which told jury that plaintiff could recover for death of intestate if defendant was guilty of willful negligence showing an utter disregard for life, even if deceased was negligent if his negligence was slight as compared with defendant's. Denver & R. G. R. Co. v. Maydole, 33 Colo. 150, 79 P. 1023.

85. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177. Contributory negligence is no defense to an action for injuries caused by gross negligence. Barmore v. Vicksburg S. & P. R. Co., 85 Miss. 426, 38 So. 210. One who willfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission, exposes another to injury or death, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. Banks v. Braman, 188 Mass. 367, 74 N. E. 594.

86. See 4 C. L. 776.

87. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595.

88. Ross v. Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. A person's negligence in placing himself in a perilous position is not a bar to a recovery where the defendant was willfully negligent thereafter. Fitzgibbons v. Manhattan R. Co., 88 N. Y. S. 341. Contributory negligence of plaintiff will not defeat recovery if defendant could have avoided the accident by the exercise of ordinary care. Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310; Hawley v. Columbia R. Co., 25 App. D. C. 1; Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259. Contributory negligence is no defense when it is alleged that defendant knew of plaintiff's peril and could have avoided the injury by reasonable care. Northern Tex. Traction Co. v. Yates [Tex. Civ. App.] 88 S. W. 283. If a motorman could have prevented a collision after seeing plaintiff's danger, plaintiff could recover though he had been previously negligent in selecting a drunken driver. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595. Engineer held grossly negligent in disobeying signals to stop instantly, as a consequence of which a child was killed on the track. Cleveland etc., R. Co. v. Ricker, 116 Ill. App. 428. Evidence held to warrant finding that motorman could have prevented collision with wagon by exercising due care. Cicero & P. St. R. Co. v. Reiser, 115 Ill. App. 146. Error of judgment by an engineer in attempting to stop before giving warning signal, when he saw a boy run on the track, was not necessarily negligence. Chicago & E. I. R. Co. & Western I. R. Co. v. Eganolf, 112 Ill. App. 323. Where a motorman saw or ought to have seen a child close to the track, the burden was on the company in an action for injuries to the child, to show that the motorman used the degree of care "strictly commensurate with the demands and exigencies of the occasion" to prevent injury to the child; if such care was not used, the company would be liable. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183.

89. See 4 C. L. 776.

90. Cardwell v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 458, 88 S. W. 422. Theory of discovered peril inapplicable where engineer could not, by the use of the utmost care, have avoided a collision after seeing deceased on the track. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 301. Evidence held not to show that motorman, by using all the means at hand, could have stopped a car in time to prevent striking a man walking on the track. McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 103 N. W. 285.

91. See 4 C. L. 777.

92. Negligence of engineer in not avoiding a collision held not imputable to conductor who was killed while in the caboose door, the conductor not being able to exercise any control over the engineer at the time. St. Louis & S. F. R. Co. v. McFall, [Ark.] 86 S. W. 824.

93. Negligence of driver employed by a coal company and not by plaintiff not imputable to plaintiff who was injured while being carried in the conveyance. Little v. Central Dist. & Printing Tel. Co. [Pa.] 62 A. 848. Negligence of husband, driving, not imputable to his wife, where she exercised no

driver was the servant of the person injured,[95] or was subject to the direction and restraint of such person,[96] or if negligence of the person injured concurs with that of the driver,[97] there can be no recovery for the injuries suffered.

By weight of modern authority, negligence of a parent or custodian is not imputable to a child non sui juris, so as to bar an action brought on its behalf.[98] But contributory negligence of a beneficiary will defeat an action for wrongful death.[99]

control over him and took no part in the driving. Negligence will not be imputed from the mere existence of the marriage relation. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Where plaintiff was riding in a buggy as the invited guest of her friend who was driving, negligence of the person driving, if any, was not imputable to plaintiff so as to bar her action for injuries resulting from a collision with a telephone pole in the street. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126. Where plaintiff was riding in a sleigh with her husband, who was driving, his negligence, if any, could not be imputed to her, so as to bar recovery in an action by her for injuries suffered in a collision with a street car. Teal v. St. Paul City R. Co. [Minn.] 104 N. W. 945. Plaintiff's testator was riding in a covered express wagon, driven by another, and was sitting on a trunk in the rear of the wagon, when a collision occurred. Held, negligence of the driver was not imputable to the plaintiff's testator. Penna v. Interurban St. R. Co., 48 Misc. 647, 96 N. Y. S. 208. Negligence of driver not imputable to one riding in vehicle unless relation of master and servant exists. Buckler v. Newman, 116 Ill. App. 546. That son was driving and mother was riding with him does not show master and servant relation. Id. The negligence of the driver of a vehicle is not imputable to a person who is riding with him as his guest and has nothing to do with the driving. West Chicago St. R. Co. v. Dougherty, 110 Ill. App. 204.

94. Where plaintiff hired a carriage and driver and simply directed the driver where to go, negligence of the driver contributing to produce a collision with a street car was not imputable to plaintiff. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648. If motorman was negligent in running car into carriage, the occupant could recover from defendant, though the driver of the carriage over whom plaintiff had no control or direction was negligent in suddenly turning the carriage on the track. Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119.

95. Negligence of a servant driving the master's wagon is chargeable to the master who suffers injury while riding therein. Markowitz v. Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351.

96. Decedent was killed at a railroad crossing by negligence of the driver who did not stop to look or listen for trains. The driver was hired with the horse and carriage and was subject to decedent's direction and restraint. Held, there could be no recovery by his estate for decedent's death. Dryden v. Pennsylvania R. Co. [Pa.] 61 A. 249.

97. The fact that wife was riding with husband who had entire control of driving did not relieve her from the exercise of due care for her own safety. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Where two persons riding in a vehicle were killed at a railroad crossing, one being the guest of the other, who drove, there could be no recovery for the guest's death where he joined with the driver in an effort to cross in front of a train, even though negligence of the driver was not imputable to the guest. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801. If plaintiff was negligent in driving with one who was drunk, and whose act contributed to produce a collision, and the motorman could not have prevented the collision after discovery of plaintiff's danger, plaintiff could not recover. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595. Where plaintiff was riding in a closed carriage on a dark night and could not see or communicate with the driver in time to direct him to avoid a street car, he could not be held guilty of contributory negligence. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648.

98. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443. Where a boy 7½ years old was fatally injured while playing in a building which was being torn down, the fact that his parents were negligent in permitting him to go unattended into a place of danger would not defeat a recovery for his death by his administrator, though the parents would be benefited by a recovery in such action. Wilmot v. McPadden [Conn.] 61 A. 1069. The contributory negligence of parents in permitting a child, a boy four years and one month old, to go without a care-taker upon streets where electric cars are run, cannot be imputed to the child in an action by him for injuries caused by negligent operation of a car. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183. Negligence of parents who take their child on a street car of defective construction is not imputable to the child in an action by it for injuries received from falling off the car. Northern Tex. Traction Co. v. Roye [Tex. Civ. App.] 86 S. W. 621. Where child a little over four years old was injured by falling through a defective walk while his father held him by the hand, negligence of his father would not bar an action by the child. Boehm v. Detroit [Mich.] 12 Det. Leg. N. 397, 104 N. W. 626. Plaintiff's two sons, each under nine years of age, found on the premises of defendant a stick of dynamite, which they exploded, instantly killing the younger and permanently maiming and injuring the other. This action was for the benefit of the injured boy. The jury found that the defendant company was guilty of negligence in permitting the dynamite to remain on or about its premises unguarded or unprotected. Held, that, conceding the contributory negligence of the children's father (a point which was in dispute) the plaintiff could recover. Mattson v. Minnesota & N. W. R. Co., [Minn.] 104 N. W. 443.

§ 5. *Actions. Pleading.*[1]—*The complaint or petition* must allege facts disclosing a duty owed by defendant to the person injured.[2] A general allegation of negligence is sufficient as against a general demurrer,[3] provided the complaint is predicated upon some act or omission,[4] but is insufficient as against a special demurrer for want of facts,[5] or a motion to make more specific.[6] A specification of the particulars of the negligence relied on cannot be avoided by alleging that such matters are more peculiarly within the knowledge of the defendant, and cannot,

Note: This case overrules the previous one of Fitzgerald v. The Railway Company, 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212. The leading case of Hartfield v. Roper, 21 Wend. [N. Y.] 615, 34 Am. Dec. 273, which holds that the negligence of the parent is imputable to the child, was relied on in Fitzgerald v. Railway Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212, and is followed in some jurisdictions. Terre Haute St. Ry. Co. v. Tappenbeck, 9 Ind. App. 422; Casey v. Smith, 152 Mass. 294, 23 Am. St. Rep. 842, 9 L. R. A. 259; Holly v. Light Co., 8 Gray [Mass.] 123; O'Brien v. McGlinchy, 68 Me. 552; Leslie v. Lewiston, 62 Me. 468; Canavan v. Stuyvesant et al., 12 Misc. [N. Y.] 74; Decker v. McSorley, 111 Wis. 91. However, the principal case seems to be in accordance both with the weight of authority and reason. Robinson v. Cone, 22 Vt. 213; Berry v. Lake Erie & W. R. Co., 70 F. 679; Daley v. Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413; Wymore v. Mahaska County, 78 Iowa, 396; Battshil v. Humphreys, 64 Mich. 514, 31 N. W. 894, 28 Am. & Eng. R. Cs. 597. 57 Am. Rep. 474 (note); Erie City Pass. R. Co. v. Schuster, 113 Pa. 412, 57 Am. Rep. 471. Bishop, Non-Contract Law, § 582; Beach, Con. Neg. (3rd Ed.) § 127, et seq; Newman v. Railroad Company, 52 N. J. Law, 446, 8 L. R. A. 842; Warren v. St. R. Co., 70 N. H. 352; Railroad Co. v. Snyder, 18 Ohio St. 399; Bottoms v. Seaboard R. Co., 114 N. C. 699, 25 L. R. A. 784; Railway Co. v. Moore, 59 Tex. 64; City of Evansville v. Senhenn, 151 Ind. 42, 41 L. R. A. 728; Railway Co. v. Wilcox, 138 Ill. 370, 21 L. R. A. 76; Jaggard, Torts, p. 984. See 3 Mich. L. R. 166. That the negligence of the actual custodian is imputable to the child is held in some jurisdictions which have repudiated Hartfield v. Roper (above). The Burgundia, 29 F. 464; Pittsburg, etc., R. Co. v. Caldwell, 74 Pa. 421. The principal case should be distinguished from that class of cases where the action is brought on behalf of the parent himself. Where the parent is the real beneficiary, his contributory negligence may be pleaded. Westerberg et al. v. Kinzu, etc., R. Co., 142 Pa. 471, 24 Am. St. Rep. 510; Battshill v. Humphreys, 64 Mich. 514.—Sec 4 Mich. L. R. 79; 5 Columbia L. R. 552; and note 4 C. L. 778.

99. See note 4 C. L. 778.

1. See 4 C. L. 779; also Pleading, 4 C. L. 980.

2. The facts and circumstances from which the law will imply a legal duty must be stated. Ward v. Danzeizen, 111 Ill. App. 163. Declaration which alleged only that defendant owned a building which it leased to another, and that a bucket dropped from the building upon plaintiff's head, and did not show where plaintiff was, or that any relation existed between them, did not show a duty owed by defendant to plaintiff. Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619. It was unnecessary to specially allege that it was defendant's duty to keep a switch closed and locked, where it was alleged that injury resulted from negligence in failing to keep switch closed and locked. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990.

3. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974. A complaint charging negligence in general terms, no specific act of negligence being charged, is sufficient as against a demurrer. Casey v. American Bridge Co. [Minn.] 103 N. W. 623. Negligence may be inferred from facts and circumstances shown in evidence and it is not necessary to plead all the facts and circumstances from which this inference may be drawn. Pittsburg, etc., R. Co. v. Wise [Ind. App.] 74 N. E. 1107.

4. A complaint characterizing an act as having been carelessly and negligently done is sufficient to withstand a demurrer for want of facts. Under such allegation facts constituting the negligence may be shown. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636; Southern Ind. R. Co. v. Messick [Ind. App.] 74 N. E. 1097. An allegation of carelessness is a sufficient allegation of want of ordinary care. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. While a general allegation that an act was negligently done is sufficient as against a demurrer for want of facts, yet a complaint for negligence which is not predicated upon some act or omission is demurrable. Lake Erie & W. R. Co. v. McFall [Ind.] 76 N. E. 400. Where a complaint charged negligence of three railroad companies in running trains and giving and receiving orders as the cause of a collision but did not set out any act or omission of any or all defendants, no negligent act being directly alleged, it was insufficient. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Complaint alleging that there was some defect on the running board of a street car, and that plaintiff's foot was caught, causing her to fall, held insufficient, amounting merely to a general allegation of negligence. Wilbur v. Rhode Island Co. [R. I.] 61 A. 601.

5. The particulars of the negligence must be set out when a special demurrer is filed, raising the objection that the allegations are too general. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974. Complaint alleging that defendant negligently and improperly manufactured and prepared mince meat which decedent ate and died held to state a cause of action, but to be defective because not alleging particular acts of negligence, and hence bad as against demurrer for want of facts. Salmon v. Libby [Ill.] 76 N. E. 573.

for want of information, be alleged.[7] Allegations of a petition cannot be aided by the maxim res ipsa loquitur.[8] A complaint which sets out several acts of negligence, each alleged to be a proximate cause of injury, is not demurrable,[9] though it may be open to the objection that it is not sufficiently specific.[10] A complaint to recover for injuries to a child inflicted by dangerous machinery on defendant's premises must allege an express invitation to come upon the premises, or that the dangerous machinery was so attractive to children that its maintenance amounted to an implied invitation.[11]

Contributory negligence is generally held to be matter of defense which need not be negatived in the complaint[12] unless the facts pleaded tend to show it.[13] But in some states the complaint must allege freedom from contributory negligence.[14] An allegation of due care by plaintiff must be broad enough to cover the entire transaction.[15]

The answer.—The defense of contributory negligence is usually not available as a defense if not specially pleaded,[16] unless plaintiff's evidence discloses such negligence.[17] The facts claimed to constitute contributory negligence must be set out.[18] While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect

6. Casey v. American Bridge Co. [Minn.] 103 N. W. 623. Defendant has the right to a specific statement of the facts relied on as constituting negligence, but plaintiff is not required to make a prolix statement of the details. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883.

7. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974.

8. Where objection is that averments of negligence are too general. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974.

9. Complaint held to allege sufficiently that negligence complained of caused the injury where several acts of negligence were set out and it was then alleged that "said acts were the direct and proximate cause of the death" complained of and that all of said acts contributed thereto. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515.

10. A complaint is not demurrable for alleging several acts of negligence, each alleged to be a proximate cause of injury; but defendant may, under Va. Code 1904 § 3249, demand a more specific statement of the cause of action relied on. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449.

11. Complaint held insufficient in action to recover for injuries to a child of 5 caught in an endless chain arrangement for hauling lumber. Driscoll v. Clark [Mont.] 80 P. 1.

12. Southern Ind. R. Co. v. Corps [Ind. App.] 76 N. E. 902. Burden of proving contributory negligence is on defendant and plaintiff need not allege freedom therefrom in his complaint. Board of Councilmen of City of Frankfort v. Chinn [Ky.] 89 S. W. 188. Where allegations necessary to state the cause of action in no way suggest negligence on the part of plaintiff, there is no implication of negligence to be negatived, and an averment that plaintiff was without fault is unnecessary, and if made, is mere surplusage. Nellis v. Cincinnati Traction Co., 3 Ohio N. P. (N. S.) 527.

13. Where a complaint alleges that the damages set up were caused solely by acts of defendant, it shows by necessary inference that plaintiff was not guilty of contributory negligence. Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co. [Ind.] 75 N. E. 649.

14. See 4 C. L. 781, n. 19.

15. Ward v. Danzeizen, 111 Ill. App. 163.

16. Where the immaturity of the plaintiff is set out in an action for damages sustained in the service of the defendant, and the answer is a general denial and contributory negligence is not pleaded, the rule which requires the plaintiff to show that he was without fault does not apply, and the silence of the jury upon that question does not amount to a finding against the plaintiff. Ginn v. Myrick, 3 Ohio N. P. (N. S.) 448. When plaintiff's evidence and pleadings do not tend to show contributory negligence, the defense is not available unless pleaded; hence, where answer is general denial and plea of contributory negligence, such plea is not mere surplusage, and a motion to make more definite will lie. Nellis v. Cincinnati Traction Co., 3 Ohio N. P. (N. S.) 527.

Contra: Contributory negligence may be proven under a general denial. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Though contributory negligence is matter of defense it may be proved under a general denial. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895.

17. Where plaintiff's evidence shows contributory negligence, the defense is available though not pleaded. Kappes v. Brown Shoe Co. [Mo. App.] 90 S. W. 1158. Where plaintiff's evidence shows contributory negligence, defendant is entitled to take advantage of the defense though it is not specially pleaded; thus, it was available though defendant's plea of contributory negligence had been stricken. Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89.

18. Southern R. Co. v. Branyon [Ala.] 39 So. 675.

between the two defenses;[19] nor does the plea of contributory negligence, when properly pleaded, admit the negligence as charged in the petition.[20]

Issues and proof.[21]—Plaintiff must prove his case as pleaded,[22] and proof of negligence not alleged is excluded,[23] as a recovery cannot be based thereon.[24] If several acts of negligence are relied on, proof of one or more of those well pleaded, as the cause of the injury, is sufficient.[25] Where particular acts of negligence are charged, plaintiff will be confined thereto though the petition contains also a general charge of negligence.[26] To sustain a joint judgment against defendants sued jointly, the evidence must show that the acts of negligence co-operated concurrently or in continuous successive order to produce the injury.[27] If he fails to show joint liability, plaintiff may amend and proceed against the party shown to be at fault.[28]

19. Jackson v. Natchez & W. R. Co., 114 La. 981, 38 So. 701.

20. [Conflict noted.] Jackson v. Natchez & W. R. Co., 114 La. 981, 38 So. 701. A plea of contributory negligence, coupled with a plea of not guilty, is not an admission of negligence; the case may be tried upon either or both defenses. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72.

21. See 4 C. L. 782.

22. Where a complaint charges that a fire was started by sparks from the engine blown upon the building by the wind it is not supported by proof that the fire spread from the right of way. Lake Erie & W. R. Co. v. McFall [Ind.] 76 N. E. 400. No variance where it was alleged that a boy was injured by a live wire on a certain street and the proof showed that the boy reached through a fence and caught hold of the wire which was hanging from a tree in a neighboring yard. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148. Where complaint alleged negligence in ordering plaintiff to jump from a moving train, and the answer denied negligence, instructions authorizing a recovery without finding negligence were erroneous. Burton v. Quincy, etc., R. Co., 111 Mo. App. 617, 86 S. W. 503.

23. Recovery, if any, must be on ground negligence alleged, or which constitute the res gestae. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974. It is error to admit evidence of negligence not charged in the complaint. Stenger v. Buffalo Union Furnace Co., 109 App. Div. 183, 95 N. Y. S. 793. In action for injuries to child, proof that he was non sui juris was inadmissible, that fact not being alleged. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895. Where a specific act of negligence is alleged, an allegation that plaintiff's injuries were caused by defendant's negligence and not by any act of plaintiff is not a general allegation of negligence under which evidence of acts not charged may be introduced. Albin v. Seattle Elec. Co. [Wash.] 82 P. 145.

24. Recovery, if any must be on ground alleged. Wabash R. Co. v. Warren, 113 Ill. App. 172; Bartz v. Chicago City R. Co., 116 Ill. App. 554. Plaintiff must prove the specific acts of negligence charged. Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128. Plaintiff must recover, if at all, upon proof of the specific acts of negligence charged. Augusta R. & Elec. Co. v. Weekly [Ga.] 52 S. E. 444. Plaintiff can recover only for negligence alleged even though other causal negligence of defendant be proved. Chicago City R. Co. v. Bruley, 215 Ill. 464, 74 N. E. 441. When declaration is for common-law negligence, there can be no recovery for statutory negligence. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49. Refusal to charge jury not to consider any negligence not pleaded was error. Baltimore & O. R. Co. v. Lockwood, 72 Ohio St. 586, 74 N. E. 1071. The negligence alleged in the complaint must be established, and an instruction which does not so limit the right of recovery is erroneous. Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. Judgment for plaintiff reversed where court submitted a theory including negligence not charged. Politowitz v. Citizens' Tel. Co. [Mo. App.] 90 S. W. 1031. Where negligence charged was permitting stairway "to become slippery and dangerous" it was reversible error for the charge to permit a recovery for failure to properly light the stairway. Reeves v. Fourteenth St. Store, 96 N. Y. S. 448. Where complaint charged failure to guard excavation near highway, so as to render the latter safe, there could be no recovery upon proof that excavation was 2 to 5 feet from highway and plaintiff knowingly left the highway and went upon the private premises. Crimmins v. United Engineering & Contracting Co., 96 N. Y. S. 1032.

25. Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915. Instruction requiring plaintiff to prove every allegation of every count held erroneous. Harvey v. Chicago & A. R. Co., 116 Ill. App. 507. A plaintiff may plead in one paragraph different acts of negligence and upon the trial it is sufficient if he prove such negligence charged as will establish his case, and this may be a single act of negligence. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

26. Politowitz v. Citizens' Tel. Co. [Mo.] App.] 90 S. W. 1031.

27. Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557. Where suit is brought against two defendants for joint negligence, there can be no recovery upon the joint action where it appears that there was no community of fault by the two defendants in the act which occasioned the injury. Sturzebecker v. Inland Traction Co., 211 Pa. 156, 60 A. 583.

28. Where counsel refused to amend, though no concert of action was shown, a

Under a plea of not guilty it may be proved that the damage alleged resulted from a cause other than that charged in the complaint.[29] Where a petition charges a joint tort against two defendants, and the answer is a general denial, one of the defendants may show that the other is an independent contractor and that negligence of his servants caused the injury complained of.[30]

Evidence. Admissibility.[31]—Negligence, like any other fact, may be proved by circumstantial evidence;[32] hence, evidence of the circumstances of an accident[33] tending to show the conduct of the parties[34] or to explain or excuse conduct alleged to have been negligent[35] is admissible. Usually, evidence must be confined to the time and place in issue;[36] but other evidence is sometimes admitted to show notice or knowledge[37] or to prove a negligent course of conduct.[38] Evidence of repairs or precautions subsequent to an injury is inadmissible.[39]

nonsuit was proper. Sturzebecker v. Inland Traction Co., 211 Pa. 156, 60 A. 583.

29. An answer in a trespass case categorically denying the numbered paragraphs of the statement of claim is equivalent to a plea of not guilty, and is supported by proof that the damage claimed resulted from some cause other than that alleged; such other cause need not be specified or alluded to in the plea. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456. Thus, in an action for damages alleged to be due to defective sewers, defendant may under such a plea, prove that an extraordinary flood caused the injury. Id.

30. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113.

31. See 4 C. L. 782; also Evidence, 4 C. L. 1301.

32. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990. Direct evidence of negligence is not necessary, since negligence, like any other fact, can be established by proof of circumstances from which it may be inferred. Western Md. R. Co. v. Shivers [Md.] 61 A. 618.

33. Evidence of circumstances surrounding accident at street crossing, including absence of a lookout, is admissible. Chicago & A. R. Co. v. Mayer, 112 Ill. App. 149. In action for damage to horse and wagon in collision, distance horse had been dragged by engine admissible to show circumstances and speed of train. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72. The introduction of the pole of a wagon, the breaking of which caused an accident, constitutes evidence of negligence, when an examination of the part shows that it has been a long time in bad condition. Walton v. Ensign, 6 Ohio C. C. (N. S.) 300.

34. Due care by plaintiff may be shown by showing circumstances and plaintiff's conduct at the time. Village of Upper Alton v. Green, 112 Ill. App. 439. Where a teamster was injured by being caught between his dray and a car from which he was unloading freight, his team having suddenly backed against him as an engine from which steam escaped passed, evidence of a failure to give a warning of the starting and approach of the engine was admissible. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29.

35. Evidence of existing labor troubles was admissible when negligence in having an insufficient force of watchmen to guard cotton was charged. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

36. Evidence that wires belonging to defendant were defective at other times and places inadmissible in action for death caused by live wire which came in contact with a feed wire of another company. United Elec. Light & Power Co. v. State [Md.] 60 A. 248. In an action for injuries to a child playing on a turntable, evidence that the turntable was no more attractive to children than near-by pools of water was irrelevant. Denison & P. S. R. Co. v. Harlan [Tex. Civ. App.] 13 Tex. Ct. Rep. 207, 87 S. W. 732.

37. Evidence that an apron or approach which caused an injury was similar to those in general use throughout the city was admissible to show knowledge of its character by plaintiff. Keim v. Ft. Dodge, 126 Iowa, 27, 101 N. W. 443. Evidence of previous accidents caused by an ash pit in the basement of a building was admissible to show notice by the owner of the building of its dangerous condition. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328.

38. Where negligence charged was failure to store cotton in such manner as to protect it against fire and to provide such a system of inspection and protection as to guard against the spreading of fire, evidence that the man in charge habitually became intoxicated and incapable of properly performing his duties, was admissible. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465. In an action for injuries resulting from negligence in loading cotton into a wagon, evidence of what took place when another person's wagon was loaded was admissible to show who was in charge and that the system of loading used was dangerous. Northern Tex. Const. Co. v. Crawford [Tex. Civ. App.] 87 S. W. 223. Where negligence of a railroad company in providing spark arresters is claimed to have caused a fire, but no particular engine is identified as the one causing the particular fire in question, evidence of the unusual quantity of sparks emitted by the company's engines, and of other fires caused by their engines at about the same time, is admissible. Shelly v. Philadelphia R. Co., 211 Pa. 160, 60 A. 581. If a particular engine is identified as the one which started a fire, evidence that other engines had defective spark arresters, or

Presumptions and burden of proof.[40]—The burden is upon the plaintiff to prove negligence of the defendant[41] as the proximate cause of the injury complained of.[42] This burden is sustained by a preponderance of evidence[43] fairly and reasonably tending to establish the facts essential to a recovery.[44] Evidence which merely raises a surmise or conjecture as to the existence of such facts is insufficient.[45]

evidence relating to the general management of the company, is inadmissible. Id.

39. Evidence that after an injury the manner of loading logs was changed, inadmissible. Louisville & N. R. Co. v. Morton [Ky.] 89 S. W. 243. Evidence that after injury complained of in action against city, the abutting owner was notified to repair the walk, and that city made repairs upon owner's failure to do so, was inadmissible. Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182. In action for injuries to a brakeman at a derailing switch, evidence that weeds and rubbish about the switch were cleared away the day after the accident was inadmissible. St. Louis S. W. R. Co. v. Arnold [Tex. Civ. App.] 87 S. W. 173.

40. See 4 C. L. 783.

41. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110; Fletcher v. Kelly [Ind. App.] 76 N. E. 813; Southern R. Co. v. Hall's Adm'r, 102 Va. 135, 45 S. E. 867. In action for injuries to cab struck by stage coach, evidence held insufficient to show defendant owned coach. Forman v. New York Transp. Co., 95 N. Y. S. 581. Burden was on plaintiff to show that snow which fell on her came from defendant's elevated tracks. No recovery since this was not shown. McGee v. Boston El. R. Co. [Mass.] 73 N. E. 657. Evidence held sufficient to show that defendant was responsible for obstruction in street. White v. Keystone Tel. Co., 211 Pa. 455, 60 A. 998. Plaintiff must show by greater weight of evidence a failure to exercise proper care in performance of a legal duty owed by defendant to plaintiff under the circumstances. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448. Evidence insufficient to show defendant was contractor in charge of blasting operations, or that he participated in work and was a joint tort feasor, in equity suit for injunction and damages. Page v. Dempsey, 99 App. Div. 152, 90 N. Y. S. 1019.

42. Baltimore & O. R. Co. v. State [Md.] 61 A. 189; Kearns v. Southern R. Co. [N. C.] 52 S. E. 131; Ramsbottom v. Atlantic Coast R. Line Co., 138 N. C. 38, 50 S. E. 448; Missourl, etc., R. Co. v. Greenwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 10, 89 S. W. 810. In action for wrongful death, plaintiff has burden of proof to show negligence and that such negligence caused the death. Pegram v. Seaboard Air Line R. Co. [N. C.] 51 S. E. 975.

43. Negligence of defendant need not be shown beyond a reasonable doubt to be the cause of injury; a preponderance of evidence is sufficient. Southern R. Co. v. Railey Bros., 26 Ky. L. R. 53, 80 S. W. 786.

44. A verdict cannot rest upon conjecture; there must be evidence fairly tending to show negligence as the cause of injury. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. Plaintiff need not prove his case beyond a reasonable doubt; to make a prima facie case he need only make it appear more probable that injury resulted from negligence complained of than that it resulted from some other cause. Wood's Adm'x v. Southern R. Co. [Va.] 52 S. E. 371. The plaintiff must show more than a probability of a negligent act. Southern R. Co. v. Hall's Adm'r, 102 Va. 135, 45 S. E. 867. Evidence sufficient to support verdict against defendant where plaintiff's son was struck by an automobile while crossing the street. Spina v. New York Transp. Co., 96 N. Y. S. 270. Evidence that a boiler was old, rusty, cracked and patched, and that an explosion occurred at a point where these defects were, was sufficient to show negligence in its use. Davis v. Charleston & W. C. R. Co. [S. C.] 51 S. E. 552. Negligence may be proved by circumstantial evidence but the circumstances must be such as to reasonably lead up to and establish the fact to be proved. Missouri, K. & T. R. Co. v. Greenwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 10, 89 S. W. 810.

45. The proof must reasonably tend to establish the essential fact; evidence which merely raises a surmise or conjecture as to such fact is insufficient to support a verdict. Byrd v. Southern Exp. Co. [N. C.] 51 S. E. 851. In an action for wrongful death based on delay of defendant in forwarding medicine for boy ill with typhoid fever, the physician in charge testified that the medicine was needful, and that the chances for recovery would have been better had the medicine arrived on time; he would not say that recovery would have resulted had timely delivery been made, nor that recovery would in such case have been probable. Held, evidence insufficient to establish defendant's negligence as proximate cause of boy's death. Id. Evidence held insufficient to warrant reasonably the inference that failure of engineer to stop engine sooner was proximate cause of crossing accident. Kearns v. Southern R. Co. [N. C.] 52 S. E. 131. There can be no recovery when situation disclosed by evidence is equally consistent with the absence as with the existence of negligence. McDonough v. James Reilly Repair & Supply Co., 93 N. Y. S. 491. Where workmen went into an elevator, the door being open, to wait for the operator, and one stood partly within and partly without the elevator and was killed by the sudden starting of the elevator, which was shown to be in perfect condition, no negligence of the owner of the building or contractor in charge of elevator was shown. Green v. Urban Contracting & Heating Co., 94 N. Y. S. 743. Where conductor was thrown from platform of his car by a sudden jerk, while car was being hauled by servants of defendant—not plaintiff's master—and the cause of the jerk was not shown, there could be no recovery for injuries suffered. McGinness v. Third Ave. R. Co., 104 App. Div. 342, 93 N. Y. S. 787. Evidence held

Negligence is not to be presumed from the mere fact of injury.[46] But the manner of the occurrence of an injury and the attendant facts and circumstances may well warrant the inference of negligence,[47] as where the instrumentality causing the injury is under the sole control of the defendant,[48] and the accident is one which does not ordinarily happen if due care is used.[49] When applicable, the res ipsa loquitur rule operates only to make a prima facie case,[50] sufficient to go to the

insufficient to prove that defendants had caused injury to plaintiff's building by negligence in blasting operations. Luria v. Cusick, 93 N. Y. S. 507. Where hostler pulled lever on engine to back it, and the lever flew back and the engine went forward into a turntable pit and injured him, but he did not prove any defect in the engine, mere proof of such injury did not show negligence of the master. Green v. Southern R. Co. [S. C.] 52 S. E. 45. No recovery where evidence did not show greater probability that defendant's negligence caused the accident than that it was otherwise caused. Louisville, etc., R. Co. v. Jolly's Adm'x [Ky.] 90 S. W. 977.

46. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; McDonough v. James Reilly Repair & Supply Co., 93 N. Y. S. 491; Venbuvr v. Lafayette Worsted Mills [R. I.] 60 A. 770. Mere fact that death was caused by crossed electric wires belonging to two different companies held not proof of negligence. United Electric Light & Power Co. v. State [Md.] 60 A. 248. Negligence of carrier cannot be inferred from mere bare fact that a passenger was injured. State v. United R. & Elec. Co. [Md.] 60 A. 249. Negligence will not be presumed from the mere happening of an accident; there must be some reasonable evidence of well defined acts of negligence or breach of duty by defendant causing the injury complained of. Evidence held not to show negligence where street car struck pedestrian who was walking on the track. Garvick v. United R. & Elec. Co. [Md.] 61 A. 138. The mere fact that an elevator passenger receives an injury, without regard to the circumstances which surround that fact, is not enough to throw upon the defendant the burden of explaining the cause of the injury. Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. Where passenger on a street car got her foot caught on the running board and fell when she was about to alight, the fact of such injury did not alone raise a presumption of negligence on the part of the company. Wilbur v. Rhode Island Co. [R. I.] 61 A. 601.

47. Negligence is never presumed from the mere fact of injury; but it may be inferred from that fact taken in connection with attendant facts and circumstances. Libby v. Banks, 110 Ill. App. 330. The doctrine res ipsa loquitur does not mean that negligence may be inferred from the mere fact that an accident and injury occurred; but that negligence may be inferred from some attendant fact or circumstance, taken in connection with the fact of injury. Wilbur v. Rhode Island Co. [R. I.] 61 A. 601. The fall of a loaded elevator is prima facie evidence of negligence in the person charged with the duty of operating it. Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. In each case for a tortious injury the question as to what evidence will make a prima facie case of negligence and require an explanation from the defendant will depend upon the nature and circumstances of the injury and the measure of care due from the defendant. Cincinnati, etc., R. Co. v. South Fork Coal Co. [C. C. A.] 139 F. 528.

48. The maxim res ipsa loquitur applies when the cause of an accident is under the control of the party charged. Pittsburg, etc., R. Co. v. Campbell, 116 Ill. App. 356. Where regular passenger train ran into train hauling workmen, maxim was applicable. Id. Where street car passenger, exercising due care, was injured by blowing out of controller of car, over which company had control, a presumption of negligence arose. Firebaugh v. Seattle Elec. Co. [Wash.] 82 P. 995. Evidence that a fire has been started by sparks from an engine is presumptive evidence of negligence on the part of the operators of the engine. Martin v. McCrary [Tenn.] 89 S. W. 324. Where a structure on which meals were being served collapsed and injured plaintiff, defendant, who was in possession, had the burden of showing that he had used ordinary care to make the structure reasonably safe. Schnizer v. Phillips, 108 App. Div. 17, 95 N. Y. S. 478.

49. When an unusual and unexpected accident happens, caused by a machine in the exclusive management, possession, or control of the defendant, the accident speaks for itself, and its mere occurrence is prima facie proof of negligence sufficient to impose on defendant the duty of showing freedom from negligence. Chicago City R. Co. v. Eick, 111 Ill. App. 452. Rule held applicable where electric car ran down a street without an attendant and caused a collision. Id. Where the place of injury is such that ordinarily no accident is to be expected unless from a careless construction, inspection, or user, and both inspection and user were at the time of the injury in the control of the party charged, and the accident happened without any voluntary act of the person injured, the doctrine res ipsa loquitur may be applied. Weber v. Lieberman, 94 N. Y. S. 460. Thus, where plaintiff was injured, while on a sidewalk looking into a show window, by going through a grating in the walk, such facts gave rise to a presumption of negligence on the part of the lessee whose duty it was to make repairs. Id. Where temporary shed built over sidewalk by defendants during building operations fell, injuring plaintiff, the doctrine res ipsa loquitur was held applicable. Lubelsky v. Silverman, 96 N. Y. S. 1056.

50. The fall of a part of building, injuring plaintiff, makes a prima facie case of negligence against the owner, sufficient, unless rebutted, to sustain a recovery by plaintiff. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400.

jury;[51] it does not shift the burden of proof.[52] Whether negligence shall be inferred from the circumstances shown,[53] and whether defendant has successfully rebutted the prima facie case made by the plaintiff,[54] are questions for the jury. The application of the res ipsa loquitur rule in the case of injuries to passengers and servants is fully treated elsewhere.[55]

In some states, plaintiff must show want of contributory negligence, as an element of his case;[56] but in most jurisdictions contributory negligence is matter of defense, and must be established by defendant[57] by a preponderance of the evi-

51. Proof that an accident occurred is sufficient to take the issue of negligence to the jury, but has no special weight as evidence of negligence. Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562.

52. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. Proof of the occurrence of an accident suffices only to take the issue of negligence to the jury. The operation of the res ipsa loquitur rule to this extent does not relieve plaintiff of the burden of proof nor raise any presumption in his favor. Ross v. Double Shoals Cotton Mills [N. C.] 52 S. E. 121; Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562; Lyles v. Brannon Carbonating Co. [N. C.] 52 S. E. 233. Though circumstances attending an injury to a passenger are such as to raise a presumption of negligence, the burden of proof is still upon plaintiff to prove negligence by a preponderance of evidence, and the court may properly so charge the jury. Patterson v. San Francisco & S. M. Elec. R. Co., 147 Cal. 178, 81 P. 531. The burden of proving the negligence charged rests upon plaintiff throughout the trial. Thus, the burden is not shifted, where plaintiff establishes a prima facie case by proving injuries resulting from a collision between a street car and ice wagon belonging to the two defendants. Maher v. Metropolitan St. R. Co., 102 App. Div. 517, 92 N. Y. S. 825.

53. The res ipsa loquitur doctrine simply makes proof of the occurrence of an accident evidence, the inference from which as to negligence of defendant is to be drawn by the jury. Lyles v. Brannon Carbonating Co. [N. C.] 52 S. E. 233.

54. Whether the prima facie case made by the application of the res ipsa loquitur rule has been overcome by defendant is for the jury. Chicago City R. Co. v. Eick, 111 Ill. App. 452. Where blowing out of controller of street car caused injury to passenger and witnesses for company said they did not know cause of its blowing out, and that sometimes the cause could not be learned, and plaintiff showed several possible causes, all within control of defendant, whether defendant had overcome presumption of negligence was for jury. Firebaugh v. Seattle Elec. Co. [Wash.] 82 P. 995.

55. See Carriers, 5 C. L. 507; Master and Servant, 6 C. L. 521.

56. Buchholtz v. Incorporated Town of Radcliffe [Iowa] 105 N. W. 336; Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. One complaining of injury through negligence of another must make it appear that on his own part he was in the exercise of due care. Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721. No recovery for death where deceased got off a street car and went around behind it and was struck by car on other track. Axelrod v. New York City R. Co., 109 App. Div. 87, 95 N. Y. S. 1072. When there is neither direct nor circumstantial evidence showing the presence or absence of contributory negligence, plaintiff cannot recover without some affirmative proof of freedom from fault. Scialo v. Steffens, 94 N. Y. S. 305. The question of defendant's negligence should not be submitted to the jury unless there is evidence of freedom of contributory negligence sufficient to go to the jury. Larsen v. United States Mortg. & Trust Co., 104 App. Div. 76, 93 N. Y. S. 610.

57. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; Simms v. Forbes [Miss.] 38 So. 546; Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29; Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863. Burden of proving contributory negligence is on defendant by Burns' Ann. St. 1901, § 359a. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818; Davis v. Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 323; Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116; New Castle Bridge Co. v. Doty [Ind. App.] 76 N. E. 557; Fletcher v. Kelly [Ind. App.] 76 N. E. 813; New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Burns' Ann. St. 1901, § 359a, applies though the cause of action arose in another state. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990. Under Burns' Ann. St. 1901, § 359a, a person injured in a collision at a railroad crossing is presumed to have been in the exercise of due care, and the burden of proving the contrary rests, throughout the case, on defendant. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50. Contributory negligence is strictly defensive and properly no evidence thereof should be admitted until after the close of plaintiff's case. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. Affirmative evidence of due care by plaintiff is unnecessary; it may be inferred from circumstances and from a lack of evidence of a want of due care. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Contributory negligence is a defense in the federal courts but the burden thereon is on defendant, since due care by plaintiff or the person injured is presumed. Ward v. Dampskibselskabet Kjoebenhaven, 136 F. 502. Where there was evidence from which the character of plaintiff's conduct could be determined, it was error to instruct that it would be presumed that he stopped, looked, and listened before crossing a street railway tract. Los Angeles Traction Co. v. Conneally [C. C. A.] 136 F. 104.

dence.[58] All the evidence in the case is to be considered on the issue;[59] and if contributory negligence is disclosed by plaintiff's pleadings[60] or evidence,[61] the defendant is entitled to the benefit of the defense so shown, though he introduces no proof of it.

Questions of law and fact.[62]—Ordinarily, negligence,[63] contributory negli-

58. New Castle Bridge Co. v. Doty [Ind. App.] 76 N. E. 557. A preponderance of evidence is sufficient to establish contributory negligence; instruction that it must be shown by evidence "clear and convincing," error. Sanders v. Aiken Mfg. Co. [S. C.] 50 S. E. 679. Defendant must prove contributory negligence by a preponderance of evidence. Houston & T. C. R. Co. v. Anglin [Tex.] 14 Tex. Ct. Rep. 104, 89 S. W. 966. Contributory negligence need only be established by a preponderance of the evidence, and it is error to require it to be proved by a preponderance "to the satisfaction of the jury." El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 90 S. W. 678. It is error in a negligence case to say that the defendant must "satisfy" the jury as to the claim of contributory negligence; or to say that the defendant was bound to use such guards or warnings as would "prevent an accident" to a person using ordinary care. Cleveland, etc., R. Co. v. Sivey, 6 Ohio C. C. (N. S.) 221.

59. A charge that defendant is bound to prove contributory negligence by a preponderance of evidence is erroneous because it deprives defendant of the benefit of any evidence adduced by plaintiff which may tend to show contributory negligence. City of Indianapolis v. Cauley, 164 Ind. 304, 73 N. E. 691; Indianapolis & E. R. Co. v. Barnes [Ind. App.] 74 N. E. 583. An instruction that defendant may prove contributory negligence under a general denial and that the burden of proving such negligence is on defendant, is not erroneous as withdrawing plaintiff's evidence from the consideration of the jury on the issue. Town of Winamac v. Stout [Ind.] 75 N. E. 158.

60. As where the declaration alleges facts which prima facie show contributory negligence, but such facts are coupled with matter in avoidance. Simms v. Forbes [Miss.] 38 So. 546.

61. Simms v. Forbes [Miss.] 38 So. 546. Contributory negligence need not be shown by defendant's evidence alone; it is sufficient to defeat a recovery that it is established by a preponderance of all the evidence, including that of plaintiff; and if plaintiff's own evidence shows such negligence, defendant need not introduce any proof, but is entitled to the benefit of the defense so shown. Philadelphia B. & W. R. Co. v. Hand [Md.] 61 A. 285. If plaintiff's evidence and all just inferences therefrom show contributory negligence, it is the duty of the court to direct a verdict even though defendant introduces no evidence to support his plea. Bridges v. Jackson Elec. R., Light & Power Co. [Miss.] 38 So. 788.

62. See 4 C. L. 785; also Questions of Law and Fact, 4 C. L. 1165.

63. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575; Ward v. District of Columbia, 24 App. D. C. 524; Central Union Bldg. Co. v. Kolander, 113 Ill. App. 305; West Chicago St. R. R. Co. v. Dougherty, 110 Ill. App. 204; Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910; Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714; Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. Whether railway company was guilty of wanton or willful conduct, in action for injuries to mule struck by a car. Montgomery St. R. Co. v. Rice [Ala.] 38 So. 857. Street car struck wagon which was on the track. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444. Whether handcar frightened plaintiff's horses. St. Louis S. W. R. Co. v. Everett [Tex. Civ. App.] 13 Tex. Ct. Rep. 890, 89 S. W. 457. Servant of independent contractor injured by car of defendant while he was at work on a building near the track. Sack v. St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79. Steam allowed to escape from locomotive near traveled street, causing runaway. Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617. Whether privy had been properly inspected and maintained. Howe v. Chicago, K. & S. R. Co. [Mich.] 12 Det. Leg. N. 36, 103 N. W. 185. Where paid spectator at exhibition was killed by dead branch falling from a tree. Williams v. Camden Interstate R. Co., 138 F. 571. Whether it was negligence to keep a powder magazine in a certain place, under certain conditions. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170. Injuries caused by falling into elevator shaft through open door in dark hall. Fletcher v. Kelly [Ind. App.] 76 N. E. 813. Whether defendant was exercising the degree of care called for by court's instructions, in handling a bale of oakum over a passageway used by the public. Burns v. Dunham, Carrigan & Hayden Co. [Cal.] 82 P. 959. Pedestrian who stopped to look in at door of building in course of construction was killed by a stone sill knocked off the wall by a workman above. Riegert v. Thackery, 212 Pa. 86, 61 A. 614. Evidence sufficient to take issue of negligence to jury where stock of millinery was injured by water from an upper floor. Levinson v. Myers, 24 Pa. Super. Ct. 481. Negligence is a mixed question of law and fact. Jones v. American Warehouse Co. [N. C.] 51 S. E. 106. Nonsuit cannot be granted on ground that plaintiff has failed to prove want of ordinary care by defendant unless no other legitimate conclusion can be drawn from the proof by the jury. King v. Zierz [N. J. Law] 62 A. 287. When, in order to determine the nature of an act claimed to have been negligent, it is necessary to pass upon all the attendant facts and circumstances, the determination of the question is for the jury. United R. & Elec. Co. v. Watkins [Md.] 62 A. 234. If there is any evidence of negligence upon which the jury can properly find a verdict, or if the conclusion therefrom is debatable or rests in doubt, though the facts are undisputed, or

gence,[64] and proximate cause,[65] are questions of fact for the jury; but if the facts are undisputed and such that only one reasonable conclusion can be drawn therefrom, such issues may be properly passed upon by the court.[66] The capacity of children over seven years of age is for the jury.[67]

if the evidence is conflicting in regard to any material fact, it becomes a question of fact for the jury. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860. Error to direct verdict where evidence is conflicting as to manner in which injury occurred. West Chicago St. R. Co. v. Schulz, 217 Ill. 322, 75 N. E. 495. Instruction that failure to heed certain signals would be negligence was erroneous. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. As a matter of law an elevator is not a place of danger, and to give a special charge to the contrary would be error. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581. Even in cases where the res ipsa loquitur rule is applicable, it is error for the court to charge that certain acts do or do not constitute negligence, where there is no statute or ordinance on the subject; the question is for the jury. Augusta R. & Elec. Co. v. Weekly [Ga.] 52 S. E. 444. It is error for the court to tell the jury what facts do or do not constitute negligence unless there is a statute or valid municipal ordinance which in terms or effect declares the act referred to to be negligence. Atlanta & W. P. R. Co. v. Hudson [Ga.] 51 S. E. 29. Where evidence was conflicting as to negligence of a driver who dumped lumber so that it rolled on plaintiff, the decision of the trial judge on the question, based on a decision as to the credibility of the witnesses, was not disturbed. McDonnell v. New Orleans Cypress Co. [La.] 38 So. 896. Defendant's negligence in construction and maintenance of snow fence on adjoining owner's land, with the owner's consent, for the jury, where a board fell from the fence injuring a child of six. Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. Negligence for jury where woman walking along brick building in course of construction was struck on the head by a brick. Decola v. Cowan [Md.] 62 A. 1026.

64. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908; Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575; Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Central R. Co. v. Sehnert, 115 Ill. App. 560; Toledo, St. L. & W. R. Co. v. Christy, 111 Ill. App. 247; Shickle-Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444; Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910; Calloway v. Agar Packing Co. [Iowa] 104 N. W. 721; Arenschield v. Chicago, etc., R. Co. [Iowa] 105 N. W. 200; Christ v. Wichita Gas, Elec. Light & Power Co. [Kan.] 83 P. 199; Strauss v. United R. & Elec. Co. [Md.] 61 A. 137; Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617; Deland v. Cameron, 112 Mo. App. 704, 87 S. W. 597; McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 103 N. W. 285; Omaha St. R. Co. v. Mathiesen [Neb.] 103 N. W. 666. Wagon on street car track struck by car. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444. Woman stepped backwards and fell down stairway in defendant's store. Accousl v. Stowers Furniture Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 362, 87 S. W. 861. Conduct of person going upon railway tracks. Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553. Collision at railroad crossing. Steed v. Rio Grande Western R. Co. [Utah] 82 P. 476. Whether teamster, on premises to deliver goods, was negligent where he stepped into elevator well in an effort to escape a hole in the floor. Wright v. Perry, 188 Mass. 268, 74 N. E. 328. Whether tenant of building was negligent in going down stairway at night without lighting the gas, knowing the stair carpet was defective. Lee v. Ingraham, 94 N. Y. S. 284. Pedestrian stopped to look in at door of building in course of construction and was struck by a falling stone sill and killed. Riegert v. Thackery, 212 Pa. 86, 61 A. 614. Horse stepped through hole in bridge and plaintiff was thrown from wagon and injured. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234. Girl of 14 fell into open inlet in street while assisting grandmother across, there being evidence that it was dark. Dougherty v. Philadelphia [Pa.] 60 A. 261. Where boy was struck by wagon, whether he was negligent in not looking out for it was for the jury, where the question must be decided by reference to all attendant circumstances. Schramm v. Parker [N. J. Err. & App.] 62 A. 410. Contributory negligence is for the court only when the evidence admits of but one conclusion. Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458. Contributory negligence is for the jury, unless exact standard of duty is fixed. Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116. What a reasonably prudent person would do for his own safety under the circumstances of a particular case is a question for the jury. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154. If, construing evidence most strongly in favor of plaintiff, the jury could find that he exercised due care, the question should be submitted to the jury. Patterson v. Chicago & W. I. R. Co., 111 Ill. App. 441.

65. Moore v. Grachowski, 111 Ill. App. 216; City of Chicago v. Bush, 111 Ill. App. 638; Southern Const. Co. v. Hinkle [Tex. Civ. App.] 89 S. W. 309. Whether negligence of driver of vehicle or motorman caused collision. Palmer Transfer Co. v. Paducah R. & Light Co. [Ky.] 89 S. W. 515. Whether the evidence shows that an accident was the direct result of an act of God is ordinarily a question of fact for the jury. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 13 Tex. Ct. Rep. 153, 87 S. W. 395. If different minds might honestly draw from the testimony (from which negligence of the defendant could reasonably be inferred) different conclusions as to the cause of the accident, that question is for the jury. Ferguson v. Central R. Co., 71 N. J. Law, 647, 60 A. 382.

66. Negligence for court. McAllister v. Jung, 112 Ill. App. 138; McIntyre v. Orner [Ind.] 76 N. E. 750; Cleveland, etc., R. Co. v.

Instructions.[68]—They should cover all issues raised by the pleadings and supported by evidence,[69] but should not submit issues not so raised and supported.[70] "Negligence," "ordinary care," and "proximate cause," should be properly defined when the terms are used in other instructions.[71] Where an instruction clearly requires the jury to find all the facts which go to make up the negligence as charged in the petition, the failure to use the word "negligently" in the charge does not render it erroneous.[72]

Haas [Ind. App.] 74 N. E. 1003. When it appears from the undisputed facts that the injury cannot by any fair process of reasoning be attributed to the negligence complained of, the question is one of law. Terminal R. Ass'n v. Larkins, 112 Ill. App. 366. If plaintiff fails to produce any evidence of negligence on the part of the defendant, or if no fair inference of negligence can be drawn from the evidence favorable to plaintiff, assuming that such evidence is true, it becomes the duty of the court to nonsuit the plaintiff, or to direct a verdict for defendant. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860. Though the facts are undisputed, the question of negligence is for the jury if more than one reasonable inference might be drawn therefrom. Sharp v. Erie R. Co. [N. Y.] 76 N. E. 923.

Contributory negligence for court. Christensen v. Metropolitan St. R. Co. [C. C. A.] 137 F. 708. Evidence being clear and certain, unconflicting, and leaving no room for doubt, contributory negligence is for the court. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72. Where from admitted facts all reasonable minds must conclude that plaintiff's negligence alone caused the injury, a verdict may be directed for defendant. Hewes v. Chicago & E. I. R. Co., 217 Ill. 500, 75 N. E. 515; Chicago, B. & Q. R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101. If taking the evidence most strongly in favor of plaintiff, the jury could not properly find that he was exercising due care, the court should direct a verdict. Patterson v. Chicago & W. I. R. Co., 111 Ill. App. 441. The court may pass upon contributory negligence if there is no room for doubt as to the character of some prominent and decisive act done by plaintiff. United R. & Elec. Co. v. Weir [Md.] 62 A. 588. When facts are not disputed and the inferences and conclusions therefrom are indisputable, the question of contributory negligence is for the court. Bridges v. Jackson Elec. R. Light & Power Co. [Miss.] 38 So. 788. The court may find as a matter of law that certain conduct constitutes contributory negligence per se, when it is such an act that all men must conclude that it was the proximate cause of the injury complained of. Cincinnati, etc., R. Co., v. Lohe, 6 Ohio C. C. (N. S.) 144.

67. Whether children over 7 have been guilty of contributory negligence is a question of fact. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234. The question as to the measure of capacity of an infant more than fourteen years of age is a question for the jury, notwithstanding the legal presumption that he is sui juris. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361. No presumption arises as to whether a boy eleven years of age can be charged with contributory negligence, but his capacity to avoid danger is a question to be left entirely to the jury. Cincinnati Traction Co. v. Blackson, 6 Ohio C. C. (N. S.) 233. Child of 8 injured while playing on turntable. Berg v. Minneapolis & St. L. R. Co. [Minn.] 104 N. W. 293. Where conduct of child was such that it would constitute contributory negligence in an adult, it was properly left to the jury to say whether the child was capable of contributory negligence. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170.

68. See 4 C. L. 786. Only a few illustrative holdings are here given. See Instructions, 6 C. L. 43, for full treatment.

69. Where contributory negligence is pleaded and supported by proof, defendant is entitled to an instruction thereon, grouping the facts relied on. St. Louis S. W. R. Co. v. Everett [Tex. Civ. App.] 13 Tex. Ct. Rep. 890, 89 S. W. 457. Two distinct though concurring acts of negligence being charged, each party has a right to proper instructions on each ground relied on, and a general verdict cannot stand if there was error in instructing or refusing to instruct on either ground. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

70. Instruction should not be given on contributory negligence if there is no evidence thereof. South Covington & C. St. R. Co. v. Nelson [Ky.] 89 S. W. 200. Where wilful injury was not claimed, an instruction that if plaintiff was a trespasser or licensee he could not recover without proof of willful or gross negligence, was error. Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. Submission of issue of contributory negligence held prejudicial error where there was no evidence to support it. Clingan v. Dixon County [Neb.] 105 N. W. 710. Judgment reversed where instructions submitted negligence not charged in petition. Politowitz v. Citizens Tel. Co. [Mo. App.] 90 S. W. 1031.

71. In an action based on negligence, the court should define the terms "ordinary care" and "negligence" as used in other instructions. South Covington & C. St. R. Co. v. Nelson [Ky.] 89 S. W. 200. In an action based on negligence, negligence should be defined, though ordinary care is also defined. Covington Saw Mill & Mfg. Co. v. Drexilius, 27 Ky. L. R. 903, 87 S. W. 266. Failure to define proximate cause was not error when the court charged that negligence must be found to have been the "direct cause" of the injury, since a detailed and technical definition might have only confused the jury. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465. A special charge is properly refused, where it holds plaintiff to the exercise of proper care and caution, without defining what would constitute proper care and caution under the circumstances of the case under consideration. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581.

Verdicts and findings.[73]—If special findings are inconsistent with a general verdict, the verdict will be set aside.[74]

NEGOTIABLE INSTRUMENTS.[75]

§ 1. *Elements and indicia.*[76]—A negotiable instrument is an unconditional written promise or order[77] to pay to a certain person[78] or his order or to bearer[79] a certain amount of money[80] at a certain time.[81]

The time of payment[82] or the fact of the maturity of the instrument at some time must be morally certain,[83] and the certainty must exist at the time the instrument is executed.[84]

The amount[85] must be certain.[86] It is certain if it can be rendered so by computation.[87] A promise to pay a stated sum plus or minus a definite amount or discount is certain.[88] The amount is not rendered uncertain by a provision for exchange[89] and by the weight of authority a provision for attorney's fees does not

72. McCaffery v. St. Louis & M. R. Co. [Mo.] 90 S. W. 816.

73. See 4 C. L. 787; also Verdicts and Findings, 4 C. L. 1803.

74. Where special findings show contributory negligence on part of plaintiff, a general verdict for plaintiff should be set aside on motion. National Brass Mfg. Co. v. Rawlings [Kan.] 80 P. 628.

75. **Scope of topic:** Matters of general contract law have been excluded to Contracts, 5 C. L. 664, though arising out of suit on a negotiable instrument. The doctrines peculiar to such instruments mark the scope of the topic. Compare post, Non-Negotiable Paper, 6 C. L.

76. See 4 C. L. 788.

77. "Deposited with me by David Luther eight hundred dollars in cash and three hundred dollars in Yorktown bonds, to be delivered on call" is a promissory note and governed by the rules of law pertaining to that class of instruments. Luther v. Crawford, 116 Ill. App. 351. The negotiable instruments law defines a bill of exchange as an unconditional order drawn by one person on another, and a check as a demand bill drawn on a bank. Instrument held a bill of exchange and not a check. Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. S. 87.

78. See 4 C. L. 789, n. 4 et seq.

79. See post, Words of negotiability.

80. See post, The amount.

81. See post, Time of payment.

82. See 4 C. L. 789. A provision that without notice the payee or holder may extend the time of payment destroys negotiability. Rosenthal v. Rambo [Ind.] 76 N. E. 404. Act May 16, 1901 § 5, P. L. 194 makes a note containing a provision for confession of judgment before maturity, non-negotiable. Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494.

83. Joseph v. Catron [N. M.] 81 P. 439. A note payable upon the confirmation by congress of a certain land grant is not negotiable. Id.

84. The fact that a condition uncertain when the instrument was made subsequently becomes certain does not make the instrument negotiable. Joseph v. Catron [N. M.] 81 P. 439.

85. See 4 C. L. 788.

86. Loring v. Anderson [Minn.] 103 N. W. 722. There must be no uncertainty as to the amount called for at any particular time. Smith v. First State Bank [Minn.] 104 N. W. 369. Where one part of a note recites a consideration of $1,500 but other parts and the coupons attached as well as the mortgage securing it recites that it was given for $1,000 the amount is definite. Griggs v. Carson [Kan.] 81 P. 471.

87. Loring v. Anderson [Minn.] 103 N. W. 722.

88. Loring v. Anderson [Minn.] 103 N. W. 722. A promise to pay at a certain date a stated sum with interest is not rendered uncertain by a provision for discount if paid on or before such date. Id.

destroy certainty;[90] but certainty is destroyed by provisions for costs and collection charges[91] or for accelerated maturity if interest is not paid when due.[92] A provision for compound interest does not destroy negotiability[93] unless under a rule that the instrument must contain no condition not certain of fulfillment.[94]

Words of negotiability[95] must be contained in the instrument.[96]

The instrument must be delivered.[97] The acts which constitute a delivery are not dissimilar from those required to complete the execution of any other contract.[98] Delivery before date does not affect validity.[99]

§ 2. *Form and interpretation and effect.*[1]—The amount must be stated in the body of the instrument,[2] but where stated on the margin a bona fide holder may fill in a blank with such amount and enforce the instrument at law,[3] and if the amount was left blank by mistake, equity may correct it.[4] That the instrument is post dated does not destroy negotiability.[5] An instrument becomes non-negotiable after maturity.[6] In Indiana the instrument must be payable at a bank within the state.[7] A certificate of deposit is negotiable.[8] A mortgage is not.[9] Warehouse

89. Smith v. First State Bank [Minn.] 104 N. W. 369.

90. Green v. Spires [S. C.] 50 S. E. 554.

91. A provision for **costs, expenses** of collection and 10 per cent. of the amount collected as attorney's fees destroys negotiability. Green v. Spires [S. C.] 50 S. E. 554. A provision for exchange and collection charges renders the amount uncertain. Smith v. First State Bank [Minn.] 104 N. W. 369. See 15 Yale L. J. 200.

92. Provisions for a higher rate of interest after maturity, and for accelerated maturity if interest is not paid when due and for attorney's fees. Dickerson v. Higgins [Okl.] 82 P. 649.

93. A provision that if interest is not paid when due it shall become as principal and bear the same rate of interest does not make the amount uncertain. Brown v. Vossen, 112 Mo. App. 676, 87 S. W. 577.

94. Under a rule that the instrument must contain no condition not certain of fulfillment, a provision that if not paid when due principal and interest shall bear an increased rate of interest destroys negotiability. Cornish v. Woolverton [Mont.] 81 P. 4.

95. See 4 C. L. 789.

96. An admission of execution of an instrument payable to a certain person or his order admits the negotiability of the paper. Brown v. Feldwert [Or.] 80 P. 414.

97. Possession by a bona fide holder held insufficient to show delivery where there was uncontradicted evidence that delivery had been refused, that the payee had surreptitiously gotten possession of them, and that the maker on discovering their absence had demanded their return. Godman v. Henby [Ind. App.] 76 N. E. 423.

98. Evidence held to show delivery. Indiana Trust Co. v. Byram [Ind. App.] 72 N. E. 670. Evidence sufficient to show execution and delivery of a note. First Nat. Bank v. Bennett, 215 Ill. 398, 74 N. E. 405. A delivery is complete when an instrument is mailed. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523. A delivery to the payee's attorney is sufficient. Schultz v. Kosbab [Wis.] 103 N. W. 237.

99. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

1. See 4 C. L. 790.

2. That the amount stated on the margin is in words as well as in figures does not supply the omission to insert it in the body of the instrument. Chestnut v. Chestnut [Va.] 52 S. E. 348. A note with a blank amount is not admissible to prove an allegation of a specified sum due. Id.

3. Chestnut v. Chestnut [Va.] 52 S. E. 348. See 4 Mich. L. R. 474. Unless it appears that the amount was left blank by mistake it is presumed that the holder has a right to fill it in unless he has delayed doing so unreasonably. Chestnut v. Chestnut [Va.] 52 S. E. 348.

Note: This holding seems to be in accordance with the weight of authority. Hollen v. Davis, 59 Iowa, 444, 44 Am. Rep. 688; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; Daniel, Neg. Inst. §§ 86, 86a. In Strickland v. Holbrooke, 75 Cal. 268, the contrary view is taken upon the theory that it is immaterial whether the amount follows or precedes the promise. In the other cases the view seems to be that the marginal figures are not a part of the instrument but aids to remove ambiguities. Bank v. Hyde, 13 Conn. 279; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246; Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52.—See 4 Mich. L. R. 474.

4. Chestnut v. Chestnut [Va.] 52 S. E. 348.

5. A post dated check is negotiable. Symonds v. Riley, 188 Mass. 470, 74 N. E. 926.

6. While the Massachusetts court says that an instrument does not cease to be negotiable at maturity, it means that it does not cease to be assignable. Gardner v. Beacon Trust Co. [Mass.] 76 N. E. 455.

7. Under the laws of Indiana notes payable in bank in another state are not negotiable. Ray v. Baker [Ind.] 74 N. E. 619.

8. Title to the deposit passes by indorsement of the certificate. Hanna v. Manufacturers' Trust Co., 104 App. Div. 90, 93 N. Y. S. 304. A certificate of deposit payable to the depositor's order on demand is negotiable under Burns' Ann. St. 1901, § 7515. First Nat. Bank v. Stapf [Ind.] 74 N. E. 987.

Note: Certificates of deposit as promissory notes and their negotiability, see Banking and Finance, 5 C. L. 357, n. 66.

9. See 4 C. L. 790, n. 18. The Louisiana court says a mortgage is negotiable but does not

receipts possess attributes of negotiability.[10] Municipal warrants[11] and bills of lading[12] are not negotiable, and if an agent had not authority to issue bills of lading for goods not received,[13] such facts may be shown as against bona fide indorsee.[14]

Matters bearing on execution, interpretation and validity,[15] including the capacity of the parties, are governed by the law of the place of execution.[16] Matters connected with the payment,[17] including presentation, notice, demand, protest and damages for nonpayment[18] by the law of the place where the instrument by its terms is payable, matters respecting the remedy to be pursued,[19] including the bringing of suits, service of process and admissibilty of evidence[20] by the law of the place where action is brought, the validity of an indorsement,[21] and the indorser's liability,[22] are governed by the law of the place where the indorsement is made.

In some states patent right notes are declared void by statute unless the nature of the consideration is shown on the face of the instrument.[23] Such statutes are constitutional.[24]

A statute abolishing grace applies to all instruments falling within its terms.[25]

An instrument will be construed according to the plain import of its terms.[26] Instruments executed contemporaneously are to be construed together.[27] A provision for attorney's fees should be enforced if the condition is broken.[28]

possess the same perfect negotiability as a note and the right of the mortgagor to contest its validity is not to be determined from the bona fides of the holder but from the fact of whether the mortgagor is estopped. Hillard v. Taylor, 114 La. 883, 38 So. 594.

Note: It would seem from the conclusion of the court that it holds no more than that a mortgage is assignable [Editor].

10. A warehouseman cannot set up as against a bona fide holder of a receipt that it was issued through mistake. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417.

11. An order to pay money out of the general funds of a borough is not a negotiable instrument upon which a holder may sue in his own name. Commonwealth v. Sholtis, 24 Pa. Super. Ct. 487. Municipal warrants are not negotiable but the legal title passes by indorsement. Morrison v. Austin State Bank, 113 Ill. App. 651. Warrants issued by a borough for paving material are not negotiable. Coleman v. Borough of New Kensington, 140 F. 684.

12. A carrier may show as against a bona fide holder that the goods were not received. Swedish-American Nat. Bank v. Chicago, etc., R. Co. [Minn.] 105 N. W. 69. Assignments of bills of lading are not governed by the law merchant. Haas & Co. v. Citizens' Bank [Ala.] 39 So. 129.

13. Evidence held to show that the agent had not such authority. Swedish-American Bank v. Chicago, etc., R. Co. [Minn.] 105 N. W. 69.

14. Swedish-American Bank v. Chicago, etc., R. Co. [Minn.] 105 N. W. 69.

15. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523. A note dated and to be paid in Ohio and its first inception as a legal contract was when it was discounted in that state is an Ohio contract. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810.

16, 17, 18, 19, 20. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523.

21. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. The validity of an indorsement is ordinarily determined by the law of the place where made. Chemical Nat. Bank v. Kellogg [N. Y.] 75 N. E. 1103.

22. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. The liability of an indorser is governed by the law of the place where the indorsement is made and not of the place of presentment. Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. S. 87.

23. Kirby's Dig. § 513, declaring void notes given in payment of a patented article if they do not show on their face for what they were given applies to a sale of an interest in a right to sell a patented article in a given territory. John Woods v. Carl [Ark.] 87 S. W. 621.

24. A statute providing that notes given in payment of a patented article or patent right are void if they do not show on their face for what they were given is not repugnant to the Federal constitutional provision that congress may promote the progress of science and useful arts by securing to inventors the right to their discoveries. John Woods & Sons v. Carl [Ark.] 87 S. W. 621.

25. Comp. Laws 1897, § 4877, abolishing grace as to checks drawn on a bank payable at a specified date, applies to an order or check drawn on a bank payable 90 days after date. Jocque v. McRae [Mich.] 105 N. W. 874.

26. Note reciting "90 days after date we promise to pay," etc., followed by "Payments to be ten dollars per month or more if maker desires," is an instalment note. Crowe v. Beem [Ind. App.] 75 N. E. 302.

27. Where an instrument refers to another they must be construed together and conditions in the one referred to may render the former non-negotiable. Cornish v. Wolverton [Mont.] 81 P. 4. Negotiable instrument and a written agreement executed contemporaneously qualifying their effect are to be construed together. Myrick v. Purcell [Minn.] 103 N. W. 902.

Maturity is to be determined by computing from the date of the instrument.[29] A note payable on demand after date is demand paper.[30] An agreement to extend the time of payment until the holder is dissatisfied with his security does not make the instrument demand paper.[31] An agreement to extend the time of payment must be definite[32] and in some states is required by statute to be in writing.[33] Such an agreement is not conclusively implied from an acceptance of interest in advance.[34] An agreement to extend the time of payment of a debt is not to be implied from the acceptance of a note.[35] An omission to make interest payable at a particular date may be supplied by other recitals.[36]

A joint and several instrument may be shown to be a contract of each maker to pay only his proportionate share.[37] An instrument signed by one as an individual is presumed to be his personal obligation though he is secretary and treasurer of a corporation.[38] If an instrument appears on its face to have been executed in a representative capacity it will be regarded as the obligation of the principal,[39] and where the payee has notice that the maker signs as a representative, the maker is not personally liable,[40] but the mere addition of description letters to the signer's name will not exempt him from personal liability,[41] especially where the consideration is appropriated by him.[42] That the payee's name is followed by letters indicating his official capacity in an association does not show that the note was payable to him other than in his own right.[43]

§ 3. *Anomalous signatures and indorsements.*[44]—As a general rule one who signs an instrument before delivery is liable as a maker[45] in the absence of any

28. Where a note provides for attorney's fees if placed in the hands of an attorney for collection or collected by suit, attorney's fees should be allowed if suit is brought. Moore v. Brown [Tex. Civ. App.] 89 S. W. 310.

29. Where a note is dated and is made payable a certain time after date, maturity is to be ascertained by reference to the date written and not to the date of delivery. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

30. Schlesinger v. Schultz, 96 N. Y. S. 383.

31. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

32. An indorsement "Renewed July 6, 1901" cannot be construed as an agreement to extend the time of payment until such date. Breneke v. Smallman [Cal. App.] 83 P. 302.

33. Payment of interest beyond maturity does not extend the time of payment under a rule that an extending agreement must be in writing. Breneke v. Smallman [Cal. App.] 83 P. 302.

34. The acceptance of interest in advance is prima facie but not conclusive evidence of a contract to delay the time of payment. Kellam v. Brode [Cal. App.] 82 P. 213.

35. Where a creditor takes from his debtor a note payable at a future day, on account of his claim, the law raises no implication that he agrees to give time until the maturity of the note but the agreement must be proved as a fact. Hummelstown Brownstone Co. v. Knerr, 25 Pa. Super. Ct. 465.

36. The words "with the privilege of paying one or more thousand at interest date" makes interest payable annually and supplies an omission to make it payable at a particular date. Illinois Nat. Bank v. Trustees of Schools (Two cases consolidated), 111 Ill. App. 189.

37. By a contract executed contemporaneously. City Deposit Bank Co. v. Green [Iowa] 103 N. W. 96.

38. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 90 S. W. 206.

39. "Thirty days after date we promise to pay," etc., signed "The Akron White Sand & Stone Co., L. K. M. Secy. & Treas. D. B. Aungst, Pres." is the note of the company. Aungst v. Creque, 72 Ohio St. 551, 74 N. E. 1073.

40. Where the payee knows that the maker executes as a trustee and does not intend to incur personal liability, a note signed by one as trustee imposes no personal liability though the note does not on its face show that the consideration was for the benefit of creditors. Kerby v. Ruegamer, 107 App. Div. 491, 95 N. Y. S. 408.

41. Under the negotiable instruments law the mere addition of words describing the signer as filling a representative capacity without disclosing his principal, does not exempt him from personal liability. This is the rule notwithstanding the lithographed form bore the name of the corporation as well as the corporate seal. Daniel v. Glidden, 38 Wash. 556, 80 P. 811.

42. A note signed by corporation officials with their official designations is their personal obligations where the loan was procured by false representations and the money was not turned over to the corporation. Daniel v. Glidden, 38 Wash. 556, 80 P. 811.

43. Luster v. Robinson [Ark.] 88 S. W. 896.

44. See 4 C. L. 791.

45. The negotiable instruments law did not change this rule. § 138, providing that an instrument is not discharged by payment by one secondarily liable, does not apply to one who indorses a note payable to a third person before delivery. Quimby v. Varnum

agreement that he signs in a different capacity,[46] and payment by him extinguishes the debt.[47] That the term "indorse" was used does not reduce his liability.[48] In Kentucky an accommodation indorser is liable as a surety.[49] In Vermont it is held that if one not a party signs at any time he is prima facie a maker.[50] Parol evidence is admissible to show the capacity in which he signed where the indorsement is in blank.[51] But if he signs pursuant to an agreement, his character is to be determined from the terms of the agreement.[52] In Nebraska persons who indorse in blank, paper payable to the maker who afterwards indorses it to another are in the absence of any special agreement liable as indorsees,[53] and such character cannot be changed by parol evidence.[54] In equity it may be shown that the apparent maker is in fact only a surety.[55] This is the rule in Kentucky in an action at law.[56] As a general rule parol evidence is inadmissible to show an agreement between indorsers and indorsee that indorsers were not to be held liable as such.[57] A surety who executes a renewal note becomes bound as principal.[58]

§ 4. *Liabilities and discharge of primary parties.*[59]—A payee who negotiates paper in direct violation of his agreement not to do so is liable to the maker for the amount of the note with interest.[60]

Payment[61] at the place where the instrument is by its terms payable does not discharge the maker if the person to whom payment is made has not possession of the instrument nor authority to collect.[62] Where a payee indorses to another but retains possession, a payment to him is good though it is not indorsed by his indorsee.[63] One who pays to another than the holder has the burden of proving that the person to whom payment was made had authority to receive it.[64]

[Mass.] 76 N. E. 671. The negotiable instruments law expressly provides that one who signs in blank before delivery is a maker. Thorpe v. White, 188 Mass. 333, 74 N. E. 592. One who indorses a note before delivery is liable as a maker though entitled to notice of dishonor. Quimby v. Varnum [Mass.] 76 N. E. 671.

46. One who indorses before delivery without any agreement that his liability should be that of an indorser is liable as a maker. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109. That one count in a complaint on a note is against a party as an indorser or that the note was protested is insufficient to show an agreement that one who signed before delivery should be liable as an indorser only. Id.

47. It could not thereafter be put in circulation as against a co-promisor but he could recover from the co-promisor the amount paid if it was the duty of the latter to pay it. Quimby v. Varnum [Mass.] 76 N. E. 671.

48. One who indorses before delivery is a maker and the fact that he told the payee that he would "indorse" does not change his liability to that of an indorser. Lake v. Little Rock Trust Co. [Ark.] 90 S. W. 847.

49. Weller v. Ralston [Ky.] 89 S. W. 698.

50. Where one not a party indorses paper after it is in circulation. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

51. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

52. Held a question for the jury where the evidence as to the agreement was conflicting. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

53. Harnett v. Holdrege [Neb.] 103 N. W. 277.

54. Harnett v. Holdrege [Neb.] 103 N. W. 277. Parol evidence of a custom or course of dealing previously pursued by the maker with regard to other paper of like character is not admissible to show such indorsers to be joint makers. Id.

55. Jennings v. Moore [Mass.] 75 N. E. 214. Where a maker contended that he was in fact but a surety for an anomalous indorser who was in fact principal, evidence as to what was said between them at the time is admissible to show that the alleged maker in delivering the note acted upon what was said between holder and indorser. Id. Evidence of the transaction in which the note was given is admissible to show that the maker was in fact surety for an anomalous indorser. Id.

56. An apparent principal may show as against the obligee of a note that he is only a surety. Weller v. Ralston [Ky.] 89 S. W. 698.

57. Second Nat. Bank v. Woodruff, 113 Ill. App. 6.

58. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523.

59. See 4 C. L. 792.

60. Myrick v. Purcell [Minn.] 103 N. W. 902.

61. See 4 C. L. 793. That a payee writes "Paid" across the face of a note does not discharge it without delivery to the maker. Wittman v. Pickens, 33 Colo. 484, 81 P. 299.

62. Instrument was payable at a certain bank. State Nat. Bank v. Hyatt & Co. [Ark] 86 S. W. 1002.

63, 64. Higley v. Dennis [Tex. Civ. App.] 13 Tex. Ct. Rep. 609, 88 S. W. 400.

A material alteration[65] after delivery renders the instrument void in the hands of the payee or a bona fide holder.[66] The negotiable instruments law rule that such is not the effect as to a bona fide holder not connected with the alteration does not apply to rights fixed prior to its enactment.[67] An immaterial alteration[68] or one made to make a note conform to the intention of the parties[69] will not avoid it.

Defenses between the original parties.[70]—Except as affected by the doctrine of bona fides,[71] a negotiable instrument is a contract and subject to all defenses.[72] Hence, as between the parties, all equitable defenses are available.[73] The consideration may always be inquired into[74] and want or failure of a consideration is a defense.[75] It may be shown that delivery was conditional upon the performance of an unfulfilled condition,[76] or that the instrument was accommodation paper.[77] The capacity in which a party signed may be inquired into.[78]

§ 5. *Liabilities and discharge of sureties, guarantors and other anomalous parties.*[79]—A surety who signs upon an unfulfilled condition is not liable to a payee with notice.[80] An extension granted at maturity without notice to a surety releases him;[81] but a mere indulgence without a valid extension agreement does not.[82] A surety is not released by the surrender of the note on receipt of a worthless check if he was not prejudiced.[83] A surety may be released by contract with the holder,[84] but such release must be in writing.[85] The surety's obligation may be barred by limitations.[86] A surety who pays is entitled to be subrogated to all rights of the creditor against his principal[87] and to contribution against co-sureties,[88] but under

65. See 4 C. L. 793.

66. Hecht v. Shenners [Wis.] 105 N. W. 309. Plea setting up a material alteration held sufficient. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

67. Hecht v. Shenners [Wis.] 105 N. W. 309.

68. One that does not change the effect of the note. Crowe v. Beem [Ind. App.] 75 N. E. 302; Brown v. Feldwert [Or.] 80 P. 414.

69. Merritt v. Dewey, 115 Ill. App. 503.

70. See 4 C. L. 794.

71. See post, § 13.

72. See Contracts, 5 C. L. 664. Want of consideration may be shown as against one who is not a bona fide holder. Carrington v. Turner [Md.] 61 A. 324.

73. Equitable defense held sufficiently alleged in an answer on a note. Downing v. Donegan [Cal. App.] 82 P. 1111. Where the payee sues the maker the fact that the payee has indorsed the note is not evidence of fraud. Burns v. Goddard [S. C.] 51 S. E. 915.

74. Morgan v. Thompson [N. J. Err. & App.] 62 A. 410. As between the drawer and payee of a check payment of which was refused by the bank. want of consideration may be shown. Ross v. Saron, 93 N. Y. S. 553.

75. When a note signed by husband and wife is given for a preexisting debt of the husband, the wife cannot be held liable thereon. Hover v. Magley, 48 Misc. 430, 96 N. Y. S. 925; Littlefield v. Perkins [Me.] 60 A. 707. As between the parties a breach of warranty of goods which were the consideration of a note may be set up as a defense to it. Pratt v. Johnson [Me.] 62 A. 242.

76. Graham v. Remmel [Ark.] 88 S. W. 899. Proof that a note was to become binding only on the happening of a condition must be reasonably certain. Elwell v. Turney [Wash.] 81 P. 1047.

77. People's Nat. Bank v. Schepflin [N. J. Law] 62 A. 333; Morgan v. Thompson [N. J. Err. & App.] 62 A. 410.

78. As between the parties it may be shown that one jointly and severally liable is but a surety. North Ave. Sav. Bank v. Hayes, 188 Mass. 135, 74 N. E. 311.

79. See 4 C. L. 795.

80. Barber v. Ruggles, 27 Ky. L. R. 1077, 87 S. W. 785.

81. Westbay v. Stone, 112 Mo. App. 411, 87 S. W. 34.

82. Barber v. Ruggles, 27 Ky. L. R. 1077, 87 S. W. 785.

83. Where it does not appear that during the interval between notice of payment by the check and notice that the check had been dishonored he could have protected himself. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

84. Payment by a surety of a portion of notes not due is a sufficient consideration for an agreement by the payee to release him from further liability. Baldwin v. Daly [Wash.] 83 P. 724.

85. Under negotiable instruments law a renunciation by the holder of his rights against any party to the instrument must be in writing and the release of a surety cannot be shown by parol. Baldwin v. Daly [Wash.] 83 P. 724.

86. In Kentucky a surety's obligation is barred in seven years regardless of the obligee's knowledge of the relation he bears to the paper. Weller v. Ralston [Ky.] 89 S. W. 698.

87. A surety who pays is entitled to collateral security, and notes executed by the principal which the note on which he was surety was given to take up. Jennings v. Moore [Mass.] 75 N. E. 214.

88. Question held for the jury as to whether one co-surety had paid so as to be

the statutes of California payment by a surety extinguishes the debt[89] and he is only entitled to maintain action against the maker on an implied contract of indemnity.[90] A guarantor contracts to pay if the maker does not.[91] Illegality of consideration is a defense to the guarantor on his contract of guaranty.[92]

§ 6. *Negotiation and transfer generally.*[93]—Notes payable to one in a firm name may be assigned by him.[94] Title to bearer paper passes by delivery,[95] and that the transfer is to enable the transferee to recover for the benefit of the transferror does not affect the validity of the transfer.[96] A written assignment is not necessary to transfer the equitable title of order paper.[97] An undelivered deed of all the grantor's property does not operate as an assignment of a note held by him.[98] Rights incident to the paper pass with an assignment of it.[99] An indorsement for transfer carries with the instrument title to collateral security.[1] The assignment of a part of several notes secured by a lien with a guaranty of payment is a waiver of the lien as to the notes retained.[2]

§ 7. *Acceptance.*[3]—The drawer is not liable until he accepts.[4] By accepting a check the drawer makes himself a guarantor of it.[5] In some states an acceptance must be in writing.[6] The acceptor's rights rest in the terms of the instrument

entitled to contribution. Adams v. DeFrehn, 27 Pa. Super. Ct. 184.

89. Is not revived by a subsequent assignment to him. Crystal v. Hutton [Cal. App.] 81 P. 1115.

90. Crystal v. Hutton [Cal. App.] 81 P. 1115.

91. In an action against a guarantor it need not be shown that remedies against the maker were exhausted or that he is insolvent. Walter A. Wood Reaping & Mowing Mach. Co. v. Ascher [Md.] 62 A. 1023.

92. That the note was given for an illegal consideration is a defense available to the guarantor in an action upon the guaranty. Tandy v. Elmore-Cooper Live Stock Commission Co., 113 Mo. App. 409, 87 S. W. 614.

NOTE: The undertaking of a guarantor and that of an indorser are materially different. The contract of both is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. First Nat. Bank v. Babcock, 94 Cal. 96, 29 P. 415, 28 Am. St. Rep. 94. Moreover, the contract of a guarantor is more onerous than that of an indorser. "The indorser," says Mr. Daniel, "contracts to be liable only upon condition of due presentment of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made and notice given to him of dishonor, within a reasonable time. And in the event of a failure to make presentment and give notice within a reasonable time, he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay. The same person may be guarantor, and also indorser of a note; and in such a case, while failure to give due notice of demand and nonpayment will discharge him as indorser, he will be bound as guarantor." 2 Daniel on Negotiable Instruments, § 1754, citing Arents v. Commonwealth, 18 Grat. [Va.] 770; Castle v. Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; Burrow v. Zapp, 69 Tex. 476, 6 S. W. 783; Deck v. Works, 57 How. Pr. [N. Y.] 292.—From note to Pearsell Mfg. Co. v. Jeffreys [Mo.] 105 Am. St. Rep. 507.

93. See 4 C. L. 796.

94. Where the payee firm was composed of but one member. Gardner v. Wiley [Or.] 79 P. 341.

95. Meyer v. Foster, 147 Cal. 166, 81 P. 402. Possession of bearer paper is prima facie evidence of ownership and a defense that the possessor is not the real party in interest is unavailable unless it appears that a judgment would be no protection against other claimants or that there is a defense against one asserted to be the true owner that cannot be made in the action. Id.

96. The transferee can maintain action in his own name. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

97. First Nat. Bank v. Moore [C. C. A.] 137 F. 505.

98. Daneri v. Gazzola [Cal. App.] 82 P. 455.

99. Provision that the holder or holders may enforce payment and one that they may exercise the power to sell collateral and apply the proceeds to the payment of the note and of any other note held against the maker, pass with the note. Richardson v. Winnissimmet Nat. Bank [Mass.] 75 N. E. 97.

1. Kittler v. Studabaker, 113 Ill. App. 342.

2. Anderson v. Perry, 98 Tex. 493, 85 S. W. 1138.

3. See 4 C. L. 796.

4. Bullard Bros. v. Bank of Madison, 121 Ga. 527, 49 S. E. 615. Under the provisions of the negotiable instruments law the drawer of a check is not liable until it accepts or promises in writing to pay it. Van Buskirk v. State Bank of Rocky Ford [Colo.] 83 P. 778. A drawee who accepts is absolutely liable regardless of the consideration between himself and the drawer. Gresham v. Ragsdale [Ala.] 40 So. 99.

5. Farmers & Merchants Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939.

accepted[7] and in collateral agreements.[8] An acceptance upon specific conditions is subject to no other,[9] but the acceptor is not liable until the performance of the condition.[10] An acceptance of a draft for a certain sum is not an acceptance of one for that sum with exchange.[11] A partial acceptance is a qualified acceptance of a particular bill.[12] An acceptance in general terms of a bill addressed to a particular place will be deemed payable there.[13] An acceptance to pay at a particular time is waived by giving a note on account payable prior to such time.[14] Where a bill shows on its face that the drawer will pay from his own funds, an indorsee who is negligent in not ascertaining the genuineness of prior indorsements is liable to the drawer from whom he has collected.[15]

As between banker and depositor, the former is held to a knowledge of the latter's signature,[16] and cannot recover from intermediate indorsers if a forged check is honored.[17]

6. In Kansas, by statute. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119.

7. Parsons v. Wentworth [N. H.] 59 A. 623. Evidence held admissible relative to a contract to accept drafts. James v. Lyons Co., 147 Cal. 69, 81 P. 275.

8. The indorsee of a bill of lading with draft attached who induces a consignee to receive the goods which he has not ordered and accept the draft and draw back on shipper for any difference is liable to such consignee for loss occasioned him thereby. Groos & Co. v. Brewster, 34 Tex. Civ. App. 140, 78 S. W. 359.

9. An acceptance upon condition "that lumber to the value of the above must be on the switch" is subject to no other conditions. Fletcher v. Simms [Ark.] 86 S. W. 993. Where the holder of a fund accepts an order on a fund to be paid after certain other claims, the fact that another claim arose in his favor against the drawer does not affect the payee's rights. Cramer v. Munkres [Wyo.] 83 P. 374. An acceptance upon condition becomes absolute on the happening of such condition. Mace v. Richardson [Me.] 60 A. 701. Where order was accepted on condition that the drawer should become entitled to a payment under a contract between him and the drawee, on failure of the drawer to become so entitled, the payee could not recover on order on drawer's subsequently becoming entitled to payment under new contract between himself and the drawee. Glidden v. Massachusetts Hospital Life Ins. Co. [Mass.] 73 N. E. 538.

10. One who accepts on condition to pay out of any moneys that should come into his hands belonging to the drawer is not liable on his acceptance if no such moneys ever come into his hands. Where after drawing the order the drawer assigned all his interest in the fund to be collected by the drawee, money collected did not belong to the drawer. Knoll v. Melone [Cal. App.] 82 P. 982.

11. State Bank v. Citizens' Nat. Bank [Mo. App.] 90 S. W. 123.

12. State Bank v. Citizens' Nat. Bank [Mo. App.] 90 S. W. 123. An offer to accept a draft for a certain amount is not a partial acceptance so as to make the acceptor liable for such amount on a draft in excess of it. Id.

13. Where a draft is addressed to one at a certain place and accepted by him in general terms it is payable at such place, and the acceptor may be sued there regardless of where he resides, under the express provisions of Rev. St. 1895, art. 1194. Yett v. Green [Tex. Civ. App.] 86 S. W. 787.

14. Where an order is accepted payable at a certain time but the acceptor subsequently gives a note on account of the order he will be deemed to have waived the acceptance to the amount of the note and be held liable on it at maturity. Potter v. Greenberg, 24 Pa. Super. Ct. 502.

15. LaFayette & Bro. v. Merchants' Bank [Ark.] 84 S. W. 700.

Note: The general rule in such cases, where money has been paid under a mistake of fact, is that it may be recovered. Merchants' Nat. Bank v. Nat. Bank of Commerce, 139 Mass. 513; Thompson v. Bank, 82 N. Y. 1. But to this rule there is the well settled exception that where a draft with a forged indorsement has been put into circulation by the drawer or his agent, no recovery is allowed by the drawee as against the bona fide holder to whom he has paid. Hortsman v. Henshaw, 11 How. [N. Y.] 177. The latter class of cases are held to be analogous to those where a draft is drawn and indorsed in the name of a fictitious payee, in which case the drawer or his principal is estopped to deny its validity. Meachers v. Fort, Hill [S. C.] 227; Phillips v. Mer. Nat. Bank, 140 N. Y. 556, 37 Am. St. Rep. 596, 23 L. R. A. 554; Coggill v. Amer. Ex. Bank, 1 N. Y. 113, 49 Am. Dec. 310. By virtue of the relations in this case between the drawee and the drawer it was argued that the exception to the general rule as to mistake ought to apply, and the defendant be discharged. But the court held, very justly, it seems, that the bill of sale on the back of the draft was sufficient notice to defendant of the arrangement between drawer and drawee, to have put defendant on its guard and that the bill of sale was really a part of the draft. Thus, though the signature on the draft was genuine, the instrument itself was fraudulent and defendant must suffer the loss. Weisser v. Dennison, 10 N. Y. 69, 61 Am. Dec. 731; note 12 L. R. A. 791; 5 Cyc. 547, et seq.—3 Mich. L. R. 478.

16. See Banking and Finance, 5 C. L. 347. The drawee of a forged check who cashes the same relying on indorsements thereon is negligent. Farmers' & Merchants' Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939.

§ 8. *Indorsement.*[18]—An indorsement in blank converts order paper into bearer paper,[19] and vests title in the holder, but if after indorsement the paper gets back into the hands of the payee the law converts his possession into prima facie legal title upon which suit may be predicated, and the burden is on the defendant to overcome this presumption.[20]

An indorsement in blank on a note dated and payable in a certain state is presumed to have been made in such state,[21] and the indorser is estopped as against a bona fide holder to deny that it is a contract of such state.[22]

Authority in an agent to indorse commercial paper must be expressly conferred,[23] and one who accepts such indorsement is bound to see that it is authorized.[24] The principal is not liable unless it has ratified the indorsement[25] or is estopped to deny the authority of the agent to make it.[26]

An indorsement of payment is in the nature of a receipt, not of a contract, and may be contradicted by parol.[27]

Indorser's liability.[28]—An indorser guaranties the genuineness of all prior indorsements,[29] but does not warrant to the drawee the genuineness of the signature of the drawer.[30] An indorser's liability is contingent upon failure of the maker to pay at maturity[31] due protest and notice thereof.[32] One who indorses a postdated

17. A drawee bank which pays a forged check which has been honored and indorsed by other banks, and holds the same for 30 days, admits the signature of the drawer to be correct and is estopped to avoid the payment as to indorsing banks. Farmers' & Merchants' Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939.

18. See 4 C. L. 798.

19. Brown v. Fisher [Ind. App.] 74 N. E. 632. A note payable to the maker and indorsed by him is bearer paper. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

20. Hughes v. Black [Ala.] 39 So. 984. This rule is not changed by Code 1896, p. 1200, providing that title of an indorsee shall not be disputed except by verified plea. Id.

Note: A blank indorsement gives the holder prima facie title upon which suit may be based. Bank v. Wofford, 71 Miss. 711; Berney v. Steiner, 108 Ala. 111, 54 Am. St. Rep. 144; Curtis v. Sprague, 51 Cal. 239. The burden is on defendant to show want of title in him. Shaw v. Jacobs, 89 Iowa 713, 48 Am. St. Rep. 411, 21 L. R. A. 440; Anniston v. Furnace Co., 94 Ala. 606.—See 4 Mich. L. R. 475.

21. At common law as well as under the negotiable instruments law. Chemical Nat. Bank v. Kellogg [N. Y.] 75 N. E. 1103.

22. Where the indorsement was accommodation and was in fact made in another state according to the laws of which it was void. Chemical Nat. Bank v. Kellogg [N. Y.] 75 N. E. 1103.

23. An agent with authority to collect cash has no implied authority to indorse his principal's name upon commercial paper and collect cash upon it. Goodell v. Sinclair & Co., 112 Ill. App. 594. Where the name of a corporation was indorsed on an instrument by one without authority, the corporation is not liable though it received the money where it did not ratify the act and was not estopped to deny the authority of the person who used its name. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124.

24. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124.

25. A corporation which has no knowledge of the act of its agent in making an indorsement until the paper is presented for payment cannot be held to have ratified the act. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124.

26. Corporation held not estopped to deny the authority of its agent to indorse paper. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124.

27. McCaffrey v. Burkhardt [Minn.] 105 N. W. 971.

28. See 4 C. L. 798.

29. As where the name of a payee is forged on a check and the check is cashed by a bank different from the one on which the check is drawn and the former indorses it, the latter need not inquire as to the genuineness of the payee's signature. Wellington Nat. Bank v. Robbins [Kan.] 81 P. 487. Where a payee's indorsement was forged to a check a subsequent indorser who is notified by the drawee of an action by the payee and requested to assume the defense is liable to the drawee for the amount of the judgment, attorneys' fees and expenses incurred. Id.

30. Such warranty extends only to subsequent holders. Farmers' & Merchants' Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939.

31. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. Recovery cannot be had on a contract of indorsement without proof that by due diligence to bring suit and enforce judgment the note could not have been enforced against the principal at any time after maturity. Godfrey v. Wingert, 110 Ill. App. 563.

32. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. A complaint against an indorser showing on its face want of protest or notice of nonpayment is demurrable. Beauchamp v. Chester [Tex. Civ. App.] 86 S. W. 1055. Failure to demand payment or give notice of dishonor at ma-

instrument is bound by the liabilities imposed by his indorsement as to all subsequent holders.[33] An indorsement for the mere purpose of passing title does not impose upon the indorser the liabilities flowing from the contract.[34] It is immaterial to an indorser having no legal defense whether the subsequent transfers of a note were made in good faith for a valuable consideration or before maturity.[35] Unless there was an understanding that indorsers should indemnify the payee, he cannot recover from them the expense of bringing a creditor's suit against the maker.[36] An indorser who is required to pay may recover from the maker the amount paid with interest from date of payment.[37] An indorser may be sued without joining the maker.[38]

Indorsers are liable inter se in the inverse order of their indorsement.[39] Under the negotiable instruments law it may be shown that indorsers have agreed as to liability otherwise than as appears from the order of indorsement.[40] As between indorser and indorsee an indorsement may be impeached for fraud.[41]

An indorsement for collection[42] makes the indorsee the mere agent of the indorser,[43] but he may sue in his own name.[44]

Discharge of indorser.[45]—An extension granted the payee discharges an indorser[46] if granted by one with authority to make the contract.[47]

§ 9. *Presentment and demand.*[48]—Presentment for payment is essential to charge an indorser.[49] A note payable at a bank is properly presented there though the bank is in the hands of a receiver.[50] Demand paper must be presented within a reasonable time[51] in order to charge an indorser.[52] What is due diligence depends

turity discharges an indorser. Westbay v. Stone, 112 Mo. App. 411, 87 S. W. 34.

33. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

34. One who obtains a note for another's benefit is not liable to him as an indorser where he indorses it to him. Peabody v. Munson, 113 Ill. App. 296. Where a payee indorses secured notes to the maker under an agreement that the latter should deliver them to a stockholder to secure advances to the maker, he is not liable to the holder as an indorser. Bradley v. Bush [Cal. App.] 82 P. 560.

35. Meyer v. Foster, 147 Cal. 1 [illegible] P. 402.

36. He sued and had a decree but it was reversed and he came back on indorsers for the full amount. Jefferson County Nat. Bank v. Dewey, 181 N. Y. 98, 73 N. E. 569.

37. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 90 S. W. 206.

38. Code Civ. Proc. § 454 expressly provides that an indorser may be sued without joining the maker. Singer v. Abrams, 47 Misc. 360, 94 N. Y. S. 7.

39. Where the last indorser pays he may recover from one preceding him. Hill v. Buchanan, 71 N. J. Law, 301, 60 A. 952. An indorsee after due diligence to collect may sue his immediate or any remote indorser. First Nat. Bank v. Stapf [Ind.] 74 N. E. 987.

40. Morgan v. Thompson [N. J. Err. & App.] 62 A. 410.

41. It may be shown to have been procured by false representations that no liability would be incurred by virtue of it. Nethercutt v. Hopkins, 38 Wash. 577, 80 P. 798.

42. See 4 C. L. 799.

43. Hence where a number of men not so organized as to be an entity own a note made by one of their number, one to whom the note is indorsed for collection cannot maintain an action thereon because so far as the maker is concerned he would be suing himself. Welch v. Kinney [Or.] 80 P. 648.

44. Neal v. Gray [Ga.] 52 S. E. 622.

45. See 4 C. L. 799.

46. Evidence insufficient to show an extension agreement whereby an indorser was discharged. People's Sav. Trust & Banking Co. v. Louque, 114 La. 1041, 38 So. 823.

47. The cashier of a bank has no implied authority merely by virtue of his office to receive interest in advance and agree to extend the time of payment and thus discharge an indorser. Bank of Ravenswood v. Wetzel [W. Va.] 50 S. E. 886.

48. See 4 C. L. 800.

49. In an action against the drawer of a check payment of which is alleged to have been refused, the holder must prove presentment and refusal of payment. Ross v. Saron, 93 N. Y. S. 553. Failure to present and demand payment is presumed to damage the indorser to the full amount of the note as it is presumed if presentment had been made the note would have been paid. Hayward v. Empire State Sugar Co., 93 N. Y. S. 449. Evidence that a check was mailed to the payee and that he failed to present it for 20 days held sufficient to raise the issues as to receipt and acceptance of the check. Pink Front Bankrupt Store v. Mistrot & Co. [Tex. Civ. App.] 90 S. W. 75.

50. Under negotiable instruments law. Schlesinger v. Schultz, 96 N. Y. S. 383.

51. 10 months held reasonable on paper payable on demand after date with interest and not negotiated until 10 days after date. Schlesinger v. Schultz, 96 N. Y. S. 383.

52. This is the rule where the effect of Gen. St. 1888, § 1859, providing that demand paper not presented within four months is

on the circumstances of each case.[53] If presentation would have been useless failure to present may be excused,[54] and the question of diligence is immaterial.[55] No custom, general or special,[56] or negligence of agents,[57] will excuse want of due diligence in presenting a check for payment; but due diligence does not require the holder, in the absence of special circumstances or custom, to present it at other than banking hours.[58] Failure to present cannot be complained of if it is the result of the drawer's act.[59] One receiving a check on a distant bank is required to transmit it to the place of payment the day following receipt.[60]

§ 10. *Protest and notice thereof.*[61]—Foreign bills must be protested in order to charge the drawer.[62] A contract for waiver of protest is not to be extended beyond the fair import of its terms.[63]

Notice of nonpayment is essential to charge an indorser[64] or a drawer of a check.[65] That presentment is excused does not excuse notice of nonpayment.[66] The date recited in the instrument controls as to maturity for the purpose of giving notice of dishonor.[67] Notice must be given the day following date of dishonor.[68] Due diligence must be observed in delivering notice.[69] Delivery to an agent may be

deemed dishonored, is waived. Hampton v. Miller [Conn.] 61 A. 952.

53. The provision of negotiable instruments law providing for presentment to the personal representative of a deceased maker if with reasonable diligence he can be found is complied with by four attempts to find him at his usual places of business. Reed v. Spear, 94 N. Y. S. 1007.

54. Where a note is payable at a national bank which is in the hands of a receiver, presentment need not be made to the receiver, as he has no authority to appropriate money in his hands to pay it. Schlesinger v. Schultz, 96 N. Y. S. 383.

55. Where after transfer of a certificate of deposit the bank had no property subject to attachment the transferror is liable on his indorsement regardless of the question of diligence. First Nat. Bank v. Stapf [Ind.] 74 N. E. 987.

56. The presenting of checks through the clearing house the day after receiving them, instead of having them certified on the same day, was claimed to be a usage, but held not to be reasonable diligence. Bank of Commerce v. Miller, 105 Ill. App. 224.

57. When the failure of a bank holding a check as indorsee to present it for payment is predicated on some act or omission of one of its agents having authority to make presentation, it is not excused by the fact that such agent was ignorant of the existence of the check. Temple v. Carroll [Neb.] 105 N. W. 989.

58. Temple v. Carroll [Neb.] 105 N. W. 989.

59. Where the holder of a check loses it and immediately gives notice of the loss to the drawer who does nothing to assist in procuring payment, he cannot set up negligence of the holder when all of his funds are subsequently wrongfully withdrawn from the bank by his partner. Sharp v. Nathan Mercantile Co. [Ark.] 88 S. W. 305.

60. Civ. Code 1903, § 2256, exonerating drawers and indorsers if presentment be not made within 10 days, is inapplicable. Manitoba Mortg. & Inv. Co. v. Weiss [S. D.] 101 N. W. 37.

61. See 4 C. L. 800.

62. Under the express provisions of the negotiable instruments law failure to protest a foreign bill for nonpayment discharges the drawer. Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. S. 87.

63. Blatchford v. Harris, 115 Ill. App. 160.

64. In an action against an indorser failure to show timely notice of dishonor precludes a recovery. Solomon v. Cohen, 94 N. Y. S. 502. A conversation with an indorser relative to the note after the death of the maker held insufficient to constitute notice of dishonor. Reed v. Spear, 94 N. Y. S. 1007. Evidence held to show notice of nonpayment duly given after payment refused. People's Sav. Trust & Banking Co. v. Louque, 114 La. 1041, 38 So. 823. Evidence insufficient to establish the direct giving of notice of protest to an accommodation indorser. Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. S. 768.

65. In an action against the drawer of a check notice of nonpayment must be alleged and proven. Ross v. Saron, 93 N. Y. S. 553.

66. The provision of negotiable instruments law that if the person primarily liable is dead and no personal representative has been appointed presentment is excused does not excuse notice of nonpayment to an indorser. Reed v. Spear, 94 N. Y. S. 1007.

67. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

68. The negotiable instruments law requires notice of dishonor, if to be given at the place of business of the person entitled, to be before close of business hours on the day following dishonor; hence notice two or three days after maturity is too late. Solomon v. Cohen, 94 N. Y. S. 502.

69. Negotiable instruments law providing that notice of dishonor to charge an indorser may be given personally or through the mail to a party or his agent on his behalf is not shown to have been complied with by evidence of service on a hotel corporation by leaving the notice at the cashier's window without calling any one's attention to it. American Exch. Nat. Bank v. American Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. S. 1006.

sufficient.[70] Under the negotiable instruments law a maker cannot on his own behalf give notice of protest to an accommodation indorser, yet he may give such notice as agent of the holder.[71] The fact of depositing in the post office a letter enclosing notice of protest raises a presumption that it reached its destination.[72] This is so whether it is deposited in a street mail box or in the general post office.[73] Such presumption may be rebutted by showing that the letter was not received.[74] The letter must be properly addressed,[75] but if actually received error in the address is immaterial.[76]

The certificate of protest as evidence.[77]—A notary's certificate is presumptive evidence of the facts therein certified,[78] but not of facts not stated.[79]

§ 11. *New promise after discharge and waiver of presentment or the like.*[80]—A waiver of notice of presentment, dishonor and protest is not a waiver of presentment and demand for payment.[81]

§ 12. *Accommodation paper.*[82]—An extension of time of payment is a sufficient consideration for the indorsement of one not before a party.[83] An accommodation party is liable according to the terms of the instrument though a holder knows his status.[84] The destruction of the instrument after delivery does not affect his liability.[85] Accommodation paper is not enforceable as between the accommodation signer and the person for whose benefit he signed,[86] nor in the hands of a party with notice that the signature was procured by fraud.[87] An accommodation maker who is compelled to pay may recover from the parties for whose accommodation the note was made.[88] Such an action is not one upon the note.[89]

An accommodation note made by a married woman who is prohibited by law from making such paper never becomes her obligation and the law merchant does not

70. Service of notice of dishonor on an indorser's wife who acted as his assistant, at the indorser's place of business is sufficient especially where the indorser actually received notice within the time prescribed by law. Reed v. Spear, 94 N. Y. S. 1007.

71. Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. S. 768.

72, 73, 74. Phoenix Brewing Co. v. Weiss, 23 Pa. Super. Ct. 519.

75. Where notice was mailed to 24 M. St. but the indorser's place of business was at 22 and 23 M. St. and it appeared that there was another person of the same name in the town who often got the indorser's mail by mistake it was held that due notice had not been given. Siegel v. Hirsch, 26 Pa. Super. Ct. 398.

76. A notarial notice of protest, addressed to an indorser as if living when the indorser is dead if actually received by his administrator is good to charge such indorser's estate. Bank of Ravenswood v. Wetzel [W. Va.] 50 S. E. 886.

77. See 4 C. L. 801.

78. Where it states that presentment was made at the bank and "found the bank closed," it is presumed that presentment was made during regular banking hours. Schlesinger v. Schultz, 96 N. Y. S. 383. Unless an affidavit that notice has not been received as prescribed by Code Civ. Proc. § 923 is served on the adverse party. Solomon v. Cohen, 94 N. Y. S. 502.

79. A notary's certificate of presentation and nonpayment only is no evidence that notice of dishonor has been served. Solomon v. Cohen, 94 N. Y. S. 502.

80. See 4 C. L. 802.

81. Hayward v. Empire State Sugar Co., 93 N. Y. S. 449. A waiver of notice of protest is not a waiver of demand for payment. Batchford v. Harris, 115 Ill. App. 160.

82. See 4 C. L. 802.

83. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

84. Chambers v. McLean, 24 Pa. Super. Ct. 567.

85. Where accommodation indorsers signed a note for $300 and the payee advanced $100 but refused to advance any more until another indorser was procured and on obtaining possession of the note for such purpose the maker destroyed it the indorsers are liable for the amount advanced. Westheimer v. Helmbold, 109 App. Div. 854, 96 N. Y. S. 830.

86. Evidence held to raise a question for the jury as to whether a note sued upon was accommodation paper. Hunter v. Allen, 94 N. Y. S. 880. Evidence insufficient to show that a note was delivered under an agreement that it should be used by the payee only in case funds were necessary to carry out the transaction in which it was given. Jennings v. Moore [Mass.] 75 N. E. 214.

87. Evidence sufficient to show that an indorsement for accommodation was given without consideration was obtained by fraud and hence the indorser was not liable to a holder with notice. Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360.

88. Morgan v. Thompson [N. J. Err. & App.] 62 A. 410. See 4 Mich. L. R. 475.

89. Hence parol evidence to show the nature of the transaction does not vary the terms of the instrument. Morgan v. Thompson [N. J. Err. & App.] 62 A. 410.

apply to it.[90] The provisions of the negotiable instruments law does not give validity to an accommodation note executed by a married woman in violation of law.[91]

As a general rule a corporation has no power to issue accommodation paper,[92] and is not liable on an accommodation indorsement in the hands of one who takes with knowledge of the character of the paper, though such indorsement was authorized by all the directors and a majority of the stockholders.[93] Accommodation paper of a business corporation cannot be enforced as against creditors or dissenting stockholders,[94] but the corporation itself cannot plead ultra vires.[95]

§ 13. *The doctrine of bona fides. Who may be a holder.*[96]—To be a bona fide holder one must take in the usual course of business,[97] before maturity,[98] for a valuable consideration[99] and without notice of infirmities.[1] The paper must be properly indorsed if it is payable to order.[2]

Once bona fide holdership always bona fide holdership,[3] consequently a bona fide holder may transfer his rights to one with notice,[4] but this rule does not apply where the paper is returned to the hands of the payee.[5]

Notice and knowledge.[6]—Notice, in order to destroy one's character as a bona fide holder must be of facts sufficient to impute bad faith.[7] Suspicious circum-

90. People's Nat. Bank v. Schepflin [N. J. Law] 62 A. 333. Where a bank refused to loan money to a husband but offered to loan it to his wife and after the wife executed the note and a proceeds check placed the money to the credit of the husband, the note was held to be accommodation paper. Id.

91. The provisions that paper is presumed to be based on a valuable consideration and parties thereto to have become parties for value. People's Nat. Bank v. Schepflin [N. J. Law] 62 A. 333.

92. See Corporations, 5 C. L. 773. A corporation cannot make accommodation indorsements. National Bank v. Snyder Mfg. Co., 94 N. Y. S. 982.

93. Brill Co. v. Norton & T. St. R. Co. [Mass.] 75 N. E. 1090. One who accepts notes indorsed by a corporation payable to and indorsed by the maker for a debt due the indorsee from the maker is charged with notice that the corporation indorsement is prima facie accommodation. Id. Where accommodation is made by a corporation it may show such fact in an action by the holder and that such holder took it from the payee with notice of its character. National Bank v. Snyder Mfg. Co., 94 N. Y. S. 982. Evidence that the payee paid interest on a note held admissible on the question of notice. Id.

94, 95. Perkins v. Trinty Realty Co. [N. J. Eq.] 61 A. 167.

96. See 4 C. L. 803.

97. Bettanier v. Smith [Iowa] 105 N. W. 999. Complaint held to allege facts constituting bona fide holdership. Haslach v. Wolf [Neb.] 103 N. W. 317. Affidavit of defense held not to state facts sufficient to show that an indorsee was not a holder for value. Brian v. Merrill, 23 Pa. Super. Ct. 629.

98. One who takes after maturity is not a bona fide holder. Carrington v. Turner [Md.] 61 A. 324. A set off available against the payee is available against the holder. Little v. Sturgis, 127 Iowa, 298, 103 N. W. 205. One who takes from the payee after maturity takes subject to the same defenses that the paper was liable to in the hands of his indorser. If his indorser was estopped from enforcing it he is likewise estopped. May v. First Nat. Bank [Neb.] 104 N. W. 184. That one who signed did so under an agreement that the payee would not hold him responsible is admissible. Citizens' Nat. Bank v. Cammer [Tex. Civ. App.] 86 S. W. 625.

99. See post, Parting with value.

1. One who takes for value but with notice of defenses is not a bona fide holder. Collins v. Schmidt [Wis.] 105 N. W. 671.

2. The assignment of order paper without indorsement destroys negotiability. Cornish v. Woolverton [Mont.] 81 P. 4. An assignee of order paper is not a bona fide holder. First Nat. Bank v. Moore [C. C. A.] 137 F. 505 (dictum).

3. See 4 C. L. 803. An indorsee after maturity with notice of defenses is protected if his indorser was a bona fide holder. Symonds v. Riley, 188 Mass. 470, 74 N. E. 926.

4. A purchaser from a bona fide holder though with notice takes free from defenses available as between the parties. Aragon Coffee Co. v. Rogers [Va.] 52 S. E. 843; Hillard v. Taylor, 114 La. 883, 38 So. 594.

5. Aragon Coffee Co. v. Rogers [Va.] 52 S. E. 843.

6. See 4 C. L. 804.

7. That notes are impressed with a trust in the hands of the holder does not impute notice of such fact to an indorsee. Bank of Luverne v. Birmingham Fertilizer Co. [Ala.] 39 So. 126. He must take without notice of fraud or knowledge of such facts that his action in taking amounted to bad faith. Mack v. Starr [Conn.] 61 A. 472. That a note was made by the officers of a corporation payable to the corporation, indorsed in the name of the corporation and by the president and secretary is not notice that it is accommodation paper which the corporation has not power to execute. In re Troy & Cohoes Shirt Co., 136 F. 420. The fact that a banker's draft fraudulently pro-

stances[8] or negligence, however gross,[9] is not enough. That a party discounting notes knows that the president and secretary of a corporation maker were members of the firm for whose accommodation the notes were made does not charge him with notice of the character of the notes,[10] or that it is accommodation paper which the maker had not power to execute;[11] but one who is told by an indorser that there is something wrong with the paper and not to take it cannot afterwards claim to be a bona fide holder as against such indorser whose indorsement was procured by fraud,[12] and if a holder informs a purchaser that he has no title or that he holds as agent, such purchaser is not a bona fide holder.[13] Under the negotiable instruments law, one who has knowledge of a defect in his transferror's title or knowledge of such facts that his action in taking amounts to bad faith is not a bona fide holder.[14] A purchaser who has been put upon inquiry cannot rely on information imparted by one whose interest it is to deceive him.[15] An indorsee is charged with notice of facts appearing from the face of the instrument.[16] One who takes from an officer of a corporation in payment of his personal debt the notes of such corporation does so at his peril,[17] and one who takes from an agent is bound to ascertain the scope of his authority,[18] but may rely on apparent authority.[19] An agent

cured by an ex county treasurer and given by him to the treasurer in payment of a shortage in his accounts was made payable to the treasurer does not charge the county with notice of irregularity in its procurement and it may retain as against the drawers the proceeds when collected from the drawee. Hathaway v. Delaware County, 103 App. Div. 179, 93 N. Y. S. 436. Evidence insufficient to show that a holder took with notice of defects or under circumstances sufficient to put a prudent man on guard. Morrison v. Hart [Ga.] 50 S. E. 471.

8. Harrington v. Butte & B. Min. Co. [Mont.] 83 P. 467. An instruction that if there is anything in an instrument to cast suspicion on its character the holder will be considered to have taken it under circumstances rendering him guilty of bad faith, invades the province of the jury. Id. Where in the acquisition of notes from a bona fide holder the transferee is represented by the person who originally negotiated the notes in fraud, this agency may give rise to suspicions but will not as a matter of law vitiate the title of the transferee, it having been the act of the principal through the agent. Hillard v. Taylor, 114 La. 883, 38 So. 594. Where the consideration was services to be performed failure of performance is no defense against a holder with notice of the nature of the consideration but not of its failure. Wilensky v. Morrison [Ga.] 50 S. E. 472.

9. Bad faith is essential. Merritt v. Dewey, 115 Ill. App. 503. Knowledge of circumstances sufficient to excite in the mind of a prudent man a suspicion, and gross negligence in taking the paper, do not destroy bona fide holdership. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880. That one takes under circumstances which would put a reasonable man on inquiry does not prevent him from being a bona fide holder unless the circumstances are such as to show bad faith. Harrington v. Butte & B. Min. Co. [Mont.] 83 P. 467.

10, 11. In re Troy & Cohoes Shirt Co., 136 F. 420.

12. Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360.

13. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880.

14. Keene v. Behan [Wash.] 82 P. 884. Under negotiable instruments law declaring the title of one who negotiates an instrument to be defective if the consideration was illegal, the title of the payee of a note given for usurious interest is defective. Id.

15. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880. One who has destroyed his prima facie title arising from possession by admitting that he has no title, cannot restore it by a verbal claim that he has since acquired title. Id.

16. That one though jointly liable was a surety. North Ave. Sav. Bank v. Hayes, 188 Mass. 135, 74 N. E. 311. Where an instrument is payable to one as trustee it shows on its face that there is a beneficiary and an indorsee is charged with notice, and is obliged to inquire as to the rights of the trustee and his authority to transfer it. This is notice under the negotiable instruments law. Ford v. Brown & Co., 114 Tenn. 467, 88 S. W. 1036.

17. Warshawsky v. Grand Theatre Co., 94 N. Y. S. 522; Orr v. South Amboy Terra Cotta Co., 94 N. Y. S. 524.

18. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880.

19. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880. Negotiable paper indorsed in blank in the hands of an agent cannot be regarded by a stranger with notice of the agency as prima facie proof of title and of power of attorney to do all acts incident to ownership, but he may deal with the agent as such and rely on his apparent authority to sell. Id.

who has possession for collection only of paper indorsed in blank may be dealt with by strangers having no notice of the capacity in which he holds as the owner.[20] But if a stranger has notice of the fact of agency he must regard the paper as the property of the principal and deal with the paper accordingly.[21] A person in possession of order paper indorsed in blank is presumed to be either the owner or an agent with full power to dispose of it,[22] and in the absence of actual or constructive notice of defect of title, fraud or other circumstance which would vitiate title, a purchaser need not make inquiry as to how the holder of paper acquired it.[23] Notice to an agent who takes paper for his principal is notice to the principal.[24] Notice acquired subsequent to taking the paper does not divest one of his character as a bona fide holder.[25]

Taking in due course of business.[26]

Taking before maturity.[27]—To be a bona fide holder the paper must be taken before maturity.[28] In the absence of proof of the date of an indorsement it is presumed to have been made before maturity and that the indorsee is a bona fide holder.[29] That paper is taken after maturity does not subject it to any defenses other than such as are connected with the paper itself,[30] and a signer must prove as against an indorsee after maturity that he had a defense against the payee.[31] The rule that a taker after maturity takes subject to defenses available to the maker does not prevent the operation of the rule that an assignee from an apparent owner takes free from an equity in favor of an intermediate transferror.[32]

Parting with value.[33]—One who takes as security for an antecedent debt under an agreement to forbear suing for a time is a holder for value,[34] but a bank discounting paper for a depositor and placing the proceeds to his credit is not, until the deposit is withdrawn, a bona fide holder.[35] Under negotiable instruments law if value has at any time been given, a holder is deemed to hold for value as to all who become parties prior to that time.[36]

Rights of a bona fide holder.[37]—A bona fide holder takes free from defenses available to the original parties,[38] hence, as to him, want of delivery,[39] failure of

20, 21. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880.

22. Theard v. Gueringer [La.] 38 So. 979. A bank to which bearer paper is presented is not negligent in cashing it without having the holder identified. Farmers' & Merchants' Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939.

23. He may rely upon possession as sufficient evidence of title. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co. [W. Va.] 50 S. E. 880.

24. Haynes v. Gay, 37 Wash. 230, 79 P. 794. Notice to an agent is notice to the principal. Bettanier v. Smith [Iowa] 105 N. W. 999. Whether one was a bona fide purchaser or purchased as the agent of one with notice held a question of fact. Aragon Coffee Co. v. Rogers [Va.] 52 S. E. 843.

25. Morrison v. Hart [Ga.] 50 S. E. 471; Hillard v. Taylor, 114 La. 883, 38 So. 594.

26, 27. See 4 C. L. 804.

28. One taking after a breach of condition that failure to pay interest when due would mature the entire debt is not a bona fide holder. Ray v. Baker [Ind.] 74 N. E. 619. Evidence of statements made by an agent of the holder held admissible on the question of whether the note in suit was acquired before maturity. Nigro & Co. v. Security Bank [Tex. Civ. App.] 88 S. W. 375.

29. Haslach v. Wolf [Neb.] 103 N. W. 317.

30. A contention that the paper was stale and dishonored at the time it was taken is without merit. Caldwell v. Dismukes, 111 Mo. 570, 86 S. W. 270.

31. In an action by an indorsee after maturity a signer has the burden of proving that he signed under an agreement with the payee that he should not be held liable and that the payee would indemnify him. Citizens' Nat. Bank v. Cammer [Tex. Civ. App.] 86 S. W. 625.

32. One who by fraud acquires by assignment an overdue note from a holder may confer by assignment a good title on another. Gardner v. Beacon Trust Co. [Mass.] 76 N. E. 455.

33. See 4 C. L. 804.

34. Under negotiable instruments law. Milius v. Kauffman, 104 App. Div. 442, 93 N. Y. S. 669.

35. City Deposit Bank Co. v. Green [Iowa] 103 N. W. 96.

36. Hence, an allegation of defense in an action by an indorsee that the note was executed and indorsed without consideration is insufficient as it admits the transfer to plaintiff for value before maturity. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49.

37. See 4 C. L. 804.

38. Negotiable instruments law expressly provides that a bona fide holder takes free

consideration,[40] payment,[41] or fraud,[42] is no defense; but that one was induced to sign by fraudulent trick or device[43] is a defense if there be no negligence on the part of the signer.[44] Negligence in such a case is generally a question for the determination of the court or jury trying the cause,[45] but on an established or undisputed state of facts it is a question of law.[46] Under the negotiable instruments law, a material alteration does not avoid an instrument in the hands of a bona fide holder.[47] Where a note is given by a municipal corporation for a debt which it is forbidden by the constitution to contract, it is void in the hands of a bona fide holder.[48]

from defenses available between the original parties. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93. That the paying teller of a drawer of a check refuses to honor it does not relieve the drawer of liability to the drawee or a bona fide holder. Land Title & Trust Co. v. Northwestern Nat. Bank, 211 Pa. 211, 60 A. 723.

39. A drawer of a check who delivers it to an imposter supposing him to be the person whose name he assumed is liable to a bona fide holder. Land Title & Trust Co. v. Northwestern Nat. Bank, 211 Pa. 211, 60 A. 723.

Note: A bona fide holder gets good title though he purchases from a thief. First Nat. Bank v. Gates, 66 Kan. 505, 97 Am. St. Rep. 383; Wheeler v. Guild, 20 Pick. [Mass.] 545; Kuhns v. Gettysburg Nat. Bank, 68 Pa. 445; Whiteside v. First Nat. Bank [Tenn. Ch. App.] 47 S. W. 1108. To defeat his right it is not sufficient to show that a prudent man would have been put on inquiry (Dutchess County, etc., Ins. Co. v. Hachfield, 73 N. Y. 226), nor will evidence of gross negligence (Seybel v. Nat. Currency Bank, 54 N. Y. 288). An instrument stolen from the maker before it becomes effective by delivery cannot be enforced by one who takes from the thief. This seems to be the better rule though there is authority to the contrary. Salley v. Ferrill, 95 Me. 553, 85 Am. St. Rep. 433, 55 L. R. A. 730; Benson v. Huntington, 21 Mich. 415; Hall v. Wilson, 16 Barb. [N. Y.] 548; Branch v. Commissioners of Sinking Fund, 80 Va. 427, 56 Am. Rep. 596.—From note to Cochran v. Fox Chase Bank [Pa.] 103 Am. St. Rep. 982.

40. Terwilliger v. Richardson Mach. Co. [Okl.] 83 P. 715; Brown v. Feldwert [Or.] 80 P. 414. Want of consideration is no defense. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086. A bona fide holder is entitled to recover the face value of the paper though a special verdict that the consideration had failed in part was returned. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470.

41. Brown v. Fisher [Ind. App.] 74 N. E. 632.

42. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086.

43. Where judgment is taken by confession on a note which appears to have been executed under belief that it was another instrument, leave to plead should be allowed. Funk v. Hossack, 115 Ill. App. 340. One induced to sign a note under belief that it was a release. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119.

Note. The circumstances of the case are somewhat novel, but the holding seems to be clearly correct. Though the signature of the defendant appeared on the back of the note, it was not really his indorsement. To quote from the opinion, "It is not the physical act which constitutes a transaction of this kind, but it is the intention of the parties." If this was not a case of forgery, it was certainly closely akin to forgery. It is not necessary that the physical act be done by the forger himself. See Marden v. Dorthy, 160 N. Y. 39, 46 L. R. A. 694; State v. Shurtleff, 18 Me. 368; McGinn v. Tobey, 62 Mich. 252, 4 Am. St. Rep. 848; Walker v. Ebert, 29 Wis. 194; Putnam v. Sullivan, 4 Mass. 54, 3 Am. Dec. 206; Foster v. McKinnon, L. R. 4 C. P. 704. For an opposing view as to the rights of the parties see dissenting opinion in Marden v. Dorthy, 160 N. Y. 39, 46 L. R. A. 694. As to the rights of bona fide holders, see Daniel's Neg. Inst. § 836 et seq.—3 Mich. L. R. 658.

44. If a party not guilty of negligence is induced by fraud to sign a negotiable instrument under the belief that it is something else, he may defend against it in the hands of a bona fide holder. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086. Evidence held to show no negligence where one was induced to sign a promissory note under the belief that it was a petition for an order of court in a matter of guardianship. Id. One who signs an instrument without reading it cannot assert as against a bona fide holder that he did not intend to sign a negotiable instrument. Brown v. Feldwert [Or.] 80 P. 414. A plea setting up fraud in esse contractus, in that the nature of the instrument was misrepresented to him but not alleging that defendant was prevented from reading the instrument or that it was materially altered since he signed it is demurrable. Holmes v. Baker [Iowa] 105 N. W. 349.

45. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086. Where a maker's signature is procured by fraudulent trick and device, evidence of the perpetration of such fraud on other persons is admissible as against a bona fide holder as showing a general scheme to defraud. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119.

46. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086.

47. He may enforce it according to its original tenor. Thorpe v. White, 188 Mass. 333, 74 N. E. 592.

48. Town of Wadley v. Lancaster [Ga.] 52 S. E. 335.

Note. While the court states the above rule in the syllabus, the opinion seems rather to hold that in such case an indorsee is charged with notice of want of power in the city officials to issue the paper. [Editor.]

Burden of proof.[49]—The holding of one in possession of paper regularly indorsed is presumed to be bona fide,[50] and the burden is on a defendant to show that it is not;[51] but where the paper is shown to have been without consideration and fraudulent in its inception[52] or a defense not available against a bona fide holder is set up,[53] or the good faith of his holding is denied,[54] or the consideration is shown to have been illegal,[55] or it is shown that the title of the person who negotiated the paper was defective,[56] or where the indorsement to the holder is denied,[57] he must prove the bona fides of his holding.[58]

§ 14. *Remedies and procedure peculiar to negotiable paper.*[59] *Parties.*[60]—An indorsee after maturity,[61] an assignee by parol of order paper,[62] or an agent who purchases a note with his principal's money and has it indorsed to himself,[63] may maintain an action in his own name. In Ohio a suit on a promissory note must be brought by the real party in interest.[64] Where holders of orders on a fund superior to the order on which action is brought have been paid, they are not necessary parties.[65]

Pleading. The complaint.[66]—The instrument should be pleaded by copy or according to its legal effect.[67] The allegations should be definite.[68] An allegation

49. See 4 C. L. 806.

50. An indorsee is presumed to be a bona fide holder. Hillard v. Taylor, 114 La. 883, 38 So. 594. A pledgee to whom an instrument has been indorsed as collateral is presumed to be a bona fide holder. Kittler v. Studabaker, 113 Ill. App. 342. The presumption as to a holder of negotiable paper, that he is the owner of it, that he took it for value before maturity, and that he took it in the usual course of trade, is supported by statute as well as by the law merchant. Wehrman v. Beech, 7 Ohio C. C. (N. S.) 367.

51. As a general rule the burden is on a defendant to show that one holding negotiable paper is not a bona fide holder. McVicar Realty Trust Co. v. Union R. Power & Elec. Co., 136 F. 678. The burden is on the maker to show that an indorsee took with notice of defects. Evidence insufficient. Haynes v. Gay, 37 Wash. 230, 79 P. 794.

52. Evidence insufficient. McVicar Realty Trust Co. v. Union R. Power & Elec. Co., 136 F. 678; Keene v. Behan [Wash.] 82 P. 884. Where notes are shown to have been procured by fraud, a pledgee to whom they have been indorsed as collateral has the burden of showing the bona fides of his holding. Kittler v. Studabaker, 113 Ill. App. 342.

53. Ray v. Baker [Ind.] 74 N. E. 619.

54. In order that the burden of showing the bona fides of his holding be shifted to the holder, the maker must deny that he is a bona fide holder. Brown v. Feldwert [Or.] 80 P. 414.

55. Le Tourneux v. Gilliss [Cal. App.] 82 P. 627.

56. Negotiable instrument law expressly provides that if it appears that the title of a person who negotiated an instrument was defective, the holder must prove that he or some person under whom he claims was a bona fide holder. Keene v. Behan [Wash.] 82 P. 884. Under negotiable instruments law an indorsee from a payee whose title was defective must show that he took for value, the facts constituting good faith, and without notice of the defect in the title. Id.

57. Where indorsement to the holder is denied, the introduction of the note with the indorsement thereon is insufficient to prove bona fide holdership in the absence of proof of the signature of the indorser. Tyson v. Joyner [N. C.] 51 S. E. 803.

58. Where the only evidence of bona fides is the testimony of the indorsees who were interested in the corporation indorser, the question of bona fides is for the jury. Iowa Nat. Bank v. Sherman [S. D.] 103 N. W. 19. Evidence sufficient to show bona fide holdership. Loring v. Anderson [Minn.] 103 N. W. 722.

59, 60. See 4 C. L. 806.

61. Hunter v. Allen, 94 N. Y. S. 880.

62. First Nat. Bank v. Moore [C. C. A.] 137 F. 505, and cases cited.

63. Routh v. Kostachek [Okl.] 81 P. 429.

64. Independent Coal Co. v. First Nat. Bank, 6 Ohio C. C. (N. S.) 225. One who is not the owner of a promissory note is not the real party in interest, and the presumption of ownership arising from the possession of the note endorsed in blank may be rebutted. Id.

65. Cramer v. Munkres [Wyo.] 83 P. 374.

66. See 4 C. L. 807.

67. The complaint should contain a copy of the note or allege that by the writing defendant promised to pay a certain sum at a certain time. Cooper v. McKee [Ky.] 89 S. W. 203. Complaint on a promissory note held sufficient. Brown v. Bilton [Colo.] 81 P. 758. Complaint on a note setting out consideration, promise and breach held sufficient under Code Civ. Proc. 1902, § 183. Merchants' & Planters' Bank v. Blacksburg Spinning & Knitting Mill [S. C.] 51 S. E. 274.

68. A complaint for the balance due on a note alleging that a certain sum had been paid on the principal and that interest had been paid to a certain date is subject to a motion to make more definite by setting out the payments, but is good on demurrer. Hawkins v. Merchants' & Mechanics' Loan & Bldg. Ass'n [Ky.] 89 S. W. 197. Failure to set out the endorsements in an action on a note, or to state that there are no endorsements, is a defect to be reached by motion and not by demurrer. Schick v. Ott, 7 Ohio C. C. (N. S.) 325.

of execution includes one of delivery.[69] It is not necessary to allege facts showing want of consideration.[70] But where the consideration has failed, facts showing such failure should be pleaded.[71] If attorney's fees are claimed, facts warranting their recovery should be alleged.[72] A complaint against an indorser need not allege exhaustion of remedies against the maker,[73] and one on a note secured by a mortgage which has been extinguished need not allege the execution of the mortgage or its extinguishment.[74] A complaint on an instalment note though for the entire amount states a cause of action for the amount of instalments due.[75] A complaint by a payee on a lost note which does not allege loss before maturity need not allege that the note was not indorsed by the payee.[76]

The answer.[77]—The grounds of defense must be plainly stated so as to give notice of their character.[78] A separate defense must be complete in itself.[79] Inconsistent defenses should not be pleaded,[80] nor should conclusions of law.[81] An answer in an action by the holder that he is not the real party in interest must allege facts on which such allegation is based.[82] A denial of facts not alleged raises no issue.[83] Allegations not denied are deemed admitted.[84] In some states certain denials must be verified.[85]

Leave to amend by inserting an allegation of notice rests in the discretion of the court.[86]

Defenses.[87]—A defense as between indorsees is not available to the maker.[88]

Evidence. Presumptions and burden of proof.[89]—A negotiable instrument is presumed to have been issued for a valuable consideration[90] and the payee of unindorsed paper is presumed to be the owner,[91] but there is no presumption that a

69. Embree v. Emmerson [Ind. App.] 74 N. E. 44.

70. May be pleaded as a conclusion. Grimes v. Erickson [Minn.] 103 N. W. 334.

71. Grimes v. Erickson [Minn.] 103 N. W. 334.

72. Where they were stipulated for in the note it must be alleged that the note was placed in the hands of an attorney for collection. Branch v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 14, 89 S. W. 813. Van Epp's Code Supp. § 6185, expressly provides that in order to recover attorney's fees in an action on a note it must be alleged that the statutory notice of intention to bring suit was given and if denied it must be proven. Pritchard v. McCrary [Ga.] 50 S. E. 366.

73. They being jointly and severally liable but not being joint obligors. Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678.

74. Bank of Paso Robles v. Blackburn [Cal. App.] 83 P. 262.

75. Crowe v. Beem [Ind. App.] 75 N. E. 302.

76. Embree v. Emmerson [Ind. App.] 74 N. E. 44.

77. See 4 C. L. 807.

78. A statement that defendant did not execute the note sued upon nor owe the sum claimed or any part thereof is insufficient. Chestnut v. Chestnut [Va.] 52 S. E. 348.

79. Kipp v. Gates [Wis.] 105 N. W. 947.

80. A plea of non est factum and that the note was obtained by fraud are inconsistent. Vette v. Evans, 111 Mo. App. 588, 86 S. W. 504.

81. Conclusions: An allegation that an indorsee had notice that the notes were impressed with a trust in the hands of his indorser. Bank of Luverne v. Birmingham Fertilizer Co. [Ala.] 39 So. 126. An allegation in an answer to a complaint by an indorsee that before delivery to plaintiff the paper had no legal inception. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49. That one is not a bona fide holder. Id. A denial that a note was taken for value is **not a conclusion** and is not demurrable. Id.

82. Brown v. Fisher [Ind. App.] 74 N. E. 632.

83. A denial by a maker of knowledge that he was signing a negotiable instrument raises no issue where there is no allegation of that nature in the complaint. Brown v. Feldwert [Or.] 80 P. 414.

84. To require proof of protest and notice of nonpayment when the same are alleged, they must be put in issue by such plea as will call for such proof. Bank of Ravenswood v. Wetzel [W. Va.] 50 S. E. 886.

85. In Georgia unless denied on oath an indorsement need not be proved, though the name of the indorser purports to have been signed by an agent and the action is against the maker. Neal v. Gray [Ga.] 52 S. E. 622. Code 1904, § 3279, expressly provides that a defendant cannot prove that he did not execute the note sued upon unless he files with his pleading an affidavit denying the signature. Chestnut v. Chestnut [Va.] 52 S. E. 348.

86. Brown v. Feldwert [Or.] 80 P. 414.

87. See 4 C. L. 808.

88. The maker may not inquire into the conditions and consideration upon which the paper was transferred after maturity. Hunter v. Allen, 94 N. Y. S. 880.

89. See 4 C. L. 809.

90. A note. First Nat. Bank v. Bennett, 215 Ill. 398, 74 N. E. 405.

91. Possession by the payee without indorsement is sufficient evidence of owner-

lost note possessed all the elements of negotiability.[92] Where execution is admitted and payment pleaded, the maker has the burden to prove payment.[93] In Indiana by statute if execution is denied by verified plea, the holder has the burden of proving it.[94] In Pennsylvania such denial raises no presumption,[95] and in Iowa such denial does not shift the burden of proof.[96] There should be no variance between the pleadings and the proof.[97]

Indemnifying maker of lost instrument.[98]—An indemnity bond is not a jurisdictional requirement.[99] The bond must conform to the decree which requires it.[100]

NEUTRALITY; NEW PROMISE, see latest topical index.

NEWSPAPERS.

This topic includes only the designation and compensation of official newspapers; necessity and sufficiency of publication of process[1] and other legal notices[2] being elsewhere treated, as are advertising contracts[3] and liability for improper publication.[4]

Where one of the parties to a contest as to the selection of an official newspaper fails to comply with the requirement to deposit before the day fixed for hearing of the contest a list of its subscribers and of the post offices to which it is mailed, the board has no power to grant an adjournment to permit the filing of such a list.[5] Where it is provided that an appeal from the selection of an official newspaper by the board of supervisors shall be taken as in ordinary action, the appeal bond is to be approved by the clerk of the board.[6] Where an administrative officer charged with the selection of a limited number of papers for an official publication has it published in more than the specified number,[7] none can recover compensation till he makes a selection within the legal limit.[8] Where the

ship. Tullis v. McClary [Iowa] 104 N. W. 505. Hence in an action by him on a lost note it is not necessary to allege ownership. Embree v. Emmerson [Ind. App.] 74 N. E. 44.

92. That it was payable in bank in the state. Embree v. Emmerson [Ind. App.] 74 N. E. 1110.

93. Downing v. Donegan [Cal. App.] 82 P. 1111.

94. If execution is denied by verified plea of non est factum, the holder has the burden of proving it. Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086. A verified plea of non est factum puts in issue the execution of the instrument. McCormick v. Higgins [Ind. App.] 76 N. E. 775. Under Burns' Ann. St. 1901, § 367, denial of execution under oath casts upon a bona fide holder the burden of proving execution including delivery. Godman v. Henby [Ind. App.] 76 N. E. 423.

95. Under a statute providing that the execution of a note shall be taken as admitted unless denied by affidavit, the effect of filing such affidavit is simply to cast the burden of proof on the opposite party. It does not raise a prima facie presumption of forgery. Stewart v. Gleason, 23 Pa. Super. Ct. 325.

96. Under Code § 3640, declaring that unless the genuineness of a signature to a written instrument referred to or incorporated in a pleading shall be denied under oath it shall be deemed genuine, denial under oath of the execution of an instrument does not shift the burden of proof. Gray v. Bennett [Iowa] 105 N. W. 377.

97. Proof of an order for a certain sum is a variance from an order for "all sums due." Leatherbury v. Spotswood, Turner & Co. [Ala.] 39 So. 588. Proof that a note was acquired as a consideration for a contract is a variance from an allegation that it was acquired by gift. Sellers v. Sellers [Ala.] 39 So. 990.

98. See 4 C. L. 810.

99. Rev. St. 1899, § 745, requiring an indemnity bond in an action on a lost instrument is not a jurisdictional requirement but a condition precedent to recovery. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128. It is given in time if filed before the ruling on a motion for new trial. Id.

100. A decree directing payment of a lost check on tender of an indemnity bond to "two defendants" does not require payment on tender of such bond to one. Moore v. Durnan [N. J. Eq.] 62 A. 327.

1. See Process, 4 C. L. 1070.

2. See such topics as Statutes, 4 C. L. 1522; Municipal Corporations (publication of ordinances) 6 C. L. 723; Public Contracts, 4 C. L. 1089.

3. See Contracts, 5 C. L. 664.

4. See Contempt, 5 C. L. 650; Libel and Slander, 6 C. L. 414.

5. Sturges v. Vail, 127 Iowa, 705, 104 N. W. 366.

6. County Auditor is ex officio clerk. Sturges v. Vail, 127 Iowa, 705, 104 N. W. 366.

7. Act requiring publication in "not more than 4" not repealed by one requiring "not less than 3." York Gazette Co. v. York County, 25 Pa. Super. Ct. 517.

8. York Gazette Co. v. York County, 25 Pa. Super. Ct. 517.

time for which a paper was designated as official has expired but no other is designated, it is a defacto official paper and publication therein is valid.[9] Where the county clerk delivers to the publisher of the official paper a mass of matter not in form for publication and the latter assumes the duty of preparing and publishing an election notice therefrom, he is entitled to compensation for the publication of a legal election notice[10] though it is not in the briefest possible form,[11] but not to compensation for publishing unnecessary and irrelevant parts of the material delivered.[12]

NEW TRIAL AND ARREST OF JUDGMENT.

This topic is designed to treat only the grounds for which judgment will be arrested or a new trial granted in the trial court. The grant of new trials by reviewing courts,[13] the modification and vacation of judgments without resort to a new trial,[14] the erroneous[15] or prejudicial[16] character of particular rulings, the necessity of objections and exceptions to save rulings for motion for new trial and the necessity of motion for new trial to save questions for the reviewing court,[17] are elsewhere treated.

§ 1. *Nature of the remedy by new trial and right to it in general.*[18]—A new trial is for the purpose of re-examining issues of fact,[19] hence, where there has been a mistrial a new trial cannot be granted.[20] A motion for a new trial reaches matters occurring at the trial and not matters which occur before[21] or after the trial has terminated.[22] The motion will not reach an insufficient pleading[23] or a defective verdict,[24] though statutory enumeration of grounds sometimes gives a broader scope. It is the appropriate remedy where the judge is not satisfied with the verdict[25] or the findings are not sufficiently sustained.[26] The grant of a new trial

9. City of North Yakima v. Scudder [Wash.] 82 P. 1022.

10, 11, 12. People v. Alleghany County Sup'rs, 93 N. Y. S. 426.

13. See Appeal and Review, 5 C. L. 121.

14. See Judgments, 6 C. L. 214.

15. See such topics as Argument and Conduct of Counsel, 5 C. L. 253; Evidence, 5 C. L. 1301; Examination of Witnesses, 5 C. L. 1371; Instructions, 6 C. L. 43; Trial, 4 C. L. 1708.

16. See Harmless and Prejudicial Error, 5 C. L. 1620.

17. See Saving Questions for Review, 4 C. L. 1368.

18. See 4 C. L. 811.

19. Where there is no issue of fact there is nothing to retry. Power v. Fairbanks, 146 Cal. 611, 80 P. 1075.

20. A mistrial leaves the case as though no trial had been had. Rosengarten v. Central R. Co., 69 N. J. Law, 220, 54 A. 564.

21. Motions upon pleadings and other matters arising before the trial is actually entered upon furnish no basis for a motion for a new trial. Cella v. Chicago & W. I. R. Co., 217 Ill. 326, 75 N. E. 373.

22. Action of the court in fixing the amount of recovery in an action for penalty for fraudulent marriage and abandonment is part of the judgment and not matter occurring at the trial, and the question as to the amount cannot be raised by motion for a new trial. State v. Richeson [Ind. App.] 75 N. E. 846.

23. It is not the office of a motion to question the sufficiency of an amendment to the pleadings. Johnson v. Thrower [Ga.] 51 S. E. 636.

24. The remedy is a venire de novo. McCaslin v. State [Ind. App.] 75 N. E. 844.

25. The grant of a new trial and not the direction of a verdict the other way where

rests largely in the discretion of the trial court[27] whether at law or in equity.[28] It is the duty of the court to act on matters resting in its discretion,[29] but a new trial cannot be granted without legal ground.[30] The right to a new trial does not exist unless provision therefor is made by law.[31]

§ 2. *Grounds. A. In general.*[32]—The grounds upon which a new trial may be had are prescribed by statute,[33] and an aggrieved party to be entitled to the remedy must bring himself within the statutory provisions.[34] A new trial will not be granted for any cause which the moving party might have avoided by the exercise of due diligence[35] nor to prove issues in direct contradiction of the allegation of the plaintiff in motion,[36] nor to satisfy the caprice of the parties,[37] nor for nonprejudicial error.[38] Hence that papers which should not go to the jury room are sent there through inadvertence or accident is not ground unless it appears that the unsuccessful party was prejudiced.[39] A mistake of a witness is not ground

in the opinion of the trial court the verdict is against the weight of evidence. Dowling v. Brooklyn Heights R. Co., 107 App. Div. 312, 95 N. Y. S. 105. Judgment notwithstanding the verdict that a will was obtained by undue influence should not be rendered unless in a clear case, but the remedy is to grant a new trial. In re Sperl's Estate [Minn.] 103 N. W. 502.

26. If special findings are not sufficiently sustained or are contrary to the law or where additional facts should have been found, relief should be had by motion for new trial and not by motion to modify, strike out or add to the findings. Tyler v. Davis [Ind. App.] 75 N. E. 3.

27. Marion Mfg. Co. v. Bowers [Kan.] 80 P. 565; Wike v. Woolverton, 26 Pa. Super. Ct. 561. It is discretionary with a trial court to grant a new trial on its own motion. Eggen v. Fox, 124 Wis. 534, 102 N. W. 1054.

28. Whether the issues are in an ordinary suit in equity or in a probate appeal, the judge in dealing with a motion for a new trial exercises his discretion as he does at law. Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068.

29. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501. It is an abuse of discretion to refuse a new trial on appeal from a default judgment in justice court where defendant presents a valid excuse and a complete defense. Kilts v. Neahr, 101 App. Div. 317, 91 N. Y. S. 945.

30. Granting a new trial without legal ground is an abuse of discretion. Le Tourneux v. Gilliss [Cal. App.] 82 P. 627.

31. There is no provision of law for the filing of a motion for a new trial in a habeas corpus proceeding in a county court. State v. Shrader [Neb.] 103 N. W. 276.

32. See 4 C. L. 812.

33. Fraud in procuring a judgment may be the basis of a complaint filed after term to obtain a new trial under Burns' Ann. St. 1901, § 572. Slusser v. Palin [Ind. App.] 74 N. E. 17. In an action in equity to vacate a judgment at law, the equity court may grant a new trial for the same reasons and upon the same conditions that it may in other equity causes. Williams v. Miles [Neb.] 102 N. W. 482.

34. Burns' Ann. St. 1901, § 568 specifically prescribes the causes for which a new trial may be granted. State v. Richeson [Ind. App.] 75 N. E. 846. Assignments that "the decision of the court in fixing the amount of damages is too small" and "that the court abused its discretion in its decision, in this, to wit, in making the amount of the recovery assessed too small" are not grounds within Burns' Ann. St. 1901, § 568, prescribing the grounds. Id. Burns' Ann. St. 1901, § 568, subd. 5, prescribing as ground for new trial of an action on contract or for injury to or detention of property, error in the assessment of the amount of recovery does not apply to an action to recover a penalty for fraudulent marriage. Id. Assignments that the verdict is contrary to the evidence and to the law and the evidence are not statutory grounds and present no question. Jennings v. Ingle [Ind. App.] 73 N. E. 945.

35. Where the cause of action was negligence of defendant's superintendent and he went to trial knowing the superintendent was absent and made no effort to postpone the trial or make a showing for him, he was not entitled to a new trial because of his absence. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Failure of a party to appear and present a meritorious defense is not ground. Ransom v. Leggett [Tex. Civ. App.] 90 S. W. 668.

36. Parker v. Ricks, 114 La. 942, 38 So. 687.

37. An application based solely on the desire of the parties to have another trial may be refused in the discretion of the court. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521. That neither party is entirely satisfied with the result is not ground after a fair hearing before an impartial jury. Fabricant v. Philadelphia Rapid Transit Co., 138 F. 976.

38. See post, 2 C. Where joint and several tort feasors are sued and recovery had against one, errors peculiarly affecting the liability of the one against whom the verdict is found and do not affect the liability of the other are not ground for new trial to plaintiff as to one in whose favor verdict is rendered. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. The fact that the jury disregarded erroneous instructions is not ground where the verdict is justified by the evidence. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376.

39. Where a bill of exceptions was inadvertently sent to the jury room but was not read by the jury. Birmingham R. & Elec.

unless it appears that a correction of it would cause a different verdict to be rendered at another hearing.[40]

(§ 2) *B. Misconduct of parties, counsel or witnesses.*[41]—The granting of a new trial for improper conduct of counsel or party rests largely in the discretion of the court,[42] and improper remarks,[43] conduct[44] or argument[45] are ground only when prejudice results to the unsuccessful party.[46]

(§ 2) *C. Rulings and instructions at trial.*[47]—Error in rulings on the admissibility of evidence[48] or in the giving[49] or refusal to give instructions[50] or other harmless error[51] is not ground, nor is the admission of relevant evidence at any

Co. v. Mason [Ala.] 39 So. 590. That a deposition was inadvertently allowed to be taken to the jury room is not where the fact contained therein could not have been forgotten. Fottori v. Vesella [R. I.] 61 A. 143. That account books were by mistake left in the jury room is not where it does not appear that the jury consulted such books or that they contained matter which could influence their verdict. Edmundson v. Swain [Ga.] 50 S. E. 942.

40. A fortiori where it does not affirmatively appear that a witness made a mistake. Johnson v. Leffler Co. [Ga.] 50 S. E. 488. That a witness testifies that a party made a certain affidavit in his presence and subsequent to the trial this witness made affidavit that he was reasonably sure that such party did not make such affidavit is not ground. Id.

41. See 4 C. L. 812.

42. Renshaw v. Dignan [Iowa] 105 N. W. 209; Jung v. Hamm Brewing Co. [Minn.] 104 N. W. 233; Whitcomb v. Mason [Md.] 62 A. 749. A motion supported by the affidavit of a juror that a plaintiff in a personal injury case misled the jury as to the extent of her injuries is addressed to the discretion of the court. Hanforth v. Tarentum Traction Pass. R. Co. [Pa.] 62 A. 1060.

43. Remarks of counsel during the trial indicating that he was unwilling that the jury should lose the effect of evidence tending to show negotiations to compromise the matter in suit, even though he had withdrawn the objectionable question and answer. Salter v. Rhode Island Co. [R. I.] 60 A 588. Improper and prejudicial remarks in opening statement of counsel. Mattoon Gas Lignt & Coke Co. v. Dolan, 111 Ill. App. 333.

44. A fair trial is nôt granted where the jury are required to view the case through an atmosphere of passion and prejudice, excited by the conduct of counsel. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361.

45. Chicago City R. Co. v. Math, 114 Ill. App. 350. Unless it appears that the verdict was not influenced. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. Stating as a fact matter pertinent to the issue but not in evidence. Supreme Lodge Mystic Workers of the World v. Jones, 113 Ill. App. 241.

46. Not ground: References to a prior trial which do not inform the jury of the outcome of it. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. Conduct of counsel in making reference to the result of a prior trial. McKenzie v. Banks [Minn.] 103 N. W. 497. Persistence of counsel in his effort to prove the general reputation of his client is not ground where no witness gave testimony of such reputation. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Making an offer of proof which had already been rejected. Henrietta Coal Co. v. Campbell, 112 Ill. App. 452.

47. See 4 C. L. 812.

48. Error in refusing to permit counsel to inquire of a juror whether he was employed by a corporation for which plaintiff's husband acted as foreman is not where there was no evidence showing that he was so employed. Shepard v. New York, etc., R. Co. [R. I.] 61 A. 42. Exclusion of evidence if erroneous held too unimportant to warrant the granting of a new trial. Brownlee v. Reiner, 147 Cal. 641, 82 P. 324. Exclusion of evidence which if allowed would not have produced a different result. Rountree & Co. v. Gaulden [Ga.] 51 S. E. 346. Exclusion of an admission against interest, where it is not shown exactly what the admission was. Dawson v. Orange [Conn.] 61 A. 101.

49. Error in instructions is not ground unless upon the whole case the verdict is wrong. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135. Minor inaccuracies in the charge. Booth & Co. v. Mohr [Ga.] 50 S. E. 173. If the verdict returned was demanded by the evidence it is not ground for new trial that the instructions were erroneous. White v. Southern R. Co. [Ga.] 51 S. E. 411. To render available the giving of certain instructions all specified must be erroneous. Chicago Furniture Co. v. Cronk [Ind. App.] 74 N. E. 627.

50. Refusal to give an oral request in the charge. Bedgood-Howell Co. v. Moore [Ga.] 51 S. E. 420. Failure to give a requested instruction not required by the pleadings and evidence. Friedman v. Goodman [Ga.] 52 S. E. 892.

51. Limiting the time for argument held not ground for new trial where it did not appear from the record that the time allowed was manifestly too short. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787.

Failure to send instructions to the jury room is not ground for new trial under Code, § 1281 (Comp. Laws 1897, § 2685), providing that all instructions shall be taken to the jury room, unless objection is raised on such ground. Cunningham v. Springer [N. M.] 82 P. 232. Error in the movant's favor. Strickland v. Hutchinson [Ga.] 51 S. E. 348. Error in decreeing upon a verdict. Booth & Co. v. Mohr [Ga.] 50 S. E. 173. In an action to cancel a deed for fraud and incapacity of the grantor where it was alleged the deed purported to have been made in consideration of services, and some services were shown and the question whether services had been rendered, and their

stage of the case;[52] but the giving of erroneous instructions[53] or other error which results in prejudice to the unsuccessful party is ground.[54]

(§ 2) *D. Misconduct of or affecting jury.*[55]—Refusal of a juror to consider competent evidence,[56] openly discussing the case and announcing his proposed verdict before submission of the cause,[57] is ground for a new trial if such facts are established,[58] and private interviews between a juror and a prevailing party may be ground.[59] That the jury resorted to chance in determining upon their verdict is ground[60] if by such means one or more of the jurors were thereby induced to assent;[61] but the mere taking of a ballot upon a quotient verdict is not.[62] Nonprejudicial misconduct[63] or misconduct known before the verdict is rendered is not.[64] The movant has the burden of proving that a verdict was improperly arrived at.[65] Affidavits of jurors are not admissible to impeach their verdict,[66] but are admissible to sustain it when misconduct is charged.[67] A party deeming himself aggrieved because a biased juror was allowed to sit is entitled to a new trial as of right;[68] but

value was submitted, it was not ground for new trial on the part of the defendant that the jury fixed a valuation upon such services. Parker v. Ballard [Ga.] 51 S. E. 465.

52. This is so though the party offering the evidence, which consisted of affidavits, failed to comply with an order of the court requiring that all affidavits to be used at the trial be filed in the clerk's office a certain time before the day set for hearing. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466.

53. Misleading instructions are ground. Joyce v. St. Louis Transit Co., 111 Mo. App. 565, 86 S. W. 469. The giving of an instruction, correct in part and incorrect in part, requires a new trial. Beaver v. Potter [Iowa] 105 N. W. 346.

54. Error in sustaining a demurrer to a special plea is ground. Theorell v. Supreme Court of Honor, 115 Ill. App. 313.

55. See 4 C. L. 814.

56. Where a juror states from the jury box that he will not regard certain evidence which is competent and does so in a manner indicating anger and disgust. Chicago City R. Co. v. Brecher, 112 Ill. App. 106.

57. Ostrom v. Clapp [Ind. T.] 90 S. W. 478.

58. Misconduct of a juryman in trespass quare clausum in expressing an opinion before all the evidence was in, and that certain remarks were made in the presence of the jury while they were viewing the premises, is not ground for a new trial where it does not affirmatively appear that a juryman expressed an opinion and it does not appear what remarks were made in the presence of the jury. Lyman v. Brown [N. H.] 62 A. 650.

59. Frequent private conversations between the prevailing party and a juror and their action in drinking together at such party's expense is ground, in the discretion of the court. Buchanan v. Laber [Wash.] 81 P. 911.

60. Affidavits of two jurors that there had been a quotient verdict held to warrant a new trial against the affidavits of seven to the contrary. King v. Elton [Cal. App.] 83 P. 261.

61. Midgley v. Bergerman [Utah] 83 P. 466.

62. There being no agreement that they should be bound, and the result not having been adopted. Conover v. Neher-Ross Co., 38 Wash. 172, 80 P. 281.

63. Root v. Coyle [Okl.] 82 P. 648; City of Lawton v. McAdams [Okl.] 83 P. 429. Misconduct in reading newspapers relating to the trial is not ground unless it is shown that the articles were of such character as to probably prejudice the losing party. Fields v. Dewitt [Kan.] 81 P. 467.

64. Misconduct of a juror in revealing their conclusion on the way from the jury room. Bernikow v. Pommerantz, 94 N. Y. S. 487. Misconduct of a party and jurors in conversing together during an adjournment is not available as ground where not called to the attention of the court or counsel before verdict rendered. Jennett v. Patten [Vt.] 62 A. 33. A party who has knowledge of misconduct of the jury but fails to call it to the attention of the court until after verdict is rendered waives it as a ground for setting aside the verdict. Lyman v. Brown [N. H.] 62 A. 650.

65. Midgley v. Bergerman [Utah] 83 P. 466. Conflicting affidavits of jurymen as to whether a quotient verdict had been returned held insufficient to show misconduct. Id. Evidence insufficient to show misconduct by viewing the premises. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591.

66. Covington & C. Bridge Co. v. Hull [Ky.] 90 S. W. 1055. To the effect that they misunderstood the law of the case or the instructions. Marcy v. Parker [Vt.] 62 A. 19. To prove that a party treated them to liquor during the trial. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872. On the ground of misconduct. Devoy v. St. Louis Transit Co. [Mo.] 91 S. W. 140; City of Battle Creek v. Haak [Mich.] 102 N. W. 1005. An affidavit of a juror that he answered special interrogatories in the affirmative in reliance on a fellow juryman's statement that it would not prevent recovery by plaintiff is not ground. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924.

67. Covington & C. Bridge Co. v. Hull [Ky.] 90 S. W. 1055. To the effect that a bill of exceptions inadvertently sent to the jury room was not read. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590.

68. Where a juror swore falsely on his voir dire and the fact did not become known to either party until after trial. Heasley v. Nichols, 38 Wash. 485, 80 P. 769.

relationship of one of the jurors to a party is not ground where such fact could not have affected his verdict.[69]

(§ 2) *E. Irregularities or defects in verdict or findings.*[70]—The inconsistency of special findings with the general verdict[71] or error in making a finding outside the issues is not ground;[72] but failure to make a finding on a material issue is.[73] Mere irregularity in the form of a verdict is not ground,[74] but a defect which cannot be cured by action of the court is.[75] Venire de novo will not lie unless the verdict is so defective and uncertain that judgment cannot be rendered on it.[76]

(§ 2) *F. Verdict or findings contrary to law or evidence.*[77]—That the court erred in overruling defendant's motion to find for them on plaintiff's evidence and on all the evidence,[78] that the finding and judgment were not sustained by the evidence nor sufficient evidence,[79] and that they are contrary to law and to the law and the evidence,[80] are grounds. It is discretionary with the court to grant a new trial on these grounds.[81] A second verdict should be regarded with more favor

69. On his voir dire he stated that he knew of no relationship but it was ascertained after verdict that he was related Senterfeit v. Shealy [S. C.] 51 S. E. 142. Relationship of a juror within the prohibited degrees to the unsuccessful party though unknown to the party or his counsel until after verdict. Screws v. Anderson [Ga.] 52 S. E. 429.

70. See 4 C. L. 815.

71. Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509. Under Burns' Ann. St. 1901, § 556, providing that when a special finding is inconsistent with the general verdict the former shall control and judgment shall be rendered accordingly, a motion for new trial on the ground of excessive damages presents only the evidence for review and if it justifies the verdict the fact that answers to special interrogatories do not is not ground for new trial. Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509.

72. Such error is available only on appeal. Power v. Fairbanks, 146 Cal. 611, 80 P. 1075.

73. Power v. Fairbanks, 146 Cal. 611, 80 P. 1075.

74. A verdict, on its face, good in substance may be put in form by the court if such action does not depend on consent or knowledge of the jury. Malott v. Howell, 111 Ill. App. 233. That two causes of action are improperly joined against one defendant and one verdict in favor of both plaintiffs rendered, the irregularity in the form of the verdict is not ground for a new trial. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916.

75. Where, in an action against parties jointly liable, a verdict is returned against one only, the want of a verdict as to the other two requires a new trial. White v. Madison [Okl.] 83 P. 798.

76. Spaulding v. Mott [Ind.] 76 N. E. 620.

77. See 4 C. L. 815.

78. George v. Robinson [Ind. App.] 75 N. E. 607.

79. George v. Robinson [Ind. App.] 75 N. E. 607. Where a trustee in bankruptcy sues to recover a preference but does not allege or prove that defendant had reasonable ground to believe that a preference was intended a new trial should be granted under Code Civ. Proc. § 3063. Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781.

80. George v. Robinson [Ind. App.] 75 N. E. 607. A court may set aside the verdict of a jury in condemnation proceedings. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135. Where a judgment is referable alone to special pleas which presented immaterial issues, a new trial is properly granted. Birmingham R., Light & Power Co. v. Tanner [Ala.] 40 So. 58. A verdict cannot be contrary to the evidence as to a point which is not an issue in the case. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110. A verdict liable to reversal cannot be maintained on a theory of law contrary to that upon which the case was submitted. Oakley v. Emmons [N. J. Law] 62 A. 996.

81. It is discretionary with a trial court to grant or refuse a new trial where the motion is based upon the **insufficiency of evidence to support the verdict.** Clifford v. Latham [S. D.] 103 N. W. 642; Baldwin v. Napa & S. Wine Co. [Cal. App.] 81 P. 1037; Northrup v. Diggs [Mo. App.] 91 S. W. 173.

Grant or refusal on the ground of excessive or inadequate damages appearing to have been given under the influence of passion or prejudice rests in the discretion of the court. English v. Minneapolis, etc., R. Co. [Minn.] 104 N. W. 886; Mohr v. Williams [Minn.] 104 N. W. 12. It is discretionary with the trial court to grant a new trial because he believes injustice has been done through the rendition of an inadequate verdict. Loevenhart v. Lindell R. Co., 190 Mo. 342, 88 S. W. 757.

Discretion not abused in granting a new trial on the ground that the evidence was not sufficient to support the verdict. Lang v. Merbach [Minn.] 105 N. W. 415. Evidence in an elevator accident case reviewed and held that granting of a new trial by court not an abuse of discretion. Lyon v. Aronson, 140 Cal. 365, 73 P. 1063. Where there is sufficient evidence to have sustained a contrary verdict it is not an abuse of discretion to grant a new trial. Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972. In an action for negligence where the verdict was for defendant but the evidence showed negligence, it was not an abuse of discretion to grant a new trial. Ruppel v. United Railroads [Cal. App.] 82 P. 1073. Evidence sufficient to warrant the trial court in granting a new trial on a jury finding of undue influence in a will contest. In re Birdseye, 77

than the first.[82] On motion based on such grounds it becomes the duty of the court to weigh the evidence.[83] If the verdict is based on conflicting evidence,[84] or if the evidence is sufficient to sustain the verdict,[85] or if there is evidence to support the verdict,[86] a new trial may be denied, and the mere fact that the judge would have rendered a different verdict had he been on the jury will not justify him in granting a new trial;[87] but if the verdict is clearly contrary to the weight of evidence[88] or is actuated by passion or prejudice,[89] or the court is satisfied that justice has not been done,[90] it is his duty to grant a new trial though the evidence

Conn. 623, 60 A. 111. Verdict, though contrary to the weight of evidence, held not so palpably so as to show an abuse of discretion in denying a motion for a second new trial. McKenzie v. Banks [Minn.] 103 N. W. 497. The grant of a new trial on a question of fact will not be interfered with unless a verdict should not be recovered. McCarty v. St. Louis Transit Co. [Mo.] 91 S. W. 132.

82. A second new trial should not be granted after two like verdicts which the evidence is sufficient to sustain. Hendricks v. Southern R. Co. [Ga.] 51 S. E. 415; Atwood Lumber Co. v. Watkins [Minn.] 103 N. W. 332. Where a verdict has been several times rendered on substantially the same evidence, a new trial should not be granted though the court is of the opinion that it is against the weight of the evidence. Lacs v. James Everard's Breweries, 107 App. Div. 250, 95 N. Y. S. 25. The fact that a new trial is ordered on the ground that the evidence does not sustain the verdict does not entitle the party to a directed verdict or another trial on a second trial if the evidence is substantially the same. McKenzie v. Banks [Minn.] 103 N. W. 497.

83. A motion on the ground that the verdict is contrary to the weight of evidence imposes on the judge the duty of weighing the evidence and the motion should not be overruled because there is some evidence to support the verdict. Nashville Spoke & Handle Co. v. Thomas, 114 Tenn. 458, 86 S. W. 379.

84. The court need not grant a new trial when the verdict was rendered on conflicting evidence. Louisville & N. R. Co. v. Rhoads [Ky.] 90 S. W. 219; Revolution Cotton Mills v. Union Cotton Mills [S. C.] 52 S. E. 674.

85. Sawyer v. Georgia R. & Banking Co. [Ga.] 51 S. E. 321. A new trial should not be granted when the verdict is supported by positive evidence where there is no contrary evidence and the only ground assigned is that the contract was an unlikely one. Rachmiel v. Armour Packing Co., 95 N. Y. S. 111. Should not be granted where the evidence was evenly balanced. Von Der Born v. Schultz, 104 App. Div. 94, 93 N. Y. S. 547. A new trial should not be granted on the ground of insufficiency of evidence to support the verdict where the testimony is conflicting and there is evidence in support of the verdict. Irby v. Phillips [Wash.] 82 P. 931.

86. A trial court should not set aside a verdict and grant a new trial where there was some evidence upon which the jury might reasonably have reached their conclusion. In re Birdseye, 77 Conn. 623, 60 A. 111. A new trial may be denied where there is evidence to sustain the verdict. Pooler v. Smith [S. C.] 52 S. E. 967; Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883; Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789; Swords v. Robertson [Ga.] 52 S. E. 544; Bristow v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 529; Shores v. Southern R. Co. [S. C.] 51 S. E. 699. That the verdict does not correspond with the numerical weight of the testimony is not ground for new trial. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

87. When some evidence tends to prove facts in issue or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court if upon the jury would have given a different verdict. To warrant a new trial in such case the evidence must be plainly insufficient to support the verdict. Parrish v. Huntington [W. Va.] 50 S. E. 416. If the inferences drawn by the jury from the evidence are fairly warranted, a new trial should not be granted though the judge thinks them wrong. Grogan v. Brooklyn Heights R. Co., 107 App. Div. 254, 95 N. Y. S. 23. The mere fact that a verdict is for larger amount than the court would have allowed is not ground. The N. K. Fairbank Co. v. Bahre, 112 Ill. App. 290.

88. Berger v. Content, 94 N. Y. S. 12. Should not refuse to set it aside where manifest injustice is so plain and palpably clear as to denote some mistake in the application of legal principles. In re Birdseye, 77 Conn. 623, 60 A. 111. Though the case was such as to call for its submission to the jury. Schnitzler v. Oriental Metal Bed Co., 93 N. Y. S. 1118. A new trial should be granted if the evidence is plainly insufficient to warrant the verdict. James Clark Distilling Co. v. Bauer, 56 W. Va. 249, 49 S. E. 160. Verdict manifestly contrary to the weight of the evidence. Chicago & A. R. Co. v. Klaybolt, 112 Ill. App. 406. Where undisputed evidence showed that a property owner suffered damages in eminent domain proceedings of $350 there was no abuse of discretion in granting a new trial where a verdict was returned for but $24. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135.

89. Mills v. Larrance, 111 Ill. App. 140.

90. Weisser v. Southern Pac. R. Co. [Cal.] 83 P. 439. Under a rule authorizing a new trial for insufficiency of evidence to support the verdict. Clark v. Great Northern R. Co., 37 Wash. 537, 79 P. 1108. If the evidence is such that the mind of the court refuses to concur in the verdict. Yarnell v. Kilgore [Okl.] 82 P. 990. It is the duty of the judge to set aside a verdict and grant a new trial unless he is satisfied that substantial justice has been done. Linderman v.

upon which the verdict was reached is conflicting.[91] An excessive[92] or inadequate verdict[93] is ground for a new trial. The allowance of excessive damages not occasioned by passion or prejudice does not require a new trial but may be remedied by a remission[94] except under a rule requiring all questions of fact to be submitted.[95]

(§ 2) *G. Surprise, accident or mistake.*[96]—Surprise,[97] accident or excusable neglect may be ground for a new trial,[98] but to bring a case within this rule it must appear that the moving party used due diligence to prepare and appear for trial and present his case and was prevented from doing so because of some accident or misfortune[99] which preventative precautions could not avoid.[1] That a party did not appear at the time set for trial because of business interests is not excusable neglect.[2] Where a party intentionally fails to appear a new trial will not be granted on the ground of inadvertence and excusable neglect to permit him to set up a defense provable under the issues filed[3] or other meritorious defense known to his counsel

Nolan [Okl.] 83 P. 796. A judge who declares a verdict shocking to every sense of justice should grant a new trial. Dinan v. Supreme Council Catholic Mut. Ben. Ass'n [Pa.] 62 A. 1067. If a trial judge is dissatisfied with the verdict and grants a new trial, some latitude must be allowed to his discretion especially where the propriety of his action is affirmed by a verdict in favor of the moving party. Citizens' Bank v. Taylor & Co. [Va.] 51 S. E. 159.

91. Ruppel v. United Railroads [Cal. App.] 82 P. 1073; Bohle v. King-Brinsmade Mercantile Co., 114 Mo. App. 439, 89 S. W. 1036.

92. Shaw v. Seattle [Wash.] 81 P. 1057; Ross v. Metropolitan St. R. Co., 104 App. Div. 378. 93 N. Y. S. 679; Willets v. Curth, 102 App. Div. 616, 92 N. Y. S. 174.

93. Where nominal damages were allowed a parent for the death of a 17 year old son and the evidence did not entitle the defendant to a directed verdict. Rawitzer v. St. Paul City R. Co. [Minn.] 103 N. W. 499. On a rule to show cause a new trial may be granted where an error has resulted in a verdict for excessive damages though such error was not subject to an exception at the trial. Butler v. Hoboken Print. & Pub. Co. [N. J. Law] 62 A. 272.

94. Circumstances held to show that a verdict excessive by $5,000 was due to mistake of judgment, the jury not having been advised of any basis upon which to estimate the damages. City of Argentine v. Bender [Kan.] 80 P. 935; Sorenson v. Oregon Power Co. [Or.] 82 P. 10; Noxon v. Remington [Conn.] 61 A. 963; McKnight v. Minneapolis, etc., R. Co. [Minn.] 105 N. W. 673; St. Louis, etc., R. Co. v. Foster [Tex. Civ. App.] 89 S. W. 450. Remittitur of an excessive verdict within a specified time may be made the condition of refusing a new trial. Such time may be extended during term. Campbell v. Pittsburg Bridge Co., 23 Pa. Super. Ct. 138. Where the damages assessed are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court in the exercise of a sound discretion may make the remittitur of the excess the condition for refusing to grant a new trial. American Contracting Co. v. Sammon, 6 Ohio C. C. (N. S.) 121. Where the amount of an evident error in a verdict is specific and certain as shown by other findings, the amount may be deducted and a new trial need not be granted. Kansas City, M. & O. R. Co. v. Turley [Kan.] 80 P. 605. Where a judgment can be reformed so as to do full justice under the evidence such action may be taken in lieu of granting a new trial. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex. Civ. App.] 90 S. W. 202.

95. Under a rule that either party shall have the right to have all questions of fact submitted to a jury, a court cannot if it deems a verdict excessive in a case where the damages are incapable of exact ascertainment, permit a remittitur but should award a new trial. Southern Pac. Co. v. Fitchett [Ariz.] 80 P. 359.

96. See 4 C. L. 818.

97. Where plaintiff was granted a summary judgment on an amended bill of particulars when defendant was entitled to assume that the case would take its regular course on the trial docket for a hearing of his plea to the sufficiency of the bill. Mueller v. Michaels [Md.] 60 A. 485. Failure to take issue on the plea of the statute of limitations filed during vacation held ground for new trial. Norfolk & W. R. Co. v. Coffey [Va.] 51 S. E. 729. Evidence held to entitle one to a new trial on the ground of surprise and accident. Chicago Cottage Organ Co. v. Standen, 5 Neb. Unoff. 494, 98 N. W. 1051, Id., 5 Neb. Unoff. 488, 98 N. W. 1052.

98. Sickness and death preventing a party from attending trial are accidental causes. Massucco v. Tomassi [Vt.] 62 A. 57.

99. The rule authorizing the court to relieve a party from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect does not necessitate a new trial where default judgment is taken in a case where a party intentionally abandons his defense after answer and makes no effort to prepare for trial or obtain a continuance. Peterson v. Crosier [Utah] 81 P. 860. On the hearing of a motion on the ground of surprise, accident or fraud, evidence held insufficient to justify granting the motion. Wells v. Gallagher [Ala.] 39 So. 747. Wilson's Rev. & Ann. St. 1903, § 4760, authorizing courts to vacate their judgments and grant a new trial for fraud in obtaining the judgment, does not authorize a new trial where a party neglects to appear after waiving service of summons and been given full opportunity to prepare a defense. Williamson v. Williamson [Okl.] 83 P. 718.

1. Clemans v. Western [Wash.] 81 P. 824.

at the time the original pleading was filed.[4] A new trial will not be granted for mistake, casualty or misfortune directly attributable to the negligence of the moving party[5] or his attorney,[6] or for mistake due to ignorance of law.[7] A party cannot assert surprise at evidence he knew would be introduced[8] and surprise at certain evidence is not ground where no cause is shown why rebutting evidence was not introduced at the trial[9] or a continuance asked to procure it.[10] Surprise is not ground unless a different verdict is probable.[11]

(§ 2) *H. Newly discovered evidence.*[12]—Newly discovered evidence which is material and important and could not have been produced at the trial is ground for a new trial[13] if it will probably change the result.[14] Such evidence is not limited to matters known to the applicant at the time of filing the motion but may include any that have been developed since that time.[15] The evidence must have been discovered subsequent to the prior trial[16] and its non production at the trial excused,[17] and it must be such as could not have been discovered before the trial by the ex-

2. Peterson v. Crosier [Utah] 81 P. 860.

3, 4. Peterson v. Crosier [Utah] 81 P. 860.

5. Robins v. Modern Woodmen [Iowa] 103 N. W. 375.

6. Peterson v. Crosier [Utah] 81 P. 860.

7. That an attorney did not introduce evidence on a material issue because he believed the burden of proof of such issue rested on the opposite party does not entitle him to a new trial on the ground of surprise. LeTourneux v. Gilliss [Cal. App.] 82 P. 627.

8. One cannot claim a right to a new trial on the ground of surprise because of the introduction of evidence he knew would be introduced and had asked a continuance in order to procure rebutting evidence. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Where one is warned to produce certain evidence he cannot assert surprise. Lederer v. Hannes, 96 N. Y. S. 1072.

9. O'Neil v. Printz [Mo. App.] 91 S. W. 174.

10. Surprise arising from absence of witnesses or unexpected testimony is not ground where no claim of surprise was made at the trial, no continuance asked to procure attendance of absent witnesses and evidence to meet the emergency. Woods v. Globe Navigation Co. [Wash.] 82 P. 401; Renshaw v. Dignan [Iowa] 105 N. W. 209. Where no subpoena was served on a material witness and though it was discovered before the trial that he could not be found, such fact was not called to the attention of the court nor motion for continuance made until the court had disclosed its determination of the case, a party is not entitled to a new trial on the ground of accident and surprise. Clemans v. Western [Wash.] 81 P. 824.

11. Where additional evidence would not have changed the verdict. Campbell v. Campbell [Iowa] 105 N. W. 583.

12. See 4 C. L. 819.

13. Evidence in an action for injuries that immediately after the trial the plaintiff's condition indicated that she was shamming at the time of the former trial, and where the verdict largely depended on expert evidenec. Wells, Fargo & Co. v. Gunn, 33 Colo. 217, 79 P. 1029; Crenshaw v. Asheville & B. St. R. & Transp. Co. [N. C.] 52 S. E. 731. After discovered evidence should be taken advantage of as ground for new trial. Lancaster v. Lee [S. C.] 51 S. E. 139.

14. Evidence held to be of such character as to warrant a new trial in a personal injury action. O'Hara v. Brooklyn Heights R. Co., 102 App. Div. 398, 92 N. Y. S. 777. Where a verdict was rendered because of injuries to eyesight, newly discovered evidence that the injury did not materially affect the sight. Popadinec v. Manhattan R. Co., 109 App. Div. 850, 96 N. Y. S. 913. In an action for injury to an eye, newly discovered evidence of an eye expert as to the condition of the eye held not merely cumulative. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 40, 86 S. W. 943.

15. Bousman v. Stafford [Kan.] 81 P. 184.

16. Refusal of new trial held not an abuse of discretion where the applicant knew of the existence of the witness and discovered his whereabouts during the prior trial but made no request for a continuance. Dumontier v. Stetson & Post Mill Co. [Wash.] 81 P. 693. Evidence is not newly discovered which at the time of the trial is known to the plaintiff in interest who had taken upon herself the prosecution of the case and which any inquiry of her would have made known to the nominal plaintiff. Emmet v. Perry [Me.] 60 A. 872. In an action for injuries sustained because of a defective sidewalk, testimony of a sidewalk inspector who called at the home of the injured party and said he was going to examine the premises where the accident occurred but it did not appear that such party saw him there or knew that he went there, and it did appear that counsel knew nothing of the incident, is newly discovered. Brennan v. Seattle [Wash.] 81 P. 1092. Where a beneficial association had paid one of two contesting claimants but did not notify its counsel, who was defending an action brought by the other, of such fact, it cannot set it up as newly discovered evidence entitling it to a new trial where judgment goes against it. Robins v. Modern Woodmen [Iowa] 103 N. W. 375. Evidence that a party has knowledge of before the trial and which became material during the trial but on the witnesses being reported absent from the city no request to delay the trial was made is not newly discovered. Wright v. Agelasto [Va.] 51 S. E. 191.

17. Hahn v. Dickinson [S. D.] 103 N. W. 642

ercise of ordinary diligence.[18] Whether reasonable diligence has been used is a question for the court upon the affidavits presented.[19] Granting a new trial for newly discovered evidence is discretionary with the trial court,[20] and it will not be granted for evidence which is immaterial[21] or is merely cumulative,[22] contradictory[23] or impeaching,[24] and which would probably not produce a different result;[25] but

18. In re Colbert's Estate [Mont.] 80 P. 248; Moore v. Rogers, 27 Ky. L. R. 827, 86 S. W. 977; Slusher v. Hopkins [Ky.] 89 S. W. 244; Jessen v. Wilhite [Neb.] 104 N. W. 1064; Hixson v. Carqueville Lithographing Co., 115 Ill. App. 427. Diligence not shown. Devoy v. St. Louis Transit Co. [Mo.] 91 S. W. 140.

Due diligence not exercised: The fact that counsel was excusable in not knowing of certain evidence at the prior trial is no ground where the fact should have been known to his client. Haner v. Northern Pac. R. Co. [Wash.] 81 P. 98. Evidence which common prudence would require a party to have at the trial. Collins v. Bacon, 38 Wash. 80, 80 P. 268. Where any sort of diligence would have produced the evidence at the trial. Renshaw v. Dignan [Iowa] 105 N. W. 209. Where a case had been pending for a long time and the witness who was to give newly discovered evidence testified at a prior trial, a new trial will not be granted unless it appears that the evidence claimed to be newly discovered could not have been brought out on cross-examination. McClendon v. McKissack [Ala.] 38 So. 1020. Newly discovered witnesses were fellow-servants of the movant. Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127. Where a letter book containing a copy of a letter was offered to be produced by one party. Texas Cotton Products Co. v. McMillan [Tex. Civ. App.] 87 S. W. 846. A party who proceeds to trial with knowledge that a witness who promised to be present was absent, and asked no postponement or made no effort to procure his attendance, is not entitled to a new trial because of such witness' absence. Dowell v. Dergfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 377, 87 S. W. 1051. A party who goes to trial without making any effort to procure evidence of available witnesses is not entitled to a new trial on the ground of newly discovered evidence to be given by such witnesses. Id. Where a party had talked with a person relative to the case and it might have been inferred from his conversation that he was concealing something, he should have called him as a witness. St. Louis & S. F. R. Co. v. Ross [Tex. Civ. App.] 14 Tex. Ct. Rep. 89, 89 S. W. 1105. Where the same diligence exercised after trial would if exercised before have procured a witness. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 12 Det. Leg. N. 639, 105 N. W. 1. Where it appeared that the movant had an agent charged with the duty of ascertaining facts, names of witnesses, etc., it must appear by the affidavit of the agent that he had no knowledge of the alleged newly discovered evidence before the trial. Missouri, etc., R. Co. v. Sloan [Tex. Civ. App.] 91 S. W. 243.

19. In re Colbert's Estate [Mont.] 80 P. 248.

20. Richards v. Meissner, 24 App. D. C. 305; Brennan v. Seattle [Wash.] 81 P. 1092; In re Colbert's Estate [Mont.] 80 P. 248; Hot Springs R. Co. v. McMillan [Ark.] 88 S. W. 846.

21. Buchholtz v. Incorporated Town of Radcliffe [Iowa] 105 N. W. 336.

22. Wood v. Moulton, 146 Cal. 317, 80 P. 92; Andrew v. Carithers [Ga.] 52 S. E. 653; Stewart v. Doak [W. Va.] 52 S. E. 95; In re Walker's Estate [Cal.] 82 P. 770; Buchholtz v. Incorporated Town of Radcliffe [Iowa] 105 N. W. 336; Renshaw v. Dignan [Iowa] 105 N. W. 209; Arenschield v. Chicago, etc., R. Co. [Iowa] 105 N. W. 200; St. Louis & S. F. R. Co. v. Ross [Tex. Civ. App.] 14 Tex. Ct. Rep. 89, 89 S. W. 1105; Slusher v. Hopkins [Ky.] 89 S. W. 244; Long v. McDaniel [Ark.] 88 S. W. 964; City of Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; Dowell v. Dergfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 377, 87 S. W. 1051; Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127; Patterson v. San Francisco & S. M. Electric R. Co., 147 Cal. 178, 81 P. 531; Hemmer v. Burger, 127 Iowa, 614, 103 N. W. 957; Hahn v. Dickinson [S. D.] 103 N. W. 642; Indianapolis & M. Rapid Transit Co. v. Edwards [Ind. App.] 74 N. E. 533; Ray v. Baker [Ind.] 74 N. E. 619. Evidence which bears wholly on a point fully investigated at the prior trial is cumulative or corroborative. Illinois Cent. R. Co. v. Colly, 27 Ky. L. R. 730, 86 S. W. 538. Especially when it does not clearly appear to be newly discovered (Cummings v. Baker [Mich.] 12 Det. Leg. N. 547, 104 N. W. 979), or is on a part of the case which was abundantly proven and as to which there was no fact in controversy (Shannon v. Tacoma [Wash.] 83 P. 186).

Not cumulative: Testimony as to the condition of a sidewalk a few days after an accident is not cumulative of testimony as to its condition at the time of the accident. Brennan v. Seattle [Wash.] 81 P. 1092. Testimony of a surgeon that in the progress of an operation involving the opening of the abdomen he found an intestine ruptured is not merely cumulative to that of a physician that upon external examination he concluded that a rupture probably existed. Bousman v. Stafford [Kan.] 81 P. 184.

23. Wood v. Moulton, 146 Cal. 317, 80 P. 92. On matter remotely important. Hixson v. Carqueville Lithographing Co., 115 Ill. App. 427.

24. Rogers v. Daniels, 116 Ill. App. 515; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29; Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310.

25. Wilson v. Alexander [Tenn.] 88 S. W. 935; Buchholtz v. Incorporated Town of Radcliffe [Iowa] 105 N. W. 336; Stewart v. Doak [W. Va.] 52 S. E. 95; Richards v. Meissner, 24 App. D. C. 305; In re Colbert's Estate [Mont.] 80 P. 248. Not where such evidence was overwhelmingly contradicted. Devoy v. St. Louis Transit Co. [Mo.] 91 S. W. 140. Not evidence partly discredited by witnesses and the known facts and circumstances of the case and at best was

this rule is not to be applied if such application would defeat substantial justice.[26]

(§ 2) *I. As a matter of right in ejectment.*[27]—The Minnesota statute applies only where the right to possession as well as ownership is involved[28] and does not apply to all actions in which title to realty is questioned.[29] The substance and not the form determines whether a party is entitled to a second trial.[30] The Indiana statute does not apply where title is questioned only as incidental to the main relief sought.[31]

§ 3. *Proceedings to procure new trial.*[32]—The entry of a motion for new trial suspends the judgment[33] and constitutes an abandonment of an appeal previously granted.[34] Motion for a new trial is waived by filing a motion in arrest,[35] except where the grounds of the former are unknown at the time the motion in arrest is made.[36] A judgment prematurely entered does not deprive a party of his right to file a motion for a new trial.[37]

A motion will not be read from an amended pleading filed after reversal and remand of the cause.[38] A motion based on statutory grounds must assert a ground within the statute.[39] If an assignment of a statutory ground contains irrelevant matter, the latter may be regarded as surplusage.[40] In the absence of an order requiring them to do so, specific grounds for the motion need not be stated by the movant.[41] All grounds not specified are deemed waived.[42] The grounds must be well assigned as a whole[43] and must be stated in such terms as will clearly indicate

merely cumulative, and not likely to change the result. Shepard v. New York, etc., R. Co. [R. I.] 61 A. 42. Not for newly discovered evidence which is flatly contradicted where the witness was present and testified at the trial. Barber v. Maden, 126 Iowa, 402, 102 N. W. 120. That a witness used an erroneous memorandum in testifying is not ground for new trial because the testimony he gave on cross-examination varied from such memorandum. Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co. [Ind. App.] 75 N. E. 672.

26. Brennan v. Seattle [Wash.] 81 P. 1092. Cumulative, contradictory or impeaching evidence which may have the effect of changing the result is ground where the evidence in support of the verdict is contradictory and not decisive. Hanson v. Bailey [Minn.] 104 N. W. 969; Schnitzler v. Oriental Metal Bed Co., 93 N. Y. S. 1119.

27. See 4 C. L. 821. See, also, Quieting Title, 4 C. L. 1167; Ejectment, 5 C. L. 1056.

28. Gen. St. 1894, § 5845 does not apply to an action to have a deed declared a mortgage where possession is not sought by either party. Phillips v. Mo [Minn.] 104 N. W. 681.

29. Phillips v. Mo [Minn.] 104 N. W. 681. Gen. St. 1894, § 5845 does not give a new trial as of right in an action to determine adverse claims. Heins v. Renville County Com'rs [Minn.] 104 N. W. 903.

30. To determine the right to a second trial under Gen. St. 1894, § 5845, the court will look to the substance of the cause and not merely to the form or manner in which it is presented. Phillips v. Mo. [Minn.] 104 N. W. 681.

31. Though a complaint asks that title be quieted, yet where the main purpose of the suit was to obtain injunctive relief, Burns' Ann. St. 1901, § 1076, providing for a new trial as of right in ejectment, does not apply. Indiana Rolling Mill Co. v. Gas Supply Min. Co. [Ind. App.] 76 N. E. 640.

32. See 4 C. L. 822.

33, 34. Leonard's Adm'r v. Cowling, 27 Ky. L. R. 1059, 87 S. W. 812.

35. George v. Robinson [Ind. App.] 75 N. E. 607.

36. New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668.

37. Jennings v. Frazier [Or.] 80 P. 1011.

38. Though it contain a prayer for new trial. Asher v. Uhl, 27 Ky. L. R. 938, 87 S. W. 307.

39. Under the rule that a new trial may be granted because the verdict or decision is not sustained or is contrary to law, an assignment that the decision of the court is contrary to the evidence presents no question. State v. Richeson [Ind. App.] 75 N. E. 846. Where a new trial is authorized on the ground that the decision is not sufficiently sustained, specifications in a motion that "special findings" specified were not sustained, were without the issues and contrary to the law, are insufficient, since "decision" means "special finding" when one has been required. Major v. Miller [Ind.] 75 N. E. 159. Where it is claimed that damages awarded in an action to recover unliquidated damages are excessive or inadequate and were given under the influence of passion or prejudice, the motion must be made in the trial court under Gen. St. 1894, § 5398, subd. 4. English v. Minneapolis & St. P. S. R. Co. [Minn.] 104 N. W. 886.

40. "In this that the amount of the recovery is too small" following the statutory ground that "the decision is contrary to law." State v. Richeson [Ind. App.] 75 N. E. 846.

41. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

42. Richardson v. Benes, 115 Ill. App. 532. By omitting to mention a particular ground in the motion it is waived. Brillow v. Oziemkowski, 112 Ill. App. 165.

43. Grounds are not well assigned where the exclusion of evidence as to a number

the error complained of.[44] If specifications are arranged under a general heading and it is readily apparent what errors are intended to be assigned, it is sufficient.[45] Newly discovered evidence asserted as a ground must be set out in the motion.[46] An amendment supplying additional grounds[47] or specifications of error may be allowed.[48] Whether a second motion should be allowed to be filed rests in the discretion of the court.[49] If so required by rule of court, the motion must be verified.[50] A motion for a venire de novo applicable only to the general verdict raises no question concerning the finding of the jury in answer to a special interrogatory.[51]

A motion is indivisible and when made by more than one party must be allowed or overruled as to all;[52] but this rule should not be invoked to defeat a meritorious petition.[53] A court is not required to grant a new trial as to part of a case.[54]

of facts is set up and the witnesses by whom it is sought to prove such facts are competent to testify to part of them but there is no segregation of the competent from the incompetent. Indianapolis & M. Rapid Transit Co. v. Hall [Ind.] 76 N. E. 242.

44. In the motion the grounds must be stated in such terms as will clearly indicate to the court the identity of the particular subject and ruling complained of. Continental Casualty Co. v. Lloyd [Ind.] 73 N. E. 824.

Held sufficient: Specification held to sufficiently point out wherein the evidence was insufficient to support the verdict as required by Code Civ. Proc. § 1173. Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370. Specifications that the verdict is excessive is not sustained by the evidence and is contrary to law and that the court erred in refusing to direct a verdict. Missouri, etc., R. Co. v. Smith [Ind. T.] 89 S. W. 668. Under a rule that specifications of error shall refer to the ruling complained of so as to clearly identify the objection, a specification that the court erred in admitting testimony set out in first, second, etc., bills of exception. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405. An assignment "there has been no evidence introduced at the trial tending to show that the plaintiff has sustained any loss by reason of the act of the defendant." Clark v. Rauer [Cal. App.] 83 P. 291.

Held insufficient: A ground of motion assigning error in refusing to permit a witness to answer a certain question should show not only what answer was expected but that the judge was informed as to it. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728. A motion based on the theory that the verdict is contrary to the law must point out wherein the law was disregarded. Ard v. Crittenden [Ala.] 39 So. 675. A specification that the verdict is contrary to the law and evidence is too general. Dodd v. Presley [Tex. Civ. App.] 86 S. W. 73. Specifications that the court erred in the admission of evidence, and in instructions given and refused, are too general. Missouri, etc., R. Co. v. Smith [Ind. T.] 89 S. W. 668. Under a rule that all grounds be stated and set out separately in the motion assignments of "error in the admission and exclusion of evidence" and "in refusing special instructions asked" are insufficient for failure to set out the evidence and instructions. Memphis St. R. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 169. An assignment that the decision is contrary to law does not raise the question of the amount of recovery. State v. Richeson [Ind. App.] 75 N. E. 846.

45. Where in a statement on motion for a new trial all the errors were under the heading "Specification of errors appearing at said trial," assignments questioning the sufficiency of evidence were not fatally defective because designated errors of law when in fact they were attempts to point out particulars wherein the evidence was insufficient. Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370.

46. Johnson v. Thrower [Ga.] 51 S. E. 636.

47. The trial court may permit an amendment to the motion after decision thereon by inserting an additional ground where such relief will not prejudice the opposite party. Jung v. Theo. Hamm Brewing Co. [Minn.] 104 N. W. 233.

48. An assignment containing no specification of error or particulars wherein the evidence was insufficient to support the verdict may be amended by inserting them. Clark v. Rauer [Cal. App.] 83 P. 291.

49. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942.

50. A motion for new trial on newly discovered evidence is a motion grounded on facts not apparent from the record and under rule 16 of this court should be verified by affidavit in order to entitle it to be considered. Emmet v. Perry [Me.] 60 A. 872. A motion on the ground of newly discovered evidence and the affidavit in support thereof must be verified. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 40, 86 S. W. 943. When not founded on evidence must be verified by affidavit is a valid rule. Dietrich v. Lancaster, 212 Pa. 566, 61 A. 1112.

51. Spaulding v. Mott [Ind.] 76 N. E. 620.

52. Godfrey v. Smith [Neb.] 103 N. W. 450. Where excessiveness of judgment was attempted to be presented by motion, on the fifth statutory ground and a new trial was sought only as to the cross complaint and not as to the whole case the motion was properly denied. Oglebay v. Todd [Ind.] 76 N. E. 238.

53. The rule that a motion for a new trial is indivisible cannot be invoked to defeat a review of a meritorious petition in error filed by a minor defendant in error whose guardian ad litem had inadvertently joined him with a mere nominal defendant who had no substantial rights involved. Godfrey v. Smith [Neb.] 103 N. W. 450.

The motion must be filed within the time prescribed by law[55] usually within a certain number of days[56] or during the term at which the verdict was rendered[57] unless a delayed filing is excused.[58] Where no motion was filed within the time prescribed, the court may not at a subsequent term direct it to be filed nunc pro tunc,[59] and an order extending the time to file the motion cannot be entered nunc pro tunc where no such order was previously made.[60] It must be filed in the proper venue[61] and before the court entitled to entertain it.[62] The motion must be prosecuted with due diligence.[63] A motion may be heard at a subsequent term[64] if filed and recognized during the term at which the verdict was rendered;[65] but a stipulation that the judge may sign the judgment after adjournment of the term does not authorize him to hear and determine a motion for a new trial.[66] A motion for a venire de novo must be made before final judgment.[67]

54. Where issues raised by a cross complaint were so identified with those raised by the complaint that a retrial of one would not avail a movant if the others were found against him, a motion for a new trial of those made by the cross complaint was properly denied. New Hampshire Fire Ins. Co. v. Wall [Ind. App.] 75 N. E. 668. Where the evidence is insufficient as to one party but sufficient as to another, the motion is properly overruled. Capital Lumber Co. v. Barth [Mont.] 81 P. 994.

55. Klein v. Southern Pac. Co., 140 F. 213.

56. A district court has no authority to grant a new trial upon an application made more than 30 days after judgment unless the application is based on newly discovered evidence. Flaherty v. Pack [N. J. Law] 62 A. 269. Rev. St. 1899, § 3748, amended by Laws 1901, p. 69, c. 66, § 1, fixing the time within which motion for a new trial may be filed, is mandatory. Todd v. Peterson, 13 Wyo. 513, 81 P. 878. A motion filed four days after entry of judgment is timely under 2 Ball. Ann. Codes & St. § 5075, requiring it to be filed within two days, where the last two days are holidays. § 4790 provides that time shall be computed by excluding the first and including the last day unless it is a holiday in which case it also is excluded. Kubillus v. Ewert [Wash.] 82 P. 147. A verdict contrary to law may be set aside on motion made at the close of the trial or within five days from judgment rendered. Express provision of Laws 1902, p. 1563, c. 580, § 254. O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760. Rev. St. 1899, § 803, providing that motions for new trial and in arrest of judgment shall be made within four days after trial does not apply to a judgment of the supreme court directing the setting aside of an order granting a new trial and the entry of judgment on the verdict. Such action is not a trial. Scullin v. Wabash R. Co. [Mo.] 90 S. W. 1026.

57. Under Burns' Ann. St. 1901, § 570, providing that the application for a new trial may be made at any time during the term at which the verdict is rendered, and § 1443, providing that business undisposed of at the end of the term may be proceeded with at an adjourned term, such adjourned term is part of the regular term and a supplemental petition then filed is in time. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942.

58. Rev. St. 1899, § 3748, amended by Laws 1901, p. 69, c. 66, § 1, excusing the failure to file motion within the statutory period, if such failure was unavoidable, does not excuse a failure which is the result of inadvertence of a party's attorney. Todd v. Peterson, 13 Wyo. 513, 81 P. 878.

59. Todd v. Peterson, 13 Wyo. 513, 81 P. 878.

60. That the judge expressed a willingness to make such order does not warrant its entry nunc pro tunc. Klein v. Southern Pac. Co., 140 F. 213.

61. Where pursuant to stipulation a case pending in one county was decided at chambers in another and the judgment was to be sent to the county in which it was pending for entry, a motion filed in the county where the court made the decision was ineffectual. Todd v. Peterson, 13 Wyo. 513, 81 P. 878.

62. A motion on the ground that the evidence is insufficient to support the verdict must be made before the judge who tried the cause at the same term. Knowles v. Savage, Son & Co. [N. C.] 52 S. E. 930. A motion on the ground of mistake, surprise, inadvertence, excusable neglect and irregularities in the judgment can be granted only by the justice who rendered the judgment. McWhirter v. Bowen, 103 App. Div. 447, 92 N. Y. S. 1039. Where a case is heard and determined and no question of law saved, a motion for new trial, after the death of the judge before reporting the case to the supreme court as he had intended, made before another judge, is properly denied. Newburyport Inst. for Sav. v. Coffin [Mass.] 75 N. E. 81.

63. The usual practice in moving the denial or dismissal of a motion for a new trial on the ground of laches in prosecuting it is to make the motion when the application for new trial comes up for disposition, but the party need not wait until such time but may make his motion at any time. Ryer v. Rio Land & Improvement Co., 147 Cal. 462, 82 P. 62.

64. The Federal circuit court may dispose of a motion for a new trial filed at a prior term provided such motion was filed in time and entertained by the court. Klein v. Southern Pac. Co., 140 F. 213.

65. The mere filing of a motion in due time at the term at which the judgment is rendered does not of its own force and without any order or recognition by the

The motion is not continued by a general order continuing "all cases, actions, motions and proceedings."[68] A postponement is properly denied if the motion is required to be heard during the term.[69]

The adverse party is entitled to notice of the time and place of the hearing of the motion and to be present and present his side of the case.[70] If so required by law a copy of the rule nisi must be served upon him.[71] Where a rule nisi was granted on a motion and ordered served and the motion set to be heard at an adjourned term of the court at which it was made to be held more than 80 days after the date of the rule the court did not abuse its discretion in dismissing the motion for want of service, there being no excuse for failure of service nor evidence of waiver[72] in ample time to allow opportunity to prepare for the hearing.[73]

The hearing on the motion at a subsequent term is an independent action.[74]

The motion may be granted at any time before judgment entered.[75]

Evidence in support of motion.[76]—The statutory right of a hearing upon a motion for a new trial is conditional upon furnishing the law court with a report of the evidence.[77] This condition cannot be waived or dispensed with.[78] The transcript should contain only the evidence on the point as to which error is asserted.[79] If

court carry it over to the succeeding term so as to give the court jurisdiction, without the consent of the opposing party to then hear and dispose of it. Klein v. Southern Pac. Co., 149 F. 213.

66. Knowles v. Savage, Son & Co. [N. C.] 52 S. E. 930.

67. McCaslin v. State [Ind. App.] 75 N. E. 844.

68. A general order continuing all "cases, actions, motions and proceedings" until the next term does not keep alive against the objection of the opposite party a motion for a new trial. Southern R. Co. v. Jones [Ala.] 39 So. 118.

69. Where a court is required to dispose of the motion during the term at which it is filed and a motion to postpone the hearing to a date beyond the term properly overruled though a deposition could not be produced during the term. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 40, 86 S. W. 943.

70. Sufficiency of proof of service of notice discussed. Peter v. Kaley [Idaho] 83 P. 526. Under Rev. St. 1887, §§ 4441, 4442, where a motion is made on affidavits, the adverse party is entitled to 10 days after service on him of the affidavits to file and serve counter affidavits and within such period the court cannot hear the motion on the affidavits of the movant. Id. Civ. Code 1895, § 4324, providing that 10 days notice of the time and place of the hearing of a motion for a new trial be given to parties in interest, applies only in a case where the trial judge upon the application of one of them, in vacation fixes a time and place for hearing during vacation. Gould v. Johnston & Co. [Ga.] 51 S. E. 608.

71. Civ. Code 1895, § 5475 expressly provides that in all applications for a new trial the opposite party shall be served with a copy of the rule nisi unless such copy is waived. McMullen v. Citizens' Bank [Va.] 51 S. E. 342. Such service is essential though the application is to be heard during the term at which the trial is had. Id.

72. McMullen v. Citizens' Bank [Ga.] 51 S. E. 342.

73. No time is prescribed within which the respondent shall be served with a copy of a rule nisi made in term under the provisions of Civ. Code 1895, § 5484, and where service has been made in ample time to allow him to prepare for the hearing, it is not ground for dismissal that it was not served within 10 days after it was granted. Gould v. Johnston & Co. [Ga.] 51 S. E. 608.

74. Under Burns' Ann. St. 1901, § 572, providing that applications for a new trial where the causes are discovered after the term may be made not later than the second term after the discovery, are independent actions and trial must be had as in any other independent proceeding. Slusser v. Palin [Ind. App.] 74 N. E. 17.

75. Until judgment the verdict is under control of the court and a new trial may be granted for any reason which appeals to its discretion, therefore where the court discharges a rule for a new trial and the defendant fails to pay costs so judgment may be entered the court may reinstate the rule and make it absolute. Cronrath v. Border, 27 Pa. Super. Ct. 15.

NOTE. New trial after satisfaction of judgment: The trial court is not deprived of jurisdiction to grant a new trial within the period allowed by statute by the fact that the judgment has been affirmed on appeal and execution returned satisfied. Chambliss v. Hass [Iowa] 68 L. R. A. 126 and note.

76. See 4 C. L. 822.

77. Morin v. Claflin [Me.] 61 A. 782.

78. Morin v. Claflin [Me.] 61 A. 782. Where by reason of the death of the official court stenographer a party who has filed a motion for a new trial is unable to procure a report of the evidence, the motion must be overruled. Id.

79. A petition for a new trial in a will contest on the ground that the evidence shows that the will was not executed according to law should not contain a transcript of the evidence other than on that

duly approved and allowed it is prima facie a complete record.[80] A rule requiring all papers used on the motion to be filed does not apply to a transcript of the stenographer's notes prepared at the expense of the movant.[81] The movant has the burden of establishing facts warranting a new trial.[82] Facts admitted for the purposes of an exception to a conclusion of law may be controverted on motion for a new trial.[83]

Bill of exceptions.[84]—The rule that a motion for a new trial must be prosecuted with due diligence extends to the preparation of the bill of exceptions[85] and the burden is on the movant to show excuse for unreasonable delay.[86] Whether due diligence has been exercised is a question for the judge.[87] Due diligence must be observed in having the bill settled[88] and in procuring the judge's signature to it.[89] A bill of exceptions cannot be filed before it has been signed by the judge.[90]

Affidavits.[91]—Affidavits in support of a motion must set up controlling and conclusive grounds.[92] It must be made to appear by affidavits that the existence of alleged newly discovered evidence was not known at the time of trial and could not have been known by the exercise of ordinary diligence[93] unless such showing is excused.[94] The mere statement of such fact as a conclusion is not enough.[95] Statu-

point. Wood v. Rhode Island Hospital Trust Co. [R. I.] 61 A. 757.

80. A party attacking it as deficient must present and support his corrections by affidavit. Wood v. Rhode Island Hospital Trust Co. [R. I.] 61 A. 757.

81. Gen. rule of practice that when an order is entered all the papers used on the motion shall be filed does not apply on a motion for a new trial under Code Civ. Proc. on the judge's minutes, to a transcript of the stenographer's notes which the moving party has obtained at his own expense and which § 1007 authorizes the judge to treat as his minutes. Schlotterer v. Brooklyn & N. Y. Ferry Co., 102 App. Div. 363, 92 N. Y. S. 674.

82. One seeking a new trial on the ground that the cause was tried out of its order on the docket and after his attorney had withdrawn from the case without notice to him has the burden of showing no notice of his attorney's withdrawal. Ranson v. Leggett [Tex. Civ. App.] 90 S. W. 668.

83. An exception to a conclusion of law though admitted for the purpose of the exception that the facts are correctly found. Reserve Loan Life Ins. Co. v. Hockett [Ind. App.] 73 N. E. 842.

84. See 4 C. L. 822 et seq.

85. Miller v. Queen Ins. Co. [Cal. App.] 83 P. 287.

86. Where five months' delay is unexplained. Miller v. Queen Ins. Co. [Cal. App.] 83 P. 287. Other business of counsel for a moving party may be considered on the question of negligence in prosecuting a motion for new trial. Id.

87. In causing a bill of exceptions to be engrossed and in procuring the judge's signature thereto. Miller v. American Cent. Ins. Co. [Cal. App.] 83 P. 289. Unreasonable delay in procuring the judge's signature to a bill of exceptions is governed by the same rules as delay in engrossing the bill. Id.

88. Where the judge was absent on the day fixed for presentation of the bill of exceptions, the movant should ascertain when he would return, and obtain an order fixing the date for settlement. He is not relieved from further action until he learns that a date has been set. Miller v. Queen Ins. Co. [Cal. App.] 83 P. 287. Where after motion to dismiss a motion for a new trial the movant gives notice fixing a date for settling the bill of exceptions, such action does not cure previous negligence and delay in prosecuting his motion. Id. Where the judge was absent on the day set for settling the bill of exceptions, meetings of the parties at the judge's chambers for the purpose of settling the bill is a waiver by the movant from the judge of notice of a day fixed for such action. Id.

89. Due diligence not shown where there was a delay of three months after the bill was engrossed. Miller v. American Cent. Ins. Co. [Cal. App.] 83 P. 289. That a judge was absent when the engrossment of a bill of exceptions was completed does not relieve the movant from the exercise of due diligence in ascertaining the date of his return and procuring his signature. Id. The clerk with whom a bill of exceptions has been left is under no duty to present it to the judge for his signature. Id.

90. Miller v. American Cent. Ins. Co. [Cal. App.] 83 P. 289.

91. See 4 C. L. 825.

92. Netcher v. Bernstein, 110 Ill. App. 484. Affidavits that a juror was asleep during a portion of the trial but which do not show how long he slept or what testimony was taken during his nap do not show ground. Kozlowski v. Chicago, 113 Ill. App. 513.

93. Johnson v. Thrower [Ga.] 51 S. E. 636.

94. Where witnesses who are to give newly discovered evidence are employes of the opposing party, such fact excuses compliance with the rule requiring affidavits of such witnesses as to what they will testify to. Brennan v. Seattle [Wash.] 81 P. 1092.

95. Jessen v. Wilhite [Neb.] 104 N. W. 1064. Should show what diligence was used,

tory requirements as to affidavits of absent witnesses must be complied with.[96] Controverted affidavits raise a question of fact for the court to decide.[97]

Brief of evidence.—In Georgia a brief of evidence is essential to the validity of a motion for a new trial.[98] The time and method of preparing and filing such brief is regulated by order of court.[99]

Order granting or refusing new trial.[1]—An order cannot be made before the statement upon which the motion is based is filed.[2] An order in general terms granting a new trial is good if any ground assigned is sufficient to sustain it.[3] Such order authorizes a trial of the entire case.[4] An order made after judgment entered has the effect of vacating it.[5] Where a motion based on several grounds is sustained upon one "and no other" it constituted an explicit overruling of the motion on other grounds.[6] Statements or recitals in the order as to the showing made constitute no part of it.[7] A general order cannot be limited by an independent writing stating the grounds.[8] An order granting a new trial should be conditioned upon the payment

how the new evidence was discovered and why it was not discovered before. In re Colbert's Estate [Mont.] 80 P. 248. An affidavit must show such facts relating to its discovery as to enable the court to see that it probably could not have been discovered before the trial by the exercise of ordinary diligence. Stewart v. Doak [W. Va.] 52 S. E. 95.

96. 2 Ball. Ann. Codes & St. § 5076, requiring an affidavit of the absent witness to the effect that his evidence will be forthcoming not complied with. Dumontier v. Stetson & Post Mill Co. [Wash.] 81 P. 693. Where the affidavit of the witness who is to give newly discovered evidence is not filed nor excuse given for failure to file it, the new trial is properly denied. City of Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136. It is not error for the court to refuse to appoint a commissioner to take affidavits as to misconduct of jurors and newly discovered evidence which could not be procured by voluntary affidavits. Devoy v. St. Louis Transit Co. [Mo.] 91 S. W. 140.

97. Presenting alleged newly discovered evidence. Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127. Conflicting evidence of misconduct of jurors presents a question for the trial court. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591.

98. Paper presented as a motion which is unaccompanied by anything purporting to be a brief of the evidence introduced is properly dismissed. Moxley v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 339.

99. Under an order passed in term fixing a day in vacation for the hearing of a motion, and granting leave to movant "to amend his motion and until said day and on said day to amend and perfect his brief of evidence," the movant may on such day present his brief of evidence for approval and file the same after it has been approved. Gould v. Johnston & Co. [Ga.] 51 S. E. 608. This is the rule where the hearing is set for a day at a subsequent term. Cross v. Coffin-Fletcher Packing Co. [Ga.] 51 S. E. 704. Order continuing the time of hearing on a motion held to preserve the right to have approved and filed a brief of the evidence. Arrington v. Cronin [Ga.] 51 S. E. 708. Where three continuances of the hearing on the motion, covering a period of 30 days have been granted, because of failure of the official stenographer to transcribe his notes, it is not an abuse of discretion to dismiss the motion on the last day fixed for hearing, for the reason that no brief of the evidence is tendered for approval and no reason is shown why the movant could not have prepared such brief without reference to the stenographer's transcript. Edmonds v. State [Ga.] 50 S. E. 936. Whether any of the dates fixed in the orders for continuance are in vacation is immaterial. Id.

1. See 4 C. L. 825, n. 60 et seq.

2. An order granting a new trial made before the statement upon which the motion is based is settled and filed is premature. Buckle v. McConaghy [Idaho] 83 P. 525. Rev. St. 1887, § 4442 contemplates that a motion for a new trial shall not be passed upon before the statement of the case upon which the motion is based is settled and filed. Id. The provisions of the statute in that regard are mandatory. Id.

3. Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370; Baldwin v. Napa & Sonoma Wine Co. [Cal. App.] 81 P. 1037; Louisville & N. R. Co. v. Wade [Fla.] 38 So. 49.

4. Where a motion for a new trial except as to a certain finding is granted in general terms, the granting order set aside the verdict in toto and authorized a new trial of the excepted issue. St. Louis & S. F. R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

5. Where in an action against conspirators a verdict is returned against one and on his motion an order was entered at the same term granting a new trial, but prior to the entry of such order the plaintiff had procured the entry of judgment without the knowledge of the court, the effect of the order granting the motion for a new trial was to set aside the verdict and grant a new trial as to all defendants. Evans v. Freeman, 140 F. 419.

6. Clyde Milling & Elevator Co. v. Buoy [Kan.] 80 P. 591.

7. Power v. Fairbanks, 146 Cal. 611, 80 P. 1075.

8. Weisser v. Southern Pac. R. Co. [Cal.] 83 P. 439.

by the moving party of the trial fee,[9] and costs where granted on the ground that the verdict is against the evidence.[10] Conditions not authorized by statute cannot be imposed where the order is made by a statutory court.[11] The judgment of a law court denying a motion for a new trial is conclusive on a court of equity as to all grounds which were or might have been presented.[12] An order denying a motion in whole or in part is a final order.[13] It may be vacated for inadvertence and excusable neglect on the part of the movant or his attorneys.[14] An order granting a new trial is not reviewable in another division.[15] An appellate court will interfere more reluctantly when granted than when denied.[16]

Subsequent new trials.—Failure to except to a denial of a motion concludes the movant from making a subsequent motion on the same grounds.[17] A rule precluding the granting of more than two new trials on the ground that the verdict is not sustained does not preclude the granting of any number for errors of law in giving instructions or admitting evidence.[18]

§ 4. *Proceedings at new trial.*[19]

§ 5. *Arrest of judgment. A. Nature and grounds.*[20]—A motion in arrest of judgment lies only for errors appearing or which should appear from the face of the record.[21] A motion should be sustained where the record shows misjoinder of causes of action[22] or when the pleadings of the prevailing party wholly fail to state a cause of action or defense;[23] but a defective statement of a substantial cause of ac-

9. Cohen v. Sofranski, 95 N. Y. S. 524.

10. Larsen v. U. S. Mortg. & Trust Co, 104 App. Div. 76, 93 N. Y. S. 610.

11. The municipal court is a creature of statute and on granting a new trial on the ground of newly discovered evidence can impose no conditions except those specified in the statute giving it power to grant a new trial on such ground. Cannot require a new party to be joined. Gelb v. Cuff, 93 N. Y. S. 472.

12. Hofmann v. Burris, 110 Ill. App. 348.

13. Must be appealed from within one year. Clyde Milling & Elevator Co. v. Buoy [Kan.] 80 P. 591. For the purposes of appeal a movant must take notice of the time of the filing of an order denying his motion. Bell v. Staacke [Cal.] 83 P. 245.

14. Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 82 P. 53. Under Code Civ. Proc. § 473, authorizing relief against proceedings taken against a party by mistake, inadvertence or excusable neglect, an order denying a motion for a new trial on the sole ground of neglect to prosecute may be set aside where such motion was brought up in the absence of the movant's counsel, without argument or opportunity on the part of movant to be heard. Whitney v. Superior Court of San Francisco, 147 Cal. 536, 82 P. 37. Refusal to relieve a party from an order denying his application to settle a statement on motion for a new trial held not an abuse of discretion where it did not appear that the facts upon which such action was sought could not have been presented at the hearing of the application for settlement. Murphy v. Stelling [Cal. App.] 81 P. 730. Failure to prepare a statement within the statutory period after denial of a motion for a new trial may be excused in the discretion of the court. Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 82 P. 53.

15. The discretion to set aside a judgment and reinstate the case given by Gen. Laws 1896, p. 846, c. 246, § 2, where exercised by the division in which the judgment was rendered, is not subject to review in another division. Cascia v. Gilbane, 26 R. I. 584, 60 A. 237.

16. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135; Clifford v. Latham [S. D.] 103 N. W. 642. See, also, Appeal and Review, 5 C. L. 121.

17. Gendron v. St. Pierre [N. H.] 62 A. 966.

18. City of Bardstown v. Nelson County [Ky.] 90 S. W. 246.

19. See 4 C. L. 825.

20. See 4 C. L. 826.

21. Does not reach denial of a motion to dismiss a petition in condemnation proceedings on the ground of want of power in the petitioner as shown by certain ordinances. Cella v. Chicago & W. I. R. Co., 217 Ill. 326, 75 N. E. 373. A motion in arrest should be based on matters appearing on the face of the record and not upon extrinsic matters. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427. A garnishee proceeding by motion in arrest cannot take advantage of defects appearing in the separate and independent record wherein judgment was obtained against the main defendant. Union Compress Co. v. Leffler [Ga.] 50 S. E. 483.

22. McNulty v. O'Donnell, 27 Pa. Super. Ct. 93.

23. Code, § 3758. A motion in arrest held good where petition in an action on an injunction bond for damages for suing out a temporary injunction failed to allege that suit had been disposed of. Lacey v. Davis, 126 Iowa, 675, 102 N. W. 535, former opinion 98 N. W. 366 withdrawn. Upon proper motion judgment will be arrested if it appears that there is no substantial cause of action. George v. Robinson [Ind. App.] 75 N. E. 607. A motion on the ground of insufficiency of the petition should be sustained where the plaintiff does not avail himself of his statu-

tion is curable error against which a motion cannot avail.[24] It will not lie where there is one good count in the declaration,[25] nor where a party has first demurred to a declaration because of the absence of allegations of damage, and, after the demurrer was overruled, has pleaded,[26] nor because the verdict did not follow the statutory form.[27]

(§ 5) *B. Motions and proceedings thereon.*[28]—A motion may be amended at any time prior to final decision.[29] If a motion is once granted for any reason and the judgment thereon is set aside, the motion is still pending, with the right of the movant to amend as in the first instance.[30]

(§ 5) *C. Effect.*[31]—The filing of a motion in arrest constitutes a waiver of a motion for a new trial.[32]

NEXT FRIENDS; NEXT OF KIN, see latest topical index.

NON-NEGOTIABLE PAPER.

The term "non-negotiable paper" comprehends those contracts for the payment of money which possess the form and other essentials of bills and notes but lack the characteristic of negotiability.[33] The indicia of negotiability and the elements which destroy it have been elsewhere treated.[34] A non-negotiable instrument is an evidence of indebtedness which will support an action by the payee.[35] An instrument will be construed according to the fair import of its terms.[36] An instrument not under seal and containing no recital of a consideration does not import such.[37]

The legal title of a non-negotiable instrument passes by indorsement,[38] but the indorsement does not create the liability which follows from the indorsement of a negotiable instrument.[39] The assignee takes it subject to equities existing between the original parties,[40] but the right of the maker to assert those equities may be defeated by superior equities of the holder.[41] Payment to the payee without notice of assign-

tory right to amend. Heald v. Western Union Tel. Co. [Iowa] 105 N. W. 588.

24. George v. Robinson [Ind. App.] 75 N. E. 607. Does not lie where the declaration is merely a defective statement of a good cause of action and sufficient after verdict. Garibaldi & Cuneo v. O'Connor, 112 Ill. App. 53.

25. Garibaldi v. O'Connor, 112 Ill. App. 53.

26. Price v. Art Printing Co., 112 Ill. App. 1.

27. Byrne v. Morrison, 25 App. D. C. 72.

28. See 4 C. L. 826.

29. Rule 44 (Civ. Code 1895, § 5675), requiring all grounds in a motion in arrest to be insisted upon at once, does not interfere with the right of the movant to amend at any time prior to final decision. Union Compress Co. v. Leffler [Ga.] 50 S. E. 483.

30. Union Compress Co. v. Leffler [Ga.] 50 S. E. 483. Where a motion was granted by the trial court and that judgment reversed by the supreme court, until the remittitur was entered the motion was still pending so far as the right to amend was concerned. Id.

31. See 4 C. L. 827.

32. George v. Robinson [Ind. App.] 75 N. E. 607.

33. Respecting the general doctrines of contract, see Contracts, 5 C. L. 664.

34. See Negotiable Instruments, 6 C. L. 777.

35. Borough warrants issued for paving material on an order given by the paving contractor and accepted by the borough officers. Coleman v. Borough of New Kensington, 140 F. 684.

36. A provision in a bond by which a club "agrees to pay the holder or any other member of the club to which it may be transferred" may limit the class of persons to which it may be transferred, but does not affect the liability of the club to one who has ceased to be a member (Donovan v. Harlem Occidental Club, 94 N. Y. S. 518), and a provision that after maturity the bond would be accepted in payment of club charges does not create an exclusive method of realizing on the bond (Id.).

37. To justify a recovery thereon there must be allegation and proof of consideration. Joseph v. Catron [N. M.] 81 P. 439.

38. An indorsee of municipal warrants may sue thereon in his own name. Morrison v. Austin State Bank, 113 Ill. App. 651.

39. Smith v. First State Bank [Minn.] 104 N. W. 369.

40. Neil v. Neil, 25 Pa. Super. Ct. 605. A non-negotiable note though transferred for value before maturity is subject to all defenses which might be interposed against it in the hands of the payee. Dickerson v. Higgins [Okl.] 82 P. 649; Ray v. Baker [Ind.] 74 N. E. 619. If an extension agreement does not preclude the defense of want of consideration as against the payee, it does not preclude it as against his assignee. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

41. Neil v. Neil, 25 Pa. Super. Ct. 605.

ment is a complete defense to an action by the assignee.[42] A maker of non-negotiable paper who induces a bank to discount it cannot deny liability though the bank gave him no notice of its action in discounting it.[43] In Kentucky an assignor is liable only in case the maker is unable to pay.[44]

NONRESIDENCE, see latest topical index.

NOTARIES AND COMMISSIONERS OF DEEDS.

Notaries public are governmental officers[45] and consequently at common law women are disqualified from appointment to the office.[46]

Notaries public are generally authorized to take acknowledgments of conveyances.[47] Interest may disqualify an otherwise duly qualified attorney from acting in certain cases.[48] Statutes prohibiting attorneys from acting as notaries public in causes in which they may be professionally engaged do not apply to matters concerning the cause of action but performed before suit is commenced.[49] In Indiana a deputy prosecutor who is also a notary public may take an affidavit upon which to base an information though he is employed to act as attorney in the prosecution.[50] Acts of a de facto notary cannot be collaterally questioned.[51]

In Alabama part of the notaries hold office for three years and until their successors qualify, but this holdover clause is only operative for a reasonable time.[52]

In taking a deposition a notary public can compel the production of evidence,[53] but he cannot commit a witness for contempt for refusing to answer questions calling for hearsay testimony.[54]

In order to be liable the notary's act must have been the proximate cause of the injury.[55] The complaint in an action against the notary and his sureties must show that injury has resulted.[56]

NOTES OF ISSUE; NOTICE, see latest topical index.

42. Dickerson v. Higgins [Okl.] 82 P. 649. In Montana. Cornish v. Woolverton [Mont.] 81 P. 4.

43. Strang v. MacArthur, 212 Pa. 477, 61 A. 1015.

44. In order that an assignee of a promissory note may hold his assignor liable he must sue the maker at the first term and obtain a return of "no property found" with proper diligence though the maker may be insolvent. Miller v. Browning [Ky.] 89 S. W. 3.

45, 46. In re Opinion of the Justices [N. H.] 62 A. 969.

47. So held under Code 1896, § 993. Loyd v. Oates [Ala.] 38 So. 1022.

48. That the notary who took the acknowledgment of the grantor of a deed of trust was the employe of the trustee, and for his services as notary was to receive in addition to his regular salary the sum of $1.50 out of the money to be raised under the deed, to be paid him by the trustee, did not disqualify him to take the acknowledgment. Scott v. Thomas [Va.] 51 S. E. 829.

49. Notary may administer oath to a claim for injuries against a municipality though he subsequently commenced suit for the injuries as attorney for the plaintiff. Comp. Laws 1897, § 2640 construed. Allen v. West Bay City [Mich.] 12 Det. Leg. N. 70, 103 N. W. 514.

50. McNulty v. State [Ind. App.] 76 N. E. 547.

51. So held where at the time of taking affidavit notary had accepted a "lucrative office" and his appointment as notary had been vacated. McNulty v. State [Ind. App.] 76 N. E. 547.

52. Code 1886, § 1102 construed. Sandlin v. Dowdell [Ala.] 39 So. 279. Acknowledgment taken seven months after expiration of notary's term held defective, there being no proof that the notary had continued to perform official acts during such period. Id.

53. Can compel the claim agent of a street railway company to produce the reports of an accident, made to him by the conductor and motorman of the car on which the accident occurred. Ex parte Schoepf, 3 Ohio N. P. (N. S.) 93.

54. Ex parte Schoepf, 3 Ohio N. P. (N. S.) 93.

55. Negligence of one buying fraudulent homestead claims and the fraud of the sellers held the proximate cause of the injury and not a false certificate to affidavits of the sellers filed in order to enable them to make such homestead entries. Smith v. Maginnis [Ark.] 89 S. W. 91.

56. Complaint against notary and sureties for damages in purchasing homestead claims of persons in reliance on the false certificate of the notary to their affidavit, held insufficient it not alleging that such persons did not own the homestead right. Smith v. Maginnis [Ark.] 89 S. W. 91.

NOTICE AND RECORD OF TITLE.

This title deals only with public records affecting title; other public records[57] and private records[58] are treated elsewhere, as is also the method of restoring lost or destroyed records.[59] The term bona fide purchaser or occupant as used in the betterments[60] or occupying claimant's acts[61] is distinct from the term as used in this article.

§ 1. *Bona fide purchasers and the doctrine of notice.*[62]—The doctrine of bona fide purchase without notice applies only in favor of the purchaser of a legal title, and not of a bare equity.[63] In equity the doctrine is that a bona fide purchaser takes title free from equities of third persons.[64] Though a deed is unrecorded, one who has notice takes subject to it.[65] As a general rule the doctrine of caveat emptor applies to judicial and execution sales, though there is a conflict of decisions based largely on the equities of particular cases.[66] One may be a bona fide purchaser from a municipality.[67]

Requisites of a bona fide purchaser.[68]—They are (1) a valuable consideration; (2) good faith; and (3) the absence of notice or knowledge, and the burden is on one claiming exemption from prior claims or liens.[69]

57. See Records and Files, 4 C. L. 1254; Census and Statistics, 5 C. L. 558.

58. See Corporations, 5 C. L. 764; Evidence, 5 C. L. 1301; Partnership, 4 C. L. 908.

59. Restoring Instruments and Records, 4 C. L. 1294.

60. See Accession and Confusion of Property, 5 C. L. 12.

61. See Ejectment (and writ of entry), 5 C. L. 1056.

62. See 4 C. L. 829.

63. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. It applies to a purchaser from the husband, after the death of the wife, of community property held in the name of the husband. The purchaser was a newcomer and had no knowledge of the family history, and bought the land upon the advice of an attorney that the record title was perfect. Lyster v. Leighton, 36 Tex. Civ. App. 62, 81 S. W. 1033.

64. A mortgagee for value, without notice, is protected, notwithstanding the mortgagor may have obtained his title by fraud or undue influence over his grantor, or the alleged mental incapacity of the latter. Parsons v. Crocker [Iowa] 105 N. W. 162. Such a purchaser may safely take the recitals in a judgment at their face value, without inquiry as to whether it was an agreement judgment. Jones v. Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

65. Licata v. De Corte [Fla.] 39 So. 58.

66. The rule in New Jersey is that a purchaser at a judicial sale takes such title as an examination of the proceedings will show that he will get. Podesta v. Binns [N. J. Eq.] 60 A. 815. In execution sales. Pullen v. Simpson [Ark.] 86 S. W. 801. The purchaser at an execution sale, whether the judgment creditor or another, without notice actual or constructive of equities of third persons, when the title to the real estate stands in the judgment debtor as the apparent absolute owner, is protected as a bona fide purchaser. Mansfield v. Johnson [Fla.] 40 So. 196. As to actual notice by purchasers at judicial sale, see Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953; Davidson v. Marcum [Ky.] 89 S. W. 703.

67. A purchaser for value of county school lands, without notice of any defect in the original grantee's title, held to hold good title against the county. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

68. See 4 C. L. 830.

69. Under a conveyance absolute in form the claimant must, as against the legal title, make his innocence affirmatively appear. Wynne v. Ward [Tex. Civ. App.] 91 S. W. 237. But where creditors attack a conveyance by their debtor as fraudulent, the grantee must show the payment of consideration and then the burden is on the creditors to show that the vendee had notice of his grantor's fraud. Morimura v. Samaha, 25 App. D. C. 189. The facts showing that one is a bona fide purchaser must be pleaded. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. The burden is upon the party asserting an equity against a legal title to show that the purchaser of the latter did not pay value therefor or had notice of the

Valuable consideration.[70]—The consideration must be actually paid though not necessarily in money,[71] or the purchaser must be irrevocably bound for its payment.[72] An antecedent indebtedness is not a valuable consideration,[73] nor is the discharge of a pre-existing judgment.[74] But a mortgagee who purchases the premises on foreclosure sale, without paying money but crediting his bid on the judgment against the mortgagor, is a purchaser for value.[75]

Good faith.[76]—Belief, to be bona fide, must be founded on ignorance of fact and not ignorance of law.[77] One who purchases chattels long after the maturity of a mortgage on record may rely upon the presumption of its payment, unless the mortgagee has exercised reasonable diligence to locate and secure the property.[78] A finding by the court that a purchase of personalty was bona fide was sufficient, in the absence of requests for specific findings on the questions of fact going to show whether the sale was bona fide.[79]

Notice or knowledge.[80]—"Knowledge" and "notice" are not synonymous, for what does not amount to actual knowledge may constitute notice.[81] In order that one may, as a bona fide purchaser, claim priority over the equities of third persons, he must not, at the time of purchase, have had either actual or constructive notice of such equities.[82] Registration or record,[83] or notice or knowledge of facts which

equity. Burden discharged by showing that the consideration was the discharge of a judgment. Catrett v. Brown Hardware Co. [Tex. Civ. App.] 86 S. W. 1045.

70. See 4 C. L. 830.

71. Services rendered as an attorney, under a contract and power of attorney to recover and clear title to lands, constitute sufficient payment. Garner v. Boyle, 34 Tex. Civ. App. 42, 77 S. W. 987.

72. By giving his negotiable obligation, which has been or may be transferred to an innocent purchaser, so as to cut off his defense to it. Nebraska Moline Plow Co. v. Blackburn [Neb.] 104 N. W. 178. One who sends a draft to be delivered in payment for lands when the deed is executed, but receives notice of adverse claims to the land in time to stop payment of the draft and makes no effort to do so is not a bona fide purchaser. Sparks v. Taylor [Tex. Civ. App.] 13 Tex. Ct. Rep. 290, 87 S. W. 740.

73. Sparks v. Taylor [Tex. Civ. App.] 13 Tex. Ct. Rep. 290, 87 S. W. 740; Nelson v. Bridge [Tex. Civ. App.] 87 S. W. 885.

74. Catrett v. Brown Hardware Co. [Tex. Civ. App.] 86 S. W. 1045.

75. Barrett v. Eastham Bros. [Tex. Civ. App.] 86 S. W. 1057.

76. See 4 C. L. 830. By "good faith" is meant a purchase made not merely for a consideration, but also without notice to the purchaser of an adverse claim to the property by others; for the taking of an estate after notice of a prior right makes one a mala fide purchaser. King v. Huni, 25 Ky. L. R. 2266, 81 S. W. 254, citing Kellar v. Stanley, 86 Ky. 246.

77. A mortgagee with full knowledge of probate proceedings afterward held fraudulent and void, whereby the mortgagor secured the title of minor heirs, cannot, after foreclosure, be considered an innocent purchaser, because it mistook the legal effect of such proceedings. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

78. Kimball Co. v. Piper, 111 Ill. App. 82.

79. Jennings v. Frazier [Or.] 80 P. 1011.

80. See 4 C. L. 830.

81. Notice may be of such a character that its effects amount to knowledge, and, on the other hand, a party may be charged with notice when in utter ignorance of that of which he is presumed to be advised. Rosenberger v. Hawker, 127 Iowa, 521, 103 N. W. 781.

82. King-Ryder Lumber Co. v. Scott [Ark.] 84 S. W. 487. Equity of one fraudulently induced to convey superior to purchaser with notice of facts. DeLeonis v. Hammel [Cal. App.] 82 P. 349. Want of consideration asserted against subsequent mortgagee with notice. First Nat. Bank v. Robinson, 105 App. Div. 193, 94 N. Y. S. 767. A purchaser of land with knowledge of an earlier contract for the sale of standing timber thereon acquires no interest in such timber except the reversionary right thereto, in case it is not removed in accordance with the contract. Brodack v. Morsbach, 38 Wash. 72, 80 P. 275. Notice to a purchaser at a judicial sale of an outstanding title in a third person, either legal or equitable, or that the vendor's title is fraudulent, at any time before the payment of the purchase money or the execution of the deed, deprives him of the character of an innocent purchaser. Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953. Where the purchaser and the assignee of his bid at a judicial sale were parties to the proceedings and knew, or must be presumed to have known, the illegal method resorted to in depriving minors of their land, they were not bona fide purchasers within the meaning of Civ. Code Prac. § 391, protecting such purchasers, on an application by an infant for vacation of a judgment. Davidson v. Marcum [Ky.] 89 S. W. 703. A third party with notice is bound by a contract between the mortgagor and mortgagee to keep alive the security, to secure future loans. Girard Trust Co. v. Baird, 212 Pa. 41, 61 A. 507. All advances made under a deed absolute on its face, but intended to operate as a mortgage, made before actual notice of a judgment against the grantor, are secured by the deed as against the judgment lien. Merchants' State Bank

would have put an ordinarily prudent man on inquiry,[84] and such as upon reasonable

v. Tufts [N. D.] 103 N. W. 760. Upon the fulfillment of the conditions of delivery of a deed deposited in escrow, the delivery of the deed relates back to its execution for the purpose of cutting off any intervening rights acquired by a third party with notice of the existence and terms of the escrow. Whitmer v. Schenk [Idaho] 83 P. 775. The purchaser with such notice upon forfeiture of such prior grantee's rights under the escrow by nonfulfillment of the conditions does not hold as trustee of a resulting trust for the use and benefit of the prior grantee. Id.

Evidence of payment of full value for land, after the death of the purchaser and the lapse of years sufficient to authorize a finding of no notice of defects in vendor's title. Eastham v. Hunter, 98 Tex. 560, 86 S. W. 323. Evidence that plaintiff, through its president, was investigating its debtor's standing, was admissible as bearing on the question of notice. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258. Evidence held to show that, when plaintiff acquired title to the land by deed from the same party that defendant claimed under by virtue of a contract in writing, he was charged with notice of defendant's possession. Myers v. Schuchmann, 182 Mo. 159, 81 S. W. 618. Testimony of grantor that grantee had no knowledge of defect in title authorized inference that grantor's communication to grantee did not include information of such defect. Id. Oral proof is competent to show that a grantee had actual notice of a prior lease. Ladnier v. Stewart [Miss.] 38 So. 748. Finding of chancellor on conflicting evidence that second mortgagee had knowledge of prior, unrecorded mortgage, not interfered with. Flowers v. Moorman, 27 Ky. L. R. 728, 86 S. W. 545. An averment in a petition that defendant had notice of the validity of an adverse claim upon the premises when he acquired, or attempted to acquire interests therein, which is not denied in the answer or other pleadings, is taken as confessed, and prevents his being considered as an innocent purchaser. King v. Huni, 25 Ky. L. R. 2266, 81 S. W. 254.

83. See post, § 2, subd. B, Sufficiency and effect.

84. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056; Sicher v. Rambousek [Mo.] 91 S. W. 68. The right in any case to postpone a senior to a junior deed rests in part upon the absence of notice or knowledge of some fact or circumstance which ought to have provoked effective inquiry; and whether there was such notice or knowledge is always a fact inquiry. Wynne v. Ward [Tex. Civ. App.] 91 S. W. 237. A purchaser from a fraudulent vendor is put upon inquiry, where he has knowledge of facts reasonably sufficient to excite suspicion. Morimura v. Samaha, 25 App. D. C. 189.

ILLUSTRATIONS. Facts constituting constructive notice: The fact that the vendor has only a **bare equity** is notice to the purchaser that secret trusts may be outstanding. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. The **reference to a mortgage** in a note brings to the notice of every one dealing with the note all the conditions of the mortgage. Cornish v. Woolverton [Mont.] 81 P. 4. A **plea filed by defendant** in foreclosure proceedings that he had sold the property and delivered possession to another was such notice as called for vigilance on the part of the mortgagee, although the deed was unrecorded. Licata v. De Corte [Fla.] 39 So. 58.

Break in chain of title: Where there is a break in the chain of title but the grantor's deed contains sufficient to show the death of the former owner, that he left a will and that grantor was his "legatee," the grantee is put upon inquiry as to the nature of his grantor's estate under the will and is chargeable with notice that it is but a life estate. Weigel v. Green, 218 Ill. 227, 75 N. E. 913. Such is the case, even though the recorded copy of the will does not, because of insufficient authentication, operate as constructive notice. Id.

The word "trustee:" The word "trustee" following the name of the grantee in a deed constitutes notice of the character of his title. Flitcraft v. Commonwealth Title Ins. & Trust Co., 211 Pa. 114, 60 A. 557; Sternfels v. Watson, 139 F. 505. Where the word "trustee" follows the name of the grantee in the record, but there is no declaration of trust recorded, an investigation which does not include the trustee or any effort to do so is not sufficient to protect a mortgagee. Id. The visible erasure of the word "trustee," after the grantee's name in a deed, puts a trust company about to loan money on the premises upon inquiry. Flitcraft v. Commonwealth Title Ins. & Trust Co., 211 Pa. 114, 60 A. 557.

Purchase pendente lite: [See, also, Lis Pendens, 6 C. L. 484]. One buying land in litigation is charged with constructive notice of the pendency of the suit and its nature, and must abide its result. Jones v. Robb, 35 Tex. Civ. App. 263, 80 S. W. 395; Rothschild v. Leonhard, 33 Ind. App. 452, 71 N. E. 673; Aetna Life Ins. Co. v. Stryker, [Ind. App.] 73 N. E. 953. He is affected with notice of everything set forth in the pleadings and exhibits with sufficient certainty and distinctness to advise him of its bearing upon the property in litigation. Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94; Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. He is bound by the agreements made by his vendor in the course of the litigation, and change of venue by agreement does not destroy the force of the suit as lis pendens. Jones v. Robb, 35 Tex. Civ. App. 263, 80 S. W. 395. But a dismissal by the plaintiff of the count in the petition claiming a lien on the land terminates the lis pendens. Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94. He is affected by lis pendens none the less because judgment was for a third person who became a party after the purchase, the latter's recovery being by force of the former's right. Jones v. Robb, 35 Tex. Civ. App. 263, 80 S. W. 395. A purchaser from the mortgagor of the mineral rights in lands, pending foreclosure of the mortgage, takes subject to the judgment that may be rendered and its consequences and takes no rights against a purchaser on his own account at foreclosure sale. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. But if the purchaser at such sale is a secret agent of

investigation would have revealed the claims of the other party,[85] are equivalent to actual notice.[86] But it is not incumbent on a party put upon inquiry to exhaust every possible source of information;[87] nor does the rule impute to him notice of every conceivable fact and circumstance, however remote, which might be so brought to light.[88] But there must appear such a connection between the facts discovered and the further facts to be discovered that the former furnish a reasonable and natural clue to the latter.[89] Visible user[90] or possession of real estate,[91] unless such possession be consistent with the record title,[92] with

the mortgagor, the purchaser pendente lite will hold the rights he attempted to acquire by his purchase. Id. In a suit to reform a deed executed by the person having the legal title, the record title being in the defendant, the complainant is not required to file a notice under Burns' Ann. St. 1901, § 328, but a purchaser from defendant pending the suit is chargeable with notice of complainant's claim. Rothschild v. Leonhard, 33 Ind. App. 452, 71 N. E. 673.

Failure to deliver bond to assignee of bond and mortgage puts assignee upon inquiry, notwithstanding assignor's statements. Syracuse Sav. Bank v. Merrick, 182 N. Y. 387, 75 N. E. 232, rvg. 96 App. Div. 581, 89 N. Y. S. 238, cited 4 Curr. L. 831, n. 54. One buying a mortgage of one not in possession of either note or mortgage, under the rule of caveat emptor, must exercise more than ordinary diligence to ascertain who is in possession of them. Richards Trust Co. v. Rhomberg [S. D.] 104 N. W. 268; Miller v. Berry [S. D.] 104 N. W. 311. Where a party is advised by the seller that a note and mortgage are lost, he is put upon his inquiry as to the true ownership and buys at his peril. Barringer v. Loder [Or.] 81 P. 778. But the mere nonproduction of a bond and mortgage by the assignees thereof, when the mortgagor paid the same, was not notice to him of the claims of other parties, although the assignees were daughters of the mortgagee and the assignment was not recorded for a long time. Weinberger v. Brumberg [N. J. Eq.] 61 A. 732.

Acceptance of second lease: The acceptance by a tenant under a recorded lease of a lease from a claimant of the land, which he did not record, but continued to pay rent to his original landlord, was not notice to a grantee of the latter of such other claim to the land, of which he had no actual notice. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

85. Tabor St., 26 Pa. Super. Ct. 167.

86. A person having such knowledge is not different in law from one who is shown to have had direct and certain knowledge. Morimura v. Samaha, 25 App. D. C. 189. There is no difference in legal effect between actual and constructive notice. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. When the conditions which the law says shall constitute constructive notice are shown to have existed, the presumption of such notice is conclusive. Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000.

87, 88. Johnson v. Erlandson [N. D.] 105 N. W. 722.

89. The fact that H.'s deed to E. was missing and unrecorded would create no reasonable or natural ground for suspecting that E.'s deed to B. was invalid. Johnson v. Erlandson [N. D.] 105 N. W. 722.

90. Parties who had knowledge of a well-defined, open roadway across the land and a claim of right to use the same were not bona fide purchasers without notice of the easement. Van de Vanter v. Flaherty, 37 Wash. 218, 79 P. 794. The completion and operation of an irrigation canal on lands is notice to subsequent purchasers of the rights of the canal company as against their vendors. Crescent Canal Co. v. Montgomery, 143 Cal 248, 76 P. 1032. The occupation of the land in the highway, in front of a farm, by the poles and wires of a telephone company, is notice to subsequent purchasers of such rights as the company may have in connection therewith. Barber v. Hudson River Tel. Co., 105 App. Div. 154, 93 N. Y. S. 993. The operation of a railroad through land is constructive notice of the railroad company's rights therein, though its deed is unrecorded. Harman v. Southern R. Co. [S. C.] 51 S. E. 689; Harman v. Southern R. Co. [S. C.] 51 S. E. 689. See 15 Yale L. J. 201. The construction of the "Board walk" at Atlantic City, along the ocean front above high water was not notice to a grantee of lands below high water, of covenants in an unrecorded deed of right of way to the city by his grantor, not to erect any structure on the ocean side of the way so granted, of which covenant such grantee had no actual notice. Atlantic City v. New Auditorium Pier Co., 67 N. J. Eq. 610, 59 A. 158, rvg. 67 N. J. Eq. 284, 58 A. 729.

91. Adverse possession is notice of whatever facts as to the title would be developed by inquiry of the person in possession; and if inquiry is not made, the presumption is that, had it been made, the right, title or interest of the possessor would have been discovered. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382. If it can be shown that the purchaser made such inquiry and pursued it in good faith, and was informed that the title was in the party from whom he purchased, the presumption arising from possession will be overcome. Id. Where husband and wife are in possession, the possession is presumed to be the husband's (Civ. Code 1895, § 3931), and the purchaser must make inquiry of the husband. Id. In case of possession by husband and wife and record title in the husband, who applies for a loan, the lender is protected against any secret equity in the wife, the husband's application indicating that any inquiry from him would have elicited the information that he was the owner. Id. Where the mortgagee knew that the mortgagor's grantor had a room in the house, that she had some interest in the premises, and that part of the money raised

acts of dominating control, improvements, the continuous cultivation of the land, etc., are as potential in imparting notice of a claim of title as the record of a deed.[93] But possession is notice only of such right as the party has; it does not create title or make no title a good one.[94] There is a conflict as to whether or not the grantee in a quitclaim deed is a bona fide purchaser.[95] Although it has been held that the fact that the immediate grantor of the purchaser holds under a quitclaim deed is a circumstance well calculated to excite inquiry, yet when the last two grantors held under warranty deeds, it was not incumbent upon the purchaser to make inquiry, simply because there was a quitclaim deed in the chain of title, especially in view of the fact that the statutes provide that such a deed shall be lawful to convey land in fee simple;[96] and a quitclaim deed loses its significance as a circumstance to show bad faith in the purchaser, when its use is sufficiently explained, and especially when it is admitted that the purchaser acted in good faith and without notice.[97] In Texas, if an inspection of the whole instrument discloses that the vendee purchased and the vendor sold the land as distinguished from a mere claim or chance of title, the instrument will support the plea of innocent purchaser.[98] And in cases of doubtful construction the payment of adequate consideration and the retention of a vendor's lien for the purchase money may be taken into consideration.[99] Notice to one is imputed from certain representative relations in which he may stand.[1] The grantee of a bona fide purchaser takes clear of equities,

on his mortgage had gone to settle her claims for support under the contract for the transfer of the property, he had sufficient notice of her equities, and his mortgage was subject thereto. Gall v. Gall [Wis.] 105 N. W. 953. Knowledge by a loan association's local representative of the occupancy by a third party of the land mortgaged held constructive notice to the association of such party's claim to the land. Dennis v. Atlanta Nat. Bldg. & Loan Ass'n [C. C. A.] 136 F. 539. Where the possession is of an ambiguous and equivocal character, the question of its sufficiency to constitute notice is a question of fact for the jury. Butler v. Wheeler [N. H.] 59 A. 935. If part of the land purporting to be conveyed be held in adverse possession, of which fact the vendee has knowledge at the time of his purchase, he can have no relief, either at law or in equity; otherwise if he has no knowledge of such adverse possession. Rich v. Scales [Tenn.] 91 S. W. 50.

92. Possession of land retained by the grantor was not notice to an innocent purchaser of the grantee that more land was included than was intended, it being presumed that he held under the grantee. Malette v. Wright, 120 Ga. 735, 48 S. E. 229. Continued occupancy of premises by the grantor's attorney in fact, when consistent with the deed executed, is not notice of any defect in grantee's title. Eastham v. Hunter, 98 Tex. 560, 86 S. W. 323.

93. Shaffer v. Detie [Mo.] 90 S. W. 131; Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193; Santee v. Day, 111 Ill. App. 495; Weber v. Shelby, 116 Ill. App. 31; Rothschild v. Leonhard, 33 Ind. App. 452, 71 N. E. 673; Johnson v. McKay, 121 Ga. 763, 49 S. E. 757. Possession by the tenants of one claiming title is such notice. Gallagher v. Northrup, 215 Ill. 563, 74 N. E. 711; Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193. The fact that a farm in the possession of one claiming title thereto has been subdivided into blocks and lots does not affect such possession as notice of claim to the entire farm. Santee v. Day, 111 Ill. App. 495.

94. Le Comte v. Freshwater, 56 W. Va. 336, 49 S. E. 238.

95. Martin v. Ragsdale [S. C.] 50 S. E. 671.

96. Code of Laws, § 2367. Martin v. Ragsdale [S. C.] 50 S. E. 671. Where the will of a nonresident had been probated at his domicile and administration taken out on his estate in Texas, the holder of lands under a quitclaim deed from the administrator, in good faith, and without notice of any community interest, was protected in his title. Nelson v. Bridge [Tex. Civ. App.] 87 S. W. 885.

97. The quitclaim deed was given by a board of levee commissioners, because there was a doubt at the time whether a perfect title could be given to certain lands conveyed to the commissioners by the state, by Act 97, p. 107, of 1890. Williams v. White Castle Lumber & Shingle Co., 114 La. 448, 38 So. 414.

98. Instrument held to be more than a mere quitclaim deed. Wynne v. Ward [Tex. Civ. App.] 91 S. W. 237.

99. Wynne v. Ward [Tex. Civ. App.] 91 S. W. 237.

1. Notice to the local representative of a loan association of facts affecting the title of borrowers to the land offered as security held to be notice to the association. Dennis v. Atlanta Nat. Bldg. & Loan Ass'n [C. C. A.] 136 F. 539. One may be bound by the notice or knowledge of his attorney in fact. Friend v. Yahr [Wis.] 104 N. W. 997. Notice to one who is the promoter, principal incorporator, manager and resident director of a company is notice to the company and it cannot claim the protection of an innocent purchaser. California Consol. Min. Co. v. Manley [Idaho] 81 P. 50. Knowledge of attorney while attending to client's business imputed to client. Mabb v. Stew-

though he himself knew thereof.[2] And the grantee of one who was not a bona fide purchaser may himself be one.[3] To affect a mortgagee's rights the notice must be communicated before the execution of the mortgage.[4] Actual, and not merely constructive, knowledge is necessary to deprive a purchaser of the benefit of the statute of Iowa for the setting aside of the sale and recovery of the purchase money, when land is sold on which the judgment is not a lien and that fact is unknown to the purchaser.[5]

§ 2. *Statutory records or filings as constructive notice. A. In general.*[6]—An act requiring recordation of transfers of title does not apply to pledges.[7]

(§ 2) *B. Deed and mortgage records. Eligibility to record.*[8]—A mortgage[9] or a written assignment of a mortgage is a conveyance within the meaning of the recording acts,[10] and an agreement to convey a strip of land for a railroad right of way is a contract relating to real estate within the meaning of such acts.[11] The Code of Iowa, in permitting the record of affidavits explaining any defect in the chain of title to real estate, does not authorize the supplying of a link in the chain by indicating, in the form of an affidavit, the oral evidence available to establish it, and thus making out a title resting in parol.[12] The word "record," in statutes relating to recordable papers has a technical meaning, the legal registry of an acknowledged or proven paper,[13] and the record of a deed without such proof or acknowledgment is a nullity.[14] But the fact that a lease was improperly acknowledged and not en-

art, 147 Cal. 413, 81 P. 1073. Knowledge of corporation's agent that the company from whom a secret detinning process was purchased obtained it by fraudulent methods imputed to corporation. Vulcan Detinning Co. v. American Can Co. [Pa.] 62 A. 881.

2. Friend v. Yahr [Wis.] 104 N. W. 997; McVay v. Tousley [S. D.] 105 N. W. 932; Garner v. Boyle, 34 Tex. Civ. App. 42, 77 S. W. 987. The assignee for value of the decree of foreclosure obtained by a bona fide mortgagee, complainant and purchaser at foreclosure sale, is entitled to protection against the prior equitable claim which was invalid as against the assignor. Ford v. Axelson [Neb.] 103 N. W. 1039.

3. The innocent purchaser for value from the grantee of land at an administrator's sale, holding under a warranty deed, is not charged with notice of outstanding equities when there is nothing in the chain of title to put him upon inquiry, although the first purchaser's payment was by credit on antecedent indebtedness. Nelson v. Bridge [Tex. Civ. App.] 87 S. W. 885. Purchasers of county school lands, in good faith and without notice of any defect in the consideration moving from the original grantee, hold a good title as against the county, notwithstanding such defect. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056. One who acquires title by fraud or undue influence has title until dispossessed by the person having the right to do so, and meanwhile may convey a good title or give a valid mortgage to a third party without notice or knowledge. Swanstrom v. Day, 93 N. Y. S. 192. Where the ostensible owner of property has fraudulently mortgaged it and negotiated the mortgage, the right of the real owner to contest the validity of the mortgage does not depend exclusively upon whether it was acquired for value, in good faith and before maturity, but rather upon whether he is estopped, under all the circumstances, from doing so. Hillard v. Taylor, 114 La. 883, 38 So. 594.

4. A mortgagee who takes a mortgage and makes advances without notice that the mortgaged property is the wife's separate property cannot be affected in his right to acquire title on foreclosure sale by any notice subsequent to the execution of the mortgage. Barrett v. Eastham Bros. [Tex. Civ. App.] 86 S. W. 1057.

5. Code, § 4034. Purchaser was ignorant of the homestead character of the land. Rosenberger v. Hawker, 127 Iowa, 521, 103 N. W. 781.

6. See 4 C. L. 833.

7. Kirby's Dig. §§ 848, 849, relating to corporation "stock" transfers. Hudson v. Bank of Pine Bluff [Ark.] 87 S. W. 1177.

8. See 4 C. L. 833.

9. Civ. Code, §§ 1640, 1641, 1642. Cornish v. Woolverton [Mont.] 81 P. 4.

10. Syracuse Sav. Bank v. Merrick, 182 N. Y. 387, 75 N. E. 232; Huitink v. Thompson [Minn.] 104 N. W. 237. B. & C. Comp. § 5368. Barringer v. Loder [Or.] 81 P. 778. Section 5362, B. & C. Comp., providing that mortgages "may" be assigned by an instrument in writing and recorded, does not repeal sec. 5367, providing that a note secured by mortgage could be transferred by indorsement and its payment noted on the record to discharge the mortgage. Id. Civ. Code, § 3823 declares that an assignment of a mortgage may be recorded and shall operate as a notice to all persons subsequently deriving title from the assignor. Cornish v. Woolverton [Mont.] 81 P. 4.

11. Hurd's Rev. St. 1903, c. 30, § 28. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

12. Code, § 2957. Adverse possession for more than the statutory period cannot be thus shown. Fagan v. Hook [Iowa] 105 N. W. 155.

13. State v. Harman [W. Va.] 50 S. E.

titled to record does not affect it as against a subsequent grantee with actual knowledge of its existence,[15] and the record of a deed, which is void as a record, because of the improper acknowledgment of the deed, is nevertheless admissible to show the existence of the deed.[16] Contracts for the sale of standing timber,[17] or deeds thereof[18] convey an interest in the land and must be recorded.

Necessity, operation and effect of recording.[19]—Record of a deed is not essential to delivery, even though it be withheld from record by agreement of the parties.[20]

The only purpose of recordation is to give notice,[21] failure to record not affecting the validity of the instrument as between the parties,[22] or those having knowledge thereof.[23] The Mississippi law requiring the recording of town plats before sale of lots by reference to them has no application to prior sales.[24]

828. Acknowledgment or proof necessary under Rev. St. 1889, § 2418. Williams v. Butterfield, 182 Mo. 181, 81 S. W. 615.

14. Wanza v. Trapp [Tex. Civ. App.] 13 Tex. Ct. Rep. 148, 87 S. W. 877. Under Rev. St. 1889, §§ 2419, 2420, only such deeds as are acknowledged or proved impart constructive notice to a subsequent purchaser in good faith. Williams v. Butterfield, 182 Mo. 181, 81 S. W. 615. And Rev. St. 1899, § 3118, does not operate to cure such defect, except in deeds recorded one year prior to 1887. Id. Where the record did not show that the subscribing witness who made the proof was sworn as required by Rev. St. 1895, art. 4622, a certified copy of it was inadmissible in evidence. Wanza v. Trapp [Tex. Civ. App.] 13 Tex. Ct. Rep. 148, 87 S. W. 877. A deed, if recorded without acknowledgment or proof, passes no title. Said of a tax deed under the West Virginia statute. State v. Harman [W. Va.] 50 S. E. 828. An instrument conveying the right to lay water pipes over real property, from a spring thereon, is within the Real Property Law, § 208 (Laws 1896, p. 593, c. 547), requiring grants of freehold estate not acknowledged before delivery to be attested by at least one witness, to make them effective as against a subsequent purchaser. Clark v. Strong, 105 App. Div. 179, 93 N. Y. S. 514. Under Civ. Code, § 4667, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient as notice to subsequent purchasers because, through failure to fill blanks, it stated that the parties "severally acknowledged —he— executed the same." Trerise v. Bottego [Mont.] 79 P. 1057.

15. Ladnier v. Stewart [Miss.] 38 So. 748.

16. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188; Wanza v. Trapp [Tex. Civ. App.] 13 Tex. Ct. Rep. 148, 87 S. W. 877.

17. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746.

18. King-Ryder Lumber Co. v. Scott [Ark.] 84 S. W. 487.

19. See 4 C. L. 834. As to record of instrument as evidence, see 5 C. L. 1349.

20. Bunten v. American Security & Trust Co., 25 App. D. C. 226. It is, however, prima facie evidence of delivery. Konser v. Konser [Ill.] 76 N. E. 846.

21. Schnitger v. Rankin [Mo.] 91 S. W. 122. A public record is an available, convenient and ready means of information as to all such questions touching the title to real property as are required to be made a matter of record. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382. Under Laws 1885, p. 233, c. 147, no conveyance of land is valid against purchasers for a valuable consideration, except from the registration thereof. Hinton v. Moore [N. C.] 51 S. E. 787. A mortgagee who fails to record his mortgage given for the purchase price of real estate, until after the bankruptcy of the mortgagor is not entitled to payment in full as against general creditors. In re Lukens, 138 F. 188. The record of a mortgage which does not state the amount of the debt it was given to secure, is notice of all the mortgagee's rights in the property. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

22. Licata v. De Corte [Fla.] 39 So. 58; Rhea v. Planters' Mut. Ins. Co. [Ark.] 90 S. W. 850. The mere fact of an agreement to withhold a mortgage from record is not of itself such evidence of a fraudulent purpose as to constitute a fraud in law, but it is a circumstance constituting more or less cogent evidence of a want of good faith. Rogers v. Page [C. C. A.] 140 F. 596. Unrecorded deed of railroad right of way sustained. Harman v. Southern R. Co. [S. C.] 51 S. E. 689. Under the laws of North Carolina (ch. 147, p. 233, Laws 1885) registration is not necessary to the validity of a deed for valuable consideration, effective under the statute of uses, as between the parties. Hinton v. Moore [N. C.] 51 S. E. 787. An unrecorded mortgage is good as against the mortgagor or any one claiming under him with notice. Girard Trust Co. v. Baird, 212 Pa. 41, 61 A. 507. An unrecorded assignment of a mortgage is good against every one except a bona fide purchaser or incumbrancer. State v. Coughran [S. D.] 103 N. W. 31. The assignee of a mortgage who, by her agent, keeps possession of the papers, is not required to record the assignment to protect herself as against later assignees from persons not in possession and merely describing the mortgage. Richards Trust Co. v. Rhomberg [S. D.] 104 N. W. 268; Miller v. Berry [S. D.] 104 N. W. 311. The preparation and delivery of a satisfaction piece to the mortgagor is not essential to the validity of the satisfaction, but only to create record evidence of that which is accomplished by mere payment of the indebtedness. Friend v. Yahr [Wis.] 104 N. W. 997.

23. Priority of record, under Ky. St. §§ 494-496 does not confer priority of lien, where the second mortgagee has knowledge of the prior mortgages. Flowers v. Moorman, 27 Ky. L. R. 728, 86 S. W. 545.

Sufficiency, operation and effect of record.[25]—Public records operate as constructive notice to those persons only who, for their own protection, are bound to search for them; as to other persons, the notice must be actual, not constructive.[26] The recording act does not operate to cure jurisdictional defects in tax proceedings.[27] The presumption is that notice to the public is given only by a recording of the document in the official records, and the burden of proving a prior notice is upon the party alleging it.[28] A person may rest upon the constructive notice which the record of his title imparts and he is under no obligation to give any other notice to any one who assumes to deal with other parties in reference to such property.[29] But while he may remain passive, he must not actively deceive or mislead a reasonable person or deter or dissuade him from examining the record and learning the true condition of the title.[30] Record begins with the delivery of the instrument to the proper officer,[31] and in such case a mistake made in the actual record thereof does not prejudice the party interested as against a subsequent purchaser.[32] The instrument must be recorded in the proper book.[33]

The record is constructive notice to all subsequent purchasers[34] of those mat-

24. Rev. Code 1892, § 4403. Wellborn v. Muller, 84 Miss. 726, 36 So. 544.

25. See 4 C. L. 835.

26. Garrett v. Simpson, 115 Ill. App. 62.

27. Although the deed was regular on its face it was invalidated by jurisdictional defects in the description on the assessment roll. Jackson v. Bailey [S. D.] 104 N. W. 268.

28. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.

29. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382. Where at the time of the cessio bonorum the mortgage is properly inscribed, there is no necessity for reinscription, under Civ. Code, art. 3369, as against the syndic of the insolvency, the jurisprudence on that subject not being altered by Act No. 15, p. 12, of 1894. Trezevant v. Levy's Heirs, 114 La. 867, 38 So. 589. Persons who have neglected to make known their ownership of lands by record or otherwise, are presumed to have notice of a suit brought against the record owner for the collection of taxes thereon, under section 9303, Rev. St. 1899. Schnitger v. Rankin [Mo.] 91 S. W. 122.

30. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382.

31. An instrument, substituting a trustee in a trust deed, is of record from the time of its delivery to the clerk of the chancery court for record. Brown v. British American Mortg. Co. [Miss.] 38 So. 312.

32. Chapman & Co. v. Johnson [Ala.] 38 So. 797. A devisee is a purchaser within the Real Property law, § 208 (Laws 1896, p. 593, c. 547), requiring the attestation of conveyances of freehold estates, to make them effective as against subsequent purchasers. Clark v. Strong, 105 App. Div. 179, 93 N. Y. S. 514.

33. Previous to June 13, 1892, when Rev. St. 1892 took effect, the circuit court clerks were not required to record real estate mortgages in special books, and a mortgage filed and recorded before that date in the Miscellaneous Record Book was constructive notice to subsequent purchasers and mortgagees. Ivey v. Dawley [Fla.] 39 So. 498. A deed absolute on its face, but intended, under a parol contract, to operate as a mortgage, is properly recorded as a deed (Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760), and is notice to subsequent incumbrancers or purchasers (Id.). But a warranty deed, which recites that it is given to secure the payment of certain notes and contains a power of sale, is notice to all the world of its execution, from the time of its filing, notwithstanding its record in the Mortgage Book instead of the Deed Book. Greenfield v. Stout [Ga.] 50 S. E. 111.

34. Under Sayles' Ann. Civ. St. 1897, art. 4652, the record is notice to all persons of the existence of the record. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056. The record of a judgment lien upon property is constructive notice to a purchaser, though he has no actual notice, on account of an error by the abstracter of the title. Stastny v. Pease, 124 Iowa, 587, 100 N. W. 482. Payments made by the purchaser from a mortgagor to the assignor of the mortgage after the recording of the assignment, are made at his own risk, especially in the absence of any showing that the assignor held the note at the time of the payment. Cornish v. Woolverton [Mont.] 81 P. 4. Deed by owner of north half of street to city and release of claim of damages caused by grading, duly recorded, is notice to purchasers of lots on such street, whose deeds are executed and recorded subsequently to owner's deed and release. Tabor St., 26 Pa. Super. Ct. 167. The record of a contract for the sale of trees, creating a lien on the land for the price thereof, was notice to subsequent purchasers. Stark v. Hicklin, 112 Mo. App. 419, 87 S. W. 106. The filing in the office of the register of deeds of a duly certified copy of an order appointing a receiver of an insolvent, as provided in § 4228, Gen. St. 1894, is notice to all parties dealing thereafter with lands of the insolvent situated in the county. Noyes v. American Freehold Land Mortg. Co. [Minn.] 105 N. W. 1126. It is not necessary that a description of all the lands owned by the insolvent be included in such notice. Id.

ters which are stated in the record[35] or may be implied therefrom,[36] notwithstanding the clerk's failure to index it as required by law and the grantee's withdrawal of his deed after record;[37] but the record of instruments not in their chain of title is no notice to purchasers of lands,[38] and a party is not charged with constructive notice of anything that the record does not show.[39] In the absence of actual notice[40] parties

35. Conveyance of growing trees. King-Ryder Lumber Co. v. Scott [Ark.] 84 S. W. 487. A contract for the purchase of standing timber together with a declaration by the vendee that he held as executor of his wife, when recorded, was notice to all parties. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746. Civ. Code, § 1640 makes the record of a mortgage notice of its contents. Cornish v. Woolverton [Mont.] 81 P. 4. The vendee must take notice of all facts shown by the deed to his vendor. Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. The record of a deed under which possession has been taken is notice to all persons of the extent of the grantee's possession. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497. The character of grantees' title. Land conveyed to two persons as tenants in common cannot be held by creditors of a partnership composed of such grantees as against the individual creditors of such partners. Parol evidence inadmissible to show that such deed was in fact to a partnership composed of the grantees. Cundey v. Hall, 208 Pa. 335, 57 A. 761. The trusteeship of the grantee when "trustee" follows his name. Flitcraft v. Commonwealth Title Ins. & Trust Co., 211 Pa. 114, 60 A. 557; Sternfels v. Watson, 139 F. 505. One who takes a mortgage on lands deeded to the mortgagor with a lien retained in the deed takes with notice of the grantor's claim. King v. Huni, 25 Ky. L. R. 2266, 81 S. W. 254. An administrator's deed which describes the record, volume and page where the order authorizing the sale of real estate is entered according to Burns' Ann. St. 1901, § 2518, is notice to subsequent purchasers of the quantity of land authorized to be sold and conveyed. Pierce v. Vansell [Ind. App.] 74 N. E. 554. Where the owner of lands conveys the same, with an exception of rights under a prior oil and gas lease, and the conveyance is duly recorded, subsequent purchasers take with constructive notice of such exception, whether they have actual knowledge or not. Moore v. Griffin [Kan.] 83 P. 395. Where an administrator's deed described the record, volume and page where the order for the execution of the deed was entered, as prescribed by Burns' Ann. St. 1901, § 2518, subsequent purchasers are chargeable with notice of what the record discloses, as to quantity of land authorized to be sold and conveyed. Pierce v. Vansell [Ind. App.] 74 N. E. 554. A recorded plat is constructive notice to all the world of the lots, streets and avenues therein. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. The owner of a lot in such a plat is entitled to assume that every newcomer will regard the notice furnished by the public records of the location and width of the streets and avenues therein. Id.

36. A statement in a deed that the interest conveyed was an undivided one-half interest, imported notice to subsequent purchasers from the grantor that there was an undivided one-half interest outstanding and not claimed by the grantor. Costello v. Graham [Ariz.] 80 P. 336. The purchaser of land entered under the homestead law is chargeable with notice that the entryman had power to convey or incumber his land any time after final proof made and is bound to search the record for conveyances executed by him after such time and prior to issue of patent. Peterson v. Sloss [Wash.] 81 P. 744. Where a purchaser from the mortgagor paid the debt to the assignor of the mortgage, after the assignment had been recorded, and took a release, a subsequent purchaser from him who made such payment was charged with notice that the assignor had no power to execute the release, and was not a bona fide purchaser for value. Cornish v. Woolverton [Mont.] 81 P. 4. Where building restrictions appear in the direct chain of title to real property, the purchaser thereof is chargeable with knowledge of the purpose of such restrictions. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455. Where, on sale of a minor's land, the deed was made to a third party who immediately conveyed to the guardian, the simultaneous dates of the deeds on record constituted notice to a mortgagee of the fraudulent character of the transaction. Burns v. Cooper [C. C. A.] 140 F. 273. In Pennsylvania the filing in the prothonotary's office of a building contract containing a stipulation against liens, bearing date more than ten days prior to the date of the filing, puts all persons upon inquiry as to the actual date of the contract. Act of June 26, 1895 (P. L. 369) requires a contract to protect property against liens to be filed within 10 days after its execution. Cutter v. Pierson, 26 Pa. Super. Ct. 10.

37. It is not the grantee's duty to see that the deed is properly indexed before he removes it, but the clerk's. Ky. St. 1903, §§ 500, 513. Herndon v. Ogg, 27 Ky. L. R. 268, 84 S. W. 754.

38. Meacham v. Blaess [Mich.] 12 Det. Leg. N. 412, 104 N. W. 579. A deed executed by the entryman under the homestead law, after final proofs made but before patent issued, was not without the chain of title. Peterson v. Sloss [Wash.] 81 P. 744. Where Texas lands owned by a nonresident were sold to pay debts, regardless of the testator's will, such will was not in the chain of title of a subsequent purchaser, though filed and proved in Texas, and was not notice of outstanding equities. Nelson v. Bridge [Tex. Civ. App.] 87 S. W. 885. Recitals in recorded deeds not in the chain of title are not notice of equities of third persons. Mansfield v. Johnson [Fla.] 40 So. 196.

39. Record of will held not to show to what use plaintiff's money, due her thereunder, had been put, and record of deed held not to show that the lands described therein had been purchased with her money. Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000. The record of a defective title to

are entitled to rely on the public records[41] as written[42] as to title and incumbrances.[43] In the absence of notice a recorded instrument has preference over an unrecorded one.[44] In Montana the burden is on the grantee in an unrecorded deed to show that a subsequent purchaser, whose deed is recorded, had notice, either actual or constructive;[45] but in California the subsequent purchaser must show that he is a purchaser in good faith and for a valuable consideration.[46] The word "subsequent" in

county school lands is not notice to the grantee of the holder of such title that a new deed from the county to such holder, prior to the grantee's deed, was intended to cure defects in the title and hence invalid. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056. The record of a mortgage is constructive notice only of its existence and its ownership by the mortgagee named therein, but not of any assignment to another. Friend v. Yahr [Wis.] 104 N. W. 997. The holder of a trust deed is charged with constructive notice of such facts only as appear of record at the time of its filing for record, and not of a tax sale and deed subsequent, although they were of record when he granted an extension of time on the trust deed. Garrett v. Simpson, 115 Ill. App. 62.

40. A bona fide purchaser is not bound by secret trusts existing against his vendor Deskins v. Big Sandy Co. [Ky.] 89 S. W. 695. The bona fide purchaser of lands sold on foreclosure, without notice of an alleged agreement for additional time to redeem, cannot be disturbed. Matuey v. Williams [Ky.] 89 S. W. 678. A mortgage containing no covenants of seisin or warranty, executed and recorded before the mortgagor had acquired title to the premises described therein, has no greater effect than a quitclaim deed and is not enforceable against the premises in the hands of a purchaser for value, and without actual notice of the existence of the mortgage, from the mortgagor's heir. Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990.

41. As a general rule the tax collector in suing for taxes is obliged to look no further than the record of deeds to learn who is the owner of lands (Wood v. Smith [Mo.] 91 S. W. 85; Schnitger v. Rankin [Mo.] 91 S. W. 122); but this rule does not apply where no patent to the land has been issued, so that there is no record title and no apparent owner but the true owner in possession of the land (Wood v. Smith [Mo.] 91 S. W. 85).

42. A record showing legal title in "Cheffey" is no notice of judgments against him under the name "Sheffey." Boyd v. Boyd [Iowa] 104 N. W. 798.

43. While there is conflict of authority as to whether an unauthorized delivery of a deed held in escrow conveys any title even in favor of an innocent purchaser, yet the grantor in such a deed who knows that the grantee therein has obtained wrongful possession thereof and had it recorded is estopped by negligence in permitting the grantee's apparent ownership to exist of record for an unreasonable length of time, to assert title as against an innocent purchaser. Johnson v. Erlandson [N. D.] 105 N. W. 722. Where a mortgagee assigned the note and mortgage by indorsement on the note, but no assignment of the mortgage was recorded, and the mortgagee foreclosed by advertisement, a purchaser without notice or knowledge of the assignment was protected by the record. Huitink v. Thompson [Minn.] 104 N. W. 237. A person taking a mortgage on real estate may rely upon the record of a satisfaction of a prior mortgage by the record owner, in the absence of knowledge of ownership of the prior mortgage by any other person. Friend v. Yahr [Wis.] 104 N. W. 997. Purchasers and incumbrancers for value, without notice other than the records, are protected by the satisfaction of a mortgage executed by the mortgagee, where there is no assignment of the mortgage on the record. McVay v. Tousley [S. D.] 105 N. W. 932. The purchaser of real property may rely upon the record of a release of a deed of trust executed by the party to whom the deed was given, in the absence of any actual knowledge of any fraud in the execution of the release. Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94. The purchaser from one who holds the record title, without notice that his deed was only a mortgage and that another had an equitable claim to the property, will hold as against such claim. Bean v. Venable, 27 Ky. L. R. 927, 87 S. W. 262. If the rule that one may rely upon the record works hardship to a third person, it is usually chargeable to the latter's negligence in not exercising ordinary care to guard his own interest by causing the record to show the actual state of the case. Friend v. Yahr [Wis.] 104 N. W. 997.

44. Williams v. White Castle Lumber & Shingle Co., 114 La. 448, 38 So. 414. Where A. sells to B., who fails to record, and B. sells to C., who records, and A. sells to D., who records after C., the title of C. prevails. Phelan v. Wilson, 114 La. 813, 38 So. 570. Where an attachment, levied without notice of a prior, unrecorded deed, is perfected by judgment, execution sale and deed, it holds as against the grantee in the unrecorded deed. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. Where two mortgages are filed simultaneously, neither has priority and the foreclosure of one extinguishes the lien of the other; hence, a written notice served on the sheriff that the sale was to be made subject to the lien of the other had no effect. Bonstein v. Schweyer, 212 Pa. 19, 61 A. 447. In order that a subsequent unrecorded mortgage lien may be held prior to the lien of a recorded mortgage to secure future advances, as to such advances made after the second mortgage, notice must have been given to the prior mortgagee before such later advances. Proof of notice insufficient. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.

45. Civ. Code, § 1641. Sheldon v. Powell [Mont.] 78 P. 491.

46. Under the rule embodied in §§ 1214,

the Colorado recording act has reference to the recording, and not to the date of the instrument, so that the bona fide purchaser whose conveyance is first filed for record is entitled to preference.[47]

Recording officers and administration of the acts.[48]—The act of recording papers is the creature of statute, and the statute must be followed.[49] The recorder of deeds is a ministerial officer and has no jurisdiction to pass upon the validity of instruments presented for record.[50] He is required to receive, and file or record instruments duly executed and purporting on their face to be such instruments as are entitled to be filed or recorded.[51] He may use discretion, but not judicial discretion.[52] It is the duty of the recording clerk to see that deeds are properly indexed and not of the person presenting them for record.[53] Under the statutes of Tennessee, relative to the bonds of the register of deeds and his liability thereunder, he is liable for a failure to register a deed correctly, although his negligence is neither willful nor so gross as to imply willfulness.[54] The cause of action therefor accrues when the vendee is deprived of his property.[55] Under the Massachusetts statute requiring the final decision in the supreme or superior court, in proceedings to register title therein, to be certified to the land court where an appeal is taken from the land court to the superior, and thence to the supreme court, the latter's decision cannot be certified directly to the land court, but through the superior court.[56]

(§ 2) *C. Wills and their probate and administration proceedings.*[57]—Where a will was duly probated and the records of the county were afterwards destroyed by fire, it will be presumed that the clerk duly recorded the will and its probate according to law, making it constructive notice.[58] Especially when a clerk's certificate to that effect appears on the original will; and the fact that the will was not permitted to remain in the clerk's office as required by law is immaterial as to third persons.[59]

(§ 2) *D. Chattel mortgages, conditional sales and other liens.*[60]—In most states chattel mortgages,[61] conditional sales,[62] and other liens, are void as against

1217, of Civil Code. And the fact that plaintiff alleged that defendants had notice of his title when they took their conveyance, and that such allegation was traversed, did not shift the burden. Bell v. Pleasant, 145 Cal. 410, 78 P. 957.

47. Mills' Ann. St. p. 593, § 446, provides that deeds, etc., shall take effect as to "subsequent bona fide purchasers" after filing for record. Houlahan v. Finance Consol. Min. Co. [Colo.] 82 P. 484.

48. See 4 C. L. 836.

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

50. Dancy v. Clark, 24 App. D. C. 487.

51. Dancy v. Clark, 24 App. D. C. 487. Only when acknowledged or proven. State v. Harman [W. Va.] 50 S. E. 828.

52. Even if the recorder exceeds his discretion in refusing to record a certificate of incorporation, yet mandamus will not issue to compel him to record it, if it appears that the paper is invalid. Dancy v. Clark, 24 App. D. C. 487.

53. Ky. St. 1903, §§ 500, 513. Herndon v. Ogg, 27 Ky. L. R. 268, 84 S. W. 754.

54. Code 1858, §§ 447, 450, 453, 454, 456, 2071, 2075, 2097 (Shannon's Code, §§ 559, 562, 566, 567, 570, 3748, 3752, 4494). State v. McClellan, 113 Tenn. 616, 85 S. W. 267.

55. State v. McClellan, 113 Tenn. 616, 85 S. W. 267.

56. Rev. Laws, c. 128, § 14. Jeffrey v. Winter [Mass.] 76 N. E. 282.

57. See 4 C. L. 836.

58. Laws 1848, p. 236, c. 157, § 3 (Pasch. Dig. art. 1262), in force in 1854. Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

59. Pasch. Dig. art. 1236. Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

60. See 4 C. L. 836. See, also, Chattel Mortgages, 5 C. L. 574.

61. A contract which conveys personal property to another to secure the payment of a debt is a chattel mortgage and must be signed by two witnesses and filed with the register of deeds, as required by §§ 3578, 8583, Wilson's Rev. & Ann. St. 1903, to be valid as against creditors. Thompson v. Crosby [Okl.] 82 P. 643.

62. A transaction is a conditional sale, whenever payment is a prerequisite to the passing of title. Pringle v. Canfield [S. D.] 104 N. W. 223. An instrument called a "lease." acknowledging the receipt of part payment and providing for payment by instalments, until a certain sum was paid, whereupon the property involved was to belong to the lessee, was a conditional sale (Id.), valid as to third parties as well as to the parties to the transaction (Kidder v. Wittler-Corbin Machinery Co., 38 Wash. 179, 80 P. 301). A

creditors and subsequent creditors or mortgagees in good faith, unless filed or recorded or accompanied by a visible and continuing change of possession.[63] An assignment of a deposit in a bank by check being absolute, the property does not remain in the possession of the assignor and is not affected by the recording acts,[64] and the fact that the mortgage was duly recorded does not prevent the attaching of an artificer's lien for repairs duly authorized to be made on the chattels.[65] Statutory provisions as to filing or recording must be strictly complied with by the mortgagee;[66] but the failure of the officer with whom a chattel mortgage is filed, to perform his duty in any respect does not affect the mortgagee's rights.[67]

Registration of a chattel mortgage is constructive notice to subsequent purchasers,[68] and a chattel mortgagee for money presently paid, who records his mortgage, has a superior right to the holder of a prior unrecorded mortgage, of which he had neither actual nor constructive notice;[69] but the unauthorized registration of a mortgage on personal property is not constructive notice.[70] While one buying from the possessor of chattels ordinarily takes as a bona fide purchaser, yet in Alabama he can not so take from a bailee until after three years' possession,[71] and it is incumbent on him to show this as against the true owner,[72] and the purchaser of chattels is bound by any knowledge he may have affecting the title to the same.[73]

contract by the United States, by which all parts of certain machinery, paid for by the government under a specified system of partial payments, became the sole property of the United States, was not a conditional sale requiring record under Va. Code 1904, § 2462, p. 1219. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174.

63. Kimball Co. v. Piper, 111 Ill. App. 82. Where a chattel mortgage is declared to be "absolutely void as against the creditors of the mortgagor," unless recorded, it is void as to creditors of a purchaser of the mortgaged property, he becoming a mortgagor within the meaning of the statute. Fidelity Trust Co. v. Staten Island Clay Co. [N. J. Eq.] 62 A. 441. The holder of corporation bonds secured by a trust mortgage executed prior to the purchase of property by the corporation under a conditional contract is neither a subsequent purchaser nor mortgagee, within the New Jersey statute making unrecorded conditional sales void as to subsequent purchasers and mortgagees in good faith. Tilford v. Atlantic Match Co., 134 F. 924. The receiver of the conditional vendee is entitled to the property or its proceeds, after the payment of the full contract price to the vendor. Id. Under the Ohio statute Rev. St. §§ 4155 (2), 4155 (3), declaring conditional sales void as to subsequent purchasers and mortgagees in good faith, and creditors, unless evidenced by writing deposited with the township clerk, an adjudication in bankruptcy and appointment of a trustee operated as a seizure of all such property in the bankrupt's possession. In re Press-Post Printing Co., 134 F. 998. And a conditional sale not so evidenced is void as against his creditors, whether their claims arose before or after the contract was made. Dolle v. Cassell [C. C. A.] 135 F. 52. Laws 1893, p. 56, c. 36, § 1, re-enacted as Rev. Civ. Code, § 1315, and declaring that all conditional sales shall vest title in the vendee, as to third persons with notice, unless in writing and duly filed, is not a deprivation of property without due process of law. Pringle v. Canfield [S. D.] 104 N. W. 223. An agreement in the nature of a chattel mortgage, though neither acknowledged nor recorded, giving the debtor the possession and right to sell in the usual course of business, is good as to third parties having no prior lien, after possession taken thereunder. Martin v. Sexton, 112 Ill. App. 199. While the withholding of a chattel mortgage from record may invalidate it as a lien as against subsequent creditors without notice, yet it does not affect the mortgagee's right to prove his debt in bankruptcy nor subordinate his claim to others. In re Ewald & Brainard, 135 F. 168.

64. Kuhnes v. Cahill [Iowa] 104 N. W. 1025.

65. The mortgagee by permitting the mortgagor to retain possession thereby authorized the latter to have necessary repairs made. Ruppert v. Zang [N. J. Law] 62 A. 998.

66. A chattel mortgage of property left in possession of the mortgagor is void as against attaching creditors if not accompanied by the affidavit of good faith, etc., required by Civ. Code, § 3861. First Nat. Bank v. Beley [Mont.] 80 P. 256. And the invalidity of a chattel mortgage filed without such affidavit is not cured by an affidavit of renewal stating the requisite facts, filed under provisions of Civ. Code, § 3866. Id.

67. Scaling v. First Nat. Bank [Tex. Civ. App.] 13 Tex. Ct. Rep. 211, 87 S. W. 715

68. Purchaser at execution sale. Howard v. Deens [Ala.] 39 So. 346. One who converts property covered by a duly recorded chattel mortgage is charged with notice of the mortgagee's lien, although he receives and sells it in another state. Scaling v. First Nat. Bank [Tex. Civ. App.] 13 Tex. Ct. Rep. 211, 87 S. W. 715.

69. Patterson v. Irvin [Ala.] 38 So. 121.

70. The affidavit of good faith required by Pub. St. 1901, c. 1010, § 6, was not signed and sworn to by the mortgagee. Tisdale v. Pray Sons Co. [N. H.] 62 A. 168.

71, 72. Matthis v. Thurman [Ala.] 39 So. 360.

§ 3. *Registration and certification of land titles under the Torrens system.*[74] —In proceedings under the Torrens act all rules and principles of law applicable to equitable actions, and rules of practice with respect to the trial, evidence, findings and order of judgment, unless clearly inappropriate or otherwise provided, should be followed.[75] Tax liens held by the state are within the provision of the Torrens law, that the state shall be joined as party defendant in proceedings thereunder whenever it has "an interest in or lien upon" the land in suit.[76]

NOTICE OF CLAIM OR DEMAND; NOTICES, see latest topical index.

NOVATION.

Definition and elements.[77]—Novation is the extinguishment of one obligation and the creating of another.[78]

Novation between the same parties.[79]—Novation may be accomplished by the substitution of a new obligation between the same parties with the intent to extinguish the old obligation.[80] Unless the second agreement in terms purports to rescind the former one or unless the entire subject-matter of the earlier agreement is covered by the later one, or the later one is so inconsistent with the former one that both cannot stand together, there is no rescission of the former.[81]

Novation by the substitution of new parties.[82]—Novation may also be accomplished by the substitution of a new debtor or creditor.[83] A novation contract is to

73. The purchaser of personal property is bound by his knowledge of the life tenancy of the vendor, and takes only such interest. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183. One who took a claim against a corporation for labor performed while he was manager, with knowledge that the expense incurred therefor was beyond the limit of his authority to bind the corporation, was not a bona fide purchaser for value. Farrell v. Gold Flint Min. Co. [Mont.] 80 P. 1027. A person who had been connected with the trading stamp business long enough to know that the stamps are not intended or adapted to the use of the public generally, and cannot be so used without detriment to the business, was not an innocent purchaser of such stamps for resale. Sperry & Hutchinson Co. v. Temple, 137 F. 992.

74. See 4 C. L. 836.

75. Court erred in denying a request by defendants for findings of fact and conclusions of law. Owsley v. Johnson [Minn.] 103 N. W. 903. The rule that each party in actions involving title and rights in real property must recover upon the strength of his own, and not upon the weakness of his adversary's title applies. Id.

76. Section 13, c. 305, p. 450, Laws 1905. That section, being merely an incidental feature of the act, is valid, since the entire act is constitutional. In re National Bond & Security Co. [Minn.] 104 N. W. 678.

77. See 4 C. L. 838.

78. Netterstrom v. Gallistel, 110 Ill. App. 352.

79. See 4 C. L. 838.

80. See Accord and Satisfaction, 5 C. L. 14; Contracts, 5 C. L. 664; Sales, 4 C. L. 1318. **Payment by a note** as novation, see Payment and Tender, 4 C. L. 955.

81. Where purchaser of a stallion warranted to be a good foal-getter gave a note for part of the purchase price, such note providing that it should be void if the stallion was not as warranted at the end of two years, held, the second agreement was not a substitution of contracts or an abrogation of the original contract. Berkey v. Lefebure & Sons, 125 Iowa, 76, 99 N. W. 710. Furnishing additional measurements and requesting another quotation on prices held to abrogate former contract for the sale of parts of a machine. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

82. See 4 C. L. 838.

83. Where D. works for R. and on settlement therefor R. agrees to pay C. and S. to whom D. is indebted, held to constitute a novation. Sherer v. Rubedew [Idaho] 83 P. 512. Where owner of property sold it on condition that it remain in his possession and control until paid for and the buyer resold it, his buyer, by consent of all parties, agreeing to pay the original owner, held a novation. Clark v. Delaware, etc., R. Co., 138 N. C. 25, 50 S. E. 446. A vendee of land agreed in writing to pay a part of the purchase price in cotton, and the vendor transferred such instrument to a third person. The vendee made default and died insolvent. The vendee's heir after the death of the vendee agreed to transfer the land to the original vendor and another under a verbal agreement that they would pay off the instrument. The holder of the instrument subsequently agreed to this. Held insufficient to establish a novation discharging the liability of the purchasers on the verbal agreement. Conly v. Hampton [Tex. Civ. App.] 13 Tex. Ct. Rep. 425, 87 S. W. 1171. Uncompleted offer of vendee of property to pay agent negotiating the sale the latter's claim against the vendor for commissions, held not to amount to a novation. Bandman v. Finn, 103 App. Div. 322, 92 N. Y. S. 1096.

be distinguished from an agreement by one person with another for the benefit of a third. The latter may be enforceable without any element of a novation contract characterizing it.[84] One contract cannot be wiped out and another formed unless the assent of all the parties interested in both contracts is given.[85] The substitution of one debtor for the other constitutes a consideration for the promise by the defendant.[86]

Essentials.[87]—An express agreement is not requisite for a novation or substitution of parties to a contract; it may be implied.[88] A contract of novation is not within the statute of frauds.[89]

Proof.[90]—Novation must be clearly proved;[91] in the absence of such proof the presumption is that there is no novation,[92] the burden of establishing it being on the party asserting it.[93]

Legal effect of novation.[94]—By a substitution of debtors, the old debtor is released and the new debtor becomes liable.[95] Contracts being substituted the old one is extinguished.[96]

NUISANCE.

§ 1. *Distinction between private and public nuisance.*[97]—Public nuisances are those which affect the public generally.[98] A common or public nuisance is in its

84. Smith v. Pfluger [Wis.] 105 N. W. 476.

85. Netterstrom v. Gallistel, 110 Ill. App. 352. Averments in a petition held insufficient to show that the plaintiff was a party to the agreement or that defendants made to it any promise to pay the debt. Palmetto Mfg. Co. v. Parker [Ga.] 51 S. E. 714.

86. Clark v. Delaware, etc., R. Co., 138 N. C. 25, 50 S. E. 446.

87. See 4 C. L. 838.

88. Lane & Co. v. United Oil Cloth Co., 103 App. Div. 378, 92 N. Y. S. 1061. Where, after the sale of goods to an individual, the business was incorporated and the corporation requested the delivery of the goods under the contract to it, and made payment on account of such goods, a novation was effected. Id.

89. Sherer v. Rubedew [Idaho] 83 P. 512; Palmetto Mfg. Co. v. Parker [Ga.] 51 S. E. 714.

90. See 4 C. L. 839.

91. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430. Case reversed 211 Ill. 138, 71 N. E. 933, this point not being mentioned. Novation is not easily presumed. It must clearly appear before the court will recognize it. Netterstrom v. Gallistel, 110 Ill. App. 352. Novation is not presumed. The intention to novate must clearly appear from the terms of the agreement or by a full discharge of the original debt. Sucker State Drill Co. v. Loewer & Co., 114 La. 403, 38 So. 399. Where plaintiff sued upon a contract, a defense that the obligations of the contract had been extinguished by novation by reason of the creditors having received other notes signed by the debtor, together with other and new parties, payable at different dates and with higher rates of interest, held not sustained. Id.

Evidence insufficient to show agreement by executrix of maker of note to pay it in consideration of the discharge of the estate from liability and an acceptance of her as sole debtor, or in consideration of plaintiff's agreeing not to insist on her filing an inventory and accounting. Crowell v. Moley, 188 Mass. 116, 74 N. E. 329.

92. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430. Case reversed 211 Ill. 138, 71 N. E. 933, this point not being mentioned.

93. Netterstrom v. Gallistel, 110 Ill. App. 352.

94. See 4 C. L. 839.

95. So held where after the sale of goods to an individual, the business was incorporated and the seller assented and looked to the corporation for payment. Lane & Co. v. United Oil Cloth Co., 103 App. Div. 378, 92 N. Y. S. 1061. See also Accord and Satisfaction, 5 C. L. 14.

96. Where subject-matter of contract of sale was changed, held first contract could not be made the basis of a cross bill by defendant in a suit to set aside the second transaction for fraud. Parker v. Anderson [Tex. Civ. App.] 85 S. W. 856. A contract may be discharged by the parties thereto or the beneficiaries therein by an entirely new contract, entered into by

nature continuing.[99] A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.[1] The doctrine now is that a nuisance may at the same time be both public and private.[2]

§ 2. *What constitutes a nuisance.*[3]—At common law, acts or things which are (1) prejudicial to public morals, (2) dangerous to life, and (3) injurious to public rights, were nuisances per se.[4] But this rule has often been made to bend to suit the requirements of commerce or manufacture,[5] and an authorized business properly conducted at an authorized place is not a nuisance.[6] An owner may make a lawful and reasonable use of his property, although it may cause some annoyance and discomfort to those in the vicinity,[7] and the motive of such owner in so using his own property is immaterial on the question of his liability to the adjoining owner as for a nuisance.[8] Nevertheless, when the use of one's own property actually results in injury of a substantial character to another it creates a nuisance.[9]

them, with reference to the same subject-matter, the terms of which are coextensive with, but repugnant to, the original contract. Marsh v. Despard, 56 W. Va. 132, 49 S. E. 24.

97. See 4 C. L. 839.

98. Kuhn v. Illinois Central R. Co., 111 Ill. App. 323. They are encroachments on the rights of the public. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695. Includes anything which by its use or by its permitted existence necessarily threatens or works annoyance, harm, inconvenience or danger to the community generally, and which, by reason of its unlawful character, may be remedied by public prosecution. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754. A magazine for the storage of explosives, that had become extremely hazardous by reason of the saturation of its floor with nitroglycerine, held to be a public nuisance. Flynn v. Butler [Mass.] 75 N. E. 730.

99. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695.

1. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition and renders the owner or possessor liable for all damages arising from such use. Lazarus v. Parmly, 113 Ill. App. 624. A nuisance which renders the occupancy of a number of dwellings materially uncomfortable is a private nuisance to each occupant individually. Meek v. De Latour [Cal. App.] 83 P. 300.

2. Kuhn v. Illinois Central R. Co., 111 Ill. App. 323.

3. See 4 C. L. 839.

4. Glucose Refining Co. v. Chicago, 138 F. 209. Enumeration of certain acts punishable as nuisances at common law, as outraging public decency and against good morals. State v. Nease [Or.] 80 P. 897. A thing is a nuisance when of itself it constitutes an unlawful annoyance or a source of danger to others. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330. A small-pox hospital, established for many years under 72 O. L. 77, by a municipality outside of its own corporate limits, at a distance of 250 feet back from a public highway, will not be abated as a nuisance, although a large township school house has since been erected on the highway opposite to it and dwellings have also been built adjacent. But the erection of an additional building to be used for hospital purposes, directly opposite the school house, and within fifty feet of the highway upon which the hospital lot abuts, will be enjoined as a public nuisance. Trustees of Youngstown Township v. Youngstown, 6 Ohio C. C. (N. S.) 498. Such specific acts as the throwing of refuse from the table and kitchen of the hospital at such points in the open as to be accessible to the dogs and cats of the neighborhood, and the permitting of nurses and convalescents, at a small-pox hospital, to walk upon the highway opposite the school house, may be restrained as a public nuisance. Id. The maintenance of a lane or passageway for the driving of infected cattle into a state, contrary to law, is a nuisance. Gen. St. 1901, §§ 7451, 7452. State v. Missouri Pac. R. Co. [Kan.] 81 P. 212.

5. Glucose Refining Co. v. Chicago, 138 F. 209.

6. A railroad company is not liable for damage and inconvenience to adjacent property owners arising from the natural and proper operation of its engines and cars. Atchison, etc., R. Co. v. Armstrong [Kan.] 80 P. 978. Wooden works, consisting of a planing mill, cistern factory, and other wood-working machinery is not a nuisance per se. City of New Orleans v. Lagasse, 114 La. 1055, 38 So. 828.

7. Phillips v. Lawrence Vitrified Brick & Tile Co. [Kan.] 82 P. 787. The building of fences upon one's own land, although they interfere with the grazing of plaintiff's cattle on public lands. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364. In the case of noxious weeds growing on defendant's lands, plaintiff must show that their growing was without right and constituted a nuisance to himself. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851. Plaintiff held not entitled to injunction for failure to make such showing as to the growing of "cocklebur and weeds" on defendant's land. Id.

8. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

9. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. To constitute the condition or use of property a nuisance, some legal right must be violated, either public or private, and it must work some material annoyance, inconvenience or injury, either actual or implied, from the invasion of the right. Lazarus v. Parmly, 113 Ill. App. 624.

The legislature has the power to declare what is a public nuisance,[10] and in some states nuisances are defined by statutes;[11] and, on the other hand, the legislature may, and often does, authorize and even direct, acts to be done which are harmful to individuals and which, without such authority, would be nuisances.[12] The legislature may also authorize a municipal council to declare what shall be considered nuisances.[13] But a council must legislate generally in so doing; it cannot enact ordinances that will affect only one factory, unless it is a nuisance per se or a public nuisance.[14] Neither the state nor a municipality, however, can make that a public nuisance which is not such in fact.[15]

The pollution of streams,[16] causing overflow of waters,[17] keeping a gaming house,[18] the illegal sale of intoxicating liquors,[19] the discharge of smoke, soot, cinders and dust,[20] or noxious odors,[21] noise and vibration,[22] or escaping electrici-

10. Hurd's St. ch. 38, § 221, par. 5, makes it a nuisance to obstruct public highways and streets. Garibaldi v. O'Connor, 112 Ill. App. 53. The illegal sale of intoxicating liquors. Sec. 7065, Rev. Codes 1899. State v. Erickson [N. D.] 103 N. W. 389. Under the Kansas prohibitory liquor law. Cowdery v. State [Kan.] 80 P. 953. Under Laws 1901, p. 73, the manager of any building or establishment from which dense smoke is emitted is deemed guilty of a misdemeanor. State v. Hemenover, 188 Mo. 381, 87 S. W. 482.

11. Public nuisance defined in Pen. Code, § 385. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754. Under Code Civ. Proc. § 731, nothing is a nuisance unless it is injurious to the health, indecent or offensive to the senses, or an obstruction to the free use of property or an interference with its comfortable enjoyment. Meek v. De Latour [Cal. App.] 83 P. 300. Sec. 1930 B. & C. Comp. is substantially the definition of a nuisance at common law. State v. Nease [Or.] 80 P. 897. To constitute an offense thereunder, neither an actual breach or disturbance of the peace nor actual or threatened violence is necessary, but any immoral or criminal act disturbing the quiet of society, to the injury of public order or decorum, etc. Id. The statutes of Oklahoma relating to the subject of nuisance are nothing beyond a legislative recognition of well-settled principles. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. E. 330.

12. The operation of a railroad in a lawful place and manner may at times be offensive and injurious to adjacent property holders. Atchison, etc., R. Co. v. Armstrong [Kan.] 80 P. 978. The authority conferred by Acts 1897-98, pp. 495, 1020, cc. 463, 989, to construct and operate plants for the generation of electricity, is not imperative but permissive, and confers no statutory sanction for the maintenance of a nuisance. Townsend v. Norfolk Ry. & Light Co. [Va.] 52 S. E. 970.

13. Glucose Refining Co. v. Chicago, 138 F. 209. An ordinance prohibiting the storage of more than two barrels of gasoline, etc., within the city limits, and punishing it as a nuisance, sustained. City of Crowley v. Ellsworth, 114 La. 308, 38 So. 199. Rev. St. Ill. art. 5, c. 24, par. 75 (Hurd's Rev. St. 1903, p. 294), authorizing city councils to declare what shall be nuisances, to abate them and impose fines for their creation, etc., authorized the Chicago council to pass Ordinance Mar. 23, 1903, § 10, declaring the emission of dense smoke a public nuisance. Glucose Refining Co. v. Chicago, 138 F. 209. The ordinance was not unconstitutional in not operating uniformly. Id. Smoke was not a nuisance at common law, and, in the absence of statutory provisions, a municipality could not declare it so. Id.

14. City of New Orleans v. Lagasse, 114 La. 1055, 38 So. 828.

15. Glucose Refining Co. v. Chicago, 138 F. 209. A municipality cannot prohibit the quarrying of rock or stone within its limits, unless it is done in such a manner or place as to constitute a nuisance. In re Kelso, 147 Cal. 609, 82 P. 241.

16. By city sewage. Glasgow v. Altoona, 27 Pa. Super. Ct. 55; Doremus v. Paterson, [N. J. Eq.] 62 A. 3.

17. Where a railroad company for its own convenience closes a natural water course and provides an artificial channel, it is its duty to make such channel of sufficient capacity to properly carry the waters formerly carried by the natural channel and all other waters that might have been lawfully turned into the natural channel. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. Dam lawfully constructed by railroad company and causing overflow of land held not to be such a nuisance to owners of adjacent property as could be abated, but for which compensation must be made. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423; Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1. Construction of structure so as to turn water injuriously against plaintiff's wall. Hartman v. Inclined Plane Co., 23 Pa. Super. Ct. 360. Construction of embankments and wire fences which caught the debris and brush and caused the water to back up and overflow plaintiff's lands. Nixon v. Boling [Ala.] 40 So. 210.

18. A "turf exchange," or pool room where persons congregate to bet on horse races is a gaming house, punishable as a nuisance at common law and also under B. & C. Comp. § 1930. State v. Nease [Or.] 80 P. 897.

19. Under sec. 7605, Rev. Codes 1899. State v. Erickson [N. D.] 103 N. W. 389. Under the prohibitory law of Kansas. Cowdery v. State [Kan.] 80 P. 953. In a place prohibited by village ordinance. Village of Sand Point v. Doyle [Idaho] 83 P. 598.

20. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488. From electric light and power plant. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970. From

ty,[23] obstructing or rendering unsafe a public highway,[24] sidewalk,[25] or public al-

railroad company's round house. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. The operation of a foundry discharging smoke, cinders and sparks on plaintiff's dwelling, setting it afire and filling up its water pipes. Over v. Dehne [Ind. App.] 75 N. E. 664. Smoke, gas and sulphurous fumes. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. Operation of coke ovens adjacent to a dwelling house. Campbell v. Bessemer Coke Co., 23 Pa. Super. Ct. 374. Emission of dense smoke declared a nuisance by ordinance of Mar. 23, 1903, § 10 of city of Chicago. Glucose Refining Co. v. Chicago, 138 F. 209. Manager of any establishment from which dense smoke is emitted deemed guilty of misdemeanor, under Laws 1901, p. 73. State v. Hemenover, 188 Mo. 381, 87 S. W. 482. But the natural and reasonable amount of smoke, dust and cinders from the proper operation of a brick plant is not a nuisance (Phillips v. Lawrence Vitrified Brick & Tile Co. [Kan.] 82 P. 787), and smoke was not a nuisance at common law (Glucose Refining Co. v. Chicago, 138 F. 209). Where the evidence showed that the occasional injury to plaintiff from smoke, etc., depended upon the direction of the wind and did not decrease the rental value of his property more than $25 per year, a permanent injunction would not be granted. Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N. Y. S. 831.

Operation of railroads held nuisances: Smoke, etc., from railroad company's round house. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. Operation of trains on a heavy grade and sharp curve, resulting in much smoke, cinders and noise near a school house. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488. A property owner may recover damages on account of the noise, smoke and vibration caused by the operation of a railroad near her residence, though it was not negligently done and her property was not damaged. St. Louis, etc., R. Co. v. Shaw [Tex. Civ. App.] 13 Tex. Ct. Rep. 45, 88 S. W. 817. Unauthorized construction and operation of street railway in front of landowner's premises. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367.

Not nuisances: The mere construction of more railway tracks or a greater use of them than was originally contemplated on a right of way reserved in the dedication of a street does not constitute a nuisance, so long as the reasonable use of the street by the public is not interfered with. Oklahoma City & T. R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W 849. The construction and operation of freight tracks, yards, depot and elevated approach in a residence district is not a private nuisance, where there is not any especial interference with plaintiff's property. Walther v. Chicago & W. I. R. Co., 215 Ill. 456, 74 N. E. 461. Construction of a second track at a country road crossing found by jury not to have so narrowed the traveled part of the road as to constitute a nuisance. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235. A railroad switch or siding is not a nuisance per se and can become so only by some particular circumstances connected with its construction, location or the manner of its use. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572. A railroad company is not liable for the maintenance of a nuisance to one whose residence is permeated by smoke, cinders and gas emitted from its engines in the proper and lawful operation of its trains. Atchison, etc., R. Co. v. Armstrong [Kan.] 80 P. 978. Where a railroad company lawfully erects structures with reasonable skill and care, for proper railroad uses, to the injury of adjacent property, they are not nuisances that may be abated; as a dam which caused water to back up over plaintiff's land. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423; Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1.

21. From a soap factory. Fairbank Co. v Nicolai, 112 Ill. App. 261; Fairbank Co. v. Bahre, 112 Ill. App. 290. From cream of tartar works. Meek v. De Latour [Cal. App.] 83 P. 300. From coke ovens. Campbell v. Bessemer Coke Co., 23 Pa. Super. Ct. 374. From the sewage disposal works of a village. Gerow v. Liberty, 94 N. Y. S. 949. Odors arising from henhouses and the noises of the inmates held not to constitute a nuisance under the circumstances of the case. Wade v. Miller, 188 Mass. 6, 73 N. E. 849.

22. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488. Caused by machinery of electric light and power plant. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970; Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. The noises, music, etc., in connection with the operation of a shooting gallery on the same premises, held to be a nuisance detrimental to the business of another tenant who kept a hotel. Grantham v. Gibson [Wash.] 83 P. 14. Evidence held not to sustain the allegation that the din and noise of a wood working factory was either a public nuisance or a nuisance per se. City of New Orleans v. Lagasse, 114 La. 1055, 38 So. 828.

23. From an electric plant, whereby one's water pipes were destroyed. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970.

24. Commonwealth v. Mock, 23 Pa. Super. Ct. 51. Obstruction of a public street unlawfully is a public nuisance regardless of any benefit or convenience to the general public that may result therefrom. Town of West Seattle v. West Seattle Land & Improvement Co., 38 Wash. 359, 80 P. 549. The permanent obstruction of a public street is a public nuisance. Weiss v. Taylor [Ala.] 39 So. 519. Obstruction permitted by a city in a street not closed to travel or without being properly guarded. Jones v. Boston, 188 Mass. 53, 74 N. E. 295. Construction of a sidewalk considerably above the natural grade of the street. Kittanning Borough v. Thompson, 211 Pa. 169, 60 A. 584. An embankment constructed by a railroad company in a street, cutting off access to abutting property. Coats v. Atchison, etc., R. Co. [Cal. App.] 82 P. 640. Erection of stone columns extending from 22 to 26 inches beyond the building line. First Nat. Bank v. Tyson [Ala.] 39 So. 560. A street fair, occupying a large portion of a street for a week, with various booths, shows, merry-go-rounds, horn blowing, megaphones, etc., is a public nuisance of a most aggravated character.

ley,[26] and blasting within thickly populated districts,[27] have been held to be nuisances.

Acts not nuisances per se may become so by reason of the manner or place of their commission.[28] When this happens it must be abated, for no one can have the legal right to do that which destroys his neighbor's property or health.[29] Where the question of a private nuisance is raised, the result produced by it upon persons of ordinary health and sensitiveness, rather than those afflicted with disease or abnormal physical conditions, is to be taken as the criterion.[30]

§ 3. *Right to maintain; defenses.*[31]—The fact that a business is a lawful one,[32] or that it is properly and carefully conducted,[33] or that there are large investments therein,[34] or that the erection complained of is lawful, or necessary to the operation of the business, is no defense if the nuisance actually exists.[35] While one may properly conduct a lawful business,[36] or make a reasonable and lawful use of his own property,[37] although it may result in some annoyance or inconvenience to his neighbor, yet the right to injure another's land at all in the use of one's own is an exception and the burden is always upon the defendant to bring himself within the exception.[38] Although a party may have operated a foundry in a certain locality long enough to acquire a prescriptive right to do so, yet he

City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998. The speeding of automobiles in a public street contrary to a state law is a nuisance per se, although sanctioned by resolution of the board of aldermen of the city. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754. Whether or not a telephone or telegraph pole placed in a public street is dangerous to the public or a nuisance is a question of fact for the jury, to be determined under proper instructions from the court and all the circumstances of the case. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229. But the obstruction of a road sought to be laid out, before notice served to remove fences, was not the obstruction of a public highway. Green v. State [Tex. Cr. App.] 90 S. W. 1098.

25. Permanent constructions, like areas and stairways, occupying a portion of the sidewalks and interfering with the public use of them. City of New York v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. S. 937. Maintenance of a defectively covered coal hole in sidewalk. Berger v. Content, 94 N. Y. S. 12. Hurd's Rev. St. ch. 38, § 221, par. 5. Sidewalk obstructed by boxes of bananas and plaintiff slipped upon a ripe banana on the walk. Garibaldi v. O'Connor, 112 Ill. App. 53. The accumulation of water and ice in a depression in a sidewalk, caused by water from a roof cast on the sidewalk by a projecting conductor, constituted a nuisance which it was the duty of the city to abate. City of Muncie v. Hey, 164 Ind. 570, 74 N. E. 250.

26. By fences at both ends. Harniss v. Bulpitt [Cal. App.] 81 P. 1022.

27. Quarrying of rock or stone by blasting may thus become a nuisance. In re Kelso, 147 Cal. 609, 82 P. 241.

28. A private park in the residence part of a city, rented for entertainments day and night, and made a rendezvous for dissolute people who indulge in music, dancing and obscenity until late at night, disturbing the sleep of residents, is a nuisance. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695. Rock or stone quarrying is not in itself a nuisance, but may become so, if carried on by blasting in a thickly populated district. In re Kelso, 147 Cal. 609, 82 P. 241. The fact that the presence and operation of a wood working factory causes an increase in insurance rates is not sufficient to make it a nuisance. City of New Orleans v. Lagasse, 114 La. 1055, 38 So. 828.

29. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695.

30. Odors and noises from henhouses that were disturbing to a nervous invalid but not to a person in a normal condition held not to be a nuisance. Wade v. Miller, 188 Mass. 6, 73 N. E. 849.

31. See 4 C. L. 843.

32. Over v. Dehne [Ind. App.] 75 N. E. 664.

33. Damages may be recovered by a property owner for annoyance and inconvenience on account of the operation of a railway near her residence, though no negligence is shown in running of the trains. St. Louis, etc., R. Co. v. Shaw [Tex. Civ. App.] 13 Tex. Ct. Rep. 45, 88 S. W. 817.

34. The investment of a large amount of money does not secure the right to injure one having a comparatively small estate, nor does the erection of extensive works justify the violation of another's right. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579.

35. Over v. Dehne [Ind. App.] 75 N. E. 664.

36. Atchison, etc., R. Co. v. Armstrong [Kan.] 80 P. 978.

37. Phillips v. Lawrence Vitrified Brick & Tile Co. [Kan.] 82 P. 787; Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

38. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. The manufacture of coke on one's own land, from coal produced by him on land in the vicinity is not the natural and necessary use of his own property for the development of its resources. Campbell v. Bessemer Coke Co., 23 Pa. Ct. 374.

cannot so operate it as to create and continue a nuisance to an adjacent property owner, especially when it is possible to operate it so as to avoid the same.[39] A municipality is not barred by mere lapse of time from removing an obstruction from a public street which constitutes a public nuisance.[40]

§ 4. *Remedies against nuisances. A. Abatement and injunction. Abatement.*[41]—A public nuisance may always be abated.[42] The underlying principle, which should control in defining and regulating nuisances is that rights of owners and users are held subject to the right of the proper authority, to require them to conform to those regulations which are essential to the preservation of life, health, morals and good government.[43] A purely public nuisance can be abated only at the suit of the public.[44] The section of the New York Public Health Law which provides for the enforcement by mandamus of the performance of any duty enjoined in the law is intended only to compel health boards and officers to do their duty, and mandamus does not lie thereunder against an individual to abate a nuisance in compliance with a local board's order.[45] Cities are generally given the power to abate nuisances within their boundaries;[46] but when a party, notified to abate a nuisance, neglects to do so, and the municipality abates it, the expense thereof cannot, in the absence of statutory authority, be charged to him, even though his property is benefited thereby.[47]

Injunction.[48]—A private nuisance can be abated either by a bill in equity to restrain,[49] or by an action at law for damages as often as any injury occurs;[50] or the aggrieved party may generally bring one action for the abatement of the nuisance and the recovery of damages;[51] and where the nuisance is abated at the

39. The nuisance complained of was the discharge of smoke, cinders, and especially sparks upon a dwelling house, so as to keep it in constant danger of fire. Over v. Dehne [Ind. App.] 75 N. E. 664.

40. Town of West Seattle v. West Seattle Land & Improvement Co., 38 Wash. 359, 80 P. 549.

41. See 4 C. L. 844.

42. The maintenance of a lane or passageway for the driving of infected cattle into the state, contrary to Gen. St. 1901, §§ 7451, 7452. State v. Missouri Pac. R. Co. [Kan.] 81 P. 212. A municipality is not prevented by mere lapse of time from removing an obstruction from a public street. Town of West Seattle v. West Seattle Land & Imp. Co., 38 Wash. 359, 80 P. 549. City ordinances regulating sidewalks, with prohibitions of encroachments and penalties provided for violations thereof do not affect the general right of the city, by suit in equity, to compel the removal of such nuisances. City of New York v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. S. 937.

43. Glucose Refining Co. v. Chicago, 138 F. 209.

44. George v. Peckham [Neb.] 103 N. W. 664. A private person cannot bring an action to have an embankment constructed by a railroad company in a street declared a public nuisance and abated, but such action must be instituted by public authority. Atchison, etc., R. Co. v. Maegerlein, 114 Ill. App. 222.

45. Sec. 31 (Laws 1903, p. 884, c. 383; Laws 1893, p. 1509, c. 661). People v. Fries, 109 App. Div. 358, 96 N. Y. S. 327.

46. Rev. St. Ill. art. 5, c. 24, par. 75 (Hurd's Rev. St. 1903, p. 294) authorizes city councils to declare what shall be nuisances and to abate the same. Glucose Refining Co. v. Chicago, 138 F. 209. A township not charged with duties pertaining to the public health cannot, independent of contract authorized by law, file a bill for protection against a public nuisance common to all its citizens, that being the right of the attorney general. Belleville Tp. v. Orange [N. J. Eq.] 62 A. 331.

47. Village trustees under direction of the State Board of Health filled up a pond which was declared to be a nuisance. Held, that section 63, c. 24 of Cities, Villages and Towns statute (Rev. St. 1901, 286) contains no authority to charge such expenses to the owner of the property. Palmyra v. Warren, 114 Ill. App. 562.

48. See 4 C. L. 845.

49. Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703. The jurisdiction of a court of equity to enjoin a continuing nuisance and compel its abatement is too well settled to admit of question. Nixon v. Boling [Ala.] 40 So. 210. Injunction is applicable to restrain the owner of property from using it for the gathering of large, boisterous, dissolute crowds of lawless people, so as to make it a nuisance. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695. Where timber and brush had been cut down and left lying on plaintiff's land, in making a survey, if leaving it there constituted a nuisance because of the menace of forest fires it was not one which defendants continued by any overt act and which could be restrained by injunction. Litchfield v. Bond, 93 N. Y. S. 1016.

50. Glasgow v. Altoona, 27 Pa. Super. Ct. 55.

time of the hearing and it is not probable that it will be renewed, yet equity will retain jurisdiction to determine the damages.[52] While equity has jurisdiction to restrain the continuance of either public[53] or private nuisances,[54] it will not interfere with one's lawful enjoyment of his own premises as he sees fit, unless his doing so constitutes a public or private nuisance,[55] and unless, in view of all the circumstances, it is just to do so.[56] An injunction will not ordinarily be granted against an anticipated nuisance, unless the facts alleged and proven are sufficient to show that it will be a nuisance per se,[57] or that, if not a nuisance per se, it is a nuisance in view of the particular circumstances of the case,[58] and it must appear that the injury would be irreparable.[59]

An action to abate a nuisance is an equitable action,[60] and neither party is entitled to a jury as a matter of right.[61] The trial of an action to enjoin the maintenance of a nuisance under the prohibitory liquor law need not be dismissed or continued to await the disposition of a criminal charge against defendant for a violation of that law.[62] The question that a temporary injunction to restrain a nuisance is too broad cannot be first raised in the appellate court.[63]

Parties.[64]—The right to recover for damages to land caused by overflow resulting from the construction of a dam accrues to those who own the land or hold damageable interest therein at the time of the injury.[65] A tenant is entitled to relief from the continuance of a nuisance by another tenant of part of the same premises.[66] Although the borough council had permitted a contractor to adapt the

51. Meek v. DeLatour [Cal. App.] 83 P. 300.

52. Miller v. Edison Elec. Illuminating Co. [N. Y.] 76 N. E. 734.

53. Kittanning Borough v. Thompson, 211 Pa. 169, 60 A. 584; Weiss v. Taylor [Ala.] 39 519; State v. Missouri Pac. R. Co. [Kan.] 81 P. 212. The continuance of a powder magazine which had become a public nuisance. Flynn v. Butler [Mass.] 75 N. E. 730. The maintenance of a nuisance under the prohibitory liquor law. Cowdery v. State [Kan.] 80 P. 953. Obstruction of a public alley by fences at both ends. Harniss v. Bulpitt [Cal. App.] 81 P. 1022. Under Acts 1905 (29th Leg.) p. 372, c. 153, any citizen is authorized to sue by injunction to restrain the keeping or exhibiting of games prohibited by law, on any premises. Ex parte Allison [Tex.] 90 S. W. 870. That act is not unconstitutional for insufficiency of title, or deprivation of right of trial by jury, or putting a person twice in jeopardy for the same offense, or denying the right of due course of law. Id.

54. Glasgow v. Altoona, 27 Pa. Super. Ct. 55; Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703. Operation of a shooting gallery with attendant music, etc., which drove away guests of a hotel kept by another tenant of the premises, restrained by temporary injunction. Grantham v. Gibson [Wash.] 83 P. 14.

55. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

56. Where the injury to plaintiff's property by smoke, etc., depends upon the direction of the wind and its rental value is not decreased more than $25 per annum, a permanent injunction will not be granted compelling defendant to close up a factory established at great outlay of capital. Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N. Y. S. 831.

57. Where the establishment and maintenance of a saloon in a village, in a particular place and under peculiar circumstances, will constitute a public nuisance, equity will grant relief. Village of Sand Point v. Doyle [Idaho] 83 P. 598. A court of equity, at the instance of the solicitor general, can enjoin the erection of a public nuisance. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998. A railroad switch or siding in the public highway in front of complainant's premises, held not to be a nuisance, either per se or under the circumstances alleged and proved. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572.

58. Plaintiff was not entitled to an injunction "restraining the continuance of cocklebur seed and weeds being blown upon his land," without a showing that the growing of such things was without legal right and a nuisance to himself. Harnton v. Stultz, 124 Iowa, 734, 100 N. W. 851.

59. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695.

60. Meek v. De Latour [Cal. App.] 83 P. 300.

61. Even if a party is entitled to have the question of damages tried by a jury, it is not error to refuse a general demand for a jury. Meek v. De Latour [Cal. App.] 83 P. 300. On the trial of an action to perpetually enjoin the maintenance of a common nuisance under the prohibitory liquor law, a jury trial is not a matter of right. Cowdery v. State [Kan.] 80 P. 953.

62. Cowdery v. State [Kan.] 80 P. 953.

63. Grantham v. Gibson [Wash.] 83 P. 14.

64. See 4 C. L. 847.

65. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423.

66. Temporary injunction to restrain the operation of a shooting gallery, the noise and music of which was driving away the

construction of a building to a pavement that might be laid in the future at an established paper grade, the borough had a standing to maintain a bill to enjoin the construction of a sidewalk at such paper grade, making it a dangerous public nuisance.[67]

Pleading, evidence and defenses.[68]—A bill which alleges that to be a nuisance which is not one per se must set forth specifically the facts and circumstances which make it a nuisance.[69] A complaint that showed that plaintiff was damaged by the continuance of an alleged nuisance was sufficient for the issuance of a temporary injunction, though it failed to allege and demand damages in any specific sum.[70] A complaint by a city for the removal of permanent constructions, encroaching on a sidewalk, asking that they be declared a nuisance and that defendant be ordered to remove them or the plaintiff authorized to charge the expense of removal to defendant, was not objectionable as uniting improperly in the same count an equitable cause of action to abate a nuisance and an action of ejectment.[71] Where a bill was filed to restrain the pollution of a stream by sewage, a cross bill averring that a certain water company above had diverted water that would have diluted the sewage and another company had built a dam below that prevented the passage of sewage, was bad as pleading matters not germane to the original bill;[72] and where the bill, in such case, tendered the opportunity of avoiding an injunction by making compensation, an answer which failed to make election was bad;[73] and also, where complainants calculated their damages upon the basis of their injuries being permanent, such calculation necessitated a counter statement whether the pollution was to be permanent or temporary, and, if temporary, for how long; and for lack thereof the answer was bad.[74]

In a suit by a private person to enjoin the obstruction of a street, the allegation of several grounds of special injury, but proof of only one, did not constitute a variance.[75] It is no defense that the acts of others contributed to cause the nuisance, there being no contribution among independent wrongdoers.[76] Municipal

guests of plaintiff's hotel. Grantham v. Gibson [Wash.] 83 P. 14.

NOTE. One without proprietary interest in his place of residence sought to recover damages for sickness caused by a palpably foul well on the defendant's adjacent land. Held, that the plaintiff might recover. Ft. Worth, etc., R. Co. v. Glenn, 97 Tex. 586, 80 S. W. 992.

The court concedes that to recover for a nuisance causing mere personal annoyance in the enjoyment of real property or damage to it, a plaintiff must show legal interest in it to the extent, at least, of possession. Kavanagh v. Barber, 131 N. Y. 211. But it distinguishes a second class of nuisances, composed of those which, as in the principal case, cause physical injury to the person, and allow recovery without a property basis. This distinction was maintained by the lower court in a New York case, which, however, was reversed on other grounds by the higher court. Hughes v. City of Auburn, 12 App. Div. [N. Y.] 311. Contra. Ellis v. Kansas City, etc., R. Co., 63 Mo. 131, 21 Am. Rep. 436. This conflict over the scope of nuisance could be wisely avoided by considering cases of the second class not under that most indefinite head, nuisance, but under the law of negligence. The defendant should use due care to prevent the escape from his premises of unhealthful air liable to cause physical injury to people in the vicinity. This duty he seems to have violated in the principal case and so was properly held liable. See Holly v. Boston Gas Light Co., 8 Gray [Mass.] 123.—18 Harv. L. R. 68.

67. Kittanning Borough v. Thompson, 211 Pa. 169, 60 A. 584.

68. See 4 C. L. 847.

69. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572. A complaint to abate an alleged nuisance and enjoin its continuance, alleging the maintenance of a wooden building within the fire limits, having a sheet iron pipe through the ceiling and roof, from an iron stove in which a wood fire was kept, and alleging facts tending to show that it was a menace to the town from fire and constituted a public nuisance, endangering the public safety, was good on general demurrer. People v. Wing, 147 Cal. 382, 81 P. 1104. Complaint of the construction of stairway, area, etc., encroaching on the sidewalk, held to set forth facts entitling plaintiff to relief. City of New York v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. S. 937.

70. Grantham v. Gibson [Wash.] 83 P. 14.

71. City of New York v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. S. 937.

72, 73, 74. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

75. First Nat. Bank v. Tyson [Ala.] 39 So. 560.

sanction constitutes no defense,[77] and the establishment of a mere paper grade by a borough confers no right on a property owner to elevate his sidewalk above the natural grade, so as to make it a dangerous public nuisance.[78] An acquittal on the charge of illegally selling intoxicating liquors under the prohibitory liquor law is no bar to an action to restrain the maintenance of a nuisance under said law.[79] The statute of limitations is no defense to a bill filed for the abatement of a public nuisance.[80] Although a nuisance may have been created beyond the period of limitation, if it is maintained as a continuing nuisance, that is a renewal of the wrong and is actionable.[81] It is no defense to the maintenance of a nuisance that the plaintiff is only a tenant, where the injury is to his business and not to the freehold.[82] A receipt for payment, for which consent was given for the operation of a soap factory on certain premises, was not a license to create noxious odors.[83]

An injunction will be denied where the nuisance has been abated pending the action,[84] or where the plaintiff himself contributes to the acts complained of.[85]

Judgment or decree.[86]—In a suit for an injunction, the court may, as incidental to the main relief sought, ascertain and allow for the injury already done.[87] A judgment for abatement may, in the discretion of the court, follow a judgment for private damages resulting from a public nuisance.[88]

Costs.[89]

(§ 4) *B. Criminal prosecution.*[90]—An ordinance which declares an act unlawful by necessary implication declares it of a noxious character, and may punish it as a nuisance without any formal declaration that it is a nuisance.[91] In Missouri the manager of any building or establishment from which dense smoke is emitted is made by statute guilty of a misdemeanor.[92] Public nuisances are generally punishable by indictment and criminal prosecution.[93] On an indictment of a railroad

76. Pollution of a stream by sewage. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

77. In the absence of express legislative authority, a municipality cannot grant the use of a street to hold a street fair or carnival, which constitutes a public nuisance by interference with the lawful use of the street. No such authority exists in the charter of Augusta, Ga. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998. Municipalities cannot by licensing them make lawful such places as are nuisances, as a "turf exchange" or poolroom, which is a gaming house. State v. Nease [Or.] 80 P. 897. A city cannot permit the use of a street for speeding automobiles so as to relieve persons participating therein from liability for damages resulting. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754.

78. The borough council merely permitted a contractor to adapt the construction of a building to a pavement that might be laid in the future at an established paper grade. Kittanning Borough v. Thompson, 211 Pa. 169, 60 A. 584.

79. Cowdery v. State [Kan.] 80 P. 953.

80. Weiss v. Taylor [Ala.] 39 So. 519.

81. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

82. Grantham v. Gibson [Wash.] 83 P. 14.

83. N. K. Fairbank Co. v. Nicolai, 112 Ill. App. 261.

84. Miller v. Edison Elec. Illuminating Co. [N. Y.] 76 N. E. 734.

85. Where plaintiff complained of the pollution of his well by nuisances maintained on defendant's premises, and it appeared that a sink or cesspool on his own premises rendered the water in the well unfit for drinking purposes. Holbrook v. Griffis, 127 Iowa, 505, 103 N. W. 479.

86. See 4 C. L. 848.

87. Gerow v. Liberty, 94 N. Y. S. 949; Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703.

88. Flynn v. Butler [Mass.] 75 N. E. 730.

89, 90. See 4 C. L. 849.

91. The storage within the city of more than two barrels of gasoline or other oils of an explosive nature. City of Crowley v. Ellsworth, 114 La. 308, 38 So. 199.

92. Laws 1901, p. 73. Secretary and purchasing agent, having charge of affairs, deemed manager. State v. Hemenover, 188 Mo. 381, 87 S. W. 482. In a prosecution under this act, an indictment need not allege whether the owner of the building is a corporation or a partnership, nor make proof thereof. State v. Eyermann [Mo. App.] 90 S. W. 1168. Evidence of management by defendant and of willful permission of the emission of smoke held sufficient to support the indictment. Id.

93. Flynn v. Butler [Mass.] 75 N. E. 730. Indictment for maintaining a common nuisance by the illegal keeping of a place for the sale of intoxicating liquors held sufficient under section 8047, subd. 7, Rev. Codes 1899. State v. Erickson [N. D.] 103 N. W. 389. An indictment charging a railroad company with having suffered and committed a nuisance by the improper erection and maintenance of a bridge and ap-

company for a nuisance for maintaining an illegal crossing, the questions of the forfeiture of its charter and the constitutionality of its act of incorporation cannot be raised.[94] There is no variance between an information charging the setting up and maintenance of "a public or common nuisance in and upon a public highway" and an indictment charging the same "in a common road, or highway for all citizens of this commonwealth to go, pass or travel at their will."[95] On the indictment of a railroad company for a nuisance for maintaining an illegal crossing over a country road, it is a question for the jury to determine whether the traveled part of the road has been so narrowed as to impede public travel.[96]

(§ 4) *C. Action for damages.*[97]—One creating or maintaining a nuisance is liable for the damages resulting therefrom,[98] regardless of the degree of care exercised by him, his liability being of the character of an insurer.[99] If a landlord

proaches on a public highway, either under or over the right of way, was bad for uncertainty. Commonwealth v. Louisville & N. R. Co., 27 Ky. L. R. 692, 693, 86 S. W. 517.

94. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

95. Commonwealth v. Mock, 23 Pa. Super. Ct. 51.

96. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

97. See 4 C. L. 849.

98. A defectively covered coal hole in a sidewalk is a nuisance and a person who maintains such a hole is liable for injuries sustained by a person falling into it. Berger v. Content, 94 N. Y. S. 12. A village whose sewage-disposal works was declared a nuisance and restrained was held liable for the damages accrued. Gerow v. Liberty, 94 N. Y. S. 949. City held liable for a continuing nuisance created by filling up the natural drainage channels in the change of a street grade, and diverting the water from its usual course, so that mud, filth and rubbish were deposited on plaintiff's premises. Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703. A city which permits the use of a street for the speeding of automobiles in violation of a state law, and all who participate therein are guilty of maintaining a nuisance per se and liable for resulting damages. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754. A municipality which allows a sidewalk to remain in such condition as to constitute a dangerous public nuisance is liable for damages resulting therefrom. City of Muncie v. Hey, 164 Ind. 570, 74 N. E. 250. Both the city and the contractors for improving a street were liable for creating a nuisance by obstructions placed in a street not closed to travel and without being properly guarded. Jones v. Boston, 188 Mass. 53, 74 N. E. 295. A railroad company which constructs an embankment in a street so as to prevent access to abutting property is liable as for a nuisance. Coats v. Atchison, etc., R. Co. [Cal. App.] 82 P. 640. Although railroad companies may lawfully erect structures for proper railroad uses to the damage of adjacent property, yet they are liable for just compensation. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423. The fact that the defendant is a quasi public corporation, invested with the right of eminent domain, does not affect the right of an adjacent landowner to bring a second or third action for what, in the case of a private individual, would be a continuing nuisance. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360. Where a county does not repudiate a nuisance created by the unauthorized act of its officers, but virtually adopts and approves the same, it is liable for damages caused thereby, to the same extent as though it originally authorized the act. Construction of a bridge without a draw across a navigable stream in violation of §§ 9, 10, 11, act of Congress March 3, 1899; 30 Stat. 1151, c. 425 (U. S. Comp. St. 1901, pp. 3540, 3541). Viebahn v. Crow Wing County Com'rs [Minn.] 104 N. W. 1089. Where there was evidence of a nuisance on the premises, but affirmative proof that the premises were owned by only one of the two joint defendants, a motion by the plaintiff to set aside the judgment and grant a new trial should have been granted as to the owner and denied as to the other defendant. Berger v. Content, 94 N. Y. S. 12. The contractor who built a bridge, ordered and contracted for as provided by law, could not be held liable for personal injuries to plaintiff caused by its fall, on the theory that, by reason of negligent and improper construction, it constituted a nuisance. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330. A railway and light company stands on the same footing as an individual, as to the maintenance of a nuisance, and if its power house is injurious to property adjoining, on account of the smoke, vibration and escaping electricity, the company is liable for the injury. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970. Punitive damages awarded against defendant, whose locomotive killed animals, for refusal to remove carcases, which were offensive to plaintiff in her home. Yazoo & M. V. R. Co. v. Sanders [Miss.] 40 So. 163.

99. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330. Persons maintaining a powder magazine on their own premises are bound to use every possible precaution to prevent injury to those living in the neighborhood, and are liable for such injuries, unless caused by an explosion precipitated by some great and unanticipated natural force, or acts of persons over whom they had no control and which could not reasonably have been anticipated. Flynn v. Butler [Mass.] 75 N. E. 730. Parties using the sidewalk in the prosecution of their business must see that it is kept reasonably safe for persons walking thereon with ordinary care. Fruit merchants held respon-

lets premises already a nuisance, he and the lessee are, both or either, liable for the continuance;[1] and even if the lessee adds to the nuisance, not by a separate, independent work, but one used along with the original nuisance, the lessor is still liable.[2] Where town officers blew up ice in a river to drain off the water overflowing a highway so negligently as to cause a nuisance endangering private property, the town was not under obligation to remove the nuisance and liable for not doing so.[3] In an action based upon nuisance, negligence is not an essential element.[4]

Where direct injury to an individual results from a public nuisance, a private action can be maintained for the damages suffered,[5] to be followed in the discretion of the court by judgment for an abatement.[6] Where the sickness complained of may have just as well resulted from other causes as the stagnant water allowed to accumulate on defendant's premises, the plaintiff cannot recover;[7] especially if those other causes existed upon plaintiff's own premises.[8] To entitle a reversioner to maintain an action for damages, the injury caused by the nuisance must necessarily be of a permanent character.[9] Where the nuisance is of a permanent nature, rendering the premises useless and valueless to plaintiff, he should recover the entire damages in a single action.[10] But if the nuisance is of such a character as can be abated and the injury terminated, plaintiff is not limited to a single action, but may sue, in successive actions, for injuries resulting from its maintenance.[11] A former recovery against a quasi public corporation for constructing a structure so as to be a continuing nuisance does not estop an adjacent landowner from recovering damages subsequently accrued.[12] While it is not necessary to notify one whose act or acts constitute a nuisance or request him to abate it,[13] yet, where the property is transferred to another during the existence of the nuisance, the grantee is not li-

sible for damage to person stepping on a ripe banana and slipping, when the sidewalk was obstructed with boxes of bananas by them. Garibaldi v. O'Connor, 112 Ill. App. 53.

1. The lessor and lessee of a boom which was a nuisance to a mill owner above. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

2. The lessee added six piers or cribs and increased its power of injury to a mill. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

3. The ice broke up and the water flooded, crushed, carried away and destroyed plaintiff's mill. Wheeler v. Gilsum [N. H.] 62 A. 597.

4. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

5. A private person cannot bring an action to have an embankment constructed in a street by a railroad company declared a nuisance and abated; his remedy being an action at law to recover personal damages, if any. Atchison, etc., R. Co. v. Maegerlein, 114 Ill. App. 222. Where the private party suffers a peculiar and special injury, different from that of the public generally. Civ. Code § 3493. Harness v. Bulpitt [Cal. App.] 81 P. 1022.

6. Flynn v. Butler [Mass.] 75 N. E. 730.

7, 8. Chesapeake & O. R. Co. v. Whitlow [Va.] 51 S. E. 182.

9. He cannot recover for depreciation in rental value pending the lease, where the only injury was to the occupation of the premises and not of a permanent character, as from the soot, cinders, ashes, steam, noises, jars and vibrations attendant upon the operation of an electric light and power plant. Miller v. Edison Elec. Illuminating Co. [N. Y.] 76 N. E. 734. This case distinguished from the elevated railroad cases (Kernochan v. N. Y. Elevated R. R. Co., 128 N. Y. 559), where the decision proceeded on the ground that the elevated road was a permanent structure and intended to be so maintained, etc. Id.

10. City Council of Augusta v. Marks [Ga.] 52 S. E. 539. Injuries caused by erection of lawful structures in the streets are permanent in their character and can be recovered for but once, by those specially damaged. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423. Refusal to charge that, if the jury believed the injury to plaintiff's land to be permanent, he could not recover as far as the loss of crops was concerned, but only for the permanent injury, held error. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

11. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

12. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360. Where an abutting landowner has recovered damages for the unauthorized construction and operation of a street railway in front of his premises, he can bring another action for the continuance thereof after the date of the first action. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367.

13. A demand for the abatement of a nuisance is not necessary before an action for damages. If any necessity for such demand previously existed, it was abrogated by § 3483. Civ. Code. Coats v. Atchison, etc., R. Co. [Cal. App.] 82 P. 640.

able for its continuance until he has been notified thereof or requested to abate it, unless it appears that he had full knowledge of the facts that would be conveyed to him by such notice.[14] It has been held that statutes requiring the presentation of claims for damages against municipalities before the commencement of suit therefor have no application to suits for relief from a nuisance.[15] But in Georgia it is held that a declaration on a money claim for damages against a municipal corporation for the maintenance of a nuisance, must allege a substantial compliance with such an act.[16] In case of a nuisance, continuous but not permanent in character, the statute of limitations does not begin to run from the beginning of the nuisance but from the time of actual damage from it.[17] In Alabama, an action by a lower riparian proprietor for pollution of a water course must be brought within one year.[18]

Pleadings.—A complaint, when first attacked in the appellate court, will be held sufficient if it states the facts constituting the alleged nuisance sufficiently to bar another action.[19] A declaration alleging the maintenance of a nuisance was sufficient after verdict, though it did not allege that offensive odors permeated the air on plaintiff's premises, but did allege that the odors caused much sickness in the vicinity and plaintiff's family were made sick by them.[20] In a complaint for damages resulting from falling into a defectively covered coal hole in a sidewalk, it is not necessary to allege that the maintenance of the hole constitutes a nuisance.[21] A complaint for the abatement of a nuisance and for private damages alleged is good, although it shows that the nuisance may also be a public nuisance;[22] but in such case the complaint must show that plaintiff will suffer some special and peculiar injury therefrom different in kind from that of the public generally.[23] An allegation that defendant could so arrange and operate his cupola that sparks, etc., would not be carried upon plaintiff's house, warranted an inference that a more careful arrangement would prevent the nuisance though the particular means were not set forth.[24]

Evidence.[25]—The existence of a nuisance must be proved by evidence of the things that constitute the nuisance.[26] It was not necessary for plaintiff to show that defendant's business, though lawful, was carried on recklessly or not properly managed, but to show that it was carried on greatly to his injury.[27] On the trial of a railroad company for a nuisance by maintaining an illegal crossing, the court may

14. Graham v. Chicago, I. & L. R. Co. [Ind. App.] 74 N. E. 541.

15. Section 322 of New York Village Law (Laws 1897, p. 453, c. 414), prohibiting actions against villages for negligent injuries to persons or property unless a claim therefor has been filed with the clerk. Gerow v. Liberty, 94 N. Y. S. 949. Fulton City Charter (Laws 1902, p. 166, c. 63, § 63, subd. 3), requiring presentation of claim for damages from change of street grade and other formalities, and § 230, prohibiting action until 30 days after presentation. Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703.

16. Acts 1899, p. 74, requiring a presentation of such claim in damages, with a statement of time, place and extent of injury. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

17. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

18. Code 1896, § 2801, subd. 6. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

19. Over v. Dehne [Ind. App.] 75 N. E. 664. Complaint against contractor for damages resulting from the fall of a bridge, on the mistaken theory that it was a nuisance, held to contain sufficient allegations of negligence to withstand a demurrer. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

20. Fairbank Co. v. Nicolai, 112 Ill. App. 261; Fairbank Co. v. Bahre, 112 Ill. App. 290.

21. Berger v. Content, 94 N. Y. S. 12.

22. Meek v. De Latour [Cal. App.] 83 P. 300.

23. Civ. Code, § 3493. An allegation that defendant obstructed a public alley with fences at both ends is sufficient allegation of a private wrong. Harniss v. Bulpitt [Cal. App.] 81 P. 1022.

24. Over v. Dehne [Ind. App.] 76 N. E. 883.

25. See 4 C. L. 851.

26. Meek v. De Latour [Cal. App.] 83 P. 300.

27. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579.

in its discretion refuse to permit a map of the premises to be sent to the jury, which is not an exact representation of the height of the embankment as compared with its length.[28] Evidence of possession of land for a long time under claim of ownership is sufficient to sustain an action for injuries to such land.[29] Cases discussing the admissibility of particular evidence will be found in the notes.[30]

Damages.[31]—Recovery may be had for damages that are consequential as well as direct;[32] but problematical or speculative damages cannot be recovered.[33] Plaintiff may recover for depreciation in value of his property.[34] Plaintiff was allowed

28. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

29. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626.

30. In an action for continuing a nuisance, based upon a former judgment, where it appears that the structure complained of is the same as was involved in the former action, the record of the former suit is admissible in evidence. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360. In such a case ownership of the property by the defendant is presumed to continue until some change or alienation is shown. Id. Evidence that the raising of the smokestacks after commencement of suit had greatly, if not entirely, abated the nuisance was admissible as tending to show that the lowness of the stacks caused the damage complained of, but not to show negligence. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. Evidence that others besides plaintiff were made sick was admissible, under instructions that plaintiff could not recover damages therefor, to show that the odors complained of were capable of producing sickness and discomfort. Fairbank Co. v. Bahre, 112 Ill. App. 290. In an action against defendant resulting from smoke, gas and sulphurous fumes, and the noise and vibration caused by steam hammers, evidence that members of plaintiff's family were made ill and could not sleep was admissible. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. In determining whether a powder magazine filled with gunpowder constituted a nuisance evidence as to the proximity of dwellings, public highways and the density of population in the vicinity was admissible. Flynn v. Butler [Mass.] 75 N. E. 730. Evidence that after complaint was made of the nuisance defendant had partially corrected it was admissible to show the manner of conducting the works complained of. Meek v. De Latour [Cal. App.] 83 P. 300. Evidence that the owner of land damaged by destruction of his drainage could have lessened the damage by constructing another system is admissible. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. In an action for pollution of a stream for 12 months prior to commencement of the action, evidence of the condition of the water prior to the 12-month period and subsequent to the commencement of suit was competent to show the effect of the deposits, if any. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762. Evidence of the kind of crops raised on plaintiff's land as showing its value, of decrease of fish in the stream, of odors arising from the stream and of sickness of family caused thereby was admissible. Id. Evidence of depreciation in value of plaintiff's property is not admissible to show the actual existence and gravity of the nuisance, nor on the question of damages, in an action to abate a nuisance under Code Civ. Proc. § 731. Meek v. De Latour [Cal. App.] 83 P. 300. Where, in an action for damages from a nuisance not of a permanent character, it was held that a prior decree was a bar to the recovery of damages antecedent to the date of its entry, evidence of the value of the property before and after the creation of the nuisance compared with the difference in value between the date of the decree and the trial was inadmissible. Holbrook v. Griffis, 127 Iowa, 505, 103 N. W. 479. In an action for damages for an alleged nuisance, a resolution adopted by the city board of health declaring the structures complained of a nuisance was inadmissible. Id.

31. See 4 C. L. 852.

32. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323.

33. Where plaintiff did not ask for damages to his land, but for a recovery of expenses he would have to pay in removing noxious weeds sown on his lands from defendant's premises, he could not recover anything until such expenses had been incurred and definitely ascertained. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851.

34. Where the nuisance was of a temporary character, instructions authorizing a recovery of the difference between the fair value of the use of the property before and after the creation of the alleged nuisance were proper. Holbrook v. Griffis, 127 Iowa, 505, 103 N. W. 479. If the plaintiff could by a reasonable expenditure under the circumstances, in the exercise of reasonable diligence, by work on his own land, have lessened the damages or obviated them in whole or in part, it was his duty to do so (Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626), and it is proper to take into consideration whether the injury could be so obviated in whole or in part (Id.). In an action by a life tenant for damages from the maintenance of a continuing nuisance, plaintiff could not be compelled to a determination of her damages on the basis of her life expectancy, where the injury complained of was not permanent in character, but resulted from negligence in the construction and maintenance of the structure claimed to constitute the nuisance. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360. In the absence of allegation and proof that the use of an avenue by a railway company constituted a nuisance, plaintiff could recover for such injury to his property only as resulted from the operation of the railway on lands not included in the avenue. Oklahoma City & T. R. Co. v. Dunham

punitive damages against a railroad company for refusal to remove the carcasses of animals killed by its locomotive and thrown into a ditch near her premises.[35] The plaintiff must show that the injury was not one common to those living in the vicinity, but one peculiar to him and substantial in its character.[36] Where there is a direct physical injury to plaintiff's premises or physical interference with the enjoyment of them, different in kind from that suffered by the public generally, it is proper, in connection therewith, to show all other elements of damage.[37] Where a street railway company lays tracks upon highways in opposition to the abutting owner's protests and without authority, it cannot demand that damages therefor be assessed upon the same basis as if it had acted in the lawful exercise of the right of eminent domain.[38] Where the nuisance complained of is the pollution of a stream by sewage, plaintiff may recover the entire damages for injury to health, to trade and to water supply, up to the time of the suit, regardless of the value of the land.[39] But the municipality may show that the injury to the land is not permanent, as it is possible to abolish the conditions of which complaint is made.[40] If the nuisance is permanent in character, but one recovery of damages can be had.[41]

(§ 4) *D. Rights of private persons in regard to public nuisances.*[42]—To authorize an individual to maintain a private action for a public nuisance, it must appear that he has suffered a special injury therefrom different in kind from and in addition to that suffered by the general public,[43] aside from and independent of the general injury to the public,[44] for which there is no adequate remedy at law.[45]

OATHS.[46]

An oath must be administered by a properly authorized officer.[47] Only those forms and solemnities which are required by statute are essential.[48] Administration of a special oath by reason of the religious conviction of the witness is in the discre-

[Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849.

35. Yazoo & M. V. R. Co. v. Sanders [Miss.] 40 So. 163.

36. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579.

37. Where plaintiff's property was damaged by the smoke, cinders, etc., from trains operated on a heavy grade and a sharp curve, it was proper to show also the noise, etc., naturally arising from the operation of the trains. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488.

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

39, 40. Glasgow v. Altoona, 27 Pa. Super. Ct. 55.

41. Dam lawfully constructed by railroad company and causing overflow of land. Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423.

42. See 4 C. L. 852.

43. A railroad siding in the public highway. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572. Damages are not special or peculiar merely because they are greater than those suffered by the public generally, but they must differ from the latter in kind. George v. Peckham [Neb.] 103 N. W. 664; Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

44. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364; Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695. Plaintiff was especially damaged and inconvenienced by the smoke, soot, etc., from the smokestacks of defendant's roundhouse. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. Injunction will lie for the removal of a steam railway track unlawfully in the street upon the suit of one specially injured thereby. Louisville & N. R. Co. v. Cincinnati, etc., R. Co., 3 Ohio N. P. (N. S.) 109. Parties who have an established line of steamboats doing business on the Mississippi, when the commissioners of a county created a public nuisance by constructing a bridge without a draw across said river, suffered damages not common to the public generally, entitling them to an action for damages. Viebahn v. Crow Wing County Com'rs [Minn.] 104 N. W. 1089. Erection of stone columns extending from 22 to 26 inches over the building line of the street is such an obstruction of an adjoining lot owner's easement of view as entitles him to an injunction. First Nat. Bank v. Tyson [Ala.] 39 So. 560.

45. Palestine Bldg. Ass'n v. Minor, 27 Ky. L. R. 781, 86 S. W. 695. It is not enough that they be special or peculiar to the plaintiff, but they must also be incapable of measurement and compensation in damages. George v. Peckham [Neb.] 103 N. W. 664.

46. See 4 C. L. 853. See, also, Affidavits, 5 C. L. 60; Perjury, 4 C. L. 970.

47. Power of a judge of another court to "preside" in a court gives no authority to administer the oath to one verifying a criminal complaint therein. Edmondson v. State [Ga.] 51 S. E. 301.

tion of the court,[49] and the presumption being that the witness was properly sworn, it must affirmatively appear that he considered another oath more binding.[50]

OBSCENITY, see latest topical index.

OBSTRUCTING JUSTICE.[51]

Preventing attendance of witness.—At common law an indictment would lie for bribery or attempting to bribe or dissuade a witness from appearing before a court pursuant to a subpoena,[52] and in Missouri it is a misdemeanor;[53] but to constitute the offense, it is necessary that a criminal prosecution against some person be actually pending in which such witness was to have appeared or testified,[54] and it is an essential element of the offense of offering to bribe a witness that the accused should know that the person to whom the bribe was offered was in fact a witness.[55] It is not necessary to the offense of inducing a witness to depart that his testimony be material,[56] nor is it necessary that the witness be under subpoena.[57] To constitute "hindering or preventing" a witness from appearing, physical intervention is not necessary but advice or threats will suffice.[58] An indictment in the language of the statute is sufficient,[59] and an averment that the witness was induced to leave the "jurisdiction" instead of the "state" is sufficient.[60] In an indictment for offering to bribe a witness it is not essential in all cases to allege expressly that the accused knew the party to whom the bribe was offered was a witness, as in many cases it is necessarily implied from a statement of the acts constituting the offense.[61]

Obstructing officer.—An averment in the language of the statute that the officer resisted was engaged in an effort to maintain the peace is not sufficient.[62]

OCCUPATION TAXES; OFFER AND ACCEPTANCE; OFFER OF JUDGMENT, see latest topical index.

OFFICERS AND PUBLIC EMPLOYES.[63]

§ 1. *Definitions and classification.*[64]—A public office is not to be regarded as the property of the incumbent.[65]

48. Formal administration of an oath is not necessary, and presentation of an affidavit to an officer by the affiant with the request that he take the oath and signed by the officer without more said is sufficient. McCain v. Bonner [Ga.] 51 S. E. 36.

49, 50. Curtis v. Lehmann & Co. [La.] 38 So. 887.

51. See 4 C. L. 853. See, also, Bribery, 5 C. L. 437; Embracery, 5 C. L. 1097; Perjury, 4 C. L. 970.

52. Commonwealth v. Bailey, 26 Ky. L. R. 583, 82 S. W. 299.

53. Rev. St. 1899, § 2041. Notwithstanding the punishment may, in some cases, be imprisonment in the penitentiary. State v. Foster, 187 Mo. 590, 86 S. W. 245.

54. The bribery of a witness to prevent his appearing and testifying before a grand jury which is making a general inquiry as to whether bribery has been committed by some person or persons unknown is not with-

"Officer" and "employe" distinguished.[66]—The courts seem to be in comparative uniformity upon the proposition that the distinction between those employments which are and those which are not public offices is as follows: Where one's employment does not arise out of contract and he performs services or owes duties to the government, state or municipality, and not merely to those who appoint or elect him; in other words if he is invested with a portion of sovereign powers, the office is a public one. It is in the application of this distinction that the courts generally have differed. It must also be remembered that in statutes the term "officer" may be used in a larger and narrower sense than here defined.[67] An office is distinct from its incumbent,[68] and exists independent of the resignation or death of the latter.[69] A salary or emolument is an incident to an office merely and not a neces-

in the statute cited. State v. Foster, 187 Mo. 590, 86 S. W. 245.

55. Sufficiency of indictment as to allegation of knowledge. Commonwealth v. Bailey, 26 Ky. L. R. 583, 82 S. W. 299.

56. Tedford v. People [Ill.] 76 N. E. 60.

57, 58. State v. Bringgold [Wash.] 82 P. 132.

59, 60. Tedford v. People [Ill.] 76 N. E. 60.

61. Commonwealth v. Bailey, 26 Ky. L. R. 583, 82 S. W. 299.

62. People v. Hubbard [Mich.] 12 Det. Leg. N. 319, 104 N. W. 386.

63. This topic deals with the general law of officers excluding the law of elections (5 C. L. 1065), of quo warranto (4 C. L. 1177) and of or pertaining to particular officers (see Sheriffs and Constables, 4 C. L. 1442; Judges, 6 C. L. 209 and like topics) or particularly applicable to particular governmental bodies (see United States, 4 C. L. 1760; States, 4 C. L. 1516; Counties, 5 C. L. 857; and Municipal Corporations, 6 C. L. 714).

64. See 4 C. L. 854.

65. State v. Grant [Wyo.] 81 P. 795. See post, § 3. Note. Preference to a certain class of citizens. Nature and right to an office.

66. See 4 C. L. 854.

67. ILLUSTRATIONS. Positions held offices: Notaries public. In re Opinion of the Justices [N. H.] 62 A. 969. Parish superintendent of public education. State v. Theus, 114 La. 1097, 38 So. 870. Judges and clerks of election appointed under Laws 1903, p. 170. State v. Maroney [Mo.] 90 S. W. 141. Deputy sheriff is an officer within Const. art. 2, § 26, declaring that no person shall hold more than one office at the same time. State v. Slagle [Tenn.] 89 S. W. 326. Road commissioner, in charge of the erection of a wall, and employing laborers who are paid by the city. Bowden v. Derby, 99 Me. 208, 58 A. 993. Court stenographer, though appointed for a single case only, is only entitled to statutory compensation. Dull v. Mammoth Min. Co. [Utah] 79 P. 1050. Treasurer of a school district. Within the meaning of Rev. St. 1899, § 4274, limiting the time within which actions may be brought against public officers. State v. Harter, 188 Mo. 516, 87 S. W. 941. Members of Florida board of control are civil officers. In re Members of Legislature [Fla.] 39 So. 63. The duties to be performed by the state board of control, established by Laws 1905, c. 5384, are governmental in character. State v. Bryan [Fla.] 39 So. 929. A public administrator is a public officer acting by virtue of his office and not merely by virtue of the letters issued to him by the court. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P. 861. An administrator is not an agent of his intestate but derives his authority solely from the statute and is, with respect thereto, a public officer. Henry v. Henry [Neb.] 103 N. W. 441. The act of March 17, 1904, to amend certain sections of the Revised Statutes relating to the tenure of municipal and other officers (97 Ohio Laws, p. 37), extends the official terms of clerks of municipal councils who were in office at the time of the passage of the act until the election of their successors in January, 1906. State v. Witt, 72 Ohio St. 584, 74 N. E. 1075.

Persons held employes: School teacher. Bogert v. Board of Education, 94 N. Y. S. 180, afg. 44 Misc. 10, 89 N. Y. S. 737. A tax inquisitor. State v. Gilfillan, 3 Ohio N. P. (N. S.) 153. Assistant matron of workhouse. Jameson v. Cincinnati, 7 Ohio C. C. (N. S.) 100. Sergeant at arms to the council of the municipal assembly is an employe of the city. Padden v. New York, 45 Misc. 517, 92 N. Y. S. 926. Health officer employed by county board of supervisors is not a county officer but a mere employe of the board. Valle v. Shaffer [Cal. App.] 81 P. 1028. A clerk or secretary of a board of waterworks trustees, appointed prior to the enactment of the municipal code, and continued in employment thereafter by the board of public service, is not an officer but an employe, subject first to the direction of the board appointing him and then to the board of public service. Hutchinson v. Lima, 6 Ohio C. C. (N. S.) 529, afg. 3 Ohio N. P. (N. S.) 55; followed State v. Jennings, 57 Ohio St. 415, 49 N. E. 404. In Washington road supervisors are not "officers" within the meaning of the state constitution. State v. Newland, 37 Wash. 428, 79 P. 983. Assistant prosecuting attorneys are not officers in the sense the word is used in the state constitution, but are persons authoritatively appointed to assist an officer in an office provided by law. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

68. The successors of magistrates constituting the fiscal court of a county at the date of a rule nisi made by the circuit court directing the fiscal court to erect a court house may be brought before the circuit court and the rule made absolute against them, or such order entered as may be proper if no sufficient response is made by them. Fiscal Court of Marion County v. Marion Circuit Ct. [Ky.] 89 S. W. 704.

69. In re Members of Legislature [Fla.] 39 So. 63. The duties to be performed by

sary element thereof.[70] Though the word "office" may be used in varying senses, the term in any proper sense implies a duty or duties to be performed;[71] hence a retired officer of the United States army is not holding office.[72]

Kinds of officers.[73]—With reference to the service performed officers are divided into civil[74] and military or naval[75] officers.

In the United States, with reference to the governmental body served, officers may be classified as Federal,[76] state,[77] county,[78] or city[79] officials.

Classified according to the legality and character of their title, officers are either de jure officers, de facto officers or usurpers.[80] To be a de facto officer there must be an office to fill.[81] An official holding over after the expiration of his term without reappointment is a de facto officer[82] if he continues to perform official acts.[83] In the absence of any color of appointment or election a mere intruder, to be treated as a de facto officer, must have acted as such under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in truth an officer[84] and mere proof of his performance of the act concerning which a controversy arises is not sufficient proof of his authority to perform it.[85]

§ 2. *Creation and change of offices. Number of employes.*[86]—In the absence of constitutional provisions to the contrary the legislature may increase the number of offices.[87] A delegated power to create offices is not destroyed by the delegation of the power to select and remove the incumbents in such offices to another body.[88]

the state board of control, established by Laws 1905, c. 5384, are governmental in character. The office is continuous and permament and remains to be filled though incumbents may die or resign. State v. Bryan [Fla.] 39 So. 929.

70. Members of board of control held civil officers. In re Members of Legislature [Fla.] 39 So. 63.

71. Reed v. Sehon [Cal. App.] 83 P. 77.

72. Within the meaning of Const. art. 4, § 20, rendering any person holding a lucrative office under the United States ineligible to any civil office of profit under the state. Reed v. Sehon [Cal. App.] 83 P. 77.

73. See 4 C. L. 854.

74. Members of the Florida board of control are civil officers. In re Members of Legislature [Fla.] 39 So. 63.

75. See Military and Naval Law, 6 C. L. 638.

76. See United States, 4 C. L. 1760.

77. Police officers in the preservation of the peace are not agents or servants of a municipality; their powers and duties are derived from the state to which their primary responsibility is due. Miller v. Hastings Borough, 25 Pa. Super. Ct. 569; Horton v. City Council [R. I.] 61 A. 759. A school director holds a state office. State v. Fasse, 189 Mo. 532, 88 S. W. 1. See States, 4 C. L. 1516.

78. Directors of the Poor and of the House of Employment of the County of Lancaster are not county officers. Nissley v. Lancaster County, 27 Pa. Super. Ct. 405. See Counties, 5 C. L. 857.

79. Where duties of park commissioners were purely for city's benefit and parks were private and exclusive property of the city, held, the commissioners were municipal and not state officers. City of Denver v. Spencer [Colo.] 82 P. 590. See Municipal Corporations, 6 C. L. 714.

80. 23 Am. & Eng. Enc. of Law [2d Ed.] 327.

81. Police captain erroneously appointed inspector when there was no vacancy to fill held not a de facto inspector. People v. McAdoo, 96 N. Y. S. 362. Promotion in navy. Peck's Case, 39 Ct. Cl. 125. Ordinance that police department of city should consist of "as many policemen as city council may from time to time provide for," held of itself insufficient to render a police officer taken into the service of the city an officer de jure. Moon v. City of Champaign, 116 Ill. App. 403. De facto officer, see 4 C. L. 863.

82. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

83. Where a notary's term had expired seven months before he took an acknowledgment and there was no proof that he had continued to perform official acts as a notary as occasion required during such period and had held himself out as a duly qualified notary, held, his certificate was not effective as the act of a de facto officer. Sandlin v. Dowdell [Ala.] 39 So. 279.

84. Buck v. Hawley [Iowa] 105 N. W. 688.

85. Buck v. Hawley [Iowa] 105 N. W. 688. Return of service signed by one styling himself deputy sheriff is not conclusive of the official character of the signer of the return. Id.

86. See 4 C. L. p. 854.

87. Const. art. 6, § 19, providing that judges of the supreme court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions, does not prevent the legislature from making other officers conservators of the peace. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4.

88. A provision of a city charter giving the council authority to establish and regulate a police and fire commission is not in

As to whether or not a new office is created is largely dependent upon the circumstances of each case.[89] A few states require a notice of an intention to apply for the passage of a local law stating the substance of such law.[90] The determination of the number of employes needed is frequently left to the discretion of some board or officer,[91] and an exercise of such discretion will not be reviewed by the courts in a collateral proceeding.[92] The number of employes allowed similar county officers in different counties need not be the same.[93]

§ 3. *Eligibility and qualifications. A. In general.*[94]—The right to hold office is not one of the fundamental privileges which belong of right to all the citizens of the states,[95] and a state has the same freedom of employment that belongs to an individual, and it may by legislative enactment, determine to employ in public service only citizens of a certain class other things being equal.[96] Special qualifica-

conflict with a provision creating a civil service commission and providing for the selection and discharge of all persons in the police and fire departments by the commission. Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328; Callaghan v. Irvin [Tex. Civ. App.] 14 Tex. Ct. Rep. 289, 90 S. W. 335.

89. Houston city charter as amended by Sp. Laws 1897, p. 186, c. 17, providing for the appointment of two aldermen on the board of appraisement, held to merely confer a new power on the aldermen and not to create a new office within Const. art. 16, § 40, declaring that no person shall hold or exercise at the same time more than one civil office or emolument. City of Houston v. Stewart [Tex.] 13 Tex. Ct. Rep. 55, 87 S. W. 663, citing 2 C. L. 1810.

90. A notice of an intention to apply for the establishment of an inferior court of record and for the election of officers thereof, etc., held sufficient to warrant the passage of Local Acts 1903, p. 40. Ex parte Black [Ala.] 40 So. 133. Notice of intention to apply for Loc. Acts 1903, p. 625, creating the office of solicitor of Calhoun county, held sufficient. State v. Tunstall [Ala.] 40 So. 135.

91. The necessity for a clerk for the county treasurer and the compensation to be paid him are matters within the discretion of the county commissioners. Jacobson v. Ransom County [N. D.] 105 N. W. 1107.

92. So held in an action by the employing officer against the county to recover excess salary paid. Jacobson v. Ransom County [N. D.] 105 N. W. 1107.

93. Assistant prosecuting attorneys. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

94. See 4 C. L. 856.

95. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121. Laws 1904, p. 8, c. 9, providing for preference of honorably discharged soldiers and sailors of the Civil War, residents of the state, in appointment, employment and promotion in public service over others of equal qualifications, does not violate the fourteenth amendment to the Federal constitution. Id. Nor does it violate Iowa Const. art. 1, § 6, declaring that the general assembly shall not grant to any citizen or class of citizens privileges or immunities not equally belonging to all. Id.

96. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121. Const. art. 1, § 6, declaring that the general assembly shall not grant to any citizen or class of citizens privileges or immunities not equally belonging to all, is not violated by Laws 1904, p. 8, c. 9, providing for preference of honorably discharged soldiers and sailors of the Civil War, residents of the state, in appointment, employment and promotion in public service over others of equal qualifications. Id. Laws 1903, p. 225, c. 119, § 12, providing for the appointment of road overseers from among "the qualified electors" in each district held not violative of Const. art. 1, § 12, relating to class legislation. State v. Newland, 37 Wash. 428, 79 P. 983.

NOTE. Preference to a certain class of citizens. Nature of and right to an office: "The right to hold office can be no more a natural and personal right, nor more sacred than the right of suffrage, and it is the general holding of the courts that the right of suffrage is not a natural and personal right, but a political and civil right. It owes its existence to the constitution of civil government and not to the personality of the individual; nor does the right necessarily follow and become an attribute of citizenship. It is a right which is conferred, withheld or limited at the pleasure of the people, acting in their sovereign capacity. Once granted it may be taken away by the same power that granted it, and it is therefore not a natural right, which is held to be inalienable like the rights of conscience. Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Barker v. People, 3 Cow. [N. Y.] 686, 15 Am. Dec. 322; People v. Barber, 48 Hun [N. Y.] 198; Anderson v. Baker, 23 Md. 531; Minor v. Happersett, 21 Wall. [U. S.] 162, 22 Law. Ed. 627; Blanck v. Pausch, 113 Ill. 64; Morris v. Powell, 125 Ind. 315, 25 N. E. 231, 9 L. R. A. 326; Gougar v. Timberlake, 148 Ind. 41, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644; Mechem on Public Officers; Bryan v. Cottell, 15 Iowa, 538; People v. Loeffler, 175 Ill. 585, 51 N. E. 785; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136. A public office has in it no element of property but is rather a personal public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof. Nor are the prospective emoluments of a public office property in any sense, for the salary and other perquisites may be reduced or otherwise regulated by law at all times, unless such change is forbidden by the constitution. Bryan v. Cottell, 15 Iowa, 553; Ex parte Lambert, 52 Ala. 79; Taylor v. Beckham, 178 U. S. 548, 44 Law. Ed. 1187;

tions such as residence[97] and that the officer be a taxpayer[98] are frequently imposed. The exaction of a filing fee as a prerequisite to filing for office under a primary election law does not constitute the imposition of a property qualification upon holding office.[99] At common law women are disabled from holding public office.[1] In Texas a deputy clerk of a county need not be a qualified voter,[2] and a woman is eligible to the office.[3] Generally one holding an incompatible[4] or lucrative public office is disqualified from holding another public office. A lucrative office is one the pay to which is affixed to the performance of its duties and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer.[5] A retired officer of the United States army is not holding office.[6] Under the Florida constitution a senator or representative is ineligible to appointment or election, during the time for which he was elected, to any civil office under the Constitution that has been created or the emoluments whereof have been increased during such time.[7] Such ineligibility continues during

Donahue v. County of Will, 100 Ill. 94. The state has the same freedom of employment that belongs to the individual, and no one will contend that the individual may not employ whom he wishes to employ, or that he may not choose his employes from a certain class." Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121, 1123, 1124. The same view is taken by a recent author of note. Abbott, in his work on Municipal Corporations, vol. 2, § 607, p. 1491, says: "The holding of public office is a special grant or mark of favor by the corporation. It is not an inherent, a vested or a natural right, and the people acting in constitutional convention or through the state legislature can prescribe such qualifications as they may deem desirable or expedient and which must be possessed by those desiring to become public officials and perform public duties."

Constitutionality of preferential statutes: In many states, and particularly under civil service laws, veterans and firemen are given a preference in appointments to public office or employment. The courts have invariably sustained the constitutionality of such statutes. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121, 1124, citing In re Wortman, 2 N. Y. S. 324; People v. Stratton, 79 App. Div. 149, 80 N. Y. S. 269; People v. Tobin, 153 N. Y. S. 381, 47 N. E. 800; People v. Wright, 150 N. Y. 444, 44 N. E. 103; People v. Lathrop, 142 N. Y. 113, 36 N. E. 805; Lewis v. Board, 51 N. J. Law, 240, 17 A. 112; Ingram v. Board, 63 N. J. Law, 542, 43 A. 445; MacDonald v. Newark, 55 N. J. Law, 267, 26 A. 82; State v. Miller [Minn.] 68 N. W. 732; Goodrich v. Mitchell [Kan.] 75 P. 1034, 64 L. R. A. 945, 104 Am. St. Rep. 429; Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Opinion of Justices, 145 Mass. 587, 13 N. E. 15. See also Rogers v. Buffalo, 3 N. Y. S. 671, afd. 51 Hun, 637, 3 N. Y. S. 674, afd. 123 N. Y. 173, 33 State Rep. 55.

Construction and operation of statutes: Such statutes do not exempt such preferred persons from the civil service examination, but they simply mean that where all applicants are equally qualified and one of them is within the preferred class he is entitled to the office; it is essential, however, that none of the applicants be better qualified than the one within the preferred class. People v. Village of Saratoga Springs, 54 Hun, 16, 26 N. Y. State Rep. 54, 7 N. Y. S. 125; People v. Almshouse Com'rs, 47 N. Y. State Rep. 369, 20 N. Y. S. 21. See also, 17 Op. Att. Gen. U. S. 194 and 19 Op. Att. Gen. 318, construing U. S. Rev. St. § 1754, 1 Fed. Stat. Ann. p. 828.

97. Under Laws 1905, ch. 5384, the appointment of members of the state board of control is required to be made by the governor, whose discretion of choice is not limited except as to reasonable and salutary requisites as to place and length of residence of persons to be appointed. State v. Bryan [Fla.] 39 So. 729. Under Ky. St. 1903, § 3671 and Const. § 234, trustees of an incorporated town must be residents thereof. Hill v. Anderson [Ky.] 90 S. W. 1071.

98. Rev. St. 1899, §§ 9759, 9760 do not require that a school director be a resident taxpayer of the district in which he is elected; but if he has paid state and county taxes in another county from which he removed to the county in which he is elected, within a year preceding his election, he is eligible. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

99. Acts 1904, p. 870, c. 580, § 112, construed. Kenneweg v. Allegany County Com'rs [Md.] 62 A. 249.

1. In re Opinion of the Justices [N. H.] 62 A. 969. Cannot hold the office of a notary public. Id.

2, 3. Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 S. W. 642.

4. Wrongfully discharged fireman may pending reinstatement accept a position as sergeant at arms to the council of the municipal assembly. Padden v. New York, 45 Misc. 517, 92 N. Y. S. 926.

5. State v. Slagle [Tenn.] 89 S. W. 326. The office of deputy sheriff, whether entitled to the compensation fixed by contract between the sheriff and the deputy, or entitled to the fees allowed by law, is a lucrative office, within Const. art. 2, § 26, declaring that no person shall hold more than one lucrative office at the same time. Id.

6. Within the meaning of Const. art. 4, § 20, rendering any person holding a lucrative office under the United States ineligible to any civil office of profit under the state. Reed v. Sehon [Cal. App.] 83 P. 77.

7. Const. art. 3, § 5. In re Members of Legislature [Fla.] 39 So. 63.

the entire time for which such member was elected and cannot be removed by resignation from the legislature.[8] A resolution of a state legislature expelling a member is not a bill of attainder within the inhibition of the Federal constitution.[9]

Courts have jurisdiction to determine the constitutional qualifications of one who has been elected to office.[10] Under a constitutional provision giving the judicial department of the government the right to review the proceedings of all special statutory tribunals, the determination of a municipal common council as to the qualification of its members is subject to judicial review,[11] and the state legislature is powerless to take away or abridge such right.[12] In such case it is the province of the court to see that no arbitrary act is done.[13] One's qualifications cannot be collaterally assailed.[14]

One holding an office to which he is ineligible is guilty of usurpation of office.[15]

(§ 3) *B. Civil service.*[16]—Under the civil service laws of most states appointments and promotions must be from competitive examinations and according to the rating established thereby,[17] but not necessarily the one rated highest.[18] In mandamus against civil service commissioners to compel them to strike certain names from the list of eligibles for a certain office, all persons whose rights will be affected are necessary parties.[19] An omission in this regard requires the reversal of a decree for the relator,[20] and the defect cannot be waived by those who are made parties.[21]

§ 4. *Choice or employment.*[22] *A. How chosen or employed.*[23] *Elections.*—The election of public officers by popular vote is treated elsewhere.[24] All other "elections" are regarded as elective appointments and are treated under appointment.[25]

Appointment.[26]—Continuing an officer in office beyond his term is equivalent to an appointment for the time he is so continued in office.[27] Unless restrained by constitutional provisions the power of the legislature to pass laws regulating appointment to statutory offices is absolute.[28]

8. In re Members of Legislature [Fla.] 39 So. 63.

9. French v. State Senate, 146 Cal. 604, 80 P. 1031.

10. Councilman. State v. Collister, 6 Ohio C. C. (N. S.) 33.

11. So held as to the common council of New Brunswick though a charter provision declares that such council shall be the sole judge of the election, return and qualification of its members. Meachem v. Common Council of New Brunswick [N. J. Law] 62 A. 303.

12. Such right held not lost by a charter provision declaring the common council to be the sole judge of the election, return and qualification of its members. Meachem v. Common Council of New Brunswick [N. J. Law] 62 A. 303.

13. Proceedings declaring seat vacant set aside where unsustained by the evidence. Meachem v. Common Council of New Brunswick [N. J. Law] 62 A. 303.

14. Question of qualification of a city engineer cannot be raised on an application to confirm a special assessment for a street improvement. Heiple v. Washington [Ill.] 76 N. E. 854.

15. Hill v. Anderson [Ky.] 90 S. W. 1071.

16. See 4 C. L. 856.

17. Transfers of a bath attendant and of a third grade clerk in the bureau of buildings to the positions of assistant superintendents of public baths and comfort stations held promotions, and where bath attendant was seventh and clerk seventeenth on the eligible list to which they were appointed, and they were appointed without regard to those ahead of them on the list, held invalid. Hale v. Worstell, 48 Misc. 339, 95 N. Y. S. 485. A city civil service rule which sanctions a promotion in the civil service in violation of Const. art. 5, § 9 and N. Y. City Charter (Laws 1901, p. 48, c. 466, § 123 et seq.), requiring appointments and promotions to be from competitive examinations and according to the rating established thereby, is void. Id.

18. Under Greater New York City Charter the police commissioner is not required to appoint the one standing highest on the list of eligibles for promotion to the office of police inspector. People v. McAdoo, 96 N. Y. S. 362.

19. One who has been appointed to the office and is exercising the duties and receiving the emoluments thereof and who relator claims is ineligible is a necessary party. Powell v. People, 214 Ill. 475, 73 N. E. 795.

20, 21. Powell v. People, 214 Ill. 475, 73 N. E. 795.

22. See 4 C. L. 855, 857.

23. See 4 C. L. 857.

24. See Elections, 5 C. L. 1065.

25. See infra this section.

Right to appointment and enforcement of right.[29]—Under the laws of most states an honorably discharged Federal soldier or sailor is given a preference to appointive offices; the right to such preference, however, may be lost if not claimed in due season.[30] The right to the appointment being absolute, mandamus will lie.[31]

By whom appointed.[32]—The power of appointment is purely statutory.[33] Executive officers[34] and departmental boards and officers are frequently authorized to appoint subordinate officers.[35] The power is often conditional.[36] In Nebraska the legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers.[37] A board having authority to retain counsel whenever it has litigation has no authority to appoint a person counsel at an annual salary.[38] The right of local self-government as understood in most of our states prohibits the appointment of local officers by state authority.[39] Police officers being state rather than municipal officials, a state legislature may provide for their appointment without infringing this right.[40] Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted without the employment of other agencies, includes the implied power to employ such agencies.[41]

26. See 4 C. L. 855, 857.

27. State v. Plasters [Neb.] 105 N. W. 1092.

28. State v. Bryan [Fla.] 39 So. 929.

29. See, also, ante, § 3, Eligibility and qualification.

30. Failure of honorably discharged Union soldier to claim his preference until four years after another was appointed to the office held to render latter's appointment valid. People v. Snyder, 94 N. Y. S. 541.

31. Under Laws 1904, p. 8, c. 9, an honorably discharged soldier held entitled to mandamus to compel his appointment. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121.

32. See 4 C. L. 855.

33. Laws 1897, p. 547, c. 378, § 1571, providing that "the coroners in each borough shall have an office in said borough, and shall appoint a clerk," held to authorize the coroners in a borough to appoint only one clerk, and not to authorize each coroner to separately appoint a clerk. In re McNiele, 107 App. Div. 338, 95 N. Y. S. 146.

34. Under Laws 1905, ch. 5384, the appointment of members of the state board of control is required to be made by the governor, whose discretion of choice is not limited except as to reasonable and salutary requisites as to place and length of residence of persons to be appointed. State v. Bryan [Fla.] 39 So. 929. Under Const. 1874, art. 7, §§ 32, 34, 36, governor has power to appoint special judges to try all cases in which the county judge is disqualified, pending in either of the three courts over which he presides. Bauman v. Wells Fargo Exp. Co. [Ark.] 91 S. W. 13.

35. Board of health of the city of Little Falls held to have power under the statutes and law as it existed on February 9, 1904, to appoint a health officer. People v. Ingham, 94 N. Y. S. 733. The president of the board of local improvements of a village has authority to appoint a commissioner to make an assessment for a public improvement. Sumner v. Milford, 214 Ill. 388, 73 N. E. 742; following Village of Melrose Park v. Dunnebecke, 210 Ill. 422, 71 N. E. 431.

36. The existence of a collector of customs for the Georgetown district precludes the appointment, with a right to compensation, of a disbursing agent for the funds appropriated for a postoffice at Washington, under U. S. Rev. St. § 3658, which authorizes such appointments only where there is no collector at the place of location of a public work. Bartlett v. U. S., 197 U. S. 230, 49 Law. Ed. 735; Id., 39 Ct. Cl. 338.

37. Laws 1905, ch. 47, p. 292, relating to registers of deeds, held unconstitutional. State v. Plasters [Neb.] 105 N. W. 1092.

38. Board of supervisors. Vincent v. Nassau County, 96 N. Y. S. 446, afg. 45 Misc. 247, 92 N. Y. S. 32.

39. Laws 1893, p. 1501, c. 661, § 20, directing a county judge to fill a vacancy in a city board of health after 30 days, is unconstitutional so far as it relates to filling a vacancy in the board of health in the city of Oswego, in that members of that board are city officers within Const. art. 10, § 2 and therefore must be appointed in the manner prescribed by the charter. People v. Houghton, 182 N. Y. 301, 74 N. E. 830, afg. 102 App. Div. 209, 92 N. Y. S. 661.

40. Pub. Laws c. 804, authorizing the Governor to appoint a board of police commissioners for the city of Newport, held constitutional. Horton v. City Council of Newport [R. I.] 61 A. 759. Such law is not in violation of Const. art. 4, § 10, declaring that the general assembly shall continue to exercise powers previously exercised, unless prohibited in the constitution. Id. See ante, § 1. Definitions and classification, for cases holding that police officers are state officers.

41. A county board of supervisors has implied power thereunder to appoint a health officer and provide for the payment of his salary, regardless of the validity of St. 1897, p. 464, c. 277, § 25, subd. 20, conferring express authority therefor. Valle v. Shaffer [Cal. App.] 81 P. 1028.

Manner of appointment.[42]—In order that there may be a valid appointment by a board or council there must be a quorum present.[43] A quorum being present, the act of a majority of the quorum is the act of the body,[44] and this is true though some of the members present refrain from voting.[45] Misconduct of the appointing board renders the appointment voidable.[46] Under the New York civil service law an appointment, in the noncompetitive class, of the person nominated cannot be made until the civil service board certifies as to his qualification and fitness.[47]

(§ 4) *B. Filling vacancies and promotions.*[48]—Like the power of appointment the power to fill a vacancy is entirely statutory.[49] The power of appointment to an elective office is exhausted when once exercised, and any subsequent appointment, until the incumbent has been removed or the office has become vacant, is void.[50] Statutes providing that if an officer die during his term of office his sureties may nominate a successor do not apply where the officer resigns.[51]

In New York promotions in the civil service must be based on competitive examinations.[52] As to ungraded service a mere increase in salary does not, ipso facto, constitute a promotion.[53] Under the New York City Charter a patrolman is not entitled to a promotion and increase of salary until the expiration of one year from the end of his probation term.[54]

Contracts of public employment.[55]—The general principles relating to public contracts are treated elsewhere.[56] In Indiana counties are prohibited from entering into contracts of employment on the percentage or commission basis unless the necessity of such employment and the contract therefor are entered of record.[57] If sanction of an employment is essential it must be proven.[58]

42. See 4 C. L. 857.

43. Where a school district trustee's resignation has been accepted to take effect on a future date, his appointment as a member of the board before such date at a meeting at which there was no quorum is ineffectual. Saunders v. O'Bannon, 27 Ky. L. R. 1166, 87 S. W. 1105.

44. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

45. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404. Where 10 out of 12 members of a council were present and motion to fill vacancy is carried by six votes, and at the election one person receives five votes and another two, the one receiving five votes held legally elected. Id.

46. Misconduct of a board of education in appointing a certain person treasurer, in consideration of a promise on such person's part to pay interest on the funds in his hands. Board of Education v. Brown [Mich.] 12 Det. Leg. N. 796, 105 N. W. 1118.

47. People v. Ingham, 94 N. Y. S. 733.

48. See 4 C. L. 857.

49. Under St. Louis Charter the house of delegates declaring one elected to the body ineligible cannot fill the vacancy. Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082.

50. State v. Vincent [S. D.] 104 N. W. 914. Rev. Pol. Code § 1814 provides that appointments to fill vacancies shall "continue until the next general election * * * and a successor is elected and qualified." The incumbent of the office of sheriff for the term ending January, 1905, was re-elected in November, 1904, for a full term of two years. He died December 7, 1904. The county commissioners appointed one to fill the unexpired term "until January 1, 1905, or until his successor is appointed and qualified." Held, that the appointee was entitled to the office until the next general election at which the vacancy could be filled and a successor elected and qualified. Id.

51. So held under Ky. St. 1903, § 4123, providing that if a sheriff die during his term of office his sureties shall have the right to nominate a person to collect the revenue for that year. Combs v. Eversole [Ky.] 86 S. W. 560.

52. Under Const. art. 5, § 9 and New York City Charter a roundsman appointed to the central office bureau of detectives is promoted, within the meaning of the constitutional requirement of competitive examinations, and, when appointed after the classification of the position of detective sergeant in the competitive schedule. must be appointed pursuant to a civil service examination. People v. McAdoo, 108 App. Div. 1, 95 N. Y. S. 400.

53. People v. Tully, 47 Misc. 275, 95 N. Y. S. 916. Laws 1899, p. 805, c. 370, requiring promotions to be based on merit and competition and defining an increase in salary as a promotion does not apply to the position of examiner of charitable institutions which is classified as ungraded service. Id.

54. People v. McAdoo, 96 N. Y. S. 445.

55. See 4 C. L. 857.

56. See Public Contracts, 4 C. L. 1089.

57. Burns' Ann. St. 1901, § 7853. A contract by a county to pay expert accountants one-half of the amount of money which they might collect for the county by an examination of public records, etc., for the purpose of ascertaining whether any money was due the county, held within the statute. Board of Com'rs of Howard County v. Garrigus, 164 Ind. 589, 74 N. E. 249, afg. former opinion 73 N. E. 82.

§ 5. *Right to office and remedies to enforce same.*[59] *A. Indicia and evidence of right.*—The absence of any record showing an appointment is prima facie evidence that the appointment was never made or approved.[60] An officer's commission is merely evidence of his appointment and, in collateral inquiries, the fact of the appointment may be shown by other means.[61] Proof that a person acts as a public officer is prima facie sufficient to show that he is such officer.[62] The rule that a certificate of election issued by the proper authority is prima facie or presumptive evidence of right to the office cannot apply where two certificates were issued to two persons for the same office.[63] There is no material difference in effect between a "commission" and a "certificate of election."[64]

(§ 5) *B. What remedy.*[65]—The determination of title to offices belongs exclusively to courts of law.[66] Quo warranto[67] and not certiorari[68] or mandamus[69] is the proper remedy to try title to public office, though it has been held that the title of a petitioner to an office may be determined in mandamus to compel the payment of his salary.[70] Relator being the sole claimant to an office, mandamus lies to compel his instalment.[71] A public officer, either de jure or de facto, in possession of an office is entitled to an injunction to restrain one who disputes his right to it or any one else from interfering with him in the discharge of his official duties.[72] Mandamus will not lie.[73] There being an adequate remedy by quo war-

58. Evidence held sufficient to show sanction by the commissioner of public charities of an employment by the sheriff of plaintiff as an examiner of indigent insane. Strong v. New York, 110 App. Div. 188, 96 N. Y. S. 1083.

59. See 4 C. L. 861. Right to appointment, see ante, § 4. See, also, specific topics such as Quo Warranto, 4 C. L. 1177, and Mandamus, 6 C. L. 496. Election contests and ouster proceedings depending upon the validity of the election, see Elections, 5 C. L. 1065.

60. Under Code 1873, § 766 and Code 1877, §§ 442, 470 the failure of the minute book of the board of supervisors to show an approval of the appointment of an alleged deputy sheriff, and the absence from the files in the auditor's office of any written appointment of such deputy sheriff, is at least prima facie evidence that the appointment was never made or approved. Buck v. Hawley [Iowa] 105 N. W. 688.

61. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319. Where a person has been lawfully elected to fill a vacancy in a borough council, the fact that he received a certificate of election from the clerk of the council is immaterial in mandamus proceedings to procure his instalment into office. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

62. It is unnecessary to prove written appointment. Earl v. State [Ga.] 52 S. E. 78.

63. People v. Davidson [Cal. App.] 83 P. 161.

64. Wilson v. Fisher [Cal.] 82 P. 421.

65. See 4 C. L. 861, 862. See, also, topics Certiorari, 5 C. L. 559; Mandamus, 6 C. L. 496; and Quo Warranto, 4 C. L. 1177.

66. Suit to restrain removal from office will not lie. People v. Howe, 177 N. Y. 499, 69 N. E. 1114, afg. 88 App. Div. 617, 84 N. Y. S. 604, and rvg. Corscadden v. Haswell, 88 App. Div. 158, 84 N. Y. S. 597. The title to an office cannot be tried through the medium of an injunction. See Callaghan v. Tobin, [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328.

67. Du Four v. State Superintendent of Public Instruction [N. J. Law] 61 A. 258 (dicta). Quo warranto is the proper remedy where it is sought to regain an office in the possession of another under color of right. People v. McAdoo, 96 N. Y. S. 362. See Quo Warranto, 4 C. L. 1177.

68. Murta v. Carr [Mich.] 12 Det. Leg. N. 289, 104 N. W. 27; Du Four v. State Superintendent of Public Instruction [N. J. Law] 61 A. 258. See Certiorari, 5 C. L. 559.

69. Mandamus does not lie to regain an office in the possession of another under color of right. Where a police captain and a veteran were both appointed to the office of inspector and there was but one vacancy to fill and veteran qualified and captain was ordered to resume duty as captain, held, mandamus would not lie to regain office of inspector. People v. McAdoo, 96 N. Y. S. 362. Mandamus will not lie to compel county treasurer to determine which of two rival bodies were the legal directors of a school district. State v. Gentry, 112 Mo. App. 589, 87 S. W. 68. See Mandamus, 6 C. L. 496.

70. City of Chicago v. People, 111 Ill. App. 594.

71. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

72. Lies to restrain city authorities from unlawfully appointing a successor and dispossessing him of his office and the property thereof. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319; Callaghan v. Irvin [Tex. Civ. App.] 14 Tex. Ct. Rep. 289, 90 S. W. 335; Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328. Rev. St. 1895, art. 4343, providing for quo warranto proceedings in such cases, does not alter the rule. Id. Injunction will lie to protect the possession of a de facto officer against the interference of a claimant where his title is disputed, until the latter establishes his title by a proper proceeding. Petition for writ of prohibition

ranto,[74] injunction will not lie to restrain one from holding an office to which he is ineligible.[75] The title of a de facto incumbent to a public office cannot be examined in any collateral proceeding attacking his official acts.[76] On proceedings in the nature of quo warranto to determine the legal existence of a certain office, the title of the claimant to the office is not involved.[77]

A board having power to determine the election and qualifications of its own members, an executive officer cannot interfere in exercise of such power[78] and the board in determining the matter acts in a quasi-judicial capacity and no man can vote for his own case.[79]

(§ 5) *C. Procedure and practice in particular remedies.*[80]—The procedure and practice in particular remedies is largely treated in the specific topics dealing with those remedies.[81] The action must be brought within the period of limitations.[82] By failing to demur one may waive lack of certainty in the complaint.[83] An amendment must not change the cause of action.[84] Where, pending mandamus, by one illegally ousted from an office, the officer's term expires, the writ of mandate will simply direct the payment of relator's salary from the time of the ouster until the expiration of the term and will not direct his recognition as an officer.[85] A school director holds a state office within the meaning of constitutional or statutory provisions governing appellate jurisdiction.[86]

§ 6. *Induction into office.*

§ 7. *Nature of tenure and duration of term.*[87]—In legal contemplation the choosing of an officer at an election duly proclaimed is a choosing for the constitutional or statutory term as the case may be.[88] Unless some other time is fixed for

denied. The fact that relator had been elected member of board of health by a city council instead of appointed by the governor held immaterial. Sanders v. Emmer [La.] 39 So. 631.

73. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319.

74, 75. Hill v. Anderson [Ky.] 90 S. W. 1071.

76. The judicial acts of one duly elected and acting as a justice of the peace are not open to collateral attack, because he had prior to that time accepted the office of city attorney and was also acting in that capacity. State v. Miller [Kan.] 80 P. 947. The validity of the appointment of school directors duly appointed by the mayor and confirmed by the city council and acting as officers de facto cannot be collaterally questioned in a suit for an injunction to restrain the collection of taxes levied by such directors. Schmohl v. Williams, 215 Ill. 63, 74 N. E. 75.

77. State v. McClain, 187 Mo. 409, 86 S. W. 135.

78. Where five aldermen of a city were chosen at an election and by an oversight it was not indicated which of them was to fill the unexpired term of a member who had resigned, held, the mayor of the city had no authority to determine the matter. Hobbs v. Uppington [Ky.] 89 S. W. 128.

79. Where five aldermen of a city were chosen at an election and by an oversight it was not indicated which of them was to fill the unexpired term of a member who had resigned, none of the members so elected were competent to vote in the determination of which of them took the short term. Hobbs v. Uppington [Ky.] 89 S. W. 128.

80. See 4 C. L. 861, 862.

81. See Quo Warranto, 4 C. L. 1177; Injunction, 6 C. L. 6; Mandamus, 6 C. L. 496; etc.

82. Under Code Civ. Proc. § 343 an action to oust certain persons from office on the ground that their election was illegal is not barred until four years. People v. Davidson [Cal. App.] 83 P. 161.

83. A complaint, in an action to oust certain persons from office, showing that two of defendants had been declared elected to one office and had received certificates and qualified and that both were performing the duties thereof and were usurpers and intruders and averring that one received the highest number of votes, but not stating which received the highest number of legal votes, held sufficient in the absence of a demurrer. People v. Davidson [Cal. App.] 83 P. 161.

84. Amendment to a petition in an action to oust officers on the ground that two officers had been elected for one office, held not to change the cause of action, it alleging on information and belief that all ballots were counted whether one or two candidates were voted for. People v. Davidson [Cal. App.] 83 P. 161.

85. Davenport v. Los Angeles, 146 Cal. 508, 80 P. 684.

86. Hence under Const. art. 6, § 12, the supreme court has exclusive appellate jurisdiction of cases involving title to the office. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

87. See 4 C. L. 858.

88. State v. Pattison [Ohio] 76 N. E. 946. Term of office of probate judge elected November 7, 1905, held three years. Id.

the beginning of a term of office, the general presumption is that the official term dates from the legal ascertainment of the result of the election and the officer assumes the duties of the office as soon thereafter as he can qualify and receive his commission.[89] Ordinarily the word or words "term" or "term of office," when used in reference to the tenure of office, mean a fixed and definite period of time;[90] hence, under constitutional or statutory provisions that officers shall hold office for a certain time and until their successors shall qualify the "term of office" is deemed to be the fixed, certain and definite period of time therein specified.[91] It is generally provided that an officer shall continue in office until his successor is elected or appointed and qualifies.[92] Such provision is not intended to prolong one's term of office beyond such reasonable time after the election or appointment as will enable the newly designated officer to qualify,[93] and if he fails to qualify before the expiration of such reasonable time the office becomes vacant.[94] An office being abolished an incumbent cannot hold over and exercise the duties of a new and distinct office even though the duties of the two offices be similar.[95] Continuing an officer in office beyond his term is equivalent to an appointment for the time he is so continued in office.[96] Where by the fundamental law the term of an office and the beginning and termination of such term are prescribed as well as the time for the election of a successor, the legislature is without authority to postpone the election of such successors and extend the term of office of the incumbents during the intervening time,[97] even though the fundamental law contains a provision that an officer shall hold over until his successor qualifies.[98] A constitutional amendment giving the legislature power to extend existing terms of office means the terms of office existing at the time of the adoption of the amendment.[99] Stat-

89. Prowell v. State [Ala.] 39 So. 164.

90. State v. Galusha [Neb.] 104 N. W. 197.

91. Is not such fixed periods and in addition thereto the indeterminate periods which an incumbent may hold until his successor qualifies. Const. art. 6, § 20 construed. State v. Galusha [Neb.] 104 N. W. 197.

92. Under the statutes of Georgia a notary public and ex officio justice of the peace, although his resignation is tendered to and accepted by the governor, continues in office until his successor is appointed and qualified. Bates v. Bigby [Ga.] 51 S. E. 717. A clerk of a board of waterworks trustees, who was performing the duties of his employment at the time of the enactment of the municipal code, was by virtue of section 213 thereof (1536-912 R. S.), continued in his employment until removed by the board of public service which superseded the waterworks trustees. Hutchinson v. Lima, 6 Ohio C. C. (N. S.) 529, afg. 3 Ohio N. P. (N. S.) 55.

93. Prowell v. State [Ala.] 39 So. 164. Under Code 1886, § 1102, providing that a competent number of notaries shall be appointed for each county who shall hold office for three years and until their successors are qualified, a notary, on the expiration of his term, is only entitled to continue the discharge of his duties pending reappointment for a reasonable time. Sandlin v. Dowdell [Ala.] 39 So. 279.

94. Prowell v. State [Ala.] 39 So. 164.

95. People v. Davidson [Cal. App.] 83 P. 159.

96. State v. Plasters [Neb.] 105 N. W. 1092.

97. State v. Galusha [Neb.] 104 N. W. 197. Assumed without deciding that Sess. Laws 1905, p. 200, ch. 16, §§ 12, 13 are unconstitutional. Argument stated in opinion. State v. Malone [Neb.] 105 N. W. 893.

98. State v. Galusha [Neb.] 104 N. W. 197. Sess. Laws 1905, H. R. 235, held unconstitutional. Id.

NOTE. Postponement of election of successor as an extension of the incumbent's term: Where the state constitution contains an unqualified limitation of the term of office, with no holding over clause, the legislature cannot alter it either directly or by postponing the date for the successor's qualification. State v. Askew, 48 Ark. 82; Howard v. State, 10 Ind. 99. But almost invariably there is a constitutional provision or general law authorizing holding over, as in the principal case. It is then frequently held that a statute postponing an election is not contrary to constitutional provisions fixing the terms of officers. The act is construed not to contemplate extending the term of the incumbent. The legislature acts under general authority to regulate elections. The incidental result is delay in the qualification of a successor; and a condition is created by virtue of which the constitutional provision for holding over operated to keep the then incumbent in office. State v. McCracken, 51 Ohio St. 123; State v. Menaugh, 151 Ind. 260, afd. Larned v. Elliott, 155 Ind. 702; Treadwell v. Supervisors, 62 Cal. 563; State v. Andrews, 64 Kan. 674. Contra. Gemmer v. State, 163 Ind. 150, 71 N. E. 478.—From 4 Mich. L. R. 70.

99. State v. Pattison [Ohio] 76 N. E. 946.

utes providing that a judge may settle and sign a bill of exceptions after the expiration of his term of office do not operate to extend such term.[1] In Nebraska the legislature cannot by an act solely for that purpose extend the terms of county officers.[2] Where long and short terms of office are to be filled at the same election and the ballot used does not indicate which candidate is to serve for the short term, the proper method for settling the question is for the candidates elected to cast lots;[3] but it is not against public policy for them to agree to elect one of their number president of the body in consideration of his taking the short term,[4] and such an agreement is binding on such member, estopping him, after the expiration of the short term, from claiming a long one.[5] Deputy supervisors of elections have no power to decide upon a disputed term of office.[6] One elected to fill a vacancy takes only the unexpired term of his predecessor.[7] Many offices are held during the pleasure of some superior officer or departmental body.[8] A statutory provision allowing officers to hold office during good behavior is not necessarily in conflict with a constitutional provision providing that the duration of offices shall never exceed a stated period.[9] A void promotion does not create a vacancy in the office from which the officer was promoted.[10] In California a judgment annulling a certificate of election not being appealed from within the statutory time vacates the incumbency.[11]

Courts will take judicial notice of the statutory terms of office of public officers.[12]

§ 8. *Resignation, abandonment, removal and reinstatement. A. Resignation.*[13]—A resignation having been presented to the proper authority[14] and accepted it is beyond recall.[15]

1. Rev. St. 1898, § 3290 does not violate Const. art. 8, § 5, limiting the term of office of district judges to four years. Larkin v. Saltair Beach Co. [Utah] 83 P. 686.

2. Laws 1905, ch. 47, p. 292, relating to registers of deeds, held unconstitutional. State v. Plasters [Neb.] 105 N. W. 1092.

3. City council. Hobbs v. Uppington [Ky.] 89 S. W. 128.

4, 5. Hobbs v. Uppington [Ky.] 89 S. W. 128.

6. State v. Pattison [Ohio] 76 N. E. 946.

7. Under Const. art. 16, §§ 27, 28, a judge elected at the general election in 1902 in place of the judge regularly elected in 1900, whose office became vacant by death, was elected for the unexpired term of the deceased judge only, and not for the full, constitutional term of four years. Nicks v. Curl [Tex. Civ. App.] 86 S. W. 368.

8. Under Const. art. 20, § 16, where an officer's term is not fixed by the constitution or declared by law, he holds only during the pleasure of the appointing power. Farrell v. Board of Police Com'rs [Cal. App.] 81 P. 674. Policemen in cities of the first class in Oklahoma hold office until their successors are appointed and qualify and not for any specified term. Wilson's Rev. Ann. St. 1903, art. 1, c. 12, § 7 construed. Oklahoma City v. Dean [Okl.] 79 P. 755. A teacher serving without any contract or agreement as to term of service at the time the city of Brooklyn became a part of the city of New York held not employed for a definite term within the meaning of N. Y. City Charter, § 1117. Bogert v. Board of Education, 94 N. Y. S. 180, afg. 44 Misc. 10, 89 N. Y. S. 737. In the absence of constitutional or statutory restraints and of a definite term, the power of appointment implies the power of removal. Price v. Seattle [Wash.] 81 P. 847. See, also, next section subd. C, paragraph, Who has the power.

9. Provision of city charter providing that certain civil service officers should hold office during good behavior held not to violate Const. art. 16 § 30, declaring that the duration of offices not fixed by the constitution shall never exceed two years; the provision meaning that the appointee shall hold office during good behavior not exceeding the constitutional limit. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319; Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct, Rep. 269, 90 S. W. 328; Callaghan v. Irvin [Tex. Civ. App.] 14 Tex. Ct. Rep. 289, 90 S. W. 335.

10. Promotion in navy. Peck's Case, 39 Ct. Cl. 125.

11. Renders the certificate of election void. Wilson v. Fisher [Cal.] 82 P. 421. "Certificate of election" held included in word "commission" as used in Code Civ. Proc. § 1127. Id.

12. Aultman Taylor Machinery Co. v. Burchett [Okl.] 83 P. 719.

13. See 4 C. L. 859.

14. Under Shannon's Code, § 442, the county judge of a county was the proper officer to receive and act on the resignation of a justice thereof. Murray v. State [Tenn.] 89 S. W. 101.

15. Resignation of chairman of board of school trustees, to take effect on a specified date, being accepted cannot be recalled even before such date. Saunders v. O'Bannon, 27 Ky. L. R. 1166, 87 S. W. 1105.

(§ 8) *B. Abandonment.*—An office cannot be abandoned without an intention, actual or imputed, of so doing.[16] Mere nonuser or neglect of duty do not of themselves produce a vacation of the office without judicial determination.[17] The intention to abandon an office is one of fact for the jury[18] and may be inferred from the conduct of the party.[19] If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created and no judicial determination is necessary.[20] Evidence that void removal proceedings were pending when the official left the state is admissible on the question of intent.[21] An officer by accepting a second incompatible office is deemed to have abandoned his first office;[22] but the mere acceptance of additional duties does not affect one's status as an officer.[23] If one accepts a second incompatible office his certificate of appointment is admissible against him although the oath subscribed by him erroneously described the office.[24]

(§ 8) *C. Removal.*[25] *Who has the power.*[26]—The power of removal is generally expressly provided for,[27] but no such provision being made, it is generally held to be incident to the power of appointment.[28] The right of appointment to the classified civil service of the United States carries with it the right of removal, which power of removal is unrestricted except for the single cause of failure to contribute money or services to a political party.[29] The power is incident to the office and cannot be exercised by one whose term has expired.[30] Being lodged in a board the

So held as to a justice of the peace. Murray v. State [Tenn.] 89 S. W. 101.

16, 17, 18. Attorney General v. Maybury [Mich.] 12 Det. Leg. N. 324, 104 N. W. 324.

19. Attorney General v. Maybury [Mich.] 12 Det. Leg. N. 324, 104 N. W. 324. Where, pending charges against him, officer took private papers and without notice went to Mexico where he stayed 17 months, for the benefit of his health he claimed, held to show an abandonment. Id. Where a constable at the close of his term turned over to a person holding a certificate of election his badge, pistol and handcuffs and accepted from such person an appointment as deputy and took the oath and thereafter acted as such, he thereby surrendered and abandoned the office, and could not thereafter claim that he was holding over after his term. People v. Davidson [Cal. App.] 83 P. 159.

20, 21. Attorney General v. Maybury [Mich.] 12 Det. Leg. N. 324, 104 N. W. 324.

22. Under Const. art. 2, § 26, where a constable accepts an appointment to the office of deputy sheriff, the office of constable becomes ipso facto vacant. State v. Slagle [Tenn.] 89 S. W. 326.

23. A policeman by accepting the additional duties and pay of a roundsman does not cease to be a policeman, and upon the abolition of the office of roundsman is entitled to hold office as a policeman. McCann v. New Brunswick [N. J. Law] 62 A. 191.

24. Action to oust one from the office of constable who claimed to hold over after the expiration of his term, it appearing that he has surrendered the office and accepted an appointment as deputy constable. People v. Davidson [Cal. App.] 83 P. 159.

25, 26. See 4 C. L. 869.

27. Statutes construed: As regards the title of a statute removal is not germane to election. Comp. Laws §§ 1642-1645 held unconstitutional. Bell v. First Judicial Dist. Ct. [Nev.] 81 P. 875. Oswego City Charter, § 63, as amended by Laws 1902, p. 551, c. 207, authorizing the mayor to remove for cause any one appointed to office by him, refers to the officers appointed by the mayor and not to individual appointments. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009. Section 225 of the Municipal Code, providing for the trial and removal of officers charged with misfeasance, does not apply to councilmen. Cleveland Elec. Illumating Co. v. Hitchens, 3 Ohio N. P. (N. S.) 57. Const. art. 8, § 120, providing that the mayor of a municipality shall have power to suspend and remove officers and members of the police and fire department is not self-executing. City of Newport News v. Woodward [Va.] 51 S. E. 193. Act May 7, 1901 (P. L. 20), authorizing the recorder of the city to remove an assessor previously elected, is constitutional. Neuls v. Scranton [Pa.] 61 A. 77, following Commonwealth v. Moir, 199 Pa. 534, 49 A. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837. Under the St. Louis charter, where a person elected to the house of delegates was ineligible, the house of delegates had power to determine his ineligibility and to oust him from office, but not to fill the vacancy. Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082.

28. In the absence of restraints imposed by the constitution or by statute the power of appointment implies the power of removal where no definite term is attached to the office or employment by law. Price v. Seattle [Wash.] 81 P. 847.

29. 22 Stat. at L. 403, ch. 27 considered. United States v. Taft, 24 App. D. C. 95.

30. Under Laws 1901, p. 204, c. 466, § 452, limiting the term of a deputy commissioner to three months, a removal of an employe by a deputy commissioner more than three months after the latter's appointment is void. People v. Monroe, 93 N. Y. S. 898.

board when exercising the power must be legally constituted.[31] The action of a de facto officer is valid as to the official removed.[32] The power lodged in a board to determine the election and qualification of its members does not authorize them to take from a member without right an office into which he has already been inducted under a previous board and to which he has a vested right.[33] Under the Los Angeles city charter the only qualified signers of a petition for removal are those whose names appear on the great register.[34]

What constitutes a removal.—The term "removal" as used in statutes on this subject is generally held to refer only to cases where an officer or employe is removed for some reason personal to himself,[35] and does not apply where the office or position has been abolished in good faith[36] or where the incumbent is dismissed for want of sufficient funds to pay for his services,[37] or to reduce expenses.[38] The reduction of one wrongfully promoted is not a "removal."[39]

Grounds.[40]—The cause assigned must be personal to the officer and imply an unfitness for the place.[41] Bribery,[42] a violation of positive law though done in ignorance,[43] or willful misconduct and neglect of duty,[44] justifies the removal of

31. City of Chicago v. People, 111 Ill. App. 594.

32. The action of a de facto board of police commissioners expelling a patrolman from the police force is as to him valid. Lang v. Bayonne [N. J. Law] 62 A. 270.

33. Board of aldermen. Hobbs v. Uppington [Ky.] 89 S. W. 128.

34. Qualifications cannot be determined by a comparison of their names as appearing on the petition with affidavits of registration. Davenport v. Los Angeles, 146 Cal. 508, 80 P. 684.

35. See Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, afg. 114 Ill. App. 168. Civil service laws and rules are enacted and promulgated to prevent the discharge of employes whose services are needed but who may be discharged because of other considerations than the welfare of the public service. Brown's Case, 39 Ct. Cl. 255.

36. McCann v. New Brunswick [N. J. Law] 62 A. 191. Civil Service Acts do not abrogate or curtail in any respect the power of a municipality to abolish offices (City of Chicago v. People, 114 Ill. App. 145), consequently in the absence of statute or express contract making the employment one for a definite term, a civil service employe may be discharged when his services are no longer needed. Under the Federal civil service laws a probationer has no right to be retained for the full period of six months if his services are not needed. Brown's Case, 39 Ct. Cl. 255.

An order notifying a sawyer, employed by the department of street cleaning, that "you are discharged from this department as a sawyer, your services being no longer required," does not necessarily import that the position of sawyer has been abrogated or that the department of street cleaning has no longer any work for a sawyer. People v. Woodbury, 102 App. Div. 462, 92 N. Y. S. 442.

37. Sess. Laws 1895, p. 88 construed. Incumbent at time of dismissal had notice of reason. Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, afg. 114 Ill. App. 168. A suspension of a municipal employe **because of** failure to appropriate sufficient funds to pay for his services is not wrongful, and neither a civil service act nor a contract of employment could afford him protection. Walsh & Co. v. Queen Ins. Co., 3 Ohio N. P. (N. S.) 1.

38. Sess. Laws 1895, p. 88, construed. Incumbent at time of dismissal had notice of reason. Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, afg. 114 Ill. App. 168.

39. Where one was promoted to an office from which another has been illegally removed. People v. McAdoo, 92 N. Y. S. 1004. A police captain appointed an inspector when there was no vacancy in the latter office to fill, held properly directed by police commissioner to resume his duties as captain. People v. McAdoo, 96 N. Y. S. 362.

40. See 4 C. L. 859.

41. City of Rockford v. Compton, 115 Ill. App. 406. Must be some dereliction or neglect of duty, or an incapacity to perform the duties of his position, or some delinquency affecting his general character and fitness for office. City of Reckford v. Compton, 115 Ill. App. 406.

42. Member of a state legislature being guilty of bribery, he may be expelled. Const. art. 4, §§ 35 and 9 construed. French v. State Senate, 146 Cal. 604, 80 P. 1031.

43. The common council of the city of New Brunswick is authorized to remove from office members of the board of water commissioners who fail to comply with the requirements of P. L. 1904, p. 259. Cohn v. Common Council of City of New Brunswick [N. J. Law] 62 A. 285.

44. An officer knowingly **failing to prosecute** gamblers is guilty of "willful misconduct." Coffey v. Superior Court of Sacramento County, 147 Cal. 525, 82 P. 75. For a mayor to persistently **refuse to sign orders** for the pay of city officials to which they are entitled under valid ordinance is misconduct authorizing removal. Riggins v. Waco [Tex. Civ. App.] 14 Tex. Ct. Rep. 21, 90 S. W. 657. A charge that two councilmen have accepted bribes and fifteen others have been influenced in their voting by a party who **contributed to** their individual **campaign funds** constitutes a charge of mis-

an officer. One lawfully assuming the duties of another office may be dismissed for a neglect thereof.[45] One month's absence from the state is not a willful neglect of duty on the part of a county superintendent of schools,[46] and this is true though he fails to leave some one in charge of his office during his absence, the law making no provision for the appointment of such a person.[47] The fact that no official duty was performed during such absence does not imply willful neglect, as there may have been no such duty to perform.[48] Drunkenness while on duty and unprovoked assaults upon citizens warrant the dismissal of a police officer.[49] Misrepresentation in application is ground for removal[50] even though the statement was not knowingly made.[51] A statute authorizing removal for good and sufficient cause contemplates some substantial cause such as corruption or inefficiency in office, infraction of rules, commission of a crime, etc.[52] The power of removal from the classified civil service of the United States is unrestricted except for the single cause of failure to contribute money or services to a political party.[53] Under a statute providing for the compulsory retirement of a police officer who has become permanently disabled, physically or mentally so as to be unfit for duty, the test is not whether he is physically and mentally perfect and capable of efficiently performing every act that may properly be required of a police officer in all branches and departments of the service, but whether he possesses the physical and mental qualifications efficiently to perform the duties of the position he is filling.[54] Under New York City Charter a removal of a policeman to the pension fund roll must be based on the personal certificate of as many police surgeons as the police commissioner may require.[55] Such a certificate must be read and construed as a

conduct in office. Cleveland Elec. Illuminating Co. v. Hitchens, 3 Ohio N. P. (N. S.) 57. A mayor is incompetent who confesses and admits that **obedience** to ordinances is **discretionary** with him or that his conscience will not admit of his observing them. Riggins v. Waco [Tex. Civ. App.] 14 Tex. Ct. Rep. 21, 90 S. W. 657.

Evidence held sufficient to sustain order dismissing police sergeant for neglect of duty. People v. Greene, 104 App. Div. 496, 93 N. Y. S. 720. Evidence held insufficient to show violation of duty by relator or any neglect on his part in failing to discharge carpenter for alleged intoxication. People v. Monroe, 94 N. Y. S. 366.

Regulation of police department providing that a member of the police force may be dismissed for entering any building while in uniform, except when in the discharge of duty, **held reasonable.** McManus v. Newark Police Com'rs [N. J. Law] 62 A. 997.

45. Police sergeant in command and acting as a captain is as much responsible for a neglect of duty as captain as though he were such officer. People v. Greene, 104 App. Div. 496, 93 N. Y. S. 720.

46, 47, 48. Bon Homme County v. McLouth [S. D.] 1004 N. W. 256.

49. Marran v. Common Council [N. J. Law] 61 A. 13. Where, on proceedings against a police officer for improper conduct, it appeared that he was in uniform on some of the occasions in question and that on other occasions he was assuming to exercise judicial functions, a contention that it did not appear that he was on duty held of no merit. Id.

50. False statement as to age. Reinstatment denied. People v. Lindblom, 215 Ill. 58, 74 N. E. 73. Willful misrepresentation as to age so as to come within requirements for service. Lindblom v. People, 116 Ill. App. 213.

51. People v. Lindblom, 215 Ill. 58, 74 N. E. 73.

52. Laws 1893, p. 176, c. 202, giving the police commissioners of the city of Manchester authority to remove police officers, construed. Gibbs v. Manchester [N. H.] 61 A. 128. Under Hurd's Rev. St. 1903, p. 381, c. 24, par. 457 (Civil Service Act), providing that an officer cannot be removed except for cause, misconduct of a police officer in **wrongfully obtaining money** from the state is cause for his removal though he was not acting strictly in the discharge of his legal duties. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184. Civil Service Act §§ 4, 5 (Hurd's Rev. St. 1903, p. 380, c. 24, pars. 449, 450), directing that the commission shall make rules for removals in accordance with its provisions, and providing for their publication and when they shall take effect, do not require a statement of the grounds on which removals by the commission may be based, such grounds being prescribed by § 12 (p. 381, par. 457), providing for removals for cause. Id.

53. 22 Stat. at L. 403, ch. 27 considered. United States v. Taft, 24 App. D. C. 95.

54. People v. McAdoo, 109 App. Div. 892, 96 N. Y. S. 868, afg. 95 N. Y. S. 511. Where police sergeant, of whom only desk service was required, had not lost a day for 15 years on account of sickness, held, he could not be retired merely because a physical examination disclosed obesity, poor agility and poor endurance. Id.

55. A certificate purporting to be a reso-

whole.[56] The terms of the contract of employment may specify the grounds for dismissal.[57]

Mode of proceeding.[58]—Under the constitutions of most states officers holding by appointment and inferior officers of any kind are not subject to impeachment.[59] Judicial officers are generally only removable by impeachment.[60] As to whether quo warranto will lie there is a conflict.[61] Statutory proceedings are often provided.[62]

Nature of proceeding and procedure.[63]—A public office is not the property of the incumbent within constitutional provisions providing that no one shall be deprived of his property without due process of law.[64] In the absence of statutory provisions defining a quorum the usual parliamentary rules apply.[65] Unless expressly authorized to proceed summarily,[66] an officer having power to remove another for cause[67] or to remove one appointed for a definite term,[68] it will not be

lution passed by "a board of surgeons of the police department" and signed by the "board's" president and secretary, is insufficient. Metcalf v. McAdoo, 95 N. Y. S. 511, afd. 109 App. Div. 892, 96 N. Y. S. 868.

56. Statement that relator was unfit to perform "full police duty" held to qualify and limit a prior clause that he was "unfit for police duty." People v. McAdoo, 109 App. Div. 892, 96 N. Y. S. 868.

57. Where school teacher agreed to teach certain term providing work was satisfactory to school board, held, board being dissatisfied, it could dispense with teacher's services. Kingston v. School Dist. [Mich.] 12 Det. Leg. N. 263, 104 N. W. 28.

58. See 4 C. L. 859, 860.

59. A state superintendent of a water district appointed by the governor is not subject to impeachment. State v. Grant [Wyo.] 81 P. 795, petition for a rehearing denied 82 P. 2.

60. A state superintendent of a water district is not a judicial officer, within the meaning of Const. art. 3; § 18, providing that judicial officers shall be liable to impeachment for high crimes and misdemeanors, in such manner as to permit his removal from office only by impeachment. State v. Grant [Wyo.] 82 P. 2.

61. Note: When an officer has been duly elected and has qualified, the authorities are in conflict as to whether quo warranto will lie to remove him. State v. Gardner, 43 Ala. 234, holds that it will not. **Contra.** State v. Wilson, 30 Kan. 661. When the alleged forfeiture has been caused by a criminal act, there must be a conviction, with jury trial, before quo warranto can be brought. Commonwealth v. Jones, 10 Bush [Ky.] 725. **Contra.** Royall v. Thomas, 28 Grat. [Va.] 130. However, forfeiture for cause other than crime may always be found by the court for itself in quo warranto proceedings. State v. Wilson, 30 Kan. 661; People v. Heaton, 77 N. C. 18; Commonwealth v. Allen, 70 Pa. 465. In re Bolte, 97 App. Div. [N. Y.] 551 the legislative provision created ipso facto a forfeiture, and thereafter respondent was a de facto officer, analogous to one holding over after the expiration of the term (Oliver v. Mayor, 63 N. J. Law, 634, 76 Am. St. Rep. 228, 48 L. R. A. 412), and to oust him from possession of the office, illegally held, quo warranto would lie, as his counsel contended, brought either by an adverse claimant or by the attorney general. Compare State v. Hixon, 27 Ark. 398. Without deciding this question, the court properly held that it had authority, upon the entire charges, under the statutes cited, to make the removal.—5 Columbia L. R. 160.

62. Pen. Code, §§ 758, 772, conferring on the superior court jurisdiction to remove municipal officers, do not control a provision of a freeholders' charter providing for the removal of such officers by a municipal board of trustees, but prescribe merely a concurrent remedy, and are not displaced as to the municipality by Const. art. 11, § 6. Coffey v. Superior Court of Sacramento County [Cal.] 82 P. 75.

63. See 4 C. L. 859-861.

64. Since a public officer has no property right in his office, Sess. Laws 1905, p. 101, c. 59, providing for the removal of certain state officers by the appointing power, on filing a reason therefor in writing with the secretary of state, is not unconstitutional as depriving an office holder, so removed, of his property without due process of law. State v. Grant [Wyo.] 81 P. 795. Members of a state legislature having been expelled by that body in the manner prescribed by and under the authority of the state constitution are not deprived of their office without due process of law. French v. State Senate, 146 Cal. 604, 80 P. 1031.

65. McManus v. Newark Police Com'rs [N. J. Law] 62 A. 997. Board being composed of four members, three is a quorum and their united action is valid. Id.

66. A state officer, removable under Sess. Laws 1905, p. 101, c. 59, providing that any officer appointed by the governor may be removed by the latter for maladministration, etc., provided reason in writing for such removal be filed in the office of the secretary of state, is removable without notice or hearing. State v. Grant [Wyo.] 81 P. 795.

67. A mayor in removing officers, under Oswego City Charter, § 63, as amended by Laws 1902, p. 549, c. 207, must conduct a judicial investigation. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

68. State v. Grant [Wyo.] 81 P. 795. So held as to action of board of election commissioners in removing judges and clerks of election. State v. Maroney [Mo.] 90 S. W. 141.

presumed that such removal can be made without notice and a hearing; but one holding office during the pleasure of the appointing power may be removed without charges, notice or trial,[69] and the removal in such a case is an administrative or ministerial act.[70] Employes may generally be summarily removed.[71] A proceeding before a civil service commission for the removal of an officer is not a common-law or criminal proceeding, but an investigation.[72] Statutory provisions govern.[73] Charges against a municipal employe may generally be investigated by a committee and the latter's report acted on by the council.[74] In New York the appointment of a deputy commissioner to take evidence upon the trial of charges against members of the police force may be made orally,[75] and the fact that such deputy commissioner directed the making of the charges does not disqualify him from conducting the hearing.[76] The impeaching body of a state legislature has no power to appoint a committee to investigate alleged misconduct of an executive officer whose term will expire before he can be tried or impeached.[77] All essential jurisdictional facts must appear.[78] Removal being authorized for cause and after due hearing, the proceedings are judicial in character,[79] and the mode of procedure not being specified, the substantial principles of the common law recognized and enforced in proceedings affecting private rights are to be observed.[80] Action in such cases must not be taken arbitrarily but upon proof of charges of sufficient gravity to authorize such removal.[81] Unless waived[82] the accused is entitled to have the charges intended to be brought against him stated specifically and with substantial certainty,[83] though not necessarily with the technical nicety required in indict-

69. Farrell v. San Francisco Police Com'rs [Cal. App.] 81 P. 674.

70. Campbell v. Doolittle [W. Va.] 52 S. E. 260.

71. An assistant matron of a workhouse is an employe and not an officer, and on sufficient proof of misconduct or neglect may be removed by the board in control, without being accorded an opportunity of meeting her accusers face to face or of making a defense. Jameson v. Cincinnati, 7 Ohio C. C. (N. S.) 100.

72. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184.

73. New York: A teacher was employed for an indefinite term by the city of Brooklyn at the time it became a part of the city of New York. After consolidation the school board of the city of Brooklyn appointed the teacher to a certain grade for a definite term. Held teacher's status was not affected by such appointment and that he could be removed only upon preferred and established charges of gross misconduct, etc., as provided by N. Y. City Charter, § 1114. Bogert v. Board of Education, 94 N. Y. S. 180, afg. 44 Misc. 10, 89 N. Y. S. 737.

74. Under P. L. 1898, p. 65 charges against a police officer may be considered by the police committee and the council may dismiss upon the report of said committee. Marran v. Common Council of Bordentown [N. J. Law] 61 A. 13.

75. People v. Greene [N. Y.] 76 N. E. 614, afg. 105 App. Div. 642, 94 N. Y. S. 1159.

76. People v. Greene, 94 N. Y. S. 477.

77. Const. W. Va. art. 4, § 9 and art. 5, construed. Investigation into alleged misconduct of governor for the sole purpose of vindicating him as against certain charges. Ex parte Caldwell, 138 F. 487.

78. Under Hurd's Rev. St. 1903, p. 381, c. 24, par. 457, § 12, where written charges against a police officer were filed with the civil service commission of Chicago and he was notified of the time and place of hearing and served with a copy of the charges, and appeared, the commission had jurisdiction to remove him from office. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184.

79. Gibbs v. Manchester [N. H.] 61 A. 128.

80. So held under Laws 1893, p. 176, c. 202, giving the police commissioners of the city of Manchester authority to remove police officers. Gibbs v. Manchester [N. H.] 61 A. 128.

81. So held as to mayor removing officers under Oswego City Charter, § 63, as amended by Laws 1902, p. 549, c. 207. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009. Removals can only be made by the board of police and fire commissioners for cause and then only when written charges have been filed, a hearing granted, investigation had, and evidence heard. City of Rockford v. Compton, 115 Ill. App. 406.

82. Lack of written charges cannot be complained of where employe appeared before civil service commissioners and requested a trial upon the charges preferred against him. Lindblom v. People, 116 Ill. App. 213.

83. Gibbs v. Manchester [N. H.] 61 A. 128; City of Rockford v. Compton, 115 Ill. App. 406, quoting from Andrews v. King, 77 Me. 224, 234. Complaint containing only a general allegation that defendant was guilty of willful neglect of duty without stating the facts constituting such neglect, is insufficient. Bon Homme County v. McLouth [S. D.] 104 N. W. 256.

ments.[84] He is entitled to reasonable notice of the charges thus stated and of the time and place of hearing;[85] he may demand the production of witnesses and that they be sworn,[86] and that he be allowed to cross-examine the witnesses produced against him and to offer testimony in his own behalf,[87] and he also has the right to be represented by counsel.[88] Removal proceedings being based upon the charge of the commission of a felony, the defendant is entitled to the same presumptions in his favor as if the charge had been made against him in a criminal court.[89] Under the Greater New York City Charter a police inspector may prefer charges in writing against a patrolman without verification and on information furnished him by others.[90] Witnesses must state facts not conclusions.[91] The proof must correspond to the pleadings.[92] The general rules as to harmless error apply.[93] The proceedings must be free from fraud or the order is void.[94] The person discharged is not entitled to a hearing where the position has been abolished in good faith and for economical or other substantial reasons.[95] Charges being required, an officer cannot be removed except for the charge stated.[96]

Order of removal.[97]—One being entitled to a hearing a summary order must show that the proceeding does not constitute a "removal."[98] In some states the charge must be stated in the order.[99] A resolution of a state legislature expelling a member is not a bill of attainder.[1]

Appeal and review.[2]—Removal proceedings being judicial in character they may be reviewed in the courts, but, unless such review is authorized by statute, a lawful summary removal is final.[3] Under the constitutions of most states the

84. Gibbs v. Manchester [N. H.] 61 A. 128; Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184; City of Rockford v. Compton, 115 Ill. App. 406, quoting from Andrews v. King, 77 Me. 224, 234.

85. Gibbs v. Manchester [N. H.] 61 A. 128.

86. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

87. Gibbs v. Manchester [N. H.] 61 A. 128; O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

88. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

89. Removal proceedings against member of fire department of the city of New York. People v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046.

90. Is a subordinate officer. People v. Greene, 101 App. Div. 33, 91 N. Y. S. 803.

91. On trial of a policeman for using profane language witness must state what the language was. Lamb v. Brunswick, 121 Ga. 345, 49 S. E. 275. See topic Examination of Witnesses, 5 C. L. 1371.

92. A policeman justifiably drawing a pistol, removal for committing a breach of the peace is unwarranted. Lamb v. Brunswick, 121 Ga. 345, 49 S. E. 275. In order to sustain a conviction for using profane language while on duty or in uniform, the evidence must show that the profane language was used at such a time. Id. On charges against a fireman for having urged other firemen not to appear as witnesses of the quarrel, evidence held merely to show advice to keep away from contestants if they did not wish to become witnesses. People v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046.

93. Action of deputy police commissioner in permitting defendant's counsel to cross-examine and produce witnesses at an adjourned hearing held to render harmless refusal to adjourn because defendant's counsel and witnesses were not present. People v. Greene, 94 N. Y. S. 477. In investigating charges against a policeman, use of affidavits on which charges were based held harmless, the affiants being witnesses before the commissioner and the defendant having had an opportunity to cross-examine them. People v. Greene, 101 App. Div. 33, 91 N. Y. S. 803.

94. City of Chicago v. People, 111 Ill. App. 594.

95. Under Civil Service Act. City of Chicago v. People, 114 Ill. App. 145. See ante this section, What constitutes a removal.

96. City of Rockford v. Compton, 115 Ill. App. 406.

97. See 4 C. L. 860.

98. An order notifying a sawyer employed by the department of street cleaning, that "you are discharged from this department as a sawyer, your services being no longer required," does not necessarily import that the position of sawyer has been abrogated, or that the department of street cleaning has no longer any work for a sawyer so as to exclude the operation of Gr. N. Y. Charter § 537, prohibiting a removal without a hearing. People v. Woodbury, 102 App. Div. 462, 92 N. Y. S. 442. See ante, this section, What constitutes a removal.

99. Under Laws 1893, p. 176, c. 202, giving the police commissioners of the city of Manchester authority to remove police officers, the charge against an officer upon which an order of removal is based should be stated in the order. Gibbs v. Manchester [N. H.] 61 A. 128.

1. French v. State Senate, 146 Cal. 604, 80 P. 1031.

2. See 4 C. L. 860.

judicial department of government cannot revise even the most arbitrary expulsion of a member from the legislature.[4] To what court the appeal lies is regulated by statute.[5] As regards the taking of an appeal a dismissal takes effect from the time it is communicated to the employe.[6]

Only allegations of fact in a petition for certiorari need be denied.[7] On certiorari evidence aliunde the record of its proceedings is properly excluded.[8] Objection must be made in order to have sufficiency of written charges reviewed.[9] In New York upon certiorari a judgment or determination of dismissal will not be disturbed unless there is an absence of evidence to sustain it,[10] and such determination will be regarded as conclusive, the evidence being conflicting and contradictory and there being sufficient evidence, if believed, to sustain such determination.[11] It will be set aside as against the weight of the evidence if it could not stand if it had been the verdict of a jury.[12] In New York appeals are in certain cases regarded as special proceedings,[13] and the removing officer may be required to return a record of the removal proceedings and show cause why his determination should not be set aside.[14] In Illinois an appeal from the action of a board of police and fire commissioners removing a patrolman should be determined on a hearing de novo.[15]

One does not cease to be an officer pending an appeal from a wrongful discharge.[16]

3. Under the Seattle City Charter, art. 24, § 8 and art. 16, § 12, where the removal of a municipal employe is sustained by the civil service commission, the ruling is not reviewable by the courts. Price v. Seattle [Wash.] 81 P. 847. Though a municipal legislative body is declared by the charter "sole judge" of the election and qualification of its members, its action in removing a member is subject to judicial review. Meachem v. New Brunswick Common Council [N. J. Law] 62 A. 303. The civil service commission having had jurisdiction of a proceeding for the removal of a police officer, the circuit court on certiorari is without power to review its order of removal on the ground that the commission wrongfully removed such officer. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184. The courts have no power to review the action of the head of an executive department of the government in removing a clerk from office on the ground that the removal was not in accordance with the civil service rules requiring notice to be given and an opportunity to reply to charges. United States v. Taft, 24 App. D. C. 95. Where there is any evidence to sustain dismissal of a police officer, it will not be reviewed. Marran v. Common Council of Bordentown [N. J. Law] 61 A. 13. In the absence of specific allegations of corruption or of abuse of discretion, the determination of board of control in dismissing an employe is conclusive. Jameson v. Cincinnati, 7 Ohio C. C. (N. S.) 100.

4. Const. art. 3, construed. French v. State Senate, 146 Cal. 604, 80 P. 1031.

5. Under Oswego City Charter, § 63 as amended by Laws 1902, p. 551, c. 207, an appeal from a removal by the mayor lies to the special term and not to the Appellate Division. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

6. So held where only notice required by statute was one of the causes of the proposed removal. People v. Woodbury, 102 App. Div. 333, 92 N. Y. S. 444. Certiorari to review such action being sued out within four months thereafter is in time. Id.

7. In a petition for certiorari to review action of police commissioner in removing relator from position as patrolman, allegations that relator is informed and believes that certain affidavits were considered by respondent, the source of information and grounds of belief not being disclosed, held not an allegation of fact requiring a denial. People v. Greene, 101 App. Div. 33, 91 N. Y. S. 803.

8. Removal by civil service commission. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184.

9. Certiorari. Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184.

10. Code Civ. Proc. § 2140, subd. 5. People v. Greene, 94 N. Y. S. 477.

11. People v. Greene, 94 N. Y. S. 477.

12. Code Civ. Proc. § 2140, subd. 5 construed. People v. Monroe, 94 N. Y. S. 366.

13. An appeal from an order of removal by a mayor under Oswego City Charter, § 63, as amended by Laws 1902, p. 551, c. 207, is a special proceeding and costs may be awarded in the discretion of the court, at the rates allowed for similar services in an action. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

14. So held upon appeal from an order of removal by a mayor under Oswego City Charter, § 63, as amended by Laws 1902, p. 551, c. 207. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009.

15. And not upon a transcript of the proceedings transmitted by such board. City of Rockford v. Compton, 115 Ill. App. 406.

16. People v. McAdoo, 92 N. Y. S. 1004.

(§ 8) *D. Reinstatement.*[17]—A legislature, or either house thereof, having expelled a member, cannot reinstate him except when lawfully called in session.[18] The right to reinstatement may be waived or abandoned[19] or barred by limitations.[20] Mandamus will lie to compel the reinstatement of an officer wrongfully or summarily removed,[21] but not where there has been a "judicial" investigation and trial of the charges against him.[22] Certiorari, but not mandamus, lies to compel the reinstatement of an officer dismissed after trial though there were errors in the trial, they not being so grave as to make it appear that the dismissal was not the result of a judicial act.[23] In order that an officer may be entitled to reinstatement by mandamus he must establish that at the time of his discharge he was an officer de jure.[24] A former officer is not entitled to mandamus to prevent his successor from performing the duties of the office and to compel the petitioner's reinstatement on the ground that the ordinance under which both were appointed is invalid.[25] One's superior officer refusing to recognize an order of reinstatement issued by a civil service commission, application should be made to a tribunal having jurisdiction to decree and enforce a reinstatement.[26]

§ 9. *Powers and duties.*[27]—A public officer takes his office subject to its burdens,[28] and has only such powers as are expressly or impliedly conferred upon him,[29] and all acts in excess of such powers[30] or done after his term has expired, he not

17. See 4 C. L. 861.

18. French v. State Senate, 146 Cal. 604, 80 P. 1031.

19. Where policeman after removal surrendered his badge and other property of the city without protest, permanently removed from the city and never demanded reinstatement or payment of subsequent salary, held to waive all right thereto, through removal was unlawful. Gibbs v. Manchester [N. H.] 61 A. 128. A rule of a municipal civil service commission that any police officer whose record is good, and who has been discharged without cause and without a trial, may re-enter the police force without examination, does not apply to a person who had once been on the police force but who was removed from the force or abandoned the employment for a term of years. People v. Lindblom, 215 Ill. 58, 74 N. E. 73.

20. Under Code Civ. Proc. §§ 343, 338, subd. 1, mandamus to require plaintiff's admission to the office of policeman, he alleging that he had been wrongfully removed, held barred by limitations where there had been a delay of nine years. Farrell v. San Francisco Police Com'rs [Cal. App.] 81 P. 674; Dodge v. San Francisco Police Com'rs [Cal. App.] 82 P. 699.

21. So held as to secretary of relief fund in the fire department of the city of New York. People v. Hayes, 94 N. Y. S. 754. Averments of a petition for a writ of mandamus to compel restoration of petitioner to a position from which it is alleged he was reduced without a hearing, held to warrant the issuance of an alternative writ. Shepard v. Oakley, 181 N. Y. 339, 74 N. E. 227, rvg. 102 App. Div. 617, 92 N. Y. S. 1145.

22. Certiorari alone lies. People v. Hayes, 94 N. Y. S. 754 [dicta]. See ante this section, Appeal and Review.

23. People v. McAdoo, 96 N. Y. S. 1069.

24. Moon v. Champaign, 116 Ill. App. 403.

25. Cambridge Chief of Police. Cunningham v. Cambridge, 188 Mass. 556, 74 N. E. 925.

26. Osborne v. Columbus, 3 Ohio N. P. (N. S.) 1.

27. See 4 C. L. 863.

Scope note: Power of appointment, see ante, § 4, subd. A. Power to remove other officers, see ante, § 8. See, also, topics dealing with specific officers, such as Judges, 6 C. L. 209; Justices of the Peace, 6 C. L. 331; etc. Duties regarding a particular subject-matter or office are treated in topics dealing with such subject-matter or office. See Counties, 5 C. L. 857; Taxes, 4 C. L. 1605; etc. See special article: **Contracts interfering with public service,** 3 C. L. 861.

28. Duties. Constable. Edwards v. McLean, 23 Pa. Super. Ct. 43.

29. Patton v. Cass County, 13 N. D. 351, 102 N. W. 174; City of Chicago v. Hannon, 115 Ill. App. 183. Under Act April 28, 1899 (P. L. 104) commissioners of townships of the first class have no powers but what are expressly granted them, and such implied powers as are necessary for the proper performance of their duties under their expressly granted powers and the accomplishment of the objects for which they were conferred. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. A police officer has no inherent police power. Peace v. McAdoo, 110 App. Div. 13, 96 N. Y. S. 1039. Deputy supervisors of elections have no power to decide upon a disputed term of office. State v. Pattison [Ohio] 76 N. E. 946.

30. Auditor of Public Accounts exceeding his authority, his act is void in so far as it attempts to bind the state. Hager v. Shuck, 27 Ky. L. R. 957, 87 S. W. 300. Tax deed by county auditor held to convey no title. Patton v. Cass County, 13 N. D. 351, 102 N. W. 174. Sheriff publishing proclamation of general election in more newspapers than the law allows, the county is not liable. York Gazette Co. v. York County, 25 Pa. Super. Ct. 517. A city being under no obligation to repair a highway, it is not liable for injuries resulting from its defective condition notwithstanding that a city official may have

having the status of a de facto officer,[31] are of no binding force or effect. An officer has such implied powers as are necessary to enable him to discharge the duties imposed upon him.[32] A grant of power to "regulate" does not include the power to "prohibit."[33] All persons dealing with a public officer are conclusively presumed to have notice of the limitations of his powers.[34] As a general rule Federal officers are special agents acting within legally prescribed limitations, and beyond those limitations no responsibility attaches to their acts as against the government;[35] and where an officer acts in subordination to the authority of a superior officer he has no discretion to bind the United States beyond the limits of his delegated powers.[36] But a depot quartermaster, while subordinate to the quartermaster general, is a general agent of the government in the purchase of supplies and in the right, when directed so to do, to sell unnecessary supplies.[37] If officers of the United States are authorized to bind the government or to shape its course of conduct as to a particular transaction and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the government.[38] Where an officer having authority appropriates private property for public use, an implied contract to make compensation will arise.[39] Fraudulent acts of a municipal officer may be repudiated by the city.[40] When a superior officer with full knowledge of the facts[41] ratifies and confirms the action of his subordinate, the ratification is equivalent to express authority.[42] A sheriff is not liable for the contracts of his deputy though they grow out of and are connected with his official duties, so long as they are not a part thereof.[43] In serving a writ the deputy sheriff can bind his principal only as to those things necessary in the proper service of the writ.[44] Official acts of members of the Federal cabinet must be regarded as acts of the president.[45] Power of insane asylum trustees under authority dele-

exercised some authority with respect thereto, unless it appeared that such authority was exercised by authority of the city. City of Chicago v. Hannon, 115 Ill. App. 183. The allowance and ordering of payment of claims by the proper officials not res judicata when the claims were founded on contracts invalid for noncompliance with statutory requirements. Hunt v. Fronlzer, 3 Ohio N. P. (N. S.) 303.

31. Under Laws 1901, p. 204, c. 466, § 452, limiting the term of a deputy commissioner to three months, a removal of an employe by a deputy commissioner more than three months after the latter's appointment is void. People v. Monroe, 93 N. Y. S. 898.

32. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319. Power to erect a jail and issue bonds in payment therefor includes the implied power to purchase a site and to issue bonds in payment therefor. Territory v. Baxter [Okl.] 83 P. 709. Power to erect courthouse includes the power to purchase permanent furnishings and fixtures. Id.

33. Gr. N. Y. Charter, §§ 300, 315, does not give the police commissioner power to prohibit by general rule the movement of any teams or vehicles in parts of certain streets. Peace v. McAdoo, 110 App. Div. 13, 96 N. Y. S. 1039.

34. Auditor of Public Accounts. Hager v. Shuck, 27 Ky. L. R. 957, 87 S. W. 300.

35, 36, 37. Houser's Case, 39 Ct. Cl. 508.

38. Walker v. U. S., 139 F. 409.

39. Use of patented invention. Brooks's Case, 39 Ct. Cl. 494.

40. Where mayor who was also a member of a board of health conveyed to a third person by a sham transfer a building the rental value of which was not over $400 per year, a subsequent lease by the board of health of the premises for a pesthouse at an annual rental of $3,000 held fraudulent as to the city. Tyrrell v. New York, 94 N. Y. S. 951.

41. Moran Brothers Co.'s Case, 39 Ct. Cl. 486. The employment of a watchman by a deputy sheriff will not be deemed to have been ratified by the sheriff where it appears that the sheriff was not informed of the nature of the contract of employment, the rate of compensation of the watchman, and how long he had been at work. Munis v. Oliver, 24 Pa. Super. Ct. 64.

42. Moran Brothers Co.'s Case, 39 Ct. Cl. 486.

43. Munis v. Oliver, 24 Pa. Super. Ct. 64.

44. Munis v. Oliver, 24 Pa. Super. Ct. 64. A deputy sheriff has no power, by virtue of his deputation, to bind the sheriff for services of a watchman, to watch goods attached under a foreign attachment. Id. It should be noticed that in the case under consideration the property attached was not live stock, and there was no special necessity for the employment of a watchman, nor was it necessary to employ a watchman in order to lawfully execute the writ of attachment. Id.

45. Order of secretary of the navy appointing a meteorologist to perform work ordinarily performed by officers of the navy and making the employment a charge upon the national defense emergency fund of 1898

gated by the legislature to contract with railroad companies with reference to a track across the asylum lands is functus officio when once exercised and contract cannot be afterwards modified.[46]

The duty of enforcing laws is primarily imposed upon executive officers.[47] It is only when executive officers renounce or fail to perform their primary duty in such a case that an appeal to the courts to enforce such a law may be made.[48] Such officers charged with the duty of enforcing an injunctive law may prevent without writ or process its violation where they can do so without infringing the rights of those who threaten to break it, and no man has any personal or property right to violate a valid law.[49] A lawful rule made by the chief of an executive department to which the enforcement of a law is intrusted, which appoints a subordinate for the purpose and imposes upon him the duty of enforcing the law is sufficient process of law to authorize him to prevent its violation in cases where he can do so without infringing upon any personal or property right of those who threaten to break it.[50]

Although an office be a constitutional one if its duties are statutory, the legislature may within reasonable limits change the duties of the office if the public welfare requires it.[51]

Unless expressly empowered to do so a public officer cannot delegate judicial functions.[52]

In the absence of evidence to the contrary the law presumes that a public official has done his duty[53] in good faith,[54] and, in some cases, that he had authority to act.[55] As to future action it will be presumed that officers will act in a legal manner.[56]

The act of a de facto officer where it is for his own benefit is void;[57] but where it is for the benefit of strangers or the public, it is valid.[58]

must be regarded as the order of the president. Hayden's Case, 38 Ct. Cl. 39.

46. State v. Toledo & Ohio Cent. R. Co., 3 Ohio N. P. (N. S.) 234.

47, 48, 49, 50. Buster v. Wright [C. C. A.] 135 F. 947.

51. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

52. Determination of when public good, convenience and necessity demanded the pavement of a certain street is judicial and cannot be delegated to street commissioners. Laws 1894, p. 144, No. 165, as amended by Laws 1902, p. 278, No. 211, construed. Blanchard v. Barre, 77 Vt. 420, 60 A. 970. Attorney general cannot delegate authority and responsibility for filing an information in the nature of quo warranto. State v. Bryan [Fla.] 39 So. 929. A county superintendent of health cannot delegate performance of his official duties to others so as to give his employes the right to make their services a county charge. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574.

53. Where a dram-shop license has issued, it will be, prima facie, presumed that the fee therefor has been duly paid where the license could not have otherwise issued except through the fraud or neglect of a public official. People of State of Illinois v. Griesbach, 112 Ill. App. 192.

54. In an action by borough to recover license tax burden is not on the borough to prove the reasonableness of the tax. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355.

55. Assistant auditor signing city warrant, held, it would be presumed that he had authority so to do. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

56. In the event the governor should wish to remove one or more members of the state board of control, it is presumed that he would do so in the way prescribed by Const. art. 4, § 15. State v. Bryan [Fla.] 39 So. 929.

57. Jordan v. Washington & C. R. Co., 25 Pa. Super. Ct. 564.

58. Bell v. State [Miss.] 38 So. 795. Consent of de facto township supervisors to construction of railroad held binding on successors. Jordan v. Washington & C. R. Co., 25 Pa. Super. Ct. 564. A de facto officer cannot in an action on his bond deny that he was an officer de jure. State v. Frentress [Ind. App.] 76 N. E. 821. The action of a de facto board of police commissioners, expelling a patrolman from the police force, is as to him valid. Lang v. Bayonne [N. J. Law] 62 A. 270. The owner of animals impounded by a de facto officer cannot escape the payment of the officer's fees, which are payable into the municipal treasury, regardless of the want of right of the officer to his fees or salary as against the municipality. White v. Clarkesville [Ark.] 87 S. W. 630.

The theory of the doctrine of officers de facto and the principles sustaining the validity of their acts are that, though wrongfully in office, justice and necessity require that their acts done within the scope of official authority and duty, be sustained to the

There is a conflict as to whether a public commission can act without using reasonable diligence to notify all the members of the meeting.[59]

Mandamus will lie to enforce ministerial duties[60] where the relator has a clear legal right to have such duty performed[61] and has no other adequate legal remedy.[62] It is essential that the performance of the duty result in benefit to the petitioner.[63] Where the duty to be performed is judicial or involves the exercise of discretion, mandamus will lie to compel the official to act in the premises and exercise his judgment and discretion,[64] but will not direct how the duty shall be performed or the discretion exercised.[65] If, however, such judgment or discretion is abused or there is a mistaken view of the law taken as applied to the admitted facts of the case, the writ will issue to compel action according to law.[66] Where mandamus is invoked to enforce a specific duty and the remedies at law are illegal, aid will not be refused merely because occupancy or incumbency or title is incidentally involved.[67] Official action cannot be collaterally attacked for errors of judgment.[68] Where the grant of power is of a business or proprietary character, to be exercised in an administrative manner for the benefit of a particular community, the courts cannot review the judgment nor control the discretion of such authorities though they may entertain an attack thereon on the ground of fraud.[69]

A special policeman not under the duty of removing obstructions from or repairing defects in sidewalks on his beat is entitled to recover for injuries sustained by defects in such sidewalks, the municipality being negligent.[70] When assaulted a policeman may defend himself with such force as may be necessary but no more.[71] A policeman is entitled to rewards offered for work which he is under no duty to perform.[72] A special policeman's right to continuous service is statutory.[73]

end that the rights and interests of third persons be protected and preserved. Buck v. Hawley [Iowa] 105 N. W. 688. A de facto officer cannot in an action on his bond deny that he was an officer de jure. State v. Frentress [Ind. App.] 76 N. E. 821.

59. A meeting of the state prison commissioners can be lawfully held by a majority of the board without giving notice to a member who is at the time of the calling and holding the meeting beyond the borders of the state. Akley v. Perrin [Idaho] 79 P. 192.

Note: When a public commission is given quasi-judicial functions, the weight of authority seems to be that it cannot act judicially unless reasonable diligence has been used to notify all the members of the meeting. People v. Batchelor, 28 Barb. [N. Y.] 310; Smyth v. Darley, 2 H. L. Cas. 789. See, also, 1 Dillon Mun. Corp. [4th Ed.] § 262. The purpose of creating the board was to give a hearing to diverse opinions, and this purpose would otherwise be thwarted. School Dist. No. 42 v. Bennett, 52 Ark. 511. But see contra, Beall v. State, 9 Ga. 367.—5 Columbia L. R. 321.

60. United States v. Bowyer, 25 App. D. C. 121. Remedy is not by mandatory injunction. Hager v. New South Brewing Co. [Ky.] 90 S. W. 608; State v. Richards [Fla.] 39 So. 152. What duties are ministerial see Mandamus, 6 C. L. 496.

61, 62. State v. Richards [Fla.] 39 So. 152. See Mandamus, 6 C. L. 496.

63. Mandamus will not lie to compel registration of invalid paper. Dancy v. Clark, 24 App. D. C. 487. See Mandamus, 6 C. L. 496.

64. Douglas v. McLean, 25 Pa. Super. Ct. 9. See Mandamus, 6 C. L. 496.

65, 66. Douglas v. McLean, 25 Pa. Super. Ct. 9. See Mandamus, 6 C. L. 496.

67. Mandamus lies to compel a state auditor to issue a warrant on the treasurer for relator's salary as superintendent of a water division, after relator's alleged improper removal from such office and the appointment of his successor. State v. Grant [Wyo.] 81 P. 795. See Mandamus, 6 C. L. 496.

68. In the absence of proof of fraud, bad faith or illegality, the comptroller's action in settling a claim for municipal lighting cannot be attacked in a taxpayer's action. Hearst v. McClellan, 102 App. Div. 336, 92 N. Y. S. 484.

69. Lincoln School Tp. v. Union Trust Co. [Ind. App.] 73 N. E. 623.

70. Klopfer v. District of Columbia, 25 App. D. C. 41.

71. Commonwealth v. Crowley, 26 Pa. Super. Ct. 124.

72. A policeman of a municipality in one state is not, by reason of his official position, precluded from claiming and recovering a reward offered by the authorities of another state for the apprehension of a fugitive from justice, whom he arrested on his own initiative and at his own expense and hazard, without being under any duty to do so. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949. A police officer who, in arresting a criminal, acts solely in the discharge of his duty, under the directions of his superior officer, is not entitled to a reward offered by a private person for the arrest of the fugitive. Atwood v. Armstrong, 101 App. Div.

§ 10. *Liabilities of public officers. A. Civil liability.*[74]—A public officer is liable for public money deposited by him in a bank which subsequently fails.[75] A taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of public funds,[76] but where the fund has been already wasted or paid out, the action to recover it back must be brought by the state or municipality to which it belonged,[77] though this rule has been altered by statute in some states.[78] A suit for the recovery of interest paid on public deposits can be recovered only by a suit by an officer or officers authorized to care for or protect such funds.[79] An officer is liable for the acts of a volunteer or unauthorized person whom he permits to perform duties officially committed to him or his legally appointed deputy,[80] and his negligence being the proximate cause of the loss, the fact that other officers are negligent is no defense.[81] He is not liable for the negligent acts of his successor.[82] An officer is not generally personally liable for the salaries of the clerks in his office.[83] Officers are not bound at their peril to adopt the correct interpretation of the statutes.[84]

Persons contracting with public officers deriving their authority exclusively from a statute are charged with knowledge of the extent and limitations of such authority, and, in the absence of bad faith, contracts entered into in the supposed exercise of public powers and functions so derived will not impose upon the officials executing them any personal liability to the party contracted with.[85] A public officer engaged in the performance of a public duty is responsible to employes for ordinary care in the selection of men and materials,[86] and having exercised this care he is liable for injuries resulting from personal acts of misfeasance;[87] but not

601, 92 N. Y. S. 596. See, also, § 13, Compensation.

73. Under Hornellsville City Charter, special policemen are not entitled to continuous service. People v. Robbins, 109 App. Div. 387, 95 N. Y. S. 901.

74. See 4 C. L. 869.

75. Parks v. Bryant [Ala.] 38 So. 180.

76. Suit for injunction cannot be maintained against the superintendent of the state penitentiary on the general allegation that, unless restrained, he will continue to furnish his family with supplies and cause the bills therefor to be paid out of the state funds; he having no authority to disburse state funds but being merely authorized to purchase supplies for the penitentiary, and render accounts therefor to the secretary of state who shall issue warrants therefor. Sears v. James [Or.] 82 P. 14. Code Civ. Proc. § 1925 is independent of Laws 1881, p. 709, c. 531, and an action may be maintained against officers of a municipality to prevent waste of or injury to its estate by one who is not assessed for any particular amount and without furnishing a bond. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81.

77. Sears v. James [Or.] 82 P. 14. While the superintendent of the penitentiary may be liable for malfeasance in office for receiving the labor of prisoners for his individual profit, in violation of B. & C. Comp. § 3662, this is no ground for equitable interference at the suit of a tax payer. Id.

78. Under Laws 1892, p. 620, c. 301, a tax payer is entitled to maintain an action against a board of supervisors and sheriff to compel the restoration to the county of money paid to the sheriff on illegal bills rendered against the county and audited by the board, without alleging collusive action on the part of the board. Hicks v. Eggleston, 93 N. Y. S. 909.

79. Nicholson v. Maile, 3 Ohio N. P. (N. S.) 201.

80. Board of Com'rs v. Sullivan [Minn.] 102 N. W. 723.

81. Auditor and sureties held liable for forgeries committed by an unauthorized person whom the auditor permitted to perform official duties, though county treasurer was negligent in honoring such forgeries. Board of Com'rs v. Sullivan [Minn.] 102 N. W. 723.

82. Clerk of court held not liable for negligence of successor in finishing making out a transcript, an order for change of venue having been made. Rev. St. 1899, § 825, considered. Llewellyn v. Spangler, 109 Mo. App. 396, 88 S. W. 1021.

83. State auditor is not personally liable on contract for salary of a clerk in the office appointed by him; St. 1903, § 138, giving the auditor merely a salary, and § 139, providing for a certain appropriation for clerk hire, and § 140, making the clerks agents of the state. Shuck v. Coulter [Ky.] 90 S. W. 271.

84. Emmert v. Elyria, 6 Ohio C. C. (N. S.) 381.

85. Henry v. Henry [Neb.] 103 N. W. 441.

86. Where road commissioner furnished a derrick for workman, though under no duty to do so, it became his duty to see that it was reasonably safe and maintained in such condition, though the relation of master and servant did not exist. Bowden v. Derby, 99 Me. 208, 58 A. 993.

87. Moynihan v. Todd, 188 Mass. 301, 74 N. E. 367. So held as regards a superin-

for the misfeasances of servants and agents.[88] Officers and members of municipal bodies charged with discretionary duties and powers with reference to public improvements are quasi-judicial officers to that extent and are not liable to damages for the improper exercise of those discretionary powers.[89] In Colorado an action

tendent of streets under St. 1889, p. 843, c. 98; St. 1893, pp. 1284, 1285, c. 423, §§ 25, 26; St. 1894, p. 29, c. 17; Rev. Laws, c. 25, §§ 85, 86, imposing the same liability on him as upon surveyors of highways and road overseers. Id.

88. Moynihan v. Todd, 188 Mass. 301, 74 N. E. 367. So held as regards a superintendent of streets under St. 1889, p. 843, c. 98; St. 1893, pp. 1284, 1285, c. 423, §§ 25, 26; St. 1894, p. 29, c. 17; Rev. Laws, c. 25, §§ 85, 86, imposing the same liability on him as upon surveyors of highways and road overseers. Id.

NOTE. Liability of public officer or agency, especially for acts of servants: The principal ground on which public officers find exemption from liability for negligence in the performance of their official duties in certain cases is the same as that which relieves cities and towns and other agencies of the government from a liability to individuals for a failure to perform similar duties. Unless under some special statutory provision, a public officer can have no greater exemption from such a liability than is granted to a city or town which neglects to perform the public duties imposed upon it. Hill v. Boston, 122 Mass. 344-361, 23 Am. Rep. 332. The subject of the liability of officers and agencies of government for negligence in the performance of public duties was considered at great length in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, with an elaborate review of the cases, both English and American. The rule adopted in that case is the same as previously had existed in England, and was understood to be then in force there. Following this rule, it has always been held in the American courts that an agency of government or a public officer, while performing a duty imposed solely for the benefit of the public, is not liable for a mere failure to do that which is required by the statute. Negligence that is nothing more than omission or nonfeasance creates no liability. Russell v. Men of Devon, 2 Term R. 667; Young v. Davis, 7 H. N. 760; Cowley v. Newmarket Local Board, App. Cas. 345; Municipal County of Sydney v. Bourke, App. Cas. 433; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; Mahoney v. Boston, 171 Mass. 427, 50 N. E. 939; Sampson v. Boston, 161 Mass. 288, 37 N. E. 177; Maximillian v. Mayor, etc., 62 N. Y. 160, 20 Am. Rep. 468; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Colwell v. Waterbury, 74 Conn. 568, 51 A. 530, 57 L. R. A. 218; Condict v. Jersey City, 46 N. J. Law, 157; Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Kuehn v. Milwaukee, 92 Wis. 263; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Bryant v. St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; Summers v. Commissioners, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Sievers v. San Francisco, 115 Cal. 648, 47 P. 687, 56 Am. St. Rep. 153; Galveston v. Posnainsky, 62 Tex. 120, 129, 131, 50 Am. Rep. 517; Conelly v. Nashville, 100 Tenn. 262; 46 S. W. 565. "For a wrong done by a public agent which constitutes only a breach of duty to the public, as such, and results in an injury to the public only, such agent is liable only to the public by a public prosecution; and a private individual cannot maintain an action against him therefor, unless he can show that he has sustained some special and particular injury by reason of such wrong." 2 Clark and Skyles Ag. p. 1322, citing Butler v. Kent, 19 Johns. [N. Y.] 223, 10 Am. Dec. 219; Barlett v. Crozier, 17 Johns. [N. Y.] 449, 8 Am. Dec. 428; Moss v. Cummings, 44 Mich. 359.

Prior to the decisions in Mersey Docks v. Gibbs, L. R. 1 H. L. 93, and Foreman v. Canterbury, L. R. 6 Q. B. 214, which overruled the case of Holliday v. St. Leonards, Shore Ditch, 11 C. B. (N. S.) 192, it was held in England that for negligent acts of misfeasance by the servants or agents of a municipality or a public officer performing duties strictly public there was no liability upon the employer, on the ground that the doctrine respondeat superior does not apply to the servants of one who is acting only as a representative of the government for the benefit of the public. Holliday v. St. Leonards, Shore Ditch, 11 C. B. (N. S.) 192; Duncan v. Findlater, 6 Cl. & Find. 894-903; Hall v. Smith, 2 Bing. 156-159. This is the rule generally in the American courts. Sampson v. Boston, 161 Mass. 288, 37 N. E. 177; Curran v. Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243; Mahoney v. Boston, 171 Mass. 427, 50 N. E. 939; Kelley v. Boston, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429. See, also, cases above cited. But now the law in England seems to hold agencies of the government liable for injuries from acts of misfeasance committed by servants or agents engaged in a public work. See Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214. The American doctrine is thus summed up in 2 Clark and Skyles on Agency, § 610, pp. 1324, 1325: "The doctrine of respondeat superior does not in general apply to public agents or officers, including all grades of officers whose trust proceeds from and whose responsibility is due to the government, and they are not personally liable for the misfeasance or nonfeasance of their official subordinates, while in the discharge of their official duties (citing among numerous other authorities Dunlop v. Monroe, 7 Cranch [U. S.] 242, 3 Law. Ed. 329; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Richmond v. Long's Adm'rs, 17 Grat. [Va.] 375, 94 Am. Dec. 461); unless, where appointed or removed by them, they have been guilty of negligence in selecting, appointing or retaining improper or unfit subordinates (citing among others, Bishop v. Williamson, 11 Me. 495; Wiggins v. Hathaway, 6 Barb. [N. Y.] 632; Schroyer v. Lynch, 8 Watts [Pa.] 453), or in superintending them in the discharge of their official duties (Dunlop v. Monroe, 7 Cranch [U. S.] 242, 3 Law. Ed. 329; Schroyer v. Lynch, 8 Watts [Pa.] 453; Richmond v. Long, 17

against an officer for charging an "illegal fee" is one to recover three times the value of the fee or compensation taken.[90]

Generally an action against an officer must be brought in the county where the cause of action arose.[91] Statutes of limitations to actions on the officer's bond have no application to an action against the officer personally.[92] Laws indemnifying officials for expenses in defending an action against them for an official act generally are held to apply only to official acts in which the public has a concern.[93]

(§ 10) *B. Criminal liability.*[94]—Besides being criminally responsible for bribery,[95] embezzlement,[96] extortion,[97] and other specific crimes,[98] a public officer

Grat. [Va.] 375, 94 Am. Dec. 461); or unless they have in some way participated in the subordinate's tort (Ely v. Parsons, 55 Conn. 83; Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206)." Whenever the work is not entirely public, but is in part for profit or when any element of pecuniary advantage enters into it, there is a liability for the negligent acts of servants. On this ground it was long ago held that a city or town might be liable for negligent acts of misfeasance done by its servants in the construction or repair of a common sewer. Coan v. Marlborough, 164 Mass. 206-208, 41 N. E. 238; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; Lynch v. Springfield, 174 Mass. 430, 64 N. E. 871; Norton v. New Bedford, 166 Mass. 48, 43 N. E. 1034; Childs v. Boston, 4 Allen [Mass.] 41, 81 Am. Dec. 680; Allen v. Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St Rep. 423; Curran v. Boston, 151 Mass. 505-508, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243. Another and different class of cases in which there is a liability for the misfeasance of servants or agents is referred to by Chief Justice Gray in Hill v. Boston, 122 Mass. 344-358, 23 Am. Rep. 332, as follows: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river or a natural watercourse so as to cause the water to flow back upon and injure land of another, it is liable to the same extent that any corporation or individual would be liable for doing similar acts. Anthony v. Adams, 1 Metc. [Mass.] 284, 285; Lawrence v. Fair Haven, 5 Gray [Mass.] 110; Perry v. Worcester, 6 Gray [Mass.] 544, 66 Am. Dec. 431; Parker v. Lowell, 11 Gray [Mass.] 353; Wheeler v. Worcester, 10 Allen [Mass.] 591. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort. Proprietors of Locks and Canals v. Lowell, 7 Gray [Mass.] 223; Hildreth v. Lowell, 11 Gray [Mass.] 345; Haskell v. New Bedford, 108 Mass. 208. But in such cases the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act causing direct injury to the property of another, outside of the limits of the public work." This doctrine was reaffirmed in Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, and it has been applied in many cases. Its exact limits have not been very clearly defined. Perhaps it includes Elder v. Demis, 2 Metc. [Mass.] 599, and Hawkes v. Charlemont, 107 Mass. 414, in which the reasons for the decisions were not very plainly stated, but in each of which the negligent act was a trespass causing a direct injury to the plaintiff's property outside of the limits of the highway. See, also, Miles v. Worcester, 154 Mass. 511, 28 N. E. 676, 26 Am. St. Rep. 264, 13 L. R. A. 841; Edgerly v. Concord, 62 N. H. 819, 13 Am. St. Rep. 533; Eastman v. Meredith, 36 N. H. 284-296, 72 Am. Dec. 302; Colwell v. Waterbury, 74 Conn. 568-573, 51 A. 530, 57 L. R. A. 218; Mayor, etc., v. Bailey, 2 Denio [N. Y.] 433.—From Moynihan v. Todd 188 Mass. 301, 74 N. E. 367 and 2 Clark and Skyles on Agency, p. 1322 et seq.

89. Mayor and members of city council are not personally liable for improper exercise of discretionary powers in failing to repair a defective bridge. Gray v. Batesville [Ark.] 86 S. W. 295. Highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they have discharged their official duties to the public, even if there is proof from which the jury might find that such duties were not discharged with reasonable prudence and skill. Neville v. Viner, 115 Ill. App. 364.

90. Mills' Ann. St. § 1301 construed. Mitchell v. Wheeler [Colo. App.] 77 P. 361. Is not an action to recover the penalty provided by Sess. Laws 1891, p. 220, § 17, for the charging of a greater fee than that provided by statute or for the charging of a fee for services not rendered. Id.

91. Under Code Civ. Proc. § 145, providing that an action against a public officer for an act done in the performance of his public duties must be tried in the county where the cause of action or some part thereof arose, the fact that some of the officer's co-defendants lived in a county other than the one in which the cause of action arose does not give the right to sue in such other county. Fishburne v. Minott [S. C.] 52 S. E. 646.

92. Burns' Ann. St. 1901, § 294, subd. 2 has no application to an action against a county auditor to recover from him personally sums collected by him during his term of office and wrongfully detained by him. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

93. Laws 1892, p. 1793, c. 686, § 230 (18) so construed. Held, that if construed otherwise it would violate Const. art. 8, § 10 prohibiting a county from giving money in aid of an individual or incurring indebtedness except for county purposes. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81. Such law held not to apply to an action against a sheriff for improperly returning an execution unsatisfied. Id. See, also, next subdivision.

94. See 4 C. L. 872; 2 C. L. 1085, 1086.

is, as a general rule, criminally liable for malfeasance, misfeasance or nonfeasance in office; hence police officers willfully refusing to arrest persons who raise riots and affrays are punishable on indictment.[99] One holding an office to which he is ineligible is guilty of usurpation of office.[1] On a prosecution of a criminal offense having as one of its ingredients a refusal to pay over money on demand, an actual seasonable demand is essential.[2] An indictment for official misconduct in the performance of executive and ministerial duties need not contain an averment that the misfeasance was corrupt.[3] An indictment for willful neglect is not double though it details several offenses in characterizing it.[4] In California an accusation against a municipal officer for misconduct in office is criminal in its nature and in presenting the same the grand jury acts as in finding an indictment,[5] and the accusation may be presented by twelve members of the jury.[6]

A statutory enactment providing in advance for the reimbursement to a public officer of the reasonable expenses actually incurred by him in defending himself against a criminal prosecution based upon a charge of official misconduct is within the constitutional power of a legislature.[7]

§ 11. *Liabilities of the public and of private persons for acts of public officers.* —The general rule is that a governmental body is not bound by the acts, contracts or representations of its officers unless such acts, contracts or representations are within the scope of such officers' authority.[8] Police officers in the preservation of

95. See Bribery, 5 C. L. 437.
96. See Embezzlement, 5 C. L. 1093.
97. See Extortion, 5 C. L. 1407.
98. See specific criminal topics, also general topics such as Counties, 5 C. L. 857; States, 4 C. L. 1516; Towns; Townships, 4 C. L. 1685; United States, 4 C. L. 1760; etc.
99. Conviction sustained where police officer assigned for duty at polling place permitted voters to be obstructed, assaulted and interfered with in his presence and view. State v. Flynn [Mo. App.] 87 S. W. 37 [Advance sheets only].
1. Hill v. Anderson [Ky.] 90 S. W. 1071.
2. Where a clerk of court held public funds, collected under an agreement with the county, pending a judicial determination as to whether he or the county was entitled to them and the only demand made upon him was by letter prior to the termination of the civil suit, held, he could not be convicted for failing to pay over the same. Commonwealth v. Shoener, 212 Pa. 527, 61 A. 1093.
3. Where police officer assigned for duty at polling place permitted voters to be obstructed, assaulted and interfered with in his presence and view, held, indictment need not allege that he acted corruptly. State v. Flynn [Mo. App.] 87 S. W. 37 [Advance sheets only].
Note: At common law indictments of judicial officers for misconduct in the performance of duty were always required to charge they acted corruptly. The ancient and modern precedents and the forms of criminal pleadings given by approved text writers conform to that rule. The underlying principle of the distinction between the above rule and that stated in the text appears to be that when the official act complained of is of doubtful legality and the official enjoyed a discretion in the performance of his duties, he cannot be convicted of acting wrongly unless he acts corruptly. But when the illegality of the act is palpable, then willful and intentional delinquency on the part of an official, whether it be a nonfeasance or a misfeasance, is indictable, even though his motive was not corrupt in the sense that he sought personal profit.—From State v. Flynn [Mo. App.] 87 S. W. 37 [Advance sheets only].
4. Where an indictment against a police officer for willful neglect of duty charged that he was detailed for duty at a polling place, and stood by and saw voters obstructed, assaulted, etc., without going to their assistance and detailed the manner in which the voters were molested, naming them, it charged but a single offense and was not objectionable for duplicity. State v. Flynn [Mo. App.] 87 S. W. 37 [Advance sheets only].
5. Pen. Code, §§ 758, 760, 762, 763, 767, 769, 770, construed. Coffey v. Superior Ct. [Cal. App.] 83 P. 580.
6. Coffey v. Superior Ct. [Cal. App.] 83 P. 580.
7. Greater New York Charter (Laws 1901, p. 103, c. 466, § 231) held valid. Kane v. McClellan, 110 App. Div. 44, 96 N. Y. S. 806.
Note: Such a law is unconstitutional if retrospective. Matter of Jensen, 44 App. Div. 509, 60 N. Y. S. 933.
8. See 23 Am. & Eng. Enc. of Law [2nd Ed.] p. 384. A government is not responsible for the tortious acts of its officers generally. To create such a liability there must be either authorization or ratification. Washington L. & T. Co.'s Case, 39 Ct. Cl. 152. A municipality is liable in damages for an assault committed by the custodian or caretaker of a public park, where the assault is committed by such employe while acting in the line of duty. Bloom v. Newark, 3 Ohio N. P. (N. S.) 480. A city is liable for negligent acts of an employe committed in the course of his employment. Gorney v. New York, 102 App. Div. 259, 92 N. Y. S. 451. See

the peace are not municipal agents or servants, but their powers and duties are derived from the state to which their direct responsibility is due, therefore the municipality is not liable for their omissions or commissions, malfeasance or nonfeasance in the performance of their duties.[9] The liability of particular public bodies is discussed under appropriate titles.[10] The power of an officer to bind the governmental body which he represents has been already shown.[11]

The liability of private persons for acts of public officers is treated elsewhere.[12]

§ 12. *Official bonds and liabilities thereon.*[13]—The contract of sureties upon an official bond is subject to the strictest interpretation, nothing being taken by construction against the obligors.[14] The sureties are not liable for acts not performed in the discharge of the principal's official duty,[15] though they are liable for the acts of a volunteer or unauthorized person whom the officer allows to perform duties officially committed to him or his legally appointed deputy,[16] and the officer's negligence being the proximate cause of the injury, the fact that other officers were negligent is no defense,[17] for there is no implied condition that other public officers shall perform their prescribed duties, and any one who becomes a surety on the bond of a public official is held to do so with knowledge of this rule.[18] Ordinarily the duration of the sureties' liability on the official bond of a public officer is coextensive with the officer's official tenure of office and ceases when the term expires by operation of law.[19] Where one holds an office for more than one term with different sets of sureties it is the time of an actual defalcation and not that of the technical breach that imposes an obligation as between the different bonds.[20] One directly participating in and contributing to the negligent act of the officer cannot recover from the latter and his sureties damages suffered thereby.[21] The failure of the proper officers to examine and approve a bond[22] or to designate the term of appointment of the bonded officer[23] does not invalidate the bond. A bond intended by the obligors thereon to be the official bond of a public officer and which such public officer acts under is by statute in many states the official bond of such officer, and in legal contemplation and effect such bond is payable and conditioned as the statute requires.[24] Any person, other than the obligor, having a legal identity

Municipal Corporations, 6 C. L. 714. See, also, ante, § 9, Powers and duties.

9. Miller v. Hastings Borough, 25 Pa. Super. Ct. 569. Borough authorities have no authority to expend public money in defense of borough officers indicted under the law, the borough itself not being involved. Id.

10. See Counties, 5 C. L. 857; Municipal Corporations, 6 C. L. 714; States, 4 C. L. 1516; Towns; Townships, 4 C. L. 1685; United States, 4 C. L. 1760.

11. See ante, § 9, Power and duties.

12. See Attachment, 5 C. L. 302; False Imprisonment, 5 C. L. 1413; Garnishment, 5 C. L. 1574; Malicious Prosecution and Abuse of Process, 6 C. L. 490; Process, 4 C. L. 1070; Sheriffs and Constables, 4 C. L. 1442; etc.

13. See 4 C. L. 869. See Bonds, 5 C. L. 422, and specific topics.

14. State v. Dayton [Md.] 61 A. 624.

15. Sureties on constable's bond are not liable for an assault committed by the constable, while levying a writ of fi. fa., upon one not a party to the writ. State v. Dayton [Md.] 61 A. 624. Sureties on bond of town marshal held not liable for reckless shooting by marshal when not engaged in the performance of any duty appertaining to his office. Carson's Adm'r v. Dezarne [Ky.] 90 S. W. 281.

16. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

17. Auditor and sureties held liable for forgeries committed by an unauthorized person whom the auditor permitted to perform official duties, though county treasurer was negligent in honoring such forgeries. Board of Com'rs v. Sullivan [Minn.] 102 N. W. 723.

18. Misconduct of a board of education in appointing a certain person treasurer held no defense in an action against the sureties on the treasurer's bond. Board of Education v. Brown [Mich.] 12 Det. Leg. N. 796, 105 N. W. 1118.

19. Aultman Taylor Machinery Co. v. Burchett [Okl.] 83 P. 719.

20. State v. O'Neill [Mo. App.] 90 S. W. 410. Evidence held to show that defalcation occurred during first term. Id.

21. A purchaser of land who participates in soliciting the recorder of deeds to permit a deed of trust on the land to be marked "Satisfied" although not in fact satisfied cannot recover for recorder's negligent act in so doing. State v. Green [Mo. App.] 90 S. W. 403.

may be the obligee in a bond.[25] A bond by which the obligors "bind ourselves, our heirs, executors and administrators, and each and every one of them" creates a joint and several obligation.[26] What constitutes a breach of particular bonds is decided in the cases below.[27] A de facto officer cannot in an action on his bond deny that he was an officer de jure.[28] Statutes providing for prosecuting an official bond in cases where no special provisions apply are remedial and should be liberally construed.[29] All official bonds, whoever may be named as obligee, are given for the use of the parties having a legal interest in their enforcement.[30] Though the bond of a United States circuit court clerk is given to the United States as sole obligee, it is available to any private suitor to indemnify him for any loss he has sustained by reason of the clerk's delinquency.[31]

The action on the bond must be brought within the period of limitations.[32] The pleadings must show a breach of the bond[33] and that actual damages have been

22, 23. Bond of deputy marshal. State v. Frentress [Ind. App.] 76 N. E. 821.

24. United States Fidelity & Guaranty Co. v. Union Trust & Sav. Co. [Ala.] 38 So. 177. Under Rev. Code 1892, § 3055, when one signs what purports and is intended to be an official bond, whether as principal obligor or surety, the law writes in all necessary recitals, including the proper penalty. State v. Smith [Miss.] 40 So. 22. Bond of member of board of supervisors held binding despite incorrect calculation of penalty. Id.

25. 2 Am. & Eng. Enc. of Law [1st Ed.] p. 451. Act April 15, 1834, § 33 (P. L. 537) not specifying the obligee in the bond, a bond given by a county treasurer to the county commissioners by name and describing them as "Commissioners of the County of Lehigh" is valid. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406.

26. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. The liability of an executor arises from that of his testator and, necessarily, both are bound to the same extent and in like manner; therefore when joint obligors bind each executor, the obligors are by implication severally bound. Id.

27. Failure of a **county auditor** to pay over fees collected by him for services rendered constitutes a breach of his bond. Workman v. State [Ind.] 73 N. E. 917. The termination of the office of a **sheriff** does not ipso facto require him to pay into court the proceeds of a sale on execution and his failure to do so does not constitute a breach of his bond. State v. O'Neill [Mo. App.] 90 S. W. 410. A **city marshal** and his sureties are liable in damages on a general clause in his bond "for the faithful discharge of his duties," or equivalent general words, for a levy on goods of one person under an execution or other process against the goods of another person. Frankenstein v. Cummisky, 9 N. Y. S. 708. Where a **county treasurer** fails to pay over to a city its proportion of the proceeds of liquor licenses, he has failed to perform the condition of his bond requiring that he "faithfully perform the duties of his office." Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. Surety on **consular officer's** bond held not liable for the special statutory penalty incurred by the principal under Rev. St. § 1723 for charging excessive fees. United States v. Ballantine [C. C. A.] 138 F. 312. Where board directed deposit of public funds in a certain bank held such **funds were in the custody** of the treasurer of the board, it appearing that the funds were at all times within his control and he could at any time have withdrawn the entire amount and deposit the same in any other bank. Board of Education v. Brown [Mich.] 12 Det. Leg. N. 796, 105 N. W. 1118.

28. State v. Frentress [Ind. App.] 76 N. E. 821.

29. Town of Ulysses v. Ingersoll, 182 N. Y. 369, 75 N. E. 225, rvg. 81 App. Div. 304, 80 N. Y. S. 924. Under Code Civ. Proc. a town is entitled to leave to prosecute an action on an official bond of the county treasurer, running to the county, to recover money which had been appropriated to the town as school funds; but had never been paid over by the treasurer. Id.

30. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. Where a county treasurer has received moneys belonging to a city as the proceeds of liquor licenses, the city may maintain a suit on the bond in the name of the county to its own use. Id.

31. United States v. Bell [C. C. A.] 135 F. 336, afg. 127 F. 1002.

32. The term "or other officer" in § 4274, Rev. St. 1899 applies to the treasurer of a school district and bars a civil action against him and his sureties on his official bond, if not brought within the time limited. State v. Harter, 188 Mo. 516, 87 S. W. 941. Limitations do not begin to run against an action on the official bond of a sheriff for the conversion of proceeds of a sale under execution of property which was claimed by a third person under an alleged superior title until the termination of the action by such third person determining the right to such property. State v. O'Neill [Mo. App.] 90 S. W. 410. Statute held not to begin to run against plaintiffs until the determination on appeal of the claim of such third person, notwithstanding no appeal bond was given in such cause. Id. Suit on county treasurer's bond for failure to pay over money received by him is not barred by the fact that it was not commenced within six years after receipt of the money. Suit on sealed instrument. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406.

33. Aultman Taylor Machinery Co. v. Burchett [Okl.] 83 P. 719. In an action against

sustained.[34] Facts showing a wrongful retention of moneys rather than conclusions thereof must be alleged.[35] In Pennsylvania in assumpsit on the official bond of a sheriff no affidavit of defense is required, the action being founded on the misfeasance or negligence of the sheriff.[36]

The measure of liability on the bond of a recorder of deeds for negligently permitting a trust deed to be falsely marked "Satisfied" cannot exceed the amount due on the trust deed at the date of the entry of satisfaction.[37] Sureties of a tax collector are liable for interest on the unpaid balance at the time of the trial from the date of the filing of the auditor's report.[38]

Where a continuing bond is given, the officer is liable for the premium thereon until release is obtained by the furnishing of another bond or by returning the property in his possession to the state, or turning it over to his successor in office after he has been duly qualified.[39]

§ 13. *Compensation.*[40]—The compensation of many public officers is paid in fees. Neither a per diem allowance[41] nor expenses incurred in performing a duty[42] can be regarded as "fees" within the meaning of constitutional and statutory provisions. The right is purely statutory[43] and unless a salary is lawfully attached to an office the officer is not entitled to any.[44] So long as he is not removed an officer is entitled to the salary affixed to his office irrespective of whether he has properly discharged his duties.[45] A public officer can only claim such fees and compensation as are fixed by law for services which the law makes it his duty to perform,[46]

the sureties of a bond of a United States marshal, allegations that the marshal had retained certain money held insufficient to show a breach of the bond, there being no allegation that the money was improperly retained. United States v. Meade [Ariz.] 80 P. 326, afg. on rehearing Id., 76 P. 467. In an action against the sureties on an official bond, an allegation that a judgment has been recovered against the principal obligor is insufficient to show a breach of the bond. Judgment is merely evidence of breach. Id.

34. State v. Green [Mo. App.] 90 S. W. 403. Action on bond of recorder of deeds for negligentiy permitting a mortgagee in a trust deed to satisfy the deed of record without canceling the notes secured by the deed on making affidavit that they had been paid held not maintainable in the absence of allegations showing damages. Id.

35. Complaint in an action on the official bond of a county auditor alleging that defendant was entitled to retain from moneys received a certain sum for his services and that it was his duty to pay over all moneys in excess of this amount. This was followed by specific allegations of various sums received by defendant and wrongfully retained, and the full amount alleged to be wrongfully retained was set forth; held not objectionable as alleging a mere conclusion. Workman v. State [Ind.] 73 N. E. 917.

36. Commonwealth v. Milnor, 23 Pa. Super. Ct. 1.

37. State v. Green [Mo. App.] 90 S. W. 403.

38. Commonwealth v. Carson, 26 Pa. Super. Ct. 437.

39. Bond of officer of National Guard required by Rev. St. § 3104. American Bonding Co. v. Bryant, 7 Ohio C. C. (N. S.) 399.

40. See 4 C. L. 865.

41. Laws 1887, p. 159, authorizing the circuit judges to appoint stenographic court reporters and providing for the payment to such reporters of a per diem compensation, does not violate Const. art. 10, §§ 9, 10, 13. People v. Chetlain, 219 Ill. 248, 76 N. E. 364.

42. Expenses of caring for impounded animals. White v. Clarksville [Ark.] 87 S. W. 630.

43. Right of disbursing clerk of the treasury department to compensation for services performed depends solely upon congressional legislation on the subject. Bartlett v. U. S., 197 U. S. 230, 49 Law. Ed. 735, afg. 39 Ct. Cl. 338.

44. Coroner's private clerk held not entitled to any salary though coroner had fixed same, he not having authority so to do. Munch v. New York, 93 N. Y. S. 509. Where the municipal civil service commission of New York City added to the classification of the class exempt from competition, "one clerk to each coroner," held, an addition of a new office and no salary having been provided none could be recovered. O'Connor v. New York, 48 Misc. 407, 95 N. Y. S. 504.

45. People v. Sipple, 109 App. Div. 897, 96 N. Y. S. 897.

46. Court stenographer appointed for a single case only. Dull v. Mammoth Min. Co. [Utah] 79 P. 1050. The Colorado statute allowing to county treasurers a commission of one per cent does not apply to moneys received by the treasurer on account of redemption from tax sales (Mitchell v. Wheeler [Colo. App.] 77 P. 361), nor does it authorize them to charge any fee for entering on their books an assignment of the certificate of purchase of land at a tax sale (Id.). A county treasurer is not entitled to commissions on any part of the taxes on personal property collected by him, as agent for the county and transmitted to the state treasury. Kirkendall v. Luzerne Co., 25 Pa. Super. Ct. 429. A register appointed subsequent to the adoption of rules and

even though he performs them before or after office hours;[47] and a contract to pay extra compensation is against public policy and void.[48] It is, however, proper to provide extra compensation for services not within the compass of the officer's official duties.[49] Compensation of county officers need not be the same in different counties.[50] The Pennsylvania constitution prohibits the giving of extra compensation after the services have been performed.[51] In California compensation must be fixed in proportion to duties.[52] In South Carolina the general assembly has no power to enact local laws fixing the amount of compensation of any county officer.[53] An officer may by agreement limit his right to compensation.[54] The amount of an officer's compensation is often fixed by the nature of the public body served.[55] A state legislature may provide for the payment of the salaries of local officers or employes out of local funds.[56] Certain boards and officers are frequently given

regulations and assigned to the duty of disposing of Indian and other lands is bound by the rules and regulations and can seek nothing beyond the prescribed legal maximum. Stewart's Case, 39 Ct. Cl. 321. A special policeman appointed by the board of police commissioners of the City of Hornellsville takes subject to the custom of the board to assign him to duty for but a portion of the time and to pay him the same wages paid to regular policemen for the time actually employed. People v. Robbins, 109 App. Div. 387, 96 N. Y. S. 901. Constable. Edwards v. McLean, 23 Pa. Super. Ct. 43. Under Laws 1892, p. 1746, c. 686, § 12, subd. 5, and p. 1775, § 141, subd. 5, a county treasurer whose salary is duly fixed by the board of supervisors is not entitled, in addition to his salary, to collect and receive fees for collecting and paying over state, school and court funds. People v. Steuben County [N. Y.] 75 N. E. 1108, afg. 93 App. Div. 604, 87 N. Y. S. 1144, afg. 41 Misc. 590, 85 N. Y. S. 244. Prior to such act the fees in counties where the treasurer was a salaried officer were to be retained by him for the benefit of the counties, but in counties in which he was not a salaried officer he retained such fees for his own compensation. Id. A police officer who, in arresting a criminal, acts solely in the discharge of his duty, under the directions of his superior officer, is not entitled to the reward offered by a private person for the arrest of the fugitive. Atwood v. Armstrong, 101 App. Div. 601, 92 N. Y. S. 596.

47. Affidavits taken by a chief messenger in the department of building of the city of New York. Morgan v. New York, 94 N. Y. S. 175.

48. So held as regards a court stenographer appointed for a single case only. Dull v. Mammoth Min. Co. [Utah] 79 P. 1050.

49. Laws 1898, p. 436, c. 182, prohibiting any officer from receiving for his own use fees in addition to his salary, held not to render it unlawful for the city treasurer of Rochester to receive extra compensation under Laws 1895, p. 788, c. 438, § 20, relating to the construction of a sewer partly in Rochester and partly in the town of Gates. People v. Monroe County Court, 93 N. Y. S. 452. Such rule held not changed by an ordinance of the city of Rochester providing that the city treasurer should receive, from moneys collected by him in payment of assessments for the construction of the sewer, the sum of $1,350 annually for the purpose of clerk hire. Id. Where a naval constructor is detailed by the secretary of navy to inspect a vessel, the fact that she is chartered by the war department as an army transport does not burden the officer with service not incident to his office. Additional compensation for such service is prohibited by Rev. St. § 1765. Stocker's Case, 39 Ct. Cl. 300.

50. Statutory exceptions which have been made relative to the compensation of prosecuting attorneys in different counties, and that in counties not having a county solicitor the prosecuting attorney shall act as the legal advisor of the county commissioners who shall fix his compensation, are not unconstitutional. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

51. Acts June 15, 1897 (P. L. 165) and July 2, 1901 (P. L. 609), allowing compensation to constables for services rendered prior to their enactment, are unconstitutional as violating Const. art. 3, § 11. Edwards v. McLean, 23 Pa. Super. Ct. 43.

52. St. 1897, p. 536, c. 277, providing for the salary of justices of the peace, held unconstitutional as fixing salaries according to population rather than duties. Millard v. Kern County [Cal.] 82 P. 329.

53. Act Feb. 22, 1905, § 33 (24 Stat. at L. p. 927) held unconstitutional. State v. Burns [S. C.] 52 S. E. 960. Rest of such act held valid. Id.

54. Where the sheriff has procured an order of the court of quarter sessions fixing the wages of a keeper of malefactors with a stipulation that "this compensation covers all fees to the sheriff or the keeper on commitment of vagrancy," the sheriff cannot thereafter claim the fee allowed by the fee bill of 1868. Dougherty v. Cumberland Co., 26 Pa. Super. Ct. 610.

55. Compensation of "The Directors of the Poor and of the House of Employment of the County of Lancaster" as fixed by the Act of April 14, 1864 (P. L. 422) is not affected by Act of July 2, 1895 (P. L. 424), changing the salaries of county officers. Nissley v. Lancaster County, 27 Pa. Super. Ct. 405.

56. Pub. Laws, c. 804, providing for the appointment of police commissioners for the city of Newport and declaring that the annual salary of the members shall be paid monthly by the city, held not unconstitutional. Horton v. City Council of Newport

the power to fix the salaries of subordinate officers or employes,[57] but this power must be exercised in accordance with statutory enactments.[58] A public officer having power to employ and discharge help may, as a condition to retaining his place, reduce an employe's salary,[59] and if the employe continues in the place and continues to draw the reduced salary, it is equivalent to an agreement on his part to accept the latter sum for his services.[60] A statute extending rules relative to part of a consolidated municipality does not operate to extend such rules to parts of the municipality to which they are inapplicable.[61] An exercise of discretion as to the amount of compensation to be paid an employe will not be reviewed by the courts in a collateral proceeding.[62] An officer being entitled to a reasonable compensation, the courts will not interfere with the amount fixed unless it is unreasonably small.[63] In New York certiorari will lie to review the action of a town board of audit in reducing the compensation of a public officer though the claim has been passed on to the board of supervisors in regular order.[64]

Although an office be a constitutional one if its duties are statutory, the legislature may within reasonable limits change the duties and diminish the emoluments of the office if the public welfare requires it;[65] but a board having exercised its delegated authority to fix an officer's salary for his entire term, its power is exhausted and it cannot increase or diminish such salary.[66] A constitutional inhibition against the increase or diminution of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed after he enters

[R. I.] 61 A. 759. Such law is not in violation of Const. art. 4, § 10, declaring that the general assembly shall continue to exercise powers previously exercised unless prohibited in the constitution. Id. The legislature has the power to appropriate the funds of a county, or to authorize the judges of the circuit courts to appoint shorthand reporters and make their compensation a charge upon Cook county, without the action of the board of commissioners. People v. Chetlain, 219 Ill. 248, 76 N. E. 364, following People v. Raymond, 186 Ill. 407, 57 N. E. 1066.

57. Laws 1889, p. 610, c. 443, fixing salary of stenographer to board of coroners at $2,500, held changed by Laws 1901, p. 32, c. 466 and Acts 1902, pp. 1067, 1068, cc. 435, 436, giving the board of estimate and apportionment power to fix salaries of officers. Hamburger v. Board of Estimate and Apportionment of City of New York, 109 App. Div. 427, 96 N. Y. S. 130. The necessity for a clerk for the county treasurer and the compensation to be paid him are matters within the discretion of the county commissioners. Jacobson v. Ransom County [N. D.] 105 N. W. 1107.

58. General council of a city of the second class has no authority to pass an ordinance fixing a less compensation for the city jailer than that fixed by Ky. St. 1903, § 3145. City of Paducah v. Evitts, 27 Ky. L. R. 864, 86 S. W. 1123. Board of police being authorized to appoint a clerk whose salary shall not be less than $500 per annum, held, salary of the clerk fixed by the board at $1,800 per annum was binding on the city unless affected by the city council's appropriation. Smith v. Lowell [Mass.] 76 N. E. 956. Detroit City Charter, § 250 prohibits the common council from creating any liability payable out of a particular fund in excess of the amount raised for that fund. The estimates of the council for a year included compensation for an assistant engineer for a specified number of days, at a fixed rate per day. Held, that an assistant engineer who received the compensation fixed in the estimate, could not recover for extra compensation, based on his having worked over eight hours a day, though an ordinance declared that eight hours should constitute a day's work. Kobel v. Detroit [Mich.] 12 Det. Leg. N. 613, 105 N. W. 79.

59, 60. Hager v. Shuck, 27 Ky. L. R. 957, 87 S. W. 300.

61. Under Gr. N. Y. Charter, §§ 56, 1068, adoption by the board of education of an existing rule as to salaries of janitors of public schools in certain boroughs held not an adoption of such rule as to all of Greater New York. People v. Board of Education, 104 App. Div. 162, 93 N. Y. S. 300.

62. So held in an action by the employing officer against the county to recover excess salary paid. Jacobson v. Ransom County [N. D.] 105 N. W. 1107.

63. Health officer. Graves v. Paducah [Ky.] 89 S. W. 708. Salary of $250 per year for health officer held not unreasonably small. Id.

64. Code Civ. Proc. § 2125 construed. People v. Sipple, 109 App. Div. 788, 96 N. Y. S. 897.

65. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

Statutes construed: St. 1905, p. 224, c. 249, increasing the salaries of the supreme court justices, has no application to any justice of the supreme court in office at the time the act was adopted. Harrison v. Colgan [Cal.] 81 P. 1010.

66. So held where the county board by resolution fixed the compensation and expenses of the county treasurer for the entire term of his office. People v. Parker, 116 Ill. App. 138.

upon the discharge of the duties of his office and before the expiration of his term, no compensation having been theretofore provided,[67] or where the statute fixing his salary is, during his term of office, declared void.[68] Under the New York City Charter a patrolman is not entitled to a promotion and increase of salary until the expiration of one year from the end of his probation term.[69]

An officer is not entitled to unearned fees,[70] but the right to earned fees is property which is not lost by the expiration of one's term,[71] nor can his right thereto be affected by any action of the governing body he served.[72] Where county commissioners enter into a contract with the prosecuting attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt and by agreement a test case is tried, the defendants in other similar cases agreeing to abide the result, the percentage the attorney is to receive in the event of his securing a judgment is not limited by either law, justice or equity to the amount involved in the test case.[73] The exclusive power to fix salaries being vested in a board, the legal incumbent of a position is entitled to the salary fixed by the board without any further step being necessary on the part of the head of the department under whom he serves.[74] As a general rule one is not entitled to salary pending proceedings disputing his right to the office.[75] Unless waived, as by failure to make a demand for reinstatement,[76] an officer is entitled to his salary while pending reinstatement after a wrongful discharge,[77] even though engaged in other employment.[78] An

67. State v. Carlisle, 3 Ohio N. P. (N. S.) 544.

68. County commissioners whose salaries are fixed by statutes declared unconstitutional during their term of office cannot be enjoined from receiving the pay provided by the Act of April 21, 1904, notwithstanding the rate is higher than they previously received under the unconstitutional statutes in existence at the time they came into office. State v. Carlisle, 3 Ohio N. P. (N. S.) 544.

69. People v. McAdoo, 96 N. Y. S. 445.

70. Under Act July 11, 1901 (P. L. 663), a sheriff is not entitled to fees for serving subpoenas unless he actually serves them. A mere offer to serve them is insufficient. Deitrick v. Northumberland Co., 24 Pa. Super. Ct. 22; O'Leary v. Northumberland Co., 24 Pa. Super. Ct. 24. Where a levy has been made upon property under a levari facias sur mortgage, but before the sale the plaintiff has sold and assigned the judgment to another and has received the money therefor without such money going through the sheriff's hands, the latter is not entitled to poundage. Act July 11, 1901 (P. L. 663) construed. Larzelere v. Fisher, 24 Pa. Super. Ct. 194.

71. Under a resolution of a city council, providing that the city attorney should be allowed a commission on all sums collected by him for the city by action to enforce collection of taxes, the attorney was entitled to commissions on taxes paid the city after he went out of office on judgments obtained by him. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49. The attorney was entitled to a pro rata share in commissions due on judgments collected by the city in suits brought by him, but not decided when he went out of office. Id.

72. Where a city attorney is to be allowed a commission on all taxes collected by him, the city cannot without the attorney's consent arbitrarily release a portion of judgments recovered or purchase any of the property in satisfaction of a judgment against it, if it is liable to the attorney for the full amount of his commission. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

73. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

74. Examiner of dependent children is entitled under Gr. N. Y. Charter to salary fixed by board of aldermen without any further step being taken by the head of his department. People v. Tully, 47 Misc. 275, 95 N. Y. S. 916.

75. 23 Am. & Eng. Enc. of Law [2nd Ed.] p. 397. Under Pol. Code, § 936, where a judgment annulling petitioner's certificate of election to the office of superintendent of schools of a county had become final by his failure to appeal within 10 days, as required by Code Civ. Proc. § 1127, he was not entitled to recover salary pending an appeal subsequently taken. Wilson v. Fisher [Cal.] 82 P. 421.

76. Where a police officer wrongfully removed leaves the city and makes no demand for reinstatement or salary, he thereby waives any claim against the city for salary after the removal. Gibbs v. Manchester [N. H.] 61 A. 128. An employe of a municipal corporation cannot rest his right to recover upon contract, and, if wrongfully suspended, he cannot, without taking proper steps to have himself reinstated, compel the municipality to pay him compensation during the suspension. Osborne v. Columbus, 3 Ohio N. P. (N. S.) 1. Where the authority of a civil service commission to reinstate employe is disputed by a director of public safety, application should be made to a tribunal having jurisdiction to decree and enforce the order of the commission. Id.

77. Padden v. New York, 45 Misc. 517, 92 N. Y. S. 926; Davenport v. Los Angeles, 146 Cal. 508, 80 P. 684.

officer drawing a per diem compensation is not entitled to the same while performing the duties of another office imposed upon him and for which compensation is provided.[79] Usages are binding as to past transactions.[80] An officer receiving a salary for his services is not entitled to retain fees collected by him for voluntary services performed after the expiration of his term.[81]

The unearned salary of a public officer cannot be assigned or attached in satisfaction of a judgment.[82]

In order that an officer or employe may obtain his salary, there must in most states be an unexpended appropriation therefor,[83] a public officer not being as a general rule, personally liable for the salaries of employes.[84] As a general rule the failure of an employing officer to procure the determination of an employe's fees will not deprive the employe of his right thereto.[85] In North Carolina a county superintendent of health cannot delegate the performance of his duties so as to give his employes the right to make their services a county charge.[86]

One who has a legal right to an office for which a salary has been lawfully provided[87] has a cause of action to recover such salary if a claim therefor has been properly presented and wrongfully refused,[88] or if his services have been tendered and refused.[89] Mandamus will not lie to compel the payment of a salary for which no appropriation has been made.[90] Under Greater New York City Charter a recovery for salary during period of wrongful suspension cannot be had in reinstate-

78. So held as regards wrongfully discharged fireman though he accepted a position as sergeant at arms to the council of the municipal assembly pending reinstatement. Padden v. New York, 45 Misc. 517, 92 N. Y. S. 926.

79. A county assessor while serving as a member of a board of review cannot draw his per diem salary as county assessor. Acts 1903, p. 65, c. 29 construed. Daily v. Daviess County Com'rs [Ind.] 74 N. E. 977.

80. United States held not entitled to recover from a former marshal payments made to deputies for services rendered. Walker v. U. S., 139 F. 409.

81. In counties where a public administrator is paid a salary he cannot retain the fees allowed him for services rendered after the expiration of his term of office. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P. 861.

82. Receiver appointed in proceedings supplementary to execution against a municipal officer held not entitled to unearned salary of latter. People v. Grout, 45 Misc. 505, 92 N. Y. S. 742. See Assignments, 5 C. L. 279.

83. Laws 1905, p. 192, c. 99 does not repeal or affect B. & C. Comp. § 2398, declaring that no warrant shall be drawn by the secretary of state unless there is an unexpended appropriation therefor. Calbreath v. Dunbar [Or.] 81 P. 366. Appropriation for "salaries and labor of police department" held available to make up deficiency in appropriation specifically intended for clerk. Smith v. Lowell [Mass.] 76 N. E. 956.

84. In the absence of fraud a state auditor is not liable for salary of a clerk in his office on the ground of misappropriation of funds merely because the funds appropriated for payment of clerks in the office were exhausted by the auditor paying other clerks for services rendered after those of the clerk in question. Shuck v. Coulter [Ky.] 90 S. W. 271.

85. Failure of the commissioner of public charities to procure an allowance of fees by the judge ordering the commitment of insane persons held not to deprive an examiner of indigent insane acting under the employment of the commissioner of the right of compensation for his services. Strong v. New York, 110 App. Div. 188, 96 N. Y. S. 1083.

86. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574.

87. Coroner's clerk held not entitled to any salary. Munch v. New York, 93 N. Y. S. 509; O'Connor v. New York, 48 Misc. 407, 95 N. Y. S. 504.

88. Where a complaint of a justice of the peace against a county to recover fees alleged that on a specified date plaintiff presented to the board of supervisors for allowance and filed with the clerk of the board his claim for services as a justice of the peace of a certain township, which claim was duly itemized and was certified by plaintiff to be correct, and that the amount claimed was then justly due and that such claim was presented within a year after the last item therein set out accrued, a copy of which was annexed and marked an exhibit and made a part of the complaint, it contained a sufficient statement of the steps taken by plaintiff in presenting his claim to the board of supervisors and stated a cause of action. Millard v. Kern County [Cal.] 82 P. 329.

89. Policeman. French v. Lawrence [Mass.] 76 N. E. 730. Allegations in petition that the city illegally and unjustifiably prevented plaintiff from performing his duties held surplusage and could not be construed as amounting to allegations that plaintiff had even been suspended by removal, or that his tender of services was made during such suspension or after the removal. Id.

90. Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, afg. 114 Ill. App. 168.

ment proceedings.[91] An officer suing for salary must establish his right to the office to which the salary attaches,[92] and any fact tending to show that he was not an officer is available to defendant under a general denial.[93] An admission of plaintiff's appointment establishes a prima facie case in plaintiff's favor.[94] Allegations in the petition must be consistent.[95] Payment to a de facto officer is a good defense to an action brought against a municipality by a de jure officer to recover the same salary after he has acquired or regained possession.[96] The court of claims has no jurisdiction of actions to recover the fees of a Federal court commissioner unless his accounts have been submitted to the district or circuit court and to the attorney general for approval.[97] In California the supreme court is the only tribunal to which the justices of the district courts of appeal can appeal for the determination of the amount of the latter's salary.[98]

Payments exceeding the amount fixed by law may be recovered[99] with interest.[1]

An officer being required to account for fees he will be required to account for all fees earned by him for official services whether collected or not,[2] and an officer dying during his term, fees paid his successor by the deceased officer's representatives to finish certain work which deceased had been paid for are properly chargeable against the successor.[3] In Ohio fees collected by a mayor for violation of penal ordinances should be paid into the city treasury when the amount of such fees and also the salary of the mayor has been fixed by the council.[4] Under statutes providing for reimbursement of officers for "sums of money actually expended," officials are not entitled to reimbursement for expenses paid for in work.[5]

Vacations.—The extent of the leave of absence of an employe of the govern-

91. Gr. N. Y. Charter, § 537 construed. People v. Woodbury, 102 App. Div. 462, 92 N. Y. S. 442. This is especially true where no evidence as to the amount of such compensation was introduced in such proceeding. Id.

92. Murtagh v. New York, 106 App. Div. 98, 94 N. Y. S. 308.

93. Action by policeman held defendant could show that appointment was invalid by reason of the fact that the number of men on the force exceeded the statutory limit. Appointment was admitted. Murtagh v. New York, 106 App. Div. 98, 94 N. Y. S. 308.

94. Murtagh v. New York, 106 App. Div. 98, 94 N. Y. S. 308.

95. An averment in a petition by such a clerk that he was arbitrarily and without cause removed from his position by the board of public service is negatived by the further averment that he was removed while the board was acting within the scope of its duties, and the petition is thereby rendered insufficient against demurrer. Hutchinson v. Lima, 6 Ohio C. C. (N. S.) 529, afg. 3 Ohio N. P. (N. S.) 55.

96. In proceedings supplementary to execution against a municipal officer who had been reinstated after a wrongful discharge, an assignment by the judgment debtor to the receiver of all sums due or to become due on account of claim for salary held to convey nothing. People v. Grout, 45 Misc. 505, 92 N. Y. S. 742.

97. Acts of 1875, 1894, and 1898 construed. Summey's Case, 39 Ct. Cl. 199.

98. Harrison v. Colgan [Cal.] 81 P. 1010.

99. A county is entitled to recover from the county assessor the sum he has been paid for his services rendered in excess of the per diem for the maximum number of days fixed by Acts 1895, p. 207, c. 101. Daily v. Daviess County Com'rs [Ind.] 74 N. E. 977. The court says: "A county is not to be absolved from the obligations of common honesty where it is seeking the return of money paid under mistake and we do not assert that the mere fact that a county may have had a technical defense to a demand will relieve it of the consequences of payment where, in the matter of substance, and as between man and man, it would be just for the defendant to retain the money." Id. Under Burns' Ann. St. 1901, §§ 7913, 7918, a settlement and dismissal of a suit brought to recover money illegally allowed county auditor does not release the defendant from liability to the county for the repayment of moneys illegally detained by him. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

1. A county is entitled to 6 per cent. interest on money illegally allowed by the county commissioners to the county auditor and withheld by the latter from the county. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

2. Boettcher v. Lancaster County [Neb.] 103 N. W. 1075.

3. Clerk of court. Boettcher v. Lancaster County [Neb.] 103 N. W. 1075.

4. City of Cambridge v. Smallwood, 6 Ohio C. C. (N. S.) 230; City of Bellefontaine v. Haviland, 3 Ohio N. P. (N. S.) 99.

5. Under Sess. Acts 1903, pp. 270, 271, an official stenographer is not entitled to an allowance for railroad fare paid by him in work for the attorney of the road. State v. Woodside, 112 Mo. App. 451, 87 S. W. 8.

ment printing office must be measured by the extent of his work during the year in the proportion of one to eleven,[6] and he is entitled to the same pay as if he had remained at work.[7]

Pensions, reliefs and benefits.[8]—According to the public or private nature of these funds they must be regarded as pensions[9] or fraternal mutual benefit insurance[10] and are consequently treated elsewhere.

Officers of Corporations; Official Bonds; Opening and Closing; Opening Judgments; Opinions of Court; Options; Order of Proof; Orders for Payment; Orders of Court; Ordinances; Oysters and Clams, see latest topical index.

PARDONS AND PAROLES.

A convict accepts a pardon subject to all its valid conditions and limitations and must comply therewith.[11] If he violates the terms of a conditional pardon he may be rearrested and recommitted to undergo the punishment imposed by his sentence or so much thereof as he has not already suffered.[12] But such rearrest and recommitment cannot be had upon the mere order of the board of pardons, unless the statute or the terms of the pardon so provide.[13] The convict is entitled to a hearing before a court of general criminal jurisdiction to show that he has performed the conditions of his pardon or has a legal excuse for not having done so.[14] But where the terms of a pardon expressly authorize the arrest and detention of a convict who has violated the terms of his pardon, it is the duty of a sheriff to whom the fact of such violation is made known from any responsible source, to make such arrest,[15] and where the rearrested convict then makes application for a writ of habeas corpus it is the duty of the court to which application is made to inquire into the truth of the alleged violation of the terms of the pardon.[16]

6. Taylor's Case, 39 Ct. Cl. 43.

7. Is not entitled to pay for Sunday. Taylor's Case, 39 Ct. Cl. 43.

8. See 4 C. L. 861, n. 44, 45.

9. See Pensions, 4 C. L. 970.

10. See Fraternal Mutual Benefit Associations, 5 C. L. 1523.

11, 12. Ex parte Alvarez [Fla.] 39 So. 481.

13. Florida board of pardons has no power to determine that a criminal has violated the conditions of his pardon and to revoke the same without a hearing. Ex parte Alvarez [Fla.] 39 So. 481.

14. Ex parte Alvarez [Fla.] 39 So. 481.

NOTE. Procedure: "The proceeding to test the question whether or not there has been a violation of or noncompliance with the condition or conditions of a pardon is purely informal. The established practice at the common law and in the American states, in the absence of statutory regulation and in the absence from the pardon itself of express stipulations for that purpose, is for some court of general criminal jurisdiction, upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated or failed to comply with the conditions of his pardon, to issue a rule, reciting the original judgment of conviction and sentence, the pardon and its conditions, and the alleged violation of or noncompliance with the condition or conditions thereof, and requiring the sheriff to arrest the convict and bring him before the court, to show cause, if any he can, why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest. When brought before the court upon such rule, if the prisoner denies that he is the same person who was convicted, sentenced, and pardoned, he is entitled to have a jury summarily empaneled to try such issue; but, if his identity is not denied, all the other facts and issues can be heard and tried by the judge alone, unless the judge solely within his discretion, shall see proper, for his own satisfaction, to submit the facts to a jury for determination. If it he found upon such investigation that there has not been a violation of or noncompliance with the condition or conditions of the pardon, or if the convict shall show to the satisfaction of the court some valid reason or excuse for such violation or noncompliance, he should be discharged from custody; but if the violation of or noncompliance with the condition or conditions of the pardon be established to the satisfaction of the court, without any legal reason or excuse therefor, the convict should be remanded to custody and ordered to have the original sentence imposed upon him, duly executed, or so much thereof as has not been already suffered by him. Such inquiry and proceedings may properly be had on the trial of a habeas corpus proceeding instituted by the convict himself to test the validity of his arrest and detention by the sheriff for an alleged violation of the condition of the pardon."—From syllabus (by court) in Ex parte Alvarez [Fla.] 39 So. 481.

A statute in existence at the date of a judgment against a convict, providing for commutation of sentences for good conduct and defining credits to be allowed, becomes a part of a sentence and inheres into the punishment assessed.[17] Such a statute is not therefore an invalid interference with the power to pardon as conferred on certain officers by the constitution.[18] But a statute which authorizes a local board to remit a portion of a sentence without fixing any basis for such remission by defining credits to be allowed for good conduct is unconstitutional because an infringement of the power to pardon conferred by the constitution.[19] The Federal act of 1902 "to regulate commutation for good conduct for United States prisoners" does not apply to prisoners sentenced before its passage.[20] The fact that an attorney convicted of a crime involving moral turpitude was pardoned by the governor of the state is no defense to a disbarment proceeding based on such conviction.[21] An escaped convict cannot be allowed time on his sentence while illegally at large upon unlawful escape.[22]

Where a reprieve by the governor fixes a date for execution of a death sentence beyond the date of a decision by an appellate court denying a new trial, such court need not fix a day for the execution.[23] A reprieve staying execution of a death sentence, granted to allow an appeal to the Federal supreme court in a habeas corpus proceeding is not a "proceeding against the prisoner" pending such proceedings in the Federal court.[24]

PARENT AND CHILD.[25]

§ 1. *Custody and control of child.*[26]—The paramount control of the child is in the state which may dispose of the child contrary to father's right.[27] But unless

15. Sheriff was justified in arresting convict found by pardon board to have violated his pardon. Ex parte Alvarez [Fla.] 39 So. 481.

16. Ex parte Alvarez [Fla.] 39 So. 481. Pardon was granted upon condition of good behavior and board of pardons attempted to revoke it on finding the convict had violated the condition. He was rearrested and applied for habeas corpus but was remanded to custody. The record did not show any inquiry by the court below before taking such action, and the judgment was therefore reversed and remanded so that the convict could have a proper hearing. Id.

17, 18. Fite v. State, 114 Tenn. 646, 88 S. W. 941.

19. Shannon's Code, § 7423, which confers on board of workhouse commissioners power to remit sentences without defining credits, is an invasion of the governor's power to pardon, conferred by Const. art. 3, § 6. Fite v. State, 114 Tenn. 646, 88 S. W. 941.

20. Act June 21, 1902, c. 1140, 32 Stat. 397 construed. United States v. Farrar [C. C. A.] 139 F. 260.

21. The pardon did not efface the moral turpitude and want of professional honesty involved in the crime—embezzlement of client's funds—nor remove the stain from the moral character of the attorney. People v. Gilmore, 214 Ill. 569, 73 N. E. 737.

22. Validity of sentence, as basis of extradition proceedings, is not affected by lapse of time while convict is illegally at large. Ex parte Moebus, 137 F. 154.

23. Rogers v. Peck, 26 S. Ct. 87.

24. U. S. Rev. St. § 766 does not apply so as to render such reprieve void. Rogers v. Peck, 26 S. Ct. 87.

25. Scope of topic.—It is confined to the relationship of parent and child and their rights and liabilities inter se, excluding the law of Adoption of Children (5 C. L. 41); Bastards (5 C. L. 412); Alimony (5 C. L. 101) and Divorce (5 C. L. 1026); Infants (6 C. L. 1) and Descent and Destribution (5 C. L. 995).

26. See 4 C. L. 873.

27. A minor over 18 years old may enlist in the navy without parents' or guardian's consent. Elliott v. Harris, 24 App. D. C. 11. Sec. 1117, U. S. Rev. St. (Comp. St. 1901, p. 813), providing that no minor shall enlist or be mustered into military service of the U. S., refers only to the army. Id. Code Civ. Proc. Cal. § 1747, under which guardians may be appointed for children, or their estates when no guardians have been appointed by deed or will, is valid; and proceedings thereunder whereby parents were deprived of the custody of children, the president of the Society for the Prevention of Cruelty to Children being placed in charge, gives no right of action by the parents. Wadleigh v. Newhall, 136 F. 941.

there is a statute to the contrary, the courts are bound to recognize the father's paramount right to the custody of his child, unless he is unfit or disqualified,[28] for it is to the best interests of child that it should be with its natural parents.[29] His right is superior to or inclusive of the mother's[30] or any other relative's,[31] and neither the mother's attempted testamentary disposal of custody of the child[32] nor the appointment of a guardian pursuant thereto[33] will defeat it. The father's paramount right is not dependent on his support of the child.[34] In absence of statute the father's authority passes on his death to the surviving mother.[35] The father is presumed fit for custody of child until the contrary is proven.[36] He may teach it any religion that does not inculcate breaking of laws.[37] His power of disposition of it is limited only by interest of child,[38] though it is said that contracts by parents to transfer to others the custody of their children are against public policy and ordinarily unenforceable.[39] The prima facie right to custody of a minor child being in the father, a claim that this right has been relinquished by contract must be supported by clear and strong proof,[40] and a contract, to have the effect of depriving the father of his rights, must be certain and definite.[41] Where as in divorce the custody is taken from the father and given to the mother, reasonable access to visit the child is implied unless clearly forbidden.[42] As between them it will be awarded to whoever can best care for the child.[43] In New York a statute[44]

28. Terry v. Johnson [Neb.] 103 N. W. 319. Father's paramount right should not be invaded without good cause, though child's welfare is first consideration. Hernandez v. Thomas [Fla.] 39 So. 641. Father is natural guardian of infant children and has paramount right to their custody; but this right is not absolute and unconditional. Taylor v. Taylor, 103 Va. 750, 50 S. E. 273. Code, § 3192, declares parents to be the natural guardians of the persons of their minor children, entitled to their care and custody. Van Auken v. Wieman [Iowa] 104 N. W. 464. Courts will not deny father's right because he contemplates taking child to another state. Ex parte Davidge [S. C.] 51 S. E. 269. In Minn. a father's right is paramount by statute as well as by common law. State v. Martin [Minn.] 103 N. W. 888.

29. Terry v. Johnson [Neb.] 103 N. W. 319.

30. Father's claim superior to mother's. Ex parte Davidge [S. C.] 51 S. E. 269. Father and mother being equally fit custodians, custody of 5 year old son was awarded the father. People v. Sinclair, 47 Misc. 230, 95 N. Y. S. 861. A mother cannot maintain an action for the enticement of her son while the father is alive and lives with her. Soper v. Igo, Walker & Co., 28 Ky. L. R. 519, 89 S. W. 538.

31. Father of infant child gave it to his sister upon death of the child's mother. Later, when he remarried, he was held entitled to custody of the child, being of good character and sufficient means. Van Auken v. Wieman [Iowa] 104 N. W. 464.

32, 33. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

34. Although mother supports and educates children father has a right to see them and write to and visit them at college. In re Redmond, 113 Mo. App. 351, 88 S. W. 129.

35. The exclusive power of the father to appoint a testamentary guardian superior to the surviving mother as once recognized in New York has been repealed. Kellogg v. Burdick, 96 N. Y. S. 965.

36. Burden of proving contrary is on person averring it. Parker v. Wiggins [Tex.] 86 S. W. 788; State v. Martin [Minn.] 103 N. W. 888. Mother's parol gift of child in view of death is not binding. Parker v. Wiggins [Tex. Civ. App.] 86 S. W. 788.

37. Hernandez v. Thomas [Fla.] 39 So. 641.

38. Ex parte Davidge [S. C.] 51 S. E. 269.

39. Agreement by father to transfer custody of child if he could not care for it unenforceable where he was able to place child in a good permanent home and person demanding custody could not give proper care. Hernandez v. Thomas [Fla.] 39 So. 641. Parol gift of child by mother when dying held not to bar father's rights to child, and could not bar his rights even had he consented, since such contract would be unenforceable, unless the child's welfare demanded its enforcement. Parker v. Wiggins [Tex. Civ. App.] 86 S. W. 788.

40. Looney v. Martin [Ga.] 51 S. E. 304.

41. Evidence held insufficient to show a certain and definite promise by father to give children to their maternal grandparents during the grandfather's life, and custody awarded the father. Looney v. Martin [Ga.] 51 S. E. 304.

42. Procedure in divorce proceeding under statute. Newman v. Newman, 93 N. Y. S. 847. Father entitled to visit and enjoy society of child custody of which was awarded the mother in divorce, at reasonable times and places. Barlow v. Barlow [Ky.] 90 S. W. 216. In awarding custody of child, the court need not and usually will not award exclusive and uninterrupted custody and control to one parent only. Commonwealth v. Strickland, 27 Pa. Super. Ct. 309.

43. Where evidence shows that mother has most time to devote to child, both parents being otherwise equally fitted for its custody, the mother is entitled to it as being for best interest of child. People v. Elder, 98 App. Div. 244, 90 N. Y. S. 703. Welfare of child is supreme consideration in awarding custody of child. Taylor v. Taylor, 103 Va.

abolishes common-law preference of father and makes either parent equally entitled to custody of child.[45] In some states a parent may by will fix the custody of the child and its guardianship.[46] Some allow only the father to do this.[47]

But while the courts recognize the rights of the natural parents to their children's custody,[48] and will prefer them to grandparents or others,[49] and will separate children from parents only on the most convincing proof of the parents' unfitness,[50] the paramount consideration is the children's welfare,[51] though mere consideration of wealth[52] or personal affections are not sufficient to abrogate the parent's paramount right.[53] Little weight is attached to child's preference[54] unless it is mature.[55] Adopting parents are entitled to custody of infants (if not shown to be unfit) rather than a grandmother[56] and especially when she is of bad character.[57]

The power to make the award of custody is discretionary and is generally for the trial court.[58]

The right of custody ends at maturity.[59] It is not a taking from rightful custody if a child of intelligent age goes voluntarily from one in loco parentis to another.[60]

750, 50 S. E. 273. When father would have to hire a housekeeper to care for children, their custody is preferably given to mother who supervises them personally. Redmond v. Redmond, 113 Mo. 351, 88 S. W. 129. In action for divorce for cruel and inhuman treatment mother was given child, 7 or 8 years old, and in delicate health. Barlow v. Barlow [Ky.] 90 S. W. 216. Where father was shown fit and capable and mother had left the home and was dependent on a brother for support, custody of child was properly awarded. Taylor v. Taylor, 103 Va. 750, 50 S. E. 273.

44. Laws 1896, c. 272, § 92.

45. People v. Elder, 90 N. Y. S. 703.

46. In South Carolina Civ. Code 1902, § 2689 gives father right to dispose of custody of infant by deed or will implying right in father against all the world even its official guardian. Ex parte Davidge [S. C.] 51 S. E. 269.

47. The will of mother awarding custody of children to her mother is a nullity as § 2086, Rev. St. 1892 gives sole power to appoint testamentary guardian to father. Hernandez v. Thomas [Fla.] 39 So. 641. Mother cannot will away custody of child against father's consent. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

48. Gilmore v. Kitson [Ind.] 74 N. E. 1083; Terry v. Johnson [Neb.] 103 N. W. 319. Duty of court to award child to father unless latter is clearly unqualified and incompetent. Parker v. Wiggins [Tex. Civ. App.] 86 S. W. 788.

49. Father being of good character and desirous of placing child in a home where surroundings and cars would be good, was given custody in preference to grandmother who lived in disreputable neighborhood and neglected child's welfare. Hernandez v. Thomas [Fla.] 39 So. 641.

50. Evidence insufficient to sustain charge of unfitness against father. Ex parte Davidge [S. C.] 51 S. E. 269. Courts cannot interfere with parental right except upon imperative necessity—gross misconduct on part of parent. Van Auken v. Wieman [Iowa] 104 N. W. 464.

51. Redmond v. Redmond, 113 Mo. App. 351, 88 S. W. 129; Barlow v. Barlow [Ky.] 90 S. W. 216; Parker v. Wiggins [Tex.] 86 S. W. 788; Hernandez v. Thomas [Fla.] 39 So. 641; Taylor v. Taylor, 103 Va. 750, 50 S. E. 273; Ex parte Davidge [S. C.] 51 S. E. 269. It is said in Gilmore v. Kitson [Ind.] 74 N. E. 1083 that state will deprive parent of child on its own motion if its welfare demands it; and in case of divorce proceedings, welfare of child controls its disposition; so too, in cass of its abandonment by the father. Father denied custody of child which had been brought up by grandmother because the child's condition demanded care which only the grandmother could give. But father given leave to renew application after one year. Ex parte Davidge [S. C.] 51 S. E. 269.

52. Gilmore v. Kitson [Ind.] 74 N. E. 1083; Ex parte Davidge [S. C.] 51 S. E. 269.

53. Van Auken v. Wieman [Iowa] 104 N. W. 464.

54. Child's preference for father based merely on prospect of less restraint under his custody and no good reason is not controlling. People v. Elder, 98 App. Div. 244, 90 N. Y. S. 703. The affection of an 8 year old child for its foster parents has little weight with the courts. Parker v. Wiggins [Tex. Civ. App.] 86 S. W. 788.

55. A mature child aged 17 will be allowed to exercise choice of custodians if based on proper information and experience. Terry v. Johnson [Neb.] 103 N. W. 319.

56, 57. Grandmother was convicted keeper of house of prostitution. Evidence held not to show unfitness of adopting parents. Smiley v. McIntosh [Iowa] 105 N. W. 577.

58. This is especially true in Pa. where on a habeas corpus proceeding the record does not appear in appellate court. Commonwealth v. Strickland, 27 Pa. Super. Ct. 309; Taylor v. Taylor, 103 Va. 750, 50 S. E. 273. Because of its superior opportunities to judge witnesses. Weathersby v. Jordan [Ga.] 52 S. E. 83.

59. Boehler v. Boehler [Wis.] 104 N. W. 840.

60. Where a child 18 years old after living 7 years with one aunt visits another and then voluntarily without force, fraud or persuasion, decides to remain with the latter,

§ 2. *Support and necessaries.*[61]—It is a legal duty of the father to support the child[62] and he is not relieved of this duty by a divorce from the mother,[63] and even a contract between himself and a third person to furnish support to them will not relieve him from his obligation.[64] Necessaries include medical attendance[65] among other things.[66] The crime of nonsupport or abandonment of child,[67] involves an absence of adequate provision for them by the father[68] or by others,[69] and to make out an abandonment there must be actual separation.[70] To be a defense, physical disability must disable earning power.[71] If coupled with wife abandonment want of a valid marriage may be shown.[72] The residence of the neglected children is the venue of such offense.[73]

When the father neglects or refuses necessary support, another may give it and an action on implied promise will lie.[74] He will remain liable though divorced and denied the custody of the child in favor of the wife if support is not charged thereby on the wife.[75] The duty of support is not reciprocal to the right of custody.[76] A direct action may be maintained by the wife in such case,[77] but whether future support and an adjustment of property rights may also be had in such an action depends first on full jurisdiction of both parties, and if it was had, second, on whether the divorce left such rights open.[78] In an action involving a claim by a di-

no abduction exists. Baumgartner v. Eigenbrot [Md.] 60 A. 601.

61. See 4 C. L. 873.

62. Breen v. Breen [Ky.] 91 S. W. 251. The duty of support of infant children is imposed upon the father by law. Parkinson v. Parkinson, 116 Ill. App. 112. Children entitled to care, protection and support by father. Brown v. State [Ga.] 50 S. E. 378. A father who is able to support a son cannot recover for such support even though the son have property of his own. Watts v. Watts' Ex'x [Va.] 51 S. E. 859.

63. Parkinson v. Parkinson, 116 Ill. App. 112.

64. Father had arranged with adult daughters to pay for necessaries out of weekly allowance. Did not relieve him from payment for necessaries furnished family in which there were minors. Wentz v. McCann, 107 App. Div. 557, 95 N. Y. S. 462. A father's contract with the mother to support herself and children out of an allowance to her did not relieve him from his obligations to children. Wright v. Leupp [N. J. Eq.] 62 A. 464.

65. This includes doctor bills incurred by mother for son on the principle that she was acting as his agent. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376. Where a mother engaged a doctor to attend her son, of age, living in her family and holding their property in common, charging bills against their respective incomes, she becomes liable, where son never knew of contract with plaintiff, had expressed no desire to see him, and for more than a year mother made no complaint because the bill was charged against her. Best v. McAuslan [R. I.] 60 A. 774.

66. Cases discussing necessaries may be found in Infants, 6 C. L. 1; Husband and Wife, 5 C. L. 1731.

67. State v. Peabody, 25 R. I. 544, 56 A. 1028.

68. It is not a criminal abandonment if he makes adequate provision for protection and support. Pen. Code 1895, § 114 is not violated if father's separation is necessary and he has made adequate provision for support of family. Brown v. State [Ga.] 50 S. E. 378. The **question** of proper support is one **for the jury.** State v. Peabody, 25 R. I. 544. 56 A. 1028.

69. Under Pen. Code 1895, § 114, the crime of abandonment does not exist if child's wants are satisfied even by others; there must be not only desertion but also destitution of child. Mays v. State [Ga.] 51 S. E. 503.

70. Abandonment may mean leaving children destitute at time of separation, or allowing them to become so afterwards, but separation is essential to crime of abandonment under Pen. Code 1895, § 114. Brown v. State [Ga.] 50 S. E. 378.

71. It was not error to exclude evidence of physical disability as a defense to an indictment for nonsupport when no impairment of earning capacity is claimed therefrom. State v. Peabody, 25 R. I. 544, 56 A. 1028.

72. Mere statement that the marriage was not legal in Austria because contrary to its laws is not sufficient without legal proof of the foreign laws on the subject. People v. Rosenzweig, 47 Misc. 584, 96 N. Y. S. 103.

73. The crime of failure of a parent to support his children is committed in the county where the children are located. State v. Peabody, 25 R. I. 544, 56 A. 1028.

74. Parkinson v. Parkinson, 116 Ill. App. 112.

75, 76. Ligon v. Ligon [Tex. Civ. App.] 13 Ct. Rep. 365, 87 S. W. 838; Spencer v. Spencer [Minn.] 105 N. W. 483, and see 4 Mich. L. Rev. 483.

77. Spencer v. Spencer [Minn.] 105 N. W. 483. It would seem a mother under such circumstances may sue only in case children are unable to support themselves. Parkinson v. Parkinson, 116 Ill. App. 112.

78. Spencer v. Spencer [Minn.] 105 N. W. 483.

Note: "The decision was placed upon the ground that since it was the wrongful act of the father that deprived him of the cus-

vorced wife for support of a child born after the divorce was granted and for whom no provision was made in the decree for alimony, it is error to so instruct the jury as to create the impression that the care and support of the child was a joint obligation upon both parents.[79] So far as necessary care and support are concerned, the whole legal obligation as between the father and the mother is upon the father.[80] In such a case the wife is not entitled to pay for her whole time in caring for the child, but only for such a proportion of her time as was necessarily thus occupied;[81] and for support the allowance should be proportionate to the father's means, considered in connection with the health and interests of the child.[82] Allowance for children cannot be made incident to divorce in Texas.[83]

When children have an estate of their own and the parents are poor, the income from their estate may be touched[84] and sometimes the principal.[85] A guardian who is charged by law to educate and support the ward[86] cannot come on the father.[87] The duty of support ends at maturity and the courts cannot extend it beyond maturity.[88]

§ 3. *Services, earnings, and injuries to child.*[89]—A parent's duty of support and right to service, property or earnings of minor are correlative.[90] Consequently

tody of the child it would be unjust to allow him to plead his own wrong as an excuse for relieving himself from an obligation. There is a serious conflict of authority as to the father's liability in an original action by the wife for the child's support when the divorce decree, as in the principal case, awards the custody of the minor children to their mother but is silent as to their maintenance. Gibson v. Gibson, 18 Wash. 489, 51 P. 1041; Plaster v. Plaster, 47 Ill. 290; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542. See contra, Hall v. Green, 87 Me. 122, 47 Am. St. Rep. 311; Finch v. Finch, 22 Conn. 410; Brown v. Smith, 19 R. I. 319, 33 A. 466, 30 L. R. A. 680. It is well settled that if the decree of divorce is silent as to the custody of the minor children, then the liability of the father remains the same after divorce as before, both to the divorced wife and any other person. Gilley v. Gilley, 79 Me. 292; Monroe County v. Abbeglen [Iowa] 105 N. W. 350. If the divorce was obtained because of the misconduct of the wife and she retains the custody of the children either by agreement or by the decree of the court, the father is not liable for the child's support. Fitler v. Fitler, 33 Pa. 50; Kelly v. Davis, 49 N. H. 187, 7 Am. Rep. 499; Gordon v. Potter, 17 Vt. 348. The general doctrine is that jurisdiction over the custody and support of children in divorce cases is a continuing one and the court may change or modify the order for custody and support at any time. The better rule would seem to be therefore that if the custody of the child is given the wife, the father is relieved from all liability for the child's support except such as the court may order in the decree of divorce or in some subsequent decree in the same proceeding. Burritt v. Burritt, 29 Barb. [N. Y.] 124; Brown v. Smith, 19 R. I. 319, 30 L. R. A. 680; Hall v. Green, 87 Me. 122, 47 Am. St. Rep. 311.—From Spencer v. Spencer [Minn.] 105 N. W. 483.

79, 80, 81, 82. Young v. Young, 7 Ohio C. C. (N. S.) 419.

83. Liability of father for necessaries for children continues after a divorce, but a court has no power in a divorce proceeding to order payment of a monthly sum for a child's support. Rev. St. 1895, art. 2987 does not give such power. Ligon v. Ligon [Tex. Civ. App.] 13 Tex. Ct. Rep. 365, 87 S. W. 838.

84. Commonwealth v. Lee, 27 Ky. L. R. 806, 86 S. W. 990. A stepmother can recover for support of infant son when he has property from which he derives sufficient income. Watts v. Watts' Ex'x [Va.] 51 S. E. 359. Where stepmother had use of land part of which stepson had inherited from his mother, the stepmother was properly charged with rents and profits of the son's land, and properly allowed compensation for supporting the son, in partition proceeding brought by him after his father's death. Id.

85. St. 1903, § 2034 gives cases in which principal of infant's estate may be used. Commonwealth v. Lee, 27 Ky. L. R. 806, 86 S. W. 990. When child supports himself out of his own estate he should receive credit for work done for parent, who is too poor to support him. Id. The rule which permits a widowed mother without means or income other than that resulting from her own labor to charge the estate of her child for support and education is applicable to one who by her own exertions supported a stepson until he was sixteen years of age. Peters v. Scoble, 7 Ohio C. C. (N. S.) 417. See, also, Infants, 6 C. L. 1.

86, 87. A guardian who spent the ward's money in educating and maintaining ward has no recourse for it to the father, since under Ky. St. 1903, § 2032, guardian must provide necessary and proper maintenance and education of ward out of her estate. Clay's Guardian v. Clay, 27 Ky. L. R. 1020, 87 S. W. 807. See, also, Guardianship, 5 C. L. 1603.

88. Boehler v. Boehler [Wis.] 104 N. W. 840. If mature daughter cannot support herself then parent's duty rests on statute for support of poor only. Id.

89. See 4 C. L. 874.

90. A minor's clothing belongs to the father and he may sue for injury to it. Parents with 21 months old child were riding on the train, the infant, according to

when a father is deprived of that service or those earnings through the fault of another, whether by enticement[91] or death, he may recover for the loss.[92] An action for loss of services and expenses of medical attention and nursing caused by an injury to a minor child is not an action for an injury to the person within the meaning of the Wisconsin statute requiring service upon defendant of a notice of the claim within one year.[93] A father is presumed entitled to his son's wages during the latter's minority, and burden of proving the contrary is upon the defendant,[94] and dutifulness of a child in giving earnings to father is also presumed.[95] A mere intention on part of minor son to contribute in future to parents' support would entitle them to recovery.[96] But when a son has been earning money for some time, the evidence should show that he either did or was about to contribute to parents' support.[97] While some still require proof of actual loss of services,[98] Kentucky among other states adopts the modern view that no actual loss of service need be shown to recover.[99] In Minnesota a father may recover damages for death of his unmarried minor child.[1] In West Virginia a father cannot maintain an action as an individual for the negligent killing of his minor son.[2] The measure of damages, in case of son's injury, is total earning capacity plus doctor bills.[3] The complaint should plead that defendant wrongfully deprived plaintiff, and

custom, riding free. In a collision, clothes of infant in father's trunk were injured. Held, father could recover. Withey v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 511, 104 N. W. 773.

91. To maintain action for enticement evidence must show an actual service of the parent by minor child, and some active or affirmative effort by the defendant to detract child from that service. Kenney v. Baltimore & O. R. Co. [Md.] 61 A. 581. Plaintiff conspired with another to assist him in eloping with defendant's daughter. Action was one of damages for assault and battery and defendant sets up as a counterclaim loss of daughter's service, medical expenses incurred, and injuries to her clothing. Held valid counterclaim. Shoemaker v. Jackson [Iowa] 104 N. W. 503. See, also, Seduction, 4 C. L. 1418.

92. Swift & Co. v. Johnson [C. C. A.] 138 F. 867.

93. Rev. St. 1898, § 4222, subd. 5 does not apply to such an action. Wysocki v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 104 N. W. 707.

94. Son was injured by being thrown from a moving train. Father recovered $400. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376.

95. A 10 year old boy was injured by a falling cleaver while playing near a telephone pole. Boy was injured and father recovered $1,000. Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623, 87 S. W. 84.

96. Parents offered to show by letters from son promises of future support. It was error to exclude this. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842. Proof by father of child's age, residence at home and nature of injury is sufficient to uphold a verdict of $1,000 recovery for loss of earnings of 10 year old child. Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623, 87 S. W. 84.

97. Plaintiff sued for death of 18 year old son, who had left home some years before without parents' consent, had never sent any money home, and over whom parents exercised no control, but evidence was offered and excluded which tended to show promises of future remittances. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842. It was error to permit a mother to show that she was dependent on her work for support, for she could only recover the diminution of the value of his services whether she be rich or poor. Gulf. etc., R. Co. v. Johnson [Tex.] 90 S. W. 164. Evidence that another son contributed to her support was also properly excluded as not tending to show her loss due to injury of the son. Id.

98. Kenney v. Baltimore & O. R. Co. [Md.] 61 A. 581.

99. It is based on the father's right to such services not on the fact of service. Washburn v. Abram [Ky.] 90 S. W. 997.

1. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Under Minn. St. 1894, § 4477, cl. 6, an action to recover damages for death of an unmarried minor child can be brought only for benefit of the father if he be living, even though he may have abandoned the child and his whereabouts be unknown, still it was error to permit mother who received his monthly earnings to show her expectancy of life or permit jury to get the impression that any one else than the father might share or have title in the recovery. Id.

2. But in West Virginia father can recover for death of child, if at all, only as administrator. Shaw v. Charleston [W. Va.] 50 S. E. 527.

3. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376. In an action by father for injuries to minor son, it was error to instruct jury that plaintiff might recover for the time the son was unable to work and receive compensation for lack of son's capacity to work during his minority, as allowing double recovery. Houston, etc., R. Co. v. Anglin [Tex. Civ. App.] 86 S. W. 785.

where plaintiff is the mother that she was the one entitled to their services.[4] Recovery is limited to actual, probable pecuniary loss not to possible or speculative or hoped for pecuniary gain.[5] However it is not necessary to show what a child can earn when unknown.[6] The son's contributory negligence[7] or assumption of risk, though good as a defense to an action by himself, will not defeat parent's claim for loss of service or earnings[8] unless the parent consented to the son's employment.[9] A father may waive his rights of recovery, and whether he does so or not is a matter of intention.[10]

Emancipation.—A father may emancipate his son and so put him on the same footing as owner of his own rights as if he were already twenty-one years old.[11] The status of an infant, as to whether emancipated or not, may be shown by an agreement or circumstantial evidence.[12] Emancipation may be by parol or in writing and may be proved by circumstantial evidence or implied from the conduct of the parties.[13] A mere intention if clearly established is all that is necessary to emancipation, and this may be inferred from conduct.[14] Thus permitting the child to own property[15] or control its earnings[16] is evidence of emancipation. This may be done at any time in the course of such employment as well as at its beginning.[17] Also to free a child for all the period of minority from care, custody and control constitutes complete emancipation; for a part of period or of parents' rights, limited or partial emancipation.[18] That a father makes a contract of employment for his son whom he has emancipated is not inconsistent with the independent status of a child,[19] nor is the fact that the son remains at home controlling as to emancipation.[20]

4. Washburn v. Abram [Ky.] 90 S. W. 997; Soper v. Igo, Walker & Co., 28 Ky. L. R. 519, 89 S. W. 538.

5. Where evidence conclusively showed that father had no substantial expectations of ever receiving precuniary support from son he had abandoned, he could at most recover but nominal damages. Swift & Co. v. Johnson [C. C. A.] 138 F. 867.

6. When earnings of a 10 year old child because of its youth are merely conjectural, no evidence to show them is necessary, it being left to the good sense of the jury to estimate from experience and observation the probable damage. Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623, 87 S. W. 84.

7. Son was working for defendant without father's consent and defendant claims contributed to his own injuries. Held no bar to father's recovery. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W. 1095.

8. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W 1095.

9. Assumption of risk by son a defense to action by father for injuries to son if father consented to employment. Texas & P. R. Co. v. Hervey [Tex. Civ. App.] 14 Tex. Ct. Rep. 80, 89 S. W. 1095.

10. Action by father as next friend of son to recover damages for injuries to son; later this action was brought by father to recover his damages in loss of services. The fact of these two suits being brought shows an intention not to waive. Slaughter v. Nashville, etc., R. Co. [Ky.] 90 S. W. 243.

11. Where son with father's consent had "worked out," earned money, bought his own horses with it, allowed to claim horses by father, the father cannot sue and recover for their death. Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487. The question as to whether son is emancipated as to earnings and property is for the jury. Id.

12. Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551; Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487.

13. Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487.

14. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Inferred from abandonment. McMorrow v. Dowell [Mo. App.] 90 S. W. 728. Where a father through failure to support forces a child to support itself, the law will imply emancipation. Swift & Co. v. Johnson [C. C. A.] 138 F. 867.

15. Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487.

16. Father consented that son's earnings, amounting some years to $2,500, be turned over to the mother and held by her in trust for the son. Jacobs v. Jacobs [Iowa] 104 N. W. 489. Where son was allowed to collect his wages and use them as he saw fit, and in action to recover loss of earnings through injury, his mother appeared as next friend and testified for him, there was sufficient evidence of emancipation to take the issue to the jury. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Silence from early childhood to maturity held conclusive. McMorrow v. Dowell [Mo. App.] 90 S. W. 728.

17. McMorrow v. Dowell [Mo. App.] 90 S. W. 728.

18. Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487.

19. Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

20. Son lived with father but was permitted to have horses, purchased with his own uncontrolled earnings, and treat them as his own. Bristor v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 487.

Emancipation prevents recovery by parent,[21] and a minor may, until his father's license to collect his own wages is revoked, recover them from whom they are owing,[22] and having assigned them, may disavow and recover from the assignee.[23] The child when come to majority may recover without proof of the death of a parent who by abandonment worked a virtual emancipation.[24]

§ 4. *Property rights and dealings between parent and child.*[25]—Transactions between parent and child will be closely scrutinized for fraud or undue influence.[26] "Favor and affection" are sufficient to support a deed from father to child.[27] When the gift is beneficial to child, equity will imply an acceptance on their part until they arrive at maturity, when they may reject it within a reasonable time.[28] Executing a conveyance and placing it on record is sufficient evidence to pass title.[29] Parol gifts between father and child, fully executed, followed by valuable improvements, are binding,[30] and a mother may give all her property to one child to the exclusion of others.[31] There is no presumption of invalidity of a gift by a parent to a child, in the absence of mental incapacity of the parent or fraudulent or improper conduct on the part of the child.[32] Gifts from parent to child are not revocable as presumptively fraudulent[33] but are if improvident.[34] When a father, who owes his son, places money to the son's credit in the bank, payment and not a gift is presumed.[35] A contract between parents though in part for children's benefit confers no interest in them.[36] The presumption is that no remuneration is expected when a child stays with its parent or one in loco parentis after its maturity,[37] but this is rebuttable.[38] When a child is supported out of its own estate

21. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. And the emancipated son, through his next friend, may himself sue and recover for loss of time and earnings. Zongker v. People's Union Mercantile Co. [Mo. App.] 86 S. W. 486.

22, 23. Vance v. Calhoun [Ark.] 90 S. W. 619.

24. McMorrow v. Dowell [Mo. App.] 90 S. W. 728.

25. See 4 C. L. 875.

26. Where children make over to mother stock worth $1,500 per child and soon thereafter receive each property worth about $9,000, both transactions, though independent, being in view of her coming marriage, no fraud or undue influence due to confidential relation was found. Ripple v. Kuehne [Md.] 60 A. 464. In Pennsylvania parent and child must be brought face to face in making or rehearsing such gift. Caldwell v. Caldwell, 24 Pa. Super. Ct. 230. To wait eight years after alleged fraudulent transaction between mother and child, the mother having in the meantime died, is such **laches** as to bar setting aside an assignment of stock to mother. Ripple v. Kuehne [Md.] 60 A. 464.

27. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

28. A father for "love and affection" executed and recorded a deed in favor of four children, they having no knowledge of transaction at the time. Later having remarried and had other children he was held not entitled to revoke it. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

29. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

30. Where donee has taken exclusive possession of property clearly designated, made improvements that are hard to compensate, and kept possession for many years, the contract is not within the statutes of fraud and perjury. Caldwell v. Caldwell, 24 Pa. Super. Ct. 230. But such gifts must be established by clear, complete, satisfactory and indubitable proof. Id.

31. The fact that a mother, by a large donation to a son, deprived herself of the means of similar gifts to the other children, did not make the gift to the son invalid. Kennedy v. McCann [Md.] 61 A. 625.

32. No fraud, confidential relation, or mental incapacity on part of mother, being shown, gift of $5,000 by mother to son held valid, though other children were deprived of equally large gifts. Kennedy v. McCann [Md.] 61 A. 625.

33. When donor occupies dominant position in relation of trust and confidence, gift is not revocable. James v. Aller [N. J. Err. & App.] 62 A. 427.

34. A father, earning from $200 to $300 per month, in the prime of life, being about to marry a second time, makes over in the form of an irrevocable gift, a deed and mortgage to children of first marriage, which he now seeks to have set aside as improvident. Held not improvident under circumstances. James v. Aller [N. J. Err. & App.] 62 A. 427.

35. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

36. A contract between husband and wife, providing that half the income from spendthrift trust estate was to go to her for the support of herself and the minor children, making no mention of her personal representatives, becomes functus officio at her death and leaves the children no interest therein. Wright v. Leupp [N. J. Eq.] 62 A. 464.

37. Einolf v. Thompson [Minn.] 103 N. W. 1026.

by parents, then it is entitled to offset the value of its services to parents against the charges against its estate for its support.[39] There is no implied contract to repay a son for support of infirm mother.[40]

§ 5. *Liability for child's torts.*[41]—A parent is not liable for the independent tort of his minor child.[42]

PARKS AND PUBLIC GROUNDS.[1]

Acquisition and creation of parks.[2]—Sale by reference to plat having space marked "Park" is a dedication for exclusive park purposes,[3] though the dedication purports to be of "streets and highways,"[4] but a space exterior to a shore drive was held not to be a park.[5] The acceptance by the public of a dedicated park need not be immediate,[6] especially when the reverse is contemplated.[7]

An act is valid which allows cities to condemn parkways beyond their limits.[8] Such authority is germane to an act entitled "to acquire, improve, and maintain parks."[9] The park or parkway need not be an indispensable public necessity as distinguished from a convenience.[10] A river which belongs to the public may be devoted by the public to park purposes, the substitution of public uses being no taking of property.[11] An act provides compensation if it directs the taking to proceed "in the manner now provided by law" and if the general law provides a sufficient method.[12] The public appropriating land for parks is amply protected by injunction pendente lite, which restrains destruction of all trees or natural ornaments useful for a park as against the objecting owner.[13]

The public title[14] is generally a fee for public use,[15] and park lands held by one municipality for the public are not taxable by a co-ordinate branch of government.[16] A dedication by platting and selling being on consideration and not a mere

38. Action by niece to recover for service after maturity, under an agreement to compensate by will, brought after several wills had been destroyed and a new one not yet made, though promised with a provision for niece. Held, this action would lie before death of testator. Elnolf v. Thompson [Minn.] 103 N. W. 1026.

39. Commonwealth v. Lee, 27 Ky. L. R. 806, 86 S. W. 990. So also when infant's land is used for support of family he should receive proper credit therefor on charges preferred by a poor parent for his support. Id.

40. Wallace v. Denny's Adm'r [Ky.] 90 S. W. 1046.

41. See 4 C. L. 875.

42. Chastain v. Johns, 120 Ga. 977, 48 S. E. 343. Where a child shot animals of plaintiff who sued defendant merely as father, he is not liable under Civ. Code 1895, § 3817; because this merely codified the common law, which held the father liable only when the tort was committed under the direction of the father or in furtherance of his affairs. Id.

1. The scope of this topic is the same as that in **4 C. L. 876,** which having been a **complete article** on Parks is supplemented by the year's cases presented hereln. **Amusement parks** privately operated may also partake of the nature of Exhibitions and Shows, as to which see **5 C. L. 1405.**

2. See 4 C. L. 876.

3. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618. Platting and selling lots in an addition with one square designated "Elliott Park" is a dedication. Elliott v. Louisville [Ky.] 90 S. W. 990.

4, 5. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

6, 7. Elliott v. Louisville [Ky.] 90 S. W. 990. Dedicator kept title as trustee till city should accept. Id. Acceptance in 1900 of park dedicated in 1868 held timely. Id.

8. Acts 1899, c. 142, pp. 250-252, enlarged Acts 1879, c. 11, p. 15. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609.

9. Acts 1899, c. 142. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609.

10. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609.

11. Board of Park Com'rs v. Diamond Ice Co. [Iowa] 105 N. W. 203.

12. Acts 1899, c. 142, §§ 1-7, held valid. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609.

13. Digging wells destroying undergrowth or even building houses does not threaten public rights. State v. Ellis, 113 La. 555, 37 So. 209.

14. See 4 C. L. 878.

15. Park commission holds the fee subject to public usufruct. Theurer v. People, 113 Ill. App. 628. Park frontage should be computed in ascertaining if the requisite frontage is represented on a petition for liquor license. Id.

16. Assessments for drainage and reclamation. Robb v. Philadelphia, 25 Pa. Super. Ct. 343.

offer is irrevocable.[17] The dedicator may declare himself trustee of the title for the public.[18] Statutory authority to discontinue existing parks cannot apply to those dedicated as such afterwards.[19]

Rights of individuals in or to parks.[20]—Abutters on a street fronting a dedicated park have a right to its continuance.[21]

Adverse possession, abandonment, and diversion; actions.[22]—The dedicator's possession cannot be adverse to the public whilst he is legally a trustee for the public,[23] and mere nonuser in the interval pending acceptance of a dedicated park is no abandonment.[24] An abutter on a dedicated park may sue to enjoin diversion,[25] but his damage must be special and different from that to the general public.[26] Mere offense to the mind from the intrusion of trolley poles and wires upon the view from his property is not such.[27] A taxpayer may sue to restrain the letting of "illegal" advertising privileges in New York, though no waste of money or injury to public property is shown.[28] Neither the city nor the dedicators are necessary parties to an injunction suit by abutters against encroachers or trespassers.[29]

Park bonds.[30]—If park bonds are issued by a town for the park board they are town bonds, and laws relating thereto are in respect of "township affairs," which must be of general operation.[31] Constitutional provisions for payment of principal and interest must be met.[32]

Government, control, and officers of parks.[33]—The creation of a park commission is germane to, and embraced in the title of, an act to authorize a city "to acquire, improve, and maintain parks."[34] The public may use the waters of a river, included as part of a park, and the ice thereon, for amusements and recreation,[35] to which end it may forbid the taking of ice by riparian proprietors.[36] Acts delegating these powers should be construed to effectuate the public purposes[37] and not be too closely restricted by implications from the immediate context. A com-

17. Elliott v. Louisville [Ky.] 90 S. W. 990.

18. He platted an addition and declared himself trustee till the land should be included in city limits, when he was to convey to city if it would accept. Elliott v. Louisville [Ky.] 90 S. W. 990.

19. Rev. St. 1892, § 680. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

20. See 4 C. L. 881.

21. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

22. See 4 C. L. 882.

23. Elliott v. Louisville [Ky.] 90 S. W. 990. And the making of expenditures on it [taxes] is no indication of a hostile possession where the trustee derives from proper public uses more than equal profit. Id. Nor can the payment of taxes of itself by a private person have such an effect. Id.

24. Elliott v. Louisville [Ky.] 90 S. W. 990.

25, 26. Permit to build street railway. Bayard v. Bancroft [Del.] 62 A. 6.

27. Bayard v. Bancroft [Del.] 62 A. 6. It must be so unsightly as to depreciate his land. Id.

28. Laws 1892, p. 620, c. 301, relating to suits to restrain "illegal" acts or waste of public moneys. Tompkins v. Pallas, 47 Misc. 309, 95 N. Y. S. 875.

29. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

30. See 4 C. L. 883, n. 31, et seq.

31. Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387. The coincidence of town limits with city limits is no rational basis for differentiating the park laws from those of towns whose limits do not so coincide. Id.

32. An act for the acquisition of park lands, the levy of taxes, and payment of bonds is valid, though it does not specifically meet the constitutional requirements of a tax provided adequate to keep up interest and pay principal in 20 years. Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387. The tax need not be levied in advance for all the years. Id. An annual levy suffices. Id. Neither is the act invalid because it provides that bonds shall be kept up and met out of the regular park tax without specifying that enough of it must be applied for that purpose. Id. The constitutional provision being self-executing will be read in so far as this is concerned. Id.

33. See 4 C. L. 883, n. 40, et seq.

34. Acts 1899, c. 142, held valid. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609.

35, 36. Board of Park Com'rs v. Diamond Ice Co. [Iowa] 105 N. W. 203.

37. Power to prohibit taking of ice held not limited to a particular dam, though used in grammatical connection therewith. Board of Park Com'rs v. Diamond Ice Co. [Iowa] 105 N. W. 203.

missioner charged by statute to maintain the beauty and utility of a park may not lease the privilege of displaying signs on even a temporary fence about the park.[38]

Injuries in parks. Public parks.[39]—Park commissioners are city, not state, officers, when their duties are wholly for the benefit of the city[40] and the city is liable for their acts.[41] Parol proof is proper to show that a defective structure in a park was erected by public officers in the absence of any law requiring a record or an act in writing.[42] The mere fall of a stand erected by them does not import negligence.[43] A municipality is liable in damages for an assault committed by the custodian or care-taker of a public park, where the assault is committed by such employe while acting in the line of duty.[44] It is not of itself negligent to discharge fireworks, such as rockets, in a public park.[45] The question of negligence is one of fact.[46]

Privately owned parks open to public.[47]—Proprietors of publicly patronized bathing places must see to proper guards and warnings,[48] and make prompt efforts to rescue or relieve any who are missing or in danger.[49] Attendants should be provided wherever and whenever conditions of peril exist or are likely to exist.[50] A patron is not guilty of contributory negligence in going anywhere within the generally used area for bathing, no warnings being displayed.[51]

PARLIAMENTARY LAW.[52]

The ordinary rule that a majority constitutes a quorum applies where the fundamental law or statutes do not provide otherwise.[53] A majority of a quorum present has power to act[54] except where a majority of the entire membership is required by the fundamental law governing the assembly.[55] A regular meeting may adjourn to a definite future day, and at such adjourned meeting the body may transact any business which might have been transacted at the meeting from which the adjournment was had.[56] Members are not entitled to notice of the time of an adjourned meeting.[57] A meeting held on a special day to which a regular meeting is adjourned is part of the regular meeting for the purposes of a motion to reconsider.[58] As a general rule, in the absence of any special rule upon the subject of the particular legislative body acting, a vote upon a reconsideration need not be taken either at the same or the next succeeding meeting, but may be taken at any time before rights have intervened in pursuance of the vote taken, or before the status quo has been changed.[59] A motion that certain business be "continued on

38. Tompkins v. Pallas, 47 Misc. 309, 95 N. Y. S. 875. The rule is the same though the city received money for it. Id.

39. See 4 C. L. 885.

40, 41. City of Denver v. Spencer [Colo.] 82 P. 590. Fall of a stand. Id.

42, 43. City of Denver v. Spencer [Colo.] 82 P. 590.

44. Bloom v. Newark, 3 Ohio N. P. (N. S.) 480.

45, 46. Crowley v. Rochester Fireworks Co. [N. Y.] 76 N. E. 470. Held error to take question from jury under the evidence. Id. Compare 4 C. L. 886, n. 1-4.

47. See 4 C. L. 887.

48, 49. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. Evidence held to show negligence. Id.

50. Storms and wind in Great Salt Lake. Larkin v. Saltair Beach Co. [Utah] 83 P. 686.

51. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. Evidence held not to show negligence of deceased. Id.

52. See 4 C. L. 888.

53. Three of the four members of the board of police commissioners of city of Newark constitute a quorum who can transact business. McManus v. Newark Police Com'rs [N. J. Law] 62 A. 997.

54. Dougherty v. Excelsior Springs, 110 Mo. App. 623, 85 S. W. 112. Where a quorum is present the act of a majority of the quorum is the act of the body. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

55. Reed v. Woodcliff [N. J. Law] 60 A. 1128.

56. An adjourned meeting being a continuation of the stated meeting. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

57. They are presumed to have notice. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

58. Stiles v. Lambertville [N. J. Law] 62 A. 288.

59. Adkins v. Toledo, 6 Ohio C. C. (N. S.) 433.

the table" is to be construed as a motion to lay over and not as a motion to lay on the table.[50] Mandamus lies to compel the presiding officer to put a motion duly made.[51] Technical violation of rules of parliamentary procedure do not vitiate the action of the assembly.[52]

PAROL EVIDENCE, see latest topical index.

PARTIES.

Scope of title.—Only general principles are here treated. As to parties in particular actions, or as controlled by relationship, see appropriate title.[53]

§ 1. *Definition and classes.*[54]

§ 2. *Who may or must sue.*[55]—In the code states every action must be prosecuted in the name of the real party in interest.[56] One having no interest in the subject-matter cannot maintain an action,[57] and persons not parties to a contract or instrument sued upon need not be joined as parties plaintiff.[58] One who has no special beneficial interest in the performance of a contract to which he is not a party cannot maintain an action for damages for its breach.[59] Courts will not entertain a controversy concerning the title or right of possession of real or per-

50. Duniway v. Portland [Or.] 81 P. 945.

51. People v. Brush, 96 N. Y. 500.

52. City of Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

53. Appeal and Review, 5 C. L. 121; Assignments, 5 C. L. 279; Bankruptcy, 5 C. L. 367; Corporations, 5 C. L. 764; Death by Wrongful Act, 5 C. L. 945; Estates of Decedents, 5 C. L. 1183; Guardians ad Litem, and Next Friends, 5 C. L. 1601; Guardianship, 5 C. L. 1603; Husband and Wife, 5 C. L. 1731; Wills, 4 C. L. 1863. Compare also such titles as Equity, 5 C. L. 1144; Ejectment, 5 C. L. 1056; Mandamus, 4 C. L. 506; Quo Warranto, 4 C. L. 1177; Replevin, 4 C. L. 1284; Specific Performance, 4 C. L. 1494; Quieting Title, 4 C. L. 1167; and other similar titles.

54. See 4 C. L. 888. See, also, Fletcher, Eq. Pl. & Pr. ch. 3, "Parties in Equity."

55. See 4 C. L. 889.

56. Under Code Civ. Proc. § 367, widow of intestate may sue to recover land conveyed by intestate by fraudulent representations and undue influence of grantee. Page v. Garver, 146 Cal. 577, 80 P. 860. A. recovered judgment against B. & C. B. sued to enjoin enforcement of judgment and by amendment set up payments to A. under duress, C. alleging the same. C. had transferred his interest in the cause of action and B. assigned for creditors pending the suit. Held, B. was not real party in interest and could not maintain action, under Code Civ. Proc. § 449, nor could he continue it under § 756. Foster v. Central Nat. Bank, 93 N. Y. S. 603. One who is not the owner of a promissory note is not the real party in interest, and the presumption of ownership arising from the possession of the note endorsed in blank may be rebutted. Suit on the note must be by the real party in interest. Independent Coal Co. v. First Nat. Bank, 6 Ohio C. C. (N. S.) 225.

57. A shipper of goods, consigned to himself, who sells the goods while in transit to others, cannot maintain an action in conversion based on failure of the carrier to deliver part of the goods. Sweeney v. Frank Waterhouse & Co. [Wash.] 81 P. 1005. Where a premium put up by a local society was won by fraud, plaintiff corporation, of which local society was a member, could not sue for its recovery, the claim not having being assigned, after demand, by the local member to plaintiff, since the local member could thereafter sue therefor. American Trotting Ass'n v. Reynolds [Mich.] 12 Det. Leg. N. 410, 104 N. W. 578.

58. In an action on a contract for the purchase of hay to recover for a deficiency in the amount delivered, vendees of the plaintiff were not necessary parties. Reed v. McDonald [Cal. App.] 82 P. 639. Name of plaintiff's wife was inserted in a lease as one of the parties of the first part, but she did not execute the lease. An action thereon was properly brought by plaintiff alone, the pleadings showing no parties thereto except plaintiff and defendant. Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339.

59. Adjoining property owner could not sue for damages for breach of railroad company's contract with levee and drainage commissioners, damage being caused by overflow, where it did not appear that such owner's lands would be assessed for benefits or that he would be called on for a part

sonal property except at the instance of some person or persons having or claiming a right thereto derived from or recognized by the laws of a state or of the United States.[60] In most jurisdictions an assignee of a claim or chose in action may sue thereon in his own name; as the real party in interest;[61] but in some states only the original owner can sue thereon.[62] Public rights in action must be sued by the proper public functionary.[63] By virtue of statute in some states a trustee of an express trust may sue without joining the beneficiary.[64] These statutes do not apply where no trust relation in fact exists.[65] Where the parties interested are numerous, some statutes allow one or more to sue for the benefit of all.[66] In Illinois a beneficial plaintiff only cannot sue in his own name.[67] Thus, the holder of legal title of a chose in action is the only proper party plaintiff in an action thereon.[68]

In determining whether or not a state is the real party in interest in order to determine whether limitations is an available defense, reference will be had not only to the name in which the action is brought, but to the facts as they appear of record.[69]

Aliens may sue in the court of claims.[70] The common-law rule that a suit

of the contract price. Rodhouse v. Chicago & A. R. Co., 219 Ill. 596, 76 N. E. 836.

60. Bonacum v. Murphy [Neb.] 104 N. W. 180.

61. Where, in action on note, plaintiff holds title by legal transfer, he is the real party in interest and defendant cannot question the consideration or conditions of the transfer. Hunter v. Allen, 94 N. Y. S. 880. The assignee of a judgment for plaintiff in an action to recover possession of personal property is the real party in interest entitled to sue on the redelivery bond, which provides for a return of the property or payment of its adjudged value. Odell v. Petty [S. D.] 104 N. W. 249. One to whom a judgment against an administrator on a claim against a decedent's estate was assigned was the real party in interest and was required to bring the action for enforcement of the judgment in his own name, under Code Civ. Proc. §§ 444, 1909. Bamberger v. American Surety Co., 48 Misc. 221, 96 N. Y. S. 665. The transferees of the holders of school bonds which have been illegally issued stand in the shoes of the original holders and are the real parties in interest in a suit to recover out of the property bought with the proceeds of the bonds the amount paid by them for the bonds. Board of Trustees of Fordsville v. Postel [Ky.] 88 S. W. 1065. An agent guaranteeing an account for his employer and being compelled by agreement to pay the same weekly, becomes in law the assignee of such account and is entitled to sue in attachment in his own name. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257.

62. Original owners of a claim for money are proper parties plaintiff in an action at law thereon though the claim has been assigned. Peoria Scrap Iron Co. v. Cohen, 113 Ill. App. 30.

63. A suit for recovery of interest paid to a village treasurer on public deposits can be recovered only by a suit by an officer or officers authorized to care for or protect such funds. Nicholson v. Maile, 3 Ohio N. P. (N. S.) 201. Action on bond given by bank in which county funds are deposited as required by Mich. Local Acts 1879, p. 217, No. 393 may be brought in the name of the county treasurer. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

64. One in whose name a lease is made may maintain an action for unlawful detainer, as trustee of an express trust—Civ. Code, § 5—without joining the persons for whose benefit the lease was made. Houck v. Williams [Colo.] 81 P. 800.

65. A shipper of goods, consigned to himself, who has sold the goods while in transit, cannot sue for conversion for failure to deliver part of the goods, on the theory that he is trustee of an express trust. Sweeney v. Frank Waterhouse & Co. [Wash.] 81 P. 1005. Burns' Ann. St. 1901, § 252, by which a trustee of an express trust may maintain an action for the benefit of the beneficiary, does not authorize the county auditor to sue on the bond of a county ditch contractor on behalf of property owners concerned, where such contractor has refused to perform and the contract has been relet at a higher price, and the increased cost has been assessed against the lands liable; an action on an official bond must be in the name of the state under § 253. State v. Karr [Ind. App.] 76 N. E. 780.

66. Under Sand. & H. Dig. Laws Ark. § 5632, providing that where the question is of common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all, trustees of a church may sue for injury to the church property by the removal of coal beneath the surface of the land, without joining the members of the congregation. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769.

67. Gilray v. Metropolitan Nat. Bank, 113 Ill. App. 485.

68. Illinois Steel Co. v. Preble Mach. Works Co., 116 Ill. App. 268.

69. Eastern State Hospital v. Groves' Committee [Va.] 52 S. E. 837.

70. Under Rev. St. § 1068. Right extends to aliens residing in colonies of foreign gov-

begun in the name of a dead man is a nullity is applicable to cases in the court of claims under the Indian depredation act.[71]

An unnecessary party plaintiff may be dismissed from the action and the remaining proper party plaintiff allowed to prosecute alone.[72]

Joinder of parties plaintiff.[73]

§ 3. *Who may or must be sued.*[74]—Persons whose rights in the subject-matter will be affected by the decree, and only such,[75] are necessary parties.[76] Parties without whom a judgment cannot be rendered are indispensable;[77] persons without whom a judgment may be rendered but who have rights which would be adjudicated if they were made parties are proper but not indispensable parties.[78] All persons claiming a fund are necessary and proper parties to an action for its recovery and to litigate and determine its ownership.[79] Persons whose right to a

ernments and to corporate as well as natural persons. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225.

71. Gallegos v. Navajos, 39 Ct. Cl. 86.

72. Where father and mother began action for death of son and defendant objected to the admission of any evidence, it was not error for the court to grant leave to dismiss the wife from the case as party plaintiff and permit her husband to prosecute it alone. Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842.

73. See 4 C. L. 889.

74. See 4 C. L. 892.

75. Where, in an action by an indorsee of a note given for the purchase price of a machine, in which one who signed the contract of sale as surety for the buyer was not made a party, the defendant files a cross petition for damages for breach of warranty, the surety, who disclaims any interest in the machine or cause of action set up in the cross petition, is not a necessary party thereto. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. A railroad receiver assigned to a contractor a right to a subsidy from a town to aid in the construction of the road, and the contractor assigned to plaintiff. Held, the mere right of the contractor, who had no interest in the property, to redeem the subsidy did not make him a necessary party to an action to recover the subsidy, since the receiver had the right to redeem from the contractor. Paige v. Rochester, 137 F. 663. Where defendant corporation by fraudulent representations induced plaintiff to become a party to the underwriting of bonds pledged with defendant to secure a note, plaintiff could sue defendant alone for rescission of the underwriting agreement without joining the corporation issuing the bonds or another corporation which made a loan thereon, defendant having received proceeds of note. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. The joinder of a cause of action on a promissory note with one to compel the payment of debts by a principal to save his sureties is improper and open to demurrer, as is also the joinder as parties defendant to such an action of creditors of the principal who are strangers to the note and in no way connected therewith. Schick v. Ott, 7 Ohio C. C. (N. S.) 325.

76. A person may be a necessary party to litigation though he will not be bound by the result. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. Plaintiff in suit to abate a dam was tenant by curtesy of land concerned, title being in his children. Held, children were necessary parties. Id. A vendor assigned his contract of sale of realty and the assignee recovered judgment against the vendee on the contract. In an action by the vendee to recover rents and profits of the land pending the litigation, the assignee having been in possession, a person for whom the assignee was acting, who had paid for the contract, and received the rents and profits, was properly made a party defendant. Ferguson v. Epperly, 127 Iowa, 214, 103 N. W. 94. Where an educational corporation transferred its property, franchise and good will to a charitable corporation in consideration of the payment of certain debts by the latter and the transfer by it of such property to another educational corporation, and the agreement was performed, the first grantee was a necessary party to an action by the original owner to recover the property. State v. U. S. Grant University [Tenn.] 90 S. W. 294.

77. A corporation is a necessary party defendant in an action by stockholders for an accounting by the president of the corporation, since a judgment against defendant must be in favor of the corporation and a judgment cannot be rendered for one not a party. Peck v. Peck, 33 Colo. 421, 80 P. 1063.

78. In an action by a mother to set aside a deed to her son for failure to perform his agreement to support her, the son's wife is a proper but not a necessary party, since the wife's inchoate right of dower or homestead would not be affected by the decree, and she would have no right to possession of the homestead apart from the right of her husband. Mash v. Bloom [Wis.] 105 N. W. 831. Where a dower right accrues subsequent to the entry of a decree concerning certain realty, the decree will not be reversed on appeal because the owner of such right was not a party, since her right was contingent and she was not an indispensable party. She will not, however, be bound by the decree. Landram v. Jordan, 25 App. D. C. 291. In a suit to cancel notes and a mortgage and to impose liens on certain land, a purchaser pendente lite, with notice of plaintiffs' rights, is properly made a party defendant by an amended complaint. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436.

79. Conservative Sav. & Loan Ass'n v. Omaha [Neb.] 103 N. W. 286. A minor recovered a judgment against a city for per-

certain fund has been settled by a personal judgment against them are neither necessary nor proper parties to a contest between others for the fund.[80] Where the purpose of a judicial proceeding is to expose real estate to public sale, the better practice is to make all persons who have any interest, contingent or otherwise, in the property sought to be sold, parties to the proceeding.[81] In some cases a trustee, in an action against him concerning the trust property, is regarded as being in court for and in behalf of the beneficiaries, and the latter are not necessary parties.[82]

In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants, so that a complete decree may be made, binding upon all parties.[83] Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests in order to a conclusion of the whole matter in one suit.[84] In a proceeding to obtain an account of a partnership all the partners are necessary parties.[85]

sonal injuries, which her guardian assigned to plaintiff. Later the guardian was removed and a second appointed. Held in an action by plaintiff against the city to quiet title to the judgment, the second guardian, who claimed the assignment to plaintiff was void, was a necessary party, but the surety of the first guardian was not. Id.

80. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Two children of a legatee were parties to an action for construction of a will, wherein a judgment determined that a certain fund should go to the issue of such legatee at her death. In a subsequent action involving the same fund between the same parties, representatives of the two children, who had died, were not necessary parties. Jewett v. Schmidt, 108 App. Div. 322, 95 N. Y. S. 631.

81. Roden v. Helm [Mo.] 90 S. W. 798.

82. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542. In a mandamus proceeding by holders of original bonds issued by a city to compel payment of interest out of taxes levied and collected to pay interest on and provide a sinking fund for refunding bonds and to make provision for the payment of such original bonds, the holders of refunding bonds issued to take up the original bonds were not necessary parties, since the city was a constructive trustee of the holders of such refunding bonds. Id.

83. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. All persons who are legally or equitably interested in the subject matter of the suit are necessary parties to a chancery proceeding, but the interest must be a present substantial interest as distinguished from a mere expectancy or future contingent interest. Pinkney v. Weaver, 115 Ill. App. 582. The court cannot properly adjudicate matters involved in a suit if it appears that necessary and indispensable parties are not before the court. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. Indispensable parties to proceedings in equity are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. Landram v. Jordan, 25 App. D. C. 291. In a proceeding in equity to remove a cloud from the title and have a conveyance canceled as fraudulent, the parties executing the conveyance, against whom fraud is alleged, are necessary and indispensable parties, especially if the conveyance contains covenants of general warranty. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. One who has such an interest in land as to render it necessary or desirable that such interest be adjudicated is a necessary party to a bill to remove a cloud and reform a deed. Getzelman v. Blazier, 112 Ill. App. 648. In a suit to enjoin a county contractor from entering upon property condemned by the county to construct a public work, the county is a real party in interest entitled to come in and defend the suit. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501. In a creditors' suit in aid of execution, all persons who assert any claim in the subject matter, whether prior or subsequent, are necessary parties, because the order of the respective liens is involved in the litigation and should be determined in the final decree. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199. One partner, without his copartner's consent, advanced to a bank part of the firm's proceeds to pay his individual debts, the bank having knowledge of the facts. Held, in a suit by one partner for an accounting, the bank was a proper party, being the equitable assignee of the partner making the advancements. Jefferson County Sav. Bank v. Jeffers [Ala.] 39 So. 228.

84. Oyster v. Iola Min. Co. [N. C.] 52 S. E. 198. Thus where it was alleged that a manager of a corporation with the consent of the corporation converted it and its assets to his own use and used the same in a reckless manner with the purpose of defeating plaintiff's and creditors' rights, the corporation and manager were properly joined, since the transactions were so connected and interwoven that justice could only in such manner be done plaintiff, who prayed for a

Joinder of parties defendant.[88]—Joint tort feasors may be sued jointly[87] or severally, at plaintiff's election.[88] Hence, in a joint action, plaintiff may dismiss as to one and proceed against the other.[89] Where judgment is rendered against both, and is set aside as to one, the judgment against the other is not impaired; but the action should be dismissed as to the defendant judgment against whom has been set aside.[90] Agents of a corporation, for whose negligence the corporation is liable, may be sued jointly with it.[91]

The joinder of two or more defendants in a suit at common law, based upon contract, express or implied, can only be upheld upon the theory of joint liability.[92]

§ 4. *Designating and describing parties.*[93]—The name of a party to a suit must be the name of the person intended to be designated.[94] An action cannot be maintained in a name as plaintiff which is neither that of a natural person, a partnership, nor of such artificial person as is recognized by the law as capable of suing.[95] A proceeding commenced in such a name, there being no plaintiff, is not an action, but a mere nullity, and may be dismissed at any time on motion.[96] Where a partnership cannot sue in the firm name, the plaintiffs must be properly described as individuals.[97] Where the name of the plaintiff or of the defendant is stated in such words as to imply a corporation, the party plaintiff or defendant will be presumed to be a corporation until the fact is put in issue by a denial.[98] Where the

receiver and an injunction to protect his interest and secure payment of his judgment. Id.

85. Where surviving partner sued for contribution from representatives of a deceased partner, an allegation that other partners had no individual estate was not sufficient to justify nonjoinder of such other partners. Bruns v. Heise [Md.] 60 A. 604.

86. See 4 C. L. 893.

87. To maintain such suit community of fault must be made to appear. Sturzebecker v. Inland Traction Co., 211 Pa. 156, 60 A. 583. Where an injury is the result of neglect to perform a common duty resting upon two or more persons, though there may be no concert of action between them the party injured may sue the persons owing him a duty which was neglected jointly if he so elects. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229. In an action for wrongful death authorized by Rev. Laws, c. 171, § 2, joint tort feasors may be sued jointly though there can be but one satisfaction of any judgment obtained. Onlighan v. Butler [Mass.] 75 N. E. 726. An action for personal injuries may be maintained against two independent corporations though the relation of master and servant exists between plaintiff and only one of such defendants. Illinois Cent. R. Co. v. Harris, 85 Miss. 15, 38 So. 225. Joint tort feasors are jointly and severally liable. Weathers v. Kansas City Southern R. Co., 111 Mo. App. 315, 86 S. W. 908.

88. Where a complaint against three defendants is amended so as to dismiss as to one, the remaining two defendants have no cause of complaint, since plaintiff may sue separately if he so elects. Olwell v. Skobis [Wis.] 105 N. W. 777.

89. Weathers v. Kansas City Southern R. Co., 111 Mo. App. 315, 86 S. W. 908. Where, in a joint action, the evidence fails to show community of fault, plaintiff may amend and proceed against the single defendant shown by the evidence to be liable. Where evidence failed to show concert of action but plaintiff refused to amend, a nonsuit was proper. Sturzebecker v. Inland Traction Co., 211 Pa. 156, 60 A. 583. Where an action is brought against a landlord and a constable for wrongful distress, and it appears that plaintiff is seeking judgment against the constable only, the appellate court may permit the name of the landlord to be stricken. Oliver v. Wheeler, 26 Pa. Super. Ct. 5.

90. Weathers v. Kansas City Southern R. Co., 111 Mo. App. 315, 86 S. W. 908.

91. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898.

92. Boogher v. Roach, 25 App. D. C. 324.

93. See 4 C. L. 893.

94. Woman who performed services while single and was thereafter married could not sue for compensation in her maiden name, when she was known to her friends by her married name. Parks v. Tolman, 113 Mo. App. 14, 87 S. W. 576.

95. Western & A. R. Co. v. Dalton Marble Works [Ga.] 50 S. E. 978.

96. Where the "Dalton Marble Works" commenced an action as plaintiff it was error for the justice to allow the words "H. P. Calvard, Proprietor" to be added to the title of the plaintiff, and then allow the action to proceed. The title and amendment did not name a person, natural or artificial, nor a partnership capable of suing, and the action should have been dismissed. Western & A. R. Co. v. Dalton Marble Works [Ga.] 50 S. E. 978.

97. Summons and complaint describing plaintiffs as "A. S. Thornton, W. D. Nesbitt, and W. D. Carr, partners as Thornton, Nesbitt & Co.," the suit was by persons named as individuals, the words "partners, etc.," being merely descriptio personarum. Thornton, Nesbitt & Co. v. First Nat. Bank [Ala.] 40 So. 78.

98. Where defendants were sued as the "Huntington Light & Fuel Co.," and the "Ohio Oil Co.," the absence of an allegation that they were corporations was immaterial,

summons and title of a complaint describe defendant as an individual only and the cause of action stated is against him as a trustee under the will of a decedent, the complaint is demurrable for defect of parties, and for failure to state a cause of action.[99]

§ 5. *Additional and substituted parties.*[1]—In suits in equity,[2] and in other proceedings, by virtue of code provisions in many states, where it appears that the presence of persons not before the court is necessary for a complete determination of the controversy, they should be brought in.[3] The court need not wait for an objection that necessary parties are not before the court but may of its own motion require them to be brought in,[4] and may entertain a motion in regard to the matter at any time while jurisdiction to hear the case remains.[5] Failure of the court to cause necessary parties to be brought in is error which is not waived by failure of the parties to raise the objection.[6] Statutory provisions requiring other persons to be brought in when a complete determination of the controversy cannot be had without them relate only to persons not parties whose rights must be ascertained and settled before the rights of parties to the suit can be determined.[7] Under such statutes a plaintiff who seeks only a money judgment cannot be compelled to bring in other parties defendant and thereby change the character of his action, as well as the kind of testimony required.[8] Additional parties cannot be brought

where the objection was first raised on appeal. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906.

99. Leonard v. Pierce, 182 N. Y. 431, 75 N. E. 313.

1. See 4 C. L. 893.

2. Right to bring in necessary additional parties in suit in equity is undoubted. Sullivan v. Chicago Board of Trade, 111 Ill. App. 492.

3. The court may at any time, before or after judgment, direct other persons to be made parties to the end that substantial justice be done. Walker v. Miller [N. C.] 52 S. E. 125. A court should not proceed in the absence of persons whose interests are liable to be prejudiced by a judgment rendered in the action. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. Under Code Civ. Proc. § 389, where it appears that the presence of persons other than those named in the complaint is necessary for a complete determination of the controversy, they may be brought in. DeLeonis v. Hammel [Cal. App.] 82 P. 349. Where in suit to restrain payment of a judgment, the answer alleged that the claim sued on had been assigned before judgment to third persons, it was proper to allow the complaint to be amended so as to bring in the assignees and settle the entire controversy. Murphy & Co. v. American Soda Fountain Co. [Miss.] 39 So. 100.

4. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. When it appears that a necessary party is not joined, it is the court's duty to order that he be brought in though no objection is raised by defendant. Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990.

5. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. Under Code Civ. Proc. § 389, requiring court to bring in parties without whom a complete determination of the controversy cannot be had, the court should entertain on the merits a motion to vacate an order sustaining demurrers by certain defendants and to bring such defendants in, where no final order or judgment has been made, even though the movant shows no mistake or inadvertence, and has failed to amend. De La Beckwith v. Superior Ct. of Colusa County, 146 Cal. 496, 80 P. 717.

6. Rev. St. 1898, § 2654, relative to waiver of defects in pleadings, does not apply to a defect of necessary parties. The court should bring such parties in under § 2610. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244.

7. Bankers' Nat. Bank v. Security Trust Co. [S. D.] 103 N. W. 654. Code Civ. Proc. § 452 refers to interested persons who were not made parties at the time the action was brought and who ask to intervene. Callanan v. Keeseville, etc., R. Co., 94 N. Y. S. 513. Code Civ. Proc. § 452, requiring the court to have necessary parties brought in, or to permit them to intervene on application, does not apply where the estate of a person who was made a party seeks to intervene in his place. § 756 controls in such case, and the case may proceed with the parties still living unless the court directs others to be brought in. Id. Where an owner of realty sues for injunction and damages for interference with his easement of light, air, and access, and thereafter sells a part of the property reserving only the right to past damages, a motion to bring in the grantee as additional party plaintiff is properly denied. Welde v. New York & H. R. Co. 108 App. Div. 286, 95 N. Y. S. 728. In a suit to restrain a city from polluting a stream, a cross bill by the city setting up that certain water companies had diverted water from the stream and built a dam in it causing it to become sluggish and preventing passage of the sewage, was multifarious and not germane to the original bill; hence the water companies could not thus be made parties to the suit. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

in after suit is commenced unless they could be sued on the same cause of action in the same county, independently of the pending suit.[9] An amendment that works an entire change of parties should not be allowed.[10]

An objection to an order bringing in an additional party will not be sustained in the absence of prejudice to the party objecting.[11] Such an order is usually discretionary in North Carolina.[12] The order must be made to appear in the record, or it is ineffective.[13]

The Missouri statute providing that where a cause of action against a city arises from the wrongful or negligent act of a person or corporation, also liable to plaintiff and subject to service in the state, the city may cause such person or corporation to be joined, does not apply to an action to recover damages to private property caused by a public improvement, negligence of the contractor not being alleged.[14]

Intervention.[15]—In many states the right of intervention is governed by statute, and in these states mere interest in the matter in litigation warrants intervention in actions at law. Such interest must, however, be direct and immediate and such that the intervener will either gain or lose by the direct legal operation and effect of the judgment.[16] Where there are no such statutes, the right of intervention is controlled by the general rules of equity.[17] Thus, parties having an interest in the subject-matter of a suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may intervene as parties complainant or defendant to the end that their interests may be adjudicated and protected.[18] But if a suit in equity is brought by complainant for himself and all others similarly situated, a person whose claim is similar to complainant's will not be

8. Where indorsee of note sues maker, who defends on ground that there was no consideration for the note and that the transfer to plaintiff was colorable mercly and without consideration, the maker cannot by a cross complaint seeking an accounting and other equitable relief against the payee, make him a party to the action. Bankers' Nat. Bank v. Security Trust Co. [S. D.] 103 N. W. 654. In an action for a money judgment only plaintiff cannot be compelled to bring in as defendant a third person who applies to the court for permission to intervene. Long v. Burke, 94 N. Y. S. 277.

9. Rev. St. 1895, § 1208 does not affect the question of venue. St. Louis S. W. R. Co. v. McKnight [Tex.] 13 Tex. Ct. Rep. 1003, 89 S W. 755.

10. Where plaintiff has amended once by adding a new defendant, he cannot make another amendment striking out the original defendant. Rarden Mercantile Co. v. Whiteside [Ala.] 39 So. 576.

11. Permitting an additional party defendant to be joined was not error where the party added did not object and the other defendants who objected showed no prejudice. Jordan v. Greig, 33 Colo. 360, 80 P. 1045.

12. Not ordinarily reviewable, under Code, § 273. Bernard v. Shemwell [N. C.] 52 S. E. 64.

13. A mere verbal order of the court at the close of the plaintiff's case that a certain person should be made party defendant, the pleadings not being amended, no appearance entered on the record, and no issue joined as to the new party, does not make him a party. Lehrer v. Walcoff, 93 N. Y. S. 540.

14. Sess. Acts 1901, p. 78 held not applicable in action under Mo. Const. art. 2, § 21 to recover damages for settling of foundations of house caused by constructing sewer too close to it, there being no allegation of negligence on the part of the city or contractor. Hence motion by city to join contractor denied. Johnson v. St. Louis, 137 F. 439.

15. See 4 C. L. 893.

16. See authorities and discussion of rules in states having statutes on the subject in Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502.

17. Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502.

18. Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502. In a suit to foreclose a trust deed on the plant of a heating and lighting corporation, given to secure bonds, persons who hold contracts for heat and light cannot intervene, even though the receiver refuses to perform their contracts, and though fraud and collusion are alleged, the object of which is to cancel such contracts and raise the price. Id. A lease provided that it should terminate if the lessee transferred his interest without the lessor's consent, and the lessor commenced a forcible entry and detainer action based on the giving of a deed of trust by the lessee of his interest. Thereafter the beneficiary in the trust deed commenced a foreclosure suit and the property was placed in the hands of a receiver, so that the lessor's forcible entry and detainer action could not be successful. Held, the lessor was properly allowed to intervene in the foreclosure proceeding to ask for a cancellation of the trust deed. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870. A claimant should upon his or her motion be admitted as a party

allowed to intervene by separate counsel where it is not proposed to dispose of the case on the final hearing otherwise than in the usual way.[19] An intervener takes the case as he finds it and cannot be heard to make objections to the pleadings or process which the defendant vouching him into court did not urge.[20] In an action involving the title to property, an interpleader is restricted to the issue as to his title or claim to the property.[21] He does not, strictly speaking, become a party to the action in the same sense and with the same status as the original parties or those made parties pending the action by the court of its own motion, or upon application.[22]

Substitution.[23]—Where the cause of action has not been transferred a substitution of parties is ordinarily effected by motion of the party desiring to be substituted.[24] The application for substitution raises the issue as to whether there has been a change of ownership of the cause of action, and unless this is admitted, it must be established by competent evidence before the order of substitution will be entered.[25] But where the transfer of interest is admitted or is not disputed in the hearing on the motion, the ruling thereon is an adjudication of the question.[26] A supplemental pleading is not, in such case, necessary.[27] The right to a substitution of parties may be barred by laches.[28] A substituted party takes up the prosecution or defense at the point where the original party left it, assuming the burdens as well as receiving the benefits.[29] An order substituting a new party plaintiff is not, in New York, reviewable on an appeal from a final judgment.[30]

§ 6. *Objections to capacity and defects of parties.*[31]—*The right of a plaintiff to maintain the action*[32] is properly raised by a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.[33] An objection to the right of plaintiff to sue is waived if not raised by demurrer or answer.[34]

Nonjoinder.[35]—When the defect of parties appears upon the face of the complaint, the proper remedy is by demurrer.[36] If the defect does not appear upon

to a bill to remove a cloud and reform a deed where it appears that he or she is a necessary party thereto. Getzelman v. Blazier, 112 Ill. App. 648.

19. If a course different from the usual one be adopted, such person will be notified and allowed to intervene if necessary to protect his interests. Bowker v. Haight & Freese Co., 140 F. 794.

20. Charleston & W. C. R. Co. v. Pope [Ga.] 50 S. E. 374.

21. He cannot raise or litigate questions or rights which do not affect such title. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

22. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

23. See 4 C. L. 895.

24. As where trustee in bankruptcy was substituted as party plaintiff in suit brought by creditors to set aside fraudulent transfers by debtor. Crary v. Kurtz [Iowa] 105 N. W. 590.

25. Crary v. Kurtz [Iowa] 105 N. W. 590.

26. Where trustee in bankruptcy moved to be substituted as plaintiff in action to set aside fraudulent conveyances, the order granting the motion was held a determination of the fact that the defendant had been declared a bankrupt, and the movant had been made the trustee. Crary v. Kurtz [Iowa] 105 N. W. 590.

27. Crary v. Kurtz [Iowa] 105 N. W. 590.

28. Where the attorney of the owner of a note knew for several years that the person suing on the note was not the owner, it was not an abuse of discretion to refuse to allow the owner to be substituted for the plaintiff in such suit. Switzer v. Eadie [Kan.] 80 P. 961.

29. Crary v. Kurtz [Iowa] 105 N. W. 590.

30. Code Civ. Proc. § 1316 does not apply; defects in papers upon which substitution was granted are waived by failure to appeal from order of substitution. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. S. 140.

31, 32. See 4 C. L. 896.

33. Collins Coal Co. v. Hadley [Ind. App.] 75 N. E. 832; State v. Karr [Ind. App.] 76 N. E. 780.

34. Objection that plaintiff is not real party in interest must be raised by demurrer or answer or it is waived. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. The objection that an action on a tax bill is brought in the name of a city instead of in the name of the city for the benefit of the holder, is waived when not raised by demurrer or answer as required by Rev. St. 1899, § 598. City of Bevier v. Watson, 113 Mo. App. 506, 87 S. W. 612.

35. See 4 C. L. 896.

36. Code Civ. Proc. 1902, § 165. Dellenev v. Winnsboro Granite Co. [S. C.] 51 S. E.

the face of the complaint the objection may be taken by answer[37] or verified plea in abatement,[38] but is not raised by a demurrer.[39] If the objection is not taken by demurrer, answer or plea in abatement, it is waived.[40] But this rule does not apply to an indispensable party without whom the court cannot properly proceed to a decree or judgment.[41] Thus, though the question of parties was not raised in the court below by demurrer, plea, or answer, and is not suggested in the appellate court, if it plainly appears from the record that there is a lack of necessary and indispensable parties, the appellate court will notice the fact of its own motion, and reverse and remand the cause, with leave to add such parties.[42]

Misjoinder.[43]—The method of objecting to a misjoinder of parties depends upon the form and nature of the action and upon the statute.[44] The objection is waived if not raised until after verdict.[45]

Misnomer.—Where, in a civil case, the party proceeded against is designated and described by a wrong name, the objection of misnomer should be taken by a plea in abatement and not by a motion to dismiss.[46] The objection is waived by a plea to the merits.[47]

Amendments, striking the names of parties joined by mistake,[48] or changing the name by which parties are sued,[49] or striking out the name of an unnecessary,

531. Code Civ. Proc. § 488. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

37. Code Civ. Proc. 1902, § 165. Delleney v. Winnsboro Granite Co. [S. C.] 51 S. E. 531. Code Civ. Proc. § 498. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

38. A defect in parties not apparent on the face of the complaint must be set up by a verified plea in abatement filed and tried before answers in bar are pleaded. Burns' Ann. St. 1901, § 368. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

39. The question of a defect of parties plaintiff or defendant, in an action to enforce the liability of a stockholder of an insolvent bank, is not raised by demurrer when the complaint does not affirmatively show that there are other creditors or other solvent stockholders who have not paid the amount due from them. Union Nat. Bank v. Halley [S. D.] 104 N. W. 213.

40. Defect of parties should be reached by special demurrer. Gragg v. Home Ins. Co. [Ky.] 90 S. W. 1045. Objection waived if not taken by demurrer or answer. Delleney v. Winnsboro Granite Co. [S. C.] 51 S. E. 531; Peck v. Peck, 33 Colo. 421, 80 P. 1063. Code Civ. Proc. § 499. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Kirby's Dig. § 6093. Less v. English [Ark.] 87 S. W. 447. In an action for injuries as caused by the bite of a dog owned by a partnership, only one partner was sued, but the defect of parties was not raised by demurrer or answer. Held, defect was waived. 2 Ball. Ann. Codes & St. § 4911. Grissom v. Hofius [Wash.] 80 P. 1002. Defect of parties is waived if not set up by verified answer. Rev. St. 1895, § 1265. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 90 S. W. 343. The objection of nonjoinder of a necessary party plaintiff in a tort action is waived if not raised by plea in abatement under Rev. St. 1895, § 1265. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Complaint cannot be dismissed for defect of parties when defect is not pleaded in abatement. Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990. Where a complaint alleged that all persons having any interest in a certain fund in issue were made parties, and the defendant admitted such allegation, and set up no defense of a defect of parties, defendant could not claim that certain parties should have been joined. Jewett v. Schmidt, 108 App. Div. 322, 95 N. Y. S. 631. The nonjoinder of a party defendant is matter of abatement and cannot be taken advantage of under the general issue. Where one of the persons made defendants was not served, the defect was waived by other defendant who pleaded to the merits, the defect being shown by the record. Armour & Co. v. Ward & Co. [Vt.] 61 A. 765.

41. Peck v. Peck, 33 Colo. 421, 80 P. 1063.

42. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

43. See 4 C. L. 897.

44. Misjoinder of parties can only be raised by motion as provided in Code, §§ 3545-3549. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349. The objection that there is a misjoinder of parties plaintiff cannot be raised by demurrer. Lancaster County v. State [Neb.] 104 N. W. 187.

45. Where in an action by three employes for damages for breach of contract by their employer, no objection to the form of action was raised until after verdict, the misjoinder of causes of action and parties was waived. Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341.

46. McIntosh County Com'rs v. Aiken Canning Co. [Ga.] 51 S. E. 585.

47. Where defendant, whether a corporation or natural person, appears and pleads to the merits by the true name, without raising the objection of misnomer, the error as to the name of such party is waived. McIntosh County Com'rs v. Aiken Canning Co. [Ga.] 51 S. E. 585.

48. Names of defendants joined by mistake may be stricken. Kidney v. Beemer, 27 Pa. Super. Ct. 558.

49. Defendant, sued as a corporation, filed a plea in abatement alleging it was not in-

uninterested party and substituting the name of the real party in interest,[50] are freely allowed.

PARTITION.

§ 1. *Nature, right, and propriety.*[51]—Partition operates upon the possession and not upon the title, and serves only to sever the unity of possession before existing.[52] The remedy is equitable in its nature though generally provided for by statute.[53]

The right, and parties entitled.[54]—Only joint tenants or tenants in common[55] who have a legal estate in the land[56] are entitled to a partition. A decree for specific performance of a contract transforms an equitable into a legal estate if defendants refuse to comply with the decree,[57] and the complainants may maintain a bill for partition, though an appeal is pending from the decree for specific performance.[58] Possession or right to possession is essential,[59] and persons who have neither

corporated, and that the company sued was a co-partnership. Held, it was error to refuse to allow plaintiff to amend, under Civ. Code Prac. § 134, by making the proper persons defendants. Teets v. Snider Heading Mfg. Co., 27 Ky. L. R. 1061, 87 S. W. 803. To permit plaintiff to amend by striking out the word "Window" from the name "Wilkinson Co-operative Window Glass Co." was a proper exercise of the court's discretion under Burns' Ann. St. 1901, § 397, permitting amendments by leave of court. Wilkinson Co-op. Glass Co. v. Dickinson [Ind. App.] 73 N. E. 957. A court may permit the summons and complaint against defendants "as executors" to be amended so as to be against defendants individually, even though limitations have run against them individually. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723. In an action against defendants "as executors" the case was never put upon the calendar, and was not moved by either party. Held, a motion to amend by making the action one against defendants individually, would not be denied on the ground of laches, though a year and a half had passed since the filing of defendants' answer. Id. See Pleading, 4 C. L. 980, for full treatment of amendments.

50. Action brought by "A." as "city solicitor, and as a taxpayer on behalf of the city of Elyria" amended by striking out all but "city of Elyria." Held proper. Lake Shore & M. S. R. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738.

51. See 4 C. L. 898.

52. Kennedy v. Rainey [Ala.] 39 So. 813. Partition among devisees does not confer title but only designates boundaries in severalty to those holding title under the devise. Sharp v. Stewart, 185 Mo. 518, 84 S. W. 963. Partition creates no new right or title, but vests in each party with respect to the portion allotted to him the right and title previously owned in common with respect to the whole. Owens v. Naughton, 23 Pa. Super. Ct. 639.

53. Suit for partition is in equity and properly on special term calendar in New York. Adams v. Bristol, 108 App. Div. 303, 95 N. Y. S. 628.

54. See 4 C. L. 898.

55. A bill for partition alleging that plaintiff owned the land and conveyed to defendant the right to remove three-fourths of the underlying coal, and that a portion of the coal had been mined by defendant, held insufficient, since it did not show a tenancy in common of the coal, nor how much had been removed, and since partition could not be had of the coal which had been severed from the realty. Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849. A trust provided that on the death of one of the beneficiaries his share should be transferred to his lineal descendants. Held, where such a transfer was made the grantees became tenants in common with the trustees and either could have partition. Paine v. Sackett [R. I.] 61 A. 753.

56. Under Hurd's Rev. St. 1903, c. 106, authorizing partition by joint tenants or tenants in common, a beneficiary under a trust in land, with no legal estate therein, cannot maintain a bill for partition. Mason v. Mason, 219 Ill. 609, 76 N. E. 692.

57. P. L. 1902, p. 525, § 45. White v. Smith [N. J. Eq.] 60 A. 399.

58. White v. Smith [N. J. Eq.] 60 A. 399.

59. A person claiming to own land as ten-

the right to possession nor the power of disposition cannot have partition.[60] Partition may be had at the suit of a life tenant which will be binding on the remaindermen.[61]

Statutory sale for partition.—Statutes giving courts power to order a sale where partition is impracticable introduce no new principle into the law of partition of estates in common.[62] Power to order a sale rests upon the same ground as power to order partition and is simply an alternative remedy where actual partition of the property is impracticable.[63] Thus, an alleged tenant in common who has been disseized cannot have a sale decreed.[64] Under the Kentucky statute property may be sold where there are vested estates jointly held, though one so holding is a life tenant and the remaindermen are infants.[65] A sale and division may also be had under this statute, though one of the owners is an infant whose undivided interest is subject to a dower right.[66] An incompetent's vested estate may also be sold, under this statute.[67]

What may be partitioned.[68]—Where the law permits neither the husband nor wife to dispose by sale or conveyance of a homestead right without the express consent of the other, neither can accomplish this result indirectly by a sale on partition.[69] The property of minors may be sold for partition.[70]

Partition of estates of decedents.—Ordinarily partition of a decedent's estate cannot be had until the estate has been settled,[71] in the absence of special circumstances.[72] In Illinois partition may be made, or, if the premises are not divisible, a decree of sale may be entered prior to the expiration of the period for proving claims against an estate.[73] But if the administrator answers in the partition suit that the personalty is insufficient to pay debts, and no proof is taken thereon, and

ant in common with others, and who has been actually ousted, must establish a unity of possession before he can ask for partition. Harrison v. International Silver Co. [Conn.] 62 A. 342.

Contra: It is not necessary to partition of real estate that the party seeking such relief be in possession of the lands. Shetterly v. Axt [Ind. App.] 76 N. E. 901.

60. Where will created an active trust making occupancy of the land by beneficiaries, and disposition of the land, discretionary with the trustee, the beneficiaries having no power of disposition, they were not entitled to partition. Owens v. Naughton, 23 Pa. Super. Ct. 639.

61. Owner of half interest and life estate in remaining half may have sale for partition, and interests of remaindermen may be represented and bound by decree. Fitts v. Craddock [Ala.] 39 So. 506. See, also, cases cited in 4 C. L. 898, n. 52, and note, Partition of Contingent Interests.

62, 63. Harrison v. International Silver Co. [Conn.] 62 A. 342.

64. Construing Connecticut statutes giving courts power of sale. Harrison v. International Silver Co. [Conn.] 62 A. 342.

65. Construing Code Civ. Prac. § 490. Atherton v. Warren, 27 Ky. L. R. 632, 85 S. W. 1100.

66. Petition held to state cause of action for sale and division under Civ. Code § 490, where it alleged situation, quantity, and value of land, that a fee simple title in possession was jointly owned by the parties, subject to an unassigned dower interest in an infant's undivided half, that a division in kind would impair the value, and that owner of dower right was willing to accept cash. Wormald's Guardian v. Heinze [Ky.] 90 S. W. 1064.

67. Under Civ. Code Proc. § 490, an incompetent's vested estate in real property may be sold under an order of a court of equity, if the estate be in possession and incapable of division without material impairment of its value. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808.

68. See 4 C. L. 900.

69. As part of settlement in divorce proceedings, husband deeded wife, through a third person, an undivided half interest in the homestead and the wife continued for a time to live with him on the premises. Held, after leaving him for alleged valid justification, she could not have the premises, still occupied by him as a homestead, sold in partition. Grace v. Grace [Minn.] 104 N. W. 969.

70. Private sale of minor's property recommended by family meeting and approved by court held valid. Succession of Sallier [La.] 38 So. 929.

71. Partition of realty devised to residuary devisees will not be decreed until the executor's account has been settled, in order that it may be first determined how much of the land is subject to the lien of legacies. Serena v. Moore [N. J. Eq.] 60 A. 953.

72. Want of administration of the estate of an heir who had been absent and unheard of for 16 years held not to bar partition, where no creditor had sought administration. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

a decree of sale entered, the court should, on the return of the report of the sale, take additional proof and make such order with reference to the distribution of the proceeds as will secure the satisfaction of claims.[74] In Wisconsin heirs have an estate in possession such as enables them to maintain a suit for partition, though the ancestor's estate has not been settled,[75] and such suit may be instituted pending administration of the estate.[76] In New York a suit by heirs for partition may continue during the pendency of proceedings in the surrogate's court for sale of realty to pay debts of the decedent,[77] since the statute provides for a deposit of the proceeds of the sale in partition until the estate is settled.[78] In Missouri a partition suit brought before expiration of the period within which a minor heir may contest the validity of a will of the property which has been admitted to probate is not premature, but a decree of distribution does not take effect until an estate is finally settled.[79] A precatory provision in a will postponing division of the estate makes premature a suit for partition brought before the expiration of the time specified by testator.[80] But jurisdiction attaches under a prayer for an accounting and other equitable relief, and having once attached is retained for all purposes, including partition.[81] Where a testator leaves property to be divided among his children by his widow as she may deem best, the children cannot maintain a bill for partition and accounting of rents and profits while the widow lives and while she has not exercised the power conferred on her by the will.[82] Where heirs petition for a sale and all the parties in interest are before the court, sale by the trustee appointed in the will may be ordered, the trustee having implied power to sell under the will.[83] A sale in partition rather than by an executor will be ordered when that course will save expense and prevent delay.[84] A legatee of a share of the proceeds of real estate directed by a testator to be sold has no standing to demand partition of the real estate.[85] Where, on the death of the ancestor, title to all his real estate passes to the heirs subject to dower rights of the widow, any of the interested parties who attempt to compel partition must include in the proceeding all the real estate which passed to the heirs and is held by them as tenants in common.[86] The fact that certain heirs made an agreement with the widow assigning to her use one-half the property is no reason for not including such property in the suit.[87]

§ 2. *Jurisdiction and venue.*[88]—Statutes conferring jurisdiction in partition upon courts of law do not take away the original jurisdiction of the chancery courts.[89] In matters jurisdiction of which is conferred by statute on the probate

73, 74. Watke v. Stine, 214 Ill. 563, 73 N. E. 793.

75. Under Rev. St. 1898, § 3101. Hinman v. Hinman [Wis.] 105 N. W. 788.

76. The statute provides for administration in the partition suit sufficient to meet all difficulties and to protect all rights. Hinman v. Hinman [Wis.] 105 N. W. 788.

77. Reubel v. Reubel, 47 Misc. 474, 95 N. Y. S. 966.

78. Code Civ. Proc. § 1538. Reubel v. Reubel, 47 Misc. 474, 95 N. Y. S. 966.

79. Rev. St. 1899, § 4384. Robertson v. Brown, 187 Mo. 452, 86 S. W. 187.

80, 81. Steinman v. Steinman, 5 Ohio C. C. (N. S.) 600.

82. Goodrich v. Goodrich, 219 Ill. 426, 76 N. E. 575.

83. Foil v. Newsome, 138 N. C. 115, 50 S. E. 597.

84. Where the mother of infant parties in interest derived her interest under the will of H., which gave the executor a power of sale, and to execute this power a construction of the mother's will would be necessary, a sale in partition rather than under the power would not be prejudicial to the infants, nor would it involve unnecessary expense. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

85. The realty having been equitably converted into personalty. In re Severns' Estate, 211 Pa. 65, 60 A. 492.

86. Bill for partition of half the real estate of a deceased ancestor held demurrable. Stickles v. Oviatt, 212 Pa. 219, 61 A. 908.

87. Stickles v. Oviatt, 212 Pa. 219, 61 A. 908.

88. See 4 C. L. 900. As to extent of jurisdiction once acquired to settle adverse claims, see post, § 4.

89. The remedy provided by statute is

court, both courts have concurrent jurisdiction.[90] The probate court has only such jurisdiction as is conferred by statute and, in Alabama, cannot decree partition where the lands are not susceptible of division into equal parts or parts of equal value,[91] and cannot adjust and equalize advancements among tenants in common when the lands descend from a common ancestor.[92] But a court of chancery having jurisdiction for any purpose may settle and adjust questions of advancements among the heirs.[93]

Service of process.—In Georgia, where no application for partition or other pleading has been filed in court, the trial judge has no jurisdiction in chambers to order service on a nonresident by publication,[94] though such service is proper when based on proper pleadings.[95]

Venue[96] is statutory.[97]

§ 3. *Procedure to obtain partition.*[98] *Limitations.*—The suit must be commenced within the period limited by law for the recovery of realty or the possession thereof.[99]

Parties.[1]—Persons interested in the property sought to be partitioned[2] whose interests will be affected by the relief prayed for,[3] and only such,[4] are necessary

cumulative only. Moore v. Willey [Ark.] 91 S. W. 184. Courts of equity had original jurisdiction to partition lands among joint owners or tenants in common, and this jurisdiction is not affected by statutes conferring jurisdiction in partition on probate court. Bozane v. Daniel [Ala.] 39 So. 774.

90. Bozane v. Daniel [Ala.] 39 So. 774.

91. As where parties own unequal interests. Bozane v. Daniel [Ala.] 39 So. 774.

92, 93. Bozane v. Daniel [Ala.] 39 So. 774.

94. One co-tenant merely gave notice to his co-tenant that he would apply for partition at the next term, and then applied to the judge in chambers to order a nonresident made a party. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

95. Civ. Code 1895, § 4788, providing for such service in partition, is not repealed by Civ. Code 1895, §§ 4976, 4979, et seq. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

Note: "A statute permitting summons to be served by publication upon unknown claimants of property applies to all actions in which service of publication may be made. Bergen v. Wyckoff, 84 N. Y. 659. It is, therefore, held proper to sue unknown defendants in a proceeding brought for the partition of land. Allen v. Allen, 11 How. Pr. [N. Y.] 277; Bergen v. Wycoff, 84 N. Y. 659; Guyer v. Raymond, 8 Misc. 606, 29 N. Y. S. 395; Kirkland v. Texas Express Co., 57 Miss. 316; Kane v. Rock River Canal Co., 15 Wis. 179. And also in an action of trespass to try title to an undivided interest in land and for a partition thereof. Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Bassett v. Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312. Such suits are proceedings in rem. Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80."—Note to McClymond v. Noble [Minn.] 87 Am. St. Rep. 366.

96. See 4 C. L. 900.

97. Under Kirby's Dig. § 6060, a suit for partition, after the administrator of the estate has been discharged, is properly brought where the land or a part of it is situated, since §§ 6063, 6064, providing that actions for settlement of estates or partition among heirs shall be brought where the representative qualified, do not apply. Cowling v. Nelson [Ark.] 88 S. W. 913.

98. See 4 C. L. 900.

99. Evidence insufficient to show possession by plaintiff or his predecessors within 10 years before commencement of suit as required by 2 Ball. Ann. Codes & St. § 4797. Hence partition suit was barred. Hyde v. Britton [Wash.] 83 P. 307.

1. See 4 C. L. 901.

2. In a suit by heirs to partition the realty of the ancestor, the widow, to whom some of the heirs have assigned a life interest in a part of the realty, is a necessary party. Stickles v. Oviatt, 212 Pa. 219, 61 A. 908. A will gave property to trustees for testator's widow for life, then to be held until his grandson reached the age of 25, and then to be equally divided between the grandson and a granddaughter, if alive, or to their issue by right of representation. In a suit for partition a daughter of the grandson, who had absconded, but would be 25 at time of suit if alive, was a necessary party. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. S. 611.

3. Where an intestate's estate was not a party to a partition suit involving land in which intestate's heirs were interested, the court had no jurisdiction in such suit to divide rents and profits in which the intestate had an interest, and such division would not bind the estate. Perkins v. Goddin, 111 Mo. App. 429, 85 S. W. 936.

4. Where in a suit for partition of a decedent's estate a trustee under his will was not made a party, the discharge of the trustee shortly after the commencement of the suit divested him of any interest he might have had and made it unnecessary to join him as a party. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. S. 611. Where a minor heir had no interest in a devise of the premises, the fact that he could, within a period which had not expired, contest the validity of the will, did not make him a necessary party to the partition suit under Rev. St. 1899, § 4375. Robertson v. Brown, 187 Mo. 452, 86 S. W. 187. Proceedings for parti-

parties. The statutory guardian of an infant defendant is the person required to file the answer,[5] and one who so styles herself need not exhibit evidence of the fact of guardianship when no issue is made thereon.[6] Where a defendant was made administrator of the estate pending partition proceedings, and no application is made to have him joined as a defendant in his capacity as administrator, he cannot complain of his not being made such.[7] In Louisiana a married woman, though a minor, can, when aided and assisted by her husband, sue for the partition of property in which she is interested, without being authorized so to do by the judge, on the advice of a family meeting.[8] The fact that a presumptive heir of the parties whose successions were being partitioned was not made a defendant in partition proceedings will not necessarily render them and sale thereunder void, where the absence of such person, together with attendant circumstances, warrant a presumption of his death.[9]

Pleading and evidence.[10]—The bill must describe the land, show the interests of the parties, and show such an interest in complainant as entitles him to partition.[11] Where a bill does not disclose that the parties are owners in common of other property not included in the bill, it is not demurrable on that ground,[12] nor will a demurrer lie on the ground that the court has acquired jurisdiction of the subject-matter in a previous suit, where the record of such suit shows that only a one-third interest of the lands were involved in that suit.[13] A plea in abatement is not a proper plea in a proceeding for partition.[14] A plea of adverse possession is insufficient if the elements of a title by adverse possession are not made to appear.[15] If the answer leaves no issue as to plaintiff's right to partition, or as to his ownership of an interest in the land, plaintiff is entitled to judgment on the pleadings,[16] unless defendants also ask for affirmative relief and plaintiff waives

tion do not affect a vendor's lien on the land, and a trustee having such a lien is not a necessary party. Moore v. Willey [Ark.] 91 S. W. 184.

5. Civ. Code Proc. § 36. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

6. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

7. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

8, 9. Tobin v. U. S. Safe Deposit & Sav. Bank [La.] 39 So. 33.

10. See 4 C. L. 901.

11. A petition which sets out the character of the title of the parties and shows on its face a vested estate in possession is sufficient, though it is not expressly stated that the property desired to be sold is a vested estate in possession. By Civ. Code Proc. § 490, only vested estates in possession can be sold. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. A complaint wherein plaintiffs claim a one-third interest as remaindermen under the will of a certain person and allege that one defendant is entitled to two-thirds of a certain tract, and another to two-thirds of another tract, and that defendants acquired title through mesne conveyances from those who held under the will of the person under whom plaintiffs claim, states but one cause of action. Woodward v. Santee River Cypress Lumber Co. [S. C.] 52 S. E. 733. A petition describing the land, making all the tenants in common parties, and showing the interest of each and which of them are infants, and alleging that the property cannot be equitably divided among the owners, gives the probate court jurisdiction to proceed and on proof of the allegations to decree a sale. Edwards v. Edwards [Ala.] 39 So. 82. Where bill sought partition between heirs and alleged that one had acquired a tax title by fraud, but the facts alleged did not show fraud, the bill for partition was insufficient since an equitable right superior to the tax title was necessary in order to maintain the suit. Woglom v. Kant [N. J. Eq.] 61 A. 9. Cross complaint alleging that cross complainant and defendants were owners as tenants in common of the realty described, and setting out their interests in the realty, held sufficient as an application for partition, under Burns' Ann. St. 1901, § 1201, though perhaps subject to a motion to make more specific. Shetterly v. Axt [Ind. App.] 76 N. E. 901.

12, 13. Love v. Robinson [Pa.] 62 A. 1065.

14. Monroe v. Millizen, 113 Ill. App. 157.

15. Plea by one claiming land by adverse possession held insufficient because not showing an ouster of the father of the petitioners and respondent, and not showing an exclusive possession by himself. Jordan v. Jordan [Ala.] 39 So. 992. Plea alleging that lands were sold for taxes, that respondent claimed same, and on paying a certain sum received a deed from the state auditor, held insufficient because not alleging how respondent became the owner, and not setting up such a possession as would be adverse to his co-tenants. Id.

16. Caldwell v. Drummond, 127 Iowa. 134. 102 N. W. 842.

the admission of the answer by proceeding to the trial of other issues raised.[17] Though a bill for partition has been dismissed as against a party asserting title by adverse possession, on the grounds of lack of jurisdiction, multifariousness, and laches, equitable relief against him being denied, such party is entitled to intervene in the suit which would cast a cloud upon his title.[18] Where a bill is filed for the partition of one piece of property belonging to the estate of one person, a cross bill to sell another piece of property belonging to the estate of another person to pay the latter's debts is not germane to the relief asked in the original bill.[19] The usual rules as to waiver of objections to the pleadings apply.[20]

Plaintiff must prove his title or interest by a preponderance of the evidence.[21] Complainant in a suit for partition is not a competent witness to prove the fact of her marriage to the person under whom she claims.[22] A defendant has a right to show that title to the land is in a third person not a party to the record.[23]

Mode and time of trial.—In New York, issues of fact in an action of partition are triable by a jury, whether defendant is an infant or adult,[24] and any party to the action has the right to insist upon a jury trial and to resist an application to refer.[25] A reference can be had only by consent of all parties to the issue, or in case of the default of all parties, including the practical default of an infant who submits his rights to the court.[26] Where a motion for a jury trial is denied, the denial of such motion is conclusive on a retrial of the suit, there being nothing in the motion or order denying it limiting their operation to one trial.[27] In Georgia an application by one co-tenant against another for partition of land by sale may be tried at the term to which application is made, if defendant has time, in the judgment of the court, to prepare and file his objections, otherwise it should be tried at the next term thereafter.[28]

§ 4. *Scope of relief in partition.*[29]—A suit for partition cannot be made a substitute for an action of ejectment.[30] Hence, where a legal title is asserted in bar

17. Where answer admitted that plaintiff's ancestors owned and occupied premises to time of their death, but claimed them under a contract whereby they were to receive the land as a consideration for the support of plaintiff's ancestors, and plaintiff proceeded to try that issue, the admission was waived. Caldwell v. Drummond, 127 Iowa, 134, 102 N. W. 842.

18. Clark v. Roller, 26 S. Ct. 141.

19. Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453.

20. The objections that a bill contains no prayer for process against defendants, and that it does not show such an interest in the property as will support a claim for partition, and that complainant's title is in dispute, are not available when no demurrer has been filed and the plea puts in issue only the sufficiency of complainant's title. White v. Smith [N. J. Eq.] 60 A. 399. An objection that a petition did not set out facts showing how defendant derived title held untenable after trial, where it was alleged that defendant owned an undivided five-sixths interest in the land. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

21. Evidence held insufficient to show that person through whom plaintiff claimed had ever owned the property. Hyde v. Britton [Wash.] 83 P. 307. Complaint dismissed where plaintiff did not prove title in himself. Landon v. Morris [Ark.] 86 S. W. 672. A petitioner claiming by relationship to a certain person had the burden of showing the number of children of such person in order to show what petitioner's share would be. Joyce v. Dyer [Mass.] 75 N. E. 81. Perfect title by adverse possession will sustain a sale and give the purchaser good title. Civ. Code Proc. § 499, requiring filing of written evidence of title before division of land, does not apply to a sale under § 490. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

22. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

23. Pooler v. Smith [S. C.] 52 S. E. 967.

24, 25. Fairweather v. Burling, 181 N. Y. 117, 73 N. E. 565.

26. Construing Code Civ. Proc. §§ 1544, 1545. Fairweather v. Burling, 181 N. Y. 117, 73 N. E. 565.

27. Tracy v. Falvey, 102 App. Div. 585, 34 Civ. Proc. R. 189, 92 N. Y. S. 625.

28. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

29. See 4 C. L. 902, § 3.

30. Partition cannot be had in a court of equity of lands held adversely. Landon v. Morris [Ark.] 86 S. W. 672. To give the court jurisdiction to settle questions of title in a partition suit, defendant must be a person who claims under one who was a joint owner with plaintiff. See Pillow v. S. W. Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804, cited in Moon's Adm'x v. Highland Development Co. [Va.] 52 S. E. 209.

of partition, the suit should be postponed until the dispute concerning the title may be settled in a court of law,[31] if the adverse claim is supported by substantial proof.[32] The existence of a dispute touching title of complainants does not, however, deprive a court of chancery of jurisdiction.[33] If the adverse claim asserted is an equitable one, the case should be retained and decided in the chancery court,[34] and where it appears that the parties are tenants in common, joint tenants, or coparceners in the realty sought to be partitioned, and as such compellable under the statute to make partition, the court has power incident to its jurisdiction to pass upon all conflicting claims of such parties to the realty concerned.[35] The rule that a partition suit cannot be made a substitute for an action of ejectment does not apply where partition is not the sole object of the suit, which has become substantially a creditor's bill for the satisfaction of liens due by co-parceners and binding on the estate to be partitioned.[36] Partition cannot be had in an action of trespass to try title when the amended petition does not ask for such relief,[37] and where interested parties are not before the court.[38]

Costs and attorneys' fees.[39]—Costs and expenses need not in every case be charged upon the parties or their shares in proportion to their interests.[40] The fact that costs were largely created by one of the parties[41] and the manner in which a party conducts and prosecutes the suit[42] are also to be considered. A judgment for costs is a lien on the land of the person against whom it is entered, but such lien can be enforced only by an independent proceeding in equity.[43] A decree in a partition suit when nothing remains to be done except to settle the costs is a final decree.[44] Hence, further proceedings by which part of the land is sold to satisfy costs is without authority, and not binding on a purchaser pendente lite who had

31. White v. Smith [N. J. Eq.] 60 A. 399. Where upon a bill for partition of lands the legal title of parties thereto is brought into dispute, a court of equity will not proceed to settle that dispute but will either dismiss the bill or retain it to allow legal title to be settled in an action at law. Woglom v. Kant [N. J. Eq.] 61 A. 9. Where possession adverse to complainants is asserted under a tax title, the partition suit should be postponed until complainants shall have established their title in an action at law. Clark v. Roller, 26 S. Ct. 141. A claim of ownership by adverse possession bars a proceeding in equity for partition until title has been determined in a court of law. Coberly v. Coberly, 189 Mo. 1, 87 S. W. 957.

32. Evidence held insufficient to show adverse possession. Coberly v. Coberly, 189 Mo. 1, 87 S. W. 957.

33. White v. Smith [N. J. Eq.] 60 A. 399.

34. White v. Smith [N. J. Eq.] 60 A. 399. Where right to partition depended upon establishing an equitable title to land, a tax title to which was held by defendants, equity would settle that dispute. Woglom v. Kant [N. J. Eq.] 61 A. 9. Where a mother devised to a daughter certain property in which she had only a life estate, and died intestate as to other property, the daughter's adverse claim was not such as required an action of ejectment to settle, but could be disposed of in a partition suit to divide the property among all the daughters. In re McMahon's Estate, 211 Pa. 292, 60 A. 787.

35. Smith v. Vineyard [W. Va.] 51 S. E. 871. In Missouri the circuit court has jurisdiction in a partition proceeding to equitably settle and adjust the claims of the parties in interest. Coffman v. Gates, 110 Mo. App. 475, 85 S. W. 657. Where, in a partition proceeding, final judgment had been entered against plaintiffs and one of the defendants had been found to be the fee simple owner, the circuit court had jurisdiction of a proceeding in the nature of a cross bill by a co-defendant to set aside, as fraudulent, a pendente lite deed of the property, under Rev. St. 1899, § 4389, giving the court in partition proceedings power to settle and adjust adverse claims. Snyder v. Arn, 187 Mo. 165, 86 S. W. 197.

36. Moon's Adm'x v. Highland Development Co. [Va.] 52 S. E. 209.

37, 38. Keith v. Keith [Tex. Civ. App.] 13 Tex. Ct. Rep. 126, 87 S. W. 384.

39. See 4 C. L. 903.

40. McMullin v. Doughty [N. J. Eq.] 61 A. 265.

41. Since by Code § 4260, a party is chargeable with costs created by his contest, trial court's discretion in apportioning costs partly according to the interests of the parties, and partly with reference to the fact that one party created a contest, will not be disturbed on appeal. McGuire v Luckey [Iowa] 105 N. W. 1004.

42. Thus, where a defendant conducts the suit in a hostile and persistent manner, causing substantially all the expense by presenting claims which were overruled and rejected, all costs of the suit are properly charged to such defendant. McMullin v. Doughty [N. J. Eq.] 61 A 265.

43. As provided by Va. Code 1904, p. 1907.

no notice thereof.[45] Attorney's fees may be allowed and apportioned among the parties according to their interests in the property involved, where the proceedings are amicable,[46] or where the rights and interests of all the parties are correctly set forth in the bill or petition,[47] and no substantial defense is interposed.[48]

Operation and effect of decree.[49]—A partition decree does not confer title but merely severs the unity of possession.[50] Rights not adjudicated in the proceeding are not affected by the decree.[51] In an ex parte proceeding for division of land, a judgment electing for one of the parties to take a life estate in a portion of the land instead of a dower interest is binding upon such party, though the petition contains nothing on which such order could be based.[52] The rule that one party to a partition decree may not acquire the title of a stranger and set it up against the other party does not apply where a decree has been procured by fraud.[53] Where all persons having a vested or contingent interest in land were made parties to a partition suit, and the decree, as to part of the land subject to a trust, substituted the fund derived from sale of the land, for the land, and left such fund intact in the hands of the trustees for the purposes of the trust, the land was freed from the trust, and the decree was conclusive against all persons, whether in being or not, who had or might have any right to share in the trust estate.[54] Under the Michigan statute conferring on the probate court jurisdiction to partition estates of decedents assigned to heirs as tenants in common and providing that a decree of partition shall be conclusive, a decree assigning a life estate to an heir, acquiesced in by her, is conclusive and precludes the subsequent assertion by her of a different estate.[55]

§ 5. *Commissioners or referees and their proceedings.*[56]—The qualifications[57] and number[58] of commissioners is statutory in New Hampshire. The appointment of a committee to make partition does not have the effect of a final decree upon the rights of the parties.[59] The appointment may be revoked for cause shown[60] where an objection is seasonably made.[61] An infant defendant should be represented by a guardian ad litem when testimony is taken before a master in support of the cause

Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

44, 45. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

46. Johnson v. Emerick [Neb.] 104 N. W. 169.

47. No such apportionment when lienholders were purposely omitted from the bill. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

48. Petitioners are entitled to a solicitor's fee when the interests of the parties are correctly set up in the bill and no substantial defense is interposed. Hurd's Rev. St. 1903, p. 1366, c. 106, § 40. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

49. See 4 C. L. 903.

50. Kennedy v. Rainey [Ala.] 39 So. 813; Sharp v. Stewart, 185 Mo. 518, 84 S. W. 963; Owens v. Naughton, 23 Pa. Super. Ct. 639.

51. Party to partition decree acquired no right to share in fund charged on land in favor of other heirs when such charge was not adjudicated. Haines v. Eshleman, 25 Pa. Super. Ct. 381.

52. Durrett v. Durrett [Ky.] 89 S. W. 210.

53. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062.

54. Janpole v. Lasky, 94 App. Div. 353, 88 N. Y. S. 50.

55. Construing How. Ann. St. c. 226, §§ 2, 5, 18. Parkinson v. Parkinson [Mich.] 102 N. W. 1002.

56. See 4 C. L. 905.

57. Under Pub. St. 1901, c. 243, §§ 10, 20, "suitable persons" must be appointed as members of a committee to make partition. Hood v. Montgomery [N. H.] 62 A. 651. That the parties agree upon certain persons is evidence that they are suitable, and such persons are properly appointed by the court. Id.

58. The appointment of two commissioners only where the statute requires three is reversible error. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

59. New Hampshire statute. Hood v. Montgomery [N. H.] 62 A. 651.

60. When the court has been misled by false representations of the petitioners that certain persons have been agreed upon by the parties, and these persons are appointed, the court may correct the error by revoking the appointment when the matter is seasonably and properly brought to its attention. Hood v. Montgomery [N. H.] 62 A. 651.

61. Where defendants object to a committee on learning of the appointment, and the court postpones consideration of the objection until the report of the committee is made, the appointment may be revoked at that time, and the effect of such action

of the adverse party, and such guardian is entitled to notice of the proceeding.[62] A master need not stop proceedings merely because a person not a party to the partition suit files a bill in equity against the plaintiff to stay proceedings and gives the master notice of the filing of such bill.[63] Ex parte affidavits are incompetent evidence in a hearing before a master.[64] Claims against a decedent are not cognizable in a proceeding before a master for partition or sale, and it is error for a decree of sale to direct that such claims should be paid out of the proceeds of the sale.[65]

If it appears that referees appointed to partition realty have not complied with the order of the court, and that the partition made is unjust and inequitable, their report should be set aside.[66] A decree sustaining a master's report in partition will not be reversed, because the master failed to give notice to creditors, where there is no evidence that there were creditors and it appeared the master made proper searches for liens of record and found none.[67] Where a commissioner's report finds that the property cannot be divided without prejudice to the owners' interests, and this report is confirmed and embodied in the decree of sale, it is immaterial that two additional reports recommending a sale did not expressly recite that partition would be prejudicial.[68] Where a report recommends a sale of the property, objections thereto on the ground that the property is divisible in kind are properly overruled when not supported by evidence.[69]

§ 6. *Mode of partition and distribution of property or proceeds.*[70]—The right to sale did not exist at common law. Partition in kind could be had as of right.[71] By statute it is now generally provided that the property may be sold where partition in kind would be impracticable and prejudicial to the interests of the parties.[72] Jurisdiction of the courts to order a sale being wholly statutory, it must be exercised in strict conformity thereto,[73] and a sale for a purpose not authorized is void.[74]

Distribution.[75]—Where one of several tenants in common has made improvements upon the property the court should, if possible, allot to him the portion improved without taking into account the value of the improvements.[76] If such a division cannot be made the court will then allow to the one making the improvements remuneration for the increased value of the premises caused thereby.[77] In

is to render the proceedings of the committee and its report invalid. Hood v. Montgomery [N. H.] 62 A. 651.

62. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

63. Monroe v. Monroe, 26 Pa. Super. Ct. 47.

64, 65. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

66. Richardson v. Ruddy [Idaho] 83 P. 606.

67. Monroe v. Monroe, 26 Pa. Super. Ct. 47.

68, 69. Watke v. Stine, 214 Ill. 563, 73 N. E. 793.

70. See 4 C. L. 905.

71. Though ruinous to and undesired by other tenants. Cowling v. Nelson [Ark.] 88 S. W. 913. At common law courts of equity had no power to order sale for partition except by consent. Moore v. Willey [Ark.] 91 S. W. 184.

72. Where the premises described in the bill are so situated and of such a character that they cannot be divided among the owners without great prejudice to their interests resulting from such division, the property should be sold and the proceeds divided among the several owners according to their respective interests. White v. Smith [N. J. Eq.] 62 A. 560.

73. In Arkansas a sale without a commissioner's report that it is necessary to properly guard parties' interests is void. Cowling v. Nelson [Ark.] 88 S. W. 913. Under Kirby's Dig. § 5775, failure of defendant to answer does not dispense with the necessity for further proof, and it is error to order a sale merely upon allegations of the petition that a sale is necessary. Moore v. Willey [Ark.] 91 S. W. 184. A finding that a sale is necessary should be based upon consent of the parties, a report of commissioners appointed under Kirby's Dig. §§ 5779-5785, or evidence taken by the chancellor. Id.

74. **Sale to pay costs** is void. Part of land was partitioned and commissioners recommended sale of one tract to pay costs, which was done. Cowling v. Nelson [Ark.] 88 S. W. 913.

75. See 4 C. L. 906.

76, 77. Noble v. Tipton, 219 Ill. 182, 76 N. E. 151.

distributing the proceeds of a sale, an heir who is indebted to the estate should be charged with the amount of his debt.[78] Advancements to heirs should also be considered in making the division of a decedent's property,[79] and a purchaser from one of the heirs is entitled to have such advancement paid out of the personalty if possible.[80] A life tenant in partition cannot be awarded any portion of the proceeds which represents property belonging to the inheritance.[81] Where it appears that certain tenants have had exclusive possession of the common property, receiving the rents and profits therefrom, the court may require an accounting of such rents and profits.[82] Unliquidated claims for damages to the property cannot be considered.[83] Allowances should be made for taxes paid and for the value of proper permanent improvements made, with lawful interest on sums so expended.[84] Where plaintiffs sued to be recognized as joint owners and for partition, and the judgment ordered defendant to account for rents, he is not estopped to set up in the partition proceedings claims for disbursements for taxes, insurance, and necessary repairs.[85] A defendant in default for the price of property adjudicated to him owes legal interest thereon from the date of the judgment and not prior to such date.[86]

Owelty[87] is a sum paid or secured in lieu of land in partition in order to equalize the portions, where an equal division in kind cannot be made.[88] Where a decree in a partition suit between a father and his children charged land allotted to the children with owelty to the amount of a debt of the father, secured by a trust deed on the land, the amount so charged was not owelty as to the creditor who was not a party to the suit.[89] The decree did not operate as an assumption of the father's debt by the children,[90] nor was the creditor subrogated by the decree to rights of the father.[91] Land allotted to the father being also charged with other debts, the father would have no right to reimbursement in case he should pay the debt secured by deed of trust, unless upon settlement of all the claims against the entire estate he should show a right to such relief.[92]

§ 7. *Sale and subsequent proceedings.*[93]—*Notice*[94] of the sale should be given as required by the decree.[95]

Terms of sale of minors' interests.—The authority of the judge, under the Louisiana statute, to convoke a family meeting to fix the terms of credit and security on which the interest of minors in property partitioned is to be sold, is not conditioned upon such convocation having been made at the special instance and request of the tutors and curators of such minors.[96] The court may order it ex officio.[97]

Conduct of sale.[98]—The sale should be made in accordance with the terms of

78, 79, 80. Barnett v. Thomas [Ind. App.] 75 N. E. 868.

81. Where life tenant had no right to extract minerals from the land, he was not entitled to proceeds representing value growing out of the actual or supposed presence of minerals in the ground. Hill v. Ground, 114 Mo. App. 80, 89 S. W. 343.

82. Barnett v. Thomas [Ind. App.] 75 N. E. 868. Rents and profits cannot be charged against a claimant if it is not shown that co-tenants were excluded from enjoyment of the property, or that rents were received from a lease of the property, or profits actually made. White v. Smith [N. J. Eq.] 62 A 560.

83, 84. White v. Smith [N. J. Eq.] 62 A 560.

85. Sharp v. Zeller, 114 La. 549, 38 So. 449.

86. Tobin v. U. S. Safe Deposit & Sav. Bank [La.] 39 So. 33.

87. See 4 C. L. 906.

88, 89. Stone v. McGregor [Tex.] 87 S. W. 334.

90. Merely charged their land with a lien. Stone v. McGregor [Tex.] 87 S. W. 334.

91, 92. Stone v. McGregor [Tex.] 87 S. W. 334.

93. See 4 C. L. 907.

94. See 4 C. L. 907, n. 90, 91.

95. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

96, 97. Tobin v. U. S. Safe Dep. & Sav. Bank [La.] 39 So. 33.

98. See 4 C. L. 907.

the decree.[99] The fixing of a minimum in the decree does not relieve the officer in charge from realizing as much as possible from the sale.[1] Failure to disclose at the sale the existence of a restrictive covenant which decreases the value of the land entitles a purchaser to be relieved from his purchase.[2] Though the land to be sold consists of several tracts in which the parties are interested in different proportions, a sale of all the land at a certain price per acre is binding upon the purchaser when the adult parties adopt and approve the sale.[3] The sale is not invalid as to an infant party, since the court may hold the proceeds until it has been determined whether the sale so made is just as to the infant and award him an amount justly due.[4] Informalities in a sale may be cured by prescription.[5]

A misdescription of the land in the advertisement,[6] decree,[7] or commissioner's deed[8] does not invalidate the sale if the land intended to be sold was in fact sold and no prejudice is shown to have resulted therefrom. An objection that the land partitioned was insufficiently described is unavailable after the parties have sold their interests and the purchasers have taken possession.[9] A purchaser takes only the land in issue in the partition proceeding and subject to sale, notwithstanding a different description in the commissioner's deed.[10]

The omission of property belonging to an estate or succession from a partition is not ground for rescission but simply for supplemental partition.[11]

Confirmation of sale.[12]—Confirmation should be entered of record, but a formal order is not essential if the fact of confirmation appears from the record as a whole.[13] Confirmation of a sale on the day the report thereof is filed is valid, if no prejudice is shown as the result of such procedure.[14] An order confirming a sale is a final judgment over which the court rendering it has no control after the expiration of the term at which it was rendered,[15] except for statutory causes for new

99. Where the terms of the decree directing a sale were not complied with, the purchase money was not fully paid, and no note for the deferred payment given, and no commissioner's deed given, the sale was void and no title passed. Liverman v. Lee [Miss.] 38 So. 658.

1. Though a decree provides that property shall not be sold for less than two-thirds the appraised value, it is the duty of the officer conducting the sale and the attorney in charge to realize as much as possible above the minimum fixed by the decree. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

2. Under Code Civ. Proc. § 1678, providing that if land to be sold at a judicial sale is subject to dower or a lien, that fact must be made known at the sale, failure to make known at a partition sale the existence of a restrictive covenant not to erect certain kinds of buildings, or to maintain a business of a certain kind on the land, entitles a purchaser to the right to be relieved from his purchase if such restrictions decreased the value of the land. Conlen v. Rizer, 109 App. Div. 537, 96 N. Y. S. 566.

3, 4. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

5. Informalities in private sale of minor's property cured by 10 years prescription statute. Succession of Sallier [La.] 38 So. 929. Where proceedings have been homologated and acted on and third parties have acquired rights based on the faith of the judgment of the court, the objection that a member of the family meeting which fixed the credit term for sale was incompetent to serve is untenable. Byrnes v. Byrnes [La.] 38 So. 991.

6. A misdescription of the property in the advertisement did not affect purchaser's title when corrected in decree and land intended was in fact sold, and no prejudice was shown. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808.

7. Where a bill for partition correctly described the land and the decree ordered sold the land described in the bill, an error in the description following such direction in the decree rendered it and the proceedings thereunder erroneous but not void. The error was a clerical one correctable by the record. Failure to appeal for 17 years barred relief. Farmer v. Allen, 85 Miss. 672, 38 So. 38.

8. If the land intended to be sold is manifest, the sale passes title, notwithstanding a misdescription in the judgment or commissioner's deed. Such misdescription is not ground for refusing to confirm the sale, the land intended to be sold being in fact sold. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. The fact that a resurvey ordered by the commissioner was not filed of record in the case, held immaterial, as it could be filed thereafter and before confirmation. Id. Description by metes and bounds, courses and distances, held sufficient, not being shown to be erroneous. Id.

9. Cowling v. Nelson [Ark.] 88 S. W. 913.

10. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

11. Succession of Sallier [La.] 38 So. 929.

12. See 4 C. L. 907.

13. Cowling v. Nelson [Ark.] 88 S. W. 913.

trial available at a subsequent term.[16] A purchaser cannot defeat confirmation of the sale on the ground that there are outstanding taxes,[17] or that there is pending a contest of the will of a former owner whose heirs and devisees are parties to the proceedings,[18] or that the wife of one of the parties,[19] or the personal representative of a grantor of one of the parties, whose deed reserved a lien for a portion of the purchase price,[20] was not made a party.

While a *limitation statute* does not apply to a sale which has not been confirmed, when confirmed, if the court had jurisdiction of the parties, the statute

14, 15. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

16. Civ. Code Prac. §§ 518, 340. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

17. When unpaid taxes are a lien on the land but are not due at the time of the sale, the proper practice is to have their amount credited on the sale bonds and for the purchaser to pay them, or to require them to be paid out of the purchase-money fund in court. A purchaser cannot defeat confirmation of the sale on the ground that such taxes are outstanding. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

18. Where devisees and heirs of a former owner of an interest in land are parties to a partition suit, the pendency of a contest of the will of such former owner is no ground for refusing confirmation of the sale, as against the purchaser, since distribution of the interest of such devisees or heirs may be deferred until the will contest has terminated, a sufficient fund being retained for that purpose. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

19. The fact that the wife of one of the parties was not made a party to the suit is no ground for refusing to confirm a sale as against the purchaser, since the court may and should cause her to be made a party, and have the amount of her dower interest determined and paid her out of the proceeds. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

NOTE. Effect of partition on dower: "In proceedings in partition, either at law or in equity, the inchoate right of dower of femes covert, whether infants or adults, in the undivided shares of their husbands in the lands, is divested by a sale under the judgment or decree of the court, so as to protect the purchasers against the dower of such femes covert, if they survive their husbands, provided such wives are made parties to the proceedings. The cases everywhere agree upon this, although there is some conflict as to the effect of a partition sale when the wife is not made a party to the proceedings. In the following cases she was made a party: Jackson v. Edwards, 7 Paige, [N. Y.] 386; afd. 22 Wend. [N. Y.] 498; Jordan v. Van Epps, 19 Hun [N. Y.] 526, afd. 85 N. Y. 427; Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Warren v. Twilley, 10 Md. 39; Rowland v. Prather, 53 Md. 232. Thus, if in an action to recover a dower interest in land, it appears that there exists a judgment rendered in an action for partition of such lands in which the feme covert claims her dower, and that she was duly served and made a party defendant in such action, but failed to appear, it must be held that such judgment is a bar to the action for dower, although such judgment fails to make any provision for dower. Jordan v. Van Epps, 85 N. Y. 427. This case overrules the early case of Bradshaw v. Callaghan, 5 John. [N. Y.] 80, which maintains an exactly contrary doctrine.

Although there is some conflict of authority as to whether a wife is a necessary party to partition proceedings between co-owners of land, the vast majority of the decisions of courts of last resort establish the rule that the seisin of a husband who acquires title to land as a tenant in common with others is subject to the paramount right of his co-tenants to demand partition in an action brought for that purpose. His wife's right of dower therein is therefore subordinate to that paramount right, which, when enforced by a sale made under a decree of the court, defeats her inchoate right of dower in the land, although she was not made a party to the action of partition. Hence, in a partition suit between co-tenants, the wife of one of them is not a necessary party, and in the event of a partition sale of real estate in a proceeding wherein such wife was not made a party, she is bound by such proceedings and sale, though she outlives her husband and becomes his surviving widow, for her inchoate right to one-third of her husband's land subsists by virtue of his seisin, and is always subject to any encumbrance, infirmity, or incident which the law affixes to the seisin, either at the time of the marriage or at the time her husband becomes seised, and liability to be devested by a partition sale is an incident which the law affixes to all estates in co-tenancy. For these reasons the courts almost universally hold that a sale of land for the purpose of partition bars the inchoate right of dower of the wife of one of the joint tenants or tenants in common, and the purchaser takes a clear title to the land. Davis v. Lang, 153 Ill. 175, 38 N. E. 635; Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883; Mitchell v. Farrish, 69 Md. 235, 14 A. 712; Williams v. Wescott, 77 Iowa, 332, 42 N. W. 314, 14 Am. St. Rep. 287; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Sire v. St. Louis, 22 Mo. 206; Hinds v. Stevens, 45 Mo. 209; Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366. A sale of land in partition proceedings is a judicial sale, and such a sale of a husband's interest in lands in a proceeding to which he is a party extinguishes the wife's right of dower therein, although she was not made a party to the proceeding. Williams v. Wescott, 77 Iowa, 332, 42 N. W. 314, 14 Am. St. Rep. 287. The leading case on the subject is Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355." See, also, Davis v. Lang, 153 Ill. 175, 38 N. E. 635; Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366; Hinds v. Stevens, 45 Mo. 209; Holley v. Grover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883.

runs in favor of the purchaser at the sale against the parties, though the sale was void.[21]

Rights and liabilities of purchasers or bidders.[22]—A purchaser at a sale becomes a party to the partition proceedings so as to be affected with constructive notice of facts shown by the record.[23] He need not look to the distribution of the proceeds of the sale to protect his title, but need only inquire if the sale and preliminary steps were regular and legal.[24] He is entitled to be informed of the existence of liens or charges on the land.[25] A purchaser acquires no interest from a party who had parted with his interest prior to the partition suit.[26] One who accepts and appropriates the proceeds of a sale of realty in partition is estopped to assert want of title in the property sold and to set up a subsequently acquired adverse title against the rights of the purchaser at the sale.[27] Where the special master making a sale is informed before accepting the cash payment that the bidder represents other persons, such agent cannot be held liable upon failure of the principals to complete the purchase; hence, the principals have no standing in court to procure their substitution as the original bidders merely because the master threatens to hold the agent.[28] A plaintiff whose bid for the property is accepted will be left to his legal remedy to regain possession which is wrongfully withheld by a defendant.[29] Where a master accepts the bid of plaintiff and awards one-half the bid to defendant charging it on the land until paid, the land is sufficient security for defendant's share and no bond need be required of plaintiff.[30]

Land sold at a void sale may be recovered, though a proper allowance should be made for improvements made by the purchaser after he acquired color of title.[31]

§ 8. *Appeal and review; vacation of sale.*[32]—Exceptions to an interlocutory judgment in a partition suit are reviewable though there is no final judgment.[33] A decree that partition of lands cannot be made, and ordering the master to sell the lands and distribute the proceeds is a final, appealable decree.[34] An infant defendant may attack such a decree for errors apparent on the face of the record by an original bill in equity, and is not required to apply for a rehearing or file a

—Note to Gaffney v. Jeffries [S. C.] 82 Am. St. Rep. 865.

20. A purchaser cannot defeat confirmation of a sale on the ground that the interest of one of the parties was by deed reserving a lien for an unpaid portion of the purchase price, and that the grantor therein has died and his representative was not made a party, since the representative may be brought in and his rights adjudicated before distribution of the proceeds. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191.

21. Cowling v. Nelson [Ark.] 88 S. W. 913.

22. See 4 C. L. 907.

23. Purchaser had constructive notice of order calling special term to consider among other things a motion to confirm the sale. Wise v. Wolfe, 27 Ky. L. R. 610, 85 S. W. 1191. The record and papers in a partition proceeding are notice to a purchaser of a variance between the description in the commissioner's deed and that contained in the decree of sale and decree confirming the sale. Where deed included all of a party wall, but land in suit only extended to middle of wall, purchaser only took to middle. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

24. Immaterial to purchaser whether incompetent got a fee or life estate under provisions made for his support. Murdock v. Loeser, 27 Ky. L. R. 1057, 87 S. W. 808.

25. Failure to disclose restrictive covenant released purchaser, under Code Civ. Proc. § 1678. Conlen v. Rizer, 109 App. Div. 537, 96 N. Y. S. 566.

26. A defaulting defendant in partition owned no interest in the premises at the time of the suit and judgment, having conveyed her interest to another. Held plaintiff in such suit, who bought in at the sale, acquired no interest through such defendant. Flagler v. Devlin, 95 N. Y. S. 801.

27. One who received proceeds could not thereafter claim that she did not own half the land sold, and that she afterward acquired title thereto from another. Gruenewald v. Neu, 215 Ill. 132, 74 N. E. 101.

28. Zeigenfuss v. Moore [N. J. Eq.] 60 A. 520.

29. Where it appears that the relations of plaintiff and defendant in partition are inharmonious, and defendant has possession of a part of the land, and plaintiff's bid is accepted, the court will fix a time within which defendant's share shall be paid by plaintiff, leaving plaintiff to his legal remedy to gain possession. Monroe v. Monroe, 26 Pa. Super. Ct. 47.

30. Monroe v. Monroe, 26 Pa. Super. Ct. 47.

31. Cowling v. Nelson [Ark.] 88 S. W. 913.

32. See 4 C. L. 905, 907.

33. Joyce v. Dyer [Mass.] 75 N. E. 81.

34. Crane v. Stafford, 217 Ill. 21, 75 N.

bill for review or sue out a writ of error.[35] Such a bill may be filed at any time during minority or within the period allowed after majority for the prosecution of a writ of error.[36] Confirmation of a report of commissioners is not a final, appealable decree when the plan of distribution is dependent upon a sale yet to be made, which would require confirmation.[37]

Vacation of sale.[38]—In Illinois a petition by a guardian ad litem for infant defendants asking that a sale be vacated is a sufficient basis for an order setting aside the sale.[39] Mere inadequacy of price is not ground for setting aside a sale.[40] But if fraud or misconduct in the purchaser, or in the officer conducting the sale, or other persons connected therewith, be shown, or if the owner or party interested has been surprised or misled into a mistake by the conduct of the purchaser or officer or other person connected with the sale, such facts will be considered, together with the inadequacy of price, and the sale set aside if the best interests of the parties concerned demand it.[41] The disabilities of parties interested should also be considered.[42] Where the attorney in charge of a partition suit purchases at the sale the burden is upon him, in a suit to set aside the sale, to show fairness, adequacy, and equity.[43] The same rule applies to one who associates himself with the attorney and purchases through the attorney as his agent.[44]

Where persons standing in a fiduciary relation to parties interested purchase at the sale, and the sale is set aside, the purchasers are to be deemed equitable mortgagees and are to be paid expenditures for purchase money, taxes, and improvements, with interest, and to be charged with rents and profits, and in case of sale to innocent purchasers without notice, with the excess of the amount realized over what they paid.[45] If upon a resale no advance is made upon the sum paid by such persons, they are to be considered purchasers.[46] When a void sale is set aside and partition decreed the purchaser at the first sale should be credited with money paid to complainants in the second suit and with money which was expended for the benefit of the entire estate,[47] but not with sums applied to payment of attorneys' fees and costs in the original proceeding.[48] Where, in a proceeding to vacate a sale, an offer to increase the bid was made absolute before the order setting aside the sale was made, and a bond was filed instead of paying the earnest money into court, the interests of other parties were sufficiently protected.[49]

E. 424. Order for sale of property, partition in kind being found impracticable, is a final, appealable order. Barnett v. Thomas [Ind. App.] 75 N. E. 868. Where application is made for partition of land by sale, and, after a hearing, commissioners are appointed and a sale of the land ordered, such judgment is so far final as to authorize the objecting party to bring the case to the supreme court by a proper bill of exceptions. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

35, 36. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424.

37. Clark v. Roller, 26 S. Ct. 141.

38. See 4 C. L. 907.

39. Hurd's St. 1899, c. 106, § 29, provides that any person interested may file exceptions to the report of the sale, but does not prescribe the form of the exceptions. Kiebel v. Leick, 216 Ill. 474, 75 N. E. 187.

40. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682. Where a sale has been conducted in the usual manner and the purchaser is a stranger to the order of sale, mere inadequacy of price will not justify vacation of the sale, unless the inadequacy is such as to amount to evidence of fraud. Kiebel v. Leick, 216 Ill. 474, 75 N. E. 187.

41. Kiebel v. Leick, 216 Ill. 474, 75 N. E. 187. Inadequacy, coupled with circumstances showing that the purchaser desired to prevent fair and open competition, is sufficient ground for vacation. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682. Sale set aside where attorney in charge, who became a purchaser, induced others to refrain from bidding. Id. Where attorney in charge induced certain persons not to bid on a piece of property and it was transferred to the wife of the master making the sale, the sale was invalid. Id. Sale set aside where attorney failed to make certain lienholders parties, he himself being a lienor, as a result of which the record was beclouded and bidders could not bid intelligently. Id.

42. Sale properly set aside at instance of infants where it appeared a bid $1,000 in excess of the prevailing bid was offered if the abstract could be seen and would prove satisfactory. Kiebel v. Leick, 216 Ill. 474, 75 N. E. 187.

43, 44, 45, 46. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

Laches cannot be charged to one seeking to set aside a sale on the ground of fraud, actual or constructive, until after his knowledge of the facts, or of circumstances sufficient to put him on inquiry which would have led to such knowledge.[50] An heir who has participated in all the partition proceedings until after a sale under a decree and until after all the parties were before the notary for the settlement of the rights of the heirs inter se, cannot, in a suit to annul the sale, raise the objection that the succession had been opened in another division of the district court and had not yet been closed, and that debts were still unpaid by it.[51] Where it appears that all creditors have been paid, the objection that debts of the succession are unpaid must fail for want of a party with legal interest to urge it.[52]

§ 9. *Voluntary partition.*[53]—A voluntary partition is binding only on the parties thereto.[54] A partition agreement between two co-tenants made after one of them had contracted to convey to a third person, such contract being recorded, is not binding on the grantee of such third person unless ratified by him.[55] Where partition is made by consent of all the parties interested, who take charge of their respective allotments without objection, neither they nor purchasers from them with notice of the partition proceedings can afterwards object thereto.[56] A judgment creditor of one tenant in common is not bound by a voluntary partition made between the tenants in common after the recovery of his judgment;[57] but a purchaser of an undivided interest under the judgment may be brought into equity for partition of all the lands owned in common before the voluntary partition, and may also, by equities raised against him or the tenant in common under whom he claims, be required to receive on the partition the lands received by the judgment debtor on the voluntary partition.[58]

PARTNERSHIP.

This topic does not deal with matters peculiar to joint stock companies[59] or

47, 48. Liverman v. Lee [Miss.] 38 So. 658.

49. Kiebel v. Leick, 216 Ill. 474, 75 N. E. 187.

50. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

51, 52. Byrnes v. Byrnes [La.] 38 So. 991.

53. See 4 C. L. 907.

54. Partition agreement between the mother of plaintiffs and their uncles and aunts held not to preclude maintenance of partition suit by them under their grand-

joint adventures.[60] The effect of bankruptcy on the rights or liabilities of the partners is treated elsewhere.[61]

§ 1. *What constitutes. Definition and kinds.*[62]—Wherever two or more persons engage in a legal business or occupation under an agreement, either express or implied, to share the profits and losses, a partnership is created.[63] The relation, except in some instances as to third persons, is a contract one.[64] A partnership may be formed for the purpose of either buying and selling generally,[65] or for the accomplishment of a single venture or undertaking.[66] Unincorporated associations[67] and joint stock companies[68] are, in many respects, deemed partnerships.

A trading partnership is one whose business consists in buying or preparing for sale and selling commodities for profit.[69]

A partner agreeing to share his proportion of profits with a third person, in such manner as to constitute himself and such third person partners, forms a subpartnership.[70] Such a relation involves all the responsibilities of any other partnership, except that the subpartner is not a member of the main firm nor liable for its debts.[71]

A partnership is, for some purposes, a distinct entity, separate from the persons composing it.[72]

Essential elements.[73]—The essential elements of every true partnership is a contract between the parties[74] and a joint ownership of the profits.[75] Mere sharing

father's will. Parrott v. Barrett, 70 S. C. 195, 49 S. E. 563.

55. Peterson v. Sloss [Wash.] 81 P. 744.

56. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025.

57. The creditor may sell under his judgment the undivided interest in the entire lands as though no partition had been made. Boice v. Conover [N. J. Eq.] 61 A. 159.

58. Boice v. Conover [N. J. Eq.] 61 A. 159.

59. See Joint Stock Companies, 6 C. L. 209. A joint stock company being in many respects a partnership [People v. Rose, 219 Ill. 46, 76 N. E. 42; Norwood v. Francis, 25 App. D. C. 463] cases dealing with such companies and illustrative of partnership principles have been kept.

60. See Joint Adventures, 6 C. L. 208.

61. See Bankruptcy, 5 C. L. 367.

62. See 4 C. L. 908.

63. Jones v. Purnell [Del.] 62 A. 149. It is a contract relation between two or more competent persons who have combined their money, labor, and skill, or some or all of them, in a lawful, joint enterprise or business for the purpose of joint profit. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

64. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760. There must be an agreement express or implied. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117. See infra this section.

65. Hl Williamson & Co. v. Nigh [W. Va.] 53 S. E. 124.

66. Such as the purchase and sale of a single lot of timber. Hl Williamson & Co. v. Nigh [W. Va.] 53 S. E. 124.

67. An unincorporated association formed to carry on a private bank under Laning's Rev. Laws Ohio, §§ 4891 et seq., may be adjudged a bankrupt under Bankruptcy Act 1898, cl. 6, § 4. Burkhart v. German-American Bank, 137 F. 958. See post, § 8, Limited Partnerships.

68. People v. Rose, 219 Ill. 46, 76 N. E. 42; Norwood v. Francis, 25 App. D. C. 463.

69. Shumaker on Partnership [2nd Ed.] p. 78, § 44. A firm engaged in contracting with the government for carrying mail is a nontrading partnership. Third Nat. Bank v. Fults [Mo. App.] 90 S. W. 755. That a firm buys and sells real estate on its own account is sufficient prima facie to make a trading partnership. Adams v. Long, 114 Ill. App. 277.

70. Husband running wife's business forms partnership with third person who is ignorant of wife's ownership, whereupon the husband and wife became subpartners, although the wife was to receive all of her husband's share of the profits of the main firm. Morrison v. Dickey [Ga.] 50 S. E. 175.

71. Morrison v. Dickey [Ga.] 50 S. E. 175.

72. May be adjudicated a bankrupt independently of any adjudication as to the separate partners. In re Perley & Hays, 138 F. 927. A judgment in favor of or against a firm in their firm name is merely irregular and not void. Meyer v. Wilson [Ind.] 76 N. E. 748.

73. See 4 C. L. 909.

74. See McDonald Bros. v. Campbell [Minn.] 104 N. W. 760; Savannah Rail & Equipment Co. v. Sabel [Ala.] 40 So. 88; Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117. The relation is founded upon mutual confidence, consent, and agreement. Morrison v. Dickey [Ga.] 50 S. E. 175.

75. The true test is whether the alleged partner acquired by his bargain or contract any property in, or control over, or specific lien against, the profits while they remained undivided in preference to other creditors. Clark v. Emery [W. Va.] 52 S. E. 770. Where several parties associated themselves together to prosecute a certain business, some contributing property and others services, there to be a community of profits, held there was a partnership. Rector v.

of profits does not necessarily constitute a partnership,[76] though the sharing of profits and losses,[77] or of net profits alone,[78] is deemed prima facie evidence of

Robins [Ark.] 86 S. W. 667. See, also, Fourchy v. Ellis, 140 F. 149; Barricklow v. Bowland, 3 Ohio N. P. (N. S.) 78.

Illustrations: Where berry producers formed an association for the sale of their product, they agreeing to bear current running expenses and share profits and losses in proportion to their respective interests in the association, regardless of the extent to which they might actually use the association in selling their berries, held a partnership. Briere v. Searls [Wis.] 105 N. W. 817. Sales agent held not a partner. Ludowieg v. Talcott, 93 N. Y. S. 621. Policy holders in an incorporated stock insurance company are not partners. Betts v. Connecticut Life Ins. Co. [Conn.] 62 A. 345. Agreement between steamship companies to pool earnings, and, after paying expenses, divide net profits, held not to constitute a partnership. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135. Agreement between corporate stockholders that stock held by them could be sold only by mutual consent, and that on such sale the stock should be drawn equally from the shares held by the parties to the contract, and that on a sale by any of the parties the others should have a prior right to purchase, held not to constitute a partnership. Whittingham v. Darrin, 45 Misc. 478, 92 N. Y. S. 752. Where one who had acquired options upon certain lands entered into a written contract with another, empowering him in the absence of the optionee to accept the options and make sales of the lands, and providing that all profits shall be divided equally between them, held not to constitute a partnership. Clark v. Emery [W. Va.] 52 S. E. 770. Purchasers of property who agree to divide the profits resulting from a resale held partners as in respect to such profits. Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669. Agreement whereby one party contributed an hotel and agreed to make certain outside repairs, pay taxes and insurance, and another party agreed to manage the hotel and pay operating expenses, profits to be divided, held a partnership. Mason v. Gibson [N. H.] 60 A. 96. Where one contributed capital for the carrying on of a specific business, a certain proportion of the profits to be taken in lieu of interest, and on the termination of the agreement the money to be repaid, held to create a quasi partnership or joint adventure. Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926. See, also, 82 App. Div. 411, 81 N. Y. S. 891, 178 N. Y. 582, 70 N. E. 1101, where the agreement was held not to constitute an ordinary partnership. Bankers advancing money to one engaged in buying and shipping stock, the only source of profit to the bankers being interest on overdrafts and exchange paid them, held not partners. Dazey v. Field, 112 Ill. App. 371. Where defendants agreed to change their heading mill into a stave mill, plaintiff to advance the money to carry on the business, such money to be repaid by giving him 10 per cent of the net profits, held to constitute a joint adventure but not a partnership. Alderton v. Williams [Mich.] 102 N. W. 753. An agreement by a rancher and another that he may milk the cows upon a ranch belonging to the former, and for his labor shall have one-half of the proceeds of the cream sold, and one-half of any calves born while he is so caring for them, and in addition shall feed the skimmed milk to hogs owned by both parties equally, does not constitute a partnership. Phillips v. Mires [Cal. App.] 83 P. 300. A mining corporation leased its mine for a royalty. Another corporation having the same management as the mining corporation sold goods to the miners and received its pay from the proceeds of the goods mined. Officers of corporations were not to receive any benefit from the operation of the mine other than as stockholders in the corporations. Held business was not a partnership between the corporations or their officers and the lessee. Paris Mercantile Co. v. Hunter [Ark.] 86 S. W. 808. The relation sustained by the members of a building association is essentially that of co-partners. Broch v. French, 116 Ill. App. 15. See Building and Loan Associations, 5 C. L. 478.

76. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760, overruling Fay v. Davidson, 13 Minn. 523 (Gil. 491); Wright v. Davidson, 13 Minn. 449 (Gil. 415); Connolly v. Davidson, 15 Minn. 519 (Gil. 428); Warner v. Myrick, 16 Minn. 91 (Gil. 18). Widow of partner allowing money to remain in business, she to have 10% of the net annual profits for the use of the money, but not exercising any control over the business, held not a partnership as between themselves. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41. Agreement that profits of a certain business should be applied to the purchase of property to be divided between the parties. Held, under the circumstances, not to constitute a partnership. Beard v. Rowland [Kan.] 81 P. 188. Where defendant leased quarry and furnished entire capital to operate same, plaintiff managing it for a share of the profits, held a contract of employment. Zuber v. Roberts [Ala.] 40 So. 319. Plaintiff was jointly interested in contract sued on and in profits. Masterson v. Heitmann & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 8, 87 S. W. 227. One who furnished logs to two persons running a saw mill with understanding that the lumber should be shared between the three was not liable for a debt created by one of the mill owners. Michener v. Fransham [Mont.] 81 P. 953. A purchaser of options authorized another party to accept them and sell the land, the profits to be equally divided, but such party was not entitled thereby to share in the profits unless the sale was made by him. Clark v. Emery [W. Va.] 52 S. E. 770. One receiving share of profits as compensation for services held not a partner. Rector v. Robins [Ark.] 86 S. W. 667. Instruction held erroneous as assuming that one-third of the profits was received as wages and that defendant did not contribute anything to the firm capital. Id.

77. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117; Jones v. Purnell [Del.] 62 A. 149. As where one party purchased

the existence of the relation. It is not essential that the profits shall be liquidated in the form of money or property in possession for division in the ratio of the interests of the members respectively, it is sufficient if the ultimate result contemplated is a community of profits and losses.[79] Except in the case of a partnership by estoppel,[80] the relation cannot be created except by the consent of the parties,[81] either personally or through their duly authorized agents.[82] Like other contracts the agreement must be definite,[83] mutual, executed, and based upon a sufficient consideration.[84]

The essential elements of an ordinary partnership do not enter into a *mining partnership.* The principle of delectus personarum does not apply to such a partnership and no contract is necessary to create it. Such a partnership exists when the tenants in common of a mine work it together for a joint profit.[85]

Intent as test.[86]—What constitutes a partnership, that is the legal elements of a partnership, is a question of law for the court.[87] There is no arbitrary test by which to determine when a partnership exists,[88] the true test being the intent of the parties as evidenced by their agreement and acts done thereunder,[89] and this inten-

logs and provided labor to put them on the market and the other party paid for them. Hi Williamson & Co. v. Nigh [W. Va.] 53 S. E. 124. An instruction that if "defendants were jointly engaged in extracting ore or mineral from the ground on the lots mentioned in the written contract introduced in evidence and each defendant was to share in the profit and loss according to their respective interests therein, then the partnership relation subsists among them, although there is no express agreement to become partners or to share in the profits and losses," held correct. Dale v. Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929.

78. Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918; Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917. See, also, Hubbard v. Mulligan [Colo.] 82 P. 783.

NOTE. Agreement to share profits: The early English cases held that when individuals shared profits they were partners as to third persons. Grace v. Smith, 2 Wm. Bl. 998; Waugh v. Carver, 2 H. Bl. 235, 2 Smith's Leading Cas. 1316. In Torbert v. Jeffrey, 16 Mo. 645, 61 S. W. 823, it was held that participation in profits raised a presumption of partnership and that this presumption was conclusive unless rebutted by satisfactory evidence. There are some cases in other jurisdictions that still support this doctrine. Brandon v. Connor, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Cleveland v. Anderson, 2 Tex. Ct. App. 138; Leggett v. Hyde, 58 N. Y. 272; Magovern v. Robertson, 116 N. Y. 61; Wessels & Co. v. Weiss & Co., 166 Pa. 490; Cossack v. Burgwyn, 112 N. C. 304. Under the modern doctrine the majority of the courts hold that partnership depends in all cases upon the contract and intention of the parties as made out by the facts of the case. The National Surety Co. v. Townsend Brick Co., 176 Ill. 156; Earle v. Literary Club, 95 F. 544; Taylor v. Bush, 75 Ala. 432; Plano Mfg. Co. v. Frawley, 68 Wis. 577; Robinson v. Allen, 85 Va. 721; Wild v. Davenport, 48 N. J. Law 129, 57 Am. Rep. 552; Dutcher v. Buck, 96 Mich. 160.—3 Mich. L. R. 673.

79. Briere v. Searls [Wis.] 105 N. W. 817.

80. See infra this section.

81. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117. The relation is founded upon mutual confidence, consent, and agreement. Morrison v. Dickey [Ga.] 50 S. E. 175.

82. Agent to rent land or do whatever he pleases with it cannot bind his principal by a partnership agreement involving the use of the land. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117.

83. Where the parties themselves put their own construction upon their agreement and showed by their actions that there was no definite agreement to purchase property on joint account. Savannah Rail & Equipment Co. v. Sabel [Ala.] 40 So. 88.

84. Savannah Rail & Equipment Co. v. Sabel [Ala.] 40 So. 88. Breach of agreement by defendant to purchase and resell certain property upon his own personal responsibility and divide profits with plaintiff, held not to give the latter a right of action. Forrest v. O'Bryan, 126 Iowa 571, 102 N. W. 492.

85. Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254.

86. See 4 C. L. 910.

87. Jones v. Purnell [Del.] 62 A. 149; Hubbard v. Mulligan [Colo.] 82 P. 783.

88. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

89. Clark v. Emery [W. Va.] 52 S. E. 770; Barricklow v. Bowland, 3 Ohio N. P. (N. S.) 78; McDonald Bros. v. Campbell [Minn.] 104 N. W. 760. As between themselves, parties are partners when they intended to combine their property, labor, and skill in an enterprise or business as principals for the purpose of joint profits. Id. Whether persons are partners as between themselves depends upon their contract with each other. Reynolds v. Radke, 112 Ill. App. 575. Where lessees of mining property agreed with a third person that when the latter had sunk a shaft to a certain depth he should be entitled to one-half interest in the property, held error to instruct that the contract itself did not make the parties partners, unless the jury believed that the work had been ac-

tion must be ascertained from the whole evidence and all the circumstances of the case.[90] But where a partnership exists as the legal result of an agreement actually made, the parties are partners, even though they have stipulated that they are not to be such.[91]

Who may become partners.[92]—A partnership cannot be formed with an unknown person.[93] In the absence of statutory authorization, corporations have no power to enter into partnership with each other.[94] A partnership agreement entered into by an infant is voidable as to him[95] and he may set up his incapacity for the purpose of releasing himself from liability for the purchase price of the firm's assets.[96] He will not, however, be permitted to derive an undue advantage from his disability, and hence he cannot, at the same time, set up his disability to relieve himself of the firm's debts and retain possession of the firm's assets.[97] Under the married women's acts of most states a married woman can enter into a contract of co-partnership,[98] though in some states the rule has not been extended to cases where the relation is sought to be created between husband and wife.[99] In others it has been so extended,[1] and in such states, as to third persons, she may create the relation by estoppel in pais.[2] In the absence of proof as to what the law of a foreign country is as to the capacity to become a partner, it will be presumed that it is the same as that of the forum.[3]

Formalities of contract of partnership.[4]—The provision of the statute of frauds requiring contracts which cannot be performed within a year to be in writing does not apply to contracts of partnership.[5] By the great weight of authority the provision of such statute requiring contracts for an interest in real property to be in writing does not require a contract of partnership to be in writing, even though the partnership property consists of realty and the very purpose of the partnership is to deal in real estate,[6] though there are authorities to the contrary,[7]

cepted by the others as a performance of the contract, and they had thereupon agreed with the one sinking the shaft that he was to have a one-half interest. Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918.

90. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760; Clark v. Emery [W. Va.] 52 S. E. 770.

91. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

92. See 4 C. L. 910.

93. Secret owner of business was not partner in firm created by a sale of an interest by the ostensible owner to a third person. Morrison v. Dickey [Ga.] 50 S. E. 175.

94. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135.

95. Is not void. Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943.

96. Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943.

97. Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943. Where infant partner agreed to redeliver goods belonging to the firm in satisfaction of a balance due on the purchase price thereof, held he could not repudiate such agreement and recover the goods or their value without paying or tendering to the sellers the balance of the original purchase price. Id.

98, 99. Norwood v. Francis, 25 App. D. C. 463.

1. A husband and wife may become partners or subpartners. Morrison v. Dickey [Ga.] 50 S. E. 175. So held under Burns' Ann. St. 1901, § 6967, providing that a married woman shall be liable for debts in carrying on a separate business, or as partner with another, etc. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811.

2. So held where she borrowed money from bank to be used in partnership business. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811.

3. Contract of partnership made in Mexico and accounting had in Texas. Avocato v. Dell'Ara [Tex. Civ. App.] 91 S. W. 830. See Conflict of Laws, 5 C. L. 610.

4. See 4 C. L. 910.

5. A verbal contract of partnership for the term of five years is not within the statute of frauds, since the death of one of the partners might work a dissolution at any time. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448.

6. Larkin v. Martin, 46 Misc. 179, 93 N. Y. S. 198. As regards the statute of frauds an agreement to become partners in dealing in real estate is neither a contract to buy, nor a contract to sell, real estate as between the parties to it. Garth v. Davis, 27 Ky. L. R. 505, 85 S. W. 692.

7. An oral agreement of partnership to deal in real estate is void under Rev. St. 1898, § 2302, providing that no estate or interest in lands shall be created or transferred, except by operation of law or by deed or conveyance in writing. Scheuer v. Cochem [Wis.] 105 N. W. 573.

and in the latter cases part performance may give validity to the contract.[8] Even statutory formalities are not always conditions precedent to the right of the firm to do business.[9]

Stockholders in illegal or defective corporations.[10]—Where parties merely assume a corporate name and merely pretend to be a corporation which is neither de facto nor de jure, the incorporators may be held liable as partners,[11] but where it is sought to hold them thus liable there must be something more than the mere fact that they signed the articles of incorporation.[12] Nor is a partnership created where one party advances money to another with a view to the formation of a corporation to develop the latter's property, but the property is never conveyed to the corporation and the corporation fails, there being no agreement between the two parties as to the sharing of profits and losses.[13]

Evidence.[14]—The burden of proving the existence of a partnership is upon the party alleging it,[15] and as between alleged partners themselves there must be an actual partnership proved, either directly or indirectly, by a preponderance of proof.[16] A partnership may be proved as between the parties and also as to third persons by evidence of the acts, dealings, conduct, admissions, and declarations of the parties themselves as well as by direct proof in different lines.[17] The relation may be proved by parol evidence.[18] Declarations or admissions of a partner are admissible to prove a partnership against him,[19] but, as a general rule, mere declarations of an alleged partner are inadmissible for the purpose of showing a partnership with another.[20] One claiming to be a partner is a competent witness to es-

8. Where under oral agreement of partnership to deal in real estate defendant took title to the real estate, and plaintiff made repairs and received a portion of the rents, held not to constitute such part performance as to give the contract validity. Scheuer v. Cochem [Wis.] 105 N. W. 573. While in Larkin v. Martin, 46 Misc. 179, 93 N. Y. S. 198 the statute of frauds was held inapplicable, still it was stated that if it had been the facts were insufficient to show a part performance.

9. Cobbey's Ann. St. 1903, providing for the recording of the names of the members of partnerships. Hanfek v. Held & Co. [Neb.] 106 N. W. 171. Filing of certificate. La Montagne v. Bank of New York Nat. Banking Ass'n [N. Y.] 76 N. E. 33. Pub. Gen. Laws Md. art. 73, § 4, providing for filing of certificate. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819. See post § 8, Limited Partnerships.

10. See 4 C. L. 910.

11. Too few incorporators and legal formalities not complied with. Mitchell v. Jensen [Utah] 81 P. 165.

12. There must be a finding of the facts showing their participation in or authorization of the conduct of the business carried on in the corporate name, or some holding out in respect thereto as principals in the business, or facts from which such matters may be inferred. Mitchell v. Jensen [Utah] 81 P. 165.

13. The party advancing the money is merely entitled to an accounting therefor. Fourchy v. Ellis, 140 F. 149.

14. See 4 C. L. 910.

15. Mitchell v. Jensen [Utah] 81 P. 165. In suit for accounting. Thompson v. Walsh, 140 F. 83. In action against partnership. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760. Defendant pleaded non est factum, and burden was likewise on plaintiff to prove execution of note. Clifton v. Royse Cotton Oil Co. [Tex. Civ. App.] 87 S. W. 182. Involuntary bankruptcy proceedings against partnership. Jones v. Burnham, Williams & Co. [C. C. A.] 138 F. 986. See post § 6 B, Pleading and Proof of Partnership.

16, 17. Jones v. Purnell [Del.] 62 A. 149.

18. Hanfek v. Held & Co. [Neb.] 106 N. W. 171.

19. Admission to representative of mercantile agency. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760. Defendant, when told that plaintiff's attorney held the firm note, said "If you have a firm note, I guess you will have to wait for it, for the reason that we are tied up now. We will have to make an arrangement about paying it later. I don't intend to pay it, and if you don't want to wait you will have to sue to get your money." It was held that this, with defendant's failure to deny that he was a member of the firm, was evidence against him, but not conclusive. Bernstein v. Cahen, 48 Misc. 639, 96 N. Y. S. 209. Where employe managed business at a monthly salary, and a commission on net profits, declaration by employer in casual conversations that he was going to make the employe a partner held insufficient to create a partnership as between the two. Strode v. Gilpin, 187 Mo. 383, 86 S. W. 77.

20. But an admission by one of two alleged partners that the other is liable to the plaintiff is not admissible to prove the partnership as against the other alleged partner, where the latter was not present when the admission was made. Bailey v. Fritz Bros. [Ark.] 88 S. W. 569. Where one party seeks to establish the relation of partnership between himself and another or

tablish the partnership.[21] The testimony of a witness who has done business with a firm as to who compose it is admissible.[22] Participation in profits and losses may constitute prima facie evidence of the existence of the relation.[23] Individual notes are irrelevant on the issue of partnership.[24] The appointment of an alleged partner as administrator of the firm does not determine his status as a partner.[25] A statute providing for the recording of a certificate showing the names of partners constituting a firm does not provide an exclusive method of proving the partnership, and a partnership may be proved by any method permissible before the statute was enacted.[26]

Questions of fact.[27]—What constitutes a partnership is a question of law for the court.[28] Whether in fact a partnership exists is a question of fact for the jury.[29]

others, his mere statement that he is or was a partner is inadmissible, without stating the facts upon which such statement is founded. Hubbard v. Mulligan [Colo.] 82 P. 783. A commercial statement of assets and liabilities made by one person and signed in the name of another is not admissible to prove that the latter was a partner. Statement made by husband and signed in name of wife. The husband, however, having testified that his wife was not a partner, the statement signed by him was admissible as affecting the value of his testimony. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760. On an issue as to whether defendant was a member of certain partnership, evidence as to what one of the members of the firm said as to who constituted the firm was incompetent. Rector v. Robins [Ark.] 86 S. W. 667.

21. Suit for accounting. Flynn v. Seale [Cal. App.] 84 P. 263.

22. Issue was whether a business conducted in a firm name was owned solely by a decedent, or was a partnership in which she was a member. In re Dusenbery, 94 N. Y. S. 107.

23. See ante this section, paragraph Essential Elements.

24. Rector v. Robins [Ark.] 86 S. W. 667.

25. Does not bar an action against him for conversion of the property on the ground that no partnership in fact existed. Strode v. Gilpin, 187 Mo. 383, 86 S. W. 77.

26. Cobbey's Ann. St. 1903, § 9300. Hanfek v. Held & Co. [Neb.] 106 N. W. 171.

27. See 4 C. L. 911.

Finding of existence of partnership agreement is sufficient if it meets the test for pleading a partnership prescribed by Rev. St. 1898, § 4197, which permits a partnership to be pleaded in general terms. Briere v. Searls [Wis.] 105 N. W. 817. See Verdicts and Findings, 4 C. L. 1803.

28. Jones v. Purnell [Del.] 62 A. 149.

29. Jones v. Purnell [Del.] 62 A. 149. Where there was evidence that one of the defendants, who claimed not to be a partner, participated in the profits of the firm and there was testimony explaining this circumstance, but there was also testimony of a contradictory character tending to discredit the explanatory evidence, the question as to whether the defendant was a partner was for the jury. Berry v. Pelmeault, 188 Mass. 413, 74 N. E. 917.

Evidence held sufficient to sustain special verdict that one of the defendants was a member of the defendant partnership. McKibben v. Day [Neb.] 104 N. W. 752, for former report of this case see 98 N. W. 845. See 4 C. L. 916. Where there was evidence tending to show that defendants bought from the estate of G. W. M. a store, and that they changed the name of the store by adding the word "The" before and the word "Store" after the name of the former proprietor, and that they hired a manager, carried on the business, took the profits, and that one of them represented to the people from whom they bought goods and to the commercial agencies that they were partners, this, with other evidence, warranted a finding that the defendants were partners. Gay v. Ray [Mass.] 75 N. E. 138. Where a party orders goods in another's presence and afterwards the two order goods together, and on refusal to sell on account of a balance due from the first party the seller is informed by such party that he will send someone to settle the old account, and the next day the other partner and a third person call on the seller, and the third party is introduced as the financial man of the concern and pays the bill of the first party, and tells the seller to ship the goods ordered and that he himself is worth a good deal of money, there is sufficient evidence to sustain a finding of a partnership between the three so as to bind them all for the goods. Fay v. Walsh [Mass.] 77 N. E. 44. Agreement to participate in both losses and profits held sufficient. Jones v. Purnell [Del.] 62 A. 149. Where a plaintiff, who denies the existence of a partnership with the defendant, is met by several witnesses who testify as to admissions by him of a partnership, and his name does not appear on the weekly pay-roll except in one instance, and he is unable to show any contract with the defendant whereby he was to furnish the material and money which he did furnish for the prosecution of the work, a verdict in his favor is clearly against the weight of the evidence and should be reversed on that ground. Schardt v. Stopper, 7 Ohio C. C. (N. S.) 256. Evidence held to show an agreement between plaintiff and his alleged partner for an equal sharing of the net profits and that plaintiff substantially performed the contract on his part. Larkin v. Martin, 46 Misc. 179, 93 N. Y. S. 198. Admissions by a married woman that she was furnishing the capital for a business carried on ostensibly by her husband and a third person, and was responsible for the debts of such firm, made to a representative of a commercial agency, held sufficient to

Partnerships as to third persons.[30]—Although parties may not be in fact partners, they may so conduct themselves towards third persons as to make themselves liable to such person as partners,[31] and in such a case their agreement between themselves is immaterial.[32] One cannot be held a partner by estoppel unless it be shown that the person seeking to so hold him knew of the acts or representations, and relied upon them to his detriment.[33] A partnership in fact existing, it is immaterial that the partner sought to be held falsely told the creditor that he was not a member of the firm.[34]

show that the woman was a partner, notwithstanding conflicting evidence to the contrary. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

Evidence held insufficient to show partnership in mining venture. Thompson v. Walsh, 140 F. 83. The fact that land purchased by one party was partly paid for by an exchange of land once owned by another, and may have been acquired jointly by both parties, does not show, in the absence of evidence that both parties were interested in the property at the time of the exchange, that the parties were partners as to the land received by one of them in the last purchase. Rogers v. Tompkins [Tex. Civ. App.] 13 Tex. Ct. Rep. 161, 87 S. W. 379. In an action against a partnership for breach of a contract of employment, plaintiff's testimony that, when he was employed, a member of the firm introduced him to defendants saying, "These are the two other members of the firm," held insufficient to counterbalance the positive testimony of one of the defendants that another person was a member. Reisman v. Silver, 48 Misc. 399, 95 N. Y. S. 483. Where one stated he wished to purchase a certain opera and that another, to whom he intended to give an interest in the production, would close the deal for him, evidence held insufficient to show that two latter persons were partners, the formal contract being made by the second person alone and the first mentioned party simply advancing him money. Atchison-Ely v. Thomas, 104 App. Div. 368, 93 N. Y. S. 693. Where, in involuntary bankruptcy proceedings, it appeared that one of the alleged partners did not participate in the profits of the firm, and there were no written articles and no express oral agreement was shown, and the alleged partner specifically denied his relation as a partner, which allegation was supported in the main by the correspondence of the firm, the fact that the alleged partner indorsed notes for one of the admitted partners, and at various times guaranteed bills for the firm and otherwise backed it financially in particular transactions, was not sufficient to establish the partnership, although the partner whose notes had been thus indorsed testified that the alleged partner was a partner. There was some evidence of a special partnership but that question was not in issue. The admitted partner also testified that he had introduced the other to various persons as his partner, but these persons were not called as witnesses. Jones v. Burnham, Williams & Co. [C. C. A.] 138 F. 986. Where plaintiff purchased livery with his own money, hired defendant as foreman, the latter not participating in the profits, and the business was afterwards sold and the proceeds appropriated by the plaintiff without objection by the defendant, and were invested by the plaintiff in a live stock ranch, on which defendant was employed as manager, it was held that the defendant was not a partner in either business. Hubbard v. Mulligan [Colo.] 82 P. 783.

30. See 4 C. L. 911.

31. Jones v. Purnell [Del.] 62 A. 149; Reynolds v. Radke, 112 Ill. App. 575. Where it appeared that plaintiff had been selling goods to two brothers separately, but never claimed to hold them both on the goods shipped to one until the transaction sued on occurred, and that even then plaintiff did not rely on a belief that there was a partnership between the brothers but relied on a joint order to which plaintiff's salesman testified, but the salesman was contradicted by both of the brothers, it was held that a finding of the trial court that there was no partnership would not be disturbed. Pritz v. Smith, 97 N. Y. S. 1003. In an action against a sales agent of a partnership to recover the price of goods sold the partnership, billheads made out as payable to the sales agent, and which had sometimes been used in returning goods to plaintiff, held inadmissible to show that defendant was a partner in the buying firm in the absence of evidence that such use was with defendant's knowledge. Ludowieg v. Talcott, 93 N. Y. S. 621. Where defendant's name was painted, with that of another, on the window of the place of business, the two names were jointly printed on advertising matter, license to conduct the business was taken out in defendant's name, defendant was frequently around the store and was introduced as the other man's partner, held to establish a partnership as to plaintiff, a third person. Reynolds v. Radke, 112 Ill. App. 575. Wife held partner with husband where she borrowed money from bank to be used in partnership business. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811.

32. The fact that, by agreement between several persons, goods purchased by one of them are to be paid for by him alone can have no effect on the seller's rights if the circumstances were such as to make them liable to the seller as partners. Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918.

33. So held as regards sales agent of a firm. Ludowieg v. Talcott, 93 N. Y. S. 621. Members of a firm sued on a firm contract held not estopped from setting up a defect of parties in that all the partners were not joined because at the time of entering into the contract plaintiff was told that defendants were the only members. Reisman v. Silver, 48 Misc. 309, 95 N. Y. S. 483.

§ 2. *Firm name, trade mark, and good will.*[35]—The firm name need not contain the names of the actual partners, as where the name remains the same after the personnel of the firm has changed.[36] While the word "company" ordinarily imports a corporation, in the absence of statutes to the contrary, there is no objection to its use in a partnership name.[37] In the absence of express provisions to the contrary there must be imported into the articles of a partnership, the business of which is dependent upon the personal attributes of the members of the firm and the confidence of its patrons therein, a mutual understanding that with the termination of the partnership the use of the firm name shall come to an end,[38] and one partner may, after the expiration of the partnership, procure an injunction to restrain the unauthorized use by the other partner of the firm name, regardless of the pendency of an action against the former for a judicial determination that he has no interest in the firm name.[39]

As regards public stores and the like, the good will of a firm is deemed attached to the premises on which the business is conducted.[40] Where a sale of partnership property is made under decree of court the general rule is that there is no implied covenant on the part of any partner that he will not solicit trade from the former customers of the firm.[41] The good will of a trade or business of a partnership, and the beneficial interests it has under an agreement by another not to engage in a like business in the same community, may be assigned by a retiring partner to the one remaining in the business.[42] While a firm name may in some cases be deemed a part of the good will of the business, it is not of itself, and necessarily, a part of the good will, and while in trade it may, under some circumstances, be such, it cannot become a part of the good will in cases of business which depend upon the personal attributes of the partners engaged therein, such as professional or banking partnerships.[43]

§ 3. *Firm capital and property. In general.*[44]—Property contributed to the partnership[45] or acquired with partnership funds or assets is partnership property,[46]

34. It being alleged that defendant was a member of the firm at the time the debt was contracted an instruction that, if before that time defendant told the creditor he was not a member of the firm, he was not liable, held erroneous, inasmuch as the statement would not relieve him from liability unless true. Rector v. Robins [Ark.] 86 S. W. 667.

35. See 4 C. L. 911. See, also, Good Will, 5 C. L. 1590; Trade Marks and Trade Names, 4 C. L. 1689.

36. The fact that a partner who has sold his interest to a third person knows that the old name of the firm is retained and assists in collecting notes given in a resale by the continuing partner, and knows of and insists on the application of the proceeds to the debts of the old firm, held insufficient to justify the court in taking from the jury the question as to whether the first sale had been rescinded. Johnson v. Wynne [Ark.] 89 S. W. 1049.

37. The name "Artope & Whitt Company" imports a corporation, but the business may be owned and operated by a partnership. Whitt v. Blount [Ga.] 53 S. E. 205.

38. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935. Use of firm name held to come to an end upon termination of partnership where articles merely provided for the relinquishment of all claim to the firm name by a partner on retirement. Id.

39. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

40. And in such case the good will does not pass to a receiver who takes charge merely of the personalty. Griffith v. Kirley [Mass.] 76 N. E. 201.

41. Griffith v. Kirley [Mass.] 76 N. E. 201.

42. An injunction against the seller of the good will in favor of the partnership held not dissolved by one of the partners retiring after assigning his interest in the firm to his partner. Markert & Co. v. Jefferson [Ga.] 50 S. E. 398.

43. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

44. See 4 C. L. 912.

45. Where owner of stock exchange seat agreed to "contribute" it to a partnership, the firm agreeing to pay him interest on the "capital so invested," held stock exchange seat was firm property. In re Hurlbutt, Hatch & Co. [C. C. A.] 135 F. 504.

46. Real estate acquired by exchange of partnership property. McKee v. Covalt [Kan.] 81 P. 475. Fixtures purchased with partnership funds, and a storehouse built for the partnership and apparently paid for with partnership funds, constitute partnership property. Taber-Prang Art Co. v. Durant [Mass.] 75 N. E. 221. A factory operated by a partnership which is rebuilt out of the proceeds of an insurance policy taken out in the partnership name, the premiums on

although the title be taken in the names of the individual partners[47] or be held in the name of one of the partners alone.[48] Even where most of the purchase price is paid by the partner in whose name the title is taken, the land will still be regarded as partnership property where the evidence shows that it was purchased for the partnership.[49] The intention with which the purchase is made controls.[50] Use by the partnership of one partner's individual property,[51] or of property owned by the partners as tenants in common,[52] does not make it partnership property, nor does the fact that buildings are erected on the lands with partnership funds conclusively show an intention to regard the property as partnership property, the firm being reimbursed out of the rents collected.[53] A transfer or assignment from one partner to another will not change the property covered thereby from partnership to individual property, where such transfer is executed merely to facilitate the partnership business.[54] But where a contract with a partnership stipulates that all moneys due thereunder by the other party shall be made payable to one of the partners, who shall be responsible for all the liabilities incurred thereunder, the interest of such partner in the money accruing under the contract is not merely the interest of a partner, but more in the nature of a personal or individual interest.[55]

The interest acquired in the property depends upon the contract of acquisition.[56]

The right of possession of partnership property is a partnership asset which belongs to each and all the partners, but to none in exclusion of the rest.[57] A partner's right of possession is terminated upon his retirement from the firm[58] and is

which were paid by the partnership, constitutes partnership property. Id. A seat in a stock exchange purchased by one partner with money furnished by the other is not a partnership asset, so as to prevent its sale for the debts of the purchaser to other members of the exchange to the exclusion of the partner who furnished the money. Zell v. Baltimore Stock Exch. [Md.] 62 A. 808.

47. Real estate acquired by exchange of partnership property. McKee v. Covalt [Kan.] 81 P. 475.

48. Griffith v. Kirley [Mass.] 76 N. E. 201; Babcock v. Leonard, 97 N. Y. S. 861. Evidence held to show that timber lands, the title to which was taken in the name of one partner, was really partnership property. Bennett v. Hough [Mich.] 12 Det. Leg. N. 371, 104 N. W. 414. When a note is purchased by a firm, but indorsed and delivered to one member, who sues thereon, the proceeds are held by him in trust for the firm. Barber v. Stroub, 111 Mo. App. 57, 85 S. W. 915. A note and mortgage were executed to one member of a partnership for money advanced by the partnership. The note was thereafter assigned by the partner to a third person and then assigned by the latter to the partnership. It was held that by the last transfer the note became partnership property, both in law and in equity, and that the sole legatee and executrix of the partner to whom the note and mortgage were originally made had no title to the mortgage and no right to assign the same, and that no title would pass to her until all the affairs of the partnership had been fully settled. Miller v. Berry [S. D.] 104 N. W. 311.

49, 50. Bennett v. Hough [Mich.] 12 Det. Leg. N. 371, 104 N. W. 414.

51. Humes v. Higman [Ala.] 40 So. 128.

52. Fact that no rent was paid, the firm, however, paying the taxes and insurance, and that no separate accounts with regard to the realty were kept, held not to show that the lands and buildings were partnership property. Taber-Prang Art Co. v. Durant [Mass.] 75 N. E. 221.

53. Taber-Prang Art Co. v. Durant [Mass.] 75 N. E. 221.

54. Quit-claim executed to expedite sale of land. Bennett v. Hough [Mich.] 12 Det. Leg. N. 371, 104 N. W. 414.

55. His interest in such a contract can be reached only by attachment against him or personal service upon him within the state, and not by an action against the partnership and service on the other partner. Morgan v. Alderman & Sons Co., 70 S. C. 462, 50 S. E. 26.

56. Where a nonassignable contract provides that one of the parties may "associate with himself such other party in the enterprise herein as he desires," and a partnership is formed by him, the contract being contributed to the partnership subject to the conditions named therein, held, on dissolution, the contract was not part of the firm property. Arthur v. Sire, 45 Misc. 257, 92 N. Y. S. 158.

57. Where the lessee of a hotel for a certain term transferred a one-half interest in the hotel saloon to another party, and took such party in as an equal partner in the saloon business, for the term of the lease to the hotel, the right to occupy the saloon premises for the purpose of conducting the business became a partnership asset of which the hotel lessee could not deprive his partner during the term, nor could the trustee in bankruptcy of the lessee oust the lessee's partner. Lamb v. Hall, 147 Cal. 44, 81 P. 288.

58. So held where one of the partners sold his interest in the business. Lamb v. Hall, 147 Cal. 44, 81 P. 288.

not assignable, the purchaser of his interest obtaining no right of access to or possession of the property, but such right remains in the liquidating partner for the purpose of closing up the business, unless he chooses to accept the purchaser as a partner.[59] A partner being adjudged a bankrupt, his co-partner is entitled to the possession of the partnership property pending settlement of the business, subject only to the duty to account for the interest of the bankrupt partner when the business is closed.[60]

As regards the statute of frauds, partnership lands are to be regarded as personalty.[61]

A partnership may transfer its property to a corporation, organized for the purpose of holding such property and continuing the business, in consideration of the transfer of a certain portion of the shares of the corporation to the partners.[62]

How title is held.[63]—All effects of a partnership are held in trust.[64] A deed to a partnership in the firm name conveys at least an equitable title,[65] and even though all the partners are dead, such a deed will at least convey an equitable title for the benefit of the heirs of the deceased partners.[66] While a mortgage to a partnership in the firm name is not enforceable at law, it may be foreclosed in equity.[67]

Partner's interest.[68]—The title to property put in as capital contributed by one partner as against labor contributed by the other remains in the original owner.[69] Where a firm ceases to do business, but there has been no accounting or settlement, neither of the partners has an undivided interest in the firm property which he can dispose of to the detriment of the firm's creditors.[70]

§ 4. *Rights and liabilities as to third persons. A. Power of partner to bind firm. In general; contracts.*[71]—One partner may bind the firm and all the members thereof to any transaction within the apparent scope of the partnership business,[72] unless the person dealing with the partner had notice of his want of authority.[73] As to whether or not an act is within the apparent scope of the partnership

59. Premises on which firm business is conducted. Lamb v. Hall, 147 Cal. 44, 81 P. 288.

60. Act July 1st, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3424. Lamb v. Hall, 147 Cal. 37, 81 P. 286.

61. Tillis v. Folmar [Ala.] 39 So. 913.

62. Where such a transfer is unconditional, it is not a sham transfer so as to prevent a federal court from taking jurisdiction of an action by the corporation to recover some of the property from a stranger on the ground of diverse citizenship, though the court would not have had jurisdiction of the action if it had been brought by the partnership. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

63. See 4 C. L. 913.

64. Purchase of co-partner's interest in assets. McKinley v. Lynch [W. Va.] 51 S. E. 4. Where the title to partnership realty is in one of the partners, he holds it as trustee for the firm. Babcock v. Leonard, 97 N. Y. S. 861.

65. Walker v. Miller [N. C.] 52 S. E. 125.

66. But "the better view, we think, is * * * that the ambiguity is latent and open to explanation by which the real party is disclosed and the deed treated as if the name were inserted." Walker v. Miller [N. C.] 52 S. E. 125.

67. Carpenter v. Zarbuck [Ark.] 86 S. W. 299.

68. See 4 C. L. 913.

69. Hillock v. Grape, 97 N. Y. S. 823.

70. Realty. McKee v. Covalt [Kan.] 81 P. 475.

71. See 4 C. L. 914.

72. Clark v. Ball [Colo.] 82 P. 529. The implied authority of a partner to contract so as to bind the firm only relates to the business in which the firm is engaged. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. See special article, Agency from Relation, 3 C. L. 101, 128, also Clark and Skyles on Agency, pp. 60, 67, 235.

73. See 4 C. L. 914, n. 85. Where the indorsee of a note executed in the name of a firm knew that the proceeds of such note were to be used by one member of such firm individually, and not for firm purposes, he cannot recover except as against the partner so deriving the benefit from such note. Adams v. Long, 114 Ill. App. 277. In such a case, under a plea denying joint liability, held proper to introduce in evidence a contract made as a part of the note transaction to which plaintiff was a party, which tended to show the use to which the proceeds of such note were to be applied. Id. Where in an action against a firm, on a contract signed in its name, the evidence

is generally a question of fact for the jury.[74] Thus it has been held that a partner may bind his firm by borrowing money,[75] may employ agents,[76] purchase[77] and sell[78] goods, rent premises upon which to conduct the firm business,[79] transfer a note and mortgage owned by the firm,[80] receive a deposit of money,[81] or enter an appearance in court.[82] In the absence of express limitations, the extent of a particular power of a partner extends to such acts as are reasonably necessary for the success of the business.[83] A partner has prima facie authority to sell the business.[84] In some states a sale by one partner of the entire partnership property at once, the other partner not having abandoned the business, is void as to the nonassenting partner.[85] Such sale, however, is valid as to the individual interest of the partner making the sale, but the purchaser acquires only this individual interest,[86] and the fact that the purchase price is applied to firm debts does not validate the sale or preclude the nonassenting partner from suing the purchaser for a conversion.[87] Where such a sale is made, ratification by the nonassenting partner can only be made with full

showed that it was signed by an unauthorized person, and that plaintiff knew of his lack of authority, held erroneous not to submit the issue whether firm became bound solely by reason of the execution of the contract in its name. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908.

74. Where, in an action against a partnership formed to exploit a summer resort, there was evidence tending to show that the partnership contemplated more than the mere sale of lots, that it engaged in cleaning up the ground, building a dock, and other things requiring the use of a team, and that the team, the price of which formed the subject of the action, was used by the firm and that it afterwards claimed to own it through purchase from the partner who purchased it from plaintiff, these circumstances, together with evidence tending to show that the purchasing partner had authority to make the purchase, were sufficient to make the question of authority one for the jury. Beckwith v. Mace [Mich.] 12 Det. Leg. N. 124, 103 N. W. 559.

75. Especially where the other partner knows of and acquiesces in the transaction. Brite v. Guy [Ky.] 88 S. W. 1069.

76. A member of a partnership formed to deal in real estate, has power to bind his firm by employing an agent to act for it in signing a sufficient memorandum to comply with the statute of frauds. Garth v. Davis, 27 Ky. L. R. 505, 85 S. W. 692. Two corporations forming a partnership, the act of the agent of one of such corporations is in law the act of each. Gunning System v. LaPointe, 113 Ill. App. 405.

77. One of the partners of a firm engaged in the sale of merchandise has power to bind the partnership by giving an order for the purchase of goods to be sold in the firm's business. Smith & Cheney Co. v. Schmidt [Mich.] 12 Det. Leg. N. 604, 105 N. W. 39.

78. A bill of sale executed in the name of the partnership to whom the property belongs, but by one of the partners only, conveys a good title as against a subsequent attaching creditor. Sullivan v. Franklin Bank, 6 Ohio C. C. (N. S.) 468.

79. Newspaper business. Woolsey v. Henke [Wis.] 103 Wis. 267.

80. The note was orlginally payable to the other partner and was transferred to the firm by an indorsee, so that the firm was both the legal and the equitable owner when the last transfer was made. Miller v. Berry [S. D.] 104 N. W. 311.

81. Where one of two partners who conduct a hotel absconds with money deposited with him by a guest, the depositor may recover from the other partner, the right to recover in such case being based upon the law of partnership and not upon the laws applicable to innkeepers. The depositor's right to recover is not dependent upon being a guest at the time the demand for the deposit is made. Clark v. Ball [Colo.] 82 P. 529.

82. In an action against three defendants as partners, two of them appearing and the attachment issuing against them, a levy may be made upon the partnership property. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. S. 140.

83. Where a partnership agreement did not limit to any particular sum the amount of money which a partner could expend for repairs, etc., held the partner was justified in making such repairs, etc., as were reasonably necessary for the success of the business. Mason v. Gibson [N. H.] 60 A. 96.

84. Evidence that the other partner was afterwards dissatisfied with the price, which, however, was not shown to be inadequate, did not show a want of authority in the partner making the sale. Kubillus v. Ewert [Wash.] 82 P. 147.

85. Montana Civil Code § 3232. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

86. Does not acquire an interest in the partnership as such so as to entitle him to an accounting as against the nonassenting partner. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

87. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. **The measure of damages** in such case is the reasonable value of the property at date of conversion with interest, or the highest market value at any time between the conversion and the verdict, without interest, together, in each case, with fair compensation for the time and money expended in the pursuit of the property, and hence evidence in such a suit as to the indebtedness of the firm and the condition of the accounts between the partners was inadmissible. Id.

knowledge of all the facts and circumstances.[88] A partner cannot bind his co-partner by a contract relating to matters not properly pertaining to the business.[89] Even as against the other partners, an act of a partner for his own exclusive benefit may be binding on the firm, where there was nothing to show affirmatively that the act in question was not for the benefit of the firm, and nothing which ought to have put a prudent person on his guard as to the true nature of the transaction.[90] A partner's authority may be enlarged by implication[91] or by a general usage acquiesced in by all the members of the firm,[92] but before such a custom or usage will become binding upon a partner who has not expressly authorized it, the circumstances must be such as to show that he not only knew of the course of dealing in particular instances, but contemplated and assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases.[93] The members of a nontrading partnership have not the same extent of authority to bind the other members of the firm,[94] but this is because the scope of the business of such firms is not so wide as that of trading partnerships, and where the act is within the scope of the firm's business, and so within the scope of the partner's authority, a member of a nontrading partnership may bind his co-partners just as truly as can the members of a trading partnership.[95] Where a firm assumes the payment of a mortgage, either member of the firm may extend the statute of limitations by making a payment.[96]

Partnership bills and notes.[97]—Where the transaction is within the scope of the firm's business, a partner may bind his firm by executing[98] or indorsing[99] a note or accepting an order.[1] Ratification is equivalent to previous authorization.[2] A

88. Hence, in an action against the purchaser for conversion, a bare offer to show that the plaintiff received a certain sum from his partner, with full knowledge of the sale, was admissible as tending to show a ratification, but an offer to show that the price of the property was applied to the firm debts, without showing that it was with the knowledge and consent of the nonassenting partner, was properly excluded. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

89. Contract of guaranty. New York Fire Proof Tenement Ass'n v. Stanley, 94 N. Y. S. 160.

90. Indorsement of note. Calvert Bank v. Katz & Co. [Md.] 61 A. 411.

91. Where one of two partners signs his name to a judgment note in which the name of the payee is left blank, and delivers it to his partner on the understanding that the latter shall sign it, and use it to raise money for the benefit of the firm, and the partner to whom it is delivered signs and negotiates it and diverts the proceeds to his own use, held the first partner was liable. Neil v. Neil, 25 Pa. Super. Ct. 605.

92. Custom of selling goods in exchange for commodities for private use. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 51 S. E. 661.

93. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 51 S. E. 661.

94. Alley v. Bowen-Merrill Co. [Ark.] 88 S. W. 838.

95. Member of law firm may bind firm for law books. Alley v. Bowen-Merrill Co. [Ark.] 88 S. W. 838.

96. McKee v. Covalt [Kan.] 81 P. 475.

97. See 4 C. L. 915.

98. Note for borrowed money. Brite v. Guy [Ky.] 88 S. W. 1069. Where one of three partners was about to retire, and one of the continuing partners told the other to settle with the retiring partner the best he could, and the partner making the settlement executed a note to the retiring partner to which he signed the name of the continuing partners, the trial court and jury were justified in finding that there was sufficient authority to execute the note. Taylor v. Herron [Kan.] 82 P. 1104.

99. Where nothing appears to show that the indorsement was without the authority of the other partner, and there was nothing to show that the transaction was not within the scope of the firm's business, or to put the other party on his guard as to the true nature of the transaction, the firm was bound, though the indorsement was for the partner's private benefit. Calvert Bank v. Katz & Co. [Md.] 61 A. 411. In an action by a continuing partner against a bank to recover the amount of a note which was charged to the plaintiff's account, after the dissolution of the firm, there was no question of recoupment, and it was error to charge upon that theory. The only question in the case was the right of the bank to charge the note to the plaintiff. Id. In such case the defendant's liability is for the jury. Id.

1. Although the drawer was not advised of the formation of the partnership, the property having been previously purchased by the partner upon whom the order was drawn. But delivery was not made until after the partnership was formed. Hi Williamson & Co. v. Nigh [W. Va.] 53 S. E. 124.

2. Where one of two partners made and signed a promissory note payable to a third

note signed individually by each member of a firm is prima facie the several obligation of each and not a partnership debt,[3] but this presumption may be rebutted by proof aliunde.[4] Partners in a nontrading firm have no implied power to bind one another by commercial paper executed in the name of the firm.[5] To make such paper binding the party seeking to hold other members must show either previous authorization or subsequent ratification.[6] Authority to a member of a nontrading partnership to act as managing partner, with full power and authority to conduct the firm's business, does not empower him to bind the other members with notes signed in the firm name.[7]

Notice to one as notice to all.[8]

Nature of partnership liability.[9]—Partners, even though silent or dormant,[10] are jointly and severally liable for all the firm's debts,[11] but his individual liability does not accrue until the insufficiency of the firm assets is made to appear.[12] The liability of partners is controlled by the laws of the place where the articles of copartnership were executed.[13] The liability of partners on a firm contract is joint.[14] The fact that credit is apparently given one partner will not relieve the partnership from liability where the latter has had the benefit of the transaction.[15]

person and indorsed it in the firm name, and the note was then discounted for such third person by a bank in curtailment and renewal of another note similarly indorsed, and after the dissolution of the firm the note was charged to the account of the other partner, who thereafter had a consultation with the president of the bank regarding the charge, and finally, through his attorney, received the note from the bank with other cancelled vouchers and retained for over two years without protesting against the bank's right to make the charge, having in the meantime, moreover, sued the other parties on the note, it was held that he could not, while still retaining the muniment of title to the debt, sue the bank for the amount thus charged to his account. Calvert Bank v. Katz & Co. [Md.] 61 A. 411. Failure of one partner to deny his liability upon a note signed by his co-partner in the firm name may be sufficient to sustain a finding that the act of the co-partner in signing the note was ratified. Taylor v. Herron [Kan.] 82 P. 1104.

3. Young v. Stevenson [Ark.] 84 S. W. 623.

4. Parol evidence held admissible. Young v. Stevenson [Ark.] 84 S. W. 623.

5. Third Nat. Bank v. Fults [Mo. App.] 90 S. W. 755. An instruction so declaring held not in conflict with one that if there was no firm having the name signed to the notes there could be no recovery against defendant, though he and other defendants were partners, unless he consented to, or knew of the use of the firm name on the notes. Id.

6. Third Nat. Bank v. Fults [Mo. App.] 90 S. W. 755.

Questions of evidence: Upon an issue as to the liability of one alleged member of a nontrading firm on a note executed in the firm name, evidence that before the execution of the note two of the other partners asked the plaintiff bank if they could get money, making no mention of the member whose liability was disputed, was proper. Third Nat. Bank v. Fults [Mo. App.] 90 S. W. 755. In an action against alleged partners on a note, evidence as to what one defendant told plaintiff's officers as to another defendant being a member of the firm held inadmissible, being hearsay. Id. In an action on a note signed by a nontrading partnership, proof of a custom of other similar partnerships to execute notes signed by all the partners did not justify submission to the jury of the question whether a partner who did not sign the note was liable thereon. Error in admission, however, held harmless. Id.

7. Third Nat. Bank v. Fults [Mo. App.] 90 S. W. 755.

8, 9. See 4 C. L. 916.

10. Partnership formed after one of the partners had purchased but not paid for timber. Hi Williamson & Co. v. Nigh [W. Va.] 53 S. E. 124.

11. Dickas v. Barnes [C. C. A.] 140 F. 849; Morrisey v. Berman, 94 N. Y. S. 596. Liability to indorser of firm paper. Johnson v. Wynne [Ark.] 89 S. W. 1049. Unincorporated joint stock company. Norwood v. Francis, 25 App. D. C. 463.

12. Morrisey v. Berman, 94 N. Y. S. 596.

13. The mere fact that the co-partnership was engaged in carrying on business in Costa Rica did not make the laws of such country apply, the partner's liability having originally arisen out of a partnership agreement executed in California. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524.

14. In an action thereon, an instruction authorizing a verdict against defendants separately or collectively held erroneous. Costet v. Jeantet, 108 App. Div. 201, 95 N. Y. S. 638. Error held harmless where jury found against all the defendants. Id.

15. Where a partner gave his individual note for a firm debt. Beckwith v. Mace [Mich.] 12 Det. Leg. N. 124, 103 N. W. 559. The fact that a bill is made out to one partner will not necessarily preclude the creditor from enforcing the claim against the firm, especially where it was done at the request of the partner denying liability. Fay v. Walsh [Mass.] 77 N. E. 44. Where an original loan was made to a firm, though

Liability for torts and crimes.[16]—Partners are jointly and severally liable for torts committed by the firm[17] or by any member of the firm in the conduct of, and within, the firm business.[18] A partner in an ordinary mercantile business has no implied power to render the firm liable for false imprisonment by reason of having caused the arrest and searching of a customer on a charge of stealing goods,[19] and

evidenced by the individual note of one of the partners and entered on the firm's books as an individual debt, and the money was applied to partnership purposes and the firm acknowledged the debt as a firm debt, and paid interest thereon and gave a judgment note for the debt which was signed in the firm name and by the individual members thereof, held firm debt. First Nat. Bank v. Follett [Colo. App.] 80 P. 147.

16. See 4 C. L. 916.

17. Grissom v. Hoflus [Wash.] 80 P. 1002. A variance between a complaint for injuries caused by the bite of a dog, alleging that the dog belonged to defendant, and proof that the dog was owned by a partnership of which defendant was a member, held immaterial. Id. Conversion of bonds and misappropriation of funds realized from bonds. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Plaintiff will not be required to elect whether he sues defendants individually or as partnership. Lewis v. Crane & Sons [Vt.] 62 A. 60. Where the administrator of a deceased partner pays to one of the surviving partners, on his withdrawal from the firm with the knowledge of all the other surviving partners out of the funds in his hands as such administrator, money in settlement of his share in the business, the withdrawing partner and the administrator and the other partners are liable to the estate of the deceased partner for the funds so misapplied. Hibberd v. Hubbard, 211 Pa. 331, 60 A. 911.

18. Where a member of a partnership received for his firm cotton which was subject to a landlord's lien, the firm was liable to the landlord as for a conversion to the extent of the landlord's lien. Thomas v. Tucker, Zeve & Co. [Tex. Civ. App.] 89 S. W. 802. A partner in a firm selling intoxicating liquors, who keeps the place of business open on Sunday, is liable personally, and cannot escape on the ground that the business conducted was firm business. Morris v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 832.

19. Firm held not liable for such an act done by an employe under the direction of one of the partners. Bernheimer Bros. v. Becker [Md.] 62 A. 526.

NOTE. Partnership liability for unauthorized tort of partner: The liability of one partner for the unauthorized torts of the other rests on the principles of agency. Ashforth v. Stanwix, 3 E. & E. 701; Pollock, Digest of Partnership [6th Ed.] 47; Burdick on Partnership, 194 (note 3). Thus he is responsible for such acts of his partner as fall within the "scope of the authority apparently conferred upon him." Lindley on Partnership, 157. Upon the words of the rule the courts are agreed. It is when they come to decide what the rule means in any given case that we find the diversity. A manifestation of a tendency to narrow the "scope of authority" is seen in the recent Maryland case (Bernheimer Bros. v. Becker [Md.] 62 A. 526) above cited. This decision is based on a previous Maryland case, Kirk v. Garrett, 84 Md. 383, which goes mainly on the unsatisfactory ground that the offending partner cannot by his wrong "drag in" the innocent one. That case, however, is clearly distinguishable, since there the unauthorized detention by one of the partners was not for the recovery of firm property but for the purpose of having the plaintiffs give testimony for the conviction of others who were charged with stealing from the firm. The innocent partner was rightly held not liable just as in the case of unauthorized malicious prosecution (Farrell v. Friedlander, 63 Hun [N. Y.] 254, 257; Marks v. Hastings, 101 Ala. 165), or the arrest of a would-be thief to secure conviction (Edwards v. London N. W. R. Co., L. R. 5 C. P. 445; Turnpike Co. v. Green, 85 Md. 161). In these cases the innocent partner is not held since the act cannot be said to have been in and for the firm business. But where ordinary legal proceedings have been instituted by one partner without the other's knowledge for the recovery of firm property, in the course of which an attachment is levied on the goods of a stranger to the action, the firm is liable in tort (Kuhn v. Weil, 73 Mo. 213), even though the litigating partner knows that they are the wrong goods (Harvey v. Adams, 32 Mich. 472). It has been suggested that there is implied authority to protect the principal's interests by causing the arrest of a person who is believed to be infringing them, but not to seek to punish after the attempt has ceased. Huffcut on Agency, 309; Allen v. London & S. W. R. Co., L. R. 6 Q. B. 65.

The favorite reason for decisions similar to that in the principal case is that no authority to do a thing which the principal could not lawfully do can be presumed. Mali v. Lord, 39 N. Y. 381; Kirk v. Garrett, 84 Md. 383; Petrie v. Lamont, Car. & Marsh. 93. The case of Mali v. Lord was an action against the members of a firm for the act of their superintendent, who had attempted to recover firm property by the means used in the principal case, except that he called in an officer of the law to aid him. The extreme of this doctrine, which has been severely criticized (Huffcut on Agency, 309; Burdick on Partnership, 197), appears where one partner refused to return collateral taken by him as security for a usurious loan made by him in the partnership business, and the innocent partner is not held in conversion (Graham v. Meyer, 4 Blatch. [N. Y.] 129). This case however is to be distinguished from the case where an agent in making the loan extorts a commission from the borrower which raises the cost of the loan to usury where the principal is not held because the act is plainly for the agent's own benefit. 2 Columbia Law

the other partners will not be liable for such an arrest unless they ratify the acts of their co-partner.[20] Where a complaint is against the individual members of a firm, an objection that the allegations charge the firm with the tort is unfounded.[21]

(§ 4) *B. Commencement and termination of liability. Incoming partner or firm.*[22]—Unless expressly assumed, an incoming partner is not liable for the debts of the old firm.[23] A partnership on taking over the business of another firm may, by agreement, assume the debts and liabilities of the old firm,[24] and "liabilities" as here used includes tort liabilities.[25] One assuming the liabilities of a partnership is not liable to one of the partners for breach of a contract with him, rendered unavoidable by reason of the performance of partnership contracts.[26]

Notice of dissolution and rights of third parties dealing with firm after apparent dissolution.[27]—Except where dissolution is caused by operation of law,[28] notice of dissolution or retirement is necessary in order to terminate liability for future acts of the other partners,[29] and no notice being given, the fact that the retiring partner relied on the continuing partner to give notice of dissolution will not relieve him from liability.[30] As to former dealers, actual notice or knowledge of facts

Review 256. The English courts have decided that when railroad companies have by statute the right to arrest passengers for defrauding them of fares, they are liable for the mistakes of their conductors in such cases. Goff v. G. N. R. Co., 3 E. & E. 672; Moore v. Met. R. Co., L. R. 8 Q. B. 36. In the absence of this statute the reverse is true. Poulton v. London & S. W. R. Co., L. R. 2 Q. B. 534. It is submitted that this position is untenable since the servant has the duty of protecting the interest of the company, and his decision as to what means should be used in any given case should bind the company. To say that in no case where the principal would not have had the right to do the act can he be held, is to say that he is never liable for the unauthorized tort of his agent. It cannot be said that the principal would have the right to violate the revenue laws (Stockwell v. U. S., 13 Wall. [U. S.] 531, 20 Law. Ed. 491; Rex v. Strannyforth, Bunb. 97), or to commit forgery (Boardman v. Gore, 15 Mass. 331), or to publish a criminal libel (Rex v. Walter, 3 Espin. 21), or to obstruct omnibuses (Limpus v. London Gen. Omnibus Co., 1 H. & C. 526), or negligently to drive a coach so as to injure someone (Moreton v. Hardern, 4 B. & C. 223), or to kick a boy stealing a ride from a swiftly moving train (Rounds v. D. L. & W. R. Co., 64 N. Y. 129); yet on all these cases the innocent partner would be held (Moreton v. Hardern, 4 B. & C. 223). The principal case seems unsound, the true rule being that where an agent, and therefore a partner, is under a duty to act in the protection of the interests of the principal or firm, his acts done in the performance of that duty, for the benefit of the principal or firm, shall render the latter liable. Staples v. Schmid, 18 R. I. 224.—6 Columbia L. R. 264.

20. Merely ordering complainant's husband off the premises after having heard a complaint by him and investigating the matter, held not a ratification. Bernheimer Bros. v. Becker [Md.] 62 A. 526.

21. Unlawful seizure of crops and malicious arrest. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

22. See 4 C. L. 916.

23. Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065. The purchaser of a partner's interest is not liable for previous debts of the firm not assumed by him. Humes v. Higman [Ala.] 40 So. 128.

24. Where one partnership transfers all its assets to another intending to take its place, and covenants that they are worth a sum stated over all liabilities, and that in one year they will yield that amount in cash, nothing further being said about the debts, such transfer is subject to the payment of the debts of the old firm. The new firm being thus under obligation to pay the debts of the old to the extent of what was realized from the latter's assets, a payment of a debt due by the old firm by one of the partners in the new was not a misappropriation of the assets of the new firm. La Montagne v. Bank of New York Nat. Banking Ass'n, 183 N. Y. S. 173, 76 N. E. 33.

25. Liability for conversion of trust funds. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

26. A successor to a partnership formed for the manufacture of lumber is not liable to a partner for damages to logs belonging to him, where such delay was necessitated by performing a log-cutting contract made by the firm with another. Crawford v. Thomas [Ark.] 86 S. W. 285.

27. See 4 C. L. 916.

28. See 4 C. L. 916, n. 36.

29. Debt incurred. Rector v. Robins [Ark.] 86 S. W. 667. Retiring partner liable to purchasing agent for all goods purchased and paid for by him before notice of the dissolution. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524. A partial payment made upon a partnership debt, after the dissolution of the firm, will suspend the operation of the **statute of limitations** as to other partners in favor of a creditor receiving such payment, who has had dealings with the partnership and has no notice of its dissolution. Robertson Lumber Co. v. Anderson [Minn.] 105 N. W. 972.

30. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524.

sufficient to put him on inquiry is necessary.[31] No particular kind of notice is essential,[32] and it is not necessary that the parties in interest should be distinctly apprised and know at the time that what is claimed to be notice was intended as such notice,[33] the question of notice being often one of fact for the jury.[34] The taking of an order for the sale of goods will constitute one a former dealer.[35] Failure of a seller to retake possession of goods sold the firm by an exercise of the right of stoppage in transitu, after receiving notice of dissolution, does not bar recovery from the retiring partner.[36] As to persons who have had no dealings with the firm prior to its dissolution, fair notice in any public and notorious manner is sufficient,[37] but, where the change of name does not convey information of the incorporation, mere incorporation of the partnership is insufficient.[38] A retiring partner is not liable to one dealing with the partnership for the first time after his retirement, where such person does not know of nor rely on such retiring partner's former connection with the firm.[39]

Novation.[40]—By agreement between all the parties a firm creditor can accept an incoming partner[41] or a new firm[42] as his debtor and thereby release all other parties, and if he so accepts an incoming partner as his debtor, he has no right to compel an accounting by the new firm.[43] In the absence of consent an agreement by one partner to assume the firm debts has no effect on the rights of the creditor,[44] and an acceptance of part payment does not constitute such consent or an estoppel.[45]

31. Smith & Cheney Co. v. Schmidt [Mich.] 12 Det. Leg. N. 604, 105 N. W. 39. Notice may be inferred from circumstances from which knowledge of the dissolution ought to be inferred. Robertson Lumber Co. v. Anderson [Minn.] 105 N. W. 972. Even after dissolution the power of a partner to bind the firm remains in full force as to parties with whom the firm has been dealing, until notice of the dissolution has been given, although, as between the partners themselves, the dissolution is a revocation of the authority of each to bind the others. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524. Where a retiring partner was sued on a debt created while he was a member of the firm, held proper to refuse to charge that if at the time of the execution of the renewal note sued on the plaintiff had the means of obtaining knowledge of defendant's retirement, he was not liable. Smart v. Breckinridge Bank [Ky.] 90 S. W. 5.

32, 33. Robertson Lumber Co. v. Anderson [Minn.] 105 N. W. 972.

34. Where managing agents of corporation had actual notice of dissolution, and corporation's books contained entries of sales to the firm and to one partner as an individual after the dissolution, and it was admitted duty of traveling auditor to examine such books, payment was made to traveling auditor, held question of notice was for the jury. Robertson Lumber Co. v. Anderson [Minn.] 105 N. W. 972.

35. Smith & Cheney Co. v. Schmidt [Mich.] 12 Det. Leg. N. 604, 105 N. W. 39.

36. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524.

37. Shumaker on Partnership [2nd Ed.] § 121, p. 216. Where partnership incorporated published notices referring to the formation of the corporation, held incompetent where they did not set forth the dissolution, and there was no proof that they were published as the acts and declarations of the partners and that there had been an actual dissolution. Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647.

38. Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647.

39. So held as to a member of an unincorporated joint stock company who withdrew therefrom and sold his stock, though unable to obtain a transfer thereof on the company's books. Norwood v. Francis, 25 App. D. C. 463.

40. See 4 C. L. 917.

41. Individual creditors of a deceased partner, who made agreement with widow of deceased that if his estate was insufficient to pay their debts she would pay them from the profits of a new partnership it was proposed to form, held to have no right to sue to compel an accounting by the new firm. Milleman v. Kavanaugh [Pa.] 62 A. 907.

42. Evidence held insufficient to justify the court in taking from the jury the question as to whether the sale by the retiring partner had been rescinded, thus reviving such partner's liability to an indorser of the firm's paper who had released him and accepted the new firm as debtor. Johnson v. Wynne [Ark.] 89 S. W. 1049.

43. Milleman v. Kavanaugh [Pa.] 62 A. 907.

44. 4 C. L. 917, n. 43. Where a new firm assumes the liabilities of an old firm which it succeeded, all the members of the old firm become members of the new, after the dissolution of both firms, a bill may be filed against all the individual members of the two firms, and the members of the old firm will be responsible for a liability thereof, whether as members of the old or the new firm. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

45. Acceptance of part payment by assignee of firm held not to bar firm creditor from recovering balance from a retiring

A retiring partner, the purchaser of whose interest has assumed the debts of the firm, occupies the relation of a surety with respect to such funds,[46] and notice being given to a firm creditor, he must look primarily to the continuing partner, and the retiring partner cannot be proceeded against until the remedy against the continuing partner has been exhausted.[47] This rule does not modify the original contract with the creditor and is based upon the fact that the continuing partner has come into the sole possession of the assets, and not upon his agreement with his partner to assume the debts.[48] The debts becoming due and remaining unpaid, the retiring partner may maintain a suit to compel his principal to pay them.[49] A novation cannot be rescinded without the consent of the retiring partner.[50]

(§ 4) *C. Application of assets to liabilities. Firm debts and assets.*[51]—There is an equity between partners giving them the right to compel application of firm assets to the payment of its debts.[52] This right may be preserved by an outgoing partner for his protection in extinguishment of partnership liabilities, and, when so preserved, it will inure to the benefit of creditors who may claim through such partner's equity,[53] but being expressly relinquished, no right remains in him to which the creditors can be subrogated.[54] A partnership has the same right of disposition of the partnership assets that individuals enjoy in the law,[55] and the partners may, during the existence of the partnership, provided they act in good faith,[56] convert joint or partnership property into separate property, or separate into joint, and the property will on dissolution be held to possess that character which is thus impressed upon it.[57] It follows that partnership creditors have no other claim or lien than creditors generally have on a debtor's property,[58] and, until equity obtains jurisdiction of a partnership for the purpose of winding up its business, the right to insist that partnership property shall be applied primarily to the discharge of partnership debts is one belonging solely to the several partners themselves, and is not available to the creditors of the firm,[59] and by the weight of authority this is true, though the firm or partner be insolvent.[60] A partner has no right to fraudulently use or waste firm assets.[61] As to the other partners a transfer of partnership

partner, who was a member of the firm at the time of the creation of the debt sued on. Smart v. Breckinridge Bank [Ky.] 90 S. W. 5.

46. Tillis v. Folmar [Ala.] 39 So. 913.

47, 48. Morrisey v. Berman, 94 N. Y. S. 596.

49. Tillis v. Folmar [Ala.] 39 So. 913.

Parties: Where complainant sold his interest and that of W. in a partnership, W., who ratified his action and was satisfied to look to complainant for his share of the proceeds, is not a necessary party to a suit to compel the purchasers to pay the debts of the firm as they had agreed. Tillis v. Folmar [Ala.] 39 So. 913.

50. Fact that retiring partner urges collection of notes received by continuing partner in name of old firm in resale of entire business, and consents to the application of the proceeds to the debts of the whole firm, held not sufficient to take from the jury the question as to whether the retiring partner had ratified a rescission by the continuing partner of the former's sale of his interest to a third person. Johnson v. Wynne [Ark.] 89 S. W. 1049.

51. See 4 C. L. 918.

52, 53, 54, 55. Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065.

56. Where firm property by sale and conveyance is appropriated to the payment of the individual debts of one partner, a fraudulent conveyance sufficient to sustain an attachment is established. Reynolds v. Radke, 112 Ill. App. 575.

57. First Nat. Bank v. Brubaker [Iowa] 105 N. W. 116. Property conveyed by a third person to a partner's father, in exchange for firm property conveyed by the partner, does not constitute partnership property. Id.

58. Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065. A partnership creditor must work out his lien on the partnership property through one of the partners, and, when he cannot do this, he has no enforceable lien. Merkley v. Gravel Switch Roller Mills Co.'s Assignee [Ky.] 90 S. W. 1059. Partnership creditors take subject to liens existing on the partnership property, to the knowledge of the partners, at the time of the formation of the partnership. Id.

59, 60. First Nat. Bank v. Brubaker [Iowa] 105 N. W. 116.

61. Where a firm was heavily indebted, a sale by a member thereof at the unusual discount of $150, of two city warrants for $1,000 each, payable to his order for money due the firm on a paving contract, held void as to the firm's creditors. Case v. McGill [N. J. Eq.] 60 A. 569.

property by a partner in payment of an individual debt to one having notice of the character of the property is voidable merely,[62] but if the transfer be to an innocent party, he takes good title and is not liable to the other partners,[63] and in the former case, the purchaser cannot set up an estoppel against the other partner on the ground that he did not use due diligence in discovering his partner's fraud,[64] but an estoppel does arise if the other partners assented to the transaction with full knowledge of the facts.[65] A partner so applying firm property, the fact that the creditor is also a firm creditor does not render such application a payment of the firm debt until disaffirmance by one of the other partners.[66] It follows that a partner cannot, without the consent of his co-partners, set off firm credits against individual debts.[67] Partnership property being, by consent of the partners, divided among themselves, one partner may apply the property so received by him in payment of an individual indebtedness without the consent of the other partners.[68] What is above stated constitutes one of several exceptions to the general rule that firm assets must be applied to the discharge of firm debts in preference to the claims of partners or of their individual creditors,[69] and vice versa,[70] the surplus of either fund being subject to the rights of the other creditors,[71] each partner being personally liable for the entire amount of all partnership obligations.[72] The general rule stated does not apply when the partnership is a silent one and the business is conducted in the individual name of one of the partners.[73] A creditor of an individual who becomes such in reliance on certain assets belonging to the debtor, is, as to such assets, entitled to a

62. Morrison v. Austin State Bank, 113 Ill. App. 651. Purchaser is charged with knowledge of the partner's want of power. Partner sold goods in payment of debt due purchaser by former firm of which selling partner was member. Murphey v. Bush [Ga.] 50 S. E. 1004. An agreement between one partner and a purchaser to sell partnership goods, and receive in exchange therefor commodities to be applied to the private benefit of the individual partner, is void as being beyond the scope of the partner's authority, the purchaser, moreover, being informed by the very nature of the transaction that the act is not within the legitimate scope of the partnership business. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 51 S. E. 661, distinguishing and partly overruling Perry v. Butt, 14 Ga. 699.

63. Morrison v. Austin State Bank, 113 Ill. App. 651.

64. Purchaser is himself a wrongdoer. Murphey v. Bush [Ga.] 50 S. E. 1004.

65. Goods bought for sole use of individual partner as a firm purchase. Stewart v. Brubaker & Co., 112 Ill. App. 408.

66. Riddle v. McLester-Van Hoose Co. [Ala.] 40 So. 101.

67. Cannot bind the firm by an agreement with a firm debtor, to whom the partner is indebted, to pay the firm a certain amount to be credited by the firm debtor on the partner's liability to him. Dunnett v. Gibson [Vt.] 63 A. 141. Cannot apply proceeds of debts due the firm to a debt due by him to the firm's creditor. Other partner may set off such payment against debt owed by firm to party who received it. Riddle v. McLester-Van Hoose Co. [Ala.] 40 So. 101.

68. First. Nat. Bank v. Brubaker [Iowa] 105 N. W. 116.

69. Partnership assets being administered in probate court. Ault v. Bradley [Mo.] 90 S. W. 775. In case of insolvency of a firm the partnership property must first be applied to the payment of the firm debts before it can be applied to the individual debts of the partners. The rule is the same even where the partners are both liable for the personal debt, as where one partner endorses for the other. In re Hallock, 47 Misc. 571, 96 N. Y. S. 105.

70. Creditors of individual partners have the exclusive right to have their debts first satisfied out of the property of individual partners. Ault v. Bradley [Mo.] 90 S. W. 775. The personal assets of a partner are first applicable to his personal debts, then the surplus will be applied to the firm debts. In bankruptcy proceedings against a partnership, the court may order the personal property of one of the partners to be brought into court for the purpose of ascertaining this surplus and applying it to the firm debts, although the partner has not been adjudged a bankrupt. Dickas v. Barnes [C. C. A.] 140 F. 849. See Bankruptcy, 5 C. L. 367.

71. Dickas v. Barnes [C. C. A.] 140 F. 849. Upon an issue in involuntary bankruptcy proceedings, as to whether a partnership is insolvent, the property of the individual members must be considered. In re Perley & Hays, 138 F. 927. See Bankruptcy, 5 C. L. 367.

72. Bankruptcy court administering bankrupt partnership estate has jurisdiction to take possession of property of solvent partner and administer the same as far as necessary to a settlement of the partnership estate. Dickas v. Barnes [C. C. A.] 140 F. 849.

73. Lien of one selling goods to an individual for use in his business, without knowledge of a dormant partner, held superior to claims of the partners or of partnership creditors. Case v. McGill [N. J. Eq.] 60 A. 569.

preference over partnership creditors of a firm subsequently formed by such debtor, and to which such property is contributed as capital.[74] So long as the partnership is solvent the partners may dispose of their individual property as they see fit,[75] and firm creditors endeavoring to set aside such conveyances as fraudulent must not only show fraud but the insolvency of the firm.[76]

§ 5. *Rights of partners inter se. Duty to observe good faith.*[77]—The delicate relation which partners sustain one to the other, the very nature of the relation, makes it necessary that each should rely upon the other rendering him his full share of whatever is made out of the partnership business.[78] Each partner is a trustee and also a cestui que trust, a trustee so far as his duties bind him, and a cestui que trust so far as the duties rest on the rest of the partners.[79] Each must therefore observe good faith in all dealings with firm and co-partner,[80] and must refrain from all concealment in regard to the transaction of the firm's business.[81] Failing to so do and deriving benefit therefrom, he will be treated in equity as a trustee for the firm.[82] A partner cannot, by a secret agreement with a third person, derive any benefit from a contract between such person and the firm.[83] Where one partner has

74. A brick company, in pursuance of its contract with a contractor furnishing him, in his name and on his credit, brick for the performance of a street paving contract with a city, held, it having recovered a judgment therefor, entitled to a preference over partnership creditors of a firm subsequently formed by the contractor to carry out the paving contract as to payments due by the city on such contract. Case v. McGill [N. J. Eq.] 60 A. 569. The fact that the brick company continued to perform its contract after the formation and knowledge of the partnership, held not to alter the case. Id.

75, 76. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70.

77. See 4 C. L. 919.

78. Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770. Law requires good faith and mutual trust between partners. Ehrmann v. Stitzel [Ky.] 90 S. W. 275. In accounting between partners preparatory to a sale of one partner's interest, held selling partner need not keep watch on purchasing partner while latter was making an accounting. Id. In transactions between partners **concealment becomes fraudulent** when it is the duty of the partner having knowledge of the facts to disclose them to the other, and obviously an intentional misrepresentation of the facts by one partner to the other would be a greater fraud than mere concealment. Id.

79. McKinley v. Lynch [W. Va.] 51 S. E. 4.

80. Managing partner purchased engine and caboose, rented them to firm, and upon dissolution sought to charge firm with engine and caboose at even greater price than he paid. Dixon v. Paddock [Va.] 51 S. E. 841. A managing partner has no right to use the firm offices for a private competing business and charge the firm with total salaries and office expenses. Id. Where a partner, in assisting the firm receiver in making up a list of assets which were to be sold in bulk, concealed the existence of certain assets of which the receiver and the other partner were ignorant, and afterwards, at the receiver's sale, purchased, in behalf of a corporation in which he was the chief stockholder, the assets of the firm in gross, the assets concealed did not pass by the sale. Crawford v. Stainback [Ark.] 88 S. W. 991. Where mining expert was to investigate mines and defendant was to buy desirable ones, profits to be shared, facts held insufficient to show fraud by one partner on his co-partner. Rutan v. Huck [Utah] 83 P. 833. Under a partnership contract for mining transactions, defendant, who for want of funds had to sell an interest in a mine, held accountable only for the price received in the absence of evidence of fraud. Id.

81, 82. McKinley v. Lynch [W. Va.] 51 S. E. 4.

83. Partner in theatrical firm claimed royalties on plays used by the firm on the ground that he collaborated in the production of them. David Belasco Co. v. Klaw, 97 N. Y. S. 712. Where a partner made an agreement with firm creditors, without the knowledge of the other partner, whereby a mortgage on the business was foreclosed and the property and business were purchased by the creditors, and the business was then continued with an understanding that when the creditors were paid the business and property should be turned over to the partner with whom this secret agreement was made, and thereafter a corporation was formed, with the members of the new partnership as stockholders, the other partner in the old firm being thereafter excluded from the business, such other partner, after sleeping on his rights for five years, was not entitled to have the sales set aside or to any relief, except to have the agreement made with the creditors treated as having been made for the benefit of the firm because of the duty of the partner who made the agreement to act for the benefit of the firm. Whatever actual interest this partner had in the corporation was held to be for the benefit of himself and his former partner, who by paying the creditors their claims might have an assignment from them of their stock, which he would hold subject to an accounting between himself and the partner who made the agreement. Lamb v. Lamb [Mich.] 12 Det. Leg. N. 65, 103 N. W. 533.

charge of one part of the firm business and the other partner has charge of the other part, if either wishes to purchase the interest of the other in the business he must make full disclosures as to the part of the business conducted by him.[84] Equity will not interfere with an exercise of discretion unless abusive.[85]

Power of majority.[86]—In a mining partnership those having a majority interest may control its management in all things necessary for its proper administration.[87]

Firm accounts.[88]—A partner must keep an accurate and full account of funds drawn by him from the firm, and such account must show the disposition of the money.[89]

§ 6. *Actions. A. By firm or partner.*[90]—At common law a partnership cannot bring suit in its firm name,[91] and statutes authorizing suits against a partnership in the firm name do not alter the rule,[92] nor can an appeal be maintained in the firm name.[93] A summons which contains the name of a partnership as plaintiff, without mentioning the individual names of the partners, is not a nullity but is merely irregular and may be cured by amendment,[94] and the action should not be dismissed without giving the plaintiff a chance to so amend.[95] In the absence of statutory provision to the contrary, one partner cannot maintain an action upon a firm claim,[96] though a silent partner need not be joined as plaintiff.[97] But one partner can sue to redress an individual wrong committed on him by the other partner without joining such partner.[98] A co-partnership suing in the federal

84. Partners, having charge of sale of coal, purchased from partners having charge of securing options. McKinley v. Lynch [W. Va.] 51 S. E. 4.

85. Where defendant took title to property purchased by a partnership for the purpose of resale, there being no agreement as to the time or price of the resale, equity will not interfere with defendant's refusal to sell the property at a price offered therefor in the absence of evidence that such refusal was unreasonable. Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669. Under a partnership contract for mining transactions, defendant, who for want of funds had to sell an interest in a mine, held accountable only for the price received in the absence of evidence of fraud. Rutan v. Huck [Utah] 83 P. 833.

86. See 4 C. L. 919.

87. Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254.

88. See 4 C. L. 919.

89. General testimony that the money was used for the firm is insufficient. Escallier v. Baines [Wash.] 82 P. 181.

90. See 4 C. L. 919.

91. Thornton, Nesbitt & Co. v. First Nat. Bank [Ala.] 40 So. 78; Western Union Tel. Co. v. Hirsch [Tex. Civ. App.] 84 S. W. 394; Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

Illustrations: Where the petition set forth that L. Hirsch, "hereafter styled plaintiffs," is a firm composed of specified persons, held suit was by alleged members as individuals. Western Union Tel. Co. v. Hirsch [Tex. Civ. App.] 84 S. W. 394. A suit by certain parties named as plaintiff, with the addition of "partners as" giving the firm name, is not a suit in the name of the partnership, the words "partners as, etc.," being merely descriptio personae. Thornton, Nesbitt & Co. v. First Nat. Bank [Ala.] 40 So. 78.

92. Code Civ. Proc. § 590, construed. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

93. Even though the action was brought in the individual names of the partners. Thornton, Nesbitt & Co. v. First Nat. Bank [Ala.] 40 So. 78.

94. Action in justice's court. Morgridge v. Stoefer [N. D.] 104 N. W. 1112.

95. Morgridge v. Stoefer [N. D.] 104 N. W. 1112.

96. Action against stranger for conversion of firm assets. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. Where, after the institution of a suit by a partnership consisting of two members, a supplemental bill was filed by one of the partners alone, alleging the transfer to him of the other's interest in the subject-matter of the suit and in the firm, but the master found that the outgoing partner retained an interest in the suit in that the record of the transfer showed that he retained the right to one-half of the proceeds of any recovery and was to pay one-half the costs, the failure to join the outgoing partner as a co-complainant was ground for dismissing the bill. Bulte v. Iglehart Bros. [C. C. A.] 137 F. 492.

97. The judgment will nevertheless be binding upon him. Masterson v. Heitmann & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 8, 87 S. W. 227.

98. Under the Montana Civil Code, § 3232, providing that one partner cannot dispose of the whole firm property at once, unless the business has been wholly abandoned by his co-partner or co-partners, where one partner disposes of the whole stock of the firm, held the other partner could sue the purchaser for a conversion of his share without joining his co-partner. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. Nor can the purchaser defend on the ground that as purchaser of an interest in the partnership he is entitled to an accounting

courts, the citizenship of the parties composing it must be alleged and must be such as to confer jurisdiction, the names of the partners need not, however, be alleged.[99] Under the common law the defendant may challenge the averment of the citizenship of the members of the association by plea in abatement, unless waived by pleading to the merits.[1]

After dissolution a partnership may still maintain an action, provided the firm affairs have not been entirely settled.[2]

A verdict in favor of a partnership should show that it is in favor of the firm and not the individual members as such.[3] A judgment in favor of a partnership in the firm name is irregular but not void.[4]

(§ 6) *B. Against firm or partner. Pleading and proof of partnership.*[5]—In the absence of some claim against him a former partner is not a necessary party to an action against the firm.[6] At common law, in order to render a judgment against the firm, all the partners must be served,[7] but failure to so do does not prevent judgment against the partners served.[8] Nonjoinder of a partner may be reached by a motion to dismiss, and is waived by pleading to the merits.[9] By statute in many states a judgment may be rendered against a partnership where process is served on one of the partners,[10] and a judgment so rendered will bind the partnership property as well as the separate property of the individual partner served with process.[11] A voluntary appearance without service by a member of a firm, or by all its members by attorney, will have a like effect.[12] Where a suit is brought against a firm, no recovery can be had against one partner on an individual liability,[13] though by statute in some states judgment may be rendered against a

before being liable to a suit at law by the nonassenting partner. Id.

99. A declaration alleging that plaintiff was a partnership organized under Mich. Comp. Laws 1897, c. 160, §§ 6070, 6089, having its principal place of business in K. and authorized to sue and he sued in the name of Y. Company, Limited, and that each and every partner was a citizen of Michigan, held sufficient. Yonkerman Co. v. Fuller's Adv. Ag., 135 F. 613. Citizenship of members must be alleged. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. "Limited partnerships" organized under 2 Comp. Laws Mich. pp. 1883, 1888, as amended by Pub. Acts 1903, pp. 398-404, are not corporations so as to become citizens of a state for the purposes of federal jurisdiction. Id.

1. Yonkerman Co. v. Fuller's Adv. Ag., 135 F. 613.

Note: "In those states which have adopted the Code of Civil Procedure, such allegation may be challenged by general or special denial in a plea to the merits."—From Yonkerman Co. v. Fuller's Adv. Ag., 135 F. 613.

2. American Cotton Co. v. Whitfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 112, 88 S. W. 300.

3. A verdict in favor of one of the plaintiffs in an action by a partnership is sufficient to sustain a judgment for the partnership where the whole record shows that the verdict is intended to be for the partnership. Masterson v. Heitmann & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 8, 87 S. W. 227.

4. Meyer v. Wilson [Ind. App.] 76 N. E. 748.

5. See 4 C. L. 920.

6. The failure to join a former partner as a party defendant in an action for equitable relief including an accounting, the partnership having been the fiscal agents and brokers of the plaintiff, is not fatal to the case on demurrer where the averments of the bill show that after the partner had retired the other partners entered into an arrangement with the plaintiff which entitled him to treat them as the only parties liable for the matters in issue. Bay State Gas Co. v. Lawson, 188 Mass. 502, 74 N. E. 921.

7. Shumaker on Partnership [2nd Ed.] p. 248, § 136.

8. Action to enforce subcontractor's lien. The lien may also be enforced as against the undivided interest of the partner served. Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774. Where the individual members of a firm have been joined in an action against a partnership and notice has been served on them individually, individual judgments may be rendered against them for any liability shown as against the firm of which they are members. Ogle v. Miller [Iowa] 104 N. W. 502. Under Const. § 147, a personal judgment against the members of a firm for a firm debt, rendered in a suit to set aside alleged fraudulent conveyances by them, held not reversible error. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70.

9. Armour & Co. v. Ward & Co. [Vt.] 61 A. 765.

10. Rev. St. 1895, art. 1347, so provides. State v. Cloudt [Tex. Civ. App.] 84 S. W. 415. Under Comp. Laws, § 840, service upon one partner authorizes a judgment against all. Hirsh v. Fisher [Mich.] 101 N. W. 48.

11, 12. State v. Cloudt [Tex. Civ. App.] 84 S. W. 415.

13. Ogle v. Miller [Iowa] 104 N. W. 502.

partner in a suit against the firm.[14] Where suit is brought against a partnership and service is had only on one of the partners, a dismissal as to the other partners and taking judgment against the partner served operates to dismiss the suit as against the firm, leaving the partner served to answer individually for the debt;[15] but in those states where partners are jointly and severally liable for firm debts, the taking of such judgment does not relieve the other partner from liability,[16] but it does constitute an election by plaintiff not to proceed against the defendants as partners, and an abandonment of his right to look primarily to the assets of the partnership for the payment of his debt,[17] and is a bar to any suit on the same demand against the partnership.[18] In Colorado the only judgment that can be rendered against a co-partnership on a firm debt or obligation is one against the co-partnership jointly, and the partners summoned or appearing, whether the summons is served upon all or one or more of the defendants,[19] and a judgment rendered against a co-partnership upon a firm debt or obligation, where service is had upon less than all the partners, is a merger of the debt or obligation in the judgment and a bar to a subsequent action against the partners not served.[20]

No action can be maintained against a firm upon a several and individual contract of the partners,[21] but where partners are improperly joined in an action upon a several and individual liability, the complaint may be dismissed as to any found not liable.[22] In an action for negligence brought against defendants "as individuals or as partners," defendant cannot be compelled to elect whether he will proceed against defendants as individuals or as partners,[23] and in such a case plaintiff may inquire into the business relations of defendants between themselves.[24]

The complaint in an action against a partnership should show with reasonable certainty that the defendants are sued in their capacity as partners[25] and should allege the time in which it is claimed that the defendants were partners.[26] A plea in an action against the members of a partnership in their individual capacity, which sets up as a defense a contract alleged to have been made with them as part-

Under Iowa Code, § 3560, where the declaration in an action against a partnership is amended so as to set up an individual liability on the part of one of the members who was served with notice of the action as a member of the partnership, but no notice of the amendment was served on such partner, an individual judgment could not be rendered against him. Id. Under the Vermont Statute, providing that judgment may be taken against such defendants as are defaulted and such as are found liable, notwithstanding that all the defendants are found not jointly liable, a judgment against one member of a partnership, the other member not being served, cannot be rendered upon a showing of joint liability. The defect, however, is waived by the partner served by pleading to the merits. Armour & Co. v. Ward & Co. [Vt.] 61 A. 765.

14. Under Mo. Rev. St. 1899, §§ 624, 892, 859, Hodel-Mutti Mfg. Co. v. Ham, 112 Mo. App. 718, 87 S. W. 608.

15, 16, 17, 18. Cowan v. Leming, 111 Mo. App. 253, 85 S. W. 953.

19, 20. Blythe v. Cordingly [Colo. App.] 80 P. 495.

21. Contract of guaranty signed in firm name, but "severally and individually" guaranteeing, etc. New York Fire Proof Tenement Ass'n v. Stanley, 94 N. Y. S. 160. But the fact that the note sued on is signed by one of the partners alone will not preclude a recovery against the firm where it appears that it was given in behalf of the firm and that the firm has had the benefit of the transaction. Beckwith v. Mace [Mich.] 12 Det. Leg. N. 124, 103 N. W. 559.

22. Firm sued on several and individual guaranty signed by one partner in firm name. New York Fire Proof Tenement Ass'n v. Stanley, 94 N. Y. S. 160.

23, 24. Lewes v. Crane & Sons [Vt.] 62 A. 60.

25. Where the complaint in its caption designates the members of the defendant partnership by their individual names, and the complaint itself alleges that these persons are partners, a subsequent reference to the partners as "defendants" is not subject to an objection for ambiguity, the word "defendants" in the connection in which it is used being understood as referring to defendants in their relation as partners. Butler v. Delafield [Cal. App.] 82 P. 260.

26. The Wisconsin statute (Rev. St. 1898, § 4197) under which an irrebutable presumption arises whenever the pleadings allege that "the plaintiff or defendant or third persons were partners at any particular time," unless such allegation is denied in the manner provided by the statute, does not require the time to be specified by days and dates as to all the times at which the

ners, should show that it was made with them in this capacity.[27] A demurrer filed in the name of a firm is the demurrer of all the defendants composing the partnership in their partnership capacity.[28]

Where the existence of the partnership is not denied, there is no necessity of proof on the subject,[29] but where the answer denies the existence of the partnership, it must be proved,[30] and the burden of proof is upon the party alleging its existence.[31]

A partnership may be proved by evidence of the acts, dealings, conduct, admissions, and declarations of the parties themselves, or by direct proof in different lines.[32] General rules as to the admissibility of evidence apply.[33] The sufficiency of the evidence is for the jury.[34]

Abatement.[35]—Failure to serve one of the members of the defendant partnership is ground for abatement.[36] Upon the death of one partner after a judgment against the firm in an action for tort, an appeal may be prosecuted against the survivor.[37]

Judgment and subsequent proceedings.[38]—Judgment against a partnership in the firm name is irregular but not void.[39] Under some circumstances judgment may be rendered against the individual defendants or one or more of them, though the action is against them in their relation as partners.[40]

pleading shall be deemed to allege a partnership. Woolsey v. Henke [Wis.] 103 N. W. 267.

27. Though the name "Artope & Whitt Co." standing alone would import a corporation, where the plea shows that it was a partnership the name will be construed merely as a trade name. Whitt v. Blount [Ga.] 53 S. E. 205.

28. Suit in equity against members of firm in own right and as partners. Allen v. Wilkinson [W. Va.] 52 S. E. 454.

29. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Wis. Rev. St. 1898, § 4197, raises an irrebutable presumption that the allegations are true whenever the pleadings allege that "the plaintiff or defendant or third persons were partners at any particular time," unless denied in the manner provided by that section. Woolsey v. Henke [Wis.] 103 N. W. 267.

30. Hart v. Foley [Ind. T.] 91 S. W. 33; Clifton v. Royse Cotton Oil Co. [Tex. Civ. App.] 87 S. W. 182; McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

31. Clifton & Wadkins v. Royse Cotton Oil Co. [Tex. Civ. App.] 87 S. W. 182; Thompson v. Walsh, 140 F. 83; McDonald Bros. v. Campbell [Minn.] 104 N. W. 760; Mitchell v. Jensen [Utah] 81 P. 165; Jones v. Burnham, Williams & Co. [C. C. A.] 138 F. 986. So also, where the evidence shows that the dealings forming the basis of a suit against an alleged partnership were had solely with one of the alleged members who managed the firm, it is necessary, in order to charge the other defendants, to find what relation they had with the firm or the business or dealings carried on in the firm name. Mitchell v. Jensen [Utah] 81 P. 165. In an action against a firm, there being no evidence that such a firm existed or that one of the defendants was a partner therein, held error to render judgment against such alleged firm and partner. Russell v. Bellinger [Ala.] 40 So. 132. See ante, § 1, Evidence.

32. Jones v. Purnell [Del.] 62 A. 149. See ante § 1, Evidence.

33. In an action against a partnership for the price of goods sold and delivered, only one partner being served, oral testimony that defendant who was served ordered the goods, that they were accepted and used by defendants but not paid for, held admissible. Hirsh v. Fisher [Mich.] 101 N. W. 48. Also affidavit served with the summons to the effect that defendants were justly indebted to the plaintiffs in a certain sum for goods sold and delivered held admissible, though it did not state that affiant was agent, attorney, or bookkeeper for plaintiffs. Id.

Proof of partner's authority. Evidence admissible under special count: Under a special count in assumpsit against a partnership alleging the co-partnership, the holding out of one of the partners as manager of the business, with authority to promote the business of the firm, and a purchase by him of the property the price of which was sought to be recovered, it was competent to prove authority or a holding out of the partner as one authorized to act for the partnership in the transaction in question. Beckwith v. Mace [Mich.] 12 Det. Leg. N. 124, 103 N. W. 559.

34. Jones v. Purnell [Del.] 62 A. 149; McDonald Bros. v. Campbell [Minn.] 104 N. W. 760; McKibben v. Day [Neb.] 104 N. W. 752; Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917; Fay v. Walsh [Mass.] 77 N. E. 44; Gay v. Ray [Mass.] 75 N. E. 138. See ante § 1, Evidence.

35. See 4 C. L. 921.

36. And is therefore waived as to the partner served by his pleading to the merits. Armour & Co. v. Ward & Co. [Vt.] 61 A. 765. As to the practice when all the members are not served, see ante this section, Pleading and Proof of Partnership.

37. Robertson v. Ford, 164 Ind. 538, 74 N. E. 1.

38. See 4 C. L. 921.

39. Meyer v. Wilson [Ind. App.] 76 N. E. 748.

40. See ante this section, Pleading and Proof of Partnership.

(§ 6) *C. Between partners.*[41]—Until there has been a settlement or an accounting one partner cannot sue another at law upon any claim arising out of their relation as partners or connected therewith,[42] and this rule may extend to one who is not, strictly speaking, a partner.[43] The suit being upon a common-law demand the same rule applies, though the ultimate relief under the statute is to be administered by a court of equity.[44] There need be no express promise to pay, for one is implied in closing the books and stating a balance,[45] nor can a purchaser of the interest of one of two or more co-partners sue at law for his share.[46] But where the partnership affairs have been adjusted and nothing remains to be done but to pay over an amount due from one to the other, to be ascertained by a reckoning as to one single item or even as to several items, there being no complications of any kind, an action at law may be maintained.[47] So also where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the claimant's share of the proceeds.[48] Where one sells his interest in the partnership to another partner, he may maintain an action for the price.[49] A partner can sue his co-partner at law upon a claim not arising out of a partnership transaction.[50]

General rules as to instructions apply.[51]

41. See post Accounting, § 7 E. See, also, 4 C. L. 921.

42. Ledford v. Emerson [N. C.] 52 S. E. 641; Gillespie v. Salmon [Cal. App.] 84 P. 310; Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669. An action at law will not lie at the instance of one partner against another for the balance due him where one or more items have prevented a settlement and a promise to pay by the one to the other. McGinty v. Orr, 110 Mo. App. 336, 85 S. W. 955. One partner cannot sue his co-partner at law to recover his share of the firm assets, the amount to which he is entitled being dependent upon a settlement of the partnership affairs and an adjustment of the balances between the partners. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. So held in an action by administrator of one partner in a suit to set aside an alleged fraudulent conveyance, it appearing that the debt asserted by the plaintiff was incurred in the course of dealings between partners and was regarded as a partnership matter. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. Where partnership articles provided that as security for the performance of the covenants therein contained each of the parties should deposit a **judgment note** with a notary to be "retained for the uses of the co-partnership, and if any of the parties fail to well and truly do and perform any of their duties in manner hereinafter set forth, the notes of such co-partner should be given to the remaining partners at the discretion" of the notary, held not to contemplate that the notes should be used by one of the partners to enforce claims against the others without any prior accounting. Herman v. Potamkin, 24 Pa. Super. Ct. 11.

43. Amount due from surviving partner to one who advanced money to deceased partner to engage in a joint adventure under an agreement for profits, and the business of which the deceased partner contributed to the partnership, held ascertainable only by an accounting. Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926.

44. So held in an action by administrator of one partner in a suit to set aside an alleged fraudulent conveyance, it appearing that the debt asserted by plaintiff was incurred in the course of dealings between partners and was regarded as a partnership matter. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785.

45. McGinty v. Orr, 110 Mo. App. 336, 85 S. W. 955.

46. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

47. Ledford v. Emerson [N. C.] 52 S. E. 641. Where a reference in proceedings to foreclose a mortgage executed to one partner to secure the other for payment of his partner's portion of the firm liability was adjourned, and time given to produce claims that might have been overlooked, the contention that there had been no accounting between the partners and that hence there could be no foreclosure was without foundation. Bowen v. Day [S. C.] 51 S. E. 274.

48. Ledford v. Emerson [N. C.] 52 S. E. 641. Where partnership was entered into for the purchase and sale of certain real estate, held one partner could maintain assumpsit against the other to recover his share of the profits. Welch v. Miller [Pa.] 59 A. 1065.

49. So held where the purchasing partner agrees to pay to the other a share of the profits arising from the sale of certain goods, already made, when the purchase money is collected. Farrell v. Young, 26 Pa. Super. Ct. 135.

50. A check executed in the name of a partnership and given for a sufficient consideration moving from one of the partners to the partnership is an individual, not a partnership, transaction, and hence an indorsee of the partner owning the check may sue the other partner thereon. Indorsee was at the time of the indorsement attorney for and creditor of the indorser. Caldwell v. Dismukes, 111 Mo. App. 570, 86 S. W. 270.

51. In an action to recover an alleged balance an instruction authorizing jury to

§ 7. *Dissolution, settlement, and accounting. A. Dissolution by operation of law.*[52]—Unless the articles of co-partnership[53] or the deceased partner's will,[54] provide for the continuance of the partnership, the death of a partner works an immediate dissolution of the firm.[55] It seems that a partnership between attorneys at law is dissolved by operation of law upon the suspension of one of the partners from practice.[56]

(§ 7) *B. Dissolution by act of partners.*[57]—A partnership may be dissolved by mutual agreement,[58] or may expire by virtue of a time limitation in the articles of agreement.[59] No term being stipulated the relation can only be terminated by consent or by a suit in equity for a dissolution and an accounting.[60] As a general rule, where one partner transfers his entire interest in the firm to his co-partner, a dissolution results ipso facto,[61] but this rule does not apply to a mining partnership.[62] A partner may sell his interest in a firm, possessing real estate, by an oral contract.[63] A partnership being terminable at will, it may be dissolved by one of the partners without regard to the question of good faith or reasonableness of time or circumstance,[64] and the fact that the firm has contracts for a definite period does not by implication prevent a termination of the relation before such period.[65] Where a partnership is for a fixed term or for the accomplishment of certain definite objects the American authorities are by no means uniform as to whether one partner can affect a dissolution at will.[66] Abandonment may be a ground upon which one's co-partners may elect to consider the partnership as dissolved.[67]

(§ 7) *C. Dissolution by order of court.*[68]—Exclusion from participation in the business of the firm is ground for dissolution by a court of equity,[69] but mere lack of harmony among the members of a mining partnership is not sufficient ground for dissolving the firm by a decree in equity for the sale of the firm property.[70] No term being stipulated the relation can only be terminated by consent or by a suit in equity for a dissolution and an accounting.[71] General rules as to pleadings

consider profits held erroneous, there being no evidence of any profits. Grier v. Strother, 111 Mo. App. 386, 85 S. W. 976. Counterclaim being filed and evidence being given in support of it, instruction ignoring it held erroneous. Id.

52. See 4 C. L. 922.

53. Where partnership articles provide that the partnership shall continue until a certain day, regardless of the death of any of the members, an extension of the time for the expiration of the agreement includes the stipulation as to continuance in the event of the death of the partners, especially where a subsequent modification of the contract recognized the extension as including such stipulation, and the will of one of the partners who dies prior to the date specified in the extension likewise showed that the testator so understood the extension. In re Marx, 94 N. Y. S. 151.

54. See 4 C. L. 922, n. 19.

55. Hence, a verbal contract of partnership for a term of years in excess of the limit specified by the statute of frauds is not within the statute, since by operation of law the contract might be terminated within the statutory period. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448.

56. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936.

57. See 4 C. L. 922.

58. In such case the cause of the dissolution is immaterial in a suit for an accounting. McCandless v. Crouse [Ill.] 77 N. E. 202.

59. As a general rule an extension of the time indorsed on the article extends to all the terms and stipulations thereof. In re Marx, 94 N. Y. S. 151.

60. Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669.

61. Durham v. Edwards [Fla.] 38 So. 926; Lamb v. Hall, 147 Cal. 44, 81 P. 288; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065.

62. Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254.

63. Tillis v. Folmar [Ala.] 39 So. 913.

64. Meysenburg v. Littlefield, 135 F. 184.

65. So held where firm was steel corporation's selling agency and its contract of agency could not be terminated except on 12 months' notice. Meysenburg v. Littlefield, 135 F. 184.

66. Shumaker on Partnership [2nd Ed.] p. 266; 22 Am. & Eng. Enc. of Law [2nd Ed.] p. 205. That he cannot, see Lawrence v. Halversen [Wash.] 83 P. 889.

67. 17 Am. & Eng. Enc. of Law [1st Ed.] p. 1108. Where partnership articles did not show nature of duties to be performed by the partners, held failure of one of the partners to actively participate in the prosecution of certain claims did not show an abandonment of the relation. Consaul v. Cummings, 24 App. D. C. 36.

68. See 4 C. L. 923.

apply.[72] In an action for a dissolution, plaintiff failing to show a partnership, his right to incidental relief asked fails.[73]

(§ 7) *D. Effect of dissolution.* 1. *In general.*[74]—Except as to such acts as are necessary or proper for the winding up of the partnership affairs,[75] the dissolution of a partnership terminates the power of the respective partners to bind each other, provided proper notice of the dissolution has been given.[76] Each partner has the power, therefore, to complete or settle unfulfilled partnership contracts and to bind the other partners by his acts in so doing,[77] and the partnership being a professional one, the rights of the partners under existing contracts for services will be determined by the partnership contracts in the absence of a showing that new contracts were made after the dissolution.[78] Where personal trust and confidence enters into and forms a part of the consideration of a contract, the retirement of the trusted partner is a release.[79] A commercial partnership exists for the purpose of its liquidation after it has been dissolved,[80] and may sue or be sued when represented by all of its members.[81] A firm acting as agent, its contract of agency is generally deemed terminated by its dissolution.[82] Except as to the settlement of the partnership affairs the duties incident to the relation cease upon dissolution.[83]

69. Gillett v. Higgins [Ala.] 38 So. 664.

70. Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254.

71. Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669.

72. A complaint for the dissolution of a stock pooling agreement alleged to constitute a partnership, and for a partnership accounting in respect to the business and stock of the corporation, held to state but one cause of action. Whittingham v. Dorrin, 45 Misc. 478, 92 N. Y. S. 752.

73. Where plaintiff failed to prove that stock pooling agreement constituted a partnership, held right to incidental relief such as an accounting, dissolution of the corporation, etc., failed. Whittingham v. Darrin, 45 Misc. 478, 92 N. Y. S. 752.

74. See 4 C. L. 923.

75. Shumaker on Partnership [2nd Ed.] § 148, p. 274. Partnership between attorneys at law. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936.

76. Easton v. Wostenholm [C. C. A.] 137 F. 524. After the dissolution of the firm, **admissions or declarations** of one of the partners are not binding on his former co-partners. Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132. Such admissions or declarations are not admissible in an action against the former firm, even as against the partner making them. Obligation is joint and there can be no several recovery. Id. Statements of one of several co-partners, made after dissolution of the partnership and relating to partnership transactions arising prior to the dissolution, are not competent to charge the other members of the firm. Peoria Scrap Iron Co. v. Cohen, 113 Ill. App. 30. See ante, § 4A, Power of Partner to Bind Firm.

77. 17 Am. & Eng. Enc. of Law [1st Ed.] p. 1150. After the dissolution of a co-partnership between attorneys at law by reason of the suspension of one member from practice, the remaining members of the co-partnership can settle partnership contracts made with the dissolved firm and thereby bind the other members of the firm. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936.

78. Partnership between attorneys at law. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936. Evidence held insufficient to show that a new contract was made as to attorney's fees after the firm dissolved. Id.

79. 17 Am. & Eng. Enc. of Law [1st Ed.] p. 1151. Contract to sell firm automobiles, one of the partners to act as salesman of them after they were purchased. Wheaton v. Cadillac Automobile Co. [Mich.] 12 Det. Leg. N. 867, 106 N. W. 399.

80. In re Dunn & Bro. [La.] 40 So. 466. So held where one partner retired and new firm was formed, the new partner not assuming any of the rights or liabilities of the old firm, though no lien was retained by the retiring partner upon the specific personalty which went into the new firm. Corbin v. Henry [Ind. App.] 74 N. E. 1096.

81. Suit in partnership name after dissolution. American Cotton Co. v. Whitfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 112, 88 S. W. 300. Where a solvent commercial firm is dissolved and two of the partners were appointed liquidators by articles of agreement, and the appointment was subsequently confirmed by order of court, but neither the convention nor the order vested the liquidators with express authority to sue and be sued, such proceedings did not affect the right of creditors to sue the firm and its members in solido. In re Dunn & Bro. [La.] 40 So. 466.

82. Where a manufacturing corporation employed a firm to act as its selling agents, the dissolution of the firm operated to terminate the contract of agency. Meysenburg v. Littlefield, 135 F. 184.

83. Where partnership has been dissolved and settlement made, and lease formerly held by the partners, with privilege of renewal if satisfactory to lessor, terminated, and lessor is unwilling to renew lease if one of the partners is connected with business, held other former partner could take a new lease in his own name without liability to account to his former partner. Brown v. Scull, 27 Pa. Super. Ct. 513.

(§ 7D) 2. *As to surviving partner and estate of deceased partner.*[84]—A surviving partner takes the title to the partnership property[85] and has the exclusive control and management of partnership affairs and litigation,[86] and where the partnership property remains in the hands of the personal representative of the deceased partner, he must account to the surviving partner for the rents and profits.[87] As to the deceased partner's representative, a surviving partner holds the assets of the firm as the trustee of an express trust,[88] and consequently is absolutely prohibited from acquiring any benefit from the deceased partner's interest at the expense of his representative,[89] and the burden is upon him to show by satisfactory evidence that any transaction he has with the partnership estate is in all respects fair and free from any fraud or deception.[90] It is proper and commendable that a surviving partner should apply to a competent court for administration to appoint appraisers of the partnership estate.[91] A surviving partner is not liable to the estate of his deceased partner for interest on money deposited in a bank in the firm name, where he has not had the use thereof and has derived no benefit therefrom.[92] Where a partner dies before action brought against the partnership, the estate of the deceased partner can only be made a party to the action by alleging the insolvency of the surviving partner,[93] and can only be made a party at its own request upon showing that the surviving partner is false to his trust, misrepresents the firm, or is treacherous to the interests of the decedent.[94] As a general rule a surviving partner is not entitled to compensation for winding up the business.[95] Still this rule does not apply in all cases but only where the business is immediately put an end to and no further work is done except to close the account between the partners, pay the debts, and distribute the surplus.[96] Where, therefore, one partner dies before the completion of a partnership contract, the surviving partner is entitled to compensation for that

84. See 4 C. L. 923, 925.

85. Bonds. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513. The deceased partner's estate has no legal interest therein until the partnership affairs are closed, and its interest is then in the net proceeds of the firm's business. Id. See, also, Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. S. 729.

86. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513. Where two persons enter into a joint adventure, one furnishing the capital and the other managing the business and the latter subsequently forms a partnership with another and all parties after learning the facts acquiesce in the arrangement, held, upon death of the member of the joint adventure who was also a partner in the firm, the other member of the joint adventure should bring his action for an accounting against the surviving partner. Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926. The administrator of a deceased partner has no right to any of the partnership assets until the debts of the firm have been paid. Harrah v. State [Ind. App.] 76 N. E. 443.

87. Defendant's testator and plaintiff owned land as tenants in common and operated a quarry thereon in partnership. The defendant was liable to account to plaintiff the same as if he himself had been a cotenant during the period in which he held the land. Flynn v. Seale [Cal. App.] 84 P. 263.

88. Jones v. Dulaney, 27 Ky. L. R. 702, 86 S. W. 547. The relation is a fiduciary one involving trust and confidence of the highest character. Bauchle v. Smylie, 104 App. Div. 513, 93 N. Y. S. 709.

89. Bauchle v. Smylie, 104 App. Div. 513, 93 N. Y. S. 709. He has no power to apply the trust fund to the payment of his individual debt, and if he does so the transferee taking the fund with notice of the trust simply succeeds to his rights and stands in his shoes. Jones v. Dulaney, 27 Ky. L. R. 702, 86 S. W. 547.

90. Surviving partner purchased deceased partner's interest. Bauchle v. Smylie, 104 App. Div. 513, 93 N. Y. S. 709. The burden is on the defendant to so show by clear and satisfactory proof. Consaul v. Cummings, 24 App. D. C. 36.

91. Though there is no statutory provision for such proceedings. Swafford's Adm'r v. White [Ky.] 89 S. W. 129.

92. Condon v. Callahan [Tenn.] 89 S. W. 400.

93. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513.

94. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513. Under Code Civ. Proc. § 756, executors of deceased partner have no absolute right to intervene. Id. Code Civ. Proc. § 452, has no application to the case. Id.

95. Condon v. Callahan [Tenn.] 89 S. W. 400. A claim by surviving partner for extra compensation for services rendered after other partner's death disallowed, no unusual services being performed. Consaul v. Cummings, 24 App. D. C. 36.

96. Condon v. Callahan [Tenn.] 89 S. W. 400.

part of the work which it would have been the deceased partner's duty to contribute,[97] especially where the completion of the contract by the surviving partner is consented to by the personal representative and the sole legatee of the deceased partner.[98] He is also entitled to reimbursements for necessary expenses incurred[99] and to interest on advances made to deceased partner during latter's lifetime.[1] All parties to an agreement are necessary parties to an action to set aside the agreement.[2]

A sole surviving partner dying during the winding up of the affairs of the partnership, his personal representative takes the partnership assets as a trustee and not as part of the personal estate of such partner,[3] and a personal representative of another partner may maintain a suit for an accounting against him without having presented a demand.[4]

Under the statutes of a few states provision is made for the administration of partnership estates. In such states claims should be certified to the probate court for allowance and classification against the partnership estate.[5] In Missouri, where there is a deficiency of assets, a surviving partner should not pay claims against the partnership without requiring them to be exhibited to the proper court for allowance.[6] The administrator of a deceased partner is a proper relator in a suit on the bond of the surviving partner as the administrator of the partnership affairs.[7] An averment in such a suit that the defendant has failed and refused to discharge his duties according to law is sufficient as against a general demurrer.[8] A final settlement between an administrator de bonis non and the partnership administrator, who was also the surviving partner, has the effect of a final judgment, and until impeached in equity is a complete defense in an action by a partnership creditor on the administrator's bond.[9] Where a surviving partner makes a final report and the same is approved by the proper court, such approval is an adjudication of the trust and a bar to any action on the bond of the surviving partner as administrator of the partnership affairs. In such case such an action can only bo maintained by setting aside such final order for fraud or otherwise.[10]

97. Railroad construction contract. The fact that the surviving partner offered to take a certain sum for his services as walking boss, which offer was not accepted by the personal representative, did not preclude the surviving partner from claiming compensation for completing the contract. Condon v. Callahan [Tenn.] 89 S. W. 400.

98. Condon v. Callahan [Tenn.] 89 S. W. 400.

99. Where a partnership was formed for the prosecution of certain claims against the United States, and provision was alone made for expenses in prosecuting allowed claims, held expenses incurred by a surviving partner in the prosecution of disallowed claims should be allowed him. Consaul v. Cummings, 24 App. D. C. 36.

1. Consaul v. Cummings, 24 App. D. C. 36.

2. Agreement between a surviving partner and representatives of the deceased partner whereby the entire partnership assets were assigned to the former and he assumed all the partnership liabilities. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

3. Franklin v. Trickey [Ariz.] 80 P. 352.

4. Is not a claim within the meaning of Rev. St. 1901, §§ 1739, 1742, 1743, 1749. Franklin v. Trickey [Ariz.] 80 P. 352.

5. Rev. St. 1899, § 65, construed. So held where a judgment was recovered against the surviving partner of a firm and judgment creditor sought to have execution against such surviving partner as administrator of the firm's assets. Cowan v. Leming, 111 Mo. App. 253, 85 S. W. 953.

6. Claims should be exhibited to the probate court. State v. Shacklett [Mo. App.] 91 S. W. 956.

7. Under Indiana statute. Harrah v. State [Ind. App.] 76 N. E. 443.

8. Under such averment it was competent to introduce the record in proceedings before the probate court for the settlement of the partnership affairs. Harrah v. State [Ind. App.] 76 N. E. 443.

9. State v. Shacklett [Mo. App.] 91 S. W. 956. Where the administrator de bonis non of a deceased partner recovered judgment on the bond of the partnership administrator, who was the surviving partner, and it appeared that a charge that the surviving partner paid claims in full when they ought to have been paid pro rata was presented for adjudication, such charge must be taken as embraced and covered by the judgment rendered on exceptions to the surviving partner's report as administrator, and oral testimony to the contrary is inadmissible. Id.

The estate of a deceased partner is liable for firm debts,[11] but not for money loaned to another partner individually.[12] Whether the money was loaned to the partnership or to a partner individually is generally a question of fact.[13] The estate of a deceased partner paying a partnership debt is entitled to be subrogated to the creditor's rights against the partnership.[14] Stale claims by a surviving partner against a deceased partner's estate are looked upon with disfavor and every intendment will be made against them.[15] A surviving partner must proceed by bill in equity for a settlement of partnership accounts before his claim against the estate of the deceased partner can be passed upon in the orphans' court.[16] A surviving partner is not entitled to enjoin a sale of partnership realty by the executor of a deceased partner who held the title thereto, it appearing that the price offered is the fair market value of the property.[17]

(§ 7D) 3. *As to continuing or liquidating partner. Retiring partner.*[18]—Where the winding up of the business and sale of firm property is committed to one partner, he occupies a fiduciary position and will not be allowed to make secret profits.[19] A continuing partner cannot enforce a contract, part of whose consideration is personal trust and confidence in the retiring partner.[20] The continuing partner may assume all the firm liabilities,[21] and for a failure to perform his obligation thus incurred he will be liable to the retiring partner[22] and also to the firm creditors,[23] and when sued by the retiring partner for failure to pay these

10. Harrah v. State [Ind. App.] 76 N. E. 443. See, also, State v. Shacklett [Mo. App.] 91 S. W. 956.

11. Is liable for money loaned the partnership for use in the partnership business. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412. Is liable for merchandise sold to the firm of which he was a member during his life, but not delivered until after his death. Evans v. Superior Steel Co., 114 Ill. App. 505.

12. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412.

13. So held under the evidence adduced. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412.

14. So held where debt paid was an attorney's lien on a judgment. Jones v. Dulaney, 27 Ky. L. R. 702, 86 S. W. 547, opinion modified 27 Ky. L. R. 810, 86 S. W. 977.

15. Claim based on duebills given by the firm 35 years before decedent's death, there having been an accounting, disallowed. In re De Coursey's Estate, 211 Pa. 92, 60 A. 490.

16. By bill in equity in the common pleas. In re De Coursey's Estate, 211 Pa. 92, 60 A. 490.

17. Remedy at law is adequate. Babcock v. Leonard, 97 N. Y. S. 861.

18. See 4 C. L. 925.

19. Partner sold option on firm property and then purchased his partner's interest for less than one-half the option price. Dixon v. Paddock [Va.] 51 S. E. 841.

20. Wheaton v. Cadillac Automobile Co. [Mich.] 12 Det. Leg. N. 867, 106 N. W. 399.

21. An agreement to "release, remise and forever discharge" the retiring partner, though not aptly expressed, will be construed to mean an agreement to assume the liabilities of the old firm. Alexander v. McPeck [Mass.] 75 N. E. 88. Such an agreement extends to a judgment for money advanced to the partnership to be invested in stocks on a margin, the statute, St. 1890, p. 479, c. 437; St. 1901, p. 391, c. 459; Rev. Laws c. 99, § 4, giving the right of recovery where money is thus advanced. The assumption of the liability by the new partnership and the new partner was not in contravention but in furtherance of the statute. Id. Where retiring partner sued the continuing partner to recover back certain money alleged to have been paid to the continuing partner upon the false representations of the latter that the funds of a certain lodge that had been lent to the firm by the continuing partner had not been paid back, the plaintiff was allowed to amend his complaint to the effect that the money had been lent to the firm by the defendant individually, and that hence he was precluded from asserting his right to contribution from the plaintiff by the settlement. It was proper to allow defendant to amend his answer so as to show that the settlement had excluded liability for lodge money. Devereux v. Peterson [Wis.] 106 N. W. 249.

22. The assumption of the liability is a contract to pay it forthwith, and hence the retiring partner's right of action accrues, at the latest, when judgment for a debt of the old firm is rendered against him, though he has not paid it. Alexander v. McPeck [Mass.] 75 N. E. 88. It was not necessary in such case for the retiring partner, upon being sued for a debt of the old firm, to vouch in a party who has taken his place in the partnership and has agreed to assume, with the continuing partner, all his liabilities incurred as a member of the old firm, where, at the time the agreement assuming such liabilities was signed the new partner had notice that the suit in question was pending. The new partner cannot, in such case, complain that the retiring partner did not continue to defend the suit. Id.

23. Where a member of a firm of brokers retires, the remaining partners are liable to their principal without joining the retired

debts, cannot claim an exemption out of the firm assets as against this equity.[24] Where a partner is illegally induced to assign his interest and the assignee enters the firm, the former partners, if innocent, are entitled to full protection in their dealings and transactions with the new partner until notice of the disaffirmance of the transfer.[25] Such former partners are necessary parties to a suit to have such assignment set aside,[26] and the assignee dying pending such suit, the action should be revived against his personal representatives.[27] In such an action an examination into the accounts of the firm at the date of the assignment is immaterial.[28] A retiring partner is secondarily liable for the firm debts.[29]

(§ 7) *E. Accounting. Right to.*[30]—A partner's right to an accounting is not dependent upon who is entitled to the balance,[31] and where the firm has already been dissolved by mutual agreement, the right of one of the partners to an accounting is not affected by the causes of the dissolution.[32] But a partner who has conveyed his entire interest in the firm to his co-partner in consideration that the latter shall assume the firm debts as well as an individual debt is not, in the absence of any allegations of fraud, entitled to an accounting.[33] A partner who has been excluded from participation in the business,[34] or who has paid firm obligations, his co-partners refusing to contribute, may maintain a suit for an accounting,[35] but a partner is not entitled to an accounting where there has been an account stated between the partners.[36] One may become estopped to deny that a settlement has been made,[37] and failure to object at the time an account is accepted by other partners is equivalent to an acceptance.[38] A purchaser of a partner's interest in a firm is, upon proper occasion, entitled to an accounting.[39] The individual creditors of one of the partners are not entitled to an accounting.[40] Where partners agree that profits shall be divided, not to themselves as individuals but to groups, it is no defense to an action for profits that there has not been a proper division in defend-

partner for all matters which they assume to account to the principal as members of the firm which continues the business, and for all frauds and errors which enter into the accounts after such retirement. Bay State Gas Co. v. Lawson, 188 Mass. 502, 74 N. E. 921.

24. Platt v. Platt [Fla.] 39 So. 536.

25, 26, 27, 28. Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. S. 121.

29. Morrisey v. Berman, 94 N. Y. S. 596. See ante, § 4 B, Commencement and Termination of Liability.

30. See 4 C. L. 925.

31. Petition for settlement improperly dismissed. Green v. Hart, 27 Ky. L. R. 970, 87 S. W. 315.

32. McCandless v. Crouse [Ill.] 77 N. E. 202.

33. Durham v. Edwards [Fla.] 38 So. 926.

34. Even without dissolution. Hogan v. Walsh [Ga.] 50 S. E. 84.

35. Gillespie v. Salmon [Cal. App.] 84 P. 310.

36. Lienbach v. Wolle [Pa.] 61 A. 248.

37. Where the plaintiff has sued for the settlement of partnership affairs and the defendant has pleaded settlement in bar, the plaintiff is estopped from thereafter asserting that there has been a settlement, and the defendant is estopped from denying a settlement, and the two estoppels thus destroy each other and set the matter at large. Chretien v. Giron [La.] 38 So. 881.

38. Where, after an account between partners had been completed by an expert employed by all the partners, a copy was handed to the partners and thereafter various meetings of the partners were held, at all of which the account was under consideration, and the account was finally accepted as correct by the expert and all the parties interested except one of the partners, the latter's failure to object to the account was equivalent to an acceptance. Leinbach v. Wolle [Pa.] 61 A. 248.

39. But where one partner sells the whole partnership property, the other partner not having abandoned the business, under the Mont. Civ. Code, § 3232, the sale is void as to the interest of the nonassenting partner, and valid as to the partner who makes the sale only as to his individual interest, and does not give the purchaser a right to an accounting so as to preclude a suit against him by the nonassenting partner for conversion. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

40. The individual creditors of a deceased partner are not entitled to an accounting from a new partnership formed between the surviving partner and the widow, by reason of the surviving partner having promised the creditors to give them a statement of the settlement between him and the widow as administratrix, and because the widow promised to pay them out of her share of the profits of the new business. Milleman v. Kavanaugh [Pa.] 62 A. 907.

ant group.[41] Laches will bar the right.[42] A suit for an accounting may be prosecuted against the estate of a deceased partner, though claims against the personal estate of such partner are barred for nonpresentment.[43] A cause of action for an accounting against a surviving partner does not accrue until the appointment and qualification of the deceased partner's personal representatives,[44] and in Wisconsin no personal representative being appointed, the cause of action is not barred until 20 years after the dissolution of the firm.[45]

Jurisdiction.[46]—Equity has jurisdiction to decree an accounting, or a contribution, or both, as between partners or their representatives.[47] An accounting means that there is to be a complete winding up of the partnership,[48] and although the old rule that a court of equity has no jurisdiction of an accounting save with a view to the final determination of all questions and cross-claims between them has been considerably relaxed, it is still applicable where there is no reason for departing from it,[49] but in a proper case a court of equity will grant an accounting, although there is no prayer for dissolution[50] and the partnership affairs are in such shape that a final settlement cannot be had.[51] Where there has been a substantial liquidation an accounting may be had, although doubtful or discredited assets remain unprovided for.[52] Protection against firm obligations not already provided for may be afforded in the final decree, and the possibility of such a contingency will not prevent the decree for the accounting where it would otherwise be proper.[53] The jurisdiction of equity in the settlement of partnership affairs would in the absence of statute, extend to a case where one of the partners is dead,[54] but in some states proceedings in the settlement of partnerships by the surviving partner are governed entirely by statute.[55]

Parties.[56]—All partners or their representatives,[57] and all other interested parties[58] should be joined, unless it appears that their presence is unnecessary.

41. Welch v. Miller, 210 Pa. 204, 59 A. 1065.

42. Where one of the legatees of a deceased partner's interest was appointed administrator, with the will annexed, a few months after obtaining his majority, and immediately sued the surviving partner for an accounting, held not barred by laches. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074. Where the firm's accounts had never been adjusted and the action was brought within 10 years after the dissolution of the firm, held proper to award an interlocutory order for an accounting. Sterling v. Chapin, 102 App. Div. 589, 92 N. Y. S. 904.

43. Rev. St. 1898, § 3844, considered. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

44, 45. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

46. See 4 C. L. 925.

47. Bruns v. Helse [Md.] 60 A. 604. Part performance of an oral contract to engage in a partnership real estate enterprise, being of such a character that the amount of a party's damage for breach of the contract was difficult or impossible of proof, held equity had jurisdiction of an action for an accounting to ascertain the profits. Larkin v. Martin, 46 Misc. 179, 93 N. Y. S. 198.

48. Albery v. Geis [Cal. App.] 82 P. 262.

49. Hoga v. Walsh [Ga.] 50 S. E. 84.

50. Where a partner is excluded from participation in the firm's affairs. Hogan v. Walsh [Ga.] 50 S. E. 84.

51. Where all the members of a partnership except one were dead, the property had been transferred to a corporation in consideration of stock, which was delivered to the surviving partner as trustee, and the personal representative of a partner who had been dead for eight years, whose rights were denied by the other parties in interest, brought suit for accounting. Brew v. Cochran, 141 F. 459.

52. Brew v. Cochran, 141 F. 459.

53. Brew v. Cochran, 141 F. 459. Where a surviving partner and the personal representatives of his deceased co-partners enter into an agreement for the merging of the firm into a trust company, according to which it is provided that any of the parties in interest may maintain a suit in law or equity for the distribution of the stock in the trust company as soon as it is ready for distribution, one of the personal representatives may have a decree for an accounting, although there has been no final liquidation of the partnership's business, certain assets and obligations not covered by the trust company agreement being still outstanding. Id.

54. Harrah v. State [Ind. App.] 76 N. E. 443. The fact that deceased partners' estates are in process of administration does not deprive circuit court of jurisdiction of an accounting against the surviving partner. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

55. Act 1877, p. 136, c. 86; Burns' Ann. St. 1901, §§ 8122-8129. The jurisdiction of the probate court is as exclusive in such case as over a decedent's estate. Harrah v. State [Ind. App.] 76 N. E. 443.

Procedure, pleading and proof.[59]—The bill must show that the plaintiff has such an interest in the partnership as entitles him to an accounting,[60] and that grounds for an accounting exist.[61] A separate and distinct prayer for an accounting is not necessary.[62] General rules as to multifariousness or misjoinder of causes of action apply.[63] Neither a prior settlement[64] nor the existence of unaccounted for profits[65] will be presumed. Where the answer sets up an account stated, a preliminary question is thus raised which must be determined prior to any consideration of the merits.[66]

Before an alleged partner can have an accounting he must prove that he was a member of the partnership.[67] A partner cannot in a suit for dissolution and accounting introduce parol testimony to show that his partner who signed the written articles of partnership was in reality the agent of third parties, and thus hold such third parties to an accounting.[68] Where the partnership has already been dissolved by mutual consent, the cause of the dissolution is immaterial.[69] Where the action is upon an account and also for an accounting, failure of the plaintiff to furnish upon demand an itemized statement of his account will not preclude him from testifying thereto upon the accounting.[70] In the settlement of partnership accounts

56. See 4 C. L. 926.

57. In a suit for an accounting by the personal representative of a deceased partner, the personal representatives of other deceased partners are indispensable parties. By agreement of parties interested all the assets had been conveyed to a corporation and the resulting stock was held by the sole surviving partner as trustee. Brew v. Cochran, 141 F. 459. Where a testator bequeathed his interest in a firm to his wife, remainder to his children, she was not a necessary party to a suit by testator's administrator with the will annexed for an accounting for his interest in the firm. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

58. Where a bill is brought for an accounting of partnership transactions and to procure the declaration of a lien in complainant's favor upon the interest of certain partners in the assets of a new firm, a **member of a new firm** against whom no liability is charged is a necessary party, in order that his interest in the assets of the new firm may be segregated from those of the partners against whom relief is sought. Selman & Co. v. Walling [Ala.] 39 So. 568.

59. See 4 C. L. 926.

60. In a suit by a partner against two surviving partners for an accounting and for judgment for his proportionate share of the net profits of the concern, where it appeared that the plaintiff's interest in the concern had been purchased by one of the other partners subject to such an accounting, it was permissible for the plaintiff to allege, by way of amendment, that the other partner, though not a party to the contract, was cognizant thereof. Houston v. Polk [Ga.] 52 S. E. 83.

61. A partnership was formed for the purchase and resale of real estate, advances made by one partner to be deducted from the profits and the balance divided, and title was taken in a dummy. The property was traded, and that received in exchange again traded. Held complaint for a dissolution and an accounting did not state a cause of action, it not alleging that defendant had title or possession of property in which plaintiff had an interest, or that he received the consideration from the dummy or realized profits in excess of the sum advanced by him. Emrich v. Goldstein, 103 App. Div. 17, 92 N. Y. S. 680. Also held not to state a cause of action against the last grantee, it not alleging that he did not pay a valuable consideration for the property. Id.

62. A prayer that the defendant shall pay plaintiff one-half of the net profits of the partnership business includes a prayer for an accounting. Hogan v. Walsh [Ga.] 50 S. E. 84.

63. A bill for an accounting is not rendered multifarious because relief is sought upon two separate transactions between the same parties, but each on account of partnership matters. Selman & Co. v. Walling [Ala.] 39 So. 568. Where to entitle representatives of a deceased partner to a partnership accounting it was necessary to first set aside an agreement entered into with the surviving partner, a complaint seeking to set aside such agreement and for an accounting held not demurrable for improper joinder of causes of action. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

64. Where some of the parties to a suit for an accounting were minors and the complaint did not suggest that their ancestor's interest in the partnership had been settled without administration, held complaint was not demurrable on the ground that they might have done so. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

65. Emrich v. Goldstein, 103 App. Div. 17, 92 N. Y. S. 680.

66. Lienbach v. Wolle [Pa.] 61 A. 248.

67. Evidence held insufficient to show that plaintiff was a partner in a mining venture. Thompson v. Walsh, 140 F. 83.

68. David Belasco Co. v. Klaw, 97 N. Y. S. 712.

69. Where the suit is for dissolution, the causes of the trouble between the parties and the improper acts of any of them must be competent evidence. McCandless v. Crouse [Ill.] 77 N. E. 202.

70. Flynn v. Seale [Cal. App.] 84 P. 263.

the burden is on the partner charging another with having taken goods from the stock for which he did not pay to prove the charge.[71] An entry in the partnership books is of less weight than a release under seal of the same liability.[72] In a suit for an accounting brought by the administrator of a deceased partner, the surviving partner may testify in his own behalf concerning items in books of original entry formerly kept by him in which regular and chronological entries were made concerning the partnership transactions.[73] In order that an appraisement of firm assets may be evidence against one, he must have had notice thereof.[74] Hearsay is inadmissible to show the state of the account between the parties.[75]

As between the partners the right to firm property cannot be determined by a motion in the suit for an accounting.[76]

Receivers.[77]—After an accounting a receiver may be appointed, if necessary, to carry the judgment into effect.[78] The remedy, however, is a stringent measure, not to be resorted to except remedially,[79] the matter resting largely in the discretion of the trial court,[80] though when a bill seeking dissolution is filed and it satisfactorily appears that the complainant will be entitled to a decree, a receiver will be appointed as of course.[81] The receiver or liquidator stands in the place of the firm, with the same rights and liabilities as to closing up the firm business,[82] and if he continues to operate the business he must do so subject to any agreement which the firm may have had with third persons in relation to such business.[83]

71. Christopher v. Mattlage [N. J. Eq.] 60 A. 1124.

72. Release of money advanced to buy stock exchange seat. Sterling v. Chapin, 102 App. Div. 589, 92 N. Y. S. 904.

73. See 2 Ky. Civ. Code Prac. § 606, and subsection 7. Swafford's Adm'r v. White [Ky.] 89 S. W. 129.

74. In an acounting against a surviving partner by one who advanced money to the deceased partner to engage in a joint adventure under an agreement for profits, and the business of which the deceased partner contributed to the partnership, held an attempted appraisement of the assets of the firm and a sale of the good will thereof, made without notice to plaintiff, was not evidence against him. Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926.

75. See 1 C. L. 1148; 3 C. L. 1355. In an action by a part owner of oil leases owned by a partnership, against a receiver of the partnership for an accounting as to such part owner's share of the profits and proceeds of such leases, the testimony of a witness as to the indebtedness of such part owner to the firm prior to the assignment of the leases, which testimony was based solely upon an examination of the books of the partnership as to the leases in question, the witness not having made any of the entries himself, was purely hearsay, and as such was inadmissible in the absence of any showing that the books represented properly the items in question or that the party who made the entries was unable to testify by reason of being beyond the jurisdiction of the court, insanity, or other disability. Rosenthal v. McGraw [C. C. A.] 138 F. 721.

76. One partner cannot on motion supported by affidavits enjoin the other from claiming a fund deposited in court. Wickes v. Hatch, 103 App. Div. 426, 92 N. Y. S. 1017.

77. See 4 C. L. 926.

78. A receiver should not be appointed by an interlocutory judgment dissolving the partnership and directing an accounting. Lowther v. Lowther, 94 N. Y. S. 159.

79. Gillett v. Higgins [Ala.] 38 So. 664. Even where surviving partners, pending actions between them and the representatives of the deceased partner, have shown a disposition to further their own interests, as against those of the decedent, and have tried to discourage bidders at the prospective sale of the firm property, a receiver will not be appointed until the termination of the actions, unless it appears that such a course is absolutely necessary for the protection of the interests of the decedent. Sarasohn v. Kamarky, 97 N. Y. S. 529.

80. Gillett v. Higgins [Ala.] 38 So. 664.

81. Where it appeared that the defendant sold out the firm's goods and turned over the business to a stranger, a **prima facie** case for appointment of a receiver was made out, even without notice of the application. Gillett v. Higgins [Ala.] 38 So. 664.

82. Liquidators or receivers appointed by agreement in a suit instituted by a member of a partnership simply stand in the shoes of their principals, and hence, in the absence of any issue of insolvency, cannot have a concurso or have liens and privileges in favor of creditors cancelled, thus referring the creditors to the proceeds of the property covered by the liens. Fitzner v. Nouilet, 114 La. 167, 38 So. 94. Where the members of an ordinary partnership agree upon liquidators and authorize them to take charge of the partnership assets and wind up its business, whether such authorization has received judicial sanction or not, the liquidators have an interest in reducing to possession the assets which they are authorized to take charge of, and in clearing away obstructions to their satisfactory distribution, and hence may appeal from an order dismissing a rule upon creditors to show

Credits and charges.[84]—Upon an accounting each party is held accountable according to the articles of partnership.[85] The respective rights of the partners upon dissolution do not depend upon which one of them has possession of the partnership property but upon its value as of the date when the partnership is dissolved,[86] except where such value is fixed by the partnership agreement.[87] Each partner is entitled to his proportionate share of all profits.[88] A partner should be credited with every item of expense incurred by him on behalf of the partnership during the existence of the firm.[89] Cash credits in favor of one of the partners appearing on the books kept by or under the supervision of the other will be allowed when the books are introduced in evidence and there is no dispute as to the entries;[90] and where a partner makes advances to his co-partner in order to enable the latter to carry out his portion of the partnership agreement, such advances should be allowed as a set-off against any sum found due from such partner to his co-partner on settlement,[91] but a partner cannot set off an individual claim against his co-partner.[92] A partner is not entitled to credit for money which according to the terms

cause why certain inscriptions purporting to operate and privileges and mortgages should not be cancelled. Id.

83. Where a partnership which owned oil properties sold an undivided interest in certain leases of such properties to a third party, and continued to operate such leases for the joint benefit of themselves and such third party, under an agreement to do so without salaries or compensation, and a receiver was thereafter appointed who continued to operate the leases, without informing the court of the special stipulations in the contract between the partnership and the third person as to compensation, etc., the receiver was not entitled to compensation for incidental services rendered in operating the property of such third person, and such charge on account of compensation should not be made in the shape of general costs of administration any more than to the receiver direct. Rosenthal v. McGraw [C. C. A.] 138 F. 721.

84. See 4 C. L. 926.

85. An agreement to furnish one-half the "stock, tools and feed, teams, etc." was agreement to furnish one-half live stock and not merely one-half of the work stock. Green v. Hart, 27 Ky. L. R. 970, 87 S. W. 315. A partner agreeing in the articles of co-partnership to make such repairs to the partnership property as are absolutely necessary, not to exceed $500, held merely to limit the amount such partner could be compelled to advance for such purpose and not to limit the amount he could use for that purpose nor affect his rights to credits for reasonably necessary repairs made by him in excess of such sum. Mason v. Gibson [N. H.] 60 A. 96.

86. Lizee v. Robert [Minn.] 104 N. W. 836.

87. Under partnership agreement fixing value of property furnished by one partner for use in the business, such partner, on dissolution of the firm, held entitled to the sum so fixed, less any amount paid by the other partner on the purchase price. Neal v. Abel, 103 App. Div. 414, 92 N. Y. S. 1045.

88. One partner, after ascertaining that his co-partner would sell his interest in partnership land for a certain sum, sold the land at a price which brought to himself a sum greatly in excess of the sum named by his co-partner. Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770. Although such transactions may have been conducted by one of the partners alone, proceeds of option taken by one partner in name of firm and suit in firm name to recover profits, and dividends collected on stock held by one of the partners. Whitney v. Whitney, 27 Ky. L. R. 1197, 88 S. W. 311. Where the members of a firm of railroad construction contractors agreed that either of such members might subcontract a certain portion of a certain piece of work, such a contract to be dealt with the same as any other subcontract, the proceeds of such a subcontract would be credited as a firm asset at the same rate of profit as the firm usually made on subcontracts. Condon v. Callahan [Tenn.] 89 S. W. 400. Where the partners, though obligated to contribute equally, contribute unequally, distribution should not be made of the ultimate assets in proportion to the amounts contributed by each, but each should be charged with the amount which he was obligated to contribute and with the amounts withdrawn by him, and the balance should be equally divided. Corbin v. Henry [Ind. App.] 74 N. E. 1096.

89. Lizee v. Robert [Minn.] 104 N. W. 836.

90. Murphey v. Bush [Ga.] 50 S. E. 1004.

91. Especially where the rights of creditors do not intervene, and even if such advances be considered as creating an individual and not a partnership debt. Logging partnership held to have commenced from time cutting was begun and not merely when logs were in stream, though one of the partners was to furnish all labor, etc., to put them in stream. Swafford's Adm'r v. White [Ky.] 89 S. W. 129. But a mutual release executed by partners upon dissolution will not include a debt evidenced by a mortgage of even date with the partnership, and given to secure an individual advancement made by one of the partners to the other. Hubbard v. Mulligan [Colo.] 82 P. 783.

92. Flynn v. Seale [Cal. App.] 84 P. 263. A claim by one partner against the other which is barred by the statute of limitations cannot be set off in a suit for an accounting. Defendant claimed he had made advances for plaintiff's benefit. Id. Person-

of the partnership agreement he was to put in the firm,[93] nor in the absence of special agreement to that effect can a partner be credited with the value of his services.[94] Property contributed by one of the members does not ordinarily become his individual property upon dissolution, but the proceeds thereof must be shared with the other partner.[95] But when one of the partners contributed capital and the other labor, the one who contributed the labor is not entitled to share in the capital or property put in as capital by the other party.[96] Each partner should receive credit for all expenditures made by him in behalf of the firm,[97] but no charges or expenditures will be allowed upon an accounting except such as are bona fide,[98] nor is a partner entitled to credit for expenditures under an illegal contract, though made for the benefit of the firm,[99] nor where the expense was needlessly incurred through his own fault.[1] A partner should not be charged with items of expenses incurred by or on behalf of the firm,[2] nor with losses for which he is not responsible,[3] nor even for losses caused by his lack of judgment or discretion, unaccompanied by actual negligence of bad faith,[4] but where, after the dissolution of a firm, one of the partners undertakes to collect the debts due the firm, he will be held for the amount of such debts unless he gives an account showing why he has not collected them.[5] So, also, where a managing partner fails to keep an account of the firm assets and expenditures, only slight evidence of willful suppression or spoliation or of fraud is necessary to raise the presumption that he is responsible for any deficits in the assets,[6] and upon an accounting, mere evidence that the partnership funds unaccounted for were expended for the benefit of the firm is insufficient, an accurate

al transactions by which one partner becomes indebted to the other do not create such a mutual account as will prevent the statute of limitations from running on the debts arising therefrom until the settlement of the partnership affairs. Id.

93. Defendant attempted to set off such funds in suit by other partner for accounting. Flynn v. Seale [Cal. App.] 84 P. 263.

94. Partner in insurance business did all office work and managed business. Whitney v. Whitney, 27 Ky. L. R. 1197, 88 S. W. 311. Personal services and use of teams. Claim not made for 12 years after completion of work. Bowen v. Day [S. C.] 51 S. E. 274.

95. Contracts to star an actress and for writing of play. Arthur v. Sire, 94 N. Y. S. 346. The fact that contracts contributed by one member contain stipulations against assignment or subletting will not deprive the other partner of his interest, though they may affect the value of the contracts. Id.

96. Nor is evidence of a witness that it was his understanding that both parties should have equal interests in the property sufficient to give the partner contributing the labor any interest in the property contributed by the other. Hillock v. Grape, 97 N. Y. S. 823.

97. Attorney's fees and costs in action by firm. Whitney v. Whitney, 27 Ky. L. R. 1197, 88 S. W. 311.

98. Secret profits on sale of partnership property, rents for engine purchased by partner but afterwards charged to firm, and portion of office salaries and expenses where office used for private competing business, disallowed. Dixon v. Paddock [Va.] 51 S. E. 841.

99. Employment of railroad engineer by member of construction partnership with consent of other partner, and without concealment from the railroad, to do things not inconsistent with the engineer's regular duties, held not illegal. Condon v. Callahan [Tenn.] 89 S. W. 400. Items claimed on account of fees paid to attorneys and agents in the matter of procuring legislation by Congress, disallowed. Consaul v. Cummings, 24 App. D. C. 36.

1. Where partner in winding up firm affairs disputed a valid claim, he was not entitled to credit for costs and attorney's fees in litigating the claim. Murphey v. Bush [Ga.] 50 S. E. 1004.

2. Lizee v. Robert [Minn.] 104 N. W. 836.

3. Logs lost in transit, by sap rot, and being scaled at delivery for defects, not allowed on first measurement. Swafford's Adm'r v. White [Ky.] 89 S. W. 129. In the absence of an agreement to that effect in the articles of partnership, a partnership is not liable on an accounting for depreciation in value of a manufacturing plant, but such loss must be borne by the firm. Electric light and power plant. Houston v. Polk [Ga.] 52 S. E. 83.

4. Installed water-wheel too large for stream. Houston v. Polk [Ga.] 52 S. E. 83.

5. Chretien v. Giron [La.] 38 So. 881.

6. Evidence of willful refusal to keep accounts. Escallier v. Baines [Wash.] 82 P. 181. Where, in a suit for an accounting against a partner who has had control of the business, the assets are less than the cash contribution to the firm made by the other partner only a few months previously, and the defendant has failed to keep accounts so as to show where the missing assets went, he cannot complain if the other partner is willing to accept and is awarded the whole amount of the assets left. Id.

account must be given.[7] Under some circumstances a partner may be charged with the value of the good will of the firm.[8]

Where there is a sale to one partner of a retiring partner's interest in the firm's property and business, made in the course of a settlement after a full accounting, the consideration of such sale, being the balance resulting from the accounting, may be surcharged to the extent that there were errors committed in arriving at the amount of the consideration, whether as the result of fraud or mistake.[9]

Interest.[10]—The allowance or refusal of interest in a partnership accounting depends upon the circumstances of each particular case,[11] but the general rule is that interest will not be allowed on partnership accounts until there has been a settlement.[12]

Reference.[13]—It is not necessary, in an equitable action for an accounting, to refer to a jury exceptions of fact to the auditor's report,[14] and the judge may pass on exceptions to the auditor's report without submitting the issues made thereby to a jury, and a judgment overruling the exceptions and making the findings of the auditor the findings of the court, unexcepted to, is valid and final.[15] When the auditor omits to include in his calculations an item which the undisputed evidence shows should be entered as a credit to one of the partners, and proper exception is taken, the exception should be allowed as a matter of course.[16]

Decree.[17]—A decree for an accounting must provide for the ascertainment of outstanding indebtedness of the firm, and no decree in favor of either partner for any balance can be made until this has been ascertained. In other words the decree must provide for a complete winding up of the firm's affairs.[18] After the relative credits and charges to which the parties are respectively entitled and liable have been adjusted, the assets will be distributed between the parties according to equitable principles.[19] In carrying out the result of an accounting the firm assets should first be exhausted, and if they are insufficient, one of the partners may have a personal judgment against the other.[20] The court may order a sale of the firm assets,[21] and it is the right of either of the partners to have the property sold so

7. Escallier v. Baines [Wash.] 82 P. 181.
8. As where he takes exclusive possession of the business and runs it as his own. He will be regarded in the same light as a purchaser at a judicial sale so far as the good will is concerned. Griffith v. Kirley [Mass.] 76 N. E. 201.
9. Ehrmann v. Stitzel [Ky.] 90 S. W. 275.
10. See 4 C. L. 926.
11. Not allowed where accounting partner had had exclusive control of the firm's finances and had made no claim for interest on amounts withdrawn. Goodwill v. Heim [Pa.] 62 A. 24.
12. Goodwill v. Heim [Pa.] 62 A. 24. Where the accounting partner had the exclusive control of the finances and business of the firm and had made no demand for a settlement, and no claim for interest on the amounts withdrawn by his co-partner, held no interest should be allowed. Id. Where at the time of the death of a partner there was a bank account in the firm name, and the surviving partner continued to deposit money to the firm's credit in this account, and never used any of the money or derived any benefit therefrom, it was held that he would not be charged interest thereon. Condon v. Callahan [Tenn.] 89 S. W. 400.
13. See 4 C. L. 926.
14. Houston v. Polk [Ga.] 52 S. E. 83.
15. Hogan v. Walsh [Ga.] 50 S. E. 84.
16. Murphey v. Bush [Ga.] 50 S. E. 1004.
17. See 4 C. L. 926.
18. Albery v. Geis [Cal. App.] 82 P. 262.
19. Where one partner put in bonus and as part thereof conveyed realty to the firm, upon dissolution before the time specified in the articles, it was decreed that the property should be reconveyed back to him, charging him therefor at its proper value, and that the balance of his unearned bonus should be paid in cash. McCandless v. Crouse [Ill.] 77 N. E. 202.
20. Gillespie v. Salmon [Cal. App.] 84 P. 310.
21. Expiration book of insurance partnership should be sold with other effects, but failure to so order held not reversible error under the circumstances of the case. Whitney v. Whitney, 27 Ky. L. R. 1197, 88 S. W. 311. Where surviving partners show a disposition to discourage bidders at a prospective sale of the partnership business, if the surviving partners are to be allowed to bid at the sale such sale must be made by a receiver and not by a referee, since the referee could only confer title as agent of the surviving partner, and furthermore could not obtain unprejudiced information as to the business which would enable him to inform other bidders as to the value and

as to obtain the benefit of the sale of the good will.[22] General rules determine as to when a judgment is final.[23]

The scope of the accounting depends upon the particular circumstances of each case.[24]

Refusal to obey a court's order constitutes a contempt.[25]

Apportionment of costs.[26]—In an equitable action for an accounting the apportionment of the costs rests in the sound discretion of the trial court.[27]

Opening or correcting settlement.[28]—Matters which might have been reviewed on appeal are not ground for opening a partnership settlement by bill of review,[29] nor is the failure of counsel to properly effect an appeal ground for a bill of review to open a partnership settlement.[30] Where the probate court has approved the final report of a surviving partner as the administrator of the partnership affairs, such report, until set aside for proper cause, is a bar to a suit on the surviving partner's bond.[31] Where partners have been in the habit of making monthly settlements on a certain basis, it will require strong evidence to sustain a claim, set up for the first time after dissolution and in connection with the last month's settlement, that the basis of settlement was incorrect, especially where the alleged discrepancy involves a large sum.[32] Although a written settlement between partners is legally binding, one of the partners may recognize a moral obligation to contribute to a debt paid by his co-partner and not included in the settlement.[33] The right to have

condition thereof. Sarasohn v. Kamarky, 97 N. Y. S. 529.

22. Griffith v. Kirley [Mass.] 76 N. E. 201. Where the master failed to make any finding as to value of good will, or to report any evidence thereon, a finding by the court that the total value of the business was a certain sum could not be sustained. Id.

23. In an action for an accounting, an interlocutory judgment being rendered to the effect that plaintiff was entitled to a certain number of corporate shares if defendants were in a position to transfer them, a final judgment giving defendants the option to transfer the shares or pay their value held erroneous. Reilly v. Freeman, 109 App. Div. 4, 95 N. Y. S. 1069. Held also that defendants were not required to transfer any specific shares, and it was proper for the final judgment not to direct the transfer of certain specific shares. Id. See, also, Appeal and Review, 5 C. L. 121; Judgments, 6 C. L. 214.

24. Where in a suit for dissolution and an accounting the plaintiff alleges that a dissolution has already been brought about by the acts of the defendant, and it appears that the plaintiff has had nothing to do with the firm since the date of the alleged dissolution, and that the defendant has, since that time, had entire charge of the firm's affairs, taken into his possession all of its assets, claiming to own the same, and, by reason of such claim, disposed of the firm property, the accounting should extend only to the date of the alleged dissolution. Lowther v. Lowther, 94 N. Y. S. 159.

25. In a suit for an accounting, a partner disregarding court's order, requiring him to file an account and to refrain from interfering with firm's matters after appointment of a receiver, held guilty of a contempt. Cox v. Clarke, 95 N. Y. S. 707.

26. See 4 C. L. 927.

27. One-half of costs taxed against plaintiff. Houston v. Polk [Ga.] 52 S. E. 83. Costs of litigation of counterclaim adjudged against the partner who set it up, the same not having been established. Green v. Hart, 27 Ky. L. R. 970, 87 S. W. 315. Partners who were compelled by the opposition of other members to invoke judicial assistance to obtain a settlement of the partnership business and to establish the nature of the partnership agreement, held entitled to costs and an allowance for attorney's fees. Briere v. Searls [Wis.] 105 N. W. 817. Costs equally divided where each party made effort to settle but failed, neither denying the partnership or its terms. Swafford's Adm'r v. White [Ky.] 89 S. W. 129.

28. See 4 C. L. 927.

29. Error in ordering partition of property without intervention of commission, infringement upon province of jury, errors in credits and charges. Avocato v. Dell'Ara [Tex. Civ. App.] 91 S. W. 830.

30. Avocato v. Dell'Ara [Tex. Civ. App.] 91 S. W. 830.

31. The jurisdiction of the probate court is exclusive, and a judgment in a suit on the bond which treats the decree of the probate court approving the surviving partner's report as a nullity is contrary to law. Harrah v. State [Ind. App.] 76 N. E. 443.

32. Partners in pool room business had made twenty-one monthly settlements. Shulsinger v. Maloney, 114 La. 846, 38 So. 581. In an action to recover back such money, allegations in the answer that when sums were paid by the defendant upon the debts the balance of which he claimed to have paid after the settlement, such payments had been made either by cash or check, and certain slips in the cash drawer representing portions of the debt were then and there destroyed, did not constitute an admission that all of the debt had been paid back before the settlement. Devereux v. Peterson [Wis.] 106 N. W. 249.

a partnership accounting reopened on a bill of review may be lost by negligence and laches.[34] General rules as to harmless error apply.[35]

(§ 7) *F. Contribution and indemnity.*—The right to contribution and indemnity cannot be enforced until the partnership has been dissolved and its accounts settled,[36] and the bill must show that such facts exist.[37] In such a proceeding all partners are necessary parties.[38]

§ 8. *Limited partnerships.*[39]—Limited partnerships were wholly unknown to the common law, and as they exist in the United States are entirely statutory,[40] consequently, a limited partnership can only be formed for the statutory purposes.[41] Sales and purchases of bonds, stocks, and other securities are "mercantile transactions" within the meaning of such statutes.[42] The omission to use the word "limited" merely imposes liability for indebtedness on members who participate in the omission or knowingly acquiesce therein.[43] The use of the abbreviation "Ltd." instead of the full word "Limited" is generally held sufficient.[44] Statutory provisions for the filing of a certificate showing that the special partner has paid in the amount of capital subscribed by him are remedial, and substantial compliance therewith is sufficient,[45] and even before the certificate has been filed, a valid contract may be made by the firm, the articles having been signed.[46] In Maryland the fact that the principal office of the partnership is alleged to be outside of the state is insufficient to convert it into a general partnership.[47] Limited partnerships are not corporations so as to become citizens of a state for the purposes of federal jurisdiction.[48] Limited partnership statutes must be construed with reference to the common law, and, except as otherwise provided by statute, the rights and

33. If he does so pay it, without fraud on the part of his co-partner, he cannot recover it back. Devereux v. Peterson [Wis.] 106 N. W. 249.

34. Bill of review, on ground that decree obtained by perjured testimony, denied, on ground that by due diligence complainants could have obtained evidence which would have revealed the perjury. Avocato v. Dell'-Ara [Tex. Civ. App.] 91 S. W. 830.

35. A partner taking a proportionate share of gross receipts from a profitable venture carried on by one partner held not harmed by a ruling crediting the latter with certain expenses thereof, regardless of whether such venture was within the scope of the partnership or not. Mason v. Gibson [N. H.] 60 A. 96.

36. Shumaker, Partnership [2nd Ed.] p. 162.

37. Bill failing to allege that there had ever been a settlement of the partnership accounts, and not containing nor being accompanied by a statement of such accounts, and not asking for a final adjudication of the accounts of the firm, held demurrable. Bruns v. Heise [Md.] 60 A. 604. Bill alleging that proceedings in equity were pending for the dissolution of the firm and the settlement of its affairs held defective. Id.

38. An allegation in a bill by a surviving partner to recover contribution from the personal representatives of a deceased partner that other partners had no individual estate held insufficient to justify nonjoinder as parties. Bruns v. Heise [Md.] 60 A. 604.

39. See 4 C. L. 927.

40, 41, 42. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

43. Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632.

44. Is not such a failure to comply with the law as will bring the association under the penalty provided by Act June 2, 1874, P. L. 271, § 3. Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632. The use of the abbreviation "Ltd." instead of the word "Limited" after a company's letterhead will not make the person who signed the letter a general partner, so that his declarations and acts will have the same force and effect in all cases as the acts and declarations of a co-partner in an ordinary partnership. Id.

45. Failure to conform literally to the statute will not render the special partner liable as a general partner, as in case of a false certificate or affidavit. Webster v. Lanum [C. C. A.] 137 F. 376.

46. Bank deposit was made by member of special partnership of special partner's contribution, and before the certificate was filed, the bank having knowledge that the certificate had not been filed, a check was drawn on the deposit. It was held that the bank rightly paid the check. La Montagne v. Bank of New York Nat. Banking Ass'n [N. Y.] 76 N. E. 33.

47. Code Gen. Pub. Laws, art. 73, § 4, requires that the certificate of a limited partnership shall be recorded in the county in which the principal place of business shall be. Held that a limited partnership is not converted into a general one merely because the principal office of the partnership is alleged to be outside of the state, its certificate stating otherwise. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

48. "Limited partnerships" organized under 2 Comp. Laws Mich. pp. 1883, 1888, as amended by Pub. Acts 1903, pp. 398-404. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

liabilities of the partners and their creditors are governed by the rules of law applicable to ordinary partnerships.[49] The fundamental difference between the liability of general and special partners is to be found in the fact that the former are responsible in solido for the debts and obligations of the firm, as in the case of ordinary partnerships, without regard to the amounts contributed by them to the social capital,[50] whilst the latter, if the statute has been complied with, are not generally liable beyond the fund contributed by them,[51] and where such amount has actually been paid in, it is immaterial where it came from.[52] Hence, a statute requiring all suits respecting the business of the partnership to be brought against the general partners only must be construed to apply to suits brought whilst the firm is a going concern, and to suits brought after its dissolution, but, whilst the special partner's contribution still forms part of the assets, or has been wholly absorbed in the liquidation of debts due by the firm,[53] it does not apply where the firm has been dissolved and the special partner's contribution has been returned leaving firm debts unpaid.[54] A limited partnership has the same power to contract as a general partnership.[55] The declarations of a single manager of a limited partnership association will not bind the association unless such declarations are made by him as a special agent of the association.[56]

PARTY WALLS.[57]

A party wall is a dividing wall between two buildings to be used equally for all purposes of an exterior wall by the respective owners of both buildings.[58] Every

49. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819. Where a limited partnership took the assets and assumed the liabilities of a general partnership, which had wrongfully aided a trustee in misappropriating trust funds, the members of the general partnership were the members of the limited partnership. The limited partnership dissolved. Held the individuals were liable whether as members of the first or second firm. Id. **A limited partnership** taking the assets and **assuming the liabilities** of a general partnership which had wrongfully aided a trustee in misappropriating trust funds held to assume the liability of making restitution. Id.

50. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

51. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819. **A special** partner's contribution to the firm's capital is answerable for precisely the same debts and obligations for which such partner would have been liable if he had been a member of an ordinary partnership. Id. The relation of a **partner in commendam** to his firm is in the nature of a stockholder's to his corporation. He is not a partner further than is provided by the Civ. Code, art. 2844, that is to say his only relation is that he has a certain fund in the firm or has agreed to contribute a certain fund, and only this fund or the obligation to contribute it stands in the firm, and he cannot act for the firm nor the firm for him. Hence the firm is without authority to take him into court, and if it does so and a judgment is rendered against him personally on a reconventional demand, the judgment must be considered as having been rendered without citation or equivalent notice and to be null and void and incapable of revival, and in a suit for revival the facts going to such want of citation may be proved. Burt & Co. v. Laplace, 114 La. 489, 38 So. 429. A partner in commendam is not a real partner as to third persons and need not be joined in a suit against the firm in liquidation. In re M. F. Dunn & Bro. [La.] 40 So. 466.

52. Money given or loaned to special partner by strangers or members of old firm. It appeared that the capital paid in by the special partner was furnished by two other persons under an arrangement that they should be the real special partners while the other should be held out as such. It was held that this did not render the ostensible special partner liable as a general partner. Webster v. Lanum [C. C. A.] 137 F. 376.

53. Code Pub. Gen. Laws, art. 73, § 19, construed. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

54. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819. In such a case the partnership having aided trustee in converting trust property, held substituted trustee in a suit for restitution properly made general and special partners parties defendant. Id.

55. Deposit of money in bank. La Montagne v. Bank of New York Nat. Banking Ass'n [N. Y.] 76 N. E. 33.

56. Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632. In an action by a limited partnership a **letter** written under the letterhead of the company and signed by a person who was not shown to have been a manager of the company is **admissible** for the purpose of proving that the goods were sold and delivered to defendant's brother rather than defendant. Id.

57. See 4 C. L. 927.

separating wall between two buildings is presumed to be a common or party wall, if the contrary be not shown.[59] Presumptively, a party wall agreement gives each an easement in the land of the other and does not convey the fee of such land.[60] Each may use his side for proper advertising purposes.[61] Either may carry the wall up for his building,[62] and in so doing, if he uncovers the other's building by consent, is liable only for negligence.[63] Light and air coming into the higher building can not be obstructed by any use of the wall except for building purposes.[64] Each owner must contribute to necessary repair and restoration of the wall if the fact be properly established,[65] and is not relieved because of slight structural changes of which he quiescently knew,[66] but the party building must pay the extra cost if the wall is made wider or higher.[67] If a wall is sufficient for the purposes of one owner, but insufficient to support an improvement to be made by the other, the latter may rebuild the wall but must bear the entire expense.[68] In Iowa the rights of parties to separating walls are governed by statute,[69] but these statutes do not prevent owners from making special agreements concerning such walls.[70] Parol evidence is incompetent to show such an agreement,[71] but is competent to show what particular statute is applicable to a given case.[72] Under these statutes, repairs to party walls are to be made at the expense of all who have rights therein in proportion to the interest of each.[73] If an old wall is rebuilt for the purpose of increasing its height, wholly at the expense of one of the owners, the owner who did not contribute thereto may use the new wall as he used the old without additional expense,[74] but he is not entitled to make any additional use of the new wall without paying a portion of the expense of reconstruction.[75]

The existence of a party wall is sufficient notice to put grantees of one owner upon inquiry as to the rights of the co-owner in the wall,[76] but is not constructive notice to a grantee of an agreement by his grantor to pay part of the expense of the erection of the wall.[77] A subsequent purchaser who has no notice, actual or constructive, of an agreement by his grantor to contribute to the cost of a party wall

58. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

59. Dividing wall between two tenements became party wall when owner sold to different persons. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698. In Iowa every separating wall between buildings is, as high as the upper part of the first story, presumed to be a wall in common if there is no title, proof, or mark to the contrary. Code § 2996. Howell v. Goss [Iowa] 105 N. W. 61.

60. Contract whereby parties conveyed to each other "such interest in the land covered, or to be covered, by said party wall as may be necessary to carry out the terms of this agreement," held to grant only easements, not fee title. Scottish-American Mortg. Co. v. Russell [S. D.] 104 N. W. 607.

61. Agreement making the wall the common property of the parties thereto and conferring the usual rights in partition walls. Lappan v. Glunz [Mich.] 12 Det. Leg. N. 282, 104 N. W. 26.

62. Action by adjacent owner for removal will not lie. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

63. Riiff v. Garvey [Neb.] 104 N. W. 1143.

64. Co-owner had no right to close up windows in party wall by masonry to prevent the other from trespassing on the roof of his building. Lengyel v. Meyer [N. J. Eq.] 62 A. 548.

65. By judgment of competent men on due notice previously given. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

66. Evans v. Howell, 111 Ill. 167.

67, 68. Bellenot v. Laube's Ex'r [Va.] 52 S. E. 698.

69. See Code, §§ 2994-3003, cited in Howell v. Goss [Iowa] 105 N. W. 61.

70, 71. Code § 3003. Howell v. Goss [Iowa] 105 N. W. 61.

72. As to show whether Code § 2997, relative to repairs, or § 2999, relative to increasing height of walls, applies. Howell v. Goss [Iowa] 105 N. W. 61.

73. Code § 2997. Howell v. Goss [Iowa] 105 N. W. 61.

74. Code § 2999 applies to such case. Howell v. Goss [Iowa] 105 N. W. 61.

75. Not entitled to decree quieting title to reconstructed wall without paying part of expense. Howell v. Goss [Iowa] 105 N. W. 61.

76. One owner need not notify grantees of the other as to his rights, no hostile claim being asserted. Howell v. Goss [Iowa] 105 N. W. 61.

77. Party wall agreement was unrecorded at time of transfer by one owner, but wall had been built. Held, grantee had no constructive notice of agreement by his grantor to contribute. Scottish-American Mortg. Co. v. Russell [S. D.] 104 N. W. 607.

is not bound thereby to pay any part of such cost to entitle him to use the portion of the wall situated on his or her land.[78] But where a contract providing for contribution by the owner of the vacant lot when he makes use of the wall is expressly made binding upon the heirs and assigns of the parties, the contract creates covenants running with the land,[79] and where conveyances are made by each owner after the party wall is built, the grantee of the vacant lot who uses the wall is required to make payment therefor to the grantee of the first builder.[80] By the Pennsylvania statute the right to compensation for use of a party wall passes with the land, unless reserved until the wall is used,[81] and such right vests in the owner at the time the wall is used.[82] When the right has actually vested in an owner it does not pass from him by a subsequent conveyance, though it is not expressly reserved.[83]

PASSENGERS, see latest topical index.

PATENTS.

§ 1. *Necessity and kinds.*[84]—Design patents cover appearances only.[85]

§ 2. *Patentability. Subjects of and invention.*[86]—A process or method, but

78. Scottish-American Mortg. Co. v. Russell [S. D.] 104 N. W. 607.

NOTE. Grantee with notice: If a person purchases a lot on which there is a party wall built by the owner of the adjoining lot, with notice, either actual or constructive, of a contract between his grantor and such adjoining lot owner, that the grantor will pay one-half of the cost of constructing the wall whenever he shall use it, it is generally agreed that such purchaser is liable for the amount agreed to be paid by his grantor in case the purchaser makes use of the wall. Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348; Pew v. Buchanan, 72 Iowa, 637, 34 N. W. 453; Savage v. Mason, 3 Cush. [Mass.] 500; Standish v. Lawrence, 111 Mass. 111; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; Brown v. McKee, 57 N. Y. S. 684. This is especially the rule when the agreement further stipulates that the covenants therein shall extend to and be binding upon each party, his heirs, assigns, etc., and the purchaser has notice of such stipulation. Roche v. Ullman, 104 Ill. 11; Stehr v. Raben, 33 Neb. 437, 50 N. W. 327; Garmire v. Willy, 36 Neb. 340, 54 N. W. 562; Brown v. Pentz, 1 Abb. App. Dec. 227; Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097. If one of the parties to a deed of a party wall covenants that he or his grantee shall pay one-half of the expense of constructing such wall whenever he shall make use of it, and stipulates that such covenant shall run with the lot, a lien is thereby created thereon which is binding upon a subsequent purchaser with such notice only as the deed affords. Parsons v. Baltimore, etc., Ass'n, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769. If a party wall has been used by the grantor at the time the vendee purchases the property, he has a right to presume that his grantor's share of the cost of the wall has been paid, and he cannot be held liable therefor in the absence of notice of the true state of the facts. Kells v. Helm, 56 Miss. 700. If one owner has a right to use a wall of an adjoining owner under an agreement between them, he has no right, as against the grantee of the adjoining owner without notice of the agreement, to use such wall without making compensation. Appeal of Helmbach [Pa.] 7 A. 737."—Note to Dunscomb v. Randolph [Tenn.] 89 Am. St. Rep. 944.

79, 80. Southworth v. Perring [Kan.] 81 P. 481; rehearing denied Id., 82 P. 785.

81. Lea v. Jones, 23 Pa. Super. Ct. 587.

82. Act April 10, 1849, § 4, P. L. 500. Lea v. Jones, 23 Pa. Super. Ct. 587.

83. Lea v. Jones, 23 Pa. Super. Ct. 587.

NOTE. Rights and liabilities of subsequent grantees: The authorities are in conflict on these questions. See Southworth v. Perring [Kan.] 81 P. 481, and 82 P. 785 for discussion of modern authorities. Also Scot-

not the end attained, is patentable.[87] The movement of a machine, irrespective of the mechanism which causes it, cannot be patented;[88] nor is concept alone patentable, but it must be accompanied by a mechanical embodiment which must be unanticipated.[89]

A design patent is addressed to the eye and is to be judged by its ability to please.[90] Design patents cover appearances only,[91] and should be artistic, though it is not necessary that they should be practical.[92] To support a method or process patent there must be a tangible product or a change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical means or steps.[93]

In all patents, including those covering designs,[94] invention,[95] as distinguished from mechanical skill,[96] or suggestion,[97] is essential; and a mechanical concep-

tish-American Mortg. Co. v. Russell [S. D.] 104 N. W. 607, and cases and authorities cited in 4 C. L. 927, 928, particularly extensive notes in Cook v. Paul [Neb.] 66 L. R. A. 673, and Dunscomb v. Randolph [Tenn.] 89 Am. St. Rep. 941.

84. See 4 C. L. 929.

85. Inventor cannot cover an invention that has merely a practical value with either a design or mechanical patent, or both, at his option. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210.

86. See 4 C. L. 930.

87. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850. A monopoly of every means for doing a certain thing is not patentable. No. 684,165, for a method of regulating electric circuits, is void. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785. No one can obtain a monopoly of the end to be effected, even when achieved by means materially different from those described and claimed. Mahoney v. Jenkins Co. [C. C. A.] 138 F. 404.

88. American Crayon Co. v. Sexton [C. C. A.] 139 F. 564.

89. Voightmann v. Perkinson [C. C. A.] 138 F. 56. Where no concrete conception can be worked out of a claim for a mechanical patent and only an ill-defined principle of construction, the only key to which is the abstract result to be attained, the patent cannot be sustained. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

90. Design patent No. 25,927, for a design for a metal basket, is void for lack of novel element of beauty. Roberts v. Bennett [C. C. A.] 136 F. 193. Design patent No. 36,905, font of type, is void because it shows no such peculiar configuration or ornamentation as to authorize a design patent. American Type Founders' Co. v. Damon, 140 F. 715.

91. A distinct class of inventions, having characteristics and features of its own, was intended to be reached by the statute and to this it is to be confined. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210. It was not the intention of Congress, in allowing patents for designs, to duplicate the existing law and to allow an inventor to cover an invention, that had merely a practical value, with either a design or a mechanical patent, or both, at his option. Id.

92. Word "useful" in the statute, construed. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210.

93. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 784. No. 684,165, method of regulating electric circuits, held void as being merely for an operative theory. Id. No. 527,361, enameling metal ware, claims 4 to 8, covering the product, and 9 to 12, covering the process, held valid. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643.

94. Roberts v. Bennett [C. C. A.] 136 F. 193.

95. Duplication is not invention unless by the combination a new or better result is evolved. In re Scott, 25 App. D. C. 307. A mere substitution of one material for another as paper for tin in the cap to a railway torpedo, does not constitute invention, notwithstanding the fact that, by such substitution, the cost of the article is cheapened to the public. Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. [C. C. A.] 138 F. 729. Invention in some degree having been shown, the court is not called upon to measure it by an exacting standard. Valvona v. D'Adamo, 135 F. 544.

96. Daylight Glass Mfg. Co. v. American Prismatic Light Co., 140 F. 174. The result of the application of the common skill and experience of a mechanic, which comes from the habitual and intelligent practice of his calling, to the correction of some slight defect in a machine or combination, or to a new arrangement or grouping of its parts, tending to make it more effective for the accomplishment of the object for which it was designed, not involving a substantial discovery, nor constituting an addition to our knowledge of the art, is not within the protection of the patent laws. Sloan Filter Co. v. Portland Gold Min. Co. [C. C. A.] 139 F. 23, citing numerous cases. Merely making in one piece what was before made in two does not constitute patentable invention although the one piece device is cheaper or more durable, when such results are merely such ordinary consequences of dispensing with joints as would naturally be anticipated by a workman. General Elec. Co. v. Yost Elec. Mfg. Co. [C. C. A.] 139 F. 568, afg. 131 F. 874. No. 481,856, stovepipes, is not so obviously lacking in invention as to be held void on demurrer. Jackes-Evans Mfg. Co. v. Hemp & Co. [C. C. A.] 140 F. 254. See, also, Thomson-Houston Elec. Co. v. Salem Elec. Co., 140 F. 445.

97. "Suggestion" of a compound or preparation is not such an origination or discovery of a process for making the compound as would entitle the discoverer to let-

tion, which naturally occurred to other persons near the same time and without knowledge of the other's actions, does not involve patentable invention.[98] The fact

ters patent for the process. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715.

ILLUSTRATIONS. Patents held to disclose invention: Reissue No. 11,260 (original No. 456,117) thill-couplings. Bradley v. Eccles, 138 F. 911. Reissue No. 11,872 (original No. 495,443), traveling contact for electric railways. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759. Reissue No. 11,995 (original No. 664,890), convertible cars. O'Leary v. Utica & M. V. R. Co., 139 F. 330. Design patent No. 32,685, lamp shade. Mygatt v. Zalinski, 138 F. 88. Nos. 344,462, 344,464, 391,439 and 479,339, instrument for teaching playing of piano. Virgil Practice Clavier Co. v. Virgil, 138 F. 897. No. 392,973, claims 1 and 6, for improvement in bicycles. Pope Mfg. Co. v. Snyder Mfg. Co., 139 F. 49. No. 413,293, system of electrical distribution. Thomson-Houston Elec. Co. v. Salem Elec. Co., 140 F. 445. No. 417,451, pulp-screening machine. Van Epps v. United Box Board & Paper Co., 137 F. 418. No. 424,905, flexible metallic weather strip. Solmson & Co. v. Bredin [C. C. A.] 136 F. 187. No. 429,874, stone sawing machine. Diamond Stone Sawing Mach. Co. v. Brown [C. C. A.] 137 F. 910. No. 442,531, store service ladder. Murray v. Orr & Lockett Hardware Co. [C. C. A.] 138 F. 564. No. 468,258, bottle-sealing device, and 582,762, for form of construction of same. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199. No. 468,258, bottle stopper. Imperial Bottle Cap & Machine Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312, overruling 136 F. 841. No. 483,646, process of making artificial mica sheets for electrical insulation. Mica Insulator Co. v. Union Mica Co., 137 F. 928. No. 485,856, thill coupling. Bradley v. Eccles, 138 F. 916. No. 491,972, coloring matter from logwood. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. [C. C. A.] 138 F. 54. No. 499,769, regulator for electric motors. Automatic Switch Co. v. Cutler-Hammer Mfg. Co., 139 F. 870. No. 520,429, portable electric battery. American Elec. Novelty & Mfg. Co. v. Howard Elec. Novelty Co. [C. C. A.] 137 F. 913. No. 527,242, process of making open metal work. Expanded Metal Co. v. Bradford, 136 F. 870. No. 533,867, detachable rubber-faced foot-rest bicycle pedals, claims 1 and 2. Curtis v. Atlas Co., 136 F. 222. No. 545,843, covering for steam pipes. Keasbey & Mattison Co. v. Philip Carey Mfg. Co. 139 F. 571. No. 555,693, fireproof wall. Sanitary Fire Proofing & Contracting Co. v. Sprickerhoff [C. C. A.] 139 F. 801, rvg. 131 F. 868. No. 559,446, shade-holding device. Curtain Supply Co. v. North Jersey St. R. Co., 138 F. 734. No. 561,559, knitting machines. Scott v. Fisher Knitting Mach. Co., 139 F. 137. No. 578,133, bag folding machine. Brown Bag-Filling Mach. Co. v. Drohen, 140 F. 97. No. 583,408, automatic mechanism for unloading and feeding sugar-cane. Mallon v. William C. Gregg & Co. [C. C. A.] 137 F. 68. No. 584,177, magazine guns. Marlin Firearms Co. v. Dinnan, 139 F. 658. No. 592,920, engraving machine. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. Nos. 604,346 and 642,075, wardrobe trunks. Bonsall v. Hamilton Mfg. Co., 139 F. 399. No. 607,433, milk can. Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 F. 123. No. 608,143, casting apparatus blasting furnace. Killeen v. Buffalo Furnace Co., 140 F. 33. No. 621,423, boot-tree. Leadam v. Ringgold & Co., 140 F. 611. No. 644,367, composition for lining pulp digesters, claim 3. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48. No. 644,464, artificial limb suspender. Rowley v. Koeber, 135 F. 363. No. 645,871, machine for folding the edges of collars, cuffs, etc. United Shirt & Collar Co. v. Beattie, 138 F. 136. No. 646,148, hoof-pad. Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899. No. 650,129, drip-coffee-pot. James Heekin Co. v. Baker [C. C. A.] 138 F. 63. No. 650,771, claims 7 and 8, plows. Avery v. Case Plow Works, 139 F. 878. No. 669,011, claims 1 and 2, method of knitting flat caps. Kahn v. Starrells [C. C. A.] 135 F. 532. No. 669,561, claim 3, folding hanger for garments. Bonsall v. Hamilton-Noyes Co., 139 F. 403. No. 676,084, automatic typographic numbering machine, claim 27. Bates Mach. Co. v. Wetter Numbering Mach. Co., 136 F. 776. No. 684,340, regulating device for arc lamp circuits, claim 4. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785. No. 695,282, machine for making prismatic glass. Daylight Glass Mfg. Co. v. American Prismatic Light Co., 140 F. 174. No. 696,940, trousers hanger. Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 138 F. 654. No. 701,580, pneumatic surfacer of stone. Kotten v. Knight, 137 F. 597. No. 701,776, mold and oven for making biscuit cups for holding ice cream. Valvona v. D'Adamo, 135 F. 544. No. 702,560, needle valve in oil burner. Cleveland Foundry Co. v. Kauffman [C. C. A.] 135 F. 360.

Patents held void for lack of invention: Design patent No. 29,793, horseshoe calk. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210. Design patent No. 36,905, font of type. American Type Founders' Co. v. Damon, 140 F. 715. No. 400,381, sleigh runner. American Carriage Co. v. Wyeth [C. C. A.] 139 F. 389. No. 412,134, can top and cover. Self Sealing Can Co. v. Hocker, 136 F. 418. No. 474,718, railway torpedo. Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. [C. C. A.] 138 F. 729. No. 483,653, claim 2, process of molding artificial mica sheet, if not construed as a continuation of the process of No. 483,653. Mica Insulator Co. v. Union Mica Co., 137 F. 928. No. 500,371, music box. Regina Co. v. New Century Music-Box Co., 138 F. 903. No. 532,554, machine for cutting candy. American Caramel Co. v. Thomas Mills & Bro., 138 F. 142. No. 539,713, claims 1, 2 and 3, photographic film roll for daylight loading of a camera. Eastman Kodak Co. v. Anthony & Scoville Co., 139 F. 36. No. 558,393, claim 2, granose flakes. Sanitas Nut Food Co. v. Voigt [C. C. A.] 139 F. 551. No. 581,251, manufacture of tubing. National Tube Co. v. Spang [C. C. A.] 135 F. 351. No. 587,874, barrel filter. Sloan Filter Co. v. Portland Gold Min. Co. [C. C. A.] 139 F. 23. No. 600,186, fireproof window. Voightmann v. Perkinson [C. C. A.] 138 F.

that the inventor is wholly ignorant of all the chemical changes that take place in the course of his process is immaterial.[99] Where two inventors improve an old machine, each is entitled to the benefit of his own improvement, so long as it differs from that of the other and does not include his.[1] The mere adaptation of well known methods of one art to another does not, as a general rule, involve invention;[2] but the adaptation of an old device to a distinctly new and highly useful service discloses invention.[3] And an invention which solves the problem of practical manufacture, accomplishing by few and simple means what has before been done by means less simple and practical, may be protected by patent, though involving no important novelty in its mechanical principles.[4] Double patenting is not allowable even to the same patentee,[5] not even where one patent is for a design or process, and the other for a mechanical device, where the two are indistinguishable in their characteristics and manifestly the outcome of the same inventive idea;[6] and the fact that the design patent proves to be invalid will not save a subsequent mechanical patent for the same device from the charge of double patenting.[7] A combination of old elements is not patentable unless the result is a new and useful article,[8] and one which

56. No. 617,592, electric device in hand lamp. American Elec. Novelty & Mfg. Co. v. Howard Elec Novelty Co [C. C. A.] 137 F. 913. No. 630,972, stick pin retainer. Capewell v. Goldsmith, 138 F. 682. No. 644,367, composition for lining pulp digesters, claims 1 and 2. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48. Nos. 668,960 and 688,111, machine for piling coal and analogous material. Dodge Coal & Storage Co. v. New York, etc., R. Co., 139 F. 976. No. 676,606, fire-arches for furnaces. McKenzie Furnace Co. v. Green Engineering Co. [C. C. A.] 138 F. 830. Nos. 695,283, 695,284 and 710,434, prismatic glass windows. Daylight Glass Mfg. Co. v. American Prismatic Light Co., 140 F. 174. No. 718,378, insulating lining for lamp sockets. General Elec. Co. v. Yost Elec. Mfg. Co. [C. C. A.] 139 F. 568, afg. 131 F. 874.

98. A method of back-charging plates into the furnace and drawing them from the front in the manufacture of tubing. National Tube Co. v. Spang [C. C. A.] 135 F. 351. If a change is an obvious one which would occur to anyone, it is not patentable. In re Scott, 25 App. D. C. 307.

99. So held where he unmistakenly defined his ingredients and indicated a process which would transform them into the product claimed. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643.

1. Wessel v. United Mattress Mach. Co. [C. C. A.] 139 F. 11.

2. A claim for a patent covering the use of a thermostat to cut off the supply of gas in an engine to prevent overheating is not patentable. In re Adams, 24 App. D. C. 275.

3. The adaptation of the stem of a needle valve to use as a plunger to remove obstructions in the valve orifice. Cleveland Foundry Co. v. Kauffman [C. C. A.] 135 F. 360.

4. No. 452,320, for an improved swivel hook, sustained on this principle. Robinson v. Lederer Co., 138 F. 140.

5. No. 521,722, improvements in cream separators. De Laval Separator Co. v. Vermont Farm Mach. Co. [C. C. A.] 135 F. 772.

6. Functional utility entitles a patentee to a mechanical patent but mere functional utility does not entitle him to a design patent for the same article. Roberts v. Bennett [C. C. A.] 136 F. 193. Where the only suggestion of a method as a distinctive part of an inventive concept in a specification is the use of the word "method," and it does not appear that there is any difference in the inventive concept underlying such disclosure from that underlying the disclosure in a patent to the applicant upon the apparatus, the alleged method claims are not applicable. In re Creveling, 25 App. D. C. 530. So held where it appeared that the substitution of the word "means" for the word "method" would not change the sense. Id. Alleged process claim for electrical generator held not patentable in view of a prior patent to the same applicant upon the apparatus disclosed. Id. No. 666,583, horseshoe calk, void for double patenting. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210, following Cary Mfg. Co. v. Neal, 90 F. 725, and dissenting from Collender v. Griffith, 2 F. 206.

7. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210.

8. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759; Brown Bag-Filling Mach. Co. v. Drohen, 140 F. 97; Self Sealing Can Co. v. Hocker, 136 F. 418. A combination of old elements, each operating the same way and producing a similar product is not patentable. American Carriage Co. v. Wyeth [C. C. A.] 139 F. 389. To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. Dodge Coal Storage Co. v. New York, etc., R. Co., 139 F. 976.

Valid patented combinations: Reissue No. 11,872 (original No. 495,443), traveling contact for electric railways. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759. Reissue No. 11,913 (original No. 586,193), transmitting electrical impulses and signals. Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 F.

would not suggest itself to an ordinarily intelligent mind experienced in the art.[9] A claim for a combination must be for an operative one.[10] A combination and its elements are distinct inventions and a patent for the combination is not the same as a patent for the elements,[11] and the patentee of a combination may obtain a patent on a combination of part of the same elements, if new and useful in itself, or in connection with other well known devices.[12] Where the advance in an art is gradual and several inventors form different combinations and make different improvements which materially aid to accomplish desired results, each is entitled to his own combination or improvement, so long as it differs from those of his competitors and does not include theirs;[13] but those improvements which result from the gradual and to be expected progress which marks every great and progressive industry do not generally involve invention.[14] Where none of the prior inventors exhibits or suggests any co-operation of the elements upon the principle adopted by the patent in question, or upon any principle adapted to serve the same purpose, the use of the old elements may limit, but cannot defeat the patent.[15] The mere substitution of equivalent, known devices or ingredients,[16] does not create a patentable combination.[17] The application of an old machine or combination to a new use

657. No. 356,963, electric circuit closing apparatus. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850. No. 447,757, method of using hydrocarbon fluids for illuminating purposes and portable lamp for practicing such method. Pennsylvania Globe Gas Light Co. v. Best, 137 F. 940. No. 499,769, regulator for electric motors. Automatic Switch Co. v. Cutter-Hammer Mfg. Co., 139 F. 870. No. 520,429, portable electric battery. American Elec. Novelty & Mfg. Co. v. Howard Elec. Novelty Co. [C. C. A.] 137 F. 913. No. 573,-171, bag filling machine. Brown Bag-Filling Mach. Co. v. Drohen, 140 F. 97. No. 583,408, automatic mechanism for unloading and feeding sugar cane. Mallon v. Gregg & Co. [C. C. A.] 137 F. 68. Nos. 589,579 and 589,580, tipping machines for fastening the tips on corset steels. Warner Bros. Co. v. Bassett Co., 136 F. 411. No. 608,220, washing machines. International Mfg. Co. v. Brammer Mfg. Co. [C. C. A.] 138 F. 396. No. 644,367, composition of material for lining vessels for storing or boiling corrosive liquids, or pulp digesters, claim 3. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48. No. 644,464, artificial limb suspender. Rowley v. Koeber, 135 F. 363. No. 645,-871, machine for folding the edges of collars, cuffs, etc. United Shirt & Collar Co. v. Beattie, 138 F. 136. No. 650,129, drip coffee pot. James Heekin Co. v. Baker [C. C. A.] 138 F. 63. No. 701,580, pneumatic surfacer of stone. Kotten v. Knight, 137 F. 597.

Void patented combinations: Nos. 468,258 and 582,762, bottle sealing devices. Crown Cork & Seal Co. v. Standard Stopper Co. [C. C. A.] 136 F. 841. No. 474,718, railway torpedo. Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. [C. C. A.] 138 F. 729. No. 500,371, music box. Regina Co. v. New Century Music-Box Co., 138 F. 903. No. 539,713, claims 1, 2 and 3, photographic film for daylight loading of camera. Eastman Kodak Co. v. Anthony & Scovill Co., 139 F. 36. No. 555,825, locking device for passenger elevators, claims 1 and 2. Standard Elevator Interlock Co. v. Ramsey, 139 F. 28. No. 587,874, barrel filter. Sloan Filter Co. v. Portland Gold Min. Co. [C. C. A.] 139 F. 23. No. 600,186, fireproof window. Voightmann v. Perkinson [C. C. A.] 138 F. 56. No. 630,-972, stick pin retainer. Capewell v. Goldsmith, 138 F. 682. Nos. 668,960 and 688,111, machine for piling coal and analogous material. Dodge Coal & Storage Co. v. New York, etc., R. Co., 139 F. 976. No. 676,606, improvement in fire arches for furnaces. McKenzie Furnace Co. v. Green Engineering Co. [C. C. A.] 138 F. 830. No. 718,499, for tenting cloth. West Boylston Mfg. Co. v. Wallace, 137 F. 922.

9. Brown Bag-Filling Mach. Co. v. Drohen, 140 F. 97; Mallon v. Gregg & Co. [C. C. A.] 137 F. 68.

10. McCaslin v. Link Belt Machinery Co., 139 F. 393. If the claim for a patent shows a combination of parts, forming a workable device when attached to a structure for which it is evidently intended, that is enough to sustain it against the objection of inoperativeness. No. 566,770, for an improvement in water-closet cisterns so sustained. Kenney Mfg. Co. v. Mott Iron Works, 137 F. 431.

11. Dodge Coal Storage Co. v. New York, etc., R. Co., 139 F. 976.

12. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759.

13. Mallon v. Gregg & Co. [C. C. A.] 137 F. 68.

14. National Tube Co. v. Spang [C. C. A.] 135 F. 351.

15. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

16. "Chamotte." which is a species of specially pure calcined clay, is not the equivalent of crushed fire brick, used in the preparation of lining for pulp digesters. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48.

17. The mere use of known equivalents for some of the elements of prior structures; the substitution for one material of another known to possess the same qualities, though not to the same degree; the mere carrying forward or more extended application of the original idea, involving a

is not invention;[18] nor is the discovery of an enlarged use of a pre-existing art of itself patentable invention.[19] But a combination of old elements which makes an advance upon the prior art discloses invention.[20]

A long series of futile experimental efforts resulting in a solution in some unthought of way sometimes serves to show inventive character;[21] and the comparative crudeness of an original construction, as contrasted with subsequent machines, is no ground for the refusal of the merit of operative success.[22] The fact that a device has gone into general use and displaced other devices,[23] that it has been acquiesced in by the public for a long time[24] and has been accorded general approval by those skilled in the art[25] is high, though not conclusive evidence of patentability, and is insufficient to support a patent, where the changes made from the prior art are mere changes of mechanical construction or of form, size or materials.[26] A labor-saving device is deemed patentable if the weakness or carelessness or dishonesty of the employe, against which the patented device is effective, is recognized as a common failing, and an appreciable source of danger to employers in like cases.[27] Patentability does not depend upon the amount of thought, labor, and time involved in the invention.[28]

A patent is firma facie evidence of the patentability, usefulness and novelty of the device covered by it,[29] though the question of its invalidity may be raised by demurrer in infringement proceedings;[30] and in such a case the patent will be sustained if the court has any doubt on the question.[31]

change only in form, proportions, or degree, and resulting in the doing of the same work in the same way and by substantially the same means, is not patentable, even though better results are secured; and this is the case, although what preceded rests alone in public knowledge and use, and not upon patent. Sloan Filter Co. v. Portland Gold Min. Co. [C. C. A.] 139 F. 23, citing numerous cases. Identity depends not merely upon the function performed, but upon the manner in which it is performed. Imperial Bottle Cap & Machine Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

18. Application of an endless-chain rake, to the new use of raking sugar-cane from a car, is not an exercise of inventive genius. Mallon v. Gregg & Co. [C. C. A.] 137 F. 68.

19. Voightmann v. Perkinson [C. C. A.] 138 F. 56.

20. Rowley v. Koeber, 135 F. 363. The assertion of a new function or effect can only give patentability to a device when sustained by proof of unexpected properties or uses capable of producing novel results. General Elec. Co. v. Yost Elec. Mfg. Co., [C. C. A.] 139 F. 568, afg. 131 F. 374.

21. National Tube Co. v. Spang [C. C. A.] 135 F. 351. Is very persuasive evidence that something more than mechanical skill was required, and that it demanded inventive genius to bridge the chasm between the bungling, imperfect, inoperative devices of prior inventors and the simple, economical and perfect device. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312. Where a device, though presenting no marked advance in the art, has nevertheless taken the final step to complete success, it is entitled to the protection of the law. Valvona v. D'Adamo, 135 F. 544. No. 468,258, bottle stopper, is patentable. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

22. Smith v. Brooks, 24 App. D. C. 75.

23. Eastman Kodak Co. v. Anthony & Scovill Co., 139 F. 36; Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899; Curtis v. Atlas Co., 136 F. 222. Patentability being doubtful commercial success will be considered on question of novelty: Leadam v. Ringgold & Co., 140 F. 611. No. 608,143, casting apparatus blasting furnaces, held to possess utility. Killeen v. Buffalo Furnace Co., 140 F. 33.

24. Acquiescence by the public in a patent for almost its entire life, is entitled to great consideration, somewhat approximating that accorded a prior adjudication. Keasbey & Mattison Co. v. Philip Carey Mfg. Co., 139 F. 571.

25. Even though the novelty of the invention is in doubt. Killeen v. Buffalo Furnace Co., 140 F. 33.

26. Eastman Kodak Co. v. Anthony & Scovill Co., 139 F. 36.

27. Doten v. Boston [C. C. A.] 138 F. 406.

28. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

29. Atwood-Morrison Co. v. Sipp Elec. & Machine Co., 136 F. 859; General Elec. Co. v. Campbell, 137 F. 600; Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. Doubt as to the validity of a patent should be resolved in its favor. Cleveland Foundry Co. v. Kauffman [C. C. A.] 135 F. 360.

30. Jackes-Evans Mfg. Co. v. Hemp & Co. [C. C. A.] 140 F. 254.

31. No. 481,856, stovepipes, held not so obviously lacking in invention. Jackes-Evans Mfg. Co. v. Hemp & Co. [C. C. A.] 140 F. 254. No. 704,168, means of cashing sales accounts, sustained. Anderson v. Metropolitan Finance Co., 139 F. 451.

Novelty is essential to all patents.[32] To determine whether a device involves patentable novelty, inquiry is made of the steps or means through which an invention is reached.[33] There is always a presumption of novelty arising from the patent itself, greater or less, according to circumstances.[34] Commercial success may be considered with reference to the question of novelty.[35]

Anticipation[36] in a prior invention is fatal to the validity of the patent.[37] That which infringes if later will anticipate if earlier;[38] but neither mere accidental use of some of the features of an invention, without recognition of its benefits, constitutes anticipation,[39] nor does prior operation of it by another than the patentee necessarily do so.[40] Prior publication will not negative the novelty of an invention

32. 4 C. L. 932, n. 77.

Patents possessing novelty: Reissue No. 11,872 (original No. 495,443), traveling contact for electric railways. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759. Design patent No. 32,685, lamp shade. Mygatt v. Zalinski, 138 F. 88. Nos. 468,258, bottle-sealing device, and 582,762, form of construction of the same. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199. No. 583,408, automatic mechanism for unloading and feeding sugar cane. Mallon v. Gregg & Co. [C. C. A.] 137 F. 68. Nos. 589,579, and 589,580, machines for fastening the tips on corset steels. Warner Bros. Co. v. Bassett Co., 136 F. 411. No. 601,405, brush having a reticulated back. Shepherd v. Deitsch, 138 F. 83. No. 608,143, casting apparatus blasting furnaces. Killeen v. Buffalo Furnace Co., 140 F. 33. No. 645,871, machine for folding edges of collars, cuffs, etc. United Shirt & Collar Co. v. Beattie, 138 F. 136.

Patents void for lack of novelty: No 11,144, Claim 1, process of polishing and finishing sole and heel edges, etc. Electric Boot & Shoe Finishing Co. v. Little [C. C. A.] 138 F. 732. Design patent No. 25,927, metal basket. Roberts v. Bennett [C. C. A.] 136 F. 193. No. 285,641, scarf or tidy pin or stud. McGill v. Whitehead & Hoag Co. 137 F. 97. No. 607,620, pipe elbow of corrugated sheet metal. Shepard v. Excelsior Steel Furnace Co. [C. C. A.] 137 F. 399. Nos. 668,960, and 688,111, machine for piling coal and analogous material. Dodge Coal Storage Co. v. New York, etc., R. Co., 139 F. 976. No. 669,011, claim 3, product of method of knitting flat caps. Kahn v. Starrells [C. C. A.] 135 F. 532. No. 678,500, process of slaking lime. Lauman v. Urschel White Lime Co. [C. C. A.] 136 F. 190. No. 715,512, improved cigar band. Regensburg v. Portuondo Cigar Mfg. Co., 136 F. 866. No. 718,499, tenting cloth. West Boylston Mfg. Co. v. Wallace, 137 F. 922.

33. National Tube Co. v. Spang [C. C. A.] 135 F. 351. Whatever novelty in a patentable sense there may be in flakes of cooked wheat which are thin, crisp and slightly brown, must be found in some superior efficaciousness or some new properties which they possess, and not in any mere change of form produced by mechanical division of the cooked grain, either before or after the last step in cooking. Sanitas Nut Food Co. v. Voigt [C. C. A.] 139 F. 551.

34. If the patent relates to something of temporary interest, and the object sought is of little importance, and offers but slight chance of profitable use, it may receive but little attention in the patent office, and the presumption therefore is slight; but where the problem sought to be solved by the patent is of such importance that the solution of it promises great pecuniary returns, and the testimony shows that all the claims of the patent were subject to critical analysis by trained experts in that office, resulting in amendments and disclaimers designed to distinguish it from everything in the prior art, and the subject appears to have been thoroughly threshed out, the presumption in favor of novelty is greater than in those cases where the patent may have passed by inadvertence. Imperial Bottle Cap & Machine Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

35. Patentability being doubtful, the commercial success of a patented device is ordinarily considered by the court upon the question of novelty. Leadam v. Ringgold & Co., 140 F. 611.

36. See 4 C. L. 933.

37. Voightmann v. Perkinson [C. C. A.] 138 F. 56.

38. Avery v. Case Plow Works, 139 F. 878.

39. Atwood-Morrison Co. v. Sipp Elec. & Mach. Co., 136 F. 859.

40. Does not rebut the presumption of invention by him, arising from the granting of the patent, where both persons were present at the time of such operation and each claims to have been the originator of the experiment from which the invention sprang. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 140 F. 449.

Patents anticipated: Design patent No. 25,927, metal basket. Roberts v. Bennett [C. C. A.] 136 F. 193. No. 400,381, sleigh runner. American Carriage Co. v. Wyeth [C. C. A.] 139 F. 389. No. 413,464, lantern, claim 1. Keystone Lantern Co. v. Spear [C. C. A.] 136 F. 595. No. 483,653, claim 2, process of molding an artificial mica sheet. Mica Insulator Co. v. Union Mica Co., 137 F. 928. No. 521,722, improvements in cream separators. De Laval Separator Co. v. Vermont Farm Mach. Co. [C. C. A.] 135 F. 772. Claim 1, No. 527,361, enameling metal ware. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643. No. 572,309, cop-winding machine, claim 2. Universal Winding Co. v. Foster Mach. Co., 136 F. 889. No. 583,585, claims 12 and 18, device for controlling and regulating operation of gas engines. Press Pub. Co. v. Westinghouse Mach. Co. [C. C. A.] 135 F. 767. No. 650,771, plows, claims 2 to 6, inclusive. Avery & Sons v. Case Plow Works, 139 F. 878. No. 678,500, process of slaking lime. Lauman v. Urschel White Lime Co. [C. C. A.] 136 F. 190.

unless it describes a complete and operative invention capable of being put into practical operation, or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art,[41] nor can an invention patented in this country be defeated by a prior foreign patent, unless the latter describes the patented invention so fully, clearly and exactly as to enable a skilled person to practice it without the necessity of experiments.[42] Anticipation is not shown by broad and general language in prior patents, although, interpreted in the light of the later invention, it may be said to include the same.[43] While the rejection of an application is no bar to a subsequent patent to another for the same device,[44] yet it does have a bearing on the question of prior invention or discovery, where that question is raised.[45]

The state of the art may sometimes be found to limit, although it may not defeat, the patent.[46] A design patent will operate as an anticipation of a subsequent mechanical patent to the same inventor, where they are indistinguishable in their characteristics.[47] Claims for a patent which would otherwise be void for anticipation cannot be saved by including in the combination some well known device which

No. 705,715, process for lustering silk. Stuart v. Auger & S. Silk Dyeing Co., 139 F. 935. No. 705,716, machine for lustering silk. Id.

Patents not anticipated: Reissue patent No. 12,115 (original No. 727,331) receiver for electro-magnetic waves. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 140 F. 449. No. 406,146, method of forming bottoms of lead traps. Baker Lead Mfg. Co. v. National Lead Co., 135 F. 546. No. 413,293, system of electrical distribution. Thomson-Houston Elec. Co. v. Salem Elec. Co., 140 F. 445. No. 417,451, pulp-screening machine. Van Epps v. United Box Board & Paper Co., 137 F. 418. No. 421,244, method of hulling peas. Chisholm v. Randolph Canning Co., 135 F. 815; Chisholm v. Canastota Canning Co., 135 F. 816. No. 424,905, flexible metallic weather strip. Solmson & Co. v. Bredin [C. C. A.] 136 F. 187. No. 429,874, stone sawing machine. Diamond Stone Sawing Mach. Co. v. Brown [C. C. A.] 137 F. 910. No. 442,531, store service ladder. Murray v. Orr & L. Hardware Co. [C. C. A.] 138 F. 564. No. 452,320, improved swivel hook. Robinson v. S. & B. Lederer Co., 138 F. 140. Nos. 468,258, bottle-sealing device, and 582,762, for a specific form of constructing the same. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199. No. 468,258, bottle stopper. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312. No. 476,051, machine for making crayons. American Crayon Co. v. Sexton [C. C. A.] 139 F. 564. No. 477,757, method of using hydrocarbon fluids for illuminating purposes and a portable lamp for practicing such method. Pennsylvania Globe Gaslight Co. v. Best, 137 F. 940. No. 483,646, process of making artificial mica sheets for electrical insulation. Mica Insulator Co. v. Union Mica Co., 137 F. 928. No. 485,856, thill coupling. Bradley v. Eccles, 138 F. 916. No. 491,972, improvements in the art of making coloring matter from logwood. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. [C. C. A.] 138 F. 54. No. 520,429, portable electric battery. American Elec. Novelty & Mfg. Co. v. Howard Elec. Novelty Co. [C. C. A.] 137 F. 913. No. 533,867, detachable rubber-faced foot-rest for bicycle pedals, claims 1 and 2. Curtis v. Atlas Co., 136 F. 222. No. 545,843, covering for steam pipes. Keasbey & Mattison Co. v. Philip Carey Mfg. Co., 139 F. 571. No. 584,177, magazine guns. Marlin Firearms Co. v. Dinnan, 139 F. 658. No. 592,920, engraving machine. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. Nos. 604,346 and 642,075, wardrobe trunks. Bonsall v. Hamilton Mfg. Co., 139 F. 399. No. 608,143, casting apparatus blast furnaces. Killeen v. Buffalo Furnace Co., 140 F. 33. No. 614,279, tilting, pivoted and counterbalanced bin. Miller v. Walker Patent Pivoted Bin Co. [C. C. A.] 139 F. 134. No. 621,423, boot-tree. Leadam v. Ringgold & Co., 140 F. 611. No. 644,367, composition for lining pulp digesters, claim 3. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48. No. 645,871, machine for folding the edges of collars, cuffs, etc. United Shirt & Collar Co. v. Beattie, 138 F. 136. No. 646,148, hoof-pad. Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899. No. 669,561, claim 3, folding hanger for garments. Bonsall v. Hamilton-Noyes Co., 139 F. 403. No. 676,084, automatic typographic numbering machine, claim 27. Bates Mach. Co. v. Wetter Numbering Mach. Co., 136 F. 776. No. 684,340, regulating device for arc lamp circuits, claim 4. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785. No. 701,776, mold and oven for making biscuit cups for ice cream. Valvona v. D'Adamo, 135 F. 544.

41. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199.

42. Valvona v. D'Adamo, 135 F. 544.

43. Keasbey & Mattison Co. v. Philip Carey Mfg. Co., 139 F. 571.

44, 45. Miller v. Walker Patent Pivoted Bin Co., 138 F. 919.

46. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312. Claims in an application relating to the manufacture of electric heaters and rheostat, on appeal from commissioner, held anticipated by state of prior art and patents. In re Carpenter, 24 App. D. C. 110. See post, § 5.

47. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210, following Cary Mfg. Co. v. Neal, 90 F. 725, and dissenting from Collender v. Griffith, 2 F. 206.

is too obvious a step in the art to involve invention;[48] nor is the effect of a device as anticipating altered by the fact that it was made to serve a purpose additional to that for which it was used in the second case, where, so far as the latter goes, the two are equivalents.[49] That a prior patent for the same invention was issued to the same patentee does not avoid anticipation.[50]

Prior public use[51] or sale for two years before filing the application,[52] although in but a single instance,[53] will defeat the right to a patent.[54] The insanity of the inventor does not affect the running of the limitation.[55] Where the first application has not been abandoned, subsequent applications and amendments constitute a continuance of the original proceeding, and the two years' public use or sale, which may avoid the patent, must be reckoned from the presentation of the first application.[56] But the abandonment of an application destroys the continuity of the solicitation of the patent; in which case a subsequent application institutes a new proceeding, and the two years' public use and sale, which may invalidate the patent, must be counted from the filing of the later application.[57] Although a reasonable degree of experimental use prior to the application for a patent is permitted,[58] yet such use must be strictly experimental, as the public cannot be permitted to use a machine or device, supposing it to be free, and then subjected to suits for infringements.[59] Experimental use of an invention, to be such, need not necessarily be made by the inventor himself or at his shop.[60] Where a patent is for a manufactured article itself, designed for general use, a presumption arises that, when the inventor issues such article to the public, he regards it as a finished product, and,

48. Claims for a patent for device to regulate the mixture of air and gas and quantity admitted to engine, combined with a well-known form of governor to actuate the regulating valves. Press Pub. Co. v. Westinghouse Mach. Co. [C. C. A.] 135 F. 767.

49. American Carriage Co. v. Wyeth [C. C. A.] 139 F. 389.

50. McCaslin v. Link Belt Machinery Co., 139 F. 393.

51. See 4 C. L. 934.

52. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80. Use held public where the inventor of a machine made and set up one for a customer who paid for it and used it commercially, selling the product, neither he nor his employes being under any obligation of secrecy. Jenner v. Bowen [C. C. A.] 139 F. 556. Duplication of rollers so as to re-inforce other rollers in certain cases held not to constitute a part of the invention so as to extend the time within which the patent might be applied for. Id.

53. Bradley v. Eccles, 138 F. 911. A single unrestricted sale by the inventor of his invention is a public sale, or puts it "on sale" within the meaning and intent of U. S. Rev. Stat. § 4886. In re Mills, 25 App. D. C. 377. Where paper-milling machinery was sold upon the condition that it could be returned if unsatisfactory, and machines were catalogued but no more made, held not to come within statute. Id.

54. Under Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]. Bradley v. Eccles, 138 F. 911. Where it is sought to be shown that an invention was in public use, the applicant is entitled to be heard as a witness in his own behalf. In re Mills, 25 App. D. C. 377.

Patents construed with reference to prior use. Valid: No. 545,843, covering for steam pipes. Keasbey & Mattison Co. v. Philip Carey Mfg. Co., 139 F. 571. No. 592,920, engraving machine. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. No. 646,148, hoof-pad. Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899.

Void: Reissue No. 11,260 (original No. 456,117), improvements in thill-coupling. Bradley v. Eccles, 138 F. 911. No. 424,314, burr-wheel for knitting machines. Australian Knitting Co. v. Gormly, 138 F. 92. No. 447,532, tilting bin. Miller v. Walker Patent Pivoted Bin Co., 138 F. 919. No. 555,825, for a locking device for passenger elevators, claims 1 and 2. Standard Elevator Interlock Co. v. Ramsay, 139 F. 28. No. 639,395, machine for making bottle wrappers. Jenner v. Bowen [C. C. A.] 139 F. 556.

55. Jenner v. Bowen [C. C. A.] 139 F. 556, 30 Stat. 915, amending Rev. St. § 4896, authorizing an application by the guardian of an insane inventor, is at least limited as to its retroactive effect to giving effect to pending applications as of the date of their filing, and, if at that time the invention had been in public use for more than two years, the right to a patent thereon is not saved by the fact that the inventor became insane before the expiration of that time. Id.

56, 57. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80.

58. Bradley v. Eccles, 138 F. 911.

59. Bradley v. Eccles, 138 F. 911, citing numerous cases distinguishing between public and experimental use. A single sale of the invention by the inventor for experimental purposes, where he is otherwise unable to make proper tests, does not put the invention "on sale" within the meaning of such section. In re Mills, 25 App. D. C. 377.

60. In re Mills, 25 App. D. C. 377.

in case he does not apply for a patent within two years, abandonment of his purpose to do so may well be assumed;[61] but where the invention is for a machine designed to produce articles, a different rule as to experimental use applies, and although the articles produced may be perfect, the machine may not be,[62] and the sale of the product does not necessarily render the use of the machine a public use, where none of the machines are sold and their use is entirely under the observation of the inventor.[63] The defense of prior use must be proven beyond a reasonable doubt,[64] but when it is established, the burden is on the inventor to prove by convincing proof that the use was experimental.[65]

Abandonment.[66]—An abandonment of an application for a patent is not necessarily an abandonment of the invention.[67] It does not follow, because an application has been rejected, that the invention stands as an abandoned experiment.[68] While long delay may raise a strong presumption that what was done was merely an abandoned experiment,[69] yet such presumption may be overcome by sufficient and satisfactory proof of successful operation and reduction to practice.[70]

§ 3. *Who may acquire patents.*[71]—The patentee must be the true inventor.[72]

§ 4. *Mode of obtaining and claiming patents.*[73]—The law does not favor the multiplication of applications, and of patents for devices closely related, when they can properly be included in one application.[74] Where the first application is not abandoned, subsequent applications and amendments constitute a continuance of the original proceeding.[75]

Specification and description.[76]—Only that which is new need be described in the claims; that which is old and will be understood by those skilled in the art will be read in as if described.[77] Claims to an alleged process are not patentable where they do not include all the steps necessary to effect the result stated or any useful result,[78] especially where the omitted steps are essential to the carrying out of the alleged method.[79] The unnecessary multiplication of claims is objectionable.[80] Claims must be definite and certain,[81] the claims being read in the light of the

61, 62, 63. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161.

61. Killeen v. Buffalo Furnace Co., 140 F. 33. Evidence held insufficient to invalidate a patent on the ground of prior use. Mica Insulator Co. v. Union Mica Co., 137 F. 928.

65. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. Where a clear case of "on sale" is established, the burden is on the inventor to prove that the sale was for the purpose of having the proper tests made, and that the sale was, at least to that extent, a restricted sale. In re Mills, 25 App. D. C. 377.

66. See 4 C. L. 935.

Facts constituting abandonment: Where applicant ten months before issuance of a patent to adversary made two devices similar to that patented and threw them both away, held an abandoned experiment. Lemp v. Mudge, 24 App. D. C. 282.

67. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80. See post, § 4.

68. Miller & England v. Walker Patent Pivoted Bin Co., 138 F. 919.

69. Delay of 2 years and 8 months after an alleged reduction to practice. Smith v. Brooks, 24 App. D. C. 75.

70. Smith v. Brooks, 24 App. D. C. 75.

71. See 4 C. L. 935.

72. No. 397,860, machine for molding tubes, held void, another than patentee having invented it. Keasbey & Mattison Co. v. American Magnesia & Covering Co., 137 F. 602.

73. See 4 C. L. 935.

74. Norden v. Spaulding, 24 App. D. C. 286.

75. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80.

76. See 4 C. L. 935.

77. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 140 F. 449.

78. In re Creveling, 25 App. D. C. 530.

79. In re Creveling, 25 App. D. C. 530. Where alleged process claim includes the step of rotating an armature, and concludes "and by said motion in one direction increasing the output of the generator and in the other direction decreasing said output," but it appears that the result stated is not accomplished by the mere motion of the armature but by the interposition of other means, held no foundation for claim. Id.

80. Four out of twelve claims held sufficient to define the invention clearly. In re Carpenter, 24 App. D. C. 110.

81. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785. Where invention is simple there is no warrant for introducing ambiguous terms, thereby failing to clearly and correctly describe it. In re Dilg, 25 App. D. C. 9.

specifications and drawings.[82] While the amendment of claims and the introduction of new claims are freely allowed, provided they are disclosed and there is a proper basis for them in the original specifications or drawings,[83] yet no such amendment or addition can be allowed when the proposed amendment or addition involves new matter not so disclosed in the original application,[84] but the applicant advancing such claims may present them in a new and distinct application if he so desires.[85]

Abandonment of application.[86]—An abandonment of an application is not necessarily an abandonment of the invention, and, after such an abandonment, a valid patent for the invention may nevertheless be secured upon a new application, provided the invention has not gone into public use or been upon sale for more than two years prior to the filing of the latter.[87] Failure of an applicant for a patent to prosecute further, after rejection by the examiner, when caused by his lack of funds, cannot be interpreted as an acquiescence in the rejection and abandonment of the application.[88]

Renewal of application.[89]—The commissioner of patents cannot issue a patent on an application filed more than two years after the allowance of a patent for the same invention, on a prior application by the same party, forfeited for nonpayment of fees.[90]

Interference.[91]—There can be no interference unless there is a patentable invention and there are rival claimants to it.[92] Interferences are declared between applications rather than applicants, and are intended to disclose and determine which invention was first produced and not who has the title.[93] The sworn preliminary statements required when an interference has been declared constitute the pleadings of the parties, and they are to be held strictly to the dates given therein.[94] A party to an interference is not estopped, by a declaration that his invention was different from that of the other party, to assume a contrary position, for the differences may be in details, while the devices may be the same in substance,[95] and mere verbal differences between the original claims and the claims of the issue of one of the parties will not preclude an award of priority to him.[96]

82. See post, § 5.

83. In re Scott, 25 App. D. C. 307. An applicant may alter and amend his specification to conform to the art as the facts are developed in the patent office, so long as he does not, by enlarging their scope, appropriate prior inventions or those which in the meantime have gone into public use (Keasbey & Mattison Co. v. Carey Mfg. Co., 139 F. 571), and so long as he keeps within the requirements of the statutes and the rules of the patent office (In re Dilg, 25 App. D. C. 9). Contention by junior party that his invention was embraced in that of senior party's, solely by reason of amendments made by the latter to his original application, held not sustained, it appearing that such amendments were within the scope of the application and accompanying drawings. Seeberger v. Dodge, 24 App. D. C. 476.

84. In re Dilg, 25 App. D. C. 9; In re Scott, 25 App. D. C. 307. Claims relative to a printing press held to constitute new matter. Id.

85. In re Scott, 25 App. D. C. 307.

86. See 2 C. L. 1141.

87. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80.

88. Shepherd v. Deitsch, 138 F. 83.

89. See 4 C. L. 936.

90. Rev. St. § 4897 [U. S. Comp. St. 1901, p. 3386.] Reissue No. 10,945 (original No. 381,305), for an electrical conductor, void for that reason. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. [C. C. A.] 136 F. 599, afg. 131 F. 90. For interference suits see post, § 9.

91. See 4 C. L. 937.

92, 93. Lattig v. Dean, 25 App. D. C. 591.

94. Hammond v. Basch, 24 App. D. C. 469. Where in a preliminary statement an allegation of the construction of a model is followed by a separate allegation of reduction to practice in a full size device upon a later date, the idea of intention to claim anything more than conception for the first construction is precluded. Opposing party may have rested his case on later dates in view of such statement, and to hold otherwise would destroy the certainty of pleading required. Id. In fixing the date of conception of an invention in the preliminary statement, the expression **"the early spring"** necessarily means not earlier at the utmost than March 1, and probably not that early. Richards v. Meissner, 24 App. D. C. 305.

The junior applicant has the burden of showing priority of invention[97] and the exercise of due diligence,[98] and this burden is substantially increased where a patent has been issued to his adversary,[99] or where there are successive adverse decisions against him in the patent office.[1] Unless it discloses the issue of the interference, a prior application by the junior applicant does not alter the rule.[2] The patentee claiming that the junior applicant's rights are based on disclosures made by him, he must prove such disclosures.[3] A junior claimant cannot overcome the prior date of his adversary by proof that some third person was in fact the inventor,[4] for the issue is not whether the senior applicant may be entitled to priority as against all persons, but the question is whether the junior applicant has established his own claim to priority over that of his opponent,[5] and this rule holds good, although such third party was at one time a party to the interference.[6]

The first to conceive and make disclosure of an invention,[7] being diligent in

95. Furman v. Dean, 24 App. D. C. 277.

96. Furman v. Dean, 24 App. D. C. 277, dist'g Bechman v. Wood, 15 App. D. C. 484; Miehle v. Read, 18 App. D. C. 128; and following McBerty v. Cook, 16 App. D. C. 133.

97. Thibodeau v. Hildreth, 25 App. D. C. 320. Where junior parties were employed by senior party to make a machine embodying the invention. Corry v. McDermott, 25 App. D. C. 305.

Evidence necessary to sustain burden: The junior applicant must obtain the award on the strength of his own claim to priority of invention. Prindle v. Brown, 24 App. D. C. 114. Such priority must be proved by a preponderance of the evidence (Robinson v. Seelinger, 25 App. D. C. 237), and to do this, the applicant's testimony must be corroborated, but the corroboratory testimony of one witness, though somewhat wanting in definiteness, is sufficient (Robinson v. Copeland, 24 App. D. C. 68). Where a patent is issued to the senior party while the junior party's application is pending, no benefit accrues therefrom to the senior party as to the burden of proof imposed upon his adversary. Paul v. Hess, 24 App. D. C. 462. Where the senior party relies upon his record date, the junior party must show reduction to practice prior to that date or earlier conception, followed by due diligence to reduction to practice, actual or constructive. Paul v. Hess, 24 App. D. C. 462; Jones v. Cooke, 25 App. D. C. 524. Where the question involved was rather one of originality than of priority, and the junior party filed his application only because the senior party refused to assign his invention to the company that employed him, and the senior's application was made at the instance of the company, held that this showed priority of invention in the senior party. Murphy v. Meissner, 24 App. D. C. 260.

98. Paul v. Hess, 24 App. D. C. 462; Jones v. Cooke, 25 App. D. C. 524. Where junior party was first to conceive but last to reduce to practice, the burden is upon him to show that immediately before his rival entered the field, and at that time, he was exercising due diligence in perfecting his invention and attempting to reduce it to actual practice. Seeberger v. Dodge, 24 App. D. C. 476. What constitutes due diligence, see infra this subdivision.

99. Must be proved beyond a reasonable doubt. Lemp v. Mudge, 24 App. D. C. 282, following Kelly v. Flynn, 16 App. D. C. 573; Dashiell v. Tasker, 21 App. D. C. 64; Harter v. Barrett, 24 App. D. C. 300. Where the applicant filed his application after the issue of a patent to his opponent and copied the claims of the patent to force an interference. Cherney v. Clauss, 25 App. D. C. 15.

1. Thibodeau v. Hildreth, 25 App. D. C. 320. A junior applicant who has three concurrent decisions against him must establish his case in the court beyond a reasonable doubt. Robinson v. Copeland, 24 App. D. C. 68. He must show a clear case of error in those decisions. Murphy v. Meissner, 24 App. D. C. 260. Decisions will not be disturbed except under very unusual circumstances. Ocumpaugh v. Norton, 25 App. D. C. 90.

2. Former application was filed before issuance of patent. Norden v. Spaulding, 24 App. D. C. 286.

3. Cherney v. Clauss, 25 App. D. C. 15. If the testimony of a wife in favor of her husband is admissible at all in an interference, and if **disclosure to a wife** is disclosure of an invention to others or to the public in the sense of the patent law, which is very doubtful, the testimony, when uncorroborated, must be rigidly scrutinized and not lightly admitted. Harter v. Barrett, 24 App. D. C. 300.

4. Prindle v. Brown, 24 App. D. C. 114, following Foster v. Antisdel, 14 App. D. C. 552, 555, and cases cited.

5, 6. Prindle v. Brown, 24 App. D. C. 114.

7. Where a party's patent was forfeited through the fault of an agent and a second party obtained a patent. Ascencio v. Russell, 24 App. D. C. 105. Where party claimed to have conceived invention prior to other party and his testimony was inconsistent, and, though the invention was in great demand, he kept his machine concealed in a pile of rubbish for three years, evidence held insufficient to establish his case. Jenner v. Dickinson, 25 App. D. C. 316. Where a party to an interference case, in his testimony in rebuttal, attempted to show disclosure of the invention at an earlier date than he claimed in his examination in chief, it tended to discredit the earlier disclosure claimed by him. Furman v. Dean, 24 App. D. C. 277. Where both parties to an interference were employed by the same company, whose superintendent had solicited suggestions from its employes, and the senior party had seen

reducing it to practice, is entitled to priority.[8] To constitute reduction to practice the machine must be capable of performing the work for which it was designed.[9] Something more than the embodiment of the invention in visible form is required, for there is no certainty that, although the device is operative as a mechanical movement, it will perform its functions when put under full conditions of practical use.[10] Neither the size of a device,[11] nor the material of which it is made,[12] nor its mechanical perfection,[13] nor the fact that it may be called and designed as a

working drawings and a model of the junior party's invention, but said nothing about any previous conception or disclosure of the invention by himself, and remained silent for a year before filing application, the junior party was held entitled to an award of priority. Harter v. Barrett, 24 App. D. C. 300. Claims to early conception and disclosure are entitled to no consideration where it appears that there was a demand for a device of the kind in issue, but the party made no disclosure to manufacturers, nor any attempts at reduction to practice, but, on the other hand, attempted to sell patents upon similar devices not embodying the invention, which devices were failures for the reason that they did not possess the advantages of the invention in question. Hope v. Voight, 25 App. D. C. 22.

8. A conception is not patentable merely because it is first in time. Voightmann v. Perkinson [C. C. A.] 138 F. 56. The general rule is that he who first reduces an invention to practice is ordinarily held to be the inventor, as against another who claims to have previously conceived the idea which led to the invention. Killeen v. Buffalo Furnace Co., 140 F. 33.

What constitutes due diligence: No invariable rule of diligence can be prescribed for the government of all cases. Hammond v. Basch, 24 App. D. C. 469. Whether it has been exercised in a particular case must depend upon its special circumstances. Id. One having the first complete conception of an invention cannot hold the field against all comers by diligent efforts merely to organize and procure sufficient capital to engage in the manufacture of his device or mechanism for commercial purposes. Seeberger v. Dodge, 24 App. D. C. 476. Where both before and after date of reduction to practice the junior party was corresponding with his attorneys making arrangements to acquire patent, held to show sufficient diligence. Jones v. Cooke, 25 App. D. C. 524. Where one of the parties successfully operated his machine before the other party's date of conception, held he was the first inventor, though his machine was not as perfect as that of the other party. Jenner v. Dickinson, 25 App. D. C. 316. Priority of invention awarded one who conceived and disclosed his invention and reduced it to practice May 6, 1902, while it did not appear by any satisfactory proof that appellant had a conception of the invention before May 26, 1902. Hope v. Voight, 25 App. D. C. 22. Proof of conception in November, 1894, construction of a full-sized voting machine about the middle of December, and public operation thereof early in February, 1895, on the part of one whose application was filed Feb. 27, 1897, held to show a high degree of diligence. Ocumpaugh v. Norton, 25 App. D. C. 90. Where both parties to an interference proceeding rely upon an infringement suit to explain delay between conception and reduction to practice, one cannot take advantage of the omission of the other to show what there was in that suit to excuse delay in the matter of the invention. Hammond v. Basch, 24 App. D. C. 469. Where a party to an interference presents evidence of completion of the invention prior to the date to which he is restricted by his preliminary statement, such evidence may be entitled to some consideration upon the question of diligence as tending to show that he had some reason to be satisfied with the practicability of his device. Id. A delay by an inventor in reducing his invention to practice and applying for a patent is not excused by a supposition that prior patents in which he had an interest were sufficiently broad to include the invention. Seeberger v. Dodge, 24 App. D. C. 476. Over a year and a half delay after perfecting drawings of the invention before reducing it to practice, or even testing it, held to show lack of due diligence. Id. Where the junior party to an interference deliberately concealed his invention for two years and a half, until he learned of the senior party's efforts in the same field, and the latter meanwhile, without knowledge of his rival's invention, worked to perfect the invention and applied for a patent, it was held that the junior's rights were subordinate to the senior's. Matthes v. Burt, 24 App. D. C. 265. And the fact that the senior party's application had not ripened into a patent when the junior filed application did not affect the result. Id. A year's delay taken up with desultory talking held not to constitute reasonable diligence. Gallagher v. Hien, 25 App. D. C. 77. That one could not find a person able and willing to construct machine held not to excuse inactivity. Robinson v. Copeland, 24 App. D. C. 68.

9. Voting machine that fails to register as often as once in 100 times cannot be considered reduced to practice. McKenzie v. Cummings, 24 App. D. C. 137, dist'g Coffee v. Guerrant, 3 App. D. C. 497.

10. Ocumpaugh v. Norton, 25 App. D. C. 90.

11. A half-sized device has been held to be the equivalent of a reduction to practice, it having been actually used and completely demonstrated its utility and practicability. Gallagher v. Hien, 25 App. D. C. 77.

12. Electric lamp socket made of wood. Norden v. Spaulding, 24 App. D. C. 286.

13. But a device must show that "the work of the inventor must be finished, physically as well as mentally. Nothing must be left for the inventive genius of the public." Gallagher v. Hien, 25 App. D. C. 77; Ocumpaugh v. Norton, 25 App. D. C. 90.

"model,"[14] nor the fact that there are "possibilities of greater excellence in shape, location, arrangement, material, or adjustment,"[15] affects the determination of the question of reduction to practice.[16] It is not always essential that actual tests of the invention be made in order to complete the inventive act,[17] but the device relied upon as a reduction to practice must, if it has not been worked, clearly be capable of work and not be a mere experiment.[18] Where the device is of a new type,[19] or is an improvement in an essential part of a machine already in use,[20] there must be a demonstration of utility under the conditions of practical operation. Where the invention undoubtedly belongs to that class which requires either actual use or thorough tests to demonstrate its practicability, there can be no actual reduction to practice until one or the other thing takes place and is proven.[21] The evidence of reduction to practice must embrace all the elements of the issue, leaving nothing to inference merely.[22] What constitutes a reduction to practice depends upon the facts of each case.[23] Long delay in making use of the invention or in applying for a patent has always been regarded as tending to show that the alleged reduction to

14. Norden v. Spaulding, 24 App. D. C. 286. The construction of a full sized device, capable of use to a sufficient extent to demonstrate the practical utility of the invention, may often be regarded as a reduction to practice, notwithstanding it may have been called a model, as well as intended by the inventor to be used as a model for the construction of a like device of better and different materials, when there has been some test or application to use. Hammond v. Basch, 24 App. D. C. 469. Such a model, so called, must be quite different from the ordinary model, which, while it may show invention, is incapable of operation to effect its purpose. Id.

15, 16. Gallagher v. Hien, 25 App. D. C. 77.

17. Gallagher v. Hien, 25 App. D. C. 77, following Mason v. Hepburn, 13 App. D. C. 86. Some devices may be so simple and their efficacy so obvious upon mere inspection that the construction of one of a size and form capable of practical use may well be deemed a sufficient reduction to practice without actual use or test to demonstrate its complete success and probable commercial value. Paul v. Hess, 24 App. D. C. 462, citing several cases. Where the new devices are of an old type and their novelty consists in specific constructions of that old type, it may well be that their practical utility may be determined without actual use of them under conditions of industry. Id.

18. Gallagher v. Hien, 25 App. D. C. 77.

19. Paul v. Hess, 24 App. D. C. 462.

20. Type bar of a typewriter. Paul v. Hess, 24 App. D. C. 462. It is necessary for the inventor to show that a machine supplied with the new device has been constructed and tested sufficiently to show that it was capable of successfully performing the work for which it was intended. Testimony of the party claiming reduction to practice that he had operated a typewriting machine fitted with six type bars embodying the issue, but used no paper in the machine, and his satisfaction resulted from the operation of the bars singly, was not sufficient showing of actual reduction to practice. Id.

21. Where both parties submitted their inventions to tests, it was in effect an admission by both that the device belonged to such class. Gallagher v. Hien, 25 App. D. C. 77. Tests of certain improvements in friction-springs held to show that the device was merely experimental and not a reduction to practice. Id.

22. The court cannot supply missing links in evidence and base its decision on facts only thought to exist but not disclosed. Robinson v. Seelinger, 25 App. D. C. 237, following Blackford v. Wilder, 21 App. D. C. 1. Judicial notice cannot be taken of an application filed in February, 1902, to show that what is therein disclosed was in possession of the applicant in September preceding. Robinson v. Seelinger, 25 App. D. C. 237, distinguishing Cain v. Park, 14 App. D. C. 42.

23. Gallagher v. Hien, 25 App. D. C. 77.

Facts constituting reduction to practice: The making of sketches showing the invention in issue from a complete tool. Richards v. Meissner, 24 App. D. C. 305. A full sized operative structure lacking only the ornamention and polish of a commercial article. Hope v. Voight, 25 App. D. C. 22. Where machine was satisfactorily and successfully operated held a reduction to practice, although machine was subsequently dismantled and some of its parts used in building other machines, which differed in some respects from the old one. Funk v. Whitely, 25 App. D. C. 313.

Facts not constituting reduction to practice: Where applicant, ten months before issuance of patent to adversary, made two devices similar to that patented and threw them both away. Lemp v. Mudge, 24 App. D. C. 282. That inventor submitted device to employers, and they rejected it and adopted another, held to tend to show that the device was not a complete and practicable invention. Paul v. Hess, 24 App. D. C. 462. Where various parts of a structure are so crude and certain of derangement that no one would seriously consider building machines according to the exhibit, without further experiment, it cannot be considered more than an experimental device. Ocumpaugh v. Norton, 25 App. D. C. 90.

practice was nothing more than an unsatisfactory or abandoned experiment,[24] especially where, in the meantime, the inventor has been engaged in the prosecution of similar inventions,[25] or other inventions without reasonable explanation have been adopted for manufacture and commercial use;[26] but an inventor after having made an actual reduction to practice is not obliged in order to preserve his rights or demonstrate his entire good faith, to file an application before the expiration of the statutory time.[27] Where neither party makes any showing of actual reduction to practice, the one who first comes to the patent office is constructively held to have been the first to reduce the invention to practice,[28] although actual reduction to practice is preferable to constructive reduction to practice.[29] Where the first applicant is shown to have also been the one who first conceived and disclosed the invention, all other questions are precluded in his favor.[30]

Where an applicant adopts a claim of a patent for the purpose of procuring an interference, the meaning of the issue is to be determined by the specification of that patent.[31]

Where the application of the junior party has been inadvertently allowed to go to patent, no advantage will be allowed him, but he will still be regarded as the junior party.[32]

Appeal and review.[33]—Under the rule of the court requiring appeals to be taken from decisions of the commissioner of patents within forty days, and the statute designating legal holidays, seven intervening Saturdays will be counted as three and a half days.[34] The determination of the question of priority of invention and of the person to whom letters patent will be issued is within the exclusive jurisdiction of the commissioner of patents,[35] and the finding by him of a question of fact, in the performance of his duties, is presumptively[36] though not conclusively[37] correct, for,

24. The excuse for the delay in applying for a patent that the inventor could not come to an agreement with his employers concerning the invention, held insufficient. Paul v. Hess, 24 App. D. C. 462, following Traver v. Brown, 14 App. D. C. 34; Reichenbach v. Kelley, 17 App. D. C. 333, and Latham v. Armat, 17 App. D. C. 345. When the construction of an experimental device involves so great cost and risk that an inventor, although possessed of sufficient means, may well hesitate to undertake the same at his own expense, due diligence requires that he should then attempt to secure his rights and promote the public interests by filing an application for a patent. Seeberger v. Dodge, 24 App. D. C. 470. While the destruction or dismantling of a first construction, and the loss of some of its parts or their use in making other machines, are sometimes important in determining the question of reduction to practice, they are only important when depending upon other circumstances tending to cast doubt upon claims of the earlier reduction, notably that of long and unreasonable delay in the exploitation of the invention. Funk v. Whitely, 25 App. D. C. 313.

25. Paul v. Hess, 24 App. D. C. 462, following Fefel v. Stocker, 17 App. D. C. 317.

26. Paul v. Hess, 24 App. D. C. 462.

27. Ocumpaugh v. Norton, 25 App. D. C. 90. Where the assignees of a patentee, on account of their hostility and refusal to testify, were allowed to make the preliminary statement, but could not procure proofs of disclosure and reduction to practice, the junior party, on showing actual reduction to practice prior to the filing of the senior party's application, was awarded priority, even though he failed to render sufficient excuse for his delay in applying for a patent until after issue of a patent to his rival. Corner v. Kyle, 24 App. D. C. 291.

28. Furman v. Dean, 24 App. D. C. 277. An unexplained delay in making application by the party first conceiving warranted the granting of the patent to the more diligent party. Ritter v. Krakan, 24 App. D. C. 271. The senior party filed an application May 28, 1903, as a division of an application dated Oct. 28, 1902, but having taken no testimony was confined to the latter date. Robinson v. Seelinger, 25 App. D. C. 237.

29. Seeberger v. Dodge, 24 App. D. C. 476.

30. Furman v. Dean, 24 App. D. C. 277.

31. Funk v. Whitely, 25 App. D. C. 313.

32. Furman v. Dean, 24 App. D. C. 277.

33. See 4 C. L. 939.

34. Section 1389, D. C. Code, as amended by act of June 30, 1892, makes Saturday afternoon a half-holiday. Ocumpaugh v. Norton, 24 App. D. C. 296.

35. Supreme court of New York has no jurisdiction to pass upon that question under the guise of restraining by injunction one claimant of the right to a patent from prosecuting his claim before the commissioner of patents. Griffith v. Dodgson, 93 N. Y. S. 155.

36. Finding that the delay which caused the abandonment of an application was not

palpable error having been committed,[38] or, under certain circumstances, one party being permitted to broaden his application for a specific invention into a generic one and thereby dominate another and different specific invention contained in the later application of another,[39] the decision of the patent office may be reversed[40] and unanimity of decision in the patent office imposes upon an appellant the burden of showing very clearly that error was committed in the final decision of the commissioner in order to warrant its reversal.[41] The court on appeal from the commissioner of patents will not interfere with rulings upon interlocutory matters in the patent office, unless, perhaps, in extreme cases it may be necessary for the maintenance of the jurisdiction of the court.[42] Unless abused the exercise of discretion will not be reviewed.[43]

Suit in equity to secure patent.[44]—It is essential that the petitioner shall have appealed from an adverse decision of the commissioner of patents to the court of appeals.[45] A bill alleging invention on a given date and an earlier application for the same invention, without explanation of the apparent contradiction, is demurrable.[46]

§ 5. *Letters patent.*[47]—When a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the operation, or by a mistaken statement as to the reasons therefor.[48] A patent for a chemical composition must give not only the names of the ingredients used but also the proportion of each, so that the invention may be practiced by persons skilled in the art, without further experimenting.[49]

Construction and limitation of claims.[50]—A patent is a contract made by the acceptance by the government of the proposition made by the inventor in his application,[51] and the rules for the interpretation of contracts govern its construction.[52] When forced to choose between a construction which destroys and one which saves the patent, the court should not hesitate to adopt the latter.[53]

unavoidable. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80. Decision in respect to the identity of the invention, the invention being one of elaborate and complicated mechanism. Seeberger v. Dodge, 24 App. D. C. 476.

37. If an invention has advanced beyond the experimental stage, has been completed and put into operative shape, and particularly if it has gone into practical and successful use, the mere fact that an application for a patent has not met with favor at the hands of the patent office does not condemn or dispose of it as an invention. Miller v. Walker Patent Pivoted Bin Co., 138 F. 919.

38, 39, 40. Seeberger v. Dodge, 24 App. D. C. 476.

41. In re Adams, 24 App. D. C. 275.

42. Ritter v. Krakau, 24 App. D. C. 271.

43. Whether an amendment to a preliminary statement in an interference proceeding shall be allowed is discretionary with the commissioner of patents, and nothing less than an abuse of that discretion, causing a palpable miscarriage of justice, will warrant a review and reversal of his action. Hammond v. Basch, 24 App. D. C. 469. The discretion of the commissioner of patents in refusing to reopen an interference case for the introduction of newly-discovered evidence, and for the filing of an amended preliminary statement, will not be reviewed on appeal. Richards v. Meissner, 24 App. D. C. 305.

44. See 4 C. L. 939.

45. Such appeal is provided for by Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 3391], and such suit by Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392]. Prindle v. Brown, 136 F. 616.

46. Bill filed under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392]. Prindle v. Brown, 136 F. 616.

47. See 4 C. L. 940.

48. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. [C. C. A.] 138 F. 54. No. 363,186, for an electric motor, held valid as against the objection of insufficiency of description. Thomson-Houston Elec. Co. v. Dayton Fan & Motor Co., 137 F. 917.

49. No. 644,367, for a composition for lining for pulp digesters, claims 1 and 2, void for failing to specify the proportions of the ingredients. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48.

50. See 4 C. L. 940.

51. Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340.

52. Donchian v. Kingston, 138 F. 890; Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340. The intention of the parties when the patent issued must be deduced, if possible, from the entire agreement. Id.

53. Shepherd v. Deitsch, 138 F. 83.

Nothing is patented except what is covered specifically by the claims required by statute.[54] The claims must be read in the light of the specifications and drawings,[55] not for the purpose of limiting and contracting the claims, but for the purpose of ascertaining their true meaning and the intention of the parties when the claims were made and allowed,[56] and even to supply essential mechanical elements omitted in the claims;[57] and if from the whole a person skillful in the art can construct the thing invented, the patent is sufficient.[58] But a claim for a mechanical or apparatus patent cannot be construed in connection with the specifications, where it goes far beyond anything there suggested and also fails to refer to one of the most distinguishing features of the invention on which its novelty principally depends.[59] While an invention is to be regarded as residing in a structure of the same general character as that described in the specifications, to which the inventor is confined,[60] yet he is not restricted to the particular form made prominent in the specifications, where he evidently had variations thereof in mind and made his claim broad enough to cover them, and also made the particular form the subject of a separate claim.[61] Claims are to be taken as they read[62] and are not limited by an amendment of the specifications describing the device, made to meet objections of the patent office, the claims themselves not being changed.[63] Where a claim has two or more elements, it is what is known as a combination claim; and in such a claim, every element specified by the patentee, whether directly or by reference to the specification, must be deemed material.[64] The con-

54. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 138 F. 823. U. S. Rev. St. § 4888, requires an inventor to particularly point out and distinctly claim the improvement or combination which he desires to secure as his discovery, and, when he has made his claims, he has thereby disclaimed and dedicated to the public all other devices, combinations, and improvements apparent from his specifications, and claims that are not mere evasions of those claimed as his own; and he is estopped by his patent from thereafter claiming a monopoly as to such devices, combinations, or improvements. Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340.

55. Shepherd v. Deitsch, 138 F. 83. No. 506,959, for an improvement on the copwinding machine of No. 480,157, claims 6 and 7, so construed. Universal Winding Co. v. Foster Mach. Co., 136 F. 879. Where claims following specifications end with the expression **"substantially as described,"** the specification must be considered in construing such claims (Scott v. Fisher Knitting Mach. Co., 139 F. 137), for those words refer to the elements, construction, and operation set forth in the specification (Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340). But claims are founded upon and explained by the specifications, whether these words appear therein or not (Id.), although those words are not to be construed as limiting the patentee to the exact mechanism described (Avery & Sons v. Case Plow Works, 139 F. 878). That the inventor of a process is wholly ignorant of the chemical changes that take place in the course of such process may properly be taken into consideration in construing the language and terms of the specifications. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643.

56. Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340.

57. If an element essential to make a combination operative is shown and described in the specification and is omitted in the claim it must be read into the claim. McCaslin v. Link Belt Machinery Co., 139 F. 393; Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340.

58. Shepherd v. Deitsch, 138 F. 83. Claims 2 and 3 of No. 527,361, enameling metal ware, held void, because they make no reference to the mottles nor to the intense alkalinity of the "mix" from which the enamel is made, which is the essential feature of the invention. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643.

59. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785. A claim which passes beyond the bounds of the specifications and deals in generalities and abstractions must be regarded as inherently defective and invalid. No. 684,340, regulating device for arc lamp circuits, claim 1, is void as too broad and abstract. Id.

60. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

61. No. 684,340, for regulating device for arc lamp, claim 4, not confined to specific device described in specifications, but covers any other device of the same general character. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

62. In making his claim the inventor is at liberty to choose his own form of expression and while the courts may construe the same in view of the specifications and the state of the art, they may not add to nor detract from the claim. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869.

63. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

64. American Can Co. v. Hickmott Asparagus Canning Co., 137 F. 86.

struction placed on the claims by the patentee should be adopted by the courts if possible;[65] and when the terms of a claim are clear and distinct, as they should be, the patentee, in a suit brought upon the patent, is bound by them;[66] but applications by the inventor, representing different developments of the same idea, made pending an application for a patent, all being allowed and issued the same day, do not necessarily limit the first invention.[67] Where a rejection of claims by the patent office is acquiesced in and the claims are amended so as to be more specific, such amended claims must be interpreted with reference to the rejected claims and the prior state of the art and cannot be construed so as to cover what was rejected or disclosed by prior devices.[68] Various constructions placed upon patents[69] and words and phrases therein[70] are stated in the notes. A patent for an inoperative machine cannot be broadly construed to cover a subsequent successful machine.[71]

A combination or adaptation of known devices, constituting a distinct step in the progress of the art, is entitled to a fairly liberal construction,[72] and a new combination of old devices to accomplish an entirely new result is entitled to a broad construction;[73] but a combination of old parts performing an old function is only entitled to a narrow construction.[74] Where claims for a new combination of

65. Where claims were construed to include by implication an element not expressly claimed, but described in the specifications and drawings, and held anticipated, and the patentee in an application for a reissue disclaimed such element, held that it should not be read into the claims of the new patent. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759.

66. No. 415,720, for a lantern holder to be attached to miners' caps, claim 1, distinctly and clearly describes the device claimed and cannot be enlarged by construction. Jones v. Davis [C. C. A.] 138 F. 62. He ought not to be heard to demand one rule of interpretation in the patent office and another in the courts. Donchian v. Kingston, 138 F. 890.

67. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

68. As so construed patent held not infringed. Greene v. Buckley [C. C. A.] 135 F. 520.

69. No. 713,209, for a method of producing hollow cylindrical phonograms, is limited to the process of making such records by expanding a blank within a mold, and is not infringed by the casting method. National Phonograph Co. v. American Graphophone Co., 135 F. 809. The carrying arm of the 6th claim of No. 509,126, for an improvement in filters, is the arm described in the specification. Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340. No. 465,255, computing machine, claims 7 and 8, limited to precise construction shown. Comptograph Co. v. Mechanical Accountant Co., 140 F. 136. Claims 6, 7, and 8 of No. 499,769, regulator for electric motors, in so far as they make an iron cap on the solenoid an element of the combination claimed must be limited to the specific construction shown. Automatic Switch Co. v. Cutter-Hammer Mfg. Co., 139 F. 870. No. 609,928, packing for thill couplings, must be limited to precise form of packing shown. Bradley v. Eccles [C. C. A.] 139 F. 447. Claims 7 and 8 of No. 650,771, plows, must be limited to claims specified. Avery & Sons v. Case Plow Works, 139 F. 878. No. 503,870, endless chain conveyors, claims 2 and 4, must be strictly construed and is limited to construction shown, and the patentee is entitled to invoke the doctrine of equivalents only where the changes are colorable merely. McCaslin v. Link Belt Machinery Co., 139 F. 393.

70. "Chamotte," as used in the arts and in No. 644,367, for a lining for pulp digesters, denotes a species of specially pure calcined clay, which must be silicate of alumina, and it is not the equivalent of crushed fire brick. Panzl v. Battle Island Paper Co. [C. C. A.] 138 F. 48. Distinction between "primary filter-beds" and "septic tanks" in sewage apparatus. American Sewage Disposal Co. v. Pawtucket [C. C. A.] 138 F. 811.

71. Scott v. Fisher Knitting Mach. Co., 139 F. 137.

72. Reissue 11,913 (original No. 586,193), improvements in transmitting electrical impulses and signals and in apparatus therefor, discloses the first practicable wireless telegraphic system. Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 F. 657. No. 509,413, tension device for cop-winding machine, claim 1, is for a new combination producing an improved result. Universal Winding Co. v. Foster Mach. Co., 136 F. 879. No. 520,429, for a portable electric battery, is useful and within its narrow sphere is entitled to liberal treatment and a limited range of equivalents. American Elec. Novelty & Mfg. Co. v. Howard Elec. Novelty Co. [C. C. A.] 137 F. 913. No. 608,220, for a mechanical movement for use in washing machines, covers a new combination, and is so construed. International Mfg. Co. v. Brammer Mfg. Co. [C. C. A.] 138 F. 396.

73. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850.

74. An inventor who selects elements from other inventions and combines them into a new device, to accomplish an old result, is entitled to a patent only for his own particular adaptation. No. 690,563, for a bottle-washing machine, so construed. Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. [C. C. A.] 138 F. 886. No. 344,793, rail bender, narrowly construed. Pettibone, Mul-

old elements have been rejected and acquiesced in, and subsequently allowed only after amendment so as to contain a single new feature, the patent will be restricted to such new element.[75] Where the field of invention has been narrowed by many earlier devices, a narrow construction must be put upon a new combination and it must be limited to the very structure shown.[76]

A pioneer invention[77] is entitled to a greater liberality of construction and a wider range of equivalents[78] than one which is simply an improvement though it may be the last and successful step in the art theretofore partially developed by other inventors in the same field;[79] yet, in view of the failures of the prior art and of the novelty and utility of the invention, a fair range of equivalents is often permissible where it is not a pioneer patent,[80] and even the pioneer character of a machine does not entitle its inventor to all the means for accomplishing the same result.[81]

In the absence of disclaimer, a patent covers all equivalents.[82] 'The range of equivalents to which the patentee is entitled depends altogether upon the character and extent of his improvements, and the degree of merit is measured by the value of his contribution to the public.[83] An inventor is not called upon to describe

liken & Co. v. Verona Tool Works, 138 F. 909. No. 379,973, overflow device for wash basins, bath tubs, etc., narrowly construed. Moore v. Meyer-Sniffin Co. [C. C. A.] 138 F. 402. No. 561,559, improvements in knitting machines, narrowly construed. Scott v. Fisher Knitting Mach. Co., 139 F. 137. No. 666,583, for a horseshoe calk, if not void is entitled to a very narrow construction. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210. No. 667,662, process of duplicating cylindrical phonographic records is entitled to only a narrow construction. National Phonograph Co. v. American Graphophone Co., 135 F. 809.

75. No. 633,772, for an automatic electric circuit breaker, so limited by the prior art. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co., 136 F. 217.

76. No. 566,770, for an improvement in water-closet cisterns, so construed. Kenney Mfg. Co. v. Mott Iron Works, 137 F. 431.

77. See 4 C. L. 490.

78. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869. Reissue No. 11,995 (original No. 664,890), convertible cars, is a pioneer invention and covers also semi-convertible cars. O'Leary v. Utica & M. V. R. Co., 139 F. 330. No. 476,051, machine for making crayons, is of a primary character and entitled to a liberal range of equivalents. American Crayon Co. v. Sexton [C. C. A.] 139 F. 564. No. 621,423, boot-tree, entitled to a fairly liberal construction. Leadam v. Ringgold & Co., 140 F. 611.

79. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869. No. 639,222, spring beds, so construed. Simmons Mfg. Co. v. Southern Spring Bed Co. [C. C. A.] 140 F. 606, afg. 131 F. 278. The claims of a patent covering a mere improvement upon prior machines, capable of accomplishing the same general result, must receive a narrow interpretation. Greene v. Buckley [C. C. A.] 135 F. 520. Where it appears from the proceedings in the patent office and a consideration of the state of the art that a patent is not a pioneer patent, its claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements, of different construction and arrangements. Id. No. 383,258, machine for plucking furs, is not a pioneer invention. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869.

80. No. 601,405, for a brush having a reticulated back, so construed. Shepherd v. Deitsch, 138 F. 83. Patent No. 607,433, for a milk can, while not strictly a pioneer patent, discloses patentable invention in a marked degree, and is entitled to a liberal range of equivalents. Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 F. 123.

81. American Can Co. v. Hickmott Asparagus Canning Co., 137 F. 86.

82. No. 620,036, for a multiplying camera with a "cellular box" and movable lens, covers one with a single movable cell and lens. Jenkins v. Mahoney, 135 F. 550. No. 461,734, for an improved construction of bowl and seat in water-closets, is not limited to any particular form of seat or bowl, so long as the patentable feature is retained, and held to include defendant's device. Webb Mfg. Co. v. Mott Ironworks, 136 F. 863. The device used in No. 733,059, held to be the mechanical equivalent of that adopted in No. 387,285, for an improvement in indicators for weighing apparatus, and an infringement. National Automatic Weighing Mach. Co. v. Daab, 136 F. 891.

83. McCaslin v. Link Belt Machinery Co., 139 F. 393. In applying the doctrine of equivalents, the courts discriminate in favor of a primary patent, while, where a patent is merely an improvement upon an old mechanism capable of performing the same results, a narrower rule of construction is applied. Avery & Sons v. Case Plow Works, 139 F. 878. The term "mechanical equivalent" has a broad and generous signification in the interpretation of a pioneer patent, a very narrow and restricted one in the construction of a patent for a slight improvement, and, in the interpretation of patents for the great mass of inventions between

every use to which his invention may be put.[84] If he discloses it fully and clearly in one environment, a person who uses it in another and different environment, the change requiring no inventive skill, cannot escape infringement.[85] The doctrine of equivalents applies to patents for a combination although the measure of its effect in the particular case depends upon the position of the patent in the art to which it relates.[86]

§ 6. *Duration of patent right, surrender and reissues.*[87]—A patent does not carry with it any rights beyond the term of the patent.[88] The provision of the statute, that an American patent shall expire with a previous foreign patent to the same inventor, is plain and unambiguous and cannot be extended by construction.[89] It applies only in cases where the inventions actually claimed in the two patents are identical, and it is not sufficient that the foreign may disclose the invention of the domestic patent, where it is not claimed therein.[90] A reissued patent takes the place of the surrendered patent and is a new grant for the unexpired part of the term of the original patent, which, from the time when its surrender takes effect, is extinguished and legally dead.[91] Whatever presumption arises from the fact of the granting of a reissue patent, that new matter found in the latter was omitted from the original by mistake or inadvertence, is merely prima facie and places the burden of proof upon one contesting the validity of the reissue.[92] Delay in application for a reissue may avoid it.[93] In the specification of a reissued patent, even though the changes in the description are not material and the claims are identical with some in the original, such facts do not affect their validity.[94]

§ 7. *Disclaimer and abandonment.*[95]—The purpose of a disclaimer after issue is to take out of a patent what has been mistakenly or inadvertently included in it, by which it is made too broad.[96] Such disclaimer must be of some distinctive

these extremes, its meaning is always proportioned to the character of the advance or invention under consideration. Mallon v. William C. Gregg Co. [C. C. A.] 137 F. 68.

84. Sanitary Fire Proofing & Contracting Co. v. Sprickerhoff [C. C. A.] 139 F. 801, rvg. 131 F. 868.

85. Sanitary Fire Proofing & Contracting Co. v. Sprickerhoff [C. C. A.] 139 F. 801, rvg. 131 F. 868. No. 555,693, for a fireproof wall, held infringed when used for more than one side of a room or shaft. Id.

86. Sloan Filter Co. v. Portland Gold Min. Co. [C. C. A.] 139 F. 23. No. 650,129, for a drip-coffeepot, accomplishes an old result in a more facile, economical and efficient way, and while not entitled to a liberal construction, is entitled to a reasonable range of equivalents. James Heekin Co. v. Baker [C. C. A.] 138 F. 63.

87. See 4 C. L. 941.

88. New York Phonograph Co. v. Edison, 136 F. 600.

89. Rev. St. § 4887, as it stood before the amendment of 1897. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 138 F. 823.

90. Terms of Nos. 511,559 and 511,560, for an improved method and means of operating electric motors, not limited by prior British patents, because the latter do not claim the same inventions. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 138 F. 823.

91. No rights can be predicated upon it; all pending suits brought upon it fail; and no judgment of any nature can thereafter be based upon it. Lattig v. Dean, 25 App. D. C. 591. It terminates interference proceedings based upon original patent. Id. An appeal from a void decision of priority in such a case will be dismissed and case remanded to patent office to be dealt with as law and justice require. Id. Rule 125 of the patent office does not change the above rule. Id.

92. Reissue No. 11,980 (original No. 642,059) machine for mounting ornamental composition directly upon circular picture frames, claims 11 to 18, held void as covering a construction not included in the original. Franklin & Co. v. Illinois Moulding Co. [C. C. A.] 138 F. 58. Reissue No. 11,913 (original No. 586,193) for improvements in transmitting electrical impulses and signals, claim 1, in attempting to claim broadly every form of imperfect contact device in the receiver goes beyond the original patent. Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 F. 657. Reissue No. 12,085 (original No. 638,669) for a clutch mechanism, held void as not authorized on account of any accident, inadvertence or mistake in the original patent. Rawson & M. Mfg. Co. v. Hunt Co., 140 F. 716.

93. Delay of two years and three months between the granting of the original patent and the application for reissue No. 12,085 (original No. 638,669) for a clutch mechanism, held to constitute such laches as to render the reissue patent void. Rawson & M. Mfg. Co. v. Hunt Co., 140 F. 716.

94. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759.

and separable matter,[97] and may be made use of to avoid the effect of having included more devices than could properly be the subject of one patent,[98] or to remove an ambiguity.[99] Matters duly disclaimed cease to be a part of the invention and the patent is to be construed as though they never had been included in it;[1] but are not thereby admitted to have been a part of the prior art.[2] To be "a material and substantial part of the thing patented" within the provisions of the law providing for the filing of a disclaimer, that which the patentee really invented must be mentioned in the particular claim to which the disclaimer relates.[3]

§ 8. *Titles in patent rights and license, conveyance, or transfer thereof. In general.*[4]—A patent secures the exclusive right to make, use and sell the invention it protects,[5] within the territorial limits of the United States.[6] A claim of equitable ownership of a patent as against the patentee, on the ground of contract or estoppel must be clearly made out.[7]

Patent rights as between employer and employe.[8]—The obligation of an employe to assign to an employer an invention made in the course of his employment, does not arise from the existence of the relation of employe and employer alone;[9] there must be an express contract to assign,[10] and the right of the employer depends upon the terms of the contract.[11] No implied contract of license, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved special contract of license.[12] But the employer may be entitled, under the particular circumstances of the case, to a shop right or license that will enable it to use such inventions without paying a royalty therefor, a right which does not strip the employe of his entire property right in his invention.[13] Unless compensation is contracted for, none is implied from a permissive use by an employer of the invention of an employe.[14] An employe agreeing to assign to his employer all inventions made by him during the term of his employment, the burden is on the employer to show that a patent applied for by the employe after the termination of the term of employment was made during such term.[15]

Royalties.[16]—A licensee is generally held liable for royalties even though the patent is invalid until he notifies the patentee that he will not be bound by the con-

95. See 4 C. L. 942.

96, 97, 98, 99, 1, 2. Manhattan General Const. Co. v. Helios-Upton Co., 135 F. 785.

3. Rev. St. § 4917 [U. S. Comp. St. 1901, § 3393]. By the peculiar wording of the disclaimer complainant describes what it desires to insert in the claim, not what it wishes to exclude or disclaim, and in so doing describes something not before included in the claim. Westinghouse Air Brake Co. v. New York Air Brake Co., 139 F. 265. No. 401,916, for an improved engineer's brake valve, claim 7, is void as too broad in its terms and not cured by disclaimer filed. Id.

4. See 4 C. L. 942.

5. The purpose of the patent law is monopoly for a limited time for the protection and encouragement of the inventor, as well as of others of a mechanical and inventive turn. Cortelyou v. Charles Eneu Johnson & Co., 138 F. 110.

6. Patentee has no superior right to sell such patent in other countries. Herman v. Pierce Co., 105 App. Div. 16, 93 N. Y. S. 413.

7. Evidence held insufficient. Standard Sanitary Mfg. Co. v. Arrott [C. C. A.] 135 F. 750.

8. See 4 C. L. 943.

9, 10. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403.

11. Contract construed and employer held entitled to the assignment of a half-interest in certain inventions. Vocalion Organ Co. v. Wright, 137 F. 313.

12. As where the employer recognized the right of the employe and agreed to pay him a reasonable royalty. Standard Sanitary Mfg. Co. v. Arrott [C. C. A.] 135 F. 750.

13. The distinction between claims for mere shop right or license and those for the entire and exclusive property right in employes' inventions must be observed in reading the cases. The distinction is observed in many Federal and state cases. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403.

14. The use by the United States of a device patented by a government employe, he understanding that he was to be paid therefor and the government officials not so understanding, held not entitled to compensation. Harley v. U. S., 198 U. S. 229, 49 Law. Ed. 1029, afg. 39 Ct. Cl. 105.

15. Mississippi Glass Co. v. [illegible]n, 138 F. 924.

16. See 4 C. L. 943.

tract.[17] Where two Federal courts of equal rank and jurisdiction render conflicting decrees with reference to the validity of a patent, the patent and the decree sustaining it constitute a sufficient consideration for a subsequent contract for royalties.[18] The interpretation and construction of royalty contracts is governed by the general contract rules.[19] A mere failure to pay royalties does not constitute a cloud upon the title to the patents;[20] nor is a refusal to pay royalties due ground for rescission of the royalty contract,[21] in the absence of any provisions for forfeiture for nonpayment.[22] An ordinary royalty contract does not create a partnership, a joint adventure, nor any relation which justifies an accounting in equity,[23] but an action to recover royalties under such contract is one at law, which defendant is entitled to have tried before a jury.[24] One is entitled to royalties on articles made and sold pending an appeal.[25] Suit must be brought within the period of limitations.[26] The validity of plaintiff's patent being doubtful, the court will not generally determine his right to future royalties.[27] In Louisiana the privilege granted to landlords to sue for rent not due when the tenant abandons the house or farm leased has no application to a suit by a lessor of patented machines to recover future royalties.[28]

Transfer.[29]—The rights of parties to a contract relating to patent rights de-

17. Where in an action for royalties plaintiff admitted that, after a decree holding the patent invalid, there was a serious dispute as to the terms of the contract, held proper to charge that if defendant notified plaintiff that he would no longer recognize the patent or the contract before the sales in question, plaintiff could not recover royalties thereon. Brazel v. Thompson Smith's Sons [Mich.] 12 Det. Leg. N. 599, 104 N. W. 1097.

18. Brazel v. Thompson Smith's Sons [Mich.] 12 Det. Leg. N. 599, 104 N. W. 1097.

19. Under a contract requiring the payment of royalties on all devices embodying the invention **until final adverse action** by the patent office the refusal of some of the claims only exonerates the vendee from paying further royalties on devices made and sold by it which do not embody the remainder of the claims. Eclipse Bicycle Co. v. Farrow, 26 S. Ct. 150, rvg. 24 App. D. C. 311. The obligation of the vendee in such a contract cannot be so extended as to require an account for the manufacture and sale of a new device, accomplishing the same results, but differing radically in construction and operation, which may reasonably and honestly have been regarded as superior to the vendor's invention. Id. Lack of novelty in a supposed invention does not, until final adverse action by the patent office, which is to terminate the contract of sale, relieve the vendee of its obligation under the contract to pay royalties **"on all devices made or sold embodying the invention,"** where the vendee took an assignment of the inventor's right, title and interest, took charge of the application and agreed to defend infringement suits. Id.

20, 21. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665.

22. Where a contract in effect assigned all of plaintiff's right to certain formulae for a term of years, plaintiff could not terminate the contract for nonpayment of the royalties stipulated. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715.

23. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665.

24. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665. Where the inventor of a device disclosed the same to defendant, one of whom contracted to pay cash royalties and the patent fees but broke his agreement, used the invention without paying therefor and sought to delay the granting of a patent, plaintiff was not entitled to an accounting, but his action was at law for damages. Griffith v. Dodgson, 103 App. Div. 542, 93 N. Y. S. 155.

25. Where defendant broke his contract to pay royalties and plaintiff recovered a judgment for royalties and for the cancellation of the contract. Bennett v. Iron Clad Mfg. Co., 96 N. Y. S. 968.

26. Where in an action for royalties there was evidence that payments had been made on items of a running account within six years prior to the commencement of the suit, held not error to charge that items arising more than six years prior to the suit were barred. Brazel v. Thompson Smith's Sons, [Mich.] 12 Det. Leg. N. 599, 104 N. W. 1097.

27. Where plaintiff's patent has been decreed an infringement on another patent, and the cause remanded for further proceedings, and where the holders of the adverse patent have enjoined plaintiff's lessees from using the machines leased, a state court will not undertake to prejudge such litigation, but will reserve plaintiff's right to sue for future royalties as they accrue and defendant's right to interpose any defenses they may have in the premises. American Machinery & Construction Co. v. Stewart [La.] 38 So. 960.

28. Extending during a period of 14 years. American Machinery & Construction Co. v. Stewart [La.] 38 So. 960. Where the lessor of patented machines alleged his right to recover judgment for future royalties on the ground that the defendants had abandoned the machines and refused to comply with the lease, held that the issue presented pertained to the merits, and that defendants waived no rights by not filing an exception in prematurity in limine litis. Id.

29. See 4 C. L. 943.

pends upon the contract and its construction.[30] A contract by an inventor, who has sold his inventions, to disclose and assign to the purchaser any future inventions made by him for improvements thereon, is not contrary to public policy, but is valid and enforceable, if based on a valuable consideration;[31] but, the inventor leaving the purchaser's employment, and both parties regarding the contract as terminated, the purchaser may become estopped to claim that new inventions made and developed are within the contract.[32] Whether a contract is an assignment or a license may depend upon the extent of interest conveyed.[33] A contract of assignment may be canceled for fraud,[34] and it is no defense that the one practicing the fraud and inducing the assignment did not personally profit thereby.[35] By acquiescence the patentee may become estopped to take advantage of a variance from the terms of the contract.[36] The doctrines of bona fide purchaser and equitable notice apply to the purchaser of a patent.[37] The vendee in a contract for the sale of an invention cannot rescind for failure of consideration because of the rejection of patents for some of the claims, without returning to the vendor those parts of the supposed invention for which patents were allowed.[38] A state statute requiring copies of letters patent and affidavits of their genuineness to be filed with the clerk of the district court is not invalid as an attempt to restrict the rights of holders of patents acquired under the Federal statutes.[39]

Licenses.[40]—Where federal officers obtain authority from the patentee to use

30. Under an assignment whereby the assignee was to construct the patented machine and **if satisfactory** manufacture and sell the same paying the assignor a sum of money out of the first profits, held the machine proving unsatisfactory the assignee was not obliged to pay the assignor such sum. Comer v. Byars [Tex. Civ. App.] 13 Tex. Ct. Rep. 784, 89 S. W. 80. Under a contract for the purchase of defendant's stock in plaintiff corporation, giving plaintiff the right to make and sell goods under defendant's **future inventions,** plaintiff was entitled to the formula of a new wire invented by defendant and a mere offer by the latter to furnish the material ready to be drawn into wire was not a compliance with the contract. Driver-Harris Wire Co. v. Driver [N. J. Eq.] 62 A. 461. The contract requiring the company to **keep accounts of licenses** and subject to inspection by the patentee, to account for his share of the license fees, a trust was created in both the trustee and the company, in favor of the patentee, which a court of equity could enforce; and a bill charging frauds and refusal to allow inspection of the books stated a cause of action for equitable relief. Duff v. Gilliland [C. C. A.] 139 F. 16, rvg. 135 F. 581.

31, 32. Reece Folding Mach. Co. v. Fenwick [C. C. A.] 140 F. 287.

33. Where a contract allows the defendants to use a patented device and binds the claimant to disclose the formulae and to hold and save them harmless from and against the demands of all persons, and to furnish full information regarding the composition of compounds employed, and to impart to defendants all imformation concerning future discoveries and inventions relating to the process, with the right to adopt and use them without further payment, is more than a naked license under a patent. Harvey Steel Co.'s Case, 39 Ct. Cl. 297.

34. Concealment of raising of fund to finance patent held fraudulent and to entitle complainant to cancellation of his assignment of his interest in the patent and to recover his share of the profits with interest. Goldsmith v. Koopman, 140 F. 616.

35. Goldsmith v. Koopman, 140 F. 616.

36. Where the legal title to a patent for a gas producer was assigned to a trustee for the benefit of a corporation, in consideration of the payment of a share of all royalties received from licenses, and the company afterward engaged in the construction of the producers with the knowledge and occasional approval of the assignor, while such operations were outside of the contract he was estopped by his acquiescence to claim that it was such a violation of the contract as entitled him to a cancellation. Duff v. Gilliland, 135 F. 581, afd. [C. C. A.] 139 F. 16.

37. A corporation which purchased the assets of an insolvent corporation owning patents subject to licenses to sell and use, with full knowledge of such licenses, was bound thereby. New York Phonograph Co. v. Edison, 136 F. 600.

38. Eclipse Bicycle Co. v. Farrow, 26 S. Ct. 150, rvg. 24 App. D. C. 311.

39. Gen. St. 1901, §§ 4356-4358. Allen v. Riley [Kan.] 80 P. 952, afg. Mason v. McLeod, 57 Kan. 105, 45 P. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548. Where the purchaser of a patent right sold without compliance with such act, seeks to rescind the contract of sale and to recover the consideration paid, and in the petition offers to return all the benefits received, and defendant contests the rescission, the plaintiff's right to relief asked and to a judgment for costs is not affected by an omission to offer to restore the patent right before the commencement of the action. Id.

40. See 4 C. L. 944.

his invention, and provide in a contract with a third person for the use of such invention, they are bound to know that the contractor cannot execute his contract without using the invention,[41] and the government cannot maintain that the use was an infringement by the contractor and not a taking by the government;[42] but an implied obligation arises.[43] A license to manufacture and vend a patented article which reserves the right to license one other person and binds the patentee to prosecute for infringements is a mere personal license and not an assignment.[44] A license follows the assets of the licensor into the possession of him who buys with his eyes open to the pre-existing contractual relations and existing equities.[45] In the absence of express provisions covering the duration for which a license is granted, the legal presumption is that the parties meant to continue their relations during the term remaining at the time the license or privilege was conveyed.[46] An extension of the term of a patent does not inure to the transferee of a license, in the absence of language expressive of such intention.[47] The insolvency of the licensee does not alone operate as an abandonment of its contract rights, it being willing and capable of fulfilling its contract obligations notwithstanding its insolvency;[48] nor does a breach of covenant work a forfeiture of a license per se, unless a condition to that effect be inserted in the agreement.[49] In a suit for breach of a contract to renew an agreement for the sale of a patented article in specified territory, the measure of damages is the value to plaintiffs of such renewal.[50] The grantee of the exclusive license to sell and use, by a corporation owning patents, can recover against a successor of such corporation with full knowledge of such licenses, for a wrongful invasion of his rights under the license.[51] The rights of parties are governed by the terms of the contract granting the license.[52]

§ 9. *Interference suits.*[53]—The section of the patent law providing for suits to annul interfering patents, gives the court jurisdiction only to determine the question of priority between interfering claims, that is, between claims substantially identical;[54] and this section cannot be made available by a complainant having a patent for one invention to annul a patent for a different invention, on the ground of want of patentability in the latter.[55] Therefore, the court must first determine whether the claims alleged to be in interference are substantially identical.[56]

§ 10. *Infringement. A. What is.*[57]—A patent may be infringed in either of

41. Brooks's Case, 39 Ct. Cl. 494.

42. Brooks's Case, 39 Ct. Cl. 494. In such cases the inventor is not bound to proceed against the contractors for an infringement. Id.

43. Brooks's Case, 39 Ct. Cl. 494.

44. Shepherd v. Deitsch, 138 F. 83.

45, 46, 47, 48, 49. New York Phonograph Co. v. Edison, 136 F. 600.

50. Heriman v. Pierce Co., 105 App. Div. 16, 93 N. Y. S. 413. Where profits for two years was $10,000, a finding in favor of plaintiffs of $10,529.46 damages for defendant's wrongful refusal to renew the contract for a further period of three years, held not excessive. Id.

51. New York Phonograph Co. v. Edison, 136 F. 600.

52. No implied contract, based on the relations of the parties or the circumstances under which the patent was taken out, can be set up as against an express contract of license. Standard Sanitary Mfg. Co. v. Arrott [C. C. A.] 135 F. 750. The organization of a holding corporation to control patents and business of wire glass manufacturing companies, constituted a "combination" within a contract of license to use patents, whereby plaintiff was to be deemed a beneficiary in any such arrangement as defendant should enter into. Brownsville Glass Co. v. Appert Glass Co., 136 F. 240. Extension licenses held effective upon mutual deposit of extensions and consideration therefor. Construction of option to renew. New York Phonograph Co. v. Edison, 136 F. 600. Where a licensee agreed not to sell competing machines, held a sale outside of the United States did not constitute a breach of the agreement. Herman v. Pierce Co., 105 App. Div. 16, 93 N. Y. S. 413.

53. For interference proceedings in patent office, see ante § 4.

54. Rev. St. § 4918 [U. S. Comp. St. 1901, p 3394]. Boston Pneumatic Power Co. v. Eureka Patents Co., 139 F. 29.

55. Such a use of the section would transgress the limitations declared in Mowry v. Whitney, 14 Wall. [U. S.] 434, 440, 20 Law. Ed. 858. Boston Pneumatic Power Co. v. Eureka Patents Co., 139 F. 29.

56. Claims held not substantially identical and bill dismissed. Boston Pneumatic Power Co. v. Eureka Patents Co., 139 F. 29.

three ways: By the unlawful making, by the unlawful selling, or by the unlawful using of a patented invention.[58] To sustain a claim of infringement of a patented machine, three things must be found: First, identity of result; second, identity of means; third, identity of operation.[59] The principle of the patent should not

57. See 4 C. L. 945.

58. Cortelyou v. Charles Eneu Johnson Co., 138 F. 110.

59. American Can Co. v. Hickmott Asparagus Canning Co., 137 F. 86; James Heekin Co. v. Baker [C. C. A.] 138 F. 63. Where patent is a combination of old elements. Greene v. Buckley [C. C. A.] 135 F. 520. Mere identity of results is not the test of infringement. Fitch v. Spang, Chalfant & Co., 140 F. 292. If the device shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869. It is not enough to establish infringement that two machines produce similar fabrics, such as may be used for the same purpose and may compete in the market, for entirely different machines, different in elements, in combination of elements, and in operation, may produce the same result. Scott v. Fisher Knitting Mach. Co., 139 F. 137. And on the other hand, if the results—the products—of the operation of two machines in the same art are different, that fact is not conclusive that there is no infringement, for the results may be due to a different way or mode of operating the machines. Id. But if the machines necessarily operate differently, and were intended to operate differently, and if one cannot do what the other does and was intended to do, there is no infringement, even when both belong to the same art. Id. Though the same results are produced by the same elements, there is no identity if they are arranged under a different co-operative law. To constitute infringement they must coact upon each other in the same way to produce the common object. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312. If a machine cannot infringe in what it produces, in its results, it does not operate in substantially the same way, with substantially the same means to produce substantially the same results. Scott v. Fisher Knitting Mach. Co., 139 F. 137.

ILLUSTRATIONS. Patents held infringed: Reissue No. 11,872 (original No. 495,443), traveling contact for electric railways. Thomson-Houston Elec. Co. v. Black River Traction Co. [C. C. A.] 135 F. 759. Reissue No. 11,913 (original No. 586,193), improvements in transmitting electrical impulses and signals and in apparatus therefor, claims 3 and 5. Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 F. 657. Reissue No. 11,995 (original No. 664,890), convertible cars. O'Leary v. Utica & M. V. R. Co., 139 F. 330. Reissue No. 12,115 (original No. 727,331), claims 11, 23 and 25, receiver for electro-magnetic waves. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 140 F. 449. Design patent No. 32,685, lamp shade. Mygatt v. Zalinski, 138 F. 88. No. 308,308, improved gangway. Doten v. Boston [C. C. A.] 138 F. 406. Nos. 344,462, 344,464, 391,439, and 479,339, instrument for teaching the playing of the piano. Virgil Practice Clavier Co. v. Virgil, 138 F. 897. No. 356,963, electric circuit closing apparatus, claims 4, 7, and 9, infringed by No. 676,426. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850. No. 363,186, electric motor. Thomson-Houston Elec. Co. v. Dayton Fan & Motor Co., 137 F. 917. No. 371,431, water-closet valve, claims 1 and 2. Kenney Mfg. Co. v. Mott Iron Works, 137 F. 431. No. 387,285, improvement in indicators for weighing apparatus, claim 1, by No. 733,059. National Automatic Weighing Mach. Co. v. Daab, 136 F. 891. No. 392,973, claims 1 and 6, improvement in bicycles. Pope Mfg. Co. v. Snyder Mfg. Co., 139 F. 49. Nos. 399,801, and 428,650, improvements on electromotor. Thomson-Houston Elec. Co. v. Dayton Fan & Motor Co., 137 F. 917. No. 403,247, reel for metal box-strap. Cary Mfg. Co. v. DeHaven [C. C. A.] 139 F. 262. No. 406,143, method of forming bottoms of lead traps. Baker Lead Mfg. Co. v. National Lead Co., 135 F. 546. No. 407,260, steam boiler of the vertical water tube type. Stirling Co. v. Standard Snuff Co., 137 F. 94. No. 413,293, claims 1, 3, 4 and 6, system of electrical distribution. Thomson-Houston Elec. Co. v. Salem Elec. Co., 140 F. 445. No. 417,451, pulp-screening machine. Van Epps v. United Box Board & Paper Co., 137 F. 418. No. 421,244, method of hulling peas. Chisholm v. Randolph Canning Co., 135 F. 815; Chisholm v. Canastota Canning Co., 135 F. 816. Nos. 424,291, apparatus to record measurements of time, space, or quantity, claim 1, and 593,320, for a calculagraph, claim 1. Calculagraph Co. v. Wilson, 136 F. 196. No. 424,905, flexible metallic weather strip, claims 2 and 3. Solmson & Co. v. Bredin [C. C. A.] 136 F. 187. No. 429,874, stone sawing machine, claims 1, 2, and 3. Diamond Stone Sawing Co. v. Brown [C. C. A.] 137 F. 910. No. 434,062, breech-loading gun, claim 27. Marlin Firearms Co. v. Kellogg, 137 F. 31. No. 442,531, store service ladder. Murray v. Orr & L. Hardware Co. [C. C. A.] 138 F. 564. No. 447,757, method of using hydrocarbon fluids for illuminating purposes and a portable lamp for practicing such method. Pennsylvania Globe Gas Light Co. v. Best, 137 F. 940. No. 452,320, improved swivel hook. Robinson v. Lederer Co., 138 F. 140. No. 461,734, improved construction of bowl and seat in water-closets, claim 1. Webb Mfg. Co. v. Mott Iron Works, 136 F. 863. No. 463,307, steam generator. Morrin v. Robert White Engineering Works, 138 F. 68. Nos. 468,258, bottle-sealing device, and 582,762, for form of construction of same. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199. No. 476,038, claims 1, 6 and 9, machine for making crayons. American Crayon Co. v. Sexton [C. C. A.] 139 F. 564. No. 483,646, process of making artificial mica sheets for electrical insulation, claims 1 and 2. Mica Insulator Co. v. Union Mica Co., 137 F. 928. No. 485,856, thill coupling, claims 1 and 2. Bradley v. Eccles, 138 F. 916. No. 491,113, bottle stopper. Hutter

be disregarded where it fairly appears that meritorious invention is described and where the infringer has substantially adopted the method of carrying the principle

v. Koscherak, 137 F. 92. No. 491,972, improvements in the art of making coloring matter from logwood. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. [C. C. A.] 138 F. 54. No. 499,769, claims 4 and 5, regulator for electric motors. Automatic Switch Co. v. Cutter Hammer Mfg. Co., 139 F. 870. No. 509,413, tension device for cop-winding machines, claim 1. Universal Winding Co. v. Foster Mach. Co., 136 F. 879. Nos. 511,559, and 511,560, method of transmitting electrical power and an electric motor. Westinghouse Elec. & Mfg. Co. v. Jefferson Elec. Light, Heat & Power Co., 135 F. 365. No. 520,429, portable electric battery.. American Elec. Novelty & Mfg. Co. v. Howard Elec. Novelty Co. [C. C. A.] 137 F. 913. No. 527,242, process of making open or reticulated metal work. Expanded Metal Co. v. Bradford, 136 F. 870. No. 527,361, enameling metal ware, claims 4 to 8, covering the product, and 9 to 12, covering the process. National Enameling & Stamping Co. v. New England Enameling Co., 139 F. 643. No. 533,867, detachable rubber-faced foot-rest for bicycle pedals, claims 1 and 2. Curtis v. Atlas Co., 136 F. 222. No. 545,843, covering for steam pipes. Keasbey & Mattison Co. v. Philip Carey Mfg. Co., 139 F. 571. No. 555,693, fireproof wall. Sanitary Fireproofing & Contracting Co. v. Sprickerhoff [C. C. A.] 139 F. 801. No. 578,133, bag folding machine used with 573,171. Brown Bag Filling Mach. Co. v. Drohen, 140 F. 97. No. 584,177, magazine guns. Marlin Firearms Co. v. Dinnan, 139 F. 658. No. 592,920, engraving machine. Bryce Bros. Co. v. Seneca Glass Co., 140 F. 161. No. 601,405, brush having a reticulated back. Shepherd v. Deitsch, 138 F. 83. Nos. 604,346, claim 3, and 642,075, claim 4, relating to wardrobe trunks. Bonsall v. Hamilton Mfg. Co., 139 F. 399. No. 607,433, milk can. Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 F. 123. No. 608,143, casting apparatus blasting furnace. Killeen v. Buffalo Furnace Co., 140 F. 33. No. 608,220, mechanical movement for use in washing machines. International Mfg. Co. v. Brammer Mfg. Co. [C. C. A.] 138 F. 396. No. 614,279, tilting, pivoted, and counterbalanced bin, claim 1. Miller v. Walker Patent Pivoted Bin Co. [C. C. A.] 139 F. 134. No. 620,036, multiplying camera. Mahoney v. Jenkins Co. [C. C. A.] 138 F. 404, rvg. 135 F. 550. No. 631,545, claims 8, 12, and 14, hydrant. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co. [C. C. A.] 135 F. 537. No. 644,464, artificial limb suspender. Rowley v. Koeber, 135 F. 363. No. 645,871, machine for folding the edges of collars, cuffs, etc. United Shirt & Collar Co. v. Beattie, 138 F. 136. No. 646,148, hoof-pad, claims 1, 2, 5 and 6. Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899. No. 650,129, drip coffee pot. James Heekin Co. v. Baker [C. C. A.] 138 F. 63. No. 669,011, claims 1 and 2, method of knitting flat caps. Kahn v. Starrells [C. C. A.] 135 F. 532. No. 669,561, claim 3, folding hanger for garments. Bonsall v. Hamilton-Noyes Co., 139 F. 403. No. 671,039, screw driver. Hurwood Mfg. Co. v. Wood, 138 F. 835. No. 676,084, automatic typographic numbering machine, claim 27. Bates Mach. Co. v. Wetter Numbering Mach. Co., 136 F. 776. No. 684,340, regulating device for arc lamp circuits, claim 4. Manhattan General Const. Co. v. Hellos-Upton Co., 135 F. 785. No. 695,282, machine for making prismatic glass. Daylight Glass Mfg. Co. v. American Prismatic Light Co., 140 F. 174. No. 696,940, trousers hanger, claim 5. Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 138 F. 654. No. 701,580, pneumatic surfacer of stone. Kotten v. Knight, 137 F. 597. No. 701,776, mold and oven for making biscuit cups for ice cream. Valvona v. D'Adamo, 135 F. 544. No. 702,560, needle valve in oil burner, claims 1 to 6. Cleveland Foundry Co. v. Kauffman [C. C. A.] 135 F. 360. No. 720,616, glove fastener stud. United States Fastener Co. v. Butez, 140 F. 556. No. 773,234, vibratile apparatus, claim 1. Lambert Snyder Vibrator Co. v. Marvel Vibrator Co., 138 F. 82.

Patents held not infringed: Reissue No. 6,404 (original No. 134,045), machine for forging sockets. Fitch v. Spang, Chalfant & Co., 140 F. 292. Reissue No. 11,913 (original No. 586,193), improvements in transmitting electrical impulses and signals and in apparatus therefor, claims 8, 10, and 24. Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 F. 657. Design patent No. 26,623, chair. Kline Chair Co. v. Kochs, 138 F. 90. Design patent No. 29,793, horseshoe calk. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210. No. 285,641, scarf or tidy pin or stud. McGill v. Whitehead & Hoag Co., 137 F. 97. No. 344,793, rail bender, claim 6. Pettibone, Mulliken Co. v. Verona Tool Works, 138 F. 909. No. 365,723, wire barbing machine. Columbia Wire Co. v. Kokomo Steel & Wire Co., 139 F. 578. No. 379,973, overflow device for wash basins and bath tubs. Moore v. Meyer-Sniffen Co. [C. C. A.] 138 F. 402. No. 383,258, fur plucking machine. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869. No. 399,093, improvements in mattress-stuffing machines. Wessel v. United Mattress Mach. Co. [C. C. A.] 139 F. 11. Nos. 400,679, claims 1 and 5, and 434,062, claims 10, 11, 12 and 21, breech-loading gun. Marlin Firearms Co. v. Kellogg, 139 F. 31. No. 401,775, car coupler. Coup v. McConway & Torley Co. [C. C. A.] 138 F. 411. No. 401,916, improved engineer's brake valve, claim 7. Westinghouse Air Brake Co. v. New York Air Brake Co., 139 F. 265. No. 407,306, apparatus for skelping or tube welding. National Tube Co. v. Spang, Chalfant & Co., 132 F. 318. No. 413,464, lantern, claim 2. Keystone Lantern Co. v. Spear [C. C. A.] 136 F. 595. No. 415,720, lantern holder to be attached to miners' caps, claim 1. Jones v. Davis [C. C. A.] 138 F. 62. Nos. 436,619, claims 4 and 5, and 452,268, claims 6 and 8, mechanism for making column stops on a typewriting machine. American Writing Mach. Co. v. Wagner Typewriter Co., 138 F. 108. Nos. 436,792, can body making machine; 365,316, for a can cap soldering machine; and 598,567, for a can body machine. American Can Co. v. Hickmott Asparagus Can-

into effect.[60] A patent being merely for an improvement upon an old way of accomplishing an old result, the prima facie presumption is that it is not infringed by a later patent upon the same old way of accomplishing the same old result.[61] A new method of producing an old result does not constitute infringement.[62] A change in nonessential parts does not avoid infringement.[63] Where a complainant patentee has accomplished a new result by a new means, a defendant cannot escape the charge of infringement merely by showing a later patent.[64] No one is permitted to evade a patent by simply constructing the patented thing so imperfectly that its utility is diminished.[65] Similarity to the eye of the ordinary man is the test of the infringement of a design patent.[66] One may patent a new and useful process and another a labor saving machine by which such process may be performed, but the use of the machine in the practice of the process constitutes an infringement of the process patent.[67] A device in one mechanism, to be the equiva-

ning Co., 137 F. 86. No. 439,085, coin purse. Langfeld v. Albright [C. C. A.] 139 F. 387. No. 450,692, adjustable mechanism for making column stops on a typewriting machine, claim 9. American Writing Mach. Co. v. Wagner Typewriter Co., 138 F. 108. No. 465,255, computing machine, claims 7 and 8, Comptograph Co. v. Mechanical Accountant Co., 140 F. 136. No. 468,258, bottle stopper. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312, rvg. Crown Cork & Seal Co. v. Imperial Bottle Cap & Mach. Co., 123 F. 669. No. 499,769, claims 6, 7 and 8, regulator for electric motors. Automatic Switch Co. v. Cutter Hammer Mfg. Co., 139 F. 870. No. 502,126, cl. 6, improvement in filters. Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340. No. 503,870, claims 2 and 4, endless chain conveyor. McCaslin v. Link Belt Machinery Co., 139 F. 393. No. 506,959, improvement on the cop-winding machine of No. 480,157, claims 6 and 7. Universal Winding Co. v. Foster Mach. Co., 136 F. 879. No. 537,629, pneumatic tool. Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co. [C. C. A.] 135 F. 783. No. 541,320, carpet fastener. Donchian v. Kingston, 138 F. 890. No. 553,740, starter's gate for race tracks. Ryan v. Metropolitan Jockey Club., 139 F. 579. No. 559,446, shade-holding device. Curtain Supply Co. v. North Jersey St. R. Co., 138 F. 734. Same, claims 3 and 4. Curtain Supply Co. v. Keeler [C. C. A.] 137 F. 911. No. 559,622, sewage apparatus. American Sewage Disposal Co. v. Pawtucket [C. C. A.] 138 F. 811. No. 561,559, improvements in knitting machines. Scott v. Fisher Knitting Mach. Co., 139 F. 137. No. 562,263, cop-winding machine, claim 3. Universal Winding Co. v. Foster Mach. Co., 136 F. 879. No. 566,770, improvement in water-closet cistern. Kenney Mfg. Co. v. Mott Iron Works, 137 F. 431. No. 569,903, finger-nail clippers. Cook Co. v. Little River Mfg. Co., 136 F. 414. No. 573,205, gas-heater. Bernard Columbus & Suvio Mfg. Co. v. Ferno Co., 136 F. 229. No. 583,408, automatic mechanism for unloading and feeding sugar cane. Mallon v. William C. Gregg & Co. [C. C. A.] 137 F. 68. Nos. 589,579 and 589,-580, tipping machines for fastening tips on corset steels. Warner Bros. Co. v. Bassett Co., 136 F. 411. No. 590,297, force-feed lubricator. Greene v. Buckley [C. C. A.] 135 F. 520. No. 599,191, improvement in ornamental ropes or cords. Oehrle v. Horstman Co. [C. C. A.] 138 F. 561. No. 609,928, packing for thill couplings. Bradley v. Eccles [C. C. A.] 139 F. 447. No. 631,545, claim 2, hydrant. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co. [C. C. A.] 135 F. 537. No. 633,772, automatic electric circuit breaker. Westinghouse Elec. & Manufacturing Co. v. Cutter Elec. & Mfg. Co., 136 F. 217. No. 639,222, spring bed. Simmons Mfg. Co. v. Southern Spring Bed Co. [C. C. A.] 140 F. 606, afg. 131 F. 278. No. 650,771, claims 7 and 8, plows. Avery & Sons v. Case Plow Works, 139 F. 878. No. 659,315, shade fixture, claims 1, 2 and 3. Curtain Supply Co. v. North Jersey St. R. Co., 138 F. 734. No. 666,583, horseshoe calk. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210. No. 667,662, process of duplicating cylindrical phonographic records. National Phonograph Co. v. American Graphophone Co., 135 F. 809. No. 673,-705, Improvement in Bunsen burners. Central Lighting Co. v. Northern Light Co., 137 F. 423. No. 690,563, bottle-washing machine. Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. [C. C. A.] 138 F. 886. No. 713,-209, method of producing hollow cylindrical phonograms. National Phonograph Co. v. American Graphaphone Co., 135 F. 809. Nos. 756,177 and 756,178, cartridge belts. Mills v. Russell Mfg. Co., 136 F. 874.

60. Shepherd v. Deitsch, 138 F. 83.

61. Presumption is rebuttable and even in the cases of the narrowest patents it is always open to the complainant to show that the defendant has appropriated his property. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850.

62. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850.

63. The particular form of the back of a weather strip, and the method of fastening it to a casing by holes for tacks, are not essential parts of the invention, and a mere variation therein does not avoid infringement where the essential characteristics of the invention are appropriated. Solmson & Co. v. Bredin [C. C. A.] 136 F. 187.

64. Ries v. Barth Mfg. Co. [C. C. A.] 136 F. 850.

65. Crown Cork & Seal Co. v. Standard Stopper Co., 136 F. 199. Such a colorable variation is merely evidence of an attempt at evasion by narrowing the function of usefulness of the device infringed. Id.

66. Useful or functional features cannot be resorted to. Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210.

lent of a device in another, must perform the same function and perform it in substantially the same manner.[68] A claim for a combination is not infringed if any one of the described or specified elements is omitted without the substitution of any equivalent thereof,[69] especially if the omitted element is the only new feature of the patented combination,[70] or by the substitution for one of its devices of another one, which, if a functional equivalent thereof, is nevertheless found in the prior art.[71] A combination of the same elements to accomplish the same result but under a different arrangement, in which they severally perform different functions, is no infringement;[72] but infringement cannot be avoided by a mere change of form or location of one or more elements if the functions performed remain the same and they are performed in substantially the same manner,[73] or by adding a new function to an element of a combination which does not affect its performance of the function of the patent,[74] or by mere colorable modifications of some elements of a combination not essentially varying its principle or mode of operation,[75] or by substituting a different form of one of the nonessential elements, where the only novel feature in the combination is appropriated.[76] The inventor is entitled to the benefit of the doctrine of equivalents.[77] The sale of a patented article by the owners of the patent, without condition or notice of restriction of use, carries with it dominion over the article sold, and the vendee may use it as he pleases;[78] but the owner of a patent may sell the patented article under a license restriction that it be used only in a particular manner, and any other use thereof will constitute an infringement,[79] and purchasers and users are sufficiently notified of such restrictions by a notice thereof conspicuously attached to the machine, and are bound thereby.[80] The part that gives sole patentability to a combination may not be replaced by a

67. Expanded Metal Co. v. Bradford, 136 F. 870.

68. American Can Co. v. Hickmott Asparagus Canning Co., 137 F. 86; International Mfg. Co. v. Brammer Mfg. Co. [C. C. A.] 138 F. 396.

69. McGill v. Whitehead & Hoag Co., 137 F. 97; Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 138 F. 654; Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312; American Can Co. v. Hickmott Asparagus Canning Co., 137 F. 86; International Mfg. Co. v. Brammer Mfg. Co. [C. C. A.] 138 F. 396; Mallon v. Gregg & Co. [C. C. A.] 137 F. 68; Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340; Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 49 Law. Ed. 1100, afg. [C. C. A.] 123 F. 869. A combination of three wheels, one of which is entirely dispensable, is not an infringement on a patent on a three-wheel combination, no one of which can be dispensed with. Columbia Wire Co. v. Kokomo Steel & Wire Co., 139 F. 578. A combination is an entirety. If one of the essential elements is wanting the combination disappears entirely. Avery & Sons v. Case Plow Works, 139 F. 878. It is elementary that, if the patentee specify any element as entering into the combination, he makes the same material to the combination, and it cannot be held immaterial by the court. Id.

70. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co., 136 F. 217.

71. Greene v. Buckley [C. C. A.] 135 F. 520. Interchangeability or noninterchangeability is an important test on an issue of infringement, for, as a general rule, like results are produced by like means. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

72. Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co. [C. C. A.] 139 F. 312.

73. O'Leary v. Utica & M. V. R. Co., 139 F. 330; Jewell Filter Co. v. Jackson [C. C. A.] 140 F. 340. When the form of a mechanical element of a patented combination is the essence of the invention claimed, a change in it, which prevents the combination in which it is embodied from utilizing the principle or mode of operation described in the patent to attain the result desired, is not an infringement. Id.

74. O'Leary v. Utica & M. V. R. Co., 139 F. 330.

75. James Heekin Co. v. Baker [C. C. A.] 138 F. 63.

76. Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 138 F. 654.

77. See ante, § 5.

78. It was not an infringement to purchase patented clasps sold in open market without restriction as to use, and to detach them from a cord to which they were attached and attach them to supporters, both parties being licensed to manufacture hose supporters under a patent. George Frost Co. v. Kora Co., 136 F. 487.

79. The owner of a patent for a rotary neostyle, used in stencil duplication, could sell the same under conditions limiting the use of supplies to those specially designed for it and furnished by the patentee. Cortelyou v. Charles Eneu Johnson & Co., 138 F. 110.

80. Cortelyou v. Charles Eneu Johnson Co., 138 F. 110.

purchaser without the patentee's consent, although it has been held in certain cases that parts may be replaced.[81]

Contributory infringement.—One making and selling one element of a combination covered by a patent, with the intention and for the purpose of bringing about its use in such a combination,[82] or one aiding or assisting another in violating the conditions imposed by the patentee upon the use of his invention,[83] is liable.

(§ 10) *B. Defenses.*[84]—In a suit for infringement the lack of legal authority in the commissioner of patents to issue the same may be pleaded in defense.[85] A prior judgment cannot be pleaded in bar to a suit for infringement on the ground that defendant virtually defended the former action, when during the trial it persistently declined to admit any connection therewith, and afterward, in another suit, filed a sworn answer denying such connection.[86] To maintain the defense of prior public use and sale of a device,[87] or to establish the claim of prior invention,[88] the proofs must be clear, satisfactory, and beyond a reasonable doubt. Laches will bar one from suing for infringement;[89] but estoppel, laches, or implied license, is not made out by the complainant's delay in bringing suit for infringement during the pendency of a test suit involving the validity of the patent,[90] and mere delay in bringing suit for infringement of a patent will not prevent the owner thereof from obtaining relief in a court of equity when the infringement has been persisted in with knowledge of the existenee of the patent, and no acts on the part of the patentee to encourage its use.[91] Where the assignee of a patent sues the patentee for infringement, the latter is estopped to insist upon so narrow a construction of the patent as to virtually render it valueless.[92]

81. An attempted generalization of the cases in which an element of a patented combination may be replaced by the purchaser, of his own authority, is as follows: (1) When its consumption was the very purpose of the device; (2) when its use upon external objects must work its early destruction; (3) when it was intended to be destroyed and was destroyed after a single use, and became waste material; (4) when in the arrangement of an element, not the chief element, it is so fashioned and placed as to be specially subjected to external forces that make it peculiarly liable to breakage and wear, like the knuckle in the car coupler; (5) when it is not the chief part of the combination, like the trolley stand; (6) when it is an ordinary working part, like the cam in actuating machinery, although specially adapted for the proper operation of the device, the decision being broad enough to cover a cam which is the most essential element in a combination. But a part of a combination may not be replaced by the purchaser when it is the vital element of the combination, in fact and in regard to patentability, especially when it is not intended to be of short life by the action of external forces thereon. Morrin v. Robert White Engineering Works, 138 F. 68. The refitting of steam generators (patent No. 463,307) with new tubes by defendant, under contracts with the purchasers thereof, held to be an infringement. Id.

82. Rumford Chemical Works v. New York Baking Powder Co., 136 F. 873. The omission of an essential element of a combination, with the intention that it or its equivalent will be supplied by users, constitutes contributory infringement. James Heekin Co. v. Baker [C. C. A.] 138 F. 63.

83. By inducing such party to buy and use supplies made by himself for a machine sold to be used only with supplies specially designed and furnished by the patentee. Cortelyou v. Charles Eneu Johnson Co., 138 F. 110.

84. See 4 C. L. 948.

85. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. [C. C. A.] 136 F. 599.

86. Westinghouse Elec. & Mfg. Co. v. Jefferson Elec. Light, Heat & Power Co., 135 F. 365.

87. Atwood-Morrison Co. v. Sipp Elec. & Mach. Co., 136 F. 859; Bradley v. Eccles, 138 F. 911; Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 F. 899.

88. Bonsall v. Hamilton-Noyes Co., 139 F. 403.

89. Where a patentee had full knowledge of a device made by another, and made no claim of infringement for five years, he could not put a different construction on his patent just before its expiration for the purpose of making out an infringement. McGill v. Whitehead & Hoag Co., 137 F. 97. Where the complainant himself infringed the patent prior to acquiring ownership therein (No. 473,338, for an improvement in automatic music-playing instruments), and for 12 years the general public used it in competition with the owners, who failed to mark the device "patented" as required by law, or to give notice of the patent, permitting thereby the investment of much capital and the sale of many machines, it was inequitable to restrain the use of the device. Wilcox & White Co. v. Farrand Organ Co., 139 F. 46.

90. Hutter v. Koscherak, 137 F. 92.

91. Wilcox & White Co. v. Farrand Organ Co., 139 F. 46.

(§ 10) *C. Damages, profits, and penalties.*[93]—In a suit for infringement in a proper case, both profits and damages are recoverable,[94] one item of which damages may be the amount saved by defendant by the use of the patented device in lieu of the device previously used by him;[95] but the patentee, in case of infringement of a patent for a device constituting only one feature of the machine sold, must satisfactorily show the profits and damages, and apportion them between the patented and unpatented features,[96] or show that the profits and damages are to be calculated on the whole machine for the reason that the entire value of the whole, as a marketable article, is properly and legally attributable to the patented feature.[97] The question whether a machine would or would not have been marketable without the patented part is a question of fact[98] depending largely upon opinion evidence,[99] the most satisfactory of which is that afforded by the nature and extrinsic value of the improvement introduced into the art or industry in which the machine is employed.[1] The injury being nominal, only nominal damages can be recovered.[2]

(§ 10) *D. Remedies and procedure.*[3]—A court of equity, having jurisdiction of a suit by the owner of a patent to enjoin its infringement and to recover damages for past infringement, does not lose it by the assignment, pending the suit, of the patent to another, who is brought in by a supplemental bill under federal equity rule 57, but may proceed to grant an injunction and award damages to both the original complainant and his assignee for infringement proved during the time of their respective ownership.[4] Separate suits may be maintained between the same parties, in the same court, and at the same time, upon different claims in a patent, where such claims cover distinct and different devices, although in the same machine.[5] Claims for profits and damages arising from past infringements do not follow the title derived by a naked assignment of the patent.[6] A mere personal licensee to manufacture and vend a patented article is not a necessary party complainant to a suit for infringement.[7] Neither the officers of a corporation, acting within the scope of their duties,[8] nor an officer of a joint stock company, he not being a shareholder therein,[9] are liable for an infringement committed by the corporation or association. Such officer cannot be joined with the corporation

92. Hurwood Mfg. Co. v. Wood, 138 F. 835.
93. See 4 C. L. 949.
94. Fox v. Knickerbocker Engraving Co., 140 F. 714.
95. Doten v. Boston [C. C. A.] 138 F. 406.
96. Westinghouse v. New York Air Brake Co. [C. C. A.] 140 F. 545; Baker v. Crane Co. [C. C. A.] 138 F. 60.
97. Westinghouse v. New York Air Brake Co. [C. C. A.] 140 F. 545.
98. Westinghouse v. New York Air Brake Co. [C. C. A.] 140 F. 545. When the patented improvement is one of subordinate importance, or the value of the machine as a whole depends more upon the presence of the patented parts, a finding that the marketable value of the whole has been created by the patented part can seldom be correct. Id.
99. Westinghouse v. New York Air Brake Co. [C. C. A.] 140 F. 545.
1. Westinghouse v. New York Air Brake Co. [C. C. A.] 140 F. 545. On an accounting for profits and damages for infringement of No. 376,837, air-brake mechanism, evidence held insufficient to establish claim that marketable value of the whole equipment was due solely to patented device. Id.
2. Where an injunction issued restraining further infringement, only nominal damages were allowed, where the device infringed was of trifling value and was used only as a means of putting up for sale another product, and was in fact not charged for when sales were made by complainant or defendant. Cary Mfg. Co. v. De Haven [C. C. A.] 139 F. 262.
3. See 4 C. L. 950.
4. Leadam v. Ringgold & Co., 140 F. 611.
5. Bates Mach. Co. v. Force & Co., 139 F. 746.
6. Leadam v. Ringgold & Co., 140 F. 611.
7. Shepherd v. Deitsch, 138 F. 83.
8. Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 138 F. 654.
9. Where it does not appear that the president or treasurer of a joint stock association is required by law to be a shareholder, and there is no proof that defendant as such officer is or ever was a shareholder, he cannot be held liable for an infringement committed by the association. National Casket Co. v. Stolts [C. C. A.] 135 F. 534. In such a case the appellate court will not remand the case with permission to amend the pleadings and introduce new evidence of such connection, nor to substitute as defendant the party shown to have infringed. Id.

merely because, as president, he directs the corporation's business,[10] and when the corporation is not shown to be insolvent, or otherwise unable to respond in damages, and there is no showing that the officer is making any colorable use of the corporation for his own benefit, or that he is personally interested, it is not equitable to subject him to the trouble and expense of a separate defense.[11] In an action for infringement defendant cannot have affirmative relief for unfair competition.[12] In infringement suits a decree in interference proceedings is not binding on one not a party nor claiming under either patent.[13] Where the patent is void on its face, or is shown to have been anticipated by prior patents, or when the presumption of novelty arising from the grant is overcome by proof of the prior art by facts of which the court may take judicial notice, it is the duty of the court to instruct the jury to that effect.[14]

The statutory provision that no costs shall be recovered by plaintiff or complainant in any suit for infringement of part of a patent, unless the proper disclaimer has been entered before suit brought, applies only to costs in the trial court and not in the appellate court,[15] and only where a disclaimer is necessary to save the patent.[16] The mandate on appeal being silent as to costs, the trial court's decree in the matter stands.[17]

Injunctions.[18]—As a general rule a preliminary injunction will not issue on affidavits[19] or ex parte opinions of experts[20] alone. Public acquiescence,[21] or a prior adjudication,[22] may warrant the issuance of such an injunction, but unless there is some substantial question as to its validity, the fact that a patent is unadjudicated is not sufficient ground for refusing a preliminary injunction.[23] The infringement must be clear.[24] A preliminary injunction to maintain the status quo until the final hearing will be granted, in a suit to compel an assignment of a patent under a contract, where there is a reasonable likelihood that the complainant may win on the merits.[25] An injunction to restrain defendants from exhibiting plans, etc.,

10. Bill for an injunction and accounting. Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co., 135 F. 540.

11. Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co., 135 F. 540.

12. George Frost Co. v. Kora Co., 136 F. 487.

13. McCaslin v. Link Belt Machinery Co., 139 F. 393.

14. Roberts v. Bennett [C. C. A.] 136 F. 193.

15. Rev. St. §§ 973, 4922 [U. S. Comp. St. 1901, pp. 703, 3393, 3396]. Kahn v. Starrels [C. C. A.] 136 F. 597.

16. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 140 F. 449.

17. Trial court in entering decree on mandate will not change prior decree as to costs. Westinghouse Air Brake Co. v. New York Air Brake Co., 140 F. 144.

18. See 4 C. L. 951.

19. Against the conjoint use of two patents, one of which, being taken out originally both at home and abroad, has expired, and the other has not been adjudicated as to its features of invention, in a contested hearing on its merits. National Phonograph Co. v. American Graphophone Co., 136 F. 231.

20. Ex parte opinions of experts held insufficient to warrant granting preliminary injunction in suit for infringement of No. 469,809, electrical converter. Westinghouse Elec. & Mfg. Co. v. Montgomery Light & Power Co. [C. C. A.] 139 F. 868, rvg. 131 F. 86.

21. No. 452,320, for an improved swivel hook, acquiesced in for 14 years, and preliminary injunction granted. Robinson v. Lederer Co., 138 F. 140.

22. Where the validity of a patent has been sustained after protracted litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, unless evidence of invalidity is introduced of such conclusive character that, if introduced in the former case, it would probably have led to a different conclusion. Thomson-Houston Elec. Co. v. Sterling-Meaker Co., 140 F. 554.

23. Lambert Snyder Vibrator Co. v. Marvel Vibrator Co., 138 F. 82; Alphons Custodis Chimney Const. Co. v. Heinicke, 135 F. 552.

24. Granted: Restraining infringement of claim 1 of patent No. 520,429, for an electric battery. American Elec. Novelty & Mfg. Co. v. Stanley, 140 F. 444.

Denied: Against infringement of No. 447,757, incandescent lamp. Pennsylvania Globe Gas Light Co. v. Cleveland Vapor Light Co., 140 F. 348. In case of reissue No. 11,872 (original No. 495,443). Thomson-Houston Elec. Co. v. Sterling-Meaker Co., 140 F. 554. Refused where it appeared that only a small number of the articles was in use, and also that the complaint misrepresented the scope of the decision to defendants for the purpose

of an invention, on which plaintiff was seeking a patent, will be denied in the absence of any showing that defendants were threatening to make such disclosure, or that there was any reason to suppose that they would do so.[26] An order granting a preliminary injunction against infringement will be reversed on the authority of a decision of an appellate court adjudging the patent invalid.[27] The injunctive order, whether preliminary or final, against a corporation may go against the corporation itself, its officers, agents, servants, and employes, so that each of them is as effectually enjoined from infringement as if made a party to the suit.[28]

Service of a copy of an injunction restraining infringement upon defendant's solicitors, and properly addressing and mailing him a copy, is sufficient to sustain proceedings for contempt in case of violation.[29] And service upon defendant's solicitors of notice of contempt proceedings, and mailing to defendant a notice of the application for an attachment and copies of the affidavits, by registered letter, is sufficient.[30] One who acts in collusion with defendants, aiding them to evade the injunction, is guilty of contempt.[31] The attempt to see how near one can come to an infringement and escape it involves great danger and is not looked upon with favor by courts,[32] and when one violates an injunction in so doing, the fact that he did so under the advice of counsel is no defense.[33] Where the court finds that the complainant is entitled to a part of the fine imposed on defendant for contempt in violating an injunction restraining infringement of a patent, only so much should be awarded as is sufficient to reimburse complainant for expenses incurred in prosecuting the contempt and loss sustained by the infringement.[34]

Pleading.[35]—An averment that the invention was not in public use or on sale in this country for more than two years prior to the application for the patent, is essential to the statement of a good cause of action for its infringement.[36] In a suit for infringement by an exclusive licensee, failure of the bill to allege that the license includes the exclusive right to make the patented article may be cured by amendment, where the evidence shows a license to make as well as to use and vend.[37] An allegation in a bill for an infringement that complainant is a corporation, organized under the laws of a designated state, is sufficient and need not be proved unless denied by the answer.[38] A supplemental bill in the nature of a bill of review may be permitted to be filed to present newly-discovered evidence of sufficient importance, and not accessible before by the exercise of due diligence.[39] Where pend-

of exacting large license fees. Ironclad Mfg. Co. v. Sugar Loaf Dairy Co., 140 F. 108.

25. Ball & S. Fastener Co. v. Patent Button Co., 136 F. 272.

26. Griffith v. Dodgson, 103 App. Div. 542, 93 N. Y. S. 155.

27. Nos. 627,898 and 627,900, for a car truck. Brill v. Peckham Mfg. Co. [C. C. A.] 135 F. 784.

28. Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co., 135 F. 540.

29. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774.

Evidence held to show contempt for violation of permanent injunction against infringement. Kahn v. Starrells, 138 F. 67. Contempt of court established by evidence of sale and offering for sale large numbers of talking machine records, on hand at the time of the issue, and service of a preliminary injunction restraining such sale. Universal Talking Mach. Co. v. Keen, 136 F. 456. Where, in proceedings for contempt for selling certain articles in violation of an injunction, complainant's statements were based on information derived from parties in whose possession the infringing devices were found, and defendant did not deny the sales, the court was justified in finding that the articles were infringements. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774.

30. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774.

31. Evidence held to sustain a decree adjudging such a party guilty and imposing a fine. Hamilton v. Diamond Drill & Mach. Co. [C. C. A.] 137 F. 417.

32, 33. Calculagraph Co. v. Wilson, 136 F. 196.

34. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774.

35. See 4 C. L. 952.

36. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80.

37, 38. Fox v. Knickerbocker Engraving Co., 140 F. 714.

ing suit for infringement defendant begins the use of another alleged infringing device, the court may permit the question of second infringement to be brought in by supplemental bill.[40] In pleading defenses it is not sufficient merely to allege that a patent is void, but anticipation, prior use, want of patentable invention, etc., must be set up if relied on.[41] Where the answer denies that the patentee was the first inventor of the improvement described in the patent named in the bill, giving its number, it sufficiently raises the issue of invention, although the title of the patent as stated may be technically inaccurate.[42] A plea to a bill for infringement that defendant had leased its plant, machinery, etc., to another, and had not infringed complainant's devices since that time, and had no present intention of doing so, was insufficient in view of the uncertainty of the lease and lessee, and in view of the admitted infringement.[43] A defendant is chargeable with laches if he fails to present to the appellate court his claim of the expiration, pending an appeal of the patent claimed to have been infringed, because of the expiration of a foreign patent for the same invention, and the court may deny him leave to file a supplemental bill to present the question after the case is determined on the merits, except on terms.[44] The validity of a patent may be questioned by demurrer to a bill for infringement,[45] but such a demurrer can be sustained only where the question of invention is absolutely free from doubt,[46] and, upon demurrer, the court will consider only matters shown upon the face of the patent, and matters of common and general information, known to the court to be reliable and to have been published prior to the application for the patent.[47] A petition, in the nature of a supplemental bill, to bring in the successor of a corporation against which a decree for an injunction and accounting had been obtained, is multifarious, it also asking that such successor be required to pay whatever was found due on the accounting and all damages growing out of transactions with the original defendant.[48]

Evidence.[49]—The court will take judicial notice of the shape of the conventional bushel basket.[50]

Interlocutory and final decree.[51]—A circuit court decree sustaining the validity of a patent, and granting a permanent injunction and reference for an accounting, although affirmed by the court of appeals, is interlocutory merely and not final on the questions of validity of patent and infringement.[52] A judgment generally binds only those who are parties to the record or assume control of the defense.[53] If any

39. Evidence held sufficiently material to warrant the reopening of the case, and not accessible before. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 138 F. 833. Permission granted a defendant to apply to trial court for leave to file supplemental bill in the nature of a bill of review, to bring forward further evidence to show the invalidity of No. 433,791, for a coil-clasp. Kelley v. Diamond Drill & Mach. Co. [C. C. A.] 136 F. 855.

40. Chicago Grain Door Co. v. Chicago, B. & Q. R. Co., 137 F. 101.

41. Australian Knitting Co. v. Gormly, 138 F. 92.

42. The bill stated that the patent was for improvements in making "composite and other wheels," while the answer alludes to it as an improvement in casting "composite or other car wheels." Robinson v. American Car & Foundry Co. [C. C. A.] 135 F. 693.

43. The defendant having infringed, the presumption was that it would infringe again, and there was nothing in the plea to overcome such presumption. General Elec. Co. v. Bullock Elec. Mfg. Co., 138 F. 412.

44. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 138 F. 823, applying In re Gamewell Fire Alarm Telegraph Co. [C. C. A.] 73 F. 908.

45. General Elec. Co. v. Campbell, 137 F. 600.

46. Demurrer to No. 726,293, for new and useful improvements in exhausting electric lamps, overruled. General Elec. Co. v. Campbell, 137 F. 600.

47. General Elec. Co. v. Campbell, 137 F. 600.

48. Western Tel. Mfg. Co. v. American Elec. Tel. Co., 137 F. 603.

49. See 4 C. L. 953.

50. Action for infringement of a patent for a design for a basket. Roberts v. Bennett [C. C. A.] 136 F. 193.

51. See 4 C. L. 953.

52. Australian Knitting Co. v. Gormly, 138 F. 92.

53. A manufacturer who voluntarily assists a purchaser in defending a suit for

accounting for profits is decreed, such decree goes only against the party who, by the use and sale of the infringing device, has made the profits.[54]

PAUPERS.[1]

Settlement and removal of paupers.[2]—A person may establish a settlement in a poor district by the payment of taxes, after he has received relief from such poor district, if it appears that the taxes were not paid out of money furnished him for relief by the district.[3] But the assessment of a tax against a pauper, not coupled with its payment or his recognition of it as an existing liability, is not evidence of his place of residence.[4] Statutes providing for loss of settlement by absence for a given period are not retroactive.[5] A married woman who lived with her husband in a town where he last resided, supporting himself and family, does not gain a residence there in her own right or derive one there from her husband, so as to make such town liable to another town in which she lives for support furnished her as a pauper after her husband's death.[6] The fact that a pauper joined a lodge in a certain town is not evidence that he was a legal resident of such town.[7] The county in which persons reside at the time they become paupers is the one liable for their support.[8] One who is not a pauper at the time of his removal and who is self-supporting during a year in his new place of residence acquires a settlement therein.[9] A notice by the overseer of the poor of the town to which such person has removed to the town from which he came that aid had been supplied, which notice was in fact untrue,[10] does not prevent the acquisition of such new settlement.[11] Statutes governing the method of perfecting appeals from orders of removal of paupers must be followed.[12]

Liability of municipalities for support and aid.[13]—The obligation of municipal corporations to care for and support the indigent and infirm is wholly statutory.[14] A county board may make reasonable rules and regulations governing the giving of aid to persons as required by statute, but cannot limit its duty to a particular class of persons other than those embraced in the statute, or make its relief dependent on

infringement, but is not a party to the record and is not shown to have assumed control of the defense, is not concluded by such a decree for complainant as to validity of the patent, and so estopped from setting up new defenses in a suit against him for infringement. Australian Knitting Co. v. Gormly, 138 F. 92.

54. Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co., 135 F. 504.

1. **Topics related** to this are Asylums and Hospitals, 5 C. L. 301; Costs (suits in forma pauperis), 5 C. L. 842; Health (expense of care), 5 C. L. 1541.

2. See 4 C. L. 954.

3. Franklin Tp. v. Rayburn Tp., 23 Pa. Super. Ct. 522.

4. City of Rockland v. Union [Me.] 60 A. 705.

5. Rev. Laws, c. 80, § 6, providing that all persons who are absent from the commonwealth for 10 consecutive years shall lose their settlement, is not retroactive. City of Lawrence v. Methuen [Mass.] 73 N. E. 860.

6. Town of Jericho v. Morristown, 77 Vt. 367, 60 A. 233.

7. City of Rockland v. Union [Me.] 60 A. 705.

8. At time of removal from L. to O. county a husband and wife were well and strong, had some furniture, $60 in money, and provisions to last some months. They paid the expense of removal. Hence they were not then paupers, and when wife and family were later deserted O. county became liable for their support, under Comp. Laws, § 4502. Superintendents of Poor of Livingston County v. Superintendents of Poor of Oakland County [Mich.] 104 N. W. 978. Under Laws 1896, c. 225, §§ 2, 42, 51, the county or town in which a person becomes a pauper is liable for his support, though he has previously gained a settlement elsewhere, which he has not lost. Delaware County v. Delaware, 105 App. Div. 129, 93 N. Y. S. 954.

9. Under Laws 1896, c. 225, §§ 40, 41. In re Kelly, 46 Misc. 548, 95 N. Y. S. 53.

10. Merely giving a letter to an employer which caused him to pay employe's wages to his wife was not giving aid. In re Kelly, 46 Misc. 548, 95 N. Y. S. 53.

11. In re Kelly, 46 Misc. 548, 95 N. Y. S. 53.

12. Under act of March 16, 1868, P. L. 45, separate exceptions must be taken to any particular finding of fact or conclusion of law alleged as error. Franklin Tp. v. Rayburn Tp., 23 Pa. Super. Ct. 522.

13. See 4 C. L. 954.

14. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574.

certain lines of conduct.[15] In Illinois the primary duty to furnish aid to poor persons not coming within the definition of paupers, who may fall sick and are unable to relieve themselves, is on the county and not on the city,[16] and a city which has furnished such aid and has given notice thereof to the county may recover the reasonable value of services rendered from the county.[17] Counties are not liable for services rendered poor persons unless there is a contract made by the proper county officers in express terms,[18] or unless the services are rendered by their request and under circumstances from which a contract may be inferred.[19] In Illinois, county boards have power to contract with physicians to render, by the year, services to such persons as the county is liable to supply with such aid.[20] A physician so employed cannot recover extra compensation for services called for by his contract.[21]

Repayment by indigent or relatives.[22]—At common law the furnishing of support to an indigent person raises no implied promise to repay on the part of the indigent.[23] In Oregon, the county court, sitting in the transaction of county business, has no power to adjudge a forfeiture against a relative of a pauper for nonsupport.[24] The statute gives the county court no such power, but only the right to recover against a delinquent relative in an action before a justice or court of competent jurisdiction, a sum deemed proper for the pauper's support.[25] In Iowa, a grandfather is not liable for the support of indigent grandchildren where it is not shown that the father is unable to support them.[26] To render a father liable for the support of an adult child, under the Iowa statutes, it must appear that the child is under some mental or physical disability.[27] The Wisconsin statute authorizing recovery from the father or children of the indigent, under certain circumstances, is prospective only, and no recovery can be had from a son for past contributions to his pauper father before proceedings to compel the son to contribute are brought.[28]

15. Rule providing that aid should be withheld from persons who engage in riots or lawlessness or violate statutes or go out on strikes or refuse or neglect to accept available work, held void. City of Spring Valley v. Bureau County, 115 Ill. App. 545.

16. City of Spring Valley v. Bureau County, 115 Ill. App. 545. It is the duty of a county to furnish medical aid to sick persons who do not come within the definition of paupers, but who are unable to pay for such services, though such county has not appointed overseers of the poor or made rules and regulations for the giving of such services. City of Chester v. Randolph County, 112 Ill. App. 510.

17. City of Chester v. Randolph County, 112 Ill. App. 510.

18. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574. A county is not liable for medical services rendered a pauper unless the services were procured to be rendered by one having authority to bind the county. Under Rev. St. 1898, § 1517, three members of county board had no power to bind county by requesting the rendition of such services. Hittner v. Outagamie County [Wis.] 105 N. W. 950.

19. County health superintendent ordered an insolvent smallpox patient removed to a private pest house where plaintiff, at the superintendent's request, took care of him. The county pest house was not ready for use, and the services rendered by plaintiff were necessary. Held county liable for plaintiff's services. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574.

20, 21. Cochran v. Vermilion County, 113 Ill. App. 140.

22. See 4 C. L. 954, notes 9-12.

23. No implied promise to pay for support of insane person where county court ordered county to take charge of such person, under a statute charging counties with burden of supporting indigent insane. Chariton County v. Hartman, 190 Mo. 71, 88 S. W. 617. Rev. St. 1899, § 3697, providing for recovery of cost of maintenance of insane persons from those legally bound to support such persons when they are able to pay does not authorize recovery from guardian of insane person who has been committed to the care of the county by order of the county court, though the guardian afterwards acquires funds belonging to the ward. Id.

24. Faling v. Multnomah Co. [Or.] 80 P. 1009.

25. Construing B. & C. Comp. §§ 2653, 2654. Faling v. Multnomah County [Or.] 80 P. 1009.

26. Under Code § 2217. Monroe County v. Abegglen [Iowa] 105 N. W. 350.

27. Under Code §§ 2216, 2252, father not liable for support of child, a divorced wife with children, who was able to and did work out, though she did not consider that she was earning a sufficient living. Monroe County v. Abegglen [Iowa] 105 N. W. 350.

28. Town of Saxville v. Bartlett [Wis.] 105 N. W. 1052.

PAWNBROKERS.[29]

PAYMENT AND TENDER.

Scope of article.—This title does not include discharge by novation,[30] release,[31] or accord and satisfaction,[32] nor does it include payment into court,[33] nor matters peculiar to negotiable paper.[34]

§ 1. *Mode and sufficiency of payment or tender. To and by whom.*[35]—Payment may be to any agent authorized to collect[36] and is binding without the payor's tracing the fund through the hands of the agent and into those of the principal.[37] One who is given a note, secured by mortgage, for collection cannot rightfully accept anything but money in payment,[38] but if he takes a new mortgage on the realty, and by its use procures means to pay off the first mortgage before his authority to collect is terminated, his authority is thereby executed and the first mortgage debt and lien extinguished.[39] This is the legal effect of the agent's act regardless of whether the money in due course or otherwise reached the rightful owner, authority to collect being presumed to continue while he had possession of the securities.[40]

Manner of payment.[41]—The law requires that the debtor must seek the residence of the creditor for the purpose of discharging the debt.[42] Where money sent by an unsafe method not authorized by the creditor is lost, there is no payment.[43]

Sufficiency of tender.[44]—To constitute a valid tender there must be an unconditional offer of the amount tendered,[45] and it must be the whole debt due.[46] There must also be not only readiness and ability to perform but actual production of the money or other thing to be delivered.[47] A tender must be made to a

29. No cases have been found for this subject since the last article. See 4 C. L. 955.
30. See Novation, 6 C. L. 826.
31. See 4 C. L. 1270.
32. See Accord and Satisfaction, 5 C. L. 14.
33. See Payment into Court, 6 C. L. 994.
34. See Negotiable Instruments, 6 C. L. 777.
35. See 4 C. L. 956.
36. Holder of notes gave them to a bank for collection and latter forwarded them to another bank which collected. Held payment to second bank was payment to payee. Porter v. Roseman [Ind.] 74 N. E. 1105. Whether person posing as "agent" was authorized to receive payment, held a question of fact for jury. Held v. Walker, 25 App. D. C. 486. Mortgagee assigned mortgage but did not have assignment recorded, and continued to collect interest for the assignee and to turn over coupons to the mortgagor without notifying him of the assignment. Held, mortgagee was assignee's agent and payment of the principal and interest to the mortgagee was payment to the assignee. Pennypacker v. Latimer [Idaho] 81 P. 55.
37. Payment by treasurer to secretary of corporation in his official capacity held to be payment to corporation. Indiana Trust Co. v. International Bldg. & Loan Ass'n [Ind. App.] 74 N. E. 633.
38, 39, 40. Friend v. Yahr [Wis.] 104 N. W. 997.
41. See 4 C. L. 956.
42. Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. S. 1062.
43. Where the maker of a note sent money to the holder by unregistered letter, before maturity or demand, and the money was not received by the holder, who had not authorized the maker to send the money in the manner and at the time he sent it, there was no legal payment. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125.
44. See 4 C. L. 957.
45. Mann v. Roberts [Wis.] 105 N. W. 785.
46. Mann v. Roberts [Wis.] 105 N. W. 785. A tender which is made conditional upon its acceptance as a full liquidation is not a legal tender. Hess v. Peck, 111 Ill. App. 111. In a suit to remove a cloud on title, a tender to the holder of a tax title of a sum greater than the amount due is not rendered conditional by a writing stating the tender to be in full payment of two-thirds of the amount paid at the sale, and for taxes, costs, charges, and expenses, with legal interest, and also stating that it was for the redemption of the lot as to his interest. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757.
47. Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891. There must be actual pro-

person authorized to receive it[48] and to the party intended to be bound.[49] Formal requisites of a tender, such as actual production of the money or thing tendered,[50] may be waived by some positive act or declaration of the creditor[51] amounting to a positive and unqualified refusal.[52] A refusal of a tender on a certain ground is a waiver of other objections.[53] While formal requisites of a tender may be waived, there can be no waiver unless there was ability to perform.[54] A tender under a contract is excused when the opposite party has repudiated the contract.[55] A tender must be kept up, but it is sufficient if the party making it holds himself ready to pay at all times.[56]

Medium.[57]—United States currency at the rate of exchange provided by act of Congress must be accepted in payment of an obligation incurred and payable in Porto Rico, where the contract does not expressly provide otherwise.[58]

A note,[59] draft,[60] order,[61] or check,[62] does not constitute payment of the debt

duction of the money. Bolton v. Amsler, 95 N. Y. S. 481, 482.

48. Superintendent and general manager of company, who was agent with whom third person contracted, was proper person to make tender to. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020.

49. Plaintiff was indebted to defendant, and the latter conspired with a third person and induced plaintiff to execute to the third person a bill of sale, representing that it was a mortgage. Held, a tender by plaintiff to recover the property was properly made to the defendant, he being the beneficiary of the fraud. Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801.

50. Where an offer to pay at any time was made, but other party declared he would not accept it, actual production of the money was not essential to the validity and effect of the tender. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020.

51. A waiver of actual production of money must be shown by some positive act or declaration of the creditor. Bolton v. Amsler, 95 N. Y. S. 481.

52. The objection that a tender was defective is not available where there was a positive and unqualified refusal. Simonson v. Lauck, 93 N. Y. S. 965. Actual production of money waived where creditor declared he would not receive it. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020. Where agent of vendee in contract for sale of land demanded deed, stating that balance would be paid on delivery of deed, and vendor's agent refused, saying that his principal would not sign the deed as the price was inadequate, such facts tended to show a waiver of the tender of the balance of the purchase price. Miller v. Smith [Mich.] 12 Det. Leg. N. 249, 103 N. W. 872.

53. Where a tender is refused on the ground that the money was not derived from the proper source, the objection that the tender was conditional is thereby waived. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763.

54. Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891.

55. Whether or not the fact of repudiation was known to the person bound to make tender at the time. Osgood v. Skinner, 111 Ill. App. 606.

56. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020.

57. See 4 C. L. 956. Also ante § 1, To and by whom.

58. Contract for sale of plantation in 1894 provided for payment in money current in the province at the rate of 100 centavos for each peso. Held, obligation due in September, 1900, could be liquidated with United States currency at the rate of 60 cents for each peso, under Act April 12, 1900, § 11. Contract did not require 100 cents for each peso. Serralles' Succession v. Esbri, 26 S. Ct. 176.

59. A note is not absolute payment unless there is an express agreement by the creditor to receive it as such. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033. A note is not payment but only evidence of the indebtedness. On default, the creditor may sue on the original demand and bring the note into court to be delivered upon trial. Hilderbrandt v. Fallot, 92 N. Y. S. 804. A promissory note given for an antecedent debt does not operate to discharge the debt in the absence of an agreement that it shall have such effect, but it does extend the credit until the note matures. Taylor v. Wahl [N. J. Law] 60 A. 63. The taking of a second note and mortgage does not of itself discharge the original security unless it is intended so to operate. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959. A premium note is not payment when it expressly provides that unless paid when due the policy should lapse, as for nonpayment of premium when due. Union Mut. Life Ins. Co. v. Adler [Ind. App.] 73 N. E. 835. Where as part of the consideration of a sale of property defendant was induced to assume the liability of the seller to plaintiff under an indemnity contract, held, defendant was not discharged from liability by reason of plaintiff's act in accepting notes of the seller, who was insolvent, as mere evidence of his indebtedness. Waas v. Anderson [Conn.] 61 A. 433. In the absence of a special agreement to the contrary the mere acceptance by the creditor from his debtor of a note or check of a third person to the creditor's order for a pre-existing indebtedness is not absolute but merely conditional payment, defeasible on the dishonor or nonpayment of the note or check, in which case the debtor remains liable on the original debt. Hummelstown Brownstone Co. v. Kneer, 25 Pa. Super. Ct. 465. Creditor took

in the absence of an express agreement to the contrary,[63] or circumstances creating an estoppel to deny an acceptance as payment.[64] The burden of proving such an agreement is on the debtor.[65] A debt cannot be discharged by gift of the creditor. The debtor must give something either in money, property right, or service.[66] Mere destruction[67] or surrender[68] of a note does not extinguish the indebtedness. The transfer and assignment of an indebtedness from one person to another is never a payment of the indebtedness.[69] Where the maker of a note is a member of a committee to which the note is assigned, the assignment is not a discharge of the note, such result not being intended.[70] A bond to secure repayment of funds deposited by a

note, believing it to be indorsed as agreed, and on discovering it was not indorsed, objected. Held, he could recover on the original demand, though he had not returned the note, no demand for its return having been made. Spiro v. Maiman, 94 N. Y. S. 358.

60. Unless expressly so understood and agreed the acceptance of a draft from a debtor does not merge the debt or operate as a payment. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949.

61. Where in awarding a contract for the construction of a factory the owners specify that the contractors shall accept in part payment an order on a citizens' committee for a sum supposed to have been subscribed to secure the location of the factory at that place, and the contractor marks the letter embodying the contract "acepted," but it afterward develops that no citizens' committee was appointed and no money was raised. the order cannot be considered as absolute payment, and the tender back of the order not a prerequisite to the bringing of suit for the amount due thereon. Weller Co. v. Washington Gordon & Co., 7 Ohio C. C. (N. S.) 303.

62. Mere delivery and acceptance of check does not constitute payment and is not evidence of payment. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119. Giving a check which is never paid is not an extinguishment of the original debt unless accepted absolutely as payment. Sharp v. E. Nathan Mercantile Co. [Ark.] 88 S. W. 305. Book entry, upon receipt of check, is, in case of nonpayment of check, evidence of conditional payment only. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119. The giving of an order, check, or other paper in payment of a debt and its acceptance in due course of business does not constitute absolute payment in the event the paper proves worthless, unless it clearly appears that the paper was accepted in satisfaction and without regard to its proving to be of the value for which it was accepted. Weller Co. v. Washington Gordon & Co., 7 Ohio C. C. (N. S.) 303. Evidence held to show that checks were accepted for a purpose other than as payments on an account. Lewis v. England [Wyo.] 82 P. 869. Reliance on the expectation that a check will be paid when presented, depositing it for collection or credit, and drawing against the account thus created or augmented, do not make the check payment, unless it is itself paid. Civ. Code 1895, § 3720. Charleston & W. C. R. Co. v. Pope [Ga.] 50 S. E. 374. Bank holding note for collection took indorser's check, which bank drawn upon said, upon inquiry, would be paid, the statement being made by mistake as to the check referred to, and surrendered the note to the indorser, crediting the amount to the owner of the note. The check was not paid and was returned to the indorser, who gave back the note, the owner being notified of these facts. Held no payment of the note. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119.

63. Evidence held to require submission to jury of question whether sublessee's rent note was accepted by lessor as payment of lessee's note or as security therefor. Crow v. Burgin [Miss.] 38 So. 625. If note was in fact given and received as payment of a cause of action it was payment, and the court properly refused to charge that it was only prima facie evidence of payment. Belknap v. Billings [Vt.] 62 A. 56. Where bonds were accepted by brokers as payment of a joint note, bonds being valued at their market value, this constituted payment so that contribution could be enforced against the other joint obligor. Hill v. Fuller, 188 Mass. 195, 74 N. E. 361. Mortgage held to have been transferred and accepted in part payment of goods. Mahuken Co. v. Pelletreau, 93 App. Div. 420, 37 N. Y. S. 737.

64. The wife of one who furnished materials to a contractor accepted the contractor's check and executed a receipt, and her husband took the check, indorsed and deposited it, thereby ratifying his wife's act, which was originally without authority. Held, though the check was not paid, husband was estopped to deny its acceptance as payment. Steffens v. Nelson [Minn.] 102 N. W. 871.

65. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033; Weller Co. v. Washington Gordon & Co., 7 Ohio C. C. (N. S.) 303.

66. White v. Black [Mo. App.] 90 S. W. 1153.

67. Destruction of a note against an estate by a creditor who took the widow's note, which was without consideration, did not extinguish the debt nor the creditor's right against the estate. Grimes v. Grimes [Ky.] 89 S. W. 548.

68. Surrender of note to maker secured by artifice in return for a worthless check is not payment. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

69. Insolvent corporation was reorganized, and creditors of the old assigned claims to the new and took stock in the new in exchange, the indebtedness not being applied on the purchase price of property of the old corporation. Held the indebtedness was not paid, but new corporation acquired creditors' rights against the old. McEwen v. Harriman Land Co. [C. C. A.] 138 F. 797.

70. Welch v. Kinney [Or.] 80 P. 648.

public officer is not performed by a transfer of credit from the officer making the deposit to his successor.[71] But where the hand to pay is also the hand to receive, payment is made when the accounts are credited and debited.[72] Where a draft is sent to a bank for collection and the bank accepts a check on the drawee's deposit for the amount of the draft, the transaction amounts to a payment of the draft, though the bank is in fact insolvent.[73] A certified check is payment to the amount of its face.[74] A corporate resolution setting aside real property for the use of the creditor may constitute payment when so treated by the parties.[75]

§ 2. *Application of payments.*[76]—A debtor has a right to direct the application of payments which he makes to such obligations as he pleases.[77] If he fails to direct their application[78] the creditor may apply them to such obligations as he pleases,[79] including even claims barred by limitations.[80] But if a payment is not actually applied to any demand until litigation is begun, the creditor's right to make such application as he thinks proper is gone.[81] When neither debtor nor creditor directs any application,[82] or when the creditor has lost his right to apply a payment as he chooses,[83] the law will make such application as equity and justice may require. A partial payment made on an account, no particular application being directed or made at the time, is applied by law to the oldest items of the account.[84] But where a creditor has part of his debt secured and part unsecured,

71. Where a bank in which public money was deposited gave a bond to the county treasurer or his successor, held that the giving of a check for the amount of the deposit by the treasurer to his successor did not amount to a payment relieving the bank on the bond. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

72. Where depositor draws check on bank on a deposit in the bank, payable to the bank, a transfer of the amount from one account to another would constitute payment. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765.

73. The depositor of the draft and the bank then become creditor and debtor, the proceeds of the check being mingled with general funds of the bank, and the depositor has no preference over other creditors when the bank closes its doors. North Carolina Corp. v. Merchants' & Farmers' Bank, 137 N. C. 697, 50 S. E. 308.

74. St. Regis Paper Co. v. Tonawanda Board & Paper Co., 94 N. Y. S. 946.

75. Corporation being unable to repay loan passed a resolution setting aside lots to be sold on the creditor's account, and thereafter recognized such lots as belonging to her, paying to her the proceeds of such as were sold. Held the lots were given as payment of the debt and the creditor was entitled to have the remainder sold for her benefit. Gulfport Land & Improvement Co. v, Ansley [Miss.] 40 So. 66.

76. See 4 C. L. 957.

77. Civ. Code § 1479. Frutig v. Trafton [Cal. App.] 83 P. 70. The debtor in the first instance has the right to designate upon what indebtedness a payment made by him shall be applied, and the creditor is bound so to apply it. Saffer v. Lambert, 111 Ill. App. 410.

78. Where payments were made simply to "apply on account," it was held there was no direction to apply them on a portion of the account secured by note and mortgage, rather than on the current account. Frutig v. Trafton [Cal. App.] 83 P. 70. Whether payments were in fact made and whether any application of them had been directed or acquiesced in by the debtor, held issues for the jury. Howver v. Ingalls, 93 Minn. 371, 101 N. W. 604. Finding that debtor did not direct application of payment erroneous, where debtor sent letter same day as money was expressed directing application, which letter was not received by creditor and receipt showing different application was returned by debtor with further direction as to application to be made. William Mulherin Sons & Co. v. Stansell, 70 S. C. 568, 50 S. E. 497.

79. Evidence held to show application of payments to entire account, including a portion secured by note and mortgage, rather than on the current portion of the account. Frutig v. Trafton [Cal. App.] 83 P. 70. Where a payment is made by a debtor to his creditor, who has more than one demand against him, and no directions are given upon which demand to apply the same, the creditor may apply it upon either. Howver v. Ingalls, 93 Minn. 371, 101 N. W. 604; Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382. When debtor made no appropriation of proceeds of property covered by two mortgages, the mortgagee could apply the same to either debt. Lyon v. Bass [Ark.] 89 S. W. 849.

80. Where money or other property is delivered by way of payment without direction as to its application, the creditor may apply it upon any claim that is due, whether barred by limitations or not. McDowell v. McDowell's Estate, 75 Vt. 401, 56 A. 98.

81. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382.

82. Saffer v. Lambert, 111 Ill. App. 410.

83. As where creditor made no application until after litigation had begun. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382.

the law does not apply the payment to the older items of the account, but to the unsecured debt.[85] When money is derived from a particular source or fund, payment must be applied to the relief of such source or fund unless there is a mutual agreement to apply it otherwise.[86] Where mortgagors are given additional time to pay a balance due under a settlement, and allowed to remain on the land, payments made as rent will be applied, after deducting interest and taxes, on the mortgage debt.[87] Where the debt is in the form of a lien reserved in a deed, and specific application was made by the parties of the early payments to the extinguishment of the lien, subsequent payments in the absence of circumstances indicating the contrary will be presumed to have been made for the same purpose.[88] In the absence of equitable considerations, payments made by a debtor to a creditor without designating their application should be applied to the only debt shown to exist.[89]

§ 3. *Effect of payment or tender.*[90]—Payment of a note secured by mortgage extinguishes the lien of the mortgage without any satisfaction thereof of record or in writing.[91] Payment in full by one of two or more joint obligors extinguishes the obligation,[92] but a decree of distribution of the estate of a payee of a note awarding the note to one of the joint makers, is not a payment of the note or an extinguishment of the obligation of the other debtor.[93] A compulsory payment may be avoided by placing the payee in statu quo.[94] A payment by mistake to the wrong party does not affect the creditor's right to recover.[95]

A valid tender precludes recovery of interest[96] and throws costs upon plaintiff, if he fails to recover more than the amount tendered,[97] but a tender of a sum less than that subsequently recovered is ineffectual to defeat a recovery of costs.[98] Where the defendant tenders and pays into court a sum of money less than the amount claimed by the plaintiff and said tender is refused and judgment rendered for more than the amount tendered, upon appeal by the defendant, plaintiff may withdraw the money tendered and apply it on his claim without barring his right to proceed for the balance claimed.[99] A tender of the amount due for stock may render a sale thereof for nonpayment void.[1] A conditional tender which is refused

84. Winston v. Farrow [Ala.] 40 So. 53.

85. Bank of New Roads v. Kentucky Refining Co., 27 Ky. L. R. 645, 85 S. W. 1103.

86. This application being made by law, the exclusion of proof of directions to the same effect was not error. Winston v. Farrow [Ala.] 40 So. 53. Where there are no directions as to the application of payments, and the payment arises out of proceeds of property on which the creditor had a lien, the law will apply it to the debt secured by such lien. Saffer v. Lambert, 111 Ill. App. 410. When property is mortgaged to secure a debt and the property is afterwards sold and the proceeds turned over to the mortgagee, the presumption is that both parties intend to apply the payment on the mortgage debt and the mortgagee may so apply it, though such debt is not due. Lyon v. Bass [Ark.] 89 S. W. 849. Creditor advanced money so that debtor could carry on his business, and after sale of the property turned the proceeds over to the creditor. Held proper to apply proceeds to repay advances rather than on prior debt secured by deed given by debtor and his wife. Id.

87. This application would be made by law, hence it was immaterial whether an agreement to that effect was based on a sufficient consideration. Sadler v. Jefferson [Ala.] 39 So. 380.

88, 89. Epply v. Von Phul, 7 Ohio C. C. (N. S.) 449.

90. See 4 C. L. 959.

91. Friend v. Yahr [Wis.] 104 N. W. 997.

92. Enscoe v. Fletcher [Cal. App.] 82 P. 1075.

93. Under Civ. Code § 1543 providing that a release of one joint obligor does not extinguish obligation of others. Enscoe v. Fletcher [Cal. App.] 82 P. 1075.

94. Payment to induce trustee to convey in accordance with trust agreement could be avoided if trustee was given rights and benefits to which he was entitled under trust agreement before he conveyed. Teeter v. Veitch [N. J. Eq.] 61 A. 14.

95. Headley Lumber Co. v. Cranford [Miss.] 38 So. 548.

96. After vendee has tendered purchase money to vendor, who has refused it, interest cannot be subsequently demanded by the vendor after a decree for specific performance, except from the date of tender of the deed in conformity with the decree. Hughes v. Antill, 23 Pa. Super. Ct. 290.

97. Reeder v. Mason, 7 Ohio C. C. (N. S.) 233.

98. Hess v. Peck, 111 Ill. App. 111.

99. In action before justice. Reeder v. Mason, 7 Ohio C. C. (N. S.) 233.

1. Where $12.50 was due on a share of

and the condition of which is never fulfilled or complied with is ineffective as an admission.[2] In Colorado tender by a defendant is deemed to be withdrawn and cannot be proven by plaintiff unless the latter accepts the offer and gives notice thereof within five days.[3]

§ 4. *Payment or tender as an issue. A. Pleading.*[4]—Payment is a question of fact, not of law, and should be set up by plea or answer, not by demurrer.[5] A self-contradictory plea is bad.[6] Where plaintiffs allege breach of a contract by failure to pay and that there is a sum due, defendants may prove payment under a general denial.[7] Proof of a gift by the creditor is inadmissible under a plea of payment.[8] Failure of a mortgagee, who takes the mortgaged property by virtue of his contract, to apply such property on the mortgage debt, is matter of defense in a suit to recover the balance of the debt.[9]

(§ 4) *B. Evidence. Burden of proof.*[10]—In an action on contract for the payment of money the burden of proving payment is on the party alleging it.[11]

stock which was advertised for sale upon nonpayment of that sum, the holder, as soon as he had notice of the advertisement, offered $15 in cash to the secretary and more if necessary, which was refused. Held a valid tender and sale of stock was void. Wilson v. Duplin Tel. Co. [N. C.] 52 S. E. 62.

2. Mitchell v. Pearson [Colo.] 82 P. 446; Id. 82 P. 447.

3. Mitchell v. Pearson [Colo.] 82 P. 447.

4. See 4 C. L. 989.

5. Dean v. Boyd [Miss.] 38 So. 297.

6. In an action on a contract a plea alleging payment of the contract price but not payment for extra work for which suit was brought, and further that the alleged extra work was included in the contract price, is not a good plea of payment. Alabama Jail & Bridge Co. v. Marion County [Ala.] 40 So. 100.

7. Cunningham v. Springer [N. M.] 82 P. 232.

8. White v. Black [Mo. App.] 90 S. W. 1153.

9. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137.

10. See 4 C. L. 959.

11. Conkling v. Weathereaux [N. Y.] 73 N. E. 1028 (per Cullen, C. J., Gray, O'Brien, and Haight, JJ., concurring in dissenting opinion as to this point), Robinson v. Bailey, 113 Ill. App. 123. Burden of proving payment on defendant in action on account. Swift & Co. v. Mutter, 115 Ill. App. 374. Where complaint alleges a debt due and the answer alleges payment, and plaintiff proves a debt was contracted, the burden is upon defendant to prove payment. Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293. Where plaintiff pleads breach of a contract by a failure to pay, and that there is a sum due and defendant's answer is a general denial and a plea of payment, defendant has the burden of proof only on the fact of payment. Cunningham v. Springer [N. M.] 82 P. 232. The party pleading payment has the burden of proving application of the payment to the debt in suit. Eastham v. Patty [Tex. Civ. App.] 83 S. W. 885. One resisting plaintiff's right to judgment on a debt on the ground of full or partial payment has the burden of proving such payment. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. In action on note indorsed before suit as paid, plaintiff alleged it was not in fact paid, and defendant alleged payment to plaintiff's husband as her agent. Held burden was on defendant to prove payment and authority of plaintiff's husband to receive it. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803. Where depositor draws a check on a deposit payable to the bank or order for the purpose, as the depositor claims, of changing a general deposit to a time deposit, and the check is indorsed "paid" and the bank seeks to avoid liability by a plea of payment, the burden is on the bank to prove payment to a third person at the request of the depositor. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765. Where it is shown that money was given a decedent either as a loan or to invest, burden is upon representatives to show payment or an accounting by decedent. In re Brown's Estate [Pa.] 60 A. 149.

Sufficiency of evidence: Evidence sufficient to show interest on note had not been paid. Yost's Estate, 23 Pa. Super. Ct. 223. Evidence insufficient to show payment of note. Carpenter v. Rosenbaum [Ark.] 83 S. W. 1047. Evidence sufficient to prove claim against an estate had been paid before decedent's death. Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293. Evidence insufficient to sustain defense of payment in foreclosure suit. Douglas v. Miller, 102 App. Div. 94, 92 N. Y. S. 514. Evidence held insufficient to show a tender and a refusal thereof so as to abate interest on the claim. Andrews v. Frierson [Ala.] 39 So. 512. Evidence insufficient to establish payment by claimant for drugs bought for defendant. In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 654. Evidence held not to show payment of notes though payments were indorsed thereon. McCaffrey v. Burkhardt [Minn.] 105 N. W. 971. Evidence held sufficient to show payment of note and that renewal note was without consideration. Hence, decree refusing foreclosure of mortgage, and setting it aside affirmed. Campbell v. Miller [Neb.] 103 N. W. 434. Payment held proved by witness who was present when parties settled, though proof by original parties was impossible. Eakle v. Hagan [Md.] 60 A. 615. In action by an estate on notes in possession of obligor, who alleged a settlement whereby notes had been surrendered, evidence held

When an action is not upon contract for the payment of money, but is upon an obligation created by operation of law, or is for the enforcement of a lien where nonpayment of the amount secured is part of the cause of action, the fact of nonpayment must be alleged and proved by plaintiff.[12]

Presumptions.[13]—The presumption of payment from lapse of time[14] is a presumption of fact only, rebuttable by evidence tending to show nonpayment,[15] such as the institution of legal proceedings by the creditors.[16] Where the presumption arises, the party alleging nonpayment must prove his allegation by evidence of more than reasonable certainty.[17] In determining the sufficiency of evidence to rebut the presumption, the relation of the parties may be considered.[18] The pre-

insufficient to prove such settlement. Bray v. Bray [Iowa] 103 N. W. 477. Proof that a payment was made does not conclusively show that it was made and received on the obligation in suit. Whether it was so made is to be determined from all the facts and circumstances shown. Robison v. Bailey, 113 Ill. App. 123. Where in action on note defendant showed a receipt and a postal order to payee's order, the two payments being equal to the note, but failed to show that such payments were on the note, the defense of payment was not made out. Silvestri v. Saveriano, 95 N. Y. S. 580.

12. Burden of proving nonpayment on plaintiff in an action to enforce a legacy as a lien on land. Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028, three judges dissenting.

13. See 4 C. L. 960.

14. A presumption of payment arises when more than twenty years have elapsed since the accrual of the debt. Ayres v. Ayres [N. J. Eq.] 60 A. 422. Presumption of payment arises after 30 years from time when balance of purchase price of land was due. Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352. Lapse of 20 years is presumptive evidence of payment increasing in strength with lapse of time after the 20 years. Luther v. Crawford, 116 Ill. App. 351. By statute, a promissory note is presumed to be paid after ten years. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803. Where there was no proof of nonpayment and ward might have sued guardian for more than 10 years, the facts warranted an inference of payment. Love v. Love [Kan.] 83 P. 201. Fact that certificate of deposit was not presented for 24 years, held, with other evidence, sufficient to show payment. Rosenstock v. Dessar, 109 App. Div. 10, 95 N. Y. S. 1064. Though the lien of a judgment against a decedent in his lifetime continues indefinitely against his heirs and devisees, the presumption of payment arises, even in such case, after twenty years. Roberts v. Powell [Pa.] 60 A. 258. Purchaser of mortgaged chattel after maturity of mortgage debt may rely on presumption of payment of debt and will be protected unless the mortgagee has exercised reasonable diligence to find the property after maturity of the debt. Kimball Co. v. Piper, 111 Ill. App. 82.

15. Facts and circumstances which reasonably tend to establish improbability of payment are admissible to rebut the presumption of payment from lapse of time. Allison's Ex'r v. Wood [Va.] 52 S. E. 559. Presumption of payment of note by husband to wife rebutted by proof of acknowledgments of indebtedness by husband to the effect that he would pay his wife's sister if he outlived the wife. Ayres v. Ayres [N. J. Eq.] 60 A. 422.

Note. Says a writer in the Michigan Law Review, approving Ayres v. Ayres [N. J. Eq.] 60 A. 422: "A presumption of payment arises at common law after the lapse of twenty years from the maturity of the indebtedness which is controlling in the absence of evidence to rebut it. Hillary v. Waller, 12 Ves. Jr. 239; Hughes v. Edwards, 9 Wheat. [U. S.] 489, 6 Law. Ed. 142; Locke v. Caldwell, 91 Ill. 417. This presumption is only of fact and may be rebutted by evidence or circumstances showing nonpayment. Sheldon v. Heaton, 88 Hun [N. Y.] 535; Parker v. Parker, 52 Ill. App. 333; Fuller v. Cushman, 170 Mass. 286. In this it differs from the bar created by the statute of limitations as that statute when relied upon is conclusive although the debt was not paid. Devereux's Estate, 184 Pa. 429. An acknowledgment of the indebtedness by the debtor within the time relied upon to raise the presumption of payment will rebut the presumption. Martin v. Bowker, 19 Vt. 526; Brewis v. Lawson, 76 Va. 36; Carll v. Hart, 15 Barh. [N. Y.] 565. This acknowledgment need not be accompanied by a promise to pay. Breneman's Appeal, 121 Pa. 641; Colvin v. Phillips, 25 S. C. 228. And it is held that the relationship existing between creditor and debtor is an element to be considered together with other circumstances in rebuttal of the presumption. Knight v. McKinney, 84 Me. 107; Updike v. Lane, 78 Va. 132; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685."—3 Mich. L. R. 668.

16. Record of action and ancillary attachment proceeding including judgment and executions thereon held admissible, though judgment was erroneous and suit unsuccessful. Allison's Ex'r v. Wood [Va.] 52 S. E. 559.

17. Party alleging that person who assumed debts in mortgage had not paid had burden of proving nonpayment where mortgage debts and assumpsit in favor of mortgage creditors had been prescribed for many years. Kuhn v. Bercher, 114 La. 602, 38 So. 468. To overcome this presumption the creditor must produce evidence of the indebtedness, or account for its absence, and also show that the debt is in fact unpaid. Luther v. Crawford, 116 Ill. App. 351.

18. Relation of husband and wife, together with acknowledgments by him, held to rebut presumption of payment of note given her by him. Ayres v. Ayres [N. J. Eq.] 60 A. 422.

sumption of payment of a legacy from lapse of time arises only between the executor and legatee and never arises to create liability on the part of a legatee to a third person who should have received it.[19] Possession of a written instrument providing for the payment of money is prima facie evidence that the debt therein contracted is unpaid.[20] In the absence of evidence, an agent for collection who cancels the obligation of the debtor is presumed to have done so in consideration of the face amount of the claim.[21] A negotiable note or order drawn by the debtor and accepted by the creditor is presumed to be an extinguishment of an existing indebtedness,[22] but this presumption may be rebutted or explained by proof of an agreement, usage, or circumstances inconsistent therewith.[23]

Admissibility.[24]—Indorsements[25] and receipts[26] are ordinarily strong evidence of the truth of their recitals, but are always open to explanation by parol evidence.[27] An indorsement on a note not written by the payor is evidence of payment, whether or not limitations has run against the note, though not alone sufficient to avoid limitations.[28] Original entries in books of account are admissible.[29] The mere fact that the debtor has money of which the creditor has knowledge, is not evidence tending to prove payment.[30]

(§ 4) *C. Limitations.*—A plea of payment is not barred, though a suit or counterclaim based on the same transaction would be barred.[31]

(§ 4) *D. Questions of law and fact.*[32]—Whether payment has been made is ordinarily a question of fact.[33]

PAYMENT INTO COURT.

A depositary holding money claimed by several parties should be allowed to pay it into court when the opposing claims are based on disputed questions of law

19. Remainderman claiming that a legacy which he should have received had been paid to a legatee must prove such payment. Outlaw v. Garner [N. C.] 51 S. E. 925.

20. Mellnk v. Coman, 111 Ill. App. 583.

21. Lexington Bank v. Phenix Ins. Co. [Neb.] 104 N. W. 1146.

22. Lewis v. England [Wyo.] 82 P. 869.

23. Evidence held to show that checks were accepted for a purpose other than as payments upon an account. Lewis v. England [Wyo.] 82 P. 869.

24. See 4 C. L. 960.

25. An indorsement on a note "Interest paid up to 1st January," held evidence of a payment. Iberia Cypress Co. v. Christen, 112 La. 451, 36 So. 491. Following was endorsed on note for $620: "Rec'd on the within four hundred and seventy-eight and 29/100 dollars, $149.41, 1st Nov. '96; $228.88, 15th Nov. '96." Held the indorsement meant only two payments aggregating $378.29. Held also that certain receipts referred to $149.41 endorsement. Garner v. Garner, 70 S. C. 424, 50 S. E. 5.

26. Fitzgerald v. Coleman, 114 Ill. App. 25.

27. Fitzgerald v. Coleman, 114 Ill. App. 25. Receipt for purchase money indorsed on deed is not conclusive. In re McPherran's Estate, 212 Pa. 425, 61 A. 954. Where receipt was uncertain on its face, the purpose, intention, and understanding of the parties were for the jury, and extraneous evidence was admissible on these issues. Swift & Co. v. Mutter, 115 Ill. App. 374. An indorsement of payments on a negotiable instrument is in the nature of a receipt, not of a contract, and may be contradicted or explained by parol. McCaffrey v. Burkhardt [Minn.] 105 N. W. 971. The words "In payment of note of 15 Dec. '92" written on the face of a check when a person indorsed it and received payment does not estop her to show the conditions under which she signed or the true purpose for which it was given. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803.

28. By V. S. 1216, an indorsement is not sufficient, but this does not make it inadmissible. McDowell v. McDowell's Estate, 75 Vt. 401, 56 A. 98.

29. In suit on note entries in defendant's books showing plaintiff charged with lumber and credited with the note at the time of the note's maturity, and other entries showing charges for lumber and credit for cash payments, held admissible to establish defense of payment. Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311.

30. That deceased had money on deposit to claimant's knowledge inadmissible to prove payment in prosecution of a claim against an estate. McDowell v. McDowell's Estate, 75 Vt. 401, 56 A. 98.

31. In a suit on a long past due note defendant pleaded payment by lumber accepted as such by plaintiff. Held the defense was not barred by limitations, though suit for value of lumber or a counterclaim for its value would be barred. Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311.

32. See 4 C. L. 961, n. 30.

33. Whether note had been paid for jury

and fact which the depositary could not undertake to determine in favor of any claimant without hazard to itself.[34] Where in an action to set aside a deed plaintiff offers to pay the consideration into court whenever the court should order a reconveyance, which offer is not accepted by the defendant, it is error to require the plaintiff to pay the money into court as a condition precedent to his maintenance of the action.[35] In an action to recover a reward, payment of the money demanded into court to be delivered to the claimant found to be entitled thereto is an admission of the offer of a reward as alleged in the complaint.[36] The fact that a fund which has been withdrawn without authority is not actually in the registry of the court does not affect the power of the court to render judgment for the party entitled thereto, since the court has power to order restoration of the fund.[37] The court may take such action without pleading, evidence, or findings by a jury where it has knowledge of the facts making such action proper.[38] Where the question involved is title to a fund paid into court, the verdict and judgment should be for the successful party generally and not for a stated sum.[39] Discharge of a defendant on paying a sum claimed into court to abide litigation among other parties who claim it is proper.[40]

PEDDLING.

§ 1. *Definition.*[41]—One soliciting and receiving orders for goods as an employe and sometimes delivering them, though a peddler within the terms of an ordinance, is not liable for a license tax imposed on peddlers with pack or vehicle.[42]

§ 2. *Statutory or municipal regulation.*[43]—A state may enact reasonable regulations with regard to peddling and canvassing for the sale of goods,[44] or it may confer on towns and cities the power to regulate peddling within their jurisdictions, especially on the public streets and squares,[45] such statutes and ordinances being subject to constitutional limitations,[46] such as those relating to class legislation,[47]

where evidence was conflicting. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803. Whether a debtor, by authorizing attorney to collect money due from a third person and deposit it to his credit and then give his check to creditor, had paid the attorney, so that the creditor could recover from the attorney, held a question for the jury. Millhiser & Co. v. Leatherwood [N. C.] 52 S. E. 782.

34. Mercantile Trust Co. v. Calvert-Rogniat, 46 Misc. 16, 93 N. Y. S. 238.

35. Green v. Duvergey, 146 Cal. 379, 80 P. 234. By Code Civ. Proc., § 572, such an order may be made when it is admitted by the pleading, or shown upon the examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs to or is due to another party. Id.

36. Atwood v. Armstrong, 101 App. Div. 601, 92 N. Y. S. 596.

37. Judgment for a party was reversed after such party had withdrawn the fund. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737.

38. Judgment for defendant was reversed and plaintiff had judgment after defendant had withdrawn the fund, of which the court had knowledge. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737.

39. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

40. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. S. 877.

41. See 4 C. L. 962.

42. State v. Smithart [Iowa] 105 N. W. 128.

43. See 4 C. L. 962.

44. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

45. Sayles' Ann. Civ. St. 1897, art. 419, and art. 428. Ex parte Henson [Tex. Cr. App.] 90 S. W. 874. The authority of the borough of Sunbury to require peddlers to take out licenses is within the police power delegated by the general borough law of Apr. 3, 1851, P. L. 320. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. Under Ballinger's Ann. Codes & St. § 739, subd. 34, and charter, § 59, subd. 6, Spokane city has authority to license, regulate, and control peddlers, and to prohibit peddling within certain districts of the city. In re Camp, 38 Wash. 393, 80 P. 547.

46. Act of March 22, 1862, P. L. 161, prohibiting hawking and peddling in Bucks

interstate commerce,[48] equal protection of the law,[49] privileges and immunities of citizens.[50] A municipal license imposed upon peddlers is not prohibitive merely because it is burdensome, especially when it appears that numerous persons are engaged in the business,[51] and an ordinance which classifies and imposes license taxes upon persons engaged in peddling is not open to the objection of lack of uniformity of taxation, as it does not impose a property tax.[52] A prohibition on peddling in a specified county is not repealed by a general law for licensing peddlers.[53] Under delegated authority municipalities may enact reasonable ordinances regulating the business,[54] but the power of the state to license peddlers does not supersede the right of municipalities, under their granted authority, to license such persons,[55] nor does the granting of a free license to peddle to certain persons by the authorities of a county under an act of the legislature supersede the regulations of a city within such county.[56, 57]

§ 3. *Who may become licensees.*[58]

§ 4. *Offenses and prosecution.*[59]—It is no defense to a prosecution for peddling tea and coffee without a license that the statute excepts the sale of "provisions."[60]

PEDIGREE, see latest topical index.

PENALTIES AND FORFEITURES.

§ 1. *Definitions and elements.*[61]—Whether a sum contracted to be paid on nonperformance of a covenant is to be construed as liquidated damages or a penalty

county, is a legitimate exercise of police power and constitutional. Warden's License, 24 Pa. Super. Ct. 75. **Before an ordinance can be attacked** as unconstitutional the record must establish its violation. State v. Smithart [Iowa] 105 N. W. 128.

47. Ordinance of Sunbury regulating peddling and canvassing held to apply uniformly to all persons. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. Ordinance No. 6,036, of Seattle, § 15, as construed, held not to operate as a discrimination in favor of local merchants who peddle within a certain district. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188. The ordinance of Spokane city, which prohibits persons from peddling fruits, vegetables, etc., within the fire limits, except farmers selling their own products, violates Const. art. 1, § 12, prohibiting the granting of privileges or immunities to any citizen or class thereof. In re Camp, 38 Wash. 393, 80 P. 547. Laws 1905, pp. 372, 373, imposing a license tax of $200 per annum in advance upon every person, etc., who peddles out, or "after shipment to the state," canvasses for, or sells by sample, certain articles, is void for nonuniformity, under Const. art. 1, § 12. Bacon v. Locke [Wash.] 83 P. 721.

48. Ordinance of Sunbury regulating canvassing and peddling held not to interfere with interstate commerce. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. Rev. Laws, c. 55, §§ 15, 16, which permit the sale without a license of the agricultural products of this country, but prohibits the unlicensed sale of those of other countries, is an unlawful interference with commerce, under Const. U. S. art. 1, § 8. Commonwealth v. Caldwell [Mass.] 76 N. E. 955.

49. A classification of dealers, for purposes of licensing, into those who buy to sell again and those who sell only what they produce or make does not deny to citizens equal protection of the laws. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

50. Laws 1905, pp. 372, 373, taxing $200 per annum in advance every person, etc., who peddles out, or "after shipment to the state" canvasses for, or sells by sample, certain articles, discriminates against citizens of other states and is void under Const. U. S. art. 4, § 2, and Amdt. 14, § 1. Bacon v. Locke [Wash.] 83 P. 721.

51, 52. Ordinance No. 6,036, § 15, of Seattle. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188.

53. Act March 22, 1862, P. L. 161, relating to Buck's County was not repealed by the general act of June 9, 1891, P. L. 250, relative to licensing soldiers to peddle. Warden's License, 24 Pa. Super. Ct. 75.

54. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. An ordinance of the city of Greenville declaring it unlawful to peddle or in any other manner to sell any kind of merchandise on the public square or streets, was sustained as to the prohibition of peddling, but held invalid as to the rest, the two objects being separable. Ex parte Henson [Tex. Cr. App.] 90 S. W. 874.

55. Ordinance of city of Greenville sustained so far as the regulation of peddling is concerned. Ex parte Henson [Tex. Cr. App.] 90 S. W. 874.

56, 57. The grant of a free license to peddle within the county of Fulton by the ordi-

is to be determined from the intention of the parties,[62] the language of the contract, the circumstances under which it was executed, and the character of the subject-matter.[63] The validity of such agreement is to be determined not by the names given the stipulation but by the law applicable to liquidated damages,[64] and though the amount to be paid be designated "liquidated damages," it will be held a penalty if greatly in excess of the amount that would constitute just compensation,[65] but where the sum to be paid is denominated "penalty," it will be so treated.[66] While penalties and forfeitures are not favored,[67] and in some states are prohibited by statute,[68] and to prevent injustice and oppression a construction may be employed which is not in harmony with the language used by the parties,[69] yet if resultant damages are of an uncertain character the stipulation is usually held one for liquidated damages,[70] but not otherwise.[71] Where contracts are affected by a public interest, the damages are not susceptible of proof and the presumption is that the provision was intended as one for liquidated damages.[72]

§ 2. *Rights and liabilities to penalties and forfeitures, and the policy of the law.*[73]—Penalties and forfeitures are not favored,[74] and one seeking to recover them must show a case within the terms of the statute or contract.[75]

nary, under Pol. Code, § 1649, to an indigent and crippled person did not relieve him from the necessity of obtaining a license to peddle in Atlanta. Justice v. Atlanta [Ga.] 50 S. E. 61.

58, 59. See 4 C. L. 963.

60. Rev. Laws, c. 65, §§ 15, 16. Commonwealth v. Caldwell [Mass.] 76 N. E. 955.

61. See 4 C. L. 963.

62. Springwells Tp. v. Detroit P. & H. R. Co. [Mich.] 12 Det. Leg. N. 164, 103 N. W. 700; McCullough v. Moore, 111 Ill. App. 545.

63. Phoenix Iron Co.'s Case, 39 Ct. Cl. 526. See, also, Damages, 5 C. L. 904.

64. What is called "rent" may be shown to be a device to obtain a penalty. Lytle v. Scottish American Mortg. Co. [Ga.] 50 S. E. 402.

65. County of Mercer v. Stupp Bros. Bridge & Iron Co., 115 Ill. App. 298.

66. Recovery will be limited to just compensation. County of Mercer v. Stupp Bros. Bridge & Iron Co., 115 Ill. App. 298.

67. See post, § 2.

68. A stipulation that on the vendee's default in making payments the vendor shall retain money previously paid on account of the purchase, and that the vendee shall lose all interest in the property or improvements, amounts to a penalty and forfeiture forbidden by Civ. Code 1895, § 3795. Lytle v. Scottish American Mortg. Co. [Ga.] 50 S. E. 402.

69. County of Mercer v. Stupp Bros. Bridge & Iron Co., 115 Ill. App. 298.

70. When from the nature of the contract the damages cannot be calculated with any degree of certainty, the stipulated sum will usually be held to be liquidated damages where it is so denominated. McCullough v. Moore, 111 Ill. App. 545. Where the subject-matter of a contract belongs to that class which is not easily susceptible of proof of actual damages, and the language of the contract indicates that the provision was intended for liquidated damages, it will be enforced as such. Phoenix Iron Co.'s Case, 39 Ct. Cl. 526. Where from the nature of the contract and subject-matter of the stipulation it is apparent that the actual damages for the breach are uncertain in their nature and difficult of ascertainment, a provision for a certain sum is regarded as compensation and not a penalty. Calbeck v. Ford [Mich.] 12 Det. Leg. N. 82, 103 N. W. 516.

71. In contracts for the sale of land, the damages are capable of exact computation, and a stipulation by which an amount in excess of such legal damages shall be paid or retained is not enforceable. Lytle v. Scottish American Mortg. Co. [Ga.] 50 S. E. 402.

72. Where a street railway company accepted a resolution of a township board granting permission to construct and place in operation within a certain time a street railway, and the company executed a bond for $10,000 to be void if it complied with the conditions of the resolution, otherwise to be of force, the bond was held not in the nature of a penalty but a fixing in advance of liquidated damages. Springwells Tp. v. Detroit, P. & N. R. Co. [Mich.] 12 Det. Leg. N. 164, 103 N. W. 700. Failure of a street railway company to comply with specified conditions in an ordinance granting it the privilege to lay a track in the streets is ground for forfeiture of the right if the ordinance provides for such forfeiture, and substantial performance of the contract as a whole is no defense. In such case the question of materiality of the conditions is settled by the stipulations of the ordinance. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

73. See 4 C. L. 964.

74. Courts will not enforce a forfeiture if there is any reasonable excuse for doing otherwise. Watson v. Gross, 112 Mo. App. 615, 87 S. W. 104. A provision in a contract for the sale of logs that if they were not delivered within a certain time they should be scaled 10 per cent for sap rot, and if not delivered by a certain later date they should be forfeited, will not be enforced as to the latter provision. Daniel v. Day Bros. Lumber Co., 27 Ky. L. R. 650, 85 S. W. 1092. In the construction of deeds. Union Stock Yards Co. v. Nashville Packing Co., 140 F. 701.

75. Where in an action to recover a penalty from a public officer for charging an il-

Statutory penalties are a pecuniary mulct for the doing of an illegal act not a crime, or which is wrong as well as criminal.[76] Statutes prescribing penalties are strictly construed,[77] especially where they create and denounce a new offense.[78]

Relief from forfeitures.—Equity will not permit the enforcement of a forfeiture in an inequitable or oppressive manner,[79] nor a perversion thereof to purposes other than those for which the power of forfeiture has been reserved.[80] In the exercise of such power, under an ordinance of a municipal corporation prescribing notice and specification of cause as a preliminary step, the officers of such corporation must deal fairly and openly with the party whose rights they attempt to take away.[81] Their conduct is governed by substantially the same rules and principles as apply to proceedings by private persons under similar circumstances.[82] In order to be inequitable and oppressive their conduct need not be actually fraudu-

legal fee, the illegal charge is proved by plaintiff and admitted by defendant, it is error to submit the question whether or not the statute has been violated. Wilson v. Barrett, 24 Pa. Super. Ct. 68. A clause in a contract for the sale of timber to be measured and paid for each month before removal, and if the purchaser fail to have such timber measured and pay for the same each month he shall forfeit all right to the timber whether cut or not, and all payments made on account thereof, is to prevent the accrual of a large indebtedness under the contract. Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432. A street railway license or privilege in a street may be forfeited for failure to lay planks of prescribed dimensions along the rails of its track in front of improved property if the ordinance expressly gives the right to forfeit for such cause. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

76. See Cyc. Law Dict. "Penalty." Compare Criminal Law, 5 C. L. 883; Fines, 5 C. L. 1424.

77. Under Act Feb. 23, 1903 (24 St. at L. p. 81), prescribing a penalty for failure of a carrier to adjust claims, but that the carrier shall not be subject to penalty unless a consignee recover the full amount claimed, no penalty can be recovered unless a claim be recovered by an action in court. Best v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 223. Cobbey's Ann. St. 1903, § 9060, prescribing a penalty for taking illegal fees by a public officer is highly penal, and if it appears that a fee was exacted for service he was not required to render and for which he was entitled to reasonable compensation, together with other services for which he was not entitled to a fee, it will not be presumed that the fee exacted was more than the services for which he was entitled to compensation were reasonably worth. Sheibley v. Hurley [Neb.] 103 N. W. 1082. The penalty attached to the collection of usury by the act of 1882 (18 St. at L. p. 35) applies to a contract executed prior to 1898, since the act of 1898 has no retroactive effect. Earle v. Owings [S. C.] 51 S. E. 980. The words "false" and "falsely" in statutes and contracts which impose a penalty or forfeiture for false acts or acts falsely done generally imply culpable negligence or wrong. They signify more than incorrect or incorrectly, and mean knowingly, intentionally, or negligently false or falsely, in the absence of express provision in the contract or statute, or reasonable implications from them, their subject and circumstances to the contrary. United States v. Ninety-Nine Diamonds [C. C. A.] 139 F. 961.

NOTE. Due process of law: A statute made it a misdemeanor for a third party to use a label that had been properly registered with the secretary of state, and by its 10th section further provided that the plaintiff "might recover from the offending party, in an action of debt, a penalty of not less than $200 nor more than $500, for the use and benefit of the plaintiff." In an action for a penalty under this statute, held that the statute is unconstitutional. Cigar Makers' International Union v. Goldberg [N. J. Err. & App.] 61 A. 457.

The statute appears to be unconstitutional for two reasons. 1. In an action of debt the amount must be definite and certain. Gottlob v. Schmidt, 66 N. J. Law, 180; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 29 Law. Ed. 463. In the latter case the court stated that a statute allowing the plaintiff to recover, by way of penalty, twice the amount of actual damage suffered, is constitutional. The case related to negligence of the railway company in not maintaining fences along its right of way. The court said the statute provided a definite sum. 2. The amount of penalty should always be inflicted by some public agency. It would allow the plaintiff to discharge a judicial function if he were permitted to fix the sum in his own interest without hearing his adversary, and thus violate the 5th and 14th amendments of the United States Constitution. The plaintiff relied on the case of Piper v. Chappel, 14 Mees. & W. 624, but the facts are not similar, for in that case the penalty was inflicted on a member of the organization, in accordance with its by-laws, and not on a stranger.—4 Mich. L. R. 64.

78. Where it is plain and unambiguous it may not be extended by interpretation to a class of persons who are excluded from its effect by its terms for the reason that their acts may be as mischievous as those of the class whose deeds it denounces. Field v. U. S. [C. C. A.] 137 F. 6; United States v. Ninety-Nine Diamonds [C. C. A.] 139 F. 961.

79. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

80. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499; Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432.

81, 82. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

lent.[83] Equity will relieve from forfeitures for nonperformance of covenants other than those for the payment of money arising out of mistake, accident, or surprise, and in the absence of willful and deliberate refusal to perform when no pecuniary injury has resulted to the covenantee and the wrong is easily remediable.[84] Its power to do so, however, is discretionary and will not be exercised unless the delinquent covenantor is able and willing to immediately perform the covenant.[85]

If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture,[86] but failure to declare a forfeiture at the expiration of the time fixed for the performance of the conditions of a contract is not a waiver of the right to do so at a subsequent time if the conditions are not performed.[87]

A declaration of forfeiture of a street railway privilege by the repeal of the ordinance by which such privilege was granted has not the force and effect of a judicial determination of the existence of a cause of forfeiture and does not preclude a resort to the courts.[88]

Cumulative penalties.—The weight of authority is against the right to recover more than one.[89] In New York a party suing for a penalty can recover for but one violation or default prior to the commencement of the action.[90]

§ 3. *Remedies and procedure.*[91]—An action to recover a penalty is a civil action and may be brought in the manner prescribed.[92] In North Carolina a qui tam action may be authorized.[93] In an action prosecuted by the state in the interest of the public, the state is the real party in interest, though a portion of the penalty goes to the prosecuting attorney.[94] In an action to recover a penalty under a statute it is essential to allege all the facts necessary to show a case falling within the terms of the statute.[95] A general statute need not be pleaded or referred to[96] if it appears what particular statute has been violated.[97]

83. If in equity and conscience it is oppressive or lacking in fairness, equity will relieve, however honest and sincere the parties attempting to forfeit may have been. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

84, 85. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

86. By permitting the accomplishment of the general result for the prevention of which a power of forfeiture has been inserted in a contract, and standing by in silence while large expenditures are made in the prosecution of the work after the accrual of the right of forfeiture under the belief that it will not be exercised, the party having such right waives it. Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432.

87. Where a landowner licensed a railroad company to build a road over his land under certain conditions and within a certain time. Littlejohn v. Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

88. The company may by injunction prevent the disturbing of its tracks if no cause of forfeiture existed or the circumstances are such as to call for the exercise of equitable jurisdiction to relieve from forfeiture. Wheeling, etc., R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

89. Cox v. Paul, 175 N. Y. 328, 67 N. E. 586.

90. Cox v. Paul, 175 N. Y. 328, 67 N. E. 586. Stock Corporation Law (Laws 1892, p. 1840, c. 688), § 53, imposing a penalty upon each officer of a corporation who refuses to exhibit the stock book and a like penalty upon the corporation, renders the officer and corporation liable for but one penalty where the secretary of a corporation refused permission to examine the stock book on two separate days and the president refused on one day. Id.

91. See 4 C. L. 967.

92. "Prosecutions" in Const. art. 5, § 31, providing that all prosecutions shall be conducted in the name of the state, applies to indictments for crime and does not affect suits under penal statutes. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 644.

93. Const. art. 9, § 5, appropriating the clear proceeds of all penalties to the school fund was not intended to and does not restrict the legislative power to authorize qui tam action to recover penalties. State v. Maultsby [N. C.] 51 S. E. 956.

94. Action to recover a penalty for failure to bulletin a train in violation of Burns' Ann. St. 1901, §§ 5186, 5187. Southern R. Co. v. State [Ind.] 75 N. E. 272.

95. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 644. Complaint held to state a cause of action under Burns' Ann. St. 1901, §§ 5186, 5187, prescribing a penalty for failure to bulletin trains. Southern R. Co. v. State [Ind.] 75 N. E. 272.

96. A complaint is sufficient if it states

PENSIONS.

State and municipal.[98]—In Illinois the board of trustees in passing upon an application for a pension exercises quasi judicial power and its finding, when made, is binding and cannot be reviewed by it except upon the ground of want of authority to act or fraud in procuring the pension.[99] The Illinois police pension act is not retrospective.[1] In order to participate in a department insurance fund, one must have been in the service of the department at the time of his death.[2] No pension can be granted a police officer who has been legally discharged.[3] Upon application a pension must be granted an honorably discharged soldier or sailor who has served on the New York City police force for 20 years or over, there being no charges pending against him.[4] The board charged with the management of a pension fund are not trustees for the beneficiary and accordingly limitations run from the time when right to a pension accrues, not from refusal of a demand therefor.[5] The school teacher's pension fund does not provide a bounty, but the basis of a mutual contract, in the nature of insurance; hence all terms should be given a fair interpretation, without favor, and where one does not come within the express terms there is no reason to strain them to include such person.[6]

Federal.—An indictment for procuring the presentation of a false paper to the United States pension office must state the manner of presentation and by whom.[7] The provision of the Iowa statutes for exemption of property bought with the proceeds of a pension applies only during the life of the pensioner.[8]

PEONAGE; PERFORMANCE, see latest topical index.

PERJURY.

§ 1. *Elements of the offense.*[9]—Perjury is the willful making, when under oath, in a judicial proceeding or court of justice, of a false statement material to the issue or point of inquiry.[10] The oath must have been administered by one having authority to administer it,[11] in a judicial proceeding,[12] in a court of competent

facts bringing the case within the statute. McConathy v. Deck [Colo.] 82 P. 702.

97. In an action to recover a penalty incurred for the violation of a statute, the state of demand must show by explicit reference what statute has been violated. Bryant v. Gleason [N. J. Law] 60 A. 1110.

98. See 4 C. L. 970, n. 39-44.

99. Eddy v. People, 218 Ill. 611, 75 N. E. 1071.

1. Laws 1899, p. 101, amending Laws 1887, p. 122, construed. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174. Is not a remedial statute within the rule that remedial statutes are generally given retrospective effect. Id.

2. Laws 1901, p. 334, c. 466, and Gr. N. Y. Charter § 1543, p. 636, construed and held that where plaintiff's husband had been employed in the fire department, as clerk in the bureau of the chief, but his position was abolished, and he was not reinstated prior to his death, plaintiff was not entitled to the benefits of the life insurance fund. Reidy v. New York, 103 App. Div. 361, 93 N. Y. S. 16.

3. McGann v. Harris, 114 Ill. App. 308.

4. Laws 1901, p. 154, c. 466. An anonymous communication containing no statement of any act or neglect constituting a breach of duty is not a charge pending though it contains certain statements reflecting on the applicant as a public officer, and this is so though such communication was in the possession of the commissioner of police for two weeks before the application for retirement was filed and though the applicant be subsequently dismissed on trial of such statements. People v. Greene, 181 N. Y. 308, 73 N. E. 1111, rvg. 97 App. Div. 502, 90 N. Y. S. 162.

5. Nicols v. San Francisco Police Pension Fund Com'rs [Cal. App.] 82 P. 557.

6. Venable v. Schafer, 7 Ohio C. C. (N. S.) 337.

7. Miller v. U. S. [C. C. A.] 136 F. 581.

8. Beatty v. Wardell [Iowa] 105 N. W. 357. See, also, 4 C. L. 970, n. 35-38.

9. See 4 C. L. 970.

10. State v. Mercer [Md.] 61 A. 220.

11. A false oath by a surety on a dis-

jurisdiction,[13] or in some matter wherein the law authorized an oath to be taken.[14] The testimony must have been false, and known to be so,[15] and must have been material to the inquiry.[16] In a prosecution for false swearing under the Kentucky statute, the matter inquired about need not have been material to the issue then being tried.[17] It is enough if the court had jurisdiction of the case, administered the oath to the witness, that he was required to and did answer the question, and that his answer was corruptly false.[18]

Subornation of perjury.[19]—One who willfully procures or induces another to swear falsely is guilty of subornation of perjury.[20]

§ 2. *Prosecution.—The indictment*[21] must of course set out the essentials of the offense,[22] but need only charge in ordinarily intelligible terms such facts as will apprise the accused of the particular offense for which he is sought to be punished.[23] Facts showing the materiality of the alleged false testimony must be set

tiller's bond taken before one who styled himself a "notary public and ex officio justice of the peace" constitutes perjury, since U. S. commissioners have power to administer such oath (29 U. S. Stat. 184), and hence notaries may also do so (19 Stat. 206). United States v. Hardison, 135 F. 419. The oath must have been taken in the presence of an officer or tribunal authorized to administer it, but the competency of the person who reads the words of the oath to the witness and does the ministerial part of its administration is not material; he may be a clerk or deputy. State v. Mercer [Md.] 61 A. 220. Allegation in indictment that oath was taken "in due form of law" "before" the orphans' court sufficient though accompanied by statement that it was administered by the deputy register of wills. Id.

12. Oath in orphans' court in an application for letters of administration is taken in a judicial proceeding. State v. Mercer [Md.] 61 A. 220.

13. Justice court had jurisdiction of prosecution for carrying weapons, though it was shown in the proof that defendant carried weapon in public assembly. Trevinio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 716, 88 S. W. 356.

14. Under U. S. Rev. St. § 3165, as amended by 20 Rev. St. 329, and Internal Revenue Laws 1900, p. 47, § 321, relative to powers and duties of internal revenue officers, an oath before a deputy collector by a distiller's surety as to his qualifications is an oath in a case wherein a law of the United States authorizes an oath to be taken, within the definition of perjury contained in U. S. Rev St. § 5392. United States v. Hardison, 135 F. 419. One who swears falsely before a deputy internal revenue collector as to his qualifications as a distiller's surety is properly charged with perjury under U. S. Rev. St. § 5392, though the state law concerning perjury required the oath to be taken in a "judicial proceeding," other false oaths being punished as "false swearing." Id. One who made false affidavit as to ownership of property in order to qualify as surety on a bail bond was guilty of perjury. People v. Froelich, 96 N. Y. S. 488.

15. The offense consists in swearing falsely and corruptly, and not through mistake. State v. Mercer [Md.] 61 A. 220. Where charge was false swearing in affidavit for marriage license, and there was evidence that defendant did not know of the false statement contained in an affidavit, being asked a different question, defendant was entitled to a charge to the effect that he could not be convicted if he did not know of the false statement in the affidavit. Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 714, 88 S. W. 359. False testimony by defendant in prosecution for carrying a pistol that he "did not have in his possession or on his person" a pistol is ground for a prosecution for perjury, his statement not being duplicitous. Trevinio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 716, 88 S. W. 356.

16. In prosecution for forgery testimony of defendant that he had not been convicted of forgery 16 years before was too remote to affect his credibility, and therefore not material. Hence the fact that it was false did not make it a basis for a charge of perjury. Busby v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 134, 86 S. W. 1032. A statement under oath in proceeding for letters of administration in orphans' court that decedent did not leave a will is material to the inquiry. State v. Mercer [Md.] 61 A. 220.

17. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

18. Indictment held sufficient where false swearing by a defendant in a prosecution for gaming was charged. Goslin v. Commonwealth [Ky.] 90 S. W. 225.

19. See 4 C. L. 971.

20. Under Pen. Code § 105, one who creates a situation whereby another becomes the apparent owner of property in order to have him swear falsely that he was the owner to qualify as a surety, is guilty of subornation of perjury. People v. Nichols, 95 N. Y. S. 736.

21. See 4 C. L. 972.

22. See § 1, supra. An indictment for perjury in the statutory form (U. S. 5417 form 49), is not defective for failing to allege directly that accused was sworn by a person qualified to administer an oath, since a charge of perjury implies that an oath was administered. State v. Webber [Vt.] 62 A. 1018.

23. Goslin v. Commonwealth [Ky.] 90 S. W. 223. Indictment charging defendant with having sworn falsely while testifying in his own behalf in a prosecution for gaming held to have set out with sufficient particu-

out; a mere allegation that it was material is insufficient.[24] The true facts should be alleged in order to show the falsity of defendant's testimony.[25] An indictment which alleges that at the time of the alleged perjury there was pending before the court a certain civil suit, and in the same paragraph alleges that the action was for the remission of a fine, is double.[26] An indictment for false swearing in a prosecution for gaming need not allege when the game was played, nothing appearing in the oath of the witness on that point.[27] A presentment charging with perjury two defendants jointly in the same count is duplicitous.[28] In Tennessee a grand jury has no inquisitorial power with respect to the crime of perjury.[29]

Admissibility of evidence.[30]—The pendency of the proceeding in which false swearing is charged, at the time the oath was administered to the accused, should be proved by the record of that proceeding[31] which would also show jurisdiction of the presiding judge to administer the oath.[32] The fact that accused was sworn as a witness may be shown by other evidence.[33] The person who administered the oath may testify that he was acting as judge of a court of record.[34] This being shown, authority to administer an oath is prima facie established and it then devolves on the accused to show want of authority in the particular case.[35] It is proper to prove by an interpreter that he interpreted to defendant the oath administered by a justice of the peace.[36]

Sufficiency of evidence.[37]—In most jurisdictions the guilt of the accused must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances.[38] Whether the quantum of evidence required by law has been adduced is for the jury.[39] The offense must be proved as charged.[40]

larity the facts relative to a game with regard to which he had testified. Id. An indictment for perjury alleged to have been committed before the grand jury must specify the nature of the matter then being investigated in order to apprise the accused of the nature of the charge against him, as required by Const. art. 10. State v. Webber [Vt.] 62 A. 1018.

24. Crow v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 559, 90 S. W. 650. An indictment charging perjury by defendant in an action by him for remission of a fine is defective if it does not allege that any fine had been previously imposed upon him. Id. The alleged false testimony being that defendant believed that a cause in which he was a witness had been continued the indictment was defective in that it failed to allege that defendant had been under legal process as a witness in a pending cause and had disobeyed such process. Id.

25. Crow v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 559, 90 S. W. 650.

26. An action for remission of a fine not being a civil action. Crow v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 559, 90 S. W. 650.

27. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

28. State v. Wilson [Tenn.] 91 S. W. 195.

29. Code 1858, § 4858, takes away such power. State v. Wilson [Tenn.] 91 S. W. 195.

30. See 4 C. L. 974.

31, 32, 33. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

34. This fact need not be shown by the record. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

35. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

36. Trevinio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 716, 88 S. W. 356.

37. See 4 C. L. 974.

38. This is the rule in prosecutions for false swearing and perjury alike, and the court should so charge. Goslin v. Commonwealth [Ky.] 90 S. W. 223. To sustain a charge of perjury the evidence must be at least strongly corroborative of the testimony of the accusing witness. People v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046. Direct testimony of a single witness may be sufficient to support a charge of perjury if sufficiently corroborated to prove the crime beyond a reasonable doubt. State v. Rutledge, 37 Wash. 523, 79 P. 1123. In Washington, the corroboration of the witness need not be equivalent to the testimony of another witness. Id. In Texas corroboration must be tantamount to a witness. Thus, where single witness was corroborated only by an admission, not equivalent to a confession, by the defendant for whom the person accused of perjury testified, the charge of perjury was not sustained. Grady v. State [Tex. Cr. App.] 90 S. W. 38. The Texas statute requires two witnesses to prove only the falsity of the alleged false swearing; one witness is sufficient to prove the oath taken and what was sworn as a predicate for the perjury or false swearing. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 699, 91 S. W. 225. One witness was enough to prove what accused swore to before grand jury, where several witnesses testified to the falsity of his testimony. Hambright v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 36,

Instructions.[41]—The court should charge that before the jury can convict the guilt of the accused should be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances,[42] and, when requested, should apply this rule specifically to a particular issue.[43] The mere fact that two witnesses testified does not justify the court in refusing to instruct that a conviction may be based on the testimony of a single witness, if sufficiently corroborated.[44] The court should define the terms "willfully" and "deliberately" used in the indictment, and should instruct that there could be no conviction for false swearing if the false statement was made by mistake or inadvertence.[45] Where the indictment sets out several facts as one assignment for false swearing, the state must prove the willful falsity of all such facts, and the court need not treat them as separate assignments in the instructions.[46]

PERPETUATION OF TESTIMONY, see latest topical index.

PERPETUITIES AND ACCUMULATIONS.

§ 1. *The rule against perpetuities and accumulations; its nature and applications.*[47]—A suspension of the power of alienation as to realty and of absolute ownership as to personalty occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.[48] Future estates must be so limited that in every possible contingency they must terminate within the statutory period.[49]

91 S. W. 232. In prosecution for subornation of perjury, married woman testified that defendant procured her to testify falsely and her husband testified that he knew she was being urged to commit perjury and advised her not to do so, and believed she would do as he told her. Held, whether husband was an accomplice, or whether his testimony was corroborative of his wife's, was for the jury. People v. Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636.

39. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

40. Where the charge submitted to the jury was that defendant testified before the grand jury that he did not buy intoxicating liquors without the prescription of a physician and not for sacramental purposes, and the evidence showed his testimony to be that he never bought any whiskey at the place in question and bought none there on the day named, the variance was fatal. Ray v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 759, 90 S. W. 632. Indictment charged defendant with testifying falsely that a certain person did not play or bet at a game of cards with certain other designated persons at a certain time and place; the proof was that defendant testified that such person did not play at all; held, variance fatal. Stanley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 S. W. 829. No variance where indictment charged that defendant swore falsely that he did not see or recollect seeing certain persons playing cards on a certain Sunday at any place in the county, and proof showed that he was examined as to games at particular places in the county and also in the county generally. Hambright v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 36, 91 S. W. 232.

41. See 4 C. L. 975.

42. Goslin v. Commonwealth [Ky.] 90 S. W. 223.

43. Where only one witness swore that father did not consent to daughter's marriage, in prosecution for false statement in affidavit for license that the girl was "18 years old and there are no legal objections to our marriage," it was error to refuse to charge that such witness must be corroborated to sustain a conviction. Holt v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 838.

44. State v. Rutledge, 37 Wash. 523, 79 P. 1123.

45. Holt v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 S. W. 838.

46. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 699, 91 S. W. 225.

47. See 4 C. L. 975.

48. In re Perry, 48 Misc. 285, 96 N. Y. S. 879.

49. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. A limitation over, so conditioned that it may not take effect within the time prescribed by the rule, is void. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. If the contingent event can possibly happen beyond the limits of the rule, the interest conditioned on it is invalid, although such event will probably happen within the rule. Id. In the case of contingent remainders the uncertainty as to the time of vesting is

Since annuities are ordinarily releasable or assignable, a trust to pay them does not work a suspension of the power of alienation.[50]

An estate which could not be created by direct devise without suspending the power of alienation for more than the specified number of lives cannot be created through the intervention of a power,[51] but a power of appointment which cannot be exercised beyond the limits of the rule is not rendered bad by the fact that within its terms an appointment could be made which would be too remote.[52]

A power of sale does not avoid the statute where the proceeds remain subject to the operation of the trust.[53]

The validity of a trust to a foreign corporation, as regards perpetuities and accumulations, depends on the laws of the corporation's domicile.[54]

§ 2. *Computation of the period and remoteness of particular limitations.*[55]—If the terms of the void devise are clear, the language or part of the devise creating the perpetuity cannot be rejected and the devise sustained by mere construction,[56] and a void limitation cannot be held, under the cy pres rule of construction, to be good as to that part which keeps within the period of perpetuity, and void only as to the excess.[57] A suspension for a minority is a suspension for a statutory life.[58]

In states where the suspension cannot exceed two lives in being, a trust to pay income until the beneficiaries, numbering more than two, reach a certain age, is invalid if the intention is to create one period of suspension and one trust to continue until the youngest child reaches the specified age,[59] but if the intention is to

fatal unless it must cease, and the remainders become capable of classification as valid or invalid within the statutory period. Provisions beyond those for husband and daughter of testatrix held void under Laws 1896, c. 547, § 32. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. No interest under a will subject to condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. Will vesting realty and personalty in trustee during life of testator's son and daughter, and after their death to go to their children, the share of each male child to be paid to him when he reached the age of 25, and each female child when she reached the age of 21, held to create void trust. Id.

50. At common law annuities are a charge simply upon the estate or upon rents and profits and are alienable, and hence a declaration of trust in favor of a college is not rendered invalid by reason of the fact that it is upon condition that, after the death of the settler, the college will pay annuities to seven persons during their lives. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92.

51. Attemped continuation of trust after death of testatrix's husband and daughter for benefit of latter's husband, by power of appoinment of income, held invalid in that it suspends power of alienation for more than two lives in being, particularly where daughter's husband was not life in being at the time of the creation of the estate. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

52. Power which must be executed, if at all, by the children of the donee. Stone v. Forbes [Mass.] 75 N. E. 141. Gift in trust for benefit in equal shares of children living at testator's death, and the issue by representation of any deceased child, income to be paid to them until sons arrive at age of 30 years and daughters at age of 25 when principal of their respective shares is to be paid to them, a power of appointment being given to those dying under such age, held to vest share of each in him at testator's death, and hence gifts not too remote, though made in execution of power of appointment given to testator by his father. Id.

53. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

54. Laws 1897, p. 507, c. 417, § 2, forbidding the suspension of the absolute ownership of personalty for more than two lives in being at the date of the instrument containing the limitation, does not apply where a trust is created by a resident of the state to be executed in another state. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92.

55. See 4 C. L. 976.

56. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Testator bequeathed to his nephews and nieces the rents of certain realty to be paid to them yearly for 30 years, and in case any of them should die without an heir, his or her share to go to the living heirs. Subsequent clause provided that 30 years after his death he gave and bequeathed to such nephews and nieces, or their heirs, and if no heirs, to be divided equally among the surviving heirs, all said realty, which was to be sold and the proceeds equally divided. Held that the limitation of 30 years in the first clause could not be rejected and the devise be upheld as one in fee, but it was void. Id.

57. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804.

58. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

59. Since two older members may prede-

create separate and distinct trusts for each beneficiary, each to be measured by its own term, the rule is otherwise,[60] it being immaterial in the latter case that the property is to be held in solido and that there is no provision for its physical division into separate shares.[61]

The construction of deeds[62] and wills for the purpose of determining whether the language used therein creates estates void under the rule is treated elsewhere.[63] Applications of the rule to particular estates will be found in the note.[64]

cease the youngest before he attains that age, and suspension may therefore be for more than two lives in being. Central Trust Co. v. Egleston, 47 Misc. 475, 95 N. Y. S. 945.

60. If two constructions are possible, the above will be preferred so as to make will valid rather than void. Central Trust Co. v. Egleston, 47 Misc. 475, 95 N. Y. S. 945. Shares held separate and distinct, and trust did not violate Laws 1897, p. 507, c. 417, § 2, prohibiting suspension of power of alienation of personalty for more than two lives in being. Id. Devise of residuary estate in trust to pay income to husband for life, and then in trust for all children who attain the age of 25, the children of any child dying during testatrix's lifetime to take the share parent would have had had he survived testatrix and reached age of 25, held to create separate trust for each child, and remaincers being vested, trusts were valid. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Each trust is limited by life of husband and by life of child, assuming that provisions for accumulation of income for children's benefit is valid during their minority. Id. Trust to pay income to several annuitants, even if regarded as a strict statutory trust, and even if annuities should be regarded as nonassignable, held severable as to the interests of the respective annuitants so that there would be a suspension of the power of alienation of that part of the income accruing to each annuitant only during his life, which would not violate the rule. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Annuities held intended as a mere lien or charge on the income, and no strict statutory trust was created for the annuitants. Id.

61. Central Trust Co. v. Egleston, 47 Misc. 475, 95 N. Y. S. 945; Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

62. See Deeds of Conveyance, 5 C. L. 964.

63. See Wills, 4 C. L. 1863.

64. Provisions held valid: Devise on condition that devisee pays all taxes, keeps up repairs, and does not sell or incumber the property until she arrives at the age of 40 years, with remainder over in case of her death under 40, does not contravene Burns' Ann. St. 1901, § 3382, prohibiting the suspension of the absolute power of alienation for a longer period than during the existence of a life or lives in being at the creation of the estate. Matlock v. Lock [Ind. App.] 73 N. E. 171. A bequest of personalty in trust to be managed and controlled by the trustee until the beneficiary shall arrive at the age of 40 years, and then turned over to her without any restrictions, does not violate Burns' Ann. St. 1901, § 8133, prohibiting the suspension of the absolute ownership of personalty for a longer period than the termination of lives in being at the time of the execution of the instrument creating such ownership, or if a will, of lives in being at the death of the testator. Id. A testamentary trust to continue during the life of testator's widow and for twenty years thereafter. Robinson v. Bonaparte [Md.] 61 A. 212. Will gave estate to be equally divided between four persons. Subsequent clause directed that share of one of them should be invested by the executor for his benefit during life, and for his wife and issue after his death. Held that he did not take a life estate in the realty, since that construction would suspend power of alienation for life of devisee, his wife, and issue, and would render devise void under Laws 1896, p. 565, c. 547, § 32. Mee v. Gordon, 104 App. Div. 520, 93 N. Y. S. 675. Devise to wife and children, "to be equally divided and equally shared among them after the youngest child of them shall have attained the age of 21 years," the wife to have the rents and profits during his minority, held not to suspend power of alienation for more than two lives in being, the period of suspension terminating on the arrival of the youngest child at his majority or upon his death before that time. Jacoby v. Jacoby, 94 N. Y. S. 260. Provision that testator's brother should, within three months after being notified of testator's death, elect whether he would occupy a certain house for life, and in case he elected to do so he should be paid certain traveling expenses and an annuity, held valid, the time given for election not being an illegal suspension of the power of alienation, since such election must be exercised within the devisee's lifetime. In re Trotter's Will, 104 App. Div. 188, 93 N. Y. S. 404.

Provisions held void: Devise to the heirs at law of person in being is void, since they cannot be ascertained until his death and may be other than his children. A devise in trust for the life of the beneficiary with remainder to "her lawful heirs" forever held void, under the statute of 1871, in so far as the attempted disposition of the remainder was concerned. Gerard v. Ives [Conn.] 62 A. 607. "Thirty years after my death I give and devise" realty to named nephews and nieces, or their heirs, or if no heirs, to be divided equally among the surviving heirs. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Bequest of rents of realty to named nieces and nephews to be paid to them yearly for thirty years, and in case any of them should die without an heir, his or her share to go to the living heirs. Id. Will gave residuary estate in trust to pay annuity to widow for life, and remainder of income to children until death of two certain daughters of testator, when estate was to be divided. Held that provision for widow was not independent of the trust but created a non-

Charitable gifts.[65]—In most states charitable gifts are not within the rule.[66]

Accumulations of income.[67]—In New York the accumulation must be for the benefit of one or more minors in being at testator's death, and must terminate at or before the expiration of their minority.[68] A direction for an accumulation for a longer period has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority only.[69]

§ 3. *Operation and effect, complete and partial invalidity.*[70]—The fact that a provision is ineffective as a restraint upon the power of alienation of whatever estate the grant conveys does not necessarily render it inoperative to characterize the quality of the estate taken under the instrument.[71]

Invalid provisions may be rejected, without in any manner affecting valid ones,

assignable beneficial interest, and hence trust was void as suspending power of alienation for three lives. People's Trust Co. v. Flynn, 94 N. Y. S. 436. In New York the same general test applicable in determining whether there has been an unlawful suspension of power of alienation of realty is applicable in determining whether there has been an unlawful suspension of absolute ownership of personalty. Laws 1897, p. 507, c. 417, § 2, and Laws 1896, p. 565, c. 547, § 32, are to be construed together. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Where testator gave each of three daughters a certain sum per month for ten years, and provided that at end of that period residuary estate, consisting wholly of personalty, should be divided equally among them, the share of any of them dying without issue to go to the survivors, held that cross-remainders to survivors in case one died without issue were void. Id. If a postponement of division be for more than two lives, and until then the trustees are forbidden to sell a certain property, the restraint is invalid. In re Trotter's Will, 104 App. Div. 188. 93 N. Y. S. 404. Where deed conveyed property to grantee to have and hold same for benefit of himself and his children, held that a further provision that after the death of the grantee and his grandchildren the land should be the property of his grandchildren was void, under Ky. St. 1903, § 2360. Brumley v. Brumley [Ky.] 89 S. W. 182. A provision in a deed to "H and children" that "it is expressly agreed by the grantee in accepting this deed that she shall not sell, convey, or incumber, or in any manner dispose of the same, but to retain the same for the use of herself and her children forever," is inoperative both under Iowa Code, § 2901, and at common law. Hubbird v. Goin [C. C. A.] 137 F. 822.

65. See 4 C. L. 977. See, also, Charitable Gifts, 5 C. L. 566.

66. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Trusts for public charities. Devise of realty to vestrymen of church and their successors for the benefit of the church with power to sell, exchange, or dispose of the property, held valid. Biscoe v. Thweatt [Ark.] 86 S. W. 432. Fact that annuity to charitable corporation may continue perpetually does not affect its validity. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

67. See 4 C. L. 978.

68. Laws 1897, p. 507, c. 417, § 2. Central Trust Co. v. Egleston, 47 Misc. 475, 95 N. Y. S. 945. Where will provided for payment of income in semi-annual instalments to testator's brother, and on his death directed his share of the estate "and any income thereof remaining" in the trustee's hands to be paid to the brother's children, held that there was no unlawful accumulation, the income referred to being that accruing after the brother's death, and the provision for semi-annual payments to the life tenant not preventing the trustee from making payments oftener if he so desired. In re Keogh, 47 Misc. 37, 95 N. Y. S. 191. Where stock of corporation was given to trustees to pay income to beneficiary until a certain age, the shares "and any accumulations or earnings thereon" to then be paid to him absolutely, and corporation went out of business and sold its assets, held that the carrying of items representing the profits or increased price received at the sale, including the price paid for good will, betterments, etc., to the corpus of the estate did not violate Laws 1897, p. 508, c. 417, § 4, prohibiting the accumulation of income of personalty except during the minority of a beneficiary, they not being "income." In re Stevens, 46 Misc. 623, 95 N. Y. S. 297. Will did not direct any accumulation, words "with any accumulations or earnings thereon" not having that effect, but referring only to portions of earnings retained by company for betterments, etc. Id.

69. Laws 1897, p. 508, c. 417, § 4, subd. 2. Central Trust Co. v. Egleston, 47 Misc. 475, 95 N. Y. S. 945. Accumulation held unlawful in so far as it postponed enjoyment of part of income until sons reached ages of 25 and 30 years, but valid in so far as it directed accumulations during minority. Id. Directions for specific advances to older sons at ages of 25 and 30 years, and reservation of 2 per cent "keeping the estate in heart and to be invested," held to be part of invalid scheme for accumulation beyond minority and to be invalid. Id. Direction for accumulation for longer period than minority is void as to excess only. Laws 1896, c. 547, § 51, subd. 3. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

70. See 4 C. L. 978.

71. Grant to "H and children" with provision that grantee agreed that she should not sell or dispose of the same, but should retain it for the use of herself and her children forever, held to give her a life estate which she could dispose of with remainder in fee to her children. Hubbird v. Goin [C. C. A.] 137 F. 822.

where the two are in fact independent and are not for the carrying out of a common or general purpose,[72] but where they are so connected together as to constitute a general scheme, so that the presumed intention of the testator would be defeated by such a course, or if manifest injustice would result, the rule is otherwise.[73]

PERSONAL INJURIES; PERSONAL PROPERTY; PETITIONS, see latest topical index.

PETITORY ACTIONS.[74]

A petitory action is one in which the mere title to property is litigated and sought to be enforced, as distinguished from a possessory action.[75]

Plaintiff in order to recover must at least show a better title to the property claimed than the defendant in possession,[76] and must recover on the strength of his own title.[77] He has the onus of proof[78] and may be met by a plea of prescription.[79] He has no right in this action to call his vendor in warranty.[80]

PEWS; PHOTOGRAPHS; PHYSICIANS AND SURGEONS; PILOTS, see latest topical index.

PIPE LINES AND SUBWAYS.[81]

One to whom a natural gas company has agreed, in consideration of a right of way, to furnish gas as long as the pipe line is operated cannot enjoin the removal of the line.[82] A franchise to supply gas gives no such right in the location of its pipes that the imposition on the gas company of the cost of changing the same when necessitated by the institution of a municipal drainage system impairs vested rights or takes property without compensation.[83] Contractor of subway is not

72. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Rejection of void provisions held not to affect valid independent and unimportant provisions not entering into the general scheme of distribution. Id. Where invalid parts may be rejected without changing or destroying testator's general testamentary scheme. In re Trotter's Will, 104 App. Div. 188, 93 N. Y. S. 404. It being clear that primary objects of testatrix's bounty were her husband and children, held that void provisions whereby she attempted to continue trusts after lives of daughters could be disregarded without interfering with principal disposition. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Where will gave each of three daughters $100 per month for ten years, and provided that at end of that time residuary estate consisting wholly of personalty should be divided equally among them, the share of any one of them dying without issue to go to the survivors, held that invalid provision that only daughters living at end of ten year period should share in the distribution might be disregarded in order to effectuate testator's general intention. In re Perry, 48 Misc. 285, 96 N. Y. S. 879.

73. Where realty and personalty were of nearly equal value, and will showed intention to divide property equally among nieces and nephews, and devise of realty was invalid, held that bequest of personalty would also be held invalid. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Where a trust attempted to be created is an entire and complete scheme for the control and disposition of the residuary estate, and cannot be held valid in part and void in part without defeating in part the intention of the testator, and a portion thereof is void as a perpetuity, the trust will be held invalid as a whole and the fund distributed as intestate property. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. Bequest held dependent upon invalid trust and a part of same testamentary scheme. People's Trust Co. v. Flynn, 94 N. Y. S. 436.

74. This topic treats only of the Louisiana petitory action affecting the title to realty. Petitory suits in admiralty are treated in Admiralty, see 6 C. L. 35.

75. Cyc. Law Dict. 691. Suit by a judgment creditor to annul a judicial sale on the ground that it was made without appraisement and on the further ground of a fraudulent combination to prevent competition in bids, is petitory in character. Moresi v. Coleman [La.] 40 So. 168. Where plaintiff alleged that he was the owner of certain property and that he was in possession of the same and that defendant was trespassing thereon, and praying that he be quieted in his own ownership and possession held not a petitory action. Gilmore v. Schenck [La.] 39 So. 40.

76. Booksh v. New Iberia Sugar Co. [La.] 39 So. 545.

77, 78, 79. Dowdell v. Orphans' Home Soc., 114 La. 49, 38 So. 16.

80. Foote v. Pharr [La.] 38 So. 885.

81. See 4 C. L. 980.

82. Connersville Natural Gas Co. v. Moffett, 164 Ind. 585, 73 N. E. 894.

83. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 Law. Ed. 831.

bound to anticipate that a sewer inspector would walk on beams set to brace the tunnel.[84]

PIRACY; PLACE OF TRIAL; PLANK ROADS, see latest topical index.

PLEADING.

Scope of title.—This topic treats only of the general rules applicable to common-law and code pleading. For the sufficiency of pleadings in particular actions reference should be had to the appropriate topics. Matters particularly applicable to equity pleading,[85] the necessity of verifying pleadings and the sufficiency of the verification,[86] and all questions in regard to set-off and counterclaim,[87] are treated elsewhere.

§ 1. *Principles common to all pleadings. General rules.*[88]—Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense.[89]

While the codes have abolished forms of action,[90] yet, since their substance remains unchanged, good pleading demands that all averments material to equitable rights of action be present and appropriately well pleaded. Conversely, matters of equity should be omitted from the pleadings in a purely legal action,[91] and, so far as rights or procedure depend thereon under the codes, the parties will be held to the kind of action or defense they have pleaded.[92] Special statutory proceedings cannot be regarded as actions at law or suits in equity,[93] nor can they be annexed to such actions or suits.[94]

In code states the only proper pleadings are those designated by the code.[95]

84. Dooley v. Degnon-McLean Contracting Co., 45 Misc. 593, 91 N. Y. S. 30.

85. See Equity, 5 C. L. 1144. Many cases having to do with equity pleading are, however, valuable to the code pleader because of their analogy to pleadings under the codes.

86. See Verification, 4 C. L. 1816.

87. See Set-off and Counterclaim, 4 C. L. 1421.

88. See 4 C. L. 981. See, also, Equity, 5 C. L. 1144.

89. Commercial News Co. v. Beard, 116 Ill. App. 501; Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619.

90. See Equity, 5 C. L. 1144; Forms of Action, 5 C. L. 1517.

91. Equitable defenses may be made to legal actions. See post, § 3.

92. Cannot plead equity to avert jury trial and then take judgment on proof of legal cause of action. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

93. Proceedings to contest an election under Hurd's Rev. St. 1903, c. 46, § 116, are purely statutory and not to be regarded as a cause at law or in equity. Quartier v. Dawiat, 219 Ill. 326, 76 N. E. 371.

94. A proceeding to contest an election under the general local option law (Pol. Code 1895, § 1546) is not an action at law or a suit in equity, but a special statutory proceeding which cannot be annexed to an action at law or a suit in equity. Ogburn v. Elmore, 123 Ga. 677, 51 S. E. 641. Petition

Where there are no written pleadings it is the duty of the court to so frame the issues after hearing the evidence as to develop the whole case, and to present to the jury the real issues of fact in dispute.[96] While pleadings in justice court and the like are informal, and the same strictness is not required as in courts of record, yet, before a case can be properly tried, there must be something before the justice by which the conflicting claims of the parties can be determined.[97] Where an additional party is brought in by scire facias, the pleadings should be directed to the original declaration and not to the writ.[98]

Material facts should be shown by direct and issuable averment[99] and not be left to inference or pleaded by way of recital.[1] Facts, not conclusions, must be pleaded.[2] Statutes in many states allow matters to be alleged generally which it

held to set forth a suit in equity and not a statutory proceeding to contest an election under the general local option liquor law. Id.

95. Under N. Y. Code Civ. Proc. § 487, only pleading on the part of the defendant is either a demurrer or an answer or both. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284. Motions to strike out objectional matter, or to make definite and certain, etc., are not pleas to the jurisdiction or in abatement. Id. A paper endorsed "trial amendment" which is deficient in the allegations necessary to make it an amended or a supplemental pleading cannot be considered. Ray v. Pecos, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep 582, 88 S. W. 466.

96. Issues in action for breach of contract held sufficient to cover the whole matter in dispute. Coxe v. Singleton [N. C.] 51 S. E. 1019.

97. Longacre Colliery Co. v. Creel, 57 W. Va. 347, 50 S. E. 430. In action before justice in order to justify a recovery in favor of defendant there must be some account or claim filed by him upon which to base it. Id. If it appears that no pleadings or accounts of any kind were filed either in justice court or in circuit court on appeal, judgment will be reversed and case remanded for proper pleadings to be filed, and to be properly heard and determined. Id.

98. Lasman v. Harts, 112 Ill. App. 82.

99. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293. In action for negligence the specific act or omission relied on as constituting a breach of duty must be stated in the declaration. Declaration held insufficient. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673, afg. 110 Ill. App. 31. Mere allegation or conclusion of pleader that a legal duty existed is insufficient but must state facts showing its existence. Pittsburgh, etc., R. Co. v. Peck [Ind.] 76 N. E. 163. Violation of duty may be shown under general allegation of negligence, but such allegation is insufficient to show existence of the duty. Id.

1. Both at common law and under Burns' Ann. St. 1901, §§ 341, 342. Recital asserts nothing and hence cannot be met by denial. Malott v. Sample, 164 Ind. 645, 74 N. E. 245. Knowledge should be alleged in terms, and both actual and constructive knowledge may be proved under such an averment. Id. Allegation that "notwithstanding the fact that" defendant could have discovered defect by exercise of reasonable diligence it was not repaired, held insufficient. Id. In suit to quiet title, title, being a material and traversable fact, must be clearly and directly alleged with certainty to a common intent. Complaint held insufficient. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293. Allegation that "after being tendered its charges therefor by this plaintiff defendant wrongfully and unlawfully turned off the gas" from plaintiff's residence, held insufficient. Greenfield Gas Co. v. Trees [Ind.] 75 N. E. 2. Complaint for injury to servant held insufficient for failure to directly aver facts showing causal connection between negligence and injury. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. Complaint in action for injuries to servant by bursting of fly wheel held insufficient for failure to directly aver that wheel was defective, that fact being left to inference. Hay v. Bash [Ind. App.] 76 N. E. 644. Every matter of defense presented by an affidavit of defense must be set forth specifically, and with such detail as to show clearly and definitely its relation to plaintiff's claim, nothing being left to inference. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381.

2. Willard v. Zehr, 116 Ill. App. 496. If fraud is relied on it must be pleaded as a fact and the circumstances constituting it must be set out clearly and with particularity. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. Complaint held not to state sufficient facts to warrant conclusion of conspiracy on the part of the officers of defendant corporation. McGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. S. 591. Acts constituting fraud by directors of mining corporation held sufficiently set out. Glover v. Manila Gold Min. & Mill. Co. [S. D.] 104 N. W. 261. An allegation which would be a statement of fact if standing alone becomes a mere conclusion of law when preceded by the words "that by reason of the facts aforesaid." Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956. Plaintiff desiring to plead waiver by defendant of conditions of insurance policy must allege condition claimed to have been waived and facts and circumstances claimed to constitute such waiver. General allegation that particular condition has been waived is insufficient. Glazer v. Home Ins. Co., 96 N. Y. S. 1099. Averments of specific facts or circumstances from which the court may see that, if they are true, the fact was probably otherwise than the finding, are essential in a pleading for the purpose of overcoming the legal pre-

would otherwise be necessary to particularize,[3] but in such case the statutory form must be strictly followed.[4]

sumption that the determination of a question of fact by an executive officer to whom its decision is intrusted by the law is correct. Allegations that fact differs from presumption, or that the decision is wrong, without more, are futile. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80. Conclusions may be alleged as to a collateral matter. That an election was duly held. State v. Malheur County Ct. [Or.] 81 P. 368.

Averments held to be conclusions: That payment was involuntary. Lewis v. San Francisco [Cal. App.] 82 P. 1106. In action by foreign corporation affidavit of defense alleging that it cannot recover because it has not complied with laws of state where action is brought held insufficient on motion for judgment in failing to allege in what respect it has failed to so comply. Mobile Cotton Mills v. Smyrna Shirt & Hosiery Co. [Del.] 62 A. 146. That paragraph of will is void. Columbian University v. Taylor, 25 App. D. C. 124. In plea in abatement that defendant was a resident of another state, that, when served, he had been brought into the county under arrest, and that indictment against him had been "wrongfully, fraudulently," etc., procured. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. That it was the duty of defendant to furnish for the plaintiff reasonably safe tools, etc. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. That complainant's father owned certain property in fee simple at the time of his death, and that complainant is a tenant in common with his brothers. Mason v. Mason, 219 Ill. 609, 76 N. E. 692. That places where appellants carry on business are private property. Pagames v. Chicago, 111 Ill. App. 590. That it was defendant's duty to do certain things. Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619. General averment of fraud. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016. In action on fire policy that defendant negligently stood by and permitted building to be consumed. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. In action by assignee of note against maker, answer alleging that plaintiff was not real party in interest but failing to state facts showing that he was not, held insufficient. Brown v. Fisher [Ind. App.] 74 N. E. 632. That contract for transmission of telegram was to be construed according to the law of the place where it was sent. Howard v. Western Union Tel. Co., 27 Ky. L. R. 858, 86 S. W. 982. That defendant "became indebted" and executed a "mortgage." Cooper v. McKee [Ky.] 89 S. W. 203. That certain credits were all that a party was entitled to. Tom's Creek Coal Co. v. Sheene [Ky.] 90 S. W. 993. Denial in answer that plaintiffs had a lien made in connection with attempted denial that credits admitted by the petition were all to which notes sued on were entitled. Id. In petition for mandamus to compel warden to remove convicts from leased farm and place and keep them on farm owned by state, averments that board of control is not having timbered land opened as "rapidly as practicable" and that all the convicts can "easily and profitably be employed." State v. Henry [Miss.] 40 So. 152. That a contract was procured by undue influence. Barber Asphalt Pav. Co. v. Field, 188 Mo. 182, 86 S. W. 860. General averment of fraud. Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6. That acts of which plaintiff complains were "without right." Williams v. Mathewson [N. H.] 60 A. 687. Upon demurrer an allegation that the injury is irreparable is to be regarded as a mere expression of plaintiff's opinion. Id. As to duties of a city and city superintendent of buildings. McGuinness v. Allison Realty Co., 46 Misc. 8, 93 N. Y. S. 267. That defendant "refuses to carry out the terms of his agreement." Armstrong v. Heide, 94 N. Y. S. 434. "That plaintiff is not a bona fide holder in due course of said note." Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49. That a note "was wrongfully converted * * * and fraudulently delivered to said plaintiff without the knowledge and assent of these defendants, or either of them." Id. Defense of usury must set up usurious contract specifying its terms and the particular facts relied on to bring it within the statute. Allegation that note is usurious and void held insufficient. Id. That the estate of a deceased partner owns a half interest in certain bonds, which are shown to have in fact belonged to the partnership. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513. As to breach of contract. Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956. In action to recover money alleged to have been received from certain insurance companies by defendants as plaintiff's agents, allegation in answer that plaintiff, having assigned his claims against the companies, has no beneficial interest and is not the real party in interest. Voisin v. Mitchell, 96 N. Y. S. 386. That defendant is "indebted" to plaintiff in certain sums for rent, etc. Nealis v. Marks, 96 N. Y. S. 740. As to nonpayment of note and notice of protest. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381. That there was no constructive delivery of a deed, Newman v. Newman [Tex. Civ. App.] 86 S. W. 635. That property was subject to a lien. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432. That a tender discharged a certain lien. Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801. That money was received in trust for certain purposes. Francis v. Gisborn [Utah] 83 P. 571. That opening of road was without authority of law and without jurisdiction. Carlson v. Spokane County Com'rs, 38 Wash. 616, 80 P. 795. That board of equalization acted illegally and arbitrarily. Ricketts v. Crewdson, 13 Wyo. 284, 81 P. 1, 79 P. 1042. That plaintiff is a preferred stockholder in a certain corporation. Hackett v. Northern Pac. R. Co., 140 F. 717. Averment that plaintiff is a corporation held, when taken with other averments, to amount to averment that partnership association is a corporation under the laws of Michigan, and hence to be conclusion. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Allegations that complainant presented to commissioner of patents good and sufficient reasons for abandonment of application for patent,

The allegations should be definite and certain,[5] and direct rather than argumentative.[6] At law only the basic ultimate facts as distinguished from matters

which latter adjudged to be insufficient. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80. Mere use of words "fraudulent mismanagement," without averments of specific facts, in bill to dissolve insurance association on that ground held insufficient to render a demurrer an admission of such mismanagement. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. In suit to set aside probate proceedings mere allegations that acts of executor were "fraudulent" and that sales were "fraudulently" made, without allegations of facts showing fraud, held insufficient. Williamson v. Beardsley [C. C. A.] 137 F. 467.

Averments held not to be conclusions: That a person named died seised and possessed of certain lands. Good after verdict. Pace v. Crandall [Ark.] 86 S. W. 812. An averment that certain land had been for years used as a public alley is not a mere conclusion because not stating the manner of use. Harniss v. Bulpitt [Cal. App.] 81 P. 1022. Allegations of complaint in action on official bond of county auditor as to unlawful retention of funds. Workman v. State [Ind.] 73 N. E. 917. That deceased servant was a passenger. Baltimore, etc., R. Co. v. Clapp [Ind. App.] 74 N. E. 267. That defendant received goods as a common carrier for hire. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908. "That there never was any valuable or other legal consideration" for a bond and mortgage. First Nat. Bank v. Robinson, 105 App. Div. 193, 94 N. Y. S. 767. A denial "that said note was ever duly negotiated or discounted for value." Rogers v. Morton. 46 Misc. 494, 95 N. Y. S. 49. Of notice to owner of furnishing materials to contractor in action to foreclose mechanic's lien. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

3. Thus it is in many states permissible to allege the performance of conditions in a contract generally (see Contracts, 5 C. L. 664), or to allege that a judgment has been duly rendered (see Judgments, 6 C. L. 214), or a statute duly passed (see Statutes, 4 C. L. 1522).

4. Where by statute an averment that a judgment was "duly given" dispenses with averments of jurisdiction, an averment merely that "it was adjudged" is insufficient. Mears v. Shaw [Mont.] 81 P. 338.

5. An unnecessary averment should not be required to be made more definite and certain. Choctaw, etc., R. Co. v. Rolfe [Ark.] 88 S. W. 870. An assignment of a chose in action, even without consideration, is not presumptively void as to a creditor who becomes such nearly four years thereafter and such presumption is not supplied by vague and general allegations, but circumstances from which fraud may be reasonably inferred must be proved or petition will be obnoxious to a demurrer. Weckerly v. Taylor [Neb.] 103 N. W. 1065. It is not an abuse of discretion to deny a motion to make definite and certain by setting forth matters which are of public record. Tax rolls, etc. City of Port Townsend v. Trumbull [Wash.] 82 P. 715.

Allegations held sufficiently definite: An averment of the month in which a demand for cars was made, where the station at which demand was made is small. Choctaw, etc., R. Co. v. Rolfe [Ark.] 88 S. W. 870. Averments as to alleged defect in switch lock. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908. Complaint in action by employe for personal injuries. Fletcher Bros. Co. v. Hyde [Ind. App.] 75 N. E. 9. Complaint held not so indefinite and uncertain as to require it to be amended where notice of motion did not specify any particular clauses, but asked generally that plaintiff be required to show clearly what he intended to claim in relation to the performance of the contract sued on or its modifications as alleged, he being entitled to claim at the trial any legal inference arising from the facts pleaded. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 353, 9 N. Y. S. 826. On motion to make more definite and certain, held that it sufficiently appeared on face of complaint that agreement sued on was verbal. Creech v. Long [S. C.] 51 S. E. 614. Complaint on building contract held to sufficiently set out the contract as against a motion to make more definite. Ekstrand v. Barth [Wash.] 83 P. 305. An averment in a complaint that defendant converted certain goods "the property of plaintiff then in" a city and state named will be deemed to refer to the location of the goods, not that of plaintiff. Phillipos v. Mihran, 38 Wash. 402, 80 P. 527. Petition claiming damages for death of railroad employe alleging the time, place, and circumstances under which it occurred, and that it was the result of the negligence of defendant's officers, agents, and employes, held not subject to special demurrer for failure to give their names, that being a matter which it was easier for defendant to discover than plaintiff. Pierce v. Seaboard Air Line R. Co. [Ga.] 50 S. E. 468.

Allegations held not sufficiently definite: Allegations as to contract between plaintiff and defendant's testator, whereby former was to have half of latter's estate in consideration of services rendered, held too vague and indefinite to withstand a demurrer on the ground that it fails to set forth the terms of the contract. Cooper v. Claxton [Ga.] 50 S. E. 399. By a timely special demurrer defendant is entitled to the benefit of an itemized statement of damages claimed by plaintiff in a lump sum, when it appears from plaintiff's allegations that such sum is made up of distinct and separate items. McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34. In an action founded upon negligence mere general averments of negligence are sufficient as against a general demurrer, but not as against a special demurrer on the ground that such allegations are too general. Hidgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974. Specification of particulars cannot be avoided by allegation that plaintiff has been unable to ascertain particular acts causing the injury, and that they are more peculiarly within defendant's knowledge. Id. General averments cannot be aided by doctrine of res ipsa loquitur,

of evidence should be stated,[7] but this rule is not applied with the same degree of strictness in equity,[8] and allegations of inducement are permissible when it does not appear that the opposite party is injured thereby.[9]

Negatives pregnant,[10] and irrelevant,[11] immaterial,[12] redundant,[13] obscene,[14]

since that maxim cannot be invoked to aid a defective pleading. Id. Complaint in action on contract of employment held not to allege performance with sufficient definiteness, or to show damages with legal certainty. Golucke v. Lowndes County, 123 Ga. 412, 51 S. E. 406. Petition in action for personal injuries held not to sufficiently specify acts of negligence relied on as against a motion to require a more specific statement. Sommers v. St. Louis Transit Co., 108 Mo. App. 319, 83 S. W. 268. A complaint for injury to chattels by flooding land should on motion be made more definite by describing the chattels damaged and the nature and extent of the damage. Berg v. Humptulips Boom & River Imp. Co., 38 Wash. 342, 80 P. 528.

6. Averments as to conveyance of property in fee, free of all incumbrances, held argumentative. Wright v. Craig, 116 Ill. App. 493.

7. Western Traveler's Acc. Ass'n v. Munson [Neb.] 103 N. W. 688; Alexander v. Du Bose [S. C.] 52 S. E. 786. Evidence of facts averred need not be pleaded, but enough of the facts themselves relied upon as sustaining the cause of action or defense must be alleged to enable the court to determine their sufficiency. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. In action for injuries to servant alleged to have resulted from failure to furnish safe place to work, plaintiff need not allege that master knew or ought to have known that it was unsafe. Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142. Declaration in action for injuries need not describe injury in all its seriousness but need only show the injury received. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209. A party is not obliged to set out in his pleadings the evidence on which he relies. Failure to allege that contract sued on was in writing raises no presumption that it was in parol. Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S. E. 725. Only the facts constituting the gist of the cause of action need be stated, it not being necessary to plead circumstances merely tending to prove the facts alleged. Declaration in action against carrier for injuries to passenger held to sufficiently specify particulars of carrier's negligence. Philadelphia, etc., R. Co. v. Allen [Md.] 62 A. 245.

8. McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. S. 708. More latitude is allowed in stating the facts and circumstances upon which plaintiff depends for the relief sought, particularly where fraud is alleged. Alexander v. Du Bose [S. C.] 52 S. E. 786. Not reversible error to refuse to strike out matters which are directly or remotely relevant to the matter sought to be established. Held no error in refusing to strike allegations in complaint in action to set aside deed as fraudulent. Id.

9. Certain paragraphs of the complaint alleging matters of inducement held improperly stricken. McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. S. 708.

10. A denial of the allegations of the complaint "as alleged" as a negative pregnant is bad, and hence plaintiff is entitled to a judgment on the ground that the answer is frivolous. Hutchinson v. Bien, 104 App. Div. 214, 93 N. Y. S. 216, afg. 93 N. Y. S. 189.

11. An irrelevant allegation is one having no substantial relation to the controversy between the parties to the suit and which cannot affect the decision of the court because having no bearing upon the subject-matter of the controversy. Noval v. Hang, 48 Misc. 198, 96 N. Y. S. 708. The test is whether, if the allegations were permitted to remain, evidence in support of them would be admissible on the trial. Id. In action for criminal conversation, allegations in answer as to plaintiff's motive in bringing the suit held irrelevant and properly stricken. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. S. 800. In action by assignee of part of claim against the debtor and an assignee of another part of the claim and the assignor who owned the remainder, held that allegations of the complaint that assignor had assigned part of claim to third person, and himself owned the remainder, and that he and such third person declined to join as plaintiffs, stated no cause of action against assignor and such person and debtor was entitled to have them stricken out as irrelevant. Chase v. Deering, 104 App. Div. 192, 93 N. Y. S. 434. In action for divorce, allegations in answer of cruel and inhuman treatment and nonsupport, constituting a counterclaim under Code Civ. Proc. § 1770, will not be stricken out as irrelevant. Mason v. Mason, 46 Misc. 361, 94 N. Y. S. 868. An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action. In action for personal injuries, allegations stating reasons why defendant was indifferent and careless, as that it carried employers' liability insurance, are irrelevant. Gadsden v. Catawba Water Power Co. [S. C.] 51 S. E. 121. Allegations that "injuries were frequently attending employes" in defendant's service held not irrelevant. Is matter in aggravation of damages, of which defendant cannot complain. Id. Allegations in action to set aside fraudulent deed held irrelevant. Alexander v. Du Bose [S. C.] 52 S. E. 786.

12. Immaterial allegations will be disregarded. Allegations of fraud in action to recover overpayments made to agent. Yonkerman v. Fuller's Adv. Ag., 135 F. 613. In suit by materialman on contractor's bond running to owner, where complaint stated direct and primary cause of action in favor of plaintiff, held that further allegations attempting to set up cause of action by assignment of bond from owner could be ignored if insufficient. Ochs v. Carnahan Co. [Ind. App.] 76 N. E. 788. No issue can be raised on immaterial allegations. In action to recover for goods sold to receiver, allegations that though defendant had repeatedly promised to pay plaintiff he had not done

and scandalous allegations should be avoided,[15] and sham[16] and frivolous pleadings should not be interposed.[17] Surplusage will be disregarded or stricken on motion.[18]

so, and that sum sued for was due and no part thereof had been paid, and that plaintiff had been duly granted leave to sue defendant, held immaterial so that denial thereof raised no issue. Hutchinson v. Bien, 93 N. Y. S. 189, afd. 104 App. Div. 214, 93 N. Y. S. 216. An immaterial averment which may be separated from the principal fact without prejudice to the substantive cause of action requires no proof. As to venue in transitory action. American Mfg. Co. v. Morgan Smith, 25 Pa. Super. Ct. 176.

13. In suit on contract between defendant and plaintiff's predecessor, allegations as to various steps whereby plaintiff succeeded to rights of his predecessor held not subject to be stricken for redundancy. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 353, 91 N. Y. S. 826. Motion to strike out reply as redundant and irrelevant held properly denied where matter was not immaterial to the issue, and only objection was to its reiteration, and it was not shown how defendant would be prejudiced by allowing it to remain. Id., 100 App. Div. 349, 91 N. Y. S. 828. A denial in an answer filed in the district court on appeal from the justice court that the oral contract alleged by the plaintiff was made, together with a statement that a contract was made at the time alleged differing substantially from the one set up by the plaintiff, is not subject to a motion to strike on account of changing the issues from a general denial, since allegation that a different contract was made is a mere matter of evidence tending to prove that the contract declared on was not made. Such allegations may be superfluous and redundant, but do not change the issues. McGinnis v. Johnson Co. [Neb.] 104 N. W. 869. Answer in action for divorce held not to be redundant. Mason v. Mason, 46 Misc. 361, 94 N. Y. S. 868. In action for criminal conversation, allegation in answer that defendant refused to be influenced by plaintiff in establishing intimate relations with the latter's wife held redundant, since that fact was provable under the general denial. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. S. 800.

14. While it is unnecessary and not permissible to insert in a complaint either a writing of great length or matter of any kind which because of its extreme obscenity would pollute the public records, it is always essential to allege the reason justifying its omission, and in addition to describe it so fully as to identify it. Complaint against physician held insufficient to justify board of medical supervisors in revoking his license. Czarra v. Board of Medical Supervisors, 24 App. D. C. 251.

15. Facts alleged in the answer which constitute a defense may not be stricken out as scandalous. In action for criminal conversation, allegation in answer that plaintiff introduced his wife to defendant, and allegations tending to show that he aided and connived at bringing about the relations between them. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. S. 800. Facts pleaded as a complete defense, which would be demurrable as constituting only a partial defense, or as being at most in mitigation of damages, may be so stricken. This on the theory that the party aggrieved thereby should not be required to admit the truth of such allegations by demurring thereto. Id. Allegations of complaint, in action for damages for deprivation of civil rights, charging defendant and others with commission of various crimes, held scandalous. Wadleigh v. Newhall, 136 F. 941.

16. A sham answer is one that is false and untrue. "Sham" means "false." State v. Webber [Minn.] 105 N. W. 490. It may be stricken out, even though interposed in good faith and in the belief that it was true, in all cases where its falsity is clearly and unquestionably disclosed. Will not be done where a fair doubt exists as to its truth or falsity. Id. In proceedings to determine the right to a public office, answer alleging that relator was not a citizen held properly stricken. Id. A denial in a verified answer which raises an issue as to any of the material allegations of the complaint cannot be stricken out as sham. Issue can only be disposed of by a trial. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. S. 718. Cannot strike out as sham denials of material portions of the complaint in an action at law whereby the general issue is raised, whether denials are absolute, or upon information and belief, or upon an allegation that defendant has not knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of the complaint. Schlesinger v. McDonald, 94 N. Y. S. 721. Verified general denial cannot be stricken as sham, though shown by affidavits to be false. Id. A counterclaim cannot be stricken out as sham, particularly where there is nothing before the court authorizing it to determine whether the allegations thereof are true or false. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. S. 718. Motion to strike answer as sham held properly overruled where it was so framed as to raise important issue of fact and disclosed a substantial ground of defense. Whitaker v. Jenkins [N. C.] 51 S. E. 104. Allegations which are false and sham to the knowledge of the pleader and are interposed merely for the purpose of defeating jurisdiction of federal court will not be allowed to have that effect. Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650.

17. A frivolous answer is one from which it is apparent without argument that it presents nothing for adjudication. Mills v. Territory [N. M.] 81 P. 447. One that does not, in view of the facts pleaded, present a defense to the action. In proceedings to determine the right to a public office, answer alleging that relator was not a citizen held not frivolous. State v. Webber [Minn.] 105 N. W. 490. In action against corporation for sequestration of its property and appointment of a receiver, answer alleging that defendant has no knowledge or information sufficient to form a belief as to the entry of judgment against it, and the issuance and return of an execution unsatisfied, held frivolous, as judgment and execution were matters of public record, and facts in regard to them were peculiarly within defendant's

As a general rule it is not permissible to plead in the alternative,[19] though in some states a party may state all the facts out of which the controversy arises and pray in the alternative for relief.[20]

Allegations of citizenship necessary to confer jurisdiction should be exact.[21] The parties to an action should be named with accuracy and particularity, but when once named may thereafter be referred to as plaintiff and defendant.[22]

A declaration must aver a time when every material traversable fact alleged therein transpired.[23] By statute in some states, however, when time is not material, it need not be stated, and, if stated, it need not be proved.[24]

knowledge, and judgment granted on answer as frivolous. Morgan & Co. v. Quo Vadis Amusement Co., 45 Misc. 130, 91 N. Y. S. 882. Separate defense that dissolution proceedings had been begun, which had not yet been completed, held ineffective, because such fact would not prevent irreparable injury to plaintiff. Id.

18. Where petition, claiming damages for negligent killing of railroad employe, taken as a whole show that deceased was blameless, an allegation in a separate paragraph that he was "free from fault," even if a mere conclusion, is not inappropriate and furnishes no reason for striking that paragraph or dismissing the whole case. Pierce v. Seaboard Air Line R. Co. [Ga.] 50 S. E. 468. In action for injuries to servant, where declaration charges that master negligently permitted place where plaintiff was working to become obscured and obstructed by steam and smoke, further allegation that smoke emanated from a steamer through the negligence of another company held surplusage. Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142. Recitals as to another sale by defendants to plaintiffs in bill by corporation alleging fraudulent sale to it by promoters held not to be surplusage. Old Dominion Copper Min. & S. Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653. In an action for personal injuries a paragraph of the complaint alleging the service of the notice of injury required by the employers' liability act may be eliminated as surplusage where the complaint states no cause of action under that act but only one at common law. Kleps v. Bristol Mfg. Co., 107 App. Div. 488, 95 N. Y. S. 337. If the complaint states facts constituting a cause of action upon a contract, which is sustained by proof, the fact that it also contains allegations of a tort does not preclude a recovery, but they will be regarded as surplusage. Action held one for breach of warranty and not one in tort. Booth v. Englert, 105 App. Div. 284, 94 N. Y. S. 700. In action for libel, innuendo pleaded in fifth paragraph of complaint held unnecessary and to be regarded as surplusage, and not to reduce complaint from a general one on the entire defamatory matter alleged to a particular complaint on the charge of larceny and murder only. Nunnally v. Press Pub. Co., 110 App. Div. 10, 96 N. Y. S. 1042. Possession under a contract with defendant being alleged, averments as to the considerations leading to the contract and the manner in which possession was acquired are properly stricken as surplusage. Action of claim and delivery. Casto v. Murray [Or.] 81 P. 883. Allegations, in action for breach of contract to erect dam, as to former decisions for purpose of showing that question of defendant's liability was res judicata stricken out as surplusage. Montgomery Water Power Co. v. Chapman, 132 F. 138.

19. As a general rule to plead in the alternative vitiates the pleading. Complaint in action for personal injuries held objectional on this ground. Pittsburgh, etc., R. Co. v. Peck [Ind.] 76 N. E. 163.

20. A petition asking relief in the alternative on the same facts does not state two causes of action. Judgment prayed for title of land or for recovery of purchase money and value of improvements. Watkins v. Collins [Tex. Civ. App.] 13 Tex. Ct. Rep. 40, 87 S. W. 368.

21. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

22. Poling & Co. v. Moore [W. Va.] 52 S. E. 99. There can be no judgment upon a declaration in which no one is named as defendant, and in such case the action should be dismissed in the absence of an amendment. Cannot adjudicate the rights of the parties and dismiss action. Id.

NOTE. Averments as to capacity in which a party sues or is sued: In the title of the complaint defendant is named only in his individual capacity, but in the complaint itself a cause of action is stated against him in his representative capacity. Upon a demurrer that the complaint does not state a cause of action, held that the demurrer should be sustained. Leonard v. Pierce, 182 N. Y. 431, 75 N. E. 313.

Courts have frequently held that the title and pleadings may be considered together to determine the capacity in which a party sues or is sued. Stillwell v. Carpenter, 62 N. Y. 639 (in full in 2 Abb. N. C. [N. Y.] 238); Jennings v. Wright, 54 Ga. 537; Rich v. Sowles, 64 Vt. 408; Beers v. Shannon, 73 N. Y. 292. Thus where a party's name appears in the title followed by words descriptio personae, and the complaint clearly states a cause of action against or for him as an individual, the affix to his name in the title is treated as surplusage. Stillwell v. Carpenter, 62 N. Y. 639; Litchfield v. Flint, 104 N. Y. 543, 550. And when under a similar title the complaint states a cause of action against the party in a representative capacity, the action is against him in that capacity. Beers v. Shannon, 73 N. Y. 292; Knox v. Met. El. R. Co., 58 Hun [N. Y.] 517, afd. 128 N. Y. 625. In the principal case a majority of the court refused to take a step further and disregard an entire omission of the officio designata in the title. They rely upon the case of First Nat. Bank v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601. In that

An averment of venue is immaterial in a transitory action and need not be proved.[25] Facts justifying the venue need not be alleged.[26]

Facts judicially noticed,[27] legal conclusions,[28] matters which need not be proven in order to make out a case,[29] and duties imposed by law, need not be alleged,[30] and rights under treaties need not be claimed in terms.[31] A party is not ordinarily required to anticipate matter in avoidance of his allegations,[32] though he may do so subject to liability to have his pleading attacked by motion or demurrer.[33] He should, however, negative exceptions in penal statutes.[34] It is sufficient to allege a failure of duty imposed by a statute substantially in the language of such statute.[35]

Interpretation and construction in general.[36]—The theory of a pleading is to be determined by its principal and leading allegations, and from its general scope

case, however, the pleadings did not supply the defect in the title. To be thoroughly consistent with the majority of decisions and the liberal rules of pleading allowed by the Codes it seems that the court might well have either disregarded the omission or allowed it to be corrected by amendment.—4 Mich. L. R. 242.

23. Otherwise is subject to special demurrer on that ground. City Council of Augusta v. Marks [Ga.] 52 S. E. 539. Declaration in action for damages against city for building sewer and maintaining dumping station, constituting nuisance, held open to special demurrer for failure to allege when sewer was constructed and how long nuisance had been maintained. Id.

24. Code § 3613. Plaintiff, in action on benefit certificate, held not concluded by allegations as to time when deceased became a member of the association, since time was not a material allegation in the petition and became material only when defendant pleaded forfeiture for nonpayment of assessments and for false representations in health certificate, which allegations were denied. Arrison v. Supreme Council of Mystic Toilers [Iowa] 105 N. W. 580.

25. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

26. Tennessee Coal, Iron & R. Co. v. Bridges [Ala.] 39 So. 902.

27. French v. State Senate, 146 Cal. 604, 80 P. 1031.

28. In action for negligence it need not be specifically alleged that it was defendant's duty to keep switch closed and locked. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990.

29. The omission of allegations which need not be proved in order to make out a case does not render a declaration demurrable. French v. Lawrence [Mass.] 76 N. E. 730. In action to recover for services as a public officer allegations as to city having illegally and unjustifiably prevented plaintiff from performing his duties should be treated as surplusage, and could not be construed as averments that he had been suspended or removed, or that tender of services was made after suspension or removal. Removal is matter of defense to be pleaded in answer if relied on. Id.

30. In an action for negligence a duty implied by law need not be alleged in terms. Wells v. Gallagher [Ala.] 39 So. 747.

31. Treaties being a part of the law of every state. Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.

32. As to necessity of alleging absence of contributory negligence on the part of plaintiff, see Negligence, 6 C. L. 748. In action on building contractors' bond the petition need not allege that delay was not due to alterations and additions made as provided for in the contract, that being a matter of defense which should be set up by plea. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638. Where insurance policy sued on is set out in haec verba, general allegation of performance of all conditions precedent, and that loss did not happen by reason of any of the conditions provided against in the policy is sufficient, and it is not necessary to negative all conditions which, if existent, will defeat a recovery. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302. Payment is an affirmative defense which must be alleged in the answer and need not be negatived by an allegation in the complaint. Action to foreclose mechanic's lien. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719. Need not aver that he has not been guilty of contributory negligence. Newport News Pub. Co. v. Beaumeister [Va.] 52 S. E. 627. Where plea sets up matter which would be a good defense if sustained by competent written evidence, and it does not appear from the plea itself that defendant relies for its establishment on parol evidence, it should not be stricken on general demurrer. Union Cent. Life Ins. Co. v. Wynne, 123 Ga. 470, 51 S. E. 389. Where answer sets up illegality of note sued on because made in contravention of a statute, if plaintiff desires to take advantage of exceptions in amendatory statute he must plead them by way of reply. Lutz v. Pender Nat. Bank [Neb.] 102 N. W. 673.

33. Waiver of notice of accident required by insurance policy and excuse for not having given it. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 103 N. W. 695, rvg. 101 N. W. 341.

34. In an action for damages for violation of a statute, facts showing that the case does not fall within the exceptions therein must be alleged. Complaint held sufficient. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21.

35. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21.

36. See 4 C. L. 988.

and tenor.[37] Collateral averments, made for the purpose of obtaining attachment and the like, should not be considered in determining the nature of the cause of action.[38] A pleading should be construed as a whole.[39] General averments are limited and controlled by specific allegations upon the same subject.[40] The presumption of the continuance of a state of facts once shown to exist applies equally to facts alleged in a pleading.[41]

At common law everything in the pleading was taken most strongly against the pleader, and this rule still prevails in some states.[42] Under the code, however, pleadings are generally to be liberally construed with a view to substantial justice between the parties,[43] and every reasonable intendment and presumption will be

37. Must stand or fall by that theory alone, regardless of its sufficiency upon some other hypothesis. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. Theory of count is to be determined from its prominent and leading allegation. State v. Petersen [Ind. App.] 75 N. E. 602. Allegations of a promise to pay for services by will or otherwise, and that decedent had made provision for payment by a deposit of bonds, do not show an election to proceed as if on a performance by such act of deposit. Cooper v. Brooklyn Trust Co., 87 App. Div. 610, 84 N. Y. S. 88.

38. Simple action on account cannot be regarded as one to recover property so that trustee in bankruptcy might intervene. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408.

39. Davies v. William W. Bierce, 114 La. 663, 38 So. 488. The whole complaint should be construed together for the purpose of determining whether causes of action are improperly joined (State v. Knife Falls Boom Corp. [Minn.] 104 N. W. 817), or whether in any count thereof a cause of action is stated (McClung v. Cullison [Okl.] 82 P. 499).

40. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650. As to abandonment of application for patent. Hayes-Young Tie Plate Co. v. St. Louis Transit Co. [C. C. A.] 137 F. 80.

41. Property insured presumed to be on certain premises at time of loss. Thomasson v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 109, 89 S. W. 564.

42. On demurrer pleading will be construed most strongly against the pleader. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. Should always be construed most strongly against the pleader. Allegation in bill to construe a will that L. and S., late partners as L. & S., obtained a certain judgment, held to mean that it was obtained in firm name, and not by them jointly. Linn v. Downing, 216 Ill. 64, 74 N. E. 729. All intendments are to be taken most strongly against pleader. American Ins. Co. v. France, 111 Ill. App. 382. Applies to bill of exceptions, which is pleading of party alleging exception. Peoria Star Co. v. Lambert, 115 Ill. App. 319; Lumbard v. Holdiman, 115 Ill. App. 458. Where doubts arise upon pleadings, they are construed most strongly against the pleader. Shenk v. Stahl [Ind. App.] 74 N. E. 538. Is to be construed most strongly against the pleader when its language is uncertain and ambiguous, rendering its theory obscure (State v. Petersen [Ind. App.] 75 N. E. 602); but if, upon giving the language a fair construction and from the nature of the facts averred, the complaint states facts sufficient to constitute a cause of action, it will not be held bad for want of facts, because so constructed as to render it difficult to determine the theory intended by the pleader (Id.). Upon demurrer every allegation is to be taken most strongly against person making it. Dick v. McPherson [N. J. Law] 62 A. 383. Declaration in action for breach of covenant in deed to defend title against grantor and persons claiming under him held not to state cause of action where it failed to allege facts showing that eviction was by the persons named in such covenant. Id.

43. Code, § 260. Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. Upon demurrer a bill should not be dismissed if by any reasonable construction of the language of its averments a case is stated entitling plaintiff to the relief sought. Shipley v. Fink [Md.] 62 A. 360. In action for specific performance of agreement to convey land, held allegation that defendant "offered to give" plaintiff the land on certain conditions would be construed as allegation of agreement "to convey the land," under which proof could be offered of such an agreement. Id. Pleadings are to be liberally construed. Casey v. American Bridge Co. [Minn.] 103 N. W. 623. In order that a complaint may be held bad on demurrer it must be wholly insufficient and it will be held sufficient if to any extent, on any reasonable theory, it presents facts sufficient to justify a recovery, however inartificially the facts may be stated. Id. Fact that negligence relied on, and the nature of plaintiff's injuries are pleaded generally does not render complaint bad on demurrer. Id. If the complaint presents two apparent theories of plaintiff's cause of action, one sufficiently and the other insufficiently pleaded, that theory will be adopted which will sustain the action rather than the one which would defeat it. Id. On demurrer a pleading should be given a broad and liberal construction, and will be held sufficient if by any fair and reasonable construction a cause of action may be spelled out of the allegations, however inartificially they may be stated. Complaint in action for damages for breach of contract held sufficient. Warren Bros. Co. v. King [Minn.] 104 N. W. 816. If open to construction, that reasonable meaning which will support it should be adopted, rather than one which will defeat it. Hart v. Neillsville [Wis.] 104 N. W. 699. On demurrer to complaint in action by a stockholder against a foreign corporation it will

indulged in their favor;[44] but the court cannot draw inferences or deductions from general allegations in order to supply material facts.[45] Both at common law and under the codes, pleadings are liberally construed when first attacked at the trial,[46] or after verdict and judgment.[47] Stipulations as to the facts in a case may be looked to in aid of a pleading[48] which sets them out or relies upon them.[49]

Profert and oyer.—The fact that a declaration makes profert does not alone make the writing a part thereof without a demand of oyer.[50] There can be neither profert nor oyer of an instrument not under seal,[51] and though profert be made, it is unavailing unless the declaration professes to declare upon a sealed instrument.[52] Formal profert of the contract sued upon is not necessary, even when it is under

be presumed for the purpose of sustaining the complaint, that plaintiff is a resident of the state and therefore competent to bring the action. MacGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. S. 591.

44. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. In action by taxpayer against county board of supervisors to recover items in their bills for services, mileage and disbursements alleged to have been collusively and illegally audited by the board, where schedules attached to complaint specifically alleged in detail the illegality and fraudulent character of the claims allowed, held not demurrable for failure to allege that defendants auditing the claims knew that they were in excess of the fees allowed by law, that being the fair import of the word "collusive." Wallace v. Jones, 182 N. Y. 37, 74 N. E. 576. The language of the pleader will be given a reasonable intendment. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. In case of one of two causes of action may be either in contract or in tort, that construction will be adopted which makes the complaint or declaration as a whole maintainable, and the different counts consonant with each other. Count for breach of warranty held to be ex delicto. Kimber v. Young [C. C. A.] 137 F. 744. On general demurrer every intendment is in favor of the pleader. St. Louis S. W. R. Co. v. Rollins [Tex. Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099.

45. South Bend Chilled Plow Co. v. Cissne [Ind. App.] 74 N. E. 282. In ascertaining the sufficiency of a pleading the court is not warranted in resorting to inferences and deductions, nor can it supply material matter by intendment. Plaintiff must state all the facts essential to a cause of action. Malott v. Sample, 164 Ind. 645, 74 N. E. 245.

46. When a pleading is assailed by motion or demurrer, it is more strictly construed against the pleader than when it is attacked at the trial. Keene v. Eldriedge [Or.] 82 P. 803. The rule that the complaint should be most liberally construed when first attacked by objection to the introduction of evidence applies only where such objection has been overruled, the action tried upon its merits, and the imperfections of the pleading cured by proper proof. Bon Homme County v. McLouth [S. D.] 104 N. W. 256. The same intendments will be indulged in favor of a complaint on demurrer at the trial as in case of attack after verdict. Brooks v. McCabe [Wash.] 80 P. 1004.

47. Where a petition is first attacked on appeal for failure to state a cause of action, its allegations will receive a liberal construction, with a view of giving effect to the pleader's purpose, and, if possible, sustaining the petition. Petition in action for injuries resulting from ejectment of trespasser from train held sufficient. Chicago, etc., R. Co. v. Kerr [Neb.] 104 N. W. 49. It will also be viewed in the light of the entire record, and where, from the nature of the answer and the evidence, it appears that both parties have placed the same construction thereon, the court will not ignore such construction, even though the petition, standing alone, might not admit of it. Id. After verdict and judgment pleadings not previously attacked will be liberally construed for the purpose of upholding the result reached by the court and jury. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 103 N. W. 695, rvg. 101 N. W. 341. Allegation seeking to excuse failure to give notice of accident required by insurance policy held not inconsistent with allegation of notice acquired by company's vice-president. Id. After verdict all intendments and presumptions are in favor of the pleading. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619. In determining whether original declaration states cause of action for purpose of deciding whether that stated by amended one is barred. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673, afg. 110 Ill. App. 31. All reasonable presumptions. Smith v. Smith [Ind. App.] 74 N. E. 1008. Will be given benefit of every reasonable intendment and doubt, even to extent of supplying omitted facts resulting as a natural sequence from the facts averred. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13.

48. Held that stipulation that certain copy of a statute of another state should be accepted as such statute, and a certain decision be accepted as the law of such state upon all points therein, would be given effect in aid of a demurrer by considering it as if it had been written into the complaint. Hall v. Western Union Tel. Co. [N. C.] 52 S. E. 50.

49. A stipulation as to the facts in a case cannot avail to make good a plea which does not set out or rely upon such facts. Gaston v. Modern Woodmen of America, 116 Ill. App. 291.

50, 51, 52. Riley v. Yost [W. Va.] 52 S. E. 40.

seal, if a copy thereof is annexed to the declaration and referred to in the body of the pleading as so annexed.[53]

Exhibits.[54]—An exhibit cannot be looked to in aid of a defective pleading,[55] but may be considered against the pleader on demurrer.[56]

Only documents which are the foundation of the action can be incorporated by annexation and reference.[57] In a suit on a written contract, filing of the contract as an exhibit is properly required on motion to make more definite and certain.[58] A separate order book entry is not necessary in order to make an exhibit incorporated into the complaint by reference a part thereof.[59]

By statute in some states when any pleading is founded on a written instrument, the original or a copy must be filed with the pleading.[60] If a defense or cross action arises out of the same instrument, it is not necessary to file another copy with the answer or cross complaint, but is sufficient to refer to the one already on file.[61]

In some states the annexation of the instrument sued on and a reference to such annexation in the body of the declaration makes such instrument as much a

53. Harper v. Essex County Park Commission [N. J. Law] 62 A. 384.

54. See 4 C. L. 991.

55. Hawkins v. Nicholas County [Ky.] 89 S. W. 484. An instrument annexed to the complaint as an exhibit, but not forming the foundation of the action, cannot be looked to to supply deficiencies in the complaint. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293. A reference in a complaint for goods sold and delivered to an attached bill of particulars in which it was alleged were "detailed certain payments" held not to amount to an allegation of value. Macksoud v. Dildarian, 93 N. Y. S. 382.

56. Where a copy of the contract sued on is by way of amendment filed as an exhibit it is to be considered against the pleader on demurrer. Gibson v. Ray [Ky.] 89 S. W. 474. Where letter written by insurance company is filed with petition in action on policy in order to show waiver of proofs of loss by denial of liability, recitals in letter that person consenting to sale of property and transfer of policy was not company's agent cannot be considered on demurrer to petition, which alleged such agency. Gragg v. Home Ins. Co. [Ky.] 90 S. W. 1045.

57. In a suit for partition though the rights of the parties are determined by a will, the will is not the foundation of the action so that it can be so incorporated. Shetterly v. Axt [Ind. App.] 76 N. E. 901.

58. Gibson v. Ray [Ky.] 89 S. W. 474.

59. In action to foreclose municipal assessment, copy of assessment roll marked "Exhibit A" and filed with complaint and referred to therein and made a part thereof, held to have become a part of the complaint without a separate order book entry, though it was not attached thereto. Cleveland, etc., R. Co. v. Porter [Ind. App.] 74 N. E. 260.

60. Nichols & Shepard Co. v. Berning [Ill. App.] 76 N. E. 776. It is only necessary that a copy of the instrument upon which the action is predicated be filed, and purely evidentiary documents need not be filed. Mueller & Co. v. Kinkead, 113 Ill. App. 132. Where it is contended that written contract has been expressly abrogated and suit is brought for services under subsequent parol agreement, contract need not be filed. Id. Under Practice Act, § 171 (Acts 1886, p. 308, c. 184) Baltimore city charter § 313, plaintiff is not entitled to summary judgment unless at the time of bringing his action he shall file with his declaration an affidavit as therein prescribed and the bond, bill of exchange, note or other writing or account by which defendant is so indebted; or if the action is founded upon a verbal or implied contract, he must file a statement of the particulars of defendant's indebtedness thereunder. Mueller v. Michaels [Md.] 60 A. 485. The writing filed must show on its face at least a prima facie case of indebtedness from plaintiff to defendant. Commonwealth Bank v. Kirkland [Md.] 62 A. 799. In action on alleged guaranty to pay mortgage debt held that receipt for interest due on mortgage, alleged to have been signed by defendant, and reciting that interest was accepted with the understanding that defendant guarantied the payment of the debt, did not, unexplained, constitute a contract by defendant to pay such debt to plaintiff, and hence filing thereof was an insufficient compliance with the statute. Id. Provisions of practice act of 1887 requiring copy of the contract upon which action is founded to accompany the statement of claim is mandatory, and if copy of contract or any part thereof does not accompany statement, and its absence is not satisfactorily accounted for, omission cannot be supplied by averments of its contents or substance. White v. Sperling, 24 Pa. Super. Ct. 120. If it is clearly made to appear by defendant's affidavit of defense that contract sued on is in writing, and statement is not accompanied by a copy thereof, defendant has shown reason why summary judgment should not be entered against him, even though he does not set forth a perfectly valid defense upon the merits. Id.

61. Cross complaint held to make a sufficient reference to agreement set out in the complaint to make it a part thereof. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

part of the pleading as if precisely set forth therein.[62] Recitals therein control the allegations of the pleading where the two are inconsistent.[63]

Bills of particulars.[64]—In some states plaintiff is required to file a copy of an account sued on,[65] or a statement of the particulars of defendant's indebtedness in case the suit is founded on a verbal or implied contract,[66] and defendant may be required to file a statement of the particulars of his ground of defense.[67]

The purpose of a bill of particulars is merely to amplify the pleading, and to indicate with more particularity than is ordinarily required in a formal plea the nature of the claim made, in order that surprise upon the trial may be avoided and the issues more intelligently met.[68] It is not a part of the pleadings[69] and cannot enlarge the cause of action[70] nor be used to aid the pleading,[71] nor will it be allowed to overthrow or control specific averments therein.[72]

A party should not be required to expose his evidence to his adversary,[73] nor to give particulars equally within the knowledge of the other party,[74] though it has been held that the mere fact that the latter has knowledge of the transaction in question is no ground for refusing to require a bill.[75] Whether plaintiff should be

62. Prac. Act § 119 (P. L. 1903, p. 570). Harper v. Essex County Park Commission [N. J. Law] 62 A. 384.

63. In action for breach of covenants of deed, copy of deed referred to and made part of declaration must be considered as accurately setting forth covenants, under Prac. Act § 119. Rev. 1903, P. L. 1903, p. 570. Dick v. McPherson [N. J. Law] 62 A. 383.

64. See 4 C. L. 991.

65. In action of assumpsit plaintiff does not waive the common counts of his declaration by failing to file the account required by Code 1899, c. 125, § 11, at the time of filing the declaration, but he may file it afterwards and rely upon the common counts. Federation Window Glass Co. v. Cameron Glass Co. [W. Va.] 52 S. E. 518. Where the verification of an account showed that it was asserted against defendant it is immaterial that the account shows only charges against third person. Pelican Lumber Co. v. Johnson Mercantile Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 917, 89 S. W. 439.

66. Practice Act § 171 (Acts 1886, p. 308, c. 184). Mueller v. Michaels [Md.] 60 A. 485. Original statement being insufficient, plaintiff was not entitled to judgment under the summary provisions of the act on filing a substituted one, since it was not filed with his declaration as required by the act. Id.

67. Under the Michigan circuit court rules whenever fraud is relied on as a defense to a written instrument the facts upon which such defense is based must be plainly set forth in a notice added to defendant's plea. Cir. Ct. Rule 7, subd. c. Notice containing no statement of any particular representation held insufficient. Stauber v. Ellett [Mich.] 12 Det. Leg. N. 156, 103 N. W. 606. Object of Code 1887, § 3249 (Code 1904, p. 1709), authorizing court to require filing of a statement of the particulars of the ground of defense is to give plaintiff notice of the defense relied on, and hence it should not be required where the pleas give with detailed particularity every such defense. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011.

68. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. S. 953. Is an enlargement of the pleading to advise the party with reasonable precision of the character of the claim or charge against him, so that he may be enabled to direct his preparation for the trial to the distinct issue. Knickerbocker Trust Co. v. Packard, 109 App. Div. 421, 96 N. Y. S. 412.

69. Sichel v. Baron, 96 N. Y. S. 186. Is no part of the declaration. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161.

70. Where plaintiff brought action for breach of contract, and justice found that defendant contracted to engage board and lodging for the season and rendered judgment for plaintiff, held that plaintiff was not thereby allowed to recover on different cause of action from that pleaded, though his bill of particulars referred to a lease by defendant and a failure to pay rent. Sichel v. Baron, 96 N. Y. S. 186.

71. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161.

72. Neither the caption of the bill nor the body thereof will be allowed to overthrow or control specific averments of the complaint in respect to the parties or person therein stated. Complaint alleging that goods were sold to C. L. held not to be rendered demurrable because caption of bill stated that they were sold to L. & Co. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

73. Is not the office of such a bill. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. S. 953. In action for money loaned, plaintiff should not be required to specify the manner in which the alleged loan was made, whether by check, cash, or otherwise, with date and number of the check and the bank on which it was drawn. Dunn v. Dunn, 108 App. Div. 308, 95 N. Y. S. 719.

74. As to actual renewal of lease, as provided by its terms or otherwise. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. S. 953.

75. Loan by plaintiff's testator to defendant. Dunn v. Dunn, 108 App. Div. 308, 95 N. Y. S. 719. Bill of particulars required by Code 1899, c. 125, § 11, in actions of assumpsit is no part of the declaration. Federation Window Glass Co. v. Cameron Glass Co. [W. Va.] 52 S. E. 518.

required to furnish a bill of particulars must be determined by an examination of the complaint, and does not depend upon the fact that defendant has served a bill of particulars of a counterclaim contained in his answer.[76] Cases dealing with the necessity of filing bills in particular instances,[77] and with the sufficiency of particular bills,[78] will be found in the note.

76. Fickinger v. Ives, 109 App. Div. 684, 96 N. Y. S. 396. In action against brokers for damages for alleged wrongful sale of stock purchased by them for plaintiff, where defendants furnished a bill of particulars of their counterclaim for money expended on plaintiff's account purporting to embrace the entire account of the stock dealings between the parties, and plaintiff showed by affidavit that he did not know what sales defendants made and that he had reason to believe that many of those included in the account were fictitious, held that he would not be required to furnish a bill of particulars of the sales which he claimed to be unauthorized. Id.

77. **Defendant held entitled to bill:** A bill is demandable in an action to recover for legal professional services. Gen. St. 1894, § 5246, applies. Davis v. Johnson [Minn.] 104 N. W. 766. In action by lessee to recover damages to personalty by reason of negligent manner in which lessor repaired and maintained roof of leased premises, held that plaintiff would be required to furnish particulars as to nature of acts relied on to constitute waiver of provision in lease requiring written notice of leakage, and of times when, and by whom, such acts were done, and of the reasonable value of the property claimed to have been destroyed. Taylor & Co. v. Asiel, 93 N. Y. S. 377. In ejectment by landlord against tenants on ground that lease has not been renewed and that defendants are not entitled to renewal because of breaches of covenants, plaintiffs should be required to give particulars as to what conditions and covenants have been broken, and when and where breaches occurred, and what defendants did which it is claimed deprived them of a right to renew, and when. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. S. 953. In action for death of servant, allegations as to negligence held mere conclusions, and plaintiff required to furnish bill showing the particular place where deceased was at work, in what respect that place was dangerous, unprotected, unsafe, and unguarded, and also the name of the foreman alleged to be incompetent, or whether neglect complained of was a failure to employ a foreman. Causullo v. Lenox Const. Co., 94 N. Y. S. 639. When the complaint contains a general allegation of money loaned, plaintiff should be required to specify the particularities of the claim so that he will be limited upon the trial, and to prevent surprise should be required to specify date and amount of the loan. Dunn v. Dunn, 108 App. Div. 308, 95 N. Y. S. 719. In action for personal injuries held proper to require bill showing in detail how long plaintiff has been prevented from attending to her business and has been deprived of her earnings, giving the nature of her business and the amount of income derived therefrom, or, if employed, the amount of her salary. Levy v. New York City R. Co., 96 N. Y. S. 399. Portion of order requiring statement of amounts expended for medical attendance held erroneous, where there were no allegations in the complaint that plaintiff had expended money for that purpose, but only that she would be compelled to do so. Id. In action against corporation on guaranty and certain certificates alleged to have been executed by defendant, where answer alleged that they were executed on the agreement with one G. that they were not to be effective except on a certain contingency which had not happened, and that they were negotiated in violation of such agreement and transferred to plaintiff, of which fact it was alleged on information and belief plaintiff had notice, held that plaintiff was entitled to bill stating whether agreement was written or oral, the names of plaintiff's officers or agents to whom notice was given, the name of the persons who gave it, and when and where it was given. Knickerbocker Trust Co. v. Packard, 109 App. Div. 421, 96 N. Y. S. 412. The fact that the name of the person must necessarily be disclosed in revealing the information is no objection to granting the motion. Id. In action for death of locomotive firemen by explosion of engine, held that plaintiff should be required to give particulars showing in what respect she claimed the engine was "weak, dangerous, defective, unsafe," etc. Heslin v. Lake Champlain & M. R. Co., 109 App. Div. 814, 96 N. Y. S. 761. Plaintiff will not be excused from furnishing bill merely because she is an administratrix with no personal knowledge of the details of her cause of action, particularly where she has had an opportunity to examine the engine with her expert. Id.

Defendant held not entitled to bill: It is not the practice to furnish bills of particulars in contempt proceedings, and whether or not one shall be ordered is discretionary in any event. Christensen v. People, 114 Ill. App. 40. Bills held unnecessary to enable defendants to prepare their defense. Id. In an action against the state for damages which the legislature agreed should be paid in case the charter of a certain railroad should be repealed, held that, the damages being unliquidated and the declaration being specific in stating a cause of action, defendant was not entitled to a bill. State v. Hosmer [Mich.] 12 Det. Leg. N. 493, 104 N. W. 637. If plaintiff is entitled to an accounting, defendant must file the account, and plaintiff should not be required to furnish a bill of particulars. Fickinger v. Ives, 109 App. Div. 684, 96 N. Y. S. 396. In action against steamship company for loss of a trunk delivered to defendant by a passenger at a foreign port, defendant's application for bill of particulars held properly denied, where it was based on affidavits of local attorney and local agent stating the practice of the company abroad and their ignorance of certain things, but it did not appear that either of them knew anything about

A motion by a defendant for a bill of particulars upon the ground that it is necessary for his defense will be denied when made before service of the answer,[79] nor will plaintiff be required to furnish a bill for that purpose where defendant is wholly ignorant of the particulars of his claim.[80]

In Florida a bill of particulars is not demandable after plea to the merits.[81] There is nothing in the New York code authorizing the service of a demand for a bill of particulars, and relief of that kind can be obtained only by motion and pursuant to an order of court.[82] A defendant moving for an order for a bill after answering to the merits need not state in his moving affidavit that he has fully and fairly stated the case to counsel, with the name and address of such counsel.[83] The order for the bill may require that in case the party has no knowledge with reference to the specified particulars he may state such lack of knowledge under oath in lieu thereof.[84]

A party failing to file a bill as required by statute,[85] or by order of court, is generally precluded from giving evidence in regard to matters which should have been specified therein.[86] So, too, plaintiff is often limited in his recovery to items specified.[87]

the matter, or had ever been abroad or had had an opportunity to become acquainted with defendant's practice in foreign ports. Canonico v. Cunard S. S. Co., 96 N. Y. S. 499. In action against carrier for loss of goods in transit refusal to require plaintiffs to show in bill where the goods and chattels and cars mentioned in such bill were delivered to defendant held not error, where defendant was not thereby hindered or embarrassed in any degree in making its defense. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161.

78. Bills held sufficient: The object of the bill in an action for legal services is accomplished when it gives to the defendant the information which will enable him to prepare his defense (Davis v. Johnson [Minn.] 104 N. W. 766), and is sufficient if it describes the nature and character of the services and the result at which they arrived and the aggregate value thereof (Id.). Same degree of detail is not required as in action for merchandise sold and delivered. Id. Bill held sufficient. Id. Defendant's bill in action for breach of contract, where he alleged a prior breach by plaintiff and counterclaimed for his resulting damages. Floersheim v. Musical Courier Co., 103 App. Div. 388, 93 N. Y. S. 41. Statement of claim in action for goods sold and delivered held sufficient to call for affidavit of defense. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23. Statement of particulars of claim or defense authorized by Code 1887, § 3249, need not set out such particulars with the formality or precision of a declaration or plea, but only in such manner as will fairly and plainly give notice to the adverse party of its character. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835. Itemized account held sufficient statement of defendant's plea of set-off. Id.

Bills held insufficient: In action in Baltimore city court to recover money lost at gaming, statement of particulars of claim in the form of an account describing the indebtedness only as "for cash money received from plaintiff" in a specified month and a specified sum. Mueller v. Michaels [Md.] 60 A. 485. Statement in action on note that defendant did not execute note and did not owe sum claimed or any part thereof held insufficient under Code 1904, § 3249, since it gave plaintiff no more notice of the character of the grounds of defense than the plea of nonassumpsit. Chestnut v. Chestnut [Va.] 52 S. E. 348.

79. Cannot be said that defense will be made until issue is raised by service of answer. Schultz v. Rubsam, 104 App. Div. 20, 93 N. Y. S. 334.

80. Since he may in such case deny any knowledge or information sufficient to form a belief as to allegations of complaint in reference to it (Code Civ. Proc. § 500). Schultz v. Rubsam, 104 App. Div. 20, 93 N. Y. S. 334.

81. Peacock v. Feaster [Fla.] 40 So. 74.

82. Stone v. Hudson Valley R. Co., 47 Misc. 5, 95 N. Y. S. 220. Such a demand is a nullity which may properly be disregarded, and it may be stricken from the files on motion. Motion to strike is proper where it is doubtful whether demand can be regarded as equivalent to a demand for an account or not. Id. Fact that motion was heard after expiration of the time fixed by the notice within which the bill was demanded held immaterial. Id. Assessments sought to be recovered by a casualty association against a member do not in any sense constitute an account between the parties, and hence a demand for a bill of particulars in an action therefor cannot be regarded as serving the purpose of a demand for a copy of an account under Code Civ. Proc. § 531. Id.

83. Rule 23 of practice does not apply. Worden v. New York City R. Co., 48 Misc. 626, 96 N. Y. S. 180.

84. Worden v. New York City R. Co., 48 Misc. 626, 96 N. Y. S. 180.

85. If plaintiff in action in assumpsit fails to file the bill of particulars required by Code 1899, c. 125, § 11, his evidence as to any item not plainly described in the declaration will be excluded. Federation Window Glass Co. v. Cameron Glass Co. [W. Va.] 52 S. E. 518.

86. Order for bill of particulars of coun-

In case the bill furnished is insufficient, a further one may be required,[88] but a party whose motion for a further bill of particulars has been denied is not entitled to renew the same except on leave granted for some substantial reason.[89]

§ 2. *The declaration, count, complaint, or petition.*[90]—The declaration, petition, or complaint, must aver all the facts necessary to show a cause of action against the defendant.[91] Where facts entitling plaintiff to relief at law or in equity are stated, it is immaterial that the form of action is improperly stated.[92] An instrument sued on should be set out either in terms or according to its legal effect.[93] It is generally held that the common counts may be used to state a cause of action under the code.[94] In determining the sufficiency of the complaint in an action

terclaim providing that in default thereof defendant should be precluded from giving evidence of the matters set forth in the counterclaim held improper, the question of the exclusion of testimony not being before the court. Schlesinger v. Thalmessinger, 93 N. Y. S. 381. Where defendant's statement of his grounds of defense is insufficient, court should, on plaintiff's objection, order the filing of a sufficient one, and on failure of defendant to comply with such order, his evidence of matters not sufficiently described should be excluded. Chestnut v. Chestnut [Va.] 52 S. E. 348.

87. In action to compel contribution by accommodation indorser of note, plaintiff can only recover for payments specified in his bill of particulars. Pratt v. Rhodes [Conn.] 61 A. 1009.

88. Defendant having served bill of particulars before argument of a motion therefor, which complied with the demand in most particulars and was retained by plaintiff, held that proper practice was to move for further bill, or to enter order merely requiring a further bill, and not to enter an order granting the motion. Schlesinger v. Thalmessinger, 93 N. Y. S. 381.

89. Floersheim v. Musical Courier Co., 103 App. Div. 388, 93 N. Y. S. 41.

90. See 4 C. L. 996. See, also, Equity, 5 C. L. 1144.

91. Should allege all the facts necessary to constitute a cause of action with such clearness that the defendant may fairly understand the charges against him, so as to be able to intelligently admit or contest them as he may desire. Complaint in action for injuries to servant sustained while operating dangerous machine should state in what respect the machine was not reasonably safe, in what respect master failed to exercise reasonable care in directing servant to work on it, and that its unsafe character caused the injury. Anderson v. U. S. Rubber Co. [Conn.] 60 A. 1057. Complaint held to sufficiently allege unsafe character of machine because of failure to warn plaintiff of danger of having his hand caught therein. Id. Where plaintiff seeks to recover punitive damages for a particular wrongful act, and relies, as evidencing the animus with which it was committed, upon a wholly independent act done at a different time and place, defendant should be advised by plaintiff's pleadings of the case he is expected to meet. Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga.] 50 S. E. 473. It is essential to the sufficiency of a complaint on demurrer that upon a reasonable construction of the language used it may be seen by an inspection of the pleading that all the facts necessary to a complete right of action are stated in such a manner that such right may be said necessarily to arise from them upon some definite theory and in such form that, the defendant being thereby fully informed of the nature of plaintiff's claim, the pleading will be susceptible of denial by answer, so that, upon being so traversed, a distinct issue of fact will be formed for trial. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293. Complaint in action against carrier for injuries to passenger held sufficient under Code Pub. Gen. Laws 1904, art. 75, § 24, subsec. 36, giving form of declaration in such actions, and providing that the same may be changed to adapt it to many cases "by merely changing the allegation as to the cause of the accident." Philadelphia, etc., R. Co. v. Allen [Md.] 62 A. 245. In both the statement of claim and affidavit of defense, facts must be stated which, if proved as set forth, are sufficient to sustain the action in the one case or the defense in the other. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171. In action for work and materials furnished, statement held insufficient where copies of books refcrred to therein showed nothing substantial, but merely dates and figures, largely unintelligible, and did not give defendant any information as to what he was charged with having received. Id. A complaint under Rev. Pol. Code, § 1806, to remove a county superintendent of schools for neglect of duty should be sufficiently definite and certain in its accusations to enable defendant to prepare his defense, and a complaint containing only a general allegation that he was guilty of willful neglect of duty is insufficient. Bon Homme County v. McLouth [S. D.] 104 N. W. 256. The declaration is sufficient if it informs defendant of the nature of the demand made against him and states such facts as will enable the court to say that, if the facts are proved as alleged, they establish a good cause of action. In action for negligence, declaration held to sufficiently show that it was plaintiff's duty to be under a press in an endeavor to locate a defect therein. Newport News Pub. Co. v. Beaumeister [Va.] 52 S. E. 627. Otherwise it is bad on demurrer. Stephenson v. Collins, 57 W. Va. 351, 50 S. E. 439. Declaration in action on contract held to insufficiently aver breaches. Id.

92. Hayden v. Collins [Cal. App.] 81 P. 1120.

93. Cooper v. McKee [Ky.] 89 S. W. 203.

against two defendants, it will be treated or considered as joint and several.[95] Allegations as to one of them cannot be considered in determining whether a cause of action is stated against the other.[96] In an action involving separable claims, the right to try those upon which a cause of action has accrued is not affected by the fact that the suit is prematurely brought as to others.[97] The performance of conditions precedent to the right to sue must be alleged.[98]

The form and character of the action are to be determined from the complaint,[99] and the nature and character of a petition from its allegations and form, and the relief asked for therein.[1] Whether the action is in tort or on contract,[2]

For necessity of attaching copy see ante § 1, Exhibits.

94. Note: Defendant, upon the solicitation of a member of the faculty of Columbia University, agreed to, and did, furnish and equip with the necessary apparatus, a hydraulic engineering laboratory at his own expense. The gift was, at the request of the donor, designated a memorial to his father. The equipment of said laboratory was furnished by the plaintiff, a corporation, of which defendant was president and owned a large amount of stock. In an action against defendant for the value of the equipment, plaintiff declared upon a common count. The trial court held, that under the code a recovery could not be had upon a common count. Held, error. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. S. 443.

In discussing the spirit of the code procedure, Mr. Pomeroy, in his Remedies and Remedial Rights, §§ 75, 544 (§§ 15, 433, 4th ed.) observes that New York jurists were originally divided as to the intent of the legislature relative to pleading under the code. The first view, which did not survive, was that the legislature intended to abolish only certain names and certain technical rules of mere form. The second view, which is now firmly established, was that the pleader must narrate in plain and concise language the actual facts from which the rights and duties of the parties arise, and not his conception of their legal effect. "And yet," he says, "with great inconsistency, as it seems to me, the courts have generally held that the ancient forms of common-law pleading in assumpsit may be used in actions upon contract, especially where the contract is implied; that they sufficiently meet the requirements of the codes, although they do not set out the actual facts of the transaction from which the legal right arises." This reasoning appears flawless, but the courts have not been disposed to follow it. That there is no abatement of the practice in New York is illustrated by the principal case, and elsewhere, by the following recent cases: Johnson-Brinkman Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615; Fox v. Easter, 10 Okl. 527; School Dist. No. 9 v. School Dist. No. 5, 118 Wis. 233; Brown v. Board of Education, 103 Cal. 531; Burton v. Rosemary Mfg. Co., 132 N. C. 17. But the rule has not received universal acceptance, and in the following cases the courts refuse longer to permit fictions to take the place of facts: Bank v. Corbett, 2 Minn. 209; Pioneer Fuel Co. v. Hager, 57 Minn. 76; Penn. Mut. Life Ins. Co. v. Conoughy, 5 Neb. 123; Ball v. Beaumont, 59 Neb. 631, 633; Bowen v. Emmerson, 3 Or. 452; Hammer v. Downing, 39 Or. 504. And in Connecticut the rule is peculiar. Cummings v. Gleason, 72 Conn. 587; McNamara v. McDonald, 69 Conn. 484, 61 Am. St. Rep. 48. Although excluded in a few states, the use of the common counts seems to be well settled. In fact, their application has been so liberal in many states that the plaintiff is permitted to recover on a common count (quantum meruit) when the evidence discloses a special contract, the court in such cases giving to the pleading an effect not recognized at the common law. The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the quantum meruit in the case. Jenney Electric Co. v. Branham, 145 Ind. 314, 33 L. R. A. 295; Roberts v. Leak, 108 Ga. 806; Hecla Gold Min. Co. v. Gisborn, 21 Utah, 68; Vanderbeck v. Francis, 75 Conn. 467. Contra, Roche v. Baldwin, 135 Cal. 522; Duncan v. Gray, 108 Iowa, 599; Band v. Corbett, 2 Minn. 209; Burton v. Rosemary, 132 N. C. 17. The common counts general in form, were introduced originally to take the place of the detailed and intricate pleading at the common law, and immediately found favor because of their convenience. Their general use before the adoption of the code is in some measure a justification for what is believed to be a clear violation of the mandate of the legislature as expressed in the reformed procedure acts.—3 Mich. Law Rev. 417.

95. Where, under the code, the question of joint or joint and several liability is to be determined from the evidence. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990.

96. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673, afg. 110 Ill. App. 31.

97. Anthony v. Smithson, 70 Kan. 132, 78 P. 454.

98. Under statute requiring anyone having a claim for damages against a municipal corporation to present a claim therefor, a declaration based on such a cause of action must allege a substantial compliance with such statute, but a copy of the demand need not be annexed thereto. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

99. Declaration must be looked to to determine the form of the action. Durham v. Stubblings, 111 Ill. App. 10. Under the code the character of the action is to be determined by the substance of the complaint rather than by its form. Action to recover for goods sold held an action at law and triable by jury, though complaint alleges that defendant is entitled to certain credits in an amount unknown to plaintiff, and demands an accounting. Hoosier Const. Co. v. National Bank of Commerce [Ind. App.] 73 N. E. 1006.

or on an express or implied contract,[3] and whether the complaint states one or more causes of action, are questions of construction.[4]

Consolidation of suits.—A party whose rights can be fully protected in a consolidated suit cannot object to the order of consolidation on the ground that he should have been made a party by amendment to the original bill.[5] Though the consolidation deprives a defendant of his right to file a cross bill against a co-defendant to compel a contribution, he is not entitled to a reversal, where he may maintain an action at law against such co-defendant for the amount due from him,[6] particularly where he failed to file such a bill in either of the two suits, or after their consolidation.[7]

Joinder of causes of action.[8]—Causes of action which are of the same nature and which may properly be the subject of counts in the same species of action may be joined,[9] the test being whether the same judgment may be rendered on both.[10]

1. Where allegations clearly show that it is petition under the statute to contest an election, fact that pleading is indorsed "Bill in Chancery; Petition to Contest Election," and that it prays for general equitable relief does not make it a bill in chancery. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

2. Complaint held to state cause of action for breach of contract of carriage and not for assault and battery, though complaint shows that an assault was committed. Busch v. Interborough Rapid Transit Co., 96 N. Y. S. 747. Complaint to recover money intrusted to defendants to be used to secure bail for third person and to be returned to plaintiff when bail was exonerated, alleging that after bail was exonerated defendants refused to return the money but converted the same to their own use, held to state cause of action ex contractu to recover on implied promise instead of ex delicto. Logan v. Freerks [N. D.] 103 N. W. 426. This held to be particularly true in view of the issues tendered by the answer, which set up defenses improper in action based on tort. Id. Notwithstanding the plaintiff used lanquage in his pleading which would be appropriate to describe a tort, if he sues, not for damages but for money actually received by the defendant and belonging to the plaintiff and for no more, it is a waiver of the tort and an election to sue upon the implied contract. Kirchner v. Smith, 7 Ohio C. C. (N. S.) 22.

3. Complaint held to have been intended to state cause of action on contract for employment only, and not on quantum meruit for services. Golucke v. Lowndes County, 123 Ga. 412, 51 S. E. 406; McCormick v. U. S. Fidelity & Guaranty Co., 114 Mo. App. 460, 89 S. W. 905.

4. Several counts for injuries received by falling into an excavation in the street held to state but one cause of action. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. A bill to rescind a loan procured by fraud praying judgment for the sum loaned and a lien on certain lands into which the proceeds had gone states but one cause of action. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. Petition construed and held to set up but two causes of action, one on quantum meruit for services rendered to defendant's testator, and the other for breach of contract made by plaintiff's father with such testator for plaintiff's benefit. Cooper v. Claxton [Ga.] 50 S. E. 399. Complaint held to state two causes of action, one for conversion and one for assault. Rector v. Anderson [Minn.] 104 N. W. 884. All of the allegations of the complaint held germane to an action, under Code Civ. Proc. § 1781, to require director of corporation to account for money and property of the corporation in his hands which it was alleged he had wrongfully acquired. Lilienthal v. Betz, 108 App. Div. 222, 95 N. Y. S. 849. Complaint alleging sale of fertilizers under promise to execute chattel mortgage and agricultural lien to secure same, and praying that contract be declared a lien on the property and that defendant be enjoined from disposing of it, and that same be sold to satisfy debt, held to state single cause of action. Creech v. Long [S. C.] 51 S. E. 614. Complaint in action by stockholder of mining corporation held to state but one cause of action against defendant officers and directors for fraudulently conspiring to depreciate the value of the stock. Glover v. Manila Gold Min. & Mill. Co. [S. D.] 104 N. W. 261.

5, 6. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 504, 104 N. W. 780.

7. Where defendant might have appeared and filed a cross bill in either of the suits, but failed to do so, and failed to file such a bill after their consolidation, he is not entitled to a reversal because deprived of that right by such consolidation. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 504, 104 N. W. 780.

8. See 4 C. L. 998.

9. Count based upon liability imposed by § 9 of the dram shop act may be joined with common law count for conversion of property, both being counts in trespass on the case. Pisa v. Holy, 114 Ill. App. 6. Causes of action of the same character and not repugnant. Mobile & O. R. Co. v. Matthews [Tenn.] 91 S. W. 194.

10. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. No misjoinder of counts or causes of action, where there were two counts in trespass on the case, one for common-law negligence and one for willful violation of the statute, both for the same injury, to both of which same plea could be pleaded, and where same judgment would have been given if verdict had been on either count

The test to be applied in an equitable action for the purpose of determining whether causes of action are improperly united, is whether they could have been included in a bill in equity under the old practice without making it multifarious.[11] There is but one cause of action where the facts, if proved, would establish but one primary right of the plaintiff and one primary wrong of the defendant.[12]

As a general rule separate causes of action cannot be joined unless they affect all the parties to the action,[13] and accrue to plaintiff in the same capacity,[14] and

alone. Marquette Third Vein Coal Co. v. Dielie, 110 Ill. App. 684.

11. If so they may be properly united under Gen. St. 1894, § 5260. State v. Knife Falls Boom Corp. [Minn.] 104 N. W. 817. An equity bill is not multifarious where one general right only is claimed by it, though the defendants have only separate interests in distinct questions which arise out of or are connected with such right. Id. All of the defendants must, however, be affected in some respect by the action or by some part thereof, but all need not be equally affected. Id. Complaint in equitable action against boom company and others to determine the relative rights of the public, the relator, and defendants to the use of a navigable river for the purpose of floating logs, and to enforce them. Id. Where defendant induced plaintiffs to join with him in purchasing certain land and falsely represented to them that the purchase price was largely in excess of the amount actually paid therefor by him, thereby inducing them to pay him a sum in excess of the amount so paid, held, in an action to have plaintiffs declared the sole owners of the land, and for an accounting, and for general relief, that several causes of action were not improperly joined, all the matters complained of having grown out of the same fraud. Wilson v. Youngman [Minn.] 104 N. W. 946. Riparian proprietor may maintain suit against several upper proprietors to restrain them from depositing refuse and filth in the stream, though they act independently in so doing. Warren v. Parkhurt, 105 App. Div. 239, 93 N. Y. S. 1009, afg. 45 Misc. 466, 92 N. Y. S. 725. Multifariousness, or the improper joining in one bill of distinct and independent matters, is a ground of demurrer in equity. The existence of similar questions of fact, or the mere fact that each demand is asserted as a right growing out of the administration of an estate, so that each case involves some common elements of fact, will not warrant the joining of separate claims against several defendants growing out of different transactions and involving material inquiries which are essentially foreign to each other. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Joinder of causes against several defendants alleged to have received preferences held improper where complaint was not framed on theory of a joint liability. Id. Action to recover amount of a preference held improperly joined with action against another defendant to set aside a fraudulent preference. Id. See, also, Equity, 5 C. L. 1144.

12. On motion to make more definite and certain by setting out each cause of action separately, complaint in action by administratrix to recover an interest in land alleged to have been procured by defendants from decedent by fraud, held to state but a single cause of action. Du Bose v. Kelly [S. C.] 51 S. E. 692. Where the facts alleged show one primary right of the plaintiff, and one wrong done by defendant which violates it, the complaint states but a single cause of action, no matter how many forms and kinds of relief the plaintiff may be entitled to. Complaint by city for removal of structures encroaching on sidewalks, praying that they be adjudged a public nuisance and to be illegal, and that defendant be enjoined from maintaining and compelled to remove them, and that, on his failure to do so, plaintiff be ordered to charge the expense of doing so to him, held to state single cause of action. City of New York v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. S. 937.

13. Under Civ. Code 1895, §§ 4938-4946, cause of action in favor of married woman for pain and suffering growing out of injuries received through wrongful conduct of another cannot be joined with cause of action in favor of her husband for loss of her services and expenses incurred in consequence of such injuries, since two are separate and distinct and in favor of different parties. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916. In Kansas causes of action to be joined must, except as to actions to enforce liens, affect all the defendants. Griffith v. Griffith [Kan.] 81 P. 178; Mentzer v. Burlingame [Kan.] 81 P. 196. Causes of action on several notes cannot be joined where makers are not identical. Mentzer v. Burlingame [Kan.] 81 P. 196. Equitable accounting against two defendants cannot be joined with cause of action for damages against a third. Benson v. Battey, 70 Kan. 288, 78 P. 844. Causes of action to cancel deeds to different grantees and covering separate tracts of land are improperly joined. Griffith v. Griffith [Kan.] 81 P. 178. A cause of action vested in the plaintiffs jointly cannot be joined with a cause vested in one of them alone. Count on cause of action by married woman for publication of false and malicious statement concerning her separate realty cannot be joined with count for damages to both husband and wife by reason of publication of false and malicious statement as to the wife personally. Ricardo v. News Pub. Co. [N. J. Law] 62 A. 301. Causes of action for noncompliance with law by a benefit association and for fraudulent representations held improperly joined with cause of action on benefit certificate, the plaintiffs having no interest in or rights under them. Conrad v. Southern Tier Masonic Relief Ass'n, 101 App. Div. 611, 93 N. Y. S. 626. Where property of two persons is converted at the same time two separate causes of action arise and the fact that one person subsequently becomes owner of both does not

unless they are consistent with each other.[15] Under the codes, however, causes of action against several defendants are frequently allowed to be joined, where they arise out of the same transaction, for the sake of preventing a multiplicity of suits.[16] So, too, plaintiff may join causes of action against persons jointly liable.[17]

Causes of action to reform an instrument and to recover on it as reformed,[18] for money had and received and on a note given in settlement of the same,[19] separate causes of action for slander,[20] any number of counts on contract,[21] counts in case

warrant the joinder of them. Foster-Cherry Commission Co. v. Davis [Mo. App.] 90 S. W. 734. Under Code, § 267, husband and wife cannot join their separate actions for damages for mental anguish caused by negligent loss of wife's baggage containing her bridal trousseau, conceding that both are entitled to recover therefor. Eller v. Carolina & W. R. Co. [N. C.] 52 S. E. 305. Beneficial plaintiff cannot, in a single action brought in the name of three legal plaintiffs, recover the damages alleged to have arisen from the nonperformance of three distinct and independent contracts, each of which was entered into by defendant with one of the legal plaintiffs individually and severally. McNulty v. O'Donnell, 27 Pa. Super. Ct. 93. Distinct causes of action against several defendants cannot be joined. Not authorized by Gen. Laws 1896, c. 233, § 20, providing that whenever plaintiff is in doubt as to person from whom he is entitled to recover, he may join two or more defendants with a view of ascertaining which is liable. Mason v. Copeland & Co. [R. I.] 61 A. 650. Negligence of livery stable proprietor in letting horses known to be intractable and in furnishing incompetent driver, and negligence of motorman in stopping car to injury of one not a passenger, held to afford distinct causes of action against each for separate torts, which cannot be joined. Id. A cause of action against a corporation for services rendered it at the request of a promoter and one against the promoter for services rendered him individually are improperly joined. Jones v. Smith [Tex. Civ. App.] 13 Tex. Ct. Rep. 16, 87 S. W. 210.

14. One cannot in a single proceeding combine his individual claim for rent as devisee with a claim in his representative character for rent which accrued during the lifetime of the devisor. Weil v. Townsend, 25 Pa. Super. Ct. 638. Misjoinder of causes of action is a matter of substance which is fatal to the pleading. Id.

15. A party may not, in one suit growing out of a single transaction, maintain an action for an alleged breach of a written contract of employment, and also sue for the value of the services rendered regardless of the contract. Golucke v. Lowndes County, 123 Ga. 412, 51 S. E. 406. A party cannot in the same action treat a contract as rescinded and sue for the amount paid by him thereunder, and at the same time rely on the contract as existing and sue for damages resulting from its breach. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. Where allegations of declaration make suit one for the amount paid by plaintiff to defendant under a contract, treating the contract as rescinded, additional allegations seeking to recover damages for breach of such contract should be stricken as inconsistent. Id. Prayer for rescission, in bill by corporation alleging a fraudulent sale of realty to it by its promoters, and prayer for damages, held not inconsistent. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653. Where declaration contains count for breach of warranty for sale of a horse and one on theory of a rescission of the contract for false representations, plaintiff should be required to elect between them, the measure of damages not being the same. Snore v. Hammond [Mich.] 12 Det. Leg. N. 222, 103 N. W. 834. Plaintiff cannot have an alleged forged deed set aside and title to land of his deceased mother adjudged to be in him, and at the same time trace the proceeds of the sale of such land into other land and have a lien declared in his favor thereon, and complaint in which he seeks such relief is demurrable. Darragh v. Rowe, 109 App. Div. 560, 96 N. Y. S. 666. Where complaint contained counts for money lent and on bond given to secure its payment, held that election to stand on first count was not a waiver of the right to use bond in evidence if it became necessary or proper to do so. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

16. Where six insurance companies issued fire policies, in the standard form, to plaintiff, each of which provided that the liability of the insurer should be limited to the proportion of the loss which the amount of the policy bore to the total amount of valid insurance, held that plaintiff, having suffered a partial loss, could bring a single action against all of them for the purpose of having the liability of each determined. Fegelson v. Niagara Fire Ins. Co. [Minn.] 103 N. W. 495.

17. Where complaint alleged that defendants were running and playing games of poker for money, and that plaintiff played with them and lost and paid to them a specified sum which they won and took from him in the games so played, held that there was no improper joinder of several causes of action. Parsons v. Wilson [Minn.] 103 N. W. 163. Joint tort feasors may be sued jointly in one suit. Oulighan v. Butler [Mass.] 75 N. E. 726.

18. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057. Cause of action for reformation of contract for sale of land may be joined with one for damages for injury to the freehold by the cutting of trees by the vendor between the making of the contract and the execution of the deed. Equitable issue should first be tried by court, and legal issue then submitted to jury. Krakow v. Wille [Wis.] 103 N. W. 1121.

19. Rev. St. 1898, §§ 2646, 2647. Are consistent. Schultz v. Kosbab [Wis.] 103 N. W. 237.

and trover,[22] for wrongful death and for pain and anguish suffered by the deceased before his death, where both accrue to the administrator,[23] but not otherwise,[24] and claims for treble and single damages resulting from different injuries growing out of the same trespass have been held to have been properly joined.[25]

The codes generally authorize the joinder of causes of action upon claims arising out of the same transaction, or transactions connected with the same subject of action,[26] claims for injuries to personal property,[27] and causes of action belonging to the same statutory class and affecting equally all parties.[28]

As a general rule causes of action in tort and on contract cannot be joined,[29]

20. Code Civ. Proc. § 484.. For several slanders uttered by several persons in pursuance of a common agreement. Green v. Davies. 182 N. Y. 499, 75 N. E. 536, rvg. 100 App. Div. 359, 34 Civ. Proc. R. 1, 91 N. Y. S. 470.

21. Armour Packing Co. of Louisiana v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Holder of note secured by a mortgage and note for unpaid interest thereon, signed by the same maker, may enforce both in one action to foreclose the mortgage. Kleis v. McGrath, 127 Iowa, 459, 103 N. W. 371. Causes of action alleging the sale of certain sugar under an express contract at an agreed price, on which there is claimed to be a specified balance due, the sale of same quantity of sugar of same value alleging same as the reasonable value and claiming balance due of exactly the same amount, and that defendant came into possession of the same quantity of sugar belonging to plaintiff and seeking to recover the same amount as upon an implied contract, held not so inconsistent as to require plaintiff to elect between them, at least before trial. Franke v. Taussig Co., 48 Misc. 169, 95 N. Y. S. 212.

22. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

23. A cause of action by an administratrix for damages for pain and anguish suffered by her intestate as a result of injuries received by him while in defendant's employ as a result of the latter's negligence may be joined with a cause of action to recover the pecuniary loss resulting to the father and mother of the intestate by reason of his subsequent death as the result of the same injuries. Nemecek v. Filer & Stowell Co. [Wis.] 105 N. W. 225.

24. In action by administrator for damages for killing of his intestate, a count under Rev. Laws c. 106, § 72, for injuries to deceased for which he could have recovered in his lifetime, cannot be joined with counts under Id. § 71, for death due to defects in the ways, works and machinery, and a count at common law for failure to furnish proper machinery and safe place to work. Hyde v. Booth, 188 Mass. 290, 74 N. E. 337.

25. Claims to recover three times the value of coal removed from plaintiff's mine and converted to defendant's use, and to recover single damages for injuries to the mine caused by negligence in mining the coal so removed and converted where they both grow out of same trespass, though there can be but one recovery. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

26. Code Civ. Proc. § 484, subd. 9. Wallace v. Jones, 182 N. Y. 37, 74 N. E. 576. Code Civ. Proc. § 484, subd. 9. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219. Causes of action for reformation of contract whereby stock of corporation was transferred to defendant in trust to sell such portion as might be necessary to carry on business of the corporation, and for violations of agreement by defendant, in which an accounting by defendant and by the corporation was demanded, held not improperly joined. Id. Action being equitable, court is not deprived of jurisdiction because all the defendants are not affected in the same matter or to the same extent. Id. Code § 267, subd. 1. Fisher v. Southern Loan & Trust Co., 138 N. C. 224, 50 S. E. 659. Complaint alleging that plaintiff's intestate had been deceived through a course of years by the systematic fraud of one of the defendants, setting out the steps taken by him for that purpose, making all those participating with him in the scheme parties and setting out their fraudulent connection with him, and seeking to compel all the defendants to surrender the property received by them in pursuance of such fraudulent scheme, held not demurrable for misjoinder of causes of action or parties. Id. Code Civ. Proc. § 144, subd. 1. Glover v. Manila Gold Min. & Mill. Co. [S. D.] 104 N. W. 261. Conceding that complaint in action by stockholder set out a cause of action for an injunction against the officers and directors to restrain them, for the benefit of the corporation, from fraudulently depreciating the value of the stock, and a cause of action for damages suffered by plaintiff personally because of the same fraud, held that they were not improperly joined. Id. An action for deceit and an action on the case for breach of warranty may be joined when they grow out of the same transaction. Under Mills' Ann. Code Colo., § 70. Counts for breach of warranty in sale of bonds, and count for deceit, growing out of and presenting different phases of same transaction and both tending to support single recovery. Kimber v. Young [C. C. A.] 137 F. 744.

27. Code Civ. Proc. § 484, subd. 6. Action of fraud is for injury to personal property, and several claims of that character may be joined. Wallace v. Jones, 182 N. Y. 37, 74 N. E. 576. Causes of action against members of county board of supervisors to recover items in their bills for services, etc., alleged to have been illegally and collusively audited by the board. Id.

28. Kruger v. St. Joe Lumber Co. [Idaho] 83 P. 695.

29. Cause of action on benefit certificate, and for damages for noncompliance with law by the association, and for fraudulent representations. Conard v. Southern Tier

nor can a cause of action for slander be joined with one for malicious prosecution or malicious abuse of legal process, even if they originate simultaneously,[30] nor a cause of action to quiet title with one for the purchase price of an interest in the land,[31] nor counts in trover and in replevin,[32] nor a husband's cause of action for funeral expenses against one causing death of the wife with the cause of action of a minor child for the death.[33] There seems to be a conflict of authority as to whether causes of action for common law and statutory negligence may be joined.[34]

Several aspects of the same cause of action may be pleaded in different counts.[35] Several causes of action should not be stated in a single count,[36] and plaintiff may be required to separately state and number them.[37] Where a petition contains, under different counts, more than one cause of action, each count must contain a complete cause of action, in distinct and separate paragraphs.[38] Reference in

Masonic Relief Ass'n, 101 App. Div. 611, 93 N. Y. S. 626. A cause of action for deceit in the sale of goods cannot be joined with one for breach of the contract of sale. Romano v. Brooks [Ala.] 39 So. 213.

30. Under Code Civ. Proc. § 484. Complaint held not to state single cause of action for conspiracy. Green v. Davies, 182 N. Y. 499, 75 N. E. 536, rvg. 100 App. Div. 359, 34 Civ. Proc. R. 1, 91 N. Y. S. 470.

31. Mitchell v. Pearson [Colo.] 82 P. 447.

32. King v. Morris [N. J. Law] 62 A. 1006.

33. Johnson v. Seattle Elec. Co. [Wash.] 81 P. 705.

34. A cause of action for common law negligence cannot be joined in the same count with one for statutory negligence. Negligently starting car while plaintiff was alighting and permitting plaintiff to leave car while it was in motion in violation of ordinance. McHugh v. St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853. Negligent operation of car and failure to keep lookout as required by ordinance. Rapp v. St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865. Where a complaint against a railroad company stated a cause of action at common law for negligently killing plaintiff's cow and a cause of action under the statute for failure to fence, whereby the cow was killed, plaintiff was properly required to elect. Harvey v. Southern Pac. Co. [Or.] 80 P. 1061. A plaintiff who pleads a right of action for wrongful death as at common law, and also under the employers' liability act, the latter remedy being merely cumulative, cannot be required to elect before trial. Monigan v. Erie R. Co., 99 App. Div. 603, 91 N. Y. S. 657. Where plaintiff has a right of action under the employers' liability act and also at common law for personal injuries he may allege both and recover upon either, and cannot be compelled to elect between them before trial. Kleps v. Bristol Mfg. Co., 107 App. Div. 488, 95 N. Y. S. 337.

35. Landers v. Quincy, etc., R. Co. [Mo. App.] 90 S. W. 117. Where negligent injury and willful injury are alleged on the same state of facts, plaintiff should not be required to elect. Waechter v. St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147. A husband suing for injury to his wife in a railroad crossing accident may include in one count claim for damages for loss of consortium, expenses of illness and injury to his horse and vehicle. Birmingham So. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363. A petition containing several counts, each referring to the same transaction but differing from each other in substantial particulars as to its details is not bad for duplicity. Gainesville & D. Elec. R. Co. v. Austin [Ga.] 50 S. E. 983. A petition containing several distinct counts, which do not differ from each other in any substantial particular, will, on motion filed at the first term in the nature of a special demurrer, be dismissed, unless the surplus counts are eliminated by amendment. Id. A single cause of action may be stated in several counts to meet possible phases thereof subject to the right to require an election at the trial. Edwards v. Hartshorn [Kan.] 82 P. 520. Though it is better pleading to set out two possible theories in separate counts, yet the fact that both are set forth in one count does not render it subject to the objection of duplicity unless the one averment negatives the other. Douglas v. Marsh [Mich.] 12 Det. Leg. N. 459, 104 N. W. 624.

36. A petition containing one count in which two causes of action are set forth will be held bad for duplicity on special demurrer. Gainesville & D. Elec. R. Co. v. Austin [Ga.] 50 S. E. 983. Must be separately stated. Kruger v. St. Joe Lumber Co. [Idaho] 83 P. 695. Services rendered from time to time under a contract to render services on request cannot be alleged in a single count. Averment of services between certain dates held insufficient though supported by itemized account. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150. When properly joined should always be separately stated. Harvey v. Southern Pac. Co. [Or.] 80 P. 1061.

37. In action for damages for libel and slander held that motion to compel plaintiff to separately state and number his causes of action, if he relied on several, or to make the complaint more definite and certain, if he intended to rely on but one, should have been granted, allegations as to time, etc., being indefinite. Cerro DePasco Tunnel & Min. Co. v. Haggin, 94 N. Y. S. 593.

38. Venable Bros. v. Louisville & N. R. Co. 137 F. 981. Declaration held not to contain two counts upon separate causes of action, one for penalty under Ga. Code 1895, §§ 2317, 2318, and one on a through bill of lading, no attempt having been made to comply with this rule. Id. A paragraph does not show a cause of action against persons joined

subsequent counts to matter of inducement alleged in the first is sufficient.[39] Only one theory can be contained in a single paragraph,[40] but this rule does not apply to the exclusion of additional causes of action which may be stated in a single paragraph of the complaint.[41]

Election.[42]—A motion to require an election is addressed to discretion.[43] Where two separately alleged causes of action taken together are in fact but a single cause of action, an election should not be required.[44]

Splitting causes of action.[45]—One may not split his cause of action,[46] but all damages arising from a single wrong or cause of action must be recovered in one suit.[47]

Prayer.[48]—The court is not necessarily limited to the prayer for relief.[49] A complaint which states a cause of action is not demurrable because the prayer for relief does not conform to the case made.[50] A party seeking equitable relief must specifically demand it as such, unless the nature of the demand itself indicates that the relief sought is equitable.[51]

§ 3. *The plea or answer.*[52]—Matters relating to set-off and counterclaim,[53] affidavits of defense,[54] and the necessity of pleading under oath, are treated in separate articles.[55]

General principles.[56]—Under the code defendant may set up as many defenses

as defendants who are not mentioned or referred to therein. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293.

39. Causes of action for negligent injury and willful injury held sufficiently stated. Waechter v. St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147.

40. State v. Petersen [Ind. App.] 72 N. E. 602.

41. Does not render paragraph demurrable for want of facts. State v. Petersen [Ind. App.] 75 N. E. 602.

42. See 4 C. L. 1003.

43. Harvey v. Southern Pac. Co. [Or.] 80 P. 1061.

44. Brown v. Calloway, 34 Wash. 175, 75 P. 630.

45. See 4 C. L. 1003.

46. Cause of action against stockholder in corporation to enforce double liability is single one no matter how many shares he owns. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Single cause of action for purchase price of goods may not be split up into several parts by assignment to several persons without the consent of the debtor. Sincell v. Davis, 24 App. D. C. 218. Separate suits cannot be maintained by a widow under Rev. Laws c. 106, § 73 for damages for the death of an employe, and by the employe's legal representatives under Id. § 72, where death is preceded by conscious suffering, but under Id. § 74, if damages are sought under both §§ 72 and 73 they must be recovered in a single suit by the administrator. Smith v. Thomson-Houston Elec. Co., 188 Mass. 371, 74 N. E. 664.

47. Where plaintiff recovered judgment against a railroad company for loss of her baggage, she could not thereafter maintain a separate action for mental anguish resulting from such loss, but, if she was entitled to such damages, she should have collected them in the original suit. Eller v. Carolina & W. R. Co. [N. C.] 52 S. E. 305.

48. See 4 C. L. 1004.

49. Hardy v. Ladow [Kan.] 83 P 401. Any relief may be granted which is consistent with the case made by the complaint and embraced within the issue, though other and different relief may be sought by the pleader and demanded in the prayer for judgment. Clark's Code § 425. Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. If plaintiff sues for specific relief to which he is not entitled, upon facts which show that he is entitled to other and different relief, he may be adjudged the latter relief. Id.

50. Prayer is mere matter of form. Erie City Iron Works v. Thomas, 139 F. 995. A demurrer will not be sustained because the allegations of the complaint do not entitle plaintiff to all the relief demanded in the prayer for judgment. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219. A demurrer to the complaint will not be sustained where it states facts sufficient to constitute a cause of action, though such facts are insufficient to sustain the judgment demanded. In action to foreclose mechanic's lien, where complaint was insufficient to sustain foreclosure but stated facts sufficient to authorize personal judgment, held that it stated cause of action for such judgment as against a demurrer for want of facts, though it was not in terms asked for, in view of Code Civ. Proc. § 3412, relative to enforcement of such liens. Schenectady Contracting Co. v. Schenectady R. Co., 94 N. Y. S. 401.

51. Muller v. Witte [Conn.] 62 A. 756. Action merely to recover legal debt arising out of a loan made by wife to her husband, or out of an agreement between them, in which money damages alone are prayed, is action at law. Id.

52. See 4 C. L. 1005. See, also, Equity, 5 C. L. 1144.

53. See Set-off and Counterclaim, 4 C. L. 1421.

54. See Affidavits of Merits of Claim or Defense, 5 C. L. 61.

55. See Verification, 4 C. L. 1816.

56. See 4 C. L. 1005.

as he may have, whether legal or equitable.[57] There is a conflict of authority as to whether inconsistent defenses[58] and matters in abatement and in bar may be united in the same answer.[59]

Defendant is not bound to plead to an insufficient declaration,[60] nor need he, ordinarily, answer amendments to the complaint made during the course of the trial for the purpose of curing defects or supplying omissions.[61]

An answer filed by one defendant inures to the benefit of his co-defendant if their relation to plaintiff's cause of action is joint and identical,[62] or if he sets up rights in his co-defendant.[63] An answer does not put in issue allegations of new matter in the separate answer of a co-defendant,[64] and the statutory provision that new matter in an answer is taken as denied does not avail one upon whom the answer containing the new matter is not served.[65]

The answer must be responsive to the allegations of the complaint[66] and must

57. Burns' Ann. St. 1901, § 350. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895. Thus, he may answer in denial and in confession and avoidance and rely upon both at the same time, and one of such defenses may not be used to destroy the other so long as they are set forth in separate paragraphs. In action on note, answer admitting execution of note for less sum payable to different person, but alleging that it was subsequently altered without defendant's knowledge or consent, held not inconsistent with plea of non est factum. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

58. California: Inconsistent defenses are allowable. Denial of execution of contract and subsequent admission thereof in connection with special defense. Butler v. Delafield [Cal. App.] 82 P. 260.

Kentucky: Denial of an agreement and averment that it was made under mistake are inconsistent. Berry v. Evans [Ky.] 89 S. W. 12.

Missouri: Non est factum and fraud in procuring instrument sued on are inconsistent. Vette v. Evans, 111 Mo. App. 588, 86 S. W. 504.

New York: Defendant may plead inconsistent defenses. Denial of material allegations of the complaint puts plaintiff to his proof, though inconsistent with allegations of an affirmative defense, and such inconsistency is not a ground for striking out answer as a sham. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. S. 718. Denials which are complete in themselves raise general issue as to allegations denied, and fact that certain allegations of new matter are inconsistent with the denials does not justify court in striking out latter as sham. Schlesinger v. McDonald, 196 App. Div. 570, 94 N. Y. S. 721.

South Dakota: A party may plead as many defenses as he may have whether they are consistent or inconsistent. Rev. Code Civ. Proc. § 127. Hardman v. Kelley [S. D.] 104 N. W. 272.

Washington: The rule against inconsistent defenses does not apply to an inconsistency between an admission and a denial. Irwin v. Buffalo Pitts Co. [Wash.] 81 P. 849. In an action to recover commissions for negotiating a sale, a defense under a contract providing for reduction of commissions if the purchase price was not paid is not inconsisent with a defense of limitations or a defense of settlement. Id.

59. Missouri: Matter in abatement and in bar may be united in the same answer. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155.

Pennsylvania: A plea in abatement cannot be pleaded at the same time with one in bar, the two being inconsistent. Southern Bldg. & Loan Assn. v. Penna. Fire Ins. Co., 23 Pa. Super. Ct. 88.

60. Defendant is not required to plead or reply by affidavit of defense to an insufficient declaration, and judgment will not be entered against him where he files an insufficient affidavit. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171.

61. If he does so, he is bound by admissions in such answer. Evasive answer treated as admission. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008.

62. A defense of usury pleaded by one joint defendant inures to his co-defendant who failed to plead. Lowe v. Walker [Ark.] 91 S. W. 22.

63. As where one defendant in replevin disclaimed and alleged that he held for the true owner, his co-defendant. Carpenter v. Ingram [Ark.] 91 S. W. 24.

64, 65. Gulling v. Washoe County Bank [Nev.] 82 P. 800.

66. Plea of justification in libel is in confession and avoidance, and must be of the very matter alleged in the declaration to have been published, and must be complete. Commercial News Co. v. Beard, 116 Ill. App. 501. Where plaintiff was charged with protecting gamblers, plea must set up how, when, and where he did so, and what he did or said. Id. In action in mandamus to compel railroad to construct private crossing, allegations in answer that plaintiff by reason of his acquiescence in and consent to the construction of a bridge for a highway crossing was estopped to demand a highway crossing held properly stricken out, the mere allegation of consent being insufficient as a foundation for the plea of estoppel, it being the duty of the railroad to make a good and sufficient highway crossing, and every citizen is bound to acquiesce in its doing so. Herrstrom v. Newton & N. W. R. Co. [Iowa] 105 N. W. 436. It is no defense to an action to recover for certain specified legal services that plaintiff's assignors had performed other services under a contract

not be evasive.[67] Each separate defense[68] or plea must be complete in itself,[69] and cannot be aided by allegations or denials in another part of the answer not incorporated therein by reference.[70] A partial defense must be pleaded as such and not as a complete defense to the action.[71] A paragraph designated as a counterclaim must be tested as such, and defendant cannot, on demurrer, urge its sufficiency as a defense.[72]

The sufficiency of a plea is to be determined by reference to it alone.[73] In order to be good it must state facts from which as a conclusion of law the court can see that a defense to the particular suit either in bar or abatement arises.[74] A plea which professes to answer the whole of what is adversely alleged in the declaration, but which in fact only answers a part of it and would not prevent a recovery if the facts therein alleged were proved, is bad.[75] Special pleas amounting to the general issue are properly stricken,[76] and the rejection of a plea setting up facts provable under pleas received is not prejudicial.[77]

The contention that the action is brought improperly and without legal authority is proper matter in abatement.[78] A plea in abatement must be certain to every intent.[79] If to the jurisdiction, there must be proper averments of facts accurately and logically stated, excluding every intendment of jurisdiction.[80]

Denials and traverses.[81]—An answer need not contain admissions, but it is sufficient to deny each controverted allegation of the complaint.[82] Such allegations can be controverted only by a general or specific denial.[83] A denial of all matters not

by which they agreed to accept whatever remuneration for their services the defendant should fix. Butler v. General Acc. Assur. Corp., 92 N. Y. S. 1025. In action for unlawful dissection of a dead body, answer alleging that defendant operated on deceased at her request and that she subsequently died, held bad as not meeting the allegations of the complaint. Jackson v. Savage, 109 App. Div. 556, 96 N. Y. S. 366.

67. An answer by a corporation that for want of information it can neither admit nor deny an allegation that a named person is its general manager is evasive and will be treated as an admission thereof. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008.

68. Defense in action on note held demurrable. Kipp v. Gates [Wis.] 105 N. W. 947.

69. At law each plea is independent of every other and the admission in one plea cannot be used to limit the effect of another. Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263.

70. On demurrer to affirmative defense it must be treated as separate plea. Singer v. Abrams, 47 Misc. 360, 94 N. Y. S. 7. Demurrers to defenses held properly sustained. Mott v. De Nisco, 94 N. Y. S. 380.

71. Code Civ. Proc. § 508. If this is not done it will be assumed that new matter is pleaded as complete defense, and it will be tested as such on demurrer. Butler v. General Acc. Assur. Corp., 92 N. Y. S. 1025. In action to recover for professional services where answer alleged agreement that sum to be fixed by defendant should be accepted in satisfaction for such services, but there was no tender, and no money was brought into court, held that defense was partial one only and demurrable because not so pleaded. Id. A separate defense not pleaded as a partial defense or in mitigation of damages must be deemed to have been pleaded as a complete defense. Tested by this rule on demurrer. Code Civ. Proc. § 508. Mott v. De Nisco, 94 N. Y. S. 380.

72. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49.

73. Whether a demurrer to an interplea is properly sustained must be determined by reference to the plea. May v. Disconto Gesellschaft, 113 Ill. App. 415.

74. Willard v. Zehr, 116 Ill. App. 496.

75. Merriman v. Cover [Va.] 51 S. E. 817. A plea in bar which professes to answer a whole count but answers only a part of it is bad. Knickerbocker Trust Co. v. Coyle, 139 F. 792. A plea which purports to go to all the counts of a complaint and is bad as to some of them is subject to demurrer. Snedecor v. Pope [Ala.] 39 So. 318.

76. Peacock v. Feaster [Fla.] 40 So. 74.

77. Merriman v. Cover [Va.] 51 S. E. 817.

78. Contention that action was brought improperly and without legal authority, because plaintiff was defendant's attorney and could not act for himself while acting for her, is properly a matter in abatement. Chamberlayne v. Nazro, 188 Mass. 454, 74 N. E. 674.

79. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

80. Presumption is in favor of jurisdiction and presumptions, deductions, arguments, inferences, and conclusions, are not sufficient. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. Averments to show that defendant was not properly charged with crime for which he had been arrested and brought into the county when he was served with process held insufficient. Id.

81. See 4 C. L. 1007.

82. Code Civ. Proc. § 500. Everything else stands admitted. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180.

specifically admitted is good,[84] and an affirmative allegation that certain facts do not exist is equivalent to a denial that they do exist,[85] but a denial on information and belief of matters of public record is insufficient.[86]

Confession and avoidance.[87]—A denial differs from a defense in that the former puts the plaintiff to his proof, while the latter is a plea by way of confession and avoidance.[88] Matter embraced in the issue raised or which could be raised by a denial is not new matter.[89] General denials being inconsistent with confession are not properly a part of a defense,[90] but to state a valid defense it may be necessary to deny specific portions of the complaint which would otherwise be deemed admitted, and hence all denials in a defense are not necessarily surplusage or immaterial.[91] A separate affirmative defense, complete in itself, in the nature of a confession and avoidance of plaintiff's cause of action, if good in law, defeats the action, notwithstanding the fact that the answer also contains a general denial.[92] A defense of the statute of limitations is not a technical plea of confession and avoidance.[93] Whether a defense of a supposed estoppel is so or not depends upon the nature of the matter alleged to show it.[94]

§ 4. *Replication or reply and subsequent pleadings.*[95]—Generally, where the answer contains a counterclaim or any new matter, plaintiff is required to file a reply denying the same or setting up new matter tending to avoid it.[96] In some states new matter set up in the answer is deemed controverted and no reply is necessary.[97] In others it may be ordered in the discretion of the court when the answer sets up new matter by way of confession and avoidance.[98] In others it is required only when the answer sets up a counterclaim.[99]

83. Denials held insufficient to constitute either a general or specific denial of allegations to assignment of note. Singer v. Abrams, 47 Misc. 360, 94 N. Y. S. 7.

84. Vette v. Evans, 111 Mo. App. 588, 86 S. W. 504.

85. Allegation that death of insured "did not result from bodily injury," etc. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282.

86. Proceedings for opening of highway. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

87. See 4 C. L. 1008.

88. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49. A defense can only consist of new matter. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180.

89. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180.

90, 91. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49.

92. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

93. Hence fact that it is insufficient does not entitle plaintiff to judgment on motion. Webber v. Ingersoll [Neb.] 104 N. W. 600.

94. Plea that plaintiff is estopped to litigate cause of action on which he elected to proceed by reason of the fact that it is a departure from the cause of action alleged in the original petition is not. Webber v. Ingersoll [Neb.] 104 N. W. 600.

95. See 4 C. L. 1009. See, also, Equity, 5 C. L. 1144.

96. If the answer sets up new matter by way of defense the reply may deny it, and may allege in ordinary and concise language new matter not inconsistent with the petition. Code Civ. Proc. § 109. Where defendant corporation pleads ultra vires, plaintiff may plead facts not inconsistent with his petition in the nature of an estoppel, or to show that the corporation was, under the circumstances, empowered to enter into the contract sued on. Horst v. Lewis [Neb.] 103 N. W. 460. Where no replication was filed to an answer denying authority of an agent, evidence of holding out is inadmissible. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390. An answer to a complaint on a note alleging that the note was given without consideration, as security only, and that nothing is due thereon, contains no new matter. Adams v. Casey [Wash.] 80 P. 853.

97. Plea of former adjudication. Harding v. Harding [Cal.] 83 P. 434. Defendant not entitled to judgment on overruling of demurrer to answer. Green v. Duvergey, 146 Cal. 379, 80 P. 234. In New York no reply is necessary in the municipal court under Laws 1898, p. 1265, c. 350, § 14, providing that pleadings shall be same as in justice's court, and Code Civ. Proc. § 2935. Mott v. Edwards, 98 App. Div. 511, 90 N. Y. S. 303. Plaintiff bought account against defendants at an assignee's sale of assets of an insolvent corporation, and in suit thereon defendants set up agreement whereby an officer of the corporation was to be allowed to trade out the amount of the purchase price at defendants' store, which was alleged to have been executed. Held that evidence of the insolvency of the corporation when such agreement was made was admissible to destroy such defense, though not pleaded in the complaint, and there was no reply. Id.

98. Service of a reply will only be compelled where the substantial ends of justice will be promoted thereby. Held that clearness of issue would not be realized nor the

A reply when filed relates back to the commencement of the action.[1] It should be complete in itself and should not require a reference to the answer to determine what matters are intended to be alleged.[2] No reply is necessary where the new matter set up constitutes no defense,[3] or is a mere conclusion of law,[4] or amounts to a mere denial,[5] nor is a demurrer to the answer allowable unless it contains new matter by way of confession and avoidance.[6] Co-defendants need not reply to an answer not made a cross-petition against them.[7]

Replications should traverse or directly confess and avoid the averments of the pleas to which they are addressed.[8] A replication which does not avoid the legal effect of an affirmative defense presents no issue of fact for the jury, though it denies certain averments of fact in such defense.[9] Defendant cannot be heard to say that the issue tendered by the replication is too broad where it is no broader than that tendered by the plea.[10] A plea specially replied to in confession and avoidance stands proved without evidence.[11]

Plaintiff can recover only on the cause of action set up in his complaint, and cannot in his reply take a position inconsistent therewith.[12] The petition and re-

ends of justice promoted by a reply under the circumstances. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 514, 91 N. Y. S. 831.

99. Under statutes dispensing with reply except in case of counterclaim, fraud in an instrument set up in the answer may be shown without reply. Sass v. Thomas [Ind. T.] 89 S. W. 656. Plaintiff need not reply to a separate answer and defense, even though it would be sufficient as a counterclaim if so pleaded. Fraudulent representations inducing the execution of a lease, pleaded as separate answer and defense only, cannot be used as equitable counterclaim for rescission Gilsey v. Keen, 93 N. Y. S. 783. Where facts which might have been used as a counterclaim are pleaded as a defense merely, and answer demands no affirmative relief, no reply is necessary. Regan v. Jones [N. D.] 105 N. W. 613. No reply is necessary where the facts stated in the answer constitute a defense only. Answer held not to state counterclaim where allegations were not so designated and were not accompanied by a prayer for judgment. State v. Coughran [S. D.] 103 N. W. 31.

1. May be filed after expiration of period of limitations when action is commenced before the running of the statute. State v. Coughran [S. D.] 103 N. W. 31.

2. Code Civ. Proc. §§ 500, 514, requires matters averred to be set forth in plain and concise language without repetition. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. S. 828. Where reply to counterclaim reiterated allegations and denials in certain other paragraphs referred to by number only, and admitted and denied certain allegations in the answer referred to in the same manner, held that court would not spell out lines in paragraphs and associate them with complaint and reply in order to determine an alleged inconsistency. Id.

3. Answer in action to recover money alleged to have been received from certain insurance companies, by defendant as plaintiff's agent, held not to constitute a defense. Voisin v. Mitchell, 96 N. Y. S. 386.

4. Voisin v. Mitchell, 96 N. Y. S. 386.

5. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. An allegation in answer to a petition, charging a duty to do certain things that defendant was bound only to use ordinary diligence therein, amounts to a mere denial. Simpson v. Kelley [Ky.] 90 S. W. 241. In action on notes, where petition alleged that credits mentioned were all to which notes were entitled, and that except as to such credits no part of them had been paid, held that no reply was necessary to answer of third person made a party at his request which alleged that notes were entitled to further credits. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. Reply held unnecessary where answer in action on notes and for enforcement of vendor's lien securing them was mere denial of allegation of lien made in the petition. Id.

6. The only defense which can be attacked by demurrer is one consisting of new matter, or, in other words, matter in confession and avoidance. Code Civ. Proc. § 494. Separate defense consisting of denial of material allegation of the complaint joined with new matter is not demurrable. Onderdonk v. Peale, 93 N. Y. S. 505. Averment that contract sued on was executed in New York is a denial of allegation in complaint that it was executed in Pennsylvania, and hence not demurrable. Id.

7. Barret v. Gwyn [Ky.] 88 S. W. 1096.

8. Otherwise they are demurrable Blasingame v. Royal Circle, 111 Ill. App. 202.

9. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

10. Not where it merely answers what the plea asserts. Peoria Star Co. v. Floyd Special Ag., 115 Ill. App. 401.

11. Lucas v. Stonewall Ins. Co., 139 Ala. 487, 36 So. 40.

12. Averments in the reply inconsistent with those of the complaint cannot be availed of by plaintiff as part of his affirmative cause of action. Defendant held not prejudiced by failure to strike out averments in reply as to modifications and waivers of contract sued on, since they could not be taken advantage of by plaintiff in establishing his cause of action. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. S. 828.

ply are to be construed together in so far as they treat of the same matter,[13] and, when not attacked until after verdict and judgment, they will not be treated as in conflict unless necessarily so.[14]

Additional pleadings.[15]—A replication to a plea setting up a release which charges fraud and covin should conclude with a verification rather than to the country, and a rejoinder should be interposed thereto by defendant, which should be followed by a similiter.[16]

Under the code new matter presented by replication is generally taken as denied.[17]

§ 5. *Demurrer. General rules.*[18]—A demurrer is directed against the pleading itself,[19] and reaches only such defects as are apparent on its face.[20] If the allegations of the complaint warrant the granting of any relief, general demurrer will not lie.[21] A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action will be upheld where a nonsuit must follow if every fact be proved that is therein alleged.[22]

A demurrer cannot go to a fragmentary part of a pleading,[23] but must go to

Held departure: Where the declaration is on a building contract and nonperformance is pleaded, and replication alleges modification of the contract and performance of it as modified. Gates v. O'Gara [Ala.] 39 So. 729. Between replication alleging that a conveyance was procured from the grantor by fraud and complaint alleging that it was in trust for grantor. Woodward v. Woodward, 33 Colo. 457, 81 P. 322. In a suit involving title, between a reply alleging license from the original patentee, and declaration alleging title from the government. Baldridge v. Leon Lake Ditch & Reservoir Co. [Colo. App.] 80 P. 477. Where the complaint was based on infringement of fishing rights acquired under statute, a reply showing that defendant's structure was a public nuisance specially injurious to complainant. Gile v. Baseel, 38 Wash. 212, 80 P. 437.

Held no departure: The complaint in a code action to quiet title properly omitting to allege the nature of defendant's claim, a reply traversing the title set up by defendant is not a departure. Mitchell v. Titus, 33 Colo. 385, 80 P. 1042. Averments in a reply which merely support and elaborate an allegation of the complaint that plaintiff was equitable owner of the premises in controversy. Holmes v. Wolfard [Or.] 81 P. 819.

13. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 103 N. W. 695, rvg. 101 N. W. 341.

14. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 103 N. W. 695, rvg. 101 N. W. 341. In action on accident policy, allegation of waiver of notice in reply held not inconsistent with allegations excusing failure to give it, and allegations of knowledge on the part of defendant in the complaint. Id.

15. See 4 C. L. 1010.

16. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622.

17. Wagner-Stockbridge Mercantile & Drug Co. v. Goddard, 33 Colo. 387, 80 P. 1038.

18. See 4 C. L. 1010. See, also, Equity, 5 C. L. 1144.

19. The examination of a defendant before trial taken and filed pursuant to Code, § 581, should not be taken as part of his answer for purposes of passing on a demurrer. Whitaker v. Jenkins [N. C.] 51 S. E. 104.

20. Only facts pleaded can be considered. Maskey v. Lackmann, 146 Cal. 777, 81 P. 115. A failure to allege that the contract sued on was in writing raises no presumption that it was in parol, and, though it is required to be in writing, failure cannot be taken advantage of by demurrer. Anderson v. Hilton & D. Lumber Co., 121 Ga. 688, 49 S. E. 725. A ground of demurrer that a copy of the contract sued on is not attached as an exhibit is not well founded, where it does not affirmatively appear that the contract was in writing. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. Question of merger of judgments does not arise on demurrer to pleading averring that only one judgment existed. Abbott v. Abbott, 70 Kan. 423, 78 P. 827. Demurrer on the ground that defendant was a married woman is properly overruled where that ground does not appear on the face of the complaint. Ball v. Paquin [N. C.] 52 S. E. 410. In an action to enforce the liability of a stockholder of an insolvent bank, where it does not affirmatively appear from the complaint that there are other creditors or other solvent stockholders who have not paid the amount due from them as such, a demurrer thereto does not raise the question of a defect of parties plaintiff or defendant. Union Nat. Bank v. Halley [S. D.] 104 N. W. 213. Only those questions can be considered which arise on the facts stated in the pleading demurred to. An estoppel based on plaintiff's nonresidence and defendant's ignorance of certain facts not involved on demurrer to a complaint which does not show plaintiff's nonresidence and alleges that defendant knew the facts in question. McNair v. Ingebrigtsen, 36 Wash. 186, 78 P. 789.

21. Village of Sand Point v. Doyle [Idaho] 83 P. 598.

22. Action against executors to determine right to legacy given to one who predeceased testator. Roberts v. Bosworth, 107 App. Div. 511, 95 N. Y. S. 239.

23. An exception will not lie to a portion of a pleading but it must be construed as a whole. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41.

the whole of the count, plea, or defense to which it is addressed.[24] A demurrer addressed to a complaint[25] or answer[26] as a whole is properly overruled if any of the counts or defenses set up therein are good, and the same is true of a demurrer to a complaint, where plaintiff is entitled to any relief on the facts pleaded.[27] So, too, a demurrer to a particular count or paragraph should be overruled if it contains matter sufficient to constitute a cause of action or defense on any theory,[28] but a demurrer by one of two defendants is properly overruled if the complaint is sufficient as to him.[29]

The action of the court in ruling on a demurrer is to be considered only with reference to the pleading on file when the ruling was made.[30] A demurrer filed after the filing of an amended pleading will be considered as addressed to it,[31] but a demurrer once sustained is not deemed interposed against the amended pleading without refiling.[32]

24. A demurrer to a part of a defense only cannot be sustained. Demurrer held one to the entire defense, and not one to each of its subdivisions separately. Bates v. Delaware, L. & W. R. Co., 109 App. Div. 774, 96 N. Y. S. 711. Demurrer to one subdivision of defense held bad. Id.

25. Demurrer to an entire declaration should be overruled if any count is good. Gulf Lumber Co. v. Walsh [Fla.] 38 So. 831; Jackson v. Baker, 24 App. D. C. 100. Demurrer based on ground that facts set out in first and second paragraphs of complaint did not constitute cause of action held joint, though styled a separate demurrer to the first and second paragraphs, there being no effort to separately question the sufficiency of each paragraph. Town of Winamac v. Stout [Ind.] 75 N. E. 158. Where complaint in action for damages for breach of contract to furnish wheels states a cause of action for damages for wheels not delivered, demurrer thereto is properly overruled. Counersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. A joint demurrer addressed to a pleading as a whole is bad if any paragraphs thereof are sufficient. Demurrer to "complaint and to each paragraph thereof" on the ground that "said complaint does not, nor does either paragraph thereof, state facts sufficient to constitute a cause of action" is a joint demurrer, and admits truth of all facts stated in complaint. Pittsburgh, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50. A demurrer to "so much of" a bill as seeks to have a sale of realty rescinded, held a demurrer to the whole bill in so far as it seeks rescission, there being no part thereof seeking such relief, and will be treated as an assignment of causes of demurrer to the whole bill. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653. Demurrer to entire complaint is properly overruled if it contains one good cause of action properly pleaded, and is too broad to eliminate allegations as to mental anguish, which are not stated as a separate cause of action, but only as a further element of damage. Hall v. Western Union Tel. Co. [N. C.] 52 S. E. 50.

26. Where one of several defenses stated is good. Downing v. Haas, 33 Colo. 344, 81 P. 33. A demurrer to a counterclaim on the ground that it does not state facts sufficient to constitute a cause of action cannot prevail if one good cause of action can be spelled out of the counterclaim as pleaded, notwithstanding that it is involved and artificial, and would have been open to the objection of duplicity if properly raised. Kneeland v. Pennell, 96 N. Y. S. 403. Partial defense constituting a new issue which, if resolved in defendant's favor, would defeat plaintiff's right to recover to the full extent demanded, and of facts which plaintiff would not be required to negative in proving his case on default, held to sustain answer as against general demurrer. Patterson v. Cappon [Wis.] 102 N. W. 1083.

27. That the complaint does not state the facts clearly, alleges unnecessary and irrelevant facts, and asks for relief to which plaintiff is not entitled, is not ground of demurrer for failure to state a cause of action if the facts alleged entitle plaintiff to any relief. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. If the declaration shows a right to even nominal damages demurrer will not reach insufficient averments of special damage. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838. Demurrer should be overruled if plaintiff is entitled to any relief on the facts pleaded though he is not entitled to some of the relief asked. McGown v. Barnum, 182 N. Y. 547, 75 N. E. 155.

28. Where part of a count is defective, but if the defective matter were stricken a cause of action would remain, demurrer will not lie. Woodstock Iron Works v. Stockdale [Ala.] 39 So. 335. A general demurrer to a complaint in an action on a bond will be overruled, if there is a single well assigned breach. Harrah v. State [Ind. App.] 76 N. E. 443. An exception for insufficiency of facts will be overruled where a cause of action might exist under some phases of the facts alleged. Hillard v. Taylor, 114 La. 883, 38 So. 594. A demurrer to a paragraph of an answer containing among other things a denial of material allegations of the complaint is properly overruled. Ingersoll v. Davis [Wyo.] 82 P. 867.

29. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990.

30. Without reference to subsequent developments in the cause. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973.

31. Complaint. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277.

32. Cooley v. U. S. Sav. & Loan Co. [Ala.] 39 So. 515.

A defendant ruled to answer may nevertheless interpose a demurrer.[33] Where plaintiff has interposed a valid demurrer to a defense, a further demurrer which is bad in form may be regarded as surplusage.[34] A demurrer for misjoinder of causes of action will lie though both are pleaded in one paragraph.[35]

Form, requisites, and sufficiency.[36]—It is sufficient if the demurrer uses language equivalent to that of the statute.[37] Where the statute prescribes the grounds of demurrer, no others are available.[38] In some states the precise defect must be pointed out.[39] Special demurrers in actions at law are abolished in some states.[40] A speaking demurrer is bad.[41]

If the grounds assigned are not well taken, the demurrer is properly overruled though the pleading is otherwise defective.[42] A tender is not permissible in aid of a defective demurrer.[43]

Error cannot be predicated on the sustaining of a demurrer to a plea, when the facts therein alleged may be proved under a general denial in the answer,[44] or in sustaining a demurrer to one paragraph where all its averments may be proven under a paragraph which is held good,[45] or in overruling a demurrer to a defense

33. Wieczorek v. Adamski, 114 Ill. App. 161.

34. Bates v. Delaware, L. & W. R. Co., 109 App. Div. 774, 96 N. Y. S. 711.

35. Benson v. Battey, 70 Kan. 288, 78 P. 844.

36. See 4 C. L. 1013.

37. Averment that "the complaint does not state facts sufficient to constitute a good cause of action" held equivalent to averment that it "does not state sufficient facts to constitute a cause of action." City of Vincennes v. Spees [Ind. App.] 74 N. E. 277. Immaterial that demurrer alleges that complaint does not "contain" facts sufficient to constitute a cause of action instead of that it does not "state" such facts. Hay v. Bash [Ind. App.] 76 N. E. 644.

38. Demurrer to paragraph of answer for want of facts held insufficient. White v. Sun Pub. Co., 164 Ind. 426, 73 N. E. 890. That contract sued on appears to be void under statute of frauds and as in restraint of trade not ground. Wolverton v. Bruce [Ind. T.] 89 S. W. 1018.

39. Where demurrers are required to distinctly state the ground of objection a demurrer to a plea that "it is no answer to the complaint" is insufficient. Ryall v. Allen [Ala.] 38 So. 851. Demurrer to bill to redeem mineral interests for certain lands held sufficiently specific. Code 1896, § 3303. Wallace v. Markstein [Ala.] 40 So. 201. Special demurrers must point out the precise defect. Demurrer in general terms alleging another suit pending, misjoinder of parties and ambiguity held insufficient. Mitchell v. Pearsen [Colo.] 82 P. 446. Demurrer on ground that facts alleged were insufficient to support the action against plaintiffs held too general to raise question whether complaint stated cause of action within scope of statute authorizing suits to quiet title in certain cases. Foote v. Brown [Conn.] 62 A. 667. Where demurrer on ground of misjoinder of causes of action does not specify that a misjoinder exists by reason of the presence of a certain cause in the complaint, the court will not consider such possible complaint. Lillenthal v. Betz, 108 App. Div. 222, 95 N. Y. S. 849. A demurrer to a counterclaim on the ground that it is not of the character specified in Code Civ. Proc. § 501, is sufficiently specific. Kneeland v. Pennell, 96 N. Y. S. 403. A demurrer failing to state wherein the complaint fails to state facts sufficient to constitute a cause of action is general, and is not allowable under the N. C. Code. Ball v. Paquin [N. C.] 52 S. E. 410. An exception to a petition as vague, indefinite and uncertain without particularizing the uncertainty complained of is to be construed as a general exception only. Missouri, etc., R. Co. v. Wetz [Tex. Civ. App.] 87 S. W. 373. Demurrer on ground of defect of parties held insufficient in failing to set forth a particular statement of the defect as required by Rev. St. 1898, § 2651. Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074. In action by administrator for partnership accounting defendants having failed to plead in their demurrer Rev. St. 1898, § 4251, providing that fact that no one is in existence who is authorized to bring an action when cause of action accrues shall not more than double the time within which the action may be brought, cannot rely on it under provisions of Id. § 2651. Id.

40. Peacock v. Feaster [Fla.] 40 So. 74.

41. A demurrer which misstates the allegations of the pleading attacked, and thereby introduces a new statement of facts into the record, to which the demurrer is directed, is a speaking demurrer, and is bad. Ivins v. Jacob [N. J. Eq.] 60 A. 1125.

42. Little v. Marx [Ala.] 39 So. 517.

43. Must accompany answer under Code § 575. Hall v. Western Union Tel. Co. [N. C.] 52 S. E. 50. Tender of $1 for mental anguish held not to aid demurrer which was too broad to eliminate allegations in regard to such anguish. Id.

44. Baggerly v. Lee [Ind. App.] 73 N. E. 921; Smith v. Smith [Ind. App.] 74 N. E. 1008; Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991; McFarland v. Stansifer [Ind. App.] 76 N. E. 124.

45. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. Error in sustaining demurrer to special replication is harmless, where facts therein alleged could have been shown under general replication allowed to stand. State v. Porter [Ala.] 40 So. 144.

which the findings show in no way entered into or affected the judgment,[46] or in overruling demurrers to argumentative denials;[47] nor is it reversible error to sustain a demurrer to a bad pleading though the demurrer is so defective in form as to present no question.[48]

Issues raised.[49]—A demurrer raises issues of law alone,[50] and only such as are involved in the facts pleaded.[51]

A demurrer, whenever and by whomsoever interposed, reaches back through the whole record, and condemns the first pleading defective in substance,[52] but if the answer is held good on demurrer, defendant cannot urge on appeal that it was error not to carry back the demurrer to the complaint.[53]

A demurrer admits the truth of all material statements of fact which are well pleaded,[54] and matters necessarily inferred therefrom,[55] but does not admit conclusions of law[56] or averments which are contrary to facts judicially noticed,[57] or allegations as to documentary exhibits.[58]

46. Overruling demurrer to paragraph of answer setting up estoppel held harmless. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991.

47. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991.

48. Spaulding v. Mott [Ind.] 76 N. E. 620.

49. See 4 C. L. 1013.

50. Questions of fact cannot be tried. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775. It is the duty of the judge to pass upon the sufficiency of the petition to show a cause of action in plaintiff's favor, when that question is raised by demurrer, though the case is one wherein plaintiff seeks to recover damages alleged to have been sustained in consequence of defendant's negligence. Hill v. Louisville & N. R. Co. [Ga.] 52 S. E. 651.

51. A demurrer to a declaration in an action for damages against a city on the ground that a copy of the demand required by statute to be made in such cases before commencing suit is not annexed to the declaration and that defendant cannot, therefore, state whether the declaration and the demand correspond, does not raise the question of the sufficiency of the demand made. City Council of Augusta v. Marks [Ga.] 52 S. E. 539.

52. Bartholomew v. Guthrie [Kan.] 81 P. 491. Under the practice prevailing in courts of Arkansas. Whitehill v. Western Union Tel. Co., 136 F. 499. A demurrer to the answer is carried back to the complaint only as to substantial defects. Smith v. Thornton [Ark.] 86 S. W. 1008. Where, in action for libel, demurrer to special replications is sustained and court subsequently becomes satisfied that special pleas of justification were not a bar to the action and that it was error to refuse to carry the demurrer back to them, he should temporarily withdraw the case from the jury, set aside order sustaining demurrer, carry it back to the pleas, enter order sustaining the demurrer to said pleas, and then permit defendant to stand by them or plead over. Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243, afg. 116 Ill. App. 184. A demurrer to a plea will not be carried back to the petition where a demurrer to the latter pleading has been waived by pleading over after it was overruled. City of Chicago v. People, 111 Ill. App. 594. Defendant cannot complain that a defective replication is allowed to stand to a defective plea. Peoria Star Co. v. Floyd Special Ag., 115 Ill. App. 401. Particularly applicable in mandamus, and demurrer to answer to the writ will be overruled if writ fails to show refusal or neglect to perform an official duty, the act demanded not appearing, either by the writ or answer, to be a duty of the respondent. State v. Sams [Neb.] 99 N. W. 544. In such case it is not error to dismiss the action and render judgment against the relator for costs on overruling the demurrer, when no offer to amend or request for leave to do so is made. Id. Failure of complaint in action by foreign corporation to allege that it has complied with statutes so as to authorize it to do business in state cannot be taken advantage of on demurrer to answer, that objection being one to plaintiff's legal capacity to sue, which is waived unless taken advantage of by demurrer or answer. Portland Co. v. Hall, 95 N. Y. S. 36. A demurrer to an answer is bad where the complaint states no cause of action. Darragh v. Rowe, 109 App. Div. 560, 96 N. Y. S. 666. A bad answer is good enough for a bad petition. Bergin & Brady Co. v. Fraas, 3 Ohio N. P. (N. S.) 206.

53. Embree v. Emmerson [Ind. App.] 74 N. E. 44.

54. Naganab v. Hitchcock, 25 App. D. C. 200; City of Chicago v. Banker, 112 Ill. App. 94; Bradbury v. Waukegan & W. Min. & Smelting Co., 113 Ill. App. 600; Malott v. Sample, 164 Ind. 645, 74 N. E. 245; French v. City of Lawrence [Mass.] 76 N. E. 730; Williams v. Mathewson [N. H.] 60 A. 687. Where demurrer to answer is sustained and defendant elects to stand by it, all properly pleaded allegations thereof will be taken as true. Chicago City R. Co. v. People, 116 Ill. App. 633.

55. Rule authorizing consideration of matters of necessary inference is not to be carried further than to authorize consideration of matters of inference from facts which are well pleaded. Malott v. Sample, 164 Ind. 645, 74 N. E. 245.

56. As to what are conclusions see § 1, ante. Columbian University v. Taylor, 25 App. D. C. 124; Mason v. Mason, 219 Ill. 609, 76 N. E. 692; Bradbury v. Waukegan & W. Min. & Smelting Co., 113 Ill. App. 600; Cowell

Hearing and decision on demurrer.[59]—A judgment on demurrer is conclusive until duly set aside, and the question thereby settled is to be regarded as res adjudicata[60] and cannot be reviewed or revised at a subsequent term,[61] but this does not apply to a mere order sustaining a demurrer or exception,[62] and such an order is not a judgment finally and irrevocably disposing of the case.[63]

The sustaining of a demurrer for inconsistency in joining certain claims with one previously made which is claimed to determine the character of the action results only in striking those particular claims, and does not authorize a dismissal of the entire action for misjoinder.[64] The action should not be dismissed where the objections raised by special demurrer are met by appropriate amendments,[65] but when the amendments are insufficient for that purpose the rule is otherwise.[66] Demurrers to the petition and to the answer should be considered independently when they raise different issues.[67]

The failure to enter a formal order showing the disposition of a demurrer is not necessarily a fatal error.[68] A statutory requirement that the decision on demurrer shall be in writing and signed will be deemed waived where counsel do not request that such decision be reduced to writing.[69]

v. City Water Supply Co. [Iowa] 105 N. W. 1016; State v. Henry [Miss.] 40 So. 152; Williams v. Mathewson [N. H.] 60 A. 687; Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956. The rule permitting conclusions of law to be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or defense is called in question has no application to conclusions of fact. Such conclusions do not render pleading vulnerable to a demurrer. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688. Allegations that injuries were received through accidental means held conclusion of fact. Id.

57. French v. State Senate, 146 Cal. 604, 80 P. 1031.

58. Demurrer does not admit allegations as to construction of statutes or documentary exhibits. Naganab v. Hitchcock, 25 App. D. C. 200. Allegation of bill that tax notices were not signed is not admitted by a demurrer, where exhibits, made a part of the bill, show affirmatively that they were signed, and that exact duplicates were served. Williams v. Olson [Mich.] 104 N. W. 1101.

59. See 4 C. L. 1015.

60. Judgment overruling demurrer to petition is conclusive that plaintiff is entitled to recover on facts stated in the petition. Sims v. Georgia R. & Elec. Co., 123 Ga. 643, 51 S. E. 573. A judgment sustaining a demurrer to the complaint is a bar to a second action on the same facts, but is not res adjudicata where the complaint in the second action supplies the allegations rendering the first one demurrable. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

61. Sims v. Georgia R. & Elec. Co., 123 Ga. 643, 51 S. E. 573. If no exception is taken thereto and it stands unreversed when the case comes on for trial on the merits, he cannot, in his instructions to the jury, give the defendant the benefit of the defense set up in the demurrer, thereby, by indirection, depriving plaintiff of the estoppel he is entitled to urge as against the defendant. If ruling on demurrer is that facts stated in petition entitle plaintiff to recover, cannot deprive him of right to recover on proof of such facts. Sims v. Georgia R. & Elec. Co., 123 Ga. 643, 51 S. E. 573.

62. Where the court has sustained exceptions to part of a pleading it may on the trial change the ruling and submit the issues raised by such pleading. Kneale v. Thornton [Tex. Civ. App.] 88 S. W. 228.

63. New parties may be brought in though time to amend has expired. De La Beckwith v. Superior Ct. of Colusa County, 146 Cal. 496, 80 P. 717.

64. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760.

65. Montgomery v. King, 123 Ga. 14, 50 S. E. 963.

66. Where plaintiff is given opportunity to amend to meet defects in petition pointed out by special demurrer and amendment is insufficient for that purpose, the petition may be dismissed without regard to whether it is good in substance. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974.

67. A demurrer to an answer, which denies averments of fraud, and alleges that the price charged was reasonable, that plaintiff has suffered no damage, and that noncompliance with statutory requirements was inadvertent rather than willful, raises different questions from those determined on demurrer to the petition. Hunt v. Fronizer, 3 Ohio N. P. (N. S.) 303.

68. Where petition to contest election was demurred to on ground that it was a bill in chancery and that chancery court had no jurisdiction, and demurrer and motion to transfer case to law docket were considered together and latter was allowed, held that failure to enter a formal order showing the disposition of the demurrer was not a fatal error. Quartier v. Dawiat, 219 Ill. 326, 76 N. E. 371.

69. Requirements of Code Civ. Proc. § 289. Mauldin v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 677. Where it is admitted that demurrer on ground that complaint did not state facts sufficient to constitute cause of action was submitted to judge and that he subsequently proceeded with the trial of the case on the merits, it sufficiently appears

Leave to plead over after demurrer sustained rests in discretion.[70]

§ 6. *Cross complaints and answers.*[71]—A cross petition must relate to the cause of action sued on.[72] A defendant may demand relief against co-defendants without asking relief against plaintiff.[73] Defendant in a creditor's suit is entitled to file a cross petition as to the amount of a debt due him from another defendant which complainants seek to reach.[74] Defendant may be granted any relief justified by the allegations of the answer and the findings of the jury upon appropriate issues, though there is no prayer therefor.[75] The failure of the cross complaint to require an answer is a waiver thereof.[76]

§ 7. *Amendments.*[77]—Amendments are as a rule freely granted in the furtherance of justice,[78] the matter being largely committed to the discretion of the court,[79] which may take into consideration the probable utility of the amendment[80]

that he overruled the demurrer, so that another judge on a second trial cannot again pass upon it. Id.

70. Stewart v. Douglass [Cal.] 83 P. 699.

71. See 4 C. L. 1015. See, also, Equity, 5 C. L. 1144. This section includes the right of defendant under the codes to demand affirmative relief against a co-defendant or against plaintiff except by way of counterclaim.

72. A landlord's action against an independent contractor for damages to leased and tenant's property cannot be litigated in action by tenant against landlord. Nahm v. Register Newspaper Co., 27 Ky. L. R. 887, 87 S. W. 296.

73. In suit to follow alleged trust fund into land, where plaintiff brings in all parties in interest including a vendee alleged to claim an interest in the premises, the latter may set up his equities as a bona fide purchaser, and ask for relief against his co-defendants, without asking any relief against plaintiff other than that his equities be declared superior to plaintiff's. Darragh v. Rowe, 109 App. Div. 560, 96 N. Y. S. 666.

74. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496.

75. Where defendants in their answer set up a mistake in the deed under which they claim, court may award a reformation thereof though there is no prayer therefor, if the allegations of the answer and the findings of the jury upon appropriate issues justify such relief. Gwyn-Harper Mfg. Co. v. Cloer [N. C.] 52 S. E. 305.

76. Cribbs v. Walker [Ark.] 85 S. W. 244.

77. See 4 C. L. 1016.

78. It is error to refuse to allow a defective jurat to be amended. Rootes v. Thomas, 85 Miss. 493, 38 So. 502. The uniform practice of the federal courts is to permit amendments in all judicial proceedings where they are necessary to enable parties to reach the merits of the controversy they attempt to present, and their allowance will work no injustice to anyone. Under Act Sept. 24, 1789, c. 20, § 32, 1 St. 91. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000. Applies in bankruptcy proceedings. Id.

79. Toher v. Schaefer, 96 N. Y. S. 470; Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71; Young v. Guess [La.] 38 So. 975; Joyner v. Early [N. C.] 51 S. E. 778; Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47; Cunningham v. Fiske [N. M.] 83 P. 789; Chunn v. City & S. R. Co., 23 App. D. C. 551. Under Law of Civ. Proc. for Cuba and Porto Rico, art. 156, allowing joinder of causes of action against or in favor of several persons arising from the same service of title, or based upon the same cause of action, held that there was no clear abuse of discretion in allowing amendment joining assignee of insurance policy as a plaintiff in a suit in Porto Rico by a mortgage creditor of the insured to enforce his right to the avails of the insurance, where assignee's rights were alleged to be subordinate to those of the mortgagee. Royal Ins. Co. v. Miller, 26 S. Ct. 46. Denial of motion made at close of evidence so as to allege illegal provisions in contract for paving not interfered with. Walker v. Detroit, 136 Mich. 6, 98 N. W. 744. Necessity of an amendment and regularity of the application for leave rest largely in the discretion of the trial court. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637; Peacock v. Feaster [Fla.] 40 So. 74. The federal courts have a large discretion in permitting the correction of defects in pleadings and process by amendment [Rev. St. § 954] (Great Northern R. Co. v. Herron [C. C. A.] 136 F. 49), and rulings of this character are no ground for reversal unless the discretion is grossly abused (Id.). A refusal to allow such amendment will, however, be cause for reversal when substantial injustice appears to have been done. Substantial injustice held to have been done by refusal to allow defendant to file additional paragraph of answer during trial. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. While in granting leave to amend pleadings the court exercises a large discretion, yet that discretion should be exercised liberally in favor of granting such amendments in order that the case may be fully tried upon its merits. Hardman v. Kelley [S. D.] 104 N. W. 272. When application is made for leave to amend by inserting an additional defense which a party may have to the action at a reasonable time before trial, such amendment should be allowed upon such terms as the court may deem just to the adverse party. Id. Held an abuse of discretion and reversible error to refuse to permit amendment setting up additional defenses, because inconsistent with those previously set up, where motion was seasonably made, and defenses, if sustained, would have entitled defendant to judgment and one of them would have been barred by a judgment in the ac-

and the diligence exercised in presenting it,[81] and impose such terms as seem just.[82] Amendments may, on proper leave granted, be made before the trial,[83] at the trial under proper restrictions against surprise,[84] at the conclusion of the trial to conform

tion. Id. Defenses inserted at the trial are properly stricken where they do not conform to the order allowing the amendment. Id. In action in municipal court, denial of motion to amend complaint so as to set up entirely new cause of action held not an abuse of discretion where terms which that court had power to impose were entirely inadequate. Toher v. Schaefer, 96 N. Y. S. 470.

80. Amendment in description of land in petition held immaterial and properly allowed on appeal. Mann v. Balfour, 187 Mo. 290, 86 S. W. 103. On issue framed after judgment has been opened generally, where it is agreed that the contract sued on shall stand for declaration, and defendant shall plead nonassumpsit, which she does, it is not error for the court to refuse to allow filing of additional plea of non est factum, since execution can be denied under plea filed. Mulhearn v. Roach, 24 Pa. Super. Ct. 483. In action against railroad company, for damages for death of passenger, it is proper to disallow amendment to petition needing no amplification where only additional matter sought to be added is the assertion that defendant owed passenger a legal duty, the nonobservance of which could in no way have brought about or contributed to the injury complained of. White v. Southern R. Co., 123 Ga. 353, 51 S. E. 411. Leave to make an unnecessary amendment is properly denied. Vulcan Ironworks v. Burrell Const. Co. [Wash.] 81 P. 836. It is not an abuse of discretion to deny leave to make amendments contradictory of the original pleading and with no substantial showing that they can be proved. Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 P. 17. Leave will not be given to file an amended answer setting up as special defenses matters provable under a general denial pleaded in the original answer. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180. That an amendment is so framed that if demurred to it might be held insufficient is not necessarily fatal in its allowance. Pratt v. Rhodes [Conn.] 61 A. 1009.

81. Fire insurance company held to have exercised sufficient diligence in presenting additional paragraph of answer, setting up fact that plaintiff had other insurance on policy, where it discovered that fact from plaintiff's evidence the day before offer was made. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. Leave to defendant to amend at the trial so as to plead a misjoinder of parties is properly denied when it appears that he knew of the facts at the time of answering. Phenix Ins. Co. v. Washington [Kan.] 81 P. 461. Where defendant in ejectment asserting rights as mortgagee in possession was defeated because it appeared that she had assigned the mortgage and could not prove a reassignment under her pleadings, held that, on obtaining a statutory new trial, she would not be allowed to amend her answer so as to allege the reassignment, she having known the facts and their bearing upon her defense and having neglected to amend for two years after the sufficiency of the pleading had been passed upon by the lower court. Barson v. Mulligan, 94 N. Y. S. 687. Where case was never put upon the calendar and was not moved by either party, held that motion to amend the complaint made a year and a half after the service of the answer would not be denied on the ground of laches. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723.

82. Imposition of terms on allowing an amendment cannot be complained of when the amendment constituted no defense. Mahoney v. Crockett, 37 Wash. 252, 79 P. 933. A provision authorizing an amendment to the complaint on payment of costs within a specified time is for defendant's benefit and may be waived by him by an extension of the time or otherwise. Written agreement for extension made by attorneys held waiver, such agreements being authorized by Rev. Laws, c. 173, §§ 69, 70. Crossman v. Griggs, 188 Mass. 156, 74 N. E. 358. Where payment of costs is a condition to amendment, acceptance and retention of moneys so paid admits full performance of such condition. Id. Amendment changing cause of action to recover under a contract to one for breach of the same contract should only be allowed upon condition that plaintiff pay all costs theretofore incurred. Dunham v. Hastings Pavement Co., 109 App. Div. 514, 96 N. Y. S. 313. Costs should be allowed defendant on the granting of an amendment to the summons and complaint changing the cause of action from one against them in their representative capacity to one against them individually. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723. An amendment setting up after-acquired title does not require payment of costs to date where the title originally pleaded is not abandoned. McCarthy v. Woods [Tex. Civ. App.] 87 S. W. 405.

83. Where the petition fails to show whether plaintiff is a corporation or a partnership, an amendment after demurrer filed is allowable. Lucile Min. Co. v. Fairbanks, Morse & Co., 27 Ky. L. R. 1100, 87 S. W. 1121. When defendant sued as a corporation pleads that it is a partnership, plaintiff should be allowed to amend. Teets v. Snider Heading Mfg. Co., 27 Ky. L. R. 1061, 87 S. W. 803.

84. Amendment at the trial is allowable in the discretion of the trial court. Altgelt v. Oliver Bros. [Tex. Civ. App.] 86 S. W. 28. There is no abuse of discretion in allowing an amendment at the trial which merely corrects a defect in an existing allegation, the purpose of which is apparent, and which has been allowed to go unchallenged up to that time. In action for damages for destruction of property by fire, alleged to have been set by train, held no abuse of discretion to allow amendment of allegations as to negligence in care of right of way. Great Northern R. Co. v. Herron [C. C. A.] 136 F. 49. Amendments which take the defendant by surprise and deprive him of an opportunity to defend against a part of the claim should not be permitted at the trial except

the pleadings to the proof,[85] and in some cases in the appellate court[86] or after

upon terms which will prevent him from being prejudiced thereby. Such as a continuance, and payment by plaintiff of costs incident thereto. Id. In action for damages for destruction by fire, alleged to have been started by train, of shed and hay which complaint alleged were situated on a specified section, held abuse of discretion to allow amendment alleging that hay was three-quarters of a mile from said section, and from hay without imposing terms. Id. Issues should not be injected after opportunity of debate has been closed save upon a very clear showing that justice will be promoted thereby. In action to compel railroad company to construct a private crossing, amendment to answer, filed after argument to the jury had been concluded, alleging that parties had agreed upon a grade crossing at a place to be determined by defendant's engineer and plaintiff, held properly stricken. Herrstrom v. Newton & N. W. R. Co. [Iowa] 105 N. W. 436. Where a variance was called to the attention of the parties on a former trial, surprise cannot be claimed at allowance of an amendment at the trial. Finlen v. Heinze [Mont.] 80 P. 918. A party is not prejudiced by an amendment at the trial where the case is reopened and he is given full opportunity to make additional proof. Jordan v. Greig, 33 Colo. 360, 80 P. 1045. Where surprise is claimed and the party desiring to amend declines to consent to a continuance, denial of leave to amend at the trial is discretionary. Denial sustained. Irwin v. Buffalo Pitts Co. [Wash.] 81 P. 849. An amendment to admit evidence which on a former trial was admitted without objection is properly allowed. Gritman v. United States Fidelity & Guaranty Co. [Wash.] 83 P. 6. Where court gave notice on appearance day that amendment must be presented before trial, amendment at trial not allowed unless delay excused. Lewis v. Williams [Tex. Civ. App.] 91 S. W. 247.

85. An amendment to conform the pleading to the proof is properly allowed in the absence of surprise. Landers v. Quincy, etc., R. Co. [Mo. App.] 90 S. W. 117. An amendment to correspond to the facts proven is allowed either before or after judgment, provided it does not introduce a new and different cause of action. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57. Amendments to cure a variance between pleading and proof may be allowed after verdict under Starr & C. Ann. St. 1896, c. 7, § 1, and c. 110, par. 24. Franke v. Hanly, 215 Ill. 216, 74 N. E. 130. Where plaintiff alleged that he was injured by reason of defect in head or top of planing machine, and evidence showed that it was result of defective lock screw holding top of machine, amendment alleging screw to be defective held to cure variance and to have been properly allowed. Id. In action for malicious prosecution of suit in replevin, where declaration alleged trespass without authority and proof showed that whatever was done was by virtue of competent legal process, held not an abuse of discretion to allow an amendment, but amended declaration should have been required to be filed before verdict or immediately thereafter. Harris v. Thomas [Mich.] 12 Det. Leg. N. 239, 103 N. W. 863. In action to recover for personal injuries alleged to have resulted from a collision of a street car with an iron gate across the tracks, held not an abuse of discretion to permit an amendment to make complaint conform to evidence showing that injuries were caused in part by manner in which car was handled in attempting to make sudden stop. English v. Minneapolis & St. P. S. R. Co. [Minn.] 104 N. W. 886. Where the parties voluntarily litigate issues of fact upon which the trial court bases conclusions of fact fairly justified by the evidence, it may amend the pleadings after trial to conform to the facts. Maul v. Steele [Minn.] 104 N. W. 4. Where answer in action to enforce specific performance of contract was unassailed by demurrer or motion and was confessedly sufficient to admit evidence that defendant was of weak mind and incapacitated from attending to business, evidence of total disability could not be excluded on the ground that it proved too much, the admission of such evidence does not require an amendment to conform the answer to the proof, and hence the allowance of such an amendment is not prejudicial to plaintiff. Miller v. Tjexhus [S. D.] 104 N. W. 519. The only limitation upon the power of the court to allow an amendment to conform the pleadings to the proof is that it must be in furtherance of justice and not change materially the claim or defense. Code Civ. Proc. § 723. Amendment to complaint in action for personal injuries so as to allege defect in the condition of the ways, works, and machinery, held properly allowed. Bovee v. International Paper Co., 108 App. Div. 94, 95 N. Y. S. 426. A variance between the pleadings and the proof is not material unless the opposite party is thereby actually misled to his prejudice in maintaining his action or defense upon the merits. Id. If a party insists that he has been misled, the court may, in his discretion, order an amendment of the pleadings on such terms as he may deem just. Code Civ. Proc. § 539. Id. If the variance is not material the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. Code Civ. Proc. § 540. Id. Amendment to conform to proof may be allowed after submission and before decision. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. Where plaintiff sues several defendants on the theory that they are jointly liable, and the evidence or pleadings show that some are not liable at all, or that some cannot be joined in the same action, plaintiff may strike the name of any defendant who is not liable and take judgment against the rest, under the code provision allowing amendments at any stage and in all respects. Charles Lippincott & Co. v. Behre [Ga.] 50 S. E. 467. An amendment to conform the pleading to the proof will not be denied merely because an exception to the admission of evidence, which becomes admissible only by reason of the amendment, will thereby be destroyed. On motion to direct a verdict for defendant reserved until after verdict, which was for plaintiff, and motion for a new trial on the minutes, the complaint

remand therefrom;[87] but an amendment at the conclusion of the trial neither designed to cure a variance nor accompanied by an offer of further proof is improper.[88]

may be amended by inserting an allegation as to the laws of a foreign state to make it conform to the proof, even though such evidence was excepted to when offered. Audley v. Townsend, 96 N. Y. S. 439. Amendment on trial permitted to eliminate allegation as to bill of lading on its appearing that such bill was unsigned. Patrick v. Missouri, etc., R. Co. [Ind. T.] 88 S. W. 330. Suspension of charge for purpose of allowing defendant to file amendment is discretionary. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. Words which are merely descriptive of plaintiff and are not essential to its right of recovery may be stricken by amendment. Amendment after close of evidence striking words "Lessee of Manor Real Estate and Trust Company" following plaintiff's name, where evidence shows that all of the dealings of defendant were with plaintiff. Mineral R. & Min. Co. v. Flaherty, 24 Pa. Super. Ct. 236. A copy of the policy filed with the declaration in an action on a fire insurance policy may be amended to conform to the original in case of variance, since it is a part of the declaration under Code, c. 125, § 61. Staats v. Georgia Home Ins. Co., 57 W. Va. 571, 50 S. E. 815. In an action at law the statute of jeofails does not cure the nonjoinder or want of issue altogether, and no verdict or judgment can properly be rendered in such case. Norfolk & W. R. Co. v. Coffey [Va.] 51 S. E. 729. Where there is no equity in the original petition, a judgment refusing an amendment striking certain allegations therein, which should have been allowed, and dismissing the petition, will not be reversed where there would have been no equity in the petition if such allegations had been stricken. Ogburn v. Elmore, 123 Ga. 677, 51 S. E. 641. An amendment to conform to the proof in case of an immaterial variance may be made at any time before judgment, and a copy of the amendment need not be served on the adverse party. Maionchi v. Nicholini [Cal. App.] 82 P. 1052. In trespass quare clausum, where title to disputed territory was tried under plea of general issue, held that, if necessary for defendant to plead specially, he would after verdict be allowed to amend pleadings in superior court to conform to the issue actually tried. Lyman v. Brown [N. H.] 62 A. 650. Under R. S. c. 110, § 23, court may allow amendment to declaration after verdict. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209. Defendant held not prejudiced where only difference between declarations was that original charged that column in question was negligently and improperly erected and permitted to remain in an unsafe and improper condition, and amended one charged that it was so erected and "placed," and that amended declaration charged that plaintiff would continue to suffer and lose health by reason of his injuries. Id. An amendment may be allowed after the retirement of the jury before they agree upon a verdict. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008.

86. On appeal in an equity case an amended petition may be filed in the supreme court for the purpose of conforming the pleading to the proof. Under statute providing for trial de novo on appeal in equity cases. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57. The circuit court of appeals may allow an amendment without sending the case back to the lower court for that purpose, provided the parties consent to such a course and the amendment could have been made in the lower court. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Where cause was removed from state to federal circuit court, but neither the original bill nor the petition for removal showed a removal cause, circuit court acquired no jurisdiction and therefore could not allow bill to be amended so as to contain necessary allegations as to citizenship, and hence appellate court could not allow it by consent. Id. On appeal from judgment of justice of the peace, where statement was ambiguous as to whether action was in contract or in tort, but averments were such as to establish a case in which action of trover and conversion would lie, and defendant pleaded nonassumpsit and went to trial on the merits, held that amendment would be permitted in appellate court, or, if there was other reversible error, it could be made below. Brown v. Kirk, 26 Pa. Super. Ct. 157. Verdict will not be set aside for variance between pleadings and proof where court's attention was not called to it during trial in any way, but amendment will be allowed to conform pleadings to proof. Freund v. Greene & Sons Corp., 139 F. 703. Laws 1902, p. 1542, c. 580, § 166, requires the New York municipal court to allow amendments to be made at any time if substantial justice will be promoted there by, and Id. § 326, relating to appeals, extends that requirement by implication to the appellate court. Rein v. Brooklyn Heights R. Co., 94 N. Y. S. 636. On appeal from municipal court in action for assault by conductor on a passenger, where all the evidence bearing on the assault was admitted, held that complaint would be treated as amended so as to state a cause of action for breach of the contract of carriage over which the lower court had jurisdiction, it having no jurisdiction over the action for assault. Id. An amendment on appeal to obviate error at the trial is not allowable. Landers v. Quincy, etc., R. Co. [Mo. App.] 90 S. W. 117.

87. Where an amendment changing the issues is sought after decision on appeal, a showing as to why the matter alleged was not previously set up is necessary. Showing held insufficient. Asher v. Uhl, 27 Ky. L. R. 938, 87 S. W. 307. Where on appeal it was ruled that petition was defective in failing to allege that defendant or its servant knew of plaintiff's presence at the time of the alleged negligent and reckless act, held that amendment embodying such an allegation was properly allowed on return of the case to the lower court, the petition containing enough to amend by, and the amendment not changing the cause of action. Rome Furnace Co. v. Patterson [Ga.] 50 S. E. 928. Allowance of certain amendments being directed by the mandate, the trial

If the averments are sufficient to give jurisdiction,[89] amendments either of form or substance are allowable.[90] Parties may be eliminated or new parties added.[91] Amendments changing the cause of action or introducing new issues are ordinarily not allowable.[92] A second amendment to correct deficiencies in the first may be

court may allow others also. Ellis v. Witmer [Cal.] 83 P. 800.

88. Grand Central Min. Co. v. Mammoth Min. Co. [Utah] 83 P. 648.

89. Where a federal circuit court acquires no jurisdiction of a case attempted to be removed from a state court, because of the failure of either the original bill or the removal petition to show a removal case, it has no authority to allow an amendment of the bill so as to allege the necessary facts as to citizenship. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Where original petition contains sufficient averments to confer jurisdiction on federal court, jurisdiction is not lost because amended petition alleges plaintiff's citizenship in present tense only. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Jurisdictional as well as other averments may be inserted or reformed by amendment. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000.

90. Where a petition does not set forth the cause of action in orderly and distinct paragraphs, numbered consecutively, the defect in form may be cured by amendment. Montgomery v. King, 123 Ga. 14, 50 S. E. 963. Defect in petition for habeas corpus in that it is not attested and subscribed by two witnesses who were present at the delivery of the same, as required by statute, is curable by amendment. Commonwealth v. Keeper of County Prison, 26 Pa. Super. Ct. 191. Amendment adding averment of venue is permissible. Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 P. 813.

91. A necessary party may be brought in by amendment. Civ. Code Prac. § 134. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. Where in the course of an action against a landlord and a constable for a wrongful distress it appeared from the evidence that plaintiff was seeking to recover verdict against constable only, and court, at plaintiff's request, limited the jury to a consideration of the claim against him, held that on appeal an amendment eliminating the name of the landlord would be allowed to be filed nunc pro tunc. Oliver v. Wheeler, 26 Pa. Super. Ct. 5. Where the assignor of a claim sued in his own name, it is error to refuse an amendment on renunciation by the assignee stating the cause of action in assignor's own right. Kelly v. Continental Casualty Co. [Miss.] 40 So. 1. Misjoinder of two distinct causes of action in favor of different plaintiffs may be cured by amendment, eliminating one of the plaintiffs and one of the causes of action. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916. Court may permit summons and complaint to be amended by striking out words "as executors," etc., appearing after the names of the defendants so as to change action from one against them in their representative capacity to one against them individually, though limitations may have run against claim against them in the latter capacity. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723. Summons and complaint alleging joint tort against three defendants may be amended by striking out one of them, plaintiff being entitled to sue them jointly or separately. Olwell v. Skobis [Wis.] 105 N. W. 777. The court may either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading by adding or striking out the name of a party or a mistake in any other respect. Code Civ. Proc. § 144. Amendment to correct description of property in foreclosure proceedings held proper. Stull v. Masilonka [Neb.] 104 N. W. 188. Where an additional defendant is brought in by amendment, a second amendment eliminating the original defendant is properly refused as changing the cause of action. Barden Mercantile Co. v. Whiteside [Ala.] 39 So. 576. Under Rev. St. 1899, § 657, prohibiting amendments substantially changing the cause of action or defense, petition against "railroad" company cannot be amended so as to set out cause of action against "railway" company operating road under lease from other company and against which action properly lay, but which had not been served and had not appeared. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155.

92. Amendment allowed: An amended petition does not state a new and independent cause of action from that in the original petition, (a) when the same evidence would prove either cause of action, (b) when the measure of recovery is the same on each cause of action, and (c) when a recovery upon the cause of action in the amended petition would bar a recovery on the original petition. Kirchner v. Smith, 7 Ohio C. C. (N. S.) 22. Additional facts in support of a plea of adverse possession. Kline v. Stein, 38 Wash. 124, 80 P. 278. Additional averments of negligence. Thayer v. Smoky Hollow Coal Co. [Iowa] 105 N. W. 1024. Under Prac. Act § 29, where cause of action is the same, the form of the action may be changed from one in case to one in assumpsit. May v. Disconto Gesellschaft, 113 Ill. App. 415. In action on building contractors' bond where petition alleged that the contractors failed to find material, labor, etc., which was necessary to complete the building, and which they were required by the contract to furnish, and that in consequence plaintiff was damaged in a certain sum, being the amount he was obliged to pay out in excess of the contract price, held that amendment alleging that such sum was necessarily expended, and that the labor and materials were procured at the lowest possible cost, and that the surety had notice of the contractors' failure to do the work and that plaintiff was completing it, and that he failed to himself complete it, held germane and not to set forth a new cause of action. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638. Amended declaration differing from original only in eliminating needless minuteness and particularity of description of the tort complained of, and the means adopted in effecting it, does not set up new cause of action.

allowed on the trial.[93] An amendment becomes part of the original pleading and is

Hopkins v. St. Louis, etc., R. Co., 112 Ill. App. 364. The cause of action is not changed by an amendment which affects merely the measure of damages. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930. Amendment of complaint against carrier for failure to provide proper unloading facilities for cattle held not to state a new cause of action. Atchison, etc., R. Co. v. Veale & Co. [Tex. Civ. App.] 87 S. W. 202. Amendment which is merely an amplification of the demand sued on does not state a new cause of action. Additional interest claimed. Sullivan & Co. v. Owens [Tex. Civ. App.] 90 S. W. 690. In an action on a contract to convey land to defendant or such person as he might designate, an amendment to a pleading alleging conveyance to defendant so as to allege conveyance pursuant to his designation does not change the cause of action. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. New count held not to state different cause of action where both it and original count charged same act of negligence in suffering sidewalk to remain in unsafe condition, and differed only in allegations as to manner in which such negligence brought about plaintiff's injury. Town of Cicero v. Bartelme, 114 Ill. App. 9. Additional count held not to allege that injury occurred in a new place. Id. In suit for royalties for use of patented machines where answer set up defense that machines were not fit for the purposes of the lease, amended answers setting up fact that since commencement of suit defendants had been enjoined from using such machines on ground that they infringed prior patent held properly allowed. American Mach. & Construction Co. v. Stewart [La.] 38 So. 960. The cause of action is the particular matter for which the suit is brought, and where the object of an amendment is not to forsake this, but to adhere to and effect a recovery upon it, it is the duty of the court to permit the amendment when the merits cannot be otherwise reached, and this is true whether the action is ex contractu or ex delicto. Jackson v. Gunton, 26 Pa. Super. Ct. 203. In action for trespass to recover damages for unlawfully mining coal, amendment made after case had been arbitrated and an award made in plaintiff's favor from which defendant had appealed, specifying more clearly that damages sought to be recovered were treble damages under the statute (Id.), and amendment seeking to recover additional damages for injuries to premises by the manner in which coal was mined, held not to change cause of action (Id.) Amendment of copy of fire insurance policy filed with declaration in action thereon held not to introduce an entirely different and new case. Staats v. Georgia Home Ins. Co., 57 W. Va. 571, 50 S. E. 815. In action for alienation of affections of plaintiff's husband, amendment alleging that he had great love and affection for her which continued until lost and alienated by defendant's acts, held not objectionable as materially affecting the issue tried. Gregg v. Gregg [Ind. App.] 75 N. E. 674. Complaint to recover moneys paid out for defendant held properly allowed to be amended so as to allege that parties indorsed accommodation notes under agreement that as between themselves they should be equally and jointly liable thereon, and that plaintiff had to pay them and had received no contribution therefor. Pratt v. Rhodes [Conn.] 61 A. 1009. An amendment is permissible which does not change the cause of action but merely sets forth a new assignment or breach springing from the original cause of action. Cause of action is the transaction complained of. Amended petition held germane to original cause of action. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57. Court may permit complaint stating a cause of action to recover under a contract to be amended so as to state a cause of action to recover for a breach of the same contract, whether, strictly speaking, a new cause of action is or is not thereby alleged. Dunham v. Hastings Pavement Co., 109 App. Div. 514, 96 N. Y. S. 313. In action on account growing out of contract to pay commissions to agent, amendments to the complaint setting up modifications of the original contract for the purpose of showing why plaintiff was entitled to a greater rate of commission at one time than another, and why he was entitled to commissions on sales made in states other than those named in the original writing, held not to change the cause of action. Charles Lippincott & Co. v. Behre [Ga.] 50 S. E. 467. An amendment of a pleading alleging that a lease was executed by A., the owner, under the name of B., so as to allege that A. was owner and that title was in B. in trust for him, does not change the cause of action in a suit to cancel release. Jordan v. Greig, 33 Colo. 360, 80 P. 1045. Amendment of complaint to oust officer, based on the election of two officers when but one was authorized, held not to state a new cause of action. People v. Davidson [Cal. App.] 83 P. 161. In action of claim and delivery for a mule where complaint simply alleged ownership and wrongful detention held not error to allow amendment to complaint after motion for nonsuit setting up fraud and deceit to make it conform to proof that possession had been obtained in that manner on payment of costs. Joyner v. Early [N. C.] 51 S. E. 778. An amendment alleging an additional act of negligence in the same transaction (Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610), or correcting an allegation as to the exact location on a line of railroad where the accident took place, does set out a new and distinct cause of action. Id. Under Civ. Code 1895, §§ 4833-4835, 5098, petition in action in superior court on promissory note containing waiver of homestead and exemption may be amended by alleging that prior to the institution of the suit defendant was adjudged a bankrupt, that certain property has been set off to him as exempt, and that plaintiff has not proved his claim in bankruptcy, and by praying for a special judgment against such exempted property. Wright v. Horne, 123 Ga. 86, 51 S. E. 30. Petition held to contain enough to amend by within meaning of Civ. Code 1895, § 5098. Id. An amendment does not state a new cause of action where the wrong pleaded is the same and merely the description of the details or minor facts of the transaction are

to be so construed,[93] and if an amended pleading be served it supersedes the

changed. In action against railway company for injuries to passenger on theory that she was forcibly and violently removed from train in reckless, if not wanton, disregard of her rights and safety, amendment alleging that she voluntarily alighted from moving train with assistance of defendant's employes, and was injured because train was moving and because of manner in which she was assisted to alight, held not to add new cause of action. Western & A. R. Co. v. Burnham, 123 Ga. 28, 50 S. E. 984. Amendment changing year of alleged conversion does not change cause of action. Karter v Fields, 140 Ala. 352, 37 So. 204. Held within discretion of court to allow amendment at trial of petition alleging that sale made by defendants as plaintiff's agents was a sham for purpose of deceiving him, and that defendants thereafter sold land at substantial advance so as to allege that defendants, as such agents, sold land for such increased price and retained the same. Did not change action to suit in equity. Moore v. Petty [C. C. A.] 135 F. 668. Since a cause of action for failure to warn plaintiff that his train must be stopped, and one for failure to warn him that the track was defective, are distinct, limitations may be successfully pleaded to amendments setting up the former, the original pleading having set up the latter. Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879. An amended pleading does not state a new cause of action where it differs from the original only in its statement of details. Averment in complaint in action for wrongful death that defendant was accustomed to keep clear space on both sides of its track at place where defendant was injured, held to include averment in amended complaint that it was its practice to keep one side clear so that cause of action was same in both. Muren Coal & Ice Co. v. Howell, 217 Ill. 190, 75 N. E. 469. In action to enforce rights acquired through assignment by vendor of an executory contract for sale of realty, held not an abuse of discretion to refuse defendant's application, made after trial and decision of the case, to amend answer by setting up claim that assignment was an unlawful preference under the bankruptcy act. Lamm v. Armstrong [Minn.] 104 N. W. 304.

Amendment not allowed: Where an amended pleading introduces a different measure of damages and would not be sustained by the same evidence, a new cause of action is stated. Kramer v. Gille, 140 F. 682. Causes of action arising after the suit cannot be added by amendment. Martin v. Hanson, 114 La. 784, 38 So. 560. Where original count in action for wrongful death alleges negligence as the cause of the injury and nothing more, additional counts alleging that deceased was wrongfully, wilfully, wantonly, and intentionally forced and pushed off the car set up a new cause of action. Chicago & G. T. R. Co. v. McDonough, 112 Ill. App. 315. After judgment has been taken on promissory note, court cannot amend record by making legal plaintiff in such judgment the use plaintiff, and introducing another legal plaintiff. Good Roads Machinery Co. v. Old Lycoming Tp., 25 Pa. Super. Ct. 156. Amendment offered at the trial held to be based on a different contract from that sued on. Patrick v. Whitely [Ark.] 87 S. W. 1179. Proper exercise of discretion to refuse to allow amendment changing cause of action when offered at the trial, particularly when such cause would have been barred by limitations. Bartz v. Chicago City R. Co., 116 Ill. App. 554. Where declaration charges only a careless and improper driving and management of a train, a new cause of action is stated by an amendment charging defendant with having carelessly and improperly equipped such train. Id. Code § 3600, providing that amendments may be permitted at any time when the claim or defense is not substantially changed thereby, does not authorize a material change. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641. In suit to foreclose mortgage given to building society, where defendant relied on by-laws and claimed to have discharged her indebtedness by payments made in accordance therewith, held error to allow amendment offered two weeks after submission of case setting up estoppel. Id. A suit in equity cannot by amendment be converted into a statutory proceeding to contest an election under the general local option liquor law. Ogburn v. Elmore, 123 Ga. 677, 51 S. E. 641. Where the statute distinguishes between contracts by persons entirely without understanding and those of unsound mind, but not entirely without understanding, the former being void and the latter subject to rescission, amendment of a complaint alleging unsound mind so as to allege entire lack of understanding states a new cause of action. Maionchi v. Nicholini [Cal. App.] 82 P. 1052. An action for a penalty cannot be converted into an action upon a contract by amendment. Action against railroad company for penalty under Ga. Code 1895, §§ 2317, 2318, cannot be converted into one on contract. Venable Bros. v. Louisville & N. R. Co., 137 F. 981. The court may allow an amendment changing a suit in equity to an action at law. Crossman v. Griggs, 188 Mass. 156, 74 N. E. 358. If the original declaration states no cause of action against one of two defendants, a cause of action against him stated in an amended declaration filed after the running of limitations is barred. Statute not a bar if original declaration states cause of action defectively. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673, afg. Jones v. Klawiter, 110 Ill. App. 31. In action on account for goods sold, where original petition sought to charge two defendants as partners, amendment alleging sale to one of them individually held not to set up a wholly new and distinct cause of action. Padden v. Clark, 124 Iowa, 94, 99 N. W. 152. Amended petition seeking to redeem from interest in land acquired by defendant under tax foreclosure sale after running of limitations where original petition sought only to foreclose mortgage. Clifford v. Thun [Neb.] 104 N. W. 1052.

93. Board of Councilmen of City of Frankfort v. Chinn [Ky.] 89 S. W. 188.

94. In action for negligence for injuries to passenger amendment setting up addi-

original.[95] The rule that an amended pleading when refiled supersedes the original does not apply where the complaint is not refiled or offered to be refiled after amendment during trial, and refiling is not demanded, and the court and both parties treat it as though it had been amended at the time when a previous demurrer thereto was overruled.[96] In case an amended petition is filed the original remains a part of the record and may be looked to for the purpose of finding whether the necessary conditions appear for entertaining the suit.[97] New and separate causes of action added by amendment do not relate back.[98] Withdrawal of a substituted petition reinstates the original.[99] Where the original complaint states no cause of action an amendment does not relate back.[1] A petition filed on the loss of the original but abandoning a cause of action therein stated is an amended and not a substituted petition, and accordingly is not to be dismissed on the finding of the original.[2] An amendment may be made by substitution of a complete amended pleading by interlineation, or by filing a statement of the additions and excisions to be made.[3] An order for an amendment made at the trial to meet evidence already adduced need not be based on affidavit.[4] Where parties try the case on the issues framed by an amendment without objection, absence of a formal order allowing the amendment is waived.[5] Where plaintiff amends before answer, notice of such amendment must be served,[6] but if the opposite party is heard on the amendment, the fact that notice was not given is immaterial.[7]

§ 8. *Supplemental pleadings.*[8]—The codes generally provide that, upon the application of either party, the court may permit him to make a supplemental complaint, answer, or reply alleging material facts which have occurred since his former pleading, or of which he was ignorant at that time.[9] The allowance of such a plead-

tional act of negligence held not objectionable as failing to show in what manner such negligence contributed to the injury when construed in connection with the declaration. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 69, 51 S. E. 610.

95. An amended petition supersedes the original. Relief prayed in original but not in amended cannot be granted. Keith v. Keith [Tex. Civ. App.] 13 Tex. Ct. Rep. 126, 87 S. W. 384. Contentions in the original answer not renewed in the substituted answer will be treated as waived. Alexander v McPeck [Mass.] 75 N. E. 88.

96. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

97. To see whether it contains necessary averments as to citizenship to give federal court jurisdiction where amended petition alleges citizenship in present tense only. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

98. Turner v. Hamilton, 13 Wyo. 408, 80 P. 664.

99. Thayer v. Smoky Hollow Coal Co. [Iowa] 105 N. W. 1024.

1. Amendment after time limited to sue in support of adverse claim to patent of mining location. Keppler v. Becker [Ariz.] 80 P. 334.

2. Phillips v. Campbell [Ky.] 86 S. W. 1112.

3. Turner v. Hamilton, 13 Wyo. 408, 80 P. 664.

4. Jordan v. Greig, 33 Colo. 360, 80 P. 1045.

5. Willman & Co. v. Alabama Brokerage Co. [Ala.] 40 So. 102.

6. Code, § 3560. Ogle v. Miller [Iowa] 104 N. W. 502. Where in action against partnership no notice of an amendment stating a cause of action against an individual partner was served, held that no judgment could be rendered against the latter. Id.

7. Where upon motion to strike off or other proceeding having that object in view the opposite party has been heard as to the propriety of an amendment, the fact that he did not have notice of the original application to amend will not of itself entitle him to a reversal of the judgment. Weiler v. Weiss, 25 Pa. Super. Ct. 247. Action of court in such case in refusing to strike off amendment will be treated on appeal as equivalent to an allowance thereof and will be judged of accordingly. Id.

8. See 4 C. L. 1029.

9. Code Civ. Proc. § 544. Central Trust Co. v. West India Imp. Co., 109 App. Div. 517, 96 N. Y. S. 519. In equitable action to compel return of certain securities alleged to have been pledged with defendant, held that plaintiff should have been allowed to file supplemental complaint alleging that since the filing of the original complaint the securities had become of no value, and changing the relief demanded to a judgment for their value at the time when their return was demanded. Id. A supplementary pleading must allege material facts occurring since the last pleading. Asher v. Uhl, 27 Ky. L. R. 938, 87 S. W. 307. Held that application for leave to serve supplemental answer setting up "the exchange of consents to discontinue this action, and the exchange and delivery of the general releases by the plaintiff herein to the defendant," etc., should have been granted as present-

ing does not in any way involve a determination that the party is entitled to any other or different relief in consequence of the facts thus pleaded, and it should be allowed in the absence of good cause to the contrary shown by the opposite party.[10] Mere delay in making the motion should not of itself be allowed to defeat the application in the absence of a showing of resulting prejudice to the other party.[11] A supplemental answer which states the substance of a good defense, however defectively, should be allowed to be filed.[12] A supplemental pleading cannot be filed after decision,[13] and one filed out of time without leave is properly stricken.[14]

§ 9. *Motions upon the pleadings.*[15]—Motions to strike out part of a pleading[16] or to make more definite and certain are addressed to the discretion of the trial court.[17] Such motion should be made in writing,[18] before trial,[19] and must specifically point out the defect.[20] A motion to strike out alleged irrelevant matter must be heard upon the pleadings alone.[21] Where the irrelevancy of certain allegations appears from the pleadings, the notice of motion to strike need not allege that the moving party is aggrieved thereby.[22] A motion to dismiss the complaint upon the ground that it does not state facts sufficient to constitute a cause of action is similar in effect to a demurrer on that ground, and admits all the allegations of the complaint.[23] A motion to strike an answer as a whole is properly denied where a portion of the matter alleged therein is properly pleaded.[24] Where, after a

ing most convenient way in which to obtain adjudication upon defense claimed to be bar to further prosecution of the action. Tucker v. Dudley, 93 N. Y. S. 355. Where city was made party to suit to foreclose mortgage because it claimed lien under certain special assessments which petition alleged were junior and void, held that supplemental petition alleging that since commencement of the action plaintiffs had recovered judgment and a decree of foreclosure against the mortgagor, but that action had been continued as to the city, and asking that assessment be canceled, did not introduce a new cause of action in so far as questions of priority of lien and right to redeem were concerned. Citizens' State Bank v. Jess, 127 Iowa, 450, 103 N. W. 471. No ground exists for striking a supplemental petition from the files, where it adds nothing to the allegations of the original petition except failure to satisfy the judgment on execution. Scofield v. Excelsior Oil Co., 6 Ohio C. C. (N. S.) 169.

10. Central Trust Co. v. West India Imp. Co., 109 App. Div. 517, 96 N. Y. S. 519.

11. Plaintiff held not guilty of laches. Central Trust Co. v. West India Imp. Co., 109 App. Div. 517, 96 N. Y. S. 519.

12. Burnett v. Kirk [Wash.] 80 P. 855.

13. Richardson v. Johnson [La.] 39 So. 449. No motion can be made for leave to file supplemental pleading pending an appeal for a judgment against plaintiff. Central Trust Co. v. West India Imp. Co., 109 App. Div. 517, 96 N. Y. S. 519.

14. Braxton v. Liddon [Fla.] 38 So. 717.

15. See 4 C. L. 1031.

16. The granting or denying of a motion to strike out matter alleged to be irrelevant or immaterial is discretionary (In re City of New York, 48 Misc. 602, 96 N. Y. S. 554), but the power should be exercised with reluctance and caution (Id.). Held that allegation in petition in condemnation proceedings that it was in fact necessary to acquire the property would not be stricken as superfluous though it was also alleged that such necessity had been determined in the statutory manner, it not appearing that moving party could be harmed thereby. Id.

17. Berg v. Humptulips Boom & River Imp. Co., 38 Wash. 342, 80 P. 528. The disposition of a motion to make more definite and certain is ordinarily discretionary with the trial court. Motion in action to enforce double liability of stockholder, that plaintiff be required to specify dates and numbers of certificates of stock held by defendant held properly denied, since defendant was presumed to have better knowledge of stock than plaintiff, and averment by latter of amount with which it charged him was sufficiently specific. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

18. Lindley v. Kemp [Ind. App.] 76 N. E. 798; Ray v. Pecos, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466.

19. Can only be made at trial when cannot be made good by amendment. Every reasonable presumption in favor of its validity will be indulged in. Strait v. Eureka, 17 S. D. 326, 96 N. W. 695. Motion by defendant to strike out a part of the answer comes too late when made after the direction of a verdict. Uzzell v. Horn [S. C.] 51 S. E. 253.

20. Motion to reform. Hubbard v. Anderson [Fla.] 39 So. 107. Acts 1903, c. 193, § 2. Mere reference to words by references to pages and lines of complaint held insufficient in motion to strike. Lindley v. Kemp [Ind. App.] 76 N. E. 798.

21. Judgment roll cannot be considered. Norval v. Haug, 48 Misc. 198, 96 N. Y. S. 708.

22. Gadsden v. Catawba Water Power Co. [S. C.] 51 S. E. 121.

23. Rothman v. Kosower, 48 Misc. 538, 96 N. Y. S. 268.

24. Motion to strike answer interposed in district court because allegations were not in issue in justice court, from which case had been appealed, held properly denied, where only a part of the allegations set up new matter. McGinnis v. Johnson Co. [Neb.] 104 N. W. 869.

motion to make the complaint more specific has been sustained in part and overruled in part, an amended complaint is filed, and the record fails to show that any such motion was filed as to it, no question as to the motion is presented by defendant's appeal.[25]

§ 10. *Right to object, and mode of asserting defenses and objections; whether by demurrer, motion, etc.*[26]—*Want of jurisdiction* not apparent on the face of the complaint is to be set up by answer or plea.[27]

Objections to process or to the service thereof are to be taken by motion[28] or plea in abatement,[29] not by demurrer.[30]

Objection to parties for want of capacity to sue is available on special demurrer,[31] but does not amount to a failure to state a cause of action.[32] The objection that the party proceeded against is wrongly named should be taken by plea in abatement, and not by motion to dismiss.[33] Misjoinder of parties is to be reached by motion[34] or plea in abatement,[35] not by demurrer.[36] It cannot be taken for the first time at the trial.[37]

25. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277.

26. See 4 C. L. 1031.

27. Lack of jurisdiction of the subject-matter may be set up in the answer to the merits. Though want of jurisdiction of the person can only be raised by plea. Duke v. Duke [N. J. Eq.] 62 A. 466. Where declaration in action by partnership in Federal court averred that members thereof were all citizens of Michigan, defendant held, under Illinois practice, entitled to challenge such averment by plea in abatement. Yonkerman Co. v. Fullers' Adv. Ag., 135 F. 613. When not apparent on the face of the record, want of jurisdiction may be pleaded with other defenses in the answer. Appearance before justice for purpose of having judgment set aside is not waiver of due service of process in such case (Templin v. Kimsey [Neb.] 105 N. W. 89), and defendant is not deprived of the right to so plead it by reason of the fact that he first raised the question on a special appearance and that his objections were then overruled (Id.). Fact that he appeared specially in justice court does not preclude him from interposing plea to jurisdiction on appeal to district court. Id.

28. Any defect in a writ, its service or return, which is apparent from an inspection of the record, may be taken advantage of by motion. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

29. An objection founded on extrinsic facts must be pleaded in abatement. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. It is within the discretion of the court to permit the filing of a plea in abatement based on the same facts as an overruled motion to set aside the service of process. Dozier Lumber Co. v. Smith-Isburgh Lumber Co. [Ala.] 39 So. 714. A plea in abatement to the service of an alias subpoena may be stricken off on motion when not supported by depositions taken in accordance with the rules of court. Scott v. Stockholders' Oil Co., 135 F. 892.

30. Objection to involuntary bankruptcy petition for insufficient service of process can be raised only by motion, or by defense at the trial and not by demurrer. In re Seaboard Fire Underwriters, 137 F. 987.

31. Defect of parties must be reached by special demurrer. Gragg v. Home Ins. Co. [Ky.] 90 S. W. 1045. A defect of parties must be taken advantage of by demurrer if apparent on the face of the complaint [Code Civ. Proc. § 488] (Rose v. Merchants' Trust Co., 96 N. Y. 946), and by answer if not so apparent [Code Civ. Proc. § 498] (Id.). Objection to an administrator bringing suit for wrongful death of the intestate must be taken by demurrer as for want of legal capacity to sue, or by special denial. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. Question of the capacity of one to sue for recovery from a village treasurer of interest on public funds collected by him, can be raised by special demurrer but must be specially assigned. Nicholson v. Maile, 3 Ohio N. P. (N. S.) 201. Where petition in suit instituted by one as next friend of an insane person does not show that latter has no guardian, or allege any reason why suit should be brought by next friend rather than guardian, objection may be made by special demurrer, and, when so taken, action will be dismissed in the absence of appropriate amendment. Stanley v. Stanley, 123 Ga. 122, 51 S. E. 287. Under Code 1902, § 165, subd. 6, the objection that it appears on the face of the complaint that plaintiff has no legal capacity to sue, because the action does not survive, cannot be raised by an oral demurrer at the trial. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

32. Failure of a complaint by a foreign corporation doing business in the state to allege due authority to do so does not affect the substance of plaintiff's claim, and hence does not render the complaint demurrable on the ground that it fails to state a cause of action (Emmerich Co. v. Sloane, 46 Misc. 513, 95 N. Y. S. 39), but it is demurrable for want of legal capacity to sue (Portland Co. v. Hall, 95 N. Y. S. 36). Where it affirmatively appears that it has not secured certificate of authority required by Laws 1892, p. 1805, c. 687, § 15. Emmerich Co. v. Sloane, 46 Misc. 513, 95 N. Y. 39.

33. Application for mandamus. Objection is dilatory. McIntosh County Com'rs v. Aiken Canning Co., 123 Ga. 647, 51 S. E. 585.

Misjoinder of cause of action is ordinarily ground of demurrer.[38] If the objection is to the manner of statement only, a motion to separate lies.[39]

Scandalous,[40] *irrelevant,*[41] *sham and frivolous matter,* is reached by motion to strike.[42]

Formal defects are ordinarily ground only for a motion to require their correction,[43] not for demurrer[44] except where special demurrers are authorized.[45]

Uncertainty is ground for a motion to make more definite and certain,[46] but not for demurrer.[47]

34. Objection on ground of misjoinder of parties should be taken by motion. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Under Code, §§ 3545-3549 misjoinder of parties or causes of action can only be raised by motion. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

35. Nonjoinder of a party defendant, when not patent upon the record, should be pleaded in abatement. Mueller & Co. v. Kinkead, 113 Ill. App. 132.

36. Objections on the ground of misjoinder of parties and causes of action cannot ordinarily be raised by demurrer, but the remedy is by motion. Citizens' State Bank v. Jess, 127 Iowa, 450, 103 N. W. 471; Lancaster County v. State [Neb.] 104 N. W. 187.

37. Objection to joinder in one action of three persons interested in recovery against railroad for negligently setting fires held waived where it was not raised by demurrer or answer as required by Code Civ. Proc. §§ 498, 499. Jacobs v. New York, etc., R. Co., 107 App. Div. 134, 94 N. Y. S. 954.

38. Duplicity in a count must be taken advantage of by special demurrer and cannot be made the subject of objection at the trial. Objection that declaration in action for personal injuries alleges the existence of the relation of master and servant between defendant and plaintiff, and also that defendant occupied the relation of owner of premises toward plaintiff, cannot be reached by motion to direct verdict. Douglas v. Marsh [Mich.] 12 Det. Leg. N. 459, 104 N. W. 624. Misjoinder of counts will support a demurrer to the whole declaration. Ricardo v. News Pub. Co. [N. J. Law] 62 A. 301. Duplicity in a count of the declaration must be taken advantage of by demurrer and not by motion to compel an election. Lewes v. Crane [Vt.] 62 A. 60. Where plaintiff claims that the complaint states a single cause of action only, and defendants that several causes are improperly united, the question should be raised by demurrer, and cannot be raised by a motion to compel a separate statement of causes of action. Weed v. First Nat. Bank, 106 App. Div. 285, 94 N. Y. S. 681.

39. Where two causes of action are stated in one count, the remedy is by motion to require an election. McHugh v. St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853. In case more than one cause of action is stated in the complaint the remedy is by demurrer for misjoinder or a motion to separate into paragraphs, and not by a demurrer for want of facts. State v. Petersen [Ind. App.] 75 N. E. 602.

40. Complaint in action for damages for deprivation of civil rights, which had previously been determined not to state cause of action, stricken. Wadleigh v. Newhall, 136 F. 941. If the entire answer is not scandalous, it should not be stricken from the files, nor should defendant be required to surrender the original to plaintiff's attorney for cancellation, or to serve an amended pleading, but the scandalous, irrelevant, and redundant matter merely should be stricken. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. S. 800.

41. Mills v. Territory [N. M.] 81 P. 447. Irrelevant or redundant matter may be stricken out on motion of any party aggrieved thereby. Code Civ. Proc. 1902, § 181. Alexander v. Du Bose [S. C.] 52 S. E. 786. Irrelevant averments are properly stricken out but refusal to strike is harmless. Vandiver & Co. v. Waller [Ala.] 39 So. 136. Where the general issue is pleaded, a special plea presenting matter admissible thereunder should be stricken. Hubbard v. Anderson [Fla.] 39 So. 107. Where a complaint mingles irrelevant and improper allegations with proper ones, the remedy is by motion to strike and not by demurrer. Tittle v. Kennedy [S. C.] 50 S. E. 544. Irrelevant or redundant matter may be stricken on motion of any person aggrieved thereby. Code Civ. Proc. 1902, § 181. Gadsden v. Catawba Water Power Co. [S. C.] 51 S. E. 121.

42. Mills v. Territory [N. M.] 81 P. 447. A sham answer may be stricken out, even though verified. State v. Webber [Minn.] 105 N. W. 490. A motion to dismiss and strike from the files a case on the ground that it is frivolous and vexatious will not be entertained when first presented on appeal. Motion is based on allegations of the complaint and is in the nature of a demurrer thereto. Fishburne v. Minott [S. C.] 52 S. E. 648.

43. A plea should not be stricken out for formal defects curable by amendment. Hubbard v. Anderson [Fla.] 39 So. 107.

44. Defects of form rather than substance should be taken advantage of by motion to strike out and not by demurrer. Improper joinder of parties. Ricardo v. News Pub. Co. [N. J. Law] 62 A. 301. Where two causes of action are embraced in a single count which might have been joined in separate counts, demurrer will not lie. Gaw v. Allen, 112 Mo. App. 711, 87 S. W. 590. The remedy for failure to verify is by motion to strike from the files, not by demurrer. Turner v. Hamilton, 13 Wyo. 408, 80 P. 664. Failure to verify is not ground of demurrer. Id.

45. Defects of form must be taken advantage of by special demurrer filed at the first term. Misjoinder of causes of action in favor of different plaintiffs. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916. Mat-

Failure to state a cause of action is fatal on objection in almost any form,[48] and if involving the entire pleading[49] may be reached by demurrer,[50] objection to introduction of evidence,[51] motion for a peremptory instruction,[52] or motion in arrest of judgment.[53]

ters of form can be reached only by special demurrer. General demurrer does not reach argumentativeness in pleading. Wright v. Craig, 116 Ill. App. 493.

46. In a proceeding to establish a preferred claim in a receivership proceeding upon the proceeds of goods alleged to have been obtained through false and fraudulent representations and with intent not to pay for them, where petition of intervention attempts to set out the exact claim made, an objection that it is not sufficiently specific can only be reached by motion. Seeley v. Seeley-Howe-LeVan Co. [Iowa] 105 N. W. 380.

47. Petition for partition held good against demurrer though subject to motion to make more certain. Shetterly v. Axt [Ind. App.] 76 N. E. 901. That in alleging the date of a conversion the day of the month is left blank is not ground of demurrer. Peacock v. Feaster [Fla.] 40 So. 74. Failure to specify with sufficient particularity the breaches of contract relied on can be taken advantage of only by motion to strike out the count, and not by demurrer. Harper v. Essex County Park Commission [N. J. Law] 62 A. 384. If by any fair intendment a cause of action appears from the allegations of a complaint, it is not demurrable because it is ambiguous and uncertain. St. Louis, etc., R. Co. v. Moss [Ark.] 86 S. W. 828. Fact that declaration charges various grounds of negligence and avers that each was proximate cause of the injury complained of does not render it demurrable because it leaves defendant ignorant of the particular ground relied on, but he may guard against surprise in such case by demanding a more specific statement of the real ground of complaint, under Code 1904, § 3249. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449. Objection that allegations as to negligence are vague and indefinite must be taken by demurrer. Atlanta R. & Power Co. v. Johnson, 120 Ga. 908, 48 S. E. 389. Indefiniteness of averment is to be reached by motion not by general demurrer. Butler v. Conwell [Wyo.] 82 P. 950. The technical defect of an averment being argumentative cannot be reached by general demurrer. Lloyd v. Travelers Protective Ass'n, 115 Ill. App. 39. Failure to definitely describe the road obstruction of which it is sought to enjoin is ground for motion to make definite and certain, but not for demurrer. Smoot v. Wainscott [Ky.] 89 S. W. 176. Where complaint states facts sufficient to constitute cause of action, but is so constructed as to render it difficult to determine the theory intended by the pleader, the remedy is by motion to make more certain, and not by demurrer. State v. Petersen [Ind. App.] 75 N. E. 602. Objection to cross complaint seeking reformation of contract sued on that it failed to clearly and definitely point out the alleged mistake should be raised by motion to make more specific, and is not a ground for demurrer. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. If the ultimate facts relied on are not stated with sufficient certainty, the remedy is by motion. Does not render pleading bad on demurrer. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688. Fact that negligence relied on and the nature of plaintiff's injuries are pleaded too generally must be taken advantage of by motion to make more definite and certain, and is not ground for demurrer. Casey v. American Bridge Co. [Minn.] 103 N. W. 623.

48. Objection to a plea insufficient in law may be taken by motion to strike or demurrer, or by objection to the evidence offered in support of it. First method is better practice. Walden v. Walden [Ga.] 52 S. E. 323.

49. An objection that part of the damages claimed are speculative cannot be raised by demurrer. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. That special damages are insufficiently alleged and a wrong measure of damages prayed is no ground for demurrer. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448. Only total insufficiency of a pleader will avail on objection to the reception of evidence under it. St. Louis S. W. R. Co. v. Rollins [Tex. Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099.

50. The failure of the complaint to state facts sufficient to constitute a cause of action should be taken advantage of by demurrer rather than by answer. Appears on face of complaint and hence should be taken advantage of by demurrer under Code Civ. Proc. § 498. Also it is not a denial of the allegations of the complaint or a statement of new matter by way of defense or counterclaim and hence cannot be included in the answer under Id. § 500. Jackson v. Savage, 109 App. Div. 556, 96 N. Y. S. 366. A defense complete in itself cannot be stricken on motion as irrelevant, even though it is insufficient but the remedy in such case is by demurrer. Noval v. Haug, 48 Misc. 198, 96 N. Y. S. 708. Omission from the narr. of proper averments of a consideration for contract sued on may be raised by demurrer. Dryden v. Barnes [Md.] 61 A. 342. The validity of a defense set up in the answer should be determined by demurrer or upon the trial, and not by a motion to strike it out as irrelevant. Rankin v. Bush-Brown, 108 App. Div. 294, 95 N. Y. S. 719. Code Civ. Proc. § 545, authorizing the court to strike out irrelevant or redundant matter, applies to allegations which are irrelevant or redundant to the cause of action or defense pleaded, and does not authorize the determination of the validity of a defense on a motion to strike. Rankin v. Bush, 108 App. Div. 295, 95 N. Y. S. 718. Failure to set out the indorsements in an action on a note, or to state that there are no indorsements, is a defect to be reached by motion and not by demurrer. Schick v. Ott, 7 Ohio C. C. (N. S.) 225.

51. Failure of a pleading to state facts sufficient may be raised by objection to evidence as well as by demurrer. Fraud alleged as mere conclusion. Barber Asphalt Pav.

Matters of defense not apparent on the face of the complaint must be raised by pleading.[54]

§ 11. *Waiver of objections and cure of defects.*[55]—Objections to pleadings must as a rule be made[56] and brought to hearing[57] at the earliest opportunity, and while entire failure to state a cause of action may be availed of at any time,[58]

Co. v. Field, 188 Mo. 182, 86 S. W. 860. Plaintiffs are not bound to demur to the answer but the objection to the sufficiency of the facts which might have been so raised may be raised by objections to the sufficiency of the evidence. Zuelly v. Casper [Ind. App.] 76 N. E. 646. Striking out of affirmative allegations of the answer, which were explanatory of denials therein, on plaintiff's motion held not to justify plaintiff in objecting to evidence in support of facts alleged therein which were relevant under the denials. Precluded by his own conduct from claiming that facts relevant to issue raised by denials should have, in fairness, been pleaded. Wilmot v. McPadden [Conn.] 61 A. 1069.

52. A defect of substance may be raised by a request for a ruling that proof of all allegations pleaded does not entitle plaintiffs to recover. Failure in action for wrongful death under Rev. Laws, c. 171, § 2, to allege that deceased left either widow, children, or next of kin. Oulighan v. Butler [Mass.] 75 N. E. 726. Only such faults in a count as would render it insufficient to support the judgment can be reached by instructions to disregard it. Feldman v. Sellig, 110 Ill. App. 130. Proper basis of motion to instruct jury to disregard certain counts is that they are faulty, and not that there is a variance or insufficiency of proof. Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664. The court may instruct the jury to return a verdict for defendant though he has pleaded to the declaration, if each count of such declaration is so defective that with all the intendments in its favor that it could not support a judgment after verdict, under Prac. Act, § 51, R. S. c. 110, authorizing application for instruction to disregard faulty counts (Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142), but the jury cannot be instructed to disregard a count the defects in which would be cured by verdict (Id.).

53. A judgment cannot be arrested for any mispleading or insufficient pleading. Act "Amendments and Jeofails," § 6. Illinois Terra Cotta Lumber Co. v. Hanley, 116 Ill. App. 359. It is only where a declaration is so defective that it will not sustain a judgment that such an objection may be availed of on motion in arrest in the trial court or on error or appeal. Id. On motion in arrest the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from its allegations, was proved at the trial; and if from the issue the fact omitted and fairly inferable from the facts alleged may fairly be presumed to have been proved the judgment will not be arrested. Id. Failure of declaration to allege that breaking and collapse of scaffold which caused the injury was result of its defective condition cannot be so taken advantage of, that statement being fairly inferable from what is alleged. Id.

54. Payment is a question of fact and must be set up by answer, not by demurrer. It was claimed that account filed with complaint showed payments which should have been applied to extinguish the claim sued on. Dean v. Boyd [Miss.] 38 So. 297. A defense that the action has been prematurely commenced should be pleaded in bar if based upon the instrument in suit (The American Home Circle v. Schumm, 111 Ill. App. 316), but can only be availed of by plea in abatement if based upon transaction extraneous of such instrument, as where time of payment of benefit certificate is extended by subsequent agreement (Id.). Contract limitations should be taken advantage of by plea. Gaston v. Modern Woodmen of America, 116 Ill. App. 291. Where plea in abatement and plea in bar are filed together the former will be stricken off. Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. The statute of limitations must be set up by plea. Cannot be raised by demurrer or motion in arrest of judgment. Rich v. Scalio, 115 Ill. App. 166; Gatlin v. Vaut [Ind T.] 91 S. W. 38. Matter of confession and avoidance based on invalidity of contract sued on. Miller v. Donovan [Idaho] 83 P. 608. In equity the defense that there is an adequate remedy at law cannot be availed of unless pleaded. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Pendency of former action when apparent is ground for demurrer but otherwise remedy is by plea in abatement. City of La Porte v. Scott [Ind.] 76 N. E. 878.

55. See 4 C. L. 1038.

56. Dilatory pleas must be urged at the first opportunity. Plea that suit was prematurely brought, which is in the nature of a plea in abatement. Grand Lodge v. Ohnstein, 110 Ill. App. 312.

57. A plea to the jurisdiction is waived by a failure to act promptly in having it disposed of, or by taking any steps looking to a trial of the cause on the merits. Defendant held to have waived plea to jurisdiction by delay, and by pleading to the merits. Daley v. Iselin, 212 Pa. 279, 61 A. 919.

58. Bell v. Thompson, 147 Cal. 689, 82 P. 327; Flood v. Templeton [Cal.] 83 P. 148; Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. Complaint averred injury to and death of "plaintiff," instead of "plaintiff's intestate." Trott v. Birmingham R., Light & Power Co. [Ala.] 39 So. 716. Pleading over after the overruling of a demurrer does not preclude defendant from contending on appeal that the declaration, aided by the verdict, does not state a cause of action and is insufficient to support a judgment. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. An order made under a defective complaint is not reversible because the complaint is merely defective. It must appear that complainant has no cause of action. Belding v. Washington Cornice Co., 36 Wash. 549, 79 P. 37. Code Civ. Proc. § 499. Defend-

other deficiencies are waived by pleading responsively[59] without objection by motion[60] or plea in abatement,[61] going to trial on the merits without objection[62] or

ant may move for dismissal on that ground at the trial. Jackson v. Savage, 109 App. Div. 556, 96 N. Y. S. 366. The omission of a material allegation is a defective statement of a cause of action merely, and not a statement of a defective cause of action. Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. In action on fire insurance policy omission of allegation of value of property insured at time of fire is a defect which may be cured by amendment, and hence is waived by answer. Id. And see ante, p. 1050.

59. Strode v. Frommeyer [Mo. App.] 91 S. W. 167; King v. See, 27 Ky. L. R. 1011, 87 S. W. 758; Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357; Feldman v. Sellig, 110 Ill. App. 130; Wright v. Teutonia Ins. Co. [N. C.] 51 S. E. 55. Fact that matter common to each count was pleaded at the end of all the counts instead of in each separately, waived. United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435. In Pennsylvania filing an affidavit of defense to the merits is a waiver of any objection to formal defects or imperfections in the statement of claim. Felty v. National Accident Soc., 139 F. 57. Failure to state defenses separately. Fleishman v. Meyer [Or.] 80 P. 209. Objection that party proceeded against is misnamed is waived by his appearing and pleading to the merits by his true name without objection. McIntosh County Com'rs v. Aiken Canning Co., 123 Ga. 647, 51 S. E. 585. Questions as to propriety of cross complaint involving other property. Power v. Fairbanks, 146 Cal. 611, 80 P. 1075. A motion to strike out the complaint for joining two causes of action in the same count is waived by answering (Harvey v. Southern Pac. Co. [Or.] 80 P. 1061), but if the causes of action are based on the same right a motion to require an election may be made at the trial (Id.).

60. Where lessor of patented machines alleged right to recover judgment for future royalties on ground that defendants had abandoned the machines and refused to comply with the contract of lease, held that the issue presented pertained to the merits, and defendants waived no rights by not filing an exception of prematurity in limine litis. American Machinery & Construction Co. v. Stewart [La.] 38 So. 960. Objection to want of verification must be taken before trial. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47. A failure to demur is a waiver of all defects which might have been so raised. Under Code Pub. Gen. Laws 1904, art. 75, § 9. Dryden v. Barnes [Md.] 61 A. 342. Defects in the declaration consisting of the absence of allegations of damage and the formal ad damnum will not warrant the sustaining of a motion in arrest of judgment, where defendant first demurred and then pleaded thereto. Price v. Art Printing Co., 112 Ill. App. 1. Defendant cannot object to evidence in support of allegations of the complaint setting up matters which are claimed not to be proper elements of damage, where he fails to move to strike such allegations. Milhouse v. Southern R. Co. [S. C.] 52 S. E. 41. Defendant cannot complain of the admission of evidence as to loss of custom resulting from defendant's failure to furnish cars, where such fact was alleged in the complaint as an element of damage and no motion was made to strike it out. Mauldin v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 677. Fact that amendment to sworn bill is unverified becomes immaterial when it is demurred to. City of Chicago v. Banker, 112 Ill. App. 94. If the declaration states a cause of action, defects therein which might have been taken advantage of by demurrer are waived by going to trial without so doing. Pierce Co. v. Beers [Mass.] 76 N. E. 603. Failure of foreign administrator to file copy of letters in probate court before commencing suit is waived unless objection is taken advantage of by demurrer, if defect affirmatively appears from the complaint, or by answer, if it does not so appear. Pope v. Waugh [Minn.] 103 N. W. 500. Objection that two causes of action have been improperly united is waived when first raised at the trial by objection to the introduction of evidence instead of by answer or demurrer. Gen. St. 1894, §§ 5232, 5234, 5235. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. The objection that the plaintiff has not legal capacity to sue is waived by a failure to plead it, either by demurrer or answer. Sullivan v. Franklin Bank, 6 Ohio C. C. (N. S.) 468. Defects appearing on the face of the petition are waived unless attacked by demurrer or motion. Defect in notice, served on sheriff by claimant of property levied on under execution, held waived where no attack was made on petition by demurrer or motion in arrest. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349. Objection that complaint in action by foreign corporation does not show that it has complied with statutes so as to authorize it to do business within the state goes to plaintiff's legal capacity to sue, and is waived unless raised by demurrer or answer. Code Civ. Proc. § 499. Portland Co. v. Hall, 95 N. Y. S. 36. An objection that the action is brought in the wrong county is waived unless taken by answer or demurrer. Burns' Ann. St. 1901, § 346. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Want of legal capacity to sue must be taken advantage of by demurrer, if it affirmatively appears from the complaint, and by answer if it does not so appear. Gen. St. 1894, § 5235. Pope v. Waugh [Minn.] 103 N. W. 500. Failure of foreign administrator to file copy of letters in probate court. Id. Code Civ. Proc. §§ 488, 498. Failure of plaintiff, a foreign corporation, to comply with state laws, so as to authorize it to do business therein. Portland Co. v. Hall, 95 N. Y. S. 36. Want of verification is waived by failure to move to strike. Turner v. Hamilton, 13 Wyo. 408, 80 P. 664. Failure of defendant to move that allegations of special damages be made more definite and certain does not preclude objection to evidence thereunder. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856. Objection that plaintiff is not the real party in interest must be taken by demurrer or answer. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. Where bar of limitations apparent on

submission on agreed facts,[63] by stipulation to abide the event of another action,[64]

the face of the complaint is ground of demurrer, it is waived by failure to demur. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. Defects in form are waived unless taken advantage of by special demurrer filed at the first term. Misjoinder of causes of action in favor of different plaintiffs. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916. In case defenses are inconsistent, the remedy is by motion to strike, and the objection cannot be raised by a request for an instruction. Manner of objecting to inconsistent defenses. Harper v. Fidler, 105 Mo. App. 680, 78 S. W. 1034. Apart from the question of jurisdiction, matters merely in abatement or suspension of the action, or in denial of status of a suitor, or of obligation to appear, must be presented before the cause of action or the defense is introduced, and objections resting on such matters are waived by any step taken for the determination of the cause on the merits. Applies to matters affecting the regularity of an appeal. Commonwealth v. Crum Lynne Iron & Steel Co., 27 Pa. Super. Ct. 508. Where, on appeal from justice court, plaintiff voluntarily files a statement, though under rules of court the transcript might have been considered as a declaration, defects therein which might have been assigned as grounds for demurrer and would have prevented summary judgment for want of a sufficient affidavit of defense, held waived by defendant by pleading the general issue, agreeing to a reference, and going to trial on the merits, there being no variance. Siegel v. Hirsch, 26 Pa. Super. Ct. 398.

61. Filing a plea to the merits before obtaining judgment on a plea to the jurisdiction of the person is a waiver of the latter plea. Objection held waived. Lebensberger v. Scofield [C. C. A.] 139 F. 380. In action by a guardian, an objection that the cause of action is in favor of the ward alone and must be prosecuted by her is one in abatement only, and is unavailable to defendant after having pleaded in bar. Randall v. Lonstorf [Wis.] 105 N. W. 663. Nonjoinder of party waived unless objected to by plea in abatement. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Under common-law system of pleading, pleas in abatement to the jurisdiction are waived by pleading to the merits. Youngerman Co. v. Fuller's Adv. Ag., 135 F. 613, Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265. An answer (Chamberlayne v. Nazro, 188 Mass. 454, 74 N. E. 674), or hearing on the merits is a waiver of the right to set up matter in abatement (Id.). Plea in abatement that plaintiff had no right to sue because he was acting as defendant's counsel held waived by hearing before auditor on the merits without objection, and failure to call court's attention to the matter on the trial until the close of the evidence. Id.

62. Under Code Civ. Proc. § 499, defect of parties is waived unless taken advantage of by demurrer or answer. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Where defendant contested all the allegations of a complaint setting up negligence, in a hearing on damages, without objection that such allegations were defective, any defects in such allegations were waived. Anderson v. U. S. Rubber Co. [Conn.] 60 A. 1057. A complaint for wrongful levy of execution not describing the property levied on is good at the trial. Rasco v. Jefferson [Ala.] 38 So. 246. In action in federal court by infant suing by guardian, allegation that such guardian was duly appointed by the probate court is not jurisdictional fact, and any objection to guardian's representation must be specially pleaded or propriety thereof is admitted. In any event objection could not first be raised after verdict and judgment. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Allegation held sufficient to show citizenship in view of fact that it was so treated by counsel on both sides during trial in lower court. Id. Any informality in a complaint in bastardy proceedings, not affecting the merits of the case, is waived by going to trial without objection. Kanorowski v. The People, 113 Ill. App. 468. Absence of an essential averment is cured by evidence thereof introduced without objection. State Nat. Bank v. Clark [La.] 39 So. 844. Right to have issue of ownership raised by proper pleadings in condemnation proceedings held waived by failure to object and by introduction of evidence. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. Objection for uncertainty cannot be made at trial. Geisseman v. Geisseman [Colo.] 83 P. 635. Objection that pleadings do not authorize the granting of equitable relief to the interveners as against the plaintiff cannot be first raised on appeal where case is tried throughout on theory that their right to such relief is the sole issue in the case. Stelpflug v. Wolfe, 127 Iowa, 192, 102 N. W. 1130. A departure in pleading is waived by going to trial without objection. Baldridge v. Leon Lake Ditch & Reservoir Co. [Colo. App.] 80 P. 477. Any objection curable by amendment is waived by going to trial on the merits without objection. Wappenstein v. Aberdeen [Wash.] 81 P. 686. Fact that replication concludes to the country instead of with a verification, and that there is no rejoinder or similiter is immaterial, where parties proceed to trial without objection. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622. Generality of averment is waived by going to trial without objection. Averment that defendant was owner of an undivided five-sixths interest. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924. Negative pregnant in denial of amount is waived by trial on the merits. Carter Dry Goods Co. v. Carson [Ky.] 90 S. W. 578.

Joinder of issue waived: Failure to take issue on an answer is waived by reception without objection of evidence disproving it. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. After a trial on the merits it is too late to object to the sufficiency of averments as to a question treated by both parties as in issue. In action against electric light company for death due to negligence, averments of declaration held sufficient to give notice that plan of construction of lines was brought into question. Morgan v. Westmoreland Elec. Co. [Pa.] 62 A. 638. Where action for personal injuries was tried on theory that liability of defendant depended on whether his co-

or by suffering a default.[65] And by pleading over or amending after ruling on demurrer any error in the ruling is waived,[66] but where the amendments made after demurrer sustained are trivial, demurrant need not again demur but may answer over without waiving any right.[67] Omissions in a pleading supplied by the pleadings of the adverse party are thereby cured,[68] and after verdict no defect which might have been cured will avail,[69] and the court will presume that all that was pleaded

defendant was an employe or an independent contractor, plaintiff could not insist on appeal that such question was not in issue under the pleadings. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113. By going to trial a rejoinder concluding to the country is treated as though issue were joined thereon. Godfrey v. Wingert, 110 Ill. App. 563. Going to trial without raising the objection that the replication does not reply to anything in the plea to which it is addressed is a waiver of a formal issue. Cummings v. Smith, 114 Ill. App. 35. Where replication tenders an issue to the country so that only a similiter is required to complete the formal issue, such similiter is waived by going to trial without further action. Peoria Star Co. v. Floyd Special Ag., 115 Ill. App. 401. Ruling on issue of law raised by demurrer to replication, concluding to the country and hence requiring only a similiter to complete the formal issue, is waived where there is no formal order showing an election to abide by the demurrer and defendant offers evidence and makes objections at the trial which would be irrelevant except upon the theory that issue of fact had been formed by such replication. Id. Failure to reply is waived by trying the case on the theory that the averments of the answer are in issue. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Trial on theory that issue is joined waives absence of answer. State Bank v. Citizens' Nat. Bank [Mo. App.] 90 S. W. 123. Defendant may waive his right to plead de novo to new counts filed to a declaration after plea to the original declaration, and does so by failing to so plead and going to trial without objection. Dubois v. Robbins, 115 Ill. App. 372.

63. Not where parties therein limit themselves to a consideration of only such facts as are pertinent under the pleadings. Elliott v. Worcester Trust Co. [Mass.] 75 N. E. 944.

64. Pacific Pav. Co. v. Vizelich [Cal. App.] 82 P. 82.

65. An omission to lay venue cured. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

66. Answer over waives all objections except lack of jurisdiction and total failure to state cause of action. Hudson v. Cahoon [Mo.] 91 S. W. 72. Pleading to merits and going to trial after overruling of plea in abatement to the jurisdiction and a motion to quash the writ and return because of irregularity of service held not a waiver of defendant's rights in abatement, where it incorporated a like plea in abatement in its answer, and excepted to order striking it out. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155. Error in overruling a demurrer is waived by answering over. Griswold v. Griswold, 111 Ill. App. 269; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; City of Chicago v. People, 111 Ill. App. 594; Eckman v. Webb, 116 Ill. App. 467; Commercial News Co. v. Beard, 116 Ill. App. 501; Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775; Blasingame v. The Royal Circle, 111 Ill. App. 202; Rodgers v. Western Home Town Mut. Fire Ins. Co., 186 Mo. 248, 85 S. W. 369; Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368; Watkins v. Iowa Cent. R. Co., 123 Iowa, 390, 98 N. W. 910; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115. Where demurrer to defenses is sustained, defendant waives right to object by failing to except and by taking advantage of permission to amend answer to conform to such ruling. Easton v. Woodbury [S. C.] 50 S. E. 790.

67. Flood v. Templeton [Cal.] 83 P. 148.

68. Defects in petition in action on accident insurance policy in failing to allege that injuries were received through external and violent means which solely and independently of all other causes necessarily caused his death, and that there were external marks of the injuries held cured by answer. Continental Casualty Co. v. Hunt [Ky.] 90 S. W. 1056. A defective or ambiguous petition may be aided and its infirmities cured by averments in the answer. Petition in action for injuries received by trespasser while being ejected from train held, in connection with answer, to sufficiently show that plaintiff was injured while in the act of leaving the train and not after he had left it. Chicago, etc., R. Co. v. Kerr [Neb.] 104 N. W. 49. An answer supplying an essential averment of the complaint cures the defect. McConathy v. Deck [Colo.] 82 P. 702. Answer supplying material averment omitted from complaint cures the defect. That judgment was "duly" given. Nolan v. Fidelity & Deposit Co. [Cal. App.] 82 P. 1119. Where the answer cures defects of petition and trial is had on the merits, objection is waived. Cooper v. McKee [Ky.] 89 S. W. 203.

69. Rule that, where defendant avers in affidavit of defense that contract sued on is in writing, and sets out such contract as an exhibit thereto, he cannot complain on appeal from judgment for want of sufficient affidavit, that statement of claim was insufficient because copy of contract was not attached thereto, does not apply where defendant is unable to attach such copy to his affidavit, and persists in his assertion that it is material to an adequate statement of his defense that a copy be furnished, and makes a bona fide effort to compel its production. White v. Sperling, 24 Pa. Super. Ct. 120. All defects in a petition short of insufficiency to support the judgment are cured by answer and trial on the merits. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351. Misjoinder of causes waived by failure to move for an election. Thompson v. Randall [Ky.] 90 S. W. 251. Misjoinder of causes of

howsoever defectively was well proved;[70] and if any count in the declaration be

action cannot be urged after verdict. Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341. In action for goods sold and delivered, where defendant avers in his affidavit of defense that goods were delivered under written agreement, and sets out agreement as exhibit to his affidavit, he cannot complain on a rule for judgment for want of sufficient affidavit that such copy was not filed with the statement, particularly when he attempts to set up a defense on the merits. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23. Defective statement of a cause of action is cured by verdict. Sauter v. Anderson, 110 Ill. App. 574. Defect in declaration in action against saloon keeper for injuries caused plaintiff by defendant's selling liquor to her husband, resulting in his intoxication and in his stabbing a man while in that condition, thereby depriving her of her support, in failing to allege that stabbing was result of intoxication, or of selling liquor to husband, held cured by verdict. Id. Misjoinder of causes of action in favor of different plaintiffs. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916. In action for wrongful death under Rev. Laws, c. 171, § 2, where defendant joined issue without specific objection to the complaint on the ground that it failed to allege that deceased left a widow, children, or next of kin, held that such objection could not be first raised on appeal. Oulighan v. Butler [Mass.] 75 N. E. 726. Argumentative declaration will sustain verdict where issue has been joined thereon and a trial had. Mills v. Larrance, 111 Ill. App. 140. Where complaint in action for alienation of husband's affections, was objected to on appeal on ground that it did not state any fact constituting harsh and cruel treatment justifying plaintiff in leaving her husband, held that it would be treated as one first attacked after verdict, and it would be presumed, in support of judgment for plaintiff, that such conduct was sufficiently proved at the trial. Gregg v. Gregg [Ind. App.] 75 N. E. 674. Paragraph of complaint, containing statement of sufficient facts to bar another action for same cause, is good when first questioned on appeal. Griffin v. Miller [Ind. App.] 75 N. E. 598. If the complaint is sufficient to bar another action for the same cause, it cannot be first questioned on appeal for the omission of allegations of facts which might be supplied by proof. Embree v. Emmerson [Ind. App.] 74 N. E. 44. Counts in complaint in action to recover damages for injuries received from bite of dog, defective in failing to allege that dog was accustomed to bite persons, held sufficient after verdict. Feldman v. Sellig, 110 Ill. App. 130. If cause is tried on an insufficient or immaterial plea or replication without objection, cannot complain on appeal. Equitable Mfg. Co. v. Martin [Ala.] 39 So. 769. Misjoinder of counts cannot be first raised on appeal. Marquette Third Vein Coal Co. v. Dielie, 110 Ill. App. 684. Where plaintiff to a plea of set-off replied in a single replication, non-assumpsit, nil debit, matter by way of traverse and new affirmative matter, without having obtained leave to reply double, and the parties go to trial upon the issue so made, the defects of such replication are cured by verdict, and a motion for judgment non obstante veredicto will be denied. Price v. Art Printing Co., 112 Ill. App. 1. Declaration, in action for personal injuries held to sufficiently aver that plaintiff was injured by explosion or in endeavoring to escape therefrom, at least after plea and verdict. Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410. Nonjoinder of a party defendant cannot be first raised on appeal. Mueller & Co. v. Kinkead, 113 Ill. App. 132. A defective statement of a substantial cause of action is curable error, against which a motion in arrest of judgment cannot avail. George v. Robinson [Ind. App.] 75 N. E. 607.

70. Verdict will aid a defective statement of a cause of action but does not cure the statement of a defective cause of action. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. In action by employe for injuries, fact that petition alleged plaintiff's necessary expenditures and compensation for loss of time in blank held cured by verdict, where answer denied allegations of petition as written, and proof was heard as though such blanks had been filed. Covington & C. Bridge Co. v. Hull [Ky.] 90 S. W. 1055. Where allegations of complaint and reply were sufficient to bar another action for same cause, held that defects in reply were cured by finding and judgment. George v. Robinson [Ind. App.] 75 N. E. 607. Declaration held not cured by verdict. Jones v. Klawiter, 110 Ill. App. 31, afd. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673. A complaint which is indefinite as to whether it charges ordinary negligence or willful injury, but which has been treated by both sides as charging the former, will be so treated on appeal. Morey v. Lake Superior Terminal & Transfer R. Co. [Wis.] 103 N. W. 271. Declaration in action of slander held good after verdict though it failed to state date when slanderous words were spoken so as to show affirmatively that limitations had not run, and that fact will be presumed to have been proven at the trial. Dubois v. Robbins, 115 Ill. App. 372. Objection that plaintiff could not recover because complaint proceeded on the theory that the parties were partners while it clearly appeared from the record that they were not, held eliminated by findings of master that all matters in controversy grew out of certain written contracts which were the basis of the case. Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419. A verdict will aid a defective statement of a cause of action by supplying facts defectively or imperfectly stated or omitted, which are within the general terms of the declaration. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. In an action for personal injuries, allegations held sufficient after verdict, to show the relation of master and servant and to create the duty alleged. Id. Failure to allege specifically what defect existed in the machinery, or how or why it was dangerous (Id.), and to allege that defendant knew or ought to have known of the defects and that plaintiff did not (Id.), and that alleged defective grindstone broke on account of defects, held cured by verdict (Id.). Defect in declaration charging the speaking of slanderous words in the Ital-

good, the verdict will be referred thereto unless the state of the record forbids.[71] If a demurrer for want of sufficient facts, seasonably interposed, is overruled, the pleading must be construed on appeal with reference to the legislative requirement that it shall contain a statement of the facts constituting a cause of action, and those intendments allowed after verdict to cure a defective complaint cannot be indulged in.[72] While it is irregular to file simultaneously a demurrer to a pleading and a

ian language in failing to allege that the bearers understood it is cured by verdict. Rich v. Scalio, 115 Ill. App. 166. In action for personal injuries to servant alleged to have resulted from his being ordered into a dangerous place, failure of declaration to allege that peril was not obvious to plaintiff, or that he was not aware of danger and of the surroundings held cured by verdict where objection was not raised by demurrer. Wiggins Ferry Co. v. Hill, 112 Ill. App. 475. Is good if it contains facts sufficient to bar another action for same cause, though its averments may be objectionable for uncertainty and inadequacy, or for stating conclusions instead of facts, complaint for services rendered smallpox patients and damages to property held sufficient. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13. Defect in failing to describe with sufficient certainty the premises on which nuisance was alleged to have been created and maintained held cured by finding. Major v. Miller [Ind.] 75 N. E. 159. Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the the jury would have given, the verdict, such defect, imperfection, or omission, is cured by verdict. United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435; Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281. Failure to allege due care on part of parents in action for death of infant. United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435. Count stating cause of action defectively good after verdict (Marquette Third Vein Coal Co. v. Dielie, 110 Ill. App. 684), but will not cure an omission to state a cause of action (Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619). Rule does not obtain where defect is failure to aver some fact or facts essential to constitute cause of action, or where, from the facts averred, plaintiff's right to recover is clearly denied. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13. Failure to allege consideration for contract sued on held not cured by verdict. Taylor v. Lesson [Ind. App.] 74 N. E. 907. If, with all the intendments in its favor, the declaration is so defective that it will not sustain a judgment, such defects may be taken advantage of on appeal or error. Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455. Defects in a complaint will be cured by verdict and judgment unless it does not contain facts sufficient to bar another action, or totally fails to state a material fact absolutely necessary to the right of recovery. Complaint in action for separate support held sufficient. Smith v. Smith [Ind. App.] 74 N. E. 1008. The fact that the omission of a material fact from the declaration is cured by verdict does not relieve plaintiff from the necessity of proving it. In action for injuries to servant alleged to have resulted from his being ordered into a dangerous place, plaintiff must prove that he was not aware of the danger, though defect in declaration would be cured. Wiggins Ferry Co. v. Hill, 112 Ill. App. 475. Allegations of citizenship necessary to confer jurisdiction on Federal court held sufficient in view of the findings. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Where the evidence eliminates one of two alleged causes of action, the misjoinder is cured. Knight v. Dalton [Kan.] 83 P. 124.

71. Plaintiff may recover upon proof of any count of the declaration, where defendant pleads to the declaration and goes to trial on the issues made, and offers no instructions limiting the right of recovery to a particular count. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. Instruction that jury should find for plaintiff if they believe that he has proven the allegations of any one or more counts of the declaration by a preponderance of the evidence held proper though some of such counts are faulty, where defendant did not demur but pleaded to whole declaration and joined issue thereon, and did not ask an instruction directing jury to disregard courts claimed to be faulty and not supported by the evidence. Johnston v. McNiff, 113 Ill. App. 1. Where it is apparent that verdict was based on first count of the declaration, it is sufficient if there is one good count to which evidence is applicable and the judgment responsive. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114. Verdict cannot be set aside or reversed if one or more counts in the declaration be sufficient to sustain it. Shickle-Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444. Is not necessary to inquire whether there is sufficient evidence to support and warrant judgment upon the verdict as to each and every count of the declaration, but it is sufficient if there is one good count fully established. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8. Where there is one good count in a declaration, refusal to exclude other counts from the jury is harmless. Feldman v. Sellig, 110 Ill. App. 130.

72. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Motion in arrest of judgment should be allowed where it appears that beneficial plaintiff seeks in one action to recover in the name of three legal plaintiffs damages alleged to have arisen from nonperformance of three distinct contracts, each of which was entered into by defendant with one of the legal plaintiffs individually. McNulty v. O'Donnell, 27 Pa. Super. Ct. 93. Where plaintiff in action

motion to strike it, if the motion is properly sustained there is no prejudice.[73] The court should not be required to determine on demurrer matters which may be disposed of on motion,[74] but if defendant after demurrer overruled suffers default, only substantial insufficiency of the complaint will avail on appeal.[75] Withdrawal or other express waiver of an objection precludes its being subsequently urged.[76] A waiver may be obviated by stipulation.[77]

§ 12. *Time and order of pleadings.*[78]—The time within which pleadings must be made is fixed by statute, but the court may, in its discretion, allow a pleading to be received out of time,[79] or extend the time for pleading[80] on such notice[81] and showing[82] as the rules may require, and the parties may of course extend the

on benefit certificate alleged that deceased became a member of the society on a certain date, but case was tried on theory that he did not become a member until a later date, case would not be reversed on ground that plaintiff was concluded by his allegation, that question not having been raised below. Arrison v. Supreme Council of Mystic Toilers [Iowa] 105 N. W. 580. A departure in recitals as to plaintiff's title, in an action for conversion, between complaint in county court and that in district court on appeal cannot be taken advantage of by motion to dismiss or a plea to the jurisdiction, where the cause of action is not changed, particularly where defendant was not thereby deprived of any available defense. Epley v. Lovell, 5 Neb. Unoff. 251, 97 N. W. 1027. Act May 25, 1887, P. L. 271, does not prevent filing, in action of trespass, of a plea in abatement setting up the pendency of a former suit in the same jurisdiction, between the same parties, and for the same cause of action. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367. Complaint in an action to have an execution sale of a homestead set aside held sufficient as against demurrer though it did not allege that the homestead claimant's wife joined in the deed to plaintiff. Elliott v. Bristow, 185 Mo. 15, 84 S. W. 48.

73. Enright v. Midland Sampling & Ore Co., 33 Colo. 341, 80 P. 1041.

74. On demurrer to a defense in an action on a note, plaintiff may not claim that a denial therein that note was ever duly negotiated or discounted for value is improperly included therein and should not be considered, but should move to strike such denial before demurring. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49.

75. Richards v. New York etc., R. Co., 77 Conn. 501, 60 A. 295.

76. When a demurrer is overruled and then withdrawn it is eliminated from the record and the decision upon it cannot be reviewed on error. Montclair Military Academy v. North Jersey St. R. Co., 70 N. J. Law, 229, 57 A. 1050. But if the final judgment appears by the record to rest solely on the pleading demurred to, or if a ruling on the trial on the question raised by the demurrer is presented in a bill of exceptions, its sufficiency may be reviewed. Id. Confession that a demurrer was not well taken and answer over waives lack of specific averment of an essential fact. Hayes v. Horton [Or.] 81 P. 386.

77. Stipulation to try sufficiency of plea after both parties had taken testimony. Ingram v. Gill [Ala.] 39 So. 736.

78. See 4 C. L. 1046.

79. Where court determined that answer constituted a counterclaim but plaintiff had been misled by form in which it was pleaded, held that it was not an abuse of discretion to permit him to file reply after time limited by the code, though motion for permission to do so was made at the trial and not on notice as required by rules of court. State v. Coughran [S. D.] 103 N. W. 31. Leave to file a plea after time rests in discretion. Lewis v. Glass [Ala.] 39 So. 771. Allowing filing of answer after expiration of time is discretionary. Hardesty v. Mt. Eden, 27 Ky. L. R. 745, 86 S. W. 687. Failure to serve due to inadvertence of counsel relieved against. Kinney v. Beaver, 140 F. 792.

80. Order extending time to answer remains in force until an order vacating it is actually signed and entered, the mere announcement by the court that the motion to vacate is granted not accomplishing that result, and where answer is served after announcement, but before signing and entry of the order, plaintiff cannot take judgment by default. De Pallandt v. Flynn, 93 N. Y. S. 678. Granting defendant five days to answer after amendment of complaint held discretionary. Gadsden v. Catawba Water Power Co. [S. C.] 51 S. E. 121. A direction in a rule to give security for costs, "that pending the giving of such security all proceedings in the case be stayed, and that the defendant be not required to plead," held to merely suspend the operation of the rule to plead until the rule for security was disposed of, and that residue of time to plead fixed by the rule commenced to run when satisfaction of the rule for security was entered of record, neither a new rule, nor a reinstatement of the pending rule, nor fresh notice to defendant, being necessary. Amer. Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

81. In South Carolina no notice of applications for orders to extend the time to demur or answer need be served on the adverse party. Code Civ. Proc. § 405 makes no such requirement, the only condition imposed being the filing of an affidavit showing the grounds for such order. Fishburne v. Minott [S. C.] 52 S. E. 648. If circuit court rule 57 can be construed as applying to such a case, it is void as imposing conditions not required by statute. Id.

82. Failure to comply with circuit court rule 19, requiring a party seeking an extension of time to demur or answer, to present a certificate of his attorney that he believes he has a good defense on the merits, is excused where two of the defendants are out-

time by stipulation.[83] If plaintiff fails to reply to a plea within the time prescribed by law or the order of the court, the proper practice is to apply for a rule to compel him to do so, or, in default thereof, to suffer a judgment of non prosequitur.[84] In case the court permits the filing of additional pleadings during vacation, notice of the application should be given to the opposing counsel so as to give him opportunity to resist it, or to procure supplemental leave to file other pleadings and make up the issue.[85] It is not an abuse of discretion to refuse to stop the trial to allow preparation of a plea of discharge when there is no showing of the date of the alleged discharge.[86] In Tennessee pleas in bar and in abatement need not be interposed at the same time,[87] and generally, matter of abatement is waived by pleading to the merits.[88]

§ 13. *Filing, service, and withdrawal.*[89]—Pleadings are required to be filed in court, but failure to file is a mere irregularity,[90] and where due to the neglect of the clerk the filing will relate back.[91] If such action does not operate as a delay, surprise, or other injury to the opposite party, either party will be allowed to have issue set aside, withdraw a plea, file new pleas, or move to reject those already filed, or secure the filing of pleas on reconsideration by the court before time rejected.[92] Defects in service and failure to verify are ordinarily waived by failure to promptly return the pleading.[93]

§ 14. *Issues made, proof, and variance.*[94]—An issue of fact is formed for trial when the parties come to a point in the pleadings where a material fact is affirmed on one side and necessarily denied on the other.[95] If issue is joined on an immate-

side of the United States, and the other two are dependent upon one of them for information necessary to their defense. Fishburne v. Minott [S. C.] 52 S. E. 648.

83. N. Y. Gen. Prac. Rule 24, relating to applications for orders extending the time to plead, does not prevent the extension of time to plead by stipulation without an order of court. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

84. That judgment is appropriate where plaintiff, after appearance and before final judgment, fails to prosecute his action by neglecting to file his pleadings in due course. Norfolk & W. R. Co. v. Coffey [Va.] 51 S. E. 729.

85. Norfolk & W. R. Co. v. Coffey [Va.] 51 S. E. 729. Where after issue joined defendant obtained leave to file plea of limitations, liberty being also granted plaintiff to reply, and such plea was filed during vacation but no issue was taken by plaintiff, and his counsel first learned of the filing of the plea on argument of a demurrer to the evidence and was taken by surprise, held that the court should of its own motion have set aside the demurrer and the award of damages thereon, and have caused issues to have been made upon the plea and ordered a new trial. Id.

86. McGhee v. Cashin [Ala.] 40 So. 63.

87. Thach v. Continental Travelers' Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255.

88. See § 11, ante; also Abatement and Revival, 5 C. L. 1.

89. See 4 C. L. 1048.

90. While it is irregular to enter judgment before the filing of the complaint, the judgment is not for that reason void. Snohomish Land Co. v. Blood [Wash.] 82 P. 933.

91. Where railroad delivered necessary papers in condemnation proceedings to circuit clerk and requested him to file them, stating that its attorney would pay filing fee, which clerk did not demand of messenger delivering papers, but clerk delayed in filing papers, though subsequently again requested to do so, held that filing would relate back to date when papers were delivered. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

92. Under the practice of West Virginia on the overruling of a demurrer to a plea to the jurisdiction, the court will not necessarily enter an order of dismissal but may allow plaintiff's motion to set aside the issue joined on such plea and to reject the same where it is of the opinion that substantial justice will be promoted thereby. Gordon v. Yost, 140 F. 79. It is not error to permit the dismissal of a paragraph of the reply. Sovereign Camp, Woodmen of the World v. Cox [Ind. App.] 75 N. E. 290. After the appellate court has held that a bill of review is devoid of merit, and has reversed and remanded the case, the chancellor may permit the withdrawal of the answer and the filing of a demurrer. Wieczorek v. Adamski, 114 Ill. App. 161.

93. Where answer was served on June 30, and plaintiff's attorney was absent from his office July 1, and July 2 was Sunday, and notice that he would treat answer as a nullity because unverified was dated July 3, and it and the answer were received by defendant's attorney, who lived in a different town, the next day through the mail, held that plaintiff's attorney exercised due diligence and could not be compelled to accept service. Fuller Buggy Co. v. Waldron, 94 N. Y. S. 1017.

94. See 4 C. L. 1049. See, also, Equity, 5 C. L. 1144.

95. Willard v. Zehr, 215 Ill. 148, 74 N. E.

rial plea, defendant must prevail if it is established.[96] The only issues involved in the case are those raised by the pleadings.[97] The allegations of the petition are conclusive on plaintiff.[98] Any matter put in issue on one count is in issue for the purposes of the whole case.[99] If issue is taken on the replication, plaintiff is entitled to judgment if the averments thereof are proved.[1]

The general issue and general denials.[2]—A general denial puts in issue all the allegations to which it is directed,[3] and renders admissible all facts which directly tend to disprove any one or more averments of the complaint, or to show that plaintiff never had a cause of action.[4] A special plea of matter provable under the general issue is subject to demurrer.[5]

107. Where a special ownership in plaintiff under a chattel mortgage is alleged, a denial of plaintiff's ownership does not put the execution of the mortgage in issue. Perry County Bank v. Rankin [Ark.] 86 S. W. 279. An answer to a complaint for money had and received which alleges that defendant by agreement paid part thereof to plaintiff's creditors, and a specified sum to himself, raises an issue which will sustain a finding that the agreement was not that defendant should pay himself such sum but that he should have whatever profit was made in the transaction. Ellis v. Doherty [Cal. App.] 82 P. 545. Where service of a notice signed by a certain person is alleged, denial that such person signed the notice does not put in issue the service thereof. Hayden v. Collins [Cal. App.] 81 P. 1120. In suit to reform a deed alleged to have misdescribed the land intended to be conveyed, where complaint alleged that whatever interest the defendant B. had in the land he purchased from the grantee in the deed with knowledge of plaintiff's possession and claim of ownership, and the answer admitted that defendants claimed the land, alleged that they were the owners thereof in fee, and denied that plaintiff held the land adversely, held that pleadings raised the issue of B.'s rights distinct from those of his co-defendant. Garst v. Brutsche [Iowa] 105 N. W. 452. A denial that defendant hung a certain wire only three feet over a trestle does not put in issue the alleged time when it was hung. Bourke v. Butte Electric & Power Co. [Mont.] 83 P. 470. In an action against a firm on a contract signed in its name, an answer denying the existence of the partnership as alleged by plaintiff in his petition and denying the execution of the contract by the firm, or for its benefit, held to raise the issue as to whether the partnership which executed the contract could be held liable thereon. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. In action for breach of warranty of peaceable possession of land, denial of any disturbance of possession raises that issue and renders admissible evidence in contradiction of plaintiff's allegation of eviction which, if preponderant, would defeat his cause of action, though such denial is based on lack of knowledge or information sufficient to form a belief. Patterson v. Cappon [Wis.] 102 N. W. 1083.

96. Rasco v. Jefferson [Ala.] 38 So. 246.

97. Question whether assignment of executory contract of sale was an unlawful preference under the bankruptcy act held not an issue under the pleadings. Lamm v. Armstrong [Minn.] 104 N. W. 304. A ground of liability not pleaded cannot be considered on appeal from a judgment of nonsuit. Crowley v. Chicago, etc., R. Co., 122 Wis. 287, 99 N. W. 1016.

98. In proceeding to condemn land, allegations of petition as to ownership are conclusive on petitioner and defendants need not prove title. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248.

99. Plaintiff alleged in paragraph 3 of her complaint that defendant delivered her a package which he stated contained certain salts, and in paragraph 4 that it did not contain such salts but a poison. Defendant filed notice that on hearing in damages he should offer evidence to disprove allegations in paragraph 4. Held that no such notice as to paragraph 3 was necessary to enable him to show that statement of his clerk to plaintiff as to contents of package were true, and that she negligently picked up wrong package. Keating v. Hull [Conn.] 62 A. 661.

1. Union Fertilizer Co. v. Johnson [Ala.] 39 So. 684.

2. See 4 C. L. 1049.

3. Where title by specified conveyances is alleged, a general denial of plaintiff's title is insufficient. Pace v. Crandall [Ark.] 86 S. W. 812. Where general issue is pleaded to a special count, plaintiff must prove all the allegations thereof in order to recover. Godfrey v. Wingert, 110 Ill. App. 563. In all civil actions founded upon a particular contract defendant may answer by general denial and prove under it a different contract from that sued on and defeat recovery, or he may answer by a general denial and also by a special paragraph of denial setting up the contract which he admits having made in respect to the same subject-matter, but in such different terms as he understands the facts to warrant. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895. In trespass quare clausum where the location of a boundary line is in dispute, the title to the disputed territory may be determined under a plea of the general issue. Special plea of soil and freehold is not necessary to try title to disputed territory. Lyman v. Brown [N. H.] 62 A. 650. In an action on a subscription a general denial with an admission of making the subscription leaves the burden on plaintiff to prove the amount thereof. Ables v. Terrell University School [Tex. Civ. App.] 85 S. W. 1010.

4. Any evidence is admissible which tends to negative or disprove the matters of fact alleged in the petition. Code, § 3615. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113.

Special issues and special denials.[6]—Matters which lie in affirmative proof because of presumptions of law to the contrary, such as contributory negligence,[7] estoppel,[8] payment,[9] fraud,[10] and the like, must be specially pleaded.

A denial is sufficient to put plaintiff on proof, though coupled with an insufficient justification.[11]

Variance.[12]—Since a party must recover, if at all, on the cause of action set up in his pleadings, his allegations and proofs must substantially correspond.[13] Mat-

Facts provable under general denial: In action for libel defendant may prove plaintiff's general bad character, but not specific acts of misconduct. Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243, afg. 116 Ill. App. 184. Defendant in action on quantum meruit for services rendered testatrix, to be paid for by testamentary bequest, held entitled to take advantage of fact that contract was satisfied by legacy which plaintiff accepted, no plea of estoppel being necessary. Such evidence negatives that which it devolves on plaintiff to prove. Burns' Rev. St. 1901, § 380. Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185. In suit to restrain use of school house for religious purposes, evidence that defendants used building pursuant to permission obtained from township trustee to use it when unoccupied for common school purposes. Baggerly v. Lee [Ind. App.] 73 N. E. 921. In action for separate support denial of intoxication, desertion, and mistreatment, and that plaintiff has lived apart of her own will, etc. Smith v. Smith [Ind. App.] 74 N. E. 1008. Where petition in action for personal injuries charges a joint tort, and answer of one of the defendants is a general denial, evidence that the other defendant was an independent contractor and that injury was caused by the negligence of his employes, is admissible. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113. Code § 3629, providing that any defense showing matter of justification, excuse, discharge, or release must be specially pleaded, does not require such defense to be specially pleaded. Id. In action against corporation and one of its employes for illegal arrest and false imprisonment, fact that individual defendant made the arrest for violation of the law, that he acted as police officer and not as agent of corporate defendant, etc. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180. Under Act May 25, 1887, § 7, P. L. 271, abolishing special pleading and providing that the only plea in the action of trespass shall be not guilty, in action of trespass for injuries to land defendant in possession may offer evidence of title under the general plea of not guilty. Edwards v. Woodruff, 25 Pa. Super. Ct. 575.

Facts not provable: A plea of the general issue with leave to give in evidence any matter which might be specially pleaded amounts to no more than the general issue, and evidence not germane thereto is properly excluded. Main v. Radney [Ala.] 39 So. 981. Defendant in action for libel cannot show under the general issue, and in mitigation of damages, facts tending to cast suspicion of plaintiff's guilt of the very charges which defendant has declined to undertake to prove. Commercial News Co. v. Beard, 116 Ill. App. 501. In action by depositor to recover from bank the amount of a note paid by it and charged to its account, held that defendant could not contend that it was a bona fide holder, and a holder in due course, where answer was general denial and plea of payment, and no claim in set-off was filed or averment of ownership made. Elliott v. Worcester Trust Co. [Mass.] 75 N. E. 944. That plaintiff is not the real party in interest. Mendoza v. Steimer, 95 N. Y. S. 603. Administrator is a merely nominal party to a suit for wrongful death and a general denial does not traverse his representative capacity. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. Does not put in issue the incorporation of a plaintiff corporation. The incorporation need not be established by proof under such a pleading, and the issue can only be raised by a special pleading. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593. Allegation that guardian was duly appointed by probate court held not a material averment within meaning of provision of Ohio Code prescribing what issues may be raised by general denial in the answer. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Averment of plaintiff's citizenship in an action in a federal court, in which jurisdiction depends on diversity of citizenship, is a material allegation within the meaning of the Ohio Code, and is put in issue by a general denial in the answer. Id.

5. Western R. Co. of Ala. v. Russell [Ala.] 39 So. 311.
6. See 4 C. L. 1049.
7. See Negligence, 6 C. L. 748.
8. See Estoppel, 5 C. L. 1285.
9. See Payment and Tender, 6 C. L. 987.
10. See Fraud and Undue Influence, 5 C. L. 1541.
11. Denial that plaintiff had an easement of way, and averment that defendant obstructed the same as agent of the owner, presents a good defense in the denial of plaintiff's right alone, and hence this answer is sufficient though justification be not shown. Hornsey v. Adams, 27 Ky. L. R. 683, 86 S. W. 514.
12. See 4 C. L. 1050.
13. A variance is a substantial departure from the issue in the evidence adduced in regard to some matter which in point of law is essential to the charge or claim. Evidence must tend to prove different cause of action from that averred or a substantive ground of recovery not within the issue. Sattley Mfg. Co. v. Wendt, 116 Ill. App. 375. Plaintiff will not be permitted to make a different case by his evidence than that stated in his declaration. Proof without corresponding pleading is as ineffectual as a pleading without corresponding proof. Gilman v. Ferguson, 116 Ill. App. 347. Where there is a variance between the pe-

ters laid under a videlicet need not be proved as alleged.[14] Proof of more than

tition and the proof, it is error to enter a decree for plaintiff without previous amendment, and is ground for reversal if not waived. Cosgrove v. Farwell, 114 Ill. App. 491. The facts proved must be legally identical with those alleged. No recovery proper in collision case where there was a variance. Trout Brook Ice & Feed Co. v. Hartford Elec. Light Co., 77 Conn. 338, 59 A. 405. Where the petition in an action is framed upon the theory that an alleged accident caused an injury, and the proof offered by the plaintiff corresponds to the allegations of the petition and is repugnant to the theory of an aggravation of an existing infirmity, the defendant is entitled to have the plaintiff confined in his recovery to the scope of his allegation and proof. Where the issue raised by the pleadings was whether or not the accident caused hernia, proof that plaintiff had hernia prior to the accident constitutes a complete defense. P., C., C. & St. L. R. Co. v. Boswell, 7 Ohio C. C. (N. S.) 413.

Fatal variance: Variance in description of order sued on. Leatherbury v. Spotswood, Turner & Co. [Ala.] 39 So. 588. Between proof of an unsealed instrument and declaration on a bond. Gutta Percha & Rubber Mfg. Co. v. Attalla [Ala.] 39 So. 719. Between allegation that injury was due to defect in head or top of planing machine and proof that it was result of defective lock screw. Frank v. Hanly, 215 Ill. 216, 74 N. E. 130. Between proof of a contract for the sale of standing timber and declaration in trespass for cutting it. Tacoma Mill Co. v. Perry [Wash.] 82 P. 140. Declaration alleging performance of conditions precedent on which plaintiff's right of action depends is not supported by proof of facts constituting a waiver of such conditions. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1. In an action for deceit, proof of repretations other than those counted on is fatally variant. Walker v. Parry [Fla.] 40 So. 69. Plaintiff having elected in his petition to treat the transaction on account of which it sought to hold plaintiffs liable as a renewal of an existing indebtedness to it, held that it could not recover if it appeared that it was not in law a renewal. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396. One alleging a cause of action of an equitable nature must prove one so far as the trial by jury is concerned, and cannot escape such tribunal by alleging an equitable cause of action, and, while wholly failing to prove it, obtain a trial by the court of a common-law action arising out of the transaction. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. One suing on a contract alleged to have been made with defendants as partners cannot recover where his own proof affirmatively shows that it was made with a corporation. Buellesbach v. Sulka, 94 N. Y. S. 1. One suing a corporation for services rendered to it is not entitled to recover on the theory that he rendered the services to another corporation and that defendant afterwards assumed the liability. Girbekian v. Cairo Cigarette Co., 94 N. Y. S. 345. In action against owner for work and labor furnished by subcontractor, where complaint alleged that owner promised to pay subcontractor if principal contractor did not, held that there could be no recovery on the theory that the owner became the principal debtor to plaintiff. Smith v. Burditt, 95 N. Y. S. 188. In action for injuries caused by falling into an excavation, where negligence charged was defendant's failure to light or guard excavation on private property adjacent to a highway on theory that it should have done so for the safety of persons using such highway, held that there could be no recovery where evidence showed that plaintiff left highway deliberately and fell into excavation at place known to him not to be the highway. Crimmins v. United Engineering & Contracting Co., 96 N. Y. S. 1032. In a suit on a note, where the execution of the note sued on is admitted, it is error to receive a note variant from that described in the complaint. Viets v. Silver [N. D.] 106 N. W. 35. Where plaintiff sets out **negligent acts** relied on as a basis of recovery, he must establish those acts, and cannot recover by reason of other negligent acts of defendant not averred, even though acts proven show that latter was guilty of negligence which caused the injury. Chicago City R. Co. v. Bruley, 215 Ill. 464, 74 N. E. 441; Shickle-Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444; Wabash R. Co. v. Warren, 113 Ill. App. 172. Is confined to proof of acts alleged or which constitute the res gestae. Hudgins v. Coca Cola Bottling Co. [Ga.] 50 S. E. 974. One seeking to recover against **several defendants** jointly cannot recover if he fails to prove liability on the part of one of them. Probata does not sustain allegata. Hibberd v. Hubbard, 211 Pa. 331, 60 A. 911; Firch v. Hackett [Wash.] 82 P. 919. In an action on **express contract** for employment plaintiff cannot, on the contract being held void under the statute of frauds, recover the value of the services actually rendered without an amendment. Banta v. Banta, 103 App. Div. 172, 93 N. Y. S. 393. One suing upon an express contract of employment cannot recover on a quantum meruit. Hunt v. Tuttle, 125 Iowa, 676, 101 N. W. 509. No recovery can be had for tort when declaration is on contract. Suit for injury to cattle on contract to fence right of way. White River R. Co. v. Hamilton [Ark.] 88 S. W. 978. In action ex delicto for deceit and fraud no recovery can be had on promise to reimburse plaintiff in case representations proved untrue. Eckman v. Webb, 116 Ill. App. 467.

No variance: Between allegation that injury occurred while "placing a spout in said machine under said blade," and proof that it occurred while straightening a spout which had not gone in properly under the blade. National Enameling & Stamping Co. v. Vogel, 115 Ill. App. 607. If the facts alleged warrant the relief sought, the mere erroneous conclusion of the pleader that a partnership existed by virtue of such facts does not prevent the granting of such relief or constitute a variance. Calkins v. Worth, 215 Ill. 78, 74 N. E. 81. Where plaintiff sued partnership for purchase price of goods, but on trial evidence showed that goods were purchased by one of the alleged partners, who was individually liable therefor, and plaintiff amended petition so as

is alleged does not constitute a variance unless contradictory of the allegations,[15] nor does a failure to prove all that is charged, provided enough is proven to make out a cause of action.[16] Where the deficiency of evidence is as to the entire scope of the pleading and not merely as to some particular thereof, it is a failure of proof and not a variance.[17]

Immaterial variances will be wholly disregarded,[18] and in such case the court may direct the facts to be found according to the evidence.[19] By statute in some

to allege that plaintiff was doing business at the time mentioned in his own name, which was treated as an allegation of a sale to him individually, held that there was no variance. Padden v. Clark, 124 Iowa, 94, 99 N. W. 152. Averment that plaintiff delivered, or caused to be delivered, to defendant bank the sum claimed, to be held by it for his use, to be paid upon his order on demand, etc., held broad enough to cover deposit made by plaintiff personally. Elliott v. Worcester Trust Co. [Mass.] 75 N. E. 944. Under Civ. Ct. rule 27, subd. "b," plaintiff pleading a joint contract executed by two defendants, and the proof showing that only one of the parties executed the contract, he may recover against such party. Root & McBride Co. v. Walton Salt Ass'n [Mich.] 12 Det. Leg. N. 193, 103 N. W. 844. Proof of employment to sell particular goods not fatally variant from averment of employment to sell goods generally. Gibson v. Bailey Co., 114 Mo. App. 350, 89 S. W. 597. Action for failure of bailee to protect by insurance held to be on implied contract and not in tort, so that proof of express contract to insure was no variance. Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. Declaration alleging injuries to plaintiff's legs, back, and body, held broad enough to authorize admission of evidence of injuries to ankle, it not being necessary to more particularly describe the parts injured. Lewes v. Crane [Vt.] 62 A. 60.

14. Date. Peoria Star Co. v. Floyd Special Ag., 115 Ill. App. 401; Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929. Averment that deposit was made on or about Feb. 21 held not to preclude reliance on deposit made Feb. 24. Elliott v. Worcester Trust Co. [Mass.] 75 N. E. 944. No variance between allegation that contract was made "on or about" a certain date and proof that it was made at an earlier date. Toan v. Russell, 111 Ill. App. 629. Where it is alleged under a videlicet that slanderous words were spoken at a particular place, it is sufficient if they are proven to have been spoken at any place. Herhold v. White, 114 Ill. App. 186.

15. Sattley Mfg. Co. v. Wendt, 116 Ill. App. 375. Where declaration contains only an averment of due care on the part of plaintiff, held that it is not a variance to show that defendant promised to repair and did not, and that plaintiff continued in his employ relying on such promise. Id.

16. Action for personal injuries. City of Ottawa v. Hayne, 114 Ill. App. 21. Need not prove all slanderous words alleged in the declaration. Dubois v. Robbins, 115 Ill. App. 372.

17. Suit for accounting. Allegation of contract of plaintiff with A and B jointly and proof of contract of A with plaintiff and B jointly. Hartman v. Belden, 38 Wash. 655, 80 P. 806.

18. Variance held immaterial: Between an averment that an irrigation ditch was constructed in 1900 and proof that a few rods of it was constructed in 1896. Vestal v. Young, 147 Cal. 715, 82 P. 381. If the complaint directs attention to the true nature of plaintiff's loss, and sufficiently indicates its general and controlling cause, it is immaterial that the particular cause alleged proves not to be the true one. Osborn v. Norwalk, 77 Conn. 663, 60 A. 645. In action for damages against owner of dam, variance between allegation that damages were caused by wrongfully and negligently failing to open the flood gate early enough in periods of high water, and proof that the real cause of the injury was the opening of the gate at any time during such periods is immaterial and will be disregarded under Rules of Court, p. 45, § 149, plaintiff not having stated a defective title to relief but having made a defective statement of a good title to it. Id. In action by one accommodation indorser against another for contribution, variance between allegation that plaintiff paid notes and proof that he bought them from the holder held immaterial where it appeared that he paid the face of the notes and part of the interest, and judgment was only for half of the amount actually paid. Pratt v. Rhodes [Conn.] 61 A. 1009. As to the exact place of the accident, where defendant is not misled thereby and the exact place is not important. Illinois Cent. R. Co. v. Kief, 111 Ill. App. 354. Between averment that insured was thrown against walls and floor of car and objects therein, and proof that he was thrown against outside of car while attempting to board it. Continental Casualty Co. v. Hunt [Ky.] 90 S. W. 1056. Where complaint alleged conspiracy to defraud, held immaterial that offered evidence tended to prove fraud only, that being the gravamen of the action. Lefler v. Fox, 92 N. Y. S. 227. Between an averment of sale to defendant and proof of a sale to a third person and an adoption of the contract by defendant. Vulcan Iron Works v. Burrell Const. Co. [Wash.] 81 P. 836. In an action to recover for work done on contract, proof of a contract price lower than that pleaded. Irby v. Phillips [Wash.] 82 P. 931.

19. Irby v. Phillips [Wash.] 82 P. 931. May direct the fact to be found according to the evidence and may order an immediate amendment without costs. Code Civ. Proc. § 139. Stull v. Masilonka [Neb.] 104 N. W. 188. Civ. Code Prac. 130. Continental Casualty Co. v. Hunt [Ky.] 90 S. W. 1056. Where the court directs that the facts be found according to the evidence, no amend-

states no variance is to be deemed material unless it has actually misled the opposite party to his prejudice in maintaining his action or defense upon the merits,[20] which fact must be established by his affidavit to that effect or otherwise.[21] A judgment notwithstanding the verdict cannot be upheld on the ground of a variance between the cause of action stated and the proof unless it further appears that the pleading is deficient to the extent that no amendment thereof can be made.[22]

A variance is waived by failure to object thereto at the trial[23] or by consenting to litigate the new issue,[24] or where a motion to exclude evidence is based solely on other grounds,[25] nor can such objection be availed of where the variance is cured by amendment.[26]

Admissions in pleadings or by failure to plead.[27]—Allegations of the complaint, declaration, or petition, which are admitted[28] or which are not specifically denied or

ment need be made. Griffith v. Ridpath, 38 Wash. 540, 80 P. 820.

20. City of Toledo v. Willinger, 6 Ohio C. C. (N. S.) 641. Civ. Code Prac. § 129. Continental Casualty Co. v. Hunt [Ky.] 90 S. W. 1056. Code Civ. Proc. § 138. Stull v. Masilonka [Neb.] 104 N. W. 188. Code Civ. Proc. §§ 190, 191. Roundtree v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 231. Bal. Ann. Codes & St. § 4949. Grissom v. Hofius [Wash.] 80 P. 1002.

Held not misleading: Misdescription of realty in petition on foreclosure proceedings, where property was correctly described in attached copy of mortgage, held not to affect judgment, particularly where it was subsequently corrected by amendment. Stull v. Masilonka [Neb.] 104 N. W. 188. Variance between allegation that plaintiff was injured while loading a truck and proof that he was injured while loading wheels of a truck. Roundtree v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 231. Not a failure of proof within meaning of Code Civ. Proc. 1902, § 192. Id. In an action for injuries from the bite of a dog, variance between an averment that the dog belonged to defendant and proof that it belonged to a firm of which he was a member. Grissom v. Hofius [Wash.] 80 P. 1002. Variance between declaration on quantum meruit and proof of special contract, where contract was alleged by defendant. Griffith v. Ridpath, 38 Wash. 540, 80 P. 820.

21. In Missouri one claiming to have been misled must file an affidavit thereof. Rev. St. 1899, § 655. Harrison v. Lakenan, 189 Mo. 581, 88 S. W. 53. Fact of prejudice must be shown to the satisfaction of the court, and it must also be shown in what respect he was misled. Code Civ. Proc. § 138. Stull v. Masilonka [Neb.] 104 N. W. 188.

22. A party cannot be deprived of right to amend pleadings on a new trial by a summary judgment under Laws 1901, c. 63, p. 74. Welch v. Northern Pac. R. Co. [N. D.] 103 N. W. 396.

23. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463; Wall v. Continental Casualty Co., 111 Mo. App. 504, 86 S. W. 491. Objection cannot be first taken on appeal. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281. Appellate court will not consider a variance between statement of claim and plaintiff's evidence where no exception to such evidence was taken at the trial and question is not specifically raised by an assignment of error. Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617. Objection cannot be raised after verdict where no objection to the evidence was made at the trial and no surprise was expressed or continuance asked for. Elder Twp. School Dist. v. Penna. R. Co., 26 Pa. Super. Ct. 112. Judgment for plaintiff will not be reversed, because court admitted evidence of an express contract while statement was on an implied one on the quantum meruit, where issue between the parties was a pure question of fact and was tried on the merits, and statement stated plaintiff's claim plainly and averred that the price of the work was a sum stated. Wike v. Woolverton, 26 Pa. Super. Ct. 561.

24. In action for injuries caused by falling into an excavation on private property adjacent to a highway, permitting introduction of evidence that property was used by public as a crossing, held not to constitute consent to litigate new issue of negligence based on that theory where such evidence was stated by plaintiff to be merely explanatory of the situation and locality. Crimmins v. United Engineering & Contracting Co., 96 N. Y. S. 1032.

25. City of Ottawa v. Hayne, 114 Ill. App. 21. Motion must point out specifically in what the variance consists. Id.

26. Not on appeal where an amendment is allowed at the argument. Elder Tp. School Dist. v. Pennsylvania R. Co., 26 Pa. Super. Ct. 112. The right to a nonsuit because of a variance between the allegations and the proof is lost by the making of an amendment conforming the two. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610.

27. See 4 C. L. 1052.

28. If defendant admits by demurrer or answer that he entered into a contract with plaintiffs by an associate name in which the suit is brought, such admission, without further qualification, is equivalent to an admission that they have sufficient capacity to bind and be bound by the instrument and to enforce the same in the contract name. Miller v. Loverne & Browne Co. [Neb.] 105 N. W. 84. Answer held to admit plaintiff's cause of action, and hence errors at the trial were harmless. Id. An averment in the answer of a consideration for the instrument sued on does not dispense with proof of consideration by plaintiff where he pleaded another and wholly different consideration. Joseph v. Catron [N. M.] 81 P. 439.

avoided by the answer,[29] and allegations of new matter in the answer not denied by the reply, in states where a reply is required,[30] are taken as established and need not be proved. If, however, allegations of an answer are to be taken as admissions they must be taken as a whole, and the defendant must be given the benefit of portions favorable to him.[31]

Express admissions are conclusive on the party making them.[32] They control inconsistent express averments[33] and prevail over findings to the contrary by a jury.[34] The original answer is admissible in evidence against the defendant as an admission even after the filing of an amended one,[35] but is not conclusive, and evidence bearing on its weight as an admission is admissible.[36]

Judgment on the pleadings[37] will be granted when they present such a state of conceded facts as entitle either party to relief,[38] but is improper where there is any material issue of fact.[39]

PLEAS, see latest topical index.

Admission that one D. was the owner of certain premises prior to a certain date when he conveyed them to plaintiff held merely an admission that he held title on that date so as to make the conveyance effective, and not an admission of the allegation of the complaint that for five years before such date he had at all times held the title. Culnane v. Dixon, 94 N. Y. S. 1093.

29. Onderdonk v. Peale, 93 N. Y. S. 505; State v. Alexander [Tenn.] 90 S. W. 20. Failure of defendant in partition to deny averment that lands cannot be equitably partitioned dispenses with proof thereof. Berry Lumber Co. v. Garner [Ala.] 38 So. 243. Where the answer in a suit to cancel instruments for want of consideration and duress denied only the duress, want of consideration is admitted. McClelland v. Bullis [Colo.] 81 P. 771. Code § 3622. Allegation in petition in action to recover dividend on bank stock that bank "refused to pay said dividend to plaintiff or his assignors." Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796. Execution of the contract sued on. Lanham v. Louisville & N. R. Co., 27 Ky. L. R. 772, 86 S. W. 680.

30. As to necessity of reply see § 4, ante. Rejoinder held to have admitted allegation of fulfillment of a certain condition in contract. Grand Lodge v. Ohnstein, 110 Ill. App. 312. Allegations of the answer in mandamus proceedings. City of Chicago v. People, 114 Ill. App. 145. In mandamus to compel street railway to lower tunnel under river on ground that it was an obstruction to navigation, failure of replication to deny averment in answer that there were other tunnels as near the surface as defendant's and below it, held an admission that such other tunnels existed but not that defendant's tunnel was not an obstruction. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

31. If allegations of new matter were to be taken as admissions that notes sued on were made and delivered by defendant, held that plaintiff could not use them to his advantage without at the same time admitting allegations that notes were usurious and void, and that they had been paid. Schlesinger v. McDonald, 106 App. Div. 570, 94 N. Y. S. 721.

32. Allegations admitted by the answer must be taken as true irrespective of the state of the evidence. Lainhart v. Burr [Fla.] 38 So. 711. An admission is conclusive upon the parties and the court, and evidence to contradict it is inadmissible, and if admitted must be disregarded. Admission of possession of premises by defendant held to render dismissal of cause for failure to prove it erroneous. Pennacchio v. Greco, 94 N. Y. S. 1061.

33. Irwin v. Buffalo Pitts Co. [Wash.] 81 P. 849.

34. Admission as to the sufficiency of a drain, the obstruction of which has caused damage to property. City of Cincinnati v. Johnson, 7 Ohio C. C. (N. S.) 167.

35. Schultz v. Culbertson [Wis.] 103 N. W. 234.

36. Evidence that attorney who prepared it did so without consulting defendant, and on information obtained from third persons. Schultz v. Culbertson [Wis.] 103 N. W. 234.

37. See 4 C. L. 1053.

38. May be rendered on motion when, on all the pleadings taken together, a party is entitled to judgment. Stratton's Independence v. Dines [C. C. A.] 135 F. 449. Where the material allegations of the complaint were not denied and only legal conclusions were alleged against it. Tonis Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. Though there is a general denial, if subsequent averments of the answer amount to a substantial admission of all the essential allegations of the complaint, judgment on the pleadings is proper. Yoder v. Randol [Okl.] 83 P. 537. Judgment on pleadings for enforcement of lien securing notes held proper. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. Where answer contained no denial of the allegations of the complaint, but merely alleged that plaintiff was insane, held that court should have granted plaintiff's motion for judgment on the pleadings subject to its discretionary power to allow defendant, on showing a sufficient excuse for his delay, to plead to the merits upon property terms. Wiesmann v. Donald [Wis.] 104 N. W. 916.

39. Viets v. Silver [N. D.] 106 N. W. 35. If any essential averment of the declaration is denied. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489.

PLEDGES.

§ 1. *Definition and nature.*[40]—A pledge is a bailment of personal property as security for some debt or engagement with implied power of sale on default.[41] It creates a lien in favor of the pledgee.[42] The obligation secured is the principal debt in the law and governs the rights of the parties and of volunteers.[43] Whether a transfer of property is absolute, or merely as a pledge, often depends upon the character of the transaction and the circumstances of the parties,[44] but equity will consider the substance of the transaction in order to determine the intention of the parties.[45] The question may be one for the jury.[46]

§ 2. *Right to make.*[47]—Property cannot be pledged except by the owner or his authorized agent.[48]

§ 3. *Property subject to be pledged.*[49]—All personal property capable of delivery may be pledged.[50]

§ 4. *The contract and its requisites.*[51]—Possession is the essence of a pledge.[52] To constitute a valid pledge an actual transfer is not always essential. It is sufficient if there be such a delivery as the property is reasonably capable of, and as is reasonably suitable under the circumstances.[53] Thus, a symbolical or constructive, instead of actual, delivery is in many cases sufficient.[54] For similar reasons substitution is permitted where strict segregation of the property pledged is impracticable,[55] and if the property is already in possession of the pledgee, the pledge becomes

40. See 4 C. L. 1054.

41. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933.

42. The lien is created by mere delivery upon an express or implied understanding that the property shall be retained as security for an existing or future debt. Farson v. Gilbert, 114 Ill. App. 17.

43. The heirs of a grantor, whose deed was in the nature of a collateral to a bond, held bound by the terms of the bond as against the devisees of the grantor, although they had no notice thereof. Godshalk's Estate, 24 Pa. Super. Ct. 410.

44. Defendant held a mere pledgee where he guaranteed the note of a new corporation, which his son-in-law was promoting, and took stock of the corporation to secure the obligation of the son-in-law to relieve him from his guaranty. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933.

45. An assignment as collateral of a vendor's executory contract for the sale of realty vests in the assignee a lien upon the vendor's interest in the realty to the extent of the debt secured, not exceeding the purchase money unpaid on the contract. Lamm v. Armstrong [Minn.] 104 N. W. 304.

46. Intention held a question for the jury where plaintiff shipped property and drew drafts and bills of lading in favor of his creditor. Gregg v. Bank of Columbia [S. C.] 52 S. E. 195.

47. See 4 C. L. 1055.

48. The agent could not pledge where he was under contract to keep the property and proceeds in trust for the principal. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949.

49. See 4 C. L. 1055.

50. Statutory **lien bonds** of North Carolina may be pledged, although they cover accounts to accrue in the future. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949. Act 72, 1876, p. 113, has no application to United States bonded warehouse receipts. Hence these need not be paragraphed "For Hypothecation" before they can be pledged. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537. Stock. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073; Dwight v. Singer, 27 Pa. Super. Ct. 119.

51. See 4 C. L. 1055.

52. Ottumwa Nat. Bank v. Lotten, 114 Mo. App. 97, 89 S. W. 65.

53. Bush v. Export Storage Co., 136 F. 918. Held sufficient where warehouse was marked off by placards, stakes, etc., to indicate possession. Id. Where a bankrupt had pledged receipts for his goods left on a portion of his own premises, which he had leased to a warehouse company who had control, the transaction was held not sufficient to raise an inference of fraud so as to entitle the trustee to the possession of the goods. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

effectual without further delivery;[56] and the consent of a bailee to becoming bailee for another to whom the owner has pledged the property is a sufficient change of possession.[57] Where there is conscious control, the intentional exclusion of others, and access to the place of custody as of right, possession is complete,[58] and the fact that the property is in a warehouse owned by the pledgor and used by him jointly with the warehouse company will not invalidate the pledge.[59] A pledge need not be evidenced by a writing,[60] and no particular formality is necessary.[61] A valid written contract of pledge cannot be varied by parol.[62] A pledge must rest on a valuable consideration,[63] but may be valid, although the debt secured is not as definite and certain as it must be in the case of a mortgage,[64] nor will the fact that the evidence of the debt may be invalid necessarily invalidate the pledge.[65] As to description of the property, it need not go beyond the fair import of a statute.[66] A defective contract of pledge may be cured by delivery of the property pledged.[67] As between the parties, a pledge of securities becomes valid without notice to the obligors.[68]

§ 5. *Rights, duties, and liabilities under the pledge.*[69]—The pledgor cannot cancel a contract pledged, to the prejudice of the pledgee,[70] nor can he defeat the lien of a mortgage by taking a deed of the mortgaged premises.[71] Delivery of property under the contract passes to the pledgee the right to things incidental thereto and necessary to render the pledge effectual, and he may maintain an action for their recovery.[72] The pledgee is entitled to his reasonable expenses incurred in realizing on collaterals,[73] and in the case of a pledge of stock he may recover assess-

54, 55. Bush v. Export Storage Co., 136 F. 918.

56. Farson v. Gilbert, 114 Ill. App. 17. Held a pledge where, upon being pressed, the debtor told the creditor in effect that he need not worry about getting his money as he had ample security in the property. Id.

57. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

58. Held sufficient at common law where pledgor had rented part of basement of his own premises and given control to a warehouse company. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154. And also under Rev. St. of Illinois, ch. 114, par. 121, sec. 2, providing that "public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration." Id.

59. Lease of part of a factory and storage of owner's goods. Bush v. Export Storage Co., 136 F. 918.

60. Plaintiff who advanced money for purchase of windmills, and was to retain possession until paid, was at least a pledgee. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

61. Civ. Code § 3159, prescribing the manner of executing acts of pledge to banks, affects only the authenticity of the act evidencing the pledge and not the pledge itself. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537.

62. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

63. Pledge of bills of lading to secure loans presently made and in exchange for warehouse receipts and other bills previously pledged is based on a sufficient consideration. Chesapeake S. S. Co. v. Merchants' Nat. Bank [Md.] 63 A. 113.

64. Marsh v. Keating [Conn.] 60 A. 689.

65. Plaintiff representing creditors claimed note invalid. Pledge of warehouse receipts and other notes held binding to secure payment of the money received. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537.

66. A statute requiring the act of pledge to mention "the species and nature of the thing given in pledge" is satisfied by a recital that the thing pledged was "Warehouse Receipts for 30 Cases-Bales Leaf Tobacco." Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537.

67. Contract to give lien bonds for security, made when no bonds existed, valid after bonds were made and delivered. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949.

68. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949.

69. See 4 C. L. 1056.

70. Where the vendor pledged an executory contract for the sale of realty, and thereafter canceled it with the vendee, it was held that the pledgee could foreclose his lien against the vendor. Lamm v. Armstrong [Minn.] 104 N. W. 304.

71. Deed to the wife of the pledgor before the obligation to the pledgee became due. Ruberg v. Brown [S. C.] 51 S. E. 96.

72. In a pledge of an **underwriting agreement**, the pledgee was entitled to stock to be given as a bonus to the subscribers in consideration of their taking an issue of bonds. Kirkpatrick v. Eastern Milling & Export Co. [C. C. A.] 137 F. 387. Lien bonds, though for future advances and covering accounts to accrue in the future, carry with them, by assignment, the accounts for advances actually made without separate assignments. Virginia-Carolina Chemical Co. v. McNair [N. C.] 51 S. E. 949.

ments necessarily paid in order to preserve his security,[74] but in such case he cannot resort to measures unnecessary for his protection.[75] A pledge to secure a joint obligation does not give to the pledgee a lien to secure the individual undertaking of one of the pledgors.[76] Where the contract of pledge provides that other security may be substituted, any security may be substituted which will not affect the ultimate value of the obligation secured, although the same may not be devoted to the security of that obligation or be available as collateral.[77]

Possession and custody.[78]—The pledgee being entitled to possession, any possessory action may be maintained.[79] The possession of the pledgee is notice to the world.[80] A pledgee holding by constructive delivery may reduce the goods to actual possession.[81]

Title to the property.[82]—The fact that the pledgee attaches the property will not estop him from asserting that he was holding it at the time as pledgee.[83]

Duty to realize on collaterals and prevent loss.[84]—In a pledge of securities the pledgor is relieved from responsibility as to collection on them, and that duty devolves upon the pledgee.[85] If he negligently fails to collect when the collaterals are due, and the makers thereafter become insolvent, he is liable for the loss.[86] Where the pledgee is also the agent of the pledgor for the purpose of realizing on securities pledged, he is liable for loss occurring by reason of his failure to follow instructions.[87] A pledgee of stock is not, in the absence of an agreement looking to a sale, liable for depreciation in value while it is in his hands.[88]

73. As against assignee of insolvent pledgor. Hickson Lumber Co. v. Pollock [N. C.] 51 S. E. 855.

74. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

75. Pledgee of stock entitling pledgor to water for his land could not shut off the water because the pledgor refused to reimburse him. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

76. Husband and wife gave note reciting that certain papers had been pledged to secure all demands against "the undersigned." This held not a covenant so as to come within a statute making joint obligations joint and several, and pledgee could not hold the papers to secure the individual note of the husband. First Nat. Bank v. Southworth, 215 Ill. 640, 74 N. E. 771.

77. So held where the stock of two corporations was pledged to secure the bonds of a third, and it was proposed to consolidate the three companies and substitute first lien bonds of the new corporation for the stock pledged. Ikelheimer v. Consolidated Tobacco Co. [N. J. Eq.] 59 A. 363. But where in such case a majority of the pledgees have authority to direct the disposition of the stock, such authority cannot be exercised to the injury of the pledgees as a whole. Id.

78. See 4 C. L. 1057.

79. Held error to exclude evidence that plaintiff was in possession as pledgee as against a mortgagee whose right depended upon possession by reason of insufficient description in the mortgage. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

80. Although there is no written contract of pledge, the pledgee in possession may maintain replevin against the sheriff and the execution creditor of the pledgor who purchased the property. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

81. A bona fide pledgee of bills of lading, providing for surrender on delivery of the goods, is entitled to recover from the carrier in its own name such damages as it sustained by the carrier's wrongful delivery of the goods to the pledgor without requiring a surrender of the bills. Chesapeake S. S. Co. v. Merchants' Nat. Bank [Md.] 63 A. 113.

82. See 4 C. L. 1056.

83. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65. And the fact that the pledgee of stock demanded and received the resignation of all the officers of the corporation, but never acted on the resignation or in the capacity of a shareholder, did not render him liable as owner. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933.

84. See 4 C. L. 1057.

85. Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882.

86. Held liable for amount of collateral less the note secured. Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882. The pledgee of a note is bound only to ordinary diligence in collecting it. Johnson, Berger & Co. v. Downing [Ark.] 88 S. W. 825. Instruction that if at maturity the maker was solvent and note could have been collected by reasonable care, and such care was not used by plaintiff and the maker thereafter became insolvent plaintiff would be liable, held not erroneous as limiting the maker's solvency to the date of the maturity of the note. Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882. Not error to fail to inform jury that plaintiff's diligence did not arise until the note was due. Id. Not error to fail to instruct jury when the note was due where the note showed the date of its maturity. Id.

87. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 N. E. 987.

Conversion by the pledgee.[89]—Trover lies against the pledgee where, after demand and payment of the debt secured, he wrongfully withholds the property.[90] Where a pledgee is a partnership, each partner is jointly and severally liable for a wrongful use of the property,[91] and conversion will lie against a third party who sells the property contrary to the instructions of the pledgor.[92] Where property is repledged, the original pledgee can maintain an action against his pledgee for damages for again pledging the property for an unauthorized purpose.[93] Such action is in tort and not on a contract.[94] Whether such repledge is unauthorized depends upon the terms of the contract of pledge.[95] Mere knowledge of the repledge without a ratification thereof,[96] and a payment to redeem the property pledged,[97] will not estop the party injured by the repledge from maintaining an action for damages. Where a pledgor has no notice until after a wrongful sale that the property has been converted, he may sue in conversion without demand for the property and tender of the amount due,[98] but if the pledgor demands an accounting for the proceeds from a wrongful sale, and from the use of the property, he thereby waives the tort of the pledgee.[99] Conversion will not lie against the pledgee by reason of a loss occurring because of his failure to follow the instructions of the pledgor in selling the property.[1] In a suit for an accounting, between pledgor and pledgee, defendant is not entitled to a jury,[2] and equity will not entertain a suit for an accounting if brought unreasonably late.[3]

Redemption and surrender.[4]—The pledgor is entitled to redeem, and a refusal to return the pledge is a sufficient justification for not paying the debt,[5] but he cannot recover possession of property pledged without first paying the debt, to secure which the pledge was made.[6] The pledgee cannot prevent redemption by deny-

88. Lake v. Little Rock Trust Co. [Ark.] 90 S. W. 847.

89. See 4 C. L. 1057.

90. First Nat. Bank v. Southworth, 215 Ill. 640, 74 N. E. 771. Where there is a remedy for conversion, an action for an accounting will not lie. Gregg v. Bank of Columbia [S. C.] 52 S. E. 195.

91. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

92. Bank sold property represented by draft and bills of lading drawn in favor of pledgee and applied proceeds to the debt of the pledgor, contrary to instructions of pledgor to notify him in case drafts were not paid. Gregg v. Bank of Columbia [S. C.] 52 S. E. 195. But in such case the benefits received by plaintiff must be considered in estimating the damages. Id.

93. Pledgee of railroad bonds repledged to secure advances for constructing a road, and the second pledgee again pledged for other purposes. Second pledgee held liable, although the third knew of the limitations of the contract. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. In such case plaintiff was entitled to the difference between the amount necessary to redeem and the amount used in the construction of the road. Id.

94. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

95. Railroad subcontractor held to have no authority to repledge bonds to secure expenses and commissions for obtaining loans. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

96. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

97. Such payment is not voluntary. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

98. And he is not barred, because the proceeds were applied in payment of the debt, where he did not ratify. Gregg v. Bank of Columbia [S. C.] 52 S. E. 195.

99. Demars v. Hudon [Mont.] 82 P. 952.

1. So held where pledgee was instructed to bid in mortgaged property at "somewhere near its present value," and he bid it in at the full amount of the debt which was much more than the actual value of the property. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 N. E. 987. And it has been held that where stock is assigned with absolute power of attorney, and with an understanding to pledge it for the purpose of speculation, trover will not lie because the assignee sells the stock and loses the proceeds in speculation, even though defendant gave receipts for the stock and promised to return it on demand. Martin v. Megargee, 212 Pa. 558, 61 A. 1023.

2. Plaintiff delivered to defendant a teaming outfit with agreement to credit the amount earned on the debt. Demars v. Hudon [Mont.] 82 P. 952.

3. Suit sixteen years after debt due held stale. Wheeler v. Breslin, 47 Misc. 507, 95 N. Y. S. 966.

4. See 4 C. L. 1058.

5. In an action on a promissory note a defense held good which stated that plaintiff refused to return another note pledged with him. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. S. 718.

6. Robinson & Co. v. Ralph [Neb.] 103 N. W. 1044.

ing the corporate existence of the pledgor.[7] He is entitled to redeem any part of the property remaining undisposed of under the contract of pledge;[8] but the pledgor cannot redeem land bought in by the pledgee, at the foreclosure of a mortgage pledged, where the pledgor had authorized the pledgee to so purchase the land.[9] Where a mortgage of real estate pledged as collateral security for a note other than the mortgage debt is foreclosed otherwise than by sale under a power, the pledgee acquiring absolute title to the land as against the mortgagor, such pledgee holds the land merely as security for the debt against the pledgor, and the pledgee's interest is liable to be defeated by payment of the debt for which the mortgage was pledged.[10] But where the foreclosure is by sale under a power and the pledgee becomes the purchaser, under the terms of the pledge the foreclosure will stand, but the proceeds of the sale will be applied as a payment on the pledgor's debt.[11]

Default, foreclosure, and sale.[12]—The pledgee cannot divest the pledgor of title to the property on default by a mere declaration that if the obligation is not performed he will consider the property as his own,[13] and an agreement that on default the property shall belong to the pledgee does not vest title absolutely in him on default, but merely gives him an option to treat it as such;[14] and in a suit on a guarantee, a mortgage pledged to secure its performance may be foreclosed in the same action,[15] but in such case the pledgee is not entitled to interest on the mortgage as a bonus.[16] In the foreclosure of a pledge the court may grant a deficiency judgment in the same action.[17] If he has several securities for the same debt he may resort to any one or all of them, and hold any surplus for the benefit of the pledgor and third persons interested.[18] But the pledgee occupies a fiduciary relation[19] and he is bound to deal fairly with the pledgor.[20] If he undertakes to sell he is bound to exercise reasonable care to obtain a fair price, although he was not required to sell.[21] He is not relieved of his obligation to exercise good faith, in disposing of collaterals, even though the contract authorized a private sale, without notice, and allowed him to bid in the property himself.[22] Where the sale is fraudulent, the

7. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537.

8. So held where three of four mortgages remained undisposed of. Jennings v. Wyzanski, 188 Mass. 285, 74 N. E. 347.

9. Jennings v. Wyzanski, 188 Mass. 285, 74 N. E. 347. It is different where the pledgee buys the land otherwise than by sale under a power. In such case the pledgor may redeem. Id. Where four real estate mortgages were pledged with authority to sell or foreclose the same, a merely colorable transfer of the mortgages, which did not constitute a sale under the terms of the pledge, did not affect the pledgor's right to redeem from the pledge. Id. Nor did the foreclosure of one of such mortgages inferior to the other three, under a power of sale, affect the pledgor's right to redeem the other three from the pledge. Id.

10, 11. Jennings v. Wyzanski, 188 Mass. 285, 74 N. E. 347.

12. See 4 C. L. 1058.

13. Sale after such declaration. Groeltz v. Cole [Iowa] 103 N. W. 977.

14. Pledgor agreed that on his failure to relieve pledgee from an obligation within 90 days the stock should belong to pledgee. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933.

15. Ruberg v. Brown [S. C.] 51 S. E. 96.

16. So held where the amount claimed and interest thereon had been realized by the foreclosure, and the pledgee claimed interest on the mortgage from the date of assignment to him to the date of foreclosure. Ruberg v. Brown [S. C.] 51 S. E. 96. Attorney's fees may, however, be included in the judgment and the guarantee paid out of the proceeds of the foreclosure. Id.

17. Commercial Nat. Bank v. Grant [Neb.] 103 N. W. 68.

18. Two actions to foreclose. Kittler v. Studabaker, 113 Ill. App. 342. In such case a distribution of the surplus cannot be considered where none could exist unless the two suits were consolidated, and the claimant denies the pledgee's interest and has not made the pledgor a party. Id.

19. Dwight v. Singer, 27 Pa. Super. Ct. 119.

20. Instruction held proper that if defendant was a pledgee he was bound to exercise good faith and fair dealing in making a sale and rendering an account thereof. Beaudry v. Duquette, 92 Minn. 158, 99 N. W. 635.

21. Pledgee held liable for the difference between what could have been secured and what was actually realized. Jennings v. Moore [Mass.] 75 N. E. 214. A pledgee with power to sell is a trustee for the pledgor and has the burden of showing that he exercised ordinary care to get the best possible price. Sale to member of pledgee's firm. Kling v. Sullivan & Co. [Tex. Civ. App.] 92 S. W. 51.

pledgor is not bound to suffer judgment to be taken against him and bring another action to recover the property.[23] If, however, the pledgor approves a sale, he approves it as made,[24] except that such approval cannot operate as a waiver of subsequent negligent conduct on the part of the pledgee,[25] nor will mere delay estop the pledgor from bringing action to recover the proceeds of property pledged in the absence of prejudice to the pledgee.[26] One paying over surplus of proceeds of sale of pledged goods to an assignee with knowledge of a claim of pledgor is liable.[27] In New York, demand is necessary to a suit for accounting for proceeds.[28]

Right of action on the debt.[29]—A pledgee in possession may attach the property in an action on the debt without losing his lien.[30] Herein his rights differ from those of a mortgagee,[31] nor does a pledgee of stock waive his lien by bringing garnishment proceedings against the corporation, in a suit against the debtor, where it does not appear that the garnishment was issued because of the pledged stock held by the debtor in the corporation.[32] But the lien may be extinguished by statute when the debt is barred by limitations.[33]

Effect of insolvency and bankruptcy.[34]—A pledge of stock is equivalent to a transfer of property.[35] A pledge of warehouse receipts carries a valid title as against a trustee in bankruptcy to all the property represented by the receipts and any that may have been substituted therefor without the knowledge or consent of the pledgee.[36] After the pledgor has made an assignment for the benefit of creditors, a pledge cannot be changed without the consent of the assignee.[37] The pledgee cannot prejudice the rights of a surety by any agreement with the pledgor's assignee in insolvency.[38]

Equities and defenses between one of the parties and third persons.[39]—The question of equities depends upon the law of the place where the contract was made,[40] but where such law is not in evidence, the law of the place of trial will control.[41]

22. Defense good which stated that plaintiff, with full knowledge that the stock was worth its face value and could have been sold for that in the market, caused it to be sold for a grossly inadequate price. Dwight v. Singer, 27 Pa. Super. Ct. 119.

23. Dwight v. Singer, 27 Pa. Super. Ct. 119.

24. Pledgor approved defendant's sale on time by demanding accounting. Defendant was held entitled to interest on the plaintiff's debt up to the time when defendant received payment for the property sufficient to discharge the indebtedness. Demars v. Hudon [Mont.] 82 P. 952.

25. Where in a sale on time the pledgee negligently surrenders his security before the price is paid, the pledgor is entitled to credit for the full purchase price. Demars v. Hudon [Mont.] 82 P. 952.

26. Groeltz v. Cole [Iowa] 103 N. W. 977.

27. Brinkerhoff Zinc Co. v. Boyd [Mo.] 91 S. W. 523.

28. Under the New York Code Civ. Proc., § 410, providing that where a right exists but a demand is necessary before an action can be maintained, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, the pledgor's right to redeem accrues when the debt becomes due. Wheeler v. Breslin, 47 Misc. 507, 95 N. Y. S. 966.

29. See 4 C. L. 1059.

30, 31. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

32. So held where the judgment sustaining the attachment against the debtor merely recited that it was levied on "goods, wares, and merchandise," and there was no order condemning the stock. Hudson v. Bank of Pine Bluff [Ark.] 87 S. W. 1177. Kirby's Dig. §§ 848-849, do not apply to transfers of stock by way of pledge, and such transfers need not be recorded with the county clerk. Id.

33. Pledge held unenforceable after the note was barred under Civ. Code, § 2911, declaring that a lien is extinguished by lapse of the time in which action can be brought on the principal obligation. Knoll v. Meione [Cal. App.] 82 P. 982.

34. See 4 C. L. 1059.

35. Pledge held a violation of a statute forbidding any corporation unable to pay its ordinary debts to transfer its property. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

36. Bush v. Export Storage Co., 136 F. 918.

37. Jennings v. Moore [Mass.] 75 N. E. 214.

38. After pledgor's insolvency pledgee took a new note with defendant as surety, and thereafter agreed with the assignee not to prove his claim. Jennings v. Moore [Mass.] 75 N. E. 214. Nor could a sale by the insolvent debtor of notes previously pledged affect the right of the assignee to redeem. Id.

39. See 4 C. L. 1059.

40. National Bank of Commerce v. Kennedy, 98 Tex. 293, 83 S. W. 368.

The rights of a pledgee in good faith for value cannot be affected by a substitution of other property for that pledged without his knowledge or consent[42] nor by a subsequent pledge.[43] And where a contract of sale to the pledgor is clear and unambiguous, the original owner cannot defeat it as against an innocent pledgee.[44] So, also, an owner who voluntarily parts with possession of notes secured by trust deeds must stand the loss as against a subsequent innocent pledgee for value,[45] and where the stock is not transferred on the company's books, the pledgor is regarded as the owner for the purpose of the banking act.[46] The fact that the stock is transferred on the company's books to the pledgee cannot alone render him liable as a shareholder.[47] The pledgee may, however, by his acts, become the absolute owner of the property pledged as against third parties.[48] So, also, the subsequent conduct of the parties may change an original contract of pledge into an absolute assignment.[49] A surety may pledge property for the further protection of the creditor without releasing his co-surety.[50] If a surety pays the debt he is entitled to be subrogated to the rights of the pledgee.[51] The lien of a pledge is inferior to a mechanic's lien of which the pledgee had knowledge.[52] A third party is not liable on a conditional acceptance of an assignee as pledgee until the condition has been fulfilled.[53] Where a subscription agreement of an underwriting syndicate was intended and expressly permitted by its terms to be used as collateral security, a subscriber, when sued thereon by the assignee, cannot set off equities existing between him and the company, and arising after the contract was executed and assigned.[54]

POINTING FIREARMS, see latest topical index.

41. Held error on a trial in one state to instruct jury that plaintiff took subject to "all defenses at any time," where the evidence showed only that the law of the state where the pledge was made provided that the pledgee takes subject to equities. National Bank of Commerce v. Kennedy, 98 Tex. 293, 83 S. W. 368.

42. Pledgee held warehouse receipts and warehouseman permitted pledgor to substitute other property of the same kind. Bush v. Export Storage Co., 136 F. 918.

43. Before the pledgee of insurance policies had received what was due him, the pledgor instructed the insurance company to send the rest of the money to another in payment of a debt. Atlanta Sav. Bank v. Downing [Ga.] 51 S. E. 38.

44. Bush v. Export Storage Co., 136 F. 918.

45. Kittler v. Studabaker, 113 Ill. App. 342. Persons who become bona fide holders of notes also become the owners of a trust deed securing them subject only to the equities of the makers, but not to latent equities of third parties. Id.

46. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461. Probably the fact that the pledgee transfers the stock in the name of another for the express purpose of avoiding assessments will not render him liable for assessments. Id.

47. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933.

48. Pledgee held liable for assessments where he credited the value of the stock and proved the balance of the debt against the estate of the debtor. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461.

49. An assignment by the principal to the guarantor of the contracts guaranteed recited that it was made to secure an advancement, but the parties treated it as absolute to enable the guarantor to perform. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

50. Held not to alter the original contract where the pledge was made either voluntarily or without any understanding with the co-surety. North Ave. Sav. Bank v. Hayes, 188 Mass. 135, 74 N. E. 311. Nor is the co-surety relieved because the creditor had the collateral renewed against his consent without showing actual, as distinguished from speculative injury. Id. In such case the co-surety on paying the debt is entitled to subrogation to the rights of the creditor, in the property pledged, only by reason of his suretyship, and not because of the contract. Id.

51. Debtor gave two notes with stock as collateral. After an assignment for the benefit of creditors he gave another note with defendant as surety. Defendant held entitled to the old notes and the market price of the stock. Jennings v. Moore [Mass.] 75 N. E. 214.

52. So held, although the debt secured was contracted before the mechanic's lien attached. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

53. Defendant held for collection bonds owned by the pledgor, and stated to the pledgee that he would pay him from any money that should come into his hands payable to the pledgor. Knoll v. Melone [Cal. App.] 82 P. 982.

54. Eastern Tube Co. v. Harrison, 140 F. 519.

POISONS.[55]

Policemen; Police Power; Pollution of Waters; Poor Laws; Poor Litigants; Posse Comitatus, see latest topical index.

POSSESSION, WRIT OF.[56]

The writ lies only to put one into actual corporeal possession,[57] hence is not available as against a co-tenant.[58] It cannot issue on a judgment become dormant until the same is revived.[59] The writ will go against persons unlawfully using a way over land, though the judgment being in ejectment could not adjudicate easements.[60]. It will not be suspended merely because a stranger has a right to trees originating before action,[61] and not yet reduced to possession by entry,[62] nor where to do so would be tantamount to vacation of the judgment[63] or the grant of an injunction;[64] but where one having a right to cut trees, and not bound by judgment, may, before service of the writ, take possession, an exception of his rights may be put into the writ.[65] While the writ must follow the judgment,[66] it may contain a direction to leave undisturbed a possession by a person not party to the judgment,[67] and such person may apply for such relief after judgment,[68] but relief will often be made conditional on the excepted person's coming in and litigating his right.[69] One claiming under a landlord omitted from the judgment to which a tenant was party, cannot be excepted from the writ without a showing that the landlord was ignorant of the action.[70] Although a stranger held title not bound by the judgment, he may come under the writ if he buys in from defendant.[71]

POSSESSORY WARRANT.[72]

The action is wholly statutory.[73] Domestic fixtures not a part of the realty may be recovered by a tenant from the wrongful possession of his landlord.[74] A statement in a motion that the affidavit is not definite is too general to raise any distinct question.[75]

POSTAL LAW.

§ 1. *The Federal postal system and its administration.*[76]—Where an extension beyond an established mail route is made, the postmaster general may adjust the compensation of the railroad for carrying mail on the extension without readjusting

55. No cases have been found for this subject since the last article. See 4 C. L. 1060.

56. See 4 C. L. 1060, as to nature of and occasion for the writ.

57, 58. He recovered undivided interest. Martel v. Jennings-Heywood Oil Syndicate, 114 La. 903, 38 So. 612.

59. King v. Davis, 137 F. 198.

60, 61. King v. Davis, 137 F. 222.

62. He is not in "constructive possession" till entry. King v. Davis, 137 F. 222. After sale of trees and before they are cut, it is said that neither the seller nor the buyer is in actual or constructive possession of the trees, as distinguished from seisin. Id.

63, 64, 65, 66, 67, 68, 69. King v. Davis, 137 F. 222.

70. If he had knowledge the rule of lis pendens would apply. King v. Davis, 137 F. 222.

71. King v. Davis, 137 F. 222.

72. See 4 C. L. 1061.

73. Where a landlord seeks to obtain a possessory warrant against his cropper, under Civ. Code 1895, § 3130, it is not necessary to allege or prove the existence of any one of the grounds enumerated in Civ. Code 1895, § 4799. Visage v. Bowers [Ga.] 50 S. E. 952. Where crop had been divided but it did not appear that cropper was seeking to remove it, or had done any of the acts set out in Civ. Code 1895, § 3130, held judgment for plaintiff was not sustained by the evidence Id.

74. Raymond v. Strickland [Ga.] 52 S. E. 619.

75. Visage v. Bowers [Ga.] 50 S. E. 952.

76. See 4 C. L. 1061.

POSTAL LAW—Cont'd.

compensation for the entire route as extended.[77] Additional compensation may be recovered by a contractor for new and additional service not included in the terms of the contract.[78] A contract for regulation wagon, mail messenger, transfer, and mail station service on a mail route, the contractor agreeing to take mails from and deliver them to the post offices, mail stations, and cars, requires carriage of mails up and down the steps of elevated stations.[79] A material error in the advertisement for bids for mail service may entitle the contractor to extra compensation.[80]

A postmaster is liable under his bond for the loss of a registered package entrusted to him, irrespective of whether such loss was occasioned by his negligence.[81]

More than one indorsement of a postal money order renders it invalid.[82]

§ 2. *Use of mails, and mail matter.*[83]—Use of the mails is a privilege, not a right.[84]

Where the postmaster general, acting upon reports of inspectors and upon evidence of the party against which complaint has been made, finds, upon evidence satisfactory to him, that the mails are being used to defraud, his finding will not be reviewed by the courts.[85] But it is held that the question whether the fraud order statute is applicable in a given case is one for the courts and not the postmaster general.[86] The fraud order statute does not apply to ordinary business enterprises or frauds perpetrated in usual trade channels.[87] Thus, a fraud order cannot be issued against a mail order business wherein customers are furnished a commercial equivalent for the price paid, though the trade literature sent through the mails contains false statements and untrue trade puffing.[88]

77. Construing U. S. Rev. St. § 4002. Chicago, etc. R. Co. v. U. S., 198 U. S. 385, 49 Law. Ed. 1094.

78. Where new postal station was added in New York, requiring more than 300,000 miles of additional transfer service, and $10,000 additional expense for ferrying for the time covered by the contract, the contractor was held entitled to additional compensation, notwithstanding a clause authorizing department to call for new and additional service of a certain kind. United States v. Utah, N. & C. Stage Co., 26 S. Ct. 69; afg. 39 Ct. Cl. 420.

79. United States v. Utah N. & C. Stage Co., 26 S. Ct. 69; afg. 39 Ct. Cl. 420.

80. Where advertisement stated there were two elevated stations on route and there were in fact four, contractor was entitled to extra pay, though notice required bidders to inform themselves of facts and stated that no allowance would be made for mistakes. United States v. Utah, N. & C. Stage Co., 26 S. Ct. 69.

81. United States v. Griswold [Ariz.] 80 P. 317.

Note: "Where a postmaster is a mere bailee he is liable only for due diligence. United States v. Thomas, 15 Wall. [U. S.] 337, 21 Law. Ed. 89; Id., 15 Wall. [U. S.] 343, 21 Law. Ed. 91. But where, as in United States v. Griswold [Ariz.] 80 P. 317, the liability is on the bond, the officer is subject to the special obligation of the bond, as in the case of the receiver of public money. United States v. Thomas, 15 Wall. [U. S.] 337, 21 Law. Ed. 89; United States v. Prescott, 3 How. [U. S.] 578, 11 Law. Ed. 734. As to such officers the liability on the bond is absolute (United States v. Dashiel, 4 Wall. [U. S.] 182, 18 Law. Ed. 319; Smythe v. U. S., 188 U. S. 156, 47 Law. Ed. 425), except in case of the act of God or the public enemy (United States v. Thomas, 15 Wall. [U. S.] 337, 21 Law. Ed. 89), which exception is strictly construed (United States v. Keehler, 9 Wall. [U. S.] 83, 19 Law. Ed. 574). The interpretation of the rule as commanding to keep safely seems correct. United States v. Prescott, 3 How, [U. S.] 578, 11 Law. Ed. 734."—5 Columbia L. R. 545.

82. Money order, indorsed and sent to agent for collection, was sold by agent to plaintiff, the agent again indorsing it. Held, plaintiff got no title. Moore v. Skyles [Mont.] 82 P. 799.

83. See 4 C. L. 1062.

84. People's United States Bank v. Gilson, 140 F. 1.

85. Finding that so-called "bank" was using mails to defraud, held not reviewable. People's United States Bank v. Gilson, 140 F. 1.

86. Rosenberger v. Harris, 136 F. 1001.

Note: The cases of Rosenberger v. Harris, and People's United States Bank v. Gilson, supra, agree that findings of facts are final, and that the courts will review a decision of the postmaster general only for an error of law, but they do not agree as to what are questions of fact in fraud order cases. See, also, 4 C. L. 1063, notes 26, 27, 28, 29.

87. Such frauds must be redressed in the courts. Rosenberger v. Harris, 136 F. 1001.

88. Fraud order should not issue against mail order liquor business because age of liquor sold is misrepresented, patrons being

An incorporated educational institution, conducting a correspondence college for gain, is not entitled to second class mail rates.[89] A postmaster general is not bound by a construction placed by a predecessor on the statute relating to second class mail matter, and may revoke a certificate of entry of a publication as second class matter issued by such predecessor, where no vested right has been created by such certificate.[90]

§ 3. *Postal crimes and offenses.*[91]—An indictment charging the breaking into a building, used in part as a post office, with intent to commit larceny in said building is insufficient; it must appear that the offense was committed in the portion of the building used as a post office.[92]

Use of mails to defraud.[93]—An indictment charging a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to accused, charges all the essential elements of the offense.[94] The gist of the offense being use of the mails to defraud, and an act done in furtherance of the fraudulent scheme, and not obtaining money by false pretenses, it is not necessary to negative the truth of the representations.[95] An allegation of an intention by accused to convert the money so obtained to his own use is unnecessary.[96] An averment that the fraudulent scheme of the defendant was to be effected by the use of the post office establishment is a sufficient allegation that use of the mails was contemplated as a part of a scheme to defraud.[97] The indictment must adequately describe the scheme, artifice, or device used to defraud, in order that defendant may be informed what facts are to be proved against him. It is not always enough to follow the language of the statute.[98] Only such evidence as tends to prove the charge of the indictment is admissible.[99]

Embezzlement and larceny from the mails.[1]—The duty of a carrier with respect to a letter which comes into his possession in the course of his official employment is the same, whether the letter be genuine or a decoy, and whether or not the address is fictitious.[2] The opening, detention, destruction, or embezzlement of the contents of either kind of letter is equally punishable.[3]

POSTPONEMENT, see latest topical index.

POWERS.

§ 1. *Nature and kinds.*[4]—In the extended sense given the word by the New York statutes,[5] a power is an authority to do an act in relation to real property,

given full value. Rosenberger v. Harris, 136 F. 1001.

89. Such a corporation is not "an incorporated institution of learning" within act of July 16, 1894. Columbian Correspondence College v. Wynne, 25 App. D. C. 149.

90. Columbian Correspondence College v. Wynne, 25 App. D. C. 149.

91. See 4 C. L. 1063.

92. U. S. Rev. St. § 5478, applies only to such an act, and not to an act committed in any other part of a building used in part as a post office. United States v. Martin, 140 F. 256.

93. See 4 C. L. 1063.

94, 95, 96, 97. Ewing v. U. S. [C. C. A.] 136 F. 53.

98. Indictment held insufficient. United States v. Etheredge, 140 F. 376.

99. Admission of letter head and certain lists and bills found in defendant's office held inadmissible, in prosecution for use of mails to defraud, where the indictment did not charge use of the letter head nor connect the names appearing on the lists and bills with the alleged fraudulent scheme. Booth v. U. S. [C. C. A.] 139 F. 252.

1. See 4 C. L. 1065.

2. Byram v. U. S., 25 App. D. C. 546.

3. Byram v. U. S., 25 App. D. C. 546. See also note, 4 C. L. 1065.

4. See 4 C. L. 1065.

5. A common-law power under the Statute of Uses is an estate in lands, not a mere authority to convey, etc. It is "a right to limit a use" (4 Kent Comm. 334). See definitions collected Cyc. Law Dict. "Powers."

or to the creation or revocation of an estate therein or charge thereon, which the owner granting or reserving the power might himself lawfully perform.[6] A mere authority to convey land is in this work treated as an agency.[7]

§ 2. *Creation, construction, validity, and effect.*[8]—No precise form or technical words are necessary to the creation of a power.[9] A power to appoint to several beneficiaries leaves the amount to be appointed to each to the discretion of the donee.[10] A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote.[11] A power in a life tenant to dispose of his estate is only co-extensive with the estate of the donee.[12] A power to appoint a fee is power to appoint a less estate,[13] but one to appoint certain persons is not a power to appoint any other.[14] A power in a trustee, holding the fee to sell and convey on directions from the beneficiary life tenant, authorizes a conveyance of the fee.[15] A power in gross is extinguished where the donee disposes of his estate.[16]

§ 3. *Execution of powers.*[17]—The intention to execute a power by will must appear by a reference in the will to the power or to the subject of it, or from the fact that the will would be inoperative without the aid of the power.[18] A general power is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee,[19] and that the power is created after the execution of the will does not prevent the will from operating as an execution of it.[20] This rule applies whether the power be general or special,[21] especially where an intention to exercise the power is apparent.[22] A codicil referring to a power the testator was authorized to exercise constitutes an exercise of the power as of that date.[23] A power to alter the proportions of an estate, which otherwise would go in specified portions to appointees designated by the donor, is not exercised by a will which does not alter or regulate the proportions in which the estate was to be distributed,[24] but any material change in the manner of disposition constitutes an exercise of it.[25] A power to a son to appoint to the donor's "direct representatives" is validly executed by bequests to the donee's "children," who were the direct representatives of the donor.[26] A power in a life tenant to appoint by

6. In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880.

7. See 5 C. L. 64.

8. See 4 C. L. 1065.

9. Where an estate is given in trust, the income to be paid to the beneficiary without control over the principal, but with power to dispose of it by will, the beneficiary takes title to the income and a life estate in the corpus with power to dispose of it by will. Robbins v. Smith, 72 Ohio St. 1, 73 N. E. 1051.

10. A power directing the donee to provide for the donor's children out of the estate devised to the donee. Biggins v. Lambert, 115 Ill. App. 576.

11. Stone v. Forbes [Mass.] 75 N. E. 141.

12. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

13. May appoint a life estate with power in the appointee to make further appointment. Mays v. Beech, 114 Tenn. 544, 86 S. W. 713.

14. Where a life tenant had power to appoint her children, a deed to a third person operates only as a release of her life estate. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 170.

15. Under the rule that a conveyance passes all the estate of the grantor unless a contrary intention appears. St. Louis Land & Bldg. Ass'n v. Fueller, 182 Mo. 93, 81 S. W. 414.

16. Rosier v. Nichols, 123 Ga. 20, 50 S. E. 988.

17. See 4 C. L. 1066.

18. Will making no reference to the power, and fully operative without the aid of it, held not an exercise of it. Thom v. Thom [Md.] 61 A. 193.

19, 20, 21, 22, 23. Stone v. Forbes [Mass.] 75 N. E. 141.

24. The donee's will devised the estate in trust, income to be paid the beneficiaries named by the donor during their lives, remainder to their appointees. In re Tenney, 93 N. Y. S. 811.

25. Where the donee exercises the power by appointing the estate to the beneficiaries in practically the same proportions they would have taken under the will creating the power, but changing the manner of paying it over, and destroying the discretion vested in the trustees in case the power was not exercised, it constitutes an execution of the power. It is a transfer within the transfer tax law. In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880.

will is exercised by devising the estate to one for life with power to dispose of it by will.[27] A mere promise to exercise a power does not constitute an execution.[28]

PRAECIPE; PRAYERS; PRECATORY TRUSTS; PRELIMINARY EXAMINATION; PRELIMINARY SUITS; PRESCRIPTION; PRESUMPTIONS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PRIOR APPROPRIATION; PRIORITIES BETWEEN CREDITORS, see latest topical index.

PRISONS, JAILS, AND REFORMATORIES.

This topic treats of penal and reformatory institutions, and the custody and control of the inmates. The law of criminal procedure,[29] the legal status of a convict,[30] pardon, commutation or remission of sentence,[31] and escape or prison breach,[32] are elsewhere treated.

§ 1. *Nature and classes.*[33]

§ 2. *Custody, discipline, government, and employment of inmates.*[34]—A commitment by a court of general jurisdiction, though possibly erroneous, is not for that reason void and subject to collateral attack,[35] and that one is erroneously committed to the wrong place of detention does not entitle him to be discharged on habeas corpus.[36]

The place of confinement is a subject of statutory regulation.[37] In Massachusetts a person guilty of criminal contempt may be committed to jail, but cannot be imprisoned in the house of correction.[38]

Persons incarcerated, not as punishment for crime, cannot be compelled to work at hard labor.[39] The constitutional provision against involuntary servitude, except as a punishment for crime, includes misdemeanors and all offenses against the penal laws.[40] Prisoners may be required to work outside the prison.[41] The nature of the labor required is in some states prescribed by statute.[42] In Mississip-

26. Stone v. Forbes [Mass.] 75 N. E. 141.
27. Does not constitute a mere delegation of the power. Mays v. Beech, 114 Tenn. 544, 86 S. W. 713.
28. A promise to convey to an appointee at his request is a nonexecution, and not a defective execution which can be enforced. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 170.
29. See Criminal Law, 5 C. L. 883; Indictment and Prosecution, 5 C. L. 1790.
30. See Convicts, 5 C. L. 760.
31. See Pardons and Paroles, 6 C. L. 876.
32. See Escape and Rescue, 5 C. L. 1179.
33, 34. See 4 C. L. 1067.
35. Commitment of a married woman to the industrial school for girls, under Burns' Ann. St. 1901, § 8273, when it is possible such statute applies only to unmarried females. Ryan v. Rhodes [Ind.] 76 N. E. 249.
36. The committing court will correct the error on application. People v. Superintendent of House of Refuge on Randall's Island, 46 Misc. 131, 93 N. Y. S. 218.
37. One convicted of a violation of Comp. Laws 1897, § 11,693, making lascivious cohabitation punishable by imprisonment of not to exceed one year in the county jail, may be sentenced to the branch prison in the upper peninsula, but not to Jackson. Ex parte Alien [Mich.] 103 N. W. 209. In Pennsylvania the county jail is the place of confinement if the penalty is simple imprisonment, the penitentiary or suitable county prison if the penalty is solitary confinement or confinement at hard labor. Commonwealth v. Fetterman, 26 Pa. Super. Ct. 569.
38. Rev. Laws, c. 166, § 13, provides that commitments for contempt may be made to jail. Rev. Laws, c. 220, § 5, providing that one convicted of a crime punishable by imprisonment in jail may be sent to the house of correction, does not apply to cases of contempt. Hurley v. Commonwealth, 188 Mass. 443, 74 N. E. 677.
39. A rule compelling all persons incarcerated to labor to defray the cost of their maintenance is unconstitutional as to persons not incarcerated as a punishment for crime. Stone v. Paducah, 27 Ky. L. R. 717, 86 S. W. 531.
40. Stone v. Paducah, 27 Ky. L. R. 717, 86 S. W. 531.
41. Ky. St. 1903, § 3151, authorizing persons committed to prison to be compelled to labor, does not require that the labor be performed within the prison. Stone v. Paducah, 27 Ky. L. R. 717, 86 S. W. 531.
42. Rev. Code 1892, § 3201, providing for the working of convicts on a farm leased for that purpose, was not repealed by Acts 1894, p. 65, c. 75, nor by Acts 1900, p. 63, c. 56, Henry v. State [Miss.] 39 So. 856.

pi, convicts may not be leased out,[43] but this rule is not violated by working convicts on a farm leased for that purpose.[44] Under the constitution of Mississippi authorizing the working of convicts on state farms, and the purchase of farms for that purpose, the Legislature is not required to purchase a farm, but may work convicts on leased lands.[45]

A convict who escapes and is recaptured can be lawfully kept in prison until the expiration of his term.[46] Prisoners may be required to be produced for trial for other offenses.[47] One under bond to appear for trial for a felony, who is arrested and confined for misdemeanor in another county, should on demand be surrendered for trial for the felony, unless the trial for misdemeanor can be had without delay.[48]

The custodian of the prison may use such force as is necessary to preserve order and prevent disturbance in the jail.[49]

The director of charities and correction, under the "Cleveland Federal Plan," is clothed with power to discharge a prisoner from the workhouse only where the question involved in the discharge is the propriety of his retention.[50] Such discharge can only be made upon the approval of the mayor, and under such regulations as may be provided by law or ordinance, and in the absence of a regulating statute or ordinance the discharge is invalid.[51] But the failure of the mayor to endorse his approval of the discharge may be cured by a subsequent endorsement thereof, provided the proceedings are otherwise regular.[52]

Scheme of credits.[53]—There is a conflict of authority as to whether the federal statute providing for "good time" to prisoners, convicted of offenses against the United States, applies to prisoners sentenced before its enactment.[54] The term of sentence may be reduced where one is erroneously committed to the penitentiary instead of to jail.[55]

§ 3. *Administration and fiscal affairs.*[56]—The express power to erect a jail and issue bonds in payment therefor includes the implied power to purchase a site and issue bonds in payment therefor,[57] also to purchase furnishings and fixtures.[58] The maintenance of a prison is the exercise of a purely governmental function,[59]

43. A contract whereby a prison board agreed to work a plantation with convict labor, the owner to have the crops and the board a specified sum of money, constitutes a lease of the land and not a hiring of the convicts. Henry v. State [Miss.] 39 So. 856.

44. Henry v. State [Miss.] 39 So. 856. A contract by which a plantation is to be worked by convict labor, the owner to have all the crops in excess of a certain amount, which he guarantees the crops will equal in value, the board of control to have absolute authority over the labor, the owner to furnish teams and implements, is a leasing of lands and not a hiring of convict labor, which is prohibited. State v. Henry [Miss.] 40 So. 152.

45. State v. Henry [Miss.] 40 So. 152.

46. In re Moebus [N. H.] 62 A. 170.

47. A person in a convict camp, serving part of his sentence by anticipation before conviction of a misdemeanor, for which he was arrested in another county, is in the same condition as though sentenced, so far as regards the statutory power of the board of convict inspectors to order his removal to another county to be tried for a felony. Russell v. State [Ala.] 38 So. 291.

48. Boone v. Riddle, 27 Ky. L. R. 828, 86 S. W. 978.

49. Whether an assault on a prisoner for boisterous conduct and for using indecent language was justified, held a question for the jury. McNally v. Arnold, 127 Iowa, 437, 103 N. W. 361.

50. Jiha v. Barry, 3 Ohio N. P. (N. S.) 65. It is not probable that the legislature intended to grant power to a director of charities and correction to interfere at all with sentences imposed by the court of common pleas in county or state cases, as distinguished from sentences imposed by the municipal court. Id.

51, 52. Jiha v. Barry, 3 Ohio N. P. (N. S.) 65.

53. See 4 C. L. 1068.

54. United States v. Farrar [C. C. A.] 139 F. 260, holds that it does not apply to such cases. Ex parte Jackson, 140 F. 266, holds that it does apply.

55. Eleven months in the penitentiary is equivalent to eighteen in the county jail. Commonwealth v. Fetterman, 26 Pa. Super. Ct. 569.

56. See 4 C. L. 1069.

57, 58. Territory v. Baxter [Okl.] 83 P. 709.

59. Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527.

and a municipal corporation is not liable for injuries caused by negligence or omission of duty, on the part of its officers, respecting the prison or persons confined therein.[60] Under a statute requiring cities to maintain police stations and provide food for persons detained therein,[61] a city which commits persons arrested for violation of ordinances and statutes to the county jail is liable to the sheriff for board furnished,[62] and demand by the sheriff is not a condition precedent to maintaining action for the value thereof.[63] A jailer may be required to perform such duties as the governing authorities may impose.[64] Employes of a prison may on sufficient proof of misconduct or neglect, be removed by the board in control, without being accorded an opportunity of meeting their accusers face to face or of making a defense.[65] In the absence of specific allegations of corruption or of abuse of discretion, the determination of the board in such a matter is conclusive.[66] Under the statutes of Mississippi the board of control is vested with a discretion in the management of convicts and penitentiary farms, and such discretion cannot be controlled by the courts.[67]

PRIVATE INTERNATIONAL LAW; PRIVATE SCHOOLS; PRIVATE WAYS; PRIVILEGE; PRIVILEGED COMMUNICATIONS; PRIZE, see latest topical index.

PRIZE FIGHTING.[68]

PROBATE, see latest topical index.

PROCESS.

§ 1. *Nature and kinds, form and requisites. Definition.*[69]—The process, as here used, is the beginning of the action,[70] and includes all original writs, sum-

60. Injuries to prisoner occasioned by unsanitary conditions of the prison. Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527.

61. Metropolitan Police Law (Acts 1897, p. 93, c. 59, amended by Acts 1901, p. 24, c. 18), requiring the maintenance of police stations and the boarding of prisoners therein confined, is mandatory. City of Kokomo v. Harness [Ind. App.] 74 N. E. 270.

62. City of Kokomo v. Harness [Ind. App.] 74 N. E. 270.

63. The Metropolitan Police Law creates an implied contract on the part of the city to pay. City of Kokomo v. Harness [Ind. App.] 74 N. E. 270.

64. Under Ky. St. 1903, § 3145, providing that the jailer in cities of the second class "shall perform such duties as the general council shall prescribe," an ordinance requiring the city jailer to act as janitor for the city hall, and an adjacent building used by municipal officers, was valid. City of Paducah v. Evitts, 27 Ky. L. R. 864, 86 S. W. 1123.

65. An assistant matron of a workhouse is an employe and not an officer. Jameson v. Cincinnati, 7 Ohio C. C. (N. S.) 100.

monses, and orders of courts of justice.[71] Sometimes actions may be instituted by notice of claim preceding the ordinary summons,[72] but a notice to redeem land from tax sale and the return of the sheriff, or the receipt for registered letter, is not the process that gives the court jurisdiction over the subject-matter.[73] In proceedings to foreclose mortgages in Georgia the process is a rule nisi.[74]

There is no jurisdiction in courts, inherent or otherwise, to adjudicate the rights of litigants without notice, either actual or constructive,[75] and mere knowledge that the court may take action in a certain matter will not dispense with the necessity of process.[76] The Federal Conformity in Practice act does not require process out of Federal courts to conform to that in the local state.[77]

Designation of court and parties.[78]—It is proper to designate the defendant by his full christian name, though the cause of action is against him by his initials only and his surname.[79] Even an erroneous designation of the defendant will not affect the validity of the judgment where the defendant is properly and actually served.[80] The summons in an action against a partnership should show the christian name of each partner.[81] Where the name of the owner is known, a summons in tax fore-

66. Jameson v. Cincinnati, 7 Ohio C. C. (N. S.) 100.

67. As to the disposal of produce of farms worked with convict labor. State v. Henry [Miss.] 40 So. 152.

68. No cases have been found for this subject since the last article. See 4 C. L. 1070.

69. See 4 C. L. 1071.

70. Ky. St. 1903, § 2524, providing that an action shall be deemed commenced at the date of the first summons, applied to proceedings by the state against a taxpayer under § 4241. Lucas v. Commonwealth [Ky.] 89 S. W. 292.

71. Code Civ. Proc. Cal. § 684. Hooper v. McDade [Cal. App.] 82 P. 1116.

72. Action against city for injuries caused by defective lamp post. See Rev. Laws Mass. c. 51, § 20. But the service of such notice is not the beginning of the action within the meaning of Rev. Laws, c. 75, § 66, relating to the admissibility of the declarations of deceased persons. See Highways, etc., 5 C. L. 1683; Municipal Corporations. 4 C. L. 751. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68.

73. See Comp. Laws, Mich. 1897, §§ 3895, 3958, 3960. Winters v. Cook [Mich.] 12 Det. Leg. N. 228, 103 N. W. 869. See post, § 6, subd. Impeachment or Contradiction of Return.

74. Civ. Code 1895, § 2743. Montgomery v. King, 123 Ga. 14, 50 S. E. 963.

75. Dwyer v. Nolan [Wash.] 82 P. 746. See, also, Jurisdiction, 6 C. L. 309.

76. The judge of the court which had granted a divorce to a woman, with the custody of her child, informed the woman's attorney that if certain parties made application for the custody of the child he would grant it to them, and thereafter, without any further notice, he granted the custody of the child to such persons. This did not dispense with the necessity of notice or process. In re Culp [Cal. App.] 83 P. 89.

77. U. S. Rev. St. § 914, Comp. St. 1901, p. 684, 4 Fed. Stat. Ann. p. 563, requiring conformity to state practice, applies only to matters of practice and procedure and does not appertain to jurisdiction, or the mode of obtaining jurisdiction of the person in actions in the federal courts. Wells v. Clark, 136 F. 462. See, also, 4 C. L. 1072, n. 95.

NOTE. Form and contents in federal courts: No form of process is provided for the courts of the United States by any Act of Congress now in force. Chamberlain v. Mensing, 47 F. 436.

The provisions of this section [R. S. § 914] include forms of process for commencement of suits except as to signature, which is provided for by section 911, R. S. Gillum v. Stewart, 112 F. 32. See, also, Middleton Paper Co. v. Rock River Paper Co., 19 F. 252; Brown v. Pond, 5 F. 31; Peaslee v. Haberstro, 15 Blatchf. [U. S.] 472. And see Martin v. Criscuola, 10 Blatchf. [U. S.] 211, holding that an action at law cannot be commenced by the issue of a summons in the name of the plaintiff's attorney.

A substantial compliance with the requirements of a state statute as to the form of summons will be upheld, when to set it aside would tend to defeat the ends of justice. Johnson v. Healy, 9 Ben. [U. S.] 321.

In the name of the United States: When no law or practice or form or mode of proceeding in the state court requires that the summons shall be in the name of the state, there can be no reason that in the Federal court it shall be in the name of the United States. Chamberlain v. Mensing, 47 F. 435.—Part of note to 4 Fed. Stat. Ann. p. 568 to Rev. St. § 914.

78. See 4 C. L. 1071.

79. Foreclosure of tax certificate. Property was assessed to defendant by his initial and surname, and summons was against him by his full christian name. Stoll v. Griffith [Wash.] 82 P. 1025.

80. Especially where subsequent notices in the case which are served on defendant designate him properly. In this case defendant's name was H. M. Francis and he was designated in the process as H. M. France. King v. Davis, 137 F. 198.

81. But irregularity in this regard may

closure proceedings must usually contain the name of the owner.[82] The court to which the process is returnable must be designated with sufficient certainty to enable the defendant to know in what court he is required to appear.[83]

Signing and sealing.[84]—Where the statute requires the summons to be signed or subscribed by the plaintiff or his attorney, it is not necessary that the signature should be by hand. A stamped or printed signature is sufficient.[85] The general principles of orderly practice forbid a summons signed by one attorney for some of the plaintiffs, and by another attorney for other plaintiffs,[86] but a defect in this regard may be cured by amendment at any stage of the action.[87]

Indorsement.[88]—In actions for the recovery of money, the amount which will be demanded by the plaintiff must in some states be indorsed upon the summons.[89]

Direction and delivery.—Process must be directed to the sheriff or any constable of the county where it is to be executed,[90] but when directed to the "Constable or any lawful officer of the county," and the sheriff of a different county executed the writ, it was held good.[91] The process may be delivered by the clerk to the plaintiff or his attorney.[92]

Stating nature of cause of action.[93]

Penalties or consequences of nonappearance. Stating these is so essential a part of the process that their omission is necessarily fatal.[94]

The appearance day must be stated with certainty.[95]

Return day.[96]—Process must be returnable upon a day or within the time re-

be cured by amendment. Morgridge v. Stoeffer [N. D.] 104 N. W. 1112.

82. Failure to give the name of the owner, when the same appears in the tax rolls and certificate of delinquency, renders the summons and the judgment based thereon invalid, regardless of any fraudulent intent, especially where the names of entire strangers to the title are given by the summons instead of the name of the owner. Anderson v. Turati [Wash.] 81 P. 557.

83. A process issued by the clerk and attested by the judge of the superior court, requiring the defendant to appear "at the next ——— court to be held" for a given county on a given day, when a regular term of the superior court is required by law to be held, is a valid process of the superior court and needs no amendment, though the clerk of the superior court is also clerk of the county court, which also has a regular term on the day mentioned in the summons. Georgia Southern & F. R. Co. v. Pritchard, 123 Ga. 320, 51 S. E. 424.

84. See 4 C. L. 1071.

85. Published summons. See 2 Ball. Ann. Codes & St. § 4882, providing that proof of service by publication shall be by affidavit of the publisher "together with a printed copy of the summons as published." Warner v. Miner [Wash.] 82 P. 1033.

86. Jones v. Conlon, 48 Misc. 172, 95 N. Y. S. 255. Code Civ. Proc. §§ 417, 418, do not apply or govern the case. Id.

87. Code Civ. Proc. § 723, construed. Jones v. Conlon, 48 Misc. 172, 95 N. Y. S. 255.

88. See 4 C. L. 1071.

89. Plaintiff can recover no greater sum than is endorsed on the summons. Elmen v. Chicago, B. & Q. R. Co. [Neb.] 105 N. W. 987. As to amendment in such case see post, § 7, subd. Amendments.

90. Sayles' Ann. Civ. St. 1897, arts. 1214, 1447, 2338, 3147, 3152, 4706. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250.

91. Hawkins & Co. v. McAlister [Miss.] 38 So. 225.

92. Sayles' Ann. Civ. St. 1897, art. 4915, providing that a constable is required to execute and return any process that is "delivered by any lawful officer," does not mean that the process must be manually delivered by a lawful officer. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250.

93. See 4 C. L. 1072.

94. A summons duly served on defendant, which notifies him of the court, term, time, and place where he is required to appear, and that he is required to answer the claim of plaintiff, is not fatally defective because it omits to state the penalty for his failure to appear as specified by statute. Ammons v. Brunswick-Balke-Collender Co. [C. C. A.] 141 F. 570, afg. [Ind. T.] 82 S. W. 937.

95. Ballinger's Ann. Codes & St. § 4879, provides that the summons on defendant out of the state shall require defendant to appear and answer within 60 days after personal service out of the state. A summons summoned defendant to appear within 20 days after service of summons, if served within the state, and within 60 days if served out of the state, and defendant answers the complaint. The summons was personally served out of the state. Held the provision relating to service within the state became surplusage and the summons was good. Lawyer Land Co. v. Steel [Wash.] 83 P. 896.

96. See 4 C. L. 1072.

quired by law,[97] and a writ defective in this particular is void.[98] Process to be published is usually returnable a certain time after the first publication.[99]

Alias, counterpart, or supplemental process.[1]—Where the summons is returned not executed, an alias writ may issue, which, if returned unexecuted, may in turn be followed by other writs until service is perfected.[2] So, also, where it is necessary to add new parties or substitute another party as defendant, a supplemental process may issue,[3] and where it is shown that the sheriff's return to a writ of possession in forcible entry and detainer proceedings is false in stating that possession had been delivered according to the mandate of the writ, such return will be quashed and an alias writ awarded.[4] A federal court to which a cause has been removed may issue an alias summons and by the service thereof acquire jurisdiction of the defendant's person.[5] A supplemental process to bring in a new party is in the same form as an original summons.[6] An alias or pluries process is a continuation of the original, and not the inception of a new suit,[7] and the date of the original process is the date of the commencement of the suit.[8] The clerk of the court has no power, without the order of the court, to issue a second process after the first has been served.[9]

§ 2. *Issuance.*[10]—Process, to be valid, must be issued in substantial compliance with the law.[11] It must be issued by an officer having proper authority in the premises,[12] but a process which is not issued within the time prescribed by statute is not void, but only irregular.[13] Where a statute requires the plaintiff to give

97. Where the statute, Code W. Va. c. 125, § 2, requires process to be returned within ninety days to the court on the first day of the term, or in the clerk's office on the first Monday in any month, or to some rule day, unless otherwise provided. but another section (§ 1) provides that rules shall be held on the first Monday in the month except when such day is the day on which a term of the court commences, in which case rules shall be held on the last Monday in the preceding month, process cannot be returned to the clerk's office on the first Monday of the month when such day is the commencement of a term of court. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422.

98. Writ was returned to clerk's office at rules on first Monday, when no rules were held on that day, such day being the commencement of the term of court. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422. But see Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985. And see post, § 7, subd. Amendments.

99. A summons which required the defendant to appear "within sixty days after the service of this summons and notice upon you, exclusive of the day of service, to-wit, within sixty days after the 30th day of July, 1903, which is the date of the first publication hereof," instead of the within sixty days after the first publication of the summons, exclusive of the day of the first publication as required by statute, is sufficient. Stoll v. Griffith [Wash.] 82 P. 1025.

1. See 4 C. L. 1072.

2. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524.

3. Where the mortgagor without the knowledge of the mortgagee has transferred his interest, and the mortgagee has sued him instead of the real party in interest. Greenwood Loan & Guarantee Ass'n v. Williams, 71 S. C. 421, 51 S. E. 272.

4. Smith v. Hardwick [Ky.] 89 S. W. 724.

5. Where, pending a motion to dissolve a foreign attachment, such motion having been originally made in the state court before removal, the defendant came into the jurisdiction of the Federal court, jurisdiction to render a personal judgment was acquired by the service of an alias summons issued by the Federal court, regardless of whether the attachment was sustained or not. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

6. Appointment of guardian ad litem held invalid because of failure to serve infant with supplemental process, as provided by Code Civ. Proc. § 453. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. S. 611.

7. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524.

8. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524. But see Elmen v. Chicago, B. & Q. R. Co. [Neb.] 105 N. W. 987, and post, § 7, subd. Amendments.

9. Medical College of Georgia v. Rushing [Ga.] 52 S. E. 333.

10. See 4 C. L. 1072.

11. In re Culp [Cal. App.] 83 P. 89.

12. Process issued by justice of the peace. Kane v. Arneson Mercantile Co., 94 Minn. 451, 103 N. W. 218. See post, § 7, subd. How Objections Made.

In foreclosure proceedings in Georgia the process is not issued by the clerk as in ordinary cases, but the process in such case is a rule nisi granted by the judge. Montgomery v. King, 123 Ga. 14, 50 S. E. 963.

security for costs, the summons should not be issued until such security has been given, but if it is so issued it is not void, and the irregularity is cured by the giving of the bond.[14]

§ 3. *Extraterritorial effect or validity.*[15]—The authority to serve a process in such manner as to give jurisdiction to render a personal judgment is restricted to the territory of the state where the process is issued, and the court has no power to require persons not within such territory to appear before it,[16] but where an action is properly brought in one county as against one defendant, process may be sent for service on another defendant in another county.[17] So, also, it is held that a court having jurisdiction of the subject-matter of an action, and jurisdiction to try the case in the county in which the action is brought, may acquire jurisdiction of the person of the defendant by issuing its original process to any county in the state where the defendant resides,[18] or, if he is a nonresident, may be found.[19] The distinctions between jurisdiction in rem and in personam,[20] and the extraterritorial force of judgments,[21] are elsewhere discussed.

§ 4. *Actual service. A. Personal. In general.*[22]—No personal judgment can be rendered without actual service of process,[23] or acknowledgment of service,[24]

13. Ky. St. 1903, § 4241, providing that the clerk shall issue summons within five days after the officer wishing to have omitted property assessed files his statement, is merely directory. Lucas v. Commonwealth [Ky.] 89 S. W. 292.

14. Fowler v. Fowler [Okl.] 82 P. 923.

15. See 4 C. L. 1072.

16. In re Culp [Cal. App.] 83 P. 89. Act April 6, 1859 (pl. 387), held unconstitutional in so far as it attempts to render valid extraterritorial service of process in proceedings in personam. Wallace v. United Elec. Co., 211 Pa. 473, 60 A. 1046.

17. All defendants were corporations. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Where an action of replevin is properly brought in the county where the property is wrongfully held by an agent, who is made a party and properly summoned, a summons may issue and service may be made on the agent's principal in another county, such principal claiming the right to the property. Central Nat. Bank v. Brooke [Kan.] 81 P. 498.

18. Divorce proceedings in district court under Comp. St. Neb. 1903, c. 25, § 6. Eager v. Eager [Neb.] 105 N. W. 636.

19. See Code Neb. § 65 (Cobb. Ann. St. 1903, § 1066). Adair County Bank v. Forrey [Neb.] 105 N. W. 714. See post, § 4, subd. Upon Nonresidents or Their Agents.

20. See Jurisdiction, 6 C. L. 267.

21. See Foreign Judgments, 5 C. L. 1483.

22. See 4 C. L. 1072.

23. In attachment proceedings. Stone v. Cassidy [Ark.] 87 S. W. 621; Johnson v. Ludwick [W. Va.] 52 S. E. 489. Where personal service is not obtained in an attachment proceeding against a nonresident, no personal judgment can be rendered. Bainbridge v. Allen [N. J. Eq.] 61 A. 706. Summons and service is necessary on a cross-petition by one defendant against another in order to sustain a judgment enforcing a lien on the land of the latter. Amburgy v. Burt & B. Lumber Co. [Ky.] 89 S. W. 680. Divorce may be granted, but no decree for costs or alimony. Baker v. Jewell, 114 La. 726, 38 So. 532. Citation in proceedings to probate will. Corcoran v. Carrau [Wash.] 82 P. 297.

Actual notice of the suit will not give the court jurisdiction to render a default judgment where there has been no service. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744. Mere knowledge that the court may take action is not sufficient, as where a judge informed the attorney of the plaintiff, in a divorce suit to whom the custody of her child had been granted, that if a certain party made application for the custody of the child he would grant it, but no further notice or process was served. In re Culp [Cal. App.] 83 P. 89.

24. NOTE. In equity: In some jurisdictions, statutory provisions relative to the acceptance of service of process are found. Such statutory provisions must be complied with in order to render unnecessary the service of process by a properly constituted officer. In the absence of any statute authorizing acceptance of service of process, it seems that the defendant has the right to accept service of process, and such acceptance of service, when duly proven, is equivalent to service of the subpoena by the proper officer. Banks v. Banks, 31 Ill. 162; Tuskaloosa Wharf Co. v. Tuskaloosa, 38 Ala. 514. The following indorsement, signed by the defendant on a summons, recited by the decree to have been made by the defendant, was held to be sufficient: "I acknowledge service of the within summons upon me as required by law, this 9th day of May, 1861, by the same being read to me, and receiving a copy of the same." Banks v. Banks, 31 Ill. 162. Proof of the genuineness of the acceptance of service is required to support a decree pro confesso. O'Neal v. Garrett, 3 Ala. 276; Norwood v. Riddle, 1 Ala. 195. If the acceptance is not made by the defendant personally, the party so doing should be duly authorized. Finney v. Clark, 86

or appearance.[25] The service must be made within the time prescribed by statute.[26] Generally personal service must be made by delivering a copy within the state to the defendant in person.[27] The discovery of a summons and its delivery to defendant by an employe is not personal serice.[28] Personal service of a summons or process cannot be made by mail.[29]

Service on minors is made, as provided by statute, either by service on the minors themselves,[30] or upon certain designated persons,[31] or, in certain cases, upon a guardian ad litem.[32] Service on one member of a partnership gives jurisdiction of the partnership property.[33]

Upon nonresidents or their agents.[34]—Nonresidents may be served personally in any county in the state where they may be found,[35] unless they are there by reason of some fraud, artifice, or trick on the part of the plaintiff, or some one acting for him, in order to obtain the service.[36] Statutes relating to service without the state do not apply to service upon a nonresident within the state,[37] but the latter may be served as though he were a resident.[38]

Va. 354, 10 S. E. 569; Bryn Mawr Nat. Bank v. James, 152 Pa. 364, 25 A. 823. It is held that a recital in the decree that it appeared to the court that the defendant had been duly served with process was satisfactory proof that the defendant did make the acceptance. Banks v. Banks, 31 Ill. 162. See, also, Lewis v. State Bank, 4 Ark. 443; Metz v. Bremond, 13 Tex. 394.—From Fletcher Eq. Pl. & Pr. § 133.

25. See Jurisdiction, 6 C. L. 309; Appearance, 5 C. L. 248.

26. Where the statute requires that the process shall be served at least a certain number of days before the "term" at which it is made returnable, but the statutory "terms" have been abolished subsequent to the passage of the statute, the word "term" will be read as "time." and a process which is not served within the prescribed number of days before the "time" of its return will not confer jurisdiction. See 2 Ball. Ann. Codes & St. § 6083. Corcoran v. Carrau [Wash.] 82 P. 297.

27. Service held insufficient where affidavit of proof of service stated that it was served personally, and affidavit in opposition to motion to set aside default judgment stated that server was given a description of defendant and that the person served answered such description, and defendant made affidavit, supported by another, that she was not served. Code Civ. Proc. § 426; subd. 4, construed. O'Connell v. Gallagher, 104 App. Div. 492, 93 N. Y. S. 643.

28. Code Civ. Proc. § 426, subd. 4, construed. O'Connell v. Gallagher, 104 App. Div. 492, 93 N. Y. S. 643.

29. Ball. Ann. Codes & St., § 4893, authorizing service of notices, etc., by mail, does not apply to service of summons or process or any paper to bring the party into contempt. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744.

30. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

In Pennsylvania there is no difference in service in personal actions between service on adults and on minors, except that after service no judgment can be taken against a minor until a guardian has been appointed. Yerkes v. Stetson [Pa.] 61 A. 113.

31. See Civ. Code Prac. § 52. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 784.

32. Under Civ. Code Prac. § 52, providing that if the defendant be under the age of fourteen years summons must be served upon certain relations in designated order, as if he has no father the service shall be on the guardian, and if he have no guardian on the mother, and if he have no mother on the person having charge of him, and if any of the designated parties be parties to the suit, the service shall be made on the person who stands first in order and who is not a party, and if all such persons are parties then service must be made on a guardian ad litem appointed for the purpose, where the plaintiff's petition against his children under fourteen alleged that the defendants' mother was divorced from plaintiff and her place of residence unknown, but failed to allege that defendants had no statutory guardian, the appointment of and service on a guardian ad litem was irregular but not void. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

33. In bankruptcy proceedings. See 30 St. 547. Bail v. Hartman [Ariz.] 83 P. 358.

34. See 4 C. L. 1073.

35. Hurd's Rev. St. Ill. 1903, c. 110, § 2. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. Code Neb. § 65 (Cobbey's Ann. St. 1903, § 1066), providing that where action is rightly brought in any county under title 4, summons may be issued to any other county, etc., applies to nonresidents of the state who may be found in such other county. Adair County Bank v. Forrey [Neb.] 105 N. W. 714.

36. Plea in abatement held insufficient to raise issue as to whether defendant was arrested and brought into the county for the mere purpose of obtaining civil service. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. See post, § 7, subd. How Objections Made, and § 8, Privilege and Exemption from Service.

37, 38. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

Upon municipal corporations.[39]—A service upon public officers as officials is binding upon their successors.[40]

Upon domestic corporations.[41]—Service on corporations may be made by service on specified officers or agents of the corporation that may be found in charge of the corporation's business office in the state, or if there are no such officers or agents, then by posting a copy of the process in some conspicuous place at such business office.[42] Service may be made on the agent appointed for such purpose according to statute.[43] Service cannot be made on an eleemosynary corporation by service on a member of the faculty or the dean thereof.[44] It is constitutional for the state to provide that a certain officer shall be agent for service of nonresident domestic corporations.[45] An agent within the meaning of a statute providing for service upon corporations is one who does business for the corporation upon its authority and for its account.[46] The service on the officer must be made in the county where the corporation is or has its principal office;[47] but sometimes a distinction is made between service on officers and agents, service on the latter being required to be made in the county where the action is brought and the agent resides in actions against domestic corporations, while no such restriction is made as to officers of the corporation.[48]

39. See 4 C. L. 1074.

40. Waldron v. Snohomish [Wash.] 83 P. 1106.

41. See 4 C. L. 1074.

42. Pub. Laws Mich. 1903, p. 378, No. 232, § 30. This act did not repeal Pub. Acts 1887, p. 303, No. 242, § 3, relating to service on corporations. Goodrich v. Hackley-Phelps-Bonell Co. [Mich.] 12 Det. Leg. N. 458, 104 N. W. 669. Jurisdiction of St. Louis City circuit court in suit against corporation held conclusively established by return showing service of summons by delivering copy to secretary of defendant in its usual place of business in said city, he being in charge thereof at the time, and that the president or other chief officer could not be found in the city at the time of service. Rev. St. 1899, §§ 994-997. Taussig v. St. Louis & K. R. Co., 186 Mo. 269, 85 S. W. 378. Under Code of Proc., art. 198, providing that "if they hold in permanence" service may be made on the corporation's agent, where a corporation has a permanent business office, with its sign over the door reciting that a certain person is its agent a service on the latter is valid. In re Curtis [La.] 40 So. 334. Under Act July 9, 1901, P. L. 614, § 2, cl. e, service may be made on a corporation by handing a true and attested copy of the writ at any of its offices, depots or places of business, to its agents, or person for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed. Return held to show a valid service. Ben Franklin Coal Co. v. Pennsylvania Water Co., 25 Pa. Super. Ct. 628.

43. See Sess. Laws Wyo. 1903, c. 53, p. 62. Harrison v. Carbon Timber Co. [Wyo.] 83 P. 215.

44. A member of the faculty or the dean of the Medical College of Georgia is not an officer or agent within Civ. Code, 1895, §§ 1899, 1900, providing for the service on corporations by service on an agent or officer, even though there was an arrangement by which the faculty was to defray the expenses of operating the college and to receive, in return, the tuition fees. Medical College of Georgia v. Rushing [Ga.] 52 S. E. 333.

45. State v. St. Mary's Franco-American Petroleum Co. [W. Va.] 51 S. E. 865. Annotated VI. Col. L. R. 120, 5 Michigan L. R. 218.

46. Fahrig v. Milwaukee & C. Breweries, 113 Ill. App. 525. A member of an advisory committee is not such an agent. Id. Within the meaning of a statute, providing for service on a railroad company of notice to build a fence, one is a station agent who sells tickets for the company on commission, regardless of whether trains stop regularly at such station and regardless of whether the amount of business done there is large or small, where such railroad company has advertised to the public that it would receive passengers at such station and that tickets should be purchased of such person. Malott v. Mapes, 111 Ill. App. 340.

47. Under Rev. St. Colo. 1899, § 3516, providing that a corporation may be served by serving its president or other chief officer, or, if he cannot be found in the "county," by serving certain other officers or agents, or, if they cannot be found, by leaving a copy at the office or usual place of business of such corporation, the word "county" means the county in which the corporation is or has its place of business, and not the county in which it may be sued as a joint defendant. Harrison v. Carbon Timber Co. [Wyo.] 83 P. 215. Service on domestic corporations may be made by service on an agent of the corporation in the county where the cause of action, if in tort, arose, or, if no such agent can be found, then by leaving a copy of the writ at the defendant's place of business in that county. Tuggle v. Enterprise Lumber Co., 123 Ga. 480, 51 S. E. 433.

48. Rev. St. Fla. 1892, § 1019. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So.

Service on an agent of a lessee railroad company is not service on the lessor company, even though both be liable to a joint action.[49] After a corporation has ceased to do business, a service of summons on a stockholder who had been a director and trustee is of no binding force on the other stockholders.[50] After two or more corporations have been consolidated, service may be had upon any of the constituent corporations as to its debts prior to the consolidation by service on such officers as might have been served if there had been no consolidation, where such officers have not been removed except by virtue of the consolidation.[51]

Upon foreign corporations.[52]—Personal service upon an officer of a foreign corporation, while casually within the state, will support a judgment in rem against the corporation.[53] A personal judgment against a foreign corporation may rest upon service of some officer thereof while temporarily within the state on corporate business,[54] or, if the corporation be engaged in business within the state, on some officer or designated agent,[55] though there is a conflict as to whether or not, if the officer be temporarily within the jurisdiction, he must be engaged in corporate business.[56] Service upon one acting as a corporate officer to the knowledge of the stockholders is sufficient.[57] In order that a Federal court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the state.[58] The fact that the corporation has actual notice of the proceedings will not

193. Under Rev. St. 1901, par. 1323, in an action against a corporation, summons may be served on a local agent of the company in the county in which suit is brought. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397.

49. Process against C. B. & Q. Railroad Company served on agent of C. B. & Q. Railway Company. Chicago, B. & Q. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

50. Stanton v. Gilpin, 38 Wash. 191, 80 P. 290.

51. Mining corporations. Cal. Civ. Code, § 361, provides that the consolidation of mining corporations will not relieve the constituent companies of their liabilities. But § 473 provides that claims against the constituents may be enforced against a consolidated railroad company. Quere, whether service may be made upon the old officers where railroad companies are consolidated. Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 P. 319.

52. See 4 C. L. 1074.

53. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

54. See Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129, and 19 Ency. Pl. & Pr. pp. 682, 683. Service of process on a general officer of a foreign corporation while within the state, and who voluntarily came into the state to settle a difference between plaintiff and the corporation with reference to the subject-matter of the suit, is sufficient to confer jurisdiction on the corporation. Brush Creek Coal & Min. Co. v. Morgan-Gardner Elec. Co., 136 F. 505.

55. See Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Evidence held sufficient to show that at the time of service defendant had a place of business within the state. Livermore & Knight Co. v. American Darracq Automobile Co., 96 N. Y. S. 1024. Service on foreign corporation. Plaintiff claimed that corporation was not engaged in business within the state. Held burden was on him to prove such fact. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

56. That he need not. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129 [dicta].

57. Secretary of corporation. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Where only three persons were interested in corporation, fact that one of them made an affidavit that he was secretary of the corporation, and as secretary conveyed real estate of the corporation, held to justify a finding that the other members had knowledge that he was acting as secretary. Id. A state court cannot acquire jurisdiction of a foreign corporation, which is not doing business within the state, by service of summons on its president, who is in the state on private business, even though the corporation had previously done business in the state, and the president when served had incidentally called upon the plaintiff in relation to a contract growing out of such business, but which had been completed. Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co., 141 F. 211.

58. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 Law. Ed. 810. A foreign corporation is doing business within the state where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses. Id. Service of summons within the state on a resident director of a foreign insurance company, as provided by N. Y. Code Civ. Proc., § 432, subd. 3, when the cause of action arises therein, is a valid service if the corporation is doing business within the state and confers jurisdiction on a Federal court sitting in that state. Id. A cause of action founded on a loss of the property covered by a policy of insurance issued by a foreign corporation arises within the state, within

give the court jurisdiction to render a personal judgment where there has not been sufficient personal service.[59] Service may be made on such agents as are designated by statute for this purpose, as a local agent,[60] or a managing agent,[61] or an agent transacting business in the state,[62] but service on a resident attorney at law, who has been employed by the foreign corporation to look after its interests in the event that suit is brought on the claim which afterwards forms the subject of the suit in which the service is made, is insufficient.[63]

It is often provided by statute that a foreign corporation shall appoint some person, residing in the county in which its principal place of business is, upon whom process may be served,[64] but such an agent, in receiving service, does not act officially,

the meaning of N. Y. Code Civ. Proc., § 432, subd. 3, where the property insured was situated in that state, the loss was to be adjusten there, and the company in case of loss was given the option of payment or of repairing or rebuilding. Id.

NOTE. In Federal courts under U. S. R. S. § 914: It is the established rule that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, will obtain recognition in the Federal courts, subject to the fundamental principle that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceeding as is fair and reasonable, and the Federal courts must judge for themselves whether the mode of service prescribed by the laws of a particular state satisfies these requirements. McCord Lumber Co. v. Doyle [C. C. A.] 97 F. 22. See, also, New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 Law. Ed. 580; Main v. Chicago Second Nat. Bank, 6 Biss. [U. S.] 26; Pomeroy v. New York, etc., R. Co., 4 Blatchf. [U. S.] 721; Toland v. Sprague, 12 Pet. [U. S.] 300, 9 Law. Ed. 1093; Atlas Glass Co. v. Ball Bros. Glass Mfg. Co., 87 F. 418; Bentlif v. London, etc., Finance Corp., 44 F. 667; Leonard v. Lycoming F. Ins. Co., 15 Fed. Cas. No. 8,258; Dallmeyer v. Farmers', etc., F. Ins. Co., 4 Cent. L. J. 464, 6 Fed. Cas. No. 3,546.

Service upon the president of a foreign corporation temporarily in a state, but a citizen and resident of another state, cannot give jurisdiction over the corporation, organized and existing under the laws of such other state and carrying on business in that state only, having no place of business, officer, agent, or property in the state in which such service was made. This section applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. Goldey v. Morning News, 156 U. S. 518.—Part of Annotation from 4 Fed. Stat. Ann. p. 569 to R. S. § 914.

59. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744.

60. Under N. C. Code, § 217, providing that service may be made upon certain officers and agents or upon a local or managing agent, and that any person receiving or collecting moneys in the state in behalf of the corporation shall be deemed a "local agent," a traveling auditor who neither received nor was authorized to collect or receive any money in the state, the corporation having, moreover, ceased to do business in the state, was not a local agent, though he demanded, without authority, but did not receive, money from the plaintiff. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020. Local correspondents of a foreign corporation, which furnishes them with market quotations to enable them to carry on their business, held agents for the service of process, the corporation being the real party in interest in the trades made by the correspondents, the latter receiving a commission thereon, though contract between corporation and correspondent expressly disclaimed agency. Board of Trade of City of Chicago v. Hammond Elevator Co., 198 U. S. 424, 49 Law. Ed. 1111. President of a bank to which borrowing members of a foreign building and loan association were accustomed to pay dues, etc., for remittance to the building company, but which was without any authority to act for the company and merely performed the work as part of its banking business, was not, after the association was in process of liquidation, an agent for the service of process. Cooper v. Brazelton [C. C. A.] 135 F. 476.

61. But one who has been but has ceased to be a mere solicitor for a foreign insurance company is not a managing agent. Spiker v. American Relief Society [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611.

62. But a secretary casually in the state and not connected with the business which gave rise to the suit is not an agent transacting business in the state, nor can he be served as an officer. Southern Sawmill Co. v. American Hardwood Lumber Co. [La.] 38 So. 977.

63. Although Shannon's Code, § 4546 provides that service may be made on any agent of the corporation that may be in the county, no matter what the character of such agent may be. Thach v. Continental Travelers Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255.

64. Act April 1, 1872 (St. 1871-72, p. 826, c. 566), as amended by Act March 17, 1899 (St. 1899, p. 111, c. 94). The appointment of such person is not a condition precedent to the right to do business in the state, but is expressly made by the statute a condition to the right to sue or to defend a suit. The prohibition against suing is valid, but query as to whether the prohibition agalnst de-

but under the power of attorney, and hence service on his deputy is insufficient,[65] nor has he any power to waive or accept service.[66] Statutes requiring foreign corporations to appoint resident agents, upon whom service of process may be made, provide an additional and not an exclusive mode of service,[67] hence, when a foreign corporation conducts a regular business within the state, and at a permanent place of business, a service of process made at such place of business upon its agent, in connection with a matter growing out of said business, is good if the same service would be good against a domestic corporation.[68] Such statutes have always been regarded as primarily designed for the protection of the citizens of the state enacting the legislation, and who might acquire rights under contracts executed with them or for their benefit while they were such citizens,[69] and are not intended to create and perpetuate a local forum to which under guise of an assignment to some resident, nonresidents may come for the purpose of instituting litigation upon contracts issued to them at their homes against a corporation, there readily subject to service, which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out.[70]

It has been held that, after a foreign corporation has appointed a resident agent for service and transacted business, personal jurisdiction may be gained by serving him though it has ceased to do business,[71] and though the cause of action was not of the character specified in its application for a permit,[72] but a power to accept service is not kept alive by mail transactions and mere adjustment after revocation and withdrawal from the state.[73] Revocation of an agency for service is not effectual unless the statute provides for it[74] and the mode prescribed is followed,[75] and especially not when it is by statute to continue until another is substituted,[76] or when there is no means of imparting by a public record any constructive notice of such revocation.[77]

fending is valid. An additional penalty for not appointing such person is that the corporation shall be denied the benefit of the statute of limitation of the state. Black v. Vermont Marble Co. [Cal. App.] 82 P. 1060.

In admiralty practice, service of a monition may be made on a foreign corporation by service on the agent to receive service appointed by such corporation pursuant to a state statute. See Act Pa. July 9, 1901 (P. L. 615), § 2, cls. e. g. Insurance Co. of North America v. Frederick Leyland & Co., 139 F. 67.

65. Service on deputy of insurance commissioner insufficient. See Cal. Laws, 1901, p. 360, c. 174. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744.

66. Wash. Laws, 1901, p. 360, c. 174, requiring foreign insurance companies to appoint the commissioner of insurance as their attorney to receive service, does not authorize the commissioner when appointed to waive or accept service. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744.

67. Act No. 41 of 1894, requiring foreign surety companies to appoint such agents, and Act No. 105, p. 132 of 1898, authorizing service to be made upon the Secretary of State, so construed. In re Curtis [La.] 40 So. 334.

68. In re Curtis [La.] 40 So. 334. As to when a service upon a domestic corporation is good, see ante this section, Upon Domestic Corporations.

69. Hunter v. Mutual Reserve Life Ins. Co. [N. Y.] 76 N. E. 1072, modifying 97 App. Div. 222, 89 N. Y. S. 849.

70. Hunter v. Mutual Reserve Life Ins. Co. [N. Y.] 76 N. E. 1072, modifying 97 App. Div. 222, 89 N. Y. S. 849. A provision rendering the power of attorney "irrevocable so long as any liability of the company remains outstanding" in the state does not prevent its effective revocation as to nonresident policy holders so as to prevent the subsequent prosecution by the assignees of claims of nonresidents against the corporation by service on such attorney. North Carolina statute construed. Id.

71, 72. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

73. Where foreign insurance company withdrew from state and revoked power of attorney, held the remittance of premiums by citizens of the state on policies already issued to the home office of the company by mail, and the payment of losses on such policies, by mail from the home office, and the appointment of an adjuster to settle a claim, did not constitute such a doing of business as to keep the power of attorney alive. Hunter v. Mutual Reserve Life Ins. Co. [N. Y.] 76 N. E. 1072, modifying 97 App. Div. 222, 89 N. Y. S. 849.

74, 75, 76. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822. Held that corporation was

Where a foreign corporation has no property, no place of business, and is transacting no business in the state, service on an officer of the corporation, while temporarily in the state upon his own private business, is insufficient.[78]

Upon foreign unincorporated associations.[79]

(§ 4) *B. Substituted.*[80]—Substituted service is actual service,[81] and constitutes due process of law.[82] Such service is valid only when authorized by statute.[83] In New York City substituted service may be made when the defendant resides in the city and cannot be found.[84] According to the various statutes, substituted service may be made by handing a true and attested copy of the process to an adult member of the defendant's family at his dwelling house, or to an adult member of the family, with which he resides, at his place of residence,[85] or by delivering a copy and explaining the purport thereof to the defendant's wife or any person found at the defendant's usual place of abode, the defendant not being found there,[86] or by posting,[87] or by leaving a copy at the defendant's place of residence,[88] or at his last

powerless to revoke as respected accrued causes of action in the state. Id.

77. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

78. Johnson v. Computing Scale Co., 139 F. 339; Remington v. Central Pac. R. Co., 198 U. S. 95, 49 Law. Ed. 959. Service on the secretary of a foreign corporation while temporarily in the state is insufficient. Southern Sawmill Co. v. American Hardwood Lumber Co. [La.] 38 So. 977. See, post, § 8, Privilege and Exemption from Service. Service on the president of a foreign corporation who is in the state in attendance on a trial is insufficient, unless it appears that he remained longer than was necessary to attend to the trial. Kinsey v. American Hardwood Mfg. Co., 94 N. Y. S. 455.

79, 80. See 4 C. L. 1076.

81. Meyer v. Wilson [Ind.] 76 N. E. 748. But see Carter v. Applegarth [Md.] 62 A. 710, where service in proceedings under Code Pub. Gen. Laws, 1904, art. 33, § 24, by leaving a copy at the defendant's residence, is spoken of as "constructive service," and upheld on the ground that the right to vote is not a property right which cannot be invaded without due process of law.

82. Service in election contest by leaving copy at defendant's residence. See Cal. Code Civ. Proc. § 1119. Chatham v. Mansfield [Cal. App.] 82 P. 343. Compare Carter v. Applegarth [Md.] 62 A. 710.

83. Civ. Code, art. 142, authorizing proceedings by substituted process against absent husbands for separation from bed and board cannot be extended to proceedings for divorce. Connella v. Connella, 114 La. 950, 38 So. 690.

84. To authorize the service, proof must be made by affidavit, and a marshal's return that the defendant's residence cannot be found, although diligent effort has been made to serve him, or that he avoids service. See Municipal Court Act, Laws 1902, p. 1500, c. 580, §§ 32, 33. This statute does not authorize the substituted service upon affidavits that "defendant resides out of the City of New York," but maintains an office in the city, and that, although one of plaintiff's attorneys is informed and believes that defendant is in the state, he avoids service, and a statement of a city marshal that after diligent search he was unable to find the defendant, with an affidavit of a third party to the same effect. Casey v. White, 48 Misc. 659, 96 N. Y. S. 190. Substituted service can be made when by "reasonable diligence" the defendant cannot be found (Dixon v. Carrucci, 97 N. Y. S. 380), and whether or not such diligence was used is generally a question for the court (Id.).

85. Yerkes v. Stetson [Pa.] 61 A. 113.

Service on minor: The dwelling house of the father is the dwelling house of a minor son within the meaning of the Pennsylvania statute authorizing service by handing copy to adult member of defendant's family at his dwelling house, and handing copy to the father at such house is sufficient, though the son is absent from the state for his health. Yerkes v. Stetson [Pa.] 61 A. 113.

86. Under the Virginia statute, Code 1887, § 3207, Code 1904, p. 1684, providing that if the defendant be not found at his usual place of abode the service may be made by leaving a copy and giving information of its purport "to his wife or any person found there, who is a member of his family, and above the age of 16 years," the wife must be a member of the defendant's family. King v. Davis, 137 F. 198.

87. Where defendant had lived in a certain house a short time prior to the date the marshal went there to serve him with summons, and diligent inquiry by the marshal failed to disclose his whereabouts, and no person was found there upon whom service could be made, held substituted service was properly made by posting a copy of the papers on the outer door of the house. Dixon v. Carrucci, 97 N. Y. S. 380.

88. Petition to strike off name of voter under Code Pub. Gen. Laws, 1904, art. 33, § 24. Under the peculiar wording of the statute, which is that the service may be made at the voter's place of residence "given by the registry," it was held that the service might be made by leaving a copy under a brick on the ground on the lot which was formerly occupied by defendant's residence, the house having been destroyed by fire. Applegarth v. Carter [Md.] 62 A. 712. Where the statute provides that the defend-

place of residence,[89] or last and legal place of residence,[90] or usual place of residence,[91] or by leaving a copy posted at the front door of the defendant's usual place of abode.[92] In some instances it is provided that service may be made by mail.[93] In such case the service is complete when the notice or process is deposited in the post office, properly addressed to the person upon whom the service is to be made,[94] and it is sometimes required that, where the defendant is out of the state at the time the service is made, by leaving a copy at his residence, additional notice shall be given.[95] Service of a notice by mail when allowable is completed by depositing in the post office the paper properly inclosed, sealed and addressed.[96] Substituted service is made on a domestic corporation by leaving a copy of the process at the defendant's place of business in the county in which the suit is brought.[97]

Statutes authorizing substantial service should not be extended beyond the plain import of their terms, nor to cases where the language of the return is ambiguous.[98]

(§ 4) *C. The server, his qualifications, and protection.*[99]—Before an officer can make authorized legal service, he must give bond as required by statute to qualify.[1] Process may be served by a constable.[2] Service may be made by a de facto officer,[3] but a recital in a default judgment of due service is not conclusive of the authority of the purported officer who made the return.[4] Service may be made by unofficial persons where the return is verified by affidavit,[5] and the fact that the server is the agent of the plaintiff is immaterial,[6] unless the statute makes such relation a disqualification.[7] Service by one other than an officer is not confined to any particular county,[8] but a false return for which a sheriff is liable is one that is

ant may be served "at his place of residence," this does not mean that personal service shall be made there, but that the summons shall be left there. Carter v. Applegarth [Md.] 62 A. 710.

89. Burns' Ann. St. Ind. 1901 (Rev. St. 1881, § 1452; Horner's Ann. St. 1901, § 1452). In action before justice of the peace. Meyer v. Wilson [Ind.] 76 N. E. 748.

90. Tyler v. Davis [Ind. App.] 75 N. E. 3.

91. Under this provision the service must be made at the defendant's residence or domicile at the time the service is made. Ruby v. Pierce [Neb.] 104 N. W. 1142.

92. Where the defendant cannot be found, and neither his wife nor any member of his family over sixteen years old can be found at defendant's usual place of abode. Johnson v. Ludwick [W. Va.] 52 S. E. 489. The copy must be left posted at the "front" door. King v. Davis, 137 F. 198.

93. In election contest. Service of notice of appearance. See Rev. Code Civ. Proc. S. D. § 554. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

94. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

95. Rev. Laws Mass. c. 170, § 34, applies to residents temporarily absent from the state as well as to nonresidents. Porter v. Prince, 188 Mass. 80, 74 N. E. 256.

96. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

97. "The agency or place of business" of a corporation within Civ. Code, 1895, § 1900, providing that service on domestic corporations in actions for tort, etc., may be made by leaving a copy at the "agency or place of business" of the defendant, is not its principal office or any agency in any county, but the defendant's agency or place of business, if any there be, in the county where the cause of action arose. Tuggle v. Enterprise Lumber Co., 123 Ga. 480, 51 S. E. 433.

98. King v. Davis, 137 F. 198. "Last usual place of residence" held not same as "usual place of residence." Ruby v. Pierce [Neb.] 104 N. W. 1142.

99. See 4 C. L. 1076.

1. Service of process issued by a city court is not legal when made by a deputy sheriff of the county who has not been appointed deputy sheriff of such court as required by the act establishing the court. See Acts 1896, p. 289. The sheriff had not given the bond required of him as sheriff of the city court, nor had his deputy given the bond required of him. McCalla v. Verdell, 122 Ga. 801, 50 S. E. 943.

2. The power and authority of a constable is co-extensive with the limits of his county, and within those limits he has the same duties and powers in regard to the execution of civil process as the sheriff. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250.

3. Officer held not a de facto officer. Buck v. Hawley [Iowa] 105 N. W. 688.

4. Buck v. Hawley [Iowa] 105 N. W. 688.

5. Va. Code, 1887, § 3207. King v. Davis, 137 F. 198.

6. King v. Davis, 137 F. 198.

7. Va. Code 1904, p. 1703, requires that the unofficial person making the service be not a party and not interested in the subject-matter of the suit, but even in this case it is doubted that the fact that the server was the agent of the plaintiff would disqualify him. King v. Davis, 137 F. 198.

false in fact as distinguished from a correct return of the acts actually done by him, though in violation of the law.[9] An officer to whom a process is given for service is liable for any failure on his part to do his official duty in this regard.[10]

§ 5. *Constructive service. Service by publication.*[11]—It is competent for the legislature to provide for service by publication upon a domestic corporation which has failed to provide officers or agents upon whom other service may be had,[12] and a personal judgment may be based thereon.[13] Statutes providing for service by publication are intended as a substitute for personal service, and, being in derogation of the common law, must be strictly observed.[14] Statutes authorizing constructive notice by publication in divorce cases should be strictly construed.[15]

When proper.[16]—Service by publication is authorized where the defendant is a nonresident and no personal judgment is sought,[17] or when the defendant is a nonresident and cannot, with due diligence on the part of the plaintiff, be served, or the plaintiff has sufficient excuse for not exercising such diligence, service may be made by publication.[18] Publication is also authorized where defendants or their residences are unknown.[19]

Procedure to authorize.[20]—The jurisdiction of the court to issue the order or publication against a nonresident depends upon the affidavit required by the statute as the ground of the order.[21] The affidavit for publication need not be joined in by all plaintiffs.[22] The affidavit or showing must set forth the facts making out a statutory occasion for publication, such as absence and nonresidence,[23] and diligence

8. Middleton v. Stokes, 71 S. C. 17, 50 S. E. 539.

9. Nor will the incorrect statement of acts, which he is not required by law to do, constitute a false return. Hooper v. McDade [Cal. App.] 82 P. 1116.

10. Hooper v. McDade [Cal. App.] 82 P. 1116.

11. See 4 C. L. 1077.

12. Constitutes "due process of law." Clearwater Mercantile Co. v. Roberts-Johnson-Rand Shoe Co. [Fla.] 40 So. 436.

13. Rev. St. 1892, § 1024, construed. Clearwater Mercantile Co. v. Roberts-Johnson-Rand Shoe Co. [Fla.] 40 So. 436.

14. Code Civ. Proc., § 422, construed. Fink v. Wallach, 47 Misc. 247, 95 N. Y. S. 872.

15. Rodgers v. Nichols [Okl.] 83 P. 923.

16. See 4 C. L. 1077.

17. Foreclosure of mortgage. Greenwood Loan & Guarantee Ass'n v. Williams, 71 S. C. 421, 51 S. E. 272. Divorce. Baker v. Jewell, 114 La. 726, 38 So. 532. Absentees can be brought into court on a moneyed demand only by an actual seizure of property in the suit in which the demand is made. Seizure in another suit is not sufficient, and it makes no difference that the claim is secured by privilege on property situated within the jurisdiction of the court. Levy v. Collins [La.] 38 So. 966.

18. The old statute, Code Proc. § 135, was satisfied with due diligence to find the defendant, while the present statute, Code Civ. Proc. §§ 438, 439, requires either due effort to serve or sufficient reason for not making the effort. Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834.

19. Foreclosure. Stull v. Masilonka [Neb.] 104 N. W. 188. The provisions of the statutes relating to publication as to unknown persons, or those whose residences are unknown, are to be liberally construed, with a view to promote their object and assist the parties in obtaining justice. Id.

20. See 4 C. L. 1077.

21. Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834; Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671. Affidavit of nonresidence is jurisdictional. Tobin v. Brooks, 113 Ill. App. 79. See post this section, Sufficiency of Order of Publication.

22. Foreclosure proceedings. Stull v. Masilonka [Neb.] 104 N. W. 188.

23. In the absence of an allegation in the petition, or an affidavit that a defendant was a nonresident of the state, there was no authority to issue a summons for him beyond the limits of the state as provided by Rev. St. 1899, §§ 575, 582. Wright v. Hink [Mo.] 91 S. W. 933. Evidence held insufficient to sustain contention that defendant was a resident of the state at the time of the publication of the summons. Morrison v. Turnbaugh [Mo.] 91 S. W. 152. Under Rev. St. 1899, §§ 575, 582, relating to divorce actions, an affidavit of nonresidence after stating the fact of nonresidence need not further state that ordinary process of law could be served upon the defendant "in this state." Paddock v. Paddock [Mo. App.] 91 S. W. 398. Case was certified to the supreme court because in conflict with the decision of the St. Louis court of appeals in Hedrix v. Hedrix, 103 Mo. App. 40, 77 S. W. 495. Order for service by publication held valid where based on proof of defendant's nonresidence consisting of several affidavits and sheriff's certificate. Meaney v. Way, 108 App. Div. 290, 95 N. Y. S. 745.

on plaintiff's part,[24] but even where the statute requires the plaintiff to exercise due diligence, it must appear, in order to invalidate the service, that he failed to comply with the statute in this regard.[25] In the absence of proof to the contrary, an affidavit of nonresidence being made, the nonresidence is presumed to continue for a reasonable time.[26] Where the record does not disclose whether the affidavit was attached to the petition or not, the proceedings of the court in granting the order of publication will be presumed to have been regular.[27] A return of not found is not necessary in Missouri.[28] Delay between the return of the sheriff "not found" and the making of the order for publication will not invalidate the publication where it is supported by the proper affidavits.[29] If summons is to be filed, it must be done with the officer designated.[30]

How made.[31]—Failure to publish for the time required by the statute vitiates the service.[32] Service by publication is not complete until the completion of the time prescribed for the publication,[33] and where the summons must be served a certain time before the return day, a service by publication must likewise be completed within such time.[34] Service by publication is complete on the last day of the publication as required by law.[35] The publication must be made in some newspaper of

24. Service by publication is void where predicated upon an affidavit of nonresidence by the attorney for the complainant, stating that defendant is a nonresident and that affiant has made diligent inquiry to learn his place of residence and has been "enabled" to ascertain the same. Tobin v. Brooks, 113 Ill. App. 79. Under the New York statute the affidavit must show not only that the defendant is a nonresident, but that plaintiff has used due diligence to find him within the state, but has been and will be unable to obtain service in the state, or a sufficient reason why such diligence has not been exercised. Code Civ. Proc. §§ 438, 439. Compare the former provision of the statute, Code Proc. § 135, which required due diligence to find defendant without provision as to excuse for failure to exercise due diligence. Under the present statute, as under the old, the affidavit must allege the facts showing the diligence exercised or the excuse relied on. Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834. But under the Washington statute which requires that the affiant shall state in the affidavit that the residence of the nonresident defendant is unknown to him, the plaintiff is not required to exercise due diligence to ascertain the residence of the defendant in order that copies of the summons and complaint may be mailed to him. See 2 Ball. Ann. Codes & St. § 4877. Warner v. Miner [Wash.] 82 P. 1033.

25. Proof that plaintiff knew of a deed on record in the county, which was acknowledged by the defendant in another county in the state before a notary public, did not, without more, show that plaintiff had failed to exercise due diligence because he did not write to the notary for the address of the defendant. Warner v. Miner [Wash.] 82 P. 1033.

26. Ross v. McGrath's Adm'r, 27 Ky. L. R. 723, 86 S. W. 555. Where order was not issued until three days after affidavit was sworn to, and nonresident could have reached the state in 12 hours, held service was good. Id.

27. Stull v. Masilonka [Neb.] 104 N. W. 188.

28. Under Rev. St. 1879, § 3494, it is not necessary that a summons should have been issued and a non est returned, before an order of publication might be issued. Morrison v. Turnbaugh [Mo.] 91 S. W. 152.

29. Mills' Ann. St. § 41. Under this statute the return of the sheriff is not the basis of the order, although it is provided that the publication shall be allowed only after process has been issued and returned. The publication is based on the plaintiff's affidavit of the nonresidence of the defendant. Richardson v. Wortman [Colo.] 83 P. 381.

30. Code Civ. Proc. § 442, requiring the summons to be filed with the county clerk, is not complied with by leaving the order directing service by publication with the clerk of one of the 21 parts of the supreme court in the county of New York. Fink v. Wallach, 47 Misc. 247, 95 N. Y. S. 872.

31. See 4 C. L. 1078.

32. As where statute requires publication in attachment proceedings to be commenced within thirty days after the granting of the attachment. Jones v. Fuchs, 106 App. Div. 260, 94 N. Y. S. 57. Pol. Code § 3549, providing for publication of summons for four weeks in an action by the state to foreclose the interest of a delinquent purchaser of public lands, is to be construed as an exception to Code Civ. Proc. § 413, providing generally for a publication for two months as against a nonresident defendant. People v. Norris, 144 Cal. 422, 77 P. 998.

33. Quigley v. Ellenwood [Cal. App.] 82 P. 974.

34. Code Civ. Proc. § 1166 authorizes the judge to make a summons which is to be published returnable at such time as he may deem proper, but section 1167 provides that the summons must be served at least two days before the return day thereof. Quigley v. Ellenwood [Cal. App.] 82 P. 974.

35. Code Iowa, §§ 3535, 3536. And a published summons requiring defendant to appear at an earlier date constitutes no serv-

general circulation[36] printed in the county wherein the action is brought.[37] Where the notice is sufficient to advise the parties in interest of the cause of action upon which the plaintiff seeks relief, it will be held sufficient.[38]

It is usually provided that where judgment has been entered upon published service, the defendant may, within a certain time, appear and move for a new trial.[39]

In Louisiana constructive service on nonresidents is made by appointment and citation of a curator ad hoc.[40] In some states a constructive service must be accompanied by the mailing of a copy of the published notice to defendant.[41]

Order of publication.[42]—The order should be based on the facts existing at the time of the affidavits and be made within a reasonable time.[43] Where there is any evidence tending to show compliance with the statute, even if inconclusive, the court has jurisdiction to make the order, and the exercise of such jurisdiction is not open to collateral attack after the entry of judgment;[44] but where there is no evidence whatever of compliance with the statute, the order of publication is void, the court not having been authorized to act, and may be impeached collaterally.[45] All reasonable presumptions will be indulged in favor of the order.[46] The order must be filed[47]

ice. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125.

36. A paper 11 by 16 inches in size, containing four columns to the page, and filled with general local advertisements, legal notices, and general and local news items, and having all the appearance of a small newspaper, with a circulation of 300 in a town of 400 population, such paper being issued regularly each week, and having, moreover, a general circulation throughout the state of about 100 copies, is, under the rule announced in Puget Sound Pub. Co. v. Times Printing Co., 33 Wash. 551, 74 P. 802, a newspaper of general circulation within the statute. Warner v. Miner [Wash.] 82 P. 1033.

37. The fact that the paper is printed at one town in the county and issued at another is immaterial. Warner v. Miner [Wash.] 82 P. 1033.

38. Notice to unknown defendants, and defendants whose residences are unknown, in foreclosure proceedings. Stull v. Masilonka [Neb.] 104 N. W. 188.

39. Code Iowa, § 3736 making such provision, does not apply where the judgment is void for want of insufficiency of the service. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125. Where a motion for a new trial under Iowa Code, § 3736, providing for new trials where the judgment is entered on published service, is resisted upon the sole ground that service has been made on the defendant's agent, the ruling upon such motion is not an adjudication as to the sufficiency of the published service. Id.

40. Code Prac., arts. 162, 163, 164, 165, 254, 260. An action in one parish against a railroad company whose agent for service is domiciled in another parish, and a co-defendant domiciled in another state to annul a contract to which the plaintiff is neither party nor privy, whereby the defendant company has agreed to establish a depot on the land of the other defendant lying contiguous to that of the plaintiff in still a third parish in consideration for the grant of a portion of such land for right of way, etc., on the ground that the contract is illegal, is not a proceeding in rem so as to authorize proceedings binding the nonresident by appointment and citation of a curator ad hoc, nor does the mere fact that jurisdiction is acquired of the resident defendant authorize the bringing of the nonresident into court by such proceedings. West v. Lehmer [La.] 38 So. 969.

41. Code Civ. Proc. § 636 (Wilson's Rev. & Ann. St. 1903), relating to divorce cases, construed and held that the provision requiring the mailing of the notice is mandatory. Rodgers v. Nichols [Okl.] 83 P. 923.

42. See 4 C. L. 1079.

43. Three days delay between affidavit and issuance of order held not unreasonable. Though nonresident could travel from place of residence to state of the forum in 12 hours. Ross v. McGrath's Adm'r, 27 Ky. L. R. 723, 86 S. W. 555.

44. Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834.

45. Affidavit upon which order of publication against nonresident was based did not show facts showing due diligence on the part of plaintiff to serve the defendant in the state, or that plaintiff had sufficient excuse for not exercising such diligence. Merely repeating the words of the statute, without giving the facts upon which the conclusion represented by such words is based, is insufficient. Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834.

46. Affidavit presumed to have been attached to petition. Stull v. Masilonka [Neb.] 104 N. W. 188. Where a summons is served as to one of the defendants after the original summons is returned, it will be presumed, in the absence of a contrary showing in the record, that an alias summons was issued. Boyer v. Pacific Mutual Life Ins. Co. [Cal. App.] 81 P. 671.

47. Handing the order to the clerk of a part of a special term is a sufficient filing, though the statute requires the order to be filed with the county clerk. Fink v. Wallach, 109 App. Div. 718, 96 N. Y. S. 543. Where a clerk of a special term of the supreme

but need not be entered.[48] On a motion to vacate an order for service by publication, the only question to be determined is whether the evidence is sufficient to warrant the making of the order.[49]

Personal service in lieu of publication.[50]—Personal service on a nonresident outside of the state will not authorize a personal judgment.[51]

§ 6. *Return and proof of service. Official return.*[52]—The return of a sheriff to a writ is an official statement by him of the acts done by him under the writ, and in obedience to its directions, and in conformity with the requirements of law, and must show a compliance with such directions or a sufficient reason for noncompliance, either in whole or in part.[53] It is not the return or proof of service that gives the court jurisdiction, but the service itself;[54] and where the service is proper, defects in the return will not affect the jurisdiction of the court, if amendment showing the proper service is subsequently made in proper time,[55] but in the absence of a legal return of service, the court is without jurisdiction to render a default judgment.[56] The return of an officer should be strictly construed.[57] By "strict construction," as here used, is meant that the return cannot be aided by presumptions or intendments that the return must show on its face that every requisite of the statute has been complied with.[58] The return should receive a reasonable and natural interpretation. It must be fairly construed and effect be given to its plain intent and meaning.[59] Substantial compliance with the statute is sufficient,[60] but the return of substituted service is strictly construed.[61] Whether presumptions will be indulged in favor of a de-

court failed to file an order of publication which was handed to him, the irregularity was curable by an order to file the papers nunc pro tunc. Id. Failure to strictly comply with Laws 1902, p. 1501, c. 580, § 34, in respect to the time for filing the order and moving papers, is fatal to the maintenance of the action and the jurisdiction of the court. Sills v. Gaffney, 93 N. Y. S. 541.

48. Fink v. Wallach, 109 App. Div. 718, 96 N. Y. S. 543.

49. That such service will not give the court jurisdiction to compel defendant to convey real estate located in the state cannot be determined. Meaney v. Way, 108 App. Div. 290, 95 N. Y. S. 745.

50. See 4 C. L. 1079.

51. A personal judgment cannot be taken against a nonresident corporation upon notice served outside of the state pursuant to Rev. St. 1895, arts. 1230, 1233. Louisville & N. R. Co. v. Missouri, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 239, 88 S. W. 413.

52. See 4 C. L. 1079.

53. His statement or silence with reference to any fact which his official duties do not require him to make, or his opinion as to the legal effect of his acts, whether correct or erroneous, does not form any part of the return and will not affect the rights of any party to the action, and if incorrect or erroneous will not constitute a false return. Hooper v. McDade [Cal. App.] 82 P. 1116. Where return recited that writ was served "on the within-named defendant, the Armour Packing Company (now Armour & Co.)," held the words "now Armour & Co." would be disregarded as surplusage. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

54. Schmidt v. Hoffmann [Wis.] 105 N. W. 44. Failure to state the place of the service is not fatal to the validity of the judgment entered thereon, especially where the record seems to indicate that the service was made within the jurisdiction of the court. The purpose of the statutory requirement that the proof of service should state the place of service is to inform the court as to its jurisdiction. Middleton v. Stokes, 71 S. C. 17, 50 S. E. 539.

55. King v. Davis, 137 F. 222. See post this section, Amendment of Return.

56. Pennsylvania Casualty Co. v. Thompson, 123 Ga. 240, 51 S. E. 314.

57, 58, 59. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

60. Under Rev. St. Wis. 1898, § 2642, providing that the affidavit shall state that the person who claims to have served the process knew the defendants to be the same persons named "in the summons," an affidavit stating that affiant "duly served the summons," etc., "in the above entitled action on (naming the defendants)," etc., "and that he knew the persons so served to be the identical persons named as the defendants in the above action," was sufficient. Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

61. King v. Davis, 137 F. 198. A return of substituted service, reciting that the marshal left a copy of the papers "at the last known place of residence of the defendant," held a substantial compliance with Laws 1902, p. 1517, c. 580, § 83, authorizing substituted service by leaving a copy of the papers "at the defendant's last place of residence." Dixon v. Carrucci, 97 N. Y. S. 380. Where the statute authorizes service by leaving a copy posted at the "front door," a return that it was left posted at the "door" is insufficient. King v. Davis, 137 F. 198. The return, moreover, must state that the

fective return of substituted service is a question of general law upon which the Federal courts are not bound by the decisions of the state courts.[62] The return should not be susceptible of two rational constructions,[63] but in this connection surplusage will be disregarded.[64]

The written proof of the service need not be filed with the clerk before the rendition of the judgment, provided such proof be submitted to the court before the judgment is rendered.[65] Nor is it necessary for the affidavit of service to be entered on the back of the writ.[66] The omission in the title of the affidavit of service of words descriptive of the defendant, which are contained in the title of the summons, is immaterial.[67]

A return "not found" does not abate the action where the return does not show that the defendants are nonresidents.[68]

In most states proof of service must be made by the affidavit of the server, though the certificate of various officers is generally made sufficient.[69] The need of such proof may be waived by the written admission of the defendant.[70]

A judgment on a mortgage note is not affected by the insufficiency of the return of the process in proceedings to foreclose the mortgage.[71]

Return of service on corporations.[72]—Must show not only service on the proper person, but also at the proper place.[73] Return showing service on officer at "usual

copy was left posted. Id. Return showed that copy was left posted at front door, but did not show that defendant's wife or some member of his family over sixteen years old was not found there. Held insufficient. See Code 1899, c. 124. Johnson v. Ludwick [W. Va.] 52 S. E. 489. The return must show that the purport of the process was given to the wife or other member of the family to whom it was delivered. See Code Va. 1889, § 3207. King v. Davis, 137 F. 198. Under the Virginia statute, Code 1887, § 3707, providing that service may be made by "delivering a copy * * * to his wife or any person found there, who is a member of his family," etc., the return must show that the defendant's wife to whom the copy is delivered "is a member of his family." King v. Davis, 137 F. 198; Id., 137 F. 222. A return of service by leaving a copy at the defendant's "last" place of residence does not show a service at the defendant's "usual place of residence." Ruby v. Pierce [Neb.] 104 N. W. 1142.

62. King v. Davis, 137 F. 198.

63. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

64. Where it recited that writ was served "on the within-named defendant the Armour Packing Company (now Armour & Co.)," held the words "now Armour & Co." would be disregarded. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

65. See Rev. St. Wis. 1898, § 2891. Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

66. It will be sufficient if the record states that the service was verified according to law. Brown v. Butterworth & Co. [Del.] 58 A. 1041.

67. The title of the summons as to defendants was "Ida Hoffman and her sole surviving joint tenancy grantee, Antonia Stolowski, formerly Skotzke, defendants," while the affidavit was entitled "Ida Hoffman and her joint tenancy grantee, Antonia Stolowski, defendant." Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

68. Nor will the action be dismissed at rules for want of a declaration unless the defendant appears and enters a rule for bill or declaration. United Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524.

69. Unverified return of service of summons by a constable is ineffective. Code Civ. Proc. § 410. Berentz v. Kern King Oil & Development Co. [Cal. App.] 84 P. 45. Under Code Civ. Proc., §§ 410-415, requiring proof of service of summons to be by affidavit, except in the case of a service by a sheriff, proof of service by "certificate" of a constable is insufficient to confer jurisdiction, though there is, however, a question whether this rule has not been relaxed in favor of constables by § 153 of the county government bill of 1897. St. 1897, p. 492, c. 277. Berentz v. Belmont Oil Co. [Cal.] 84 P. 47.

70. Montana Code Civ. Proc. § 642. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737.

71. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737.

72. See 4 C. L. 1080.

73. Under Rev. St. 1899, § 995, providing that when the corporation has no place of business in the county where suit is brought, or if no person shall be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be directed to any county in the state where the president or chief officer of the company may reside or be found, or where any office or place of business may be kept of such company, where suit was brought in P. county, a return showing service on D., manager of the corporation and in charge of its office and place of business in another county, as agent and manager of the company in P. county, showed service on

business office" does not show service at principal office of corporation.[74] In Florida a return of service on a foreign corporation, need not state that the corporation is doing business in the state, or that its president, upon whom the service was made, is a resident of the state, or that he was then in the state on the business of the corporation.[75]

Amendment of return.[76]—The purpose of an amendment is not to give the court jurisdiction, which must depend upon the service and not the return, but merely to perfect the evidence of the court's jurisdiction.[77] The question of amendment addresses itself to the discretion of the court, and amendments will be allowed in the furtherance of justice,[78] and the question being one of the power of the court, the Federal courts are not bound by the decisions of the state courts thereon.[79] The fact that the service and return were made by a person not an officer will not preclude an amendment.[80]

The court, in allowing an amendment of the return, may require notice to the defendant;[81] but where the judgment rendered on defective proof of service has been stricken from the records, the plaintiff may withdraw the papers from the files for the purpose of having an amendment of the proof of service made, without leave of court or notice to the defendant.[82] Amendment of return may be made at any time during the term,[83] or even after judgment.[84] The amendment when properly made relates back to the date of the service,[85] but will not render valid a default judgment entered upon a defective return.[86] An amendment of the return in an ejectment suit in a Federal court for the state of Virginia is binding on innocent purchasers from the defendant pendente lite.[87] Where the record shows that leave to amend was granted, it will be presumed, in the appellate court, that the amendment was made.[88] Where the original record fails to show service, and a supplemental or addi-

the agent not at the company's place of business and was insufficient. Bente v. Wyckoff [Mo. App.] 91 S. W. 297.

74. Thomasson v. Mercantile Town Mut. Ins. Co., 114 Mo. 109, 89 S. W. 564, afg. [Mo. App.] 81 S. W. 911. See 4 C. L. 1080, n. 21.

75. The statute contained no restrictions as to the residence of officers of a corporation who might be served. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193.

76. See 4 C. L. 1080.

77. King v. Davis, 137 F. 222.

78. King v. Davis, 137 F. 198. An amendment may be allowed where the return does not show that copy was left posted at the "front door," but merely at the "door" (Id.), and when it fails to show that the defendant's wife to whom the copy was delivered was a "member of his family" (Id.). Where the service in an action against a corporation shows service on an individual, the return may be amended so as to show service on the corporation by service on such individual as agent for the corporation. Pennsylvania Casualty Co. v. Thompson, 123 Ga. 240, 51 S. E. 314.

79. King v. Davis, 137 F. 198.

80. King v. Davis, 137 F. 198. Where a person not an officer is authorized to make service, he is authorized by necessary implication to amend his return according to the facts. First Nat. Bank v. Kromer [Wis.] 105 N. W. 823.

81. As where a long interval lapses between the return and the motion to amend. King v. Davis, 137 F. 222.

82. And upon such amended return the court may enter judgment, the defendant having opportunity to be heard before such entry. First Nat. Bank v. Kromer [Wis.] 105 N. W. 823.

83. Rev. St. 1895, art. 1239. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

84. Schmidt v. Hoffmann [Wis.] 105 N. W. 44.

85. King v. Davis, 137 F. 222. Where, pending a motion to vacate a judgment at law on account of a return of service invalid on its face, a motion to amend is made, the motion to vacate will not be granted if the amended return be true in fact. Id.

86. Where such an amendment is allowed the defendant should be allowed to demur, and plead instanter, notwithstanding a default judgment which was entered upon the defective return. Pennsylvania Casualty Co. v. Thompson, 123 Ga. 240, 51 S. E. 314.

87. The Virginia statute relating to the filing of notices of lis pendens does not apply to the Federal courts for this state, and the mere pendency of the suit operated as notice. King v. Davis, 137 F. 222.

88. An assignment of error that the court erred in proceeding with the trial after sustaining a motion to quash the service of the citation, where it appears from the record that permission to amend the return was granted, and there is nothing to show that

tional transcript is filed which shows service, such additional transcript is conclusive in the appellate court.[89]

Impeachment or contradiction of return.[90]—The return is generally held to be conclusive upon the officer making it[91] and upon the parties to the suit or action,[92] and cannot be contradicted except for fraud or mistake,[93] or in a direct action against the sheriff for making a false return.[94] This strict rule of the common-law as to the conclusiveness of the return has been considerably relaxed in many of the states,[95] though in such states the officer's return is deemed prima facie evidence of the facts stated therein.[96] A court has no jurisdiction to compel an officer to change his return.[97] If the return is false, the injured party has a remedy against sheriff and surety.[98] An order setting aside a return valid on its face is a final appealable order.[99] Where the statute provides that a written admission of service shall be sufficient proof of service, such an admission is conclusive.[1] The authority of the purported officer who made the return may be impeached,[2] and where it appears that the person who made an unsworn return was not an officer in fact, the probative value of the return is destroyed.[3] So, also, where the process was not served by the

the return was not amended before the conclusion of the trial, will not be sustained. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

89. Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

90. See 4 C. L. 1081.

91. A sheriff having made a specific return, it is not competent for him to contradict it. Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205.

92. Meyer v. Wilson [Ind.] 76 N. E. 748. Rule applies whether service be personal or constructive. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880. Evidence dehors the record is not admissible to contradict it. Id.; Ben Franklin Coal Co. v. Pennsylvania Water Co., 25 Pa. Super. Ct. 628. A sheriff's formal and correct return of his writ cannot be overthrown by parol evidence. Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205. Where the return is regular on its face it is conclusive, in the absence of fraud, as against a collateral attack. Return that summons was served by leaving a true and certified copy at defendant's last and legal place of residence. Tyler v. Davis [Ind. App.] 75 N. E. 3. A judgment is not subject to collateral attack for want of proper proof of service where the record recites that the judgment was entered according to law. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138. Where the court has passed upon the sufficiency of the service, as a general rule the judgment is not subject to collateral attack on the ground of defective service. This rule applies even in courts of inferior jurisdiction, as in justices' courts. Meyer v. Wilson [Ind.] 76 N. E. 748. Where the statute provides that certain suits may be brought before justices of the peace in the township in which the defendant may be found, a constable's return of service on the defendant in the township where the suit was brought is conclusive of the justice's jurisdiction. Rev. St. 1899, § 3839. Kerr v. Quincy, etc., R. Co., 113 Mo. 1, 87 S. W. 596. See 6 C. L. 235, and see especially 4 C. L. 304, where the question as to the conclusiveness of the return is discussed at length in connection with the matter of equitable relief on the ground of false or fraudulent return. See Judgments, 6 C. L. 214.

93. See 4 C. L. 1080, n. 37.

94. Regent Realty Co. v. Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

95. Illinois: While an officer's return cannot be contradicted so as to defeat jurisdiction, yet it may be done to excuse a default. Cooke v. Haungs, 113 Ill. App. 501.

Iowa. Buck v. Hawley [Iowa] 105 N. W. 688. A judgment may be enjoined for lack of service, though the return shows service and the judgment recites due service. Id. Where a return showing service on two defendants is attacked by one of the defendants as false, the evidence of the other defendant that he was not served is admissible as going to show the falsity of the whole return. Id.

Nebraska: The return of an officer may be impeached by extrinsic evidence. Goble v. Brenneman [Neb.] 106 N. W. 440.

South Dakota. Matchett v. Liebig [S. D.] 105 N. W. 170.

96. Matchett v. Liebig [S. D.] 105 N. W. 170. Such presumption can be overcome only by clear and satisfactory proof. Id. Sheriff's return. Rev. St. 1901, par. 1088, so provides. Where, in an action against a corporation, return showed service on local agent, and there was evidence corroborating the return, allegations of want of service of process in a motion to set aside the judgment held unavailable. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 80 P. 397.

97, 98. Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205.

99. Ben Franklin Coal Co. v. Pennsylvania Water Co., 25 Pa. Super. Ct. 628.

1. See Mont. Code Civ. Proc. § 642. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737.

2. In injunction proceedings. Buck v. Hawley [Iowa] 105 N. W. 688.

3. Notwithstanding Code Iowa 1897, § 3524, providing that the truth of the return

officer, and a false return has been procured through the fraud of the plaintiff or by a conspiracy between him and the officer, the return is not conclusive.[4] Federal courts of equity will entertain a bill to vacate a judgment on the ground of a false return where the plaintiff participated in the fraud,[5] or where the service and return were made by an unofficial person,[6] but such a bill will not be entertained where the plaintiff was not connected with the fraud and the person making the service and return was an officer.[7] But in no case has a Federal law court the power, after the end of the term, to set aside its final judgment on the ground of a false and fraudulent, but apparently valid, return of service.[8]

Waiver of irregularities.[9]—Where a plea in abatement is filed for defects appearing upon the face of the papers, an answer to the merits filed at the same time is a general appearance and waives defects in the return.[10] But where a return of substituted service by leaving a copy with the defendant's wife is insufficient by reason of the failure of the return to show that the wife was a member of his family, the defect is not cured by the subsequent service of a notice to amend the declaration.[11]

Return on constructive service, and proof of service by publication.[12]—Proof of service by publication must in most states be made by the affidavit of the publisher, together with a printed copy of the summons as published,[13] and a statement that publication was for the full number of weeks.[14] Where the affidavit states that the paper is "printed and published" at a certain town in the county, and the evidence shows that the paper, though issued at the town named, is printed at another town in the county, the variance is immaterial.[15] Where it is provided that an affidavit of the publication must be filed within a certain time, an affidavit filed after the expiration of the time limit is not the only evidence of the publication where the record recitals show that all was done that was necessary to the validity of the judgment.[16]

§ 7. *Defects, objections, and amendments. In general.*[17]—Defects in the process must be distinguished from defects in the return.[18] Where the process is sufficient to put the defendants upon notice it will be held sufficient, whatever may be its informality.[19] Error in refusing to quash a summons as to one of several de-

is proven by the signature of the officer, of which the court shall take judicial notice. Buck v. Hawley [Iowa] 105 N. W. 688. See 4 C. L. 304.

4. Meyer v. Wilson [Ind.] 76 N. E. 748.

5. Even though the service and return were made by an officer. King v. Davis, 137 F. 222.

6. Even though the plaintiff did not participate in the fraud. King v. Davis, 137 F. 222.

7. King v. Davis, 137 F. 222.

8. But this does not mean that the court has not the power in such case to control the execution of its final process so as to prevent injustice being done. King v. Davis, 137 F. 222.

9. See 4 C. L. 1081.

10. Although the statute requires all the defendant's defenses to be included in one answer, matters on the face of the return, however, not being proper matters for plea or answer. Thomasson v. Mercantile Town Mut. Ins. Co., 114 Mo. 109, 89 S. W. 564.

11. King v. Davis, 137 F. 222.

12. See 4 C. L. 1082.

13. 2 Ball. Ann. Codes & St. § 4882. Warner v. Miner [Wash.] 82 P. 1033.

14. A certificate of publication which does not show that the notice therein referred to was published once in each week for four successive weeks is void, and will not support service by publication. Tobin v. Brooks, 113 Ill. App. 79.

15. The statute required that the paper be printed and published in the county without reference to the town. The variance was therefore immaterial. Warner v. Miner [Wash.] 82 P. 1033.

16. The judgment recited that the defendant's default was "regularly entered according to law," and this was held to be sufficient evidence that the affidavit was filed in time, though there was another affidavit in the records filed too late. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138.

17. See 4 C. L. 1082.

18. See ante, § 6. Return and proof of service.

19. Subpoena in bankruptcy proceedings. Ball v. Hartman [Ariz.] 83 P. 358.

fendants is harmless as to the others where the others are duly served, appear, and claim to be the exclusive owners of the property which constitutes the subject-matter of the controversy.[20] Where an action is dismissed for want of service, the court should find the facts, which will be conclusive upon an appeal.[21]

Alterations. Amendments.[22]—As a general rule amendments are freely allowed at any stage of the action,[23] except that a defective publication of service cannot be amended nunc pro tunc,[24] and one who proceeds on a defective service is at his own cost.[25] The court may by amendment change the name of the defendant,[26] the capacity in which he is sued,[27] may supply a christian name,[28] and may remedy the failure of the indorsement to state the amount which the plaintiff will claim.[29] As to whether the summons may be amended as to the return day, there is some conflict. On one hand it has been held that a summons commencing an action cannot be amended as to the return day, there being no statute to authorize it,[30] while on the other hand it has been held that a mistake in the return day of the summons is curable by amendment, even after objection to the jurisdiction of the court on that very account.[31] The right to amend may be lost by laches.[32] An order permitting an amendment so as to change the action from one against defendants representatively, to one against them individually, should allow costs to defendants.[33]

When objections made.[34]—After joinder of issue by judgment by default, an exception to the jurisdiction ratione personae comes too late.[35]

How objections made.[36]—A party may appear specially and object to irregularities in the service of process.[37] Any defect in a writ, its service or return, which

20. Tyler v. Davis [Ind. App.] 75 N. E. 3.

21. But failure to find the facts is not fatal where there is no substantial conflict in the affidavits upon which the motion to dismiss was made. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

22. See 4 C. L. 1082.

23. Code Civ. Proc. § 723. Summons signed by different attorneys for different plaintiffs amended, so that all the plaintiffs were represented by the same attorneys. Jones v. Conlon, 48 Misc. 172, 95 N. Y. S. 255.

24. Hillquit v. Sun Printing & Pub. Ass'n, 97 N. Y. S. 388. A jurisdictional defect, consisting in a failure to properly file the summons, etc., with the clerk as required by Code Civ. Proc. § 442, where service is made by publication, cannot be cured by a nunc pro tunc order. Fink v. Wallach, 47 Misc 247, 95 N. Y. S. 872.

25. One who makes a mistake in publishing a summons, which is discovered by plaintiff's attorneys after three publications, is not liable for money expended, or counsel fees for services in the second action, as on the discovery of the mistake the attorneys should have discontinued publication under the first order and commenced de novo, so that only the expense of the three publications would have been lost. Hillquit v. Sun Printing & Pub. Ass'n, 97 N. Y. S. 388.

26. Where the mortgagor has, unknown to the mortgagee, transferred his interest, and the mortgagee has sued the mortgagor for foreclosure. Greenwood Loan & Guartee Ass'n v. Williams, 71 S. C. 421, 51 S. E. 272.

27. Summons amended by striking out the words "as executors" after the names of defendants, though limitations had barred action against defendants individually. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723.

28. Christian names of the members of a partnership defendant. This applies also to summons from justice's court. Morgridge v. Stoefer [N. D.] 104 N. W. 1112.

29. But such an amendment will not relate back to the date of the issuance of the summons so as to prevent the bar of the statute of limitations, especially where the plaintiff does not rely on his amendment but issues an alias summons. Elmen v. Chicago, B. & Q. R. Co. [Neb.] 105 N. W. 987.

30. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422.

31. Such an amendment relates back to the date of the issuance of the summons so as to prevent the bar of the statute of limitations. Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985.

32. Year and a half delay, after filing answer, in moving to amend so as to change action from one against defendants representatively to one against them individually, held not to constitute laches, the case never having been put on the calendar and not having been moved by either party. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723.

33. Kerrigan v. Peters, 108 App. Div. 292, 95 N. Y. S. 723.

34. See 4 C. L. 1083.

35. West v. Lehmer [La.] 38 So. 969. See infra, Waiver of Irregularities or Lack of Process.

36. See 4 C. L. 1083.

37. The grounds of objection must be

is apparent from an inspection of the record, should be taken advantage of by motion,[38] but where the objection is founded upon extrinsic facts, such facts must be pleaded in abatement;[39] but a plea in abatement to the action is not the proper method of making objection to sufficiency of the service on a corporation by service on its agent.[40] The proper method in such case is a motion to quash.[41] An objection to a variance between the summons and declaration must be raised by motion to dismiss or plea in abatement, and, not being so raised, is deemed to have been waived.[42] Objections to the service cannot be raised by demurrer.[43] Process will not be quashed on a rule supported by defensive matter.[44] Defendant's privilege from service of a summons should be asserted upon an application to get rid of the service rather than by any plea or defense in connection with the merits of the action,[45] and his remedy on the court's refusal to set aside a defective service is by appeal.[46] Insufficient service may in New Jersey be attacked in chancery by plea to the jurisdiction on special appearance,[47] but it is not a common practice in other jurisdictions.[48] A bill of review or rehearing is proper where there has been no legal service.[49] A defect as to the return day may be reached in a direct proceeding in the same action to reverse the judgment for error of the trial court in refusing to quash.[50] A judgment entered on a void service may be set aside on motion.[51] Such a motion is not addressed to the discretion of the court and must be sustained by clear and

specifically stated. Smith v. Delane [Neb.] 104 N. W. 1054.

38. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. Not by plea in abatement. Thomasson v. Mercantile Town Mut. Ins. Co., 114 Mo. 109, 89 S. W. 564. As where the return in an action against a corporation shows service on an individual instead of on the company by service on the individual as agent. Pennsylvania Casualty Co. v. Thompson, 123 Ga. 240, 51 S. E. 314.

39. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193. A plea in abatement that the defendant was not at the time he was served a resident of the state, or voluntarily in the county where the service was made, but was there under arrest and had been brought from his home in another state upon a capias issued out of the county in which the service was made, without stating that defendant was not properly charged with the crime for which he was arrested and brought into said county, was held insufficient, and the insufficiency was not cured by additional averments that the indictment was wrongfully, etc., procured for the purpose of bringing him into the said county, etc., without stating the facts upon which the conclusion alleged was based. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. See ante, § 4 A, Upon Nonresidents, etc.

An objection to a plea in abatement which attempts to raise the issue as to the bona fides of an indictment, and arrest by which the defendant, a nonresident, was brought into the state and county and served with the civil process, that such plea does not allege the facts showing that the indictment and arrest were fraudulent, goes to the substance of the plea and may be made by general demurrer. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

40. Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co. [Ind.] 75 N. E. 649.

41. In this way the plaintiff may have an alias writ, which he could not have if the action were abated. Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co. [Ind.] 75 N. E. 649.

42. Held waived where demurrer was filed. Wabash R. Co. v. Barrett, 117 Ill. App. 315.

43. In bankruptcy proceedings. In re Seaboard Fire Underwriters, 137 F. 987.

44. Rule to show cause with an affidavit setting up res adjudicata. Bruner v. Finley, 211 Pa. 74, 60 A. 488.

45. People v. Smith [N. Y.] 76 N. E. 925, rvg. 106 App. Div. 613, 95 N. Y. S. 1152.

46. Prohibition does not lie. Code Civ. Proc. §§ 3053, 3057, considered. People v. Smith [N. Y.] 76 N. E. 925, rvg. 106 App. Div. 613, 95 N. Y. S. 1152.

47. Motion to set aside is not exclusive, but defendant so pleading may be required to stand by his plea and forego trial of merits. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

48. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

49. Code 1899, c. 124, § 14. Where the defendant has not been served in the state and has not appeared, he is not required by this statute to appear openly in the state as a prerequisite to the right to file his bill of review, such prerequisite being necessary only in attachment where the defendant is proceeded against by publication and does not appear and make defense. Johnson v. Ludwick [W. Va.] 52 S. E. 489.

50. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422.

51. No affidavit of the merits is necessary in support of a motion to set aside a default judgment entered upon void service. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744. See Judgments, 6 C. L. 214.

satisfactory evidence,[52] and a court will not set aside a decree on the ground that it is void for want of service, without notice to the parties to be affected and a chance to be heard.[53] A judgment without legal service may be enjoined,[54] and where a judgment is entered upon a void process, a direct action may be maintained to set it aside;[55] but a domestic judgment, regular on its face, cannot be collaterally attacked for want of process of service.[56] A foreign judgment, however, may be collaterally attacked on the ground that there was no service of process on the defendant,[57] and this does not violate the comity between the states or the provision of the Federal constitution requiring full faith and credit to be given to the judicial proceedings of sister states.[58]

Waiver of irregularities or lack of process.[59]—Process and service or defects therein are waived by appearance and answer to the merits,[60] or by entering appearance generally and demurring to the petition,[61] or by demurrer and answer.[62] Where the defendant in an attachment proceeding withdraws a motion to set aside the service, and asks for and obtains time to answer, this is a submission to the jurisdiction of the court.[63] Giving bond in replevin is such an appearance as waives service or defects in the process.[64] So, also, the giving of an appeal bond is a waiver of any question as to the jurisdiction of the appellate court, and such court will not consider the refusal of the lower court to quash the summons where the case is tried de novo on appeal,[65] but not so where the appellate court sits as a court of er-

52. Evidence held insufficient to show that defendant was not served. Matchett v. Liebig [S. D.] 105 N. W. 170. See Judgments, 6 C. L. 214.

53. Divorce. See Ball. Ann. Codes & St. § 4886a. Dwyer v. Nolan [Wash.] 82 P. 756.

54. But the injunction will not be granted where it is not alleged and proved that the complainant has a meritorious cause of action. Meyer v. Wilson [Ind.] 76 N. E. 748. See ante § 6, Impeachment or Contradiction of Return.

55. Where the action is to set aside a judgment of a justice of the peace on the ground that he was not a justice de jure or de facto, the complaint must declare that the justice was not elected at the general election preceding and has not duly qualified. Kane v. Arneson Mercantile Co., 94 Minn. 451, 103 N. W. 218.

56. A plea to a writ of scire facias to revive a judgment, denying service in the original action, is a collateral attack on the original judgment and inadmissible. King v. Davis, 137 F. 198, Id., 137 F. 222. See 6 C. L. 247. Where, by statute, repugnant pleas may be filed, a plea in scire facias to revive a default judgment denying service as alleged in the return is not rendered improper because another plea is filed at the same time denying the authority of the person who made the service. See Code Va. 1887, § 3264 (Code 1904, p. 1718). King v. Davis, 137 F. 198.

57. Order made after final decree in divorce case requiring the mother of an infant to whom the custody had been granted, to surrender the custody thereof to the grandfather. In re Culp [Cal. App.] 83 P. 89. Where a foreign judgment is sued on, the defendant may defend on the ground that there was no service of process in the suit in which the judgment was obtained where the transcript of such judgment fails to show affirmatively that the court had jurisdiction. Spiker v. American Relief Soc. [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611.

58. In re Culp [Cal. App.] 83 P. 89.

59. See 4 C. L. 1083.

60. Greenwood Loan & Guarantee Ass'n v. Williams, 71 S. C. 421, 51 S. E. 272; Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858. Summons from directors of unincorporated association. Williamson v. Randolph, 48 Misc. 96, 96 N. Y. S. 644. General appearance waives irregularity in obtaining an order of publication. Landram v. Jordan, 25 App. D. C. 291. Service at a wrong place is waived by voluntary appearance. Stamey v. Barkley, 211 Pa. 313, 60 A. 991. Where a notice to answer indorsed on a bill in equity gives 15 instead of 30, and a motion to dismiss the bill signed by an attorney at law gives as reasons: First that the notice is defective, and second, that the bill sets forth no cause entitling plaintiff to relief, the motion thus signed will be considered a general appearance. Taylor v. McCafferty, 27 Pa. Super. Ct. 122. See Appearance, 5 C. L. 248.

61. Election contest. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

62. Defendant claimed that he was a nonresident and had been served only by publication. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. A general appearance and demurrer to the petition in an election contest waives all objections to the sufficiency of the service of the summons, and the right to afterwards enter a special appearance to object to the jurisdiction of the court over defendant's person. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

63. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

64. Fowler v. Fowler [Okl.] 82 P. 923.

ror.[66] Objection to the service is not waived by a special appearance to set the service aside,[67] nor by a general appearance in support of a motion to set aside a default judgment entered upon such service,[68] nor by filing a demurrer after protesting against the jurisdiction of the court for want of legal service,[69] nor by pleading to the merits after the overruling of a motion to quash to which exception has been taken and made a part of the record,[70] nor by pleading to the merits after filing a plea in abatement for want of service.[71] One may by agreement waive defects.[72]

§ 8. *Privilege and exemptions from service.*[73]—The following persons are exempt from service in civil suits: Officers of foreign corporations temporarily in the state,[74] foreign parties to suits who are in the state in attendance on court,[75] nonresidents brought into the state by any fraudulent artifice or device in order to obtain service in a civil suit,[76] witnesses from other states while in attendance on court.[77] The exemption of parties and witnesses from other states extends not only to the time during which they are actually in attendance on the court, but the time necessary for coming and going,[78] but the exemption of a witness from another state

65. Appeal to district court. Fowler v. Fowler [Okl.] 82 P. 923.

66. Fowler v. Fowler [Okl.] 82 P. 923.

67. Such an appearance does not preclude a motion to remove to the Federal court. Johnson v. Computing Scale Co., 139 F. 339; Dexter v. Lichliter, 24 App. D. C. 222. Where an unauthorized personal service is attempted to be had on a nonresident, while without the jurisdiction, the latter has the right to appear specially, and attacking such service and such appearance will not operate as a waiver of his rights. Id. In an action under D. C. Code § 1531, being an adaptation of the equitable remedy of interpleader, personal service being made upon a nonresident while without the jurisdiction, the filing of an affidavit, by defendant not entitled in the cause, alleging no defense to the action and asking for no relief, but containing proof only of his actual residence at the time of the attempted service upon him, has not the effect of a general appearance. Id. It is not necessary for the defendant in appearing in a court of record to quash a defective summons to cause the record to recite that his appearance is for that purpose only in order to avoid a waiver of the defect. In such case, whether the appearance is general or special is to be determined by the record as it stands at the time the motion is made. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422. Where a person describing himself as the attorney of a fire insurance company, which is a party defendant, makes a full and elaborate affidavit of defense invoking every form of legal defense, except irregularity of service of summons, the company cannot afterwards allege that an appearance filed by such person was an appearance de bene esse for the purpose of having the service of the summons set aside. Southern Bldg. & L. Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. See Appearance, 5 C. L. 248.

68. Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744.

69. And where the court errs in refusing to dismiss for want of sufficient service, it has no jurisdiction to pass on the demurrer. Medical College of Georgia v. Rushing [Ga.] 52 S. E. 333.

70. Summons returned to a day not allowed by law. M. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422; Duke v. Duke [N. J. Eq.] 62 A. 471.

71. See Acts 1897, p. 277, c. 121, §§ 1, 2, Thach v. Continental Travelers' Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255. A defendant does not waive objection to the jurisdiction by answering, after his motion to quash the service and his plea in abatement to the jurisdiction have been overruled and he has been ordered to answer. Duke v. Duke [N. J. Eq.] 62 A. 471. But see ante, § 6, Waiver of Irregularities.

72. Agreement, "We agree that the summons * * * was served * * * and defendant waives all irregularities in the same," held to waive any irregularity. Ammons v. Brunswick-Balke-Collender Co. [C. C. A.] 141 F. 570, afg. [Ind. T.] 82 S. W. 937.

73. See 4 C. L. 1084.

74. Johnson v. Computing Scale Co., 139 F. 339. A secretary of a foreign corporation is exempt from service as such while temporarily in the state, such secretary not having transacted business in the state. Southern Sawmill Co. v. American Hard Wood Lumber Co. [La.] 38 So. 977.

75. Martin v. Bacon [Ark.] 88 S. W. 863. Where the president of a foreign corporation is in the state in attendance on a trial, he is exempt from service as president until a reasonable time has elapsed in which to allow him to depart from the state. Kinsey v. American Hardwood Mfg. Co., 94 N. Y. S. 455.

76. As where the nonresident is arrested upon a fraudulent indictment. Hurd's Rev. St. Ill. 1903, c. 110, § 2. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. See ante, § 4 A, Upon Nonresidents and Their Agents, and § 7. How Objections Made.

77. Even a witness in his own behalf is exempt. Martin v. Bacon [Ark.] 88 S. W. 863. A party attending court in order to avoid a forfeiture of a bail bond is within the spirit of the rule exempting witnesses and parties from other states. Id.

is personal, and does not preclude service in a suit against him in a representative capacity.[79] In Kentucky a resident of one county attending court in another county in obedience to a subpoena or returning therefrom is exempt from service,[80] but a nonresident of the state brought into the state and a certain county under arrest for a crime is not exempt from service in a civil suit,[81] unless the arrest is a mere trick or subterfuge to get him in the county in order to obtain the service.[82]

§ 9. *Abuse of process*[83] is treated elsewhere.[84]

PRODUCTION OF DOCUMENTS, see latest topical index.

PROFANITY AND BLASPHEMY.[85]

Use of profane language in the presence of females does not constitute "disturbing the peace in a loud and boisterous manner or by offensive conduct," in the absence of an averment that the peace of the person hearing it was thereby disturbed.[86] On a prosecution for using profane language in the "presence" of a female, an instruction authorizing conviction if it was used in her "hearing" was sustained.[87] Where defendant, on a trial for using profane language, denies that he ever swore, proof of the use of profanity by him on other occasions is admissible.[88]

PROFERT, see latest topical index.

PROHIBITION, WRIT OF.

§ 1. *Nature, function, and occasion of remedy.*[89]—A writ of prohibition lies only where there is a want of jurisdiction,[90] or where a court or judge or other tri-

78. Martin v. Bacon [Ark.] 88 S. W. 863.

79. Especially as the statutes of Kentucky (St. 1903, § 3846) provide that where personal representatives reside out of the state they shall be removed, thus contemplating that such a representative shall reside in the state. Such representative cannot, therefore, while exercising his office, plead his exemption from service in a suit against him in his representative capacity. Linn v. Hagan's Adm'x, 27 Ky. L. R. 996, 87 S. W. 763; Linn v. Hagan's Adm'x, 27 Ky. L. R. 1113, 87 S. W. 1101.

80. Civ. Code Prac. § 542. But this statute refers only to the venue and when a party is properly sued in his own county or in a county where the court would otherwise have jurisdiction, he may be served while attending court in such county in obedience to a subpoena. Linn v. Hagan's Adm'x, 27 Ky. L. R. 996, 87 S. W. 763; Linn v. Hagan's Adm'x, 27 Ky. L. R. 1113, 87 S. W. 1101.

81. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

82. Plea in abatement held insufficient to raise the issue as to the bona fides of the arrest, etc. Willard v. Zehr, 215 Ill. 148, 74 N. E. 107. See ante § 4 A, Upon Nonresidents or Their Agents, and § 7, How Objections Made.

83. See 4 C. L. 1084.

84. See Malicious Prosecution and Abuse of Process, Special Article, 4 C. L. 470, supplemented in 6 C. L. 490.

85. See also, Disorderly Conduct, 5 C. L. 1023; Indecency, Lewdness and Obscenity, 5 C. L. 1776.

86. Ex parte Boynton [Cal. App.] 82 P. 90.

87. Roberts v. State, 123 Ga. 505, 51 S. E. 505.

88. Lampkin v. State [Tex. Cr. App.] 85 S. W. 803.

89. See 4 C. L. 1084.

NOTE. Definition: The writ of prohibition is one which commands the person to whom it is directed not to do something which the court is informed he is about to do. It will not lie after the cause is ended. United States v. Hoffman, 4 Wall. [U. S.] 158, 18 Law. Ed. 354; State v. Burckhartt, 3 West. Rep. 806, 87 Mo. 533; Ex parte Gordon, 104 U. S. 516, 26 Law. Ed. 814. Prohibition does not lie to restrain an inferior tribunal, after its judgment has been given and fully executed. Haldeman v. Davis, 28 W. Va. 324. It cannot be assumed that any tribunal will act in a matter over which it has no jurisdiction, and until it has done some act to indicate its intention to do so, prohibition will not lie. Romberger v. Water Valley, 63 Miss. 218. It will not issue to restrain the execution of a judgment unless it clearly appears that the court is without jurisdiction. State v. Lapeyrollerie, 38 La. Ann. 264. Nor will it lie to restrain a superior court from proceeding in a matter alleged to be in excess of its jurisdiction, unless the attention of the superior court has

bunal is proceeding in excess of the jurisdiction conferred.[91] The remedy is usually preventive rather than corrective,[92] and will not lie to correct anticipated errors in matters of which a court has jurisdiction;[93] but where an inferior court has acted in excess of its jurisdiction, but something remains to be done to give full effect to its judgment, the writ may be granted not only to prevent further illegal action but also to undo what has been done.[94]

first been called to the alleged excess of the jurisdiction. Baughman v. Calaveras Co. Super. Ct., 72 Cal. 572.—From note Walcott v. Wells [Nev.] 9 L. R. A. 59.

90. People v. Davy, 105 App. Div. 598, 94 N. Y. S. 1037. Prohibition is used to prevent a court from exercising a jurisdiction it does not possess. Tehan v. Brown [Mass.] 77 N. E. 313. In New York, writ of prohibition may issue out of supreme court to restrain a judge or party from further proceeding in the action or special proceeding complained of. Code Civ. Proc. §§ 2091-2096. People v. Trial Term, Part 1 (Cr. Br.), of Supreme Ct. for New York County [N. Y.] 76 N. E. 732. Civ. Code, § 3423 prohibits an injunction to prevent a legislative act by a municipal corporation. Hence, prohibition lies to prevent a court of equity from restraining a board of supervisors from acting on an application for formation of a reclamation district. Glide v. Superior Court of Yolo County, 147 Cal. 21, 81 P. 225. Judge of circuit court has no jurisdiction to issue writ of prohibition against city council to prevent removal of police officers. Hence, supreme court of appeals will issue writ prohibiting circuit judge from proceeding further with a rule to show cause. Campbell v. Doolittle [W. Va.] 52 S. E. 260. Prohibition is the proper remedy to prevent a city police judge from taking jurisdiction of an offense committed in territory not legally annexed to the city. City of Bardstown v. Hurst [Ky.] 89 S. W. 147. Although disqualification of the judge of a superior court deprives him of authority to render judgment in any action in that court, it does not take from the court jurisdiction in a cause properly brought in that county. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129.

91. People v. Davy, 105 App. Div. 598, 94 N. Y. S. 1037. The writ should not issue unless it clearly appears that the inferior court is about to exceed its jurisdiction. United States v. Scott, 35 App. D. C. 88. Prohibition is granted only when the proceedings of the inferior tribunal are without or in excess of its jurisdiction. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129. Rev. St., § 4929 does not authorize suspension of an attorney on mere production of the record of his conviction pending his appeal, with stay of execution, and prohibition will issue when the circuit court indicates an intention to take such action. State v. Sale, 188 Mo. 493, 87 S. W. 967. Prohibition lies to prevent the circuit and county court judges from proceeding further in an injunction proceeding to restrain a county officer from refusing to allow inspection of his books, since those courts may punish as for contempt disobedience of lawful orders they may make, and this is an adequate remedy. McWilliams v. Burnes [Mo. App.] 90 S. W. 735.

92. People v. District Ct. of Denver, 33 Colo. 293, 80 P. 908.

93. Prohibition cannot be used to correct anticipated errors, but will issue only when the inferior tribunal is proceeding or is about to proceed in excess of its jurisdiction. Klnard v. Police Court of City of Oakland [Cal. App.] 83 P. 175. Prohibition will not issue to an inferior tribunal unless it is acting or is about to act in excess of its jurisdiction. Code Civ. Proc. § 1102. Raine v. Lawlor [Cal. App.] 82 P. 688. Where allegations for injunction conferred jurisdiction on court, prohibition would not lie to prevent continuance of the injunction. Sanders v. Emmer [La.] 39 So. 631. Though the granting of an appeal would be illogical and inconsistent with previous rulings, prohibition would not lie to prevent it. Xavier Realty v. Louisiana R. & Nav. Co., 114 La. 484, 38 So. 427. Where the subject matter is within the jurisdiction of the circuit court, prohibition will not issue to prevent its taking jurisdiction on the ground that it may erroneously decide that the petition is sufficient. The sufficiency of the pleading is for the circuit court. State v. Gates, 190 Mo. 540, 89 S. W. 881. Prohibition will not be allowed to guard against a future apprehended error of an inferior court against which, if the error should be committed, there would be an adequate remedy by appeal. People v. Smith [N. Y.] 76 N. E. 925. It will not lie, where the court has jurisdiction, to prevent an erroneous exercise of its jurisdiction. State v. District Ct. of Second Judicial Dist., 32 Mont. 394, 80 P. 673. Where a motion is made to strike an answer from the files under Code Civ. Proc. § 3306, and the court is considering that motion, of which it has jurisdiction, prohibition will not lie to restrain it from exercising such jurisdiction on the ground that § 3306 is invalid. Id. An allegation that an election contestant did not comply with Rev. St. 1899, §§ 7180, 7182, requiring a statement of election expenses to be filed, is not ground for a writ prohibiting the circuit court from proceeding with an election contest, since the effect of failure to comply with such law, and the question whether there was a noncompliance is for the circuit court. State v. Taylor [Mo.] 91 S. W. 917. The supreme court will not prohibit the circuit court from proceeding in an election contest, though the notice of the contest appears to the higher court to be defective where the defects are remediable, since the circuit court has jurisdiction of such contests by Const. art. 8, § 9, and Rev. St. 1899, § 7029. State v. Hough [Mo.] 91 S. W. 905. On application to prohibit the circuit court

The writ does not issue as a matter of right, but only in the sound discretion of the court[95] in cases of supreme necessity, where the grievance cannot be redressed by ordinary proceedings at law or in equity, or by appeal.[96] Prohibition is therefore inappropriate where there is an adequate remedy by appeal,[97] writ of error, or cer-

from ordering the ballot boxes opened, the supreme court will not, therefore, decide whether the preliminary proof has been sufficient to warrant such order. Id.

Note: A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. Smith v. Whitney, 116 U. S. 167, 29 Law. Ed. 601; Ex parte Gordon, 104 U. S. 515, 26 Law. Ed. 814; Ex parte Detroit River Ferry Co., 104 U. S. 519, 26 Law. Ed. 815; Ex parte Hagar, 104 U. S. 520, 26 Law. Ed. 816; Ex parte Pennsylvania, 109 U. S. 174, 27 Law. Ed. 894; State v. Rombauer, 99 Mo. 216.—From note, Walcott v. Wells [Nev.] 9 L. R. A. 59.

94. People v. Dist. Ct. of City of Denver, 33 Colo. 293, 80 P. 908.

95. People v. Trial Term Part 1, (Cr. Br.) of Supreme Court of New York County [N. Y.] 76 N. E. 732; People v. Smith [N. Y.] 76 N. E. 925.

96. People v. Trial Term Part 1, (Cr. Br.) of Supreme Court of New York County [N. Y.] 76 N. E. 732.

97. While a writ of prohibition will lie to an inferior court where it is acting manifestly beyond its jurisdiction, such writ will issue only when there is no other remedy. Alexander v. Crollott, 26 S. Ct. 161. Where defendant in forcible entry and detainer claimed to own the property and alleged lack of jurisdiction of the justice, and the decision of the justice was against him, his remedy was an appeal to the district court under New Mexico Code, § 3358, and not prohibition. Id. The objection that there is another action pending between the same parties for the same cause must be raised by demurrer or answer, from a ruling upon which an appeal may be taken, hence prohibition does not lie to prevent a judge from taking jurisdiction for that reason. Kastor v. Elliott [Ark.] 91 S. W. 8. Prohibition to police court to restrain prosecution for violation of alleged invalid ordinance denied, where petitioner had been convicted only once and had the right to appeal. United States v. Scott, 25 App. D. C. 88. Where there has been a hearing and submission of the cause, and the judge has directed counsel for plaintiff to draw findings and the form of an interlocutory decree, prohibition will not lie, since an appeal from such decree will afford an adequate remedy. Carr v. Superior Court of Monterey County, 147 Cal. 227, 81 P. 515. Prohibition will not issue upon application by an heir to prohibit a superior court from ordering payment of an inheritance tax by the estate, since such an order is appealable, and an appeal would afford an adequate remedy. Cross v. Superior Court of San Francisco [Cal. App.] 83 P. 815. Prohibition does not lie to prevent a court from exercising its jurisdiction, in a prosecution of a misdemeanor, on the ground that a dismissal of the same charge barred the prosecution, since the question whether or not the prosecution is barred, within Pen. Code, §§ 1385, 1387, is within the jurisdiction of the court, and defendant has an adequate remedy by appeal for error. Kinard v. Police Court of City of Oakland [Cal. App.] 83 P. 175. On application for prohibition against a special circuit judge the propriety of his order in appointing the receiver or directing him to take charge of the property cannot be inquired into. The remedy is by appeal. Dupoyster v. Clarke [Ky.] 90 S. W. 1. On its appearing that there is an adequate remedy by appeal, the writ of prohibition will be recalled. Barbier v. Nagel [La.] 39 So. 447. Where a court has jurisdiction to render a judgment from which an appeal lies, prohibition will not ordinarily issue to restrain execution of the judgment. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 705. Where a default has been entered against a garnishee defendant, and an interlocutory judgment entered against him, and a reference made to determine the amount of the judgment, the defendant's motion to quash service having been previously denied, prohibition does not lie to restrain further proceedings. Gorman v. Calhoun Circuit Judge [Mich.] 103 N. W. 567. The objection that service was had on defendant in an action before a justice, while subpoenaed as a witness in another court, cannot be raised by prohibition. Defendant should attack the service in justice court, and if error was made, appeal. People v. Smith [N. Y.] 76 N. E. 925. Denial of a motion to dismiss an indictment on the ground that defendant had been compelled to testify against himself before the grand jury is appealable in New York (Code Cr. Proc. §§ 485, 517, 519, subd. 3). Hence prohibition does not lie to restrain proceeding with a case. People v. Trial Term Part 1 (Cr. Br.) of Supreme Ct. of New York County [N. Y.] 76 N. E. 732; People v. Davy, 105 App. Div. 598, 94 N. Y. S. 1037. If an order vacating a judgment affects a party's substantial rights, it is appealable, hence prohibition would not in such case lie. State v. Tallman, 38 Wash. 132, 80 P. 272. An appeal from an order discharging a writ of garnishment is an adequate remedy, since a bond pending the appeal will preserve the fruits of the garnishment, hence prohibition will not lie to restrain such discharge. State v. Superior Ct. of King County [Wash.] 83 P. 14. A writ of prohibition cannot be made a process for correction of errors and take the place of an appeal or writ of error. City of Grafton v. Holt [W. Va.] 52 S. E. 21. An order made by a disqualified judge is not void but voidable. Hence, appeal, not prohibition, is the proper remedy in such case. Id.

tiorari.[98] It is the rule in Washington that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied in applications for prohibition, and not the mere question of jurisdiction or lack of jurisdiction,[99] and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense.[1] Elsewhere it is held that the fact that the greater part of the expenses of a proceeding could not be recovered as legal costs may be sufficient to render the remedy of appeal inadequate.[2] Where two courts of co-ordinate jurisdiction are proceeding in suits for the same relief, and such courts have made conflicting orders, prohibition lies to settle the conflict of jurisdiction and vacate improper orders,[3] since the remedy by appeal would not in such case be adequate.[4]

The constitutionality of a statute under which proceedings have been instituted will be determined upon an application for prohibition if the remedy by appeal from a judgment in such proceedings would not be adequate.[5]

Prohibition will not issue where the acts of the parties have rendered further action by the court unnecessary,[6] or where the threatened action will not affect the petitioner's substantial rights.[7]

In some states prohibition will issue only to judicial tribunals,[8] and will not go to control nonjudicial or ministerial acts,[9] even though discretionary[10] or performed by judges.[11]

Appeal held not adequate remedy: Remedy by appeal would not be adequate to correct an erroneous injunction granted to prevent consideration by supervisors of an application for formation of a reclamation district. Glide v. Superior Ct. of Yolo County, 147 Cal. 21, 81 P. 225.

98. Prohibition cannot be made to serve the purpose of a writ of error, or certiorari, to correct mistakes of law and fact by a court acting within its jurisdiction. United States v. Scott, 25 App. D. C. 88.

99. Denial of change of venue on ground of nonresidence is not a reason for prohibition. State v. Superior Ct. of Spokane County [Wash.] 82 P. 877.

1. There must be something in the nature of the action or proceeding rendering appeal an inadequate remedy. State v. Superior Ct. of Spokane County [Wash.] 82 P. 877. Appeal from final judgment is adequate remedy for error in denying change of venue on ground of nonresidence. Id.

2. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70.

3. Wells v. Montcalm Circuit Judge [Mich.] 12 Det. Leg. N. 301, 104 N. W. 318. Where wife commenced suit for divorce and custody of child, and process had been placed in an officer's hands, but had not been served, another circuit court had no right to entertain a suit by the husband for similar relief; hence, prohibition should issue to restrain the latter court from proceeding and to vacate its orders. Id.

4. Wells v. Montcalm Circuit Judge [Mich.] 12 Det. Leg. N. 301, 104 N. W. 318.

5. Bell v. First Judicial Dist. Court [Nev.] 81 P. 875. Comp. Laws, §§ 1642-1645, provide that upon complaint by a private complainant for malfeasance of officers the matter will be summarily heard, and that if an order of removal is made, the officer shall not hold office pending an appeal therefrom. Held an appeal would not be an adequate remedy, and the constitutionality of the law may be determined on application for prohibition. Id.

6. Where only issues presented on application to supreme court for prohibition have become abstract questions, or only such as are within appellate jurisdiction of court of appeals, supreme court will not act. Albert Mackie Grocery Co v. Pratt, 114 La. 341, 38 So. 250.

7. If order vacating a judgment does not affect a party's substantial rights, he has no standing to demand prohibition. State v. Tallman, 38 Wash. 132, 80 P. 272.

8. The writ runs to courts, not to individuals, and will not issue against civil sheriff. Albert Mackie Grocery Co. v. Pratt, 114 La. 341. 38 So. 250. Prohibition will not issue to prevent a member of a special tribunal, created under Code 1899, c. 6, § 15, to hear election contests, from sitting and acting with such body, since it is a subordinate legislative, not a judicial tribunal. McWhorter v. Dorr, 57 W. Va. 608, 50 S. E. 838.

9. In West Virginia prohibition can go only against judicial action, or quasi judicial action. Campbell v. Doolittle [W. Va.] 52 S. E. 260. Prohibition does not lie to prevent a county court from granting a liquor license, even where the county court acts beyond its jurisdiction, since the act is not judicial but administrative in its nature. Virginia-Pocahontas Coal Co. v. McDowell County Ct. [W. Va.] 51 S. E. 1.

10. Removal of police officer by city council is nonjudicial action not controllable by prohibition. Campbell v. Doolittle [W. Va.] 52 S. E. 260.

11. Allowance of claim for construction of bridge by commissioners' court is a ministerial act. Goodwin v. State [Ala.] 40 So. 122.

Prohibition does not lie to try a right to public office.[12]

In Idaho the writ will not issue against city authorities acting within the scope of authority conferred on them by statute.[13] In South Carolina prohibition is not the proper remedy for relief from an illegal ordinance, where lack of jurisdiction and power to pass ordinances relating to the general subject is not claimed.[14]

§ 2. *Practice and procedure.*[15]—An application for prohibition, on the ground that a motion for change of venue because of disqualification of the judge has been made, which the judge refuses to hear, must present facts which will establish the disqualification of the judge.[16] In Montana an order of the district court sustaining a motion to quash an alternative writ of prohibition is not appealable.[17]

Jurisdiction to grant the writ may be expressly conferred by statute.[18] Prohibition will not lie to give the appellate court jurisdiction to try an issue which it would not have jurisdiction to try on appeal.[19] The Federal supreme court cannot grant prohibition in cases over which it has neither original nor appellate jurisdiction.[20] In California, when a case is such that an appeal from the judgment of the lower court would properly be taken to the district court of appeal, a petition to prohibit the proceeding should be addressed to that court and not the supreme court.[21] The court of civil appeals of Texas has no power to issue a writ of prohibition to an inferior court where the writ is not sought in aid of its appellate jurisdiction.[22] In West Virginia a judge of the supreme court of appeals may, in vacation, issue a rule to show cause why the writ of prohibition should not issue.[23]

PROPERTY.[24]

Definition and nature.[25]—In the general sense[26] "property" has recently been held to include dogs,[27] the possessory right of the locator of a mining claim on public lands,[28] a riparian right apart from the intrinsic worth of the underlying land.[29] Liquor tax certificates are not property in a full sense.[30] Letters patent have no locality as property but that of the person of the owner.[31]

Possession.—In the absence of actual possession it follows the legal title.[32]

12. Plain and adequate remedy provided by Code 1896, p. 966, c. 94, § 3420. Goodwin v. State [Ala.] 40 So. 122.

13. Writ will not issue to prohibit assessment of property to pay bonds, and to certify a levy and assessment to the county collector for collection as other taxes, such action being authorized by Laws 1903, p. 34, § 12, subd. 10, and Sess. Laws 1899, p. 209, § 86. Denning v. Moscow [Idaho] 83 P. 339.

14. Riley v. Greenwood [S. C.] 51 S. E. 532.

15. See 4 C. L. 1087.

16. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129.

17. State v. Hawkins [Mont.] 82 P. 952.

18. Acts 1901, p. 107, § 2, giving the judge of the Walker county court authority to issue the writ of prohibition, is not repealed by § 1112 of those laws. Goodwin v. State [Ala.] 40 So. 122.

19. Where subject matter of controversy had ceased to exist, prohibition would not lie to try issue of costs only. State v. Tallman, 38 Wash. 132, 80 P. 272.

20. In re Commonwealth of Mass., 197 U. S. 482, 49 Law. Ed. 845.

21. Collins v. Superior Court, 147 Cal. 264, 81 P. 509.

22. Dunn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 665, 88 S. W. 532.

23. Code 1899, c. 110, § 1, so providing, is valid. Campbell v. Doolittle [W. Va.] 52 S. E. 260.

24. **Includes** general principles pertinent to the nature of property. See 4 C. L. 1087, n. 31.

25. See 4 C. L. 1087.

26. See particular meanings. Constitutional Law, 5 C. L. 619; Eminent Domain, 5 C. L. 1097 and like titles.

27. Reed v. Goldneck, 112 Mo. App. 310, 86 S. W. 1104.

28. O'Connell v. Pinnacle Gold Mines Co. [C. C. A.] 140 F. 854.

29. Waterford Elec. Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

30. People v. Flynn, 48 Misc. 159, 96 N. Y. S. 653.

31. Hildreth v. Thibodeau, 186 Mass. 83, 71 N. E. 111.

32. Lindsay v. Austin, 139 N. C. 463, 51

There cannot be two conflicting constructive possessions.[33] A possessor's rights are superior to a stranger's.[34] A bare possessor has a right superior to trespassers or strangers,[35] but by contract with one respecting the property he may attorn his possession.[36]

Realty or personalty.[37]—Applying the ordinary tests, growing strawberry plants,[38] crude turpentine run into boxes which are part of the tree,[39] and natural gas drawn from the earth in pipes[40] are personalty, while trees sold but not yet severed are real estate,[41] as are all fixtures.[42] A meteorite is real property until severed from its place,[43] and severance must be proved,[44] which is not done by a mere tradition that Indians used it in tribal and religious rites, to which end they supposedly had dug it from the ground and set it up.

Formulae, processes, literary and like mental productions.[45]—Literary property becomes free by publication.[46] Hence a printer, who being entrusted with plates of a book struck off copies and sold them, is not liable except he violated a copyright[47] or his contract,[48] but at most is guilty of conversion,[49] if the title to the plates having been made by him had passed to the employer.[50] If the printer's act was a mere unauthorized use by a bailee, he would be liable for the value of the use of the property with any damage to it,[51] or, if it was a conversion, then for the value of the property.[52] But in neither case is he liable for the value of the books sold.[53] The title of the books is not in such case in the employer, there being no trusteeship,[54] and in the absence of either that or copyright an injunction against sale by the printer will not issue, or an accounting be allowed.[55] The purchaser with knowledge of a secret process, from one who obtained it by inducing a violation of confidence re-

S. E. 990; Ladd v. Powell [Ala.] 39 So. 46; St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852.

33. Gilmore v. Schenck [La.] 39 So. 40.

34. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

35, 36. Casto v. Murray [Or.] 81 P. 883. Anyone holding from or for another admits his possession. Cobb v. Robertson [Tex.] 86 S. W. 746.

37. See 4 C. L. 1087.

38. Cannon v. Mathews [Ark.] 87 S. W. 428.

39. Susceptible of larceny. Dickens v. State [Ala.] 39 So. 14.

40. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15.

41. King v. Davis, 137 F. 222.

42. See Fixtures, 5 C. L. 1431.

43, 44. Oregon Iron Co. v. Hughes [Or.] 81 P. 572.

Note: Both the main facts in the case and the theory of severance by the Indians, brought forward by the defendant, are unusual and peculiar. Evidence was introduced that the meteorite, which lay in a saucer like depression on top of an eminence, had been the object of worship by the Indians as a "Tomanowas," and that the Indians in time of war laved their faces and dipped their bows and arrows in the water accumulated in the hollows or "potholes" in its surface. As the court found this evidence insufficient to infer a severance by the Indians, however, the defendant's claim as next finder was unsuccessful. As to the main proposition, that a meteorite or aerolite is realty, although not buried in the earth, the court is supported by reason and authority and follows Goddard v. Winchell, 86 Iowa, 71, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788. Although brought to the earth by some planet through natural causes, the mass is one of nature's deposits and presumptively it was primarily a part of the soil or the realty upon which it was discovered. "Minerals lying beneath the surface or on the surface unworked are real estate." Park Coal Co. v. O'Donnell [Pa.] 7 Leg. Gaz. 149.—From 4 Mich. L. R. 77.

The classification of meteorites or aerolites is new to American law. Only one earlier case on the point has been found and this held the meteorite was real property. Goddard v. Winchell, 86 Iowa, 71. It is said to have been so considered under civil law rules, 20 Alb. L. J. 299. The manner of attachment to the soil is certainly somewhat analogous to the growth of land by accretion in that both are the result of natural agencies, and therefore should go to the owner of the fee. 2 Bl. Com. 262. The result might well be the same if they are classed as chattels. They would then be analogous either to wild animals, and so normally belong to the owner of the fee (5 Columbia L. R. 241), or perhaps to objects washed up on the foreshore, which are held to belong to the owner of the foreshore. Barker v. Bates, 13 Pick. [Mass.] 255.—From 5 Columbia L. R. 551.

45. See 4 C. L. 1088.

46, 47, 48, 49, 50, 51, 52, 53, 54, 55. State v. State Journal Co. [Neb.] 106 N. W. 434.

posed in a servant, will not be protected,[56] and an agreement to keep secret the knowledge so purchased is also bad.[57] A party to such a transaction, who afterward obtains a license from the lawful owner, does not hold it in trust for the other fraudulent party.[58] One employed by a contract not specific as to the kind of service to be rendered will not be enjoined from engaging with a different employer, even though he is in possession of trade secrets,[59] but a competing employer scheming to acquire the secret may be restrained from employing him.[60] A royalty contract to transfer formulae and permit the discoverer's name to be exclusively used as a trade mark is not a mere license but a grant,[61] and the same can be forfeited for nonpayment of royalties only when the grant so provides.[62] Royalties on "suggested" preparations may, by the terms of the contract, include some, the process of which the suggester did not originate,[63] and as in other contracts the parties will be bound by the construction they adopt.[64] Chemical tests by reagents may be employed to prove the similarity of a secret process to that acquired by the user under a royalty contract,[65] and will overcome mere statements by the manufacturer that he uses a different process.[66]

Creation and transfer.[67]—Transfer is usually accomplished by sale,[68] gift,[69] inheritance,[70] or will.[71]

Loss and abandonment.[72]—The title to property cannot be lost by abandonment if no other takes possession.[73] A mere disclaimer does not divest title to personalty.[74] Lost property belongs to the finder as against all but the true owner.[75]

PROSECUTING ATTORNEYS; PROSTITUTION; PUBLICATION, see latest topical index.

56. Detinning process. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881. Corporate purchaser is charged with its agent's notice of the fraud. Id. Evidence held sufficient to show such knowledge. Id.

57. Vulcan Detinning Co. v. American Can Co. [N. J Eq.] 62 A. 881. Injunction refused. Id.

58. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

59. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

60. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 61 A. 946.

Note: Where trade secrets are likely to be devulged there are three ways in which the injured party may protect himself by injunction; first by restraining the employe from making known, and any future employer from using, the secrets in question. Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Eastman Co. v. Reidenbach, 20 N. Y. S. 110; Fralich v. Despar, 165 Pa. 24, 30 A. 521; O. & W. Thum Co. v. Floczynski, 114 Mich. 149, 68 Am. St. Rep. 469, 38 L. R. A. 200. Contra. Deming v. Chapman, 11 How. Prac. [N. Y.] 382. Second, the prospective employer may be enjoined from taking the employe into service. This method, though employed in the principal case, does not appear to have been often made uss of by the courts; third, if the employe's contract provides for the exercise of peculiar skill, and in it he expressly stipulates not to work for another, he may be restrained from entering the employ of such other. Harrison v. Glucose Sugar Refining Co., 116 F. 304, 58 L. R. A. 915; Duff v. Russell, 14 N. Y. S. 134. To the contrary are Sanquirico v. Benedetti, 1 Barb. [N. Y.] 315; Delavan v. Marcarte, 1 Ohio Dec. 226. An express negative stipulation, although insisted upon here, has not always been held necessary. Hoyt v. Fuller, 19 N. Y. S. 962; Montague v. Flockton, L. R. 16 Eq. 189; Webster v. Dillon, 3 Jur. [N. S.] 432; see, also, High on Injunctions, 11, 902. The principal case seems very strict, also, in requiring that it must appear affirmatively upon the face of the contract that the services to be performed require peculiar skill. This point was not so strongly insisted upon in Harrison v. Glucose Sugar Refining Co., 116 F. 304, 58 L. R. A. 915.—4 Mich. L. R. 403.

61. Royalties to be paid are the purchase price. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715.

62. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715. Clause reading "under the following conditions" held not to mean that. Id.

63. A contract as modified held to have so intended. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715. A provision that the suggester's name should be given to the preparations is important as showing which should be subject to royalties. Id.

64. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715.

65, 66. He refused to disclose his pretended process. Barclay v. Charles Roome Parmele Co. [N. J. Eq.] 61 A. 715.

67. See 4 C. L. 1088.

68. See Sales, 4 C. L. 1318; Judicial Sales, 6 C. L. 260; Executions, 5 C. L. 1384.

69. See Gifts, 5 C. L. 1587.

PUBLIC CONTRACTS.[76]

§ 1. *Power of government and authority of its officers to contract.*[77]—Municipal corporations may make such contracts as they are expressly authorized to enter into,[78] or are implied as incident to powers granted,[79] and no others.[80] If the meth-

70. See Descent and Distribution, 5 C. L. 995.

71. See Wills, 4 C. L. 1863.

72. See 4 C. L. 1088.

73. Kreamer v. Voneida [Pa.] 62 A. 518.

74. Cole v. Bradner Smith & Co., 111 Ill. App. 210.

75. Larceny is done by artfully getting it from the finder and converting it. Williams v. State [Ind.] 75 N. E. 875.

76. Includes principles general to contracts whereto the public is a party, but not the general law of Contracts (see Contracts, 5 C. L. 664), or the law of particular kinds of public projects, such as Public Works and Improvements (6 C. L. 1143). Building and Construction Contracts (5 C. L. 455), Sewers and Drains (4 C. L. 1429), Waters and Water Supply (4 C. L. 1824), or the law of Municipal Bonds (6 C. L. 704).

77. See 4 C. L. 1089.

78. Under the provisions of Rev. Codes 1899, § 1115a, the township board may purchase graders or other road machinery on its own motion without previous authorization or petition by the freeholders or voters of the township. Bank of Park River v. Norton [N. D.] 104 N. W. 525. Under Rev. Codes 1899, § 1115a, providing that a township board may purchase road machinery "on credit or otherwise," the board may purchase such machinery and order payment out of the general fund in certain cases, instead of by taxation. Id. Under Laws 1895, p. 1687, c. 789, amended by Laws 1896, p. 732, c. 612, and Acts 1901, p. 1, c. 466, the trustees of the New York and Brooklyn Bridge have power to contract for the operation of the Williamsburgh Bridge. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754. Under its charter a city is held to have the right to contract for the construction of a telephone system within its limits to the bidder offering the largest percentage of its gross receipts. City of California v. Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604. The purchase of stationery, blank books, etc., for the use of county officers is to be made by a committee consisting of the county treasurer, auditor, and chairman of the board of county commissioners as provided by Rev. Codes 1895, § 1906, amended by Laws 1899, p. 69, c. 59. Knight v. Cass County Com'rs [N. D.] 103 N. W. 940.

79. A city council sitting as a board of equalization may contract with the city assessor for such information as is necessary in equalizing the assessment roll, and which it is not the assessor's legal duty to furnish. Maurer v. Weatherby [Cal. App.] 81 P. 1083. A rule that if owners refuse to repair defective sidewalks the board of public works may do so gives the board power to award a contract to repair them. Heath v. Manson, 147 Cal. 694, 82 P. 331. A county may make a yearly contract with a physician to render medical service to such persons as the county is liable to supply with such aid. Cochran v. County of Vermilion, 113 Ill. App. 140.

80. Under statutes authorizing a town to make provisions for the maintenance of the poor, and make all contracts necessary for the transaction of business of the town, it may not contract to furnish a certain quantity of produce for a given period whether it be produced on the poor farm or not. Staples v. Walmsley [R. I.] 61 A. 141. Gen. St. p. 622, § 4, authorizing a town to make regulations as to laying sewers through the township, such as might be imposed for laying its own sewers therein, did not authorize a contract relating to the use of a sewer in another municipality. Belleville Tp. v. Orange [N. J. Eq.] 62 A. 331. Burns' Ann. St. 1901, § 7853, prohibiting a county from employing a person to be paid by commission or percentage unless the necessity of such employment and the contract be entered of record, prohibits a contract to pay an accountant one-half the amount he might find due the county by an examination of the public records. Board of Com'rs of Howard County v. Garrigus, 164 Ind. 589, 73 N. E. 82, 74 N. E. 249. Under Hurd's Rev. St. 1903, c. 34, §§ 22-26, and c. 120, par. 329, a county board has no power to employ a tax ferret to search for omitted property. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024. Under the constitution of 1877, a municipal corporation cannot purchase a fire engine and apparatus and give negotiable notes therefor payable annually through a series of years (Town of Wadley v. Lancaster [Ga.] 52 S. E. 335), nor can a resolution passed at a citizens' mass meeting authorize such contract (Id.). Gen. Laws, 25th Leg., p. 138, c. 103, relative to the collection of delinquent taxes, gives the county no authority to contract for the publication of notice of sale of a nonresident's land. Baldwin v. Travis

od of entering into a contract is prescribed by charter or statute, the doctrine of implied contract or estoppel does not apply,[81] but where not so restricted, a contract may be implied.[82] An implied contract arises where an officer with authority appropriates private property for public use,[83] or adopts the device of an inventor who offers its use for a reasonable royalty;[84] but no implied contract arises out of unlawful acts of public officers,[85] or from the adoption of the invention of an employe who leads the officers to believe that no royalty is expected,[86] nor can an implied contract be thrust upon the government against its will.[87] There is no implied contract on the part of the public to pay laborers employed by a contractor of public work.[88]

Public officers[89] or boards[90] have only such power to contract on behalf of the

County [Tex. Civ. App.] 13 Tex. Ct. Rep. 313, 88 S. W. 480. A contract executed without authority of law will not be enforced. Bunch v. Tipton [Ark.] 88 S. W. 888. Contract by the highway commissioner with an engineer to make plans at his own expense for an approach, is not the appointment of a consulting engineer authorized by the board of public improvements under Laws 1897, p. 159, c. 378, § 455. Hildreth v. New York, 97 N. Y. S. 582. A resolution of a town council, "Councilman S. moves whether the council will buy (a certain grader), provided the machine gives satisfaction," only authorizes a test of the machine and not a purchase. Fleming Mfg. Co. v. Franklin [Iowa] 103 N. W. 997. Railroad Law 1850, p. 211, c. 140, requiring the consent of a municipality for the construction of a street railroad does not give a municipality power to contract away or limit the taxing or police power of the legislature under such act. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

81. A city which has procured the benefits of an invalid contract is not liable on the ground of estoppel or implied contract. Fountain v. Sacramento [Cal. App.] 82 P. 637. That the benefits of a contract irregularly entered into have been accepted by a city does not estop it to deny liability thereon. Paul v. Seattle [Wash.] 82 P. 601. Where a promissory note is given in an unauthorized contract, the municipality is not estopped to set up such illegality when sued on the note, though it has retained possession of the property for which it was given. Town of Wadley v. Lancaster [Ga.] 52 S. E. 335.

82. Where one town furnished to the children of another town instruction in its schools, and the director of the former told the director of the latter that tuition would be expected, evidence held to show an implied contract. Town District of Hardwick v. Wolcott [Vt.] 61 A. 471. A city is liable for what it receives under a contract for a water supply, though such contract is void as creating a monopoly. City of Tyler v. Jester & Co., 97 Tex. 344, 78 S. W. 1058.

83. As where an officer uses a patented invention acknowledging the rights of the patentee. Brooks' Case, 39 Ct. Cl. 494. Where the contractor is authorized to use a patented article the government cannot maintain that such use is an infringement by the contractor and not a taking by the government. Id. Where contracts for river and harbor improvements are authorized, a contract in the nature of tenancy is implied for use and occupation of land on the frontage by the engineer in charge. Willink's Case, 38 Ct. Cl. 693.

84. A contract on the part of the government will be implied where officers adopt the device of an inventor who offers its use for a reasonable royalty. Harley's Case, 39 Ct. Cl. 105.

85. No contract of tenancy will be implied for occupation of frontage by government engineers, in charge of river and harbor improvements, where the damages sustained were caused by their illegal acts. Willink's Case, 38 Ct. Cl. 693.

86. No contract on the part of the government is implied where they adopt an invention of an employe who leads the officers to believe that it may be used without the payment of royalty. Harley's Case, 39 Ct. Cl. 105.

87. For the payment of a royalty. Harley's Case, 39 Ct. Cl. 105.

88. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111.

89. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754. A resolution authorizing the mayor to execute a note does not give him authority to execute a bond. Gutta Percha & Rubber Mfg. Co. v. Attalla [Ala.] 39 So. 719. The commissioner of street improvements imposed with the duty of laying out an entrance to a boulevard by Laws 1896, p. 76, c. 57, § 1, amended by Laws 1897, p. 925, c. 679, is not authorized to employ an engineer to make plans for such approach. Hildreth v. New York, 97 N. Y. S. 582. A depot quartermaster has authority to sell unnecessary supplies when directed to do so. Houser's Case, 39 Ct. Cl. 508. A contract entered into by the city of Chicago cannot be altered by the commissioner of public works. City of Chicago v. Duffy, 117 Ill. App. 261. A supplemental contract substantially modifying the provisions of one let cannot be entered into by the mayor or other city officials of Chicago. Id.

90. Authority in a highway commissioner to lay out an approach and make necessary plans is not authority to take any action or make any contracts relative to the construction of the approach. Hildreth v. New York, 97 N. Y. S. 582. A committee authorized to investigate and report the best manner of raising funds for the erection of a court

public as is conferred upon them by law, and one contracting with them is bound to know the scope of their authority.[91] Delegated power,[92] or power conferred to enter into a specific contract,[93] is exhausted by a single exercise thereof.

A department head,[94] or a municipal corporation, may ratify the unauthorized contracts of its agents[95] if it would have had authority to make the contract in the first instance.[96] Ratification may be implied from formal acceptance of the work and assertion in judicial proceedings of claims founded upon it.[97] A contract in violation of a mandatory statute can be ratified only by an observance of conditions essential to a valid contract in the first instance,[98] and, under a rule that a contract cannot be entered into except by ordinance, one entered into in violation of the rule can be ratified only by ordinance.[99] A curative act is not void because of erroneous recitals in its preamble.[1] When an unauthorized contract is ratified, it becomes as binding as if originally authorized,[2] but an attempted ineffectual ratification gives it no force.[3]

house, and to report with plans and specifications, has not authority to decide to build a court house nor to employ architects to draft "working plans and specifications" but only preliminary plans for the information of the board. Kinney v. Manitowoc County [C. C. A.] 135 F. 491. Authority in a committee to procure plans and specifications for a court house at a cost not exceeding $100,000 is not authority to contract with architects for plans of a building to cost such sum exclusive of heating and plumbing. Id. Authority in a committee to prepare and submit plans for a public building by a certain date is not authority to extend the time to architects preparing the plans. Id.

91. Paul v. Seattle [Wash.] 82 P. 601. Since persons dealing with municipalities are conclusively presumed to have notice of the limitations of their powers, there can be no recovery from a city on a contract made without authority, even though officials have represented that the city had power to contract. Citizens' Bank v. Spencer, 126 Iowa, 101, 101 N. W. 643. A contractor is not entitled to presume that the engineer of a drainage commission has authority to consent to the substitution of cheaper materials than the contract calls for. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

92. Power of insane asylum trustees under authority delegated by the legislature to contract with railroad companies with reference to a track across the asylum lands is functus officio when once exercised, and contract cannot be afterward modified. State v. Toledo & O. Cent. R. Co., 3 Ohio N. P. (N. S.) 234.

93. Comp. Laws, § 2908, providing that a city council may contract from year to year or for a period of 10 years for lights, is the full measure of power in this behalf, and when one contract for 10 years has been entered into no other contract can be made during its existence for the same period. Village of Morrice v. Sutton [Mich.] 12 Det. Leg. N. 19, 103 N. W. 188.

94. Where a subordinate officer in the quartermaster department makes a contract beyond the scope of his powers, if not unlawful, it may be ratified by the quartermaster-general. Moran Brothers Co.'s Case, 39 Ct. Cl. 486.

95. Tarentum Borough v. Moorhead, 26 Pa. Super. Ct. 273.

96. A county commissioner's court has no power to ratify a contract which it could not have made. Baldwin v. Travis County [Tex. Civ. App.] 13 Tex. Ct. Rep. 313, 88 S. W. 480.

97. Tarentum Borough v. Moorhead, 26 Pa. Super. Ct. 273.

98. A contract by a city in violation of a mandatory provision of its charter is void. City of Plattsmouth v. Murphy [Neb.] 105 N. W. 293. Where after making a contract it was ascertained that statutory conditions precedent had not been complied with, whereupon the necessary conditions were fulfilled, an alteration of the contract so as to make it refer to the latter proceedings constitutes the making of a new contract and not an attempted ratification of the original one. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389.

99. Paul v. Seattle [Wash.] 82 P. 601.

1. That Acts 25th Gen. Assem., p. 167, c. 179, legalizing a contract for a street improvement, erroneously recited in the preamble that a portion of the work had been done does not render the act void. McCain v. Des Moines [Iowa] 103 N. W. 979.

2. Where trustees of a town library entered into unauthorized contracts but with knowledge thereof, the town accepted their report. Nelson v. Georgetown [Mass.] 76 N. E. 606. That the appointment of a committee to make a contract was invalid is immaterial where the contract was ratified by the council which might have made it in the first instance. Under a statute vesting in the mayor and board of aldermen the duty of carrying into effect a vote of the city council, a formal vote by them adopting a contract made by a special committee ratifies it, though the committee was illegally appointed. Hett v. Portsmouth [N. H.] 61 A. 596.

3. A county cannot be estopped from asserting the invalidity of a contract by an attempted but ineffectual ratification. Baldwin v. Travis County [Tex. Civ. App.] 13 Tex. Ct. Rep. 313, 88 S. W. 480.

It is within the power of a municipal corporation to provide a scale of wages and hours for laborers on work done by contract for the city.[4]

§ 2. *How initiated.*[5]—Some form of offer is necessary.[6] A resolution to propose a contract should be followed by official communication of it to be a good offer.[7] Statutory requirements as to advertising for bids must be complied with[8] if the contract is one required to be made under competitive bids.[9] Substantial compliance is sufficient.[10] Failure to advertise for bids may be cured by law.[11] If so required the specifications in the published notice must be so framed as to secure fair competition on equal terms to all bidders.[12] A reference to where such specifications may be found is sufficient.[13] The materials to be used may be specified,[14] but indefiniteness as to materials to be used which prevents actual competition in bidding invalidates the contract.[15] Bids must respond to the terms of the published notice.[16] The contracting board should not allow additional time for the perfecting of a bid in insufficient terms,[17] and a sealed bid should not be permitted to be changed in any material respect after it has been opened.[18] It may be prescribed by statute that failure of a board to report within a reasonable time is to be construed as favorable action.[19]

4. Gies v. Broad [Wash.] 83 P. 1025.

5. See 4 C. L. 1092.

6. See Contracts, 5 C. L. 664.

7. Resolution to invite water supply contract from sister city. Jersey City v. Harrison [N. J. Law] 62 A. 765.

8. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. A contract which has never been begun is one not completed within the time specified under Cobbey's Ann. St. 1903, § 5519, providing for reletting such contracts. Gutschow v. Washington County [Neb.] 104 N. W. 602.

9. The purchase of stationery for the use of county officers need not be made under competitive bids under Rev. Codes 1895, § 1906, as amended by Laws 1899, p. 69, c. 59. Knight v. Cass County Com'rs [N. D.] 103 N. W. 940.

10. Substantial compliance with statutory requirements respecting advertisement for bids, and putting the public on notice of the extent and character of the work, and terms of the contract, is all that is necessary. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508.

11. Failure to advertise a grading contract as required by act May 22, 1895 (P. L. 105), is cured by act April 18, 1899 (P. L. 57). In re Marshall Avenue [Pa.] 62 A. 1085.

12. Where municipal authorities can only let contracts for public work to the lowest bidder after advertising for bids, the specifications must be so framed as to secure fair competition on equal terms to all bidders, and any contract entered into with the best bidder containing provisions beneficial to him which were not included in the specifications is void. Patterson v. Barber Asphalt Pav. Co. [Minn.] 104 N. W. 566. Under Greater New York Charter the plans and specifications of a public work exceeding $1,000 in cost must be sufficiently definite to require competition on every material item, and must state as definitely as practicable the quantity of work required. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

13. Where a notice to bidders refers to specifications stating when the work is to be done, the kind of material to be used, when the payments are to be made, and when proposals are to be acted upon, it is not necessary to otherwise state such facts. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381.

14. An advertisement for bids is not objectionable as hindering competition because it specifies the materials to be used. Ex parte City of Paducah [Ky.] 89 S. W. 302.

15. Where specifications stated that "high carbon steel or nickel steel" was to be used and there was a difference in the price and the amount of the materials required, the contract was held void under Greater New York charter. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

16. A bid which proposes to "construct, excavate and complete by working sections" at a fixed price per cubic yard of earth responds to a notice requiring bids to be made "by each working section, since the proposal means at the same price per yard for each working section or for the whole work. Gutschow v. Washington County [Neb.] 104 N. W. 602.

17. Under Code § 441, relative to the selection of an official newspaper, where on a contest one of the publishers failed to deposit a statement containing the names of subscribers as required by law, but merely filed an affidavit as to his total subscription list, the board has no authority to adjourn to permit the filing of such list. Sturges v. Vail, 127 Iowa, 705, 104 N. W. 366.

18. Change as to time for completion of work and appliances to be furnished held unauthorized. City of Chicago v. Mohr, 216 Ill. 320, 74 N. E. 1056. An unsuccessful bidder may enjoin the entering into a contract with a bidder who was allowed to materially change his bid after the bids were opened. Mohr v. Chicago, 114 Ill. App. 283.

19. Under the Charter of the City of Houston, where the board of public works neglects for 15 days to report on plans, the city council may accept them. City of

§ 3. *How closed.*[20]—Acceptance is necessary, as in all contracts.[21] A resolution to propose a water contract with a sister city, and a resolution by the latter to accept, do not make a contract, unless the first resolution was transmitted,[22] and especially not if they vary.[23] If the making of a contract is an administrative act, it may be accomplished by order.[24] A contract authorized by a two-thirds vote of the council after veto by the mayor is valid when the council has such power.[25] Where an advisory board approves a bid it is the duty of the municipal officers to execute a contract with the bidder.[26] An acceptance of a bid need not be made according to parliamentary forms[27] but must be unqualified.[28] Premature acceptance may be cured by resolution after judgment confirming the validity of the contract.[29] An acceptance of a bid creates a contract,[30] and the bidder's rights are not affected by the conditional acceptance of another bid pending the determination of the validity of the contract.[31] Under the rule that all bids may be rejected and new bids adver-

Houston v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 652, 89 S. W. 425.

20. See 4 C. L. 1094.

21. See Contracts, 5 C. L. 664.

22, 23. Resolution to get new and pure supply was met by resolution to contract for supply from existing reservoirs and water works. Jersey City v. Harrison [N. J. Law] 62 A. 765.

Note: The contention on the part of the plaintiffs was that the resolution of the town council was a proposition for a contract, and that the paper executed by the city and tendered for execution to the town made up a contract in writing. There is good authority for this position where the ordinance or resolution purports to be a direct offer to the other party or an acceptance of the offer of another previously made, the written record of the ordinance signed by the clerk and a written acceptance signed by the other party being regarded sufficient written memorandum to satisfy the statute of frauds. People v. Board of Sup'rs, 27 Cal. 655; Argus Co. v. Albany, 55 N. Y. 495; Wade v. Newbern, 77 N. C. 460. The defence in the principal case is that the ordinance was not intended to be a contract, an offer, or an acceptance, but merely an authorization of certain officers to make a contract, and that it was not communicated to the plaintiff. This seems a good defence. A municipal corporation may make contracts within its ordinary corporate power in the same manner as individuals and other corporations, except where the statutes provide otherwise. Montgomery Co. v. Barber, 45 Ala. 237; City of Logansport v. Dykeman, 116 Ind. 15; City of Indianola v. Jones, 29 Iowa, 282. In the case of contracts between private individuals there can be no binding acceptance until the terms of the offer are communicated to the other party, and any written memorandum of the offer cannot be used by the other party as evidence if it were merely given to the agent of the first party as a direction for making the contract. Steel v. Fife, 48 Iowa, 99. Merely authorizing the town authorities to contract on certain terms with another corporate body could not be treated as an offer and accepted so as to form a binding contract until communicated by the proper authorities. But see Argus Co. v. Albany, 55 N. Y. 495.—See 4 Mich. L. R. 560.

24. Under the Los Angeles Charter the making of a contract for city advertising is an administrative act, and not the exercise of a legislative power, and may be performed by order instead of ordinance. Earl v. Bowen, 146 Cal. 754, 81 P. 133.

25. Diefenderfer v. State, 13 Wyo. 387, 80 P. 667.

26. Under Burns' Ann. St. 1901, § 80851, it is the duty of the township trustee to sign a contract for the erection of a school house with the bidder whose bid is approved by the advisory board. Lincoln School Tp. v. Union Trust Co. [Ind. App.] 74 N. E. 272. Such statute does not contemplate that the trustee should hold supervisory power over the board which is created as a check upon him. Id.

27. County commissioners ought to keep minutes of their meetings at which they award contracts to improve roads, but a bid may be accepted by an agreement not arrived at through parliamentary forms. Le Moyne v. Washington County [Pa.] 62 A. 516.

28. A telegram to a bidder "you are low bidder, come on morning train" is not an acceptance under the rule that a bid is not binding until notice of acceptance to the bidder. Cedar Rapids Lumber Co. v. Fisher [Iowa] 105 N. W. 595. Action of a board in awarding a contract to the lowest bidder and instructing the secretary to telegraph him to that effect, whereupon a telegram "you are low bidder, come on morning train" was sent, does not show a completed contract. Id.

29. Diefenderfer v. State, 13 Wyo. 387, 80 P. 667.

30. Where after the acceptance of a bid a question as to the validity of the contract arose, the fact that a better bid was made did not authorize the town to ignore its acceptance, neither bid being in response to advertisement. Diefenderfer v. State, 13 Wyo. 387, 80 P. 667.

31. Where after the acceptance of a bid the validity of the contract was questioned, the fact that another bid was accepted conditionally on a result of the determination of the question does not affect the first bidder's rights. Diefenderfer v. State, 13 Wyo. 387, 80 P. 667.

tised for, the contract may not be let to a nonbidder and recovery had for the difference between the contract price and the bid of the lowest bidder who refuses to perform.[32] Under a rule requiring contracts to be let to the lowest bidder there is no authority to award to a higher bidder.[33] This rule is not nullified by one that property owners may petition for the use of a certain kind of paving.[34] The rule is not violated by requiring specified portions of the work to be done within the state,[35] nor by specifying a particular kind of material to be used[36] unless such material be a patented article,[37] nor by the fact that there was but one bidder,[38] nor by any fact not shown to have entered into the competition.[39] The rule does not apply to contracts that would be impracticable to so let out.[40] In the absence of a

32. Cedar Rapids Lumber Co. v. Fisher [Iowa] 105 N. W. 595.

33. Faist v. Hoboken [N. J. Law] 60 A. 1120.

34. Monaghan v. Indianapolis [Ind. App.] 76 N. E. 424.

35. An ordinance requiring all contracts involving the use of dressed stone to require the dressing to be done within the state does not of itself violate the rule that contracts must be let to the lowest responsible bidder. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926.

36. A contract is not illegal because a particular kind of material was specified which all bidders would be required to procure from a certain producer. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

37. Under a rule that contracts for street improvements must be let to the "lowest and best bidder," a city has not power to specify that a patented pavement shall be used, though the owner of the patent agrees to furnish the material at a specified price to any contractor equipped to lay it. Monaghan v. Indianapolis [Ind. App.] 75 N. E. 33; Monaghan v. Indianapolis [Ind. App.] 76 N. E. 424.

Note: The jurisdictions divide on the question whether such contracts are consistent with a statute requiring competition. Similar considerations to those expressed in the principal case have led other courts to the same result. Dean v. Charlton, 23 Wis. 590; Nicolson v. Painter, 35 Cal. 699; Fishburn v. Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482; Verdin v. St. Louis, 131 Mo. 26; State v. Elizabeth, 35 N. J. Law, 351; Burgess v. Jefferson, 21 La. Ann. 143. The opposing cases maintain that the necessary competition is present in the labor, and that the city should have the benefit of patented material if the best (Hobart v. Detroit, 17 Mich. 246; In re Dugro, 50 N. Y. 513), especially when it is procurable at a fixed price (Hastings v. Columbus, 42 Ohio St. 585). In Wisconsin this limitation has been accepted where the improvements are not assessable. Kilvington v. Superior, 83 Wis. 222, 33 Am. St. Rep. 32, 18 L. R. A. 45. In several states such contracts have been authorized by statute on petition of taxpayers. State v. Elizabeth, 35 N. J. Law, 351; Nicolson v. Painter, 35 Cal. 699.—See 5 Columbia L. R. 549.

Note: Where statutes confer on municipalities the power to impose a burden on private property requiring the taking of certain steps, in their nature jurisdictional, precedent to the right to impose such burden, the municipality has only such power as the statute grants it and must comply strictly with the provisions of the statute in exercising such power. City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989; Barber Paving Co. v. Edgerton, 125 Ind. 461, 25 N. E. 436. Provisions in the charter requiring competitive bidding are for the benefit of lot owners, and the city has no power to waive or ignore them. Fineran v. Bithulithic Co., 116 Ky. 495, 76 S. W. 415. The courts do not agree on the main proposition affirmed in the principal case that there can be no competition in bidding when the article specified is patented; however, the weight of authority sustains this view. Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; Nicholson Pavement Co. v. Painter, 35 Cal. 699; Smith v. Syracuse Improvement Co., 161 N. Y. 484, 55 N. E. 1077; Kean v. Elizabeth, 35 N. J. Law, 351; Burgess v. Jefferson, 21 La. Ann. 143; Barber Asphalt Paving Co. v. Wilcox, 86 N. Y. S. 69; Dillon, Municipal Corporations [4th Ed.] § 467. There are, however, many strong opinions to the contrary which affirm the right of a city to advertise for bids for a patented pavement, though the charter specifies that contracts for public improvements shall be let to the lowest bidder. Hobart v. Detroit, 17 Mich. 246; In re Dugo, 50 N. Y. 513; Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172; Verdin v. City of St. Louis [Mo.] 27 S. W. 447.—See 4 Mich. L. R. 78.

38. That a person to whom a contract is let, under Cobbey's Ann. St. 1903, § 5519, requiring the contract to be let to the lowest responsible bidder, is the only bidder does not render the contract illegal in the absence of fraud or collusion, or a showing that the price is unreasonable or excessive. Gutschow v. Washington County [Neb.] 104 N. W. 602.

39. The fact that a contract specifies the number of hours to constitute a day's labor does not affect the validity of the contract where it does not appear that such specification entered into the competition. Gage v. Chicago [Ill.] 77 N. E. 145.

40. A rule that all contracts for improvements must be let out by sealed bid to the lowest bidder does not apply to the employment of an architect to prepare plans for a building. City of Houston v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 652, 89 S. W. 425. Contract for the supervision of the construc-

statute limiting the power of the board making the contract, the only limitation is that they must act in good faith and as a result of an honest exercise of discretion.[41] In the absence of a law requiring contracts to be let to the lowest bidder, the municipal body has a large discretion in the premises;[42] but technical informalities or irregularities in the form of a bid will not defeat the right of the lowest bidder to be awarded the contract,[43] nor authorize a municipal board to award the contract to a higher bidder.[44] Where the lowest bidder has not conformed to the advertised requirements, the contract may be let to the next lowest at a price less than his bid without readvertising.[45] If the letting of a contract is a discretionary act it cannot be compelled by mandamus.[46] In the absence of fraud or collusion the exercise of discretion is binding on the public[47] and is not subject to judicial review.[48] A refusal of a bidder to enter into a contract in conformity to the terms of his bid is a condition precedent to a forfeiture of the accompanying deposit.[49]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*[50]—A contract must be authorized by a valid law.[51] It must be properly proposed and accepted,[52] and when the mode of contracting has been expressly prescribed by law, no other method can be adopted.[53] All statutory conditions must be complied

tion of an improvement. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389.

41. Board of freeholders letting a contract for bridge construction. Bloomfield v. Middlesex Chosen Freeholders [N. J. Law] 62 A. 116. The determination of whether to accept bids for a fixed sum or for a schedule of prices for piece work rests in the discretion of the board authorized to make the contract. LeMoyne v. Washington County [Pa.] 62 A. 516.

42. Discretion not abused where, in a contract involving the expenditure of $40,000, a bid $225 higher than the lowest was accepted, but a different material was used. Murray v. Bayonne [N. J. Law] 63 A. 81. The power of municipal officers in awarding contracts is discretionary. Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323. To what bidder a contract shall be awarded rests in the discretion of the board authorized to make the contract, and if they believe the lowest bidder is not responsible they may reject him. LeMoyne v. Washington County [Pa.] 62 A. 516. The law relating to the canals and to the state board of public works is distinct from and independent of the provisions which in the Revised Statutes are grouped under the caption of "Public Buildings," and concerning the letting of contracts for work on the canals there is a discretion which is not allowed under the public building code. Carmichael & Co. v. McCourt, 6 Ohio C. C. (N. S.) 561.

43. Faist v. Hoboken [N. J. Law] 60 A. 1120. On an allegation that the lowest bidder is not a responsible one, or that other just causes exist for the rejection of his bid, he is entitled to be heard. Such rejection cannot be made arbitrarily. Id.

44. Faist v. Hoboken [N. J. Law] 60 A. 1120.

45. Sanitary District of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510.

46. A town board cannot be compelled by mandamus to give its consent to a contract proposed by the highway commissioner where it has a right to withhold it. People v. Early, 106 App. Div. 269, 94 N. Y. S. 640.

47. The letting of a contract for street improvements rests in the discretion of the city council, and in the absence of fraud or collusion their action is binding on the tax payers. City of North Yakima v. Scudder [Wash.] 82 P. 1022.

48. Where a board of public works accepted a proposition by a manufacturer to install a smoke preventer, "and remove the same at our own expense if found unsatisfactory," the city's decision not to accept the apparatus on the ground that it was unsatisfactory is not subject to judicial review. Graham v. Grand Rapids [Mich.] 12 Det. Leg. N. 592, 104 N. W. 983.

49. Where a bidder, notified that his bid was the lowest, appeared before individual members of the board and told them that he had made a mistake in his figures, and they desired a change in the specifications but the board did not call upon him to contract according to his bid, nor give him a chance to refuse to do so, there was no refusal on his part so as to authorize a forfeiture of the deposit accompanying the bid. Cedar Rapids Lumber Co. v. Fisher [Iowa] 105 N. W. 595.

50. See 4 C. L. 1095.

51. A contract made under a void ordinance is unenforceable. City of Covington v. Brinkman, 25 Ky. L. R. 1949, 79 S. W. 234. A contract for work which has been ordered without a valid ordinance or resolution is invalid and unenforceable by the contractor. Contract for sewering. Citizens' Bank v. Spencer, 126 Iowa 101, 101 N. W. 643.

52. Where a town council authorized a contract with a city for a supply of water, and the city upon learning of the resolution caused to be drawn a paper claimed to accord with the terms of the resolution, it was held that as the resolution was never communicated to the city it was not a proposal which it could accept. Jersey City v. Harrison [N. J. Err. & App.] 62 A. 765.

53. Paul v. Seattle [Wash.] 82 P. 601. Custom of officials in transacting public bus-

with.[54] Deliberation may be essential,[55] but though a rule requiring contracts to be let to the lowest and best bidder after advertisement for bids is not complied with, a city is liable for the reasonable value of services rendered under a contract entered into;[56] and where there was no bad faith in awarding the contract, irregularities in the details as to bidding will not invalidate it after it has been executed.[57] If expedition is essential, competitive bidding may be dispensed with.[58] A contract must be signed by one duly authorized to do so.[59] If recordation is required by statute it is essential,[60] but under the rule that a duplicate copy of the contract shall be filed with the county clerk it is not necessary that a record entry set forth all the terms of the contract.[61] The contract must be in writing[62] if so

iness cannot validate a contract not authorized or executed in the manner prescribed by law. Id.

54. Under Act March 7, 1901, art. 15 (P. L. 36), amended by Act June 20, 1901 (P. L. 592), though a contract for printing was reduced to writing, accepted by the bidder and delivered by him to the city, no contract exists where the recorder has not signed it, though he was prevented from signing because of his sudden death. Press Pub. Co. v. Pittsburgh, 207 Pa. 623, 57 A. 75. Statute requiring certificate of county auditor as to availability of funds before contracts are entered into by public officials. Hunt v. Fronizer, 3 Ohio N. P. (N. S.) 303. Compliance with a constitutional provision requiring advertisement for bids and publicly awarding the contract to the lowest bidder is essential to the validity of a contract. City of Providence v. Providence Elec. Light Co. [Ky.] 91 S. W. 664. Ky. St. 1903, § 3212, providing that for the execution of a contract by the board of education the majority of the members must concur on a call for yeas and nays, a vote on call of the yeas and nays is indispensable (Board of Education of Newport v. Newport Nat. Bank [Ky.] 90 S. W. 569), and the rule that the yeas and nays must be entered of record is not satisfied by a record showing that the contract was unanimously adopted (Id.). Sayles' Rev. Clv. St. 1897, art. 797, authorizing the county commissioners court to appoint an agent to contract on behalf of the county for the repair of buildings, etc., requires the commissioners in conferring such authority to act as a body. Jackson-Foxworth Lumber Co. v. Hutchinson County [Tex. Civ. App.] 13 Tex. Ct. Rep. 565, 88 S. W. 412. It is not essential, however, that the appointing order be actually entered on the minutes. Id. Act of April 4, 1870, P. L. 834, relative to advertisement for bids for the construction of a court house, held to have been complied with. Commonwealth v. Brown, 25 Pa. Super. Ct. 269. Entire work of improvement held to have been properly included in one contract. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069. Where the police jury undertakes the work of a public improvement for which it is necessary to incur a debt payable from the estimated surplus of the public revenues, the contract therefor may be made on the basis of cash realized or to be realized from certificates of parish indebtedness, to the payment of which the surplus is dedicated. Dupuy v. Police Jury of Parish of Iberville [La.] 39 So. 627. The provisions of St. 1896, p. 497, c. 500, authorizing the commissioners of a certain county to construct a county building, and providing that contracts should contain a provision that no contractor should be paid for additional material or labor unless the additional sum should be approved before the labor or material was furnished, applies to contracts made to complete the building after the original contractors had failed to perform. Cutter v. Middlesex County [Mass.] 75 N. E. 954.

55. The rule that a contract by a board is a deliberative act requires that before it is entered into the board compare ideas, consult, and deliberate. Austin Mfg. Co. v. Ayr Tp. 24 Pa. Super. Ct. 91; Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477.

56. City of Providence v. Providence Elec. Light Co. [Ky.] 91 S. W. 664.

57. Wabash Ave., 26 Pa. Super. Ct. 305.

58. Where a plan prepared for the construction of a bridge was not feasible, and expedition in its construction was imperative, it was not an abuse of discretion to award the contract on plans submitted by a bidder without competitive bidding. Bloomfield v. Middlesex Chosen Freeholders [N. J. Law] 62 A. 116.

59. Under a statute providing that contracts must be signed by the mayor or some other person authorized in behalf of the public, the city clerk may sign under authority from the council. Earl v. Bowen, 146 Cal. 754, 81 P. 133. Under a rule that no contract is binding unless approved by the council, and by them ordered to be signed, an approval by the council after an authorized official has signed is equivalent to approval before the signature is attached. Id.

60. Under a rule that contracts must be recorded, a contract not evidenced by a record entry is void. Morrow v. Pike County, 189 Mo. 610, 88 S. W. 99.

61. An entry reciting the employment of an attorney to defend a certain case, the compensation to be paid out of a certain fund, is sufficient. Morrow v. Pike County, 189 Mo. 610, 88 S. W. 99.

62. An ordinance offering to let the right to construct a telephone system upon certain conditions, and a bond by the successful bidder accepting the provisions of the ordinance, satisfy Rev. St. 1899, § 6759. City of California v. Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604. Contract with a board of health and not in writing for necessaries to be provided for a family quarantined on

required.[63] The contract entered into must be one authorized by law,[64] and must conform to the specifications in the advertisement for bids[65] and the resolution by which it is authorized.[66] By statute, contracts with the United States are not assignable.[67] Contracts must conform to the principles of public policy; hence, a public official cannot contract with himself on behalf of the public.[68] In some states it is a penal offense to do so.[69] Contracts must not have the effect of giving public property for private use,[70] nor be for the purpose of accomplishing an end by an unlawful method.[71]

A contractor's bond must conform to the requirements of the statute.[72] Public officers charged with the duty of exacting the bond are personally liable if they do

account of smallpox. Melley v. Columbus, 3 Ohio N. P. (N. S.) 398. A contract between two municipalitles for a supply of water for public and private use is within the provisions of the statute of frauds. Jersey City v. Harrison [N. J. Err. & App.] 62 A. 765.

63. Under Laws 1893, p. 464, c. 138, §§ 4, 7, a contract with an architect need not be in writing. Ritchie v. State [Wash.] 81 P. 79.

64. A statute prohibiting a contract except on a consideration wholly to be performed renders void a contract based on a past consideration. Morrow v. Pike County, 189 Mo. 610, 88 S. W. 99. Villages organized under the general law have not power to contract for the construction of sewers until the property owners have an opportunity to perform the work themselves as provided by Laws 1901, p. 215, c. 167. State v. Foster, 94 Minn. 412, 103 N. W. 14. An express contract to pay for an improvement out of city funds which, if executed, would raise the city's indebtedness beyond the constitutional limit, is void. Citizens' Bank v. Spencer, 126 Iowa 101, 101 N. W. 643.

65. Injunction will lie to restrain the execution of a contract for public work awarded under different specifications from those under which bids were advertised and subsequent to the time named for receiving bids. State v. Board of Education, 6 Ohio C. C. (N. S.) 345. Under a rule that the contract must be let to the lowest bidder, a provision which authorizes changes in the material and work and leaving the additional amount to be paid to the city engineer invalidates the contract. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

66. Jersey City v. Harrison [N. J. Err. & App.] 62 A. 765.

67. Where a partnership is formed for the performance of a contract which one of the members secured from the government, neither the contract nor any interest therein is transferred so as to violate Rev. St. U. S. § 3737, providing that contracts with the government transferred to another party shall be thereby annulled. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890.

68. A public officer having power to purchase supplies cannot contract with himself or with a firm of which he is a member for them. Lainhart v. Burr [Fla.] 38 So. 711. Where an official with power to purchase supplies contracts with himself or with a firm of which he is a member, and the purchase price has been paid, if the transaction was tainted with fraud the entire purchase may be recovered by the public, but where there is no fraud and the supplies were beneficial to the public, only the excess over cost may be recovered. Lainhart v. Burr [Fla.] 38 So. 711. Where a house of which a member of the board of health was the real owner was let to the city as a pest house at a grossly excessive rental, the lease was held a fraud upon the city. Tyrrell v. New York, 94 N. Y. S. 951. Contract for bath tubs in engine houses set aside where it appeared that a member of the city council was indirectly interested therein. City charter prohibited councilmen from being interested in public contracts. Harrison v. Elizabeth, 70 N. J. Law, 591, 57 A. 132.

69. Chap. 4020, p. 50, Act May 19, 1891, making it a penal offense for a public officer to contract with himself on behalf of the public, does not apply to a contract for the purchase of supplies, but only to construction contracts and contracts for working the public roads. Lainhart v. Burr [Fla.] 38 So. 711.

70. A village council has no power to contract to aid private adventures. Village of Morrice v. Sutton [Mich.] 12 Det. Leg. N. 19, 103 N. W. 188. A contract by a city to give a sum of money to a corporation if it would maintain a factory there for a certain period is void. Collier Shovel & Stamping Co. v. Washington [Ind. App.] 76 N. E. 122.

71. Where a railroad company objected to a petition to lay out a street at grade across the railroad, but consented to the granting of the petition if the city would maintain a gate at the crossing, the contract to maintain the gate if an attempt to buy off opposition to the petition was beyond the power of the city to make (Old Colony R. Co. v. New Bedford, 188 Mass. 234, 74 N. E. 468), but such contract was binding on the city for a reasonable time under Pub. St., 1882, c. 112, § 128, providing that if a highway across a railroad is authorized, expenses incident to maintaining the way at the crossing shall be borne by the city until otherwise determined by a special commission (Id.).

72. A stipulation in a contractor's bond that he will furnish all labor and materials is not a compliance with a rule requiring a bond that he will pay for all labor and materials used. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111. Deposit held to be an additional and cumulative security in addition to the bond for the performance of a contract, and not a limited security only, to furnish an available fund to enable the city to have omitted work promptly done. Com-

not do so.[73] In Tennessee such failure is a misdemeanor.[74] A provision in a contract retaining a portion of the money earned is governed by the law of guaranty.[75] In Minnesota a city which fails to require a bond for the performance of a void contract is not liable to a subcontractor.[76]

§ 5. *Interpretation and effect of public contracts; performance and discharge. A. Construction and interpretation.*[77]—A contract may be read from the provisions of a statute[78] if the terms are so intended.[79]

A public contract like any other should be given effect, if possible,[80] according to all its provisions[81] and the plain meaning of its terms.[82] Parol evidence which is explanatory of the subject-matter consistent with the terms of the contract, and necessary for its interpretation, is admissible.[83] Important stipulations not contained are presumed to have been designedly omitted.[84] The intention of the parties should be ascertained from all its provisions.[85] Terms are to be given the

monwealth v. Philadelphia, 211 Pa. 85, 60 A. 549.

73. A building committee appointed by a county court, who made a contract subject to the ratification of the appointing body, are, notwithstanding such ratification, parties to the contract and are liable to mechanics and materialmen where they failed to take a bond as required by statute. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111.

74. Members of a building committee appointed to make a contract are public officers within a statute making it a misdemeanor for a public officer to award a contract without taking a bond. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111.

75. Switzer & McHenry's Case, 38 Ct. Cl. 275.

76. The failure of a city to require a bond from a contractor to pave streets, under an entire contract void because in excess of authorized municipal indebtedness, does not render the city liable under Laws 1901, p. 535, c. 321, for that neglect to a subcontractor who furnished materials. Laws 1903, p. 595, c. 382, validating such contracts and authorizing the payment of evidences of indebtedness already issued, does not impose liability on the part of the city to such subcontractor. Kettle River Quarries Co. v. East Grand Forks [Minn.] 104 N. W. 1077.

77. See 4 C. L. 1096.

78. Act March 3, 1875 (18 Stat. at L. 463), for the improvement of the Mississippi between South Pass and the Gulf of Mexico providing details generally intrusted to the executive branch of the government, is in form and substance a contract. Switzer & McHenry's Case, 38 Ct. Cl. 275.

79. No contract to convey land in Alaska to persons in possession, or to reimburse them for improvements if the lands should be withdrawn from sale, was created by the Act of 1891, or Act May 17, 1884 (23 St. L. p. 24). Russian-American Packing Co.'s Case, 39 Ct. Cl. 460. A resolution of village trustees granting the petition of a contractor to change the line of a sewer from the center of the street to a point near the curb does not constitute a contract so that the resolution may not be rescinded before any work is done under it. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246.

80. Contract by the bridge commissioner of New York for the operation of a railroad over the Williamsburgh bridge did not illegally create a franchise in the railroad company. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754. A contract by which an architect is employed to prepare plans is not the creation of a debt, under a rule prohibiting the creation of a debt, unless provision has been made for its payment, where it is intended that the services shall be paid for out of the current revenues. City of Houston v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 652, 89 S. W. 425. The making of a contract for water for a number of years to be delivered in the future does not create a debt, but liability only arose as the water was used each year. City of Tyler v. Jester & Co., 97 Tex. 344, 78 S. W. 1058. The duty of a commissioner's court to audit all claims is not abdicated by a contract for the erection of a court house, according to certain plans and specifications, under the direction of a competent architect, to be paid for only after final inspection. Tally v. Commissioners' Ct. of Jackson County [Ala.] 39 So. 167. Where a city, not obliged to make any payments until the contract is completed, at the request of the contractor agreed to divert money when due to materialmen for goods furnished and to be furnished, such agreement was not a contract of guaranty or suretyship which the city was forbidden to make. City of Albany v. Cameron & Barkley Co., 121 Ga. 794, 49 S. E. 798.

81. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510.

82. Printed specifications providing that no tunneling should be allowed except on "written permission" of the engineer, and typewritten specifications provided "unless otherwise ordered by the engineer," are not inconsistent, and written permission is essential. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246. Inferences and implications cannot prevail against the express term of a contract providing for the payment of interest semi-annually on a contractor's money held as security. Switzer & McHenry's Case, 38 Ct. Cl. 275.

83. Rouseville Borough School Dist. v. Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214.

84. Donald's Case, 39 Ct. Cl. 357.

85. Provisions in a contract, for a street

meaning intended by the parties.[86] Plans and specifications attached to a contract and referred to therein become a part of it.[87] Prior negotiations are subservient to the express terms of the written contract.[88]

A contract is not void because provision for paying the obligation it creates is unenforceable,[89] nor because creating a debt in excess of current revenues, where such result is caused by failure of the city to impose a tax it was authorized to levy.[90] A contract is not invalid because it may become improvident,[91] or because entered into hastily and ill advisedly,[92] or because when entered into it was the intention to refuse to carry out the terms of a previous one on the same subject for breach of which an action for damages will lie.[93] A paving contract is not rendered void by a provision requiring the contractor to keep up repairs.[94] A contract for one portion of the work is not affected by the fact that a contract for another portion is void.[95]

No renunciation of a city's rights is to be implied from the grant of an exclusive privilege to maintain water pipes in the highways for a period of years.[96] A municipal corporation in granting a franchise to a company to furnish water does not impliedly contract that it will never do any act by which the value of the franchise may be reduced.[97] The inventor of a patented article to be used in the work does not, by making an unsuccessful bid, waive his rights under the patent to the successful bidder.[98]

improvement relative to grading, that old pavement should be removed to such depth as was necessary to enable new pavement to be put down did not contemplate any expenses for grading except such as were necessary to make room for the new pavement. McCain v. Des Moines [Iowa] 103 N. W. 979. Where plans and specifications of a sewer showed the depth of the excavation required, and such plans were to control the depth, failure of the city engineer to give instructions as to depth in accordance with a provision in the contract does not impose liability on the city for damages sustained by the contractor in the absence of request for specific instructions. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246. A post two and one-half miles from the seacoast is not in the interior of the island, within a contract to take meat for interior posts. Simpson v. U. S., 26 S. Ct. 54.

86. When a contract for the construction of vessels provided that on default of the contractor the United States might complete the same by contract, and on abandonment of the work by the contractor a new contract for the construction and completion of the vessels was let, it was held that "construction" and "completion" as used were substantially the same in meaning. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 F. 685. Held further that "constructed" as used did not imply other or different vessels than those originally contracted for. Id.

87. When a contract for street improvement provided that the work should be done according to attached plans and specifications, which should be considered as incorporated therein, a provision in the plans that the city could order omitted any portion of the work called for, and the contractor would not be entitled to pay therefor, became a part of the contract. City of Ensley v. Moore & Co. [Ala.] 39 So. 679.

88. Simpson v. U. S., 26 S. Ct. 54.

89. A construction contract is not invalid because the action of the commissioner's court in levying a special tax to meet warrants issued in payment beyond the current year is void. Tally v. Commissioner's Ct. of Jackson County [Ala.] 39 So. 167.

90. City of Providence v. Providence Elec. Light Co. [Ky.] 91 S. W. 664.

91. Wabash Ave., 26 Pa. Super. Ct. 305.

92, 93. Cox v. Jones [N. H.] 63 A. 178.

94. A provision requiring a pavement contractor to keep up repairs for 10 years does not render the contract void. Erie City v. Grant, 24 Pa. Super. Ct. 109. A municipal lien for paving is not void, because the contract required the contractor to keep up repairs for five years, where it appears that the paving will last five years without repair. Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323.

95. A contract with an architect to prepare plans is distinct from one thereafter made for the construction of a building. City of Houston v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 652, 89 S. W. 425.

96. A contract granting the exclusive privilege of maintaining water pipes in the public highways for 20 years, with the privilege to the city of purchasing the water works after 10 years, is not an implied renunciation of the city's rights to construct water works after the 20 years' period. City of Sioux Falls v. Farmers' Loan & Trust Co., 136 F. 721.

97. City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 721.

A provision that the contractor should make good any defective work does not render him liable for defects arising from other causes.[98] A provision that the contractor shall bear loss resulting from delay does not apply to delay not contemplated by the parties.[1] A provision in a paving contract that the contractor shall keep up repairs for a specified period is a mere guaranty of good work and does not require him to replace paving torn up by bursting water mains,[2] nor violate a rule that repairs shall be paid for out of the general revenue fund.[3] Damages suffered by the contractor, because of failure to comply with the terms of the contract, fall on him, though the supervising engineer did not object to the violation.[4] Where a contract provides that if any change is made in the specifications the increased or diminished cost shall be assessed by a board, the action of such board is conclusive.[5] Provisions relative to extras must be complied with in order to entitle the contractor to recover.[6]

(§ 5) *B. Performance and discharge.*[7]—Substantial performance of the terms of the contract is essential[8] if not waived,[9] but exact compliance with the terms is not essential if impracticable,[10] or if such performance was not intended.[11]

98. In New York, no patent hydrant valve or stopcock can be used by the water department if the patentee insists on royalty. Held that, where the owner of a patent made an unsuccessful bid to furnish said hydrants, he did not waive his rights under the patent to the successful bidder. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co., 127 F. 355.

99. Morley v. St. Joseph, 112 Mo. App. 671, 87 S. W. 1013.

1. A contract for the construction of a street provided that loss or damages from delay and unforeseen circumstances should be borne by the contractor. Held that such provision did not apply to delay caused by failure to obtain a complete right of way, as it was understood that a right of way had been secured. Sheehan v. Pittsburg [Pa.] 62 A. 642.

2. Green River Asphalt Co. v. St. Louis, 188 Mo. 576, 87 S. W. 985.

3. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926.

4. Where caving in of an excavation was caused by failure of the contractor to comply with the terms of his contract as to shoring up, he cannot recover from the city, though the city engineer under whose supervision he worked did not object to the violation. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246.

5. A contract provided that if it be deemed necessary or desirable by the United States to make any change in the plans or specifications affecting the cost of the work in a sum not exceeding $300, the increased or diminished cost should be assessed by a board appointed for that purpose. Held that an assessment because of the nonfireproofing of certain wood was within such provision, and the decision of the board was conclusive. Conners v. U. S. [C. C. A.] 141 F. 16.

6. See, also, Building and Construction Contracts, 5 C. L. 455. A provision in a contract that no claim for extras should exist unless ordered by the town board precludes recovery for extras furnished under the direction of the city engineer and necessitated by a change in the plans by such officer, but not ordered by the board where it would increase the cost to a sum in excess of what the board was authorized to expend. People v. Snedeker, 106 App. Div. 89, 94 N. Y. S. 319. Under a provision in a contract that no allowance should be made for extras unless an itemized bill, and the order authorizing it, should be presented to the city engineer, or if the stipulation was not complied with unless the mayor should in writing approve the same, the mayor alone may waive compliance with the stipulation, and he only by approval of the extras in writing. Cashman v. Boston [Mass.] 76 N. E. 671.

7. See 4 C. L. 1097.

8. Preparation by architects of plans for a public building held not sufficient to enable the architects to recover, where the plans failed in 20 particulars to give such detailed drawings as were required for the builder's guidance. Kinney v. Manitowoc County [C. C. A.] 135 F. 491. Architects who furnish plans for a public building but are not entitled to recover on the contract, both by reason of its invalidity and insufficient performance, cannot recover the value of the use of the plans in the absence of proof of the value of such use. Id.

9. Provision in the contract for the construction by the state of a kiln, held waived by the contractor. Mills & Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676. Where failure to maintain insurance on a public building in course of construction as required by the contract was induced by the contractors who were chargeable with the expense, they are estopped to recover loss occasioned by fire on the ground of nonperformance of the contract. Fransen v. Regents of Education [C. C. A.] 133 F. 24.

10. Where it was impracticable for a paving contractor to pave a railroad crossing, and the railroad company was required to keep up such crossing, it is no objection to the performance of the contract that the contractor failed to pave it. Hund v. Rackliffe [Mo.] 91 S. W. 500.

11. A contract for the construction of a

If a contract is to be performed to the satisfaction of the director of public works, the question of satisfactory performance involves the discretion of such director.[12] Where county commissioners accept a public improvement as a compliance with a contract, their integrity cannot be collaterally attacked.[13] Where the execution of a contract is to be under the supervision of the city engineer, extra expense due to his negligence should be borne by the city and not by the contractor.[14] Power in a superintending engineer to direct the execution of the contract is not power to change its terms or extend the time for completing the work.[15] Where because of default of a city the contract becomes impossible of performance, the contractor may abandon the work or waive the delay caused and recover damages.[16] A per diem penalty for delay cannot be collected where delay was caused by litigation concerning the construction of the contract which terminated favorably to the contractor.[17] A contract may be discontinued upon the happening of a condition specified therein.[18] A contract is not rescinded by the mere offer of one party to enter into a new contract on the same terms except as to price.[19] A company which has obtained the right to operate a telephone system for a percentage of its gross receipts is not excused from paying because others are given the right without charge.[20] If a contract is unenforceable, its obligation cannot be impaired.[21]

Time.—The necessary hauling of the material is a part of the work to be done under a contract, and doing this within the time limited for the commencement of the work is a compliance with the terms of the contract.[22] Where the only time limit is specified in the contract, it may be extended for any good cause shown.[23] A breach of a provision in the contract limiting time for performance does not invalidate the tax bills levied to meet the cost.[24]

Materials.—A contract specifying a particular material to be used is not satisfied by the use of any other.[25] A contractor who uses cheaper material than called

sidewalk of a certain width does not apply where a portion of the sidewalk area has, with the consent of the city, been withdrawn from public travel and enclosed by abutting owners. Hund v. Rackliffe [Mo.] 91 S. W. 500.

12. Mandamus will not lie to compel the return of money deposited to secure performance on the ground that the work has been satisfactorily done. Commonwealth v. Philadelphia, 211 Pa. 85, 60 A. 549.

13. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. A finding that a board of county commissioners, in accepting a public improvement as a compliance with a contract, acted negligently and in disregard of duty is not a finding that they acted corruptly or in bad faith. Id.

14. City of Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912. Expense of extra work occasioned by errors of the inspector should be borne by the city. City of Chicago v. Duffy, 117 Ill. App. 261.

15. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510.

16. Sheehan v. Pittsburg [Pa.] 62 A. 642.

17. City of Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912.

18. Where a convict labor contract provided that if by reason of legislation the contract should become illegal the contractor should have no action for damages, on the enactment of such legislation the contract could be discontinued without liability on the part of the state. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

19. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353.

20. City of California v. Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604.

21. Where by reason of lapse of time a contract, obligating a city to extend a street and build a bridge, or upon default the state might do so and collect from the city, had become unenforceable, its obligation was not impaired by a statute authorizing the city to construct such improvements. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937.

22. Hund v. Rackliffe [Mo.] 91 S. W. 500. Especially is this so where the hauling is designated by the contract as a part of the work to be done. Id.

23. Hund v. Rackliffe [Mo.] 91 S. W. 500.

24. If no ordinance requires a work of public improvement to be completed within a certain time, a contract provision requiring work to be done within a specified time under penalty does not make completion within the time a condition to the validity of the tax bills. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926.

25. A contract specifying that the "best quality of imported Portland cement" should be used is not satisfied by the use of any sound imported Portland cement which fills the three special requirements of tensile strength, fineness, and weight. Drainage

for by the contract is liable for the improper profits[26] in an appropriate action,[27] and the fact that he lost money on the contract,[28] or that the contract is executed, is no defense.[29] The defense of ultra vires is not available to him.[30]

Compensation and payment.—A contractor cannot be deprived of his compensation because of misappropriation of the fund raised for its payment,[31] or because of invalidity of the assessment,[32] or orders given in payment,[33] or because his work was not utilized.[34] A council cannot by ordinance bind the city to pay for work done pursuant to a written contract for which the city has paid the price stipulated in the contract.[35] Where a contractor's money is retained as a guaranty under an agreement to pay interest thereon, delay in completion of the work does not damage the government.[36] Money paid by a contractor under a contract merely malum prohibitum cannot be recovered by him.[37] Money advanced, pursuant to a condition that a town council which had laid out a highway would construct it, may be recovered where the town abandons the work, regardless of whether the council had power to bind the town in the premises.[38] After an ultra vires contract has been partly performed the city authorities will not be enjoined from restoring to the contractor such fruits of the unauthorized contract as have not been dissipated but remain in the custody of the municipality.[39]

Specific performance of an ultra vires contract will not be decreed.[40]

Commission of New Orleans v. National Contracting Co., 136 F. 780.

26. Contractors who have used on a public work cheaper materials than the contract calls for, and have profited thereby, will not be heard to say that the material used was as good as that called for, when sued for the improper profits. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780. Acts La. 1896, p. 162, No. 114, §§ 5, 6, 7, creating a commission to provide a drainage system for the City of New Orleans, does not authorize the commission or its engineer to consent to a cheaper material than the contract specifies. Id.

27. The fact that a contractor uses a cheaper material than is specified in the contract does not, after he has been paid the contract price, give a right of action in repetition, under Rev. Civ. Code La., art. 2293, to recover the difference in cost, but the remedy is an action for damages for breach of contract under Civ. Code La. arts. 1930, 2769. National Contracting Co. v. Sewerage & Water Board [C. C. A.] 141 F. 325. Improper profits made by a contractor by substituting cheaper material than those specified may be recovered under Civ. Code La., art. 2301 (2279), providing for the recovery of that which one receives which is not due him, and art. 2302 (2280), providing that one who pays under mistake may recover it. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

28. That the contractor lost money in the performance of the contract is no defense to an action to recover profits made by wrongfully substituting cheaper materials than those specified. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

29. A contractor who made a large profit by substituting cheaper materials than those specified is liable for such profits though the contract is executed. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

30. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

31. Fund raised for its payment has been exhausted in paying debts not chargeable against such fund. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389.

32. Where an ordinance provided for payment of sewer construction by special assessment, and the contract provided that the contractor should receive assessment certificates as payment in full, the city was liable to the contractor for the amount of the certificates, though the assessment were invalid. Iowa Pipe & Tile Co. v. Callanan, 125 Iowa 358, 101 N. W. 141.

33. There may be recovery for repairs on a county court house after completion and acceptance of the work, though the contract provided for payment in interest bearing orders, and the orders given were invalid. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

34. That a city decides not to use plans prepared by an architect does not affect its liability under the contract by which he was employed. City of Houston v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 652, 89 S. W. 425.

35. O'Rourke v. Philadelphia, 211 Pa. 79, 60 A. 499.

36. Switzer & McHenry's Case, 38 Ct. Cl. 275.

37. Where a contract is merely malum prohibitum and not malum in se, money voluntarily paid thereunder by the contractor cannot be recovered by him. Mills & Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

38. Valley Falls Co. v. Taft [R. I.] 61 A. 41.

39. Coker v. Atlanta, K. & N. R. Co., 123 Ga. 483, 51 S. E. 481.

40. Where a town without legislative authority contracted with a city for the con-

§ 6. *Remedies and procedure. A. By taxpayer.*[41]—Any citizen and taxpayer may enjoin the enforcement of a void contract, which will generally affect his rights,[42] if he acts promptly,[43] and the fact that great benefits will flow to a city from carrying out an ultra vires contract is no reason for denying appropriate equitable relief to him;[44] but a taxpayer may not restrain the execution of a contract which will not prejudice him.[45] A taxpayer who seeks to enjoin a city from entering into an illegal contract is entitled to the favorable consideration of the court, though moved by private grievance to bring the action.[46] Where a municipality adopts and ratifies a contract irregularly let, a taxpayer may not set up its invalidity.[47] The city is a necessary party to an action by a taxpayer to restrain the performance of a contract made in behalf of the city.[48] Taxpayers who rely on fraud as the basis of a suit to enjoin payment to contractors must allege facts constituting the fraud.[49] In an action by a taxpayer to restrain a public officer from entering into a contract where there are no charges of fraud, the only question is the authority of the officer.[50]

(§ 6) *B. By bidder.*[51]

(§ 6) *C. On the contract proper.*[52]—When work under the contract has been completed, the amount due may be recovered under the common counts, though special counts filed with the common counts are insufficient.[53] Pendency of a taxpayer's suit to enjoin payments for a completed contract is not a bar to an action by the contractor for the balance due where the pendency of such suit is not pleaded, no injunction issued, and no cross bill filed by the contractor therein.[54] An action must be brought within the limitation period,[55] but not before conditions precedent have been complied with[56] and a fund provided for the payment of the contract price.[57] A contractor suing for the contract price, and alleging that he

struction of a tidal collection chamber in another municipality, to be operated in a certain manner, it could not compel the specific performance of the provision relative to operation. Belleville Tp., Essex County v. Orange [N. J. Eq.] 62 A. 331.

41. See 4 C. L. 1102.

42. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024. A tax payer may enjoin the payment of warrants issued in payment of goods purchased by a public officer from himself, or a firm of which he is a member. Lainhart v. Burr [Fla.] 38 So. 711. County commissioners may be enjoined by a tax payer from entering into an unauthorized contract, which if carried out would result in the imposition of an unlawful tax. State v. Newton County Com'rs [Ind.] 74 N. E. 1091.

43. A tax payer who seeks to enjoin the letting of a contract for which no appropriation has been made is not guilty of laches, if innocent parties will not be prejudiced and he prosecutes his suit with diligence. State v. Newton County Com'rs [Ind.] 74 N. E. 1091.

44. Coker v. Atlanta, K. & N. R. Co., 123 Ga. 483, 51 S. E. 481.

45. Contract for the purchase of voting machines, which by its terms imposed no liability on the municipality until every element of doubt in favor of the utility of the machines had been solved. Shoemaker v. Des Moines [Iowa] 105 N. W. 520.

46. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157. Although injunction may be the proper remedy for preventing the award of a contract for public work to another than the lowest bidder, it does not lie, where the suit is brought by the lowest bidder, unless he sue in his capacity of taxpayer, or become the beneficiary of a suit brought by a taxpayer whom he may agree to indemnify against costs and expenses. Carmichael & Co. v. McCourt, 6 Ohio C. C. (N. S.) 561.

47. In re Brighton Road [Pa.] 63 A. 124.

48. Eames v. Kellar, 102 App. Div. 207, 92 N. Y. S. 665.

49. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247.

50. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754.

51, 52. See 4 C. L. 1103.

53, 54. City of Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912.

55. An action on an implied contract to recover for construction of a public work must be brought within five years after completion of the work. Citizens' Bank v. Spencer, 126 Iowa, 101, 101 N. W. 643.

56. Under Building Code, § 155, providing that where a building commissioner has caused an unsafe building to be razed under precept from a justice he shall make return of the costs and expenses, and the amount shall be adjusted and taxed, a contractor employed by the commissioner cannot recover until return has been made and the amount adjusted. Parker Co. v. New York, 110 App. Div. 360, 97 N. Y. S. 200.

57. Sewer construction contract construed and held to give the contractor no right of action for the contract price until an assess-

was to be paid out of the proceeds of a sale of bonds issued pursuant to an election, need not allege that provision for his payment had been made as required by law.[58] It is presumed that a contractor suing on a contract void in part only is suing on the valid portion.[59] A contract enforceable against a municipal corporation may be proved by circumstances, acts, conduct, and sayings of officers having authority to bind the corporation.[60] After a long lapse of time it is presumed that statutory conditions were complied with.[61] Where the amount claimed is disputed, and the city could have settled the same by measuring the work, but did not do so, the question of amount is for the jury.[62] Where a contract provides for payment of the consideration out of a specific fund, a judgment should provide for its satisfaction out of such fund.[63] Money due under the contract and unlawfully withheld bears interest.[64]

(§ 6) *D. On the contractor's bond.*[65]—An action on a contractor's bond lies in favor of any person falling within its terms,[66] and intended to be protected,[67] if they suffer damage because of a breach thereof;[68] but material men and laborers not provided for in a bond have no right of action thereon.[69]

The action must be brought by a party entitled to sue.[70] The city is the real party to a contract made by a committee on its behalf, and may maintain an ac-

ment therefor had been levied and collected, or the trustees of the village had placed it beyond their power to levy an assessment. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246. In an action by a contractor to recover under his contract, an answer that he had been paid in full is not an admission that the necessary assessment had been levied and paid. Id. Where an assessment is invalid and a curative act is passed, the city should be given time to reassess before an action on implied contract to recover for the work is brought. Citizens' Bank v. Spencer, 126 Iowa, 101, 101 N. W. 643.

58. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389.

59. Where an ordinance authorizing a contract was invalid as to a portion of the work ordered, where action is brought on a tax bill making no reference to unauthorized work, the defendant has the burden of showing it to be void. Haag v. Ward, 186 Mo. 325, 85 S. W. 391.

60. Town District of Hardwick v. Wolcott [Vt.] 61 A. 471.

61. Marklove v. Utica, C. & B. R. Co., 48 Misc. 258, 96 N. Y. S. 795.

62. Sheehan v. Pittsburg [Pa.] 62 A. 642.

63. Morrow v. Pike County, 189 Mo. 610, 88 S. W. 99.

64. Where payment of the contract price is prevented because of unwarranted refusal of the city engineer to certify to the completion of the work, the contract price bears interest from the date it should have been paid. John A. Roebling's Sons Co. v. New York, 110 App. Div. 366, 97 N. Y. S. 278.

65. See 4 C. L. 1104. Also see Public Works and Improvements, 6 C. L. 1143.

66. One who furnishes a contractor with material may recover on a bond conditioned to pay promptly for all labor and materials. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033. A bond conditioned to pay all labor and material furnished in the work embraces a materialman who furnishes material to a subcontractor. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

Subcontractors are within the provisions of a bond conditioned on the payment for all labor and materials used, and under a rule that individuals intended to be secured may maintain action, may sue thereon. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318. Subcontractors may rely on the security afforded by a bond conditioned on the payment of all claims for labor and material, and need not perfect their claims against a fund withheld by the building committee. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

67. The Federal statute (28 Stat. 278), requiring a government contractor's bond to be conditioned for the payment of all labor and materials furnished, does not merely afford the relief given by the foreclosure of a mechanic's lien, but protects persons who furnish material which does not become part of the permanent structure. United States v. Henningsen [Wash.] 82 P. 171. Under a statute, the manifest purpose of which is to protect laborers and materialmen, labor or materials used, whether furnished under the contract directly or to a subcontractor, are within the obligation of the bond. United States v. American Surety Co., 26 S. Ct. 168.

68. Where suit is brought on a bond, damages must be proved. Switzer & McHenry's Case, 38 Ct. Cl. 275.

69. A statute giving laborers and materialmen a right of action on a bond required gives them no right of action on a nonstatutory bond. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111. Where there are no mechanic's liens on public buildings a mechanic has no right of action on a bond providing that the surety is liable to no one except the owner. Id. Act Cong. Aug. 13, 1894, c. 280, providing that the surety of a government contractor shall assume an

tion on the bond for damages sustained by reason of a breach thereof.[71] Notice to the sureties may be a condition precedent to the maintenance of an action.[72]

A surety is not relieved because a bond is more comprehensive than the law requires,[73] nor because the contractor is discharged from performance of a portion of his contract for which a certain price was to be paid,[74] nor because of a nonprejudicial variation.[75] While under a statutory bond no act of the owner can relieve the surety from liability to laborers and materialmen, under a common-law bond any breach by the owner absolves the surety.[76] That a materialman extends the time for payment of the goods is no defense.[77] The defense of ultra vires is not available to a surety unless the invalidity of the contract is shown.[78] Where on default of the contractor to repair streets the work was done by the city pursuant to a stipulation to such effect in the contract, it is no defense to a surety that the money used in making such repairs was procured by issuing bonds, as in the case of original construction work.[79] It is no defense in an action on a city contractor's bond that the use plaintiff had agreed to give him a bond against defects in his work and had not done so, it not appearing that the contractor had been prejudiced.[80] Failure to comply with the terms of a contract renders the surety liable regardless of the condition in the bond, for the payment of materialmen.[81] The averments in the pleadings must be certain.[82] It is not necessary to allege the exact date the contract was abandoned.[83] A city contractor cannot, in an action

obligation that the contractor shall pay all labor and materialmen, does not make the surety liable for facilities used in transporting the material to the place where the building is being erected. United States v. Fidelity & Deposit Co., 86 App. Div. 475, 83 N. Y. S. 752. The word materials in a bond conditioned on the payment by the contractor for labor and materials does not include equipments used in the performance of the contract. United States v. Jacoby [Del.] 61 A. 871.

70. Burns' Ann. St. 1901, § 252, authorizing the trustee of an express trust to maintain an action for the benefit of the person interested in the contract, does not authorize the county auditor to sue on the bond of a contractor, as trustee for property owners, where the contractor refused to perform and the work was relet at an increased cost, which was assessed against the property liable. State v. Karr [Ind. App.] 76 N. E. 780.

71. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

72. The provision of Laws 1897, c. 307, p. 568, § 3, that no action shall be maintained on a contractor's bond unless written notice is given to the principals and sureties within 90 days from the last item of labor or materials performed or furnished, does not apply to contractor's bonds given pursuant to the citizen's charter of St. Paul. Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133.

73. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

74. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1.

75. Variation from the terms of a contract, which entails no additional cost, held not to discharge a surety. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

76. Hardison Co. v. Yeaman [Tenn.] 91 S. W. 1111.

77. It is no defense to a surety on a government contractor's bond, conditioned for the payment of labor and materials furnished, that the seller of the goods extended the time of payment thereon to the detriment of the surety. United States v. Henningsen [Wash.] 82 P. 171.

78. The defense of ultra vires, based upon the contention that a supplemental contract varied in some particular from the original, cannot avail a surety whose contract refers to the supplemental contract, and it does not appear that in making such contract the statutory provisions as to advertising were not observed. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

79. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

80. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999.

81. Where a contract for building a lighthouse required the contractor to furnish furniture, the surety on the contractor's bond is liable for his failure to do so regardless of the condition in the bond requiring payment for material and labor furnished. United States v. Henningsen [Wash.] 82 P. 171.

82. Where a statement of claim in an action on a city contractor's bond alleged that the cost bond given to the city had been approved by the city solicitor, an averment in the affidavit of defense that the defendant is informed that such bond had not been approved is insufficient. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999.

83. Where a contractor failed to perform, and in fact abandoned the contract, it is unnecessary to allege in an action on his bond the exact date of abandonment, it appearing that the new contract was awarded after such abandonment. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 F. 685.

on his bond to recover for materials furnished, set off a claim for damages to his property occasioned by negligence of the use plaintiff.[84]

One suing on a city contractor's bond is entitled to recover only what is due him at the commencement of the action.[85]

(§ 6) *E. Under lien laws.*[86]

PUBLIC LANDS.

This topic includes both state and Federal lands. The treatment of each is separate from the other within each section, but many principles common to both may be found.

§ 1. *The public domain and property therein.*[87]—The collection of taxes on land does not estop the public from asserting title thereto.[88] Where land is relinquished to the United States, title vests on filing the deed of relinquishment.[89] The power of congress over the public lands is plenary so long as title thereto remains in the government, and no right of property therein has vested in another.[90]

State lands.[91]—Where one state is created from the territory of another, it acquires no title to lands within its limits previously granted by the state from which its territory is derived.[92] Tide lands belong to the states within which they are situated,[93] but prior to the admission of the state into the union they were under Federal control;[94] and one who had become entitled to a patent prior to the admission of a state was entitled to the lands where the state in its constitution disclaimed title to all lands patented.[95] Grants to a state requiring confirmation do not pass

84. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999.

85. That a larger sum is due when he asks judgment is no ground for awarding it. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999.

86. See 4 C. L. 1105.

87. See 4 C. L. 1107.

88. That taxes have for a long time been collected upon wharves does not estop the public from asserting title to the lands upon which they are located. Murray v. Barnes [Ala.] 40 So. 348.

89. Under Act Cong. June 4, 1897, c. 2, 30 Stat. 36, providing that an owner of land within a forest reserve may relinquish the same and select in lieu a tract of vacant land, title vests in the government on filing the deed of relinquishment for record, and is not dependent on the selection of land granted in lieu thereof. Territory v. Perrin [Ariz.] 83 P. 361.

90. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401.

91. See 4 C. L. 1107.

92. Where, prior to the formation of Kentucky, Virginia granted land afterward included in Kentucky, Kentucky had no title. Taulbee v. Buckner's Adm'r [Ky.] 91 S. W. 734.

93. Chicago Transit Co. v. Campbell, 110 Ill. App. 366. Upon admission of Washington into the Union, tide lands became property of the state. Town of West Seattle v. West Seattle Land & Improvement Co., 38 Wash. 359, 80 P. 549.

94. Congress has power to grant tide land within a territory. Kneeland v. Korter [Wash.] 82 P. 608.

95. Where a railroad had performed all the conditions entitling it to a grant, including tide lands within its limits, before the territory became a state, it is entitled to such lands where the state in its constitution disclaimed title to all such lands patented, though the patent was not issued until after the adoption of the constitution. Kneeland v. Korter [Wash.] 82 P. 608.

title until confirmed.[96] No title to school lands granted by the Federal government to the state, and described by designation of section numbers only, vests in the state until official survey is made and approved by the Federal authorities.[97] Hence the state cannot assert title to any portion and convey a fee or grant a lease of it.[98] Public lands[99] are under the dominion of the state, though title is vested in a subdivision thereof.[1] Lands granted by congress to a state for a specified purpose[2] are to be used in the manner the legislature directs.[3] It is the province of the legislature alone to determine the manner in which said lands may be disposed of in furtherance of the purposes of the grant,[4] and such power cannot be delegated.[5] Lands granted by congress to Idaho for university purposes may be used only in support and maintenance of the university, in the payment of current expenses and charges for conducting the same,[6] and not for the erection or equipment of buildings.[7]

§ 2. *Lands open for settlement and lands granted or reserved.*[8]—Where a timber culture entryman dies without heirs before completing the period of occupancy and receiving his patent, the land is open as part of the public domain for oc-

96. Under 9 Stat. 519, granting certain swamp lands to the state, and Acts 1850-51, authorizing the swamp land commissioners to demand from the United States indemnity for lands sold since the grant or which might thereafter be sold, and Act Cong. March 3, 1857, confirming to the state all lands theretofore selected, so far as they remained vacant and unappropriated, one who purchased from the United States after the grant but prior to the confirmatory act obtained good title. Cotton Belt Lumber Co. v. Kelly [Ark.] 86 S. W. 436.

97, 98. Clemmons v. Gillette [Mont.] 83 P. 879.

99. Islands formed in navigable streams in Missouri belong to the counties in which they appear, and may be disposed of as swamp lands under Rev. St. 1899, art. 6, c. 122. Frank v. Goddin [Mo.] 91 S. W. 1057.

1. Swamp and overflowed lands vested in the counties by Rev. St. 1899, § 8195, being public lands and held as school lands, the legislature was authorized by Const. 1875, art. 2, § 4, to create a board of education with power to employ an attorney in each congressional district to look after such lands, as provided by Rev. St. 1899, §§ 9814, 9817. Phillips v. Butler County, 187 Mo. 698, 86 S. W. 231. Under Rev. St. 1899, § 9816, requiring the board of education to ascertain from counties the disposition made of the state school fund, and if any of such fund had been diverted from its channel to procure its return, the power of the board's attorney was not limited to a recovery of misappropriated lands or funds, but he might assist in a defense of a suit against a county to quiet title. Id. The legislature of Florida, under the Swamp and Overflowed Land Act (9 Stat. 519), had the right to deal with all swamp and overflowed lands in the state and grant the same in trust or otherwise before identification and patent to it by the United States, subject to the right of the secretary of the interior to determine what lands were embraced in said act. Kittel v. Trustees of Internal Improvement Fund of Florida, 139 F. 941. Under Laws Fla. 1854-55, p. 9, c. 210, known as the Internal Improvement Fund Act, creating trustees to hold such fund for the purposes provided for therein, such trustees had power to make effective a railroad land grant, passed not strictly in conformity to the internal improvement fund act, and their promise to make deeds when patents were received from the United States will be specifically enforced. Id.

2. The erection of a residence for the governor is within the purpose of the grant of land made by congress to the state for public buildings at the capitol, under § 17 of the enabling act (25 Stat. 681, c. 180). State v. Budge [N. D.] 105 N. W. 724. Act Cong. July 2, 1862, 12 Stat. 503, and Act Cong. Aug. 30, 1890, 26 Stat. 417, granting lands to the states for the benefit of colleges, is a grant to the states and not to the colleges to be received through the states as a mere conduit. State v. Irvine [Wyo.] 84 P. 90. Under these acts, the state being required to accept the grant, it was the duty of the legislature to select the beneficiary. Id.

3. The disposition of lands granted by congress to the state for public buildings at the capitol is exclusively with the legislature, and its action in such matters is final unless violative of some constitutional provision and clearly contrary to the terms of the grant. State v. Budge [N. D.] 105 N. W. 724. Act Cong. Feb. 22, 1889, granting lands to Montana for state normal schools and conferring on the legislature the manner in which such lands shall be disposed of, and Montana Const. art. 11, § 12, providing that only interest on invested funds and rents from leased lands should be used, are not inconsistent, since the act of congress referred only to the disposition of the land and the constitutional provision for the control of the fund derived from a sale thereof. State v. Rice [Mont.] 83 P. 874.

4. State v. Budge [N. D.] 105 N. W. 724.

5. It being purely legislative. State v. Budge [N. D.] 105 N. W. 724.

6. Roach v. Gooding [Idaho] 81 P. 642.

7. Lands granted by act of congress February 18, 1881, and the Idaho admission act, act July 3, 1890, 26 Stat. 216, c. 656. Roach v. Gooding [Idaho] 81 P. 642.

8. See 4 C. L. 1107.

cupancy by any qualified homesteader.[9] Notwithstanding statutes declaring all mineral deposits on public lands open to exploration and purchase, the president has power by proclamation to reserve a portion of the public domain for an Indian reservation.[10] A right to locate mineral claims, under an act of congress subjecting mineral lands in an Indian reservation to mineral entry, is suspended by joint resolution passed the same day postponing the operation of the act.[11]

§ 3. *Mode of locating and acquiring title. A. Federal lands.*[12]—An entry must be made by one qualified to enter,[13] for the purpose for which the land is open,[14] but an entry valid on its face by one disqualified to make entry prevents the initiation of rights by another while it remains of record and unrelinquished.[15] Patents when issued relate back to the date of entry,[16] or enactment of a law constituting a grant in praesenti.[17] Erroneous recitals in the patent not required by law are not binding.[18] An acceptance of a grant of a highway over public lands may be shown by general public user.[19]

Railroad grants[20] take effect in praesenti on lands then public if selection and location are all that remains to be done to pass the land,[21] and title passes on filing of the map of definite location[22] or actual construction of the road,[23] and compliance with other statutory conditions.[24] Title to land within the place limits of the grant

9. Gould v. Tucker [S. D.] 105 N. W. 624.

10, 11. Gibson v. Anderson [C. C. A.] 131 F. 39.

12. See 4 C. L. 1109.

13. One who was within the Chilocco reservation on the date a portion of it was opened, and raced to such part at the hour of opening, is not a "sooner," and is qualified to enter a portion of such land. Lee v. Ellis [Okl.] 83 P. 715, following McCalla v. Acker [Okl.] 78 P. 223.

14. Under act of congress March 2, 1889, 25 Stat. 896, where railroad lands are forfeited they are subject to homestead and not to townsite entry. Sanford v. King [S. D.] 103 N. W. 28.

15. McMichael v. Murphy, 197 U. S. 304, 49 Law. Ed. 766.

16. Where an entry is made on the faith of an original government survey, the patent when issued relates back to the date of the entry and is based on such original survey. Washington Rock Co. v. Young [Utah] 80 P. 382.

17. The Swamp and Overflowed Land Act (9 Stat. 519) is a grant in praesenti of the equitable title of all such lands within the state, and at the request of the governor the secretary of the interior should cause a patent to be issued to the state therefor and when the patent was issued the title related back to the date of the act. Kittel v. Trustees of International Improvement Fund of Florida, 139 F. 941.

18. McCorkell v. Herron [Iowa] 103 N. W. 988.

19. Under Rev. St. U. S. § 2477, granting a right of way for highways over public lands not reserved for public use, and Laws 1903, p. 155. c. 103, authorizing county commissioners to accept such rights of way but not invalidating an acceptance by general public use, an acceptance of such grant is shown by general public use for seven years prior to entry by a homesteader without action by the county commissioners. Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262.

20. See 4 C. L. 1109.

21. The grant to the Northern Pacific Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365, was one in praesenti and was confined in terms to public land. Land not public at the date of the grant did not pass, though it subsequently became of that character. Northern Lumber Co. v. O'Brien [C. C. A.] 139 F. 614. Acts 1860-61, p. 136, entitled "An act to invest the swamp land in the Campagnolle swamp land district" as stock in a certain railroad, **was not a grant in praesenti** to the railroad, and the grant did not take effect until the making of a deed by the governor. Cotton Belt Lumber Co. v. Kelly [Ark.] 86 S. W. 436.

22. The grants to the Atlantic and Pacific Railway Company and to the Southern Pacific Railway Company by Act Cong. 1866 were grants in praesenti, which, when the maps of definite location were filed and approved, took effect by relation as of the date of the act. Southern Pac. R. Co. v. Lipman [Cal.] 83 P. 445.

23. A grant for a right of way becomes definitely fixed by the actual construction of the road as effectually as it could have been by the filing of the map of location. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401. Act Cong. March 3, 1873, c. 291, 17 Stat. 612, granting a right of way to the Utah and Northern Railway Company and requiring the filing of a map of definite location with the secretary of the interior, is substantially complied with so far as settlers are concerned by the actual construction and operation of the road. Id.

24. A finding that it had been finally determined that a railroad company had no interest in land claimed by it under a grant, and should not receive a patent, held not sustained by the evidence. Southern Pac. R. Co. v. Lipman [Cal.] 83 P. 445. A finding that a railroad company did not use

passes without selection and approval[25] if not subject to a prior grant,[26] but indemnity lands do not.[27] A grant of a right of way passes no title to land previously granted.[28] A grant of a right of way of a certain width carries a right to possession of a tract of such width.[29] The grant of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant and limited to use and occupation for railroad purposes.[30] The franchise and right of way are inseparably attached, and the company cannot convey any part of the way in such manner or for such purpose as would sever the right of possession from the franchise.[31] It therefore follows that adverse possession cannot ripen into a right which would divert the use and occupation from that to which congress made the dedication.[32] "Public land" as used by congress, when a different intention is not clearly expressed, means such land as is subject to sale or other disposal under general laws, and not such as is reserved by competent authority, though no exception is made of it.[33]

Cancellations and forfeitures.[34]—Unearned railroad lands, title to which is resumed by the state and reverted to the United States, are not lands excepted from the operation of the grant within the meaning of section five of the Adjustment Act of March 3, 1887, and a purchaser from the company acquires no right to purchase from the United States.[35] One who purchases unearned lands from a railroad company, after the state has resumed title, acquires no rights and is not protected

ordinary diligence to obtain patents is not sustained where delay was caused by failure of the land department to approve report of commissioners appointed to inspect the road, on which approval depended, and by litigation relative to its right to patents, which it prosecuted as diligently as possible. Id.

25. Title within the place limits of the grant by the act of July 27, 1866, to the Atlantic and Pacific Railroad Company passed on the completion of the road without selection and approval by the secretary of the interior, unless the tract was within the excepted classes. Howard v. Perrin, 200 U. S. 71, 50 Law. Ed. —.

26. Lands within the place limits of a railroad grant, but also included in the lines of an official survey of a Mexican grant made at the instance of the person to whom such grant was confirmed, held excluded from the grant to the railroad company. Southern Pac. R. Co. v. U. S., 200 U. S. 354, 50 Law. Ed. —. The objection that there had been no final order of confirmation requisite under the act of March 3, 1851, to justify an official survey of a Mexican grant, because of an appeal from the decree of confirmation, is not available to defeat the contention that lands within the place limits of a railroad grant were excluded because included by a survey of the Mexican grant. Id.

27. No interest in lands within the indemnity limits of the grant to the Northern Pacific Railroad Company by Act July 2, 1864, was acquired by the company until the selections were approved by the secretary of the interior. Sjoli v. Dreschel, 199 U. S. 564, 50 Law. Ed. —.

28. Under Act Cong. March 3, 1875, 18 Stat. 482, granting railroads a right of way through public lands and providing that the manner in which private lands and possessory rights may be condemned, a railroad acquires no rights against an actual settler until condemnation, and if a patent is issued to him prior to condemnation, he has legal title free from any claim of the railroad. Slaght v. Northern Pac. R. Co. [Wash.] 81 P. 1062.

29. The grant by congress of a right of way 100 feet wide on each side of the central line of the track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use, and carried with it the right of possession to the whole of such tract. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401.

30, 31. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401.

32. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401. Limitations will not run against an action to maintain the integrity of a right of way granted by congress for a specific use. Id.

33. Northern Lumber Co. v. O'Brien [C. C. A.] 139 F. 614. Where a withdrawal of public lands along the route of a railroad, in aid of which a grant of lands has been made by congress, is made by the chief officers of the land department in advance of the definite location of the route of such road in order that the lands may be preserved for the ultimate satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other congressional enactment, is a reservation made by competent authority. Id. The reservation during its continuance removes the lands embraced therein from the category of public lands, and excludes them from subsequent railroad grants containing no declaration of an intention to include them, even though it subsequently transpires that the withdrawal was ill advised or that the lands are not required for the satisfaction of the prior grant. Id.

34. See 4 C. L. 1111.

as a bona fide holder under the Adjustment Act of March 3, 1887, as against one who enters under the land laws of the United States to which the lands were subsequently relinquished by the state.[36] The United States may cancel fraudulent entries as against the entryman, and innocent purchasers, prior to the issuance of the patent;[37] but the title of a bona fide purchaser subsequent to the issue of a patent is superior to the equitable claim of the United States to avoid the patent for fraud in its issue.[38]

Jurisdiction of land officers and courts.[39]—The land department of the government is invested with primary jurisdiction over the disposition of public lands,[40] and is empowered, in the exercise of such jurisdiction, to try and determine all adverse claims thereto.[41] Such jurisdiction is exclusive[42] except as to possessory rights.[43] In the exercise of that jurisdiction the land department is a judicial tribunal,[44] but a decision of the commissioner of the general land office in denying a patent is not a judicial determination of the title as between the applicant and caveator, who claims under a prior patent.[45] Its decisions are final and conclusive as to matters of fact, and subject to correction by the courts only in matters of law after final hearing and conveyance by the government,[46] and in the absence of the pleadings in contest cases, the recitals of the decisions of the department are conclusive as to what issues were determined;[47] but after title has passed from the

35, 36. Ostrom v. Wood, 140 F. 294.

37. United States v. Clark [C. C. A.] 138 F. 294.

38. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668; United States v. Clark [C. C. A.] 138 F. 294. Where it appears that land was patented under a railroad grant while an application for a homestead entry thereon was pending on appeal before the land department, which through mistake had not been entered upon the records, thus depriving the department of power to determine the homestead claim on its merits, a case of erroneous patenting is made out which entitles the government to cancel the patent in a suit under the adjustment act March 2, 1887, c. 376, 24 Stat. 556. Sage v. U. S. [C. C. A.] 140 F. 65.

39. See 4 C. L. 1112.

40, 41. Sage v. U. S. [C. C. A.] 140 F. 65.

42. The jurisdiction of courts arises after title passes and not before. Healey v. Forman [N. D.] 105 N. W. 233. State courts have no jurisdiction to determine the character of public lands, as to whether it is mineral or not, while the claims of respective parties are pending before the department. Le Fevre v. Amonson [Idaho] 81 P. 71; Smith v. Love [Fla.] 38 So. 376. When the jurisdiction of the land department is once set in motion, and that tribunal is engaged in an investigation to determine the character of the land, the courts are precluded from trying that question. Le Fevre v. Amonson [Idaho] 81 P. 71.

43. Where claims of one in possession and a homestead entryman are pending in contest before the land department, the courts will protect the rights of the parties so far as can be done without interfering with the jurisdiction of the department. Zimmerman v. McCurdy [N. D.] 106 N. W. 125.

44. Sage v. U. S. [C. C. A.] 140 F. 65. The sole scope and purpose of the act of March 3, 1887, c. 376 (24 Stat. 556), providing for the adjustment of railroad grants, is to restore to that tribunal jurisdiction of any case where through fraud or mistake an erroneous certification has been made or patent issued. Id.

45. Carswell v. Swindell [Md.] 62 A. 956.

46. Sage v. U. S. [C. C. A.] 140 F. 65. On the question of whether certain land is mineral or not. Le Fevre v. Amonson [Idaho] 81 P. 71. Upon issues of fact involving the title to public lands. Parryman v. Cunningham [Okl.] 82 P. 822. On the rights of contesting homestead entrymen. Martinson v. Marzolf [N. D.] 103 N. W. 937. In the absence of clear and cogent reasons for a different conclusion, the courts should sustain the decision of the secretary of the interior in a land contest over a homestead entry. Sanford v. King [S. D.] 103 N. W. 28. In the absence of fraud, findings of the land department upon questions of fact are conclusive on the courts, whether contrary to the preponderance of evidence or not. Love v. Flahive [Mont.] 83 P. 882. Which of two simultaneous applicants made a prior settlement is a question of fact. Id. It is not ground for equitable relief against a decision of the land department that perjury was committed during a contest over a homestead entry. Estes v. Timmons, 199 U. S. 391, 50 Law. Ed.—. Where two homestead applicants filed simultaneously a finding by the secretary of the interior that the one who had preserved his right since his settlement should be given preference over one who had abandoned his right is proper, where it did not appear that the right had been established prior to the settlement by the other. Love v. Flahive [Mont.] 83 P. 882. The allowance of an application to contest a final entry of public land is by rule of the general land office vested exclusively in the discretion of the commissioner of the general land office, and courts will not interfere with the exercise of such discretion unless there has been such an abuse

United States, equity will convert the holder of the legal title into a trustee, if in good conscience and by the laws of congress and rules of the land department the land should have gone to another.[48] It is the settled law of the interior department that a second contest will not be entertained against an entry of public land upon a charge which has been once investigated and decided.[49]

(§ 3) *B. State lands.*[50]—Contracts between individuals having for their direct object the acquisition of public lands in a lawful manner are not contrary to public policy.[51] A county which holds lands in trust cannot tie its hands so as to prevent execution of its trust.[52] Public lands must be disposed of in the manner provided by law,[53] and cannot be disposed of by a boundary agreement if the statute prescribes a sale.[54] The conveyance must be based on a consideration.[55] The consideration must be such as is provided by law.[56] A power in the county court to reject or confirm a sale gives it power to prevent a sacrifice of the land.[57] In Texas, school lands in the absolute lease district cannot be sold while there is a valid lease in force,[58] and the waiver of a lease by a lessee in favor of an ineligible purchaser does not authorize a sale to any other person during the existence of the lease.[59] The amount of land to be awarded to one applicant is regulated by statute,[60] and may depend on the character of the land[61] as classified by the constitution.[62] In Texas an

of it as to amount to a denial of a clear right. Parryman v. Cunningham Okl.] 82 P. 822.

47. Parryman v. Cunningham [Okl.] 82 P. 822.

48. Smith v. Love [Fla.] 38 So. 376. Where one obtains a patent from the United States by fraudulent imposition on the officers of the land department, equity will give relief to a party entitled to the patent. Id.

49. Such policy should not be overturned by the courts. Parryman v. Cunningham [Okl.] 82 P. 822.

50. See 4 C. L. 1113.

51. Williams v. Finley [Tex.] 90 S. W. 1087.

52. A contract between a county and bidder for swamp lands, that the bidder should not carry out his contract until the title of the county to all the lands had been judicially determined in pending litigation, is invalid. Wheeler v. Reynolds Land Co. [Mo.] 91 S. W. 1050.

53. School lands of a county can be disposed of only by sale. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846. Under Const. 1876, art. 7, § 2, Act Feb. 4, 1856, §§ 16, 18, and Act March 18, 1873, relative to the location of railroad certificates, held to authorize a survey of an alternate for the state when a certificate given a railroad was located outside the reservation. Williams v. Finley [Tex. Civ. App.] 13 Tex. Ct. Rep. 209, 87 S. W. 736.

54. A boundary agreement cannot divest the county of its title unless made by the commissioners' court, and is a matter of record. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

55. Compromise of an action on an invalid contract is not a consideration. Wheeler v. Reynolds Land Co. [Mo.] 91 S. W. 1050.

56. Under Rev. St. 1895, art. 4271, the commissioners' court has no authority to sell school lands for any consideration other than money. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

57. A statute vesting in the county court power to reject or confirm a sale of school lands gives it power to reject for inadequacy of price as well as for irregularities or unfairness. Williams v. State [Ark.] 88 S. W. 980.

58. Under Gen. Laws 1897, p. 184, c. 129, school lands situated in the absolute lease district cannot be sold, if at the time of the application to purchase there is a lease in force. Trevy v. Lowrie [Tex. Civ. App.] 14 Tex. Ct. Rep. 75, 89 S. W. 981. Under the statutes of Texas providing for the cancellation of leases for failure to pay rent, the commissioner must take some official action and formally deciare in writing the cancellation of the lease before the land comes on the market for sale. Willoughby v. Terrell [Tex.] 90 S. W. 1091. A judgment by an applicant to purchase against a lessee from the state does not estop the state to deny his right to purchase. Id.

59. Trevy v. Lowrie [Tex. Civ. App.] 14 Tex. Ct. Rep. 75, 89 S. W. 981. An award is not shown invalid by proof that a state lease had been executed for a period sufficient to embrace an award, as an additional homestead, without showing that the lease had not been forfeited or rights thereunder waived. Hood v. Pursley [Tex. Civ. App.] 13 Tex. Ct. Rep. 231, 87 S. W. 870.

60. Laws 1905, p. 163, c. 103, §§ 5, 6, authorizes one who has purchased four sections of land in one of the counties designated to purchase four more sections. Ross v. Terrell [Tex.] 90 S. W. 1093.

61. Land unfit for cultivation, unless by the boring of artesian wells, water may be developed for irrigation, is not suitable for cultivation under Const. art. 17, § 3, providing that such land may be granted to actual settlers in tracts not exceeding 320

assignee of an "entire lease" is entitled to purchase one complement.[63] Appraisers appointed to appraise land as leased land cannot be compelled to appraise it as land actually settled.[64]

An entry is not indispensable to the validity of a grant.[65] Actual settlement at the time application is made may be essential.[66] Such settlement must be in good faith.[67]

A premature applicant acquires no rights against one who files an application before an award is made.[68] By making a second application to purchase state school lands, the applicant does not waive his rights under the first application.[69] If an application for the purchase of a home section fails, a claim of the applicant for another section as additional land must also fail.[70] If impracticable, strict compliance with the letter of a statute, requiring an application for a land certificate to particularly describe the claim to be surveyed and the land applied for, is not essential.[71] One who intends to acquire title as a substitute purchaser must comply with statutory requirements.[72] A transfer from the purchaser to one who intends to become a substitute purchaser is not rendered void by a defect amounting only to an irregularity.[73]

An application to purchase cannot be arbitrarily rejected if the applicant has

acres, and Pol. Code § 3495, providing that land is suitable for cultivation if the smallest legal subdivision is. Robinson v. Eberhart [Cal.] 83 P. 452.

62. A constitutional classification of public lands as suitable for cultivation cannot be altered by legislative definition as to what are lands suitable for cultivation. Robinson v. Eberhart [Cal.] 83 P. 452. Exclusion of records of the land office showing classification of lands in May, 1901, as evidence of classification in September, 1899, held not ground for reversal. Smithers v. Lowrance [Tex. Civ. App.] 91 S. W. 606. The identity and condition of records of the land office should be proven by deposition of the land commissioner and not by his certificate. Id.

63. Under Laws 1905, p. 163, c. 103, § 5, providing that an assignee of an "entire lease" out of which no sale of one complement of land has been made may purchase out of his lease the quantity allowed to one purchaser, an assignee of a lease out of which a portion of the lands had been sold to a third person with the consent of the lessee is entitled to purchase. The part not sold is an entire lease. Garza v. Terrell [Tex.] 90 S. W. 1092.

64. Where two petitions are pending asking for a sale of the same tract of school land, one of which requests that it be sold as leased land, and the other to an actual settler, and appraisers are appointed to appraise the land as leased land, they cannot be compelled by mandamus to act as appraisers under the other petition. Wilson v. Winfrey [Kan.] 84 P. 123.

65. Sampson's Heirs v. Chester's Heirs [Tenn.] 91 S. W. 43.

66. Evidence tending to show whether or not one was an actual settler at the time of his application to purchase, held admissible. March v. Shaw [Tex. Civ. App.] 87 S. W. 360.

67. Evidence held to show that one's settlement on land which he made application to purchase was not made in good faith. Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936.

68, 69. Perry v. Rutherford [Tex. Civ. App.] 13 Tex. Ct. Rep. 228, 87 S. W. 1054.

70. Sanford v. Terrell [Tex.] 13 Tex. Ct. Rep. 58, 87 S. W. 655.

71. Application in gross for a large number of acres out of a larger tract, where the land could not be more particularly described without a preliminary survey Raoul v. Terrell [Tex.] 13 Tex. Ct. Rep. 253, 87 S. W. 1146. Where railroad certificates are located in gross on a much larger tract than they call for, another road may locate its certificates on the same land subject to the prior location, and where the first location is forfeited without making surveys, the latter may have surveys made on any part of the land designated in its application. Id.

72. Rev. St. 1895, art. 4218 K, requires the vendee to file his obligation with the commissioner together with his transfer from the original purchaser, and where actual residence is required, file an affidavit that he desires to purchase the land as a home. Dugat v. Means [Tex. Civ. App.] 91 S. W. 363. Under the direct provisions of Rev. St. 1895, art. 4218 K, after a sale of state school lands has been effected the transferee thereof, on filing in the general land office a transfer from the purchaser and his own obligation, is entitled to become a substitute purchaser. Smith v. Coble [Tex. Civ. App.] 13 Tex. Ct. Rep. 345, 87 S. W. 170. Evidence of collusion held immaterial, where, if established, the defendant would take under his application as a substitute purchaser. Perry v. Rutherford [Tex. Civ. App.] 13 Tex. Ct. Rep. 228, 87 S. W. 1054.

73. Failure to have his transfer recorded in the county where the land lies, as required by Rev. St. 1895, art. 4218 K. Smith

complied with all rules and the land is on the market.[74] After the land commissioner has accepted an applicant's proof of occupancy and issued his certificate, he cannot reverse his decision merely because of an error on his part as to the sufficiency of proof of occupancy.[75] Where, pending a petition for mandamus to compel the commissioner to award school land to relators, without reserving minerals, they accept under protest an award containing such reservation, the petition will be denied,[76] and prior to their right to demand a patent they are not entitled to mandamus to determine the commissioner's right to make such reservation.[77] Courts will not inquire into the motive that prompted an order of the board of state land commissioners, rejecting an application to purchase, where such order is regular on its face and within the authority of the board.[78] An award of school land by the commissioner of the land office is prima facie evidence that at the date of such award the land was on the market, and that all prerequisites of his power to make a sale had been met.[79]

Adverse possession may give title,[80] but does not run against the title of a county to lands granted to it for educational purposes.[81]

Grants and patents.[82]—The issuance of a patent by the state at the request of the patentee is a mere grant of the state's right as it exists.[83] A deed should refer to statutory authority for its execution and show compliance with statutory requirements,[84] but the signature of the official who executed need not be attested by a seal.[85] A conveyance under a statute authorizing a lease reserving rent is void as a conveyance.[86] A patent may be shown by extrinsic evidence to be void,[87] but one regular on its face is not subject to collateral attack.[88]

v. Coble [Tex. Civ. App.] 13 Tex. Ct. Rep. 345, 87 S. W. 170.

74. Knapp v. Patterson [Tex. Civ. App.] 87 S. W. 391.

75. Smith v. McClain [Tex. Civ. App.] 87 S. W. 212.

76, 77. Thaxton v. Terrell [Tex.] 91 S. W. 559.

78. Polson v. Callvert, 38 Wash. 614, 80 P. 815. Under Laws 1897, p. 261, c. 89, § 67, giving the board of state land commissioners power to review its official acts, relating to state lands, until a lease or contract shall have been executed, an application to purchase may be rejected prior to execution of the conveyance, though such application had previously been granted. Id.

79. Hood v. Pursley [Tex. Civ. App.] 13 Tex. Ct. Rep. 231, 87 S. W. 870. Where land is awarded to a later applicant, the burden is on a prior applicant to show irregularity in the award, and lack of power in the commissioner to make it. Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936. Where one made application to purchase 10 days after a prior application, evidence that it was awarded to the later applicant is not evidence that a prior award had been cancelled at the time the first application was filed. Id. One who makes an application to purchase school land, after the land office has accepted another's proof of occupancy and issued a certificate, cannot controvert the fact of occupancy. Smith v. McClain [Tex. Civ. App.] 87 S. W. 212. One who claims under an application to purchase, indorsed "rejected," has the burden of showing that the rejection was wrongful. Knapp v. Patterson [Tex.] 90 S. W. 163. Admission in evidence of a portion of a certificate from the land office held error without admitting it in whole, though the portion excluded contained matter not properly in the record. Id. Under Acts 27th Leg., p. 292, c. 125, § 1, requiring the commissioner to make a list of unsold school lands, such list to be filed as a public record in the county court, he had no power under a head "remarks" to state that land on the list was sold and that the sale was in good standing, and such recital was no evidence of such fact. Knapp v Patterson [Tex. Civ. App.] 87 S. W. 391.

80. Prior to the enactment of Rev. St. 1899, § 4270, adverse possession ran against swamp lands patented by a state to a county, and that statute did not toll adverse possession already commenced. Hunter v. Pinnell [Mo.] 91 S. W. 472.

81. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

82. See 4 C. L. 1114.

83. It is not an assertion of title, and one who has in fact acquired title by adverse possession cannot be ousted by the patentee. Asher v. Howard [Ky.] 91 S. W. 270.

84. Under Rev. St. (3d Ed.), title 4, c. 15, § 3, a deed of gospel and school lands must refer to statutory authority for its execution, and show that it was executed with the advice and consent of the inhabitants of the town in town meeting assembled. Raquette Falls Land Co. v. Buyce, 108 App. Div. 67, 95 N. Y. S. 381.

85. Under Rev. St. 1895, art. 4271, a deed of school lands by members of the commissioners' court is not inoperative merely because the signatures were not attested by

Rescissions, cancellations, forfeitures, and reversions.[89]—Where land is granted by the state on condition subsequent, a breach of the condition will not defeat the estate until the state asserts a forfeiture,[90] and an individual cannot assail the title for nonperformance of the condition.[91] Where a contract for sale is made on the express statutory condition that rights thereunder are forfeited by failure to make deferred payments as required, a default in payment ipso facto forfeits the rights of the purchaser,[92] but if legal proceedings are necessary, mere failure to pay does not work a forfeiture;[93] and a tender before a forfeiture is declared, or other rights have intervened, will save the rights of the purchaser.[94] A forfeiture must be based on a finding of facts constituting ground for such action.[95] The state of Texas has power to forfeit, through a declaration of its land commissioner, a sale of lands for nonpayment of interest on the purchase money,[96] or for failure of the purchaser to live on and improve the land.[97] The act of the land commissioner in declaring such forfeiture has the effect of restoring such land to the public domain.[98] The declaration of a forfeiture, while land is in the adverse possession of another, tolls the statute of limitations as to him.[99] Where an award is cancelled for mistake in classification, the presumption of regularity in the acts of the commissioner pertains to the cancellation and not to the award.[1]

Adjudication of title by the courts.[2]—Under the statutes of California, where the surveyor general submits to the court the right of contesting applicants to purchase school lands, the jurisdiction of the court is confined to the determination of the rights

a seal. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

86. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

87. Morgan v. Stoddard, 187 Mo. 323, 86 S. W. 133. Under Sess. Acts 1869, p. 66, providing that a patent from a state to a county of swamp lands therein is prima facie evidence of title in the counties, a patent to a county is void where it appears that at the time it was executed the land was not situated in that county. Id.

88. A patent conveying "about 100 acres" for a consideration of $125 is not void because in fact containing 127 acres and was therefore conveyed for a price less than authorized. Frank v. Goddin [Mo.] 91 S. W. 1057.

89. See 4 C. L. 1116.

90, 91. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

92. Sess. Laws 1878, p. 47, providing that failure to pay interest on purchase-money notes for one year forfeits all payment made by the purchaser and all his rights under the contract. Sehlbrede v. State Land Board [Or.] 81 P. 702. Laws 1899, p. 77, § 5, waives a forfeiture so far as it exists at the date of the act, but not one thereafter accruing. Id.

93. Under Code, c. 11, §§ 2356, 2466, providing that persons entering Cherokee lands shall file bonds payable to the state in four equal instalments, and declaring that if the bonds are not paid when due, and if the money cannot be collected by judgment, the lands shall revert to the state, where an entryman failed to pay the bond for 10 months after maturity, such failure did not work a forfeiture so as to impress the legal title with a trust in favor of a junior entryman. Frazier v. Gibson [N. C.] 52 S. E. 1035.

94. Where proceedings under Gen. St. 1901, § 6356, to forfeit school land contracts for nonpayment of interest were void, and the purchasers tendered principal, interest, and taxes before other proceedings were commenced or other rights intervened, mandamus will issue to compel the acceptance of such tender and the issuance of receipts. True v. Brandt [Kan.] 83 P. 826.

95. A forfeiture of school land contracts cannot be based on the return of a sheriff that he found no one in possession. True v. Brandt [Kan.] 83 P. 826.

96. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039.

97. Under Laws 1901, p. 294, c. 125, § 3, declaring that if a purchaser fail to live on and improve the land he shall forfeit it and all payments, where a purchaser leaves the land for 8 months and only returned on one occasion for a day or two, he forfeited his rights. Land purchased under the statute requiring three years' residence thereon. Andrus v. Davis [Tex.] 13 Tex. Ct. Rep. 1003, 89 S. W. 772.

98. This is so notwithstanding Sayles' Ann. Civ. St. 1897, art. 4218f, providing that after forfeiture purchasers may have their claims reinstated by payment of interest in full, if rights of third persons have not intervened. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039.

99. Under Sayles' Ann. Civ. St. 1897, art. 4218l, the state may place the land on the market and sell it. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039.

1. Smithers v. Lowrance [Tex. Civ. App.] 91 S. W. 606. Proof of three years' occupancy by a claimant under a cancelled award is immaterial. Id.

2. See 4 C. L. 1116.

of the parties to the reference.[3] Consequently, a party who intervened without authority is not aggrieved by a judgment that one of the parties to the reference is entitled to purchase,[4] nor can he raise the point that the parties to the contest have agreed to divide the land in order to evade a constitutional provision that lands shall be granted only to actual settlers.[5] Persons designated by statute,[6] and no others,[7] have a right to intervene. The right of an actual settler to contest adverse claims to purchase under the statutes of California may be lost by laches.[8] The supreme court of Texas has no jurisdiction to pass upon a question of fact, hence, an issue as to actual settlement on the land applied for deprives it of jurisdiction to determine the rights of an applicant against the commissioner of the general land office.[9]

§ 4. *Interest and title of occupants, claimants, and patentees. A. Federal lands.*[10]—The legal title to a timber culture claim[11] or homestead[12] remains in the United States until patent issued,[13] and any time before patent issues the land may be withdrawn from sale and reserved for public purposes,[14] and if the entryman die before such time, his heirs take as donees of the government.[15] This is so even though the entryman's administrator uses funds of the estate to commute the entry,[16] and if he leaves no heirs, the land is open as part of the public domain for occupancy by any qualified homesteader.[17] No right of property as against the government vests in a settler on public lands until he has complied with all the prerequisites for acquiring title, and paid the purchase money.[18] A mere oc-

3. Does not extend to parties who unauthorizedly intervene. Youle v. Thomas, 146 Cal. 537, 80 P. 714.

4. Youle v. Thomas, 146 Cal. 537, 80 P. 714.

5. He not being in privity with the state, and the state having submitted its rights in that regard to the determination of its officers and courts. Youle v. Thomas, 146 Cal. 537, 80 P. 714.

6. One alleging that at the time of making his application to purchase, and for a year previous thereto, he had been a settler on the lands which were suitable for cultivation, is entitled to intervene in such action under Code Civ. Proc. § 387, providing who may intervene in actions. Smith v. Roberts [Cal. App.] 81 P. 1026.

7. One who was neither a party, nor the legal representative of a party, to an action under Pol. Code § 3414, providing for a reference to courts of a contest of applicants to purchase state lands, is not entitled to have the judgment set aside and be allowed to intervene on the ground of mistake, accident, surprise, etc., though he is an actual settler on the lands. Smith v. Roberts [Cal. App.] 81 P. 1026.

8. Where, with knowledge that other claimants were moving to perfect their claims, he takes no steps to look after his rights. Smith v. Roberts [Cal. App.] 81 P. 1026.

9. Gordon v. Terrell [Tex.] 14 Tex. Ct. Rep. 320, 89 S. W. 1052.

10. See 4 C. L. 1117.

11. Gould v. Tucker [S. D.] 105 N. W. 624.

12. An action to declare a resulting trust cannot be maintained against one who has made final proof for government land until he has received a patent. Hamilton v. Foster [Okl.] 82 P. 821.

13. The rights of a surviving husband or wife in a homestead entry made by the other is a Federal question upon which the decisions of the Federal courts are controlling. Hall v. Hall [Wash.] 83 P. 108. Where after divorce a husband makes a homestead entry, the divorced wife acquires no interest in the land by reason of her residence thereon with her husband prior to divorce. Hall v. Hall [Wash.] 83 P. 108.

14. Act March 3, 1891, gives persons who had entered upon lands in Alaska only a pre-emptive right to purchase if the government should sell, but did not impair the right of the government to withdraw the land from sale. Russian-American Packing Co.'s Case, 39 Ct. Cl. 460.

15. Where a wife dies prior to the issuance of a patent to a homestead, which was entered by the husband during her life, on issuance of the patent the children succeed to the title their mother would have had as a member of the community. Cox v. Tompkinson [Wash.] 80 P. 1005. The administrator of the estate of a deceased homestead entryman has no right to make final proof or perfect the entry. Rev. St. U. S., § 2291, provides that the patent shall issue to his heirs. Demars v. Hickey, 13 Wyo. 371, 80 P. 521, 81 P. 705. Where a timber culture entryman dies before completing the period of occupancy and receiving his patent, his heirs succeed to all his rights. Gould v. Tucker [S. D.] 105 N. W. 624. The doctrine of relation cannot be invoked to confer any interest in land under the state laws upon the child of a homestead entryman as against the widow to whom the patent has issued under the homestead laws. McCune v. Essig, 199 U. S. 382, 50 Law. Ed. —.

16, 17. Gould v. Tucker [S. D.] 105 N. W. 624.

18. Oregon Short Line R. Co. v. Quigley, 10 Idaho 770, 80 P. 401. One who makes

cupant acquires no rights against the United States,[19] but a squatter on unsurveyed public lands has an inchoate interest in the timber growing thereon as against a trespasser.[20] An occupying claimant cannot be ousted by a claimant under a homestead entry where the merits of their opposing claims are involved in a contest pending before the land department.[21] The use of public lands for pasturage confers no title on the person using them.[22] No prior right is obtained by priority of use,[23] nor is such right enlarged by or dependent upon ownership of neighboring lands.[24] One who encloses public land in violation of an act of congress, being without right to possession or color of title, cannot prevent trespass on the land by another,[25] nor recover damages for being compelled to allow his stock to run on the common range because the land was depastured by the stock of another,[26] nor can he have incidental relief by way of enjoining another from continuing to depasture the land.[27] One who settles on unsurveyed lands with the intention of claiming them under the homestead laws acquires a prior right to file when the land is surveyed,[28] which is not lost by enforced absence.[29] This prior right carries with it the right to possession, which will be protected when unlawfully disturbed.[30] The

improvements on public land, knowing that it is open for exploration and sale for minerals, but makes no effort to secure title to it, under the laws of congress or local rules of miners has no claim to possession or for improvements against a patentee. Helstrom v. Rodes [Utah] 83 P. 730.

19. Mere occupancy of public lands by a settler gives him no rights as against the United States, and, consequently, none as against a purchaser from it. Le Fevre v. Amonson [Idaho] 81 P. 71. A settler on unsurveyed public lands has no right of recovery against another for cutting timber. Nickelson v. Cameron Lumber Co. [Wash.] 81 P. 1059. No contract was created by the Act of March 3, 1891, or the Act of May 17, 1884, whereby the government was bound to convey to persons who had settled upon lands in Alaska, or reimburse them for improvements if the lands were withdrawn from sale. Russian-American Packing Co.'s Case, 39 Ct. Cl. 460. Any rights acquired under the Act of March 3, 1891, by settlement upon and survey of public lands in Alaska, was terminated by the proclamation of the president reserving such lands for a fish culture station. Russian-American Packing Co. v. U. S., 199 U. S. 570, 50 Law. Ed. —. The Act of May 17, 1884, providing a civil government for Alaska and recognizing the rights of Indians and settlers in the lands, and reserving to them power to acquire title, is not available to one who took possession five years after the passage of the act. Id. Mere settlement without taking any steps required by law to initiate the settler's rights to the land is inoperative as against the United States. Id. Mere occupancy of public lands and improvements thereon is not a vested right as against the United States or a purchaser from it. Helstrom v. Rodes [Utah] 83 P. 730. A trespasser acquires no right to be compensated for losses sustained by reason of enforced removal. Russian-American Packing Co.'s Case, 39 Ct. Cl. 460. Improvement placed upon public land by a trespasser cannot be recovered for when the land is reserved from settlement by the United States. Russian-American Packing Co. v. U. S., 199 U. S. 570, 50 Law. Ed.——.

NOTE. Right of entryman to growing crops and improvements: A purchaser of public lands is entitled to crops growing thereon at the time of his purchase (Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; Rasor v. Qualls, 4 Blackf. [Ind.] 286, 30 Am. Dec. 286; State v. Salisberry, 49 Kan. 160, 30 P. 192; Boyer v. Williams, 5 Mo. 335), and to the improvements (Graham v. Roark, 23 Ark. 19; Collins v. Bartlett, 44 Cal. 371; Blair v. Worley, 2 Ill. 178; Rhea v. Hughes, 1 Ala. 219; Altridge v. Billings, 57 Ill. 51; Welborn v. Spears, 32 Miss. 138; Hill v. Pitt, 2 Neb. Unoff. 151, 96 N. W. 339). See Reservation State Bank v. Holst, 17 S. D. 240, 70 L. R. A. 799, and note.

20. Shea v. Cloquet Lumber Co. [Minn.] 105 N. W. 552.

21. Injunction is the proper remedy to protect his rights until the contest is decided. Zimmerman v. McCurdy [N. D.] 106 N. W. 125.

22. The government may at any time withdraw its consent to such use. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364. The right of pasturage upon public lands is common to all. Id.

23. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364. One accustomed to graze cattle on public lands cannot enjoin another from driving his sheep on such lands. Healy v. Smith [Wyo.] 83 P. 583.

24. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364. That an owner of land in the vicinity of public lands to which exclusive right is asserted by another does not entitle him to an injunction to restrain as a nuisance the exclusion of his cattle from such lands. Id.

25, 26, 27. Clemmons v. Gillette [Mont.] 83 P. 879.

28. Huffman v. Smyth [Or.] 84 P. 80.

29. Where a settler has established a residence and made improvements, his enforced absence by reason of conviction for

title being an equitable one, courts of equity have jurisdiction of an action of which the right to possession is the subject-matter.[31] A claimant under a homestead filing, of land in the adverse possession of another cannot recover possession by injunction though the defendant is insolvent.[32] One contesting for a preference right has no right to possession pending litigation as against a homestead entryman.[33] After making final proof, a homestead entryman has an equitable title which he may transfer.[34] The acceptance and approval of an application to purchase land, not under the homestead laws, vests in the applicant an equitable title, though the purchase price has not been paid,[35] which is perfected as of the date of the application by the subsequent payment of the price and issuance of patent.[36] A homestead entryman is entitled to possession of the land covered by his filing until his entry is cancelled by a proceeding for that purpose.[37] The locator of a mining claim on public lands, who has complied with all the conditions necessary to entitle him to a patent, has an estate not perceptibly different from that acquired by an entryman of agricultural lands.[38]

A homestead entryman[39] or pre-emptor is forbidden to sell or contract to sell prior to the issuance of a patent,[40] but a timber culture entryman is not.[41] The doctrine of relation protects a bona fide purchaser of timber lands from the patentee against wrongful conduct of the entryman.[42] A mortgagee of a patentee, who takes with notice of a conveyance of timber and right of way, cannot challenge the validity of such conveyance because made pursuant to a contract entered into prior to the issuance of patent.[43]

crime does not work an abandonment. Huffman v. Smyth [Or.] 84 P. 80.

30, 31. Huffman v. Smyth [Or.] 84 P. 80.

32. Martinson v. Marzolf [N. D.] 103 N. W. 937.

33 Bilyeu v. Pilcher [Okl.] 83 P. 546.

34. Peterson v. Sloss [Wash.] 81 P. 744.

35. Application under the Treaty of February 22, 1855 (10 Stat. 1165), between the United States and the Mississippi band of the Chippewa Indians. Nicholson v. Congdon [Minn.] 103 N. W. 1034. Such title is subject to conveyance. Id.

36. Nicholson v. Congdon [Minn.] 103 N. W. 1034.

37. Bilyeu v. Pilcher [Okl.] 83 P. 546. No right of action accrues to a successful contestant for unlawful detainer until the entry is cancelled. Id.

38. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 136 F. 124.

39. A lease by a homestead entryman for turpentine purposes before perfecting his entry is not invalid where it does not appear that operations under the lease were intended to be commenced before the entry was perfected. Orrell v. Bay Mfg. Co. [Miss.] 40 So. 429.

40. U. S. Rev. St. 2262, requiring a preemptor to make affidavit that he has not settled upon the land to sell the same on speculation, nor made any contract by which, when he acquires title, it shall inure to the benefit of another, is not violated by a contract to pay an amount advanced him to defray expenses of perfecting his entry out of any sale he might make after acquiring title. Hafemann v. Gross, 199 U. S. 342, 50 Law. Ed. ——.

41. Act Cong. June 14, 1878, 20 Stat. 113, to encourage growth of timber, is not an inhibition on the privilege of one who enters land and cultivates timber thereon from contracting to sell after making final proof, before he secures a patent. Watkins Land Co. v. Creps [Kan.] 83 P. 969.

42. United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 50 Law. Ed. ——. A bona fide purchaser of standing timber from a holder of receiver's final receipts for the purchase price of land, entered under the Timber Act of June 3, 1878, cannot be required to account to the United States for timber cut and removed, where the patents afterward issued are avoided for fraud of the entryman. Id.; United States v. Clark, 200 U. S. 601, 50 Law. Ed. ——. Bona fide purchasers of the equitable title, evidenced by receiver's final receipts upon which patents subsequently issue, have a complete defense to an action by the United States to avoid the patents for fraud, perjury, or error in their procurement. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668. A purchaser is not charged with notice of the wrongful character, as against the government, of conveyances to his vendors where there was no disclosed circumstances by the fact that notice might have been obtained by an investigation of the vendor's evidences of title. United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 50 Law. Ed. ——. Concurrent finding of two lower courts that a purchaser of timber lands had no notice of the fraud of the entryman will be adopted by the supreme court if not clearly wrong. United States v. Clark, 200 U. S. 601, 50 Law. Ed. ——.

43. Hartman v. Butterfield Lumber Co.,

A homestead is forever exempt from liability for debts of the patentee contracted before the patent issued;[44] and under the Federal statutes relating to homestead and pre-emption acquisition of lands, where a homestead entryman commutes his entry, the commutation does not amount to a pre-emption and an abandonment of the homestead exemption rights,[45] nor are such rights abandoned where after commuting his land but before receiving a patent he conveys it and surrenders possession.[46] Where an entryman dies prior to patent issued his heirs take subject to voluntary liens placed on the land after making final proof, but not to debts created prior to such time.[47]

Patentees of land bordering on the Columbia River take subject to fishing rights secured to the Yakima Indians by the treaty of 1859, though their patents are in absolute terms.[48] Grants bordering on streams are to be construed as to their effect according to the law of the state where the land lies.[49] A patentee, though his land be itself surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks.[50]

Where persons agree to fraudulently obtain land from the government, but the government with knowledge of all the facts issues a patent to one, an enforceable trust may result in favor of the other.[51]

The value of land erroneously patented to a railroad and sold by it to bona fide purchasers may be recovered by the United States.[52]

199 U. S. 335, 50 Law. Ed. ——. White, J., dissenting.

Note: Public lands upon original entry of claim become private property (Hastings, etc., R. Co. v. Whitney, 132 U. S. 357, 33 Law. Ed. 3637), in which the government, after the required conditions have been performed, holds a naked legal fee in trust for the prospective grantee (Cornelius v. Kessel, 128 U. S. 456, 32 Law. Ed. 482), who obtains a complete title upon the issuance of patent (Meader v. Norton, 11 Wall. [U. S.] 442, 20 Law. Ed. 184). Since the government, though it has been held to possess the power of restraining the alienation of a granted fee (Smythe v. Henry, 41 F. 705; Jackson v. Thompson, 38 Wash. 282, 80 P. 454), has not exercised it in this connection, the view that a conveyance by the grantee is not rendered invalid by reason of the fact that it was executed in pursuance of a prior illegal agreement is unassailable. It is true the government may have the patent, as issued upon fraudulent affidavits, set aside as against the patentee (United States v Minor, 114 U. S. 233, 29 Law. Ed. 110), and consequently as against his grantee with knowledge of the fraud (Mullan v. U. S., 118 U. S. 271, 30 Law. Ed. 170), yet this should not deprive such grantee of standing in equity to maintain his title as against a third person (Armstrong v. American Exch. Bank, 133 U. S. 433, 33 Law. Ed. 747). The practical result of this position, granting as it does full recognition to rights acquired by land speculators through the voluntary performance of illegal contracts, seems well supported in legal theory, though its conflict with the homestead laws may call for legislative interference along the line of restraints on alienation.—See 6 Columbia L. R. 195.

44. McCorkell v. Herron [Iowa] 103 N. W. 988. Lands held under the United States homestead laws prior to the issuance of patent are exempt from mechanic's liens based on contracts made while title remains in the United States. Green v. Tenold [N. D.] 103 N. W. 398.

45. McCorkell v. Herron [Iowa] 103 N. W. 988.

46. The exemption is available after the conveyance is set aside as fraudulent. McCorkell v. Herron [Iowa] 103 N. W. 988.

47. Gould v. Tucker [S. D.] 105 N. W. 624. The only interest the United States can convey under the timber culture act is an estate free from all involuntary liens and debts of the patentee, contracted prior to the issuance of final certificate. Id.

48. The land department has no power to grant exemption from such rights. United States v. Winans, 198 U. S. 371, 49 Law. Ed. 1089.

49. Where according to a state law such owner owns to the center of the channel, an unsurveyed island in the center of the stream is not subject to entry where the land department refused to survey. Whitaker v. McBride, 197 U. S. 510, 49 Law. Ed. 857.

50. Whitaker v. McBride, 197 U. S. 510, 49 Law. Ed. 857.

51. One in perfecting title to script land was acting as trustee for another. Keely v. Gregg [Mont.] 83 P. 222, overruling [Mont.] 82 P. 27. Evidence insufficient to show that the locator of a mining claim held a portion of it entrusted for another. Helstrom v. Rodes [Utah] 83 P. 730.

52. This is so notwithstanding the adjustment acts of March 3, 1887, and March 2, 1896. Southern Pac. R. Co. v. U. S., 200 U. S. 341, 50 Law. Ed. ——.

Adverse possession[53] does not run against a patentee prior to the issuance of patent,[54] but commences from the date patent issues.[55]

Area acquired and boundaries.[56]—It is presumed that a patent was intended to follow the survey.[57] Where the boundaries of grants lap, the elder grant prevails.[58] Ordinarily the question of the location of a disputed patent is one of fact, but is one of law where only the application of legal principles will leave no question.[59] An omitted line in a patent may be supplied by reference to the original plat or survey.[60] The official surveys made by the government are not open to collateral attack in an action between private parties.[61] A patentee cannot profit by a mistake of the land department of which he must have been cognizant.[62]

Mode of proving title.[63]—Receiver's final receipts are prima facie evidence that the lands they describe were honestly and regularly entered, and that the entryman is entitled to patents.[64] It is presumed that a patent was regularly issued and that all preliminary requirements have been complied with,[65] but the effect of it in passing title may be questioned in an action at law.[66] Copies of the records of the land department are admissible on the question of title under a railroad grant.[67]

(§ 4) *B. State lands.*[68]—One who has settled on school lands with the intention of becoming a purchaser, and has made valuable improvements, has such an interest as will entitle him to enjoin its sale to another,[69] but one in possession who has taken no steps to acquire title has no interest.[70] Nor has one who shows neither title nor possession.[71] A grantee from one who has no title but who subsequently acquires a certificate entitling him to a patent has rights superior to one who acquires a patent fraudulently.[72] That the consideration for school lands sold by the commissioners' court was defective does not invalidate the title of a bona fide pur-

53. See 4 C. L. 1117.

54. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 136 F. 124; Slaght v. Northern Pac. R. Co. [Wash.] 81 P. 1062. Whether limitations run against a settler on public lands prior to the issuance of a patent is a federal question upon which the decisions of the United States supreme court are controlling. Slaght v. Northern Pac. R. Co. [Wash.] 81 P. 1062.

55. Tyee Consol. Min. Co v. Langstedt [C. C. A.] 136 F. 124.

56. See 4 C. L. 1119.

57. Where according to the calls of a survey one call in a patent was duplicated, it was held a clerical error and should be disregarded. Witt v. Middleton, 27 Ky. L. R. 831, 86 S. W. 968.

58, 59, 60. Kerr v. De Laney [Ky.] 91 S W. 286.

61. Kneeland v. Korter [Wash.] 82 P. 608.

62. Where because of carelessness of the land department his patent refers for description of the land conveyed to an original survey, though a resurvey had been mada at his instance, and land included in the later survey was subsequently patented to another. Gleason v. White, 199 U. S. 54, 50 Law. Ed. ——.

63. See 4 C. L. 1120.

64. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

65. Demars v. Hickey, 13 Wyo. 371, 80 P. 521, 81 P. 705. Recitals in a patent confirming a Mexican grant, that persons named therein had acquired an undivided interest, which patent was based on a decree of the court of private land claims, establishes a record title in persons named as against one holding by adverse possession, though under the act creating that court such confirmation only quitclaims the title of the United States. Herrick v. Boquillas Land & Cattle Co., 200 U. S. 96, 50 Law. Ed. —.

66. Carswell v. Swindell [Md.] 62 A. 956.

67. A certified copy of the records of the general land office is competent evidence under Rev. St. § 891, on the question of title in a railroad company under a grant. Howard v. Perrin, 200 U. S. 71, 50 Law. Ed. ——.

68. See 4 C. L. 1120.

69. Schwab v. Wilson [Kan.] 84 P. 123.

70. One in possession of land alleged to have been set apart for the benefit of the school fund, but who has taken no steps to acquire title, cannot litigate the question of vacancy between any surveys under which another claims and which apparently connect. Hickey v. Collyns [Tex. Civ. App.] 90 S. W. 716.

71. Where one protests entry of vacant lands under Acts 1903, p. 447, c. 272, but shows no title except deeds running to other persons, nor any possession except for two years long past, his proceeding is properly dismissed. Johnson v. Wescott, 139 N. C. 29, 51 S. E. 784.

72. Where one sells land belonging to the state, but afterward purchases from the state and receives a certificate entitling him to a patent when the title of the state is confirmed by the United States, which equitable title vests in his grantee by virtue of statute, and subsequently a patent is fraudulently acquired by another from the

chaser from the grantee.[73] One who claims under a prior survey has a vested right in the lands embraced in the boundaries of the survey as against one who claims under a subsequent survey.[74] A grant of land covered by a senior grant,[75] or a grant of land in which the state has no interest,[76] passes no title; and a junior entryman who seeks to impress a trust on a grant to a senior entryman has the burden to show that the senior entry was void for indefiniteness.[77] One is not deprived of a preference right to purchase by a statute providing for a lien on the lands.[78] In Texas the grazing rights of one who purchases land inclosed with leased land are governed by statute.[79] Where public lands are granted to certain proprietors in their corporate capacity as a town, the legal title vests in the town in trust for the purpose specified.[80] A grant of land subject to entry may not be collaterally attacked for fraud or irregularity,[81] but if the land was not subject to entry, the grant is void and may be collaterally attacked.[82] Prior to the location of his certificates a pre-emptor may transfer his rights by parol,[83] but after he has performed all the requirements of the law entitling him to a patent, he is in effect the owner of the land and can convey it only by a written instrument.[84] Title passed by patent is never relinquished by abandonment.[85] A purchaser on credit may abandon his location in the manner prescribed by law.[86]

Area acquired and boundaries.[87]—A purchaser of state lands who selects the land and has a "call" survey made by protraction without actually running the lines, and obtains a patent in accordance with such survey, takes the risk of overlaps on

state, such grantee may have the patent set aside as against anyone but a bona fide purchaser. Rozell v. Chicago Mill & Lumber Co. [Ark.] 89 S. W. 469.

73. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056.

74. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

75. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857. As between two conflicting grants, neither of which is supported by a valid entry, the older takes priority. Sampson's Heirs v. Chester's Heirs [Tenn.] 91 S. W. 43. Junior grantee held to have no rights as against a senior grantee under the registration acts, Laws 1893, p. 52, c. 40, where neither was in actual possession. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857. Recitals in a deed by the state showing that it had been issued in conformity to law held insufficient to avoid a prior deed. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

76. Fractional sections in fractional townships did not pass to the state under the general grant by congress of sixteenth sections for school purposes, and the sale of such a section by the school treasurer conveyed no title. Lauve v. Wilson, 144 La. 699, 38 So. 522.

77. Frazier v. Gibson [N. C.] 52 S. E. 1035. An action by a junior entryman to have the legal title held by a senior impressed with a trust in his favor is barred after 10 years. Id.

78. Owners of upland bordering on state tide land, having a preference right to purchase, are not deprived of any right by Laws 1893, p. 241, c. 99, providing for a lien on such lands. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P 845.

79. Laws 1901, c. 125, pp. 295, 296, providing for the sale of leased lands on the expiration of the lease, and providing that no purchaser other than the lessee shall turn into such lessee's inclosure more than a certain number of cattle per acre, applies only to land sold under its provisions. Lyons v. Slaughter [Tex. Civ. App.] 13 Tex. Ct. Rep. 1, 87 S. W. 182.

80. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

81. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857. A grant under the "headright laws," which is apparently issued conformably with the law, is not open to collateral attach. Houston v. State [Ga.] 52 S. E. 757.

82. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857.

83. Alford Bros. v. Williams [Tex. Civ. App.] 91 S. W. 636.

84. Wilson v. Nugent [Tex. Civ. App.] 91 S. W. 241. A written transfer of a certificate after location of the land thereunder operates as an equitable transfer of the land located. Alford Bros. v. Williams [Tex. Civ. App.] 91 S. W. 636.

85. Only applicable where title is inchoate or imperfect. Kreamer v. Voneida, 24 Pa. Super. Ct. 347.

86. Under Pol. Code § 3570, providing that where a purchaser of state land on credit desires to abandon the location he may do so by a surrender of the certificate, a complaint to compel the surrender of a certificate alleging that the purchaser had not paid the amount due, and that defendant was the lawful owner of the certificate, states a cause of action though not alleging that the purchaser had abandoned. Shepard v. Mace [Cal.] 82 P. 1046.

87. See 4 C. L. 1121.

prior grants, and of loss by reason of extension of the boundaries beyond the state.[88] That the boundaries of a tract of land, as given in a patent based on a survey made at the instance of the patentee, extend beyond the state is not ground for relocation by the courts so as to place it all within the state.[89] A map and field notes referred to in a grant as defining the boundaries may be considered in aid of the description in the grant and to supply omissions.[90]

Mode of proving title.[91]—A conveyance from the state shows prima facie title in the grantee.[92] Transcripts of the records of the land office are of equal dignity as evidence as the originals,[93] if foundation is laid for their admission.[94] Which was a senior grant may be determined from recitals in the patents.[95] Where the land commissioner in issuing patents acts on the surveyor's correction of the original field notes, it is presumed that the correction was authorized.[96]

§ 5. *Leases of public lands and rights thereunder.*[97]—The mere filing of an application for a lease does not confer upon the applicant any interest in the land.[98] In making a lease of school lands statutory conditions must be complied with.[99] The lease must be executed at a legal meeting of the board authorized to make it.[1] If irregularly entered into it may be validated by statute.[2] Payment of the consideration in cash instead of in instalments as prescribed by statute does not render it void.[3] In Texas classification of lands is not a condition precedent to the exercise of the power of the commissioner of the general land office to lease the same.[4] Lands cannot be released while a prior lease is in force.[5] County commissioners' courts of Texas counties have power in leasing county school lands to contract that the lessee shall have a preference right to purchase.[6] The act of the commissioner in leasing lands is presumed regular.[7] The act of the state land commissioner in releas-

88. 89. Bramblet v. Davis [C. C. A.] 141 F. 776.

90. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

91. See 4 C. L. 1121.

92. Covington v. Berry [Ark.] 88 S. W. 1005.

93. Under Kirby's Dig. § 3064, a commissioner's transcript of records from the state land office is of equal dignity with the originals. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

94. Unless it is shown that a patent is lost or cannot be produced, a transcript of the records of the land office is inadmissible. Covington v. Berry [Ark.] 88 S. W. 1005.

95. Recitals in patents as to date of survey held to refer to the date of entry for the purpose of determining which was the senior patent. Asher v. Brashear [Ky.] 90 S. W. 1060.

96. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751.

97. See 4 C. L. 1121.

98. A rejected applicant may not institute mandamus to compel the advertisement of a lease for sale under the rule that mandamus can issue only on the application of one beneficially interested. State v. Ross [Wash.] 81 P. 865.

99. Where Hutch. Code, p. 213, c. 9, art. 12 § 2, and p. 223, c. 9, art. 26, § 5, relative to payment, were not complied with, the lease did not pass any title and was beyond the validating power of curative statutes. Sexton v. Coahoma County Sup'rs [Miss.] 38 So. 636. Sixteenth sections are subject to taxation under Rev. Code 1857, c. 3, § 5, art. 20, only after they have been validly leased. Id.

1. A lease of a sixteenth section made at an illegal meeting of the board of supervisors is void. Sexton v. Coahoma County Sup'rs [Miss.] 38 So. 636.

2. It was intended by Acts 1870, p. 165, c. 71, to validate all leases of sixteenth sections previously made in an irregular and informal manner. To bind the lessees to make the stipulated payments and oblige the county to perform its part of the contract. Id.

3. A lease of a sixteenth section is not void because the consideration is paid in cash and not in four annual instalments. Sexton v. Coahoma County Sup'rs [Miss.] 38 So. 636.

4. Under Rev. St. 1895, art. 4218r, it is only lands which have been classified as agricultural which the commissioner is forbidden to lease for more than five years. Sanford v. Terrell [Tex.] 13 Tex. Ct. Rep. 58, 87 S. W. 655.

5. Under Rev. St. 1895, art. 2118r, where application to lease a larger number of sections is made, and the annual rental paid and the lease executed, it is valid as to those sections for which a prior lease had then expired, but void as to those under lease at the time. McDowell v. Terrell [Tex.] 13 Tex. Ct. Rep. 115, 87 S. W. 668.

6. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

7. Under the statutes of Texas, where the land commissioner has leased land for ten

ing public lands is administrative or executive,[8] and mandamus will not lie to compel him to advertise for sale a lease of land that he has re-leased,[9] but where he treats a lease as void, mandamus will lie to compel his recognition of it.[10] One to whom lands have been leased on cancellation of a prior lease is a necessary party in mandamus to compel the reinstatement of the cancelled lease.[11]

§ 6. *Spanish and other grants antedating Federal authority.*[12]—The absence of documents evidencing an ancient Spanish grant may be explained by showing a reasonable probability that they may have been lost or destroyed.[13]

§ 7. *Regulations and policing, and offenses pertaining to public lands. Cutting timber on public lands.*[14]—By act of congress bona fide residents of certain states and territories are given the right to cut timber from mineral lands.[15] Under this act timber cut may be shipped to any part of the state or territory and sold for any domestic purpose.[16] The classification as mineral of land within the limits of the grant to the Northern Pacific Railroad Company in the states of Montana and Idaho, by commissioners appointed pursuant to an act of congress, is not conclusive on the United States, and does not prevent the land department from making such disposition of them as may be proper on a subsequent showing that the land is not in fact mineral.[17] Where defendant's right to cut and remove timber from public land depends on the land being mineral and not subject to entry, except for mineral entry, evidence as to the use of the adjoining land for agricultural purposes is admissible.[18] The question whether such land is mineral is not the subject of expert opinion.[19] Where the register of the land office testifies that the land had been classified by commissioners as mineral land, the government is entitled to show by him in rebuttal the nonmineral entries of other lands in the township.[20] A partial survey by the United States by lines run on two sides of a section is insufficient to identify it as an odd numbered section, and within the grant to a railroad company, so as to constitute a defense to an action for cutting timber.[21] The United States may not sue in equity for the wrongful conversion of timber on the theory that the remedy at

years, it is presumed that he first determined that the land was not in immediate demand for settlement and that it was not agricultural land, and his determination of these questions is conclusive. Sanford v. Terrell [Tex.] 13 Tex. Ct. Rep. 58, 87 S. W. 655.

8. A writ of prohibition will not lie to restrain such act. State v. Ross [Wash.] 81 P. 865.

9. State v. Ross [Wash.] 81 P. 865. A writ of mandamus will not issue to restrain a re-leasing of state lands and to compel the advertisement for sale of a lease of such land on the ground that the re-lease was in excess of legal authority. Such a writ would have two functions, one the converse of the other. Id.

10. McDowell v. Terrell [Tex.] 13 Tex. Ct. Rep. 115, 87 S. W. 668.

11. Where one seeks by mandamus to compel the commissioner of the general land office to reinstate him upon the records as a lessee, one to whom the lands were leased after the cancellation of the relator's lease is a necessary party. Nevell v. Terrell [Tex.] 13 Tex. Ct. Rep. 65, 87 S. W. 659.

12. See 4 C. L. 1122.

13. Evidence of an Indian raid about the time of the grant and the destruction of the inhabitants and their homes. State v. Oritz [Tex.] 90 S. W. 1084. Evidence sufficient to show a grant by the king of Spain as compensation for a prior grant expropriated by him. Id.

14. See 4 C. L. 1123.

15. The act of June 3, 1878, c. 150, 20 Stat. 88, giving the right to cut timber from public mineral lands for certain purposes to bona fide residents of certain states and territories, extends to all lands within such state or territory. United States v. Edgar, 140 F. 655.

16. For use in households, hoisting work in mines, smelters, or other local purposes. United States v. Edgar, 140 F. 655.

17. Classification under Act Feb. 26, 1895, c. 131, 28 St. 683. Lynch v. U. S. [C. C. A.] 138 F. 535.

18. Right to cut timber under Act June 3, 1878, c. 150, 20 St. 88, Comp. St. 1901, p. 1528. Action for wrongfully cutting timber on public land. Lynch v. U. S. [C. C. A.] 138 F. 535.

19. Jury competent to determine question from facts on which opinion was based. Lynch v. U. S. [C. C. A.] 138 F. 535. Witness held not qualified to give expert opinion Id.

20. Lynch v. U. S. [C. C. A.] 138 F. 535.

21. United States v. Birdseye [C. C. A.] 137 F. 516.

law is inadequate because of devices resorted to by the principal tort feasor to cover his tracks and render it difficult to prove a case against him,[22] nor because one of the defendants is executrix of the principal wrongdoer whose estate is solvent,[23] nor because a case for an accounting is made,[24] nor because a multiplicity of suits will be thereby prevented;[25] nor can the rule that proceeds of property obtained by theft or fraud may be recovered in equity as against a voluntary assignee, or one holding in bad faith, be invoked to sustain the jurisdiction where the allegations do not identify any specific proceeds.[26] That one compromises a prosecution for cutting timber as he may do under the Federal statutes is not conclusive of his guilt,[27] but it precludes a recovery of contribution against a joint wrongdoer.[28] An action to recover the enhanced value of timber taken is for a penalty.[29] Admission of evidence showing that the value of timber taken is greater than the verdict is not prejudicial.[30]

Crimes and offenses against public lands.[31]—It is an offense against the United States to conspire to fraudulently obtain public lands.[32]

Fencing.—Federal statutes forbid the complete enclosure of public lands.[33]

PUBLIC POLICY, see latest topical index.

PUBLIC WORKS AND IMPROVEMENTS.

§ 1. *Definitions and scope of title.*[34]—This article treats generally of public

22. Right to inspection of the defendant's books precluded the necessity of a discovery. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

23. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. — .

24. The wrongdoers having been granted permits to cut timber on other lands. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. — .

25, 26. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

27. That a party compromises a prosecution for cutting timber from public lands by making payment as provided by Act Cong. June 3, 1878, 20 Stat. 90, is not conclusive of his guilt. Cox v. Cameron Lumber Co. [Wash.] 82 P. 116.

28. Where one compromises a prosecution for cutting timber from public land by making payment as provided by Act Cong. June 3, 1878, 20 Stat. 90, he cannot enforce contribution against a joint wrongdoer, because to do so he would have to show his own guilt. Cox v. Cameron Lumber Co. [Wash.] 82 P. 116.

29. An action to recover for timber taken by trespassers from state lands, for the enhanced damages above its value, brought under Laws 1895, c. 163, § 7, is for a penal-

works and improvements, the powers and duties of municipalities with respect thereto, the procedure to be followed in the making thereof, and the manner of providing for the cost, including local assessments. The taking of property for public use,[35] the construction and operation of particular public works,[36] and matters peculiar to the powers and fiscal affairs of particular public bodies[37] are specifically treated elsewhere. While the manner of letting a contract for a public work, and the validity of provisions peculiar to contracts of this kind, are here treated, matters pertaining to the making and validity of public contracts in general are not included.[38] Liability for personal injuries resulting from negligence in constructing a work is also excluded.[39]

§ 2. *Power, duty, and occasion to order or make improvements.*[40]—Municipalities have only such powers with respect to the ordering or making of public improvements as are expressly or impliedly conferred by statute.[41] The powers so

ty and must be commenced within three years from the date of trespass. Gen. St. 1894, § 5136. State v. Buckman [Minn.] 104 N. W. 240.

30. Lynch v. U. S. [C. C. A.] 138 F. 535. In an action to recover for timber taken from public lands, a witness who knows the value as appraised by state officers may testify that some timber had been sold for a greater price. Id.

31. See 4 C. L. 1124.

32. Conspiracy to obtain school lands from Oregon and California and relinquish them to the United States in exchange for other lands, as provided by law, is a conspiracy within Rev. St. U. S., § 5440, forbidding conspiracies to defraud the United States. Hyde v. Shine, 199 U. S. 62, 50 Law. Ed. —; Dimond v. Dame, 199 U. S. 88, 50 Law. Ed. — . Indictment under Rev. St. § 5440, for conspiring to defraud the United States out of its title to certain public lands, held sufficient, though not alleging that the acts were done with knowledge of the fraudulent character of the entries. United States v. Mitchell, 141 F. 666.

33. One who joins his fence to the fence of another in order to make a complete inclosure violates Act Feb. 25, 1885, c. 149, 23 Stat. 321, forbidding the enclosure of public lands. Thomas v. U. S. [C. C. A.] 136 F. 159. The fact that a fence is extended into the water, but cattle could get around the end at low water, and that there was a gap across an impassable canon, does not show that the enclosure was not complete., Id. Act Feb. 25, 1885, c. 149, 23 Stat. 321, making it unlawful to enclose public lands without claim of right under the land laws, applies to the enclosure of such lands by fences built on other lands. Cardwell v. U. S. [C. C. A.] 136 F. 593.

NOTE: An indictment for fencing public lands in violation of 23 St. U. S., p. 321, is fatally defective in not alleging that at the time the alleged enclosure was made the defendant had no claim or color of title "made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to acquiring title under the laws of the United States" (United States v. Churchill, 101 F. 443), but it need not allege that defendant had not improved or occupied under the United States land laws, as that is a matter of defense (United States v. Cook, 36 F. 896). But see United States v. Felderward, 36 F. 490. [Ed.]

34. See 4 C. L. 1125.

35. See Eminent Domain, 5 C. L. 1097.

36. See Highways and Streets, 5 C. L. 1645; Sewers and Drains, 4 C. L. 1429; Waters and Water Supply, 4 C. L. 1824.

37. See Counties, 5 C. L. 857; Municipal Corporations, 6 C. L. 714; Towns, etc., 4 C. L. 1685; States, 4 C. L. 1516.

38. See Public Contracts, 6 C. L. 1109; also Building and Construction Contracts, 5 C. L. 455.

39. See Negligence, 6 C. L. 748; Municipal Corporations, 6 C. L. 714; Independent Contractors, 5 C. L. 1782.

40. See 4 C. L. 1125.

41. "Burnt District Act," Laws 1904, p. 141, c. 87, construed as giving burnt district commission of Baltimore power to add new docks and wharves as well as to extend and improve old docks. Dyer v. Baltimore, 140 F. 880. Under San Francisco City Charter, art. 6, c. 2, § 16, the board of public works has power to repair defective walks or award a contract for such repairs. Heath v. Manson, 147 Cal. 694, 82 P. 331. Where construction of a wharf would interfere with a ferry operated under a franchise from a city, construction thereof would be enjoined, though the city had power under its charter to build wharves, and the necessity of it had been duly determined, since Pol. Code, § 2919, prohibits granting of authority with respect to wharves or piers which would interfere with vested rights or grants. Vallejo Ferry Co. v. Vallejo, 146 Cal. 392, 80 P. 514. The fact that a street has once been macadamized does not, under St. 1891, p. 196, c. 147, § 2, preclude a council from ordering the street paved with bituminous rock, unless it has previously been accepted as a completed street, under St. 1885, p. 160, c. 153, § 20. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076. Where a board walk between two sections of cement walk is out of repair, the board of public works

granted cannot be delegated,[42] but the exercise of powers clearly granted by the proper municipal authorities, in determining the necessity, time, place, and plan of a particular improvement,[43] is discretionary and final, and will not be interfered with by the courts in the absence of fraud or an abuse of discretion.[44] Objections that action taken is unreasonable or oppressive, or an evasion of law, will be passed upon by the courts,[45] but the person raising such objection has the burden of establishing its truth.[46]

of San Francisco may properly require repairs by the construction of a cement walk. Heath v. Manson, 147 Cal. 694, 82 P. 331. Under Const. art. 20, granting home rule to Denver, that city has power to provide by charter for the erection of an auditorium, to buy a site therefor, and to issue bonds to pay the cost. City & County of Denver v. Hallett [Colo.] 83 P. 1066. Where sidewalks were built without an order by the town board of trustees, who alone, under 2 Mills Ann. St. §§ 4403 (cl. 7), 4473, had power to order their construction, the sale of property assessed therefor was void. Mitchell v. Titus, 33 Colo. Sup. 385. 80 P. 1042. Under Code § 792 empowering cities to improve streets or alleys so as to bring them up to an established grade does not authorize paving of an alley which will bring it above such grade. Hubbell, Son & Co. v. Bennett Bros. [Iowa] 106 N. W. 375. Under Gen. St. 1901, § 1068, a petition to the mayor and council of a city of the second class confers upon them exclusive power to cause an improvement to be made and to determine the kind and quality thereof. Hence, they may enact, amend, or repeal any ordinance respecting such improvement if rights of third persons be not thereby prejudiced. Carey Salt Co. v. Hutchinson [Kan.] 82 P. 721. Where neither state nor city of Boston exercised options in contract for building of bridge and street for 30 years because the cost would exceed engineer's estimate, and city was not obliged to build at such cost, the existence of such contract, which neither could enforce, did not render St. 1903, p. 350, c. 381, requiring the city to do the work, invalid. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937. Laws 1883, p. 666, c. 490, § 2, authorizing construction of an aqueduct between some point on Croton lake or river to some point in New York, with dams and reservoirs, authorized construction of a reservoir not in the direct line between the points selected. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

42. The determination of the jurisdictional fact that an improvement is necessary is judicial in character and cannot be delegated. City council could not delegate determination of question to street commissioners. Blanchard v. Barre, 77 Vt. 420, 60 A. 970. An ordinance requiring the board of works to report on the kind of material recommended for an improvement to the general council, which was then to pass upon the report and authorize the board to close a contract, is not objectionable as delegating legislative powers of the council to the board. Ex parte City of Paducah [Ky.] 89 S. W. 302.

43. City councils have power to determine what local improvement is required, its nature and character, when it shall be made and the manner of its construction. Ton v. Chicago, 216 Ill. 331, 74 N. E. 1044. City authorities have broad discretion in determining character of an improvement. Marshall v. People, 219 Ill. 99, 76 N. E. 70. Under Ky. St. 1903, § 3096, city councils of cities of the second class are the final judges of the necessity of sidewalks. Mudge v. Walker [Ky.] 90 S. W. 1046. City councils have the sole right to designate what streets shall be paved and the character of the paving. Wabash Ave., 26 Pa. Super. Ct. 305. It was within power of city council to determine whether it was practicable to maintain a street by repairing it, or whether a complete resurfacing on the concrete base already down was necessary. Bush v. Peoria, 215 Ill. 515, 74 N. E. 797. Where an objector appeals to the city council, and his objections to the manner in which the work is done are overruled by the council, its action is final and the objections cannot be urged as a defense in an action to foreclose the lien of the assessment. Lambert v. Bates [Cal.] 82 P. 767.

44. The discretion of city councils in these matters, when honestly and reasonably exercised, will not be reviewed by the courts. Ton v. Chicago, 216 Ill. 331, 74 N. E. 1044. The action of local tribunals in determining the necessity for improvements will not be interfered with by the courts so long as they act within their jurisdiction. Dyer v. Woods [Ind.] 76 N. E. 624. A city council having power to make street improvements has authority to include storm sewers in an improvement, and the necessity of such sewers will not be reviewed in a suit to set aside the assessment. Parsons v. Grand Rapids [Mich.] 12 Det. Leg. N. 507, 104 N. W. 730. County commissioners have broad discretion in determining necessity of court house and selecting location, and court will not interfere with their action in the absence of an abuse of discretion. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508. Action of police jury in undertaking construction of new court house on new site is not subject to judicial review. Dupuy v. Police Jury of Parish of Iberville [La.] 39 So. 627. Equity powers of a court will be slow to move where the issue relates to the discretion exercised by the proper officials as to the amount of work to be done and assessment to be levied for cleaning out and keeping in repair a public ditch or drain. Crawford v. Taylor, 6 Ohio C. C. (N. S.) 278.

45. Ton v. Chicago, 216 Ill. 331, 74 N. E. 1044.

§ 3. *Funds for improvement and provision for cost.*[47]—The power of municipalities to provide for the cost of public improvements, and the method to be pursued in making an improvement of a particular kind, are controlled by the fundamental law and general legislation pursuant thereto. Thus, according to the statute applicable in the particular case, the cost may be borne wholly by the municipality,[48] or wholly by abutting property,[49] or may be apportioned between the municipality and such property.[50] In some cases more than one method has been provided, any one of which may be followed,[51] and where discretionary power has thus been conferred, courts will not interfere with the selection made by the local authorities.[52] So, also, the apportionment of the cost between the municipality and private property by the local authorities is not subject to judicial review.[53] Though a city be authorized to make improvements either by special assessment or general taxation, if it

46. One complaining that an ordinance is unreasonable must prove his claim. Sidewalk ordinance held not unreasonable. Marshall v. People, 219 Ill. 99, 76 N. E. 70. Evidence held not to show that paving ordinance was unreasonable, though it required an old curb to be replaced with a combined curb and gutter, and decision of city authorities and county court approved. Lamb v. Chicago, 219 Ill. 229, 76 N. E. 343. Evidence held to sustain finding that ordinance was not unreasonable as providing for paving which was unnecessary. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762. Held not unreasonable to require paving of street intersection. Lamb v. Chicago, 219 Ill. 229, 76 N. E. 343. A provision of a sewer ordinance requiring house slants every 25 feet is not an unreasonable and arbitrary division of the owner's lands. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383. Three ordinances were passed at different times concerning street improvements which adjoined or touched each other. No improper motives being shown, they were upheld as against objection that the works constituted but one improvement and should have been provided for by one ordinance. Ton v. Chicago, 216 Ill. 331, 74 N. E. 1044.

47. See 4 C. L. 1126.

48. In street vacation proceedings under Act April 21, 1858, P. L. 385, damages to property may be assessed against the city without any assessments against property owners. Penrose Ferry Avenue, 27 Pa. Super. Ct. 341.

49. Where a city constructs a street through land which has been dedicated by the owner to the public, abutting property is liable for the cost. If the land has not in fact been dedicated, and the extension is without authority, the city is liable for the cost. Terrell v. Hart [Ky.] 90 S. W. 953. A street may be repaired in sections or parts and the property owners assessed to pay the cost thereof. Andrix v. Columbus, 3 Ohio N. P. (N. S.) 368.

50. Under Act 169, p. 340, of 1898, the cost of paving in Baton Rouge is to be borne by the city and abutting owners in certain proportions. Act No. 10, p. 9, of 1896, authorizing an assessment on railways occupying city streets was repealed as to Baton Rouge by the act of 1898. Louisiana Imp. Co. v. Baton Rouge Elec. & Gas Co., 114 La. 534, 38 So. 444. Under Laws 1897, p. 421, c. 414, §§ 161, 162, where a property owner is instructed by village trustees to build a four foot stone sidewalk, he is entitled to credit of three-fourths the expense on his assessment, or to be reimbursed one-half the expense, even though the trustees have previously passed a general resolution that walks were to built at owner's expense. Sanford v. Warwick, 181 N. Y. 20, 73 N. E. 490. Under Hurd's Rev. St. 1893, p. 271, c. 24, §§ 24, 55, 63, assessment vouchers issued by a city for its part of the expense of constructing local improvements bear interest until paid. City of Chicago v. People, 215 Ill. 235, 74 N. E. 137.

51. Under Const. art. 9, § 9, and Local Imp. Act 1897, § 1, cities and villages of Illinois may make local improvements by special taxation, general taxation or otherwise. City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044. Under Act May 16, 1891, P. L. 71, a borough has general power to grade, curb, and pave a street, or it may ordain that a fund shall be raised by assessment upon the abutting properties of the costs, damages, and expenses, according to benefits. Dunn v. Tarentum Borough, 23 Pa. Super. Ct. 332.

52. Where county commissioners had discretionary power to order construction of court house at once and meet the expense out of taxes for the current year, or to delay construction and allow an election to decide upon a bond issue, the court would not interfere with a decision to pursue the former course, and had no power to stay proceedings until the electors should have voted on a bond issue. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508.

53. In the absence of mistake, fraud, or arbitrary action, amounting to an abuse of discretion, action of commissioners in determining the proportion of the cost of an improvement to be borne by the city, and the portion to be assessed on benefited property, is not subject to judicial review. In re Westlake Ave. [Wash.] 82 P. 279. Under city and village act, art. 9, § 24, assessment roll is conclusive on question of apportionment of cost of improvement between public and benefited property. Beckett v. Chicago, 218 Ill. 97, 75 N. E. 747.

provide for special assessments in the ordinance, and the assessment is levied and the work completed, it cannot thereafter pay for a portion of the work by general taxation;[54] but an issue of bonds is sometimes authorized where special assessments prove to be insufficient.[55] Where general taxation is resorted to, the work must be one of public utility,[56] and the constitutional limit of indebtedness cannot be exceeded.[57] Where a city changes its policy of special assessments for improvements and provides for payment thereof by general taxation, a charter provision providing for a refund to owners, who had already paid assessments, is not invalid as creating a debt without providing a fund for its repayment.[58]

Ordinances requiring lot owners to lay sidewalks are regarded as police regulations imposing duties, the neglect of which creates a liability to the municipality for the cost of doing the work.[59] Assumpsit lies to recover such cost from a lot owner who is in default,[60] but there is no liability for the cost or any part of it unless the owner has been notified.[61]

A public building to be used by the state and one of its subdivisions may properly be constructed at their joint expense.[62] The erection of a residence for the governor at the capital is within the purposes of the grant of land by congress to the state of North Dakota for public buildings, under the enabling act.[63] The power to dispose of such lands and to limit the sum used for each building rests solely with the legislature and cannot be delegated by it.[64]

Bonds must conform to the statutes or ordinances authorizing their issue.[65] In Illinois, local improvement bonds, payable solely out of instalments of assess-

54. City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044. The city of Chicago has no power to pay or purchase improvement bonds, coupons, and vouchers issued in payment of local improvements constructed by special assessment. Id.

55. Comp. St. 1903, c. 12a, § 101b, does not require the issuance of bonds in every case when lands are appropriated for parks, parkways, or boulevards, but only where the special assessment is sufficient for the purpose. Hart v. Omaha [Neb.] 105 N. W. 546.

56. Construction of Northern Avenue and bridge across Fort Point channel would be of public benefit, and fact that private owners of neighboring property would profit did not render use of fund one for private purposes. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937. Const. art. 3, § 34, prohibiting the giving of state aid or credit to any individual, association or corporation for the construction of works of internal improvement, does not apply to public roads; hence Acts 1904, p. 388, c. 225, authorizing state aid for the building of county roads and making an annual appropriation therefor, is not invalid. Bonsal v. Yellott, 100 Md. 481, 60 A. 593.

57. A county had already exceeded its constitutional debt limit when a law was passed authorizing an annual tax for a series of years to build a court house. Held, the levy and collection of such tax to meet obligations to be thereafter incurred was an obligation within the constitutional prohibition, though the law provided that the county should not be liable to the contractor, except that the special tax was to be applied to pay him. Brix v. Clatsop County [Or.] 80 P. 650.

58. City of Houston v. Stewart [Tex.] 13 Tex. Ct. Rep. 55, 87 S. W. 663.

59, 60. Pittsburg v. Biggert, 23 Pa. Super. Ct. 540.

61. Pittsburg v. Biggert, 23 Pa. Super. Ct. 540. Under Act April 2, 1867, P. L. 677, the city of Chester has no power to compel a lot owner to cut down an embankment so as to conform to the grade of the road before building his sidewalk. The city must first reduce the street to the required grade. Chester City v. Lane, 24 Pa. Super. Ct. 359. Hence, where notice to construct a walk is given and the owner expresses his willingness to do so when the city has cut down such embankment, the city cannot reduce the street to grade and construct the walk without further notice to the owner and then recover the cost of the owner. Id.

62. Statute providing for building to be used as parish court house and state library building, expense to be borne by the parish and state, held valid. Benedict v. New Orleans [La.] 39 So. 792.

63. 25 Stat. 681, c. 180. State v. Budge [N. D.] 105 N. W. 724.

64. Laws 1905, p. 297, c. 166, providing for the appointment by the governor of a commission to remodel and reconstruct the capitol building, and to erect a residence for the governor, but not specifying the sums to be used, nor the time for completion of the buildings, is invalid, being an unwarranted delegation of legislative functions. State v. Budge [N. D.] 105 N. W. 724.

65. Local Improvement Act, § 86, authorizing bonds to anticipate only second and succeeding instalments of assessments, held not violated by ordinance providing for bonds to anticipate five instalments where it

ments, are not negotiable.[66] Purchasers of such bonds have only such rights as the contractor would have, and where the latter has failed to complete an improvement as required by the authorizing ordinance, they cannot compel payment of the bonds.[67] A property owner is entitled to credit for a proportion of a premium received from a sale of bonds,[68] but has no recourse against a municipality which refunds street improvement bonds at a lower rate of interest, deriving a profit therefrom.[69]

§ 4. *Proceedings to authorize making. A. In general.*[70]—Statutes prescribing procedure must be followed, and while mere irregularities may be waived or cured,[71] a jurisdictional defect renders subsequent proceedings, including assessments, invalid.[72] Thus, the various steps must be taken by the officers designated by law for their performance.[73] Ordinarily, different classes of improvements must be made by separate proceedings,[74] but the amount of work of the same kind to be included in one proceeding is largely discretionary.[75] Where the work is performed by the municipality directly and not by contract, the procedure required in the case of contract work need not be followed.[76]

(§ 4) *B. By whom and how initiated.*[77]—Where a petition by property owners is required,[78] it must be signed by the required number of owners, or persons authorized to sign.[79]

was also provided that the bonds were to conform to the statute. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

66. Construing Local Imp. Act, c. 24, §§ 73, 86, 90. Northern Trust Co. v. Wilmette [Ill.] 77 N. E. 169.

67. Northern Trust Co. v. Wilmette [Ill.] 77 N. E. 169.

68. An abutting owner, upon whose property a street assessment was levied prior to the passage of the Municipal Code, is entitled to be credited with his proportion of the premium received from the sale of bonds to meet the cost of the improvement, but this credit can only be made upon the interest payable on the deferred instalments of his assessment. Mudge v. Evanston, 7 Ohio C. C. (N. S.) 197.

69. Borger v. Columbus, 3 Ohio N. P. (N. S). 261.

70. See 4 C. L. 1129.

71. See post, § 8 H, Waiver of and estoppel to urge defenses.

72. All steps taken under an invalid ordinance are void. Glos v. Collins, 110 Ill. App. 121.

73. Where map of sewer as determined upon by ordinance was changed by city engineer, under direction of director of public works, and engineer's map was followed in making the improvement, an assessment of benefits according to the altered plan could not be enforced. In re Scranton Sewer [Pa.] 62 A. 173. Under Laws 1896, p. 76, c. 57, § 1, amended by Laws 1897, p. 925, c. 679, a commissioner of street improvements has no power to employ an engineer to make plans for a boulevard approach. Hildreth v. New York, 97 N. Y. S. 582. An ordinance requiring permanent walks to be constructed of stone or artificial stone is a compliance with an ordinance requiring the mayor and council to designate the kind of materials to be used for permanent walks, and is not a delegation of that duty. Richardson v. Omaha [Neb.] 104 N. W. 172.

74. Where a charter provides that the improvement of each street or part thereof shall be by separate proceeding, the city has no power to include in one proceeding different classes of improvements for separate parts of a street. Portland City Charter § 375. Oregon Transfer Co. v. Portland [Or.] 81 P. 575.

75. A city may elect by separate ordinances and contracts to pave and grade different parts of the same street. Wabash Ave., 26 Pa. Super. Ct. 305. Resolution of intention to pave held not invalid because including work of various kinds on different streets. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

76. Specifications for repair of street need not be filed. Andrix v. Columbus, 3 Ohio N. P. (N. S.) 368.

77. See 4 C. L. 1130, 1132, (§ 4) F.

78. Jurisdiction of council to order a street improvement was based, under 90 O. L. 156, in the petition therefor of one-half or more of the frontage. Herman v. Columbus, 3 Ohio N. P. (N. S.) 216. Comp. Laws 1897, § 2480, requiring repairs on public buildings to be authorized by vote of electors when they exceed $500 in value, does not apply where work of reconstruction is to be paid out of insurance money and not by taxes. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

79. The president of a corporation is the proper person to sign a petition for repaving on behalf of the corporation. Corporation held bound by president's signature, though directors did not act. Eddy v. Omaha [Neb.] 103 N. W. 692. The board of education of the Omaha school district may authorize its president to sign a petition for repaving. Id. To render effective a signature to a petition

Initiatory steps by municipal legislative bodies must be taken in the manner and form required by the statute or charter.[80] Thus, an order, resolution, or ordinance must be passed by the required vote.[81] Where the authorization of a work is required to be by ordinance, a resolution is insufficient.[82] A common practice is to require a preliminary resolution of intention[83] to be followed, after property owners have had an opportunity to be heard, by an ordinance or resolution providing for construction. In such case the ordinance must conform to the resolution, as a substantial variance between the work as declared for in the resolution and that provided for by ordinance invalidates the proceedings.[84] Both the resolution and ordinance must properly describe[85] and fix[86] the character and location of the proposed work. In this respect a resolution of intention may be aided by reference to plans

for a street improvement, it must be that of the owner of the property at the time of the passage of the ordinance ordering the improvement. Herman v. Columbus, 3 Ohio N. P. (N. S.) 216. Life tenant binds the property by signing for a street improvement. Id. Owner of unassigned dower cannot bind the property by her signature for a street improvement. Id.

80. Under St. 1892, p. 467, c. 418, § 5, the Boston board of street commissioners need not include an order for construction in its order providing an improvement shall be made. The construction order may be separate. New England Hospital for Women & Children v. Street Com'rs, 188 Mass. 88, 74 N. E. 294. A resolution of a board of public works of New York authorizing the commissioner of highways to employ a consulting engineer on the work of constructing an approach to a bridge is not an authorization and approval of the work as required by Laws 1897, c. 378, § 413. Hildreth v. New York, 97 N. Y. S. 582. Specifications need not be created by ordinance. A resolution is sufficient. Haughawout v. Raymond [Cal.] 83 P. 53.

81. A paving ordinance is not invalid because passed by the casting vote of a member of the council who signed the petition for the paving. Erie City v. Grant, 24 Pa. Super. Ct. 109. Street improvement ordinance void because not passed by majority of council as required by law. Reed v. Woodcliff [N. J. Law] 60 A. 1128. Plans and specifications for rebuilding of court house destroyed by fire held to provide practically for a new structure, and not merely for repairs. Hence, a two-thirds vote of county supervisors was necessary to authorize the work. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792. Under Comp. Laws 1897, §§ 2543, 2544, 2484, subd. 16, 2485, a board of supervisors of a county cannot provide for reconstruction of burned county building out of insurance money except by a two-thirds vote. Id.

82. In cities of the third class, the ordering of the work and the assessment of the cost must be by ordinance and not by resolution. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386. Street grading must be authorized by ordinance, not by resolution, under Rev. St. 1899, § 5979. Graden v. Parkville [Mo. App.] 90 S. W. 115. Under Rev. St. 1899, §§ 5954, 5955, grading and macadamizing of a street, not provided for by ordinance, was without authority of law. Id. An ordinance authorizing a common council to determine the necessity for, and to require construction of a new sidewalk, by resolution, cannot make action so taken valid, since the statute requires such action to be taken by general or special ordinance, preceded by application in writing for the improvement. Sproul v. Borough of Stockton [N. J. Law] 62 A. 275.

83. Local Imp. Act § 7 is complied with where a resolution is passed approving an engineer's estimate and fixing a time and place of hearing as to the necessity, nature, and cost of the improvement, and it is immaterial that two preliminary resolutions had previously been passed. Heiple v. Washington, 219 Ill. 604, 76 N. E. 854. A recital that a certain improvement "seems desirable" does not satisfy a requirement that the council decide by resolution that public convenience demands it. Blanchard v. Barre, 77 Vt. 420, 60 A. 970. No particular form of expression is required by Code § 811, in order that a resolution may "order" an improvement. A resolution adopted pursuant to another fixing a hearing with the purpose of making the improvement if expedient, held sufficient. Stutsman v. Burlington, 127 Iowa 563, 103 N. W. 800.

84. Held no variance between first resolution and ordinance. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762. Where first resolution described improvement as "a system of brick and vitrified tile-pipe sewer," an ordinance described it as "a system of brick and vitrified tile-pipe sewers," both resolution and ordinance describing the streets and character of sewer in each, the variance was immaterial. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

85. Ordinance providing that catch-basins shall be provided with cast iron covers weighing 470 pounds, "and of the same size and pattern as those used in new work by the city of Chicago during the year 1902," sufficiently describes the catch-basins. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726; Connecticut Mut. Life Ins. Co. v. Chicago, 217 Ill. 352, 75 N. E. 365. "Flat stones" held to have well understood meaning among contractors so that ordinance using term was sufficient. Beckett v. Chicago, 218 Ill. 97, 75 N. E. 747. It is not necessary that a resolution to pave should refer to curbing and guttering, these being necessarily included in the prop-

and specifications.[87] A substantial compliance with statutory requirements as to the description of the improvement in the ordinance is all that is required.[88] An erroneous description or date may be corrected by a second resolution or ordinance.[89] A resolution of intention to pave properly excepts work which is required to be done by street railway companies,[90] or which has already been done by property owners as required by law.[91] An ordinance for a street improvement should either establish a grade or require the work to conform to a grade already established.[92] It is proper for an ordinance to name more than one material of which an improvement may be constructed, since competition is thus encouraged.[93] Where two ordinances have been passed for the same improvement, one of which is valid and the other invalid, the law will presume that the improvement was made under the valid ordinance.[94] Formal defects in the record of the action taken are immaterial.[95]

(§ 4) *C. Notice and hearing.*[96]—It is essential to the validity of proceedings that notice of the proposed work be given owners of property which will be affected, and an opportunity for a hearing afforded,[97] where the law so requires.[98]

osition to pave. Owens v. Marion, 127 Iowa 469, 103 N. W. 381. If a sidewalk resolution so describes its location that property owners could know what property abutted on the proposed improvement, it would be sufficient. Dyer v. Woods [Ind.] 76 N. E. 624. Failure of resolution to give estimated cost held not to invalidate proceedings. City of North Yakima v. Scudder [Wash.] 82 P. 1022.

86. Ordinance for street improvement held not invalid as giving city engineer discretionary power to change character of proposed work. Guyer v. Rock Island, 215 Ill. 144, 74 N. E. 105.

87. A reference is sufficient; the plans need not be physically annexed to the resolution. Haughawout v. Raymond [Cal.] 83 P. 53.

88. Ordinance for street paving held not invalid for uncertainty in determination of grade, since grade could be computed by mathematical calculation. Chicago Union Traction Co. v. Chicago, 215 Ill. 410, 74 N. E. 449. In determining the sufficiency of the description in an ordinance, what was done under it is immaterial. Beckett v. Chicago, 218 Ill. 97, 75 N. E. 747.

89. No jurisdictional defect where a second improvement ordinance is passed and published identical with the first, except that an erroneous description of the improvement district is corrected. City of North Yakima v. Scudder [Wash.] 82 P. 1022. Where a resolution of intention specified a date for the hearing which would not permit of a sufficient publication thereof, and the council on being so informed by the clerk, substituted a later date, and the resolution was published as changed, there was no jurisdictional defect in such procedure. Id.

90. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

91. As work done under St. 1891, p. 204, c. 147, § 7, subds. 10, 11. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

92. Amended ordinance which established no grade for a sidewalk and referred to no other ordinance, record, or datum by which the grade could be determined, but attempted to delegate the power to determine the grade to the engineer in charge, was void. Harris v. People, 218 Ill. 439, 75 N. E. 1012. Failure of ordinances authorizing special assessments for street improvements to fix the grade of the street held not to deprive court of jurisdiction of subject-matter, so as to render judgment rendered by county court void on collateral attack. People v. Brown, 218 Ill. 375, 75 N. E. 989. A reference to an established grade of a street to be improved, which has been established by another ordinance, is a sufficient specification of the grade. Connecticut Mut. Life Ins. Co. v. Chicago, 217 Ill. 352, 75 N. E. 365. Where the grade of a street had been established by a general ordinance, and, though not placed on record, the grade of the street to be improved could be ascertained, this was a sufficient establishment of the grade to sustain a paving ordinance. Guyer v. Rock Island, 215 Ill. 144, 74 N. E. 105. City council ordered sidewalk constructed and board of public works determined it should be built adjacent to the curb, fixing the grade. Subsequently, the board recommended delay, but the council ordered the work done at once. Held the board did not rescind its action fixing the grade. Cuming v. Gleason [Mich.] 12 Det. Leg. N. 127, 103 N. W. 537.

93. Ordinance for paving with "brick, bithulithis, bituminous macadam, or other improved material," held proper. Ex parte City of Paducah [Ky.] 89 S. W. 302. Failure of the ordinance authorizing an improvement to specify which of several materials shall be used does not invalidate the action of the board of public surveys in awarding the contract for one of the materials named. Emmert v. Elyria, 6 Ohio C. C. (N. S.) 381.

94. Harris v. People, 218 Ill. 439, 75 N. E. 1012.

95. That a clerk's certificate of an improvement ordinance preceded the ordinance instead of following it in the record, held immaterial. Heiple v. Washington, 219 Ill. 604, 76 N. E. 854.

96. See 4 C. L. 1131.

The sufficiency of the notice given depends upon the requirements of the law and the facts.[99] Failure to notify a particular land owner does not invalidate proceedings as to other owners duly notified.[1] In Nebraska, property owners are entitled to an opportunity to designate materials to be used for paving.[2]

(§ 4) *D. Protests and remonstrances.*[3]—In some jurisdictions, objections to the prosecution of a work, properly raised by the required number of property owners, deprives the local authorities of jurisdiction to proceed.[4] Only the owners of property affected[5] or their authorized agents[6] may sign a remonstrance. Persons

97. A municipal ordinance directing that a street be paved, and the cost assessed upon property benefited, is a judicial act, and it is essential to its validity that notice be given and an opportunity for a hearing afforded to property owners liable to be affected thereby, although the city charter does not expressly require such notice. Sears v. Atlantic City [N. J. Law] 60 A. 1093. A notice of a hearing before commissioners to assess benefits after the completion of the improvement does not suffice. Id. Under statutes or charters providing for construction of improvements by the municipality on default of abutting owners, the right of an owner to construct the improvement cannot be taken from him except in accordance with law. City of Denver v. Dunning, 33 Colo. 487, 81 P. 259. Thus a wholly insufficient notice to owners relative to the construction of the improvement renders subsequent proceedings by the municipality invalid. City of Denver v. Dunning, 33 Colo. 487, 81 P. 259. Publication of resolution declaring necessity of sewer, and filing of plans and plats required by Ohio statute, afford reasonable notice to property owners of intention to make improvement, and of the extent and character thereof. Cleneay v. Norwood, 137 F. 962.

98. Where a charter does not require the question of advisability of an improvement to be submitted to taxpayers, nor provide for a hearing on that question, the fact that the contract was let and executed, the bond approved, and the work completed before taxpayers had an opportunity to be heard, did not render the assessment invalid. Parsons v. Grand Rapids [Mich.] 12 Det. Leg. N. 507, 104 N. W. 730. No notice is required by the Grand Rapids charter until after assessments are reported. Id. Under Local Imp. Act § 11, the ordinance need not be referred and published where the engineer's estimate does not exceed $100,000, and no publication is necessary where it is $100,000, though court costs are not included. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762. In Indiana an order to build a sidewalk need not be served on the owner but is to be entered of record and the owner must then take notice of it. Order unnecessarily served held not to have misled owner. Dyer v. Woods [Ind.] 76 N. E. 624.

99. Held no variance between first resolution and notice of the public hearing. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762. Use of word "expense" instead of "extent" in notice of public improvement did not invalidate assessment, it not appearing that owners were misled thereby. Heiple v. Washington, 219 Ill. 604, 76 N E. 854. Publication of the ordinance requiring an owner to build a sidewalk is sufficient notice to the owner under the sidewalk act of 1875. Marshall v. People, 219 Ill. 99, 76 N. E. 70. If notice of sidewalk resolution is in fact served on owner, a defect in the return of service is immaterial. Dyer v. Woods [Ind.] 76 N. E. 624. Law held to require posting of notices of passage of resolution of intention only along line of improvement, and not on a block not to be improved. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069. Failure to give notice within 10 days of an ordinance for improving a street required by Act May 16, 1891 (P. L. 79), does not render the assessments invalid but only inconclusive. The error may be shown on trial. Duquesne Borough v. Keeler [Pa.] 62 A. 1071. Recitals in special assessment resolution that handbills announcing filing of plat, and schedule, and time and place of hearing thereon, had been posted as required by law, held sufficient proof of the fact. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381. Notice of a proposed street improvement is binding upon all parties interested in the property, when served on a lessee for ten years with privilege of purchase, to whom the care and control of the property is entrusted. Clemmer v. Cincinnati, 7 Ohio C. C. (N. S.) 31.

1. Failure to give notice of proceedings for a drainage ditch to a particular landowner did not render the proceedings invalid as to other owners. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

2. In Nebraska, property owners of a paving district must be allowed 30 days after approval and publication of the ordinance declaring the improvement necessary in which to designate by petition the materials to be used. But where a petition, signed by owners representing a majority of taxable foot frontage, is filed, the mayor and council do not lose jurisdiction by acting on the petition before the 30 days have expired, where no other petition designating materials, and signed by the required number of owners, is filed within the 30 day period. Eddy v. Omaha [Neb.] 103 N. W. 692.

3. See 4 C. L. 1131.

4. Where Sess. Laws 1897, p. 219, § 31, providing that if the owners of more than half the property assessed object to the improvement, it shall not then, nor within six months, be made, is violated, the assessment is void. Hensley v. Butte [Mont.] 83 P. 481.

5. Administrator of deceased owner cannot sign. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014. Conveyance in

who sign may withdraw their signatures during the period within which the remonstrance must be filed,[7] and those who have so withdrawn cannot be counted in determining the sufficiency of the remonstrance.[8] The validity of a remonstrance is subject to impeachment by evidence controverting ownership or authority of the signers.[9] The passage of an ordinance for an improvement, after the report of a committee, that a remonstrance filed is insufficient, has been received and filed, amounts to an adoption of the report and a finding that no sufficient remonstrance was filed.[10] But since a sufficient remonstrance would deprive the council of jurisdiction to proceed,[11] its finding that there was no sufficient remonstrance is not conclusive.[12] In California a written protest against the acceptance of a work is treated as an appeal to the council from the action of the street superintendent.[13] Where the council has sustained such a protest and vacated an assessment, it cannot thereafter rescind the action so taken.[14]

(§ 4) *E. Estimates of cost.*[15]—Statutes requiring estimates of cost should be closely followed,[16] though merely formal defects will not invalidate proceedings thereunder.[17] Such estimates need be made only when required by law.[18]

firm name vested title in party named only. He alone should be counted as a single remonstrant. Id.

6. Officers of corporate owners cannot sign unless authorized by directors. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

7. Within 10 days after resolution, under Laws 1892-1893, p. 92, § 110. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

8, 9, 10. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

11. Under Laws 1892-1893, p. 92, § 110, that council may proceed if majority of property owners liable do not protest within 10 days after publication of resolution. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

12. City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

13. Under St. 1885, p. 156, c. 153, § 11, a written protest by property owners stating that they protest against acceptance of work because it has not been performed in accordance with the terms and specifications of the contract, is properly treated as an appeal to the council from action of the street superintendent. Creed v. McCombs, 146 Cal. 449, 80 P. 679.

14. Where a city council has sustained a protest of property owners under St. 1885, p. 156, c. 153, § 11, and vacated an assessment, it cannot rescind its action, and bonds issued on an assessment vacated and attempted to be reinstated are void. Creed v. McCombs, 146 Cal. 449, 80 P. 679. But though the holders of such bonds have no active subsisting lien, they are not deprived of the right to acquire a lien by proper proceedings. Id. A city council having sustained an appeal of property owners and vacated an assessment, it cannot rescind such action. Hence, the appeal remains pending notwithstanding such attempted rescission, and the council has power to direct a new assessment, or a reissuance of the former assessment, on completion of the work. Id.

15. See 4 C. L. 1132.

16. An estimate which will give property owners a general idea of the estimated cost of the substantial component elements of the improvement is sufficient. Connecticut Mut. Life Ins. Co. v. Chicago, 217 Ill. 352, 75 N. E. 365. Estimate of cost of street paving held sufficiently itemized. Chicago Union Traction Co. v. Chicago, 215 Ill. 410, 74 N. E. 449. Evidence held not to show that estimate included items not provided for by the ordinance. Connecticut Mut. Life Ins. Co. v. Chicago, 217 Ill. 352, 75 N. E. 365. Street commissioner directed by ordinance to make an estimate of the cost of a sidewalk is a "proper officer" to make such estimate, within Rev. St. 1899, § 5985. City of Bevier v. Watson, 113 Mo. App. 506, 87 S. W. 612. Where an engineer made an estimate of cost of a sewer based on plans showing levels, distances, directions, and location with sufficient fullness, and these plans were executed and the assessment was based thereon, and the estimate and plans had been in town clerk's office and used by the town, Pub. St. 1882, c. 50, § 7, requiring an estimate of cost, was complied with. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306.

17. That engineer did not place proper title after signature to estimate did not affect assessment. Heiple v. Washington, 219 Ill. 604, 76 N. E. 854. The qualifications of the engineer who furnished the estimate of cost cannot be questioned in a proceeding to confirm an assessment. Id.

18. If city council does not require an estimate of the engineer, failure to furnish one does not invalidate the proceedings. Haughawout v. Raymond [Cal.] 83 P. 53. Pol. Code 1886, § 4409, does not require the city council to have an estimate of street work before passing a resolution of intention unless the council is desirous of issuing bonds or of placing the work in a district. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069. Though a charter provides that a grading of a street can be legally ordered only at the expense of abutting property owners to the extent of excess of benefits over damages, under Rev. St. 1898, § 1210d, a

(§ 4) *F. Approval and acceptance of work.*—The acceptance of an improvement by a local board of public works is, in the absence of fraud, conclusive in a collateral proceeding attacking the assessment, where the manner in which the work was done is questioned;[19] but an arbitrary acceptance of work not done according to the terms of the contract is not binding or conclusive upon property owners.[19a] The engineer's certificate of the completion of a work, when required,[20] must show that the work was properly done.[21]

(§ 4) *G. Curative legislation and ratification.*[22]—Where proceedings for a public work are commenced under a statute subsequently held unconstitutional, it is competent for the legislature, by a retroactive amendatory act, to validate such proceedings.[23]

§ 5. *Proposals, contracts, and bonds.*[24] *Awarding the contract.*—The advertisement for bids must comply with statutory requirements[25] and must be sufficiently definite as to the character and extent of the work, and the terms and time of payment, to render possible intelligent bidding and competition.[26] In awarding contracts, municipal authorities are vested with broad discretion, and their action will not be disturbed by the courts in the absence of fraud or a palpable abuse of discre-

determination of the amount so chargeable is not a condition precedent to ordering of the work in order to create a valid lien on the property. Pabst Brewing Co. v. Milwaukee [Wis.] 105 N. W. 563.

19. Duniway v. Portland [Or.] 81 P. 945. Under Local Imp. Act § 84, an order of the county court approving a certificate of the board of improvements, which recites that the improvement has been completed in substantial compliance with the ordinance, is conclusive on that issue. People v. Cohen, 219 Ill. 200, 76 N. E. 388.

19a. Paving not done in manner provided by contract, the departures being to the advantage of the contractor and to the prejudice of owners. Acceptance held not conclusive. McCain v. Des Moines [Iowa] 103 N. W. 979.

20. St. 1891, p. 206, c. 147, held not to require certificate of city engineer in certain street paving proceedings. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

21. Engineer's certificate of completion of work held not defective, because not containing an estimate of cost where it gave measurements of the different kinds of work, and stated that the work was completed to official line and grade. San Francisco Pav. Co. v. Dubois [Cal. App.] 83 P. 72. Certificate of engineer that he had examined work described in resolution to pave and found same "practically to official line and grade," and showing area of pavement laid and length of curb constructed, held sufficient, if any certificate was required. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

22. See 4 C. L. 1134. See also, post, § 8 H, Waiver of and estoppel to urge defenses.

23. Proceedings for a ditch were begun under Code tit. 10, c. 2, notice being given as required by that act, which was held invalid because not providing for notice to owners of "lands in the vicinity." Laws 30th Gen. Assem. p. 59, c. 67, cured the defect and was made retroactive. Held proceedings already taken were validated. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. Acts 25th Gen. Assem. p. 167, c. 179, expressly legalizing a contract between a city and a contractor for paving, is not invalid because its preamble erroneously recited that part of the work was done. McCain v. Des Moines [Iowa] 103 N. W. 979.

24. See 4 C. L. 1135. See, also, Public Contracts, 6 C. L. 1109.

25. Advertisements for bids for new court house held to have complied with Act April 4, 1870, P. L. 834. Commonwealth v. Brown, 25 Pa. Super. Ct. 269.

26. Plans and specifications must be sufficiently definite to require competition on every material item, and should specify the quantity of work so far as practicable. Contract held illegal because specifications were too indefinite. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157. Notice to bidders, which referred to plans and specification on file, held sufficient, though it did not state when the work was to be done, the kind of material to be used, when payments were to be made, and when proposals could be acted on. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381. Where an advertisement for bids for a court house invited bids on a building in two locations, stating the amount available in each case, Pol. Code 1895, § 345, being otherwise substantially complied with, so that the public was informed as to the extent and character of the work and the terms and time of payment, the carrying out of the contract would not be enjoined. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508. Greater New York charter § 419, requiring contracts to be let to the lowest bidder, is violated by a contract provision that changes in the character of the work and materials could be made, and that the city engineer was to have power to determine the additional amount to be paid therefor. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

tion.[27] It is not essential that the lowest bid be accepted;[28] other matters besides the price offered may be considered.[29] An "unbalanced bid" is not per se fraudulent and unlawful.[30] Provision for payment must sometimes be made before a valid contract can be awarded.[31] A taxpayer may maintain a suit to enjoin the making of a contract.[32]

Particular contract provisions.—It has been held that under a charter providing for the designation of two or more kinds of material for paving by the board of public works, from which property owners may select the material to be used, the board has power to designate a kind of material as to which competitive bidding is impossible.[33] In New York it is held that a contract requiring the use of a material which can be obtained from only one producer is valid.[34] It is held in Indiana that a requirement that a patent paving material is to be used is inconsistent with the statute requiring contracts to be let to the lowest and best bidder.[35] Such a requirement is said to be invalid as tending to create a monopoly and preventing competition, even though the owner of the patent agrees to supply the material to any properly equipped, responsible contractor at a specified rate, and to furnish an expert to supervise preparation of the material;[36] but this rule does not exclude the use of patented material.[37]

27. Murray v. Bayonne [N. J. Law] 63 A. 81. Performance of a contract will not be enjoined upon the mere ground that the contract is inadmissible or upon general allegations of fraud or bad faith. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479. The action of the proper authorities in letting the contract is conclusive on property owners in the absence of collusion or fraud. City of North Yakima v. Scudder [Wash.] 82 P. 1022. Held proper to include in one contract the improvement of a street, except a part between two intersecting streets, though it appeared that if two contracts were let there would not have been as many curves and curbs. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069.

28. Lowest bid need not be accepted by aqueduct commissioners under Laws 1901, p. 231, c. 466. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

29. Fact that lowest bid was not accepted did not invalidate contract, where it appeared that material on which lowest bid was made was not known to be as good as that selected. Murray v. Bayonne [N. J. Law] 63 A. 81. Municipal authorities have discretionary powers in awarding contracts. They may consider other matters besides the contractors' financial responsibility and need not award contracts to the lowest bidders. Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323.

30. An "unbalanced" bid, based on nominal prices for some work and enhanced prices for other work, is not per se fraudulent or unlawful, and does not render a contract illegal where there has been no material enhancement of the gross price and the items are fairly identified. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

31. Where police jury undertakes to build a court house, for which it is necessary to incur a debt payable from the estimated surplus of the parish revenues, the contract therefor may be made upon the basis of cash realized or to be realized from certificates of parish indebtedness to the payment of which the surplus is dedicated. Dupuy v. Police Jury of Parish of Iberville [La.] 39 So. 627. Section 45a of the Municipal Code, relating to the requirement that the funds for an improvement be in the city treasury before the work is undertaken, is fairly open to two constructions, and where the auditor certifies on the advice of the city solicitor that the money is in the treasury, the contract cannot be invalidated on the ground of fraud in that the bonds which had been authorized had not yet been sold. Emmert v. Elyria, 6 Ohio C. C. (N. S.) 381.

32. One who is in fact a taxpayer is entitled to maintain a suit to enjoin the making of a contract for a public improvement, though his motive may have been the fact that he was interested in a corporation which was an unsuccessful bidder. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

33. Designation of particular kind of asphalt held within power of board under Kansas City Charter, art. 9, § 2. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860. Designation of particular kind of asphalt is not an illegal interference with interstate commerce. Id.

34. Contract for construction of bridge held not illegal, though requiring a certain kind of steel which could be procured only from one producer. Gage v. New York, 110 App. Div. 403, 97 N. Y. S. 157.

35. Acts 1905, p. 281, c. 129, § 95. Monaghan v. Indianapolis [Ind. App.] 75 N. E. 33; Id., 76 N. E. 424.

36. Monaghan v. Indianapolis [Ind. App.] 75 N. E. 33; Id., 76 N. E. 424.

37. It is intimated that patented material may be used when the procedure adopted will avoid the objections above noted. Monaghan v. Indianapolis [Ind. App.] 76 N. E. 424.

The contract should disclose what the expense is to be and must conform to the statute authorizing the work in that regard.[38] An ordinance providing that where public work involves the use of dressed stone the contract must require the work of dressing to be done within the state is not unconstitutional as interfering with interstate commerce,[39] nor is it invalid as preventing competition.[40] A municipality has power to fix a minimum wage for laborers engaged on public works.[41] To sustain an objection to an assessment on the ground that there was a clause in the specifications limiting the number of hours to constitute a day's work, it must be made to appear that such clause actually entered into the competition.[42] Contracts requiring the contractor to make repairs for a term of years,[43] and requiring a fund to be deposited by the contractor to secure the making of such repairs,[44] are valid. A paving contract requiring the contractor to keep the pavement in proper repair for a term of years requires only the making of such repairs as are rendered necessary by ordinary wear and use of the street.[45] For the making of repairs not required by the contract the contractor cannot recover from the city.[46] A city is not such a party to a paving contract made with property owners as to be liable to the contractor for negligence resulting in damage to the pavement.[47]

Performance of contract.—In the absence of an ordinance requiring completion of work within a specified time, a contract provision specifying a certain time and calling for liquidated damages for its violation does not invalidate tax bills for work not finished within the time designated, but completed within a reasonable time thereafter.[48] Where the purpose of an ordinance and contract provision requiring a deposit of a percentage of the amount of the contract is not only to furnish a fund with which to complete work left unfinished, but also to provide additional security for the performance of the contract,[49] the question of satisfactory performance of the contract is one involving the discretion of the director of public works, and mandamus will not lie to compel its repayment.[50] Officials have no power to substitute other materials for those specified in the contract.[51] Execution of a contract illegally awarded may be enjoined,[52] and in such a suit the contractors should, upon their application, be admitted as parties.[53]

38. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

39, 40. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926.

41. Ordinance fixing limit of $2.25 for 8 hours' work on street improvement held valid. Gies v. Broad [Wash.] 83 P. 1025.

42. Where specifications appended to contract contained an 8 hour clause, but advertisement for bids referred to specifications on file in the department of public works, and the latter were not shown to contain such clause, the objection was not sustained. Gage v. Chicago [Ill.] 77 N. E. 145.

43. See, also, 4 C. L. 1136, notes 53, 54. A provision for repairs by the contractor for a term of years does not render the contract absolutely void. Repairs to paving for 10 years. Erie City v. Grant, 24 Pa. Super. Ct. 109. Where it appears that paving laid in accordance with specifications will last 5 years without repairs, a contract provision for repairs by the contractor for that length of time does not invalidate the assessment lien. Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323.

44. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926.

45. No obligation to repair pavement torn up by bursting of water mains. Green River Asphalt Co. v. St. Louis, 188 Mo. 576, 87 S. W. 985.

46. Green River Asphalt Co. v. St. Louis, 188 Mo. 576, 87 S. W. 985.

47. Under contract requiring maintenance of pavement for five years, contractor could not recover from city for repairs on pavement damaged by bursting of water mains. Green River Asphalt Co. v. St. Louis, 188 Mo. 576, 87 S. W. 985.

48. Allen v. Labsap, 188 Mo. 692, 87 S. W. 926. See, also, 4 C. L. 1137, notes 61, 62, 63.

49. Contract for street cleaning requiring 10% deposit so construed. Commonwealth v. Philadelphia, 211 Pa. 85, 60 A. 549.

50. Commonwealth v. Philadelphia, 211 Pa. 85, 60 A. 549.

51. Under Acts La. 1896, p. 162, No. 114, which creates a commission to provide a drainage system for New Orleans, neither the commission nor its engineer had power to substitute, for materials specified in a contract, materials of a cheaper grade; hence, unauthorized profits from such substitution may be recovered. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780.

Bonds.—In distributing the proceeds of a bond given by a contractor the United States is not entitled to priority over the claims of persons supplying labor or materials for prosecution of the work.[54] The liability of sureties on such bond is limited to the amount of the penalty specified therein, notwithstanding the two-fold obligation to the United States and to persons supplying labor and materials.[55]

§ 6. *Security to laborers and materialmen.*[56]—A Federal statute requires contractors for public works to execute a bond for the protection of persons furnishing labor and materials, and authorizes any such person to sue thereon in the name of the United States to his own use.[57] The provision of the statute that the action can be brought only in a court having power to require security for costs of plaintiff does not deprive a court of jurisdiction of an action by a domestic corporation.[58] Similar bonds are commonly required by local municipalities.[59] A contractor's bond which is not in the statutory form and does not expressly secure laborers and materialmen gives no right of action thereon in favor of such laborers or materialmen;[60] but a surety cannot be relieved on a bond because its conditions are more comprehensive than required by ordinance.[61] Where a contract secured by bond requires prompt payment of claims for labor and materials, subcontractors may rely on the bond for security without perfecting claims against the fund in the hands of the treasurer of a building committee.[62] A statutory lien for labor or materials is lost when the action to enforce it is not commenced within the statutory period,[63] and a lien which has expired cannot be revived by any action on the part of the municipality.[64]

In some states a sidewalk built at the expense of the abutting owner is considered a private, not a public, improvement.[65] Hence, one who supplies materials for its construction has a lien upon it, under the mechanics' lien law.[66]

§ 7. *Injury to property and compensation to owners. A. In general.*[67]—

52. Injunction will lie to restrain the execution of a contract for public work awarded under different specifications from those under which bids were advertised and subsequent to the time named for receiving bids. State v. Board of Education, 6 Ohio C. C. (N. S.) 345.

53. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

54. United States v. American Surety Co. [C. C. A.] 135 F. 78.

55. Claim that the United States could recover the full penalty notwithstanding other claims held untenable. United States v. American Surety Co. [C. C. A.] 135 F. 78.

56. See 4 C. L. 1138.

57. Act Cong. Aug. 13, 1894, 28 U. S. Stat. 278. Furnishing scows to a contractor for the removal of stone near the Harlem river is not supplying "labor or materials" within the meaning of U. S. Rev. St. § 3747, and one so doing cannot recover on the bond. United States v. Conkling [C. C. A.] 135 F. 508.

58. By bringing the action plaintiffs tender themselves willing to furnish proper security for costs in case judgment be for defendant, and the court requires it; hence the court has power to do so. Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513.

59. Plaintiffs, who supplied paving brick to contractor, could recover on bond given by him to secure payment to materialmen. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033. A contractor's bond under Philadelphia ordinance of March 30, 1896, conditioned to pay "any and all persons, any and all sums of money which may be due for labor and materials furnished and supplied or performed in and about said work," gives a right to sue thereon to one who furnishes materials to a subcontractor. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

60. Where bond expressly provided that surety should be liable to no one except owner, it does not conform to Acts 1899, c. 182. Hardison & Co. v. Yeaman [Tenn.] 91 S. W. 1111.

61. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

62. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

63. Lien on money due on paving contract lost by failure to bring action within 90 days, under Gen. St. p. 2078. Borough of Rosselle Park v. Montgomery [N. J. Eq.] 60 A. 954.

64. Borough of Rosselle Park v. Montgomery [N. J. Eq.] 60 A. 954.

65. Leiper v. Minnig [Ark.] 86 S. W. 407.

66. Kirby's Dig. §§ 4970, 4971, 4972. Leiper v. Minnig [Ark.] 86 S. W. 407.

67. See 4 C. L. 1139.

A city which exercises care and skill in making a public improvement is not liable for consequential damages to abutting owners;[68] but where private property is taken for public use, compensation must be made.[69] A property owner has no individual remedy in an action on the case against a contractor and public officials for damages, where by fraud and collusion an improvement other than that authorized is made and accepted.[70]

(§ 7) *B. Establishment or change of grade of street.*[71]—Liability for damages resulting from changes lawfully made in street grades is wholly statutory.[72] Damages must be recovered in the manner provided by the statute.[73] The right of recovery is in the owner of the property injured at the time the improvement is made, and not in his subsequent grantee.[74] A property owner who joins in a petition for the improvement is not estopped to claim damages to his property, nor does he thereby release his right to damages;[75] and the fact that the authorities have found that certain property will be benefited does not preclude a claim for damages by the owner.[76] He is entitled to a jury trial of the question.[77]

The measure of damages for a change of grade is the difference in the value before and after the change, less the special benefit to the property caused by the change;[78] but benefits for which an assessment has been or will be made cannot be set

68. If care and skill were used in grading, abutting owner could not recover damages resulting to stone wall which formed lot boundary. Davis v. Silverton [Or.] 82 P. 16.

69. See Eminent Domain, 5 C. L. 1097. Statute requiring city of Boston to build bridge and construct street held in part unconstitutional, because not providing for compensation for damages to certain lands, but this portion of the law was held separable from the remainder and did not render the whole invalid. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937. Improvements under the Illinois drainage act resulting in the lowering of the water in the South Branch of the Chicago River and in canals connected therewith, necessitating the deepening of such canals, is damaging private property for public use, within Const. art. 2, § 13. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

70. Gage v. Springer, 112 Ill. App. 103.

71. See 4 C. L. 1140.

72. See 4 C. L. 1140, n. 5. Change of grade held to have been merely ordinary repairs which selectmen had power to make; hence property owner could maintain petition for assessment of damages under Pub. St. 1882, c. 52, § 15. Garvey v. Revere [Mass.] 73 N. E. 664. Laws 1892, p. 1761, c. 686, § 69, authorized towns to repair and macadamize roads at their expense, but did not provide for recovery of damages for change of grade. Laws 1903, p. 1396, c. 610, giving such right of damages, is not unconstitutional as authorizing a gift, since the legislature has power to provide for such claims in the act of 1892. In re Borup, 182 N. Y. 222, 74 N. E. 838.

73. Damages for street improvement are to be determined in a proceeding before viewers. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481. Trespass will not lie for injuries caused by water thrown on land by reason of the plan adopted for grading a street. Id. A petition for the assessment of damages caused by a change of grade under Pub. St. 1882, c. 52, § 15, which is taken to the office of the selectmen and handed to a member of the board in the presence of two others, though the board was not then in session, is filed properly, and it cannot affect the petitioner's rights that it was not placed on record. Garvey v. Revere [Mass.] 73 N. E. 664. Damages to property cannot be recovered in a suit in equity where the equitable relief prayed for has been denied. Suit to enjoin enforcement of assessment and for damages to property caused by grading and widening street. Injunctive relief being denied, claim for damages could not be litigated in court of equity. Davis v. Silverton [Or.] 82 P. 16.

74. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481.

75. Property owners petitioned for a street improvement, "costs, damages and expenses" to be charged to their property. An ordinance, pursuant to the petition, provided that "costs and expenses" should be charged to the property. Viewers were appointed to ascertain "damages and assess costs, expenses and benefits." Held borough could not charge damages on property or claim that owners had released their rights to damages. Dunn v. Tarentum, 23 Pa. Super. Ct. 332.

76. Where property is injured by a change of street grade and construction of a walk, the owner is not precluded from claiming damages because the walk was to be built by special taxation, and the authorities had found his property would be benefited. Village of Grant Park v. Trah, 115 Ill. App. 291; Id., 218 Ill. 516, 75 N. E. 1040.

77. Determination of village to construct sidewalks by special taxation does not determine question of damages. Village of Grant Park v. Trah, 218 Ill. 516, 75 N. E. 1040.

78. Evidence that change was necessary inadmissible on issue of damages. Garvey

off against a claim for damages.[79] Where land and buildings thereon constitute but one piece of property, damages resulting from a change of grade can be properly ascertained only by considering the property as a whole.[79a] Impairment of the use of property for a particular purpose will not entitle the owner to damages if the market value of the property is enhanced by the improvement.[79b] The cost of adjusting the property to the new grade and the injury to trees, are proper elements of damage.[79c]

Where two improvements and assessments therefor are made under separate proceedings, damages caused by one cannot be set off against an assessment for the other.[80] While the mere passage of an ordinance providing for a change of grade does not of itself give rise to an immediate cause of action for damages,[81] yet a property owner who improves his property in accordance with an established grade, and thereafter voluntarily changes his improvements to conform to a newly established grade, before the city has done any act to conform the surface of the street to the new grade, may recover damages when the change is actually made by the city.[82] In Missouri an abutting owner whose property will be damaged by grading is entitled to damages to be ascertained by a jury or board of commissioners before the work is commenced,[83] and the prosecution of work commenced without authority and before such compensation has been determined may be enjoined.[84]

§ 8. *Local assessments. A. Power and duty to make.*[85]—Municipal corpora-

v. Revere [Mass.] 73 N. E. 664. Under Laws 1903, p. 1396, c. 610, authorizing recovery of damages for change of grade of highways, only actual damages, less benefits properly charged to the property, may be recovered. In re Borup, 182 N. Y. 222, 74 N. E. 838. The damages recoverable by an abutting owner for a change of grade is the difference in value of his property before and after the change. Widman Inv. Co. v. St. Joseph [Mo.] 90 S. W. 763. In determining the special benefits which may be set off against such damages in an action therefor, the cost of making the improvement is not to be considered. Under Const. art. 2, § 21. Widman Inv. Co. v. St. Joseph [Mo.] 90 S. W. 763. Under Laws Wash. 1893, p. 194, c. 84, § 15, only damages in excess of benefits conferred by the improvement on the property concerned can be allowed for a change in street grade. City of Seattle v. Board of Home Missions [C. C. A.] 138 F. 307.

79. In determining damages for a change of grade for sidewalk construction, the assessment against the property may be deducted from the benefits resulting from the improvement. Village of Grant Park v. Trah, 115 Ill. App. 291. Benefits to property from sidewalks, sewers and drains, made possible by a change of grade, cannot be set off against damages caused by the change of grade, since the property would be liable to special assessments when these improvements were made. Garvey v. Revere [Mass.] 73 N. E. 664.

79a. Evidence of benefits to lot, without regard to building, properly excluded. City of Seattle v. Board of Home Missions [C. C. A.] 138 F. 307.

79b, 79c. City of Seattle v. Board of Home Missions [C. C. A.] 138 F. 307.

80. Damages caused by widening a street cannot be set off against an assessment for paving and grading when the ordinance for widening was passed nine months after the contract for grading was awarded, and the cost of the two improvements were assessed in separate proceedings. Duquesne Borough v. Keeler [Pa.] 62 A. 1071.

81. Under Code § 785, providing for damages for change of grade. York v. Cedar Rapids [Iowa] 103 N. W. 790.

82. York v. Cedar Rapids [Iowa] 103 N. W. 790.

83. Const. art. 2, § 21. Graden v. Parkville [Mo. App.] 90 S. W. 115.

84. Graden v. Parkville [Mo. App.] 90 S. W. 115.

85. See 4 C. L. 1141.

NOTE. Improvements for which special assessments may be made: "The rule is well established that general taxes cannot be levied or imposed to pay the costs of a specific local improvement. The converse of this rule is also well established: that local assessments or taxes cannot be levied or imposed to pay for the cost of an improvement of a general character or one which results in a general benefit and advantage not only to the individual whose property is adjacent to or near but also to an equal extent to that individual whose property may be situated at the remotest distance from the improvement. A local assessment, therefore, is only valid or legal when levied to pay the cost of a local improvement in its restricted sense.

"Applying this rule, courts have held that a local tax or assessment cannot be levied for the construction of a court house, public market, public school house, or other buildings of a similar character, or a plant for supplying water and light to the entire municipality, or the construction and repair of large sewers, or water mains designated as the main arteries of a general system.

"On the contrary, the opening, paving or

tions have no inherent power to levy special assessments. Such power exists only to the extent that it is expressly conferred by statute.[86] Statutes conferring the power are to be strictly construed against the municipality and in favor of the property owners.[87] Where conferred, the power is a continuing one and may be exercised whenever the public need demands.[88] It cannot be delegated by the legislative bodies upon which it is conferred.[89] The law in force at the time proceedings for an improvement are instituted controls.[90]

A holder of warrants issued in payment of work done may, by mandamus, compel the levy of assessments to provide for their payment;[91] but a city is not lia-

macadamizing, grading, curbing and guttering, sprinkling or general improvement of streets and highways, the running of water pipes and mains, or placing of hydrants. construction of viaducts, local sewers, ditches or drains, or the running of sewer pipes, the construction or repair of sidewalks, the establishment of park ways, public grounds or parks, the construction of safe harbors, landings, wharves and docks, have each been considered local improvements of such a character that the cost of their construction or making should be assessed against the property benefited in proportion to the benefits received. The general rule in regard to the construction of all the improvements noted above in the absence of special charter or statutory provisions is that the original cost of such improvement must be borne by local assessments levied upon property benefited; after such original construction the cost of making the usual and necessary repairs must, however, be paid from the general corporate funds or revenues. The power to construct local and public improvements outside of the corporate limits in the absence of an express legislature grant is universally denied. The rule applies to the opening of a street, the repairing of a highway, the grading of an avenue, or the construction of a bridge."—See Abbott. Mun. Corp. § 340, and authorities there cited.

86. Marion Trust Co. v. Indianapolis [Ind. App.] 75 N. E. 834. The power to make assessments exists only when distinctly conferred by legislative authority. Blanchard v. Barre, 77 Vt. 420, 60 A. 970. A benefit assessment on abutting property may be made where a sewer channel is relocated. St. 1899, p. 496, c. 450. Atkins v. Boston, 188 Mass. 77, 74 N. E. 292. Burns' Ann. St. 1901, § 3845, authorizes a city to apportion the entire cost of a sidewalk built by it on the property abutting thereon. Marion Trust Co. v. Indianapolis [Ind. App.] 75 N. E. 834. Under Ky. St. 1903, § 3105, cities of the second class have power to build sewers at cost of abutters. City of Covington v. W. T. Noland & Co. [Ky.] 89 S. W. 216. Act June 4, 1901, P. L. 364, authorizes the filing of a municipal lien for the paving of a cartway. Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323. Laws 1902, p. 589, c. 219, amending Port Chester Charter, tit. 5, § 4, by providing for the inauguration of improvements by the village trustees, merely supplements the charter and does not affect the provisions for local assessments to pay for such works. In re Locust Ave. in Village of Port Chester, 110 App. Div. 774, 97 N. Y. S. 508. Comp. St. 1903, c. 12a, § 101b, authorizes a special assessment on land "specifically" benefited by a park or boulevard to pay for the land appropriated or purchased. This section is not controlled by or in conflict with c. 12a, § 158, which provides generally for the assessment of damages for the taking of property for street purposes on abutting or adjacent real estate. Hart v. Omaha [Neb.] 105 N. W. 546. St. 1902, p. 439, c. 527, does not authorize two assessments for the same public work, but only one assessment for public improvements completed within six years before the day of the passage of the act. New England Hospital for Women & Children v. Boston St. Com'rs, 188 Mass. 88, 74 N. E. 294. Street improvement held not completed until ready for public use; hence, in this case, assessments were properly levied under law of 1902. Id.

87. Marion Trust Co. v. Indianapolis [Ind. App.] 75 N. E. 834; Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165.

88. Shannon v. Omaha [Neb.] 103 N. W. 53. Thus, a city which has in good faith adopted and carried out plans for a sewerage system, approved by a competent sanitary engineer of high standing in his profession, is not chargeable with the cost of additional or substituted improvements made necessary by the growth of the city. Inadequacy of sewer held to have been brought about by large business blocks displacing residences in a certain section of the city. Id.

89. Under Rev. St. 1899, § 1498, and §§ 1495, 1496, and Acts 1893, p. 65, the power to levy and assess the cost of street improvements is vested in city councils of cities of the third class, and cannot be by them delegated to city clerks. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386.

90. Where proceedings for improvement of a public road were commenced by petition, under act of March 22, 1895 (Gen. St. p. 2902), before passage of the act of April 1, 1903 (P. L. 1903, p. 145), the right to assess abutting land for 10% of the cost was not affected by the act of 1903. Haines v. Burlington County Chosen Freeholders [N. J. Law] 62 A. 186.

91. The holder of warrants of which payment is withheld, the construction of the work being unnecessarily delayed or refused, may by mandamus, compel county commissioners to proceed and provide for payment. Espy Estate Co. v. Pacific County Com'rs [Wash.] 82 P. 129. An assessment to pay such warrants may be levied, though condemnation proceedings and construction of the work have not been completed. Id.

ble upon warrants payable out of a special fund, merely because of a failure to collect taxes, where it does not appear that the assessment is invalid or that the city has been negligent in making the assessment.[92]

(§ 8) *B. Constitutional and statutory limitations.*—Usually, though not always,[93] special assessments can be levied only for work constituting an original improvement,[94] or a reconstruction.[95] Mere repairs must be made at the general expense.[96] Whether particular costs and expenses may be included in an assessment depends upon the statute.[97]

Equality and uniformity.[98]—Special assessments are based upon the theory that property assessed will be specially benefited.[99] Accordingly, they are not considered "taxes" within the meaning of constitutional provisions requiring equality and uniformity.[1] Absolute equality is not to be expected, and any rule of apportionment which makes assessments as nearly as possible proportionate to

Where an original ordinance and several subsequent reassessment ordinances were held void, a holder of warrants issued to pay for the improvement could compel the city to pass a proper ordinance to provide for payment by mandamus. Waldron v. Snohomish [Wash.] 83 P. 1106. Acceptance of money from the city in part payment of improvement warrants, under invalid ordinances, held not to preclude resort to mandamus to compel the authorities to make a valid reassessment. Id. Where a contractor has received a final order for the full contract price for a drain before it is completed, and while it is valueless to the public, he is not entitled to a writ of mandamus to compel a township supervisor to certify a special assessment roll. Sherwood v. Rynearson [Mich.] 12 Det. Leg. N. 395, 104 N. W. 392.

92. City of Denver v. National Exch. Bank [Colo.] 82 P. 448.

93. Under Ky. St. 1903, § 3096, abutting owners are liable for the cost of sidewalks made of improved materials, whether the construction is original or a reconstruction. Mudge v. Walker [Ky.] 90 S. W. 1046.

94. Where a work of public utility has once been constructed, either by the public or at the expense of abutting owners, the latter cannot be charged with the cost of any subsequent reconstruction or change, even though this is a further benefit. Philadelphia v. Meighan, 27 Pa. Super. Ct. 160. Where sewer was built on one side of a highway and charged to owners on that side, the city could not build one on the other side years later and charge the cost to owners on that side. Id. A public highway was macadamized for a width of 18 feet at the expense of property owners, under act April 21, 1882, and thereafter became a county road. In 1895 it was made a part of a city and in 1904 was graded, curbed, and paved. Held the work on the city street in 1904 was original construction and property owners were liable therefor. Heim v. Figg [Ky.] 89 S. W. 301. Macadamizing of a street by an abutting owner at his own expense, with the consent of the mayor and board of public works, was not an original construction so as to bar an assessment for a subsequent improvement by the city. City of Louisville v. Gast [Ky.] 91 S. W. 251.

95. Where evidence showed that asphalt surface was so badly worn that it could not be repaired, and street was completely resurfaced, the old concrete base being used, the work done constituted an improvement and not mere repairs. Bush v. Peoria, 215 Ill. 515, 74 N. E. 797.

96. Funds for the repair of streets which have been improved by special assessment must be provided by general taxation, special assessments not being proper for such work. Bush v. Peoria, 215 Ill. 515, 74 N. E. 797.

97. In Iowa the expense of collecting the assessment cannot be included therein. Higman v. Sioux City [Iowa] 105 N. W. 524. The cost of the necessary preliminary work or action pertaining to a street improvement, such as the cost of advertising, serving notices, etc., paid by the municipality from its general fund, may be included in the assessment and collected from the owners of property specially benefited by the improvement in order to reimburse the general fund, notwithstanding all such costs were proper charges which could enter into the aggregate charge to be assessed upon the properties benefited as part of the costs of the improvement, and no fund to pay such costs existed at the time the expenses were incurred. Adkins v. Toledo, 6 Ohio C. C. (N. S.) 433. Where a local assessment included an amount necessary to meet the expenses of making a survey, plans, specifications, and superintendence, under the express charter provisions, the fact that the sum so collected went into an improvement revolving fund largely supported by special assessments, the expenses named being in fact paid out of another fund supported by general taxation, did not render the assessment illegal as double taxation, since property owners paid no more than they should have paid and enjoyed the use and benefit of the accumulation in the revolving fund. Burns v. Duluth [Minn.] 104 N. W. 714. A special assessment for unpaid non-interest bearing vouchers cannot properly include interest on such vouchers, and an ordinance providing for an amount which includes such interest, the amount of interest and of principal not being separable on the face of the ordinance, is wholly void. Cratty v. Chicago, 217 Ill. 453, 75 N. E. 343.

98. See 4 C. L. 1141.

benefits is upheld.[2] Thus, the assessment of contiguous[3] or abutting property according to frontage[4] or area,[5] or a rule involving both frontage and depth,[6] or according to the assessed valuation,[7] is upheld, provided the amount assessed is substantially proportionate to the benefits actually conferred,[8] and the assessment is not arbitrary and unreasonable.[9] The omission of property benefited and assessable renders an assessment unjust and erroneous.[10]

99. Arnold v. Knoxville [Tenn.] 90 S. W. 469.

1. Acts 1905, p. 585, c. 278, authorizing special assessments does not violate Const. art. 2, §§ 28, 29. Arnold v. Knoxville [Tenn.] 90 S. W. 469.

Note: Arnold v. City of Knoxville [Tenn.] 90 S. W. 469, overrules Taylor, McBean & Co. v. Chandler, 9 Heisk. [Tenn.] 352, 24 Am. Rep. 308, and Reelfoot Lake Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725, which held special assessments unconstitutional. The opinion cites and reviews many authorities, pointing out the distinction between special assessments and general taxes.

For note on Local Assessments as Taxes, see 4 C. L. 1143.

2. The fact that assessments may not be exactly proportionate to benefits in particular instances does not render the rule of apportionment invalid. Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 Law. Ed. 819. The fact that an assessment is excessive as to particular property is not a jurisdictional defect where it is uniform as a whole and states the number and frontage of each lot assessed. Bates v. Adamson [Cal.] 84 P. 51.

3. Statute authorizing local improvements to be made by special taxation of contiguous property does not violate Const. 1870, art. 9, § 1, requiring taxes to be levied according to valuation "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." Harrigan v. Jacksonville [Ill.] 77 N. E. 85.

4. A sewer assessment at a uniform rate according to frontage does not necessarily violate a requirement that assessments must be proportionate to benefits. People v. Desmond, 97 N. Y. S. 795. Benefits from new sewer held practically confined to property in new district, all of such property being benefited, and front foot rule of apportionment held not inequitable. Shannon v. Omaha [Neb.] 103 N. W. 53. Where the boundaries of an avenue are extended for the sole purpose of providing ornamental courtyards, the benefits should be assessed according to the frontage, irrespective of whether the property is improved or not. In re City of New York, 106 App. Div. 31, 94 N. Y. S. 146.

5. Assessments according to area of abutting property for grading, curbing, and paving, do not violate the 14th amendment. Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 Law. Ed. 819.

6. Rev. St. Ohio 1892, § 2383, provides that a part of the frontage of lots having a greater frontage than the average depth may be exempted and the deficiency charged to the entire frontage pro rata. Held, an assessing ordinance conforming to this statute is not open to the objection that it provides for an assessment which is not uniform. Cleneay v. Norwood, 137 F. 962.

7. Acts 1893, p. 102, providing that levee assessments shall be according to assessed value, is not invalid because assessments thereunder are not according to benefits. Porter v. Waterman [Ark.] 91 S. W. 754.

8. Pub. St. 1882, c. 50, § 7, provides for a fixed, uniform rate of assessment according to frontage or area or both, and that no assessment shall be made on any estate which cannot be drained until such incapacity is removed. This statute is construed as meaning that assessments shall not exceed benefits, and, as so read, is constitutional. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306. Under this statute an objection that an assessment is not made with reference to the cost of a particular sewer is untenable, since the statute provides for a fixed uniform rate based on the average cost of all sewers in the system. Id. Acts 28th Gen. Assem. p. 14, c. 29, § 1, providing that special assessments shall be in proportion to special benefits and not in excess thereof, is sufficiently definite without an ordinance, since the determination of the extent of the benefits depends upon the circumstances of each case. Stutsman v. Burlington, 127 Iowa, 563, 103 N. W. 800.

9. Assessments for street paving should be uniform and laid with relation to the benefit derived from the entire improvement, although different kinds of paving are used on different portions of the street. Where brick and asphalt were used, it was improper to impose the entire cost of each kind of paving on the property abutting thereon. Cossitt Land Co. v. Neuscheler [N. J. Law] 60 A. 1128. Assessment for widening of street for market place, whereby portions of lots were assessed an amount equal to the value of the parts taken, without reference to the different situation of the lots, and the fact that some already fronted on the market, set aside as arbitrary and unjust. Berdel v. Chicago, 217 Ill. 429, 75 N. E. 386. Assessment against relator's property, levied under front foot rule for sewers, held unjust and excessive as compared with other assessments, his property being used for residential purposes only, and other lots for business purposes. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597. Improper to assess for street paving lots having a depth of 25 feet on same basis as lots having depth of 100 feet, especially where one lot was corner property, and other lots were omitted. Cossitt Land Co. v. Neuscheler [N. J. Law] 60 A. 1128. A municipality cannot adopt as a basis for estimating the benefits accruing to abutting lots from a street improvement the depreciated value of the lots at the time of the improvement, due to the fact that the street had been used as a dump for waste

Due process of law.[11]—Notice to property owners, substantially in the manner provided by law, is essential to the validity of assessments.[12] Due process of law does not, however, require notice of each successive step leading up to the assessment.[13] Any statutory notice to the property owner which will enable him to appear before some duly constituted tribunal, where he may be heard with reference to the fairness and validity of an assessment before it becomes a fixed charge on his property, is sufficient.[14] Restricting the right of appeal from local tribunals is not a denial of due process of law.[15]

(§ 8) *C. Persons, property, and districts liable, and extent of liability.*[16]—Only property benefited by an improvement can be assessed for its cost,[17] and the amount of the assessment must be proportionate to the benefits.[18] Subject to the constitutional and statutory limits already noted, local authorities are vested with a broad discretion in determining what property will be benefited by an improvement,[19] and the extent of such benefit,[20] since these are questions of fact[21] in the decision of

matter of all kinds and had thereby become a public nuisance from which property values suffered. Kummer v. Cincinnati, 6 Ohio C. C. (N. S.) 559.

10. Sewer assessment. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597.

11. See 4 C. L. 1144.

12. Under Middletown Charter, there can be no assessment for a local sewer unless notice of the application and time of hearing thereon is given as required by the charter. Weeks v. Middletown, 107 App. Div. 587, 95 N. Y. S. 352. Under Act May 16, 1901, pl. 224, § 29, property owner cannot be charged with cost of house connections of sewer in absence of notice to him and default in compliance with notice. Erie City v. Willis, 26 Pa. Super. Ct. 459. Act May 16, 1901, pl. 224, § 35, requiring 5 days' notice of sewer assessment, is only directory, and failure to give notice for the required time does not make the assessment wholly void. Id. Where the plat and schedule showing lots, owners, amounts, etc., required by Code § 821, was filed, and the notice of assessment required by § 823 given, the fact that the assessment resolution (§ 825) did not enumerate the lots, owners. etc., did not render the assessment invalid. Higman v. Sioux City [Iowa] 105 N. W. 524. Code, § 823, provides that objections to special assessments must be filed within 20 days after first publication of the notice. Held a notice published 2 days after its date, and providing for the filing of objection within 20 days from its date, was defective but not void. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381. The notice need not fix a time when objections will be heard as the statute does not so require. Id. Under the St. Paul charter a reassessment is not void because one notice was given and a meeting held to fix the assessment district, and afterwards a second notice was given and a meeting held for placing the assessment upon the specific lands within this district. State v. District Ct. of Ramsey County [Minn.] 103 N. W. 744; State v. District Ct. of Ramsey County [Minn.] 104 N. W. 553. Under Local Imp. Act § 41, requiring notice of an assessment to the persons paying taxes on the property during the last preceding year, where the record shows notice to a certain person he will be presumed to be the person who paid taxes the preceding year. Roberts v. Evanston, 218 Ill. 296, 75 N. E. 923.

13. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

14. Local improvement act of 1897 held valid. Citizens' Sav. Bank & Trust Co. v. Chicago, 215 Ill. 174, 74 N. E. 115. Notice and opportunity to be heard at some stage prior to the assessment is due process. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. Burns' Ann. St. 1901, § 3977, relating to proceedings for construction of sidewalks, provides for notice to the landowner, and an opportunity to be heard upon the institution of the proceedings and again as to his share of the cost, and also provides for construction of the walk by the owner if he so desires. Hence it affords due process of law. Dyer v. Woods [Ind.] 76 N. W. 624.

15. Code, tit. 10, c. 2, as amended by Laws 30th Gen. Assem. p. 59, c. 67, providing that on appeal from an assessment for a drainage ditch a landowner cannot object that his land received no benefit, is not invalid for so limiting the scope of the appeal. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. Local Imp. Act § 84, providing that property owners shall be notified of the filing of the certificate of the board of local improvements, and of the time and place of hearing the same by publication and posting of notices, that objections may be filed within a certain time, that a trial shall be had at which the court shall hear and determine the issues in a summary manner, affords due process of law though the court's decision is conclusive, no appeal being provided for. People v. Cohen, 219 Ill. 200, 76 N. E. 388.

16. See 4 C. L. 1146, 1148.

17. To justify an assessment, benefits must be direct, immediate, appreciable, and certain. Naugatuck R. Co. v. Waterbury [Conn.] 61 A. 474. Where different parts of the same street are paved and graded under separate ordinances and contracts, property abutting on one part cannot be assessed for work on the other part. Wabash Ave., 26 Pa. Super. Ct. 305.

18. Where an improvement made retaining walls necessary, property owners who had already built such walls, which rendered

which courts will not interfere in the absence of fraud or mistake, or some error of law.[22] But courts will pass upon the questions whether a given work is one for which a special assessment may be laid,[23] and whether a particular assessment is reasonable[24] or laid in accordance with law.[25] In determining whether benefits are

others unnecessary, were entitled to credit therefor. Johnson v. Tacoma [Wash.] 82 P. 1092.

19. State v. District Ct. of Ramsey County [Minn.] 103 N. W. 744. A city has power to create a new sewer district within the limits of a larger district, and to assess the cost of a new sewer upon abutting property in the district according to benefits. Shannon v. Omaha [Neb.] 103 N. W. 53. Under Illinois sidewalk act of 1875, the determination by a village board that a sidewalk should be constructed by special taxation is a determination that the property specially taxed is benefited to the extent of the tax imposed. Harris v. People, 218 Ill. 439, 75 N. E. 1012. Under Laws 1898, p. 189, c. 84, power to apportion the cost of a street extension and to determine what property is benefited is lodged in the commissioners, hence they are not bound by action of the city council creating an assessment district, but may include as benefited property outside such district. In re Westlake Ave. [Wash.] 82 P. 279. Fixing of the boundaries of a drainage district, and classifying lands therein, is a legislative function, and Code tit. 10, c. 2, as amended by Laws 30th Assem. p. 59, c. 67, providing for commissioners to take such action, is not invalid for not providing for notice thereof to owners. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. Whether a particular lot or tract of land is specially benefited by a park, parkway or boulevard, is ordinarily a question of fact upon which the distance of the land from the improvement would have a bearing (Hart v. City of Omaha [Neb.] 105 N. W. 546), but a court cannot say as a matter of law that land at a certain distance is not benefited (Id.) Land assessed was three-fourths of a mile from boulevard. Id.

20. State v. District Ct. of Ramsey County [Minn.] 103 N. W. 744. A property owner is not entitled to a jury trial to determine the question of benefits in cases of special taxation. Harris v. People, 218 Ill. 439, 75 N. E. 1012.

21. It cannot be said that a sewer is of no benefit merely because a sewer already existed where the old one was a temporary one only, and the new one became a permanent part of the entire sewer system and displaced the old one. People v. Desmond, 97 N. Y. S. 795. Abutting owner held under deed restricting him from building nearer than 20 feet to street line for 30 years. Held condemnation of 20 foot strip along the street to widen and beautify it was a benefit to the land. In re City of New York, 106 App. Div. 31, 94 N. Y. S. 146. Where houses fronted on one street and lots were terraced down to another from which they were sometimes reached, the improvement of the latter street was of some benefit to the property. Johnson v. Tacoma [Wash.] 82 P. 1092. An objection by an abutting owner to a sewer assessment, based upon the ground that the sewer is not available to his lots, is not sustained where the proof shows that the lots for a distance of from fifteen to fifty feet back towards their rear are on a level with the grade of the street in which the sewer is built, from which point they descend from fifty to sixty feet to a river bounding them on the rear, and the sewer is from fifteen to seventeen feet below the surface of the street, and it also appears that with respect to several of the lots the houses and improvements thereon are so built as to permit the carrying off of sewerage from cellar levels through such sewer. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450. A street assessment cannot be successfully resisted on the ground of lack of benefits because the traffic upon the street is too heavy for an improvement of the kind made. Herman v. Columbus, 3 Ohio N. P. (N. S.) 216.

22. The action of municipal authorities in making assessment for local improvements is not subject to review by the courts. Price v. Toledo, 4 Ohio C. C. (N. S.) 57, 25 Ohio C. C. 617. The judgment of a board of public works as to what property is benefited by an improvement, and the extent of such benefit, is final and conclusive and will not be interfered with by the courts. State v. District Ct. of Ramsey County [Minn.] 103 N. W. 744. The fixing of the limits of a district to be taxed is not a judicial function, and courts will not interfere with the action of statutory authorities in the matter except to correct palpable violations of the constitution or charter. Spreading a paving assessment one block west and two blocks east of street paved held not so unreasonable or unjust as to warrant judicial interference, considering the section which would necessarily use the street. Id. Where a grass plot extended some distance down the center of a street, and the street on only one side of the plot was improved, the assessment of property on both sides of the street by the front foot was not so erroneous as to justify interference by the court on certiorari. In re Phelps, 110 App. Div. 69, 96 N. Y. S. 862. Where the assessor has determined a sewer assessment district, all property therein will be considered as benefited as least to some extent. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597.

23. Bush v. Peoria, 215 Ill. 515, 74 N. E. 797.

24. Though village board may determine what property is benefited by a special tax by providing for payment of the cost by special assessment, whether an ordinance is unreasonable or oppressive is a question upon which the courts will pass. Harris v. People, 218 Ill. 439, 75 N. E. 1012.

25. Where report of commissioners in street opening proceedings affirmatively shows that property not taken has been assessed more than one-half its value, contrary to charter of Greater New York § 980, a re-

conferred by an improvement, land is to be considered in its general relations and apart from its particular use.[26] Thus, a lot used for railroad purposes may be assessed for grading, curbing, and paving.[27] Property may be benefited though it does not abut upon the street improved.[28] Whether particular property is assessable may depend upon the terms of the statute[29] or ordinance[30] as applied to the property in question.

No property benefited is exempt from assessment unless expressly made so by law,[31] and a city has no power to release a property owner from liability for future improvements.[32]

The equipment of public service corporations in streets within an assessment district, and the rights, privileges, and franchises of such corporations, under which they so use the streets, are not subject to assessment for improvements[33] in the ab-

cital of the report to the contrary is not conclusive. In re City of New York, 103 App. Div. 496, 93 N. Y. S. 84.

26. Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 Law. Ed. 819. Particular use made of property by lessee is immaterial in determining benefits from a street improvement. Assessment on land leased by defendant and used as a public resort held not in excess of benefits. Chicago Union Traction Co. v. Chicago, 215 Ill. 410, 74 N. E. 449.

27. Notwithstanding a claim that it is to be used in the future for such purposes and that no benefit will result to it. Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 Law. Ed. 819.

Contra: Railroad lands necessary for railroad purposes used exclusively for such purposes and devoted permanently thereto are not so benefited by a paving of the street upon which they abut as to justify an assessment of benefits. Naugatuck R. Co. v. Waterbury [Conn.] 61 A. 474.

28. Under Laws 1903, p. 241, c. 129, assessments for the extension of a street may be levied upon property which is not "contiguous" to the improvement. In re Westlake Ave. [Wash.] 82 P. 279. Property may be assessed for street paving, though it does not abut on the street paved, if it is presently specially benefited. Roberts v. Evanston, 218 Ill. 296, 75 N. E. 923.

29. Under Laws 1901, p. 229, c. 113, § 1, providing for the assessment of abutting property to the center of the block, where a street improved does not intersect another at right angles, and a corner lot only corners on the street improved, that portion of such lot extending to the middle of the block is nevertheless assessable. Felt v. Ballard, 38 Wash. 300, 80 P. 532. Under St. 1891, p. 204, c. 147, § 7, subds. 11, 8, 7, where two subdivision streets terminate on an improved street, the half of the improvement opposite the streets terminating upon it is properly charged to property fronting on the subdivision streets. San Francisco Pav. Co. v. Dubois [Cal. App.] 83 P. 72. An assessment does not cease to be a single assessment because made on lands including property not on the street improved. Id.

30. Where the opening of a part of a street on a new location, the widening of the existing part of the street, and the grading of the whole, were treated as one proceeding, there being but one ordinance and one contract, an assessment was properly based upon the entire improvement. In re Wilmington Ave. [Pa.] 62 A. 848.

31. City property is subject to sewer assessments. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597.

School property, not a part of section 16, nor acquired with funds derived therefrom, held subject to assessment for street improvement. Board of Education of Chicago v. People, 219 Ill. 83, 76 N. E. 75. The separation of school funds under the new school code, making it possible to distinguish the trust from the contingent fund, will not have the effect of rendering valid an assessment against school property for a street improvement where the levy was made prior to the passage of the school code, whatever may be its effect as to such levies made subsequent thereto. Board of Education of Columbus v. Bowland, 3 Ohio N. P. (N. S.) 122. School property is not rendered liable to assessment for a street improvement by reason of the fact that with knowledge that the property was not liable to assessment the school board petitioned for the improvement (Id.), but where the lien of an assessment for a street improvement has already attached, it will not be defeated by the subsequent purchase of the property by a school board (Id.).

Voluntary grantors: In New York a voluntary conveyance, in order to exempt the owner's remaining property in street opening proceedings, may be made at any time, or at least before the appointment of commissioners. Westminster Heights Co. v. Delany, 107 App. Div. 577, 95 N. Y. S. 247. An owner who has made a voluntary conveyance for a street is not entitled to have his property entirely excluded from the proceedings, since it is liable, or may be, for a share of awards that may be made for buildings taken in opening the residue of the street. In re Avenue L in City of New York, 107 App. Div. 581, 95 N. Y. S. 245. Consolidation Act § 971 exempts from assessment for a street opening lands of a donor who has given land to the city for the street. Held, lands of others not acquired from the donor are not thereby exempted. In re City of New York, 103 App. Div. 496, 93 N. Y. S. 84.

See 4 C. L. 1146, for note on **applicability of exemptions to local assessments.**

32. Contract whereby land was deeded to

sence of statute or charter provisions imposing such liability. Street railway corporations are, however, commonly required to bear the cost of improving the portion of streets used by them,[34] and the right to do so cannot be contracted away by a municipality.[35] A statute granting to a corporation immunity from contribution to the expense of street improvements does not constitute a contract but merely a privilege revocable by subsequent legislation.[36] Such a privilege does not pass to a successor in interest of the corporation to which it was granted.[37]

(§ 8) *D. Procedure for authorization, levy, and confirmation of assessments.*[38] —The power to levy special assessments must be exercised in the manner prescribed by law.[39] Thus, the various steps must be taken in the manner,[40] at the time,[41] and by the officers[42] designated by the law.

city for street, and city agreed to release grantor and remainder of land from liability for cost of extending or maintaining street, held ultra vires and void. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165.

33. In re West Farms Road in City of New York, 47 Misc. 216, 95 N. Y. S. 894. A street railway corporation cannot be assessed for the widening of a street merely because it occupies the street with its tracks. Greater New York Charter § 980 does not authorize such assessment. In re East 133d St., 95 N. Y. S. 76. Street railway, electric light, telephone, and gas companies cannot be assessed for widening streets in which they maintain equipment. In re Anthony Ave., 46 Misc. 525, 95 N. Y. S. 77. Under Act May 16, 1891, P. L. 75, assessments for benefits can be levied only on abutting property. They cannot be levied against owners personally, or against a street railway company occupying streets or against its tracks in the streets. Harriott Ave., 24 Pa. Super. Ct. 597.

34. Laws 1890, p. 1112, c. 865, § 98, as amended by Laws 1892, p. 1404, c. 676, requiring street railways to pave portion of streets used by them is an exercise of the taxing power. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953. An ordinance granting a franchise and requiring the grantee, a street railway corporation, to place strips of lumber along the rails does not require it to pave such streets; hence Code § 834, requiring the corporation to pave a portion of the streets used by it, applies. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa 637, 103 N. W. 1005. Under an ordinance granting a street railway franchise containing a provision that if on said street a pavement has already been laid and an assessment therefor placed on the tax duplicate, and that said company shall pay to the city such proportion of the assessment for said improvement as the space occupied by its tracks, and one foot on the outside of the outer rails thereof bears to the entire width of the improved railway, held that the railway company is bound by its contract to pay said proportion of the assessments made and levied upon the feet front of the abutting property, and cannot defend upon any of the grounds that would have been available to abutting lot owners, or to the company if not bound by such contract obligations. Urbana, M. & C. R. Co. v. Columbus, 3 Ohio N. P. (N. S.) 438. In determining the width of an improved street to determine the proportion thereof chargeable against a street railroad, where the curb on each side thereof was constructed at the same time of said improvement, the curb is a part of the improved roadway and should be computed. Urbana, M. & C. R. Co. v. Columbus, 3 Ohio N. P. (N. S.) 438. An ordinance granting a street railway company the use of certain streets, and imposing on it the cost of improving the portion of the streets occupied by it, held to apply not only to the streets enumerated in the ordinance but all streets occupied by it and thereafter improved. City of McKeesport v. Pittsburg, etc., R. Co. [Pa.] 62 A. 1075.

35. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

36. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953. Code § 834, requiring street railways to pave a portion of streets occupied by tracks, is not objectionable as impairing a contract obligation when applied to a corporation granted a franchise, prior to the enactment of the statute, which purported to exempt the corporation from liability for paving, since Code § 1619 makes such franchises subject to conditions. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa 637, 103 N. W. 1005.

37. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

38. See 4 C. L. 1149, 1150.

39. Where the mode of exercising the power is prescribed it must be followed, and the assessment must show on its face that it was made according to the prescribed rule. Blanchard v. Barre, 77 Vt. 420, 60 A. 970. Statutes must be strictly followed. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165. Act May 15, 1901, repealing portions of Barrett law, held applicable to subsequent proceedings. Id. Local Imp. Act § 19, requiring an affidavit of the superintendent of assessments as to the making and filing of the assessment roll, its contents, etc., applies only to improvements involving the taking or damaging of property, and not to assessments for street paving. Roberts v. Evanston, 218 Ill. 296, 75 N. E. 923. Local Imp. Act § 99, provides that its terms shall control proceedings to collect instalments of an assessment made under a prior act. Section 84 requires the board to certify the cost of an improvement within 30

Assessment roll or report.[43]—The roll or report must properly describe the land assessed.[44] No plat need be filed with the report unless the statute so requires.[45] Ordinarily separate tracts of land should be separately assessed,[46] unless owned and used as one tract.[47]

Confirmation of assessments.[48]—Statutes giving courts power to pass upon disputes concerning assessments, and to correct errors and inequalities, are not unconstitutional as conferring legislative powers on the judiciary.[49] Judicial confirmation is required in some states. In Illinois the county court has jurisdiction of the proceeding, and has power therein to revise and correct the assessment roll.[50] Notice

days after its completion and acceptance. Held § 84 does not apply where an improvement was completed and accepted more than 30 days before it became effective. Gage v. People, 219 Ill. 424, 76 N. E. 583.

40. Under Rev. St. 1899, § 1498, and Acts 1893, p. 65, assessment of cost must be by ordinance after completion and acceptance of work. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386.

41. A tax for a drainage ditch may properly be levied before the work is done. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. In Nebraska it is the duty of the city council to provide available funds with which to pay for street intersections before ordering a street improvement. But failure to provide such funds is not ground for enjoining assessments after the improvement is finished and street intersections paid for. Eddy v. Omaha [Neb.] 103 N. W. 692.

42. Under city act of March 24, 1897 (P. L. 1897, p. 46), § 48, clause 3, an assessment for a street improvement may be levied by the common council. Tusting v. Asbury Park [N. J. Law] 62 A. 183. It is not necessary that the officer making the assessment roll should be appointed by the court or directed by order of the court to make the assessment. Appointment by the president of the board of local improvements is sufficient. Harrigan v. Jacksonville [Ill.] 77 N. E. 85. Common council made assessment on report of city engineer without reference to city commissioners to apportion cost in proportion to benefits as required by Laws 1901, p. 534, c. 231. Held, assessment void. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165. Local improvement act of 1897 is not invalid because providing for superintendent of assessments to apportion cost of improvements between city and property benefited, nor as conferring legislative powers on county courts. Citizens' Sav. Bank & Trust Co. v. Chicago, 215 Ill. 174, 74 N. E. 115. That town instead of selectmen determined the portion of sewer cost to be borne by the town was not ground for setting aside the assessment where the amount was within the statute. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306.

43. See 4 C. L. 1150.

44. Failure of the engineer's report to properly describe the lands bordering on the improved street in the statutory manner invalidates the assessment as to the lands improperly described. Dunkirk Land Co. v. Zehner [Ind. App.] 74 N. E. 1099. Description of property in assessment roll, delinquent list, and application for judgment of sale held too indefinite to sustain a judgment of sale. People v. Colegrove, 218 Ill. 545, 75 N. E. 991.

45. No plat need be filed with an assessment roll for street paving, hence, failure of a plat unnecessarily filed to show lots of an objector is immaterial. Roberts v. Evanston, 218 Ill. 296, 75 N. E. 923.

46. Where a street extension divides a tract of land into two parcels, such parcels should be separately assessed. In re Westlake Ave. [Wash.] 82 P. 279. Where the statute requires assessments to be made separately against each tract or parcel of ground benefited, an assessment for a gross sum against two distinct tracts or parcels, each described by metes and bounds, is invalid. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165. Under Code § 821, requiring the filing of a plat showing owners' names and amount assessed against each tract, and Acts 28th Gen. Assem. p. 14, c. 29, § 1, that assessments must not exceed 25% of the value of each lot or tract, lots must be separately assessed and an assessment of several as one tract is invalid, though the lots are used and owned as one tract. Stutsman v. Burlington, 127 Iowa 563, 103 N. W. 800.

47. Where a widow owned one tract of land in fee and had a dower interest in another, and occupied the two as one farm, an assessment of all the land as one parcel was not erroneous. Parsons v. Grand Rapids [Mich.] 12 Det. Leg. N. 507, 104 N. W. 730. Under Laws 1901, p. 106, § 41, providing that several lots or parts of land owned and improved as one parcel may be assessed as one parcel, it will be presumed in the absence of contrary evidence that two lots assessed as one parcel were owned and improved as one. Ottis v. Sullivan, 219 Ill. 365, 76 N. E. 487. Where four lots were described in tax bill and petition to enforce same as lots 2, 4, 6, 8, the additional averment of their total frontage was not equivalent to an allegation that they were used as one lot. Barber Asphalt Co. v. Peck, 186 Mo. 506, 85 S. W. 387. Where only one of four lots in one tract owned by the same person abutted on an improved street, that lot alone was properly assessed, there being no showing that the lots were used as one tract, the lot lines being disregarded. Id. An assessment for a street improvement is enforceable, though the amount apportioned to an entire tract was afterwards, with the consent of the owner, no injustice resulting, placed on particular lots forming a part of the tract. Bloch v. Godfrey, 5 Ohio C. C. (N. S.) 318.

48. See 4 C. L. 1150.

of application for judgment of confirmation must be given,[51] and the statutory procedure followed.[52] The objection that another proceeding for the same improvement was pending at the time a proceeding to confirm an assessment was brought is unavailable where the record shows the former proceeding was dismissed.[53] Objections to ordinances should be specific.[54] Leave to file additional objections is properly refused when no good reason for delay in filing is shown.[55] A recommendation of a board of local improvements, presented with an ordinance to a council, is prima facie proof that the preliminary steps have been taken.[56] The introduction of such recommendation in a proceeding for confirmation of an assessment places upon an objector the burden of proving want of such steps.[57] The assessment roll, if in proper form, is admissible in evidence.[58] The superintendent of assessments cannot be called to impeach his report that he had investigated the district in which the improvement was to be laid in accordance with law.[59] Opinion evidence as to the gross amount of benefits to property from the improvement is admissible.[60] Judgments confirming assessments are, by express provision of statute in Illinois, several judgments as to each piece of property.[61] Hence, alteration of the assessment roll as filed by changing the number of a lot invalidates a judgment confirming the assessment, as to the lot so improperly charged,[62] but does not invalidate the judgment of confirmation as a whole.[63] A judgment confirming an assessment against school property cannot be collaterally attacked in mandamus proceedings to compel payment by school authorities.[64] A verdict that property of objectors is not assessed more than it will be benefited, nor more than its proportionate share of the cost, is sufficient, though it does not find that the property was specially benefited.[65] In New Jersey, when the circuit court has once confirmed a report of commissioners of adjustment, it cannot subsequently modify or amend its order of confirmation.[66]

49. In re Westlake Ave. [Wash.] 82 P. 279.

50. County court has power to revise and correct the assessment roll and to change and modify the distribution of the total cost between the public and the property benefited, and on this last question its decision is conclusive. Local Imp. Act 1897, § 47. Berdel v. Chicago, 217 Ill. 429, 75 N. E. 386. The court has power to correct the description of property assessed and to confirm the assessment as corrected, no request for a re-reference of the roll to the superintendent having been made. Connecticut Mut. Life Ins. Co. v. Chicago, 217 Ill. 352, 75 N. E. 365.

51. Notice is essential to give the court jurisdiction, and want of it, appearing on the face of the record, may be shown to defeat an application for judgment of sale. Phillips v. People, 218 Ill. 450, 75 N. E. 1016.

52. Local Imp. Act § 41, requires an affidavit to show compliance with the terms of that section only, not with §§ 38 and 39 as well. Conway v. Chicago, 219 Ill. 295, 76 N. E. 384. Amended affidavit, after the hearing, showing compliance with statute (Local Imp. Act § 41), held sufficient, it not being necessary for the affidavit to show compliance with §§ 38, 39. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

53. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

54. Where objection was that ordinance "does not specify the nature, character, locality and description" of the improvement, it was too general, but it was reviewed, no objection to it being raised. Close v. Chicago, 217 Ill. 216, 75 N. E. 479.

55. McLennan v. Chicago, 218 Ill. 62, 75 N. E. 762.

56. Guyer v. Rock Island, 215 Ill 144, 74 N. E. 105.

57. Proof held not to overcome prima facie case for validity of assessment. Guyer v. City of Rock Island, 215 Ill. 144, 74 N. E. 105. Objector must prove want of a proper notice of the public hearing. Harrigan v. Jacksonville [Ill.] 77 N. E. 85.

58. Objection to assessment roll as evidence on the ground that compliance with Local Imp. Act § 41 was not shown, properly overruled where affidavits were attached and were not shown to be insufficient. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762.

59. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

60. Johnson v. Tacoma [Wash.] 82 P. 1092.

61. 4 Starr & C. Ann. St. 1902, p. 182, c. 24, § 56. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

62, 63. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

64. Board of Education of Chicago v. People, 219 Ill. 83, 76 N. E. 75.

65. Local Imp. Act § 49. McLennon v. Chicago, 218 Ill. 62, 75 N. E. 762.

66. Order of court striking out additional assessments, after its order of confirmation, held void. Borough of Rutherford v. Maginnis [N. J. Law] 60 A. 1125.

(§ 8) *E. Reassessments and additional assessments.*[67]—A reassessment is commonly authorized where the original assessment has been held invalid and set aside.[68] Such reassessments are legal[69] if, in the making of them, the statutory procedure is followed.[70] The purpose of such reassessment proceedings is only to supplement the original proceeding.[71] A legal reassessment is therefore effective not only to secure a valid assessment of benefits, but also to reach back and validate the warrants, so far at least as the reassessed benefits are sufficient for that purpose.[72] A reassessment district may include property not included in the original district.[73] In a proceeding for a new assessment, whether the original proceeding is still pending is a question of fact.[74] Property owners who have paid an original assessment are entitled to object to a reassessment on the ground that property formerly assessed has been arbitrarily reassessed at a lower rate,[75] and such objection, if sustained, is fatal.[76] Where an assessment has been set aside on appeal, and the original petition dismissed by the county court, the dismissal is not res judicata in a proceeding to confirm the new assessment.[77]

A supplemental assessment is sometimes provided for to cover a deficiency.[78] A commissioner's estimate of a deficiency, approved by town trustees, is prima facie proof of the amount of the deficiency.[79] The cost of collecting and disbursing assessments,[80] and interest which accrued upon vouchers in the hands of the contractor, when there was no money in the treasury to pay the vouchers or interest,[81] are proper charges for a supplemental assessment. Where an assessment is confirm-

67. See 4 C. L. 1151.

68. Where an ordinance has been held defective but not void, and a judgment confirming an assessment reversed and the petition dismissed, the assessment has been set aside and a new one may be made, under Local Imp. Act, § 46. Goodrich v. Chicago, 218 Ill. 18, 75 N. E. 805. Where an assessment was confirmed Oct. 7, 1896, and the judgment reversed April 21, 1898, a petition for a new assessment was governed by the act of 1872, and not by that of 1897. Goodrich v. Chicago, 218 Ill. 18, 75 N. E. 805.

69. A reassessment, under Portland City Charter § 400, where the original assessment has been held invalid, cannot be regarded as an effort to raise money by taxation for private purposes, that is for the contractors, in violation of Const. art. 11, § 9. Duniway v. Portland [Or.] 81 P. 945. Reassessments by the board of public works under the St. Paul charter are valid, notwithstanding jurisdictional defects in the original proceedings. The power of such board is not affected by the 1898 amendment to art. 4, § 36, of the constitution requiring a legislative body to be a feature of home rule charters. State v. District Ct. of Ramsey County [Minn.] 106 N. W. 306.

70. Failure of the city auditor to give abutting owners personal notice of a reassessment, under Charter, § 400, is not fatal to the reassessment where proper and sufficient notice is published. Duniway v. Portland [Or.] 81 P. 945. Notice need not be given or a hearing accorded abutting property owners prior to a resolution directing the city auditor to prepare a preliminary reassessment, since the charter (Portland City Charter, § 400) does not require such notice or hearing. Id. The decision of the city council that objections to a reassessment, under Portland City Charter, § 400, are invalid, is conclusive as against collateral attack, where no fraud in the proceedings is shown. Id.

71, 72. Duniway v. Portland [Or.] 81 P. 945.

73. The St. Paul board of public works has authority, in making a reassessment, under Charter, tit. 111, § 57, to establish a new district and include therein all property benefited, whether embraced in the original district or not. State v. District Ct. of Ramsey County [Minn.] 104 N. W. 553.

74. Cratty v. Chicago, 217 Ill. 453, 75 N. E. 343.

75. State v. District Ct. of Ramsey County [Minn.] 104 N. W. 553.

76. Where, after certain property owners had paid, and others had refused to pay, their assessments, a reassessment was made which excluded from the new district property on which assessments had been paid, but included that on which assessments had not been paid, and some additional property, and the new assessment on property formerly assessed was less than the old assessment by $1.25 per front foot, without regard to benefit, the deficiency being made up by assessments on the additional property, the assessment was arbitrary and void. State v. District Ct. of Ramsey County [Minn.] 104 N. W. 553.

77. Goodrich v. Chicago, 218 Ill. 18, 75 N. E. 805.

78. In the absence of contrary proof it will be presumed that an improvement ordinance was broad enough to include catch basins and extras, and that the cost thereof

ed after being reduced, but there is no finding that the property has been assessed its full proportionate share, the judgment of confirmation is not conclusive as to the right to make the supplemental levy.[82] It is not necessary that the supplemental assessment should be payable in more than one instalment.[83] A supplemental assessment payable in one payment cannot be made to draw interest, though the original assessment, payable in several instalments, provided for interest.[84] In proceedings for a supplemental assessment, objectors will not be permitted to attack the sufficiency of the ordinance for the original assessment.[85]

(§ 8) *F. Maturity, obligation, and lien of assessments.*[86]—Whether assessments shall be payable in instalments is for the legislative body of the municipality.[87] Interest may be required on deferred instalments,[88] the rate of which may be fixed by the legislature.[89] An assessment against a municipality for public improvements draws interest the same as assessments against private owners.[89a]

The lien of a municipal claim being statutory, its validity, duration, and extent are wholly dependent upon compliance with the statute.[90] The lien of general taxes is superior to the lien of a local assessment, though the latter is payable in instalments some of which have not matured.[91] In Indiana, if lots primarily liable for a street improvement prove insufficient to meet the assessment, the statute fixes a lien upon lots secondarily liable without a separate assessment.[92] An apportionment warrant issued by mistake against the wrong person does not create a lien.[93] Where the holder of such warrant has a right to have it corrected by the city council within a certain time, failure to take such action within the time allowed bars his rights against the true owner.[94]

may properly be included in a supplemental assessment to cover a deficiency. Town of Cicero v. Skinner [Ill.] 77 N. E. 137.

79, 80, 81, 82. Town of Cicero v. Skinner [Ill.] 77 N. E. 137.

83. Conway v. Chicago, 219 Ill. 295, 76 N. E. 384.

84. Provision for interest does not, however, render entire assessment invalid. Conway v. Chicago, 219 Ill. 295, 76 N. E. 384.

85. Conway v. Chicago, 219 Ill. 295, 76 N. E. 384.

86. See 4 C. L. 1154.

87. Under Hurd's Rev. St. 1893, p. 276, whether an assessment shall be payable in one or more than one installment is a question for the legislative body. Goodrich v. Chicago, 218 Ill. 18, 75 N. E. 805.

88. The personal rights of a property owner are not infringed by a statute requiring the payment of interest on deferred instalments of street improvement assessments when it is optional with him to pay the entire assessment at any time. Local Improvement Act 1897 (5 Starr & C. Ann. St. 1902, p. 175), § 42. Gage v. Chicago, 216 Ill. 107, 74 N. E. 726.

89. Local Imp. Act 1897 is not invalid because it fixes a rate of interest on instalments of assessments. Hulbert v. Chicago, 217 Ill. 286, 75 N. E. 486.

89a. Special assessment vouchers issued by a municipality in payment of a local improvement bear interest at the legal rate. City of Chicago v. People, 116 Ill. App. 564.

90. A scire facias on a municipal lien, insufficient to support a judgment because defectively served, does not continue the lien beyond the time of its expiration, hence there can be no valid judgment on an alias scire facias issued after the original lien had expired. City of Philadelphia v. Cooper, 212 Pa. 306, 61 A. 926. Contra. Id., 27 Pa. Super. Ct. 552. Municipal claim for sewer is sufficient which sets out size of sewer, material, length in front of defendant's property, price per foot, length and price per foot of house connections, and title and date of approval of ordinance for work. Erie City v. Willis, 26 Pa. Super. Ct. 459. Neglect of prothonotary to enter municipal lien for assessment in mechanic's lien docket, and to keep a locality index (Act May 16, 1901, P. L. 224, §§ 26, 27) does not wholly invalidate the lien. Id. The act of June 4, 1901, P. L. 364, does not apply to work commenced under an ordinance adopted prior to the statute. Act April 23, 1889, P. L. 44, applies, and under it a claim filed within 4 months after completion of the entire work is sufficient to preserve the lien, notwithstanding an interruption of 2 years in the work. Tarentum Borough v. Moorhead, 26 Pa. Super. Ct. 273. Under Act June 4, 1901, P. L. 364, which repeals Act March 22, 1869, P. L. 482, municipal liens have no priority over mortgages created prior to the passage of the act. Martin v. Greenwood, 27 Pa. Super. Ct. 245.

91. City of Ballard v. Ross, 38 Wash. 209, 80 P. 439.

92. Mullen v. Clifford [Ind. App.] 76 N. E. 1009.

93. Warrant against grantor of record owner at time of improvement created no

(§ 8) *G. Payment and discharge.*[95]—Where a sidewalk assessment is paid by a lot owner, who thereafter conveys, and the city then annuls the order for a walk and repays the assessment to the original owner, the grantee of the lot is not entitled to recover the amount of the assessment from the city.[96] An action to recover an assessment which has been paid and afterwards annulled by judgment of a court, under the New York statute, must be brought within six years after the accrual of the right of action.[97] In Illinois, a property owner who is entitled to a rebate on an assessment paid by him may recover the same in an action of assumpsit against the municipality which levied and collected the assessment.[97a]

(§ 8) *H. Enforcement and collection.*[98]—There is no personal liability for assessments unless expressly created by statute.[99] Collection is usually by enforcement of the lien of the assessment against the land.[1] An election to foreclose a lien upon property fronting on an improved street does not work an estoppel to foreclose on the backlying property, where the property fronting on the improvement sold for less than the assessment.[2]

Demand and notice.[3]—Since no proceeding to enforce such lien can be maintained until the property owner is in default,[4] it must appear that notice of delinquency[5] or a demand for payment[6] has been made in accordance with law. A regis-

lien. Voris' Ex'rs. v. Gallaher, 27 Ky. L. R. 1001, 87 S. W. 775.

94. Holder's rights barred after 5 years. Voris' Ex'rs v. Gallaher, 27 Ky. L. R. 1001, 87 S. W. 775.

95. See 4 C. L. 1155.

96. Smith v. Minneapolis [Minn.] 104 N. W. 227.

97. Laws 1896, c. 910, providing for refundment of annulled assessment, and giving a right of action after a year if not refunded, does not revive a cause of action already barred. Dennison v. New York, 182 N. Y. 24, 74 N. E. 486.

97a. City of Chicago v. Singer, 116 Ill. App. 559.

98. See 4 C. L. 1156.

99. The Rochester charter makes special assessments a personal obligation and gives a right of action for their recovery in addition to other remedies. It also provides for the addition of unpaid assessments to general taxes. Held the right of action to recover assessments is not lost by adding them to the general taxes. City of Rochester v. Rochester R. Co., 109 App. Div. 638, 96 N. Y. S. 152.

1. County court has jurisdiction to confirm a special assessment or render a judgment of sale thereunder at a probate term. Local Imp. Act § 51. County Court Act § 5. People v. Brown, 218 Ill. 375, 75 N. E. 989.

2. Cleveland, etc., R. Co. v. Porter [Ind. App.] 74 N. E. 260.

3. See 4 C. L. 1158.

4. Until Local Imp. Act § 84 has been complied with by filing a certificate of cost, so that the excess of an assessment over the cost, if any, may be abated, a property owner is not in default, and an application for sale cannot be maintained. Gage v. People, 219 Ill. 634, 76 N. E. 834.

5. Clerk's report of delinquency of sidewalk assessment need not be under city seal, under act of 1875, p. 64, § 4. Marshall v. People, 219 Ill. 99, 76 N. E. 70. An ordinance requiring a village clerk to file his report of delinquent lands with the county collector by a certain date not being for the benefit of the property owner, a filing of such report at a later day is not fatal to the enforcement of the assessment. Harris v. People, 218 Ill. 439, 75 N. E. 1012. Hurd's Rev. St. 1903, c. 120, requiring copy of newspaper in which delinquent list of lands subject to special assessments is published to be filed as part of records of county court, is mandatory, and must be complied with to confer jurisdiction on court to render judgment against property assessed. Nowlin v. People, 216 Ill. 543, 75 N. E. 209. Filing such copy, with publisher's certificate, as a part of records of county clerk's office, is not a compliance with the statute. Id. The notice of an assessment required to be shown in an action to foreclose a lien (Burns' Ann. St. 1901, § 3626a) may be either verbal or written, and may be given by any person interested in the claim or any officer charged with a duty in connection with the making or collection of the assessment. Ross v. Van Natta, 164 Ind. 557, 74 N. E. 10.

6. Demand for payment of warrant shown to have been publicly made on premises assessed in accordance with statute. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076. Where the return of a warrant is signed in behalf of the contractor, by the person who made the demand, and verified by his oath, St. 1885, p. 155, c. 153 is complied with. Id. Sending the warrant of a nonresident owner by registered letter is a sufficient demand for payment; a personal demand is not necessary. Marshall v. People, 219 Ill. 99, 76 N. E. 70. Though a tax warrant is void in so far as it authorizes the street commissioner to make the amount of the tax out of the chattels of the property owner, it is sufficient to give the commissioner authority to make a

tered owner of property assessed must be given notice or be made a party.[7] An unregistered owner is bound by an otherwise valid proceeding, though he had no notice.[8]

Pleading and proof.[9]—In a proceeding to enforce the lien of an assessment, the complaint need only allege the facts necessary to make a prima facie case of liability.[10] Matters of defense must be set out in the answer.[11] If fraud is relied upon, the facts claimed to constitute it must be set out.[12]

Where the statute provides that the issuance of bonds shall be prima facie proof of the regularity of proceedings, the effect is only to change the burden of proof; it has no curative effect where the record is produced and irregularities appear therefrom.[13] Upon application for judgment and order of sale in Illinois, the collector's report with proof of publication thereof and notice of application for judgment make a prima facie case.[14] A suit on a tax bill, in Missouri, should be in the name of the state to the use of the person to whom it is issued.[15] A tax bill is prima facie proof of the regularity of the proceedings.[16]

Defenses.[17]—Mere irregularities, not shown to have been prejudicial, do not constitute a defense.[18] Partial illegality of an assessment is no defense where the il-

valid demand for payment. Id. Where no other sufficient demand has been made upon a special tax bill, bringing of suit thereon is a demand, and starts the running of the penalty for failure to pay. Under St. Louis Charter, art. 6, §§ 24, 25. Barber Asphalt Pav. Co. v. Peck, 186 Mo. 506, 85 S. W. 387.

7. Where the registered owner of property was not made a party to lien proceedings, he was not bound by a judgment against the property. Philadelphia v. Nell, 25 Pa. Super. Ct. 347.

8. An owner who has not registered his title is not entitled to notice, or to be made a party to proceedings to enforce a lien if the property is sufficiently identified. A judgment and sale of the property is binding as against one who registers subsequently. Philadelphia v. Peyton, 25 Pa. Super. Ct. 350.

9. See 4 C. L. 1158.

10. Where a complaint in an action to foreclose the lien of an assessment alleges the facts necessary under the statute to make a prima facie case, and these allegations are not denied, plaintiff need not make formal proof thereof. Raisch v. Hildebrandt, 146 Cal. 721, 81 P. 21. Complaint in action to foreclose assessment lien, alleging that "more than 10 days before the bringing of this suit the plaintiffs notified said defendant in writing of said assessment and the amount thereof, with interest, and where the same was payable," held to allege sufficient notice under Acts 1901, c. 170. Low v. Dallas [Ind.] 75 N. E. 822. The complaint need not set out in detail the taking of every step in the proceedings creating the lien. Thus, it need not be alleged that orders and resolutions were made a part of town records. Id. In a petition to enforce an assessment lien, a general allegation of the passage of the ordinance for the improvement is sufficient. Petition need not allege that ordinance was twice publicly read and passed at two sessions on different days, where it alleges passage by the required vote. Cabell v. Henderson [Ky.] 88 S. W. 1095.

11. Where a complaint, in an action to enforce an assessment lien, shows the assessment to be due, it need not show that defendants were given time to elect to pay in instalments. If the necessary steps to acquire the privilege of paying in instalments were taken, defendants should allege the same in their answer. Low v. Dallas [Ind.] 75 N. E. 822. Where the filing of a copy of the resolution accepting the work is alleged, and the allegation is not denied, failure to file such copy will not defeat recovery. Cabell v. Henderson [Ky.] 88 S. W. 1095.

12. In an action to enforce a special tax bill, the answer alleged that a certain person was employed by the contractor as its agent and lobbyist to procure paving contracts, and that such person had great political influence and used his time and money to influence official action. Held, fraud in procuring contract not alleged. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860. An allegation that a contract was secured by reason of the undue and illegal influence of a paving company and its agents over municipal authorities held a mere conclusion, not an allegation of fact. Id.

13. Creed v. McCombs, 146 Cal. 449, 80 P. 679.

14. People v. Lyon, 218 Ill. 577, 75 N. E. 1017.

15. Under Rev. St. 1899, §§ 5992, 5986, where a city of the fourth class builds a sidewalk, the special tax bill therefor should be issued to the committee or officer in charge of the work, and suit thereon should be in the name of the city to the use of such officer or committee. City of Bevier v. Watson, 113 Mo. App. 506, 87 S. W. 612.

16. A tax bill is, in an action thereon, prima facie evidence of the regularity of the proceedings upon which it is based, and upon its introduction in evidence the burden is upon defendant to prove the omission or invalidity of any essential step.

legal portion, being capable of computation, has been properly deducted.[19] That the improvement constructed is not that authorized is a good defense[20] when properly raised[21] and proved.[22] A mere difference in the quality of material, or a slight deviation from the contract provisions, does not make the improvement a different one from that authorized within the meaning of this rule.[23] An unintentional trespass or encroachment on the property of an abutting owner in the course of the construction, in good faith, of an authorized public improvement does not invalidate the assessment;[24] and a sewer assessment will not be set aside because a statute prohibiting pollution of a stream was violated in providing for a sewer outlet.[25] Under a city charter providing for enforcement of assessments by executions, to which the owner may file affidavits of illegality denying liability in whole or in part, an owner may set up in such affidavit any defense which will extinguish liability.[26] An agreement between a property owner and contractor cannot be set up to defeat enforcement of a lien by the assignee of the contractor who completed the work.[27]

Waiver of and estoppel to urge defenses.[28]—Jurisdictional defects cannot be waived[29] nor cured by subsequent legislation;[30] but in most jurisdictions, mere ir-

City of Sedalia v. Montgomery [Mo. App.] 88 S. W. 1014.

17. See 4 C. L. 1159.

18. The fact that a contract was not awarded until 5 years after the bid therefor was submitted is no defense to an action to enforce the lien of an assessment where the property owner does not show that he was prejudiced by the delay. City of Philadelphia v. Hood, 211 Pa. 189, 60 A. 721.

19. Where, in an action to foreclose a sidewalk improvement lien under the Barrett act of 1889, the court, in its conclusions, deducted the illegal portion of the assessment, it being capable of accurate computation, the property owner could not complain that the assessment was in part illegal. Ross v. Van Natta, 164 Ind. 557, 74 N. E. 10.

20. On application for judgment and order of sale it may be shown that the improvement provided for in the ordinance and for which the assessment was levied, was a different improvement from that actually constructed. People v. Lyon, 218 Ill. 577, 75 N. E. 1017. Objectors to an application for judgment of sale are entitled to show that the improvement provided for, and for which the assessment was levied, was not that actually constructed. Phillips v. People, 218 Ill. 450, 75 N. E. 1016. Where an ordinance pursuant to a petition to grade, curb and pave a street "charging costs, damages, and expenses" to abutting property, requires improvements to be made according to plans and specifications mentioned, the borough cannot charge damages to the property unless the work is completed according to the plans. Dunn v. Tarentum Borough, 23 Pa. Super. Ct. 332.

21. Objections that owners were overcharged for the reason that there were not the same number of square yards or lineal feet of paving as alleged are properly stricken, as they do not amount to an objection that the improvement made was not that authorized. Phillips v. People, 218 Ill. 450, 75 N. E. 1016.

22. Whether the improvement actually constructed was that authorized by ordinance, and for which the assessment was levied, cannot be determined unless the ordinance is in evidence. People v. Lyon, 218 Ill. 577, 75 N. E. 1017.

23. That cobblestones were not of the size called for could not be urged against an application for judgment and order of sale. People v. Bridgeman, 218 Ill. 568, 75 N. E. 1057. Sidewalk held not different from the one authorized, though a few inches shorter than that called for and though some witnesses thought stone used too soft. Marshall v. People, 219 Ill. 99, 76 N. E. 70.

24. An alleged encroachment on plaintiff's property in the course of grading a street, there being no intention to widen it, held no ground to enjoin collection of an assessment. Davis v. Silverton [Or.] 82 P. 16.

25. Cleneay v. Norwood, 137 F. 962.

26. Whether it be payment, unconstitutionality of the law under which the assessment was made, or irregularity of procedure rendering the assessment illegal. City of Gainesville v. Dean [Ga.] 53 S. E. 183.

27. A property owner became surety on a contractor's note, the contractor agreeing that if he failed to pay he would credit the owner with the amount of his assessment. The surety was obliged to pay the note and the contractor assigned his rights, the assignee completing the work. Held the property owner could not set up his agreement with the original contractor to defeat enforcement of the lien by the assignee. Stitt v. Horton [Ind.] 76 N. E. 241.

28. See 4 C. L. 1160.

29. Mere silence and inaction of a street railway company, while streets traversed by its tracks are being paved, do not estop it to plead absolute want of power and jurisdiction in a city council to levy an assessment against it for the improvement. Louisiana Imp. Co. v. Baton Rouge Electric & Gas Co., 114 La. 534, 38 So. 444. This is especially true where the contract was let on the basis of payment by the city and abutters, and no benefits to the railway are

regularities, not jurisdictional, are waived, in the absence of fraud,[31] or prejudice to the rights of property owners,[32] by failure to urge the proper objection in the manner and at the time duly provided for by law.[33] Conduct indicating acquiescence in

shown. Id. The Iowa statute does not cover fundamental defects going to the jurisdiction of the local tribunal to entertain the proceedings. Owens v. Marion, 127 Iowa 469, 103 N. W. 381. Abutting owner not estopped from challenging the legality of a street improvement assessment by the fact that he asked for the improvement and that it be made by a certain contractor. Borger v. Columbus, 6 Ohio C. C. (N. S.) 401. The mere fact that an abutting property owner petitioned for a sewer improvement, and stood by without objection or protest and saw it built, does not estop him from thereafter contesting the validity of the assessment against his property to pay the costs thereof on the ground that his property is not specially benefited thereby. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450.

30. Where proceedings are void, the assessment cannot be validated by a subsequent ordinance designed to cure the jurisdictional defect. Hubbell, Son & Co. v. Bennett Bros. [Iowa] 106 N. W. 375. Hurd's Rev. St. 1903, c. 42, § 42½, designed to cure errors in drainage assessments, does not validate an assessment which a justice had no jurisdiction to authorize. Frank v. Rogers [Ill.] 77 N. E. 221.

31. Fraud is not established by proof that the city council failed to take testimony as to the value of property assessed and the amount of benefits, nor does proof of the inequitable character of an assessment show fraud. Owens v. Marion, 127 Iowa 469, 103 N. W. 381.

32. Failure to give notice of proceedings for a drainage ditch waived by an owner who appeared, by her guardian, and claimed and was allowed damages. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506. A person who files a protest against a special assessment with the board of equalization before the time fixed in the published notice for the meeting of the board thereby waives any defect in the notice. Shannon v. Omaha [Neb.] 103 N. W. 53. Failure to have the viewers' report presented to the court for confirmation nisi is immaterial where the persons objecting had notice of the filing of the report, and came into court and excepted within the proper time. In re Marshall Ave. [Pa.] 62 A. 1085. Under St. 1902, p. 439, c. 527, it is immaterial whether part of the cost of a street improvement was illegally incurred and whether the illegality, if any, was of a kind which the legislature could have authorized, provided that the assessment did not exceed half the expense or the benefits. Gardiner v. Boston Street Com'rs, 188 Mass. 223, 74 N. E. 341. Failure to file certificate of date and amount of first voucher within 30 days of its issue, as required by Local Imp. Act § 42, which provides that interest shall run from the date of the first voucher, is not prejudicial to an owner when it is not shown that he was charged with interest nor from what date it ran if charged. Gage v. People, 219 Ill. 634, 76 N. E. 834.

33. California: The objection that an assessment is excessive being one which may be raised before the city council under St. 1885, p. 156, c. 153, § 11, failure to appeal to the council bars the use of the objection as a defense against enforcement of the assessment. Bates v. Adamson [Cal. App.] 84 P. 51.

Iowa: By Code § 824, objections first raised by petition on appeal from the assessment, not having been submitted to the city council, may be stricken. Higman v. Sioux City [Iowa] 105 N. W. 524. That notice of intention to pave was not given for required length of time, and that neither it nor the resolution stated the kind of material to be used, held mere irregularities cured by failure to urge at proper time. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381. A mere general objection that proceedings were irregular did not raise the question whether the council had erroneously included the space occupied by the rails in computing the area of paving required to be done by a street railway company. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005.

Illinois: Under Hurd's Rev. St. 1903, c. 24, § 66, providing that upon application for judgment of sale upon an assessment no defense or objection shall be made or heard which might have been interposed in the proceedings for the making of the assessment, and no errors in the proceedings not affecting the power of the court shall be deemed a defense, the objection that the original assessment proceedings were pending when proceedings to confirm a new assessment were begun, is not a good defense to an application for judgment of sale for the new assessment. Wagg v. People, 218 Ill. 337, 75 N. E. 977. The objection that an ordinance for paving was not preceded by a petition of property owners is not jurisdictional and cannot be successfully interposed in an action to enforce the assessment. Phillips v. People, 218 Ill. 450, 75 N. E. 1016. A property owner who appears and objects to judgment waives objections to the delinquent list and publication and certification thereof. Marshall v. People, 219 Ill. 99, 76 N. E. 70. One who appears and makes a general defense to an application for judgment and order of sale waives irregularities in the delinquent list and publication of the notice of application for sale. Ottis v. Sullivan, 219 Ill. 365, 76 N. E. 487. Revenue Act § 191 provides that errors or informalities in the assessment and collection of taxes, not affecting the substantial justice of the tax itself, shall not vitiate or affect the tax or assessment. Slight irregularities may be cured by amending the record by leave of court. Id. Where tax judgment sale and forfeiture record shows one assessment against one lot and a second against another, both having been originally assessed as one parcel, judgment of sale cannot properly be entered until the county treasurer has amended the record. Id.

the making of an improvement, and in the procedure adopted, also amounts to a waiver or estoppel.[34] In Indiana, irregularities are expressly waived by owners who are given the privilege of paying an assessment in instalments.[35]

Where the grading of a street can only be legally ordered by a city and performed at the expense of abutting owners to the extent of the excess of benefits over damages, and such excess has been, in form but not legally, ascertained, and the requisite conditions precedent to the payment thereof, in form, satisfied, payment by the property owner without protest is a waiver of all errors which might have been insisted upon to defeat the tax,[36] and such payment cannot be recovered, either by a direct action for that purpose or by any proceeding in which the relief sought will in effect accomplish such recovery.[37] Where after such payment the municipality has changed its position by paying the amount to the contractor, the property owner is estopped to urge irregularities in the proceedings.[38]

The judgment[39] must be properly signed[40] and must identify the property and

Kentucky: Errors in procedure do not exempt abutting owners from payment when the work has been completed as required by the ordinance or contract. Under Ky. St. 1903, § 3100, such errors are to be corrected by the city council or courts so as to do justice to the parties concerned. City of Covington v. Noland & Co. [Ky.] 89 S. W. 216. In such cases the city cannot be held for the cost unless it was without power to construct the improvement at the cost of the abutting owners. Id. An objection that a sidewalk was not completed according to contract cannot be urged for the first time after completion and acceptance of the work. Mudge v. Walker [Ky.] 90 S. W. 1046.

New Jersey: A property owner who has ample notice of the proceedings for a street improvement, but delays application for a writ of certiorari until the improvement is completed and the assessment levied, will not be heard with regard to any errors in procedure prior to the assessment. Tusting v. Asbury Park [N. J. Law] 62 A. 183.

Pennsylvania: The Act of April 18, 1899 (P. L. 57), providing that where a street has been improved by municipal authority under invalid laws or ordinances the improvements shall be valid and binding, is constitutional. In re Marshall Ave. [Pa.] 62 A. 1085. The act cures failure to advertise an ordinance for grading. Id. Where a paving ordinance has been advertised and passed in the statutory manner, it is immaterial, in an action to enforce the assessment lien, whether a majority of property owners on the street signed the petition. Erie City v. Grant, 24 Pa. Super. Ct. 109. Where paving was accepted and liens therefor filed by the borough, property owners could not object that a second contract was let without an attempt to get bids and without an authorizing ordinance or resolution. Tarentum Borough v. Moorhead, 26 Pa. Super. Ct. 273. After acceptance of a work of paving property owners cannot escape payment of the assessment because of irregularities in the details of advertising and bids, in the absence of bad faith or fraud. Wabash Ave., 26 Pa. Super. Ct. 305.

34. Where a person interested in and in charge of property joined in a petition for curbing and guttering by the city, he could not object to the assessment on the ground that he had not been given notice to do the work, and that the city would do it on his default, under Laws 1899, p. 152, c. 128. People v. Clarke, 110 App. Div. 28, 96 N. Y. S. 1051. A plaintiff who is active in promoting a street improvement, under a statute which provides that the assessment shall be by the front foot, is not entitled to relief as to the excess of the assessment over the special benefits resulting from the improvement, Murphy v. Sims, 7 Ohio C. C. (N. S.) 193. A finding that an abutting property owner signed the original petition for improvement of the street, and knew that the work was progressing and that the property would be assessed, is not sufficient to support the conclusion that he participated in the improvement of the sidewalk in accordance with a supplemental petition, but where his name appears on the supplemental petition also, the mere fact that he has no recollection of signing it does not disprove the signature in the absence of a motive on the part of any one else for placing his name there. Id.

35. Owners who have executed the statutory waiver of irregularities for the privilege of paying an assessment in instalments cannot object to an assessment on the ground that the engineer's report did not properly describe the lands. Dunkirk Land Co. v. Zehner [Ind. App.] 74 N. E. 1099.

36. Pabst Brewing Co. v. Milwaukee [Wis.] 105 N. W. 563. By such payment the owner admits the demand upon him and cannot thereafter urge that there was in fact no determination of the excess of benefits over damages. Id.

37. Owner cannot after such payment sue the municipality for damages to his property. Pabst Brewing Co. v. Milwaukee [Wis.] 105 N. W. 563.

38. Since before paying to the contractor the city could have protected itself by a reassessment under Rev. St. 1898, § 1210d. Pabst Brewing Co. v. Milwaukee [Wis.] 105 N. W. 563.

39. See 4 C. L. 1161.

40. Judgment and order of sale marked "O. K.," followed by initials of county judge, is not signed as required by Hurd's Rev. St. 1903, c. 120, § 191. Gage v. People, 219 Ill. 20, 76 N. E. 56.

indicate the amount adjudged against each tract.[41] A judgment for an assessment may include instalments not due if it provides that execution therefor shall not issue until they are due.[42] Fees allowed by law may be included.[43]

The sale and redemption.[44]—In Illinois the county court has no power to order a sale for failure to pay an instalment of a special assessment after the judgment of confirmation has been reversed.[45]

(§ 8) *I. Remedies by injunction or other collateral attack, and grounds therefor.*[46]—Collection of a void assessment will be enjoined by a court of equity,[47] unless the invalidity is apparent on the face of the record,[48] and in such suit, owners of land assessed may join;[49] but mere irregularities, not jurisdictional, cannot be urged in a collateral attack in a suit in equity,[50] but must be raised in the tribunal and in the manner provided by law.[51] In such collateral attack, jurisdiction of the local authorities[52] and regularity of proceedings[53] will be presumed. The facts that a city is attempting to enforce two executions for assessments against two parcels of land owned by the same person, and that enforcement of a third is threatened, do not

41. Judgment of sale referred to attached schedule for amount and schedule contained no dollar mark to indicate meaning of numerals. Held, judgment insufficient. Gage v. People, 219 Ill. 20, 76 N. E. 56. A judgment may refer to the schedule showing the tracts and amounts against each and make such schedule a part of the judgment, and need not use the word "aforesaid" and follow the schedule. Gage v. People, 219 Ill. 369, 76 N. E. 498.

42. City of Rochester v. Rochester R. Co., 109 App. Div. 638, 96 N. Y. S. 152.

43. Under Burns' Ann. St. 1901, §§ 4290, 4297, attorneys' fees may be recovered, in an action to foreclose the lien of an assessment for street improvements, against back lying property, commenced after foreclosure against abutting property. Cleveland, etc., R. Co. v. Porter [Ind. App.] 76 N. E. 179. A judgment for "special assessments, printer's fees and costs" does not allow a double recovery of printer's fees. Gage v. People, 219 Ill. 369, 76 N. E. 498.

44. See 4 C. L. 1162.

45. Glos v. Collins, 110 Ill. App. 121.

46. See 4 C. L. 1163.

47. Hensley v. Butte [Mont.] 83 P. 481. If proceedings for the making of improvements, or for the making or collection of assessment, are void or without jurisdiction, an equitable action will lie to have them so declared, and a person affected is not bound to file objections thereto or to appeal from action taken therein. Owens v. Marion, 127 Iowa 469, 103 N. W. 381. Paving of alley above grade being without authority, enforcement of assessment would be enjoined. Hubbell, Son & Co. v. Bennett Bros. [Iowa] 106 N. W. 375. Where there has been a substantial departure from the terms of a paving contract, property owners interested may have the assessment enjoined. McCain v. Des Moines [Iowa] 103 N. W. 979.

48. Where bill was for injunction against collection of an assessment claimed to be void because of lack of a jurisdictional step in the making of the improvement, relief was refused because such defect would appear on the face of the proceedings and the property owner would have an adequate legal remedy. Blanchard v. Barre, 77 Vt. 420, 60 A. 970.

49. Coleman v. Rathbun [Wash.] 82 P. 540.

50. Owens v. Marion, 127 Iowa, 469, 103 N. W. 381. A bill in chancery to enjoin collection of a special assessment will not lie on the ground that a petition of property owners for the improvement was not filed. Village of Oak Park v. Schosenski, 215 Ill. 229, 74 N. E. 135. Where collateral attack on proceedings of a local board is made after the completion of the improvement, mere irregularities not going to the jurisdiction of the board will not vitiate its action. Dyer v. Woods [Ind.] 76 N. E. 624. Though funds to pay for street intersections should be provided for, in Nebraska, before the city council orders a street improvement, failure to provide such funds is no ground for enjoining special assessment after the improvement is completed and street intersections paid for. Eddy v. Omaha [Neb.] 103 N. W. 692. Where a street improvement was made in conformity with the requirements of the constitutional provisions of a statute, by a municipality of the class and grade specially provided for in the unconstitutional part thereof, an assessment will not be enjoined merely because the procedure was not in accordance with the requirements of the unconstitutiohal part. Adkins v. Toledo, 6 Ohio C. C. (N. S.) 433. The fact that a court divides on the question whether property has been specially benefited in the amount of the assessment does not afford ground for disturbing the assessment in the absence of some of the grounds usually invoking equitable intervention. Mechlem v. Cincinnati, 7 Ohio C. C. (N. S.) 212.

51. In Iowa, irregularities must be urged before the city council, or on appeal from its action taken under Code § 839. Owens v. Marion, 127 Iowa 469, 103 N. W. 381.

52. Where there is a collateral attack on the proceedings of a local board involving an effort to oust it of jurisdiction by the interference of a court of equity, jurisdiction of the board is presumed to exist in the absence of a contrary showing. Dyer v. Woods [Ind.] 76 N. E. 624.

53. A bill to restrain collection of a sewer

constitute grounds for an injunction on the ground of multiplicity of suits, or that such executions constitute a cloud on title.[54] In a suit to restrain collection of an alleged excessive assessment, it is not error to render an unconditional judgment for plaintiff where defendant does not demand a conditional judgment for the alleged excess only, and does not demand that plaintiff keep good his tender of the amount admitted to be due.[55]

Injunction to restrain the making of an assessment is a proper remedy where the assessment is invalid.[56] A property owner has no standing in a court of equity to enjoin the making of a second assessment on the ground that the first appeared to be valid, while denying that the first was in fact valid.[57]

(§ 8) *J. Appeal and other direct review.*[58]—Proceedings for the review of assessment proceedings must be instituted within the time[59] and in the manner[60] provided by law.

Scope of review and of relief.—The admissibility and effect of evidence, upon an appeal, may depend upon the statute applicable.[61] On appeal from a decision of the county court in a confirmation proceeding in Illinois, only questions passed upon by the county court will be reviewed;[62] and, in Massachusetts, objections not raised at a hearing to confirm an assessment, nor on the first appeal therefrom, cannot be considered on a second appeal.[63] On appeal from the council in Washington, an ob-

assessment must specifically allege want of preliminary steps, as it will be presumed such steps were taken in the absence of a contrary showing. Cleneay v. Norwood, 137 F. 962. Upon a collateral attack plaintiff should show the condition of the record in respect to the defect of which he complains, and in the absence of such a showing the presumption must be against him. Contrary not being shown, it was presumed that sidewalk resolution and notice thereof were sufficiently definite to inform property owner of location of proposed walk. Dyer v. Woods [Ind.] 76 N. E. 624. Where an abutting owner seeks to enjoin the collection of an assessment for a street improvement on the ground that the assessment exceeds the benefits, the burden is upon him to show that such is the fact, and this burden is not overcome by merely showing that the market value of the property was not enhanced by the improvement. Andrix v. Columbus, 3 Ohio N. P. (N. S.) 368.

54. City of Gainesville v. Dean [Ga.] 53 S. E. 183.

55. Coleman v. Rathbun [Wash.] 82 P. 540.

56. Arnold v. Knoxville [Tenn.] 90 S. W. 469.

57. If the first was insufficient, he could not claim that power to assess had been exhausted and thus escape all liability. Dyer v. Woods [Ind.] 76 N. E. 624.

58. See 4 C. L. 1164.

59. Denver City Charter 1893, art. 7, § 62, providing that appeals to review assessments must be commenced within 90 days after the ordinance making the final assessment, does not apply to sidewalk assessments under the charter of 1885 as amended in 1889. City of Denver v. Dunning, 33 Colo. 487, 81 P. 259. Certiorari to review an assessment must be applied for within 60 days after confirmation by the common council. Tusting v. Asbury Park [N. J. Law] 62 A. 183. Permission given by Act of May 16, 1891, (P. L. 75), and the amendment thereto of April 2, 1903 (P. L. 124), to appeal from confirmation of a report of viewers within 30 days, does not take away the right given by Act of May 19, 1897 (P. L. 67) to appeal within 6 months. In re Scranton Sewer [Pa.] 62 A. 173. Notice of a hearing on a sewer assessment held not to show that the assessment had been finally completed, and hence it was insufficient to start limitations against the right of appeal from the assessment under Sp. Laws 1893, p. 183, Act No. 113, § 4. Velhage v. Stanley [Conn.] 63 A. 347.

60. A notice of appeal from an assessment under Laws 1901, c. 118, which complies with the statute in other respects, is not objectionable because several objectors join in the appeal. Harris v. Tacoma [Wash.] 81 P. 691. Under Laws 1901, c. 118, one who appeals from an assessment must notify the city clerk and legal department of the filing in the superior court of the transcript within 3 days. Held, failure of such notice to name all the appellants is not a jurisdictional defect. Id. Nor is failure to file the required bond at the same time such transcript is filed, as required by the statute, ground for dismissal of the appeal. Id. Under Hurd's Rev. St. 1903, c. 24, §§ 57, 58, providing for a writ of error to review a levy under a supplemental assessment, if the affidavit required by § 96 is not filed, the writ of error will be dismissed. Stone v. Chicago, 218 Ill. 348, 75 N. E. 980.

61. On appeal from a viewer's report in proceedings under Act May 16, 1891 (P. L. 75), the report cannot be received as prima facie evidence of benefits as provided in the act of April 2, 1903 (P. L. 124). Carson v. Allegheny City [Pa.] 62 A. 1070. On trial of such appeal the contract for the improvement is inadmissible. Id.

62. Close v. Chicago, 217 Ill. 216, 75 N. E. 479.

jector may introduce evidence to support his contentions, whether or not such evidence was heard by the council.[64] Since a judgment of confirmation has, in Washington, the effect of a separate judgment upon each tract assessed, upon an appeal therefrom, the action of the appellate court affects only those who join in the appeal.[65] In New Jersey, when commissioners of adjustment have made an assessment for a public improvement, although no assessment had theretofore been imposed or attempted to be imposed, and the proceedings are removed by certiorari, it is the duty of the court to determine for what sum the property is legally liable, if at the time of adjudication an assessment can be legally levied.[66] An order setting aside an assessment brought up by certiorari, and directing a new assessment, vacates only the apportionment under review and does not determine the correctness or incorrectness of any particular assessment.[67] In New York, upon certiorari to review the action of an assessing officer, if it appears that the assessment of relator's property is unjust and unequal as compared with assessments against other property similarly located, the court may correct the assessment, though the rule or general principle upon which the assessment was made was not illegal or erroneous;[68] but the point that property in the assessment district was not at all benefited does not present a question of law unless the determination of the district was without competent proof to support it or was opposed by a decided preponderance of proof.[69]

A writ for the *vacation of an assessment* is not a writ of right but is issued only when it appears that substantial justice requires it.[70] A complaint in a proceeding to set aside an assessment must set out facts showing its illegality.[71] The Iowa statute, providing that no action shall be brought questioning the legality of improvement certificates or bonds unless within three months after their issuance, does not apply to bonds and certificates issued before the statute was passed.[72]

PUIS DARREIN CONTINUANCE; PURCHASE-MONEY MORTGAGES, see latest topical index.

QUESTIONS OF LAW AND FACT.

Scope of topic.—Only the general principles are here treated, with a few illus-

63. Beckett v. Chicago, 218 Ill. 97, 75 N. E. 747.

64. On appeal from action of the council on objections to an assessment roll, under Sess. Laws 1901, p. 240, c. 118, which gives the court power to correct, modify, or annul the assessment complained of, the appellant may introduce evidence to sustain his objections regardless of whether such evidence was heard by the council. Ahrens v. Seattle [Wash.] 81 P. 558. Where, on appeal to the supreme court, it appears that the superior court erroneously refused to hear such evidence, the case will be remanded for a full and proper trial and judgment. Id.

65. In re Westlake Ave. [Wash.] 82 P. 279.

66. Assessment by commissioners adopted by court. Zahn v. Rutherford [N. J. Law] 60 A. 1123.

67. Milton v. Stell [N. J. Law] 62 A. 1133.

68. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597.

69. In re Phelps, 110 App. Div. 69, 96 N. Y. S. 862. Where assessors expressly find that property on both sides of a street is benefited by a sewer, that finding is not reviewable on certiorari. People v. Desmond, 97 N. Y. S. 795.

70. Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914. One who paid without objection 5 instalments of sewer assessment, and used the sewer, was not entitled to a writ vacating the assessment. Id.

71. A complaint to set aside local assessments, after describing certain premises, alleged that plaintiff owned 51 other lots in the assessment district, and that the assessment on each of which was oppressive and unlawful, but stated no facts to show the illegality. Held insufficient to justify vacation of assessments on such lots. Harriman v. Yonkers, 109 App. Div. 246, 95 N. Y. S. 816.

72. Code § 989. Citizens' State Bank v. Jess, 127 Iowa 450, 103 N. W. 471. Nor does this statute apply to a reassessment under § 980 authorizing a relevy under certain conditions. Id.

trative applications. Whether particular facts or issues are questions of law or fact is considered as germane to the particular subject involved, and is treated in the topic referring thereto.[73] The propriety of taking a case from the jury is also treated elsewhere.[74]

Province of court and jury in general.[75]—It is always the province of the jury to find whether a fact exists,[76] and, in general, all issues of fact are to be tried and determined by it;[77] always, however, with reference to the proofs and the law as given by the court.[78] The credibility of witnesses,[79] and the weight and preponderance of evidence,[80] are matters peculiarly within the province of the jury; but the legal sufficiency of proof, and the moral weight of legally sufficient proof, are very distinct in the conception of the law. The first lies within the province of the court, the last, within that of the jury.[81] Where the testimony in a case is oral, it must be submitted to the jury to determine its credibility, even when it is undisputed,[82] and in such cases it is an invasion of the province of the jury for the court to direct them that they must accept as true and act upon, the evidence of witnesses.[83] The jury must pass upon material issues of fact upon which the evidence is conflicting,[84] or is such that more than one reasonable inference may be

73. See such titles as Contracts, 5 C. L. 664; Negligence, 6 C. L. 748; Master and Servant, 6 C. L. 521; Railroads, 4 C. L. 1181; Street Railways, 4 C. L. 1556; Highways and Streets, 5 C. L. 1645; Wills, 4 C. L. 1863.

74. See Directing Verdict and Demurrer to Evidence, 5 C. L. 1004; Discontinuance, Dismissal and Nonsuit, 5 C. L. 1011.

75. See 4 C. L. 1165. Instructions invading the province of the jury, see Instructions, 6 C. L. 43.

76. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627. They must clear up doubts, settle questions of credibility, draw correct inferences, and give final shape to findings of fact. Barley v. Beegle, 29 Pa. Super. Ct. 635.

77. The case must go to the jury where there is any evidence which alone justifies an inference of a disputed fact (Kelton v. Fifer, 26 Pa. Super. Ct. 603), or when there is any evidence to support plaintiff's case (Cohen v. Mincoff, 96 N. Y. S. 412), or where the evidence is sufficient to create more than a surmise or suspicion of the plaintiff's right to recover (Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627). Where the appellate court rules that the evidence is sufficient to carry the case to the jury, it becomes the law of the case. Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 80 P. 337.

78. Chicago Union Traction Co. v. Straud, 114 Ill. App. 479. Unreasonableness of delay in the transportation of animals was, under the evidence, a mixed question of law and fact for the jury. Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117.

79. Barley v. Beegle, 29 Pa. Super. Ct. 635; Mallory v. Brademyer [Ark.] 89 S. W. 551; Sharp v. Erie R. Co. [N. Y.] 76 N. E. 923; Kelton v. Fifer, 26 Pa. Super. Ct. 603; Western Maryland R. Co. v. Shivers [Md.] 61 A. 618; Southern Industrial Institute v. Hellier [Ala.] 39 So. 163; Poppers v. Schoenfeld, 110 Ill. App. 408; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596; Buckley v. Acme Food Co., 113 Ill. App. 210; Chicago City R. Co. v. Matthieson, 113 Ill. App. 246; Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259.

80. Mallory v. Brademyer [Ark.] 89 S. W. 551; Western Maryland R. Co. v. Shivers [Md.] 61 A. 618; Domenico v. El Paso Electric R. Co. [Tex. Civ. App.] 90 S. W. 60. Weight, as evidence, of declarations of deceased person admitted under Rev. Laws, c. 175, § 66. Nagle v. Boston & N. St. R. Co., 188 Mass. 38, 73 N. E. 1019. Under Code § 413, the weight of evidence is left entirely with the jury. Lehew v. Hewett, 138 N. C. 6, 50 S. E. 459. The court must explain the law in regard to the intensity of the proof, but the jury must finally decide what weight should be given to it in reaching a conclusion, whether it is sufficient under the rule laid down by the court to warrant a verdict. Id. And even in causes of an equitable nature, where the proof must be clear, strong, and convincing, the case must go to the jury with proper instructions as to the intensity of the proof, and the judge has no right to declare the evidence insufficient to establish the equity because he may not consider it clear, strong, and convincing. Id.

81. Campbell v. Everhart [N. C.] 52 S. E. 201. Whether certain acts are sufficient to divest title is a proper matter for the determination of a jury in an action at law. Ladd v. Powell [Ala.] 39 So. 46. An instruction that a deed was sufficient to vest title in plaintiffs was in effect a peremptory instruction in plaintiff's favor, and an invasion of the province of the jury under Code § 413. Campbell v. Everhart [N. C.] 52 S. E. 201.

82. Barnett v. Becker, 25 Pa. Super. Ct. 22. There may be exceptional cases where the evidence introduced by the defendant is of such conclusive and unimpeachable nature as to justify binding instructions in his favor, but this situation can scarcely ever arise, where the defense rests on oral testimony and the credibility of the witnesses is involved. Kelton v. Fifer, 26 Pa. Super. Ct. 603.

drawn therefrom,[86] even where there is no conflict in the evidence.[86] It is also for the jury to determine what a witness means when he uses language warranting distinct and opposite inferences;[87] but if the facts are undisputed, or admitted, or clearly established,[88] and such that all reasonable minds can draw but one inference from them,[89] a question of law only is presented.

Questions of law are to be determined solely by the court.[90] The existence or nonexistence of a corporation and its power to condemn property are questions of law.[91] Whether there is any evidence of a fact essential to the plaintiff's case,[92]

83. Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271, citing numerous cases.

84. Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319; Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374. The rescission of a contract. Wellden v. Witt [Ala.] 40 So. 126. In an action on a building contract, the question of the date of completion of the work. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. The question of whether a struggle between the parties was a friendly scuffle or an illegal assault. Nicholls v. Colwell, 113 Ill. App. 219. Where there is a controversy over the delivery of a deed and over an alleged reconveyance under a lost or destroyed deed. Drees v. Drees [Iowa] 104 N. W. 479. When there is a dispute as to the language used in an oral contract, the jury will determine the question of fact as to the words actually used, and then apply the law as given them by the court. Higbie v. Rust, 112 Ill. App. 218; Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893. Where the evidence is contradictory, the question of the existence of a nuisance is for the jury. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. Whether or not a telephone or telegraph pole placed in a public street is dangerous to the public, or a nuisance, is a question of fact for the jury to be determined under proper instructions from the court and all the circumstances of the case. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229. Where the evidence is conflicting, the question of negligence is for the jury, but the court may refer to an essential fact, which is undisputed, as an element of negligence, if it leaves the other facts to the jury. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129.

85. Barley v. Beegle, 29 Pa. Super. Ct. 635; Campbell v. Everhart [N. C.] 52 S. E. 201; Cascade Foundry Co. v. Mueller Furnace Co., 140 F. 791. Questions of assumption of risk and contributory negligence. Annadali v. Union Cement & Lime Co. [Ind.] 74 N. E. 893. Where the theories of scientific works and experts differ as to the possibility of spontaneous combustion in certain substances. Sun Ins. Office v. Western Woolen Mill Co. [Kan.] 82 P. 513. The question of negligence, when there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care required, varies with the circumstances (Farr v. Philadelphia & R. R. Co., 24 Pa. Super. Ct. 332), or when, though the facts are undisputed, yet different conclusions may be drawn as to its presence or absence (Chicago, etc., R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101). It was error in the court to assume that the frightening of a horse by reason of an approaching bicycle is such an extraordinary occurrence that the township could not reasonably be expected to provide against it. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

86. Rothrock v. Cedar Rapids [Iowa] 103 N. W. 475.

87. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234.

88. The question of what is a reasonable time. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006; Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017. Also the question of diligence when the facts are uncontroverted. Id. Where in an action on an insurance policy, the evidence as to the value of the property is uncontradicted, is given without objection and not subjected to cross-examination, the question need not be submitted to the jury, though such evidence is general in character and the witness does not show himself qualified to testify on the subject. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572. Where there is no dispute as to the language of the parties, whether oral or written, which it is claimed establishes a contract, the question of its existence is purely one of law. Higbie v. Rust, 112 Ill. App. 218. Where the defense is a plea in avoidance, and the evidence clearly sustains it, there being no conflict upon the point, the matter is reduced to a pure question of law. Louisville & N. R. Co. v. Mounce's Adm'r [Ky.] 90 S. W. 956.

89. If the evidence is direct, certain, presenting no question of credibility and leaving no sufficient ground for inconsistent inference of fact, the court may be asked to instruct the jury as to its legal effect. Barley v. Beegle, 29 Pa. Super. Ct. 635. The question of negligence. Ward v. District of Columbia, 24 App. D. C. 524; Rowe v. Taylorville Elec. Co., 114 Ill. App. 535.

90. Under Code § 268, providing that material allegations in the complaint not denied by the answer shall be taken as true, the question whether certain allegations were so denied was a matter of law for the court. West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565. Whether the rule of "Falsus in uno, falsus in omnibus" applies to the consideration of the evidence in a case is primarily a question for the court and not for the jury. Pumorlo v. Merrill, 125 Wis. 1021, 102 N. W. 464.

91. Chicago, etc., R. Co. v. Llebel, 27 Ky. L. R. 716, 86 S. W. 549.

92. In an action for malicious prosecution, "Whether or not there is any evidence to

and whether from facts in proof a particular inference can be drawn,[93] are questions for the court; but whether an inference may be drawn, and whether one inference successfully answers or defeats another, is for the jury.[94] Although the legal meaning or effect of a statute is always a question of law for the court,[95] yet where any question of fact is to be determined in the construction of a statute, the jury must determine it;[96] and where a town ordinance had been duly proved and its language was direct and needed no construction, it was not error for the court to instruct the jury to determine what the ordinance was, and whether it had been violated.[97] When there is no jury, the court makes the findings of fact as well as of law,[98] and passes upon the credibility of witnesses.[99]

A consent by the defendant to the submission of a case on evidence admitted on a former trial,[1] or a request to submit a certain matter to the jury,[2] concedes that there are questions of fact to be determined; and where both parties move the court to direct a verdict, they admit that the evidence is undisputed, so that the only question is one of law,[3] or leave both questions of fact and credibility of witnesses to the determination of the court.[4]

Particular facts or issues.[5]—The question of intent,[6] of intoxication and its extent,[7] of good faith and sufficiency of possession by the purchaser of personal property,[8] of damages,[9] the application of a description of land to its subject-matter,[10] and the reasonableness of time under the particular circumstances of the case,[11] are all questions for the jury. The computation of interest may be left

submit to the jury want of probable cause in bringing the criminal prosecution" properly reserves a question of law. Scott v. Dewey, 23 Pa. Super. Ct. 396.

93, 94. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585.

95. It was error for the court to decline to construe a statute and to leave the jury to construe and apply it as a question of fact. Winchell v. Camillus, 109 App. Div. 341, 95 N. Y. S. 688.

96. The determination of which is the "main stem" of a railroad, as distinguished from its branches, under the act of 1888 for the taxation of railroads (Gen. St. p. 3325, § 214, subd. 4), depends upon the question of which line is used for passenger traffic as distinguished from a line used for freight traffic, or when there are two lines used for both kinds of traffic, which is the one upon which the passenger traffic is mainly carried, and the question in each case is one of fact depending upon the actual use of the line at the time of assessment. Jersey City v. State Board of Assessors [N. J. Law] 63 A. 21.

97. Thomasson v. Southern R. Co. [S. C.] 51 S. E. 443.

98. In an action by a broker for his commission tried without a jury, the question of whether the broker had knowledge of a minor's interest in the land, which caused a failure of the sale, before he secured a purchaser, was a question of fact. O'Neil v. Printz [Mo. App.] 91 S. W. 174.

99. Mora v. Thomas [Tex. Civ. App.] 86 S. W. 632.

1. Rowe v. Gerry, 109 App. Div. 153, 95 N. Y. S. 857.

2. Where a party requested the court to charge that the question of the term of his employment was one for the jury, he could not afterward contend that there was no conflict as to the term of his employment. McDonald v. Ideal Mfg. Co. [Mich.] 12 Det. Leg. N. 896, 106 N. W. 279. Where counsel for appellant requested the court to submit, as a question of fact, whether appellee's intestate at the time of the accident was exercising due care for his own safety, he could not afterward contend, as a matter of law, that deceased failed to exercise such care. Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259. In an action for personal injuries, questions of assumption of risk, of contributory negligence, and whether the injury was caused by the negligence of a fellow-servant, are deemed waived as questions of law, where the defendant causes their submission as questions of fact. Chicago City R. Co. v. Enroth, 113 Ill. App. 285.

3. McComb v. Baskerville [S. D.] 106 N. W. 300.

4. Dearman v. Marshall, 88 App. Div. 41, 84 N. Y. S. 705.

5. See 4 C. L. 1166.

6. As determining residence. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

7. Botwinis v. Allgood, 113 Ill. App. 188.

8. Schwab v. Woods, 24 Pa. Super. Ct. 433.

9. The amount necessary to compensate a person for damages must be left to the jury, under proper instructions, to fix in view of all the facts and circumstances. The N. K. Fairbank Co. v. Bahre, 112 Ill. App. 290. The question of what is a proper compensation for injury to the use of property by a nuisance, and for its effect upon health and physical comfort, is for the jury. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. Damages in condemnation proceedings. Chicago, etc., R. Co. v. Liebel, 27 Ky. L. R. 716, 86 S. W. 549.

10. Warner v. Marshall [Ind.] 75 N. E. 582.

to the jury.[12] Where dependent on extrinsic facts or conflicting evidence, the existence of a contract,[13] the determination of its terms if oral,[14] the interpretation of the language and intention of the parties,[15] and its discharge or rescission,[16] are questions for the jury; but the construction of a written instrument,[17] or the validity of an oral contract, the terms thereof being determined,[18] is for the court. The question of whether the owner of a wharf dedicated it to the public was properly left to the jury under the evidence,[19] but whether a city ordinance operated as an abandonment of the public user was a question of law for the court;[20] and while it is for the jury to determine the facts in any given case, what constitutes probable cause is a question of law.[21] The questions of negligence,[22] and contributory negligence,[23] are ordinarily questions of fact; but when only one inference can reason-

11. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627; American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

12. Melink v. Coman, 111 Ill. App. 583, following Evans v. Murphy Varnish Co., 59 Ill. App. 583. The law is settled in Missouri that it is the province of the jury to compute the principal and interest due on a note. Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271.

13. Whether a binding contract of insurance had been executed. Grossbaum Ceramic Art Syndicate v. German Ins. Co. [Pa.] 62 A. 1107. A request to instruct, which assumes the existence of the contract in dispute, is properly refused. Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

14. Where a contract is the result of several conversations, its terms are for the jury. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

15. Where the expression "word of honor" was used by parties entering into an agreement, it is a question for the jury to determine whether they intended a legal or moral obligation. Osgood v. Skinner, 111 Ill. App. 607. Whether an assessment loan was payable to the actual or to the original owner of the stock, under a resolution of the directors, held a question for the jury. Steck v. Bridgeport Water Co., 24 Pa. Super. Ct. 188.

16. Whether notes were given to release or abrogate a precedent contract. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130. Where the evidence is conflicting as to whether a contract was rescinded so as to entitle the seller to recover the property. Wellden v. Witt [Ala.] 40 So. 126.

17. Upchurch v. Mizell [Fla.] 40 So. 29; Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271. Where the evidence to explain an ambiguity in a written contract is not conflicting, it is still the province of the court to construe the contract. Licking Rolling Mill Co. v. W. P. Snyder & Co. [Ky.] 89 S. W. 249.

18. Between two railroad companies for the use of each other's tracks. Looney v. Metropolitan R. Co., 24 App. D. C. 510.

19, 20. Palen v. Ocean City [N. J. Law] 62 A. 947.

21. Young v. Lindstrom, 115 Ill. App. 239.

22. Chicago, etc., R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101; Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319; Farr v. Philadelphia & R. R. Co., 24 Pa. Super. Ct. 332; Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242; Central Union Bldg. Co. v. Kolander, 113 Ill. App. 305; Chicago City R. Co. v. Barnes, 114 Ill. App. 495; Nagle v. Boston & N. St. R. Co., 188 Mass. 38, 73 N. E. 1019; Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263; United R. & Elec. Co. v. Watkins [Md.] 62 A. 234; Western Maryland R. Co. v. Shivers [Md.] 61 A. 618; Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242. In action for damage to stock by flooding from upper floor. Levinson v. Myers, 24 Pa. Super. Ct. 481. Running an automobile in the dark without warning headlights. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71. Where the driver of a vehicle suddenly and without notice turned from one side of the road to the other, causing a collision. Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147. Whether a motorman was negligent in not having his car under control (Jordan v. Old Colony St. R. Co. [Mass.] 76 N. E. 909), or in not doing more to prevent the frightening of plaintiff's horse (Dulin v. Metropolitan St. R. Co. [Kan.] 83 P. 821). The existence or nonexistence of a defect in appliances used by an employe. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114. In an action for injuries to a servant the question whether the servant was operating a saw with defendant's permission. Rahn v. Standard Optical Co., 96 N. Y. S. 1080. Whether a railroad company was guilty of want of ordinary care in failing to keep its depot steps free of ice and snow. Illinois Central R. Co. v. Keegan, 112 Ill. App. 28. The existence and sufficiency of barriers to protect a street while being repaired. McMahon v. Boston [Mass.] 76 N. E. 957. When the nature and attributes of an act relied on to show negligence contributing to an injury can be correctly determined only by considering all the circumstances, it falls within the province of the jury, and the court cannot determine its quality as a matter of law. United R. & Elec. Co. v. Watkins [Md.] 62 A. 234. When it is reasonably inferable from the facts proven that the passenger was injured through some act or omission of the carrier's servant, which might have been prevented by the exercise of a high degree of care, the question of the carrier's negligence is for the jury. Gottlob v. North Jersey St. R. Co. [N. J. Law] 62 A. 1003.

23. United R. & Elec. Co. v. Watkins [Md.] 62 A. 234; Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319; St. Louis, etc.,

ably be drawn from undisputed facts,[24] and then only, they become questions of law;[25] and whether a given state of facts constitutes negligence is generally a question of law.[26] Although the question of whether the degree of care required has been exercised is ordinarily one for the jury,[27] yet it may become a question of law when the evidence, with all the reasonable inferences to be deduced therefrom, is insufficient to support a verdict for plaintiff;[28] and it was held that the reasonableness and sufficiency of a regulation for the protection of servants engaged in blasting, requiring the giving of a certain signal in time to warn, was a question of law for the court and not of fact for the jury.[29] And what a reasonably prudent person would do for his own safety under the circumstances of any particular case is to be determined by the jury,[30] for common prudence is not measured by custom or by rule, but by the exigencies of the occasion, which is solvable by the facts.[31] Ordinarily, the relation of the alleged negligence to the injury complained of, whether proximate or remote, is a question for the jury,[32] but where it clearly appears that the damages cannot, by any fair process of reasoning, be attributed to the negligence charged, it becomes a question of law.[33] The jury are also to determine the

R. Co. v. Burgess [Kan.] 83 P. 991; Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893; McMahon v. Boston [Mass.] 76 N. E. 957; Rahn v. Standard Optical Co., 96 N. Y. S. 1080. In case of injury at a grade crossing. Toban v. Lehigh & Wilkes-Barre Coal Co., 24 Pa. Super. Ct. 475. In case of a fall on an icy sidewalk. Steck v. Allegheny [Pa.] 62 A. 1115. Whether plaintiff exercised reasonable care in the use of a defective street (Brassington v. Mt. Carmel Borough, 24 Pa. Super. Ct. 318; Steck v. Allegheny [Pa.] 62 A. 1115), or bridge (Smith v. Jackson Tp., 26 Pa. Super. Ct. 234), or in going upon railroad tracks (Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553), or in operating an electric crane (Shickle-Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444). Whether the danger from the use of defective appliances was so apparent and imminent that the servant should heve declined to use them, notwithstanding a promise to repair. Leeson v. Saw Mill Phoenix [Wash.] 83 P. 891. Where, in an action for wrongful death, the undisputed facts are that the deceased, a boy of seventeen years, was killed while attempting to put a belt on a rapidly revolving wheel, the belt flying off and wrapping itself about his person; that the deceased had been employed in defendant's shop only about three weeks; that when he entered the shop he had had no experience in the kind of work upon which he was engaged; that he was asked to do the work which resulted in his death without any instruction or warning being given to him by the foreman or any one in authority at the shop, it is for the jury to say whether the danger was so open and apparent that instructions concerning it were not necessary and whether the deceased was guilty of contributory negligence. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. It is not error to leave it to the jury to say whether the facts and circumstances under which the plaintiff stepped into the open elevator shaft were such as to lull him into a sense of security by leading him to think the cab was there to receive him. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581.

24. Ward v. District of Columbia, 24 App. D. C. 524, following Washington Gaslight Co. v. Poore, 3 App. D. C. 127; Adams v. Washington & G. R. Co., 9 App. D. C. 26; West Chicago St. R. Co. v. Dougherty, 110 Ill. App. 204. The facts being undisputed does not alone make the question of negligence one of law; the circumstances must be such that men of ordinary prudence and discretion cannot differ thereon. Sharp v. Erie R. Co. [N. Y.] 76 N. E. 923.

25. McAllister v. Jung, 112 Ill. App. 138; Chicago, etc., R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101; Chicago City R. Co. v. Barnes, 114 Ill. App. 495. Contributory negligence of plaintiff in driving his horse against a chain closing an entrance to an enclosed lot, in plain sight and known to him. McCandless v. Phreaner, 24 Pa. Super. Ct. 383.

26. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129.

27, 28. Rowe v. Taylorville Elec. Co., 114 Ill. App. 535.

29. Kenefick-Hammond Co. v. Rohr [Ark.] 91 S. W. 179.

30. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154.

31. Geldard v. Marshall [Or.] 83 P. 867.

32. Terminal Railroad Ass'n v. Larkins, 112 Ill. App. 366. Whether negligence of township in not providing guard rails on an embankment was such cause. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Whether, in an action for damages against a saloon keeper, intoxication was the proximate cause of death. Botwinis v. Allgood, 113 Ill. App. 188. Whether damages suffered were a direct consequence of defendant's alleged injury to plaintiff's premises. Baltimore Belt R. Co. v. Sattler [Md.] 62 A. 1125. Where there is evidence of an unbroken connection and continuous operation between a disease and an injury, it is for the jury to determine whether the wrongful act that caused the injury was the proximate cause of the disease. Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. S. 491.

33. Terminal Railroad Ass'n v. Larkins, 112 Ill. App. 366.

questions of assumption of risk[34] and who are fellow-servants,[35] unless, by facts admitted or proven beyond dispute, so that reasonable minds can draw but one conclusion therefrom, the existence of the relation of fellow-servant is shown within the established rule.[36] Foreign laws are also matters of fact.[36a] Other illustrations of what falls within the province of the jury will be found in the notes.[37] Where a plea of the statute of limitations was interposed to an amended declaration in an action for personal injuries, and a replication to such plea was filed, a mixed question of law and fact was presented, the jury to determine when the injury occurred and the court when the suit was commenced.[38]

QUIETING TITLE.

§ 1. *Chancery and statutory remedies and rights. Nature and office.*[39]—The proceeding to quiet title is equitable, and to entitle the complainant to relief he must do equity.[40] A court of law has no jurisdiction.[41] If ejectment lies, a suit to quiet title will not.[42] A bill to quiet title will not lie to settle a boundary

34. Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893; St. Louis, etc., R. Co. v. Burgess [Kan.] 83 P. 991; Rahn v. Standard Optical Co., 96 N. Y. S. 1080.

35. Shickle-Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444.

36. Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615; Chicago, etc., R. Co. v. Mikesell, 113 Ill. App. 146; Illinois Southern R. Co. v. Marshall, 112 Ill. App. 514. In an action for an injury to a servant, it was a question for the jury under the evidence whether a rope, which broke and caused the accident, was selected by the defendant or plaintiff's fellow-servants. Geldard v. Marshall [Or.] 83 P. 867.

36a. Whether the common-law doctrine of nonliability of employers for negligence of fellow-servants prevailed in Mexico. Mexican Cent. R. Co. v. Chantry [C. C. A.] 136 F. 316.

37. In an ejectment suit, whether a line, under the evidence, was a consentable line. Dunlap v. Reardon, 24 Pa. Super. Ct. 35. Where, in an action on a building contract, evidence tends to show that the architect acted under defendant's instructions in refusing to deliver a certificate of approval of work, it was a question for the jury whether vexatious and unreasonable delay in payment was occasioned by defendant's fault. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. In which capacity one, who was both a special officer of a railroad company and a police officer, was acting when he attempted to arrest, without warrant, violators of the law (Baltimore & O. R. Co. v. Deck [Md.] 62 A. 958), or when he shot a boy attempting to steal a ride on a freight train (Sharp v. Erie R. Co. [N. Y.] 76 N. E. 923).

38. Merchants Loan & Trust Co. v. Boucher, 115 Ill. App. 101.

39. See 4 C. L. 1168.

40. NOTE. Bill to remove vendor's lien when claim for purchase price is barred by limitations: Held that the bill can be granted only on condition that the plaintiff pay for the land. Cassell v. Lowry, 164 Ind. 1, 72 N. E. 640. It is true that equity will not as a rule allow a title otherwise unimpeachable to be clouded by a claim which can never be successfully enforced, since such a claim can result only in oppression and useless reduction of value. Steam, etc., Co. v. Jones, 21 Blatchf. [U. S.] 138. Accordingly, a disseisor who has acquired land by adverse possession for the statutory period is entitled to a decree of a court of equity making his title perfect of record. Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722. The fact that in Indiana the running of the statute of limitations against the debt bars also the lien which secures it would seem at first sight to bring the present case within these principles, since the plaintiff is in possession of the land with a title which no one can dispute. But though the statute limiting personal actions bars all remedies, it does not, like the statute applicable to realty, extinguish the right. Under such circumstances the court is right in denying relief till such obligation is discharged. Booth v. Hoskins, 75 Cal. 271.—18 Harv. L. R. 471.

41. A cloud consisting of an invalid ordinance and statutes authorizing the condemnation of land cannot be removed in condemnation proceedings instituted under such legislation. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125.

42. A mortgagor who has paid the mortgage and thereby divested the title of the mortgagee cannot maintain the suit to quiet title against a void foreclosure. Drum v. Bryan [Ala.] 40 So. 131.

dispute,[43] nor for the sole purpose of determining a question of fraud.[44] Defendants in ejectment cannot base a bill to quiet title on matters which would constitute a defense to the action at law,[45] and during the pendency of an action in ejectment, a bill to cancel the deed under which plaintiff claims, for fraud in its procurement, and to enjoin the prosecution of the action at law, will not lie.[46] That the judgment will amount to a technical forfeiture is not a bar to the suit.[47] The pendency of a suit in a state court does not abate a suit in a Federal court to quiet title to the same land.[48]

Title and possession[49] in the complainant are essential,[50] both in the suit in equity and in the statutory equivalents,[51] except as the statutes provide for determining conflicting claims to vacant property;[52] and, unless defendants are numerous, plaintiff's title, if a legal one, must have been established at law or be founded on undisputed evidence of long continued possession.[53] An equitable title will sustain the suit.[54] The plaintiff must recover on the strength of his own title.[55]

Possession.[56]—As a general rule, possession in the complainant is essential, whether the proceeding be at common law[57] or under the statutes,[58] unless the land

43. Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72.

44. Suspension of levy on land conveyed in fraud of creditors under Rev. Laws, c. 178, § 31, does not authorize the fraudulent grantee to sue to cancel the levy as a cloud, and thus procure the determination of the question of fraud. Dunbar v. Kelly [Mass.] 75 N. E. 740.

45. Murray v. Barnes [Ala.] 40 So. 348.

46. Wilson v. Miller [Ala.] 39 So. 178. See 6 Columbia L. R. 55.

47. A bill will lie to quiet title against a contract under which all rights have been lost by willful and prolonged neglect, though the relief granted amounts to a technical forfeiture. Sawyer v. Cook, 188 Mass. 163, 74 N. E. 356.

48. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

49. See 4 C. L. 1168.

50. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398; Carpenter v. Smith [Ark.] 88 S. W. 976. Title and actual possession. Wallace v. Elm Grove Coal Co. [W. Va.] 52 S. E. 485. Title in defendant from a paramount source antedating that of plaintiff is a defense. Downing v. Haas, 33 Colo. 344, 81 P. 33. One claiming by virtue of an executory contract of sale conditioned that the vendor would make him title on payment of the purchase price which has not been paid, has not even an equitable interest. Bradley v. Bell [Ala.] 38 So. 759.

51. Facts constituting perfect legal or equitable title must be alleged and proven under Code 1892, § 500. Jones v. Rogers [Miss.] 38 So. 742. Though the law authorizing suits to quiet title should be liberally construed, no one except the true owner can maintain the action. Weyman v. Atlanta, 122 Ga. 539, 50 S. E. 492.

52. See infra, this section.

53. Carswell v. Swindell [Md.] 62 A. 956.

54. The holder of a bond for title has an equitable title sufficient to support the suit. Norman v. Pugh [Ark.] 86 S. W. 833. The complainant must establish perfect legal or equitable title. Stevens Lumber Co. v. Hughes [Miss.] 38 So. 769. Under B. & C. Comp. § 516, the holder of a mere equitable right may maintain an action to determine conflicting claims. Holmes v. Wolfard [Or.] 81 P. 819.

55. Stevens Lumber Co. v. Hughes [Miss.] 38 So. 769; Logan's Heirs v. Ward [W. Va.] 52 S. E. 398. One claiming under a void donation deed cannot maintain the action as against one having color of title. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852. The suit cannot be maintained because of any defect in the defendant's title. Jones v. Rogers [Miss.] 38 So. 742. Where one sues to quiet title held under patent from a county, the defendant may show that the county received no consideration. Wheeler v. Reynolds Land Co. [Mo.] 91 S. W. 1050.

56. See 4 C. L. 1169.

57. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852; Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72; Drum v. Bryan [Ala.] 40 So. 131; Gunning v. Sorg, 113 Ill. App. 332. Possession is essential unless the land is unoccupied. Glos v. Kenealy [Ill.] 77 N. E. 146. Answer stating facts showing that plaintiff is not in possession states a good defense. Downing v. Haas, 33 Colo. 344, 81 P. 33. A bill to cancel a deed is bad where it alleges that the grantee is in possession of a portion of the premises. Stannard v. Aurora, E. & C. R. Co. [Ill.] 77 N. E. 254. Does not lie against a defendant, alleged to have possessed himself of certain of the lands, to have leased others of them and to be otherwise attempting to control all the lands. Barco v. Doyle [Fla.] 39 So. 103. A bill from which it does not appear that plaintiff is in possession is lacking in equity. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. Actual possession in complainant is essential. Carswell v. Swindell [Md.] 62 A. 956. If the owner is entered upon, a suit to quiet title will not lie. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398.

Possession sufficient to sustain the action is shown where one went upon the land and directed another to put up a fence, though the fence was not a substantial one. Bland

is wild or unoccupied,[59] or the title of the plaintiff is equitable.[60] One who has been in peaceable possession for a long period is not deprived of his right to maintain the suit because forcibly entered upon.[61] A possession acquired secretly and by unfair means will not support the action.[62] In Alabama the possession must be peaceable.[63] In California possession is not essential.[64] Ownership in fee carries with it possession sufficient for the purposes of the suit in the absence of actual adverse possession by another,[65] but actual possession of a portion of the premises will not support the suit if there be not constructive possession of the remainder.[66] Where equity has assumed jurisdiction, it may quiet title as incident to the main relief, though plaintiff is not in possession,[67] but where defendants are in possession, the fact that other equitable relief is prayed for does not authorize equity to retain jurisdiction where plaintiff is not entitled to such other relief.[68] A remainderman, though not in possession, may maintain the suit where the life tenant has conveyed the fee and lapse of time will bar him.[69] The question of possession may be waived.[70] The question as to possession is one of fact and cannot be considered on demurrer.[71]

Defenses.[72]—A suit may be barred by laches[73] or limitations,[74] if the statute is

v. Windsor, 187 Mo. 108, 86 S. W. 162. Payment of taxes and occupation by tenants of a large tract of land, including wild mountain land, is possession of the whole sufficient to support an action. Davis' Heirs v. Hinckley, 141 F. 708. In Alabama actual or constructive possession is sufficient. Foy v. Barr [Ala.] 39 So. 578. Evidence sufficient to show possession in plaintiff at the time suit was instituted. Davis v. Commonwealth Land & Lumber Co., 141 F. 711.

58. Gen. St. 1902, § 4053, authorizing suits to quiet title under certain circumstances, does not authorize suit to recover possession of one who is alleged to have entered unlawfully. Foote v. Brown [Conn.] 62 A. 667. A suit may be maintained by one in actual possession against an adverse claimant not in possession. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398.

59. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852; Weyman v. Atlanta, 122 Ga. 539, 50 S. E. 492. One who claimed wild land under deeds purporting to convey a larger tract, and had exercised acts of ownership and paid taxes for five years, may maintain a suit to quiet title under P. L. 1901, pp. 57, 58, though the land was not "separately" assessed for taxes to her. McGrath v. Norcross [N. J. Eq.] 61 A. 727. Cutting timber, etc., by an adverse claimant held not to preclude the record owner from maintaining suit to quiet title under P. L. 1901, pp. 57, 58, authorizing the record owner of wild and unoccupied land to maintain the action. Id.

60. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852.

61. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

62. Where a drift from one mining claim is surreptitiously run under the surface of another. Badger Gold Min. & Mill Co. v. Stockton Gold & Copper Min. Co., 139 F. 838.

63. Peaceable possession under a claim of ownership is essential under Code 1896, § 809. Lyon v. Arndt [Ala.] 38 So. 242; Randle v. Daughdrill [Ala.] 39 So. 162. As distinguished from disputed or scrambling. Foy v. Barr [Ala.] 39 So. 578.

64. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

65. Mitchell v. Titus, 33 Colo. 385, 80 P. 1042. A sheriff's deed under a foreclosure decree vests in the grantee the title and possession in the absence of actual adverse possession in another, sufficient to maintain the action authorized by Code Civ. Proc. § 255. Keener v. Wilkinson, 33 Colo. 445, 80 P. 1043.

66. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co., 139 F. 838.

67. Norman v. Pugh [Ark.] 86 S. W. 833. Where equity assumes jurisdiction for the purpose of enjoining waste, it may, for the purpose of preventing a multiplicity of suits, quiet title, though plaintiff is not in possession. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

68. Brownback v. Keister [Ill.] 77 N. E. 75.

69. For the purposes of this action the possession of the life tenant is the possession of the remainderman. Alley v. Alley [Ky.] 91 S. W. 291.

70. Where after a demurrer on the ground that the action would not lie against a defendant in possession was overruled, the defendant answered on the merits and obtained a verdict on the issues of fact, the objection was waived. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775.

71. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775.

72. See 4 C. L. 1170.

73. One held barred by laches from maintaining a suit to remove a cloud. Bradley v. Johnson [Idaho] 83 P. 927. Acquiescence by the owner in a tax judgment sale and deed for 25 years, though not a bar to a suit to quiet title, may be considered by the court. Morrison v. Turnbaugh [Mo.] 91 S. W. 152. One who received his deed in August, 1900, and commenced suit to quiet title against a cloud prior to his deed in January, 1901, is not guilty of laches. Bland v. Windsor, 187 Mo. 108, 86 S. W. 162.

applicable to such proceeding.[75] An agreement by plaintiff to dispose of the property is no defense where such agreement does not affect the defendant's title.[76] A defense available only to the general public cannot be asserted by a municipality.[77]

§ 2. *What is a cloud or conflicting claim.*[78]—A cloud is a semblance of title either legal or equitable, or a claim of interest appearing in some legal form but which is in fact unsound.[79] The test by which to determine whether a cloud exists is, would the owner in ejectment brought by the adverse claimant be required to offer evidence to defeat a recovery.[80] The claim must be such that extrinsic evidence is necessary to establish its invalidity,[81] but it is not essential that an attempt has been made to enforce it.[82] An unfounded assertion,[83] a mere fear of suit, or that another merely questions one's title,[84] is not a cloud. Relief may be granted, though the claim asserted is void on its face.[85]

§ 3. *Procedure.*[86] *Process.*[87]—The manner of service of process is regulated by statute.[88] Where one defendant files a cross petition against his co-defendant, the court may not enter judgment on such cross petition where the co-defendant had not been summoned or heard.[89]

Parties.[90]—One who claims an interest necessary to be adjudicated is a necessary

74. Code 1892. § 2731, bars a suit to quiet title in 10 years. Jones v. Rogers [Miss.] 38 So. 742.

75. The Oregon statutes of limitation applicable to actions for the recovery of land sold for taxes do not apply to suits to quiet title. Mount v. McAulay [Or.] 83 P. 529.

76. State v. Coughran [S. D.] 103 N. W. 31.

77. In a suit against a town to determine adverse claims, defenses that the land was a highway and a public beach were properly stricken. Dawson v. Orange [Conn.] 61 A. 101.

78. See 4 C. L. 1070.

79. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125.

Held to constitute a cloud: An outstanding forfeited mining lease. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. The suspension of a levy of execution. Dunbar v. Kelly [Mass.] 75 N. E. 740. Undischarged mortgage where the mortgagees refused to disclaim. Flint Land Co. v. Fochtman, [Mich.] 12 Det. Leg. N. 171, 103 N. W. 813. A mortgage executed under an erroneous belief that the mortgagor had title to all land included is a cloud on the title of such portion of the land as he did not own. Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989. Under Laws 1897, p. 405, c. 414 (Village Law §§ 112, 118), an invalid assessment is a cloud where invalidity must be shown by extrinsic evidence. Trumbull v. Palmer, 104 App. Div. 51, 93 N. Y. S. 349. Where a judgment creditor of third persons assert that his debtor has an interest in a mine and has levied execution and advertised the same for sale, the fee owner may maintain a suit to quiet title against him. Spar Consol. Min. Co. v. Casserleigh [Colo.] 83 P. 1058. A claim by a municipality that the franchise of a street railway company would expire at a certain date, and an asserted purpose to resume possession on such date, is a cloud. Blair v. Chicago, 26 S. Ct. 427. Owner of part of a tract of land subject to a street improvement bond held entitled to have his title quieted against the bond. Ellis v. Witmer [Cal.] 83 P. 800. A deed wrongfully procured from the depositary in escrow is a cloud. Bales v. Roberts, 189 Mo. 49, 87 S. W. 914. Where a grantee procures a deed by fraud, the grantor is entitled to rescind and have his title quieted against the deed. Reynolds v. Rickgauer [Neb.] 106 N. W. 175. A widow in possession to whom a husband devised all his property may maintain a bill to quiet title against children who may assert that omission to mention them in the will was unintentional. Jenks v. Jenks [R. I.] 60 A. 676.

80. City of Birmingham v. McCormack [Ala.] 40 So. 111.

81. A void ordinance and statutes purporting to authorize the condemnation of land do not constitute a cloud on the title of land claimed to be subject to condemnation. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125. A deed under a sale based on an invalid ordinance is not a cloud. A party claiming under such deed would have to prove the ordinance. City of Birmingham v. McCormack [Ala.] 40 So. 111.

82. Dawson v. Orange [Conn.] 61 A. 101.

83. An unfounded assertion by a wife of title to community property is not a cloud on the title of the husband who has absolute control of it. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

84. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

85. Deed alleged to constitute a cloud. Mount v. McAulay [Or.] 83 P. 529.

86. See 4 C. L. 1171.

87. See 4 C. L. 1172.

88. In an action to quiet title to coal lands under Act June 10, 1893 (P. L. 415), the rule to show cause must be served on nonresident respondents at their residence or place of business, but such service is waived where they voluntarily file answer. Stamey v. Barkley, 211 Pa. 313, 60 A. 991.

89. Amburgy v. Burt & B. Lumber Co. [Ky.] 89 S. W. 680.

90. See 4 C. L. 1172.

party.[91] An action alleging the deed to defendant to be void, but which fails to join his grantor, is demurrable for nonjoinder of necessary parties.[92] In a suit to remove a cloud and have a conveyance canceled as fraudulent, the parties who executed the conveyance are indispensable, especially if the conveyance contains covenants of warranty.[93] One who appears to be a necessary party should be admitted as a party upon his motion.[94] Under a rule that a person having legal title and possession may sue, a mortgagor in possession may maintain the suit against a mortgagee asserting title.[95] The suit must be brought for relief contemplated by the statute,[96] and by a party falling within its terms.[97] A trustee under a voluntary conveyance from one heavily indebted cannot maintain a bill to cancel as a cloud a suspended levy of execution, which was sued out by a creditor who refused to participate in the trust scheme.[98] Receivers in possession of street railway property under decree of a Federal court, may, with authority from such court, maintain a bill to remove a cloud.[99]

Bill, complaint, or petition.[1]—The complaint must allege plaintiff's title[2] and possession.[3] Facts showing title in plaintiff must be alleged[4] and not left to presumption,[5] but the character of the adverse claim,[6] or that it constitutes a cloud,[7]

91. Getzelman v. Blazier, 112 Ill. App. 648.

92. Davis v. Denham [Ala.] 40 So. 277.

93. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

94. Getzelman v. Blazier, 112 Ill. App. 648.

95. Sheffield v. Day [Ky.] 90 S. W. 545.

96. The holder of the record title cannot maintain a bill under Code D. C. § 111, as that statute provides only for the establishment of a title acquired by adverse possession as a record title. Harvey v. Miller, 24 App. D. C. 51.

97. P. L. 1901, pp. 57, 58, authorizing suit to quiet title by one claiming to own wild land, who has paid taxes thereon for five years, authorizes the maintenance of the action by one who "claims" to own the fee, and is not limited to actual owners of the disputed possession. McGrath v. Norcross [N. J. Eq.] 61 A. 727. One in possession under a contract by which the owner agreed to will the land to him may, under Act June 10, 1893 (P. L. 415), maintain a bill to quiet title against persons to whom his vendor conveyed for life, and in remainder, and the judgment will conclude both. Smith v. Hibbs [Pa.] 62 A. 834. Under Rev. St. 1898, § 3186, one who is either the owner in fee of the premises or the owner of an incumbrance thereon may prosecute a suit to test the validity of any claim, lien, or incumbrance on such land or any part of it. Coe v. Rockman [Wis.] 106 N. W. 290. Under this statute one claiming by conveyance from a mortgagee may maintain an action to test the legality of tax deeds, although the mortgage sale has not been confirmed. Id.

98. Dunbar v. Kelly [Mass.] 75 N. E. 740.

99. Blair v. Chicago, 26 S. Ct. 427.

1. See 4 C. L. 1172.

2. Title must be clearly and directly alleged with certainty to a common intent. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293. Bill to quiet title under Act March 8, 1870 (P. L. p. 20), held not demurrable because setting up title under a deed not properly acknowledged. Fittichauer v. Metropolitan Fireproofing Co. [N. J. Eq.] 61 A. 746. Complaint held to state a cause of action in partition, and not to determine adverse claims under the statute. Chamberlain v. Waples [Mo.] 91 S. W. 934.

3. Possession must be affirmatively alleged and proven. Carswell v. Swindell [Md.] 62 A. 956; Jones v. Rogers [Miss.] 38 So. 742; Weyman v. Atlanta, 122 Ga. 539, 50 S. E. 492. A bill must show actual and not merely constructive possession. Carswell v. Swindell [Md.] 62 A. 956. Under Code 1896, §§ 809, 810, complainant must allege that he is in peaceable possession, or that his title is denied and no suit is pending to test the validity thereof. City of Birmingham v. McCormack [Ala.] 40 So. 111.

4. Not sufficient to state such fact as a conclusion. Weyman v. Atlanta, 122 Ga. 539, 50 S. E. 492; Jones v. Rogers [Miss.] 38 So. 742.

5. It will not be presumed from an allegation that execution sale was made to the plaintiff that the marshal executed a deed to him. Jones v. Rogers [Miss.] 38 So. 742.

6. In an action under Mills' Ann. St. § 255, the complaint need not set out the character of the adverse claim. Mitchell v. Titus, 33 Colo. 385, 80 P. 1042. Complaint held sufficient, though allegations concerning the invalidity of the defendant's title were eliminated. Mitchell v. Pearson [Colo.] 82 P. 446. Act March 2, 1870 (P. L. p. 20), authorizing suits to quiet title against one claiming an adverse interest, does not require that the bill set forth the character of the defendant's claim. Fittichauer v. Metropolitan Fireproofing Co. [N. J. Eq.] 61 A. 746. The complaint need not show the nature of the defendant's claim nor state what it is based on. Indiana Natural Gas & Oil Co. v. Beales [Ind. App.] 74 N. E. 551. Complaint alleging "that the defendant's claim is without right and unfounded and is a cloud upon the plaintiff's rights" is good against demurrer. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906.

7. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

need not be alleged. The allegations must be definite[8] and not inconsistent.[9] Allegations which tend to state the case more fully and plainly, though not strictly necessary, are proper.[10] A complaint does not show any cause of action against parties joined but not named or referred to therein.[11] The action cannot be maintained by the owner of an equitable estate against the owner of the legal title, under a complaint containing only the usual averments.[12] If the original bill fails to show ground for relief, plaintiff may not by supplemental bill set up matters arising after it was filed.[13]

An answer[14] denying plaintiff's title and alleging affirmative matter showing title in defendant merely raises the issue of title.[15] Repetition of defenses should be avoided.[16] Terms used will be construed as intended by the pleader.[17]

Evidence.[18]—A party suing to quiet title has the burden of the issue throughout the cause.[19] He must prove the title he asserts[20] and show that defendant claims the land;[21] but a defendant who asserts a contract to purchase the land, title to which is sought to be quieted, has the burden to establish such contract.[22] One alleging a regular chain of title from the sovereignty, and also title under several statutes of limitation, may prove either or both.[23] Where both parties claim from a common source, title need not be traced further than to such source.[24]

8. Complaint held demurrable because allegations were not sufficiently definite to enable the defendant to determine whether to admit or deny. Long v. Mechem [Ala.] 38 So. 262.

9. A bill alleging title in plaintiff and that defendant wrongfully asserted some claim, and praying that he be required to show what claim he had, and an amendment alleging that legal title was in defendant, but that he held it in trust, but containing no prayer for the enforcement of the trust, is inconsistent with itself. Long v. Mechem [Ala.] 38 So. 262.

10. Dawson v. Orange [Conn.] 61 A. 101.

11. Corbin Oil Co. v. Searles [Ind. App.] 75 N. E. 293.

12. DeLeonis v. Hammel [Cal. App.] 82 P. 349.

13. Brownback v. Keister [Ill.] 77 N. E. 75.

14. See 4 C. L. 1173.

15. Where plaintiff alleges title which defendant denies and sets up title in himself, the affirmative matter merely raises an issue as to title and no reply is necessary. Irvine v. Irvine [Ky.] 89 S. W. 193.

16. Where defenses, repeated in the separate denials of the answer, were in substance specifications of sources of title, the court might have ordered them consolidated, but it was not error to strike out the repetition. Dawson v. Orange [Conn.] 61 A. 101.

17. That a pleader uses the term "reservation" in defining a right asserted will not defeat his claim when it is apparent that an "exception" is meant. Elsea v. Adkins, 164 Ind. 580, 74 N. E. 242.

18. See 4 C. L. 1174.

19. State Board of Education v. Makely, 139 N. C. 31, 51 S. E. 784. One who sues to remove a grant from the state as a cloud on the ground that the land was swamp land and not subject to grant, but belonged to the board of education, has the burden of proving that the land is swamp land. Id. Where a deed includes within the bounds of the land conveyed lands which are excepted, the grantee suing to quiet title has the burden to show that land he claims is not the land so excepted. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398.

20. In an action under Code Civ. Proc. §§ 1638-1650, to determine adverse claims, the plaintiff has the burden of showing that the defendant's claim is unjust. Brown v. Brown, 96 N. Y. S. 1002.

Evidence sufficient to show that testator intentionally omitted to mention certain of his children in his will, that they had no title to his property but that the sole devisee had title. Greene v. Greene [R. I.] 60 A. 675. Evidence held to show title of mining claims in the complainant. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517. Where plaintiff claimed as heir of her deceased husband, evidence held sufficient to show that her husband was the grantee in a deed running from the record owner to a person of that name. Gage v. Cantwell [Mo.] 91 S. W. 119.

Evidence insufficient to warrant the relief demanded by the complainant. Coppom v. Forman [Neb.] 104 N. W. 167. In an action to quiet title against attachment proceedings, evidence held to justify a decree awarding defendant a lien to the amount of his judgment. Kurtz v. Gartner [Mich.] 12 Det. Leg. N. 439, 104 N. W. 596. Evidence held to warrant a judgment for defendant. Webber v. Ingersoll [Neb.] 104 N. W. 600. Evidence held to show that plaintiff had no title. Rausch v. Michel [Mo.] 91 S. W. 99. A warranty deed running to plaintiff executed by one in possession as owner, prior to the tax deed under which the defendant claimed, is **prima facie evidence** of title. Mitchell v. Titus, 33 Colo. 385, 80 P. 1042.

21. Where plaintiff claims through deeds containing exceptions, he must show that land claimed by defendant is not within the exceptions, Davis v. Commonwealth Land & Lumber Co., 141 F. 711.

22. Stamey v. Barkley, 211 Pa. 313, 60 A. 991.

Joinder of causes.—One suing to recover the value of timber taken from land may join a cause to quiet title to a portion of such land.[25]

Trial.—Under the New Jersey statute, jurisdictional questions are first tried.[26]

Jury trial.[27]—A statute authorizing a trial by jury of issues arising on legal, as distinguished from equitable, claims, is valid.[28]

Findings, decree, or judgment.[29]—The decree must conform to the issues raised and the relief prayed for.[30] It should dispose of the conflicting claim arising under the pleadings as of the date of the judgment,[31] and should protect the interests of third persons.[32] By statute in some states, where the facts upon which plaintiff's claim is based are alleged, any proper relief may be granted.[33] The object of the action is to finally determine as between the parties all conflicting claims to the property in controversy,[34] hence, a judgment of nonsuit is improper if the plaintiff establishes any legal interest, though he fails to establish that the property is free from the claim asserted by the defendant.[35] A denial of the plaintiff's title precludes an entry of judgment on the pleadings, though the answer does not set forth a valid adverse interest.[36] A decree brings to the successful party no new and independent right which he may assert against a stranger to the suit,[37] nor can the unsuccessful party be required to quitclaim to him.[38] The amount of relief to which a defendant, who files a cross petition against a co-defendant, is entitled should not be left to the commissioner.[39] A jury finding,[40] or finding at law on the question of title,[41] is binding on the court.

23. Alford Bros. v. Williams [Tex. Civ. App.] 91 S. W. 636.

24. Where both parties claim from the same source, it is not necessary to trace the title further than to such source. Kendrick v. Burchett [Ky.] 89 S. W. 239. Under Rev. St. 1899, § 650, where plaintiff claimed as heir of her deceased husband and defendant under a tax deed against him, it was only necessary to prove title to the common source. Gage v. Cantwell [Mo.] 91 S. W. 119.

25. Alford Bros. v. Williams [Tex. Civ. App.] 91 S. W. 636.

26. Where, in an action under Act March 2, 1870 (P. L. p. 20), the defendant denies the jurisdictional facts of peaceable possession, nonpendency of any test suit and incapacity of plaintiff to bring any test suit, the jurisdictional issues will be first tried, before the question of title is inquired into. Fitti-chauer v. Metropolitan Fireproofing Co. [N. J. Eq.] 61 A. 746. Under P. L. 1901, pp. 57, 58, providing that one claiming title in fee to wild land, who has paid taxes for five successive years, is presumed to be in possession and may sue to settle title where the existence of the statutory conditions are denied, the issues will be tried by chancery before sending the question of title to be tried at law. McGrath v. Norcross [N. J. Eq.] 61 A. 727.

27. See 4 C. L. 1174.

28. Dawson v. Orange [Conn.] 61 A. 101.

29. See 4 C. L. 1175.

30. In a suit by the grantees of land against the grantees of timber standing thereon, decree ordering a sale of the land and division of the proceeds held not authorized under a prayer for general relief. Liston v. Chapman & Dewey Lumber Co. [Ark.] 91 S. W. 27.

31. Brown v. Hodgson [N. D.] 105 N. W. 941.

32. Under Civ. Code §§ 658, 660, a decree quieting title to land, where the ownership of timber standing thereon is in another, should protect the rights of the owner of the timber. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121.

33. Code Civ. Proc. § 580, authorizing the award of any relief consistent with the case made. DeLeonis v. Hammel [Cal. App.] 82 P. 349.

34. Action under Code Civ. Proc. § 738 to determine adverse claims. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121. Where it was sought to quiet title against a deed, plaintiff was held entitled to have her rights determined, whether the deed was procured by fraud or was intended as a mortgage. DeLeonis v. Hammel [Cal. App.] 82 P. 349. Under the rule that a defendant, who by his answer claims relief for a cause growing out of or connected with the bill, may have it, where a purchaser at foreclosure sale sues to quiet his title, he may be held liable for conversion of machinery on the premises which did not constitute a fixture. Humes v. Higman [Ala.] 40 So. 128.

35. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121.

36. Under Laws 1901, c. 5, p. 9. Larson v. Christiansen [N. D.] 106 N. W. 51.

37. Does not transfer to the successful party the title held by the unsuccessful one. Lockwood v. Meade Land & Cattle Co. [Kan.] 81 P. 496.

38. A decree setting aside a tax deed is erroneous in requiring the defendant to quitclaim his title. Woodard v. Glos, 113 Ill. App. 353.

39. Where one defendant filed a cross petition against his co-defendant for the value

Costs.[42]—A defendant who disclaims is not liable for costs[43] if the disclaimer be absolute and unqualified.[44]

QUO WARRANTO.

§ 1. *Nature, function, and occasion of the remedy.*[45]—Quo warranto is an extraordinary remedy,[46] and is available only where the public, in theory at least, have some interest.[47] It is the appropriate remedy to try title to public office,[48] but cannot be used to take the place of mandamus.[49] Quo warranto will lie against a municipal corporation where it usurps the exercise of a franchise not granted by its charter or by law,[50] and within the meaning of quo warranto statutes, a municipal corporation is a "person."[51] Quo warranto is the proper remedy to test the validity of the proceedings incorporating a local governmental body[52] or a private corporation,[53] or to try title to office in a private corporation.[54] It is a proper remedy to

of certain trees. Amburgy v. Burt & B. Lumber Co. [Ky.] 89 S. W. 680

40. Where plaintiff claimed title and right of possession, and defendant denied such title, the issue of ownership was presented, and under Code Civ. Proc. § 580, providing that any relief consistent with the case made may be granted, the jury having found for plaintiff, the court properly rendered judgment accordingly. Reiner v. Schroeder, 146 Cal. 411, 80 P 517.

41. In a suit under Act March 2, 1870 (P. L. p. 20), if the defendant affirmatively pleads legal title either party has a right to have an issue at law for the settlement of the legal controversy, and subject to the power to order a new trial chancery is bound by the result of such issue. Fittichauer v. Metropolitan Fireproofing Co. [N. J. Eq.] 61 A. 746.

42. See 4 C. L. 1176.

43. Gen. St. 1902, § 4053, authorizing suits to quiet title under certain circumstances, expressly provides that costs cannot be adjudged against a defendant who disclaims all interest in or incumbrance on the property. Foote v. Brown [Conn.] 62 A. 667.

44. Moore v. Wallace [Okl.] 82 P. 825.

45. See 4 C. L. 1177.

Note: The historical phase of this subject is extensively presented in State v. Kent [Minn.] 104 N. W. 948.

46. A **city** having authority to pass an **ordinance** granting a telephone company the right to use the city's streets, the ordinance will not be declared void in quo warranto. State v. Nebraska Telephone Co., 127 Iowa, 194, 103 N. W. 120. Under Code 1896, § 3420 (1), quo warranto does not lie against **officers** of a city for a mere **threatened abuse of** their **powers,** under its charter to exact license taxes on the ground that the act extending the corporate limits to include the territory within which relators live is unconstitutional. State v. City of Ensley [Ala.] 38 So. 802. Voidable **action of a board** of county commissioners will not be reviewed on a proceeding in the nature of quo warranto. Review must be had by appeal. Johnston v. Savidge [Idaho] 81 P. 616.

47. Does not lie to enforce the performance of private contracts. State v. Bryan [Fla.] 39 So. 929. Quo warranto does not lie to prevent a corporation legally organized from acting as trustee of an express trust. State v. Higby Co. [Iowa] 106 N. W. 382.

48. So held where a public officer sought to determine his title to an office to which he had been wrongfully promoted. People v. McAdoo, 96 N. Y. S. 362. Quo warranto is the proper remedy to try title to office. A court of chancery has no jurisdiction of a bill filed purely for that purpose. Blinn v. Riggs, 110 Ill. App. 37.

NOTE: Removal of officers by quo warranto see Officers and Public Employes, 6 C. L. 856.

49. In a proceeding in the nature of quo warranto, brought by the state to oust a foreign corporation from the exercise of corporate franchises within the state, the court will not review the action of the charter board in refusing an application made to it by respondent for permission to transact business within the state. State v. Kansas Natural Gas Co. [Kan.] 81 P. 506.

50. Code 1896, § 3420, construed. City of Uniontown v. State [Ala.] 39 So. 814.

51. Code 1896, § 3420, construed. City of Uniontown v. State [Ala.] 39 So. 814.

52. Independent school district. State v. Alexander [Iowa] 105 N. W. 1021. Information in the nature of quo warranto is the appropriate remedy to test the legality of the formation of a new school district. School Dist. No. 2, Tp. 24, R. 6 E., Butler County v. Pace, 113 Mo. App. 134, 87 S. W. 580.

53. The legality of organization of a corporation can only be attacked and judicially examined in a direct proceeding by quo warranto. Cannot be attacked in condemnation proceedings instituted by it. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

declare a forfeiture of the franchise of a corporation,[55] and to question the right to exercise licenses and privileges involving matters of public right on the ground that they have been granted improperly or without warrant of law, or are so held or exercised.[56] The occasion for declaring such forfeiture is treated in other topics.[57] In the absence of statutory provisions to the contrary, quo warranto lies to oust and exclude a foreign corporation doing business in a state in violation of statutory prohibition or without complying with statutory conditions precedent.[58]

An act giving a private citizen the power to redress a wrong done him by a corporation does not by implication deprive the public of the right to quo warranto for the correction of public injuries.[59]

In some states, in lieu of the ancient writ of quo warranto, there is provided a common-law action to prevent the usurpation of an office.[60]

§ 2. *Parties and right to prosecute.*[61]—Relator's hands must be clean,[62] and he must be free from laches.[63] The ancient writ of quo warranto, and the information in the nature of quo warranto at common law, is and always was a writ of right at the instance of the attorney general ex officio, as the representative of the crown, commonwealth or state,[64] and upon the return it is the duty of the court to try the issues of law and fact presented thereby, and to determine the same upon the merits according to the rules of law applicable thereto;[65] but trial courts generally have a judicial discretionary power to grant or refuse leave to file informations in the nature of quo warranto when applied for by individuals.[66] The court exhausts its discretion when it exercises it upon the preliminary application for leave to file the information.

54. Hayes v. Burns, 25 App. D. C. 242.

55. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

56. Right to exercise telephone franchise in the streets of a city, under authority of a city ordinance. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

57. See Corporations, 5 C. L. 764; Franchises, 5 C. L. 1518; Municipal Corporations, 6 C. L. 714; Waters and Water Supply, 4 C. L. 1834, etc.

58. 3 Clark & Marshall on Private Corporations, p. 2727, § 848. Kirby's Dig., § 6749, held applicable to a foreign railroad corporation operating in the state under a lease, and hence a suit can be maintained against such corporation, under § 6750, providing for the enforcement of § 6749 by information in the nature of quo warranto or other proper suit. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

59. Act June 14, 1836 (P. L. 621), in regard to water companies, is not repealed or modified by Act April 29, 1874, § 34 (P. L. 93). Commonwealth v. Potter County Water Co., 212 Pa. 463, 61 A. 1099.

60. Under Civ. Code Prac. §§ 480, 483-485, a citizen and taxpayer of a city who claims no title to any of the offices cannot maintain a suit to oust members of the city council on the ground that they have failed to take the required oaths. King v. Kahne, 27 Ky. L. R. 1080, 87 S. W. 807.

61. See 4 C. L. 1178.

62. Where, on petition by a private prosecutor for quo warranto to try title to a public office, it appeared that at the connivance and in the interest of petitioner intoxicating liquor was, with some system and to a considerable extent, furnished voters while the polls were open, held writ would be denied. Pomeroy v. Kelton [Vt.] 62 A. 56.

Note: The court states that if the complaint had been preferred and prosecuted by the state's attorney other principles would be applicable and the court's duty might be different, citing State v. Harris, 52 Vt. 216. Pomeroy v. Kelton [Vt.] 62 A. 56.

63. Where an independent school district, formerly included in another district, was organized and nothing was done between the two districts except to adjust their finances and to collect taxes, held 14 months' delay did not bar quo warranto to test validity of incorporation of independent school district. State v. Alexander [Iowa] 105 N. W. 1021.

64. State v. Kent [Minn.] 104 N. W. 948; State v. Bryan [Fla.] 39 So. 929. The term "quo warranto" as used in the Minnesota statutes refers to an information in the nature of quo warranto as it existed at the common law. State v. Kent [Minn.] 104 N. W. 948.

Note: In the principal case (State v. Kent [Minn.] 104 N. W. 948) the history of the writ is learnedly discussed, and the Minnesota statutes and cases collected, distinguished, and discussed.

65. State v. Kent [Minn.] 104 N. W. 948.

66. District court has such power. State v. Kent [Minn.] 104 N. W. 948. Proceedings in nature of a quo warranto, as distinguished from a quo warranto ex officio, may be entertained by the court, or not, in the exercise of its judicial discretion. State v. McClain, 187 Mo. 409, 86 S. W. 135. A complaint for a quo warranto is addressed to the sound discretion of the court. Pomeroy v. Kelton [Vt.] 62 A. 56.

This presumes, however, that the court actually exercises its discretion and does not deprive it of the right to dismiss the proceedings if it subsequently appears that it acted improvidently or through inadvertence and under a misapprehension of facts.[67] Under a statute requiring a prosecuting attorney to institute quo warranto proceedings when requested by an interested citizen, a proceeding thus instituted is one in the nature of a quo warranto and not quo warranto ex officio.[68] Either quo warranto or information in the nature of quo warranto must be prosecuted by the state or some public officer representing sovereignty,[69] and proceedings will not be instituted on the relation of a private prosecutor in the absence of special injury.[70] The attorney general is the proper officer to file an information in the nature of a quo warranto to inquire into the title to public office,[71] and the responsibility for filing the same rests on him,[72] and this authority and responsibility cannot be delegated by him to any person or persons or even cast upon the court.[73] An order granting a person leave to bring quo warranto is not subject to collateral attack.[74] In Minnesota the jurisdiction of the supreme court being to a certain extent voluntary, it may decline to order the writ to issue in a case which comes within the conditions prescribed by such court, even though the district court under the same circumstances would have no right to refuse it.[75] In Arkansas, while the supreme court has jurisdiction to issue, hear, and determine the writ of quo warranto in aid of its appellate jurisdiction, the writ and information as an original proceeding are abolished.[76]

Joinder of parties.[77]—In proceedings to oust a public or municipal corporation the better opinion seems to be that where the proceedings are based upon an original lack of authority they should be against the persons who unlawfully assume to act as the corporation.[78]

67. State v. Kent [Minn.] 104 N. W. 948. **NOTE. When is court's discretion exhausted?** In People v. Regents, 24 Colo. 175, 49 P. 286, Mr. Justice Campbell said: "The authorities seem to be unanimous that, when once the discretion of the court in which the proceeding is brought has been exercised and the permission given to relator to file an information, such discretion is exhausted, and may not be recalled; but, on the contrary, the court must then proceed to determine the controversy the same as any other upon the law and facts." In 2 Spelling, Extr. Rem. § 1777, it is said: "Where, however, the court has in the exercise of its discretion permitted the information to be filed, its discretionary power is thereby exhausted, and the issues of fact and law as presented must at the trial be determined according to the strict rules of law as in ordinary cases." In State v. Brown, 5 R. I. 1, the court said: "The discretion to allow in such a case the filing of an information of this character is, as we apprehend, all the discretion which courts of authority justify. When the information is filed, all the discretionary power of the courts is expended." To the same effect are High, Extr. Rem. § 606; People v. Golden Rule, 114 Ill. 34, 28 N. E. 383; People v. Paisley, 81 Ill. App. 52; Place v. People, 83 Ill. App. 84; State v. Elliott, 13 Utah, 200, 44 Pac. 248; State v. Shank, 36 W. Va. 230, 14 S. E. 1001. And see Rex v. Brown, 4 Term R. 276. Mr. Justice Campbell's statement that the authorities seem to be unanimous is hardly correct, as there are cases which hold that this discretionary control remains with the court until the case is finally determined, and that where leave is improvidently given the court may, upon the hearing, refuse relief upon the same grounds upon which it might originally have refused leave to file the information. People v. Wild Cat Special Drainage Dist., 31 Ill. App. 223; People v. Hamilton, 24 Ill. App. 609; State v. Hoff, 88 Tex. 297, 31 S. W. 290; State v. Claggett, 73 Mo. 388. In support of the rule stated in the text the court cites Gilroy v. Com., 105 Pa. 484; Commonwealth v. Kistler, 149 Pa. 345, 24 A. 216.—From State v. Kent [Minn.] 104 N. W. 948.

68. State v. McClain, 187 Mo. 409, 86 S. W. 135.

69. Suit by town marshal to compel payment to himself of sums due on liquor licenses held not quo warranto, or information in the nature of it. Moody v. Lowrimore [Ark.] 86 S. W. 400.

70. Under Va. Code 1894, §§ 3022-3024, 1105e, cl. 30 and 1313a, cl. 58, a writ of quo warranto on the relation of a private prosecutor will not lie to terminate the franchises of a railroad company for failing to construct its road in the time allowed. South & W. R. Co. v. Com. [Va.] 51 S. E. 824.

71. State v. Bryan [Fla.] 39 So. 929. It is a power incident to the office. Id.

72, 73. State v. Bryan [Fla.] 39 So. 929.

74. Quo warranto to test the legality of the incorporation of a school district. State v. Alexander [Iowa] 105 N. W. 1021.

75. State v. Kent [Minn.] 104 N. W. 948.

76. Kirby's Dig. §§ 7981, 7982, construed. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

77. See 4 C. L. 1179.

§ 3. *The information or complaint.*[79]—In a proceeding on information in the nature of quo warranto, it is not necessary to obtain a fiat for the issuance of an alternative writ before filing the petition on information.[80] The proper practice in a proceeding in the nature of a quo warranto to inquire into the title of one to a public office is to institute the proceeding in the name of the state upon the relation of the attorney general, and the mention of relators in the information other than the attorney general, where the proceeding is instituted by the latter, is mere surplusage.[81] In a proceeding on information in the nature of a quo warranto, the filing of the petition on information is the commencement of the suit.[82]

§ 4. *Answers and other pleadings, and motions to quash or dismiss.*[83]—Where one is called upon to show warrant or authority for the exercise of an office, he must plead directly and positively all facts necessary to establish title to the office.[84]

§ 5. *Trial and judgment.*[85]—Under a statute providing that a court shall be open at all times for the trial of a proceeding on information in the nature of quo warranto, such a trial, whether held in vacation or in term time, is by the court and not by the judge.[86] In quo warranto proceedings in courts of original jurisdiction to annul, vacate, and cancel a charter or franchise, or any other property right, the right of trial by jury of issues of fact is a common-law right.[87] The burden is upon one called upon to show warrant or authority for the exercise of an office to prove his title thereto.[88] Only matters in issue will be determined.[89]

Costs.[90]

§ 6. *New trial and review.*[91]

RACING.[92]

The public may, on any ground of police power, regulate race tracks,[93] and may therefore declare it unlawful to deny admission to any lawful ticket holder.[94] To charge liability for an ejection it must, however, appear that the persons who did it were defendants' servants.[95]

"Riding" and "suffering" to be ridden a horse in a race on a public highway are distinct offenses in Indiana.[96] These offenses may be averred in the language

78. 23 Am. & Eng. Enc. of Law [2d Ed.], p. 622. Quo warranto attacking the legality of the organization of a school district held properly brought against the school directors as individuals. State v. McClain, 187 Mo. 409, 86 S. W. 135. Quo warranto against persons claiming to be officers of a town is the proper proceeding to test the validity of the incorporation of the town, and the town is not a necessary party. People v. Stratton, 33 Colo. 464, 81 P. 245.

79. See 4 C. L. 1179.

80. Newman v. State [Ala.] 39 So. 648.

81. State v. Bryan [Fla.] 39 So. 929.

82. Newman v. State [Ala.] 39 So. 648.

83. See 4 C. L. 1179.

84. 17 Enc. Pl. & Pr. 469. Pleas denying each and every allegation in the information, and alleging that the doing of the acts complained of was by virtue of the authority contained in a certain answer, held demurrable. Newman v. State [Ala.] 39 So. 648.

85. See 4 C. L. 1180.

86. Newman v. State [Ala.] 39 So. 648.

87. Consequently, is a constitutional right in Arkansas. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

88. People v. Stratton, 33 Colo. 464, 81 P. 245.

89. In quo warranto to determine title to an office, held not necessary to consider the power of the defendant to appoint a deputy in the absence of any showing that he had attempted to exercise such power. State v. Tunstall [Ala.] 40 So. 135. Where, on petition in the nature of quo warranto to oust respondents from the position of school directors, it appeared from the petition, return, and agreed statement of facts that respondents were legally elected and that relator had voted for them, and induced one of them to become a candidate for the office, held there was no question as to respondent's right to hold the office if it existed. State v. McClain, 187 Mo. 409, 86 S. W. 135.

90, 91. See 4 C. L. 1180.

92. See, also, Betting and Gaming, 5 C. L. 417.

93. Not restricted to forbidding racial discrimination. Greenberg v. Western Turf Ass'n [Cal.] 82 P. 684.

94, 95. Greenberg v. Western Turf Ass'n [Cal.] 82 P. 684.

96. Burns' Ann St. 1901, § 2280. State v. New [Ind. App.] 76 N. E. 181.

of the statute,[97] and the highway may be described by simply stating that it is in a certain county.[98]

RAILROADS.

The duties and liabilities of railroad companies as common carriers,[1] their li-

abilities to employes,[2] interurban electric lines,[3] and matters common to all corporations,[4] are elsewhere treated.

§ 1. *Definition and general nature of railroads.*—When the term railroad is used in statutes, steam railroad is meant, unless it clearly appears that some other meaning is intended.[5]

§ 2. *Franchises, licenses, permits, and the like.*[6]

§ 3. *Route, location, termini and stations. Filing, location, profile, etc.*[7]—Location of a railroad is a proceeding in the exercise of the power of eminent domain, amounting to an appropriation of the property as against all except the owner and any who have perfected a prior location thereon.[8] A location can be made only by the act of the corporation through its board of directors.[9] The mere filing of a location involves no action, municipal or otherwise, that can be reached by certiorari.[10] A survey staked out on the ground or an actual location, whether delineated on paper or not, may be a sufficient location.[11] In West Virginia a location may be perfected before the filing of a map and profile, or the commencement of condemnation proceedings.[12] As between rival railroad companies claiming the same location, priority of location in point of time gives superiority of right,[13] but a priority of location may be lost by laches.[14] If diligent and acting in good faith a railroad company may seize and hold as against another company, by location thereon, land on any part of its proposed route without having made a survey of its entire road.[15] A railway may be extended through townships not named in its articles of incorporation where such townships are located in counties which are named.[16] Railroads passing near a county seat may be required to locate its line through that municipality.[17] The incorporation of a railroad to run from one place "to" another does not require it to stop at the corporate limits of the latter place;[18] and the fact that the company built and used a depot at a certain point in its terminal city does not preclude it from extending its line to another point in such city.[19]

Alteration and changes.[20]—The statutes of some states provide that no railroad shall change its route or depot grounds after they have been designated.[21]

Compulsory maintenance of stations, sidings, etc.[22]—A railroad company is a

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97, 98. State v. New [Ind. App.] 76 N. E. 181.

1. See Carriers, 5 C. L. 507.

2. See Master and Servant, 6 C. L. 521.

3. See Street Railways, 4 C. L. 1556.

4. See Corporations, 5 C. L. 764.

5. In re Avon Beach & S. R. Co., 3 Ohio N. P. (N. S.) 561. Whether or not a railroad is a steam railroad, within the meaning of the statutes of Ohio, may be determined, not only by the provisions of its charter, but evidence is admissible to show how it is constructed and operated and the character of the business it is engaged in, and the mode and manner of conducting such business. And if the road is not completed and in operation, evidence is admissible to show how it is to be constructed and operated and the character of the business it is to engage in, and the contemplated mode and manner of conducting such business. Id.

6. See 4 C. L. 1184. See, also, Franchises, 5 C. L. 1518.

7. See 4 C. L. 1188.

8. Chesapeake & O. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

9. Chesapeake & O. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890. Evidence examined and held to show that a specified location of a railroad was a new location not adopted by corporate action. West Virginia, etc., R. Co. v. Belington & N. R. Co., 56 W. Va. 360, 49 S. E. 460.

10. P. L. 1903, p. 650, § 8. Essen v. Dickinson [N J. Law] 60 A. 1102.

11. But survey not adopted by corporation not sufficient. Chesapeake & O. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

12, 13. Chesapeake & O. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

14. West Virginia Short Line R. Co. v. Belington & N. R. Co., 56 W. Va. 360, 49 S. E. 460.

15. Chesapeake & O. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

16. Hayes v. Toledo R. & T. Co., 6 Ohio C. C. (N. S.) 281.

17. Const. § 187. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732.

18, 19. Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473.

20. See 4 C. L. 1189.

21. Rev. St. 1895, arts. 4492, 4493. Gulf, etc., R. Co. v. Martin [Tex. Civ. App.] 86 S. W. 25.

quasi public corporation,[23] and the public has an interest in the location of depots, and the time and place at which trains must stop for freight and passengers,[24] so that a contract whereby a railroad company is obligated to place its station or depot at a designated point, regardless of public necessity or convenience, is void as against public policy.[25] Mandamus, not injunction, is the proper remedy,[26] and private citizens will in general be left to their suits for damages.[27] Where property rights have become fixed with reference to an established railroad, only imperious necessity or consent of the railroad commission will warrant the abandonment of the line or stations.[28] In the absence of a showing that a proposed freight depot is not necessary, or could be as conveniently built elsewhere, its construction will not be enjoined for the reason that it is in a residence neighborhood,[29] but a company cannot act arbitrarily in the location of its repair and machine shops.[30] The taking up and removal of a parallel track is a public good to the extent that the burden upon the public domain is thereby relieved, and the danger at crossings reduced, and the convenience of the carrier promoted.[31] The Alabama Act of Feb. 28, 1903, does not give the railroad commission power to require a change in the location of a station.[32]

22. See 4 C. L. 1189.

23. Enid Right of Way & Townsite Co. v. Lile [Okl.] 82 P. 810.

24. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732; Commonwealth v. Illinois Cent. R. Co., 27 Ky. L. R. 763, 86 S. W. 542. The construction of a station for passengers only is not a compliance with Kirby's Dig. § 6709. St. Louis, etc., R. Co. v. Crandall [Ark.] 86 S. W. 855.

25. Enid Right of Way & Townsite Co. v. Lile [Okl.] 82 P. 810.

26. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. State is a proper party. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732.

27. Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18. Measure of damages for breach of contract to maintain a given station. Louisville, etc., R. Co. v. Whipps, 27 Ky. L. R. 977, 87 S. W. 298.

Contra: Deed held to constitute a contract to maintain a depot at a given place. St. Louis, etc., R. Co. v. Crandall [Ark.] 86 S. W. 855; Gulf, etc., R. Co. v. Martin [Tex. Civ. App.] 86 S. W. 25; City of Tyler v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 173, 87 S. W. 238.

Note: In Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18, the complainants contended: (1) That each person who uses the road for the purpose of transportation has an equitable right to compel the railroad company to maintain the station; basing this claim upon the theory that by establishing the station and thereby inducing people to settle near, the company impliedly contracted to continue it. There seems to be little foundation for such a claim inasmuch as the courts have frequently refused to enforce positive contracts with individuals to continue the maintenance of stations on the ground that it was against public policy to permit railroad companies to thus limit their power of subserving public necessity and convenience. Florida, etc., R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30, 20 L. R. A. 419; Texas, etc., R. Co. v. Marshall, 136 U. S. 393, 34 Law. Ed. 385. The remedy at law in an action for damages is adequate, and the court here properly refused to act. (2) The complainants further contend that the public have a legal right to the maintenance of the station, which the court of equity should protect. No rule of equity is better settled than that complainants are not in a position to ask for an injunction, when the right on which they found their claim is, as a matter of law, unsettled. Citizens Coach Co. v. Camden H. R. Co., 29 N. J. Eq. 299; Morris & Essex R. Co. v. Attorney General, 20 N. J. Eq. 530. That the courts of law, when there is no legislation on the subject, will hold it to be the duty of common carriers to maintain stations at such points as the court shall determine is by no means clear. State v. Republican Val. R. Co., 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424; State v. Spokane St. R. Co., 19 Wash. 518, 53 P. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; Texas & Pac. R. Co. v. Marshall, 136 U. S. 393, 34 Law. Ed. 385; People v. N. Y., L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. Therefore, if the legal right exists it must be enforced at law by mandamus. Nor has the court of equity power to keep the matter in statu quo pending the settlement of the legal principle, even though irreparable injury will result to the complainants ad interim. Barber v. W. J. Title & Guar. Co., 53 N. J. Eq. 158, 32 A. 222; People v. A. & V. R. R. Co., 24 N. Y. 261, 82 Am. Dec. 295. As pointed out in the present case, while the remedy at law hardly seems "adequate," if, at the time it is applied, the rights of the complainant have so suffered that there may be nothing of value left to him in the remedy, "there is, in the existing state of the law, no provision for such a situation."—4 Mich. L. R. 81.

28. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732.

29. Walther v. Chicago & W. I. R. Co., 215 Ill. 456, 74 N. E. 461.

30. Rainey v. Red River, etc., R. Co. [Tex.] 13 Tex. Ct. Rep. 993, 89 S. W. 768.

31. Dayton & Union R. Co. v. P., C., C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 537.

The power of the railroad commissioners to require the erection and convenient location of depots does not extend to a requirement that two separate depots be maintained in one town.[33] Statutes may require railroad companies to keep their passenger stations open, lighted, and warmed,[34] but the statutes of Kentucky do not require the keeping open and maintenance of depots at flag stations during the nighttime.[35]

§ 4. *Rights of way and other lands, and acquirement thereof. Certificate of public convenience.*[36]—On an application for a certificate of necessity and convenience it is the duty of the railroad commissioners to inquire into the proceedings of the alleged company to ascertain whether such company is of a legal character and entitled to receive any certificate.[37] The action of a board of railroad commissioners in granting a certificate of public convenience and necessity is subject to judicial review in New York.[38] The necessity for a lateral railroad on the route selected by petitioners is a question for the jury under proper instructions by the court.[39]

A charter authority to acquire land.[40]

Grants in highways and streets.[41]—Municipalities may grant to railroad companies a reasonable use of the streets for the construction and operation of roads for public transportation,[42] but such grants are subject to the prior easement of the public[43] and will not be permitted to injure or destroy the rights of abutters without compensation.[44] An ordinance permitting a railroad to occupy a street with its tracks is not, however, a vacation of the street so as to make it revert to the abutters.[45] A conditional grant of a right of way may be given.[46] The right to construct tracks across a city street can only be acquired by exact compliance with the authorizing ordinance.[47] Laches and implied acquiescence may estop a city from claiming a railroad company's alleged forfeiture of its rights in vacated streets,[48] or from asserting a right to the unobstructed use of a street.[49]

Consent of abutting owners.[50]—An abutter, who for a consideration has granted

32. State v. Nashville, etc., R. Co. [Ala.] 39 So. 984.

33. State v. Yazoo & M. V. R. Co. [Miss.] 40 So. 263.

34. Rev. St. 1895, art. 4521. Gulf, etc., R. Co. v. Martin [Tex. Civ. App.] 86 S. W. 25.

35. Ky. St. 1903, § 784. Sandifer's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 528.

36. See 4 C. L. 1184.

37. People v. Board of Railroad Com'rs, 105 App. Div. 273, 93 N. Y. S. 584.

38. Projected freight switch road held not to be a public convenience or necessity. People v. State Board of Railroad Com'rs, 103 App. Div. 123, 93 N. Y. S. 58.

39. Pennsylvania Mining Co. v. Naomi Coal Co., 26 Pa. Super. Ct. 39. That petitioners for a lateral railroad constructed a temporary road by a roundabout route does not estop them to assert the necessity of a route by the desired route. Id.

40, 41. See 4 C. L. 1184.

42. Grant to railroad company irrespective of charter powers. Bonner v. Milledgeville R. Co., 123 Ga. 115, 50 S. E. 973. The Nebraska statute declaring that all streets or parts thereof in the town of Columbus previously taken by the U. P. R. for turnouts, etc., should be vacated so long as so used, and that a perfect title should be vested in the company by that statute, to terminate on the termination of the use, has been sustained. Act Jan. 25, 1866. City of Columbus v. Union Pac. R. Co. [C. C. A.] 137 F. 869.

43. People v. Atchison, etc., R. Co., 217 Ill. 594, 76 N. E. 573. The board of public service is not authorized by 75 V. 115, § 8324 (Smith & Benedict, § 5), to grant to the lessee of the Cincinnati Southern Ry. Co. the right to occupy the streets of the city of Cincinnati. Louisville, etc., R. Co. v. Cincinnati, etc., R. Co., 3 Ohio N. P. (N. S.) 109.

44. Maintaining an embankment in a street. Coats v. Atchison, etc., R. Co. [Cal. App.] 82 P. 640.

45. Tonkawa Milling Co. v. Tonkawa [Okl.] 83 P. 915.

46. City of Columbus, Neb., held authorized to vacate certain streets on specified condition. City of Columbus v. Union Pac. R. Co. [C. C. A.] 137 F. 869.

47. After expiration of time limit fixed by ordinance, no further tracks can be built. Chicago Terminal Transfer Co. v. Chicago [Ill.] 77 N. E. 204.

48. City of Columbus v. Union Pac. R. Co. [C. C. A.] 137 F. 869. A city acquiescing in the improvement of property by a railroad company under a title acquired from the city is estopped to dispute such title. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183.

49. User for 50 years and expenditure of $400,000 thereon by railroad company. People v. Rock Island, 215 Ill. 488, 74 N. E. 437.

50. See 4 C. L. 1185.

to a railroad company the right to use the street for railroad purposes, cannot, in his individual capacity, successfully maintain mandamus proceedings to compel a removal of the railroad structures.[51]

Rights in public lands.[52]—The grant by congress of a right of way is in the nature of a conditional grant, and limited to use and occupation for railway purposes only.[53] Statutes authorizing a company to condemn private property for a right of way may impliedly authorize construction over the public domain.[54] Delegated authority of state asylum trustees to contract with a railroad for tracks across the asylum grounds is exhausted by its exercise and cannot be subsequently modified.[55]

Right of eminent domain.[56]—A de facto railroad corporation may maintain condemnation proceedings.[57] Proceedings for the taking of private property must be in strict compliance with the statute.[58] In Indiana a railroad company having made payment or tender of the award may enter into and continue in possession pending litigation.[59] Unless all parties interested are joined in a condemnation proceeding, the land is acquired subject to their rights.[60] A railroad company condemning land is not the agent of the state, and condemnation does not extinguish the lien of taxes unless the state be made a party.[61] A lien holder is an owner who must be paid or secured before property can be taken.[62] Cases relative to the elements of damage are cited in the notes.[63]

Private grants.[64]—Statutes may provide that in the absence of contract relating to land through which a railroad passes it shall be presumed that land has been granted by the owner, unless he shall within a specified time apply for an assessment of value after the road has been located.[65] A general release of damages as to land taken for a right of way will be construed to embrace every injury to the entire tract necessarily resulting from the construction of the railroad as originally located, and as extended for increased traffic,[66] but does not exempt the grantee from liability for

51. People v. Rock Island, 215 Ill. 488, 74 N. E. 437.

52. See 4 C. L. 1185. See as to land grants, Tiffany Real Prop. 834.

53. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401.

54. Ayres v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 159, 88 S. W. 436.

55. State v. Toledo & O. Cent. R. Co., 3 Ohio N. P. (N. S.) 234.

56. See 4 C. L. 1185.

57. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856. Defects in a railroad company's certificate of incorporation cannot be urged to defeat eminent domain proceedings. Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473.

58. Notice to property owner (Chicago, B. & Q. R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412), and a failure therein, will make the taking a trespass (Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991).

59. Burns' Ann. St. 1901, § 5160. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 531.

60. Lien of state for taxes. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

61, 62. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

63. Award not excessive. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. Damages for discomfort from blasting and other construction operations. Gossett v. Southern R. Co. [Tenn.] 89 S. W. 737.

64. See 4 C. L. 1186.

65. City of Hickory v. Southern R. Co., 137 N. C. 189, 49 S. E. 202.

66. Davis v. Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364. The mere imposition of more railway tracks or their use, beyond what may originally have been thought probable, does not constitute a nuisance. Oklahoma City, etc., R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849. A deed of right of way for the purpose of constructing, maintaining, and operating a single or double track railroad with all necessary appurtenances and for all uses and purposes connected with its construction, etc., conveys a perpetual right of way but not the fee. Laying of more than two tracks held not an additional servitude. Walker v. Illinois Cent. R. Co., 215 Ill. 610, 74 N. E. 812. Deed held to convey such rights as would have been acquired by exercise of right of eminent domain. Harman v. Southern R. Co. [S. C.] 51 S. E. 689. Deeds held to confer a right to use for railway purposes, its right of way in a street restricted only by the right of the public to the reasonable use of the avenue and the right not to have a nuisance imposed. Oklahoma City, etc., R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849.

damages resulting from negligence, either in construction, maintenance, or operation of the road.[67] The fee owner of land subject to a railroad right of way may use it for any purposes subject to the easement,[68] a deed to a right of way giving no greater rights than would be acquired by condemnation.[69] A verbal contract giving a railroad company a right to enter upon private property and remove sand cannot be revoked by the landowner giving notice to leave the premises.[70] A contract to convey a right of way is a contract relating to real estate within the recording laws.[71]

Conditions and reservations in private grants.[72]—A grant of right of way for a term of years with a proviso that the grantee may retain the way as long thereafter as he desires, on payment of a stipulated amount, confers a mere option.[73] An agreement in consideration of a grant of right of way to erect and maintain fences along the right of way is a covenant running with the land.[74] A deed of right of way in a street, but not permitting the unlawful operation of the railroad, does not authorize a filling in of the street above the established grade so as to interfere with the grantor's ingress and egress.[75]

Enforcement of conditions.[76]—The grantor is in most cases confined to an action for damages,[77] but specific performance of an agreement to maintain passageways, which has been recognized for many years, will be decreed against a purchaser of the railroad at foreclosure.[78] After a lapse of 30 years a grantor will be presumed to have received the benefit of a condition to change a watercourse.[79] That assurances made by a railroad company as to future conduct were not fulfilled is not ground for canceling a conveyance of right of way unless it appears that they were fraudulently made.[80] An agreement by a railroad company in consideration of a right of way to pay a certain sum, and make certain wagon roads over the tracks, is severable, and the company may thereafter condemn the wagon roads for the purpose of widening its roadway.[81]

Rights as against subsequent grantees.[82]—A grant of exclusive right of way may entitle the grantee to an injunction restraining a third party purchasing with notice, from locating a railroad across the grantee's right of way.[83] In ejectment, possession of a railway roadbed will be presumed to have followed the title until dispossession by defendant, where the tracks were on the land and plaintiff claimed under a series of deeds.[84]

67. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. A charter requirement to construct and maintain bridges and passages over roads does not absolve a company from responding in damages for private rights invaded in the performance of the duty thus imposed. Deed of right of way held not to release damages. Perrine v. Pennsylvania R. Co. [N. J. Law] 61 A. 87.

68. Harman v. Southern R. Co. [S. C.] 51 S. E. 689.

69. Shepard v. Suffolk & C. R. Co. [N. C.] 53 S. E. 137.

70. Cox v. St Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

71. Hurd's Rev. St. 1903, c. 30, § 28. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

72. See 4 C. L. 1187.

73. Alderman & Sons' Co. v. Wilson, 71 S. C. 64, 50 S. E. 643.

74. Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15. Deed construed to require the maintenance of a passenger station on the land granted. St. Louis, etc., R. Co. v. Crandall [Ark.] 86 S. W. 855; Gulf, etc., R. Co. v. Martin [Tex. Civ. App.] 86 S. W. 25. Railroad company held to have no reasonable ground to believe it was authorized to remove sand under a contract for the purchase of land upon condition that a depot be maintained. Cox v. St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

75. Conners v. Yazoo & M. V. R. Co. [Miss.] 38 So. 320.

76. See 4 C. L. 1187.

77. Alleged breach of condition to erect bridge. Bright v. Louisville & N. R. Co., 27 Ky. L. R. 1052, 87 S. W. 780.

78. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

79. Bright v. Loulsville & N. R. Co., 27 Ky. L. R. 1052, 87 S. W. 780.

80. Stannard v. Aurora, E. & C. R. Co. [Ill.] 77 N E. 254.

81. Lilley v. Pittsburg, V. & C. R. Co. [Pa.] 62 A. 852.

82. See 4 C. L. 1187.

83. Alderman & Sons' Co. v. Wilson, 71 S. C. 64, 50 S. E. 643.

Disposal of or use of right of way by company.[85]

Abandonment of right of way.[86]—To constitute abandonment of a right of way, intent to abandon and actual nonuser must concur.[87] Lands deeded to a railroad company in fee simple do not revert to the grantor on abandonment of the location.[88]

Adverse possession by or against railroad.[89]—Use of land for the statutory period in a manner incompatible with its use for railroad purposes may confer title by adverse possession to a part of the right of way;[90] but adverse possession cannot ripen into a right which would divert the use and occupation of a right of way granted by congress for railway purposes exclusively.[91] The maintenance and operation of a railroad over certain land may be sufficient notice to the public of the company's claim, though the deed for right of way is not recorded.[92]

Appropriation of right of way for other public use.[93]—One railroad company cannot, for right of way purposes, condemn the terminal grounds of a projected road soon to be completed;[94] but the mere acquiring and appropriation by one railroad company of certain lands to its own use will not prevent another company from taking the same lands for crossing or intersection purposes, provided such taking will not render the former use ineffectual.[95] A city condemning a street crossing over a railroad acquires only a right of way,[96] and proceedings therefor may be commenced without first attempting to secure the right of way by agreement;[97] but land owned in fee by a railroad company cannot be taken by a municipality for a street crossing without compensation.[98] Under statutes requiring a special procedure where it is sought to lay out a highway over property used for station purposes, whether property is so used is to be determined from the existing conditions.[99]

§ 5. *Aids and bonuses.*[1]—Public land grants to railroads[2] and municipal aid bonds are treated elsewhere.[3]

Subscriptions.[4]—A condition in a bonus note requiring the maintenance of a depot is complied with by the keeping of a freight depot.[5] The payment of a city railroad aid subscription is not contrary to a constitutional provision forbidding the lending of a city's credit for such purposes.[6] Where a railroad aid act provided that after the money had been collected the railroad company should on completing the

84. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 199 U. S. 247, 50 Law. Ed. —.

85, 86. See 4 C. L. 1187.

87. Stannard v. Aurora, E. & C. R. Co. [Ill.] 77 N. E. 254. A railroad company does not abandon river front land conveyed to it for depot purposes by permitting its occasional use as a boat landing. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183.

88. Enfield Mfg. Co. v. Ward [Mass.] 76 N. E. 1053. Evidence held to show no abandonment of title. Id. And see Property, 6 C. L. 1106.

89. See 4 C. L. 1188.

90. Harman v. Southern R. Co. [S. C.] 51 S. E. 689. A user for less than the statutory period is insufficient. Davis v. Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364.

91. Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 P. 401.

92. Harman v. Southern R. Co. [S. C.] 51 S. E. 689.

93. See 4 C. L. 1188.

94. State v. Superior Ct. of Spokane County [Wash.] 82 P. 417.

95. Jennings v. Delaware, L. & W. R. Co., 103 App. Div. 164, 93 N. Y. S. 374. One railroad company will not be enjoined from condemning a right of way over the property of another company where it appears that full redress may be had at law. South & W. R. Co. v. Virginia & S. E. R. Co. [Va.] 51 S. E. 843.

96. Possibility of railroad being required to maintain an overhead crossing is not an element of damages. St. Louis, etc., R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

97. St. Louis, etc., R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

98. Town of Poulan v. Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657.

99. Rev. St. 1883, § 29, c. 18; Rev. St. 1903, § 31, c. 23. "Station purposes" discussed. In re Atlantic & St. L. R. Co. [Me.] 62 A. 141.

1. See 4 C. L. 1183.

2. See Public Lands, 6 C. L. 1126.

3. See Municipal Bonds, 6 C. L. 704.

4. See 4 C. L. 1183.

5. Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co. [Ark.] 88 S. W. 1031.

6. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

road be entitled to demand it, the company is not on such completion entitled to compel by mandamus the levy of a tax to raise the amount donated.[7]

§ 6. *Taxes, fees, and license charges.*[8]—General taxes are levied according to the statutory modes of the several states.[9] For taxation purposes in Illinois a bridge approach, consisting of elevated tracks, embankment and viaduct, located on land purchased for right of way and used exclusively for railroad purposes, is a railroad track.[10] What is the "main stem" of a railroad for purposes of taxation is a question of fact depending on the use of the line at the time of assessment.[11]

§ 7. *Public control and regulation.*[12] *Control by railroad commissions.*[13]—Railroad commissions may inquire into matters concerning public comfort and convenience, and issue orders thereon in accordance with their statutory powers.[14] A company appearing and contesting a matter before a railroad commission cannot complain that the order rendered therein deprives it of property without due process of law.[15] The Mississippi railroad commission is not a court,[16] and its judgments may be reviewed by certiorari.[17] The Connecticut board of railroad commissioners is an administrative body, and its decisions are not subject to review by the courts, the statute to the contrary being unconstitutional.[18] A failure of the commission to give notice to petitioners of a hearing on a grade crossing is not fatal.[19]

§ 8. *Construction and maintenance. Private and farm crossings.*[20]—In the absence of statute[21] or agreement there is no duty to maintain farm crossings for the use of the general public.[22]

Public crossings.[23]—Railroad companies are required to keep their tracks and all approaches thereto at public crossings in good repair.[24] A liability arises from

7. State v. Clinton County Com'rs [Ind.] 76 N. E. 986.

8. See 4 C. L. 1183.

9. People v. Illinois Cent. R. Co., 215 Ill. 177, 74 N. E. 116.

10. Hurd's Rev. St. 1903, c. 120, §§ 40-52, 109. People v. Illinois Cent. R. Co., 215 Ill. 177, 74 N. E. 116.

11. Line used mainly for passenger travel rather than one used mainly for freight is the main stem. Jersey City v. State Board of Assessors [N. J. Law] 63 A. 21.

12. See 4 C. L. 1183. Regulation of tariffs and charges, see Carriers, 5 C. L. 507. As to operation of particular regulations, see also other sections of this topic, as section 7 for regulation of location of stations, and section 11 for regulation of operation of trains.

13. See 4 C. L. 1183.

14. In some states they may designate the location of new stations in case the site selected by the railroad officials is inconvenient and inaccessible. Code 1892, § 4309. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732. The South Carolina commission may determine whether proper passenger service is furnished, and may require specified trains to be stopped at a given station. Mandamus proper remedy. Railroad Com'rs v. Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641. The North Carolina corporation commission may require a railroad company to install track scales where the business justifies it. North Carolina Corp. Commission v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793. The statute creating the Texas railroad commission has been held constitutional, and to confer authority to require two railroads crossing each other to connect their tracks, though they do not cross at grade. Rev, St. 1895, art. 4562. International & G. N. R. Co. v. Railroad Commission [Tex.] 14 Tex. Ct. Rep. 42, 89 S. W. 961.

15. Railroad Com'rs v. Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641.

16. Illinois Cent. R. Co. v. Mississippi R. Commission [C. C. A.] 138 F. 327.

17. Gulf & S. I. R. Co. v. Adams, 85 Miss. 772, 38 So. 348.

18. Gen. St. 1902, §§ 3718, 3747. Appeal of Spencer [Conn.] 61 A. 1010.

19. Appeal of Spencer [Conn.] 61 A. 1010.

20. See 4 C. L. 1189.

21. The private crossing which a railroad is required to establish on demand for one owning land on both sides of the track is such a crossing as will connect the several tracks of his land without requiring him to go to a public highway. Herrstrom v. Newton & N. W. R. Co. [Iowa] 105 N. W. 436. The burden of showing that a landowner accepted a certain bridge in lieu of a private crossing is on the railroad company. Id. Finding that bridge was not accepted by landowner in lieu of a private crossing held sustained by evidence. Id. Practicability of private grade crossing at particular place, held for jury. Id. If a grade crossing is impracticable, construction of an overhead crossing may be required, though the cost exceeds the benefit to the landowner. Id.

22. Johnson v. Chicago, etc., R. Co. [Minn.] 104 N. W. 961.

23. See 4 C. L. 1190.

24. Western R. of Ala. v. Cleghorn [Ala.] 39 So. 133. A railroad company may be

failure to comply with statutes requiring companies to restore streets to their original condition.[25] Mandamus will lie to compel a railroad company to plank and grade crossings,[26] the right of municipalities to do the work and charge the railroad company with the cost not being an adequate remedy.[27] The judgment in such case should specifically direct what is to be done in the construction of the crossing.[28] As a general rule a city or town cannot bind itself by contract with a railroad company to erect and maintain crossing gates and bear the expense of a gateman,[29] but under the Massachusetts highway law such liability may be the subject of contract for a reasonable time at least.[30] Municipal regulation as to precautions at highway crossings must be reasonable, fair, impartial, and not arbitrary or oppressive.[31]

Damages from negligent construction.[32]—Authority to construct a railroad does not exempt the company from responsibility for injuries to private rights, whether resulting from negligence or otherwise,[33] and a liability arises for damages to real property resulting from the construction or operation of a railroad in close proximity,[34] though one obtaining title subsequent to the construction cannot complain.[35] In the selection of a site for its repair and machine shops a railroad cannot act arbitrarily and without reference to damage to property in the vicinity and the discomfort of persons there residing.[36] A company which acts within its authority and exercises reasonable skill and care in construction does not commit a nuisance though property be damaged thereby,[37] and is not liable in damages to one whose residence is thereby rendered uncomfortable and unhealthful.[38]

Establishment of crossings.[39]—In case of steam railroads the court, under 97 O. L. 546, may grant permission to construct a grade crossing conditional upon acquirement by the company, either by agreement with the municipal or other officers in charge of the road or street, or by condemnation, of the right to do so. Such agreement or condemnation need not precede the permission granted by the court.[40]

Abolition and prevention of grade crossings.[41]—Many states require that all

liable for failure to maintain in repair a sidewalk crossing its track. Evidence held sufficient to warrant the finding as to ownership of the track. Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509.

25. Gen. St. 1901, p. 297, § 1316, subd. 4. Atchison, etc., R. Co. v. Townsend [Kan.] 81 P. 205.

26, 27, 28. Vandalia R. Co. v. State [Ind.] 76 N. E. 980.

29. Old Colony R. Co. v. New Bedford, 188 Mass. 234, 74 N. E. 468.

30. Pub. St. 1882, c. 112, § 128. Old Colony R. Co. v. New Bedford, 188 Mass. 234, 74 N. E. 468.

31. Ordinance held invalid as requiring a flagman at unreasonable time. Southern Ind. R. Co. v. Bedford [Ind.] 75 N. E. 268.

32. See 4 C. L. 1190.

33. Gossett v. Southern R. Co. [Tenn.] 89 S. W. 737.

34. Measure of damages. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488. Measure of damages to real property arising from construction and operation of a railroad on contiguous property. Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75; Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. A railroad company removing the lateral support from the property of another is liable for the resulting damages. Map is admissible to show the conditions. After verdict and judgment a railroad company cannot complain for the first time that the jury did not view the property. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613.

35. Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1. The construction of a viaduct connecting a surface line with an elevated road does not render the company liable to an abutting owner who acquired title from the company's grantor and after conveyance to it. Bennett v. Long Island R. Co., 181 N. Y. 431, 74 N. E. 418.

36. Rev. St. 1895, arts. 4424, 4445. Rainey v. Red River, etc., R. Co. [Tex.] 13 Tex. Ct. Rep. 993, 89 S. W. 768.

37. Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1.

38. Atchison, etc., R. Co. v. Armstrong [Kan.] 80 P. 978.

39. See 4 C. L. 1191.

40. In re Avon Beach & S. R. Co., 3 Ohio N. P. (N. S.) 561. The law relating to the establishment of grade crossings (97 O. L. 546) relates exclusively to steam railroads, and in the case of an application to the common pleas court under this act by a railroad for permission to lay its tracks at grade over street crossings, and to prescribe what gates, signals, etc., shall be maintained, if the court find from the testimony that such railroad is not a steam railroad it is without jurisdiction in the premises. Id.

41. See 4 C. L. 1191.

crossings constructed after the enactment of the statute shall be above or below grade unless permission for a crossing at grade be secured,[42] and a preliminary injunction is proper where there is apparently to be a violation of the crossing law.[43] A city may lawfully obligate itself to bear a portion of the expense of abolishing grade crossings.[44] In Illinois a city may compel railroad companies to elevate their tracks, though because thereof certain streets must be vacated or changed.[45]

Damages for change of grade.[46]—A private property owner has an adequate remedy at law for damages alleged to result from the construction and maintenance of an embankment in a street under city ordinance.[47] An abutting property owner is in general entitled to compensation upon the change of a railroad depressed in the street to an elevated road impairing his easements of light and air, though such elevation be required by statute.[48]

Crossings with other railroads, street railroads, and canals.[49]—Upon an application to a court to define the mode in which one railroad may cross another, it is incumbent upon the petitioner to show it had lawful power to construct its road.[50] A railroad company which is under the duty of maintaining an overhead bridge has a right in equity to object to the construction of street car tracks upon the bridge.[51] Where before the service of a restraining order the defendant railroad company has perfected its crossing, and upon the service the complainant company tears up such crossing with violence, and there is doubt as to the title and possession of complainant to the locus in quo, and public interest will be subserved, the order may be dissolved unless the status quo be restored for temporary crossing.[52] The Ohio statute on crossings of two or more steam roads applies to cases where condemnation proceedings had been commenced prior to the passage of the act.[53] A turn-out or switch is within the New York statute on compulsory intersections and crossings.[54] Under the Indiana statute requiring interlockers at railroad crossings, the six months within which such apparatus must be constructed commences to run when the crossing is used as such.[55]

Duty to make transfer connections.[56]—Under the Ohio statutes, where the tracks of a railway company lie contiguous to a manufacturing establishment, and are also connected with the tracks of another railroad company, it is the duty of such first company, on request, to switch the cars arriving by said other company, consigned to such manufacturing establishment, to such contiguous tracks of its own for the purpose of unloading them, and where such company, without valid excuse,

42. P. L. 1901, p. 531. Crossing held to be within the statute. Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100.

43. Borough of Clifton Heights v. Thomas Kent Mfg. Co., 212 Pa. 117, 61 A. 817.

44. Old Colony R. Co. v. Boston [Mass.] 75 N. E. 134. Authority of a city to agree with a railroad company for the joint erection and maintenance of a viaduct does not authorize a contract by which the city alone is to maintain the viaduct in its then form for all time. Vandalia R. Co. v. State [Ind.] 76 N. E. 980.

45. Hurd's Rev. St. 1903, p. 291, c. 24, § 62, cl. 7. People v. Atchison, etc., R. Co., 217 Ill. 594, 75 N. E. 573.

46. See 4 C. L. 1192.

47. Atchison, etc., R. Co. v. Maegerlein, 114 Ill. App. 222.

48. Laws 1892, c. 339. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872.

49. See 4 C. L. 1192.

50. Gen. St. p. 2717. Mercer County Traction Co. v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 61 A. 461.

51. Act of June 19, 1871, P. L. 1360. Pennsylvania R. Co. v. Parkesburg, etc., R. Co., 26 Pa. Super. Ct. 159.

52. Suwannee & S. P. R. Co. v. West Coast R. Co. [Fla.] 39 So. 538.

53. 95 Ohio Laws, p. 530. Wheeling, etc., R. Co. v. Toledo R. & Terminal Co., 72 Ohio St. 368, 74 N. E. 209.

54. Laws 1890, p. 1084, c. 565. Jennings v. Delaware, L. & W. R. Co., 103 App. Div. 164, 93 N. Y. S. 374.

55. Act March 3, 1903, p. 125, c. 59. Not postponed to final termination of litigation. Chicago, etc., R. Co. v. Indianapolis & N. W. Traction Co. [Ind.] 74 N. E. 513.

56. See 4 C. L. 1193.

refuses so to do, the performance of such duty may be enforced by mandatory injunction.[57] In Texas two railroads crossing each other may be required to connect their tracks, although they do not cross at grade.[58]

Cattle guards.[59]—In Texas a failure to maintain the statutory cattle guards renders a railroad company liable for a cattle owner's increased outlay for help.[60] A statute requiring without exception the construction of cattle guards applies in towns and in counties where the stock law is in force.[61]

Fences.[62]—The statutory requirement to fence is not designed for the protection of travelers upon the highway whose horses may become frightened.[63] In Illinois, fences need not be constructed until six months after the running of trains begins, whether for construction or other purposes.[64] Liability for failure to construct or maintain fences is considered elsewhere.[65]

Drainage and disposal of surface water.[66]—A railroad constructing a ditch which discharges surface water onto another's land is not liable for damage alone by surface water emptied into its ditch by strangers without the company's knowledge or consent.[67] The statute of limitations runs against actions for damages from the obstruction of a ditch by natural causes from the time the particular damage is done.[68]

Obstruction of watercourses.[69]—A railroad company electing to close a natural watercourse must construct an artificial channel of sufficient capacity to carry all waters then carried by the natural channel, and also all waters which may thereafter lawfully come to or be turned in to flow through the natural channel.[70] A liability arises for causing water to back upon private property by reason of the negligent construction of a track[71] or a culvert.[72]

Miscellaneous matters.[73]—At common law a railroad company owes to the adjoining owner no duty relative to Johnson grass, growing upon the right of way, except to refrain from actively conveying the noxious weed to such premises.[74] The Texas Johnson grass statute allows recovery without proof of negligence,[75] but there can be no recovery by one who permits Johnson grass communicated by a railroad to mature and go to seed.[76] To allow animals killed by a train to decay on the right of way so that the odor disturbs persons living near is a nuisance for which damages may be recovered.[77] A railroad company may in some states be

57. Rev. St. §§ 3340, 3341. Troy Wagon Works Co. v. C., H. & D. R. Co., 3 Ohio N. P. (N. S.) 412.

58. International & G. N. R. Co. v. Railroad Commission [Tex.] 14 Tex. Ct. Rep. 42, 89 S. W. 961.

59. See 4 C. L. 1193. See post, § 10 F.

60. Rev. St. 1895, §§ 4523, 4527. Missouri, etc., R. Co. v. Wetz [Tex. Civ. App.] 87 S. W. 373.

61. Shepard v. Suffolk & C. R. Co. [N. C.] 53 S. E. 137.

62. See 4 C. L. 1193. See post, § 10 F.

63. Wabash R. Co. v. Gaull, 116 Ill. App. 443.

64. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063.

65. See Duty to maintain fences, § 10 F.

66. See 4 C. L. 1194.

67, 68. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846.

69. See 4 C. L. 1194.

70. Plaintiff not limited to one action for damages and not estopped by having bid on contract. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626.

71. Measure of damages is loss of use of land for crops. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 86 S. W. 1052. Measure of damages in an action by owners of land rented on shares. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997.

72. Shores v. Southern R. Co. [S. C.] 51 S. E. 699; Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281.

73. See 4 C. L. 1194.

74. San Antonio & A. P. R. Co. v. Burns [Tex. Civ. App.] 89 S. W. 21.

75. Act April 18, 1901. San Antonio & A. P. R. Co. v. Burns [Tex. Civ. App.] 89 S. W. 21.

76. Laws 1901, p. 283, c. 117. San Antonio & A. P. R. Co. v. Burns [Tex.] 13 Tex. Ct. Rep. 250, 87 S. W. 1144; San Antonio & A. P. R. Co. v. Burns [Tex. Civ. App.] 89 S. W. 21.

77. Yazoo & M. V. R. Co. v. Sanders [Miss.] 40 So. 163.

liable for treble damages by committing a willful trespass in taking sand from the property of another,[78] but a taking under a claim of right cannot be converted into a willful trespass by a notice to leave the premises.[79] The Illinois Central Railroad Company is not responsible for the conduct of officers of the Illinois Central Hospital.[80] A complaint alleging that defendant railroad company had by collusion allowed another company to use its road to grade a branch, whereby defendant aided such other company to reach plaintiff's possessions which were taken by force and his crops destroyed, does not state a cause of action.[81]

Construction contracts.[82]

§ 9. *Sales, leases, contracts, and consolidation. Lease or joint use of privileges.*[83]—Associations for the joint use of privileges may be formed.[84] The right of a railroad company to do a freight business over the road of another company includes the right to use the main and side tracks for gathering freight.[85] A valid contract between two railroad companies, whereby one is to have the use of the other's road so long as they continue to exist as chartered corporations, is in the nature of a permanent license.[86] The rights of a railway company under a lease from a union station company are not affected by a subsequent lease executed by the station company to another railway company.[87] The Union Pacific Company must allow other railroad companies a joint use of its bridge at Omaha.[88] A stipulation in a lease of privileges on the right of way that the lessee exonerates the railroad company from damage by fire resulting from negligent operation is not against public policy.[89]

Consolidation.[90]—Consolidation defeating competition is frequently prohibited,[91] and a special statute authorizing the consolidation of specified railroads, contrary to the general laws, is unconstitutional as class legislation.[92] In determining whether roads are parallel or competing, the lines which they were authorized to construct, as well as those actually constructed, must be considered.[93]

78. Rev. St. 1899, § 4572. Cox v. St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

79. Cox v. St. Louis, etc., R. Co., 111 Mo. App. 394, 85 S. W. 989.

80. Illinois Cent. R. Co. v. Buchanan, 27 Ky. L. R. 1215, 88 S. W. 312.

81. Henry v. Nashville, etc., R. Co. [Ala.] 38 So. 361.

82, 83. See 4 C. L. 1194.

84. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

85. Dayton & U. R. Co. v. P., C., C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 537.

86. The word "road" will be construed as a generic term, including all present and future facilities. Dayton & U. R. Co. v. P., C., C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 537. A grant by a railroad company of the use of its road for "all trains required in the prosecution of its business" limits the licensee to the business of the grantee company, and the test as to whether the business passing over the road is that of the licensee is to be determined from the facts of the case, and not from the engines or crews used in operating the trains. Id.

87. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

88. 16 St. at L. 430. Union Pac. R. Co. v. Mason City, etc., R. Co., 199 U. S. 160, 50 Law. Ed. —.

89. Mansfield Mut. Ins. Co. v. Cleveland, etc., R. Co. [Ohio] 77 N. E. 269. An exemption from liability for injury by fire to property on the right of way covers the whole of a building partly on the right of way where the part on the right of way was ignited by the operation of the road. Id.

90. See 4 C. L. 1195.

91. Laws 1899, p. 116. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562; Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. A trackage contract between railroad companies, whose tracks are parallel for a distance of fifteen miles and thereafter separate widely, is within the enumerated powers of railroads, and does not destroy but rather creates competition between them, and where in a contract of this character an ultra vires feature is found, which can be eliminated, the remaining portion of the contract is not rendered invalid thereby, nor is ground afforded for forfeiture of the company's charter. Dayton & U. R. Co. v. P., C., C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 537.

92. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732.

93. Lines held not parallel or competing. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562.

Duties and liabilities after sale or lease.[94]—In general the lessor and lessee of a railway are jointly and severally liable for a negligent operation thereof,[95] but under the holdings of the Federal courts a lessor of a railroad track is not liable for the negligence of its lessee in operating its trains on such track.[96] A lessee railroad has no greater right with respect to the leased property than its lessor, and is bound to perform the duties devolving upon the lessor.[97] A railroad company in possession of a switching yard is under the same obligation with respect to the condition and safety thereof as though it owned the property,[98] and may be liable for damages for the killing of stock, though not owning the property if it is operating the road at the time of accident.[99] Ownership of stock in one railroad by another road is competent evidence to show a control and operation thereof.[1] In the absence of statute or a contractual assumption of liability for torts, a vendee is not responsible for the torts of its vendor,[2] and a purchaser at judicial sale is not liable for damages resulting from violations of the preceding company's personal contract unless so assumed or prescribed by decree or statute.[3] The lessee of a railroad line is not an agent of the railroad company on whom process can be served for it.[4] On purchase at foreclosure the successor company takes no greater rights or estate in the site of the roadbed and works than the mortgagor company had.[5]

Contracts for use of bridges.[6]

§ 10. *Indebtedness, insolvency, liens, and securities. Mechanics' and materialmen's liens.*[7]—To confer a lien the circumstances must fall fairly within the

94. See 4 C. L. 1195.

95. Rev. St. Ohio 1892, § 3305, applies only to liabilities growing out of duties as a carrier, and not out of duties as an employer. Beltz v. Baltimore & O. R. Co., 137 F. 1016. Rev. St. Ohio 1892, § 3305. Axline v. Toledo, etc., R. Co., 138 F. 169. Injury to engineer. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898. The lessor is liable for damages from water resulting from its improper construction of a culvert, but for a negligent alteration therein, after lease, the lessee is responsible. Shores v. Southern R. Co. [S. C.] 51 S. E. 699.

Note: The appellee, a switchman in the employ of a company operating the line of the defendant railroad under a lease, was injured in the course of his duty through the negligence of the lessee in furnishing defective appliances. Suit was brought against the lessor railroad. Held that the defendant is liable. Chicago, etc., R. Co. v. Hart, 209 Ill. 414. The lessor railroad has often been held liable, in the absence of statutory exemptions, for torts against the public due to the negligent operation of its line by the lessee. Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574. The basis of such decisions is the requirement, founded on public policy, that the common carrier be held to the proper exercise of its chartered powers and obligations with respect to the public, considering the lessee the agent of the lessor in the discharge of those duties. Between the lessee's servant and the lessor no interdependent relation such as exists between the public and the lessor is established either by charter or by voluntary contract. Consequently, most courts rightly regard the lessee as an independent contractor with the employee, and refuse to charge the lessor with the employer's negligence toward him. East Line, etc., R. Co. v. Culberson, 72 Tex. 375, 13 Am. St. Rep. 805, 3 L. R. A. 567. The principal case seems to find support only in North Carolina. Logan v. North Carolina R. Co., 116 N. C. 940. But for injuries resulting from defects in the roadbed, stations, and premises leased, the lessor is quite generally responsible to employees and to the public alike. Lee v. Southern, etc., R. Co., 116 Cal. 97, 58 Am. St. Rep. 140, 38 L. R. A. 71.—18 Harv. L. R. 152.

96. Yeates v. Illinois Cent. R. Co., 137 F. 943.

97. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732. In Mississippi a new road consolidating with an existing road to form a through line is not warranted in abandoning a portion of the existing line and constructing the through line over another route. Id.

98. Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463. Proof of possession and operation dispenses with proof of ownership. Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501.

99. Karn v. Illinois So. R. Co., 114 Mo. App. 162, 89 S. W. 346.

1. Pennsylvania Co. v. Rossett, 116 Ill. App. 342.

2. Karn v. Illinois So. R. Co., 114 Mo. App. 162, 89 S. W. 346.

3. Damages for failure to maintain depot at specified location. Hukle v. Atchison, etc., R. Co. [Kan.] 80 P. 603.

4. Chicago, B. & Q. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

5. Barker v. Southern R. Co., 137 N. C. 214, 49 S. E. 115.

6, 7. See 4 C. L. 1196.

statute,[8] and the action must be commenced within the specified period.[9] In the absence of fraud or mistake a mechanic's lien once destroyed is not capable of revival even by the subsequent delivery of materials under the same original contract.[10] When that part of a right of way of a railroad company on which labor was performed supporting a lien was a part of the entire railroad system and necessary for carrying out the company's duties to the public, a personal judgment may be given against the railroad company;[11] and so where, though the road is practically completed, the company is not yet engaged in the business of a common carrier.[12] Matters of procedure are discussed in the notes.[13]

Bonds and mortgages.[14]—The ordinary rules as to bonds and the rights of holders thereof apply.[15] A railroad company may be compelled, according to its agreement, to convert its bonds into preferred stock or answer in damages to the extent of the market value of the stock[16] as well as the usual equitable rules as to laches.[17]

Property covered by mortgages.[18]—A claim for the taking of property is a lien upon the road which is not defeated by foreclosure sale unless the lienholder is made a party to the proceedings.[19]

Foreclosure of mortgages.[20]—The right of a trustee to foreclose, as authorized by the mortgage, when in his discretion he might deem it necessary, is not affected by the fact that a competing railroad has secured control of the mortgagor and prevented the payment of interest.[21] A request by a third person in possession of the requisite amount of bonds authorizes the foreclosure of a mortgage granting

8. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395. In Arkansas, one who furnishes material used in the construction of a railroad has a lien therefor regardless of whether the material was sold to the railroad or its contractor (Ozark & C. Cent. R. Co. v. Moran Bolt & Nut Mfg. Co. [Ark.] 86 S. W. 848), but one furnishing supplies to a railroad subcontractor has no lien therefor against the railroad (St. Louis, etc., R. Co. v. Henry [Ark.] 86 S. W. 841). The Arkansas statute does not give a lien for hire of teams or other supplies furnished a subcontractor unless they entered into or became a part of the road. Kirby's Dig. § 6661. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395. To sustain a lien under the Missouri statutes it need not be shown that the materials were actually used for railroad purposes. Rev. St. 1899, § 4239 et seq. Westinghouse Air Brake Co. v. Kansas City So. R. Co. [C. C. A.] 137 F. 26. Under the Indiana statute a lien may be had by laborers employed by a subcontractor in the second degree. Burns' Ann. St. 1901, § 7265. Pere Marquette R. Co. v. Baertz [Ind. App.] 74 N. E. 51; Pere Marquette R. Co. v. Smith [Ind. App.] 74 N. E. 545.

9. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395; Ozark, etc., R. Co. v. Moran Bolt & Nut Mfg. Co. [Ark.] 86 S. W. 848. The acceptance, for a debt secured by a mechanic's lien, of a promissory note which matures subsequent to the time fixed by statute for the commencement of an action to foreclose the lien estops the creditor from enforcing the lien. Westinghouse Air Brake Co. v. Kansas City S. R. Co. [C. C. A.] 137 F. 26.

10. Westinghouse Air Brake Co. v. Kansas City S. R. Co. [C. C. A.] 137 F. 26.

11. Pere Marquette R. Co. v. Baertz [Ind. App.] 74 N. E. 51.

12. Pere Marquette R. Co. v. Smith [Ind. App.] 74 N. E. 545.

13. Under the Arkansas statute a personal judgment against a nonresident subcontractor is not a prerequisite to the declaration of a lien against a railroad. Kirby's Dig. § 6661. St. Louis, etc., R. Co. v. Love [Ark.] 86 S. W. 395. Rev. St. 1899, § 4241, requires "personal" service and does not permit of substituted service. Service must be timely. Dalton v. St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610. To perfect a lien in Tennessee the person claiming the lien must give the statutory notice, a notice by his assignee being insufficient. Shannon's Code, § 3580. Norman & Co. v. Edington [Tenn.] 89 S. W. 744. Under a statute requiring service of lien notice on the person or corporation owning or operating the railroad, service upon a station agent is insufficient. Rev. St. 1899, § 4241. Williams v. Dittenhoefer, 188 Mo. 134, 86 S. W. 242; Dalton v. St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610.

14. See 4 C. L. 1196.

15. Bona fide purchasers. Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000.

16. Bratten v. Catawissa R. Co., 211 Pa. 21, 60 A. 319.

17. Real Estate Trust Co. v. Perry County R. Co. [Pa.] 62 A. 25.

18. See 4 C. L. 1197.

19. Kentucky & I. Bridge & R. Co. v. Clemmons, 27 Ky. L. R. 875, 86 S. W. 1125.

20. See 4 C. L. 1197.

21, 22. Farmers' Loan & Trust Co. v. New York & N. R. Co., 94 N. Y. S. 928.

to the trustee the power to foreclose when requested by "holders" of a specified amount of bonds.[22] The successor to the Union Pacific Railroad Company under a foreclosure sale of the first mortgage did not take the property free from the obligation to allow a joint use of the Omaha bridge.[23]

Receivership.[24]—A judgment against a receiver should not be against him personally, but should run against him in his official capacity and direct payment in due course of administration;[25] though a receiver pendente lite continuing in possession of the railroad after confirmation of a foreclosure sale is individually liable for a tort committed by a servant in operating the road during such continuance in possession.[26] A corporation assuming all liabilities incurred by a receiver is liable for the receiver's tort.[27] The existence of a receivership does not ipso facto divest a railway corporation of its authority to condemn land.[28]

§ 11. *Duties and liabilities incident to operation of road. A. Obligation to operate and statutory regulations. Keeping stations open.*[29]—Courts will not interfere with the closing of stations except in cases of abuse of a railroad company's vested discretion therein.[30] It is the duty of a railroad company to provide a suitable waiting room for passengers and to keep the place open for all trains which stop there, whether regularly or on signal.[31] A company agreeing to stop its train at a station to take on a passenger agrees to keep open its waiting room for the accommodation of the passenger while waiting for the train.[32]

Equipment of cars.[33]—A statute requiring safety couplers on each end of every freight car does not refer to locomotive tenders,[34] and a freight car, being taken to a shop for repairs, is not within a statute prohibiting a railroad company in "moving traffic" from hauling a car not equipped with automatic couplers.[35] Cars equipped with automatic couplers may, under special circumstances of convenience or necessity, be temporarily linked by other devices.[36]

Speed regulations.[37]—By statute a violation of a speed regulation may constitute negligence per se if it be the proximate cause of injury,[38] though in some states excessive speed is made only presumptive evidence of negligence.[39] That a passenger train is running 25 minutes behind schedule time does not show negligence on the part of the company.[40] An ordinance providing that it shall be unlawful for any engineer, conductor, or other "person" to run or permit to be run any train faster than a given rate of speed through a city applies to railroad corporations.[41]

Precautions at highway crossings.[42]—Under its general police powers a city

23. Union Pac. R. Co. v. Mason City, etc., R. Co., 199 U. S. 160, 50 Law. Ed. —.
24. See 4 C. L. 1198.
25. Malott v. Mapes, 111 Ill. App. 340.
26. Larsen v. United States Mortg. & Trust Co., 104 App. Div. 76, 93 N. Y. S. 610.
27. Baer v. Erie R. Co., 95 N. Y. S. 486.
28. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.
29. See 4 C. L. 1199.
30. Chicago, etc., R. Co. v. State [Neb.] 103 N. W. 1087.
31. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520.
32. Draper v. Evansville, etc., R. Co. [Ind.] 74 N. E. 889.
33. See 4 C. L. 1199.
34. Comp. Laws 1897, § 5511. Blanchard v. Detroit & M. R. Co. [Mich.] 12 Det. Leg. N. 30, 103 N. W. 170.
35. Rev. Laws, c. 111, §§ 203, 209. Taylor v. Boston & M. R. Co., 188 Mass. 390, 74 N. E. 591.
36. Whalin v. Illinois Cent. R. Co., 112 Ill. App. 428.
37. See 4 C. L. 1199.
38. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8; Chicago, etc., R. Co. v. Crose, 113 Ill. App. 547; Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418; Illinois Cent. R. Co. v. Watson [Miss.] 39 So. 69. Violation of speed ordinance held not to be proximate cause of injury. Missouri, etc., R. Co. v. Penny [Tex. Civ. App.] 13 Tex. Ct. Rep. 196, 87 S. W. 718.
39. Sec. 24, chap. 114, R. S. Chicago & W. I. R. Co. v. Zerbe, 110 Ill. App. 171
40. Keiser v. Lehigh Valley R. Co., 212 Pa. 409, 61 P. 903.
41. Southern R. Co. v. Jones, 33 Ind. App. 333, 71 N. E. 275.
42. See 4 C. L. 1200.

may require the erection of gates,[43] and the courts will not interfere with the location of the machinery required to operate the gates unless it necessarily interferes with the use of the street.[44]

Obstruction of crossings.[45]—In some states punitive damages are allowed for unlawful obstruction of crossings.[46]

Stops at railroad crossings.[47]—Failure to stop at a railroad crossing as required by statute is negligence.[48] Duties concurrent in point of time are imposed upon both steam and street railway companies at grade crossings, and a failure on the part of either company to maintain gates or take other required precautions will render such company liable for negligence in case of injuries resulting.[49] The conductor of a street car may assume that the employes of a railroad company will comply with such a regulation, he having done so.[50] Where the condition of a semaphore at the time of accident is a material question, a witness may state its condition at that time or soon after.[51]

Maintaining telegraph offices.[52]

(§ 11) *B. General rules of negligence and contributory negligence.*—Railway companies, in the absence of statutory limitations, are vested with a very broad discretion in the matter of locating and operating their railways and stations,[53] but the right of a railroad company to operate its trains is subject to the restrictions of reasonable prudence.[54] The duty to avoid injury to those on the train and to the train itself is paramount to the duty to avoid injury to trespassing stock upon the track.[55] As to all persons who are rightfully on or about its tracks,[56] a railroad company owes the duty of observing all statutory precautions,[57] and in addition to these, of taking every precaution dictated by reasonable prudence.[58] A railroad company is of course liable only for injuries proximately resulting[59] from negligence

43. Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995. A borough has power under the "general welfare" clause of the borough act to require a railroad company to erect, maintain, and operate at its own expense safety gates at street crossings. Act of April 3, 1851, P. L. 320. Pennsylvania R. Co.'s Case, 27 Pa. Super. Ct. 113.

44. Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995.

45. See 4 C. L. 1200.

46. Tutwiler Coal, Coke & Iron Co. v. Nall, 141 Ala. 374, 37 So. 634.

47. See 4 C. L. 1200.

48. Code 1896, § 3441. Southern R. Co. v. Williams [Ala.] 38 So. 1013.

49. Kopp v. B. & O. S. W. R. Co., 6 Ohio C. C. (N. S.) 103.

50. For the jury, whether a street car conductor is guilty of contributory negligence going only to the middle of a crossing, whereas the statute required him to go to the opposite side. Southern R. Co. v. Jones [Ala.] 39 So. 118.

51. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558.

52. See 4 C. L. 1200.

53. Chicago & N. W. R. Co. v. State [Neb.] 103 N. W. 1087.

54. Pyne v. Delaware, etc., R. Co., 212 Pa. 143, 61 A. 817. In some states a railroad company is liable for damages for injury to any person on its tracks, whether at a public crossing or elsewhere, arising from negligent operation of the train. Ray v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762. To back a freight train along a side track in a town at dusk without lights or other warning is negligence. St. Louis, etc., R. Co. v. Johnson [Ark.] 86 S. W. 282. Under a statute requiring signals when a person or object appears "on the road," such warning need not be given until the object is near enough to be struck by a passing train. Shannon's Code Tenn., §§ 1574, 1575. Rogers v. Cincinnati, etc., R. Co. [C. C. A.] 136 F. 573.

55. Best v. Great Northern R. Co. [Minn.] 103 N. W. 709.

56. As to trespassers, see post, § 11 E.

57. Federal courts will follow the construction given by state courts to state statutes on railway injuries. Rogers v. Cincinnati, etc., R. Co. [C. C. A.] 136 F. 573.

58. It is negligence to operate a train at night at such a speed that it cannot be stopped within the distance that the headlight illuminates the track. Western R. of Ala. v. Stone [Ala.] 39 So. 723.

59. Fright of horse and not defective character of crossing held proximate cause of accident. Norfolk & W. R. Co. v. Gee [Va.] 52 S. E. 572. Whether allowing an engine to stand on a street crossing for more than five minutes was the cause of the injury to one hurt by a team which became frightened at the engine is for the jury. Burns v. Delaware & Hudson Co., 96 N. Y. S. 509. Failure to slacken speed at a crossing as required by law is not the proximate cause of injury to cattle which came suddenly on the track at a point some distance beyond

for which it is responsible.[60] Persons on or about the tracks owe a correlative duty of due care and vigilance, and the ordinary rules as to imputed negligence apply;[61] but one finding himself without fault in a position of imminent peril is not negligent, though from fright he fails to act with prudence in endeavoring to extricate himself,[62] and statutes have to some extent rendered railroad companies liable for omission of prescribed precautions irrespective of contributory negligence.[63] After one is discovered to be in a position of peril, though he was placed therein by his own fault, the company must exercise reasonable care to avoid injury to him.[64]

(§ 11) *C. Damage to passengers and freight.*[65]

(§ 11) *D. Injuries to employes.*[66]

(§ 11) *E. Injuries to licensees and trespassers. General rules.*[67]—In general, a railroad company owes to all persons along its tracks, the duty of refraining, as to them, from active misconduct and wanton or willful injury,[68] though in some states a company owes to trespassers no duty until their peril is known.[69] It is not generally responsible for mere negligence toward trespassers,[70] though

the crossing. Central of Georgia R. Co. v. Duggan [Ga.] 52 S. E. 768. Fright of horse and not negligent conduct of employes at crossing held proximate cause. Courtney v. Minneapolis, etc., R. Co. [Minn.] 106 N. W. 90.

60. That a railroad company uses the track of another road for switching does not make it liable for an accident on such track due entirely to defects in the roadbed. Collier v. Great Northern R. Co. [Wash.] 82 P. 935.

61. Where the parent suing for killing of infant was negligent in permitting the child to go on the track unattended, no recovery can be had except for failure to avoid injury after discovery of peril. St. Louis S. W. R. Co. v. Cochran [Ark.] 91 S. W. 747.

62. Where one was not negligent in going on a crossing, his acts in endeavoring to escape injury after discovering that he was in imminent peril are not to be judged by standard of prudence under ordinary circumstances. Bilton v. Southern Pac. R. Co. [Cal.] 83 P. 440. One who by his negligence puts himself in peril is not within the rule as to acts in the presence of sudden danger. Hood v. Lehigh Valley R. Co., 109 App. Div. 418, 96 N. Y. S. 431.

63. A statute making a railroad company liable for certain negligent acts without regard to contributory negligence does not apply where the conduct of the person injured was deliberate and reckless. Rev. Code 1892, § 3549. Plaintiff seeing a train but a few feet away attempted to cross in front of it. Sledge v. Yazoo & M. V. R. Co. [Miss.] 40 So. 13. Where one has not been negligent in placing himself in danger, he is not negligent in exercising poor judgment in the means taken to extricate himself. Chicago & E. I. R. Co. & Western I. R. Co. v. Eganolf, 112 Ill. App. 323. Plaintiff's conduct held not so variant from that of an ordinarily prudent person as to constitute contributory negligence as a matter of law. Plaintiff startled by sudden appearance of unannounced train and fell onto track. Morey v. Lake Superior Terminal & Transfer R. Co., 125 Wis. 148, 103 N. W. 271.

64. Engineer seeing a person 175 feet ahead and 18 feet from track need not stop. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136. Contributory negligence is no defense where defendant's employes fail to avail themselves of the last clear chance to avert the injury. Reid v. Atlanta & C. Air Line R. Co. [N. C.] 52 S. E. 307.

65. See Carriers, 5 C. L. 507.

66. See Master and Servant, 6 C. L. 521.

67. See 4 C. L. 1200.

68. Chicago & Grand Trunk R. Co. v. McDonough, 112 Ill. App. 315; Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230; Seaboard & R. R. Co. v. Vaughan's Adm'x [Va.] 51 S. E. 452; Hern v. Southern Pac. Co. [Utah] 81 P. 902; Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827; Keller v. Erie R. Co. [N. Y.] 75 N. E. 965; Williamson v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 510, 88 S. W. 279; Burns v. St. Louis S. W. R. Co. [Ark.] 88 S. W. 824; Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416. Failure to signal to pedestrian on track. Reyburn v. Missouri Pac. R. Co., 187 Mo. 565, 86 S. W. 174. Wanton injury inflicted by company's employe operating railroad tricycle furnished by company. Barmore v. Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210. Negligence of defendant railroad company for the jury. Breeze v. MacKinnon Mfg. Co. [Mich.] 12 Det. Leg. N. 195, 103 N. W. 908. Evidence held to show that plaintiff, a loiterer, was a trespasser. Hern v. Southern Pac. Co. [Utah] 81 P. 902. Evidence held to show plaintiff's intestate was not a trespasser. Elgin, etc., R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109; Vicksburg, etc., R. Co. v. Barmore [Miss.] 39 So. 1013.

69. Bartlett v. Wabash R. Co., 116 Ill. App. 67; Louisville, etc., R. Co. v. Hathaway's Ex'x [Ky.] 89 S. W. 724; Clemans v. Chicago, etc., R. Co. [Iowa] 104 N. W. 431; Yates v. Illinois Cent. R. Co. [Ky.] 89 S. W. 161.

70. Chicago, etc., R. Co. v. McDonough, 112 Ill. App. 315. Trespasser on tracks taking no precaution cannot throw upon trainmen the entire duty of securing his safety. White v. Illinois Cent. R. Co., 114

otherwise as to licensees[71] who are entitled to ordinary care.[72] In general, engineers must keep a look out for licensees,[73] but not for trespassers,[74] while in some states they are under no obligation to be on the look out for trespassers upon the track,[75] and neither violation of speed ordinance[76] nor failure to give customary signals is negligence as to a trespasser;[77] and in all states after the discovery of a trespasser on the track, ordinary care should be used to avoid injury,[78] though there be con-

La. 825, 38 So. 574. Contra, Ray v. Chesapeake & O. R. Co., 57 W. Va. 333, 50 S. E. 413.

71. Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24. A judgment for plaintiff will not be disturbed where it does not conclusively appear that defendant was free from negligence in the case of a turntable upon which a child was injured. Berg v. Minneapolis & St. L. R. Co. [Minn.] 104 N. W. 293.

72. Elgin, etc., R. Co. v. Thomas, 115 Ill. App. 508; Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24; Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. Evidence held insufficient to show that by exercise of ordinary care defendant could have stopped a train in time to prevent a derailed car from striking a licensee bill poster. Harper v. St. Louis Merchants' Bridge Terminal Co., 187 Mo. 575, 86 S. W. 99. As to a licensee a company is under no obligation to equip its locomotive with a light. Williamson v. Southern R. Co. [Va.] 51 S. E. 195. A railroad company must use reasonable care to discover and avoid injuring persons whom it may reasonably expect to be upon its tracks. Id.; Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24. A railroad whose line occupied a street must employ reasonable means and exercise reasonable care in unloading its cars to avoid injuring a person in the street. St. Louis S. W. R. Co. v. Underwood [Ark.] 86 S. W. 804.

73. Chicago & A. R. Co. v. Mayer, 112 Ill. App. 149; Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 943; Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24. Contra. Kinnare v. Chicago & N. W. R. Co., 114 Ill. App. 230. A railroad company owes no duty to a trespasser or licensee except to refrain from wantonly or willfully injuring him. Elements of willful negligence considered. McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262.

74. Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230; Yates v. Illinois Cent. R. Co. [Ky.] 89 S. W. 161; Louisville, etc., R. Co. v. Hathaway's Ex'x [Ky.] 89 S. W. 724.

75. Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055; Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827; Hulsey's Adm'r v. Louisville, etc., R. Co., 27 Ky. L. R. 969, 87 S. W. 302. The rule that a railroad is not bound to keep a lookout for trespassers on the track is subject to an exception in case of the operation of trains through cities (Johnson v. Louisville & N. R. Co. [Ky.] 91 S. W. 707), but this does not apply to operation through a stock yard (Id). The entire duty toward a trespasser on the track is to use due care to avoid injuring him after it is discovered not only that he is on the track but that he does not heed the approaching train. Copp v. Maine Cent. R. Co. [Me.] 62 A. 735; Louisville & N. R. Co. v. Redmon's Adm'x [Ky.] 91 S. W. 722.

76. Louisville & N. R. Co. v. Redmon's Adm'x [Ky.] 91 S. W. 722.

77. Louisville & N. R. Co. v. Redmon's Adm'x [Ky.] 91 S. W. 722. That by ordinary vigilance a trespasser on the track could have been discovered in time to avert injury will not make the company liable. Barry v. Kansas City, etc., R. Co. [Ark.] 91 S. W. 748.

78. St. Louis, etc., R. Co. v. Evans [Ark.] 86 S. W. 426; Reyburn v. Missouri Pac. R. Co., 187 Mo. 565, 86 S. W. 174; Hall v. Western & A. R. Co., 123 Ga. 213, 51 S. E. 311; Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89; Bartlett v. Wabash R. Co., 116 Ill. App. 67; Louisville, etc., R. Co. v. Hathaway's Ex'x [Ky.] 89 S. W. 724. After discovery of peril every effort must be used to avoid killing a trespasser. Hulsey's Adm'r v. Louisville, etc., R. Co., 27 Ky. L. R. 969, 87 S. W. 302; Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055; Yates v. Illinois Cent. R. Co. [Ky.] 89 S. W. 161. Evidence held insufficient to raise the question of discovered peril. Tull v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 395, 87 S. W. 910. Evidence held not to show negligence of engineer. Burns v. St. Louis S. W. R. Co. [Ark.] 88 S. W. 824. Evidence held sufficient to justify a finding that by the exercise of ordinary care the train could have been stopped in time to avoid injury. St. Louis, etc., R. Co. v. Hill [Ark.] 86 S. W. 303. For the jury whether trainmen were negligent after discovery of peril. Clemans v. Chicago, etc., R. Co. [Iowa] 104 N. W. 431. The statutory presumption of negligence from injury by the operation of a train is overcome in case of injury to a person on the track by evidence that the train was running at a moderate speed and every effort made to stop as soon as he was seen. Korter v. Gulf & S. I. R. Co. [Miss.] 40 So. 258. Where a person is seen walking on the track an alarm signal must be given at such distance as will enable him to get off on hearing it. Kelley v. Ohio River R. Co. [W. Va.] 52 S. E. 520. Blowing whistle and effort to stop held due care toward trespasser. Copp v. Maine Cent. R. Co. [Me.] 62 A. 735. Where the evidence shows that the whistle was blown as soon as a trespasser was discovered and that every effort was made to stop the train when it was seen that he did not heed the warning, there is no evidence of willful injury. Bartlett v. Wabash R. Co. [Ill.] 77 N. E. 96. The persons in charge of a train are not bound to stop or even slacken speed on seeing a person on the track. Copp v. Maine Cent. R. Co. [Me.] 62 A. 735. Trainmen see-

tributory negligence by the trespasser.[79] Failure to observe statutory regulations may be negligence[80] but does not import a wantonness or willfulness by the company's servants.[81] Contributory negligence may bar recovery,[82] but a licensee is not guilty of negligence per se in being on a railroad right of way.[83]

Employes of other roads and of independent contractors.[84]—A company must use ordinary care for the safety of a person carried gratuitously,[85] and must exercise a reasonable care to avoid injuring a railway mail clerk,[86] or an employe of another road,[87] and owes to the employes of the express company operating on its lines the duty of furnishing a reasonably safe passageway from the depot to the train.[88] A railroad company is not responsible for defects in its cars furnished to an employer of one injured by reason of such defects.[89] Contributory negligence will bar recovery.[90] One may be negligent in acting on information as to the delay of a train received one hour before.[91] A railroad owes due care to one entering its yard as an employe of an independent contractor.[92] No duty to employe of another railroad fencing a parallel track except to avoid injuring him after he is observed to be in dangerous place.[93]

Persons at stations.[94]—A passenger going to a depot and finding it locked near train time does not become a trespasser by entering the room, which is opened and

ing a person walking beside the track ahead of the train are not bound to anticipate that he will go on the track. Louisville & N. R. Co. v. Redmon's Adm'x [Ky.] 91 S. W. 722. Evidence in case of injury to trespasser on track held for jury. Louisville & N. R. Co. v. Daniel [Ky.] 91 S. W. 691.

79. St. Louis, etc., R. Co. v. Evans [Ark.] 86 S. W. 426; Bartlett v. Wabash R. Co., 116 Ill. App. 67.

80. Shannon's Code Tenn. §§ 1574, 1575. Rogers v. Cincinnati, etc., R. Co. [C. C. A.] 136 F. 573.

81. Failure to provide car brakes (Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416), and a city speed ordinance is inapplicable in favor of a trespasser injured by being struck by a train within the city limits (Clemans v. Chicago, etc., R. Co. [Iowa] 104 N. W. 431).

82. Yates v. Illinbis Cent. R. Co. [Ky.] 89 S. W. 161; Huber v. Chicago, B. & Q. R. Co. [Neb.] 103 N. W. 51; Risque's Adm'r v. Chesapeake & O. R. Co. [Va.] 51 S. E. 730. Bicycle rider. Seaboard & R. R. Co. v. Vaughan's Adm'x [Va.] 51 S. E. 452. Where plaintiff's evidence shows circumstances of contributory negligence, defendant may take advantage thereof though the plea of contributory negligence was stricken out. Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89.

83. Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24. One going upon a railroad company's property in good faith for the purpose of becoming a passenger is not a trespasser. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8.

84. See 4 C. L. 1202.

85. A laborer employed by a railroad company and carried gratuitously to and from his work is entitled to care required toward a servant. Riding on top of box car. Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345.

86. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530.

87. Chicago & Alton R. Co. v. Vipond, 112 Ill. App. 558; Mintram v. New York, etc., R. Co., 104 App. Div. 38, 93 N. Y. S. 331. An employe of one road, lawfully upon the tracks of another under the terms of a written lease, is entitled to the exercise of ordinary care by such lessor (Loomis v. Lake Shore & M. S. R. Co., 182 N. Y. 380, 75 N. E. 228), and may assume that all of its rules will be observed in the moving of trains (Id). Complaint held to show a cause of action against each of several roads. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Servants of a company operating cars on the tracks of another under a contract may recover from the company owning the tracks for injuries resulting from negligence of its employes. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990.

88. Harvey v. Louisiana Western R. Co., 114 La. 1065, 38 So. 859.

89. Risque's Adm'r v. Chesapeake & O. R. Co. [Va.] 51 S. E. 730.

90. Failure to descend from freight car and signal approaching train having the right of way. Northern Pac. R. Co. v. Cummiskey [C. C. A.] 137 F. 508. Negligence and contributory negligence for the jury. Loomis v. Lake Shore, etc., R. Co., 182 N. Y. 380, 75 N. E. 228.

91. Northern Pac. R. Co. v. Cummiskey [C. C. A.] 137 F. 508.

92. Caffi v. New York Cent., etc., R. Co., 96 N. Y. S. 835. Failure to carry a light on an engine in the yard as is customary will sustain a finding of negligence where no substituted warning was given. Caffi v. New York Cent., etc., R. Co., 96 N. Y. S. 835.

93. Evidence held not to show negligence. Mobile & O. R. Co. v. Dowdy's Adm'x [Ky.] 91 S. W. 709. Person required to work on and about tracks held not guilty of contributory negligence. Sherrill v. Southern R. Co. [N. C.] 52 S. E. 940.

94. See 4 C. L. 1203.

lighted by one not an agent of the company.[95] A declaration against a railroad company for injuries received from the negligence of an express company occupying property leased from the former company is insufficient if it fails to show defendant's relation to the property, or the location thereof, or the reason for plaintiff's presence.[96]

Persons having relation to passenger.[97]—A railroad company owes, to one who comes to its station to receive a friend or guest, ordinary care for his safety while at the station.[98] One walking on a sidetrack of a railroad from the depot to a train on the main line in order to take passage on such train is a passenger and not a trespasser.[99]

Persons loading and unloading cars.[1]—Persons upon the right of way for the purpose of loading or unloading cars are not trespassers.[2] They must use ordinary care for their own safety but are not bound to anticipate danger,[3] and are entitled to the exercise of reasonable care and skill on the part of the railroad.[4] A railroad company is bound to have its premises to which persons resort on business with it in reasonably safe condition.[5] One entering a railroad yard on business at the invitation of the company is bound to exercise reasonable care.[6] The general rules of contributory negligence apply.[7]

Children on or near tracks.[8]—A railroad company may assume that no children are playing about its cars unless it has reasonable grounds to anticipate their presence,[9] but thereafter it cannot assume that the child will remain in or seek a place of safety.[10] The company must exercise ordinary care under the existing circumstances with reference to keeping a lookout,[11] and in stopping a train after the realization of danger.[12] It is generally for the jury to say whether a child is capable of understanding and avoiding the dangers to be encountered upon railroad tracks,[13] but walking along railroad tracks and over cattle guards is so danger-

95. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520.

96. Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619.

97. See 4 C. L. 1203.

98. Atlantic & B. R. Co. v. Owens, 123 Ga. 393, 51 S. E. 404.

99. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

1. See 4 C. L. 1203.

2. Southern R. Co. v. Goddard [Ky.] 89 S. W. 675.

3. Southern R. Co. v. Goddard [Ky.] 89 S. W. 675. A railroad company hauling rock from a quarry on a spur track owned by the quarry company is liable for injuries to an employe of the quarry company caused by defective equipment of a car. Hale v. New York, etc., R. Co. [Mass.] 76 N. E. 656.

4. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29. For the jury whether company negligent. Southern R. Co. v. Goddard [Ky.] 89 S. W. 675. Company guilty of gross negligence. Elgin, etc., R. Co. v. Thomas, 115 Ill. App. 508. A railroad company is liable for injuries to a freight handler caused by its negligence, though he is not in the employ of the railroad company. Defective brakes. Wheeling & L. E. R. Co. v. Rupp, 6 Ohio C. C. (N. S.) 273.

5. Colorado & S. R. Co. v. Sonne [Colo.] 83 P. 383.

6. Colorado & S. R. Co. v. Sonne [Colo.] 83 P. 383. One familiar with switching operations who crossed a switch track without looking or listening. Id.

7. Hickey v. Rio Grande Western R. Co. [Utah] 82 P. 29; Johnson v. Minneapolis, etc., R. Co. [Mich.] 12 Det. Leg. N. 149, 103 N. W. 594; Southern R. Co. v. Goddard [Ky.] 89 S. W. 675. Person sitting on track after unloading car. Texas, etc., R. Co. v. McDonald [Tex.] 13 Tex. Ct. Rep. 337, 88 S. W. 201.

8. See 4 C. L. 1203.

9. Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827; Kinnare v. Chicago & N. W. R. Co., 114 Ill. App. 230. The court will not presume a permissive license by a railroad company that its road bed be converted into a play ground for children. Huber v. Chicago, etc., R. Co. [Neb.] 103 N. W. 51.

10. In an action for death of a child killed in attempting to mount cars running down grade unattended, held a question for the jury whether defendant was negligent in releasing the cars. Ott v. Johnson [Tex. Civ. App.] 86 S. W. 649.

11. Woods v. Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

12. Evidence held to sustain verdict for plaintiff. Woods v. Wabash R. Co., 188 Mo. 229, 86 S. W. 1082. Evidence held insufficient to show negligence of railroad employes. Freels v. Louisville, etc., R. Co. [Ky.] 89 S. W. 143.

13. Child of seven years, ten months.

ous that plaintiff's youth may not entirely exonerate him.[14] Contributory negligence of the parent will bar recovery.[15] It is not negligence to maintain an unlocked turntable near public grounds.[16]

Adults walking on tracks.[17]—In general one walking along the tracks of a railroad, except when necessary to cross upon some street, highway, or public place, is entitled only to the care required toward a trespasser,[18] and is in some states guilty of such negligence as to bar recovery for an injury resulting therefrom[19] unless from custom or otherwise the injured person can claim rights as a licensee,[20] or the operatives of the train saw the trespasser in time to avoid injury by the exercise of ordinary care.[21] Statutes may prohibit all persons except those connected with the railroad from walking upon its tracks at any other places than street and highway crossings,[22] and under such statutes a presumptive right to cross the tracks at a point not a street or highway crossing cannot be acquired even by long user, when it is necessary to walk along the tracks of an intersecting railroad to reach such point of crossing.[23]

Persons along or between tracks.[24]—When a track is laid along a public highway the rights of the public and the railroad company are equal,[25] and the company is charged with greater care to avoid injury to travelers.[26] A lookout must be kept for licensees along a recognized path,[27] but the engineer may assume that a pedestrian at the side of the track will remain there or step back when the train approaches.[28] Where the "locus in quo" is to be considered a public street, one injured upon the track of a railroad company cannot be deemed a trespasser,[29] nor is one a trespasser who follows a pedestrian beaten path in an attempt to board a train about to leave, though this path is some feet away from the depot.[30] Persons

Kinnare & Chicago, etc., R. Co., 114 Ill. App. 230.

14. Age 15. Woods v. Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

15. Pollack v. Pennsylvania R. Co. [Pa.] 60 A. 312.

16. Walker's Adm'r v. Potomac, etc., R. Co. [Va.] 53 S. E. 113, repudiating, after extensive discussion, the doctrine of the "attractive nuisance" cases. Contra. Wheeling & L. E. R. Co. v. Harvey, 7 Ohio C. C. (N. S.) 57.

17. See 4 C. L. 1204.

18. Keller v. Erie R. Co. [N. Y.] 75 N. E. 965. Whether the maintaining of a pile of cinders along a track is negligence is for the jury. Missouri, etc., R. Co. v. Penny [Tex. Civ. App.] 13 Tex. Ct. Rep. 196, 87 S. W. 718. Person using railroad track as a path is a trespasser and the company is bound only to refrain from wanton injury. Bartlett v. Wabash R. Co. [Ill.] 77 N. E. 96.

19. To walk on tracks on a dark night without attentively watching and listening is gross negligence. White v. Illinois Cent. R. Co., 114 La. 825, 38 So. 574. Where plaintiff was walking on the track and did not look behind him and signals were given as soon as his presence was discovered. Williams v. Central of Georgia R. Co. [Ala.] 40 So. 143. Trespasser failing to exercise vigilance to discover approaching trains cannot recover. Limb v. Kansas City, etc., R. Co. [Kan.] 84 P. 136.

20. A person walking along the roadbed which the company has for years knowingly permitted the public to use as a walk way is a licensee and is not guilty of negligence as a matter of law in walking on the track. Gulf, etc., R. Co. v. Matthews [Tex.] 13 Tex. Ct. Rep. 244, 88 S. W. 192. Evidence held not to show contributory negligence. Illinois Cent. R. Co. v. Watson [Miss.] 39 So. 69.

21. Burns v. St. Louis S. W. R. Co. [Ark.] 88 S. W. 824; Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89.

22. Laws 1892, p. 1394, c. 676, § 53. Keller v. Erie R. Co. [N. Y.] 75 N. E. 965.

23. Keller v. Erie R. Co. [N. Y.] 75 N. E. 965.

24. See 4 C. L. 1205.

25. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 13 Tex. Ct. Rep. 401, 87 S. W. 853.

26. Instructions on necessary care considered. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 13 Tex. Ct. Rep. 401, 87 S. W. 853.

27. Negligence and contributory negligence for the jury. Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 832, 89 S. W. 24; Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983.

28. Bicycle rider. Seaboard & R. R. Co. v. Vaughan's Adm'x [Va.] 51 S. E. 452. Railroad employes seeing a man lying beside the track are not negligent in failing to stop the train in anticipation that he would place his arm upon the rail before the train reached him. Louisville, etc., R. Co. v. Hathaway's Ex'x [Ky.] 89 S. W. 724.

29. Illinois Terminal R. Co. v. Mitchell, 116 Ill. App. 90.

walking on a railroad track are bound to be continually on the lookout for approaching trains.[31]

Persons standing, sitting, or lying on track.[32]—Sitting or lying upon a railroad track is contributory negligence,[33] and the sole duty of the company is to use all means in its power to keep from injuring a person so situated after discovery.[34]

Persons on bridges or trestles.[35]—One going upon a trestle is a trespasser,[36] and the engineer is under no duty to keep a lookout for such nor give warning of approach,[37] but the company may be liable for physical injury resulting from fright caused by failure to stop a train while crossing a bridge on which a person is known to be walking.[38] A railroad company is under no special obligation of care toward a trespassing child using a stone bridge abutment as a passway.[39] No liability exists for injury to a person arising from his misjudgment of space in driving under the company's bridge.[40] A person near a railroad crossing though having no intention of crossing the tracks, is entitled to the benefit of the statutory signals.[41]

Persons near crossings. Persons crossing tracks away from established crossings.[42]—Occasional use by the public of an enclosed right of way,[43] failure of a railroad company to proceed criminally against persons walking on its tracks, does not amount to a license;[44] but where trespassers habitually use a railroad track at a certain place, the railroad company is required to take notice of the fact and either provide for their exclusion or take precautions against injury,[45] though acquiescence in use by public of place other than public crossing imposes no duty to keep such place free from the appliances and machinery used in the operation of the road.[46] One about to cross a railroad track is bound not only to look and listen but to continue to use his eyes and ears until he has passed out of danger,[47] though in Texas it is for the jury to say whether he should look and listen, a failure to do so not being negligence per se.[48] A person having an impediment in his walk is not re-

30. Willis v. Vicksburg, etc., R. Co. [La.] 38 So. 892.

31. Copp v. Maine Cent. R. Co. [Me.] 62 A. 735.

32. See 4 C. L. 1205.

33. Ayers v. Wabash R. Co., 190 Mo. 228, 88 S. W. 608; Hall v. Western & A. R. Co., 123 Ga. 213, 51 S. E. 311; Texas & N. O. R. Co. v. McDonald [Tex.] 13 Tex. Ct. Rep. 337, 88 S. W. 201.

34. Hall v. Western & A. R. Co., 123 Ga. 213, 51 S. E. 311. Evidence held to require submission of whether injury to one killed while lying unconscious on the track could have been avoided after discovering his peril. Plemmons v. Southern R. Co. [N. C.] 52 S. E. 953.

35. See 4 C. L. 1206.

36. Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055. One going upon a trestle directly in front of a train is prima facie guilty of contributory negligence. International, etc., R. Co. v. De Ollos [Tex. Civ. App.] 76 S. W. 222.

37. Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055.

38. Complaint held to state a cause of action. Hendrix v. Texas & P. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 895, 89 S. W. 461.

39. Child not a licensee. Williamson v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 510, 88 S. W. 279.

40. Steele v. Central of Georgia R. Co., 123 Ga. 237, 51 S. E. 438.

41. Rev. St. 1895, § 4567. St. Louis S. W. R. Co. v. Kilman [Tex. Civ. App.] 86 S. W. 1050.

42. See 4 C. L. 1206.

43. Louisville & N. R. Co. v. Redmon's Adm'x [Ky.] 91 S. W. 722.

44. Copp v. Maine Cent. R. Co. [Me.] 62 A. 735.

45. Evidence held for jury. Louisville & N. R. Co. v. Daniel [Ky.] 91 S. W. 691. Where a railroad company established a gate at a place where a street abuts on the right of way, and a great number of people habitually cross the tracks there, the railroad company is bound to use ordinary care to avoid injury to persons so crossing. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. When the long continued and frequent use of a pathway crossing is acquiesced in by a railroad company. Person crossing tracks to reach private boat house held to be trespasser. Clark v. New York, etc., R. Co., 104 App. Div. 167, 93 N. Y. S. 525. It must exercise proper care in the operation of its trains. Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 86 S. W. 34.

46. Person crossing tripped on semaphore wire. Atchison, etc., R. Co. v. Fuller [Kan.] 84 P. 140.

47. Contributory negligence for the jury. St. Louis, etc., R. Co. v. Johnson [Ark.] 86 S. W. 282.

48, 49. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863.

quired to exercise more care in looking and listening than one not so afflicted.[49] One who goes upon the right of way to pass around a train temporarily obstructing a street crossing is a trespasser,[50] but otherwise, if the crossing be blockaded for an unreasonable time and the traveler have urgent reason to cross;[51] and such a person does not necessarily become a trespasser by going straight across the tracks, after having passed around the train, instead of returning to the crossing.[52]

Persons in switch yards.[53]—Warning notices along railroad yard limits notifying all persons to keep off is sufficient notice to trespassers,[54] and no liability arises for injuries resulting from switching operations to a child playing in the yards, in the absence of evidence that the switching crew had or should have had knowledge of the presence of the child or his companions;[55] but to back an engine in yards frequented by pedestrians without maintaining a lookout is negligence.[56] An ordinance requiring a bell to ring continuously while a locomotive is in motion within city limits is applicable to railroad yards.[57] Failure to warn that cars are about to be moved is not actionable negligence when plaintiff knew without such information of the intended moving and took a position which he considered safe.[58] A liability may arise for injuries to a passenger on one road by reason of the proximity of track and cars of another company.[59]

Persons under cars.[60]—When a conductor in charge of a freight train states that he is through switching, one may assume that the car mentioned will be free from interference by the freight train,[61] and is not negligent in placing his foot on the rail while repairing the car.[62]

Persons stealing rides.[63]—A person riding on freight cars in violation of the company's rules cannot recover,[64] and the duty of the company is confined to refrain from willfully or intentionally injuring him.[65] Children fall within this rule, apparently, without regard to whether they are of sufficient discretion to be contributorily negligent.[66] Where the only negligence complained of was in the ejection of a person stealing a ride and such person was found dead from injuries causing instant death some distance from where he was ejected, no connection between ejection and death is shown.[67]

Persons using hand cars or railroad tricycles.[68]—A railroad company may be

50. Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416.

51. Extreme coldness of weather is such an urgency. Chicago & A. R. Co. v. Mayer, 112 Ill. App. 149.

52. Chicago & Alton R. Co. v. Mayer, 112 Ill. App. 149.

53. See 4 C. L. 1206.

54. Katzinski v. Grand Trunk R. Co. [Mich.] 12 Det. Leg. N. 356, 104 N. W. 409.

55. Hamilton v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 604, 105 N. W. 82; Katzinski v. Grand Trunk R. Co. [Mich.] 12 Det. Leg. N. 356, 104 N. W. 409.

56. Willis v. Vicksburg, etc., R. Co. [La.] 38 So. 892.

57. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863.

58. Belt R. Co. v. Manthei, 116 Ill. App. 330.

59. Instructions considered. Pittsburgh, etc., Co. v. Fitzpatrick, 112 Ill. App. 152.

60. See 4 C. L. 1206.

61, 62. Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172.

63. See 4 C. L. 1206.

64. Person riding in caboose. St. Louis, etc., R. Co. v. Reed [Ark.] 88 S. W. 836. Person on foot board at rear of switch engine. Kansas City, etc., R. Co. v. Williford [Tenn.] 88 S. W. 178.

65. St. Louis, etc., R. Co. v. Reed [Ark.] 88 S. W. 836. Company held liable. Chicago, etc., R. Co. v. Kerr [Neb.] 104 N. W. 49. Evidence held to sustain a verdict for plaintiff injured by jumping from a freight train under threats by the brakeman. Illinois Cent. R. Co. v. Brown [Miss.] 39 So. 531. That a watchman requested an errand of a boy who thereafter played about in a place of safety for some time does not make the company liable for injury to the boy in boarding a moving train. Fitzgerald v. Chicago, etc., R. Co., 114 Ill. App. 118.

66. A child who does not claim that he did not know it was wrong and dangerous to climb on a moving freight car will be chargeable with contributory negligence. Fitzgerald v. Chicago, etc., R. Co., 114 Ill. App. 118.

67. Morgan v. Oregon Short Line R. Co. [Utah] 83 P. 576.

liable for negligent injury to a quasi licensee using a tricycle upon its tracks with permission.[69]

(§ 11) *F. Accidents to trains.*[70]—It is a complete defense, in an action by a sleeping car porter for injuries received from the explosion of a locomotive, that in his contract with the sleeping car company he released from liability for personal injuries all railroad companies over whose lines the sleeping cars traveled.[71] Where the explosion of car of burning naphtha injures persons who go into a field from curiosity to watch the conflagration, the questions of negligence and contributory negligence are for the jury.[72] A company is liable to a pedestrian at a safe distance upon the right of way injured by the breaking of the engine because of excessive speed.[73]

(§ 11) *G. Accidents at crossings.* 1. *Care required on part of company. General rules.*[74]—Travelers and railroad companies have reciprocal rights at highway crossings,[75] and each must know that the other may use the crossing at any time.[76] The care requisite at crossings is that which is commensurate with the dangers,[77] greater vigilance and care being required at street crossings in a populous city.[78] Where the view is obstructed,[79] and where a dangerous situation is apparent, the train should be stopped as soon as possible.[80] A traveler's mistake in judgment does not excuse the willful or negligent infliction of injury upon him.[81] Those in charge of a locomotive must exercise ordinary care in keeping a lookout,[82] but a fireman is not negligent in failing to keep a lookout at a crossing where he is otherwise engaged in his regular line of duty.[83] Negligent running of a train creates a liability for injuries inflicted.[84] To be actionable, the negligence complained of must of course be the proximate cause of injury.[85]

Duty to signal.[86]—Failure to give a reasonable warning of the approach of a locomotive may render the company liable.[87] Statutes may require every locomotive

68. See 4 C. L. 1207.

69. Wabash R. Co. v. Erb [Ind. App.] 73 N. E. 939. Plaintiff held not to have been a trespasser. Trinity & B. V. R. Co. v. Simpson [Tex. Civ. App.] 13 Tex. Ct. Rep. 23, 86 S. W. 1034.

70. See 4 C. L. 1207.

71. Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705.

72. Morrison v. Pittsburg, etc., R. Co., 26 Pa. Super. Ct. 338.

73. Evidence held to show no contributory negligence, and that excessive speed of locomotive was proximate cause of injury. Kansas City, etc., R. Co. v. Chiles [Miss.] 38 S. 498.

74. See 4 C. L. 1207.

75. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515.

76. Louisville & N. R. Co. v. Cleaver [Ky.] 89 S. W. 494.

77. Wardner v. Great Northern R. Co. [Minn.] 104 N. W. 1084. Reasonable and ordinary care. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746. A railroad company should, under the law, take proper precautions for the safety of travelers on the highway having reference to all the conditions and probabilities to be anticipated. Brooks v. Boston & M. R. Co., 188 Mass. 416, 74 N. E. 670.

78. McCabe's Adm'x v. Maysville & B. S. R. Co. [Ky.] 89 S. W. 683.

79. Bilton v. Southern Pac. Co. [Cal.] 83 P. 440. Injury at crossing where view was obstructed. Train operated at excessive speed. Id.

80. Yeaton v. Boston & M. R. Co. [N. H.] 61 A. 522. Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 51 S. E. 211.

81. Yeaton v. Boston & M. R. Co. [N. H.] 61 A. 522. Jumping from street car to avoid apparent collision. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279.

82. Missouri, etc., R. Co. v. Sisson [Tex. Civ. App.] 13 Tex. Ct. Rep. 347, 88 S. W. 371; McCabe's Adm'x v. Maysville, etc., R. Co. [Ky.] 89 S. W. 683.

83. Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 51 S. E. 211.

84 Ray v. Chesapeake & O. R. Co., 57 W. Va. 333, 50 S. E. 413.

85. Conduct of employes at work at crossing held not negligent nor the cause of horse being frightened. Courtney v. Minneapolis, etc., R. Co. [Minn.] 106 N. W. 90. That a train was unlawfully obstructing a crossing held not the proximate cause of injury to one who, mistaking a trainman's starting signal for an invitation to cross, was injured. Corbin v. Grand Trunk R. Co. [Vt.] 63 A. 138.

86. See 4 C. L. 1209.

87. Pyne v. Delaware, etc., R. Co., 212 Pa. 143, 61 A. 817; Norris v. New York, etc., R. Co. [Conn.] 61 A. 1075. If a prudent rail-

to be equipped with bell and whistle and that they be sounded under specified conditions,[88] and a failure to give statutory signals is negligence per se;[89] but this duty does not extend to private crossings[90] or crossings not on the same grade,[91] though persons using private crossings in the vicinity of a public crossing are entitled to the benefit of signals required to be given at the latter.[92]

Speed.[93]—In the absence of statute or ordinance a railroad company may determine the speed of its trains, but under the rules of common law must exercise its franchise with due regard to the safety of the public,[94] unless there be circumstances of peculiar hazard about a particular crossing which require a slackening of speed.[95] Excessive speed[96] may be some evidence of negligence,[97] and in some states is negligence per se,[98] but does not prevent the application of rules of contributory negligence.[99] A high rate of speed may be proper at a country crossing, although it might be considered negligence in a populous city.[1] The speed of a

road company would give warning of the approach of a train to a public place, it is negligence to fail to do so. Bamberg v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 988. Private crossing. Ayers v. Wabash R. Co., 190 Mo. 228, 88 S. W. 608. Where it was customary for a train to stand at a certain place for several hours, it is negligence to run without warning, move the train over a crossing permissively used by the public during such period of time. Minot v. Boston & M. R. Co. [N. H.] 61 A. 609.

88. Civ. Code § 486, requiring the sounding of a bell or whistle where a railroad crosses any street or highway, is applicable where the railroad crosses the highway on a bridge. Johnson v. Southern Pac. R. Co., 147 Cal. 624, 82 P. 306. That a train starts towards a crossing within the designated distance at which signals must be given does not excuse a failure to signal. Rev. St. 1899, § 1102. Spiller v. St. Louis, etc., R. Co., 112 Mo. App. 491, 87 S. W. 43.

89. Morey v. Lake Superior, etc., R. Co., 125 Wis. 148, 103 N. W. 271; Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910; Wilson's Adm'rs v. Chesapeake & O. R. Co., 27 Ky. L. R. 778, 86 S. W. 690; Louisville & N. R. Co. v. Crominarity [Miss.] 38 So. 633; Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. When there is evidence tending to show that signals were not given at a railroad crossing by a train passing over an interlocking switch, though by the company's rules it would not be opened without signals, the court will not hold as a matter of law that signals were given. Bamberg v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 988. The only question for the jury with reference to an electric gong at a railway crossing which failed to ring is whether the defendant company had exercised ordinary care under all the circumstances to prevent the accident. C., C. & St. L. R. Co. v. Sivey, 6 Ohio C. C. (N. S.) 221. Failure to give statutory signals at a crossing is negligence. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

90. For the jury whether failure to signal was negligence. Ayers v. Wabash R. Co., 190 Mo. 228, 88 S. W. 608.

91. Lewis v. Southern R. Co. [Ala.] 38 So. 1023. It is only at grade crossings that the Virginia statutes require signals. Construing Code 1904, § 1294d. Norfolk & W. R. Co. v. Scruggs [Va.] 52 S. E. 834.

92. Wilson's Adm'rs v. Chesapeake & O. R. Co., 27 Ky. L. R. 778, 86 S. W. 690.

93. See 4 C. L. 1209.

94. For the jury to determine whether speed was negligence. Toledo, etc., R. Co. v. Smart, 116 Ill. App. 523. Where the view is obstructed the speed of a train should be so regulated that a traveler who has stopped, looked and listened at the proper place may pass in safety. Schwarz v. Delaware, etc., R. Co. [Pa.] 61 A. 255. Whether it is negligence to run across an unguarded crossing at a speed of 40 miles an hour without giving warning is for the jury. Nelson v. Long Island R. Co., 109 App. Div. 626, 96 N. Y. S. 246. No particular rate of speed at country crossing is negligence per se. Chicago, etc., R. Co. v. Campbell [Colo.] 83 P. 138. 50 miles per hour. Lake Shore & M. S. R. Co. v. Barnes [Ind.] 76 N. E. 629. Finding of negligence sustained, 35 miles an hour, where view was obstructed. Bilton v. Southern Pac. R. Co. [Cal.] 83 P. 440.

95. That a crossing was much used for travel does not alone make it extra hazardous. Lake Shore & M. S. R. Co. v. Barnes [Ind.] 76 N. E. 629.

96. Morey v. Lake Superior, etc., R. Co., 125 Wis. 148, 103 N. W. 271.

97. Morey v. Lake Superior, etc., R. Co., 125 Wis. 148, 103 N. W. 271; Southern I. R. Co. v. Messick [Ind. App.] 74 N. E. 1097.

98. Southern I. R. Co. v. Messick [Ind. App.] 74 N. E. 1097; Borneman v. Chicago etc., R. Co. [S. D.] 104 N. W. 208; Chicago & A. R. Co. v. Pulliam, 111 Ill. App. 305. Excessive speed creates a presumption of negligence under Hurd's Rev. St. 1903, c. 114, § 87, but that presumption may be overcome. Chicago & E. I. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865. Running train over street crossing at greater speed than ordinance allows is negligence per se. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136.

99. Greenwood v. Chicago, etc., R. Co. [Minn.] 104 N. W. 3. That a train is run at a forbidden rate of speed does not excuse use of due care at crossing. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136.

1. Southern I. R. Co. v. Messick [Ind. App.] 74 N. E. 1097. To run a fast passenger train in the nighttime over a country crossing at the rate of 35 miles an hour is not

train should be moderated when a flagman is off duty and the gates are locked open.[2]

Gates.[3]—Failure to maintain gates at a country highway crossing is not negligence,[4] nor is the erection of gates as required by a valid municipal ordinance.[5] A railroad is not negligent in failing to maintain at street crossings gates of sufficient strength to restrain a runaway team.[6]

Flagmen.[7]—In the exercise of its police power a municipality may require a railroad company to keep a watchman at a dangerous crossing,[8] but otherwise of a crossing practically in the open country where there is no evidence to show the extent of the public use thereof.[9] Failure to place a flagman at a crossing is not negligence per se.[10] Flagman not necessary where crossing gates are properly operated from a distant tower,[11] but otherwise of failure to place a watchman at a much used city street crossing, or to take other precautions commensurate with the danger, at least during hours when numbers of people use the crossing.[12] It is a flagman's duty to know of the approach of trains and to give timely warning to all persons attempting to cross the railroad tracks.[13]

Headlights.[14]—An ordinance requiring railroad companies under penalty to light their crossings at night is to be strictly construed[15] and must be definite and specific.[16]

Switching and backing trains.[17]—It is unlawful for a railroad company to back cars over a crossing without signals.[18] An engineer backing his engine after dark over a busy street crossing, where he knows there is no watchman, should exercise care proportionate to the danger.[19]

(§ 11G) 2. *Contributory negligence. General rules.*[20]—One intending to cross at a highway crossing must make a reasonable use of his senses, the care required being proportionate to the dangers of the crossing.[21]

Who may be charged.[22]—Contributory negligence of a driver of private conveyance is not imputable to one riding with him as guest or companion,[23] unless the

negligence. Keiser v. Lehigh Valley R. Co., 212 Pa. 409, 61 A. 903.

2. Schwarz v. Delaware, etc., R. Co. [Pa.] 61 A. 255.

3. See 4 C. L. 1210.

4. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746.

5. Klein v. Missouri Pac. R. Co., 114 Mo. App. 89, 89 S. W. 75. Injury to members of fire department by collision with machinery for operating gates. Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995.

6. Brooks v. Boston & M. R. Co., 188 Mass. 416, 74 N. E. 670.

7. See 4 C. L. 1210.

8, 9. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 205.

10. Cowen v. Dietrick [Md.] 60 A. 282. County highway crossing. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746.

11. Brooks v. Boston & M. R. Co., 188 Mass. 416, 74 N. E. 670.

12. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234. Where an engine is backed over a crossing at night, warning signals should be given and a man with a light should be stationed as lookout. Reid v. Atlanta & C. Air Line R. Co. [N. C.] 52 S. E. 307.

13. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154.

14. See 4 C. L. 1210.

15. Chicago, etc., R. Co. v. Salem [Ind.] 76 N. E. 631.

16. An ordinance requiring such light at crossings in a town as the town maintains is too indefinite. Chicago, etc., R. Co. v. Salem [Ind.] 76 N. E. 631.

17. See 4 C. L. 1210.

18. Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268. For a railroad to kick a string of detached cars over the crossing of a public street with much force and without warning is actionable negligence with respect to a pedestrian injured thereby. Chicago Terminal Transfer Co. v. Walton [Ind.] 74 N. E. 988. It is negligence for a railroad company to kick a detached standing car, driving it across a crossing without giving warning. Davis v. Michigan Cent. R. Co. [Mich.] 105 N. W. 877.

19. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234.

20. See 4 C. L. 1210.

21. Wardner v. Great Northern R. Co. [Minn.] 104 N. W. 1084; Armstrong v. Pennsylvania R. Co., 212 Pa. 288, 61 A. 831.

22. See 4 C. L. 1211.

23. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801.

injured person is able to exercise authority over the driver, or fails to exercise reasonable care under the circumstances.[24] The care required of an infant is such as may be reasonably expected of one of his age, intelligence, and experience.[25]

Acts required of traveler.[26]—The law regards a railroad crossing as a place of danger,[27] though in some states travelers and railroad companies have reciprocal rights at highway crossings.[28] All persons competent to exercise care for their own protection must use their faculties of sight and hearing,[29] and one who could have seen an approaching train but went on the crossing without looking is guilty of contributory negligence.[30] He must look and listen at a sufficient distance[31] before attempting to cross the track,[32] continue to exercise such care[33] until past the danger,[34] look both ways,[35] and exercise care proportionate to the dangerous nature of the place[36] and in view of all the circumstances.[37] One who hears a

24. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801. Contributory negligence of a driver may be imputed to the passenger. Dryden v. Pennsylvania R. Co. [Pa.] 61 A. 249.

25. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746. A child of six years and ten months can not be charged with contributory negligence (Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69), nor can a child of less than six years (Chicago, etc., R. Co. v. Eganolf, 112 Ill. App. 323).

26. See 4 C. L. 1211.

27. Seaboard & R. R. Co v. Vaughn's Adm'x [Va.] 51 S. E. 452; Marshall & Green Bay & W. R. Co., 125 Wis. 96, 103 N. W. 249; Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 51 S. E. 211.

28. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515; Louisville & N. R. Co. v. Cleaver [Ky.] 89 S. W. 494.

29. Marshall v. Green Bay & W. R. Co., 125 Wis. 96, 103 N. W. 249; Wardner v. Great Northern R. Co. [Minn.] 104 N. W. 1084; Cowen v. Dietrick [Md.] 60 A. 282; Fuchs v. Lehigh Valley R. Co. [N. J. Law] 61 A. 1; Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 61 S. E. 211. Contributory negligence held for the jury. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Negligence in going on a crossing does not contribute to injury received some time later while lawfully at work between the tracks. Elgin, J. & E. R. Co. v. Hoadley [Ill.] 77 N. E. 151.

30. Schmidt v. Missouri Pac. R. Co. [Mo.] 90 S. W. 136; Milliman v. New York Cent., etc., R. Co., 109 App. Div. 139, 95 N. Y. S. 1097; Carlson v. Chicago & N. W. R. Co. [Minn.] 105 N. W. 555. One who sees the steam of an approaching train, view of the track being obstructed, and drives on the crossing in an effort to get across ahead of it, is guilty of contributory negligence, though he would have had ample time to get across had the train not been backing up. Storrs v. Grand Trunk W. R. Co. [Mich.] 105 N. W. 764.

31. Southern R. Co. v. Carroll [C. C. A.] 138 F. 638. Distance not arbitrary, but traveler must use a place reasonably calculated to afford full opportunity for seeing and hearing. Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910. That one driving a team stopped, looked and listened at a place where the traveling public generally stopped is strong evidence that it was a proper place. Fry v. Pennsylvania R. Co., 24 Pa. Super. Ct. 147. For the jury to determine whether plaintiff stopped at a proper place. Toban v. Lehigh & Wilkes-Barre Coal Co., 24 Pa. Super. Ct. 475; Summers v. Bloomsburg & S. R. Co., 24 Pa. Super. Ct. 615. An instruction limiting the injury on contributory negligence to "the instant" when an accident occurred is erroneous. Illinois Cent. R. Co. v. Kief, 111 Ill. App. 354.

32. Pyne v. Delaware, L. & W. R. Co., 212 Pa. 142, 61 A. 817; Anderson v. Baltimore & O. R. Co. [Md.] 61 A. 575; Southern R. Co. v. Carroll [C. C. A.] 138 F. 638.

33. Blotz v. Lehigh Valley R. Co., 212 Pa. 154, 61 A. 832; Southern R. Co. v. Carroll [C. C. A.] 138 F. 638. One who stops and looks 30 feet from a crossing where the view is obstructed, and continuously listens from that time, is not guilty of contributory negligence as a matter of law in not stopping again. Coffee v. Pere Marquette R. Co. [Mich.] 102 N. W. 953. Contributory negligence held for the jury where plaintiff stopped, looked and listened when a few feet from the track. Nelson v. Long Island R. Co., 109 App. Div. 626, 96 N. Y. S. 246.

34. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 911.

35. Marshall v. Green Bay & W R. Co., 125 Wis. 96, 103 N. W. 249. Failure to look for approaching trains is negligence. Fisher v. Central Vermont R. Co., 109 App. Div. 449, 95 N. Y. S. 693. The fact that one about to drive over a railroad track looks each way and then starts his horse on a trot is not conclusive proof that he saw an approaching train. Such action is ordinarily that of a prudent man who desires to avoid any possible risk in a place well known to be dangerous. Baltimore, etc., R. Co. v. Moloney, 7 Ohio C. C. (N. S.) 437. Though no signals were given, if the person injured could have discovered the approaching train by looking and listening and he failed to do so, he cannot recover. Cooper v. North Carolina R. Co. [N. C.] 52 S. E. 932. Must look and listen before going on crossing. Evidence held to show contributory negligence. Stokes' Adm'x v. Southern R. Co. [Va.] 52 S. E. 855.

36. Fuchs v. Lehigh Valley R. Co. [N. J. Law] 61 A. 1; Dryden v. Pennsylvania R. Co. [Pa.] 61 A. 249.

train at a crossing where the view is obstructed, but is told by another that it is not on that track, is not guilty of contribuory negligence as a matter of law in going on the crossing without waiting to see where the train was.[38] If one listens and looks attentively before going on a crossing and discovers no appearance of danger, it cannot be said as a matter of law that he was guilty of contributory negligence in not waiting longer.[39] Many courts hold that a traveler upon a highway approaching a crossing must stop, look, and listen,[40] but the better rule seems to be that whether he must stop in addition to looking and listening, depends upon the facts of each case;[41] while in Kentucky[42] and Texas it is for the jury to say whether one should look and listen, a failure to do so not being negligence per se.[43] In Illinois a failure to look up and down the track is not negligence per se,[44] even though the crossing gates are down,[45] though otherwise, where the gates are down at a reasonable time and the flagman gives warning.[46] The traveler is bound only to exercise ordinary care and prudence,[47] and when he can neither hear nor see a train he is not guilty of contributory negligence in assuming that there is no train sufficiently near to make the crossing dangerous, when the statutory signals are not given.[48] That a traveler is hard of hearing and short sighted increases his obligation to be watchful at railroad crossings.[49] A company is not liable to one who through fright places himself in a place of danger.[50] Since a person approaching a crossing is

37. Norris v. New York, etc., R. Co. [Conn.] 61 A. 1075; Farrell v. Erie R. Co. [C. C. A.] 138 F. 28. Contributory negligence held for jury where person was injured at crossing where view was obstructed. Tingley v. Long Island R. Co., 109 App. Div. 793, 96 N. Y. S. 865. It is contributory negligence as a matter of law to drive on a crossing where the view is obstructed without stopping, looking and listening. State v. Western Md. R. Co. [Md.] 62 A. 754.

38. Coffee v. Pere Marquette R. Co. [Mich.] 102 N. W. 953.

39. Bilton v. Southern Pac. R. Co. [Cal.] 83 P. 440.

40. Cohen v. Philadelphia, etc., R. Co., 211 Pa. 227, 60 A. 729; Pyne v. Delaware, etc., R. Co., 212 Pa. 143, 61 A. 817; Toban v. Lehigh & Wilkes-Barre Coal Co., 24 Pa. Super. Ct. 475. Failure to look, when to have done so would have prevented injury and where there are no circumstances justifying such a failure, precludes recovery. Toledo, etc., R. Co. v. Christy, 111 Ill. App. 247. Where there is no evidence that one injured at a crossing looked or listened on approaching it, there can be no recovery. York v. New York, etc., R. Co., 108 App. Div. 126, 95 N. Y. S. 1105. Evidence held to show that person in automobile either deliberately tried to cross in front of an approaching train or that he wholly failed to keep a lookout. Turck v. New York, etc., R. Co., 108 App. Div. 142, 95 N. Y. S. 1100. Where plaintiff drove onto a crossing without looking for approaching trains, he is guilty of contributory negligence as a matter of law. Chicago, etc., R. Co. v. Schwanenfeldt [Neb.] 105 N. W. 1101.

41. Marshall v. Green Bay & W. R. Co., 125 Wis. 96, 103 N. W. 249; Fuchs v. Lehigh Valley R. Co. [N. J. Law] 61 A. 1; Bamberg v. Atlantic C. L. R. Co. [S. C.] 51 S. E. 988; Louisville & N. R. Co. v. Crominarity [Miss.] 38 So. 633; O'Connor v. New York, etc., R. Co. [Mass.] 75 N. E. 614.

42. Wilson's Adm'rs v. Chesapeake & O. R. Co., 27 Ky. L. R. 778, 86 S. W. 690; Louisville & N. R. Co. v. Cleaver [Ky.] 89 S. W. 494.

43. Accident to employe of defendant. Gulf, etc., R. Co. v. Melville [Tex. Civ. App.] 13 Tex. Ct. Rep. 29, 87 S. W. 863.

44. Chicago & Alton R. Co. v. Pulliam, 111 Ill. App. 305. Duty to look and listen depends on surrounding circumstances. Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501. Whether failure to stop, look and listen is contributory negligence is for the jury. Toledo, etc., R. Co. v. Hammett [Ill.] 77 N. E. 72.

45. Evidence showed a custom to leave the gates down without reason. Chicago & E. I. R. Co. v. Keegan, 112 Ill. App. 338.

46. Ludolph v. Chicago & N. W. R. Co., 116 Ill. App. 239.

47. Farrell v. Erie R. Co. [C. C. A.] 138 F. 28; International, etc., R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515; Dougherty v. Chicago, etc., R. Co. [S. D.] 104 N. W. 672; Southern R. Co. v. Carroll [C. C. A.] 138 F. 638. A traveler should give way to any train in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety. Southern R. Co. v. Carroll [C. C. A.] 138 F. 638.

48. Dougherty v. Chicago, etc., R. Co. [S. D.] 104 N. W. 672.

49. Toledo, etc., R. Co. v. Smart, 116 Ill. App. 523. Man of impaired hearing and vision driving on crossing without stopping or looking held guilty of contributory negligence. Hood v. Lehigh Valley R. Co., 109 App. Div. 418, 96 N. Y. S. 431. A deaf person approaching a railroad crossing is held to a more vigilant exercise of his remaining senses than one not so affected. Toledo, P. & W. R. Co. v. Hammett [Ill.] 77 N. E. 72.

bound to the vigilant exercise of his senses, that a train was an extra does not excuse his failure to take proper precautions.[51]

Duty where view of track is obstructed.[52]—A person whose hearing[53] or vision is temporarily obstructed should take the greater care[54] and await its passing away,[55] or resort to other means to ascertain whether a train is approaching, and after passing the obstruction stop, look and listen.[56] A traveler unable to obtain a sufficient view from his carriage should go forward on foot and investigate.[57] It is not contributory negligence as a matter of law for a person to stand for a moment on a crossing near a detached and stationary car.[58]

Parallel tracks.[59]—A failure to stop, look and listen at each track may not be contributory negligence.[60] Only positive evidence that one killed at a railroad crossing did not stop, look and listen will so rebut the presumption that he did so as to take the case from the jury.[61]

Right to rely on crossing signals, stops, gates, flagmen, etc.[62]—The public may, to a reasonable extent, rely on a gateman or other person to perform his duty in giving signals of danger,[63] but a failure to perform such duty does not justify a traveler in placing himself in a position of danger,[64] nor absolve him from the use of independent observation for his own protection;[65] and that an automatic alarm at a crossing does not ring, does not as a matter of law entitle a traveler to assume that

50. Illinois Cent. R. Co. v. Haecker, 110 Ill. App. 102.

51. Carlson v. Chicago & N. W. R. Co. [Minn.] 105 N. W. 555.

52. See 4 C. L. 1212.

53. Fuchs v. Lehigh Valley R. Co. [N. J. Law] 61 A. 1. Defective hearing. Toledo, etc., R. Co. v. Smart, 116 Ill. App. 523.

54. Cohen v. Philadelphia & R. R. Co., 211 Pa. 227, 60 A. 729. Defective eyesight. Toledo, etc., R. Co. v. Smart, 116 Ill. App. 523.

55. Keller v. Erie R. Co. [N. Y.] 75 N. E. 965. Where a temporary obstruction like a passing train obstructs the view, it is the duty of the traveler to wait until the view is clear and then look. Turck v. New York, etc., R. Co., 108 App. Div. 142, 95 N. Y. S. 1100.

56. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801. One approaching a crossing where the view is obstructed is not as a matter of law guilty of contributory negligence in failing to ask persons standing near the track if it was safe to cross. Coffee v. Pere Marquette R. Co. [Mich.] 102 N. W. 953.

57. Dryden v. Pennsylvania R. Co. [Pa.] 61 A. 249; Blotz v. Lehigh Valley R. Co., 212 Pa. 154, 61 A. 832; Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 51 S. E. 211.

58. Davis v. Michigan Cent. R. Co. [Mich.] 105 N. W. 877.

59. See 4 C. L. 1212.

60. Cohen v. Philadelphia & R. R. Co., 211 Pa. 227, 60 A. 729; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908. Where one who has crossed two parallel tracks, and is waiting for the passage of a train on the third, stands so near the second track that he is injured by a train thereon, the approach of which he could have seen, he is guilty of contributory negligence. Hoopes v. Atchison, etc., R. Co. [Kan.] 83 P. 987. Evidence that person stepped on one track to avoid a train passing on another held to show contributory negligence. Mullin v. Philadelphia, etc., R. Co. [Del. Super.] 63 A. 26.

61. Hanna v. Philadelphia & R. R. Co. [Pa.] 62 A. 643.

62. See 4 C. L. 1212.

63. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154; Baltimore & O. R. Co. v. Connell [C. C. A.] 137 F. 8; Greenawaldt v. Lake Shore, etc., R. Co. [Ind.] 74 N. E. 1081; Chicago, etc., R. Co. v. Olson, 113 Ill. App. 320; Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268. Travelers may take into consideration the suggestions and conduct of a brakeman in a position to observe the tracks. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 990. Where a flagman beckoned to one driving to proceed across the tracks, he had a right to rely on the assurance that he would incur no danger from approaching trains (Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636), and one may assume that he may cross in safety where the flagman is at his post but gives no warning (Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501). Every person who would be benefited by compliance by a railroad with a speed ordinance may assume that it will not be violated. Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537. Failure to give statutory signals at a crossing does not excuse persons using the crossing from exercising ordinary care. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

64. Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268. Failure to signal by bell or whistle does not justify a person in attempting to cross railroad tracks without looking for trains. Fisher v. Central Vt. R. Co., 109 App. Div. 449, 95 N. Y. S. 693.

65. Chicago & E. I. R. Co. v. Olson, 113 Ill. App. 320; Wardner v. Great Northern R. Co. [Minn.] 104 N. W. 1084; Louisville & N. R. Co. v. Cleaver [Ky.] 89 S. W. 494; Cohen v.

the crossing is clear.[66] The fact that the crossing gates are up is an indication to travelers that they can safely cross the tracks,[67] but does not justify them in ignoring all the other sights and sounds indicating that they cannot safely advance,[68] but the raising of gates after the passing of a train is an invitation for travelers to cross.[69] A traveler is not required to anticipate that an approaching train would proceed at an unlawful speed[70] or at a speed dangerous in view of the relative location of the crossing and a curve.[71]

Duties as to standing, switching, and backing trains.[72]—An attempt to pass between cars blocking a city street is not necessarily contributory negligence.[73]

(§ 11) *H. Injuries to persons on highway or private premises near tracks. Injuries from frightened horses.*[74]—Travelers must regard railroad crossings as a place of danger.[75] A railway company is not liable for injuries from frightening horses by the ordinary operation of a train[76] or hand car,[77] though it may be for doing anything unnecessary, naturally calculated to frighten ordinarily gentle horses,[78] or for failure to sound the statutory signals,[79] or to give warning at an elevated crossing though not required by law if in fact such would be reasonable.[80] It may be negligence to give the statutory crossing signal when it will obviously increase the fright of a team,[81] and to leave a hand car on a highway is prima facie unlawful.[82] A company is not required to keep a lookout for trains on parallel highways remote from stations and crossings,[83] or on thoroughfares which are not

Philadelphia & R. R. Co., 211 Pa. 227, 60 A. 729; Larsen v. United States Mortg. & Trust Co., 105 App. Div. 631, 93 N. Y. S. 610; Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 51 S. E. 211.

66. Southern I. R. Co. v. Corps [Ind. App.] 76 N. E. 902.

67. Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553; Chicago, etc., R. Co. v. Olson, 113 Ill. App. 320.

68. Briggs v. Boston & M. R. Co., 188 Mass. 463, 74 N. E. 667.

69. Smith v. Michigan Cent. R. Co. [Ind. App.] 73 N. E. 928.

70. Farrell v. Erie R. Co. [C. C. A.] 138 F. 28; Davenport, etc., R. Co. v. Yaeger, 112 Ill. App. 537.

71. Farrell v. Erie R. Co. [C. C. A.] 138 F. 28.

72. See 4 C. L. 1213.

73. Whether one is negligent in attempting to pass between cars by getting upon the bumpers at the invitation of the brakeman is a question for the jury. Sheridan v. Baltimore & O. R. Co. [Md.] 60 A. 280. Evidence is admissible to show that train blocked the crossing for an unlawful length of time and that plaintiff was in danger of being late at his employment. Thomasson v. Southern R. Co. [S. C.] 51 S. E. 443.

74. See 4 C. L. 1218.

75. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636. Failure to look up and down track. Chicago & A. R. Co. v. Vremeister, 112 Ill. App. 346.

76. Louisville & N. R. Co. v. Sights [Ky.] 89 S. W. 132; Lewis v. Southern R. Co. [Ala.] 38 So. 1023; Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617; Atchison, etc., R. Co. v. Walkenshaw [Kan.] 81 P. 463. One driving across railroad tracks in front of an engine attached to a train assumes the risk of his horse becoming frightened at the noises made in the ordinary handling of a train, as a whistle signal to the brakeman. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636. A railroad company is not liable for the frightening of horses on adjacent premises by the noises incident to the ordinary movement of its trains. Wieber v. New York, etc., R. Co., 109 App. Div. 81, 96 N. Y. S. 28.

77. Failure to give warning of the approach of a hand car is not negligence per se in the absence of statute or ordinance. Chicago & A. R. Co. v. Vremeister, 112 Ill. App. 346. Averment of injury by horse becoming frightened at hand car left near track demurrable unless it is alleged that the hand car was an object likely to frighten horses. Norfolk & W. R. Co. v. Gee [Va.] 52 S. E. 572.

78. Escaping steam. Negligence for the jury. Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617; Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 13 Tex. Ct. Rep. 545, 88 S. W. 445; Ala. Great Southern R. Co. v. Fulton [Ala.] 39 So. 282; Hickey v. Rio Grande Western Ry. Co. [Utah] 82 P. 29; Gulf, etc., R. Co. v. Hord [Tex. Civ. App.] 13 Tex. Ct. Rep. 351, 87 S. W. 848. For the jury whether company's employés were negligent in manner of placing a hand car on track at crossing (Chicago, B. & Q. R. Co. v. Harley [Neb.] 104 N. W. 862), or whether a hand car moving at an excessive speed was the proximate cause of injury (St. Louis S. W. R. Co. v. Everett [Tex. Civ. App.] 89 S. W. 457.

79. Johnson v. Southern Pac. R. Co., 147 Cal. 624, 82 P. 306.

80. Louisville & N. R. Co. v. Sawyer, 114 Tenn. 84, 86 S. W. 386. Contra, Lewis v. Southern R. Co. [Ala.] 38 So. 1023.

81. St. Louis S. W. R. Co. v. Kilman [Tex. Civ. App.] 86 S. W. 1050.

82. Southern I. R. Co. v. Norman [Ind.] 74 N. E. 896.

public highways, but are near the right of way,[84] nor to give warning of intention to move a train to parties near the track but having no business with the company;[85] but after discovery of the peril of a traveler, because of the fright of his mule, the company's servants must use every means at hand which a man of ordinary prudence would have used to allay the fright of the animal.[86] When the person in charge of a train sees one deliberately drive a team into immediate proximity to the track, he need not stop but may assume that the team is gentle and that the driver will use due care,[87] but he must keep watch and immediately on discovering that for any reason the driver does not or cannot avoid the danger, he must use all available means to stop the train.[88] A railroad company is liable for injuries resulting from a mule taking fright at a mail crane and mail bag suspended therefrom upon the property of the company.[89] Flagmen should give such warning of the approach of a train as will enable a traveler to stop his team where an ordinarily well broken team would not become dangerously frightened, or such warning as would give him time, if his team were not ordinarily well broken, to turn about and drive to a point of safety.[90] It is negligence to place a signal torpedo on the track so near a highway that a person on the highway is injured by explosion of the torpedo.[91] The usual rules as to contributory negligence apply.[92] Failure to stop, look and listen is immaterial in an action for injury resulting from a mule taking fright at a mail crane and mail bag.[93]

(§ 11) *I. Injuries to animals on or near tracks.*[94] *How far liability extends.*[95]—The general rules applying to injuries to licensees and trespassers extend to the live stock of such persons upon the right of way under similar conditions,[96] and a railroad company may be guilty of negligence in failing to give signals[97] independent of the statutory crossing signals,[98] or for using an inferior kind

83. Atchison, etc., R. Co. v. Walkenshaw [Kan.] 81 P. 463.

84. Alabama G. S. R. Co. v. Fulton [Ala.] 39 So. 282.

85. Gulf, etc., R. Co. v. Hord [Tex. Civ. App.] 13 Tex. Ct. Rep. 351, 87 S. W. 848.

86. Alabama Great Southern R. Co. v. Fulton [Ala.] 39 So. 282. Evidence of frightening of horse by escaping steam held to show that engineer stopped the steam as soon as possible after observing the horse and accordingly disclosed no negligence. Powers v. Grand Trunk R. Co. [Vt.] 63 A. 139.

87, 88. Chicago, etc., R. Co. v. Clinkenbeard [Kan.] 84 P. 142.

89. No defense that mail bag was for government. That driver should have seen person approaching with mail bag does not show contributory negligence. Western R. of Ala. v. Cleghorn [Ala.] 39 So. 133.

90. Louisville & N. R. Co. v. Sights [Ky.] 89 S. W. 132.

91. Illinois Cent. R. Co. v. Schultz [Miss.] 39 So. 1005.

92. Alabama Great Southern R. Co. v. Fulton [Ala.] 39 So. 282; St. Louis S. W. R. Co. v. Everett [Tex. Civ. App.] 13 Tex. Ct. Rep. 890, 89 S. W. 457; Chicago, etc., R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865; Hickey v. Rio Grande W. R. Co. [Utah] 82 P. 29. Evidence held to require submission of contributory negligence in leaving team unattended near railroad track. Habenicht v. Chicago, etc., R. Co. [Wis.] 105 N. W. 910. It is not contributory negligence as a matter of law for a shipper to leave his team unattended near the track while he went to the freight house, the team being at the place to which he was directed by the baggageman to go. Bankman v. Pere Marquette R. Co. [Mich.] 105 N. W. 154. That a city employe, whose duty it was to clean street lights between the tracks at a railroad crossing, knew of the dangerous character of the crossing does not as a matter of law charge him with contributory negligence. Elgin, etc., R. Co. v. Hoadley [Ill.] 77 N. E. 151.

93. Western R. Co. v. Cleghorn [Ala.] 39 So. 133.

94. See 4 C. L. 1219.

95. See 4 C. L. 1220.

96. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537; Russell v. Maine Cent. R. Co. [Me.] 61 A. 899; Atlantic Coast Line R. Co. v. Waycross Elec. L. & P. Co., 123 Ga. 613, 51 S. E. 621. Must use ordinary care. Atlanta & W. P. R. Co. v. Hudson, 123 Ga. 108, 51 S. E. 29. Conduct after discovery of animals on track. Missouri, etc., R. Co. v. Rodgers [Tex. Civ. App.] 86 S. W. 625. Killing of horse upon depot grounds. Texas Cent. R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 610, 88 S. W. 414. Not bound to keep tracks in such condition that animal going thereon will not be hurt. Horse fell through bridge. Padgitt v. Missouri, etc., R. Co. [Tex. Civ. App.] 90 S. W. 67.

97. Dougherty v. Chicago, etc., R. Co. [S. D.] 104 N. W. 672.

98. O'Leary v. Chicago, etc., R. Co. [Iowa] 103 N. W. 362; Dougherty v. Chicago, etc., R. Co. [S. D.] 104 N. W. 672.

of locomotive headlight."[99] In some states an engineer need not keep a lookout for trespassing stock,[1] while in others he owes no duty toward trespassing stock until after discovery of their presence.[2] After the discovery of an approaching unattended team, an accident must be avoided by stopping the train, if possible in the exercise of ordinary care.[3] There is no common-law remedy for injuries to stock by railroads[4] other than the ordinary remedy for negligent injuries to stock.[5] Under the Arkansas statute providing a penalty for injuries to stock by reason of failure to maintain cattle guards, the owner cannot recover the value of the stock.[6] By statute, railroad companies may be held liable for injuries to animals running against the fence upon the right of way.[7] Statutes on injury to stock apply to companies operating railroads regardless of the ownership.[8] Where an animal goes suddenly on the track so close to an approaching train that it is impossible to stop there is no liability[9] unless the impossibility of stopping was due to the train being operated at a negligent rate of speed.[10] Evidence that by a proper lookout an animal on the track could have been seen in time to stop the train makes a case for the jury.[11] Under a statute providing that proof of injury by the operation of a train raises a presumption of negligence, a case for the jury is made by evidence that plaintiff's animal was found injured at a place some distance from the railroad and that tracks ran from such place to where hair and blood on the ties showed that an animal had been injured.[12] That an animal is killed by a train at a public crossing does not ordinarily make a prima facie case.[13]

Place of entry on right of way.[14]—The place where the animal gets upon the track and not where it is injured fixes the liability of the road.[15] A railroad company owes no duty of fencing as to the owner of stock pastured on the property of a third person which does not join the railroad location,[16] though in

99. Light showing only 90 or 100 ft. ahead. St. Louis, etc., R. Co. v. Shannon [Ark.] 88 S. W. 851.

1. Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208.

Contra: Must keep a lookout [Kirby's Dig. § 6607] (Prescott, etc., R. Co. v. Brown [Ark.] 86 S. W. 809), and if running through a town he must be on the alert and prepared for instant action in case stock stray upon the track (St. Louis, etc., R. Co. v. Kimberlain [Ark.] 88 S. W. 599).

2. Russell v. Maine Cent. R. Co. [Me.] 61 A. 899.

3. O'Leary v. Chicago, etc., R. Co. [Iowa] 103 N. W. 362.

4. St. Louis, etc., R. Co. v. Busick [Ark.] 86 S. W. 674.

5. Oyler v. Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162.

6. Kirby's Dig. §§ 6644, 6645. St. Louis etc., R. Co. v. Busick [Ark.] 86 S. W. 674.

7. Rev. St. 1899, § 1106. Hobbs v. St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525.

8. Karn v. Illinois So. R. Co., 114 Mo. App. 162, 89 S. W. 346.

9. Mongogna v. Illinois Cent. R. Co. [La.] 39 So. 699. Evidence insufficient to show negligent failure to discover animal on track. Chicago, etc., R. Co. v. Campbell [Colo.] 83 P. 138. That the track was straight for a great distance does not of itself, and without proof that the animals were on the track for a considerable time, warrant submission of failure to avert discovered peril. Gulf, etc., R. Co. v. Simpson [Tex. Civ. App.] 91 S. W. 874.

10. Western R. Co. v. Stone [Ala.] 39 So. 723. An instruction exonerating the railroad company, if cattle came on the track so close to the train that it could not be stopped, is erroneous as ignoring whether the impossibility of stopping in time was due to negligent rate of speed. Id.

11. Colorado & S. R. Co. v. Charles [Colo.] 84 P. 67. Evidence held insufficient to warrant finding that animal could have been seen in time to stop. Chicago, etc., R. Co. v. Roberts [Colo.] 84 P. 68.

12. Johnson v. Illinois Cent. R. Co. [Miss.] 39 So. 780.

13. International & G. N. R. Co. v. Carr [Tex. Civ. App.] 91 S. W. 858.

Contra: Evidence of first class equipment, vigilant lookout, and every effort to stop train insufficient to take case from jury. Central of Georgia R. Co. v. Turner [Ala.] 40 So. 355.

14. See 4 C. L. 1220.

15. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537. For the jury whether stock went upon right of way where fence was defective. Hobbs v. St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525. Evidence held to show that animal entered railroad right of way through gap in defective fence. Colyer v. Missouri Pac. R. Co., 113 Mo. App. 457, 87 S. W. 572; Texas & P. R. Co. v. Owens [Tex. Civ. App.] 13 Tex. Ct. Rep. 354, 87 S. W. 846.

16. Russell v. Maine Cent. R. Co. [Me.] 61 A. 899.

Missouri a liability exists for injury to any stock which reaches the right of way through the company's failure to erect the statutory guards or fences.[17]

Duty to maintain fences.[18]—A railroad company by common law was not required to fence its right of way,[19] but was liable for negligent injury to stock.[20] Statutes may require railroad companies to erect and maintain fences of sufficient height and strength to turn stock[21] along inclosed or cultivated fields or uninclosed lands,[22] or when necessary to prevent stock from going upon the tracks from adjoining lands,[23] and may authorize abutting owner to construct such a fence at the company's expense if it is negligent therein.[24] Where a stock law was adopted with apparent regularity, a railroad company is entitled to omit to fence its track in that precinct, though the law was not in fact legally adopted.[25] Failure to comply with the statute renders the company liable for resulting damages,[26] though in some states failure to fence as required by statute is prima facie but not conclusive evidence of negligence.[27] There is no obligation to fence a right of way across a public highway whether established by legal authority or by adverse user,[28] nor a statutory private road crossing,[29] nor at stations where to do so would hinder the proper operation of the road,[30] but otherwise as to repair shops and side tracks if practicable,[31] and in Missouri fences are not required in incorporated or platted towns.[32] The sufficiency of a fence

17. Rev. St. 1899, § 1106. Oyler v. Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162.

18. See 4 C. L. 1221.

19. Wabash R. Co. v. Gaull, 116 Ill. App. 443; Frisch v. Chicago G. W. R. Co. [Minn.] 104 N. W. 228.

20. Oyler v. Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162.

21. Code §§ 2055-2058. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343; Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827. Fence must be kept in reasonably safe repair. Baltimore, etc., R. Co. v. Seitzinger. 116 Ill. App. 55. Fence constructed in accordance with Gen. St. 1894, § 2055, is sufficient. Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827.

22. Rev. St. 1899, § 1105. Open lane is "uninclosed land." Reed v. Chicago & A. R. Co., 112 Mo. App. 575, 87 S. W. 65.

23. Laws 1890, c. 565, p. 1082; 1891, c. 367, p. 712; 1892, c. 676, p. 1382. Clarke v. New York, etc., R. Co., 104 App. Div. 167, 93 N. Y. S. 525. A company may be responsible for a failure to fence when a fence becomes necessary by reason of a raising of the level of land by natural accretions. Chicago & A. R. Co. v. Hand, 113 Ill. App. 144.

24. In Indiana, if a railroad company after notice neglects to repair the fence along the right of way, the abutting owner may repair and recover the cost from the railroad [Burns' Ann. St. 1901, § 5323-5] (Terre Haute & L. R. Co. v. Salmon, 34 Ind. App. 564, 73 N. E. 268), and the fact that the abutting owner does not repair it until two years after giving the notice does not preclude his right to recover (Terre Haute & L. R. Co. v. Earhart [Ind. App.] 73 N. E. 711).

25. Galveston, etc., R. Co. v. Kropp [Tex. Civ. App.] 91 S. W. 819.

26. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343. Failure to fence when required by law to do so renders the railroad company liable for killing stock irrespective of whether the train was negligently operated. Galveston, etc., R. Co. v. Kropp [Tex. Civ. App.] 91 S. W. 819.

27. Ellington v. Great Northern R. Co. [Minn.] 104 N. W. 827.

28. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537; Chicago, etc., R. Co. v. Dowhower [Neb.] 104 N. W. 1070.

29. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537.

30. B. & C. Comp. § 5146. Harvey v. Southern Pac. Co. [Or.] 80 P. 1061. A point on a railroad where a switch is maintained for the exclusive accommodation of certain quarries is not a station though trains sometimes stopped there to receive freight and passengers. Rev. St. 1899, § 1105. Foster v. Kansas City So. R. Co., 112 Mo. App. 67, 87 S. W. 57. Evidence held to show existence of a station. McGuire v. St. Louis etc., R. Co., 113 Mo. App. 79, 87 S. W. 564. For jury to say what are necessary station grounds. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537; McGuire v. St. Louis, etc., R. Co., 113 Mo. App. 79, 87 S. W. 564. For the jury to say whether the existence of a switch at a place used by the public for loading and unloading cars excused a company from the obligation to fence. Wabash R. Co. v. Warren, 113 Ill. App. 172. The Michigan statute does not require the fencing of a railroad yard. Katzinski v. Grand Trunk R. Co. [Mich.] 104 N. W. 409; Chicago, B. & Q. R. Co. v. Campbell [Colo.] 83 P. 138. Place a few rods from depot held not, as a matter of law, part of the depot grounds which need not be fenced. Habenicht v. Chicago, etc., R. Co. [Wis.] 105 N. W. 910.

31. Gen. St. 1894, § 2692. Mattes v. Great Northern R. Co. [Minn.] 104 N. W. 234.

32. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537.

is a question of fact unless otherwise provided by statute.[33] The Minnesota statutes give a right of action only for animals killed upon the right of way.[34]

Gates.[35]—Ordinary care and prudence must be exercised in the construction of gates.[36] Under the New York statute, if the fences are in good repair, in the absence of some negligent or willful act a railroad is not liable for damages to domestic animals straying through an open gateway on the track.[37]

Cattle guards.[38]—Statutes may require railroad companies to maintain proper and sufficient cattle guards,[39] but they need not necessarily be maintained at a place in a pasture where for the convenience of the abutting owner a cattle crossing has been constructed.[40] The construction of a guard of the kind in general use by first class railroads is not necessarily a compliance with a statute requiring guards sufficient to turn stock.[41]

Contributory negligence of owner.[42]—Contributory negligence of the owner is a defense[43] and a question for the jury,[44] unless the facts be undisputed.[45] If a railroad company erects a fence it is not contributory negligence for the adjoining owner to permit stock to roam at large on his land, though the fence be in bad repair at places,[46] though the contrary is the law in Pennsylvania.[47] A trespasser who has suffered damage by reason of the failure of a railroad company to erect a statutory fence cannot recover unless the injury was wanton or willful.[48] That plaintiff had frequently ridden the mule injured along the track where subsequently killed is not such contributory negligence as bars recovery.[49] In an action based upon a failure to fence, it is no defense that the stock owner failed to perform his duty while in the railroad company's employ.[50]

(§ 11) *J. Fires.*[51]—An insurance company paying for a fire loss resulting from a railroad company's negligence may maintain an action against the negligent company therefor.[52] A railroad company is liable to the owner of lumber piled on its right of way with its consent for the loss of such lumber by fire occurring through negligent operation of trains.[53] Recovery may be had for loss by fire ignited in combustible rubbish negligently permitted to accumulate on the right of way.[54] If defendant's negligence is the proximate cause of damage, it is immaterial that the property of others lay between the railroad and plaintiff's property.[55]

33. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343. A fence inclosing the right of way and an additional strip of land is a compliance with the Illinois statute. Chicago, etc., R. Co. v. Tice, 111 Ill. App. 161.
34. Gen. St. 1894, §§ 2693 and 2695. Frisch v. Chicago G. W. R. Co. [Minn.] 104 N. W. 228.
35. See 4 C. L. 1222.
36. Sufficiency in construction and fastening a question for the jury. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343.
37. Laws 1890, p. 1093, c. 656, § 32. Whaley v. Erie R. Co., 181 N. Y. 448, 74 N. E. 417.
38. See 4 C. L. 1222.
39. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21. Under the New Hampshire statutes a railroad company owes the duty to provide cattle guards only to the owner or custodian of animals rightfully upon the adjoining land. Pub. St. 1901, c. 159, § 3. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938.
40. Gulf & S. I. R. Co. v. Ellis, 85 Miss. 586, 38 So. 210.
41. Act 1885, p. 224, c. 91. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21.
42. See 4 C. L. 1223.
43. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72.
44. O'Leary v. Chicago, etc., R. Co. [Iowa] 103 N. W. 362.
45. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72.
46. Baltimore, etc., R. Co. v. Seitzinger, 116 Ill. App. 55.
47. Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15.
48. Chicago, etc., R. Co. v. Tice, 111 Ill. App. 161.
49. Prescott, etc., R. Co. v. Brown [Ark.] 86 S. W. 809.
50. Chicago & A. R. Co. v. Hand, 113 Ill. App. 144.
51. See 4 C. L. 1225. Matters not peculiar to fires by railroads, see Fires, 5 C. L. 1424.
52. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361.
53. Cincinnati, etc., R. Co. v. South Fork Coal Co. [C. C. A.] 139 F. 528.

Duty as to equipment and operation of engines.[56]—The law requires a high degree of care to prevent the escape of fire,[57] but the adoption and maintenance in good condition of the device generally recognized as the best for the suppression of fire is sufficient.[58] Where a railroad company equips its locomotives with the best known spark arresters,[59] keeps the locomotives in good repair,[60] and keeps its right of way clear of combustible materials, it is as a general rule not liable for fires caused by locomotive sparks.[61] It is no defense that the property destroyed was in a building belonging to the railroad company which had been leased to a third person and the lease wrongfully transferred to plaintiff without the lessor's consent.[62]

Contractual exemptions from liability.[63]—A railroad company leasing a part of its right of way is not acting as a common carrier and may stipulate an exemption from liability for loss by fire,[64] and such a stipulation will bind the assignee of the lease, but not a subtenant, as to fire negligently set by the company.[65]

Contributory negligence.[66]—An owner of lands adjoining a railroad is required to take such care of his property to protect it from fire as a man of ordinary prudence would employ under the circumstances,[67] though he may assume that the railroad company will not be guilty of negligence.[68] It is not contributory negligence to build a warehouse for storing inflammable oils immediately adjacent to a railroad right of way.[69]

Pleading.[70]—The legal owner of property is the only necessary plaintiff in an action for its destruction.[71] In New York the owner of property damaged by fire, and insurance companies who have paid losses thereon, may properly be joined as plaintiffs.[72] The sufficiency of several complaints is discussed in the foot notes.[73]

54. Elder Tp. School Dist. v. Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

55. Phillips v. Durham & C. R. Co., 138 N. C. 12, 50 S. E. 462. A railroad company setting fire on premises abutting on the right of way is liable for damages caused by its spread to adjoining premises. Phelps v. New York, etc., R. Co., 48 Misc. 27, 96 N. Y. S. 72.

56. See 4 C. L. 1226.

57. Care proportionate to the danger. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361. In Iowa, railroad companies must exercise ordinary and reasonable care, which demands the use of the best known and most appropriate appliances for preventing the escape of fire. Id.

58. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361. But such a defense is not made out by testimony as to the use of spark arresters where the evidence as to the origin of the fire is to the effect that it was started by sparks from the locomotive. Lake Shore & M. S. R. v. Anderson, 7 Ohio C. C. (N. S.) 17.

59. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172; St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595.

60. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172; St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595.

61. The right of way must be kept clear of combustible material liable to ignition by sparks from engines. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172.

62. Fred England & Co. v. Wabash R. Co. [Mo. App.] 90 S. W. 111.

63. See 4 C. L. 1227.

64. Wooldridge v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 86 S. W. 942. Contract held to release company from liability. Blitch v. Central of Georgia R. Co., 122 Ga. 711, 50 S. E. 945.

65. Wooldridge v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 86 S. W. 942.

66. See 4 C. L. 1227.

67. Evidence held not to justify submission to the jury of the question of plaintiff's contributory negligence. McFarland v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 525, 88 S. W. 450.

68. Phillips v. Durham & C. R. Co., 138 N. C. 12, 50 S. E. 462.

69. Southern R. Co. v. Patterson [Va.] 52 S. E. 694.

70. See 4 C. L. 1227.

71. Conner v. Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145.

72. Code Civ. Proc. § 446. Jacobs v. New York Cent., etc., R. Co., 107 App. Div. 134, 94 N. Y. S. 954.

73. Allegations held sufficient as to accumulation of combustible matter, charging of negligence, and as to equipment of locomotive. Pittsburg, etc., R. Co. v. Wise [Ind. App.] 74 N. E. 1107. Complaint held sufficient without alleging duty imposed by law on defendant as to protection against fire, or that the building was not on defendant's land, or that plaintiff was not gratui-

Burden of proof and presumptions.[74]—Fire caused by sparks from a locomotive is prima facie proof of negligence under the statutes of most states,[75] and casts upon the defendant the burden of proving its engines to have been properly equipped.[76] An injurious accident may be presumed to result from negligence if it be one not likely to occur if due care is exercised.[77]

Admissibility of evidence.[78]—That fire was the result of negligent operation may be proved by either direct or circumstantial evidence,[79] but the origin of the fire must be established by reasonable affirmative evidence and to a reasonable certainty;[80] and where there is no direct proof of the starting of the fire, it may be shown that the locomotive started other fires at or about that time[81] or emitted sparks,[82] and testimony is receivable as to similar conduct of other engines where the engine charged with the fire is not identified.[83] Expert testimony regarding locomotives is admissible[84] to show the distance to which live sparks may be thrown.[85] Where a fire is alleged to have been caused by a particular engine, evidence of negligence in the general operation of engines,[86] or defects in other locomotives, is inadmissible.[87] A dispatcher's train sheet is admissible to show the arrival and departure of trains.[88] Evidence is admissible to show the original cost of the property destroyed as well as the cost of reproduction thereof at the time of its destruction,[89] but evidence that the engineer in charge of a certain locomotive was cautious and very careful about allowing sparks to escape is irrelevant.[90]

Sufficiency of evidence.[91]—Cases in which the sufficiency of evidence has been reviewed are grouped in the notes.[92]

tous licensee of building from defendant. Adriance, Platt & Co. v. Lehigh Valley R. Co., 105 App. Div. 33, 93 N. Y. S. 473. In an action for recovery on account of loss by fire communicated by a locomotive, a petition is sufficient under §§ 3365-5, and 3365-6, which avers that fire and sparks were emitted by one of the defendant company's locomotives, thereby causing fire on the railroad right of way and the plaintiff's land, the plaintiff being ignorant as to whether the fire started on his own land or that of the company, and such an averment is a sufficient averment that the fire was communicated directly from the locomotive and not from some other source. Lake Shore & M. S. R. Co. v. Anderson, 7 Ohio C. C. (N. S.) 17.

74. See 4 C. L. 1228.

75. Swindell & Co. v. Alabama Midland R. Co., 123 Ga. 311, 51 S. E. 386; St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595. Evidence held not to show a rebuttal of the presumption of negligence raised by plaintiff. St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595.

Contra: In New York the mere fact that a fire set by sparks from a locomotive is insufficient to raise a presumption of negligence. Babbitt v. Erie R. Co., 108 App. Div. 74, 95 N. Y. S. 429. That a fire started from a locomotive spark does not alone justify an inference that the fire originated on the railroad's right of way. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172.

76. Phillips v. Durham & C. R. Co., 138 N. C. 12, 50 S. E. 462. Evidence held to show a rebuttal of prima facie case by evidence as to equipment. Toledo, St. Louis & W. R. Co. v. Needham, 116 Ill. App. 543.

77. Evidence held to raise presumption of negligence. Cincinnati, etc., R. Co. v. South Fork Coal Co. [C. C. A.] 139 F. 528.

78. See 4 C. L. 1228.

79. St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595; Shelly v. Philadelphia & R. R. Co., 211 Pa. 160, 60 A. 581; Babbitt v. Erie R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Swindell & Co. v. Alabama Midland R. Co., 123 Ga. 311, 51 S. E. 386.

80. Wick v. Tacoma E. R. Co., [Wash.] 82 P. 711.

81. Jacobs v. New York, etc., R. Co., 107 App. Div. 134, 94 N. Y. S. 954; Hendricks v. Southern R. Co., 123 Ga. 342, 51 S. E. 415.

82. Shelly v. Philadelphia & R. R. Co., 211 Pa. 160, 60 A. 581; Hendricks v. Southern R. Co., 123 Ga. 342, 51 S. E. 415.

83. Shelly v. Philadelphia & R. R. Co., 211 Pa. 160, 60 A. 581. Evidence that the day before the fire cinders were found on the roof of the burned building is competent. Gorham Mfg. Co. v. New York, etc., R. Co. [R. I.] 60 A. 638.

84. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361.

85. Babbitt v. Erie R. Co., 108 App. Div. 74, 95 N. Y. S. 430.

86. Shelly v. Philadelphia & R. R. Co., 211 Pa. 160, 60 A. 581. Where the engine is identified and could have been the only one which caused the fire complained of, evidence of fires set by other engines is inadmissible. McFarland v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 525, 88 S. W. 450.

87. Shelly v. Philadelphia & R. R. Co., 211 Pa. 160, 60 A. 581.

88. Firemen's Ins. Co. v. Seaboard Air Line R. Co., 138 N. C. 42, 50 S. E. 452.

89. Conner v. Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145.

Instructions.[93]—Instructions are governed by the customary rules.[94]

Special findings. Damages.[95]—The measure of damages for negligent burning of fencing and ornamental trees is the diminution in the value of the premises resulting therefrom.[96] For injuring plaintiff's turf the measure of damages is the difference in value of the land before and after the fire.[97] Damages from fire to buildings, etc., on the remaining portion of a track of land appropriated by a railroad company are to be considered by a jury in determining the compensation.[98]

(§ 11) *K. Actions for damages. Parties.*—A railroad company and its engineer may be jointly sued for injuries caused by his failure to give signals at a crossing.[99]

Pleading.—The allegations of negligence should be specific,[1] as must also the ownership of property injured.[2] The name of the employe in charge of the train need not be alleged.[3] A declaration need not allege a duty to construct a fence at a particular point, or a duty to keep such fence in repair, where it alleges the negligent maintenance of a fence, and the proof showed that the company had then constructed and maintained a fence.[4] A plea of not guilty coupled with a plea of con-

90. McFarland v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 525, 88 S. W. 450.

91. See 4 C. L. 1229.

92. Evidence held sufficient. Jacobs v. New York, etc., R. Co., 107 App. Div. 134, 94 N. Y. S. 954; Conner v. Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145; Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046; Elder Tp. School Dist. v. Pennsylvania R. Co., 26 Pa. Super. Ct. 112; Fields v. Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134; Babbitt v. Erie R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Union Pac. R. Co. v. Fickenscher [Neb.] 105 N. W. 39. Evidence held insufficient. Union Pac. R. Co. v. Fickenscher [Neb.] 100 N. W. 207; Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172. Evidence held sufficient to show ownership and operation of the railroad by defendant. Kerr v. Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596. Whether defendant was negligent in the manner of equipping its engine, held a question for the jury. Richmond v. Oregon R. & Nav. Co. [C. C. A.] 137 F. 848. Evidence held sufficient to show that fire started by sparks from locomotive. Fred England & Co. v. Wabash R. Co. [Mo. App.] 90 S. W. 111. A jury is warranted in finding that fire upon the land of the plaintiff lying adjacent to a steam railroad originated from sparks emitted by a locomotive which had passed a short time before, where the evidence shows that the wind was blowing in the direction of the plaintiff's land with sufficient force to carry sparks thereon, and that there were no other fires in the neighborhood at the time. Lake Shore & M. S. R. Co. v. Anderson, 7 Ohio C. C. (N. S.) 17. Conflicting testimony as to origin of fire. Bonner Co. v. New Orleans & N. E. R. Co. [Miss.] 40 So. 65. Evidence that large cinder was allowed to fall from engine cab held to make a case for the jury. Southern R. Co. v. Patterson [Va.] 52 S. E. 694.

93. See 4 C. L. 1229.

94. Kerr v. Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596. An instruction that if the fire originated from sparks from defendant's engine the presumption was that the sparks were negligently emitted, held proper. Fireman's Ins. Co. v. Seaboard Air Line R. Co., 138 N. C. 42, 50 S. E. 452. Instruction held not erroneous as authorizing a recovery for defendant's failure to extinguish fires on its right of way regardless of their origin. Wick v. Tacoma Eastern R. Co. [Wash.] 82 P. 711.

95. See 4 C. L. 1230.

96. Louisville & N. R. Co. v. Kohlruss [Ga.] 52 S. E. 166.

97. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046.

98. Hayes v. Toledo R. & Terminal Co., 6 Ohio C. C. (N. S.) 281.

99. Southern R. Co. v. Grizzle [Ga.] 53 S. E. 244.

1. Injury to stock. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21; South Georgia R. Co. v. Ryals, 123 Ga. 330, 51 S. E. 428. Complaint for killing cattle held to sufficiently allege negligence. Western R. Co. v. Stone [Ala.] 39 So. 723. Complaint held to sufficiently show that negligence charged was proximate cause of injury. Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 74 N. E. 1081. Petition held to sufficiently allege that the negligent acts enumerated produced the injury complained of. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515. An allegation in a complaint characterizing an act as having been "carelessly and negligently done" is sufficient against a demurrer. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636. An allegation that defendant "negligently and carelessly ran" its train against plaintiff at a crossing is good as against demurrer. Southern R. Co. v. Douglass [Ala.] 39 So. 268. Petition held defective on special demurrer. Kemp v. Central of Georgia R. Co., 122 Ga. 559, 50 S. E. 465. Complaint held to show that establishment of crossing below grade in violation of statute was proximate cause of accident. Southern I. R. Co. v. Corps [Ind. App.] 76 N. E. 902.

2. South Georgia R. Co. v. Ryals, 123 Ga. 330, 51 S. E. 428.

3. Western R. Co. v. Stone [Ala.] 39 So. 723.

tributory negligence is not an admission of negligence.[5] The complaint must fall within the statute giving the right of action.[6] A plaintiff need not allege that he did not hear or see the approaching train,[7] and in those jurisdictions where contributory negligence is a matter of defense, freedom therefrom need not be averred.[8] One relying on a foreign statute must plead it specially and make proof of the statute.[9] Several acts of negligence may be alleged in one paragraph, and under such a pleading plaintiff may sustain his case by proof of a single negligent act if it constitute actionable negligence.[10] Evidence that an animal was injured by a train and that defendant's employes, deeming it fatally injured, killed it, is not fatally variant from an averment that the animal was killed by the train.[11]

Burden of proof.[12]—Where there are no eye witnesses to an accident it will be presumed that one killed therein exercised due care in crossing the track,[13] and stopped, looked and listened at the most advantageous place;[14] but if this presumption applies at all, where a person goes upon a railroad crossing at night knowing of danger from moving engines, it is only in the absence of testimony explanatory of his conduct.[15] The presumption is destroyed by undisputed evidence that if he had looked and listened before driving upon the crossing he must have seen and heard the train approaching.[16] As a general rule the burden is on the plaintiff not only to show negligence on the part of the defendant,[17] and that such negligence was the proximate cause of injury,[18] but also to show his own freedom from contributory negligence.[19] After a default the burden of showing plaintiff's contributory negligence is on defendant.[20] In many states, however, con-

4. Baltimore, etc., R. Co. v. Seitzinger, 116 Ill. App. 55.

5. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72.

6. **Injury to stock:** Variance held immaterial. Reed v. Chicago & A. R. Co., 112 Mo. App. 575, 87 S. W. 65. In Indiana the complaint must show that the stock was killed in the county where the action is commenced. Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21. In Montana the complaint must allege the plaintiff's ownership or possession of the land along which the railroad ran at the point where the cattle strayed on the track. Metlen v. Oregon Short Line R. Co. [Mont.] 81 P. 737. Under the Idaho statute the complaint must allege that at the time of killing defendant was operating a line of railroad within the state. Rev. St. Idaho 1887, § 2680. Laws 1901, p. 87. McKnight v. Oregon Short Line R. Co. [Mont.] 82 P. 661.

7. Bamberg v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 988. Complaint held to sufficiently show that plaintiff was ignorant of approach of train and was misled by failure to give signals. Southern I. R. Co. v. Corps [Ind. App.] 76 N. E. 902.

8. Absence of contributory negligence need not be alleged in an action for wrongful death at a crossing. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

9. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

10. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

11. Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. [Mont.] 83 P. 886.

12. See 4 C. L. 1224, 1228.

13. Blauvelt v. Delaware, etc., R. Co., 206 Pa. 141, 55 A. 857; Clarke Co. v. Baltimore & O. R. Co., 27 Pa. Super. Ct. 251; Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50; Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537. Rule does not apply where there is testimony of eye witnesses. Illinois, etc., R. Co. v. Kief, 111 Ill. App. 354. In New York it is only where the accident results in death and there are no eye witnesses of the occurrence that freedom from contributory negligence may be established by circumstantial evidence. Seidman v. Long Island R. Co., 104 App. Div. 4, 93 N. Y. S. 209.

14. Schwarz v. Delaware, etc., R. Co. [Pa.] 61 A. 255; Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50.

15. St. Louis & S. F. R. Co. v. Chapman [C. C. A.] 140 F. 129.

16. Rollins v. Chicago, etc., R. Co. [C. C. A.] 139 F. 639.

17. Kearns v. Southern R. Co. [N. C.] 52 S. E. 131. That a witness did not notice or hear a bell ringing is not of equal weight with positive testimony that it was ringing. Chicago & E. I. R. Co. & Western I. R. Co. v. Eganolf, 112 Ill. App. 323. That a person is found dead beneath a locomotive along the right of way raises no presumption of negligence on the part of those operating the engine. St. Louis & S. F. R. Co. v. Chapman [C. C. A.] 140 F. 129.

18. Evidence held insufficient to show engineer's failure to stop train sooner was proximate cause of injury. Kearns v. Southern R. Co. [N. C.] 52 S. E. 131.

19. Seidman v. Long Island R. Co., 104 App. Div. 4, 93 N. Y. S. 209.

20. Norris v. New York, etc., R. Co. [Conn.] 61 A. 1075.

tributory negligence is now made a matter of defense.[21] When a person stops and listens, contributory negligence cannot be based on a mere failure to hear an approaching train.[22] By statute, proof of injury,[23] excessive speed,[24] or death caused by cars, raises a presumption of negligent operation.[25] Evidence that the locomotive causing injury is marked with the initials of defendant company is prima facie proof that it is the property of defendant and is operated by defendant's employees.[26] Where a pedestrian walking by daylight over a railroad crossing is struck by a descending semaphore, no presumption of negligence arises.[27] By statute in some states proof of the killing of stock by a train raises a presumption of negligence on the part of the railroad company[28] which must be overcome by evidence of the exercise of due care,[29] but where a notice to defendant is a requisite to this presumption, there must be a strict compliance with the statute thereon.[30] A defendant's failure to controvert the alleged value of an animal killed does not relieve plaintiff from proving such value.[31] In the absence of evidence to the contrary it will be presumed that stock came upon the road where it was killed.[32] Evidence of failure to give the statutory signals raises a prima facie case[33] and overcomes the general presumption that railroad employees performed their duty.[34]

Evidence.[35]—The evidence must be confined to the issues made,[36] but all the surrounding circumstances may be shown, though such showing involves proof of negligence not charged,[37] and under a general averment of negligence, plaintiff is not confined to a single negligent act.[38] A witness may state directly whether certain obstructions shown to exist obscured the view from a certain place.[39] Rules,[40] train orders,[41] and customs are admissible where violation thereof is

21. Burns' Ann. St. 1901, § 359a. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50. Pub. St. 1882, c. 112, § 113. Kenny v. Boston & M. R. Co., 188 Mass. 127, 74 N. E. 309.

22. Birmingham S. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363.

23. Code 1896, § 3443, is applicable in an action by a husband for injury to his wife and property. Birmingham S. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363.

24. Hurd's Rev. St. 1901, p. 87, c. 114. Chicago & N. W. R. Co. v. Jamieson, 112 Ill. App. 69.

25. Kemp v. Central of Georgia R. Co., 122 Ga. 559, 50 S. E. 465.

26. East St. Louis Connecting R. Co. v. Altgen, 112 Ill. App. 471.

27. McKenna v. Alabama & V. R. Co. [Miss.] 40 So. 426.

28. Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co., 123 Ga. 613, 51 S. E. 621; Dougherty v. Chicago, etc., R. Co. [S. D.] 104 N. W. 672; Atlantic & W. P. R. Co. v. Hudson, 123 Ga. 108, 51 S. E. 29; Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537; Atlantic & B. R. Co. v. Smith, 123 Ga. 423, 51 S. E. 344; St. Louis, etc., R. Co. v. Shaver [Ark.] 88 S. W. 861. Code, § 2326 does not apply to injuries to animals running upon a trestle in advance of a train. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

29. Atlantic & W. P. R. Co. v. Hudson, 123 Ga. 108, 51 S. E. 29. For the jury whether presumption of negligence overcome by evidence. St. Louis, etc., R. Co. v. Shaver [Ark.] 88 S. W. 961.

30. Rev. St. Idaho 1887, § 2680; Laws 1901, p. 87. McKnight v. Oregon Short Line R. Co. [Mont.] 82 P. 661.

31. Prescott, etc., R. Co. v. Brown [Ark.] 86 S. W. 809.

32. Acord v. St. Louis S. W. R. Co., 113 Mo. App. 84, 87 S. W. 537.

33, 34. Roberts v. Wabash R. Co., 113 Mo. App. 6, 87 S. W. 601.

35. See 4 C. L. 1224, 1228.

36. Pleadings held to warrant proof of negligence by watchman at crossing. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. Where plaintiff alleged that the market value of his horse was $500. admission of evidence that the horse had no market value but had an intrinsic value for purposes for which he had been trained is error. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 89 S. W. 1001. Evidence as to equipment is inadmissible when the only negligence alleged is in operation. Western R. Co. v. Stone [Ala.] 39 So. 723.

37. Where it appears that a crossing was almost continuously used by the public, and that the train was moving at an excessive speed, evidence as to the absence of flagmen or gates is admissible, though the complaint does not allege negligence in failure to maintain them. Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746.

38. Where the negligence of a railroad company is averred in general terms, plaintiff will not be confined in his evidence to any one particular act of negligence. Southern R. Co. v. Douglass [Ala.] 39 So. 268.

39. Rietveld v. Wabash R. Co. [Iowa] 105 N. W. 515.

40. The rule of a company requiring a

charged as negligence, or to charge plaintiff if he had knowledge thereof,[42] but a practice of taking certain precautions is not admissible to show that they were taken on a particular occasion.[43] A conductor of long experience and familiar with the locality may testify as an expert on speed,[44] and his train record is admissible.[45] Cases involving sufficiency of evidence are noted below.[46] Positive evidence is of greater weight than negative as to the giving of signals.[47]

Instructions[48] should be given as to negligence[49] and contributory negligence[50]

bell to be rung when an engine is about to move is admissible. Minot v. Boston & M. R. Co. [N. H.] 61 A. 509.

41. Train orders are admissible to show the whereabouts of a train at a particular time. Louisville & N. R. Co. v. Daniel [Ky.] 91 S. W. 691.

42. In showing a custom to leave crossing gates down without reason, evidence of such instances unknown to plaintiff is inadmissible. Chicago, etc., R. Co. v. Keegan, 112 Ill. App. 338.

43. The testimony of a fireman and an engineer that it was their habit and custom to give the statutory signals at a particular crossing is inadmissible. Texas & P. R. Co. v. Frank [Tex. Civ. App.] 13 Tex. Ct. Rep. 236, 88 S. W. 383.

44. Baltimore & O. R. Co. v. Connell [C. C. A.] 137 F. 8.

45. Where conductor's train record shows a speed of 35 miles an hour, testimony that the train was running very fast but not fixing any standard is immaterial. Keiser v. Lehigh Valley R. Co., 212 Pa. 409, 61 A. 903.

46. Accidents at crossings: Evidence insufficient to show negligence. Kearns v. Southern R. Co. [N. C.] 52 S. E. 131; Guilmont's Adm'r v. Central Vt. R. Co. [Vt.] 62 A. 54; Hintz v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 292, 104 N. W. 23; McCarthy v. Philadelphia & R. R. Co., 211 Pa. 193, 60 A. 778; Southern R. Co. v. Douglass [Ala.] 39 So. 268. As to ringing of bell. Chicago & A. R. Co. v. Pulliam, 111 Ill. App. 305. Evidence of an altercation between a switchman and a watchman at crossing and refusal of one to heed signals of the other held sufficient to take the case to the jury as to defendant's negligence. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. Evidence insufficient to show contributory negligence. Spiller v. St. Louis, etc., R. Co., 112 Mo. App. 491, 87 S. W. 43; Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268; Kenny v. Boston & M. R. Co., 188 Mass. 127, 74 N. E. 309; Potter v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 175, 103 N. W. 808. Evidence did not show contributory negligence where deceased was killed at crossing by a train moving backwards without lights, on dark night. Blauvelt v. Delaware, etc., R. Co., 206 Pa. 141, 55 A. 857. Evidence held to show driver guilty of contributory negligence. Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995; Cowen v. Dietrick [Md.] 60 A. 282; St. Louis & S. F. R. Co. v. Chapman [C. C. A.] 140 F. 129; Guilmont's Adm'r v. Central Vermont R. Co. [Vt.] 62 A. 54; Brennan v. Pennsylvania R. Co. [N. J. Law] 62 A. 177.

Injury to cattle: Evidence held to show negligence of defendant. Missouri, etc., R. Co. v. Rodgers [Tex. Civ. App.] 86 S. W. 625; St. Louis & S. F. R. Co. v. Carlisle [Ark.] 88 S. W. 584. Evidence held insufficient to charge defendant with negligence in killing a horse upon depot grounds. Texas Cent. R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 610, 88 S. W. 414. Evidence held not to show negligence in operation of the train. Chicago, etc., R. Co. v. Dowhower [Neb.] 104 N. W. 1070; Atlantic & B. R. Co. v. Smith, 123 Ga. 423, 51 S. E. 344; Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. R. 570, 88 S. W. 301. Evidence held to justify finding that defendant owned the railroad complained of. Oyler v. Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; Payne v. Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164. That a cattle guard does not prevent stock from passing over it does not conclusively show that it is unsafe and unsuitable. St. Louis, etc., R. Co. v. Busick [Ark.] 86 S. W. 674. The Missouri statute does not require direct evidence of the killing. Oyler v. Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; Payne v. Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164.

47. Testimony of 14 witnesses that certain signals were given, and of 9 witnesses that they heard no such signals, conclusively proves the performance of those duties. Keiser v. Lehigh Valley R. Co., 212 Pa. 409, 61 A. 903. Testimony that signals were not given held sufficiently positive to make a question for the jury as against testimony that they were given. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

48. See 4 C. L. 1225, 1229.

49. Instructions as to care required in backing an engine after dark over a busy street crossing held proper. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234. Instruction as to ringing of bell or blowing of whistle, and as to obstruction of crossing, held proper. Id. Instruction in an action for injury while passing between cars of standing train held not to impose greater burden on defendant than law required. Thomasson v. Southern R. Co. [S. C.] 51 S. E. 443. Instruction placing upon the railroad company the burden of proving that its employes exercised the highest degree of care known to the law held erroneous. Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co., 123 Ga. 613, 51 S. E. 621. Instruction as to the character of fence which defendant was required to maintain upheld. Colyer v. Missouri Pac. R. Co., 113 Mo. App. 457, 87 S. W. 572. A charge of court is erroneous which makes it incumbent upon a railroad company to regulate the speed of its trains at a given crossing with due regard to "all the circumstances surrounding the place and affecting the traveling public," where testimony has been introduced tend-

requiring that such negligence be the proximate cause of the injury,[51] specifically applicable to the facts of the particular case,[52] and confining the jury to the issues made,[53] but not singling out particular facts[54] and instructions ignoring evidence or issues are properly refused.[55] An instruction referring to a customary pathway over the tracks as a public crossing is not harmful where the same instruction correctly defined the duties of defendant thereat.[56] An instruction that the presumption that one killed at a crossing exercised due care is overcome if from the circumstances the jury find that by due care he could have avoided injury should be given.[57]

Directing verdict; questions for jury.—Except where a particular act is declared to be negligence, either by statute or ordinance, the question as to what constitutes negligence[58] and contributory negligence are ordinarily for the jury,[59] and

ing to show that the view was to some extent obstructed by trees, weeds, etc., not on the company's right of way. Baltimore, etc., R. Co. v. Moloney, 7 Ohio C. C. (N. S.) 437. Inasmuch as the manner of giving notice of the approach of a train is prescribed by statute, it is erroneous to charge that such notice "must be given so that one approaching (the crossing) could protect himself from injury." Id.

50. Evidence held to require instructions on necessity of providing watchman at crossing and on acts of persons in imminent peril. Crowder v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 166. A charge that, if the jury should find that plaintiff's intestate saw the approaching train, was conscious of his danger, and had the time and ability to remove himself from peril but failed to do so, plaintiff could not recover is not erroneous. Griffin v. Seaboard Air Line R. Co., 138 N. C. 55, 50 S. E. 516.

51. Where one of the grounds of alleged negligence was a failure to ring the bell, and some evidence tended to show that the accident might have occurred regardless of the bell signal, it is error to refuse to charge that the verdict be for defendant, unless the jury find that the failure to ring the bell was the proximate cause of injury. Missouri, etc., R. Co. v. Jackson [Tex. Civ. App.] 13 Tex. Ct. Rep. 172, 88 S. W. 406. Failure of instruction to require that negligence must have beeen the proximate cause of injury is harmless where there is no evidence of an intervening cause. Southern R. Co. v. Douglass [Ala.] 39 So. 268.

52. In an action for injury to one of defective hearing, an instruction that he was bound to exercise the care of an ordinarily prudent person, whose hearing was so defective, should have exercised under the circumstances, is not misleading. Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268. An instruction as to the presumption of negligence when an animal is "killed" by a train is not improper where the evidence shows that the animal was injured by a train and that defendant's employes, deeming the injuries fatal, killed it. Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. [Mont.] 83 P. 886. Instruction in case of injury to child of tender years, authorizing engineer to assume that child would use reasonable prudence, is properly refused. Missouri, etc., R. Co. v. Nesbit [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891. An instruction that it is not the duty of a railroad company to check the speed of its trains at crossings is properly refused where it appears that the train inflicting injury was running at an excessive speed. Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537.

53. Where the only negligence charged is a failure to keep a lookout and the employment of incompetent men, an instruction that evidence of failure to give crossing signals should not be considered for any purpose should be given. Missouri, etc., R. Co. v. Nesbit [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891.

54. Instruction as to contributory negligence at crossing held not to single out certain parts of the evidence. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 909.

55. Submission of failure to fence when no evidence thereof. Gulf, etc., R. Co. v. Simpson [Tex. Civ. App.] 91 S. W. 874. Instruction about "inferences," as to where cattle entered the right of way, refused where there was positive evidence thereon. Texas & P. R. Co. v. Owens [Tex. Civ. App.] 13 Tex. Ct. Rep. 354, 87 S. W. 846.

56. Gulf, etc., R. Co. v. Johnson [Tex.] 90 S. W. 164.

57. Rietveld v. Wabash R. Co. [Iowa] 105 N. W. 515.

58. St. Louis, etc., R. Co. v. Kimberlain [Ark.] 88 S. W. 599; Atlanta & W. P. R. Co. v. Hudson, 123 Ga. 108, 51 S. E. 29; Hobbs v. St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525; Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746; Lewis v. Erie R. Co., 105 App. Div. 292, 94 N. Y. S. 765; Elgin, J. & E. R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109; Greenawaldt v. Lake Shore, etc., R. Co. [Ind.] 73 N. E. 910; Chicago & E. I. R. Co. v. Olson, 113 Ill. App. 320; McCabe's Adm'x v. Maysville, etc., R. Co. [Ky.] 89 S. W. 683; Payne v. Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164; Yates v. New York, etc., R. Co., 95 N. Y. S. 497; Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; St. Louis & S. F. R. Co. v. Satterfield [Ark.] 86 S. W. 821; St. Louis & S. F. R. Co. v. Thompson, Yont & Co. [Ark.] 88 S. W. 593. Sounding of stock alarm. St. Louis, etc., R. Co. v. Shavér [Ark.] 88 S. W. 961.

59. Baltimore & O. R. Co. v. Connell [C. C. A.] 137 F. 8; McCarthy v. Philadelphia & R. R. Co., 211 Pa. 193, 60 A. 778; Cromley v. Pennsylvania R. Co., 211 Pa. 429, 60 A.

always so on a conflict of evidence.[60] If the undisputed evidence shows the accident to have resulted from plaintiff's negligence,[61] or the evidence for the plaintiff is a mere scintilla and that for the defendant so overwhelming that no real controversy is raised, a verdict for the defendant should be directed.[62]

Special findings.[63]—A finding that intestate was guilty of contributory negligence cures error in a refusal of a prayer on that issue.[64]

Double damages and attorney's fees.[65]—By statutes, attorney fees[66] and double damages are frequently allowed for injury to stock caused by failure to fence.[67] A recovery of the statutory penalty is the only remedy open to one whose stock is killed by reason of a failure to maintain a statutory cattle guard.[68]

§ 12. *Railroad corporations. Incorporation and existence.*[69]—In designating the route for a proposed railway in the articles of incorporation, it is necessary that the counties, but not the townships, through which it is to pass be named. Where townships are named it is mere surplusage.[70] The Arkansas statute providing for a forfeiture of franchise and charter rights acquired by any railroad

1007; Minot v. Boston, etc., R. Co. [N. H.] 61 A. 509; Worthington v. Philadelphia & R. R. Co., 23 Pa. Super. Ct. 195; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908; McCabe's Adm'x v. Maysville, etc., R. Co. [Ky.] 89 S. W. 683; Toledo, etc., R. Co. v. Christy, 111 Ill. App. 247; Lewis v. Erie R. Co., 105 App. Div. 292, 94 N. Y. S. 765; Christensen v. Oregon Short Line R. Co. [Utah] 80 P. 746; Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553; Chicago & Eastern I. R. Co. v. Olson, 113 Ill. App. 320; Steed v. Rio Grande Western R. Co. [Utah] 82 P. 476; Farrell v. Erie R. Co. [C. C. A.] 138 F. 28; Elgin, etc., R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109; Greenawaldt v. Lake Shore, etc., R. Co. [Ind.] 74 N. E. 1081; Greenawaldt v. Lake Shore, etc., R. Co. [Ind.] 73 N. E. 910. Whether plaintiff should have taken other precautions. Beach v. Pennsylvania R. Co., 212 Pa. 567, 61 A. 1106. Place of stopping to look and listen. Fry v. Pennsylvania R. Co., 24 Pa. Super. Ct. 147; Tobin v. Lehigh & Wilkes-Barre Coal Co., 24 Pa. Super. Ct. 475.

60. Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 74 N. E. 1031; Pyne v. Delaware, etc., R. Co., 212 Pa. 143, 61 A. 817; Farrell v. Erie R. Co. [C. C. A.] 138 F. 28; Southern R. Co. v. Carroll [C. C. A.] 138 F. 638; Greenawaldt v. Lake Shore & M. S. R. Co. [Ind.] 73 N. E. 910; Summers v. Bloomsburg & S. R. Co., 24 Pa. Super. Ct. 615; Potter v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 175, 103 N. W. 808; Hintz v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 292, 104 N. W. 23. So with a railroad and a street car company where each is negligent. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. Degree of care requisite on part of traveler under special circumstances. Armstrong v. Pennsylvania R. Co., 212 Pa. 228, 61 A. 831.

61. St. Louis S. W. R. Co. v. Purcell [C. C A.] 135 F. 499; Toledo, etc., Co. v. Christy, 111 Ill. App. 247. Held contributory negligence. Greenwood v. Chicago, etc., R. Co. [Minn.] 104 N. W. 3. Defendant's negligence should not be submitted to jury unless evidence of plaintiff's freedom from contributory negligence is such as to justify submission of that question. Larsen v. U. S. Mortg. & Trust Co., 104 App. Div. 76, 93 N. Y. S. 610.

62. Cromley v. Pennsylvania R. Co., 211 Pa. 429, 60 A. 1007; Patterson v. Chicago & W. I. R. Co., 111 Ill. App. 441. Testimony of plaintiff that he looked and listened will not make an issue for the jury where it appears beyond contradiction that had he done so he would have seen the train approaching. St. Louis S. W. R. Co. v. Purcell [C. C. A.] 135 F. 499. A peremptory instruction for defendant is proper where plaintiff's case rested solely upon the statutory presumption of negligence, and the testimony of defendant's engineer conclusively showed that the accident was unavoidable. Southern R. Co. v. Murry [Miss.] 39 So. 478.

63. See 4 C. L. 1225, 1230. Special findings held not inconsistent with general verdict for plaintiff. Smith v. Michigan Cent. R. Co. [Ind. App.] 73 N. E. 928.

64. Edwards v. Carolina & N. W. R. Co. [N. C.] 52 S. E. 234.

65. See 4 C. L. 1225, 1230.

66. B. & C. Comp. § 5146. Harvey v. Southern Pac. Co. [Or.] 80 P. 1061.

67. Code § 2055. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343. Rev. St. 1899, § 1105. Foster v. Kansas City S. R. Co., 112 Mo. App. 67, 87 S. W. 57. That plaintiff sued for twice the amount agreed upon with defendant does not preclude recovery of the agreed amount. Suit may be brought in 40 days after the date of agreement. Rev. St. 1899, §§ 1108, 1109. Keylon v. Missouri, etc., R. Co., 114 Mo. App. 66, 89 S. W. 337. Double damages for failure to fence are allowed in Missouri only in case of an actual collision between the locomotive or train and the animal. Reed v. Chicago & A. R. Co., 112 Mo. App. 575, 87 S. W. 65. Rev. St. 1899, § 1105. Evidence insufficient. Logan v. St. Louis, etc., R. Co., 111 Mo. App. 674, 86 S. W. 565.

68. St. Louis, etc., R. Co. v. Rowland [Ark.] 88 S. W. 994.

69. See 4 C. L. 1181.

70. Hayes v. Toledo R. & T. Co., 6 Ohio C. C. (N. S.) 281.

under a lease not in conformity with the statute is applicable to foreign corporations operating in the state under lease.[71]

Powers of corporation and authority of officers.[72]—Where not limited as to the kind of motive power to be used, a railroad company is required to use that which is best and most convenient for its operation, having due regard to the safety of the public.[73] A grant of power to construct a steam railroad without limiting it to surface construction authorizes the building of a viaduct across certain streets on which to lay its tracks.[74] A company authorized to manufacture lumber and other articles with "all the rights, powers, and privileges of a general transportation company" is not restricted to the carriage of its own products and does not lose its right to operate its railroad where it has ceased to have such products to carry.[75] Under the Pennsylvania statutes a railroad company may be incorporated to construct beneath city streets an underground railroad having no city access except the terminus, and such road may be operated by electricity.[76] An agreement by a railroad corporation to guarantee dividends on the bonds of a hotel to be built on its line is ultra vires,[77] and receipt of added revenue from travel due to the erection of such hotel does not estop the railroad company to assail the agreement.[78] The lack of any congressional authority in the successive grantees of a railway roadbed, lying in the District of Columbia, to extend their lines into that district could not affect their title if the original grantor had authority.[79] A railroad company duly incorporated under the general railroad laws of Ohio may construct and operate a railroad having both of its terminal points wholly within the same city.[80] Under the consolidation act the P. B. & W. R. Co. is authorized to widen its right of way beyond the 66 foot limit when necessary for the successful prosecution of its business, but the charter prohibitions on condemning land were not repealed.[81] In the absence of specific provisions in its charter to the contrary, the power of making and receiving contracts as to the right of way belongs to the president of a railroad company.[82] A charter provision that certain acts shall not be valid until "ratified by the stockholders" requires the consent of the majority only.[83]

Foreign corporations.[84]—A foreign corporation operating in Arkansas under a lease is within a statute of that state governing the form of railroad leases.[85]

§ 13. *Actions by and against railroad companies.*[86]—In general, suits against railroad corporations should be brought in the county where the cause of action arises,[87] but some states will enforce a right of action accruing under the statutes

71. Acts 1901, p. 368. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.
72. See 4 C. L. 1182.
73. Company incorporated under Act April 4, 1868, may use electricity as well as steam. Howley v. Central Valley R. Co. [Pa.] 62 A. 109.
74. Bubenzer v. Philadelphia, etc., R. Co. [Del.] 61 A. 270.
75. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.
76. Act April 4, 1868. Sparks v. Philadelphia & C. R. Co., 212 Pa. 105, 61 A. 881.
77, 78. Western Md. R. Co. v. Blue Ridge Hotel Co. [Md.] 62 A. 351.
79. Chesapeake Beach R. Co. v. Washington P. & C. R. Co., 199 U. S. 247, 50 Law. Ed. —.
80. Rev. St. 1892, § 3270. State v. Union Terminal R. Co., 72 Ohio St. 455, 74 N. E. 642.
81. Bubenzer v. Philadelphia, etc., R. Co. [Del.] 61 A. 270.
82. City of Hickory v. Southern R. Co., 137 N. C. 189, 49 S. E. 202.
83. Louisville & N. R. Co. v. Jarvis, 27 Ky. L. R. 986, 87 S. W. 759.
84. See 4 C. L. 1183.
85. Acts 1901, p. 368. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.
86. See 4 C. L. 1182.
87. In North Carolina an action against a railroad, whether resident or foreign, must be tried in the county where the cause of action arose, or in an adjoining county, or in the county where the plaintiff resides. Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920. Pleadings and evidence held sufficient to show that stock was killed in township where suit was brought. Payne v. Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164. A return showing service of a writ on a railroad company's agent in the township of suit is conclusive evidence of a justice's jurisdiction. Rev. St. 1899, § 3839.

of another state if such statutes be similar to those in force at the place of venue.[88] Service of process on railroad companies whether domestic or foreign is largely controlled by statute.[89] A railroad company and its engineer, who are jointly liable for injuries caused by the latter's negligence, may be sued jointly therefor.[90] To successfully maintain an action for personal injuries it must be shown that defendant neglected to discharge some duty which it owed to plaintiff, and such duty must appear from an averment of facts from which the duty follows as a matter of law.[91]

§ 14. *Offenses relating to railroads.*[92]—Some states have made penal a failure of a railroad company to bulletin its trains,[93] or to give the statutory crossing signals.[94] On an indictment of a company for a nuisance for maintaining an alleged illegal crossing, the question of forfeiture of charter or its validity are not in issue.[95] An indictment under the Kentucky statute requiring the maintenance of stations must charge that the railroad commission had ordered a station at the place in question.[96] An action for the penalty for violation of the South Carolina separate coach law is barred in one year.[97] A person who throws a missile into a coach in a moving train, while standing on a platform of the coach, violates a statute making it punishable for a person to hurl any missile into a moving train.[98] An indictment for the statutory offense of shooting or throwing rocks at a railroad train need not allege that the train belonged to a chartered railroad.[99] It is for the jury whether an engine standing on a street crossing is a "willful obstruction" within a statute.[100]

RAPE.

Matters of criminal law and procedure common to other crimes,[1] and civil liability for ravishment,[2] are treated elsewhere.

§ 1. *Nature and elements. A. In general.*[3]—Rape is the carnal knowledge of a female forcibly and against her will.[4] Any penetration, however slight, is

Kerr v. Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596.

88. A railroad which extends into and is operated in Texas, and is there served with process, may be sued on a cause of action arising in Kansas, though it be a Kansas corporation and plaintiff be a citizen of that state. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 13 Tex. Ct. Rep. 140, 87 S. W. 401.

89. One who sells tickets on commission at a place where trains are advertised to stop, and who is advertised as the proper party to purchase tickets of, is a "station agent" upon whom service may be made. Malott v. Mapes, 111 Ill. App. 340.

90. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234. Injury to mail clerk. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530.

91. Chicago, etc., R. Co. v. Gardanier, 116 Ill. App. 619.

92. See 4 C. L. 1230.

93. Under Burns' Ann. St. § 5187, each violation of § 5186 is a separate offense. Southern R. Co. v. State [Ind.] 75 N. E. 272.

94. Defendants are entitled to have the record show what train committed the alleged violation of the statute. Choctaw, O. & G. R. Co. v. State [Ark.] 87 S. W. 631.

95. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

96. Ky. St. 1903, § 772. Commonwealth v. Illinois Cent. R. Co., 27 Ky. L. R. 763, 86 S. W. 542.

97. 23 St. at Large p. 457. Sturkie v. Southern R. Co., 71 S. C. 208, 50 S. E. 782.

98. Laws 1900, p. 141, c. 103. State v. Ray [Miss.] 39 So. 521.

99. Allen v. State, 123 Ga. 499, 51 S. E. 506.

100. Burns v. Delaware & H. Co., 96 N. Y. S. 509.

1. See Criminal Law, 5 C. L. 883, and Indictment and Prosecution, 5 C. L. 1790.

2. See Assault and Battery, 5 C. L. 269

3. See 4 C. L. 1231.

sufficient to complete the offense.[5] A husband cannot himself be guilty, as principal in the first degree, of rape upon, or of an assault with intent to commit a rape upon, his wife.[6] Force is a necessary element,[7] but this does not necessarily mean actual physical force, constructive force, as by duress or putting in fear, being sufficient.[8] The act of having intercourse with a woman who is asleep is rape since it is without her consent.[9] Consent or submission after the offense has been completed by penetration is no defense.[10] The law does not require that the woman shall do more than her age, strength, and attendant circumstances make it reasonable for her to do.[11] An outcry is not an essential of proof of the crime,[12] and a failure to make it raises no presumption of law that the prosecutrix has sworn falsely,[13] but is merely a circumstance tending to disprove the good faith of the charge, to be weighed by the jury in connection with the surrounding circumstances.[14] The same is true of delay in making complaint.[15]

(§ 1) *B. Female under age of consent.*[16]—It is universally provided by statute that carnal knowledge of a female under a specified age shall be rape, regardless of whether she consents or not.[17]

4. Hubert v. State [Neb.] 104 N. W. 276. The carnal knowledge of a woman above the age of ten years against her will. State v. Truitt [Del.] 62 A. 790. Cr. Code § 11 makes it rape for any person to have carnal knowledge of his daughter or sister forcibly and against her will. Id. § 12 makes it rape to have forcible carnal knowledge of any other woman or female child, or to have intercourse with a female child under the age of 18 years, without force and with her consent, unless she is over 15 and of previous unchaste character. Hubert v. State [Neb.] 104 N. W. 276. Each of these three classes of crimes is totally distinct from the other two. Id.

Principals and accessories: Defendant who called his co-defendant in to commit crime held an accessory of the latter. Barrett v. People [Ill.] 77 N. E. 224. Under Rev. St. 1889, § 2364, providing that every person who shall be a principal in the second degree in the commission of a felony may be convicted and punished as a principal in the first degree, held that where evidence showed two distinct rapes. one by third person aided by defendant, and one by defendant, he was properly tried and convicted as principal in first degree. State v. Sykes, 191 Mo. 62, 89 S. W. 851. One who stands by and witnesses a rape, and gives encouragement to the perpetrator by failing to interfere, is an accessory before the fact, though neither he nor prosecutrix knows such third person. Id.

5. Pen. Code, § 280. People v. Asteli, 94 N. Y. S. 748. Actual penetration committed forcibly and against the consent of the female is all that is necessary to be proven. Code 1896, § 5445. Posey v. State [Ala.] 38 So. 1019.

6. Not where he himself is the actual party to the intercourse. Frazier v. State [Tex. Cr. App.] 86 S. W. 754.

7. Mere want of consent is insufficient. Perez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 453, 87 S. W. 350.

8. Posey v. State [Ala.] 38 So. 1019.

9. Under Rev. St. 1889, § 1837, providing for the punishment of anyone convicted of rape "by forcibly ravishing any woman." State v. Welch, 191 Mo. 179, 89 S. W. 945.

10. State v. Welch, 191 Mo. 179, 89 S. W. 945.

11, 12, 13. State v. Miller [Mo.] 90 S. W. 767.

14. State v. Miller [Mo.] 90 S. W. 767. Failure of girl of 15 to make outcry held not to entitle defendant to an acquittal, where crime was committed in unoccupied field, two miles from any dwelling, where she was in power of defendant and his accomplice. Id. Failure to make outcry or complaint must be considered in the light of the opportunity for so doing, and the conditions surrounding prosecutrix at the time. State v. Wertz [Mo.] 90 S. W. 838.

15. Fact that prosecutrix made no complaint to negroes, with whom she and defendant stayed on the night after the alleged rape, held not to entitle defendant to an acquittal, where she, a girl 15 years of age, was constantly under the surveillance of defendant and his accomplice. State v. Miller [Mo.] 90 S. W. 767. Fact that she did not complain until she told her father and the prosecuting attorney held properly submitted to the jury. Id. Effect of delay in making complaint depends upon circumstances of each particular case and is question for jury. State v. Dilts [Mo.] 90 S. W. 782. Considerable delay in failing to make disclosure of the crime is a circumstance which may be considered as bearing upon the guilt or innocence of the accused (People v. Asteli, 94 N. Y. S. 748), but this rule is to be considered in connection with opportunity, fear, or other circumstances which the court or jury can see have operated to prevent an immediate disclosure, as, in case of child of tender years, that she was afraid of being punished (Id.). Held not error to refuse to charge that failure to make prompt disclosure of crime is circumstance against prosecutrix and tends to disprove truth of her charge, where court charged that whether she did or did not make prompt disclosure was a matter for the jury to consider. People v. Asteli, 94 N. Y. S. 748.

(§ 1) *C. Attempts and assaults with intent to commit rape.*[18]—In order to constitute an assault with intent to commit rape there must be an assault coupled with the purpose of having intercourse with the person assaulted,[19] and the assault and the intent must concur as to time.[20] Impotency is no defense,[21] neither is drunkenness where defendant, at the time of the alleged offense, knew what he was doing, was able to appreciate the character of the act, and knew that it was wrongful and unlawful.[22]

§ 2. *Indictment and prosecution. A. Indictment or information.*[23]—As in other cases the indictment or information must clearly inform the accused of the nature of the accusation against him.[24] Except in the case of statutory rape, where force is not a necessary element,[25] it must be alleged that the act was done with

16. See 4 C. L. 1231.

17. Rev. St. 1892, § 2396, denouncing and punishing the crimes of ravishing a female over 10 by force, and of carnally knowing and abusing a female under 10, is not repealed by Id. § 2598, providing a punishment for anyone having intercourse with an unmarried female under 16, as amended by Laws 1901, c. 4965, p. 111, raising the age of the female to 18 and increasing the punishment. Wilson v. State [Fla.] 39 So. 471. While it is necessary, under § 2396, to allege and prove a different state of facts if female is under 10 than if she is over that age, yet in either case the crime is rape. Id. Object of § 2598, as amended, is to punish crime of intercourse with unmarried female under 18 under circumstances that do not make the crime rape, and female referred to is an unmarried one between 10 and 18. Id. Word "unlawfully," as used in Gen. St. 1901, § 2016, defining crime of carnally knowing a female under 18, is used in the sense of "without authority of law," or "not permitted by law." State v. Tinkler [Kan.] 83 P. 830. Under Cr. Code § 12, it is rape to have sexual intercourse with a female child under the age of 18 years without force and with her consent, unless she is over the age of 15 and of previous unchaste character. Hubert v. State [Neb.] 104 N. W. 276. The law conclusively presumes that a female under the statutory age is incapable of consent, and therefore act is by force and arms. State v. Jones, 32 Mont. 442, 80 P. 1095. Under a count charging statutory rape it is wholly immaterial whether intercourse was had with or without the consent of the prosecutrix, or with or without the use of force or threats. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345. Fact that intercourse was against will of prosecutrix and without her consent is not a defense to an indictment under Kirby's Dig. § 2008 for carnal abuse of a female under 16. Corothers v. State [Ark.] 88 S. W. 585. Under Act March 29, 1889 (Laws 1889, p. 951, c. 686), making it a misdemeanor to use a female under the age of 18 for the purpose of sexual intercourse, it is immaterial whether she consents to the act or not. State v. Cunningham [Del.] 63 A. 30. In prosecution under Rev. St. 1899, § 1838, for having carnal knowledge of a female between 14 and 18, her consent does not affect defendant's criminality. State v. Day, 188 Mo. 359, 87 S. W. 465.

18. See 4 C. L. 1231.

19. In order to authorize a conviction, the jury must be satisfied beyond a reasonable doubt that defendant would have been guilty of rape if he consummated his intent. State v. Truitt [Del.] 62 A. 790. Under Kirby's Dig. § 1583, defining an assault as an "unlawful attempt, coupled with present ability to commit a violent injury on the person of another," both the intention and ability to commit the crime must be shown, and defendant cannot be convicted of assault with intent to rape where he never attempted to have intercourse or asked for it, or to do any act without which it could not take place, and released prosecutrix when she expressed a desire to go back from where they had come. Anderson v. State [Ark.] 90 S. W. 846. Must be a taking hold of the person for the purpose of committing the rape, even in the case of a girl under 15, it not being enough that her mind is humiliated in some way, or that she suffers some disagreeable emotions of the mind. Hudson v. State [Tex. Cr. App.] 90 S. W. 177. Instruction that "the injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind," held erroneous. Id. Fewox v. State [Tex. Cr. App.] 90 S. W. 178.

20. Hudson v. State [Tex. Cr. App.] 90 S. W. 177.

21. State v. Bartlett, 127 Iowa 689, 104 N. W. 285.

22. State v. Truitt [Del.] 62 A. 790.

23. See 4 C. L. 1232.

24. Information charging rape of female under the age of 16 years, to wit, of the age of 14 years and upwards, held not confusing as to the meaning of the language employed. State v. Jones, 32 Mont. 442, 80 P. 1095. Indictment held to have properly charged an assault on a female under 15 by the use of force. Herbert v. State [Tex. Cr. App.] 90 S. W. 653.

25. Charge of assault in information under Gen. St. 1901, § 2016, for carnally knowing female under 18, held mere surplusage, and failure to prove it was not a variance. State v. Tinkler [Kan.] 83 P. 830. Where information charges that crime was committed upon a female child under the age of 16, further allegation that it was against her consent is mere surplusage, since law presumes that she is incapable of giving consent, and hence but one offense is charged. State v. Jones, 32 Mont. 442, 80 P. 1095.

force and against the will or consent of the prosecutrix.[26] It is sufficient if the crime is charged substantially in the words of the statute.[27] In prosecutions for statutory rape the age of the prosecutrix[28] and that of defendant, if material, must be alleged.[29] So must the previous chastity of prosecutrix, if material.[30] It has been held sufficient if the facts that prosecutrix is a female,[31] and was not defendant's wife, appear by necessary implication.[32] An indictment for an attempt to commit rape must aver the intent and the overt act constituting the attempt.[33]

A felony and a misdemeanor cannot be blended in one count.[34] In case two or more distinct crimes are alleged, the state will be required to elect between them.[35] Where the statute provides that the crime may be committed in different ways or by different means, the act constitutes but a single offense, whether one or all of such ways and means be employed in its commission, and it is proper to charge its commission in one of the ways or by one of the means, or in all such ways or by all such means conjunctively.[36] As a general rule there is no variance if another day than that alleged in the indictment be proven, provided it be prior to the indictment and within the statute of limitations,[37] but the indictment must on

26. Information under first clause of Cr. Code § 12. Hubert v. State [Neb.] 104 N. W. 276.

27. Information not rendered bad because defendant was charged with having "unlawfully" committed the offense without stating facts showing that it was done unlawfully. State v. Tinkler [Kan.] 83 P. 830.

28. Information under second clause of Cr. Code § 12 must charge that person upon whom offense was committed is a female child under 18 years of age. Hubert v. State [Neb.] 104 N. W. 276.

29. On prosecution under Hurd's Rev. St. 1903, c. 38, § 237, making it rape for male of 16 and upwards to have carnal knowledge of female under 14, either with or without her consent, indictment must allege that defendant was over 16. Schramm v. People [Ill.] 77 N. E. 117. Information under second clause of Cr. Code § 12 must charge that accused is a male person of 18 years or over. Hubert v. State [Neb.] 104 N. W. 276.

30. In prosecution under second clause of Cr. Code § 12, previous chastity must be alleged if she is over 15. Hubert v. State [Neb.] 104 N. W. 276.

31. Indictment charging that defendant "her, the said M., then and there unlawfully, forcibly, and against her will, feloniously did ravish," etc., is sufficient, though it does not specifically charge that prosecutrix was a female. State v. Miller [Mo.] 90 S. W. 767.

32. Indictment for statutory rape alleging that the prosecuting witness was under 16, and that defendant did unlawfully and feloniously have carnal knowledge of her, held to sufficiently negative the idea that they were man and wife, though that fact was not specifically alleged. Hust v. State [Ark.] 91 S. W. 8.

33. Indictment held fatally defective in failing to allege overt act, and conviction thereunder arrested. Hogan v. State [Fla.] 39 So. 464.

34. Indictment charging attempt to rape female over the age of 10, which is a felony, Rev. St. 1892, § 2396, and attempt to rape female under 18, which is misdemeanor under Laws 1901, c. 4695, p. 111, in one count held defective. Hogan v. State [Fla.] 39 So. 464.

35. Where indictment contained count for rape on girl under 15 and count for rape by fraud and threats, held proper to allow state to elect to prosecute on first count. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345. Where indictment contained count for rape on girl under 15 and count for rape by force, threats, and fraud, held within province of court to submit only the first count, and his action in so doing amounted to an election. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345. Proof that defendant has committed two or more similar crimes to which the information may relate does not render such information, if otherwise sufficient, insufficient to sustain a conviction of any one of such crimes, nor does proof that two distinct crimes have been committed render the proofs insufficient to sustain a conviction for either of them, the only effect in such cases being to render it uncertain as to which of such crimes the information was intended to apply, which uncertainty is properly removed by requiring the state to elect. State v. Osborne [Wash.] 81 P. 1096.

36. Under Bal. Ann. Codes & St. providing that person shall be guilty of rape who (1) shall forcibly ravish any female of the age of 18 years or more; (3) shall carnally know any female child under the age of 18 years, held that on information alleging that defendant did "forcibly and against her will ravish and carnally know" the prosecutrix, "a female child under the age of 18 years," charged but one offense. State v. Adams [Wash.] 83 P. 1108.

37. Whatley v. State [Fla.] 35 So. 80. Under Bal. Ann. Codes & St. § 6845, allegation of time is immaterial, otherwise than that indictment or information must show on its face that prosecution is not barred by limitations, and hence information charging that crime was committed on certain date does not confine state to proof of crime committed

its face charge a crime sufficiently definite to enable the court to impose the proper sentence, and, in determining its sufficiency in this respect, the date alleged must be taken as true.[38]

Defendant may ordinarily be convicted of a lesser offense necessarily included in that charged provided the evidence authorizes it.[39] By statute in some states, however, he cannot be convicted of an assault with intent to commit the crime, or of an attempt to commit it, where it appears that the crime was fully consummated.[40]

(§ 2) *B. Evidence.* 1. *Admissibility.*[41]—The general rules of criminal evidence of course apply.[42] Admissions and confessions of the accused,[43] the clothing

on such date, but an act committed at any time within three years next preceding the filing of the information may be shown and conviction therefor will be sustained thereby. State v. Osborne [Wash.] 81 P. 1096.

38. Whatley v. State [Fla.] 35 So. 80. Indictment charging the particulars of the offense of having carnal intercourse with an unmarried female under 16, under Rev. St. 1892, § 2598, as it stood prior to the amendment thereof by Acts 1901, c. 4695, p. 111, making it an offense to have such intercourse with unmarried female under 18, but alleging the time of its commission as a day subsequent to the amendment, will not support a conviction for an offense committed prior to the amendment. Whatley v. State [Fla.] 35 So. 80. Under Const. 1885, art. 3, § 32, original statute remains in force as to crimes committed before amendment becomes effective. Id.

39. One indicted for raping "a female under the age of 16 years, forcibly and against her will," may be convicted of carnal abuse of a female under 16 years (Kirby's Dig. § 2008), in view of Kirby's Dig. § 2413, authorizing conviction of any offense included in that charged. Henson v. State [Ark.] 88 S. W. 965. Assault and battery held included in averments of indictment for assault with intent. Anderson v. State [Ark.] 90 S. W. 846. Assault with intent to ravish includes in its commission a single assault where the evidence shows a continuous, violent assault by defendant upon prosecutrix, and defendant may, under proper instructions, be convicted of the lesser crime, though the evidence is sufficient to sustain a conviction for the greater. People v. Green [Cal. App.] 82 P. 544. Verdict of simple assault against one indicted for assault with intent to ravish will only be interfered with on appeal where there is no evidence showing that an assault was committed. Id. Defendant may be convicted of an attempt to commit rape on an information charging rape on a female under 16 years, though force or want of consent is not alleged, under Pen. Code § 1159, providing that defendant may be convicted of an offense necessarily involved in that charge, or of an attempt to commit the offense. People v. Ah Lung [Cal. App.] 83 P. 296. Pen. Code § 288, protecting children from lewd or lascivious acts not constituting other crimes, does not affect the rule, since it clearly excludes such offense. Id. Since proof of defendant's guilt of the crime of rape necessarily includes that of every included offense, he cannot complain of a conviction of one of such lesser offenses, unless it appears that in order to arrive at such a verdict the jury must have absolutely rejected the evidence of the witnesses of the state. State v. Barkley [Iowa] 105 N. W. 506. Held that defendant could not object to conviction for assault with intent where it appeared that a portion of prosecutrix's story might have been rejected and the rest accepted as true. Id. The offense of assault and battery is included in an indictment for rape. Id. Under an indictment for assault with intent to rape, any character of an assault upon a female by a man may be proven. Conviction of aggravated assault may be had though indictment does not charge defendant as being an adult male, and the assaulted party a female. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363.

40. Under Rev. St. 1899, § 2361, providing that no person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit any offense when it shall appear that the crime intended or offense attempted was perpetrated by such person at the time of such an assault or in pursuance of such an attempt, defendant cannot be tried or convicted of an assault with intent to commit rape where the testimony of prosecutrix, if credited, shows that the crime of rape was fully consummated, notwithstanding Id. §§ 2369, 2370, authorizing conviction of a lower offense than that charged necessarily involved in it. State v. Bell [Mo.] 91 S. W. 898.

41. See 4 C. L. 1232.

42. Evidence held admissible: As to understanding as to room defendant was to occupy, it being competent to show that he was to occupy a room found locked on the occasion of witness' visit. People v. Ah Lung [Cal. App.] 83 P. 296. Where prosecutrix testified that she never had any communication with defendant after the alleged rape, held error to exclude testimony that she was seen playing with him shortly thereafter. State v. Shouse, 188 Mo. 473, 87 S. W. 480. Where defendant and third person ravished prosecutrix pursuant to a common purpose, held that fact that third person first assaulted her while defendant looked on, and that defendant immediately afterwards also assaulted her, did not make two distinct offenses, and evidence of the whole transaction was admissible on trial of defendant. State v. Sykes, 191 Mo. 62, 89 S. W. 851.

Other offenses: Held not error to admit

worn by the accused if sufficiently identified,[44] that he fled to escape arrest[45] but

written confession of defendant, admitting intercourse with prosecutrix and another girl, where portion relating to the latter could not be separated, and jury were instructed to disregard all evidence of other offenses. Wistrand v. People, 218 Ill. 323, 75 N. E. 891. Proof by other girls that they had been at defendant's house many times, and that it was in the county mentioned held an improper method of proving venue, but not prejudicial where there was nothing in the evidence tending to show that defendant bad had improper relations with them. Id. Testimony of chief of police that upon a certain occasion there were other girls at police headquarters making charges against defendant held admissible for purpose of precluding inference that his failure to take down the evidence of prosecution in writing was due to a want of belief in its truthfulness, though it was not admissible for the purpose of showing that defendant had been guilty of other similar crimes. State v. Hummer [N. J. Law] 62 A. 388.

Evidence held inadmissible: In prosecution for statutory rape on defendant's stepdaughter, testimony of a witness that he had visited defendant's house and saw nothing incriminating. Hust v. State [Ark.] 91 W. 8. Penetration not being an element of the crime of an attempt to commit rape, its admission is harmless where defendant is convicted of that offense. People v. Ah Lung [Cal. App.] 83 P. 296. In prosecution for using female under 18 for purpose of sexual intercourse, where evidence showed that offense was committed early in June, evidence tending to show that it could not have been committed on the day in that month alleged in the indictment, since the state was not bound to establish that it was committed on that day. State v. Cunningham [Del.] 63 A. 30. In prosecution for rape on stepdaughter, petition for divorce filed against defendant by his wife on other grounds. State v. Shouse, 188 Mo. 473, 87 S. W. 480. Testimony of witness that he had kissed defendant, particularly where it did not appear that defendant was present. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363. Conversation between prosecutrix and her grandmother after she had driven home with defendant, a distance of five miles. Id. That before birth of prosecutrix's child defendant offered to furnish witness a woman with whom he could have intercourse, but refused to divulge her name unless witness would agree to have intercourse with her, being in no way connected with prosecutrix. Shults v. State [Tex. Cr. App.] 91 S. W. 786. Testimony of prosecutrix that one H. had proposed marriage to her without previously having made love to her, and that defendant had, in her presence, stated that he would give H. a span of mules when he married her, no connection between defendant and H. in regard to the matter being shown. Id. Evidence that a companion of defendant on a previous occasion had been convicted of seducing another girl. Neill v. State [Tex. Cr. App.] 91 S. W. 791. Evidence that prosecutrix's mother was an opium fiend in absence of anything to show connection of that fact with the case. Id. In prosecution for statutory rape, held proper to refuse to allow defendant to show by prosecutrix on cross-examination, as bearing on her credibility as a witness and as tending to show a motive for charging defendant with the crime, that she had had intercourse with many different men ever since she was 12 years old and down to the time in question. State v. Stimpson [Vt.] 62 A. 14.

43. Declarations of third person in presence of accused and his conduct in relation thereto held relevant and competent under Code Civ. Proc. § 1870, subd. 3, and Pen. Code § 1102. People v. Ah Lung [Cal. App.] 83 P. 296. Letter written by defendant after his arrest which was manifestly an attempt to fabricate evidence and suborn perjury, though never delivered. Dickey v. State [Miss.] 38 So. 776. On prosecution for having carnal knowledge of a female between 14 and 18, of previous chaste character, letters written by defendant to her expressing his affection for her and speaking of their intention of living together, as tending to corroborate her testimony and as being in the nature of an admission of his criminal conduct. State v. Kelley [Mo.] 90 S. W. 834. Instruction authorizing their consideration held proper. Id. Statements by defendant to third persons that prosecutrix had told her story all right at the preliminary examination, except as to the choking and that she had fought at first. State v. Wertz [Mo.] 90 S. W. 838. Cross-examination of defendant in regard to such admissions held proper. Id. Statement made by defendant to witness with reference to tree under which crime was alleged to have been committed. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345. State should not, however, be permitted to introduce evidence of acts of accused and statements alleged to have been made by him, which do not tend to corroborate the evidence of prosecutrix, or impeach or discredit his own testimony. Hubert v. State [Neb.] 104 N. W. 276. Prejudicial error to allow introduction of evidence of certain acts of defendant, such as the purchase of drinks for the officer arresting him, and statements made by him to such officer. Id.

44. Shirt and trousers claimed to have been worn by the accused when offense was committed held sufficiently identified. Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113.

45. State may show defendant's disappearance from home immediately after commission of the crime, and the search that was instituted for him, as tending to show flight. Dickey v. State [Miss.] 38 So. 776. The fact that defendant fled from the county to avoid arrest and trial for the offense charged may be considered. State v. Kelley [Mo.] 90 S. W. 834. Evidence that when warrant was issued officers could not find defendant, but that they finally located him in another county, held admissible as tending to show that he was concealing himself to escape arrest until he and prosecutrix could flee the country, as the evidence showed they intended to do. Id.

not that his co-conspirator did so,[46] evidence as to the relations existing between him and prosecutrix,[47] and evidence of the age of the prosecutrix, though there is no question that she is over the age of consent,[48] are admissible. In a prosecution for statutory rape a child born to the prosecutrix may be exhibited to the jury.[49] Declarations of the prosecutrix inconsistent with her testimony are not admissible as original evidence.[50] There is a conflict of authority as to the admissibility of evidence of other acts of intercourse.[51]

Evidence that prosecutrix made complaint soon after the alleged offense is admissible,[52] but the particulars of her complaint cannot be shown unless they are part of the res gestae.[53] As a general rule, evidence as to whom she charged with

40. Evidence of flight of co-conspirator held irrelevant and immaterial. State v. Sykes, 191 Mo. 62, 89 S. W. 851. Its admission held harmless. Id.

47. As to the actions of defendant and his association with prosecutrix. People v. Ah Lung [Cal. App.] 83 P. 296. In prosecution for raping defendant's daughter under the age of consent, admission of evidence showing the relation existing between defendant and prosecutrix and his disposition towards her, extending over several years, held not prejudicial error. State v. Norris, 127 Iowa 683, 104 N. W. 282.

48. Evidence of age of prosecutrix, a child slightly over 10 years old. Dickey v. State [Miss.] 38 So. 776.

49. As evidence tending to establish the fact of birth and prior unlawful intercourse. State v. Danforth [N. H.] 60 A. 839. In such case counsel for the state may call attention to the peculiarities in the features of the child and the defendant, and to a general resemblance between them. Id. The ground of the relevancy of such evidence is the same whether comparison is made to determine whether there is a difference of race as when it is a comparison between individuals, though greater weight may be given such evidence in the former case. Id. An objection resting upon the immaturity of the child goes merely to the definiteness of the proof, and whether its features are sufficiently developed to authorize its use as evidence by comparison with the alleged parent is purely a question of fact. Id. Objection that defendant was compelled to furnish evidence against himself held without foundation, it not appearing that he was required to do anything or that he did not testify. Will be presumed that he offered himself as a witness and made himself the subject of cross-examination and comment. Id.

50. Admissions made by child are incompetent, there being no privity between her and the state. State v. Hummer [N. J. Law] 62 A. 388.

51. Colorado: Evidence of other acts of intercourse with the prosecuting witness committed within the period of the statute of limitations is admissible as explanatory or corroboratory of the act charged. Schuette v. People, 33 Colo. 325, 80 P. 890. Jury should, however, be instructed, on request, that it is admissible for that purpose only, and that defendant can only be found guilty of the offense charged. Id. State must also elect on which offense it will rely. Id.

Kansas: Even though it is not proper to show subsequent acts of intercourse between defendant and prosecutrix, held that judgment of conviction would not be reversed because testimony of that character was brought out incidentally during examination upon another matter, particularly where it did not clearly appear that such evidence related to a subsequent and not to a prior transaction. State v. Oswalt [Kan.] 82 P. 586.

Michigan: Evidence of subsequent acts of intercourse with defendant is inadmissible on prosecution for statutory rape. People v. Brown [Mich.] 12 Det. Leg. N. 852, 106 N. W. 149.

New York: Where evidence of subsequent offenses was first brought out by defendant on cross-examination of prosecutrix, and no objection to such evidence was made at the trial, held that defendant could not complain of its admission. People v. Astell, 94 N. Y. S. 748.

Ohio: On trial of one indicted under Rev. St. 1905, § 6816, for carnally knowing and abusing female under 16 with her consent, confessions and admissions of defendant of acts of intercourse more than two years after the offense charged, and after prosecutrix had attained age of 16, held inadmissible. State v. Lawrence [Ohio] 77 N. E. 266.

Texas: On prosecution for statutory rape, state cannot examine prosecutrix as to other acts of intercourse between herself and defendant, and, even where defendant opens the way for such evidence, details of such other acts are inadmissible. Shults v. State [Tex. Cr. App.] 91 S. W. 786.

Vermont: On prosecution for statutory rape evidence of acts of intercourse on different days both before and after the one charged is admissible. State v. Willett [Vt.] 62 A. 48.

52. Posey v. State [Ala.] 38 So. 1019; Dickey v. State [Miss.] 38 So. 776. The voluntary complaints of the prosecutrix. State v. Andrews [Iowa] 105 N. W. 215. Testimony of prosecutrix that she made complaint to her husband and others soon after the occurrence. State v. Stines, 138 N. C. 686, 50 S. E. 851. Held that no error was committed in receiving testimony that complaint was made several months after the offense, and the explanation of the delay, the jury having been properly instructed on the subject. Donaldson v. People, 33 Colo. 333, 80 P. 906.

53. State v. Andrews [Iowa] 105 N. W. 215; Dickey v. State [Miss.] 38 So. 776. The

the offense is inadmissible,[54] though there seems to be some conflict of authority in this regard.[55] Evidence as to her mental condition immediately after the alleged offense is admissible,[56] but the person to whom she made complaint cannot give her opinion that she had been mistreated.[57]

On a trial for rape by force, defendant may show his general reputation for peace, but where the crime charged is statutory rape, only repute for chastity and morality is admissible.[58] Such evidence must be confined to reputation in the community where the accused resides[59] and as it existed before the commission of the alleged offense.[60] Where previous chastity of the prosecutrix is a necessary element, general reputation is not admissible.[61]

(§ 2B) 2. *Weight and sufficiency.*[62]—Chastity is presumed until the contrary is shown.[63] Evidence of previous good character may be considered in connection with all the other evidence in determining defendant's guilt or innocence,[64] but it is never conclusive in favor of the accused, nor does it raise a presumption in his favor.[65]

In some states corroboration of prosecutrix is required by statute.[66] There is a conflict of authority as to its necessity in the absence of statute.[67]

rule permitting the declarations of prosecutrix to be given limits such statements to the mere complaint, and prohibits the giving of the details of the offense, the name of the assailant, or the place where the assault was committed. Donaldson v. People, 33 Colo. 333, 80 P. 906. Objection that details of complaint were not admissible held waived by failing to make proper objection at the trial. Id. Held error to admit evidence that prosecutrix stated that accused had torn her clothes. State v. Barkley [Iowa] 105 N. W. 506. Where the prosecutrix is a very young child this rule is not applied with the same degree of strictness as when she is an adult, or has reached such an age as to have an understanding of such matters. Evidence held admissible. State v. Andrews [Iowa] 105 N. W. 215.

54. Donaldson v. People, 33 Colo. 333, 80 P. 906. Is confined to bare fact of complaint, and details of the occurrence, or the identity of the person accused, are inadmissible. Posey v. State [Ala.] 38 So. 1019. Where there was no question of defendant's identity, or of the fact that the parties had intercourse, admission of such evidence held harmless. Dickey v. State [Miss.] 38 So. 776. In prosecution for statutory rape where state's attorney, in attempting to prove a complaint, cautioned witness not to name the person complained of, answer that "she said he had insulted her" held not objectionable as in effect naming the respondent, the most he was entitled to being an instruction as to the proper use of the answer. State v. Willett [Vt.] 62 A. 48.

55. It is proper to show complaints made by the prosecutrix as to who her assailant was and as to what he did to her. State v. Andrews' [Iowa] 105 N. W. 215. Statement which was in effect that defendant had had intercourse with her forcibly, held admissible. State v. Barkley [Iowa] 105 N. W. 506.

56. On prosecution for assault with intent. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363.

57. Held improper to allow witness to testify that, from her general appearance, she "would be inclined to think" that she had been mistreated. State v. Wertz [Mo.] 90 S. W. 838.

58. Evidence of defendant's general reputation as a peaceable and quiet citizen held irrelevant. Wistrand v. People, 218 Ill. 323, 75 N. E. 891.

59. Evidence of defendant's reputation for morality in another state several years before the alleged offense held inadmissible. State v. Shouse, 188 Mo. 473, 87 S. W. 480.

60. On an issue as to defendant's good character prior to the alleged offense, state may, on cross-examination of witnesses who have testified to his general reputation, inquire of specific instances in which his character was reflected upon, provided the inquiry does not extend to discussions reflecting upon his reputation occurring after the preferring of the charge in the information, general reputation after that time being admissible only for the purpose of impeaching his credibility as a witness. State v. Wertz [Mo.] 90 S. W. 838.

61. On prosecution for having carnal knowledge of a female between 14 and 18 of previous chaste character. State v. Kelley [Mo.] 90 S. W. 834. Evidence of prosecutrix's general reputation in the community for morality and chastity subsequent to the time of defendant's arrest, when it was self evident that she had been debauched, held inadmissible. State v. Day, 188 Mo. 359, 87 S. W. 465.

62. See 4 C. L. 1233.

63. State v. Kelley [Mo.] 90 S. W. 834.

64. State v. Jones, 32 Mont. 442, 80 P. 1095.

65. Instruction held erroneous. State v. Jones, 32 Mont. 442, 80 P. 1095.

66. Code § 5488 requires that prosecutrix be corroborated by other evidence tending to connect defendant with the commission of the act. State v. Norris, 127 Iowa, 683, 104 N. W. 282. Assault with intent to commit. State v. Bartlett, 127 Iowa, 689, 104 N. W. 285. The statutory requirement is

Cases dealing with the sufficiency of the evidence in particular cases will be found in the note.[68]

(§ 2) *C. Instructions.*[69]—As in other cases, instructions should be clear,[70] and should not be misleading[71] or argumentative,[72] nor should they give undue

met if there is some evidence tending to strengthen and corroborate the prosecutrix in connecting the defendant with the commission of the offense. State v. Norris, 127 Iowa, 683, 104 N. W. 282. Evidence of stains on clothing of prosecutrix held some corroboration where evidence tended to show that they were caused by seminal emissions and that no one but defendant had an opportunity to produce them. Id. Evidence of opportunity made by defendant's deliberate act, in connection with evidence that he was doing the things usually leading to sexual intercourse, tends to connect defendant with the crime. Id. Corroboration is only necessary for the purpose of connecting defendant with the commission of the crime, and the fact that the crime charged has been committed may be proved by the testimony of the prosecutrix alone. State v. Bartlett, 127 Iowa, 689, 104 N. W. 285. The sufficiency of corroborating evidence is for the jury. State v. Norris, 127 Iowa, 683, 104 N. W. 282.

67. **California:** In prosecution for statutory rape the corroborative evidence need not tend directly to connect defendant with the offense charged. People v. Ah Lung [Cal. App.] 83 P. 296. In such cases there is no absolute rule requiring corroboration, and it is only when testimony of prosecutrix is uncorroborated and so inherently improbable as to warrant the belief that verdict was the result of prejudice, that judgment of conviction will be reversed. Id. Appellate court will not interfere, though evidence of prosecutrix is contradictory and corroboration is slight, unless preponderance of evidence is against the verdict. Id.

Kansas: No corroboration necessary to sustain conviction under Gen. St. 1901, § 2016, for carnally knowing female under 18. State v. Tinkler [Kan.] 83 P. 830.

Montana: No additional evidence than that of prosecutrix is necessary. State v. Jones, 32 Mont. 442, 80 P. 1095.

Missouri: No rule requiring corroboration. State v. Dilts [Mo.] 90 S. W. 782; State v. Welch, 191 Mo. 179, 89 S. W. 945. Not necessary either in criminal prosecution or civil action for damages. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92. In prosecution under Rev. St. 1899, § 1838, for having carnal knowledge of a female between ages of 14 and 18. State v. Day, 188 Mo. 359, 87 S. W. 465.

Texas: Corroboration not necessary where female is under age of consent. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 827.

68. Evidence held to have no tendency to show a conspiracy to convict defendant by unlawful means. Donaldson v. People, 33 Colo. 333, 80 P. 906. In prosecution under statute making it rape for male of 16 and upwards to have carnal knowledge of female under 14, evidence held not to authorize conviction where it showed that defendant was under 16. Schramm v. People [Ill.] 77 N. E. 117. Evidence held to make a case for the jury, and demurrer thereto properly overruled. State v. Wertz [Mo.] 90 S. W. 838.

Evidence held sufficient to sustain a conviction. Barrett v. People [Ill.] 77 N. E. 224; Dickey v. State [Miss.] 38 So. 776; State v. Sykes, 191 Mo. 62, 89 S. W. 851; State v. Welch, 191 Mo. 179, 89 S. W. 945; State v. Miller [Mo.] 90 S. W. 767; State v. Dilts [Mo.] 90 S. W. 782; Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159; Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345.

Statutory rape. State v. Tinkler [Kan.] 83 P. 830; State v. Day, 188 Mo. 359, 87 S. W. 465; State v. Jones, 32 Mont. 442, 80 P. 1095; Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 827.

Assault with intent. State v. Bartlett, 127 Iowa, 689, 104 N. W. 285; State v. Urspruch [Mo.] 90 S. W. 451; Castle v. State [Tex. Cr. App.] 90 S. W. 32. To show force and intent. Castle v. State [Tex. Cr. App.] 90 S. W. 32.

Corroboration. People v. Astell, 94 N. Y. S. 748. Corroboration on prosecution for assault with intent. State v. Bartlett, 127 Iowa, 689, 104 N. W. 285. To sustain conviction of an attempt. People v. Ah Lung [Cal. App.] 83 P. 296.

Identification. Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113. Evidence of **penetration.** State v. Andrews [Iowa] 105 N. W. 215. Penetration in prosecution for statutory rape. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159. Evidence held to justify inference of a **conspiracy** between defendant and third person to commit rape. State v. Sykes, 191 Mo. 62, 89 S. W. 851. On prosecution for having carnal knowledge of a female between 14 and 18, of previous chaste character, evidence held sufficient to show such **chaste character.** State v. Kelley [Mo.] 90 S. W. 834.

Evidence held insufficient to sustain conviction: Statutory rape under second clause of Cr. Code § 12. Hubert v. State [Neb.] 104 N. W. 276.

Assault with intent. Anderson v. State [Ark.] 90 S. W. 846; State v. Hahn, 189 Mo. 241, 87 S. W. 1006; Dusek v. State [Tex. Cr. App.] 89 S. W. 271.

69. See 4 C. L. 1234.

70. Instruction as to what would constitute an assault with intent held not sufficiently clear. Hudson v. State [Tex. Cr. App.] 90 S. W. 177.

71. Where there was no evidence of threats of violence by accused before the act, but there was evidence that immediately thereafter he told her that he would kill her father if she told him, instruction that force did not mean exclusively physical force, but that force was used if prosecutrix was made to yield through threats of violence or injury then made, held misleading and prejudicial error. Darrell v. Commonwealth [Ky.] 88 S. W. 1060.

prominence to a part of the evidence,[73] comment on the evidence,[74] made the province of the jury,[75] or assume the guilt or innocence of the accused.[76]

The court should charge as to every offense involved in the charge made by the indictment of which the accused might lawfully be convicted under any view of the evidence.[77] Defendant's theory of the case should be given if supported by the evidence.[78] It is not necessary to charge as to immaterial matters.[79]

Holdings as to the necessity, propriety, and correctness of instructions defining the crime,[80] and defining accessories[81] as to lesser offenses,[82] the degree of force re-

72. Charge that jury might consider in whose power woman alleged to have been assaulted was at time of alleged assault, held not so argumentative as to require a reversal. Sutton v. State, 123 Ga. 125, 51 S. E. 316. Instruction held improper. People v. Brown [Mich.] 12 Det. Leg. N. 852, 106 N. W. 149.

73. Instruction in prosecution for assault with intent held not objectionable as giving undue prominence to the fact that defendant induced prosecutrix to enter his buggy under a promise to take her home. Donovan v. People, 215 Ill. 520, 74 N. E. 772. Requested instruction as to reasonable doubt held objectionable as singling out certain elements of the offense. State v. Wertz [Mo.] 90 S. W. 838.

74. Instruction as to impeachment of prosecutrix held not objectionable. State v. Kelley [Mo.] 90 S. W. 834.

75. Charge that there was no evidence of a conspiracy to convict defendant by unlawful means, and that jury should disregard statement of counsel that such evidence would be introduced, held proper. Donaldson v. People, 33 Colo. 333, 80 P. 906. Instruction that statement of accused did not amount to a confession properly refused. its effect being for the jury. Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113.

76. Instruction not objectionable as assuming, by use of words "his object," that he had a criminal intent. Donovan v. People, 215 Ill. 520, 74 N. E. 772.

77. On trial of indictment for assault with intent to commit rape, where there was evidence authorizing a finding that assault was committed with intent of gaining woman's consent to intercourse, but without any intent to commit rape, held error to fail to charge on law of assault and assault and battery. Sutton v. State, 123 Ga. 125, 51 S. E. 316. Where evidence is such that defendant might be found guilty of assault and battery, it is prejudicial error not to submit the question of his guilt of that crime, even though the issue of his guilt of a simple assault is submitted. State v. Barkley [Iowa] 105 N. W. 506. Charges of assault and of assault with intent held eliminated from the case where girl's evidence showed the completed offense, defendant denied the whole transaction, and evidence showed that girl consented, and hence failure to submit those issues was not error. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159. Where case was rape if state's testimony was true, and defendant denied that act was committed at all, held not necessary to charge as to the law of aggravated assault, or assault with intent to commit rape. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345. Held error to instruct as to assault with intent, there being no evidence suggesting that defendant was guilty of that offense. Dusek v. State [Tex. Cr. App.] 89 S. W. 271. Evidence held to raise issue of aggravated assault and to require a charge that defendant would only be guilty of that offense if he did not use all the force necessary to overcome resistance. Fewox v. State [Tex. Cr. App.] 90 S. W. 178. Where testimony of prosecutrix, in a prosecution for assault with intent, showed that defendant's unquestioned purpose was to have intercourse with her, and he denied that he made the attempt at all, held that court was not required to charge on aggravated assault. Herbert v. State [Tex. Cr. App.] 90 S. W. 653. Fact that state's evidence makes out rape, and defendant's an assault, held not to preclude court from charging on aggravated assault. Neill v. State [Tex. Cr. App.] 91 S. W. 791.

78. Refusal of instruction that if defendant kissed and hugged prosecutrix, thinking that she would not object, there would be no assault, held error in view of evidence as to intimacy between them. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363. Where res gestae statements of prosecutrix were to the effect that she and defendant had been fighting, held error to fail to charge on that theory. Hudson v. State [Tex. Cr. App.] 90 S. W. 177. Evidence held not to require a charge on impotency. Herbert v. State [Tex. Cr. App.] 90 S. W. 653. Where defendant admitted his presence with prosecutrix, held that there was no necessity for a charge on alibi. Id. Where evidence strongly tended to show that prosecutrix consented, charge authorizing conviction of aggravated assault held not objectionable as eliminating issue of consent and self-defense raised by testimony. Neill v. State [Tex. Cr. App.] 91 S. W. 791. Instruction that defense was an alibi held not objectionable because defense was more than that where evidence established beyond question that crime was committed. Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113.

79. Where only the first count of the indictment charging statutory rape was submitted to the jury, held not error to refuse to charge with reference to question of force and want of consent. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345.

80. Instruction as to what constitutes carnal abuse held not prejudicial, even if erroneous. State v. Hummer [N. J. Law] 62 A. 388.

81. Where evidence tended to show concert and agreement between defendants and

quired,[83] the failure to make outcry and complaint,[84] previous good character,[85] corroboration,[86] flight,[87] reasonable doubt,[88] the law of circumstantial evidence,[89] the weight of prosecutrix's testimony,[90] impeachment,[91] will be found in the notes.

(§ 2) *D. Trial and punishment.*[92]—As in other cases the verdict must be responsive to and cover the offense charged in the indictment.[93]

Cases dealing with the propriety of the punishment inflicted in particular instances will be found in the note.[94]

RATIFICATION, see latest topical index.

REAL ACTIONS.[95]

The owner of land is not obliged to begin an action for its recovery as soon as

another to commit the crime, instruction held properly given. Barrett v. People [Ill.] 77 N. E. 224.

82. Instructions as to simple assault approved. People v. Green [Cal. App.] 82 P. 544. Instruction as to assault held harmless where defendant was convicted of an attempt to commit. People v. Ah Lung [Cal. App.] 83 P. 296.

83. Where prosecutrix testified that she was unconscious for a part of the time, held proper to charge that force need not have been actual physical force, but it was sufficient if it was constructive force, such as duress, or being put in fear. Posey v. State [Ala.] 38 So. 1019. Requested instructions making physical force necessary to conviction held properly refused. Id. Requested instruction that jury must be convinced beyond reasonable doubt that defendant had sexual intercourse with prosecutrix by force held properly refused, penetration being sufficient. Id. Instruction not objectionable for using other words instead of "penetration," or for requiring jury to find that prosecutrix manifested the utmost reluctance, particularly in view of instructions given at defendant's request. State v. Dilts [Mo.] 90 S. W. 782. In view of the evidence, held error to refuse to instruct that consent on part of prosecutrix would be presumed until state proved beyond reasonable doubt that she used every means within her power to prevent intercourse, and that more must be shown than a mere want of consent, and it must appear that she used every exertion within her power to prevent it. Perez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 453, 87 S. W. 350.

84. Instruction held objectionable in form. State v. Wertz [Mo.] 90 S. W. 838. In prosecution for statutory rape, where force was not charged, held not material error to refuse special instruction that, in weighing evidence of prosecutrix, who was 17 years old, jury might consider that she made no complaint immediately after the offense was alleged to have been committed. State v. Oswalt [Kan.] 82 P. 586.

85. Approved. State v. Kelley [Mo.] 90 S. W. 834. Instruction, though objectionable, held not reversible error when taken in connection with other instructions. State v. Wertz [Mo.] 90 S. W. 838. Instruction that if from all the evidence the jury believed defendant guilty beyond a reasonable doubt they should so declare, notwithstanding the fact that they might believe that he was a man of good reputation and character before the commission of the offense, held proper. State v. Jones, 32 Mont. 442, 80 P. 1095.

86. Instruction held not objectionable as permitting jury to find that stains on the garments of the prosecutrix were alone sufficient, regardless of how they were produced or who produced them. State v. Norris, 127 Iowa, 683, 104 N. W. 282.

87. Instruction approved. State v. Kelley [Mo.] 90 S. W. 834.

88. Charge held not objectionable. Roszczynlala v. State, 125 Wis. 414, 104 N. W. 113.

89. Where prosecutrix testified fully as to the intercourse and all the attending circumstances, held not necessary to submit law of circumstantial evidence. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345.

90. Instruction that prosecutrix had no interest in the case other than that of a witness, and that her evidence should be weighed like that of any other witness, held not prejudicial when considered in connection with other instructions. State v. Sykes, 191 Mo. 62, 89 S. W. 851.

91. Instruction as to impeachment of prosecutrix properly refused. State v. Kelley [Mo.] 90 S. W. 834.

92. See 4 C. L. 1234.

93. Donovon v. People, 215 Ill. 520, 74 N. E. 772. Verdict finding defendant guilty of the crime of an intent to commit rape in manner and form as charged does not authorize judgment of conviction of an assault with intent to commit rape. Id.

94. Punishment held not excessive: Imprisonment for 20 years where defendant was convicted of assault with intent to rape daughter under age of 15 years. State v. Bartlett, 127 Iowa, 689, 104 N. W. 285. Discretion of court in inflicting punishment of life imprisonment on one convicted of raping child eight years old will not be interfered with. State v. Andrews [Iowa] 105 N. W. 215. Punishment of 65 years imprisonment for assault with intent. Castle v. State [Tex. Cr. App.] 90 S. W. 32. Imprisonment for 99 years for rape on girl under 15. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159.

Punishment held excessive: Imprisonment for five years for carnal abuse of female under 16 reduced to 2 years. Henson

he is aware of the defendant's occupation,[98] and the fact that the owner does not make objection until the suit is commenced does not bar his claim for rents and profits, they being duly demanded in the action.[97]

REAL COVENANTS, see latest topical index.

REAL PROPERTY.

This topic is restricted to definitions and to such infrequently invoked rules and doctrines as do not lend themselves to a separate topical treatment. Ordinarily the law of a branch or division of real property will be topically treated.[98]

Definitions and nature of real property.[99]—Real estate includes those interests in land which partake of its immobility, hence, minerals in place and the right to mine them are realty.[1] A separate estate from the surface may be created therein.[2] A meteorite is realty being regarded as any natural accretion to the soil until severed from its place,[3] and a severance will not be conjecturally inferred from its use in Indian tribal rites.[4] A riparian right is of itself property.[5] The right to have a ditch maintained in its location may be appurtenant.[6] The conveyance of appurtenant water rights to a corporation taking back a right in the aggregate water supply thus made does not destroy its appurtenant character.[7] Shares in the company, which was thereby bound to irrigate the holder's land, are also appurtenant to the land,[8] and a later statute respecting such corporations does not undo this result.[9]

The rule in Shelley's case[10] applies when the word heirs is used as a word of limitation in an estate to one with remainder to heirs.[11] It does not apply if one estate be legal and one equitable.[12]

Restraints on alienation.—An absolute restraint on alienation is void as against public policy, and opposed in sense to ownership.[13] A reasonable restraint on alienation is valid in Kentucky,[14] though the weight of authority is otherwise.

v. State [Ark.] 88 S. W. 965. Sentence for life on conviction of defendant for raping his own daughter reduced to 20 years. State v. Norris, 127 Iowa, 683, 104 N. W. 282.

95. See Ejectment, etc., 5 C. L. 1056; Quieting Title, 6 C. L. 1183; Trespass (including trespass to try title), 4 C. L. 1698. See, also, Petitory Actions, 6 C. L. 1007.

96, 97. Cote v. Leterneau [Me.] 62 A. 734.

98. See latest topical index for real property headings.

99. See 4 C. L. 1235.

1. Marble and granite. Hudson v. Cahoon [Mo.] 91 S. W. 72. Coal Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849. Oil is a mineral. Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 P. 317.

2. Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849; Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

3, 4. Oregon Iron Co. v. Hughes [Or.] 81 P. 572. See note in Property, 6 C. L. 1107.

5. Waterford Electric Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

6. Candelaria v. Vallejos [N. M.] 81 P. 589.

7, 8, 9. In re Thomas' Estate, 147 Cal. 236, 81 P. 539.

10. See 4 C. L. 1236.

11. To her and "her heirs and assigns" forever, but in part over if she remarried, carries fee. Rissman v. Wierth [Ill.] 77 N. E. 108. A clause that grantee should not sell but should retain the land "for herself and her children forever" is not within the rule. Hubbird v. Goin [C. C. A.] 137 F. 822. "Lawful" heirs is not outside the rule. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785.

12. Trust for a woman till a certain age, then to take the property for life with remainder in fee to her lawful issue. Slater v. Rudderforth, 25 App. D. C. 497. The trust held an active one not executed by the statute of uses. Id. Not when first taken holds under a trust. Johnson v. Buck [Ill.] 77 N. E. 163.

13. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785. Limitation on manner of enjoyment of absolute estate void for repugnancy. Clark v. Clark, 99 Md. 356, 58 A. 24.

14. During life of middle aged widow.

Present and future estates.—A present estate requires living parties, but one in futuro may be given to persons not yet in esse.[15] Lien of an execution levied upon an indeterminate estate is lost by a conveyance by deed executed after the estate vested.[16]

Charges.—In Pennsylvania there is a statutory presumption of payment of a charge after 21 years,[17] and an incumbrance for dower is within it.[18] At law, but not necessarily in equity, a charge on land is merged in the estate when the latter comes to the person favored by the charge.[19]

Common lands.—By allotment the common lands of a town cease to be common.[20]

Entails[21] are commonly now regarded as fees simple.[22] In Rhode Island the "actual seisin" necessary to a tenant in tail in order to bar the entail is required only in legal estates,[23] and the owner of an equitable entail need not be seised if he would bar it,[24] but the statute of that state enabling one to bar equitable entails does not retroact.[25]

Covenants running with the land[26] have been held to include party wall agreements,[27] covenants to pay rent in a perpetual lease,[28] an agreement in consideration of a grant of way to fence the same,[29] but not a grantee's promise to pay an incumbrance.[30]

Possession[31] follows the legal title in the absence of actual possession.[32] Actual possession of any part extends to the whole area claimed.[33] A mere possession is superior to strangers.[34] A distinction has been claimed between constructive possession and seisin in law.[35] Possessory rights of the locator of a mining claim not patented are property.[36]

Merger[37] is the annihilation of a lesser estate by union with a greater in the same person or right.[38] It depends on intention at the time of the union of estates.[39] By merger of a life estate the tenant's power in gross is extinguished.[40]

Lawson v. Lightfoot, 27 Ky. L. R. 217, 84 S. W. 739.

15. Hall v. Wright, 27 Ky. L. R. 1185, 87 S. W. 1129.

16. Swerer v. Trustees of the Ohio Wesleyan University, 2 Ohio N. P. (N. S.) 333.

17, 18. DeHaven's Estate, 25 Pa. Super. Ct. 507.

19. Charge for owelties held not to merge when surety purchased land. Van Ormer's Estate, 25 Pa. Super. Ct. 234.

20. Evidence held to show allotment. Dawson v. Orange [Conn.] 61 A. 101.

21. See 4 C. L. 1237.

22. Estates tail abolished. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. To daughter but over if she die without heirs, held to create fee tail changed by Act April 27, 1855, P. L. 368, to a fee. Corrin v. Elliott, 23 Pa. Super. Ct. 449.

23, 24, 25. Paine v. Sackett [R. I.] 61 A. 753.

26. See 4 C. L. 1237. See, also, Covenants for Title, 5 C. L. 875; Landlord and Tenant, 6 C. L. 345; Buildings, etc., 5 C. L. 487; Easements, 5 C. L. 1048.

27. Party wall agreement binding heirs and assigns and covenanting to pay when wall used. Southworth v. Perring [Kan.] 81 P. 481.

28. A devisee of land subject to a perpetual lease is an assignee of the lessor, and as such may, where the lease contains an express covenant to pay rent, sue the lessee or his representatives for breach of the covenant. Under Ohio Code Civ. Proc. Broadwell v. Banks, 134 F. 470. The death of a lessee in a lease containing a covenant to pay rent, and renewable forever, does not convert the term into a life estate. Id.

29. Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15.

30. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460.

31. See 4 C. L. 1237.

32. King v. Davis, 137 F. 222; Kreamer v. Voneida, 24 Pa. Super. Ct. 347; Mitchell v. Titus, 33 Colo. 385, 80 P. 1042; State v. Harman, 57 W. Va. 447, 50 S. E. 828; Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990.

33. Jones v. Goss [La.] 40 So. 357.

34. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

35. King v. Davis, 137 F. 222.

36. O'Connell v. Pinnacle Gold Mines Co., 140 F. 854.

37. See 4 C. L. 1237.

38. Van Ormer's Estate, 25 Pa. Super. Ct. 234. Curtesy is merged if title comes into the husband. Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.

39. Life lease held merged in the fee. In re Stafford, 105 App. Div. 46, 94 N. Y. S. 194.

40. Rosier v. Nichols, 123 Ga. 20, 50 S. E. 988.

Persons having a possible future estate may convey to one holding a conditional estate and thus make his title absolute.[41]

Abandonment[42] of an easement may divest title but will not affect that which is held in fee.[43] An entryman's or locator's rights in public lands can be abandoned but not the title after patent.[44] There must be adverse possession for the full period.[45]

REASONABLE DOUBT; RECEIPTORS, see latest topical index.

RECEIVERS.

Rules peculiar to receivers of foreign[46] or domestic[47] corporations, and to those appointed in mortgage foreclosure[48] or supplementary[49] proceedings, are treated elsewhere.

§ 1. *Nature, grounds, and subjects of receivership.*[50]—Proceedings for the appointment of a receiver are ancillary in nature; and, as a general rule, the appointment will not be granted in a suit brought solely for that purpose,[51] hence, the appointment must be predicated upon some pleading praying affirmative relief. A mere petition is not such a pleading nor is an answer not made a cross bill.[52] The appointment of a receiver is not a matter of right[53] but rests in the sound judicial discretion of the court,[54] the power being a chancery one.[55] The propriety of the

41. Devisees over to devisee on condition. Cheek v. Walker, 138 N. C. 446, 50 S. E. 863.
42. See 4 C. L. 1238.
43. Railroad right of way. Enfield Mfg. Co. v. Ward [Mass.] 76 N. E. 1053.
44. Kreamer v. Voneida, 24 Pa. Super. Ct. 347.
45. Kreamer v. Voneida [Pa.] 62 A. 518.
46. See Foreign Corporations, 5 C. L. 1470, also see particular corporate articles such as Railroads, 6 C. L. 1194; Street Railways, 4 C. L. 1556, etc.
47. See Corporations, 5 C. L. 764, also particular corporate articles such as Railroads, 6 C. L. 1194; Street Railways, 4 C. L. 1556, etc.
48. See Foreclosure of Mortgages, etc., 5 C. L. 1441.
49. See Supplementary Proceedings, 4 C. L. 1591.
50. See 4 C. L. 1239.
51. If the action fails the appointment will be denied. Benepe-Owenhouse Co. v. Scheldegger, 32 Mont. 424, 80 P. 1024. In an action on an illegal note, plaintiff cannot have a receiver appointed to take possession of the property for which it was given, sell it, and pay the note. Town of Wadley v. Lancaster [Ga.] 52 S. E. 335. The appointment of a receiver is merely auxiliary to the ultimate relief, and if, for want of proper pleading, no ultimate relief can be decreed, the appointment of receiver is useless. Ruprecht v. Henrici, 113 Ill. App. 398; Ruprecht v. Henrici, 116 Ill. App. 583. A receiver may only be appointed in a pending case. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660. This is also true as to appointments in vacation. Id. In Colorado, courts of equity have no jurisdiction to appoint a receiver except in an action pending. People v. District Ct. of Denver, 33 Colo. 293, 80 P. 908. See note on this subject, 4 C. L. 1239, et seq.
52. Ruprecht v. Henrici, 113 Ill. App. 398.
53. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.
54. Baltimore Bargain House v. St. Clair

appointment can only be considered on an appeal from the order of appointment,[56] and an exercise of the power will not be reviewed unless abusive of the court's discretion.[57] Statutes authorizing the appointment of receivers should be strictly construed.[58] There should be a reasonable probability that the party asking for the appointment will ultimately prevail in the cause.[59] The remedy being an extraordinary one, it is to be resorted to only in cases of emergency,[60] and the appointment will not be made unless necessary as a protective measure,[61] and this necessity must be clear where the proceeding is opposed by the owner of the property.[62] Insolvency is generally a sufficient,[63] and, except where the title to property alone is involved,[64] an essential[65] element. A person is insolvent when he is unable to pay

[W. Va.] 52 S. E. 660; Ford v. Taylor, 137 F. 149.

55. Garrett v. London & L. Fire Ins. Co. [Okl.] 81 P. 421. See post, next section.

56. Cannot be considered in action for a writ of prohibition. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

57. Suit to foreclose a trust deed. Garrett v. Simpson, 115 Ill. App. 62.

58. Bartlett v. Fourton [La.] 38 So. 882.

59. Ruprecht v. Henrici, 113 Ill. App. 398.

60. Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 P. 1024; Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660; Ford v. Taylor, 137 F. 149. The effect of appointing a receiver being to take the property of a corporation out of the control of the officers selected by the shareholders, the courts should proceed with extreme caution. Bartlett v. Fourton [La.] 38 So. 882.

61. Ford v. Taylor, 137 F. 149. Where debtor had made an assignment for the benefit of creditors, and a bill for the removal of the trustee and the appointment of a receiver did not allege that the trustee was insolvent, that the debtor was a nonresident or was absconding, or any emergency, held relief would not be granted. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660. When in a suit in equity the title to personal property of such character as renders sale thereof necessary for the adequate protection of the rights of the parties interested is involved, the court in which such suit is pending may properly appoint a receiver to take charge of it and make sale thereof. Nutter v. Brown [W. Va.] 52 S. E. 88. A bill for the appointment of a receiver in ejectment to take charge of rents and profits averring that plaintiff has a good legal title to the land, that defendant is insolvent, and that there is probable danger that the rents will be lost, is sufficient. Baker v. Starling [Ala.] 39 So. 775. Mortgagee held not entitled to a receiver to collect rents and profits in the absence of an allegation that his security was insufficient or that the mortgage was discharged or the property released therefrom, the mortgage being an express charge on the rents. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476. Bill by stockholder in banking corporation alleging wrongful conversion of the corporate assets, the necessity of a receiver to trace and preserve the same, that the principal offending officer has been discharged in bankruptcy, that the complainant stockholder has been paid nothing on account of his investment, and that no account has been made with her or her fellow stockholders, makes a proper case for the appointment of a receiver. Chandler Mortgage Co. v. Loring, 113 Ill. App. 423. A receiver should not be appointed in a foreclosure proceeding where it does not appear that the trust deed provides for the appointment of a receiver and that the mortgaged premises are insufficient security for the debt. Ruprecht v. Henrici, 113 Ill. App. 398. The fact that a foreclosure sale resulted in a deficiency is, in the absence of special circumstances, ground for the appointment of a receiver, notwithstanding that there are no express words in the mortgage giving a lien on the rents and profits. Walker v. Kersten, 115 Ill. App. 130. Where the decree in a foreclosure sale provides that possession shall not be surrendered to the purchaser until after 15 months after the sale, it is proper to appoint a receiver, though the trust deed provides that in case of default the trustee may take possession of the premises, file a bill, and after a sale "pay all rents that may be collected before the time of redemption expires to the purchaser at such sale." Id. If mortgaged premises are inadequate security, the debtor insolvent, and the person in possession committing waste, or if other equitable grounds are shown and any part of the foreclosure decree is not satisfied by the sale, the court in which the foreclosure suit was pending might, through a receiver, appropriate the rents, issues and profits arising from the premises during the period of redemption to pay the deficiency. Schaeppl v. Bartholomae, 217 Ill. 105, 75 N. E. 447. A receiver may be appointed to take charge of, care for, put in marketable condition, and sell timber belonging to a decedent's estate lying on the lands of a stranger subject to his purchase-money lien at the instance of creditors, when the personal representative refuses to do so. Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432. See Foreclosure of Mortgages, etc., 5 C. L. 1441; Estates of Decedents, 5 C. L. 1183.

62. DeLeonis v. Walsh [Cal.] 82 P. 1047.

63. Petition held sufficient to authorize appointment of receiver for insolvent firm and granting of a permanent injunction restraining its members from disposing of its assets. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

64. Nutter v. Brown [W. Va.] 52 S. E. 88.

65. So held in a suit by holders of less than one-fourth of the stock of the corporation, the fraud alleged being denied and

his debts.[66] In Louisiana a resolution by the board of directors of a corporation that the corporation is insolvent and that a receiver is necessary is prima facie evidence of the necessity of the appointment.[67] When necessary to preserve the property a mortgagee may secure the appointment of a receiver without waiting until there has been a default, either in the payment of the principal or of interest on the indebtedness secured.[68] That a mortgagee has the right to collect rents and profits,[69] or may proceed by sequestration proceedings,[70] will not prevent the appointment.

In all cases in which a receiver of property is applied for the showing must be made either that the applicant has an actual interest in the property or a lien thereon, or else the property constitutes a fund out of which he is entitled to the satisfaction of his claim,[71] hence, except in those states where the trust fund doctrine still prevails,[72] or the rule is changed by statute,[73] a general creditor cannot successfully apply for a receiver of the property of an insolvent corporation.

The appointment of a *receiver pendente lite*[74] will only be made, as against one in possession, in a case showing an immediate necessity for preserving some particular property.[75] Mere statement of a cause of action is of itself insufficient,[76] and something beyond the mere unsupported statement of the plaintiff made on information and belief in the general allegation of a complaint should appear where the allegations are explicitly denied.[77]

Liability for wrongful appointment.[78]—One procuring the wrongful appointment of a receiver is liable for the latter's compensation.[79]

unsupported by evidence. Stokes v. Knickerbocker Inv. Co. [N. J. Eq.] 61 A. 736. A solvent corporation cannot be placed in receivership to enable a stockholder, who has deposited his stock as collateral for a debt, to have an account of its assets. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846. Mere refusal of corporation to pay its debts is not ground for appointment of a receiver, even though it consents thereto. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. Where executor of a decedent appealed from an order admitting a subsequent will of the decedent to probate, held receiver would not be appointed on application of executor under the last will alleging that the first executor had wasted a portion of the estate and had failed to make a true inventory, it not being alleged that further waste was threatened or that the executor or his surety was insolvent. Floor's Ex'r v. Floor, 27 Ky. L. R. 894, 87 S. W. 272.

66. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. Evidence held insufficient to show insolvency of corporation or imminent danger of its insolvency. Id. See Insolvency, 6 C. L. 38. As to when one is insolvent within the meaning of the Bankruptcy Act. See Bankruptcy, 5 C. L. 367.

67. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

68. Mortgagee had legal title. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661. A United States court, in the exercise of its chancery jurisdiction and in the absence of statutory power, on a proper showing by a proper party on due notice and in the exercise of a sound judicial discretion, may appoint a receiver over a railway where default in the payment of mortgage indebtedness is imminent by reason of insolvency. Cole v. Philadelphia & E. R. Co., 140 F. 944. Receiver appointed. Bill alleging insolvency, danger of default, and that valuable results would accrue to creditors and stockholders by continuing it as a going concern. Id.

69. Suit by mortgagee need not allege that tenants are insolvent or colluded with plaintiff. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476, afg. 33 Tex. Civ. App. 580, 77 S. W. 637. See 2 C. L. 1465, n. 50.

70. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476, afg. 33 Tex. Civ. App. 580, 77 S. W. 637. See 2 C. L. 1465, n. 50.

71. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. A mortgage being a lien on the land and the rents and profits thereof, the fact that it is discharged as to the land does not prevent the appointment of a receiver for the rents and profits. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

Evidence held insufficient to show sufficient interest in petitioner to warrant appointing a receiver. Chemung Min. Co. v. Hanley [Idaho] 81 P. 619.

72. Texas. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898.

73. Louisiana: The applicant need not be a judgment creditor of the corporation. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

74. See 4 C. L. 1241.

75. Refusal to appoint a receiver pendente lite held proper where property was not of a perishable nature and it did not appear that any loss would result by failure to so do. Sarasohn v. Kamarky, 110 App. Div. 713, 97 N. Y. S. 529.

76, 77. Weber v. Wallerstein, 97 N. Y. S. 852.

78. See 4 C. L. 1241.

§ 2. *Appointment, qualification, and tenure of receivers. A. Proceedings for appointment and qualifications.*[80]—The appointment of a receiver is an exercise of chancery power[81] and ordinarily cannot be conferred upon nor exercised by probate courts.[82] The power is frequently denied appellate courts,[83] though under constitutional or statutory provisions giving a court authority to issue all writs necessary or proper to the complete exercise of its jurisdiction, the court has authority to appoint a receiver pendente lite.[84] In the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation, and, to that end, appoint a receiver for the sequestration of the corporate property,[85] but even though such court has no jurisdiction to dissolve a corporation, yet it may, in a proceeding by a stockholder against the corporation and its officers for fraudulent mismanagement, appoint a receiver to preserve the res.[86] Courts,[87] and consequently special judges,[88] generally have the power to appoint receivers in vacation. The appointment of a receiver by a judge on his own motion without an application by either party is error.[89] Except in cases of great emergency, notice of the application must be given,[90] and unless necessary, a receiver should not be appointed before answer is made.[91] When an ex parte application is made the proper practice is to make an order requiring the defendant to appear and show cause why the application should not be granted, and, if a proper showing is made as to the necessity or emergency

79. Bank held liable where directors wrongfully secured appointment, all parties acquiescing therein for 10 years. Tabor v. Bank of Leadville [Colo.] 83 P. 1060.

80. See 4 C. L. 1242.

81, 82. Garrett v. London & L. Fire Ins. Co. [Okl.] 81 P. 421.

83. Court of appeals has only appellate jurisdiction and cannot appoint a receiver. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509.

84. Supreme court of Idaho has such power. Const. § 9 construed. Chemung Min. Co. v. Hanley [Idaho] 81 P. 619.

85. People v. District Ct. of Denver, 33 Colo. 293, 80 P. 908. This power is not given by Code § 163, subds 1 and 3, the power to appoint receivers over domestic corporations having been specially legislated on in Code § 164. Id. Mills' Ann. St. § 497, which in substance provides that if a corporation does an act subjecting it to forfeiture of its franchise, or allows an execution to remain unsatisfied or be returned "No property found," or dissolves or ceases doing business, leaving debts unpaid, a court of equity shall have power to dissolve the corporation and appoint a receiver, does not give a court of equity power to dissolve a corporation or appoint a receiver at the suit of an individual stockholder who complains of fraud in the management. Id.

Note: The statute last referred to was copied almost literally from Illinois, and the construction put upon it there in repeated decisions is that the statute was intended merely to afford a remedy in the nature of a creditors' bill. Coquard v. Nat. Linseed Oil Co., 171 Ill. 480, 49 N. E. 563; Hunt v. La Grand Roller Rink Co., 143 Ill. 118, 32 N. E. 525; Wheeler v. Pullman I. & S. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818.—From People v. District Ct. of Denver, 33 Colo. 293, 80 P. 908.

86. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423.

87. Circuit court of Jefferson county has such jurisdiction. Ensley Development Co. v. Powell [Ala.] 40 So. 137.

88. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

89. White v. Britton [S. C.] 51 S. E. 547.

90. Ensley Development Co. v. Powell [Ala.] 40 So. 137; Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660. Code 1896, § 799. Walker County Coal & Mineral Land Co. v. Long [Ala.] 39 So. 770. That the directors of a corporation for which a receiver was asked might, pending the appointment of a receiver, adjust a certain claim and issue negotiable paper of the company, held not ground for the appointment of a receiver without notice where the court on the date on which the receiver would have been appointed issued an injunction restraining all the parties from taking any action toward the settlement of the claim in question. Id.

Evidence of notice: Letter from the vice-president of the corporation to an attorney stating that the appointment of a certain person as receiver would be satisfactory held not to show notice, it not appearing whether the letter was written before or after the appointment of the receiver, and the letter not being signed by the vice-president in his official capacity. Ensley Development Co. v. Powell [Ala.] 40 So. 137.

91. A receiver is not usually appointed before an answer is put in unless fraud is clearly proved by affidavit, or when it is shown that imminent danger would ensue if the property is not taken under the care of the court. Larson v. West, 110 Ill. App. 150. Code, § 164, contemplates that when the appointment of a receiver is asked for by a party to a pending action, his adversary should have notice, and, if in court, the absolute right to file an answer to the petition therefor, putting in issue the matters therein set up, and evidence to determine the issues joined should be heard before de-

of such an appointment, to appoint a temporary receiver until the day for the hearing on the rule to show cause, in order to afford the plaintiff the necessary protection.[92] A distinction is made between real and personal property and the appointment of a receiver for the latter in vacation and without notice is voidable merely.[93] The owner of the property alone is entitled to notice.[94] Creditors and third persons are not entitled to notice,[95] nor are they entitled, after the order of appointment has been made, to a rehearing or a reopening of the case in order to resist the application.[96] The law looks, so far as third persons are concerned, to action on the application first and objections or complaints afterwards.[97] A statute providing for the appointment of a receiver ex parte, in certain cases the burden is on the applicant to show that such an exigency exists,[98] and when the case is brought before a court of review, such showing must affirmatively appear upon the record.[99] The application or the affidavits supporting it must set out the particular facts and circumstances rendering the appointment of the receiver[1] and summary action[2] necessary. An ex parte order appointing a receiver cannot be based on the complaint alone, unless the latter is supported by affidavits which have evidentiary value.[3] Verification by an attorney is generally sufficient.[4] In Louisiana the delay fixed by the statute in which the defendant is required to show cause why a receiver should not be appointed is in the interest of the insolvent and may be waived by it.[5] One may stipulate away his right to a receiver.[6] A receiver dying, a successor will not be appointed unless necessary and a proper showing is made.[7] Objections to the proceedings which require the introduction of evidence to support them have to be made on motion to vacate the appointment and not by appeal.[8] Where at an interlocutory hearing of a petition for injunction and receiver, to which a demurrer has been filed, the whole case is heard together on the petition, demurrer, answer, and evidence, it is not error to refuse to allow the defendant to open and conclude the argument on the demurrer.[9] One recognizing the authority of a receiver cannot attack his appointment for irregularities.[10]

cision is made. People v. District Ct. of Denver, 33 Colo. 293, 80 P. 908.

92. Ford v. Taylor, 137 F. 149.

93. Nutter v. Brown [W. Va.] 52 S. E. 88. A receiver of personal property may be appointed in vacation, without notice of the application, before service of process in the suit in cases where to require notice would be unreasonable or would probably defeat the purpose for which a receiver is necessary, and in cases of great emergency. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

94. Act No. 159, p. 312 of 1898 construed. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

95, 96, 97. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

98, 99. Code Civ. Proc. § 951 construed. Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 P. 1024.

1. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

2. Larson v. West, 110 Ill. App. 150. A mere statement of opinion as to such necessity, even though made under oath, will not warrant a departure from the general rule requiring notice. Id. Must set out the grounds which excuse failure to give notice. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

3. Code Civ. Proc., §§ 951, 3100, 3104, 3320, considered. Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 P. 1024. A verification upon "knowledge, information and belief," under Code Civ. Proc. § 731, is insufficient. Id.

4. Under Civ. Code 1895, § 4966, if the attorney for the petitioner makes a positive affidavit that of his own knowledge the facts alleged in the petition are true, the verification is sufficient. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

5. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

6. Where plaintiff filed a petition for the immediate appointment of a receiver, and subsequently stipulated that the application should not be urged and that no receiver should be appointed, held he was not precluded from obtaining a receiver after a hearing of the cause on the merits of his bill. Baker v. Sterling [Ala.] 39 So. 775.

7. Mere fact of death of former receiver is insufficient. DeLeonis v. Walsh [Cal.] 82 P. 1047. But see 4 C. L. p. 1243, n. 71.

8. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

9. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

10. Nutter v. Brown [W. Va.] 52 S. E. 88.

The court need not render two distinct judgments, the first recognizing the necessity for the appointment, and the second making the appointment, but the two orders must be read together as constituting one judgment,[11] and the time for taking an appeal runs from the order appointing the receiver.[12] The decree of appointment must be based on findings of fact.[13] Both an order of appointment[14] and an order refusing to appoint a receiver[15] are appealable, hence, mandamus will not lie to compel the vacation of such order.[16] One who is interested in lands sought to be foreclosed, and who is a party to the suit in which such foreclosure is sought, may appeal from an order appointing a receiver in such suit.[17] In Louisiana it is no ground for dismissing an appeal taken by a third person that the order or judgment was under a confession of judgment by the defendant.[18]

Bonds.—Where a receiver is appointed, the complainant should, in the absence of a special showing, be required to give a bond to the adverse party,[19] but a failure to require such a bond is not reversible error, the appointment being proper.[20] An irregularity in the bond cannot be taken advantage of collaterally[21] and may be corrected nunc pro tunc.[22]

(§ 2) *B. Who may be appointed.*[23]—Neither a clerk of the court[24] nor an attorney or other person interested in the action[25] is eligible.

(§ 2) *C. Tenure of receiver.*[26]—It is not essential that the decree limit the term of the receivership.[27] The possession of a receiver pendente lite terminates upon the confirmation of the judicial sale.[28] Where there are numerous creditors, the mere payment of the claim of the creditors securing the appointment will not dispose of the receiver's right to the property for the benefit of the other creditors.[29] In the absence of bad faith the fact that the receiver continued the business at a loss does not call for his removal.[30] A corporate stockholder securing the appointment of a receiver for the corporation cannot complain of the receiver's manner of conducting the corporate business when the creditors do not complain and no injury or loss will result to the company or stockholders.[31] Where a receiver has accounted for all the property of the estate and has reduced it to cash, there is no occasion for his removal for misconduct and the appointment of another.[32]

11, 12. Oil City Ironworks v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

13. Jones v. Weir [Pa.] 62 A. 643.

14. Pontiac, etc., R. Co. v. Oakland Circuit Judge [Mich.] 12 Det. Leg. N. 711, 105 N. W. 745. Where subject-matter was personal property. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660. Contra. See 4 C. L. 1243, n. 75.

15. Receiver for estate of decedent. Floor's Ex'r v. Floor, 27 Ky. L. R. 894, 87 S. W. 272. Under Const. § 9, art. 5, an order or decision of a district court or judge. Chemung Min. Co. v. Hanley [Idaho] 81 P. 619.

16. Pontiac, etc., R. Co. v. Oakland Circuit Judge [Mich.] 12 Det. Leg. N. 711, 105 N. W. 745.

17. Ruprecht v. Henrici, 113 Ill. App. 398.

18. Act No. 159, p. 312 of 1898, construed. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

19, 20. Walker v. Kersten, 115 Ill. App. 130.

21. Boynton v. Sprague, 100 App. Div. 443, 91 N. Y. S. 839.

22. Under Code Civ. Proc. § 723, the court may amend nunc pro tunc a provision of the order of appointment requiring the receiver to file the bond with a certain officer, another officer being intended and the bond being actually filed with him. Boynton v. Sprague, 100 App. Div. 443, 91 N. Y. S. 839.

23. See 4 C. L. 1243.

24. White v. Britton [S. C.] 51 S. E. 547.

25. Kirby's Dig. § 6355. Cook v. Martin [Ark.] 87 S. W. 625.

26. See 4 C. L. 1243.

27. Receiver for property mortgaged by husband and wife. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

28. Larsen v. U. S. Mortg. & Trust Co., 104 App. Div. 76, 93 N. Y. S. 610. Where a receiver of a railroad pendeate lite continued in possession of the property after confirmation of a foreclosure sale, held individually liable for tort committed by a servant in operating the road during such continuance in possession. Id.

29. So held as to a receiver appointed under a judgment sequestrating all the insolvent's property and requiring the receiver to distribute the proceeds thereof to the creditors. Offer was not to pay the claim of the creditor securing the receivership

An order discharging a receiver being entered in vacation, the court has jurisdiction at the following regular term to set aside the order and retain the receiver.[33]

§ 3. *Title and rights in and possession of the property. A. Title in general.*[34]—A receiver is merely a custodian for those who may be found entitled to the property. He is entitled to possession but his appointment extinguishes no titles.[35] He takes no title to the property[36] and his possession is that of the court appointing him.[37] When a corporation is voluntarily dissolved and a receiver appointed the corporate property vests in him.[38] No action can be brought which will interfere with the receiver's custody or control of the property unless he be made a party thereto.[39]

A simple discharge of a receiver of a dissolved corporation does not divest him of the property of the corporation which vested in him on his appointment.[40]

(§ 3) *B. Rights as between receivers, claimants, or lienors.*[41]—As before stated the appointment of a receiver in no way affects the title to the property,[42] the status of the property and all interests and liens thereon being preserved as of the date of the appointment,[43] the receiver's rights being similar to those of a levying creditor.[44] Where there is a controversy between a foreign receiver and an attaching creditor who resides in the state where the attachment proceeding is instituted, the courts of the latter state will protect its own citizen.[45] Failure to intervene in the receivership proceedings does not preclude the lienor from subsequently maintaining a separate suit to enforce his lien,[46] though while the property is in the possession of the receiver the right to enforce existing liens thereon is suspended,[47] unless the permission of the appointing court is obtained;[48] though it should be

but to pay the amount thereof into court. Raymond v. Security Trust & Life Ins. Co., 101 App. Div. 546, 91 N. Y. S. 1041.

30, 31, 32. Jordan v. Electrical Supply Co. [Iowa] 105 N. W. 160.

33. Reardon v. White [Tex. Civ. App.] 87 S. W. 365.

34. See 4 C. L. 1244. See, also, Abatement and Revival, 5 C. L. 1.

35. Polk v. Johnson [Ind. App.] 76 N. E. 634; Dow v. Nealis, 93 N. Y. S. 379.

36. Dow v. Nealis, 93 N. Y. S. 379.

37. Polk v. Johnson [Ind. App.] 76 N. E. 634. See infra, subdivision C. Dow v. Nealis, 93 N. Y. S. 379.

38. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844.

39. A receiver in actual possession of the property of a traction company is a necessary party to a proceeding to compel it to accept a certain fare in exchange for carriage. Chicago City R. Co. v. People, 116 Ill. App. 633.

40. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844. Held a necessary party to a suit by a stockholder to compel a director who purchased the property at foreclosure sale to account. Id.

41. See 4 C. L. 1244.

42. See ante subd. A, this section.

43. Commonwealth Roofing Co. v. North American Trust Co. [C. C. A.] 135 F. 984. Attachment liens. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. S. 937. Lien of steamship company for freight, on money remitted by consignee to receiver of consignor. Michigan S. S. Co. v. Thornton [C. C. A.] 136 F. 134. Right of pledgee to recover possession of stock certificates agreed to be assigned as collateral security for a loan. Kirkpatrick v. Eastern Milling & Export Co. [C. C. A.] 137 F. 387, modifying 135 F. 146. As against the receiver of a consignee a consignor of merchandise is entitled to recover the same where it was sent to be sold on commission. Williamson & Co. v. Prairie Queen Milling Co., 111 Ill. App. 373. A seller of goods if he acts promptly may rescind a fraudulent sale and recover the goods or the proceeds thereof in the hands of the buyer's receiver. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. An assignment of claims against an insurance company for loss sustained made by a solvent corporation to a creditor, who took the same as a bona fide purchaser, there being no intention to give him a preference, held valid against a receiver of the corporation subsequently appointed. Voss v. Smith, 110 App. Div. 104, 97 N. Y. S. 3. Receiver in foreclosure held not bound by an oral agreement between the mortgagor and the tenant of the premises. Dow v. Nealis, 93 N. Y. S. 379.

44. Duplex Printing Press Co. v. Clipper Pub. Co. [Pa.] 62 A. 841.

45. Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. [Ark.] 87 S. W. 632.

46. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

47. Under Pub. St. N. H. 1901, c. 141, contractor held entitled to attach property to secure mechanic's lien after expiration of statutory period. Commonwealth Roofing Co. v. North American Trust Co. [C. C. A.] 135 F. 984.

48. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. S. 937.

remembered that, even while the property is under the control of the chancellor, unless relief is prayed for promptly the progress of the estate may have so developed that an equitable estoppel will have arisen.[49] If a lienor attempts to proceed without obtaining the leave or direction of the court, he is guilty of a contempt,[50] and no title to the property can be acquired even though the execution were enforced by a sale.[51] The receivership proceeding does not prevent the foreclosure of a mortgage on the property, but if foreclosure becomes necessary the mortgagee can file a cross bill for foreclosure in the receivership suit, and an independent foreclosure suit may be consolidated with such suit.[52] In Minnesota, where a duly certified copy of an order appointing a receiver of an insolvent is filed in the office of the register of deeds, it is notice of the fact of the receivership to all parties who thereafter deal with lands of the insolvent situated in the county.[53]

(§ 3) *C. Possession and restitution.*[54]—A receiver is an officer of the court appointing him,[55] his possession being deemed that of the court,[56] and any unauthorized attempt to interfere therewith constitutes a contempt of court.[57] Unless inequitable, a receiver is entitled to possession of property of the insolvent though there is a prior attachment lien thereon.[58] Where the receiver obtains possession of property not belonging to the insolvent, the owner not being indebted to the insolvent, it should be returned to him without expense,[59] and the owner presenting a claim therefor, the receiver should file an affidavit stating whether or not the petitioner is indebted to the insolvent.[60] Under a statute authorizing a reconveyance by the receiver when the insolvent's debts have been paid or "provided for," a mere extension of the time of payment is insufficient to authorize reconveyance.[61]

§ 4. *Administration and management of the property. A. Authority and powers in general.*[62]—Primarily the receiver represents the court,[63] though in a qualified sense he may be said to represent the insolvent, his creditors, and, if a corporation, stockholders.[64] A receiver is an officer or agent of the court appointing him[65] and has only such authority or powers as are conferred upon him by

49. Commonwealth Roofing Co. v. North American Trust Co. [C. C. A.] 135 F. 984.

50, 51. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. S. 937.

52. Cole v. Philadelphia & E. R. Co., 140 F. 944.

53. Noyes v. American Freehold Land Mortg. Co. [Minn.] 105 N. W. 1126. Gen. St. 1894, § 4228, is a registry law. Id.

54. See 4 C. L. 1245.

55. Ruprecht v. Henrici, 113 Ill. App. 398; McKenzie v. Coslett [Nev.] 80 P. 1070; McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93.

56. Polk v. Johnson [Ind. App.] 76 N. E. 634; Gunning v. Sorg, 113 Ill. App. 332; Ruprecht v. Henrici, 113 Ill. App. 398.

57. Gunning v. Sorg, 113 Ill. App. 332; Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. S. 937.

58. Injunction will lie to restrain a sale under the attachment. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. S. 937. Such relief cannot be granted by motion in an action to which the persons sought to be restrained are not parties. Strickland v. National Salt Co., 105 App. Div. 640, 94 N. Y. S. 936.

59. Bowker v. Haight & Freese Co., 140 F. 796. Where the receiver of a hotel building was directed to collect from the tenants in possession or other persons liable therefor all rents due, and it did not appear that the plaintiff company, the then tenant, was at the time it surrendered possession indebted for rent, the receiver was liable for money collected by him which was due plaintiff from former guests. St. Paul Hotel Co. v. Segrave, 48 Misc. 657, 96 N. Y. S. 308.

60. Bowker v. Haight & Freese Co., 140 F. 795.

61. P. L. 1896, p. 300, § 69, construed. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 739. Held not an abuse of receiver's discretion to refuse to adjourn sale at the request of counsel, representing 97 per cent of the creditors and all the stockholders, on the ground that an agreement had been made by a large part of the creditors for an extension of the time of payment. Id.

62. See 4 C. L. 1245.

63. Chicago City R. Co. v. People, 116 Ill. App. 633.

64. McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93.

65. Polk v. Johnson [Ind. App.] 76 N. E. 634; Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. [Ark.] 87 S. W. 632; Ruprecht v. Henrici, 113 Ill. App. 398; McKenzie v. Coslett [Nev.] 80 P. 1070; McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93.

such court,[66] and, except as recognized upon considerations of comity,[67] the exercise of such powers is limited by the jurisdiction of the court.[68] The court may from time to time give the receiver such directions as will prevent a sacrifice of the rights of the parties,[69] and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees,[70] and he must excuse any failure to do so.[71] In the absence of proof to the contrary the receiver's powers will be presumed to be such as are ordinarily conferred on similar receivers.[72] The mere institution of a suit to enjoin the enforcement of an order of a Federal court directed to its receiver does not constitute an act of contempt against the Federal court,[73] though it is otherwise if there is an actual physical interference with the execution of such order.[74] While a receiver is an officer of the court, he is also a quasi trustee and occupies a fiduciary relation towards the parties to the action in which he is appointed, and, entirely independent of any question of fraud,[75] he will not be permitted to deal with or purchase the trust property for his individual benefit or for that of any third party.[76] Where property is placed in the hands of a receiver its administration should be conducted in the same way and the same rules of prudence and economy should be observed by the receiver that obtain in the management and control of the private interests of individuals.[77] He may deposit the funds of an insolvent estate coming into his hands as such in a bank of good standing and repute.[78] In determining the character of the bank, that degree of prudence and care is exacted which is ordinarily exercised by reasonably cautious men in transacting their own business of like importance,[79] and the same rule obtains with reference to continuing the deposit.[80] That the bank is a creditor of the estate does not render it an illegal depository of the funds of the estate.[81] It cannot apply the receiver's funds on its claims nor plead said claims as an offset to his demands for the deposit, at least not in excess of the amount previously ordered by the court to be paid thereon.[82] In some states a receiver is by statute required to deposit the funds of the estate in state banks.[83] A receiver in charge

66. Dow v. Nealis, 93 N. Y. S. 379. Authority depends almost entirely on the purpose of the appointment and the extent of the powers conferred by the decree of appointment. Duplex Printing Press Co. v. Clipper Pub. Co. [Pa.] 62 A. 841.

An order appointing one a receiver of "all of the copartnership property * * * of every description or so much thereof as may be necessary to satisfy plaintiff's judgment," makes it the duty of the receiver to reduce to his possession enough property to pay the plaintiff's claim as it should eventually be established. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. S. 327.

67, 68. Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. [Ark.] 87 S. W. 632.

69. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

70. Lyle v. Sarvey [Va.] 51 S. E. 228; Polk v. Johnson [Ind. App.] 76 N. E. 634.

71. Persistent disobedience of orders of the court and neglect to settle accounts for three years by a receiver of a corporation held not excused because at the time the receiver was engrossed with public duties as state senator, and the fact that the president and manager of the company was absent from the state. Lyle v. Sarvey [Va.] 51 S. E. 228.

72. Receiver in foreclosure suit. Dow v. Nealis, 93 N. Y. S. 379.

73. Royal Trust Co. v. Washburn, etc., R. Co. [C. C. A.] 139 F. 865.

74. So held where receiver was ordered to tear up railroad track and his agents and employes were arrested. Royal Trust Co. v. Washburn, etc., R. Co. [C. C. A.] 139 F. 865.

75. Cook v. Martin [Ark.] 87 S. W. 625.

76. Cook v. Martin [Ark.] 87 S. W. 625. Where a receiver in a creditors' suit purchased for his wife a portion of the trust property from one who claimed under an execution sale, whereby a title had been acquired good as against plaintiffs in the creditors' suit, held that the wife was not entitled to hold such property, though the receiver had been acting as counsel for the judgment creditor and though the counsel of plaintiffs in the creditors' suit knew of the title existing under the execution and refused to buy it in for the creditors. Id.

77. Drey v. Watson [C. C. A.] 138 F. 792.

78, 79, 80, 81. State v. Corning State Sav. Bank [Iowa] 105 N. W. 159.

82. State v. Corning State Sav. Bank [Iowa] 105 N. W. 159. See Banking and Finance, 5 C. L. 347.

83. Civ. Code, art. 1150, requiring all moneys collected by syndics, as soon as the same shall come into their hands, to be deposited in a chartered bank of the state allowing interest on deposits, under a pen-

of the property of a corporation has no authority to carry on the business of the corporation unless he be so authorized and directed by the court.[84] When deemed advisable the court may order the receiver to continue the business.[85] A receiver of a bank has no power or authority to receive or hold money for the purpose of meeting obligations maturing at the bank,[86] and as to funds that come into his possession as receiver, he has no authority to appropriate any of them to the payment of obligations maturing at the bank.[87] While one having an executory contract with an insolvent may treat the same as abandoned upon the appointment of a receiver,[88] he is entitled to a reasonable time before electing to do so for the purpose of ascertaining what may be done by the parties in interest or the receiver with respect to such contract.[89] Where a receiver declines to recognize and enforce an assigned lease which is not otherwise enforceable as against him, the court will not generally interfere with his discretion.[90] A receiver not adopting an executory contract the other party is only entitled to a just compensation for the actual expenditure of labor and money by him in fulfillment of his contract, subject to deduction of all sums paid him thereunder.[91] Upon an application for an order directing the receiver to turn over certain property, collateral issues cannot be inquired into.[92] A judgment directing a receiver to pay over certain moneys in his hands cannot be entered in vacation.[93] The propriety of an order directing the receiver to take charge of the property can only be inquired into on appeal from the order.[94] Being a mere agent of the court the receiver has no authority to appeal from orders made by it in the pending proceeding except as it may authorize him to do so.[95] He may, however, appeal in all matters relating to his official conduct or his accounts and credits.[96]

(§ 4) *B. Payment of claims against receiver or property.*[97]—A receiver has no discretion, speaking generally, as to the application of funds which are in his hands by virtue of the receivership. He holds them strictly subject to the order of the court to be disposed of as the court may direct.[98] It is for the court appointing the receiver to determine whether it has in its possession, or the receiver

alty of 20 per cent interest per annum on the amount not deposited or withdrawn, is imperative and leaves no discretion in the courts to reduce the prescribed rate of interest. Conery v. His Creditors, 113 La. 420, 37 So. 14.

84. Dalliba v. Riggs [Idaho] 82 P. 107.

85. Where hotel corporation was hopelessly insolvent and during the delay necessary to properly advertise and dispose of it as a going concern it was run by the receiver at a loss, held proper for the court not to continue to manage the business. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 739.

86. Schlesinger v. Schultz, 96 N. Y. S. 383.

87. Note so maturing need not be presented to receiver for payment. Schlesinger v. Schultz, 96 N. Y. S. 383.

88. Building contract. Commonwealth Roofing Co. v. North American Trust Co. [C. C. A.] 135 F. 984.

89. Building contract. Commonwealth Roofing Co. v. North American Trust Co. [C. C. A.] 135 F. 984.

90. In re Witte, 45 Misc. 336, 90 N. Y. S. 444.

91. A receiver not adopting an executory contract but acquiescing in its repudiation made a few days before his appointment, held damages for the breach thereof would not be allowed. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193, following Griffith v. Blackwater Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125.

92. On an application for an order requiring receivers of an insolvent corporation to deliver certain certificates of the corporation's stock to a pledgee of bonds given as collateral security for a loan to enable the pledgee to make a tender of the same to the subscribers of an underwriting agreement in support of a suit thereon, the court cannot consider any defenses which the underwriters may have. Kirkpatrick v. Eastern Milling & Export Co. [C. C. A.] 137 F. 387, modifying 135 F. 146.

93. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

94. Cannot be considered in an action for a writ of prohibition. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

95. Polk v. Johnson [Ind. App.] 76 N. E. 634.

96. In these cases he occupies the position of a party to a suit. Polk v. Johnson [Ind. App.] 76 N. E. 634.

97. See 4 C. L. 1247.

98. Polk v. Johnson [Ind. App.] 76 N. E. 634.

has assets under his control, or that he would be entitled to control, for settling the liabilities of claims not previously provided for,[99] hence, where a judgment is rendered in a state court against a Federal receiver, it is proper to certify the judgment to the Federal court to be disposed of as that court sees fit.[1] A creditor may in behalf of himself and other persons in interest intervene in the receivership proceedings praying leave to effect a settlement with the receiver of a valid claim held against the insolvent,[2] and the receiver being called upon to show cause why the offered settlement should not be made, he becomes a party defendant to the action and is entitled to urge any defensive matter which the creditors or other persons interested in the proper administration of the affairs of the insolvent if they had been made parties defendant,[3] and judgment being rendered against him he may, if dissatisfied therewith, sue out a writ of error.[4] If he fails to show cause, upon being cited to do so, why the proposed settlement should not be authorized, the court may in its discretion order him to accept the terms of the settlement offered in order to avoid long and expensive litigation.[5] In a suit by a receiver of an insolvent bank against a debtor of the bank, defendant cannot set off a claim against the bank acquired after the bank became insolvent.[6] In some states claims for services are preferred.[7]

Debts created by receiver and expenses of administration.[8]—The allowance of costs and expenses is largely discretionary with the appointing court,[9] and is upon appeal treated as presumptively correct.[10] Expenses incurred in the administration of the trust are payable out of the fund.[11] Expenses of litigation by which the fund is created or preserved is chargeable against it,[12] but the rule is otherwise where the object of the litigation is to diminish or destroy the fund.[13] Where expenditures are for the benefit of all the creditors they cannot be charged against one individually.[14] Allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary,[15] and a decree respecting such costs is appealable.[16] Such allowances of expenses and compensation may in a proper case be provisionally allowed the receiver out of the fund, and ultimately decreed to be paid to the party entitled to the fund by his adversary.[17] The payment of broker-

99, 1. Reardon v. White [Tex. Civ. App.] 87 S. W. 365.

2, 3, 4, 5. McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93.

6. Schlesinger v. Goldberg, 93 N. Y. S. 592.

7. Where all parties connected with the management of a corporation treated as a nullity a resolution of stockholders to the effect that certain stockholders should receive nothing for their services, unless the corporation should earn such sums over all expenses, such stockholders held entitled to have their claims for services preferred under Ballinger's Ann. Codes & St. §§ 5919-5923. Cors v. Ballard Iron Works [Wash.] 83 P. 900. Under Sess. Laws 1897, p. 55, c. 43, laborers are entitled to a prior lien upon the property of a corporation in the hands of a receiver. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

8. See 4 C. L. 1247.

9. Expenses of litigation beneficial to estate. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

10. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

11. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31. Where the receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property for their advantage, all proper charges, expenses and liabilities incurred incident to the receivership are held to be a first charge, not only upon the current earnings but also the corpus of the estate. People's Nat. Bank v. Virginia Textile Co. [Va.] 51 S. E. 155.

12. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

13. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31. Trust fund is not chargeable although the result of the litigation is to establish a rule by which similar claims were expeditiously settled without litigation. Id.

14. Mortgagee of property held not liable for money spent by receiver in preserving the property, though the sale thereof did not realize sufficient to pay the mortgage. Cunningham v. Alryan Woolen Mills [N. J. Eq.] 61 A. 372.

15. Nutter v. Brown [W. Va.] 52 S. E. 88.

16. Nutter v. Brown [W. Va.] 52 S. E. 88.

age for procuring the receiver's bond is not a lawful charge as an expense of the receivership.[18] A receiver is not guilty of wrongdoing, necessarily, because he incurs expense in the collection or conservation of a liability validly hypothecated by the insolvent as security for a debt owing by him, because he has no reason to expect such hypothecation to yield a surplus for the trust fund.[19] One furnishing money to a receiver for gathering a crop planted by a tenant has no lien on other crops grown on the leased premises, but the matter must be settled by the receiver and accounted for in his settlement of accounts.[20] Courts of equity have the power and authority to appoint receivers of property and direct them to care for, protect, and preserve the property, and decree the charges and expenses therefor as prior and preferred liens to that of all other liens, mortgages or incumbrances and to direct the sale of the property to pay the same;[21] but, except in the case of a public service corporation, it has no authority to direct the receiver to carry on the business of the insolvent and charge the expenses of the business and operations as a prior and preferred lien against property over that of prior recorded mortgages and incumbrances on the same property.[22] A decree directing the payment of debts and expenses incurred by a receiver should set forth specifically the amount of each claim and the date from which interest is to be computed.[23]

A receiver's certificate[24] does not acquire priority because it fails to recite the existence of prior certificates.[25] One whose right to relief is based on a receiver's certificate is in no position to contest the validity of such certificate.[26]

Counsel fees.[27]—Reasonable[28] fees for attorney's services rendered the receiver[29] and not constituting a part of his duties[30] are proper items of expense allowable to the receiver,[31] and generally may be taxed as costs.[32] Where an attorney employed by creditors recovers and turns over to the receiver a part of the trust fund, he is entitled to a preferred claim on the fund for the reasonable value of

Even though such costs are provisionally allowed receiver out of the fund and are ultimately decreed to be paid to the party entitled to the fund by his adversary. Id.

17. Nutter v. Brown [W. Va.] 52 S. E. 88.

18. Is not a sum paid to his surety under Code Civ. Proc. § 3320. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. S. 327.

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

20. Goodwin v. Mitchell [Miss.] 38 So. 657.

21. Dalliba v. Riggs [Idaho] 82 P. 107.

22. Held to have no authority to authorize receiver in charge of placer mines to carry on a general mining business and give expenses preference. Dalliba v. Riggs [Idaho] 82 P. 107. Where a corporation is not engaged in any public service a court will not authorize the receiver appointed in foreclosure proceedings to issue certificates of indebtedness to raise money to put its plant in a condition to run, and make such certificates prior in lien to the mortgage. Wiggins v. Neversink Light & Power Co., 93 N. Y. S. 853.

23. People's Nat. Bank v. Virginia Textile Co. [Va.] 51 S. E. 155.

24. See 4 C. L. 1247.

25. Held not to thereby acquire priority over a former certificate for an actual cash loan and which was declared by order of court to be a prior lien. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

26. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

27. See 4 C. L. 1247.

28. Allowances made attorney held excessive. Drey v. Watson [C. C. A.] 138 F. 792.

29. Services rendered by an attorney who successfully attacked a receivership fund in afterwards aiding the receiver by explaining the effect of the court's decision to persons sent him by the receiver, and advising them to settle their claims in accordance with such decision, is not ground for an allowance of compensation to the attorney from the receivership fund. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

30. Attorney's services constituting a part of the duties of the receiver the charge is a personal expenditure and should be borne by the receiver individually. Dalliba v. Riggs [Idaho] 82 P. 107. A receiver is not entitled to allowance for fees paid attorneys for making his reports, narrating his acts, receipts and expenditures as receiver, and prosecuting claims against the estate he represents for his own compensation and for the allowance of such attorney's fees. Id.

31. State v. Active Bldg. & Loan Ass'n No. 2, 102 Mo. App. 675, 77 S. W. 171.

32. Under Rev. St. 1899, § 755. State v. Active Bldg. & Loan Ass'n No. 2, 102 Mo. App. 675, 77 S. W. 171. So held as to counsel fees paid by a receiver pursuant to an order of court. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. S. 327.

his services, whether such fund is recovered before or after the appointment of the receiver,[33] and such claim need not be presented to the court for allowance by the employing creditors or by the attorney.[34] The allowance of fees incurred in litigation beneficial to the trust estate is largely discretionary with the lower court, and is upon appeal treated as presumptively correct.[35] An appellate court cannot reverse the trial court's action in refusing an allowance of attorney's fees to an attorney who attacked the trust fund on the ground of a previous oral agreement between the trial judge and the attorney to allow such fees.[36] An order supplemental to the judgment in an action directing further proceedings by the receiver in the collection of the judgment is not a final order in a special proceeding and cannot include an extra allowance of fees in lieu of costs to the attorney for the receiver.[37]

(§ 4) *C. Sales by receivers.*[38]—The court may revoke ex proprio motu an order improvidently granted,[39] as for instance, where a sale has been ordered to be made on a credit when it should have been for cash.[40] It is erroneous to order the sale of property on credit to pay a debt which is due and exigible.[41] When advisable the property may be sold in bulk.[42] Statutory provisions as to notice must be complied with,[43] and it appearing that no higher sum could have been realized, the sale will not be set aside because the petitioning creditor did not have actual notice thereof.[44] The sale is made under the direction of the court as a court of equity, and it should be presumed that the court and its officers will make an honest effort to realize the greatest sum possible for the assets of the trust.[45] Mere, as distinguished from gross,[46] inadequacy of price is insufficient to warrant a refusal to confirm the sale.[47] A creditor acting in good faith and with the approval of the court may purchase from a receiver his debtor's equity of redemption at an agreed price.[48] A purchase by a receiver at his own sale through a third person, while irregular and voidable, is not void nor subject to collateral attack.[49] It is proper to permit a purchaser holding receiver's certificates which are prior liens on the property to turn them in as part of the purchase money.[50] A purchaser may by stipulation estop himself from off-setting against the purchase price claims held by him against the estate.[51] The debtor has an interest author-

33, 34. Butler v. Conwell [Wyo.] 82 P. 950.

35, 36. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

37. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. S. 327.

38. See 4 C. L. 1248.

39, 40, 41. Fitzner v. Noullet, 114 La. 400, 38 So. 398.

42. Sale in bulk held proper where the assets of a hotel corporation consisted largely of household goods, a stock of liquors, cigars, etc., and an unexpired leasehold, and it did not appear that a greater sum would have been realized if the articles had been sold separately. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 739.

43. Where a notice of a receiver's sale of an interest in a contingent remainder was not published for the 10 days required by rule 77 of the rules of general practice, and there was nothing in the notice indicating what was to be sold or the extent of the interest of the remaindermen, it was insufficient. Rawolle v. Kalbfleisch, 94 N. Y. S. 16.

44. Order of confirmation will not be set aside. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

45. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

46. Gross inadequacy of price is sufficient ground for setting aside a receiver's sale. Rawolle v. Kalbfleisch, 94 N. Y. S. 16.

47. Receiver's sale of assets appraised at $7,500 for $6,000 confirmed, though on the hearing a purchaser was tendered who was then willing to bid $8,000 and give security for the performance of the offer. Fleming v. Fleming Hotel Co. [N. J. Eq.] 61 A. 739.

48. Pitzele v. Cohn, 217 Ill. 30, 75 N. E. 392.

49. Groeltz v. Cole [Iowa] 103 N. W. 977.

50. Nisbet v. Great Northern Clay Co. [Wash.] 83 P. 15.

51. Where the terms of sale are one-half cash and one-half in thirty days, and the purchaser gives a note for part of the purchase price and stipulates therein that claims were to be paid out of proceeds in receiver's hands, he cannot claim in a suit upon the note that he should be allowed

izing his moving the court to set aside the sale by his receiver, though intervening the sale and motion the property is sold under a mortgage by him, where he disputes the validity of such mortgage sale.[52] Title does not pass until the sale is confirmed.[53] A sale by the receiver passes a good title against the insolvent irrespective of the purchaser's status as a creditor either with or without notice.[54] The interest conveyed[55] and the property sold[56] largely depends upon the decree of sale. A receiver's itemized inventory is admissible to show what is included in the term "assets" as used in the order of sale.[57] An order of sale being reversed on appeal and after the sale, the disposition of the property held by the purchaser and of proceeds of a sale of a portion of such property cannot be determined in litigation to which the insolvent is not a party.[58]

(§ 4) *D. Actions by and against receivers.*[59]—Generally, where it is desired that a receiver shall bring suit, application is made to the court of his appointment setting out the grounds for suit, and upon proper showing the court passes an order giving direction to the receiver.[60] The court, however, is not bound as a matter of course to direct a receiver to bring suit upon a claim in his hands but is invested with some discretion in determining whether such a suit would be profitable to the estate or not.[61] Thus, if the debtor be insolvent the court is not required to diminish the assets by the incurring of useless costs.[62] Ordinarily the receiver of a corporation is the proper party to bring suit against offending officials,[63] but when the receiver is himself charged with having been one of the officials guilty of the wrongdoing, an equitable proceeding may be maintained by the stockholders, the receiver and corporation both being made parties defendant.[64] In

credit for claims which he had against the receiver's corporation, and that the plaintiff should file an account before pressing for judgment. Kidney v. Beemer, 27 Pa. Super Ct. 558.

52. Rawolle v. Kalbfleisch, 95 N. Y. S. 540.

53. Purchaser held to take subject to judgment rendered in mortgage foreclosure suit before confirmation. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

54. Duplex Printing Press Co. v. Clipper Pub. Co. [Pa.] 62 A. 841. Purchaser of ship sold subject to maritime liens, held estate had no interest in money paid by purchaser to lien claimants. In re Red River Line [La.] 40 So. 250. An answer in an action by a railroad company to remove a cloud on its title to a part of its road equipment and appurtenances, which alleges that the property was placed in the hands of a receiver and sold by order of court, that defendant became the purchaser at the receiver's sale and that title vested in him by reason of the sale, held sufficient as against demurrer. Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048.

55. Under decree giving purchasers title free of all claims and liens of creditors and parties, held to take free from judgments of property owners for damages for taking of property under the power of eminent domain. Settegast v. Houston, etc., R. Co. [Tex. Civ. App.] 87 S. W. 197.

56. Sale of partnership property by a receiver held not to include property not inventoried. Crawford v. Stainback [Ark.] 88 S. W. 991. Plaintiff was injured by the negligence of the servants of a receiver. Before an action for damages was commenced the property of the insolvent was sold, the sale confirmed, and the receiver discharged by an order directing him to convey to the purchaser all property of every description belonging to the corporation, including all property rights, contracts, and choses in action. After the commencement of the action the court vacated the order of discharge pending the action. Held such order showed that the sale and confirmation thereof did not pass title to an accident policy held by the receiver and hence a contract by which plaintiff released the property of the corporation from liability for any judgment against the receiver did not preclude a judgment against him. Reardon v. White [Tex. Civ. App.] 87 S. W. 365.

57. Illinois Steel Co. v. Prehle Mach. Works Co., 219 Ill. 403, 76 N. E. 574, afg. 116 Ill. App. 268.

58. Lutey v. Clark [Mont.] 84 P. 73, denying motion for a rehearing, original opinion 31 Mont. 45, 77 P. 305.

59. See 4 C. L. 1249.

60, 61. Sterling Elec. Co. v. Augusta Telephone & Elec. Co. [Ga.] 52 S. E. 541.

62. Sterling Elec. Co. v. Augusta Telephone & Elec. Co. [Ga.] 52 S. E. 541. Where the court ordered a receiver to bring suit "if upon investigation it appears that there is a reasonable prospect of realizing on any judgment that may be obtained," it will not be reversed on appeal in the absence of evidence showing what evidence was before the trial court, the solvency of the debtor, or the probability of realizing on a judgment if obtained. Id.

63. Weslosky v. Quarterman, 123 Ga. 312, 51 S. E. 426.

such a case it is unnecessary to allege a demand upon the receiver to sue.[65] In the absence of some conveyance or statute vesting the property of the debtor in the receiver he cannot sue in courts of a foreign jurisdiction upon the order of the court which appointed him to recover the property of the debtor,[66] and this is true though the receiver is authorized to institute the suit in the name of the corporation;[67] but where a receiver has title to the property he may, through comity, be allowed to maintain a suit in a foreign jurisdiction where such course will not conflict with local policy or the rights of creditors in such jurisdiction.[68]

Where it is sought to bring an action against a receiver as such, leave of the court appointing the receiver must first be obtained. The granting of such leave is discretionary with the court.[69] The commencement of an action against a receiver without leave does not affect the jurisdiction of the court[70] but raises purely a question of contempt.[71] The court on motion may set aside or stay the proceeding commenced without its sanction, but until the court interferes the action is regular.[72] The complaint need not allege that permission to sue the receiver has been granted.[73] A court will not entertain an action to recover property in the possession of a defendant as receiver of another court unless leave to sue its receiver has been obtained from that court,[74] and the want of power in the Federal courts to entertain such a suit is held to be jurisdictional.[75] It is essential, however, that the receiver be made a party defendant.[76] The beneficiaries of a trust fund under the control of a receiver may, by permission of the court to whom the latter is accountable, maintain an action against him to compel him to perform his duty.[77] The function of an action against a Federal receiver in his official capacity, brought without leave of the court appointing him, to recover damages for an alleged tort committed by him while acting in such capacity is to establish the amount of the plaintiff's claim, but in nowise to interfere with the custody, control, and disposition by the court of the property involved in the receivership proceedings.[78] Execution upon a judgment recovered in such an action cannot be enforced or legally issue against the property in custodia legis,[79] and, consequently, the receiver as such should not be joined with others against whom the judgment would constitute a personal liability to be enforced by execution at law.[80] A court having property in custody through its receiver may, in a proper case, direct that receiver to turn over the property to the Federal court in aid of the enforcement of its writ.[81] A foreign receiver appearing generally in an action brought

64. Weslosky v. Quarterman, 123 Ga. 312, 51 S. E. 426. To allow such a proceeding does not bring about a multiplicity of suits. Id. Remedy of complainants is not to apply for the appointment of another receiver. Id.

65. Weslosky v. Quarterman, 123 Ga. 312, 51 S. E. 426.

66. Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 Law. Ed. 1163; Fowler v. Osgood [C. C. A.] 141 F. 20; Edwards v. National Window Glass Jobbers' Ass'n, 139 F. 795; Leman v. MacLennan, 7 Ohio C. C. (N. S.) 205.

67. Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561. 49 Law. Ed. 1163. See, also, Leman v. MacLennan, 7 Ohio C. C. (N. S.) 205.

68. See Edwards v. National Window Glass Jobbers' Ass'n, 139 F. 795.

69. McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93. Where a person claims the right to the possession of real estate which is held by a receiver, it rests in the discretion of the appointing court to allow such claimant to bring an independent action against such receiver or to compel him to proceed against such receiver in the action in which he was appointed. Gunning v. Sorg, 113 Ill. App. 332.

70, 71, 72. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. S. 995.

73. Hutchinson v. Blen, 46 Misc. 302, 93 N. Y. S. 189.

74, 75. See Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 P. 319 and cases cited.

76. Not being made a party defendant, court has jurisdiction. Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 P. 319.

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

78, 79, 80. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

by a citizen of the state of the forum to cancel a contract for fraud, the court acquires jurisdiction, even though the contract related to lands in a foreign country.[82]

The general rules as to continuance and postponement apply.[83]

A personal judgment and execution cannot properly be awarded against a receiver, but it should be against him in his official capacity to be paid in due course of the administration of his trust.[84] In some states an affirmative judgment on a counterclaim cannot be rendered in an action by a receiver.[85]

§ 5. *Accounting by receivers.*[86]—The court may in its discretion postpone all questions of accounting until the filing of the final account.[87] It is proper in order to determine the amount and correctness of debts alleged to have been incurred by a receiver to refer the same to a commissioner.[88] Creditors who fail to object to the fee returned and claimed by an auditor of the receiver's account may be concluded from enjoining the receiver from paying it though in excess of the legal fee.[89] A receiver stating that the corporation is solvent but refusing to account may be held liable for all indebtedness proved,[90] and, in Virginia, he is not entitled in such a case to have his deposition considered at final hearing for the purpose of extenuating his conduct and reducing his liability.[91] Confirmation of the account concludes the receiver and creditors as to the sales, distribution of the proceeds, and all items on the account.[92] A receiver may appeal in all matters relating to his official conduct or his accounts and credits.[93]

§ 6. *Compensation of receivers.*[94]—The amount of the receiver's compensation is to be determined by equitable and not by legal principles.[95] It should be proportionate to the amounts involved[96] and he is entitled to commissions on the total value of the property acquired by him in endeavoring to discharge his duty in good faith, although that property proves to be more than sufficient to accomplish

81. Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 P. 319. Held improper to so order where, after appeal from a judgment for plaintiff in a suit to cancel a lease, and the filing of a supersedeas, and the appointment of a receiver to take charge of the property, plaintiff brought a similar suit for the same relief in the federal court in which she recovered a judgment by default and the court issued a writ of assistance. Id.

82. Code Civ. Proc. §§ 421, 1780, construed. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. S. 995.

83. Where in an action against receivers counsel for defendants asked leave to file a plea, setting up a discharge of defendants as receivers, but stated that he did not propose to show that the discharge occurred since a former trial, there was no abuse of discretion in refusing to stop the trial and wait for counsel to prepare the plea. McGhee v. Cashin [Ala.] 40 So. 63.

84. Malott v. Howell, 111 Ill. App. 233; Malott v. Mapes, 111 Ill. App. 340.

85. So held under Laws 1902, p. 1539, c. 580 (Municipal Court Act), § 152, subd. 3. Schlesinger v. Rachmil, 94 N. Y. S. 12.

86. See 4 C. L. 1251.

87. Where a receiver filed a provisional account and the court decreed a distribution of the assets on hand among the privileged creditors, reserving the right of all creditors not paid to demand of the receiver a full and complete account of his administration, held that all questions of accounting should be postponed until the filing of the final account. In re Red River Line [La.] 40 So. 250.

88. People's Nat. Bank v. Virginia Textile Co. [Va.] 51 S. E. 155.

89. McHenry v. Finletter, 23 Pa. Super. Ct. 636.

90. Where the receiver of a corporation stated in the pleadings prepared by himself as counsel and in a letter to counsel for the creditors that the corporation was solvent but persistently disobeyed orders of the court and neglected to settle his account before its commissioners, a commissioners' report requiring him to pay all the indebtedness proved against the corporation was proper. Lyle v. Sarvey [Va.] 51 S. E. 228.

91. So held where receiver of a corporation neglected, without good cause, to settle his accounts for three years. Va. Code 1904, p. 1778, § 3362, construed. Lyle v. Sarvey [Va.] 51 S. E. 228.

92. Where syndic charged himself with proceeds of sale as cash to be distributed, held he could not show that he had not collected the money. Conery v. His Creditors, 113 La. 420, 37 So. 14.

93. In these cases he occupies the position of a party to the suit. Polk v. Johnson [Ind. App.] 76 N. E. 634.

94. See 4 C. L. 1251.

95. Nutter v. Brown [W. Va.] 52 S. E. 88.

96. Where a receiver of property which

the purposes of the receivership.[97] He is not entitled to compensation for incidental services which the insolvent was under contract to render free of charge.[98] A receiver being an officer of the court appointing him, and being accountable to it, any compensation to be allowed him as costs on appeal must be allowed by such court and not by the appellate court.[99] In New York the court is not prohibited from granting fees to a receiver of a corporation in process of dissolution except upon an accounting.[1] Misconduct by a receiver will deprive the receiver of his right to compensation,[2] but mere irregularities in his appointment acquiesced in by the parties will not deprive him of his compensation,[3] nor the successful party of a decree over against his adversary for the amount thereof when it has been allowed out of a fund belonging to the party so prevailing.[4] If the receiver be improperly appointed the party procuring his appointment is liable for his compensation.[5] The owner of the property may except to and appeal from a judgment awarding a retiring receiver a portion of the fund and directing his successor to pay the same,[6] and on such an appeal the receiver's successor is not a necessary party.[7]

§ 7. *Liabilities and actions on receivership bonds.*[8]—A receiver is personally liable for interest when he has funds in his hands on which he could by proper management have collected interest,[9] and where by neglect or misconduct he fails to pay over sums which came into his hands.[10] A sale of the receivership property upon the condition that the purchaser assume all liabilities does not bar the continuation of suits against the receiver for negligent acts of servants, his order of discharge providing that it should not prevent him from defending actions then pending.[11]

§ 8. *Foreign and ancillary receivers.*[12]—A Federal court has power, upon

sold for $271,000 served for 29 months, during which time he did not physically manage the property and the principal service rendered by him was 125 days spent in various cities, for which he received $15 a day as expenses, an allowance of $15,000 exclusive of such expense allowance, held sufficient. $24,022.84 held excessive. Drey v. Watson [C. C. A.] 138 F. 792.

97. So held where an order appointing a receiver directed him to reduce to his possession enough property to pay plaintiff's claim as it should eventually be established. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. S. 327.

98. So held where receiver continued insolvent's business. Rosenthal v. McGraw [C. C. A.] 138 F. 721.

99. Receiver appointed under Civ. Prac. Act § 146 (Comp. Laws § 3241). McKenzie v. Coslett [Nev.] 80 P. 1070.

1. People v. Anglo-American Sav. & Loan Ass'n, 94 N. Y. S. 1113. Where receiver was only prevented from rendering a final account by the pendency of two actions against him, and the attorney-general made no request for an accounting before the payment of the allowance and merely objected to an order making it, held proper for court to allow receiver commissions on money received and disbursed by him subject to inquiry on his next accounting. Id.

2. Where a receiver has failed to keep correct accounts, has made overcharges and false charges, has been reckless in expenditures and in employing servants, and has shown a general disregard for the trust he has assumed, he is not entitled to any salary or compensation for his services. Dalliba v. Riggs [Idaho] 82 P. 107. Where after object of receivership was fulfilled the receiver, by agreement between himself and the debtor, retained possession of the property as receiver until a debt owing him was paid, held the court would not allow him any compensation. Davis v. Atkinson [Ark.] 87 S. W. 432.

3, 4. Nutter v. Brown [W. Va.] 52 S. E. 88.

5. Bank held liable where directors wrongfully secured appointment, all parties acquiescing therein for 10 years. Tabor v. Bank of Leadville [Colo.] 83 P. 1060.

6. Owner is a party to the judgment though not named therein. Polk v. Johnson [Ind. App.] 76 N. E. 634.

7. Polk v. Johnson [Ind. App.] 76 N. E. 634.

8. See 4 C. L. 1252. Liability of **railroad receivers,** see Railroads, 6 C. L. 1194. **Validity of bonds,** see ante, § 2 A.

9. Rosenthal v. McGraw [C. C. A.] 138 F. 721.

10. Rosenthal v. McGraw [C. C. A.] 138 F. 721. Held liable for interest on sums withheld by him from the time of their receipt until he paid the same into court and asked for directions as to their distribution. Id.

11. Denver & R. G. R. Co. v. Gunning, 33 Colo. 280, 80 P. 727.

12. See 2 C. L. 1480. Suits by and against

exhibition to it of proceedings in a state court wherein a receiver has been appointed,[13] to appoint an ancillary receiver of assets of an insolvent corporation within its jurisdiction in aid of a primary appointment by a state court of another state.[14]

RECEIVING STOLEN GOODS.

§ 1. *Nature and elements; other crimes distinguished.*[15]

§ 2. *Indictment and prosecution. Indictment.*[16]—An indictment in the language of the statute is sufficient.[17] The property stolen must be described with as much certainty as the circumstances of the case will permit and must be sufficient to apprise defendant of the property charged to have been stolen,[18] but it is not necessary to so describe the property as to identify it from other property of the same class.[19] A description of the property as "two cases containing thirty-five pairs of shoes" charges defendant with receiving the shoes as well as the cases.[20]

An indictment for receiving stolen goods knowing them to be stolen is not fatally defective for failing to charge the name of the thief or stating that his name was unknown to the grand jury,[21] nor is it necessary to allege that the defendant knew that they were stolen from a particular person, and if it contains such an allegation it may be disregarded as surplusage and need not be proven.[22] Where the name of the person from whom defendant received the property is known to, or by the exercise of reasonable diligence could be ascertained by, the grand jury, an indictment alleging that the name is "unknown" to the grand jury, is insufficient.[23] The fact that an indictment charged receiving a certain number of ounces of silver, while the proof showed the receipt of certain spoon, fork, and knife blanks, is no ground for arrest of judgment.[24] The buying or receiving of stolen property, knowing it to have been stolen, implies a felonious intent.[25]

Evidence.[26]—To convict of the crime of receiving stolen goods it is necessary to prove that defendant had knowledge of the fact that they were stolen property,[27] and any circumstance or fact which tends to prove such guilty knowledge is admissible[28] though they may prove another distinct crime.[29] Where the facts and cir-

foreign and ancillary receivers, see ante § 4 D.

13, 14. Scaife v. Scannon Inv. & Sav. Ass'n [Kan.] 80 P. 957.

15, 16. See 4 C. L. 1253.

17. Under Rev. St. 1899, § 1916, making it a crime to "buy or in any way receive" stolen goods, etc., an information charging that defendant did "buy, have, receive and take into his possession" certain goods, knowing them to be stolen, does not charge two distinct offenses. State v. Kosby [Mo.] 90 S. W. 454. Under Rev. St. 1899, § 1916, an information following the exact language of the statute sufficiently apprises defendant of the cause and nature of the accusation against him. Id. Where the statute does not make "intent" an element of the crime, it need not be alleged that defendant received the property with intent to deprive the owner thereof. State v. Sakowski [Mo.] 90 S. W. 435.

18. An indictment describing the property as "1,200 cigars, of the value of $42," is sufficient. State v. Kosky [Mo.] 90 S. W. 454. Describing spoon, fork, and knife "blanks" as so many ounces of silver is insufficient. State v. Nelson [R. I.] 60 A. 589.

19. An indictment describing the property as brass of a certain value of the personal property of a designated person is sufficient. Miller v. State [Ind.] 76 N. E. 245.

20. State v. Sakowski [Mo.] 90 S. W. 435.

21. Buechert v. State [Ind.] 76 N. E. 111.

22. State v. Sakowski [Mo.] 90 S. W. 435.

23. McKay v. State [Tex. Cr. App.] 90 S. W. 653.

24. State v. Nelson [R. I.] 60 A. 589.

25. State v. Levich [Iowa] 104 N. W. 334.

26. See 4 C. L. 1253.

27. Code § 4845. State v. Levich [Iowa] 104 N. W. 334.

28. Evidence of other stolen goods found in defendant's possession at the time and

cumstances attending the receipt of the goods imply a guilty knowledge, the question of guilt is for the jury.[30]

In an action for receiving stolen goods the theft may be proved by the testimony of the person who stole it,[31] but a confession by such person made under circumstances which would render it inadmissible as against him under a charge of larceny is inadmissible.[32] It is held to be no error to refuse to require the person from whom the goods were stolen to state who, besides himself, handled and sold the kind of property stolen.[33] In a prosecution for receiving stolen goods, where the value is material,[34] the market value is the proper criterion,[35] but where the jury fails to fix the value of the goods and hence it cannot be entered as costs, any error in admitting or excluding evidence bearing upon the value is harmless.[36]

Instructions.[37]—The charge of the court must be relevant to the issues and applicable to the evidence.[38] In charging the necessity of a stealing the constituents of larceny need not be technically set out.[39]

Review.—In an appeal from a conviction for receiving stolen property, under an indictment containing other counts, only errors relating to the count charging receipt of stolen goods will be considered.[40] A prosecution for receiving stolen goods is barred by the statute of limitation if not brought within three years.[41]

RECITALS, see latest topical index.

RECOGNIZANCES.[42]

Under a statute which prescribes no particular form for a recognizance it is not necessary that it be in the precise language of the statute.[43] A recognizance, though taken in a court of inferior jurisdiction, need not state jurisdictional facts, and at most this is but an irregularity which under the statutes of Kansas does not invalidate the recognizance.[44] Where the name of the principal is properly spelled in a recognizance wherein he is recited as appearing to enter into the

prior to the receiving is admissible. Buechert v. State [Ind.] 76 N. E. 111.

29. Evidence that defendant had received other property stolen from the same person but by another employe, which property he had concealed, is admissible. State v. Levich [Iowa] 104 N. W. 334.

30. State v. Brown [N. J. Law] 60 A. 1117.

31. Miller v. State [Ind.] 76 N. E. 245.

32. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 568, 87 S. W. 1158.

33. State v. Levich [Iowa] 104 N. W. 334.

34. Under Cr. Code 1896, § 5052, the value of the goods is authorized to be entered as costs if the goods be not returned and paid to the owner. Moss v. State [Ala.] 39 So. 830.

35. Evidence of cost and the retail price is admissible as bearing upon the market value. Moss v. State [Ala.] 39 So. 830.

36. Moss v. State [Ala.] 39 So. 830. An instruction that if defendant received the property from a third person, not knowing where he got it, he is not guilty, is erroneous as he may still know that it was stolen. Id. Where the indictment charges burglary and receiving stolen property, an instruction ignoring the charge of burglary is properly refused. Id.

37. See 4 C. L. 1253.

38. Where the evidence shows that the goods were received from the thief it is not error to refuse to instruct as to receiving goods from one other than the thief. Buechert v. State [Ind.] 76 N. E. 111. An instruction that if defendant or his wife purchased the goods in good faith from one having possession thereof without knowledge that they were stolen, the defendant must be acquitted, is sufficiently favorable to defendant. State v. Sakowski [Mo.] 90 S. W. 435.

39. State v. Sakowski [Mo.] 90 S. W. 435.

40. Moss v. State [Ala.] 39 So. 830.

41. McKay v. State [Tex. Cr. App.] 90 S. W. 653.

42. See 4 C. L. 1253.

43. It is sufficient if it comes within the terms of the statute. People v. Tidmarsh, 113 Ill. App. 163.

44. Section 5596, Gen. St. 1901. Lies v. State [Kan.] 80 P. 949.

same, the fact that his name is improperly spelled subsequently does not invalidate the recognizance.[45]

The principal must be regularly called and fail to appear as conditioned before there can be a legal forfeiture of the recognizance declared,[46] but when there has been such a forfeiture declared, it is not then necessary to enter a default as to the surety.[47] An order as follows: "And now it is by the court ordered that recognizance herein be and is now forfeited," is a sufficient declaration of forfeiture.[48]

RECORDARI; RECORDING DEEDS AND MORTGAGES, see latest topical index.

RECORDS AND FILES.

This topic is confined to the nature and characteristics of public records. The form and requisites of particular instruments in order to entitle them to record,[49] and the doctrine of notice,[50] are treated elsewhere, as is also the restoration of lost records.[51]

§ 1. *What are records.*[52]—A public record is a written memorial drawn up, under authority of law, by a proper public officer and designed to remain as a memorial or permanent evidence of the matters to which it relates.[53] Documents and papers prepared by a private party may become public records upon being filed in a public office.[54] A copy of a judgment being recorded upon the minutes of the court is a part of the records of the court if certified to by the clerk of the court,[55] or if the minutes are signed by the judge at the conclusion of the term as required by statute;[56] and the fact that the clerk's certificate is attached to the minute entry does not make that entry any less a record entry.[57] It is the duty of officials having authority to record documents or to make entries in the records of which they have custody, in the course of their official duty, to note on such records the date upon which they record such instruments or make such entries, which notes become part of such record,[58] and the dates specified therein are to be taken as prima facie correct.[59]

45, 46, 47, 48. People v. Tidmarsh, 113 Ill. App. 153.

49. See Notice and Record of Title (deeds and real estate mortgages), 6 C. L. 814; Wills, 4 C. L. 1863; Chattel Mortgages, 5 C. L. 574; Sales, 4 C. L. 1318.

50. See Notice and Record of Title, 6 C. L. 814.

51. See Restoring Instruments and Records, 4 C. L. 1294.

52. See 4 C. L. 1254.

53. See 20 Am. & Eng. Ency. of Law, 474. Death certificate is a public record. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40. Report of a commissioner appointed to supply the burned records under the Act of 1882 held of no weight, the court not having confirmed it or ordered the deed recorded. Alley v. Alley [Ky.] 91 S. W. 291. Entry of improperly acknowledged deed is void. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188. V. S. 305 provides that the state auditor shall require all bills presented to him for allowance to be fully itemized and accompanied as far as possible with vouchers which shall be kept in his office. Held that the term "bill" includes all claims and accounts which by law may be presented to the auditor for allowance, and the term "vouchers" includes all books, papers, receipts and receipted bills and documents which serve to prove the truth of the claims and accounts presented. Clement v. Graham [Vt.] 63 A. 146. See Notice and Record of Title, 6 C. L. 814; Wills, 4 C. L. 1863; Chattel Mortgages, 5 C. L. 574; Sales, 4 C. L. 1318.

54. Under V. S. 305, bills against the state and vouchers accompanying the same on being filed in the auditor's office become public documents. Clement v. Graham [Vt.] 63 A. 146.

Stenographic reports and minutes of proceedings before a grand jury are not official statements which in themselves constitute proof of the facts reported, but are merely memoranda to refresh the recollection.[60]

An injunction will lie to prevent the erroneous placing of one's picture in a rogues' gallery.[61]

§ 2. *Keeping and custody.*[62]—The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping them safely in their offices.[63] Statutes requiring probated wills to be filed and remain in the office of the clerk of the court are frequently construed as being for the benefit of the heirs and devisees of the testator,[64] and when so construed a violation of the statute is immaterial so far as third persons are concerned.[65] If a judge acts corruptly and falsifies his record he is answerable both civilly and criminally.[66] The liability of a register of deeds for negligently permitting the wrongful cancellation of a recorded mortgage is one of indemnity,[67] and hence the measure of damages cannot exceed the amount due on the mortgage at the date of the entry of satisfaction.[68] One participating in the wrong cannot recover damages from the officer.[69] A court has the inherent power to correct its records at any time.[70] In the absence of statutory provisions a court has the exclusive right to keep its records free from immaterial or improper matter.[71]

§ 3. *Publicity and access.*[72]—At common law and under the statutes of most states, when not detrimental to the public interests,[73] all interested parties[74] have the right to inspect the public records.[75] The right must, however, be exercised by each individual in a reasonable and orderly manner, at reasonable hours and times, and with due regard to the official rights of the officer in charge and to the performance by him of his official duties and to the reasonable exercise by the

55, 56, 57, 58, 59. Mansfield v. Johnson [Fla.] 40 So. 196.

60. Havenor v. State, 125 Wis. 444, 104 N. W. 116.

61. Itzkovitch v. Whitaker [La.] 39 So. 499; Schulman v. Whitaker [La.] 39 So. 737. See contra, Molineux v. Collins, 177 N. Y. 395, 69 N. E. 727.

62. See 4 C. L. 1255.

63. Clement v. Graham [Vt.] 63 A. 146.

64, 65. Pasch. Dig. art. 1236, so construed. Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

66. Justice of the peace. Reddish v. Shaw, 111 Ill. App. 337.

67. Suit on bond. Damages must be shown. State v. Green [Mo. App.] 90 S. W. 403.

68. Suit on bond. State v. Green [Mo. App.] 90 S. W. 403.

69. State v. Green [Mo. App.] 90 S. W. 403.

70. See Judgments, 6 C. L. 214, 227.

71. The court of appeals has no power to review an order of a county court denying a motion of a board of supervisors to set aside a presentment of the grand jury censuring them for their neglect in the keeping of the records of the minutes of their proceedings. Appellate Division had affirmed order. In re Jones, 181 N. Y. 389, 74 N. E. 226.

72. See 4 C. L. 1255.

73. One accused of crime is not entitled to inspect before trial the **records of the grand jury** relating to testimony given by him before such body concerning the transaction involved upon the trial in order to enable him to prepare for trial, and to lay the foundation for the impeachment of witnesses who may testify differently on trial than when before the grand jury. Havenor v. State, 125 Wis. 444, 104 N. W. 116. Laws 1903, p. 136, c. 90, providing for a reporter for grand juries, does not remove the obligation of secrecy concerning grand jury proceedings or authorize inspection thereof as a public record by a member of the public and their use as evidence upon the trial of causes. Id.

74. A citizen and taxpayer of the state desiring to examine bills and vouchers on file in the office of the state auditor for the purpose of ascertaining alleged irregularities in the allowance and payment of claims against the state, in order that reforms may be inaugurated, has sufficient interest to entitle him to such inspection as a matter of right. Clement v. Graham [Vt.] 63 A. 146.

75. Clement v. Graham [Vt.] 63 A. 146. V. S. 320, as amended by Laws 1904, p. 25, No. 21, providing for an inspection of claims and vouchers in auditor's office by committee on claims of the general assembly, does not alter rule. Id. Under a statute providing that the records shall always be open to the public generally, any persons or firm

rest of the public of the same co-ordinate rights.[76] The officer in charge of such records is not entitled to a fee for permitting the examination thereof.[77] Mandamus lies to compel permission to examine and inspect public records,[78] even though they are in an office forming a part of the executive department of the government.[79] The complaint is sufficient if it shows the official character of the defendant and his duty to keep the records.[80] It need not allege that the officer has or had the records in his possession[81] or that the records are public ones.[82]

§ 4. *Proof of records and use in evidence.*[83]—The contents of a public record may be proved by a certified copy,[84] the production of the original being dispensed with on account of the inconvenience which would result from the frequent removal of public documents,[85] and consequently the absence of the original affords no presumption of fraud.[86] The custodian of a record, having authority to certify a transcript thereof, has authority to specify in his certificate the particular record from which the transcript is taken, and such certificate is at least prima facie evidence of the facts certified.[87]

Public records legal in form and substance are competent evidence of the facts recorded,[88] but a record void as such may be admissible to prove facts other than those recorded.[89] The record of a court[90] or quasi judicial body[91] imports verity and cannot be questioned collaterally, nor can it be contradicted, impeached, varied or explained by evidence dehors the record.[92] If the record does not state the truth, application should be made to the trial court to correct the record,[93] for when it is once made up it is conclusive upon all parties until altered or set aside by a court of competent jurisdiction, and all questions relating to the time when it was in fact made, or in regard to the authority on which it was made, or in respect to the truthfulness of its recitals, must be settled by reference to the

who may be engaged in **compiling abstract books** have the continuous right, by themselves or their agents, to inspect and make abstracts from any and all public records. State v. McMillan [Fla.] 38 So. 666.

76. State v. McMillan [Fla.] 38 So. 666.

77. Where inspection and extracting is done by the parties themselves or by their agents or assistants, without any service or assistance of the official in charge or his deputies other than their general supervision and watchfulness, such officer is not entitled to any fees or compensation for such inspection and extracting. Clerk of court. State v. McMillan [Fla.] 38 So. 666.

78. Vouchers in state auditor's office. Clement v. Graham [Vt.] 63 A. 146. Relief granted citizen taxpayer who had no adequate remedy at law. Id.

79. Vouchers in state auditor's office. Clement v. Graham [Vt.] 63 A. 146.

80. Clement v. Graham [Vt.] 63 A. 146.

81. Law presumes that he will perform his duty. Clement v. Graham [Vt.] 63 A. 146.

82. Clement v. Graham [Vt.] 63 A. 146.

83. See 4 C. L. 1256. See, also, Evidence, 5 C. L. 1301.

84. Mansfield v. Johnson [Fla.] 40 So. 196; Clement v. Graham [Vt.] 63 A. 146. Death certificate. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40. A certified copy of a chattel mortgage is competent to show how the mortgage read when entered and recorded. Kimball Co. v. Piper, 111 Ill. App. 82. So held as regards copy of certified entry of judgment on minutes of court. Mansfield v. Johnson [Fla.] 40 So. 196. Copy of original execution returned to court from which it issued. Id.

85. Clement v. Graham [Vt.] 63 A. 146; Mansfield v. Johnson [Fla.] 40 So. 196.

86. Clement v. Graham [Vt.] 63 A. 146.

87. Mansfield v. Johnson [Fla.] 40 So. 196.

88. See Evidence, 5 C. L. 1349.

89. Void deed record held evidence that a deed alleged to be lost was made. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188.

90. Cannot be questioned on habeas corpus. Hanley v. State [Fla.] 39 So. 149.

91. The record of a board of county commissioners. Brooks v. Morgan [Ind. App.] 76 N. E. 331.

92. Record of justice of the peace. Reddish v. Shaw, 111 Ill. App. 337. Entries required to be made in the record proper of a trial cannot be contradicted by the bill of exceptions. Hanley v. State [Fla.] 39 So. 149.

Records cannot be modified or changed by parol evidence where no such relief is sought by the pleadings. Welsiger v. Mills [Ky.] 91 S. W. 689.

93. Hanley v. State [Fla.] 39 So. 149.

record alone.[94] Statutory records are prima facie evidence of the contents of the instrument.[95]

A record having been destroyed parol evidence is admissible to show its contents.[96] Where the record of a suit is destroyed it will be presumed that the record contained evidence justifying the judgment.[97] A clerk's certificate on a will is sufficient to show recordation of will, the records having been destroyed.[98]

§ 5. *Crimes relating to records.*[99]—If a judge acts corruptly and falsifies his record he is answerable both civilly and criminally.[100]

REDEMPTION; RE-EXCHANGE, see latest topical index.

REFERENCE.

§ 1. *Definitions and distinctions, master and referee, referee and umpire or arbitrator.*[1]—The reference here meant is the Code analogue of the reference to a master in chancery[2] and the reference to state an account allowed in actions at law. Referees and references so called are provided by statute in certain proceedings[3] and in bankruptcy.[4] Under the Indiana Code a reference to one, by agreement, to examine into all the issues, take evidence thereon and report his findings of fact and the evidence heard by him and his rulings thereon, is a reference to a master commissioner.[5]

§ 2. *Occasion for reference.*[6]—References under special statutes are governed

94. Reddish v. Shaw, 111 Ill. App. 337.

95. When the original will is lost and a certified copy of the record of said will in a foreign jurisdiction is offered in evidence, and it further appears that said original record contains a marginal item and that a part of said marginal item as recorded was below the signature of the testator, the presumption is that said record is a true copy and a true reproduction in form of the will as originally signed by said testator, and unless this presumption is overcome by evidence, such will is by reason of said marginal item, invalid in Ohio to pass title to property in Ohio. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261.

96. On a plea of res judicata, the pleadings in the former cause being destroyed and the issues involved not appearing in the entry of judgment, parol evidence is admissible to show such issues. Holford v. James [C. C. A.] 136 F. 553, afg. [Ind. T.] 76 S. W. 261.

97. Judgment awarding dower, held it would be presumed that husband was dead, and that widow had a claim to unassigned dower. Bloom v. Sawyer [Ky.] 89 S. W. 204.

98. Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

99. See 4 C. L. 1257.

100. Justice of the peace. Reddish v. Shaw, 111 Ill. App. 337.

1. See 4 C. L. 1257.

2. See Masters and Commissioners, 6 C. L. 607. Arbitrators are sometimes called "referees." See Arbitration and Award, 5 C. L. 250.

3. For reference in particular proceedings see such topics as Garnishment, 5 C. L. 1574; Supplementary Proceedings, 4 C. L. 1591; Estates of Decedents, 5 C. L. 1183; Divorce, 5 C. L. 1026, etc.

4. See Bankruptcy, 5 C. L. 367.

5. Under Burns' Ann. St. 1901, § 1462, et seq., and not to a referee under §§ 565-567. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17.

by the terms thereof and the code reference analogous to that in chancery is governed by principles similar to those of chancery.[7] In chancery the order is discretionary and not appealable.[8] A reference is generally authorized when the examination of a long account is necessary.[9] In actions by attorneys against clients the trend of the decisions is against ordering a reference, and one should only be ordered in cases where it is apparent that from the complicated nature of the issues it is "practically impossible" for a jury to determine them.[10]

§ 3. *Time and stage of proceedings.*[11]—A reference cannot be ordered until the cause is ready for a hearing.[12] Where an accounting is made the basis of the demand, complainant must make out his case and prove the charges of his bill showing that he has the right to demand an account,[13] and an interlocutory judgment providing for an accounting must be entered.[14] The premature entry of an order of reference is harmless where no account is taken thereunder.[15]

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.*[16]—Jurisdiction to order a reference cannot be conferred by consent of parties.[17] No special notice of an order of reference is necessary in an equity case.[18] A motion for a continuance being denied and the court giving complainant his election to proceed to trial or consent to a reference, a consent to a reference is not made under duress.[19] One appearing before a referee without objection cannot complain that the reference was made without his consent.[20] Under the Code of Alaska an order of reference need not require that the witnesses who testify before the referee shall read over and subscribe their testimony.[21] An objection to the form of the order should be taken at the time of the introduction of evidence.[22] The parties having consented to the reference and proceeded therewith, the order therefor may be entered nunc pro tunc, the first order being void because of the disqualification of the justice making it.[23]

6. See 4 C. L. 1258.

7. Compare Masters and Commissioners, 6 C. L. 607.

8. Lockwood v. Lockwood [S. C.] 53 S. E. 87. See Masters and Commissioners, 6 C. L. 607.

9. Properly referred where case stated cause of action on contract and trial involved examination of account of several hundred items. Starin v. Fonda, 107 App. Div. 539, 95 N. Y. S. 379.

10. Hoff v. Reid & Co., 110 App. Div. 95, 97 N. Y. S. 107. Reference denied where only two items were disputed. Id. Controversy about propriety of consolidating several causes of action held not to take case out of general rule. Moyer v. Nelliston, 96 N. Y. S. 485.

11. See 4 C. L. 1259.

12. Reference refused where several defendants had not been served nor appeared, and case was not dismissed as to them, and no replication had been filed to answers filed. Macfarlane v. Hills [Fla.] 39 So. 994.

13. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170.

14. Gibson v. Widman, 106 App. Div. 388, 94 N. Y. S. 593.

15. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170.

16. See 4 C. L. 1259.

17. Parties to an action cannot by consent confer upon a justice of the appellate division jurisdiction to hold a special term for the hearing of motions and to enter an order of reference on a motion there pending. Owasco Lake Cemetery v. Teller, 96 N. Y. S. 985.

18. Lockwood v. Lockwood [S. C.] 53 S. E. 87. Where calendar No. 2 is being called at intervals during the trial of cases on calendar No. 1, on motion in open court after trial of a case on calendar No. 1 an order of reference may be made in a case on calendar No. 2 without further notice, one counsel of record being in court and the other not being present and having no notice of the motion. Brookshire v. Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442. See Masters and Commissioners, 6 C. L. 607.

19. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

20. Gulf Lumber Co. v. Walsh [Fla.] 38 So. 831.

21. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

22. Objection that order did not require witnesses to read and subscribe testimony. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

23. Where the referee had been previously agreed upon between the parties and they had gone to trial before him and his deci-

§ 5. *Selection and qualifications of the referee; his oath and induction into office. Removals and substitutions.*[24]—A referee may be removed for discussing facts of case with a witness in the absence of counsel.[25] Within the meaning of statutory provisions the resignation of a referee is a "refusal to serve."[26]

§ 6. *General scope of reference and powers of referees or masters.*[27]—Where the principal issues presented are questions of law not involving or involved in an accounting, the court should merely refer the taking of any necessary account,[28] but where the primary purpose of the action is accounting and the account is a long one, the court has authority to refer the whole case and submit to the referee all incidental questions of law arising therein,[29] and this rule applies to suits in equity.[30] The powers of the referee are limited by the order of appointment.[31] A cause being referred without any conditions or limitations a referee has full power to decide all questions arising both of law and fact.[32]

A referee has power to act outside the county where sits the court appointing him,[33] and by appearing before the referee one may become estopped to question this power.[34] The referee may exercise this power where to do so will greatly expedite the taking of evidence.[35] A referee has power to employ a bailiff when necessary for the preservation of many, some of them valuable, exhibits.[36]

§ 7. *Appearance before referee, hearing and adjournments, trial and practice thereon.*[37]—A party is entitled to notice of the hearing.[38] As a general rule an auditor or referee is authorized to allow amendments to pleadings.[39] A party

sion had been rendered on the assumption by the parties that the order of reference was valid. Code Civ. Proc. §§ 721-724, construed. Owasco Lake Cemetery v. Teller, 96 N. Y. S. 985.

24. See 4 C. L. 1259.

25. Smith v. Dunn, 91 App. Div. 200, 86 N. Y. S. 307.

26. Within the meaning of Code Civ. Proc. § 1011, requiring the court to appoint another referee where the referee named in the stipulation refuses to serve. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 105 App. Div. 88, 93 N. Y. S. 849.

27. See 4 C. L. 1259.

28. Under Rev. St. 1898, § 2864. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

29. Under Rev. St. 1898, § 2864. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

30. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

31. Referee appointed to report the facts in a suit on a contract for the sale of land to recover the unpaid purchase price held justified in reporting what portion of the price was still due. Dunn v. Stowers [Va.] 51 S. E. 366. Where a referee is appointed to hear, try and determine the issues raised by the pleadings in a certain case, he has no power to review preliminary order denying defendant's motion to dismiss the complaint because of the refusal of plaintiff's attorney to testify as an adverse witness. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067. Royalties upon any device found to come within a contract of sale held within the scope of a reference to an auditor to state the account under a decree declaring in general terms the right of complainant to royalties upon all devices manufactured by defendant and embodying the inventions made in the contract, although the bill and decree specifically mentioned but a single decree. Eclipse Bicycle Co. v. Farrow, 26 S. Ct. 150, rvg. 24 App. D. C. 311.

32. Piscataquis Sav. Bank v. Herrick [Me.] 62 A. 214.

33. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

34. Where upon agreement of counsel an order is made by the circuit court referring a cause to a practicing attorney for trial as referee, and the parties appear before such referee and take testimony in a county other than the one in which the cause is pending, one of such parties cannot afterwards be heard to complain that the reference was not made with his consent or that the referee was without authority to hear and determine the cause in the county where the testimony was taken. Gulf Lumber Co. v. Walsh [Fla.] 38 So. 831.

35. Where the reference involved the inspection of numbers of exhibits, including books, correspondence files, and machinery not situated in the county where the referee was appointed and resided, it was proper for the referee to hold sittings at the place where the evidence was located. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

36. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

37. See 4 C. L. 1259.

38. See 4 C. L. 1259, n. 59. Held not necessary to give notice of the hearing to an infant not a party to the action. Jewett v. Schmidt, 108 App. Div. 322, 95 N. Y. S. 631.

may, after the hearing has been concluded, but before the auditor has made his report, so amend his pleadings as to make the same conform to the evidence admitted on the hearing without objection, but he cannot, as matter of right, then insist upon being afforded an opportunity to offer evidence to sustain an amendment which introduces new and distinct issues of fact.[40] In Alabama it is the statutory duty of a register to allow the introduction of viva voce testimony without previous notice.[41] The rulings of the referee on the admissibility of evidence will be settled on the hearing of his report.[42] Where a referee overrules an objection to the admission of evidence, and the evidence is received subject to a motion to strike it out, the evidence remains in the case, unless a motion to strike it out is made, and the referee has no right, after the case has been tried and submitted, to conclude on his own motion to strike the evidence on the ground that it is subject to the objection originally made against it.[43] If insufficient time to take all the evidence is allowed by the order of the court an application for further time must be made before the expiration of the time fixed in the order.[44] A reference being ordered upon consent and proceeding without objection, any constitutional right of the parties to trial by jury is waived.[45] A mistake of counsel may warrant the reopening of the hearing.[46]

§ 8. *The report, its form, requisites and contents, and return and filing.*[47]—The report must comply with statutory requirements. Failing to do so it is ineffectual.[48] In New York the report must state separately the facts found and the conclusions of law.[49] A temporary removal of the report from the clerk's office will not destroy the effect of a filing.[50]

§ 9. *Revision of report before the court. Objections and exceptions.*[51]—Exceptions should go to what the auditor reported, not to what he did not report.[52] If an auditor's report fails to find all the facts or to cover all the issues, advantage should be taken by motion to recommit.[53] An objection to a portion of the evidence on which an auditor has based his conclusion cannot be taken as a matter of right except by motion to recommit the report to the auditor before the trial.[54] One cannot except to a mere statement in the report.[55] In view of the complicated

39. So held under Civ. Code 1895, § 4583. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665.

40. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665.

41. So held under Code 1896, § 743, subd. 3. Brady v. Brady [Ala.] 39 So. 237.

42. Court will not determine the materiality of evidence on an application for instructions to the commissioner. State v. Standard Oil Co. [Mo.] 91 S. W. 1062.

43. Gottlieb v. Dole, 109 App. Div. 583, 96 N. Y. S. 329.

44. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

45. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 105 App. Div. 88, 93 N. Y. S 849.

46. Mistake of counsel in presuming that disputed item in account was admitted held sufficient to warrant reopening of hearing and the allowance of proof of such item. Gottlieb v. Dole, 109 App. Div. 583, 96 N. Y. S. 329.

47. See 4 C. L. 1260.

48. Report which fails to state separately the conclusions of law and facts found is not a report within the meaning of Code Civ. Proc. § 1019 requiring the referee's report to be filed within a designated time. Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623.

49. Code Civ. Proc. § 1022. A report containing numbered paragraphs but not stating anywhere that the referee has found any facts as such or any conclusions of law will not sustain a judgment. Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623.

50. So held where report was marked "Filed" and removed for binding. Poole v. Poindexter [Kan.] 83 P. 126.

51. See 4 C. L. 1261.

52. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

53. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The error cannot be attacked by an "exception of law as to matters not appearing on the face of the record." Id.; Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

54. Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944.

55. A statement by an auditor that a personal inspection of the premises involved

character of cases generally referred to auditors, and the length of the resulting record, there are specially strong reasons for requiring the strictest compliance with statutory provisions requiring exceptions to clearly and distinctly specify the errors complained of.[56] The exception should contain all facts and rulings necessary to show harmful error.[57] It should state the ruling complained of, the evidence on the point, and state of what and wherein the error consisted.[58] The neglect of a party excepting to an auditor's report on matters of fact or on matters of law dependent for their decision upon the evidence, to point out by appropriate reference to the auditor's brief of the evidence or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason in an equity case for refusing to approve the exceptions of fact and for overruling the exceptions of law.[59] The time for filing exceptions is largely statutory and may generally be extended by the court.[60] The time for filing exceptions runs from the filing of the report and not from the time of filing a sup-

had considerable influence on his mind, and that "in his opinion much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted" is not a finding by the auditor and cannot be excepted to as such. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

56. Armstrong v. Winter, 122 Ga. 869, 50 S. E. 997. General exceptions are insufficient. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. General exception to report of master commissioner under Indiana Code held insufficient. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17. Exceptions held too general to be considered on appeal. Waggaman v. Earle, 25 App. D. C. 582. Where an auditor found a particular portion of the premises in dispute in favor of the plaintiff and described it by metes and bounds, an exception to such finding upon the ground that "one of his boundary lines is indefinite, uncertain and impossible to locate," without indicating which boundary line was referred to, is not properly made. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

57. Armstrong v. Winter, 122 Ga. 869, 50 S. E. 997.

58. Armstrong v. Winter, 122 Ga. 869, 50 S. E. 997. It ought not to refer the court from one part of the record to another to discover what was ruled, and to other and various parts of the record to search for evidence relating to that particular point. Id. It is incumbent upon a party excepting to the report of an auditor in an equity case, when the exceptions thereto involve a consideration of the evidence on which the auditor based his findings, to set forth in connection with each exception of law or of fact the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or to at least point out to the court where such evidence is to be found in the brief of the evidence prepared and filed by the auditor. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665. An exception of law to an auditor's report does not properly present any question for determination by the court when it complains of the admission or rejection of evidence, whether the same be oral or documentary, and fails to disclose upon its face or by an exhibit attached to the exception and referred to therein what the substance of such evidence was, or to point out where in the auditor's brief of evidence the same may be found. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The same rule obtains in an equity case in reference to an exception of law or of fact to a finding of the auditor which involves a consideration of the evidence upon which such finding was based. Id. When assignments of error are sought to be made upon rulings of an auditor as to the admissibility of the testimony of an agent of an interested party, the evidence admitted or rejected must be set forth in the exceptions filed to the auditor's report. Not incompetent to testify as to all matters merely because case defended by representatives of a deceased party. Code 1895, § 5269. Murphey v. Bush, 122 Ga. 715, 50 S. E. 1004.

Note: The decision in the case of White v. Reviere, 57 Ga. 386, was made with reference to the procedure which obtained prior to the passage of the act of December 18, 1894 (Laws 1894, p. 123), which outlines the practice now to be observed in excepting to an auditor's report in such cases. First State Bank v. Avera [Ga.] 51 S. E. 665.

59. Armstrong v. Winter, 122 Ga. 869, 50 S. E. 997.

60. Under Code Proc. § 195 the court may in its discretion allow exceptions to referee's report to be filed after 10 days from notice of filing. Brown v. Rogers, 71 S. C. 512, 51 S. E. 257. The marking of a case "heard" by the judge on the calendar in open court is not an agreement in writing not to require exceptions to referee's report to be filed within 10 days, nor was it a memorandum of such agreement noted by the presiding judge with the consent of plaintiff's attorney under rule 14 of the circuit court. Id.

plemental report.[61] Objections for fraud, prejudice, or mistake on the part of the referee should be made when the report is offered for acceptance.[62] Exceptions not appearing to have been in writing will be presumed on appeal to have been oral.[63]

§ 10. *Decree or judgment on the report; confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.*[64]—The report of the referee is merely advisory and the court may upon the hearing add evidence to it.[65] As a general rule the report is prima facie correct.[66] A cause being referred by agreement of parties without condition or limitation, the referee's decision is final in the absence of fraud, prejudice or mistake on his part,[67] and the parties agreeing that his findings of fact shall have the same force and effect as the verdict of a jury, they cannot be reviewed on exceptions.[68] A finding upon the general question of liability may furnish the evidence of facts which are involved in, and may be inferred from, the general finding.[69] In Georgia the auditor must now report not only his conclusions but the evidence upon which he based the same, and while his report is yet treated as prima facie true, the excepting party is at liberty to overcome this presumption of its correctness by directing the attention of the court by way of proper exceptions to the fact that the evidence reported by the auditor does not sustain his findings.[70] If it be doubtful, when the testimony is meager or conflicting, whether a particular finding of fact was warranted, the court, in the exercise of a broad discretion, may order a jury trial on that or other similar issues, but the trial is to be had only upon such evidence as was adduced before the auditor, and such newly-discovered evidence as could not have been procured and submitted on the hearing before him.[71] On exception being made, clerical errors and obvious mistakes should be corrected.[72]

A motion to recommit is addressed to the discretion of the presiding judge and his ruling is not subject to exception.[73] A motion to recommit must assign the reasons therefor.[74] Recommittal is the proper remedy to supply the omission

61. Brown v. Rogers, 71 S. C. 512, 51 S. E. 257.

62. Piscataquis Sav. Bank v. Herrick [Me.] 62 A. 214.

63. Report of master commissioner under Indiana Code. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17.

64. See 4 C. L. 1262.

65. Whether a plaintiff makes out a case on the facts found by the auditor, apart from the additional facts put in evidence at the trial, is immaterial, and a ruling that plaintiff is not entitled to recover on the facts and evidence stated by the auditor is properly refused. Paul v. Wilbur [Mass.] 75 N. E. 63.

66. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665. So held under Rev. Laws, c. 165, § 55. Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913. Where an item allowed by the auditor in an accounting is not on its face unreasonable it is incumbent upon the party objecting to show the impropriety of its allowance. Waggaman v. Earle, 25 App. D. C. 582.

67. Piscataquis Sav. Bank v. Herrick [Me.] 62 A. 214. Report being accepted, an appeal from a final decree entered in accordance therewith cannot be sustained. Id.

68. Campbell v. Equitable Life Assur. Soc., 130 F. 786.

69. Finding of liability of co-tenant for use and occupancy of estate held to justify a finding that he agreed to pay therefor. Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913.

70, 71. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665.

72. When an auditor appointed to take an accounting between partners omits to include in his calculations an item which the undisputed evidence shows should be entered to the credit of one of the partners, and he takes proper exceptions to this omission, the exception should be sustained by the court as a matter of course. Murphey v. Bush, 122 Ga. 715, 50 S. E. 1004.

73. Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944.

Note: An exception to this rule has been made where the rule to the auditor provides that his findings on matters of fact are to be final. Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361.—From Allwright v. Skillings [Mass.] 74 N. E. 944.

74. Report of master commissioner under Indiana Code. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17.

of a material fact,[75] and to remedy a breach of a stipulation as to the time for filing briefs.[76]

§ 11. *Appellate review.*[77]—A refusal to recommit is not appealable.[78] A referee's finding of fact will not be disturbed on appeal unless clearly erroneous,[79] but where the referee alone heard the witnesses his findings are not binding on an appellate court in the sense that they would be if the trial court whose judgment is reviewed had seen the witnesses and heard them testify.[80] The finding of a referee cannot be reviewed in the absence of a part of the evidence.[81] Exceptions not appearing to have been in writing will be presumed on appeal to have been oral.[82] In New York, on appeal to the appellate division from a judgment on a referee's report, no exception to the report or decision is prerequisite to a review of the facts.[83] An appellant may bring exceptions to the report in his bill of exceptions rather than in the transcript of the record so long as they are duly certified by the trial judge who overruled them.[84] The report of a master to whom reference is made to take evidence and report the same and his findings thereon, to be part of the record, must be made so by bill of exceptions or order of the court.[85] In Georgia, where an auditor files, as a part of the brief of the evidence accompanying his report, a stenographic report of the testimony, it becomes a part of the record and can be specified and brought into the appellate court as such, and the bill of exceptions will not be dismissed because there is no condensed and narrative brief.[86] The appeal is from the decision of the trial court and hence it is no ground of exception thereto that the amount of the recovery therein is less than the evidence before the auditor authorized.[87]

§ 12. *Compensation, fees, and costs.*[88]—The amount of the referee's fees is generally discretionary with the court.[89] A referee's recovery of fees should be limited to the actual hearings before the referee and to such adjourned days as the parties met and further adjourned, whether evidence was taken or not.[90] Where a referee is appointed by stipulation between the parties and both parties have the benefit of his services, they are both responsible for his fees.[91] Where the parties themselves terminate the action by stipulation and enter a judgment

75. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The error cannot be attacked by an "exception of law as to matters not appearing on the face of the record." Id.; Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

76. Where unknown to the referee the attorneys for the parties by stipulation fix the time for filing briefs, and before the expiration of such time the referee files his report and judgment is entered thereon, defendant not having filed his brief held entitled to have the case referred back with direction to consider defendant's brief and make a new report. Mercantile Nat. Bank v. Sire, 100 App. Div. 491, 91 N. Y. S. 419.

77. See 4 C. L. 1263.

78. Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944. See, also, 4 C. L. 1263, n. 30.

79. Piersol's Estate, 27 Pa. Super. Ct. 204; Consaul v. Cummings, 24 App. D. C. 36; Waggaman v. Earle, 25 App. D. C. 582; Lambertson v. Vann, 134 N. C. 108, 46 S. E. 10; Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067. Complicated accounting. Jackson v. Smyth, 24 Pa. Super. Ct. 545.

80. La Jara Creamery & Live Stock Ass'n v. Hansen [Colo.] 83 P. 644.

81. Poole v. Poindexter [Kan.] 83 P. 126.

82. Report of master commissioner under Indiana Code. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17.

83. In re Mosher's Estate, 103 App. Div. 459, 93 N. Y. S. 123.

84. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The court says that while the practice may be open to objections the writ of error will not be dismissed on that account. Id.

85. Master commissioner under Indiana Code. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17.

86. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

87. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

88. See 4 C. L. 1264.

89. Under Rev. St. 1898, § 2930, the trial court has a broad discretion as to the fees. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

without the knowledge or consent of the referee, and the plaintiff is the prevailing party, the referee's cause of action for fees can then be enforced against him without the filing or delivery of the report.[92] A statutory provision that the fees shall be taxed upon the coming in of the report does not prevent allowance of the fees of a referee who died pending the hearing and made no report, but such fees are taxable upon the coming in of his successor's report.[93] A referee dying pending the hearing the expense of the extension of the reporter's notes taken before the deceased referee is properly allowed as an item of costs.[94] Traveling expenses are generally chargeable as costs.[95] The employment of a referee by attorneys under stipulation is sufficient to raise a presumption on the part of the attorney's clients to pay for his services.[96]

REFORMATION OF INSTRUMENTS.

§ 1. *The remedy. A. Nature and office.*[1]—The remedy is not corrective of the agreement but only of the written instrument evidencing the actual agreement.[2]

(§ 1) *B. Right to remedy.*[3]—A contract made without fraud or mistake will not be reformed by a court of equity to give either party a better bargain.[4] Where, however, a written instrument fails through mistake of fact to express the real agreement of the parties it will be reformed,[5] as between the parties and persons

90, 91, 92. Keeler v. Bell, 95 N. Y. S. 841.

93, 94. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

95. Where a reference involved the inspection of numbers of exhibits, including books, correspondence files, and machinery not situated in the county where the referee was appointed and resided, it was proper for the referee to hold sittings at the place where the evidence was located, and his traveling and hotel expenses for this purpose were chargeable as costs. Winnebago County v. Dodge County, 125 Wis. 42, 103 N. W. 255.

96. Keeler v. Bell, 95 N. Y. S. 841.

1. See 4 C. L. 1264.

2. Plaintiff applied to defendant for insurance on a certain building but gave a misleading description. As a consequence the agent looked at the wrong building and wrote the insurance on it. Plaintiff now seeks to reform the policy so as to cover the building that he intended to insure. Cannot be reformed as there was no agreement for insurance on that building. Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589. Where a contract has been completed and a mistake is made in reducing it to writing, the writing will be reformed. King v. Hobbs, 139 N. C. 170, 51 S. E. 911.

3. See 4 C. L. 1265.

4. After all had attained their majority a contract of distribution was fairly entered into between distributees who now seek to reform on the ground that the distribution was grossly inequitable. Burnes v. Burnes [C. C. A.] 137 F. 781.

5. Policy was issued on lumber in the name of the president instead of in name of corporation. Phoenix Ins. Co. v. State [Ark.] 88 S. W. 917. Where a contract to convey provided that the R. R. Co. was to stop all its accommodation trains at a certain point, and the deed executed in fulfillment of the contract contained the further provision that the property was to revert if the company failed to fulfill its undertakings, the deed will not be reformed unless it be proved that the provision was added by mistake. Gray v. Chicago, etc., R. Co. [C. C. A.] 140 F. 337. Defendant had acquired title to a piece of land through a mortgage foreclosure. He offered to sell this land to plaintiff, but in reducing the agreement to writing more land was included than was intended by either party. Reformed. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

Scrivener's mistake. Sicher v. Rambousek [Mo.] 91 S. W. 68. City of Jackson leased certain manufacturing buildings to Christy, including the heating plant, but Christy was to furnish such power and heat as was necessary to supply unleased buildings, providing it did not require more than one-half, city to pay for the amount used. Subsequently a new contract was substituted in which, through mistake of the scrivener, city was to pay for amount used in excess of one-half. Reformed. Bronk v. Standard Mfg. Co. [Mich.] 12 Det. Leg. N. 626, 105 N. W. 33. Plaintiffs sold land to the defendant, reserving all pine timber, excepting

claiming under any of them with notice,[6] but not against innocent third persons.[7] The mistake, as a general rule, must be mutual,[8] not unilateral,[9] unless the other party be guilty of fraud or other unconscionable conduct,[10] and mutuality of the mistake relates to the time of the execution and does not mean that both parties must agree at the time of trial.[11] A mutual mistake in the basis of the contract is ground for reformation although the written instrument apparently expressed the intent of the parties at the time of execution.[12] The fact that a lease by a city is required to be in writing and must be authorized by action of the council does not bar relief by reformation where a mistake is made in reducing the contract authorized to writing.[13] While reformation for mistake of law is ordinarily de-

such as would be necessary for a clearing for a residence. By mistake of the scrivener the plaintiffs were to clear all that was necessary for improvements without defining the nature of the improvements. Reformed. Jacobs v. Parodi [Fla.] 39 So. 833. Complainant traded his farm for a stock of goods of defendant's. By agreement, complainant was to retain possession of farm until Jan. 1st next, and to have rents of the current year. By mistake of scrivener this reservation was omitted from both the written contract and from the deed. Carrell v. McMurray, 136 F. 661.

Deed not including the intended land or all of it. Abbott v. Flint's Adm'r [Vt.] 62 A. 721; Penn v. Rodriguez [La.] 38 So. 955. Defendant agreed to convey to plaintiff the Keywood Place. The deed described the land as a certain portion of a certain government subdivision. This description did not include a small strip which both regarded as a part of the Keywood Place. Reformed. Perry v. Sadler [Ark.] 88 S. W. 832. Deed reformed at instance of grantee in possession where by mistake in transcribing six inches of another's land was included and six inches of grantor's left out. Brennan v. Thompson, 46 Misc 317, 94 N. Y. S. 684.

6. Sicher v. Rambousek [Mo.] 91 S. W. 68. Smith sold to plaintiff forty acres off the S. W. corner of his farm but the deed did not convey full forty acres. Remainder of the farm sold to defendant, who was told that forty acres had been sold to plaintiff. Plaintiff was also in actual possession of a portion of such land. Deed corrected so as to convey full forty acres. Thalheimer v. Lockhart [Ark.] 88 S. W. 591.

7. Austin v. Brown [Neb.] 106 N. W. 30. Graham agreed to replat and convey to Tillotson lots 19 & 20 according to new plat. Deeded lots 19 & 20 according to original plat. Lots 19 & 20 under new plat would include a part of lot 21 of the old plat. Lot 21 sold to innocent purchaser. Deed cannot be reformed. Boone v. Graham, 215 Ill. 511, 74 N. E. 559.

8. Huber Mfg. Co. v. Clandel [Kan.] 80 P. 960; Ranalli v. Zeppetelli, 94 N. Y. S. 561; Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049. Plaintiff applied to the defendant for a certain kind of insurance policy which defendant undertook to furnish. By mistake a different kind of policy was delivered and accepted. Reformed. Gray v. Merchants Ins. Co., 113 Ill. App. 537. One Graham deeded a portion of two lots to Tillotson according to the original plat. Prior to this it was agreed that the property was to be replatted and Tillotson was to receive under the new plat. Same lot in the new plat would include more. Not mutual mistake. Boone v. Graham, 215 Ill. 511, 74 N. E. 559. Deed contained clause that it was not to be delivered until after the death of the grantor. Clause inserted by the scrivener but was read over to the grantor. No mutuality of mistake in inserting. Griffin v. Miller, 188 Mo. 327, 87 S. W. 455.

9. Plaintiff applied to defendant for insurance and gave a misleading description of the property to be insured. Defendant looked at and wrote up a policy on the wrong property. There was no mutual mistake. Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589.

10. Guardian applied to court to lease a certain tract known as the "Wilson Tract," and decree so made. In the lease, through fraud, the tract was described as bounded by a certain road which left a strip unleased, the lessee believing that he was getting the whole tract. Reformed. Le Comte v. Freshwater, 56 W. Va. 336, 49 S. E. 238. City of Philadelphia furnished plaintiff with an estimate of the amount of filling necessary to grade a street. Plaintiff bid on that estimate at 49c per yard. City resurveyed and reduced estimate about one-third, which was concealed from plaintiff. Bid accepted at 49c per yard but was not to exceed $26,000, which was 49c per yard on the last estimate. Plaintiff did not discover this. Reformed so as to allow 49c per yard on original estimate. McManus v. Philadelphia, 211 Pa. 394, 60 A. 1001.

11. Matthews v. Whitethorn [Ill.] 77 N. E. 89.

12. A dissolving partnership had an accounting made by the bookkeeper which was erroneously done. One then agreed to purchase the other's interest and this accounting was used to determine how much was due. It being the intent to pay according to the actual interest, contract will be reformed to correct the error. House v. Wechsler, 104 App. Div. 124, 93 N. Y. S. 593.

13. Bronk v. Standard Mfg. Co. [Mich.] 12 Det. Leg. N. 626, 105 N. W. 33.

nied, yet it is proper if only one of the parties is mistaken as to the legal effect, and the other fraudulently conceals the truth[14] or knows that the other is mistaken.[15]

A court of equity will not, as a general rule, reform an instrument at the instance of a mere volunteer who is not a party to the instrument,[16] nor will it lend its aid where the party has an adequate remedy at law.[17]

Reformation will not be granted at the instance of one who was guilty of negligence, but the fact that one does not examine before signing is not such negligence if some reasonable excuse exists for not reading,[18] nor will it be granted to one guilty of laches, but where the action is brought within a year after the discovery of the fraud there is no laches.[19] Mere failure to avail one's self of the

14. Complainant executed a deed of his farm to defendant. It was agreed that the current rent should be reserved to the grantor, but such reservation was not inserted in the deed, the complainant believing it to be unnecessary. Defendant knew from advice of counsel the true legal effect of the deed but concealed it from grantor. Carrell v. McMurray, 136 F. 661. A warranty deed excepted the "rental for 1902." When deed was offered to the grantee it was expressly stated by the grantor that the estate was subject to an unsigned lease from Mar. 1st, 1902, to Nov. 1st, 1903, and that this lease was excepted. Grantee took deed to an attorney and was informed that it did not except this lease. On returning he accepted deed, saying that he would hold the grantor strictly to its terms. Reformed. Jones & Co. v. New England Mortg. Co., 38 Wash. 637, 80 P. 796.

Mistake as to the effect of a policy constitutes an exception where induced by representations of the other party, or even when such representations were made of the policy which was renewed by the one at bar. A policy may be reformed to cover the property intended to be insured though the agent stated it did in effect cover it. Phoenix Assur. Co. v. Boyett [Ark.] 90 S. W. 284.

Note: Equity will not relieve against a mere mistake of law (Hunt v. Rhodes, 1 Pet. [U. S.] 1, 7 Law. Ed. 27; 2 Columbia L. R. 420); but the courts in upholding this rule have been ready to limit it by exceptions (Stedwell v. Anderson, 21 Conn. 139, 142; 2 Pomeroy Eq. Jur. § 842), and have generally held that where an instrument fails to express the settled intention of the parties it will be reformed, though the failure was caused by a mistake as to the legal effect of the terms used (Pitcher v. Hennesy, 48 N. Y. 415; Bonbright v. Bonbright, 123 Iowa, 305; Jacobs v. Parodi [Fla.] 39 So. 833; 2 Pomeroy Specific Perf. § 234. Contra. Fowler v. Black, 136 Ill. 363). The court in the principal case bases its decision mainly on the fact that there was reliance upon the superior knowledge of the adverse party. Though this has been considered as a distinct ground for relief in a few cases, where, however, the misrepresentation was more active (Snell v. Ins. Co., 98 U. S. 85; 25 Law. Ed. 52; Lawrence Co. Bank v. Arndt, 69 Ark. 406) it is usually treated merely as an additional circumstance (Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 517; Griswald v. Hazard, 141 U. S. 260, 35 Law. Ed. 678).—From 6 Col. L. R. 362.

15. Civ. Code § 3399. Chapin v. Ross [Cal. App.] 84 P. 53. Sayles entered into a contract to sell Keeley 83 acres. A deed was prepared by Keeley which included some 10.87 acres. This deed was signed by Sayles in ignorance of the fact that it contained more than was agreed upon, which fact was fraudulently concealed from him. Reformed. Keeley v. Sayles, 217 Ill. 589, 75 N. E. 567. Both parties intended to convey only two-thirds of the land, but the plaintiff was induced by defendant to believe that only that amount was conveyed by the written instrument, which conveyed more than was intended. Reformed. Bourland v. Schulz [Tex. Civ. App.] 13 Tex. Ct. Rep. 423, 87 S. W. 1167.

16. Husband entered into a contract which purported to relinquish all of his interest in wife's property. After her death a controversy arose between the husband and a niece of the wife in which the latter seeks to reform the contract so as to release his interest. Refused as the niece was a mere volunteer. McWorter v. O'Neal, 123 Ga. 247, 51 S. E. 288.

17. Petitioner contracted to do a certain amount of plumbing at a maximum cost of $11,000. Now seeks to have the contract reformed so as to read that defendant will agree to pay $11,000. Courts of law will so interpret it as it now stands. Dismissed. Flitcroft v. Allenhurst Club [N. J. Eq.] 61 A. 82.

18. The deed was prepared by an attorney, who stated to the complainant that it conformed to the agreement of the parties. Acting on this statement complainant signed without reading. Reformed. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539. Where the party seeking to have an instrument reformed could not read or write the English language, his failure to have it read to him was not such negligence as to preclude him where the instrument was drawn up by his cousin in whom he reposed confidence. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

19. The deed conveyed more than was intended by plaintiff, which mistake was

means of knowledge does not bar relief from mistake provided there is no neglect of a legal duty.[20]

A right of action to reform a written instrument arises when the party seeking the relief first discovers the mistake,[21] and in Indiana if not brought to reform a deed within the time limited by statute for the recovery of real property, the right will be barred.[22] The contrary is held in Iowa where an action to reform a deed so as to convey only the amount intended to be conveyed is not an action to recover real estate;[23] but the statute of limitations does not operate against a grantee in possession to have his deed reformed to conform with the true intent of the parties.[24] Relief should not be made conditional on the doing of a useless thing.[25]

(§ 1) *C. Instruments reformable.*[26]—A deed of a sheriff for land sold under execution, void on its face, can not be reformed where the execution and proceedings thereunder contain the same defect,[27] nor will a deed of voluntary conveyance be reformed by a court of equity;[28] but a deed to the wife of a grantor through a third person to provide against any reversal which may occur in his business has such a meritorious consideration as between them and the heirs as will support a reformation of the deed on the ground of mistake.[29] Construction contracts may be reformed for fraud, accident, or mistake, though required to be in writing.[30]

§ 2. *Procedure. A. Jurisdiction and form of proceeding.*[31]—Reformation lies exclusively within equitable jurisdiction,[32] and the equitable jurisdiction of the

due to fraud on the part of defendant. Action was commenced within a year after discovering the mistake. No laches. Keeley v. Sayles, 217 Ill. 589, 75 N. E. 567.

20. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

21. Plaintiff deeded certain premises to defendant, which deed included more than was intended to be conveyed. The mistake was discovered about six months after the deed was executed. A cause of action to reform then accrued. Garst v. Brutsche [Iowa] 105 N. W. 452.

22. Plaintiff's deed to defendant conveyed more than either party intended, but the plaintiff delayed for sixteen years after discovering his mistake before seeking to have it reformed. Statute provided that actions to recover real property or actions founded on written contracts (Code §§ 3447, 3448) must be brought within ten years after right accrues. Garst v. Brutsche [Iowa] 105 N. W. 452.

23. By decree of court administrator was authorized to sell twelve acres. By the description in the deed he sold thirty-nine. The mistake in description was mutual. Five years later this action to reform the deed was commenced. Statute provided that no action shall be brought to recover lands sold by an administrator unless within five years. Case not within the statute. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

24. By mistake in the description of the land the deed did not convey the property intended. Plaintiff took possession. Action brought after period of limitation had expired if it operated at all. Did not run. Reformed. Brennan v. Thompson, 46 Misc. 317, 94 N. Y. S. 684.

25. In a suit to foreclose mortgage and reform it as to description of land, in which a mistake had been made, it appeared that the mortgagor owned only a fractional undivided interest in the land. Held error to deny reformation except on condition that mortgage as reformed should show mortgagor's real interest, since foreclosure could in any case transfer only such interest as he in fact owned. Jenkins v. Bailey [Ark.] 87 S. W. 1180.

26. See 4 C. L. 1267.

27. Plaintiff sued one Langdon and secured judgment against C. M. Langdon, doing business as C. M. Langdon Milling Co. Execution was issued against the C. M. Langdon Milling Co., property sold, and deed given under that name. Deed recited the facts. Records also show the defects. Not reformed. Langdon v. Morris [Ark.] 86 S. W. 672. "It is doubted whether a court of equity will under any circumstances * * * reform a deed of conveyance executed pursuant to a power conferred by statute and not pursuant to a voluntary agreement." Id.

28. A mother executed a deed of voluntary conveyance to her son. Through error of the scrivener the deed did not correctly describe the property. Henry v. Henry, 215 Ill. 205, 74 N. E. 126.

29. Crawley v. Crafton [Mo.] 91 S. W. 1027.

30. Plaintiff entered into contract with city of Philadelphia to do certain street grading. Through mistake or fraud on the part of the city he was induced to sign a contract which was not according to the bid, which he did not know at the time. McManus v. Philadelphia, 211 Pa. 394, 60 A. 1001.

31. See 4 C. L. 1267.

county and probate courts does not include the power to grant such relief.[33] Under statute in many states a contract can be reformed and enforced in the same action,[34] and defendant in such an action need not demand a reformation as a condition precedent to a prayer in his cross bill for reformation on the ground of mistake or fraud.[35]

(§ 2) *B. Parties.*[36]—A party who has or claims to have any interest which will be affected by the reformation is a necessary party[37] and should be admitted as a party on motion.[38] In an action to reform a lease with regard to a provision giving the lessee an option to purchase at a certain price, the lessee who has assigned the lease is a proper person to join as party defendant.[39]

(§ 2) *C. Pleading and evidence.*[40]—A bill for relief on the ground of mistake must state with precision the facts constituting the mistake,[41] but a bill which alleges that certain provisions of the true agreement were omitted when such agreement was reduced to writing, specifying what those provisions were, is sufficient.[42] An allegation of mistake in a petition to reform a written instrument is insufficient if it does not allege that the mistake was mutual.[43] Where a bill for reformation states the real agreement of the parties, and alleges a mistake not due to negligence of complainant in reducing it to writing, it is not demurrable.[44] Also a bill which alleges that a mistake occurred in drawing the contract and states wherein such mistake consists is not demurrable because it does not state that the mistake was mutual, the allegation of mistake being broad enough to admit evidence that it was mutual.[45] The bill must show that the mistake did not occur

32. Cannot bring premature suit at law on note asking reformation. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 104 App. Div. 451, 93 N. Y. S. 916. Suit on a membership certificate, and defendant sets up a release from liability. In reply, complainant alleges that the release was obtained under duress. The action being at law the reply was insufficient. Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481.

33. Defendant's intestate executed a warranty deed to plaintiff. A paramount title being asserted, plaintiff files claim against estate. Defendant answered contending that the intention of the parties was to release only the interest that the intestate might have. Probate court has no jurisdiction to reform. Rook v. Rook, 111 Ill. App. 398.

34. Chapin v. Ross [Cal. App.] 84 P. 53. Plaintiff brought an action to enforce a written contract. Defendant filed a cross-answer, asking to have the contract reformed to correct a mutual mistake. It was competent for the court to reform and enforce it in the same action. Huber Mfg. Co. v. Claudel [Kan.] 80 P. 960. A policy was issued upon property in a certain building, but by mistake or fraud it was described as being in another building. Loss having occurred, suit was commenced to recover, the petition setting up facts showing mistake or fraud. Can be reformed in same action. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

35. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

36. See 4 C. L. 1268.

37. Action brought to remove a cloud on the title and to reform a deed. Wife claimed an interest. Complainants alleged that she released all interest by an antenuptial agreement. In reply she alleged fraud. A necessary party. Getzelman v. Blazier, 112 Ill. App. 648.

38. Getzelman v. Blazier, 112 Ill. App. 648.

39. Hackett v. View, 109 App. Div. 351, 95 N. Y. S. 675.

40. See 4 C. L. 1268.

41. Bill alleging that the note was given for interest supposed to be due on a certain mortgage, "but it was a mistake, as there was not due that amount of interest," insufficient as it does not state wherein the mistake occurred. Pearson v. Dancy [Ala.] 39 So. 474. Where the bill does not set out clearly the mistake complained of, it is good upon demurrer but subject to a motion to make more specific. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

42. By agreement defendant was appointed agent of plaintiff to sell stocks with certain restrictions. In reducing the agreement to writing these restrictions were omitted. Bill alleges that certain provisions of the true agreement were omitted in reducing it to writing, specifying what they were. Sufficient. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219.

43. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 91 S. W. 614.

44. Jacobs v. Parodi [Fla.] 39 So. 833.

45. Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049.

through the negligence of the party seeking relief.[46] In a suit to enforce a contract, a petition which alleges a mistake or fraud sufficiently is not defective because it fails to pray for a reformation, and evidence of mistake or fraud is admissible,[47] as a court may always reform a written instrument where the issues and proof justify such relief, although reformation is not specifically prayed for,[48] but if the issue tendered fails to direct the inquiry to the mutuality of the mistake, it is properly rejected.[49]

Where a written contract is set up as a defense to a complaint, it is competent to allege mistake and pray for reformation in the reply.[50]

Equity will reform a written instrument only on clear and convincing evidence.[51] A mere preponderance of evidence is not sufficient.[52] This, however,

46. Bill alleging that note sued upon was by mistake given for interest not then due, but not showing that complainant was not negligent, insufficient. Pearson v. Dancy [Ala.] 39 So. 474.

47. Plaintiff insured with defendant company certain goods, but by mistake or fraud they were described as being in another building. After loss, plaintiff brought action to recover, alleging mistake in the description of the building, but petition contained no prayer for reformation. Not defective. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

48. Plaintiff sought to recover certain lands and for trespass. Defendant in answer alleged that a certain deed executed by him to grantor of plaintiff by mistake included property in question, but no appropriate issue of mistake was submitted. Error to admit evidence of mistake. Gwyn-Harper Mfg. Co. v. Cloer [N. C.] 52 S. E. 305. May reform where cancellation is demanded. Hardy v. Ladow [Kan.] 83 P. 401.

49. Plaintiff brought suit to enforce specific performance of a deed, and defendant set up the defense that the land was included through mistake, but an issue tendered by defendant failed to direct the inquiry to the mutuality of the mistake, and was hence properly refused. Kelly v. Johnson, 135 N. C. 650, 47 S. E. 672.

50. Plaintiff delivered some cattle to defendant for shipment to Chicago, via St. Louis. Written contract omitted to state over what road the cattle were to be shipped. Plaintiff sues for damages because of shipment over a longer road which caused a delay. Defendant sets up the written contract and plaintiff alleges mistake in reply. Competent. Turner v. Wabash R. Co. [Mo. App.] 90 S. W. 391.

51. Gray v. Merchants Ins. Co., 113 Ill. App. 557; Abbott v. Flint's Adm'r [Vt.] 62 A. 721; Heffron v. Fogel [Wash.] 82 P. 1003. Evidence held not "clear and satisfying." Hackett v. View, 109 App. Div. 351, 95 N. Y. S. 675. Instruction that the evidence must be "clear, precise, and convincing," correct. Snyder v. Phillips, 25 Pa. Super. Ct. 648. Proof of the mistake and of the real contract must be full and satisfactory, as the writing will be deemed to contain the agreement of the parties until the contrary is shown beyond reasonable controversy. Jacobs v. Parodi [Fla.] 39 So. 833.

Evidence sufficient: Plaintiff orally arranged with defendant to ship cattle to Chicago, via St. Louis, over latter's road, and was led to believe that the written contract so provided by an indorsement on the back, which, however, did not have that effect. When plaintiff applied to defendant to have it reformed, defendant answered by letter in which it admitted the mistake. Turner v. Wabash R. Co. [Mo. App.] 90 S. W. 391. Plaintiff sold defendant land, reserving all of the pine timber excepting such as would be necessary for a clearing about the residence. By mistake of the scrivener complainant was to clear all that was necessary for improvements without defining what improvements. Jacobs v. Parodi [Fla.] 39 So. 833. One Coblentz executed a bond to deed a certain forty acres to one Perry. By mistake, Perry took possession of adjoining forty. When mistake was discovered Coblentz told him that it would be all right, that he would execute a deed to piece in his possession. Deed executed as called for by the bond. Evidence sufficient to show that parties agreed to deed land in possession of Perry. Black v. Baskins [Ark.] 87 S. W. 647. Testimony of persons who knew contents of title bond that it ran to widow and heirs, and recitals in deed to same effect held sufficient as against prima facie case made by record that it ran to widow alone, so as to warrant reformation of administrator's deed to make it run to widow and heirs. Franklin v. Cunningham, 187 Mo. 184, 86 S. W. 79.

A deed was executed which contained a provision that it should not be delivered until after death of the grantor. Clause was inserted by scrivener but was read by grantor. **Not sufficient** evidence that mistake was mutual. Griffin v. Miller, 188 Mo. 327, 87 S. W. 455. Plaintiff's testator conveyed to defendant his interest in a piece of land which had been sold in execution, and claims that defendant agreed to redeem and to reconvey 160 acres, which provision was omitted by mistake from the deed. Evidence contradictory. Clutter v. Strange [Wash.] 82 P. 1028. Reformation of compensation clause of land broker's contract refused because proof of alleged mis-

does not mean that the evidence must be so clear and convincing as to leave no doubt in the minds of the jurors, it is said to be sufficient if there be evidence to satisfy an unprejudiced mind beyond a reasonable doubt.[53] In a suit for reformation of a promissory note, where it is claimed wrong dates have been inserted for maturity of different instalments, it is not necessary to show the mistake by other evidence than that afforded by the note itself if an inspection of the note clearly establishes that a mistake has been made.[54]

Where a written instrument imposes an obligation upon the party seeking to reform, he must show by a fair preponderance of evidence that he has complied with the terms,[55] but where a deed contains, through mistake, more than was intended, the grantor need not offer to put grantee in statu quo before seeking to reform it.[56] A statement by the agent that the policy was all right is admissible as bearing upon the question of plaintiff's negligence in not reading the policy.[57] Extrinsic evidence concerning the subject matter, the relations of the parties, and the facts and circumstances at the time of execution of the instrument is admissible to show the real agreement.[58]

(§ 2) *D. Trial and judgment.*[59]—The question whether there was a mutual mistake is one for the court or jury to be determined on the weight of the testimony.[60] Injunction may issue ancillary to a bill to reform.[61]

Where a deed by mistake was made to run to a widow alone, instead of to the widow and legal heirs of the purchaser, the effect of the reformation of the deed is to vest in all the grantees, as of the date of the deed, an equal undivided interest as tenants in common.[62] Where one brings an action to reform a written instrument against one defendant, and judgment is rendered against him, the judgment is conclusive against his right to maintain an action for the same relief against one who subsequently acquires a right under the defendant.[63]

REFORMATORIES; REGISTERS OF DEEDS; REGISTRATION; REHEARING; REJOINDERS, see latest topical index.

take of scrivener was not "clear and satisfactory." Wilcox v. Swecker [Iowa] 105 N. W. 392.

52. Complainant sold to defendant the timber on a vast tract of land. The contract was originally oral, but was reduced to writing. Complainant seeks to reform written contract by inserting clause permitting him to clear 320 acres per year if not cut by defendant after twelve months' notice. Two reliable witnesses on each side. Evidence insufficient to reform. Goerke v. Rodgers [Ark.] 86 S. W. 837.

53. Snyder v. Phillips, 25 Pa. Super. Ct. 648.

54. Reep v. Lyman, 6 Ohio C. C. (N. S.) 113.

55. A deed containing a defective description was executed in consideration of $1, and the maintenance during life of grantor and his wife will not be reformed until grantee has shown that he has complied with its terms. Williams v. Husky [Mo.] 90 S. W. 425.

56. By mistake a deed contained more than was intended, a consideration being paid for the correct amount. Not necessary to offer to put the grantee in statu quo before seeking reformation. Keeley v. Sayles, 217 Ill. 589, 75 N. E. 567.

57. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 91 S. W. 614.

58. Jacobs v. Parodi [Fla.] 39 So. 833. Parol evidence is competent to show mutual mistake of fact. Gray v. Merchants Ins. Co., 113 Ill. App. 537. Parol evidence is admissible to prove the real contract of the parties in an action to reform a written contract. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

59. See 4 C. L. 1270.

60. Not necessary that the evidence of plaintiff and defendant agree. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 91 S. W. 614.

61. Plaintiff placed some stocks in defendants' hands for sale, agreeing that if they put the corporation on a sound basis within five years they were to have 65% of the unsold stock then remaining, otherwise to have no compensation. Defendants fraudulently induced plaintiff to sign a written instrument representing that it conformed to the oral contract, but which gave a much larger compensation. Temporary injunction granted restraining sale of stock pending

RELEASES.

This topic includes only formal releases, excluding settlements and the effect of a release as an accord and satisfaction.[64]

§ 1. *Nature, form, and requisites.*[65]—A release is the discharging of a right of action which one person has against another.[66] It must be executed[67] and be supported by legal and sufficient consideration.[68]

§ 2. *Parties to release.*[69]—A release may be executed by a person having capacity to contract or his agent,[70] but the release of a demand by a stranger is no defense to an action.[71] Releases executed by releasor in his own proper person in one name and accepted as such operate upon transactions conducted by releasor under a different name.[72]

§ 3. *Interpretation, construction, and effect.*[73]—Releases absolute and unequivocal in their terms must be construed according to the language which the parties have seen fit to use,[74] and general words are to be limited and restrained to the particular words in the recital.[75] A release of damage incident to certain acts

suit for reformation and other relief. Woolf v. Barnes, 104 App. Div. 620, 93 N. Y. S. 961.

62. Franklin v. Cunningham, 187 Mo. 184, 86 S. W. 79.

63. Plaintiffs brought suit against their grantee and one Anderson, a subsequent grantee, to correct the description in the deed, and judgment was rendered for the defendants. Now they seek to maintain an action for the same relief against Anderson's subsequent grantee. Judgment conclusive. William v. Husky [Mo.] 90 S. W. 425.

64. See Accord and Satisfaction, 5 C. L. 14.

65. See 4 C. L. 1270.

66. A cause of action already accrued, released by a subsequent written contract. Fountain v. Wabash R. Co. [Mo. App.] 90 S. W. 393.

67. What is execution. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786.

68. Fountain v. Wabash R. Co. [Mo. App.] 90 S. W. 393. Release of breach of previous contract to furnish cars held without consideration. Id.

69. See 4 C. L. 1271.

70. The agent's name appeared in the body of the instrument, but it was signed by the agent in his representative capacity. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

71. Flynn v. Butler [Mass.] 75 N. E. 730. A landlord executed a release which his tenants sought to avail themselves of. Hirschfield v. Alsberg, 93 N. Y. S. 617.

72. Releasor executed general releases under a fictitious name, which were held to include transactions conducted by him under his own name, because his rights attached to his personality and not to his name. Klopot v. Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596.

73. See 4 C. L. 1271. Release reciting "given under our hands and seals" signed by one of two parties held release of both parties. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

74. General releases held to include demands not contemplated by the parties. Klopot v. Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596.

75. Texas & P. R. Co. v. Dashiell, 198 U. S. 521, 49 Law. Ed. 1150. A general release construed. Kelly v. Pioneer Press Co. [Minn.] 103 N. W. 330.

Estoppel: A release by a legatee does not estop releasor from participating in property not covered by the will. In re St. John, 104 App. Div. 622, 93 N. Y. S. 840. Release of damages held to cover damage for location of sewerage works as well as for diversion of stream. Evans v. Boston [Mass.] 76 N. E. 905.

Note: Plaintiff was injured in a railway accident, and for thirty dollars signed a paper which recited certain specific injuries, and then released the defendant in general terms from "all claims, demands, damages and liabilities, of any and every kind or character whatsoever, for or on account of the injuries sustained * * * in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing in any way therefrom." The plaintiff now sues for injuries subsequently developing and unknown at the time of the release. Held the general terms in the release are limited to the specific injuries in the recital, because the plaintiff being ignorant of the injuries cannot be said to have intended to release them. Texas & P. R. Co. v. Dashiell, 198 U. S. 521, 49 Law. Ed. 1150. The principle is well settled that general words in a release are limited

applies only to injury then contemplated.[76] However, a release reserving demands cannot be set up in bar to a subsequent action brought thereon,[77] nor is the release of a stranger a defense.[78] Where releasor had two accounts, one in his own name and one in an assumed name, a general release in the assumed name released both.[79] For a release of one joint tort feasor to enure to the others, satisfaction must be intended and received as in full.[80] So it has been held that when tort feasors are not jointly liable the release of part does not release all.[81] By statute in some jurisdictions one joint debtor may be released without releasing the others.[82]

§ 4. *Defenses to, or avoidance of, releases.*[83]—Like all other contracts a release is invalid if procured by fraud[84] or made under mistake,[85] or where releasor was incompetent to contract;[86] but misrepresentation as to collateral facts will not avoid a release in an action at law,[87] nor will fraud regarding the value of the consideration,[88] and a person failing to use ordinary care in ascertaining the character of a release is bound thereby,[89] as when the releasee acted in good faith

by the specifications of the recital (2 Rolle Ab. 409; Thorpe v. Thorpe, 1 Ld. Raym. 235; Jackson v. Stackhouse, 1 Cowen [N. Y.] 122; Railroad v. Artist, 60 F. 365), as the intention is taken to be to release only the claims recited (Lumley v. Railway Co. 76 F. 66). But it would seem a release as to injuries may reserve rights as to claims not mentioned or yet accrued. Bliss v. Railway Co., 160 Mass. 447, 39 Am. St. Rep. 504. Under a general release containing no specific recital, the one releasing is held to take "the chances of future development" (Railway Co. v. McCarty, 94 Tex. 298, 86 Am. St. Rep. 854, 53 L. R. A. 507), though such a release may be set aside in equity for fraud or mistake (Blair v. Railway Co., 89 Mo. 383). The principal case accords with the weight of authority, but see for an opposite holding on a similar release, Quebe v. Railway Co., 98 Tex. 6, 81 S. W. 20.—5 Columbia L. R. 552.

76. A deed granting land to a railroad contained a release "from all inconvenience and damage, incident to the construction and use of said railroad." Improvements upon the railroad necessitated a change of grade of the adjacent highway. Perrine v. Pennsylvania R. Co. [N. J. Law] 61 A. 87.

77. A release of all demands "except forest timber which may have been damaged." Morgan v. St. Louis & S. F. R. Co., 111 Mo. App. 721, 86 S. W. 590.

78. A landlord executed a release which his tenants sought to avail themselves of. Hirschfield v. Alsberg, 93 N. Y. S. 617.

79. Klopot v. Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596.

80. Bailey v. Delta Elec. Light, Power & Mfg. Co. [Miss.] 38 So. 354. The release of one joint tort feasor, with a reservation of the right to sue the other, does not release the joint feasor. Hirschfield v. Alberg, 93 N. Y. S. 617.

81. Pecos & N. T. R. Co. v. Lovelady [Tex. Civ. App.] 13 Tex. Ct. Rep. 176, 87 S. W. 710. Release of one guilty of distinct acts of negligence does not operate as release under joint tort feasor rule. Chapman v. Pittsburg R. Co., 140 F. 784.

82. Symmes v. Cauble [S. C.] 51 S. E. 862.

83. See 4 C. L. 1273.

84. Good faith on the part of the releasee and full understanding of his rights by the releasor are essential. Kansas City, etc., R. Co. v. Chiles [Miss.] 38 So. 498. Misrepresentations must be intentionally and knowingly false. Kelly v. Pioneer Press Co. [Minn.] 103 N. W. 330. Evidence held insufficient to show fraud in promising job for life to releasor. Southwestern Tel. & T. Co. v. James [Tex. Civ. App.] 91 S. W. 654. Release signed under representation that it was a receipt for a small gratuity held invalid. Austin v. St. Louis Transit Co. [Mo. App.] 91 S. W. 450. Release of life insurance policy by widow for nominal consideration on claim that policy was void, held fraudulent. Rauen v. Prudential Ins. Co. [Iowa] 106 N. W. 198. False statements of physician employed by releasee. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. A release of life insurance policies obtained from a sick woman by misrepresentation. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609.

85. A railroad employee, believing he was but slightly injured, when in fact he was seriously injured, signed a release, relying upon the statement of releasee's physician. Great Northern R. Co. v. Fowler [C. C. A.] 136 F. 118; Great Northern R. Co. v. Fowler [C. C. A.] 136 F. 118.

86. Evidence held to sustain finding that releasor was incompetent. Galveston, etc., R. Co. v. Green [Tex. Civ. App.] 91 S. W. 380. And see Incompetency, 5 C. L. 1775.

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

88. Mattoon Gas Light & Coke Co. v. Dolan, 111 Ill. App. 333.

89. Release signed by a person able to read. Hartley v. Chicago & A. R. Co., 116 Ill. App. 277. Release sought to be avoided without excuse for not reading without any showing of mental incapacity, disability, or misreading. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328; Hartley v. Chicago, etc., R. Co., 116 Ill. App. 277. Failure to request that a release be read before signing held to prevent avoidance for misrepresentation as to nature of instrument. Hicks v. Harbison-Walker Co., 212 Pa. 437, 61 A. 958.

and parted with consideration while the releasor clothed a person committing fraud with apparent authority to act,[90] and one seeking to repudiate a release for fraud must promptly disavow it.[91] The decisions are in hopeless conflict as to whether the return of the consideration for a release is necessary before action brought to avoid a release.[92] Tender need not be made of indebtedness incurred but not yet paid by releasee, amount not known.[93]

§ 5. *Pleading, proof, and practice.*[94]—Fraud is ordinarily pleaded by replication to the plea of release[95] which must allege rescission,[96] and should conclude with a verification rather than to the country.[97] Fraud may be proved under plea non est factum.[98]

The burden of proof is upon one claiming that a release was obtained by fraud or without consideration.[99] The equitable rule of evidence in reforming or abrogating instruments does not apply in a court of law when the execution of a release under seal is admitted,[1] and testimony to contradict, vary, or add to a written release is incompetent.[2] The evidence conflicting, whether a release was legally obtained, is a question of fact for the jury,[3] but where there is no evidence, the question should not be submitted to the jury.[4] What constitutes fraud or mistake, as well as the admissibility[5] and sufficiency of evidence,[6] are more fully treated elsewhere.[7]

RELIEF FUNDS AND ASSOCIATIONS, see latest topical index.

90. Releasor's attorney fraudulently procured a release, which was accepted by releasee in good faith. Belheumer v. Thomas [Vt.] 62 A. 719.

91. What is ratification: Ratification of a release as a matter of law is not shown by the appropriation of the consideration therefor when releasor labored under a mistake. Rockwell v. Capital Traction Co., 25 App. D. C. 98. Use of a small part of the consideration for a release procured by fraud does not constitute ratification where repudiation and tender were made as soon as releasor was apprised of his rights. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

92. Not necessary. Rockwell v. Capital Traction Co., 25 App. D. C. 98; Zuelly v. Casper [Ind. App.] 76 N. E. 646. **Contra.** Savory v. North East Borough, 26 Pa. Super. Ct. 1. Must tender consideration in order to repudiate release. Harrison v. Alabama Midland R. Co. [Ala.] 40 So. 394. Evidence held not sufficient to warrant an instruction that there could be no recovery without a return or offer to return the money paid for a release. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609. Money given as present. Release written over receipt. Need not tender. Ingram v. Covington, etc., R. Co. [Ky.] 89 S. W. 541. Tender need not include interest. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709. Compensation for board and nursing furnished by employer of his own motion before release and not included in stated consideration need not be tendered. Id. Where the stated consideration in the release did not include certain items, and releasee on the repudiation of the release did not ask that it be returned, evidence as to such items is inadmissible. Id.

93. Glisson v. Paducah Ry. & Light Co., 27 Ky. L. R. 965, 87 S. W. 305.

94. See 4 C. L. 1274.

95. Mistake avoiding a release cannot be urged by replication in an action at law. Chicago, etc., R. Co. v. Jennings, 114 Ill. App. 622.

96. Demurrer to a replication sustained. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328.

97. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622.

98. Michigan Mut. Life Ins. Co. v. Vierra, 116 Ill. App. 476.

99. St. Louis & Belleville Elec. R. Co. v. Erlinger, 112 Ill. App. 506; Davis v. Weatherly, 119 Ill. App. 238.

1. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609.

2. Instrument held a release and not a mere receipt. Lanham v. Louisville & N. R. Co., 27 Ky. L. R. 772, 86 S. W. 680. Assignment of claim with power to release cannot operate as a release, nor can it be shown by parol to be one. Flynn v. Butler [Mass.] 75 N. E. 730.

3. Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196; Hot Springs R. Co. v. McMillan [Ark.] 88 S. W. 846; Kansas City, etc., R. Co. v. Chiles [Miss.] 38 So. 498; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Glisson v. Paducah R. & Light Co., 27 Ky. L. R. 965, 87 S. W. 305; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609; Rockwell v. Capital Traction Co., 25 App. D. C. 98. Evidence held to sustain finding of fraud. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709; Erickson v. Northwest Paper Co. [Minn.] 104 N. W. 291.

4. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786.

5. Acts and declarations of agent procur-

RELIGIOUS SOCIETIES.

§ 1. *Organization as a corporation, and status of society.*[8]—Under a statute providing that land conveyed to religious societies shall vest in the trustees thereof, the wardens and vestry of a parish are a body corporate;[9] but the statutes of New York, authorizing trusts of real and personal estate for the benefit of the Shaker society and vesting the title of all its property in the trustees, do not make that society a religious corporation.[10] Laws permitting the incorporation of religious associations are an implied part of the association agreement and members impliedly agree that it may avail itself of such law at any future time.[11] If the steps leading up to such incorporation conform to the statute, the association becomes thereby incorporated, whether the subsequent administration of the corporation be regular or not, and whether the by-laws adopted be reasonable or unreasonable;[12] nor is it necessary that such corporation should bear the same name as the original association, the incorporators being at liberty to choose such appropriate name as seems best to them.[13] A minority faction of such association, which continues to meet in the church building, proceeding regularly and without fraud, may incorporate and hold possession of the property of the association.[14] Notice of intention to submit the question of amendment of the charter of a church is necessary to the validity of such action at any meeting.[15]

§ 2. *Membership and meetings.*[16]—Every member of a voluntary religious society has an absolute right to have its property controlled and administered according to its organic plan and to participate in its affairs.[17] The court will not pass upon the membership or spiritual status of persons belonging or claiming to belong to religious societies.[18] A meeting held at the regular time and

ing release before and after the release, held admissible. Glisson v. Paducah R. & Light Co., 27 Ky. L. R. 965, 87 S. W. 305. Evidence of plaintiff's attorney that he did not know of release, inadmissible. Wojtylak v. Kansas & T. Coal Co., 188 Mo. 260, 87 S. W. 506. Evidence that recitals of consideration were not true admissible. Proof of custom to pay wages of disabled employe, such wages being part of consideration stated. Hot Springs R. Co. v. McMillan [Ark.] 88 S. W. 846.

6. Evidence held to show that release was signed under belief that it was receipt for small gratuity. Austin v. St. Louis Transit Co. [Mo. App.] 91 S. W. 450. Evidence held to show that release of damage was procured by false statement that it was a receipt for a small payment for expenses of delay. Chicago & A. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560.

7. See Fraud and Undue Influence, 5 C. L. 1541; Mistake, etc., 6 C. L. 678.

8. See 4 C. L. 1275.

9. Code, § 3665. St. James Parish v. Bagley, 138 N. C. 384, 50 S. E. 841.

10. Laws 1839, p. 146, c. 174; Laws 1849, p. 527, c. 373; Laws 1852, p. 275, c. 203. Hence an order of the supreme court is not necessary to render a conveyance of its real estate valid. Feiner v. Reiss, 98 App. Div. 40, 90 N. Y. S. 568.

11, 12. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

13. Rev. St. 1898, § 1991. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

14. A meeting held at the regular time and at the regular church edifice, of which due public notice was given and which all members were free to attend, was a "stated" meeting at which the required notice of incorporation could be given under Rev. St. 1898, § 1990. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

15. Where the charter of a church could be amended only by a vote of two-thirds of the male members thereof, such amendment submitted without any previous notice or debate and not voted upon in the usual parliamentary manner, although agreed to by the required two-thirds and subsequently signed by more than that number, could not be sustained. African M. E. Union Church, 28 Pa. Super. Ct. 193.

16. See 4 C. L. 1275.

17. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

18. Bonacum v. Murphy [Neb.] 104 N. W. 180.

place, which was publicly called and which every member was free to attend, was a "stated" meeting at which the required notice of incorporation could be given.[19]

§ 3. *Ministers.*[20]—The pastor of a church is a factor in the promotion of the religious purposes thereof,[21] and the church is bound to pay his salary.[22] By continued services, payment of salary and the common understanding of all parties, one may, without formal call or installation, become pastor of a church congregational in polity and having authority to employ its own pastor.[23] In the absence of any law of a religious denomination regulating the appointment and dismissal of priests, the board of trustees of a religious society incorporated under the statutes of a state, which is vested by the by-laws with the control and direction of the association and church, has the power of appointing or dismissing a priest.[24]

§ 4. *Powers and liabilities of society in general.*[25]—It is an inherent right of a church society, which is congregational in polity, to manage its own affairs.[26] Where the constitution of a religious corporation, adopted by the members by unanimous consent, provided for a determination of all controversies by a majority vote, the fact that it also provided that the management of its affairs should be by "the congregation as a whole" did not require the assent of every member to every vote,[27] but that phrase referred to action at a meeting which all the members were entitled and had an opportunity to attend.[28] Although in some states the doctrine prevails that a gift to a voluntary charitable or religious society is a gift in trust for the uses and purposes of such society,[29] yet it was held that a bequest of funds in New York to acquire lands and erect a church within a diocese located in Utah and Idaho, no such corporation as the one named as beneficiary existing, was void in the absence of any showing that such doctrine prevailed in Utah and Idaho, and under the presumption that the common-law doctrine was in force.[30]

§ 5. *Property and funds.*[31]—When the members of a religious congregation divide into factions and separate, the title to the property of the congregation will remain in that division which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated.[32]

19. Under Rev. St. 1898, § 1990. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

20. See 4 C. L. 1276.

21. Kelsey v. Jackson, 123 Ga. 113, 50 S. E. 951.

22. If the divine law does not prompt the members to pay such a debt, human law will enforce it. Kelsey v. Jackson, 123 Ga. 113, 50 S. E. 951.

23. A German Evangelical Lutheran church. Duessel v. Proch [Conn.] 62 A. 152.

24. Papaliou v. Manusos, 113 Ill. App. 316.

25. See 4 C. L. 1276.

26. It can affiliate itself with any synod or council of its denomination and change its affiliation from time to time by a majority vote of its members. Duessel v. Proch [Conn.] 62 A. 152, citing Lutheran Congregation v. St. Michael's Evangelical Church, 48 Pa. 20.

27, 28. Duessel v. Proch [Conn.] 62 A. 152.

29. A conveyance of land to the trustees of an unincorporated religious society is not void for want of a grantee, it being in the nature of a charitable trust and all the members of the congregation being beneficiaries. Christian Church of Sand Creek v. Church of Christ of Sand Creek, 219 Ill. 503, 76 N. E. 703. Such property, upon the incorporation of the society, vests in the corporation (Id.) especially where the law at the time of the organization of the society makes provision for the incorporation of such voluntary associations (Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026). Where such a society had had uninterrupted possession and use of land for at least 30 years under a lost deed, it was presumed, since the society was incapable of taking title in itself, that the title was legally conveyed to trustees for its benefit. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769.

30. The bequest could not be saved by Laws 1893, p. 1748, c. 701, authorizing the organization of a corporation in such cases, nor by the amendment of 1901 which was enacted after testatrix's death, nor by the authority of courts to administer a gift so as most effectually to accomplish the donor's will when a literal compliance is impracticable, for that can be done only after the lapse of 25 years from the time of the gift. Mount v. Tuttle [N. Y.] 76 N. E. 873.

31. See 4 C. L. 1276.

32. Christian Church of Sand Creek v.

Even a minority faction of a voluntary religious society, which continues to meet in the regular church edifice, can, by proceeding regularly and without fraud, under a statute providing for incorporation of such bodies, organize as a corporation and hold the property of the association as against a seceding majority faction that meets at a private residence.[33] When land was conveyed to trustees of a certain Lutheran church and to their successors and assigns, "to them and their own proper use and behoof," such church being congregational and having power to manage its own affairs, the use of such property by a corporation subsequently organized from the old congregation, of the same ecclesiastical character, was lawful;[34] and a bill of complaint based on such use of the property was properly dismissed, it not presenting a case of the use of a trust estate for purposes foreign to the trust.[35] A voluntary, unincorporated religious society may by statute obtain the corporate power to have property held by trustees in perpetual succession.[36] It having ever been the policy of a state to refrain from taxing property held for religious and charitable purposes, a legislative intent to impose such taxes will not be presumed in the absence of language clearly expressing it.[37]

§ 6. *Jurisdiction of courts.*[38]—The right of civil courts to interfere in ecclesiastical matters exists only where there are conflicting claims to church property or funds, or the use of them,[39] or where civil rights are involved.[40]

§ 7. *Actions by or against society or members.*[41]—In order that a church may sue or be sued as an entity it must either be incorporated or must file the certificate required by law;[42] but where it has not been incorporated and has not filed such certificate, a proceeding to subject its trust property to a debt for which the church is liable may be brought against the trustees who are the only necessary

Church of Christ of Sand Creek, 219 Ill. 503, 76 N. E. 703.

33. Rev. St. 1898, § 1990, provides for such incorporation. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

34, 35. Duessel v. Proch [Conn.] 62 A. 152.

36. Laws 1839, p. 246, c. 174; Laws 1849, p. 527, c. 373; Laws 1852, p. 275, c. 203, authorize trusts of real and personal estate for the benefit of the Shaker society and vest in the trustees thereof the legal title to all its property. Feiner v. Reiss, 98 App. Div. 40, 90 N. Y. S. 568. Such statutes vest the legal title in the trustees, and the "Covenant" of the society vests the fee of all lands in the trustees, expressly surrendering any rights or claim of the members thereto. Id. A conveyance of real estate by the society approved by the ministry and elders as required by the "Covenant" is valid without all the members joining. Id. Where it has been the uniform practice of the society on a sale of real estate to manifest such approval verbally, in informal consultation among its trustees, ministry and elders, such approval is sufficient. Id. A quitclaim deed executed by the trustees and approved by the ministry and elders in writing conveyed a marketable title. Id.

37. A mortgage held for the use of a Catholic congregation "solely for the same objects of religion and purely public charity" is not subject to the personal property tax imposed in Pennsylvania by Act June 8, 1891 (P. L. 229). Mattern v. Canevin [Pa.] 63 A. 131.

38. See 4 C. L. 1276.

39. The courts will not review the process or proceedings of church tribunals to decide whether they are regular or within their ecclesiastical jurisdiction, nor attempt to decide upon the membership or spiritual status of persons belonging or claiming to belong to religious societies. Bonacum v. Murphy [Neb.] 104 N. W. 180, reversing 98 N. W. 1030. The courts have no concern with questions of church doctrines or policies. All such questions must be left to the determination of the congregation. Christian Church of Sand Creek v. Church of Christ of Sand Creek, 219 Ill. 503, 76 N. E. 703. But where the members of a religious congregation divide into factions, organize separate corporations, and both claim ownership of the church property, the courts can pass upon the differences between the factions so far as necessary to determine property rights. Id.

40. Every participant in a voluntary religious organization has the absolute right, which the courts will protect, to have its property controlled and administered according to its organic plan and to participate in its affairs in harmony therewith. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026. Where the pleadings disclose no question of property or civil rights at issue, but only questions of church discipline, it will be dismissed. Bonacum v. Murphy [Neb.] 104 N. W. 180, reversing 98 N. W. 1030.

41. See 4 C. L. 1277.

42. It may be incorporated under § 2351, or file the certificate under § 2355, Civil Code. Kelsey v. Jackson, 123 Ga. 113, 50 S. E. 951.

parties.[43] Where an unincorporated religious society consisted of many members, its trustees were entitled to sue for an injury to its freehold without joining all the members of the congregation.[44] Where a church corporation had authority to depose its pastor by a majority vote, being congregational in its character and independent of any compulsory affiliation with any superior body, a pastor so deposed could not maintain an equitable action to prevent the use of the church building by any other pastor than himself, and to secure its use for services conducted by himself.[45] An allegation in a complaint in an action against church trustees that the contract sued on had been executed by a committee appointed for that purpose, on behalf of the church, was not supported by proof of subsequent ratification of the contract instead of prior authorization.[46]

REMAINDERS; REMEDY AT LAW; REMITTITUR, see latest topical index.

REMOVAL OF CAUSES.

While the rule that a cause to be removable from state to Federal court must be within the jurisdiction of the Federal courts is here treated, the nature and extent of that jurisdiction pertains to another topic.[47]

§ 1. *Right to remove from state to Federal court.*[48]—No civil suit or criminal proceeding in a state court can be removed into a Federal court unless warrant therefor be found in some act of congress.[49] The right of removal is given wholly to the defendant without any reference to the plaintiff or his wishes.[50] A nonresident heir, given leave to intervene in the matter of a contested claim, does not, as against an administrator pro tem. representing the estate, become such a party to the suit as to give him the right to remove the cause to the Federal court.[51]

§ 2. *What is a "suit" or "action" so removable.*[52]—To be removable, suits must be within the original jurisdiction of the circuit court.[53] Where the statutes of a state provide that one may proceed against a nonresident of the state on a simple contract debt or claim for unliquidated damages, by suing out an attachment which gives him a lien from the time of levy, and then filing a bill in equity to establish the claim and enforce the lien, such a suit is one to enforce a lien previously acquired, within the jurisdiction of a Federal court and removable for

43. Civil Code 1895, § 3202. Debt due to pastor for his salary. The church edifice and site may be subjected to the payment of such debt under Civ. Code 1895, § 2361. Kelsay v. Jackson, 123 Ga. 113, 50 S. E. 951.

44. Under Sand. & H. Dig. Ark. § 5632, providing for suits by one or more for the benefit of all in certain cases. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769.

45. Duessel v. Proch [Conn.] 62 A. 152.

46. Ashley v. Henderson [Ind.] 76 N. E. 985.

47. See Jurisdiction, 6 C. L. 267.

48. See 4 C. L. 1278.

49. Commonwealth of Kentucky v. Powers, 26 S. Ct. 387.

50. Morris v. Clark Const. Co., 140 F. 756.

51. Mayer v. Schneider, 112 Ill. App. 628.

52. See 4 C. L. 1278.

53. Cochran v. Montgomery County, 199 U. S. 260, 50 Law. Ed. —.

diversity of citizenship.[54] A proceeding to condemn lands for a railroad right of way under the South Dakota statutes is a civil suit within the meaning of the Federal judiciary act,[55] and is a removable cause, although the proceeding is an exercise by the state of its sovereign right of eminent domain and can be maintained only as authorized by the laws of the state, and could not in the first instance be brought in the Federal court;[56] but an application for mandamus, not in aid of a jurisdiction previously acquired, is not a suit "of a civil nature at law or in equity" within the meaning of the removal act[57] and an action begun in what was supposed to be a legally constituted court, but was subsequently determined to have no legal existence, is not such a "suit" or "action" as can be removed.[58]

§ 3. *Nature of controversy or subject-matter, and existence of Federal question.*[59]—A Federal question which will warrant the removal of a case must be one of law and not of fact.[60] A case cannot be removed as one arising under the constitution or laws or treaties of the United States unless such fact appears from plaintiff's statement of his claim,[61] but for the purpose of removal the Federal court will take judicial notice that a defendant is a corporation created by a law of the United States, even though such fact does not appear in plaintiff's declaration.[62] A cause cannot be removed on the ground that it is a suit arising under the constitution or laws of the United States where the cause of action is joint and not separable, as for a joint tort, except on a petition in which all the defendants join.[63] Where the daughter of a deceased homestead settler brings suit to establish her title under the operation of the state laws as against the widow, to whom the patent has been issued under the provisions of the Federal statutes, a Federal question is involved.[64]

§ 4. *Diversity of citizenship and alienage of party.*[65]—When it is sought to remove a case on account of diverse citizenship, it is necessary only to show that fact and that the jurisdictional amount is involved in order to secure a removal,[66] although neither party is a citizen or resident of the state where the action is brought.[67] The state court can only determine as matter of law whether, on the face of the record, a right to removal is shown; if so, its jurisdiction ends and it can proceed no further.[68] The allegations of the petition alone can be looked

54. Code W. Va. 1899, c. 106. Craddock v. Fulton, 140 F. 426.

55. Act Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

56. Notwithstanding the right is one that appertains to sovereignty, yet, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance and, if that inquiry takes the form of a proceeding before the courts between the parties, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

57. Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509]. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

58. Hence the Federal court could neither entertain the case nor remand it, but struck it from the docket. Crowley v. Southern R. Co., 139 F. 851. Delay on the part of defendants in making objection in the Federal court could not operate as a waiver. Id.

59. See 4 C. L. 1278. See, also, Jurisdiction, 6 C. L. 267.

60. The mere assertion in the complaint of the fact that defendant was engaged in interstate commerce, there being no controversy as to the construction of the law, is not sufficient to justify removal. Myrtle v. Nevada, etc., R. Co., 137 F. 193.

61. If it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. Mitchell Engineering & Machinery Co. v. Worthington, 140 F. 947.

62. Heffelfinger v. Choctaw, etc., R. Co., 140 F. 75.

63. Under Act Mar. 3, 1887, c. 372, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 509]. Heffelfinger v. Choctaw, etc., R. Co., 140 F. 75.

64. U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, pp. 1390, 1394. McCune v. Essig, 199 U. S. 382, 50 Law. Ed. —.

65. See 4 C. L. 1278.

66. Parker v. Vanderbilt, 136 F. 246.

67. Robert v. Pineland Club, 139 F. 1001.

68. A petition alleging diverse citizenship of plaintiff and the principal defendant, no cause of action against the resident defend-

to by the state court in determining the right of removal for diversity of citizenship,[69] and where the cause is not removable under the allegations of plaintiff's pleadings and the petition, the Federal court acquires no jurisdiction and its orders therein are void,[70] and plaintiff's appearance and motion to remand and participation in the trial after the overruling of his motion do not confer jurisdiction;[71] but an amendment to a complaint in the state court, which transforms a nonremovable case into a removable one, allows its removal if the defendant acts promptly.[72] The diversity of citizenship on which the right of removal must be predicated is that of the parties to the suit[73] at the time of the filing of the petition for removal;[74] but a party who has been improperly joined as a defendant is to be disregarded,[75] and a case may be removed without regard to the technical position occupied by the parties in the pleadings as plaintiffs and defendants, the court regarding the real interests of the several parties and realigning them to determine diversity of citizenship.[76] Neither a state,[77] nor a joint stock company,[78] nor a citizen of one of the territories of the United States,[79] is a citi-

ant and joinder merely to defeat removal, is sufficient to require removal. Texas & P. R. Co. v. Eastin [Tex. Civ. App.] 89 S. W. 440. The right of removal, so far as concerns the action of the state court, depends upon the condition of the record in the state court at the time the removal is sought. Texarkana Tel. Co. v. Bridges [Ark.] 86 S. W. 841.

69. Texarkana Tel. Co. v. Bridges [Ark.] 86 S. W. 841. Where it is alleged in the petition for removal that plaintiff's averments, on which the joint action against resident defendants depends, are false and were fraudulently made so as to defeat removal, the state court must accept the allegations and sustain the petition, the truth of such allegations being determinable on a motion to remand. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898; Pooser v. Western Union Tel. Co., 137 F. 1001.

70. Pierce's Adm'r v. Illinois Cent. R. Co., 27 Ky. L. R. 801, 86 S. W. 703; Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234. The absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect or consent to waive it. An allegation that a corporation is a citizen of a certain state is not enough, it should be shown that it was created by the laws of that state. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

71. Pierce's Adm'r v. Illinois Cent. R. Co., 27 Ky. L. R. 801, 86 S. W. 703.

72. Myrtle v. Nevada, etc., R. Co., 137 F. 193.

73. Although the law of New York (Code of Civil Procedure, § 1919), where a joint stock company was organized, authorizes actions by and against its president (Saunders v. Adams Exp. Co., 136 F. 494), such officer, who was a citizen of Ohio, could not enter his appearance in behalf of such company in a case pending in New Jersey, wherein full jurisdiction of defendant had been obtained under the laws of New Jersey, and obtain a removal of the case on the ground of his diversity of citizenship (Id.).

74. Where, at the time of the commencement and of the removal of an action, defendants were citizens of another state than that of plaintiff, the fact of the removal of one of the defendants into plaintiff's state afterward did not deprive the Federal court of jurisdiction. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

75. The employe of a foreign railroad company in an action for personal injury improperly joined the lessor of the railroad, a domestic railroad company. Axline v. Toledo, etc., R. Co., 138 F. 169. In such cases, in the absence of any state statute on the subject, the Federal court is not bound by the decisions of the highest state court as to the joint liability of the lessor and lessee, but, on the question of removal, will follow the rule established by Federal decisions. The lessee being a corporation of a state other than that of plaintiff, case held removable. Curtis v. Cleveland, etc., R. Co., 140 F. 777. In an action for personal injuries against three defendants, the complaint alleged that two were foreign corporations but made no allegation of the incorporation of the other. The two alleged foreign corporations petitioned for removal, alleging that the other defendant was not a corporation but the trade name of one of two persons, neither of whom had been served with process or was a party to the action. Held that the trial court should have accepted the petition and proceeded no further in the suit. Texarkana Tel. Co. v Bridges [Ark.] 86 S. W. 841.

76. Held that the joining of a domestic corporation as defendant, but whose interests were really with complainants, did not prevent the removal of the cause. Lucas v. Milliken, 139 F. 816.

77. An action between a state, in which it is the real party in interest, and a citizen or corporation of another state, cannot be removed solely on the ground of diverse citizenship. Southern R. Co. v. State [Ind.] 75 N. E. 272. In an action in the name of the state by a prosecuting attorney, against a railroad company to recover penalties for violation of Burns' Ann. St. 1901, §§ 5186, 5187, the state is the real party in interest, notwithstanding part of the penalties are payable to the prosecuting attorney. Id.

78. A joint stock company, although a legal entity, is not a corporation and can-

zen of another state, within the meaning of the constitution and judiciary acts.

It is necessary that all the parties on one side of the controversy shall be citizens of a different state or states from all the parties on the other side,[80] and all the defendants must join in the removal;[81] but when a resident of the state where the suit is brought has been joined, the right of removal then depends upon the question as to whether there is a separable controversy between the parties,[82] in which case the removal may be effected "by one or more of the defendants."[83] The question whether there is a separable controversy in a suit in equity, within the meaning of the removal statute, must be determined from the allegations of the bill,[84] and in an action at law from the facts set out in the declaration;[85] and the mere fact that a suit might be brought against each defendant separately or against them jointly does not determine the question.[86] In order that a separable controversy may exist, the whole subject-matter of the suit must be capable of being finally determined as between the parties on each side and complete relief afforded as to the separate cause of action without the presence of other parties originally brought in.[87] An action against several defendants for a joint tort cannot be held to involve a separable controversy.[88] Where the resident defend-

not be deemed to have citizenship. Saunders v Adams Exp. Co., 136 F. 494.

79. An action by a citizen of Indian Territory against a citizen of a state is not removable for diversity of citizenship. Kansas City Southern R. Co. v. McGinty [Ark.] 88 S. W. 1001.

80. Axline v. Toledo, etc., R. Co., 138 F. 169. The party to the suit on one side, whether consisting of one or more persons, must have a citizenship different from that of the party on the other side, whether consisting of one or more persons. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

81. New England Waterworks Co. v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 521.

82. Parker v. Vanderbilt, 136 F. 246.

83. New England Waterworks Co. v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 521.

84. Act Mar. 3, 1887, c. 373, 24 Stat. 552, § 2, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]. Such allegations are to be taken as confessed, independent of the allegations of the petition for removal or of answers filed after the removal. Elkins v. Howell, 140 F. 157.

85. Statement of facts in suit for personal injuries against two railroad companies held to show a separable controversy. Yeates v. Illinois Cent. R. Co., 137 F. 943.

86. Yeates v. Illinois Cent. R. Co., 137 F. 943. Nor do the allegations of the declaration that the act was the joint and concurrent act of the defendants add anything to the plaintiff's position. Id.

87. Perkins v. Lake Superior & S. E. R. Co., 140 F. 906, citing cases. In a suit for an undivided one-half interest in a single tract of land, alleged to be wrongfully held by two defendants, there is no separable controversy. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404. In a suit by the purchaser of lands to enforce specific performance of the contract of sale, brought against the owner and grantees to whom he conveyed the land before the recording of complainant's contract, there is a separable controversy with the grantees as to their right to hold the land as against complainant. Elkins v. Howell, 140 F. 157. Where, within a suit against several defendants for the foreclosure of a mortgage, there is a controversy between the complainant and a defendant corporation, citizen of another state, standing apart from the other questions and parties involved, as to whether the mortgage covers certain property, such controversy is a separable controversy. New England Waterworks Co. v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 521. The question of whether a new pumping station with its connecting mains were covered by a mortgage as after-acquired property was such a controversy. Id. In condemnation proceedings by a railroad company, under a state statute, against numerous property owners, and where only the single question of petitioner's right to condemn as against all the parties joined as defendants is presented, the mere fact that one defendant is the owner of part of the lands in severalty does not create a separable controversy. Perkins v. Lake Superior & S. E. R. Co., 140 F. 906. But where one defendant, a citizen of another state, is the exclusive owner of a strip of land lying within the right of way sought to be condemned, and is alone entitled to the entire compensation for its taking, there is a separable controversy as to such defendant. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

88. Heffelfinger v. Choctaw, etc., R. Co., 140 F. 75. It cannot be removed except on a petition in which all the defendants join, even on the ground that it is a suit arising under the constitution or laws of the United States. Act Mar. 3, 1887, c. 372, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 509]. Id. No separable controversy is stated where the complaint, in an action to recover for death by wrongful act, charges that it

ant is not an indispensable party to the controversy with the nonresident defendant, the latter is entitled to remove the cause to the Federal court,[89] but not so where the resident defendant is an indispensable and necessary party.[90] Where the state law makes a corporation and its servants and agents jointly liable for injury or death caused by negligence, an action brought against a nonresident corporation and its resident servants is not removable, even though the servants were joined solely to prevent removal,[91] and though such joinder be not proper,[92] unless the plaintiff's petition fails to show a cause of action against the servant.[93] If, however, the plaintiff trifles with the court and joins a resident defendant fraudulently to prevent a removal, the state court should, as soon as such fact becomes apparent on the trial, dismiss the action as to the resident defendant and remove the cause.[94]

§ 5. *Prejudice and local influence and denial of civil rights.*[95]—The right of removal on account of prejudice or local influence is based on different grounds from that of removal on account of diverse citizenship. It must not only appear that defendant is a nonresident and that the jurisdictional amount is involved, but also that defendant cannot secure a fair and impartial trial in the state court because of prejudice or local influence.[96] The cases removable on these grounds are those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states,[97] and not cases wherein the controversy is partly between citizens of the same state.[98]

was caused by acts of the servants of a nonresident railroad company, committed in the course of their employment, although not by express order or in presence of any officer of the company, yet negligently, willfully, recklessly, and maliciously. Davenport v. Southern R. Co. [C. C. A.] 135 F. 960, rvg. 124 F. 983.

89. In a suit for the specific performance of a contract to convey to complainants their share of certain railroad securities, the bank named to receive payment and make delivery was held not to be an indispensable party to the principal controversy. Cella v. Brown, 136 F. 439. In a suit for the specific performance of a contract for the sale and delivery of the issued stock of a corporation, the latter is not an indispensable party (Lucas v. Milliken, 139 F. 816), but it might be otherwise if there were an allegation of the insolvency of the other defendants, making it necessary to enjoin a transfer of the stock to prevent its being put beyond the control of the defendants or of the court (Id.).

90. Paulk v. Ensign-Oskamp Co., 123 Ga. 467, 51 S. E. 344.

91. Pierce's Adm'r v. Illinois Cent. R. Co., 27 Ky. L. R. 801, 86 S. W. 703; Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234; Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530; Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714; Illinois Cent. R. Co. v. Leisure's Adm'r [Ky.] 90 S. W. 269; Illinois Cent. R. Co. v. Cane's Adm'x [Ky.] 90 S. W. 1061; Southern R. Co. v. Grizzle [Ga.] 53 S. E. 244. An action by a resident for personal injuries, against a foreign railroad corporation and a domestic corporation and others who were employed to keep the railroad and equipments in order, was not removable on the ground of diversity of citizenship. Ayles v. Southern R. Co. [Ky.] 88 S. W. 1048. In an action against a master for the willful tort of his servant in the scope of his employment, the servant is a proper party, and if a nonresident the cause cannot be removed on the theory that he is a sham defendant. Able v. Southern R. Co. [S. C.] 52 S. E. 962.

92. Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 Law. Ed. — . See note 19 Harv. L. Rev. 470. Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 50 Law. Ed. — .

93. No cause of action shown against the trainmaster joined as defendant. Slaughter v. Nashville, etc., R. Co. [Ky.] 91 S. W. 744.

94. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234.

95. See 4 C. L. 1280.

96. Parker v. Vanderbilt, 136 F. 246. No defendant who is a nonresident should be compelled to try his case in the state court when it is made to satisfactorily appear that he cannot obtain a fair and impartial trial in that court, in view of the fact that his case can be tried in another forum, which possesses every facility for giving both plaintiff and defendant a fair and impartial trial, a court which is presided over by a resident of the state, and before a jury selected by a jury commission, the members of which are also residents of the state and belong to different political parties, and who are charged with selecting true and lawful men, regardless of local or political influence. Parker v. Vanderbilt, 136 F. 246.

97. Cochran v. Montgomery County, 199 U. S. 260, 50 Law. Ed. ——.

98. To hold otherwise brings the language of the clause into conflict with the rule that a suit, to be removable, must be within the original juridiction of the circuit court,

Where a change of venue for prejudice or local influence is, under the law of the state, a matter resting in the discretion of the trial judge, a defendant seeking removal on that ground is not required to show that he could not obtain justice in any county of the state.[99] A removal for denial of civil rights can be had only when the party complainant cannot enforce rights secured to him by the law providing for equal civil rights of the citizens of the United States in a judicial tribunal of the state by reason of some enactment or constitutional provision of the state.[1]

§ 6. *Amount in controversy.*[2]—A cause is not removable on account of diversity of citizenship, prejudice, and local influence, or a Federal question involved, unless it clearly appears that the jurisdictional amount of $2,000 is involved, exclusive of interest and costs.[3] To determine the amount in controversy the trial court must look not only to the averments of the petition for removal but also to the complaint,[4] but this rule does not require the court to shut its eyes to the reality, and if it appears that the plaintiff has but one cause of action, the question of removal cannot be affected by the fact that he has alleged two separate causes.[5] Under the Kentucky statute relative to amendments, an amended petition, reducing the claim against a nonresident defendant from $5,000 to $1,999, filed in vacation and without notice to defendant, deprived it of the right of removal;[6] but after a cause has been removed on pleadings of the plaintiff, showing that the amount in controversy and claimed by him is sufficient to give the Federal court jurisdiction, he cannot defeat the removal by changing his position or the amount of his claim.[7]

§ 7. *Procedure to obtain and effect the removal.*[8]—No notice to the other party is required in removal proceedings.[9] The filing of a petition for removal

departs from the settled former construction and ignores the main purpose of the act of 1887 (Act Mar. 3, 1887, as corrected by Act Aug. 13, 1888), which was to restrict the jurisdiction of the circuit court. Cochran v. Montgomery County, 199 U. S. 260, 50 Law. Ed. —.

99. Parker v. Vanderbilt, 136 F. 246.

1. A failure to obtain trial of an action resulting from inability to secure an attorney and because plaintiff had been able to secure postponements against defendant's protests, are not a good cause for removal under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], for denial of civil rights. Scott v. Kinney & Co., 137 F. 1009. The denial of any equal civil rights secured by the Federal constitution or laws, in the summoning or impaneling of jurors in a criminal prosecution, does not give the right of removal under Rev. St. § 641, unless such denial is authorized by the state constitution or laws as interpreted by its highest tribunal (Commonwealth of Kentucky v. Powers, 26 S. Ct. 387. rvg. 139 F. 452), nor does the nonrecognition by the state court of the validity of a pardon pleaded in bar by the defendant make a case for removal on account of denial of civil rights (Id.). The statute of New Jersey relative to grand jurors considered, and held that neither the statute nor any interpretation thereof by the highest court of the state denies or prevents the enforcement of any civil right of the petitioners. State v. Corrigan, 139 F. 758.

2. See 4 C. L. 1280. See, also, Jurisdiction, 6 C. L. 267.

3. The petition was based on all three grounds, but the case was remanded as the amount allowed by B. & C. Comp. Or. § 5672, as an attorney fee in certain cases could not be added to make up the jurisdictional amount. Swofford v. Cornucopia Mines of Oregon, 140 F. 957.

4. Where each paragraph of the complaint averred damages in the sum of $5,000, but demanded judgment for less than $2,000, and there was nothing in the record to show that the demand for damages was in excess of $2,000, the petition for removal was properly denied. Springer v. Bricker [Ind.] 76 N. E. 114.

5. Complaint stated two causes of action, each below the jurisdictional amount, but both together above that amount, one for nondelivery of a telegram to "Mr. F. M. Pooser" and one to "Mrs. F. M. Pooser." Held to be but one cause of action and case remanded for want of jurisdiction in Federal court. Pooser v. Western Union Tel. Co., 137 F. 1001.

6. Rev. St. 1895, § 1118. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 91 S. W. 312.

7. Johnson v. Computing Scale Co., 139 F. 339.

8. See 4 C. L. 1281.

9. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

amounts to a special appearance only,[10] but the general appearance of a defendant in a state court does not operate as a waiver of his right to remove to a Federal court,[11] nor is his appearance and hearing upon preliminary motions a waiver[12] or estoppel.[13] While the petitioner for removal on account of diversity of citizenship may expressly waive his right of objecting to the further jurisdiction of the state court after the refusal of his petition,[14] he does not do so by moving for a continuance for the purpose of making another corporation a party and in seeking and receiving relief against it;[15] but a defendant corporation, by filing a petition for removal, waives its privilege of being sued in the state of its residence.[16] The filing of the requisite petition and bond for removal instantly transfers the case,[17] even if the state court makes an order refusing the application for removal,[18] and it is the duty of the state court to proceed no further.[19] These must be filed at or before the time the defendant is required to answer or plead to the declaration,[20] and an amended petition for removal filed after the statutory limit for filing answers is too late,[21] but the time within which the proceedings to remove shall be taken is not jurisdictional and may be waived, as by stipulation of the parties.[22] Where the petition to remove is filed as soon as a case becomes a removable

10. Defendant after removal may move to dismiss the suit for want of jurisdiction of defendant's person, either in the state or Federal court. Motion to dismiss for lack of jurisdiction of defendant should have been granted. International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129.

11. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

12. Motions regarding injunctions, attachments, and other provisional remedies. Cella v. Brown, 136 F. 439.

13. A defendant is not estopped by moving in the state court to set aside service of process upon him (Johnson v. Computing Scale Co., 139 F. 339), nor because, on the day after the right appeared, it successfully argued a motion in the state court to stay proceedings pending an appeal from an order denying a motion to set aside service of summons (Remington v. Central P. R. Co., 198 U. S. 95, 49 Law. Ed. 959).

14, 15. Texas & P. R. Co. v. Eastin [Tex. Civ. App.] 89 S. W. 440.

16. The plaintiff was an alien, defendant an Illinois corporation, and the court a Federal court in South Carolina. Motion to remand for want of jurisdiction in the Federal court denied. Morris v. Clark Const. Co., 140 F. 756.

17. All that the removal act requires is that the party entitled to remove the cause shall make and file a petition in such suit in the state court, and make and file therewith a bond with good and sufficient surety conditioned as named. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284. Should the court arbitrarily refuse to approve a surety, it cannot be doubted that the removing party would have the right to file the bond and petition, procure the filing of the record on removal, and proceed in the Federal court. Id. The remedy of the plaintiff in such a case would be to move to remand and show the insufficiency of the surety and that the judge of the state court was justified in refusing to approve the bond. Id.

18. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

19. Upon the filing of a proper petition in the state court, that court at once loses its jurisdiction, although any bail given therein is continued in force. State of New Jersey v. Corrigan, 139 F. 758.

20. A petition for removal, filed before the time fixed by the statutes or court rules for the filing of an answer to a bill, is timely. Cella v. Brown, 136 F. 439. Where a summons served September 16 required defendant to appear and plead within 20 days exclusive of the day of service, a petition for removal filed October 6 was in time. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578. By rule of the court of common pleas of Philadelphia county, Pa., defendant is allowed four days from service of statement on him to file any dilatory plea, and by the procedure act 15 days to file affidavit of defense. Held that a petition for removal must be filed within four days. First Nat. Bank v. Appleyard & Co., 138 F. 939. Where the trustees of an unincorporated association were brought into an action affecting the title of real estate, by service on them of an amended complaint, the cause was removable on a petition filed by them in apt time after service on them, although the time for answer by the association was past. Robert v. Pineland Club, 139 F. 1001.

21. Kansas City Southern R. Co. v. McGinty [Ark.] 88 S. W. 1001.

22. Stipulation to extend time of pleading held extension of time to institute removal proceedings. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284. It is well settled in the second circuit that an extension of time to answer by an order entered in the state court extends the time for filing a petition for removal. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284, citing Lord v. Lehigh Val. R. Co., 104 F. 929, which cites numerous cases. Where the rules of the state court provide that the time for answering may be

one it is in time, although defendant may be in default in the state court for failure to answer in time.[22] The provision of the statute authorizing the removal of causes on account of prejudice and local influence, that the case may be removed at any time before trial, must be construed to mean that the petition should be filed before the trial machinery is put in motion.[24] A petition to remove a cause from a state court to a Federal court is collateral and foreign to the merits of the case.[25] It is not insufficient, because the allegation that the time had not arrived at which the defendant was required to answer or plead was an allegation of a conclusion of law.[26] A petition for removal on account of diversity of citizenship need not be verified,[27] but a petition for removal on account of prejudice or local influence, or the denial of equal civil rights, or in case of prosecutions against revenue officers is required by the statute to be verified.[28] An allegation in a petition for removal that defendant was, at the time of the commencement of the suit, and still is, a citizen of another state than that where the suit was begun, and of no other state, is a sufficient allegation of nonresidence in the state where sued;[29] but an allegation that a corporation is a citizen of a certain state is not enough, it should be shown that it was created by the laws of that state.[30] Where the petition for removal alleges that certain defendants were joined to prevent removal, it concedes their residence, and an answer affirmatively alleging such residence is immaterial.[31] Where the petition expressly states that the amount in controversy exceeds the sum of $2,000 exclusive of interest and costs, it is sufficient, although there may be no proof on the trial to sustain it.[32] It is sufficient if the petition and bond for removal are presented to the judge at chambers, and after approval filed with the clerk of the court.[33] A removal bond signed by a surety is not defective because it was not signed by the defendant and because the penalty was limited to $500.[34] Where the state court refused to remove a cause, defendant's act in filing a certi-

extended by stipulation, a petition for removal may be filed within such extended time. Sanderlin v. People's Bank of Buffalo, 140 F. 191.

Contra: It is firmly settled that the time within which the removal may be had cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulations of the parties, or by orders of the court extending the time to answer. This doctrine rests upon the solid foundation that the statute is mandatory and that the right of removal ceases to exist when the time limited therefor has elapsed. First Nat. Bank v. Appleyard & Co., 138 F. 939.

23. The New York Code of Civil Procedure, § 418, does not require an answer to be filed within 20 days of service of summons when no complaint or notice of amount of claim has been served on defendant. Remington v. Central P. R. Co., 198 U. S. 95, 49 Law. Ed. 959.

24. Held that it does not require the filing of the petition at or before the term at which the case could first be tried. Parker v. Vanderbilt, 136 F. 246.

25. The denial of such petition is not reviewable, unless assigned as a reason for a new trial, where there has been a trial in the state court. Southern R. Co. v. Sittasen [Ind.] 76 N. E. 973.

26. Allegations which involve such conclusions import that the facts which justify them are true, and many such allegations are permitted to avoid an intolerable prolixity on matters not likely to be controverted. Remington v. Central P. R. Co., 198 U. S. 95, 49 Law. Ed. 959.

27. Hence such a petition, the verification of which was not signed but was certified by the notary as having been sworn to, was not defective. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

28. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284. Petition for removal on account of prejudice or local influence verified by the duly constituted agent of the defendant and supported by affidavits of parties who said they were thoroughly conversant with the facts alleged, held sufficient. Parker v. Vanderbilt, 136 F. 246.

29. Parker v. Vanderbilt, 136 F. 246.

30. Knight v. Lutcher & M. Lumber Co. [C. C. A.] 136 F. 404.

31. Pierce's Adm'r v. Illinois Cent. R. Co., 27 Ky. L. R. 801, 86 S. W. 703.

32. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

33. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284; Johnson v. Computing Scale Co., 139 F. 339; Remington v. Central P. R. Co., 198 U. S. 95, 49 Law. Ed. 959.

34. Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], does not require such signature nor

fied copy of the record in the Federal court does not make it a pending action there.[35] In a partition suit in North Carolina, in which the clerk of the court is authorized by law to make all necessary orders and enter judgment, he can make an order for the removal of the suit on a petition properly filed.[36] The removal statutes cannot be used to oust the jurisdiction of the state court and then obtain a dismissal of the action in the Federal court for want of such jurisdiction.[37]

§ 8. *Transfer of jurisdiction and other consequences of removal.*[38]—When a suit begun by attachment is removed pending a motion to dissolve the attachment, both the principal suit and the attachment proceeding are transferred to the Federal court.[39] Where the cause is one in which the state court could grant either legal or equitable relief, the plaintiff may proceed in the Federal court either at law or in equity, but is bound by his election.[40]

§ 9. *Practice and procedure after removal; remand or dismissal.*[41]—Although the statute for removal gives the petitioner until the first day of the next term in which to produce and file in the Federal court a copy of the proceedings,[42] yet that court meanwhile has jurisdiction, and the nonpetitioning party may file such copy before the next term and move to remand the case.[43] By reason of diversity of citizenship and compliance with the removal statutes, the Federal court acquires the right to determine the question of jurisdiction of the state court on a motion to dismiss for lack of such jurisdiction, and to act accordingly.[44] It is not bound to remand the case and let the state court determine the question.[45] After the transfer of a cause it may be dismissed and renewed in the state court, and it is not material that the second action was begun before the dismissal of the original action in the Federal court, provided the dismissal occurs before trial of the second action.[46] All issues of fact raised on the petition for removal are triable in the Federal court on a motion to remand,[47] and where a cause has been removed on the ground of local prejudice, it devolves on the plaintiff, on a motion to remand, to show that such prejudice as is alleged in the petition does not exist.[48] The allegations of the bill in a suit in equity for the purpose of a motion to remand are

an unlimited penalty. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

35. Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140.

36. Sanderlin v. People's Bank of Buffalo, 140 F. 191.

37. Where in attachment proceedings against a citizen of another state, plaintiff was proceeding to obtain substituted service according to the statutes of the state where the suit was pending, and defendant appeared specially to obtain a removal, and so prevented the full notice contemplated by the state law, he gave the Federal court jurisdiction of his person and could not obtain a dismissal of the case for want of jurisdiction. Wells v. Clark, 136 F. 462.

38. See 4 C. L. 1282.

39. The Federal court, upon the filing of the transcript and the docketing of the cause, is as fully possessed of the case as if it had been begun there. Act Mar. 3, 1875, c. 137, 18 Stat. 470, § 4 [U. S. Comp. St. 1901, p. 511]. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

40. Plaintiff having elected to proceed in equity and having failed to make a case for equitable relief, his bill was properly dismissed. Union Stockyards Co. v. Nashville Packing Co. [C. C. A.] 140 F. 701.

41. See 4 C. L. 1282.

42. Rev. St. § 641 [U. S. Comp. St. 1901, p. 520]. State v. Corrigan, 139 F. 758.

43. State v. Corrigan, 139 F. 758.

44. Courtney v. Pradt, 135 F. 818.

45. Suit dismissed on defendant's motion for lack of jurisdiction in the state court, and plaintiff's motion to remand overruled. Courtney v. Pradt, 135 F. 818.

46. Dana & Co. v. Blackburn [Ky.] 90 S. W. 237.

47. Texarkana Tel. Co. v. Bridges [Ark.] 86 S. W. 841. Where it is charged in the petition that plaintiff's averments of facts, upon which the joint action against resident defendants depends, are false and were fraudulently made to prevent removal, the truth of the issue of fraud can be tried in the Federal court on a motion to remand (Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898); and where the petition for removal charges that a resident defendant was fraudulently joined to prevent removal, such issue is triable only in the Federal court (Texas & P. R. Co. v. Eastin [Tex. Civ. App.] 89 S. W. 440).

48. The court is then called upon to find as a question of fact whether local prejudice

taken as confessed, independent of any allegations in the petition for removal or of answers filed after removal,[49] and regardless of any amendments made to a bill after the filing of the petition for removal.[50] Allegations of fact in a petition for removal, not denied in any way by the plaintiff, are to be taken as true on a motion to remand or any other proceeding challenging the right of the Federal court to entertain the case.[51]

§ 10. *Transfers between courts of the same jurisdiction.*[52]—Where it is apparent that the plaintiff is entitled to some remedy, the mere fact that he has invoked the aid of the wrong tribunal is not sufficient cause for the dismissal of his suit, but it should be removed to the proper court.[53] Where the applicant for a transfer of a criminal case to some other justice of the court, on account of alleged bias of the justice against him, could, on appeal, have a hearing on every question affecting the fairness and impartiality of his trial, his application for a special appeal from the order refusing to make the transfer was denied.[54] Under an act authorizing the removal of a cause from the municipal court to the city court of New York city, where the damages exceeded $250, a bond and order for removal were tendered too late after a motion had been granted permitting the plaintiff to reduce his demand from $500 to $200.[55] Where a justice of the municipal court made an order on defendant's motion removing an action to the supreme court, under a statute which had been repealed, plaintiff's remedy was to move the supreme court to remand the case, and not to apply to the municipal court to vacate the order.[56] Under a statute of Indiana, providing that, upon the overruling of a petition for rehearing by a losing party in the appellate court, he may apply for a transfer of the cause to the supreme court on certain grounds,[57] where a judgment for plaintiff was reversed by the appellate court with a mandate for a new trial, a defendant who merely moved to modify such mandate so as to direct the lower court to enter judgment for it, could not be considered the "losing party" within the meaning of the statute.[58]

Rendition of Judgment; Repleader; Replegiando, see latest topical index.

REPLEVIN.

§ 1. *Nature and form of action—Distinctions.*[59]—The action of replevin is

exists to such an extent as to prevent defendant from securing a fair and impartial trial. Parker v. Vanderbilt, 136 F. 246.

49. Elkins v. Howell, 140 F. 157.

50. Cella v. Brown, 136 F. 439.

51. Commonwealth of Kentucky v. Powers, 139 F. 452. Case remanded for want of jurisdiction in Federal court. Myrtle v. Nevada, etc., R. Co., 137 F. 193.

52. See 4 C. L. 1283.

53. Under the express provisions of Code Pub. Gen. Laws, art. 26, § 44, and art. 75, § 113. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

54. In re Gassenheimer, 24 App. D. C. 312.

55. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

56. Order made under Laws 1902, c. 580, p. 1490, § 3, which was expressly repealed by Laws 1904, pp. 1429, 1430, c. 598, §§ 1, 4.

an action to recover the possession of specific personal property;[60] its object being to recover possession, the issue is which of the parties is entitled to the possession, and the action will lie upon proof of unlawful detention, though the taking be not wrongful.[61] Where the wrongful withholding of possession originated in a disturbance of possession, either replevin, or trespass,[62] or trover,[63] or assumpsit, may lie,[64] but when one remedy has been pursued to a judgment, the others are barred.[65]

§ 2. *Right of action and defenses.*[66]—Replevin, being an action to recover the possession of specific personal property, can be maintained only when the plaintiff has an immediate right to the possession,[67] and if plaintiff's right to the possession has terminated before the commencement of the action, the suit will not lie.[68] An action must be brought while the defendant is in possession of the property, and cannot be maintained if he has disposed of it before the commencement of the suit,[69] unless the disposal was wrongful.[70] A surety in a bond given to release an attachment of goods, by virtue of the suretyship, does not get any property right in the goods such as to enable him to maintain replevin against a vendee of his principal.[71] Where defendant took the property from the possession of the plaintiff, such possession will sustain an action of replevin unless defendant can prove a superior right of possession.[72] Where chattels of one have been seized and sold under execution issued against another, the owner may maintain an action of replevin against the person in possession,[73] and such action will lie against the sheriff or officer if he sells after notice of the plaintiff's interest, but is still in possession under his writ,[74] and where the officer justifies under a writ issued against another on the ground that such party had fraudulently conveyed the property to the plaintiff to defeat his creditors, he must show that the relation of debtor and creditor exists

Volkommer v. Columbia Paper Bag Co., 105 App. Div. 57, 93 N. Y. S. 771.

57. Burns' Ann. St. 1901, § 7337j. Standard Pottery Co. v. Moudy, 164 Ind. 656, 74 N. E. 242.

58. Standard Pottery Co. v. Moudy, 164 Ind. 656, 74 N. E. 242.

59. See 4 C. L. 1284.

60. King v. Morris [N. J. Law] 62 A. 1006.

61. Miller v. Hackbarth [Wis.] 105 N. W. 311.

62. Palmer v. People, 111 Ill. App. 381.

63. Harris v. Nelson, 113 Ill. App. 487.

64. Fisher v. Brown, 111 Ill. App. 486.

65. See Former Adjudication, 5 C. L. 1502; Election and Waiver, 5 C. L. 1078. Fisher v. Brown, 111 Ill. App. 486; Palmer v. People, 111 Ill. App. 381; Harris v. Nelson, 113 Ill. App. 487.

66. See 4 C. L. 1285.

67. Where a bailee sells the property which is the subject of the bailment, the bailment is ended, and the bailor has such a right to possession as will support an action of replevin to recover the property. United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056. Where a sale of property has been induced by fraud, the seller is not entitled to possession until the sale has been rescinded. McGuire v. Bradley, 118 Ill. App. 59. And see Baker v. McDonald [Neb.] 104 N. W. 923. The action will lie upon proof of unlawful detention, although unlawful taking and detention are both alleged. Miller v. Hackbarth [Wis.] 105 N. W. 311. Where property has been delivered unconditionally by the seller to the purchaser, and he has transferred his legal title to another, a receiver of the original seller can not maintain an action of replevin on the theory that the conditions of the sale have not been complied with. Gilroy v. Everson, Hickok Co., 103 App. Div. 574, 93 N. Y. S. 132. One who holds property as security for a loan can maintain an action of replevin against one who has no right of possession. Equitable Trust Co. v. Burley, 110 Ill. App. 538.

68. Casto v. Murray [Or.] 81 P. 883.

69. Longerbeam v. Huston [S. D.] 105 N. W. 743.

70. Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 N. Y. S. 997.

71. Schultz v. Grimwood [R. I.] 60 A. 1065.

72. Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823. One rightfully in possession of property under a transaction untainted by fraud must prevail over a replevin plaintiff who can show no superior title. Koehler v. King, 119 Ill. App. 6. Where property is taken from the possession of a stranger under a writ of attachment, when sued in replevin by such person, the officer must not only prove that the writ is valid on its face, but that the attachment proceedings are regular, and until he does this he can not question the plaintiff's right to possession. Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823.

73, 74. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

between the attaching creditor and such third party.[75] If property be seized under a writ of attachment bond upon an insufficient petition, it may be recovered in replevin.[76] The appointment of an administrator gives a title which dates back to the death of the intestate and may be pleaded in defense to an action of replevin commenced before appointment if the administrator came into possession lawfully, but not otherwise.[77]

When the defendant has lawfully come into the possession of the property sought to be replevied, a demand is essential to the maintenance of the action,[78] unless expressly waived;[79] but the Iowa statute which requires an officer to levy upon any personal property in the possession of the defendant, unless he has received notice in writing from some other person that such property belongs to him, does not require the owner to give notice before bringing replevin.[80] Where the statute requires that a notice setting forth certain facts must be given before an action of replevin will lie against an officer who has seized the property under attachment, the notice given must conform to the statutory requirement.[81] A notice served upon the husband, where by statute he is made the manager of the personal community property, is sufficient in an action of replevin against the husband and wife to recover community property.[82]

The action of replevin may be barred by the statute of limitations if not brought within the time prescribed,[83] but where the property is wrongfully taken from the possession of the owner and removed from the state or concealed, the statute does not commence to run until the property is brought back into the vicinity or is openly held so that the owner may reasonably know of its whereabouts.[84]

§ 3. *Jurisdiction and venue.*[85]—In those states where the statute provides that all actions except certain specific ones must be brought in the county where the defendants or one of them reside, an action of replevin in the absence of other provisions for its venue cannot be brought in the county where the goods are located, unless that is the county where defendant resides.[86] The jurisdiction of inferior courts, being courts of limited jurisdiction, in replevin actions is dependent upon the value of the property sought to be recovered.[87]

75. Dunn v. Overton [Okl.] 83 P. 715.

76. Upp v. Neuhring, 127 Iowa, 713, 104 N. W. 350.

77. Casto v. Murray [Or.] 81 P. 883.

78. Where the real owner of property permits it to remain in the possession of another, thus making him the ostensible owner, and the property is sold to a third party who has no notice of owner's interest, a demand must be made before an action of replevin will lie. Rosenbaum v. King, 114 Ill. App. 648.

79. Under a conditional sale contract which gives the seller the right to take possession of the property upon condition broken without notice, no demand is necessary. Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 P. 813. Where an officer levies execution upon property in the possession of the defendant in the execution, and another party claims the goods, the party claiming must make demand on the officer before bringing replevin, unless the officer had notice at the time of taking. Greenberg v. Stevens, 114 Ill. App. 483.

80. Code, §§ 3991, 3906. Upp v. Neuhring, 127 Iowa, 713, 104 N. W. 350.

81. Where the statute requires the notice to set forth the nature of claimant's interest in the property, how and from whom acquired, and the consideration paid, a notice which fails to disclose the consideration is insufficient. Shaw v. Tyrrell [Iowa] 105 N. W. 1006. Where a verified notice is required, an unverified notice is insufficient. Id.

82. Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 P. 813.

83. Where the property has been in the possession of the defendant and his vendor under a claim of ownership in good faith for nine years, the action of replevin is barred. Leavitt v. Shook [Or.] 83 P. 391.

84. See 6 C. L. 471. Gatlin v. Vaut [Ind. T.] 91 S. W. 38.

85. See 4 C. L. 1288.

86. Under § 314, Burns' Ann. St. 1901, the action must be brought in the county where the defendants or one of them resides. Fry v. Shafor, 164 Ind. 699, 74 N. E. 503.

87. Justice of peace in Illinois has jurisdiction of all replevin actions where the property sought to be replevied does not exceed $200. Rice v. Travis, 117 Ill. App. 644.

§ 4. *The affidavit.*[88]—An insufficient affidavit may be amended and does not deprive the court of its jurisdiction of the case.[89] An affidavit for a writ of replevin which states, as required by the statutes of many states, that the property has "not been taken for a tax assessment, or fine," is not conclusive of the facts so stated, and they may be set up as a defense.[90] Those statutes which require an affidavit for a writ of replevin to state that the property was not taken for any tax, assessment, or fine, do not preclude a person from maintaining an action of replevin against the purchaser at a sale under a tax warrant directed against another person than the owner and wrongfully levied on the property in question.[91]

§ 5. *Plaintiff's bond.*[92]—The purpose of the replevin bond is to provide security to the defendant, if he prevails, for the return of the property, and to indemnify him for such damages and costs as he may be entitled to recover.[93] In those states where a bond is required by statute, the property can not be lawfully delivered to the plaintiff until such bond is executed,[94] and such delivery renders the original taking unlawful and the officer liable in trespass or trover, and furnishes evidence of trover sufficient to sustain the action without proof of a previous demand.[95] The acceptance and approval of plaintiff's bond must be done in the manner prescribed by statute.[96] An officer in taking a replevin bond is required to use the best means of forming a correct estimate of the value of the property, and the law requiring him to do this clothes him with all reasonable and necessary power to do so, and if he neglects this duty,[97] or takes a bond with insufficient sureties, he is liable to the obligee for any damage which may result from such negligence,[98] but such right of action does not accrue until a breach of the conditions of the bond has occurred.[99]

A bond duly executed and delivered to the replevying officer is valid and binding upon the principal and sureties though not approved,[1] and where an officer refuses to execute a replevin writ for insufficiency of the bond, and a new bond is thereupon executed and delivered, by virtue of which the property is taken, such bond is valid though no order was issued by the court for a new bond.[2] Where an officer's return in a replevin suit cites that a bond has been taken without further describing it, a prima facie presumption arises that a proper statutory bond is meant.[3] The assignment of a judgment in replevin operates as an assignment of the bond, and the assignee being the real party in interest can maintain an action upon it.[4] Sureties on a replevin bond have such an interest as will enable them after death of principal to maintain an action to set aside an erroneous judgment or one im-

88. See 4 C. L. 1288.

89. Where an affidavit is defective in that it states that the goods were not taken for any tax, etc., against the "affiant," instead of "plaintiffs," there being more than one, may be amended and the defect does not deprive the court of its jurisdiction. Fisher v. Brown, 111 Ill. App. 486.

90, 91. Rev. St. 1898, § 2718. Wisconsin Oak Lumber Co. v. Laursen [Wis.] 105 N. W. 906.

92. See 4 C. L. 1288.

93. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

94. Under Rev. Laws, c. 190, § 9, an officer may seize and remove the property replevied, but he cannot lawfully deliver it to the plaintiff until the customary bond is executed. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

95. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

96. Where the statute provides that the approval of the bond may be referred to a certain magistrate and a notice given to the defendant of the time and place of approval and the names of the proposed sureties, such notice must be given or the approval is a nullity. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

97. Officer has no right to rely on the statement of value in the complaint and writ. Pickett v. People, 114 Ill. App. 188.

98, 99, 1. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

2. Stafford v. Baker [Mich.] 12 Det. Leg. N. 393, 104 N. W. 321.

3. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

4. Odell v. Petty [S. D.] 104 N. W. 249.

peachable for fraud or irregularity not apparent on the face of the record,[5] but where the sureties have or have had an adequate remedy at law to correct or set aside an erroneous judgment, a court of equity will not enjoin the plaintiff in an action upon the replevin bond from prosecuting the suit.[6]

§ 6. *The writ and its execution.*[7]

§ 7. *Custody and delivery of property; forthcoming bond.*[8]—Under statutes authorizing defendant to retain possession of the property upon executing a forthcoming bond, conditioned that he will deliver the property to plaintiff if plaintiff prevails, a tender of the property by the sureties relieves them from liability,[9] and where plaintiff elects to take a money judgment in lieu of the return of the property, he waives the condition in the forthcoming bond for the return of the property and releases the sureties from that condition.[10] Where plaintiff prevails, the measure of damages in a suit on the forthcoming bond is the value of the property at the time and place where taken under the writ,[11] but no suit can be maintained on a forthcoming bond until after final judgment.[12]

§ 8. *The pleadings and parties to the action.*[13]—Replevin, being an action to recover possession of personal property, the complaint must allege ownership or right to the possession[14] at the time of the commencement of the action,[15] but where plaintiff claims absolute title to the property sued for, it is sufficient to allege title generally, and the right to immediate possession, and the answer may be equally general in its denials;[16] but where plaintiff claims possession under a special ownership, he must set forth facts upon which such special ownership is based, and the defendant, in order to put in issue the allegations of such special ownership, must deny specifically the allegation of facts upon which the plaintiff claims ownership.[17] In an action of replevin it is not permissible to declare in trover.[18] Where the statute requires the giving of a notice setting out plaintiff's interest in the

5. Where the principal dies before the action is prosecuted, and the court renders a default judgment, not knowing of his death, the sureties may bring action to set aside the judgment. McBrayer v. Jordan [Neb.] 103 N. W. 50.

6. McBrayer v. Jordan [Neb.] 103 N. W. 50.

7. See 4 C. L. 1288.

8. See 2 C. L. 1519.

9, 10. Gerlaugh v. Ryan, 127 Iowa 226, 103 N. W. 128.

11. Defendant had cut trees and enhanced their value by hauling to point of market where it was levied upon. Defendant not entitled to enhanced value. Little v. Cornett [Ky.] 91 S. W. 272.

12. Ind. T. Ann. St. 1899, § 3552. Where suit has terminated in favor of defendant, and on appeal is reversed and remanded for a new trial, the sureties are not liable for the costs of the appeal if the action is dismissed by the plaintiff on remand to trial court. Spencer v. Davidson [Ind. T.] 82 S. W. 731.

13. See 4 C. L. 1289.

14. A complaint alleging that defendant at various times prior to and within a year from a certain date wrongfully took certain described property from plaintiff's possession, and "that on March 10, 1902 plaintiff was, ever since has been, and now is the owner of (description of property)," that on March 10, 1902, he made demand of defendant, and that defendant still unlawfully retains property, is sufficient. McGregor v. Lang, 32 Mont. 568, 81 P. 343.

15. A complaint which bases plaintiff's right to possession upon a contract which covered a definite period of time within which the action was commenced, and which alleges that prior to the expiration of the period defendant unlawfully took possession of the property, is a sufficient allegation of right to possession. Casto v. Murray [Or.] 81 P. 883. A complaint which alleges that plaintiff was the owner on March 21, 1903, and that on that day it was wrongfully taken from her possession, which complaint was filed on April 16, 1903, is defective in that it does not allege that plaintiff was entitled to possession at the time of the commencement of the action, and this is not cured by the allegation that defendant still unlawfully withholds and detains it. Chan v. Slater [Mont.] 82 P. 657.

16. Perry County Bank v. Rankin, 73 Ark. 589, 86 S. W. 279, 84 S. W. 725.

17. Where plaintiff alleged special ownership of property under a mortgage which he alleged was assigned to him for a valuable consideration, and defendant denied generally the ownership of the plaintiff and alleged payment of the note, he did not put in issue the assignment. Perry County Bank v. Rankin, 73 Ark. 589, 86 S. W. 279. A complaint alleging title will not sustain proof of a special property. Baker v. McDonald [Neb.] 104 N. W. 923.

18. King v. Morris [N. J. Law] 62 A. 1006.

property, before an action of replevin can be maintained against an officer who has levied an attachment or execution upon it, the giving of the prescribed notice must be alleged.[19] Where a trustee under a trust deed sued out replevin by an affidavit in his own name without adding the word "trustee," this does not prevent him from showing that he held as trustee, and an amendment, if necessary, was properly allowed.[20] A seizure by statutory distress warrant against one in possession of property must in order to be a defense as against the true owner be pleaded as in all respects conformable to the statute,[21] and when not well pleaded the defendant cannot question the sufficiency of a notice given by plaintiff to protect his property against distraint of the possessor's goods.[22] Under a statute which provides that a warehouseman shall not be made defendant in a replevin suit, where he shall have made known to the claimant the name and address of the depositor, he must plead his exemption by way of answer.[23]

A general denial to a complaint in replevin which counts in the detinet puts in issue not only the wrongful detention but the plaintiff's title.[24] Where, after personal service in an action of replevin, a default judgment is entered, on a petition to vacate the judgment on the ground that the complaint was insufficient, the courts will not exact the same strict particularity of pleading as would be required upon a demurrer.[25] A complaint in replevin which bases plaintiff's right upon a certain contract, averments which explain the means whereby plaintiff came into possession and which led up to the making of the contract are matters of inducement and immaterial.[26] Where plaintiff demands judgment for the possession of the "said watch, or for the sum of $75 in case possession thereof cannot be had, and for $75 damages," the allegation of damages will be construed to mean such damages as plaintiff is entitled to recover for the detention of the property.[27] A denial of plaintiff's ownership in the language of the complaint has been held to be sufficient.[28]

A mortgagor and a mortgagee may join as parties plaintiff in an action to recover the property mortgaged, though the possessory right is in only the mortgagor.[29] Where the property of one has been seized and sold under execution against another, the officer having been given notice by the owner of his rights before the sale, there is no misjoinder in making both the sheriff and the execution purchaser parties defendant in an action to recover the property.[30] It is not necessary to join as defendants those who claim an interest or right in the property but do not have possession, their interposition being provided for by statute.[31] In an action of replevin against a state constable to recover mules and wagon which had been seized because hauling contraband liquor, the state is not a necessary party.[32] Where in equitable replevin the bill is retained for the assessment of damages, the property having been shipped out of the state, and the defendant consents to the making of others parties de-

19. Shaw v. Tyrrell [Iowa] 105 N. W. 1006.

20. McCarty v. Key [Miss.] 39 So. 780.

21, 22. Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

23. Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580.

24. Title may be shown in a third party. Stearns v. Early, 96 N. Y. S. 837.

25. Where the petition states the facts which entitle the plaintiff to the possession, but does not allege that he is the owner or entitled to the immediate possession, it will be sustained upon a motion to set aside a default judgment where the defendant had personal service. Thompson v. Caddo County Bank [Okl.] 82 P. 927.

26. Casto v. Murray [Or.] 81 P. 883.

27. Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 N. Y. S. 997.

28. Mills Novelty Co. v. Dunbar [Idaho] 83 P. 932.

29. Longerbeam v. Huston [S. D.] 105 N. W. 743.

30. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

31. Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580.

32. Jaro v. Holstein [S. C.] 52 S. E. 870.

fendant, it is too late after the evidence is in to object that they can not be held jointly.[33]

§ 9. *Evidence.*[33a]—The evidence must be sufficient to identify the property which is the subject matter of the suit.[34] Anything which shows a title carrying immediate possession is admissible for plaintiff.[35] On an issue whether title to bailed property has passed to the bailee, a letter from the bailor to the bailee referring to it as "your" property, is admissible.[36] In an action of replevin to recover goods taken by a sheriff as the property of a third person, where plaintiff claims under a bill of sale from the person from whom the property was taken, and introduces a check in evidence given in payment, dated before the judgment against the third person but not paid until after the levy was made, evidence on the part of the defendant, who claimed that the sale was fraudulent, as to how long it takes a check deposited as this one was to go through the clearing house is admissible.[37]

§ 10. *Trial.*[38]—Under a statute which provides that in case of transfer of interest the action may be continued by the original parties, unless the court orders the transferee substituted, it is error to dismiss the complaint on proof of appointment of a receiver in another action since the commencement of the action.[39] Where the agent in actual possession of property is made defendant in a replevin suit, and the action is properly brought in the county where he holds the possession, a summons will issue and service may be had in another county upon one who as principal claims the possession as against plaintiff.[40] Where three of four defendants answer and while disclaiming any title or interest in the property themselves allege that they hold possession for the fourth defendant whom they allege to be the true owner, the answer inures to the benefit of the fourth and a default judgment cannot be rendered against him.[41] In a replevin suit to recover property which has been taken from plaintiff's possession, it is only incumbent upon plaintiff to establish his case in chief to prove ownership, the taking and detention of the property by defendant against his consent, and any justification must be established by the defendant.[42] Where in replevin defendant is in possession of the property under a claim of right, the burden is upon plaintiff to establish his right to possession,[43] but where a prima facie right to the property under a trust deed is made out by the plaintiff, it is not error to throw the burden on the defendant to show that it is not embraced in the deed.[44] Where issue is joined on a plea of non detinet in an action of replevin, the burden is on the plaintiff to prove his right of possession.[45]

33. United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056.

33a. See 4 C. L. 1290.

34. St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259.

Evidence sufficient: Where the evidence shows that most of the timber was cut on lands other than defendant's, that plaintiff incurred the expense of cutting, hauling, and sawing, and placed it on the land of defendant which was deeded to plaintiff's wife, the court properly adjudged the title to be in plaintiff. Graham v. Strawsburg [Ky.] 91 S. W. 737.

35. Illustration: Title of seller of beer to kegs is provable against buyer's assignee by showing invoice of sale making such reservation. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43.

36. Cox v. Burdett, 23 Pa. Super. Ct. 346.

37. Runsdorf v. Coriell [N. J. Law] 63 A. 24.

38. See 4 C. L. 1290.

39. Stearns v. Early, 96 N. Y. S. 837.

40. Central Nat. Bank v. Brooke [Kan.] 81 P. 498.

41. Carpenter v. Ingram [Ark.] 91 S. W. 24.

42. Osmers v. Furey, 32 Mont. 581, 81 P. 345.

43. Defendant was in possession of certain logs which he cut under a claim of right. Plaintiff claimed under a bill of sale from defendant but on trial failed to prove the genuineness of the bill of sale. Judgment rightly entered for defendant without further evidence. Metropolitan Lumber Co. v. McColeman [Mich.] 12 Det. Leg. N. 172, 103 N. W. 809. When the plaintiff's right to possession is based upon a title obtained under a mortgage he must show that the mortgagor had title to the property. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

44. Where plaintiff claimed the property

In an action in replevin where defendant claims title under a sale by plaintiff, and plaintiff claims that such sale was conditional, the burden is on plaintiff to prove such conditional sale, and the question is one for the jury.[46] Also, the question whether the property belonged to plaintiff and defendant as partners or to plaintiff as an individual is one for the jury,[47] as is the question whether a bailment has been cancelled by agreement and the title vested in the bailee.[48] The fact whether a sale contract has been disaffirmed, thus vesting the title to the goods in the seller, is one for the jury.[49]

Verdict.[50]—A general verdict in replevin implies a finding on every material issue involved in the action.[51] A verdict which does not conform to the instruction of the court is erroneous and will be set aside.[52] A verdict for defendant should be a general finding for the defendant and for damages for the detention on which a proper judgment pro retorno habendo and for damages will issue.[53] Under a statute which provides that in a replevin suit where the jury finds for the party not in possession of the chattels replevied, the jury must fix the value of the property at the time of trial, the verdict must conform to the requirements of the statute,[54] and must be based upon evidence of its value at such time.[55]

§ 11. *Judgment and award of damages.*[56]—Where the court directs the jury to find who was entitled to the possession of the property, and, if they found plaintiff to be entitled to it, to find its value, a verdict for plaintiff for a specific sum of money is sufficient to sustain an alternative judgment.[57] A judgment which gives the possession of the property to the plaintiff and also awards damages for its value is irregular.[58] A judgment which provides that plaintiff shall return the property to defendant or in lieu thereof pay to defendant a specific sum of money gives the plaintiff an option between returning the property or paying the money and having paid the defendant, the defendant cannot subsequently maintain replevin.[59] The property replevied must be sufficiently described in the judgment as to be identi-

under a trust deed and it was prima facie shown that it was embraced in the trust deed, not error to require a laborer, who claims under a laborer's lien, to prove that it was not embraced in the deed. McCarty v. Key [Miss.] 39 So. 780.

45. Where plaintiff relies for title to the property on a mortgage executed by a third person, and no evidence is introduced to show that the mortgagor had any title or that defendant's possession is in any way connected with the mortgagor, plaintiff cannot recover. Beal v. McKee [Ala.] 39 So. 664.

46. Schenck v. Griffith [Ark.] 86 S. W. 850.

47. Calderwood v. Robertson, 112 Mo. App. 103, 86 S. W. 879.

48. "Lease" of mill to purchaser and alleged breach, followed by transfer of title by consent. Cox v. Burdett, 23 Pa. Super. Ct. 346.

49. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 83 P. 998.

50. See 4 C. L. 1291.

51. Not necessary to expressly find that plaintiff was the owner. McGregor v. Lang, 32 Mont. 568, 81 P. 343.

52. Where the court instructs the jury that plaintiff cannot recover the value of a horse which had died in defendant's possession unless defendant's negligence was the cause of its death, a verdict which awarded plaintiff damages for the death of the horse but found that the defendant was guilty of no negligence is erroneous. Burke v. Graham, 106 App. Div. 108, 94 N. Y. S. 559.

53. Whitehill v. Schwartz, 27 Pa. Super. Ct. 526.

54. A verdict "we find for the plaintiff in full" is irregular and must be set aside under Municipal Court Act, Laws 1902, p. 1529, § 120. O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760.

55. Where such value is based upon plaintiff's affidavit filed 27 months before the trial, it is erroneous. Gilroy v. Everson, Hickok Co., 103 App. Div. 574, 93 N. Y. S. 132.

56. See 4 C. L. 1291, 1292.

The measure of damages is treated in the topic Damages, 5 C. L. 904.

57. Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 N. Y. S. 997.

58. Where the judgment is that the plaintiff "retain the property replevied by virtue of the writ of replevin issued," and also awards damages for the value of the property, and the record shows that no property was replevied under the writ, the first part of the judgment is a nullity, and the judgment is valid. Greenberg v. Stevens, 114 Ill. App. 483.

59. Walters v. Walters, 116 Ill. App. 24.

fied.[60] The amount of damages that plaintiff can claim in an action of replevin where possession cannot be had is the market value of the property at the time it was taken or at the time the wrongful detention began,[61] and in determining the market value of property in replevin it is competent to take into consideration the cost price, but such price is simply one of the facts tending to show the market value and is not conclusive,[62] but where possession cannot be had, damages for the wrongful detention may be had, which is the legal rate of interest on the market value where the property has no value except for consumption, but where the property has a usable value which is in excess of the legal rate of interest on its value, the measure of damages is the value of such use during the time detained.[63] In replevin the defendant on recovering damages is entitled to recover the value of the use of the property during period of detention under writ without deduction for its increase in value.[64] The person maliciously procuring replevin to be sued out in order to extort money may be liable for injury to defendant's feelings as well as for taking the property,[65] but not for expense of caring for goods after judgment in the action awarded them to the owner.[66] Defendant may recover exemplary damages from plaintiff where there are circumstances of aggravation,[67] but punitive damages cannot be recovered in South Carolina in an action of claim and delivery.[68]

§ 12. *Costs.*[69]

§ 13. *Review.*[70]—Where an issue as to damages is separable from the other issues of the case, a new trial of that issue alone will be ordered where it is incorrect.[71]

§ 14. *Liability of plaintiff or his bond, and of receiptors, etc.*[72]—In an action of debt on a replevin bond the question of damages is for the jury,[73] and the statement contained in the affidavit for replevin as to the value of the property is prima facie evidence of its value.[74] Where the property has no market value, proof may be made of such facts as tend to show the value or to aid the jury in estimating it,[75] but where the suit was prosecuted to judgment, the amount of the alternative judgment in case the goods be not returned is conclusive measure of damages in a subsequent suit upon plaintiff's bond.[76] In a suit upon a replevin bond the judgment in the replevin action is conclusive upon the question whether or not property was delivered under it.[77]

A plaintiff in replevin action is liable for goods of a third person taken under the writ if he disposes of them after learning of such person's interest.[78] The fact that the principal in a recognizance bond is cited as attorney for the plaintiff in

60. A judgment describing the property as "Twenty-six steers branded 11-11 on the left side, and fish or dove-tail ear-marks, * * * * ten heifers, branded 11-11 on the left side, with fish or dove-tail earmarks," sufficiently describes the property. McGregor v. Lang, 32 Mont. 568, 81 P. 343.

61, 62. Osmers v. Furey, 32 Mont. 581, 81 P. 345.

63. Smith v. Stevens, 33 Colo. 427, 81 P. 35.

64. McGrath v. Wilder, 77 Vt. 431, 60 A. 801.

65, 66. Harris v. Thomas [Mich.] 12 Det Leg. N. 239, 103 N. W. 863.

67. Cox v. Burdett, 23 Pa. Super. Ct. 346.

68. Code Civ. Proc. §§ 283 and 299. Tittle v. Kennedy, 71 S. C. 1, 50 S. E. 544.

69, 70. See 4 C. L. 1293.

71. Osmers v. Furey, 32 Mont. 581, 81 P. 345.

72. See 4 C. L. 1293.

The measure of damages recoverable of defendant is treated in Damages, 5 C. L. 904, and such topics as Conversion as Tort, 5 C. L. 753, etc.

73, 74. Farson v. Gilbert, 114 Ill. App. 17.

75. As the cost of manufacturing, transporting it to market, etc. Farson v. Gilbert, 114 Ill. App. 17.

76. Martin v. Hertz, 118 Ill. App. 297.

77. In a suit upon a replevin bond the defendant set up the defense that the property was never delivered to his principal, and, therefore, plaintiff has not been damaged and can not maintain a suit on the bond. Judgment in the replevin action conclusive upon this point. Stafford v. Baker [Mich.] 12 Det. Leg. N. 393, 104 N. W. 321.

78. Barley v. Beegle, 29 Pa. Super. Ct. 635.

the replevin suit does not make the latter the principal nor relieve the attorney from his liability to indemnify the surety.[79] In an action upon a replevin bond the burden of proof is upon the defendant to prove his title to the goods.[80] The failure to prosecute the action of replevin is a breach of the bond and gives the defendant a right of action to recover at least nominal damages.[81] In an action on a replevin bond by one who had only a lien upon the property, the defense that the lien has been satisfied, and hence the defendant released on his bond, must be specifically pleaded.[82] The sureties on a replevin bond when sued may set up as an absolute and complete defense that the court rendering judgment had no jurisdiction, or that the judgment was obtained by fraud.[83] A statute which provides for an undertaking to answer for "the payment to the defendant of any sum which the judgment awards to him against the plaintiff" has reference to damages relating to the right of possession of the chattel.[84] Where a bond is given to the sheriff to indemnify from claims which may be made against him by separate parties, he may bring one action on the bond for the benefit of all.[85]

In an action on a replevin bond by one claiming title by attachment, where all the evidence is directed to the title at the time of the attachment, an instruction that the "burden is upon defendant to prove title" is not erroneous because it does not state that he must prove title at the time of attachment.[86]

REPLICATION; REPORTED QUESTIONS; REPORTS; REPRESENTATIONS; RES ADJUDICATA; RESCISSION; RESCUE; RES GESTAE; RESIDENCE; RESPONDENTIA; RESTITUTION, see latest topical index.

RESTORING INSTRUMENTS AND RECORDS.

§ 1. *Evidence and proof of loss and of contents.*[87]—One who relies upon a lost deed to sustain his title must establish its execution, loss, and material parts by clear, satisfactory, and convincing evidence.[88] In an action on a lost note and mortgage the record of a mortgage collateral thereto, admitting the execution of the note to plaintiff's intestate, is admissible, without other evidence of decedent's

79. Hayes v. Bronson [Conn.] 61 A. 549.
80. Fabian v. Traeger, 117 Ill. App. 176.
81. Parker v. Young, 188 Mass. 600, 75 N. E. 98.
82. Where a mortgagee defendant in a replevin suit prevails and brings an action on the replevin bond, the defense that his lien has been satisfied can not be interposed under the general issue. Stafford v. Baker [Mich.] 12 Det. Leg. N. 393, 104 Mo. 321.
83. McBrayer v. Jordan [Neb.] 103 N. W. 50.
84. Does not include damages arising out of counterclaims. Dickson v. Bickershoff, 48 Misc. 353, 95 N. Y. S. 585.
85. Koehler v. King, 119 Ill. App. 6.
86. Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131.
87. See 4 C. L. 1294.
88. The findings of the court that the deed was executed, but lost before record and that there were no subsequent purchasers or mortgagees of the land in good faith, were sustained by the evidence. Lloyd v. Simons [Minn.] 105 N. W. 902. The record of a deed which is void because of the improper acknowledgment of the instrument is nevertheless admissible to prove the existence of the deed after its loss (Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188), and a curative deed subsequently executed and properly executed is also admissible. (Id.). To prove the execution of a lost deed, evidence that grantee bought and paid grantor for the land; that the deed which had been destroyed by fire was signed and acknowledged by grantor and wife; that the wife was examined separate and apart from her husband; that the deed was explained to her and she signed it willingly, was admissible (Garrett v. Spradling [Tex. Civ. App.] 88 S. W. 293), and

ownership at the time of his death.[89] In such action it will not be presumed that the note was payable in a bank of the state, nor that the payee intentionally parted with title or possession.[90] An affidavit that the note sued on is lost or destroyed, but plaintiff does not know which, but believes it is one or the other, is a sufficient compliance with the statute relative to actions on lost instruments.[91] Where a will was duly probated in 1854 and the records of the probate court were destroyed by fire in 1889, it was presumed that the clerk of the court duly recorded the will and probate thereof as required by the law in force at that time.[92]

§ 2. *Proceedings in equity or otherwise to restore lost papers or instruments.*[93]—Originally there was no relief at common law or in equity to decree the re-execution of a deed except as an ancillary remedy to some other relief, as ejectment or to enjoin a recovery and the like,[94] but relief has been provided by statutory enactments.[95] A bill asking to have a lost or destroyed deed restored, and for a record of the decree for complainant's protection, presents a case within a well recognized head of equitable jurisprudence.[96] Where a decree directed the payment of a lost check upon the tendering to defendants of an indemnity bond, the tender of a bond to one of them was not a compliance with the decree.[97]

§ 3. *Procedure in equity or under the burnt records act to restore records.*[98]

RETRAXIT; RETURNABLE PACKAGE LAWS; RETURNS; REVENUE LAWS; REVERSIONS; REVIEW; REVIVAL OF JUDGMENTS; REVIVOR OF SUITS; REVOCATION, see latest topical index.

REWARDS.

§ 1. *Nature and definition.*[99]

§ 2. *The offer.*[1]—An offer by publication of a reward for the discovery of parties concerned in the commission of an offense becomes a valid contract between

the testimony of a lawyer that plaintiff consulted him about the title of a tract of land; that deed was given him for examination, which may have been the deed in question, and that he considered the acknowledgment proper, was admissible, and its weight as evidence was for the jury (Id.). The report of a commissioner, appointed under 2 Acts 1881-82, p. 143, c. 821, to supply burned records as to a certain deed was not admissible to show the interest conveyed to the grantee where such report had not been confirmed by the county court or the deed ordered recorded. Alley v. Alley [Ky.] 91 S. W. 291. To establish title under a lost deed, whose existence has been proved by circumstantial evidence, it is sufficient to show possession of part of the land conveyed by it and asserted ownership of the whole. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188.

89. Embree v. Emmerson [Ind. App.] 74 N. E. 44. Evidence held to justify a finding that the note and mortgage were lost and that no part of the indebtedness had been paid. Id.

90. Evidence fairly warranted the conclusion that the note was lost and out of circulation. Embree v. Emmerson [Ind. App.] 74 N. E. 1110.

91. Rev. St. 1899, § 3854. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128. The note being described in the statement to which the affidavit was attached and to which it referred, it was sufficient. Id.

92. Laws 1848, p. 236, c. 157, § 3 (Pasch. Dig., art. 1262). Hymer v. Holyfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 201, 87 S. W. 722.

93. See 4 C. L. 1295.

94. Jones v. Ballou [N. C.] 52 S. E. 254.

95. Chapter 6, p. 37, Pub. Laws 1893, gives the right to bring an action to prevent a cloud upon title, and plaintiff is entitled to this additional relief besides the decree for setting up and recording the deed, whether such relief is prayed for or not (Clark's Code [3d Ed.] § 233 [3]), the remedy before the clerk in case of a lost deed, given by Code § 56, being an additional and not an exclusive remedy. Jones v. Ballou [N. C.] 52 S. E. 254.

96. Comp. Laws 1897, § 448, conferring jurisdiction on chancery courts in proceedings to quiet title does not restrict their jurisdiction in matters before cognizable by them. Blackford v. Olmstead [Mich.] 12 Det. Leg. N. 286, 104 N. W. 47.

97. Moore v. Durnan [N. J. Eq.] 62 A. 327.

98. See 4 C. L. 1295.

99. See 2 C. L. 1521.

the offerers and the acceptors by performance upon the discovery contemplated,[2] but it does not become a "contract in writing" in the statutory sense.[3] Where a statute authorized the county court to offer a reward for apprehension and arrest, but prohibited payment until final conviction, and the court offered a reward for "apprehension and conviction," the statute and offer construed together were an offer to pay a reward after conviction for the apprehension of the felon.[4] The statute of Mississippi, providing for the payment of a reward to any person who arrests any one who has killed another and is fleeing, contemplates its payment only upon the allowance by the circuit court and by the board of supervisors, and the circuit court cannot order it paid without allowance by the board.[5] A resolution of a county board of supervisors which offered a reward for information or evidence to convict persons guilty of crimes committed before its adoption, but offered no reward for the conviction of persons committing offenses afterward, was invalid and not binding.[6]

§ 3. *Earning reward.*[7]—To entitle one to recover a reward he must show a rendition of the services required in the offer, after knowledge of, and with a view of obtaining, the reward,[8] and one who apprehends a felon before the offer of a reward, and delivers him to the proper authorities without any knowledge of or reliance on a reward, is not entitled to it.[9] Where, under statutory authority, a reward was offered for the "apprehension and conviction" of a felon, a claimant who made the apprehension on his own initiative, at his own expense and hazard, put the party in the hands of the proper officer and gave evidence at the trial from which conviction resulted,[10] was entitled to the reward. Where the reward offered was for the discovery of the persons who committed a certain crime, the right to the reward accrued at the time of their actual discovery without regard to their conviction.[11] A constable is not entitled to the reward provided for by the act for the apprehension of horse thieves,[12] but a policeman of a municipality in one state is not precluded from claiming a reward offered by authorities of another state for the apprehension of a fugitive from justice.[13]

RIGHT OF PRIVACY; RIGHT OF PROPERTY, see latest topical index.

RIOT.[14]

The word "riot" as used in statutes making a municipality liable for damages to property is construed to mean a riot as defined at common law and not as defined by the Penal Code.[15] Under such statutes a municipality is liable only for the damages which might have been prevented by proper diligence.[16] An in-

1. See 4 C. L. 1309.
2. Cunningham v. Fiske [N. M.] 83 P. 789.
3. Within the meaning of Comp. Laws 1897, § 2915. Cunningham v. Fiske [N. M.] 83 P. 789.
4. Rev. St. 1899, § 2474. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949.
5. Code 1892, § 1387. Tate County v. Moore [Miss.] 39 So. 781.
6. People v. Brower, 97 N. Y. S. 349.
7. See 4 C. L. 1310.
8. Couch v. State [N. D.] 103 N. W. 942. He must establish his substantial compliance with all the conditions of the offer of reward. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949.
9. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949.
10. Rev. St. 1899, § 2474. The fact that he was paid witness fees did not preclude him from recovering the reward. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949.
11. Cunningham v. Fiske [N. M.] 83 P. 789.
12. He is a public officer and bound to execute criminal process. The act applies to persons under no special obligation to arrest the thief. Commonwealth v. Lane, 28 Pa. Super. Ct. 149.
13. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949.
14. See 4 C. L. 1310.
15. General Municipal Law, Laws 1892, p. 1740, c. 685, § 21. Adamson v. New York, 110 App. Div. 58, 96 N. Y. S. 907.
16. Where the police quelled all disturb-

dictment charging the offense of riot in the language of the statute is sufficient.[17] In a prosecution for the crime of riot, evidence which tends to show the conduct of the defendant,[18] and the resultant terror of the people,[19] is admissible. An acquittal on a charge of assault with intent to kill is a bar to a subsequent prosecution on a charge of riot based upon the same facts.[20]

RIPARIAN OWNERS.

Scope of title.—This topic includes matters relating to ownership and use of soil bordering on and under water, accretion and reliction, and rights incidental thereto. Matters relating to water, navigable or otherwise, are treated elsewhere.[21]

§ 1. *Persons who are riparian owners, and title to lands under water.*[22]—The ownership of the bed of tidal rivers is vested in the state so far as the tide ebbs and flows.[23] That a river is a tidal stream is a fact of which the court will take judicial notice.[24] At common law the title to soil under navigable water was in the crown and was held for the benefit of all the public for commerce, navigation, and fishery.[25] The shore owner at common law took to high water mark on navigable waters,[26] but above tide water he took to center of the stream.[27] While most states[28] have abandoned the common-law test of navigability, they still retain the common-law rules as to questions of boundary and ownership.[29] As between itself and riparian owners each state must decide for itself the ownership of the beds of navigable streams.[30] They widely diverge, however, in the solution of this question.[31] A grantor may separate flats from uplands and convey the one and retain

ances as soon as they were notified, and the city had no reason to anticipate such a riot there is no liability. Adamson v. New York 110 App. Div. 58, 96 N. Y. S. 907.

17. Penal Code 1895, § 354. Lock v. State, 122 Ga. 730, 50 S. E. 932.

18. Where the riot consisted of throwing stones, etc., against the house of the prosecutor, a sack of stones picked up about the house after the riot is admissible. Johnson v. State [Ga.] 52 S. E. 880.

19. That the wife of prosecutor fainted. Johnson v. State [Ga.] 52 S. E. 880.

20. Lock v. State, 122 Ga. 730, 50 S. E. 932.

21. See Waters and Water Supply, 4 C. L. 1824; Navigable Waters, 6 C. L. 742.

22. See 4 C. L. 1311.

23. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

24. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710; Mobile Docks Co. v. Mobile [Ala.] 40 So. 205.

25. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

26. Navigable waters at common law were those in which the tide ebbed and flowed. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

27. Streams above tide water were not navigable at common law. Id.

28, 29. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. In **Illinois** the common-law test of navigability will not apply, and waters which are navigable in fact are navigable in law. Id. The question of where fresh and salt water meet, or whether the water is impregnated with salt, is not considered in determining the fact of navigable waters, McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

30. Kinkead v. Turgeon [Neb.] 104 N. W. 1061.

31. In Kinkead v. Turgeon [Neb.] 104 N. W. 1063, Oldham, C., says: "It is plain that we stand at the parting of ways in regard to the decisions of the state courts of this country on the question of title to river beds of the class in dispute. It is also apparent that each of these two divergent lines of authority start from a basis both sound and sane, and that the result of each of these lines of decisions have been sanctioned and approved by the Supreme Court of the U. S." Kinkead v. Turgeon [Neb.] 104 N. W. 1061. In Nebraska the title to the bed of fresh water navigable streams is in the state, and the right of riparian owners is bounded by the banks of the stream. Id. In New York riparian owners hold only to the high water mark. In re Driveway in New York, 46 Misc. 157, 93 N. Y. S. 1107. Consequently it was proper for the commissioners to refuse to award damages for land under water taken for speedway, or for land filled in by the city lying below high water mark. Id. Under the colonial ordinance of Massa-

the other,[32] hence it has always been held that the description "to the shore and then by the shore" unqualified excludes the shore, which is the flats between high and low water mark,[33] but a conveyance by an individual who owns a tideway, who bounds his deed upon the river, is presumed to include the tideway.[34] Not so if the same conveyance were made by a municipality, in which case the opposite presumption prevails and express words are necessary to convey the tideway.[35] One may obtain title to flats by adverse possession.[36] So where a city in a previous action, as co-defendant with the railway company, defended on the ground of dedication to public use and conveyance to the railway company of property abutting on a river,[37] and where it has permitted the railway company in reliance upon its title from the city to expend vast sums of money in the improvement of the land, the city is estopped from asserting title thereto.[38] However, an occasional use of a river front by the public for the landing of boats is not inconsistent with the title thereto of a railroad company or its use otherwise for railroad purposes.[39] A grant of lands described by metes and bounds carries with it lands under water within those bounds.[40] Land fronting on a small cove of a river does not front on the river onto which the cove opens.[41] Barren islands of no utility in the waters of a great pond are public,[42] and title to them rests in the state, unless previously conveyed away, if the pond is owned by the state.[43]

§ 2. *Rights attendant on change in bed of stream or in shore line.*[44]—Each state may settle for itself the title to lands formed by accretions within its boundaries.[45] Accretions or relictions in tide water rivers belonged to riparian owners at common law.[46] Now, all accreted or reclaimed land goes with the fee to which it is attached.[47] An accretion to the mainland bordering on a river but separated

chusetts of 1641-47, the owner of upland adjoining tide water prima facie owns to low water mark, and does so in fact unless the presumption is rebutted by proof to the contrary. Whitmore v. Brown [Me.] 61 A. 985. Under the laws of Pennsylvania the riparian owner has an absolute title in fee only to the high water mark, and a title between high and low water mark qualified by the right of the public to navigate; consequently, in an action to recover for land condemned for railway purposes, the riparian owner could recover for his land to low water mark. McGunnegle v. Pittsburg & L. E. R. Co. [Pa.] 62 A. 988. It was not error to refuse to permit the amendment of description of land condemned after trial had proceeded to an advanced stage without objection, especially when the jury was instructed that they should give damages only for land actually owned by riparian proprietors. Id. In Missouri the riparian proprietor owns only to low water mark. Frank v. Goddin [Mo.] 91 S. W. 1057.

32. Whitmore v. Brown [Me.] 61 A. 985.

33. This may be qualified by phrases in the deed. Whitmore v. Brown [Me.] 61 A. 985. Words, "to the head of Gilpatrick's Cove," construed to mean to the high water mark. Id.

34. In re New York, 182 N. Y. 361, 75 N. E. 156.

35. In 1686, the King conveyed tideway lands on the eastern bank of the Hudson to the City of New York. In 1701 the city deeded a tract of land abutting on the river and tideway to De Kay. Held that his successors did not take the tideway under a deed calling for the river as a boundary. In re New York, 182 N. Y. 361, 75 N. E. 156.

36. Held no adverse possession shown. Whitmore v. Brown [Me.] 61 A. 985.

37, 38. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183.

39. A strip of river front, conveyed to the railroad and used by them for railroad purposes, with an occasional permissive use to the public for landing boats, was claimed by the city of Sioux City to have been diverted to such public use as to constitute a public levee, although the actual public levee was on the opposite side of the river. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183.

40. The Andros Patent of 1677 construed to carry with it the grant of lands under Oyster Bay. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

41. Plaintiff sues for closing a small cove off a river on which her premises are situated, claiming her riparian rights in the river were injured. Held that her riparian rights were restricted to the cove. The only right in the river was the right of access through the waters of the cove to the river from the land or vice versa. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

42, 43. Attorney-General v. Herrick [Mass.] 76 N. E. 1045.

44. See 4 C. L. 1312.

45. Frank v. Goddin [Mo.] 91 S. W. 1057.

46. Kinkead v. Turgeon [Neb.] 104 N. W. 1061.

47. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183.

by a small creek belongs nevertheless to the original mainland,[48] but accretions in the stream and not connected with the shore do not.[49] However, in case of avulsion or any sudden, violent, and visible cause of change, the former thread of the stream continues to mark the limits of riparian lands,[50] nor does the doctrine of accretion apply to land reclaimed by human agencies.[51] The essential point is that the accretion or submergence[52] must be gradual and imperceptible.[53] In states where the water line is the boundary, it remains so no matter how far it shifts or what may be its relation to former boundaries, subject only to be reshifted to its former location by accretion or recession.[54] Islands springing up in navigable streams do not belong to riparian owners.[55] The isolation as well as the emergence of land to make an island must be permanent and not like a mere sand bar,[56] and depends on the stability of the soil and the size and permanence of the channels around it.[57] Accretions belong to the owner of the abutting soil. He may sell the upland and reserve the accretions.[58] Although an island, in a patent thereto, is conveyed by description, yet when the plain import of the document is to convey the entire island it will be held to include accessions and relictions.[59]

§ 3. *Rights incidental to riparian ownership.*[60]—The "shore" and soil under water are entirely separate and distinct from "riparian rights,"[61] and the two must not be confused. Riparian rights originate in and are dependent upon the ownership of upland contiguous to and attingent on water,[62] whether stream, lake, or ocean, and cannot extend beyond the original survey as granted by the government.[63]

48. A river before receding left alluvial deposits. A creek which flowed into it flowed over part of the deposits. The part thus separated from the mainland nevertheless belonged to it. Dowdle v. Wheeler [Ark.] 89 S. W. 1002.

49. Evidence held sufficient to show that bar formed in the stream and was not an accretion to the shore. Mallory v. Brademyer [Ark.] 89 S. W. 551.

50. McBride v. Steinweden [Kan.] 83 P. 822. Where a man owns to the water's edge and there is a sudden or marked change in the shore line or the course of a stream, the adjoining owner is not thereby divested of his title. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

51. In re Driveway in New York, 46 Misc. 157, 93 N. Y. S. 1107. Where land was filled in for speedway purposes, it is not accretion in law. Id.

52. If a man's title is to the water's edge and the water by gradual and imperceptible degrees encroaches upon a man's land, it changes his boundaries accordingly. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

53. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. Where a man's land was submerged by artificial means, such as the opening of a canal and the putting in of a lock so as to raise the level of the water in a swamp 4 or 5 ft., the submergence did not deprive owner of his title to the lands. Id.

54. Frank v. Goddin [Mo.] 91 S. W. 1057. Where by a shift in the channel of the Missouri river covering a period of 50 years, which extended the Kansas boundaries 2 miles, the center of the main channel continued to be the boundary of the states and the estates of riparian proprietors. McBride v. Steinweden [Kan.] 83 P. 822. If in the void space, created by the action of a stream, new land formations spring up and become attached to the old survey by accretions, they belong to it, but if they remain islands, they do not. Frank v. Goddin [Mo.] 91 S. W. 1057.

55. Frank v. Goddin [Mo.] 91 S. W. 1057. In Missouri under article 6, c. 122, Rev. St. 1899, islands formed by alluvial deposits in navigable streams belong to the respective counties in which they appear, and are subject to disposition as swamp lands for the benefit of the public schools. Id.

56. Instruction sustained. McBride v. Steinweden [Kan.] 83 P. 822. Whether emerged land in a stream is an island or a bar is for the jury. Id.

57. McBride v. Steinweden [Kan.] 83 P. 822. Evidence held sufficient to show that land was a bar and not an island. Id.

58. Minor's Heirs v. New Orleans [La.] 38 So. 999.

59. Frank v. Goddin [Mo.] 91 S. W. 1057.

60. See 4 C. L. 1314.

61. Hence an act which dealt with the fee of lands but whose title mentioned only "riparian rights" was unconstitutional. Mobile Docks Co. v. Mobile [Ala.] 40 So. 205. The phrase "riparian rights" cannot be separated into its component parts so as to give the word "rights" a broader meaning. It cannot be made to include the right or title to the shore and soil. Id.

62. Mobile Docks Co. v. Mobile [Ala.] 40 So. 205; Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848.

63. Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733. A "shore" as used in this connection has been defined to be the land on the margin of the sea or lake or river; the space between high and low water mark; that space alternately covered and uncovered by the flood and ebb of the tide.

They attach to and are appurtenant to the upland and not to the soil under water.[84] They are private property and pass inferentially by the grant of the land unless previously sold or expressly reserved.[65] All jurisdictions protect them from any invasion or appropriation for private purposes or for any purpose save that of navigation.[66] Even the government cannot interfere with them for purposes other than navigation except upon due compensation,[67] consequently, when the land of a riparian owner is taken for any purpose there is a liability,[68] but if the invasion for purposes of navigation affects only the rights, then there is no liability.[69] Riparian owners on a cove have the right of access by water to and from their uplands,[70] the right to wharf out in their front,[71] and the right of reclamation or accretion.[72] Courts differ on the question as to whether the right of access to or from a river can be destroyed by the state without compensation.[73] By statute[74] in Alabama a riparian owner on a bay may plant oysters and make such use of the waters as is needed to raise and market them,[75] but this will not imply an exclusive use for all purposes, and a co-riparian owner may use a channel for ingress and egress from the bay.[76] The common law recognized the exclusive right to fish in the owner of the subaqueous soil.[77] In Illinois the common law prevails as to the right to hunt and fish.[78] The rights to hunt and fish are concomitant.[79] The owner of the land has no right to put any structure or filling into a navigable stream beyond low water mark.[80] The riparian owner has no property in the water except that which he has abstracted.[81] The rights of riparian owners on a navigable water are subordinate to rights of navigation.[82] The owner of upland has no right to trespass upon the property of another to reach navigable water,[83] but if the land intervening between the upland and the navigable waters belong to the state, the upland owner may use them to reach the water.[84] A state has the same rights as riparian owner that an individual has.[85]

It is synonymous with "beach." Mobile Docks Co. v. Mobile [Ala.] 40 So. 205.

64. Mobile Docks Co. v. Mobile [Ala.] 40 So. 205.

65, 66, 67, 68. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848.

69. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 855.

70. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

71. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295. Although a riparian owner's land is situated on a cove opposite its mouth, this gives him no right to wharf out to and reclaim in the river, as it would be inconsistent with the rights of other riparian owners of the cove. Id.

72. Within the cove. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295. In this case the railroad company built an embankment across a part of the mouth of the cove which interfered to a considerable degree with the access to river by riparian owners of cove, but their enumerated rights in cove were not invaded. Held that they had no cause of action. Id. The right of access in case of riparian proprietors on a cove to and from river, is a private right distinguished from the public right to navigate the cove. Id.

73. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

74, 75. Code 1896, c. 84. The riparian proprietor may plant oysters 600 yards in front of his land. Cain & Simonson [Ala.] 39 So. 571.

76. Such owner may not ride over any part of the bay, except over the general channel to and from his own premises. Cain v. Simonson [Ala.] 39 So. 571.

77. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

78. In Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, a man's soil was inundated by the flooding of swamp lands through a canal. Held he retained the sole and exclusive right to hunt and fish on the waters over his own soil subject to the public's easement of navigation, and such regulation as the state may provide.

79. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

80. McGunnegle v. Pittsburg & L. E. R. Co. [Pa.] 62 A. 988.

81. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

82. See Navigable Waters, 6 C. L. 742.

83. An upland owner cannot build a dock from his land across the land of the town to a stream. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

84. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

85. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

§ 4. *Subjection to public easements.*[86]—A person owning land abutting upon a navigable stream holds his rights in the stream subject to the servitude of the government to improve said stream for purposes of navigation and commerce,[87] since the public has an easement of navigation in all waters deep enough for useful commerce.[88] There is no natural or necessary connection between the easement of navigation, which is of the same character as a public highway, and the right to hunt and fish, where such easement exists.[89] In Louisiana, battures formed within the limits of incorporated towns or cities are subject to a public easement to the extent necessary to commerce, navigation, public highways and streets.[90]

§ 5. *Action for protection of riparian rights.*[91]—Riparian owners may sue at any time for loss of riparian rights, even after selling the abutting land.[92] Where it is evident that a commission erred in matters of law in awarding damages for the taking of riparian rights and lands, their report must be set aside.[93] Prescription will not run against a batture used by the city for public easements.[94] By statute,[95] it is the duty of the courts in Louisiana to determine what parts of a batture are and are not necessary for public use.[96] Where injury is caused to a riparian owner's rights by the action of several mine owners acting independently, and in an action against one of them there is no effort to prove the amount contributed by the other mines to the injury, or to show the jury the actual injury for which the defendant alone is responsible, the jury cannot be required to divide the amount of the injury equally among them, and return a verdict against the defendant for only its aliquot part thereof.[97]

ROBBERY.

§ 1. *Nature and elements.*[98]—Robbery consists of the unlawful and felonious[99] taking and asportation of the personal property of another by violence or

86. See 4 C. L. 1316.

87. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848.

88. In Illinois the ownership of the soil is immaterial where waters are insufficiently deep to afford a channel for useful commerce. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

89. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

90. This does not, however, include a public servitude in favor of railroads. Minor's Heirs v. New Orleans [La.] 38 So. 999.

91. See 4 C. L. 1316.

92. Held that one who sold after the filing of notice of condemnation proceedings was presumptively injured in the selling price of the land and hence entitled to damages. Waterford Electric Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

93. A commission awarded damages of only $100 to a riparian owner for depriving him wholly of his riparian rights, under the erroneous instruction of their counsel that the riparian owner was not deprived of the fee in the land condemned, nor of access to the land, and secondly, that the riparian proprietor had lost his interest in the question of damages through the sale of his land. Waterford Electric Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

94. New Orleans held certain accretions for public uses for a number of years. No prescriptive rights against the lawful heirs arose. Minor's Heirs v. New Orleans [La.] 38 So. 999.

95. Section 318, Rev. Stat. 1870.

96. Minor's Heirs v. New Orleans [La.] 38 So. 999.

97. Upson Coal & Mining Co. v. Williams, 7 Ohio C. C. (N. S.) 293. The measure of damages to a riparian owner, caused by the wash from mines poured into the stream above him, is the difference in the value of the land before and after the injury occurred, and not the depreciated rental value from the date of the occurrence of the injury, and it is consequently competent for a plaintiff in such a case to prove the nature and extent of the injuries complained of and the amount of loss sustained. Id.

98. See 4 C. L. 1317.

99. Unlawful taking of property from the person or presence of another by force or fear amounts to robbery only when done with a felonious intent, and intent is not as a matter of law presumed from such taking. State v. O'Malley [N. D.] 103 N. W. 421. Where one takes his own property by force or fear from another who has the legal right to the possession, under a mistaken belief that he has a right to the possession,

by putting him in fear.[1] The statutory crime of robbery by assault with intent to kill, if resisted, supersedes the common-law robbery[2] and the statutory crime of "felonious assault" with a dangerous weapon with intent to rob does not include robbery.[3] In those states where the common-law crime of robbery has been superseded by a statutory crime, a finding and commitment to the effect that one has been convicted of robbery does not describe a crime known to law.[4] A rubber hose loaded with lead is construed to be a dangerous weapon within the meaning of those statutes which make an assault with a dangerous weapon an element of the first degree of robbery.[5]

While the taking must be against the will and without the consent of the victim, the fact that a person, anticipating that he might be robbed, marks the property so as to be able to detect the robber is not such consent as to absolve the person so robbing from criminality.[6]

Whether an attempt to commit a crime has been made is determined solely by the condition of the actor's mind and his conduct in the attempted consummation.[7]

Defense.—Though officers may use force in searching a prisoner, and may lawfully remove valuables from his person for safe keeping, it is robbery if the search is made with the intent to take the valuables for their own use and use force to obtain the same.[8]

§ 2. *Indictment and prosecution. A. Indictment.*[9]—All the elements of the crime must be averred with certainty.[10] Substantial conformity to statutory forms ordinarily suffices,[11] even though they do not embody common-law averments such as ownership of property,[12] and asportation may be omitted if the statutory definition of the crime does not include it.[13] Responsibility of accused for the force or fear cannot be eked out by intendment or inference.[14] It is not necessary to allege

he is not guilty of robbery, there being no felonious intent. Triplett v. Com. [Ky.] 91 S. W. 281. And see Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217, as to intent to steal by officers searching a prisoner.

1. Triplett v. Com. [Ky.] 91 S. W. 281; State v. Stebbens, 188 Mo. 387, 87 S. W. 460. Where, after making the arrest and taking the prisoner to jail, the officers, without his consent, backed him up against the wall and held his hands up while one of them extracted money from his pocket, sufficient force was used to constitute robbery. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

2, 3. People v. Scofield [Mich.] 12 Det. Leg. N. 654, 105 N. W. 610.

4. People v. Powler [Mich.] 12 Det. Leg. N. 656, 105 N. W. 611.

5. People v. Du Veau, 105 App. Div. 381, 94 N. Y. S. 225.

6. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

7. Where defendant suggested the crime, which if consummated would have clearly been robbery, furnished his accomplice with the means of carrying out the plans, and was present to receive the results, he is guilty of an attempt to commit robbery where the crime is not consummated because of some outside force. People v. Du Veau, 105 App. Div. 381, 94 N. Y. S. 225.

8. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

9. See 4 C. L. 1317.

10. **Held sufficient:** An indictment charging that on a certain date, and other days before and since, within 12 months last past, "in the county aforesaid," defendant did feloniously, etc., steal one diamond pin, of the personal property of V., of the value of $35, stolen and carried away by defendant from the person of V., without his consent and by putting him in fear. Commonwealth v. Finn, 27 Ky. L. R. 771, 86 S. W. 693.

11. An indictment which charges the accused "with having feloniously taken five bills of the denomination of $5 each of the lawful money of the United States of America, the property of A. B., from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same," is sufficient. Toliver v. State [Ala.] 38 So. 801.

12. Under B. & C. Comp. § 1305, which prescribes the form of stating the crime as "feloniously took a gold watch (or as the case may be) from the person of C. D., and against his will, by violence to his person," an indictment need not state the name of the owner of the property taken. State v. Eddy [Or.] 81 P. 941.

13. An information for robbery, following the language of the statute and charging that the accused did "forcibly and feloniously take from the person" of the prosecuting witness, is not defective in that it does not allege that the accused "carried away" the property. State v. Smith [Wash.] 82 P. 918.

14. The indictment, after alleging that defendants took certain described property

the means whereby the victim was put in fear.[15] The description in the indictment of the property is sufficient if it enables the jury to determine whether the property proved to have been taken is the property described in the indictment,[16] and to enable the court to judicially know that the property could have been the subject-matter of the offense charged.[17] Under an information charging robbery, the accused may be convicted of pocket picking,[18] and in a prosecution under a statute imposing a penalty for robbery where the robber is armed with a dangerous weapon and has an intent to kill if resisted, the accused may be convicted of an assault with intent to rob,[19] but not of common-law robbery.[20] Proof that the robbery was accomplished by both force and fear is no variance from an indictment which alleges that it was accomplished by fear,[21] and where it is alleged that the accused committed the robbery by force and by putting the person robbed in fear, the offence is complete if either allegation is proven;[22] but under an indictment for robbery by force or intimidation, a conviction cannot be had for statutory robbery by sudden taking from the person.[23]

(§ 2) *B. Evidence.*[24]—In order to convict of robbery it is not necessary to prove the taking of all the property alleged in the indictment to have been taken, proof that any portion was taken being sufficient.[25] It is sufficient if the substance of the allegations be proven.[26] Evidence is admissible to prove that the accused was in possession of the means alleged to have been used to commit the robbery.[27] While it is necessary that the property taken have value, it is not necessary to prove that a "nickel" is lawful current coin or its value. The court will take judicial notice of those facts.[28]

Evidence that the prosecuting witness stated prior to the trial that it was his brother that was robbed and that he had not lost any money is not substantive evidence, but is admissible as affecting the credibility of the prosecuting witness.[29] Where the robbery is alleged to have been committed by putting the victim in fear, actual fear need not be strictly and precisely proved, as the law will presume fear where there appears to be just grounds for it.[30] Evidence of willful and unlawful withholding by officers of money taken from a prisoner under the right to search is competent to prove a present intent to appropriate it, and if obtained through force or fear, amounts to robbery.[31]

"wrongfully and feloniously" from the person of one William Dompire, continued: "That the said money was unlawfully and feloniously taken from the person of said Dompire, against his will and by violence to his person and by putting him in fear of force and violence." Insufficient, does not state that defendants put him in fear. State v. Eddy [Or.] 81 P. 941.

15, 16, 17. State v. Sanders [N. D.] 103 N. W. 419.

18. State v. Miller [Kan.] 80 P. 947.

19. People v. Powler [Mich.] 12 Det. Leg. N. 656, 105 N. W. 611.

20. People v. Scofield [Mich.] 12 Det. Leg. N. 654, 105 N. W. 610.

21. State v. Sanders [N. D.] 103 N. W. 419.

22. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

23. Pride v. State [Ga.] 53 S. E. 192.

24. See 4 C. L. 1318.

Evidence held sufficient to sustain conviction where the prosecuting witness was shot and robbed. Lewis v. State [Ala.] 39 So. 928.

25. Where the indictment for robbery alleged the taking of a dime and two nickels, and the proof, supplemented by judicial knowledge, was sufficient with respect to the nickels, it was not indispensable to make proof with regard to the dime. Barddell v. State [Ala.] 39 So. 975; State v. Sanders [N. D.] 103 N. W. 419.

26. Information charged the accused with taking personal property of the prosecuting witness. Evidence showed him to be the owner of only a part of the property. Sufficient to sustain the conviction. State v. Smith [Wash.] 82 P. 918.

27. Where robbery was accomplished by putting the party robbed in fear by exhibiting a revolver, it is competent to show that the accused was in possession of a revolver a few days after the crime. State v. Gordon [La.] 39 So. 625.

28, 29. Barddell v. State [Ala.] 39 So. 975.

30, 31. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

(§ 2) *C. Instructions.*[32]—As in other crimes the instructions should conform to the issues raised by the pleadings and evidence.[33] The mere reiteration of the statute defining the crime of robbery does not sufficiently charge that the taking must be "fraudulent."[34]

RULES OF COURT; SAFE DEPOSITS, see latest topical index.

SALES.

§ 1. *Definition; distinction from other transactions.*[35]—A sale is a transmutation of property, or a right, from one person to another in consideration of a sum of money[36] as opposed to barters, exchanges, and gifts.[37] As used in this topic

32. See 4 C. L. 1318.

33. Under an indictment charging robbery by assault, it is not necessary for the court to define assault and battery in its instructions, it being sufficient to define assault. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025. The defense having been made that accused laid hands on the prosecuting witness intending to protect him from accused's companion, the charge should have been specific on the question of intent. Id.

34. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025.

35. See 4 C. L. 1319.

36. Lucas v. County Recorder of Cass County [Neb.] 106 N. W. 217. "Sale" in its broadest sense comprehends any contract for the transfer of property from one person to another for a valuable consideration. James v. State [Ga.] 52 S. E. 295. A sale is a contract by which for a consideration one transfers to another property or an interest therein. Yick Sung v. Herman [Cal. App.] 83 P. 1089. Consideration or price is an essential element. First Nat. Bank v. McIntosh & Peters Live Stock & Commission Co. [Kan.] 84 P. 535. Where the owner of cattle delivers them to another under an express agreement that such person's interest is what he may put on the cattle, held a bailment and not a sale. Id.

37. See Exchange of Property, 5 C. L. 1382, and Gifts, 5 C. L. 1587.

the term is limited to cases wherein the subject-matter is personalty.[38] The intent of the parties as expressed in the contract governs in determining the character of the transaction.[39] In ascertaining this intent the court must look at the entire transaction[40] and will not be bound by the name given it by the parties.[41] The contract being ambiguous and uncertain, parol evidence of surrounding circumstances,[42] of other similar transactions between the parties,[43] and of the acts of the parties under the transaction in question,[44] may be considered. Where provisions must be interpretated in the light of surrounding circumstances, the intent of the parties is for the jury.[45] When the question is presented in the Federal courts the character of the contract is to be determined by the local law.[46] That the goods are billed as if sold,[47] that the consignee is to sell upon terms fixed by himself and is bound to pay the consignor a fixed price,[48] are often deemed indicative of a sale. Transition of title either present or contemplated is an essential element of a sale,[49] consequently, a provision that title shall not pass, being unnecessary if the transaction is not a sale, is often deemed of importance in determining the intent of the parties.[50]

A sale should be distinguished from a bailment,[51] option,[52] lease,[53] loan,[54]

38. Electricity is personal property. Civ. Code §§ 654, 655, 663, construed. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562. Sales of realty, see Vendors and Purchasers, 4 C. L. 1769.

39. First Nat. Bank v. McIntosh & Peters Live Stock & Commission Co. [Kan.] 84 P. 535.

40. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

41. In re Wells, 140 F. 752. Where defendant proposed to sell plaintiffs an unlimited quantity of bolts at 80 per cent off, f. o. b. seller's place of business, at 5 per cent commission, which bolts he was to get under a contract which he had with nonresident manufacturers, and plaintiffs replied accepting the offer and requesting that defendant place the order with the factory and advise plaintiffs how soon they could look for shipment, held defendant was a seller of the bolts and not plaintiffs' agent to buy the same. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586.

42. A written order purporting to be part of a continuing transaction in which the writer stated that he had not been able to sell much up to that time but thought that he would do better in the future, and then authorized plaintiff to ship to him at once 2,000 pounds of white lead, if possible "at five cents," held not a definite contract of sale and parol evidence was admissible to explain its nature. Weir v. Long [Ala.] 39 So. 974.

43. Where question was whether defendant was a buyer or a factor, evidence of defendant's employe, who had taken the order in question and had been connected with other transactions between the parties, that he did not know of any goods being bought on commission, held admissible. Weir v. Long [Ala.] 39 So. 974. Defendant claiming to be a factor, held error to exclude evidence in regard to the defendant's payment of previous bills for goods alleged to have been similarly sold. Id.

44. American Seeding Mach. Co. v. Stearns, 109 App. Div. 192, 95 N. Y. S. 830. So held where contract in the form of one of sale provided that "good purchasers' notes, indorsed by agents * * * will be accepted in settlement." Id.

45. Weir v. Long [Ala.] 39 So. 974. Where acts of parties under contract are considered, interpretation is a mixed question of law and fact. American Seeding Mach. Co. v. Stearns, 109 App. Div. 192, 95 N. Y. S. 830.

46. In re Tice, 139 F. 52. As to whether contract is lease or conditional sale, bankruptcy court will follow state law. In re Sheets Printing & Mfg. Co., 136 F. 989.

47. While not conclusive, is of more or less persuasive force. In re Wood, 140 F. 964.

48. In re Wells, 140 F. 752. Where buyer had a running account with seller but fell behind in her payments, and it was agreed between the parties that thereafter goods should be "consigned" to her, and that the goods on hand should be invoiced and credited on her general indebtedness and charged to her on "consigned account." She was to report monthly the goods on hand and the amount sold, paying for the latter at the regular wholesale prices at which the goods were billed to her. It was further agreed that the title should not pass. No restriction was made as to the manner of sale or prices and she kept no separate account. Held as to her creditors the transaction was a sale. Id.

49. Bankers receiving goods bought under mercantile letters of credit issued by them, and delivering the goods to the merchant, receiving a "trust receipt" therefor, held to retain title to the goods. Moors v. Bird [Mass.] 77 N. E. 643.

50. In re Wells, 140 F. 752.

51. Where dealer sent for goods out of season to be exhibited at a fair, and they were shipped and billed to him as sold "subject to next spring's terms," and no demand was made for the goods for over six months

mortgage,[55] or contracts of agency.[56] An agreement by a person to sell, in the future, articles which he habitually makes and which are not made or finished at the time is a contract of sale and not a contract for labor.[57] Sales are executed or executory,[58] absolute or conditional.[59] In determining the amount of damages for a breach, contracts of sale are again divided into manufacturing and other similar contracts.[60] A contract of "sale and return" exists where title passes to the party to whom the goods are delivered, subject to the option of returning them if he so desires.[61]

§ 2. *Contract requisites of a sale.*[62]—The sale being a contract, it must contain all the requisites thereof relative to parties, consideration,[63] mutuality,[64] and

and until bankruptcy was imminent, held a sale and not a bailment. In re Wood, 140 F. 964. Contract for the sale and installing of machinery, payment to be made in three instalments, one on delivery, another when the machinery was installed, and the final payment on completion of test, the buyer to keep the machinery insured for the seller's benefit, held on delivery of machinery and payment of first instalment there was a completed sale and not a bailment. William R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174. Machinery was delivered to one under a contract requiring him to pay certain various sums at irregular intervals as rent for the same, and that on a final small payment he should be entitled to a bill of sale. There was no provision for the return of the machinery aside from one giving the privilege of retaking it on default in making any of the payments. Held a conditional sale and not a bailment. In re Tice, 139 F. 52.

52. Where payment made was denominated rent and "buyer" was to give a chattel mortgage and note for the article provided it proved satisfactory, held a sale and not a mere option. Star Drilling Mach. Co. v. McLeod [Ky.] 92 S. W. 558. A sale of cattle to be delivered by seller on notice from buyer within a few days after Sept. 1st is not an option nor a conditional sale, but an outright purchase. Bell v. Hatfield [Ky.] 89 S. W. 544. Contract declared on, held to be an agreement to buy stock in a commercial enterprise and not a mere option to buy. Edwards v. Capps, 122 Ga. 827, 50 S. E. 943.

53. A contract leasing a machine for a term of three years, designated sums to be paid as "rent" and the lessee to have the option to purchase at any time within three years for a designated sum less the rentals paid, held a conditional sale within Bates' Ann. St. Ohio, p. 2306, § 1, and not a lease. In re Sheets Printing & Mfg. Co., 136 F. 989.

54. Payments by plaintiff to furniture dealers of the price of furniture bought by defendants of such dealers, defendants to repay plaintiff in instalments a greater amount, is a loan and not a sale. Zussman v. Woodbridge, 97 N. Y. S. 973. Where one took up a debt of a corporation, secured by some of the corporate stock, taking a note signed by the incorporators individually, and stock was thereafter reissued to him without his knowledge, held transaction amounted to a loan for the corporation's benefit and not to a purchase of the stock. In re McLean-Bowman Co., 138 F. 181.

55. Bill of sale absolute in form but given under an oral agreement that it shall be held as security for the seller's indebtedness is a mortgage. Clark v. Williams [Mass.] 76 N. E. 723. Where contract of sale provided that title should remain in the seller, and upon failure to execute the notes or make the payments specified the seller could take possession, and, after 30 days advertisement, sell the property, paying the buyer any surplus and collecting from him any deficiency, held an equitable mortgage and not a conditional sale. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

56. Where goods were shipped to be sold on commission for not less than certain specified prices, the consignee to insure the goods and be liable for damage thereto, and the contract expressly provided as to what warranties should be given and entitled claimant to require the goods to be returned, title to remain in consignor, held contract was one of agency and not a conditional sale. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802. Evidence that goods were sent to defendant on agreement to pay not less than a certain market price held to establish a sale and not a contract of sale on commission. Brockman Commission & Cold Storage Co. v. Pound [Ark.] 91 S. W. 183.

57. James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356.

58. An "executed contract of sale" is one wherein the title has passed; an "executory contract of sale" is one wherein the title has not passed. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Written order of tobacco when accepted held to constitute an executory contract of purchase and sale. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777. Contract providing for delivery of chattel, payment of purchase price in instalments and retention of title in the seller until purchase price is paid, held executory. Bunday v. Columbus Mach. Co. [Mich.] 12 Det. Leg. N. 902, 106 N. W. 397.

59. See post, § 14, Conditional sales.

60. See post, § 12, Damages for breach of sale and warranty.

61. In re Wells, 140 F. 752.

62. See 4 C. L. 1320. See, also, Contracts, 5 C. L. 664.

63. Must be a valuable consideration. Contract reciting that the first party had

freedom from fraud.[65] The minds of the parties must meet,[66] and hence all the terms of the contract must be agreed upon or be capable of ascertainment,[67] but

sold to the second party from 1,000 to 1,500 tons of coal at a certain price, to be shipped as ordered within a certain time, held valid. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829. The capital stock of a corporation constitutes a good consideration for the transfer of property. Gardner v. Haines [S. D.] 104 N. W. 244. Antecedent indebtedness is a sufficient consideration for the transfer of corporate stock. Thaxter v. Thain, 100 App. Div. 488, 91 N. Y. S. 729. The prospective commission is a sufficient consideration for an agent's agreement to keep repairs on hand as an inducement to purchaser to buy a machine. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930. Where a party repudiates an agreement to extend credit to another because of false and fraudulent representations, and the agreement is then changed so as to eliminate the provision for credit and require cash on delivery, the second agreement is not a mere modification of the first but is a new and independent agreement, and no new or further consideration is necessary to support it. Omaha Feed Co. v. Rushforth [Neb.] 106 N. W. 25. Where a contract for the sale of corporate stock was made on the condition that the buyer should obtain control of the corporation, and realize from the property or from a mine thereon a specified sum within four years, the execution of a new agreement before the expiration of the four years, whereby the buyer agreed to pay for the stock whenever he secured the specified sum from the sale of the property, or from the mine thereon, was supported by a sufficient consideration, as it gave the buyer the right to continue to possess the stock and the right to extend his opportunity to make a sale of the property or work a mine thereon. Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

64. Contract to send what pails buyer may want at certain prices held unenforceable. Higbie v. Rust, 112 Ill. App. 218. Contract void where amount to be bought or sold and price were omitted. Id. Simple order with no agreement to deliver. Mayo v. Koller, 28 Pa. Super. Ct. 91. A contract by which one party agrees to buy, but the other party does not agree to sell, is unilateral and cannot be enforced. Joseph Schlitz Brewing Co. v. Komp, 118 Ill. App. 566. Contract for the sale of corporate stock to be paid for out of dividends and earnings and from other sources at option of buyer held not void for want of mutuality. White v. C. & G. Cooper Co., 7 Ohio C. C. (N. S.) 114. Plea alleging that at the time of the purchase the seller agreed to give the buyer the exclusive sale of the goods so long as he pushed the same held demurrable as alleging a unilateral contract. Mountain City Mill Co. v. Cobb [Ga.] 53 S. E. 458. Contract of purchase of stock, with agreement not to sell it without first giving vendor ample opportunity to purchase the same, held not void for indefiniteness and not unilateral. Cothran v. Witham, 123 Ga. 190. 51 S. E. 285. A contract reciting that the first party had sold to the second party from 1,000 to 1,500 tons of coal at a certain price, to be shipped as ordered within a specified time, is mutual. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829. Where the buyer agrees to purchase and the seller agrees to sell a definite quantity of specified articles, the contract does not lack mutuality because of a provision requiring the purchaser to specify the sizes and styles wanted. George Delker Co. v. Hess Spring & Axle Co. [C. C. A.] 138 F. 647.

65. Fraud which will relieve a party who can read must be fraud which prevents him from reading. Stoddard Mfg. Co. v. Adams, 122 Ga. 802, 50 S. E. 915. The mere fact that one is busy, that the other party expressly states that the contract is as claimed, that he had previously dealt with the parties and relied on their honesty, and that the contract was long, is insufficient. Id. So held where contract was printed in a booklet covering 10 or 12 printed pages, controversy was only over words describing articles bought, and which were written in blank spaces. Id. That one signing order for books did not read it owing to his haste, but relied on agent's statement that he wanted to get an indorsement of the books, held insufficient to relieve him from liability. Williams v. Leisen [N. J. Law] 60 A. 1096. To constitute a defense the false representations must have been relied upon. Loveland v. Gravel [Minn.] 103 N. W. 721. Evidence held insufficient to show fraud in size of coat sold, the coat having been tried on, approved, and paid for. Wolf v. Halliburton & Son [Mo. App.] 91 S. W. 467. Evidence held insufficient to show fraud or misrepresentation on the part of seller. Main v. Radney [Ala.] 39 So. 981. See Fraud and Undue Influence, 5 C. L. 1541. See, also, post, § 10 A and § 11 A.

66. Where buyer thought he was buying gold rolled rings and seller was selling electro-plated rings, held not to constitute a contract. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500. Held no contract of sale where seller wrongly supposed buyer, the C. Coal Company, was a corporation. Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122. Where seller telegraphed that he could not accept offer to buy but would try and ship four cars of potatoes, and buyer wrote for an explanation and seller answered that he confirmed a shipment of four cars, held to constitute a contract for the sale of four cars of potatoes. William & Co. v. Alabama Brokerage Co. [Ala.] 40 So. 102. Evidence held not to show a complete offer and acceptance for contract for sale of scrap copper. San Antonio Gas & Elec. Co. v. Marx [Tex. Civ. App.] 13 Tex. Ct. Rep. 442, 87 S. W. 1166. If one makes a contract of sale with one party, believing it to be another, the sale is voidable. Place of business is not part of identity of firms. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

67. Where one who manufactured different styles of automobiles at different prices agreed to fill "specified orders," an order for

the mere fact that the firm with which one is dealing has its office or factory at a different place than was supposed will not vitiate the sale.[68] In the absence of fraud, misrepresentations, or disability, failure to read an order is no defense.[69] An offer to sell or to buy is revocable at any time before acceptance[70] in the manner provided in the contract,[71] and the acceptance to create a valid contract of sale must be an unconditional[72] acceptance of all the terms of the offer, and must be made within the time specified therein, or, if no time is specified, within a reasonable time.[73] The amount being optional with the buyer, a partial order constitutes an acceptance pro tanto.[74] All conditions precedent must be per-

a certain number of machines, without specification of style, was too indefinite for enforcement, though accepted by the seller. Wheaton v. Cadillac Automobile Co. [Mich.] 12 Det. Leg. N. 867, 106 N. W. 399. An agreement to pay the purchase price or deliver the goods on demand, or on so many days' notice, is not bad for indefiniteness. Bell v. Hatfield [Ky.] 89 S. W. 544. A contract reading that plaintiff "contracts and agrees to ship to the order of" defendant "5,000 or more stoves" within a year, is a binding contract on one to ship and on the other to receive 5,000 stoves (Hardwick v. American Can Co. [Tenn.] 88 S. W. 797), and it is not void for indefiniteness when on a basis of 10 years' experience the character of the trade of buyer is known and his needs as to size, quality, and style of stove can be ascertained therefrom with reasonable and approximate certainty (Id.).

68. A firm having office in Chicago but factory in Iowa City, Ia. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

69. Main v. Rodney [Ala.] 39 So. 981.

70. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613. Offerer is not bound until the offer is accepted as provided in the offer. Robinson & Co. v. Ralph [Neb.] 103 N. W. 1044. An order to an agent does not become binding upon the offerer until accepted by the principal, even though it expressly provides that it shall not be subject to countermand. Mayo v. Koller, 28 Pa. Super. Ct. 91. A countermand must be received before goods are shipped according to order to prevent recovery of purchase price. Evidence not sufficient to sustain a verdict for defendant in an action for the purchase price. W. F. Main & Co. v. Tracey [Ark.] 88 S. W. 981. Acceptance at seller's place of business as required by the contract held to have taken place after revocation. Minneapolis Threshing Mach. Co. v. Evans, 139 F. 860.

71. Where contract provided that it was not binding unless signed by one of the officers of the seller, held signature by an agent did not render contract binding. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613. Where the contract called for delivery to railroad company as delivery to purchaser, such delivery if made not in accordance with terms would avoid the sale. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

72. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586; Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648; West Point Cotton Mills v. Blythe, 29 Pa. Super. Ct. 642; Philip Wolf & Co. v. King [Cal. App.] 82 P. 1055; Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. In accepting offer to sell, a statement of the dates of shipment held not to render the acceptance conditional. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. Where offer was to sell "choice" potatoes, held an acceptance requiring potatoes to be "strictly choice" did not constitute a variance, it being shown that they meant the same grade. Id. Order containing words "Kindly acknowledge acceptance of above order and conditions," held not to become binding contract until accepted. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500. Where offer to buy was accepted upon condition and this new offer was accepted, there being enclosed with the "acceptance" a form of agreement for signature embodying other provisions not referred to in the correspondence, and the seller refused to sign this agreement, held no contract. Philip Wolf & Co. v. King [Cal. App.] 82 P. 1055. Where defendant's offer to sell was accepted conditionally and defendant replied without referring to the condition, that he would simply furnish the articles if he could purchase them, held insufficient to constitute a contract binding defendant to furnish the articles in any event. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586. The buyer may reject goods and refuse payment wherever the acceptance is not according to the terms of the offer. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648. Plaintiff was not bound to recognize a qualified acceptance of an order to his broker to sell so as to entitle the latter to set off damages resulting because he was obliged to supply his customer from other sources. West Point Cotton Mills v. Blythe, 29 Pa. Super. Ct. 642.

73. Where offer arrived in the town of the buyer's residence after business hours on Saturday, and was received by the buyer Monday morning, an acceptance sent by telegram and mail Monday evening held within a reasonable time. James E. Mitchell & Co. v. Wallace, 27 Ky. L. R. 967, 87 S. W. 303.

74. Where offer was not accepted as required the fact that the offerer, who was the buyer, specified the part of articles desired, held not to render the contract binding except as to the accepted specification. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613. The buyer having an option to demand more than a designated quantity up to a maximum quantity, each order given above the minimum quantity constitutes an acceptance pro tanto. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294.

formed.[75] Where the parties to an executory agreement for the sale of goods agree that the price to be paid for the property shall be fixed by valuers nominated in the agreement, there is no contract of sale if the persons appointed as valuers fail or refuse to act as such,[76] and this is true even though one of the parties to the agreement is the cause of such failure or refusal.[77] An offer being accepted in the manner stated, a contract is formed[78] and is deemed made at the place of acceptance.[79] In this connection the solicitation of an offer to buy must be distinguished from an offer to sell.[80] Acceptance may be shown by acts performed under the contract.[81] An acceptance being conditional it amounts to a new offer.[82] In determining whether or not an acceptance is conditional, requests and conditions should be distinguished,[83] the question being generally one for the court,[84] and the matter being doubtful, the court may look to the surrounding circumstances and subsequent conduct of the parties.[85] Any question as to the identity of the parties is for the jury.[86]

A contract made by a duly authorized agent or representative[87] as such[88] is

75. Sale upon the condition that the seller have an "immediate" wire routing is not performed by the sending of a telegram after a day's delay. Van Camp Packing Co. v. Smith [Md.] 61 A. 284.

76. Elberton Hardware Co. v. Hawes, 122 Ga. 858, 50 S. E. 964.

77. Elberton Hardware Co. v. Hawes, 122 Ga. 858, 50 S. E. 964.

NOTE: Where the agreement has been fully executed by the delivery of the goods, and the purchaser has done any act which prevents their valuation being fixed as their agreement provides, the vendor is entitled in a proper action to recover the value of the goods estimated by the jury. 1 Benj., Sales, § 87; Beach on Sales, § 213; Clerke v. Westrope, 18 C. B. 765; Humaston v. American Telegraph Co., 20 Wall. [U. S.] 20, 22 Law. Ed. 279; Smyth v. Craig, 3 Watts & S. [Pa.] 14.—From Elberton Hardware Co. v. Hawes [Ga.] 50 S. E. 964.

78. Where seller forwarded unsigned and unexecuted contract to buyer with a letter stating that if the same was satisfactory it should sign and return the same and the seller would then do the same, held upon signature by buyer a complete contract was made. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. An instrument which might merely be an order or offer signed by the purchaser becomes a contract when signed by the seller also. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

79. Order taken subject to approval is governed by the law of the state where approved and accepted. P. J. Bowlin Liquor Co. v. Brandenburg [Iowa] 106 N. W. 497. See Conflict of Laws, 5 C. L. 610.

80. Where solicitation of offer to buy, sent to brokers, stated that if price was satisfactory samples would be sent, and brokers telegraphed that they would accept the articles, that plaintiff was the proposed buyer and that samples should be expressed, and the brokers also wrote that there was no question but that if the corn was good standard it would be approved, held not to amount to a contract. Jobst-Bethard Co. v. Glenwood Canning Co. [Iowa] 105 N. W. 385.

81. Where an offer to buy is accepted conditionally, acceptance may be shown by acceptance of deliveries thereunder. H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co. [Mo. App.] 92 S. W. 121. The filling of an order within a specified or reasonable time is a sufficient acceptance and notice to bind the proposed buyer. Minneapolis Threshing Machine Co. v. Zemanek [Iowa] 106 N. W. 512. A delivery in compliance with the terms of the offer is an acceptance and passes title to the purchaser. Baird Bros v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648. Evidence held insufficient to show acceptance. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500.

82. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586.

83. An acceptance of an offer to sell bolts held not rendered conditional by an expression in the buyers' letter of acceptance that it was not of so much importance to have such bolts put up in packages but that they would like at least the smaller sizes that way if possible. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586. Any form of expression showing clearly an intention to accept on the terms proposed, i. e. a consent to the same subject-matter in the same sense, is sufficient if not coupled with some new condition or new term implying a new condition. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056.

84. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056; Philip Wolf & Co. v. King [Cal. App.] 82 P. 1055.

85. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056.

86. Whether shares of stock were sold by defendant to plaintiff held a question for the jury. Shreve v. Crosby [N. J. Err. & App.] 63 A. 333.

87. An agent for the sale of property has no implied power to accept an order for his principal. Mayo v. Koller, 28 Pa. Super. Ct. 91. Evidence held to justify verdict that agent was within apparent scope of his employment in the purchase of certain goods. Brockman Commission & Cold Storage Co. v. Pound [Ark.] 91 S. W. 183. Evidence held to show that it was within the apparent authority of agent to sell on terms providing

valid and binding. So also, a contract of sale may be valid and binding upon the purchaser although made by him in the name of another.[89] Ratification merely confirms a contract as made,[90] neither anterior authority of an agent nor subsequent ratification will operate to change the terms of the written contract without the knowledge or consent of the other party and adversely to him.[91]

One is liable for goods furnished, received, and appropriated,[92] even though not ordered, and this is especially true where he subsequently promises to pay for them.[93] The mere delivery of goods by one person to another, however, is not of itself sufficient to create a liability for their value. The delivery to and an acceptance by the intended purchaser must have occurred under such circumstances that the law will imply a promise to pay for them.[94]

The contract of sale must not be in restraint of trade.[95] An executory Sunday contract of sale is unenforceable unless subsequently confirmed or ratified by the parties.[96] It is legally possible for the buyer to agree to resell the property to the seller at a higher price payable in the future. If such be the actual transaction the law will enforce it.[97] It is, however, in such cases frequently difficult to determine whether the transaction is a sale or a device to evade the usury laws. The transaction being lawful on its face, the party asserting its illegality must prove it,[98] the question being generally one for the jury.[99] One of several exceptions to the general rule that no court will lend its aid to enforce a claim based upon an illegal or immoral contract is where the party complaining can exhibit his case without relying upon the illegal transaction.[1]

for payment after sale of goods by vendee. Patton-Worsham Drug Co. v. Stark [Tex. Civ. App.] 13 Tex. Ct. Rep. 979, 89 S. W. 799. In an action for a balance due upon a sale of furniture, plaintiff proved by defendant that the latter had received the goods and had made payments thereon. It was also shown that the goods were selected by defendant in company with his wife, and that the agreement of sale, which was afterwards signed by **defendant's wife** was not signed by defendant merely because he was unable to go to plaintiff's place of business. Held error to dismiss the bill on the merits. Monahan v. Campion, 96 N. Y. S. 1019.

88. Seller's agent simply signing order with buyer's name without the buyer's request held merely an order subject to the approval of the seller before becoming a contract. Braly v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149.

89. O. M. Cockrum Co. v. Klein [Ind.] 74 N. E. 529.

90. Where contract secured by an agent provided that it should not be binding until signed by one of the seller's officers, held ratification without such signing could not render the contract valid. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613. If a sale is approved by a principal it must be taken to be an approval of the terms as actually made. Patton-Worsham Drug Co. v. Stark [Tex. Civ. App.] 13 Tex. Ct. Rep. 979, 89 S. W. 799. Though a principal has reserved the right to reject an order solicited by an agent if unsatisfactory, the contract cannot be annulled after delivery of goods because of the wrong of the agent. Soliciting an order on unsatisfactory terms and then erasing the terms from the contract. Id.

91. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613.

92. Certain goods shipped by the plaintiff to a bankrupt were stopped in transit. An order upon the carrier was then given by the plaintiff's agent to the defendant, whereby the defendant obtained the goods and used them in his business. Held that under the circumstances there was an implied contract upon his part to pay to plaintiff the fair market value of the goods which could be enforced by an action on the contract. Teetzel v. Davidson Bros. Marble Co. [Neb.] 104 N. W. 1068. See Implied Contracts, 5 C. L. 1756.

93. Instruction held proper. Reynolds v. Blake, 111 Ill. App. 53.

94. Smith v. Perham [Mont.] 83 P. 492.

95. A sale is not void under Burns' Ann. St. 1901, § 3312g, unless made between persons or corporations "who control the output." Over v. Byran Foundry Co. [Ind. App.] 77 N. E. 302. Sale of sash weights held not void. Id. See Contracts, 5 C. L. 664.

96. P. J. Bowlin Liquor Co. v. Brandenburg [Iowa] 106 N. W. 497. See Contracts, 5 C. L. 664, and Sunday, 4 C. L. 1589.

97. Rogers v. Bluenstein [Ga.] 52 S. E. 617.

98, 99. Rogers v. Bluenstein [Ga.] 52 S. E. 617. Errors in charge, if any, held harmless. Id.

1. Packard & Field v. Byrd [S. C.] 51 S. E. 678. A contract being severable the fact that the consideration of a separate part is illegal will not prevent the enforcement of the rest. Where contract for exclusive selling agency was assumed void as against public policy, held the purchaser was liable for goods subsequently sold under the orig-

Whenever required by the statute of frauds the contract must be in writing.[2] In the absence of statutory provisions to the contrary it is immaterial in what part of the instrument the signature is affixed, providing it is placed there with the intention that all parts of the instrument constitute a part of the contract which is being signed.[3]

§ 3. *Modification, rescission, and revival.*[4]—While one of the parties cannot, without the consent of the other, modify or change the contract in any way,[5] still both parties may by mutual consent,[6] expressed by themselves or their duly authorized agents,[7] change the contract in any way without additional consideration.[8] A variation from the terms of a preliminary agreement made in drawing up the final agreement does not bind one not consenting thereto.[9]

Except where the contract is rendered voidable by fraud, breach of warranty or other similar cause,[10] the contract can only be rescinded by mutual consent[11]

inal agreement where the seller could establish the sale without relying on the illegal portion of the original contract. Id.

2. See Frauds, Statute of, 5 C. L. 1550.

3. B. F. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614. See Contracts, 5 C. L. 664; Names, Signatures and Seals, 6 C. L. 739.

4. See 4 C. L. 1323.

5. Statement on seller's billhead that all claims must be made within 10 days after receipt of goods held not binding on purchaser. Doddato v. Gratti-McQuade Co., 97 N. Y. S. 972. An absolute acceptance of a seller's offer to sell bolts, held not affected by a subsequent communication informing the buyer that he assumed no responsibility in the sale but simply procured the bolts for the buyer provided he could purchase them as he had been assured he could do, which statement was not assented to by the buyer. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586. Where the acceptance of an offer to sell did not stipulate for a contract under seal and the sellers accepted the buyer's executed draft of the contract without objection that it was not under seal, held it was no objection to the validity of the contract that, though it concluded with the words "Witness our hands and seals," it was only signed and not sealed by the buyers. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. Where defendant was bound to accept and pay for tobacco sold at fixed prices, the fact that plaintiff thereafter offered to reduce the price in order to induce defendant to accept and pay for the tobacco did not create a new contract or defeat defendant's liability for the price fixed. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777.

6. Welden v. Witt [Ala.] 40 So. 126. Where buyer, an individual, requested the seller to transfer the account and contract to a company as buyer, held contract became the obligation of the company. Vulcan Ironworks v. Burrell Const. Co. [Wash.] 81 P. 836. Where buyer's agent requested of seller's agent a modification of date of delivery as specified in the contract, and shipments were made apparently in compliance with such request and were acquiesced in by the buyer for over a month, held to show modification. Birkett v. Nichols [N. Y.] 77 N. E. 374, rvg. 98 App. Div. 631, 90 N. Y. S. 257. Evidence held to show that contract for the sale of stone had been modified. Farrell v. Ryan, 94 N. Y. S. 850. Evidence held insufficient to show a new agreement made after the sale that the buyer should make, at the seller's expense, such repairs, additions, and changes as he might find necessary. Callahan v. O'Rourke, 96 N. Y. S. 1010. Evidence held to establish that vendee never authorized a change in terms of sale. Erasure of "Pay for when sold" from order blank. Patton-Worsham Drug Co. v. Stark [Tex. Civ. App.] 13 Tex. Ct. Rep. 979, 89 S. W. 799.

7. In an action to recover for shortage in weights, the contract providing that if the buyer was dissatisfied with the weights the seller should have the right to reweigh, and it is shown that the broker of the seller consented to the buyer using the cotton before notice to the seller of the objection to the weights, so that it could not be reweighed, plaintiff can show that such broker had no authority to grant such permission. Revolution Cotton Mills v. Union Cotton Mills [S. C.] 52 S. E. 674.

8. Welden v. Witt [Ala.] 40 So. 126. It is not necessary to allege a consideration for the modification of an executory contract. Warren & Lanier v. Cash [Ala.] 39 So. 124.

9. Where preliminary agreement provided for joint ownership of the article purchased, held a party thereto was not liable for any of the purchase price, he not being present when the final contract was entered into and the other buyers at such time forming a partnership which took title to the horse. Dunham, Fletcher & Coleman v. Crawford [Iowa] 106 N. W. 930. Verbal order of time of delivery held not legally changed by written order given at practically the same time, the seller's attention not being specifically called to the intended change. Kiley v. Lee Canning Co., 105 App. Div. 633, 93 N. Y. S. 986.

10. See post, §§ 10 A, 11 A.

11. Contract for the sale of corporate stock to be paid for out of dividends and earnings and from other sources at option of buyer held to show an executed contract, and it would not be rescinded at the option of one of the parties without the other's consent. White v. C. & G. Cooper Co., 7 Ohio

expressed by the parties or their duly authorized agents.[12] No implied authority to rescind a sale can be inferred from the mere fact that an agent has authority to sell.[13] Rescission terminates the contract and the rights of the parties thereunder,[14] and upon an unconditional proposal to cancel by one party, the other may assume that all the legal consequences of unreserved cancellation were contemplated.[15]

§ 4. *General rules of interpretation and construction.*[16]—The interpretation of the contract is governed by the law of the state where made.[17] The construction of the contract, whether committed to writing, contained in correspondence or merely verbal, is a matter of law,[18] and the meaning of its terms, if precise and explicit, is a question for the court,[19] but if such meaning is doubtful or uncertain,[20] or in case the terms of a verbal contract are disputed,[21] it may be submitted to the jury under proper instructions. The general rule that the court will give effect to the intention of the parties applies,[22] and this intention may be ascertained from the customs and usages of the trade,[23] the circumstances of the case,[24] and from the practical construction of the contract by the parties,[25] and such construction while not conclusive[26] is entitled to great weight.[27] In order for a custom

C. C. (N. S.) 114. Where price was to be paid in instalments, the seller to retain possession of the goods until payment was completed, held the contract containing no stipulation for forfeiture on default, that where the buyer defaulted and the seller, after extending the time for payment to no avail, resold the goods, that there was a mutual rescission. Pierce v. Staub [Conn.] 62 A. 760.

12. Brokers acting as such, to the knowledge of both parties, in negotiating sale, held to have no authority to annul contract and authorize the buyer to sell the goods for the account of the seller. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891.

13. Whether salesman had authority to rescind contract of sale held question for jury. Mange-Wiener Co. v. Worsham Drug Co. 27 Pa. Super. Ct. 315.

14. After rejection of goods and rescission of contract the buyer cannot without the assent of the seller take the goods. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

15. Waives right to damages for prior breach. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex. Civ. App.] 90 S. W. 202.

16. See 4 C. L. 1324.

17. See Conflict of Laws, 5 C. L. 610.

18. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250; Upchurch v. Mizell [Fla.] 40 So. 29; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Defendant not entitled to finding of jury as to whether there was a warranty. Young v. Van Natta, 113 Mo. App. 550, 88 S. W. 123.

19, 20. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250.

21. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250. Evidence being conflicting as to whether seller's agent agreed that his principal should pay the freight, held the question was for the jury. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789.

22. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

23. The regular and established method of conducting a business is of significance in construing a contract relating to it. Sale of coal for future delivery. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617.

24. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

25. William R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174; Kennedy v. Lee, 147 Cal. 596, 82 P. 257. Evidence that defendant construed the agreement as plaintiff did, held admissible. Id. Is strong evidence of the meaning of equivocal terms. Baldwin v. Napa & Sonoma Wine Co. [Cal. App.] 81 P. 1037. Where contract for the sale of wines entered into in March provided that a certain quantity should be taken annually before September 1st, held that where parties acquiesced in a pro rata taking for the months from March to the first of September, the seller could not claim breach of contract for failure of the buyer to take the full yearly amount for such period. Id. Instruction held erroneous. Id. Where seller furnished cars, held bound by construction placed on contract. Davis v. Alpha Portland Cement Co. [C. C. A.] 142 F. 74, afg. 134 F. 274. Under such construction buyer of hops held to have the right to inspect the entire crop and make his selection therefrom. Mitau v. Roddan [Cal.] 84 P. 145.

26. The fact that a purchaser accepts a part of a bill of goods and pays the freight thereon does not estop him to deny his liability to pay freight on the balance of the bill. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789. Where a contract for the sale of lumber provided for delivery f. o. b. point of shipment, the fact that the seller submitted to a deduction for alleged shortage on a single car, based on a tally made on arrival of the car at destination, and thereafter offered to deliver the lumber at destination on condition that an advance payment be made for the balance, did not preclude it from insisting that a delivery to the carrier at the

to be regarded as part of a contract, it must have been actually or constructively known and be consistent with the contract.[28] The courts will take notice of the fact that trade of a certain kind does not vary very much from year to year, making it possible to ascertain with reasonable certainty the meaning of a contract to supply a gross amount of certain merchandise not specified.[29] In a "bought" memorandum drawn by a broker the essentials are expressly stated and the rest left to reasonable implication, from what is thus stated, when considered in the light of the situation of the parties and the circumstances known to both.[30] The test is what would a reasonable man infer on reading the contract in the light of that situation and those circumstances if the facts ultimately developed occurred to him as possible or likely to happen.[31] In construing the contract for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and effect must be given to every part thereof when it can be done without violence.[32] Evidence of prior[33] or contemporaneous[34] parol agreements is inadmissible to vary, alter, or add to the terms of a complete[35] written contract of sale,[36] though it may be admitted to explain ambiguous terms in the instrument[37] and to render it complete,[38] or to show that the contract was obtained

point of shipment constituted a compliance with its contract as to the balance. Murphy v. Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113.

27. Baldwin v. Napa & Sonoma Wine Co. [Cal. App.] 81 P. 1037.

28. Denton Bros. v. Gill [Md.] 62 A. 627. Where a contract for the sale of corn provided "Any deficiency on the bill of lading weights to be paid for by the seller," the contract could not be varied by the evidence of a custom whereby, in sales and purchases of corn, the shipping weights taken at port of shipment, as stated in the bill of lading, are final. Id. A custom cannot control the express provisions of a contract. Delaware & Hudson Canal Co. v. Mitchell, 113 Ill. App. 429. See Customs and Usages, 5 C. L. 894.

29. An order for 5,000 stoves, variety, size, etc., not specified. Held that an average of previous orders for 10 years past would be a proper criterion of the orders under the contract in measuring damages. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

30. M. & E. Solomon Tobacco Co. v. Cohen [N. Y.] 77 N. E. 257, rvg. 95 App. Div. 297, 88 N. Y. S. 641. See 4 C. L. 1326, n 22.

31. M. & E. Solomon Tobacco Co. v. Cohen [N. Y.] 77 N. E. 257, rvg. 95 App. Div. 297, 88 N. Y. S. 641. See 4 C. L. 1326, n. 22. A bought memorandum contained a stipulation that the buyer should pay the duty, expressed as follows: "Terms: **Duty Cash** 70c if appraised at less **diffice to be allowed.**" Held the buyer could recover excessive duties paid by him and recovered by the seller on the ground that the appraisement was illegal. Id.

32. Williams v. Gridley, 96 N. Y. S. 978; Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

33. Statements made during negotiations held inadmissible. Contract provided that verbal agreements would not be recognized or allowed. Buffalo Pitts Co. v. Shriner [Wash.] 82 P. 1016. It was not error to reject all testimony of a prior verbal understanding where the written contract disclaimed that any verbal understanding existed. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

34. Evidence of parol, contemporaneous agreement, giving defendant exclusive right to goods in his town, held inadmissible. Main v. Rodney [Ala.] 39 So. 981.

35. When the written agreement of the parties is complete in itself, the conclusive, legal presumption is that it embodies the entire engagement of the parties and the manner and extent of their obligations, and parol evidence of other terms relating to the same subject-matter is inadmissible to extend, modify, or contradict it. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. A contract of sale reciting the purchase of "500 sax Bayo, more or less, at $3.50 per 100; 500 sax peas, more or less, at $2.95 per 100; 350 sax pinks, more or less, at $2.70 per 100; net on bank of river," held complete and parol evidence was inadmissible to show that sale was by sample. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

36. Where seller's broker quoted price by telegram, and the buyer ordered goods, held a memorandum made out and signed by the broker a copy which was given both parties constituted a contract. Day Leather Co. v. Michigan Leather Co. [Mich.] 12 Det. Leg. N. 548, 104 N. W. 797. A letter of confirmation written by the seller and accepted in writing by the buyer held to constitute written contract of sale. Midland Linseed Co. v. Remington Drug Co. [Wis.] 106 N. W. 115.

37. Sholl v. Prince Line, 109 App. Div. 591, 96 N. Y. S. 368. "Terms: Dryer, net 60 da." Hagen Co. v. Greenwood, 27 Pa. Super. Ct. 239. Terms "Same as last" interpreted to refer to last sale or order, not to next to last or to any other previous similar contract. Licking Rolling Mill Co. v. W. P. Synder & Co. [Ky.] 89 S. W. 249. Merchandise "to be invoiced as per the following cost mark:" Webb v. Steiner, 113 Mo. App. 482, 87 S. W. 618. Where the goods are to be delivered

through fraud,[39] but the evidence of such improper influences must be clear and satisfactory.[40] A mistake in the written contract may be shown by oral evidence.[41] Where there is an express contract of sale, nothing is implied.[42] Whether an agreement contains language importing a complete contract is a question of law for the court and is to be determined from an inspection of the face of the agreement.[43] A covenant to purchase may be implied.[44] As to whether printed matter on paper is a part of the contract is a question of intention.[45] The acceptance of a submitted estimate does not bind the seller to deliver the goods regardless of the buyer's ability to pay.[46] The construction placed upon words and phrases in particular contracts are stated in the notes.[47]

on a certain day "or as soon as possible," there is no ambiguity. Williams v. Gridley, 96 N. Y. S. 978. Parol evidence held admissible to explain ambiguous clauses referring to description of property. Young v. Guess [La.] 38 So. 975. Order of macaroni **"without time limit,"** held parol evidence was admissible to show whether phrase referred only to the colder season of the fall and winter following the making of the contract or not. Sholl v. Prince Line, 109 App. Div. 591, 96 N. Y. S. 368. Where contract of sale recited the purchase of "500 sax Bayo, more or less, at $3.50 per 100," held parol evidence was admissible to show that **"Bayo"** meant a variety of beans known as "Bayous," and that "per 100" meant "per hundred pounds." Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

38. Niles v. Sire, 46 Misc. 321, 94 N. Y. S. 586. Where advertising contract was to apply on hat order, for hats for a dramatic production at $22 per hat, held parol evidence was admissible to show number of hats, terms of payment, etc. Id. Where written communications are insufficient to create a contract, parol evidence is admissible to prove terms not mentioned. Correspondence as to prices of machines held not a complete contract so as to preclude parol evidence. Goodwin Mfg. Co. v. Arthur Fritsch Foundry Co. [Mo. App.] 89 S. W. 911.

39. Buffalo Pitts Co. v. Shriner [Wash.] 82 P. 1016; Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Parol evidence is admissible to show that one of the parties was induced to sign by fraud and that the written contract did not represent the agreement of the parties. Lilienthal v. Herren [Wash.] 84 P. 829.

40. Buffalo Pitts Co. v. Shriner [Wash.] 82 P. 1016. Where instrument contained, to plaintiff's knowledge, a provision that no verbal agreements would be recognized or allowed and the answer to an action for the price alleged a warranty, held proper to refuse to permit an amendment alleging that the agent of the seller made false and fraudulent representations as to the machinery and represented that the seller would warrant it. Id.

41. Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Evidence held to show that oral contract should include option of rescission, and on nonrescission, right of fulfilling it at a later date. Walker v. Kirwan [Ky.] 90 S. W. 244.

42. Where an offer of sale is made by letter and the buyer wires acceptance, there is an express contract excluding any contract by implication. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373.

43. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

Receipt in following words: "August 24, 1903. Received from George L. Tait nine hundred and 00-100 dollars. In payment on sale of Los Gatos Hotel and contents. J. S. McInnes," held not to show that sale was complete and unconditional. Tait v. McInnes [Cal. App.] 84 P. 674.

Note: The question whether a given writing is or is not a complete contract is for the court. Beck v. West, 87 Ala. 213; Ry. Co. v. Wynn, 88 Tenn. 321; Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 35 Law. Ed. 837. On the question whether or not a memorandum of sale constitutes a complete contract which may not be varied by parol evidence, the authorities are in conflict. The stricter view is upheld in Harrison v. McCormick, 89 Cal. 327, 26 P. 830; Wiener v. Whipple, 53 Wis. 298, 40 Am. Rep. 775 (relying on Meyer v. Everth, 4 Camp. 22; Gardiner v. Gray, 4 Camp. 144). Shaw, J., with whom concur Van Dyke and McFarland, JJ., in the principal case, dissents from this view, and his opinion is supported by Hersom v. Henderson, 21 N. H. 224, 53 Am. Dec. 185; Perrine v. Cooley, 39 N. J. Law 449; Neal v. Flint, 88 Me. 72, 33 A. 669. —From 4 Mich. L. R. 81.

44. So held where contract provided all the terms of sale and was signed by both parties. King-Keystone Oil Co. v. San Francisco Brick Co. [Cal.] 82 P. 849.

45. Where memorandum of purchase by lumber dealer was written upon the face of a printed blank intended only for use in sales by the dealer to his customers, held the printing was no part of the contract. Patch v. Smith, 105 App. Div. 208, 94 N. Y. S. 692.

46. Submission of an estimate by a contractor to a materialman for materials desired for a building. Oldenburg & Kelley v. Dorsey [Md.] 62 A. 576.

47. The words **"this day sold"** mean a present sale. Yick Sung v. Herman [Cal. App.] 83 P. 1089. Terms **"same as last"** interpreted to refer to last sale or order. Licking Rolling Mill Co. v. W. P. Synder & Co. [Ky.] 89 S. W. 249. Sale of wines, a **certain portion to be taken yearly,** held not to require buyer to take a proportionate share of each kind yearly. Baldwin v. Napa & Sonoma Wine Co. [Cal. App.] 81 P. 1037. Instruction held erroneous. Id. The word

The entirety or separability of a contract depends primarily upon the intention of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.[48]

§ 5. *Property sold. Amount, kind, nonexistence, and failure of consideration.*[49]—Any kind of property can be sold,[50] although a government concession or franchise provides that it cannot be transferred without previous authority of the government, the concessionary can sell an undivided part interest in the concession, subject to the contingency of the government refusing the right of the buyer,[51] and such a sale conveys a valuable equitable interest such as to provide a consideration for a promise to pay money as the price thereof.[52]

"land" when used in a contract of sale without limitation is broad enough to include a piece of real property described as a block in a townsite. J. I. Case Threshing Mach. Co. v. Mickley [Kan.] 83 P. 970. So held where buyer was to have the right to countermand the order if he bought "land." Id. It has been held that a contract to **supply the requirements** of a party means to supply what his business may need and not merely what he may chose to take. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Where a contract for the sale of coal for future delivery provided that if the seller failed to secure sufficient cars it should deliver to the buyer a **proportionate amount of the coal mined,** and it was known by both parties that the seller had no storage facilities and there was evidence that the buyer understood that the seller had other contracts to fill, held the contract required the seller in case of a lack of cars to give the buyer its proportionate share of the coal produced and shipped without discrimination in favor of any other contract. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617. Defendant, while continuously operating a carriage factory consuming tire steel daily, and requiring a large amount of such steel to be kept constantly on hand, contracted to buy of plaintiff **"all the tire steel,"** not to exceed 14,000 sets, that should be **used in its works** prior to September 1, 1899, at terms and prices specified. At the time the contract was made both parties knew that steel could not be furnished on the day of the contract and that the tire steel must be used from the stock on hand. Held that plaintiff was bound to furnish steel up to 14,000 sets as ordered, during the year, necessary to replace the steel used and to keep the stock unimpaired during such period. Staver Carriage Co. v. Park Steel Co. [Ill.] 77 N. E. 174. A contract by an insurance company to transfer its good will and a list of its policies to another company, which recited that the seller was about to discontinue its business and to wind up its affairs, was not broken by the insolvency of the seller within a few months after the making of the contract and the appointment of a receiver for its assets, especially where, prior to the judicial declaration of the seller's insolvency, the buyer had obtained all the benefit which could accrue to it under the contract. Bowers v. Ocean Accident & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

48. Packard & Fleld v. Byrd [S. C.] 51 S. E. 678. The sale at one time of different articles at different prices creates a several contract as to each article, unless acceptance of the whole is made necessary by the nature of the property or agreement of parties. Slayden-Kirksey Woolen Mills Co. v. Spring, 116 Ill. App. 27. A simultaneous purchase of different chattels at different prices constitutes a several contract as to each chattel, unless impracticable from the nature of the subject-matter or unless the parties have agreed to the contrary. Id. Where pending sale of machine bolts the seller offered to sell also some carriage bolts, and, after negotiating for a while, the buyer bought the machine bolts and offered to buy the carriage bolts, which offer was accepted conditionally, held transactions were several. Kelley, Maus & Co. v. Sibley [C. C. A.] 137 F. 586. A contract for a set of books to be delivered one volume at a time and to pay at a certain rate per volume on delivery is an entire contract, though performance is several. Barrie v. Jerome, 112 Ill. App. 329. Where plaintiffs sold defendants an assortment of toilet articles and a counter showcase, the contract was an entire one. Walter Pratt & Co. v. Frasier & Co. [S. C.] 51 S. E. 983. Where a contract for the sale and removal by the buyer of five buildings bound the buyer to complete the removal within 15 days, and to start within 24 hours' notice, a notice given the buyer to take possession of and remove three buildings was ineffective. Lippman v. Hauben, 94 N. Y. S. 520. Where one buys goods by items separately listed, each item being bought by sample and warranty, the contract is severable. Perfumes itemized and each perfume bought on its own sample and warranty. S. M. Duffie & Co. v. Walter Pratt & Co. [Ark.] 88 S. W. 842. The fact that a contract guarantees a profit on all the goods sold does not render an otherwise severable contract an entire contract. Contract for itemized bill of perfumes guaranteed a profit of 33% on entire order. Id.

49. See 4 C. L. 1326.

50. An interest in the capital stock of a corporation constitutes a property right which may be transferred and affords a consideration for a contract of sale, although no certificates have been delivered. McGue v. Rommel [Cal.] 83 P. 1000. Electricity is personal property. Civ. Code §§ 654, 655, 663, construed. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562.

The kind and quality, the identity, the title,[53] *and the quantity*[54] of property purchased depends upon the terms of the contract. Only those things will be considered appurtenances and necessaries to a ship which are really necessary to it in carrying on its accepted business, and there is no implied warranty that duplicates shall be furnished.[55] One buying a specific collected mass of articles, the questions of quantity and quality are immaterial.[56] There being a dispute as to the quantity and kind of property sold, evidence of the value of the property claimed to have been purchased and of the price paid is admissible,[57] as is the check given in payment and the receipt given therefor, they containing recitals defining the kind and quantity of property sold.[58]

Failure of title only constitutes a cause of action where there is an actual want of title and the failure to have title is the cause of a loss.[59]

§ 6. *Transition of title.*[60]—The transition of title in order to determine the locus of a crime as in the sale of inhibited articles is largely treated elsewhere.[61]

Meaning and effect of contract.[62]—The time when title passes depends upon the intention of the parties,[63] and this intention is a question of fact for the jury[64] to be gathered from the terms and purposes of the contract, the nature, condition, and situation of the property, and the circumstances surrounding the parties when made.[65] An executed contract for the sale of a chattel vests the title at once, but

51. McGue v. Rommel [Cal.] 83 P. 1000. In an action on a note given in consideration of a transfer of an interest in government concessions, evidence of a forfeiture of the concessions by the government long after the date fixed in the contract for the transfer, and long after a tender of conveyance by plaintiff to defendants, did not show a partial failure of consideration. Id.

52. McGue v. Rommel [Cal.] 83 P. 1000.

53. The following contained in catalogues and bills for books sold rendered to the purchasers for sale at retail, "Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association," does not constitute a limitation or restriction of the title to the books. Scribner v. Straus, 139 F. 193. Where the publishers of a copyrighted book printed a notice on the page following the fly leaf that the price of the book at retail was $1 net, and that no dealer was licensed to sell it at a less price, and the sale at a less price would be treated as an infringement of the copyright, such notice did not purport to reserve to the publisher any interest in the book or any right to control it or the action of its owner in the use and disposition thereof, and was insufficient to constitute a license agreement or contract restricting or modifying the absolute title acquired by purchasers. Bobbs-Merrill Co. v. Straus, 139 F. 155.

54. Evidence held sufficient to support a finding that a model typewriter was included in an auction sale of unassembled parts of typewriters. Scharndorf v. Alten, 96 N. Y. S. 452. Evidence by plaintiff's agent that an order for 6,000 butter boxes was correctly read and delivered to, and signed and returned by, defendant's agent, and opposing testimony by the latter that he did not read it and that it was read to him 2,000 boxes, together with wavering testimony of another, that it was read 2,000 boxes, held insufficient to vary the written order. Lenz v. Spencer, 28 Pa. Super. Ct. 31.

55. Gazzam v. Moe [Wash.] 82 P. 912. Bill of sale of a ship reading: "The whole of the said screw steamer or vessel, together with the whole of the masts, sails, boats, anchors, cables, tackle and all other necessaries thereunto appertaining and belonging, * * * to have and to hold the said screw steamer * * * and appurtances thereunto belonging," etc., held not to include an old crank shaft removed from the boat and replaced by another and a rudder made before the sale from a measurement of the rudder on the boat but not placed therein. Id.

56. Pile of lumber. Patch v. Smith, 105 App. Div. 208, 94 N. Y. S. 692. Evidence held sufficient to show that lumber was so bought. Id.

57, 58. Dimmack v. Wheeling Traction Co. [W. Va.] 52 S. E. 101.

59. First Nat. Bank v. Columbus Sav. & T. Co., 2 Ohio N. P. (N. S.) 525.

60. See 4 C. L. 1327.

61. See Intoxicating Liquors, 6 C. L. 165, etc.

62. See 4 C. L. 1327.

63. O'Keefe v. Leistikow [N. D.] 104 N. W. 515; Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438; St. Anthony & D. Elevator Co. v. Cass County [N. D.] 106 N. W. 41.

64. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048; Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

65. Where property was delivered to contractor to put in premises of a third person, held to show intent to pass title to such third person, for any lien on or ownership of the chattels in the seller would be antagonistic to the main purpose. Milicie v. Pearson, 110 App. Div. 770, 97 N. Y.

an executory contract always leaves something to be done before the title to the property will vest in the purchaser.[66] When, however, the act is performed, the sale is complete and the title to the property passes.[67] Where there is an agreement to sell and to buy a specified article, the title passes to the purchaser at once, unless the terms of the contract indicate an intention to have it otherwise.[68] Where it would be illegal, title will not be deemed to have passed.[69] That the sale is fraudulent will not prevent the passage of title.[70] In a purchase of property with an option to return it within a certain time, title passes subject to the right to return,[71] and if this right is not exercised at the time named, the sale is complete and a promise to pay the purchase price becomes absolute.[72] The words "this day sold" mean a present sale.[73] In a sale by description title passes to the purchaser on delivery,[74] but in a sale by sample it seems that title does not pass until there has been an opportunity for inspection.[75] A bill of sale is not necessary

S. 431. Where books loaned were to be paid for out of a fund created by the royalties of a book to be published, which book was never completed, no title passed. Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555. Where testator in his lifetime agreed to deliver farm produce to defendant when it was ready for market, and latter was to reimburse himself from proceeds for advances made on the strength of the agreement, held that title remained in testator, and where, after his death, his executrix delivered the produce to defendant without knowledge of the agreement, defendant acquired no rights therein as against the estate, and the executrix could recover the amounts withheld by him on account of advances. Schermerhorn v. Gardenier, 46 Misc. 280, 94 N. Y. S. 253. Contract for the sale and installing of machinery, payment to be made in three instalments, one on delivery, another when machinery was installed, and the final payment on completion of test, the buyer to keep the machinery insured for the seller's benefit, held on delivery of machinery and payment of first instalment there was a completed sale. William R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174. A buyer of cattle under contract binding him to pay only for such as were delivered to him at the place of delivery, held he was the owner of all the cattle that were transported to the place of delivery except such as might die en route. International & G. N. R. Co. v. Jones [Tex. Civ. App.] 91 S. W. 611. An oral sale of personal property without actual or constructive delivery or payment of any part of the price, and without any special agreement as to immediate delivery or change of title, is not a completed sale and title does not pass to the purchaser. St. Anthony & D. Elevator Co. v. Cass County [N. D.] 106 N. W. 41.

66. Conard v. Pennsylvania R. Co. [Pa.] 63 A. 424; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. As between buyer and seller the buyer's title to shares of corporate stock attaches the moment the contract of sale is fully consummated between them. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971. Present sale; delivery to buyer at place designated; title passes. Yick Sung v. Herman [Cal. App.] 83 P. 1089. Weighing by vendor, title held not to pass. Gibson v. Ray [Ky.] 89 S. W. 474. A sale of corporate stock to be paid for out of dividends and earnings and from other sources at the option of the buyer held a valid sale vesting good title in the purchaser. White v. C. & G. Cooper Co., 7 Ohio C. C. (N. S.) 114. Seller is not liable for damage occurring after inspection. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891. As to what contracts are executory see ante, § 1, Definitions and distinctions, and infra, the next three subdivisions of this section.

67. Conard v. Pennsylvania R. Co. [Pa.] 63 A. 424.

68. Julius Kessler & Co. v. Velo [Mich.] 12 Det. Leg. N. 790, 106 N. W. 73.

69. Under Code 1892, § 850, expressly forbidding the payment of subscriptions to corporate stock with notes, held where a note was given for a subscription to corporate stock and the stock was held by the corporation as security for the note, no title to the stock passed to the subscriber and he was not entitled to possession of a stock dividend. Headley Lumber Co. v. Cranford [Miss.] 38 So. 548.

70. McGuire v. Bradley, 118 Ill. App. 59.

71. Guss v. Nelson, 26 S. Ct. 260.

72. Guss v. Nelson, 26 S. Ct. 260. Contract for the transfer of corporate stock for a part payment "to be considered an option" construed and held to confer an option to return and not an option to purchase. Id.

73. Yick Sung v. Herman [Cal. App.] 83 P. 1089.

74. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

NOTE: In a sale by description title passes, in the absence of other stipulation, immediately upon the completion of the contract. Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Wing v. Clark, 24 Me. 366; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471. In a sale where the quality of goods is expressly or impliedly warranted, title does not pass, however, until acceptance by the vendee. Bach v. Levy, 101 N. Y. 511, 5 N. E. 345; Aultman v. Clifford, 55 Minn. 159, 56 N. W. 593.—From 4 Mich. L. R. 81.

75. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

to transfer title where possession is taken by the vendee at the time of the purchase and by him retained.[76]

Separation and designation of the goods.[77]—In the absence of evidence showing an intent to the contrary, title does not pass where there is no selection or identification out of a common mass,[78] though a seeming exception is made in the case of a sale of part of a mass of grain of one grade and quality.[79] As soon, however, as the purchaser makes a selection of a particular part of the property in pursuance of his contract, and his act is approved by the vendor, the sale is complete and the title of the vendor is divested.[80] Measurement and weighing, when necessary to determine the purchase price, is frequently deemed a condition precedent to the passage of title.[81]

Payment.[82]—In the absence of an unwaived condition to the contrary,[83] payment is not essential to the passage of title in any sale[84] other than one for cash.[85]

Delivery and acceptance.[86]—While delivery is often important as bearing on the question of intent,[87] many cases hold that, unless made a condition precedent by the contract,[88] as between the parties[89] neither actual[90] nor "constructive"[91] delivery is essential, and symbolical delivery certainly suffices,[92] complete manual tradition being unnecessary;[93] but in the absence of either actual or symbolical delivery, it would seem essential that there be a "constructive" delivery. That is to say such an intention to complete the buyer's title that the seller's subsequent possession if any is regarded by them as merely that of a bailee or lienor. The contract providing for delivery f. o. b. point of shipment, title passes on goods being loaded on cars.[94] In the absence of any stipulation or agreement as to the

76. Klinger v. Joseph Schlitz Brewing Co., 115 Ill. App. 358.

77. See 4 C. L. 1327.

78. Conard v. Pennsylvania R. Co. [Pa.] 63 A. 424. Sale of mortgaged cattle held not to pass title, there being no separation from the herd of which they were part. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

79. If the parties so intend. O'Keefe v. Leistikow [N. D.] 104 N. W. 515; St. Anthony & D. Elevator Co. v. Cass County [N. D.] 106 N. W. 41.

80. Conard v. Pennsylvania R. Co. [Pa.] 63 A. 424.

81. Where a contract for the sale of a crop of tobacco in the barn of the seller fixed the price per pound and the time for delivery, held title did not pass, the number of pounds not being ascertained. Tingle v. Kelly [Ky.] 92 S. W. 303.

82. See 4 C. L. 1328.

83. Commonwealth v. Adair [Ky.] 89 S. W. 1130.

84. Baker v. McDonald [Neb.] 104 N. W. 923; Ettien v. Drum, 32 Mont. 311, 80 P. 369; Commonwealth v. Adair [Ky.] 89 S. W. 1130.

85. See 4 C. L. 1328, n. 63.

86. See 4 C. L. 1328.

87. Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

88. Commonwealth v. Adair [Ky.] 89 S. W. 1130. Where the bill of lading of goods shipped provided for delivery "at ship's tackle," held a similar provision in the contract of sale of such goods while in transit did not constitute a condition precedent to the passage of title. Sweeney v. Frank Waterhouse & Co. [Wash.] 81 P. 1005.

89. Delivery as essential to pass title as to third persons, see Fraudulent Conveyances, 6 C. L. 1556.

90. Ettien v. Drum, 32 Mont. 311, 80 P. 369; Baker v. McDonald [Neb.] 104 N. W. 923. Actual delivery. Julius Kessler & Co. v. Veio [Mich.] 12 Det. Leg. N. 790, 106 N. W. 73; Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438. The fact that the seller retains the property under his control is not inconsistent with the transfer of title. Id. Where property was described and separated, a price agreed upon and a warehouse receipt, reciting that the buyer assumed the risk of loss, given the buyer, held there was a completed sale, though goods were in the seller's warehouse. Julius Kessler & Co. v. Manhein, 114 La. 619, 38 So. 473. Under Civ. Code § 1140, title passes as between the parties to the sale, though there is no immediate delivery where there is proper identification. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964. Where a holder of matured stock in a building and loan association agreed to sell it to the association, the price to be paid in instalments, held retention of the stock by the seller while evidentiary of ownership in him was not inconsistent with the existence of a consummated sale to the association. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754.

91. Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

92. Delivery of warehouse receipts is sufficient. So held as to sale of whisky to be reduced to "95 proof." Julius Kessler & Co. v. Veio [Mich.] 12 Det. Leg. N. 790, 106 N. W. 73.

93. See ante, cases holding actual delivery to be unnecessary.

place of delivery,[95] the sale is complete upon delivery to a common carrier for transportation to the buyer.[96] The effect of a bill of lading issued by a carrier on the title to the property as between the consignor and consignee is a question of fact depending not only on the terms of the paper itself but on the intention of the parties as expressed by their dealings with each other.[97] The fact that when shipping the goods the seller takes the bill of lading in his own name as consignee,[98] or forwards the bill of lading with draft on the buyer attached to a bank for collection before delivering possession to the buyer,[99] is prima facie evidence that title has not passed. As already stated, however, the question, in its last analysis, is one of intention, and this prima facie conclusion may be rebutted by proof that in so doing the seller acted as agent for the buyer and did not intend to retain control of the property, and it is for the jury to determine as a question of fact what the real intention was.[1] The bill of lading being forwarded with draft attached, the buyer obtains no right to possession by tender of less than the amount called for by the draft, even though such amount is in excess of the contract price,[2] and if the goods are destroyed before payment, the buyer cannot, by afterwards paying the draft and taking the bill of lading, obtain a title which will relate back so as to authorize him to sue for the destruction of the goods.[3] A sale of the bill of lading with draft attached will pass title to the goods represented thereby.[4] The place of delivery is often of importance in determining the intent of the parties and when disputed raises a question for the jury.[5] Cases dealing with the sufficiency of delivery to pass title are shown in the notes.[6]

94. Buyer is liable for amount loaded as distinguished from amount received at destination; refusing to pay for the same is a breach of the contract. Murphy v. Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113.

95. Where goods are sold, the seller to have the privilege of returning all goods not resold by him, he is liable for goods lost by a common carrier on returning them, he having selected the carrier in the performance of his agreement to make delivery to the consignee. Conn v. Reed, Dawson & Co. [N. J. Law] 62 A. 271.

96. Burns v. Goddard [S. C.] 51 S. E. 915. Where a firm employed complainant to purchase goods for it in England, complainant agreeing to repay freight, insurance, and other charges for a specified commission, held, as against a retiring partner, title to the goods passed to defendant firm on delivery of the goods to a common carrier for transportation to such firm. Easton v. George Wostenholm & Son [C. C. A.] 137 F. 524. A written order for goods sent C. O. D. constitutes a sale at the point of shipment and not of destination. Keller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 264, 87 S. W. 669; Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Vendee is in duty bound to pay whether he receives and accepts goods or not, or whether he intended to or not. Id. In case of loss of goods or failure to deliver, the consignee has remedy against the express company. Id. If goods were such as the contract called for when shipped and were shipped in good condition, the seller is not liable for any damage subsequently occurring. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891.

97. Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. [S. C.] 52 S. E. 191.

98. Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438; American Nat. Bank v. Lee [Ga.] 53 S. E. 268.

99. Vaughn v. New York, etc., R. Co. [R. I.] 61 A. 695; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. [S. C.] 52 S. E. 191.

1. Benjamin on Sales, p. 333; Hamilton v. Jos Schlitz Brewing Co. [Iowa] 105 N. W. 438. Where goods were shipped with bill of lading and drafts attached and were wrongfully taken by the consignee without taking up the drafts, held railroad company having purchased claims of shippers had title to the property. Erie R. Co. v. Dial [C. C. A.] 140 F. 689.

2. Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. [S. C.] 52 S. E. 191.

3. Vaughn v. New York, etc., R. Co. [R. I.] 61 A. 695.

4. So held where goods were shipped to the order of the consignor and he subsequently sold the bill of lading with draft on the original "purchaser" to a third person. American Nat. Bank v. Lee [Ga.] 53 S. E. 268.

5. Burns v. Goddard [S. C.] 51 S. E. 915.

6. Where coffee was sold but left with the seller to roast and the seller set the amount sold aside in separate piles and placed the buyer's name and address on each pile, held delivery was good as against an execution creditor. Riggs v. Bair [Pa.] 62 A. 1086.

How proved.[7]—A bill of sale may constitute prima facie evidence of ownership.[8]

Revesting of title.[9]—After goods have been received and accepted a subsequent return of them is no defense to an action for the purchase price.[10]

§ 7. *Delivery and acceptance under the terms of the contract. A. Construction and operation of contract. Necessity, time, place, amount, etc.*[11]—Unless delivery according to terms be waived,[12] it is ineffectual unless it corresponds to the terms of the contract respecting place,[13] amount,[14] and time, when of the essence of the contract;[15] but no time being specified[16] or delivery being required "immediately"[17] or "about" a specified date[18] or on a specified date "or as soon as possible,"[19] a reasonable time is implied. What is a reasonable time is a mixed question of law and fact[20] and except where the facts are few, simple and undisputed and where only one inference can be drawn, or except where the time is so short or so long that the court can declare it reasonable or unreasonable it should be left to the jury.[21] Parol evidence of the facts and circumstances attending the sale are admissible to determine what is a reasonable time.[22] No time for delivery being fixed and a shipment not being in accord with the contract a redelivery may be

7. See 2 C. L. 1539.

8. Where record proof that a bill of sale executed by a corporation was authorized was excluded on objection, it was sufficiently proved by proof of its due execution to be admissible in evidence, and, together with proof of payment of the consideration for the property and its delivery by those having the management of the corporation's affairs, establishes the purchaser's title prima facie. Lingle v. Dalzell [Mich.] 12 Det. Leg. N. 465, 104 N. W. 665.

9. See 4 C. L. 1330.

10. Return of 2-3 of order. Lenz v. Spencer, 28 Pa. Super. Ct. 31.

11. See 4 C. L. 1330. Delivery to pass title, see ante, § 6.

12. Where cotton was sold to be delivered in April, May, or June at buyer's option, an order given by the buyer to sell if July cotton reached a certain price operated to **extend the time** of delivery until the last day of July. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250.

13. Where billposters were ordered for delivery f. o. b. New York and they were delivered to a bill posting company of Brooklyn, held delivery was insufficient in the absence of proof of authority to so deliver. Sackett & Wilhelms Lithographing & Printing Co. v. Tilyou, 97 N. Y. S. 749. Contract considered and place of delivery held properly determined by the trial court. American Bridge Co. v. Duquesne Steel Foundry Co., 28 Pa. Super. Ct. 479.

14. Seller should deliver all he promises to deliver. Young v. Guess [La.] 38 So. 975. Where a contract of sale binds the seller to transfer his **"rights, title and interest" in a corporation** which has issued no certificate of stock and in government concessions, he is required only to tender a deed or assignment transferring and conveying all his right, title and interest in the property in question and he need not tender a perfect legal title to some specific undivided part of the concession for certificates of stock in the corporation. McGue v. Rommel [Col.] 83 P. 1000.

15. Where plaintiffs unconditionally accepted a special order for ice cans requiring delivery within thirty days, and plaintiffs knew that the cans were for a special use in the making of defendant's product and of the importance to defendant of prompt delivery and that the loss would follow delay, the time of performance is a condition precedent. Wall v. St. Joseph Artesian Ice & Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574. Evidence held insufficient to show a failure to deliver within the contract time. Crusel v. Hermitage Planting & Mfg. Co., 114 La. 920, 38 So. 648.

16. Aikman v. Wahnetah Silk Co., 110 App. Div. 191, 96 N. Y. S. 1067; Long v. Abeles & Co. [Ark.] 91 S. W. 29; McGinnis v. R. K. Johnson Co. [Neb.] 104 N. W. 869. Where coal was ordered in December for winter trade held a delivery the last of March was unreasonably delayed. McGinnis v. R. K. Johnson Co. [Neb.] 104 N. W. 869. An order not specifying time of delivery or intimating need of haste if filled in due course of business within a reasonable time is such delivery as will bind purchaser. An order for hoop-iron given Feb. 21, 1903, filled by delivery to railroad company March 27, 1903, and received April 28, 1903. Hardesty v. Pittsburg Steel Co. [Ky.] 89 S. W. 260.

17. Claus-Shear Co. v. E. Lee Hardware House [N. C.] 53 S. E. 433.

18. Bell v. Hatfield [Ky.] 89 S. W. 544.

19. Williams v. Gridley, 96 N. Y. S. 978.

20. Claus-Shear Co. v. E. Lee Hardware House [N. C.] 53 S. E. 433.

21. Where time was 30 days held a question for the jury. Claus-Shear Co. v. E. Lee Hardware House [N. C.] 53 S. E. 433. Except where there are circumstances of doubt or dispute as to the terms of the contract or where facts are testified to which, if believed by the jury, might excuse the delay in delivery, the question of whether or not delivery was made within a reasonable time is for the court. Id.

22. Walter Pratt & Co. v. Frasier & Co. [S. C.] 51 S. E. 983.

made.[23] The determination of questions arising from stipulations relating to time of performance rests entirely upon the intention of the parties to be collected from the language used and the circumstances.[24] Where the contract is by its terms to be performed on a day named, both parties have the whole of the business day in which to tender performance.[25] The intention of the parties as to the place of delivery is for the jury.[26] In the absence of fraud or of provisions to the contrary, the determination of inspectors, appointed and acting under the terms of the contract, as to the quality and quantity delivered, is conclusive.[27] Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods sold. His duty is fulfilled by so placing them at the disposal of the buyer that they can be removed by him.[28] In the absence of any stipulation or agreement as to the place of delivery, delivery to a common carrier for transportation to the buyer is delivery to the latter,[29] but if the seller is named as consignee and does not deliver the bill of lading to the buyer there is no delivery.[30]

The courts will take judicial notice that "f. o. b." means "free on board."[31] A contract of sale for the delivery of perishable goods in car loads f. o. b. shipping point, where the car is loaded by the seller and not by the common carrier, requires that the seller shall properly load and deliver the car in good condition to the railroad company. There the responsibility of the seller ends; but if he should fail in any particular in properly loading the car and delivering it to the railroad company in proper condition, and by reason of such failure the goods are injured or destroyed in transit, the buyer is not bound to receive the same, nor does the property in the goods pass to him until the obligation of the shipper is discharged with reasonable care and diligence.[32] The law of such contracts requires that the seller shall do the thing which is right and reasonable for the protection of perishable property to be delivered f. o. b. at shipping point, and the question as to what is right and reasonable is a question for the jury, and evidence of the general custom of

23. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

24. Wall v. St. Joseph Artesian Ice & Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574.

25. Brauer v. Macbeth [C. C. A.] 138 F. 977.

26. Burns v. Goddard [S. C.] 51 S. E. 915.

27. Strother v. McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650. Contract held to imply conclusive inspection. Electric Fireproofing Co.'s Case, 39 Ct. Cl. 307. Where lumber was inspected at the contractor's plant before subjected to fireproofing process and after passing defendant's inspection was treated by the process, delivered and accepted, the inspection was final as to quality and dimensions and precluded a second inspection. Id. Where the amount to be paid is to be determined by measurement of the property to be made by the parties a measurement which is grossly unfair, as the result of fraud or mistake, is not binding, and a tender based thereon does not entitle the purchaser to possession. Baker v. McDonald [Neb.] 104 N. W. 923. See, also, post, § 9.

28. Am. & Eng. Ency. of Law [2d Ed.] vol. 24, p. 1068. Williams v. Wilson & McNeal Co., 97 N. Y. S. 731. Court's finding that goods were not delivered though demanded does not show that the seller was under any obligation to deliver them, or that he violated his contract. Id.

29. Burns v. Goddard [S. C.] 51 S. E. 915. The contract providing that the goods shall be shipped f. o. b. at a certain place and addressed to the buyers, a delivery of the goods to the carrier free on board the car at the place designated, addressed to the buyers as provided for in the contract, with notice of shipment to them, held a delivery to the buyers. Kilmer v. Moneyweight Scale Co. [Ind. App.] 76 N. E. 271. Where seller of coal agreed to sell and furnish the buyer specified quantities of coal from its mines and on cars at its mines held cars of coal which were loaded by the seller at its mines and billed to the purchaser in its shipping orders to the railroad company, but which the railroad company appropriated to its own use, were to be considered, as between the parties to the contract, as having been delivered to the buyer. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617. See ante, § 6, Transition of title.

30. Sears, Roebuck & Co. v. Martin [Ala.] 39 So. 722.

31. Kilmer v. Moneyweight Scale Co. [Ind. App.] 76 N. E. 271.

the trade in handling such perishable property is competent for the purpose of showing what is reasonably necessary under such circumstances.[33]

All questions of fact are for the jury,[34] the general rules of evidence applying.[35]

(§ 7) *B. Sufficiency of delivery; actual, symbolical.*[36]—A tender of the necessary transfer papers should be made to the buyer personally.[37]

(§ 7) *C. Acceptance; necessity; time; what is.*[38]—The seller performing his part of the contract, the buyer is in duty bound to accept,[39] but the contract being entire, failure of the seller to ship an essential article authorizes the buyer to refuse to accept the part shipped.[40] Although notice of readiness to receive goods is necessary as a condition precedent to the right of the buyer to demand a tender, it is not a condition as to his liability ultimately to take and pay for the chattels.[41] A provision in the contract that none of the articles should be returned except in exchange for the other articles does not bar the purchaser from refusing to accept the articles because not conforming to description.[42] After being put in default an offer to accept is too late.[43] Any intentional[44] dealing with the property in such a manner as would be unlawful if it were the property of another constitutes an acceptance of the goods,[45] the question being frequently one for the jury.[46] Receipt and use of article sold on trial does not constitute an acceptance.[47] An attempted sale of the salable part of the goods while awaiting adjustment of claim

32, 33. Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. (N. S.) 445.

34. Evidence being conflicting question of whether or not there was a delivery according to the contract held for the jury. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048. As to whether letter by alleged "buyer" disavowing agent's order constituted an implied acknowledgment that goods were delivered according to contract held a question for the jury. Sackett & Wilhelms Lithographing & Printing Co. v. Tilyou, 97 N. Y. S. 749.

35. Where conflict was as to whether delivery of peas was made on a certain date evidence that seller's son requested permission of his employer to be excused on a certain date to help his father held harmless. Kiley v. Lee Canning Co., 105 App. Div. 633, 93 N. Y. S. 986. Where conflict was as to on which of two dates delivery was made and it was admitted that the seller's son made the delivery, testimony of the son's employer that the son worked for him on one of the dates and not on the other held competent. Id.

36. See 4 C. L. 1332.

37. Where the seller tendered the necessary papers of transfer at the buyer's house and failing to see the purchaser personally put the papers in the bank and notified the purchaser, held tender was insufficient. Tait v. McInnes [Cal. App.] 84 P. 674.

38. See 4 C. L. 1332.

39. Where contract provides that delivery will be made as soon as possible after a certain date, the buyer must accept if the condition is fulfilled. Widman v. Straukamp, 94 N. Y. S. 18. Quality, quantity, and price answering terms of contract, the buyer must accept. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777.

40. Walter Pratt & Co. v. Frasier & Co. [S. C.] 51 S. E. 983. Where plaintiffs sold defendants an assortment of toilet articles and a counter showcase, the contract was an entire one and a failure to redeliver the showcase excused defendants from accepting the goods. Id.

41. Bell v. Hatfield [Ky.] 89 S. W. 544.

42. Puritan Mfg. Co. v. Westermire [Or.] 84 P. 797.

43. Woodstock Iron Works v. Standard Pulley Mfg. Co. [La.] 40 So. 236.

44. Where a vendor refuses to accept a return of defective goods and a vendee inadvertently sells part of such goods with no intention to treat them as his own, he is liable only for the goods sold. Such instruction should have been given. Walter Pratt & Co. v. W. C. Morris & Co., 27 Ky. L. R. 1035, 87 S. W. 783.

45. Kupfer v. Michigan Clothing Co. [Mich.] 12 Det. Leg. N. 433, 104 N. W. 582. Where buyer returned goods but subsequently retook possession held an acceptance. Id. Examining and testing ice machine for two months and then using it for remainder of season held to constitute an acceptance. Callahan v. O'Rourke, 96 N. Y. S. 1010. Where tobacco was imported and placed in a bonded warehouse, samples were delivered and the buyer received and retained, without objection, for two months a part of the tobacco and warehouse delivery orders for the balance, held to show an acceptance. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777. Continued use of property purchased is evidence of acceptance. Borden & Selleck Co. v. Fraser, 118 Ill. App. 655.

46. So held where evidence was conflicting. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048.

47. Where a contract to manufacture a boiler for a tug provided that it should be satisfactory to the engineer, the fact that the boiler was received by him and put in the tug does not necessarily constitute an acceptance. The Nimrod, 141 F. 215.

does not constitute an acceptance of all the goods.[48] Unless acceptance of the whole is made necessary by the nature of the property or the agreement of the parties, the buyer may accept part and reject part of a several contract.[49] Rejection should be prompt and within the time specified in the contract.[50] Notice of refusal to accept being given the buyer need not return the goods;[51] it is sufficient in such case if the seller be given an opportunity to retake possession,[52] and if he fails to retake possession the purchaser may dispose of them at the best price obtainable and interpose in an action for the contract price the defense of the seller's noncompliance with the contract.[53]

(§ 7) *D. Excuses for and waiver of breach.*[54]—In order that failure to deliver may constitute a breach of the contract the seller must be in duty bound to deliver.[55] Delivery[56] or acceptance[57] will be excused if the buyer or seller has failed to perform all conditions precedent. So, also, delivery under the terms of the contract will be excused if prevented[58] or rendered futile[59] by the acts of the buyer. In the absence of agreement for credit or delay, delivery and payment are each a condition of the other.[60] Refusal to accept is equivalent to actual production and tender.[61] Where one part of a severable contract is breached, it will not

48. Such an attempt while waiting adjustment of claim that shoes were not equal to sample held not to constitute an acceptance of the entire lot. Woolfe Bros. Shoe Co. v. Bishop [Kan.] 84 P. 133.

49. Slayden-Kirksey Woolen Mills Co. v. Spring, 116 Ill. App. 27.

50. Contract of sale providing that the buyer should have 60 days in which to keep or reject the property the rule that he is bound to exercise his option within a reasonable time is inapplicable. Allyn v. Burns [Ind. App.] 76 N. E. 636.

51. Where machine was sold on trial mere acquiescence in allowing it to remain on premises after notice of refusal to accept held not to constitute an acceptance. Allyn v. Burns [Ind. App.] 76 N. E. 636.

52. If articles delivered are not those ordered and the seller is notified thereof and is in substance also notified that the buyer refuses to accept them and the seller has an opportunity to retake possession there can be no recovery for the purchase price. Perkins Windmill Co. v. Kelly [Mich.] 12 Det. Leg. N. 533, 104 N. W. 668.

53. So held where seller insisted that he had fully performed the contract. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891.

54. See 4 C. L. 1333.

55. Where the seller has an option to refuse to continue to deliver, an exercise of the option does not constitute a breach of the contract. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

56. Failure to pay on date required by terms of contract held to authorize subsequent refusal to deliver. Bennett v. Taylor [Kan.] 84 P. 533. Where the contract provides for delivery as ordered it is incumbent on the buyer to demand delivery as a condition to putting the seller in default for failure to deliver. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829. Where a party agreed to give notice of readiness to receive within a few days after Sept. 1, and he never gave it, held he had rendered a reasonable tender impossible, and hence had waived. Bell v. Hatfield [Ky.] 89 S. W. 544.

57. Where plaintiff contracted for one-half of defendant's tar, its failure to remove the tar or send cars for that purpose held not a default in the absence of notice from defendant that there was tar to be removed under the contract. National Coal Tar Co. v. Malden & Melrose Gaslight Co. [Mass.] 75 N. E. 625. Evidence held insufficient to show performance by seller of condition of contract requiring him to give the buyer notice of the time of delivery. B. F. Boneweil & Co. v. Jacobson [Iowa] 106 N. W. 614.

58. Held proper to allow plaintiff to show that defendant's foreman prevented plaintiff's teamsters from delivering brick. McAvoy & McMichael v. Com. Title Ins. & Trust Co., 27 Pa. Super. Ct. 271.

59. Where the contract called for the delivery of cattle at a certain time and place and the buyer absented himself from the place at the time and had no representative there, the seller was under no obligation to attempt a self-evident futile delivery. Bell v. Hatfield [Ky.] 89 S. W. 544.

60. Williams v. Wilson & McNeal Co., 97 N. Y. S. 731. Where a seller put prices on goods and the buyer ordered them from time to time but no credit was extended, there was not such an entire contract that the seller was not entitled to recover for the goods first sold and delivered till he should have delivered goods subsequently ordered by the buyer. Id. Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale, and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered. Baker v. McDonald [Neb.] 104 N. W. 923.

61. Levis v. Royal Packing & Drying Co. [Cal. App.] 81 P. 1086; R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250; Bell v. Hatfield [Ky.] 89 S. W. 544. Where the purchaser rejects part of the goods when tendered, stating that he does not care for

justify the disregard by the other party of the entire contract and suing on quantum meruit.[62] Unless provided for by the contract, the seller has no right to impose additional conditions as a condition precedent to deliver.[63] Whether conditions precedent have been performed is a question for the jury.[64] The seller agreeing to a postponement of the time of delivery there is no breach of the contract.[65] Refusal to accept cannot be based on an unlawful or false calculation.[66]

Failure to deliver on a certain date may be excused under a provision in the contract that it is subject to delays or nondelivery for any reason beyond the control of the seller.[67] The contract binding the seller to use every possible effort towards completing the contract but providing that delivery is subject to strikes beyond the seller's control binds the seller to deliver unless there is a strike so far beyond its control as to render performance impossible.[68] Whether such a strike exists is a question for the jury.[69] The burden is on the seller to show that delivery was excused under strike or car-shortage clauses.[70]

Waiver is a question of intention[71] for the jury.[72] In the absence of prejudice, silence on the part of the seller will not waive a breach by the buyer.[73] As a general rule acceptance without objection[74] or based upon specific objections[75] waives all objections not made. There is a conflict as to whether acceptance of

more, further tender on the part of the seller is excused. Kiley v. Lee Canning Co., 105 App. Div. 633, 93 N. Y. S. 986. **Contract** for the sale and purchase of axles and springs requiring purchaser to specify styles and sizes, and providing that a **refusal to accept** on the part of the buyer shall entitle the seller to **regard the articles as specified or,** at his option, treat the same as a **lawful tender** of all undelivered goods, held to merely dispense with the necessity of a tender and not to render an election by the seller necessary. George Delker Co. v. Hess Spring & Axle Co. [C. C. A.] 138 F. 647.

62. Contract for lumber, certain items specified, certain other items not, latter provisions breached; did not justify suing for lumber furnished under other items on quantum meruit in disregard of contract price. Magnolia Compress Co. v. Smith [Ark.] 88 S. W. 563.

63. Held to have no right to demand an indemnity bond. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829.

64. As to whether delivery was demanded. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829.

65. Wood v. Planters' Oil Mill [Ark.] 90 S. W. 18. Postponement of delivery at the buyer's request, until further notice does not start the running of the statute of limitations. Woodstock Iron Works v. Standard Pulley Mfg. Co. [La.] 40 So. 236.

66. Where contract called for 500,000 ft. of oak logs, the fact that oak rafts which with the admixture of 30% of poplar logs to make them float measured about 500,000 ft. in gross, but only 378,000 ft. of actual oak logs, refusal of oak logs could not be based on having received contractual amount. Walker v. Kirwan [Ky.] 90 S. W. 244.

67. Widman v. Straukamp, 94 N. Y. S. 18. In an action for breach of contract to furnish wheels, an answer predicating a defense on a provision making **"unavoidable cause"** an excuse for failure to perform is not sufficient to bar the action, where it alleges that the failure was caused by the giving way of the foundation of the engine, the delay of plaintiff in giving orders, and the extraordinary demand for material necessary to manufacture the wheels, all of which was without fault of defendant, and that defendant in good faith complied with the contract, except in so far as it was prevented from doing so by such unavoidable causes. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294.

68, 69, 70. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829.

71. Murmann v. Wissler [Mo. App.] 92 S. W. 355. Settlement of suit in November held not to bar suit for refusal to accept balance of fruit in December. Willson v. Gregory [Cal. App.] 84 P. 356.

72. So held where the evidence was conflicting. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048.

73. Wood v. Planters' Oil Mill [Ark.] 90 S. W. 18.

74. Where defendant at no time during the negotiations with reference to the sale of tobacco assumed to reject the same absolutely, or made any suggestion that more tobacco had been tendered than complied with the terms of the contract, or more than defendant was required to take, it was estopped to defend an action for the price on the ground that the tender was excessive. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777.

75. Where buyer refused coal on the ground that it was not the kind purchased held he could not subsequently justify refusal on the ground that the coal was not of merchantable quality. Ginn v. W. C. Clark Coal Co. [Mich.] 13 Det. Leg. N. 240, 106 N. W. 867. Refusal on ground that prices had not been wired. Held vendee could not afterward object to time of performance or quality. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281.

delivery after the stipulated times waives the breach.[76] It would seem, however, that waiver being a question of intent, the question is one for the jury under the circumstances of the case.[77] Such acceptance has been considered prima facie evidence of waiver.[78] As one court states it: "When time of performance is made an essential element of the contract, such stipulation is regarded as being in the nature of a warranty that the goods will be delivered in the time agreed, and in case of failure of the seller to so deliver the buyer has the option to either rescind the contract and refuse to accept the goods, or to receive them and recover from the seller his damages."[79] This latter right is not waived by urging the seller to fill the order after default is made.[80] If, after breach of contract, the parties mutually agree to an unconditional rescission, the effect is to waive the right to recover damages for the breach[81] unless expressly reserved,[82] and no consideration in addition to mutual consent to rescind contract is necessary to support such waiver.[83] After breach the other party may abandon the contract without waiving his right to damages.[84] One acquiescing in rejection of all the goods because part are not up to sample waives his right to insist that the contract is severable.[85]

§ 8. *Warranties and conditions.* A. *In general. Nature and distinctions. Descriptions and representations.*[86]—A warranty is a collateral agreement,[87] and while not a necessary constituent element of the sale,[88] it must enter into or become collateral to the contract of sale.[89] No particular form of words is necessary to constitute a warranty.[90] An intention to warrant must, however, be apparent,[91] and the court or jury will not be bound by the fact that the parties have named an agreement a warranty, it not being such in fact.[92] Representations of past or existing material facts[93] as distinguished from mere expressions of opinion,[94] if

76. Waives breach. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048; Lucile Min. Co. v. Fairbanks, Morse & Co., 27 Ky. L. R. 1100, 87 S. W. 1121 (By divided court). Right to damages for failure to deliver at time specified is not waived by accepting goods after such time. Murmann v. Wissler [Mo. App.] 92 S. W. 355.

77, 78. Murmann v. Wissler [Mo. App.] 92 S. W. 355.

79, 80. Wall v. St. Joseph Artesian Ice & Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574.

81, 82, 83. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex. Civ. App.] 90 S. W. 202.

84. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex. Civ. App.] 90 S. W. 202. After the breach by the buyer, the seller may change his position so as to be unable to perform his part of the contract without affecting his right to damages. So held where one contracting to sell milk went out of business after the buyer defaulted. Brazell v. Cohn, 32 Mont. 556, 81 P. 339.

85. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

86. See 4 C. L. 1334.

87, 88. Simonson v. Jenson [N. D.] 104 N. W. 513.

89. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 91 S. W. 598. Where agent in trying to induce sale made warranties, and ten days later defendant ordered artiele, held warranties were part of the contract of sale. Id.

90. Collins v. Tigner [Del.] 60 A. 978; McAllister v. Morgan, 29 Pa. Super. Ct. 476. Warranty as to the quality or soundness of chattels. Shuman v. Heater [Neb.] 106 N. W. 1042. The **assurance by the seller** that the buyer will have the right to remove the property until a certain day amounts to a warranty that up to that time the seller will have authority to convey a title. Sale by government of shacks, etc., after war of 1898. Houser's Case, 39 Ct. Cl. 508.

91. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

92. Privilege of exchange: Portion of contract reading as follows: "Warranty. Any jewelry in this assortment failing to wear satisfactorily will be replaced by new articles free of charge, if returned to us within five years," held not to constitute a warranty so as to exclude implied warranties. Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

93. J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231. Any form of words whereby the seller, for the purpose of inducing the sale, makes affirmation pending the negotiations that the subject-matter of the sale is of a particular quality or fitness, will constitute a warranty when relied upon by the purchaser. Evidence held sufficient to show warranty. Shuman v. Heater [Neb.] 106 N. W. 1042; Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

94. The mere expression of an opinion not amounting to an affirmation and not showing an intention to warrant, will not constitute a warranty. Collins v. Tigner [Del.] 60 A. 978; J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231. A mere expression of opinion or

made at the time or as a part of the sale,[95] may constitute warranties as to all facts covered thereby, and it is for the jury[96] to determine from all the circumstances of the sale[97] whether or not a warranty is to be inferred from the representations made. The mere fact that a statement takes the form of an expression of opinion, however, is not always conclusive.[98] Whatever representation is made by the seller at the time of the sale as to the quality[99] or suitableness[1] of the article is an express warranty. The seller or his agent falsely asserting a material fact to be true of his own knowledge, he is liable for damages to the purchaser, though not knowing the statement to be false.[2] The buyer must have relied upon the representations and must not have been negligent in so doing.[3] Ordinarily a buyer is not justified in relying upon the seller's statement of value,[4] but the buyer has a right under certain circumstances to rely upon the seller's representations as to extrinsic facts affecting the value.[5] Misrepresentations made by an agent in connec-

"trade talk" cannot be construed into a false representation. Gaar, Scott & Co. v. Halverson [Iowa] 105 N. W. 108. Praising goods does not impliedly warrant against defects ascertainable by ordinary inspection. Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602. Expressions of opinion by seller of mining stock as to the value of the mining property, together with predictions as to future operations, profits, and dividends, held no defense to an action for the purchase money. Crosby v. Emerson [C. C. A.] 142 F. 713. Where sellers of timber assured the buyers that they had had the timber carefully estimated and that such estimate showed certain quantities such representations were not mere matters of opinion. May v. Loomis [N. C.] 52 S. E. 728. "Nice books, books that children would love to read" did not constitute false representations. Barrie v. Jerome, 112 Ill. App. 329. Representations that engine was practically as good as new, that it would steam well and was of sufficient power to drive defendant's threshing machine, held mere expressions of opinion. Gaar, Scott & Co. v. Halvorson [Iowa] 105 N. W. 108. Where on a sale of the business and assets of a life insurance company a list of agents' balances was made and shown the buyer, and in reply to an inquiry the seller's secretary stated that they had charged off the bad accounts and that those remaining were "better than the ordinary," held merely an expression of opinion and not a representation as to the solvency of the persons charged or the collectibility of the accounts. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. Assurance that article will be fit for purpose is but an expression of an opinion when it is followed by a written contract, complete in itself, which is silent on the subject. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332.

95. Collins v. Tigner [Del.] 60 A. 978; San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 91 S. W. 598.

96. The question must be determined by the jury or court. J. N. Clark Co. v. Rice [Wis.] 106 N. W. 231. Where defendant on buying a horse said "she looked colicky" and plaintiff replied that he had known her ever since she was a colt and had never known her to be sick a day, held question as to existence of warranty was for the jury. Beasley v. Surles [N. C.] 53 S. E. 360.

97. Collins v. Tigner [Del.] 60 A. 978. Where offer of sale of machinery stated that prompt acceptance would be necessary so that apparatus could be installed the next Sunday, and that part of the work might have to go over until the next Sunday, but that there would be **no delay in the operation of the plant,** held there was no warranty that after the apparatus was installed there would never be any delay in the operation of the plant because of it. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373.

98. J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231.

99. Collins v. Tigner [Del.] 60 A. 978.

1. Representations that a chattel is suitable for the purpose for which bought, reasonably relied upon by the buyer, are equivalent to an express warranty of suitability for such purpose though there are no formal words of warranty. Young v. Van Natta, 113 Mo. App. 550, 88 S. W. 123. A counterclaim by a buyer, alleging that the articles were furnished for a specified use and purpose, which was known to the seller when making the sale, and that the sale was made on special solicitation by the agent of the seller, on the representation and warranty that the article so sold was adapted for said use and purpose, and that in purchasing the goods from plaintiff the defendant relied on such representation or warranty, set up only an express warranty. B. P. Ducas Co. v. American Silk Dyeing & Finishing Co., 48 Misc. 411, 95 N. Y. S. 590.

2. John Gund Brewing Co. v. Peterson [Iowa] 106 N. W. 741.

3. Collins v. Tigner [Del.] 60 A. 978; Shuman v. Heater [Neb.] 106 N. W. 1042; Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596. A buyer who fails to inspect goods purchased when he has the opportunity cannot complain of defects ascertainable by reasonable examination. Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602. Where a prospective purchaser undertakes to make and does make an investigation of his own of the property and the seller does nothing to prevent it from being as full as is desired, the purchaser cannot afterwards be heard to say that the seller made representations which he relied upon to his injury. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888.

tion with an authorized sale are binding upon the principal, although the agent had no express authority to make them,[6] but such representations must be limited to the article sold.[7] A seller ratifying the sale is bound by a warranty made by the agent who made the sale, although the agent had no actual authority to make the warranty and the seller had no knowledge of the warranty as made.[8] The naked averment of a fact is neither a warranty nor evidence of it.[9] The jury must be satisfied from the whole case that the seller actually, and not constructively, consented to be bound for the truth of his representation.[10] Where the evidence is conflicting as to the fact of a warranty or as to the authority of the party making it, the question should be left to the jury.[11]

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.*[12]—The doctrine of caveat emptor does not apply to cases of actual fraud,[13] or where the seller expressly warrants the soundness of animals and the vendee in good faith relies thereon after reasonable examination.[14] One who relies on an express warranty must prove that it was made at or before the sale, and that it was broken when made,[15] though an instrument of warranty given after a sale merely to correct one made prior thereto relates back to the time of the first warranty and is binding upon the parties.[16]

4. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

5. Damages may be recovered for false statements as to fertility of land if circumstances warrant a reliance thereon. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

6. John Gund Brewing Co. v. Peterson [Iowa] 106 N. W. 741. Seller is liable for false representations of agent. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

7. An agent having authority to sell pumps has no apparent authority; sufficient to bind his principal, that a boiler in possession of buyer is capable of doing its present work and running the pump to be purchased in addition. Lucile Min. Co. v. Fairbanks, Morse & Co., 27 Ky. L. R. 1100, 87 S. W. 1121.

8. Holman v. Calhoun [Ala.] 40 So. 356; Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359. A vendor is bound by the representations of his agent if he accepts an order and profits by it. Rheinstrom v. Elk Brewing Co., 28 Pa. Super. Ct. 519. Evidence of buyer as to warranty held admissible. Holman v. Calhoun [Ala.] 40 So. 356.

9. The naked averment of a fact is neither a warranty nor evidence of it. The jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation. McAllister v. Morgan, 29 Pa. Super. Ct. 476.

10. McAllister v. Morgan, 29 Pa. Super. Ct. 476.

11. Held error to instruct for defendant when plaintiff sought to recover the purchase price of a horse. McAllister v. Morgan, 29 Pa. Super. Ct. 476.

12. See 4 C. L. 1335.

13. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

14. Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122.

NOTE: Caveat emptor is the principle applicable, in general, to sales in which the question of quality is involved. There are, however, many exceptions to the rule. One of these is that where a sale of goods is executory, and with no inspection by the buyer there is an implied warranty that the goods shall be merchantable. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199; Hood v. Bloch, 29 W. Va. 244; Fogel v. Brubaker, 122 Pa. St. 7; Chicago Pack. & Prov. Co. v. Tilton, 87 Ill. 547; Russell v. Critchfield, 75 Iowa 69. The term, merchantable, as thus employed, does not imply that the goods shall measure up to any particular standard of fineness nor that they shall be of the best grade; but it means that the goods shall not be of a quality so inferior as that there shall be no average market for them among those who deal in the particular commodity. Or as it is sometimes expressed, "the article shall not have any remarkable defect." McClung v. Kelley, 21 Iowa, 508; Howard & Ryckman v. Hoey, 23 Wend. [N. Y.] 350, 35 Am. Dec. 572. Apparently, the only state which has adopted the civil law rule, caveat venditor, is South Carolina. Timrod v. Shoolbred, 1 Bay [S. C.] 324, 1 Am. Dec. 620; Smith v. McCall, 1 McCord [S. C.] 143, 10 Am. Dec. 666; Bulwinkle & Co. v. Cramer & Blohme, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645. If a general, indefinite term is employed in an executory contract, it is proper that the jury be instructed that the word has a broader meaning than is expressed by its mere dictionary definition and means an article that is merchantable. There will be no performance of the contract if a merchantable article be not supplied. Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207, 31 Am. St. Rep. 526, 14 L. R. A. 492; Sweet v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.—3 Mich. L. R. 402.

15. Collins v. Tigner [Del.] 60 A. 978.

16. Barton Bros. v. Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599.

As a general rule an express warranty,[17] or a refusal to make an express warranty,[18] excludes an implied warranty. A written warranty cannot be added to or changed by parol,[19] or by previous writings not made a part of the agreement.[20] There is a conflict as to whether or not a warranty will be implied in an instrument of sale containing no warranties.[21] In some states in the absence of an express warranty or provisions negativing implied warranties, the statute raises certain implied warranties.[22]

Except in those states where implied warranties are prohibited by statute, a manufacturer impliedly warrants that the article sold is merchantable,[23] free from latent defects arising from the manner in which the article was manufactured and not discoverable upon ordinary examination,[24] and, if ordered for a special purpose, that it is reasonably fit for such purpose,[25] unless the article is known, described, and defined,[26] and the same general rule applies where the article is, to the buyer's knowledge, to be manufactured for the seller.[27] The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exem-

17. Gaar, Scott & Co. v. Hodges [Ky.] 90 S. W. 580. An express warranty of workmanship and material excludes an implied warranty of fitness. La Crosse Plow Co. v. Helgeson [Wis.] 106 N. W. 1094. An express warranty of one of the qualities of an article excludes an implied warranty of other qualities of a similar nature. Reynolds v. General Electric Co. [C. C. A.] 141 F. 551.

18. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

19. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601; Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516. Evidence of prior or contemporaneous agreements or representations are inadmissible. So held where written contract of sale referred to catalogue for terms of the warranty. Buchanan v. Laber [Wash.] 81 P. 911. Previous conversations between the parties are inadmissible. So held as to broker's memorandum of sale. Day Leather Co. v. Michigan Leather Co. [Mich.] 12 Det. Leg. N. 548, 104 N. W. 797.

20. In a warranty of paint plaintiff held not bound by a prior pamphlet warning against its use on a green surface. Barton Bros. v. Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599.

21. Where written contract contains no warranty, none will be implied by law. Walker v. Johnson, 116 Ill. App. 145. A written order which neither contains nor excludes a written warranty does not preclude the establishment of parol warranty. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49. Warranty that machine will work as well as others can be introduced by express contract only, and parol evidence of it is excluded by a written contract of sale which is silent on the subject. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332.

22. Under Civ. Code 1895, § 3555, in the absence of express warranty or provisions negativing the statute, the law raises an implied warranty of title, right to sell, merchantability, suitableness and lack of knowledge of undisclosed latent defects. Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

23. Material and workmanship must be good. The Nimrod, 141 F. 215. Sale of window screens to be made according to specifications. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048.

24. The Nimrod, 141 F. 215. Manufacturer is held presumptively to a knowledge of the qualities of the things he sells. George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432. On a sale by a manufacturer of window screens made according to specifications held only implied warranty was that the article should be merchantable and free from any defect arising from the process of manufacture or the use of defective materials not discoverable by ordinary inspection and tests. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048.

25. The Nimrod, 141 F. 215; Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332.

26. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. Cream separators. La Crosse Plow Co. v. Helgeson [Wis.] 106 N. W. 1094; H. McCormick Lumber Co. v. Winans [Wis.] 105 N. W. 945; Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373. Where there was a sale of known and described grates and blowers held evidence that plaintiff knew that defendant desired the apparatus to produce as much steam as was produced before held inadmissible. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373. Manufacturer and seller warranting certain metallic shells to "finish sound" and the buyer knowing more of the purpose for which the shells were intended than the seller held there was no implied warranty that they should be suitable for such use. H. H. Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co. [Mass.] 75 N. E. 624. Where one buys of a dealer a definite machine of known manufacture, which has been, or is to be, made by one other than the seller, and the buyer knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purposes for which such articles are commonly used. Reynolds v. General Electric Co. [C. C. A.] 141 F. 551.

27. A contract by a dealer to furnish to a purchaser a definite pump of a known manu-

plar and that it shall be suitable to perform the ordinary work which the described machine is made to do.[28] A distinction is drawn by the courts between a sale of articles to answer a certain description, and a sale of certain specific articles, then in the hands of the seller and described to be of a certain grade and quality.[29] In the former case there is, until acceptance by the purchaser, a warranty that the article shall answer the description, whereas in the latter case no warranty is implied unless an intention to warrant clearly appears.[30] There is no implied warranty of quality by a vendor who is not a manufacturer.[31] An importer does not warrant against latent defects.[32] The buyer disclosing to the seller his intention to use an article for a special purpose, a sale impliedly warrants against hidden defects impairing its usefulness for such purpose, although the seller is ignorant of the existence of such defects.[33] In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim "caveat emptor" applies,[34] and there is no implied warranty or representation of quality or fitness.[35] But when articles of human food are sold to the consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food.[36] If the seller is in possession there is an implied warranty of title.[37] If goods sold by sample correspond to the sample, it is sufficient.[38] In order to constitute a sale by sample it must appear that the parties contracted solely in reference to the sample exhibited and mutually understood that they were dealing with it as an agreement or understanding that the bulk of the commodity corresponded with it.[39] One selling an article with a warranty that it is safe has a right to assume, in the absence of evidence to the contrary, that it will be used in a lawful manner.[40] Where the buyer and seller each has equal knowledge or means of knowledge, and each relies on his own judgment and observation, there is no warranty either express or implied.[41] Custom will not be permitted to set aside an express contract of warranty, and in the absence of an express warranty, in order to be enforceable, a customary warranty must be so general and so known as to justify the presumption that the parties knew it and contracted in reference to it.[42] The vendor of a chattel in possession sold for a fair price is liable to his vendee on an implied warranty of title.[43] "Full value" in the sale of a chattel, as affecting an implied

facture, having a designated capacity, which has been selected by the purchaser and is to be built by the manufacturer, is not a warranty of the efficiency, performance or endurance of the machine, but a description of the pump, like the name it bears, and is limited in its effect as a warranty to the quality of size. Reynolds v. General Electric Co. [C. C. A.] 141 F. 551.

28. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. Articles being sold by description there is an implied condition that the articles delivered shall substantially correspond in their entirety to the representations of the seller. Puritan Mfg. Co. v. Westermire [Or.] 84 P. 797. Where goods are sold by description not for identification but for character and quality, there is a warranty of such description and it is construed to be an express warranty. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

29. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

30. A seller of cotton having on hand three kinds of cotton, but refusing to warrant the grade. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

31. Plaintiff was not bound to furnish new fly wheel for Corliss engine. Borden & Selleck Co. v. Fraser & Chalmers, 118 Ill. App. 655.

32. B. P. Ducas Co. v. American Silk Dyeing & Finishing Co., 48 Misc. 411, 95 N. Y. S. 590.

33. Sale of seed grain. Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602.

34, 35, 36. Nelson v. Armour Packing Co. [Ark.] 90 S. W. 288.

37. Houser's Case, 39 Ct. Cl. 508.

38. Kupfer v. Michigan Clothing Co. [Mich.] 12 Det. Leg. N. 433, 104 N. W. 582.

39. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048.

40. Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N. Y. S. 59.

41. Collins v. Tigner [Del.] 60 A. 978.

42. Florence Wagon Works v. Trindad Asphalt Mfg. Co. [Ala.] 40 So. 49. Where there was an express warranty that asphalt roofing was first class held evidence of a customary warranty of such roofing for three years and that the seller would repair defects within such time was inadmissible. Id.

warranty of title, does not mean exact value, but no such inadequacy in price as would put a prudent buyer on suspicion.[44]

A warranty will be limited to the matters[45] imported by its terms,[46] and, in the absence of fraud, does not cover obvious defects.[47] An implied warranty of the fitness of a machine to do a particular work does not include a warranty that it will do the work as rapidly or economically as some other specified machine.[48] One who warrants to deliver the best procurable article of a certain kind does not fulfill his warranty by using reasonable care to obtain the article warranted, even though he acted in good faith.[49] Representations of soundness imply a warranty against defects known to the seller but not discernible by the buyer upon ordinary inspection.[50] A warranty of the soundness of cattle is broken where the cattle are, at the time of the sale, infected with the germs of a disease which afterwards developed, though the fact was not known to the seller.[51] As to whether a warranty is broken is for the jury.[52] Cases dealing with the sufficiency of the evidence to show breach of warranty are shown in the notes.[53] A warranty does not run with the property.[54] Each vendor can resort, as a general rule, only to his immediate vendor,[55] for there is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales.[56]

43, 44. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

45. See 4 C. L. 1337.

46. That a horse was lame and diseased in feet and legs held breach of **warranty of soundness.** Devine v. Ryan, 115 Ill. App. 498. Contract for merchandise to be **invoiced "as per the following cost-mark"** held to justify refusal to instruct that this was a warranty that the goods cost what they were marked. Webb v. Steiner, 113 Mo. App. 482, 87 S. W. 618. Where a letter in which plaintiff offered to install certain grates and blowers under defendant's boilers stated that the apparatus was **"adapted to the burning of fine anthracite fuel,"** held there was no warranty that the apparatus would, with the use of such fuel, produce as much steam as the boilers previously produced, nor enough steam to run defendant's plant. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373. Warranty that certain **metallic shells** would **"finish sound,"** held to mean that when finished they would be free from cracks and air holes, both obvious and hidden. H. H. Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co. [Mass.] 75 N. E. 624. It is error in an action on a note for the purchase price of a stallion sold with a warranty that he was serviceably sound, to give an instruction relieving defendant from liability if the horse was merely diseased at the time of sale. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601. Where stallion was guaranteed to be a **satisfactory breeder** providing he had proper care and exercise and the horse when delivered was worthless as a breeder held warranty was broken irrespective of whether he had proper care and exercise. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

47. A charge of court to the effect that warranty of soundness would cover the condition of the shoulders, where the vendor had said of the thin shoulders that they were all right, was erroneous, unless it appeared that the fact that the horse was sweenied was not obvious to those who examined him. Palmer & Son v. Cowie, 7 Ohio C. C. (N. S.) 46.

48. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332.

49. George Lawley & Son Corp. v. Park [C. C. A.] 138 F. 31.

50. Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602.

51. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286. See, also, Rosenthal v. Rambo [Ind.] 76 N. E. 404.

52. Whether engine complied with warranty, question for the jury. Buchanan v. Laber [Wash.] 81 P. 911.

53. Evidence held sufficient: To show a defect in the quality of cotton seed furnished. Gloster Oil Works v. Buckeye Cotton Oil Co. [Miss.] 40 So. 225. To show that buyer got compound lard instead of pure leaf lard as warranted. German-American Provision Co. v. Jones Bros. & Co. [Miss.] 39 So. 521. To show that quality of potatoes was in accordance with terms of contract. Yick Sung v. Herman [Cal. App.] 83 P. 1089. To show that apples were not merchantable nor similar to samples shown the buyer as required by the contract. Jones v. Emerson [Wash.] 82 P. 1017. In an action for the price of certain grates and blowers installed by plaintiff under defendant's boilers, evidence held to show that the apparatus was "adapted to the burning of fine anthracite fuel," as represented. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373.

Evidence held insufficient to show breach of warranties as to workmanship, construction, material, aptitude of the details for the 1010.

purpose intended, and capacity of ice machine. Callahan v. O'Rourke, 96 N. Y. S.

54. Nelson v. Armour Packing Co. [Ark.] 90 S. W. 288. Held that no warranty as to fitness of canned foods exists between packer and vender of retail merchant. Id.

55. Where plaintiff, a purchaser of can-

(§ 8) *C. Conditions and fulfillment or breach.*[57]—Conditions must be substantially complied with,[58] but a technical compliance will be required where necessary to protect the rights of the parties.[59] A contract provision that written notice must be "mailed" to either party is not performed where the letter is wrongly addressed,[60] or where the sender by affirmative act controls the circumstances of actual delivery to the addressee and by such act prevents actual delivery.[61] Where an article is sold upon the condition that it be satisfactory to the buyer, the entire control and determination of the matter is left with the latter.[62] A condition that a machine shall operate to the satisfaction of the purchaser has reference to the production of a marketable commodity when the machine is properly operated,[63] and this implies an adequate test in good faith under suitable conditions by a competent operator.[64] The purchaser cannot omit such test and arbitrarily declare the machine unsatisfactory.[65] Property being sold subject to inspection by a third person, such inspection is conclusive in the absence of collusion.[66] Where the contract provides that the machine sold shall be operated and tested under instructions of the seller, the buyer cannot arbitrarily refuse such instructions.[67] Where an animal is sold upon the condition that he might be returned if unsatisfactory provided he is in as sound and healthy condition as when delivered, the fact that diseases incipient in the animal at the time of the contract, and of which neither buyer nor seller had knowledge, have fully developed, will not bar a return.[68] A trial period starts to run from the first day the purchaser has exclusive control of the use of the article.[69] Interpretations given

ned meats, was poisoned thereby, he cannot resort to the wholesale or packing plant, but to his immediate vendor only. Nelson v. Armour Packing Co. [Ark.] 90 S. W. 288.

56. Nelson v. Armour Packing Co. [Ark.] 90 S. W. 288.

57. See 4 C. L. 1338.

58. Where the contract gave the seller right to rescind if the buyer did not have "identical" contracts with others, held the existence of contracts with such other persons "substantially" identical with the contract in question, constituted a compliance with such provision. Bernard v. Sloan [Cal. App.] 84 P. 232. Evidence held to show that other contracts were substantially identical. Id. Where a seller of cattle agreed to furnish registration papers and failed to do so within a reasonable time, there is a breach of the contract entitling the seller to damages. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

59. Where contract of purchase of grain for foreign shipment required that notice of the shipment must be given the buyer within five days from date of bill of lading, held time was of the essence of the contract and compliance by the seller was essential to compel acceptance. Steinhardt v. Bingham, 182 N. Y. 326, 75 N. E. 403, afg. 90 App. Div. 149, 85 N. Y. S. 1044.

60, 61. Wrongly addressed registered letter. Price v. New York, 104 App. Div. 198, 93 N. Y. S. 967.

62. Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149. A contract for the purchase of a threshing outfit provided that the buyer could reject it if not "satisfactory." Held buyer could reject the outfit without giving his reasons. Reeves & Co. v. Chandler, 113 Ill. App. 167. An agreement at the time of the sale that, if the article is not satisfactory, the buyer may return it and receive his money back, permits the buyer to decide for himself, whether after reasonable trial the article is satisfactory. Sale of a horse. Collins v. Tigner [Del.] 60 A. 978. When by the terms of the contract the property is to "prove satisfactory" to the buyer it is not sufficient to show that he ought to be satisfied with it; the contract requires satisfaction on his part. Delahunty Dyeing Machine Co. v. Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433. **But see** Kupfer v. Michigan Clothing Co. [Mich.] 12 Det. Leg. N. 433, 104 N. W. 582, where it is held that under an offer allowing the buyer to return any unsatisfactory goods the buyer is only entitled to return the goods when they are unsatisfactory and are rejected for a reasonable cause. Compare this case with Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149.

63, 64. Delahunty Dyeing Machine Co. v. Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433.

65. Held it was for jury to find real contract and whether defendant refused plaintiff's instructions. Delahunty Dyeing Machine Co. v. Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433.

66. American Bridge Co. v. Duquesne Steel Foundry Co., 28 Pa. Super. Ct. 479.

67. Delahunty Dyeing Machine Co. v. Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433.

68. Rosenthal v. Rambo [Ind.] 76 N. E. 404. See, also, Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286.

69. Sale of a machine; time counted from first day purchaser operated machine after the expert had set it up and left it in his charge. Shearer v. Gaar, Scott & Co. [Tex. Civ. App.] 90 S. W. 684.

particular conditions are stated in the notes.[70] Where the sale is made through an agent, the latter may personally make and become liable on conditions thereof.[71]

(§ 8) *D. Conditions on a warranty.*[72]—Conditions attached to a warranty are to be strictly construed against the party in whose interest they are made.[73] Under a condition in a warranty to replace defective parts of machine, notice of such defect must be given and the warrantor has a reasonable time within which to make the repairs or replacement.[74] Breach of the warranty rendering compliance with a condition futile it is unnecessary.[75] As a general rule the contract requiring notice without specifying the kind, actual or personal notice must be given.[76] A denial of liability may be equivalent to a refusal to comply.[77]

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.*[78]—The waiver of a warranty may be express or implied.[79] An express warranty survives acceptance[80] notwithstanding the fact that the buyer had previously inspected the goods[81] or samples thereof,[82] but the buyer must within a reasonable time ascertain the defects and notify the seller thereof or he waives his right to damages.[83] Breach

70. Covenants that the financial condition of the company at the time of the delivery of the stock in goods, accounts and merchandise shall aggregate $40,000 plus any profits that may have accrued since the commencement of the business less the legitimate expenses of the company, and that it has either the goods, moneys, or accounts representing the full amount of moneys paid in for stock, or $40,000, less current expenses paid and plus any profits that may have accrued since the commencement of the company's business, are not to the effect that the property represented by the corporation should equal $40,000. Issenhuth v. Riegel [S. D.] 106 N. W. 58. The right of a seller of corporate stock under contract stipulating that the sale was made on condition that the **buyer should control the corporation,** to recover the purchase price, was unaffected by the manner in which the buyer used the stock or manipulated other stock to obtain control of the corporation, where the rights of third persons were not involved. Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

71. Where agents selling on commission promise personally to keep repairs on hand as an inducement to procure a sale, the counterclaim for failure to keep such repairs in a suit for the purchase price, is against the agents and not against the company. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930.

72. See 4 C. L. 1338.

73. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

Particular condition interpreted: A cow and a young calf were purchased by plaintiff for breeding purposes under a catalogue reciting that a cow and calf should be treated as one animal, and under a warranty that all animals of breeding age were guarantied breeders, snd that, in case of a failure to breed, after a satisfactory trial, the animal might be returned, with the reserved right to the seller for the period of six months to try the animal and return her to the buyer if she proved a breeder, held plaintiff was not bound to return the calf as a condition to his right to return the cow as a nonbreeder under the contract. White v. Miller [Iowa] 105 N. W. 993.

74. Lucile Min. Co. v. Fairbanks, Morse & Co., 27 Ky. L. R. 1100, 87 S. W. 1121. And no action will lie unless such notice was given and a failure to comply with the warranty within a reasonable time. Id.

75. On the sale of an animal his death being caused by a disease constituting a breach of warranty, the buyer need not comply with the terms of the sale as to returning him to the place of delivery. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

76. So held where contract of purchase of grain for foreign shipment required notice of time of shipment. Steinhardt v. Bingham, 182 N. Y. 326, 75 N. E. 403, afg. 90 App. Div. 149, 85 N. Y. S. 1044.

77. It is equivalent to a refusal by sellers of a horse to give another in his place to the purchaser, as allowed by the contract of sale, where, knowing of the horse's death and without a request to defendant to take another, they bring an action on the note for the purchase price, denying liability on their warranty. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

78. See 4 C. L. 1338.

79. Gaar, Scott & Co. v. Hodges [Ky.] 90 S. W. 580.

80. Callahan v. O'Rourke, 96 N. Y. S. 1010. Acceptance of property warranted does not waive the right to defend on a breach of warranty in an action for the price. Daily v. Smith-Hippen Co., 111 Ill. App. 319.

81. Sale of brooms warranted to be of certain weight and tight in handle. Purchaser looked at them hurriedly without close examination. Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126.

82. That buyer examined only samples does not bar his claiming that the goods when received were not merchantable, they being warranted. Jones v. Emerson [Wash.] 82 P. 1017.

83. Acceptance and use of logs without objection held to waive breach of warranty as to size. Diechmann v. Boyd, 98 N. Y. S. 202. Under a warranty of fitness, a pur-

of warranty may be waived by taking advantage of an exchange privilege.[84] As a general rule an implied warranty is waived by acceptance,[85] except where the defects are latent,[86] though it being possible to return the goods, retention or payment after discovery will waive the latter.[87] An implied warranty survives acceptance until inspection or until a reasonable time has elapsed therefor.[88] It is the buyer's duty to make a prompt inspection and such as is customary and sufficient to determine the character of the goods,[89] and if he makes such inspection and latent defects subsequently appear, the seller can only recover on a quantum meruit.[90] What is a reasonable time for inspection depends upon the circumstances of the case and is usually a question of fact for the jury.[91] This reasonable time depends more or less upon the character of the goods shipped and the opportunity for inspection.[92] A more prompt inspection of perishable goods is required than of nonperishable goods.[93] Under an agreement by the vendee to inspect the goods and notify the vendor of any defects within a certain time or waive all objections to them, the fact that the inspection cannot be made within such time is no defense to an action for the purchase price in the absence of fraud.[94] But if plaintiff in such case knows that the inspection cannot be made within the given time and knowingly sends inferior goods for the purpose of defrauding the vendee, he cannot recover the purchase price.[95] A pur-

chaser has a reasonable length of time in which to test a machine. Gaar, Scott & Co., v. Hodges [Ky.] 90 S. W. 580. A purchaser of a chattel with a warranty has a reasonable time in which to examine and use the property to ascertain whether it is as warranted. Devine v. Ryan, 115 Ill. App. 498. Retention of machine for five days after seller's agents ceased to try to remedy defects held not an unreasonable time. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. A purchaser of an article sold under warranty of fitness is not justified after demonstration of its unfitness, in not only using up what he had first bought, but in going on and buying and using the article indefinitely, but by so doing he waives the warranty. B. P. Ducas Co. v. American Silk Dyeing & Finishing Co., 48 Misc. 411, 95 N. Y. S. 590.

NOTE. Waiver of right: Whether a legal right has been waived is a question of fact for the jury. Fox v. Harding, 7 Cush. [Mass.] 516. Since a warranty is a collateral agreement (Fairbank Canning Co. v. Metzger, 118 N. Y. 260), which, being broken, gives the right to retain the goods and sue for damages (Underhill v. Wolf, 131 Ill. 425), and this without any notice to the seller, of the defect (Tacoma Coal Co. v. Bradley, 2 Wash. 600), it would seem that the continued use of the first lot of goods in the principal case would not constitute a waiver. See Burlington & Missouri R. Co. v. Boestler, 15 Iowa, 555. Although the ordering of the second lot might constitute a waiver by estoppel (Royal v. Aultman & Taylor Co., 116 Ind. 424, 427), yet the court should have sent the question to the jury.—6 Columbia L. R. 280.

84. Where the buyer returned the article and exchanged it for other property held to waive right to damages for breach of warranty. Smith v. Newberry [N. C.] 53 S. E. 234.

85. Acceptance waives all defects except breach of specific warranties. Callahan v. O'Rourke, 96 N. Y. S. 1010.

86. Where a contract to manufacture a boiler for a tug provided that it should be satisfactory to the engineer, the fact that the boiler was received by him and put in the tug does not necessarily constitute an acceptance, nor exclude the implied warranty of fitness by the manufacturer with respect to defects which were discoverable only by actual use. The Nimrod, 141 F. 215.

87. A voluntary payment of the amount due on the goods, less an agreed deduction, after discovery of defects held to bar recovery of money so paid. Altschul v. Koven, 94 N. Y. S. 558.

88. In the absence of an express warranty the buyer, on receipt of the goods, must act promptly after an opportunity to inspect and must reject them within a reasonable time. Day Leather Co. v. Michigan Leather Co. [Mich.] 12 Det. Leg. N. 548, 104 N. W. 797. Where a purchaser of lumber accepted it and made no complaint as to quality for eight months thereafter, he waived any defects and was liable for the purchase price. H. McCormick Lumber Co. v. Winans [Wis.] 105 N. W. 945.

89. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891. The fact that such an inspection will take a few hours' time is no defense. Id.

90, 91, 92. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891.

93. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891. Two days' delay in inspecting shipment of beans held unreasonable. Id.

94. Notice within 5 days after receipt of part of the goods of defects in another part received more than 5 days before the notice held insufficient. Walter Pratt & Co. v. Morris & Co., 27 Ky. L. R. 1035, 87 S. W. 783.

95. If buyer within reasonable time offered to return the goods. Walter Pratt & Co. v. Morris & Co., 27 Ky. L. R. 1035, 87 S. W. 783.

chaser of goods for a certain purpose cannot keep them without paying for them merely because they are unfit for such purpose if they are of value for some purpose.[96] Acceptance does not bar a purchaser in a sale by sample from keeping the goods and suing for damages.[97] A privilege of changing the goods if unsatisfactory will not bar the purchaser from setting up breach of the implied warranty of suitableness in an action for the price.[98]

Unless waived,[99] failure to comply with the terms of the conditions of the warranty will waive a breach of the latter.[1] Notice of the kind required by the contract must be given within the time stipulated therein; but the seller waives his right to a notice in the manner prescribed, by acting on the notice received.[2] As to whether there is a waiver of a provision requiring notification of defects is a question for the jury.[3] The waiver of one condition does not necessarily affect others.[4] Neglect on the part of the buyer to perform any of the above stated duties may be waived.[5]

Conditions.[6]—In the absence of fraud, acceptance after an opportunity to inspect[7] or a reasonable time thereafter[8] and without an offer to return[9] is generally

96. Instruction erroneous that if goods were of no value for the purpose for which sold verdict should be for defendant. Walter Pratt & Co. v. W. C. Morris & Co., 27 Ky. L. R. 1035, 87 S. W. 783.

97. So held where goods, at buyer's request, were sent to a mill and breach was not discovered until returned by the latter. Hamilton v. Pelonsky, 48 Misc. 554, 96 N. Y. S. 216.

98. Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

99. Where seller tried to remedy defects after expiration of the time limit set by the contract for notice thereof held to amount to a waiver of such provision. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

1. Failed to give notice and return machine. Shearer v. Gaar, Scott & Co. [Tex. Civ. App.] 90 S. W. 684. Where engine if not satisfactory at the end of 30 days' trial was to be delivered on board cars at a certain place, failure to so deliver waives breach. Charter Gas & Engine Co. v. Barton [Ala.] 39 So. 985. Notice to be given within 5 days of receipt of perfume, goods not up to sample but no notice given. S. M. Duffie & Co. v. Walter Pratt & Co. [Ark.] 88 S. W. 842. Contract provided for itemized notice of failure to come up to samples within 5 days after receipt of goods. Failure to give such notice construed as waiver. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648. Where there was no notice of breach of warranty, according to terms of contract, evidence of breach was inadmissible and there was no question for the jury thereon. Id. Payment cannot be refused on the ground of breach of warranty in case of waiver of breach by failure to give the contractual notice. Id. Where warranty provided that notice of and opportunity to remedy defects should be given and buyer refused to allow an opportunity to remedy the defect, held not to show a breach of the warranty, the defect being remedial. Gaar, Scott & Co. v. Halverson [Iowa] 105 N. W. 108.

2. Siebe v. Hellman Mach. Works [Ind. App.] 77 N. E. 300.

3. Buchanan v. Laber [Wash.] 81 P. 911.

4. Where warranty required that notice of defects be given, that after such notice the seller be allowed a reasonable time to remedy the same and if he fail to do so the buyer could then return the machine, held waiver of notice had no effect upon stipulation for a return, but that the buyer had a reasonable time after seller ceased to try and remedy defects within which to return the machine. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

5. Letters of advice and extension of time held a waiver of delay in returning animal for breach of warranty. White v. Miller [Iowa] 105 N. W. 993. Failure to return horse within a reasonable time after discovery of breach of warranty held not to absolve seller of duty to recompense buyer, the seller having extended the time for testing and the horse having died during such extended time from the disease constituting the breach of warranty. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

6. See 4 C. L. 1340.

7. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048. An acceptance of goods sold after a full and fair opportunity to inspect them waives a subsequent objection to plain and visible defects. Objection to the seams and rivets of pipe held waived after 30 days. McLeod v. Andrews & Johnson Co., 116 Ill. App. 646.

8. Goods of a certain quality and price being ordered, the buyer is bound to determine compliance with the contract within a reasonable time after opportunity for inspection. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777. Remedy in the absence of a warranty is to refuse to accept the goods when delivered or to return them within a reasonable time after the departure from the terms of the contract is discovered. American Theater Co. v. Siegel-Cooper & Co. [Ill.] 77 N. E. 588.

9. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048. The article not complying with the contract, the buyer cannot retain the property and claim damages or refuse to pay therefor. Id. The buyer receiving and using goods below grade must pay their value. Gilmore & Maginnis v. Meek-

held to waive nonconformity with the contract. Mere complaint that goods do not conform to contract does not amount to a rejection or an offer to return the goods.[10] Buyers of goods, who neglect to inspect the same on delivery and who assume ownership and consign the goods to others, cannot obtain relief against their vendors because of a patent defect, which the most superficial examination would have disclosed.[11] An agreement that goods sold shall prove satisfactory necessarily implies a reasonably prompt inspection where no period of time is specified,[12] and if the buyer refuses the goods he must be prepared to show that the goods rejected were legally unsatisfactory.[13] He cannot establish his right to refuse acceptance by showing merely that other goods received under similar orders were unsatisfactory.[14] It is no excuse for the breach of an unconditional condition that the buyer could have prevented the breach.[15] Acquiescence may waive breach.[16] Objections not made are deemed waived.[17] Conditions for the benefit of one of the parties alone may be waived by him.[18] An agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller has authority to bind his principal by a waiver of such conditions,[19] and, the principal being a corporation, this is true though the contract contains a clause providing that "no person has any authority to add to, abridge or change this warranty in any manner."[20]

(§ 8) *F. Remedies*[21] on the warranty and breach of condition have been reserved for other parts of this title[22] together with damages for breach,[23] and rights of assignees and subsequent purchasers.[24]

er [La.] 40 So. 244. A buyer who accepts and retains goods and consumes them by use without objection admits by so doing that they are satisfactorily in compliance with the terms of his purchase as respects character and quality. Cohen v. Hawkins [Neb.] 104 N. W. 179. Where after sellers discover a breach of the contract authorizing rescission they treat the contract as a valid, vital obligation, they waive their right to rescind. Bernard v. Sloan [Cal. App.] 84 P. 232. A buyer cannot receive goods under a contract, appropriate them to his own use and then defeat an action for the purchase price on the ground that the goods are not of the exact quality or description called for by the contract. American Theater Co. v. Siegel-Cooper & Co. [Ill.] 77 N. E. 588. Where orders for bags were subject to cancellation in case plaintiff did not furnish defendant a certain machine by a certain date and plaintiff failed to do so but subsequently delivered the bags and they were retained for five months, held a waiver of the condition. Root & McBride Co. v. Walton Salt Ass'n [Mich.] 12 Det. Leg. N. 193, 103 N. W. 844.

10. E. T. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048.

11. W. L. Watkins & Co. v. Guthrie & Co. [Miss.] 38 So. 370. So held where buyers of corn shipped to them paid the draft and received the bill of lading therefor and on the same day, without inspection, though having ample opportunity therefor, and without breaking the seal of the car, forwarded the goods to their customers. Id.

12, 13, 14. Kupfer v. Michigan Clothing Co. [Mich.] 12 Det. Leg. N. 433, 104 N. W. 582.

15. Sale of cattle; held breach of agreement to furnish registration papers could not be justified on the ground that the purchaser should have procured the papers from other sources. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648. The breach of an unconditional agreement to keep extras for repairs on hand gives rise to a set-off against an action for the purchase price regardless of the cause of the breakages. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930.

16. Where a written contract provided for an official grading of corn and a subsequent letter from purchaser gave a different grading acquiesced in by seller, the original grading was waived. Flanagan Mills & Elevator Co. v. Geo. A. Adams Grain Co. [Mo. App.] 90 S. W. 1035.

17. Where the seller of a horse, which he had agreed to take back if unsatisfactory, objected to taking him back, on the ground that he was in bad condition, an objection that the tender back was premature is waived. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

18. Where defendant agreed to sell and plaintiff agreed to buy provided he could get a certain lease, held condition could be waived by plaintiff. Kubillus v. Ewert [Wash.] 82 P. 147. Where contract provided that if seller found that identical contracts did not exist between the buyer and others, the contract should become void held that such provision was for the sole benefit of the seller and the breach thereof only rendered the contract void at the seller's election. Bernard v. Sloan [Cal. App.] 84 P. 232.

19, 20. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

21. See 4 C. L. 1341.

22. See post, § 10, Remedies of the seller; § 11, Remedies of the purchaser.

23. See post, § 12.

24. See post, § 13.

§ 9. *Payment, tender, and price as terms of the contract.*[25]—In the absence of agreement for credit or delay, delivery and payment are each a condition of the other,[26] though this condition may be waived by the seller or his agent.[27] Where the parties to an executory contract of sale agree that the price shall be fixed by valuers nominated in the agreement, and one of the valuers nominated refuses to act, the other has no power, without the consent of both parties to the agreement, to select a third person to act as valuer in the place of the person so refusing.[28] The consent of one of the parties to the agreement to such an arrangement cannot be implied from his failure to answer notices of the refusal of a valuer to act and stating that on his failing to select another valuer the valuer willing to act would make a selection,[29] and the fact that such party is the cause of the refusal of the one valuer to act does not estop him from denying that he is bound by a valuation made otherwise than as provided in the agreement.[30] A person who buys goods upon credit thereby impliedly, if not expressly, represents that he intends to pay for them,[31] and one obtaining goods as upon an implied contract is liable for their fair market value.[32] The buyer agreeing to pay a third party the latter may sue to enforce the contract,[33] and the promise being unconditional, it is immaterial whether such third person executes a release to the seller or not.[34] The retirement of a partner constitutes a "discontinuance of the business," even though the other partners take in a new partner and continue to carry on the business.[35] Where the price to be paid is to be determined by measurement or estimate of the parties or third persons, the conclusion reached is conclusive in the absence of fraud, mistake, or express provision to the contrary.[36]

§ 10. *Remedies of the seller. A. Rescission and retaking of goods or action for conversion. Rescission.*[37]—A sale being induced by fraud[38] or undue influence[39]

25. See 4 C. L. 1342. Payment as necessary to pass title, see ante, § 6. Conditional sales, see post § 14.

26. Williams v. Wilson & McNeal Co., 97 N. Y. S. 731. Where a seller put prices on goods and the buyer ordered them from time to time, but no credit was extended, there was not such an entire contract that the seller was not entitled to recover for the goods first sold and delivered, till he should have delivered goods subsequently ordered by the buyer. Id. Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale. Baker v. McDonald [Neb.] 104 N. W. 923.

27. Where the seller forwards the bills of lading with drafts attached to a bank, the fact that the buyer obtains the bills of lading without paying the drafts does not constitute a breach of contract by the buyer. So held where bank delivered bills of lading upon the buyer accepting the draft. John E. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 20.

28, 29, 30. Elberton Hardware Co. v. Hawes, 122 Ga. 858, 50 S. E. 964.

31. Upchurch v. Mizell [Fla.] 40 So. 29.

32. Teetzel v. Davidson Bros. Marble Co. [Neb.] 104 N. W. 1068.

33. Civ. Code § 1559. Peters v. George [Cal. App.] 81 P. 1117. Where the buyer assumes and agrees to pay as the purchase price, or a part of it, an indebtedness of the seller to a third person, the creditor may enforce the obligation by a suit at law against both parties to the agreement. Butler v. E. E. Bruce & Co. [Neb.] 106 N. W. 445.

34. Peters v. George [Cal. App.] 81 P. 1117.

35. Warren & Lainer v. Cash [Ala.] 39 So. 124.

36. Where the amount to be paid is to be determined by measurement of the property by the parties, a measurement which is grossly unfair, as the result of fraud or mistake, is not binding. Baker v. McDonald [Neb.] 104 N. W. 923. Where a contract for the delivery of coal in instalments provided for the making of payments in instalments, according to estimates and certificates of the buyer's engineer, the estimates and certificates of the engineer were conclusive on the parties in the absence of any claim of fraud or mistake as to the quantity or value of the coal delivered. Price v. New York, 104 App. Div. 198, 93 N. Y. S. 967. See, also, ante, § 7 A.

37. See 4 C. L. 1343.

38. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748; Shevlin v. Shevlin [Minn.] 105 N. W. 257; Fisher v. Brown, 111 Ill. App. 486. So held where sale was induced by fraudulent representations of insolvent buyer made with intent not to pay for the goods. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. Executory contract. Fraudulent misrepresentations as to paid up capital. Omaha Feed Co. v. Rushforth [Neb.] 106 N. W. 25. Sale of goods sold corporation on the faith of a false return of its assets and liabilities made under Pub. St. 1882, c. 106, § 54, may be rescinded and the goods recovered in replevin. Steel v. Webster, 188 Mass. 478, 74 N. E. 686. A bill of sale, giv-

the seller may rescind and reclaim his property or so much of it as is still in the possession of the purchaser,[40] or his receiver.[41] It is not necessary that the vendor consent to the rescission.[42] If the seller elects to rescind he must give notice to the purchaser of such election and of his determination to reclaim the goods sold,[43] and if he has received anything in payment, he must return it or tender it to the purchaser.[44] If the buyer has sold or disposed of some of the property so as to put it beyond the seller's reach, the latter may reclaim all the property that can be recovered,[45] but cannot recover that the identity of which has been lost.[46] As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract but based upon the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort.[47] He cannot, however, proceed both under the contract of sale and against it.[48] The wrongdoer cannot make extreme vigilance and promptitude conditions of the affirmative disapproval by the party wronged,[49] but the duty to commence proceedings arises only upon discovery,[50] and, in the absence of special circumstances, mere acquiescence will not take away the right of action unless continued for the period of limitations.[51] Any unequivocal act whereby the seller with knowledge of the fraud elects to treat the sale as valid, whether made in court or not, is a sufficient election to prevent him from subsequently rescinding the sale,[52] and such election is conclusive

en to prevent a lawful levy upon certain chattels, is a voluntary act and not open to rescission. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784. Where a company is practically insolvent and it buys property on credit and turns it over to a retiring stockholder in liquidation of his interests, the transaction may be considered fraudulent as to the vendor entitling him to rescind. Howell v. Crawford [Ark.] 89 S. W. 1046. A tradesman who knowingly makes false **statements to a commercial agency** to procure credit is liable to an action for rescission and for damages to anyone who extends credit on the faith of such statement and who suffers injury thereby although the representations were not made to him personally and although there was no specific intent on the tradesman's part to defraud his creditors by the statements made by him. Mills v. Brill, 105 App. Div. 389, 94 N. Y. S. 163.

39. Shevlin v. Shevlin [Minn.] 105 N. W. 257. Where younger brother was a drunkard and was ignorant of value of stock sold, held elder brother exercised undue influence in buying same. Id.

40. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.

41. So held where sale was induced by fraudulent representations of insolvent buyer made with intent not to pay for the goods. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380.

42. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.

43. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748. Party relying on rescission must show what he rescinded promptly and this implies some notice to the other party of such determination. McGue v. Rommel [Cal.] 83 P. 1000.

44. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748; Welden v. Witt [Ala.] 40 So. 126. Before demanding return of property must tender purchase price paid. German-American Provision Co. v. Jones Bros. & Co. [Miss.] 39 So. 521. Where a note was given for the purchase price and the seller, claiming rescission by mutual consent, sought to recover the chattel sold, his offer to return the note made at the time of the trial is sufficient. Welden v. Witt [Ala.] 40 So. 126. One being induced by fraud to sell personal property, replevin will not lie to recover it without a rescission prior to commencing the action and a placing, or offer to place, the vendee in statu quo. McGuire v. Bradley, 118 Ill. App. 59. Plaintiff sold defendant corporate stock and the latter agreed to pay the corporate debts and did, and he also agreed, but failed, to change the corporate name. Held that plaintiff could not rescind the sale because of such failure and recover the stock without returning the price paid. Donovan v. McDermott, 108 Mo. App. 533, 84 S. W. 153.

45. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.

46. A seller of lumber which was used by the purchasers, together with other lumber, in the construction of barges, cannot acquire any right or title to such barges by an attempted rescission of the sale. American Lumber Co. v. Taylor [C. C. A.] 137 F. 321.

47. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.

48. Cannot take back such of the goods as remain on hand as part payment of the indebtedness arising from the contract of sale and retain a claim or seek payment for the balance of the purchase price. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.

49. Shevlin v. Shevlin [Minn.] 105 N. W. 257.

50. Shevlin v. Shevlin [Minn.] 105 N. W. 257. Must act promptly. McGue v. Rommel [Cal.] 83 P. 1000.

upon him though no injury has been done by reason thereof or would result from setting it aside.[53] A person who buys goods upon credit thereby impliedly, if not expressly, represents that he intends to pay for them.[54] If, therefore, he has no such intention, and a fortiori if he has then a present intention not to pay for them and conceals this fact from the seller, there is such a misrepresentation of a material fact as will entitle the seller to avoid the sale.[55] This intention must be one existing at the time of the sale and not merely one formed after the sale.[56] It may be inferred from circumstances.[57] Undue influence is especially a ground for rescission where the parties occupy a fiduciary relation towards each other,[58] and in such case the burden is on the defendant to show that he exercised no undue advantage.[59] The seller must have had a right to rely[60] and must have relied[61] on the false representations. As to whether the purchaser must have intended to deceive there is a conflict.[62] The question of rescission being one of intent is frequently for the jury.[63]

Recovery of chattel; replevin.[64]—Where by fraud or mistake the tender of the purchaser is insufficient, the seller may recover possession by an action in replevin on the ground of special ownership and right of possession,[65] but he cannot maintain such action under the claim of absolute ownership without rescinding the contract of sale and tendering back the amount paid.[66] Plaintiff having rescinded he must prove the fact.[67] The rights of innocent third parties will be protected.[68] In an

51. Shevlin v. Shevlin [Minn.] 105 N. W. 257.

52. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. An attempt to collect the purchase price held to constitute an election to treat the sale valid. Id. This is especially true where he treated his account as an entire one without separating his claim into one arising on contract so far as it related to the goods sold, and into one arising in tort so far as it related to the goods undisposed of. Id. To establish a ratification it must be shown that the person ratifying acted with full knowledge of all material particulars and circumstances. Imperfect and incomplete information is insufficient. Shevlin v. Shevlin [Minn.] 105 N. W. 257. Where sale was between brothers, held finding that the younger brother was mentally sound and fully competent and had full and accurate knowledge of all facts relative thereto, held not sustained by the evidence. Id. Where after sellers discover a breach of the contract authorizing rescission they treat the contract as a valid, vital obligation, they waive their right to rescind. Bernard v. Sloan [Cal. App.] 84 P. 232.

53. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380.

54, 55, 56. Upchurch v. Mizell [Fla.] 40 So. 29.

57. Upchurch v. Mizell [Fla] 40 So. 29.

58. Where one brother was a drunkard, held evidence showed that a fiduciary relation existed between the brothers. Shevlin v. Shevlin [Minn.] 105 N. W. 257.

59. Shevlin v. Shevlin [Minn.] 105 N. W. 257. Evidence held insufficient to show that such influence was not exercised where $70,000 was paid for stock alleged to be worth more than $140,000 and which the trial court found to be worth $95,000. Id.

60. Where seller was well acquainted with buyer's agents and contract was long and involved, held he had a right to rely on their representations that it embodied the agreement between the parties. Lilienthal v. Herren [Wash.] 84 P. 829. Where report of mercantile agency stated that figures were 2½ years old and could not be corroborated, held sufficient to put plaintiff on his guard. Beacon Falls Rubber Shoe Co. v. Pratte [Mass.] 76 N. E. 285.

61. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748; Beacon Falls Rubber Shoe Co. v. Pratte [Mass.] 76 N. E. 285. Where defendant had been told the truth and offered to sell, slight misrepresentations contained in letter received after such offer held insufficient to avoid the sale. Sadallah v. Mandour, 94 N. Y. S. 562.

62. That he need not. Mills v. Brill, 105 App. Div. 389, 94 N. Y. S. 163.

That he must have: Affidavit of defense to an action by a bankrupt buyer to recover property held insufficient. American Lumber & Mfg. Co. v. Taylor [C. C. A.] 137 F. 321.

63. Evidence being conflicting question of rescission is for the jury. Wellden v. Witt [Ala.] 40 So. 126. That the alleged rescission was accomplished by agreement between the parties may be submitted to the jury to aid them in determining whether or not the transaction was a rescission or a preference in bankruptcy. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748. Where first shipment was rejected defendant wrote plaintiff that it was out of the question to meet the latter's requirements and therefore thought it best to cancel the order, and requested plaintiff to supply its wants from some other source, held to amount to a rescission. H. Gans & Sons Mfg. Co. v. Chicago Lumber & Coal Co. [Mo. App.] 92 S. W. 121.

64. See 4 C. L. 1344.

65, 66. Baker v. McDonald [Neb.] 104 N. W. 923.

67. Must show that he relied on representations and had a right to rely on them. Beacon Falls Rubber Shoe Co. v. Pratte [Mass.] 76 N. E. 285.

action to recover property under an alleged bill of sale, claimed by vendor to be a mortgage, evidence of previous lack of good faith on part of vendee is admissible.[69]

(§ 10) *B. Stoppage in transitu.*[70]—As between buyer and seller of personal property, the right of stoppage in transitu arises upon the insolvency of the buyer and continues until an actual delivery of the property by the carrier to the buyer, or upon his order, or to a bona fide indorsee of the bill of lading from the buyer.[71] So far as the right is concerned the general rule is that the destination of the goods is that contemplated by the contract of sale or understood between the buyer and seller at the time of shipment.[72] Deliveries to local delivery companies are generally regarded as exceptions to the general rule that delivery to an agent is delivery to the buyer, and the right of stoppage exists until they deliver the goods.[73] The right of stoppage in transitu is not defeated by the fact that an invoice or bill of lading is made out and delivered to the consignee,[74] nor by the fact that the vendor had previously brought suit for the purchase price under a mistaken belief that the goods had been delivered.[75] Neither a mere resale by the buyer of goods without actual delivery or assignment of the bill of lading,[76] nor the fact that an innocent purchaser wrongfully obtained possession of the goods,[77] will defeat the right.

(§ 10) *C. Lien.*[78]—As a general rule an unpaid vendor has a lien upon the goods so long as they remain in his possession, but, in the absence of an express or implied contract to the contrary,[79] this lien is divested by a voluntary delivery[80] and is inconsistent with a claim of title to the property itself.[81] Such lien being retained is good, though unrecorded, against subsequent general attaching creditors.[82] The lien being lost by delivery the property is nevertheless subject to execution issued on a judgment in favor of the vendor for the purchase money.[83]

A vendor's privilege[84] (recognized in Louisiana) on a steamboat must be enforced within six months from the date of the sale, although a note payable at a distant date is given for the credit portion of the purchase price.[85] Such note, however, being received as cash, the debt is novated and the vendor's lien waived.[86]

68. Where in replevin by a seller of lumber the evidence justified a verdict against the fraudulent buyer, and a third person who obtained possession upon paying simply the freight charges, held seller must repay freight in order to have judgment in his favor. Kulzer v. Simonton [Wash.] 84 P. 582.

69. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784.

70. See 4 C. L. 1344.

71. Delta Bag Co. v. Kearns, 112 Ill. App. 269.

72. Right held to exist where goods were addressed to buyer's store street number, were received by local transfer company, and were stored by it owing to the closing of the buyer's store for insolvency. In re M. Burke & Co., 140 F. 971.

73. Right held to exist where local transfer company had a general order from the buyers to receive goods on their behalf, took goods, but owing to closing of buyer's store by reason of insolvency had to store same. The goods were addressed to the street number of the buyer's store. In re M. Burke & Co., 140 F. 971.

74, 75, 76. Delta Bag Co. v. Kearns, 112 Ill. App. 269.

77. Where the goods were not actually received by the consignee and the bill of lading was returned unindorsed to the consignor, the right to stop in transit was not defeated though an innocent purchaser from the consignee had obtained possession of the goods by replevin without an order from the consignee. Delta Bag Co. v. Kearns, 112 Ill. App. 269.

78. See 4 C. L. 1344.

79. Under a contract for the sale of a drilling machine whereby the buyer agreed to give notes and a chattel mortgage for the unpaid portion of the price, which he failed to do, the seller has a lien for the unpaid portion. Star Drilling Mach. Co. v. McLeod [Ky.] 92 S. W. 558.

80. Howell v. Crawford [Ark.] 89 S. W. 1046.

81. Attempt to convert an action for the purchase money into an action to try title and right to possession of property. Neal v. Cone [Ark.] 88 S. W. 952.

82. Star Drilling Mach. Co. v. McLeod [Ky.] 92 S. W. 558.

83. This, however, creates no lien. Howell v. Crawford [Ark.] 89 S. W. 1046.

84. See 4 C. L. 1345.

85. The privilege preempts or dies at the end of six months, and in such a case no plea of prescription is necessary. In re Red River Line [La.] 40 So. 250.

86. In re Red River Line [La.] 40 So. 250.

(§ 10) *D. Resale.*[87]—Where payment of the purchase price is made a condition precedent or contemporaneous with delivery, and the buyer fails to make payment, the seller has the right to dispose of the gooods to the best advantage and hold the buyer for any loss entailed by his default,[88] and in order to recover for such loss it is not essential that the buyer have express notice of the seller's intention to resell,[89] such notice being intended merely to give the buyer another opportunity of complying with his contract or to protect himself against fraudulent or collusive sales by the seller at less than the actual market value.[90] It is not absolutely necessary that the sales should be made at auction or that notice should be given the defaulting purchaser,[91] yet it is essential that the sale must be fair and such as is most likely to produce most nearly the full and fair value of the article,[92] and the sale being a private one, the question as to the manner in which the sale was conducted and the reasonableness of the efforts made to obtain a fair price should be submitted to the jury.[93] The resale being fairly made and express notice thereof given the buyer, no inquiry is permitted into what was the actual value of the commodity at the time of the resale.[94] The sale may be made at the place of delivery even though a higher price could be obtained elsewhere.[95] It is not the duty of the seller to resell until there has been an actual breach of contract,[96] and a vendee cannot complain of a failure to make sale at a time previous to actual breach and a sale at the time of request for it by the vendee.[97] Under an executed contract of sale a vendor in making a resale acts as agent of the vendee.[98]

(§ 10) *E. Action for the price or on quantum valebat. Right of action and conditions precedent.*[99]—There being an express contract the action must be based thereon and not on a quantum valebat,[1] and having performed all conditions precedent on his part, the plaintiff can recover the contract price unless the contract has been unambiguously repudiated by the purchaser before such performance.[2] The

87. See 2 C. L. 1557; 4 C. L. 1360. See, also, post, § 12 C.

88. McDonald Cotton Co. v. Mayo [Miss.] 38 So. 372; Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 567, 75 N. E. 246, afg. 88 Ill. App. 407; Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281; Fox v. Woods, 96 N. Y. S. 117. In an action for breach of a contract to purchase a lease of a house and furniture therein, plaintiff was entitled to recover the difference between the contract price of the furniture and what she was able to obtain therefor on a resale fairly conducted, and the pro rata amount of rent she was compelled to pay, less any amount she received for the rent of rooms in the house during such period, together with certain expenses to which she was placed in packing articles in the house. Id.

89. McDonald Cotton Co. v. Mayo [Miss.] 38 So. 372. Notice held sufficient where bill of lading was sent with draft attached and buyer was notified to protect draft, but, instead of doing so, asked for further time. Id.

90. McDonald Cotton Co. v. Mayo [Miss.] 38 So. 372.

91. Fox v. Woods, 96 N. Y. S. 117.

92. Fox v. Woods, 96 N. Y. S. 117. Evidence held insufficient to show that resale was at highest market price. Willson v. Gregory [Cal. App.] 84 P. 356.

93. Fox v. Woods, 96 N. Y. S. 117.

94. See McDonald Cotton Co. v. Mayo [Miss.] 38 So. 372 [dicta]; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. If properly made it is binding on both vendor and vendee. Id.

95. Where the purchaser of coal refused to receive it at his place of business, the seller had a right to resell it in that market for the best price obtainable, and was not bound to carry the coal back to the place of shipment, though the price was greater there. Ginn v. W. C. Clark Co. [Mich.] 12 Det. Leg. N. 1012, 106 N. W. 867. Under Civ. Code § 3353, the value of the property is to be deemed the price which the seller could have obtained therefor in the market nearest to the place at which the property should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale. Willson v. Gregory [Cal. App.] 84 P. 356.

96. A request not to send cotton seed at present, not a breach. Wood v. Planters' Oil Mill [Ark.] 90 S. W. 18.

97. Wood v. Planters' Oil Mill [Ark.] 90 S W. 18.

98. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

99. See 4 C. L. 1345.

1. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

2. Fountain City Drill Co. v. Peterson [Wis.] 106 N. W. 17.

cause of action accrues when the price becomes due.[3] The plaintiff must prove that all conditions precedent on his part have been complied with[4] or that he was at all times ready to perform the same, but that performance was excused.[5] A buyer cannot complain of the act of the seller in making an unnecessary delivery after the buyer's refusal to accept the goods, nor can he obtain any benefit thereby.[6] Where the buyer requested postponement of shipments until further notice, a written notice from the seller putting the buyer in default is sufficient.[7] A buyer seeking to repudiate the contract of sale before delivery and thereby limit his liability to breach of the contract must, to effect a repudiation, give the seller notice thereof, which must be so clear as to wholly absolve the seller from the duty of completing the contract.[8] An action for the purchase price of goods sold by an agent should be brought in the name of the principal and not in that of the agent,[9] but a defect in this regard is generally amendable even after verdict.[10]

Abandonment.—Removal of the chattel by the seller after the commencement of the action will be deemed an abandonment thereof.[11]

Defenses and election between them.[12]—Failure of consideration,[13] and breach of warranty,[14] constitute defenses to the action. False representations may be set up as a defense where at the time of the discovery of fraud it would not have been possible to have placed the parties in statu quo if the contract had been rescinded,[15] and though the written contract of sale contains a provision that no agent of the seller has a right to make a representation modifying the agreement, the buyer may show that the contract was obtained by the false and fraudulent representations of the seller's agent.[16] It is a fundamental and elementary rule of the common law that the courts will not enforce illegal contracts, or contracts which are contrary

3. Where credit is given unconditionally and was not obtained by fraud or based upon a consideration which has failed or has not been waived, an action will not lie on the contract for the purchase price until the expiration of the term of credit. Tatum v. Ackerman [Cal.] 83 P. 151. An action not brought until after October 1st held not prematurely brought where, by the terms of the contract, spring sales were to be settled by October 1st, and the article involved was to be shipped February 1st and had come into defendant's possession in June or July. American Seeding Mach. Co. v. Stearns, 109 App. Div. 192, 95 N. Y. S. 830.

4. Sale of hotel business, tender of lease required by contract must be proved. Tait v. McInnes [Cal. App.] 84 P. 674. Must deliver according to agreement. Bell v. Hatfield [Ky.] 89 S. W. 544. The promise to accept and the agreement to deliver being concurrent and mutual, neither party can recover without alleging and proving performance or tender of performance on his part. Armstrong v. Heide, 94 N. Y. S. 434.

5. Gilmore & Maginnis v. Meeker [La.] 40 So. 244. Buyer refusing to accept before the expiration of the time of delivery the sellers are excused from making a tender and delivery (R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250), and may recover the purchase price if they were ready, willing, and able to deliver and to otherwise comply with their contract (Id.). A seller may recover by averring readiness to tender when the making of the tender is dependent on a prior act by buyer. Bell v. Hatfield [Ky.] 89 S. W. 544. Excuses for nondelivery, see ante, § 7 D.

6. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250.

7. Woodstock Iron Works v. Standard Pulley Mfg. Co. [La.] 40 So. 236.

8. Fountain City Drill Co. v. Peterson [Wis.] 106 N. W. 17. Notice by one of two joint buyers that he would not be bound held insufficient. Id.

9, 10. Fay v. Walsh [Mass.] 77 N. E. 44. See Agency, 5 C. L. 64.

11. Roesch v. Young, 111 Ill. App. 34.

12. See 4 C L. 1346.

13. So held where machine was practically useless by reason of plaintiff's failure to furnish iron wheels as agreed. Gaar, Scott & Co. v. Hill, 113 Mo. App. 10, 87 S. W. 609. The fact that a machine known and understood by a previous inspection of one of like character was purchased upon trial, and in that trial developed structural defects which could not be remedied and that the machine was thereby rendered worthless for the purpose for which it was bought, is a good defense to an action for the purchase price. Hagen v. Greenwood, 27 Pa. Super. Ct. 239.

14. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92. So held where buyer gave promissory notes for the price and suit was on such notes. Pratt v. Johnson [Me.] 62 A. 242.

15. So held where an option was sold and fraud was not discovered until after the expiration of the option. Rumsey v. Shaw, 212 Pa. 576, 61 A. 1109.

16. B. F. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614.

to public policy or which are in contravention of the positive legislation of the state,[17] consequently, independent of any statute, the courts of a state will not enforce a contract in behalf of a vendor to recover the purchase price of goods sold by him, if he not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported, but, as well, did some act in furtherance of this illegal purpose.[18] Unless retroactive, a statute prohibiting the maintenance of an action for the price of intoxicating liquors bought in another state with the intention of selling the same in violation of law is constitutional.[19] That the seller has failed to pay a license or privilege tax may constitute a defense.[20] Under statutes providing that impurity or adulteration of goods shall be a defense to an action for the purchase price, it must be shown that such impurity or adulteration was such as to impair the quality or value of the goods.[21] A seller who fails to perform his contract in full may recover compensation for the part performed, less the damage occasioned by his failure.[22]

The complaint.[23]—The complaint must be sufficiently specific to apprise defendant of the source and character of the claim presented.[24] In order to charge the defendant the complaint must set forth an express contract, or a request, expressed or implied, on the part of the defendant for the goods, or the delivery of the goods by the plaintiff, and a promise, expressed or implied, on the part of the defendant to pay therefor.[25] It is not necessary to allege that the purchase price is due and unpaid.[26] A complaint on a note given in consideration of a sale need not allege the agreement of sale and a compliance with its conditions.[27]

Answer, counterclaim, and reply.[28]—Frequently defendant is by statute authorized to set forth by answer as many defenses and counterclaims as he may have, whether legal or equitable.[29] The answer setting up fraud, it must show that the false representations were relied on by defendant,[30] and if the contract is written, that he can-

17. Corbin v. Houlehan [Me.] 61 A. 131. See Contracts, 5 C. L. 664; Conflict of Laws, 5 C. L. 610.

18. Sale of intoxicating liquors. Corbin v. Houlehan [Me.] 61 A. 131.

19. Corbin v. Houlehan [Me.] 61 A. 131.

20. In an action for breach by the buyer of a contract for the sale of cotton seed, allegations showing that plaintiff was a cotton seed buyer and that it had never paid the privilege tax required of such buyers, state a defense. Gloster Oil Works v. Buckeye Cotton Oil Co. [Miss.] 40 So. 225.

21. Affidavit that liquor was impure, vitiated, and adulterated, without more, held insufficient. Act Mar. 29, 1860, P. L. 346. Spellman v. Kelly, 27 Pa. Super. Ct. 39.

22. McAvoy & McMichael v. Commonwealth Title, Ins. & Trust Co., 27 Pa. Super. Ct. 271. Where books are delivered at stated times at a certain price per volume payable on delivery, delivery of the entire set of books ordered is not a condition precedent to a recovery for those delivered. Barrie v. Jerome, 112 Ill. App. 329.

23. See 4 C. L. 1347.

24. Complaint for lumber sold held too general to require defense. Altoona Concrete Const., etc., Co. v. Knickerbocker Contracting Co., 29 Pa. Super. Ct. 512.

25. Smith v. Perham [Mont.] 83 P. 492. A complaint alleging that during a time specified plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own use, and that he has not paid therefor, states no cause of action; its allegations not being inconsistent with a gift. Id. Where the averment of the complaint is a sale and delivery of specified articles at a certain price, the words "at his request" may be omitted. Kamber v. Becker, 27 Pa. Super. Ct. 266. Complaint for goods sold and delivered held sufficient which alleged a sale and delivery of the goods at a certain amount, and that this sum was justly due and unpaid where a copy of the book account was annexed, though there was no averment of a sale at regular market prices, or that defendant agreed to pay the price charged, or on what time the goods were sold. Id.

26. Hutchinson v. Bien, 46 Misc. 302, 93 N. Y. S. 189.

27. McGue v. Rommel [Cal.] 83 P. 1000.

28. See 4 C. L. 1348.

29. Under Rev. St. 1898, § 2657, so authorizing defendant, in an action on notes given for the price of a patent right, may by counterclaim seek damages for false representations by which he was induced to enter into the contract of sale and also tender back all rights acquired under the contract and ask for rescission of the same. J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231.

30. Loveland v. Gravel [Minn.] 103 N. W. 721. Held proper to exclude evidence tending to show fraud. Id.

not read it[31] or was not afforded a full and fair opportunity to do so.[32] A defendant who desires to show illegality of contract as being in violation of a statute or public policy, or would show failure of title or consideration, must affirmatively allege such defense.[33] Failure to do so will only be excused where the illegality or failure of title or consideration appears from the complaint.[34] An option to pay other than by cash must be pleaded.[35] Pleas alleging a warranty and the breach thereof need not allege whether the warranty was written or parol,[36] nor need they allege evidentiary facts.[37] The general rules as to amendments of pleadings apply.[38] Sufficiency of affidavits of defense[39] and particular averments[40] are shown in the notes.

The claim or damage to be recouped must be a valid cause of action for which a separate suit could be maintained against plaintiff and must not have occurred through the fault or negligence of the defendant.[41] Although damages for breach of a condition are unliquidated, they may nevertheless be set up against a note for purchase price,[42] but the vendee cannot set off unliquidated damages arising from breach of a contract unconnected with plaintiff's suit.[43]

Variance.[44]—The proof must sustain the allegations of the pleadings as to parties.[45] In an action for goods sold on quantum meruit, plaintiff proving a written contract, he can recover the agreed price.[46] Failure to allege waived conditions of a warranty is not fatal.[47]

31, 32. Loveland v. Gravel [Minn.] 103 N. W. 721.

33. Miller v. Donovan [Idaho] 83 P. 608. Evidence of illegality and failure of title held inadmissible under answer denying purchasing or receiving property. Id.

34. Miller v. Donovan [Idaho] 83 P. 608.

35. Payment by note. Hirschberg v. Marx, 94 N. Y. S. 342.

36, 37. Warren & Lanier v. Cash [Ala.] 39 So. 124.

38. Where the proof showed a contract for the sale of coal by a firm of the same name as plaintiffs, who were their predecessors, held the court should have permitted an amendment of the answer to plead as a defense to the action the breach of the contract under which the coal was purchased. Piper v. Seager, 97 N. Y. S. 634.

39. Affidavit of defense held sufficient which showed that the tobacco was sold by sample, that it did not conform to the sample, wherein it was lacking, prompt notice to plaintiff, and the amount of loss. Straus v. Welsh, 29 Pa. Super. Ct. 437. Affidavit of defense that the goods were not first class and up to date as represented by the seller and that defendant was injured in his business held insufficient. Fuhrman v. Stackman, 28 Pa. Super. Ct. 154.

40. Averment that defendant notified plaintiff of defective material and workmanship in the machinery is not a sufficient averment that parts of the machinery were defective and that notice thereof was given. Lucile Min. Co. v. Fairbanks, Morse & Co., 27 Ky. L. R. 1100, 87 S. W. 1121.

41. Edgemoor Iron Co. v. Brown Hoisting Mach. Co. [Del.] 62 A. 1054. In an action for the price of a traveling crane, defendant cannot recoup damages alleged to have been suffered through having paid, without suit, a claim for damages on account of the death of a servant killed by the overturning of the crane because of its alleged negligent construction. Id. Damages resulting from articles not being up to contract may be set off. Yick Sung v. Herman [Cal. App.] 83 P. 1089. In an action for materials furnished, the purchaser is entitled to offset loss of rent by delay in furnishing such materials according to contract. Not entitled to offset extra expense in retaining labor. Long v. Abeles & Co. [Ark.] 91 S. W. 29. Defendant could not set off, as against the purchase price of machinery, an amount paid by him for repairs done pursuant to an agreement between him and the manufacturer and merely delivered by the plaintiff. Borden & Selleck Co. v. Fraser, 118 Ill. App. 655.

42. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930.

43. Breach of subsequent contract. Higble v. Rust, 112 Ill. App. 218.

44. See 4 C. L. 1349.

45. A complaint by P. and son constituting the firm of P. & Co., alleging a sale of coal to defendant, is not supported by evidence of a contract for the sale of coal by P. & Co. composed of P. and L., the predecessors of the plaintiffs, and a delivery of the coal by plaintiffs. Piper v. Seager, 97 N. Y. S. 634. Evidence showing the existence of a contract for the sale of goods by plaintiff to another and the subsequent adoption, without assignment, of that contract by defendant as its own, is not a variance, or at least not a material variance, from a complaint alleging the sale and delivery of the goods to defendant. Vulcan Ironworks v. Burrell Const. Co. [Wash.] 81 P. 836.

46. Niles v. Sire, 46 Misc. 321, 94 N. Y. S. 586.

47. Failure of the notice, filed with the plea of the general issue under circuit court rule 7c in an action on a note given for the purchase price of a stallion, to set forth with the warranty, in the contract of sale, of his being serviceably sound and the breach thereof, the duty imposed by such contract of returning the horse for trade and the subsequent waiver of the provision

Presumptions and burden of proof.[48]—Plaintiff must show that he performed or was ready to perform his part of the contract.[49] The burden is upon a vendee who has accepted the goods to show that the quality does conform to the contract.[50] In some states a consideration is presumed in favor of a written contract.[51] Where the seller's agent in making the sale makes representations, agreements, or guaranties as a part of the contract of sale, and suit is brought by the seller, he is bound by the agreement of the agent.[52] In such case it is the duty of the seller to ascertain, and not the duty of the buyer to inform him, what representations have been made by the agent.[53] The buyer setting up breach of warranty by way of recoupment must prove the breach.[54]

Evidence; admissibility and sufficiency.[55]—As the familiar rules of evidence[56] determine the questions of relevancy and competency, illustrations only are given.[57] Parol evidence may be introduced to show the true consideration.[58] Where the sale is denied, correspondence between the parties referring to sales between them is admissible,[59] it being for the jury to determine whether the reference was to the sale in question or not.[60] In order that a receipt may be admissible in evidence the authority of the signer must be shown.[61] An itemized statement of account being admissible in evidence it is not objectionable for indefiniteness because of trade terms and abbreviations well understood in the trade, showing the number and kind of articles shipped and the catalogue numbers, price per dozen and discounts allowed on each.[62] In an action for purchase price and defense of inferior quality, samples of the goods will not be permitted to be shown in evidence by defendant unless fully identified.[63] The proof must be admissible under the pleadings.[64]

therefor does not create a fatal variance. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

48. See 4 C. L. 1349.

49. American Label Co. v. Kander, 93 N. Y. S. 1108; Gilmore & Maginnis v. Meeker [La.] 40 So. 244; Tait v. McInnes [Cal. App.] 84 P. 674; Armstrong v. Helde, 94 N. Y. S. 434.

50. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281.

51. Under Civ. Code § 1614. Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

52. See ante, § 8 A.

53. Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359.

54. H. H. Franklyn Mfg. Co. v. Lamson & Goodnow Mfg. Co. [Mass.] 75 N. E. 624.

55. See 4 C. L. 1349.

56. See Evidence, 5 C. L. 1301.

57. Where **telegraphic notice of rescission required an answer,** held competent to require defendant to state as a witness whether he answered it. Lipschutz v. Weatherly & Twiddy [N. C.] 53 S. E. 132. Where plaintiff in his replication alleged that defendant was estopped from denying the indebtedness because he paid the freight and kept the goods, held it was competent for plaintiff to prove such fact by **defendant** on his cross-examination, when **introduced as a witness in his own behalf.** Equitable Mfg. Co. v. Martin [Ala.] 39 So. 769. Defense being breach of warranty the **books of the buyer** are inadmissible to show loss or gain to buyer. German-American Provision Co. v. Jones Bros. & Co. [Miss.] 39 So. 521. Where the facts show that a vendee was not warranted in relying on, or did not rely on, statements as to the fertility of **land, evidence of such statements** should have been excluded. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. **Testimony of value** though immaterial on any issue may be introduced in rebuttal. Id. It was not error to exclude **testimony of an oral warranty** that a machine was adapted to a required purpose when its defects were due to breaches of warranties in the written contract. Shearer v. Gaar, Scott & Co. [Tex. Civ. App.] 90 S. W. 684. On an issue as to whether the seller of goods contracted to pay the freight, **evidence of a decline in the market,** subject to which the order was taken, is admissible. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789. On an issue whether an order for goods was given or not, the salesman who is claimed to have taken the order may not testify that he took an **order of the same kind** from another company managed by the alleged purchaser, and that such order was accepted. Id. Proof of the sale and delivery of personal property may be made by the **books of the agent of the purchaser.** Forbes Co. v. Leonard, 119 Ill. App. 629. Where in an action for the price of wheat defendant claims the wheat was of inferior quality, **evidence of the quality of other wheat** sold by plaintiff about the same time is competent. Daily v. Smith-Hippen Co., 111 Ill. App. 319.

58. Gaar, Scott & Co. v. Hill, 113 Mo. App. 10, 87 S. W. 609.

59. Swindell Bros. v. J. L. Gilbert & Bro., 100 Md. 399, 60 A. 102.

60. So held where defendant wrote plaintiff referring to "our patronage." Swindell Bros. v. J. L. Gilbert & Bro., 100 Md. 399, 60 A. 102.

61. Brinn v. Levine, 97 N. Y. S. 966.

The evidence must preponderate[65] to establish the sale between the parties,[66] its terms,[67] the performance or breach thereof,[68] the cases cited being illustrative of this rule and plaintiff's right to recover.[69]

Trial and instructions.[70]—The general principles of trials[71] and instructions[72] are treated elsewhere. Particular cases hereinunder discuss the applicability of the instructions to the cases as defined by its issues,[73] and their sufficiency to fairly present such issues[74] without misleading the jury.[75] Instructions should not be on the

62. Claus-Shear Co. v. E. Lee Hardware House [N. C.] 53 S. E. 433.

63. Whaley v. Vannatta [Ark.] 91 S. W. 191.

64. Matters of counterclaim or recoupment are not admissible under a general denial. So held where it was sought to show overpayments on former deliveries. Strother v. McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650. The complaint alleging that the account sued on was due at the commencement of the action, and the plea being but a denial of such fact, proof that its becoming due at such time was conditional is admissible without further pleadings. A reply pleading such condition is unnecessary. Warren & Lainer v. Cash [Ala.] 39 So. 124. The notice filed with the plea of the general issue under circuit rule 7c, in an action on a note for the purchase price of a stallion, stating that the horse was purchased on the assurance that he was serviceably sound when he was not, but was afflicted with a certain disease, which rendered him sterile and ultimately caused his death, is broad enough to permit recoupment of any damages resulting from the breach of warranty of his being serviceably sound. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

65. See 4 C. L. 1350.

66. Evidence held to justify submission to jury of question whether sale was to corporation or its manager as an individual. O. M. Cockrum Co. v. Klein [Ind.] 74 N. E. 529. Where there was evidence that duly authorized agent ordered coal, and that janitress receipted for the same, also evidence of the price and amount of coal, held plaintiffs were entitled to judgment. Muller v. Greenwald, 94 N. Y. S. 427.

67. In an action to recover the purchase price of logs, held finding that parties did not agree that the scale of logs by the surveyor general should be conclusive was sustained by the evidence. Nelson v. Charles Betcher Lumber Co. [Minn.] 104 N. W. 833.

68. In an action to recover a balance due on goods sold and delivered by plaintiff to defendant, evidence held to show the existence of the balance claimed by plaintiffs to be due. Armstrong v. Rorick [Mich.] 12 Det. Leg. N. 618, 105 N. W. 29.

69. In an action for the price of timber sold, where the court found that plaintiff did not own the timber when defendant purchased it, and there was no finding that he subsequently became the owner of the proceeds of the sale, and the evidence was in conflict as to whether he was entitled to the amount due for the timber, held that a judgment for plaintiff for that amount was erroneous. Bovo v. D. M. Fulmer Lumber Co., 123 Wis. 614, 101 N. W. 1098.

70. See 4 C. L. 1351.

71. See Trial, 4 C. L. 1703.

72. See Instructions, 6 C. L. 43.

73. In an action for the price of a windmill sold on trial, there being no evidence that the buyer agreed to return the mill if unsatisfactory, an instruction so charging is properly refused. Allyn v. Burns [Ind. App.] 76 N. E. 636. Sale of option on corporate stock. Defendant pleaded misrepresentations as to net earnings of corporation but made no allegations as to any misrepresentations as to plant of corporation. Held error to instruct that if defendant had inspected the plant or had full knowledge thereof he could not recover. Rumsey v. Shaw, 212 Pa. 576, 61 A. 1109.

74. Instruction as to rights of parties if article was ordered on buyer's risk, or upon the condition that it be satisfactory to the buyer, held not argumentative or unfair. Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149. In an action for the price of goods, issues submitting to the jury whether defendant refused to perform its part of the contract and what damage, if any, plaintiff had sustained, were broad enough to permit defendant to present in every phase the defense of plaintiff's failure to deliver within the time fixed by the contract. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250.

75. Defense being breach of warranty, charge that if the defense was made out the jury must believe that defendant had paid plaintiff the value of the articles, or they must return a verdict for plaintiff, held misleading. Holman v. Calhoun [Ala.] 40 So. 356. Where court clearly charged as to effect of use after expiration of trial period as well as effect of acceptance, held jury could not have been misled by instructions which did not submit the inference which might be drawn from defendant's exercise of dominion inconsistent with ownership in plaintiff after expiration of trial period. Allyn v. Burns [Ind. App.] 76 N. E. 636. Where, in an action for the price of certain building materials, it was proved that plaintiff contracted to furnish materials to the "contractor" as rapidly as wanted, and that all the defendants, including the contractor, were to be liable for the amount, a requested instruction that if plaintiff contracted to furnish the materials to the "owners" as rapidly as wanted and failed to do so then the owners were entitled to offset against plaintiff's claim, such sum as the jury found "the defendants" lost by reason of such delay, held properly refused. Oldenburg & Kelley v. Dorsey [Md.] 62 A. 576.

weight of the evidence.[76] In Indiana it is not proper to submit questions calling for a finding upon some items of evidence.[77]

Fraud is generally a question for the jury.[78]

If possible the findings must be construed so as to be consistent.[79]

(§ 10) *F. Action for breach.*[80]—Plaintiff must allege and prove performance or tender of performance on his part.[81] An allegation that defendant refused to carry out the terms of his agreement is a mere legal conclusion[82] and does not relieve plaintiff of the obligation of alleging and proving performance on his part.[83] Facts should be alleged.[84] Where it is sought to establish the market value of merchandise at a certain time, the evidence must be of sales at such time, of like merchandise, in like quantities and condition as that involved in the litigation.[85] If a buyer removes himself or is so removed involuntarily that demand cannot be made of him, the law presumes that he would pay the price or deliver the goods without demand.[86] Instructions must be applicable to the issues,[87] must fairly present them,[88] and must not be vague or indefinite.[89] Findings should be construed together.[90]

(§ 10) *G. Action for damages for goods not accepted.*[91]—The sale being on

76. On an issue of warranty a charge that the testimony of a witness who was claimed to have made the warranty, in that he did not recollect making the warranty and did not deny making it, held on the weight of the evidence. Holman v. Calhoun [Ala.] 40 So. 356.

77. Under Burns' Ann. St. 1901, § 555, where issue was whether goods were sold to corporation or its manager as an individual, held proper to refuse to submit an interrogatory as to whether any of the goods were ordered otherwise than by letters written by the manager and signed with his individual name. O. M. Cockrum Co. v. Klein [Ind.] 74 N. E. 529.

78. Perkins Windmill Co. v. Kelly [Mich.] 12 Det. Leg. N. 533, 104 N. W. 663.

79. Complaint alleging sale of goods to the value of $999.65, which with interest amounted to $1,015.70, and that only $300 had been paid, leaving a balance of $715.70, and the findings were that the goods were of the value of $715.95 and that by reason of defects defendant was entitled to a credit of $178.25, leaving a balance of $537.70, held that the finding as to the value of the goods sold must be construed as referring to the amount alleged to be due after the payment of the $300. Wiestner v. California Coke & Gas Co. [Cal. App.] 83 P. 461.

80. See 4 C. L. 1352.

81. Brazell v. Cohn, 32 Mont. 556, 81 P. 339. Complaint alleging that plaintiff was then and there able, ready, and willing, and offered to perform all the terms and conditions of the contract to be performed by him during the term of the contract, and was and would be during the entire continuance of the contract able, ready, and willing to perform the same and had offered to do so, etc., held sufficient. Id. Where promise to accept and the agreement to deliver are concurrent and mutual. Armstrong v. Heide, 94 N. Y. S. 434. In an action for breach of contract to purchase it is incumbent upon plaintiff to show a tender of goods of the description called for in the contract. Armour v. Produce Co., 28 Pa. Super. Ct. 524. Delivery being a condition precedent, the seller must not only be able but must actually offer to comply with its terms unless excused by buyer. Bell v. Hatfield [Ky.] 89 S. W. 544.

82, 83. Armstrong v. Heide, 94 N. Y. S. 434.

84. Plea that contract was part of a "scheme" devised by defendant to monopolize the trade and was contrary to public policy, held insufficient to raise the defense that the contract was void as against public policy. Bernard v. Sloan [Cal. App.] 84 P. 232. Answer alleging that plaintiff by mistake or with intent to deceive defendant inserted in the written contract certain provisions not contained in the agreement, and thereby increased defendant's liability, held sufficient. Lilienthal v. Herren [Wash.] 84 P. 829.

85. James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356.

86. Bell v. Hatfield [Ky.] 89 S. W. 544.

87. Where there is no evidence of a waiver of breach by silence, an instruction on the point is erroneous. Wood v. Planter's Oil Mill [Ark.] 90 S. W. 18.

88. Alleged sale and incomplete performance held issues as to existence of contract as alleged, performance and value of lumber tendered were sufficient. Coxe v. Singleton, 139 N. C. 361, 51 S. E. 1019.

89. Requested instruction that the jury in fixing damages for future nonperformance should make allowance for uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance, held vague and indefinite. Brazell v. Cohn, 32 Mont. 556, 81 P. 339.

90. Where jury found failure of performance on part of plaintiff, a further finding that the lumber tendered by him was less than the value required by the contract held to render the first finding conclusive. Coxe v. Singleton, 139 N. C. 361, 51 S. E. 1019.

trial or on condition precedent, the "buyer" is only liable for loss or damage to the property caused by his negligence during the time it was in his possession on trial.[92]

(§ 10) *H. Choice and election of remedies.*[93]—The buyer refusing to make instalment payments as required by the contract, the seller may terminate the contract and recover for part performance.[94]

§ 11. *Remedies of purchaser. A. Rescission.*[95]—Fraud[96] or false material representations,[97] by the seller or his agent,[98] constituting an inducement to the contract of purchase, and the buyer relying thereon[99] without negligence,[1] is ground for the rescission of the contract, in equity,[2] and that too though the party making the representation may have been ignorant as to its truth or falsity[3] and had no fraudulent intent;[4] the real inquiry being not whether the seller knew the representation to be false, but whether the buyer believed it to be true and was misled by it in entering into the contract.[5] Negligence in relying on representations is no defense where artifice is used to induce the buyer to forbear making inquiries.[6] Nonconformity with the contract[7] and partial failure of the consideration of an entire contract[8] warrants rescission, so also the coming into effect of a condition expressly entitling one to rescind warrants the use of the remedy,[9] but not a mistake in the statement of the term of credit in the invoice, such mistake being corrected.[10] As to whether

91. Liability for goods not returned when contract is rescinded, see post, § 11 A, Rescission.

92. Allyn v. Burns [Ind. App.] 76 N. E. 636. Where "buyer" refused to keep machine and gave the seller notice, held he was not liable for damage caused by himself three months after the giving of such notice. Id.

93. See 4 C. L. 1352. The right of resale has been treated in § 10 D. See, also, Election and Waiver, 5 C. L. 1078.

94. Price v. New York, 104 App. Div. 198, 93 N. Y. S. 967.

95. See 4 C. L. 1353.

96. Ward v. Marvin [Vt.] 62 A. 46; May v. Loomis [N. C.] 52 S. E. 728; Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Elderly lady without business experience being induced by her attorney and agent to buy mining stock for $1 per share held entitled to rescind the stock at the time selling for $.50 a share and plaintiff not knowing that she was buying stock owned by defendant. Landis v. Wintermute [Wash.] 82 P. 1000. Where in inducing one to become a party to an underwriting agreement a pledgee of bonds concealed the fact that the bonds were held as security for a loan and represented that a sale of the bonds at par had practically been closed, held fraud justifying rescission. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

97. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

98. Brounfield v. Denton [N. J. Err. & App.] 61 A. 378.

99. Statements made by the seller out of the buyer's hearing held inadmissible. J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231. Newspaper articles, circulars, pamphlets, etc., many of which were never seen by defendant and some of which were not in print at the time of the sale held inadmissible. Id.

1. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596. Purchaser of logs having lived near land on which logs were situated, having been on such land and having had an opportunity to examine them before buying held he could not rescind the contract of sale for false representations of the seller as to the number and quality of logs. Hulet v. Achey [Wash.] 80 P. 1105.

2, 3. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

4. See J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231. Statements made by the seller out of the buyer's hearing are inadmissible to prove bad faith and an intent to deceive on his part. Id.

5. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

6. May v. Loomis [N. C.] 52 S. E. 728.

7. Seller delivering inferior goods, buyer may reject and sue for damages, or he may pay the contract price, take the goods and recover the difference between their value and the value of goods of the quality named in the contract. John E. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 20. Machine delivered not being the one contracted for, the buyer may disaffirm the contract and return or hold the machine subject to the order of his seller. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 83 P. 988.

8. Walter Pratt & Co. v. Frasier & Co. [S. C.] 51 S. E. 983. Where plaintiffs sold to defendants an assortment of toilet articles and a counter showcase, the contract was an entire one, and a failure to deliver the showcase excused defendants from accepting the goods. Id.

9. Where contract for the sale and demolition of buildings provided that if the seller did not acquire title by a certain date the contract should be void and the consideration paid by the buyer should be restored held the seller not acquiring title by the specified date the buyer could on such date, or at least within a reasonable time thereafter, elect to rescind and recover the consideration paid. Lippman v. Hauben, 94 N. Y. S. 520.

10. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

breach of warranty is a ground for rescission there is a conflict, some courts holding that the right only exists while the contract is executory[11] while others extend the right to both executory and executed contracts.[12] In those states where the former rule prevails, the buyer's remedy is one at law for damages,[13] though of course the parties may by express agreement to the contrary retain the right of rescission.[14] A purchaser from a partner having authority to sell cannot rescind because at the time of purchase he did not know that another partner had an interest.[15] Rescission being merely the choice of two or more remedies,[16] it must be voluntary.[17] Damage must have resulted,[18] and by the great weight of authority this damage must be an actual pecuniary damage as distinguished from a nominal or theoretical injury.[19]

In order to rescind, notice thereof must be given the seller[20] with as much promptitude and dispatch as the circumstances of the case will admit.[21] The law does not require the buyer to act upon the appearance of the first indication of fraud, but allows him a fair opportunity to ascertain the extent of the false representations and to test the quality of the article falsely put upon him.[22] All the law requires is that he shall act within a reasonable time after the discovery of all the essential elements of the fraud.[23] Any delay in doing so, or the continued employment, use, and occupation of the property received under the contract, will be deemed an election to affirm it[24] and a waiver of the right to rescind[25] though the presumption is

11. Does not apply to executed contracts. Hulet v. Achey [Wash.] 80 P. 1105; Simonson v. Jenson [N. D.] 104 N. W. 513.

12. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92. Warranty of soundness. Palmer & Son v. Cowie, 7 Ohio C. C. (N. S.) 46. Where machine was warranted to be of good material and well made and on delivery appeared to be old, out of order and put together in a bungling manner held buyers were justified in refusing to accept the same and in rescinding the entire contract. Baskerville v. Johnson [S. D.] 104 N. W. 913.

13. Hulet v. Achey [Wash.] 80 P. 1105; Simonson v. Jenson [N. D.] 104 N. W. 513.

14. Kugel v. McEnroe, 115 Ill. App. 419; Cook v. Lantz, 116 Ill. App. 472; Simonson v. Jenson [N. D.] 104 N. W. 513. Where contract of warranty provided that the buyer could return the animals and recover the purchase price upon breach of warranty, held the buyer, on breach of warranty, was entitled as a matter of contract to return the animals and recover the purchase money on compliance with or waiver of the conditions specified. White v. Miller [Iowa] 105 N. W. 993.

15. Webb v. Steiner, 113 Mo. App. 482, 87 S. W. 618.

16. See infra subd. H, Choice and election of remedies.

17. Held in suit to recover purchase price for breach of warranty, court could not order plaintiff to rescind. McCarthy v. Eilers, 94 N. Y. S. 1109.

18, 19. Jackway v. Proudfit [Neb.] 106 N. W. 1039.

20. McGue v. Rommel [Cal.] 83 P. 1000; Olson v. Brison [Iowa] 106 N. W. 14.

21. Ward v. Marvin [Vt.] 62 A. 46; Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Machine Co. [Mo. App.] 89 S. W. 911; Armour v. Produce Co., 28 Pa. Super. Ct. 524; Rumsey v. Shaw, 25 Pa. Super. Ct. 386; Collins v. Tigner [Del.] 60 A. 978. Three weeks delay in returning horse after discovery of breach of warranty held unreasonable. Collins v. Tigner [Del.] 60 A. 978. Where inspection of beans sold was insufficient held notice of rescission given two days after receipt of beans held unreasonably delayed. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891. A refusal to accept and offer to rescind made within three days after the receipt of goods was made within a reasonable time. Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126.

22, 23. Ward v. Marvin [Vt.] 62 A. 46.

24. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Where one was induced by fraud to become a party to an underwriting agreement, held payment, on discovery of fraud, of amount due by buyer on the bonds to the "syndicate manager" and tender of the bonds to the seller did not amount to a ratification. Id. A purchaser of corporate stock held not estopped to maintain an action to rescind by attending and participating in a stockholders' meeting after the commencement of the action, where she had tendered the stock to the seller prior to the commencement of the action and demanded a return of the purchase money which had been refused. Landis v. Wintermute [Wash.] 82 P. 1000. In an action to rescind a contract for the purchase of a machine evidence considered and held not such as to have warranted a direction to the jury to find for defendant on the ground that the machine had been accepted. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Machine Co. [Mo. App.] 89 S. W. 911. Where a commodity has been sold to be delivered in certain instalments, the vendee is not relieved by defective deliveries which would ordinarily entitle him to rescind if he has accepted and retained them with knowledge

only a prima facie one.[26] What constitutes a reasonable time within which such offer shall be made is a question for the court,[27] but whether such a reasonable time has elapsed before it was made is a question for the jury.[28] The seller may waive an unreasonable and unwarranted delay,[29] and whether he has done so is generally a question for the jury.[30] Retention upon the seller's promise to "make matters right" bars the remedy.[31] But for the necessity of a tender, the commencement of the action for the consideration paid would be a sufficiently definite disaffirmance of the contract and an election to rescind.[32] The institution by the buyer, with full knowledge or reasonable means of knowledge of the facts, and without returning or offering to return the chattel sold or rescind the sale, of a suit for breach of warranty, is an affirmance of the sale and precludes the repudiation of the contract for fraud[33] even though he subsequently amends his complaint so as to set up a different cause of action,[34] and though no damages are recovered in such action.[35] Unless the article be entirely worthless,[36] or it is plainly evident that a tender will not be accepted,[37] rescission involves the obligation to return the property to the seller.[38] The place of purchase and the seller's residence being different it is proper for the buyer to ask the seller for shipping directions.[39] Where it is impossible to return all the parts without injury to the buyer's property, he should return what he can and allow a deduction for those not returned.[40] An animal being purchased for

of the fact. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

Note: The buyer could of course refuse to accept inferior goods and compel the seller to furnish that which was up to the standard and if this is not done he is entitled to damages. But the contract being entire it cannot be abrogated after there has been a partial, even though a defective, performance, of which the defendants knowingly accepted the benefits.—From Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

25. Ward v. Marvin [Vt.] 62 A. 46.

26. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Machine Co. [Mo. App.] 89 S. W. 911. An instruction that the use of a machine and payment for it created a presumption of acceptance precluding recovery, and that the burden of proving nonacceptance was on plaintiff, held proper. Id.

27. Collins v. Tigner [Del.] 60 A. 978; Ward v. Marvin [Vt.] 62 A. 46; Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126.

28. Collins v. Tigner [Del.] 60 A. 978. But when disputed facts, involving questions of excuse, discovery of fraud and like matters, are to be passed upon, the question is a mixed one of law and fact and is for the the jury. Ward v. Marvin [Vt.] 62 A. 46. Whether buyer rescinded with due promptness after discovery of fraud held a question for the jury. Shreve v. Crosby [N. J. Err. & App.] 63 A. 333.

29. Collins v. Tigner [Del.] 60 A. 978. Three weeks delay after discovery of breach of warranty in sale of a horse held not unreasonable if induced by the seller's request to keep the horse a while longer. Id. Prompt rescission is not required by the vendee where the vendor has misled him into believing that such rescission will not be insisted upon. Defective machine. Rheinstrom v. Elk Brewing Co., 28 Pa. Super. Ct. 519. Delay in instituting proceedings to rescind on the ground of abuse of confidential relations by the seller does not constitute a waiver of the right where it is induced by temporary alleviation of suspicions and ignorance and inexperience. Landis v. Wintermute [Wash.] 82 P. 1000.

30. Collins v. Tigner [Del.] 60 A. 978.

31. Where the buyer of a horse, after discovering fraud of the seller, and after being assured by the seller that if the horse was not as represented, he would make it right, continued to use the horse as his own, he thereby elected to affirm the contract and waived his right to rescind. Ward v. Marvin [Vt.] 62 A. 46.

32. Olson v. Brison [Iowa] 106 N. W. 14.

33, 34, 35. Davis v. Schmidt [Wis.] 106 N. W. 119.

36. Rumsey v. Shaw, 25 Pa. Super. Ct. 386.

37. Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126.

38. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92; May v. Loomis [N. C.] 52 S. E. 728; Olson v. Brison [Iowa] 106 N. W. 14; Rumsey v. Shaw, 25 Pa. Super. Ct. 386; Palmer & Son v. Cowie, 7 Ohio C. C. (N. S.) 46. The buyer disaffirming the contract for a breach thereof he cannot hold the article sold to satisfy a claim for damages. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 83 P. 988. The buyer retaining any part of the goods can only recover damages for breach of warranty. McCarthy v. Ellers, 94 N. Y. S. 1109. Where one bought a horse, carriage, and equipment for a lump sum and the horse died causing a breach of warranty, held buyer could not recover price unless he tendered back the carriage and equipment. Id.

39. White v. Miller [Iowa] 105 N. W. 993.

40. Where the evidence showed that part of a heating plant could not be removed from the building without great injury. These parts were disconnected from the other portions of the plant. Defendant placed them in the building in executing his con-

breeding purposes while in "show condition" and the contract providing for a return in "good condition" the latter phrase refers to good breeding condition.[41] The offer to rescind being properly made and upon sufficient grounds and refused it is as effectual as if accepted.[42] The purchaser may in such case retain possession, and if he does so he becomes merely a bailee of the seller.[43] Questions of disaffirmance[44] and affirmance[45] are for the jury.

Generally the action for rescission need only be against the party practicing the fraud.[46]

(§ 11) *B. Action to recover purchase money paid or to reduce price.*[47]—The seller removing the property[48] or failing to deliver property in conformity with the terms of the contract,[49] the buyer may recover back so much of the price as he has paid in advance, and the seller having put it out of his power to deliver the goods sold, no demand therefor is necessary to the maintenance of an action to recover purchase money paid in advance.[50] Upon rescission being promptly and properly made, the buyer is entitled to recover the purchase money paid,[51] and it seems that the rescission having become executed a demand for such price is not essential.[52] In the absence of a contract, express or implied, that money paid shall be forfeited, the buyer may, upon mutual rescission, recover purchase money paid even though the rescission was induced by his own default.[53] A buyer wrongfully refusing to carry out his contract cannot recover earnest money.[54] Money paid under a mistake of fact may be recovered back in an action for money had and received where the money is paid in consequence of a mutual mistake as to facts which if known would have prevented the payment.[55] An error of fact takes place either when something which really exists

tract to install the plant. Held that plaintiff was not bound to return such parts in order to recover the price paid for the plant minus the value of such parts. Olson v. Brison [Iowa] 106 N. W. 14.

41. White v. Miller [Iowa] 105 N. W. 993.

42. Exchange of property. Hayes v. Woodham [Ala.] 40 So. 511.

43. Where subject of contract was a horse, use thereof occasionally after offer to return does not bar right. Hayes v. Woodham [Ala.] 40 So. 511.

44. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 83 P. 988. Whether or not the redelivery is an absolute one is a question for the jury. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806.

45. Whether plaintiff affirmed sale with knowledge of fraud held a question for the jury. Shreve v. Crosby [N. J. Err. & App.] 63 A. 333. Where buyer and seller occupied a confidential relation and the latter was ill held that whether a letter written by plaintiff's representative to the defendant shortly after discovery of the fraud containing the words "I want to sell you my stock; what will you give me for it," should be treated as an affirmance of the purchase, with knowledge of the fraud, or as a polite intimation that the defendant should take back the stock and return the money because of the fraud, was a question for the jury. Id.

46. In action for rescission of a contract for the underwriting of certain bonds held maintainable against the party practicing the fraud, and neither the "syndicate manager" nor the corporation issuing the bonds was a necessary party. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

47. See 4 C. L. 1355.

48. Removal on defendant's refusal to pay balance because of breach of warranty. Roesch v. Young, 111 Ill. App. 34.

49. Where buyer ordered goods of a certain kind and weight. Altschul v. Koven, 94 N. Y. S. 558.

50. Fay v. Fitzpatrick [Iowa] 105 N. W. 398. Where property is sold to be delivered at once after payment and the seller fails to make such delivery, notice of suit to recover the payment made is a sufficient demand. Id.

51. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806. One is entitled to recover the price paid upon a breach of a warranty of soundness with an agreement that the purchaser can return the property if found unsound. Kugel v. McEnroe, 115 Ill. App. 419. What constitutes a rescission see ante, this section, subd. A, also § 3.

52. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806.

53. Pierce v. Staub [Conn.] 62 A. 760. What constitutes rescission see ante, § 3, also, ante this section, subd. A.

NOTE: Proper procedure to protect vendor: It has been said by high authority that the better remedy of the vendor, and in some instances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. Hansbrough v. Peck, 72 U. S. 497, 18 Law. Ed. 520.—From Pierce v. Staub [Conn.] 62 A. 760.

54. Webb v. Steiner, 113 Mo. App. 482, 87 S. W. 618.

55. So held where apple waste was bought

is unknown, or some fact is supposed to exist which really does not exist,[56] and the action will lie unless the mistake results from inexcusable neglect by the party paying, and there was no legal or moral obligation on his part to pay, or the payment was made intentionally, without reference to the state of facts under which it was made.[57] In a suit to recover for a deficiency in the amount delivered, subsequent purchasers from the original buyer are not necessary parties.[58] In such a case the burden is on the buyer to show the deficiency,[59] and the contract containing the method of measurement, it is admissible in evidence.[60] On the question as to whether representations of title were false and fraudulent, the testimony of an attorney as to the result of an examination of the record is admissible.[61] In a joint action against two defendants to recover the purchase price of stock, a guarantee of the value of the stock, made by one of the defendants only, cannot be considered.[62] The evidence showing that a tender would have been of no avail, the fact that the petition contains no allegations with respect to a tender is immaterial.[63]

While in Louisiana a vendee who has sold the things purchased has disabled himself from bringing a redhibitory action, he may still have relief in an action quanti minoris,[64] and in such an action he can claim and recover damages from his vendor, if the latter knew of the defects in the things sold but omitted to declare them.[65] He is, however, controlled as to such demand by the conditions, rules, and limitations of the action quanti minoris.[66] Special statutes of limitation govern.[67]

(§ 11) *C. Actions for breach of contract.*[68]—Except where the seller notifies the buyer of his inability to perform and cancels the contract,[69] plaintiff must show that he was ready and willing to perform his part of the contract as required by the terms of the latter,[70] and he cannot recover if performance is prevented by the act of his agent,[71] and whether or not it was so prevented is generally a question for the jury.[72] The right of the vendee to recover from the vendor for breach of contract is based solely upon the contract between the two.[73] A buyer may sue upon a contract

by sample and by mistake wrong car was sampled. De Wolff v. Howe, 98 N. Y. S. 262.

56, 57. De Wolff v. Howe, 98 N. Y. S. 262.

58, 59. In an action on a written contract for the purchase of hay, the contract price to be paid for a stipulated number of tons as estimated, and on ascertainment of the true tonnage any deficiency to be made good at the contract price. Reed v. McDonald [Cal. App.] 82 P. 639.

60. Action on a written contract for the purchase of hay, the contract price to be paid for a stipulated number of tons as estimated, and on ascertainment of the true tonnage any deficiency to be made good at the contract price, held error to exclude the contract from evidence it containing the manner in which the tonnage was to be determined. Reed v. McDonald [Cal. App.] 82 P. 639.

61. Testimony of an attorney that he had, since the representations, examined the records and failed to find any evidence of title to the lands in the company except certain leases held admissible as tending to show what knowledge the seller possessed at the time he made the representations. Shreve v. Crosby [N. J. Err. & App.] 63 A. 333.

62. Moore v. Adams, 29 Pa. Super. Ct. 239.

63. Olson v. Brlson [Iowa] 106 N. W. 14.

64, 65, 66. George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432.

67. An action quanti minoris, which by reason of its facts, falls under the provisions of article 2545 of the Civil Code, is governed by the special rule as to prescription which is laid down in that article. George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432. Under articles 2534, 2544, 2554, where the seller knew of the vice but did not disclose it, the action must be commenced within a year after discovery by the buyer. Discovery is not presumed but must be proved by the seller. Id.

68. See 4 C. L. 1355.

69. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056.

70. Hughes v. Knott [N. C.] 53 S. E. 361.

71. Brauer v. Macbeth [C. C. A.] 138 F. 977.

72. So held where plaintiff was to transfer "unexpired insurance fully paid" and there was a dispute as to whether plaintiff's agent refused to accept equivalent new insurance or not. Brauer v. Macbeth [C. C. A.] 138 F. 977.

73. Where there was a shortage in the shipment of grain held vendee might recover of his vendor without first having reimbursed his subvendee for the shortage. Denton Bros. v. Gill [Md.] 62 A. 627. Whether defendant's local office notified witness, who was his agent, that defendant could not make any more deliveries under the contract, under instructions from another corporation, until witness had settled his account,

made by its agent though the seller was without knowledge of the agency.[74] Though refusal to accept is based on error or misrepresentation, it will defeat recovery for breach of the contract.[75]

Pleading.[76]—Formal pleadings not being required, as before a justice of the peace, it is sufficient if the allegations of the petition show an acceptance of the offer inferentially.[77] Defendant relying upon a condition in the contract must plead the existence of the condition in order to have the advantage thereof.[78]

Proof.[79]—Facts admitted by the answer need not be proven.[80] Damages which necessarily result from the act complained of are denominated "general damages" and may be proved under the ad damnum clause.[81] Where the seller fails to deliver and in an action for damages the buyer proves the contract and the market price of the cattle, no further burden rests on him.[82] The general rules as to the admissibility of evidence apply.[83] A witness can state in a single answer the entire profit which would have been made on the articles had they been delivered pursuant to contract, the answer not being based upon speculation.[84]

Questions for the jury and instructions thereon.[85]—Instructions should not be misleading[86] and must be construed together.[87]

Findings.—It is essential that the findings show a contract actually made between the parties[88] and conform to the admissions in the complaint.[89]

and with reference to what amounts witness had been credited was irrevelant. Armour Packing Co. v. Vletch-Young Produce Co. [Ala.] 39 So. 680.

74. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. See Agency, 5 C. L. 64.

75. False calculations as to whether contractual amount of lumber had been delivered. Walker v. Kirwan [Ky.] 90 S. W. 244.

76. See 4 C. L. 1356.

77. H. Gans & Sons Mfg. Co. v. Chicago Lumber & Coal Co. [Mo. App.] 92 S. W. 121.

78. Omaha Feed Co. v. Rushford [Neb.] 106 N. W. 25.

79. See 4 C. L. 1356.

80. Where defendant in his answer set out the contract, held plaintiff need not prove it. King-Keystone Oil Co. v. San Francisco Brick Co. [Cal.] 82 P. 849.

81. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562.

82. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268.

83. In an action to recover the price paid for property which the seller failed to deliver, in which there was evidence that the sale was made by an agent, evidence that demand for the property was made on the agent was admissible. Fay v. Fitzpatrick [Iowa] 105 N. W. 398. In an action to recover for breach of a contract to deliver cattle, **admissions** of defendant as to having sold the cattle to plaintiff and declarations of plaintiff as to such sale, made in defendant's presence, were admissible. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268. Evidence that a third person with whom the buyer had agreed to sell the same goods retained a specified sum to cover his damages by reason of the failure to deliver is inadmissible. Tingle v. Kelly [Ky.] 92 S. W. 303. Where, in an action for breach of contract to sell a crop of tobacco, the amount thereof was in issue, a **forthcoming bond** executed by the seller in a prior unsuccessful attachment suit brought by the buyer for the recovery of the tobacco and which stated the amount of the tobacco held admissible against the seller, since, under Civ. Code Proc. §§ 215, 258, he could have availed himself of an appraisement before giving the bond. Id. In an action by a buyer of a machine to recover damages for nondelivery, **letters from the agent** who made the contract sued on, to plaintiff, written a year or more after the transaction, held admissible to discredit the agent as a witness, but the testimony should have been so limited. Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390.

84. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

85. See 4 C. L. 1356.

86. Instruction held misleading as tending to instruct that plaintiff could not recover unless it first made inquiry concerning agent's authority, notwithstanding existence in fact of the requisite authority. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. So held as to instruction that if certain facts existed there was an agency, there being evidence of an agency. Id. Instruction as to agency, reliance on agent's representations of authority, duty to inquire, etc., held properly refused as involved, confused and misleading. Id.

87. Sale of 21 head of cattle; breach of agreement to furnish registration papers in that such papers were furnished for only 3 head, held an instruction that if defendant sold 21 head and agreed to furnish registration papers and failed so to do the verdict should be for plaintiff held correct the jury being instructed as to the proper measure of damages. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

88. H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co. [Mo. App.] 92 S. W. 121.

89. In an action involving a contract for

(§ 11) *D. Action for breach of warranty.*[90]—The cause of action accrues upon breach of the warranty[91] and cannot be maintained prior to the transition of title.[92] The warranty need not be the sole inducement to the purchase in order to give the purchaser a right of action for its breach, but it must have been operative in causing the sale.[93] Where causes of action for breach of warranty and deceit arise out of the same transaction, they may be joined in one action.[94]

Pleading and issues.[95]—The promise to accept and the agreement to deliver being concurrent and mutual, neither party can recover without alleging and proving performance or tender of performance on his part.[96] An allegation that defendant refused to carry out the terms of his agreement is a mere legal conclusion[97] and does not relieve plaintiff of the obligation of alleging and proving performance on his part.[98] In case, upon a false warranty, scienter need not be alleged or proved.[99] Complaint stating cause of damage and amount of damage is sufficient as against a general demurrer.[1] Where under the allegations of the complaint plaintiff is entitled to recover some amount, although merely nominal, the complaint is not demurrable.[2] A complaint in a justice's court alleging that defendant guaranteed the health and soundness of animals, well knowing they were sick, is sufficient.[3] The word "inferior" when used in the complaint means less important or less valuable.[4] Where the warranty is general in its character or nature the breach or failure may be shown by a general negation of said warranty.[5]

Evidence and trial.[6]—Except where the knowledge, notice, or intent of a party is material, the rule is that no evidence of similar transactions with third persons can be given.[7] Proof of reliance on the warranty need not be made by the positive testimony of the buyer, but it is sufficient if it appears from the circumstances.[8] Proof of value must refer to the time the property was delivered under and pursuant to the warranty.[9] Plaintiff must show by a preponderance of the evidence that there was a contract of warranty,[10] that such contract was broken,[11] and the damages sustained by reason of such breach,[12] and such damages must not be speculative.[13] In a suit on

the sale of hops for several sucessive years and claiming a breach in a certain year and admitting a credit for such year, and defendant claimed that the credit should apply on the year previous and the court so found, held defendant could not complain of the court's finding an entire breach for the year claimed as contrary to the admission in the complaint. Mitau v. Roddan [Cal.] 84 P. 145.

90. See 4 C. L. 1356.

91. Right of action for damages held to accrue upon delivery of inferior goods and payment of agreed price. John E. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 20.

92. Bunday v. Columbus Mach. Co. [Mich.] 12 Det. Leg. N. 902, 106 N. W. 397.

93. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286.

94. Smith v. Newberry [N. C.] 53 S. E. 234.

95. See 4 C. L. 1357.

96, 97, 98. Armstrong v. Heide, 94 N. Y. S. 434.

99. Wallace v. Tanner, 118 Ill. App. 639.

1. Complaint alleging warranty of seed wheat, that wheat furnished was inferior to kind warranted to be sold, and produced an inferior crop to plaintiff's damage in the sum of $1,000, held sufficient. Moody v. Peirano [Cal. App.] 84 P. 783.

2. Moody v. Peirano [Cal. App.] 84 P. 783.

3. Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122.

4. Moody v. Peirano [Cal. App.] 84 P. 783.

5. Where horses were warranted free from disease, an allegation that they were not healthy and sound but were diseased, because of which one of them died a few days after the purchase and the other became and remained lame and was of no value, held not demurrable. Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co. [Ind. App.] 75 N. E. 672.

6. See 4 C. L. 1357.

7. Evidence of similar warranties in other sales to third persons held inadmissible. Moody v. Peirano [Cal. App.] 84 P. 783.

8. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286.

9. Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516.

10, 11. Collins v. Tigner [Del.] 60 A. 978; Wallace v. Douglas [W. Va.] 51 S. E. 869.

12. Collins v. Tigner [Del.] 60 A. 978. Damages could not be recovered because hogs were in fact sick but recovered. Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122.

13. Where the proven price of 10 hogs was based on the weight of the lot and 8 died, damages could not be recovered without proof of the weight of the hogs that died.

a warranty given by an agent the burden is on the plaintiff to show that the agent had authority to make the warranty, either by direct proof or by proof of a general custom to that effect.[14] The general rules as to expert testimony,[15] the competency,[16] materiality,[17] and admissibility[18] of evidence, apply. The evidence being conflicting the question is for the jury.[19] Cases dealing with the sufficiency of the evidence are shown in the notes.[20]

Questions for jury and instructions; findings.[21]—Where the buyer claims to have mailed notice of breach and seller denies receiving it, the question is for the jury.[22] Instructions may state warranties according to their substance and effect instead of as alleged in the petition.[23] Instructions must be confined to the issues[24] and conform to the evidence.[25] Directions of findings must conform to the issues.[26] The findings need not show the evidentiary facts.[27]

(§ 11) *E. Recovery of chattel; replevin or conversion.*[28]—If a contract transfers title at once the purchaser may sue for possession of the property.[29]

(§ 11) *F. Lien for price paid.*[30]

Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122.

14. Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359.

15. As to whether certain holes and cracks in an iron front to a building furnished to plaintiffs, affected its strength was a proper question for expert testimony. Fraternal Const. Co. v. Jackson Foundry & Machine Co. [Ky.] 89 S. W. 265.

16. On the issue whether apples were delivered in a merchantable condition, evidence of a fruit expert that, if the apples were in a merchantable condition at the place of sale at the time of shipment, they could not have arrived at the place of destination when they did in the condition in which they did arrive, was competent. Jones v. Emerson [Wash.] 82 P. 1017.

17. Where in an action for breach of warranty in the sale of seed wheat, warranted to be "White Australian," defendant testified that he sold wheat to M. from the same lot from which he sold plaintiff, evidence of M. that he bought wheat of defendant near the time when plaintiff bought his wheat, and that when the crop was grown it proved not to be "White Australian," held relevant and material. Moody v. Peirano [Cal. App.] 84 P. 783.

18. In an action for the price of potatoes sold, in which the defense was breach of warranty where there was evidence that all the land from which they were taken was of the same quality and the potatoes were all about the same, testimony of a witness that he had seen the seller digging and sacking potatoes and that the potatoes he saw were in good condition, held admissible. Yick Sung v. Herman [Cal. App.] 83 P. 1089. On an issue as to whether shoes sold were equal to sample held not error to permit the buyer to produce one of the shoes and point out the defects. Wolfe Bros. Shoe Co. v. Bishop [Kan.] 84 P. 133.

19. There being a conflict in the evidence as to whether the material used was the "best procurable" as required by the contract, held question was for the jury. George Lawley & Son Corp. v. Park [C. C. A.] 138 F. 31.

20. Evidence held to show a sale to plaintiff (Stanhope v. Agnew, 27 Ky. L. R. 1018, 87 S. W. 758; Shuman v. Heater [Neb.] 106 N. W. 1042) to show warranty (Id.) and breach of warranty (Id.). Evidence held insufficient to sustain a verdict that an engine purchased under a written warranty was worthless. Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516.

21. See 2 C. L. 1575.

22. Siebe v. Heilman Mach. Works [Ind. App.] 77 N. E. 300.

23. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 91 S. W. 598.

24. Where in an action for breach of warranty on the sale of cattle there was no claim that there was any breach, save that the animals had a certain disease, and no other breach was shown to the jury, an instruction that if there was a warranty of any or all of the cattle and it had been broken plaintiff was entitled to damages, held not erroneous on the theory that it did not limit the jury to the particular breach relied on. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286.

25. Where the evidence shows only a breach, if any, of part of the warranty, instruction limiting plaintiff's recovery to such part held correct, though pleadings claimed breach of entire warranty. Strueb-ing v. Stevenson [Iowa] 105 N. W. 341.

26. In an action for a breach of warranty of paint, it was error to direct a finding for defendant if the paint was applied to a green surface without defendant's consent, where it was not contended that defendant consented, and the case depended on whether plaintiff was bound by a certain pamphlet. Barton Bros. v. Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599.

27. Findings showing sale, warranty, breach, and damage, held sufficient to support judgment for amount of damage without a finding of the evidentiary facts showing such damage. Moody v. Peirano [Cal. App.] 84 P. 783.

28. See 4 C. L. 1357.

29. Tingle v. Kelly [Ky.] 92 S. W. 303. A crop of tobacco to be delivered at some future time. Gibson v. Ray [Ky.] 89 S. W. 474.

(§ 11) *G. Recoupment and counterclaim.*[31]—Ratification of the sale does not bar the purchaser from setting up his damages as a counterclaim in a suit for the price.[32] All matters of defense and recoupment in actions for the purchase price have been previously treated.[33]

(§ 11) *H. Choice and election of remedies.*[34]—Repudiation is the proper remedy before the passage of title,[35] rescission being the remedy thereafter.[36] One contracting for a machine for a particular purpose, which, upon delivery, he finds is not the machine contracted for, may either affirm the contract and keep the machine and recoup his damages,[37] or disaffirm the contract and return or hold the machine subject to the order of his vendor.[38] On discovering the breach of warranty the buyer may either return the goods and rescind the contract,[39] or he may retain the goods and bring an action for breach of warranty,[40] or plead the breach as an offset in an action for the purchase price,[41] but this rule does not hold where the parties have made an express stipulation in the matter.[42] When a person has been induced to buy goods by the fraudulent misrepresentations of the seller, he is entitled either to sue the seller for fraud[43] or he may, on discovering the fraud, rescind the contract, and, if he has paid the purchase price, recover it under a count for money had and received to his use, provided he can restore the article purchased in the same state as that in which he received it.[44] Either case or assumpsit lies for a false warranty in the sale of goods.[45] Where goods are sold to be delivered and paid for in instalments, and the vendor refuses to deliver an instalment, it is a breach of the entire contract for which the vendee may immediately recover his damages,[46] or he may wait until the time for the delivery of the goods has expired and then recover,[47] but he cannot maintain successive actions to recover for breach on delivery of each instalment and a judgment for damages for nondelivery of a part of the goods is a bar to an action for failure to deliver the balance.[48] Where a declaration contains a count for breach of warranty, and one on the theory of a rescission of the contract for false representations, plaintiff must elect, the measure of damages being different.[49]

30. See 2 C. L. 1576.

31. See 4 C. L. 1357. See, also, ante, § 10 E.

32. May v. Loomis [N. C.] 52 S. E. 728.

33. See § 10 E.

34. See 4 C. L. 1357.

35. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648.

36. Baird Bros. v. Walter Pratt & Co. [Ind. T.] 89 S. W. 648. See post, §§ 10, 11.

37, 38. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 83 P. 988.

39. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92; Palmer & Son v. Cowle, 7 Ohio C. C. (N. S.) 46; Cook v. Lantz, 116 Ill. App. 472; Gaar, Scott & Co. v. Hodges [Ky.] 90 S. W. 580. An aggrieved buyer may rescind sale and sue for the price instead of suing on the warranty. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

40. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92; Palmer & Son v. Cowie, 7 Ohio C. C. (N. S.) 46; Devine v. Ryan, 115 Ill. App. 498; Gaar, Scott & Co. v. Hodges [Ky.] 90 S. W. 580. Though contract expressly gives him right to rescind. Cook v. Lantz, 116 Ill. App. 472.

41. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92.

42. Gaar, Scott & Co. v. Hodges [Ky.] 90 S. W. 580. It is presumed that when parties agree that on breach of warranty or failure of condition the contract is to be rescinded, and this remedy alone is provided, that the consideration was regulated by this provision and no damages were expected. Id.

43. Ward v. Marvin [Vt.] 62 A. 46. Material false representations, though unintentional but inducing a purchase, are actionable. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. The misrepresentations having been intentionally and fraudulently made the buyer has a right of action for deceit. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. See Deceit, 5 C. L. 953. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

44. Ward v. Marvin [Vt.] 62 A. 46; Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

45. Wallace v. Tanner, 118 Ill. App. 639.

46, 47. Pakas v. Hollingshead [N. Y.] 77 N. E. 40, afg. 86 N. Y. S. 560; Id., 99 App. Div. 472, 91 N. Y. S. 1105.

48. Pakas v. Hollingshead [N. Y.] 77 N. E. 40, afg. 86 N. Y. S. 560; Id., 99 App. Div. 472, 91 N. Y. S. 1105. See Judgments, 6 C. L. 214.

49. Snore v. Hammond [Mich.] 12 Det. Leg. N. 222, 103 N. W. 834. In such a case where there was no election, held error for the court to instruct that the verdict if for

§ 12. *Damages for breach of sale and warranty. A. General rules.*[50]—Damages to be recoverable must be the natural and necessary consequence of the breach and must flow directly and naturally and in the due course of things from the breach, and the expression is often used that they must be such as were within the contemplation of the parties.[51] No damages can be recovered for breach of contract except such as are clearly ascertainable in both their nature and origin.[52] The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and his outlay fairly incurred.[53] Damages recoverable are limited to what the plaintiff by using reasonable precautions could have reduced them to.[54] The performance of a condition for valuation being prevented by the act of the buyer, the price of the article sold is to be fixed by the jury on a quantum valebat,[55] and in the absence of proof of the value only nominal damages can be recovered.[56] A rescission to operate as a discharge must be supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations incurred in making the contract.[57] The contract being so rescinded neither party can maintain an action thereon for damages sustained prior to the breach.[58]

(§ 12) *B. Breach by seller. On the seller's failure to deliver,*[59] the measure of damages is the difference between the contract price and the market value at the time and place of delivery[60] less any expense which the buyer, if the contract had been performed, would have been put to in delivering the goods at such place;[61] or if

the plaintiff should be for the amount of the purchase price. Id.

50. See 4 C. L. 1358.

51. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255.

52. Civ. Code, § 4301, so provides. Such section held not to authorize an instruction that the jury in fixing damages for future nonperformance should make allowance for the uncertainties which affect all conclusions depending on future events and that only such evidence as was reasonably certain to extend to future events should be considered. Brazell v. Cohn, 32 Mont. 556, 81 P. 339.

53. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562.

54. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

55. So held where test was to be made and if plant was found superior to one already possessed by the seller he was to pay more for it. Hopedale Electric Co. v. Electric Storage Battery Co. [N. Y.] 77 N. E. 394, afg. 96 App. Div. 344, 89 N. Y. S. 325.

Note: This case is to be distinguished from those wherein the test is for the benefit of the buyer, as where he is entitled to reject the goods or have a reduction of the price if the goods fail to stand the prescribed test, and so when he fails or refuses to make the test he thereby evinces his willingness to pay the stipulated purchase price and is held liable therefor. Waters Heater Co. v. Mansfield, 48 Vt. 378; Thomson-Houston Elec. Co. v. Brush-Swan Elec. L. & P. Co., 31 F. 535. The case of Humaston v. Telegraph Co., 20 Wall. [U. S.] 20, 22 Law. Ed. 279, is analogous to the principal case.—From Hopedale Electric Co. v. Electric Storage Battery Co. [N. Y.] 77 N. E. 394.

56. Hopedale Electric Co. v. Electric Storage Battery Co. [N. Y.] 77 N. E. 394, afg. 96 App. Div. 344, 89 N. Y. S. 325.

57. Where buyer consented to rescission to obtain further shipments held rescission was based on sufficient consideration. Lipschutz v. Weatherly [N. C.] 53 S. E. 132.

58. Lipschutz v. Weatherly [N. C.] 53 S. E. 132.

59. See 4 C. L. 1358.

60. National Coal Tar Co. v. Malden & Melrose Gaslight Co. [Mass.] 75 N. E. 625; Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294; Sanders, Swan & Co. v. Allen [Ga.] 52 S. E. 884; Cresent Hosiery Co. v. Mobile Cotton Mills [N. C.] 53 S. E. 140; Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255; McKay v. Elder [Tex. Civ. App.] 92 S. W. 268; Armeny v. Madson & Buck Co., 111 Ill. App. 621. So held where goods were to be ordered during specified period and would have been delivered a certain time after ordering. Aikman v. Wahnetah Silk Co., 110 App. Div. 191, 96 N. Y. S. 1067. Such market value must be proved. Id. Breach of contract to sell electricity measure of damages is difference between contract price and cost of procuring electricity from another. Civ. Code § 3308, construed. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562.

61. National Coal Tar Co. v. Malden & Melrose Gaslight Co. [Mass.] 75 N. E. 625. Where a party in a distant place sells and agrees to deliver goods at a designated point where he knows they are to be sold by the vendee, the measure of damages is the difference between the purchase price at the place of purchase and the market value at the point to which they are to be shipped and where they are to be sold, less cost of transportation and necessary handling and sales expenses. Lilly v. Lilly, Bogardus & Co. [Wash.] 81 P. 852.

there be no market at the place of delivery, then the value in the nearest and most available market to which the buyer must resort in order to supply himself, with the cost of transportation and compensation for the time, trouble, and expense of making the repurchase added.[62] And where, by the terms of the contract, the goods are to be delivered by instalments or at stated periods, the time for delivery will be the date for the delivery of each instalment successively; the damage being the aggregate of these differences estimated as of these respective dates,[63] and interest where allowed.[64] Of course if by consent of the parties the time of delivery has been postponed, the damages will be estimated as of such postponed date.[65] It is the duty of the buyer to exercise reasonable diligence to obtain the goods elsewhere and to act throughout as a reasonable man of business.[66] The basic principle to be followed in the measurement of damage in this class of cases is the awarding of full compensation for the actual loss sustained at the time and place of delivery,[67] hence the above rule does not apply where it fails to afford full redress as where the buyer is unable to purchase the article, in such cases actual loss measures the recovery.[68] Assurances by the seller that he will deliver do not change the measure of damages.[69] Of course the parties may by agreement fix the measure of damages.[70]

Special damages[71] may be recovered where they are the usual and proximate result of the breach, and such as may be reasonably supposed to have been within the contemplation of the parties at the time they made the contract.[72] As a general rule unearned profits[73] and damages resulting from consequent breach of the contracts entered into by the buyer[74] cannot be allowed, though they may be recovered where

62. National Coal Tar Co. v. Malden & Melrose Gaslight Co. [Mass.] 75 N. E. 625.

63. Cresent Hoslery Co. v. Mobile Cotton Mills [N. C.] 53 S. E. 140. Where contract entitles a purchaser to call for provisions from time to time and the seller refuses to deliver, the buyer may obtain his supply from time to time on the market, and so fix the measure of damages. Buyer was not compelled to purchase entire supply of coal at one time on the market. Delaware & Hudson Canal Co. v. Mitchell, 113 Ill. App. 429.

64, 65. Cresent Hoslery Co. v. Mobile Cotton Mills [N. C.] 53 S. E. 140.

66. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

67. Wall v. St. Joseph Artesian Ice & Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574.

68. Where article sold was to be made by the vendor for a particular purpose and could not be had elsewhere or where the purchase price was paid in advance the buyer ought to receive full compensation. Murmann v. Wissler [Mo. App.] 92 S. W. 355. Sale of ice cans, held measure of defendants' damage was extra cost, over the cost of manufacture, they were put to to buy ice for customers. Wall v. St. Joseph Artesian Ice & Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574. An **allegation** that a buyer of lumber **could not,** on the seller's failure to deliver, **obtain lumber** of the quality and dimensions contracted for **in the city** where the same should have been delivered, is not an allegation that it could not have been obtained in the open market and hence does not affect the measure of damages for the breach. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255.

69. Alabama Chemical Co. v. Gelss [Ala.] 39 So. 255.

70. Where seller agreed to pay buyer "15c per barrel as liquidated damages for each and every barrel short of 200,000 barrels; and we agree to make all shipments to you within ten days after receipt of orders," held such clause furnished the only measure of the damages recoverable by the purchaser for nondelivery, whatever might be the rule of damages were the claim merely for delay in filling orders afterwards shipped. Davis v. Alpha Portland Cement Co. [C. C. A.] 142 F. 74, afg. 134 F. 274.

71. See 4 C. L. 1359.

72. Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183. Buyer of lumber for erection of manufacturing plant cannot on the seller's failure to perform recover the losses sustained by being compelled to excuse its contractor from a forfeiture for failure to complete the plant within the time stipulated and by being hindered in his business, though the seller knew that the lumber was to be used for the erection of the plant, and the buyer could not obtain the lumber in the city where the plant was erected; the parties only having in mind an ordinary sale of lumber. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255. In an action for damages from a defective iron front to a building furnished by defendant as a result of which the building fell, the measure of damages is the reasonable cost of replacing building. Fraternal Const. Co. v. Jackson Foundry & Machine Co. [Ky.] 89 S. W. 265.

to the seller's knowledge, at the time of the making of the contract of sale,[75] the goods were purchased to fill a particular contract.[76] The buyer being entitled to recover profits is only entitled to recover net profits.[77]

For breach of other conditions[78] the buyer is entitled to recover actual damages,[79] unless too remote and speculative to be capable of ascertainment.[80] Nominal damages may be recovered.[81]

In an action for deceit, the measure of damages is the actual loss to the buyer, or, in other words, the difference between the actual value and the price he was induced to pay,[82] and the sale being a single transaction, though embracing different kinds of property, there can be no recovery unless it is shown that the property obtained as a whole is worth less than was paid for it.[83] This rule excludes all speculative profits.[84]

All the above rules are subject to the qualification that the buyer must use all reasonable means to mitigate the damages,[85] but the fact that they could have been but were not mitigated will not bar a partial recovery.[86]

73. In an action for breach of contract to furnish wheels for the manufacture of vehicles, a complaint seeking to recover loss resulting from inability to run plaintiff's factory to its full capacity because of failure to deliver the wheels held to involve contingent and unearned profits. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. Losses sustained by the purchaser by reason of his failure to realize profits on contracts which he entered into on the faith of receiving the personal property bought are too remote, conjectural and speculative to be recovered. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255.

74. Where seller fails to deliver the goods the buyer cannot claim damages resulting from his having resold the goods where his vendor had no notice of such resale. Sanders, Swan & Co. v. Allen [Ga.] 52 S. E. 884.

75. Subsequent notice not sufficient to render vendor liable. Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183.

76. Cannot be recovered in the absence of such a showing. Walker v. Johnson, 116 Ill. App. 145. Seller having knowledge that buyer must deliver the goods to another under an agreement providing penalties for delay beyond the time fixed in the seller's contract he is liable, in the absence of an agreement to the contrary, for such penalty if he defaults. Whether such agreement existed held, under the facts, for the jury. Sutton v. Wanamaker, 95 N. Y. S. 525. Special damages cannot be recovered for failure of the vendor to deliver goods unless the vendor had notice of the circumstances from which they arose. Claim to set-off in action for price of steel beams where defendant had contract to build for third party. Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183.

77. Armeny v. Madson & Buck Co., 111 Ill. App. 621; Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390. Where it appeared that the purchase price was to be paid partly on shipment of the machine, partly on its installation and the remainder in 12 months from shipment with interest held that in arriving at the net lost profits the interest on the investment, or at least the year's interest on the deferred payment, together with all necessary expenses, including insurance, provided for in the contract, should be taken into account. Id.

78. See 4 C. L. 1360.

79. Where the seller of cattle agrees **to deliver registration papers** for each head and fails to do so, the measure of damages is the difference in the reasonable market value of cattle delivered without registration papers and the market value accompanied by registration papers. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648. Where defendant purchased certain sewing machines under an agreement that the **seller should furnish work,** out of the profits of which the buyer could pay for the machines, the measure of damages for breach of the contract which could be set-off against the price of the machines was the profit which defendant might have made together with the expense of maintaining the plant, caused by the neglect of plaintiff to furnish the work. Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A. 1087.

80. Where in reliance on promise to give the buyer the **exclusive sale of the goods** the buyer built up a trade therein, and the seller broke this promise and sold the goods to the buyer's competitor, held damages were too remote and speculative to be capable of ascertainment. Mountain City Mill Co. v. Cobb [Ga.] 53 S. E. 458.

81. Where the seller of cattle failed to deliver registration papers as agreed, the purchaser was entitled to nominal damages, though the cattle were worth as much unregistered as registered. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

82. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888; Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596; May v. Loomis [N. C.] 52 S. E. 728. See Damages, 5 C. L. 904.

83. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. See Deceit, 5 C. L. 953.

84. Kell v. Trenchard [C. C. A.] 142 F. 16, mod. 127 F. 596.

85. Sale of cattle, a petition alleging an agreement to furnish registration papers for cattle, breach thereof and consequent depreciation in value of cattle held not demurrable in that it did not show that the damages were actual or irrevocable. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

The amount of damages as measured by the above rules is for the jury.[87] When the measure of damages for nondelivery of goods is the difference between the contract price and the price of resale, both such prices must be proven.[88]

(§ 12) *C. Breach by purchaser.*[89]*—There being a complete performance* the seller is entitled to recover the contract price.[90]

For nonacceptance.[91]—The contract being repudiated, and the goods rejected by a vendee in toto, it is violated in every part and he becomes liable for all actual damages suffered by the vendor.[92] Except where the article has no market value,[93] the measure of damages for the refusal to receive goods is the difference between the contract price and the market value at the time and place of breach.[94] In the case of manufacturing contracts,[95] there being no specific determinate chattel in esse, and the purchaser having refused to accept performance, the measure of damages is the profit which the manufacturer would have made if he had been permitted to comply with his contract.[96] Where the buyer refuses to receive the property furnished the seller may resell the goods and recover the difference between the contract price and the amount received upon resale,[97] plus necessary expenses in making such resale,[98] providing the resale is properly made,[99] and a claim for damages is not made

86. There being a breach of an agreement to furnish registration papers for cattle sold, an instruction that if the buyer had signed a certain paper the registration papers would have been procured, held properly refused as ignoring the damages which might have accrued to plaintiff before the papers were presented. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

87. Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A. 1087.

88. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

89. See 4 C. L. 1360.

90. An instruction that if defendant's agent agreed to pay the market price not below a fixed sum it was a valid sale and rendered defendant liable for the agreed price, whereas if he merely agreed to sell the goods on commission for plaintiff the defendant was not liable for more than he received, properly submits issues of liability of the defendant. Brockman Commission & Cold Storage Co. v. Pound [Ark.] 91 S. W. 183.

91. See 4 C. L. 1360.

92. Moody v. McTaggart, 29 Pa. Super. Ct. 465.

93. See 4 C. L. 1360, n. 63.

94. Brazell v. Cohn, 32 Mont. 556, 81 P. 339; Levis v. Royal Packing & Drying Co. [Cal. App.] 81 P. 1086; Woodstock Iron Works v. Standard Pulley Mfg. Co. [La.] 40 So. 236; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797; Bell v. Hatfield [Ky.] 89 S. W. 544; Kiley v. Lee Canning Co., 105 App. Div. 633, 93 N. Y. S. 986.

95. Contracts by which plaintiff, who was a manufacturer of vehicle axles and springs, agreed to sell and deliver to defendant within a year certain quantities of springs and axles, the styles and sizes to be specified by defendant from time to time, provided that strikes of workmen should excuse performance on the part of plaintiff, and that in consideration of the purchase by plaintiff of the steel for their manufacture defendant should take the full quantity of springs and axles covered by the contract, without rebate in price in the event of a decline in the market, held manufacturing contracts. George Delker Co. v. Hess Spring & Axle Co. [C. C. A.] 138 F. 647.

96. Gardner v. Deeds [Tenn.] 92 S. W. 518. Is the difference between the cost of manufacture and delivery and the contract price. George Delker Co. v. Hess Spring & Axle Co. [C. C. A.] 138 F. 647.

97. Where the purchaser refuses to accept the property and it is agreed that the vendor shall sell to other parties the measure of damages is the difference between the sum remaining due on the contract price and the sum realized on the sale pursuant to such agreement. James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356. When property is wrongfully refused by a consignee and the shipper thereupon sells it to other parties, the shipper is not bound to sue the consignee for the entire purchase price. He may sue for the difference between the original selling price and the amount actually realized, deducting freight and charges. Moody v. McTaggart, 29 Pa. Super. Ct. 465. Where buyer refused to perform his part and the goods were resold and judgment was rendered for the difference between the contract price and the **market price as stated by the buyer,** held the latter could not complain, the market price as so stated being higher than the resale price. McDonald Cotton Co. v. Mayo [Miss.] 38 So. 372. See ante, § 10 D, Resale.

98. When damages for breach of contract have been liquidated by resale, the right of action is to recover these damages and expenses incurred in effecting the liquidation. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. In an action for breach of a contract to purchase, plaintiff's measure of damages in case the property had not been resold in the manner prescribed by Civ. Code § 3049, was the excess if any of the amount due from the buyer under the contract over the value to the seller together with the excess, if any, of the expense properly incurred in carrying the property to market over those which would have been incurred

prior thereto.[1] To recover the damages for breach of contract liquidated by resale, one must sue for them as such and not sue for general damages.[2] Interest will be allowed plaintiff as a part of his damages where an amount of the purchase price conceded to be due is unreasonably withheld by the defendant.[3] So far as he can reasonably do so it is the seller's duty to mitigate the damages,[4] but he is not obliged to change the character of his business in order to do so.[5] The amount of damages as estimated by the above rules is for the jury.[6] Of course, stipulations between the parties govern.[7]

(§ 12) *D. Breach of warranty.*[8]—The purpose of the law of damages for breach of warranties is to make full compensation to the aggrieved party for all losses thereby sustained.[9] On retention of the property the measure of damages is the difference between the actual value of the chattel and its value as warranted[10] at the time and place of delivery,[11] though its value as warranted exceeded the contract price,[12] but in case the vendee paid more for the article than its reasonable market value, his recovery is controlled by the purchase price rather than by the market value.[13] In some cases the buyer has been permitted to recover the cost of making the article comply with the requirements of the warranty.[14]

for the carriage thereof if the buyer had accepted it. Willson v. Gregory [Cal. App.] 84 P. 356.

99. So held where resale was ineffectual owing to improper notice. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. See ante, § 10 D, Resale.

1. But where a bill for damages is filed before making resale, recovery must be on proof of evidence showing actual market value at time and place of delivery, which may or may not include the price received at the resale. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

2. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

3. So held where withheld for the mere purpose of forcing a settlement of the amount in dispute. Borden & Sellack Co. v. Fraser, 118 Ill. App. 655. A stockholder in a building and loan association who, on the maturity of his stock, sold it to the association according to agreement in the usual course of business of the association, was entitled on failure of the association to pay for the stock to recover the amount of his claim with interest from the time it was due. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754.

4. Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 567, 75 N. E. 246, afg. 88 Ill. App. 407.

5. Where defendants broke a contract to purchase all of plaintiff's milk at wholesale for a specified price and time, plaintiff was not thereafter required to change the character of his business and sell his milk at retail in order to reduce his damages. Brazell v. Cohn, 32 Mont. 556, 81 P. 339.

6. Reasonableness of expense of packing furniture sold, held for the jury. Fox v. Woods, 96 N. Y. S. 117. On the breach of a contract to buy certain household furniture and lease, held error for the court to direct a verdict for plaintiff for expenses incurred in getting ready to remove unsold furniture and to withdraw from the jury the other items of damage. Id.

7. In an action for the price of cotton the loss in weight of the cotton should not be deducted in assessing the damages where the allowance of such a loss was agreed upon in the correspondence constituting the contract of sale. R. T. Wilson & Co. v. Levi Cotton Mills [N. C.] 52 S. E. 250.

8. See 4 C. L. 1362.

9. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357. For breach of warranty of a bull the buyer could recover interest and for medical treatment and shipping. Young v. Van Natta, 113 Mo. App. 530, 88 S. W. 123.

10. Collins v. Tigner [Del.] 60 A. 978; The Nimrod, 141 F. 215; Birdsinger v. McCormick Harvesting Mach. Co. [N. Y.] 76 N. E. 611, afg. 95 App. Div. 621, 88 N. Y. S. 1092; McCarthy v. Ellers, 94 N. Y. S. 1109; John E. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 20; Devine v. Ryan, 115 Ill. App. 498. Warranty as to character and quality of rooming house. Walsh v. Meyer [Wash.] 82 P. 938. Warranty as to quality or variety of seeds sold for planting is the difference between the value of the crop produced and the value of the crop that would have been produced had there been no breach of warranty. Moody v. Peirano [Cal. App.] 84 P. 783.

11. Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516.

12. Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122. Instruction proper. Young v. Van Natta, 113 Mo. App. 550, 88 S. W. 123. In an action on a warranty of the quality, the measure of damages is not limited by the price paid, but is the difference between what the article was worth in its actual condition when delivered to buyer and what would have been its value if as warranted. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

13. Narr v. Norman, 113 Mo. App. 533, 88 S. W. 122.

14. Boiler for tug. The Nimrod, 141 F. 215. The measure of damages for breach of a warranty that materials are first class is the actual proximate injury sustained, in-

SALES—Cont'd.

The buyer is also entitled to recover all special, proximate damages which were within the contemplation of the parties at the time the contract was made,[15] and which the buyer by the use of ordinary care could not have prevented,[16] and such damages may be recovered without being especially pleaded.[17] In an action for damages for breach of warranty as to the character and quality of a rooming house sold by defendant to plaintiff, damages for humiliation and mental agony resulting to plaintiff are not recoverable.[18] Breach being waived, consequential damages cannot be recovered.[19]

The authorities are in conflict as to the measure of damages in case of the breach of a warranty, express or implied, of title, one line holding the proper measure in such case to be the value of the property—according to some at the date of the sale, to others at the date of the vendor's dispossession—while another line holds the proper measure to be the purchase price with interest thereon,[20] and, whichever rule has been adopted, the courts have as a general rule extended it to both real and personal property.[21] It being the duty of a vendee of property to defend the title warranted by the vendor,[22] he is entitled to recover, as a part of his damages, the expense of counsel necessarily incurred in such defense.[23] Different courts look upon the purchase money sometimes as the minimum measure of damages to be received by the buyer, and sometimes as the maximum to be paid by the seller.[24] The words "value" and "price" are used indiscriminately in actions on warranty of title.[25] If several articles are sold and title to a part fails, recovery is proportionate.[26]

cluding such expense as is reasonably necessary to repair the materials or put them in the condition they would have been in if there had been no defects. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49.

15. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 91 S. W. 598; Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92. The right to recover consequential damages depends upon the terms of the warranty considered in connection with the character of the articles sold. Birdsinger v. McCormick Harvesting Mach. Co. [N. Y.] 76 N. E. 611, afg. 95 App. Div. 621, 88 N. Y. S. 1092. Corn husker and shredder being warranted to do good work, to be well made, of good material, and to be durable, if used with proper care, held not to insure against injury to the buyer in consequence of the breaking down of the machine. Id. Sale of boiler for tug, loss of use of tug during time of repairs, allowed. The Nimrod, 141 F. 215. Where breach of warranty resulted in breaking of rope used for well drilling purposes, held cost of recovering tools dropped in well as a result of the breaking, rent of drilling outfit during loss of time and loss of plaintiff's time, not remote. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 91 S. W. 598. In an action for breach of warranty of soundness on the sale of cattle, an instruction that plaintiff was entitled to fair and reasonable compensation for loss sustained to his other cattle as the direct and natural consequence of the diseased condition of the cattle purchased from defendant, if such disease was communicated to plaintiff's other cattle, held correct. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286. Where the property is returned and an action is brought for a false warranty, special damages such as feeding or care may be recovered if properly pleaded and proved. Wallace v. Tanner, 118 Ill. App. 639.

16. One cannot recover consequential damages to which his own negligence contributed. Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N. Y. S. 59.

17. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

18. Walsh v. Meyer [Wash.] 82 P. 938.

19. Shearer v. Gaar, Scott & Co. [Tex. Civ. App.] 90 S. W. 684.

20. Morgan v. Hendrie Bros. [Colo.] 81 P. 700; Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

21. Morgan v. Hendrie Bros. [Colo.] 81 P. 700.

22. Houser's Case, 39 Ct. Cl. 508.

23. Houser's Case, 39 Ct. Cl. 508; Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

24. In an action on implied warranty of title. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357. Where a purchaser was sued in conversion by the real owner of goods bought, he was entitled to recover from his vendor the value of the goods not to exceed the judgment rendered against him and in favor of the true owner. Id.

25, 26. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

The buyer reselling a warranted article under the same warranty, and suit being brought against him by his vendee for breach thereof, he is not entitled to claim as damages from the original vendor the costs[27] and attorney's fees[28] incurred in such suit or interest on his claim against his vendee.[29] The seller removing the property cannot recover for parts which he is unable to remove without destruction of the buyer's property.[30]

The parties may by stipulation limit the amount of damages.[31] The right to damages may be waived by settlement between the parties.[32] Amount recoverable is a question for the jury.[33]

(§ 12) *E. Evidence as to damages.*[34]—Cases dealing with the sufficiency of the evidence are shown in the notes.[35] An offer by a buyer to show that by the breach he sustained damages under an "arrangement" that he had with a third party is insufficient.[36] General rules as to the competency and admissibility of evidence apply.[37]

§ 13. *Rights of bona fide purchasers and other third persons.*[38]—On a sale of property obtained through theft, the original owner may recover the same from any taker[39] without regard to his innocence or good faith,[40] and in the case of money it is not essential to trace the identical money into such third person's possession; it is sufficient to show that it went into his bank account.[41] In such a case a promise to repay the money to the rightful owner is implied and the latter may maintain an action for money had and received.[42] Such purchaser cannot tack the thief's possession to his own so as to bar recovery in replevin by the statute of limitations.[43] Ordinarily the purchaser of property must ascertain facts relating to its title or right or

27, 28, 29. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92.

30. Parts of furnace. Roesch v. Young, 111 Ill. App. 34.

31. Where a contract for the sale of breeding cattle provided that, if the animal proved barren, the purchase price, with legal interest from the date of the sale, would be refunded, the measure of damages in an action for the breach of such warranty was the purchase price and interest, independent of any depreciation in the value of the animal not being a breeder. White v. Miller [Iowa] 105 N. W. 993.

32. Where after discovering breach of warranty the buyer returned the chattel and received in exchange another of the full value of the consideration paid for the first chattel, he can recover only nominal damages. Smith v. Newberry [N. C.] 53 S. E. 234. Where after breach of warranty in engine was discovered the seller supplied a new governor and granted a credit in the belief that such governor would remedy all defects, but it failed to so do, held the granting of such credit did not relieve the seller from liability for future damages resulting from an effort to use the engine. Erie City Iron Works v. Tatum [Cal. App.] 82 P. 92.

33. John E. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 20. Where a stallion is sold with a warranty of being serviceably sound, and after the purchaser has had him for a year he dies of a disease, constituting a breach of warranty, the purchaser cannot be said to have received no consideration and the amount of his damages is for the jury. Otto v. Braman [Mich.] 12 Det. Leg. N. 699, 105 N. W. 601.

34. See 4 C. L. 1363.

35. In an action by the seller of coal against the purchaser, who had refused to accept a shipment, a **telegram from the seller to his agent** authorizing a resale at a certain price held not evidence that the coal was of an inferior quality. Ginn v. W. C. Clark Coal Co. [Mich.] 12 Det. Leg. N. 1012, 106 N. W. 867. In an action for damages for breach of a contract to buy all of the milk defendant's dairy would produce during a certain period, evidence of the **number of cows** defendant could maintain on his ranch held competent. Brazell v. Cohn, 32 Mont. 556, 81 P. 339.

36. The "arrangement" if legal must have been embodied in a contract which should have been offered. American Theater Co. v. Siegel, Cooper & Co. [Ill.] 77 N. E. 588.

37. Where buyer refused to accept, evidence held sufficient to show market value. Kiley v. Lee Canning Co., 105 App. Div. 633, 93 N. Y. S. 986. In an action for damages for failure to deliver an ice machine, evidence that the buyer, to the seller's knowledge, had contracts to sell a certain quantity of ice, that delivery of the machine was called for on a certain date, but failing to show how long it would be before the machine could have been installed, held insufficient to support an award of damages for loss of sales. Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390.

38. See 4 C. L. 1363.

39. Where employe misappropriated his employer's money and used it to pay a note. Porter v. Roseman [Ind.] 74 N. E. 1105.

40, 41, 42. Porter v. Roseman [Ind.] 74 N. E. 1105.

43. Gatlin v. Vaut [Ind. T.] 91 S. W. 38.

he buys at his peril,[44] but the owner permitting another to display the ordinary indicia of ownership, he will be estopped from denying title in an innocent third person who, for value, acquires possession on the faith of the apparent ownership.[45] An estoppel may arise by statements that one has no title or interest in the property.[46] In such case the seller's intent is immaterial.[47] One taking a bill of sale as a sham acquires no title as against a subsequent purchaser.[48] A bona fide purchaser takes free from liens of which he had no notice,[49] also he takes free from certain statutory "vendor's liens," even though he has notice that the purchase price has not been paid.[50] To become a bona fide purchaser one must have parted with value[51] or become irrevocably bound to pay the purchase price[52] before obtaining knowledge of the fraud or facts sufficient to put him on inquiry.[53] One buying from one having the absolute title to the property by purchase takes, in the absence of agreement to the contrary, free from any restrictions placed upon the sale of the article by the original vendor.[54] In some states it is a crime to fraudulently dispose of goods bought on credit,[55] in others a sale in bulk is deemed fraudulent unless attended with certain formalities.[56] One who sells an article, knowing it to be dangerous by reason of concealed defects, is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment.[57]

44. One purchasing from the assignee for the benefit of creditors of a saloonkeeper, held not to take title to the beer kegs, the saloonkeeper having only a right to use the same. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43.

45. Seller allowing buyer to retain possession after rescission of sale, held he could not assert ownership against innocent purchasers of such buyer. Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964. Where a sale of cattle was not accompanied by such a change of possession as to give third persons notice of the buyer's claim to the cattle, a mortgage on the cattle given by the buyer to plaintiff was not, even though recorded, constructive notice to purchasers or subsequent incumbrancers of the cattle covered thereby. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

Note: In support of the text see McNeil v. National Bank, 46 N. Y. 325, 7 Am. Rep. 341; Commercial Bank v. Armsby, 120 Ga. 74, 65 L. R. A. 443; Third Nat. Bank v. Smith, 107 Mo. App. 178, 81 S. W. 215.—4 Mich. L. R. 81.

46. Statement by one holding a bill of sale that it was a sham, that there was no sale, being relied on by a subsequent purchaser, will bar the one making such statement from claiming title as against such purchaser. Chandler Bros. v. Higgins [Ala.] 39 So. 576. Exclusion of evidence of such statement held reversible error. Id. Where either the seller under a conditional sale, or a seller having a lien or interest on the goods for his unpaid purchase price, makes a statement and thereby induces another acting as a reasonably prudent man to rely thereon and advance money to the buyer, his right is superior to that of the seller. C. E. Slayton & Co. v. Horsey [Tex. Civ. App.] 91 S. W. 799.

47. C. E. Slayton & Co. v. Horsey [Tex. Civ. App.] 91 S. W. 799.

48. Chandler Bros. v. Higgins [Ala.] 39 So. 576.

49. Laborer's lien. Cotton. Sheeks-Stephens Store Co. v. Richardson [Ark.] 88 S. W. 983.

50. Kirby's Dig. §§ 4966, 4967, gives the vendor the right to seize property only while in the hands of the vendee, and not after it has passed into the hands of third persons purchasing for value, even though with notice that purchase price is not paid. Neal v. Cone [Ark.] 88 S. W. 952.

51. Nebraska Moline Plow Co. v. Blackburn [Neb.] 104 N. W. 178. Where certain goods are given in payment of past due obligations, the buyer is not a bona fide purchaser. 2 loads of cotton. Sheeks-Stephens Store Co. v. Richardson [Ark.] 88 S. W. 983.

52. Nebraska Moline Plow Co. v. Blackburn [Neb.] 104 N. W. 178.

53. Where defendant had been in complainant's employment long enough to know that the necessities of complainant's business in selling and redeeming trading stamps required that such stamps should not be dealt in by the public generally, he was not an innocent purchaser without notice in purchasing issued stamps for resale. Sperry & Hutchinson Co. v. Temple, 137 F. 992.

54. Restriction as to price at which books could be sold. Scribner v. Straus, 139 F. 193.

55. See False Pretenses and Cheats, 5 C. L. 1416.

56. See Fraudulent Conveyances, 5 C. L. 1556.

57. Kuelling v. Roderick Lean Mfg. Co. [N. Y.] 75 N. E. 1098, rvg. 94 App. Div. 613, 88 N. Y. S. 1105. A manufacturer of a land roller who constructed the tongue of cross-grained wood with a knot in it and a knot-hole and plugged up the hole, and by means of paint and putty concealed the defects, held

An assignee of the contract of sale takes the rights of his assignor.[58]

§ 14. *Conditional sales. Definition, validity, and formation.*[59]—In a conditional sale the transfer of title to the purchaser or the retention of it by him depends upon the performance of some condition.[60] While technically distinct from chattel mortgages,[61] loans,[62] agreements to sell,[63] and contracts of agency,[64] the

liable for damages for injuries sustained by reason of the defects by one purchasing from the manufacturer's vendee. Id.

NOTE. Concealed defects in manufactured article: Where the manufacturer has been simply negligent, not being shown to have had actual knowledge of the defect, his liability has not in general been extended to third persons on the ground that such a rule would unduly burden the business of manufacturing. Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Curtin v. Somerset, 140 Pa. 70, 23 Am. St. Rep. 220, 12 L. R. A. 322; Heizer v. K. & D. Mfg. Co., 110 Mo. 605, 15 L. R. A. 821; see, also, Necker v. Harvey, 49 Mich. 517. An exception is made, however, where the article manufactured or sold is inherently dangerous. Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; and see Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311. But where the manufacturer has knowledge of the defect, as in the principal case, he is liable for injury to a third person on the ground of fraud. Woodward v. Miller, 119 Ga. 618, 100 Am. St. Rep. 188, 64 L. R. A. 932; Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818. Where one knowingly sells a defective article, not inherently dangerous, as sound, liability should be enhanced instead of diminished. Lewis v. Terry, 111 Cal. 39, 43 P. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220. It only remains for the courts to extend the manufacturer's liability to cases of negligence in the manufacture and sale of articles not inherently dangerous in order to afford all innocent third persons a complete remedy. This, it would seem, might be done on the ground of constructive fraud, or better, of the duty of every manufacturer to use reasonable care in guarding against defects. Such a duty with respect to third persons has been held to exist in the case of a shipowner by whose negligence a stevedore, working for a contractor, was injured (Coughlin v. The Pheola, 19 F. 926), and where defective staging, erected by defendant company, resulted in the death of an employee of another company (Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; Coughtry v. Globe Woolen Co., 56 N. Y. 124). —4 Mich. L. R. 400.

58. St. Regis Paper Co. v. Watson Page Lumber Co., 97 N. Y. S. 636. See Assignments, 5 C. L. 279.

59. See 4 C. L. 1364.

60. Pringle v. Canfield [S. D.] 104 N. W. 223; O'Neil v. Rogers, 110 Ill. App. 622. Until performance of conditions precedent, risk of loss generally remains in the seller. American Soda Fountain Co. v. Blue [Ala.] 40 So. 218. Where title was reserved, held contract was one of conditional sale. Barton v. Groseclose [Idaho] 81 P. 623.

ILLUSTRATIONS. Contracts held conditional sales: "Rent" of a safe, title to pass upon payment of a certain sum. In re Poore, 139 F. 862. A written instrument denominated a "lease" acknowledging the receipt of $50 and providing for further payments of $10 per month with interest until a certain sum was paid, after which the **leased personalty** was to become the property of the lessee. Pringle v. Canfield [S. D.] 104 N. W. 223. Where a supplemental agreement attached to a note, given for the price of certain live stock, recited that the stock was to be the **property of the seller** until the note was paid. Townsend v. Melvin [Del.] 63 A. 330. Where one **"sells"** another property on the condition that the buyer pays him a certain sum and the buyer agrees to **buy such property** and pay such sum **upon the happening of certain conditions,** the buyer to have possession of the property. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. A contract leasing a machine for a term of three years, designated sums to be paid as **"rent"** and the **lessee to have the option to purchase** at any time within three years for a designated sum less the rentals paid, held a conditional sale within Bates' Ann. St. Ohio, p. 2306, § 1, and not a lease. In re Sheets Printing & Mfg. Co., 136 F. 989. Machinery was delivered to one under a contract requiring him to pay certain various sums at irregular intervals as **rent** for the same, and that on a final small payment he should be entitled to a bill of sale. There was no provision for the return of the machinery aside from one giving the privilege of retaking on default of making any of the payments. In re Tice, 139 F. 52. Where buyer contracted absolutely to pay for article and gave notes for the unpaid purchase price, and the contract expressly provided that **title should remain in the vendor** until the chattel was fully paid for, and that it might be taken upon legal process on a default in any payment. National Cash Register Co. v. Zangs, 127 Iowa, 710, 104 N. W. 360.

Contracts held not conditional sales: A contract of sale which stipulates that the chattels shall be **held in trust by the buyer** as security for the price is not a conditional sale but a mere personal agreement of the buyer. Webber v. Conklin [S. D.] 104 N. W. 675. Where property was delivered to a contractor **to put in premises of a third person,** and the seller wrote the third person requesting him to pay the contractor direct, held to waive any ownership or lien the seller had in or on the chattels. Milicie v. Pearson, 110 App. Div. 770, 97 N. Y. S. 431. A contract by the United States with a shipbuilding company, whereby all parts of machinery paid for by the United States under a specified system of partial payments become thereby the sole property of the United States, is not a contract of conditional sale. William R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174.

61. In some states all conditional sales

classification of a given transaction is often difficult, there being a conflict as to whether the question is one of law[65] or of fact.[66] The court must look at the entire transaction and ascertain what was the true intent of the parties.[67] As to whether the contract is a conditional sale the Federal courts will follow the state law.[68] An agreement that a buyer was not to sell goods until paid for is not tantamount to a retention of title in the seller.[69] The buyer by giving a purchase-money mortgage on the property to the seller estops himself from subsequently claiming that the sale was a conditional one.[70] A contract of conditional sale, giving the possession and use of the goods to the buyer while title remains in the seller until full payment, affords a sufficient consideration for the buyer's absolute promise to pay the agreed price.[71] A conditional contract of sale may be merged into an actual sale by the taking of notes secured by a mortgage on the property.[72]

Rights of parties to the contract.[73]—The security retained by the seller in a conditional sale is not a vendor's lien but is a reservation of title and right to pursue the property in specie[74] after default.[75] Upon default the seller has the option to demand a return of the goods[76] or sue for the unpaid purchase price,[77]

are by statute deemed chattel mortgages. See Chattel Mortgages, 5 C. L. 574. Where contract of sale provided that title should remain in the seller, and upon failure to execute the notes or make the payments specified the seller could take possession and, after 30 days' advertisement, sell the property, paying the buyer any surplus and collecting from him any deficiency, held an equitable mortgage and not a conditional sale. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

62. The fact that in a loan there were provisions for a future sale did not constitute a conditional sale in praesenti. Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555. Where books were loaned to a person to be used in editing a book, title not to pass until the proposed book was written and published, when the books loaned were to be paid for out of royalties of the proposed work, no conditional sale within § 3412, Rev. St. 1899, was made. Id.

63. Where title to machine was not to pass until full settlement, and machine was warranted, held not to constitute an immediate sale but only an agreement for sale with a warranty and right of inspection and rescission for a breach of contract. Rev. Civ. Code §§ 1299, 1301, considered. Baskerville v. Johnson [S. D.] 104 N. W. 913.

64. Where goods were shipped to be sold on commission for not less than certain specified prices, the consignee to insure the goods and be liable for damage thereto, and the contract expressly provided as to what warranties should be given and entitled claimant to require the goods to be returned, title was to remain in consignor, held contract was one of agency and not a conditional sale. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802.

65. The question whether a particular instrument shows a conditional sale or not is one of law to be decided by the court. Instrument held conditional sale under guise of a lease. Rosenbaum v. King, 114 Ill. App. 648.

66. As to whether parties intended sale to be conditional held for the jury. Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 P. 426. So held where evidence showed that the buyer should pay a sum in cash and execute his note for the balance but this was never done and the buyer remained in possession for two years and had performed work in value to liquidate the purchase price. C. E. Slayton & Co. v. Horsey [Tex. Civ. App.] 91 S. W. 799.

Note: This last case would seem to have overlooked the fact that in Texas all "conditional sales" are chattel mortgages.

67. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

68. Bankruptcy court. In re Sheets Printing & Mfg. Co., 136 F. 989.

69. Agreed that timber made into staves not to be sold until timber was paid for. Neal v. Cone [Ark.] 88 S. W. 952.

70. American Soda Fountain Co. v. Blue [Ala.] 40 So. 218.

71. Kilmer v. Moneyweight Scale Co. [Ind. App.] 76 N. E. 271.

72. Where this was done, held seller could not assert title as against labor claimants of buyer. Anundsen v. Standard Printing Co. [Iowa] 105 N. W. 424.

73. See 4 C. L. 1365.

74. Barton v. Groseclose [Idaho] 81 P. 623.

75. Seller cannot maintain detinue until default. Mere fact that note given for the purchase price failed to contain a provision for interest is not ground for action. Weilden v. Witt [Ala.] 40 So. 126.

76. Kilmer v. Moneyweight Scale Co. [Ind. App.] 76 N. E. 271; O'Neil v. Rogers, 110 Ill. App. 622. Upon default in payment on a conditional sale contract, the vendor may retake and sell the property and devote the proceeds to the payment of his debt. Little Rock Vehicle & Implement Co. v. Robinson [Ark.] 87 S. W. 1029. In an action by the vendee against the vendor for reselling the property, it was error to refuse to instruct the jury that if plaintiff had agreed to pay the price within a certain time and failed defendant could sell. Id.

77. Kilmer v. Moneyweight Scale Co. [Ind.

the rights of third parties not having intervened.[78] Neither the seller nor his assignee can, upon failure of the purchaser to make payments, have an attachment against the property of the purchaser to secure the payment of the purchase price until the property sold has become exhausted.[79] A seller under a conditional sale having received the purchase price cannot accept a rescission of the sale and a redelivery of the goods without repaying such price.[80] Where the purchaser in a conditional sale makes default, the seller must pursue his remedy within a reasonable time.[81] A removal of the property from the state where sold does not constitute a breach of a provision in the contract prohibiting the buyer from selling or disposing of the property,[82] but a sale of the property, in the state to which it is removed, without the vendor's consent is wrongful[83] and conveys to the purchaser no title other than that owned by his vendor.[84] There is a conflict as to whether there can be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made when, without the fault of the purchaser, the property is destroyed before the price falls due.[85] The property being destroyed in transit and the parties agreeing that the buyer shall sue for its value, a judgment recovered by the buyer stands in the place of the property.[86] Suit by the seller to recover the purchase price does not divest his title, the judgment recovered therein not being paid.[87] The seller may waive his rights.[88]

The purchaser has a mortgageable interest in the property.[89] Where a mortgage covers after-acquired property, such property acquired under a conditional sale comes under the mortgage subject to the terms of the sale,[90] and if the mortgage is foreclosed the seller is entitled to receive from the proceeds of the foreclosure sale

App.] 76 N. E. 271; Cambridge Soc. v. Elliot, 98 N. Y. S. 232.

78. See post next subdivision.

79. Barton v. Groseclose [Idaho] 81 P. 623.

80. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806.

81. Must proceed at least by the second term of court after the default, and where he neglects to claim the goods for four years after default he is estopped from recovering them as against an execution creditor of the buyer or a bona fide purchaser. Townsend v. Melvin [Del.] 63 A. 330.

82, 83, 84. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2, denying petition for rehearing. Former opinion, 13 Wyo. 358, 80 P. 151.

85. That he can. Lavalley v. Ravenna [Vt.] 62 A. 47.

NOTE. Conditional sale; destruction of property: The question whether the vendee, in a conditional contract for the sale of personalty, who has possession but does not hold the legal title, must bear the loss in case of the accidental destruction of the property has been diversely decided. One line of cases holds strictly to what would seem the logical doctrine (1 Mechem Sales, § 634), that "the loss follows the title," or relieves the vendee from further liability on the ground that the consideration for his promise has failed, or that he is a bailee (Bishop v. Minderhout, 128 Ala. 162, 29 So. 11, 86 Am. St. Rep. 134, 52 L. R. A. 395; Swallow v. Emery, 111 Mass. 355; Randle v. Stone, 77 Ga. 501). See, also, Arthur v. Blackman, 63 F. 536. The other view makes the vendee liable upon his absolute promise, considering that possession and use of the chattel is sufficient consideration to support such promise, or, looking at the situation from the standpoint of equity, regards the vendee as holding the actual title and as standing in the relation of mortgagor to the seller. Burnley v. Tufts, 66 Miss. 48, 5 So. 627; Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, 22 Am. St. Rep. 863, 10 L. R. A. 526; Tufts v. Wynne, 45 Mo. App. 42; Osborn v. South Shore Lumber Co., 91 Wis. 526, 65 N. W. 184. —4 Mich. L. R. 317.

86. Seller has superior right over assignee of buyer. T. L. Murphy & Co. v. American Soda Fountain Co. [Miss.] 39 So. 100.

87. E. E. Forbes Piano Co. v. Wilson [Ala.] 39 So. 645. Overruling dictum in Davis v. Millings, 141 Ala. 378, 37 So. 737.

88. Where wife purchased property and was in default in making payments, and her husband, as her agent, made a substitute agreement providing for the payment of the unpaid purchase price, held seller did not waive right to property. Lane v. Dreger [Minn.] 103 N. W. 710. Suit to recover unpaid instalments of the purchase price before the last instalment matures, the buyer's property being attached and judgment being taken by default, held an election to treat the buyer as the absolute owner of the property. Whitney v. Abbott [Mass.] 77 N. E. 524.

the amount still due on the price.[91] In some states one buying property upon the instalment plan may upon default recover back payments made; such an action is one for money had and received.[92] This right may be waived by provisions in the contract of sale.[93] The buyer's remedy for breach of contract is an action for damages.[94]

Rights of third persons. Notice, record, and filing.[95]—Except in those states where recordation is required,[96] the original seller may recover the property even from a bona fide purchaser,[97] and the contract providing for the retaking of possession on default, no demand is necessary to entitle the seller to recover the property from a subsequent vendee.[98] In Illinois a purchaser without notice from a vendee who has not complied with the terms of a conditional sale is entitled to possession of the property as against such vendee and may enforce his right provided he does so before the rights of innocent third parties intervene,[99] but so long as the property remains in the possession of the original vendee, the title of the purchaser is liable to be defeated by another purchaser without notice or by a creditor who may obtain a lien or levy upon the property as belonging to the party in possession,[1] and in such case the original vendor and the purchaser without notice from his vendee have equal rights in the property still remaining in the possession of the vendee,[2] and the party who first reduces such property to actual possession has the better right.[3] It follows that a vendor in a conditional sale cannot recover possession of the property from an innocent third person who purchased without notice of the vendor's lien.[4] In Pennsylvania a conditional sale is void as against the creditors of the buyer if he be in possession.[5] The fact that a conditional sale contract is not recorded does not render it void as against an assignee in bankruptcy.[6] Under the statutes of some states conditional sales of household goods or furniture need not be record-

89, 90, 91. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 106 App. Div. 195, 94 N. Y. S. 495.

92. Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, so construed, and action held not within jurisdiction of municipal court as provided by Municipal Court Act § 139 (Laws 1902, p. 1533, c. 580). Woodman v. Needham Piano & Organ Co., 94 N. Y. S. 371.

93. Right held waived where contract provided that in case of default all payments made should be in full for the use of the article. Woodman v. Needham Piano & Organ Co., 94 N. Y. S. 371.

94. Gibson v. Ray [Ky.] 89 S. W. 474.

95. See 4 C. L. 1367.

96. Alabama: Code 1896, § 1017, as amended by Acts 1898-99, p. 1120, relating to the recordation of conditional sales, does not apply to Montgomery and Jefferson counties. Worthington v. A. G. Rhodes & Son Co. [Ala.] 39 So. 614.

Georgia: Under Code Ga. 1895, §§ 2776, 2777, a conditional sale cannot be recorded unless executed and attested in the same manner as chattel mortgages, and if recorded do not operate as constructive notice. General Fire Extinguisher Co. v. Lanar [C. C. A.] 141 F. 353.

Missouri: Conditional sales are void as to subsequent purchasers in good faith and as to all subsequent creditors unless recorded as provided; hence notice of a conditional sale of books would not preclude the lien of a subsequent mortgagee. Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555.

Oklahoma: A promissory note or instrument in writing evidencing the conditional sale of personal property, when executed in the manner in which such instruments are authorized to be executed, is entitled to be deposited and filed with the register of deeds and need not be witnessed or acknowledged to entitle it to registration and to make it constructive notice when so filed. Shafer v. National Cash Register Co. [Okl.] 82 P. 646.

South Dakota: Laws 1893, p. 56, c. 36, § 1, as re-enacted as § 1315 of the Revised Civil Code of 1893, held not affected by the repealing act of Feb. 25, 1903. Pringle v. Canfield [S. D.] 104 N. W. 223.

97. See 4 C. L. 1367, n. 64.

98. Worthington v. A. G. Rhodes & Son Co. [Ala.] 39 So. 614.

99, 1. O'Neil v. Rogers, 110 Ill. App. 622.

2. A vendor in a conditional sale may repossess himself of the property sold after he has notice that his vendee has sold it to an innocent third party. O'Neil v. Rogers, 110 Ill. App. 622.

3. Plaintiff purchased from vendee in conditional sale after condition broken. Held he could not recover the property from defendant, the original vendor, who had repossessed himself while vendee still had possession. O'Neil v. Rogers, 110 Ill. App. 622.

4. Rosenbaum v. King, 114 Ill. App. 648.

5. In re Tice, 139 F. 52; In re Poore, 139 F. 862. Conditional sale held not convertible into a bailment so as to defeat the rights of creditors. Pennsylvania law considered. Id.

6. Vendor could retake. York Mfg. Co. v. Cassell, 26 S. Ct. 481.

ed,[7] and in determining the character of the article sold as household goods or furniture there is a conflict, arising partly from the wording of the different statutes, as to whether or not the use to which the article is put is material.[8] Statutes providing that unless a conditional sale be in writing and recorded title shall vest in the buyer as to third persons are not unconstitutional as depriving one of property without due process of law.[9] A state legislature has power to enact a law requiring instruments of conditional sale affecting property brought into the state from a foreign jurisdiction to be recorded within a reasonable time,[10] but such power has not been generally exercised.[11] The requirement of registration and the manner of making and solemnizing a contract in another state or country, relative to personal property located in that state or country at the time of the making of the contract, cannot be inquired into in construing the contract further than to determine whether or not the contract is valid under the laws of such other state or country.[12] The conditional sale being made in the state where the parties reside and where the property is situated and delivered, and without any agreement or intention that the property is to be removed to another state, upon such removal the lex loci contractus still governs the rights of the buyer,[13] and the seller or his legal representatives may follow the property into the jurisdiction where removed, and, in the absence of statutes to the contrary, may, without complying with the registration laws of such jurisdiction, enforce his lien against subsequent bona fide purchasers or incumbrancers from the buyer,[14] but this rule does not apply where the seller consents to the removal and the conditional sale notes are so changed as to make them obligations of the state to which the property is removed, and payable in such state.[15]

An assignment of the contract by the seller carries with it the legal title to the property[16] and gives to the assignee all the rights and remedies enjoyed by his assignor.[17]

SALVAGE; SATISFACTION AND DISCHARGE, see latest topical index.

7. Linoleum, which is an article customarily used as a floor covering in dwellings, is, though it is knowingly sold to cover the floor of a store, household furniture within the meaning of Gen. St. 1902, § 4864. Boston Furniture Co. v. Thoms [Conn.] 61 A. 949. Piano, kept for use in the buyer's family, is an article of "household goods" within the meaning of Pub. St. 1901, p. 448, c. 140, § 23. Lamb v. King [N. H.] 62 A. 493.

8. Linoleum, though knowingly sold to cover the floor of a store, is "household furniture" within the meaning of Gen. St. 1902, § 4864. Boston Furniture Co. v. Thoms [Conn.] 61 A. 949. Piano, so long as kept for use in the buyer's family, is an article of "household goods" within the meaning of Pub. St. 1901, p. 448, c. 140, § 23. Lamb v. King [N. H.] 62 A. 493.

9. Pringle v. Canfield [S. D.] 104 N. W. 223.

10. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2, denying petition for rehearing. Former opinion 13 Wyo. 358, 80 P. 151.

11. Rev. St. 1899, § 2837, does not apply to a conditional sale, made in another state, of property located in that state and not intended to be removed therefrom. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2, denying petition for rehearing. Former opinion, 13 Wyo. 358, 80 P. 151. One purchasing from the buyer under a conditional sale prohibiting a resale held only to take the title of his vendor, though property had been removed from state where originally sold and contract was not recorded in state to which the property was removed. Id.

12, 13. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2, denying petition for rehearing. Former opinion, 13 Wyo. 358, 80 P. 151.

14. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2, denying petition for rehearing. Former opinion, 13 Wyo. 358, 80 P. 151.

Note: There appears to be but one case contra to the doctrine stated in the text, that is the case of Sanger v. Piano Co., 21 Tex. Civ. App. 523, 52 S. W. 621. The rule stated in the text does not apply where it was contemplated at the time of the sale that the property should be removed to the state of the forum. See Wharton, in his latest edition on the Conflict of Law (§ 355b). —From Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

15. National Cash Register Co. v. Paulson [Okl.] 83 P. 793.

16, 17. Barton v. Groseclose [Idaho] 81 P. 623.

SAVING QUESTIONS FOR REVIEW.

Scope of title.—This title covers the things that must be done in the lower or trial court in order to save matters complained of for review. It does not, however, cover bills of exceptions, statements of case, or any of the formal steps incidental to the transmission of the case to the appellate court,[1] nor does it cover the manner of objecting to pleadings.[2] Objections to jurisdiction and waiver thereof are more fully treated elsewhere.[3]

§ 1. *Inviting error.*[4]—A party cannot complain of error which he invites or in which he participates.[5] Thus, a party cannot object to an instruction given at his own request,[6] or which is in effect the same as one which he himself has requested,[7] or which is in conformity with his own theory of the case as advanced by him,[8] or which is too long, the greater part having been given at his own request,[9] or

1. See Appeal and Review, 5 C. L. 121.
2. See Pleading, 6 C. L. 1008.
3. See Jurisdiction, 6 C. L. 267.
4. See 4 C. L. 1368.
5. Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182; Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791; City of North Yakima v. Scudder [Wash.] 82 P. 1022. But the reason of this rule does not apply to the case where the losing party does not invite the error, but yields, under protest to the theory of the trial court, and thereafter tries as best he may to save himself from injury by reason of the adverse ruling of the court. Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182. But see post, § 10, Waiver of objections and exceptions taken. Ruling predicated on statement of appellant's counsel cannot be complained of. Hayward v. Scott, 11 Ill. App. 531. An error induced by appellant's objection cannot be complained of. American Ins. Co. v. Meyers, 118 Ill. App. 484. Overruling of motion at request of movant not available. Brecher v. Chicago Junction R. Co., 119 Ill. App. 554.
6. Haxton v. Kansas City, 190 Mo. 53, 88 S. W. 714; Nordquist v. Hall [Kan.] 80 P. 952; Hale's Adm'rs v. Gilbert [Ky.] 91 S. W. 721; Muren Coal & Ice Co. v. Howell, 119 Ill. App. 209; Werckmann v. Taylor, 112 Mo. App. 365, 87 S. W. 44. Although it embodies an erroneous theory or contains bad law. Davis v. Johnson [Minn.] 104 N. W. 766.
7. Oneal v. Weisman [Tex. Civ. App.] 13 Ct. 503, 88 S. W. 290; W. W. Kimball Co. v. Piper, 111 Ill. App. 82; City of Pana v. Broadman, 117 Ill. App. 139; West Chicago St. R. Co. v. Vale, 117 Ill. App. 155; Cleveland, etc., Ry. Co. v. Ricker, 116 Ill. App. 428; Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507; City of Rock Island v. Gingles, 118 Ill. App. 410; Louisville Water Co. v. Phillip's Adm'r [Ky.] 89 S. W. 700; Chicago, etc., R. Co. v. Troyer [Neb.] 103 N. W. 680; Lyons v. Slaughter [Tex. Civ. App., 13 Tex. Ct. Rep. 1, 87 S. W. 182; American Bonding Co. v. Regents of University of Idaho [Idaho], 81 P. 604; Galveston, etc., Ry. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Where a charge given at the plaintiff's request is in substance a modification of the charge as already given, the plaintiff will be bound by the whole charge. Viemeister v. Brooklyn Heights R. Co., 182 N. Y. 307, 74 N. E. 831. A party cannot complain that an instruction is inaccurately drawn and that the words employed are inaptly chosen, where a similar instruction has been given at his own request. Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489; Bryce v. Burlington, etc., R. Co. [Iowa[104 N. W. 483.
8. Defendant held estopped to claim that the court should not have charged that a certain contract showed upon its face that it applied to services rendered prior to its date. Levin v. New Britain Knitting Co. [Conn.] 61 A. 1073; Tyng v. Corporation Trust Co., 104 App. Div. 486, 93 N. Y. S. 928. One offering instructions based on certain theory cannot claim it was not in the case. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280; Smith v. Forrester-Nace Co. [Mo.] 92 S. W. 394. Refusal to charge on a theory not made by pleadings and disavowed in argument. Fogarty v. Rutland St. R. Co., 77 Vt. 438, 60 A. 801; Scott v. Scott, 111 Ill. App. 220. Where, in an action of trover, the plaintiff put a certain sale in evidence on cross-examination and the court in-

which would have been corrected but for his objection,[10] or which merely limits the effect of evidence improperly introduced by him;[11] and the appellate court will be disposed to overlook trivial errors in instructions where counsel complaining thereof presented a great number of requests.[12] Nor can a party complain of the effect of evidence which he himself introduces,[13] or which is admitted upon his own suggestion,[14] or for which he opens the way,[15] or which is admitted by his agreement,[16] or which he himself brings out,[17] nor of the absence of evidence excluded on his objection;[18] and where a party objects to the admission of evidence which would cure an error in the admission of other evidence, he cannot complain of such error on appeal[19] nor can he take advantage of defects in the pleadings for which he is responsible.[20] A party cannot challenge a jurisdiction which he himself has invoked,[21] nor complain of the joinder of a party whom he recognized as properly joined,[22] or

structed the jury as to the effect of such sale, although the defendant did not make any claim based thereon. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597.

9. Heman v. Hartman, 189 Mo. 20, 87 S. W. 947.

10. Where a party offers an instruction which corrects an error in another instruction already given at his request, and such instruction is refused upon the objection of the other party. Barnes v. F. Weikel Chair Co. [Ky.] 89 S. W. 222.

11. Where a record offered by the defendant is admitted over the plaintiff's objection without proper authentication, and without limitation as to its relevancy, the defendant cannot complain of a subsequent instruction limiting the relevancy. Feeney v. York Mfg. Co. [Mass.] 75 N. E. 733.

12. Chicago City R. Co. v. Enroth, 113 Ill. App. 285.

13. Plaintiff objected that the defendant was allowed to prove matter in the nature of res judicata under a plea of payment, but all the evidence in this respect was introduced by plaintiff. Calhoun v. Texas Quarry & Mfg. Co. [Tex. Civ. App.] 90 S. W. 671. Incompetent evidence elicited by objector. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033.

14. Stipulation as to the testimony given in another suit. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

15. In action by employment agency for libel, publication subsequent to the one complained of and in regard to other agencies erroneously admitted first for plaintiff and then for the defendant. Ott v. Press Pub. Co. [Wash.] 82 P. 403. A party cannot object to the admission of immaterial testimony which is introduced in rebuttal of testimony which he himself has introduced. Oneal v. Welsman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290; Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616; Warren Live Stock Co. v. Farr [C. C. A.] 142 F. 116; Cincinnati, L. & A. Elec. St. R. Co. v. Stahle [Ind. App.] 77 N. E. 363. Testimony on behalf of the plaintiff in action for personal injuries as to plaintiffs having consulted a physician and of statements made by plaintiff to the physician is not a waiver of the right to object to the competency of the physician as professional witness for the defendant. Indianapolis & M. Rapid Transit Co. v. Hall [Ind.] 76 N. E. 242. An objection to testimony in rebuttal will not be considered where practically the same testimony was given by a witness for the other party on cross-examination. Dryden v. Barnes [Md.] 61 A. 342. A party who merely brings a book of entries into court and submits to cross-examination thereon does not thereby waive his right to object to the introduction of the book without proper foundation being laid. Hoogewerff v. Flack [Md.] 61 A. 184.

16. Children of divorced parents examined privately by the court upon an issue as to the custody of the children. Dawson v. Dawson [Wash.] 82 P. 937.

17. Gadsden Grocery & Feed Co. v. McMahen [Ala.] 40 So. 87. On cross-examination. Johnson v. Walker [Miss.] 39 So. 49. Incompetent testimony elicited on cross-examination. Schonbachler's Adm'r v. Mischell [Ky.] 89 S. W. 525. A party cannot complain of a cross-examination as to matters which he himself has brought out on the chief examination. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616.

18. Frenchi v. New York City R. Co., 46 Misc. 612, 92 N. Y. S. 771; Chicago & A. R. Co. v. Walker, 118 Ill. App. 397; Home Building & Loan Ass'n v. McKay, 118 Ill. App. 586; Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599; Choctaw, O. & G. R. Co. v. Doughty [Ark.] 91 S. W. 768.

19. In an action against carrier for injury to stock, plaintiff introduced evidence as to value of the stock at an intermediate point, and thereafter offered to prove the value at the point of destination to which defendant objected. Ft. Worth & D. C. R. Co. v. Snyder [Tex. Civ. App.] 89 S. W. 1119.

20. Where defendant fails to file answer and no default is taken against him, but he goes to trial, he cannot on appeal complain that no issue was formed. Parscouta v. State [Ind.] 75 N. E. 970.

21. A party at whose instance a suit is transferred to the chancery court cannot challenge the jurisdiction of such court. Deidrich v. Simmons [Ark.] 87 S. W. 649. See post, § 4, Jurisdiction. Where the defendant made both a motion for a new trial and in arrest of judgment after the judgment of the referee was filed, but within the time allowed by statute for making such motions, brought the same on for hearing and had a ruling thereon he cannot complain, in appellate court, o such action of the referee in considering and entertaining the motions. Reynolds v. Smith [Fla.] 38 So. 903

22. Cannot claim that libellants had wholly separate interests after having obtained or-

to whose absence he objected.[23] No complaint can be made by movant that in passing on a motion the court did not give relief not moved for.[24]

§ 2. *Acquiescing in error.*[25]—Where a court has jurisdiction there can be no such thing as error except upon denial of an asserted right.[26] Only such questions, therefore, as are raised in the trial court will be considered on appeal,[27] and in passing on the questions which were properly saved for review, the appellate court will consider only the grounds urged below.[28] This rule has been applied to the performance of conditions precedent to right of action,[29] election of remedies,[30] disqualification of the judge,[31] the authority of a prosecuting attorney to institute proceed-

der on them to take proof jointly because joint in interest. The Oregon, 133 F. 609.

23. Demurrants for want of necessary party cannot complain that he has no litigable interest. Harrington v. Gordon [Wash.] 80 P. 187.

24. Carmichael v. John Hancock Mut. Life Ins. Co., 97 N. Y. S. 976.

25. See 4 C. L. 1371.

26. Creditors of a decedent who do not appear and object to a report of the administrator have no standing on an appeal by a creditor who did appear, object, and except. In re Lund's Estate [Iowa] 104 N. W. 1139. Lack of jurisdiction of subject-matter may be raised any time. Peabody v. Long Acre Square Bldg. Co., 98 N. Y. S. 242.

27. Goodwin v. Mitchell [Miss.] 38 So. 657; Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713; Demmer v. American Ins. Co., 110 Ill. 580; Coles v. Interurban St. R. Co., 97 N. Y. S. 289; Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259; De Rodriguez v. Vivoni, 26 S. Ct. 475; A. H. George & Co. v. Louisville & N. R. Co. [Miss.] 40 So. 486; Lund v. Ozanne [N. M.] 84 P. 710; Miller v. Donovan [Idaho] 83 P. 608; McGregor v. J. A. Ware Const. Co., 188 Mo. 611, 87 S. W. 981; Fenn v. Georgia R. & Elec. Co., 122 Ga. 280, 50 S. E. 103; Brumley v. Nichols & Shepherd Co. [Ky.] 92 S. W. 548; Upchurch v. Mizell [Fla.] 40 So. 29; O'Donnell v. Weiler [N. J. Law] 59 A. 1055; McCarthy v. Dedham, 188 Mass. 204, 74 N. E. 319. Questions not raised by the pleadings. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439. The appellate court will not pass upon a question not raised by the pleadings, even though counsel for both parties assumed below that the question was raised. Weicker v. Stavely [N. D.] 103 N. W. 753. No motion for a directed verdict was made, nor was the question as to whether the accident was caused by a fellow-servant raised in the trial court in any manner whatever. Coal Belt Elect. Co. v. Kays, 217 Ill. 340, 75 N. E. 498. Plaintiff relying in the trial court on an estoppel arising from defendant's admissions in his answer in a former action, he cannot claim for the first time on appeal that the judgment in such action was res judicata of the facts upon which the alleged estoppel was based. Flannery v. Campbell, 30 Mont. 172, 75 P. 1109. Where no objection is made before the register to sufficiency of objection to allowance of claims against an insolvent bank filed under the provision of Code 1896, § 4164, and based on Const. § 250, giving a preference to the holders of bank notes and the depositors who have not stipulated for interest, such objection cannot be raised on appeal. Taylor v. Hutchinson [Ala.] 40 So. 108. Where no objection or exceptions are taken on a trial without a jury and no propositions presented, only the sufficiency of the evidence treating it all as competent is open to review. Illinois Trust & Sav. Bank v. Pontiac, 112 Ill. App. 545.

On an appeal from an intermediate appellate court, only such errors as were assigned in such court will be considered. Chicago City R. Co. v. Schmidt, 217 Ill. 396, 75 N. E. 383; Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 567, 75 N. E. 246.

28. The denial of a motion to direct a verdict will not be reviewed on other grounds than those on which the motion was based below. Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140. A party who appears specially before a justice and moves to dismiss on specific grounds for want of jurisdiction of the person waives the right on appeal to urge any grounds not presented to the justice People v. Court of Appeals, 33 Colo. 258, 79 P. 1017. Where a motion in arrest of judgment is sustained on the ground that the law on which it is based is void, the only question on appeal is the validity of the law. State v. Briggs, 45 Or. 366, 78 P. 361. Reasons why damages should not be awarded property holder for change of street grade. City of Detroit v. C. H. Little Co. [Mich.] 12 Det. Leg. N. 589, 104 N. W. 1108. On appeal from an order denying a motion, only those objections which were grounds of the motion can be heard. Wisman v. Meagher [Mo. App.] 91 S. W. 448.

29. Notice of claim for injury against city was not duly served. Seliger v. New York, 88 N. Y. S. 1074. Insufficiency of notice, to tenant before bringing summary proceedings must be objected to below. Peabody v. Long Acre Square Bldg. Co., 98 N. Y. S. 242. Rev. St. 1899, § 1575. Harrison v. Lakenan, 189 Mo. 581, 88 S. W. 53. An objection that no demand for the subject-matter of the suit was made prior to the bringing in the suit as waived, unless it is expressly set up in the answer or replication. In an action for injury to live stock during transportation, the defendant, by going to trial on an answer which set up a defense based on the failure to give notice, but relied on denial of the injury, waived the defense of lack of timely notice. Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co., 113 Mo. App. 144, 87 S. W. 553.

30. That plaintiff should have elected as to his remedy in enorcing a judgment. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737.

31. Waived by moving for continuances. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

ings in behalf of the state,[32] misjoinder of plaintiffs,[33] reinstatement at trial of a dismissed plaintiff,[34] validity of assignment to plaintiff of instrument in suit,[35] interest of certain plaintiffs,[36] that a verdict is excessive,[37] sufficiency of the complaint [38] or the answer,[39] allowance of an amendment,[40] absence of a bill of particulars [41] or the sufficiency thereof,[42] the jurisdiction of an intermediate appellate court,[43] transfer of case to an equity docket,[44] disqualification of juror for a matter which might have been ascertained on his voir dire examination,[45] that the action is frivolous and vexatious [46] or premature,[47] or that plaintiff has mistaken his action,[48] misconduct of the jury,[49] the admission,[50] exclusion,[51] and sufficiency of evidence,[52] competency of witnesses,[53] variance between the pleading and the proof,[54]

32. Proceedings under Pub. Acts 1899, p. 409, No. 225, § 1, to restrain combination in restraint of trade. Hunt v. Riverside Co.-op. Club [Mich.] 12 Det. Leg. N. 264, 104 N. W. 40.

33. Walker v. Baldwin [Md.] 63 A. 362.

34. Dalton v. Moore [C. C. A.] 141 F. 311.

35. Murphy v. Smith, 112 Ill. App. 404.

36. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547.

37. Hubbard v. State Life Ins. Co. [Iowa] 105 N. W. 332; Daggs v. Smith [Mo.] 91 S. W. 1043. Granting or refusal of new trial on ground of excessive damages. English v. Minneapolis & St. P. Surburban R. Co. [Minn.] 104 N. W. 886.

38. Where a complaint is not objected to by demurrer or motion to dismiss on the ground that it does not state a cause of action, the question will not be considered on appeal. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37. But see post, § 4, to pleadings. Answering cross-complaint without objection. Power v. Fairbanks, 16 Cal. 611, 80 P. 1075. Duplicity in information for contempt. O'Neil v. People, 113 Ill. App. 195. Unless wholly insufficient to sustain judgment, complaint cannot be first attacked on appeal. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606; Scott v. Collier [Ind. App.] 77 N. E. 666. Objection that court erred in sustaining demurrer to complaint when defendant had tendered a certain sum to defendant. Mitchell v. Pearson [Colo.] 82 P. 447. Error in denying motion to strike out amended petition waived by answering to the merits. Castleman v. Castleman, 184 Mo. 432; 83 S. W. 757.

39. The insufficiency of the answer is immaterial on appeal where during the progress of the trial an amended complaint setting up an entirely new cause of action was substituted and the trial proceeded as though it had been met with a general denial. American Shawl Co. v. Waldman, 92 N. Y. S. 367.

40. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971. No objection or request for postponement on granting amendment. Devery v. Winton Motor Carriage Co., 97 N. Y. S. 392.

41. Want of bill of particulars accompanying a plea of set-off is waived by a plaintiff who goes to trial upon such plea without it. Muller v. Ocala Foundry & Machine Works [Fla.] 38 So. 64.

42. A party cannot ignore an insufficient bill of particulars and at the trial have evidence excluded as though no bill had been served. Davis v. Johnson [Minn.] 104 N. W. 766.

43. That appeal was prematurely entered. Corsiglia v. Burnham [Mass.] 75 N. E. 253. Defects in appeal to intermediate court cannot be urged for first time in court of last resort. Griswold v. Smith [Ill.] 77 N. E. 551. Where a court on appeal has jurisdiction of the subject-matter and of the parties, any objection to the manner in which it reaches the court will be waived by the parties appearing and pleading without objection. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473.

44. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66.

45. Objection that juror had been convicted of felony. Turley v. State [Neb.] 104 N. W. 934.

46. Fishburne v. Minott [S. C.] 52 S. E. 648.

47. Enright v. Gibson, 119 Ill. App. 411; Byrne v. Morrison, 25 App. D. C. 72.

48. Conroy v. Equitable Acc. Co. [R. I.] 63 A. 356. Pleading to the merits and trial without objection waives claim that plaintiff has mistaken his remedy. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

49. When a party regards the conduct of the jury as improper and prejudicial to his rights, he should call the matter to the attention of the court, and if he does not and goes on with the trial, objection on the ground of such conduct is waived. Lyman v. Brown [N. H.] 62 A. 650.

50. Where the averments of a complaint stand admitted, no error can be predicted upon the admission or exclusion of evidence to prove such averments. Medocino County v. Peters [Cal. App.] 82 P. 1122.

51. Where all the parties acquiesce in a ruling excluding certain evidence, no one can thereafter complain of the ruling. Davis v. Johnson [Minn.] 104 N. W. 766.

52. Keller v. Schwartz, 93 N. Y. S. 620; Warth v. L. Loewenstein & Sons, 219 Ill. 222, 76 N. E. 379. In an action for wrongful attachment, objection that the attachment proceedings were not fully shown because the bond was not introduced cannot be first made on appeal. C. M. Carrier & Son v. Poulas [Miss.] 40 So. 164. Where the question as to the sufficiency of evidence was not raised in the trial court in some proper manner, as by motion to direct verdict, request for instructions or motion for a new trial, such question will not be considered on appeal. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113.

53. Millard v. Millard [Ill.] 77 N. E. 595.

54. Spencer v. Wilson [Neb.] 104 N. W. 930; Elder Tp. School Dist. v. Pennsylvania R. Co., 26 Pa. Super. Ct. 112; Hinton v. Ring, 111 Ill. App. 369; Olcese v. Mobile Frult & Trading Co., 112 Ill. App. 281; Illinois Ter-

that a judgment is not technically accurate [55] or does not conform to the pleadings [56] or the proof,[57] or the verdict.[58]. Absence of necessary parties is not waived by failure to raise it by answer or demurrer.[59]

Under the same rules, issues not made below will not be considered on appeal,[60] nor can a party set up claims [61] or defenses not urged below,[62] but where a constitutional question is necessarily involved, the fact that it was not raised in the trial court will not prevent its consideration on appeal.[63] So also, an appellee may

minal R. Co. v. Thompson, 112 Ill. App. 463; Dowie v. Priddle, 116 Ill. App. 184; Chicago, Peoria & St. Louis R. Co. of Illinois v. Alderson, 116 Ill. App. 441; Adams v. Connelly, 118 Ill. App. 441; Alton Ry., Gas & Elec. Co. v. Webb, 119 Ill. App. 75; Richardson v. Nelson [Ill.] 77 N. E. 583; Kalispell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709; Ingwersen v. St. Louis & H. R. Co. [Mo. App.] 92 S. W. 357; Thomas v. Murphy, 87 Minn. 358, 91 N. W. 1097; Coley v. Tallman, 107 App. Div. 445, 95 N. Y. S. 339; Remey v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 368, 104 N. W. 420; Stecher v. People, 217 Ill. 348, 75 N. E. 501; Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410; Ensley Mercantile Co. v. Otwell [Ala.] 38 So. 839; Alton Ry., Gas & Electric Co. v. Webb, 219 Ill. 563, 76 N. E. 687; Freund v. S. H. Greene & Sons Corporation, 139 F. 703. Objection to evidence on ground that it was not pleaded. Langley v. Rouss, 106 App. Div. 225, 94 N. Y. S. 108. Variance, in an action for injury to crops, as to description of part of the land upon which the crops were grown. Williamson v. Missouri K. & T. R. Co. [Mo. App.] 90 S. W. 401. Where evidence covering plaintiff's whole case was received below without objection as to the pleadings, the court on appeal will not assume that an amendment would have been refused, but will consider the whole case. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812.

In Missouri the party complaining of the variance must file an affidavit in the trial court alleging that he has been misled by the variance. Rev. St. 1899, § 655; Harrison v. Lakenan, 189 Mo. 581, 88 S. W. 53.

55. Inaccuracy in awarding execution jointly and severally. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Amendable defects in the judgment cannot be first urged on appeal. C. M. Carrier & Son v. Poulas [Miss.] 40 So. 164.

56. Contention that judgment was for greater amount than that prayed for in the complaint. Bruce v. Wanzer [S. D.] 105 N. W. 282. That the judgment exceeds the amount of the ad damnum of the declaration. Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810.

57. Suit for reformation of deed. Thalheimer v. Lockhart [Ark.] 86 S. W. 591. Objection that injunction against nuisance was too sweeping. Grantham v. Gibson [Wash.] 83 P. 14.

58. Elmer v. Levin, 95 N. Y. S. 537.

59. Mitau v. Roddan [Cal.] 84 P. 145.

60. Kunkle v. Utah Lumber Co. [Utah] 81 P. 897. That certain articles did not constitute baggage, no evidence being offered or instructions requested in regard thereto. Hubbard v. Mobile & O. R. Co., 112 Mo. App. 459, 87 S. W. 52. Right to recover for loss of earnings in action for injuries. Rev. St. 1899, § 864; Caplin v. St. Louis Transit Co., 114 Mo. App. 256, 89 S. W. 338. That a bond given for a sale of realty in attachment proceedings was invalid. Williams v. Bennett [Ark.] 88 S. W. 600. Question as to corporate entity. Armour Packing Co. of Louisiana v. Vietch-Young Produce Co. [Ala.] 39 So. 680. That plaintiff, in an action to enforce a mechanic's lien, having alleged and proved substantial compliance with his contract, did not allege and prove the actual cost of completing the building, it appearing, however, that the amount allowed to the defendant for this purpose was adequate. Rowe v. Gerry, 109 App. Div. 153, 95 N. Y. S. 857.

61. When no evidence is introduced under an allegation of damage in a complaint, recovery upon such allegation is waived. Watson v. Colusa-Parrot Mining & Smelting Co., 31 Mont. 513, 79 P. 14. Necessity of tendering consideration on avoiding release not raised below in any manner. Robertson v. George A. Fuller Const. Co. [Mo. App.] 92 S. W. 130.

62. That plaintiff's testator was guilty of contributory negligence. Penna v. Interurban St. R. Co., 48 Misc. 647, 96 N. Y. S. 208. Limitations. Matlock v. Stone [Ark.] 91 S. W. 553; Grace v. Moseley, 112 Ill. App. 100. That negligence complained of was of a fellow-servant. St. Louis & Belleville Elec. R. Co. v. Erlinger, 112 Ill. App. 506. Matter of abatement waived by failure to plead it. Nonjoinder of necessary plaintiff. H. E. Mueller & Co. v. Kinkead, 113 Ill. App. 132. Failure of plaintiff in suit to enforce vendor's lien to tender deed with complaint. Lillar v. Clayton [Ark.] 88 S. W. 972.

Defense against insurance policy. Billmeyer v. Hamberg-Bremen Fire Ins. Co., 57 W. Va. 42, 49 S. E. 901. Defense that a fire insurance policy was assigned without the knowledge and consent of the company, and that the iron safe clause was not complied with. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283.

63. Carmody v. St. Louis Transit Co., 188 Mo. 572, 87 S. W. 913. But when no constitutional question is necessarily involved, a specific constitutional guaranty must have been invoked in and denied by the trial court. An exception that an instruction is insufficient where it does not point out any constitutional provision violated by the instruction is insufficient. Id. Where no evidence of facts on which a constitutional question, first raised in a motion for a new trial, is based is presented at the hearing, the question is not sufficiently raised for a ruling thereon and will not be considered on appeal. Love v. Central Life Ins. Co., 92 Mo. App. 192. Where a party desires to challenge the validity of the constitutional amendment he should specifically point out the reason why such amendment should have been recognized. Amendment to Const. Mo., art. 2

plead in the appellate court that since the appeal was taken a judgment has been rendered in another suit settling the rights of the parties involved in the appeal,[64] and failure of the clerk in recording a judgment to certify that certain of the defendants are sureties is reversible error, though not presented to the trial court.[65] Failure to make up issue out of chancery,[66] that motion was heard at time other than that named in notice,[67] or that a motion granted below was not sufficiently specific will not be considered unless urged below.[68]

A party cannot complaint of error which he could have avoided,[69] and in some cases his participation in the proceedings after the commission of the alleged error will estop him from complaining on account thereof,[70] a fortiori is a party estopped to predicate error upon matters to which he has expressly consented.[71]

§ 28, adopted November, 1900, authorizing three-fourths of the jury to render a verdict. Carmody v. St. Louis Transit Co., 188 Mo. 572, 7 S. W. 913.

64. The pendency of the first action might have been pleaded as a bar to the second, but not having been so pleaded the judgment in the second action operates as a bar of all defense either legal or equitable which were interposed or which should not be interposed in such action. Church v. Gallic [Ark.] 88 S. W. 979.

65. Escritt v. Michaeleson [Neb.] 103 N. W. 300, citing Blaco v. State, 58 Neb. 557.

66. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19.

67. Thompson v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 131.

68. Guess & Glover v. Southern R. Co. [S. C.] 53 S. E. 421.

69. Counsel objected to the declaration which contained counts to which demurrers had been sustained going to the jury room, but refused, upon being offered the opportunity, to have the objectionable counts removed from the declaration. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. Where a paper writing with a pencil memorandum on the back thereof is introduced by a party, and such party obtains a ruling that the memorandum should be excluded, if he allows the paper to go to the jury without erasing the memorandum he cannot thereafter complain. Warth v. L. Loewenstein & Sons, 219 Ill. 222, 76 N. E. 379.

70. An objection that an **action is prematurely brought** must be raised by plea in abatement and is waived by answer to the merits. McClung v. McPherson [Or.] 82 P. 13. Where a party participates in the proceedings without objection he cannot afterwards be heard to say that he was entitled to **additional time** to prepare his case. Owens v. Waddell [Miss.] 39 So. 459. Defendant took no exception to the **order changing the venue,** and made no motion to strike the case from the docket in the county to which it was transferred, but on the contrary appeared in the court to which the transfer was made and submitted to its jurisdiction without objection. See Rev. St. 1899, § 882; Haxton v. Kansas City, 190 Mo. 53, 88 S. W. 714. A party who appears and takes part in a cause after the same has been reinstated waives his right to except to the **order of reinstatement.** Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427. Joinder in proceedings to take **depositions** and the filing of cross interrogatories constitutes a waiver of objection to commission. Palatine Ins. Co., Limited, v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. Where an **amendment** changing a suit in equity to an action at law is allowed upon condition of the payment of the costs within a certain time, the acceptance by the defendant's attorney of the costs and the retention thereof, with full knowledge that they were not paid within the required time, and the subsequent filing of a general appearance and an answer to the declaration at law, constitutes a waiver of objection on account of the plaintiff's failure to pay the costs within the time required. Crossman v. Griggs, 188 Mass. 156, 74 N. E. 358. Where the defendant elects to proceed with the trial after an amendment of the complaint to conform to the proof has been allowed, his statutory right to a postponement of the trial and to have the amendment written out is waived. Bovee v. International Paper Co., 108 App. Div. 94, 95 N. Y. S. 426.

71. Submission of matters on affidavit that should be submitted on answer. Berman v. Cosgrove [Minn.] 104 N. W. 534. Procedure expressly agreed to below. Pike v. Pike, 112 Ill. App. 243. Where counsel expressly declares that he has no objection to certain proof. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. Acquiescence in statement by court that a point was not disputed preclude attack for failure of proof thereon. Burke v. Baker, 97 N. Y. S. 768. By consenting to **direction of verdict** without reserving leave to make a motion to go to the jury on a question of fact should the verdict be directed against him. Bernhein v. Bloch, 45 Misc. 581, 91 N. Y. S. 40. After trial and disagreement of jury parties agreed to **submit the case to the court** without any agreement to save the exceptions and objections made on the trial before the jury. Grunsky v. Field [Cal. App.] 82 P. 979. Stipulation that court might make **sale of the corporation's property** without objection that complaint did not state a cause of action. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374. Agreement that the court might enter the same judgment in an action as might be entered in another action was waiver of defects in complaint in the action in which the agreement was made, the judgment in such action being a **judgment by consent.** Pacific Pav. Co. v. Vizelich [Cal. App.] 82 P. 82. Where a party consents to the **final hearing** of the cause, he cannot thereafter object on the ground that such hearing was had before the determination of the rule

Exception to conclusion of law admit, for the purposes of the exceptions, the correctness of the findings of fact,[72] and where special findings recite the facts and an exception is taken to the conclusion of law upon such facts, the appellate court will deem it unnecessary to pass upon the sufficiency of the pleading, such question being waived by the exceptions taken.[73]

Change of theory.[74]—The appellate court will determine the case upon the same theory as upon which it was tried below,[75] although such theory is not covered by the pleadings[76] or is even contrary thereto.[77] When, therefore, the parties have placed a certain construction upon their pleadings, they cannot, on appeal, urge a different construction.[78] They cannot contend that the issues, not

against the other party for violation of a temporary injunction awarded in the cause. Pence v. Carne [W. Va.] 52 S. E. 702. Consent to **submission of case** upon evidence erroneously admitted in a former trial admits that there are questions of fact to be determined. Rowe v. Gerry, 109 App. Div. 153, 95 N. Y. S. 857. Stipulation **that verdict might be received by clerk** in the absence of the presiding judge. Dubuc Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401. When counsel for both sides acquiesce, against the advice of the court, in **submitting the case to the jury without argument.** Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341. Where the parties to an action stipulate that a certain party, if present, would testify to certain facts amounting to a disclaimer by such party, the parties cannot claim on appeal that the absent party is a **necessary party** to the suit on account of his interest in the subject-matter. Suit to quiet title. Karren v. Rainey [Utah] 83 P. 333.

72. Halstead v. Sigler [Ind. App.] 74 N. E. 257; Western Indiana Coal Co. v. Brown [Ind. App.] 74 N. E. 1027; Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086.

73. Ray v. Baker [Ind.] 74 N. E. 619; Union Inv. Co. v McKinney [Ind. App.] 74 N. E. 1001; Ross v. Van Natta, 164 Ind. App. 557, 74 N. E. 10.

74. See 4 C. L. 1374.

75. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113; York v. New York, O. & W. R. Co., 108 App. Div. 126, 95 N. Y. S. 1105; McDermott v. Mahoney [Iowa] 106 N. W. 925; Kath v. Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217; McGregor v. J. A. Ware Const. Co., 188 Mo. 611, 87 S. W. 981; Mystic Workers of the World v. I. S. Troutman, 113 Ill. App. 84; Spellman v. Rhode [Mont.] 81 P. 395. Tried on theory that all defendants or none were liable. Joint judgment cannot be objected to on appeal. Nishkian v. Chisholm [Cal. App.] 84 P. 312. Theory that defendant owed the plaintiff the duty to exercise ordinary care in the operation of its cars. Sack v. St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79. As to scope of accident policy. James v. United States Casualty Co., 113 Mo. App. 622, 88 S. W. 125. A mere demand for discovery and accounting for rents, in a bill expressly denying the title of the lessor and the validity of the lease, does not amount to a ratification or adoption of the lease. McNeely v. South Penn Oil Co. [W. Va.] 52 S. 480. Where counsel, upon a motion to dismiss a complaint, admit the allegations of the complaint, upon appeal the case will be considered as upon a demurrer for want of statement of sufficient facts. Knieriem v. New York Cent., etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602. Objection that parties had elected to take under will and could not contest it cannot be first made on appeal. In re Pederson's Estate [Minn.] 106 N. W. 958.

76. Where, in condemnation proceedings, the defendant sought to defeat the plaintiff's right to condemnation on the ground that the plaintiff had power to construct only a street railroad, and that hence the line of its road was restricted to the highway, and the plaintiff refused to so frame its petition so as to show that it did not intend to use steam, and the court submitted the case to the jury on the theory that the plaintiff had the right to use steam or any other motive power it wished, thus enhancing the defendant's damages, the plaintiff could not complain. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. Where evidence was introduced by both parties without objection on issues outside the pleadings, a verdict passing on the issues as tried cannot be assailed. Quarles v. Frederick [Wash.] 84 P. 634. A reviewing court will not regard an objection to the hearing and submission of evidence to the jury on an issue not made in the pleadings where the objection was first made in the petition in error, nor will it assume that there was error in the matter of the opening and close to the jury where such error does not affirmatively appear from the record; nor a claim of error in the matter of burden of proof where it does not appear that the party objecting was prejudiced thereby. Minzey v. Marcy Mfg. Co. 6 Ohio C. C. (N. S.) 593. A defendant in a chancery suit who submits to the jurisdiction of the court when the bill shows any ground of equitable jurisdiction cannot for the first time in a court of review contend that there was an adequate remedy at law. Whalon v. Billings, 104 Ill. App. 281.

77. Theory that insured did not become a member of the defendant insurance company until after a certain date adopted by the supreme court, though contrary to an allegation of the complaint, such allegation being immaterial when made, but becoming material thereafter by reason of allegations in defendant's answer. Arrison v. Supreme Council of Mystic Toilers [Iowa] 105 N. W. 580.

78. Southern R. Co. v. Jones, 33 Ind. App. 333, 71 N. E. 275. Where a complaint does not indicate whether ordinary negligence or willful wrong was intended to be charged, but both parties treated it as charging only ordinary negligence. Morey v. Lake Superior Terminal & Transfer R. Co., 125 Wis. 148, 103 N. W. 271; Cramer v. Springfield Traction Co., 112 Mo. App. 350, 87 S. W. 24.

jurisdictional upon which the case was tried, were not raised by the pleadings,[79] or that the judgment upon such issues is not authorized by the pleadings,[80] or that the pleadings upon the issue raised are not responsive to some other pleading;[81] and when a party bases his right to recover upon particular grounds, he will not be heard to insist on other grounds on appeal;[82] so also where a party bases his defense on a particular ground.[83] But the fact that a defendant treats the complaint as stating a cause of action will not preclude the objection on appeal that the complaint does not state a cause of action,[84] nor will failure to object to the submission of an equitable action to a jury constitute an election to treat the case as an action at law.[85] Complaints as to instructions in conformity with the issues adopted by parties below will not be considered on appeal.[86] Thus, where both parties single out the same fact, and ask an instruction upon it, neither party can complain that the instruction given singled out such fact,[87] and where a party

A demurrer will be treated as to the amended petition when so treated by all parties and the court below, though no order is shown disposing of the amendment. Williston Seminary v. Easthampton Spinning Co., 186 Mass. 484, 72 N. E. 67. Party estopped to urge that the complaint did not authorize submission upon certain theory. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37. Complaint construed to be for forcible entry under statute (Code Civ. Proc. § 2080), but was more properly applicable to ejectment. Spellman v. Rhode [Mont.] 81 P. 395. Plaintiff tried case on theory that it was action on contract and could not insist on appeal that it was in tort. Nielsen v. Northwestern Siberian Co. [Wash.] 82 P. 292. Where a case is tried on the theory that an answer was in, the objection cannot be raised on appeal that there was no answer. State Bank v. Citizens' Nat. Bank [Mo. App.] 90 S. W. 123. Objection that defendant who was sued individually filed cross-complaint as administrator. Kraft v. Moore [Ark.] 89 S. W. 51. Reasonable cost of building, in action on building contract. Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791. Plaintiff in suit to quiet title joined issue on a counterclaim involving more land than that described in complaint. Karren v. Rainey [Utah] 83 P. 333. Issue of dedication in an action to enjoin a city from opening alley. Incorporated Town of Hope v. Shiver [Ark.] 90 S. W. 1003. Where the party treated the complaint as seeking a redemption from tax sale, tendered issue as to the right to redeem and did not object to the proof being all directed to that issue, he could not object on appeal that the prayer for relief did not cover such issue. Waterman v. Irby [Ark.] 89 S. W. 844. As against a general objection the submission of the question of notice in an action of unlawful entry and detainer is not error where it appears that the parties took issue upon such question, although notice was alleged in the complaint and was not denied by the answer. McElvaney v. Smith [Ark.] 88 S. W. 981.

79. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Morrill v. McNeill [Neb.] 104 N. W. 195; Cramer v. Springfield Traction Co., 112 Mo. App. 350, 87 S. W. 24; Missouri, K. & T. R. Co. v. Jackson [Tex. Civ. App.] 90 S. W. 702. Not waiver by asking instruction on improper issues forced on objector. Arnold v. Maryville, 110 Mo. App. 254 85 S. W. 107.

80. Judgment exceeded the amount claimed in the pleadings but the issues and proof supported such judgment. Layne v. Layne [Ky.] 90 S. W. 555.

81. Where the theory was that a certain sum was due for use of an engine at so much per thousand feet of lumber hauled, a contention that the findings were not responsive on the theory that the money was due as the reasonable value of the use of the engine would not be considered. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

82. Though such other grounds are stated in the complaint. Metlen v. Oregon Short Line R. Co. [Mont.] 81 P. 737. Plaintiff, in opposition to a motion for a new trial, expressly based his right of action on a particular ground. Maguth v. Board of Chosen Freeholders of Passaic County [N. J. Err. & App.] 62 A. 679. Plaintiff, in personal injury action, abandoned, in open court, allegations of negligence in original petition and relied on acts alleged in amendment. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

83. Suit to enforce mechanic's lien. Objection that complaint contained no allegation that materials were used in building, waived. Mandary v. Smartt [Cal. App.] 82 P. 561. Failure of plaintiff in suit to foreclose vendor's lien to tender a deed with his complaint, waived. Tillar v. Clayton [Ark.] 88 S. W. 972. In considering the sufficiency of complaint on appeal from judgment dismissing same on demurrer, only the questions raised by the demurrer will be considered. Hammock v. Tacoma [Wash.] 82 P. 893.

84. Trott v. Birmingham Ry., Light & Power Co. [Ala.] 39 So. 716. A complaint dismissed after issue joined for failure to state a cause of action will be considered as though demurred to on the same grounds. Hinds v. Fishkill & Matteawan Equitable Gas Co., 96 App. Div. 14, 88 N. Y. S. 954. See post, § 4, Necessity of objection to pleadings.

85. So as to preclude the party from insisting that the verdict is not binding on the court. McCelland v. Bullis [Colo.] 81 P. 771.

86. Smith v. Corrigan [Neb.] 101 N. W. 331. If such instruction is ever to be questioned, it ought to be only in cases where manifest injustice results therefrom. Carpenter v. Lancaster, 212 Pa. 581, 61 A. 1113.

87. That an expert had preconceived opinion and was, therefore, disqualified as an ap-

adopts a certain theory in a requested instruction he cannot complain that the same theory is adopted by the court in the instructions given at the request of the other party.[88] So also, where a party requests a charge upon a certain theory he cannot, on appeal, raise objections based on a contrary theory.[89] Where one party asks for a directed verdict, thus admitting that the case presents merely a question of law, he cannot complain that the court directs a verdict for the other party unless the verdict directed be against the evidence,[90] and so, on the other hand, where a party declines to join in a motion for a directed verdict, he cannot, on appeal, be heard to say that the case should have been disposed of as matter of law,[91] nor can a party appealing from an order granting a new trial complain of the action of the court in refusing to submit matters to the jury.[92] A party who offers evidence for a specific purpose cannot sustain an exception to its rejection on the ground that it was admissible for some other purpose.[93] So also a party who offers evidence without stating the purpose for which it is offered, and the other party objects upon a specific ground, such objection should be ruled upon as if the evidence were offered solely for the purpose indicated by the objection,[94] and where a party questions a witness in hopes of receiving favorable testimony, he will not be heard on a motion to strike it out.[95] Where evidence is regarded or stipulated by counsel as being in the case, the contention that it was not really introduced will not be considered,[96] nor can one upon whose objection competent evidence to prove a fact is excluded afterwards say that the fact was not proved.[97] Resistance of a motion on the merits precludes technical objections on appeal.[98]

§ 3. *Mode of objection, whether by objection, motion, or request.*[99]—Objection for want of proper parties must be made by demurrer or answer,[1] for misjoinder of causes of action by motion to elect,[2] to an oral instruction by exception,[3] to an auditor's report on account of insufficiency by motion to recommit,[4] to failure

praiser of fire insurance loss. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129.

88. Dodge v. Knapp, 112 Mo. App. 513, 87 S. W. 47.

89. Plaintiff based his right to recover upon title claimed by him, but having introduced evidence of adverse possession, the court gave instructions upon this point at the defendant's request. Love v. Turner, 71 S. C. 322, 51 S. E. 101.

90. Gray v. Central Minnesota Immigration Co., 127 Iowa, 560, 103 N. W. 792. Contra. Minahan v. Grand Trunk Western R. Co. [C. C. A.] 138 F. 37.

91. Grogan v. Brooklyn Heights R. Co., 107 App. Div. 254, 95 N. Y. S. 23.

92. Thrush v. Graybill [Iowa] 104 N. W. 472.

93. Deitrich v. Kettering, 212 Pa. 356, 61 A. 927.

94. Burns v. Pennsylvania R. Co. [Pa.] 62 A. 845.

95. O'Brien v. Knotts [Ind.] 75 N. E. 594.

96. Contract sued on. Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319. Facts assumed by both parties throughout the trial cannot be questioned on appeal. Brown v. Gurney, 26 S. Ct. 509. Plat treated as in evidence for all purposes by both parties during the trial. Rabberman v. Com'rs of Highways of Alhambra, 116 Ill. App. 26. Contract regarded as in the case but not formally offered in evidence. Shelyer v. Pinkerton Const. Co. [N. J. Err. & App.] 59 A. 462.

97. In proceedings to improve highway, evidence as to necessity of the improvement. Spaulding v. Mott [Ind.] 76 N. E. 620.

98. Sauer v. Eagle Brewing Co. [Cal. App.] 84 P. 425. Where all technical objections to a motion are expressly waived and it is heard on its merits, the objection that a party in default was not joined cannot be raised. Nichols v. Riley, 98 N. Y. S. 346.

99. See 4 C. L. 1375.

1. Not by motion for nonsuit. Delleney v. Winnsboro Granite Co. [S. C.] 51 S. E. 531. The question of proper parties cannot be saved by a motion for a new trial. Lamb v. Hall, 147 Cal. 37, 81 P. 286.

2. Civ. Code Prac. §§ 85, 86. Thompson v. Randall [Ky.] 90 S. W. 251.

3. And not by motion to exclude the objectionable part. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

4. And not by exceptions. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. An objection to a portion of the evidence upon which the auditor has based his conclusions cannot be taken as a matter of right except by motion to recommit the report to the auditor before the trial. Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944.

to try the issues of the case by motion to correct the record of the judgment roll,[5] to erroneous conclusion of law by request for instruction,[6] or by exception.[7]

A variance should be brought to the attention of the court by an objection to the evidence when offered, or by a motion to strike out the evidence after it is admitted, or by a request for a peremptory instruction based on the variance.[8]

An objection to the conduct of the jury in condemnation proceedings may be taken by objection to the confirmation of the verdict.[9]

Objections to evidence must be made by objection to its admission or by motion to strike.[10] An objection to a question must be made before the question is answered,[11] but the answer may be reached by motion to strike,[12] as where the answer is not responsive,[13] or where the question itself is not objectionable.[14] So, when testimony was properly admitted in the first instance, but becomes inadmissible by reason of subsequent disclosures, such evidence may be reached by motion to strike.[15] An objection to the answer of a witness given in a deposition should be made by objection to the reading of such answer to the jury, and by a motion to exclude, coupled with a request that the jury be directed not to consider it.[16] In an action for taxes any objection to the manner in which the tax rolls have been prepared should be made to the introduction of such rolls in evidence, and not to the testimony of the assessor identifying evidence as the records of his office.[17]

Improper pleadings may be reached by motion to strike out or expunge.[18] The necessity of objections and exceptions cannot be obviated by setting out the errors complained of in a motion for a new trial.[19]

§ 4. *Necessity of objection. In general.*[20]—A timely objection in the trial court is essential to the preservation of any question for review.[21] In the absence of such an objection the appellate court will not consider the propriety of argument

5. And not by exceptions to the findings of fact and conclusions of law. Keyes v. Smith [N. Y.] 76 N. E. 473.

6. And not by a motion for a new trial. Mauch v. Hornback, 109 Mo. App. 624, 83 S. W. 536.

7. And not by a motion to modify by reducing the judgment. Such a motion is based upon the assumption that the conclusions of law depend upon the judgment, whereas the judgment really depends upon the findings of fact and the conclusions of law. Halstead v. Sigler [Ind. App.] 74 N. E. 257.

8. An instruction held not to raise question of variance. Alton Ry., Gas & Elec. Co. v. Webb, 219 Ill. 563, 76 N. E. 687.

9. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

10. An objection in the form of a request for an instruction comes too late. St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 89 S. W. 450; Flanagan Mills & Elevator Co. v. Geo. A. Adams Grain Co. [Mo. App.] 90 S. W. 1035. See post, § 4, Time of objection.

11. Swygart v. Willard [Ind.] 76 N. E. 755; Hebert v. Hebert [S. D.] 104 N. W. 911; Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765. Hearsay. Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683. See post, § 4, Time of objection.

12. Swygart v. Willard [Ind.] 76 N. E. 755. After question answered remedy is motion to strike and objection is unavailing. Blake v. Meyer, 110 App. Div. 734, 97 N. Y. S. 424. In the absence of an objection to evidence a party cannot have it stricken out as a matter of right, even though it is irrelevant. Ard v. Crittenden [Ala.] 39 So. 675.

13. Hebert v. Hebert [S. D.] 104 N. W. 911; Snedecor v. Pope [Ala.] 39 So. 318. The usual practice in objecting to unresponsive or improper answers is by motion to strike out such answer. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765. But such a motion is a mere form of objection and an objection to an answer on the ground that it is irrelevant, incompetent, and immaterial, may take the place of a motion to strike. Id.

14. Boland v. New York City R. Co., 48 Misc. 523, 96 N. Y. S. 262.

15. Brown v. Moosic Mountain Coal Co. [Pa.] 61 A. 76.

16. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983.

17. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

18. The court may expunge a pleading of its own motion. Dawson v. Orange [Conn.] 61 A. 101. The appellate court will not reverse a judgment on account of the refusal to strike portions of the pleadings where the matter might have been remedied by objection to testimony and by requesting proper charges. Snedecor v. Pope [Ala.] 39 So. 318.

19. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

20. See 4 C. L. 1376.

21. Perry v. Potsdam, 106 App. Div. 297, 94 N. Y. S. 683; Hooper v. Fletcher, 145 Cal. 375, 79 P. 418; Upchurch v. Mizell [Fla.] 40 So. 29; People v. Court of Appeals, 33 Colo. 258, 79 P. 1017; Taylor v. Hutchinson [Ala.] 40 So. 108. See ante, § 2, Acquiescing in error.

and remarks of counsel,[22] or remarks of the trial judge,[23] or the competency of the trial judge to try the case,[24] or erroneous instructions,[25] or the time of the service of a notice of a motion for a new trial,[26] or to a master's report for failure to sign.[27]

A motion for a new trial cannot take the place of objections in the trial, and unless the record shows that the errors complained of were properly saved by such objections, they will not be considered on appeal though urged as grounds for a new trial.[28] By submitting to a trial of an appeal on the merits, the party so submitting waives all objections to defects in the appeal not prior thereto properly brought to the attention of the appellate court;[29] nor will objections to the appeal bond be considered when not made below,[30] nor objections to the statements of the case.[31] Where no objection was made to the reservation of decision on a motion until after verdict an exception to the granting of the motion did not raise the right to so reserve decision.[32]

The rule that objections not made below will not be considered on appeal is based on a waiver of the objections or an acquiescence in the error.[33]

To jurisdiction.[34]—Objections to the jurisdiction of the person is waived if not properly taken in the lower court;[35] nor can the objection that a complainant in equity had an adequate remedy at law be raised for the first time on appeal;[36] nor can a party object to the jurisdiction of a court of equity where he makes no objection to the transfer of the case to the equity docket.[37] Where objection is not made to the hearing of a petition in vacation, no objection can thereafter be made of this account,[38] nor can a party object on appeal from an intermediate appellate court, to the manner in which the case reached such court, where no such objection was made in such court;[39] but where the court has no jurisdiction

22. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92; Joyce v. Chicago, 111 Ill. App. 443; Chicago & Joliet Elec. R. Co. v. Spence, 115 Ill. App. 465. Discussing extraneous issues and irrelevant facts and insinuating erroneous views of the law. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14. Comments upon records introduced for the consideration of the court alone. Sprinkle v. Wellborn [N. C.] 52 S. E. 666.

23. Upchurch v. Mizell [Fla.] 40 So. 29; Belt R. Co. v. Confrey, 111 Ill. App. 473.

24. Unless his incompetency affirmatively appears from the record. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509. The right of a special judge to try the cause. Perry v. Pernet [Ind.] 74 N. E. 609.

25. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059. Inadvertent statement that ten years constituted adverse possession, the proper rule, however, having been previously stated. Love v. Turner, 71 S. C. 322, 51 S. C. 101. Misstatements in instructions should be promptly called to the attention of the court. Pooler v. Smith [S. C.] 52 S. E. 967. Objection to an instruction made for the first time on appeal is too late. Crult v. Owen, 21 App. D. C. 378.

26. Where no objection is made to the time of the service of a notice of intention to move for a new trial at the time the service is made or at the time the bill of exceptions reciting due notice is settled, the objection is waived. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

27. Dearlove v. Hayward, 113 Ill. App. 326.

28. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

29. Appeal to intermediate appellate court. Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106.

30. Objection that names of some of the sureties had been erased. First Nat. Bank v. Coles [Wash.] 82 P. 892.

31. Objection that statement was not prepared and presented in time. Perry v. J. Noonan Loan Co. [Cal. App.] 82 P. 623.

32. Antes v. Watkins, 98 N. Y. S. 519.

33. See ante, § 2, Acquiescence in error.

34. See 4 C. L. 1380.

35. Under Burns' Ann. St. 1901, § 346, an objection that the action as to the defendant was brought in the wrong county is waived if not taken by answer or demurrer. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Objection that substituted defendant was a foreign corporation of which the court had no jurisdiction. Reichardt v. American Platinum Works, 94 N. Y. S. 384. Right of ancillary administrator to sue a ersident of the state of the domiciliary administration who happens to be in the jurisdiction of ancillary administration cannot be raised for the first time on appeal. Such objection relates to the jurisdiction over the situs of the debt and may be waived (Kraft v. Moore [Ark.] 89 S. W. 51), but a party does not waive the question of jurisdiction or validate a void judgment by a general appearance in support of a motion to set the judgment aside (Bennett v. Supreme Tent of Knights of Maccabees of the World [Wash.] 82 P. 744). See Process, 4 C. L. 1070.

36. Savannah, F. & W. R. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401.

37. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432.

38. Owens v. Waddell [Miss.] 39 So. 459.

39. Corsiglia v. Burnham [Mass.] 75 N. E. 253; Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473.

of the subject-matter, jurisdiction cannot be conferred by appearance and failure to object,[40] nor is it necessary to object below to the jurisdiction of the proceedings.[41]

To parties.[42]—Objection cannot be made for the first time on appeal to the misjoinder,[43] nonjoinder,[44] or the substitution of parties,[45] but where the parties are indispensable, the appellate court will notice the failure to join them, on its own motion, where such defect plainly appears from the record.[46]

To pleadings.[47]—Where a party fails to object to the sufficiency of a pleading, he thereby waives objection thereto.[48] An objection that a pleading is not sufficiently specific cannot be made for the first time on appeal,[49] nor that the facts relied on are defectively stated,[50] nor that the court permitted plaintiff to plead new matter in reply to the surprise and prejudice of defendant,[51] nor that a pleading is filed out of time,[52] nor that there is a misjoinder of causes of action,[53] nor that a pleading is not properly verified,[54] nor that the prayer for relief is insufficient;[55] but failure of the complaint to state cause of action is not waived by failure to object below.[56] In such case, however, the complaint will be held

40. The fact that the appellant took an appeal to the appellate court from a judgment which was not final did not estop him from raising objection to the jurisdiction of such court on appeal therefrom to the supreme court. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473.

41. South & W. R. Co. v. Com. [Va.] 51 S. E. 824. But see Reichardt v. American Platinum Works, 94 N. Y. S. 384, where it was held that an objection that the action of which the municipal court had no jurisdiction could not be raised for the first time on appeal.

42. See 4 C. L. 1380.

43. Especially where the interest of the absent party was known to all the parties before trial. Cramer v. Munkres [Wyo.] 83 P. 374. That plaintiffs joined in a suit when they were not partners nor joint owners. Williamson v. Missouri, etc., R. Co. [Mo. App.] 90 S. W. 401.

44. Objection that stockholders were not made parties to an action against the corporation, the corporation, however, having been dissolved since the decree below and a receiver appointed. Sparrow v. E. Bement & Sons [Mich.] 12 Det. Leg. N. 798, 105 N. W. 881.

45. By failure to appeal from an order substituting a plaintiff and proceeding with the trial before a referee, defendant waives any defect in the papers on which the substitution was made. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. S. 140.

46. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

47. See 4 C. L. 1380.

48. Under Code Pub. Gen. Laws, 1904, art. 75, § 9, failure of the declaration in an action on contract to allege the consideration is waived by failure to demur. Dryden v. Barnes [Md.] 61 A. 342; Plano Mfg. Co. v. Schell, 114 Tenn. 410, 84 S. W. 807. Bill of particulars. Davis v. Johnson [Minn.] 104 N. W. 766; Muller v. Ocala Foundry & Machine Works [Fla.] 38 So. 64. Objection to ruling sustaining demurrer to complaint. Mitchell v. Pearson [Colo.] 82 P. 447. Objection to refusal to strike amended petition. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757. If a cause is tried on an insufficient or immaterial plea or replication without objection, it is too late to complain of such matters on appeal. Equitable Mfg. Co. v. Martin [Ala.] 39 So. 769. Variation between bill and master's report. Armstrong v. Stebbins, 218 Ill. 641, 75 N. E. 1081. That amended bill makes new issue. Verble v. Dillow, 218 Ill. 537, 75 N. E. 1046.

49. Such objections should be raised by the demurrer or motion. Patterson v. Fleenor [Ky.] 89 S. W. 705.

50. Sufficiency of complaint in action to enforce lien for materials furnished for construction of well, to show defendant's interest in the land, and also to show whether the claim came within Code Civ. Proc. § 1183, relating to lien for material and labor furnished for construction of wells. Park & Lacy Co. v. Inter Nos Oil & Development Co., 147 Cal. 490, 82 P. 51.

51. Allen v. Labsap, 188 Mo. 692 87 S. W. 926.

52. Hinrichs v. Interurban St. R. Co., 43 Misc. 654, 88 N. Y. S. 193.

53. Tort and contract. See Civ. Code Prac. §§ 85, 86. Thompson v. Randall [Ky.] 90 S. W. 251. Objection that two causes of action were blended contrary to Code Civ. Proc. § 672. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

54. That counter affidavit offered on a motion to change venue was not verified properly cannot be urged for the first time on appeal. Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200.

55. Waterman v. Irby [Ark.] 89 S W. 844.

56. See Code Civ. Proc. § 434. Bell v. Thompson, 147 Cal. 689, 82 P. 327. Foreclosure proceedings. Horn v. United States Min. Co. [Or.] 81 P. 1009. Though the complaint as a whole, however many paragraphs it may contain, may be attacked by assignment of error for want of sufficient facts, such initial attack cannot be made upon the paragraphs severally of a complaint containing a number of paragraphs. Ellison v. Towne, 3 Ind. App. 22, 72 N. E. 270. But see Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37, when it was held that where the complaint is not challenged by demurrer or motion to dismiss on the ground that it does not state a cause of action, such question will not be considered on appeal.

sufficient on appeal if it is sufficient to bar another action.[57] A petition assailed for the first time on appeal will be liberally construed.[58]

To evidence.[59]—The admission of evidence will not be reviewed on appeal where no objection was made below,[60] nor can a party object for the first time on appeal to an instruction based on evidence not objected to by him,[61] nor to depositions not objected to below,[62] but the court may, of its own motion, exclude evidence, though not objected to;[63] and in suits in chancery formal objections to the evidence admitted are not necessary to preserve the question for review, the verdict of the jury in such cases being merely advisory,[64] nor will failure to object to evidence on a first trial necessarily preclude on objection on the second,[65] nor is a party required to object to the introduction of documentary evidence where

57. Brotherhood of Painters, Decorators & Paperhangers v. Moore [Ind. App.] 76 N. E. 262; Indiana Natural Gas & Oil Co. v. Beales [Ind. App.] 74 N. E. 551; Griffin v. Miller [Ind. App.] 75 N. E. 598.

58. First Nat. Bank v. Thompkins [Neb.] 94 N. W. 717.

59. See 4 C. L. 1377.

60. Featherstone Foundry & Machine Co. v. Criswell [Ind. App.] 75 N. E. 30; American Ins. Co. v. Walston, 111 Ill. App. 133; Bragg v. Metropolitan St. R. Co. [Mo.] 91 S. W. 527; Moore v. Kersey [Ky.] 90 S. W. 1073; Forrester v. Metropolitan St. R. Co. [Mo. App.] 91 S. W. 401; In re Arnold's Estate, 147 Cal. 583, 82 P. 252; Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683; Shores v. Southern R. Co. [S. C.] 51 S. E. 699; Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680; E. Rose & Co. v. Woods [Ala.] 39 So. 581; Howell v. Commercial Bank [Fla.] 40 So. 76; MacFeat v. Philadelphia, W. & B. R. Co. [Del.] 62 A. 898; Berry v. Evans [Ky.] 89 S. W. 12. Where tax proceedings are admitted in evidence in support of a title, and no objection is made to their admission, they will be presumed to be regular. Blake v. Grondin [Mich.] 12 Det. Leg. N. 353, 104 N. W. 423. Evidence of expenses incurred by plaintiff, who was a minor, in the medical treatment of the injury sued for. Andrews v. Chicago & G. W. R. Co. [Iowa] 105 N. W. 404. Where no objection was made to an invoice being admitted in evidence, no question could be raised on appeal as to the admissibility of any part of such invoice. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429. Parol evidence. Wagner v. Ellis, 85 Miss. 422, 37 So. 959. Objection to evidence in defense of written instrument sued on. First Nat. Bank v. Carter [Mich.] 101 N. W. 585. Objection to evidence of alteration of written contract by a parol agreement on ground that the agreement was not executed. Barton v. Koon [S. D.] 104 N. W. 521. Evidence outside the issues must be objected to or the appellate court will consider the pleadings amended so as to admit it. Coe v. Rockman [Wis.] 106 N. W. 290, and see Maul v. Steele [Minn.] 104 N. W. 4; Union Pac. R. Co. v. Thompson [Neb.] 106 N. W. 598. Evidence admitted without objection should go to the jury though outside the issues. Capital Lumber Co. v. Barth [Mont.] 81 P. 994. Objection that testimony in chancery was not signed by witness cannot be first made on appeal. Tyler v. Toph [Fla.] 40 So. 624. Where in an action upon a justice's judgment a copy of the execution issued by the justice, which was attached to the justice's deposition, was admitted without objection, if there was any difference between such copy and the original it was competent for the officer who executed it to explain such difference. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 90 S. W. 61. Opinion of witness as to whether land was formed by accretion. Mallory v. Brademyer [Ark.] 89 S. W. 551. Opinion of witnesses as to damages in condemnation proceedings. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124. Estimate of a city council as to the number of feet of paving that a street railroad should pay for while the proceedings were pending before the council. Marshalltown, Light Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005. Objection to the certificate of acknowledgment to a deed. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937. That the answer of a witness is not responsive. Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 90 S. W. 55. Hearsay. Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188. Where defendant's motion for a continuance was overruled on the condition that his affidavit might be read as the deposition of an absent witness, to which the plaintiff made no objection at the time. Humboldt Bldg. Ass'n v. Ducker's Adm'r, 27 Ky. L. R. 1007, 87 S. W. 766. Objection to question as being too broad. Witness was asked as to the financial condition of a person during a certain year, and the evidence was pertinent to such condition during a part of such year only, but no objection was made to the question as being too broad. Upchurch v. Mizell [Fla.] 40 So. 29.

61. Instruction that jury might consider the expenses incurred by the plaintiff, who was a minor, in the treatment of the injury sued for. Andrews v. Chicago & G. W. R. Co. [Iowa] 105 N. W. 404.

62. Reading of depositions. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. A party who is present at the taking of a deposition cannot object for the first time on the trial that the deposition was in narrative form. Paterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621.

63. See Code Civ. Proc. § 125, Subd. 1-5. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671.

64. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

65. The fact that a portion of a witness' testimony, though incompetent, was admitted without objection on a former trial, does not preclude an objection to such incompetent part of the testimony at a subsequent

he is not aware of the purpose for which it is introduced.[66] Failure to object to testimony when offered does not preclude objection at trial for variance.[67]

Failure to object to the sufficiency of evidence admits its sufficiency,[68] but failure to object to the admission of evidence does not admit its legal sufficiency for the purpose for which it is introduced.[69]

Time of objection.[70]—Objections to the competency of a witness which are made for the first time after the witness has testified are too late.[71] Likewise, an objection to a question should be made before the question is answered,[72] but where the question is unobjectionable and the vice in the answer is that it is unresponsive, an objection immediately following the answer is in proper time,[73] such an objection being equivalent to a motion to exclude,[74] but a motion to exclude after the conclusion of the examination of the witness comes too late.[75] An objection to the admission of evidence which is made by a request for an instruction comes too late.[76] So also, objection to introduction of documentary evidence must be made and determined before final submission of the case,[77] except where the purpose for which the evidence is offered does not appear.[78] Objection for variance between the pleadings and proof need not be made by objection to the evidence, but may be taken by motion to dismiss at the close of the plaintiff's case,[79] nor can an objection that evidence tends to vary a written contract be raised before the writing is in evidence.[80]

Where no objection to a plea is made on account of its not being verified, objections to the evidence under such plea will not be considered.[81] An objection to a juror on account of his having been convicted of a felony should be made before the trial.[82] Objection to remarks or argument of counsel must be made at the time.[83]

While the usual practice in moving for the denial of a motion for a new trial on the ground of laches is to make the motion when the motion for a new trial comes up for disposition, it is not necessary to wait for such time and the motion may be made at any time.[84] An objection that a proposed statement has not been presented to the judge in time must be urged when the statement is presented for settlement, and, if the objection is overruled, the party must have his objection in

trial after the death of the witness. Meekins v. Norfolk & S. R. Co, 136 N. C. 1, 48 S. E. 501.

66. Swainson v. Scott [Tenn.] 76 S. W. 909.

67. Kalispell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709.

68. Keller v. Schwartz, 93 N. Y. S. 620; Warth v. L. Loewenstein & Sons, 219 Ill. 222, 76 N. E. 379; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Bankers' Union of the World v. Nabors, 36 Tex. Civ. App. 38, 81 S. W. 91. Failure of proof of connection between admitted facts. Clinberg v. Interurban St. R. Co., 92 N. Y. S. 1.

69. Failure to object to notice to quit admits the authority of the attorney who signed it, but not the sufficiency of the notice. McClung v. McPherson [Or.] 82 P. 13.

70. See 4 C. L. 1381.

71. Davis v. Hall [Iowa] 105 N. W. 122.

72. Hebert v. Hebert [S. D.] 104 N. W. 911; Dunnett & Slack v. Gibson [Vt.] 63 A. 141; Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. [Mont.] 83 P. 886; Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765.

73. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Brown v. Brown, 96 N. Y. S. 1002.

74. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765. See ante, § 3. Mode of objection, whether by objection, motion, or request.

75. Franklin v. State [Ala.] 39 So. 979.

76. Flanagan Mills & Elevator Co. v. Geo. A. Adams Grain Co. [Mo. App.] 90 S. W. 1035; St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 89 S. W. 450.

77. Kirby's Dig. §§ 2743, 3190. Boynton v. Ashabraner [Ark.] 88 S. W. 1011.

78. Swainson v. Scott [Tenn.] 76 S. W. 909.

79. Fiorito v. Interurban St. R. Co., 95 N. Y. S. 528.

80. Mason v. Postal Tel. Cable Co., 71 S. C. 150, 50 S. E. 781.

81. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

82. Turley v. State [Neb.] 104 N. W. 934.

83. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92. Objections which are not made until after the case has been decided by the jury are too late. St. Louis S. W. R. Co. v. Martin [Tex. Civ. App.] 87 S. W. 387.

84. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62.

support of it incorporated in the statement so as to avail himself of it as a reason why a motion for a new trial should be denied, or in order to present the question on appeal from the order granting or overruling the motion for a new trial,[85] but this rule applies only to objections urged at the time the proposed statement comes up for settlement, and has no application to objections or motions made subsequent to the order settling the statement and which are urged at the time the statement is presented for certification.[86]

§ 5. *Necessity of motion or request. In general.*[87]—Where no motion is made in an intermediate appellate court to dismiss an appeal as prematurely entered, the question of jurisdiction cannot be raised on appeal to a higher court.[88] Variance in name of defendant between pleadings and default judgment must be raised by motion to set aside.[89] Failure to prove conspiracy between defendants jointly sued must be saved by motion to require election between defendants.[90] One petitioning for opening of default and trial of issues waives jury trial by not demanding it when petition is filed.[91] Inspection of exhibit refused by counsel must be requested of court to save right.[92]

Motion for judgment or nonsuit, or direction of verdict.[93]—In order to preserve the question of the sufficiency of the evidence a motion must be made at the close of all the evidence for a directed verdict, and an exception taken to the action of the court in overruling such motion.[94] Where testimony properly admitted in the first instance becomes inadmissible by reason of subsequent disclosures, it is the duty of counsel to move to strike it out, and not for the court to strike it out of its own motion,[95] and where a motion for a directed verdict is based on particular grounds, no other grounds will be considered on appeal;[96] but failure to move for eventual dismissal for failure of proof to sustain a certain finding will not confer jurisdiction to make another finding to support which there is no evidence at all.[97]

85. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62. See Appeal and Review, 5 C. L. 121.

86. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62.

87. See 4 C. L. 1382.

88. On appeal from superior court to supreme court. Corsiglia v. Burnham [Mass.] 75 N. E. 253. See ante, § 4, Necessity of objection. Jurisdiction.

89. Edwards v. Warner, 111 Ill. App. 32.

90. Sehon, Blake & Stevenson v. Whitt [Ky.] 92 S. W. 280.

91. Acts 1888-9, p. 997. Baker v. Jackson [Ala.] 40 So. 348.

92. Tull v. Nash [C. C. A.] 141 F. 557.

93. See 4 C. L. 1383.

94. Earp v. Lilly, 217 Ill. 582, 75 N. E. 552; Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546. A request for a directed verdict is necessary to preserve the question of the sufficiency of the evidence. Perry v. Potsdam, 106 App. Div. 297, 94 N. Y. S. 683. In order to have the sufficiency of the evidence ruled upon so as to preserve it for review, a motion to direct a verdict, or to exclude the evidence or a demurrer to the evidence should be interposed. Where none of these steps are taken, the question is not raised by a motion for a new trial. Warth v. L. Loewenstein & Sons, 219 Ill. 222, 76 N. E. 379. Sufficiency of evidence must be presented as a question of law. American Food Co. v. Halstead [Ind.] 76 N. E. 251. A statute requiring the court to render such judgment as, on inspection of the whole record, it shall appear ought to be rendered, does not apply so as to permit a reversal of a judgment for defendant as against the evidence where the objection that there was no evidence was not raised before verdict by a prayer for instructions. Code § 957. Such defect does not arise in the record as distinguished from the case proper. Babcock Printing Press Mfg. Co. v. Herbert, 137 N. C. 317, 49 S. E. 349. Ground urged in support of judgment considered though not made ground of motion to direct verdict upon which it was entered in view of the practice in trial court whereby defendant, after his motion to direct a verdict is overruled, is permitted to introduce evidence and ask a submission of all the issues raised thereby under appropriate instructions. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325. As to the necessity of repetition of a motion at the close of the plaintiff's case, see post, § 10, Waiver of objections and exceptions taken.

95. On motion for new trial. Testimony which, when offered on preliminary examination, did not appear to be privileged communication, but subsequent testimony showed that it was privileged. Brown v. Moosic Mountain Coal Co. [Pa.] 61 A. 76.

96. Contributory negligence not included in defendant's motion. Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208; Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261.

97. Herald Square Cloak & Suit Co. v. Rocca, 48 Misc. 650, 96 N. Y. S. 189.

Motion to strike out.[98]—Where no motion to strike evidence that has been improperly admitted is made, the point is lost,[99] but where objection to a question is overruled, no motion need be made to strike a responsive answer.[1] The motion should be made at or about the time the evidence is given,[2] and should point out with reasonable certainty the particular matter to which it is addressed,[3] but the court may, of its own motion, expunge improper pleadings, although the right to have them expunged has been waived by the parties.[4]

Motion for new trial.[5]—A motion for a new trial is necessary to save any questions which must be brought into the record by a bill of exceptions.[6] Under this rule a motion for a new trial is necessary to save any question as to instructions,[7] or admission of evidence,[8] or the exclusion of evidence,[9] or the sufficiency of evidence,[10] or the action of the court in striking out parts of the evidence,[11] or

98. See 4 C. L. 1383.

99. MacFeat v. Philadelphia, W. & B. R. Co. [Del.] 62 A. 898; Hagins v. Aetna Ins. Co. [S. C.] 51 S. E. 683; Snedecor v. Pope [Ala.] 39 So. 318.

1. Tracey v. Reid, 97 N. Y. S. 1074.

2. MacFeat v. Philadelphia, W. & B. R. Co. [Del.] 62 A. 898. Where evidence is admitted on condition, motion to strike out must be made if the condition is not performed. Chicago Terminal Transfer R. Co. v. Schiavone, 116 Ill. App. 335; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367.

3. O'Brien v. Knotts [Ind.] 75 N. E. 594. Where a motion is made to strike out a portion of the testimony of a witness, the part of the testimony desired to be stricken must be specifically pointed out. Vale v. Suiter [W. Va.] 52 S. E. 313; Woodstock Iron Works v. Stockdale [Ala.] 39 So. 335. Motion to strike out all of witness' testimony properly overruled if any part is admissible. Ventresca v. Beckwith, 98 N. Y. S. 134; City of Spokane v. Costello [Wash.] 84 P. 652. A motion to strike the testimony of two witnesses is properly denied where the testimony of the one is competent for some purposes. Dorais v. Doll [Mont.] 83 P. 884.

4. See Prac. Book §§ 185, 186; Gen. St. 1902, § 614. Dawson v. Orange [Conn.] 61 A. 101.

5. See 4 C. L. 1384.

6. Such as errors in the admission and exclusion of evidence in regard to instructions on account of insufficiency of evidence. Memphis St. R. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 169; Watson v. Molden, 10 Idaho, 570, 79 P. 503. Compare City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405, and see post this section and subdivision as to the necessity of motion for new trial in order to preserve questions as to evidence.

Where case tried by court: It seems that a motion for a new trial is necessary in order to save questions which do not appear upon the record proper, even where the case is tried by the court without the intervention of the jury. Memphis St. R. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 169. But see Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936, as to sufficiency of evidence.

Specification of error in a motion for a new trial may be made by reference to the bill of exceptions. See Rev. St. 1895, at 1371; District & County Court Rules, 67, 68 (67 S. W. xxv). City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 618, 89 S. W. 405. New ground for a motion for a new trial cannot be added after the judgment overruling the motion has been affirmed. Benning v. Horkan, 123 Ga. 454, 51 S. E. 333.

7. Llewellyn v. Spangler, 109 Mo. App. 396, 88 S. W. 1021. Ruling of the trial court in giving or refusing instructions. Louisville Water Co. v. Phillip's Adm'r [Ky.] 89 S. W. 700. Giving of peremptory instruction. State v. Turner, 113 Mo. App. 53, 87 S. W. 464. Refusal to give instructions. French v. French, 215 Ill. 470, 74 N. E. 403. Where the refusal of the court to give instructions was not included in the defendant's writtten specification of grounds for a new trial. Odin Coal Co. v. Tadlock, 216 Ill. 624, 75 N. E. 332. Refusal of the lower court to direct a verdict and to give certain instructions was not specified as a ground for a new trial in a written motion specifying the grounds for a new trial. Id. Where an objection is made in gross to two instructions, and the objection as to one is waived by omitting it from a motion for a new trial, the appellate court will not consider the other. Carpenter v. Jones [Ark.] 88 S. W. 871.

8. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283; Barton v. Koon [S. D.] 104 N. W. 521. Even in equity where the facts are submitted to a jury. Johnson v. Forrell, 215 Ill. 542, 74 N. E. 760. But see City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405, where it is held that no specification o error in a motion for a new trial is necessary in order to preserve the question as to the admissibility of evidence. Where a mtion for a new trial, on the ground that certain evidence was improperly admitted because the rules of law applicable to the introduction of such evidence were not complied with, fails to state the evidence complained of and does not show that the ground of objection was urged at the time the evidence was tendered, the appellate court will not consider the question. Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330.

9. A ground of motion for a new trial cannot be considered on appeal where it alleges error in the exclusion of a written transfer but does not state what the rejected evidence was. Screws v. Anderson [Ga.] 52 S. E. 429.

10. W. F. Main & Co. v. Galloway [Ala.] 39 So. 770; Dean v. Cate [Tex. Civ. App.] 87 S. W. 234. Even in equity where facts were submitted to pay. Johnson v. Farrell 215 Ill. 542, 74 N. E. 760. Preponderance of the evidence. Jaeger v. German-American Ins.

the question as to whether the verdict is contrary to the law,[12] or the question of excessiveness,[13] or inadequacy [14] of recovery, or a contention that the court erred in rendering personal judgment,[15] or the denial of a trial by jury,[16] or the refusal of a continuance,[17] or the denial of a motion to remove to the Federal court; [18] but a motion for a new trial is not necessary in order to save questions which appear on the face of the record.[19] A motion for a new trial presents only rulings made during the progress of the trial, rulings made prior to the trial being presented by appeal from the judgment; [20] but where the sufficiency of the pleadings are challenged during the progress of the trial by objection to the introduction of evidence or by other appropriate method, the sufficiency of the pleadings will be considered on appeal from the ruling on a motion for a new trial.[21] The necessity of objections and exceptions cannot be obviated by setting out the errors complained of in a motion for a new trial where the record does not show that they were otherwise raised in the lower court.[22] Failure to file written points specifying grounds for a new trial does not preclude a party from review where the adversary takes no step to require the filing of such points.[23] Where motion is required it must be timely filed,[24] and the ground of objection must be specifically stated therein.[25] Motion to set aside verdict is equivalent to motion for new trial for

Co. 94 N. Y. S. 310. Evidence of tender of freight in an action for injury to cattle. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530. Failure of proof of a material averment of the complaint. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. Statement on motion or a new trial held to sufficiently specify the particulars in which the evidence was insufficient to justify the decision. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

Where an action at law is tried by the court without a jury, the evidence may be reviewed on appeal, though no motion for a new trial was made below. Rev. Codes 1899, § 5627. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936. Compare Memphis St. R. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 169. Not necessary to review denial of motion to direct verdict. Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561.

11. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258.

12. The motion must definitely point out wherein the law was disregarded. Ard v. Crittenden [Ala.] 39 So. 675.

13. See Kirby's Dig. § 6215. Kansas City Southern R. Co. v. Short [Ark.] 87 S. W. 640.

14. Recovery of part only of chattels in replevin and omission of judgment for defendant as to others must be challenged by motion for new trial or in arrest. Beatty v. Clarkson, 110 Mo. App. 1, 83 S. W. 1033.

15. Hot Springs R. Co. v. McMillan [Ark.] 8 S. W. 846.

16, 17. Hanson v. Nathan [Neb.] 104 N. W. 175.

18. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898; Southern R. Co. v. Roach [Ind.] 77 N. E. 606.

19. Such as rulings on motions, demurrers, etc. Memphis St. R. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 169. A motion for a new trial is not necessary to save the question as to whether the court erred in dismissing garnishment proceedings and ruling that the funds garnished were not subject to garnishment proceedings, and in not allowing the plaintiff judgment against the garnishee where there were exceptions to the action of the court in overruling plaintiff's motion for judgment and dismissing the writ of garnishment. Smith v. Marker [Ind. T.] 90 S. W. 611. A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court on the hearing of an appeal from an order of the license board granting or refusing license to sell intoxicating liquors. Lee v. Brittain [Neb.] 104 N. W. 1076.

20. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145. Unless an order denying or granting a new trial made after judgment is appealed from either alone or in connection with an appeal from the judgment, the sufficiency of the evidence will not be considered on an appeal from the judgment alone. Contra, where the order is made before judgment. Foss v. Van Wagenen [S. D.] 104 N. W. 605.

21. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

22. Bird v. Bird, 218 Ill. 158, 75 N. E. 760. A motion for a new trial does not present or preserve for appeal the question of proper parties. Lamb v. Hall, 147 Cal. 37, 81 P. 286. See ante, § 4, Necessity of objection, and post, § 7, Necessity of exception.

23. Streator Independent Tel. Co. v. Continental Tel. Const. Co., 118 Ill. App. 14.

24. Widman v. American Cent. Ins. Co. [Mo. App.] 91 S. W. 1003.

25. Miller v. Nuckolls [Ark.] 91 S. W. 759. A ground of motion for new trial complaining of the admission of evidence which does not show that the objections set out in the motion were raised at the time the evidence was offered will not be considered. Pool v. Warren County, 123 Ga. 205, 51 S. E. 328. A motion for a new trial in an action for breach of contract to supply electric current, on the ground that the jury visited defendant's power plant and were probably influenced by what they saw, is too vague to require consideration on appeal. Wofford & Rathbone v. Buchel Power & Irr. Co., 35 Tex. Civ. App. 531, 80 S. W. 1078. That verdict is 'contrary to law' is an inadequate specification in motion for new trial to permit re-

purposes of review.[26] To review denial of new trial request must be made for filing of reasons for such denial.[27]

Request for instructions.[28]—In some states the law of the case must be given to the jury even though no request for instructions is made,[29] but failure to give instructions will not be considered on appeal where none were asked.[30] The fact that the court should have given a fuller charge cannot be taken advantage of by excepting to instructions which were correct and pertinent so far as they went,[31] and where a party desires an instruction upon any particular matter, he must make a request therefor.[32] In the absence of such a request the appellate court will not consider the failure of the trial court to modify instructions given,[33] or to submit the case upon a particular theory,[34] or to submit particular issues to the jury,[35] or to instruct in regard to a particular defense,[36] or to instruct in regard to the pleadings,[37] or the evidence,[38] but if the court intimate an opinion that

view of instructions. Daitz v. Lensinger [Ark.] 91 S. W. 755.

26. Morgan v. Keller [Mo.] 92 S. W. 75.

27. Moore v. Hartford Life Ins. Co. [Mich.] 13 Det. Leg. N. 13, 106 N. W. 1116.

28. See 4 C. L. 1386.

29. Overhouser v. American Cereal Co. [Iowa] 105 N. W. 113.

30. Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208; Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290; Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404. In suit relating to boundaries. Berry v. Evans [Ky.] 89 S. W. 12.

31. Georgia F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15.

32. Court failed to explain doctrine of **res ipsa loquitur.** Lyles v. Brannon Carbonating Co. [N. C.] 52 S. E. 233. Failure to instruct on burden of proof and credibility of witnesses. Carpenter v. Jones [Ark.] 88 S. W. 871. Measure of damages in action for injuries to passenger. Louisville R. Co. v. Blum [Ky.] 89 S. W. 186.

33. McCarthy v. Metropolitan St. R. Co., 96 N. Y. S. 140; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113. Where an instruction is correct except that it singles out a particular fact, a party desiring to save an objection on this account should request a modification of the instruction. National Fire Ins. Co. v. O'Bryan [Ark.] 87 S. W. 129.

34. York v. New York, O. & W. R. Co., 108 App. Div. 126, 95 N. Y. S. 1105.

35. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Galveston, etc., R. Co. v. Holyfield [Tex. Civ. App.] 91 S. W. 353; Raum v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 426; Smith v. Newberry [N. C.] 53 S. E. 234; Goodwin v. Mitchell [Miss.] 38 So. 657. Circumstances under which the violation of a speed ordinance might be the proximate cause of injury to a licensee. Missouri, K. & T. R. Co. v. Penny [Tex. Civ. App.] 13 Tex. Ct. Rep. 196, 87 S. W. 718. Assumption of risk by servant. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679. Issue of punitive damages and sufficiency of evidence to sustain a finding therefor. Roundtree v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 231; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113. Issue in proceedings to compel railroad company to construct overhead crossing as to whether a grade crossing would not be sufficient. Herrstrom v. Newton & N. W. R. Co. [Iowa] 105 N. W. 436. The trial court cannot, after the case has been tried and a judgment entered on a special verdict, make findings covering issues tendered on the trial but which the parties fail to have submitted to the jury. Coke & Reardon v. Ikard [Tex. Civ. App.] 13 Tex. Ct. Rep. 232, 87 S. W. 869. Failure to submit an issue will not be a ground for reversal unless its submission is requested in writing by the party complaining in the judgment. Sayles' Ann. Civ. St. 1897, art. 1331. Mecaskey v. Morris [Tex. Civ. App.] 89 S. W. 1085.

Sufficiency of request to raise issue: A request limiting the plaintiff's damages to the sum paid by him for the transmission and delivery of a telegram was sufficient to raise the question as to the right of the plaintiff to recover for mental suffering. Western Union Tel. Co. v. Haley [Ala.] 39 So. 386. A request for a ruling that there was no sufficient evidence to authorize a finding that the proper statutory notice of injury was given to the defendant town within the time required by the statute did not raise the question of the form of the notice where the record showed that the defendant intended merely to raise the question of the time. McCarthy v. Dedham, 188 Mass. 204, 74 N. E. 319.

36. Hubbard v. Mobile & O. R. Co., 112 Mo. App. 459, 87 S. W. 52. An objection that the instructions do not include all of the defenses urged by defendant must be raised by a request. Metropolitan St. R. Co. v. Wishert [Tex. Civ. App.] 13 Tex. Ct. Rep. 799, 89 S. W. 460. In an action against the carrier for injury to live stock, the court instructed the jury that unless they believed there was an agreement as to the freight rates to be paid before the cars were placed and loaded the plaintiff would not be entitled to recover anything because of such charges, but failed to instruct as to the effect of a written contract, set up by the defendant, upon an oral contract set up by the plaintiff. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499.

37. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15. Where a prayer was based on the evidence without making any reference to the pleadings, the appellate court cannot consider the pleadings for the purpose of determining its correctness. Home Friendly Soc. v. Roberson, 100 Md. 85, 59 A. 279.

38. Objection that certain items were omitted from courts summary of evidence.

there is no evidence on a certain issue, the party is relieved of making a formal request for its submission.[39] Nor can a party, in the absence of a proper request, complain that an instruction is not sufficiently specific,[40] or explicit,[41] or full,[42] or is too technical,[43] or failure to properly explain or define words or terms used in the instructions given,[44] or that any such word or term is misleading.[45]

Where a party wishes a written instruction he must request it,[46] and where a party requests two special instructions upon the same issue, he cannot complain if the court fails to select and give the one most favorable to him.[47]

Request for findings.[48]—Where no request for findings are made, failure to make them cannot be urged on appeal.[49] So also, where a cause is tried by the court without the intervention of a jury, its judgment is not subject to review where no special findings of facts are requested or made.[50] Requests for findings of law are necessary in order to preserve any question in regard to the same.[51]

Requests for findings must be made in proper time.[52] On court trial no errors of law are presented unless propositions were submitted.[53]

Horr v. C. W. Howard Paper Co. [Wis.] 105 N. W. 668. Instruction to support which there was no evidence. Davis v. Richardson [Ark.] 89 S. W. 318. Where evidence is competent for any purpose the court, in the absence of a request, is not bound to limit its effect, but where the court of its own motion makes an erroneous charge as to the effect of the evidence, the party injured may justly complain, though he made no request covering the subject. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

39. Beasley v. Surles [N. C.] 53 S. E. 360.

40. Failure to apply law to facts of case. Georgia, F. & R. Co. v. Lasseter [Ga.] 51 S. E. 15; Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74. Instruction correct in itself cannot be attacked for generality if no request made. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 426.

41. Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286. As to elements of damage. Smith v. Ferdyce, 190 Mo. 1, 88 S. W. 679. As to degree of danger to which plaintiff must have been subjected by defendant's negligence to justify him in jumping from trestle. Texas Midland R. R. v. Byrd [Tex. Civ. App.] 90 S. W. 185.

42. Forrester v. Metropolitan St. R. Co. [Mo. App.] 91 S. W. 401; Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 92 S. W. 446; Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 106 N. W. 805.

43. Equitable Loan & Security Co. v. Lewman [Ga.] 52 S. E. 599.

44. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Ordinary care. Western Coal & Mining Co. v. Jones [Ark.] 87 S. W. 440. "If they were negligent in their conduct;" "proper care." Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591.

45. Instruction submitting to the jury the question as to whether the defendant "accepted" certain plans from the plaintiff. Hight v. Klingensmith [Ark.] 87 S. W. 138.

46. The court verbally instructs the jury not to consider remarks of counsel. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842.

47. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 13 Tex. Ct. Rep. 123, 87 S. W. 867.

48. See 4 C. L. 1387.

49. Slayton v. Felt [Wash.] 82 P. 173. In action at law tried by court it must on its own motion make findings on all material issues pleaded. Jennings v. Frazier [Or.] 80 P. 1011. The failure of the court to cover all the issues by its special findings. Else v. Freeman [Kan.] 83 P. 409. Findings on issues made outside pleadings must be requested. Jennings v. Frazier [Or.] 80 P. 1011. A judgment will not be reversed for failure of the court to make a particular finding when no request therefor was made, and the findings made support the judgment. State v. Coughran [S. D.] 103 N. W. 31; Loyd v. Oates [Ala.] 38 So. 1022. The question of limitations cannot be considered on appeal where there is no finding or request to find, though the question is raised by the answer. Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47.

Under Ballinger's Ann. Codes & St. § 5029, providing that the trial court must make findings of fact and conclusions of law, a request for findings of fact in favor of a particular party is insufficient to sustain an exception to the failure of the court to make any findings at a as required by the statute. Slayton v. Felt [Wash.] 82 P. 173.

50. Central of Georgia R. Co. v. Turner [Ala.] 39 So. 30; Daniels v. Crane [Mich.] 12 Det. Leg. N. 547, 104 N. W. 736. But see McClung v. McPherson [Or.] 81 P. 567, where it was held that the submission of a case to the court alone for trial is equivalent to a demand for special verdict, and no requests for findings on the issues is necessary.

51. Gibson v. Bailey Co., 114 Mo. App. 350, 89 S. W. 597. Failure to find certain facts not available unless additional findings were requested. Veatch v. Gray [Tex. Civ. App.] 91 S. W. 324. Where the case is tried before the court without a jury in order to present a question of law to the appellate court, the parties should present propositions of law to the trial court See Prac. Act § 42, Hurd's Rev. St. 1903, p. 1405. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

52. Requests made before judgment is entered on findings already made are in time where the case is tried by the court without a jury. B. & C. Comp. § 134, requiring requests to be made at close of evidence, not being applicable to such case. McClung v. McPherson [Or.] 81 P. 567.

53. Burch v. Goodenough, 110 Ill. App 603; Brown v. Rouse, 116 Ill. App. 513; Mil-

§ 6. *Necessity of ruling.*[54]—Questions not raised by rulings in the lower court will not be reviewed on appeal.[55] Thus, an objection made in the absence of the judge of the court room and not renewed on his return is unavailing,[56] and in the absence of a ruling by the lower court the appellate court will not consider the sufficiency of the pleadings,[57] or the question of necessary parties,[58] argument of counsel,[59] or the admissibility of evidence.[60] An exception to the last ruling preserves the question though there was a previous ruling to the contrary.[61] A bare ruling excepted to is not available if advantage is not taken of it.[62] The ruling need not be formal,[63] and where the court declares that it will exclude all evidence of a certain class, an exception to such ruling will present the correctness thereof.[64]

§ 7. *Necessity and time of exception.*[65]—As a general rule an exception must be taken to the ruling of the court in order to save the question involved therein for review.[66] Exceptions to rulings are required in chancery the same as in law where issues in chancery are tried to a jury,[67] but not otherwise.[68] An exception must be taken to the refusal to grant a continuance,[69] to refusal to allow an amendment,[70] to refusal of leave to file additional count,[71] to transfer of a case from the

ler v. Cobden Bldg. & Loan Ass'n, 119 Ill. App, 39.

54. See 4 C. L. 1388.

55. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58. 75 N. E. 439; Upchurch v. Mizell [Fla.] 40 So. 29; Howell v. Commercial Bank [Fla.] 40 So. 76; Calhoun v. Texas Quarry & Mfg. Co. [Tex. Civ. App.] 90 S. W. 671; Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Laches. Vollenweider v. Vollenweider, 216 Ill. 197, 74 N. E. 795. Authority of trustees to make sale. Lawler v. French [Va.] 51 S. E. 180. Sufficiency of the description of the land in a title bond. Strickland v. Hutchinson, 123 Ga. 396, 51 S. E. 348. Constitutionality of Act 1904, p. 332, relating to schools. Clark v. Cline, 123 Ga. 856, 51 S. E. 617. Constitutionality of statute. Hass v. Leverton [Iowa] 102 N. W. 811. Objection as to sufficiency in the matter of description of ordinance authorizing a local improvement. Close v. Chicago, 217 Ill. 216, 75 N. E. 479. Where there was no hearing or evidence on the subject of the apportionment of the costs of widening a street between the property owners and the public. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159.

56. Objection to argument of counsel. Wells v. O'Hara, 110 Ill. App. 7.

57. Defects in declaration which are not specifically pointed out and passed upon by the trial court will not be considered on appeal, though they would have been fatal if properly objected to. Oulighan v. Butler [Mass.] 75 N. E. 726. Where the record shows no ruling by the lower court upon a demurrer, it will be presumed that the demurrer was withdrawn or was not insisted upon, and the appellate court will not consider it. Henderson v. Berry Co. [Ala.] 39 So. 662; Troy v. Elyton Land Co. [Ala.] 39 So. 589. A demurrer relating to formal defects only should be disposed of by the common pleas division. Keeler v. Lederer Realty Corp., 26 R. I. 524, 59 A. 855.

58. An objection to the ruling of the court in holding that a certain person was not a necessary party to the suit which was presented only by a special exception to the petition, and upon which no action was taken by, the court, must be considered as waived. Guarantee Savings Loan & Inv. Co. v. Cash [Tex. Civ. App.] 87 S. W. 749.

59. Whaley v. Vanatta [Ark.] 91 S. W. 191.

60. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680; Summerville v. Penn Drilling Co., 119 Ill. App. 152. When the trial court reserves its ruling on evidence and is not again requested to rule no question thereon is presented for review. Naas v. Welter, 92 Minn. 404, 100 N. W. 211.

61. Objection to evidence sustained, but court stated during argument that evidence was in. Steltemeier v. Barrett [Mo. App.] 91 S. W. 56.

62. Evidence withdrawn on objection though objection was overruled. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256.

63. Gregg v. Barnes Co, 110 Ill. App. 238.

64. Corrigan v. Funk, 109 App. Div. 846, 96 N. Y. S. 910.

65. See 4 C.L. 1388.

66. In re Moebus [N. H.] 62 A. 170; White v. Western State Bank, 119 Ill. App. 354; Axelson v. Anderson [Colo.] 83 P. 626. Rulings on evidence and instructions not reviewed. Cutter v. Pierson, 26 Pa. Super. Ct. 10; Upchurch v. Mizell [Fla.] 40 So. 29; Selesky v. Vollmer, 107 App. Div. 300, 95 N. Y. S. 130; Perry v. Potsdam, 106 App. Div. 297, 94 N. Y. S. 683.

A motion for a new trial cannot take the place of exceptions taken on the trial. Bird v. Bird, 218 Ill. 158, 75 N. E. 760; Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30. Grounds not included waived. Variance by motion to exclude evidence on other specific grounds. City of Ottawa v. Hayne, 114 Ill. App. 21.

67. Henline v. Brady, 110 Ill. App. 75.

68. Wittmann v. Wittmann, 110 Ill. App. 201.

69. Reynolds v. Smith [Fla.] 38 So. 903.

70. Sanks v. Chicago & A. R. Co., 112 Ill. App. 385.

71. Kinnare v. Chicago & N. W. R. Co., 114 Ill. App. 230.

law to the equity docket,[72] to the admission,[73] or exclusion of evidence,[74], to refusal to strike out evidence,[75] to remarks of the trial judge,[76] to improper remarks or argument of counsel,[77] the giving or refusing of instructions,[78] to the report of a referee or master,[79] to an order denying motion for judgemnt on pleadings,[80] to direction of [81] or refusal to direct a verdict,[82] to the findings of fact,[83] or rulings

72. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66.

73. German v. Browne [Ala.] 39 So. 742; Harnish v. Miles, 111 Ill. App. 105; Fabian v. Traeger, 117 Ill. App. 176; Schloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114; Asher v. Kentucky Union Co., 27 Ky. L. R. 1102, 87 S. W. 1087; Levison v. Davis, 212 Pa. 148, 61 A. 819; Marcy v. Parker [Vt.] 62 A. 19. Even though the admission of the evidence was stated as ground for a new trial. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30.

In suits in chancery exceptions to the ruling of the court in admitting evidence in a trial before a jury over objection are not necessary to preserve the question of the admission of the evidence for review. Bird v. Bird, 218 Ill. 158, 75 N. E. 760. But under Sup. Ct. Rule 67, assignments of error to ruling on evidence in an equity suit cannot be received on appeal, unless exceptions are filed either to the ruling or to the court's finding of fact and conclusion of law. Swope v. Snyder, 209 Pa. 352, 58 A. 669.

74. But where the evidence to sustain the verdict is very unsatisfactory, failure to except to the exclusion of competent evidence will not preclude a reversal on account of such conclusion. Evidence excluded under Code Civ. Proc. § 829, relating to evidence of transactions with decedents. Bernstein v. Cahen, 48 Misc. 639, 96 N. Y. S. 209.

75. Stauber v. Ellett [Mich.] 12 Det. Leg. N. 156, 103 N. W. 606.

76. Upchurch v. Mizell [Fla.] 40 So. 29; Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678.

77. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92; Pittsburg, etc., R. Co. v. Campbell, 116 Ill. App. 356; Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304; Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92.

78. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850; Zipkie v. Chicago, 117 Ill. App. 418; Hales' Adm'rs v. Gilbert [Ky.] 91 S. W. 721; Alft v. Clintonville [Wis.] 105 N. W. 561; Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; State v. Kirkpatrick [Iowa] 105 N. W. 121; Kunkel v. Utah Lumber Co. [Utah] 81 P. 897; Dyer v. Middle Kittitas Irr. Dist. [Wash.] 82 P. 301; York v. New York, O. & W. R. Co., 108 App. Div. 126, 95 N. Y. S. 1105; Davis v. Alexander, 99 Me. 40, 58 A. 55; Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844. Oral charge. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Instruction submitting issues to jury. Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553. Failure to submit certain question to jury. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90. Answer to request for instructions will not be considered where no exception was taken to the ruling. Sibley v. Robertson, 212 Pa. 24, 61 A. 426. No objection made below that the instruction was misleading or was not supported by the evidence. Turrittin v. Chicago, etc., R. Co. [Minn.] 104 N. W. 225. A statute requiring the court to render such judgment as, on inspection of the whole record, it shall appear ought to be rendered, does not apply so as to permit a reversal of a judgment as against the evidence where the charge was not excepted to. Code § 957. Alleged defect does not arise in the record as distinguished from the case proper. Babcock Printing Press Mfg. Co. v. Herbert, 137 N. C. 317, 9 S. E. 349.

Where the trial judge charges as requested, and afterwards charges erroneously, the latter charge must be excepted to and not the charge given on request as modified by the later charge. Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553.

79. McGregor v. J. A. Ware Const. Co., 188 Mo. 611, 87 S. W. 981. No objections to master's report not embraced by exceptions filed thereto. Hess v. Peck, 111 Ill. App. 111; Johnson's Estate, 29 Pa. Super. Ct. 255; Houston v. Polk [Ga.] 52 S. E. 83.

80. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048.

81. Wood v. Rairden, 97 N. Y. S. 735; Beckwith v. Dierks Lumber & Coal Co. [Neb.] 106 N. W. 442.

82. Such an exception is necessary to the review of the sufficiency of the evidence. Earp v. Lilly, 217 Ill. 582, 75 N. E. 552. Denial of motion for directed verdict need not be excepted to (Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561); but the sufficiency of evidence is presented on appeal from an order denying a new trial, though there is no sufficient exception to the refusal to direct a verdict (Weizinger v. Erie R. Co., 106 App. Div. 411, 94 N. Y. S. 869).

83. Cartsens v. Alaska S. S. Co. [Wash.] 81 P. 691; Fleer v. Reagan, 24 Pa. Super. Ct. 170; Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89; Adams v. Casey [Wash.] 80 P. 853; Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371. Where no exception is taken to a statement of fact in a finding, such statement will be held on appeal as conclusive. Dawson v. Orange [Conn.] 61 A. 101. Where no exception below, findings of referee and decree thereon will not be reviewed. Lockhaven Trust & Safe Deposit Co. v. U. S. Mortg. & Trust Co. [Colo.] 81 P. 804. The statement will not be striken for failure to except to the findings but will be held for the sole purpose of reviewing that portion thereof which has to do with the exclusion of evidence by appellants. Bringgold v. Bringgold [Wash.] 82 P. 179.

When rule inapplicable: No exception to findings of fact made by the court without a jury is necessary to a review of such questions on appeal to the appellate division. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665. See, also, Sutherland v. St. Lawrence County, 103 App. Div. 597, 93 N. Y. S. 958. Where the judgment is excepted to and the record contains a statement of the

on propositions of law submitted [84] to order for judgment,[85] to an order discharging rule for judgment,[86] to the judgment of the trial court,[87] and to denial of new trial;[88] but inadvertent omission of exceptions from the printed case will not preclude a review;[89] nor will a party be precluded by failure to take exceptions where it was impossible for him to do so;[90] nor where there is a mutual understanding between court and counsel that no exceptions need be taken in order to preserve a certain question,[91] and where justice requires it, the court may disregard the failure to take exception;[92] and judgment based on a reservation of a point of law which is not properly made will be reversed whether an exception has been taken or not.[93] Errors apparent on the face of the record will be reviewed though not excepted to,[94] and the trial court may grant new trial for errors not excepted to.[95] Specification in motion for new trial does not cure failure to except.[96]

Time of taking exceptions.[97]—Where it does not affirmatively appear from the bill of exceptions that exception was taken in due time, the writ of error will be dismissed.[98] Exceptions may be taken at any time before verdict.[99] Exceptions

facts, the findings may be assailed although no exceptions to them has been taken. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. Though there be no exceptions to the findings, the court will examine rulings as to the exclusion of evidence where proper exceptions were taken to same. Smith v. Glenn [Wash.] 82 P. 605. Where the findings of fact are not filed until after the appeal has been perfected, the failure of the appellant to except to such findings will not preclude him from objecting to them in the appellate court. Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. Conclusion of law. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991. Where the trial court upon request states separately its conclusion of law and fact, there must be an exception to the conclusions of law. A motion for a new trial in the absence of such exception will not cure the omission. Providence Washington Ins. Co. v. Paducah Towing Co. [Ky.] 89 S. W. 722.

84. Gratiot St. Warehouse Co. v. St. Louis, etc., R. Co. [Ill.] 77 N. E. 675.

85. Miller v. Cambria County, 25 Pa. Super. Ct. 591.

86. Chambers v. McLean, 23 Pa. Super. Ct. 551.

87. Gadsden Distilling Co. v. Keddedy Stave & Cooperage Co. [Ala.] 39 So. 622. Judgment for cost. Keene v. Sappington [Mo. App.] 88 S. W. 144. Order of court setting aside report of commissioners in condemnation proceedings and appointing a new commission. City of St. Louis v. Lawton, 189 Mo. 474, 88 S. W. 80. An exception to the judgment is necessary in order to save any question as to the findings of the trial judge. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89.

88. Wallace v. North Ala. Traction Co. [Ala.] 40 So. 89; Hawley v. Huth, 114 Ill. App. 29; Moore v. Hartford Life Ins. Co. [Mich.] 13 Det. Leg. N. 13, 106 N. W. 1116; Sicher v. Rambousek [Mo.] 91 S. W. 68; Kiesewetter v. Supreme Tent of the Knights of the Maccabees of the World, 112 Ill. App. 48; Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183. A party cannot raise objection to the judgment in the absence of an exception to overruling the motion for a new trial. Reedy Elevator Mfg. Co. v. Mertz, 107 Mo. App. 28, 80 S. W. 684.

89. Where the trial court in granting plaintiff's motion for the direction of a verdict remarked that the motion was granted "subject to the exceptions as taken by the defendant," the appellate court will presume either that exceptions were taken and inadvertently omitted, or that there was a mutual understanding between court and counsel that no exceptions need be taken. Hamilton v. Pelonsky, 48 Misc. 554, 96 N. Y. S. 216.

90. Where a motion or nonsuit is decided after conclusion of the trial and evidenced by an order formally entered, and there was no opportunity to except, the appellate division will review the order as though exception was taken. Sutherland v. St. Lawrence County, 103 App. Div. 597, 93 N. Y. S. 958. See, also, Brenton v. Peck [Tex. Civ. App.] 13 Tex. Ct. Rep. 214, 87 S. W. 898. Objections and exceptions by the party in default, are not required to review proceedings on inquest of damages. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253.

91. Hamilton v. Pelonsky, 48 Misc. 554, 96 N. Y. S. 216; Odell v. Petty [S. D.] 104 N. W. 249. A certificate of the trial to the effect that an exception is deemed to be taken to each of his rulings without the formality of an exception really being taken is insufficient to preserve the question for review unless such exceptions are incorporated in a bill of exceptions. McLennon v. Fenner [S. D.] 104 N. W. 218.

92. To send the petitioner to the superior court merely or the purpose of representing the questions in a formal manner is usually considered unnecessary when the questions are so presented that they can be fairly considered. In re Moebus [N. H.] 62 A. 170.

93. Cover v. Hoffman [Pa.] 62 A. 836.

94. Elliott v. Elliott [Colo.] 83 P. 630.

95. Nagle v. Laxton [Mass.] 77 N. E. 719.

96. Zipkie v. Chicago, 117 Ill. App. 418.

97. See 4 C. L. 1391.

98. Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164.

99. But when not taken until after the jury have returned ready to render their verdict, it will receive a strict construction by the appellate court. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90. An exception to the submission of the case on special issues and the refusal of a requested general charge covering all issues must be taken before the verdict. Bouriand v. Schulz

to instructions may in some states be taken at any time during the term.[1] An exception to the taxation of cost must be made at the term at which the judgment is rendered.[2] An exception to an order setting aside the report of commissioner cannot be made for the first time after the report of the new commissioner has been filed.[3] An exception to the overruling of plea of privilege should be taken at the time, and cannot be taken by a motion after judgment for reconsideration of such ruling.[4]

§ 8. *Form and sufficiency of objection.*[5]—The prime essential of an objection is that it must point out specifically the matter objected to,[6] but care should be exercised, in pointing out the specific objections, to include all grounds of objection which the party wishes to urge on appeal, for ordinarily the court will confine itself to the particular objections urged below.[7] Where a general objection is overruled, specific grounds of objection cannot be urged on appeal.[8]

To evidence.[9]—An objection to evidence must specify the ground of the objection with sufficient particularity to enable the court to ascertain the precise ground of the objection and to what portion of the evidence it applies.[10] An objection of

[Tex. Civ. App.] 13 Tex. Ct. Rep. 423, 87 S. W. 1167. Irregularity in summoning jury must be excepted to before verdict. Code 1887, § 3156, as amended by Feb. 27, 1894. Exceptions to charge must be taken at trial. Nagle v. Laxton [Mass.] 77 N. E. 719. Exception to charge must be noted before verdict. Leonard v. Leslie, 23 Pa. Super. Ct. 63. Exception to ruling on evidence must be taken at the trial and one subsequently allowed is unavailing. Annans v. Sewell [Or.] 84 P. 395. If leave is granted, objection to charge may be made after jury retire. Dalton v. Moore [C. C. A.] 141 F. 311.

1. But if the instructions are oral they may be excepted to when filed, opportunity for excepting to them as written instructions being given by requiring filing with the clerk at least one full day before the close of the term. See Acts 1903, p. 338, c. 193, § 1. Strong v. Ross [Ind. App.] 75 N. E. 291.

2. Keene v. Sappington [Mo. App.] 88 S. W. 144.

3. In condemnation proceedings. City of St. Louis v. Lawton, 189 Mo. 474, 88 S. W. 80.

4. Atchison, etc., R. Co. v. Dawson [Tex. Civ. App.] 90 S. W. 65.

5. See 4 C. L. 1392.

6. An objection that the proceedings of a city council levying paving taxes were irregular, invalid, and without authority of law, was insufficient to raise any question as to the correctness of the council's estimate as to the number of square feet chargeable to the taxpayer. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005. An objection that an ordinance authorizing a local improvement does not specify the nature, character, locality and description of the proposed improvement is not sufficiently specific. Close v. Chicago, 217 Ill. 216, 75 N. E. 479. But in such case it is the duty of the court to require the objection to be made more specific, and if this is not done the generality of the objection will not prevent a review on appeal. Id. Objection to pleadings. Oulighan v. Butler [Mass.] 75 N. E. 726. Defects of substance in a declaration may be raised by a request for a ruling that proof of all the allegations pleaded does not entitle the plaintiff to recover. In action for death. Id.

7. Where a demurrer averred want of jurisdiction generally, denying the power of the court to entertain a petition, not because the hearing was in vacation but by reason of a lack of power to grant relief prayed for, such demurrer did not raise any objection to the jurisdiction on account of the hearing being in vacation. Owens v. Waddell [Miss.] 39 So. 459. The authority of an attorney to appear for a party cannot be raised by an objection that there is no evidence in the case legally sufficient to entitle plaintiff to recover. Fowler v. State, 99 Md. 594, 58 A. 444. An objection that the widening of a street was a public improvement and a public benefit is insufficient to raise the question of the apportionment of the costs of the improvement between the property owners and the public. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159. Even though the lower court be found in error in sustaining a demurrer upon one of the grounds assigned, if there were other grounds assigned which should have been sustained, the judgment will be affirmed. Gaynor v. Bauer [Ala.] 39 So. 749. Where a statute forbids the trial of cases involving contested issues at special session of court, except where a certain notice of the session has been given, unless upon written agreement of parties an objection to the assignment of a case wherein the statutory requirements have not been complied with, filed by counsel, the defendant not appearing, and written exceptions filed, constitute a sufficient objection to save the point, it being, moreover, the duty of the court to ascertain whether the statute had been complied with before proceeding with the case. See Gen. St. 1902, § 454. O'Keefe v. Scoville Mfg. Co. [Conn.] 61 A. 961. Must not falsely assume facts as predicate for objection. Carhart v. Oddenkirk [Colo. App.] 79 P. 303.

8. Alabama Great So. R. Co. v. Sanders [Ala.] 40 So. 402.

9. See 4 C. L. 1392.

10. Senterfelt v. Shealy, 71 S. C. 259, 51 S. E. 142; Pooler v. Smith [S. C.] 52 S. E. 967; Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315; Western & A. R. Co. v. Branan, 123 Ga. 692, 51 S. E. 650. Where the objection to the admission of a record did not specify as a ground of objection that the preliminary

irrelevancy is not sufficient to raise the question of competency.[11] So also, a general objection for incompetency not specifying in what particulars the evidence is incompetent is not sufficient, unless the evidence is not competent for any purpose whatever.[12,13] So also, an objection to evidence collectively is insufficient where any of the evidence is admissible.[14]. A general request for a ruling that the plaintiff cannot recover does not sufficiently call the attention of the trial judge to the fact

proof was not sufficient. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. Objection to evidence must state the precise ground and raises only the stated ground. Conklin v. Yates [Okl.] 83 P. 910. A motion to strike out the testimony of a witness because the witness testified partly from his own memoranda and partly from a copy thereof could not be sustained. If the movant wished to prevent the witness from testifying from the copy he should have interposed a proper objection. Southern R. Co. v. State [Ind.] 75 N. E. 272. Where a witness was testifying to the value of a horse, an objection in general form, as "I object," without specifying the ground. Vagt v. Utman, 125 Wis. 265, 104 N. W. 88. Where there is anything in a stipulation relating to the facts of the case which limits its use to a former trial, such matters should be pointed out by the court on a second trial. Mugge v. Jackson [Fla.] 39 So. 157. In an action against a city for injuries caused by a defective sidewalk an objection to evidence of subsequent repairs by the city on the ground that such evidence related to a time subsequent to the injury, is sufficiently specific. Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182.

11. Competency of secondary evidence. Michigan Paper Co. v. Kalamazoo Valley Elec. Co. [Mich.] 12 Det. Leg. N. 32, 104 N. W. 387.

12, 13. Mugge v. Jackson [Fla.] 39 So. 157; Summerville v. Penn Drilling Co., 119 Ill. App. 152; Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37; Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114. General objection to slightly inaccurate hypothetical question. Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500. General objection to introduction of deed will not raise deficiencies in description. Preston v. Davis, 112 Ill. App. 636. General objection to evidence will not raise a technical ground. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415. General objection insufficient to question as to what was reasonable value because it had not been shown that there was not customary value. Maneaty v. Steele, 112 Ill. App. 19.

"Incompetent, irrelevant and immaterial" insufficient. Shandrew v. Chicago, etc., R. Co. [C. C. A.] 142 F. 320; Maul v. Steele [Minn.] 104 N. W. 4. That it is "obnoxious to the provisions of section 829 of the code" suffices to challenge competency of testimony as to transactions with deceased persons, etc. Russell v. Hitchcock, 93 N. Y. S. 950. Objection to proof of a change in a contract that it was immaterial and irrelevant and tended to vary the contract executed does not raise the objection that there was no consideration for such change. Gurski v. Doscher, 98 N. Y. S. 588. "Irrelevant, immaterial, and incompetent under the pleadings" Seestadt [Mich.] 12 Det. Leg. N. 918, 106 N. W. 1127. Objection that testimony "incompetend" insufficient to present claim that it is secondary and no foundation laid. Smith v. Hubbell [Mich.] 12 Det. Leg. N. 860, 106 N. W. 547. "Incompetent and not matter of expert knowledge" does not raise objection that ultimate issue for jury was submitted. Bragg v. Metropolitan St. R. Co. [Mo.] 91 S. W. 527. An objection to evidence as "incompetent, irrelevant and immaterial," and that it "throws no light on the issues of the case," is too indefinite and uncertain and general to present any question on appeal. Hicks v. State [Ind.] 75 N. E. 641. An objection that the question was illegal, irrelevant and immaterial, and an attempt to impeach the witness on an immaterial matter, is insufficient where the answer of the witness is responsive to the question, and a portion of such answer relates to material matters. Alabama Great So. R. Co. v. Bonner [Ala.] 39 So. 619. Objections to the testimony that it is immaterial, irrelevant and inadmissible is so general as to furnish a very weak basis for reversal, and in order to test their force it would be necessary for the appellate court to be advised as to the condition of the entire evidence. State v. Farrier, 114 La. 579, 38 So. 460. Objection to sheriff's deed for irregularity will not reach misdescription. Kenner v. Wilkinson, 33 Colo. 445, 80 P. 1043. To hypothetical question as not containing all the facts must point out the omission. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Illinois C. R. Co. v. Becker, 119 Ill. App. 221.

14. Barnewell v. Stephens [Ala.] 38 So. 662; Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99; St. Louis S. W. R. Co. v. Frazier [Tex. Civ. App.] 87 S. W. 400; Logan v. Field [Mo.] 90 S. W. 127. Where part of a question and answer is proper, a motion to strike out the whole is properly denied. Einolf v. Thompson [Minn.] 103 N. W. 1026. An objection to the whole of the witness' answer will not be sustained against a portion of such answer as a conclusion of the witness. Field v. Field [Tex. Civ. App.] 87 S. W. 726. An objection to the whole correspondence between the parties where a part is admissible. Julius Kessler & Co. v. Ellis, 27 Ky. L. R. 1042, 87 S. W. 798. Part of declaration res gestae and part not. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 91 S. W. 317. An objection to a question calling on the witness to repeat a conversation goes to the whole of such conversation. Tracey v. Reid, 97 N. Y. S. 1074. Where an answer is responsive to the question and contains statements both relevant and irrelevant. Alabama Great So. R. Co. v. Bonner [Ala.] 39 So. 619. An objection to the admission of a letter on the ground that the facts contained therein are not competent evidence cannot be sustained if any of the facts contained in such letter are competent. Louisville & N. R. Co. v.

that a variance between the pleading and evidence is relied on,[15] nor is a general objection jointly by several parties sufficient where the evidence is admissible as to any one of them,[16] but where the evidence is absolutely incompetent, a general objection that it is wholly incompetent, irrelevant, and immaterial, is sufficient.[17]

An objection, however, may be too specific, or rather too narrow, for the appellate court will confine its consideration to the particular grounds urged below.[18] Thus an objection to the competency of the evidence will not reach the competency of the witness,[19] nor will an objection for incompetency reach a variance,[20] but where the incompetency of evidence is clearly apparent, it is error to overrule an objection though based on the ground of irrelevancy.[21]

An objection that the evidence is insufficient as to any particular matter will raise no question as to its sufficiency to sustain some other matter.[22]

Where a question is objected to and the court puts the question to the witness in a different form, whereupon the objecting counsel excepts, the objection is properly saved.[23]

Britton [Ala.] 39 So. 585. An objection to "any testimony" as to an assignment is too broad to raise objection to parol proof of a written assignment. Dorais v. Doll [Mont.] 83 P. 884. Upon an issue to the effect of a diversion of water upon the healthfulness of the plaintiff's premises, the plaintiff was asked whether his wife had been sick during a certain period, and if so, what was his opinion as a physician as to the cause of such sickness, and whether he had suffered in mental anxiety on this account. The part of the question relating to the sickness of the plaintiff's wife was admissible. Woodstock Iron Works v. Stockdale [Ala.] 39 So. 335. Where a book is offered as a whole, a general objection should be sustained if any part is inadmissible. The person offering it should make his offer specific, and not having done so cannot assert that the objection was not specific. Geneva Mineral Spring Co. v. Steele, 97 N. Y. S. 996. Where evidence is in part admissible against a party in his individual right, an objection to the whole evidence will not raise any question as to its admissibility against such party in an official capacity. Evidence admissible against individual but inadmissible against guardian under Rev. St. 1895, art. 2302. Field v. Field [Tex. Civ. App.] 87 S. W. 726.

15. Garfield v. Peerless Motor Car Co. [Mass.] 75 N. E. 695.

16. Fox v. Erbe, 100 App. Div. 33, 91 N. Y. S. 832.

17. Mugge v. Jackson [Fla.] 39 So. 157; Bailey v. Kansas City, 19 Mo. 503, 87 S. W. 1182. Evidence inadmissible under Code Civ. Proc. § 1881, relating to communications between husband and wife. Humphrey v. Pope [Cal. App.] 82 P. 223.

18. Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330; Henry v. Brown [Ala.] 39 So. 325; Sanitary Dist. v. Alderman, 113 Ill. App. 23; Michigan Mut. Life Ins. Co. v. Vierra, 116 Ill. App. 476. Motion to strike evidence as not being proper for impeachment denied on ground that evidence was admissible for other purposes. Devencenzi v. Cassinelli [Nev.] 81 P. 449. An objection on the ground that the testimony as to the market value of cattle if in good condition, based on the ground that such testimony was opinion evidence, should not be sustained on appeal on the ground that the defendant was not responsible for the depreciation in weight on the cattle naturally resulting from transportation. Missouri, etc., R. Co. v. Russell [Tex. Civ. App.] 13 Tex. Ct. Rep. 691, 88 S. W. 379. In an action against a beneficial association, an objection that the means used by a doctor to secure an affidavit from the plaintiff which the defendant attempted to use in its defense was not competent to be proved for the reason that it was not shown that the doctor was the agent of the defendant did not raise the question as to the right of the court to inquire into the validity of the release. Fraternal Army of America v. Evans, 216 Ill. 629, 74 N. E. 689. An objection on the ground that defendants are not bound by any statement by an employe long after the accident, or by statements between two agents, raises the question as to whether the declarations of mere agents made after the accident are admissible. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405.

19. Competency of witness under Rev. St. 1898, § 4069, relating to testimony as to transactions with decedents. Wells v. Chase [Wis.] 105 N. W. 799.

20. Reed v. Spear, 9 N. Y. S. 1007.

21. Gearty v. City of New York [N. Y.] 76 N. E. 12.

22. Where a case is submitted to the jury upon two issues, either of which is sufficient to sustain a recovery, an objection that the evidence is insufficient to sustain one of the issues will not be considered on appeal where no objection is made to the sufficiency of the evidence to sustain the other issue. St. Louis S. W. R. Co. v. Ratley [Tex. Civ. App.] 87 S. W. 407. Objection that evidence was insufficient to show that the failure to furnish lights at the defendant's station was the proximate cause of the injury not sufficient as against sufficiency to establish fact that failure to furnish lights was negligence. Id. Objection that evidence is insufficient to support a judgment as to one party cannot be urged as an objection to its sufficiency as to another antagonistic party. McNinch v. Crawford, 30 Mont. 297, 76 P. 693.

23. Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758.

To exclusion of evidence.[24]—Where it does not appear from the issues that the exclusion of evidence was improper, such exclusion will not be held erroneous in the absence of any showing, by offer of proof or otherwise, as to what the evidence was that was excluded.[25] Thus, where an offer of evidence is unconditional, no question is raised as to the admissibility of the evidence for a specific purpose.[26] So also, where a question itself does not suggest the materiality and competency of the expected answer, an objection that the question was overruled will not be considered on appeal where there is nothing in the record showing an offer to prove what facts were expected to be established by the question.[27] Where, therefore, a party desires to save an objection to the refusal to allow certain questions to be asked, he must show or offer to show the purpose of the question and what it is intended to elicit.[28] Where a party offers several writings in evidence they should be separated so as to give the opposite party an opportunity for inspection and objection.[29] Likewise, a party offering evidence should separate the relevant and competent from the irrelevant and incompetent, otherwise he cannot object if the whole is excluded.[30] An offer of evidence must, furthermore, state its purpose with sufficient certainty to show its relevancy,[31] and where a party desires to cross-examine a witness upon apparently irrelevant matters, he must show the court wherein the proposed examination is relevant;[32] but where it is clearly understood by the trial court what certain testimony is intended to prove, the failure to state the answer which the witness is expected to give will not preclude a review of the ruling sustaining an objection to the testimony.[33]

To instructions.[34]

To report of referees, etc.[35]—Where a large number of objections are presented to the confirmation of a special assessment, it is proper for the court to require the objector to specify which ones he relies on, and in such case the others on appeal will be deemed waived.[36]

24. See 4 C. L. 1395.

25. Judy v. Buck [Kan.] 82 P. 1104. If there is no reversible error in excluding the evidence for the purpose for which it was offered, the appellate court will not consider that it might have been admissible for some other purpose. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. On motion for new trial. Dawson v. Orange [Conn.] 61 A. 101.

26. Hart v. Brierley [Mass.] 76 N. E. 286.

27. Regan v. Jones [N. D.] 105 N. W. 613; Judy v. Buck [Kan.] 82 P. 1104.

28. Snedecor v. Pope [Ala.] 39 So. 318; McLeod v. Andrews & Johnson Co., 116 Ill. App. 646; Geringer v. Novak, 117 Ill. App. 160; Weske v. Chicago Union Traction Co., 117 Ill. App. 298; Baker v. Moore, 29 Pa. Super. Ct. 301; Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979; City of Macon v. Humphries, 122 Ga. 800, 50 S. E. 986; Moore v. Mobley, 123 Ga. 424, 51 S. E. 351; Franklin v. State [Ala.] 39 So. 979; Indianapolis & M. Rapid Transit Co. v. Hall [Ind.] 76 N. E. 242; Long v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 1048. Expected answer need not be shown on objection to cross question. Long v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 1048.

29. But the collective tender and admission of such writings is not fatal error where it appears that all the papers were admissible and that the opposite party was given full opportunity to urge his objection to each instrument. Lee v. Giles [Ga.] 52 S. E. 806.

30. Ledger offered in evidence without specification of any particular account. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680; Indianapolis & M. Rapid Transit Co. v. Hall [Md.] 76 N. E. 242. Where stenographer reads from his notes testimony given by certain witnesses on former trial, an offer to show all their testimony was rejected as too general, the relevancy of the remainder not being made to appear. Flohr v. Territory, 14 Okl. 477, 78 P. 565.

31. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. The facts which are expected to be elicited by a question must be stated specifically. Id. An offer to prove a seller's lien upon goods which had been delivered was properly rejected where there was no offer to prove an agreement that the lien should continue after delivery. Meyers v. McAllister, 94 Minn. 510, 103 N. W. 564.

32. Sister testified as to age of prosecutrix in rape case, and counsel for defendant desired to cross-examine as to ages of other children in family. People v. Colbath [Mich.] 12 Det. Leg. N. 446, 104 N. W. 633.

33. Robinson v. Old Colony St. R. Co. [Mass.] 76 N. E. 190.

34. See 4 C. L. 1395.

35. See 4 C. L. 1396.

36. Clark v. Chicago, 214 Ill. 318, 73 N. E. 358.

§ 9. *Sufficiency of exception.*[37]—A mere speculative exception will not be considered.[38] Where a pleading contains several paragraphs an exception to the ruling of the court upon a demurrer to the several paragraphs, without specifying the paragraph as to which the ruling is claimed to be erroneous, is a joint exception and cannot be sustained unless all the ruling is incorrect as to all the paragraphs.[39]

Exceptions to the admission of evidence must state the grounds upon which the exception is based,[40] and also what the testimony was.[41] Where a number of letters are admitted, and an exception is taken to the admission of the whole lot, it is insufficient if any of the letters are admissible.[42] A record statement that the defendant then and there "accepted the ruling" of the court upon a motion to exclude evidence does not show any exception to such ruling.[43] Where a party excepts to the exclusion of evidence, he must inform the trial judge of what was expected to be proved.[44] Exceptions to report of master in chancery must be specific.[45]

Under a statute requiring that where there are exceptions an appeal to the circuit court from the judgment of the county court in condemnation proceedings shall be tried de novo, such an appeal must be tried de novo, although the exceptions taken relate to only a part of the damages.[46]

To instructions.[47]—The exception must specify the grounds thereof, otherwise it is too general.[48] Thus a specific exception is necessary to save any question as to the form of instructions,[49] or as to the submission issues not raised by the

37. See 4 C. L. 1396.

38. After verdict in favor of plaintiff, plaintiff excepted to an order transferring the cause to the legal calendar for the purpose of trying a plea of adverse possession set up in the answer. Brock v. Kirkpatrick [S. C.] 52 S. E. 592.

39. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328. But in Berry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 74 N. E. 1114, it was held that such an exception is sufficient to raise the correctness of the ruling on each paragraph. If the court had made a separate entry of its ruling upon the first paragraph of the complaint and appellant had thereupon excepted to such ruling, and if the court had thereafter made and entered its ruling upon the demurrer to the second paragraph, the appellant again reserving an exception, etc., it would have then been the duty of the appellate court to examine each paragraph of the complaint under the separate assignments of error made. Shryer v. Louisville & S. I. Traction Co. [Ind. App.] 74 N. E. 902.

40. Phillips v. Collinsville Granite Co., 123 Ga. 830 51 S. E. 666; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113.

41. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

42. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

43. Bondman v. State [Ala.] 40 So. 85.

44. Screws v. Anderson [Ga.] 52 S. E. 429.

45. General Fire Extinguisher v. Lamar [C. C. A.] 141 F. 353. An exception to a referee's report that the referee failed to find that a certain claim set up by the defendant as an offset had been adjudicated in favor of the plaintiff, is too general to raise the question of res adjudicata. Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810.

46. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124.

47. See 4 C. L. 1397.

48. It is insufficient to merely quote the portion excepted to. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. A general complaint as to the correctness of instructions, made in a motion for a new trial is not sufficient to preserve the question of the correctness of the instructions. State v. Kirkpatrick [Iowa] 105 N. W. 121. An exception that the court erred in instructing that if the party from whom defendant obtained certain notes for the possession of which the suit was brought, in the manner claimed by the plaintiff, defendant acquired no title, did not raise the question as to the courts failure to the bona fides of the defendant in obtaining the notes. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90. A general exception to a charge on the ground that the law was not correctly presented is not well taken unless the charge contains a single proposition which is objectionable for that reason, or, if it contains several distinct propositions, none of them contains a correct statement of law. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15. Such an exception does not raise any question as to whether the charge was as full and explicit as the objecting party had a right to expect. Georgia F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15.

49. Assuming facts which are properly for the jury. Church v. Gallic [Ark.] 88 S. W. 979. That an instruction in action for assault was susceptible of the conclusion that it allowed defendant's wealth to be considered in computing both punitive and actual damages, instead of punitive alone. Davis v. Richardson [Ark.] 89 S. W. 318.

pleadings,[50] or as to whether an instruction is contrary to a constitutional provision.[51]

An exception to several instructions should not be in gross, but an exception should be taken to each instruction separately, unless all are erroneous,[52] but where it is evident that the court fully understood the exception and had in mind the charge to which the exception was taken at the time such exception was taken, the exception will be deemed sufficient.[53] An exception should not be taken to an instruction which is modified and given of the court's own motion, but should be taken to the refusal to give the instruction requested and which was modified.[54]

In some states the manner in which exceptions to instructions may be taken is defined by statute.[55] Thus, in Indiana it is provided that exceptions to instructions may be either orally and entered of record,[56] or by memorandum in writing, signed and dated, made by counsel at the close of the instruction.[57]

To the findings and judgment.[58]—A general exception to findings is insufficient.[59] The exceptions must specify the grounds upon which they are based.[60] Thus, where there is some evidence to support the findings an exception that the findings are not supported by the evidence raises no question of law.[61] So also, where a constitutional question is the basis of the exception, it should be specifically stated.[62] Findings must be separately excepted to,[63] and exceptions to findings must, moreover, show the particular findings the refusal to make which is excepted to.[64]

A general exception to a judgment confirming the report of the referee is insuf-

50. Where notice was alleged in complaint in unlawful entry and detainer and was not denied in the answer. McElvaney v. Smith [Ark.] 88 S. W. 981.

51. Carmody v. St. Louis Transit Co., 188 Mo. 572, 87 S. W. 913.

52. Acts 1903, p. 338, c. 193, § 1. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852; Abbott v. Milwaukee Light, Heat & Traction Co. [Wis.] 106 N. W. 523; Dowell v. Schisler [Ark.] 88 S. W. 966. An exception that the defendant "duly, severally and separately excepted" was insufficient. Southern R. Co. v. Bradford [Ala.] 40 So. 100.

53. Colloquy between court and counsel showed that court understood the exception. Burns v. Delaware & H. Co., 96 N. Y. S. 509. Where unnumbered oral instructions are given as a continuous whole, a general exception to each proposition or charge without the designation of any particular one cannot be taken. The portion excepted to must be particularized by number. See Acts 1903, p. 338, c. 193, § 1. Strong v. Ross [Ind. App.] 75 N. E. 291. An exception "to the underscored parts of the charge" is sufficient. Meyer v. Home Ins. Co. [Wis.] 106 N. W. 1087.

54. See Acts 1903, p. 338, c. 193, § 1. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852.

55. See Acts 1903, p. 338, c. 193, § 1. Strong v. Ross [Ind. App.] 75 N. E. 291.

56. Acts 1903, p. 338, c. 193, § 9, providing that no provision of the act shall be so construed as to preclude any matter from being made a part of the record by bill of exceptions, does not abrogate the method previously provided by the statute for taking exceptions to oral instructions. Strong v. Ross [Ind. App.] 75 N. E. 291.

57. Strong v. Ross [Ind. App.] 75 N. E. 291. An exception to an instruction taken by memorandum in writing at the close of the instruction should be dated as well as signed. Acts 1903, p. 338, c. 193, § 1. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852.

58. See 4 C. L. 1398.

59. Horrell v. California, Or. & Wash. Homebuilders' Ass'n [Wash.] 82 P. 889.

60. Smith v. Glenn [Wash.] 82 P. 605. A general exception that rulings and findings are erroneous under the pleadings and evidence is insufficient. Exceptions to auditor's report. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. A general exception to the findings of the court in a suit to enforce a mechanic's lien is unavailable to raise the question as to the correctness of a finding that the notice of lien was filed and complied with the law. Gilmour v. Colcord [N. Y.] 76 N. E. 273.

61. Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia [N. H.] 61 A. 676.

Where a case is tried by the court without a jury, and there is no conflict in the evidence, an exception to the conclusion of the court upon the evidence and a request for other findings is sufficient to preserve the point. McClung v. McPherson [Or.] 81 P. 567.

62. An exception to the finding of the trial court that the complainants were lawfully appointed members of the board of health of a city is sufficient to cover the constitutionality of the appointment so as to raise such point in the court of appeals where the constitutional question was the only one discussed in the appellate division, though the exception in the trial court did not specifically mention the constitutional point. People v. Houghton, 182 N. Y. 301, 74 N. E. 830.

63. Franklin Tp. Overseers v. Rayburn Tp. Overseers, 23 Pa. Super. Ct. 522.

64. Mere general conversation between court and counsel will not cure the defect where the exception is too general. See Ball. Ann. Codes & St. § 5052 Bringgold v. Bringgold [Wash.] 82 P. 179.

ficient.[65] An exception to the dismissal of a petition for a new trial does not necessarily raise any question of law where the ground of the dismissal is not stated.[66]

§ 10. *Waiver of objections and exceptions taken.*[67]—A party may not only waive error by acquiescing in it,[68] or by failing to object,[69] or by failing to except,[70] but he may also waive errors to which due and proper objections and exceptions have been taken,[71] as where a party fails to take advantage of opportunity offered by the court for the correction of the error,[72] or subsequently makes an agreement, through his counsel, which is inconsistent with the objection taken,[73] or by compliance with the order of the court,[74] or by failure to assign it as error,[75] or to urge in argument or brief in the appellate court.[76]

By cross-examination as to the matter objected to a party may waive the objection.[77] He is not obliged, however, to rest his fate upon unavailing objections to improper evidence, and after all his objections have been overruled he may introduce evidence to meet that improperly admitted for his adversary without

65. See practice rule No. 27, 35 S. E. 7. Rutherford County Com'rs v. Erwin [N. C.] 52 S. E. 785.

66. The petition was under Pub. St. 1901, c. 230, § 1, providing for new trials on account of accident or mistake, and the petition alleged newly-discovered evidence. Barton v. Rowell [N. H.] 61 A. 589.

67. See 4 C. L. 1398.

68. See ante, § 2, Acquiescing in error.

69. See ante, § 4, Necessity of objection.

70. See ante, § 7, Necessity of exception.

71. Where an instruction is given on the first trial of the case, it is the duty of the appellant to point out any error therein, and if he fails to do so he cannot make any objection on account of such error on a second appeal. Lexington R. Co. v. Fain [Ky.] 90 S. W. 574. Where no demurrers are filed to pleas as amended, and the record does not show what the amendments are, the appellate court will not consider the pertinency of the demurrers to the pleas before amendment. Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359. Where an objection to the complaint was waived on a prior appeal, and the case was retried after reversal without amendment of the complaint, its sufficiency will not be considered. Southern Ind. R. Co. v. Moore [Ind. App.] 71 N. E. 516. Cross assignments will not be considered where they were not filed in the lower court and no copy of the appellee's brief containing them was filed in such court, as required by district and county court rule 101. City of Austin v. Cahill [Tex. Civ. App.] 88 S. W. 536.

72. After exception for refusal to charge, the court offered to recall the jury and give the charges, to which offer counsel made no reply and the charges were not given. Drucklieb v. Universal Tabacco Co., 106 App. Div. 470, 94 N. Y. S. 777. Objection saved to introduction of evidence waived by objection to withdrawal. Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172. An exception is not waived by declining to prepare on suggestion of the court a special instruction to disregard. Gulf, etc., R. Co. v. McClerran [Tex. Civ. App.] 91 S. W. 653.

73. Objections and exceptions taken on a trial before a jury are waived by an agreement to submit the case to the court for retrial, the jury having disagreed without any agreement that such objections and exceptions should be preserved. Grunsky v. Field [Cal. App.] 82 P. 979. Where a party consents to submit the case upon evidence erroneously admitted, over his objection, in a former trial of the case, he cannot question the judgment because it is based on such evidence. Rowe v. Gerry, 109 App. Div. 153, 95 N. Y. S. 857.

74. Order to produce paper to be used as evidence complied with under protest. City of Macon v. Humphries, 122 Ga. 800, 50 S. E. 986.

75. See Appeal and Review, 5 C. L. 121.

76. Ball v. Hartman [Ariz.] 83 P. 358; Lewis v. City and County of San Francisco [Cal. App.] 82 P. 1106; Stohr v. Stohr [Cal.] 82 P. 777; Humphrey v. Pope [Cal. App.] 82 P. 223; Sayre v. Johnson [Mont.] 81 P. 389; Riley v. Allen [Kan.] 81 P. 186; In re Antoldi's Estate [Cal.] 81 P. 278; Jones v. Ballou, 139 N. C. 526, 52 S. E. 254; Southern R. Co. v. Bradford [Ala.] 40 So. 100; Kansas City, etc., R. Co. v. Randolph [Ala.] 39 So. 920; Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585; Greely-Barnham Grocery Co. v. Cottingham [Ala.] 39 So. 567; Western R. Co. v. Russell [Ala.] 37 So. 311; Coolidge v. Hallauer [Wis.] 105 N. W. 568; Cochran v. Cochran [Minn.] 105 N. W. 183; American Woolen Co. v. Boston & M. R. Co. [Mass.] 76 N. E. 658; American Food Co. v. Halstead [Ind.] 76 N. E. 251; Springer v. Bricker [Ind.] 76 N. E. 114; Glos v. Davis, 216 Ill. 532, 75 N. E. 208; Major v. Miller [Ind.] 75 N. E. 159; Wright v. Perry, 188 Mass. 268, 74 N. E. 328; Swain v. Boston Elevated R. Co., 188 Mass. 405, 74 N. E. 672. Exception to instruction. See Sup. Ct. Rule 22, subd. 5. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523. Sufficiency of a pleading. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560; Sovereign Camp, Woodmen of the World, v. Cox [Ind. App.] 75 N. E. 290; Western Union Tel. Co. v. State [Ind.] 76 N. E. 100. Admissibility of evidence. Mahan v. Newton & B. St. R. Co. [Mass.] 75 N. E. 59; Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760; Carroll v. Metropolitan Coal Co. [Mass.] 75 N. E. 84; Benett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330; McClendon v. McKissack [Ala.] 38 So. 1020; Baxley v. Baxley, 123 Ga. 686, 51 S. E. 591; Smith v. Smith [Ind. App.] 74 N. E. 1008; Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 28; Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 76 N. E. 816.

77. Morristown Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016.

thereby waiving his objection,[78] nor does a party waive exceptions and objections duly taken to the admission of evidence by making use of such evidence by way of rebuttal,[79] nor by failure to except to the direction of a verdict,[80] nor by failing to accept to the final judgment;[81] but objection and exceptions to the admission of evidence are waived by failure to object to the subsequent admission of similar evidence,[82] or by failure to repeat the objection to evidence admitted conditionally,[83] or by failure to move to strike,[84] or to except to so much of the charge as is based on such evidence.[85] Asking instruction assuming competency of evidence, however, waives objection to its admission.[86] One who calls a witness as his own and does not ask him as to matters upon which cross-examination had been retricted, waives exceptions to the restriction.[87] Motion to open a judgment by confession on the merits waives defects in procedure,[88] but trial on merits does not waive objection saved to jurisdiction,[89] a fortiori is a party estopped to urge an objection to evidence where he has expressly waived it,[90] nor can a party complain of the exclusion of evidence where he withdraws his objection.[91] An objection to the sufficiency of the evidence is waived by failure to except to the final judgment.[92] So also, where the defendant proceeds with testimony after the rejection of his motion to take the case from the jury at the conclusion of the plaintiff's

78. Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182. Especially where the objection is reviewed by a request to exclude. Plaintiff in action for damages tried to enlarge issues by proving speed of defendant's train. Chicago, etc., R. Co. v. Wheeler [Kan.] 83 P. 27.

79. Where one party introduces a book of entries, over the objection of the other party, without laying the proper foundation, the latter party may use the entries in the book by way of rebuttal without waiving the error in admitting the book (Hoogewerff v. Flack [Md.] 61 A. 184), nor by failure to repeat the objection when the same kind of evidence is subsequently admitted (Fethergill v. Fethergill [Iowa] 105 N. W. 377; Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182). Need not be repeated upon immediate repetition of question. Davis v. Reflex Camera Co., 105 App. Div. 96, 93 N. Y. S. 844.

80. Benedict v. Pincus, 109 App. Div. 20, 95 N. Y. S. 1042.

81. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

82. McFarland v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 525, 88 S. W. 450.

83. Expert testimony admitted on promise to connect. Dorr Cattle Co. v. Chicago & G. W. R. Co. [Iowa] 103 N. W. 1003. Evidence was received on counsel's statement that he would connect it and the connection was not made, but no motion to strike was made by the other party. Lundvick v. National Union Fire Ins. Co. [Iowa] 103 N. W. 970. Where, upon objection being made to the admission of evidence, the party offering such evidence states that he will subsequently supply the defect in the preliminary proof necessary for its admission, it is not for the judge of his own motion to determine whether such defect has been supplied and to rule out the evidence without a request to that effect from the other party. Hix v. Gulley [Ga.] 52 S. E. 890. Where upon objection being made to the admission of a will the court, in order to enlighten itself, orders the will to be read, and no further objection of exception was taken, the objection was waived. Admission of will in evidence. Love v. Turner, 71 S. C. 322, 51 S. E. 101.

84. But where the evidence is admissible upon any conceivable showing, a party who has objected to its introduction and moved to strike it out after it was admitted does not waive the objection by failing to repeat the motion to strike at the close of all the evidence. Bryce v. Chicago, etc., R. Co. [Iowa] 105 N. W. 497.

85. Where evidence as to certain elements of damage was excluded and exception taken, plaintiff need not except to so much of the charge as defined the measure of damages. Rudomin v. Interurban St. R. Co., 98 N. Y. S. 506.

86. Shannon v. Potts, 117 Ill. App. 80.

87. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8.

88. Treasurer of Division No. 168, A. A. of S. R. E. of A. v. Keller, 23 Pa. Super. Ct. 135.

89. State Bank of Chicago v. Thweatt, 111 Ill. App. 599.

90. Where, after an objection to testimony has been overruled, the objecting counsel says that if the testimony does not go any further he does not care, whereupon the examination along the line objected to is discounted, the objection to the testimony already admitted is waived. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819.

91. Ordinarily, when an objection is sustained by the court, and objection is then withdrawn, and the party against whom the ruling is made does not propound the question again, the matter will be treated as having been waived by the party excepting. But the obvious meaning of the statement made by the court with respect to the matter was that the court was satisfied with the ruling and would not allow a renewal of the question by the plaintiffs, and that, notwithstanding the withdrawal of the objection by the defendant, the ruling of the court must stand, the general rule does not apply. Main v. Radney [Ala.] 39 So. 981.

92. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

testimony and does not repeat his motion at the close of all the evidence, he thereby waives any exception to such refusal;[93] and an objection on account of refusal to nonsuit the plaintiff at the close of his evidence is waived where the defendant introduces evidence;[94] and a motion to dismiss at the close of plaintiff's case is waived by failure to renew it at the conclusion of the evidence.[95] But where, after the defendant's motion for a directed verdict is overruled, the defendant asks for and receives instructions submitting the case to the jury, he does not thereby waive his right to have the action of the court reviewed with respect to its refusal to direct a verdict.[96] Nor will the reopening case after refusal to direct a verdict and the taking of immaterial testimony necessitate renewal of motion,[97] and a previous denied request for directed verdict does not preclude a party from asking that the case be submitted to the jury.[98] An objection to doubtful, but not plainly improper, remarks of counsel will not be considered when, after the objection is overruled, no motion is made to exclude the remarks and comments upon facts not in evidence.[99] Where a party moves for a new trial specifically stating the grounds of the motion all errors not specified are waived.[100]

SAVINGS BANKS; SCANDAL AND IMPERTINENCE; SCHOOL LANDS, see latest topical index.

SCHOOLS AND EDUCATION.

§ 1. *The school system in general.*[1]—The term "public schools" is a comprehensive one and it should be narrowed or restricted in its meaning, which fre-

93. Baltimore & O. R. Co. v. State [Md.] 61 A. 189; Bernheimer Bros. v. Becker [Md.] 62 A. 526. A motion at the close of the plaintiff's evidence is insufficient where the defendant introduces evidence and does not repeat his motion at the close of all the evidence. Streator Independent Tel. Co. v. Continental Tel. Const., 217 Ill. 577, 75 N. E. 546. Motion for directed verdict. Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546.

94. Milhiser & Co. v. Leatherwood [N. C.] 52 S. E. 782. Demurrer to evidence waived by introducing proof after it is overruled. Dowie v. Priddle, 116 Ill. App. 184; Conine v. Olympia Logging Co. [Wash.] 84 P. 407.

95. Biogioni v. Eglee Bunting Co., 98 N. Y. S. 591.

96. Chicago Terminal Transfer R. Co. v. Schiavone, 216 Ill. 275, 74 N. E. 1048.

97. Where, after both parties rested, defendant moved for directed verdict, which was refused, the defendant excepting, and the case was subsequently reopened and a few unimportant questions were asked, one witness being recalled for each party, the failure to renew the motion for the verdict was not a waiver. Weizinger v. Erie R. Co., 106 App. Div. 411, 94 N. Y. S. 869.

98. Seddon v. Tagliabue, 98 N. Y. S. 236.

99. Fuller v. Stevens [Ala.] 39 So. 623. The court ruled that certain argument was proper, and it was not necessary to repeat the objection to the argument along the line objected to after the ruling had been made. Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 74 N. E. 738.

100. Haden v. Bamford Bros. Silk Mfg. Co. [N. J. Law] 63 A. 7; Brillow v. Oziemkowski, 112 Ill. App. 165; Town of Cicero v. Bartelme.

quently must be ascertained from the context, being sometimes synonymous with common or primary schools and sometimes far more comprehensive.[2] The public policy generally is opposed to sectarian influences in the public schools,[3] but the offering of a prayer which in neither form nor substance represented any peculiar dogma of any sect or denomination, or taught it, or detracted from that of any other, at the opening of a public school, did not make such school a "sectarian school" within the meaning of the constitution;[4] nor does the reading, without comment, of passages of the King James version of the Bible and the offering of such a prayer make the school "a place of worship" and its teachers "ministers of religion" within the contemplation of the constitution.[5] The legislature has general control of the educational system of the state and may adopt such measures as it deems necessary to secure to the people the advantages of education,[6] except so far as constitutional provisions prescribe them,[7] and has authority to locate the state institutions of learning or to remove them to some other place in the state, as it may deem best for the interests of the state.[8] In California the general laws passed by the legislature under the constitution regarding the public schools are paramount and any provisions of a city charter conflicting therewith must give way;[9] but municipal charters may make additional provisions, or provide for

114 Ill. App. 9; Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359; Peoria Star Co. v. Lambert, 115 Ill. App. 319; Koehler v. King, 119 Ill. App. 6; Nishkian v. Chisholm [Cal. App.] 84 P. 312. Remarks of judge. Miller v. Nuckolls [Ark.] 91 S. W. 759; Carpenter v. Roth [Mo.] 91 S. W. 540; Texas & P. R. Co. v. Norman [Tex. Civ. App.] 91 S. W. 594. Assessment of damages on dissolution of injunction. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Where the motion for a new trial refers only to proceedings on a second trial, it preserves no error respecting the first. White v. Madison [Okl.] 83 P. 798.

1. See 4 C. L. 1401.

2. Meaning as used in Const. art. 3, § 25. State v. Bryan [Fla.] 39 So. 929.

3. That policy is evidenced in New York by Const. art. 9, § 4, and a regulation by the superintendent of public instruction prohibiting teachers from wearing distinctive religious garbs is in accord with such policy. O'Connor v. Hendrick [N. Y.] 77 N. E. 612, affg. 109 App. Div. 361, 96 N. Y. S. 161.

4. Const. § 189, prohibiting the appropriation of educational funds in aid of such schools. Hackett v. Brooksville Graded School Dist., 27 Ky. L. R. 1021, 87 S. W. 792.

5. Const. § 5, providing that no one shall be compelled to attend such place or to contribute to the support of such persons. Hackett v. Brooksville Graded School Dist., 27 Ky. L. R. 1021, 87 S. W. 792. The King James translation of the Bible, or any edition thereof, is not a sectarian book, and the reading of it without comment in the public schools is not sectarian instruction within the meaning of Ky. St. 1903, § 4368, prohibiting the use of sectarian books or the teaching of sectarian doctrine therein. Id.

6. Chapter 5384 of the Laws of 1905, creating a board of control and vesting it with the management of the several state institutions of learning, is constitutional and valid. State v. Bryan [Fla.] 39 So. 929. It does not conflict with Act Cong. July 2, 1862, c. 130, 12 Stat. 503, donating lands for the endowment of agricultural colleges, etc. and Laws 1870, c. 1766, p. 45, and acts amendatory thereof, accepting the said donation. Id. Nor is it unconstitutional as a delegation of legislative powers in authorizing the state board of education and the state board of control jointly to locate the university and the female college of the state. Id. Laws 1903, p. 290, is a restatement of the entire law on the subject of redistricting public schools and in regard to the management and control of the same, intended to set up a new system, so that whatever power any school officer may have must be derived from that act. Gibson v. Mabrey [Ala.] 40 So. 297. The general school law of New Jersey, of Oct. 19, 1903 (P. L. 1903, Sp. Sess. p. 5), construed. Wolley v. Hendrickson [N. J. Law] 62 A. 278.

7. Chapter 5384, Laws of 1905, in providing for a colored normal school and for a normal department to the state university of Florida and in conferring on the state boards of education and control to establish a normal department in the female college, sufficiently complies with Const. art. 12, § 14, relative to normal schools. State v. Bryan [Fla.] 39 So. 929.

8. Even if the trustees of the Florida agricultural college made a specific contract with certain donors of lands and money for the location thereof at Lake City, the legislature was not precluded from removing the college to some other place. State v. Bryan [Fla.] 39 So. 929.

9. The requirement of the charter of San Francisco that all charges against teachers shall be preferred by the superintendent does not prevent the board from acting under the general law (Pol. Code, §§ 1791, 1793) and investigating charges not preferred by that officer. McKenzie v. Board of Education [Cal. App.] 82 P. 392. Const. art. 11, § 6, makes city charters subject to general laws except in municipal affairs. Art. 21, § 25, subd. 27, prohibits the passage of local laws for the management of common schools, and art. 9, § 5, requires the legislature to provide for a system of common schools. Los Angeles School Dist. v. Longden [Cal.] 83 P.

matters not enumerated in the general law, if not in conflict with such law.[10] In Kansas, laws providing for the organization, maintenance, and control of common schools may be either general or special.[11] The New York state superintendent of public instruction has the power to make such regulations as to the management of public schools as are consonant with the general school laws and not inconsistent with the laws of the state.[12]

§ 2. *Right, privilege, and duty of attendance.*[13]—The taxes levied by a school district are for the education of the children of that district,[14] and the trustees of a graded common school district cannot arbitrarily expel a pupil or refuse him the privilege of attending school.[15] When the question of residence and right to admission is raised, the board of directors of the district is to determine it, and the board's action, being quasi judicial, cannot be reviewed by a court and jury.[16] The legislature of California cannot confer on boards of county supervisors the power to admit, generally, to a city high school district, for high school purposes, and with the consequent burden of taxation upon it, an adjacent school district lying entirely outside the city and not being a part thereof,[17] but the statute providing for the admission of the pupils of one district to the schools of another contemplates only a qualified admission upon such terms as may be proper.[18]

246. The charter provisions of Los Angeles for the issue of bonds for school purposes do not supersede the provisions of Pol. Code, §§ 1880-1887, for the issue of bonds by a school district, although the city and district are coterminous in territorial limits. Id. Pol. Code, §§ 1617, 1662, 1663, which make provisions for kindergartens in cities and towns, when construed as not to entitle them to share in the state school fund, and conceding that they apply only to cities and towns, do not conflict with Const. art. 4, § 25, subd. 27, prohibiting the passage of local or special laws for the management of common schools. Los Angeles County v. Kirk [Cal.] 83 P. 250.

10. It is the duty of the courts to harmonize such provisions with the general law if possible. McKenzie v. Board of Education [Cal. App.] 82 P. 392.

11. But such laws are not of a general nature under Const. art. 2, § 17, and may therefore be amended by a special act. Richardson v. Board of Education [Kan.] 84 P. 538. Chapter 414, p. 676, Laws 1905, a special act amendatory of Gen. St. 1901, § 6290, is not in violation of any constitutional provision. Id.

12. Although such authority is not expressly conferred by Consolidated School Law, Laws 1894, p. 1181, c. 556. O'Connor v. Hendrick [N. Y.] 77 N. E. 612, affg. 109 App. Div. 361, 96 N. Y. S. 161. A regulation prohibiting the wearing of a distinctively religious garb, as the dress of the "Sisterhood of St. Joseph," is reasonable and valid, and accords with the nonsectarian policy of the state as declared in Const. art. 9, § 4. Id.

13. See 4 C. L. 1401.

14. The residents of one district are not entitled to free admission to and education in schools of an adjoining district. Commonwealth v. Wenner [Pa.] 61 A. 247. Where the children of defendant township attended the schools of plaintiff township, after notice given to one of defendant's directors that tuition based on the cost per pupil of maintaining the school attended would be charged, an implied contract was created to pay the same. Town District of Hardwick v. Wolcott [Vt.] 61 A. 471. Acts 1900, p. 18, No. 23, providing for an appeal by either board in case of disagreement as to tuition in such cases to the examiner of teachers, whose decision shall be final, does not apply where the question of liability to pay is based on an implied contract. Id.

15. No such power is conferred by Ky. St. 1903, §§ 4364, 4367, 4373. Cross v. Walton Graded Common School Dist. Trustees [Ky.] 89 S. W. 506. In proceedings by mandamus to compel the trustees to permit a pupil to attend school, it will be presumed that he was of the color properly admissible to the school, and a complaint is not objectionable for failure to state his color. Id. The father with whom a minor child is living may maintain an action of mandamus to compel a board of education to admit his child to the public school. Cartwright v. Board of Education [Kan.] 84 P. 382. Mandamus lies, at the relation of a foster parent, to compel a schoolboard to admit to the public schools a child of legal age and a resident of the district without the payment of tuition (McNish v. State [Neb.] 104 N. W. 186); and it is not necessary that the foster parent shall have legally adopted the child (Id.).

16. Commonwealth v. Wenner [Pa.] 61 A. 247.

17. Contrary to the constitutional provision prohibiting taxation without representation. Mooney v. Tulare County Sup'rs [Cal. App.] 83 P. 165.

18. An agreement for admission of pupils upon payment of tuition in advance at a rate fixed by the board of the receiving district and not if detrimental to the interests of the school is lawful. Mooney v. Tulare County Sup'rs [Cal. App.] 83 P. 165. The legislature having seen fit to condition the admission of an adjacent school district to become a part of an existing high school district upon such terms and conditions as the two districts may agree upon, the board of supervisors can make an order of admission

Separate schools for races.[19]—The establishment of separate schools for white and colored pupils is not a discrimination to the prejudice of either race, where equal facilities are provided for both,[20] but a board of education in the absence of statutory authority cannot establish separate schools for white and colored children.[21]

Vaccination of pupils.[22]

Duty to furnish school facilities.[23]—The failure to provide transportation for children living remote from the school house is not such a failure to provide "suitable school facilities and accommodations," as to justify the county superintendent of schools in transmitting an order to the custodian of school moneys to withhold from the district its share of the state school funds.[24] The statute which requires a town to maintain a high school or furnish instruction for advanced pupils in a high school or academy in the same or another town vests a discretion in the board of directors as to which method it will adopt.[25] Under the terms of an act providing for the payment of the tuition of a pupil desirous of taking a high school course, by a town not maintaining a free high school,[26] a minor who made no contract in his own behalf respecting tuition, personally incurred no legal indebtedness, made no expenditure, and sustained no loss, could not sue to recover from the town the tuition voluntarily paid for him by his father.[27]

§ 3. *School districts, sites, and schools.*[28]—A school district is a quasi municipal corporation, and although its territorial limits may be coterminous with those of a city, the identity of the district as a corporation is not lost in that of the city,[29] but in Kentucky, where the census enumerators of a city school district made false reports, whereby the city and its schools received and expended moneys

only on such terms, and the courts cannot dispense with such conditions. People v. Hanford Union High School Dist. [Cal.] 84 P. 193. But an agreement by the trustees of the admitted district that such district would pay its pro rata share of the taxes for the maintenance of the high school district and the liquidation of the bonded indebtedness thereof, as a condition of its admission, could not become binding on the district without the assent of two-thirds of the qualified voters thereof, under Const. art. 11, § 18, and without such assent was ineffectual. Id.

19. See 4 C. L. 1402.

20. Although Laws 1905, p. 30, c. 11, establishing a graded school in Kernersville, uses the term "graded school" in the singular, it must be construed as directing the establishment of one school in which the children of each race are to be taught in separate buildings and by separate teachers, and when so construed does not violate Const. art. 9, § 2, prohibiting discrimination. Lowery v. Board of Graded School Trustees [N. C.] 52 S. E. 267. The erection of a necessary school building for a large number of white pupils is not a discrimination against a small number of colored pupils where they are amply provided for. Id. But section 7 of said act providing for an allowance of school funds per capita to the white children of school age violates the constitution, though it does not avoid the rest of the act. Id. Section 8 of said act, providing that the property of the public schools for white children shall be the property of the board of trustees, to be disposed of in their discretion for the use of the graded school did not authorize them to take the school building provided for colored children and use it for the whites. Id.

21. So held in the case of second class cities in Kansas. Cartwright v. Board of Education [Kan.] 84 P. 382.

22, 23. See 4 C. L. 1402.

24. As contemplated in § 126 of the school law. P. L. 1904, p. 48. Board of Education of Frelinghuysen Tp. v. Atwood [N. J. Law] 62 A. 1130.

25. Acts 1904, No. 37, p. 61. The board cannot be compelled by mandamus after adopting one method to select the other. Samson v. Grand Isle [Vt.] 63 A. 180. The act of a town in accepting a gift to purchase a building for a "graded school," in making the purchase, equipping the building, opening a school, and maintaining such school by taxation for two years, did not vest in the inhabitants of the town a right to have high school instruction so continued. Id.

26. Rev. St. c. 15, § 63. Goodwin v. Inhabitants of Charleston [Me.] 62 A. 606.

27. Goodwin v. Inhabitants of Charleston [Me.] 62 A. 606.

28. See 4 C. L. 1402.

29. The authority of the district to issue bonds under Pol. Code, §§ 1880-1887, is not affected by the charter authority of Los Angeles to issue bonds for school purposes. Los Angeles City School Dist. v. Longden [Cal.] 83 P. 246, citing numerous cases. In Missouri, school districts are declared to be bodies corporate possessing the usual powers of corporations, and are required to organize by electing a board of directors within 15 days after formation, hence, quo warranto is the proper remedy to test the legality of its formation. School Dist. No. 2, Tp. 240, v. Pace, 113 Mo. App. 134, 87 S. W. 580.

in excess of the amount to which it was entitled, the board of education and the enumerators being the agents of the city, the state could recover the excess from the city.[30]

Formation, alteration, consolidation, and dissolution of districts.[31]—It will be presumed that the legislature in creating school district corporations intended to impose upon them not only the duties expressly named in the statutes, but also those necessary to carry out the objects of the statutes,[32] and in creating these corporations the legislature did not contemplate, in defining their duties, to prevent them from being just, or to take away from them the power to do right when an innocent mistake has been made.[33] A special act of the legislature in creating a new school district and giving to it the property within its limits formerly belonging to the districts from which it was created[34] is not invalid as a taking of property without due process of law, or as an impairment of contract obligations, within the meaning of the Federal constitution;[35] nor is such action incompatible with the republican form of government guaranteed by that constitution, even assuming that such provisions apply to the creation, powers, or property of the subordinate municipalities of a state.[36] Where by special act a town is made a public school district, such district is confined to the limits prescribed;[37] but in Indiana a school district has no fixed boundaries, being composed of the persons residing in the township who have been enumerated and attached to the district,[38] although under the statutes providing for the transfer of children of school age from one school corporation to another,[39] the parent, guardian, or custodian of a pupil as transferred does not become a legal voter in the district to which the transfer is made.[40] Where territory is duly annexed to a city which constitutes a school district, it is annexed for public school as well as other purposes.[41] Like other statutes those affecting the organization of school districts are construed prospectively rather than retrospectively.[42] Statutory requirements must generally

30. Construing together Acts 1873, p. 39, c. 25, establishing a public school system, and Acts 1885 (Ex. Sess.), p. 48, c. 8, to reduce the acts incorporating Knoxville and amendments to one act. State v. Knoxville [Tenn.] 90 S. W. 289.

31. See 4 C. L. 1402.

32. Ky. St. 1903, §§ 4464, 4469, 4470, 4481, 4482, relative to graded common school districts, etc., must be liberally construed to effectuate their purposes. Churchill v. Highland Park Graded School Trustees [Ky.] 89 S. W. 122.

33. Board of trustees of a graded common school district compelled by mandamus to levy a tax to pay judgment for taxes levied by mistake on property outside of its taxing district and paid by plaintiff. Churchill v. Highland Park Graded School Trustees [Ky.] 89 S. W. 122.

34. Local Acts, Mich., 1901, No. 315. Attorney General of Michigan v. Lowrey, 199 U. S. 233, 50 Law. Ed. ——.

35. Attorney General of Michigan v. Lowrey, 199 U. S. 233, 50 Law. Ed. ——.

36. Const. U. S. art. 4, § 4. Attorney General of Michigan v. Lowrey, 199 U. S. 233, 50 Law. Ed. ——.

37. Acts 1905, p. 30, c. 11, to establish a graded school in Kernersville, cannot be made to include contiguous territory for the colored schools. Lowrey v. Board of Graded School Trustees [N. C.] 52 S. E. 267. The territory of the borough of Bradley Beach was constituted a separate school district by the general school act of Oct. 19, 1903 (P. L. 1904, p. 5), and was not consolidated with the township of Neptune by the supplement to that law passed March 28, 1904 (P. L. 1904, p. 272). McCarter v. Board of Education [N. J. Law] 63 A. 93.

38. Under Burns' Ann. St. 1901, § 5958 (Acts 1895, p. 127, c. 54), all taxpayers residing in the township and attached to a school district are legal voters at the school meetings therein. Ireland v. State [Ind.] 75 N. E. 872.

39. Burns' Ann. St. 1901, §§ 5959a-5959e. Ireland v. State [Ind.] 75 N. E. 872.

40. Ireland v. State [Ind.] 75 N. E. 872. Since persons may be legal voters at all school meetings in the district (Burns' Ann. St. 1901, § 5958), yet not entitled to vote for township trustee, an allegation that such trustee abandoned a school district without the written consent of a majority of the legal voters was not an allegation that he did not have the written consent of a majority of the voters entitled to vote for township trustee, requisite for the abandonment of a district (Burns' Ann. St. 1901, § 5920f). Id.

41. Trustees of Schools v. Board of School Inspectors, 115 Ill. App. 479, Phelps v. Peoria School Inspectors [Ill.] 73 N. E. 412.

42. Act of Feb. 5, 1903, P. L. 4, relating to school districts, etc., is not to be given a retrospective effect so as to abolish two school districts that had existed more than three years, restoring the original district

be strictly complied with in the formation or alteration of school districts,[42] but the requirement in the Iowa code that the election on the question of consolidation of districts shall be held on the same day and time in the several districts is merely directory, and a failure to observe it does not invalidate the proceedings in the absence of any showing of prejudice.[44] Where a statute provides that no school district shall contain less than four sections of land, unless it can support six months' school per year, the county superintendent and commissioners determine that question and their determination is final.[45] Under statutes authorizing townships to abolish school districts and to constitute themselves single consolidated districts, assuming the property of the districts and becoming liable for their debts,[46] upon such action, the township becomes absolutely liable for the debts of the districts, although there has been no equitable adjustment of property rights and liabilities as provided by law.[47] In Missouri any common school district may be organized into a village district with the special privileges appertaining thereto,[48] notwithstanding the village is not incorporated and the plat thereof may be defective.[49] In Ohio, territory in a special school district is not open to be taken in whole or in part to form a new special school district,[50] nor when the schools of a township have been centralized can any part of the territory be taken to form a special district,[51] and the legislature cannot validate the organization of special school districts created under an act declared unconstitutional.[52] In South Dakota, commissioners appointed for the formation of a school district from the parts of two or more counties may detach adjacent territory from an independent district in one county and attach it to a district in another county.[53] In Washington the county superintendent, in forming a new school district, is not restricted to the boundaries described in the petition, but may in the exercise of his judgment modify such proposed boundaries.[54]

Lapse of time and public recognition as a school district will bar any collateral

and incidentally annulling a judgment obtained by one against the other. Old Forge School District, 27 Pa. Super. Ct. 586.

43. Where the petition for the formation of a new school district, contemplated in Rev. St. 1899, § 9742, was not presented to the clerks of the districts affected, an election held on the question was void. School Dist. No. 2, Tp. 24, R 6 E. v. Pace, 113 Mo. App. 134, 87 S. W. 580. The provision that where the assent of the districts to be divided in the formation of a new district is not given, the matter may be referred to the county commissioner and appealed to a board of arbitrators, whose decision shall be transmitted to the clerks of the districts interested and entered in the record of the district divided, implies that the judgment of the board shall be reduced to writing, so that where no such decision was written or filed no new district was created. State v. Cummins, 114 Mo. App. 93, 89 S. W. 74.

44. Code, § 2749. Molyneaux v. Molyneaux [Iowa] 106 N. W. 370.

45. Under Ballinger's Ann. Codes & St. § 2277. Wilsey v. Cornwall [Wash.] 82 P. 303. Where there is no showing to the contrary it will be presumed that the superintendent and commissioners found that the district could support a school for that time per year. Id.

46. Gen. St. 1888, §§ 2193, 2198. Winsted Sav. Bank v. New Hartford [Conn.] 62 A. 81.

47. Gen. St. 1888, §§ 2198, 2206. Such provisions being mere details of the consolidation and not conditions precedent. Winsted Sav. Bank v. New Hartford [Conn.] 62 A. 81. The fact that the township neglected to make such adjustment did not entitle it to object, upon returning to the district system, to the payment of the stipulated interest, during the time of the consolidation on the indebtedness of one district, on the ground that it would be inequitable as against the taxpayers of other districts. Id.

48. Under Rev. St. 1899, § 9861. State v. Gill, 190 Mo. 79, 88 S. W. 628.

49. When once the directors have received a proper petition for an election on the question and have ordered an election and given notice thereof, a majority of the board cannot withdraw the notice, their duty being mandatory and ministerial. State v. Gill, 190 Mo. 79, 88 S. W. 628.

50. By order of the probate court under Rev. St. § 3929. Scott v. McCullough [Ohio] 75 N. E. 52.

51. Fulks v. Wright, 72 Ohio St. 547, 75 N. E. 55.

52. Rev. St. § 3891 and §§ 3891, 3928, as amended and supplemented by Act Apr. 25, 1904 (97 Ohio Laws, p. 334), are unconstitutional and void. Bartlett v. State [Ohio] 75 N. E. 939.

53. Rev. Pol. Code, §§ 2327, 2410, as amd. by Laws 1903, p. 150, c. 133. Independent School Dist. No. 2 v. District No. 37 [S. D.] 106 N. W. 302.

54. Wilsey v. Cornwall [Wash.] 82 P. 303.

attack on the validity of its organization,[55] and private individuals by participation in the proceedings to consolidate districts may be estopped to question their validity.[56] The appeal to the county superintendent, authorized by the Iowa code for testing the legality of the incorporation of a school district, is not the exclusive remedy.[57]

Division of property on change of district.[58]—The act passed for the adjustment of indebtedness and property rights between township districts and borough districts carved out of them is applicable only where the districts cannot agree, and does not prevent a mutual adjustment between themselves.[59] The statute providing a method of distribution of the state appropriation to common schools was intended only for that purpose and has no application to a division of funds upon the creation of a borough district out of a township.[60]

Establishment of high schools.[61]

Sites.[62]—Lands for school house sites may be taken under the rights of eminent domain.[63] In Alabama the matter of the location of schools in the several districts rests with the county board of education and not with the district trustees.[64] The statutes of Connecticut requiring a two-thirds vote to fix or change a school house site, do not apply to consolidated town school systems.[65] Under the

55. Where a district had been recognized by both state and county for several years, the validity of its organization could not be questioned in a collateral proceeding by another district to compel a county clerk to extend certain taxes over the land therein in which proceeding the district attached was not a party. State v. Miller, 113 Mo. App. 665, 88 S. W. 637. And a taxpayer was barred by laches from obtaining mandamus to contest the validity of the organization. Id.

56. Where all the electors of a school district are present and vote on a proposition of consolidation of districts, they are estopped to question the validity of the proceedings because the petition and notice of election failed to describe the territory to be consolidated. Molyneaux v. Molyneaux [Iowa] 106 N. W. 370. Where a meeting of the electors of a consolidated district was duly called and held, and plaintiffs appeared and voted for new directors without any objection to the validity of the consolidation, they were estopped to deny the validity of the proceedings afterward. Id.

57. Code, § 2818. Quo warranto and not certiorari is the proper remedy to test the validity of the proceedings incorporating an independent school district composed of a town in a township formerly constituting a district. State v. Alexander [Iowa] 105 N. W. 1021. Where an independent district was formed from another, but nothing further was done except to adjust finances and collect taxes, one who took no part in the formation of the new district and had not recognized it except to pay taxes under compulsion, 14 months after the incorporation, was not barred by laches from instituting quo warranto to test the validity of the incorporation. Id.

58. See 4 C. L. 1404.

59. Act July 24, 1895, P. L. 259. Rouseville Boro. School Dist. v. Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214.

60. Act July 15, 1897, P. L. 271. Rouseville Boro. School Dist. v. Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214.

61, 62. See 4 C. L. 1404.

63. 3 Starr & C. Ann. St. 1896, p. 3661, c. 122, art, 3. § 41, empowers boards of education of township high schools to perform the duties of directors for school districts, and hence, under §§ 31, 32 of the school law, they can acquire school house sites by condemnation (Thompson v. Trustees of Schools for Rio Tp., 218 Ill. 540, 75 N. E. 1048), and an affirmative vote of the electors in favor of a site, under art. 9, § 4 of the school law, authorizes the board to procure the site by either purchase or condemnation (Id.). Under Code Civ. Proc. § 3371, providing for the confirmation or setting aside of the commissioners' report in the condemnation of lands, where their award is general, being a gross sum for compensation for the value of the land taken for a school house site, it will be presumed that they acted within the law and that their award is supported by the facts which came within their inquiry, and should be confirmed. Mead v. Conger, 97 N. Y. S. 526. The Pennsylvania statute for condemnation of land for the use of state normal schools does not authorize the condemnation for a campus of streets and alleys dedicated to public use. In re Southwestern State Normal School [Pa.] 62 A. 908.

64. Laws 1903, p. 292, § 11. Gibson v. Mabrey [Ala.] 40 So. 297.

65. Gen. St. 1902, §§ 2209, 2212, as construed in the light of the course of legislation. Pub. Acts 1841, p. 52, c. 40; Pub. Acts 1856, p. 39, c. 41; Pub. Acts 1865, p. 107, c. 112; Pub. Acts 1868, p. 202, c. 102; Pub. Acts 1878, p. 338, c. 124. Benham v. Potter, 77 Conn. 186, 58 A. 735. A warning of a town meeting specified the purpose of taking action as to the purchase of a site and building a new school house, but the action taken contemplated the expenditure of a certain sum "in addition to what the present school property may be sold for." Held that, if a sale was authorized and was invalid as not contemplated in the warning, such sale was not so incorporated in or made a condition of the vote as to invalidate and defeat the entire action and render void the authorization of

provisions of the North Dakota statute the voters of a school district are required to select the site of a new school house by a general designation only,[66] and the school board is required to locate and fix the boundaries of the site upon the land indicated by the general designation of the voters, being vested with discretion as to the precise limits of the site and the amount of the land taken.[67] In Illinois, the law not requiring a specification of the proposed site in the notice of an election to vote on a proposition to build a high school building and it being within the province of the voters to select it,[68] the specification of two sites in the notice is surplusage,[69] and in that state it is not essential that an expression of the will of the voters be taken at an election held to select a school house site as to the amount to be expended in purchasing the site or constructing the building, or as to the area of the site, those matters being left to the discretion of the board of education.[70] Although the law of Oklahoma prohibits the designation of a site more than one-half mile from the center of the district,[71] yet, where a change in boundaries caused by detaching territory leaves the site more than one-half mile from the center, it is not necessary before erecting a new school house that the designation of the site should be submitted to the people;[72] and when a school house site has been once selected and a building erected thereon, it can be changed and the building removed only by authority of the people of the district expressed as provided by law;[73] and when the erection of a new school house is ordered and no change made in the site by vote of the people, the board is not required before the erection of the building to submit the question of a site to a vote of the people.[74] In Washington a board of school directors has power to purchase a site for a school house,[75] and even if a board exceeds its authority in making such purchase, the action may be ratified subsequently by the electors.[76]

Schools.[77]—In California, kindergartens, notwithstanding their legislative designation as "primary" schools, are not "primary and grammar schools" within the constitutional and statutory provisions for the distribution of the state school fund.[78]

Use of building for other purposes.[79]

§ 4. *Organization, meetings, and officers.*[80]—The officers of school districts are generally held to be public officers,[81] and the title to a school office in case of

expenditure for the purposes mentioned in the warning. Id.

66. Rev. Codes 1899, § 701. Location held sufficiently definite. Petersburg School Dist. of Nelson County v. Peterson [N. D.] 103 N. W. 756.

67. Petersburg School Dist. v. Peterson [N. D.] 103 N. W. 756.

68. School Law (3 Starr & C. Ann. St. 1896, p. 3689, c. 122) art. 5, § 31, prohibits the purchase or location of sites without an election held as required by art. 9, § 4. Thompson v. Trustees of Schools for Rio Tp., 218 Ill. 540, 75 N. E. 1048.

69. The electors could vote for the selection of any other site. Thompson v. Trustees of Schools for Rio Tp., 218 Ill. 540, 75 N. E. 1048.

70. Thompson v. Trustees of Schools for Rio Tp., 218 Ill. 540, 75 N. E. 1048.

71. Wilson's Rev. & Ann. St. 1903, § 6154. Stayton v. Butchee [Okl.] 82 P. 726.

72. Stayton v. Butchee [Okl.] 82 P. 726.

73. Wilson's Rev. & Ann. St. 1903, § 6154. Stayton v. Butchee [Okl.] 82 P. 726.

74. Stayton v. Butchee [Okl.] 82 P. 726.

75. Code of Education (3 Ballinger's Ann. Codes & St. § 2367). Nichols v. Pierce County Directors [Wash.] 81 P. 325.

76. A vote instructing the directors to build a school house on such site operates as a ratification. Nichols v. Pierce County Directors [Wash.] 81 P. 325.

77. See 4 C. L. 1404.

78. Const. art. 9, §§ 5, 6. Los Angeles County v. Kirk [Cal.] 83 P. 250. Pol. Code, §§ 1617, 1662, 1663, which make provision in cities and towns for the establishment of kindergartens, when so construed as not to entitle them to participate in the distribution of the state school fund, do not conflict with Const. art. 9, §§ 5, 6. Id.

79, 80. See 4 C. L. 1404.

81. In California the superintendent of schools is a county officer whose duties are prescribed by general laws (Pol. Code, § 1543), so that he could not be charged by the charter of San Francisco with the additional duty of preferring charges against teachers. McKenzie v. Board of Education [Cal. App.] 82 P. 392. In Louisiana the parish superintendent of public education is a public officer and a member of the house of representatives is ineligible to election as such, under Const. 1898, prohibitory art. 27. State v. Theus, 114 La. 1097, 38 So. 870. A treasurer of a school district is a public officer within the meaning of the Missouri statute

contest as in other cases must be tried by quo warranto;[82] and in case of a conflict between a city school committee and the mayor, council, and superintendent of streets, over the right to care for the public school houses, the latter officers could not be prevented by mandamus from performing the duty until their right to do so had been settled by quo warranto proceedings.[83] In Iowa a school director is prohibited from acting in any way as agent for or dealer in school text books and supplies.[84] An election of trustees of a graded school district was not invalidated because the order for the election called for the election of six trustees when only five could be chosen, the five having the greatest number of votes being deemed elected;[85] nor was the election invalidated because a few taxpayers and voters were improperly included in the boundaries of the district, it appearing that they did not vote and could not have affected the result if they had voted.[86] Although the statute of Kentucky provides that the trustees of graded common school districts shall be classified to hold office for one, two, and three years respectively, or until the election and qualification of their successors,[87] where, owing to failure to hold elections the terms of all had expired, the election of an entire board at once was lawful, although the statute provides for the election of but two trustees annually.[88] The resignation of a member of a board of school trustees to take effect on a specified date cannot be withdrawn after acceptance.[89]

A board of education can legally act only when a quorum is assembled[90] after due notice.[91] Where the statute requires a record of the annual school meeting and election of directors to be kept, but does not make such record the sole and conclusive evidence thereof, parol evidence of such election is admissible in the absence of such record.[92] Such records and proceedings should not be given a narrow and technical construction, but so as to give effect to the manifest intention

limiting the time for the commencement of civil actions against public officers (Rev. St. 1899, § 4274; Rev. St. 1889, § 6776), and an action on a school district treasurer's bond was barred after three years. State v. Harter, 188 Mo. 516, 87 S. W. 941. The office of school director is an office within the meaning of the Missouri constitution conferring exclusive appellate jurisdiction on the supreme court in cases involving the title to an office under the state. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

82. Neither certiorari from the decision of the state superintendent of public instruction, who is authorized in New Jersey to decide controversies as to the election of members of municipal boards of election (Du Four v. State Superintendent of Public Instruction [N. J. Law] 61 A. 258), nor mandamus against a person actually in the office in favor of one claiming it is available. (Caffrey v. Caffrey, 28 Pa. Super. Ct. 22).

83. Fowler v. Brooks, 188 Mass. 64, 74 N. E. 291.

84. Code § 2834 prohibits it and does not merely prohibit directors from acting as agents of the board, as provided in § 2824, to keep books and supplies and sell them at cost. State v. Wick [Iowa] 106 N. W. 268.

85. Election held under Acts 1894, p. 22, c. 15. Williams v. Lovelace [Ky.] 90 S. W. 983.

86. Williams v. Lovelace [Ky.] 90 S. W. 983.

87. Ky. St. 1903, § 4471. Lee v. Trustees of Shepherdsville Graded Common School Dist. No. 4 [Ky.] 88 S. W. 1071.

88. Lee v. Trustees of Shepherdsville Graded Common School Dist. No. 4 [Ky.] 88 S. W. 1071. The board so elected had authority to issue a notice of an election on the question of issuing bonds. Id.

89. And his subsequent appointment as a member of the board at a meeting at which no quorum was present was ineffectual. Saunders v. O'Bannon, 27 Ky. L. R. 1166, 87 S. W. 1105.

90. The appointment of a member to fill a vacancy when there is no quorum present is of no effect. Saunders v. O'Bannon, 27 Ky. L. R. 1166, 87 S. W. 1105.

91. A request to the chairman of a board signed by three members to call a meeting at a specified time and place is not a notice to him of a meeting at such time and place. Saunders v. O'Bannon, 27 Ky. L. R. 1166, 87 S. W. 1105. Where it was found that due notice had been given to all the members and that a quorum was present, the business transacted at the meeting was sustained. Akron Sav. Bank v. School Tp. [Iowa] 103 N. W. 968. Where the district meetings had been held for many years in an academy building which was used for district school purposes also, a notice in the warrant for a school meeting to see how much money the district would raise to establish a lighting plant for the academy was sufficiently specific. Brooks v. School Dist. of Franconia [N. H.] 61 A. 127.

92. Conceded for the purpose of this case that Code § 2751 requires such record. State v. Cahill [Iowa] 105 N. W. 691.

of the voters if it can be ascertained therefrom,[93] and the board cannot delegate its discretionary powers.[94]

Selection of officers.[95]—The municipal corporation act of California confers on cities the power of employing a superintendent of schools,[96] and also, where the school board of a city is vested by the charter with "the government" of the school district, it has the power of appointing such superintendent.[97] In Michigan the appointment of county school examiners by the board of supervisors as provided by law is the transaction of ordinary business, within the statutory provision that such business may be transacted by a majority of the members present,[98] and a person who received ten votes to his opponent's nine, the board consisting of twenty-one members, was entitled to the office.[99] The fact that a board of education appointed a person treasurer, in consideration of his promise to pay interest on the funds in his hands, does not avoid the appointment nor avail his sureties as a defense to an action on his bond.[1]

Qualification of officers.[2]—In Missouri it is not required that a school director be a resident taxpayer of the district in which he is elected,[3] but it is sufficient if he has paid state and county taxes in another county, from which he removed, within a year preceding his election.[4] In Iowa the election of an unqualified person as director in a school subdistrict and his failure to qualify does not constitute a failure to elect but a failure to qualify, and the director for the previous year is entitled to qualify as a hold over within ten days after the March meeting of the directors.[5]

Tenure of office.[6]—In Iowa the term of office of a director in a school subdistrict begins and ends on the third Monday in March, when the regular meeting of directors is held, and not on the first Monday when the annual meeting and election is held.[7]

Removal from office.[8]—Under a statute providing for the removal of county officers for willful neglect of duty, one month's absence from the state is not in itself such neglect on the part of a county superintendent of schools;[9] neither is the fact that no one was left in charge of the office during the absence.[10]

93. Resolutions held sufficient to authorize sale by the officers of the district of the school house and the building of a new one on the same site. Quisenberry v. School Dist. No. 6 [Neb.] 105 N. W. 982.

94. A contract between a board of education, authorized to manage the common schools of the district, employ and discharge teachers and fix their salaries (3 Priv. Laws 1867, p. 321), and the state board of education, permitting the state normal university to furnish teachers without legal qualifications for certain classes, and the joint employment of "critic teachers" to be paid in part by the school district, is void as a delegation by the school district board of its discretionary powers to the state board. Lindblad v. Board of Education of Normal School Dist. [Ill.] 77 N. E. 450.

95. See 4 C. L. 1405.

96. This power has been in effect affirmed in Pol. Code, §§ 1533, 1550, 1560, 1616, 1617 1714, 1788, 1858, 1874, and St. 1903, p. 388, c. 270, §§ 3, 5, 8. Davidson v. Baldwin [Cal. App.] 84 P. 238. A decision that such authority was conferred by Pol. Code § 1793, as amended in 1891, held res judicata. Id.

97. St. 1905, p. 918, c. 11 amending the charter of San Diego by providing generally for a school system for the city and for a board of education for the government of the school district, is sufficient to authorize the employment of a superintendent whose salary may be fixed as authorized by Pol. Code, § 1793. Davidson v. Baldwin [Cal. App.] 84 P. 238.

98. Pub. Acts 1901, p. 65, No. 43, and Comp. Laws, § 2476, respectively. Howland v. Prentice [Mich.] 106 N. W. 1105.

99. Howland v. Prentice [Mich.] 106 N. W. 1105.

1. Board of Education v. Brown [Mich.] 12 Det. Leg. N. 796, 105 N. W. 1118.

2. See 4 C. L. 1405.

3. Under Rev. St. 1899, §§ 9759, 5760, declaring that he must be a resident taxpayer and qualified voter of the district. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

4. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

5. Under Code, §§ 2751, 2757, 2758, and 1275, construed together. State v. Cahill [Iowa] 105 N. W. 691.

6. See 4 C. L. 1405.

7. Under Code, §§ 2751, 2757, 2758, construed together. State v. Cahill [Iowa] 105 N. W. 691.

8. See 1 C. L. 548.

9. Rev. Pol. Code § 1806. A general allegation of willful neglect in a complaint for removal from office without stating the facts constituting the neglect is not sufficient. Bon Homme County v. McLouth [S. D.] 104 N. W. 256.

10. The fact that there was no official

Salaries.[11]—In California the salary of a superintendent of schools appointed under the general provisions of a city charter for the government of the city school district may be fixed as authorized by the general law.[12]

§ 5. *Property and contracts.*[13]—The board of education of the city of Omaha may authorize its president to sign a petition on behalf of the board for the repaving of a street, and such signing will bind the district.[14] Where land has been conveyed to a school district on condition that it shall be used for school purposes only, with right of re-entry reserved to the grantor, his heirs or representatives, a mere temporary removal of the school to another school house, by a vote of the school board not taken in the manner provided by law, is not a breach of the condition.[15] School property is not rendered liable to assessment for a street improvement by reason of the fact that with knowledge that the property was not liable to assessment the school board petitioned for the improvement,[16] but where the lien of an assessment for a street improvement has already attached, it will not be defeated by the subsequent purchase of the property by a school board.[17]

School lands.[18]—A county can dispose of the fee in its school lands only by sale.[19] In Texas the county commissioners' courts, in leasing county school lands, have power to give lessees a preference in the purchase of the lands should the county wish to sell, and such contracts are not contrary to public policy.[20] Under the laws of Kansas, after void proceedings to forfeit school land contracts for default in payment and before other proceedings have been taken, no rights of third parties having intervened, the purchasers under the contracts may tender payment in full and demand receipts therefor.[21] The act of Nebraska for the registration and disposal of the educational lands is valid.[22] In Texas, applicants to purchase school lands upon the market, by complying with all the requirements of the statute, fix their rights as purchasers with all the rights and incidents conferred by the statute for the sale of such lands, and are entitled to make their payments, perfect their titles, and demand patents without any reservation whatever.[23] Where the Texas land commissioner awarded school lands, classified as dry grazing lands, at $1 per acre, but canceled the award for mistake in classification, the lands being in fact dry agricultural land, the first act was destroyed by the latter

duty performed in the office does not imply willful neglect, as there may have been no duty to perform. Bon Homme County v. McLouth [S. D.] 104 N. W. 256.

11. See 4 C. L. 1405.

12. St. 1905, p. 918, c. 11, amending the charter of San Diego, and Pol. Code, § 1793. Davidson v. Baldwin [Cal. App.] 84 P. 238.

13. See 4 C. L. 1406.

14. Eddy v. Omaha [Neb.] 103 N. W. 692.

15. Act of Apr. 11, 1862, P. L. 471, requires a vote of a majority of the entire board to abandon or change the location of a school house. Birmingham Public School Dist. v. Sharpless, 27 Pa. Super. Ct. 630.

16, 17. Board of Education v. Bowland, 3 Ohio N. P. (N. S.) 122.

18. See 4 C. L. 1406.

19. It cannot be deprived of any of its school lands by any supposed agreement as to boundary lines, as the doctrine of agreed boundary is founded on the idea of an agreement inferred mainly from acquiescence for a long time, and a county cannot be bound by such acquiescence. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846. And no agreement which would undertake to divest a county's title would have any effect unless made by the commissioner's court, which would be a matter of record. Id.

20. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

21. In case of the county treasurer's refusal to receive the payment and to issue the duplicate receipts as provided by law, mandamus will issue to compel him to do so. True v. Brandt [Kan.] 83 P. 826. In proceedings to forfeit school land contracts for default, under Laws 1879, p. 288, c. 161, § 2 (Gen. St. 1901, § 6356), a sheriff's return of service of notice of forfeiture that he "found no one in possession" of the land is not a return that no one was in possession and forfeiture cannot be based thereon. Id.

22. Act of April 1, 1899 (Laws 1899, p 300, c. 69); re-enacted. § 28 is in force. State v. Sams [Neb.] 99 N. W. 544.

23. But they cannot raise the question of the right of the commission of the general land office to reserve the minerals in the sale of the land, by mandamus, prior to their right to demand a patent. Thaxton v. Terrell [Tex.] 91 S. W. 559. Mandamus to compel commission to accept applications without reservation of minerals refused. Id.

and the presumption of the regularity of an official act attaches to the cancellation and not to he award.[24]

Validity of contracts in general.[25]—As in the case of other contracts there must be an unqualified acceptance of a bid by a school district, communicated to the bidder, to constitute a completed contract,[26] and there must be a concurrence of the parties upon the terms of the contract.[27] Where a contract for building a school house was let and fully completed, the fact that the contractor purchased the lumber required from a corporation in which one of the school trustees was a stockholder and assigned the orders drawn therefor to such corporation did not avoid the contract.[28] A contract for a school building entered into beyond the legal limit of indebtedness is valid to an amount within such limit.[29] A countermand of a valid order for the purchase of supplies must be promptly made to be effective.[30] Neither the board of school trustees nor the commissioners can bind the District of Columbia as a municipality by a contract for services as assistant engineer and night janitor rendered to the public schools in the absence of authority and an appropriation therefor by act of congress.[31] In Kentucky the concurrence of a majority of the members of a city board of education, on a call of the yeas and nays, is indispensable to the valid execution of a contract by the board, and the record of the meeting of the board must show that the concurrence was so given.[32] In Indiana, when a township trustee finds it necessary to erect a new school house, it is his duty to sign a contract with the party whose bid is approved by the advisory board.[33]

Proposals.[34]

Contracts for text books.[35]

Ratification of action of officers.[36]—The electors of a school district, acting with full knowledge thereof, may ratify an action in excess of its authority by a school board in the purchase of a school house site,[37] or by the board of trustees of a town library in the execution of contracts and payments thereon;[38] but a

24. Smithers v. Lowrance [Tex. Civ. App.] 91 S. W. 606.

25. See 4 C. L. 1406.

26. Where bids for the erection of a school building were opened and a motion carried to let the contract to the lowest bidder, a telegram "You are low bidder. Come on morning train," is not a sufficient acceptance. Cedar Rapids Lumber Co. v. Fisher [Iowa] 105 N. W. 595.

27. A contract could not be considered complete where a bidder after a notice merely that he was "low bidder" desired to correct an error in the footing of his bill and the board expressed a desire to make some changes in the specifications. Cedar Rapids Lumber Co. v. Fisher [Iowa] 105 N. W. 595. Under such circumstances the board could not declare the bidder's deposit forfeited on the ground of refusal on the part of the bidder to enter into a contract. Id. Nor could the board, under the provisions of Code, § 2779, permitting the rejection of all bids and the re-advertising for bids, on the refusal of the lowest bidder to enter into a contract, let the contract to a nonbidding party and then recover of the lowest bidder the difference between such contract price and his bid. Id.

28. Under Pol. Code, § 1876 prohibiting any school trustee from being interested in any contract made by the school board. Escondido Lumber, Hay & Grain Co. v. Baldwin [Cal. App.] 84 P. 284.

29. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734.

30. Where on conflicting evidence the finding was that due notice of a meeting was given and the facts of the purchase of certain maps was generally known and a warrant issued, but no steps were taken to countermand the order or repudiate the sale for four or five months, the maps meanwhile being received and distributed among the schools, the district was liable therefor. Akron Sav. Bank v. School Tp. [Iowa] 103 N. W. 968.

31. Construing acts of Congress of June 25, 1864, 13 Stat. at L. 187, c. 156, and of June 11, 1878, 20 Stat. at L. 103, c. 180. Myers v. District of Columbia, 25 App. D. C. 132.

32. Ky. St. 1903, § 3212. Board of Education of Newport v. Newport Nat. Bank [Ky.] 90 S. W. 569.

33. Under Burns' Ann. St. § 8085i, relative to advisory boards of townships. Lincoln School Tp. v. Union Trust Co. [Ind. App.] 74 N. E. 272.

34, 35. See 4 C. L. 1407.

36. See 4 C. L. 1408.

37. Nichols v. Pierce County Directors [Wash.] 81 P. 325.

38. The contracts having been made in good faith and ratified, the fund when paid over should be charged with a trust to indemnify the trustees against any loss by reason of personal liability on the contracts. Nelson v. Georgetown [Mass.] 76 N. E. 606.

contract of employment of a teacher, made without any action of the board of directors authorizing it, was not rectified by being recorded by the clerk of the board.[39]

Officers are not personally liable.[40]

Contractors' bonds.[41]

§ 6. *Funds, revenues, and taxes.*[42]—In the absence of any prohibitory or conflicting constitutional provisions, the state legislature has full discretionary power as to the manner in which the funds, derived from the sale of public lands and donated by act of congress to the state for the maintenance of at least one college for instruction in agriculture and mechanic arts, shall be applied to that purpose.[43] Under the laws of Kentucky the tax on foreign insurance companies of $2 on each $100 of premiums is no part of the 22 cents on each $100 of valuation of property required to be assessed for taxation for the school fund,[44] nor is it fine, forfeiture or license, so as to require the payment of a portion of it into the school fund.[45] Under the constitutional provisions of Montana, for the investment of the funds of state institutions of learning, as soon as the state treasurer receives any money from the sale of normal school lands or timber he is required to invest the same and to apply only the interest therefrom and the rents from leased lands for the maintenance of the school.[46] In Washington the constitutional provisions for the investment of the state school funds not only prohibit their investment in private securities but define the character of public securities in which they may be invested.[47] In Ohio the board of commissioners of the sinking fund of a school district [48] is entitled to the management and control of said fund for the payment of debts and investment of the surplus without dictation, but is not entitled to the custody or possession thereof,[49] and orders drawn on said fund must be drawn by the president and clerk of the board of education in favor of the person entitled

39. Rev. St. 1899, § 9766. Pugh v. School Dist. No. 5 in Tp. No. 59 [Mo. App.] 91 S. W. 471.

40, 41, 42. See 4 C. L. 1408.

43. It may prescribe what college or colleges shall receive the funds or may bestow them upon a university of the state; it may withdraw them from any such institution and found another for the purpose of receiving them; it may prescribe proper educational qualifications for admission to such institutions, and provide for the management and control of the institutions and change such provisions at will. State v. Bryan [Fla.] 39 So. 929. Laws of 1905, c. 5384, No. 13, abolishing several state educational institutions and creating a state board of control, etc., does not conflict with Act Cong. July 2, 1862, c. 130, 12 Stat. 503, donating lands for the maintenance of a college to teach agriculture and mechanic arts, etc. Id.

44. By Ky. St. 1903, § 4370, subd. 5. Fuqua v. Hager, 27 Ky. L. R. 46, 84 S. W. 325.

45. Under Ky. St. 1903, § 4370, subd. 6. Fuqua v. Hager, 27 Ky. L. R. 46, 84 S. W. 325.

46. Const. art. 11, § 12. State v. Rice [Mont.] 83 P. 874. Laws 1905, p. 5, § 5 in providing for the payment of the interest and principal of bonds, issued for the equipment of a state normal school, out of moneys derived from the sale of lands or timber on lands granted in aid of such school, contravenes Const. art. 11, § 12, requiring normal school funds so obtained to be invested and the income therefrom to be used for the maintenance of the school. Id. The provisions of Const. art. 11, § 12, refer only to the control of the funds arising from the sale and rent of the lands and hence do not conflict with Act Cong. Feb. 22, 1889, granting the normal school lands to the state, which refer only to the management and disposition of the lands themselves. Id.

47. Const. art. 16, § 5, as amended in 1894. State v. Clausen [Wash.] 82 P. 187. Bonds of a city indebted to its constitutional limit, issued under the express provisions of Laws 1901, p. 177, c. 85, for a waterworks plant and payable only out of a special fund arising out of the receipts of the plant, without pledging the credit of the city, are not such municipal bonds as are contemplated in the constitutional provision for the investment of state school funds. Id.

48. Appointed under Rev. St. §§ 3971, 3972. State v. Board of Education of Findlay, 3 Ohio N. P. (N. S.) 401.

49. State v. Board of Education of Findlay, 3 Ohio N. P. (N. S.) 401. Inasmuch as the primary purpose of § 3968, providing for the designation of an official depository for school funds, is to obtain a revenue from the idle monies of school boards, the provision of the act that the depository shall give a good and sufficient bond "of some approved surety company" is incidental merely, and indicates a purpose to require a good and sufficient lawful bond and nothing more. State v. Rehfuss, 7 Ohio C. C. (N. S.) 179. It follows, therefore, that the objectional provision of the act is directory only and that the act is constitutional. Id.

thereto upon requisition made upon them by said board therefor.[50] The separation of school funds under the new school code of Ohio, making it possible to distinguish the trust from the contingent fund, will not have the effect of rendering valid an assessment against school property for a street improvement where the levy was made prior to the passage of the school code, whatever may be its effect as to such levies made subsequent thereto.[51] Though a county treasurer in Indiana is not the agent of the county with respect to money of a school city collected by him, and the board of county commissioners occupies no relation of trust as to such funds, the county is nevertheless liable for funds of a school city received by it in compromise of a defaulting treasurer's shortage and turned into the general fund of the county.[52] Where the taxpayers have voluntarily paid taxes for school purposes they should not be diverted from their proper channel by technical objections to the manner of levy.[53]

Tuition and incidental fees.[54]—A foster child, resident of a district although not legally adopted, cannot be charged tuition.[55] Where the children of one town district attended the schools of another, after notice that tuition would be charged had been given by the latter district to the other, an implied contract to pay the same was created.[56] An agreement to pay tuition in advance at a rate fixed by the receiving district is a valid condition for the admission of the pupils of one district to the high schools of another.[57]

Debt limit.[58]—A contract beyond the legal limit of indebtedness may be valid to an amount within such limit.[59] In California the assumption of a pro rata share of taxes to maintain and liquidate the bonded indebtedness of a high school district, as a condition of the admission of an adjacent district to such high school district, is the incurring of indebtedness within the purview of the constitutional inhibition of the incurring of certain indebtedness without the assent of two-thirds of the electors.[60]

Levy and collection of taxes.[61]—The power to conduct a school carries with it the power to meet those obligations which are justly incurred in conducting it,[62] and school district authorities are generally empowered by statute under certain conditions to levy and collect taxes therefor,[63] and they may make levies within the statutory limit for such purpose,[64] but statutes authorizing the imposition of

50. Rev. St. §§ 3970-74, 4047. State v. Board of Education of Findlay, 3 Ohio N. P. (N. S.) 401.

51. Board of Education of Columbus v. Bowland, 3 Ohio N. P. (N. S.) 122.

52. Demarest v. Holdeman, 34 Ind. App. 685, 73 N. E. 714.

53. Trustees of Schools v. School Inspectors, 115 Ill. App. 479.

54. See 4 C. L. 1408.

55. McNish v. State [Neb.] 104 N. W. 186.

56. Town District of Hardwick v. Wolcott [Vt.] 61 A. 471.

57. Mooney v. Tulare County Sup'rs [Cal. App.] 83 P. 165.

58. See 4 C. L. 1409.

59. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734.

60. Const. art. 11, § 18. People v. Hanford Union High School Dist. [Cal.] 84 P. 193.

61. See 4 C. L. 1409.

62. Churchill v. Highland Park Graded School Trustees [Ky.] 89 S. W. 122.

63. Although the power of school township trustees as to the removal of school houses and the abandonment of school districts is limited by Burns' Ann. St. 1901, §§ 5920a-5920g, yet § 5920, authorizing them to establish schools and build school houses therefor, has not been changed. State v. Black [Ind.] 76 N. E. 882. Under the statutes of Illinois, where a school district has issued bonds for part of the cost of a school house, it may thereafter levy an annual tax, not to exceed two and one-half per cent. of the taxable valuation of the district for the payment of interest on the bonds and to create a sinking fund to pay the bonds [4 Starr & C. Ann. St. pp. 1168, 1169, § 1] (People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734), and where a school building has been authorized the directors may, from time to time, levy taxes to build it as directed by the vote, or as they may determine, in case the price and character of the building were not determined by vote (Id.).

64. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734. A levy for building purposes within such limit, if otherwise valid, will not be invalidated by the letting of a contract beyond the constitutional limit. Id. In Kentucky under Ky. St. 1903, § 4440, school district trustees are authorized to levy a capitation tax for erecting or furnish-

taxes for the support of schools contemplate their levy only on property within the boundaries of the district.[65] Where a private academy has been voted funds by a school district for erecting a school building for the town district, such building becomes for all practical purposes its school house,[66] and the district may lawfully expend money for repairs and improvements thereon.[67] In Kentucky it is not necessary for a fourth class city to comply with the statute for the acceptance of the graded school law [68] before it can hold an election for the mere levying of an increased ad valorem tax for the maintenance of public schools and the erection of buildings.[69] In South Dakota the county treasurer is the collector of taxes and must pay over to the school district all moneys received by him and belonging to the district.[70] It is no defense to the collection of a school tax that it is proposed to divert the tax when collected to a different purpose from that for which it was levied.[71] Taxes and assessments for school purposes, levied and imposed under acts subsequently declared unconstitutional, may be validated by the legislature.[72]

School bonds.[73]—Where the general law provides for the issue of bonds by districts, the power of a school district to issue them is distinct from that of a city whose charter authorizes the issue of bonds for school purposes, even though the district and city are identical in territorial limits.[74] Where, through inadvertence, no tax was levied for the payment of school district bonds, the action of the district in liquidating the bonds by issuing refunding bonds as provided by statute [75] was sustained, though the effect of the action was to postpone payment more than 20 years from the contracting of the debt.[76] In Washington the action of the board of school directors as a canvassing board, at a special election called to vote on a proposed bond issue in the absence of any showing of fraud, failure in

ing a school house, not exceeding a certain limit. Trustees of Common School Dist. No. 32 v. Thomas Kane & Co., 27 Ky. L. R. 983, 87 S. W. 321. Such tax may be levied, although not assented to by the people and although no tax is actually levied by the school trustees for the year, notwithstanding the prohibition in Const. § 157, of any municipality becoming indebted to an amount exceeding in any year the income provided without the assent of two-thirds of the voters. Id.

65. Ky. St. 1903, § 4482. Restitution of taxes levied by mistake on property outside of district and paid by owner. Churchill v. Highland Park Graded School Trustees [Ky.] 89 S. W. 122.

66. The fact that certain rooms only were used by the district and the rest by the academy was presumably a convenient arrangement for the use of the building and not an absolute division, curtailing the rights of the town district pupils in the use of the entire building. Brooks v. School Dist. of Franconia [N. H.] 61 A. 127.

67. The mere fact that the academy may incidentally derive a benefit therefrom is immaterial. Brooks v. School Dist. of Franconia [N. H.] 61 A. 127.

68. Ky. St. 1903, § 4489, specifying the conditions of acceptance. Bowman v. Middlesboro [Ky.] 91 S. W. 726.

69. Under Ky. St. 1903, § 3490, subd. 2, as amended by Act March 24, 1904, for the levy of an additional ad valorem tax for school purposes. Bowman v. Middlesboro [Ky.] 91 S. W. 726. The board of education of a fourth class city being charged by Ky. St. 1903, § 3588, with the conduct of the common schools and the control of the school funds, its approval of the action of the city in the matter of an election for the levy of an increased ad valorem tax for school purposes, under Ky. St. 1903, § 3490, subd. 2, as amended by Act March 24, 1904, was proper and could not affect the validity of the bonds issued. Id.

70. Laws 1897, p. 60, c. 28, §§ 79, 95. Mineral School Dist. No. 10 v. Pennington County [S. D.] 104 N. W. 270. He cannot retain any part of such taxes as the school district's portion of the cost of defending an injunction suit, to prevent the collection of the taxes, brought in the Federal court. Id.

71. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734.

72. Act Oct. 19, 1903 (P. L. 1903, Sp. Sess. p. 96), to validate such taxes, etc., declared constitutional and effectual to make valid all appropriations, taxes and assessments made under the general school laws of 1900 and 1902, which were held unconstitutional. Woolley v. Hendrickson [N. J. Law] 62 A. 278.

73. See 4 C. L. 1409.

74. Los Angeles School Dist. v. Longden [Cal.] 83 P. 246.

75. Rev. St. 1899, § 5157, as amended by Acts 1901, p. 52, authorizing districts to refund indebtedness at a lower interest rate by issuing bonds payable in not less than five nor more than thirty years from date. State v. Walber [Mo.] 92 S. W. 69.

76. Const. art. 10, § 12, provides for the collection of an annual tax by school districts to pay interest on such indebtedness and to create a sinking fund for payment of the principal within twenty years from the date of contracting the debt. State v. Walker [Mo.] 92 S. W. 69.

duty, or malfeasance, is final, no provision being made by statute for any contest.[77] Equity will relieve the holders of void school district bonds, under the doctrine that equity follows a fund, where the proceeds have been excessively used in procuring a lot, school house, and furniture.[78]

Orders and warrants for payment of claims.[79]—Where school orders were intended to be continuing obligations for loans and a separate agreement for the payment of interest was made, the orders bore interest as stipulated until payment was demanded, suit brought, or payment made.[80] An order drawn for the payment for lumber used in the construction of a school house is not void, because the lumber was bought of a corporation in which one of the school trustees was a stockholder and because the order was subsequently assigned to the corporation.[81] A school warrant issued in violation of positive statutory provisions is void.[82]

Apportionment of funds.[83]—In Georgia the apportionment of school funds is made according to school population and not according to the number actually attending the schools;[84] and the citizens and taxpayers of a county outside of a town or city, patrons of the county schools, may proceed by application for an injunction to prevent the payment to such town or city of a greater proportion of the county school funds than it is entitled to.[85] In North Carolina a special tax for the establishment of a graded school in a town cannot be apportioned between the white and colored races per capita.[86]

§ 7. *Teachers and instruction.*[87]—A diploma of the State Normal School of New York, until revoked or annulled, conclusively establishes the holder's fitness and qualifications as a teacher and cannot be limited in the absence of clear statutory authority.[88] A county superintendent of schools is estopped to attack collaterally a certificate issued by him by showing that it was issued without due examination;[89] and where the law provides that he may at his option renew teachers' certificates at their expiration by indorsement, they can be renewed only in that manner, and the issue of a new certificate cannot be deemed a renewal.[90] The

77. Nichols v. Pierce County Directors [Wash.] 81 P. 325. Ballinger's Ann. Codes & St. §§ 2398-2405, being a special act for ratifying certain illegal school indebtedness, do not apply to an election to determine whether bonds shall be issued to construct a high school building. Id.

78. Bonds issued without a vote of the legal voters and void under Const. § 157. Board of Trustees of Fordsville v. Postel [Ky.] 88 S. W. 1065. Ky. St. 1903, § 2353, providing that when a deed is made to one and the consideration is paid by another no trust shall result, but not applying when the deed is so made without the consent of the payer, does not affect the doctrine that equity follows the fund and compels restitution when it can be identified. Id. The holders of such void bonds stand in the place of the original purchasers and may pursue the equitable remedy. Id.

79. See 4 C. L. 1410.

80. Winsted Sav. Bank v. New Hartford [Conn.] 62 A. 81.

81. Under Pol. Code, § 1876, prohibiting any trustee from being interested in any contract made with the board. Escondido Lumber, Hay & Grain Co. v. Baldwin [Cal. App.] 84 P. 284.

82. Rev. Pol. Code, § 2366, declares no contract binding on a school district unless made by the school board, acting as such at a regular meeting or a special meeting regularly called, except contracts employing teachers, and a warrant issued in payment of a contract otherwise made was held void. Rochford v. School Dist. No. 6, Lyman County [S. D.] 103 N. W. 763.

83. See 4 C. L. 1410.

84. The school population includes all children between six and eighteen years of age. Clark v. Cline, 123 Ga. 856, 51 S. E. 617.

85. Clark v. Cline, 123 Ga. 856, 51 S. E. 617. Where a county contains a town or city entitled to direct apportionments, the amount paid it is determined by the proportion of its school population to that of the county, as shown by the last school census. Id. Children of school age resident in the county but attending the public schools of a town or city are to be counted in the school population of the latter and their share of the county fund is to be paid to the proper officer of the municipal school board. Id.

86. Acts 1905, p. 31, c. 11, § 6, establishing a graded school in Kernersville. The school term must be of the same length during the year for each race. Lowery v. Board of Graded School Trustees [N. C.] 52 S. E. 267.

87. See 4 C. L. 1410.

88. Bogart v. Board of Education, 106 App. Div. 56, 94 N. Y. S. 180, arg. 44 Misc. 10, 89 N. Y. S. 737; Shaul v. Board of Education, 108 App. Div. 19, 95 N. Y. S. 479.

89, 90. Van Dorn v. Anderson, 219 Ill. 321, 76 N. E. 53.

provision of the charter of Greater New York that at the close of the third year of continuous successful service of a teacher the city superintendent may make a temporary license permanent is not mandatory,[91] nor is the issue of a special license to one who has taught three years under a temporary license a determination by the superintendent that the teacher is entitled to a permanent license.[92] A teacher in a town annexed to the city of Greater New York, holding a school commissioner's certificate, was not thereby entitled to become a member of the permanent teaching force in the city,[93] nor was her status as a member of that force affected by the issue to her subsequently of a first grade school commissioner's certificate.[94] The statute of New York making Saturday afternoon a public half-holiday does not prohibit a city board of school examiners from continuing examinations beyond noon of that day;[95] nor is a person who observes Saturday as a day of worship deprived of the equal protection of the law or discriminated against by being denied a special examination on some other day, in the absence of any statute requiring it.[96]

Contracts of employment.[97]—A board of directors of a school district can make a valid contract for the employment of a teacher only at a regular or special meeting as a board,[98] and the fact that such contract is regular on its face and is duly signed and attested is not conclusive of its legality. The validity of such a contract may depend upon the construction of the statute authorizing it.[99] A provision in a teacher's contract for the winter term agreeing to teach the spring term, "providing satisfaction is given the school board," authorizes the board to dispense with the teacher's services for the spring term, if dissatisfied, upon notice given before the commencement of the spring term.[1] In Alabama, district trustees are not deprived of the right to employ teachers by the provision of law rquiring the approval of the county board of education.[2] A contract between the school trustees and the teacher of a common school is, by implication, subject to the power of the proper authority to make reasonable regulations as to the management of the schools,[3] and a refusal to comply with such regulations, on the teacher's part, works a forfeiture of the contract.[4]

91. Laws 1901, p. 1774, c. 718 (Revised & Amended Greater New York Charter, § 1089). People v. Board of Education, 106 App. Div. 101, 94 N. Y. S. 61.

92, 93, 94. People v. Board of Education, 106 App. Div. 101, 94 N. Y. S. 61.

95. Laws 1892, p. 1485, c. 677, § 24 (Statutory Construction Law), and by Laws 1897, p. 759, c. 614, § 1, does not prevent a public officer from voluntarily performing an official act on holidays nor render such act void or voidable. Cohn v. Townsend, 94 N. Y. S. 817.

96. Cohn v. Townsend, 94 N. Y. S. 817.

97. See 4 C. L. 1410.

98. Rev. St. 1899, § 9766. A contract signed by the president and attested by the clerk, in the absence of any authority of the board, is not valid. Pugh v. School Dist. No. 5 [Mo. App.] 91 S. W. 471. A contract made with a teacher, at a meeting of which all the members of the school committee had notice and at which a majority was present, is valid and binding. Hitchens v. School Dist. No. 180 [Del.] 62 A. 897. Where the minutes of the meeting of a school board show that "all members answered the roll-call" and that a committee report recommending the employment of certain teachers was adopted, "all members voting in the affirmative," that was a substantial compliance with the spirit of an act requiring a record of the names of the members voting. Act April 11, 1862, P. L. 471, § 4. Burke v. Wilkes-Barre Tp. School Dist., 28 Pa. Super. Ct. 16.

99. In Pennsylvania, under Act June 25, 1885, P. L. 175, a local school board of a township may elect a properly qualified teacher for an ordinary common school for three successive school terms. Burke v. Wilkes-Barre Tp. School Dist., 28 Pa. Super. Ct. 16. In the expression "public high and state normal schools," in said act, the word "public" will not be construed as qualifying simply the word "high." Id.

1. Kingston v. School Dist. No. 5 [Mich.] 12 Det. Leg. N. 263, 104 N. W. 28.

2. Laws 1903, p. 292, § 10, authorizes district trustees to employ teachers subject to the approval of the board, and § 11 prescribes the powers and duties of the board. Gibson v. Mabrey [Ala.] 40 So. 297.

3. The state superintendent of public instruction has such power in New York. O'Connor v. Hendrick [N. Y.] 77 N. E. 612, afg. 109 App. Div. 361, 96 N. Y. S. 161.

4. The regulation of the New York state superintendent of public instruction prohibiting the wearing of a distinctively religious garb. O'Connor v. Hendrick [N. Y.] 77 N. E. 612, afg. 109 App. Div. 361, 96 N. Y. S. 161.

Dismissal, suspension, and reassignment.[5]—In California a board of education can hear testimony against a teacher, although no formal charges have been presented against her by the county superintendent,[6] the statutory provision of that state protecting teachers holding city certificates from removal without cause, applying only to holders of general certificates, while those holding special certificates for the teaching of special studies only are removable at the will of the board.[7] The right of a teacher to a writ of mandamus to compel her reinstatement to a position from which she has been summarily removed by the board depends upon this statute and is lost after three years both by laches and the limitation of actions on statutory liabilities.[8] Where the law provides that a board may remove a teacher upon notice in writing, giving, when required, the reasons for dismissal, a letter merely notifying the teacher that the trustees believed it for the best interests of the school that her services be dispensed with was not a sufficient compliance with the law.[9]

Breach of contract.[10]—Where a teacher is wrongfully discharged before the end of his term he can recover the stipulated compensation for the remainder of the term;[11] and where one is wrongfully prevented from retaining his position as a regular teacher, he can recover his salary for the term, less any sum he may have meanwhile earned as a substitute.[12] Where a teacher wrongfully discharged is unable to obtain other employment, the fact that the school board employed another teacher in her place does not prevent her recovery of the stipulated wages.[13]

Payment of salary.[14]—In Ohio the statutory provision for the payment to teachers in the public schools of any county where a county institute is held, of their regular salary for the week of their attendance at the institute, applies alike to those who have been engaged to teach for the ensuing school year, but whose schools do not open until after the holding of the institute, and to those who have not yet been employed but are thereafter employed for a term beginning within three months after the close of the institute.[15]

5. See 4 C. L. 1411.

6. Pol. Code, §§ 1791, 1793, authorizes such boards to dismiss teachers for certain causes; § 1543 imposes no duty on the superintendent to prefer such charges; and the provisions of the San Francisco charter imposing that duty being in conflict with the general school law, are of no effect. McKenzie v. Board of Education [Cal. App.] 82 P. 392, 394.

7. Pol. Code, § 1793. Bradley v. Board of Education [Cal. App.] 81 P. 1036.

8. Code Civ. Proc. § 338, subd. 1, bars such actions in three years. Harby v. Board of Education [Cal. App.] 83 P. 1081.

9. Code Pub. Gen. Laws 1904, art. 77, § 53. Underwood v. Prince George's County School Com'rs [Md.] 63 A. 221.

10. See 4 C. L. 1411.

11. Hitchens v. School Dist. No. 180 [Del.] 62 A. 897. Plaintiff's testator, holding a state certificate, was employed by a school board for an indefinite term to teach a particular school, and taught until prevented from doing so by the New York city superintendent of schools, the district having been incorporated within that city. Held that he could recover for breach of contract. Shaul v. Board of Education, 108 App. Div. 19, 95 N. Y. S. 479.

12. He was employed as a teacher in the city of Brooklyn when it became a part of New York city and was continued in the same position by Laws 1897, pp. 403, 404, c. 378, §§ 1114, 1117, until removed for cause after trial, but was prevented from teaching by the city superintendent of schools. Bogert v. Board of Education, 44 Misc. 10, 89 N. Y. S. 737, affd. 106 App. Div. 56, 94 N. Y. S. 180. Such teacher was not a person holding office for a definite term, within New York city charter, § 1117 (p. 404), providing for their retention for the remainder of their terms only, but he was continued as a teacher under § 1117 and could be removed only after trial under § 1114, p. 403. Bogert v. Board of Education, 106 App. Div. 56, 94 N. Y. S. 180, afg. 44 Misc. 10, 89 N. Y. S. 737.

13. A letter to the board announcing her intention to marry, but that she would continue to teach until the end of the year, followed by another near the close of the year that she would teach another year under her contract if satisfactory to the board, did not constitute a resignation which the board could accept as such. Underwood v. Prince George's County School Com'rs [Md.] 63 A. 221.

14. See 4 C. L. 1411.

15. Rev. St. § 4091. Board of Education of the Bowling Green City School Dist. v. Beverstock, 7 Ohio C. C. (N. S.) 373.

Instruction.[16]

§ 8. *Control and discipline of scholars, and regulation of attendance.*[17]—The enforcement of wholesome and reasonable discipline is important to the upholding and maintenance of the common school system in its integrity.[18] In Iowa, under the authority conferred on school boards to adopt regulations for the conduct of pupils, a board could prohibit pupils from playing football in a game purporting to be played under the auspices of the school, by a team purporting to represent the school, though the game was not played in school hours or near the school grounds.[19]

Corporal punishment.[20]—A teacher, standing in loco parentis and exercising the parent's delegated authority, may administer reasonable chastisement to a child to the same extent as the parent himself.[21]

§ 9. *Torts and liability for the same.*[22]—The duty of providing public education at the public expense by building and maintaining school houses and conducting schools is purely a public or governmental duty, in the discharge of which school districts act as representatives of the state.[23] The statutory liability imposed on "owners" or "possessors" of premises for damages resulting from unlawful excavations thereon [24] does not apply to boards of education holding title to lots for school and school building purposes.[25]

§ 10. *Decisions, rulings, and orders of school officers, and review of the same.*[26]—Generally the exercise of the judgment and discretion reposed in the officers of school districts is reviewable only in the manner provided by law,[27] and the courts will not interfere with them while acting within their legal province, except in case of abuse of their powers.[28] A taxpayer may have an injunction to

16, 17. See 4 C. L. 1412.

18. This high duty is cast upon the trustees and the courts will not interfere with them while acting within their legal province, except in case of abuse. Cross v. Walton Graded Common School Dist. Trustees [Ky.] 89 S. W. 506.

19. Code, §§ 2743, 2745, 2772. Kinzer v. Directors of Independent School Dist. [Iowa] 105 N. W. 686.

20. See 4 C. L. 1412.

21. To make the act criminal it must be done immoderately and malo animo, or else some permanent injury must be inflicted. Holmes v. State [Ala.] 39 So. 569.

22. See 4 C. L. 1413.

23. Hence a city is not liable for injury to a pupil from a defect in a building furnished by it for a public school. Clark v. Nicholasville, 27 Ky. L. R. 974, 87 S. W. 300.

24. Rev. St. § 2676. Limiting excavations to nine feet. Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N. E. 646.

25. Board held not liable in its corporate capacity for damages to the foundation and walls on an adjoining lot, resulting from excavations below the statutory depth, for the foundations of a school building. Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N. E. 646.

26. See 4 C. L. 1413.

27. In Idaho the remedy for review of the action of a board of county commissioners is by appeal from the order or act complained of, under Rev. St. 1887, § 1776 (Amended Sess. Laws 1899, p. 248). Equity will not interfere in such case. School Dist. No. 25, Shoshone County v. Rice [Idaho] 81 P. 155. In New York under Laws 1902, p. 1343, c. 560; Laws 1894, p. 1278, c. 556 (modified by Laws 1904, p. 94, c. 40), and Code Civ. Proc. § 2122, the determination of a board of education, in a second class city, removing a principal of schools can be reviewed only by appeal to the commissioner of education and certiorari will not lie. People v. O'Brien, 97 N. Y. S. 1115. The determination by boards of supervisors in California, under Pol. Code, § 1670, subd. 22, of the questions involved, in acting on petitions for the admission of pupils in one district to the high school of another on terms, is conclusive. Mooney v. Tulare County Sup'rs [Cal. App.] 83 P. 165. In Washington the action of the county superintendent in organizing a new school district may be reviewed on appeal to the county commissioners, whose decision is final, unless there is a want or an exceeding of jurisdiction. Wilsey v. Cornwall [Wash.] 82 P. 303. In South Dakota an appeal lies to the circuit court from the action of commissioners appointed to organize a school district from territory lying in two adjacent counties under Rev. Pol. Code, § 2410, as amended Laws 1903, p. 150, c. 133 (Independent School Dist. No. 2 v. District No. 37 [S. D.] 106 N. W. 302), and when the circuit court tries an appeal de novo and adjudicates the matter of the division of the property of the districts, it is not necessary to determine whether the proceedings of the committee in the premises was or was not properly made (Id.).

28. In Alabama the county board of education is a deliberative body, charged under Laws 1903, p. 292, § 11, with the duty of determining whether the employment of a teacher by the district trustees should be approved, and their reasons for approving or disapproving cannot be inquired into.

prevent the misappropriation of school funds by an unlawful contract,[29] and mandamus will lie against a superintendent of schools to compel the performance of a merely ministerial duty,[30] but will not be issued to interfere with the exercise of his discretionary powers, of a judicial nature, except in case of their gross abuse.[31] Where the statutes providing for the formation, etc., of districts provided for an appeal to the superior court, giving the court the same powers to act on the application as the town had in the first instance,[32] on an appeal from a rescission of a consolidation of two districts, the reversal or modification of the action of the township was within the court's discretion,[33] and the provision of the statute that the action of the county board confirming or rejecting the action of the district school trustees shall be final, makes it final only so far as the trustees are concerned and does not interfere with the power of the state board of education to direct the

Gibson v. Mabrey [Ala.] 40 So. 297. Courts will not interfere with trustees of school districts while acting within their legal province in the enforcement of wholesome discipline except in case of the exercise of arbitrary power, the exercise of arbitrary power being forbidden by the constitution of Kentucky to any man or set of men. (Cross v. Walton Graded Common School Dist. Trustees [Ky.] 89 S. W. 506); nor control the exercise of the judgment and discretion reposed by law in a board of school examiners as to fixing the day for holding teachers' examinations (Cohn v. Townsend, 94 N. Y. S. 817); nor coerce by mandamus the discretion vested in a board of education as to the adjustment and payment of amounts claimed under contracts, by Acts 1874, Colo., p. 234, § 14 (Keefe Mfg. & Inv. Co. v. Board of Education, 33 Colo. 513, 81 P. 257). Where the statutes provide for appeals from decisions of township trustees in school matters to the county superintendent, the discretion of the trustees in establishing districts and locating and building new school houses, if exercised in good faith, cannot be reviewed by the courts in mandamus proceedings. Burns' Ann. St. 1901, § 6028, authorizes such appeals. State v. Black [Ind.] 76 N. E. 882. In the absence of any showing of fraud in the settlement, the court of common pleas cannot allow an appeal nunc pro tunc from a settlement of a school district treasurer's accounts by borough auditors four months after the thirty days allowed for appeal. Act April 15, 1834, P. L. 537. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super. Ct. 39. Where the statute, Code, § 2774, provides for the furnishing of school facilities for any ten children in the district and a remedy for the board's failure to do so, the fact that pupils may be deprived of such privileges by a consolidation of districts is no ground for a review of the proceedings of consolidation by certiorari. Molyneaux v. Molyneaux [Iowa] 106 N. W. 370. In Georgia the county board of education constitutes a tribunal to determine matters of local controversy under the school law, but this does not oust a court of equity of its lawful jurisdiction. The unlawful payment of county school funds to a municipal school system will be enjoined. Clark v. Cline, 123 Ga. 856, 51 S. E. 617. Although in Iowa, under Code, § 2818, the proper remedy for a review of the proceedings of a school board, either as to law by fact in a matter resting within its discretion is by appeal to the county superintendent of schools [Code, § 2818] (Kinzer v. Directors of Independent School Dist. [Iowa] 105 N. W. 686), yet the question of whether regulations for the conduct of pupils, for violation of which one has been expelled, reasonably fall within the authority conferred by Code §§ 2743, 2745, 2772, 2782, is reviewable by the courts but will not be interfered with except in case of abuse of discretion (Id.). Findings by the board that a pupil had violated a regulation prohibiting the playing of foot ball in a game purporting to be played under the auspices of the school by a team purporting to represent the school, though the game was not played in school hours or near the school grounds, and that his apology tendered was insufficient to purge his offense, were reviewable only on appeal to the county superintendent under Code § 2818. Kinzer v. Directors of Independent School Dist. [Iowa] 105 N. W. 686.

29. A contract between the district board and the state board of education for the employment by the latter of "critic teachers" to be paid in part by the district (Lindblad v. Board of Education [Ill.] 77 N. E. 450), but so far as such contract relates to the manner of conducting the schools in the district it causes no injury to a taxpayer and does not entitle him to an injunction to prevent its enforcement (Id.), although he might have a remedy at law by mandamus to compel the district board to provide such teachers for his children as the law intends (Id.).

30. To correct a certificate issued to a qualified teacher and illegally antedated so as to conform to the facts. Van Dorn v. Anderson, 117 Ill. App. 618, afd. Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53.

31. He exercises discretionary powers in determining the qualifications of an applicant for a certificate. Van Dorn v. Anderson, 117 Ill. App. 618, afd. Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53.

32. Gen. St. 1902, §§ 2175, 2181, 2182. First School Dist. of Groton v. Eighth School Dist. [Conn.] 61 A. 234.

33. Although the court found that a consolidation on certain conditions would be beneficial, yet it did not appear that the court abused its discretion in dismissing the appeal and refusing to enforce the consolidation, the sentiment of the town being pronouncedly against it. First School Dist. of Groton v. Eighth School Dist. [Conn.] 61 A 234.

county board as to the intent and meaning of the law.[34] Where an election held on the question of forming a new school district is void, any action had on appeal therefrom is also void.[35]

§ 11. *Actions and litigation.*[36]—In New York, by express constitutional and statutory provisions, a school district may sue in its corporate capacity,[37] but it cannot as a corporation, or as a representative of the taxpayers, have an injunction to restrain a village within the district from separating therefrom in the manner provided by law.[38] In Kansas, in case of the breach of any condition in a school district treasurer's bond, if the director neglects or refuses to prosecute, any householder of the district may cause a prosecution to be instituted in the name of the district and prosecute it to judgment.[39] Where after the issue of bonds a portion of the district was cut off and annexed to a city without any adjustment of bonded indebtedness, plaintiff in an action on the bonds is not obliged to make the city a party to the litigation.[40] Where the constitution of Louisiana directed the payment of certain city public school certificates out of the proceeds of the sale of constitutional bonds of an issue authorized for the liquidation of the city debt, and all the bonds authorized had been disposed of, mandamus did not lie to compel the issue and sale of additional bonds to pay belated certificates issued after the exhaustion of the bond issue.[41] In mandamus proceedings to compel the advisory board of a township to make an appropriation to build a school house, a complaint and alternative writ which failed to show that there were any available funds were demurrable.[42] A petition for a writ of mandamus to compel a township treasurer to credit a school district with the amount of taxes collected should allege that the district has not received the full amount of such taxes to which it is entitled, and that the treasurer holds sufficient funds to make such credit.[43]

§ 12. *Libraries, reading rooms, and other auxiliary educational institutions.*[44]—A gift of a library to "the inhabitants of the town of Georgetown" is a gift to the town in its corporate capacity,[45] and the fund donated for library purposes should be in the custody of the town to be drawn upon by the action of the trustees of the library as needed from time to time.[46]

§ 13. *Private schools.*[47]—A university corporation organized by the legislature of Kentucky took its powers, like all other corporations, subject to the reserved rights of the state to alter or repeal its charter.[48] The consolidation of two such institutions was authorized by the statutes of the state and was not a diversion of the purpose of the original incorporators or of those furnishing the means for

34. Code Pub. Gen. Laws 1904, art. 77, § 11, conferring such power and authority on the state board of education, is a valid exercise of legislative power and confers visitorial powers on such board over school matters in the state. Underwood v. Prince George's County School Com'rs [Md.] 63 A. 221.

35. An election under Rev. St. 1899, § 9742, being void for irregularity, the action of the county commissioner and board of arbitration, provided for in said section, held void. School Dist. No. 2, Tp. 24, v. Pace, 113 Mo. App. 134, 87 S. W. 580.

36. See 4 C. L. 1414.

37. Const. art. 8, § 3, and Laws 1892, p. 1801, c. 687, § 3. Union Free School Dist. No. 1 v. Glen Park, 109 App. Div. 414, 96 N. Y. S. 428.

38. Laws 1903, c. 125, p. 299. Union Free School Dist. No. 1 v. Glen Park, 109 App. Div. 414, 96 N. Y. S. 428.

39. Under Gen. St. 1901, § 6174. School Dist. No. 9 v. Brand [Kan.] 81 P. 473.

40. Southold Sav. Bank v. Board of Education, 44 Misc. 74, 89 N. Y. S. 714.

41. The remedy of the certificate holders in such case was legislative and not judicial. State v. Board of Liquidation of City Debt [La.] 39 So. 448.

42. Advisory Board of Harrison Tp. v. State [Ind.] 76 N. E. 986.

43. People v. Helt, 116 Ill. App. 391.

44. See 4 C. L. 1414.

45. Construction of the terms of the gift as to the erection of a new building, selection of site, and cost of building. Nelson v. Georgetown [Mass.] 76 N. E. 606.

46. Nelson v. Georgetown [Mass.] 76 N. E. 606.

47. See 4 C. L. 1415.

48. Reserved in the general law of 1856. Central University of Kentucky v. Walter's Ex'rs [Ky.] 90 S. W. 1066.

establishing them,[49] and its effect was to continue in the new corporation all the property rights of the constituent corporations, subject to the terms of their acquirement.[50] A teacher employed by an independent contractor, to whom the proprietor of a private school has let a department, has no claim against the proprietor for her services.[51] Where a teacher was sick and his wife taught for him without being employed by the school, it was a question for the jury to determine whether the wife's services were accepted in lieu of her husband's and he was entitled to compensation therefor.[52]

SCIRE FACIAS.[53]

After the severance of such plaintiffs in error as refuse to assign errors, scire facias will lie on behalf of the other plaintiff to obtain a hearing upon their assignment of errors.[54] Where a scire facias sur municipal lien is insufficient to obtain a judgment thereon because of defective service, it does not continue the lien so as to give validity to a judgment on an alias scire facias sued out after the expiration of the lien of the original claim.[55] A scire facias proceeding to revive a default judgment in ejectment in the Federal courts of Virginia is matured at rules.[56]

Service.[57]—In serving a scire facias sur municipal lien the statute must be strictly followed.[58]

A return[59] which does not show sufficient service may be amended as against defendant on scire facias to revive a default judgment against such defendant.[60]

Procedure.[61]—Under a statute authorizing a defendant to plead as many matters as he may think necessary, repugnant pleas may be interposed on scire facias to revive a judgment.[62] Where a party is brought in as defendant after judgment by scire facias under section nine of the practice act, he may set up any defense that he might have interposed had he been originally made a party to the suit,[63] and his pleadings should be directed to the declaration and not to the writ.[64] It is unnecessary to allege in a writ of scire facias to revive a judgment matters which sufficiently appear in the judgment roll,[65] and especially will a writ be held sufficient where by immemorial practice such facts have been omitted.[66] A writ in the usual form to revive a judgment alleging that "execution for the debt, etc., still remains to be made" sufficiently alleges that the judgment has not been satisfied.[67]

In a proceeding scire facias to revive a judgment it is no defense that the judg-

49. Ky. St. 1903, § 555. The consolidation of a college and a university owned by the northern and southern Presbyterian churches respectively was valid. Central University of Kentucky v. Walter's Ex'rs [Ky.] 90 S. W. 1066.

50. The consideration of a note given to endow a chair in one of the institutions did not fail because of the consolidation and the removal of it from the residence city of the maker, no condition appearing in the note. Central University of Kentucky v. Walter's Ex'rs [Ky.] 90 S. W. 1066.

51. Coltrane v. Peacock [Tex. Civ. App.] 91 S. W. 841.

52. Southern Industrial Institute v. Hellier [Ala.] 39 So. 163.

53. See 4 C. L. 1415. Devlin v. McAdoo, 96 N. Y. S. 425.

54. Fraser v. Fraser, 110 Ill. App. 619.

55. City of Philadelphia v. Cooper, 212 Pa. 306, 61 A. 926, rvg. 27 Pa. Super. Ct. 552.

56. King v. Davis, 137 F. 198.

57. See 4 C. L. 1415.

58. Where the statute requires an affidavit to be filed, where personal service cannot be had, stating that the registered land owner is a nonresident, to be followed by a posting and publication, a failure to follow the statute results in a void service. Act June 10, 1881 (P. L. 91). City of Philadelphia v. Cooper, 212 Pa. 306, 61 A. 926.

59. See 4 C. L. 1415.

60. King v. Davis, 137 F. 198.

61. See 4 C. L. 1416.

62. Pleas denying service of process, declaration, and notices in the manner and at the time and places stated in the returns and alleging service by an unauthorized person are not objectionable. King v. Davis, 137 F. 198.

63, 64. Lasman v. Harts, 112 Ill. App. 82.

65. Where the proceeding is by the judgment plaintiff it is not necessary to negative assignment of the judgment. Starkweather v. West End Nat. Bank, 21 App. D. C. 281.

66, 67. Starkweather v. West End Nat. Bank, 21 App. D. C. 281.

ment was obtained through fraud,[68] nor is it a defense to a scire facias proceeding to revive a judgment in ejectment that defendant's only interest in the property was under a lease which has been surrendered to the landlord.[69]

Where, on scire facias to revive a default judgment, the record shows that the return of service in the original action was insufficient to show a valid service, the judgment will be vacated under either a motion to vacate or a plea of nul tul record, but subject to the right to amend the return of service.[70] Oyer of a recognizance and of the record of a criminal proceeding may be demanded in a scire facias procedure on a recognizance given in the proceedings.[71]

Appeal.[72]—An appeal in a scire facias proceeding will lie only from a final order or finding.[73]

SEALS; SEAMEN, see latest topical index.

SEARCH AND SEIZURE.

§ 1. *What is an unreasonable search and seizure.*[74]—No house can be entered or searched except under a warrant issued by a magistrate on sufficient cause proved before him on oath,[75] and a forcible entry by an officer without a warrant though on suspicion that a crime is being committed therein, is trespass and will be restrained.[76] In New York it is provided by statute that only after notice of authority and refusal of admittance may an officer break doors to enter.[77] A search by an officer of the person of one suspected of having stolen money in his possession, without any warrant having been issued or complaint entered, is illegal,[78] and the search is no less so because after arrest the person expressed himself as being willing to be searched.[79] A statute authorizing an officer to arrest without a warrant a person committing a misdemeanor in his presence is not an unreasonable seizure of his person,[80] nor is an act compelling a person to permit certain specified books or papers in his possession to be inspected by the assessor for the purpose of discovering whether some third person has listed all his property for taxation, an unreasonable

68, 69, 70. King v. Davis, 137 F. 198.

71. State v. Dorr [W. Va.] 53 S. E. 120.

72. See 4 C. L. 1416.

73. An order overruling a demurrer to a writ of scire facias is not appealable unless an appeal is specially allowed. Starkweather v. West End Nat. Bank, 21 App. D. C. 281.

74. See 4 C. L. 1416. For seizure of property used or sold in violation of law see Betting and Gaming, 5 C. L. 417, and Intoxicating Liquors, 6 C. L. 165.

75. A charter empowering the police to enter any house if two householders report in writing to the police commission that there are good grounds for believing that it is a gambling house is unconstitutional. Greater New York, Charter, § 318. Phelps v. McAdoo, 94 N. Y. S. 265. A charter empowering the police to observe and inspect all gambling houses does not give the police the power to enter and search a house without a warrant on suspicion that it is a gambling house. Greater New York Charter § 315. Id.

76, 77. Phelps v. McAdoo, 94 N. Y. S. 265.

Note: Except in the cases where arrest may be made for crime without warrant (see 5 Columbia L. R. 612; 2 Hawkins P. C. c. 14; 2 Hale P. C. 92; Arrest and Binding Over, 5 C. L. 264), and in those cases where a stranger was sought by civil process in a house (5 Columbia L. R. 611), it is said to be a general rule that no one might break doors save pursuant to warrant issued by a justice of the peace on probable cause and supported by oath (McLennon v. Richardson, 15 Gray [Mass.] 74, 77 Am. Dec. 353. Even with a warrant he must have first demanded and been refused entrance (Semayre's Case, 5 Coke Rep. 91; 1 Smith's Lead. Cas. [8th ed.] 238; but see Hawkins v. Com., 14 B. Mon. [Ky.] 395, 61 Am. Dec. 147), disclosure of the contents of the warrant (2 Hale P. C. 116; Dremon v. People, 10 Mich. 169), some proof of the officer being such (State v. Green, 66 Mo. 361), and in the case of an unknown officer production of the warrant (2 Hawkins P. C. c. 13, § 28; State v. Curtis, 11 Hayw. [N. C.] 471).—From 5 Columbia L. R. 611. See, also, note to Semayre's Case, 1 Smith's Lead. Cas. [8th ed.] 238.

78, 79. Regan v. Harkey [Tex. Civ. App.] 13 Tex. Ct. Rep. 494, 87 S. W. 1164.

80. Cr. Code 1902, §§ 26, 590, not offensive to Const. art. 1, § 16. State v. Byrd [S. C.] 51 S. E. 542.

search within the constitutional prohibition.[81] The examination of books and papers of a public officer by an authorized committee is not an unreasonable search and seizure.[82] An officer searching premises under a writ must not make a more extensive search or seizure than authorized by the writ.[83]

A corporation is protected under the Federal constitution against unlawful searches and seizures,[84] and a subpoena duces tecum requiring a corporation to produce generally all papers, letters, communications of the corporation, is an unreasonable search and seizure [85] unless it be shown that all such papers, etc., are necessary, and in that case the subpoena must specify with particularity the papers, etc., required.[86] A law for the seizure of property must in due process of law provide for its judicial disposal when seized.[87] A warrant issued under an invalid law is no protection to the officer. [88]

§ 2. *Procedure for issuance and execution of search warrants.*[89]— Under a constitutional provision that no warrant to search any place or seize any person or thing shall issue without a special designation of the place to be searched, a warrant describing more than one place owned by different persons, is invalid.[90] A search warrant must show upon its face a cause in which such a warrant can lawfully issue,[91] and it must not be shown alternatively or left to several inferences.[92] All the requirements of the statute relative to the issuance of a search warrant must be strictly observed.[93] It is not a search under warrant if admittance to premises be gained by offer to produce a warrant, it being declined.[94]

SECRET BALLOT; SECURITY FOR COSTS, see latest topical index.

81. Act 1901, p. 109, c. 71. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

82. A committee duly authorized by the state legislature may examine the books of a county dispenser. State v. Farnum [S. C.] 53 S. E. 83.

83. Under a search warrant authorizing the officer to search plaintiff's premises and to seize and remove any liquor found therein together with the casks in which it is contained, he has no authority to seize a locked safe in the absence of evidence that it contained liquors. Blackman v. Nickerson, 188 Mass. 399, 74 N. E. 932.

84. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——.

85. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——; In re Hale, 139 F. 496.

86. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——.

87. Beavers v. Goodwin [Tex. Civ. App.] 90 S. W. 930.

Note: The act makes no provision for the disposition of liquors seized nor does it allow the offender a hearing before a judicial tribunal. Otherwise, it might be competent under the police power of the state. It has been quite generally held that if the property cannot be used except in violation of law statutes authorizing its destruction are valid. See Collins v. Lean, 68 Cal. 284, 9 Pac. 173-175, with reference to lottery tickets; Board of Police Com'rs v. Wagner, 93 Md. 182, 48 A. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775, allowing the seizure of slot machine. Frost v. People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352, regarding seizure of gambling apparatus. Such statutes are upheld on the theory that a thing which can be used only in violation of law is not property in the sense that it is entitled to the protection of the law. But here, the property seized might have been subjected to a perfectly legitimate use and was, therefore, entitled to protection. Hence its owner could not be deprived of it without due process of law and its disposition should not be left to a ministerial officer. See Cooley's Const. Lim. [7th ed.] p. 431, and Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420. Also, Sullivan v. Oneida, 61 Ill. 242, and Darst v. State, 51 Ill. 286, 2 Am. Rep. 301, holding that the power to destroy property could be exercised only by some judicial instrumentality. As was said by Speer, J., in the principal case: "Due course of the law of the land may not always mean a trial by jury, but it at least does mean that the citizen's property shall not be taken from him permanently without notice, and the opportunity of being heard before a judicial tribunal." See Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, commented on 4 Mich. L. R. 294.—From 4 Mich. L. R. 551.

88. Beavers v. Goodwin [Tex. Civ. App.] 90 S. W. 930.

89. See 4 C. L. 1417.

90. State v. Duane [Me.] 62 A. 80.

91. Under a statute which provides that a search warrant can only issue for gambling apparatus in a gaming house, a writ which fails to state that the house to be searched is a gaming house is void. Early v. People, 117 Ill. App. 608.

92. A warrant which may issue only on complaint of an officer or citizen must show in which capacity complaint was made. If officially the office must appear. Casselini v. Booth, 77 Vt. 255, 59 A. 833.

93. Under a statute requiring the search warrant to command the officer serving it to bring the person in possession of the seized property before the court, a writ failing so to direct is void. Early v. People, 117 Ill. App. 608. A search warrant which com-

SEDUCTION.

§ 1. *Nature and elements of the tort.*[95]

§ 2. *Civil remedies and procedure.*[96] *Pleading.*—In a complaint charging seduction it is sufficient to allege that the defendant "seduced, debauched, and carnally knew" plaintiff, without alleging the means or specific acts employed to accomplish the purpose.[97]

Evidence.[98]—In a civil action by the seduced where the birth of a child is alleged in aggravation of damages, evidence is admissible of intercourse with other men during the period when conception may have taken place,[99] which period may be shown by expert testimony where there is evidence of intercourse with another man.[1] In an action for seduction the question whether sexual intercourse for the first time in a top buggy with the top up by persons of usual weight and height would result in conception is not a subject of expert testimony,[2] but whether pregnancy would be likely to result from a woman's first act of intercourse is.[3]

To justify a court in directing a verdict the evidence must be undisputed or so certain and convincing that no reasonable mind could come to any but one conclusion.[4]

§ 3. *The crime* [5] consists generally in inducing an unmarried woman of chaste character [6] to have sexual intercourse by promise of marriage,[7] or by artifice or other seductive means.[8] The words "virtuous" or "chaste" means physical not moral chastity,[9] but a woman who has once surrendered her chastity may reform and, if chaste at the time, comes within the protection of the statutes defining seduction.[10] Where the only means used by the defendant to induce the prosecutrix to submit to sexual intercourse was a promise of marriage, the prosecutrix must have relied on and been induced by it alone.[11] One who has sexual intercourse with a virtuous female under a promise of marriage is guilty of seduction if he refuses to marry her though the promise was made in good faith at the time of the intercourse.[12]

mands the officer to bring the property before the officer issuing it, or "to some other judge or justice of the peace of the court," is void under a statute requiring the articles to be brought to the judge or justice of the peace who issues the warrant or to some other judge or justice of the peace or court having cognizance of the case. Id.

94. Articles so acquired are not compulsorily produced to be used in evidence. Commonwealth v. Tucker [Mass.] 76 N. E. 127. As to the rule against self-crimination, see Witnesses, 4 C. L. 1943.

95. See 2 C. L. 1620.

96. See 4 C. L. 1418.

97. The charge that defendant "seduced" plaintiff is tantamount to an allegation that artifice and deceit were employed. Peterson v. Crosier [Utah] 81 P. 860.

98. See 4 C. L. 1419.

99. Where child was born Jan. 14, 1904, testimony of a witness that he had intercourse with the plaintiff during the latter part of May and first part of June, 1903, is admissible. Kesselring v. Hummer [Iowa] 106 N. W. 501. It is proper to ask the plaintiff whether or not she had indulged in sexual intercourse with a certain other man during a period when under the laws of gestation it was possible the child was begotten. Id.

1, 2, 3. Kesselring v. Hummer [Iowa] 106 N. W. 501.

4. Evidence not sufficient: Evidence in an action of seduction which is confined to the testimony of the plaintiff who stated that she knew nothing of the intercourse until months afterwards when her memory was restored by hypnotism is not sufficient to justify the court in directing a verdict of guilty. Austin v. Baker, 96 N. Y. S. 814.

5. See 4 C. L. 1418.

6. Evidence held insufficient as to the chastity. Garlas v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 690, 88 S. W. 345.

7. Evidence held sufficient to sustain a conviction of seduction under a promise of marriage. State v. Drake [Iowa] 105 N. W. 54.

8. Neary v. People, 115 Ill. App. 157.

9. Washington v. State [Ga.] 52 S. E. 910.

10. Weaver v. State [Ala.] 39 So. 341.

11. Where the prosecutrix was moved partly by lust or fear and partly by the promise of marriage to submit to the intercourse, there is no crime of seduction. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242.

12. Rucker v. State [Ark.] 90 S. W. 151.

§ 4 *Indictment and prosecution.*[13]—An indictment for seduction need not allege the previous chastity of the female seduced, her unchastity being a defense to be interposed by defendant.[14] It is not ground for a new trial that the woman seduced was permitted to remain in the presence of the jury during the argument of the prosecuting attorney, though manifesting great feeling and emotion, where no objection was made by defendant's attorney.[15]

Suspension of prosecution by marriage.[16]—A statute which provides that if the accused marries the seduced woman such marriage shall suspend a pending prosecution for seduction, and also provides that if the accused subsequently wrongfully abandons her the prosecution shall revive, is not unconstitutional as tending to deny a speedy trial where the defendant makes no demand for a continuance of the trial,[17] nor does the suspension of the trial before verdict, with defendant's consent, and a subsequent trial after desertion, put the accused twice in jeopardy of his liberty,[18] and if no objection is made to the continuance his consent will be presumed.[19] Under statutes which provide that the marriage of the defendant and the prosecutrix will suspend the prosecution, some states hold that an offer by defendant to marry though not accepted by the prosecutrix will suspend the action,[20] but it constitutes no defense in Arkansas.[21] Where the statute requires the marriage to be consummated before final judgment, this provision must be complied with.[22] Under a statute which makes a subsequent offer of marriage a bar to an action for seduction, the offer must be made directly to the prosecuting witness.[23]

Burden of proof and evidence.[24]—Every woman is presumed to be of a chaste character and the burden is upon the defendant to overcome this presumption when he interposes a defense of unchastity,[25] and the jury cannot infer unchastity from the fact that no evidence was introduced to prove chastity.[26]

Evidence which tends to show that the prosecutrix was unchaste at the time of the seduction is admissible.[27] While it is no defense that the prosecutrix subsequently became a prostitute if she was chaste at the time of the intercourse with defendant, yet, if her conduct is such as indicates general prostitution, evidence of it is admissible as bearing upon the question whether she was chaste at the time of the alleged seduction,[28] while no particular amount of improper conduct or indecent familiarity with men, exclusive of sexual intercourse, is conclusive of an unchaste character,[29] yet proof of lascivious conduct is conclusive of it.[30] In rebuttal of evidence tending to prove specific acts of unchastity, the reputation of prosecutrix for sexual virtue is admissable, but not her general reputation for morality.[31] Prosecutrix's age is admissible as bearing upon her susceptibility to the artifices employed.[32] Prosecutor may testify directly as to the motive which caused her to yield to the sexual intercourse.[33] Evidence that prior to the trial the prosecutrix stated that

13. See 4 C. L. 1419.
14. Rucker v. State [Ark.] 90 S. W. 151.
15. Washington v. State [Ga.] 52 S. E. 910.
16. See 4 C. L. 1419.
17, 18, 19. Burnett v. State [Ark.] 88 S. W. 956.
20. Stat. 1893, § 1214. Commonwealth v. Akers [Ky.] 88 S. W. 1108.
21. Carrens v. State [Ark.] 91 S. W. 30.
22. A marriage or offer to marry after verdict but before the entry of the final judgment is sufficient. Commonwealth v. Akers [Ky.] 88 S. W. 1108.
23. Not sufficient if made to the father though the prosecuting witness is a minor. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242.
24. See 4 C. L. 1419.
25. Evidence held insufficient to overcome the presumption of chastity. State v. Drake [Iowa] 105 N. W. 54.
26. Weaver v. State [Ala.] 39 So. 341.
27. Letters written by the prosecutrix to third persons showing a vulgar and lascivious mind are admissible. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242. Evidence of acts of prosecutrix subsequent to the alleged intercourse, showing illicit relations with others, is admissible as tending to show that she was unchaste at the time of the sexual intercourse with defendant. Id.
28. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242.
29, 30, 31. State v. Hummer [Iowa] 104 N. W. 722.
32. Whatley v. State [Ala.] 39 So. 1014.
33. Not objectionable as opinion testi-

defendant had raped her is admissible to impeach her testimony.[34] Oral or written admissions of defendant are admissible,[35] as is evidence that defendant was not seen in the community after the woman's condition became known as tending to show that defendant realized his danger.[36] Where seduction by promise of marriage is claimed, conversations naturally characteristic of betrothed persons, such as expressions and manifestations of affection,[37] and declarations as to a previous marriage and divorce of defendant, are admissible.[38]

The woman seduced is not an accomplice to the act within the meaning of those statutes which require an accomplice's testimony to be corroborated before it will support a conviction,[39] but in many states her testimony is required by statute to be corroborated.[40] Under these statutes it must be corroborated on every material fact testified to.[41] Evidence of prosecutrix as to sexual intercourse is sufficiently corroborated if evidence be introduced which tends to show acts of sexual intercourse provided they be subsequent to the time of the promise of marriage.[42]

Instructions.[43]—Where the statute requires the evidence of the prosecutrix to be corroborated, it is not reversable error for the court to neglect to define the word "corroborate" if no request is made by defendant's counsel.[44] A charge upon the necessity of evidence to corroborate the evidence of the proscutrix must not be so worded, as to assume the truth of prosecutrix testimony,[45] or to amount in effect to a comment upon the weight of the evidence of the prosecutrix or defendant.[46]

SENTENCE; SEPARATE PROPERTY; SEPARATE TRIALS; SEPARATION, see latest topical index.

SEQUESTRATION.[47]

In Texas.[48]—Where sequestered property is retained under a replevin bond the liability of the surcties on such bond continues until the judgment is finally affirmed on appeal,[49] and on one taking possession of land under sequestration pro-

mony for the prosecutrix to testify that her love for the accused induced her to yield to the sexual intercourse. Washington v. State [Ga.] 52 S. E. 910.

34. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242.

35. Conversation had by defendant with a third person in regard to promise to marry admissible. Whatley v. State [Ala.] 39 So. 1014. Letter written by defendant to prosecuting witness containing admissions of a criminating character is admissible. Id. Letters which have been identified as in defendant's handwriting, tending to show the relation of the defendant and the prosecutrix and which contained acknowledgments that he had done wrong and alluded to his previous promise to marry, are admissible though written after the seduction. Weaver v. State [Ala.] 39 So. 341.

36. Weaver v. State [Ala.] 39 So. 341.

37. The testimony of a brother of the prosecuting witness that he heard the defendant tell the prosecutrix that he loved her, and of prosecutrix to such declarations, are competent as tending to show that defendant was leading the girl to believe that he was going to marry her. Weaver v. State [Ala.] 49 So. 341. Association and apparent affection. Whatley v. State [Ala.] 39 So. 1014.

38. Whatley v. State [Ala.] 39 So. 1014.

39. Penal Code 1895, § 991. Washington v. State [Ga.] 52 S. E. 910.

40. Rucker v. State [Ark.] 90 S. W. 151.

41. Burnett v. State [Ark.] 88 S. W. 956. Where the seduction was accomplished by a promise of marriage, she must be corroborated both as to the promise and the sexual intercourse. Carrens v. State [Ark.] 91 S. W. 30; Rucker v. State [Ark.] 90 S. W. 151. Evidence of admissions by defendant that he had promised to marry prosecutrix is corroborative. State v. Sublett [Mo.] 90 S. W. 374. Letters alleged to have been written by defendant which are only identified and proved to be letters of defendant by the prosecutrix do not corroborate. Carrens v. State [Ark.] 91 S. W. 30. Evidence as to time of the birth of the child is admissible as tending to corroborate the mother as to the time of the sexual intercourse. Whatley v. State [Ala.] 39 So. 1014.

42. Rucker v. State [Ark.] 90 S. W. 151.

43. See 4 C. L. 1420.

44. State v. Sublett [Mo.] 90 S. W. 374.

45. Garlas v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 690, 88 S. W. 345.

46. State v. Sublett [Mo.] 90 S. W. 374.

47. See 4 C. L. 1420.

48. See 4 C. L. 1421.

49. Fidelity & Deposit Co. v. Texas Land & Mortgage Co. [Tex. Civ. App.] 90 S. W. 197. Where vendor had rescinded the executory

ceedings, and judgment being finally rendered against him, the principal and sureties on the replevin bond are liable for rents collected after taking possession.[50]

Damages for wrongful sequestration[51] cannot be offset in another action unless wrongfulness was proved.[52]

In Louisiana.[53]—Where necessary the trial court has jurisdiction, after appeal, to order the sequestration of property which is the subject of litigation,[54] but in such case it must confine its rulings to subsequent conditions and cannot decide issues brought up by the appeal;[55] and the writ of sequestration will not issue in a suit after final judgment,[56] nor at the instance of one co-owner against another except as incident to other proceedings.[57] When issued the appellate court will not consider the matter of the release of a sequestration on bond or of increasing the amount of the bond in the absence of full information of conditions existing at the trial.[58] Where the necessity for a writ of sequestration is put in issue it is incumbent upon the applicant to produce evidence in support of his affidavit.[59] A sequestration based on mutual mistake will be dissolved.[60] Property whose character will not admit of division so as to admit of partial sequestration may be so sequestered by express agreement of the parties.[61] A money judgment in terms maintaining a writ of sequestration is equivalent to a decree restoring the property to satisfy the judgment.[62]

SERVICE, see latest topical index.

SET-OFF AND COUNTERCLAIM.

§ 1. *Nature and extent of right in general.*[63] *Equitable set-off.*—A court of equity will take cognizance of cross claims between litigants though wholly disconnected and wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injury.[64] In-

contract of sale and sued the purchaser's widow individually, and as administratrix to recover the land, and sequestered the property, the surety on the replevin bond of the widow were held liable for rents pending her appeal. Id. In such case the vendor may recover the rental value of the property without regard to the amount actually collected by the widow or her care in managing the land. Id.

50. Flynt v. Taylor [Tex. Civ. App.] 91 S. W. 864.

51. See 4 C. L. 1421.

52. A plaintiff who secures a judgment for the recovery of property with defendant's privilege to purchase is not bound to credit defendant for damages arising because plaintiff sequestered the property in the absence of proof that the sequestration was wrongful. Held error to charge plaintiff with rents on defendant electing to purchase. Moore v. Brown [Tex. Civ. App.] 89 S. W. 310.

53. See 4 C. L. 1421.

54, 55. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 114 La. 573, 38 So. 458.

56. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 441.

57. Held not proper where one co-owner denied the possessory rights of the other except as incident to a suit in partition: Martel v. Jennings Heywood Oil Syndicate [La.] 39 So. 441.

58. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 114 La. 573, 38 So. 458.

59. Young v. Guess [La.] 38 So. 975.

60. Pharr v. Shadel [La.] 38 So. 914.

61. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 441.

62. Perret v. Coleman [La.] 40 So. 176. In such a case a surety on the release bond cannot defend on the ground that the judgment fails to recognize the plaintiff as owner of the property or entitled to a privilege thereon. Id.

63. See 4 C. L. 1421.

64. Porter v. Roseman [Ind.] 74 N. E. 1105. Defendant, a resident of Indiana, owed plain-

solvency [65] and nonresidence [66] of one of the parties are grounds for the application of this principle.

Statutory set-off and counterclaim.—Under the codes, and subject to the code limitations, a counterclaim includes well-nigh every kind of cross demand existing in favor of defendant and against plaintiff in the same right, whether said demand be of a legal or equitable nature.[67] It is broader in meaning than set-off, recoupment, or cross action, and includes them all and secures to defendant the full relief which a separate action at law, or bill in chancery, or a cross bill, would have secured on the same state of facts.[68] The right of set-off given by statute is not subject to or defeated by other statutory provisions relating to exemptions.[69] Thus, where cross demands exist which, under the set-off statutes, must be deemed compensated so far as they equal each other, one of the claimants is not entitled to an allowance of the amount of the claim against him on a claim of exemption, though, under the exemption statute, he would be entitled to hold such amount.[70] The statute of the state wherein an action is brought controls as to the nature of

tiff, resident of New York, for goods sold. An employe of defendant misappropriated money of defendant, and took up his notes to plaintiff, which plaintiff had given a bank for collection. Held, defendant could, in equity, set off his claim for the money so received by plaintiff against plaintiff's demand. Id. Where two wards sue a third to avoid a sale by the guardian to defendant, and judgment is for plaintiffs but they are charged with their share of the cost of improvements made by defendant while in possession, plaintiffs may set off against the claim for improvements their share of the rents and profits, less their share of taxes, insurance and repairs, but such set-off cannot under Rev. Laws, c. 179, §§ 23, 24, exceed the sum with which they are charged for improvements. Sunter v. Sunter [Mass.] 77 N. E. 497.

65. Renfro v. Yarbrough [Ala.] 39 So. 660. A bank deposit was attached by the depositor's creditor. Thereafter, without knowledge of an assignment by the debtor for creditors, the bank and the attaching creditor made an agreement whereby the creditor was allowed to draw on the bank on the faith of the attachment. The bank assigned, and the attachment debtor's assignee assigned the deposit to the attaching creditor. Held, in equity, the deposit could be set off against the amounts received from the bank. Id.

66. Principle applied where resident of New York came into Indiana to sue on a demand. Porter v. Roseman [Ind.] 74 N. E. 1105.

NOTE. Grounds for equitable set-off: Where debts are not mutual, insolvency alone has been held insufficient, even in a case of positive indebtedness, to authorize an equitable set-off (Lockwood v. Beckwith, 6 Mich. 169, 72 Am. Dec. 69; Hale v. Holmes, 8 Mich. 37; Watts v. Sayre, 76 Ala. 397), but the adjustment of demands by counterclaim or set-off rather than by independent suit is favored and encouraged by the law to avoid circuity of action. Hence, the insolvency of the party against whom a set-off is claimed is a sufficient ground for equitable interference. North Chicago Rolling Mill Co. v. St. Louis, etc., Steel Co., 152 U. S. 596, 38 Law. Ed. 565; Scott v. Armstrong, 146 U. S. 499, 36 Law. Ed. 1059; Robbins v. Holley, 1 T. B. Mon. [Ky.] 191; Nashville Trust Co. v. Bank, 91 Tenn. 336, 347; Laybourn v. Scymour, 53 Minn. 105, 39 Am. St. Rep. 579; Bemis v. Smith, 10 Met. [Mass.] 194; Marshall v. Cooper, 43 Md. 46; Levy v. Steinbach, 43 Md. 212; Fidelity, etc., Co. v. Haines, 78 Md. 454; Becker v. Northway, 44 Minn. 61, 20 Am. St. Rep. 543; White v. Wiggins, 32 Ala. 424; Farris v. Houston, 78 Ala. 250; Coffin v. McLean, 80 N. Y. 560; Davidson v. Alfaro, 80 N. Y. 660; Ainslie v. Boynton, 2 Barb. [N. Y.] 258; Lindsay v. Jackson, 2 Paige [N. Y.] 581; Conroy v. Dunlap, 104 Cal. 133. Nonresidence of the party against whom set-off is prayed is also ground therefor in some jurisdiction. North Chicago Rolling Mill Co. v. St. Louis, etc., Steel Co., 152 U. S. 596, 38 Law. Ed. 565; Robbins v. Holley, 1 T. B. Mon. [Ky.] 191. Cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice. North Chicago Rolling Mill Co. v. St. Louis, etc., Steel Co., 152 U. S. 596, 615, 38 Law. Ed. 565. The impossibility of obtaining the benefit of a set-off in an ordinary suit at law also authorizes a court of equity to enforce it. Ainslie v. Boynton, 2 Barb. [N. Y.] 258, 263. If, however, the demand against which the set-off is urged has been assigned, it must appear that the insolvency or removal from the state occurred before the assignment. Robbins v. Holley, 1 T. B. Mon. [Ky.] 191. Cross demands, though unliquidated by judgment, and although not within the statute of set-off, will, after the insolvency of one of the parties, the set off in equity against one another, if, from the situation of the parties, justice cannot otherwise be done. Davidson v. Alfaro, 80 N. Y. 660.—Note St. Paul, etc., Trust Co. v. Leck [Minn.] 47 Am. St. Rep. 579.

67, 68. R. L. Smith & Co. v. French [N. C.] 53 S. E. 435.

69. Serhant v. Haker [Ohio] 76 N. E. 943.

70. Under Rev. St. 1905, §§ 5066-5077, one judgment may be offset against another notwithstanding the exemption statute would ordinarily apply. Serhant v. Haker [Ohio] 76 N. E. 943.

demands which may be pleaded as set-off.[71] Thus, where the statute permits demands upon simple contracts to be offset against judgments, such a demand may be offset against a foreign judgment, regardless of the statute of the state wherein such judgment was rendered.[72]

Statutes commonly provide, in substance, that a counterclaim must be (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim,[73] or connected with the subject of the action;[74] (2) in an action on contract, any other cause of action, arising also on contract, and existing at the commencement of the action.[75] In an action on a contract a cause of action in tort may be counterclaimed if it comes within the first subdivision of the statute,[76] though the damages claimed are unliquidated.[77] Unliquidated damages arising from breach of a contract, unconnected with the subject-matter of plaintiff's suit, cannot, in Illinois, be offset.[78] In an action ex delicto, neither a cause of action in tort,[79] nor a debt,[80] can be counterclaimed, when not connected with the subject-matter of plaintiff's action.[81] A debt or the dam-

71. Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810.

72. In action on Missouri judgment, in Illinois, simple contract demand may be offset under Hurd's Rev. St. 1903, c. 110, § 19. Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810.

73. **Transaction:** In a suit for an injunction to compel defendant, claimed to be a servant, to leave plaintiff's house, defendant claiming to be plaintiff's wife, defendant may by a cross complaint sue for the value of services rendered, since the cause of action therefor arose out of the same "transaction" as was the subject of plaintiff's action. Mixer v. Mixer [Cal. App.] 83 P. 273. In a claim and delivery action for furniture of a lessee taken by the lessor under an alleged lien for rent, the "transaction" on which the complaint was based was the wrongful taking of the property. Hence, claims for water rent and repairs, and for damage to the building, could not be counterclaimed. Osmers v. Furey, 32 Mont. 581, 81 P. 345.

74. The words **subject of the action** denote plaintiff's principal, primary right, to enforce which the action is brought under Code Civ. Proc. § 501. Steinmetz v. Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. S. 456. In an action by the assignee of a legatee to enforce payment of the legacy out of general assets of the estate, a claim that plaintiff's assignor had converted a portion of the assets was not "connected with the subject of the action" under Code Civ. Proc. § 501, and was not a good counterclaim. Lechleuter v. Shano, 96 N. Y. S. 716.

75. In an action on a note liability upon which is admitted, a claim against plaintiff as indorser of another note cannot be set off where the indorsement was simply to pass title to defendant and was without consideration. Peabody v. Munson, 113 Ill. App. 296.

76. Under Code Civ. Proc. § 501, subd. 1, in an action on contract, a counterclaim need not be on contract if it arises out of the same transaction, a cause of action in tort may be counterclaimed. Kneeland v. Pennell, 96 N. Y. S. 403. In an action on a note given in the course of a transaction in the sale of wheat on margins by plaintiff for defendant, a claim for damages arising out of plaintiff's misconduct in handling the business arises out of the same transaction and constitutes a valid counterclaim. Id. Counterclaims for conversion of securities by plaintiff, in that they were sold without notice to defendant, held also within Code Civ. Prac. § 501, subd. 1. Id. Under Rev. Codes 1899, § 5274, subd. 1, a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued on the note secured by the mortgage. Hanson v. Skogman [N. D.] 105 N. W. 90. In an action to enforce a mortgage lien on land given to secure notes, the answer alleged conversion of other mortgaged property by sale under a void judgment on the notes. Held the answer constituted a counterclaim, the cause of action being connected with or arising out of the transaction or cause of action sued on (Civ. Code Prac. § 96), and also a defense. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137. In an action on contract, if a claim of defendant be based upon matters directly connected with, and injuries growing out of, the contract sued on, it can be asserted as an offset. Under Code 1887, § 3299, in an action on account growing out of a lease contract of hotel premises, defendant may offset damages for acts of trespass by plaintiff and disregard of defendant's rights, injuring his business. Newport News & O. P. Ry. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. In an action of assumpsit defendant may set off the value of goods belonging to him which have been converted by plaintiff. Under Code 1904, § 3298, providing that in an action of debt defendant may prove any payment or set-off. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835.

77. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. If a counterclaim arises out of the same transaction as plaintiff's cause of action, it is not objectionable as seeking unliquidated damages. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930.

78. Higbie v. Rust, 112 Ill. App. 218.

79. In a tort action, another cause of action in tort cannot be counterclaimed under Code Civ. Proc. 1902, § 171. Roberts v. Jones, 71 S. C. 404, 51 S. E. 240.

80. A debt cannot be set off against a claim for unliquidated damages arising out of tort. Sayles' Civ. St. 1897, art. 754. Baldwin v. Richardson [Tex. Civ. App.] 13 Tex. Ct. Rep. 189, 87 S. W. 746.

81. A cause of action cannot be pleaded as a counterclaim to an action ex delicto

ages which can be set off as an independent counterclaim must be such as a jury can find and liquidate in the ordinary way.[82] Where the right of defendant is only to call plaintiff to an account, and this demand is such as must be settled in an action of account rendered, or by bill in equity for an account, it is not a proper set-off.[83]. In Alabama, any demand, not sounding in damages merely, may be set off against any other demand, not sounding in damages merely, whether the cause of action and the demand sought to be set off against it arose out of a contract or tort.[84]

Recoupment.[85]—A defendant may not set up a claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action.[86] In an action on a contract, unliquidated damages arising out of a tort independent of and disconnected with the transaction sued on cannot be recouped by way of equitable defense.[87] In Mississippi, in an action for the price of goods sold, a claim for damages for breach of warranty is properly pleaded in recoupment but not as a set-off.[88]

§ 2. *To be available as a set-off or counterclaim, a demand must, ordinarily, have been a vested and subsisting cause of action at the time of the commencement of plaintiff's suit,*[89] but, in North Carolina, "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation for plaintiff's claim, or connected with the subject of the action," may be pleaded as a counterclaim if it matures before answer filed or trial had. It is not essential that a claim within this provision of the statute should exist at the commencement of the action.[90] A claim or demand not due and enforceable at the time of the transfer or assignment of the claim sued on is not available as a counterclaim.[91]

unless it arises out of the transaction set forth in the complaint or is connected with the subject-matter of the action. Gen. St. §§ 94, 5237. Hanson v. Byrnes [Minn.] 104 N. W. 762. In action for damages to land caused by diversion of surface water, a claim for damages caused by plaintiff's diversion of certain other water was not connected with the subject-matter of plaintiff's action. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226.

82. Appleby v. Barrett, 28 Pa. Super. Ct. 349. Unliquidated damages arising ex contractu may be set off under the defalcation act of 1705, 1 Gen. Laws 49, whenever they are capable of liquidation by any known legal standard. Wanamaker v. Quinn, 27 Pa. Super. Ct. 288. Where purchaser of furniture loses a tenant by reason of the delay in delivery, he may set off the rent lost against the price of the furniture. Id.

83. An unascertained balance alleged to be due one member of a firm from another cannot be set off in an action by one upon the individual note of the other. Appleby v. Barrett, 28 Pa. Super. Ct. 349.

84. Under Code 1896, § 3728, a claim for conversion by plaintiff of a stated amount of cotton of a certain value, mortgaged to defendant by a third person, defendant's lien being thereby impaired, may be set off against a claim for a balance due on account between plaintiff and defendant. Debter v. Henry [Ala.] 39 So. 72.

85. See 4 C. L. 1422.

86. In an action for the price of a traveling crane, defendant cannot recoup damages paid, without suit, to the widow of a servant killed by reason of the negligent construction of the crane, since the issues of negligence involved cannot properly be tried in the action for the price. Edgemoor Iron Co. v. Brown Hoisting Mach. Co. [Del.] 62 A. 1054. In an action for the price of a wagon under a contract warranting soundness of the wagon, damages resulting from injuries caused by defects in the wagon cannot be recouped. S. W. Rodes & Son v. Arney, 115 Ill. App. 629.

87. In suit on notes given for interest in firm, the claim that plaintiff tortiously took possession of the business and property cannot be used by way of recoupment, since the tort is not connected with the transaction sued on. Roth v. Reiter [Pa.] 62 A. 1063.

88. W. T. Adams Mach. Co. v. Thomas [Miss.] 39 So. 810.

89. See 4 C. L. 1422. Under Code § 3570, a cause of action not held by defendant at the time action is instituted against him by plaintiff cannot be interposed as a counterclaim in that action. Morrison Mfg. Co. v. Rimerman, 127 Iowa, 719, 104 N. W. 279. Pleading insufficient as counterclaim because not setting forth a "present, subsisting" cause of action against plaintiff in favor of defendant. Portland Co. v. Hall, 95 N. Y. S. 36.

90. Construing Revisal 1905, § 481. R. L. Smith & Co. v. French [N. C.] 53 S. E. 435. In claim and delivery for property covered by a chattel mortgage, wherein the property is taken under process and turned over to plaintiff, an answer admitting plaintiff's right to possession, but alleging that the value of the property taken was greatly in excess of the debt, and that plaintiff had taken and wasted the property, and demanding judg-

§ 3. *Demands must be mutual*[92] *and the parties must stand in the same right and capacity.*[93]—A claim against a third person cannot be used as a set-off.[94] In an action against defendants as partners, they may use as a counterclaim a judgment against plaintiff, on a right of action which accrued to the firm and was sued upon by them as partners.[95] A trustee who borrows for himself and others may plead usury as a counterclaim for himself and beneficiaries.[96] In a suit against a principal and his surety, the surety may set off a demand due from the plaintiff to the principal.[97] In New York, in an action by a receiver, defendant can counterclaim only to the extent of plaintiff's demand.[98]

Statutes providing that, in case of an assignment of a chose in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment are for the sole benefit of the debtor.[99] They do not apply in actions by an assignee against a person to whom the debtor has paid the claim.[1]

§ 4. *To admit of set-off or counterclaim the main action must be similar in form and remedy to that required for the other.*[2]—A claim for a money judgment

ment for the value of the property in excess of the debt, constitutes a good counterclaim. Id.

91. Under Code Civ. Proc. § 1909, relative to assignments, and § 502, sub. 1, relative to counterclaims, note given by plaintiff's assignor of claim sued on to defendant, but not due at time of assignment, was not available as a counterclaim. Michigan Sav. Bank v. Miller, 96 N. Y. S. 568.

92. In an action by agents who sold machinery on commission against a purchaser, an answer setting up a counterclaim and alleging that defendant was induced to buy by plaintiffs becoming personally liable on defendant's obligation, and that note sued on was therefor given, and that plaintiffs personally agreed to keep extras on hand, stated a cause of action against plaintiffs and not against their principal. Tyson v. Jackson Bros. [Tex. Civ. App.] 90 S. W. 930. Grantor warranted right to cut timber from land conveyed, and grantee conveyed to another, who cut timber and thereby suffered judgment for a statutory penalty for wrongful cutting of timber. Held original grantee could not set off amount of penalty against purchase price, not being a party to the judgment for the penalty. Turner v. Lawson [Ala.] 39 So. 755. Notwithstanding Code § 3887, providing that a defendant in an attachment suit may interpose a claim for damages on the bond, such counterclaim is not available if his right of action therefor has not accrued from damages which he has suffered, but has been acquired by assignment from another to whom such right accrued by reason of a levy or the attachment in such suit. Morrison Mfg. Co. v. Rimerman, 127 Iowa, 719, 104 N. W. 279. Husband and wife executed a bond, secured by mortgage on the wife's property, to an association which issued certificate to husband entitling him to participate in a fund. Held, in suit to foreclose mortgage, husband could set off a claim under the certificate against any deficiency judgment which might be rendered against him. American Guild of Virginia v. Damon, 94 N. Y. S. 985.

93. See 4 C. L. 1422.

94. In an action on a renewal note, the fact that the original note, given to a third person, was for a patent right but failed to express the consideration, as required by Laws 1903, p. 723, c. 438, thereby subjecting such third person to the penalty, equal to the face of the note, under such statute, did not give defendant a right of counterclaim against plaintiff, since the penalty was a claim against the third person only. Kipp v. Gates [Wis.] 105 N. W. 947. Certain persons doing business under a name afterwards used as the name of a corporation formed by them agreed to pay an employe $50 per month. A bank paid vouchers drawn in such business name and continued to do so after the corporation was formed. Held, in an action against the corporation for salary due the employe, amounts advanced by the association prior to incorporation could not be counterclaimed. Davis v. Bakersfield Oil & Stock Exch. [Cal. App.] 83 P. 260. In action by seller for price of machine, an amount spent by defendant for repairs under an arrangement with the manufacturer, which agreed to bear such expense, could not be set off. Borden & Selleck Co. v. Fraser, 118 Ill. App. 655.

95. Butler v. Delafield [Cal. App.] 82 P. 260.

96. Earle v. Owings [S. C.] 51 S. E. 980.

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

98. Laws 1902, c. 580, § 152, subd. 3, provides that if plaintiff is a trustee for another or has no actual interest in the suit brought in his name demand against plaintiff cannot be counterclaimed, but that a demand against the person represented by plaintiff or for whom the action is brought may be allowed to satisfy plaintiff's demand. Held, in an action by a receiver, affirmative relief cannot be rendered for defendant. He can counterclaim only to the extent of plaintiff's demand. Schlesinger v. Rachmil, 94 N. Y. S. 12.

99. Quigley v. Welter [Minn.] 104 N. Y. 236.

1. Where laborer assigned claim for wages and debtor thereafter, in garnishment proceedings, paid a creditor of the laborer, under an invalid judgment, Gen. St. 1894, § 5157, did not apply to a suit by the assignee to recover the money. Quigley v. Welter [Minn.] 104 N. W. 236.

2. See 4 C. L. 1425.

cannot be interposed as a counterclaim in an action for the recovery of the possession of property or its value.[3] In an action on a contract, on which defendant elects to stand, he cannot sustain a counterclaim on the theory of quantum meruit.[4] In an action for damages for the wrongful death of an employe, the master cannot set off damages for injury to his property caused by negligence of the deceased.[5] In an action on a contractor's bond by a city to the use of a material man, the contractor cannot set off a claim for damages arising out of negligence of a servant of the use plaintiff.[6] Pleas of offset may be filed in a proceeding by motion under the Virginia statute, such proceeding being an action at law.[7]

§ 5. *Pleading and practice.*[8]—In some jurisdictions no averments in a pleading will be treated as constituting a counterclaim unless they are so designated in the answer and unless it contains a proper prayer for judgment.[9] Elsewhere it is held that while merely calling a claim a "counterclaim" when pleaded responsively does not warrant affirmative relief,[10] yet where it distinctly appears from the relief demanded that matter set up in the answer is intended as a counterclaim, it is immaterial that it is not expressly so denominated.[11] Under code provisions permitting a defendant to plead all the counterclaims or defenses he may have, whether legal or equitable or both, facts which if true simply defeat plaintiff's action may be set up as a defense alone,[12] but facts which call for affirmative relief in favor of defendant before plaintiff's action can be defeated must be set up by counterclaim.[13] Under this provision a counterclaim may be joined with a defense.[14] Where a paragraph of an answer is called a counterclaim by the pleader, on demurrer it will be tested as a counterclaim, and its sufficiency as a defense cannot be urged.[15] A demurrer to a counterclaim on the ground that it is not of the character specified in the code is sufficiently specific.[16]

To constitute a valid counterclaim, every fact must be set forth which is necessary to uphold an original petition founded on the same cause of action.[17] A plea of equitable set off must be sufficiently definite and certain to present an

3. Under Code Civ. Proc. § 691, providing that a counterclaim must tend to diminish or defeat plaintiff's recovery. Osmers v. Furey, 32 Mont. 581, 81 P. 345. In replevin to recover cattle, the issue being the ownership and right to possession of the cattle, damages for trespass by the cattle cannot be counterclaimed, even though Ky. St. 1903, § 4646, gives a lien on trespassing cattle to the one injured, which must be enforced by an action. Linn v. Hagan's Adm'r [Ky.] 92 S. W. 11.

4. Missouri Pac. R. Co. v. Kansas City & I. Air Line Co., 189 Mo. 538, 88 S. W. 3. In action to recover for work done under contract to protect defendant's right of way, which was occupied also by plaintiff's tracks defendant could not sustain a counterclaim for other work done by it, on a part of the right of way not covered by the contract, on the theory that such work was of incidental benefit to plaintiff. Id.

5. Under Code 1896, § 27, railway company cannot set off claims for damages to its cars in action for death of engineer. Western Ry. v. Russell [Ala.] 39 So. 311.

6. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999.

7. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011.

8. See 4 C. L. 1427.

9. State v. Coughran [S. D.] 103 N. W. 31.

10. American Guild of Virginia v. Damon, 94 N. Y. S. 985.

11. So held in divorce action. Mason v. Mason, 46 Misc. 361, 94 N. Y. S. 868.

12. Chicago & N. W. R. Co. v. McKeigue [Wis.] 105 N. W. 1030.

13. Construing Rev. St. 1898, § 2657. Chicago & N. W. R. Co. v. McKeigue [Wis.] 105 N. W. 1030.

14. In action on notes for patent rights, defendant may claim damages for false representations and also ask for rescission of the contract, tendering back rights acquired thereunder. J. H. Clark Co. v. Rice [Wis.] 106 N. W. 231.

15. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49.

16. Kneeland v. Pennell, 96 N. Y. S. 403.

17. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226. In action on a note by an indorsee, a paragraph of the answer reaffirmed all the allegations of the defenses, and alleged that plaintiff fraudulently diverted the note and converted it, whereby the railroad company for whose benefit it was given became insolvent, to defendants' damage. Held the paragraph was insufficient for want of facts to state a distinct cause of action, so as to constitute a valid counterclaim. Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49. In suit to set aside probate of will, the answer set up due probate of the will, that it was deceased's last will, and prayed that the probate be confirmed and the will established. Held such allegations did not constitute a counterclaim

issue of fact for the settlement of the court.[18] A plaintiff is entitled to have a plea in reconvention show whether or not the claim or any part of it is barred by limitations.[19] In Illinois, a defendant cannot make a defense under a special plea and then prove a set-off under a notice of special matter.[20] In Pennsylvania the averments of a set-off in an affidavit of defense must be set forth with the same clearness and particularity that are required of a plaintiff in his statement.[21] In Virginia the particulars of a claim relied on as a set-off need not be set out with the formality and precision of a declaration or plea but only in such manner as to notify the adverse party of the nature of the claim.[22] Where, in New York, an answer in a divorce action contains a general denial and also allegations of cruel and inhuman treatment and failure to support, the latter allegations constitute a "counterclaim." [23] In Alabama a plea of set-off does not entitle the pleader to judgment for any excess.[24]

Evidence.—The general rules regarding the admissibility of evidence under a counterclaim are the same as those regulating evidence under a complaint or declaration.[25] The burden of proving a counterclaim [26] or set-off [27] is on defendant.

Instructions on the amount which a plaintiff may recover, which ignore a plea of set-off by defendant, are erroneous.[28]

Limitations.—A counterclaim for usury is available as long as a right of action exists on the principal sum.[29] The statute of limitations as to an action for a penalty or forfeiture has no application.[30]

SETTLEMENT OF CASE; SETTLEMENTS; SEVERANCE OF ACTIONS, see latest topical index.

SEWERS AND DRAINS.

§ 1. *State and municipal authority and control.*[31]—Laws providing for the construction and repair of public drainage ditches are within the police power.[32] The reclamation, by construction of drains, of lands rendered useless by surface

for affirmative relief, and it was error for the court, after plaintiff had dismissed, to render judgment for defendant. Davis v. Preston [Iowa] 106 N. W. 151.

18. Plea held too vague and uncertain. State v. Alexander [Tenn.] 90 S. W. 20.

19. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

20. Berry v. Kingsbaker, 118 Ill. App. 198.

21. Appleby v. Barrett, 28 Pa. Super. Ct. 349. The rule that affidavits of defense must set forth matters of defense specifically and clearly, leaving nothing to inference, applies where a set-off is asserted. Allegations held insufficient to show liability of an indorser on a note. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381.

22. Set-off for conversion, in action of assumpsit, which gave an itemized account of goods claimed to have been converted held sufficient under Code 1887, § 3249. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835.

23. Code Civ. Proc. § 1770. Mason v. Mason, 46 Misc. 361, 94 N. Y. S. 868.

24. Riddle v. McLester-Van Hoose Co. [Ala.] 40 So. 101.

25. Where answer contained general denial and counterclaim, it was error to exclude evidence offered to contradict evidence given in support of counterclaim. Blaut v. Gross, 94 N. Y. S. 324.

26. Evidence held insufficient. Simonoff v. Horwitz, 95 N. Y. S. 522.

27. Fuller v. Stevens [Ala.] 39 So. 623.

28. Instructions should include direction to set off amounts found due the respective parties and render verdict for the party found to be entitled to a balance. Carlin & Co. v. Fraser [Va.] 53 S. E. 145.

29, 30. Earle v. Owings [S. C.] 51 S. E. 980.

31. See 4 C. L. 1429.

32. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065.

water is of public benefit,[33] and the legislature may properly so declare [34] and may authorize the taking of private property for the construction of drains.[35] The legislature may properly delegate its powers with reference to drainage to local municipalities,[36] and the exercise by them of discretionary powers so conferred is not subject to review by the courts unless an abuse of discretion appears.[37] It is

33, 34. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

35. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. The North Carolina drainage laws are not unconstitutional as authorizing the taking of land for a private purpose. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

NOTE. Drains as public works: In Hagar v. Reclamation District, 111 U. S. 701, 28 Law. Ed. 569, it was held that it was within the discretion of the California legislature to prescribe a system for reclaiming swamp lands when essential to the health and prosperity of the community, and to lay the burden of doing it upon the districts and persons benefited. And in Re Madera Irr. Dist., 92 Cal. 296, 28 Pa. 272, 27 Am. St. Rep. 106, 14 L. R. A. 755, the court said: "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public within the district affected by the means adopted for such reclamation." So, also, in the very recent case of Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 P. 933, Justice Lorigan, in sustaining the public character of the use of land for drainage purposes, said: "It is to the interest of every state, and hence conducive to the public good that all its lands should be utilized and made productive, and this end attained in any particular locality or localities is a benefit to the entire state." And continuing, he said: "And not only is drainage legislation suported as being, from a material point of view, conducive to the public good, but it is equally sustained as being within the exercise of the police power of the state—in the interest of public health." In fact, in some of the states, drainage lawe are upheld upon the ground of being an exercise of the public power. Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707; Winslow v. Winslow, 95 N. C. 24; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; State v. McNay, 90 Wis. 104, 62 N. W. 917. The court, in Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094, in drawing the distinction when drainage was an exercise of eminent domain, and when an exercise of the police power, said: "Where the laws have for their object the reclamation of large tracts of wet and swamp lands for agricultural purposes, they are sustained under the right of eminent domain. The fact that large tracts of otherwise waste lands may be thus reclaimed and made suitable for agricultural purposes is deemed and held to constitute a public benefit. When the object is to drain such lands in the interest of the public health and welfare, such laws are sustained and upheld as a proper exercise of the police power." Citing Wurts v. Hoagland, 114 U. S. 606, 29 Law. Ed. 229.

The necessity for drains to be for the public interest was also stated in Chaplin v. Wheatland Highway Com'rs, 129 Ill. 651, 22 N. E. 484; Collins v. Rupe, 109 Ind. 340, 10 N. E. 91; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; Reeves v. Wood County Treas. 8 Ohio St. 333.

The drainage of swamps, marshes, or other wet lands giving rise to malaria or other unhealthful results is generally upheld as being either within the right of eminent domain or the police power, on the ground that such drainage conduces toward the public health. Springer v. Walters, 139 Ill. 419, 28 N. E. 761; Coolman v. Fleming, 82 Ind. 117; Hull v. Baird, 73 Iowa, 528, 35 N. W. 613; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824; Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672; In re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; People v. Henion, 64 Hun, 471, 19 N. Y. S. 488.

The right of way for a drainage ditch cannot be taken where the ditch is solely for private benefit. Fleming v. Hull, 73 Iowa, 598, 35 N. W. 573; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824; Coster v. Tide Water Co., 18 N. J. Eq. 54. But it is not necessary in order that a drain may be regarded as of a public use that the whole community or any large portion of it particlpate in its use. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character. Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; Talbot v. Hudson, 16 Gray, 423. But in Quillen v. Hatton, 42 Ohio St. 202, it was held that the fact that a proposed ditch by draining a farm would thereby enable the owners to raise more corn or better crops was not sufficient to make said ditch constitute a public use. The same ruling was also made in Anderson v. Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.—Note Zircle v. Southern R. Co. [Va.] 102 Am. St. Rep. 832, 833, 834.

36. See § 2, Independent Organizations. Pub. Acts 1903, No. 237, p. 390, delegating to county supervisors certain legislative and administrative powers with reference to the construction of drains, is valid, under Const. art. 4, § 38. Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19.

37. The exercise of discretionary powers conferred on commissioners of a drainage district by statute will not be interfered with by the courts in the absence of an abuse of discretion. Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466. Mandamus will not issue to compel commissioners to raise additional funds (none being available) to clear out a lateral drain, when they have exercised their judgment and declined to join in a petition for such a proceeding. Id. Under Pol. Code tit. 8, c. 2, county supervisors have power to determine questions of fact relative to the organization and division or eclamation districts. Hence, court will not enjoin action on application for formation of a district on ground that lands have been reclaimed. Glide v. Superior Court of Yolo County, 14 Cal. Sup. 21, 81 P. 225. Upon petition for division of a

held in Michigan that neither the drain commissioner nor persons interested in the construction of drains have any contractual or vested rights which are violated by a statute modifying, amending, and supplementing the general law as applicable to a certain county.[38]

Cities have only such powers with reference to the construction of sewers as are expressly conferred by statute or charter. General power to construct and maintain streets includes power to construct storm sewers,[39] and such sewers may, in the discretion of the city authorities, be built over private property by agreement with the owners.[40] A statute authorizing borough authorities to construct sewers does not confer power to contract with a private corporation for the exclusive right to provide and maintain a sewer system.[41] A grant of permission to use the streets of a city for a sewer system does not constitute a contract nor confer any exclusive right upon the corporation to which it is granted,[42] hence the corporation is not entitled to damages when the city exercises its right to construct a sewer system.[43] The exercise of discretionary powers by city authorities, as in determining the necessity for and character of a sewer, is not subject to judicial review[44] in the absence of unreasonable or arbitrary action.[45]

§ 2. *Independent organizations controlling drainage, reclamation, and sanitation.*[46]—The construction of drains to reclaim waste lands and to conserve the public health is commonly intrusted to local organizations known as drainage, reclamation or sanitation districts. Drainage districts are public, governmental agencies, and in no sense private corporations.[47] In Illinois a drainage district is said to be a voluntary quasi corporation organized for a special and limited purpose.[48]

Organization and officers.—Where there is no order of record finding a drainage district duly established as provided by law in Illinois, the defect cannot be remedied at a subsequent term by an order nunc pro tunc.[49] The method of appointing or electing officers is statutory.[50] In Indiana, viewers of a county have a right to resign and their resignations may be legally accepted by the county ap-

reclamation district, under Pol. Code Cal. §§ 3446-3493 1-2, the question whether lands have been reclaimed so as to warrant division is for the supervisors, and a court of equity will not decide that question and enjoin proceedings. Rico v. Snider, 134 F. 953. In a proceeding to provide for repairs to a ditch, the questions whether the ditch will promote the 'public health, convenience and welfare will not again be considered. These questions are settled when a ditch is originally constructed. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065.

38. Rice v. Ionia Probate Judge [Mich.] 12 Det. Leg. N. 645, 105 N. W. 17.

39. Parsons v. Grand Rapids [Mich.] 12 Det. Leg. N. 507, 104 N. W. 730.

40. Construction of storm drain in natural ravine owned by private persons, upheld. Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334.

41, 42, 43. Olyphant Sewage Drainage Co. v. Olyphant Borough [Pa.] 61 A. 72.

44. Power to construct street improvements held to include power to provide for storm sewers in connection therewith, and the necessity therefor determined by council would not be reviewed by the court in a suit to set aside the assessment. Parsons v. Grand Rapids [Mich.] 12 Det. Leg. N. 507, 104 N. W. 730. The fact that a municipality owning lands abutting on a stream has not taken wholly effective measures in all cases to prevent the pollution of the water thereof, which goes into its waterworks system, will not hinder or prevent it from taking measures, such as the building of a sewer, to divert the sewerage to another course, nor will such fact prevent the collection of an assessment levied against the property specially benefited by such sewer to pay the cost thereof. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450.

45. An ordinance for sewer construction requiring house slants every 25 feet is not unreasonable or arbitrary. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

46. See 4 C. L. 1431.

47. Rev. St. 1899, § 8213, and Act April 8, 1905, § 8253. State v. Chariton Drainage Dist., No. 1 [Mo.] 90 S. W. 722.

48. Barton v. Minnie Creek Drainage Dist., 112 Ill. App. 640.

49. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691.

50. A drain commissioner elected in Berrien county under Loc. Acts 1903, p. 489, No. 448, is entitled to the office as against an appointee of supervisors under the Laws of 1897, p. 351, No. 254, as amended by Laws 1899, p. 459, No. 272. Attorney General v. Stryker [Mich.] 12 Det. Leg. N. 518, 104 N. W. 737.

pointing them, though such county is not the one in which the proceeding originated.[51] Property owners who have no notice of the original proceeding for a public ditch, but who are first brought in and their lands assessed in a proceeding for an additional assessment, may at such time object to the qualifications of commissioners on the ground of kinship to parties interested.[52] The Kansas statute requiring directors of drainage districts to be freeholders elected by resident taxpayers does not violate the provision of the bill of rights of that state that no property qualification shall be required for any office of public trust or for any vote at any election.[53] In Michigan a county drain commissioner is individually liable for damage to property of a township caused by the unlawful enlargement of an artificial drain.[54]

Limits of districts and changes therein.—In Illinois a drainage district may be enlarged without including all the lands benefited, provided the petitioners still include a majority of owners or represent one-third of the affected area.[55] In a proceeding to have lands alleged to be benefited by a ditch added to the district, a complaint signed by a majority of the commissioners is sufficient to confer jurisdiction.[56] In such proceeding the true issue is whether each particular tract of each objector is benefited as a whole.[57] Under the Illinois farm drainage act, commissioners of a district have no power to enlarge it by adding streets and alleys of a village which has connected its drains with those of the district, or to levy assessments against the village or streets for drainage.[58] Commissioners who attempt to do so act beyond their jurisdiction and the village concerned waives no rights by appearing to object or by failing to raise certain objections, or to appeal.[59]

Combined systems.—The amount to be paid by a drainage district which connects with the ditch of another district is to be determined solely by the benefits accruing to lands in the connecting district by reason of the connection.[60] A connecting district is estopped to deny that some benefit results.[61] Liability of the connecting district for such benefits is not affected by the fact that the outlet ditch is not completed when the connection is made, the plans of the two districts having been adopted at the same time and in contemplation of each other.[62] The fact that an assessment for a ditch upon lands benefited has been levied and paid does not preclude recovery from a connecting district in its corporate capacity.[63] The relative volume of the water carried by two ditches and the relative acreage of the two districts is competent evidence on the issue of benefits from connection with a ditch.[64] A connecting district is not liable for the cost of an enlargement and extension of an outlet ditch built solely for the benefit of the undertaking district.[65]

Mandamus lies to compel payment of a judgment by a drainage district where it appears that there are funds available[66] and a sufficient demand for payment has been made.[67]

51. Under Burns' Ann. St. 1901, § 5677. State v. Popejoy [Ind.] 74 N. E. 994.

52. Small v. Buchanan [Ind.] 76 N. E. 167.

53. Such provision refers only to officers and elections contemplated by the constitution. State v. Monahan [Kan.] 84 P. 130.

54. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587.

55. Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701.

56. Levee and Drainage Act of May 29, 1879, § 58. Perdue v. Big Four Drainage Dist., 117 Ill. App. 600.

57. Perdue v. Big Four Drainage Dist., 117 Ill. App. 600.

58, 59. Drainage Com'rs of Dist. No. 1 v. Cerro Gordo, 217 Ill. 488, 75 N. E. 516.

60, 61, 62, 63, 64, 65. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114.

66. Lewis v. Drainage Com'rs of Union Drainage Dist. No. 1, 111 Ill. App. 222.

67. A demand for payment and a refusal to pay is sufficient to warrant mandamus, whether or not the creditor has knowledge that there are, or are not, funds available. Lewis v. Drainage Com'rs of Union Drainage Dist. No. 1, 111 Ill. App. 222.

The statute of limitations cannot be successfully relied on by commissioners in mandamus proceedings to compel them to alter and repair a drainage system, when it appears that they have, by their conduct, recognized their obligations within the time relied on as a bar.[68]

§ 3. *Procedure in authorization and construction of sewers and drains.*—The mode of procedure is largely discretionary with the legislature, and any mode prescribed will be upheld by the courts if it affords due process of law[69] and does not unjustly discriminate between classes of land owners.[70] Proceedings for construction of a ditch commenced under an invalid statute may be validated by a subsequent curative act made applicable to such proceedings.[71]

Due process of law; notice.—Notice of each step of the proceeding is not required; notice and an opportunity to be heard at some stage previous to the time when the assessment becomes a fixed charged on land liable is sufficient.[72] Denying the right of appeal from action of the local authorities, or limiting the scope of an appeal, is not a denial of due process.[73] The fact that a particular landowner had no notice of proceedings to establish a drainage ditch does not invalidate proceedings as to other owners properly notified.[74] A statute which grants an appeal to a court of equity from an order establishing a drainage district does not deprive an owner of property without due process of law, though he is not allowed a jury trial of the question whether his land will be benefited by the proposed drain.[75]

Petition or application.—The petition for a drain must conform to the statute[76] where the latter is capable of enforcement.[77] It must be signed by the required number of owners of land in the district.[78] In Illinois, signers of a petition may withdraw their names at any time before the county court has acquired general jurisdiction of the proceedings.[79] An order of the county court finding that a petition was signed by the required number of owners is not conclusive where it appears that the court erroneously refused to allow certain signers to withdraw.[80]

Remonstrances.—Qualified parties may join in a remonstrance if it is of a general nature and such that, if upheld, it will defeat the work as an entirety.[81]

Report of viewers or commissioners.—In proceedings in Indiana for the construction of a ditch in two or more counties, the viewers appointed in the several counties act jointly, and a report in favor of a ditch must be signed by a majority;[82]

68. Kreiling v. Northrup, 116 Ill. App. 448.

69. Act April 15, 1902, § 3, providing for the cleaning out and repair of ditches and drains, provides for due process of law in the hearings and notice given, since parties interested have a right to appeal to the courts from findings of the officers concerned. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065.

70. Act April 15, 1902, which requires a bond from certain classes of applicants for repairs to ditches, but does not require such bond from other classes, is not invalid, as discriminative, these matters being within the discretion of the legislature. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065.

71, 72, 73, 74. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

75. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

76. Petition in drain proceedings held to have complied with statute in giving names and addresses of nonresident landowners. Stack v. People, 217 Ill. 220, 75 N. E. 347.

77. The Michigan general drain law requires an application for a drain to be signed by not less than 10 freeholders, 5 or more of whom shall be owners of land liable to an assessment for the drain. Held, this requires 5 signers to be persons who may be assessed for benefits and is capable of enforcement. Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19. Local Acts 1903, No. 495, p. 607, requires an application for a drain in a certain county to be signed by not less than one-third of the freeholders "of the land to be drained thereby and to be assessed therefor," but fails to provide what lands are to be drained or assessed. Held the statute is inoperative and cannot be enforced. Id.

78. Signature of life tenant and four-sixths of remaindermen held sufficient. Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701.

79. Error to refuse to allow withdrawal before court had determined sufficiency petition. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691.

80. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691.

81. Beery v. Driver [Ind.] 76 N. E. 967.

82, 83. Whirledge v. Shoup [Ind.] 75 N. E. 871.

hence, where viewers are evenly divided, a notice of a hearing by an auditor is without authority and the petition for the ditch should be dismissed.[83] Where in North Carolina a court finds that two commissioners have been guilty of gross indiscretion, its action in setting aside the report of the commissioners because it does not conform to the statute will not be disturbed.[84] Where the report of commissioners is set aside and new commissioners are directed to be appointed, the court should not instruct the new officers as to their duties.[85] In Pennsylvania an order merely setting aside a report of viewers for a legal reason, apparent on its face, is not appealable.[86]

Order, ordinance, or resolution for work.—An order for the establishment of a ditch must describe its location with accuracy.[87] Where a board of commissioners has made a final order for the establishment and construction of a public ditch, its jurisdiction is at an end and it has no power thereafter to vacate its order and annul proceedings already taken.[88] There should be no variance between a preliminary resolution and the ordinance providing for a city sewer.[89]

Waiver of irregularities.—One who files a claim for damages to his property caused by the location of a ditch waives irregularities in the proceedings to establish the ditch,[90] such as lack of notice.[91] Objections to the sufficiency of a petition for a drainage ditch are waived where the proper parties are notified and appear and fail to object until after the final order for the construction of the ditch.[92]

Collateral attack.—A suit to enjoin construction of a drain is a collateral attack on action of the commissioners and cannot be maintained unless it is shown that they were without jurisdiction.[93]

Costs.—In Indiana the petitioners are liable for costs of proceedings, when unsuccessful, under certain circumstances.[94]

§ 4. *Compensation to property owners for land taken or damaged. For what allowed.*—Damages are allowed, usually, only for the taking, injuring or destroying of property.[95] A statute providing only for repairs to a ditch already esablished is not invalid because not providing for compensation to landowners.[96] In Texas a flowage of land caused by the negligent construction of a county ditch does not constitute a taking of or an injury to private property for which the county is liable.[97]

84. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

85. They are to be guided by the statute (Code § 30), and their acts may be reviewed when their report is presented. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

86. It is not a final order affecting the rights of parties interested. Barnett's Case, 28 Pa. Super. Ct. 361.

87. Order of county supervisors held void because not accurately locating proposed ditch. State v. Lindig [Minn.] 105 N. W. 186.

88. Plew v. Jones [Ind.] 74 N. E. 618.

89. There is no substantial variance between an ordinance describing a sewer improvement as a system of "brick vitrified tile pipe sewers" and a resolution describing it as a "brick and vitrified tile-pipe sewer." Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

90. Gutschow v. Washington County [Neb.] 105 N. W. 548.

91. An owner who appears and procures the allowance of a claim for damages waives lack of notice as required by statute. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

92. Plew v. Jones [Ind.] 74 N. E. 618.

93. Evidence and record held not to show want of notice or jurisdiction. Brooks v. Morgan [Ind. App.] 76 N. E. 331.

94. A remonstrance was filed against construction of a public ditch, the petition sustained, and a commissioner appointed. An appeal to the state supreme court was dismissed. An injunction was then granted by the federal court. Held the petitioners were not liable, under the Indiana statutes for the cost of the proceedings already taken. Board of Com'rs of Lake County v. Jarnecke, 164 Ind. 658, 74 N. E. 520.

95. Act of May 16, 1891 (P. L. 75), provides only for the recovery of damages for the taking, injuring or destroying of property in sewer construction. A corporation which has begun work under a permission to use the streets, but not under a contract granting any exclusive right, cannot recover damages by reason of loss from competition with a borough sewer system. Olyphant Sewage Drainage Co. v. Olyphant Borough [Pa.] 61 A. 72.

96. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065.

97. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333.

Amount and ascertainment thereof.—Where an assessment to the amount of special benefits received from a ditch has already been made, the value of such benefits should not be deducted from damages to land not actually taken for the proposed ditch.[98] In Illinois the statutory methods of ascertaining damages and benefits resulting from a drainage ditch have been held unconstitutional,[99] and the only legal method of assessing damages for land taken is by a jury duly selected, impanelled, and sworn, and acting under the direction of a court of competent jurisdiction:[1] hence a report of commissioners, appointed under the statute, as to damages, cannot deprive owners of the right to a jury trial of the question,[2] and is not conclusive as to the amount of damages in a hearing before a jury.[3] In assessing damages for the taking or injuring of property in Illinois, the provisions of the drainage act, and not of the general eminent domain act, must be followed.[4] A petition by property owners for the establishment of a district does not confer on the court jurisdiction to proceed under the eminent domain act.[5] Only a petition by the district warrants procedure under the latter act.[6]

Appeals.—The method of perfecting appeals from awards of damages is statutory.[7]

§ 5. *Provision for cost.*[8] *Bonds.*—An issue of bonds is ordinarily governed by the statute under which the work was done.[9] Drainage bonds payable out of future instalments of special assessments do not amount to a loan of public credit to persons primarily liable for the cost of a drain.[10] A drainage district is not liable upon a bond duly issued by it where the property in the district has been once assessed to pay it, and the assessment paid to the proper officials and expended by them for other purposes.[11] The remedy of the holder of the bond is upon the bonds of the officers who misappropriated the funds raised to pay the bond.[12]

Local assessments.[13]—This subject is given a general and more extended treatment elsewhere.[14] Only decisions peculiarly applicable to the subject in hand are here retained.

Power to assess and property liable.—Power to levy special assessments exists only when expressly conferred,[15] and may be exercised only for the purposes named[16] and in the mode prescribed by the charter or statute conferring it.[17]

98. Gutschow v. Washington County [Neb.] 105 N. W. 548.

99. See cases cited in Michigan Cent. R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696; Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701. Act May 29, 1879, § 37, is invalid so far as it authorizes the assessment by commissioners, in lieu of a jury, of damages for the taking or damaging of land for a drain. Stack v. People, 217 Ill. 220, 75 N. E. 347; Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354.

1. As provided by the constitution, the requirement of which is self executing. Michigan Cent. R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696; Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701.

2. Michigan Cent. R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696.

3, 4, 5, 6. Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354.

7. In Iowa an appeal may be taken from an award of damages in 20 days after the order of the commissioners establishing the drain. Henderson v. Calhoun County [Iowa] 105 N. W. 383. Notice of an appeal from an award of damages must, in Iowa, be served on the petitioners for the ditch. Id.

8. See 4 C. L. 1432.

9. Rev. St. 1899, § 8259, was repealed by Acts 1905, p. 207, § 8263q, but under a proviso in the latter act it is held that where proceedings begun under the old act are complete, except as to the issue of bonds payable out of the tax to be levied, the old act may be followed and such bonds executed and delivered thereunder. State v. Chariton Drainage Dist. No. 1 [Mo.] 90 S. W. 722.

10. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

11, 12. Barton v. Minnie Creek Drainage Dist., 112 Ill. App. 640.

13. See 4 C. L. 1433.

14. See Public Works and Improvements, 6 C. L. 1143.

15. Cities of second class in Kentucky may build sewers at cost of abutting owners by Ky. St. 1903, § 3105. City of Covington v. W. T. Noland & Co. [Ky.] 89 S. W. 216.

16. Act May 16, 1891, P. L. 75, does not confer authority to assess benefited property to pay damages sustained by other owners. Barnett's Case, 28 Pa. Super. Ct. 361.

17. See post, Procedure.

Assessments can be laid only when the work has been done in the manner prescribed by law.[18] Where a sewer has been built at the expense of abutting property the latter cannot be charged for any reconstruction or change even though benefited thereby.[19]

All lands benefited should be included in a drainage district,[20] and lands not benefited should be excluded.[21] Where a statute forbids assessments in excess of benefits it will be assumed that such provision will not be violated.[22] An assessment roll prepared by a jury who viewed the land is prima facie evidence that the land is benefited to the extent of the amounts assessed [23] but is not conclusive.[24] Where land is included in a drainage district by fraud on the part of the drain commissioner, equity will grant the owner proper relief.[25]

Procedure.—The statute in force at the time of institution of proceedings for a sewer or drain ordinarily controls as to the manner of making an assessment.[26] That an assessment may be valid, the tribunal before which proceedings are instituted must have jurisdiction of the subject-matter,[27] and proper notice must be given as required.[28] Jurisdictional defects cannot be cured.[29] An assessment may

18. An ordinance provided for the construction of sewers on certain streets, and the city engineer changed the map showing the location of sewers proposed, erasing certain streets, and the sewers were made according to the altered map. Held assessments for the sewer were invalid. In re Scranton Sewer [Pa.] 62 A. 173.

19. Where a sewer was built on one side of a street at the cost of property on that side, the city could not, years after, build another on the other side at the cost of property on that side. Philadelphia v. Meighan, 27 Pa. Super. Ct. 160.

20. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885. An objection by an abutting owner to a sewer assessment, based upon the ground that the sewer is not available to his lots, is not sustained where the proof shows that the lots for a distance of from fifteen to fifty feet back towards their rear are on a level with the grade of the street in which the sewer is built, from which point they descend from fifty to sixty feet to a river bounding them on the rear, and the sewer is from fifteen to seventeen feet below the surface of the street, and it also appears that with respect to several of the lots the houses and improvements thereon are so built as to permit the carrying off of sewerage from cellar levels through such sewer. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450. Lots are not provided with adequate local drainage, such as will exempt them from paying their share of an assessment, levied to pay the cost of a sewer improvement, unless the right exists to dispose of sewerage as it is at the time being disposed of, and the right to continue so to do is one that cannot be interfered with—that is, the present right must include not only permanency of structure but also of control. Hence a claim of adequate local drainage, based upon the right to allow sewerage to drain into a natural watercourse running through a municipality, is not sustained where such drainage will pollute the stream and create a nuisance and imperil the health of other riparian owners. Id.

21. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885. The mere fact that an abutting property owner petitioned for a sewer improvement, and stood by without objection or protest and saw it built, does not estop him from thereafter contesting the validity of the assessment against his property to pay the costs thereof on the ground that his property is not specially benefited thereby. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450.

22. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

23. Wathen v. Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781.

24. Evidence held to show assessments for a drainage ditch grossly excessive. Wathen v. Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781.

25. Proceedings set aside and inclusion of land in district enjoined where fraud was established. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885.

26. By Burns' Ann. St. 1894, § 5646, which repeals the drainage acts of 1881 and 1883, where proceedings have been commenced under the earlier acts, the work is to be completed and assessments laid and collected under their provisions. Ellison v. Branstrator, 34 Ind. App. 410, 73 N. E. 146.

27. Under Hurd's Rev. St. 1903, c. 42, § 48, a justice of the peace has no jurisdiction to authorize the levy of additional assessments for drainage work to cost more than $2,500. Frank v. Rogers [Ind.] 77 N. E. 221.

28. Where charter required notice of pendency of application for local sewer to be paid for by special assessment, no valid assessment could be made without such notice. Weeks v. Middletown, 107 App. Div. 587, 95 N. Y. S. 352. Under Hurd's Rev. St. 1903, c. 42, § 37, a justice has no jurisdiction to authorize a levy of additional drainage assessments, unless he has given the notice required by § 3, and unless an itemized statement of previous expenditures and description of the proposed work has been filed as required by the act. Frank v. Rogers [Ill.] 77 N. E. 221. A notice of a proceeding for an additional assessment, under § 37 of the act of May 29, 1879, must be given in the manner provided by § 3 of the act, but need run only for two weeks. Notice of revision of assessment held to comply with law. Stack v. People, 217 Ill. 220, 75 N. E. 347.

29. Hurd's Rev. St. 1903, c. 42, § 34½, de-

be levied before the work is done.[30] In Ohio an assessment for a county ditch is not made by the county commissioners until it is ordered by them to be placed on the duplicate against the lot, lands, corporations or railroad assessed.[31]

Waiver or correction of irregularities.—A statutory provision allowing taxpayers who waive objections to pay an assessment in instalments does not deny equal protection of the laws.[32] Where there is no objection to the substantial justice of a drainage tax, mere irregularities in the proceedings to levy or collect the tax may, in Illinois, be corrected or supplied in the discretion of the court.[33]

Review of assessment proceedings.[34]—Where fraudulent conduct on the part of a drain commissioner is charged in an appeal to a board of review, it is error for the board to allow the commissioner a private hearing in regard to the matter.[35] An appeal or writ of error from the final order confirming an assessment roll brings up for review the order of the court declaring the district duly organized.[36] The recitals of a judgment confirming a special assessment that statutory requirements as to notice have been complied with are not overcome by a defective notice or certificate of publication found in the record.[37]

Collection by a municipality of an assessment to pay the cost of a sewer to carry off sewage which would otherwise pollute a stream will not be enjoined merely because the municipality has also emptied sewage into the stream.[38]

§ 6. *Management and operation; duty to properly construct, maintain, and repair works, and provide drainage.*[39]—Where a statute imposes upon a city the public duty of constructing and maintaining sewers, it is not liable for negligence of its agents in the performance of that duty;[40] but if a city voluntarily accepts and exercises powers to construct and own sewers, it is liable for injuries to persons and property caused by a negligent performance of such powers,[41] and such liability cannot be escaped by delegation of the performance of such powers to agents.[42] Thus, negligence in the construction or maintenance of a drain or sewer, when shown to exist,[43] renders a city liable in damages,[44] even though an act of God

signed to cure irregularities in drainage assessments, cannot cure irregularities depriving a justice of the peace of jurisdiction to proceed. Frank v. Rogers [Ill.] 77 N. E. 221.

30. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

31. Under Rev. St. 1906, § 4479. Cattell v. Putman [Ohio] 76 N. E. 390.

32. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

33. People v. Prust, 219 Ill. 116, 76 N. E. 68. Where delinquent list recited that it contained lands reported for 1904, and did not state that the taxes were due in March, 1905, the error was not fatal, especially since the drainage treasurer's report contained the omitted statement. Id. Where the treasurer's report identifies assessments as a special drainage tax for a certain district, failure of the county collector's return to show what the assessments were for, and to whom payable, was immaterial. Id. Description of delinquent lands in drainage district treasurer's return by section, township and range, without naming state or county, held not fatally insufficient. Id. That treasurer's report is not sworn to is not fatal. Defect may be cured on application for judgment. Id.

34. See 4 C. L. 1435.

35. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885.

36. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691.

37. Stack v. People, 217 Ill. 220, 75 N. E. 347.

38. The municipal riparian owner is not estopped to exercise its right to prevent pollution of the stream merely because it has been guilty of the same offense. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450.

39. See 4 C. L. 1438.

40. St. 1886, p. 309, c. 331, requiring the city of Worcester to build a sewer system, imposes a public duty on the city. Rome v. Worcester, 188 Mass. 307, 74 N. E. 370.

41. As where power is conferred and accepted to build sewers by special assessment for use of property owners. Lockwood v. Dover [N. H.] 61 A. 32. Complaint for damages for death caused by negligent maintenance of sewers and water pipes held not demurrable. Id.

42. Statute giving board charge of construction and maintenance of sewers did not relieve city of liability, power to construct and maintain sewers being conferred on it. Lockwood v. Dover [N. H.] 61 A. 32.

43. In action for damage caused by obstruction in drain, evidence held insufficient to show how obstruction got into drain, and hence verdict for plaintiff could not be sustained. Newborg v. Boston [Mass.] 77 N. E. 486. Evidence held to sustain finding that storm sewer was not built strong enough to withstand pressure to which it was subjected on plaintiff's premises. Kramer v. Los

co-operated to produce injury.[45] A municipality is not, however, liable for damages resulting solely from defects in the original plan of construction of a sewer,[46] since the due adoption of a plan requires the exercise by the governing body of a city of discretionary authority of a quasi judicial nature;[47] but if a city constructs a sewage system without any plan, or according to a plan not duly adopted, it is liable for damages resulting therefrom.[48] It is also liable if it has knowledge of defects in a plan duly adopted and executed and fails to use ordinary care to prevent injury by correcting such defects.[49] The fact that injury would not have resulted if there had been no private drain connected with the city's sewer is no defense to the city.[50]

Authority conferred upon a city to use a creek as an outlet for its sewerage system, and to improve and deepen the stream, does not impose upon the city an absolute, ministerial duty to so restrain the waters of the stream as to prevent damage to property by overflows, but merely vests the city with discretionary power to act in the matter;[51] hence the city is not liable for damage resulting from an overflow caused by an extraordinary and unusual flood, though its use of the stream as a part of its sewerage system contributed to the result, and though the stream had been made a public highway by statute;[52] but a municipality

Angeles, 147 Cal. 668, 82 P. 334. Evidence sufficient to support finding that city negligently allowed outlet of sewer to become clogged, thus increasing pressure and causing pipe to burst. Id. Evidence held not to warrant finding of negligence by borough in allowing sewer channel to become clogged where it was shown that the inlets in question were cleaned five days before the injuries complained of occurred, and that they remained clear during the time intervening. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456.

Notice of a defect must be shown to establish negligence. In action for personal injury caused by defective drain, plaintiff was bound to prove notice of defect by officers of town or that reasonable care would have given them notice of defect and of its dangerous character. Fitzgerald v. Concord [N. C.] 52 S. E. 309. City had sufficient notice of defective condition of sewer where, after a storm which burst a pipe on plaintiff's premises, he notified the city engineer, the street department and the council when in session, and a second storm occurred resulting in most of the damage of which plaintiff complained. Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334.

Admissibility of evidence: Condition of sewer outlet immediately after storm could be shown in order to prove negligence of the city in allowing it to become clogged. Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334. Where in action for damage caused by obstruction in drain the evidence did not show how drains were jointed, evidence of the usual manner of making joints was inadmissible. Newborg v. Boston [Mass.] 77 N. E. 486.

44. Under Code § 3803, a town is bound to use ordinary care to maintain culverts in streets in a reasonably safe condition. Fitzgerald v. Concord [N. C.] 52 S. E. 309. The construction of a drain by a municipality in such a manner as to obstruct the flow of water through it is negligence on account of which a property owner can recover for damages sustained. City of Cincinnati v. Johnson, 7 Ohio C. C. (N. S.) 167. While provision for drainage of surface water by a municipality is a duty purely judicial in its nature, for the breach of which it has been held no liability attaches, the duty of keeping a sewer in proper condition is of a ministerial character, and where the sewer is inadequate to carry off the refuse and filth, which under certain conditions are backed onto the property of an abutting owner, the municipality is chargeable with the damages resulting. City of Cincinnati v. Frey, 3 Ohio N. P. (N. S.) 627.

45. If negligence of a city in the maintenance of its sewers co-operates with an act of God to cause injury, the city is liable. City of McCook v. McAdams [Neb.] 106 N. W. 988.

46. Adoption of plan involves judicial or legislative, not merely ministerial powers. Keeley v. Portland [Me.] 61 A. 180. A city having by its governing body duly adopted a plan for a sewerage system and executed the same, it is not liable for injuries caused thereby to private property, not involving an unconstitutional taking thereof, produced by defects in such plan. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699. A municipality is not liable for damages resulting from an error of judgment with respect to the location or direction of a sewer or its sufficiency for the purpose designed. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456.

47, 48. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699.

49. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699. Where private property was connected with a sewer by means of an opening left for that purpose, and by reason of a defective plan, of which the city had notice but the property owner had not, the cellar was flooded, the city was liable. Id.

50. Such private connections being contemplated and intended. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699.

51. O'Donnell v. Syracuse [N. Y.] 76 N. E. 738.

52. O'Donnell v. Syracuse [N. Y.] 76 N. E. 738, rvg. Id., 102 App. Div. 80, 92 N. Y. S. 555. See 4 C. L. 1440.

which adopts a natural watercourse as an open sewer must keep the channel open and prevent accumulation of filth, or answer in damages to riparian owners for failure to do so.[53] The fact that a town has repaired the manhole of a private drain under a public highway does not show adoption of it as a part of the drainage system.[54]

The authorities of one township may not lawfully deepen existing waterways or drains so as to cast greater quantities of water upon the highways, bridges and culverts of an adjoining township to the latter's damage.[55] The fact that natural depressions and channels are used in part does not render waterways natural rather than artificial.[56]

In Indiana it is the duty of land owners to whom portions of a ditch have been alloted for repairs and maintenance to remove obstruction therefrom annually at their own expense, regardless of action by the town trustee,[57] and an owner who has negligently allowed a ditch over his land to become out of repair and inefficient is not entitled to have required work done at the general expense.[58]

§ 7. *Private and combined drainage.*[59]—A property owner who is required to drain his lot and to do so lays a sewer in the street with the permission of the authorities is entitled to the exclusive use of the sewer.[60] If improved city property is so situated that connection with an adequate sewer system can be had, such connection of water spouts and gutters will be required when necessary to avoid injury to adjacent property by the throwing of water upon it.[61]

In Illinois a drain constructed by mutual license, consent or agreement of the owners of adjacent lands, exists for the benefit of the lands affected and cannot be used for a purpose other than that for which it was built without the consent of the owners.[62] Thus, where such a drain is made and for many years used only to drain low lands, it cannot be used for sewerage purposes,[63] and a court of equity will enjoin such use, though it did not constitute a nuisance, in order to prevent the acquisition of a right by user.[64]

§ 8. *Obstruction of drains.*[65]—Obstruction of a drainage ditch may be enjoined in a proper case.[66] In a prosecution for obstructing a ditch it is error to receive in evidence an order for the establishment of the ditch which is void for uncertainty in the description.[67]

SHAM PLEADINGS; SHELLEY'S CASE, see latest topical index.

53. Glasgow v. Altoona, 27 Pa. Super. Ct. 55. The liability of a municipality is confined to injuries due to interference with the natural flow of water, faulty construction, and failure to maintain a sewer in proper condition, and the rule is the same whether the drainage is by a natural watercourse or artificial channel. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456.

54. It was but an incident to the repair of the highway. Matlack v. Callahan, 25 Pa. Super. Ct. 454.

55, 56. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587.

57, 58. Beery v. Driver [Ind.] 76 N. E. 967.

59. See 4 C. L. 1441.

60. Other owners have no right to use it. Carroll v. Connor, 93 N. Y. S. 1077.

61. Defendant held liable for damages caused by water thrown from roof of building. Ginter v. Rector, etc., of St. Mark's Church [Minn.] 103 N. W. 738.

62. Ditch built by owners under a statute subsequently held unconstitutional, held within Hurd's Rev. St. 1903, c. 42, § 187. Kenilworth Sanitarium v. Kenilworth [Ill.] 77 N. E. 226.

63. Use of drain as sewer by sanitarium enjoined, though sewage was first filtered, the filtration being uncertain and dependant upon the manner of operating the plant. Kenilworth Sanitarium v. Kenilworth [Ill.] 77 N. E. 226.

64. Kenilworth Sanitarium v. Kenilworth [Ill.] 77 N. E. 226.

65. See 4 C. L. 1441.

66. Where plaintiffs and their predecessors had maintained a ditch under an adverse claim for fifty years, when defendant obstructed it by a driveway, they were entitled to an injunction, though the damage already done was slight and though the ditch was dry in dry seasons of the year. Robertson v. Lewis, 77 Conn. 345, 59 A. 409.

67. State v. Lindig [Minn.] 105 N. W. 186.

SHERIFFS AND CONSTABLES.

§ 1. *The office; election or appointment.*[68]—Proof that a person acts as a sheriff, prima facie, shows that he is such officer.[69] Where the affect of a statute is to authorize one constable instead of two, the offices of both will be deemed to have been abolished and a new one established as far as the right to hold over is concerned.[70] The term continues for the statutory period and ordinarily the incumbent holds over till the qualification of the successor,[71] but where a constable abandons his office at the end of his term to one holding a certificate of election, he cannot thereafter claim that he is holding over when such person's election is held void.[72] An appointment to a post-election vacancy "till the next general election" will continue for the unexpired term and full term intervening thereafter,[73] and the power of appointment to the office is exhausted when once exercised. A deputy sheriff appointed pursuant to a statute to serve processes in his section of the county is an officer within the meaning of the constitution prohibiting any person to hold more than one office,[74] and where a constable accepts such appointment, his office becomes ipso facto vacant.[75]

§ 2. *Powers, duties, and privileges.*[76]—A sheriff's power to complete the execution of process begun continues after his term.[77] A constable's power is coextensive with the county where the statute authorizes the clerk of the county or district court to direct process to the "sheriff or any constable," [78] and within such limits he has the same power as a sheriff in regard to the service of process.[79] In Pennsylvania a constable cannot be compelled to serve a subpœna issued from the office of the prothonotary or by the clerk of the court at quarter sessions for the attendance of witnesses,[80] but when he does so he is entitled to the same fees as the sheriff.[81] Where a sheriff receives from the governor an extradition warrant, it is his duty to arrest the person named therein and to take him before a judge of one of the courts designated by law.[82]

68. See 4 C. L. 1442.

69. Earl v. State [Ga.] 52 S. E. 78.

70. County Government Act, § 56, as amended by St. 1901, p. 685, c. 234, providing that townships of six thousand or less shall have but one constable, abolishes the two existing offices so that neither incumbent can hold over. People v. Davidson [Cal. App.] 83 P. 159.

71. See Officers and Public Employes, 6 C. L. 841.

72. Abandonment may be established by surrendering his badge, pistol, handcuffs, etc. People v. Davidson [Cal. App.] 83 P. 159. Certificate of appointment as deputy may be shown as evidence of abandonment of office though it erroneously describes the oath. Id.

73. Where the statute provides that an appointee shall hold until the "next general election," one appointed to fill an unexpired term of a sheriff who has been re-elected, but not yet qualified, will continue for the unexpired and for the new term. State v. Vincent [S. D.] 104 N. W. 914.

74. Shannon's Code, § 448. And such office is a lucrative one whether he receives pay under contract with the sheriff or fees under the law. State v. Slagle [Tenn.] 89 S. W. 326.

75. State v. Slagle [Tenn.] 89 S. W. 326.

76. See 4 C. L. 1442.

77. A sale under execution of property by a sheriff after the expiration of his term is not void where he had begun to execute the writ during his term. Gen. St., p. 3118, § 35, requiring a sheriff to turn over all writs to his successor, applies only to writs upon which nothing has been done Ayers v. Casey [N. J. Err. & App.] 61 A. 452.

78, 79. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250.

80, 81. Kottcamp v. York County, 28 Pa. Super. Ct. 96.

82. Probate judge has no jurisdiction to release on a writ of habeas corpus. Thomas v. Evans [Ohio] 76 N. E. 862.

The service of a venire does not come within the meaning of the term "civil process" as used in a statute requiring a constable to give a bond before serving a civil process.[83]

By special act a sheriff in Indiana may recover moneys rightfully belonging to him which are paid into the treasury under mistake of law.[84]

Constabulary power[85] includes the power of police departments and officers as conservators of the peace. Policemen may patrol a place of public thoroughfare and accost and turn back persons because of the disorderly nature of the locality though one's business near by is injured,[86] but they may not warn people away from one's business place when there is no violation of law there.[87] In such case injunction will not issue, it being not appropriate to enforcement of criminal law,[88] but an action for damages will lie or a criminal prosecution unless there is a continuing and irreparable trespass.[89]

§ 3. *Compensation.*[90]—Compensation is determined by statute,[91] the fees for a particular act being so fixed.[92]

A constable is entitled to receive the same fee for receiving a prisoner from jail and taking him before a magistrate for a hearing as on a commitment, as well as mileage and other expenses.[93] Any allowance to a sheriff which is intended as a reimbursement and not as compensation is outside a prohibition as to changing compensation during term.[94] Whether several acts done simultaneously are each to be paid or carry only one fee depends on the terms of the statute.[95] Fees are not chargeable for acts lawfully done by other officers or persons.[96] If compensation is by fees chargeable to parties the right to look to the state is wholly statutory.[97]

83. Rev. Laws, c. 25, § 88. Commonwealth v. Tucker [Mass.] 76 N. E. 127.

84. Burns' Ann. St. 1901, § 7913. Board of Com'rs of Morgan County v. Crone [Ind. App.] 75 N. E. 826.

85. See 4 C. L. 1443.

86. Entrance from street to enclosed court within the block. Pon v. Wittman, 147 Cal. 280, 81 P. 984.

87. Craushaw v. McAdoo, 47 Misc. 420, 94 N. Y. S. 386; Cleary v. McAdoo, 99 N. Y. S. 60; Cullen v. Bourke, 93 N. Y. S. 1085.

88. Delaney v. Flood [N. Y.] 76 N. E. 209. Contra, as to inapplicability of injunction. Pon v. Wittman, 147 Cal. 280, 81 P. 984; Adams v. Chesapeake Oyster & Fish Co. [Colo.] 82 P. 528.

89. McGorie v. McAdoo, 99 N. Y. S. 47; Burns v. McAdoo, 99 N. Y. S. 51.

90. See 4 C. L. 1444.

91. Power v. Douglas County [Neb.] 106 N. W. 782.

92. Expenses incurred in taking prisoners to the penitentiary authorized by Act of July 11, 1901, P. L. 663. Peeling v. York County, 212 Pa. 245, 61 A. 911. Act of July 11, 1901, P. L. 663, repeals fee bill of April 2, 1868, P. L. 3. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350; Kottcamp v. York County, 28 Pa. Super. Ct. 96. Under Civ. Code 1902, § 1030, providing that a magistrate may appoint a constable who shall receive a stated amount, or he may have the sheriff serve the papers for which he will receive the fees allowed to a constable, the compensation refered to is that of a regular constable. Mullins v. Marion County [S. C.] 51 S. E 535.

93. May tax hack hire. Peeling v. York County, 212 Pa. 25, 61 A. 911. Under a statute providing that the sheriff shall be allowed the expenses necessarily incurred in serving criminal processes, he can recover for car fare, livery hire, and hotel bills paid while serving such processes. Bybee v. Marion County [Iowa] 105 N. W. 118.

94. As mileage for taking prisoners to a state institution. Scharrenbroich v. Lewis & Clark County [Mont.] 83 P. 482. Not protected by the constitutional prohibition against an increase or diminution of salary during term of office. Id.

95. Where sheriff has commitments for several persons to serve at the same time, he is entitled to charge mileage for each commitment. Act of July 11, 1901, P. L. 663. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350. Sheriff is entitled to charge six cents per mile for the transportation of each prisoner, in addition to "necessary help and expenses." Act July 11, 1901, P. L. 663. "Necessary help and expenses" means the reasonable help and expenses necessarily incurred and is a question of fact for the jury. Id.

96. Act of July 11, 1901, P. L. 663, fixing sheriff's fees for serving subpoenas does not confer any exclusive right (O'Leary v. Northumberland County, 24 Pa. Super. Ct. 24), and he is not entitled to the fee where service is made by another. Immaterial that sheriff offered to serve the subpoena. O'Leary v. Northumberland County, 24 Pa. Super. Ct. 24.

97. A county is not liable to its sheriff for costs allowed by Pen. Code 1895, § 1107, for conducting prisoners before a judge or court, to and from jail but these costs must be collected from the prisoners after conviction. Hall County v. Gilmer, 123 Ga. 173, 51 S. E. 307.

Where the statute allows ten cents per mile "actually and necessarily traveled," recovery is not limited to mileage one way.[98]

Under a statute which gives the sheriff poundage upon the value of the property attached, but not to exceed the sum at which settlement is made if settled, he is entitled to poundage where the attachment was dismissed without consideration.[99] A sheriff is not entitled to poundage for a levy upon property where there has been no sale, unless the debt has been extinguished or compromised.[1]

Where the statute imposes a duty upon municipalities to provide lodging and board for prisoners arrested, a sheriff may recover where they are lodged in the county jail.[2] When sheriff's salary and that of his deputies are to be paid out of a particular fund, that fund alone must be looked to.[3] The word "fees" as used in statutes, providing that fees collected by the sheriff shall belong to the county and constitute a fund for the payment of his salary, has reference to compensation paid by individuals for official service,[4] and any fee directed by statute to be paid by the county belongs to the sheriff and is in addition to his salary.[5]

The plaintiff is primarily liable to the sheriff for his costs and the court has jurisdiction to compel him to pay such costs or give bond.[6] Where a statute prescribes the manner of allowing sheriff's fees and costs, a sheriff cannot maintain an action until steps have been taken under the statute.[7]

Where a statute provides that the commissioners' court shall issue an order for a draft in favor of the sheriff upon allowing his account, an order directing his account to be credited upon an indebtedness is a sufficient allowance to entitle the sheriff to a draft,[8] and a mandamus suit will lie to compel the court to issue an order for a draft.[9]

§ 4. *Deputies, undersheriffs, and bailiffs.*[10]—Where there is authority to depute one and specially to a particular court, no other deputy can act.[11] Persons summoned by the sheriff, under his authority to summon the power of the county, are not deputies.[12] Whether one is a deputy sheriff may be proved by showing that he acts as such,[13] and such is not secondary evidence in a collateral proceeding.[14] Under a statute authorizing the court to appoint a special bailiff to summon

98. July 11, 1901, P. L. 663. Kottcamp v. York County, 28 Pa. Super. Ct. 96; Lenhart v. Cambria County, 29 Pa. Super. Ct. 350; Peeling v. York County, 212 Pa. 245, 61 A. 911.

99. Poundage to be determined upon the value of the property not exceeding value specified in warranty. Miller v. Miller, 108 App. Div. 310, 95 N. Y. S. 763.

1. Act July 11, 1901, P. L. 663. Where plaintiff receives payment by an assignment of the mortgage to a third person, and the money does not pass through the sheriff's hands, he is entitled to no poundage. Larzelere v. Fisher, 24 Pa. Super. Ct. 194.

2. Act of Feb. 28, 1897, § 7 (Acts 1897, p. 93, c. 59), amended by Acts 1901, p. 24, c. 18. City of Kokomo v. Harness [Ind. App.] 74 N. E. 270.

3. Section 42, c. 28, Comp. St. 1905. County not liable if that fund is insufficient. Power v. Douglas County [Neb.] 106 N. W. 782.

4. Burns' Ann. St. 1901, § 6528. Does not include fees paid by the county. Starr v. Delaware County Com'rs [Ind. App.] 76 N. E. 1025. The allowance per diem for attendance of the sheriff upon sessions of the superior courts is not to be regarded as fees collected under the fee and salary act, but his private property. Board of Com'rs of Morgan County v. Crone [Ind. App.] 75 N. E. 826.

5. Burns' Ann. St. 1901, § 6528, providing a fee of twenty-five cents to be paid by the county to the sheriff for each prisoner received and discharged from jail. Starr v. Delaware County Com'rs [Ind. App.] 76 N. E. 1025.

6. Not material that by the decree the defendant is ordered to pay costs in the actions. Martel v. Jennings-Heywood Oil Syndicate [La.] 39 So. 705; Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 40 So. 727.

7. Gen. Laws 1896, c. 247, § 17, c. 295, §§ 13, 15. Gerardi v. Caruolo [R. I.] 61 A. 599.

8. Code Cr. Proc. arts. 1103, 1104. Denman v. Coffee [Tex. Civ. App.] 91 S. W. 800.

9. County can not credit upon a debt due. Denman v. Coffee [Tex. Civ. App.] 91 S. W. 800.

10. See 4 C. L. 1445.

11. McCalla v. Verdell, 122 Ga. 801, 50 S. E. 943.

12. Power v. Douglas County [Neb.] 106 N. W. 782.

13, 14. Under Van Epps' Code Supp. §§ 6097-6103, an inspector of roads and bridges who has been sworn in as a deputy sheriff may arrest for the violation of the

jurors but not providing who shall be appointed, the court may appoint a constable [15] and allow such compensation as will reasonably indemnify him for his time and expenses.[16]

§ 5. *Liabilities and rights. A. Liability in general.*[17]—In a suit against a sheriff for the destruction of property in his possession under attachment levy, he cannot object to a judgment which awards the entire damages to the debtor.[18] Where the law protects an officer unless a written notice of an adverse claim is served on the officer, the claim must contain a statement full in every particular specified by statute [19] and verified as required.[20]

(§ 5) *B. Failure to execute process or insufficient execution.*[21]—Where it is alleged in a petition for a rule against an officer that he has levied the plaintiff's fi. fa. and that he has had sufficient time in which to "make such money and has not done so," a general denial is sufficient.[22]

(§ 5) *C. Failure to return process and false return.*[23]

(§ 5) *D. Failure to take security.*[24]—If a sheriff accepts a bond with insufficient sureties when by the exercise of reasonable discretion he would have discovered their irresponsibility, he is liable in damages for his negligence,[25] whether his approval is in writing or without doing so he executes the process,[26] but if he delivers the property to the plaintiff without a sufficient bond, his taking becomes wrongful and trover or trespass will lie.[27]

(§ 5) *E. Wrongful levy or sale.*[28]—A sheriff is liable if he levies upon property exempted.[29]

Where property is taken by a sheriff from the possession of the owner under a writ of execution issued against a third party, the taking is wrongful,[30] and replevin will lie against the sheriff if the property is still in his possession although sold, providing a notice of ownership was given before the sale.[31] Where property is seized by a sheriff under a writ of attachment, a written statement of a mortgagee of the amount due which is insufficient to work a release does not make

criminal laws of this state as other deputy sheriffs. Earl v. State [Ga.] 52 S. E. 78.

15. Hurd's Rev. Stat. 1903, p. 1145. Carroll County v. Durham, 219 Ill. 64, 26 N. E. 78.

16. Not entitled to the fees allowed by law to the sheriff where those fees simply constitute a fund out of which the sheriff is paid and do not belong to him personally. Carroll County v. Durham, 219 Ill. 64, 76 N. E. 78.

17. See 4 C. L. 1445.

18. Especially where the creditor has been made a party and is bound by the judgment. Fields v. Vallance, 27 Ky. L. R. 992, 87 S. W. 770.

19. Code §§ 3906, 3991.

20. Shaw v. Tyrell [Iowa] 105 N. W. 1006.

21. See 4 C. L. 1446.

22. Sanders v. Carter [Ga.] 52 S. E. 887.

23. See 4 C. L. 1446.

24. See 2 C. L. 1645.

25. Trover is not appropriate. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

26. Parker v. Young, 188 Mass. 600, 75 N. E. 98.

27. Parker v. Young, 188 Mass. 600, 75 N. E. 98. Where an officer delivers property to plaintiff without sufficient bond, the delivery is sufficient to sustain an action of conversion without proof of previous demand. Id.

28. See 4 C. L. 1447.

29. An indorsement on a fi. fa. made by the prothonotary at the request of the plaintiff that the exemption is waived, or a recital in a judgment of a justice, does not relieve sheriff from liability. Schock v. Waidelich, 27 Pa. Super. Ct. 215. One may prove the full value of exempt chattels in a suit for wrongful levy up to the value alleged, though he also pleaded as exempt some things which were not. Wiser v. Thomas [Wash.] 80 P. 854. An action cannot be maintained against a constable for refusing the benefits of the exemption act in a suit commenced by an attachment in which no execution was ever issued. Blakeley v. Smith, 27 Pa. Super. Ct. 583.

30. No demand need be made to maintain conversion. Beaman v. Stewart [Colo.] 83 P. 629. To constitute a conversion of chattels by levying thereon pursuant to a writ of execution, it is not essential that the officer take them into his possession provided there be an assertion of dominion over them and an interference with the owner's right of possession. Kloos v. Gatz [Minn.] 105 N. W. 639. Whether permission to thresh grain held by levy overcame refusal to release levy, held for jury. Id. The sheriff is liable in conversion for the sale of chattels under execution where the judgment debtor had no interest, though the purchaser has not removed the property. Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465.

31. Not necessary to bring action on the

the sheriff liable in conversion.[32] Where a sheriff takes property under a writ, in an action of trover by the person who was in possession, the burden is on the sheriff to show that the property was covered by the writ and that the execution debtor had a superior title.[33]

A warrant issued under an invalid law is no protection to an officer making a levy,[34] and when he attempts to justify under any writ he must allege all the jurisdictional facts.[35] The presumption in favor of the legality of the proceedings of officers does not apply where the constable is acting as an agent of an individual.[36]

Where a sheriff, having possession of property under a levy, dies during a suit of replevin, his successor in office should be substituted as defendant.[37]

A constable who wrongfully levies upon goods may be guilty of larceny.[38]

(§ 5) *F. Missappropriation of proceeds.*[39]—Under statutes authorizing the sheriff to collect credits of the defendant and directing him to pay them to the defendant if he prevails, the defendant is entitled to such proceeds if the attachment is dismissed.[40] The summary proceedings authorized by statute for failure by the sheriff to pay over proceeds in his possession to one entitled to them will lie only when such refusal is willful.[41]

(§ 5) *G. Rights of levying officers.*[42]—Speaking generally the officer may recover from a claimant or the debtor who gave a forthcoming bond or took the goods as bailee and was afterwards defeated.[43] If a claimant induces a constable to deliver goods to him either by threats or by promises to hold harmless, he is liable for all damages which result from such delivery.[44] By statute in some states an indemnity bond irregularly drawn will sustain a judgment where it has had the effect of a validly executed bond.[45] Where the statute provides that a constable who has levied execution upon property shall, if another asserts a claim to it, taking an indemnity bond before proceeding to sell, it is immaterial as affecting the right to take a bond that the property was in custodia legis at the time of levy,[46] and such bond may be taken in a special execution levy.[47] While a formal notice to the party liable upon an indemnity bond is necessary to make the judgment in the suit against the sheriff res adjudicata, such notice may be waived.[48]

indemnity bond. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349. Where the attachment was rightful, the fact that plaintiff has since become entitled to the possession does not create a liability where no proper demand is made. Cousins v. O'Brien, 188 Mass. 146, 74 N. E. 289.

32. Statement of mortgage debt inaccurate. Cousins v. O'Brien, 188 Mass. 146, 74 N. E. 289.

33. Marcy v. Parker [Vt.] 62 A. 19. See, also, Conversion as Tort, 5 C. L. 753.

34. Beaver v. Goodwin [Tex. Civ. App.] 90 S. W. 930.

35. Beckstead v. Griffith [Idaho] 83 P. 764.

36. A constable who destrains under a landlord's warrant is not acting as a public officer, and where he attempts to justify under the warrant he must show conformity to all the statutory requirements. Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

37. Mugge v. Jackson [Fla.] 39 So. 157.

38. Where a constable selzes property under a writ of execution based upon a judgment fraudulently entered, and then conceals himself and property under circumstances which show a felonious intent to deprive the owner of the property, he is guilty of larceny. Luddy v. People, 219 Ill. 413, 76 N. E. 581.

39. See 4 C. L. 1448.

40. Michener v. Fransham [Mont.] 81 P. 953.

41. Where there is a dispute between a special and general administrator as to who is entitled to the proceedings, and the sheriff in good faith pays to one, he is not liable under this procedure upon failure to pay to the other. Roche v. Dunn [Minn.] 106 N. W. 965.

42. See 4 C. L. 1448.

43. See Attachment, 5 C. L. 302; Executions, 5 C. L. 1384.

44. See release of property on forthcoming bonds, 5 C. L. 1390. Turner v. Woodward, 123 Ga. 866, 51 S. E. 762.

45. Code 1892, § 946. A bond issued pursuant to a section authorizing it to one who is about to levy upon property, where a doubt exists as to whether it belongs to the defendant, is sufficient to cover property exempt where both intended for that purpose. Bank of Gulfport v. O'Neal [Miss.] 38 So. 630.

46. Smith v. Rogers [Mo.] 90 S. W. 1150. Where an indemnifying bond recites that the constable has levied the execution, the bondsmen are estopped to assert that there was no levy as the property was in custodia legis. Id.

47. As where the execution issued only against property in custodia legis. Smith v. Rogers [Mo.] 90 S. W. 1150.

48. Where the complaint is turned over to the attorneys of such party and they come

A mistake in an indemnity bond as to the name of the engine levied on will not invalidate the bond if as a matter of fact there was only one engine involved and the bond was intended to cover that engine.[49]

A sheriff who pays out money under a mistake can not be reimbursed by the auditor or treasurer.[50]

§ 6. *Liability on bonds.*[51]—In the absence of statutory provisions the liability of the obligors on the official bond of a constable is controlled by the terms of the bond, which are to be given a reasonable interpretation with view to the purpose of such bonds.[52] The contract of sureties upon such a bond is strictly construed, and the sureties are only liable for breach of official duty.[53]

Under statute in some states an action may be brought by any person injured by the official misconduct of a sheriff,[54] and the principal and sureties may be sued in the same action.[55]

Where a sheriff held two terms of office and had two sets of sureties, the time of the actual defalcation and not the technical breach determines which set is liable,[56] and the burden is upon the plaintiff to prove when the defalcation occurred.[57]

The statute of limitations in an action upon a sheriff's official bond for conversion of the proceeds of an execution sale of property claimed by a third person does not begin to run until the termination of the action determining such person's interest,[58] and not then unless there has been a violation of his official duty.[59]

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SHIPPING AND WATER TRAFFIC.

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in and defend without objection from such party, deemed waived. Audley v. Townsend, 96 N. Y. S. 439.

49. Smith v. Rogers [Mo.] 90 S. W. 1150.

50. Court issued an order directing sheriff to pay a deficit in the jury fund, which was done, but the order as issued by the clerk was to the auditor. Held that the auditor could not reimburse. Gibony v. Com. [Ky.] 91 S. W. 732.

51. See 4 C. L. 1448.

52. A bond conditioned that the constable shall "diligently and faithfully perform the duties of his office as prescribed by law" does not make the sureties liable for fees collected from the county in excess of the amount allowed by law, although the constable is required by law to make out an accurate statement of his fees. Jennings v. Bobe [Fla.] 40 So. 194.

53. Not liable for assault committed while levying a writ of fieri facias. State v. Dayton [Md.] 61 A. 624. If a constable in executing a valid search warrant exceeds his authority and commits trespass by causing one to be imprisoned, his sureties are responsible. Gomez v. Scanlan [Cal. App.] 84 P. 50.

54. Pol. Code 1895, § 12. McCain v. Bonner, 122 Ga. 842, 51 S. E. 36.

55. McCain v. Bonner, 122 Ga. 842, 51 S. E. 36.

56. State v. O'Neill [Mo. App.] 90 S. W. 410.

57. But it may be proven by reasonable inferences from facts established by the defendant. State v. O'Neill [Mo. App.] 90 S. W. 410.

58. Where appeal is taken in such suit, it is immaterial that no supersedeas bond was filed. State v. O'Neill [Mo. App.] 90 S. W. 410.

59. Where a statute requires the proceeds to be paid into court or otherwise disposed of as the court may order, no cause of action arises in favor of attaching plaintiff until the sheriff has failed to comply with a mandate of the court. State v. O'Neill [Mo. App.] 90 S. W. 410. A failure to turn over the proceeds upon the expiration of his term of office does not ipso facto constitute a breach of official duty. Id.

Matters relating to the jurisdiction of courts of admiralty and the practice and procedure therein,[60] and to the obstruction of navigable waters, are treated elsewhere.[61]

§ 1. *Public control and regulation; extent of state jurisdiction.*[62]—The territorial sovereignty of a state extends to its vessels upon the high seas, they being deemed a part of the territory of the state to which they belong.[63]

Inspection.[64]—The master and owners of a steam vessel, and the vessel itself are liable for the full amount of damage sustained by a passenger or his baggage through violation of the inspection laws.[65]

§ 2. *Nationality, registration, and enrollment.*[66]

§ 3. *Master and officers.*[67]—Masters of vessels are not entitled to liens for their wages.[68] The attempted abandonment of a vessel to the insurers after her stranding, which they refuse to accept, does not operate to render them liable for the subsequent wages of the master, whom they do not employ, whether sufficient in law to vest the ownership in them or not.[69] The master in such case having been employed by the owners and having been instructed by them to assist the insurers in the work of salving the vessel, and after she was temporarily repaired, having loaded a cargo and proceeded on the voyage without notice of such attempted abandonment until he reached his destination, may recover his wages from such owners.[70]

The master of a vessel is responsible to the owner for damages which the latter is required to pay because of a collision resulting from the master's negligence.[71]

A mate may be discharged or disrated for incompetency and neglect of duty.[72]

§ 4. *Seamen. Shipping articles.*[73]—Masters of vessels of the burden of fifty tons or upward, engaged in the coastwise trade, are required, before proceeding on voyages, to enter into a written contract with every seaman on board declaring the voyage or term of time for which such seaman shall be shipped.[74] Shipments of

60. See Admiralty, 5 C. L. 35.
61. See Navigable Waters, 6 C. L. 742.
62. See 4 C. L. 1450.
63. State statute creating a liability or authorizing a recovery for consequences of a tortious act operates as efficiently upon a vessel of a state when beyond its boundaries as it does when physically within the state. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261.
64. See 4 C. L. 1451.
65. Rev. St. § 4493, does not apply to vessels of other countries. Rev. St. § 4400. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261.
66, 67. See 4 C. L. 1451.
68. Masters assuming designation of pilots for purpose of avoiding law. The Pauline, 136 F. 815. Persons not performing duties of masters, but engaged solely in the navigation of the vessels, held pilots. The Pauline, 138 F. 271.
69, 70. Frenz v. Hume, 141 F. 481.
71. Master of overtaking vessel held guilty of negligence in running into overtaken vessel. Gaffner v. Johnson [Wash.] 81 P. 859. Limitations do not begin to run against the owner in such case until he is compelled to pay the party injured. Under 2 Bal. Ann. Codes & St. § 4805, has two years after such payment. Id.
72. Reduction of wages of mate on coasting vessel after completion of the voyage for incompetency and neglect of duty will not be approved where master had an opportunity to discharge or disrate him before completion of voyage but did not do so. The Sadie C. Sumner, 142 F. 611.
73. See 4 C. L. 1452.
74. Rev. St. § 4520, 6 Fed. St. Ann. p. 859. The Elihu Thompson, 139 F. 89; Commonwealth v. Bartlett [Mass.] 76 N. E. 607. The articles must be signed by both the master and the seamen in order to be binding.

seamen without signing such shipping articles are void and they may leave the service at any time,[75] and may recover the highest rate of wages paid at the port of departure for the time of their actual service.[76]

Wages and subsistence.[77]—The Federal statutes provide that a seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, without just cause and without his consent, may recover a month's wages in addition to the amount actually earned by him.[78] This provision has, however, been held not to apply to seamen in the coastwise trade not shipped by a shipping commissioner.[79]

A seaman engaged in the coasting trade is entitled to payment of his wages immediately at the time of his discharge, or within two days after the termination of the agreement under which he was shipped.[80] Every master or owner who refuses or neglects to make such payment without sufficient cause is made liable for one day's wages for each day's delay.[81]

In case the wages of a seaman are not paid within ten days after they become due, the statutes provide for the summoning of the master before the district judge of the district where the vessel is, or any magistrate, to show cause why process should not issue against the vessel,[82] and that if the master fails to appear, or fails to show that the wages have been paid or forfeited, and the matter be not settled forthwith, such judge or magistrate shall then certify that there is sufficient ground on which to issue process in rem against the ship.[83] This statute has, however, been held to be permissive only, and a seaman is not required to institute the proceedings therein provided for but may in the first instance institute a proceeding in rem against the vessel.[84]

The Federal statutes prohibit, under penalty, the payment of advance wages to seamen, and provide that such payment shall not preclude the recovery by a seaman of the full amount earned by him.[85] This statute is made equally applicable to foreign vessels in the absence of treaty provisions to the contrary.[86]

Commonwealth v. Bartlett [Mass.] 76 N. E. 607.

75. Rev. St. § 4523, 6 Fed. St. Ann. 862. Commonwealth v. Bartlett [Mass.] 76 N. E. 607. Hence, where articles have not been signed by the master at the time a seaman is induced to leave the vessel, the parties so inducing him cannot be convicted under a state statute prohibiting the enticing and persuading and aiding and assisting a member of the crew of a vessel about to sail to desert before the expiration of his term of service therein. Cannot be convicted under Rev. Laws, c. 66, § 2. Id.

76. Rev. Stat. §§ 4521, 4523, 6 Fed. St. Ann. pp. 860, 862. The Elihu Thompson, 139 F. 89. Held that court would take judicial notice of intimate commercial relations existing between port of destination and departure, and, in absence of proof to contrary, would infer that highest rate of wages at latter port was not less than usual rate at former. Id.

77. See 4 C. L. 1452.

78. Rev. St. § 4527, 6 Fed. St. Ann. 864. The George B. Ferguson, 140 F. 955. Seamen held bound by settlement made by their attorney with the master after their discharge, and hence not entitled to recover additional wages upon claim that their service lasted longer than time agreed upon on such settlement. Id.

79. The George B. Ferguson, 140 F. 955.

80. Rev. St. § 4529, 6 Fed. St. Ann. 866. The Elihu Thompson, 139 F. 89.

81. Rev. St. § 4529. The Sadie C. Sumner, 142 F. 611. There is a sufficient cause where there is a fair question for controversy as to the right to reduce mate's wages for incompetency and neglect of duty. Id.

82, 83. Rev. St. § 4546, 6 Fed. St. Ann. 879. The Elihu Thompson, 139 F. 89.

84. Is useless proceeding in any case in which the right to wages, or the amount of the balance due, is in dispute. The Elihu Thompson, 139 F. 89.

85. Act Dec. 21, 1898, c. 28, § 24, subd. a, 30 St. L. 763, 6 Fed. St. Ann. 871. The Neck, 138 F. 144. Contract made in violation of this provision is void and seaman may quit the service of the vessel without forfeiting his right to wages earned. Id.

86. Act Dec. 21, 1898, c. 28, § 24, subd. f. Are subject to same restrictions as domestic vessels in matter of hiring seamen in ports of the United States. The Neck, 138 F. 144. Treaty of Dec. 11, 1871, with Germany (17 St. 928), art. 13, giving consular officers jurisdiction to determine differences between officers and seamen, does not exempt German vessels from operation of this act. Id. Contract in violation of this provision is void, and seaman is not to be deemed a member of the crew of a German ship so as to be obliged to submit differences respecting his right to wages to German consular officers under treaty above quoted. Id. If seaman is citizen of United States he cannot by treaty be deprived of his right to invoke ad-

Punishment of seamen.[87]—Seamen may be fined for refusal to work when able to do so,[88] but no deduction for misconduct will ordinarily be allowed unless the master makes an entry of the offense in the ship's log book on the day it is committed and reads the same over to the seaman.[89]

Care of injured seamen.[90]—The vessel and her owners are bound to furnish seamen injured in the service with prompt medical and surgical aid and are liable in damages for a failure to do so.[91] Whether the captain is bound to put into the nearest port for that purpose depends upon the circumstances of each particular case, he being only required to exercise a reasonable judgment in the matter.[92] So, too, the vessel or her owners are liable to a seaman injured in her service to the extent of his maintenance and cure.[93] Such liability does not necessarily terminate with the voyage,[94] but a seaman who is permanently disabled is not entitled to maintenance after the accomplishment of such cure as is possible.[95]

§ 5. *Mortgages, bottomry, maritime and other liens on the vessel, craft, or cargo.*[96]—A pledge for loans made for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, gives the pledgee a maritime lien on such freights.[97] A mortgagee who, on taking possession of the vessel, in good faith pays off arrears of wages due the crew in order to prevent the filing of libels therefor, is entitled to enforce the preferred lien of the seamen therefor on distribution of the proceeds of a sale

miralty jurisdiction of Federal courts to recover wages earned in employment commencing and terminating within the United States. Id.

87. See 4 C. L. 1453.

88. Where seaman laid off for five days in port claiming that he was incapacitated because of illness, but surgeon refused to give him a certificate of illness and he was logged and given a copy of the log entry, held that he could not recover wages for such time in the absence of proof that he was in fact too ill to work. The St. Louis, 137 F. 972.

89. Rev. St. § 4597, 6 Fed. St. Ann. 914, requiring reading of log entry to seamen who are fined, held sufficiently complied with by giving him a copy of such entry. The St. Louis, 137 F. 972.

90. See 4 C. L. 1454. For liability of vessel for injuries to seamen, see § 18, post.

91. Ship liable in damages for negligence in failing to leave seaman, whose hand was injured, at first port of call in accordance with his request, and in failing to follow directions of physician as to proper treatment, as a result of which his hand became permanently disabled. The Sarnia, 137 F. 952. Seaman awarded $1,500 for permanent crippling of his right hand through failure of ship to furnish proper treatment. Id. Evidence held insufficient to show that master was negligent in diagnosing or treating injury. The Kenilworth, 137 F. 1003. Evidence held insufficient to show actionable neglect on the part of the master to afford seaman reasonable treatment for the cure of frostbite. Johnson v. Holmes, 188 Mass. 170, 74 N. E. 364. Action of master in requiring seaman, whose hand had been forstbitten, to work at shoveling ice held reasonable and proper under the circumstances, the vessel being short-handed and in a position of peril. Id.

92. Failure to do so held not negligence in view of the character of the injury. The Kenilworth, 137 F. 1003. Master held not chargeable with negligence in failing to deviate from his course and put into an intermediate port to procure aid for seaman whose leg was bitten off by a shark, it appearing that he was not caused any additional permanent injury by reason thereof. The Margharita [C. C. A.] 140 F. 820.

93. The Henry B. Fiske, 141 F. 188. A seaman injured while in the service of the ship is entitled to the expenses of his maintenance and cure, at least so long as the voyage lasts. The Kenilworth, 137 F. 1003. Item for medical and surgical treatment disregarded in absence of evidence that he had incurred, or was likely to incur, any such expense. Id. Item for board and lodging after reaching port held not to clearly appear to be an expense of maintenance during cure, and further testimony permitted to be taken in regard to it. Id. Though tug was not liable for injuries to fireman, held that she was liable for the expense of his cure and for his maintenance during his disability. The Mars, 138 F. 941. Seaman injured in course of his duty, though through his own negligence, is entitled to recover the amount expended by him for hospital charges and medical services in effecting a cure. The Chico, 140 F. 568.

94. Held entitled to expenses incurred, after his discharge from hospital, it appearing that his cure was not then complete so far as could he effected by ordinary medical means. The Henry B. Fiske, 141 F. 188.

95. The Kenilworth, 137 F. 1003. Not after ordinary medical and surgical means can do nothing more for him, even if liable at all after termination of voyage. The Kenilworth, 139 F. 59.

96. See 4 C. L. 1455. For liens for repairs and supplies, see § 12, post.

97. As where charterer procures advances from bank on the credit of the freights of particular vessels assigning to it the charters and insurance policies. Bank of British

of the vessel under proceedings instituted by other lien claimants.[98] He is not, however, entitled to recover the value of their services rendered under a contract with him after he takes possession.[99] One advancing money to pay off a lien for salvage on a vessel under an agreement that he shall have an assignment of such lien and a lien on the vessel for the amount so advanced is subrogated to all the rights of the assignor, and, on a subsequent sale of the vessel in admiralty, is entitled to priority over prior judgments in personam against the owners.[1]

A maritime lien attaches not only to the original subject of the lien but also to whatever is substituted for it, and the lienholder may follow the proceeds wherever he can distinctly trace them,[2] and may assert his lien thereon in a court of admiralty by an action in rem, though he may also have an equitable lien enforceable in a court of equity.[3]

The duration of a lien created by contract depends, of course, upon the terms of such contract.[4] In Louisiana a vendor's lien or privilege on a vessel must be enforced within six months from the date of the sale.[5]

A state court can only sell the right of the shipowner subject to maritime liens, and the purchaser of a vessel at a receiver's sale takes subject to them.[6]

§ 6. *Charter party.*[7]—One chartering a part interest in the vessel acquires a special interest therein as against the original owner,[8] and in such case the master's possession is as much for the benefit of the charterer as for the owner.[9]

A charter party gives the charterer the whole and exclusive use of the vessel, whether or not there be a demise of the ship.[10] If the vessel be let so that there is a transfer or relinquishment to the charterer of the entire command, possession, and subsequent control, he will be treated as owner for the voyage or particular event stipulated for;[11] but if the charter is merely an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession, and control over its navigation, the charterer must be regarded as a contractor for a designated or specific service only,

North America v. Freights [C. C. A.] 137 F. 534, affg. 127 F. 859.

98, 99. The Pauline, 136 F. 815.

1. The Dredge No. 1, 137 F. 110.

2. Lien created by maritime pledge of freights follows freights through all their transmutations and wherever they can be found. Bank of British North America v. Freights [C. C. A.] 137 F. 534, affg. 127 F. 859.

3. Bank of British North America v. Freights [C. C. A.] 137 F. 534, affg. 127 F. 859. Fact that pledgee permitted charterer to deposit proceeds in his general account and to draw checks against such account for other purposes than paying advances held not a waiver of the lien, it not appearing that pledgee had any reason to believe that such checks were not drawn against charterer's own part of the fund. Id. Where charterer depleted such account, before accounting for advances, by a check drawn for other purposes, which was not, however, shown to have been delivered until after he made a deposit of his own money to the credit of such account, held that he would be regarded as having drawn out his own funds rather than the trust money, and the deposit would be deposited pro tanto in payment of the check, leaving the balance to be applied on the advances. Id.

4. In view of previous course of dealing between the parties, held that lien created by pledge of freights did not terminate when charterer collected and deposited them, though he mingled them with his own funds. Bank of British North America v. Freights [C. C. A.] 137 F. 534, affg. 127 F. 859.

5. Rev. Civ. Code, art. 3227. Though note has been given for part of purchase price, prescription begins to run from date of contract and not from maturity of the debt. In re Red River Line [La.] 40 So. 250. Privilege perempts or dies at the end of six months, and in such case no plea of prescription is necessary. Id. The receipt of such a note as cash works a novation and is a waiver of the lien. Id.

6. Lien for salvage. In re Red River Line [La.] 40 So. 250. Where purchaser paid a certain sum to lien claimants who had filed a libel against the vessel, held that insolvent estate had no ownership or equity in the amount so paid, and lien claimants, who were also creditors of the insolvent, could not be compelled to account for the same in the receivership proceedings. Id.

7. See 4 C. L. 1456.

8. Original owner disclaiming as to this item, and it appearing that charterer paid him insurance after the seizure of the vessel, charterer of an eighth interest in vessel is entitled to one-eighth of the indemnity awarded under law relative to French spoliation claims. Brig Maria, 39 Ct. Cl. 39.

9. Brig Maria, 39 Ct. Cl. 39.

10. The Arizonan, 136 F. 1016.

11. Grimberg v. Columbia Packers' Ass'n [Or.] 83 P. 194. The fact that the owner

and the duties and responsibilities of the owner are not altered.[12] The question is one of intention to be d...ved from the language used.[13] There is, however, a presumption against a demise, and the contract is to be construed as one for an affreightment unless the terms show a clear intendment to the contrary,[14] any doubt being resolved in favor of a contract of affreightment,[15] and the burden of showing a demise being on the party relying thereon.[16]

The owner must provide proper fittings and equipment for the service in which the vessel is to be engaged,[17] and is generally required to furnish a vessel which is staunch, strong, and in every way fitted for such service.[18] There is an implied warranty of seaworthiness at the inception of the voyage on which the charterer is entitled to rely,[19] unless he examines and accepts the vessel with knowledge of her unseaworthy condition.[20] A carrier contracting to carry a cargo by water, who charters a vessel belonging to a third person to transport it a part of the distance, is the shipper as to such vessel and may maintain a suit in rem against her for damages to such cargo due to unseaworthiness, even in the absence of evidence of subrogation to the rights of the cargo owner.[21]

In the absence of a provision therein to the contrary, delay in reaching the port of loading does not put and end to the charter where it does not defeat its object.[22] Where the charter fixes no time within which the vessel is to arrive and

agrees to pay the wages of the crew does not prevent its being a demise. Auten v. Bennett [N. Y.] 76 N. E. 609.

12. Charterer is not in such case liable for injuries to seaman due to defective rigging. Grimberg v. Columbia Packers' Ass'n [Or.] 83 P. 194. If the charter party is a demise the charterer has possession with the incidental right of use, but if less than a demise, he has no right to possession but only an exclusive right of use. The Arizonan, 136 F. 1016.

13. Grimberg v. Columbia Packers' Ass'n [Or.] 83 P. 194. Charter party containing no technical words of grant or demise, and not in terms letting the vessel to hire, held mere contract of affreightment, so that charterer was not liable for death of seaman due to defective rigging. Id. Provisions that vessel shall be kept well fitted, tight, etc., during voyage, that whole vessel shall be at disposal of charterers, and that no goods shall be loaded otherwise than for them, held to indicate that contract was one of affreightment. Id. Words "freighting" and "chartering" in provision that first party "does covenant and agree on the freighting and chartering" of the vessel for one voyage held consistent with contract of affreightment. Id. Provisions whereby charterer covenants to "charter and hire" vessel and to pay for charter, including captain's salary, a specified sum on the "acceptance" of the vessel and a specified sum per month until she was discharged of her cargo, that charterer should "employ" the vessel only in lawful trade, that charter should "commence" when vessel was "delivered" in manner designated, held not inconsistent with such a contract. Id. Charter held not tantamount to a demise where owner agreed to furnish charterer "with the services of the tug boat, fully manned and equipped," and paid the crew for their services. The Arizonan, 136 F. 1016. Fact that crew were selected in whole or in part from charterer's night crew held not to change the rule, they being the servants of the owner. Id. Contract held not to make transportation line delivering freight to canal boat for transportation her owner pro hac vice, but to be a mere contract of affreightmen so that boat was not a mere bailee for hire. The Presque Isle, 140 F. 202.

14. Grimberg v. Columbia Packers' Ass'n [Or.] 83 P. 194. Will not be considered as a lease or demise for the time being unless the intention to transfer possession and ownership to the charterer is unequivocally manifested by the contract. Is presumption that ownership continues in general owner. Auten v. Bennett [N. Y.] 76 N. E. 609. Charter party on its face, and purposes for which it was executed, held to show that there was a demise of a yacht so as to render defendant liable for failure to return it in as good condition as he received it. Id.

15, 16. Grimberg v. Columbia Packers' Ass'n [Or.] 83 P. 194.

17. Owner is liable for cost of lining vessel where, owing to her construction, it was necessary in order to render her seaworthy for carrying a cargo of asphalt in contemplation when the charter was made, and also for removing such lining at the expiration of the charter. Tweedie Trading Co. v. Dene Steam Shipping Co., 140 F. 779.

18. Evidence insufficient to show that vessel was not "tight, staunch, strong and in every way fitted for the service," as required by charter, by reason of foulness of her bottom. Glasgow Shipowners' Co. v. Bacon [C. C. A.] 139 F. 541, affg. 132 F. 881.

19. The Presque Isle, 140 F. 202.

20. Must be actual knowledge, the mere fact that stevedores employed by him had some opportunity to observe vessel's condition being insufficient. The Presque Isle, 140 F. 202.

21. Lake carrier contracting to carry cargo from New York to Chicago and chartering canal boat to carry it through Erie canal. The Presque Isle, 140 F. 202.

22. Delay of sixty days held not to have done so where she was loaded by charterer on her arrival and carried and delivered her cargo as contemplated, and in such case

receive her cargo, she is only bound to make reasonable efforts to enter as speedily as practicable upon the performance of the voyage named in the charter,[23] and, having made such efforts, the owner is not responsible for any loss sustained by the charterer by reason of the fact that she is delayed without fault on his part or that of the crew in reaching the port of loading.[24]

In the absence of an express provision to the contrary the charterer is bound to have the cargo ready for loading at the proper place so as to give the vessel reasonable dispatch.[25] The fact that the vessel is delayed in reaching the port through no fault of her own does not excuse the charterer in this regard provided it is not so long as to frustrate the object of the contemplated voyage.[26]

In the absence of any speed warranty or provision in the charter for docking or cleaning, the charterer is not entitled to a deduction because the speed of the vessel is retarded on account of the foul condition of her bottom, of which he knew when the contract was made, or should have expected from the circumstances.[27] Though the vessel is so disabled by stranding as to render her unfit to perform the service for which she is engaged, so that, under the terms of the charter there can be no recovery of hire for the remainder of the voyage, the owner is nevertheless entitled to recover hire for the time occupied in discharging at the port of destination, it appearing that the accident did not affect the actual ability of the vessel to discharge, though there was some delay owing to the condition of the cargo as a result of such stranding.[28]

As in the case of any other bailee for hire, the charterer of a vessel is bound to exercise the diligence of a prudent man with respect to it, and is responsible to the owner for any default.[29] He is not, however, liable for loss due to inevitable

owner is entitled to recover freight at charter rate. Schooner Mahukona Co. v. Chas. Nelson Co., 142 F. 615.

23. Schooner Mahukona Co. v. Chas. Nelson Co., 142 F. 615.

24. Charterer not entitled to set off damages due to delay caused by storm. Schooner Mahukona Co. v. Chas. Nelson Co., 142 F. 615. The owner is not liable to the charterer for delay in delivery due to repairs made necessary by the stranding of the vessel on the way to the port of delivery, where he exercises good faith and reasonable diligence in the prosecution of the work. Charterer not entitled to demurrage exacted by the owner from contractor making the repairs for delay in completing the work. Tweedie Trading Co. v. Dene Steam Shipping Co., 140 F. 779.

25. Charterer held liable for demurrage for delay in loading vessel, though cargo intended for her had been forwarded by another vessel and it was necessary to manufacture another one, which was done with reasonable diligence, where charter contained no provision as to time when vessel should arrive, nor for lay days, nor for her loading at any particular dock or place. Schooner Mahukona Co. v. One Hundred and Eighty Thousand Feet of Lumber, 142 F. 578. Evidence held insufficient to show that charter was modified so as to provide that vessel should wait thirty days before commencing to load, and should thereafter receive cargo only so fast as the same was manufactured at the mill. Id.

26. Schooner Mahukona Co. v. One Hundred and Eighty Thousand Feet of Lumber, 142 F. 578.

27. Charterer of vessel by time charter held not entitled to deduction where charter contained no guaranty of speed, and clause in printed charter providing for docking and cleaning was stricken out, and charterer knew that she had not been docked for several months during which time she had been in tropical waters. Glasgow Shipowners' Co. v. Bacon [C. C. A.] 139 F. 541, affg. 132 F. 881. In any event not entitled to recover where evidence does not show how much of loss of speed was due to foul bottom and how much to other causes, and it does not appear definitely to what extent bottom was covered with barnacles, etc. Id.

28. There being no valid claim against the ship for damage to the cargo through the stranding under the charter and the Harter act. Lake Steam Shipping Co. v. Bacon, 137 F. 961.

29. City hiring scow under verbal charter held insufficient to establish that injury to libelant's barge was caused by her being struck by one of respondent's tugs, she being under charter to respondent and lying at its dock when struck. Blakeslee v. New York Cent., etc., R. Co. [C. C. A.] 139 F. 239. Hirer of a vessel notified owner that he had sent it to latter's dock, but it did not reach there and was found elsewhere by the and leaving it in exposed place held liable for its loss by being crushed by floating ice. Bleakley v. New York, 139 F. 807. Evidence owner in a damaged condition. Held that, even if, under the contract of hiring, he was not under the ordinary obligation of a bailee to return it, he assumed that obligation by such notice and thereby made himself liable for at least the cost of towage to owner's

accident,[30] or the fault of the owners.[31] Lessees of a boat who, at the expiration of the lease, undertake to deliver it to the lessor at a port other than that named in the lease, although at the owner's request and without charge, are bound to exercise such maritime skill and care as is reasonable under the conditions existing at the time, and are liable for any tort committed by them during the towage growing out of their negligence.[32] The lessor cannot recover as for a total loss on the ground that the damage cannot be repaired without the expenditure of an amount exceeding half the vessel's value after the repairs, in the absence of an abandonment of the vessel to the lessee.[33]

As a general rule the owner rather than the charterer is entitled to salvage awards for services rendered by a vessel, unless the charter amounts to a demise or there is an agreement to the contrary.[34] The charterer is, however, entitled to recover any damage resulting from delay and to recover payments for unearned services made under mistake of fact.[35] The fact that the owner accepted the per diem compensation for the time occupied by the salvage service does not estop him from claiming the award in the absence of a showing that there was any controversy in that regard between the parties, or that the owner asserted in terms that the vessel was in the charterer's service during such time.[36]

A charter party is to be construed in the same manner as any other contract.[37] The intention of the parties controls,[38] and their rights and obligations are to be determined from the language used.[39] They will be deemed to have contracted with reference to the usages of the port where the charter is made.[40] The construction of particular charter provisions with reference to the docking and cleaning of the vessel,[41] the time when she is required to sail,[42] liability for improper stowage,[43]

dock. Swenson v. Ward, 48 Misc. 534, 96 N. Y. S. 175.

30. No accident can be regarded as inevitable which could, with the exercise of proper care, have been foreseen and provided against. Damage to scow lying on northerly side of pier due to drifting ice held not the result of inevitable accident. Bleakley v. New York, 139 F. 807.

31. The bailee of a barge is not responsible for a loss caused by the manner of its loading, when such loading is under the direction and control of the master of the barge, who is kept on board by the bailors and vested by them with such direction and control. Under such circumstances defendant would not be liable for taking barge to sea, though manner of loading was such as to make danger of doing so obvious. Dunwoody v. Saunders [Fla.] 39 So. 965.

32. Lessees of houseboat held negligent in attempting to tow boat by placing it between two loaded scows, and in attempting to tow it at all in the then condition of wind and sea. Cotton v. Almy [C. C. A.] 141 F. 358.

33. Even if rule applied in marine insurance is applicable. Cotton v. Almy [C. C. A.] 141 F. 358.

34, 35, 36. The Arizonan, 136 F. 1016.

37. Auten v. Bennett [N. Y.] 76 N. E. 609.

38. Rosasco v. Pitch Pine Lumber Co. [C. C. A.] 138 F. 25, affg. 121 F. 437.

39. Depend upon stipulations of the contract as to liability for delay in unloading. Adamson & Mail v. 4,300 Tons Pyrites Ore, 137 F. 998.

40. One permitting his vessel to be chartered by brokers at a port where a usage exists for shipbrokers to execute charters without reference to the master of the vessel will be regarded as having contracted with reference to such usage. Richard J. Biggs & Co. v. Langhammer & Son [Md.] 63 A. 198.

41. Under provision that charter might require vessel to be docked and cleaned once every six months, hire to be suspended until she was again in a proper condition for service, but requiring charterer to send her to United States port where there were docking facilities, and that charterer should pay for all time lost in shifting ports for that purpose, held that he was liable for hire during month spent in waiting for repair of docks, during which time she was subject to his orders and could have been sent elsewhere. Albis Co. v. Munson [C. C. A.] 139 F. 234, affg. 130 F. 32. Rule that it is the duty of the party injured by breach of contract to use reasonable means to minimize damages held not applicable so as to have required owner to have sent her to another port and thus lessen delay, since loss was one accruing to charterer, and charterer could and should have himself sent her to another port. Id.

42. Provision that loading port was to be named before vessel left Venice, "but vessel to sail 48 hours after orders are given," held to apply to orders given after vessel was loaded and not to time she was required to sail from Venice after the naming of the port of loading. Rosasco v. Pitch Pine Lumber Co. [C. C. A.] 138 F. 25, affg. 121 F. 437. Provision requiring vessel to sail in ballast for port of loading within 48 hours after notice designating such port held not a condition precedent, a breach of which entitled

the place of delivery of the cargo and the risks incident thereto,[44] and liability for loss of goods after they are unloaded,[45] will be found in the notes.

The usual rules as to the rescission [46] and modification of the contract apply.[47] The justifiable abandonment of the vessel because of perils of the sea authorizes the cargo owners to treat the contract as at an end and to refuse to go on with the voyage, at least where the master does not rejoin the ship before anyone else takes possession, or does not get it back from the salvors before the cargo owners have been heard from.[48]

Charter parties and similar contracts which do not call for the exercise of any personal skill, and can be performed equally well by anyone, may be assigned by the charterer without the consent of the owners.[49] The burden of the obligations imposed thereby cannot, however, be assigned without such consent.[50] The indorsement and transfer of the contract to the assignee transfers to him all the assignor's rights thereunder,[51] but there is an implied contract on the part of the assignee to the assignor that he will carry out such contract, and he is liable for all damages resulting to the latter from his failure to do so.[52]

The damages recoverable for breach of a charter are of the character contemplated by the parties at the time of making the contract, or such as might reasonably have been expected to follow its breach.[53] The measure of damages for breach by failure to carry the full amount of merchandise agreed to be carried is the market value of the quantity not delivered at the port where it is agreed to be

the charterer to cancel the contract, in view of a subsequent provision that charter should be canceled if she did not arrive at port of loading before a specified day, and fact that she did so arrive. Id.

43. Ship held responsible for bad stowage though stevedores were selected by charterer, as charter provided that they might be, where it was further provided that they should be under the direction of the master and that owners should be responsible for all risks of loading and stowage. Corsar v. J. D. Spreckels & Bros. Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786.

44. Where vessel is equipped and chartered for purpose of supplying troops with water, and agrees to deliver it at such places as ordered, held that it would be presumed that parties mutually intended that water should be supplied to soldiers whenever or wherever they might be at sea, if necessity required. Donald's Case, 39 Ct. Cl. 357. Under charter of boat for purpose of furnishing troops with water, providing that owners are to bear marine risk and charterers the war risk, injury to vessel due to furnishing water to transports during rough weather is not a war risk. Id. Injuries to water boat in delivering water to transport held not attributable to charterers under provision requiring them to make such repairs as are the result of their own fault. Id. Where charter contains no provision that water shall only be delivered in calm sea or harbors, it will be presumed that it was designedly omitted and that water is to be delivered where wanted, though attended with risks. Id.

45. Where charter gave charterers absolute right to select place for unloading, provided only that steamer should always lie safely afloat at any stage of tide, and contained further provision that charterers would indemnify owners from any liability that might arise from captain's signing bills of lading or otherwise complying with the same, held that charterers and not owners were liable for damage to plaintiff's goods caused by collapse of pier on which they had been unloaded. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, affg. 102 App. Div. 39, 92 N. Y. S. 86.

46. Charter held not to have been rescinded by mutual consent. Schooner Mahukona Co. v. Chas. Nelson Co., 142 F. 615.

47. Local quartermaster held to have no authority to settle claim for damages to water boat chartered by government resulting from a risk which government did not assume under charter. Donald's Case, 39 Ct. Cl. 357.

48. Is a breach of the contract amounting to a renunciation which authorizes the other party to rescind. The Eliza Lines, 26 S. Ct. 8, rvg. [C. C. A.] 114 F. 307 [C. C. A.] 132 F. 242.

49. Charter and contract whereby owners agreed to furnish charterers with cargo of lumber at specified price per thousand in addition to freight. Frese v. Moore [Cal. App.] 82 P. 542.

50. Civ. Code 1457. Charterer, in such case, becomes surety to secure performance by assignee. Frese v. Moore [Cal. App.] 82 P. 542.

51. Civ. Code § 1459. Release of owners by assignee is conclusive on assignor. Frese v. Moore [Cal. App.] 82 P. 542.

52. Where plaintiff assigned charter and contract to defendant at a higher rate than that which he was required to pay, and defendant released owners without plaintiff's consent, held that he was liable to plaintiff for all the benefits he would have received if contract had been performed as contemplated. Frese v. Moore [Cal. App.] 82 P. 542.

53. The A. Denicke [C. C. A.] 138 F. 645.

delivered at the time it was to be delivered, less its value at the port where the vessel agreed to receive it and the freight agreed to be paid.[54]

§ 7. *Navigation and collision. A. Rules for navigation and their operation in general.*[55]—A fault of navigation imposing legal liability for a collision must be one which was clearly, at the time, bad seamanship, irrespective of its results.[56] Faults which do not cause or materially affect the collision are immaterial.[57] Errors of judgment in extremis will not ordinarily be regarded as faults.[58] There is no legal liability for a collision due to inevitable accident,[59] but a vessel is not excused because of her inability to maneuver immediately before the collision where she has deliberately placed herself in a position where she will not be free to do so.[60] The question in collision cases is not what the colliding vessels do when they get close together, but what maneuver they were bound to adopt, and what one they actually did adopt, when they were still far enough apart to maneuver in safety.[61]

A vessel violating the navigation rules is presumably in fault for an ensuing collision,[62] and has the burden of showing that such disregard could not have been one of the causes thereof,[63] but where it appears that she has not violated any such regulation, but has only neglected the usual and proper measures of precaution, the burden resting on her to show that the collision was not owing to her

54. For failure to carry full amount of lumber. The A. Denicke [C. C. A.] 138 F. 645. Liability of barge for failure to carry full amount of lumber is not necessarily the same as liability of charterer to one to whom he has sold the lumber for failure to deliver the full amount. Id.
It not appearing that lumber was sold by charterer at port where it was to be received by barge at less than the market price, and there being a presumption that such price, with freight added, would at least have equaled price at which he had agreed to sell it at port of delivery, held that he was only entitled to nominal damages. Id.

55. See 4 C. L. 1459.

56. Liability does not necessarily follow from acts or omissions without which collision would not have occurred. The Jumna, 140 F. 743.

57. Collision held to have been brought about by failure to properly locate lookout. The Vendamore [C. C. A.] 137 F. 844, affg. 131 F. 154. Signals of vessels held immaterial, even if improper, where they were not misled thereby. The City of Lowell, 139 F. 901. Fact that schooner exhibited false and misleading light in the extremity of the collision held not to require division of damages, it being doubtful whether it contributed to the collision, which was fully accounted for by the plain fault of the steamer with which she collided. The Furnessia, 137 F. 955. Dumping scow which broke from tow in high wind and drifted against yacht held not responsible for injuries to latter, by reason of absence of anchor chain or cable, where evidence showed that anchor, if it could have been used, would not have prevented collision because of the wind. The Scow No. 51 H, 140 F. 70. Where the privileged vessel keeps her course until collision, as she is bound to do, it is not material to inquire whether or not there was any incompetency on the part of her lookout. The Fannie Hayden, 137 F. 280.

58. The Jumna, 140 F. 743. A vessel will not be held liable for errors of seamanship committed when confronted with great peril into which she has been brought by the action of another vessel. Brigham v. Luckenbach, 140 F. 322.

59. Collision between steamer being towed by three tugs and another tug with three tows caused by the breaking of a hawser by which steamer was being towed, held the result of inevitable accident. The Jumna, 140 F. 743. Jamming of tug's wheel, claimed to have prevented her from avoiding collision, held not an unavoidable accident relieving her from responsibility where it was due to the suddenness with which it was turned, which would not have been necessary had she had a more vigilant lookout and thus seen the approaching schooner earlier. Brigham v. Luckenbach, 140 F. 322. Evidence held insufficient to show that yacht was caused to break loose by being fouled by another yacht which dragged her anchors, though reasonable provision had been made to secure her, but that the injuries to both were due to the extraordinary severity of the storm and were the result of inevitable accident. The Kentonia, 141 F. 384.

60, 61. The Transfer No. 10, 137 F. 666.

62. Vessel on wrong side of East river. The Transfer No. 10, 137 F. 666. Vessel navigating East river in violation of narrow-channel rule requiring vessels to keep to the right, and of state statute requiring vessels on that river to keep as near the center of the stream as possible, held in fault for collision. Id.

63. The Fannie Hayden, 137 F. 280. A vessel which has been found guilty of a palpable violation of a statutory requirement relative to navigation, sufficient in itself to cause, and which in the judgment of the court did cause, the collision, cannot escape liability by merely throwing doubt on the conduct of the other vessel, but must clearly and conclusively establish that the collision was caused by the fault of such vessel. Baltimore Steam Packet Co. v. Coastwise Transp. Co., 139 F. 777.

neglect as the efficient cause is only the ordinary one.[64] Violation of such rules is not excused because it may result in easier navigation, or because it is customary to violate them under certain tidal conditions,[65] and they are equally applicable to passenger steamers running regularly on an established route on schedule time.[66]

(§ 7) *B. Lights, signals, and lookouts. Lights.*[67]—Vessels must show the prescribed lights in the prescribed manner.[68] Unfinished breakwaters and like structures should be properly lighted at night.[69]

Signals.[70]—The passing[71] and fog signals required by the navigation rules must be given.[72] The burden is upon the libelant to show that fog signals were not given.[73]

Lookouts.[74]—Every vessel is required to have a competent and efficient lookout[75] who should be stationed at the point best suited for the purpose alike of

64. Privileged vessel not in fault even if there was incompetency on part of lookout where she kept her course. The Fannie Hayden, 137 F. 280.

65. Vessel on wrong side of channel in East river. The Transfer No. 10, 137 F. 666.

66. Are liable for damages for collision resulting from excessive speed in harbor during fog. The Bellingham, 138 F. 619. Steamer held not to be regarded as ferryboat making regular trips across harbor so as to be entitled to peculiar privileges. Id.

67. See 4 C. L. 1461.

68. Evidence held to show that schooner's lights were properly set and burning at the time of the collision. Brigham v. Luckenbach, 140 F. 322; The Fannie Hayden, 137 F. 280.

Vessel moored at end of wharf in navigable part of narrow stream constantly traversed by vessels held in fault for failure to carry a light so that she could not recover damages for collision. Even if Act June 7, 1897, c. 4, art. 11, 30 St. 98, and rule of board of supervising inspectors adopted Feb. 8, 1899, relating to lights on moored vessels, did not apply, "special circumstances" required her to carry lights under art. 29 of the Act of 1897. The Millville, 137 F. 974. Schooner held not in fault for failing to show a flare-up light to a tug approaching from forward of her beam, since showing such a light would have been a fault (Art. 10, sailing rules) while vessels were approaching, and it was too late to do so when damages became apparent (Art. 12). Brigham v. Luckenbach, 140 F. 322. Evidence held not to show that schooner was a vessel being overtaken by another so as to make her in fault for failing to show a white or flare-up light. The Fannie Hayden, 137 F. 280.

Catboat in fault for collision with tug for failure to have lantern with green glass on one side and red on the other, as required by Act Aug. 19, 1890, c. 802, art. 7, § 35, 23 St. 322. The Our Friend, 142 F. 274.

69. Use of white light by government to mark end of unfinished breakwater in Great Lakes, instead of red one, such as is used by lighthouse board to mark finished structures, held not misleading so as to exonerate master of vessel from charge of negligent navigation in running into it, it appearing that it had been the custom to so mark such structure for many years, and that master had received notice warning him of such structure to which he paid no attention. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315. Evidence held sufficient to sustain verdict holding owner liable for damage to breakwater. Id.

70. See 4 C. L. 1461.

71. The one of two meeting steam vessels having the other on her starboard side is required to indicate by one blast of her whistle her intention to direct her course to starboard, and by two blasts her intention to direct her course to port, to which the other vessel shall promptly respond. The New Hampshire [C. C. A.] 136 F. 769. If one of the meeting vessels does not intend to acquiesce in the passing signals of the other, it is her duty to sound alarms for the purpose of notifying the latter of that fact. The Transfer No. 10, 137 F. 666. In case the pilot of either of two vessels approaching each other fails to understand the course or intention of the other, he is required to signify the same by proper signals, and, in such case, if the vessels have approached within half a mile of each other, both must slow down until the proper signals are given, answered, and understood, or until they have passed each other. Rule 3 of board of supervising inspectors. The Atlantic City, 136 F. 996. Both vessels held in fault for failure to observe this rule. Id.

72. Evidence held to sustain finding that fog was not so thick as to render the ordinary rules of navigation inapplicable, or to render vessel in fault for failure to give fog signals. The New Hampshire [C. C. A.] 136 F. 769.

Skiffs and the like navigating on waters emptying into the Gulf of Mexico are required to sound fog horns in a fog. Pilot rules adopted March 1, 1897. U. S. Rev. St. § 4233, rule 15 D., 2 Fed. St. Ann. 189. Quinette v. Bisso [C. C. A.] 136 F. 825. Failure to do so is contributory negligence. Id. Noise made by patent rowlocks on skiff held not equivalent to fog horn. Id.

Vessels lying at anchor in a fog must give the required fog signals. Schooner lying at anchor held solely in fault for failure to sound fog signals required by art. 15d of navigation rules. Baltimore Steam Packet Co. v. Coastwise Transp. Co., 139 F. 777. Evidence held sufficient to establish fact that there was a fog. Id.

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

74. See 4 C. L. 1462.

75. When the only two men on deck are engaged in taking down sail in the nighttime, there is no proper lookout. Schooner held in fault for collision with another one having the right of way. The Fannie Hayden, 137 F. 280. A seaman whose duty it is

hearing and observing the approach of all objects likely to be brought into collision with the vessel.[76]

(§ 7) *C. Steering and sailing rules.*[77]—As a general rule vessels approaching each other head on, or nearly so, are required to pass port to port.[78] When two steam vessels are crossing so as to involve risk of collision, the one having the other on her starboard side is required to keep out of the way of the other.[79]

When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the former must keep out of the way of the latter.[80] So, too, an overtaking vessel must keep out of the way of the overtaken one.[81]

to watch, but who goes aft into the cabin to rake the stove, is not at the time a competent and proper watch. Id. The services of a proper lookout, suitably located, cannot be dispensed with because some officer of the ship, engaged in other duties, may or may not have observed the approaching vessel or heard its signals. Failure to have lookout in bow not excused because officer who was there, arranging to lower anchor, did not hear fog signals of approaching vessel, or observe her. The Vendamore [C. C. A.] 137 F. 844, affg. 131 F. 154. Assignment as to want of proper lookout held unavailable, it appearing that there was a lookout at his proper station and that he could not see skiff before it was run down owing to the dense fog. Quinette v. Bisso [C. C. A.] 136 F. 825. Steamer in fault for collision in fog. The Furnessia, 137 F. 955. Tug navigating in nighttime in place frequented by vessels held in fault for collision with schooner by reason of inattention and lack of vigilance of person stationed in her pilot house who was undertaking to act as lookout. Brigham v. Luckenbach, 140 F. 322. Steamer in fault for not having lookout, it appearing that had she had one he could have seen the danger in time to have avoided it by enabling her to stop and reverse. The Northman, 139 F. 692. Tug with tows and barge about to anchor held both in fault for collision because neither had an efficient lookout. The Violetta, 141 F. 690. Tug with car floats on each side projecting ahead of her so as to shut off view of pilot held in fault for running into rowboat, for failing to have a lookout, to give warning signal, and to slacken speed. Klutt v. Philadelphia & R. Ry. Co. [C. C. A.] 142 F. 394, rvg. 133 F. 1003. Tug in fault for collision with catboat for failure to station lookout on dark night. The Our Friend, 142 F. 274. Steamer colliding with hawser stretched across slip held not in fault for failing to have lookout forward, it appearing that presence of a watchful person there would not have averted the accident. The Roma, 138 F. 218. Lookouts on steamer and ferryboat held sufficient. The City of Lowell, 139 F. 901.

76. The Vendamore [C. C. A.] 137 F. 844, affg. 131 F. 154. Large ocean going steamer held in fault for collision with schooner on Chesapeake Bay in night in foggy weather where lookout was stationed in crow's nest, sixty feet above deck and one hundred feet from the stem, where he could not see and hear objects in front of the vessel, particularly small deeply laden vessels of the character usually navigating such bay, and it appeared that he did not hear schooner's fog horn, though regularly sounded, until immediately before the collision. Id. Fact that it was impractical, because of large number of sheep on deck, to have lookout stationed in bow, held no excuse. Id.

77. See 4 C. L. 1462.

78. The Transfer No. 10, 137 F. 666. Meeting vessels are only permitted to pass starboard to starboard when they are approaching each other on lines each of which is so far to starboard of the other as to justify an exception to the general rule. Id. Evidence held to show that tug and steam lighter were approaching each other in such a manner that they should have passed port to port, and that lighter was in fault for misunderstanding tug's signals to so pass and in sheering to port. The Tug No. 32, 140 F. 87. Held that there was not such a bend in the river at the place where the collision occurred as to render the starboard hand rule inapplicable. The New Hampshire [C. C. A.] 136 F. 769. Tug in fault for attempting to pass by going to the left in violation of rule 1, art. 18, Inland Nav. Rules. The Northman, 139 F. 692. Agreement to pass port to port made between vessels at mouth of Detroit river, held to be construed with reference to custom of vessels to pass between Bar Point Light and gas buoy and to have required each vessel to keep to the starboard side of the channel betwen them, so that incoming vessel was in fault for collision for being on wrong side. Lake Erie Transp. Co. v. Gilchrist Transp. Co. [C. C. A.] 142 F. 89. Locality being known as one where usual custom would require vessels to turn before their courses would cross, rule in regard to crossing courses did not apply. Id.

79. Act June 7, 1897, c. 4, 30 St. 96, art. 21, 2 Fed. St. Ann. 180. The New Hampshire [C. C. A.] 136 F. 769. Steamer having another on her starboard hand held solely in fault for collision in failing to keep out of the way after latter had refused to assent to her signal of two blasts, assent of both vessels being necessary to change the rule. The Cygnus [C. C. A.] 142 F. 85.

80. Act Aug. 19, 1890, c. 802, art. 20, 26 St. 327. The Our Friend, 142 F. 274. Act Feb. 8, 1895, c. 64, rule 19, 28 St. L. 648, 2 Fed. St. Ann. 172. Declaration in action for damages held sufficient. Chicago Transit Co. v. Campbell, 110 Ill. App. 366. No presumption of negligence on the part of the steamer arises from the mere fact that a collision occurs, but it must also appear that it did not keep out of the way of the sailing vessel. Instruction held erroneous for failure to submit question whether steamer did keep out of the way. Id. Held error to refuse instruction placing burden on plaintiff of establishing her case by a preponderance of the evidence. Id.

81. Where they are running on parallel courses. Gaffner v. Johnson [Wash.] 81 P.

The privileged vessel must hold her course and speed,[82] and the burdened one must, if the circumstances permit, avoid crossing ahead of her.[83] The privileged vessel will not be held in fault for maintaining her course and speed as long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty.[84]

In narrow channels every steam vessel, when safe and practicable to do so, is required to keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.[85] The entire body of navigable water in a bay, which is also a port or harbor, is not to be considered a single narrow channel within this rule where several channels, running substantially parallel with each other and in the same general direction as the main flow of the tide or current, have been officially designated therein.[86] Vessels navigating the East river are required to keep as near the center of the stream as possible.[87]

It is the duty of a vessel approaching another so as to involve risk of collision to slacken speed, or stop or reverse if necessary,[88] but this rule does not apply to a situation which is perfectly safe if no departure is made from settled principles of navigation, whether imposed by law or custom.[89] In such case it is only when it becomes or ought to become apparent that the approaching vessel has begun to depart from her duty and disregard her obligation that a reasonably prudent navigator becomes charged with notice of risk of collision.[90]

859. Libelant's vessel held the overtaking one and in fault for collision with another sailing vessel on a clear day in failing to keep out of the way. The Horace P. Shares, 139 F. 809. Overtaking vessel held in fault for collision with tow for persisting in attempting to pass between vessel with tow and another vessel after danger of such a course should have been apparent. Lake Shore Transit Co. v. Corrigan [C. C. A.] 137 F. 484.

82. Act June 7, 1897, c. 4, 30 St. 96, art. 19, 2 Fed. St. Ann. 180. The New Hampshire [C. C. A.] 136 F. 769. Under starboard hand rule privileged vessel must keep her course and speed, unless both vessels have, by a timely interchange of signals, affected an agreement to undertake to navigate in a manner different from that provided by the rule. The Cygnus [C. C. A.] 142 F. 85. Overtaking vessel should keep her course. One of two vessels overtaking a third with a tow held in fault for crowding in when other was attempting to pass between her and the tow. Lake Shore Transit Co. v. Corrigan [C. C. A.] 137 F. 484. Tug held solely in fault for collision with ferry boat in failing to keep her course and speed as required by the starboard hand rule. The John Fleming, 136 F. 917.

83. Act June 7, 1897, c. 4, 30 St. 96, art. 22, 2 Fed. St. Ann. 180. The New Hampshire [C. C. A.] 136 F. 769. Collision between steamboat and tug with car floats held due to fault of former in failing to observe starboard hand rule, and to keep out of the way by stopping and reversing until tug and tow had passed in accordance with latter's signal. Id.

84. Privileged vessel held not in fault for maintaining course and speed after refusing to assent to signal of two blasts. The Cygnus [C. C. A.] 142 F. 85. Privileged schooner held not in fault for collision for holding her course as required by rules in the absence of a clear showing of special circumstances requiring her to change it. Brigham v. Luckenbach, 140 F. 322.

85. Laws 1885, c. 354, 23 St. 442. The Atlantic City, 136 F. 996. Rule held not applicable in Delaware river where channel was two thousand feet wide. Id. See, also, International Nav. Rules, art. 25 (Act Aug. 19, 1890, c. 802, 30 St. L. 327), and regulations applicable to rivers, harbors, etc., art. 25 (Act June 7, 1897, c. 4, 30 St. L. 101). Steamer in fault for running into dredge anchored in channel of river for failing to keep on right hand side of channel and to allow for tide. The City of Birmingham [C. C. A.] 138 F. 555, rvg. 125 F. 506. Tug with car floats in tow alongside held solely in fault for collision between one of the floats and a meeting schooner in tow on a hawser, because unnecessarily on the wrong side of the channel and because she did not give the other vessels sufficient room to pass after giving passing signals. The Transfer No. 10, 138 F. 221. Tug held solely in fault for collision between one of her tows and a meeting steamer for failure to keep to right of channel after agreeing by signal to pass by keeping to the right, though she was compelled to keep near center on account of shallow water. The S. S. Wyckoff, 138 F. 418.

86. Upper New York Bay held not such a channel. The Bee [C. C. A.] 138 F. 303, affg. 127 F. 453.

87. Steamer navigating East river in dense fog held in fault for being near Manhattan shore instead of in middle of river. The City of Lowell, 139 F. 901.

88, 89. Lake Erie Transp. Co. v. Gilchrist Transp. Co. [C. C. A.] 142 F. 89.

90. Vessel which in all respects complied with passing agreement held not in fault for not anticipating risk of collision sooner. Lake Erie Transp. Co. v. Gilchrist Transp. Co. [C. C. A.] 142 F. 89. One of two vessels approaching each other is not bound to anticipate that the other will not act lawfully and, comply with her passing agreement, but

At all times no steamer has a right to navigate at such a rate of speed that it is impossible for her to prevent damage, taking all precautions at the moment she sees possible danger.[91] Vessels should proceed slowly when entering their slips.[92] The navigators of a steamer are bound to exercise reasonable care to prevent her swells from causing injury to other vessels, and are chargeable with knowledge of the consequences naturally resulting from her customary navigation.[93] It is no defense in such case that no injury has previously resulted therefrom, or that injury could have been prevented by the exercise of a higher degree of care on the part of the injured vessel than the law requires.[94]

Neither a steamer or a sailing vessel is ordinarily required to change her speed or course to avoid small craft, such as yawls or skiffs, but she has a right to presume, until the contrary appears, that they will keep out of her way.[95] This right is, however, relative and contingent and not absolute,[96] and the vessel has no right to maintain a speed or course which is dangerous to the safety of smaller craft which can be seen ahead.[97]

Ferryboats are entitled to the space requisite for proper maneuvers in entering and leaving their slips.[98] Such boats have a right to navigate prudently and maintain steerageway even in a fog.[99]

In obeying and construing the navigation rules, due regard is to be had to all dangers of navigation and collision and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger.[1]

Vessels stretching hawsers across slips in the nighttime without adequate warning are responsible for the damages caused thereby to careful navigators.[2]

In a fog all vessels are required to go at a moderate speed [3] and to exercise

may act on the assumption that she will proceed properly so long as there is apparent reasonable opportunity for her to do so. Id.

91. Applies whether fog or clear, or light or dark. Quinette v. Bisso [C. C. A.] 136 F. 825.

92. A steamer colliding with hawser stretched across slip held not in fault for excessive speed. The Roma, 138 F. 218.

93. Steamer navigating New York Harbor at such speed that her swells caused sinking of vessel a mile away, by striking her against dock at which she was discharging, held liable for resulting damage, it appearing to be generally known that she caused dangerous swells. The Asbury Park, 138 F. 925. Steamer held liable for damage caused by one of two scows in tow being thrown against the other by her swells, it appearing that when steamer's speed was properly reduced and she passed at a proper distance from a tow she produced no injurious swell, and therefore that she was not navigated with proper care. The Asbury Park, 138 F. 617.

94. The Asbury Park, 138 F. 925.

95, 96, 97. Quinette v. Bisso [C. C. A.] 136 F. 825.

98. Starboard hand rule held not applicable to ferry boat nearing her slip in a fog. The City of Lowell, 139 F. 901. Tug with car floats alongside held not in fault for being on west side of channel in East river, it being necessary and customary for her to be there in order to make her landing safely on the Brooklyn side in the then state of the tide. The New Hampshire [C. C. A.] 136 F. 769.

99. Ferry boat held not in fault for collision with steamer. The City of Lowell, 139 F. 901.

1. Act Aug. 19, 1890, c. 802, art. 27, 26 St. 327, 2 Fed. St. Ann. 163. The Our Friend, 142 F. 274. Circumstances held such as to require catboat, which had right of way, to luff up in the wind so as to avoid collision. Id.

2. Ship held negligent in failing to place light on hawser or otherwise notifying steamer accustomed to use slip in time to prevent her running into it, and was liable for resulting damage. The Roma, 138 F. 218.

3. Act Aug. 19, 1890, c. 802, art. 16, 26 St. L. 326, 2 Fed. St. Ann. 160. Steamer must reduce her speed to such a rate as will enable her to stop in time to avoid collision after an approaching vessel comes in sight, providing the latter is herself going at the moderate speed required by law. Evidence held to support finding that steamer was in fault for collision because of excessive speed in dense fog. La Bourgoyne [C. C. A.] 139 F. 433, rvg. 117 F. 261, on other grounds. On rivers entering the Gulf of Mexico. Rev. St. § 4233, rule 21. Quinette v. Bisso [C. C. A.] 136 F. 825. Every vessel should be navigated cautiously in foggy weather and its movements governed with respect to all the conditions known to exist. The Bellingham, 138 F. 619. Vessel with tow in fault for collision with passenger steamer in harbor in fog for failing to take warning of latter's approach and to wait for her passage before proceeding on her course. Id. Passenger steamer held in fault for collision with vessel and tow because of excessive speed of ten knots in fog in harbor. Id.

extraordinary care and watchfulness, particularly when navigating inland waters where numerous small craft are liable to be encountered.[4] Moderate speed means a prudent rate of speed under the circumstances.[5] In a fog a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel whose position is not ascertained, is required, so far as the circumstances of the case permit, to stop her engines and then to navigate with caution until danger of collision is over.[6] Meeting vessels attempting to cross courses in a fog, when neither can see the other in time to avoid a collision, are both in fault.[7]

(§ 7) *D. Vessels anchored, drifting, grounded.*[8]—Care, diligence, and observance of the rights of others are demanded of the owners of vessels at docks and at anchor,[9] and vessels entering slips must be careful to avoid collision with vessels lying at adjacent piers.[10]

Moving vessels must keep out of the way of vessels anchored within recognized anchorage grounds.[11] Vessels anchoring must exercise good seamanship in selecting proper anchorage grounds and in paying out sufficient chain.[12]

Vessels are prohibited from tying up or anchoring in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.[13] The statutes of New York prohibit any vessel from lying at the end of any wharf in the North and East rivers, and provide that any vessel doing so shall not be en-

4. Is not justified in relying on her fog signals alone. Quinette v. Bisso [C. C. A.] 136 F. 825.

5. Time, place and circumstances rather than the swiftness of the vessel over her course, determine whether the actual speed was immoderate. Quinette v. Bisso [C. C. A.] 136 F. 825. Speed of seven and one-half to nine miles an hour going up Mississippi near New Orleans in a dense fog held immoderate and owners of tug held liable for damages for death of passenger on skiff which was run down. Id. Speed of six knots while approaching New York at night in a fog held excessive. The Furnessia, 137 F. 955. Evidence held to show that steamer was not proceeding at excessive speed when collision occurred. Baltimore Steam Packet Co. v. Coastwise Transp. Co., 139 F. 777. Steamer held in fault for excessive speed and for not reversing in time. The City of Lowell, 139 F. 901.

6. Int. Nav. Rules Act, Aug. 19, 1890, c. 802, art. 16, 26 St. L. 326, 2 Fed. St. Ann. 160. The Admiral Schley [C. C. A.] 142 F. 64, affg. 131 F. 433. Both colliding vessels held in fault for violation of this rule. Id.

7. Meeting ferry steamers held both in fault for collision for attempting to cross courses in dense fog when neither could see the other in time to avoid collision, one for signaling that she would do so, and the other for assenting thereto. The San Rafael [C. C. A.] 141 F. 270.

8. See 4 C. L. 1465.

9. Where owner of yacht fastened her to anchored buoy near shipyard under agreement with owner of latter that he would pull her out and store her for the winter, held that owner of yard was agent of owner of yacht and latter's negligence in not removing her or seeing that she was safely anchored, in view of the condition of the weather, rendered yacht liable for damage to libelant's boat caused by collision due to yacht's dragging anchor during high wind. The Nellie, 139 F. 753. Injury to schooner's bowsprit as she lay in a slip held due to chafing by bows of scow tied a few feet away, which, owing to insufficient fastening, drifted close to schooner during a high wind. The Mallay, 136 F. 992. Steamer lying at end of pier held in fault for collision with another steamer for backing while latter was landing. The Rosedale, 141 F. 1001.

10. Tug held in fault for injury to canal boat by bringing barge, which she was attempting to warp into slip, into collision with such canal boat which was lying at the end of adjacent pier. The Chauncey M. Depew [C. C. A.] 139 F. 236, rvg. 130 F. 59.

11. Tug with tow of thirty-three boats held solely in fault for allowing them to collide, on a clear night, with steamer properly anchored within anchorage grounds and with proper lights. Lind v. Pennsylvania R. Co. [C. C. A.] 139 F. 233. Anchor watch held not in fault for not paying out more chain. Id.

12. Vessel which dragged anchors and collided with another held solely in fault for want of good seamanship in anchoring a second time in immediate vicinity of former anchorage, which had proven insecure, and so near other vessels that sufficient length of chain could not be given starboard anchor to secure a holding, in not examining port anchor before second anchorage, and in not paying out more cable to both anchors. The Rickmers [C. C. A.] 142 F. 305. Anchored vessel held not in fault for collision with another vessel which dragged her anchor. Id.

13. Act March 3, 1899, c. 425, 30 St. 1152. The City of Birmingham [C. C. A.] 138 F. 555, rvg. 125 F. 506. Dredge held in fault for anchoring at night within two hundred feet of center line of narrow channel when she could have anchored in a place of safety entirely outside of it, both under this statute and irrespective of it. Id.

titled to recover damages for injuries caused by any vessel entering or leaving any adjacent pier.[14]

One negligently casting a vessel adrift in a storm is liable for the resulting damage.[15]

One inviting vessels to his wharf is bound to exercise reasonable care with respect to the place where they are moored,[16] and this rule is equally applicable to one to whom a vessel is delivered for the purpose of unloading it,[17] and to a consignee upon whom is imposed the duty of discharging a vessel.[18] He does not guarantee the vessel's safety in coming to or lying at his wharf, but is bound to exercise diligence in ascertaining the condition of the dock and berths and to give notice of any obstruction or danger,[19] and this obligation to furnish a safe dock applies to all the conditions in which the vessel is placed, and to all dangers to which she is exposed in effecting the discharge of her cargo.[20] The master of the vessel, in such case, has a right to assume that the invitation to his vessel to come to a proper place of discharge is an assurance of safety, and to assume that special assurances of safety are made with due knowledge of the premises.[21] One not a party to a contract for building piers and wharves and dredging cannot, however, maintain an action in tort in respect of the breach of a duty arising solely out of the contract.[22]

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*[23]—The tug is not an insurer of the safety of the tow but is liable only in case of negligent management of the tug or in the handling of the tow,[24] negligence in such case being the want of ordinary skill in navigation, and of the exercise of such care and diligence in handling the tow as a man of ordinary prudence would exercise in the preservation of his own property.[25] If the water is rough it is the duty of the tug to

14. Laws 1897, c. 378, p. 314, § 879. The Chauncey M. Depew [C. C. A.] 139 F. 236, rvg. 130 F. 59. Purpose of act was merely to prevent prosecution of claims for damages in state courts, and not to attempt to regulate procedure in Federal courts. Id. Canal boat held in fault for collision resulting from violation of this act and damages divided. Id. Steamer held in fault for collision with vessel entering dock for violation of this statute, though she only intended to remain at end of dock for few minutes. The Rosedale, 141 F. 1001.

15. In action for damages to dock and boats caused by scow which collided with them, evidence held to sustain finding of negligence of the part of an employe of defendant, who had possession of the scow under contract to transport and unload it, in casting it adrift during storm. Dooley v. Booth, 96 N. Y. S. 253.

16. Conklin v. Staats, 70 N. J. Law, 771, 59 A. 144. A dock owner who either expressly or impliedly invites a vessel thereto is bound to use reasonable diligence to have the place safe and proper for a vessel to lie there. Dock owner held responsible for injuries due to grounding of barge, he having assured her master, who had never been there before, that there was sufficient depth of water. The Electra, 139 F. 858. Master held entitled to rely upon representations of dock owner as to depth of water and condition of bottom, and not in fault for failing to take soundings, it appearing that he was prevented from doing so for at least a part of the time by ice. Id.

17. Defendant held not liable for injury to scow and cargo resulting from its being let down onto a submerged pile by falling tide. Conklin v. Staats, 70 N. J. Law, 771, 59 A. 144.

18. Is bound to designate a suitable place for her to lie while discharging, and to know, as far as by reasonable effort he can ascertain, that such place is reasonably safe. Not necessary to prove actual knowledge on his part, but is sufficient if his agent had means of knowledge. Look v. Portsmouth, K. & Y. St. R. Co., 141 F. 182.

19. Look v. Portsmouth, K. & Y. St. R. Co., 141 F. 182.

20. Look v. Portsmouth, K. & Y. St. R. Co., 141 F. 182. Consignee held chargeable with knowledge of danger to vessel from electric wires on its dock used in operating its railway, though its agent had no actual knowledge thereof, and to be liable for injuries resulting from vessel being set on fire by its chains coming in contact with such wires. Id.

21. Captain held entitled to rely on assurances of consignee's agent that there was no danger to the vessel from electric wires on the dock, which were used in operating the consignee's railway, it not being his duty to know the danger. Look v. Portsmouth, K. & Y. St. R. Co., 141 F. 182.

22. One whose contract requires him to remove submerged piles is not liable to third person whose scow is damaged and cargo lost by running onto one not so removed. Conklin v. R. P. & H. H. Staats, 70 N. J. Law, 771, 59 A. 144.

23. See 4 C. L. 1467.

24. The Samuel E. Bouker, 141 F. 480.

25. Loss of scows held not due to negligence of tug, nor was it negligent in search-

exercise such a degree of care as the conditions require to prevent injury to the tow.[26] It is the duty of the tug to see that the tow is properly constructed,[27] not to start on the voyage when the weather conditions are such as to render it imprudent to do so,[28] and to leave the tow in a place of safety.[29] She is entitled to rely on the statement of the master of the tow as to her draught, and, if such a statement is made, is not required to examine the boat for draught marks or to rely upon them if found.[30]

As in the case of other bailees for hire, there is a presumption of negligence against a tug when it appears that the tow has been injured or destroyed while in its custody by an accident such as in the ordinary course of things would not have happened had the tug used due care.[31] In determining the condition of the sea during a towage service, the pleadings and the observations of witnesses who were on the water should control rather than a record condition of the wind noted by the weather bureau at a point several miles distant and at a considerable altitude above the water.[32]

Under ordinary circumstances the relation between a tug and her tow is that of independent contractor rather than that of principal or agent, so that the tow is not responsible for the acts of the tug.[33] Thus, if the tow collides with some other vessel during the voyage, she is not liable for the resulting damage unless some negligence contributing to the collision is proven against her, or unless her

ing for them so as to render it liable for amount of salvage awarded another tug picking them up. The Samuel E. Bouker, 141 F. 480. Tug not in fault for not sending assistance to barges which broke loose during storm, in consequence of which one of them collided with a yacht, where she could not see that they had broken loose, and neither she nor her helpers could have safely left the remaining boats to go to their relief. The Scow No. 51 H, 140 F. 70. Tug held not in fault for capsizing of one of four tows by striking some floating object, probably a submerged log, though lookout was not attending strictly to his duties, the lookout on the tug assisting her in the towing, which was only thirty feet away, having failed to see the object. The Knickerbocker, 138 F. 148. Tugs held solely in fault for injury to canal boat by pushing her through heavy ice, considering the kind of boat and fact that master of canal boat inquired in each case what ice was likely to be encountered and informed master of tug that he did not wish to be towed if there was such danger, and was informed that there was not. The R. G. Townsend, 140 F. 217.

26. Tug held liable for injury to tow alongside by pounding against her side, due to improper arrangement of tow. The Winnie, 137 F. 166.

27. Owners of tug held liable for damage to house boat. Cotton v. Almy [C. C. A.] 141 F. 358.

28. Weather held not such as to render it imprudent for tug to start out with tow so as to render it in fault for collision between one of the barges, which broke loose in subsequent storm, and a yacht. The Scow No. 51 H, 140 F. 70. Tug held in fault, and liable for loss of one scow and expense of rescuing another, on the ground that the master was imprudent in undertaking the towage service under the weather conditions then existing, he having had no experience outside the harbor, and the tug not having been previously used in such towing. The E. T. Williams [C. C. A.] 139 F. 231, affg. 126 F. 871. Evidence held not to warrant finding that hawser connecting the two scows was cut by the orders or on the suggestion of anyone on the tug. Id.

29. Libelant's vessel having been loaded Saturday night, respondent had her towed out into the river on Sunday, where she was injured by drifting ice. Held that respondent was chargeable with negligence and liable for the resulting damages, the evidence not showing any contributory fault on the part of libelant. Roney v. New York S. & W. R. Co., 132 F. 321. Tug casting two barges, having neither motive power nor signaling apparatus, adrift in Hudson river in fog, while delivering third, held solely in fault for collision between one of them and a steamship. The Etruria, 139 F. 925. Custom of so casting tows adrift, even if established, would be no excuse. Id.

30. Tug held not liable for grounding of tow in shallow creek where evidence showed that master of barge represented her draught to be seven feet, and depth of water was over nine feet. The Royal, 138 F. 416. Contention of claimant that it was flood tide when tow grounded held sustained by the evidence. Id. Evidence held to show that depth of water was nine feet. Id.

31. The Gennessee [C. C. A.] 138 F. 549. Tug with several tows which lay to outside of another tow at a dock held responsible for loss of one of them, which was overrun and sunk by scow in tier behind it owing to influence of wind and tide, the accident being one which tug should have anticipated and guarded against, and there being no evidence of any effort on her part to do so. Id.

32. The Winnie, 137 F. 166.

33. Tug is not the servant or employe of the tow, and owners of latter do not necessarily constitute the master and crew of the tug their agents in performing the service. The De Gama, 140 F. 755.

officers are directing the navigation.[34] If the tow is towing at the end of a hawser, the liability is upon the tug if the tow steers properly.[35] A tug towing vessels on long hawsers in a narrow and crowded channel is bound to exercise a high degree of care to prevent collisions, but such method of towing being usual and not illegal, she is not liable for a collision simply because such a long tow is inherently more unmanageable than a shorter one.[36] Tugs towing scows, having neither steering gear nor men to operate it, on long hawsers, are bound to use the most extreme care in the interests of common safety.[37] A tug with tows should not loiter in front of the entrance to a harbor in a fog.[38]

(§ 7) *F. Sole or divided liability, and division of damages.*[39]—In case a collision is due to the fault of two or more vessels, the damages and costs will be divided between them,[40] but the fault of one of the colliding vessels having been clearly established, she is not entitled to a division of damages except upon clear proof of some fault upon the part of the latter, not made in extremis.[41]

Under the American rule, where two vessels are equally in fault, cargo owners may recover their full damages from either,[42] while under the English rule, only half the damages may be recovered from either.[43] The question of which rule is applicable in the case of a collision between two British vessels on the high seas is one of rights and not merely of remedies, and hence the law of the flag applies.[44]

(§ 7) *G. Ascertainment and measure of damages.*[45]—In collision cases where repairs are practicable, the measure of damages is such sum as will be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred.[46] If, however, the injuries are of such a character that they cannot be repaired at reasonable cost, an allowance may be made for actual or permanent depre-

34. The De Gama, 140 F. 755. Tow without power and passively in control of tug, and not chargeable with any negligence contributing to a collision between herself and another vessel, is not liable therefor with tug on theory that entire tow constitutes one vessel. The Violetta, 141 F. 690.

35. The De Gama, 140 F. 755.

36. Tug with three tows on two long hawsers held not in fault for collision between them and another vessel solely on account of manner in which tow was made up. The Jumna, 140 F. 743. Evidence held not to establish undue delay on part of one of three tugs towing steamer in getting into position. Id. Evidence held to show that hawser with which tug was towing steamer was a good one. Id. Tug towing steamer held not in fault for manner in which she was taken out from pier, or in not waiting for slack water, or in turning her when they did. Id. Tugs with steamer and tug with tow held to have properly attempted to pass starboard to starboard. Id. Tug with three scows in tow on line held solely in fault for collision in Harlem river between last one and car float in tow alongside transfer tug for being too far to the eastward, and in failing to properly estimate distance between her tow, which was not kept in line, and the other one. The Mattie, 141 F. 701.

37. Tugs with such tows meeting in New York Bay held both in fault for collision between tows in failing to leave sufficient clearance, and one of them also in fault for straightening out on her course before tows had passed. The Bee [C. C. A.] 138 F. 303, affg. 127 F. 453.

38. Tug with tows in fault because her tows were without necessity and in a fog, strung across the usual course of vessels leaving harbor. The Admiral Schley [C. C. A.] 142 F. 64, affg. 131 F. 433.

39. See 4 C. L. 1470.

40. The Atlantic City, 136 F. 996; The Chauncey M. Depew [C. C. A.] 139 F. 236, rvg. 130 F. 59; The Our Friend, 142 F. 274. Each of two overtaking vessels held in fault for injury to tow of overtaken vessel, and damages divided equally. Lake Shore Transit Co. v. Corrigan [C. C. A.] 137 F. 484. Damages and costs equally apportioned between steamer and dredge. The City of Birmingham [C. C. A.] 138 F. 555, rvg. 125 F. 506. Passenger steamer held liable for one-half of the damages, and steamer with tow, both belonging to same owner, for other half resulting from collision in fog, including damages for injury to anchored vessel struck by passenger steamer in consequence of collision. The Bellingham, 138 F. 619.

41. Reasonable doubts should be resolved in favor of latter. Lake Erie Transp. Co. v. Gilchrist Transp. Co. [C. C. A.] 142 F. 89. Collision between steamer and schooner held two well accounted for by former's plain faults to allow division of damages. The Furnessia, 137 F. 955.

42, 43. The Eagle Point [C. C. A.] 142 F. 453, rvg. 136 F. 1010.

44. British rule will be applied in such case in American admiralty court. The Eagle Point [C. C. A.] 142 F. 453, rvg. 136 F. 1010.

45. See 4 C. L. 1471. For limitation of liability in collision cases, see § 14, post.

46. The Rickmers [C. C. A.] 142 F. 305. Allowance of commissioner for repairs confirmed. The Sovereign of the Seas, 139 F. 812. Allowance of damages in collision case

ciation, subject to the general rule that damages which are uncertain, contingent, or speculative, cannot be recovered.[47] The fact that the repairs put the vessel in a better condition than she was before cannot be taken advantage of by the vessel responsible for the injury.[48] The reasonable cost of raising the injured vessel,[49] demurrage,[50] the costs of survey and protest, and tonnage charges, are proper elements of damage.[51] The allowance of interest is discretionary.[52]

§ 8. *Carriage of passengers.*[53]—A common carrier of passengers by water is not an insurer, but is required so far as it is capable by human care and foresight to carry them safely, and is responsible for all injuries to them resulting from even the slightest negligence on its part.[54] In very bad weather it is the ordinary duty of the vessel to keep passengers below deck for the sake of protection.[55] The breaking of a deck, resulting in injury to a passenger rightfully there, is prima facie evidence of negligence.[56] It is not, however, conclusive, but may be overthrown or explained by evidence showing that defendant exercised proper care.[57] The passenger is not negligent in remaining there after general orders have been issued to the passengers who are there to go below, where he does not hear them, and has no information that they have been given.[58]

A passenger injured while on board a vessel is entitled to the same degree of care thereafter as a seaman, and the owner's duty is not fulfilled by giving him that reasonable care which an ordinary person would have bestowed upon him under the circumstances.[59]

held not excessive. The City of Birmingham [C. C. A.] 138 F. 555, rvg. 125 F. 506, on other grounds.

47. To recover such damages their nature must be clearly established and not be left to speculation or uncertainty. The Rickmers [C. C. A.] 142 F. 305. Evidence held not to sufficiently establish permanent injury to warrant recovery on that ground. Id.

48. New bowsprit where old one was injured by scow. The Mallay, 136 F. 992.

49. The owner of a scow sunk in collision who raised her, can only recover a reasonable sum for doing the work. Award held not excessive. The Bee [C. C. A.] 138 F. 303, affg. 127 F. 453. Fact that work could have been done cheaper by dumping contents of scow on bottom of channel held immaterial, owner not being obligated to take risk of prosecution under Federal statute for dumping in the harbor. Id.

50. See § 10, post.

51. Allowance of commissioner for costs of survey and protest and for towage charges confirmed. The Sovereign of the Seas, 139 F. 812.

52. Allowance from date when schooner was repaired and reloaded held proper. The Rickmers [C. C. A.] 142 F. 305. Interest and demurrage held properly allowed as elements of damage in collision case. The City of Birmingham [C. C. A.] 138 F. 555, rvg. 125 F. 506, on other grounds. Interest on loss of profits not allowed. The North Star, 140 F. 263. Interest may be allowed cargo owners as part of the damages recoverable by them for loss due to a collision on the high seas. The Eagle Point, 136 F. 1010, rvd. on other grounds [C. C. A.] 142 F. 453.

53. See 4 C. L. 1472. For limitation of liability for injury to passengers, see § 14, post.

54. Instruction held erroneous. Evers v. Wiggins Ferry Co. [Mo. App.] 92 S. W. 118. Is bound to exercise the utmost vigilance and care in maintaining order, and in guarding them against violence from whatever source arising which might reasonably have been anticipated or naturally expected to occur, in view of all the existing circumstances, and of the number and character of the persons on board. Owner held liable to passenger who, without his fault or negligence, was injured through officers permitting negligent and careless shooting on board. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383. Instructions approved. Id. Instructions as to measure of damages held proper. Id. In action for damages for injuries to passenger on ferry boat operated by railroad, caused by collision between boat and bulkhead, question of defendant's negligence held for the jury. Prethrow v. West Jersey & S. R. Co. [Pa.] 63 A. 415.

55. Steamer held negligent in requiring steerage passengers to come on deck for their food during stormy weather, and liable for injuries received by one of them who was thrown to the deck by a wave. The Princess Irene, 139 F. 810.

56. Instruction approved. Evers v. Wiggins Ferry Co. [Mo. App.] 92 S. W. 118. Passenger directed by collector of fares to go upon hurricane deck, who goes there, where he finds many other passengers, is not ordered below and fails to hear general orders to passengers to go below, is rightfully there, though it is not constructed or designed for the accommodation of passengers. Id.

57. Instruction held erroneous. Evers v. Wiggins Ferry Co. [Mo. App.] 92 S. W. 118.

58. Evers v. Wiggins Ferry Co. [Mo. App.] 92 S. W. 118.

59. Requested instruction as to degree of care required in case of injury to passenger through permitting reckless shooting on board, held properly refused. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383.

The carrier is responsible for the personal baggage of a passenger unless the loss is caused by the act of God or of public enemies,[60] and is liable as a carrier for baggage which it places in storage for its own temporary convenience.[61]

As in the case of other carriers, a carrier of passengers by water must serve the public without discrimination, and sell its tickets and accommodations in the order of application.[62] The carrier is also liable for failure to furnish a passenger on a boat running at night with a berth where he applies for one when purchasing his ticket, unless it then informs him that none can be had.[63] A single ticket sold by a railroad company for the whole of a journey calling for transportation on both land and water, and not on its face indicating that part of the transportation is to be by means of another carrier, imports on its face that such company owns or operates all the means of transportation between the points named.[64]

§ 9. *Carriage of goods.*[65]—As in other cases, a vessel owner who expressly and publicly offers to carry for all persons indifferently, or by its conduct and the manner of conducting its business, holds itself out as ready to carry for all on such trip as the boat is then making, is a common carrier and liable as an insurer for loss of goods in transit,[66] but if it acts in each case in consequence of a special enployment, it is not a common carrier and is not liable except for negligence.[67] The carrier retains his character as such, with the attendant liability as insurer until the goods have been actually or constructively delivered to the consignee.[68] To constitute a constructive delivery there must be a notice of the arrival of the vessel at the place of docking and a reasonable time thereafter given for the removal of the goods by the consignee.[69] If he then fails to remove them, the carrier's responsibility as such ceases,[70] and it is thereafter liable only for the ordinary care required of a wharfinger or warehouseman.[71] It has, however, been held that in the case of the great trans-

Failure to call attention of jury to claim for neglect after injury occurred held not prejudicial to defendant. Id.

60. Hart v. North German Lloyd S. S. Co., 108 App. Div. 279, 95 N. Y. S. 733, affg. 46 Misc. 426, 92 N. Y. S. 338. Even if it was negligence on the part of a passenger not to close porthole and not to lock his door, held that it would not defeat recovery for articles lost after steward visited stateroom, it being the latter's duty to shut the porthole and lock the door if necessary to do so to secure passenger's baggage. Id.

61. Transatlantic steamship company held liable as carrier for baggage sent to it by prospective passenger, pursuant to advice of its agent, several days before time of sailing, which was kept by it on its docks for its own convenience and was there destroyed by fire. North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426.

62. Patterson v. Old Dominion S. S. Co. [N. C.] 53 S. E. 224. Where there was evidence that other parties were furnished berths after defendant's refusal to furnish one to plaintiff, and that plaintiff was compelled to sit up all night, granting of nonsuit held error. Id. It is liable in damages for a breach of such duty, and a passenger may also recover for the indignity, vexation and disgrace resulting therefrom. Id.

63. Cannot withhold information as to lack of sufficient accommodations until ticket is paid for and passenger has embarked. Patterson v. Old Dominion S. S. Co. [N. C.] 53 S. E. 224.

64. Passenger injured on ferry need not show that railroad company operated it. Prethrow v. West Jersey & S. R. Co. [Pa.] 63 A. 415.

65. See 4 C. L. 1474. For limitation of liability for loss of, or damage to, goods, see § 14, post.

66. For loss of cargo of brick by sinking of vessel. Bassett & Stone v. Aberdeen Coal & Min. Co., 27 Ky. L. R. 1122, 88 S. W. 318. Whether defendant had assumed the character of a common carrier held, under the evidence, to be a question for the jury. Id.

67. Bassett & Stone v. Aberdeen Coal & Min. Co., 27 Ky. L. R. 1122, 88 S. W. 318.

68. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, affg. 102 App. Div. 39, 92 N. Y. S. 86. Evidence held to sustain finding that sufficient notice was not given. Id.

69. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, affg. 102 App. Div. 39, 92 N. Y. S. 86.

70. If he fails to remove them after having been notified of their arrival and given ample time and opportunity to do so. As where consignee was notified, paid freight, and commenced to remove goods, and, so far as appeared, had been given ample time and opportunity to remove them. Stone & Co. v. Clyde S. S. Co., 139 N. C. 193, 51 S. E. 894. Carrier may put them in a place of safety for storage, giving notice thereof, and thus be relieved from further liability with reference thereto. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, afg. 102 App. Div. 39, 92 N. Y. S. 86.

71. Carrier not guilty of negligence in placing goods on its open platform in accordance with local usage, where plaintiffs, after notice, paid freight and commenced to remove goods without any protest on that

atlantic steamers engaged in carrying passengers and light freight, which ply between specified ports and run upon schedule time, no notice to the consignee of the arrival of the goods other than posted upon the custom house bulletin board is required.[72]

In the absence of an express provision to the contrary, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of affreightment,[73] and this includes not only a ship seaworthy in hull and equipment, but also seaworthy in respect to the storage of the cargo.[74] A vessel is unseaworthy unless she is structurally fit and properly equipped to safely and securely carry the cargo she has undertaken to transport.[75]

A bill of lading is prima facie evidence of the receipt of the merchandise and its condition at the time of delivery.[76] As in the case of other written contracts it cannot be varied or altered by prior conversations.[77] An affreightment contract modifying or qualifying the carrier's common-law liability will be strictly construed, and doubts or ambiguities therein will be resolved against the carrier.[78]

It is the duty of one making delivery of logs by means of a raft, to be attached to the ship's side until the logs can be hauled aboard, to so make up the raft, that, under ordinary conditions of weather, it will remain intact until the ship, using due diligence, can get the logs aboard.[79] Where the cargo is loaded by the vessel it is responsible for the adoption of a proper method.[80]

In the absence of a clear intention as to when a vessel for hire shall proceed from the port of loading, the general rule is that she is to deliver the goods carried or fulfill her engagement with ordinary promptitude and within a reasonable time.[81] What constitutes a reasonable time depend upon the conditions and attendant circumstances.[82] If after making the contract and loading the vessel the owner, on account of unforeseen difficulties, is unable to depart within a reasonable time, as anticipated, it is his duty to notify the shippers and either obtain a modification of the contract or reship the goods to the end that the agreement may be fulfilled with the least possible injury and delay.[83]

Bills of lading generally exempt the vessel from liability for loss due to peril of the seas.[84] After delivery to the vessel the burden is on her to show sufficient stress

ground. Stone & Co. v. Clyde S. S. Co., 139 N. C. 193, 51 S. E. 894.

72. Ship held not within this exception. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, affg 102 App. Div. 39, 92 N. Y. S. 86.

73. Corsor v. J. D. Spreckels Bros. & Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786.

74. Corsor v. J. D. Spreckels Bros. & Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786. Evidence held to show that vessel was unseaworthy in respect to storage or cargo of cement for voyage undertaken at the time of entering upon it. Id.

75. Injury to oats held due to unseaworthy condition of vessel owing to leaky condition of her decks, etc. The Gordon Campbell, 141 F. 435. Evidence held not to show that cargo was injured by being loaded in rainy weather. Id.

76, 77. The Presque Isle, 140 F. 202.

78. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625, affg. 102 App. Div. 39, 92 N. Y. S. 86. Bill of lading containing no provision as to notice to consignee, but providing that goods were to be taken from ship by consignee directly as they came to hand in discharging, and that carrier's responsibility was to seize package by package immediately the goods left the ship's deck or tackle, and that if not taken from along side by consignee they would be landed and deposited on the dock or in the warehouse at consignee's expense and at his risk, held not to relieve carrier from duty to give notice, and where no such notice was given, he was liable for loss due to collapse of dock, whether they were guilty of negligence or not. Id.

79. Vessel held not liable for value of logs which broke away, there being no evidence of negligence on her part. Munson S. S. Line v. E. Steiger & Co. [C. C. A.] 136 F. 772, affg. 132 F. 160.

80. Vessel held liable for damage due to breaking of bags of cement by negligent handling. The D. Harvey, 139 F. 755. In action to recover for damage to cargo by leakage of vessel, evidence that agents were notified previous to the loading to use dunnage in placing the cargo is admissible. Donaldson v. J. W. Perry Co. [C. C. A.] 138 F. 643.

81, 82, 83. The Gordon Campbell, 141 F. 435.

84. Such a provision held to exempt vessel from liability for loss of logs rafted to it for loading if loss was due to abnormal condi-

of weather to make out a case of peril of the seas.[85] If a jettison of a cargo, or damage thereto, is rendered necessary or is caused by any fault or breach of contract of the master or owners of the vessel, it must be attributed to such fault or breach of contract rather than to perils of the sea, though such perils may be present and enter into the case.[86]

As in the case of other carriers a vessel owner receiving merchandise in good condition for transportation and delivering it in damaged condition has the burden of showing that the damage was caused by a risk excepted in the bill of lading.[87]

The construction of particular provisions with reference to responsibility for weight, quality, and loose bales,[88] will be found in the notes.

A provision requiring a written claim for loss to be made within a specified time as a condition precedent to liability is valid.[89]

The Harter Act.[90]—Under the Harter Act the owners, agents, and charterers of a vessel, and the vessel itself, are exempted from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, provided the owner has exercised due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied.[91] The act also makes it un-

tion of wind and water. Munson S. S. Line v. E. Steiger & Co. [C. C. A.] 136 F. 772, affg. 132 F. 160.

85. Munson S. S. Line v. E. Steiger & Co. [C. C. A.] 136 F. 772, affg. 132 F. 160.

86. Corsar v. J. D. Spreckles & Bros. Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786.

87. In absence of satisfactory proof that it was so caused, court may find for libelant, even if cause does not plainly appear. The Presque Isle, 140 F. 202. Vessel held liable for damage due to musty and discolored condition of fiber. La Kroma, 138 F. 936. Vessel held liable for damage to cargo of cement which was received in good condition but was lumpy and set when delivered, due to its having been wet, in absence of any explanation as to manner in which it became so. The D. Harvey, 139 F. 755. The burden is on the vessel to show that she was seaworthy and in good condition at the beginning of the voyage. Vessel held liable for injury to cargo of oats which became wet and heated. The Gordon Campbell, 141 F. 435.

88. Under bill of lading providing "not responsible for weight, nor quality, nor for loose bales," ship held not liable for shortage in weight of shipment of vegetable fiber in bales where it is shown that all the bales shipped were delivered. La Kroma, 138 F. 936. Word "quality" means commercial quality of fiber shipped, and provision does not relieve vessel from liability for damaged condition of fiber delivered where evidence shows it was in good condition when shipped. Id.

89. Letter sent by proctor of cargo owner to carrier stating that he held claim for damage to cargo for collection held sufficient compliance where both parties had actual notice of claimed damage at time of discharge. The D. Harvey, 139 F. 755.

90. See 4 C. L. 1477.

91. Act Feb. 13, 1893, c. 105, § 3, 27 St. L. 445, 4 Fed. St. Ann. 857.

Seaworthiness: In suit to recover for damage to cargo carried in tank used for cargo or water ballast, by the entry of sea water through leaky sea valve and obstructed tank valve, held that whether spindle controlling valve closing pipe leading from distribution box in pump room into such tank was disconnected was immaterial since it appeared that when the spindle was so disconnected the valve became a nonreturn valve which would prevent the entry of water from the distribution box, and hence ship would not be unseaworthy even if it was disconnected. The Brilliant, 138 F. 743. Held further that evidence showed that tank valve was disconnected en route, if at all, and hence ship could not be held on account of such disconnection. Id. Evidence held to show that owners did all that was required of them as to the sea valve. Id. Failure to place rose or screen on bottom of pipe used to pump out tank, so as to prevent entrance of stick which obstructed valve, held a failure to exercise due diligence to render ship seaworthy at beginning of voyage. Id. Shipowner must show that a due and proper inspection had been had, and that vessel had been found to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used. McCahan Sugar Ref. Co. v. The Wildcroft, 26 S. Ct. 467, afg. [C. C. A.] 130 F. 521. Evidence held sufficient to sustain finding that an inspection was had and that everything was found in good order at the beginning of, as well as during, the voyage, and that ship was in all respects seaworthy at the beginning of the voyage, and that damage resulted from careless opening of valves shortly before it occurred. Id. If a vessel starts on her voyage with a port negligently left open, causing damage, her owners are liable for failure to provide a ship seaworthy at the beginning of the voyage, though they furnished proper appliances for closing them. Omission of officers to keep them closed or to discover that they had been tampered with held not merely a fault in management or navigation so as to relieve owners from liability under Harter Act, § 3 (Act Feb. 13, 1893, c. 105). The Tenedos, 137 F. 443. To escape liability as a common carrier for injury to cargo, the vessel must be staunch, strong, and fitted for the

lawful to insert in the bill of lading any provision exempting the vessel from liability for damages arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise or other property, and declares that any such provision shall be void,[92] or to insert any provision whereby the obligation of the owners to exercise due diligence to properly equip, man, provision, and outfit the vessel and to make her seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided.[93] The effect of the act is to hold the ship responsible for loss or damage arising from negligence, fault, or failure in the proper custody, care, or delivery of the cargo, and to exonerate her from damage or loss arising from faults or errors in navigation or in the management of the vessel where due diligence has been exercised to properly man, equip, and supply her, and to make her in all respects seaworthy.[94] The burden of proving that the vessel was seaworthy when she sailed, or that due diligence was exercised to make her so, is on the owner, even if there is no evidence to the contrary.[95] The act does not, either expressly or by implication, render valid a contract entitling the owner to share in a general average in case of a loss resulting from negligent navigation.[96]

service for which she is engaged. The Presque Isle, 140 F. 202. Evidence held to clearly show that damage to coffee was caused by leakage in the deck of transporting canal boat, which rendered her unseaworthy for carrying freight of the class mentioned in the bill of lading, and not by rain at time of loading. Id.

Due diligence: The owner is bound to exercise the utmost care and diligence to see that the vessel is seaworthy before starting on the voyage (The Tenedos, 137 F. 443), and special attention is required at those points where the likelihood or possibility of unseaworthiness is most obvious (Id.). The ports should be inspected the last thing before the hatches are closed or the voyage begun, particularly where they are so located as to be submerged when the vessel is fully loaded. Failure to so inspect held lack of due diligence in making vessel seaworthy, so that owners were liable for resulting damage to cargo. The Tenedos, 137 F. 443. Fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. Id.

Navigation or management: Change of course so as to go by way of Cape of Good Hope and Australia instead of Cape Horn, on account of bad weather, and failure to put in for repairs, held matters pertaining to the "navigation and management of the vessel." Corsar v. J. D. Spreckels & Bros. Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786. Damage to cargo caused by barge springing a leak while being unloaded in usual manner, which caused an uneven keel for a few hours, held not the result of "faults or errors in navigation or in the management of" the barge. Donaldson v. J. W. Perry Co. [C. C. A.] 138 F. 643.

92. Act Feb. 13, 1893, c. 105, § 1, 27 St. L. 445, 4 Fed. St. Ann. 854. Donaldson v. J. W. Perry Co. [C. C. A.] 138 F. 643. Damage to cargo caused by barge springing a leak while being unloaded in usual manner, which caused an uneven keel for a few hours, held due to negligence, etc., within meaning of this section, and vessel was liable therefor. Id. Ship cannot exempt herself from liability for damage to cargo by entry of sea water on ground that it is peril of the sea, where water entered because of obstruction of tank valve by stick due to the failure to exercise due diligence in placing rose or screen over intake pipe, The Brilliant, 138 F. 743.

93. Act Feb. 13, 1893, c. 105, § 2, 27 St. L. 445, 4 Fed. St. Ann. 856. Though fault of error in navigation may result in injury to "custody, care, and delivery" of the cargo, vessel cannot be held for incidental damage to cargo if owner has complied with requirements of § 3. Corsar v. J. D. Spreckels & Bros. Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786.

94. Provisions must be so read as to give effect to each if possible. Corsar v. J. D. Spreckels & Bros. Co. [C. C. A.] 141 F. 260, rvg. 125 F. 786.

95. Doubts will be resolved in favor of the shipper. W. J. McCahan Sugar Refining Co. v. The Wildcroft, 26 S. Ct. 467, affg. [C. C. A.] 130 F. 521. 'There is no presumption, in case of damage due to negligent navigation, that the owners exercised due diligence in manning the ship, but the burden is on them to show that they did so, and they cannot escape liability in the absence of affirmative proof to that effect. Vessel held liable for loss of cargo by stranding on well known reef through negligence of master where owners failed to show exercise of such diligence in his selection. The Fri, 140 F. 123. Unseaworthiness at the time of starting on the voyage being established, the burden is on the owners to show that they exercised due diligence to make her seaworthy. The Tenedos, 137 F. 443.

96. Such a contract is void. New York & C. Mail S. S. Co. v. Ansonia Clock Co., 139 F. 894.

§ 10. *Freight and demurrage. Freight.*[97]—In the absence of an express provision to the contrary, the law presumes that freight is only to be paid on the cargo actually delivered,[98] but where the charter provides that a cargo of not less than a certain number of tons, at so much per ton, shall be shipped, and that amount paid upon delivery of the cargo, the owners are entitled to recover the minimum amount stipulated for upon delivery of the cargo as shipped by the charterers.[99] The delivery of cargo to one claiming to own it will support a promise on his part to pay the freight.[1] The construction of charter and contract provisions with regard to freight will be found in the note.[2]

Demurrage.[3]—The owner of a vessel is entitled to recover the loss of profits or of the use of the vessel, pending repairs or other detention arising from a collision or other maritime tort, provided such profits have actually been, or may reasonably be supposed to have been, lost, and the amount thereof is proven with reasonable certainty,[4] and it is immaterial in such case that he might have substituted another vessel and did not do so.[5] There can, however, be no recovery of demurrage in the absence of a showing of the market value of the use of the vessel during her detention, or of her net earnings.[6] The charterer is not liable for demurrage for delay due to the acts of the owner,[7] nor is a libelant proceeding in rem against a vessel in good faith and under advice of counsel liable for damages caused by the attachment and detention of the vessel beyond the taxable costs in the suit.[8]

Charters frequently provide that no days shall count as lay days during which delays or hindrances may result from the intervention of constituted authorities[9] or from any causes whatsoever beyond the control of the charterers,[10] and exempt

97. See 4 C. L. 1478.

98. Donaldson v. Severn River Glass Sand Co., 138 F. 691.

99. Though without vessel's fault, less than minimum amount is loaded. Donaldson v. Severn River Glass Sand Co., 138 F. 691. Evidence held to show that whole cargo shipped was delivered. Id.

1. In action to recover freight on cargo of coal, evidence held sufficient to support finding that on or about a certain day plaintiff delivered coal to defendant at his special instance and request in consideration of his promise to pay the freight money thereon. Doe v. Allen [Cal. App.] 82 P. 568.

2. Charter provided that freight should be payable in cash on delivery of each cargo, and that ship should have lien for freight money though cargo had been delivered. Consignee paid the entire amount due for the cargo and freight to the shipper, leaving the latter to settle for the freight. The day before such a remittance was received the shipper went into the hands of a receiver. Held that the money so received by the receivers was impressed with a trust in favor of the shipowner for the amount of the freight. Michigan S. S. Co. v. Thornton [C. C. A.] 136 F. 134. Contract for shipment of lime held one for payment of bonus above freight rate, which was not discharged by payment of freight at usual rate by consignor and its acceptance by the carrier. Henry Cowell Lime & Cement Co. v. Globe Nav. Co. [C. C. A.] 141 F. 12. Contract to pay bonus held not to depend on lime being shipped on a particular vessel, or on loading being commenced at a particular time where contingencies arose which caused delay. Id.

3. See 4 C. L. 1478.

4. Demurrage allowed. The North Star, 140 F. 263. Allowance of demurrage for delay due to collision held proper. The Rickmers [C. C. A.] 142 F. 305. Rate of demurrage fixed by commissioner in collision case held proper. The Sovereign of The Seas, 139 F. 812. Demurrage allowed by commissioner for time consumed in repairing barge after collision reduced, where amount allowed was largely in excess of cost of repairs, and it appeared that repairs could have been made in much less time. Id. Fact that award of demurrage by commissioner was less than amount claimed held not to entitle libelant to more favorable consideration thereof where his claim was clearly excessive and exhorbitant. Id.

5. The North Star, 140 F. 263.

6. Vessel injured through negligent operation of drawbridge. City of Chicago v. Hawgood & Avery Transit Co., 110 Ill. App. 34.

7. Not for delay in unloading coal from barge's hold after arrival at place of loading, owing to inadequacy of charterer's facilities, where coal was taken on under contract with third party after the charter and without consulting the charterer. Donaldson v. Severn River Glass Sand Co., 138 F. 691.

8. The Alcalde, 132 F. 576.

9. Charterers held not liable for demurrage for delay in loading at pier belonging to town in foreign port, where port authorities refused to permit vessel to berth in her turn on ground that she would project beyond the pier. Adamson & Mail v. 4,300 Tons Pyrites Ore, 137 F. 998.

10. Charterers not liable for delay due to

the charterer from liability for demurrage for delay due to strikes[11] or other causes or accidents beyond his control.[12] The allowance of interest upon demurrage is discretionary with the court.[13] Where the charter provides that the time for discharging shall commence when the vessel is ready to unload and written notice is given, whether in berth or not, the lay days for discharging commence to run when the vessel gives such notice and is actually ready.[14]

§ 11. *Pilotage, towage, wharfage.*[15]—Congress may permit the several states to adopt pilotage regulations.[16] The Federal statutes prohibit the adoption by any state of any regulation or provision discriminating in the rate of pilotage or half-pilotage between vessels sailing between the ports of one state and those sailing between the ports of different states, or any discrimination between vessels propelled in whole or in part by steam, or against national vessels of the United States, and annul and abrogate all existing provisions or regulations making any such discrimination.[17] They also provide that the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states may employ any pilot duly licensed or authorized by either to pilot the vessel to or from such port.[18]

Pilots are entitled to a lien for their wages.[19]

§ 12. *Repairs, supplies, and like expenses.*[20]—In order to raise a lien on a vessel for repairs furnished at a foreign port it must appear that there was an understanding or contract that they should be made on the credit of the vessel.[21] The manner in which the books are kept and the bills rendered is some evidence whether the person doing the work relies on the credit of the vessel or of the owner, but it is not conclusive and will not defeat the right to a lien when an agreement therefor is shown.[22] The fact that the repairer first sues the owner in personam does not estop him from subsequently enforcing his lien.[23]

intervention of port authorities. Adamson & Mail v. 4,300 Tons Pyrites Ore, 137 F. 998.

11. Coal strike resulting in large quantities of coal being brought to this country from abroad held not the proximate cause of delay in unloading vessel due to arrival of large number of vessels loaded with coal at same port at same time, and the requirement of the consignees that they be unloaded at certain railroad docks to facilitate shipment. W. K. Niver Coal Co. v. Cheronea S. S. Co. [C. C. A.] 142 F. 402, afg. 124 F. 937.

12. Delay due to arrival of large number of vessels at same port at same time each under separate charter to same party held not excused by this provision. W. K. Niver Coal Co. v. Cheronea S. S. Co. [C. C. A.] 142 F. 402, affg. 124 F. 937.

13. Interest on demurrage awarded for time consumed in repairing vessel after collision allowed only as of the entry decree in view of delay in prosecuting suit. The Sovereign of The Seas, 139 F. 812. Allowance of interest held proper. W. K. Niver Coal Co. v. Cheronea S. S. Co. [C. C. A.] 142 F. 402, afg. 124 F. 937.

14. Whether at her designated berth or not. W. K. Niver Coal Co. v. Cheronea S. S. Co. [C. C. A.] 142 F. 402, afg. 124 F. 937.

15. See 4 C. L. 1480.

16. Va. Code 1887, §§ 1900, 1963, 1965, 1966, 1978, imposing compulsory pilotage on certain vessels inward or outward bound through the capes, does not violate U. S. Const. art. 1, § 9, providing that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. Thompson v. Darden, 198 U. S. 310, 49 Law. Ed. 1064.

17. Rev. St. § 4237, 5 Fed. St. Ann. 749. Thompson v. Darden, 198 U. S. 310, 49 Law. Ed. 1064. Virginia compulsory pilotage law (Code 1887, §§ 1963 et seq.) is not, in and of itself, discriminatory since it imposes a like compulsory pilotage charge upon all vessels bound in and bound out. Id. The fact that compulsory pilotage does not prevail in all the inland waters of the state is immaterial. Id. Courts cannot consider fact that regulations may be unwise or unjust. Id.

18. Rev. St. § 4236, 5 Fed. St. Ann. 749. Thompson v. Darden, 198 U. S. 310, 49 Law. Ed. 1064. Contention that Virginia compulsory pilotage law violates this section not sustained, where contention was not raised below, and it did not appear that state of Maryland had ever attempted to regulate pilotage between the capes of Virginia, to which the Virginia statute relates, or that any Maryland pilot offered his services in the case at bar. Id.

19. Persons not performing the duties of masters but engaged solely in the navigation of the vessels held pilots. The Pauline, 138 F. 271. But masters assuming designation of pilots for purpose of acquiring lien are not entitled to one. The Pauline, 136 F. 815.

20. See 4 C. L. 1481.

21. The Grand Republic, 138 F. 615.

22. The fact that an account for repairs is kept in the name of the owner and that the bill is sent to him. Evidence held to

By common law, materialmen furnishing repairs to a domestic ship have no maritime lien upon the ship itself for their demand,[24] hence, the right to a lien for repairs and necessaries furnished in the port or state to which the vessel belongs is governed entirely by local law,[25] which must be complied with before a lien can be acquired.[26] One having acquired possession of a vessel for the purpose of repairing the engine has a lien thereon therefor and is entitled to retain possession until paid,[27] but such lien is lost by a voluntary surrender of the possession,[28] and is not revived by subsequently again acquiring possession for a different purpose.[29] A vessel owner who fails to pay for an engine installed therein cannot, however, recover possession of it from the builder, to whom it has been returned for repairs, until he pays the purchase price.[30]

Contracts for the building of ships or for furnishing materials for their construction are not maritime in their nature, nor are liens given upon them while in course of construction maritime liens,[31] hence state statutes creating liens of this character and conferring upon their own courts power to enforce them are not invalid as derogating from the jurisdiction of the Federal admiralty courts,[32] and

show that repairs were made on credit of the ship. The Grand Republic, 138 F. 615.

23. The Grand Republic, 138 F. 615.

24. Shipwright who takes domestic vessel into possession to repair it is not bound to part with possession until paid, but if he does so, or if he works upon it without taking possession, he has no claim upon the ship itself. The Sue, 137 F. 133.

25. No lien implied unless by that law. The Sue, 137 F. 133.

26. Liens not filed in accordance wth state law dismissed. The Sue, 137 F. 133.

27. Downey v. Lozier Motor Co., 138 F. 173.

28. Lien claimed on yacht for purchase price of gasoline engine installed. Downey v. Lozier Motor Co., 138 F. 173.

29. By acquiring possession of yacht for purpose of repairing engine. Downey v. Lozier Motor Co., 138 F. 173.

30. Owner of yacht who has gas engine installed therein and fails to pay for it as agreed cannot recover possession of it from the builder, to whom he has returned it for repairs, until he pays the purchase price. Downey v. Lozier Motor Co., 138 F. 173. Engine furnished held all that owner was entitled to, and his objections thereto unreasonable. Id.

31. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527.

32. The Winnebago [C. C. A.] 141 F. 945. Comp. Laws 1897, § 10,789, does not violate provision of Federal constitution conferring exclusive admiralty jurisdiction on Federal courts. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527.

Construction of state statutes: Under Mich. Comp. Laws 1897, § 10,789, lien is given for labor or materials furnished for the purpose of being used in the construction of a particular vessel, and it is not necessary to its enforcement to prove that they were in fact so used. The Winnebago [C. C. A.] 141 F. 945. It is immaterial whether credit is given to the vessel or to the owner personally, and lien exists in either case unless waived, the burden of showing waiver being on the party alleging it. Id. Lien attaches by operation of law and as an incident to the contract. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691,105 N. W. 527. Giving of notes by owner of vessel to materialman for arbitrary amounts to be used by him in raising funds, which notes were not paid and were afterwards returned, held not payments depriving materialman of his right to a lien, there being no agreement that they should be so considered. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co., [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527. In proceedings to establish materialman's lien on vessel held error, on reversing judgment for petitioners, to dismiss the proceeding instead of granting new trial, where decision was based on findings of ref-referee showing that all but two items of the claim were barred by limitations and that those two were not for materials used in the construction of the vessel, since such findings rested in part at least on oral evidence which might be changed on another trial. In re Froment [N. Y.6 77 N. E. 9, modifying 110 App. Div. 72, 96 N. Y. S. 1061. Lien for work done or materials furnished for or toward the building, repairing, or equipping of a vessel, by Laws 1897, p. 526, c. 418, § 30, exists only when the materials have actually gone into the construction, repair, or equipping of the vessel. In re Froment, 110 App. Div. 72, 96 N. Y. S. 1061, modified on other grounds [N. Y.] 77 N. E. 9. Statute, being in derogation of the common law, should be strictly construed and is not affected by Id. § 22, providing for a liberal construction of the provisions in regard to mechanic's liens. Id. A suit to enforce a lien for materials furnished in the construction of a vessel, given by Pub. St. 1882, c. 192, §§ 14-17 (Rev. Laws, c. 198, § 14-17), is a proceeding in rem in which the jurisdiction of the court to enter a judgment depends upon jurisdiction of the property, and the only judgment which can be entered is one against the property, to be enforced by an order of sale. Merriman v. Currier [Mass.] 77 N. E. 708. Without the process of attachment provided for by § 17, and an effectual service thereof, the court can never make an effectual order for the sale of the vessel and a disposition of

this is true whether the vessel is intended to be used wholly in state waters or elsewhere as well.[33] A ship launched, but still in course of construction, does not become subject to maritime law until she is put into use as an agency of commerce, or, at least, until she is fitted for that purpose.[34] The fact that the vessel against which proceedings have been begun in the state court has been enrolled and engaged in interstate commerce, and may therefore become subject to superior maritime liens enforceable in a court of admiralty, does not deprive the state court of jurisdiction in such cases.[35] The title to a vessel constructed under a contract with certain individuals who are to form a corporation, to which the completed vessel is to be transferred, is in the builder until such transfer takes place, and therefore one furnishing materials to him is not a subcontractor.[36]

§ 13. *Salvage.*[37]—In order that a service may be regarded as a salvage one, it must involve some element of danger to persons or property, and must be extraordinary in its nature.[38] One raising a sunken vessel may, however, recover a reasonable compensation therefor though the service is in no sense a salvage one.[39]

The United States is liable on an implied contract for salvage services rendered to government vessels.[40] The government, being liable to refund customs duties on imported merchandise destroyed while in custody of the customs officers, has an interest in goods on a vessel on which such duties have been paid and which

the proceeds. Id. Where petition for enforcement of lien was inserted in a writ of original summons and attachment, in which the order was to attach the goods of defendants to a specified value and to summon the defendants to appear and answer, no reference being made to the vessel, and return showed an ordinary attachment of the vessel to be held as security for such judgment as should be recovered against them, and subsequently vessel was attached under a special precept as in actions in personam, held that court acquired no jurisdiction. Id. Such proceedure does not give jurisdiction to proceed in personam, since statute only permits a proceeding in rem. Id. Neither does personal service on defendants. Id. Order of attachment which is to accompany writ of original summons, and be included in it, is order for attachment of vessel as res, the same as when petition is filed in court. Id. Provision of § 15, as amended by St. 1896, p. 355, c. 404, Rev. Laws, c. 198, § 15, does not imply that lien can be enforced without an attachment of the vessel within the jurisdiction. Id. The attachments being wholly inapplicable to the case, held that bond given to dissolve the last of them, which did not in any way recognize its validity, did not in any way change their character. Id. Defect in proceeding held one of substance and not of form, so that decision of superior court on motion to dismiss was not final under Rev. Laws, c. 173, § 76. Id.

33. The Winnebago [C. C. A.] 141 F. 945. Lien given by Comp. Laws 1897, § 10,789, applies to vessel actually navigating in state waters, though she also navigates elsewhere. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527.

34. Mere fact that she rests in the water does not operate to deprive one thereafter furnishing materials to be used in her construction of lien given by state statute. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527.

35. The Winnebago [C. C. A.] 141 F. 945. If law creating lien is valid, seizure may be made after vessel is enrolled and licensed, and while she is engaged in interstate commerce. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527.

36. Is not barred from enforcing lien given by Comp. Laws 1897, § 10,789, on ground that he is a subcontractor only and there is nothing due from principal contractor. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 691, 105 N. W. 527; The Winnebago [C. C. A.] 141 F. 945.

37. See 4 C. L. 1484.

38. Raising of dredge sunk in shallow water held not a salvage service, there being no element of danger to person or property and no extraordinary means required or employed. Merritt & Chapman D. & W. Co. v. Morris & Cummings Dredging Co. [C. C. A.] 137 F. 780, rvg. 132 F. 154. Evidence held to show that tug rendered salvage services in towing car float from burning pier. The Car Float No. 19, 138 F. 435. Aiding in putting out fire on government vessel loaded with ammunition for warship held salvage services. Hartford & N. Y. Transp. Co. v. U. S. 138 F. 618.

39. Allowance of $4,000 for raising sunken dredge affirmed, work being in no sense a salvage service. Merritt & Chapman D. & W. Co. v. Morris & Cummings Dredging Co. [C. C. A.] 137 F. 780, rvg. 132 F. 154. In suit to recover for services for raising sunken dredge, held that, in view of long delay in prosecuting suit, the fact that the claim was excessive and the difficulty experienced by respondent in obtaining proof of value of libelant's services owing to fact that latter had monopoly of such work, neither costs or interest would be allowed. Id.

40. Under provisions of Tucker Act (Act March 3, 1887, c. 359, 24 St. 505). Hartford & N. Y. Transp. Co. v. U. S., 138 F. 618.

are still in the custody of such officers, and salvors are entitled to an award against it on the basis of the amount thus put at risk.[41]

The law does not fix any maximum or minimum percentage to be allowed salvors,[42] but they should be allowed a fair share of what they save, each case being judged with reference to its peculiar facts.[43] The danger to the salved vessel,[44] the value of the two vessels,[45] the effectiveness of the services rendered,[46] and the risk of the salvors, will be considered.[47] The vessel rendering the salvage service should also be reimbursed for expenses and losses actually incurred.[48]

A certain proportion of the award is generally divided among the officers and crew rendering the services.[49]

§ 14. *Loss and expense and limitation of liability therefor.*[50]—In the absence of specific proof it is presumed that the cargo on board a vessel at the time of its loss was the equivalent of its carrying capacity.[51] It cannot be assumed that the proceeds of the outward bound voyage were invested in the return cargo.[52]

Limitation of liability.[53]—The Federal statutes provide that the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put aboard such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost,

41. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455, afg. 130 F. 480. U. S. Rev. St. § 2984, providing for refund in such cases, is mandatory. Id. The Federal district courts have jurisdiction to entertain a petition for a salvage award against the United States for services in saving a cargo in which the government is interested. Under Tucker Act (Act March 3, 1887, c. 359, 24 St. 505. 1 Supp. Rev. St. 559). Id.

42. The South Bay, 139 F. 273. Award in derelict cases is not necessarily a moity but depends upon circumstances. The Edith L. Allen, 139 F. 888. While rescued schooner was not a derelict in the strict sense, held that she might justly be considered one for salvage purposes. Id. Would be manifestly unjust to allow half in derelict cases, where there is a large salved value, and small risk to the salving vessel. Id.

43. The South Bay, 139 F. 273.

Awards in particular cases: Nine thousand dollars awarded tug worth $20,000 for putting out fire on tank steamer worth, with its cargo of crude petroleum, $221,000. The Toledo, 136 F. 959. Tug worth $25,000 allowed $1,000 for towing car float worth $22,000 from burning pier. The Car Float No. 19, 138 F. 435. Award of $500 to tug aiding in putting out fire on United States vessel loaded with ammunition. Hartford & N. Y. Transp. Co. v. U. S., 138 F. 618. Award of $2,000 to owners and crew of tug for towing into port steamer worth $50,000, which had struck stonework at entrance of harbor and was in peril but not in imminent danger, the service not requiring exposure to extraordinary peril, or the endurance of special hardships. The South Bay, 139 F. 273. Steamer worth $300,000 awarded $8,000 for towing into port a schooner, whose salved value with her cargo and freight was $25,000, and which could justly be considered a derelict for salvage purposes. The Edith L. Allen, 139 F. 888. Award of $250 to tug for towing two mudscows which had broken loose in a fog, the service being the lowest order of salvage. Scows Nos. 1 and 10, 141 F. 477.

44. The Toledo, 136 F. 959; The South Bay, 139 F. 273. Drifting scows held in some danger. Scows Nos. 1 and 10, 141 F. 477. Fact that lives of crew of salved vessel were probably saved from an essential ingredient in considering question of compensation. The Edith L. Allen, 139 F. 888.

45. The Toledo, 136 F. 959. Value of property salved. The South Bay, 139 F. 273.

46. The effectiveness of the services rather than the time consumed in rendering them is of importance. The Toledo, 136 F. 959.

47. No danger to rescuing boat or her crew. Scows Nos. 1 and 10, 141 F. 477. Value of services increased where human life is involved. The Toledo, 136 F. 959. Fact that they were not exposed to extraordinary peril or required to endure special hardships. The South Bay, 139 F. 273. If there is danger in towing vessel the risk should be terminated as soon as possible, and fact that this was not done should be considered. The Edith L. Allen, 139 F. 888.

48. Claims for value of hawser and for towage charges held proper. The Edith L. Allen, 139 F. 888.

49. Salvage divided between owner and crew in the proportions of seventy-five and twenty-five per cent., the crews share being divided according to their wages, the master and those going on board the rescued schooner to steer her receiving double shares, and engineer who cut anchor chain on schooner one and a half shares. The Edith L. Allen, 139 F. 888. One-third of salvage award given to master and crew in proportion to their wages, master receiving a double portion. The Toledo, 136 F. 959.

50. See 4 C. L. 1486.

51. Burden is on owner to show as against claim of charterer of an eighth interest in the vessel that it was less. Brig Maria, 39 Ct. Cl. 39.

52. Can be no recovery of value of return cargo captured by French privateer where there is no evidence by which its value can be estimated. Brig Maria, 39 Ct. Cl. 39.

53. See 4 C. L. 1487.

damage, or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending,[54] and that whenever the whole value of the vessel and the freight for the voyage is not sufficient to compensate all persons suffering loss, it shall be divided pro rata between them, for which purpose appropriate proceedings may be had in any court.[55] The

54. Rev. St. § 4283, 4 Fed. St. Ann. 839.

Vessels which may take advantage of the act: Mudscow navigating Boston Harbor may maintain proceeding for limitation of liability for collision under Rev. St. §§ 4283-4289, as amended by Act June 19, 1886, c. 421, § 4, 24 St. 80. In re Eastern Dredging Co., 138 F. 942. Is immaterial that it is not engaged in business of carrying merchandise, or passengers or both, or that it is engaged in purely local trade and is not run on any particular route. Id. It is also immaterial that there is never any freight pending on its voyages, if such is the fact. Id.

Liability for removal of wreck from harbor: Where vessel is lost without privity or knowledge of owner, he is only liable to the extent of his interest therein and cannot be held personally responsible for expenses incurred by local authorities in removing the wrecked vessel from their harbor. Va. Code, § 2011, as amended by Acts 1889-90, p. 624, c. 371, is invalid in so far as it authorizes removal at owner's expense. Hagan v. Richmond [Va.] 52 S. E. 385.

Damages for loss of life may be proved against the fund paid in in proceedings by the owner of a foreign vessel for limitation of liability for claims arising out of the loss of the vessel in collision, for which the vessel is held in fault, where the law of the country to which the vessel belongs authorizes such a recovery in such cases. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261.

Freight pending: "Freight pending" and "freight for the voyage" mean the earnings of the voyage, whether from the carriage of passengers or merchandise. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261. Passage or freight money collected under contracts making it the absolute property of the shipowner, whether voyage is completed or not, must be regarded as earned though vessel is lost, and hence must be surrendered. Id. Does not include any part of subsidy paid to company by French government in consideration of maintaining weekly steamer service between Havre and New York, transporting mails, etc., it being impossible to determine what part thereof is to be considered compensation to any particular steamer for transporting mails on any particular trip. Id.

Insurance moneys need not be surrendered. In re Knickerbocker Steamboat Co., 136 F. 956.

Privity or knowledge: Evidence held insufficient to show that officers of steamship company knowingly tolerated or encouraged the running of its steamers at excessive speed in fogs, or were negligent in failing to enforce the rules in this regard so as to prevent limitation of liability for collision while vessel was running at excessive speed in fog, on ground that collision occurred with company's privity or knowledge. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261, on other grounds. Rules as to speed in fog held sufficient. Id. Evidence insufficient to show that vessel was in actual violation of statutory provisions as to life boats, etc. (R. S. §§ 4488, 4489). Id. An owner who, after a general inspection, purchases a vessel from a shipbuilder of recognized standing and reputation, who equips her with machinery, means, and appliances which are suitable and sufficient if properly used, may limit his liability for damage occasioned by their negligent use by his employes. For injuries to stevedores caused by unloading coal in such a manner as to put heavy pressure on defective bulkheads. The Harry Hudson Smith [C. C. A.] 142 F. 724.

Collision cases: Where both vessels are held to be in fault for a collision, and each is condemned to pay half the damage, the claims of outside claimants are entitled to priority over any claim of the owner or charterer of either vessel for injuries thereto against the other vessel. The Mauch Chunk, 139 F. 747. In such case underwriters stand by subrogation in the shoes of the owners and their rights are subordinate to those of the damage claimants who must first be paid in full. Id. Cost of raising one of two vessels, both of which were held in fault for collision, held a proper claim against the fund, though exceeding the value of the raised vessel, where she was an obstruction to navigation, and it was also necessary to raise her in order to determine her true condition and value. Id. Sinking of ferry boat in collision held not to have prevented owner of pier from using it so as to entitle him to damages. Id. It is a condition precedent to the limitation of liability that the party seeking it surrender each and every vessel owned by him participating in the tort. Where petition is for limitation as owner of vessel sunk in collision, but it appears that petitioner also owned the other vessel concerned, which was equally at fault, both must be surrendered or proceedings will be dismissed. The San Rafael [C. C. A.] 141 F. 270, rvg. 134 F. 749.

Pleading and practice: Petition for limitation of liability sufficient to give court jurisdiction. In re Eastern Dredging Co., 138 F. 942. Questions whether collision could not have occurred without petitioner's privity or knowledge, and whether scow was negligent in failing to have proper lights, will be left to be determined at the trial, where petition denies such knowledge and negligence and will not be decided on special plea to the jurisdiction. Id. In a proceeding for limitation of liability, interrogatories which are merely for the purpose of finding assets of the petitioner are inadmissible. In re Knickerbocker Steamboat Co., 136 F. 956.

55. Rev. St. § 4284, 4 Fed. St. Ann. 49. Effect of this section is to make every admissible claim a statutory lien on the fund, and entitled to share therein pro rata, except as affected by equitable rights between the parties. The Mauch Chunk, 139 F. 747.

Freight for the "voyage" means the particular voyage which exposes the property

transfer by the owner of his interest in the vessel and freight to a trustee, to be appointed by any court of competent jurisdiction, is made a sufficient compliance with the statute.[56] For the purpose of such proceeding a charterer of a vessel, who mans, victuals, and navigates her at his own expense, or by his own procurement, is to be deemed her owner, and the vessel is liable in the same manner as if navigated by the owner thereof.[57] It is further provided that the individual liability of an owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and that the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending.[58]

§ 15. *General average.*[59]—The Harter Act does not, either expressly or by implication, render valid a contract entitling the owner to share in a general average in case of a loss resulting from negligent navigation.[60]

§ 16. *Wreck.*[61]

§ 17. *Marine insurance.*[62]—The word "collision," when used alone in a policy, means the coming in contact of two navigable things.[63] A provision that a deduction of one-third shall be made from all partial loss claims after two years from the date of the vessel's original custom house survey is valid.[64]

A policy of insurance on a vessel engaged in navigation is a maritime contract, though it insures her against fire risks only, and a court of admiralty has jurisdiction of an action in personam to enforce the same.[65]

§ 18. *Maritime torts and crimes.*[66]—A ship is liable for the torts of the master and crew, though committed without the knowledge or consent of the owners.[67] The lien for a maritime tort accompanies the vessel even into the hands of a bona fide purchaser.[68]

to risk, and, in the case of an Atlantic liner making regular trips between the United States and Europe, each trip or crossing is such a voyage. Hence, where French ship is sunk on her way from New York to Havre, owner is not bound to surrender earnings of previous trip from Havre to New York. La Bourgogne [C. C. A.] 139 F. 433, rvg. 117 F. 261.

Claims for injuries and loss of life are within this and the next section. The Mauch Chunk, 139 F. 747. Funeral expenses of persons killed are recoverable where the law imposes upon the relatives for whose benefit the claim is made the obligation to bear them. Id.

56. Rev. St. § 4285, 4 Fed. St. Ann. 850. The Mauch Chunk, 139 F. 747.

57. Rev. St. § 4286, 4 Fed. St. Ann. 851. The Mauch Chunk, 139 F. 747.

58. Act June 26, 1884, c. 121, § 18, 23 St. L. 57, 4 Fed. St. Ann. 852. Act is to be construed in connection with Rev. St. § 4283, 4 Fed. St. Ann. 839, limiting owner's liability in case of loss by embezzlement, collision, etc. Rudolf v. Brown, 137 F. 106.

Contracts for supplies: Does not apply to personal contracts for supplies so as to relieve a part owner from full liability therefor, particularly where they are purchased by his authority or with his consent. Rudolph v. Brown, 137 F. 106.

59. See 4 C. L. 1487.

60. Such a contract is void. New York & C. Mail S. S. Co. v. Ansonia Clock Co., 139 F. 894.

61. See 4 C. L. 1487.

62. See 4 C. L. 1488.

63. Hence policy insuring against collision does not cover a loss due to striking a wrecked vessel sunk several hours previously and never raised, and which could only have been raised at a cost exceeding her value when raised. Burnham v. China Mut. Ins. Co. [Mass.] 75 N. E. 74. Policies covering "the risk of collision sustained" and "loss sustained by collision with another vessel" mean the same thing, namely, collision with another vessel. Id.

64. Claim for repairs. Providence-Washington Ins. Co. v. Paducah Towing Co. [Ky.] 89 S. W. 722. Such provision held to be in addition to that whereby insurer undertook to be liable for only two-thirds of the loss in the first instance, that is, defendant was entitled to deduct from two-thirds of the amount of the loss one-third thereof. Id.

65. Relation of insurance to hull or cargo, in maritime service, and not the particular terms of the policy controls. North German Fire Ins. Co. v. Adams [C. C. A.] 142 F. 439.

66. See 4 C. L. 1454, 1491. See, also, Master and Servant, 6 C. L. 521; Negligence, 6 C. L. 748.

67. For blowing off boiler while lying next to another vessel, thereby destroying a part of the latter's paint. The Bulley, 138 F. 170.

NOTE. Liability of ship for unauthorized tort of seamen: American admiralty courts disregard the common-law limitations on the doctrine of respondent superior in torts and

The owner is bound to exercise ordinary and reasonable care to provide reasonably safe appliances, machinery and working places, and to keep them in a reasonably safe condition of repair.[69] Seamen are bound to use ordinary care in the use of such appliances[70] and assume the risk of the ordinary perils of navigation.[71] Neither the vessel nor its owner is liable for injuries to a seaman caused by the negligence of his fellow-servants, in the absence of evidence showing that the owner was negligent in selecting them.[72] The crew of a vessel and the crew of a lighter into which she is engaged in unloading are engaged in a common undertaking, and therefore each owes to the other the duty of exercising ordinary care and prudence.[73] One deliberately choosing a dangerous method of doing his part of the work, rather than a safe one equally practicable, is guilty of negligence making him liable for the resulting injuries to the other party.[74]

In order that the owner may be held liable for injuries to a stevedore it must appear that he had control and supervision of the work of loading the vessel, or that he furnished the instrumentalities for doing so and was negligent in furnish-

permit an action in rem against the vessel for the unauthorized, willful acts of its crew. This conception, that the ship itself is the wrongdoer, originated in the commercial customs of the middle ages (The China, 7 Wall. [U. S.] 53, 68, 19 Law. Ed. 67), and in the efforts of the courts to insure indemnity to the injured party (The United States v. Brig Malek Adhel, 2 How. [U. S.] 210, 233, 11 Law. Ed. 239). The English decisions, however, more nearly approach the common-law doctrine (Abbott on Shipping [6th Am. Ed.] 228, Carver on Carriage by Sea, § 707), one case even holding that the liability of the ship and the responsibility of the owner are convertible terms (The Druid, 1 W. Robinson, 391, 399). The weight of American authority, however, favors the decision in the Bulley, above cited. Schooner Little Charles, 1 Brock, 347, 354.—5 Columbia L. R. 545.

68. One purchasing vessel during pendency of proceedings for limitation of liability held not bona fide purchaser. The San Rafael [C. C. A.] 141 F. 270, rvg. 134 F. 749.

69. See 4 C. L. 1454. Vessel held liable for injury to seaman caused by breaking of rope fastening pulley to top of funnel. The Lowlands, 142 F. 888. The owner is only bound to furnish machinery and appliances which are reasonably safe and fit. Need not furnish the very best which can be procured or those which are absolutely the most convenient or most safe (The Chico, 140 F. 568), but they must be such as can be used by the servant in the course of his employment without danger to himself by exercising ordinary care (Id.). Owner held not negligent in installing and continuing in use a winch in which cogwheels were not protected where it could be safely used by exercise of reasonable care, and not liable for injuries to seaman whose fingers were caught therein. The Chico, 140 F. 568. Liability on the part of the vessel to a seaman for injuries resulting from the breaking of an appliance is incurred only when those who represent her have failed to exercise reasonable care to make it safe, and arises only out of such defects as reasonable care on her part would have discovered and remedied. Owners and vessel held not liable to seaman struck by anchor chain which ran out suddenly, owing to breaking of patent spring rider. The Henry B. Fiske, 141 F. 188. Held not negligence on master's part to order him, or to permit mate to order him, to work in chain locker where he was injured by sudden running out of anchor chain due to breaking of patent spring rider, there being no reason to apprehend unusual danger. Id. Tug held not liable for injuries received by fireman while tightening nuts on valve of stuffing box, the work being such as he was familiar with, and it appearing that machinery was in general good repair. The Mars, 138 F. 941. Evidence held sufficient to show that owners were not negligent in furnishing too small a tug for the service (Smith v. Lehigh Valley R. Co., 141 F. 192), or because pilot house was too low to permit captain to see libelant while at work on deck of float, this ground not having been assigned in the libel as a matter of negligence (Id.).

70. Seaman held not guilty of contributory negligence in running line used to fasten boatswain's chair for painting funnel through wooden pulley fastened by rope instead of iron one, where he tried latter and found that it was rusted and would not work. The Lowlands, 142 F. 888.

71. Evidence held to show that injury to seaman was due to the ordinary perils of navigation and not to the negligent manner in which yardarm was fastened, so that vessel was not liable therefor. The Margharita [C. C. A.] 140 F. 820.

72. Mate and floatman belonging to same crew, having the same employer, and being engaged in a common object, though of different rank, and working on different lines to accomplish the undertaking, are fellow-servants. Smith v. Lehigh Valley R. Co., 141 F. 192.

73. Carlson v. White Star S. S. Co. [Wash.] 81 P. 838.

74. Ship's servants held guilty of negligence in failing to use winches in unloading timber onto lighter. Carlson, v. White Star S. S. Co. [Wash.] 81 P. 838. Fact that lighterage company was also negligent in failing to provide a sufficient number of men held not to relieve vessel owners from results of their negligence. Id. Crew of lighter held not guilty of contributory negligence. Id.

ing defective ones.[75] He is bound to provide a safe place on the vessel for them to work,[76] but is not liable for the consequences of the negligence of an independent contractor who undertakes to load the vessel and to furnish the necessary labor and appliances for so doing,[77] nor for the consequences of contributory negligence on the part of the injured person.[78] The ship is bound to furnish loading tackle that will support loads with which men of usual skill and prudence in the business will burden it,[79] but it is the duty of the contracting stevedore to see that only such loads are hoisted, and to use proper judgment in their selection, and the ship is not responsible for injuries to his employes resulting from his failure to do so.[80] If the vessel is bound to furnish to the stevedore winches and winchmen to be used in unloading, its whole duty is performed when it furnishes properly constructed winches in good order, and winchmen selected and employed with due and reasonable care as to their skill and competence.[81]

The first officer of a vessel sunk in collision is not chargeable with negligence because of improper navigation where he acted in all that he did under the orders of the master.[82] So too, the members of the crew are not chargeable with the vessel's faults, and the fact that both vessels are held in fault and the damages divided does not preclude their representatives from recovering full damages for their deaths.[83] Negligence in failing to provide a fog horn for a skiff, or negligence of the oarsman in failing to use a fog signal, or negligent navigation on his part, is not imputed to a mere passenger having no control over the skiff or its management,[84] nor is the act of the passenger in attempting to cross the river without seeing that there is such a horn such an act of known danger and recklessness on his part as will charge him with personal contributory negligence, it appearing that it was not customary for such boats to carry such horns.[85]

The question of the contributory negligence of one run down by a tug while crossing a river in a row boat is ordinarily for the jury.[86] Contributory negligence

75. In action for injuries to stevedore by breaking of rope, held not to show that rope was furnished by vessel, and nonsuit properly granted. West v. Brakelow S. S. Co. [Ga.] 52 S. E. 888.

76. Where bulkhead in coal barge was faulty, and defects could have been readily discovered by master by inspection, but he directed one bin to be unloaded before the other, in consequence of which bulkhead collapsed under the pressure of the coal in the full bin and injured stevedores, held that such injuries were attributable to negligence of master, for which owner was responsible, in absence of contributory negligence. The Harry Hudson Smith [C. C. A.] 142 F. 724. Vessel being under no obligation to light that section of the hold where libelant was injured until its representatives were notified that men unloading ore were ready to go to work there, held that she was not guilty of negligence, it not appearing that there was any unreasonable delay in furnishing lights after they were called for. The Santiago [C. C. A.] 137 F. 323, rvg. 131 F. 383. Claimant held not negligent in failing to provide a safe place for laborer unloading ore to work, it not appearing that latter was bound to go into the hold until customary lights were furnished, and the evidence showing that if he was ordered to do so it was by his foreman and not by anyone representing the vessel. Id.

77. See, also, Independent Contractors, 5 C. L. 1782. West v. Brakelow S. S. Co. [Ga.] 52 S. E. 888.

78. Longshoreman's contributory negligence in needlessly and recklessly climbing about on ore piles in hold of vessel while waiting for lights held the proximate cause of his injury. The Santiago [C. C. A.] 137 F. 323, rvg. 131 F. 383.

79. Carlson v. Comeric Co., 140 F. 109.

80. Carlson v. Comeric Co., 140 F. 109. Vessel held not liable for death of employe in charge of tackle due to breaking of hook from overloading, it not appearing that it resulted from any negligence of the owners in supplying and maintaining tackle. Id.

81. The Elton [C. C. A.] 142 F. 367, rvg. 131 F. 562. Where winchman so furnished acted under immediate orders of master stevedore, held that he was a fellow-servant of a stevedore, and ship was not responsible for injury to latter due to winchman's negligence. Id. Evidence held to show due care in selection of winchman. Id.

82. Will not preclude recovery for his death where he was not personally negligent. The Saginaw, 139 F. 906.

83. Are not precluded from recovering more than half the damages otherwise recoverable. The Saginaw, 139 F. 906.

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

85. Act of passenger in so doing held not a proximate contributing cause of her death resulting from collision with tug running at immoderate speed. Quinette v. Bisso [C. C. A.] 136 F. 825.

86. Direction of verdict for defendant held error. Klutt v. Philadelphia & R. R. Co. [C. C. A.] 142 F. 394, rvg. 133 F. 1002.

on the part of plaintiff is no defense if defendant discovered, or by the exercise of ordinary care might have discovered, the exposed situation of plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of plaintiff's negligence and avoided the injury which happened.[87]

The exercise of a reasonable care by a wharf owner toward those who come upon the structure by his implied invitation demands the use on his part of appliances which shall not be so defective as to be dangerous to such visitors.[88] The doctrine of res ipsa loquitur applies where one who has entered on the wharf with the sanction of a steamship company is injured by the breaking of a hawser used by the company's servants in bringing a vessel alongside the wharf.[89] One who, in going upon a vessel, unnecessarily uses a temporary gangway, used in unloading cargo, instead of a passenger gangway of which he has knowledge, assumes the risk, and the vessel cannot be held liable for injury received by him in falling into the water.[90]

The only right of action for death due to collision is that given by state statutes,[91] which must be applied in admiralty in the same manner as in suits in the state courts, and any defense is available which would be a bar in such courts.[92] The Federal courts will be governed in the measure of damages by analogy to the decisions of the highest state court under similar circumstances.[93] Mortality tables prepared for life insurance purposes are of little value in determining the duration of life in such cases.[94]

In a suit in personam for damages for tort, ownership of the vessel must, of course, be proved.[95]

In enforcing a lien given by the general maritime law, courts of admiralty are not governed by limitations prescribed by state statutes giving similar liens.[96]

87. Held question for jury whether, by employing proper lookout, defendant's tug could have discovered rowboat in time to have avoided running it down. Klutt v. Philadelphia & R. R. Co. [C. C. A.] 142 F. 394, rvg. 133 F. 1003.

88, 89. Duhme v. Hamburg-American Packet Co., 94 N. Y. S. 1102.

90. Tally clerk who did not go upon ship for any purpose connected with such gangway. The Marie, 137 F. 448.

91. Quinette v. Bisso [C. C. A.] 136 F. 825. State laws giving right of action for death by wrongful act controls, where negligent act occurs on great lakes within jurisdiction of a state. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

92. Contributory negligence a good defense in action based on La. Civ. Code, art. 2315. Quinette v. Bisso [C. C. A.] 136 F. 825.

93. In case of death of one of her citizens on river within her borders. $4,000 allowed. Quinette v. Bisso [C. C. A.] 136 F. 825. This rule requires only that measure of damages should be determined by the law of the place, and while admiralty courts will follow ordinary methods in assessing damages which they would instruct a jury to adopt, verdicts of juries in particular cases cannot be regarded as precedents. The Saginaw, 139 F. 906. Damages recoverable for death of various members of crew in collision determined. Id. Claim for damages in name of administratrix, but based on state statute giving right of recovery to widow, held sufficient to properly present the claims where it appeared that she was also widow, and amendment making claim in that capacity properly allowed. Id. Damages for death in collision increased. The San Rafael [C. C. A.] 141 F. 270.

94. Held error for commissioner to accept them absolutely, particularly where deceased was a colored person. The Saginaw, 139 F. 906.

95. In suit for injuries to lighters resulting from negligence in unloading vessel, evidence held to establish prima facie case of ownership in defendant. Carlson v. White Star S. S. Co. [Wash.] 81 P. 838. Variance as to word "The" in defendant's corporate name held not to warrant reversal. Id. A copy of the last enrollment of a vessel, duly certified by the collector of customs, is prima facie evidence of ownership. Vincent v. Soper Lumber Co., 113 Ill. App. 463. Proof of ownership shifts the burden of proving that the vessel was not under the control of those shown to be its owners when the injury complained of occurred. Action for death by wrongful act of one shoveling coal on a barge. Id. In action for damages to canal boat caused by alleged negligence of captain of a barge claimed to belong to defendants, evidence held insufficient to show that he was the owner and employed the captain, it being merely to the effect that it was owned by the "S. Transportation Co." Warn v. Starin, 95 N. Y. S. 550.

96. Limitation of one year prescribed by Cal. Code Civ. Proc. § 813, held not applicable to libel for personal injuries due to collision. The San Rafael [C. C. A.] 141 F. 270, rvg. 134 F. 749.

Where there is nothing exceptional in the case, they will, however, be governed by the analogies of common-law limitation.[97]

SIGNATURES; SIMILITER; SIMULTANEOUS ACTIONS, see latest topical index.

SLAVES.

The condition of peonage [98] is one of compulsory service based on the indebtedness of the peon to the master,[99] and the 13th amendment forbids such service, whether created by contract, criminal force, municipal ordinance, state law, or otherwise.[1] Under a statute making it an offense to hold, arrest, or return, etc., any person to peonage, a master who arrests a former servant on a criminal charge for the purpose of releasing him on condition that he returns to him and works out a debt, and thus procures his return, is guilty of peonage.[2] Laws punishing the obtaining of money or property on a fraudulent promise to perform labor do not contravene the peonage act.[3]

Slave marriages, their offspring, and inheritance.[4]—In North Carolina the statute merely legitimatizes slave children [5] enabling them to inherit from both parents [6] but not from collaterals,[7] nor can a legitimatized child inherit through an illegitimate mother from lineals or collaterals.[8] The provision that illegitimates shall be considered as legitimates as between themselves and their estates shall descend accordingly does not apply except when they have the same mother.[9] Under a statute legitimatizing slave marriages continued after the war and until the act took effect, the fact that the slave had left another slave wife prior to the subsequent marriage does not effect the legitimacy of the offspring of the marriage so legitimatized,[10] nor was the legitimacy affected by the fact that the man left the woman after the act took effect,[11] and the secret intention of one of the parties at the beginning of the new relation is not material.[12] A legitimatized child of one of the parents of an illegitimate slave child cannot inherit from such child.[13] Under a statute legitimatizing the issue of customary marriages of negroes, the evidence of the marriage, though slight, will be held sufficient after a long lapse of time,[14] and the marriage is not invalidated because of failure to appear before the clerk of the county court and make declaration as required by the statute.[15]

SLEEPING CARS; SOCIETIES, see latest topical index.

97. Two years' period of limitation, prescribed by Cal. Code Civ. Proc. § 339, for actions for personal injuries. The San Rafael [C. C. A.] 141 F. 270, rvg. 134 F. 749. Libelant held not guilty of laches. Id.

98. See 4 C. L. 1494.

99, 1. In re Peonage Charge, 138 F. 686.

2. Sections 1990, 5526, Rev. St. (Comp. St. 1901, pp. 1666, 3715). In re Peonage Charge, 138 F. 686.

3. And a party charged and held under such law is not entitled to release on habeas corpus. Towsend v. State [Ga.] 52 S. E. 293. Act approved Aug. 15, 1903 (Acts 1903, p. 90), held not to contravene art. 1, § 1, p. 17, of the constitution of Georgia, or to violate the constitution of the United States. Id.

4. See 4 C. L. 1494.

5, 6, 7, 8, 9. Code § 1281, rules 9, 10, 13. Legitimized child held not entitled to inherit from the son of her father's illegitimate slave sister. Bettis v. Avery [N. C.] 52 S. E. 584.

10. Act March 10, 1866 (Laws 1866, p. 99, c. 40). Nelson v. Hunter [N. C.] 53 S. E. 439.

11. Nelson v. Hunter [N. C.] 53 S. E. 439. 439.

12. Evidence as to intention held properly excluded on question of inheritance of property. Nelson v. Hunter [N. C.] 53 S. E. 439.

13. Slaves had child before the war. Mother died. Father had child by another slave which child was subsequently legitimatized. Latter could not inherit. Johnson v. Shepherd [Ala.] 39 So. 223.

14. Under Act Feb. 14, 1866 (Meyer's Supp. p. 734), evidence was held sufficient that some time in the 50's the marriage was announced and that witness afterwards saw the parties act as husband and wife, although other members of the family did not regard plaintiff as kinsman. Hardin v. Hardin, 27 Ky. L. R. 899, 87 S. W. 284.

15. Hardin v. Hardin, 27 Ky. L. R. 899, 87 S. W. 284.

SODOMY.[16]

Inducing a seven year old boy to insert his privates in the mouth of the accused is the crime against nature and not the crime of taking improper liberties with the privates of a minor.[17] An information, not in the language of the statute, must charge facts which plainly and unequivocally show the nature of the crime committed,[18] and the evidence must show in proof of bestiality that there was a copulation with the beast.[19] An averment that defendant copulated with a "sow" sufficiently describes the character of the animal.[20]

Spanish Land Grants; Special Interrogatories to Jury; Special Jury; Special Verdict, see latest topical index.

SPECIFIC PERFORMANCE.

§ 1. *Nature and propriety of remedy in general.*[21]—The remedy of specific performance is strictly equitable. It is not a matter of right.[22] The granting or withholding of it is a matter of discretion to be exercised upon a consideration of the circumstances of each particular case,[23] but a chancellor has no arbitrary discretion to deny the relief,[24] and where all the elements which justify the relief are made to appear, it should be awarded as a matter of right.[25] The specific performance of an unconscionable contract,[26] or one procured by fraud,[27] deceit, or trickery,[28] unless ratified,[29] or one made by an incompetent party,[30] will not be decreed, but that the contract imposed a greater burden on the defendant than he anticipated

16. See 4 C. L. 1494.

17. Rev. St. 1898, §§ 4591, 4591a. Means v. State, 125 Wis. 650, 104 N. W. 815.

18. An information charging that defendant did "commit the crime against nature with and upon one Frank Derby by having carnal knowledge of the body of said Frank Derby" does not charge a crime in that it fails to allege that Frank Derby was a male. People v. Carroll [Cal. App.] 81 P. 680.

19. **Evidence held insufficient** to show copulation. Langford v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 11, 89 S. W. 830.

20. Langford v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 11, 89 S. W. 830.

21. See 4 C. L. 1495.

22. Thomas v. Gottlieb Bauern Schmidt Strans Brewing Co. [Md.] 62 A. 633. Dulaney v. Devries [Md.] 62 A. 743. Where the right to the remedy is doubtful, Rev. Prob. Code § 259, provides that the probate court shall dismiss the suit without prejudice to the right to proceed in the circuit court. Hartshorn v. Smith [S. D.] 104 N. W. 467.

23. Somerville v. Coppage [Md.] 61 A. 318; Sutton v. Miller, 219 Ill. 462, 76 N. E. 838; Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695. Silberschmidt v. Silberschmidt, 112 Ill. App. 58. The right of a purchaser of land to a specific performance against the vendor depends in each case on the facts peculiar to such case. Gibson v. Honnett, 72 Ark. 412, 82 S. W. 838.

24. He may exercise his discretion only where the facts are doubtful or the contract or its terms are so uncertain that injustice may arise. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482.

25. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

26. Jennings v. Bethel, 6 Ohio C. C. (N. S.) 245.

27. A fraudulent contract for the sale of land will not be enforced. Wolford v. Steele, 27 Ky. L. R. 1177, 87 S. W. 1071.

28. Representation not in itself fraudulent but dependent for its accomplishment on bad faith. Miller v. Fulmer, 25 Pa. Super. Ct. 106.

29. A contract ratified after discovery of fraud inducing it may be specifically enforced. Urbansky v. Shirmer, 97 N. Y. S. 577.

30. The grace of the court which prompts enforcement of specific performance of a contract should not be extended, when in addition to inadequacy of consideration there appears to have been a delusion on the part of the seller with reference to property values, and the circumstances compel the belief that at the time of the transaction he was not of sound mind. Stroppel v. Plageman, 3 Ohio N. P. (N. S.) 501.

does not preclude the relief.[31] Specific performance will not be decreed of a contract which on account of mistake does not accurately express the terms agreed upon,[32] or one which a party did not intend to make and would not have entered into had he understood its true effect.[33] A contract which is fair and just and certain in its terms, and for the nonperformance of which it would be impossible to estimate money damages, may be specifically enforced,[34] and the fact that a contract stipulates liquidated damages in case of failure to perform does not preclude the remedy if such provision is intended merely to secure performance.[35] The relief may be granted to avoid multiplicity of suits which would be vexatious, expensive, and would not furnish adequate relief.[36] The remedy will be denied if it would work great injury to one party and do the other comparatively little good,[37] and will not be decreed where the complainant has parted with nothing and no irreparable damage is suffered and no fraud is inflicted upon him, and he is in statu quo at the commencement of the suit,[38] or where the party against whom it is sought is incapable of performing,[39] or where it is impossible to comply with the

31. Where one conveyed his interest in land which had been sold under execution under an agreement that the purchaser should redeem, pay the seller an annuity, and reconvey a part when the income paid incumbrances, the purchaser was not relieved of his obligation to reconvey such part because he was compelled to purchase an outstanding title of which he had no notice. Clutter v. Strange [Wash.] 82 P. 1028.

32. Contract to convey land. Somerville v. Coppage [Md.] 61 A. 318. It may be shown by parol that through a mistake of either or both of the parties that a writing does not express the real agreement or that the agreement was entered into through mistake as to its subject-matter or terms. Somerville v. Coppage [Md.] 61 A. 318. Not a contract entered into through misrepresentation of one party or misapprehension of the other. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. That one through an honest mistake not attributable to his own negligence thought he was buying more land than his agreement covers, is a defense. Cawley v. Jean [Mass.] 75 N. E. 614. A contract for the sale of land entered into under a mutual misapprehension as to the title will not be. Hay v. Kirk, 116 Ill. App. 45. Evidence sufficient to show that there was **no mistake** in the execution of a contract. Clutten v. Strange [Wash.] 82 P. 1028. Evidence insufficient to show that a stipulation in a lease giving the lessee an option to purchase was inserted through mistake. Thomas v. Gottlieb Bauern Schmidt Straus Brewing Co. [Md.] 62 A. 633. A reviewing court will not disturb a finding involving specific performance unless it is made to appear that the finding was based upon an error or misapprehension. Stroppel v. Plageman, 3 Ohio N. P. (N. S.) 501.

33. Somerville v. Coppage [Md.] 61 A. 318. Thomas v. Gottlieb Bauern-Schmidt Straus Brewing Co. [Md.] 62 A. 633.

34. Contracts held enforceable: Agreement in a deed of a right of way to repair and renew a retaining wall, along the line of the grantor's lot. Flege v. Covington & Elevated Ry. & Transfer & Bridge Co. [Ky.] 91 S. W. 738. An **executory contract for the conveyance of land.** Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692. Where a contract is definite and complete and the vendee could have compelled performance, the vendor may compel the acceptance of his deed and payment of the purchase price. Migatz v. Stieglitz [Ind.] 77 N. E. 400.

A contract by a city for the purchase of land properly executed pursuant to a resolution of the council is specifically enforceable against the city. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692. A contract by which one agreed, in consideration of a commission and the extinguishment of a liability, to purchase for another certain land and take title for him, is enforceable at the election of the beneficiary though the purchase was at an excessive price. Kelly v. Keith [Ark.] 90 S. W. 150. One who purchases an interest in the profits of a real estate transaction and receives as the only evidence of his interest a receipt, may compel a formal assignment of his share though there can be no severance until twenty-five years later when the contract is closed. Dilworth v. Nicola [Pa.] 62 A. 909. Complaint for performance of a contract to sell land setting up a wholly complete contract duly executed by the plaintiff's agents is good. Campbell v. Lombardo [Ala.] 39 So. 573. A contract for the sale of land selected in lieu of land within a forest reservation is capable of specific enforcement, the selection having an inchoate, equitable right which would ripen into good title on the approval of the commissioner of the land office. Farnum v. Clarke [Cal.] 84 P. 166.

35. Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049.

36. Contract by a lessee railroad company to run its trains over the roads of the lessor for a term of nine hundred and ninty-nine years and pay rental on a wheelage basis, held enforceable in equity. Grand Trunk W. R. Co. v. Chicago & E. I. R. Co. [C. C. A.] 141 F. 785.

37. Where to compel a telephone company to comply with the terms of an ordinance requiring it to furnish service at specified rates would force it into bankruptcy. Maryland Tel. & Tel. Co. v. Charles Simons' Sons Co. [Md.] 63 A. 314.

38. Howes v. Barmon [Idaho] 81 P. 48.

39. An agreement by the owner of a city block to replat it so as to leave more room

controlling inducement of the contract though such fact was not referred to in the contract,[40] but the mere fact that the contract is improvident is not ground for denying the relief.[41] The basis of equitable interference is the lack of a complete and adequate remedy at law,[42] and if the remedy at law is adequate,[43] or if the legal remedy of damages is all that can be decreed,[44] it will not lie, but that a purchaser may have an action at law for the purchase money does not preclude the remedy.[45] Specific performance may be enforced by injunction,[46] though it does not appear that complainant will suffer damage by reason of the breach.[47] A bill for an injunction, the purpose of which is to enforce performance of a contract, is governed by the rules applicable to a bill for specific performance.[48] If time is of the essence of the contract,[49] or if the parties have expressly so treated it, it will not be specifically enforced regardless of the time limit,[50] but where time is not of the essence it may be enforced after the time prescribed if failure to do so within such period is the fault of the defendant.[51] Where a party elects to pursue his remedy at law for damages he cannot thereafter sue for specific performance,[52] but that complainant brings an action for damages which he had no right to bring

for a street cannot be enforced after he has parted with his title to a part of the land. Boone v. Graham, 215 Ill. 511, 74 N. E. 559.

40. Where immediate possession was the controlling inducement and it was subsequently found that possession could not be had for a year. Somerville v. Coppage [Md.] 61 A. 318.

41. Specific performance of a contract to convey a mine cannot be defeated on the ground that the purchaser made but slight improvements, where he did considerable work and discovered valuable veins of ore in a short time, because the seller had spent a fortune without developing ore in paying quantities. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

42. Contention that plaintiff had an adequate remedy at law held without foundation. Western Union Tel. Co. v. Pittsburg, etc., R. Co., 137 F. 435. Complaint in a suit for the enforcement of a contract for the sale of corporate stock which would give complainant control of the corporation held to show that there was no adequate remedy at law. Sherwood v. Wallin [Cal. App.] 82 P. 566. A finding that defendant had not surrendered certain shares of corporate stock evidenced by a certain certificate is sustained where it appears that defendant has the same stock evidenced by a different certificate. Sherwood v. Wallin [Cal. App.] 82 P. 566.

43. Where the sole purpose of the bill is to have the contract performed and the defendant is solvent. Hazelton v. Miller, 25 App. D. C. 337. Where the breach can be compensated by damages and the amount of such damages is readily ascertainable. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex.] 90 S. W. 863. An agreement not to assert a money demand and not to plead limitations as to another in consideration of a devise of property is not specifically enforceable. Flood v. Templeton [Cal.] 83 P. 148.

44. Where a purchaser of land, knowing that the vendor has no title and can not convey one, brings an action for specific performance and prays that in case specific performance cannot be had that he have damages, a judgment dismissing the action is proper, since the want of an adequate remedy at law is the basis of the equity jurisdiction for specific performance. Peters v. Van Horn, 37 Wash. 550, 79 P. 1110.

45. Migatz v. Stieglitz [Ind.] 77 N. E. 400.

46. By enjoining the removal by a railroad of its offices and shops from a place where it has contracted to maintain them. City of Tyler v. St. Louis Southwestern R. Co. [Tex.] 91 S. W. 1. The violation of a contract not to engage in a certain business, deliberately entered into, will be enjoined. Camors-McConnell Co. v. McConnell, 140 F. 412.

47. Contract not to engage in a particular business for a limited time. Andrews v. Kingsbury, 112 Ill. App. 518.

48. Bill to enforce a telephone company, by restraining it from charging higher rates, to comply with an ordinance specifying rates to be charged and to enjoin it from refusing service so long as the ordinance rate was paid or tendered. Maryland Tel. & Tel. Co. v. Charles Simons' Sons Co. [Md.] 63 A. 314.

49. Where an option contract for one year specified that the vendor might incumber the property, the vendee was bound to take subject to the incumbrance within the time specified. Bennett v. Giles [Ill.] 77 N. E. 214.

50. Vendor who was not able to perform within the time limit held not entitled to specific performance. North Ave. Land Co. v. Baltimore [Md.] 63 A. 115.

51. Vendor failed to perfect his title within the time prescribed for paying the balance of the purchase money. Hobart v. Frederiksen [S. D.] 105 N. W. 168.

52. When a vendee objected to the abstracts and after several attempts by the vendor to cure defects stated that he would not accept a conveyance and requested payment of liquidated damages, stipulated for credit to be given the vendor for rent while possession was had. Sutton v. Miller, 219 Ill. 462, 76 N. E. 838. An action for damages and a bill for performance cannot be maintained at the same time or successively. Pyle v. Crebs, 112 Ill. App. 480.

is not an election of remedies barring a suit for specific performance.[53] The right to the remedy may be waived [54] or lost by laches.[55] Long delay is only excused by clear proof that the contract existed and where other rights have not intervened.[56] A contract under seal is enforceable only against the parties to it.[57] A grantee of the premises who takes subsequent to and with notice of a contract to convey to another may be compelled to perform by executing a deed to the person entitled,[58] and he may be required to perform the conditions of a contract relative to the premises of which he had notice.[59] This rule applies to one who takes by operation of law.[60] Specific performance of a contract relating to land cannot be had against a subsequent bona fide grantee not a party to the contract.[61] In New York it will not be decreed against the assignee of a vendee.[62]

§ 2. *Subject-matter of enforceable contract.*[63]—A contract relative to personal property having no quoted or ascertainable value and of peculiar value to the person entitled to it will be specifically enforced,[64] but not if the breach can be fully compensated in damages.[65] A contract for a continuing personal service

53. Wilson v. Knapp [Mich.] 12 Det. Leg. N. 917, 106 N. W. 695.

54. Where after the making of a contract for the conveyance of land it develops that the vendor's title is defective and the purchaser with full knowledge of all the facts unconditionally refuses to take the only title the seller can convey, he is precluded from thereafter seeking the remedy. Riley v. Allen [Kan.] 81 P. 186. That defendant assents to a trial by a referee is not a waiver of his right to raise the question that there exists an adequate remedy at law. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113.

55. In the absence of other circumstances a suit is not barred by laches if brought within the period of limitation. Cantwell v. Crawley [Mo.] 86 S. W. 251. Evidence insufficient to show as a matter of law that complainant had forfeited his right to the remedy by delay and conduct. Brownson v. Perry [Kan.] 87 P. 197. Where one did not seek enforcement of a contract by which a railroad company agreed to build a depot on his land for sixteen years, during the greater part of which period a depot had been maintained a short distance away and had become an important shipping point, relief was denied. Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697.

56. A contract by which a mother agreed to convey land to her son but which he did not attempt to enforce will be enforced at the suit of his widow only on clear proof that he was entitled to a conveyance and that his possession of the land excused his laches and was such as to constitute notice to third persons. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 170.

57. Not as against the real party who had procured another to take the legal title for him. Van Allen v. Peabody, 97 N. Y. S. 1119.

58. A complaint is not objectionable as failing to state a cause of action because showing that the land had been conveyed to another where it appears that such grantee took with notice and is made a party to the suit. Meaney v. Way, 108 App. Div. 290, 95 N. Y. S. 745.

59. An agreement whereby a railway company acquired a right of way over lands on the condition that certain crossings should be maintained, which has been recognized and complied with for fifty years, will be enforced as against a purchaser at foreclosure sale of the road. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. A provision in a deed for a passageway between premises conveyed and reserved, one-half on the land of each, is enforceable against a grantee with notice of the servient tenament by the owner of the dominant tenament. Bailey v. Agawam Nat. Bank [Mass.] 76 N. E. 449.

60. One who takes by operation of law real property subject to an executed oral contract for a sale of all the sand thereon may be compelled to convey the right held under such contract. Brandon v. West [Nev.] 83 P. 327.

61. An agreement by the owner of a block on selling lots to replat the block so as to leave more ground for a street will not be enforced against a grantee of an intervening lot. Boone v. Graham, 215 Ill. 511, 74 N. E. 559.

62. The court says that the principle of the decision is that the acceptance of the assignment does not place him in privity of contract as to the assignor's promise to perform. Forbes v. Reynard, 46 Misc. 154, 93 N. Y. S. 1097.

63. See 4 C. L. 1497.

64. Where an owner of corporate stock sells it with an option to repurchase. Eichbaum v. Sample [Pa.] 62 A. 837.

65. Specific delivery of chattels will not be decreed unless it appears that they are of peculiar value and character, the loss of which cannot be compensated in damages. Graham v. Herlong [Fla.] 39 So. 111. A contract to sell corporate stock which complainant has no special interest in acquiring will not be specifically enforced simply because such stock is not listed on the market so that its value may not be readily established. Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. S. 766. A contract relative to corporate stock will not be specifically enforced merely because it is not listed or offered for sale so that the market value may be readily established if the value can be otherwise ascertained. Ehrich v. Grant, 97 N. Y. S. 600. The mere fact that corporate stock which is the subject of the contract has no market value is not sufficient to give equity jurisdiction. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113.

cannot be enforced.[66] A contract to pledge [67] or mortgage property to secure a debt [68] may be enforced, though the Alabama court says that to warrant such relief it must appear that the debtor is insolvent or that there are other circumstances of equitable cognizance.[69] An agreement to make a testamentary disposition of property [70] in consideration of services may be enforced [71] providing the services are fully performed and cannot be compensated in money.[72]

§ 3. *Requisites of contract. A. Necessity of contract.*[73]—To entitle one to specific performance a completed contract must exist,[74] hence an unaccepted offer cannot be enforced,[75] nor can a contract made by an agent without authority,[76] nor one not based on a consideration.[77] Where a contract contemplated ratification by the court and was set aside by it, the vendor cannot subsequently compel specific performance on the ground that ratification was unnecessary.[78]

(§ 3) *B. Mutuality of contract.*[79]—A contract in order to be capable of specific enforcement must be mutually binding on the parties,[80] and the burden is on one seeking specific performance to show such fact.[81] A contract for the sale

66. No mutuality of remedy. Taussig v. Corbin [C. C. A.] 142 F. 660.

67. An agreement by one to pledge his estate to a trustee to secure certain creditors will be. Morris v. McCutcheon [Pa.] 62 A. 982.

68. Where one pays the debt of another on faith of his promise to execute a mortgage to secure the amount so paid, equity will enforce performance of the promise. Lowe v. Walker [Ark.] 91 S. W. 22.

69. A contract to give a mortgage on real estate will not be specifically enforced unless it appear that the debtor is insolvent or that there are other circumstances of equitable cognizance or that the remedy at law is inadequate. Brown v. E. Van Winkle Gin & Machine Works [Ala.] 39 So. 243.

70. An agreement to dispose by will of a definite part or the whole of the promisor's estate in a particular manner may be. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249.

71. A contract by which a decedent agreed to purchase a house and lot to belong to another at his death if he would live there and make a home for decedent during his life will be enforced after his death where there has been a compliance with its terms. Ayers v. Short [Mich.] 12 Det. Leg. N. 783, 105 N. W. 1115.

72. An agreement to make a testamentary disposition of property in consideration for services will not be enforced until the services are fully performed, and not then if they can be compensated in money. Hayden v. Collins [Cal. App.] 81 P. 1120.

73. See 4 C. L. 1500.

74. See Contracts, 5 C. L. 664. Where one's relation to a contract is in his capacity as agent, no contractual relation exists after the termination of his agency. Taussig v. Corbin [C. C. A.] 142 F. 660. An offer by the holder of an option to purchase on terms different from those stated in the option will not be enforced though he has paid a portion of the price and subsequently offers to meet the terms of the option. Henry v. Black [Pa.] 63 A. 250.

75. Evidence insufficient to show that a contract for an option had been entered into. Couch v. McCoy, 138 F. 696.

76. A contract for the sale of real estate made by an agent without authority will not be. Trau v. Sloan [Pa.] 62 A. 984. Where the contract was made by an agent, his authority must clearly appear. Fay v. Sullins [Okl.] 81 P. 426.

77. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249. A contract to give attorneys one-half of certain land to conduct litigation for its recovery and a subsequent contract to give them the other half in case it was recovered. Lipscomb v. Adams [Mo.] 91 S. W. 1046. Contract for the sale of real estate showing that $500 had been paid, held to be based on a good and sufficient consideration. Winch v. Edmunds [Colo.] 83 P. 632.

78. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115.

79. See 4 C. L. 1501.

80. A naked promise from which the promisor received no benefit will not be enforced though he encouraged the promisee to make expenditures for his own benefit. Swan Oil Co. v. Linder, 123 Ga. 550, 51 S. E. 622. A written statement that an unaccepted agreement to convey land by the signer and two other persons did not mean what it stated will not be specifically enforced. Marvel v. Fralinger [N. J. Err. & App.] 63 A. 166. Not by a purchaser whose identity was concealed when the contract was not binding between the nominal parties and was rescinded by the vendor before he was appraised of the purchaser's claims. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. A written instrument certifying that the owner of land has agreed to sell it to a certain person for a certain price and containing a statement that "it is further noted" that such person is to pay the price, the time of conveyance and payment being fixed, is a mutually binding contract (Brownson v. Perry [Kan.] 81 P. 197), and where the person named as purchaser accepts and acts upon it, his omission to sign it is immaterial. The acceptance constitutes an execution (Brownson v. Perry [Kan.] 81 P. 197). Contract for the sale of real estate upon which $500 had been paid, balance payable in thirty days at delivery of deed or execution of a mortgage to secure it, or on failure to do so the $500 to be forfeited as liquidated damages, is not a unilateral contract. Winch v. Edmonds [Colo.] 83 P. 632.

81. One who seeks to compel legatees to release the charge of their legacy on certain property alleging that it belonged to him un-

of land is mutual though verbally accepted by the vendee.[82] On acceptance of an option within the time specified the contract becomes mutual.[83] A vendor may enforce a contract, though he did not have title at the time it was made, where such fact is known to both parties and he acquires title before the time for performance arrives.[84] A complainant by tendering performance and commencing suit for specific performance estops himself from claiming that he is not bound,[85] but the institution of a suit for specific performance does not ratify and make binding on the vendor a contract entered into by an agent of the vendee who had no authority to act in the premises.[86] A contract to sell by one who holds the legal title in trust for another is not mutual,[87] but becomes mutual if the contract is signed by the equitable owner.[88] An option to a lessee to purchase is enforceable by him after he accepts,[89] and when he takes possession under the lease he may enforce it though not signed by him.[90]

(§ 3) *C. Definiteness of contract.*[91]—A contract to be capable of specific enforcement must be definite and certain in its terms,[92] as to its subject-matter[93]

der a parol contract. Haberman v. Kaufer [N. J. Eq.] 61 A. 976.

82. Ullsperger v. Meyer, 127 Ill. 262, 75 N. E. 482.

83. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695. Where a party seeking enforcement of an option contract has performed all terms required to be performed by him, specific performance cannot be refused on the ground of want of mutuality. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

84. Day v. Mountin [C. C. A.] 137 F. 756.

NOTE. Upon the question of mutuality of remedy at the time a contract is executed there is some apparent conflict of authority. In some of the text books statements may be found to the effect that, unless there is mutuality of remedy at the time the contract is made, specific performance will not be decreed. Fry on Specific Performance of Contracts, 214; Bisp. Eq. 437; Eaton, Eq. 548. And it has been so held in several cases. Boucher v. Vanbuskirk, 2 A. K. Marsh [Ky.] Hutchinson v. McNutt, 1 Ohio, 14; State v. Baum, 6 Ohio, 383; Cabeen v. Gordon, 1 Hill, Eq. [S. C.] 51; Norris v. Fox, 46 F. 406; Farrer v. Nash, 35 Beav. [N. C.] 167; Bronson v. Cahill, Fed. Cas. No. 1,926.

The reason given for the rule in most of these cases is that such a transaction will not be sanctioned by a court of equity because it is a mere speculation, and one who speculates upon that for which he has no contract, or the means of acquiring it, is not a bona fide contractor. In Eaton's Eq. 58, it is said: "But if the vendor had no title at the time the contract was executed, equity will not interfere to compel specific performance of the contract, even if the vendor subsequently acquires a title. Such a transaction is speculative, and the vendor is not a bona fide contractor." Other courts have seemingly adopted the rule that a contract for the sale of real estate which the vendor does not own is enforceable by specific performance whenever, at the time the contract is to be performed, there is a mutuality of remedy. Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123; Burks v. Davies, 85 Cal. 114, 24 P. 613, 20 Am. St. Rep. 213; 1 Chit. Cont. (11th Am. Ed.) 431; Dresel v. Jordan, 104 Mass. 407; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739; Smith v. Cansler, 83 Ky. 371; Hepburn v. Auld, 9 U. S. 262, 3 Law. Ed. 96. An examination of the cases last cited will show that in many if not all of them the vendor's title was defective only and that he had some interest in the lands sought to be conveyed, though he had not good title at the time the contract was executed.—See Day v. Mountin [C. C. A.] 137 F. 756.

85. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695.

86. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322.

87, 88. Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145.

89. After a lessee notifies his lessor of his intention to avail himself of an option in the lease to purchase, the stipulation granting the option becomes binding on both. Thomas v. Gottleib Bauern-Schmidt Straus Brewing Co. [Md.] 62 A. 633.

90. After a lessee goes in possession under a lease giving him an option to purchase, he may enforce the option though he did not sign the lease. White v. Weaver [N. J. Err. & App.] 61 A. 25.

91. See 4 C. L. 1502.

92. Dulaney v. Devries [Md.] 62 A. 743. Contract to dispose by will of the promisor's estate. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249. A provision in a lease that if the party of the first part should conclude to sell the second party should have the first chance to buy is too indefinite, no price or method of ascertaining it being fixed. Folsom v. Harr, 218 Ill. 369, 75 N. E. 987. Specific performance of a contract whereby one advanced money to the trustees of a lunatic to be repaid out of the proceeds of a sale of his lands can be had only on a clear showing that the contract was made; that the contract would have been authorized by the court, and that money was advanced under it. Dulaney v. Devries [Md.] 62 A. 743. Contract held too indefinite and uncertain in the amount to be paid to warrant a decree for performance. Reymond v. Laboudigue [Cal.] 84 P. 189. Contract to form a corporation cannot be enforced where the parties are hostile and the by-laws agreed upon at the time the contract was made do not clearly show the details and terms of the proposed

and time of performance,[94] but it is not essential that the time for its completion be specified,[95] nor that terms as to details be incorporated.[96] An immaterial difference between the quantity of land mentioned in the contract and that contained in the tract will not defeat the action when the contract was for a sale of the land in gross.[97] In contracts for the sale of land the description is sufficiently definite if the premises can be identified by the aid of parol evidence.[98]

(§ 3) *D. Legality and fairness of contract.*[99]—In order to preclude the enforcement of a contract, on the ground that it is in restraint of trade, it must appear to be directly and not merely collaterally connected with such unlawful purpose.[1] A contract in excess of legal right will be enforced where public interests are involved as long as such interests demand it.[2] The contract must be fair, equal, and just in its terms,[3] founded upon an adequate consideration, and free from suspicion as to its bona fides[4] and made by persons of sufficient understanding,[5] and for an act not inhibited by law.[6] Under the rule that it is not available

incorporation. Rudiger v. Coleman, 98 N. Y. S. 461. It must be shown by satisfactory proof to be clear, certain, and unambiguous in its terms. Sprague v. Jessup [Or.] 84 P. 802.

93. Where land was not described by section township or range, nor streets by which it was bound, nor could it be located from evidence given by witnesses. Kirkpatrick v. Pettis, 127 Iowa, 611, 103 N. W. 956. Where it is doubtful whether a contract contemplated a sale of a fee or an easement, the conveyance of a fee will not be decreed. Brandon v. West [Nev.] 83 P. 327.

94. Contract not void for indefiniteness as to time of performance. Veum v. Sheeran [Minn.] 104 N. W. 135. A memorandum of a contract for the sale of land which contemplates a partial cash payment, balance on credit but containing no stipulations as to terms of credit or time of making deferred payments, is too indefinite. Buck v. Pond [Wis.] 105 N. W. 909.

95. Where not specified it is not of the essence of the contract and a reasonable time will be presumed. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482.

96. Where all the terms the parties saw fit to incorporate into an agreement are made out by clear and unambiguous proof, specific performance may be decreed though other terms might properly have been incorporated in it. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

97. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 632.

98. Description sufficient: Sprague v. Jessup [Or.] 84 P. 802. A description of the land is not too indefinite if it can be made certain by the introduction of parol evidence which does not vary the terms of the contract. Farmer v. Sellers [Ala.] 39 So. 772. If the description is sufficiently definite that the court may by extrinsic evidence determine with certainty what property was intended to be conveyed, the contract may be enforced. Warner v. Marshall [Ind.] 75 N. E. 582. Contract and deed construed in the light of surrounding circumstances held sufficiently clear, definite, and certain to be specifically enforced. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. Description "a certain fruit farm known as the 'I Fruit Farm' and containing about 199 1-2 acres situated about one and a quarter miles northwest of" a certain town is prima facie a sufficient description. Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049. If the land may be determined from the contract the description is sufficient. McFarland v. Stansifer [Ind. App.] 76 N. E. 124. A contract for the sale of land situated on a certain street is presumed to be in the city where the contract is made. Levin v. Dietz, 48 Misc. 593, 96 N. Y. S. 468. Parol evidence is admissible to show the location of each parcel where a contract is for the sale of a tract of land owned by different persons. Morrison v. Hazzard [Tex.] 92 S. W. 33.

Description insufficient: Will not be decreed of a written option to purchase land where the land is so vaguely described that the writing furnishes no key to its identification. Tippins v. Phillips, 123 Ga. 415, 51 S. E. 410.

99. See 4 C. L. 1502.

1. Camors-McConnell Co. v. McConnell, 140 F. 412.

2. Contract by a corporation in violation of its franchise. Seattle Elec. Co. v. Snoqualmie Falls Power Co. [Wash.] 82 P. 713.

Note: Equity will not decree the specific performance of a contract which will compel the doing of or which will assist or give effect to an illegal act (Hanson v. Powers, 8 Dana [Ky.] 91, Pratt v. Adams, 7 Paige [N. Y.] 615, 653), and a contract but partly legal, if inseparable, is on the same footing (Ewing v. Obaldiston 2 Myl. & Cr. 53). But equity will enforce the legal portion of an illegal contract if the contract is severable. Knowles v. Haughton, 8 Ves. 168. In the principal case the illegal stipulation not to serve others would be separable from the agreement to serve the plaintiff (Stewart v. Railway, 39 N. J. Law, 505; Trent on Potteries Co. v. Oliphant, 58 N. J. Eq. 507), and the proper result was reached, particularly as the defendant was a public service corporation but the reasoning of the court seems unsound.—See 6 Col. L. R. 363.

3. Silberschmidt v. Silberschmidt, 112 Ill. App. 58.

4. Thomas v. Gottlieb Bauern-Schmidt Straus Brewing Co. [Md.] 62 A. 633. In the absence of a showing that the consideration agreed upon is inequitable, it is presumed reasonable. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482.

5. A contract by one mentally incapable of contracting with discretion will not be enforced where the vendee took advantage of

against one who has not received an adequate consideration, or as to whom the contract is not just, the complainant must show that such conditions did not exist.[7]

(§ 3) *E. Necessity of written contract.*[8]—A contract within the statute of frauds must be in writing,[9] or evidenced by a memorandum sufficient to satisfy the statute,[10] and that a vendee in a parol contract believed the land to be hers and acted upon such belief until a claim for services rendered in consideration was barred does not entitle her to specific performance.[11] Specific performance of an oral contract to convey[12] or make a gift of land[13] may be decreed if there has been sufficient part performance to withdraw the case from the statute of frauds. Part performance relied upon must be founded on and referable solely to the spe-

his condition, especially where payments made under the contract had been returned. Miller v. Tjexhus [S. D.] 104 N. W. 519.

6. Objection that under Civ. Code § 3390, subds. 4, 5, providing that a contract to do an act which the party has no power to lawfully do and an agreement to procure the act or consent of a third person cannot be specifically enforced, held without merit in a proceeding to enforce a contract to locate public lands and procure title for plaintiff. Farnum v. Clarke [Cal.] 84 P. 166.

7. Contract to devise land in consideration of a forbearance to assert a money demand or plead limitations cannot be enforced in the absence of a showing of what the land was worth or that the promisor gained any advantage. Flood v. Templeton [Cal.] 83 P. 148.

8. See 4 C. L. 1503.

9. Must not be within the inhibition of the statute of frauds. Ruff Brewing Co. v. Schanz, 114 Ill. App. 508. Under the rule that a written contract can be altered only by a writing or executed oral contract,—specific performance of a written contract as modified by a subsequent parol agreement, where such subsequent agreement changes the terms of the written contract, cannot be decreed where there has been no part performance. Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088.

10. A memorandum "Received rom A. $100 on said purchase of the property, No. 1031 Milwaukee Ave., at the price of $14,000" may be specifically enforced. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482. Letters and memorandum taken together held to satisfy the statute of frauds. Levin v. Dietz, 48 Misc. 593, 96 N. Y. S. 468.

11. Terry v. Craft [Tex. Civ. App.] 13 Tex. Ct. Rep. 396, 87 S. W. 844.

12. **Sufficient performance** is shown where the vendee goes into possession, makes valuable improvements, and manages the land as if it were his own. White v. Poole [N. H.] 62 A. 494. A parol contract whereby a testator purchased certain land valuable as a stone quarry on specified terms, paid part of the purchase price, and quarried stone the value of which cannot be ascertained, will be. In re Fay's Estate [Pa.] 62 A. 991. Where a portion of the purchase price is paid and the purchaser takes possession. McFarland v. Stansifer [Ind. App.] 76 N. E. 124. Possession by the vendee with consent of the vendor is sufficient part performance without improvements or payment of the purchase price. Jomsland v. Wallace [Wash.] 81 P. 1094. Possession under the contract, partial payment, improvement of the land, and preparing it for cultivation. Cross v. Johnston [Ark.] 88 S. W. 945. Where complainant has been in possession, made valuable improvements, and paid a portion of the purchase price, and the parties cannot be placed in statu quo. Wilson v. Knapp [Mich.] 12 Det. Leg. N. 917, 106 N. W. 695. Possession of the premises together with payment of a portion of the purchase price and tender of the balance. Sprague v. Jessup [Or.] 83 P. 145. Defendant's ancestor having taken possession of land under a contract binding plaintiff to convey the same, and having made improvements and continued in possession for many years with plaintiff's acquiescense, held that it would be inequitable to refuse specific performance of the contract at the instance of defendants. Neece v. Neece [Va.] 51 S. E. 739. If sufficient part performance of a verbal contract for the sale of land is clearly shown it may be enforced. Jomsland v. Wallace [Wash.] 81 P. 1094. Evidence sufficient to show part performance sufficient to take a parol contract for the sale of land out of the statute of frauds. Veum v. Sheeran [Minn.] 104 N. W. 135.

Contract to devise land in consideration of support is shown where the plaintiff has been in possession under the contract and has fulfilled her part of the agreement. Cherry v. Whalen, 25 App. D. C. 537. An oral contract by a father to convey land to his son in consideration of support is not enforceable unless the son has taken possession under the contract. Reel v. Reel [W. Va.] 52 S. E. 1023. A parol contract to leave property to another in consideration of support which has been fully performed by the party agreeing to furnish the support may be enforced. Russell v. Sharp [Mo.] 91 S. W. 134.

Insufficient performance: Mere possession without making improvements does not entitle a donee, by parol, of land to specific performance. West v. Webster [Tex. Civ. App.] 13 Tex. Ct. Rep. 6, 87 S. W. 196. Where pursuant to a parol promise to convey land in consideration of services to be rendered the promisee performs the services and enters into possession of the land, there is no such part performance as will entitle the promisee to specific performance. Terry v. Craft [Tex. Civ. App.] 13 Tex. Ct. Rep. 396, 87 S. W. 844. There must be clear proof of a fair contract in order to enforce a parol contract to convey land. Thompson v. Jones [Ala.] 39 So. 983. Part performance not shown. Pence v. Life [Va.] 52 S. E. 257.

13. A parol gift of land when followed by possession and the making of improvements may be enforced. Karren v. Rainey [Utah] 83 P. 333.

cific terms of the agreement.[14] Where possession is relied upon as part performance, it must be notorious, exclusive, continuous, and in pursuance of the contract.[15]

§ 4. *Performance by complainant.*[16]—One seeking specific performance must show that he has performed or is able and willing to perform all the terms of the contract incumbent on him to perform,[17] and that he has done so within the time prescribed.[18] He must be able to convey the title called for by the contract,[19] and if for sale of a thing it must be merchantable[20] and free from incumbrances if so specified,[21] but where the vendor cannot convey free from incumbrances according to the terms of the contract, the purchaser may have specific performance with a deduction from the purchase price.[22] Mere captious objections to the title will not defeat the suit.[23] In an option contract time is necessarily of the essence of the agreement and a tender of performance must be made within the time specified.[24] Tender of the purchase price is not a condition precedent if the vendor has given

14. Howes v. Barmon [Idaho] 81 P. 48. In order for possession to constitute part performance, it must be shown to have been taken under the contract. Lay v. Lay [Ark.] 87 S. W. 1026.

15. Baldwin v. Baldwin [Kan.] 84 P. 568.

16. See 4 C. L. 1504.

17. A contract for the conveyance of several tracts, all of said tracts to be in one body, will not be enforced at the suit of the vendor who is unable to convey the whole. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115. Where an owner of one of several tracts which a city had an option to purchase knew that it was not the intention of the city to purchase unless the entire tract could be secured, he is not entitled to specific performance as to his tract. Vickers v. Baltimore [Md.] 63 A. 120. The assignee of a contract for electrical power who has failed to procure the equipment required by the terms of the contract cannot enforce it, though the contract required the electric company to keep available for use a specified amount of energy and a covenant to pay for the amount kept available. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421. Specific performance of a contract to execute a mortgage to secure the cost of erecting a building will not be decreed where it appears that the building did not conform to the contract but that substantial and structural defects pervaded the work. Flanders v. Rosoff, 97 N. Y. S. 514. Contract by which plaintiff employed defendant to locate government land for him held sufficiently performed by plaintiff to entitle him to maintain the proceeding. Farnum v. Clarke [Cal.] 84 P. 166. One who seeks specific performance on allegations of full performance on his part has the burden of showing that he has fully performed. Flanders v. Rosoff, 97 N. Y. S. 514.

18. Time is not of the essence of a contract for the sale of land under which a considerable portion of the price has been paid and improvements made, and delay can be compensated by payment of interest. McWhorter v. Stein [Ala.] 39 So. 617.

19. A contract for the conveyance of a fee will not be enforced at the suit of the vendor where the only title he has is a government entry without final proofs. Day v. Mountin [C. C. A.] 137 F. 756. Evidence insufficient to show title in the plaintiff. Cawley v. Jean [Mass.] 75 N. E. 614. A vendor cannot compel the vendee to accept a tax title where the statutory requirements as to the sale have not been complied with. Hewitt v. Parsley [Md.] 60 A. 619.

20. Will not be decreed against a vendee where the title is not free from reasonable doubt and all the parties who have a right to be heard on the question are not before the court. Where executors contract to sell and it is doubtful whetner they have power to sell, and the remaindermen who could question the sale are not parties. Salisbury v. Ryaon, 105 App. Div. 445, 94 N. Y. S. 352. A defect in title arising from a question of law involved in the construction of a wil is sufficiently cured by a decision in favor of the validity of such title. Davidson v. Jones, 98 N. Y. S. 265. Where a city was the only person having a legal right to question the title, and action by it was improbable, the title was held marketable. Empire-Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

21. A provision in the deed to the vendor reserving in favor of an adjoining lot the right to keep windows open precludes him from enforcing a contract to sell free from all incumbrances, though a house had been built on the adjoining lot without any windows facing the lot in controversy. Remsen v. Wingert 98 N. Y. S. 388. A purchaser cannot be compelled to perform where the premises are burdened with a restrictive covenant of which he had no notice. Scudder v. Watt, 98 App. Div. 228, 90 N. Y. S. 605. Evidence sufficient to show that a deed of the premises executed by defendant to another before the contract was made was void. Reynolds v. Condon, 110 App. Div. 542, 97 N. Y. S. 1. One who purchases free from incumbrances cannot be compelled to accept a title burdened with an easement. Howell v. Northampton R. Co., 211 Pa. 284, 60 A. 793.

22. Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145.

23. Jordan v. Jackson [Neb.] 106 N. W. 999. A vendor who has title by adverse possession may enforce a contract for a sale of the land. Watkins v. Pfeiffer [Ky.] 92 S. W. 562.

24. Evidence sufficient to show a tender within the statute where defendant was absent. Herman v. Winter [S. D.] 105 N. W. 457.

notice that he will not accept it.[25] A vendor may compel performance where he perfects title pending suit.[26] A vendee once released because of the vendor's inability to perform within the time limit cannot be compelled to perform when the vendor subsequently becomes able to.[27]

§ 5. *Actions. Jurisdiction.*[28]—An action to compel performance of a contract to convey land is one in personam and may be tried wherever jurisdiction of the person of the defendant can be acquired.[29] Where necessary parties are subject to the jurisdiction of the Federal court in an action to compel performance of right of way contracts, it is immaterial that a portion of the property affected is beyond the court's territorial jurisdiction.[30]

Parties.[31]—Only parties to the contract are necessary parties to the suit.[32] All owners are properly made parties to an action to enforce a contract to sell a tract of land owned by different persons.[33]

Defenses.[34]—That defendant is responsible and plaintiff has an adequate remedy at law is no defense,[35] but that the plaintiff has abandoned the contract is.[36] Mere inadequacy of consideration is no defense.[37] Where the vendee agrees to accept subject to the inchoate right of dower in the vendor's wife, her refusal to sign is no defense.[38] Basing a refusal to perform on a specific ground is a waiver of all other grounds.[39] That a vendor who contracted to sell land which he had a contract to purchase, had not paid the entire purchase price is no defense to an action by him against his vendee.[40] The rescission of a resolution of a city council authorizing the purchase of land is no defense to an action to enforce a contract entered into by virtue of it.[41] That a decree for specific performance will require the constant supervision of the court for its enforcement is no reason for denying the relief.[42] Defensive matter stated in a pleading not properly before

Whiteside v. Winans, 29 Pa. Super. Ct. 244.

26. A vendor may compel specific performance if tendered a good title, though he perfect title pending the suit. Finnegan v. Summers [Ky.] 91 S. W. 261.

27. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115.

28. See 4 C. L. 1506.

29. Timma v. Timma [Kan.] 82 P. 481.

NOTE: Courts having personal jurisdiction of the parties have frequently exercised jurisdiction to enforce specific performance of contracts by a vendor to convey land in another state or country on the ground that the decree in such cases is in personam and not in rem, and that the vendor may be compelled by process against the person to execute a conveyance which shall be sufficient according to the law of the place where the land is situated to pass title. Montgomery v. U. S., 36 F. 4; Smith v. Davis, 90 Cal. 25; Winn v. Strickland, 34 Fla. 610; Cloud v. Greasley, 125 Ill. 313; Bethell v. Bethell, 92 Ind. 318; Brown v. Desmond, 100 Mass. 267; Davis v. Headley, 22 N. J. Eq. 115; Potter v. Hollister, 45 N. J. Eq. 208; Lindley v. O'Reilly, 50 N. J. L. 636; Sutphen v. Fowler, 9 Palge [N. Y.] 280; Newton v. Bronson, 13 N. Y. 587; Burnley v. Stephenson, 24 Ohio St. 474; Morris v. Hand, 70 Tex. 481. So also, a purchaser may be compelled to perform his contract though the land is situated abroad and the contract was made and was to be performed abroad and the plaintiff is a nonresident. Cleveland v. Burrill, 25 Barb. [N. Y.] 532.—See note to Proctor v. Proctor [Ill.] 69 L. R. A. 681.

30. Western Union Telegraph Co. v. Pittsburg, etc., R. Co., 137 F. 435.

31. See 4 C. L. 1507.

32. Lucas v. Milliken, 139 F. 816.

33. Morrison v. Hazzard [Tex.] 92 S. W. 33.

34. See 4 C. L. 1508.

35. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695.

36. An abandonment of the contract by the vendee is a bar to the remedy as to him. May v. Getty [N. C.] 53 S. E. 75.

37. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482. A contract to convey property in consideration of a promise to care for the grantor during his life may be enforced where the complainant has fully performed, though the services rendered did not equal the value of the land. Warren v. Marshall [Ind.] 75 N. E. 582.

38. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695.

39. A defendant, who alleges that he refused to accept a tender on the ground that the money was not derived from a certain source, waives any claim that it was not good because conditional. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763.

40. The decree could require a sufficient portion of the purchase price to be paid the seller's vendor to satisfy his contract. May v. Getty [N. C.] 53 S. E. 75.

41. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692.

42. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex.] 90 S. W. 863.

the court cannot be considered.[43] Where plaintiff's title depends on a decree in a tax sale, an answer putting in issue his title by reason of defects in a lien under which he bought states no defense.[44]

Pleading.[45]—The bill must be framed for the appropriate relief.[46] The proceeding being equitable, the rules of equity pleading control.[47] Upon demurrer a bill is good if by any reasonable construction of its language a case is stated entitling complainant to the relief sought.[48] The statute of frauds must be pleaded if relied on as a defense.[49] In a suit by a vendee it is not necessary to allege tender of a deed for execution by the vendor unless under the terms of the contract preparation of the deed devolved on the vendee.[50] Tender of the purchase price need not be alleged where it appears that defendant has denied the contract and would have refused it. It is sufficient to allege readiness to comply with the contract.[51] A complaint may be amended by correcting a misdescription of the land set forth,[52] or so as to allege the contract more definitely,[53] or to ask for a quitclaim deed where it appears that a warranty deed was asked for by mistake.[54] A denial of an allegation that plaintiff has no adequate remedy at law raises the issue and no affirmative allegation is necessary.[55]

Evidence.[56]—The contract sought to be enforced must be clearly and unequivocally proved,[57] and as proved, its terms as to subject-matter, consideration, and all other essentials, must be explicit and unambiguous.[58] Proof of a parol contract

43. Where one sues in ejectment but trial is had on defendant's counterclaim for specific performance, the answer in ejectment is not before the court and cannot affect defendant's right to specific performance. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

44. Finnegan v. Summers [Ky.] 91 S. W. 261.

45. See 4 C. L. 1509.

46. Steele v. Steele, 112 Ill. App. 409.

47. See Equity, 5 C. L. 1144.

48. A bill alleging that defendant "offered to give," etc., held good against demurrer, "offered to give" being construed as an agreement to convey. Shipley v. Fink [Md.] 62 A. 360.

Complaint to enforce performance of a contract to convey land held sufficient as against objection made at the trial. Herman v. Winter [S. D.] 105 N. W. 457.

49. A contract merely voidable because in violation of the statute of frauds will be enforced unless the statute is pleaded as a defense. Koenig v. Dohn, 209 Ill. 468, 70 N. E. 1061.

50. Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436.

51. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

52. Does not add a new cause of action. Sweat v. Hendley, 123 Ga. 332, 51 S. E. 331.

53. Bill to compel specific performance of an oral contract to convey land. White v. Poole [N. H.] 62 A. 494.

54. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

55. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113.

56. See 4 C. L. 1510.

57. Evidence insufficient to prove a contract to transfer a patent. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403. Hayden v. Collins [Cal. App.] 81 P. 1120. Correspondence held insufficient to establish for the sale of certain mining stock. Laybourn v. Zinns [Minn.] 103 N. W. 563. Evidence insufficient to show a contract after 50 years. Gum v. Isaacs [Ky.] 90 S. W. 963. Oral contemporaneous agreement "was not proven by that clear and convincing evidence required by the equity rule." Guaranty Safe Deposit & Trust Co. v. Liebold, 207 Pa 399, 56 A. 951. Evidence insufficient to show a contract whereby one advanced money to trustees of a lunatic to be repaid out of a sale of his real estate. Dulaney v. Devries [Md.] 62 A. 743. The facts relied upon in an action for specific performance of a parol contract to convey land must be established by clear and satisfactory proof. Baldwin v. Baldwin [Kan.] 84 P. 568. An instruction that a parol contract for the sale of land must be established by evidence so clear and unequivocal as to satisfy your minds to a reasonable certainty that the contract was made is proper. Warren v. Gay, 123 Ga. 243, 51 S. E. 302. A judgment in mandamus to compel the mayor of a city to execute a contract authorized by resolution is res judicata as to the legality and sufficiency in form of the contract in an action to enforce it where the mandamus proceeding was defended by the city attorney. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692. In an action to recover a payment on a contract to convey land where the defendant filed a contract for specific performance, a general finding in favor of the cross petitioner will sustain a decree. Jordan v. Jackson [Neb.] 106 N. W. 999. Mental condition of the party against whom performance is sought is to be considered in determining the circumstances attending the making of the contract to discredit the transaction. Sprague v. Jessup [Or.] 83 P. 145. The fact that during one's possession of a mine under a contract to purchase the seller's foreman visited the mine and at one time gave orders is not inconsistent with the purchaser's exclusive possession so as to bar specific performance. Finlen v. Heinze, 32 Mont. 354, 80 P 918.

58. Pressed Steel Car Co. v. Hansen [C. C.

to leave land in consideration of support must be so clear, cogent, and convincing as to the existence of the contract and certainty of its terms as to leave no reasonable doubt.[59] If entered into by an agent his authority must be established.[60] A defendant vendor who alleges that the land in his homestead,[61] or who asserts a mistake not attributable to his negligence as a defense,[62] has the burden of proving it. Interpleaders who allege that they purchased the land without notice of the contract have the burden of proving such fact.[63]

The relief granted.[64]—The relief to which a party shows himself entitled may be decreed,[65] but no other.[66] If the proceeding is in effect one at law, the relief will be limited to what is legal.[67] Damages may be awarded in lieu of specific performance.[68] Though a contract is such that a court cannot decree specific performance, it may interfere by injunction,[69] unless otherwise provided by statute.[70] A vendor can be compelled to convey the title he has if he has not the title he contracted to convey,[71] and he may be required to convey an after acquired title,[72] but this rule does not apply to a contract which expressly provides that it shall be

A.] 137 F. 403. To warrant a decree for performance of a contract to sell or devise land. McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. S. 708.

Evidence held to show that a parol contract for the sale of land was entered into. Shipley v. Fink [Md.] 62 A. 360. Evidence insufficient to establish a parol contract by a father to give his son land in consideration of services. Lay v. Lay [Ark.] 87 S. W. 1026.

Evidence sufficient to show that plaintiff had not rescinded her contract to purchase defendant's land and was entitled to specific performance. Cotton v. Butterfield [N. D.] 105 N. W. 236. Evidence sufficient to show a complete oral agreement for the sale of a mine. Finlen v. Heinze, 32 Mont. 354, 80 P. 918. Evidence insufficient to show an agreement by an incompetent to deed or will property in consideration for services. Hayden v. Collins [Cal. App.] 81 P. 1120. Evidence sufficient to establish a parol contract for the sale of land. Sprague v. Jessup [Or.] 83 P. 145. Evidence held to show that a parol contract for the sale of land was entered into. Veum v. Sheeran [Minn.] 104 N. W. 135.

59. Russell v. Sharp [Mo.] 91 S. W. 134. Evidence insufficient. Id. Evidence insufficient to establish an oral contract by parents to give their child certain real estate at their death in consideration for services rendered. Haberman v. Kaufer [N. J. Eq.] 61 A. 976.

60. Where it is sought to enforce a contract to sell land entered into on behalf of a corporation by certain of its officers, the complainant must show that the corporation either authorized or ratified the contract. Parmele v. Heenan [Neb.] 106 N. W. 662.

61. Evidence insufficient. Steele v. Robertson [Ark.] 87 S. W. 117.

62. As to the area of land purchased. Cawley v. Jean [Mass.] 75 N. E. 614.

63. When two interpleaders took part in the purchase it was necessary to show that neither had notice of the prior contract. Steele v. Robertson [Ark.] 87 S. W. 117.

64. See 4 C. L. 1510.

65. Where the complaint alleged a contract for the sale of the fee but the proof showed a contract for an easement, to prevent a multiplicity of suits, the complainant will be decreed the relief to which he is entitled. Brandon v. West [Nev.] 83 P. 327

66. There can be no recovery upon a quantum meruit for work done without proof of its value where it is shown that the plaintiff has performed his part so defectively as not to be entitled to a decree for specific performance. Flanders v. Rosoff, 97 N. Y. S. 514.

67. A suit brought in equity to compel the payment of a sum of money then due under an agreement between husband and wife for a periodical sum is in effect an action at law on the contract brought in equity because of the relations of the parties, and a supplemental decree will not issue to compel the defendant to do more than the original decree required. Buttlar v. Buttlar [N. J. Eq.] 61 A. 11.

68. Damages in lieu of specific performance may be awarded by a court of equity where such a course becomes necessary in order to do full justice between the parties and confer complete relief in one judicial proceeding, but in such a case the damages awarded will not include speculative or accidental profits and will be limited to saving the parties from loss. Trustees Cincinnati Southern R. v. Hooker, 7 Ohio C. C. (N. S.) 357.

69. Where one contracted to purchase electric current at a specified rate for a term of years exclusively from another, he will be enjoined from purchasing from any other. Beck v. Indianapolis Light & Power Co. [Ind. App.] 76 N. E. 312.

70. By the express provisions of Civ. Code 3423, if a contract cannot be specifically enforced its breach cannot be enjoined. Farnum v. Clarke [Cal.] 84 P. 166.

71. A vendee may procure specific performance with an abatement for defects in the title though he knew of the defects when he commenced suit. White v. Weaver [N. J. Err. & App.] 61 A. 25.

72. A provision in a contract for the sale of land, title of which was in litigation, that if the vendor failed to make good title he would return the consideration paid, does not preclude the remedy though the vendor was adjudged to have no title, when he afterwards acquires it. Showwalter v. Sorenson [Wash.] 81 P. 1054.

void in case the title of the vendor fails.[73] One to whom the defendant conveyed prior to the contract cannot be compelled to join in the deed of performance though his deed is void.[74] A preliminary injunction should not be granted where the contract is disputed or uncertain in its terms or the plaintiff's right is doubtful, nor where it does not appear that there is danger of loss which cannot be compensated in damages.[75] The defendant, on specific performance being decreed against him, is not entitled to interest on purchase money because of delay occasioned by himself.[76] A plaintiff who has had the use of the land after tender of the purchase price and has not paid such price into court is chargeable with interest on the amount.[77] Where a vendor is awarded a decree and has used the land after the time when the conveyance should take effect, the value of such use will be deducted from the purchase price remaining unpaid.[78]

A decree[79] must conform to the theory upon which the case was tried and the issues made,[80] and to the terms of the contract.[81] If the conveyance of property upon the payment of a specified sum is decreed, a definite time within which payment should be made should be prescribed.[82] A decree should not be refused where complainants are entitled to relief, because after filing the bill, but before hearing, the defendant takes measures to perform.[83]

SPENDTHRIFTS, see latest topical index.

STARE DECISIS.

§ 1. *The doctrine and its application.*[84]—In the civil law each case is decided according to the natural and moral rights involved,[85] but it is a general rule among courts administering the common law system that a point which has been settled by judicial decision becomes a precedent which will be followed in subsequent cases before the same court.[86] Where the highest court of a state has decided that a cer-

73. Schwab v. Baremore [Minn.] 104 N. W. 10.

74. Reynolds v. Condon, 110 App. Div. 542, 97 N. Y. S. 1.

75. Lucas v. Milliken, 139 F. 816. Where defendant holds the legal title to corporate stock, a contract for the sale of which is sought to be enforced, a preliminary injunction should not be granted on an ex parte showing which would deprive defendant of his right to possession and to vote the stock. Lucas v. Milliken, 139 F. 816.

76. Under Civ. Code § 4280. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

77. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763.

78. Cotton v. Butterfield [N. D.] 105 N. W. 236.

79. See 4 C. L. 1511.

80. Theall v. Port Chester, 110 App. Div. 776, 97 N. Y. S. 442. Decree held to be in accordance with the pleadings and proof where defendants set up a counterclaim and brought in cross parties. Franklin v. Burris [Colo.] 84 P. 809.

81. Purchaser should be given the privilege of executing a deed of trust to secure the price, as authorized by the contract. Pence v. Life [Va.] 52 S. E. 257. The court cannot make a different contract for the parties. Bennett v. Giles, 111 Ill. App. 428. The decree cannot add to the contract a promise not made. Lone Star Salt Co. v. Texas Short Line R. Co [Tex.] 90 S. W. 863.

82. Lawrence v. Halversen [Wash.] 83 P. 889.

83. Gray v. Citizens' Gas Co., 212 Pa. 473, 61 A. 1004.

Note: The principle that an injunction will issue to prevent threatened waste by a tenant, though he asserts that he does not intend to commit waste again (Attorney General v. Burrows, 1 Dick. 128; Packington v. Packington, 1 Dick. 101; Lowerby v. Fryer L. R. 8 Eq. 417), would seem to apply to the case of continuing contracts.—See 6 Columbia L. R. 203.

84. See 4 C. L. 1512.

85. State v. Manford [Minn.] 106 N. W. 907.

86. See State v. Manford [Minn.] 106 N. W. 907, discussing the doctrine at length

tain rule of law should not be applied under given circumstances, this decision will be followed in a subsequent case presenting like facts even though the very application of the rule rest in the discretion of the court.[87] A ruling of the supreme court, upon questions certified from the court below, that a certain contract does not violate an act, is conclusive that the contract is not in violation of an act narrower in scope.[88] The doctrine of stare decisis is not a fixed rule applicable to all cases and is not observed or enforced where the prior decision is palpably wrong, or is in conflict with positive law, or where a further adherence thereto would amount to judicial legislation.[89]

Former decisions construing a statute.—The magnitude of the interests at stake and the fact that the last decision was by a divided court are sufficient reasons for re-examining the question,[90] and the court should be convinced not merely that the case was erroneously decided but that less injury will result from overruling than from following it.[91]

The various judges who, exercising co-ordinate jurisdiction, sit in the same court should not, except for the most cogent reasons, attempt to overrule the decisions of each other, especially upon questions involving rules of property and of practice.[92] This rule does not, however, deprive the aggrieved party of the right to review and reverse a ruling which follows an erroneous decision of another judge, but it leaves the case in the same situation in which it would have been if the judge who rendered the first decision had made the rulings which followed it.[93] The rule of stare decisis has no application to matters of defense or evidence not before the court in a prior decision.[94]

In applying the law of a foreign state the judicial decisions of its courts are to be taken as a part thereof.[95] The statutes and judicial decisions of the jurisdiction, where a contract was made and is to be performed, control in determining its validity.[96]

Law of the case.[97]—What has been finally decided in a case will not be re-examined, but ruling on demurrer need not be followed on a final hearing on the merits,[98] nor does the overruling of a demurrer on the ground that it is not the proper remedy conclude the court on the trial as to the sufficiency of the pleading.[99]

An expression of opinion by an appellate court on granting a writ of error looking to a fuller consideration of the point on a hearing is not the law of the case.[1] The law of the case as determined in former appeals is treated elsewhere.[2]

§ 2. *Decisions and obiter dicta.*[3]—General expressions in an opinion, which are not essential to dispose of the case, cannot control the judgment in subsequent

87. Petition to recover money paid under a judgment which was afterwards reversed. Horton v. Hayden [Neb.] 104 N. W. 757.

88. Ft. Worth & D. C. R. Co. v. State [Tex. Civ. App.] 88 S. W. 370.

89. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386.

90. Injunction to prevent removal of county seat. Hand v. Stapleton [Ala.] 39 So. 651.

91. Ejectment by city to recover streets. City of Wahoo v. Netheway [Neb.] 102 N. W. 86.

92. Replevin. See, also, Boatmen's Bank v. Fritzlen [C. C. A.] 135 F. 650; Plattner Implement Co. v. International Harv. Co. [C. C. A.] 133 F. 376.

93. Plattner Implement Co. v. International Harv. Co. [C. C. A.] 133 F. 376.

94. Action as to infringement of patent. Bragg Mfg. Co. v. New York, 141 F. 118.

95. Decisions of another state cannot be received in an appellate court to establish the law of such state. Mercantile Guaranty Co. v. Hilton [Mass.] 77 N. E. 312.

96. No distinction between statutes and decisions. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

97. See 4 C. L. 1513.

98. Order overruling demurrer to complaint in action to settle title to land. Gerard v. Ives [Conn.] 62 A. 607.

99. Dawson v. Orange [Conn.] 61 A. 101.

1. Expression of opinion that the evidence before city council was not sufficient to justify judgment of removal from office. Riggins v. Waco [Tex. Civ. App.] 90 S. W. 657.

2. See Appeal and Review, 5 C. L. 121.

3. See 4 C. L. 1513.

suits,[4] but whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, such ruling cannot be called mere dictum.[5] A judgment of affirmance by a divided court is not a precedent under the law of Florida.[6] A decision is not a precedent as to points not brought to the attention of, or considered by, the court,[7] except perhaps those involving the jurisdiction,[8] but the determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, because this point is only indirectly involved in the decision of the question upon which the case turns.[9] Views expressed on the merits by a minority of the court in a case where the court declines jurisdiction are not binding.[10]

§ 3. *Rules of property.*[11]—Decisions which have become rules of property will not be lightly disturbed.[12] Where there is a diversity of state decisions which declare rules of property and in reliance upon which rights have been acquired by contract, the first decision in time may constitute the obligation of the contract and the measure of rights under it.[13] Thus, a state court has no power to reverse nor to modify its decisions which declare rules of property, where the exercise of such power would take away rights acquired, by contract, under and in reliance upon these decisions and which have come under the protection of the Federal constitution.[14] A course of decisions that abutters on a street have easements therein of light, air, and access, which cannot be taken away by construction of an elevated railway, are a rule of property as to one who took while they stood as law.[15]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate.*[16]—The latest expression of opinion by the appellate court is controlling on the inferior courts.[17] Prior decisions of inferior courts cannot form a basis for the application of the doctrine in the appellate court.[18] The rule that judges sitting in the same

4. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739.

5. Where a case presents two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on each point is authoritative although only one was considered below. Union Pac. R. Co. v Mason City & Ft. D. R. Co., 199 U. S. 160, 50 Law. Ed. ——.

6. Where the judges of the supreme court, sitting in bank, are equally divided in opinion as to whether or not a judgment should be reversed, and there is no prospect of an immediate change in the personnel of the court, it becomes the duty of those who favor reversal to vote with those who favor affirmance and thereby affirm the judgment of the lower court. In such cases, while the judgment is a bar to another action for the same cause, yet, as no matters of law are decided so far as the question upon which the court stands equally divided is concerned, the judgment possesses no dignity or force as a judicial precedent regarding such matters. State v. McClung [Fla.] 37 So. 51.

7. Mandamus to compel issuance of certificate of election. Atwood v. Sault Ste. Marie [Mich.] 12 Det. Leg. N. 403, 104 N. W. 649.

8. Since want of jurisdiction will be raised by an appellate court of its own motion, decision of the merits amounts to a holding that there is jurisdiction though the question was not argued. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

9. Objections to personal tax assessment overruled by county board of equalization. Lancaster County v. McDonald [Neb.] 103 N. W. 78.

10. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

11. See 4 C. L. 1514.

12. Decisions construing homestead laws. Schoonover v. Birnbaum [Cal.] 83 P. 999. The word "heirs" construed to mean "widows and children" only and not including widower. Johnson v. Seattle Electric Co. [Wash.] 81 P. 705.

13. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872.

14. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872. One acquiring property abutting on street after state courts have decided that such property owners have easement of light and air and access secured by contract cannot be deprived thereof by the elevation of railroad tracks at the command of the legislature without payment of compensation. Id.

15. Muhlker v. New York, etc., R. Co., 197 U. S. 544, 49 Law. Ed. 872. In a note in 19 Harvard L. R. 67, it is said that this extends this doctrine to a new class of rights.

16. See 4 C. L. 1514.

17. Missouri, K. & T. R. Co. v. Nesbit [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891.

18. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386. A decision of the Kansas City court of appeals, construing a statute, is not binding as a precedent on the Missouri supreme court, although contracts have been entered into in reliance upon it. Action on a special tax bill. Id.

court and exercising co-ordinate jurisdiction should not attempt to overrule the decisions of each other, has no application in an appellate court, whose duty it is to review the decisions of the questions of law which were rendered by the inferior courts and to decide them according to the law and the facts.[19]

(§ 4) *B. Federal and state courts. When Federal courts follow state decisions.*[20]—The Federal courts are bound by decisions of the highest court of a state on matters of purely local law,[21] even in the determination of a case therein pending at the time the decision of the state court was rendered[22] but not in matters involving a Federal question,[23] or, in the determination of questions of general law.[24] Great weight as a precedent, however, will be given to the decision of a state court in a case between the same parties on the same facts.[25] They will ordinarily follow the construction put upon a local constitution or statute by the highest court of the state,[26] but are not bound to disregard the substance of a statute for

19. Plattner Implement Co. v. International Harv. Co., 133 F. 376.

20. See 4 C. L. 1514.

21. Decisions of the highest court of a state, which affect the title to real property situated within that state. As to application of rule in Shelley's Case. Hubbird v. Goin [C. C. A.] 137 F. 822.

22. Bill in equity to enjoin city from constructing waterworks system. City of Sioux Falls v. Farmers' Loan & T. Co. [C. C. A.] 136 F. 721.

23. In a suit to decide whether the change of decision of a state court is an unconstitutional impairment of a contract, the United States supreme court will determine for themselves the existence and extent of such contract. Suit to enjoin the use of an elevated railroad structure in front of a dwelling house because the easements of light, air, and access to these premises were thereby impaired. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872. As a general rule the holder of a vested right, acquired under and by virtue of a state constitution or statute, is entitled to the independent judgment of the Federal courts upon the construction of such constitutional provision or statute. Bill in equity to enjoin city from constructing waterworks system. City of Sioux Falls v. Farmers' Loan & T. Co. [C. C. A.] 136 F. 721. In an action in the Federal court construing a patent, although a decision of the state court has already construed it, the Federal court is not bound by that decision where the plaintiff himself sueing in a state court would not be estopped, on the ground that he was not a party to the prior state action. Davis v. Commonwealth Land & Lumber Co., 141 F. 711. The decision of a state court cannot extend, limit or define the powers of the Federal government to the exclusion of the jurisdiction of its own courts. United States v. Tully, 140 F. 899. The courts of a state cannot by their decisions settle the jurisdiction of the Federal courts, not even in the construction of their own constitution or laws. Id.

24. Hence where on question of liability for negligence a different rule of general law exists in each court, and the case is removed from state to Federal courts, the rule of law prevalent in the latter courts will govern the determination of the case. Curtis v. Cleveland, etc., R. Co., 140 F. 777. Under the holdings of the Federal courts a lessor of a railroad track is not liable for the negligence of its lessee in operating trains on such track, and a Federal court is not controlled thereon by state decisions. Question whether declaration disclosed a severable controversy. Yeates v. Illinois Cent. R. Co., 137 F. 943. Whether a creditor of a bankrupt is entitled to a preference, on the ground that his claim is based upon the bankrupt's misappropriation of trust moneys coming into his hands under a factorage contract with the creditor, does not depend upon a construction of this contract between the parties but on a rule of preference in equity as to which the Federal decisions and not those of the state where the contract was made must control (John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802), but decisions of state courts in so far as they express opinions on general principles, law of contracts (City of Mankato v. Barber Asphalt Co. [C. C. A.] 142 F. 329), or on the evidential value of facts are not binding on the Federal courts (Id.).

25. Where an action against a carrier for damages for personal injuries has been dismissed pursuant to the unanimous opinion of the highest state court, and the questions of negligence presented by the case are not questions as to which the Federal and state courts are at variance, comity requires that such decision be followed by the Federal courts in a subsequent action therein by the same parties for the same cause, though such opinion is not controlling upon the Federal court. Mearns v. Central R. R. [C. C. A.] 139 F. 543. Even where a Federal court will not follow a state court, it has been said to be the duty of the former to treat the opinion of the latter with respect, to examine deeply into its reasonings, and weigh it carefully. Davis v. Commonwealth Land & Lumber Co., 141 F. 711.

26. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329; Love v Busch [C. C. A.] 142 F. 429; City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 721. Statutes of Iowa held in case of death after six days to give cause of action for death only and not for pain and suffering before death also. Jacobs v. Glucose Sugar Refining Co., 140 F. 766. Where the supreme court of a state sustains the validity of a statute from which a contract is claimed, the Federal courts will follow that decision in determining whether subsequent legislation has violated the contract. Powers v. Detroit,

that purpose.[27] It makes no difference that the suit in the state court was a case of friendly litigation for no purpose other than to have the local law interpreted by the state court,[28] but where a decision of a state court is apparently collusive and expressly designed to forestall a decision in the Federal courts, the latter will not be bound.[29] Where the rights of a party accrued before the state decision, it is not binding upon the Federal courts even in the construction of a local statute.[30] In the case of a question of local law, which has never been determined by the state tribunals, they may adopt their own interpretation, and rights accruing under such decision will not be disturbed although subsequently a different interpretation is adopted by the state court.[31]

When state courts follow Federal decisions.[32]—State courts are bound by the construction placed upon the Federal constitution and statutes by the Federal courts.[33] It has been held that upon general propositions of law, unaffected by

G. H. & M. R. Co., 201 U. S. 53, 50 Law. Ed. ——. In the absence of any question of general or commercial law or of right under the United States constitution, and this rule obtains notwithstanding the fact that courts of other states have interpreted such constitution differently. Suit against stockholder by creditor of corporation. Harrison v. Remington Paper Co. [C. C. A.] 142 F. 365. A vested right acquired under and by virtue of the constitution or statute of a state, prior to a state decision, will entitle the holder of such right to the independent judgment of the Federal court upon the construction of a constitutional provision, or the statute of a state. Rights, although vested prior to a state decision, but without especial reference to the existing state of the law, not so favored. City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 731. Construction put upon a mechanic's lien act. In re Grissler [C. C. A.] 136 F. 754. Interpretation of statutes under which a corporation was organized. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. Statute as legislative change of grade of street for its full width. Mead v. City of Portland, 200 U. S. 148, 50 Law. Ed. ——. Decision that state statutes do not conflict with its constitution is conclusive on the Federal supreme court. Carstairs v. Cochran, 193 U. S. 10, 48 Law. Ed. 596; Hughes v. Pflanz [C. C. A.] 138 F. 980. Construction put upon the constitution by the state supreme court at the time the statute was passed. Rees v. Olmsted [C. C. A.] 135 F. 296. Denial by a state court of mandamus to compel a corporation to do certain acts does not conclude the Federal courts as to the charter duties of the corporation, where, under the decision of the state court, mandamus will not lie against corporations of that kind. Wiemer v. Louisville Water Co., 130 F. 251. The decision of an intermediate appellate state court as to the construction or effect of a state statute is not binding on a Federal court. So held as to the Missouri court of appeals. State Trust Co. v. Kansas City, etc., R. Co., 129 F. 455.

27. A Federal court of bankruptcy, in determining whether a state imposition is a tax within § 64a, U. S. Bankruptcy Act, requiring priority of payment thereof, will not disregard the substance of the action and blindly follow a decision of the courts of that state holding such imposition to be a tax. In bankruptcy. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858.

28. City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 721.

29. Construction of a land grant. Davis v. Commonwealth Land & Lumber Co., 141 F. 711.

30. City of Mankato v. Barber Asphalt Co. [C. C. A.] 142 F. 329.

31. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629. Determination by state court that property covered by mortgage of all the property and franchises of a railway company remains liable, after a sale under a Federal court decree of foreclosure, for debts thereafter accruing against the mortgagor, because of the purchaser's failure to organize a domestic corporation, held not conclusive on Federal supreme court, since Federal decree would be thereby virtually set aside. Id.

32. See 4 C. L. 1516.

33. Holding that fire insurance is not interstate commerce. State v. Insurance Co. [Neb.] 106 N. W. 767. The Federal constitution is within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the Federal court of last resort. Information charging violation of anti-trust laws. State v. Cudahy Packing Co. [Mont.] 82 P. 833. By decision of the Federal supreme court that, under the Federal statutes, state courts are forbidden to issue an attachment against a national bank. Merchants' Laclede Nat. Bank v. Troy Grocery Co. [Ala.] 39 So. 476. Removal statutes. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100. By decision of Federal supreme court that state statute is in conflict with interstate commerce act. Spratlin v. St. Louis S. W. R. Co. [Ark.] 88 S. W. 836. On an issue involving a railroad company's rights in certain public lands under a congressional grant, trial court based a finding that the company had no rights in the land on certain Federal decisions. Subsequently to the trial court's finding the Federal supreme court rendered a decision holding that the company and the government were tenants in common in a large tract which included the land in controversy, and this opinion was held available, on appeal to the state supreme court, as a conclusive authority that such finding of the trial court was errone-

legislative enactments, the supreme court of a territory will adopt the law as enunciated by the supreme court of the United States.[34]

(§ 4) *C. Different Federal courts.*[35]

(§ 4) *D. Different state courts.*[36]

STATE LANDS; STATEMENT OF CLAIM; STATEMENT OF FACTS, see latest topical index.

STATES.

§ 1. *Boundaries and jurisdiction. Boundaries.*[37]—Where a navigable stream forms the boundary line between two states, the thread of the main channel is the boundary,[38] and if the river changes its course by accretive process, the boundary line follows the river.[39] State boundaries are defined by the act of congress by which they are admitted into the Union,[40] and on the admission of a state, congress has no power to give it territory belonging to another state.[41] A state may lose its sovereignty and jurisdiction over its territory by prescription and acquiescence whenever such facts are clearly established.[42] A board created for the purpose of auditing claims for taxes paid on lands on which no taxes are due has no power to determine that lands sold for taxes are not within the state.[43]

The jurisdiction[44] of a state is co-extensive with its territorial boundaries.[45]

ous. Southern Pac. R. Co. v. Lipman [Cal.] 83 P. 445. Whenever the question before a state court is what title to land, which had been the property of the United States, has passed to one claiming under the government, that question must be resolved by the Federal statutes, and Federal decisions on the question are controlling. Rights of surviving husband or wife with reference to homestead entry under Federal land law. Cunningham v. Krutz [Wash.] 83 P. 109. Similarly, whether or not a state statute of limitations runs against a settler on public lands, belonging to the government prior to the issuance of a patent to him, is a Federal question which must be answered even by the state courts in conformity with the decisions of the Federal supreme court. Action by railroad company to recover right of way. Slagt v. Northern Pac. R. Co. [Wash.] 81 P. 1062.

34. As to fellow-servant rule. Mollhoff v. Chicago, etc., R. Co. [Okl.] 82 P. 733.

35, 36. See 4 C. L. 1516.

37. See 4 C. L. 1516.

38. An island between the thread of the stream and the shore belongs to the state in which it is located. McBride v. Steinweden [Kan.] 83 P. 822. Evidence sufficient to show that Island No. 76 in the Mississippi river was on the Mississippi side of the channel when Arkansas and Mississippi were admitted, and hence within the boundaries of Mississippi. Moore & McFerrin v. McGuire, 142 F. 787.

39. McBride v. Steinweden [Kan.] 83 P. 822.

40. Boundary between Iowa and Illinois decreed to be the center of the main navigable channel of the Mississippi river. State of Iowa v. State of Illinois, 26 S. Ct. 571, 50 Law. Ed. ——. Boundary between Louisiana and Mississippi, under the Act of April 8, 1812, admitting Louisiana into the Union defined. Louisiana v. Mississippi, 26 S. Ct. 408, 50 Law. Ed. ——. Boundary line between Mississippi and Louisiana decreed. State of Louisiana v. State of Mississippi, 26 S. Ct. 571. The western boundary of Mississippi is the center of the main channel of the Mississippi river. Act March 1, 1817, admitting the state into the Union, construed. Moore & McFerrin v. McGuire, 142 F. 787.

41. Louisiana v. Mississippi, 26 S. Ct. 408, 50 Law. Ed. ——.

42. Evidence held to show that Mississippi has not lost to Arkansas Island No. 76 in the Mississippi river. Moore & McFerrin v. McGuire, 142 F. 787. A boundary between states may be established by long acquiescence. Louisiana v. Mississippi, 26 S. Ct. 408, 50 Law. Ed. ——.

43. Its action in refunding an amount paid is not conclusive of such question on the state. Moore & McFerrin v. McGuire, 142 F. 787.

44. See 4 C. L. 1517.

45. NOTE. Concurrent jurisdiction: The plaintiff sued in Kentucky on a judgment obtained in Indiana. The defendant pleaded the invalidity of the service of summons in the first instance, contending that under the Virginia compact of 1789, and the Act of Congress Feb. 4, 1791, c. 4, 1 Stat. 189, Indiana courts had no jurisdiction over the Ohio river, the defendant being on the river when served. Held the service was valid and the judgment of the Indiana court was entitled to full faith and credit in the courts of Kentucky. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570. The compact provided that "the respective jurisdictions * * * of

§ 2. *Property.*[46]—On a simple contract claim, no steps to enforce which have been taken until a receiver is appointed, a state has no preference over other creditors of an insolvent.[47] The exemption of a state from taxation extends no further than the attributes of sovereignty.[48] A state may prohibit the use of the national flag,[49] or of its arms or seal,[50] for advertising or commercial purposes. It is a legislative prerogative to deal with and dispose of state property.[51]

§ 3. *Contracts.*[52]—A provision in a contract that, if because of legislative action, it became impossible to fully execute it the contractor should have no claim for damages, absolves the state from liability when the condition arises.[53]

§ 4. *Officers and employes.*[54]—Public officers are to be appointed[55] and vacancies filled in the manner prescribed by law.[56] The legislature may not add to the qualifications required of legislators by the constitution nor impose other restrictions upon the candidates or voters.[57] Where the time of commencement, termination, and duration of a term of office are fixed by statute, and provision is made for filling vacancies but without provision as to the duration or authority of the person appointed or elected, he is entitled to serve the unexpired term only[58]

the proposed state (Kentucky) * * * shall be concurrent only with the states which may possess the opposite shores of the said (Ohio) river." The Kentucky court ruled that the contract contemplated a limitation, not a future grant, that, unless there is an express stipulation to the contrary, the jurisdiction of all states is limited to their territorial boundaries, and that whatever concurrent jurisdiction Indiana had was legislative for regulating navigation. The supreme court reached a different conclusion as to all the points, following in this holding prior decisions by state courts, and provision of the Indiana state constitution. Ind. State Const. art. 14, § 2; State v. Plants, 25 W. Va. 119, 52 Am. Rep. 211; Carlisle v. State, 32 Ind. 55. The case of Mississippi, etc., R. Co. v. Ward, 2 Black, 485, is distinguished on the ground that jurisdiction on the river does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.—5 Columbia L. R. 59.

46. See 4 C. L. 1517.

47. State v. Williams [Md.] 61 A. 297.

Note: By the common law the crown was a preferred creditor. King v. Cotton, par. 112. Its right of priority, however, was not absolute. It could not be enforced against assets the title to which the debtor had transferred to another before the suing out of the writ of extent. King v. Lee, 6 Price, 369. A lien, too, obtained by a third person was secure (King v. Watson, 3 Price, 6), but a mere change of custody was of no effect (In re Henley & Co., 9 Ch. D. 469). In this country there has developed a divergence of opinion in the state courts, some holding that the states as successors to the sovereignty of the king became invested with his right of priority (Robinson v. Bank of Darien, 18 Ga. 65), and others repudiating the whole doctrine as inconsistent with our altered political conditions (Freeholders of Middlesex Co. v. State Bank, 30 N. J. Eq. 311). The states which do hold to the rule of state priority subject it to the restriction that it is liable to be defeated pro tanto by prior legal interests vested in third persons. Thus we find that the leading case on the subject in this country denies the state's claim to preference after an assignment in trust for creditors. State of Maryland v. Bank of Maryland, 6 Gill & J. [Md.] 205.—See 19 Harv. L. R. 292.

48. The buying and selling of intoxicating liquors for a profit under a dispensary system is of a commercial character as well as a police regulation and subject to taxation by the Federal government. State of South Carolina's Case, 39 Ct. Cl. 257.

49. Such power does not belong exclusively to the Federal congress. Halter v. State [Neb.] 105 N. W. 298.

50. Commonwealth v. R. I. Sherman Mfg. Co. [Mass.] 75 N. E. 71.

51. It may do so without the aid of the courts. State v. Bryan [Fla.] 39 So. 929.

52. See 4 C. L. 1517. See, also, Public Contracts, 6 C. L. 1109.

53. Contract for convict labor. F. H. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

54. See 4 C. L. 1517. See, also, Officers and Public Employes, 6 C. L. 841.

55. Laws 1905, c. 5384, providing for the appointment of members of the state board of control, is not void. State v. Bryan [Fla.] 39 So. 929. Qualifications of members of the board of control mentioned in chapter 5384, Laws 1905, do not relate to classes of persons but to place and length of residence, and do not make appointment to the office a legislative one, but it is required to be made by the governor. Id.

56. The duties to be performed by the board of control created by Laws 1905, chapter 5384, are governmental. The office is continuous and remains to be filled though the incumbents may die or resign. State v. Bryan [Fla.] 39 So. 929.

57. A constitutional provision that one is eligible for the office of senator or representative, who has resided in the district for two years, is violated by a statute limiting the number of nominees. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

58. Under Const. art. 4, § 11; art. 6, § 5; art. 4, § 7, Sess. Laws 1890-91, p. 237, a person appointed to fill the office of state treasurer, who is afterward elected at a general election held before the term of his predecessor would have expired, is entitled to

Under the constitution of Colorado the president pro tem of the senate does not become lieutenant governor de jure when the lieutenant governor becomes governor on the resignation of that official,[59] and since he is prohibited by the constitution from becoming lieutenant governor de jure, he could not become such by estoppel from acts of the party entitled to the office.[60] Under a rule that the governor may appoint certain officers with the advice and consent of the senate, an appointment is not completed on the transmission of a nomination to the senate and a confirmation thereof.[61] A public officer has no property right in his office[62] and may be removed without notice or hearing[63] in the manner prescribed by law.[64] Members of the legislature are generally prohibited by law from holding any other civil office during the period for which they are elected,[65] and a legislator cannot render himself eligible by resigning his legislative membership.[66] Salary or emolument is merely an incident to the office and is not an element in determining its character as a civil office.[67] The power of a legislature to expel a member will not be limited by implication.[68] Members of the legislature who have been expelled in the manner prescribed by the constitution are not deprived of the right to office without due process.[69] A house of the legislature has power to adopt any procedure and change it at any time without notice and cannot tie its own hands by establishing unchangeable rules.[70] A resolution resulting in the expulsion of a member is not a bill of attainder.[71] The legislature cannot reinstate an expelled member except when lawfully in session.[72] After a legislature has adjourned sine die, it is a thing of the past and cannot be reconvened upon the mandate of judicial power.[73] The acts of public officers are subject to investigation[74] in the manner prescribed by law.[75] An officer is not rendered personally responsible by misappropriating

hold the office only for the remainder of his predecessor's term. State v. Brooks [Wyo.] 84 P. 488.

59. Where at the close of the regular session of the legislature another senator was elected president pro tem, the right to the office of lieutenant governor passed to him. People v. Cornforth [Colo.] 81 P. 871. A statutory provision that whenever by resignation of the governor the powers and duties of his office shall devolve upon the lieutenant governor, the governor's salary shall cease, does not show that it was the intention of the framers of the constitution that the president pro tem of the senate should become lieutenant governor de jure. Id.

60. People v. Cornforth [Colo.] 81 P. 871.

61. Until the commission is issued the appointment is not completed and the governor may refuse to issue it after the nomination is confirmed. Harrington v. Pardee [Cal. App.] 82 P. 83.

62. He is not deprived of property without due process where removed by the appointing power who has filed a reason for removal with the secretary of state. State v. Grant [Wyo.] 81 P. 795.

63. State v. Grant [Wyo.] 81 P. 795.

64. Under the constitution and statutes of Wyoming a state superintendent of a water district appointed by the governor is removable for maladministration by the governor and is not an officer removable by impeachment only. State v. Grant [Wyo.] 81 P. 795. He is not a judicial officer who must be impeached. State v. Grant [Wyo.] 82 P. 2. If the governor should wish to remove a member of the board of control established by Laws 1905, c. 5384, it is presumed that he would do so in the manner prescribed by law. State v. Bryan [Fla.] 39 So. 929.

65. The constitution of Florida prohibits them from holding any civil office during the time for which they were elected. In re Members of Legislature [Fla.] 39 So. 63.

66. In re Members of Legislature [Fla.] 39 So. 63.

67. That no salary or emolument is attached to the office of the members of the board of control does not make it any less a civil office which a member of the legislature may not hold during his term. In re Members of Legislature [Fla.] 39 So. 63.

68. Not by a constitutional provision that a member who is convicted of being influenced by bribery shall be forever prohibited from holding any office of public trust. French v. State Senate, 146 Cal. 604, 80 P. 1031.

69, 70, 71, 72. French v. State Senate, 146 Cal. 604, 80 P. 1031.

73. French v. State Senate, 146 Cal. 604, 80 P. 1031. A court cannot make process, to compel a house of the legislature to reinstate expelled members, effective where prior to the issuance thereof the legislature has adjourned sine die and will be composed of different members when it reconvenes. Id.

74. Laws 1899, p. 797, c. 370, § 6, subd. 3, authorizes the right of investigation by the civil service commission of the action of any person in the public service and is not limited to an investigation of collusion between an examiner and subordinate of the commission and persons in the public service. People v. Milliken, 110 App. Div. 579, 97 N. Y. S. 223.

75. In proceedings by the state civil service commission to investigate the acts of a state officer, the title of the papers "In the matter of the alleged violation of section 24

the fund provided for the payment of the clerks of his office.[76] One department of the state government may exercise power properly belonging to another,[77] hence the action of the legislature in expelling a member is not subject to revision by the courts.[78]

§ 5. *Fiscal management.*[79]—No money can be paid out of the state treasury except upon statutory authorization,[80] and as a general rule auditors are forbidden to draw their warrant for a claim unless an appropriation is made for its payment.[81] Appropriations cannot be made for a private purpose,[82] and the fact that reliance has been placed upon such appropriation will not create an obligation against the state.[83] A suit to enjoin the unlawful disbursement of state funds must be brought against the officer charged with the duty of making the disbursement.[84] The state

of the civil service law in the department of the fiscal supervisor of state charities" does not indicate that the commission was seeking to exceed their powers granted by Laws 1899, p. 797, c. 370, § 6. People v. Milliken, 110 App. Div. 579, 97 N. Y. S. 223.

76. That the state auditor misappropriates the fund provided for the payment of clerks does not render him personally liable for a clerk's salary. Shuck v. Coulter [Ky.] 90 S. W. 271.

77. The department of the legislature with power of impeachment may not, for the sole purpose of vindicating the governor whose term would expire before he could be impeached or tried, appoint a committee to sit during vacation and investigate charges against him. Such power is in the judicial department alone. Ex parte Caldwell, 138 F. 487. Such committee being appointed and acting without authority of law has no power to incarcerate a witness for refusing to obey its subpoena. Id. The exercise of the option to retire state bonds under Acts 1896, p. 30, c. 34, § 7, is a legislative and not an executive power. Colbert v. State [Miss.] 39 So. 65.

78. Under the rule 'that one department shall not exercise the functions of another. French v. State Senate, 146 Cal. 604, 80 P. 1031.

79. See 4 C. L. 1519.

80. Gibony v. Commonwealth [Ky.] 91 S. W. 732. The auditor cannot be compelled to draw his warrant where the funds appropriated for the purpose had been expended and no agreement on his part to do so would be binding on the state. Hager v. Shuck, 27 Ky. L. R. 957, 87 S. W. 300. While Ky. St. 1903, § 4001a, subsec. 4, authorizes the auditor of public accounts to employ an additional clerk at a salary not to exceed $1,200 per year, payable out of the state treasury, on account of the merger of the land office into the auditor's office, it is not intended thereby to restrict the expenditures on account of services that may be required in the land office department to $1,200 annually. Id. Under Const. §§ 63, 64, 68, 69, 73, in the absence of an appropriation to pay state bond issued under Acts 1896, p. 27, c. 34, the governor has no power to order such bonds paid out of other money in the treasury. Colbert v. State [Miss.] 39 So. 65. Gen. Acts 1903, p. 50, § 1, subd. 36, making an appropriation for the department of archives and history, implied, repealed Acts 1900-01, making an appropriation for the same purpose. Owen v. Beale [Ala.] 39 So. 907. Appropriation for educational purposes held not invalid in view of prior appropriations and the apparent intention of the constitutional convention. Agricultural & Mechanical College v. Hager, 27 Ky. L. R. 1178, 87 S. W. 1125. The act of May 10, 1902, creating a bureau of inspection of public officers, etc., is not rendered unconstitutional by the provision that the expense of maintaining the bureau shall be paid by the counties out of the general county fund in proportion to their population, nor by the provision that each taxing body shall be chargeable with the expense of auditing the accounts under its jurisdiction. State v. Shumate, 72 Ohio St. 487, 74 N. E. 588.

81. Laws 1905, p. 192, c. 99, prescribing the method of paying certain state officers, did not repeal B. & C. Comp. § 2398, providing that no warrant shall be drawn in payment of any claim unless an appropriation has first been made therefor. Calbreath v. Dunbar [Or.] 81 P. 366. Acts 1896, p. 30, c. 34, § 7, providing for the issuance of state bonds and giving the state an option after five years to retire them, did not constitute an appropriation for their payment. Colbert v. State [Miss.] 39 So. 65. Under the rule that no warrants shall be drawn unless an appropriation has been provided to meet it, the auditor properly refuses to draw a warrant in excess of an appropriation. Crouter v. Bennet [Colo.] 81 P. 761.

82. To pay materialmen who furnished material to a contractor who was paid by the state but who became bankrupt without paying them. State v. Houser, 125 Wis. 256, 104 N. W. 77. Laws 1895, c. 1, p. 57, to provide for the encouragement of the manufacture of sugar and chicory, and to provide a compensation therefor, is void. Oxnard Beet Sugar Co. v. State [Neb.] 105 N. W. 716. A provision for the erection of a public building at the joint expense of the state and a parish is not a violation of the rule that appropriations shall not be made for private use and forbidding the state to engage in private enterprise. Benedict v. New Orleans [La.] 39 So. 792.

83. Where manufacturers, for whose benefit the appropriation is made, pay larger prices for their material relying on the appropriation for remuneration. Oxnard Beet Sugar Co. v. State [Neb.] 105 N. W. 716.

84. Not against the superintendent of the penitentiary who is not authorized to disburse state funds and where no money can be paid out except on warrants of the secretary of state. Sears v. James [Or.] 82 P. 14.

and not an individual taxpayer may sue to recover funds already misapplied.[85] Appropriations must be drawn out within the time prescribed,[86] but appropriations for specified purposes are not forfeited because not drawn during the fiscal year for which they were made, unless such is the plain intent of the legislature.[87] The constitution of Kansas prohibits the state from being a party in carrying on any work of internal improvement.[88] Under a rule that no money shall be paid out except upon warrant of the auditor drawn upon the treasurer, and by check of the treasurer upon a depositary, the mailing of a check to the proper address constitutes a payment.[89]

§ 6. *Claims.*[90]—Claims must be properly itemized and accompanied by vouchers.[91]

§ 7. *Actions by and against.*[92]—That the governor is the chief executive and it is his duty to see that all laws are faithfully executed does not give him power to sue in the name of the state.[93] In Indiana the state may maintain an action for possession and to quiet title to its lands.[94] A state cannot be sued in its own courts[95] except with its consent clearly conferred by legislative act.[96] Federal

85. Sears v. James [Or.] 82 P. 14.

86. Because an appropriation is required to be drawn out only as necessity for its use arises, and is not required to be spent within two years, it is not obnoxious to a provision that no appropriation shall be made for a longer period than two years. Benedict v. New Orleans [La.] 39 So. 792.

87. A per annum appropriation for the support of an agricultural college. Maryland Agricultural College v. Atkinson [Md.] 62 A. 1035.

88. The construction, operation, and maintenance of an oil refinery for the purpose of receiving, storing, and manufacturing crude and refined oil and its by-products and marketing the same is a work of internal improvement. State v. Kelly [Kan.] 81 P. 450. An appropriation to pay interest on "other state indebtedness" held to include bonds issued under Acts 1896, p. 27, c. 34, and to disclose an intention that such bonds should remain outstanding. Colbert v. State [Miss.] 39 So. 65.

89. Gibony v. Commonwealth [Ky.] 91 S. W. 732. If the check is not received the payee may, by executing an indemnity bond and proving loss of the check, receive a duplicate Id.

90. See 4 C. L. 1520.

91. A statute requiring the state auditor to require all bills presented to be itemized and accompanied by vouchers applies to all claims which may by law be presented for allowance, and "vouchers" means all written evidence which serve to prove the truth of the claims and accounts presented. Clement v. Graham [Vt.] 63 A. 146.

92. See 4 C. L. 1521.

93. Henry v. State [Miss.] 39 So. 856, Const. art. 5, defining executive powers, supersedes any inherent common-law power of the governor to sue in the name of the state. Id.

NOTE. The governor's right to sue: As a general rule the governor is confined to his granted powers and denied any inherent rights. Logan v. Pennsylvania Rd. Co., 132 Pa. St. 403. He has been allowed to sue on bonds payable to the governor on behalf of the state on the theory that he is a corporation sole. Gov. v. Allen, 8 Humph. [Tenn.] 176. Again for the purposes of suits between states he represents the state, and by rule of the Federal supreme court, service is to be made upon him and the attorney-general. Grayson v. Virginia, 3 Dall. [U. S.] 320. A few states expressly authorize the governor to engage other counsel under certain disabilities of the attorney-general (Orton v. State, 12 Wis. 509; Alexander v. State, 56 Ga. 478; State v. Dubaclet, 25 La. Ann. 161), but under the general duty to execute the laws he has no right to execute them himself (Shields v. Bennett, 8 W. Va. 74; In re Fire, etc., Com'rs, 19 Colo. 482; In re Neagle, 135 U. S. 1, 34 Law. Ed. 55; Cahill v. State Auditors, 127 Mich. 487). See 19 Harv. L. R. 524.

94. Burn's Ann. St. 1901, § 7164, when construed in connection with the whole of Acts 1883, p. 170, c. 24, relative to procedure when possession of its lands is unlawfully withheld, does not apply where the question of title is involved. McCaslin v. State [Ind. App.] 75 N. E. 844.

95. State v. Appleton [Kan.] 84 P. 753. There is no statute authorizing a suit to have deeds executed to the state by the comptroller on sale of land for delinquent taxes declared void. Sanders v. Saxton, 182 N. Y. 477, 75 N. E. 529. The state may grant the right to bring suit against it and at any time take that right away without impairing the obligation of its contracts. Wheeler v. Board of Control of State Public School [Mich.] 100 N. W. 394. Eleemosynary institutions maintained by the state cannot be sued for injuries occasioned by an inmate or employe though subject to be sued in other matters. Leavell v. Western Kentucky Asylum for Insane [Ky.] 91 S. W. 671. Mandamus to compel public officers to levy a tax to pay bonds is **not a suit against the state** because such officers have no authority to exercise such power. Graham v. Folsom, 200 U. S. 248, 50 Law. Ed. ——. Ancillary relief in a Federal court by way of injunction in aid of a decree in a suit over state taxation in which the state has consented to be sued is not a suit against the state. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. ——.

96. Consent to be sued is given where the

courts are forbidden by the 11th amendment of the Federal constitution to assume jurisdiction of actions against a state,[97] but this provision cannot be applied to nullify the power of congress to regulate interstate commerce by barring judicial investigation of state action.[98] The Federal supreme court has original jurisdiction of a dispute between states in their sovereign capacity.[99] Limitations do not run against actions in favor of the state,[1] but a claim against the state is barred by the same limitations which would bar it as between private citizens.[2] The state may waive the defense of limitations.[3] In the absence of statutory authority,[4] costs cannot be awarded against the state in a civil action.[5]

STATUTES.

attorney general is authorized to defend on behalf of the state a suit to enjoin the collection of taxes in which the state is interested. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. ——.

97. A suit in equity against state officers to restrain them from initiating judicial proceedings in the courts of the state to enforce a statute alleged to be unconstitutional is in reality a suit against the state of which the Federal courts are prohibited by the eleventh amendment of the Federal constitution to exercise jurisdiction. Hutchinson v. Smith, 140 F. 982.

98. Does not prevent an action by a citizen of another state to restrain the state railroad commission from enforcing an order affecting interstate commerce. Illinois Cent. R. Co. v. Mississippi Railroad Commission [C. C. A.] 138 F. 327.

99. A controversy between state authorities which involves a dispute respecting the boundary. State of Louisiana v. State of Mississippi, 50 Law. Ed. ——.

1. In Indiana since 1881 the common-law rule has prevailed. McCaslin v. State [Ind. App.] 75 N. E. 844.

2. Action by a county to recover a sum which should have been paid as taxes but which was lost because the state exempted certain railroad lands in the county from taxation. People v. Miller, 181 N. Y. 439, 74 N. E. 477. A creditor of the state for the payment of whose claim the law makes no provision is not required to file such claim within two years after its accrual with the auditor for adjustment and allowance, and failure to do so will not bar an action thereon. Lancaster County v. State [Neb.] 104 N. W. 187, following State v. Moore, 40 Neb. 854, 59 N. W. 755.

3. A resolution of the state senate passed in accordance with the provisions of Cobbey's Ann. St. 1903, § 4768, authorizes a claimant to maintain action against the state on a statute barred claim. Lancaster County v. State [Neb.] 104 N. W. 187.

4. A state is liable for costs and disbursements in civil actions brought by it, but not in criminal prosecutions. State v. Buckman [Minn.] 104 N. W. 289.

5. State v. Williams [Md.] 61 A. 297.

§ 1. *Enactment.*[6]—Constitutional provisions for the government of the legislative department in the enactment of laws are mandatory,[7] and the courts will take judicial notice of the course of legislation so required;[8] but in Texas the courts will not, for the purpose of invalidating a law, go into an investigation to determine whether, as a matter of fact, the legislature in enacting it failed to observe some rule of procedure prescribed by the constitution.[9] Such provisions should receive a reasonable interpretation, and only such legislative acts as offend their spirit and meaning should be overthrown.[10] Under a constitutional provision requiring three several readings before the passage of a bill, an amendment which does not materially change the bill may be made after the second reading.[11] From the unanimous passage of a bill it will be presumed that dispensing with the reading thereof in full was authorized by a two-thirds vote.[12] A constitutional provision that no bill shall be passed unless it shall have been printed and placed in final form upon the desks of the members at least three calendar legislative days prior to its final passage is sufficiently complied with where the bill as it originated in one house, with all the amendments there made, had been printed and placed on each member's desk for the requisite time.[13] Some bills are required to be passed by a two-thirds vote,[14] but, under a constitutional provision requiring a two-thirds vote to appropriate money, except in specified cases, including defraying the "necessary" expenses of government,[15] the legislature is the judge of what expenses are necessary, and its determination cannot be reviewed by the courts.[16] In some states bills after their passage must be signed by the presiding officers in the presence of their respective houses.[17]

6. See 4 C. L. 1522.

7. State v. Bryan [Fla.] 39 So. 929. Requirement that every bill enacted shall be signed by the presiding officers of both houses of the legislature. Lynch v. Hutchinson, 219 Ill. 193, 76 N. E. 370.

8. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

9. The validity of an act passed at a special session was assailed on the ground that the governor had not called the attention of the legislature to such legislation. Sp. Laws 27th Leg. (1st Called Sess.), p. 1. State v. Larkin [Tex. Civ. App.] 90 S. W. 912. The validity of the statute was further assailed on the ground that it was special legislation of which no previous notice had been given, but the court declined to look into the matter. Id.

10. State v. Bryan [Fla.] 39 So. 929.

11. Const. art. 2, § 14. An amendment was made to a bill authorizing a county bond issue by striking out a provision as to the purchase of the bonds before maturity, since such amendment did not increase the amount of bonds or tax, or make any material change in the original bill. Chatham County Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862.

12. Under a constitutional provision that the reading of bills at length may be dispensed with by a two-thirds vote of the quorum present, which fact shall be entered on the journal. Const. § 66. City of Uniontown v. State [Ala.] 39 So. 814.

13. Const. art. 3, § 15. Tax Law, Laws 1905, pp. 474-477, c. 241, §§ 315-324, valid. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

14. The Medical College of Alabama is not an educational institution under the absolute control of the state, and an act appropriating money for it without the requisite two-thirds vote was void under Const. § 73. State v. Sowell [Ala.] 39 So. 246. Laws 1891, p. 483, c. 259, creating a corporation to maintain a public waterway from a point on the Niagara river and supply water to villages and their inhabitants, did not require a two-thirds vote for its passage, under Const. art. 3, § 20, as an appropriation of public property to private use; the state having no property in the river did not appropriate any. Niagara County Irr. & Water Supply Co. v. College Heights Land Co., 98 N. Y. S. 4. Mortgage Tax Law, Laws 1905, p. 2059, c. 729, amending Tax Law, Laws 1896, p. 795, c. 908, did not require the assent of two-thirds of the members of each house for its passage, under Const. art. 3, § 20, because it provided for the payment of one-half of the tax into the general fund of the county, for the money so disposed of is not the public money of the state. People v. Ronner, 110 App. Div. 816, 97 N. Y. S. 550.

15. Const. art. 5, § 31. State v. Moore [Ark.] 88 S. W. 881.

16. Act app. Mar. 17, 1905, appropriating money to promote the efficiency of the state guard, was valid, though passed by a majority vote. State v. Moore [Ark.] 88 S. W. 881.

17. Such a constitutional requirement is mandatory. Lynch v. Hutchinson, 219 Ill.

Under a constitutional provision prohibiting the introduction of any new bill after the fiftieth day of the session, the validity of a substitute for a bill, after such limit, depends upon whether the subject-matter thereof is germane to that of the original bill.[18]

In the absence of any fixed rule the day on which a bill is presented to the governor is to be excluded in determining the time within which he is required to act,[19] except when the legislature, by adjournment, prevents its return, in which case it shall be a law, unless returned within three days after the beginning of the next session,[20] and full days of twenty-four hours each are contemplated.[21]

A statute need not be unconditional and of immediate effect.[22] The time when statutes not given immediate effect shall become operative is generally prescribed by constitutional provisions[23] or general law,[24] and a statute may be held in abeyance by the indirect effect of a constitutional provision.[25] Under a constitutional provision for the taking effect of a general law 40 days after its passage, unless it shall state that the public welfare requires that it shall take effect sooner,[26] it has been held that the legislature may, by the terms of the act itself, postpone its taking effect to a later period.[27]

Special sessions.[28]—The constitution of Texas prohibits legislation at a called session on any subject not recommended by the governor, but the courts will not look into the matter for the purpose of invalidating an act passed.[29]

The journals.[30]—Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted,[31] but in California, where the indorsements on a bill show that it was properly enrolled, authenticated, and depos-

193, 76 N. E. 370. Journal record held to show a sufficient compliance with Const. 1901, § 66, in this respect. Mitchell v. Gadsden [Ala.] 40 So. 350.

18. A bill to provide for the election of drain commissioners in Berrien county (Local Act 448, 1903) was germane to the subject-matter of a bill to amend § 1, c. 2, Act 254, Pub. Acts 1897 (the general drain law), being an amendment of that law by implication. Attorney General v. Stryker [Mich.] 12 Det. Leg. N. 518, 104 N. W. 737.

19. Carter v. Henry [Miss.] 39 So. 690.

20. The bill having been sent to the governor March 16, March 20 being Sunday, and the legislature adjourning March 22 at 12:45 p. m., he sent his return message to the senate on that day, but his secretary delivered the bill to the secretary of state, who included it with the Acts of 1904. Held that the bill (Laws 1904, p. 47, c. 57) did not become a law that session, the full five days not having expired before adjournment. Carter v. Henry [Miss.] 39 So. 690.

21. Const. § 72. Carter v. Henry [Miss.] 39 So. 690.

22. Const. art. 4, § 16, prescribing the procedure for the enactment of a law, does not have any bearing on the time of its taking effect. Harrison v. Colgan [Cal.] 82 P. 674. It may be conditional and made to depend upon a subsequent event. State v. Bryan [Fla.] 39 So. 929. An act may provide upon its face that the duty of compliance with its provisions may depend upon the happening of a condition or contingency. Wright v. Cunningham [Tenn.] 91 S. W. 293.

23. St. 1905, p. 224, c. 249, amending Pol. Code § 736, by raising the salaries of certain judges, having been passed without an emergency clause, was of no force until 60 days after its passage, under Pol. Code § 323. Harrison v. Colgan [Cal.] 82 P. 674.

24. Act Mar. 20, 1905 (St. 1905, p. 422, c. 354), regulating chattel loans, prescribed no time for taking effect, and therefore did not take effect until 60 days after passage, under Pol. Code § 323, i. e. May 19, 1905. Ex parte Sohncke [Cal.] 82 P. 956.

25. St. 1905, p. 224, c. 249, amending Pol. Code § 736, raising the salaries of certain judicial officers, was not operative as to judges in office when it was passed, under Const. art. 6, § 17, prohibiting the increase or decrease of a judge's salary during his term of office. Harrison v. Colgan [Cal.] 82 P. 674.

26. Const. art. 2, § 20. Wright v. Cunningham [Tenn.] 91 S. W. 293. The expression, "This act shall be in full force and effect" was held to give an act immediate operation as to certain matters for the regulation of which there seemed to be urgent need. Laws 1905, p. 856, c. 703, so far as it imposed certain duties on the auditor of the county, which office was created by the act, went into effect July 1, 1905, the beginning of such officer's term. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

27. Wright v. Cunningham [Tenn.] 91 S. W. 293.

28. See 4 C. L. 1524.

29. State v. Larkin [Tex. Civ. App.] 90 S. W. 912.

30. See 4 C. L. 1524.

31. When the certificates of passage provided for by Laws 1892, p. 1676, c. 682, § 40, as amended by Laws 1894, p. 123, c. 53, fail to show the presence of three-fifths of the members on the passage of a tax bill, as required by Const. art. 3, § 25, the journals may be consulted. In re Week's Estate, 109 App. Div. 859, 96 N. Y. S. 876. That act, in

ited with the secretary of state as having been passed, the journal of either house cannot be looked into to rebut the presumption of its proper passage.[32] The silence of the journals upon any step in the enactment of a law is not affirmative evidence to the courts that such step was or was not taken, except in those respects where the constitution mandatorily requires the journals to show the action taken.[33] Under a constitutional provision requiring amendments to bills, with the names of those voting for or against them to be entered on the journal, and also requiring a vote to be taken and the names of those voting for or against concurring in amendments made by the other house to be entered on the journal,[34] such concurrence was sufficiently recorded where the names of the members voting were entered, though the amendment was not set forth in the journal of the house concurring.[35]

Submission to popular vote.[36]—While the legislative power cannot be delegated,[37] yet the enactment of a law to become locally applicable upon vote of the people or of a local board or body is valid;[38] but a different rule prevails in Tennessee, and, under its constitution, no legislative act can be so framed that it must derive its efficacy from a popular vote.[39] In California the governor has power to cause the constitutional publication to be made of a statute submitting a bonding proposition to the people, even though the statute makes no provision or publication.[40] Under an act authorizing cities to issue bonds, requiring an election on the subject and providing for a contest of such election, it will be presumed, on a collateral attack and in the absence of any contest, that the election was duly held and it will not be invalidated for failure of the council proceedings to show the appointment or election of returning officers.[41]

Presumptions and evidence as to passage.[42]—In California the indorsements on a bill of enrollment, authentication, and deposit with the secretary of state as having been passed are presumptive of proper passage and cannot be contradicted by the journals.[43]

Publication.[44]

§ 2. *Special or local laws.*[45] *In general.*—A law of a general nature is one whose subject-matter is common to all the people of the state.[46] Under the Ohio

so far as it assumes to make such certificates conclusive evidence of the passage of the bill, is unconstitutional. In re Stickney's Estate, 110 App. Div. 294, 97 N. Y. S. 336. The speaker of the assembly cannot, of his own motion, after the expiration of his term and the life of the assembly, amend his original certificate of the passage of a bill. Id. The constitutional provision, relative to the passage of tax laws, applies to the passage of collateral inheritance or transfer tax laws. Id.

32. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069.

33. As, for example, the entry of the ayes and noes upon the final passage of a bill. West v. State [Fla.] 39 So. 412.

34. Const. 1901, § 64. State v. Porter [Ala.] 40 So. 144.

35. State v. Porter [Ala.] 40 Sa. 144.

36. See 4 C. L. 1524.

37. Wright v. Cunningham [Tenn.] 91 S. W. 293. Shannon's Code, § 7423, which fixes no schedule of credits for good conduct of prisoners in the county work house, but leaves the whole matter to the board of commissioners, is an unconstitutional delegation of legislative power. Fite v. State, 114 Tenn. 646, 88 S. W. 941.

38. The power delegated in such case is not a law "making" power. Sandys v. Williams [Or.] 80 P. 642; Fouts v. Hood River [Or.] 81 P. 370; Childers v. Shepherd [Ala.] 39 So. 235.

39. Acts 1905, p. 670, c. 316, amending Acts 1903, p. 408, c. 177, relative to the running at large of small stock so as to make it effective only in such counties as may adopt it by majority vote, is unconstitutional. Wright v. Cunningham [Tenn.] 91 S. W. 293.

40. Const. art. 16, prohibits the creation of a state debt exceeding $300,000 without such submission, and requires a statute proposing it to be published in each county. Held that the governor's duty to execute the laws (Const. art. 5, §§ 1, 7) empowered him to direct the secretary of state to make the required publication. Spear v. Reeves [Cal.] 83 P. 432. Such publication was not rendered insufficient by the secretary of state's failure to accompany the statute with a certificate of its authenticity. Id.

41. Acts 1903, p. 59. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

42. See 4 C. L. 1524.

43. Sacramento Pav. Co. v. Anderson [Cal. App.] 82 P. 1069.

44. See 4 C. L. 1524.

45. See 4 C. L. 1525.

46. Richardson v. Board of Education [Kan.] 84 P. 538.

constitution all such laws must have uniform operation throughout the state [47] upon all persons similarly situated,[48] but a statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state.[49] General laws are those which apply to and operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws,[50] the difference between laws of a general nature and general laws being that the subject-matter of the former must be one common to the people of the entire state, while all that is required of the latter is uniformity of operation.[51] In Alabama, under the wording of its constitutional provisions,[52] a law which is general in its terms and is in good faith so framed that all parts of the state may come within the circle of its operation is a general law, notwithstanding there may be localities where there are no objects for its present operation, or where there are special laws which must be repealed before the general law could become operative there.[53] The terms "general law" and "public law" are not equivalent.[54]

A local law presumably was passed to meet local and exceptional conditions.[55] In Alabama, within the meaning of the constitution, a law is local if it applies to less than the whole state, although its purpose may have an indirect bearing on the whole state;[56] but in Louisiana a statute requiring a certain parish to build a court house, to the erection of which the state contributed, was held not to be a local act, the constitution and legislation having treated the question of a court house as one

47. Section 1230b, Rev. St., providing for the fees of sheriffs in all counties having a population of 22,500 or over. In taxing poundage sheriffs must be governed by § 1230. Childs v. Perry, 26 Ohio C. C. 543, 5 Ohio C. C. (U. S.) 33.

Lacking in uniformity: That part of the new school code found in 97 O. L. p. 334 recreating and legalizing special school districts. State of Ohio v. Hickman, 5 Ohio C. C. (N. S.) 175, 27 Ohio C. C. 216. That part of original § 2267 (repealed 96 O. L., 96; see 1536-221), which provided that no public improvement, except sidewalks and sewers, should be made by cities of the third grade of the first class until the majority of the owners of the property to be assessed therefor had petitioned the council for the improvement, etc., was legislation upon a subject of a general nature and was unconstitutional. Adkins v. Toledo, 6 Ohio C. C. (N. S.) 433. The amendments to Rev. St. §§ 3437, 3439, relating to street railway grants. Cleveland, etc., R. Co. v. Urbana B. & N. R. Co., 5 Ohio C. C. (N. S.) 583, 26 Ohio C. C. 180. Provision in Ohio Municipal Code limiting its operation with reference to market house commissioners for an indefinite time in the city of Cleveland. Slatmyer v. Springborn, 5 Ohio C. C. (N. S.) 89, 26 Ohio C. C. 100.

48. A statute is not invalid for lack of uniform operation because it applies to railroads only and to a particular class of employes. Ignatius Froelich v. Toledo & Ohio Cent. R. Co., 5 Ohio C. C. (N. S.) 6, 24 Ohio C. C. 359.

49. The statutory exceptions which have been made relative to the compensation of prosecuting attorneys in different counties, the provision for the appointment of assistants in certain counties, and the further provision that in counties not having a county solicitor the prosecuting attorney shall act as the legal adviser of the county commissioners, who shall fix his compensation, are not unconstitutional. State v. Taylor, 3 Ohio N. P. (N. S.) 505. Act Sept. 12, 1881 (Acts 1880-81, p. 608), prohibiting the sale of spirituous liquors in Jefferson County, is unconstitutional as special legislation. Edwards v. State, 123 Ga. 542, 51 S. E. 630, following Papworth v. State, 103 Ga. 36, 31 S. E. 402.

50. Richardson v. Board of Education [Kan.] 84 P. 538.

51. An act for the organization, maintenance, and control of common schools may be a general or a special law, but it is not a law of a general nature, for its subject-matter is not one of a general nature. Richardson v. Board of Education [Kan.] 84 P. 538. Art. 10, c. 92, Gen. St. 1901, for the organization, etc., of high schools in cities of the first class, is a general law but not a law of a general nature. Id.

52. Const. § 110, defining general and local laws. State v. Thompson [Ala.] 38 So. 679.

53. Acts 1903, p. 438, relative to general elections, including county superintendents of education, is a general law, although Act Feb. 7, 1899 (Acts 1898-99, p. 676), makes different provisions for the election of those officers in Montgomery county. State v. Thompson [Ala.] 38 So. 679.

54. Every general law is necessarily a public law, but every public law is not a general law. State v. Sayre [Fla.] 39 So. 240. Any law affecting the public within the limits of a county or community would be a public law though not a general law. Id.

55. Nissley v. Lancaster County, 27 Pa. Super. Ct. 405.

56. Const. § 110. Acts 1903, p. 488, creating the 15th judicial circuit, composed of counties formerly belonging to other circuits under the general law, is local. State v. Sayre [Fla.] 39 So. 240.

in which the whole state is interested.[57] The fact that a local act adopts some of the provisions of a general law does not make it any less a local law.[58] Special or local legislation is prohibited, with more or less stringency, by many state constitutions.[59] Curative acts applying to all places, things, or subjects which are affected by the conditions to be remedied are not special acts within the constitutional prohibition,[60] nor does the reservation of existing rights and privileges in a general act render the act objectionable.[61] Where the constitution prohibits the passage of local or special laws in certain enumerated cases and in all other cases where a general law can be made applicable,[62] the general provision is addressed to the discretion of the legislature,[63] while in the enumerated cases a rule is established which cannot be evaded.[64] In Missouri the organization of a criminal court in a county having more than 50,000 population is not objectionable as special legislation, though a general law can be made applicable.[65]

57. Acts 1904, No. 96, p. 214, and amendatory Act 1904, No. 179, p. 369. Benedict v. New Orleans [La.] 39 So. 792.

58. Acts 1896-97, p. 265, § 6, establishing the Tuscaloosa county law and equity court, is a local law, though it incorporated provisions of the general law for the drawing of juries, etc. Green v. State [Ala.] 39 So. 362. And that being a local law, Loc. Acts 1903, p. 309, amending it, is not subject to the objection of enacting a local act by the partial repeal of a general law, under Const. 105. Id.

59. Laws 1905, p. 1160, c. 501, which became a law before the census of 1905 was taken, is not a special act within Const. art. 12, § 2, because it provides, with some exceptions, that its provisions shall not apply to a city that becomes one of the second class under that census until 1908, it relating to no particular city but to all of the third class. Koster v. Coyne, 110 App. Div. 742, 97 N. Y. S. 433. Act Feb. 20, 1902 (23 St. at Large, p. 1168), to organize a union station company, does not violate Const. art. 9, § 2, prohibiting the amendment of charters by special acts, in that it grants powers to several railroad companies where it was passed under a concurrent resolution as provided in the said section. Riley v. Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485. Pol. Code §§ 1617, 1662, 1663, providing for kindergartens in cities and towns, do not, as construed, violate Const. art. 4, § 25, prohibiting the passage of local or special laws for the **management of common schools.** Los Angeles County v. Kirk [Cal.] 83 P. 250. Laws 1905, c. 5384, reorganizing the government of the several state educational institutions, is not unconstitutional as special legislation relative to certain institutions under Const. art. 3, § 25 (State v. Bryan [Fla.] 39 So. 929), nor is it special legislation on account of its incorporation of the state board of control, since that is not an "educational, etc., company or association," but is a subordinate public agency established in aid of a public purpose (Id.). Acts 1903, p. 255, c. 145, for **improvement of highways** at cost of property benefited, excluding lands not within 2 miles, as construed, is not local or special legislation. Spaulding v. Mott [Ind.] 76 N. E. 620. Act No. 202, p. 391, of 1902, relative to the powers of **police juries** throughout the state (Orleans parish excepted), is not a local or special law in the sense of Const. art. 48. Blanchard v. Abraham [La.] 40 So. 379. Laws 1901, c. 101, p. 107, limiting the number of **liquor licenses** in places bordering on the patrol limits in cities of 50,000 population, is void as aimed at a special contingency and not expected to apply equally to all cities of the class. State v. Schraps [Minn.] 106 N. W. 106. Under Acts 1898, c. 80, p. 95, and Code 1892, § 3587, both **prohibiting parallel or competing railroads from consolidating,** the legislature could not pass a special act granting two such railroads power to consolidate without violating Const. § 87, forbidding the suspension of a general law for the benefit of any individual, private corporation, or association. State v. Mobile, etc., R. Co. [Miss.] 38 So. 732. Pub. Laws 1905, p. 407, which attempt to validate **proceeding by cities,** being limited to those "heretofore voting," is special legislation. Murphy v. Long Branch [N. J. Law] 61 A. 593. A navigable stream is not a highway within the meaning of a constitutional provision prohibiting local or special legislation "to lay out, open, alter or work roads or highways." Const. South Carolina, art. 3, § 34. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. ——.

60. Gen. Laws 1905, cc. 76, 77, pp. 93, 94, legalizing school bonds heretofore voted upon by cities under Gen. Laws 1893, c. 204, p. 333 and amendatory acts, are curative acts. State v. Brown [Minn.] 106 N. W. 477.

61. Certain vested rights of corporations were reserved in the repeal of prior acts by the act concerning trust companies (Revision of 1899, P. L. 1899, p. 461). State v. Twining [N. J. Law] 62 A. 402.

62. Const. art. 4, § 22. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

63. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321. The legislature is the exclusive judge whether its object may be obtained by a law general in form or by a special law. Richardson v. Board of Education [Kan.] 84 P. 538.

64. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

65. Const. art. 6, § 1, recognizes such courts in vesting the judicial power of the state and § 31 prohibiting their establishment "except in counties having a population exceeding 50,000," fully recognizes the general assembly's power to establish them in such counties State v. Etchman, 189 Mo. 648, 88 S. W. 643. The power to establish

Some state constitutions require notice of intention to apply for the enactment of special or local legislation, stating the substance thereof, to be given and published,[66] proof of which notice and its due publication must be entered on the journal,[67] and any essential change from the substance of the bill noticed, made by the legislature in its passage, will render the act void for insufficient notice.[68] This

such courts carries with it the power to provide for the necessary incidents of the court. Id. It is not necessary to include every such county in the state in organizing such courts, and Rev. St. 1899, p. 2568, § 1, organizing a criminal court in Buchanan county, is not void as special legislation under Const. art. 4, § 53, subd. 32. Id.

66. Const. § 106. Law v. State [Ala.] 38 So. 798. In case of local laws passed under the old constitution, constitutional notices are presumed to have been given. Norvell v. State [Ala.] 39 So. 357.

Notice required: Act. Sept. 26, 1903 (Acts 1903, p. 369), for removal of causes from a city court to other courts in the county, is a local law. Dudley v. Fitzpatrick [Ala.] 39 So. 384.

Notice not required: Acts 1903, p. 438, relative to general elections, even if § 106 of the act is intended to except localities having special election laws. State v. Thompson [Ala.] 38 So. 679. Acts 1903, p. 59, authorizing cities and towns to issue bonds for certain purposes, does not become a local act requiring previous notice, under Const. § 106, by reason of the exemption of two cities from its provisions, such exemption being provided for in Const. § 225. Blakey v. City Council of Montgomery [Ala.] 39 So. 745. Acts 1903, p. 117, providing for the change of county seats, being a general law. State v. Porter [Ala.] 40 So. 144. Act No. 96 of 1904, p. 214, requiring Orleans parish to erect a court house, to which the state contributed, and amendatory Act No. 179, p 369, of 1904, did not require notice under Const. art. 50, the project being one in which the whole state was interested. Benedict v. New Orleans [La.] 39 So. 792.

Requisites of notice: The word "substance," as employed in Const. § 106, cannot be said to be synonymous with subject or mere purpose, but means the essential or material part, essence, abstract, compendium, meaning. Ex parte Black [Ala.] 40 So. 133. Discussion of the meaning of "substance" in this provision. State v. Tunstall [Ala.] 40 So. 135. It is not necessary for the notice of a local act amending an existing act to state whether the new amendment shall be in the form of an act amending a section of the original act or not, that not being a matter of substance Id. Notice of Act Sept. 26, 1903 (Acts 1903, p. 369), for removal of causes from a city court to other courts, was not insufficient for failure to refer to details of procedure for such removal, or to name the particular courts named in the act as passed. Dudley v. Fitzpatrick [Ala.] 39 So. 384. The published notice of intention need not be signed. Id.

Sufficient notice: Of an act to create a new county out of portions of Henry, Dale, and Geneva counties, sufficient statement of the substance of the proposed act, under Const. § 106. Law v. State [Ala.] 38 So. 798. Of Act Sept. 26, 1903 (Loc. Acts 1903, p. 352), prohibiting sale of liquors in a certain locality. State v. Williams [Ala.] 39 So. 276. Substance of Loc. Acts 1903, p. 5, establishing a liquor dispensary in Uniontown, sufficiently indicated. City of Uniontown v. State [Ala.] 39 So. 814. Of Act Sept. 26, 1903 (Acts 1903, p. 369), for removal of causes from a city court to other courts. Dudley v. Fitzpatrick [Ala.] 39 So. 384. Of Loc. Acts 1903, p 40, creating an inferior court of record in Geneva county. Ex parte Black [Ala.] 40 So. 133. Of Loc. Acts 1903, p. 625, creating the office of solicitor of Calhoun county. State v. Tunstall [Ala.] 40 So. 135. Of Local Acts 1903, p. 379, establishing inferior courts in a certain county. State v. Abernathy [Ala.] 40 So. 353.

Insufficient notice: Of Local Acts 1903, p. 482, for the establishment of an inferior court in lieu of justices' courts in precinct 38, Jefferson county, under Const. art. 4, § 106. Tillman v. Porter [Ala.] 38 So. 647. Of Act Sept. 25, 1903 (Loc. Acts 1903, p. 316), prohibiting the liquor traffic in Coffee county. Town of Elba v. Rhodes [Ala.] 38 So. 807. Of Act Sept. 26, 1903 (Loc. Acts 1903, p. 365), partially repealing an act which prohibited the sale of intoxicants within 8 miles of the court house of the town of Linden. Brame v. State [Ala.] 38 So. 1031. Of Act Mar. 6, 1903 (Loc. Acts 1903, p. 101), to repeal the Walker county law and equity court, insufficient to cover particular provisions for the disposition of pending cases. Norvell v. State [Ala.] 39 So. 357. The legislature cannot pass a special act when the notice of intention to apply therefor, required by Const. § 106, shows that the act, if enacted in accordance therewith, would be unconstitutional. Held that Local Act of 1903, to establish an inferior civil court in Mobile county in lieu of justices' courts, was void for defective notice. Alford v. Hicks [Ala.] 38 So. 752.

Notice of amendments: Where a notice is given of an intention to apply for numerous amendments to a local act, and the notice as to each amendment proposed is independent of all of the others, an alleged insufficiency as to one will not affect the notice as to another. Green v. State [Ala.] 39 So. 362. An amendment of Acts 1896-97, p. 265, contained in Loc. Acts 1903, p. 309, as to the Tuscaloosa county law and equity court, not affected by an alleged insufficiency of notice as to other amendments. Id.

67. Sufficiency of affidavit of publication and entry on journal considered. Childers v. Shepherd [Ala.] 39 So. 235; Dudley v. Fitzpatrick [Ala.] 39 So. 384; Ex parte Black [Ala.] 40 So. 133; Jacobs v. State [Ala.] 40 So. 572. Sufficient journal entry of Act Mar. 3, 1903 (Loc. Acts 1903, p. 137), authorizing towns and cities in Walker county to establish dispensaries for sale of liquors, etc. Childers v. Shepherd [Ala.] 39 So. 235.

68. The notice of Act Sept. 14, 1903 (p. 239, Local Acts 1903), included a provision for transfer of misdemeanor cases to "a law and equity court," but the act provided for such transfer to the circuit court. Act held invalid. State v. Speake [Ala.] 39 So. 224.

provision is plain and mandatory, and prohibits the passage of any local act without the prescribed notice,[69] but in Texas the legislature can pass local laws for the maintenance of public roads and highways, without the notice required for local and special acts.[70] Noncompliance with mere statutory formalities prescribed for the introduction of private bills in the legislature does not nullify the act passed.[71]

Classification.[72]—The power of the legislature to classify municipalities and to legislate for each class separately is too well settled,[73] and an act which applies alike to all the persons or things within a legitimate class to which it is alone addressed does not violate a constitutional provision requiring uniformity of operation, nor is it local or special legislation.[74] Such classification is primarily a matter for the legislature and should be controlled by the courts only when it is apparent that the legislature has abused its discretion.[75] The classification must be founded upon legitimate differences in situation, population, or inherent condition, and the basis must be sufficiently broad to include all subjects whose conditions and wants render such legislation equally appropriate.[76] The distinction between classes must be based on something more substantial than mere caprice.[77] In Texas the exception of counties containing a second class city from the general rule making the sheriff ex officio a member of the county board of election commissioners, and substituting the circuit court clerk instead, was held to define a class arbitrarily and unreasonably.[78] Courts will take judicial notice of the fact that a county is within a statutory classification.[79]

Based on population.[80]—There can be no proper classification of cities except by population. The moment geographical distinctions are resorted to it becomes special legislation.[81] Legislation based on the classification of cities according to population is limited to the organization and administration of the city government, to the regulation of municipal affairs and matters under municipal control, to the number, character, powers and duties of officers employed in such affairs and to the exercise generally of the corporate powers vested in the municipality.[82] If it relates to subjects not included in the purposes of classification or excludes any city

Loc. Acts 1903, p. 392, regulating the license and sale of liquor in a certain county, and providing for no elections, could not be passed under a notice of a bill to prohibit the sale of liquors "outside of incorporated towns" in that county, except pursuant to an election on the question of sale or no sale. Hudgins v. State [Ala.] 39 So. 717.

69. Acts 1903, p. 488, creating the fifteenth judicial circuit, out of counties in other circuits, is a local law and void for lack of previous notice. State v. Sayre [Fla.] 39 So. 240. Act app. Mar. 6, 1903 (Acts 1903, p 88), creating the fourteenth circuit, is void for the same reason. Walker v. State [Ala.] 39 So. 242.

70. Const. art. 8, § 9. The word "maintenance" construed to include the laying out and constructing of roads, and hence Acts 24th Leg. (Laws 1895), p. 213, c. 132, creating a road system in Dallas county, is valid. Dallas County v. Plowman [Tex.] 91 S. W. 221.

71. Rev. St. South Carolina, 1893, prescribing certain formalities to be observed by those desiring special legislation, was a mere statute which could be repealed, amended, or disregarded by the legislature. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. ——.

72. See 4 C. L. 1527.

73. Cities. Beltz v. Pittsburg, 26 Pa. Super. Ct. 66; Johnson v. Gunn [Cal.] 84 P. 665. School districts. Old Forge School District, 27 Pa. Super. Ct. 586.

74. Ex parte Sohncke [Cal.] 82 P. 956. County Government Act (St. 1897, p. 538, c. 277) § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, regulating compensation for justices in townships of counties of 27th class, etc., is not local or special legislation in violation of Const. art. 11, § 5. Johnson v. Gunn [Cal.] 84 P. 665.

75. State v. Brown [Minn.] 106 N. W. 477.

76. State v. Brown [Minn.] 106 N. W. 477; Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071; Ex parte Sohncke [Cal.] 82 P. 956; Johnson v. Gunn [Cal.] 84 P. 665.

77. Johnson v. Gunn [Cal. App.] 84 P. 370.

78. Acts 1904, p. 197, c. 93, amending Ky. St. 1903, § 1596a. subsec. 2, held repugnant to Const. § 59, as special legislation where a general law could be applied, and as special legislation regulating elections. Droege v. McInerney, 27 Ky. L. R. 1137, 87 S. W. 1085.

79. Alameda County v. Dalton [Cal.] 82 P. 1050.

80. See 4 C. L. 1528.

81. Act authorizing consolidation of contiguous cities of the first class where there were but two in the state. Sample v. Pittsburg [Pa.] 62 A. 201.

82, 83. Beltz v. Pittsburg, 26 Pa. Super. Ct. 66.

within the class mentioned, it falls within the constitutional prohibition of local or special legislation and is void.[83] Legislation guarding the public health by establishing or promoting sanitary conditions is also within the purposes for which the classification of cities is permitted.[84] Classification of counties by population is proper and reasonable for legislation relating to the construction of bridges, viaducts, and public improvements.[85] A bona fide classification based on a real and substantial difference in population is generally held valid,[86] even though there may be but one city [87] or county [88] in a particular class, but the classification must not be unreasonably minute.[89] The legislature may prescribe any reasonable method for determining whether or not a county has the requisite population,[90] but the same method must be applied uniformly to all municipalities.[91]

Other classifications.[92]—Some other grounds of classification have been sustained.[93] The legislature may classify political parties with reference to differences in party conditions and numerical strength, for purposes of primary election legislation.[94] Foreign corporations constitute a class distinct from domestic corporations, and necessarily require laws of a different character,[95] but there is no warrant, in the legislation providing for intra and extra urban railways, for the theory of classification of municipal and interurban passengers on any basis which would discriminate in favor of one as against the other with respect to rights of transfer on railways within the city limits; on the contrary, within the city limits urban and interurban passengers have precisely the same rights as to transportation.[96]

84. Act June 7, 1901, P. L. 493, regulating plumbing or house drainage, is constitutional. Beltz v. Pittsburg, 26 Pa. Super. Ct. 66.

85. Laws 1903, p. 731, c. 444, valid. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.

86. State v. Brown [Minn.] 106 N. W. 477. Laws 1903, c. 333, p. 577, fixing and regulating the collection and disposition of the fees of clerks of district courts in counties having, or which may hereafter have, 200,000 population, as amd. by Laws 1905, c. 171, p. 221, is valid. State v. Rogers [Minn.] 106 N. W. 345. The special regulations in the primary election law (Laws 1905, p. 211) for holding such elections in Cook county cannot be supported on any reasonable basis of classification on account of substantial differences in situation and needs arising out of population. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

87. The provision of Sess. Laws 1905, p. 200, c. 16, § 12, for an election of city aldermen on the first Tuesday of June, 1905, is not special legislation because only one city comes under the law. State v. Malone [Neb.] 105 N. W. 893. Laws 1903, c. 289, p. 459, relative to school inspectors in cities having 10,000 inhabitants or less, not special legislation though applicable to only one city. State v. Henderson [Minn.] 106 N. W. 348.

88. Johnson v. Fulton [Ky.] 89 S. W. 672. Laws 1903, p. 731, c. 444, authorizing supervisors in counties of 150,000 population to construct certain viaducts or bridges, not special legislation because only one county came under it when passed. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.

89. Act relating to consolidation of cities with population between 6,000 and 7,000 held unreasonable. Town of Longview v. Crawfordsville, 164 Ind. 117, 73 N. E. 78.

90. A provision that reference shall be had only to the last Federal census is reasonable and valid. State v. Rogers [Minn.] 106 N. W. 345.

91. County Government Act § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, which discriminated among townships, to determine population to fix the compensation of justices, was void as local or special legislation, under Const. art. 4, § 25. Johnson v. Gunn [Cal. App.] 84 P. 370.

92. See 4 C. L. 1527.

93. Acts 1904, p. 43, c. 11, regulating the holding of circuit courts in counties having towns more than 17 miles from the county seat, and having more population than the county seat, is not special legislation in violation of Const. § 59. Johnson v. Fulton [Ky.] 89 S. W. 672. St. 1901, p. 646, c. 214, authorizing suits against the state on claims for coyote bounties authorized by St. 1891, p. 280, c. 198, was not objectionable as special legislation, such claimants constituting a class characterized by substantial qualities and attributes for purposes of appropriate legislation. Beckerdike v. State, 144 Cal. 681, 78 P. 270.

94. State v. Drexel [Neb.] 105 N. W. 174.

95. St. 1871-72, p. 826, c. 566, and St. 1899, p. 111, c. 94, in relation to foreign corporations, apply uniformly to all such corporations. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

96. City of Cincinnati v. Cincinnati Street R. Co., 3 Ohio N. P. (N. S.) 489.

Local option laws[97] are generally held not to be within the objection of being local or special.[98] The local option law of Oregon was held to be a general act, the operation of which merely was conditioned on the vote of the people in the several counties or subdivisions thereof,[99] and therefore not in violation of the constitutional provision against the passage of any law, the taking effect of which is made to depend upon any authority except as provided in the constitution,[1] but in Tennessee no act can be so framed as to derive its efficacy from a popular vote.[2]

County and township affairs.[3]—Some constitutions prohibit special legislation regulating county or township affairs.[4]

Municipalities.[5]—Special acts regulating municipal affairs are prohibited in some states.[6] In Kansas such legislation is not permissible,[7] and a general statute which attempts to confer upon special laws subsequently passed the effect of changing the boundaries of cities is unconstitutional.[8] In Virginia, cities and towns not in existence when the constitution went into effect can be incorporated under general laws, and special acts therefor are prohibited,[9] which prohibition is self-executing,[10] but special legislation as to municipal corporations is not within the inhibition of the Tennessee constitution.[11] The legislature of Idaho has power to annul a special

97. See 4 C. L. 1528.

98, 99. Laws 1905, p. 41. Fouts v. Hood River [Or.] 81 P. 370.

1. Const. art. 1, § 21. Fouts v. Hood River [Or.] 81 P. 370.

2. Acts 1905, p. 670, c. 316, which amended Acts 1903, p. 408, c. 177, relative to the running at large of small stock, so as to make it effective only in such counties as adopted it by a majority vote, was held unconstitutional. Wright v. Cunningham [Tenn.] 91 S. W. 293.

3. See 4 C. L. 1525.

4. Primary election law (Laws 1905, p. 211), which contains special provisions for Cook county, conflicts with Const. art. 4, § 22, as a special act for regulation of county affairs. People v. Chicago Election Com'rs [Ill.] 77 N. E 321. Chapter 69, p. 78, Laws 1903, is a special law for the alteration of county boundaries and therefore conflicts with Const. § 167. State v. Stark County [N. D.] 103 N. W. 913. County Government Act, § 184, subd. 13, as amended by St. 1901, which discriminates among townships in different counties in fixing compensation of justices according to population, is void as local or special legislation regulating county and township affairs, under Const. art. 4, § 25. Johnson v. Gunn [Cal. App.] 84 P. 370. Act May 10, 1901 (Sess. Laws 1901, pp. 253-256), authorizing authorities of certain towns to issue bonds in certain cases, and to provide for taxation to pay the principal and interest thereof, is void under Const. 1870, art. 4, § 22, as a regulation of township affairs, by special or local act referring only to one town. Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387.

5. See 4 C. L. 1525.

6. Act Apr. 20, 1905 (P. L. 221), for the annexation of smaller to larger cities, is a local act regulating the affairs of cities in violation of Const. art. 3, § 7. Sample v. Pittsburg [Pa.] 62 A. 201. The supplementary act of Mar. 30, 1905, to the Act app. May 2, 1885, to remove the fire and police departments of cities from political control, is invalid as a special act to regulate the internal affairs of cities. State v. Nealon [N. J. Law] 62 A. 182. Laws 1905, p. 2053 c. 729, providing for a mortgage tax, does not violate the constitutional principle of home rule (Const. art. 10, § 2) by withdrawing from local assessors the right of assessing and taxing tangible property (People v. Ronner, 95 N. Y. S. 518), nor are Laws 1905, cc. 629, 630, 631, pp. 1533, 1548, 1550, taking the control of streets and power of granting street railway franchises in New York city from the board of aldermen and giving it to the board of estimate and apportionment, repugnant to the home rule provision of the constitution; nor to Const. art. 3, §§ 26, 27, relative to aldermen and supervisors in a city including an entire county, and to the conferring of local legislative powers upon supervisors (Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941). Laws 1905, cc. 629, 630, 631, pp. 1533, 1548, 1550, giving control of streets and the conferring of street railway franchises in New York city to the board of estimate and apportionment, is not repugnant to Const. art. 3, § 18, prohibiting local bills for street railroads without consent of the proper local authorities. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941.

7. Const. art. 12, §§ 1, 5. Laws 1903, c. 529, § 109, p. 804, a special act purporting to withdraw a tract of land from the city of Wilson, is void. Levitt v. Wilson [Kan.] 83 P. 397.

8. Const. art. 12, § 1. Gen. St. 1901 (§ 2, c. 66, p. 92, Laws 1893), relative to vacation of town sites in certain cases, has such effect. Davenport v. Ham [Kan.] 83 P. 398.

9. Const. art. 8, § 117 (Va. Code 1904, p. ccxxxviii), regardless of what special acts may be passed under art 4 (Va. Code 1904, p. ccxvii). Campbell v. Bryant [Va] 52 S. E. 638.

10. Acts 1904, p. 283, c. 167, incorporating a town under special provisions, is void. Campbell v. Bryant [Va.] 52 S. E. 638.

11. Const. 1870, art. 11, § 8. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016. Laws 1903, p. 796, c. 276, not invalid as a partial suspension of general laws for the benefit of city of Clarksville. Id.

municipal charter, which was passed before the adoption of the constitution and was continued in force with other existing legislation by the constitution.[12] In Louisiana the general assembly may legislate as to municipalities of over 2,500 population by general or special statutes,[13] and the general act authorizing such cities to amend their charters, with the approval of the governor and attorney general, is valid.[14] A constitutional provision authorizing the legislature to pass general "laws" empowering municipalities to issue bonds does not require the passage of more than one law to authorize such an issue.[15]

Taxation.[16]

Courts.[17]—Special laws regulating the practice in courts are sometimes prohibited.[18]

Special privileges.[19]—Laws granting special privileges or immunities are void.[20]

Police power.[21]—The true purpose of the police power is the preservation of the health, the morals and the safety of the community,[22] and the state may enact such laws notwithstanding the fourteenth amendment to the Federal constitution, although they operate to restrict the liberty of citizens of the United States,[23] but whether legislation thus operating is in fact calculated to promote the public welfare is a proper subject of inquiry by the courts when its constitutionality is questioned.[24] The legislature may, under the police power, fix by statute the times,

12. Construing Const. art. 3, § 19; art. 11, § 2; art. 12, § 1. Butler v. Lewiston [Idaho] 83 P. 234.

13. Const. art. 48, as construed. City of Lake Charles v. Roy [La.] 40 So. 362.

14. Act No. 136, p. 224, of 1898, relative to the creation and government of municipal corporations (Lawrason act). City of Lake Charles v. Roy [La.] 40 So. 362.

15. Const. § 222. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

16, 17. See 4 C. L. 1525.

18. St. 1871-72, p. 826, c. 566, in relation to foreign corporations, and St. 1899, p. 111, c. 94, amendatory thereof, are not special laws regulating practice in courts. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. That part of Code Civ. Proc. § 204, which provides for the selection of a panel of jurors in certain cases, is not objectionable as a special act regulating the practice of courts, the same provisions being older than the constitution and retained in force by Const. art. 22, § 11. People v. Richards [Cal. App.] 82 P. 691. Laws 1903, p. 148, No. 92, even if not permitting redemption from tax sales as is allowed in execution sales, etc., does not contravene the organic law of the territory (Rev. St. 1901, p. 85, § 63) prohibiting local or special laws regulating practice in courts. Wallapai Mining & Development Co. v. Territory [Ariz.] 84 P 85. Act Mar. 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code § 3443, to provide a special proceeding in courts for determining questions as to validity of proceedings for purchase of public lands, is not a special law regulating practice in courts, all the ordinary rules as to practice, etc., being recognized therein. Boggs v. Gancard [Cal.] 8 P. 195.

19. See C. L. 1528.

20. Act Oct. 1, 1903 (Loc. Acts 1903, p. 443), for the establishment of a dispensary in the town of Elba for the sale of liquors, etc., is unconstitutional as a grant of a special privilege to the commissioners. Town of Elba v. Rhodes [Ala.] 38 So. 807. Act Mar. 20, 1905 (St. 1905, p. 422, c. 354), relative to interest on chattel mortgages, is void for granting privileges and immunities to a certain class of citizens. In re Sohncke [Cal.] 82 P. 956. Act Mar. 3, 1903 (Loc. Acts 1903, p. 137), authorizing towns and cities in Walker county to establish liquor dispensaries, is not invalid as granting exclusive privileges. Childers v. Shepherd [Ala.] 39 So. 235. Laws 1903, p. 68, c. 55, prohibiting carrying on the business of barbering on Sunday, does not grant special privileges or immunities to one class above another. State v. Bergfeldt [Wash.] 83 P. 177. St. 1871-2, p. 826, c. 566, in relation to foreign corporations, and St. 1899, p. 111, c. 94, amendatory thereof, do not grant special and exclusive rights, privileges, and immunities to any corporation. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

21. See 4 C. L. 1529.

22. City of Chicago v. Gunning System, 114 Ill. App. 377. Laws 1903, pp. 301, 302, regulating speed of automobiles in public streets, etc., a valid exercise of police power. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

23. Halter v. State [Neb.] 105 N. W. 298.

24. Laws 1903, c. 139, p. 644 (Cobbey's Ann. St. 1903, § 2375g et seq.), to prevent and punish the desecration of the United States flag, being calculated to foster sentiments of patriotism, is not vulnerable to the objection that it is not promotive of the welfare of society. Halter v. State [Neb.] 105 N. W. 298. Laws 1905, c. 538, § 5, to prevent dealing in futures, and making certain things prima facie evidence that a contract is a wagering one under Laws 1889, p. 233, c. 221, and § 7 excepting certain persons, is not void for discrimination, since prescribing when and under what circumstances and as to what offenses certain acts shall be prima facie evidence is a legislative discretion under the police power. State v. McGinnis, 138 N. C. 724, 51 S. E. 50.

places, and manner of killing animals by their owner to be used for food without any infringement of property rights.[25]

§ 3. *Subjects and titles.*[26] *In general.*—It is generally provided by state constitutions that a law shall embrace but one subject, which must be expressed in its title.[27] The purpose of the clause was to prevent surreptitious legislation,[28] by the

25. State v. Davis [N. J. Law] 61 A. 2.

26. See 4 C. L. 1529.

27. The purpose and effect of this provision discussed. State v. Bryan [Fla.] 39 So. 929.

Held to violate: Act July 9, 1897, P. L. 233, for the destruction of wild cats, etc., and payment of bounties by counties; also Act Apr. 11, 1899, P. L. 43, amendatory of the title of the act of 1897. Bennett v. Sullivan County, 29 Pa. Super. Ct. 120, distinguishing Hays v. Cumberland, 5 Pa. Super. Ct. 159, 186 Pa. 109, 40 A. 282. Act June 26, 1895 (P. L. 317), prohibiting adulteration of foods. Commonwealth v. Kehort, 212 Pa. 289, 61 A. 895. Comp. Laws §§ 1642-1645, providing for the removal of officers, being entitled "An act relating to elections," violates Const. art. 4, § 17. Bell v. First Judicial Dist. Court [Nev.] 81 P. 875. Sess. Laws 1903, p. 230, c. 123, relating to prostitution, is void under Const. art. 2, § 51, so far as it makes it unlawful for a male person to live with a prostitute. State v. Poole [Wash.] 84 P. 727. Act Sept. 28, 1903 (Loc. Acts 1903, p. 391), fixing the holding of courts in the fourteenth circuit, void under Const. § 45. Walker v. State [Ala.] 39 So. 242. Title of Laws 27th Leg. p. 283, c. 117, to prohibit railroad companies from permitting Johnson grass or Russian thistles from going to seed on their right of way and fixing a penalty, held not to cover provisions for recovery of private damages therefrom. Gulf, etc., Co. v Stokes [Tex. Civ. App.] 91 S. W. 328. Title of Act Mar. 23, 1900, p. 89, c. 29, to amend and re-enact act app. Mar. 19, 1898 (Acts 1898, p. 96, c. 38), concerning assessment of corporate franchises for taxation by cities of the first and second classes, does not warrant the provision extending the provisions of the act of 1898 to cities of the third class. Henderson Bridge Co. v. Alves [Ky.] 90 S. W. 995. Acts 1866-67, p. 307, granting to the city of Mobile the riparian rights to the river front and giving the city the "shore and soil" under the river within the city limits, embraces more than one subject, contrary to Const. art. 4, § 2. Mobile Docks Co. v. Mobile [Ala.] 40 So. 205.

Held not to violate: Act Apr. 23, 1903, P. L. 274, defining certain powers of courts of quarter sessions of the peace. Commonwealth v. Fisher, 27 Pa. Super. Ct. 175, afd. [Pa.] 62 A. 198. Act May 29, 1901, P. L. 327, relating to sale of oleomargarine. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279. Act app. Apr. 12, 1904, P. L. p. 515, protecting pigeons, etc. State v. Davis [N. J. Law] 61 A. 2. Acts 1892, p. 662, c. 469, amending charter of Writing Telegraph Company of Baltimore City, etc. Brown v. Maryland Tel. & T. Co. [Md.] 61 A. 338. Section 77 of act concerning trust companies (Revision of 1899; P. L. 1899, p. 461). State v. Twining [N. J. Law] 62 A. 402. Sess. Laws 1903, pp. 301, 302, regulating speed of automobiles on public streets, etc. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. Laws 1893, p. 136, to compel custodians of public funds to account for interest thereon. City of Chicago v. Wolf [Ill.] 77 N. E. 414. Laws 1903, c. 126, p. 170, to reorganize the state agricultural society and state fair, etc. Berman v. Cosgrove [Minn.] 104 N. W. 534. Acts 30th Gen. Assem. p. 61, c. 68, for drainage of lands of state. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. Laws 1901, c. 93, p. 493, providing penalties for blackmail, extortion, etc. In re Algoe [Neb.] 104 N. W. 751. Local Acts 1905, No. 364, to provide for locating and establishing drains in a particular county. Rice v. Ionia Probate Judge [Mich.] 12 Det. Leg. N. 645, 105 N. W. 17. Gen. Laws 1905, c. 346, p. 626. State v. Braun [Minn.] 105 N. W. 975, following State v. Bates [Minn.] 104 N. W. 7090. St. 1871-72, p. 826, c. 566, in relation to foreign corporations, and St. 1899, p. 111, c. 94, amendatory thereof. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. Sess. Laws 1902, p. 43, c. 3, in relation to the public revenue. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Laws 1903, p. 328, c. 156, § 12, relating to the public schools and defining certain offenses. State v. Packenham [Wash.] 82 P. 597. Sess. Laws 1905, p. 376, c. 180, prohibiting the unauthorized sale of railroad transportation. In re O'Neill [Wash.] 83 P. 104. Laws 1903, p. 68, c. 55, prohibiting barbering on Sunday. State v. Bergfeldt [Wash.] 83 P. 177. Act app. Mar. 9, 1903 (Sess. Laws 1903, p. 105), amending the special charter of city of Lewiston. Butler v. Lewiston [Idaho] 83 P. 234. Laws 1903, p. 150, relative to irrigation. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499. Laws 1901, p. 416, c. 232, relating to the sale of intoxicating liquors. State v. Kleinfield [Kan.] 83 P. 831. The title of Laws 1881, p. 96 (Gen. St. 1883, c. 23), covers the provisions of § 7, p. 98, which is numbered § 50 and amended by Laws 1885, p. 162. Paterson v. Watson [Colo.] 83 P. 958. Laws 1888, p. 146, to incorporate the Milledgeville & Asylum Dummy railroad company and define its powers, etc. Bonner v. Milledgeville R. Co., 123 Ga. 115, 50 S. E. 973. Act app. Aug. 4, 1904, to amend the charter of Poulan and conferring power to condemn private property for streets. Town of Poulan v. Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657. Act of 1903 (Laws 1903, p. 90), relative to procuring money, etc., on a contract to perform services with intent to defraud. Banks v. State [Ga.] 52 S. E. 74. Act Dec. 10, 1903 (Acts 1902-03, p. 626, c. 410), vesting certain powers in circuit courts. Whitlock v. Hawkins [Va.] 53 S. E. 401. Act Mar. 17, 1906, to amend and re-enact chapter 23 of the Code, re-enacting in terms an act of Dec. 10, 1903 (Acts 1902-03-04, p. 610, c. 388), and validating assessments made under it. Id. Laws 1903, c. 5106, p. 3, imposing licenses and other taxes. Schiller v. State [Fla.] 38 So. 706. The inheritance tax law of Louisiana approved June 28, 1904, falls within the requirements of Const. art.

insertion in an act of incongruous matter, having no connection or relation with the general subject as expressed in the title.[29] These constitutional provisions re-

31. Succession of Levy [La.] 39 So. 37. Acts 1903, c. 5197, p. 139, an act amendatory of Laws of Florida, c. 4001, § 720, Rev. St., relative to contracting territorial limits of cities and towns, does not conflict with Const. art. 3, § 16, as to title. Town of Ormond v. Shaw [Fla.] 39 So. 108. Laws 1901, c. 4930, p. 58, relative to the liquor traffic. Caesar v. State [Fla.] 39 So. 470. Act Feb. 23, 1903 (Acts 1903, p. 64), to prohibit sale of liquor on Sunday, does not violate Const. art. 4, § 45, as to title. Borck v. State [Ala.] 39 So. 580. Laws 1905, c. 5384, providing for the management and control of state educational institutions of Florida. State v. Bryan [Fla.] 39 So. 929. Act No. 66, p. 74, of 1888, known as the "Pharmacy Law." State v. Kumpfert [La.] 40 So. 365. Laws 1903, p. 796, c. 276, validating certain railroad stock subscriptions. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016. Acts 1904, p. 43, c. 11, regulating the holding of circuit courts in counties having towns over 17 miles from the county seat and having more population than the county seat. Johnson v. Fulton [Ky.] 89 S. W. 672. Acts 1905 (29th Leg.), p. 372, c. 153, to prevent the use of buildings, etc., for gaming. Ex parte Allison [Tex.] 90 S. W. 870. Laws 1901 (1st Called Sess.), p. 32, to amend art. 386c., Rev. St. 1895, relating to cities and towns and validating certain defective incorporations of cities. State v. Larkin [Tex. Civ. App.] 90 S. W. 912. Acts 1897, p. 166, regulating the practice of dentistry. State v. Doerring [Mo.] 92 S. W. 489. Acts of 1859, 1861, and 1865, relative to horse railways in Chicago. Blair v. Chicago, 26 S. Ct. 427. Laws 1897, p. 159, c. 114, amending art. 397, c. 2, title 18, Rev. St. 1895, relating to vacancies in city offices, does not violate Const. art. 3, § 35, relative to titles. State v. Larkin [Tex. Civ. App.] 90 S. W. 912. Act Feb. 26, 1877 (Acts 1877, p. 335), prohibiting the sale of intoxicating liquors on the Island of St. Simons. James v. State [Ga.] 52 S. E. 295. The word "prohibit" in the title is sufficiently broad to authorize legislation making penal the sale which is prohibited by the act. Id. Title of Gen. Laws 1899, p. 40, c. 33, to create corporation courts in cities, is broad enough to include a provision that the county attorney shall not be entitled to fees for prosecuting cases in such courts. Howth v. Greer [Tex. Civ. App.] 90 S. W. 211. Acts 1891, p. 57, c. 51, § 3 (Rev. St. 1895, art. 4562), establishing a railroad commission, as construed, does not embrace matter outside of its title. International, etc., R. Co. v. Railroad Commission [Tex.] 14 Tex. Ct. Rep. 42, 189 S. W. 561. Loc. Acts 1903, p. 379, establishing inferior courts in certain precincts of a county, complies with Const. art. 4, § 45, as to titles of acts. State v. Abernathy [Ala.] 40 So. 353. Act Feb. 8, 1901, defined the jurisdiction of the county court, and Acts 1903, p. 398, amending the act of 1901, further defined the jurisdiction and restored the jurisdiction of justices over misdemeanors as provided by Cr. Code 1896, art. 4, c. 142. Held that the latter act did not embrace two distinct subjects. Blue v. Everett [Ala.] 40 So. 203. Acts 1903, p. 59, to authorize cities and towns to issue bonds for certain purposes, does not violate Const. art. 4, § 45, relative to titles, because it provides for an election on such question. Blakey v. City Council of Montgomery [Ala.] 39 So. 745. Title to Acts 1894-95, p. 498, limiting the criminal jurisdiction of justices of the peace and notaries public in certain places, as construed, covers the provisions of the act. Lee v. State [Ala.] 39 So. 366. Act Feb. 20, 1902 (23 St. at Large, p. 1168), incorporating the Charleston Union Station company, does not violate Const. art. 3, § 17, because it authorizes railroad companies to subscribe for stock or guaranty its bonds. Riley v. Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485. The title of Act Mar. 6, 1901 (Laws 1901, p. 67, c. 55), relating to the taxation of inheritances, is not confined to the strict technical meaning of "inheritances," but is broad enough to include the imposition of a tax on property which passes by will or otherwise than by operation of law. In re White's Estate [Wash.] 84 P. 831. St. 1901, p. 647, c. 215, adding, re-enacting, amending, and repealing certain sections of the Political Code, relating to the revenue and taxes, does not violate Const. art. 4, § 24, as to titles of acts. Murphy v. Bondshu [Cal. App.] 83 P. 278. Laws 1905, p. 1080, c. 476, to authorize city of Elmira to issue bonds to construct a bridge or reconstruct an existing bridge, does not violate Const. art. 3, § 16, providing that no local or private bill shall embrace more than one subject which shall be expressed in its title. City of Elmira v. Seymour, 97 N. Y. S. 623. Acts 1905 (House Enrolled Act 70), amending the charter of Battle Creek, does not violate this provision by discontinuing justice courts, establishing a municipal court, and regulating the office of constable. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4. Title of Act 31, Pub. Acts 1903, p. 37, to regulate the method of procedure and practice of law in Wayne county circuit court, covers provisions for drawing juries in body of act. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147. Title of Act 171, Pub. Acts 1903, p. 230, "for the incorporation of associations not for pecuniary profit," sufficiently comprehensive to include its provisions. American Matinee Ass'n v. Secretary of State [Mich.] 12 Det. Leg. N. 262, 104 N. W. 141. Section 193 of the act to regulate elections (P. L. 1898, p. 323) is within the title of the act. State v. Johnson [N. J. Law] 63 A. 12. Act May 16, 1891, P. L. 75, sufficiently comprehensive to cover provisions of act. Nicholson Borough, 27 Pa. Super. Ct. 570. Supplement to Gen. Railroad Law, app. Mar. 28, 1902 (P. L. p. 214), now § 23, Revised Railroad Act 1903 (P. L. p. 657), not invalid as bringing condemnation of tunnel rights within the range of the eminent domain act of 1900 (P. L. p. 79) without indicating such intention in title. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130. The title of Acts 1900, p. 345, to establish a new charter for Milledgeville, etc., contains only one subject-matter, to which all the incidental powers mentioned are germane, but a certain provision in § 65, continuing other laws in force, is broader than the title and void. Bass v. Lawrence [Ga.] 52 S. E. 296.

28. In re Algoe [Neb.] 104 N. W. 751.

29. Sisson v. Buena Vista County Sup'rs

fer to the title as enacted by the legislature and not to headlines inserted in a code for convenience in indicating the subject-matter of a chapter,[30] and the constitution also contemplates the presence of a sufficient title at the time the statute is enacted, so that a subsequent amendment of the title will not validate an act with a defective title.[31] The title need not be an index to the provisions of the act,[32] although it is made by the constitution the conclusive index to the legislative intent as to what shall have operation.[33] The title should state in a brief and comprehensive form the purpose of the act and the subject-matter to be dealt with,[34] and it is sufficient if the subject and purpose of the proposed legislation is manifest from the language of the title.[35] Even if the title does not in express terms give the subject of the act but contains brief mention of all its provisions, all of which provisions relate to one subject and matters properly connected therewith, it will be sufficient.[36] The fact that the title is restrictive is not objectionable when the body of the act is correspondingly restricted.[37] Although general titles to acts must be construed liberally and in a common sense way, and it is sufficient if a general title is not made a cloak for legislating upon dissimilar matters,[38] yet when the title is restrictive, carving out for consideration a part only of a general subject, legislation under it must be confined within the same limits, and all provisions of the act outside of such limits are unconstitutional,[39] even though such provisions might have been included in the act under a broader title;[40] and even where the legislature gives a meaning to terms different from that which attaches to them in the common understanding, the title of the act must express such special meaning clearly enough to put readers upon their inquiry.[41]

While the legislature may not include in one act two different and unconnected subjects,[42] yet provisions on one subject and matters properly connected therewith may be embraced in one act[43] without being expressed in the title.[44] Including a

[Iowa] 104 N. W. 454; Blair v. Chicago, 26 S. Ct. 427; State v. Bryan [Fla.] 39 So. 929; State v. Doerring [Mo.] 92 S. W. 489.

30. The words "Forgery and Offenses Against the Currency," inserted as a chapter heading, do not form the title of an act so as to render Cr. Code 1902, § 373, void for discrepancy between the title and body. State v. Murray [S. C.] 52 S. E. 189.

31. Amendatory Act Apr. 11, 1899, P. L. 43, did not avail to validate Act July 9, 1897, P. L. 233, whose title was defective. Bennett v. Sullivan County, 29 Pa. Super. Ct. 120.

32. Commonwealth v. Fisher, 27 Pa. Super. Ct. 175, afd. [Pa.] 62 A. 198; State v. Bryan [Fla.] 39 So. 929. A literal recital in detail of the subject of legislation is not required. Alperson v. Whalen [Neb.] 105 N. W. 474; Banks v. State [Ga.] 52 S. E. 74.

33. Megins v. Duluth [Minn.] 106 N. W. 89.

34. Banks v. State [Ga.] 52 S. E. 74; Schiller v. State [Fla.] 38 So. 706.

35. Alperson v. Whalen [Neb.] 105 N. W. 474; State v. Bryan [Fla.] 39 So. 929. If the title to an act is sufficiently comprehensive to indicate the matters actually embraced therein, it cannot be said to violate this provision. In re Algoe [Neb.] 104 N. W. 751; Blair v. Chicago, 26 S. Ct. 427.

36. The title to Laws 1905, c. 5384, providing a system of management and control of the state educational institutions, is very prolix, cumbersome, and awkwardly worded, but does not conflict with Const. art. 3, § 16, as to titles of acts. State v. Bryan [Fla.] 39 So. 929.

37. There is no discrepancy between the title and body of Act of 1905 to prohibit certain games and sports on Sunday. West v. State [Fla.] 39 So. 412.

38. Megins v. Duluth [Minn.] 106 N. W. 89; State v. Bryan [Fla.] 39 So. 929.

39. Megins v. Duluth [Minn.] 106 N. W. 89. Such restriction in the title confines the body of the act to such phase of the subject as is indicated by the title. State v. Bryan [Fla.] 39 So. 929.

40. Laws 1897, c. 248, p. 459, is restricted to the recovery from municipalities of injuries to the person only. Megins v. Duluth [Minn.] 106 N. W. 89.

41. Commonwealth v. Kebort, 212 Pa. 289, 61 A. 895.

42. Schiller v. State [Fla.] 38 So. 706. Any thing included in a statute which is not germane to the general purpose expressed in the title brings the statute within this constitutional provision. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147.

43. State v. Bryan [Fla.] 39 So. 929. In an act imposing licenses and other taxes, provisions for the payment of such licenses, penalties for doing business without licenses, and penalties for failure to comply with the act, may be included. Schiller v. State [Fla.] 38 So. 706. In a liquor license act, provisions that if the licensee sells liquor at a particular time, or violates the restrictions and limitations of his license, he shall be deemed guilty of selling without a license, are germane to the subject of the act. Id. Under the title of Acts 1884-85, p. 30, pro-

penal clause in a general statute embracing a given subject, which simply provides punishment for the violation of the provisions of that act, is not an introduction into the act of things having no relation to its subject-matter.[45] The repeal of a statute on a given subject is properly connected with the subject-matter of a new statute on the same subject, and a repealing clause is valid, though not mentioned in the title,[46] and repeals by implication are not covered by provisions requiring the subject of an act to be expressed in its title.[47] Provisions relative to the time when an act shall go into effect are always germane not only to the title but to all the contents of an act.[48] In Georgia the words "and for other purposes" in a title are sufficient to cover provisions in the body of the act germane to the general subject-matter,[49] but when those words are omitted the matter in the body of the act is limited by the title,[50] although, if those words are omitted, a penalty for the violation of the act is nevertheless held germane to a statute prohibiting the sale of liquors.[51] The title of an amendatory act is sufficient if it recites the title or substance of the act amended, provided the amendment is germane to the subject of the original act and is embraced within the title of that act.[52]

Partial invalidity.[53]—An entire act is not necessarily unconstitutional because the title fails to give notice of some particular matter contained therein.[54] The

viding for the correct return of property for purposes of taxation and for other purposes, provisions could be included making certain objects personal property for purposes of taxation. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. Provisions of Act Dec. 5, 1900 (Acts 1900-01, p. 107), conferring jurisdiction of cases formerly triable in county court of Walker county upon the newly created law and equity court, were germane to the title. Morvell v. State [Ala.] 39 So. 357. Under the title of an act in relation to embezzlement (Laws 1903, p. 96, c. 5160), may be embraced a class of persons of equal moral guilt with those formerly included, and rules of pleading for indictments. Teston v. State [Fla.] 39 So. 787. Act Mar. 21, 1905 (Laws 1905, p. 131), to prohibit book-making and pool-selling, is not violative of Const. 4, § 28, for including subjects not germane. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. Provisions for an election on the question of a bond issue are clearly cognate to the general purpose of Acts 1903, p. 59, authorizing cities and towns to issue bonds for certain purposes. Blakey v. City Council of Montgomery [Ala.] 39 So. 745. A statute which defines certain powers of a court, providing that certain things may be done and the manner of their performance, may also provide that certain powers shall not be exercised without in any sense introducing another subject of legislation or going outside of the scope of its title (Act Apr. 23, 1903, P. L. 274, defining certain powers of courts of quarter sessions of the peace). Commonwealth v. Fisher, 27 Pa. Super. Ct. 175, afd. [Pa.] 62 A. 198.

44. Schiller v. State [Fla.] 38 So. 706.

45. Penal § 17, of the act concerning trust companies (Revision of 1899; P. L. 1899, p. 461). State v. Twining [N. J. Law] 62 A. 402.

46. State v. Larkin [Tex. Civ. App.] 90 S. W. 912. The repealing section (§ 3) of Act July 22, 1897, P. L. 305, is so germane to the act as to be embraced within the title, though no reference is made to repeal in the title. Phillips v. Barnhart, 27 Pa. Super. Ct. 26.

47. Const. art. 2, § 19. Coleman v. Cravens [Wash.] 82 P. 1005.

48. Wright v. Cunningham [Tenn.] 91 S. W. 293.

49. Banks v. State [Ga.] 52 S. E. 74.

50. Edwards v. Atlanta [Ga.] 52 S. E. 297.

51. James v. State [Ga.] 52 S. E. 295.

52. The amendment of Acts 1903, p. 408, c. 177, prohibiting the running at large of small stock in certain cases, into a county local option law, by Acts 1905, p. 670, c. 316, was germane to the original title. Wright v. Cunningham [Tenn.] 91 S. W. 293. Laws 1905, p. 194, amending Act July 1, 1874 (Hurd's Rev. St. 1903, c. 89), relating to divorce, does not introduce a subject outside of the original title. Olsen v. People, 219 Ill. 40, 76 N. E. 89. The fact that the titles of the several acts organizing the Chicago street railway companies referred only to "horse railways" did not prevent the exercise of the power to amend the authority conferred by the amendatory act of Feb. 6, 1865, so as to authorize the use of cable or electricity. Blair v. Chicago, 26 S. Ct. 427. Act Feb. 18, 1895, amendatory of an act to incorporate the town of Geneva, introduced a provision not within the scope of the original act and is void. Black v. State [Ala.] 40 So. 611. Act Apr. 1, 1901, to amend § 19, c. 10, Comp. Stat. 1899 (Sess. Laws, p. 63, c. 11), is void on account of introducing matter not germane to the title of the original. Knight v. Lancaster County [Neb.] 103 N. W. 1064. An act to amend an act incorporating a named town is sufficiently broad to cover any enactment germane to the general subject of incorporating a town. Town of Poulan v. Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657. Provisions validating former assessments made under a law held germane to an act amending and re-enacting such law. Whitlock v. Hawkins [Va.] 53 S. E. 401.

53. See 4 C. L. 1532.

54. Commonwealth v. Caulfield, 27 Pa.

general rule has been to sustain the portion of which the title gives notice[55] if it can be separated and treated as an independent proposition, without doing violence to the apparent purpose of the legislature,[56] and hence, under the constitutional provisions relative to the title, an act may be good in part and void in part, or the act may be absolutely invalid.[57] If both the title and the body of the act contain separate and distinct subject-matters, the act will be void in its entirety, since it would be impossible to tell what particular object, rather than another of those referred to, the legislation was intended to accomplish,[58] but, if only one subject-matter is covered by the title, the act will be operative as to the provisions covered by the title if the legislative scheme will not be defeated by the rejection of the extraneous matter.[59] The constitution of Texas expressly provides that only so much of an act shall be void as is not expressed in its title.[60]

§ 4. *Amendments and revisions. Amendments.*[61]—A general law may be amended or repealed by a general or special act if its subject-matter is not of a general nature.[62] If the provisions of a new statute are independent and complete in themselves, it will be valid although it purports to amend a statute that has been repealed.[63] An act of the legislature amendatory or supplementary to an unconstitutional act is void.[64] Where an amendatory statute is declared void, the original statute remains in force.[65]

Reference to act amended.[66]—It is generally provided that an act cannot be amended by reference to its title only,[67] but the act or section amended, or the substance of it, must be recited in the amendment,[68] but this provision has no application to an independent enactment, though it impliedly modifies a former statute.[69] A statutory provision long operative, the explicit language of which remains un-

Super. Ct. 279; State v. Davis [N. J. Law] 61 A. 2. Acts 1900, p. 345, to establish a new charter for Milledgeville, is not entirely void, though the provisions of § 65 are broader than the title and ineffective. Bass v. Lawrence [Ga.] 52 S. E. 296.

55. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279; State v. Davis [N. J. Law] 61 A. 2.

56. State v. Dow [Conn.] 60 A. 1063.

57. Bass v. Lawrence [Ga.] 52 S. E. 296.

58. Bass v. Lawrence [Ga.] 52 S. E. 296; Whitlock v. Hawkins [Va.] 53 S. E. 401.

59. Bass v. Lawrence [Ga.] 52 S. E. 296. If the part of Act Dec. 5, 1900 (Acts 1900-01, p. 107), which abolishes the Walker county court, is not included in the title, that part creating the law and equity court will nevertheless be operative. Norvell v. State [Ala.] 39 So. 357.

60. Const. art. 3, § 35. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. The contention that the liquor dealers' act "to regulate the sale of intoxicants" is void because undertaking to regulate the gift of intoxicants cannot be sustained. Id.

61. See 4 C. L. 1532.

62. Laws 1905, c. 414, p. 676, relating to the public schools of Kansas City, Kansas, is a special act amending Gen. St. 1901, § 6290, and does not violate Const. art. 2, § 17. Richardson v. Board of Education [Kan.] 84 P. 538.

63. Attorney General v. Stryker [Mich.] 12 Det. Leg. N. 518, 104 N. W. 737.

64. Laws 1887, c. 14, p. 308, amending and supplementing Laws 1885, c. 14, p. 148, relating to second-class cities, held unconstitutional, is void. City of Plattsmouth v. Murphy [Neb.] 105 N. W. 293.

65. Whitlock v. Hawkins [Va.] 53 S. E. 401.

66. See 4 C. L. 1532.

67. Act app. Aug. 4, 1904, to amend the charter of Poulan, etc., is not unconstitutional as amending an act by reference to its title only (Civ. Code 1895, § 5779). Town of Poulan v. Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657. Primary Election Law, § 2 (Laws 1905, p. 213), attempts to amend the ballot law by reference to title only. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

68. Sections of the original act not amended need not be republished, under Const. art. 4, § 25. People v. Shuler, 136 Mich. 161, 98 N. W. 986. Only such sections as are amended need to be set forth. State v. Lawson [Wash.] 82 P. 750; State v. Bergfeldt [Wash.] 83 P. 177.

69. Act June 17, 1887, P. L. 409, giving a lien for labor on improvements on leased ground, in providing for proceedings thereunder as "now provided by law in case of mechanics' liens," does not violate Const. art. 3, § 6, relative to amendatory statutes. James Smith Woolen Mach. Co. v. Browne, 206 Pa. 543, 56 A. 43. Pub. Acts 31, 1903, p. 37, relative to practice and procedure in the Wayne county circuit court, does not expressly amend any prior act but repeals all inconsistent acts and parts of acts, and does not conflict with this provision. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147. Act Apr. 24, 1905 (Acts 1905, p. 480), changing the boundaries of a levee district without reference to Act Mar. 16, 1893 (Acts 1893, p. 102), creating the district, does not violate Const. art. 5, § 22, relative to reference to acts amended. Porter v. Waterman [Ark.] 91 S. W. 754. Local Acts 1905, No. 364,

changed, will not be modified by an amendment of another law relating to a different subject-matter unless the legislative intent to alter is unmistakable.[70] The intent of a legislature in enacting a statute which declares and preserves existing laws and rights is to dispel doubts and to prevent the modification or disregard of such laws and rights, hence such statutes are not nugatory as modifying existing laws because their true purpose and effect are to prevent such modification.[71] A mere reference to local statutes to indicate the procedure necessary in taking property for public streets and places in a certain city is not repugnant to a constitutional provision against making any existing law or part thereof applicable except by inserting it in the later act.[72]

Effect.[73]—A statute amends a prior law on the same subject to the extent that the acts are in conflict, though the latter is not mentioned in the former.[74] When a statute is amended, it is to be afterward understood as if it had read from the beginning as it does amended.[75] An act intended to become applicable locally upon determination of the propriety thereof by local authorities does not necessarily supersede former legislation but may simply modify it.[76] The change of a statute from an operative one to one effective only upon its being adopted by the vote of the counties, where the body of the original act remains virtually the same, is an amendment and not a repeal.[77]

Identification.—The amendment of a section or article takes the place and number of the original, and a reference thereto by such number, in a subsequent amendment, is sufficient.[78]

Revisions.[79]

§ 5. *Interpretation. A. Occasion for interpretation.*[80] *Unambiguous statutes.*[81]—Construction and interpretation have no place where the language of a stat-

providing for drains in Ionia county, does not attempt to revise, alter, or amend the general drain law so as to require publishing at length. Rice v. Ionia Probate Judge [Mich.] 12 Det. Leg. N. 645, 105 N. W. 17. Acts 1905 (House Enrolled Act 70), by establishing a municipal court, discontinuing justices' courts, and making special provisions as to constables, does not amend the general laws of the state on those subjects so as to require publishing at length. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4. Acts 1905 (House Enrolled Act 70), which sets forth sections of Battle Creek charter actually amended, is sufficient although it does not contain at length those amended by implication. Id. Laws 1905, c. 5384, providing for the government and control of the state educational institutions, is not a revision of all the statutes of the state on the subjects of the various schools and colleges above the grade of common schools, and therefore unconstitutional for not publishing those laws at length, but it is an independent statute on a general and comprehensive subject. State v. Bryan [Fla.] 39 So. 929.

70. Laws 1898, p. 941, c. 319, adopted in lieu of Code Civ. Proc. § 2732, subd. 12, does not affect subd. 3. In re Hardin's Estate, 97 App. Div. 493, 89 N. Y. S. 978.

71. The purpose of Bankr. Act July 1, 1898, c. 541, § 8a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], is to give the bankrupt's widow the dower rights granted by the state laws. In re McKenzie [C. C. A.] 142 F. 383.

72. Const. art. 3, § 17. Laws 1896, p. 887, c. 727, § 2, making such reference, held valid. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6. Section 33 of the primary election law supplement (P. L. 1903, p. 628) is not void in the matter of reference to an existing law. State v. Johnson [N. J. Law] 63 A. 12.

73. See 4 C. L. 1533.

74. Porter v. Waterman [Ark.] 91 S. W. 754.

75. The extension of corporate existence granted by the amendatory act of Illinois, Feb. 6, 1865, to the street railway corporation created by act of Feb. 14, 1859, § 1, must be read into the charter of the street railway company created by § 10. Blair v. Chicago, 26 S. Ct. 427. A designated mode of prosecuting error to all judgments entered in pursuance of an act applies to a proceeding brought under an amended section thereof. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206.

76. Liquor laws of a general nature not superseded by local option act. Sandys v. Williams [Or.] 80 P. 642.

77. Acts 1905, p. 670, c. 316, so changed Acts 1903, p. 408, c. 177, prohibiting the running at large of small stock in certain cases. Wright v. Cunningham [Tenn.] 91 S. W. 293.

78. Art. 386c, Rev. St. 1895, was amended in 1897 (Laws 1897, p. 6, c. 7), which amendment became art. 386c, the amendment of 1901 (1st Called Sess.), p. 32, referring to art. 386c, contemplated the article as amended in 1897. State v. Larkin [Tex. Civ. App.] 90 S. W. 912.

79. See 4 C. L. 1533.

80. See 4 C. L. 1533. See, also, Constitutional Law, 5 C. L. 621.

81. See 4 C. L. 1533; 2 C. L. 1724.

ute is unambiguous and its meaning is evident,[82] and its only construction must be given to it.[83]

Who may invoke interpretation.[84]

(§ 5) *B. General rules.*[85]—The doctrine of equitable interpretation of statutes has been abandoned,[86] but they should have a rational, sensible, interpretation.[87] They are to be construed, if reasonably possible, so as to render them valid,[88] and, if not obnoxious to constitutional provisions, so as to give them full force and effect.[89] Statutes must be construed with reference to constitutional provisions, and, if susceptible of more than one construction, that must be adoped which renders them constitutional,[90] but it is not proper to ascribe to a statute a meaning at variance with its plain import so as to conform it either to constitutionality or wisdom.[91]

Intention to be reached.[92]—The only purpose of construction and interpretation is to ascertain the intention of the legislature,[93] which is to be sought in the words employed to express it, and when found should be made to govern.[94] That which is clearly not within the intention of a statute, although within the letter of it, is held not to be within the statute.[95] If a statute is so incomplete that it cannot be complied with, courts cannot supply provisions that are not indicated in the act itself, so as to make it valid and enforceable.[96] The use of inapt, inaccurate or improper terms or phrases, will not invalidate a statute, provided the real meaning of the legislature can be gathered from the context or from the general

82. United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961; Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929; State v. Henry [Miss.] 40 So. 152. The rule of contemporaneous construction has no application where there is no ambiguity. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174.

83. Holden v. U. S., 24 App. D. C. 318.

84. See 2 C. L. 1723.

85. See 4 C. L. 1533 et seq.

86. State v. Woodside, 112 Mo. App. 451, 87 S. W. 8.

87. United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961. Laws 1903, p. 9, c. 5106, § 19, licensing "lung testers, striking machines, weighing machines, chewing gum stands, automatic penny in the slot machines," etc., cannot, under a constitution prohibiting lotteries (art. 3, § 23), be construed to license the operation of a machine in which the element of chance largely predominates. State v. Vasquez, [Fla.] 38 So. 830.

88. Sauter v. Anderson, 112 Ill. App. 580.

89. The general drain law of Michigan, as construed, is not invalid as being inoperative, but Local Acts 1903, No. 495, p. 607, for the establishment of drains in Saginaw county, is inoperative because of impossibility of enforcement. Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19.

90. Whitlock v. Hawkins [Va.] 53 S. E. 401; Callaghan v. McGown [Tex. Civ. App.] 90 S. W. 319; Jiha v. Barry, 3 Ohio N. P. (N. S.) 65; Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19. Act 1905, to establish a graded school in Kernersville (Laws 1905, p. 30, c. 11), as construed, does not discriminate in favor of, or prejudicial to, either white or colored citizens in violation of Const. art. 9, § 2. Lowery v. Kernersville Graded School Trustees [N. C.] 52 S. E. 267.

91. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

92. See 4 C. L. 1533.

93. United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961; Struthers v. People, 116 Ill. App. 481; State v. Drexel [Neb.] 106 N. W. 791; McNeill v. Durham & C. R. Co., 138 N. C. 1, 50 S. E. 458; Goode v. State [Fla.] 39 So. 461; Wilson v. State [Fla.] 39 So. 471.

94. Maryland Agricultural College v. Atkinson [Md.] 62 A. 1035; State v. Cudahy Packing Co. [Mont.] 82 P. 833; Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920. An act must be construed with reference to its general scope and the intent of the legislature in enacting it. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

95. Sexton v. Sexton [Iowa] 105 N. W. 314; Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250. To adhere to a technical and literal construction, manifestly contrary to the intention and meaning of the legislature, would be to legislate and not to construe. State v. Drexel [Neb.] 106 N. W. 791. Courts are not authorized to legislate or read into statutes constructions that will do violence to the language thereof, but in all cases where a reasonable construction can be placed upon a statute, when a literal construction would lead to absurd and unreasonable results, that construction should be favored. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 439, 88 S. W. 250.

96. Laws 1905, c. 176, p. 659, purporting to prescribe the method of selecting juries in counties of less than 30,000 population, is invalid, because the method provided is impossible of execution (State v. Reneau [Neb.] 106 N. W. 451), but clerical errors or misprisions which, if not corrected, would render the statute unmeaning or incapable of reasonable construction, or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected if practicable (Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950). One "third" used by inadvertence for one "fourth," in Laws 1896, p. 888, c. 727, § 4. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6.

purpose and tenor;[97] nor will inadvertences or omissions vitiate an act if they can be supplied by reference to the context or to other statutes, and the true reading made obvious and the real meaning made apparent.[98] An ambiguous or meaningless clause in a statute may be rejected, or words supplied by intendment to express the obvious intention of the legislature.[99] The maxim that the expression of one thing is the exclusion of another is to be applied only when it appears to point to the legislative intent, and never to defeat the plainly indicated purpose of the law-making body.[1]

Whole act to be considered.[2]—The intention of the law givers is to be deduced from the whole statute taken and compared together,[3] for the presumption is that the legislature intends its acts and every part of them to be valid and capable of being carried into effect.[4] All parts of a statute must be made to harmonize,[5] and apparent inconsistencies and conflicts reconciled, if possible.[6] Separate sections of a code must be construed, if possible, so as to harmonize and effectuate each.[7]

All language to be effectuated.[8]—In order that the true meaning of the legislature may be determined and carried out, every word, phrase, term, and provision of an act must be considered,[9] and none should be considered as unmeaning if a construction can be found which will give it effect.[10]

Avoiding hardship or absurdity.[11]—A construction is not to be put upon a statute which would manifestly effectuate injustice, if it is susceptible of a different construction,[12] for considerations of what is reasonable always have a potent influence, and statutes will be construed in such a manner as to prevent absurdity, hardship, or injustice, and to favor public convenience.[13]

Presumption of legislative knowledge of the law.[14]—In the construction of statutes the legislature is presumed to have known its constitutional limitations,[15] and, in enacting a subsequent statute on the same subject, the legislature is presumed to have known of a prior statute.[16]

97, 98. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

99. Form of ballots prescribed to be used for and against the local adoption of a law held to be ambiguous and corrected, in Acts 1905, p. 670, c. 316, amending the stock law (Acts 1903, p. 408, c. 177). Wright v. Cunningham [Tenn.] 91 S. W. 293.

1. Swick v. Coleman, 218 Ill. 33, 75 N. E. 807

2. See 4 C. L. 1535.

3. Laws 1905, c. 72, p. 371; Cobbey's Ann. St. 1903, § 9069. State v. Drexel [Neb.] 106 N. W. 791. Intention to be gathered from the context of the entire act as showing its general purpose. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389. Every part must be given effect if possible. Hoover v. Saunders [Va.] 52 S. E. 657; State v. Fink [Neb.] 104 N. W. 1059; State v. Harter, 188 Mo. 516, 87 S. W. 941; United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961.

4. Hoover v. Saunders [Va.] 52 S. E. 657.

5. Code 1904, § 3385, relative to signing of bills of exceptions, construed and harmonized. Hoover v. Saunders [Va.] 52 S. E. 657; Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950; Goode v. State [Fla.] 39 So. 461.

6. State v. Houghton [Ala.] 38 So. 761.

7. Code §§ 192, 194. Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920. Burns' Ann. St. 1901, §§ 1712, 1713, relative to "recognizances" on appeals from justices in criminal cases, made clear and plain in meaning by § 1714. Cain v. State [Ind. App.] 74 N. E. 1102.

8. See 4 C. L. 1535.

9. Eddy v. People, 118 Ill. App. 138; United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961; Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950; State v. Fink [Neb.] 104 N. W. 1059; Hawkins v. Louisville & N. R. Co. [Ala.] 40 So. 293; Goode v. State [Fla.] 39 So. 46.

10. Act Jan. 23, 1905, prohibiting corporations engaged in any trust agreement from doing business in the state, construed so as to effectuate the phrase "in this state and elsewhere." Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42.

11. See 4 C. L. 1536.

12. Sexton v. Sexton [Iowa] 105 N. W. 314; Louisville & N. R. Co. v. Jarvis, 27 Ky. L. R. 986, 87 S. W. 759. Rev. St. 1895, art. 1867, which provides that the rights, powers, and duties of executors and administrators shall be governed by the common law where no statutes apply, cannot be so interpreted as to abolish the common law as to administration of partnership estates and result in serious and embarrassing consequences. Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 S. W. 6.

13. Medlin v. Seideman [Tex. Civ. App.] 13 Tex. Ct. Rep. 39, 88 S. W. 250.

14. See 4 C. L. 1536.

15. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

16. Town of Benton v. Willis [Ark.] 88 S. W. 1000

General and particular provisions.[17]—General provisions in statutes yield to special ones so far as necessary to effectuate the particular purposes of the latter,[18] hence, where a specific provision of a municipal incorporation act confers a certain power, such power cannot be enlarged by general language found elsewhere in the act.[19]

(§ 5) *C. Aids to interpretation. The title.*[20]—The title of an act is made by the constitution a conclusive index to the legislative intent as to what shall have operation.[21]

Marginal notes.[22]

Legislative history.[23]—In construing statutes the courts will not be guided by the debates of the legislature which enacted it.[24]

Contemporaneous interpretation.[25]—Due regard should be given to contemporaneous construction, and if that construction was generally received and acquiesced in, it will not be disturbed except for weighty reasons,[26] but the rule of contemporaneous construction has no application unless it can be said that the statute is ambiguous or of doubtful meaning.[27]

Official construction.[28]—The uniform and contemporaneous construction of a statute by officers charged with its execution should not be disregarded,[29] and a doubt as to the construction of a statute will be resolved in favor of such practical interpretation.[30] A practical construction by the legislature of its powers and long prevailing custom is a matter entitled to consideration by the courts.[31]

Surrounding conditions.[32]—If the words of the statute seem to be of doubtful import it may be necessary to look beyond them to ascertain the legislative intent, the circumstances under which the act was passed, what evil, if any, was meant to be redressed, what was the leading object of the law, and what the subordinate and relatively unimportant objects,[33] and the court will adopt that interpretation most in accord with the manifest purpose of the statute.[34] An erroneous description in a statute may be helped out by extraneous evidence.[35] The courts will resort to

17. See 4 C. L. 1535.

18. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542; Callaghan v. McGown [Tex. Civ. App.] 90 S. W. 319.

19. City of Chicago v The Gunning System, 114 Ill. App. 377.

20. See 4 C. L. 1534.

21. Megins v. Duluth [Minn.] 106 N. W. 89.

22. See 2 C. L. 1723.

23. See 4 C. L. 1534.

24. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350.

25. See 4 C. L. 1534, 1535; 2 C. L. 1723.

26. Eddy v. People, 118 Ill. App. 138. A contemporaneous exposition of statutory provisions not clear in themselves, and a well-established practice accordingly, universally acquiesced in and followed for many years, precludes a construction by the court which would impose a penalty for conduct consistent with such exposition and practice. State v. Northern Pac. R. Co. [Minn.] 103 N. W. 731. The fact that, for twenty-five years, agents of domestic insurance companies were not required to procure licenses, they not being referred to in the acts, is a binding, contemporaneous construction of Ky. St. 1903, §§ 634, 681, 694, 753, 761, on that subject. Commonwealth v. Gregory [Ky.] 89 S. W. 168.

27. The fact that a police board for five years erroneously construed Laws 1899, p. 101, a police pension act, as retrospective, did not estop it from withdrawing a pension. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174.

28. See 4 C. L. 1534.

29. Galm's Case, 39 Ct. Cl. 55. Practice and acquiescence in the machinery for the selection of jurors for many years, sanctioned by the courts, furnishes an almost irresistible reason for not overturning it. People v. Richards [Cal. App.] 82 P. 691.

30. Action of the territorial board of equalization in increasing or diminishing the valuation of property in counties by classes. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization [Ariz.] 84 P. 511.

31. State v. Bryan [Fla.] 39 So. 929.

32. See 4 C. L. 1535.

33. Maryland Agricultural College v. Atkinson [Md.] 62 A. 1035; State v. Maloney [La.] 39 So. 539; Prowell v. State [Ala.] 39 So. 164; United States v. Ninety-nine Diamonds [C. C. A.] 139 F. 961; Eddy v. People, 118 Ill. App. 138; State v. Henry [Miss.] 40 So. 152; Holden v. U. S., 24 App. D. C. 318.

34. Smith v. St. Paul, etc., R. Co. [Wash.] 81 P. 840; State v. Maloney [La.] 39 So. 539.

35. A reference in Laws 1905, p. 856, c. 703, § 12, to "section 74 of the public laws of 1905," in view of the passage of the bill through the legislature, held to mean § 74 of c. 590, although such chapter was not referred to. Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.

the common knowledge of the public at large on conditions which led to the adoption of a statute.[36] They may, and, when the statute is not clear, must take cognizance of the trend of public events which make the "history of the times" in so far as the same touches or furnishes the moving cause for the statute under review.[37]

Prior acts [38] on the same subject may be taken into consideration to ascertain the legislative intent,[39] to solve, but not to create, an ambiguity,[40] and the legislative policy may be looked to as persuasive in a matter of doubtful construction.[41] Before a statute will be construed as radically departing from the settled policy of the state, it must be made to appear by some language not ambiguous and susceptible to two constructions.[42]

Original act.[43] *Re-enactment statutes.*[44]—The legislature, in re-enacting a statute, will be held to have adopted the prior construction put upon it by the courts.[45]

Statutes adopted from other states are presumed to have been enacted with reference to the previous construction there given to them,[46] unless some change of phraseology has been made necessitating a change of construction;[47] and before this rule will be discarded a court must find some more potent reason than its own conviction of the unwisdom of such legislation as construed by the courts of the state of its origin,[48] but this rule is subject to the qualification that the judicial construction of the statute in the state of its origin does not contravene the well established policy prevailing on the subject in the adopting state.[49] The rule is applied in Texas to its statute of frauds, which was copied from the English statute, holding it to have been adopted with the construction previously put upon it by the English courts.[50]

State statutes in Federal courts.[51]—Federal courts follow the construction placed upon constitutional provisions or statutes by the courts of last resort of the state by which they are enacted.[52]

Enforcement.[53]—The fact that a penal statute has been on the statute books for more than 40 years, and no attempt has been made to enforce it in a particular manner, has no weight as to the construction of the meaning and operation of the statute.[54]

36. State v. Maloney [La.] 39 So. 539.
37. Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42.
38. See 4 C. L. 1535.
39. Struthers v. People, 116 Ill. App. 481; Fortune v. Buncombe County Com'rs [N. C.] 52 S. E. 950.
40. Holden v. U. S., 24 App. D. C. 318.
41. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.
42. Tax deeds having been made prima facie evidence of the regularity of proceedings, by statutory provisions for many years, the policy of the state in relation thereto was not changed by implication by Acts 7 and 11 of 1882, supplementing and repealing respectively the tax law of 1869. Hoffman v. H. M. Loud & Sons' Lumber Co. [Mich.] 12 Det. Leg. N. 356, 104 N. W. 424.
43. See 4 C. L. 1535.
44. See 4 C. L. 1537.
45. By carrying bodily into Rev. St. 1881, §§ 978, 980, the provisions of Rev. St. 1852, p. 485, pt. 4, c. 3, §§ 1, 3, relating to bastardy, adopted their prior construction. Evans v. State [Ind.] 75 N. E. 651. Shannon's Code, §§ 4146, 4147, relative to widow's dissent from provisions of will in lieu of dower. Walker v. Bobbitt, 114 Tenn. 700, 88 S. W. 327.
46. Sess. Laws 1905, p. 483, Act No. 309, adopted verbatim et literatim from Indiana. Preston Nat. Bank v. Brooke [Mich.] 12 Det. Leg. N. 708, 105 N. W. 757.
47. Rev. St. Arizona 1901, par. 3880, compared with par. 2282, Gen. Laws Colorado 1877, and construed. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization [Ariz.] 84 P. 511.
48. Preston Nat. Bank v. Brooke [Mich.] 12 Det. Leg. N. 708, 105 N. W. 757.
49. The construction of Acts 1881, p. 238, c. 170, § 8, relative to the employment of competent coal mine bosses, by the courts of Pennsylvania, held contrary to the policy of the laws of Tennessee. Smith v. Dayton Coal & Iron Co. [Tenn.] 92 S. W. 62.
50. The members of the congress of the Republic of Texas, which enacted the statute, are presumed to have been advised of the English construction of it. City of Tyler v. St. Louis S. W. R. Co. [Tex.] 91 S. W. 1.
51. See 4 C. L. 1535.
52. Duffy v. Glucose Sugar Refining Co., 141 F. 206.
53. See 4 C. L. 1534, n. 25; 2 C. L. 1725.
54. A poolroom held to be a gaming house, punishable as a nuisance under B. &

Laws in pari materia.[55]—Laws in pari materia must be read together and effect given to each if possible,[56] but in construing statutes by the aid of others in pari materia, the courts are not restricted to legislation enacted on the same day or at the same session, nor is it necessary that one statute construed by the aid of another should expressly refer to it.[57]

Acts of same date.[58]

Acts of same session.[59]

(§ 5) *D. Words, punctuation, and grammar.*[60] *Words.*[61]—The words of a statute are to be construed according to their ordinary and popular meaning in connection with the subject-matter to which they relate,[62] but the precise meaning of particular words will yield to an intent obvious from the whole act.[63] The right of the legislature to define the terms it uses is beyond question,[64] but in construing

C. Comp. § 1930, although that section had not been applied to gaming houses before State v. Nease [Or.] 80 P. 897.

55. See 4 C. L. 1535.

56. Struthers v. People, 116 Ill. App. 481; Swift & Co. Newport News [Va.] 52 S. E. 821. Statutes relating to the same subject enacted at different dates, the later having in view the earlier and intended to be amendatory or supplementary thereto, are in pari materia. State v. Kiley [Ind. App.] 76 N. E. 184. Rev. St. 1881, § 5318; Act June 28, 1895 (Burns' Ann. St. 1901), §§ 7283b, 7283k and Act 1897 (Burns' Ann. St. 1901), § 7283, amending Rev. St. 1881, § 5318, all regulating the liquor traffic, constitute one system, having but one subject-matter and but one purpose, and must be construed together. Cahill v. State [Ind. App.] 76 N. E. 182; State v. Kiley [Ind. App.] 76 N. E. 184.

57. Familiar illustrations are found in the interpretation and construction of progressive statutes relating to the rights of married women, or the regulation of the liquor traffic. Indianapolis Northern Traction Co. v. Ramer [Ind. App.] 76 N. E. 808. Statutes for the condemnation of lands for steam railroads and electric railways so construed. Id. All statutes upon the same general subject are to be regarded as part of one system, later statutes being considered supplementary or complementary to the preceding ones. State v. Omaha Elevator Co. [Neb.] 106 N. W. 979. The laws to suppress "pool rooms" and "turf exchanges" are on the same subject, and what is clear in one statute may be called in aid to explain what is doubtful in another (Civ. Code, art. 17). State v. Maloney [La.] 39 So. 539.

58. See 4 C. L. 1535, n. 40 et seq.; 2 C. L. 1726.

59. See 2 C. L. 1726.

60. See 4 C. L. 1535, 1536.

61. See 4 C. L. 1536.

62. Swift & Co. v. Newport News [Va.] 52 S. E. 821; Cameron v. Sexton, 110 Ill. App. 381. Particular words are to be taken in the sense in which, looking to the entire act they appear to have been used, rather than according to their accepted lexicographic definition. City of Houston v. Potter [Tex. Civ App.] 91 S. W. 389. In the statutes of Ohio, when the term "railroad" is used, steam railroad is meant, unless it clearly appears that some other meaning is intended. In re Avon Beach & Southern R. Co., 3 Ohio N. P (N. S.) 561. "Pool-room" interpreted. State v. Maloney [La.] 39 So. 539. The words "conviction" and "judgment" being interchangeable in common parlance, an indictment referring to two former "judgments" against defendant for burglary was sufficient, although the statute used the word "convictions." State v. Smith [Iowa] 106 N. W. 187. The word "railroad" in Rev. St. 1883, c. 6, § 42, as amd. by c. 145, p. 160, Pub. Laws 1901, includes the equipment, roadbed, depot sites, warehouses, and real estate used in the business, and the words "line or system" cannot be disconnected therefrom. State v. Canadian Pac. R. Co. [Me.] 60 A. 901 Free transportation of customers of a store across a river and back held to be in effect a "transportation for hire" and a keeping of a "ferry," in violation of Rev. St. 1883, c. 20, §§ 1, 2. Inhabitants of Peru v. Barrett [Me.] 60 A. 968. "Land" and "property" in eminent domain act of 1900, P. L. p. 79, include such rights and easements as are necessary for constructing tunnels. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130. The words "false" and "falsity" in statutes which impose forfeitures generally imply culpable negligence or wrong. United States v. Ninety-Nine Diamonds [C. C. A.] 139 F. 961. In act Apr. 8, 1885 (Laws 1885, p. 151, c. 48), relative to telegraph and telephone companies, "discrimination," "partiality," and "transmission," construed. Western Union Telegraph Co. v. Braxtan [Ind.] 74 N. E. 985. The terms "embezzle" and "fraudulently convert to his own use" are synonymous or kindred phrases. Teston v. State [Fla.] 39 So. 787.

63. Sexton v. Sexton [Iowa] 105 N. W. 314. Less regard is to be paid to the words used than the policy which dictated the act. Goode v. State [Fla.] 39 So. 461. Executors are "assigns" within the meaning of Laws 1891, § 110, c. 100, p. 271, authorizing the issue of a tax deed to "the purchaser, his heirs or assigns." Blakemore v. Cooper [N. D.] 106 N. W. 566. The word "inheritances" in the title to the Inheritance Tax Law of Mar. 6, 1901 (Laws 1901, p. 67, c. 55), is not strictly technical in its meaning but broad enough to include a tax on property passing by will, or otherwise than by operation of law. In re White's Estate [Wash.] 84 P. 831. In an act prohibiting the sale of intoxicating liquors the word "sale" is to be construed in its broad and comprehensive sense, and therefore includes what is commonly known as barter and exchange. James v. State [Ga.] 52 S. E. 295.

64. Commonwealth v. Kebort, 212 Pa. 289, 61 A. 895.

statutes, a word is not to be given a limited or specialized meaning until such meaning is made by legislative enactment.[65] General words in a statute, following a specific enumeration, include only cases of the same kind enumerated.[66]

Punctuation.[67]—In the construction of statutes courts will, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation or repunctuate, if need be.[68]

Grammar.[69]—Grammatical rules of construction are not rules of law,[70] and while statutes are to be construed first in acordance with the ordinary rule of grammar, yet the grammatical sense must in all cases yield to the clearly disclosed legislative intent.[71]

(§ 5) *E. Exceptions, provisos, conditions, and saving clauses.*[72] *Things excepted.*[73]—An exception to the provisions of a statute, not suggested by any of its terms, cannot be introduced by construction from considerations of mere convenicnce.[74]

The proviso.[75]—The general office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it,[76] and usually it is not permitted to enlarge the meaning of the enactment so as itself to operate as a substantive enactment,[77] although it will have that effect if such is the plain intention of the lawmakers.[78] It is a general rule that a proviso relates only to the paragraph which immediately precedes it, but that rule has no application where it clearly appears that the proviso was intended to apply to the whole statute.[79] The meaning of a proviso must generally be ascertained from the language in it.[80]

(§ 5) *F. Mandatory or directory acts.*[81]—Whether a statute is permissive or mandatory depends upon the intent of the legislature.[82] The most satisfactory and conclusive test of the mandatory or directory character of a statute is whether the prescribed mode of action is of the essence of the thing to be accomplished, or whether it relates to immaterial matter, or matter of convenience.[83] Generally, statutes which confer upon public officers power to act, for the sake of justice or concerning public interests or the rights of third persons, though permissive in form, are mandatory, and impose a positive duty to act when the conditions calling for the exercise of the power are present.[84]

65. Venable v. Schafer, 7 Ohio C. C. (N. S.) 337.

66. Struthers v. People, 116 Ill. App. 481.

67. See 4 C. L. 1536.

68. Lorenz v. U. S., 24 App. D. C. 337.

69. See 4 C. L. 1535, 1536.

70. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929.

71. State v. Scaffer [Minn.] 104 N. W. 139; Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929.

72. See 4 C. L. 1537, and Special Article, 4 C. L. 1543.

73. See 2 C. L. 1728.

74. A failure to prop the roof of a working place in a mine, as provided by § 6871 Rev. St. 1905, cannot be excused because the presence of props might render mining inconvenient or impracticable. Morris Coal Co. v. Donley [Ohio] 76 N. E. 945.

75. See 4 C. L. 1537.

76, 77. Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920; State v. Bryan [Fla.] 39 So. 929.

78. The proviso to Code § 192, added by Acts 1905, p. 398, c. 367, given a broad interpretation so as to apply to all railroad companies, both foreign and domestic. Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920.

79. Last proviso of Laws 1895, c. 306, p. 720, applies to whole statute. State v. Webber [Minn.] 105 N. W. 68.

80. Propst v. Southern R. Co., 139 N. C. 397, 51 S. E. 920.

81. See 4 C. L. 1536.

82. State v. Barry [N. D.] 103 N. W. 637. Code § 530, relative to interest on judgments, is directory only so far as it provides that the judgment must itself state that it shall bear interest from its date until paid, the intent of the legislature being to allow interest on judgments. McNeill v. Durham & C. R. Co. 138 N. C. 1, 50 S. E. 458.

83. Appeal of Spencer [Conn.] 61 A. 1010. The code provisions as to selecting jurors are directory and are to be given a liberal construction, a substantial compliance therewith is all that is necessary. People v. Richards [Cal. App.] 82 P. 691. The requirement of Rev. St. 1901, p. 3864, requiring the assessor to attach his certificate to the assessment roll, is directory. Wallapai Mining & Development Co. v. Territory [Ariz.] 84 P. 85.

84. That part of § 8246, Rev. Codes 1899,

(§ 5) *G. Strict or liberal constructions.*[85]—The rule of strict construction when applicable is subordinate only to that cardinal rule in the construction of all statutes that the true intention of the lawmakers should be ascertained and carried out.[88]

Statutes changing the common law.[87]—Statutes in derogation of the common law must be strictly construed,[88] and are not presumed to change or alter it further than is expressly declared by the terms thereof.[89] The common law is not to be deemed abrogated by statute unless it clearly appears that such was the legislative intent.[90]

Penal statutes.[91]—Penal statutes are to be strictly construed,[92] and persons, matters, and things which are not clearly included cannot be brought within their operation by mere construction,[93] but the rule should not be so applied as to thwart the manifest intention of the legislature.[94] The only exception to the rule requiring strict construction of statutes which are in their nature penal is in the case of those which provide for more than actual compensation, such as double or treble recovery.[95] In California all the provisions of the penal code are to be construed according to the fair import of their terms, to effect its object, and promote justice.[96]

Various other strict constructions.[97]—The general rule is that statutes granting authority to levy special assessments against private property must be strictly construed and the mode of procedure prescribed closely followed in all essential details.[98] Statutes granting special and exclusive privileges are to be strictly construed, the presumption being that the state has granted in express terms all that

relative to action of judges when juries impose higher or lower punishments than authorized by law, is mandatory. State v. Barry [N. D.] 103 N. W. 637. In the determination of the question as to whether or not a provision as to the proceedings of a public officer is of the essence of the thing to be accomplished, the cases agree that significance is to be attached to the nature of the act, and also the language and form in which the provision is couched, as, for instance, whether or not it is, on the one hand, affirmative and such as would naturally be chosen to prescribe directions for an orderly and proper dispatch of business, or, on the other, negative or prohibitive, or expressive of a condition precedent, or appropriate to the creation of a limitation of power. Appeal of Spencer [Conn.] 61 A. 1010.

85. See 4 C. L. 1537.

86. Casey v. St. Louis Transit Co. [Mo. App.] 91 S. W. 419.

87. See 4 C. L. 1537.

88. McNemar v. Cohn, 115 Ill. App. 31; Brown v. Rouse, 116 Ill App. 513, Hay v. Baraboo [Wis.] 105 N. W. 654. Civ. Code 1895, § 3777, providing that certain limitations of actions shall run against the state in tax matters. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. The "Civil Rights Act," Starr & Curtis' Rev. St. § 84, c. 38, p. 1247, creates a new liability unknown to the common law. Grace v. Moseley, 112 Ill. App. 100. Rev. St. 1899, § 2864, for the forfeiture of $5,000 for wrongful death through negligence of corporations, is in derogation of the common law. Casey v. St. Louis Transit Co. [Mo. App.] 91 S. W. 419.

89. Brown v. Rouse, 116 Ill. App. 513.

90. McNemar v. Cohn, 115 Ill. App. 31.

91. See 4 C. L. 1537.

92. Field v. U. S. [C. C. A.] 137 F. 6; Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. Code, §§ 2125, 2129, 2130, prohibiting combinations by common carriers to prevent continuous shipments, are penal in character. Clark v. American Express Co. [Iowa] 106 N. W. 642. Rev. St. 1899, § 2864, for the forfeiture of $5,000 for wrongful death through negligence of corporations, is a penal statute. Casey v. St. Louis Transit Co. [Mo. App.] 91 S. W. 419. Laws 1897, c. 384, p. 313, § 30, requiring annual reports from corporations and making directors personally liable, must be strictly construed in favor of the directors. Hoboken Beef Co. v. Hand, 104 App. Div. 390, 93 N. Y. S. 834.

93. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. The officer of a bankrupt corporation, who is not and has not been a bankrupt cannot be punished under § 29b, Bankrupt Law of July 1, 1898, c. 541, 30 St. 554 (U. S. Comp. St. 1901, p. 3433), for concealing the property of the corporation from its trustee. Field v. U. S. [C. C. A.] 137 F. 6. Rev. St. 1899, § 1255, relative to the receipt and dispatch of messages by telephone and telegraph companies, is penal, and any party sought to be punished under it must be brought strictly within its penal provisions. Pollard v. Missouri & K. Tel. Co. [Mo. App.] 90 S. W. 121.

94. State v. Kiley [Ind. App.]76 N. E. 184.

95. Casey v. St. Louis Transit Co. [Mo. App.] 91 S. W. 419.

96. Pen. Code § 4. And this rule applies to penal statutes not a part of the Code; Act Mar. 12, 1887 (St. 1886-87, p. 112, c. 95), § 8, relative to the exploding of explosives in certain places. In re Mitchell [Cal. App.] 82 P. 347.

97. See 4 C. L. 1537.

98. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165.

it designed to grant at all,[99] and any ambiguity in the terms of the grant must be resolved against the grantee and in favor of the public.[1]

Remedial statutes.[2]—While the rule is that remedial statutes are to be liberally construed,[3] the rule is never carried to the extent of giving the act retrospective effect, unless such an intent appears in the act.[4]

Revisions.[5]

Other liberal constructions.[6]

(§ 5) *H. Partial invalidity.*[7]—If the unconstitutional provisions of a statute are not essentially and inseparably connected with the valid portions, so that they may be disregarded and the legislative purpose may be accomplished independently of them, it is the duty of the court to give effect to so much of the act as is good,[8] but where the unconstitutional portions of the act were obviously the principal, if not the sole inducement for the passage of the act,[9] or are of such import that the other parts without them would cause results not contemplated or desired by the legislature, then the entire act must be held inoperative;[10] and if a particular provision is unconstitutional, it cannot be given effect in part if the result would be to accomplish a purpose which the lawmaking power never intended, or where the

99, 1. Blair v. Chicago, 26 S. Ct. 427.

2. See 4 C. L. 1538.

3. Revenue Act (Acts 1901, p. 373, c. 174) § 81, is remedial in its nature and broadly constructed. State v. Kelly, 111 Tenn. 583, 82 S. W. 311.

4. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174.

5. See 4 C. L. 1536.

6, 7. See 4 C. L. 1538.

8. State v. Bryan [Fla.] 39 So. 929. Where the first section of a statute conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by inconsistent provisions in a later section which do not so conform, but such later provisions are nugatory and will be disregarded. State v. Bates [Minn.] 104 N. W. 709. The question whether the latter part of Pen. Code 1895, art. 402, as amended by Gen. Laws 1903, p. 55, c. 40, is unconstitutional and vitiates the entire article as amended held immaterial, the prosecution being sustainable under the article as it stood before amendment. Uloth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521. 87 S. W. 822.

Acts partially valid: The invalidity of part of V. S. 4663, relative to sale of drugs by dealers in general merchandise, does not affect the part relating to the sale by medical practitioners, wholesale dealers, etc. State v. Abraham [Vt.] 61 A. 766. Shannon's Code, § 7423, workhouse law § 18, is unconstitutional as a delegation of legislative power, but is so independent of the rest of the act as not to affect it. Fite v. State, 114 Tenn. 646, 88 S. W. 941. The provision of Loc. Acts 1905, No. 392, p. 128, relative to salary of mayor, is valid notwithstanding the invalid part relative to courts. City of Battle Creek v. Barnes [Mich.] 12 Det. Leg. N. 1034, 106 N. W. 1119. Unconstitutional provisions in Sess. Laws 1905, p. 325, c. 66, held not to affect the rest of the act. State v. Drexel [Neb.] 105 N. W. 174. Acts 1902, p. 98, No. 90, regulating traffic in intoxicating liquors, is not entirely void by reason of the invalidity of § 21, excepting certain sales. State v. Hazelton [Vt.] 63 A. 305. Laws 1893, p. 136, requiring custodians of public funds to account for interest thereon, though void as to state officers, is otherwise valid City of Chicago v. Wolf [Ill.] 77 N. E. 414 Acts 1905, p. 30, c. 11, to establish a graded school in Kernersville, is not entirely invalid on account of the provisions in § 7 illegally discriminating between the white and colored races. Lowery v. Kernersville Graded School Trustees [N. C.] 52 S. E. 267. Unconstitutional portion of St. 1903, p. 350, c. 381, for construction of bridge by city of Boston, separable from valid part. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937. Conceding that the provisions of Sess. Laws 1905, c. 16, p. 200, §§ 12, 13, relating to election of police judge, are invalid, the rest of the act is not affected thereby. State v. Malone [Neb.] 105 N. W. 893. Sess. Laws 1905, p. 377, c. 180, prohibiting unauthorized sale of railroad transportation, is not invalidated by provisions of § 5, conceding their invalidity. In re O'Neill [Wash.] 83 P. 104. Certain provisions in Laws 1905, c. 5384, relative to the management of the state educational institutions of Florida, even if invalid, could not avoid the entire act. State v. Bryan [Fla.] 39 So. 929.

9. State v. Galusha [Neb.] 104 N. W. 197. Held to govern in case of a scheme of legislation for a particular purpose where the law, specially enacted to create it and referring to other laws required for a complete plan, is unconstitutional and was the inducement to the rest of the scheme. Huber v. Martin [Wis.] 105 N. W. 1031.

10. State v. Patterson [Fla.] 39 So. 398.

Entirely void: The biennial election law (H. R. 235, Sess. Laws 1905) held entirely void. State v. Galusha [Neb.] 104 N. W. 197. Pen. Code § 321, prohibiting combinations, etc., being inseparably connected with § 325, which is unconstitutional under Const. U. S. amdt. 14, is invalid. State v. Cudahy Packing Co. [Mont.] 82 P. 833. In Acts 1905 (House Enrolled Act 70), amending the charter of Battle Creek, a provision that the associate judge of the municipal court created shall exercise his powers subject to the discretion of the judge vitiates the entire act. Attorney General v. Loomis [Mich.] 12 Det.

legislative intent is doubtful.[11] Invalid provisions of an act, not operating to avoid the whole, cannot be relied on to excuse the performance of a duty enjoined by the valid portions of the act.[12]

§ 6. *Retrospective effect.*[13]—Retrospective legislation impairing vested rights or obligation of contracts is elsewhere treated.[14]

In general.[15]—All statutes are to be construed prospectively only, unless the language used clearly requires a retrospective construction,[16] and the rule applies to repeals and revisions of the revenue laws,[17] but in some instances, in the application of remedial statutes, the rule is applied with less strictness.[18] Courts, however, do not look with favor upon retroactive or retrospective legislation.[19]

Retrospective legislation is not invalid unless prohibited by the constitution,[20] or unless they partake of the nature of ex post facto laws,[21] impair the obligation of contracts,[22] deprive a citizen of property without due process of law,[23] or disturb

Leg. N. 553, 105 N. W. 4. Acts 1905, c. 5420, discriminating between white and colored pasengers on street cars, held entirely void under Const. U. S. 11th amdt. § 1. State v. Patterson [Fla.] 39 So. 398.

11. In the San Francisco Freeholders' Charter, § 2, providing for certain concurrent jurisdiction by the police court with the superior court, rendering the section invalid, the provision as to such concurrence of jurisdiction cannot be separated so as to give the police court an exclusive jurisdiction. Robert v. Police Court of City & County of San Francisco [Cal.] 82 P. 838.

12. State v. Malone [Neb.] 105 N. W. 893.

13. See 4 C. L. 1539.

14. See Constitutional Law, 5 C. L. 619.

15. See 4 C. L. 1539.

16. Atwood v. Buckingham [Conn.] 62 A. 616; Greenwood v. Trigg, Dobbs & Co. [Ala.] 39 So. 361; Whitlock v. Hawkins [Va.] 53 S. E. 401; Swift & Co. v. Newport News [Va.] 52 S. E. 821; Old Forge School District, 27 Pa. Super. Ct. 586; United States v. Atchison, etc., R. Co., 142 F. 176. The fact that the legislature incorporates the original act in an amendment and then adds new provisions does not show a legislative intent to give the new matter a retrospective effect, but is simply a compliance with the constitutional requirement as to setting forth the law amended. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174. Code § 1898, relating to computation on foreclosure by a building association, is, by the express provisions of Acts 27th Gen. Assem. p. 32, c. 48, applicable to contracts made prior to the taking effect of the Code. Iowa Cent. Bldg. & Loan Ass'n v. Klock [Iowa] 104 N. W. 352.

Held not retrospective: Laws 1899, p. 101, amending Laws Apr. 29, 1887 (Laws 1887, p. 122), a police pension act. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174. Laws 1905, p. 194, amending Act July 1, 1874 (Hurd's Rev. St. 1903, c. 89), relating to divorce as construed. Olsen v. People, 219 Ill. 40, 76 N. E. 89. Act Feb. 5, 1903, P. L. 4, relating to school districts in townships and boroughs erected therefrom. Old Forge School District, 27 Pa. Super. Ct. 586. Act Feb. 19, 1903, § 3 (32 Stat. 848, c. 708 [U. S. Comp. St. Supp. 1905, p. 600]), known as the "Elkins Act." United States v. Atchison, etc., R. Co., 142 F. 176. Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p 215, c. 272, prohibiting marriage, between uncles and nieces, did not invalidate a prior marriage between such relatives. Weisberg v. Weisberg, 98 N. Y. S. 260. Act Feb. 23, 1899 (Acts 1898-99, p. 34), amending Code 1896, §§ 1920-1922, as to filing judgments in probate office, etc., is prospective and does not cure a defective certificate previously filed. Greenwood v. Trigg, Dobbs & Co. [Ala.] 39 So. 361. Under Act June 4, 1901, P. L. 364, municipal liens have no priority over mortgages executed prior thereto. Martin v. Greenwood, 27 Pa. Super. Ct. 245.

Held retrospective: Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), relative to the recovery of forfeitures in actions pending under Gen. St. 1902, § 324, when that section was repealed, is retroactive. Atwood v. Buckingham [Conn.] 62 A. 616.

17. Rev. Codes 1895; Laws 1897, c. 126, p. 256, and Laws 1901, c. 166, p. 221, relating to redemption from tax sales, do not apply to certificates issued under former law. Blakemore v. Cooper [N. D.] 106 N. W. 566.

18. Laws 1899, p. 101, amending Laws Apr. 29, 1887 (Laws 1887, p. 122), the police pension act, is not a remedial act within the rule giving such acts retrospective effect. Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174.

19. Whitlock v. Hawkins [Va.] 53 S. E. 401.

20. There is no such prohibition in the Connecticut constitution. Atwood v. Buckingham [Conn.] 62 A. 616. Sess. Laws 1902, p. 73, c. 3, § 65, imposing an annual state license tax on the stock of foreign corporations, is not an ex post facto or retrospective law, within the prohibition of Const. art. 2, § 11, because Sess. Laws 1897, p. 157, c. 51, and Sess. Laws 1901, p. 116, c. 52, required the payment of certain fees before doing business in the state. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

21. Whitlock v. Hawkins [Va.] 53 S. E. 401. Laws 1901, c. 4930, § 4, p. 59, which was expressly repealed by Laws 1903, c. 5187, p. 131, held to be in force and effect as to defendant to prevent the repealing act from being ex post facto legislation. Goode v. State [Fla.] 39 So. 461.

22. Whitlock v. Hawkins [Va.] 53 S. E. 401. Act Mar. 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code § 3443, so as to provide an additional method of contesting the right to purchase public land, etc., though retroactive, impairs no obligation of contract as it merely gives a new remedy. Boggs v. Ganeard [Cal.] 84 P. 195.

23. Whitlock v. Hawkins [Va.] 53 S. E. 401.

vested rights.[24] As long as vested rights are not impaired, retrospective laws giving new and additional remedies for existing rights, or giving a remedy at law where one previously existed in equity only, or vice versa, are valid;[25] and a statute respecting practice passed during the pendency of proceedings in the lower court and remaining in force will be applied in the final disposition of the case,[26] but a judgment correct at the time it was rendered and properly affirmed by the supreme court cannot be affected on a rehearing by a statutory change in practice made after the decision on appeal.[27] Statutes are not to be construed so as to interfere with vested rights if their terms admit of any other reasonable construction.[28]

Curative acts.[29]—A curative act can be effectual to do that only which the legislature would have been competent to provide for and require to be done by a law prospective in its operation.[30] The legislature can no more validate an election carried by a corrupt use of money, or by the votes of infamous persons, than it could authorize such proceedings by prior action.[31] The idea implied in the ratification of an act performed without previous legislative authority is that it communicates authority which relates back to, and restrospectively vivifies and legalizes, the act as if the power had been previously given.[32] Curative acts applying to all places, things, or subjects affected by the conditions remedial are not objectionable as special legislation.[33] While the legislature of Texas cannot, under the constitution, by special act create a municipal corporation having a population of 10,000 or less, yet it can, by special act, pass a curative act legalizing the defective incorporation of a city already in existence under the general laws.[34] The effect of a curative act is not destroyed by its subsequent repeal.[35]

§ 7. *Repeal. A. In general.*[36]—There must appear to have been an intention of the legislature to repeal.[37] An act is not repealed or superseded by a sub-

24. The inheritance tax law of Louisiana, approved June 28, 1904, even if retroactive, is not unconstitutional as an interference with vested rights. Succession of Levy [La.] 39 So. 37.

25. Boggs v. Ganeard [Cal.] 84 P. 195. An act making broader the right of joinder may be made applicable to pending actions in which judgment has not yet been rendered. Gibson v. Miller, 7 Ohio C. C. (N. S.) 96.

26. New provisions concerning appeals in street opening cases incorporated in the Greater New York charter. In re Commissioner of Public Works, 97 N. Y. S. 503.

27. Act app. Feb. 25, 1905, p. 33, c. 21, purporting to amend Civil Practice Act, § 197. Powell v. Nevada C. & O. R. Co. [Nev.] 82 P. 96.

28. Jersey City v. North Jersey St. R. Co. [N. J. Law] 61 A. 95.

29. See 2 C. L. 1732.

30. Whitlock v. Hawkins [Va.] 53 S. E. 401. Laws 1903, p. 148, No. 92, providing a remedy and procedure for collection of taxes due, even if retrospective, is so only in validating proceedings which might have been authorized in advance. Walapai Mining & Development Co. v. Territory [Ariz.] 84 P. 85. Under Const. art. 8, § 10, providing that no municipality shall give any money or property or loan its money or credit to any individual, Laws 1903, p. 1182, c. 515, validating any bona fide payment by a county treasurer to a supervisor of the taxes from railroad corporations in the town, did not validate such a payment wrongfully made prior to the passage of the act. Town of Walton v. Adair, 97 N. Y. S. 868. Act Mar. 17, 1906, to amend and re-enact chapter 23 of the Code as previously amended, and to validate assessments made under such chapter as amended, held valid as curative legislation. Whitlock v. Hawkins [Va.] 53 S. E. 401. Act Apr. 8, 1899 (P. L. 57), known as the "Curative Act" validating street improvements made under invalid laws or ordinances, is constitutional. In re Marshall Avenue [Pa.] 62 A. 1085.

31. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

32. Acts 1903, p. 796, c. 276, validated a railroad stock subscription. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

33. Gen. Laws 1905, cc. 76, 77, pp. 93, 94, legalizing school bonds voted on by cities, under Gen. Laws 1893, c. 204, p. 333, and amendatory acts, are valid. State v. Brown [Minn.] 106 N. W. 477.

34. Sp. Laws 27th Leg. (1st Called Sess.), p. 1, held valid. State v. Larkin [Tex. Civ. App.] 90 S. W. 912.

35. Act of Illinois, June 9, 1897, ratifying grants to street railway companies of permission to use cable, electric, or other motive power. Blair v. Chicago, 26 S. Ct. 427.

36. See 4 C. L. 1540.

37. Struthen v. People, 116 Ill. App. 481. Where a street railway company was already in existence and had acquired the right to make alterations in its charter, etc., as provided in Act Mar. 20, 1903 (Acts 1903, p. 114,

sequent unconstitutional act.[38] The words "all other acts and parts of acts in conflict with this act," in a repealing section, add nothing to the legal effect of the act.[39] A statute which is operative is not repealed by being changed to one that is effective only upon adoption by vote of the people of a county, but such a change is an amendment.[40] Statutes existing when a new constitution is adopted, and inconsistent with its provisions, are nullified by such constitution.[41]

Effect on vested rights.[42]—Vested rights secured by the constitution cannot be disturbed by the legislature,[43] nor the obligation of a legislative contract impaired.[44] The right of the general government to an income tax which had attached to an officer's pay was not taken away by a repealing act.[45]

Effect on penalties.[46]—Pending prosecutions are not affected by the repeal of statutes when excepted by saving clauses.[47]

Repeal of repealing statutes.[48]

Effect on pending actions.[49]—A general saving clause whether in the repealing act or in the general statutes, providing that the repeal of a statute shall not affect accrued rights or pending causes, protects such rights or causes,[50] but in the absence of such saving clause or statute, the right to bring suit to recover a penalty or forfeiture falls with the act providing for it,[51] although in Indiana, where a statute, under which a liability has accrued has been repealed, and the repealing act does not provide for the extinguishment of such liability, the repealed statute

amending Code § 1283, its right to do so was saved from repeal by the reserving clause of Act Ala. Oct. 2, 1903, p. 326, § 47. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

38. Gen. Acts 1903, p. 566, fixing the time for holding the circuit court in Washington county, being unconstitutional, the terms of that court remained as fixed in act approved Feb. 21, 1899, Acts 1898-99, p. 1345 Yellow Pine Lumber Co. v. Randall [Ala.] 39 So. 565.

39. Struthers v. People, 116 Ill. App. 481. Although such a clause has the form of an express repeal, yet in legal effect it expresses nothing more than a legislative intention of repealing all prior acts and parts of acts conflicting with the provisions found in the body of the new act. State v. Drexel [Neb.] 105 N. W. 174.

40. Acts 1903, p. 408, c. 177, prohibiting the running at large of small stock in certain cases, was so changed by Acts 1905, p. 670, c. 316. Wright v. Cunningham [Tenn.] 91 S. W. 293.

41. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

42. See 4 C. L. 1540.

43. Laws 1901, p. 966, c. 354, § 30, limiting to 6 months the right of action against officers of a corporation failing to file annual reports, affected only the remedy and did not interfere with any vested rights in any person entitled to recover. Davidson v. Witthaus, 106 App. Div. 182, 94 N. Y. S. 428.

44. The assurance held out by the state at tax sales by the revenue laws of 1890, as amended in 1891, that tax certificates and deeds would be prima facie evidence of regularity, constituted a substantial inducement to the purchase and the contract with the state, which could not be taken away by subsequent legislation without impairment of contract obligations. Blakemore v. Cooper [N. D.] 106 N. W. 566, following and approving Fisher v. Betts, 12 N. D. 197, 96 N. W. 132. The repeal of the coyote bounty act (St. 1891, p. 280, c. 198) did not destroy the effect of certificates as to claims already accrued. Bickerdike v. State, 144 Cal. 681, 78 P. 270. Laws 1905, c. 5384 repealing various acts relative to the state educational institutions and providing a new system of government for the same, does not violate the obligation of any contracts. State v. Bryan [Fla.] 39 So. 929. The repeal of the Illinois act of June 9, 1897, ratifying grants to street railway companies of permission to use cable, electric, or other motive power, could not affect contracts, already in existence and validated by it. Blair v. Chicago, 26 S. Ct. 427.

45. Repealing Act 14th July, 1870 (16 Stat. L. p. 261, § 17). Galm's Case, 39 Ct. Cl. 55.

46. See 2 C. L. 1733.

47. Under Acts 1905, p. 757, c. 169, § 699, relating to public offenses and providing for the continuance of pending prosecutions under existing laws, such prosecutions were governed as to procedure by the former law. Miller v. State [Ind.] 76 N. E. 245.

48. See 2 C. L. 1733.

49. See 4 C. L. 1541.

50. Under Gen. St. 1902, § 1, saving actions pending for the recovery of penalties or forfeitures, the repeal of § 324 for the recovery of penalties from administrators did not affect pending actions. Atwood v. Buckingham [Conn.] 62 A. 616. The right to redeem from a tax sale made under Laws 1890, c. 132, p. 376, was a "right accrued" perpetuated by the saving clause in Rev. Codes 1895, § 2686, notwithstanding the repeal of the 1890 revenue laws by Rev. Codes 1895. Blakemore v. Cooper [N. D.] 106 N. W. 566.

51. Atwood v. Buckingham [Conn.] 62 A. 616. The provisions of Laws 1890, c. 132, p. 376, requiring service of notice to terminate right of redemption from tax sales, is still in force as to sales made thereunder. Blakemore v. Cooper [N. D.] 106 N. W. 566.

will be treated as still in force for the purpose of sustaining any proper action for the enforcement of such liability.[52]

(§ 7) *B. Implied repeal. In general.*[53]—Repeals by implication are not favored,[54] and in order that such a repeal may be given effect, the two statutes in question must be irreconcilable.[55] Every rule of construction is to be applied without efficiently harmonizing provisions seemingly in conflict before holding that there is any irreconcilable inconsistency between them,[56] the legal presumption being that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law, without expressing an intent to do so.[57] Nevertheless a subsequent statute repeals a prior one in so far as they are clearly repugnant,[58] although the earlier statute is not mentioned in the later one,[59] and even where statutes in pari materia are to be construed together, so as to make a harmonious whole, those of later date are to be given controlling preponderance where there is any inconsistency or uncertainty,[60] and where two sections in the same act are irreconcilable, the provisons of the later

52. Burns' Ann. St. 1901, § 248. Pittsburgh, etc., R. Co. v. Oglesby [Ind.] 76 N. E. 165.

53. See 4 C. L. 1541.

54. Struthers v. People, 116 Ill App. 481; Hoffman v. H. M. Loud & Sons' Lumber Co. [Mich.] 12 Det. Leg. N. 356, 104 N. W. 424; Hay v. Baraboo [Wis.] 105 N. W. 654; Central City v. Morquis [Neb.] 106 N. W. 221; State v. Omaha Elevator Co. [Neb.] 106 N. W. 979; Lee v. State [Ala.] 39 So. 366; Town of Benton v. Willis [Ark.] 88 S. W. 1000; Louisville & N. R. Co. v. Jarvis, 27 Ky. L. R. 986, 87 S. W. 759. Especially of long existent laws. State v. Vasquez [Fla.] 38 So. 830. Not prohibited by the Oregon constitution. Sandys v. Williams [Or.] 80 P. 642.

55. Struthers v. People, 116 Ill. App. 481; Lee v. State [Ala.] 39 So. 366. Act May 23, 1901 (Kirby's Dig. § 5450), relative to the restraint of cattle running at large in cities of first and second classes and incorporated towns, does not repeal Act Apr. 20, 1895 (Kirby's Dig. § 5451), prescribing procedure in case of impounded animals. Town of Benton v. Willis [Ark.] 88 S. W. 1000. Cobbey's Ann. St. 1903, §§ 6130, 6131, being c. 72, p. 587, Laws 1887, do not operate as a repeal of that part of § 8756 relating to the liability of municipalities for the construction and repair of bridges. Central City v. Morquis [Neb.] 106 N. W. 221. The amendment of 1854 (2 Acts 1853-54, p. 453, c. 913) was not repealed by that of 1869 (1 Acts 1869, p. 230, c. 1393), to the original charter of the Shelby Railroad, (2 Laws 1850-51, p. 368, c. 431), § 8. Louisville & N. R. Co. v. Jarvis, 27 Ky. L. R. 986, 87 S. W. 759. Acts 1873, p. 100, c. 64 (Shannon's Code, §§ 4067, 6028), giving county courts concurrent jurisdiction with the chancery and circuit courts to sell real estate of decedents, etc., does not impliedly repeal the Code provisions for the administration of insolvent estates. Key v. Harris [Tenn.] 92 S. W. 235. The local option law (Laws 1905, p. 41, c. 2, § 1) does not supersede the provisions of the Portland city charter (Sp. Laws 1903, p. 3, § 73, subds. 21, 48) relative to regulation of the liquor traffic. Sandys v. Williams [Or.] 80 P. 642.

56. Hay v. Baraboo [Wis.] 105 N. W. 654. Gen. Laws 1896, c. 240, § 10, as amd. by Pub. Laws p. 81, c. 671, making decrees "conclusive" in certain cases, harmonized with Gen. Laws, c. 246, § 2, providing for setting aside decrees in certain cases. Masterson v. Whipple [R. I.] 61 A. 446.

57. Wilson v. State [Fla.] 39 So. 471. Rev. St. 1892, § 2396, is not repealed by § 2598, as amended by Laws 1901, c. 4965, p. 111, they not being contradictory but denouncing separate and distinct offenses against females. Id.

58. Struthers v. People, 116 Ill. App. 481; Sandys v. Williams [Or.] 80 P. 642; State v. Drexel [Neb.] 105 N. W. 174. The anti-trust act of 1897, known as the "Gondring Act" (Sess. Laws 1897, p. 347, c. 79), was repealed by implication by the "Junkin Act" (Sess. Laws 1905, p. 636, c. 162) except as to § 1, defining "trusts." State v. Omaha Elevator Co. [Neb.] 106 N. W. 979. If there is an irreconcilability between the domestic wine act (Acts 1877, p. 33) and Acts 1877, p. 335, prohibiting the sale of liquors on the Island of St. Simons, it extends only to the wine whose sale is the subject of the general law, and the local act would be unrepealed so far as it related to liquors other than the wine referred to in the general law. James v. State [Ga.] 52 S. E. 295. The conflict between § 2805 and the later act of May 10, 1902, terminates all the powers of city boards of equalization appointed under the prior section. State v. Godfrey, 6 Ohio C. C. (N. S.) 511.

Determination of priority: Where an annual volume of laws contains two acts, identical except as to the penalty imposed, and both signed on the same day, it is competent for a reviewing court, having before it the case of an accused person sentenced under one of these acts, to determine whether the act under which sentence was pronounced was the one actually in force. Derby v. State of Ohio, 6 Ohio C. C. (N. S.) 91. In determining such a question, resort will first be had to the journals of the two houses of the General Assembly, and failing to thus establish which act was the last to be signed, the one which appears last in the printed volume, and to which the compiler of that volume has given the highest number, will be presumed to be the latest expression of the lawmaking power on that subject. Id.

59. Porter v. Waterman [Ark.] 91 S. W. 754.

60. State v. Kiley [Ind. App.] 76 N. E. 184.

one will govern.[61] Where the general provisions of a statute conflict with the express provisions of a later act, the latter governs, although the words of the earlier general act, standing alone, would be broad enough to include the subject of the more particular provisions,[62] but prior acts prohibiting particular kinds of combinations do not except dealers coming thereunder from the provisions of a later act covering all illegal combinations.[63] If the conflicting part of the later act is unconstitutional and void, it will not operate to repeal the former act by implication.[64] Repeals by implication are not affected by constitutional provisions requiring the subject of every act to be expressed in its title.[65]

A subsequent statute revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, repeals the former statute,[66] although there are no express words to that effect.[67]

General and special laws.[68]—Special acts are not repealed by general ones unless specially mentioned or such purpose is apparent,[69] or unless there is an irrecon-

61. The provisions of §§ 160, 215, County Government Act 1897 (St. 1897, p. 503, c. 277), relating to the assessor's compensation for collecting poll taxes, cannot be reconciled, and § 215 prevails. Alameda County v. Dalton [Cal.] 82 P. 1050.

62. Act Feb. 25, 1852 (50 Ohio Laws, p. 84), giving probate courts general jurisdiction in habeas corpus (now incorporated in § 5727, Rev. St. 1906), conflicts with Act Mar. 23, 1875 (72 Ohio Laws, p. 79, now in § 97, Rev. St 1906), with respect to fugitives from justice, and is pro tanto repealed by the latter. Thomas v. Evans [Ohio] 76 N. E. 862.

63. Sess. Laws 1887, p. 675, c. 114, and Sess. Laws 1897, p. 352, c. 80, prohibiting combinations by grain dealers do not except them from the operation of later anti-trust acts, Sess. Laws 1897, p. 347, c. 79, and Sess. Laws 1905, p. 636, c. 162, applying to all illegal combinations to fix prices, etc. State v. Omaha Elevator Co. [Neb.] 106 N. W. 979.

64. Act Mar. 20, 1905 (St. 1905, p. 422, c. 354), regulating chattel loans, did not take effect until May 19, and Act Mar. 21, 1905 (St. 1905, p. 711, c. 550), relating to the same subject, became effective on its passage. Held that the later act, as to the conflicting provisions, was unconstitutional. Ex parte Sohncke [Cal.] 82 P. 956

65. Coleman v. Cravens [Wash.] 82 P. 1005.

66. Phillips v. Barnhart, 27 Pa. Super. Ct. 26; Struthers v. People, 116 Ill. App. 481; Sandys v. Williams [Or.] 80 P. 642; State v. Omaha Elevator Co. [Neb.] 106 N. W. 979.

67. Sandys v. Williams [Or.] 80 P. 642; Struthers v. People, 116 Ill. App. 481. A codifying act, designed to reduce all statutes on a subject to a complete and harmonious system, is presumed to exhaust the subject to which it relates unless a different intention appears on its face or is an irresistible inference from special circumstances, and is substituted in the place of all statutes previously existing and becomes the sole rule of action. Pratt Institute v. New York [N. Y.] 75 N. E. 1119. The Code of Alabama of 1896 is not a mere compilation of the laws previously existing, but is a body of laws duly enacted so that laws which previously existed cease to be law when omitted from said Code, and additions which appear therein become the law from the approval of the act adopting the Code. State v. Towery [Ala.] 39 So. 309. Act Feb. 12, 1885 (Acts 1884-85, p. 114), § 2, relative to the vesting of the homestead title in the widow in certain cases, was neither adopted into Code 1886 nor otherwise preserved, and was therefore repealed by the adoption of the Code. Bailes v. Daly [Ala.] 40 So. 420. But where a Code is a mere compilation, the failure by the compilers to include therein a statute, or a part thereof, does not amount to a repeal of it by implication when there is nothing in such Code inconsistent with it. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. The compilers of the Code of 1895 failed to include part of an act of 1885 (Acts 1884-85, p. 30) relative to returns of property for taxation, but it was held to be in effect. Id.

Repealing revisions: Act July 22, 1897, P. L. 305, intended as a substitute for the prior legislation relative to the assessment of school tax on male taxables over 21 years of age, as authorized by Act Apr. 11, 1862. Phillips v. Barnhart, 27 Pa. Super. Ct. 26. Act July 11, 1901, P. L. 663, to regulate and establish sheriffs' fees, supersedes and repeals the fee bill of Apr. 2, 1868, P. L. 3. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350. Acts 1903, p. 428, to further regulate elections, is a general revision of the election laws, intended as a substitute for existing ones, and repealing them. Prowell v. State [Ala.] 39 So. 164. Act Mar. 11, 1893 (Laws 1893, p. 286, c. 120), relating to incompetents residing out of the state, repealed all conflicting laws by implication. Coleman v. Cravens [Wash.] 82 P. 1005.

68. See 4 C. L. 1542.

69. Acts 1894-95, p. 498, limiting the criminal jurisdiction of justices and notaries in certain places, was not repealed by Acts 1900-01, p. 216, § 8, relative to the jurisdiction of the circuit in the same locality. Lee v. State [Ala.] 39 So. 366. The result of the cases may be summed up as follows: First, the rule that a general statute does not repeal by implication a local act with different or inconsistent provisions is still the prevailing rule. Second, but the rule being founded on a presumption of legislative intent, will not apply when a contrary intent is clearly apparent. Third, where the clear, general intent of the legislature is to establish a uniform and mandatory system as in the municipal classification acts, the presumption must be that the local acts are in-

cilable repugnancy between them,[70] but conflicts in terms and provisions between general and local acts often exist and yet both stand, each having a field of operation.[71] In such case a later general act does not repeal an earlier one, unless a repeal is necessary to give the words of the general act any meaning at all.[72] A city cannot be incorporated under a general law while a special act incorporating it is in force.[73]

STAY OF PROCEEDINGS.

Grounds for stay.[74]—The effect of supersedeas bond is treated elsewhere.[75] Stay of proceedings is usually discretionary, and its granting or refusing is not error unless arbitrary and prejudicial.[76] The power to grant a stay is equitable in its nature, and intended to prevent the vexatious multiplication of suits,[77] and it is held in some jurisdictions that to authorize a stay the suit must be vexatious,[78] and a stay necessary to the ends of justice.[79] On the bringing of a second suit involving the same facts and for the same purpose against the same defendant, the rule is well established that a stay of proceedings will be granted until the costs of the former suit are paid, and if not paid in a reasonable time, a dismissal of the action will be proper,[80] but the motion for a stay for nonpayment of costs in some jurisdictions is addressed entirely to the discretion of the court and cannot be reviewed on appeal.[81] However, in case of vexatious suits brought and then abandoned, and new suits brought without payment of costs, it might be an abuse of discretion not to grant a stay until costs were paid or secured.[82] In New York stay of proceedings will not be granted for nonpayment of costs unless the new trial is conditioned thereon by statute or by the court.[83] On reversal of judgment the trial court may stay proceedings until plaintiff pays cost of appeal,[84] and it has been held that the court may stay a second appeal until the costs of the first appeal

tended to be repealed. Fourth, where an act is passed to carry into effect a mandatory general provision of the constitution, the presumption must be that it was intended to repeal even local acts inconsistent with its terms. Nissley v. Lancaster County, 27 Pa. Super. Ct. 405. Act Feb. 27, 1798, 3 Sm. L. 306, and Act Apr. 14, 1864, P. L. 422, creating "The Directors of the Poor and of the House of Employment of the County of Lancaster," and fixing their compensation, is not affected by Act July 2, 1895, P. L. 424, fixing salaries of county directors of the poor in counties of over 150,000 inhabitants. Id. Act Mar. 24, 1892 (P. L. p. 255), relating to assessment of damages in condemning land in first class cities, is not rendered inapplicable to Newark by the passage of the general condemnation act of 1900 (P. L. p. 79), that city being within the exception of § 17, p. 86. Morris v. Newark [N. J. Law] 62 A. 1005. Gen. Tax Law, Laws 1896, p. 797, c. 908, § 4, subd. 7, as amended, exempting from taxation certain real estate of educational institutions, repealed the special provisions on that subject in the charter of the Pratt Institute (Laws 1887, p. 497, c. 398). Pratt Institute v. New York [N. Y.] 75 N. E. 1119. Acts 24th Leg. (Laws 1895), p. 213, c. 132, creating a road system for certain counties, provides that in case of conflict with the general laws the local act shall prevail. Held that the latter controlled as to the method of condemnation and award of damages. Dallas County v. Plowman [Tex.] 91 S. W. 221.

70. Section 11 of the Child Employment Act of 1903 repeals by implication § 22 of the Miners' Act of 1899, in so far as it permitted the employment of children of the age of 14 years. Struthers v. People, 116 Ill. App. 481.

71. State v. Houghton [Ala.] 38 So. 761.

72. Act Feb. 28, 1903 (Acts 1903, p. 166), creating a board of revenue for Montgomery county, etc., was not repealed by the general election law (Acts 1903, p. 438). State v. Houghton [Ala.] 38 So. 761.

73. State v. Larkin [Tex. Civ. App.] 90 S. W. 912.

74. See 4 C. L. 1549.

75. See Appeal and Review, 5 C. L. 121.

76. Section 6, c. 136, Code 1899, W. Va., construed 1st, to vest a discretion in the court; 2nd, that the decision of case pending in other court must have a material or controlling effect upon case in which stay is asked. Dunfee v. Childs [W. Va.] 53 S. E. 209.

77, 78. Ex parte Mathews [Ala.] 40 So. 78.

79. Dunfee v. Childs [W. Va.] 53 S. E. 209.

80. Ex parte Mathews [Ala.] 40 So. 78.

81, 82. Davenport, Rock Island, etc., R. Co. v. De Yeager, 112 Ill. App. 537.

83. It is a reversible error of law to grant a stay of proceedings under Code Civ. Proc. § 779 of N. Y., when the court grants a new trial on appeal not conditioned on the payment of costs under the statute. Smith v. Cayuga Lake Cement Co., 105 App. Div. 307, 93 N. Y. S. 959.

84, 85. Ex parte Mathews [Ala.] 40 So. 78.

are paid.[85] The court may grant a stay in the later action to await the decision of the former.[86] Of course the stay must be on the ground that the action in the other case is material to the decision of the case stayed,[87] but a suit cannot be suspended merely because a legal question may be common to two suits,[88] nor ought a stay to be granted if another suit pending involves only one of the matters litigated, as it does not cover the whole case,[89] nor when the decision in one case will not determine the other;[90] but the fact that a former action is pending for the same cause between the same parties is not ground for a stay where the courts are in different states or one is a Federal and the other a state court,[91] not even if the Federal court is in a district embracing the state.[92] Neither does the fact that a criminal action is pending involving the same state of facts furnish a good cause for continuing a civil case,[93] nor will a stay of proceedings be granted a second action to await the decision of a prior action involving the same subject-matter, but different parties with varying and unparallel authority over the matter in litigation.[94] Proceedings under an interlocutory money judgment may be stayed without securing its holder for payment in case of affirmance on appeal.[95] The fact that an appeal is pending, if properly shown,[96] is ground for a stay in lower court,[97] but where the movant for a stay was the one who incurred the unpaid costs of an appeal,[98] and where the appeal was prosecuted merely to right an error committed by the lower court,[99] no ground for stay is laid because nothing constituting "vexatious multiplications" of suits is involved.[1] The grant of a stay of proceedings pending an appeal from an order vacating an attachment of the property of a foreign corporation is proper.[2]

86. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S. 144.

87. Section 6, c. 136, Code 1899, W. Va., construed to effect that actions for stay under it must be governed by common-law principles. Dunfee v. Child [W. Va.] 53 S. E. 209. An appeal which has been dismissed takes effect on that day and not at the end of the term of the supreme court, so that a denial of a stay of proceedings granted after dismissal of appeal but before end of term was not error. Id.

88, 89. Dunfee v. Childs [W. Va.] 53 S. E. 209.

90. Plaintiff sued defendant in supreme court for conversion and breach of contract; answer, a general denial. In a previous case in municipal court defendant had sued the plaintiff for work, labor, and services rendered, and plaintiff had set up a counterclaim. Plaintiff procured a stay of proceedings in municipal court. This was error. Walkup v. Mesick, 110 App. Div. 326, 97 N. Y. S. 142. Where an action against a mortgagor, his wife, and several judgment creditors, to foreclose a mortgage was begun after an action instituted by the mortgagor as sole plaintiff to have the mortgage set aside as void for usury, no stay will be granted in the former action to await the decision of the later, because neither the parties, nor the cause of action, nor the relief sought are the same. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S. 144.

91. It was no abuse of discretion to refuse a stay of proceedings in foreclosing a mortgage brought in a county court, because the mortgagor had brought an action involving the validity of the same mortgage in a Federal court. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S 144.

92. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S. 144. Where an attorney taking advantage of a technical nonresidence begins an action in a Federal court for the evident purpose of vexatious delay, no stay will be granted in a subsequent action in a state court involving a similar cause of action. Id.

93. In an action to abate and enjoin a nuisance under the prohibitory liquor law, it was no error to refuse a continuance until the criminal action involving the same offense was decided. Cowdery v. State [Kan.] 80 P. 953.

94. City of New York v. Interborough Rapid Transit Co., 109 App. Div. 596, 96 N. Y. S. 314. Action brought by the City of New York against the Interborough Rapid Transit Co. to compel them to remove signs, vending and weighing machines from subway stations. Later similar action was brought by the Board of Rapid Transit Railroad Commissioners of the city. A stay of proceedings in later action granted on theory that former action covered all that the second one did. Held error because the board may have had greater or perhaps the only authority in the matter and preference is given by statute to actions by the board. Id.

95. Potter v. Rossiter, 109 App. Div. 37, 95 N. Y. S. 1039. Where a money judgment is not presently enforceable, security for payment need not be given as a condition of staying its enforcement. Id.

96. Dunfee v. Childs [W. Va.] 53 S. E. 209. Mere averment in motion for stay not sufficient, requires affidavit, record, or other authentic showing. Id.

97. But not on a bill of review for the same error for which the appeal is pending, as that would be rather a ground for dismissing the bill. Dunfee v. Childs [W. Va.] 53 S. E. 209.

98, 99. Ex parte Mathews [Ala.] 40 So. 78.

1. Where the plaintiff recovered in the

The exercise of the power to stay parties from prosecuting another suit in a different court is discretionary.[3] A court of bankruptcy will not stay a proceeding in the appropriate state court to foreclose a mechanic's lien though the trustee has been made a party to determine his interest.[4]

Proceedings to obtain a stay.[5]—Where the statute requires the giving of a bond in order to procure a stay in actions for money judgments only, it is improper to grant a stay without requiring such a bond,[6] nor will an interlocutory judgment for the delivery of property enforceable "forthwith" be stayed unless its holder is given the benefits which would accrue from actual delivery.[7] Likewise a stay of proceedings will be granted to one sued for debt, entitled to an accounting on a copartner in the venture, provided he files a bond to pay the sum for which judgment against him may ultimately be granted.[8]

Effect of stay.—Conflict of jurisdiction arising on the pendency of two suits is obviated by a stay of one of them.[9]

STEAM.[10]

A contract for steam supply for certain premises may be regarded as incident to the use thereof and incident to a lease,[11] and may be protected by an injunction where a sudden cutting off of the supply in violation of contract is threatened.[12]

STENOGRAPHERS.[13]

The appointment[14] of official stenographers is within the power of the courts in most states.[15] It is the practice in the courts of admiralty for the parties to stipulate for the employment of a stenographer,[16] but the court may in the furtherance of justice order the services of a stenographer to advance its business,[17] and

lower court but on appeal was reversed and remanded for a new trial, the defendant was not entitled to a stay on failure to pay costs of trial and appeal by plaintiff. Ex parte Mathews [Ala.] 40 So. 78.

2. A motion to reargue a motion for stay of proceedings, on the ground that vacating the attachment of the property of a foreign corporation annuls the warrant, will not be granted. Norden v. Duke, 47 Misc. 473 95 N. Y. S. 940.

3. By statute Code Civ. Proc. § 611, bond must be exacted as condition for an injunction. Walkup v. Mesick, 110 App. Div. 326, 97 N. Y. S. 142.

4. Immaterial that the mechanic's notice of lien was not filed until after the institution of bankruptcy proceedings. In re Grissler [C. C. A.] 136 F. 754.

5. See 4 C. L. 1549.

6. Code Civ. Proc. § 611. Walkup v. Mesick, 110 App. Div. 326, 97 N. Y. S. 142.

7. An interlocutory judgment for the immediate delivery of stocks and bonds will not be staid unless the stock be transferred on the books and the transferee be allowed to vote thereon pending the final determination of any appeal. Potter v. Rossiter, 109 App. Div. 37, 95 N. Y. S. 1037.

8. Kirkwood loaned money to Locke to put into a business, K. to be repaid out of the firm money and profits. Locke then entered into a partnership with Smith. K. bought heavily on the firm. Then Locke died, Now Smith sues K. for the merchandise, but K. was entitled to a stay until an accounting could be had to determine how much Locke had in the firm due to K. Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926.

9. Pending proceedings in the courts of administration to sell decedent's lands for debts, a bill was filed by the purchaser for relief, the administrator filed a cross bill for specific performance, and the former proceedings were stayed by stipulation. Podesta v. Binns [N. J. Eq.] 60 A. 815.

10. See 4 C. L. 1551.

11. So, where it had been used during a prior term and the lease was renewed with the same rights, privileges, conveniences, and conditions as under the first lease. Slack v. Knox, 114 Ill. App. 435. Such a right was not a revocable lease and the courts have not determined its technical classification. Id.

12. Lessee after entering upon premises under a lease made a separate agreement for the use of steam from lessor's plant to run a restaurant, in consideration of which lessee's porter was to render certain services. Lease was renewed and lessor after some months threatened to cut off the steam. Held an injunction would lie to restrain him. Slack v. Knox, 114 Ill. App. 435.

13, 14. See 4 C. L. 1552.

15. Laws 1887, p. 159, authorizing circuit judges to appoint court stenographers, is not unconstitutional under the provisions of the Constitution art. 10, §§ 9, 10, 13. People v. Chetlain, 219 Ill. 248, 76 N. E. 364.

16, 17, 18. Rogers v. Brown, 136 F. 813.

if the parties refuse to stipulate, it will authorize such employment where necessary in its discretion, and the stenographer's fees are taxed as costs upon the parties.[18]

The court in the exercise of sound discretion may in some jurisdictions order a transcript of the proceedings to be made by the official stenographer whenever necessary,[19] but in others it can order a transcript only when it is necessary to determine the accuracy of the bill of exceptions submitted to it,[20] and of course either party to a suit may order a transcript of the official stenographer's notes but is not bound to do so.[21]

The fact that a transcript of the evidence was not prepared by the official court reporter is no valid excuse for a refusal by the judge to sign said transcript,[22] for it is the duty of the trial judge to examine the bill of exceptions which is submitted to him and to determine whether it is correct and accurate, regardless of whether it is written up from the official stenographer's reports or not;[23] nor may the trial judge substitute the notes of the official court reporter for his own judgment or his own recollection as to what occurred on the trial, but he may use them as an aid to his memory.[24] The reporter's notes will not be accepted as determining what evidence was introduced and what rulings were made,[25] for signing and sealing a bill of exceptions is a judicial act, presupposing a judicial determination of its accuracy which cannot be delegated to a court reporter.[26] The trial court may designate a reasonable time within which the reporter shall file his transcript of the evidence,[27] but the court can designate the time only in cases where it is the duty of the reporter to make a transcript and the court is appealed to to designate the time within which the reporter shall perform his duty.[28]

The official court reporter is entitled to his per diem *compensation* and to be paid the same by the county treasurer independently and outside of the cost of writing up his notes after they have been taken, in many jurisdictions.[29] When the transcript is ordered by the judge or court, his fees therefor become a proper charge against the county treasury,[30] but where the request for a transcript comes from either party, the stenographer is bound to make it only on tender, or payment of his fees or charges.[31] If a person is unable to pay he may appeal to the judge who will order such parts of the record transcribed as is necessary and fit in criminal cases,[32] and the settled rule in Kentucky is that where a person is poor he is entitled to a transcript of the reporter's notes without payment.[33] Under a statute providing that an official stenographer shall be paid by the folio of 100 words, he cannot charge for punctuation marks.[34] Under a statute[35] providing that official stenographers of circuit courts shall be reimbursed for money actually expended in railroad fare, a stenographer who pays for his fare by labor, through private arrangement with the railroad company, is not entitled to be reimbursed by the county.[36]

19. Richards v. Superior Court of City and County of San Francisco, 145 Cal. 38, 78 P. 244.

20. People v. Chetlain, 219 Ill. 248, 76 N. E. 364. The judge cannot arbitrarily order a transcript of the stenographer's notes, but only after an examination of the bill of exceptions, disagreement by counsel, and the necessity of the transcript to determine the accuracy of the bill. Id.

21, 22, 23, 24, 25, 26. People v. Chetlain, 219 Ill. 248, 76 N. E. 364.

27, 28. Code Civ. Proc. § 269. Richards v. Superior Court of City, and County of San Francisco, 145 Cal. 38, 78 P. 244.

29. People v. Chetlain, 219 Ill. 248, 76 N. E. 364.

30, 31, 32. Richards v. Superior Court of City & County of San Francisco, 145 Cal. 38, 78 P. 244.

33. Ky. St. 1903, § 4642, provides for free transcript of reporter's notes on application by motion to judge of a person sueing in forma pauperis, and on improper refusal to grant motion, the appellate court will reverse. Smith v. Sisters of the Good Shepherd, 27 Ky. L. R. 1170, 87 S. W. 1076.

34. Walsh v. Jackson, 33 Colo. 454, 81 P. 258.

35. Sess. Acts 1903, pp. 270, 271. State v. Woodside, 112 Mo. App. 451, 87 S. W. 8.

36. State v. Woodside, 112 Mo. App. 451, 87 S. W. 8.

STIPULATIONS.[37]

Right to make and form.[38]—Parties to actions may make stipulations for the government of their conduct,[39] or the control of their rights,[40] or the conduct of a litigation,[41] which, unless they be unreasonable or against good morals or sound public policy,[42] not only bind them but must be enforced by the courts,[43] and such stipulations may be by express agreement, by acts inconsistent with the objection, or by silence and omission to present proper objections when one ought to.[44] One may stipulate away statutory [45] and even constitutional rights. Facts may be stipulated by the parties and used as evidence,[46] but an oral agreement to enter into a written stipulation will not be enforced by the courts.[47] The attorneys in a case may agree to try the case on the sufficiency of the averments in the bill rather than the merits of the issue,[48] and for a judge to ignore such a stipulation would be reversable error.[49] An attorney can make stipulations binding his client as to the principal matter in an action,[50] but otherwise as to collateral matters,[51] and the client may by his acts ratify an unauthorized stipulation entered into on his behalf by his attorney.[52] The court cannot recognize nor the opposite party act upon any stipulation made by a litigant in a cause unless it is done with the express assent of his attorney of record,[53] hence the president of a corporation cannot stipulate a consent to judgment without the consent of the attorneys for the corporation,[54] and such a stipulation signed by a litigant himself can be made effectual only by an application to the court on notice to his attorneys.[55] A stipulation between attorneys to the

37, 38. See 4 C. L. 1553.

39. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177; Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

40. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401. Irregularities may be waived by stipulation, such as absence of judge or of jury, or reception of verdict by clerk. Chichester v. Winton Motor Carriage Co., 110 App. Div. 7, 96 N. Y. S. 1006.

41. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177; Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401. A stipulation that a certain copy of the statutes of another state should be accepted as authentic and that the law as laid down in a certain case should be accepted as the law of a certain state as to the matter in litigation is valid, and will be given effect as though written into the complaint. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. A stipulation that a verdict may be received by the clerk in the absence of the presiding judge is valid and binding (Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401), and even in the absence of the jury, especially when no objection thereto was taken at several successive steps in the procedure (Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006).

42, 43. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177; Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

44. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401; Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006.

45. Shorter limitations, than statutory, for bringing actions for breach of contract; waiving right of appeal; questions of jurisdiction. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

46. A stipulation that certain contractors in doing certain work were in the employ of the defendant may be used as evidence Mullins v. Siegel-Cooper Co. [N. Y.] 75 N. E. 1112.

47. An oral agreement to stipulate in writing for extending the time for filing the statement of facts never reduced to writing will not be enforced. Humes v. Hillman [Wash.] 80 P. 1104.

48, 49. Ingram & Goodman v. Gill [Ala.] 39 So. 736.

50. Admit facts on trial or in pleading, waive a right of an appeal, review, notice, and so forth, and confess a judgment. Leahy v. Stone, 115 Ill. App. 138.

51. Leahy v. Stone, 115 Ill. App. 138.

52. Where an attorney stipulates that a trial shall be final waiving the right of appeal, and the client in the ensuing trial testifies in his own behalf, he will be held to have ratified the acts of his attorney. Leahy v. Stone, 115 Ill. App. 138.

53. Where a corporation has appeared by an attorney, the court cannot recognize a stipulation consenting to judgment made without the attorney's of record assent. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. A stipulation for settlement and discontinuance signed by a litigant without his attorney's consent would be invalid by statute in New York. Code Civ. Proc. § 55. Kuehn v. Syracuse Rapid Transit R. Co., 104 App. Div. 580 96 N. Y. S. 882.

54. Where president stipulated a consent to have judgment entered and it was done, with the effect of depriving the corporation of all its property, the stipulation and judgment were vacated on request of the stockholders. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298.

55. A stipulation for settlement made by a plaintiff without his attorney's knowledge or consent will not be recognized. Kuehn v.

effect that evidence set forth in a bill of exceptions on a previous appeal, that it shall be considered before the court, although not incorporated in the record in the latter case, will not be effectual.[56] Where a party is by statute disabled from acts in respect to a suit which lies without the province of his attorney, a stipulation by a party for discontinuance is ineffectual[57] except so far as the settlement on which it is based is ground of dismissal regardless of such stipulation.[58]

Enforcement and effect.[59]—The court always has the power to enforce in a summary way, by motion, the observance of an undisputed and proper stipulation entered into by the parties to an action,[60] but when the existence or validity of a stipulation is dependent on voluminous evidence, an action for its enforcement may be the proper remedy.[61] Where a stipulation, not in writing, is sought to be proved or disproved by the affidavits of the counsels, the court will not decide between conflicting affidavits.[62] Stipulations based on an erroneous interpretation of the legal effect of a contract should be disregarded.[63] A trial court may relieve a litigant from the effect of a stipulation because of mistake, inadvertence, or other good cause, but such relief must be promptly asked for.[64] Fraud will always avoid a stipulation even though signed by the litigant's attorney.[65] If not competent evidence, a fact, though stipulated, may be excluded.[66] Where a stipulation that no writ of error shall be prosecuted appears of record, it is proper to move the dismissal of the writ.[67] A stipulation not to present an application for the appointment of a receiver, but to hear a bill for such an appointment on its merits, does not preclude the appointment of a receiver after the cause is heard on its merits.[68] Where a

Syracuse Rapid Transit R. Co., 104 App. Div. 580, 93 N. Y. S. 883.

56. Krippendorf-Dittman Co. v. Trenoweth [Colo.] 84 P. 805.

57. Kuehn v. Syracuse Rapid Transit Co., 104 App. Div. 580, 93 N. Y. S. 883.

58. Where plaintiff in personal injury case stipulated for settlement and discontinuance, the court committed no error in not discontinuing, even though the stipulations were valid. Kuehn v. Syracuse Rapid Transit Co., 104 App. Div. 580, 93 N. Y. S. 883.

59. See 4 C. L. 1553.

60. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177. A stipulation whereby a corporation agreed to recognize a certain person as an approved assignee is enforceable by the courts. Id.

61. Potter v. Rossiter, 109 App. Div. 737, 96 N. Y. S. 177.

62. Humes v. Hillman [Wash.] 80 P. 1104.

63. Where a stipulation stated that "the lease had expired by its terms," whereas as a matter of law it had not, it is not binding. Owen v. Herzikoff [Cal. App.] 84 P. 274.

64. Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006.

Note: In an action for libel the plaintiff's attorney entered into successive stipulations with the defendant's attorney for a year's extension of the time within which he might serve his complaint. The stipulations contained also the following provision: "The defendant to have the same amount of time in which to answer or demur to the complaint when the same shall be served, as the plaintiff has had altogether in which to serve the complaint." After the above extensions of time had been granted by the defendant the plaintiff obtained an order of substitution and his substituted attorney refused to be bound by this provision. Held the court will not relieve the defendant from such stipulations. Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. S. 673. An attorney has exclusive control of the suit and may enter into stipulations in regard thereto; thus he has authority to stipulate for a discontinuance but not to release the cause of action itself. Barrett v. Third Ave. R. Co., 45 N. Y. 628, 635. The court may relieve a party from stipulations entered into by his attorney (Barry v. Mut. Life Ins. Co., 73 N. Y. 536), but the exercise of this power is discretionary and the party seeking relief must show that the stipulation was entered into under a clear mistake, or was procured by fraud, imposition, or collusion (Becker v. Lamont, 13 How. Pr. [N. Y.] 23). None of these elements existing and the sole ground for asking relief being the carelessness of the attorney, the courts have been prone to refuse it. So in an action for personal injuries a stipulation by the defendant's attorney that the cause of action should survive the death of the plaintiff was upheld. Cox v. N. Y. C. & H. R. R. Co., 63 N. Y. 414. If, as in the principal case, the stipulation has been acted upon, it seems unjust to allow the party who has had the benefit to escape performance on his part. Mark v. City of Buffalo, 87 N. Y. 184; Mut. Life Ins. Co. v. O'Donnell, 146 N. Y. 275, 48 Am. St. Rep. 796. One who hires an incompetent attorney should not cast the burden of his irresponsibility upon his opponent. Foster v. Wiley, 27 Mich. 244.—5 Columbia L. R. 322.

65. Kuehn v. Syracuse Rapid Transit R. Co., 104 App. Div. 580, 93 N. Y. S. 883.

66. In an action on a promissory note where the defense was fraud, a stipulated fact to the effect that other frauds had been practiced similar to the one in case is not competent as evidence in Nebraska. Hunt v. Van Burg [Neb.] 106 N. W. 329.

67. Leahy v. Stone, 115 Ill. App. 138.

68. Baker v. Starling [Ala.] 39 So. 775.

claimant agrees to abide by the result of the trial of a co-claimant, he is bound thereby, however erroneously or through whatever misfortune the conclusions may have been reached.[69] A stipulation that the pleadings, findings, and decree in a foreclosure suit are sufficient in form and substance will make such proceedings binding on one served by publication, and pass his interest in land sold under the foreclosure suit.[70] Where evidence in addition to a stipulation of facts is introduced without objection, it is proper for the jury to consider the evidence though it contradicts the stipulated facts.[71] A prior agreement, by which the interested parties mutually agree upon terms of settlement on condition that a patent in controversy is sustained by the courts, cannot upon principle and authority deprive a court of its inherent power and jurisdiction.[72] A stipulation, not limited to a particular occasion or temporary object, may be used in a later trial.[73] The court cannot infer an essential fact from the stipulated facts, which are not as a matter of law to be necessarily inferred, but is confined to a consideration of facts agreed to.[74] A stipulation of disclaimer of interest in property made at the trial will estop an appellant from urging that it was error not to make the person disclaiming a party defendant because of having an interest in fact in the property in controversy.[75] A minute entry by the court "heard," the time having gone by, is not equivalent to a stipulation or agreement to waive the irregularity in filing exceptions.[76] Admitting, by stipulation, the maintenance of a certain aperture, does not admit its maintenance in an unlawful condition.[77] An agreement empowering the judge to sign the judgment after adjournment does not include the form to hear and determine the motion to set the verdict aside.[78]

STOCK AND STOCKHOLDERS; STOCK EXCHANGES; STOPPAGE IN TRANSIT; STORAGE, see latest topical index.

STREET RAILWAYS.

[By ELLERY H. CLARK.*]

69. Several co-claimants merged their claims in the trial of one against a judgment creditor agreeing to abide the event. The judgment creditor prevailed and on appeal was affirmed three false statements in the brief of the evidence. Held it was no ground for dissavowing the agreement. Jarrett v. McLaughlin, 123 Ga. 256, 51 S. E. 329.

70. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671.

71. In an action on a promissory note the defendant introduced evidence contradictory to the stipulated facts which evidently influenced the jury. The verdict being for plaintiff. Held he was in no position to complain. Hunt v. Van Burg [Neb.] 106 N. W. 329.

72. On a bill asking for damages and a permanent injunction for the infringement of an unexpired patent, the court has jurisdiction, although before suit was instituted the parties had agreed in writing that in case validity of patent was sustained the plaintiff would release the defendant from payment of damages and grant it a license to use, sell, and manufacture patented machine. Victor Talking Mach. Co. v. American Graphophone Co., 140 F. 860.

73. An agreed statement of facts, filed in one case, may be used in a second case unless specifically objected to on valid grounds. Mugge v. Jackson [Fla.] 39 So. 157.

74. Where the stipulated facts did not state whether the notice of the reduced amount of insurance a specified premium would buy was received by the intestate, the court could not infer that he had and change the insurance contract accordingly. Morse v. Fraternal Acc. Ass'n [Mass.] 77 N. E. 491.

75. Karren v. Rainey [Utah] 83 P. 333.

76. Brown v. Rogers, 71 S. C. 512, 51 S. E. 257.

77. A street railway company admitted maintaining an aperture between its tracks. This did not admit that said aperture was wide enough to admit a bicycle wheel, and proof to the contrary was admissible. Griffin v. Interurban St. R. Co., 46 Misc. 328, 94 N. Y. S. 854.

78. Knowles v. Savage, Son & Co. [N. C.] 52 S. E. 930.

*Author of "Street Railway Accident Law."

This topic is limited to the law of street railways, excluding their ordinary character as corporations,[79] carriers,[80] or employers.[81]

§ 1. *The franchise or license to operate a street railway and regulation of its exercise.*[82]—The distinction between a street railway and a general traffic railroad depends not upon the motive power used but upon the general character of the road.[83] The distinction is fundamental, and statutes relating to railroads are not construed to include street railroads.[84] There is no warrant in the legislation providing for intra and extra urban railways for the theory of classification of municipal and interurban passengers on any basis which would discriminate in favor of one as against the other with respect to rights of transfer on railways within the city limits; on the contrary, within the city limits, urban and interurban passengers have precisely the same rights as to transportation.[85] In Kentucky street car franchises must be offered for sale to the highest and best bidder.[86] The franchising power is in the state which has paramount authority over streets and highways,[87] though the obtaining of the consent of local authorities is often required,[88] and as

79. See Corporations, 5 C. L. 764.
80. See Carriers, 5 C. L. 507.
81. See Master and Servant, 6 C. L. 521.
82. See 4 C. L. 1556. See, also, Franchises, 5 C. L. 1518.
83. An electric street railway company was organized under the railroad law, as distinguished from the street railroad act, and was authorized to operate through several counties, and transport passengers, their ordinary baggage, mail, express, and milk, is a commercial railroad, and is not entitled to lay its tracks in a street, the fee of which is in the abutting owner, without condemning a right to do so. Wilder v. Aurora, De Kalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. An electric railway, operating beyond the limits of a city, and into a town incorporated for the mere maintenance of a park adjacent to the city, was a street railway, within a power reserved in the lease of the land used for the park, reserving to the lessors the right to grant a right of way through the land "for street railway purposes." Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.
84. A city ordinance providing that it shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn on such part of any railroad as shall be within the limits of a city at a faster rate than six miles an hour, has no application to the cars of a street railroad operated in such city. Licznerski v. Wilmington City R. Co. [Del.] 62 A. 1057. The law relating to the establishment of grade crossings (97 O. L. 546) relates exclusively to steam railroads, and in the case of an application to the common pleas court under this act by a railroad for permission to lay its tracks at grade over street crossings, and to prescribe what gates, signals, etc., shall be maintained, if the court find from the testimony that such railroad is not a steam railroad it is without jurisdiction in the premises. In re Avon Beach & Southern R. Co., 3 Ohio N. P. (N. S.) 561. In the statutes of Ohio, when the term railroad is used, steam railroad is meant, unless it clearly appears that some other meaning is intended. Id.
85. City of Cincinnati v. Cincinnati Street R. Co., 3 Ohio N. P. (N. S.) 489.
86. The grant of a franchise to operate street car lines not being made to the highest and best bidder after due advertisement is void under the Kentucky statute. Const. § 164. Monarch v. Owensboro City R. Co., 27 Ky. L. R. 575, 85 S. W. 193. The assignment of such a void franchise conveyed no rights to the assignee. Id.
87. State may give right to operate in streets. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 323.
88. Consent of local authorities obtained within time limited. Nanticoke Suburban St. R. Co. v. People's St. R. Co., 212 Pa. 395, 61 A. 997. Where the consent of a supervisor of a township was essential for an extension of a street railway, and the office of supervisor was abolished during the life of the street railway, extension cannot be made without official consent, but the provision is satisfied by the consent of the trustees of the town, which had the power to control and supervise streets and highways. Blair v. Chicago, 26 S. Ct. 427. Id. Where an ordinance granting a franchise to a street railway company provided that before the rights conferred should be enjoyed the company should obtain from the county court a confirmation of the right of way over a bridge, the obtaining of the

a matter of practice the power of the state to determine upon what conditions the franchise shall be granted is to a large extent delegated to the municipal or other local authorities,[89] the legislature having the power to determine by what officer or board such delegated power shall be exercised,[90] and, as a check upon the power of the local authorities, the consent of a certain proportion of the abutting owners is usually made a further condition precedent to the granting of the franchise.[91]

consent of the county court was a reasonable and enforceable condition precedent to the acquisition of any rights under the franchise, and the company was required to obtain the consent within a reasonable time, one month not being long enough to be termed a reasonable time. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826. Where, in a suit to annul a street railway franchise, conferred by ordinance, providing that, before the franchise should be enjoyed, the company should obtain from the county court a confirmation of the right of way over a bridge, the complaint alleged that application to the county court to confirm the right of way had never been made, and the answer admitted the allegation and the only proof was the testimony of the company's manager that no application was made to the county court, and that he had believed that permission to cross the bridge would not be granted, the question of the authority to revoke the franchise on the refusal of the county court to grant permission was not presented. Little Rock Ry. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 1026.

89. The granting of power to a municipality to pass all necessary ordinances for the protection of the safety of citizens is not an infringement of the maxim that legislative power may not be delegated. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648.

90. A statute giving the control of streets of the city of New York, and the power to grant franchises to street railway companies, to the board of estimate and apportionment, taking the power away, from the board of aldermen, is constitutional and does not violate that provision of the constitution prohibiting the legislature from passing local bills authorizing the construction of street railways except with the consent of the local authorities having control of the public streets. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941. A statute transferring from the board of aldermen to the board of estimate and apportionment the authority to consent to the use of the streets by corporations having franchises therefor, is not in conflict with a provision in the constitution authorizing the legislature to pass general laws providing for the construction and operation of street railroads on the consent of the local authorities, the legislature having the right to designate the local authorities whose consent is required, and the board of aldermen having no right to retain control over the streets for the purpose of giving such consent. Wilcox v. McClellan, 110 App. Div. 378, 97 N. Y. S. 311. Where a statute makes a street railway company city property, and vests control in the rapid transit commissioners, a borough president has no authority to remove advertising signs, news stands, and automatic vending machines from the stations of the road, and his act in threatening to do so may be enjoined. Interborough Rapid Transit Co. v. New York, 47 Misc. 221, 95 N. Y. S. 886.

91. Under the New York statute which requires the obtention of the consent of the owners of one-half in value of the land abutting on a street before a street car line may be built thereon, the value of the land is estimated on the value of the entire tract bounding on the street as appearing on the last assessment roll. The fact that it extends back to another street has no effect. Fox v. New York City Interborough R. Co., 98 N. Y. S. 338. Consent of abutting owners requires by statute in order to confer jurisdiction on a township committee must be a consent that municipal permission may be granted for the construction of the street railway line for which application was made to the township committee, and consents of said owners acknowledged prior to the date on which the company resolved to construct its line and the date on which the ordinance was introduced are not valid. Mercer County Traction Co. v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 61 A. 461. Where a statute provided that a street surface railroad should not be built unless the consent of the owners of one-half of the assessed value of the property "bounded on" the street should have been obtained, and property relied on toward making up the one-half of the value of the property abutting on a street on which a railroad was contemplated consisted of an entire block fronting on the street and extending eight hundred feet to a street in the rear, the block having been improved and used for an academy and being assessed as a single tract, it was held that the manner of assessing the property did not deprive the court of the power to determine what part of it should be deemed as "bounded on" the street, and in determining the voting power of the tract it should neither be taken as a whole nor regarded as a tract fronting on the street and extending back one hundred feet, but the court should make such an apportionment of the value thereof as would result in giving justice to the railroad company and an objecting property owner. Fox v. New York City Interborough R. Co., 48 Misc. 162, 95 N. Y. S. 251. A statute providing that a city shall not grant a street railway franchise excepting to the corporation or individual that will agree to carry passengers at the lowest fare, and shall have obtained the written consent of a majority of the property holders upon each street, confers upon the property holders the right to grand or withhold consent, but not the right to limit their consent to a particular corporation or individual. Such limitation in his consent is void, but the consent is good as a consent to the lowest bidder. Forest City R. Co. v. Day [Ohio] 76 N. E. 396. Where a petition of abutting owners for the grant of a street railroad franchise prayed that such grant should be for a

Municipal authorization has of course no extra-limitary effect.[92] Municipalities must conform to the authorizing statute, but a complete and proper municipal grant is not affected by the fact that it purports to be an amendment of a previous void grant.[93] Where a franchise is granted by the state subject to a municipal regulation, the corporate franchise granted by the state is distinct from the street railway franchise, which is to be exercised only on terms imposed by the city whose streets are used.[94] Where the power of a municipality over certain territory is suspended by injunction, no franchises can be granted therein and expenditure by the railway company does not work an estoppel.[95] If the grant of a franchise gives an option as to nature and extent of structure and affixes a time limit for construction, no additional construction is authorized after such time[96] unless excuse for delay is shown.[97] The grant is to be strongly construed against the company.[98] Franchises are not exclusive unless expressly made so[99] or unless statutes so provide.[1] Right to make connections with another company is not implied.[2] A franchise may prop-

term of forty years from the passage of the ordinance, an ordinance, granting authority to a traction company for a term of thirty-eight years from the passage thereof, did not conform to the petition. Wilder v. Aurora, De Kalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. Where a petition by property owners for the passage of an ordinance granting a street railway franchise, as required by statute, was for the grant to certain individuals, their representatives and assigns, and not to defendant corporation, and an ordinance granting such franchise to such individuals was void, an assignment of their rights thereunder to a subsequent corporation did not operate as an assignment of the petition so as to entitle the city council to pass another ordinance thereunder granting a new franchise to the corporation. Id.

92. Wheeling & E. G. R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

93. Previous grant was to individuals and statute authorized only grant to company. Wilder v. Aurora, De Kalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

94. By statutes of 1859 and 1861, street railway companies were incorporated with a corporate life of twenty-five years, subject to the authority of the city of Chicago to fix the terms and conditions upon which said companies should occupy its streets. By statute of 1865 the corporate life of these companies was extended to ninety-nine years. It was held that under the earlier statutes the city had the power to fix the term of the occupation of the companies, and that the statute of 1865 did not give the right to use the streets for ninety-nine years without reference to any limitation as to time fixed by the city. Blair v. Chicago, 26 S. Ct. 427.

95. Little Rock Ry. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826.

96. A city ordinance, granting a street railway the right to build and maintain a single or double track railway, with all necessary switches or turnouts upon certain streets of the city, provided that the entire line shall be completed and in operation before a certain date, gives the railway an option to build either a single or a double track line within the specified time, and its exercise of that option, by building and putting in operation a single track line, exhausts its rights under the ordinance, and it cannot, after the expiration of the time limited, lay additional tracks and thus convert its line wholly or partially into a double track line. Eastern Wisconsin Ry. & Light Co. v. Winnebago Traction Co. [Wis.] 105 N. W. 571.

97. When a street railway by an ordinance is allowed a certain time in which to lay its tracks, and, that time having expired, seeks to enforce its rights by mandamus, it must allege such a state of facts as excuses the delay, and where it was provided that delay caused by injunction should not be counted, an injunction on an unimportant connecting line will not serve as an excuse. Blocki v. People [Ill.] 77 N. E. 172.

98. A grant by the public, such as authority by a city to a street railway to build its road in the street, is to be construed most strongly against the grantee. Such a grant is a mere license to be exercised upon the conditions named in the grant. Blocki v. People [Ill.] 77 N. E. 172.

99. In the absence of statutory restriction a city council has power to grant a right to construct a street railroad over substantially the same route as that embraced within the franchise of another corporation. Electric City R. Co. v. Niagara Falls, 48 Misc. 91, 95 N. Y. S. 73.

1. Where a statute provides that no street surface railroad corporation shall construct, extend, or operate its road or tracks in that portion of any street, avenue, road, or highway in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings, without first obtaining the consent of the corporation owning or maintaining the same, it was held that the consent of an existing railroad to the use of streets occupied by it by a competing company was not a condition precedent to the right of such competing company to obtain the consent of local authorities to the use of such streets. Electric City R. Co. v. Niagara Falls, 48 Misc. 91, 95 N. Y. S. 73.

2. The grant by a city to a company organized under the train railway act, of the right to construct and operate a street railway with all necessary tracks and connections, all tracks to be constructed under the supervision and with the approval of the common council, does not authorize the company to make a connection in the streets of

erly be renewed and extended.[3] A provision for forfeiture of the franchise in case of noncompliance with certain conditions may be embodied in the permission granted by the legislature or by a municipality to construct and operate a street railway.[4] Franchise rights cannot be collaterally questioned,[5] but a street railroad company seeking to enforce rights must show the jurisdiction of the officers granting the same.[6]

Rights and duties under franchise.[7]—It is well settled that under its franchise a street railway company secures certain vested rights which cannot arbitrarily be interfered with.[8] On the other hand, the legislative power granting the franchise

the city with the tracks of a company organized and operating under the general railroad laws, and having no franchise from the city, though in the ordinances granting franchises to such train railway company and to another company organized under the general railroad laws, a connection between them, and transfers from the one to the other, were required. City of Monroe v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 1035, 106 N. W. 704.

3. An intention to prolong the life of a street railway franchise from the date originally fixed for the termination to a date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was, with the consent of the city, consolidated, must be inferred from subsequent ordinances authorizing the consolidated company to extend its lines and change to electricity as a motive power, the rights under all of which were to terminate with the franchise of the "main line" which was recognized as continuing until that date. Such extension does not violate a statute that a city shall not release the grantee from any obligation or liability imposed during the term of a street railway grant or renewal thereof, nor a statute permitting a city to renew a street railway grant at its expiration. City of Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 5 L. Ed. ——. An ordinance which recites that it is intended by it to renew and extend all the franchises, rights, and privileges now owned by a street railway company, and which provides in plain terms that the rights, privileges, and franchises granted under a former ordinance "be and the same are hereby renewed and extended," continues and renews the right of the company to lay tracks on a portion of the territory covered by the original ordinance, but not constructed at the passage of the renewing ordinance, notwithstanding the fact that such territory is not specifically named in the renewing ordinance. City of Akron v. Northern Ohio Traction & Light Co., 6 Ohio C. C. (N. S.) 445.

4. Where one section of a statute provided that if any railroad corporation within five years after its certificate of incorporation was filed failed to begin construction, its corporate existence should cease, and another section on street surface railroads provided that if any such railroad began the construction of its road or an extension within a year after consent was given and did not finish in three years all rights should be forfeited, it was held that a street railway given the right to construct an extension and not commencing within five years lost its rights ipso facto under the first section quoted, the same being self-executing. In re Brooklyn, Q. C. & S. R. Co., 106 App. Div. 240, 94 N. Y. S. 113. When an ordinance granting a street railway franchise provides that a failure to comply with the terms and conditions of the ordinance after twenty days' notice from the city council shall operate as a forfeiture of all rights and franchises granted, the failure of the owner of the franchise to lay a track in a portion of the territory covered by the franchise will not work a forfeiture of its rights to lay such track in the absence of notice given as provided in the ordinance. City of Akron v. Northern Ohio Traction & Light Co., 6 Ohio C. C. (N. S.) 445. Permission by a municipality to a street railway company to construct and operate its railway in the streets of the town, when the ordinance is accepted by the company, constitutes a contract, and if the ordinance provides for forfeiture as the penalty for non-compliance with certain conditions, substantial performance is no defense, even though the conditions not complied with are of relatively small importance. Equity, however, has discretionary power in such a case to grant relief from forfeiture to prevent unfairness and oppression, and where the company is able and willing immediately to perform the covenant the company is entitled to an injunction preventing the town authorities from removing or disturbing its track. Wheeling & E. G. R. Co. v. Triadelphia [W. Va.] 52 S. E. 499.

5. Whether occupation of streets was unlawful because without consent of municipality cannot be raised in an action for personal injuries. Roberts v. Terre Haute Electric Co. [Ind. App.] 76 N. E. 323.

6. Upon application to court of chancery, under statute, to define the mode in which one railroad may cross another, it was incumbent upon the petitioner to show it had lawful power to construct the road, and therefore to show the jurisdiction of a township committee granting such power. Mercer County Traction Co. v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 61 A. 461.

7. See 4 C. L. 1560.

8. See Constitutional Law, 5 C. L. 619; Franchises, 5 C. L. 1518. Where a street railway company was in existence prior to the passage of a statute providing a method for alteration and amendment of street railway charters, and was therefore authorized to make alterations in its charter and to change its lines and their termini as provided by an earlier statute, the company's right under the earlier statute was saved from the effect of the later act by a clause thereof that nothing therein should be so

may reserve the power to alter, amend, or repeal the charter of the company, subject to the qualification that this right is not to be exercised in an arbitrary manner.[9] A law empowering the city solicitor to sue in the name of the city, "whenever an obligation or contract made on behalf of the corporation, granting an easement or creating a public duty, is being evaded or violated," authorizes a suit by the city solicitor to enjoin traction companies from refusing to give or receive transfers in accordance with the grant to the lessor company.[10]

Rates, fares, and transfers.[11]—The requirement by statute that street railway companies shall issue half-fare tickets to school children does not impair the obligation of any contract with the municipality fixing the rates which such company might charge.[12] The giving of transfers is for the benefit of individuals and mandamus will not lie to enforce a contract obligation to do so, but only one imposed by positive law.[13] The state or city may take street railway property for the purpose of linking it with some larger corporation so as to compel operation on the one fare and universal transfer principle, but cannot compel independent private corporations to so operate.[14] It cannot compel independent street railway companies to enter into a co-partnership for the purpose of accepting transfers from each other.[15]

§ 2. *Property and the acquirement thereof; eminent domain.*[16]—A street railway franchise carries no implied power of eminent domain,[17] and where the power of eminent domain was given to a corporation under certain conditions which have

construed as to affect the rights, etc., of any corporation now existing and chartered under the general or special laws of the state. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

9. All domestic corporations being by the Code subject to legislative control at all times, where a street railway company is granted a franchise with an exemption from liability for paving the streets, there is no impairment of the obligation of contract in a later statute requiring the company to do such paving between its tracks and for one foot outside. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005. A supplement to a charter of a street railway company enacting that no municipal corporation shall interfere with the company's constructing and running its railroads, provided the same are constructed and run according to the charter, does not discharge the company from its contractual obligations to a city previously undertaken by the company, and does not modify the terms of contracts thereafter made between the city and the company. Jersey City v. North Jersey St. R. Co. [N. J. Law] 61 A. 95.

10. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489.

11. See 4 C. L. 1561.

12. San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. Ed. ——. Any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of the Texas constitution of 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority, was lost by the sale of its property on foreclosure, and the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation incorporated since the adoption of such constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts, and obligations. Id.

13. A writ of mandamus should not issue at the instance of a municipal corporation to compel a street railway company to give transfers to its passengers within the municipality when the obligation of the company to do so arises wholly from its assent to certain municipal ordinances, which of themselves have no legislative force. City of Newark v. North Jersey St. R. Co. [N. J. Law] 62 A. 1003.

14. Chicago City R. Co. v. Chicago, 142 F. 844. On a question of compelling independent street railway companies of Chicago to accept transfers from each other, the constitutional question of due process together with multiplicity of suits is involved so as to give rise to a suit in equity under the constitution and give the Federal courts jurisdiction. Id.

15. Chicago City R. Co. v. Chicago, 142 F. 844.

16. See 4 C. L. 1561.

17. The county court from which authority was obtained had no control over private ways. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. The charter of a street railway company, authorizing it to acquire such real and personal estate as may be necessary and convenient in the prosecution of its business, does not confer the power of eminent domain, the charter not conferring the power expressly, pointing out any steps to be taken in its exercise, or making any provision for compensation. Claremont R. & Lightning Co. v. Putney [N. H.] 62 A. 727. A statute providing that street railway companies may take and hold such lands as may be necessary to install and maintain power plants does not author-

all been exercised and complied with years before, a street railway company, coming into possession of its franchises, cannot use the power to extend the tracks formerly laid or change the route.[18] Where the power for condemnation was given for surface roads it cannot be used for elevated roads.[19] Where such power is given property may be condemned for sites for barns and power houses.[20] Property may of course be acquired by purchase or lease.[21]

§ 3. *Taxes and license fees.*[22]—An exemption from taxation will not be sustained unless the intent of the legislature clearly appears.[23] A street railway company may not be assessed for the widening of a street merely because of its occupation of the street with its track.[24] In an action to recover taxes on cars, where the ordinance provides a specified tax on each car running within said borough, it is not necessary that each car run every day, nor the whole of any particular day.[25] Where, under an ordinance providing for a specific tax on each street car, the company refuses to give a list of the cars operated, the public may offer in evidence the testimony of policeman authorized to make and keep a list of the numbers of cars passing on three different days, and it may base its tax on these lists.[26]

§ 4. *Street railway corporations.*[27]—The corporate activities of a street railway company are governed by the rules relating to corporations generally.[28] Leases by street railroad companies[29] are generally sustained unless they amount to a

ize a street railway company to condemn land and water privileges to divert streams and procure power with which to operate power plants erected on its own land, but the authority is limited to taking such land as may be necessary for locating or placing power plants in position for use and maintaining the same Id.

18, 19. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

20. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

21. Where a town was incorporated merely for park purposes, had never been platted, was without streets, and its entire territory had been surrendered to a private corporation, it was nevertheless a town which might legally be made the terminus of a street railway, and the building of such railway into the town not being ultra vires, the railway had a right to acquire a right of way over private property within the town by purchase or lease from the owners, regardless of whether it had power to condemn a right of way over property in the town. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353. Where a lease of land for park purposes reserved to the grantor the right to grant a right of way through the park for street railway purposes, mere acquiescence by the lessors in a prior entry of a street railway company into the park at the instance of the lessees, and its use of a part of the premises as a station for receiving and delivering passengers, did not constitute an exercise of the power reserved. Id.

22. See 4 C. L. 1562.

23. A statute requiring street railway companies to pay for paving between the tracks is an exercise of the taxing power of the legislature, and since an exemption from taxation will not be sustained under the intent of the legislature clearly appears, a prior statute granting certain immunities from paying for paving is not a contract right of which the company cannot be deprived, but a mere gratuity, recoverable at the pleasure of the legislature, and such immunity, being a personal one, does not pass to a lessee of the road. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

24. In re East 133d St., 9 N. Y. S 76. In proceedings to acquire land for the widening of an avenue in New York city, the right of street railway, electric light, telephone, or gas supply corporations to maintain their rails, wires, and pipes on such street being unaffected by the widening or narrowing of the street, and not being in any way increased in value because of the widening, such corporations are not subject to assessment for benefit because of such improvement under the Greater New York charter. In re Anthony Ave., 46 Misc. 525, 9 N. Y. S. 77. Under an ordinance granting a street railway franchise containing a provision that, if on said street a pavement has already been laid and an assessment therefor placed on the tax duplicate, and that said company shall pay to the city such proportion of the assessment for said improvement as the space occupied by its tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved railway, held that the railway company is bound by its contract to pay said proportion of the assessments made and levied upon the feet front of the abutting property, and cannot defend upon any of the grounds that would have been available to abutting lot owners, or to the company if not bound by such contract obligations. Urbana, Mechanicsburg & Columbus R. Co. v. Columbus, 3 Ohio N. P. (N. S.) 433.

25, 26. Braddock Borough v. Street R. Co., 28 Pa. Super. Ct. 262.

27. See 4 C. L. 1563.

28. See Corporations, 5 C. L. 764.

29. Adjustment of rights on expiration of lease: Where a lease of the lines of a consolidated street railway company to defendant provided for a return of equipment, on cancellation of the lease, to each company, of equal value to that received by the lessee, the lessor's claim for return of specific cars

virtual surrender of the corporate franchises,[30] and lessees and sublessees are bound by all the obligations of the original charter.[31] Where the lessee of a railroad company agrees to pay all damages incident to its operation, the lessee may be called in warranty as defendant in the place of the owner in Louisiana.[32] Where a street railway company enters into a contract whereby competition will result with the effect that its value as security will greatly diminish, a court of equity will interfere on behalf of a mortgagee.[33] Transfer of a franchise is sometimes permissible,[34] and the successor of a street railroad company is not liable for negligence of the original company.[35] Where a railroad was empowered by its franchise to operate

on behalf of certain of the consolidated companies or termination of the lease by the insolvency of the lessee was an equitable right enforceable against property in the hands of its receivers by petition for surrender of specified cars, but the lessor's claim, under a betterment clause in the lease, for a share of cars purchased by the lessee which had not been appropriated to such lines, was a legal claim, allowable only as a claim against the proceeds of a sale of all of the insolvent's property by the receivers. Johnson v. Lehigh Valley Traction Co., 138 F. 601. A consolidated electric railway company, composed of several independent companies, leased its lines to defendant, the lease providing that defendant, in addition to rentals, should expend $100,000 for improvements within two years, so that at all times the roads and rolling stock should be at least of equal efficiency and value as at the date of the lease; and at the termination of the lease defendant agreed to return the property to the consolidated companies in as good condition and repair as it was at the date of the lease, together with all the improvements, additions, betterments, enlargements, and extensions which were made during the lease. Held, that on defendant's insolvency and cancellation of the lease, the receivers were bound to return equipment to each subordinate company equal in value and efficiency to that which was received, and not merely equipment equal in value and efficiency to that received under the lease as a whole. Held, also, that the excessive value of equipment returned to one of such companies could not be set off against the claim of another company for return to it of cars of equal value and efficiency. Id.

30. A street railway company wishing to extend the tunnel under a river, leased from a connecting street railway company the right to use part of its land for such purpose for nine hundred and ninety-nine years. The land was practically vacant, and such use did not interfere with exercise of the franchises of the lessor. Held that such lease was not ultra vires, and when defendant interfered by force, plaintiff was entitled to an injunction restraining such acts. Hoboken & M. R. Co. v. Jersey City, etc., R. Co. [N. J. Eq.] 62 A. 539. Although a railroad company leases so much of its terminal plat for nine hundred and ninety-nine years as to permanently prevent the enlargement of its terminal facilities, a mortgagee holding as security the franchises of the company cannot on this ground restrain the performance of the contract. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

31. The provision of § 1777, empowering the city solicitor to sue in the name of the city, "whenever an obligation or contract made on behalf of the corporation, granting an easement or creating a public duty, is being evaded or violated," authorizes a suit by the city solicitor to enjoin traction companies from refusing to give or receive transfers in accordance with the grant to the lessor company. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489.

32. Muntz v. Algiers & G. R. Co., 114 La. 437, 8 So. 410.

33. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

34. Where the holder of a Havana horse-car franchise executed an assignment of his right to the concession, and agreed to follow the assignment by proper transfer when the Havana authorities should grant a right to use electricity as a motive power for the road, which assignment defendant acknowledged he had received, and was to hold in escrow in accordance with the terms of the agreement, which trust he thereby accepted the receipt constituted a mere escrow contract by which defendant agreed to hold the assignment until an electric concession was granted, and did not create a fiduciary relation between him and complainant. Havana City R. Co. v. Ceballos [C. C. A.] 139 F. 538. The assignment contract having been cancelled three years after it was made, because of the inability of complainant and the assignor to then obtain an electric concession, the fact that defendant had acted as the holder of the escrow agreement for complainant, and had knowledge thereof, etc., did not preclude him, more than a year after the contract was cancelled, from himself obtaining an assignment of the original concession. Id. One who agrees to convey a street railway franchise to another in consideration of the latter constructing the road to a certain point, both to perform by a certain date, cannot sue for damages for nonperformance of the defendant where he himself did not offer to perform until two years after the agreement. Monarch v. Owensboro City R. Co., 27 Ky. L. R. 30, 85 S. W. 193. Where the plaintiff assigned to defendant a void street railway franchise under certain mutual covenants, and brought suit for breach of them, the defendant might set up nonperformance on part of plaintiff as a defense, although he had accepted the assignment of the void franchise and accepted the dismissal of a suit based on the assignment on the theory that the assignor was not prejudiced by such assignment or the dismissal of such suit. Id.

35. In an action against a street railway company and its successor for negligence, a verdict is properly directed in favor of the successor on its appearing that it was not

on the west and south side of Chicago, and it voluntarily conveyed all its rights on the west side to another corporation, which transfer was ratified by the legislature, that relieved the South Side Company so far as the public was concerned of all further rights and duties on the west side.[36] The courts will not ordinarily restrain a street railway company from executing a lease or other contract whose effect is to encourage competition,[37] but a mortgagee may restrain a street railway company whose franchises he holds as security from granting terminal facilities to a rival which will seriously impair the value of the mortgagee's property through increased competition.[38] A street railway company has power to dedicate land to public use but such dedication will not be presumed.[39]

§ 5. *Location, construction, equipment, and operation in general.*[40]—The duty of paving the portion of the street occupied by the tracks is frequently imposed.[41] Power to establish crossings over railroad tracks and rights of way is usually conferred.[42] It is only when the unlawful construction or operation of a railway inflicts peculiar damage on an abutter that he may have it abated as a nuisance,[43] and

in existence at the time of the accident. Palmer Transfer Co. v. Paducah R. & Light Co. [Ky.] 89 S. W. 515.

36. Chicago City R. Co. v. Chicago, 142 F. 844.

37, 38. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

39. Not from use of the land by the public generally necessary to or consistent with the public use for which the railroad company holds the property claimed to have been dedicated. Loomis v. Connecticut R. & Lighting Co. [Conn.] 61 A. 539.

40. See 4 C. L. 1563. See, also, Highways and Streets, 5 C. L. 1645, as to changes of grade and the doctrine of additional servitude.

41. A city ordinance granting a location for street railway tracks, and containing restrictions that the company is to pave the street in which the tracks are laid, is not unreasonable, or ultra vires, and successors in title are bound by such restrictions. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. A city ordinance gave a street railway the right to lay tracks on certain specified streets, and provided that the company should pay the cost of the improvement between its tracks and the lines of its tracks and one foot on each side thereof of all highways which it occupied which should hereafter be improved. Held to apply to all streets occupied by the company, and not merely those enumerated in the ordinance. City of McKeesport v. Pittsburg, etc., R. Co. [Pa.] 62 A. 1075. Though a city may have no power to impose on a street railroad the burden of repaving any portion of its streets, or to exact a contract for such repaving, it may impose on the company, as a condition to granting it the right to use electricity in propelling its cars, and to erect poles and wires for that purpose, the burden of paving the parts of the street between and adjoining the tracks. Such action is not ultra vires, and the payment of the franchise tax does not relieve the company from such duty of paving. Inhabitants of City of Trenton v. Trenton St. R. Co. [N. J. Law] 63 A. 1. A franchise providing that when the streets are not paved the street railway shall spike lumber to the ties, and that the railway shall not in any case be required to pave the streets except as provided in the franchise, does not require the company to pave, and exempts the company when a statute provides that all street railway companies must pave unless by their franchises they are not bound to. Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005.

42. A railroad company owning the bed of its road in fee where the road crosses a public highway is not in the same position as its vendors would have been with reference to a street railway company desiring to lay its tracks on the highway. If the street railway company is otherwise fully entitled, the railroad company holds subject to such right all the land which constitutes its roadway, or "right of way," with respect to all other land the railroad's right is as perfect as that of a private individual. In case of doubt, the court will not restrain a street railway company from laying its tracks on the turnpike on which the land abutts, and extending them on the turnpike across the railroad's right of way. Pennsylvania R. Co. v. Inland Traction Co., 25 Pa. Super. Ct. 115. Where, in a suit by a steam railroad to restrain a street railway company from laying its tracks at grade over the tracks of the steam railroad, the evidence showed that the street was so closely built up that no view of coming trains could be had until the crossing was reached; that fourteen trains passed across the street daily; that, because of a neighboring switch, a large amount of shifting across the street was required; and that many vehicles and pedestrians passed hourly, it was error to dissolve a preliminary injunction on conflicting evidence. Delaware, etc., R. Co. v. Danville, etc., R. Co. [Pa.] 61 A. 80.

43. Where by Code a private person may sue for a public nuisance only if it is specially injurious to himself, and a street railway, in violation of its franchise, built its track near the side of the street in front of the property of an abutting owner, it was held that the injury was one suffered alike by the public at large, and that the plaintiff could not have it abated as a public nuisance specially injurious to her. Reynolds v. Presidio & F. R. Co. [Cal. App.] 81 P. 1118. A complaint alleging the existence of a nuisance consisting of the obstruction of a street in front of plaintiff's premises by the

where the abutter is guilty of laches an injunction will be refused,[44] nor will it issue to restrain the construction of a street railway through a park where there was a right to so construct it but the entry so to do was forcible.[45] Though the business of a street railroad is confined to transportation of passengers, it may transport on its tracks such materials and supplies as are incident to the conduct of its business.[46] The use of street passenger railway tracks for freight traffic is an injury to an abutter[47] for which he can recover permanent damages, but not successive damages as in nuisance.[48] When suing for damages the measure is the depreciation in value of his land based on the hypothesis of a permanent and lawful freight traffic.[49] It is no defense that such unfranchised traffic may be prevented by the public if it so elects and thus lose its supposed permanency.[50]

General rules of care in equipment and operation.[51]—Street railway companies are ordinarily required to keep in repair the portion of the street occupied by their tracks,[52] and are liable for injuries resulting from its negligent failure to do so,[53]

tracks of a street railroad, and further alleging that it had depreciated the rental value of plaintiff's property in a certain sum, and praying that the tracks be adjudged to be a nuisance and that they be abated, and demanding damages equal to the depreciation in the rental value of the premises, could not be held to be one for compensation for damaging private property, within the rule that authorizes an abutting owner to sue for damages suffered through the occupation of a street by a railroad, but was one for the abatement of a nuisance. Id.

44. Where plaintiff, who had been the owner of property abutting a street in New York in which defendant's elevated railway was constructed, made no objection for ten years to defendant's construction of a third track on which to operate express trains, which, though constructed without right, was built in good faith and under color of legislative authority, the court, in a subsequent suit by plaintiff to restrain the maintenance of such track as an unlawful interference with plaintiff's easement of light and air, had power to refuse an injunction on condition that defendant pay damages for the injuries sustained, though defendant had no power to condemn plaintiff's easements; the damage to defendant and to the public, caused by the removal of the track, being greatly in excess of the damage accruing to plaintiff by continuance thereof. Knoth v. Manhattan R. Co., 109 App. Div. 802, 96 N. Y. S. 844.

45. Where a street railway's entry into complainant's park was lawful if properly made, and became unlawful only because it was alleged that the entry was by force at the hands of one from whom the possession was wrongfully withheld, a court of equity, in the absence of irreparable injury from the mode of entry and occupation, would not protect the possession of one wrongfully seeking to withhold it by injunction. but would leave such complainant to redress the forcible trespass by ordinary remedies. Montgomery Amusement Co v. Montgomery Traction Co., 139 F. 353. Where a lease of land for park purposes reserved to the lessors a power to grant a right of way by deed or grant through any part of the leased premises for street railway purposes, the lessors were only entitled, after the improvement of the park, to grant a right of way to a railway company at such a location as would not unreasonably interfere with the arrangement of the park. Id.

46. Carrying coal to power house. Caswell v. Boston Elevated R. Co. [Mass.] 77 N. E. 380.

47. 48. In Illinois the court puts recovery for injury to abutting property by the unauthorized use of streets for freight traffic on the ground that it was "unauthorized and not contemplated by the franchise." The fee is there presumed to be in the public. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32. Liability, however, is not placed on the ground of lack of authority or franchise, since that gives the abutting owner no greater rights nor affects the question of damages. Id.

49. The depreciated market value of the property affected is the proper measure of damages in such a case. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32. The evidence in such a case should be confined to such use as is of a permanent character and reasonably necessary. Id. A mere temporary use of the street for freight traffic purposes is not to be considered in estimating permanent damages. Id. The mere maintenance of a freight depot and the hauling of freight to and from it by teams would not be an element of damages. Id. Whether the property was benefited by the use of the entire railway system for freight traffic is not an element to be considered. Id. The street railway will be allowed to show that abutting property was not injured and that the land was adapted to other uses than its present specific use. Id.

50. Owner may recover for the permanent injury to his property, although at some future date, that same use might be enjoined or abated. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32.

51. See 4 C. L. 1566.

52. A city ordinance requiring any street railway company operating a line within the corporate limits to keep in good repair all that part of the street occupied by its tracks includes additional tracks to be laid as well as those already laid and under operation. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757.

53. The fact that a street railway is by city ordinance required to keep that part of the street over which its track passes in

and are likewise liable for injuries by defects in the track itself.[54] If electricity be used as a motive power they are liable for injuries resulting from negligent use thereof.[55] In most states by statutes railroads, even urban roads in rural districts, must fence their right of way.[56] Cars are frequently required to be equipped with fenders and other safety devices,[57] and occasionally examination and licensing of employes in charge of cars is imposed.[58] Unless the evidence establishes that the railroad company used the fenders improperly, no action can be predicated on injuries inflicted by them.[59] The speed at which cars shall be operated is often regulated.[60] Cars may be allowed to stand on the track for a reasonable length of time.[61]

good repair does not make it any the less liable for negligence in leaving an excavation made by it in such street without the usual safeguards. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Irrespective of ordinance, where a street railway company takes possession of a portion of a public street for the purpose of building and operating a railway under its franchise, it necessarily assumes a duty to the public to keep that part of the street occupied by it free from pit falls and in a safe condition, and where the work to be done is intrinsically dangerous, the company cannot escape liability by employing an independent contractor, but is liable for his acts, however skilfully performed. Id. Where a street railway company had a street torn up between its tracks, and put down a board crossing, the fact that there was a knot hole in a board whereby a pedestrian was injured does not show negligence where it is not shown that the company put the board there, had knowledge of the defect, or that the board was there long enough to charge them with notice. Keating v. Metropolitan St. R. Co., 105 App. Div. 362, 94 N. Y. S. 117. In an action against a street railway company for an accident caused by a defect in a bridge, the plaintiff must show that the company and not the town was responsible for the repairs of the bridge. Wagner v. Lehigh Traction Co., 212 Pa. 132, 61 A. 814. The fact that the city engineer is overlooking work done by a street railway in a public street in the course of repairing its tracks does not relieve the railway from the duty resting on it to keep such part of the street in a safe condition. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757.

Contributory negligence: A pedestrian on a public street need not ascertain whether or not the way is clear, but, if knowing of an instruction or having reason to believe that one exists, he must exercise ordinary care in looking for and avoiding it. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Pedestrian injured by stepping into knothole in board at temporary crossing must show, to show due care, that he took precautions to observe state of temporary crossing of which he had knowledge. Keating v. Metropolitan St. R. Co., 105 App. Div. 362, 94 N. Y. S. 117.

54. Where a child of seven caught his foot between one of the rails and the boards of one of defendant's crossings, the question of negligent construction is for the jury upon all the evidence. McDermott v. Severe, 25 App. D. C. 276. Where by the construction of a subway beneath the roadbed of a street railway a trolley slot thereon would spread at times about an inch for a distance of two feet, and a bicycle rider was thereby injured, and the evidence showed the slot was safe up to within a short time of the accident, it was held that the street railway company was not chargeable with notice of its condition so as to make it liable on the theory of negligence. Griffin v. Interurban St. R. Co., 46 Misc. 328, 94 N. Y. S. 854. A street railway company is not liable for an injury to a wagon through a switch, licensed by the city, if reasonable care is used in the selection and maintenance of the same, and the danger is not so great as to have the switch amount to a nuisance. Morie v. St. Louis Transit Co. [Mo. App.] 91 S. W. 962.

55. See Electricity, 5 C. L. 1086.

56. Iola Electric R. Co. v. Jackson, 70 Kan. 791, 79 P. 662.

57. A city ordinance, providing that it shall be unlawful on and after a certain date to run any street car within the city without having securely fastened to its front end a proper automatic fender made by a particular fender company, or some other fender equally as good, to be approved by the common council or its street committee, is void for nonuniformity and is arbitrarily discriminating in favor of some manufacturers of fenders and against others. City of Elkhart v. Murray [Ind.] 75 N. E. 593. When a passenger alighted at a terminus and, going directly in front of the car, stumbled over the fender, it being dark at the time, it was held that the company was not negligent. Poland v. United Traction Co., 107 App. Div. 561, 95 N. Y. S. 498.

58. A person employed to stand at the rear end of a car, in charge of a motorman and loaded with coal, to look out for the trolley, turn switches, and unload the coal, is not a "conductor," and the failure of such person to obtain a license has nothing to do with an accident where the only negligence, if any, was that of the motorman. Caswell v. Boston Elevated R. Co. [Mass.] 77 N. E. 380.

59. In backing a car around a curve plaintiff was struck and injured by a fender. No negligence because it was not raised, especially where no custom or necessity for raising them was shown. Hoffman v. Philadelphia Rapid Transit Co. [Pa.] 63 A. 409.

60. The proper construction of an ordinance limiting the speed of cars to fourteen miles, including stops, is that at the end of the run the average speed should not exceed that rate. Columbus Ry. v. Connor, 6 Ohio C. C. (N. S.) 361. It is negligence per se to run a street car at a speed prohibited by a city ordinance. Heintz v. St. Louis Transit Co. [Mo. App.] 92 S. W. 353.

61. Poland v. United Traction Co., 107 App. Div. 561, 95 N. Y. S. 498.

Reasonable restrictions and conditions may be imposed,[62] and if the company enters on the enjoyment of a franchise containing restrictions it is estopped to deny their validity.[63] An ordinance requiring motormen to keep a vigilant lookout and stop the car at the first appearance of danger is a valid exercise of the police power.[64] Statutes regulating the operation of railroads are sometimes held to apply to interurban street car lines.[65]

§ 6. *Injuries to passengers.*[66]

§ 7. *Injuries to employes.*[67]

§ 8. *Injuries to persons other than passengers or servants. A. Travelers on highway.*[68] *Pedestrians run over. Due care of plaintiff.*[69]—It is well settled that a pedestrian must use due care in approaching and crossing street railway tracks, but where there is no evidence on this point, there is a conflict of opinion as to whether due care may or may not be presumed.[70] Some jurisdictions hold that he must look and listen before crossing as an absolute matter of law,[71] others hold that there is no such absolute duty imposed, and that due care is a question to be determined by the circumstances of each particular case.[72] As a general rule, where a pedestrian goes in front of a car, and there is evidence either that he did not look or that he had a clear view and could have seen the car if he had looked, he cannot recover.[73] Where it appears that a pedestrian did look for a car, this is

62. An ordinance limiting the speed of electric cars will not be interfered with by the courts except for good cause shown, and a limit of 6 miles an hour between crossings and 4 miles an hour over crossings is not unreasonable. Cincinnati, L. & A. Elec. St. R. Co. v. Stahle [Ind. App.] 76 N. E. 551. A municipality may provide by ordinance for the separation of the races on street cars in such city under its police power, and an option that the company may provide separate cars or divide its cars is not an unauthorized delegation of authority. Patterson v. Taylor [Fla.] 40 So. 493. The legislative or municipal control over streets in the matter of authorizing the placing of obstructions thereon is not absolutely unlimited and must be exercised for the public welfare, and private structures which are inconsistent with the primary use of the streets or structures which prevent the use of the streets for travel or access to abutting property cannot be licensed. Morle v. St. Louis Transit Co. [Mo. App.] 91 S. W. 962.

63. Where ordinances of a city gave to a street railway company permission to construct lines of railway in the streets and to operate cars thereon, upon terms of paying annual license fees for each car so operated, and the company accepted the ordinance upon these terms, constructed the lines of street railway, and for many years operated cars thereon, it was held that the company and its successors who acquired its railway lines and assumed its obligations are estopped from setting up that the terms imposed by the ordinances were ultra vires the municipal corporation. Jersey City v. North Jersey St. R. Co. [N. J. Law] 61 A. 95.

64. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648. See note 19 Harv. L. R. 303.

65. Par. 75, § 12, c. 114, R. S. Hurd, providing an engineer must come to a full stop within 800 ft. of a railroad which crosses the tracks on which the engineer is running, applies to an electric railroad as well as a steam road, and failure to make the stop is negligence. Roy v. East St. Louis & Suburban R. Co., 119 Ill. App. 313.

66. See Carriers, 5 C. L. 507.

67. See Master and Servant, 6 C. L. 521.

68, 69. See 4 C. L. 1567.

70. In the absence of evidence to the contrary it will be presumed, in an action for death by being run over at a crossing, that the deceased looked and listened for an approaching car and was in the exercise of due care. Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602. Where a pedestrian was run over by a car it was held that, assuming the motorman's negligence just before the accident, the burden was on the plaintiff to show due care, and the burden was not sustained where plaintiff was last seen walking near the track, and there was no evidence of due care between this and the accident. Gorham v. Milford, etc., R. Co. [Mass.] 75 N. E. 634.

71. A pedestrian about to cross street car tracks is under obligations to listen and look both ways and failure to do so is negligence. Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390; Heintz v. St. Louis Transit Co. [Mo. App.] 92 S. W. 353.

72. It is not a rule of law that a person is bound under all circumstances to look and listen before crossing the tracks of a street railway. Chicago City R. Co. v. Barnes, 114 Ill App. 495. A person crossing the tracks of an electric railway is not bound to the same duty to stop and look and listen as when crossing a steam railway. Finnick v. Boston & N. St. R. Co. [Mass.] 77 N. E. 500.

73. Where a pedestrian run over at night had a clear view of an approaching car, and the car was lighted by electricity, there can be no recovery. Chicago City R. Co. v. Barnes, 114 Ill. App. 495. A woman possessed of good eyesight and hearing who walks across a street car track in broad daylight, oblivious to her surroundings, is guilty of contributory negligence. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680,

generally enough to take the question of due care to the jury, especially when there are other circumstances tending to show negligent operation of the car.[74] The mere fact of looking once, however, does not absolve the pedestrian from taking further precautions. If he sees a car when he is some distance from the track and goes on the track without looking again, he is guilty of negligence.[75] Where there are double tracks and a passenger alights from a car, crosses in the rear of the car, and is struck by a car coming in the opposite direction, if it appears that he crossed without looking he is generally held to be guilty of lack of due care,[76] although a recovery has been allowed under such a state of facts.[77] A pedestrian has a perfect right not only to walk in the street where a street railway track is situated, but also to walk on the tracks themselves, always provided that he uses due care.[78] A

88 S. W. 765. Where a pedestrian walked in front of a car when there was nothing to obstruct his view except a car coming in the opposite direction, it was held that there could be no recovery. McEntee v. Metropolitan St. R. Co., 110 App. Div. 673, 97 N. Y. S. 476.

74. Where a pedestrian looked for a car, and it appeared that his view was obstructed, and that the car which struck him was run at high speed without warning, his due care is a question for the jury. Wachter v. St. Louis & M. R. R. Co., 113 Mo. App. 270, 88 S. W. 147. Where a pedestrian saw an approaching car, and was injured while attempting to cross in front of it, and there was evidence of a defective lookout on the part of the motorman, due care was held to be a question for the jury. Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319 Where a pedestrian saw an approaching car, but was injured while attempting to cross in front of it, and there was evidence that the car was being driven at high speed, due care is a question for the jury. Chicago City R. Co. v. Nelson, 116 Ill. App. 609.

75. Where a pedestrian looked when she started to cross the street, saw a car coming, and did not look again until struck by the car, there is no evidence of due care. Boring v. Union Traction Co. [Pa.] 61 A 77. A pedestrian must look, not only before crossing a street, but also after her view has been intercepted by a wagon, and if her failure to look is the direct cause of her injury, there can be no recovery. Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319. It is not enough for a pedestrian to look once when some distance away from the track. He must continue to look until he is safely across. Lofsten v. Brooklyn Heights R. Co. [N. Y.] 76 N. E. 1035; Ross v. Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144. If a pedestrian saw the danger or should have seen it under the circumstances and could have avoided it by reasonable care, her right of recovery is defeated. Hoffman v. Philadelphia Rapid Transit Co. [Pa.] 63 A. 409.

76. Where a passenger steps off a car, goes around behind it, and is struck and killed by a car coming in the opposite direction, and it appears that there was a clear view and that the car was lighted, there is no evidence of due care. Axelrod v. New York City R. Co., 109 App. Div. 87, 95 N. Y. S. 1072. A passenger who alights from a car, and, absorbed in a paper, passes behind the car onto a parallel track without looking, is not in the exercise of due care. Deane v. St. Louis Transit Co. [Mo.] 91 S. W. 505. Where a passenger alighted from a car, went around behind it without looking, and was struck by a car coming on a parallel track in the opposite direction, he is not in the exercise of due care and cannot recover, even if the company is negligent, unless their negligence is willful or wanton. The question of due care is not affected by the fact that the company did not observe its rules as to stopping and sounding the bell, it not appearing that such rules were customarily observed or that the plaintiff relied upon or knew of them. Birmingham R., Light & Power Co. v. Oldham, 141 Ala. 195, 37 So. 452.

77. A motorman must use ordinary care at a street crossing immediately after a car bound in the opposite direction has stopped there to let off passengers, and where a passenger alighted on a foggy night, and was struck by a car coming at high speed, a verdict for the plaintiff was held to be sustained by the evidence. Chicago Union Traction Co. v. Nuetzel, 114 Ill. App. 466.

78. A pedestrian has a right to walk on an electric car track if he is in the exercise of due care, and this question is for the jury where the plaintiff was struck by a car on a country highway at night, where cars only ran once an hour, and it appeared that no warning was given and that a freight train in the near vicinity was making much noise. Neary v. Citizens' R., Light & Power Co., 110 App Div. 769, 97 N. Y. S. 420. Where plaintiff, standing between two parallel tracks at a regular stopping place waiting to board a car, was struck by a car, and it appeared that the motorman was not looking ahead and had temporarily abandoned control of his car to fix his fender, it was error to direct a verdict for the defendant. Hawley v. Columbia R. Co., 25 App. D. C. 1. One who is standing in the street near the curve of a street car track, which is plainly visible to him, is bound to step back a sufficient distance to avoid being struck by the overhang of the rear end of a car which he sees approaching the curve. Matulewicz v. Metropolitan St. R. Co., 107 App. Div. 230, 95 N. Y. S. 7. Where a pedestrian miscalculated the swing of a car rounding a curve and was injured, it was held that he could not recover. McCabe v. Interurban St. R. Co., 97 N. Y. S. 353. Where plaintiff left a sidewalk because of alleged defects, and, with full knowledge of the locality, and plenty of space between the car track and the sidewalk, walked so near the track on a dark night that he was struck by a car coming from the rear, he was held guilty of contrib-

common case is that of injury to a laborer working on the tracks of a street railway.[79]

Negligence of company.[80]—A street railway company is bound to use ordinary care to avoid accidents.[81] At street crossings the rights of the car and the pedestrian are usually held to be equal.[82] Notwithstanding a pedestrian's lack of due care, the company may nevertheless be held liable if it could have prevented the accident by the use of ordinary care,[83] but it is a qualification of this rule as important as the rule itself that, where there are no intervening facts to give rise to a new situation, the rule cannot properly be applied.[84] Various rulings have been

utory negligence. Dooley v. Union R. Co., 106 App. Div. 397, 94 N. Y. S. 635. One who stands on a street car track talking, with knowledge that a car is rapidly approaching, and without taking any precaution to avert injury to himself, is guilty of contributory negligence. Gargano v. Forty-Second St., etc., R. Co., 94 N. Y. S. 544. In an action for injuries sustained by being struck by a street car, where it appeared that the plaintiff was stooping near the track with his face in the direction from which the car came, and could have seen it had he looked, and could have heard it had he listened, it was proper to direct a verdict for defendant. Quinn v. Boston Elevated R. Co., 188 Mass. 473, 74 N. E. 687. Where a pedestrian walking on the track did not see or hear a car coming, but was warned by a companion, who easily avoided injury, he was held guilty of contributory negligence. Garvick v. United Rys. & Electric Co. [Md.] 61 A. 138.

79. A workman in a trench under a street railway track cannot rely on being signalled by the motorman, nor can he rely on his sense of hearing alone, and if he forgets to use due care in keeping a lookout he cannot recover. Clancy v. St. Louis Transit Co. [Mo.] 91 S. W. 509.

80. See 4 C. L. 1670.

81. Hoffman v. Philadelphia Rapid Transit Co. [Pa.] 63 A. 409. The violation of a municipal ordinance with regard to the use of fenders is prima facie evidence of negligence. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359. The degree of care to be exercised by a motorman necessarily varies with circumstances and no unbending rule can be laid down. Hanlon v. Philadelphia & W. C. Traction Co., 28 Pa. Super. Ct. 223. The mere fact that a car strikes and injures a pedestrian raises no presumption of negligence on the part of the street railway company. Garvick v. United Rys. & Electric Co. [Md.] 61 A. 138. The mere fact that the horses of a street car driver broke away and ran while they were being detached from the car to get around a hole in the street does not establish the defendant's negligence. Cunningham v. Dry Dock, etc., R. Co., 96 N. Y. S. 1070. Where the only person in the company's employ charged with negligence was the conductor, an instruction that the defendant could not be held liable because the motorman did not reverse his power instead of relying on the brakes was held improperly refused. Cunningham v. Metropolitan St. R. Co., 104 App. Div. 525, 93 N. Y. S. 700.

82. At street crossings the rights of pedestrians and street cars are equal, each being bound to use ordinary care to avoid injury. Birmingham R., Light & Power Co. v. Oldham, 141 Ala. 195, 37 So. 452. The right of the electric railway company to use its tracks, although laid on a public highway, is superior to that of a pedestrian or the driver of a vehicle. Minninch v. Wright [Pa.] 63 A. 438. Where one crosses street car tracks at their intersection with a highway he is not a trespasser. Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390.

83. The contributory negligence of a person injured will not defeat his action if the defendant, by reasonable care and prudence, might have avoided the consequences of such contributory negligence. Hawley v. Columbia R. Co., 25 App. D. C. 1. Though a pedestrian is negligent in going upon a track (Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390), yet if the motorman by the exercise of ordinary care could have avoided injuring him and failed to do so, then the pedestrian's negligence is no defense (Id.). If a pedestrian or driver through an error of judgment attempts to cross in front of a car and is injured, the question of negligence is not a matter of law but for the jury. Heintz v. St. Louis Transit Co. [Mo. App.] 92 S. W. 353. If a pedestrian has placed himself in a position of peril through his own negligence, and the employes in charge of a car of a street railway company, comprehending the situation in time to avoid injury, deliberately run him down, the company is liable. Ross v. Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144. Though a pedestrian negligently places herself in a position of peril while crossing a street railway track, the street railway company may nevertheless be held liable if the motorman, knowing of the pedestrian's peril in time to prevent the injury negligently fails to do so. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765. Where a pedestrian negligently catches his foot in a street railway track the company is liable if the employes in charge of a car could have discovered his peril in time to avoid injury by the exercise of proper care, but failed to do so. Williams v. Metropolitan St. R. Co., 114 Mo. 1, 89 S. W. 59. A motorman who discovers the peril of a person on the track is bound to use only ordinary care to use all means at hand to avoid injuring the person in peril. Beaty v. El Paso Electric R. Co. [Tex. Civ. App.] 91 S. W. 365.

84. Plaintiff, waiting in the space between two tracks, was struck by a passenger attempting to board another car on a parallel track and thrown under the car. A charge that if plaintiff was negligent, yet if the conductor could have avoided the accident the plaintiff was not barred from recov-

made on the question of what constitutes a proper lookout,[85] what constitutes proper warning,[86] and what is proper speed at which to run a car.[87] If a motorman operating a street car sees a pedestrian or vehicle crossing the tracks before him and he fails to stop the car in time to avoid the accident when he might have done so, he is guilty of negligence.[88]

Children run over.[89]—Whether a child is so young as to be incapable of contributory negligence is a question which has come frequently before the courts. In some cases it is held as a matter of law that a child is non sui juris, while in others whether or not the child is non sui juris is held to be a question for the jury.[90] If

ery, held error. Cunningham v. Metropolitan St. R. Co., 104 App. Div. 525, 93 N. Y. S. 700.

85. Motormen are bound to look out not only for persons on the track but for people moving towards it with evident intention of crossing. Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390. A motorman is not required to assume that pedestrians approaching the track will act carelessly in going upon the track in front of him. To make it incumbent to stop there must be something noticeable in the conduct of the pedestrian sufficient to show some danger of an accident. Ross v. Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144. A motorman may assume that a person, apparently normal, approaching the track, will stop before crossing, but if the conduct of the pedestrian tends to show that he is not going to stop, the motorman must run his car as if he knew that the pedestrian was going to cross in front of the car. Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602. When a man was run over at a street crossing at midnight, and the car was brilliantly lighted, and there was no evidence of undue speed or failure to give proper signals, a nonsuit is proper. Mulvaney v. Pittsburg Rys. Co. [Pa.] 62 A. 926. A motorman has a right to assume that a pedestria non the track, possessing full powers of locomotion and free to escape from danger, will leave the track in time to avoid injury, especially when he knows the car is approaching. Garvick v. United Rys. & Electric Co. [Md.] 61 A. 138. A motorman on a street car may rightfully assume that an adult, apparently in full possession of health and vigor, standing in the street near a curve in the track, but not near enough to be struck by the forward end of the car, will draw back far enough to avoid being struck by the overhang of the car as it rounds the curve. Matulewicz v. Metropolitan St. R. Co., 107 App. Div. 230, 95 N. Y. S. 7. Where a pedestrian standing near the track suddenly ran in front of an approaching car, there was held to be no negligence on the part of the company. Greve v. New Orleans & C. R. Light & Power Co., 114 La. 974, 38 So. 698. A motorman running over the company's private right of way is not bound to keep a lookout for trespassers where he has a right to assume that the track is clear, but where pedestrians have been for some time in the habit of walking along the right of way, a motorman, before reaching a point where he has reasonable grounds to anticipate the presence of such persons, must be on the alert and keep a lookout. Levelsmeier v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 104. A statute provided that engineers and conductors of railroads should stop their trains before crossing the tracks of another road and not proceed until they know the way to be clear, and a municipal ordinance required persons in charge of street cars to stop them before crossing railroad tracks, and requires the conductor to "walk across the track" in front of the car. A conductor of a street car stopped his car on a dark, rainy night, walked to the center of the track, and, hearing no train, signaled the motorman to cross. The car was struck by a train running at high speed without lights or warning, and the conductor was killed. Held that whether he violated the statute and was thus guilty of contributory negligence, and whether his death was proximately caused by his negligence in failing to comply literally with the ordinance, were questions for the jury. Southern R. Co. v. Jones [Ala.] 39 So. 118.

86. If a pedestrian knew that a car was approaching, whether or not those in charge of the car gave warning is immaterial. McEntee v. Metropolitan St. R. Co., 110 App. Div. 673, 97 N. Y. S. 476. Failure of motorman to ring gong is not evidence of negligence when pedestrian knew of car's approach. Garvick v. United Rys. & Electric Co. [Md.] 61 A. 138. Where a pedestrian saw a car before it started, whether the motorman rang his bell or not is immaterial. McCabe v. Interurban St. R. Co., 97 N. Y. S. 353. It is error to dismiss the complaint at the close of plaintiff's case in an action for a collision of a street car with a uniformed street sweeper engaged in sweeping the track when there is evidence that he was seen by the pasengers at a considerable distance, that the motorman did not slacken speed until the accident was inevitable, and gave no warning, though the sweeper saw the car two blocks away, and, expecting a warning, did not look up again. Reilly v. Interurban St. R. Co., 108 App. Div. 254, 95 N. Y. S. 721.

87. A pedestrian has a right to assume that a car at a crossing will be run in obedience to a city speed ordinance. Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602. Speed of 20 to 25 miles an hour at crossing, in violation of 10 mile speed limit, is evidence of negligence. Id. Where a motorman 120 ft. from a crossing well lighted by an arc light, where a pedestrian is trying to cross, runs his car at a prohibited speed and fails to ring a gong, it is a question of fact for the jury whether he could have avoided the accident by ordinary care. Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390

88. Heintz v. St. Louis Transit Co. [Mo. App.] 92 S. W. 353. That he honestly believed the pedestrian or vehicle would clear the track in time to avoid the danger is no excuse. Id.

89. See 4 C. L. 1571.

90. In a suit on account of injuries to a

it is decided that a child is non sui juris, and consequently incapable of exercising due care, there is a conflict as to whether the lack of due care of the parent or person in charge of the child may be imputed to it.[91] The children are not held to the same degree of care as adults, yet they must exercise the degree of care which ordinarily prudent children of their age and intelligence would exercise under like circumstances.[92] Due care requires a child to use some degree of watchfulness before attempting to cross a street railroad track[93] and if children unreasonably, intelligently, and intentionally run into danger from street railways, they should take the risks.[94] The youth of a plaintiff does not relieve him from proving negligence.[95] A street railway company must use more care towards children than towards adults,[96]

boy eleven years of age from being struck by a car, it is error to charge that, in the absence of greater intelligence and capacity than is common to boys of his age, the law presumes that he is incapable of being charged with contributory negligence. Cincinnati Traction Co. v. Blackson, 6 Ohio C. C. (N. S.) 233. No presumption arises as to whether a boy eleven years of age can be charged with contributory negligence, but his capacity to avoid danger is a question to be left entirely to the jury. Id. If it is not averred that a child is non sui juris, he is not entitled to prove such fact. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895. A child of ten may be guilty of contributory negligence sufficient to bar recovery. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177.

91. Negligence of parents in allowing child of four to go alone on city street where street cars are run cannot be imputed to child in action by him for being run over. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183. Whether the parents of a bright child of 5 are negligent in allowing the child in the street alone is for the jury. Wabnich v. Dry Dock, etc., R. Co., 98 N. Y. S. 38. Even though the parents of a child are negligent in allowing it to be alone in the street, if a child run over by a street car at the time of the accident exercised the due care of an adult, mere negligence on the part of the servants of the company is sufficient for the maintenance of the action, and there is no need to show wanton negligence. Chicago City R. Co. v. Jordan, 116 Ill. App. 650.

92. Colomb v. Portland & B. St. R. Co. [Me.] 61 A. 898. Age and intelligence of a party are important factors in determining whether due care has been used. Id. Though a child, one crossing street car tracks is bound to exercise due care. Id. A child run over by a street car in order to recover was bound to show not only the defendant's negligence but affirmatively that there was no want of due care on her part. Id. A child of ten, in crossing street railway tracks, must exercise the care reasonably to be expected from a child of his age and intelligence. West v. Metropolitan St. R. Co., 105 App. Div. 373, 94 N. Y. S. 250. A child of 5 years and 2 months is bound to use the care to be expected from a child of her age and condition. Wabnich v. Dry Dock, etc., R. Co., 98 N. Y. S. 38. Where the mental capacity of a boy of twelve is in question, the rule is that he is bound to exercise all the care that he might reasonably have exercised by the employment of his faculties. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895. A boy nine years old running from behind a wagon suddenly and unexpectedly in front of a street car, and instantly struck by the car, so that the motorman had barely an instant in which to stop the car was guilty of such negligence as barred recovery. Wirzginda v. Schuylkill Traction Co., 212 Pa. 360, 61 A. 943. It is not enough for a boy of twelve to look for cars before crossing the track but he must exercise due care while on the track as well. Lipis v. Metropolitan St. R. Co., 98 N. Y. S. 259. Where a boy of ten saw a car 200 feet away, and attempted to cross in front of it, he is not negligent as a matter of law. Hovarka v. St. Louis Transit Co. [Mo.] 90 S. W. 1142. For a child of five to pass behind a car and step on a parallel track without looking for an approaching car is not negligent as a matter of law. Chicago City R. Co. v. Jordan, 116 Ill. App. 650. The attempt by a 10 year old child to cross the track in front of a moving car, which could not have been many feet from her, was conduct "such as the judgment of common men universally would condemn as careless in any child of sufficient age and intelligence to be permitted to go alone" across a street on which electric cars are frequently passing. Colomb v. Portland & B. St. Ry. Co. [Me.] 61 A. 898. The due care of a boy of ten who crossed from behind a wagon where there were double tracks and was struck by a car coming in the opposite direction on the further track is for the jury. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177.

93, 94. Colomb v. Portland & B. St. R. Co. [Me.] 61 A. 898.

95. Wiszginda v. Schuylkill Traction Co., 212 Pa. 360, 61 A. 943.

96. More care must be used towards children than towards adults, and where a motorman should and must have seen a young child, alone, dangerously near the car tracks, it was his duty to use means "strictly commensurate with the demands and exigencies of the occasion" to prevent injury, and the company must prove such means were used or be liable. Jacksonville Electric Co. v. Adams [Fla.] 39 So. 183. A motorman operating a street car on approaching a crossing where a number of children are congregated or passing across the tracks is bound to know that they may not exercise the care of older persons, and to take special precautions accordingly to avoid their injury and where in such case a child was run over and there was substantial evidence tending to show that the car approached the crossing at a speed of 10 to 15 miles an hour, without giving any warning of its approach, although such evidence was contradicted, a verdict finding the company negligent will not be

although some courts prefer to state the rule as being that ordinary care under all the circumstances of each particular case is the general standard to be applied, whether the case be that of a child or an adult.[97] Numerous rulings have been made on the question of proper lookout on the part of those in charge of the car,[98] and what is proper speed for a car.[99] The care due from the company may be affected by the fact that a child is a trespasser upon the company's premises.[1]

(§ 8) *B. Accidents to drivers or occupants to wagons. Collisions between car and wagons.*[2]—The driver of a wagon must use due care in approaching and crossing street railway tracks.[3] As a general rule, where there is evidence that the driver of a wagon either did not look for a car or could have seen it if he had

disturbed. Camden Interstate R. Co. v. Broom [C. C. A.] 139 F. 595.

97. Although the age of the plaintiff is one of the circumstances to be considered, and although conduct which might not be negligent towards an adult might be negligent in the case of a child, still it is not proper to say that the company owes more care to a child on a crowded street crossing than to a man on a vacant street. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359.

98. Plaintiff, a child less than three years old, in attempting to cross a street, darted from a sidewalk behind a wagon standing in front of plaintiff's house and struck the running board of defendant's street car. The car was going at moderate speed, and as it approached there was nothing in sight and no children in sight for 200 yards. It was held there was no negligence in failing to sound the gong. Bouthillier v. Old Colony St. R. Co. [Mass.] 75 N. E. 960. When a child of five was playing behind a pile of earth about five feet from a street railway track, and suddenly ran out on the track when the car was not more than four feet away, there is no negligence on the part of the company. Sontgen v. Kittanning, etc., R. Co. [Pa.] 62 A. 523. Where a boy of nine was walking behind a wagon and stepped suddenly in front of a car, there was held to be no negligence on the part of the company. Leitzel v. Harmsburg Traction Co. [Pa.] 62 A. 102. A street railway company is not liable for the death of a child, who ran across the street directly in front of the car, in the absence of evidence that anything the gripman could have done would have avoided the accident. West v. Metropolitan St. R. Co., 105 App. Div. 373, 94 N. Y. S. 250. Where a boy of ten started to cross the track 200 feet ahead of the car, the motorman was not negligent in not attempting to stop the car. Hovarka v. St. Louis Transit Co. [Mo.] 90 S. W. 1142. Where a child of nine is negligent in going on the track, and it is proved that the motorman did not see the child until after the accident, there can be no recovered, for according to California law the motorman must actually be aware of the child's danger to hold the company in such a case. Bennischen v. Market St. R. Co. [Cal.] 84 P. 420. Where a child of seven was caught in the track and a motorman saw him 300 or 400 feet away, but made no effort to stop until 35 or 40 feet away, where he saw the boy was caught, negligence is for the jury, and it is not enough that the motorman did what he could after he actually saw the boy was caught. McDermott v. Severe, 25 App. D. C. 276. Where a child is too small to be guilty of contributory negligence, inevitable accident is no defense; when a motorman might have discovered it 50 ft. ahead of him and by the exercise of due care have stopped the car 'nside of 40 feet. Koenig v. Union Depot R. Co. [Mo.] 92 S. W. 497. Where there is an allegation of wanton negligence, and there is no evidence that the motorman saw the child in time to avoid the injury, and no evidence that he purposely ran over her, it must appear that his negligence was so gross as to amount to wanton or willful negligence. Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177.

99. In an action for injuries caused by being struck by a street car, evidence that the father of the plaintiff, then an infant one year old, before going on the track saw that the car had stopped about 40 feet away, and that as he stepped on the track the motorman quickened speed, so that the car struck him as he was on the last rail, presenting a case for the jury. Franco v. Brooklyn Heights R. Co. 108 App. Div. 14, 95 N. Y. S. 476. Dangerous speed and the failure to give warning at a crossing sustains a charge of wantonness. Chicago City R. Co. v. Jordan, 116 Ill. App. 650.

1. Where a child of two was run over by an electric car of a coal company operated on its own grounds, there was held to be no evidence of negligence. Estep v. Webster Coal & Coke Co. [Pa.] 62 A. 1082. In the case of an injury to a boy trespasser it was held that a company erecting and maintaining an elevated railway structure upon which there is a live rail is required to use only ordinary care in precluding children from getting on the rail, and that not to prevent people from climbing on the structure at a point where there is no temptation to do so is not negligence, nor is it negligence not to place warning signs on the live rail where there is no custom of children climbing on the structure and nothing about the structure alluring to them. McAllister v. Jung, 112 Ill. App. 138.

2. See 4 C. L. 1572.

3. Even if the street railway company is negligent, yet, if a driver is also negligent, and his negligence contributed to the accident so that but for it he would not have been injured, there can be no recovery. Lexington St. R. Co. v. Strader [Ky.] 89 S. W. 158. An instruction authorizing recovery only if the plaintiff was "free" from negligence is improper as saying that any negligence, however slight, will bar recovery. Palmer Transfer Co. v. Paducah R. & Light Co. [Ky.] 89 S. W. 515. Failure to look for an approaching street car is negligence per se. Houston Bros. Co. v. Traction Co., 28 Pa. Super. Ct. 374. Any one before crossing a

looked for it, he cannot recover for injuries received from driving in front of the car.[4] As a general rule, where there is evidence that the driver did look for a car, this is sufficient to take the question of his due care to the jury, especially where there is evidence of negligent operation of the car.[5] The mere fact of looking once for a car, however, does not by any means absolve the driver from the duty of taking further precautions. If he sees a car coming when he is some distance from the track, and drives on the track without looking again, he is not in the exercise of due care,[6] although under a somewhat unusual state of facts the question of the

track should not only look but also listen for approaching cars. Hattcher v. McDermot [Md.] 63 A. 214.

4. Evidence that plaintiff's servant was driving along a street in the same direction in which a street car was traveling, and, without looking or taking any precaution, drove on the track in front of the car, does not show freedom from contributory negligence. Kueski v. New York & Q. C. R. Co., 109 App. Div. 209, 95 N. Y. S. 650. To convict a driver of negligence it must appear that if he had looked about him he could have discovered an approaching car in time to avoid the accident. Minnich v. Wright [Pa.] 63 A. 428. There is always a duty on the part of a driver about to cross a street railway to look for an approaching car, and if the street be obstructed, to listen, and in some situations to stop. Houston Bros. Co. v. Traction Co., 28 Pa. Super. Ct. 374. The time of looking for an approaching car is not on first entering a street but just before he enters onto the track. Id. A jury might find that a driver failed to look for a car where the collision occurred in daytime and a free view of the track, 30 feet before approaching it, was obtainable. Weske v. Chicago Union Traction Co., 117 Ill. App. 298. Where, if the driver of a cab had looked, he could not have failed to see a car approaching at high speed, he cannot recover. Hebron v. New York City R. Co., 9 N. Y. S. 341. There can be no recovery where the driver of a wagon either saw or could have seen a car approaching but drove directly in front of it when it was but 15 or 20 feet distant. Williams v. New York City R. Co., 97 N. Y. S. 393. There is no evidence of due care when the driver of a team driving near the tracks at night turned suddenly onto the track in front of a car which he could have seen if he had looked. American Ice Co. v. New York City R. Co., 98 N. Y. S. 219. A failure to look and listen is not always negligence. North Chicago St. R. Co. v. Canfield, 118 Ill. App. 353. Going upon a track without looking or listening is negligence when nothing is shown to excuse the failure to exercise reasonable and ordinary care. Id.

5. For a cab driver to attempt to cross the tracks of a street railway company ahead of an approaching street car is not negligence per se. Fisher v. Chicago City R. Co., 114 Ill. App. 217. Due care is for the jury where the accident occurred on a snowy night, and the plaintiff was struck by a car which he saw 150 feet away, there being evidence to show that the car came at high speed without warning. Id. It was error to take a case from the jury where plaintiff before crossing looked 300 ft. up the track and saw no car. Gaffka v. Detroit United R. Co. [Mich.] 13 Det. Leg. N. 44, 106 N. W. 1121. Where a driver looked for a car, but was injured while crossing the track, and there was evidence of defective lookout on the part of the motorman, the driver's due care was held to be for the jury. Macon R. & Light Co. v. Streyer, 123 Ga. 279, 51 S. E. 342. Due care is for the jury where the driver of a wagon saw a car coming but was injured, and there was evidence that the car was being driven at high speed. Central R. Co. v. Sehnert, 115 Ill. App. 560. The due care of the driver of a team injured in a collision is for the jury where the driver looked for the car, and there was evidence of defective lookout on the part of the motorman and evidence that the brakes were in a defective condition. Hot Springs St. R. Co. v. Charlton [Ark.] 88 S. W. 1006. The due care of the driver of a team who looked for an approaching car is for the jury when there was evidence of a defective lookout on the part of the motorman. Rapp v. St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865. Due care is for the jury where the driver of a team looked for an approaching car, and there was evidence that the car approached a crossing at high speed without warning. Orth v. Boston El. R. Co., 188 Mass. 427, 74 N. E. 673. Due care is for the jury where the driver of a team with a heavy load saw a car and drove on the tracks when the car was 75 feet away. Murphy v. Metropolitan St. R. Co., 110 App. Div. 717, 97 N. Y. S. 483. Where the driver of a team looked for a car before attempting to cross the part of the motorman and evidence that the track, and there was evidence that the car was being driven at high speed, the due care of the driver is for the jury. United Rys. & Electric Co. v. Watkins [Md.] 62 A. 234. Where street car had to travel over 200 feet, embracing two crossings, while driver's truck was traveling about 60 feet in crossing tracks obliquely, and the driver testified that the speed of the car was increased, that he used his whip and almost got clear, it was held that he was not guilty of contributory negligence as a matter of law. Mattes v. New York City R. Co, 95 N. Y. S. 596. Whether driver of vehicle was justified in believing he could cross street at a crossing in front of a street car, or whether he was negligent, held a question of fact for jury. Omaha St. R. Co. v. Mathiesen [Neb.] 103 N. W. 666.

6. Where a driver drove on the tracks before rounding a curve and looked once, although he could see but a short distance, and then did not look again until struck by a car, and there was no allegation of wilful negligence or that the motorman saw the danger in time to prevent the accident, there can be no recovery. Allworth v. Muskegon Traction & Lighting Co. [Mich.] 12 Det. Leg. N. 630, 105 N. W. 75. It was error to nonsuit a plaintiff who, before going across one track behind a car looked up and down the

driver's due care in such a case has been held to be one for the jury.[7] Similarly, if he sees a car coming and determines to take his chances of getting across ahead of it, and miscalculates the distance, he is unable to recover,[8] and he has no right to proceed on the supposition that the car will be stopped before it reaches him.[9] There are other circumstances which may properly be taken into consideration on the question of the plaintiff's due care, such as the obstruction of the street,[10] or the nature of the load on the driver's wagon,[11] or the unusual length of his team.[12]

track to see if it were safe, but after having passed across the track did not look again, was hit on the adjoining track by a car, inasmuch as it was not necessarily his duty to look again. Mathers v. Interurban St. R. Co., 98 N. Y. S. 433. Where a driver, to avoid a collision with a car coming towards him, deliberately crossed over to the opposite track in front of a car which he had seen approaching from the rear, without looking to see where it was, he was held guilty of contributory negligence precluding a recovery. Coats v. Seattle Electric Co. [Wash.] 81 P. 830. If one looks and sees a street car coming on a track and drives into it deliberately, he cannot recover, nor can he recover if he completely fails to look where he is going and drives onto a track and is injured. Minnich v. Wright [Pa.] 63 A. 428. To attempt to cross a street car track in front of a rapidly approaching car, where it appears that the person must be struck unless the car is stopped or slackened in speed, is not contributory negligence as a matter of law. Chicago Union Traction Co. v. Jacobson, 118 Ill. App. 383. It is a question of fact for the jury. Id. By the law of Pennsylvania a driver must look and listen immediately before crossing an electric railway track, and where a wagon had a hood and the driver looked when he was some distance from the track and then drove on the track without looking again, this is negligence per se. Berger v. Philadelphia Rapid Transit Co., 141 F. 1020. Where a driver looked for a car when he was twenty feet from a crossing where he knew cars ran at high speed, this is not sufficient. He must exercise due care up to the time of crossing and failure to look again is negligence. Fancher v. Fonda, etc., R. Co., 97 N. Y. S. 666. Where the driver of a wagon looked once for a car when he was some distance away from the track, and then drove onto the track without looking again, he is not in the exercise of due care. Fisher v. New York City R. Co., 98 N. Y. S. 221. A nonsuit is proper when the driver of a team driving on a level street which crossed the car tracks at right angles testified that he looked for approaching cars as he passed the house line, at least twenty-two feet from the first car rail, saw the headlight of a car, and did not look again until the horse was on the tracks at the very moment of collision. Walsh v. Philadelphia Rapid Transit Co., 27 Pa. Super. Ct. 89.

7. Where, on driving onto a street occupied by a street railroad, the driver looked and was unable to see any car approaching, his failure to look when he drove on the track a little later, the driver relying on a warning being given by the motorman and having poor eyesight, and being in a position where it was inconvenient for him to look, did not render him guilty of contributory negligence as a matter of law where there was evidence that the car came at improper speed without warning. Petersen v. St. Louis Transit Co., 114 Mo. App. 374, 89 S. W. 1042. One is not bound as a matter of law to stop to look and listen before driving upon street car tracks to avoid an obvious and imminent danger on the highway. Palmer v. Larchmont Horse R. Co., 98 N. Y. S. 567.

8. Whether one driving across the tracks in front of a rapidly approaching street car, whose speed he misjudged, is guilty of contributory negligence is a question for the jury. Heintz v. St. Louis Transit Co. [Mo. App.] 92 S. W. 353. Where a driver saw a car approaching rapidly only fifty feet away, and took his chances of crossing ahead of it, he cannot recover. Norton v. Interurban St. R. Co., 98 N. Y. S. 216. Where a driver saw a car coming at high speed and deliberately took his chances of getting across the track ahead of it, he cannot recover. Couch v. New York City R. Co., 94 N. Y. S. 393.

9. Where a teamster deliberately drives on the tracks of a street car company, knowing that a car is approaching at a high rate of speed and must strike his wagon unless the car is stopped, and with intent to compel the car to stop, he is guilty of negligence per se. Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, 75 N. E. 508. The action of a teamster in driving slowly across a track in front of a rapidly approaching street car, relying for his safety upon a supposition that the car will stop at the crossing before it reaches him, is negligence. Chicago City R. Co. v. Strampel, 110 Ill. App. 482. Where a driver tried to pass in front of a car twenty-five feet away, it was error to refuse an instruction that if it was apparent to the driver, or would have been apparent to a person of ordinary prudence, exercising ordinary care, that the car would overtake him unless it slackened speed, it was not a prudent act for him to proceed, though it was the motorman's duty to slow down or stop to enable him to cross. Goodman v. New York City R. Co., 95 N. Y. S. 544.

10. A driver of a vehicle is not negligent in driving on a street car track about forty feet ahead of a car going six or seven miles an hour to avoid another vehicle. Latson v. St. Louis Transit Co. [Mo.] 91 S. W. 109.

11. Where the plaintiff could not see a car coming on account of the height and width of his load, and testified that he and a companion listened carefully before crossing the track, a verdict for the plaintiff was held to be justified. Shea v. Lexington & B. St. R. Co., 188 Mass. 425, 74 N. E. 931. The driver of a long van or barge, enclosed on all sides except the front, has a right to suppose that a motorman coming from behind will give him time to cross the tracks after he has started to do so, and not run against

One attempting to cross the tracks before a street railway train has a right to assume that it will stop at its usual place, and is not guilty of contributory negligence as a matter of law for acting on that assumption.[13] It would seem that not so much care need be exercised by a driver at a time of the night when cars do not usually run, than at times when he might expect them.[14] One about to drive over street car tracks has no right to assume that because one car has passed another may not come immediately after it.[15] Where under the rules of the road an electric car should be traveling on a certain track, and it in fact travels on another through which the driver of a vehicle is injured, it is no defense to the railroad that the driver could have seen the car, unless he also could see it was not on its customary track.[16]

Driving on or near tracks.[17]—The driver of a wagon has a perfect right not only to drive in the street where street railway tracks are situated, but to drive upon the tracks themselves, provided he uses due care.[18]

Imputed negligence.[19]—The general rule on the subject of imputed negligence appears to be that, where the passenger has no opportunity to exercise direction or control, the driver's lack of due care cannot be imputed to him,[20] but if a person is injured in part by the negligence of another and in part by the insufficiency of the driver, horse, or carriage by which he was being conveyed, which insufficiency was due to his own want of care in selecting them, no recovery can be had.[21]

Negligence of company.[22]—A street railway company is bound to use reasonable care to avoid accidents.[23] The rule as to right of way is generally stated to be

him while he is crossing. Williamson v. Old Colony St. R. Co. [Mass.] 77 N. E. 655. While it is his duty to use reasonable care for his own safety, he may suppose that others will do theirs. Id.

12. Where a driver started to drive a long team (thirty-seven feet) across a track, taking no precautions until he had gone too far to turn back, he was guilty of contributory negligence. Houston Bros. Co. v. Traction Co., 28 Pa. Super. Ct. 374.

13. Cranch v. Brooklyn Heights R. Co., 107 App. Div. 341, 95 N. Y. S. 169.

14. Finnick v. Boston & N. St. R. Co. [Mass.] 77 N. E. 500.

15. Hattcher v. McDermot [Md.] 63 A. 214. The fact that a street railway operates an extra car running only a few seconds behind the scheduled car is not evidence of negligence of part of the company and will not relieve the person injured from exercise of due and ordinary care in crossing the tracks. Id.

16. Minnich v. Wright [Pa.] 63 A. 428.

17. See 4 C. L. 1574.

18. Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392. One driving along the highway has the right to traverse any part of such highway subject to the paramount right of a street railway to operate its cars in a reasonably careful manner. Palmer v. Larchmont Horse R. Co., 98 N. Y. S. 567. It is not negligence as a matter of law to drive a team so near a street car track that a car going in the same direction will collide with it. Logan v. Old Colony St. R. Co. [Mass.] 76 N. E. 510. It is the duty of the driver of a vehicle using car tracks to watch for approaching cars, and if one were coming on the track he occupied, to leave it and permit the car to pass. Minnich v. Wright [Pa.] 63 A. 428. A driver may drive upon any portion of a street including the street car tracks, only giving way to the street cars, nor would he be a trespasser. Chicago City R. Co. v. Rohe, 118 Ill. App. 322. Where a truck was being driven on a street railway track, and was nearly off the track when it was struck by a car, the due care of the driver of the truck is a question for the jury. Central Brewing Co v. New York City R. Co., 97 N. Y. S. 1025. Where a driver of a covered van was about in the middle of a block, and looked back and saw a car coming rapidly two hundred feet away, and then, after driving some distance, turned and was struck, he is guilty of contributory negligence. Kiley v. New York City R. Co., 97 N. Y. S. 375.

19. See 4 C. L. 1576.

20. Negligence of a husband taking his wife to drive cannot be imputed to the wife, but in an action by her she must prove freedom from negligence. Teal v. St. Paul City R. Co. [Minn.] 104 N. W. 945. Where a passenger is riding in a coach, the driver not being her servant or under her control, and the passenger is several feet from the driver and seven feet from the ground, contributory negligence is not attributable to her for either failing to warn the driver of danger or in not leaping from the coach. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. Plaintiff driving in closed hired carriage on winter night and having no knowledge of danger until he saw car bearing down on him is not guilty of contributory negligence and cannot have the negligence of the driver imputed to him. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648.

21. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595.

22. See 4 C. L. 1576.

23. The mere fact of a collision with a buggy does not raise a presumption of negligence against the street car company. Feitl v. Chicago City R. Co., 113 Ill. App.

that between street crossings the cars of a street railway, since they cannot leave their tracks and since they are being run primarily for the convenience of the public, have a superior, although not an exclusive right of way.[24] A statute giving the fire department the right of way over all vehicles except those carrying the United States mail is constitutional, and a motorman must obey the statute, using reasonable care under the circumstances.[25] This superior right of way does not exist at street crossings where the rights of the car and the wagon are held to be equal,[26] each being bound to exercise due care under all the circumstances of the case,[27] although the rule at street crossings has been declared to be the same as that prevail-

381. A street car company is charged with the duty of employing all reasonable means to avoid injuries to such of the public as it knows to be rightfully using the streets where its track lies. Chicago Union Traction Co. v. Jacobson, 118 Ill. App. 383.

24. The cars of a street railway have the right of way over vehicles, since the cars cannot leave the tracks and since the street railway company, as a carrier, owes a duty to the public convenience. Chicago City R. Co. v. Meinheit, 114 Ill. App. 497. Where a street car track passes an intersecting street which is at that place a cul de sac, a request that the place was not a street crossing and that the car had the right of way should have been given. Rutz v. New York City R. Co., 107 App. Div. 568, 95 N. Y. S. 345. Error in refusing to charge that a street railroad has a paramount right of way in a street where its track passes an intersecting street which is at that point a cul de sac is not cured by an instruction that the motorman, though seeing the traveler at a distance of half a block from the track, was not bound to bring his car to a stop, but had a right to believe that the traveler would not attempt to drive across in front of the car. Id. The rights of the street railway company and the individual to use the streets are equal. Each owes the other the duty to use reasonable care to avoid injury. United Rys. & Electric Co. v. Watkins [Md.] 62 A. 234. A street car has no exclusive right to the use of its tracks. Both the driver of a wagon and those in charge of the car must use due care to avoid accident. Palmer Transfer Co. v. Paducah R. & Light Co. [Ky.] 89 S. W. 515.

25. Duffghe v. Metropolitan St. R. Co., 109 App. Div. 603, 96 N. Y. S. 324. And see Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577.

26. Note: Both the plaintiff and defendant had the right to use the streets and its intersections; both owed the reciprocal duty of exercising that right with due reference to the other, in connection with the knowledge and the fact that the defendant's car followed a fixed path only. 2 Current Law, 1762. While the vehicle was being driven parallel with and near the track on which the car was running, the motoneer was not bound to anticipate that it would abruptly attempt to cross the tracks immediately in front of the car. If it did so undertake, the defendant company might not be guilty of negligence because of the failure of the motorman in charge to stop or slacken speed, or to avoid the collision. Fritz v. Street R. Co., 105 Mich. 50, 62 N. W. 1007; Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 69 N. E. 570; Chicago Street R. Co. v. Ahler, 107 Ill. App. 397; O'Connell v. St. Paul City R. Co., 64 Minn. 466, 67 N. W. 363. But the duty rested upon the street car company to have its cars in control at these points that the rights of others might be protected. People using the highways for lawful purposes had a right to rely in some measure upon the discharge of this duty (Sesselmann v. Metropolitan St. R. Co., 65 App. Div. 484, 72 N. Y. S. 1010; Id., 76 App. Div. 336, 78 N. Y. S. 482; Traction Co. v. Glynn, 59 N. J. Law, 432, 37 A. 66); and it would be actionable negligence to run a car at a rate of speed incompatible with the lawful and customary use of highways by others with reasonable safety (Railway Co. v. Block, 55 N. J. Law, 607, 27 A. 1067, 22 L. R. A. 374; Searles v. Elizabeth, etc., R. Co., 70 N. J. Law, 388, 57 A. 134)."—Per Jaggard, J., in Smith v. Minneapolis Street R. Co. [Minn.] 104 N. W. 16.

27. The rights of a cab driver and of a street car company at a street crossing are the same, neither has the right to use it to the exclusion of the other and both must use reasonable diligence under the circumstances. Fisher v. Chicago City R. Co., 114 Ill. App. 217. At a street intersection the rights of a car and a wagon are equal. Each must use due care for the safety of the other under all the circumstances of the case. Smith v. Minneapolis St. R. Co. [Minn.] 104 N. W. 16. The driver of a team at a street intersection must look and listen for cars, even though a car has just passed and there is a rule of the company that its cars shall keep a certain distance apart. Dewez v. Orleans R. Co. [La.] 39 So. 433. While the driver of a vehicle and a motorman are both bound to ordinary care, ordinary care for the motorman is greater in extent than is the driver's. Weske v. Chicago Union Traction Co., 117 Ill. App. 298. Where a milk cart and an electric car, moving upon lines which intersect each other almost at right angles, collide in such a way as to show that the points of contact were the right shaft of the cart and the left front umbrella post of the car, it cannot be said that the car ran into the cart any more than that the cart ran into the car. Dewez v. Orleans R. Co. [La.] 39 So. 433. Where a motorman sees a driver approaching a track and slows up, which gives the driver the idea he will be allowed to cross, and he proceeds while the motorman in the meantime has turned off the brakes and turned on the current, as a result of which the car strikes the driver's vehicle, the jury may find negligence. Brown v. Los Angeles R. Co. [Cal. App.] 84 P. 362. The driver of a wagon must use due diligence to avoid injury at a street crossing. Ford v. Hine Brothers Co., 115 Ill. App. 153.

ing between crossings.[28] Perhaps no rule of law is more often involved in cases of collisions between wagons and street cars than that known as the "last clear chance" rule. This rule embodies the principle that notwithstanding the plaintiff's lack of due care, if the company in the exercise of ordinary care could nevertheless have avoided the accident, it may still be held liable.[29] Various rulings have been made on the questions of what constitutes a proper lookout,[30] what constitutes the proper giving of warning,[31] and what is a proper speed at which to run a car.[32]

28. At street crossings a street car has a preferential right of way owing to its ponderous construction, the fact that it cannot leave its tracks, and the duty owed to the public convenience by the street railway company. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599.

29. A charge that contributory negligence on the part of the driver of a team would defeat recovery, and that the verdict, if such contributory negligence were found, must be for the defendant, is error. Thomas v. Gainesville & D. Electric R. Co. [Ga.] 52 S. E. 801. Notwithstanding the plaintiff's negligence, the street railway company may still be liable for injury to the driver of a team if those in charge of the car discovered his peril or could have done so by the exercise of ordinary care in time to avoid the accident. Louisville R. Co. v. Hoskins' Adm'r [Ky.] 88 S. W. 1087. Although the driver of a team may be guilty of negligence, a street railway company may yet be held liable if, after discovering the plaintiff's danger, or if, in the exercise of due care they should have discovered it, they could have prevented the accident by the use of ordinary diligence. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595. Notwithstanding the negligence of the driver of a team a street railway company may nevertheless be liable if those in charge of the car could have prevented the accident by the use of ordinary care after discovering the plaintiff's danger. Rapp v. St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865. Although a driver of a wagon may have been guilty of negligence, the street railway company is liable if it failed to use the means at its command to save him when by the exercise of ordinary care it would have discovered his danger in time to have done so. Jager v. Metropolitan St. R. Co., 114 Mo. App. 10, 89 S. W. 62.

30. Even if a motorman saw a person coming toward a crossing he might assume that such driver would not put himself in a perilous position. Hattcher v. McDermot [Md.] 63 A. 214. A motorman is bound to use greater care in approaching a street crossing than at many other points along his route. Fisher v. Chicago City R. Co., 114 Ill. App. 217. A motorman is only required to use ordinary care under the circumstances, so that a charge that the motorman was obliged to use "more than ordinary caution" because the day was wet was erroneous. Quinn v. New York City R. Co., 94 N. Y. S. 560. If a wagon standing near the track is suddenly turned onto the track so that the motorman cannot prevent the collision by the exercise of ordinary care, the company is not liable. Louisville R. Co. v. Hoskins' Adm'r [Ky.] 88 S. W. 1087. Where a motorman having a clear view of the tracks for at least one thousand eight hundred feet ahead runs into the rear end of a thirty-seven foot team and van, he may be found guilty of negligence. Williamson v. Old Colony St. R. Co. [Mass.] 77 N. E. 655. It is the duty of motormen to notice the apparent movement and consider the probable movement of teams traveling before him in the same direction, especially if the driver was so seated that he could not see a car approaching behind him. Id. Where the evidence showed that a car was approaching a crossing at a high rate of speed without giving any warning, not under control, and that the motorman was not exercising the degree of care the situation demanded, is ground for leaving question of negligence for jury. Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577. If a driver cuts suddenly in front of a car and there is no negligence on the part of those in charge of the car, there can be no recovery. Chicago City R. Co. v. Meinheit, 114 Ill. App. 497. Where there was a collision between a wagon and a car on a dark night, and there was evidence that the car was running at moderate speed and that the motorman was on the lookout and stopped the car as soon as he saw the wagon, there was held to be no evidence of negligence on the part of the company. Wagner v. Lehigh Traction Co., 212 Pa. 132, 61 A. 814. Where the driver of a wagon drove on the tracks on a dark night, the fact that the motorman momentarily ceased to keep a lookout will not render the company liable when there is nothing to show that a constant lookout would have prevented the accident. Theobald v. St. Louis Transit Co. [Mo.] 90 S. W. 354. A breach of an ordinance relating to the keeping of a vigilant watch by motormen is negligence per se, and the ordinance is not void on the ground that it requires a higher degree of care than that required by the common law. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648. Where the driver of a vehicle goes on a street car track about forty feet ahead of a car going six or seven miles an hour to avoid another vehicle, the motorman is guilty of negligence under an ordinance requiring him to stop on the first appearance of danger. Latson v. St. Louis Transit Co. [Mo.] 91 S. W. 109.

31. Warning may be given in any manner. Hattcher v. McDermot [Md.] 63 A. 214. Failure to ring a gong or sound a whistle on approaching a crossing is evidence of negligence on part of a street railway company. Id. The question of negligence on part of a street railway will not be submitted to jury on evidence merely that no gong was sounded, there being no other evidence of negligence to give warning of approaching car. Id. An instruction that if an engineer failed to ring a bell or blow a whistle within eighty rods of public cros-

Frightening horses.[33]—The circumstances attending each particular case of this description are so varied that it is impossible to lay down any more specific rule of law than that the driver of the horse and the employe in charge of the car must both do what they reasonably can under all the circumstances of the case to avoid the danger of an accident.[34]

(§ 8) *C. Bicycle riders; automobiles; animals.*[35]—Riders of bicycles and drivers of automobiles have a right to use the streets occupied by street railway tracks and to go on the tracks themselves, provided they exercise due care under all the circumstances of each case.[36] Those in charge of the car must, in turn, also

sing, as required by statutes, as a result of which a collision with a street car causing the death of engineer occurred, the jury might find engineer guilty of negligence, is more than sixty feet from the crossing, it proper. Roy v. E. St. Louis & Suburban R. Co., 119 Ill. App. 313. Where a motorman is required by ordinance to sound the gong within sixty feet of a crossing, and does not do so, but the driver of a coach sees the car is error for the court to direct particular attention to the failure to sound the gong. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. From evidence showing that motorman was running car at a very high rate of speed, dropped no fender, used no brake, and gave no signal of warning at or before running over a child, the jury may infer negligence. Koenig v. Union Depot R. Co. [Mo.] 92 S. W. 497. A street railway company is not bound to sound a gong at a point where there is no intersecting street, in the absence of knowledge that there is any one on the street at that point. Theobald v. St. Louis Transit Co. [Mo.] 90 S. W. 354. Where the driver of a team saw a car coming some distance away, and then had her attention distracted, whether failure to ring the gong was negligence was held to be a question for the jury. Teal v. St. Paul City R. Co. [Minn.] 104 N. W. 945.

32. Running a car at a speed prohibited by ordinance, negligence per se. Moore v. St. Louis Transit Co. [Mo.] 92 S. W. 390. From facts which indicated the running of a street car at a high rate of speed, faster than twelve miles an hour, at an unusual time of the night, without sounding any warning at cross streets, under circumstances making it difficult for the motorman to see approaching team or pedestrians, the jury might find negligence. Finnick v. Boston & N. St. R. Co. [Mass.] 77 N. E. 500. A speed of from eight to fifteen miles an hour in an outlying district of a city over an unimproved street is not negligence as a matter of law. Theobald v. St. Louis Transit Co. [Mo.] 90 S. W. 354. A good cause of action is shown, by one sueing for damages from injuries for being run into, by offering an ordinance prohibiting fast motoring in the city and proving its violation by the street car company. Heintz v. St. Louis Transit Co [Mo. App.] 92 S. W. 353. A speed of fifteen to twenty miles an hour in a thinly settled district is not negligent as a matter of law. American Ice Co. v. New York City R. Co., 98 N. Y. S. 219. A motorman, who ran his car with full power at a speed of forty-five miles an hour on a down grade, when he knew that a steam roller was either on or close to the track, until he had reached a point where it was impossible for him to stop and avoid the danger of a collision with the roller, is guilty of contributory negligence. Hanson v. Whalen, 97 N. Y. S. 237. To be guilty of wilful or wanton conduct a motorman must be conscious that injury will probably result from his conduct, and must proceed with reckless indifference to consequences. Montgomery St. Ry. v. Rice [Ala.] 38 So. 857. The fact that a car colliding with a team was not being run faster than five or six miles an hour does not show as a matter of law that the motorman was not guilty of wilful misconduct. Id.

33. See 4 C. L. 1578.

34. Where a horse reared once some distance away from a car, then proceeded as usual until near the car, and then jumped suddenly in front of it, there was held to be no negligence on the part of the motorman. Wright v. Monongahela St. R. Co. [Pa.] 62 A. 918. When plaintiff left his horse in front of his store fastened to a weight, and the horse was frightened by cars decorated with cotton cloth and running at high speed, due care and negligence were held to be questions for the jury. Joyce v. Exeter, etc., R. Co. [Mass.] 76 N. E. 1054. The negligence of a motorman in ringing his gong and not stopping his car after he sees that a horse is frightened is a question for the jury. Dulin v. Metropolitan St. R. Co. [Kan.] 83 P. 821.

35. See 4 C. L. 1579.

36. A bicycle rider has a right to assume that when he is compelled to ride close to the track that a motorman will not run his car by at a high and dangerous rate of speed without warning. South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1. Where owing to a narrow street two bicycle riders and a buggy are compelled to pass in close proximity and one of the bicycle riders is pushed very close to the tracks, it is the duty of the motorman of a passing street car to get his train under control and give warning. Id. A traveler on a street on which street cars are operated has the right to travel on any part of the street, having equal rights with the car except as modified by the fact that the car cannot leave its tracks and therefore must not be unreasonably impeded, but the traveler must use reasonable care to avoid a collision and has the right to expect corresponding care from the motorman. Kerr v. Boston E. R. Co., 188 Mass. 434, 74 N. E. 669. The question of reasonable care on part of injured and negligence on part of railroad in a street car accident, whereby a bicyclist was injured, is primarily for the jury and the appellate court will not interfere with their verdict except on clear and manifest error. South Chicago City R. Co.

use due care to avoid the risk of accident.[37] Although an adjoining tract of land is platted into lots, streets, and alleys, it is nevertheless the duty of an interurban electric railroad to fence in its right of way and place cattle guards across entrances and exits to inclosures.[38] Cattle pastured in a private inclosure abutting a street railroad, which is not fenced in according to law, are not running at large, nor are they trespassers if they go upon the railroad lands.[39] Where a motorman can see that cows are attempting to cross a track and the owner is exerting himself to prevent them, he is bound to have his car completely under control.[40] A plaintiff for damages to his horse and vehicle for being run into by a street car must first show that he himself was in the exercise of due care.[41]

§ 9. *Damages, pleading and practice in injury cases*[42] are governed by rules which pertain to other topics. Only a few illustrative decisions of peculiar pertinency are here retained. Upon the issue of negligence, customs,[43] and rules of the company,[44] ordinances regulating the operation of street cars[45] and all the facts

v. Kinnare, 117 Ill. App. 1. Plaintiff and four other bicyclists were riding single file along a smooth path next to the rail of a street railway track when they saw a car approaching. New material had been recently placed on the carriage path in the road, which was unoccupied by other vehicles, making it unfit for bicycle travel, and plaintiff's evidence tended to show that the car passed the bicycle rider, who was fifteen feet in front of plaintiff, before plaintiff attempted to turn away from the car, and that it then increased its speed by a mile and a half an hour and struck plaintiff's bicycle before he could get out of the way, causing plaintiff's injuries. Held that the collision was due, in part at least, to plaintiff's negligence in not turning farther from the track soon enough to avoid a collision, and that he could not, therefore, recover. Dechene v. Greenfield & T. F. St. R. Co., 188 Mass. 423, 74 N. E. 600. A person riding a bicycle at about noon in a crowded city street, who, when about to cross a street car track, looked to ascertain whether a car was coming, and, his view of an approaching car being obstructed, took his chances, and while crossing the track was struck by the car, was held guilty of contributory negligence. Bartlett v. Worcester Consol. St. R. Co. [Mass.] 75 N. E. 706. One in a position of danger is not required to use the highest degree of care but only such as the ordinary prudent person would exercise under like circumstances. South Chicago City R. Co. v. Kinnare, 216 Ill. 451, 75 N. E. 179.

37. In an action against a street railroad for injuries to an automobile which was struck by a passing car, the evidence showed that the motorman of a stalled car motioned for the operator of the automobile to pass in front of him. The operator stood up and saw the car with which he collided approaching about seventy-five feet away, and then crossed the track at slow speed. It was held that the signaling of the motorman was not negligent. Hirsch v. Interurban St. R. Co., 94 N. Y. S. 330. Where an automobile running parallel to a street railway track was struck from behind by a car, the negligence of the street railway company was held to be for the jury. Foley v Forty-second St., etc., R. Co., 97 N. Y. S. 958.

38, 39. Iola Electric R. Co. v. Jackson, 70 Kan. 791, 79 P. 662.

40. Hanlon v. Philadelphia & West Chester Traction Co., 28 Pa. Super. Ct. 223.

41. Stacey v. Haverhill, etc., R. Co. [Mass.] 77 N. E. 714. One who leaves a horse in a street, where street cars pass and were about due, wholly unfastened for ten minutes or more without looking after it, and a street car runs into the horse and vehicle, the street railway company is not liable. Id.

42. See 4 C. L. 1580. See Damages, 5 C. L. 904; Instructions, 6 C. L. 43; Negligence, 6 C. L. 748; Pleading, 6 C. L. 1008, and like topics.

43. A practice and custom of stopping cars at certain places and under certain conditions become part of the res gestae of an injury. Chicago City R. Co v. Lowitz, 119 Ill. App. 360. Evidence of the general custom of other railways in the matter of construction, maintenance, and operation is not always admissible, and even when admissible upon the question of negligence it is neither conclusive nor of especially great weight. McDermott v. Severe, 25 App. D. C. 276. Evidence of a custom where two street car tracks cross for one to give precedence to the other is admissible. Chicago City R. Co. v. Sugar, 117 Ill. App. 578. On the ground of being a part of the res gestae. Id. But it would not necessarily absolve either company, the question of negligence being dependent on other elements of care besides this. Id.

44. The rules of a street railway company for the conduct of its motormen and conductors are admissible in evidence to prove practise and custom, and in connection with other testimony to prove negligence in management of car. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. But a substantive cause of action cannot be founded on its breach. Id. Rule of street car company providing when its cars will stop to receive or discharge passengers not competent in own behalf in personal injury suit. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351.

45. In an action against a street railroad company for personal injuries caused by a collision in a street, an ordinance giving the railroad company the right of way in the street was admissible as bearing on the degree of caution imposed on the motorman. Quinn v. New York City R. Co., 94 N. Y. S.

which are part of the res gestae of the accident are admissible,[46] while previous and subsequent acts and conditions not part of the res gestae are inadmissible.[47] A statute providing that no examination, request, or advice of a board of railroad commissioners shall impair the liability of a railroad does not operate to exclude evidence of advice given by the board to a street railway corporation as to the manner of rendering their roadway safer in an action for personal injuries.[48] Notice to a railroad of a defect, no matter what the source, is competent evidence in action against the railroad due to injuries flowing from the defect,[49] but violation by a motorman of an ordinance requiring a vigilant watch does not show negligence by the company.[50]

§ 10. *Statutory crimes.*[51]

STREETS; STRIKES; STRIKING OUT; STRUCK JURY, see latest topical index.

SUBMISSION OF CONTROVERSY.[52]

A case stated must rest on a pending action.[53] Where an agreement is set forth at length in a case stated, the construction of such agreement is a question of law for the court.[54] A submission of a controversy cannot be entertained by a court where some third party has an interest which will be affected by the determination and has not been made a party.[55] Where a statute provides that the case stated shall be in certain form and contain certain matters, such statute must be observed or the court has no jurisdiction.[56]

SUBPOENA, see latest topical index.

560. An ordinance providing where cars shall stop at street intersections is not competent for the purpose of showing where a street car shall stop at a point when the cars merely turn a street corner. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351. City ordinance regulating speed at crossings admissible. Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602.

46. Evidence of how a warning to a motorman of an approaching fire engine was received by him and what he said is competent where the accident followed almost immediately after the warning was given. Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577. In a collision, statement of motorman to conductor immediately after collision that brakes would not work on account of a wet rail is admissible as part of the res gestae. Cincinnati L. & A. Electric St. R Co. v. Stahle [Ind. App.] 76 N. E. 551. Statement of motorman made immediately after accident that gong and brake were out of repair, part of res gestae. Lexington St. R. Co. v. Strader [Ky.] 89 S. W. 158. A witness injured by collision with a street car may testify as to his actions at the time as part of the res gestae, though he could not show his uncommunicated motives. Birmingham R., Light & Power Co. v. Livingston [Ala.] 39 So. 374.

47. Testimony that if motorman had left car after accident to pedestrian he would have been mobbed is extraneous to the issue and highly prejudicial to the defendant. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765. The admission of evidence as to a motorman's being in a previous accident is error. American Ice Co. v. New York City R. Co., 98 N. Y. S. 219.

48, 49. Baruth v. Poughkeepsie City & W. F. Electric R. Co., 89 App. Div. 324, 85 N. Y. S. 822.

50. Held that a motorman's noncompliance with the ordinance did not imply corporate negligence under a statute imposing a penalty on a street railway company which by its negligence causes the death of a person. Caswell v. Boston Elevated R. Co. [Mass.] 77 N. E. 380.

51. See 4 C. L. 1581.

52. See 4 C. L. 1582.

53. Hafer v. McKelvey, 23 Pa. Super. Ct. 202.

54. Whether or not it is an agreement to lend money is for the court's determination, and it is immaterial that it is not admitted in the case stated to be such an agreement. Carbon Spring Water Ice Co. v. Hawk, 29 Pa. Super. Ct. 13.

55. Where a controversy arose between two persons as to which is entitled to the proceeds of a certain benefit certificate, a case stated asking that the court direct the payment to be made to the person entitled to the same must be dismissed where the benefit society is not a party to the submission. Davin v. Davin, 105 App. Div. 580, 94 N. Y. S. 281.

56. Municipal Court Act, Laws 1902, p. 1560, c. 580, § 241. Where the statute requires the statement to be accompanied by

SUBROGATION.

§ 1. *Definition and nature.*[58]—The doctrine of subrogation rests generally upon the principle that one who pays the debt or liability of another to protect his own interest in the property, is entitled to and may enforce all the liens and securities of the party to whom he pays,[59] and being based upon an equitable right, a party is ordinarily entitled to be subrogated whenever it will work out justice as between the parties unless his own contract negatives that intent.[60]

§ 2. *Right to subrogation.*[61]—The doctrine of subrogation is generally applied to cases where one secondarily liable discharges an obligation upon which another is primarily liable,[62] and upon payment he is entitled to all the rights and securities of the creditor as against the principal[63] and co-sureties,[64] but must first pay the costs.[65] Subrogation does not exist in favor of a mere volunteer who pays the obligation of another,[66] but a surety who pays the debt after default is not a

an affidavit setting out certain facts, a failure to accompany the statement with such affidavit invalidates all proceedings of the court. Lax v. Fourteenth Street Store, 97 N. Y. S. 396; Pollock v. Platt, 97 N. Y. S. 990.

57. Closely related holdings will be found in topics dealing with the relation out of which subrogation usually arises. See Mortgages, 6 C. L. 681; Partnership, 6 C. L. 911; Suretyship, 6 C. L. ——, and like topics.

58. See 4 C. L. 1583.

59. Eddy v. Leath, 4 Ohio C. C. (N. S.) 250.

60. Where a curator borrowed money to pay off a mortgage on his ward's land, and the lender refused to accept an assignment of the old mortgage as security but demanded a new one, he will not be subrogated if it proves void. Capen v. Garrison [Mo.] 92 S. W. 368.

61. See 4 C. L. 1584.

62. As sureties McKenna v. Corcoran [N. J. Eq.] 61 A. 1026. Guarantors of a debt upon payment become subrogated to the creditor's interest in a trust deed securing such debt. Dickson v. Sledge [Miss.] 38 So. 673. Where an administrator pays out more than his share as distributee, which fact is known to the party receiving it, the surety upon the administrator's bond upon paying the estate is subrogated to the rights of the administrator de bonis non as against such third party, and if the third party still holds the property sold the administrator, the surety may subject the administrator's interest therein to the liability. Caviness v. Fidelity & Deposit Co. [N. C.] 52 S. E. 265. Where the maker of a note given to take up other notes who was surety only for an anomalous endorser, pays the same, he is entitled to the notes for which it was given. Jennings v. Moore [Mass.] 75 N. E. 214. Where an administrator distributes all of the estate and his surety is obliged to pay an unexpected debt presented against the estate, he is subrogated to his principal's rights against the distributees. Baldwin v. Alexander [Ala.] 40 So. 391. Where lands of a wife are taken to discharge obligations of the husband, she is subrogated to the creditors' interests. Long v. Deposit Bank [Ky.] 90 S. W. 961. Where a mortgage covers several lots owned by different persons, one owner who discharges the entire mortgage is not subrogated to the mortgagee's interest. Senft v. Vanek, 110 Ill. App. 117. Where mortgaged chattels are sold under an execution issued upon a judgment against the mortgagor, the mortgage not being filed, the mortgagee is subrogated to the lien of the judgment. Boice v. Conover [N. J. Eq.] 61 A. 159.

63. Surety on a judgment note after default may pay the same and enter judgment to his use. Lawrence County Nat. Bank v. Gray, 23 Pa. Super. Ct. 62. A senior lienor who purchases at the foreclosure of his own lien is subrogated to such lien as against junior lienors not cut off by the foreclosure. Ramoneda Bros. v. Loggins [Miss.] 39 So. 1007.

64. The fact that he does not insist that the sheriff first sell goods of the principal does not release the cosureties, especially where they are jointly and severally liable with the principal. Shaffer v. Messner, 27 Pa. Super. Ct. 191.

65. McKenna v. Corcoran [N. J. Eq.] 61 A. 1026.

66. Held not volunteers: One who advances money to pay a note at the maker's request and under an agreement that he shall have the same lien. In re McGuire, 137 F. 967. One who pays a secured debt at the request of the debtor's authorized agent. Lesser v. Steindler, 110 App. Div. 262, 97 N. Y. S. 255. A purchaser at a foreclosure sale who redeems from tax sales made before foreclosure. Northern Inv. Co. v. Frey Real Estate Inv. Co., 33 Colo. 480, 81 P. 300. A life tenant paying valid assessments where it appears that general taxes, which he was bound to pay, were refused, unless the assessments were also paid. Eddy v. Leath, 6 Ohio C. C. (N. S.) 249.

Held volunteers: A third person paying a mortgage on lands in which he has no interest. Doxey v. Western State Bank, 113 Ill. App. 442. One discharging a lien inferior to his. Anthes v. Schroeder [Neb.] 103 N. W. 1072. Where a husband takes a transfer from wife of a bond for titles upon the consideration that he pays an obligation therein, such assignment being void, which payment is made. Webb v. Harris [Ga.] 53 S. E. 247. Where one pays a mortgage on cattle not covered by his mortgage under a

volunteer though not compelled by legal process.[67] The entire debt must be paid before the surety can participate in the securities held for the payment of the remainder.[68]

Where one has assumed to exonerate another from a liability, the latter upon paying the same will be subrogated; thus a vendor who pays a lien assumed by the vendee is subrogated to the mortgagee's interest,[69] and the same may be enforced as against subsequent vendees,[70] but where a vendee pays a mortgage which he assumed as a part of the purchase price, he is not subrogated as against other lien holders.[71] It is also applied to cases where the property of one has been used to discharge a debt where such payment was made under a void contract or sale.[72] One who discharges a lien upon land to protect his own interest in the land is subrogated to such lien.[73]

Where mortgaged premises are sold by administratrix to pay the mortgage debt and the purchasers have not paid, the creditor is subrogated to the vendor's lien.[74] Where a judgment creditor of a tenant levies upon cotton raised on the premises, and a judgment in conversion is recovered by the landlord who owns an interest therein, upon discharging such judgment he is subrogated to the landlord's interest,[75] and may plead the same in any action wherein the title of the landlord was assailed.[76] A creditor is entitled to be subrogated to securities given by a principal to his sureties if such were given to secure the payment of the debt,[77] but if given as indemnity securities against losses, he can not be subrogated while the principal is solvent.[78] Where a surety pays a debt and takes an assignment of the note in the form of a purchase, the transaction will be treated as a payment as against those jointly liable.[79]

Where a power coupled with a trust is created to sell certain lands for the support and care of the beneficiary, and a sale is made and services rendered to the

mistaken belief that the mortgages covered the same cattle. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996. Paying debt barred by limitations. Collings v. Collings [Ky.] 92 S. W. 577.

67. Fanning v. Murphy [Wis.] 105 N. W. 1056.

68. Bank of Fayetteville v. Lorwein [Ark.] 88 S. W. 919.

69. Mortgage assumed. Oglebay v. Todd [Ind.] 76 N. E. 238. Tax lien. Webber Lumber Co. v. Shaw [Mass.] 75 N. E. 640.

70. If the deed contains the agreement, all subsequent purchasers are charged with notice. Oglebay v. Todd [Ind.] 76 N. E. 238.

71. Abbeville Rice Mill v. Shambaugh [La.] 40 So. 453; Avon-by-the-Sea Land & Improvement Co. v. McDowell [N. J. Eq.] 62 A. 865; Dieboldt Brewing Co. v. Grabski, 7 Ohio C. C. (N. S.) 221.

72. Where an assignment of corporate property to a director upon his promise to pay certain corporate creditors is held void, such director is subrogated to the claims which he has actually paid. Mills v. Hendershot [N. J. Eq.] 62 A. 542. Where the proceeds of a loan secured by a mortgage have been used to discharge liens upon the estate, the mortgagee is subrogated to the liens if the mortgage proves void. Wilson v. Wilson [Wash.] 82 P. 154. A wife is not subrogated to a mortgage paid by money loaned to her husband, especially where it was not agreed at the time of the loan it should be so used. Hickey v. Conine, 6 Ohio C. C. (N. S.) 321. Where the order to mortgage lands and the mortgage given thereunder are void, one who in good faith loaned money used to pay liens upon the estate is subrogated. Wilson v. Wilson [Wash.] 82 P. 154. Where the proceeds of a void sale are used to discharge tax liens, the bidder is subrogated to the liens. Liverman v. Lee [Miss.] 38 So. 658. Where an assignment of a bid on land sold to pay debts is void, the assignee is entitled to a lien on the land for the debts actually paid. Daniels v. Daniels, 27 Ky. L. R. 882, 86 S. W. 1116. Where one having only a divided interest in lands executes a mortgage upon the entire interest to raise money to discharge a lien upon the whole, the mortgagee is subrogated to the discharged lien. Ligon v. Barton [Mass.] 40 So. 556.

73. A wife who pays a mortgage on the homestead to protect her interest therein is subrogated to the mortgage. Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106. A purchaser at a foreclosure sale who redeems from tax sales made prior to the foreclosure is subrogated to the rights of the state and may assert the same against creditors who redeem from the foreclosure. Northern Inv. Co. v. Frey Real Estate & Inv. Co., 33 Colo. 480, 81 P. 300.

74. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

75, 76. Miles v. Dorn [Tex. Civ. App.] 90 S. W. 707.

77, 78. Dyer v. Jacoway [Ark.] 88 S. W. 901.

79. Fanning v. Murphy [Wis.] 105 N. W. 1056

beneficiary in reliance on the trust, the purchasers and persons rendering services are subrogated to the beneficiary's interest where the sale fails.[80] A fire insurance company upon payment of a loss is subrogated to the rights of the insured against one responsible for the fire.[81]

The doctrine of subrogation will not be applied where it will be inequitable.[82]

§ 3. *How forfeited or lost.*[83]—A release in good faith by sureties of indemnity securities defeats the creditor's right to be subrogated to such securities,[84] as does laches in prosecuting an action to be subrogated.[85] An entry of satisfaction of a judgment paid by sureties does not destroy the right of subrogation.[86]

§ 4. *Remedies and procedure.*[87]—A purchaser of lands at a sale to pay debts of a decedent, to be entitled to subrogation as against a devisee in remainder who was not a party to the proceedings, must prove that the debts were a charge upon the land.[88] In working out a subrogation all persons interested either in the judgment or property covered by it, at the time the subrogation is worked out, are entitled to be heard as to their equities.[89] Where a decree in equity provided that a judgment should be paid out of the proceeds of a sale of chattels mortgaged to a third person, the owner of the judgment was subject to a decree subrogating the mortgagee to the judgment.[90]

The party subrogated must prosecute his rights within the time allowed by statute.[91] Where one discharges a lien upon land to protect his interest therein, the period of limitation is measured from the time the lien accrued in the hands of the original party,[92] but where one secondarily liable pays a debt, the right of action on the implied contract then accrues and statute runs from that period to enforce the securities received by subrogation.[93]

Subscribing Pleadings, see latest topical index.

SUBSCRIPTIONS.

§ 1. *Nature, requirements, and sufficiency as a contract.*[94]—Voluntary subscriptions do not become binding obligations until they have been accepted.[95]

80. Cutter v. Burroughs [Me.] 61 A. 767.

81. Insured cannot maintain an action against the person whose negligence caused the loss after being indemnified by the insurer. Cunningham & Hinshaw v. Seaboard Air Line R. Co., 139 N. C. 427, 51 S. E. 1029.

82. Where a sale of property was fraudulent and void, a purchaser at a foreclosure of a mortgage given by vendee, who knew of the fraudulent transaction will not be subrogated to the rights of the vendee as against innocent persons. German Savings & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

83. See 2 C. L. 1770, and ante, § 2.

84. Dyer v. Jacoway [Ark.] 88 S. W. 901.

85. Delay of thirty years bars the action. Dyer v. Jacoway [Ark.] 88 S. W. 901.

86. Satisfaction may be cancelled by proper proceeding. Shaffer v. Messner, 27 Pa. Super. 191.

87. See 4 C. L. 1586.

88. Order of the court to pay the debts issued, in a proceeding to which the devisee was not a party, insufficient. Rice v. Bamberg [S. C.] 51 S. E. 987.

89, 90. Boice v. Conover [N. J. Eq.] 61 A. 159.

91. By statute in California the payment by surety extinguishes the debt, and the surety's right of action is upon the implied promise of indemnity and hence must be brought within two years. Civ. Code, § 1473. Crystal v. Hutton [Cal. App.] 81 P. 1115. A fire insurance company's rights against the wrongdoer, not being founded on an instrument in writing, under Civ. Proc. § 338, must be brought within two years. Phoenix Ins. Co. v. Pacific Lumber Co. [Cal. App.] 81 P. 976. Under the equitable doctrine of subrogation, an action to establish and enforce a lien of an assessment paid is governed by the ten-year limitation prescribed by § 4985. Eddy v. Leath, 6 Ohio C. C. (N. S.) 249.

92. Not suspended where the wife pays a mortgage debt of her husband to protect homestead interest. Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106.

93. Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106.

94. See 4 C. L. 1587.

95. So long as the beneficiary is contend-

If a subscription is made upon certain conditions, a performance of those conditions makes the obligation of the subscription binding.[96] Where a subscription is given upon condition that the contract to build the church shall not be let until three-fourths of the probable cost has been subscribed, and the contract is let when three-fourths of a bona fide estimate has been made, a subsequent change in the plans increasing the costs will not relieve the subscriber.[97]

§ 2. *Rights and liabilities arising from subscriptions.*[98]

§ 3. *Enforcement, remedies, and procedure.*[99]—An action by a subscriber to recover subscription because of breach of defendant's contract, is an action at law.[1] Where a number of persons severally subscribed separate funds, they can not join in such an action.[2]

SUBSTITUTION OF ATTORNEYS; SUBSTITUTION OF PARTIES; SUBWAYS; SUCCESSION, see latest topical index.

SUICIDE.[3]

SUMMARY PROCEEDINGS; SUMMARY PROSECUTIONS; SUMMONS, see latest topical index.

SUNDAY.

Sunday as dies non juridicus.[4]—Where a defendant in a criminal case has an opportunity to poll the jury, a verdict is not vitiated because brought in on Sunday.[5]

Violations of Sunday laws as defense to actions.[6]—Contracts made in violation of the Sunday law are void and cannot be enforced,[7] and a loan by check made on Sunday is within the rule though the check was not cashed or the deed given as security recorded on that day;[8] but an executory contract of sale, though not enforceable because made on Sunday, is rendered enforceable by the making and accepting a delivery of the property on a subsequent secular day.[9] The mere signing of an instrument on Sunday is no defense in an action to enforce it, plaintiff not being a party to the signing.[10] Where a note is given on Sunday, the maker cannot avoid payment of it without restoring the consideration received.[11] A note given on Sunday is valid in the hands of a subsequent bona fide purchaser.[12] The fact that a defendant in his answer fails to assert the fact that a contract sued on was made on Sunday does not cut off his right to assert its invalidity.[13]

Sunday laws and prosecutions for their violation.[14]—The Sunday law is justified as a sanitary measure and as a legitimate exercise of the police power.[15] Statutes prohibiting the public selling or offering for sale of property on Sunday must

ing that the conditions of his proposition calling forth the subscriptions have not been satisfied a subscription may be withdrawn. Doherty v. Arkansas & O. R. Co. [C. C. A.] 142 F. 104. Where the beneficiary of a voluntary subscription incurs liability relying upon the subscription, the obligation becomes binding as there is an implied acceptance. Lutheran Church v. Gardner, 28 Pa. Super. Ct. 82.

96, 97. Lutheran Church v. Gardner, 28 Pa. Super. Ct. 82.

98. See 4 C. L. 1587.

99. See 4 C. L. 1588.

1, 2. Akins v. Hicks [Mo. App.] 83 S. W. 75.

3. No cases have been found for this subject since the last article. See 4 C. L. 1589.

4. See 4 C. L. 1589.

5. Sanford v. State [Ala.] 39 So. 370; Rawlins v. State [Ga.] 52 S. E. 1.

6. See 4 C. L. 1589.

7. A contract to give theatrical performance on Sunday violates Pen. Code, §§ 263, 265, 277; Charter L. 1897, p. 522, c. 378, § 1481. Hallen v. Thompson, 96 N. Y. S. 142.

8. Jacobson v. Bentzler [Wis.] 107 N. W. 7.

9. Order taken on Sunday but goods delivered and accepted later. P. J. Bowlin Liquor Co. v. Brandenburg [Iowa] 106 N. W. 497. But see Jacobson v. Bentzler [Wis.] 107 N. W. 7. Also 4 C. L. 1590, n. 59.

10. Where the guarantee sued on was so signed but dated and delivered on a secular day. Diamond Glass Co. v. Gould [N. J. Law] 61 A. 12.

11. Hale v. Harris [Ky.] 91 S. W. 660.

12. Myers v. Kessler [C. C. A.] 142 F. 730.

13. Jacobson v. Bentzler [Wis.] 107 N. W. 7.

14. See 4 C. L. 1590.

15. State v. Weiss [Minn.] 105 N. W. 1127.

be liberally construed for the protection of the Sabbath.[16] In interpreting such a law it is necessary to consider its object, and mere changes in the view of people as to the nature of the Lord's day are immaterial.[17] Such statutes do not violate the Federal or state constitutions.[18] Laws prohibiting public traffic in certain articles of merchandise do not contravene the constitutional provisions regarding religious freedom,[19] and laws prohibiting the business of barbering on Sunday are constitutional,[20] although there is some conflict of authority on this point.[21] The Sunday law of Texas does not violate the local option section of the constitution of that state.[22] Under statutes excepting works of necessity, the fact that a compliance with the law would subject defendant to some additional expense and inconvenience is not a defense.[23] In jurisdictions rendering a defendant liable both civilly and criminally for violating the Sunday law, both actions may generally be brought independently.[24] The complaint need not specify the particular business in which defendant was engaged,[25] and the fact that the indictment failed to allege that the acts charged were not works of necessity or charity is no ground for a new trial;[26] but under a statute imposing a fine for performing worldly labor on Sunday, except works of necessity and charity, a charge that defendant performed worldly business is defective if it does not negative the exceptions contained in the statute.[27] Under statutes prohibiting Sunday entertainments in which fees are charged, the fact that seats are sold is competent evidence that a fee was charged,[28] and where the statute prohibits the pursuing of one's ordinary calling on Sunday, proof that on several other Sundays the accused had conducted the same business is sufficient to convict.[29] In prosecutions for permitting one's place of business to be opened for traffic on Sunday, it is not necessary to prove a sale,[30] and the fact that the grand jury failed to indict others for violating a Sunday law is no defense.[31] It is immaterial in such case whether the door is open or was opened for ingress and egress and closed as soon as the parties went in or out.[32] A sale on Saturday

16. The opening of a place of business for the sale or offering for sale of property violates such law, unless the goods are within its exceptions. Pen. Code, §§ 263, 264. People v. Zimmerman, 95 N. Y. S. 136.

17. Commonwealth v. White [Mass.] 77 N. E. 636.

18. People v. Zimmerman, 95 N. Y. S. 136.

19. Ch. 362, L. 1903. State v. Weiss [Minn.] 105 N. W. 1127. Laws 1903, p. 63, c. 55, held not unconstitutional for insufficiency of its title or for failure to set forth at full the act as amended. State v. Bergfeldt [Wash.] 83 P. 177.

20. Laws 1903, p. 68, c. 55, held not to violate state Const. art. 1, § 12, or the 14th amendment to the Federal constitution. State v. Bergefeldt [Wash.] 83 P. 177.

21. State v. Bergfeldt [Wash.] 83 P. 177.

22. Const. art. 16, § 20. Bennett v. State [Tex. Cr. App.] 92 S. W. 415.

23. Gathering a large crop. St. 1904, p. 477, c. 460, § 2. Commonwealth v. White [Mass.] 77 N. E. 636.

24. City of New York v. Williams, 96 N. Y. S. 237; Under Greater New York charter, Laws 1897, p. 522, c. 378, § 1481, prohibiting certain entertainments and making a violation of its provisions a misdemeanor, and in addition rendering the offending party liable to a penalty in a civil action, an action for the penalty may be maintained before conviction of a misdemeanor, and both remedies may be pursued independently. Id.

25. Held sufficient to allege that defendant was a dealer in wares and merchandise. Griffith v. State [Tex Cr. App.] 14 Tex. Ct. Rep. 9, 89 S. W. 832.

26. Scandrett v. State [Ga.] 52 S. E. 160.

27. Rev. Code 1893, p. 953, c. 131, § 4. Mott v. State [Del.] 62 A. 301.

28. Heigert v. State [Ind. App.] 75 N. E. 850. In a prosecution for playing baseball on Sunday and charging a fee, evidence of the sale of seats for the amphitheater and "bleachers," but that many people saw the game free, held properly submitted to the jury. Burn's Ann. St. 1901, § 2087. Id.

29. Evidence sufficient to convict under Pen. Code 1895, § 422, although there was no evidence that during the week defendant had any other business than farming. Scandrett v. State [Ga.] 52 S. E. 160.

30. Griffith v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 9, 89 S. W. 832.

31. Keeping open saloon before 9 o'clock a. m. and after 4 o'clock p. m., when defendant believed there was an arrangement with the officers. Smith v. State [Tex. Cr. App.] 90 S. W. 37. Held not necessary to instruct jury to acquit if defendant kept his place open for any other purpose than the exchange of goods, wares, and merchandise (Id.), nor to tell jury what constitutes traffic (Id.), or a liquor dealer (Id.), where the proof showed that defendant was a dealer in liquor, held not error for court to speak of him as a merchant or dealer in goods, wares, and merchandise (Id.).

32. Held not error to so charge. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

of goods sent out on Sunday does not necessarily constitute an opening up of a house for traffic on Sunday.[33] Generally the owner of a saloon or dealer in intoxicants is prohibited from keeping his place of business open for traffic on Sunday.[34] The fact that a defendant who has violated a Sunday law conscientiously believes in observing and does observe another day of the week is no defense.[35] Statutes making it a defense in a prosecution for "servile labor" that another day of the week is uniformly kept as holy time do not apply to publicly selling groceries.[36] Where an act charged is contrary to an express provision of the statute, it is no defense that it did not interfere with religious observances of Sunday by the public.[37] The Sunday law is not suspended as to a liquor dealer because of his license.[38] A judicial officer having jurisdiction of the person and subject-matter cannot be held personally liable for prosecuting a suit on Sunday in the absence of malice, or evidence that defendant objected during trial.[39] Repeated convictions of violating a Sunday law which in its nature is merely a civil regulation cannot be made a basis for compelling a person to give security for his good behavior where such violations do not disturb the peace.[40]

SUPERSEDEAS; SUPPLEMENTAL PLEADINGS, see latest topical index.

SUPPLEMENTARY PROCEEDINGS.

§ 1. *Nature, occasion, and propriety.*[41]—Statutory provisions in aid of exection for ascertaining and taking of equitable interests in land have been construed to be merely cumulative or alternative, and not exclusive of the ordinary remedies when both are applicable.[42] Though proceedings supplementary to execution are not named they must be deemed included in the spirit and intent of the bankruptcy act vacating all liens accruing within four months prior to the filing of the petition in bankruptcy.[43] Supplementary proceedings in New York, though termed "special" in the Code,[44] have been held to be an ordinary action.[45] They necessarily

33. Where sale of whiskey occurred on Saturday, and seller cleaned saloon behind closed doors on Sunday and sent out bottles as per request, held no opening in absence of bad faith. Crawford v. State [Tex. Cr. App.] 89 S. W. 1079. And the fact that the seller violated his bond in selling to the particular party cannot authorize a conviction for violating the Sunday law. Id.

34. For cases dealing with the sale of intoxicating liquors on Sunday and the prosecution of the offense see Intoxicating Liquors, 6 C. L. 165, 184 et seq.

35. Seventh Day Adventist. State v. Bergfeldt [Wash.] 83 P. 177. Person of Hebrew race. State v. Weiss [Minn.] 105 N. W. 1127.

36, 37. State v. Weiss [Minn.] 105 N. W. 1127.

38. Bennett v. State [Tex. Cr. App.] 92 S. W. 415.

39. Defendant tried and fined for assault. Held he could not recover fine personally from justice. Sec. 6, Code Civ. Proc. Kraft v. DeVerneuil, 94 N. Y. S. 230.

40. Commonwealth v. Foster, 28 Pa. Super. Ct. 400.

41. See 4 C. L. 1591.

42. Code Civ. Proc. §§ 481-483 [Gen. St. 1901, §§ 4957-4959]. Poole v. French [Kan.] 80 P. 997.

43. Bankruptcy Act § 67f, July 1, 1898; c. 541, 30 Stat. 565 [U. S. Comp. Stat. 1901, p. 3450]. Gardiner v. Ross [S. D.] 104 N. W. 220.

44. Code Civ. Proc. § 2433. Deane v. Sire, 95 N. Y. S. 556.

45. Deane v. Sire, 95 N. Y. S. 556, following Graves v. Scovil, 102 N. Y. 676. Supplementary proceedings not special proceedings in **New York** but merely a new remedy in an action of which the court already has general jurisdiction. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. In **New Jersey** a decree in a supplementary proceeding rendered in

fall when the judgment on which they are based becomes invalid or void.[46] Supplementary proceedings begun by an assignee as judgment creditor are valid in New York under the statute.[47]

§ 2. *Proceedings necessary on which to base remedy.*[48]—On the return of an execution unsatisfied, supplementary proceedings may be instituted any time within ten years,[49] and in the absence of an allegation to the contrary, will be presumed to have been instituted in time.[50] They are instituted by a motion on affidavit which must correctly describe the judgment, but a slight error in the amount will not vitiate the proceedings.[51]

§ 3. *Application for an examination of defendant and debtors. A. Affidavit and opposition to same.*[52]—In New York an affidavit for an order requiring a third person to be examined under supplementary proceedings must prove either that the person has property exceeding $10 of the judgment debtor or that he owes the judgment debtor over $10,[53] and an allegation in an affidavit that the complainant derives his knowledge from the records of transfers of real property and statements made under oath by the defendant is not proof sufficient to sustain an order for an examination of third persons.[54] An assignee who seeks to examine the judgment debtor must show in his affidavit all the facts entitling him to act in the judgment.[55] A subpoena duces tecum may be issued with the order for an examination, but only to enable the witness to refresh his own memory.[56] Where a judgment is regular, remains unsatisfied of record, and with no written agreement to satisfy it in any event, it is sufficient to sustain the order for a third party examination, no irregularity appearing otherwise.[57] In a proceeding for the examination of a third person, no order could issue compelling a retransfer of property or the appointment of receiver,[58] nor under such proceedings can the validity of transfers of real estate from a judgment debtor to his wife be tested;[59] hence where such a transferee denies in an action pending to set aside a conveyance that any of the property received is subject to the payment of the judgment, no order for an examination should issue, for no order could result therefrom.[60]

(§ 3) *B. Order and citation process or warrant.*[61]—An order to attend for

another state is a final decree such as the courts will take judicial notice of and give full faith and credit to. P. L. p. 1902, Evidence Act. Id.

46. Gardiner v. Ross [S. D.] 104 N. W. 220. A release in bankruptcy renders null and void a judgment previously accrued as well as an order in supplementary proceedings made within the four months preceding the inception of the action in bankruptcy to procure payment of the judgment. Id.

47. Code Civ. Proc. § 2435. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

48. See 4 C. L. 1591.

49. Code Civ. Proc. § 2435. Fawcett v. New York, 98 N. Y. S. 286.

50. Fawcett v. New York, 98 N. Y. S. 286.

51. A judgment for $148.09 on retaxation reduced to $121.09 through retaxation, though not formally amended. Held not to invalidate supplementary proceedings. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

52. See 4 C. L. 1592.

53. A statement in the alternative, "has personal property of the said judgment debtor exceeding $10 in value, or is indebted to the said judgment debtor in a sum exceeding $10," is not in compliance with the statute and fatally defective. Lowther v. Lowther, 110 App. Div. 122, 97 N. Y. S. 5.

54. Lowther v. Lowther, 110 App. Div. 122, 97 N. Y. S. 5.

55. Where affidavit says "said judgment was duly assigned to George Allaire," it showed the assignee's authority sufficiently to entitle him to proceed in supplementary proceedings, though it might have been clearer. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

56. Franklin v. Judson, 99 App. Div. 323, 91 N. Y. S. 100.

57. Where judgment creditor and judgment debtor by affidavits make conflicting statements as to settlement of claim by assignment of interest in another judgment, the remedy is by motion to have the judgment satisfied of record, and not by motion to vacate the order for a third party examination. Thompson v. Sage, 94 N. Y. S. 31.

58. Lowther v. Lowther, 110 App. Div. 122, 97 N. Y. S. 5.

59. Validity of transfer to be tested by separate, appropriate action. Lowther v. Lowther, 110 App. Div. 122, 97 N. Y. S. 5.

60. Lowther v. Lowther, 110 App. Div. 122, 97 N. Y. S. 5.

61. See 4 C. L. 1592.

examination is "an order in an action"[62] which, though issuing out of the city court of New York, may be served in any part of the state.[63]

§ 4. *Procedure at and after examination.*[64]—Where in supplementary proceedings a debtor was served with a subpoena duces tecum which does not entitle the plaintiff to an examination of defendant's books, he cannot ask for information which requires the reading of the books in court,[65] as there is no practical difference between physical possession and inspection of the books and compelling a witness to read from them,[66] nor can questions be asked not germane to the litigation in hand and to be used in another case.[67] It is well settled also that where the question of title is raised in supplementary proceedings, relative to property in hands of third person, the proper procedure is to appoint a receiver who can test the question by action, and not to determine the question by motion.[68]

§ 5. *Relief against defendant. A. Order for payment or delivery.*[69]—If an examination discloses that the debtor possesses property or the cash proceeds of property, the court will order payment of the debt.[70] In New York, by statute,[71] a judgment creditor, on the return of an unsatisfied judgment for necessaries, may obtain an order of the court for execution against the debtor's salary or wages against any person or corporation,[72] but this does not include municipal corporations.[73] An order or judgment for payment must be in direct and appropriate language, not merely inferential.[74]

(§ 5) *B. Receivership or other equitable relief.*[75]—The appointment of a receiver is a step in the proceedings supplementary to execution, and he may be appointed at any time in the course of a properly instituted proceeding.[76] Whether a receiver shall be appointed or not rests very largely in the discretion of the court to whom the application is made.[77] The time of the appointment is immaterial when the supplementary proceedings were properly instituted.[78] While a receiver should be appointed if the judgment debtor has any property applicable to the lien of the

62. So held on authority of Graves v. Scovil, 102 N. Y. 676, though had the question been open a contrary decision would have been favored. Deane v. Sire, 95 N. Y. S. 556.

63. Deane v. Sire, 95 N. Y. S. 556.

64. See 4 C. L. 1594.

65. Franklin v. Judson, 99 App. Div. 323, 91 N. Y. S. 100.

66. Where a subpoena did not authorize possession and inspection of books, it was error to compel a witness to read from them. Franklin v. Judson, 99 App. Div. 323, 91 N. Y. S. 100.

67. Where a witness in one case is supposed to have information of a combination, proceedings against which are to be brought later, information leading to the latter indictment cannot be elicited in examination in supplementary proceedings. Franklin v. Judson, 99 App. Div. 323, 91 N. Y. S. 100.

68. Whether a third party collected rent for a judgment debtor, the lessee, or for another person as sublessee. Thompson v. Sage, 94 N. Y. S. 31.

69. See 4 C. L. 1592.

70. State v. Gutridge [Or.] 80 P 98. The fact that defendant sold a piece of land in May, 1902, for $2,000, and has since been receiving $3.00 per day while his wife took in boarders for pay, and in May, 1903, could not give a satisfactory account as to what had become of the proceeds, will not justify an order in March, 1904, to pay the $2,000. Id.

71. Code Civ. Proc. § 1391. Rosenstock v. New York, 101 App. Div. 9, 34 Civ. Proc. R. 16, 91 N. Y. S. 737.

72, 73. Rosenstock v. New York, 101 App. Div. 9, 34 Civ. Proc. R. 16, 91 N. Y. S. 737.

74. State v. Gutridge [Or.] 80 P. 98 The statement by the court: "As conclusions of law I find that the defendant, G. H. Gutridge, be required to pay said $2,000, or as much thereof as may be necessary to satisfy the said judgment and costs and disbu sements taxed at $149.30 within 15 days from the entry of judgment herein," is not an order or a judgment. Id.

75. See 4 C. L. 1593.

76. Fawcett v. New York, 98 N. Y. S. 286. The productions and proof of an order appointing a receiver, reciting the facts necessary to give the judge or court jurisdiction, furnishes conclusive evidence of the regularity of the order when questioned collaterally, and prima facie evidence of the existence of the facts necessary to confer jurisdiction. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

77. In New York Code Civ. Proc. § 2464. In re Stafford, 105 App. Div. 46, 94 N. Y. S. 194.

78. And this though the receiver was appointed thirteen years after the judgment rendered and execution returned, nothing appearing as to when supplementary proceedings were begun. Fawcett v. New York, 98 N. Y. S. 286.

judgment, none should be appointed if he does not have any and where it may only harass the debtor without benefiting the creditor.[79]

A receiver in supplementary proceedings upon his appointment becomes vested with title to all the property of the debtor [80] and all the rights of the creditor for the enforcement of the judgment against such property; [81] likewise, title to property coming to a judgment debtor after the appointment of a receiver immediately vests in his receiver,[82] but only for the purpose of paying the judgment he represents,[83] and such title relates back under the Code of some states to the time of the service of the third party order,[84] but for title to vest in the receiver the proceeding must have been prosecuted to judgment in favor of the creditor against the debtor's debtor.[85] A receiver appointed in one state may assert title to garnisheed property of the debtor located in another state,[86] however, by the appointment of a receiver, a judgment creditor's liens are not assigned or surrendered to him.[87]

A receiver may bring an action for the sale of the real estate on a judgment lien against the real estate accruing before his appointment.[88] His appointment, however, will not preclude the original judgment lienor from issuing execution to sell real estate previously attached.[89] So too, creditor's suit may be maintained by judgment creditors on their own account and for their exclusive benefit after a receiver in supplementary proceedings has been appointed,[90] without even a request to and a refusal by the receiver to maintain the same,[91] nor in a suit by the receiver for an award for the taking of the property of the judgment debtor for public purposes is the judgment debtor a necessary party.[92]

An order for the appointment of a receiver is not void because it does not provide for the statutory exemptions.[93] At most it is only an irregularity, and would still entitle the judgment debtor to withhold the exempted property.[94] In New York [95] it is necessary to give a judgment debtor two days' notice of the application for an order for the appointment of a receiver, unless the court is satisfied that he cannot be found inside the state.[96]

(§ 5) *C. Contempt.*[97]—In supplementary proceedings, failure to appear for examination on a day fixed by the court is contempt,[98] but the court must not only have found the defendant in possession of property, applicable to the judgment, and

79. Where the record showed that the trial judge at the time of hearing the motion for the appointment of a receiver took evidence as to whether the debtor had any property and the motion was denied, it will be assumed that he was satisfied that judgment debtor had no property applicable to the lien of the judgment. In re Stafford, 105 App. Div. 46, 94 N. Y. S. 194.

80. N. Y. Code Civ. Proc. § 2468. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

81. Ullman v. Cameron, 105 App. Div. 159, 93 N. Y. S. 976.

82. Code Civ. Proc. § 2468. Fawcett v. New York, 98 N. Y. S. 286.

83. An order for payment to him of a fund in court should not go beyond the amount of the judgment. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

84. N. Y. Code Civ. Proc. § 2469. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

85. Midler v. Lese, 45 Misc. 637, 91 N. Y. S. 148.

86. Insurance due to a resident of New York from a New Jersey Co. garnisheed by valid process in New York. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

87, 88, 89. Ullman v. Cameron, 105 App. Div. 159, 93 N. Y. S. 976.

90. Creditor may have a mortgage declared void and sell land on execution where lien accrued before receiver was appointed. Ullman v. Cameron, 105 App. Div. 159, 93 N. Y. S. 976.

91. Ullman v. Cameron, 105 App. Div. 159, 93 N. Y. S. 976.

92. Fawcett v. New York, 98 N. Y. S. 286.

93. Code Civ. Proc. § 2463 of New York. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

94. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

95. Code Civ. Proc. § 2464. Bank of Port Jefferson v. Darling, 108 App. Div. 48, 95 N. Y. S. 492.

96. An order, which recites that a judgment debtor resides in another state and is now in that state, does not satisfy the statute that with reasonable diligence notice of application for order cannot be made within the state within two days. Bank of Port Jefferson v. Darling, 108 App. Div. 48, 95 N. Y. S. 492.

97. See 4 C. L. 1594.

98. And punishable as such though the subpoena is served on the defendant's attorney and he never knows of its existence at

required him as a matter of law to pay the same, but he must have made a positive order or rendered judgment to that effect.[99] In a proceeding to adjudge a debtor guilty of contempt for not complying with an order made in supplementary proceedings about three years before, it is proper for the debtor to present any defense arising since the making of the order in the supplementary proceedings.[100]

SURCHARGING AND FALSIFYING, see latest topical index.

SURETY OF THE PEACE.[1]

SURETYSHIP.

This topic excludes bonds,[2] their requisites, form, and validity, and the rights and liabilities under particular kinds of bonds;[3] it is confined to the law of suretyship strictly.

§ 1. *Definitions and distinctions.*[4]—It is immaterial so far as the rights and liabilities of a surety are concerned whether it be an individual or a corporation.[5] His liability is primary, like a principal's, while that of a guarantor is secondary.[6] Accommodation indorsers are mere sureties.[7] So is an agent who signs the contract as an obligor,[8] and where for additional security two persons write their names on the back of a note, they are prima facie joint makers and in fact sureties,[9] and consequently liable to each other for contribution.[10] If land is conveyed subject to mortgage the grantee becomes a principal and the grantor the surety for the payment of the mortgage,[11] and upon default upon the part of the grantee, one of several

all. Ex parte Depue, 108 App. Div. 58, 95 N. Y. S. 1017.

99. State v. Gutridge [Or.] 80 P 98.

100. A defense of release in bankruptcy is a proper defense to a judgment accruing within two months before the proceedings in bankruptcy were begun. Gardiner v. Ross [S. D.] 104 N. W. 220. Where a creditor of a judgment debtor, because of failure to appear or refusal to answer when duly notified in the proceedings in aid of execution before a justice of the peace, has been ordered to pay money to the plaintiff, as provided in §§ 6680-3 and §§ 6680-4, Revised Statutes, and said plaintiff under favor of §§ 6680-5 brings his action against said creditor, the petition must set forth not only the proceedings before the justice but also an allegation that the defendant is in fact indebted to the judgment debtor. Carlin v. Hower, 5 Ohio C. C. (N. S.) 70, overruled. Sidney S. Wilson Co. v. Cleveland Elec. R. Co., 7 Ohio C. C. (N. S.) 258.

1. No cases have been found for this subject since the last article. See 4 C. L. 1595.

2. See Bonds, 5 C. L. 422.

3. See Indemnity, 5 C. L. 1777 (fidelity and like bonds); Officers and Public Employes, 6 C. L. 841 (official bonds); Appeal and Review, 5 C. L. 121 (appeal bonds), and like topics.

4. See 4 C. L. 1595.

5. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577.

6. Fields v. Willis, 123 Ga. 272, 51 S. E. 280. The fact that a surety is obligated merely to pay the debt of a principal and not to perform the undertakings of a contract other than payment of indebtedness does not render him a guarantor. Id.

7. Weller v. Ralston [Ky.] 89 S. W. 698. In Georgia. Civ. Code 1895, § 2969. Bigby v. Douglas, 123 Ga. 635, 51 S. E. 606.

8. Tabet v. Powell [Tex. Civ. App.] 13 Tex. Ct. Rep. 436, 88 S. W. 273.

9. Caldwell v. Hurley [Wash.] 83 P. 318. Prima facie joint makers are mere sureties, not accomodation indorsers. Id.

10. Caldwell v. Hurley [Wash.] 83 P. 318.

11, 12. Fanning v. Murphy [Wis.] 105 N. W. 1056; Oglebay v. Todd [Ind.] 76 N. E. 238.

grantors may pay the same and have recourse against the principal by foreclosure and against the other grantors as co-sureties by way of contribution.[12]

§ 2. *The requisites of the contract.*[13]—No particular or formal phrase is required to create a contract of surety.[14] Either natural persons or corporations may be parties to the contract,[15] but in some states corporations cannot be sureties on official bonds.[16] It requires a consideration like every other contract,[17] but such consideration need not flow to the surety himself.[18] In Georgia where the test of guaranty is a benefit flowing to the guarantor a contract to answer for or guaranty another's performance or payment, with the consideration flowing merely between debtor and creditor, is regarded as one of suretyship.[19] An unqualified order to a person to let the bearer of the order have anything he wants and the writer would "see to it that it was paid for" constituted the latter a surety,[20] and he was liable on his promise without notice of acceptance by plaintiff, nor of the default in payment by the principal.[21] It is immaterial whether the relation appears upon the face of the contract or not,[22] for an apparent principal may show that he is merely a surety, regardless of whether obligee was aware of the suretyship or not.[23]

Want or failure of consideration for a promissory note will not change the relations of makers and payee of a note into principal and surety, even though indorsed to an innocent purchaser, and the makers have no defense against the holders.[24]

§ 3. *The surety's liability.*[25]—Independent of statute, the general rule is that a creditor cannot be compelled to exhaust his remedy against the principal before resorting to the surety.[26] The liability of a surety becomes fixed with that of the principal,[27] being co-extensive with and measured by it,[28] and he is liable if the

13. See 4 C. L. 1596.

14. Fields v. Willis, 123 Ga. 272, 51 S. E. 280.

15. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577.

16. Laws 1895, p. 122, c. 122, authorizing acceptance of corporations as sureties in certain cases, is ineffectual as an amendment to or repeal of Comp. St. 1903, c. 10, or to dispense with personal sureties on official bonds. Fidelity & Deposit Co. v. Libby [Neb.] 101 N. W. 994.

17. Where an executed contract of indebtedness already exists, an execution of a mortgage by a third person to provide additional security, given without any consideration, is not binding on him as a surety or otherwise (Bluff Springs Merchantile Co. v. White [Tex. Civ. App.] 90 S. W. 710), but whether any consideration or not existed was a question for the jury (Id.). Ordinarily an agreement to be responsible for an "advance" presupposes that an actual advance of money or property will be made, not merely a release of an existing lien. C. S. Hirsch & Co. v. Meldrim [Ga.] 52 S. E. 813. Sureties on a stay bond executed without any consideration are not liable. Olsen v. W. H. Birch & Co. [Cal. App.] 81 P. 656.

18. C. S. Hirsch & Co. v. Meldrim [Ga.] 52 S. E. 813. Under Civ. Code § 2831 defining a surety, persons who sign a note and execute a mortgage to secure a loan contract by another for his exclusive benefit, are sureties for the payment of the latter's debt. Townsend v. Sullivan [Cal. App.] 84 P. 435.

19. Fields v. Willis, 123 Ga. 272, 51 S. E. 280; C. S. Hirsch & Co. v. Meldrim [Ga.] 52 S. E. 813. Where a person went surety for another for "advances" made to him and these advances consisted merely of a release of a lien enabling the principal to sell property to which he might otherwise have looked for reimbursement, and in permitting the lienor to retain part of the proceeds of such sale, was not such an advance as was contemplated in the contract of suretyship. C. S. Hirsch & Co. v. Meldrim [Ga.] 52 S. E. 813.

20, 21. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

22. Action on promissory note by innocent holder. Shank v. Washington Exch. Bank [Ga.] 52 S. E. 621.

23. Weller v. Ralston [Ky.] 89 S. W. 698. But not to release surety as against a payee or innocent holder of a note not aware of the suretyship. Shank v. Washington Exch. Bank [Ga.] 52 S. E. 621.

24. Action on a note by innocent holder, given for machinery, fraudulently defective and worthless. Makers try to have payee held as principal and themselves as sureties with the right of subrogation on discharge of debt by themselves. Held not a good plea. Shank v. Washington Exch. Bank [Ga.] 52 S. E. 621.

25. See 4 C. L. 1596.

26. Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co. [Ala.] 39 So. 54. Under Rev. St. 1899, § 889, a joint bond will be interpreted as joint and several and the surety may be held without going to the extremity of the law against the principal. Manny v. National Surety Co., 103 Mo. 716, 76 S. W. 69.

27. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93. Recovery against the principal in a bond is prima facie binding on the sureties, and it is immaterial that they were not parties. Can only avoid by showing that the recovery was excessive or

defense set up is insufficient to release the principal.[29] However the surety's liability is limited by exact terms of contract [30] which should always be strictly construed,[31] nor is it to be extended by implication.[32] Nevertheless, the contract should be construed with reference to its spirit as well as to its letter,[33] and so as to give effect to the intention of the parties,[34] and sureties are presumed to have bound themselves with reference to the statutes.[35] Where sureties severally and jointly obligate themselves, each becomes severally as well as jointly liable.[36] In order to

that no recovery at all should have been had. Grafflin v. State [Md.] 63 A. 373. The petition, answer, and judgment are admissible in suit on the bond. Id. Where by an assignment a debt becomes instantly due under the statute as to the principal, it would seem that the liability of the surety is co-ordinate. P. L. 1893, p. 433, c. 453, § 1. Pritchard v. Mitchell, 139 N. C. 54, 51 S E. 783. When a surety, in pursuance to the terms of undertaking, assumes the performance of the principal's contract, such surety by being subrogated to the rights of the principal also becomes subject to his liabilities. Payment of material used in constructing building. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577.

28. Pritchard v. Mitchell, 139 N. C. 54, 51 S. E. 783. Ordinarily the duration of the liability of a surety on official bonds is coextensive with the officer's tenure of office and ceases when the term expires by operation of law. Aultman Taylor Machinery Co. v. Burchett [Okl.] 83 P. 719. Sureties on a bond to comply with a statute or an order of the court are estopped in the same manner and to the same extent as the principal by any order or decree estopping him to deny that he has failed to comply with the condition of his bond. State v. Corron [N. H.] 62 A. 1044. The authorized finding of a board of commissioners that a liquor dealer had violated a liquor act and that his license should be cancelled was conclusive both on the dealer and his sureties in an action on the bond. Id.

29. Where lessee is not relieved of covenant to pay rent, surety will be held. Shand v. McCloskey, 27 Pa. Super. Ct. 260.

30. Moroney v. Coombes [Tex. Civ. App.] 13 Tex. Ct. Rep. 527, 88 S. W. 430; Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550. The contract of a surety is to be given no retroactive effect so as to cover past delinquencies, unless it in express terms provides that it shall have that effect, but a bond given to go into effect March 1st, though not received and approved by proper authorities until March 16th, takes effect from March 1st. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93. Sureties are favorites of the law and their liability must be found within the terms of their consent. Stewart v. Knight & Jillson [Ind.] 76 N. E. 743. So "surety" who undertakes to "guaranty" is liable only for obligations of the kind guarantied, as, guaranty of "advances" does not cover "credits" given to be taken up out of other transactions. C. S. Hirsch & Co. v. Meldrim [Ga.] 52 S. E. 813.

31. C. S. Hirsch & Co. v Meldrim [Ga.] 52 S E. 813; Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550. Sureties on an official bond not liable for an assault unnecessarily committed by a constable in the discharge of his duty, under its strict interpretation. State v. Dayton [Md.] 61 A. 624. Surety not bound for objects not in contemplation of parties when contract was signed. Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550.

Building contracts: The liability of a surety on a builder's contract arising in case a building fell to ruin in whole or in part, under §§ 2762, 3545, will be construed strictly. Police Jury of the Parish of Vernon v. Johnson, 111 Ga. 279, 35 So. 550. A distinction is drawn sometimes between active and passive violation of a contract. In the latter case notice to contractor is necessary before his surety can be held. Id. The discovery of latent defects requires notice to contractor with opportunity to him to remedy them before surety on builder's contract can be held. Id. Where defects were discovered in a building nearly two years after its completion, no element of fraud or deception being involved, the parties were not entitled to call on the surety on the bond to make good without notifying the contractor. Id.

32. Surety on a forthcoming bond in attachment proceedings held not liable to produce property. Gilbert v. Yunk's Estate, 214 Ill. 237, 73 N. E. 335. Sureties do not assume liabilities not fairly inferrable from the terms of their contract, as an obligation by a lessee to pay charges incurred by the lessor in recovering the property leased did not warrant a recovery from the sureties on the bond of the lessee of atorney's fees paid by the lessor in order to protect the property against third persons. White River L. & W. R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14. Sureties on a liquor dealer's bond, who covenanted that if the state recovered judgment against the dealer for breach of the bond they would pay the state's damages if the dealer did not, were liable for any judgment enforceable against the liquor dealer. State v. Corron [N. H.] 62 A. 1044.

33. Where a contract called for a two-inch asphalt coating, but stating that such an estimate of thickness was approximate and reserving the right to vary it in the discretion of the city, repairs 2 1-2 inches thick entailing additional cost on the surety, is not such a variation of the contract as to release the surety. American Bonding Co. v. Ottumwa, 137 F. 572.

34. A surety on a bond conditioned that a defendant pay any judgment rendered for plaintiff was not released because plaintiff was allowed within the proper time to amend his complaint so as to ask for damages instead of specific performance. Doon v. American Surety Co., 110 App. Div. 215, 97 N. Y. S. 270.

35. On a bond. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93. But sureties on an official bond not liable for a penalty imposed by statute for fraudulent collection of fees by strict construction. Eccles v. Walker [Neb.] 106 N. W. 977.

36. East Bridgewater Sav. Bank v. Bates [Mass.] 77 N. E. 711. Where the signers of

recover against a surety, default by the principal within the terms of the contract must be shown.[37] Mere notice that he will no longer be liable will not release a surety.[38] A surety may be discharged by the same acts before or after judgment,[39] and if after judgment he may enjoin the collection of the debt.[40] Where one surety company absorbs another it becomes liable on the bonds of the company absorbed.[41] A surety is estopped by recitals in the bond executed by him.[42] He may make the principal his agent for the delivery of the contract of suretyship.[43] The fraud of the principal upon the surety, of which obligee has no notice, will not release the surety from his liability.[44] In so far as the relation of two apparently joint purchasers to each other is concerned, it is always competent to show that one of them stands in the relation of surety to the other.[45] Although an old bond given has not yet expired, the sureties on a new bond for the same purpose of indemnification are liable.[46] Where sureties are liable on a note and a new note is given as collateral security on the original obligation, which is indorsed by all but one of the original sureties, the one not indorsing the new note is still liable on the original obligation, and may be held for contribution by his co-sureties, but he is entitled to share pro rata in the proceeds of the new note.[47]

§ 4. *The surety's defenses. A. Legal defenses to surety's liability.*[48]—The existence of legal defenses will defeat a bill in equity to restrain certain parties from enforcing a judgment against sureties.[49] Sureties cannot be held where the original contract,[50] or the contract of suretyship, is void,[51] nor where a release is

notes jointly and severally promise to pay, the fact that defendant signed as a surety did not affect her joint and several primary liability. Id.

37. In order to recover upon the bond of a public officer it is necessary to allege and show defaults covered by and included within the conditions of the bond sued on. Aultman Taylor Machinery Co. v. Burchett [Okl.] 83 P. 719. The fact that plaintiff had recovered a judgment against the principal as sheriff does not show that it was for defaults covered by bond sued on. Id.

38. Where a lessee enters premises under a contract with the privilege of renewal, a surety cannot release himself from liability for rent for the second term by mere notice that he will not be liable. Shand v. McCloskey, 27 Pa. Super. Ct. 260. Even though given before any work was actually done under a contractor's bond. A. S. Ripley Co. v. Cooes [Colo.] 84 P. 817.

39, 40. Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co. [Ala.] 39 So. 54.

41. Manny v. National Surety Co., 103 Mo. App. 716, 78 S. W. 69.

42. Where a surety in an insolvency bond recited that the debtor was in custody, he is estopped to deny this recital. Hauser & Son v. Ryan [N. J. Law] 63 A. 4.

43. Where a surety executes a bond and delivers it to the principal for the purpose of aiding the latter in his negotiations, the latter is made the agent of the former for its delivery (Gritman v. United States Fidelity & Guaranty Co. [Wash.] 83 P. 6), and if there is nothing on the face of the bond to put the creditor on guard, the surety is bound (Id.). A recital that the sureties will be liable on a note so long as there is any liability on the part of the principal does not constitute the latter the agent of the former for renewing the note. Newell v. Clark [N. H.] 61 A. 555. The mere fact that the note is payable on demand with interest annually does not show that the sureties intended to constitute the maker their agent to renew it. Id.

44. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285; A. S. Ripley Bldg. Co. v. Cooes [Colo.] 84 P. 817.

45. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

46. Bond given May 16, 1899, running one year, did not release sureties on a bond given March 1st, 1900, for loss occurring March 2nd, 1900. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

47. Adams v. DeFrehn, 27 Pa. Super. Ct. 184.

48. See 4 C. L. 1599.

49. Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co. [Ala.] 39 So. 54. Averments that an action had been begun against the principal, that he had interposed certain pleas in bar which were true and constituted a good defense, do not constitute a discharge. Action against bond company on breach of contract by Machine Company with Steamship Company. Defense of Machine Company, unauthorized alteration of contract, stoppage due to inspection, and so forth. Id.

50. Agreement by principal to do freight handling considered and held not void for indefiniteness or want of mutuality so as to relieve sureties on the principal's bond. Eastern R. Co. v. Tutgeur [Wis.] 105 N. W. 1067. Sureties cannot question the power of the promissee to enter into the contract secured as defense on the ground that the contract of lease was not within the charter power of plaintiff's assignor. White River L. A. W. R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

51. Signatures to bonds: Where a bond is void for lack of sufficient signatures, a

granted by statute on proper notice,[52] or by statute of limitation.[53] An infant's contract of suretyship may be avoided by mere disaffirmance.[54] When the liability of the surety is once discharged it cannot be revived by any subsequent arrangement between the principal and creditor without the consent of the surety.[55]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.*[56]—A termination of the contract secured does not discharge the sureties from liabilities already fixed.[57] Even though a surety make a valid agreement not to plead the statute of limitations, such an agreement can only be taken advantage of by estoppel or to bring an action upon it.[58] Sureties on a bond may be released though the principal is still charged; but they are never liable if the principal establishes a defense in bar.[59] The death of the principal does not discharge the sureties if the cause of action forming the liability be one that survives.[60] An adjudication that there is no liability on part of principal releases the surety.[61] A release of a debtor obtained by fraud will not release the surety where he is informed of the fraud of the principal before he has placed himself in a worse position in reliance upon the supposed release.[62] Discharge in bankruptcy of the debtor does not release his surety.[63] An acceptance by the obligee of an assignment for benefit of creditors upon condition that the sureties on an indemnity bond will not be re-

surety will not be liable thereon even though for a time he acknowledge his liability as a surety, as where one of three sureties signed a bond. On breach of conditions the surety who signed thinking himself liable tried to borrow money to pay the debt. Slaughter v. Hampton [Ky.] 90 S. W. 981. Bonds being delivered in an incompleted state and without the signatures of all the sureties, the liability of the signing sureties depends upon the authority of the principal to deliver as the act of such sureties. Such authority may be implied from the acts and conduct of the sureties (Baker County v. insufficient as a matter of law to show authority (Id.). The liability of the sureties did not depend entirely upon the question Huntington [Or.] 83 P. 532, but the mere signing and attempting to limit their liability by writing amounts before their names and leaving the bond with the principal was whether there was an agreement or understanding at the time of signing that the bond should not be delivered until others had signed it. Id. A surety may waive the right to insist that co-sureties must sign the bond before he is liable. Insertion of names in body of bond in red ink is notice that the surety who signs will not be bound unless the co-sureties also sign. Slaughter v. Hampton [Ky.] 90 S. W. 981.

52. Under Code Civ. Proc. § 812, entitling sureties as a matter of right to a discharge from obligation on the bonds of fiduciaries, a surety is entitled to a discharge during the term for which it has been paid for being surety. In re United States Fidelity & Guaranty Co., 98 N. Y. S. 217.

53. In Kentucky, sureties on a note are discharged from liability seven years after the cause of action accrues. Weller v. Ralston [Ky.] 89 S. W. 698.

54. Civ. Code § 17, requiring a return of the consideration upon the disaffirmance by an infant of a contract beneficial to himself and made at the age of over 18 years, does not apply. Helland v. Colton State Bank [S. D.] 106 N. W. 60.

55. Where the surety liability was expressed in a letter which the principal gave the creditor, and after some time creditor returned letter to principal with directions to have the surety modify it, this discharged the surety and the subsequent return of the letter by the principal to the creditor, without the sureties knowledge or consent, did not review the surety's liability. Stewart v. Knight & Jillson [Ind.] 76 N. E. 743.

56. See 4 C. L. 1599.

57. Termination of a lease by accepting a return of the property leased did not discharge the sureties from liability for rent then due. White River L. & W. R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

58. Newell v. Clark [N. H.] 61 A. 555.

59. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. In Pennsylvania a surety on a sealed bond is not released by the fact that limitations have run against the debt secured by the bond. United States v. Mercantile Trust Co. [Pa.] 62 A. 1062.

60. Action under civil damage act. State v. Soale [Ind. App.] 74 N. E. 1111.

61. Especially true in an action against surety on the bond of a county treasurer where treasurer was declared not liable. Stevens v. Carroll [Iowa] 105 N. W. 653.

62. A creditor gave back a note to a debtor on receiving a check which, however, was dishonored at the bank. The surety had been informed of the release of the note and soon thereafter the creditor informed him that he would hold him on the note. Held surety was not released. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

63. Bankruptcy Act July 1, 1898, c. 541, § 16. Carpenter v. Goddard [Mass.] 76 N. E. 953. A surety upon a poor debtor's recognizance is not released by the adjudication of the debtor as a bankrupt after his default. Id. The liability of a surety on a poor debtor's recognizance fixed by Rev. L. c. 168, § 66, requiring execution on such recognizance to issue for the full amount of the judgment, cannot be reduced to nominal damages by the subsequent adjudication of the debtor as a bankrupt. Id.

leased does not release such sureties where the assignment is not secretly made, especially where the obligee is a trustee of the debt for third persons.[64]

(§ 4) *C. Defenses based on change of contract or increase of the risk.*[65]—A material change of the contract of suretyship releases the surety without regard to whether surety is prejudiced thereby or not,[66] unless waived,[67] but an immaterial variation from the terms of the contract will not constitute a release.[68] A surety may estop himself by consent and conduct from asserting that the contract has been modified.[69] The liability of sureties on a bond are not relieved by an order of the court requiring further security.[70]

(§ 4) *D. Defenses arising out of forbearance or suspension of liability of principal.*[71]—An extension of time for the payment of a debt, made without the consent of the surety, discharges him,[72] but such extension must have all the essentials of a binding contract[73] and must be for a definite period, and for a valuable

64. Weddington v. Jones [Tex. Civ. App.] 91 S. W. 818.

65. See 4 C. L. 1599.

66. Moroney v. Coombes [Tex. Civ App.] 13 Tex. Ct. Rep. 527, 88 S. W. 430; Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. A waiver of covenants by a lessee without the knowledge or consent of his sureties will release them. Sureties of lessee of hotel on waiver of covenants of repair and furnishing. Stern v. Sawyer [Vt.] 61 A. 36. Sureties of a lessee are released by a sale of a part of the leased premises by lessor, although with the lessee's consent. Id. The reservation in a lease of the right to sell the entire leasehold on six months' notice to the lessee will not justify the sale of a part without notice to the sureties. Id. Where a contractor was to remove a stone in 12 months, but through lapse of lease by government his time was reduced to 9 months, after which he refused to go on with the work, his surety was not liable for breach of the contract. Fidelity & Deposit Co. v. United States [C. C. A.] 137 F. 866.

Building contract: Payment to the contractor without presentation of certificates of the architect and without reserving a certain percentage as provided by the contract discharged the sureties. First Nat. Bank v. Fidelity & Deposit Co. [Ala.] 40 So. 415. A surety is not liable if notice is not given according to the terms of the contract. Notice to be given within 21 days of default. Union Surety & Guaranty Co. v. Sevenson, 27 Pa. Super. Ct. 324. Parol evidence admissible to show material change in terms of contract without surety's consent or knowledge. A parol understanding that part of consideration for mortgage should be an extension of time in which to pay note secured, made without consent or knowledge of sureties. Moroney v. Coombes [Tex. Civ. App.] 13 Tex. Ct. Rep. 527, 88 S. W. 430.

67. First Nat. Bank v. Fidelity & Deposit Co. [Ala.] 40 So. 415. A promisee who waives performance according to the terms of a contract cannot thereafter hold the sureties to answer for subsequent obligations. Plaintiff who had accepted property returned to him by his lessee at a place other than that required by the contract could not thereafter hold the sureties for expenses in removing the property or for rent after such acceptance. White River, L. & W. R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

68. Defendant directed plaintiff to deliver teeth to a dental company "said teeth to be consigned and paid for every 30 days as sold." Held the fact that plaintiff did not collect every 30 days did not release the surety. Eccleston v. Sands, 108 App. Div. 147, 95 N. Y. S. 1107. Payment of labor and material bills by obligee in building contractor's bond without retaining a percentage as provided by the contract held not necessarily to release surety. First Presbyterian Church v. Housel, 115 Ill. App. 230. The contract providing that wages earned by the principal up to the 15th of the month should be paid on or about the 20th. payment on the 15th did not discharge the surety. Eastern R. Co. v Tuteur [Wis.] 105 N. W. 1067. In an action by a city to recover from a contractor and surety the amount of a judgment against it for injuries caused by the contractor, the fact that the city did not after notice of the claim retain from the salary of the contractor money with which to pay the judgment did not release the surety where the contract simply provided that such sum might be retained if in the judgment of the board of public works it was necessary. City of Spokane v. Costello [Wash.] 84 P. 652.

69. A surety on a **contractor's bond** having waived provisions as to the time of performance and payment was estopped from defending on the ground that the contract could not be varied by parol where plaintiff relied on the waiver and would be prejudiced were it repudiated. Hellman v. City Trust, Safe Deposit & Surety Co., 98 N. Y. S. 51.

70. Defendants who were sureties on a bond conditioned that the principal would pay $45 per month for the support of his wife for one year from May 7, 1901. Court issued an order that before July 1, 1901, a new bond should be executed conditioned upon the payment until further order of the court. Held no release. Keefer v. Keefer, 28 Pa. Super. Ct. 256.

71. See 4 C. L. 1601.

72. Fanning v. Murphy [Wis.] 105 N. W. 1056. Absence of consent must be alleged and proven. Patnode v. Deschenes [N. D.] 106 N. W. 573.

73. A mere agreement to extend the time at the same rate of interest is not binding, and co-surety is not released. Fanning v. Murphy [Wis.] 104 N. W. 1056. Such extension cannot be supported on the theory of an exchange of promises on the part of the

consideration,[74] and the holder must have knowledge that the party seeking release is a surety.[75] The mere indulgence of the holder of a note in not enforcing its collection is not sufficient to release the sureties.[76] The personal representatives and legatees of a surety cannot raise the defense of laches by a creditor when the cause of the creditor's delay was the fact of a suit pending against the principal and another surety, the effect of which suit was to reduce materially the liability of the surety in question.[77]

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal or collateral securities.*[78]—A creditor owes no duty to the surety of active vigilance to collect from the principal,[79] but he does owe proper diligence to preserve the security of a debt, and failure to exercise it releases the surety to the extent of the loss incurred,[80] and a request by the surety to sue the principal relieves the surety from liability if the creditor by negligence loses the means of recovering his debt from the principal.[81] The rule that a release of collateral security merely discharges the surety pro tanto does not apply as to a condition going to the completion of the entire contract,[82] nor is it necessary that a creditor be in collusion with a debtor to make him liable for the diversion of the surety's security.[83] A creditor's diligence or lack of diligence may be shown by parol evidence,[84] but if the release of the security was erroneous and the surety was notified of the error before being preju-

debtor to keep the money and on the part of the creditor to loan. Id. Must bind creditor as against principal to release surety. Higgins v. McPherson, 118 Ill. App. 464. An agreement which cites that the holder of a note has purchased of the maker a piece of land which the maker agrees to sell on or before a certain day, which day is after the maturity, and that the holder will refund to the maker all of the sale price in excess of the note, is an extension of the time of payment. Carter-Battle Grocer Co. v. Clarke [Tex. Civ. App.] 91 S. W. 880. The **insolvency of the husband** does not affect the rule that an extension of the time on a debt for which the wife is surety releases her if made without her participating in it. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476. Even though the amount to be paid at the end of the extended period be exactly the same as what was previously due. Id. Payment of interest before it is due does not of itself amount to an agreement to extend the time. Weaver v. Prebster [Ind. App.] 77 N. E. 674. Consent of holder of note to receive less interest for the first half year than he could have demanded, held a mere gratuity. Fanning v. Murphy [Wis.] 105 N. W. 1056. The payment of interest after alleged extension, no consideration. Id. Unilateral memorandum on back of note made 4 days after the agreement for the alleged extension, ineffectual. Id. The fact that the holder of the note entered the result upon the loan register as a renewal loan immaterial. Id.

74. Held by divided court that payment of interest before maturity is insufficient consideration. Weaver v. Prebster [Ind. App.] 77 N. E. 674. The hypothecation of land for the payment of a note and the additional interest to accrue because of the extention is sufficient consideration to support an agreement to extend time. Carter-Battle Grocer Co. v. Clarke [Tex. Civ. App.] 91 S. W. 880. Payment of interest in advance is sufficient consideration, and such payment is prima facie evidence of such an agreement. Higgins v. McPherson, 118 Ill. App. 464. Payment of interest already due is insufficient. Id.

75. Mutuality must exist between payee and the maker. Weaver v. Prebster [Ind. App.] 77 N. E. 674.

76. Titterington v. Murrell [Tex. Civ. App.] 90 S. W. 510. A note due Oct. 24, 1902, had on the back an indorsement "Rec'd $10, interest on this to Nov. 24th '02," but the evidence showed that this $10 was paid 6 or 8 weeks after said note was due without any understanding as to any extension of time on the note. Held, sureties were not released. Id. Where debtor was unable to pay at date of maturity, the creditor said "Let it go on," and he did let the note run another six months. Surety not released King v. Griggs, 116 Ill. App. 132..

77. Turk v. Ritchie [Va.] 52 S. E. 339.

78. See 4 C. L. 1602.

79. That creditor had not been active held no defense in an action for contribution. Fanning v. Murphy [Wis.] 105 N. W. 1056.

80. Scott v. Llano County Bank [Tex.] 13 Tex. Ct. Rep. 808, 89 S. W. 749; Magney v. Roberts [Iowa] 105 N. W. 430. As where a bank has funds of the debtor on deposit and pays out such fund after maturity of note, surety released as far as fund would have paid. Bank of Taylorsville v. Hardesty [Ky.] 91 S. W. 729. Where an insured mortgagee releases insurance with another company to which the company would have been subrogated, released to extent of insurance. Molaka v. American Fire Ins. Co., 29 Pa. Super. Ct. 149.

81. Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co. [Ala.] 39 So. 54.

82. First Nat. Bank v. Fidelity & Deposit Co. [Ala.] 40 So. 415.

83. Scott v. Llano County Bank [Tex.] 13 Tex. Ct. Rep. 808, 89 S. W. 749.

84. The number of cattle covered by a mortgage. Scott v. Llano County Bank [Tex.] 13 Tex. Ct. Rep. 808, 89 S. W. 749.

diced, he is not relieved,[85] and creditor may apply funds received from debtor to other unsecured debts without releasing surety.[86]

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.*[87]—The liability of a surety may be relieved by acts of bad faith of the obligee,[88] but sureties are not discharged by concealment of facts by approvers of a bond who were not the obligees thereof and under no duty to disclose.[89]

(§ 4) *G. Other defenses.*[90]—In a suit by a creditor against his debtor and sureties, the sureties may set up as an offset a debt due the principal.[91] If an administrator or trustee wrongfully applies a trust fund with acquiescence of the beneficiary, the sureties are released from liability to the beneficiary.[92] Of course a surety may purchase his release,[93] but surety is not discharged because after a contract has been broken by the principal the other party refuses to continue performance on his part,[94] nor will the fraud of the principal relieve the surety, the obligee having no notice,[95] nor will the subsequent correction by the surety of a violated duty of the principal release him generally.[96]

§ 5. *Rights of surety against principal and co-surety.*[97]—Under the common law a surety who paid a debt was entitled to all rights of the creditor, including an assignment of securities,[98] but the right of subrogation does not exist until the sureties have discharged the obligation of suretyship.[99] However, where the funds are about to be paid to third persons, they may stay the proceedings until the extent

85. Where a mortgage was released by mistake, and the sureties on a note soon thereafter had notice that such release was erroneous, that note was unpaid, and that the creditors still claimed the debt, the sureties are liable, although the principal sold the mortgaged property two or three years after the alleged release. Gaar, Scott & Co. v. Taylor [Iowa] 105 N. W. 125.

86. The fact that cash payments not otherwise applied by a vendee of goods were applied by the vendor to other debts due the latter from the vendee did not discharge the surety for the payment of the price of the goods. Eccleston v. Sands, 108 App. Div. 147, 95 N. Y. S. 1107.

87. See 4 C. L. 1602.

88. Where the administrator of the surety asked the obligee whether his intestate was surety upon a note held by him and received a negative answer, such false answer will relieve the suretyship, especially where the principal was then solvent and subsequently became insolvent. Bank of Taylorsville v. Hardesty [Ky.] 91 S. W. 729.

89. Bank officer's bond given for depositors and approved by directors when he was already to their knowledge a defaulter. Watertown Sav. Bank v. Mottoon [Com.] 62 A. 622.

90. See 4 C. L. 1603.

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

92. Estate of Koehnken, 6 Ohio C. C. (N. S.) 359.

93. The immediate payment by a surety of part of a debt not yet due is a sufficient consideration for a release of the surety from his obligation to pay the balance. Baldwin v. Daly [Wash.] 83 P. 724.

94. Where plaintiff refused to furnish the principal with more gold from which to make watch cases, and withdrew all the principal had on hand after the latter had refused to make good a deficiency, though the bond was conditioned that the principal perform at the termination of the contract. Keene v. Newark Watch Case Material Co., 98 N. Y. S. 68.

95. It is immaterial that notice was served upon the obligee that he would not be liable on the contractor's bond before any work was done under it. A. S. Ripley Bldg. Co. v. Coors [Colo.] 84 P. 817; Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. Where a contract provides that the contractor will furnish all material at his own cost, and his bond is conditioned for a strict performance of the contract, it is no defense to a suit against the sureties on the bond to recover money paid to discharge a mechanic's lien for material that plaintiff did not file the contract which would have relieved him. 3 Mills' Ann. St. Rev. Supp. § 2867. A. S. Ripley Bldg. Co. v. Coors [Colo.] 84 P. 817.

96. Where a surety is sued on his bond for the failure of his principal to pay into court a sum of money, it is no defense that the surety now offers to pay into that court the money and to await its decision as to his defenses. Grafflin v. State [Md.] 63 A. 373. Where for violation of duty the committee of a lunatic has been discharged and ordered to bring the funds into court, in a suit on the bond against the surety it is no defense that the violation of duty was corrected after the order was issued. Id. Where funds authorized to be loaned on a first mortgage are loaned on a second, and the committee is discharged for the violation, no defense that surety subsequently discharged the first mortgage. Id.

97. See 4 C. L. 1603.

98. Bigby v. Douglas, 123 Ga. 635, 51 S. E. 606.

99. Where a contractor defaults and assigns his claims for work done, the sureties on his bond cannot claim the money due until they have been called upon to perform their undertaking. Dickson v. St. Paul [Minn.] 106 N. W. 1053.

of their liabilities are determined and discharged.[1] Where the fact of suretyship does not appear in a decree, the surety cannot enforce his rights thereunder except on adjudication of his suretyship,[2] but as against a claimant under a co-defendant with notice, he may subsequently have an adjudication of suretyship.[3]

Indemnity and contribution.[4]—The surety has no claim against the principal until after payment of the debt by the surety, even though liability be incurred,[5] but upon the payment of the debt by the surety a new and distinct debt is created, rendering the principal liable to the surety for the full amount paid.[6] The relation of principal and surety continues notwithstanding the rendition of a judgment against the surety.[7] When he is sued alone he may notify the principal to defend the suit, and upon failure of the principal to indemnify him and defend, the surety, upon paying the judgment against him, may in the absence of fraud recover the amount paid from the principal, whether the principal was actually liable or not.[8] Advice of the attorney of an assignee to his sureties to settle a claim against the assignee will not bind him,[9] but where an assignee refuses to have anything further to do with a case and declares that his bondsmen may do as they please, they are justified in making settlement with the creditors;[10] and where sureties make such settlement as a result of which the accounts of the assignee are confirmed by withdrawal of exceptions to them, the assignee cannot in good conscience be heard to assert that because the record is clear he cannot be held for indemnity by the sureties[11] on the ground that when an adverse opinion is about to be filed against an assignee in an action of surcharging and falsifying, and his sureties obtain a postponement and settle certain claims in the meantime, such payment is not voluntary but legal and binding on the assignee as principal.[12] Where a surety who has paid a note releases one of his principals in consideration of the latter selling his interest in a partnership business to another who should assume the liability, which sale is afterwards rescinded by the other partner, but without the ratification of the rescission by the first partner, the surety cannot hold such principal.[13] A creditor cannot charge the sureties with expense of a collection of a claim filed in bankruptcy proceedings against the principal at the principal's suggestion, but not authorized by the sureties.[14]

A surety is entitled to contribution from his co-sureties[15] on showing payment of

1. Dickson v. St. Paul [Minn.] 106 N. W. 1053.

2. Foreclosure decree, surety paid judgment. Oglebay v. Todd [Ind.] 76 N. E. 238.

3. Oglebay v. Todd [Ind.] 76 N. E. 238.

4. See 4 C. L. 1603.

5. Winston v. Farrow [Ala.] 40 So. 53.

6. Applied where administratrix of surety paid the debt. Townsend v. Sullivan [Cal. App.] 84 P. 435.

7, 8. Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co. [Ala.] 39 So. 54.

9, 10, 11, 12. Bleakley v. Adelman, 27 Pa. Super. Ct. 21.

13. Whether there has been a ratification of the rescission, such as to re-establish the liability of the principal released, is for the jury. Johnson v. Wynne [Ark.] 89 S. W. 1049.

14. Even though benefiting sureties. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968.

15. Bigby v. Douglas, 123 Ga. 635, 51 S. E. 606. The right of contribution exists though the sureties were defendants in the suit by the promisee and judgment was rendered against some of them and in favor of others, the sureties defendant not being adversaries. Comstock v. Keating [Mo. App.] 91 S. W. 416. Prima facie to makers who are in fact sureties liable for contribution. Caldwell v. Hurley [Wash.] 83 P. 318. Contribution arises between grantors of mortgaged premises when the grantee defaults and one of the grantors pays the foreclosure judgment on the principle of co-suretyship. Fanning v. Murphy [Wis.] 105 N. W. 1056. The right of contribution, recognized and declared in Civ. Code 1895, § 2992, is not of statutory origin so as to come within § 3766. Bigby v. Douglas, 123 Ga. 635, 51 S. E. 606. On a rule to show cause a surety, who under pressure of an execution and levy upon his personal property and real estate paid a judgment on which several obligors were jointly and severally liable, is entitled to be subrogated to the plaintiff's rights against his co-surety for contribution. Shaffer v. Messner, 27 Pa. Super. Ct. 191. Satisfaction of a judgment by paying it does not defeat a surety's right of subrogation as against a co-surety for contribution. Id.

principal's debt [16] under compulsion,[17] but a surety need not wait until payment is coerced by the creditor.[18] It is an equitable principle based on the idea of equality of burden between co-sureties where loss has been sustained,[19] but many modern authorities now hold the liability of contributions to be contractual and not merely equitable, as formerly regarded.[20] Nevertheless, the right of contribution not arising until after the closing up of the estate of a deceased co-surety, it may be enforced in equity against his legatees or distributees.[21] A co-surety failing to exercise diligence to realize on security given by the principal, he is not entitled to contribution.[22] Where a surety pays the debt of his principal with his principal's money, he is not entitled to contribution from co-sureties.[23]

§ 6. *Security held by surety and rights therein.*[24]—If conveyanees are made by a principal to a surety for the purpose of securing the payment of a debt, the creditor has an interest therein which the surety cannot destroy,[25] but if the conveyance is made to a surety for an indemnity, the ereditor has no interest therein except such subsequent equitable interests as may arise out of the insolvency of the parties principally liable.[26] A surety may release such a security unless such equitable interests intervene.[27] In fact the mortgagee if acting in good faith may release such security even after insolvency, no demand for it having been made upon him.[28] Although creditors might have been entitled to certain indemnification securities in the hands of sureties if claimed in time, to do so more than twenty years after their release is laches.[29] Creditors cannot lay claim to a deceased surety's interest in an indemnity mortgage by proceedings against other sureties to whieh neither the heirs nor representatives of the dead surety are parties.[30] Although a principal quitclaims land to his surety before judgment is rendered in consideration of the surety's payment of the judgment, the latter is nevertheless entitled to the land as surety.[31] Notes executed by the prineipal for payments made on the debt by the sureties are not new obligations but merely evidenee of the old one, and as such are protected by any security originally exeeuted for the indemnification of the sureties.[32]

16. Adams v. De Frehn, 27 Pa. Super. Ct. 184. When two or more jointly pay a note on which they are jointly liable with another, those paying may maintain a joint action against their co-surety to enforce contribution. Id.

17. Fanning v. Murphy [Wis.] 105 N. W. 1056.

18. Immediately upon default, the surety may pay the debt for his protections, such payment being compulsory. Fanning v. Murphy [Wis.] 105 N. W. 1056. A surety may pay off the debt and enforce his rights of contribution at any time after the maturity of the debt. Id. The fact that a surety solely to protect his rights of contribution and subrogation pays off the debt in the form of a purchase of the securities does not affect his rights as against his co-sureties. Id.

19. In re Skiles' Estate [Pa.] 61 A. 245.

20. Caldwell v. Hurley [Wash.] 83 P. 318. Under subd. 2, § 4798, Ballinger's Ann. Codes & St., the liability of co-sureties to contribute is an implied liability arising out of a written agreement. This statute is peculiar, however, and unlike most statutory provisions on the subject. Id. The liability for contribution is an implied liability. Id. Where a surety pays off a judgment, his remedy against a co-surety is in implied assumpsit, not on the judgment which has become extinguished by its judgment. Farlton v. Orr [Tex. Civ. App.] 90 S. W. 534.

21. Rev. St. 1899, § 4519, providing that the remedy may be pursued against the executors and administrators, did not supersede this right. Comstock v. Keating [Mo. App.] 91 S. W. 416.

22. Three sureties were unsuccessful in attempting to enforce a mortgage. One of them refused to join in an appeal as per his agreement. Held he could not recover against the other two on a note given by the principal covering the amount he had paid and whereon the other two were sureties. Pollard v. Pittman [Ind. App.] 77 N. E. 293.

23. Director of a bank, paying obligation of bank with bank's money wrongfully in his possession. In re Skiles' Estate [Pa.] 61 A. 245.

24. See 4 C. L. 1605.

25, 26, 27, 28, 29, 30. Dyer v. Jacoway [Ark.] 88 S. W. 901.

31. Tarlton v. Orr [Tex. Civ. App.] 90 S. W. 534. It is no evidence of bad faith, or that land was not accepted in satisfaction of payment of a debt, that the principal at the time of conveyance to surety had already forfeited his land to the government, of which fact the surety was ignorant. Id.

32. Pollard v. Pittman [Ind. App.] 77 N. E. 293.

§ 7. *Remedies and procedure.*[33]—The creditor will not be delayed in his remedy by a collateral issue between principal and surety.[34] The surety of a bonded depositary of the assets of a bankrupt is without priority.[35] Where various notes are secured by mortgage, and equitable foreclosure is sought in a partition proceeding to which both the mortgagor and mortgagee are parties, it can not be maintained that a particular note secured by the mortgage, but upon which there is a surety, was merged in the finding in the suit in partition to which the surety was not a party.[36] The payment by a surety of a judgment against the principal and surety jointly extinguishes the judgment.[37] A surety may offset a debt due to his principal from the creditor in a suit against him.[38] The petition or complaint in an action against the surety must show the facts necessary to establish the suretyship[39] and ripening of the liability.[40] It is proper to permit the amendment of the original petition by facts setting forth more clearly the suretyship.[41] In an action against a surety, notice to him of the default of the principal need not be alleged in the complaint, as it is a matter of defense.[42] A suit for contribution may be upon written evidence of indebtedness, in which case period of limitation would be that applicable to that class of instruments, or to sue upon the implied contract, period of limitation that applicable to implied assumpsit.[43] In actions involving surety-

33. See 4 C. L. 1605.

34. Shank v. Washington Exch. Bank [Ga.] 52 S. E. 621.

35. American Surety Co. v. Akron Sav. Bank Co., 6 Ohio C. C. (N. S.) 374. An individual who has paid money to the government as a surety acquires the right of priority which belongs to the government, and it may be that the same priority extends to one who has satisfied a moral obligation by responding as surety for a Federal officer or employe. Id.

36. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145.

37. Tarlton v. Orr [Tex. Civ. App.] 90 S. W. 534.

38. Marcy v. Whallon, 115 Ill. Opp. 435.

39. A petition which alleges that the plaintiff was engaged at a specified salary to carry on a certain business for the defendants, who were to become responsible for the liabilities incurred in the conduct thereof, sets forth a state of facts which would create the relation of principal and surety, upon which an action could be maintained after the debts have become due to compel the defendants to pay them. Schick v. Ott, 7 Ohio C. C. (N. S.) 325. A denial of the relation of surety when the facts are admitted out of which the law infers that relation raises no issues. Townsend v. Sullivan [Cal. App.] 84 P. 435.

40. A petition in a suit to compel a principal to pay the debts to save his surety is open to demurrer for failure to allege that such debts have became due. Schick v. Ott, 7 Ohio C. C. (N. S.) 325. Where one becomes surety for payment of rent upon proof of demand, the lessor will be nonsuited in an action against the surety for the rent on failure of proof of demand from lessee. Folsom v. Squire [N. J. Law] 60 A. 1102. Where an affidavit admits default but denies that notice thereof was given within the period provided for in the contract, it is presumed that the default alleged in the complaint is referred to, and the question should have gone to a jury. Union Surety & Guaranty Co. v. Stevenson, 27 Pa. Super. Ct. 324.

41. Fields v. Willis, 123 Ga. 272, 51 S. E. 280. Where a bonding company defended on been altered, it was proper to allow plaintiff the ground that the principal contract had to amend his complaint by an allegation that defendant executed such bonds for hire and received a valuable consideration in this instance. Michigan S. S. Co. v. American Bonding Co., 109 App. Div. 55, 95 N. Y. S. 1034. The allowance of such amendment was not an adjudication as to the materiality or effect of evidence necessary to support the amendment. Id. Under a statute providing that the allowance of an amendment shall not be binding upon persons not parties to the record, sureties on attachment bond may contest the effect of an amendment to the declaration in the original suit (Morton v. Shaw [Mass.] 77 N. E. 633), but where the amendment merely puts the cause of action in proper form, it is binding on the sureties (Id.). Where the original court founded on a written contract of sale was amended so as to declare on an oral contract of which the writing was a memorandum, the sureties are bound. Morton v. Shaw [Mass.] 77 N. E. 633. Mere correction of a clerical error does not affect the binding force. Id. In an action by the surety against the principal, an amendment that the surety "gave" defendant the money borrowed by defendant from a third person was properly denied as involving a contradiction under the pleadings. Townsend v. Sullivan [Cal. App.] 84 P. 435.

42. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743. The requirement of § 5833, as to notice by a surety to the principal debtor, must be strictly complied with, and where the principal debtor is a woman, notice to her husband does not satisfy the statute. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145.

43. Bigby v. Douglas, 123 Ga. 635, 51 S. E. 606. A surety to obtain the benefit of articles 3815, 3813, Rev. Civ. St. 1895, giving him right to litigate question of suretyship and entitling him to execution as assignee of a judgment against the principal he has been compelled to pay, should plead the

ships it is not always necessary to implead the principal[44] or the surety,[45] or a co-surety.[46] A surety may be sued in the county of the principal's residence, whereas a guarantor must be sued in the county of his residence.[47] A bill charging liability upon the estate of a decedent and upon his sureties, making the personal representatives, heirs, and distributees of the principal and the sureties defendants, praying for special and general relief, under the latter prayer confers jurisdiction upon the court to grant relief against the personal representatives of the sureties.[48] It is competent for a surety to show his good faith in making settlements with creditors in order to limit his own and his co-sureties' liability.[49] The fact that an apparent co-purchaser is a surety may be shown orally.[50] Illustrations of what evidence is admissible are given in the notes.[51]

SURFACE WATERS; SURPLUSAGE; SURROGATES; SURVEYORS; SURVIVORSHIP; SUSPENSION OF POWER OF ALIENATION; TAKING CASE FROM JURY, see latest topical index.

question of suretyship and have the same adjudicated on the trial. Tarlton v. Orr [Tex. Civ. App.] 90 S. W. 534. By signing and filing an injunction bond with the clerk, the sureties submit themselves to the jurisdiction of the court so that any assessment of damages for its breach will bind them without notice. Under Rev. St. 1899, § 3640. Sutliff v. Montgomery [Mo. App.] 92 S. W. 515. A charge to a jury which declared that the bonding company was a surety for hire, but was nevertheless a surety, a favorite of the law and entitled to all the rights a private person would be entitled to, is not prejudicial to the company. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

44. In an action against a surety the principal is not a necessary party. Stewart v. Knight & Jillson [Ind.] 76 N. E. 743.

45. In a suit by an innocent holder of a note against the maker, the latter may bring a cross-complaint impleading the payee, to which cross-complaint a surety on the note is not a necessary party. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497.

46. In an action by the administratrix of a surety to recover from the principal an amount paid by her in discharge of the debt, the estate of a co-surety is not a necessary party. Townsend v. Sullivan [Cal. App.] 84 P. 435.

47. Fields v. Willis, 123 Ga. 272, 51 S. E. 280.

48. Turk v. Ritchie [Va.] 52 S. E. 339.

49. Bleakley v. Adelman, 27 Pa. Super. Ct. 21.

50. At least against all parties except the seller, and probably against him, unless his rights under the written contract are prejudiced thereby. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. A maker of a promissory note could have shown that he was in fact a mere surety had this case not been affirmed on other grounds. Baldwin v. Daly [Wash.] 83 P. 724. This is true even after judgment has been entered against both as principals. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. In a suit brought against several defendants, it may be proved by parol either before or after judgment that some of them are sureties. Shank v. Washington Exch. Bank [Ga.] 52 S. E. 621. Under Negotiable Instruments Act (L. 1899, p. 361), § 122, requiring a "renunciation" of a holder's rights against any party to the instrument to be in writing, a release of a surety on a note cannot be shown by parol. Baldwin v. Daly [Wash.] 83 P. 724.

51. Evidence as to whether the obligee requested a surety from the principal held immaterial. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. In an action by the surety to recover money paid for the principal, evidence of a declared intention of the surety to give the money to the principal excluded as varying terms of written contract. Townsend v. Sullivan [Cal. App.] 84 P. 435. It being admitted that the surety had mortgaged property in which she was interested to secure the payment of the debt of the principal, the extent of that interest was immaterial in an action by the administratrix to recover the amount of the debt which she had paid. Id. The question whether defendant had assumed to pay for goods furnished another being at issue, evidence as to whether the latter ever offered to pay the bill held admissible. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Evidence that the principal showed the surety in the absence of the obligee a set of plans as the ones agreed on is inadmissible as mere hearsay. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. But it is permissible for sureties to testify that they signed an indemnity bond with reference to one set of plans and did not know or consent to the second, regardless of whether obligee was present or not. Id. Whether certain facts create an original obligation or that of a surety is a question of law for the court. Objection to question asked witness whether defendant acted as his surety properly sustained. Gates v. Morton Hardware Co. [Ala.] 40 So. 509.

TAXES.[52]

§ 1. *Nature and kinds, and power to tax.*[53]—A tax is an enforced contribution from a citizen to the state to be applied for governmental or public purposes.[54] It is not a "debt."[55]

The power to tax is an attribute of sovereignty necessary not only to the public welfare but to the maintenance of the government, and hence subject to no limitation or restriction beyond those set up in the fundamental law,[56] or found in the structure of the government itself.[57] There are, however, several well defined limitations upon the power, some of which have been expressly incorporated in the written fundamental law of the nation and the various states. Thus, the provisions of the Federal constitution guarantying equal protection of the laws,[58] forbidding

52. Special assessments, 6 C. L. 1158, and Internal Revenue Laws, 6 C. L. 161, are given separate treatment.

53, 54. See 4 C. L. 1605.

55. A tax is not a debt in the sense that it will be barred by a statute of limitations against actions on open account or on implied contract. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

56. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

57. "The only security against the abuse of this power [of taxation] is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed.—— (quoting from McCulloch v. Maryland, 4 Wheat. 316, 428); Succession of Levy [La.] 39 So. 37.

58. The New York mortgage tax law, Laws 1905, c. 729, § 307, is held not to deny equal protection of the laws, since, though applicable only to mortgages recorded after July 1, 1905, it makes no distinction between persons in the same class or condition.

the deprivation of property without due process of law,[59] and denying to states the right to tax objects of interstate commerce;[60] and provisions of state constitutions,[61] such as those restricting the rate of taxation, and the purposes for which taxes may be imposed,[62] and requiring uniformity and equality[63] within the limits of the taxing authority,[64] must not be violated. It is also essential to the validity of a tax that the property taxed shall be within the territorial jurisdiction of the taxing power.[65]

People v. Ronner, 95 N. Y. S. 518; Id., 110 App. Div. 816, 97 N. Y. S. 550. The North Carolina road tax law does not discriminate between the inhabitants of towns and of the country, since inhabitants of towns, though not required to work on roads, are under greater expense for city streets. State v. Wheeler [N. C.] 53 S. E. 358. The North Carolina statute requiring citizens to contribute four days' labor per year on the public highways or to make a money payment in lieu thereof, is held not objectionable as double taxation, though the roads are worked in part by funds derived from taxation. Requirement of labor is not a "property" tax, time and labor not being property in this sense. Id. The **fourteenth amendment** to the Federal constitution was not designed to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality to prevent the classification of property for taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and that the method of assessment and collection is not inconsistent with natural justice. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law Ed.—. U. S. Const., Amend. 14, does not require equality of taxes by state. State v. Wheeler [N. C.] 53 S. E. 358.

59. Laws 1905, c. 729, § 307 (New York mortgage tax law), does not violate due process of law requirement. People v. Ronner, 95 N. Y. S. 518; Id., 110 App. Div. 816, 97 N. Y. S. 550.

60. A license tax on a corporation which sells oil from barrels, tanks, or wagons of the corporation is not a tax on interstate commerce, since the property of the corporation is in the state and mingled with the mass of other property therein. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817. A license tax on a foreign corporation engaged in interstate commerce is not a tax on interstate commerce. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

61. The Michigan railroad tax law does not violate the provision of the Michigan constitution requiring tax laws to distinctly state the tax and the object to which it is to be applied. Michigan Railroad Tax Cases, 138 F. 223. New York mortgage tax law does not interfere with freedom to contract, or the home rule principle. No power of "assessing" is withdrawn by the act from local assessors. People v. Ronner, 95 N. Y. S. 518; Id., 110 App. Div. 816, 97 N. Y. S. 550. There is no constitutional prohibition against double taxation. State v. Wheeler [N. C.] 53 S. E. 358.

62. Laws 1903, c. 551, as amended by Laws 1905, c. 667, does not violate Const. art. 5. §§ 1, 2, requiring poll taxes to be applied to education and support of the poor. State v. Wheeler [N. C.] 53 S. E. 358.

63. Sess. Laws 1905, p. 273, provides that where live stock is pastured in more than one county during the year, it shall be subject to taxation in each county in proportion to the time it remains in each. It also provides for payment of taxes in the home county for the full year at the rate of the last preceding levy, if the owner of the stock has no realty liable for the tax. The act fails to provide for any equalization or adjustment in case the rate for the "last preceding year" should be different from that of the current year. Held owners of stock who have no realty are not taxed at the same rate as owners of other property, and the law is unconstitutional under Const. art. 1, § 32, and art. 9, § 1. Lake County v. Schroder [Or.] 81 P. 942. Sess. Laws 1903, p. 290, c. 151, requires payment of fees to clerk in probate proceedings, proportionate to the amount of the estate, to be paid into the county funds. The tax is construed as a property tax and violates Const. art. 7, §§ 1, 2, 9, requiring property to be taxed in proportion to its value and at an equal and uniform rate. State v. Case [Wash.] 81 P. 554.

NOTE. "Fees" as taxes: "If a charge, though in the statute authorizing it designated as a 'fee,' is in fact based entirely upon a property valuation and not upon actual and necessary services rendered or to be rendered, it is a property tax, rather than a fee for services. State v. Gorman, 40 Minn. 232, 41 N. W. 948; State v. Mann, 76 Wis. 469, 45 N. W. 526; Fatjo v. Pfister, 117 Cal. 83, 48 P. 1012. A law providing for the collection of a 'fee,' which has for its direct and only purpose the creation of a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes creates a tax. Pittsburg, C. & St. L. R. Co. v. State, 49 Ohio St. 189, 30 N. W. 435, directly in point; and by way of inference In re Wau Yin, 22 F. 701, where a charge as a 'license fee' was held to be a tax because the charge was much greater than the service rendered would warrant."—4 Mich. L. R. 169.

64. Acts 1904, c. 167, which purports to incorporate a town and to exempt the inhabitants from certain county taxes, is unconstitutional, violating Const. art. 13, § 168, requiring uniformity of taxation on the same class of subjects within the taxing authority. Campbell v. Bryant [Va.] 52 S. E. 638.

65. A tax in Kentucky on the rolling stock of a corporation permanently employed and located in other states, under Ky. St. § 4020, is a denial of due process of law.

Municipal corporations[66] have no inherent powers of taxation but possess only such as are expressly delegated to them.[67] The control of the legislature over the power of taxation delegated to municipal corporations is subject to the prohibition of the Federal constitution against legislation impairing the obligation of contracts,[68] and a law restricting or withdrawing from such a corporation the power to tax to such an extent as to impair the obligation of its contracts, made upon a pledge, expressly or impliedly given, that it shall be exercised for its fulfillment, is void.[69] Thus, a statute limiting the county tax rate for various purposes, and also placing a limitation upon the total rate for all purposes,[70] thereby authorizing county authorities to dispense with a levy for the sinking fund to pay its bonded indebtedness, is invalid.[71] Legislative control over municipal taxation is also subject to provisions of the state constitutions restricting the power of the legislature with respect to municipal affairs.[72] The power of a de facto municipal corporation to levy taxes for authorized municipal purposes cannot be collaterally attacked in a proceeding to collect the tax.[73]

Construction of tax laws.[74]—The language of a law providing for a constitu-

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 Law Ed.—. Property placed outside the limits of a municipality by a change in its territorial limits is not liable to taxation for bonds issued by the municipality before its territory was reduced (Miller v. Pineville [Ky.] 89 S. W. 261), even though property owners in the territory taken from the municipality agreed to pay their portion of the debts of the municipality (Id.). The power to levy taxes rests alone with the legislature, it is not the subject of agreement. Id. Assessment of property to a nonresident owner is a jurisdictional defect, not curable by Laws 1904, c. 234, curing irregularities in taxes in city of Poughkeepsie. Rowley v. Poughkeepsie, 106 App. Div. 258, 94 N. Y. S. 454.

66. See 4 C. L. 1608, n 65 et seq.

67. Applied to county courts. Southern R. Co. v. Hamblen County [Tenn.] 92 S. W. 238. Thus, counties of Tennessee cannot levy and collect for general county purposes taxes in excess of the amount allowed by law (Southern R. Co. v. Hamblen County [Tenn.] 92 S. W. 238), and taxes for general purposes in excess of the statutory limit are invalid, though styled in the levy as "special" taxes (Id.). County court has no power to levy "special" tax to defray expense of suppressing smallpox epidemic and to repay loan from sinking fund. Id. Act March 7, 1901 (P. L. 40), pars. 4 and 22 of § 3, art. 9, authorizing license taxes by cities of the second class does not authorize a tax of 25 cents per lineal foot of street railways, this being a property tax though designated a "license" tax by the ordinance. Pittsburgh Rys. Co. v. Pittsburg, 211 Pa. 479, 60 A. 1077.

68, 69. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929.

70. Laws 1899, c. 41, § 3, held to limit county rate to 8 mills for all purposes. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929.

71. Laws 1899, c. 41, § 3, authorizes taxes for purposes other than the sinking fund up to the limit, and thus authorizes omission of a levy for that fund, and is hence invalid. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929.

Note: On this question see Von Hoffman v. Quincy, 4 Wall. [U. S.] 535, 18 Law. Ed. 403; Wolff v. New Orleans, 103 U. S. 358, 26 Law. Ed. 395; Ralls County Court v. U. S., 105 U. S. 733, 26 Law. Ed. 1220; and Port of Mobile v. Watson, 116 U. S. 289, 29 Law. Ed. 633, cited in 4 Mich. L. R. 551, in a commentary on Fremont, etc., R. Co. v. Pennington County [N. D.] 105 N. W. 929.

72. Act of May 10, 1901, authorizing towns to issue bonds to acquire and improve parks, and to provide a tax to pay the same, is violative of Const. art. 4, § 22, prohibiting regulation of township affairs, by local or special laws. West Chicago Park Com'rs v. Chicago, 216 Ill. 54, 74 N. E. 771. Const. art. 9, § 10, prohibiting the general assembly from imposing taxes on municipal corporations or their inhabitants for corporate purposes, is not violated by Laws 1893, p. 136, authorizing city treasurers to retain a portion of the interest on funds under their control. City of Chicago v. Wolf [Ill.] 77 N. E. 414. Const. art. 11, § 12, prohibiting the legislature from imposing taxes on municipalities for municipal purposes, and providing for the vesting of the power to impose such taxes on the municipalities themselves, is not violated by Acts 1903, c. 186, requiring submission of a proposed charter amendment to vote of the people, though such requirement will entail expense to the municipality. Hindman v. Boyd [Wash.] 84 P. 609.

73. People v. Pederson [Ill.] 77 N. E. 251.

74. NOTE. Construction of tax laws: "No consistent rule for the interpretation of tax laws has been laid down by the authorities. Precedents can be cited from courts of high standing in large numbers to sustain almost any view contended for. The construction is sometimes aggressively hostile to the state (Blackwell on Tax Titles, 728, approved in Buell v. Boylan, 10 S. D. 180, 72 N. W. 406), requires the resolution of doubts against it (Commercial Bank v. Sanford, 103 F. 98, 100), and denies the propriety of applying thereto any equitable considerations (Lord Cairns,

tional method of taxation is to be construed fairly and reasonably so as to effectuate legislative intention, and to compel property protected by the state to contribute its ratable share of public revenue, and to avoid discrimination in taxation between property owners.[75] The validity of a statute providing for a method of taxation for property of a particular class cannot be attacked on the ground that officers executing the law have systematically undervalued other property, thereby causing an inequality in taxes.[76] Statutes imposing restrictions upon business or the common occupations of the people, or levying a tax upon them, are to be construed strictly.[77] The rule that in case of doubt as to the validity of a tax the doubt is to to be resolved in favor of the citizen is not applicable in construing a statute imposing a license fee on foreign corporations.[78] Repeals and revisions of revenue laws have a prospective operation only, unless the legislative intent to the contrary clearly appears.[79] The construction of particular statutes, not included under the general principles already discussed, is treated in the note.[80]

§ 2. *Persons, objects, and interests taxable. A. Taxable property and its classification.*[81]—The legislature has power to classify persons or property for purposes of taxation,[82] and to impose different rates upon different classes,[83] or to tax

in Partington v. Attorney Gen., L. R. 4 H. L. 100, 122). More frequently the construction is merely strict. 'A tax cannot be imposed without clear and express words for that purpose.' Pollock, C. J., in Burr v. Scuddus, 11 Exch. 191, approved in U. S. v. Isham, 17 Wall. [U. S.] 504, 21 Law. Ed. 728, and in Treat v. White, 181 U. S. 264, 45 Law. Ed. 853. In an increasing degree, however, the tendency is to construe tax laws, not literally, but liberally, to effectuate their manifest and reasonable purpose, and in the light of surrounding circumstances. Treat v. White, 181 U. S. 264, 45 Law. Ed. 853. 'Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactments.' Swain, J., in United States v. Hodson, 10 Wall. [U. S.] 395, 406, 19 Law. Ed. 937. And see Cliquot v. Cham, 3 Wall. [U. S.] 114, 18 Law. Ed. 116; Taylor v. U. S., 3 How. [U. S.] 197, 210, 11 Law. Ed. 559. Much of the apparent inconsistency of the formulas used will disappear when they are confined to the facts involved in the decision under consideration, especially with reference to whether the matter for determination be the right of the state to tax, the legal sufficiency of the language employed, or the machinery prescribed, the creation of the tax by officials of the law, or its collection. Usually a construction, liberal to the state, is applied to the earlier stages of tax proceedings which are anterior to the attempt by the state to collect the tax, as to the method of taxation and the determination of a sum to be collected as a tax; while a construction, strict as against the state, is applied to the later proceedings to seize and sell property in satisfaction of, or otherwise to collect, the tax as thus ascertained." Jaggard, J., in State v. Western Union Tel. Co. [Minn.] 104 N. W. 570.

75. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567.

76. Michigan Railroad Tax Cases, 138 F. 223.

77. Lockwood v. District of Columbia, 24 App. D. C. 570.

78. Standard Oil Co. v. Commonwealth [Va.] 52 S. E. 390.

79. The right to redeem from a tax sale made under Laws 1890, c. 132, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right by the saving provisions contained in Rev. Codes 1895, § 2686, though the code of 1895 repealed the revenue laws of 1890. Blakemore v. Cooper [N. D.] 106 N. W. 566. Provisions of Rev. Codes 1895, and Laws 1897, c. 126, and Laws 1901, c. 156, relating to redemption from tax sales, are prospective and do not apply to certificates issued under former statutes. Id.

80. Poll tax authorized by Const. art. 13, § 12, levied and collected for the benefit of the state school fund, is a state tax. Alameda County v. Dalton [Cal.] 82 P. 1050. Under the alternative road law of 1891, each male citizen between the ages of 16 and 50 years is subject to road duty. Under the act of 1896, as amended, each male inhabitant between 21 and 50 is subject to such duty. The latter act does not repeal the former, though there are some differences in the two; each applies where it has been adopted in the manner provided therein. Maxwell v. Willis, 123 Ga. 319, 51 S. E. 416.

81. See 4 C. L. 1609.

82. The fourteenth amendment to the Federal constitution is not violated by the classification of property for purposes of taxation. Michigan Railroad Tax Cases, 138 F. 223. Thus, the Michigan railroad tax law, which places the property of railroad corporations in a separate class for purposes of taxation is valid. Id.

83. Michigan Railroad Tax Cases, 138 F. 223. A state may separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that upon other property. Michigan

certain kinds of property and not others.[84] It also has power to provide for different methods of assessment and collection of taxes upon different classes.[85] The exercise of these powers is subject only to the limitations that the tax imposed must not discriminate in favor of one as against another of the same class,[86] and the method prescribed must be consistent with natural justice.[87]

(§ 2) *B. The persons liable.*[88]—In general, the owner of property at the time of assessment is liable for the taxes.[89] Personalty must be assessed to the owner,[90] but a person to whom it is assessed may be estopped by his conduct to deny ownership as against a purchaser at a tax sale.[91]

Vendor and vendee.[92]—As between vendor and vendee, taxes becoming a lien before the conveyance is completed are chargeable to the former.[93] An assessment against property as an entirety having been paid by the original owner, an assessment against a vendee of an interest therein for the same year is void.[94] Where a purchaser of land agrees with his vendor to pay the taxes on the land for the current year, a judicial assessment against the purchaser for such year, though erroneous, is not prejudicial and will not be set aside.[95] Where the liability of a township, and of property therein, is fixed by a judicial decree ordering a special tax to pay an existing indebtedness, prior to the transfer of property in the township, free from claims or liabilities against the vendor, the vendor must pay the special tax.[96]

Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed.—. The legislature has power to classify real estate for purposes of taxation and may authorize the levy of a different rate upon each class. Jermyn v. Scranton [Pa.] 62 A. 29.

84. It is competent for the legislature to single out any species of property or business or the transfer of property as the object of taxation. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

85. Michigan Railroad Tax Cases, 138 F. 223. Equal protection of the laws is not denied by the Michigan railroad tax law because no provision is made for deducting debits from credits in assessing railroad property, since a different method may lawfully be provided and is contemplated by the act, namely, assessment of railroad property as a unit. Id.

86, 87. Michigan Railroad Tax Cases, 138 F. 223.

88. See 4 C. L. 1609.

89. Theobald v. Sylvester, 27 Pa. Super. Ct. 362. The owner of land to whom a tax thereon is assessed is primarily liable therefor, the lien on the land being merely security for payment. Webber Lumber Co. v. Shaw [Mass.] 75 N. E. 640. Evidence and pleadings held insufficient to prove claim that lands assessed to a resident were owned by a nonresident. Culnane v. Dixon, 94 N. Y. S. 1093. An oral sale of personalty without actual or constructive delivery or any payment, and without any special agreement as to immediate delivery or change of title, is not a completed sale, and the property was properly assessed to the seller when it was in his possession under those circumstances on April 1. St. Anthony & D. Elevator Co. v. Cass County [N. D.] 106 N. W. 41. Plaintiff bought lumber to be sawed and placed on mill dock. After it was ready for shipment, its amount estimated, insurance transferred to plaintiff, 90% of price paid, and it was marked as property of plaintiff, he had title and it was properly assessed to him for taxes. Edward Hines Lumber Co. v. Wells Tp. [Mich.] 12 Det. Leg. N. 777, 105 N. W. 872.

90. Rev. St. 1898, § 1044, and Laws 1899, p. 382, c. 229. Wisconsin Oak Lumber Co. v. Laursen [Wis.] 105 N. W. 906.

91. Corporation estopped to deny ownership by acts of president who had knowledge of assessment and failed to object at any time. Wisconsin Oak Lumber Co. v. Laursen [Wis.] 105 N. W. 906.

92. See 4 C. L. 1609.

93. Mallory v. Gray [Iowa] 103 N. W. 1015. In Texas, one owning land on the first day of January is personally liable for the taxes of that year, though he sells before the amount of taxes has been ascertained and before payment thereof is due. Thus, a sale April 16 did not relieve the owner though lands may be listed any time before June 1, and taxes are not due until October 1st. C. B. Carswell & Co. v. Haberzettle [Tex. Civ. App.] 87 S. W. 911.

94. Where a tract of land in which an undivided interest in the oil, gas, and minerals therein had been sold was assessed as a single property and the taxes thereon paid by the original owner, an assessment against the grantee of the mineral interest was void. Intention held to have been to assess entire property, though mistakes had been made in extending the levies. Barnes v. Bee, 138 F. 476.

95. Under Kentucky statute authorizing county court to change assessments where property is assessed to the wrong person. Garrett v. Creekmore [Ky.] 89 S. W. 166.

96. Hudson Coal Co. v. Ogden, 212 Pa. 407, 61 A. 902.

Mortgagor and purchasers under mortgage sale.—If property is sold in foreclosure proceedings during the year following the assessment, the purchaser is not liable for prior taxes.[97] Where, after assessment to the owner, the land is sold under a mortgage, subject to the tax, the tax collector cannot be enjoined from collecting the tax from the owner,[98] but the owner is entitled to be subrogated to the rights of the tax collector as against the purchasers under the mortgage.[99]

Trust property.—State and county taxes on land held in trust for a city are properly charged to the holder of the legal title, in the absence of an agreement as to the payment of such taxes.[1]

A life tenant[2] and not the remainderman is under the duty of paying taxes.[3]

Estates of decedents.[4]—The Louisiana revenue law, levying a tax on property held by executors, has reference only to property so held that is subject to taxation.[5] Where a universal legatee is one whose property is exempt by law, the property composing the universal legacy, which passes to such legatee immediately upon the death of the testator, becomes exempt and cannot be assessed to the succession while it is in course of administration;[6] but particular legacies, which are in the hands of the succession representative to be turned over to the legatees, not being themselves exempt, are properly assessed to the succession.[7]

Property of nonresidents.[8]—Under the Iowa statute, classing as owners for purposes of assessment persons who hold taxable property of nonresidents, property consigned to a warehouseman who has no power to sell but holds it subject to shipping orders of the owner is properly assessed to such warehouseman.[9] The assessment of such property is not an unlawful interference with interstate commerce.[10]

(2) *C. Corporations, and corporate stocks and property.*[11] *Corporate franchises and privileges.*[12]—It is now well settled that franchises and privileges of corporations are proper objects of taxation.[13] It has been held that license fees are not taxes in the ordinary meaning of the term, but are contract obligations assumed by corporations organized under statutes requiring payment thereof.[14] Usually, however, the exaction of such payments is considered an exercise of the taxing power.[15] But license or franchise taxes are not taxes on property,[16] even

97. Theobald v. Sylvester, 27 Pa. Super. Ct. 362.

98. In Massachusetts equity will not enjoin collection of a tax. Webber Lumber Co. v. Shaw [Mass.] 75 N. E. 640.

99. Land should be charged with amount paid by owner for taxes. Webber Lumber Co. v. Shaw [Mass.] 75 N. E. 640.

1. Elliott v. Louisville [Ky.] 90 S. W. 990.

2. See 4 C. L. 1610.

3. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747.

4. See 4 C. L. 1610.

5. Tulane University v. Board of Assessors [La.] 40 So. 445.

6. Property going to Tulane University as universal legatee exempt. Tulane University v. Board of Assessors [La.] 40 So. 445.

7. The universal legatee does not pay such tax but receives that much less under the will. Tulane University v. Board of Assessors [La.] 40 So. 445.

8. See, also, post, Place of taxation.

9. Construing Code §§ 1314, 1318. Merchants' Transfer Co. v. Board of Review [Iowa] 105 N. W. 211.

10. Such property is not "in transit" but has reached its destination, and the fact that it is subject to reshipment is immaterial. Merchants' Transfer Co. v. Board of Review [Iowa] 105 N. W. 211.

11. See 4 C. L. 1610.

12. See 4 C. L. 1611.

13. Franchises are property subject to taxation. Const. art. 13, §§ 1-10. San Joaquin & K. R. Canal & Irr. Co. v. Merced County [Cal. App.] 84 P. 285. The right of a corporation to exercise the powers given it is taxable property. Cumberland Telephone & Telegraph Co. v. Hopkins [Ky.] 90 S. W. 594.

14. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858. A statute requiring all corporations organized in the state, with certain exceptions, to pay a certain percentage of the amount of stock issued and outstanding does not impose a "tax" within the meaning of § 64a of the Bankruptcy Act. Id.

15. A license tax on foreign corporations is an exercise of the taxing power, not of the police power. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

though the capital[17] or earnings[18] of the corporation constitute the means of measuring the amount to be paid. Consequently, constitutional requirements as to uniformity and equality of taxation do not apply,[19] and the state has power, in imposing such taxes, to make any classification of corporations deemed proper,[20] may impose such tax on some corporations and not on others, and may discriminate between foreign and domestic corporations;[21] but it is essential to the validity of such taxation that there be no discrimination between corporations belonging to the same class.[22] What corporations are subject to such taxes is to be determined by reference to the terms of the statute and the nature of the corporation and its business.[23]

For purposes of taxation, corporate franchises are classified as creative, such

16. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

NOTE. Nature of franchise tax: "It is a generally accepted rule that a state may tax a corporation on its franchise, capital stock, business and profits. But a tax on these subjects may be either a property tax or an excise or privilege tax. And the nature of the tax is usually determined by the phraseology of the statute. The test often applied is whether the tax is on the capital stock by that name without regard to its value, in which case it is a franchise or excise tax, or whether it is on the stock at its assessed value, in which case it is a property tax. State v. Stonewall Ins. Co., 89 Ala. 335; Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143; Society for Savings v. Coite, 6 Wall. [U. S.] 594, 18 Law. Ed. 897. But this test cannot always be applied and the courts do not agree that a tax such as that provided for in the principal case is a franchise or excise tax, though the weight of authority seems to be that it is. Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; Singer Mfg. Co. v. Heppenheimer, 54 N. J. Law, 439; Jones v. Savings Bank, 66 Me. 242; Society for Savings v. Coite, 6 Wall. [U. S.] 594, 18 Law. Ed. 897. As a franchise or excise tax it is not subject to the restrictions as to uniformity imposed on a property tax. The fact that a filing fee or other charge is exacted of a corporation before it can file its articles of incorporation or secure its franchise does not by implication exempt the corporation from further taxation and the imposition of another charge or fee does not impair the obligation of contract. New Orleans City & L. R. Co. v. New Orleans, 143 U. S. 192, 36 Law. Ed. 121; Erie R Co. v. Pennsylvania, 21 Wall. [U. S.] 492, 22 Law. Ed. 595. Every presumption is against the surrender of the taxing power. Washington University v. Rowse, 42 Mo. 308; Reed v. Beall, 42 Miss. 472. A state has power to discriminate in favor of domestic corporations. Paul v. Virginia, 8 Wall. [U. S.] 168, 19 Law. Ed. 357; Liverpool Ins. Co. v. Massachusetts, 10 Wall. [U. S.] 566, 19 Law. Ed. 1029; Western Union Tel. Co. v. Mayer, 28 Ohio St 521."—4 Mich. L. R. 407.

17. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

18. A statute imposing on express companies a percentage tax on the gross receipts from business done in the state, and a pro rata share of interstate business from and to the state, imposes a franchise tax, not a tax on property. Rev. St. 1883, c. 6, § 55, construed. State v. Boston & P. Exp. Co. [Me.] 61 A. 697.

19. Sess. Laws 1902, c. 8, § 65, imposes a license tax of 4 cents on each $1,000 of capital stock of foreign corporations (or 2½ cents per 1,000 shares if stock is less than $1 per share). The law is held not to violate the constitutional requirement as to uniformity, not being a property tax. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

20. Imposing a license tax of 4 cents on each $1,000 of capital stock and 2½ on each 1,000 shares, where the par value of each share is less than $1, is not an unreasonable classification for the purposes of such taxation American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Corporations, both domestic and foreign, are subject to such privilege taxes as the legislature sees fit to impose. Clarksdale Ins. Agency v. Cole [Miss.] 40 So. 228.

21. Sess. Laws 1902, c. 8, § 65, imposing annual license tax on foreign corporations, is not invalid as discriminating against them. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

22. An ordinance which imposes a license tax on corporations transporting oil to the state in bulk, in tank cars, or through pipes, for the purpose of sale in the city, and imposes a smaller tax on corporations transporting oil in barrels only, is discriminatory and invalid. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817. But an ordinance imposing a tax of $1.50 on those engaged in selling or offering for sale oil at wholesale, or at wholesale and retail, and applying to any person, firm, or corporation, storing its oil in stationary tanks within or without the city, and transporting the oil in tank wagons or barrels through the streets for delivery to purchasers at their place of business, is reasonable and valid. Id.

23. Corporation held estopped to deny reincorporation under present constitution and hence to be liable to organization tax. Licking Valley Bldg. Ass'n No. 3 v. Commonwealth [Ky.] 89 S. W. 682. Code Pub. Gen. Laws 1888, art. 81, § 86, imposes a franchise tax only on a savings bank, institution, or corporation organized to receive deposits and pay interest thereon. Hence, in an action to collect such tax from a savings bank, the defense that it was not such a concern was valid. State v. German Sav. Bank [Md.] 63 A. 481. Owners of certain

as a franchise to exist and act as a corporation,[24] and special, such as the right to collect rates for water distributed or furnished to municipalities or their inhabitants,[25] or the right to use the streets of a city for the purpose of exercising corporate powers.[26] The creative franchise does not include special franchises; the two kinds are separately taxable.[27] The creative franchise of a corporation is taxable where its principal place of business is located.[28] Its special franchises are taxable where they are actually exercised.[29]

In Kentucky a franchise tax is held to be a tax on all the intangible property of the corporation;[30] hence, where such tax has been assessed by the state and apportioned to its municipalities, a city cannot impose an additional tax of the same character.[31] Where a franchise has been purchased at a stipulated annual price, it is not subject to taxation.[32]

Stocks.[33]—The taxation of corporate capital stock, franchises, and property is not a taxation of the shares held by individual shareholders.[34] Such shares are personal property of the holder and taxable as such.[35] Shares of stock of a foreign

real estate conveyed to trustee who sold to corporation organized to do a general business in purchase of real estate, sale of mortgages and stocks and bonds. Held corporation subject to franchise tax. People v. Kelsey. 110 App. Div. 797, 97 N. Y. S. 197. A corporation is not entitled to exemption from the franchise tax in New Jersey unless it shows by its return that it is within the exempted class. Though an insolvent corporation's property had been turned into cash prior to the year for which it was assessed, it was liable to the franchise tax under P. L. 1901, p 31, no return being made. King v. American Electric Vehicle Co. [N. J. Eq.] 62 A. 381. An oil company engaged in the business of refining and distributing oil, and which sells it to local dealers from tank wagons, is not a "merchant" and cannot escape payment of a license tax on its business by paying a license fee as a merchant. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817.

24, 25. San Joaquin & K. R. Canal & Irr. Co. v. Merced County [Cal. App.] 84 P. 285.

26. City and County of San Francisco v. Oakland Water Co. [Cal.] 83 P. 61.

27. San Joaquin & K. R. Canal & Irr. Co. v. Merced County [Cal. App.] 84 P. 285.

28. Creative franchise of plaintiff company held taxable in city and county of San Francisco. San Joaquin & K. R. Canal & Irr. Co. v. Merced County [Cal. App.] 84 P. 285. Under Pol. Code § 3628, only the creative franchise is taxable at the principal place of business where the property used in the corporate business is located elsewhere. City and County of San Francisco v. Oakland Water Co. [Cal.] 83 P. 61.

29. Corporation was authorized to acquire property, appropriate and distribute water, construct canals, and to establish and collect water rates and rents, and these powers were exercised in Merced County. The franchise was there taxable, though the company's principal place of business was in San Francisco. San Joaquin & K. R. Canal & Irr. Co. v. Merced County [Cal. App.] 84 P. 285. Water company using streets of Oakland named San Francisco in its articles as principal place of business. Held franchise to use streets taxable only in Oakland; franchise to be a corporation, only, taxable in San Francisco. City and County of San Francisco v. Oakland Water Co. [Cal.] 83 P. 61. Under Const. art. 13, § 10, providing for the assessment of all property (except that of railroads operated in more than one county) in the county or district where located, the franchise of a lighting corporation giving it the right to use the streets of a city is taxable in the county where such city is situated. Stockton Gas & Elec. Co. v. San Joaquin County [Cal.] 83 P. 54.

30. An assessment of the "franchise" of a railroad company, under Ky. St. 1903, §§ 4077-4080, embraces all the intangible property of the company. Hence, there was no omission of property where the franchise and also the tangible property of a company was assessed. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 91 S. W. 672.

31. This would constitute double taxation and would violate the constitutional provision for uniformity. Const. § 171. Cumberland Telephone & Telegraph Co. v. Hopkins [Ky.] 90 S. W. 594. Ky. St. 1903, § 4077, providing for a franchise tax on public service corporations, held to exhaust power to tax such franchises, hence a city franchise or occupation tax on the right of a telephone and railroad company to do business was held invalid. Id.

32. A telephone company purchased, at a stipulated annual price, the right to erect exchanges and equipment and do business in the city. Held its franchise was paid for and the city could not impose an additional franchise or occupation tax on its right to handle telephone messages therein. Cumberland Telephone & Telegraph Co. v. Hopkins [Ky.] 90 S. W. 594.

33. See 4 C. L. 1612.

34. Succession of Kohn [La.] 38 So. 898.

35. Shares of stock are subject to taxation in Louisiana. Succession of Kohn [La.] 38 So. 898. Stocks in national banks may be taxed to the holders thereof. Old Nat. Bank v. Berkeley County Court [W. Va.] 52 S. E. 494. Shares of bank stock are personal property (Code 1904, § 1173a, subsec. 7) and are assessable under an ordinance imposing

corporation held by a citizen are taxable even though the property of the corporation is situated in other states and is there taxed.[36] Where a deduction is made from the valuation of such shares on account of corporate property located and taxed in the state, the holder of the shares cannot complain of the tax imposed.[37] The failure of the taxing authorities to directly tax shares of stock of domestic corporations, whose property is located in the state, as property in the hands of the shareholders (the corporate property being taxed instead), while at the same time levying a direct tax on shares of stock in foreign corporations, whose property is outside the state, such stock being held by citizens of the state, is not a denial of the equal protection of the laws to the holders of the foreign stock.[38] A claim that the policy of the state, as shown in the administration of the law, denied to complainants, who were taxed on foreign stock held by them, the equal protection of the laws, is not sustained by proof that some of the tax officials had not required foreign stock to be returned, and by an admission of the comptroller general that the complainants were the only delinquents, as to such taxes, brought to his notice.[39]

Banks and trust companies.[40]—Under Federal law no tax based on income, licenses, or franchises can be imposed on national banks by a state,[41] and bonds of the United States held by a national bank as part of its capital cannot be taxed by a state or under its authority.[42] Unpaid bank dividends represented by time checks given the stockholders, payable at a future date, are, until the checks are presented for payment, taxable assets of the bank.[43] A Pennsylvania savings bank which pays a tax on its capital stock is exempt from taxation on bonds of a corporation owned by it.[44] A New York domestic trust company which pays the annual tax on its capital stock, surplus, and undivided profits is exempt from taxation on its bank stock.[45] The Montana statute providing for the taxation of trust deposit and security corporations in the same manner as national banks is held invalid.[46] A state bank or trust company may deduct from its solvent credits its just debts, provided it makes the

a tax on all personal property in the city "including the capital stock of banks." West v. Newport News [Va.] 51 S. E. 206. An ordinance imposing such tax does not violate Acts 1902-1904, § 17, exempting a tax on the "capital" of any bank. Id.

36. Thrall v. Guiney [Mich.] 12 Det. Leg. N. 443, 104 N. W. 646.

37. Where foreign corporation owned property in several states, including Michigan, a tax on shares held in Michigan, based on a valuation from which a deduction proportionate to the amount of property in Michigan had been made, was proper. Thrall v. Guiney [Mich.] 12 Det. Leg. N. 443, 104 N. W. 646.

38. Georgia R. & Banking Co. v. Wright [Ga] 53 S. E. 251.

Note: It was held by the majority that in this case (to enjoin enforcement of executions for taxes on stock of a foreign railroad) it was not necessary to decide whether shares of stock in a domestic corporation in the hands of a stockholder are required to be taxed as such in order to comply with the uniformity clause of the constitution; nor whether, if domestic shares are taxable, it would be double taxation to assess them in the hands of the stockholder and also include them in the return made by the president of the corporation as required by law. But Candler, J., who wrote the opinion, gave it as his individual view that to assess foreign but not domestic stock to the resident stockholder would not violate the uniformity clause, since the tax on the property of the domestic corporation was in effect a tax on its stock. See syllabi 8, 9, in Georgia R. & B. Co. v. Wright [Ga.] 53 S. E. 251.

39. Affidavits from one-third of the county tax receivers were to the effect that a return of such stock was not required by them. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

40. See 4 C. L. 1613.

41. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689.

42. Old Nat. Bank v. Berkeley County Court [W. Va.] 52 S. E. 494.

43. Grenada Bank v. Adams [Miss.] 40 So. 4.

44. Under Act of July 15, 1897, P. L. 292. People's Sav. Bank v. Monongahela River Consol. Coal & Coke Co., 29 Pa. Super. Ct. 153.

45. Construing Tax Law art. 9, §§ 187a, 202. Guaranty Trust Co. v. New York, 108 App. Div. 192, 95 N. Y. S. 770.

46. Since the Federal statute limits the right of the state to tax national banks to a tax on realty and shares of stock in the hands of stock holders, and Code § 611 thereby exempts the personal property of such trust companies, contrary to Const. art. 12, §§ 1, 7. Daly Bank & Trust Co. v. Silver Bow County Com'rs [Mont.] 81 P. 950.

proper return to the assessor and claims the reduction and otherwise complies with the law.[47] When this is done, all its remaining property is subject to taxation the same as property of a natural person.[48] In Pennsylvania a reserve fund of a trust and insurance company, invested in securities and held to cover maturing insurance risks, is not held in trust for policy holders so as to be subject to a tax on securities held by a trustee, but is taxable as a part of the assessed value of its stock.[49]

Corporate capital and other property.[50]—The easement possessed by a corporation in a public thoroughfare may be assessed and taxed as real estate owned by the corporation.[51] To exempt from ordinary taxation property of a corporation subject to a gross earnings tax, it must be made to appear that such property was necessarily used in the ordinary conduct of the business.[52] A railroad company is liable to local county taxation on an ice plant used to furnish ice for refrigerator and passenger cars.[53] Whether property of a corporation is taxable as a railroad depends, of course, upon its character and use.[54] Under the New Jersey railroad act, whether part of a railroad is assessable as the main stem or as other real estate is a question of fact depending upon the actual use of the line at the time of assessment,[55] and not upon its history.[56]

47. Pol. Code § 3701, permitting deduction of debts, does not violate Const. art. 12, § 1, enumerating exemptions. Daly Bank & Trust Co. v. Silver Bow County Com'rs [Mont.] 81 P. 950.

48. Daly Bank & Trust Co. v. Silver Bow County Com'rs [Mont.] 81 P. 950.

49. Construing Pennsylvania statutes. Provident Life & Trust Co. v. Durham, 212 Pa. 68, 61 A. 636.

Note on Provident Life & Trust Co. v. Durham, 212 Pa. 68, 61 A. 636. "A tax on the capital stock of a corporation is a tax on its property and assets. Commonwealth v. Standard Oil Co., 101 Pa. St. 119; People v. Coleman, 126 N. Y. 433, 27 N. E. 818; 1 Wilgus Corp. Cas. 778. The assets sought to be taxed in the principal case were therefore constituent elements of the appraised value of the capital on which plaintiff paid a tax. The court based its opinion that these assets were not held in trust on the fact that the fund consisted not of the net profits of the insurance business but was part of the plaintiff's gross assets subject to insurance liabilities. This seems to be placing the policy holders in the same position as the stockholders in an ordinary corporation. Until a dividend is declared the shareholder is not a creditor of the corporation. Price v. Morning Star Mining Co., 83 Mo. App. 470; Alsop v. De Koven, 107 Ill. App. 190. And even then unless some specific fund is set aside for the payment of the dividend, there is no trust relation between the company and the stockholder. Hunt v. O'Shea, 69 N. H. 600, 45 A. 480; 11 Wilgus Corp. Cas. 1628; In re Severn & Wye & Severn Bridge R. Co., 74 Law T. (N. S.) 219. In the absence of charter or contract provisions to the contrary, the profits of an insurance company belong to the stockholders and not to the policy holders. Pierce v. Equitable Life Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. And even where there is a provision that the policy holders are to have a share in the surplus profits,—as in the tontine policies,—no right to any specific fund accrues but only to such net earnings as are declared. Fuller v. Knapp, 24 F. 100; Bewley v. Society, 61 How. Pr. [N. Y.] 344. No trust relation is created by such provisions. Everson v. Equitable Life Assur. Soc., 71 F. 570; Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 429, 17 N. E. 363, 4 Am. St. Rep. 482. The policy holder has no such title to any part of the surplus as to enable him to maintain an action at law therefor. Greeff v. Equitable Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712," 73 Am. St. Rep. 659, 46 L. R. A. 288.—4 Mich. L. R. 231.

50. See 4 C. L. 1612. Also, as to railroads, Public service corporations, 4 C. L. 1613.

51. Gas company which laid mains in streets under its franchise acquired a taxable easement in the streets. Consolidated Gas Co. of Baltimore City v. Baltimore [Md.] 61 A. 532.

52. Evidence held to sustain finding that lot owned by telephone company was not necessarily used in its business. State v. Northwestern Tel. Exch. Co. [Minn.] 104 N. W. 1086.

53. Delaware, etc., R. Co. v. Metzgar, 28 Pa. Super. Ct. 239.

54. Company incorporated under the railroad incorporation statute of Michigan, and which built and owned a bridge used solely for railroad purposes and had always reported to the railroad commissioner and paid taxes as a railroad, held a railroad corporation within the Michigan railroad tax act. Sault Ste. Marie Bridge Co. v. Powers, 138 F. 262. Land adjoining a railroad right of way and used as a reservoir for railroad purposes is properly assessed as "railroad track" in Illinois (Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021), but a tract of land adjoining, not used as a reservoir, should have been separately assessed (Id.).

55. Question determined as to certain roads. Jersey City v. State Board of Assessors [N. J. Law] 63 A. 21; Id., 63 A. 23. As between a line used mainly for passenger

Foreign corporations.[57]—Foreign corporations are subject to such taxes as the state sees fit to impose as a condition of doing business in the state.[58] Thus, license taxes[59] are commonly imposed on foreign corporations engaged in business in the state, or authorized to do so,[60] or employing capital in the state.[61] The fact that only a portion of the capital of a foreign corporation is employed in the state does not relieve it from payment of the annual license tax.[62] A fee paid by a foreign corporation upon filing its articles of incorporation is merely a bonus for the privilege of existing as a corporation in the state.[63] A statute imposing such a fee does not impliedly exempt the corporation from other taxes,[64] and a subsequent statute imposing an annual license tax is not invalid as an ex post facto law,[65] nor as impairing the obligation of the charter contract of the corporation.[66] A license tax on a foreign corporation engaged in interstate commerce is not a tax on interstate commerce.[67] A foreign corporation which has paid a franchise tax and otherwise complied with the law relating to such corporations is not liable to the franchise tax imposed on domestic corporations.[68]

The taxability of property of nonresidents, including that of foreign corporations, is treated in a succeeding section.[69]

(§ 2) *D. Public property.*[70]—Public property is not taxable[71] in the absence of special statutory provisions.[72] Thus, school lands and the proceeds thereof are exempt.[73] When the beneficial title to Federal public lands has passed from

traffic and a line used mainly for freight, the former is the "main stem." Id. As between two lines used for freight traffic, the longer line, in the absence of other distinguishing characteristics, is the main stem. Id.

56. Jersey City v. State Board of Assessors [N. J. Law] 63 A. 23.

57. See 4 C. L. 1614.

58. Metropolitan Life Ins. Co. of New York v. Parish of Orleans Assessors [La.] 39 So. 846.

59. See supra, Corporate franchises and privileges. The imposition of a license tax on foreign corporations as a condition precedent to their right to exercise their franchises in the state is not a denial of the equal protection of the laws. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

60. The fee required by Revenue Law § 37, of a foreign corporation authorized by charter to exercise the powers of a transportation company, must be paid by a corporation having such charter powers and engaged in any business in the state, though it does not intend to exercise its powers as a transportation company, and though Const. art. 12, § 163, prohibits the exercise of such powers by foreign corporations. Standard Oil Co. v. Commonwealth [Va.] 52 S. E. 390. Such corporation, being included in the class described in § 37, cannot be taxed under § 38. Id.

61. Corporation owning and managing an apartment house in the state is "employing its capital" within the state. People v. Kelsey, 96 N. Y. S. 745. A corporation owned 200 acres of land on which there were many dwellings which brought in an annual income, the remainder being held for sale as lots. The land was not a part of that on which the shops of the corporation were located, or its work carried on. Held such land was not "capital actually employed in manufacturing" and hence exempt under § 183 of the franchise tax law, nor was it "surplus," even though the full capital stock was shown to be employed and the corporation had assets in excess of the value of the land but was "capital employed in the state" and subject to the franchise tax under § 182. People v. Kelsey, 108 App. Div. 138, 96 N. Y. S. 42.

62. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

63. Construing Sess. Laws 1897, c. 51, and Sess. Laws 1901, c. 52. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

64. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

65. Sess. Laws 1902, c. 3, § 65, does not violate Const. art. 2, § 11. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

66. Sess. Laws 1902, c. 3, § 65, does not violate Const. U. S. art. 1, § 10, par. 1. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

67. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

68. Though Ky. St. 1903, § 841, provides that a foreign railroad corporation, on complying with the statutes, becomes a corporation, citizen, and resident of Kentucky, Commonwealth v. Chesapeake & O. R. Co., 27 Ky. L. R. 1084, 87 S. W. 1077.

69. See § 4, "Place of taxation."

70. See 4 C. L. 1614.

71. Public parks of a city of the metropolitan class are not taxable property within Comp. St. 1903, c. 12a, § 110 (111), relating to public works and improvements. Herman v. Omaha [Neb.] 106 N. W. 593. A Spanish land grant gave right to cut timber on certain land, title to the soil remaining in the king. This land was assessed to the inhabitants of Bellevue (to whom the grant ran) and sold for taxes. Held title to the soil was in the United States and the land

the government such lands are taxable.[74] Where lands allotted to an Indian are sold by the heirs, the proceeds are subject to taxation, though the sale was subject to conditions imposed by the secretary of the interior as to disposition of the proceeds.[75]

(§ 2) *E. Realty.*[76]

(§ 2) *F. Personalty.*[77]

§ 3. *Exemption from taxation.*[78]—The power and right of the state to tax is always presumed and exemptions are strictly construed in favor of the taxing power.[79] For reasons of public policy, property devoted exclusively to charitable,[80]

could not be sold for taxes as assessed. Richard v. Perrodin [La.] 40 So. 789. Lands acquired for public purposes during the period between the first and final steps of taxation are exempt from taxes levied during the year in which they are acquired. Land relinquished to United States held not taxable. Territory v. Perrin [Ariz.] 83 P. 361.

72. Real property owned by the city of New York outside the city limits, together with the constructions and works thereon used for municipal purposes, are taxable in the town where they are located. Real estate, aqueduct, and waterworks taxable under Laws 1896, c. 908, § 4, and Greater New York Charter, Laws 1901, c. 466, § 480. In re City of New York [N. Y.] 76 N. E. 18, afg. 94 N. Y. S. 1111.

73. Under Rev. Code 1857, c. 3, § 5, art. 20, 16th section lands are taxable as other lands only after they have been leased by the county by valid lease. Sexton v. Coahoma County Sup'rs [Miss.] 38 So. 636. Const. 1870, art. 8, § 2, requires property granted for school purposes and the proceeds thereof to be applied to the object of the grant. Held land acquired in exchange for school land, and rents arising therefrom, are "proceeds" of school grants and are not subject to taxation. People v. Chicago, 216 Ill. 537, 75 N. E. 239. This constitutional provision has reference only to grants made before adoption of the constitution. Thus, property acquired by foreclosure of a school fund mortgage is not exempt unless the money loaned on the mortgage was received prior to 1870. R. & C. Grosse v. People [Ill.] 75 N. E. 978. Hurd's Rev. St. 1903, c. 122, art. 12, § 6, providing that funds derived from the sale of school lands "or from the sale of any real estate or other property taken on any judgment or for any debt due to the principal of any township or county fund," etc., shall constitute a part of such fund, etc., does not exempt from taxation property acquired by foreclosure of a school fund mortgage. Id.

74. Holder of public land scrip had selected his land and had no other act to do to obtain a patent. Held land was taxable, the United States being only the depositary or trustee of the title. Appeal of De La Vergne, 4 Ariz. 10, 77 P. 617.

75. United States v. Thurston County, 140 F. 456.

76. See 4 C. L. 1615.

77, 78. See 4 C. L. 1616.

79. City of Rochester v. Rochester R. Co. 182 N. Y. 99, 74 N. E. 953; In re Deutsch's Estate 107 App. Div. 192, 95 N. Y. S. 65. Silence is the same as the denial of exemption. Norfolk, P. & N. N. Co. v. Norfolk [Va.] 62 S. E. 851. Exemptions are strictly construed and doubt is fatal. State v. New Orleans Ry. & Light Co. [La.] 40 So. 597. Exemptions from taxation are to be strictly construed and no claim of exemption can be sustained unless within the express letter or necessary scope of the exempting clause. In re Hickok's Estate [Vt.] 62 A. 724; American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

Illustrations: Acts 1866-67, p. 97, § 3, exempted lands of the Real Estate Bank while in the hands of the receiver, and required the receiver to furnish the assessor a list of lands sold. Held the assessment of lands was evidence of a sale by the receiver, after which lands were taxable. Crocraft v. Meyers [Ark.] 88 S. W. 1027. That no deed was shown by the record did not overthrow the presumption arising from a tax deed that the land in question had been sold and had become taxable. Id. Report of receiver that he omitted from a list lands which had already been sold by the bank, held to strengthen presumption arising from tax deed. Id. The exemption of capital, machinery, and property used in the manufacture of articles of wood (Const. 1898, art. 230) does not extend to a part of a building used for the storage and sale of such articles, and of other articles purchased for resale. Victoria Lumber Co. v. Rives [La.] 40 So. 382. Under Gen. Tax Law, Laws 1896, c. 908, § 4, subd. 7, only so much of the realty of educational institutions is exempt as is actually used for the corporate purposes of the institution; hence, leased realty is not exempt, though it was under its special incorporating act. Pratt Institute v. New York [N. Y.] 76 N. E. 1119. A statute exempted certain territory annexed to Baltimore city from taxation at the city rate until it should be improved in a certain manner. It was held that an alley, paved but not curbed, was improved as required, and the territory bounded by it was subject to city taxation. City of Baltimore v. Rosenthal [Md.] 62 A. 579.

80. In determining whether property of an association organized for charitable purposes is taxable, what it actually does, not what it was organized to do or has power to do, is the test. Pocono Pines Assembly, etc. v. Monroe County, 29 Pa. Super. Ct. 36. Where an association organized for charitable purposes uses a part of its property in business for profit, such property is taxable, though the profits are devoted to charity. Id. Where an association organized for charitable purposes issues stock on which no dividends can be declared, it is not deprived of exemption merely by reason of the fact that shareholders have a right to vote

benevolent,[81] religious,[82] or educational[83] purposes is commonly exempted from taxation. When such use of property ceases, it becomes taxable.[84] A change in the use of property, bringing it within an exemption class, does not relieve it from taxes to which it previously became liable.[85] The exemption of stocks, bonds, treasury notes, and other obligations of the United States from taxation by state, municipal, or local authorities does not extend to obligations such as checks and warrants intended for immediate use and designed merely to stand in the place of money until presented at the treasury.[86]

Contracts of exemption.[87]—A statutory grant of exemption in aid of railroad construction, accepted and acted upon, constitutes a contract the obligation of which cannot be impaired by subsequent legislation.[88] A grant of immunity by a

for trustees, or that they may be granted reduced admission fees to lectures, or that a surplus may be accumulated, provided no attempt is made to accumulate a surplus. Id. A corporation, organized and conducted purely for charitable purposes, owned land and buildings, and charged nominal fees, but its income was not sufficient to support it, donations being largely relied on. No dividends or profits were paid or intended to be paid. The property was held exempt under Pol. Code 1895, § 762. Brewer v. American Missionary Ass'n [Ga.] 52 S. E. 804. Under Rev. Laws c. 12, § 5, cl. 3, exempting property of literary, benevolent, charitable, and scientific institutions, property of a non-stock and nondividend paying corporation, organized to provide a home for working girls at moderate cost, is not taxable. Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675. Farm lands owned by a charitable corporation, the proceeds of which are devoted exclusively to charity but which are not otherwise necessary for the operation of the charitable institution, are not exempt. Farm owned by hospital corporation, not a part of the curtilage of the hospital, not exempt under Const. art. 9, § 3. State v. St. Barnabas Hospital [Minn.] 104 N. W. 551. In New Jersey, if a tract of land on which are erected the buildings of a corporation used exclusively for charitable purposes be devoted to the same charitable purposes, it is exempt. 20 Atl. 292, 52 N. J. L. 373, 9 L. R. A. 198, followed in construction placed on P. L. 1903, p. 395. Sisters of Charity of St. Elizabeth v. Thompson [N. J. Law] 61 A. 387.

81. Corporations organized to do a mutual insurance business are not benevolent corporations or corporations "not for pecuniary profit" under Iowa statutes, and are not exempt from taxation. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

82. Where constitution exempts "actual places of religious worship" and "institutions of purely public charity," a mortgage held by a trustee for a Catholic congregation, "solely for the same objects of religion and purely public charity as the real estate" sold, was not subject to a personal property tax. Mattern v. Canevin [Pa.] 63 A. 131.

83. The provision of the constitution exempting from taxation all the property of Tulane University of whatsoever character does not limit the exemption to property whereof the university has actual corporeal possession. Tulane University v. Board of Assessors [La.] 40 So. 445.

84. Where property used exclusively for religious and educational purposes is abandoned and ceases to be used for such purposes, it becomes taxable. Holthaus v. Adams County [Neb.] 105 N. W. 632.

85. Where assessment was completed and taxes for the year became a fixed liability 7 months before a change in the use of property, it was liable for the taxes. City of Philadelphia v. Pennsylvania Institution for the Instruction of the Blind [Pa.] 63 A. 420; Id., 28 Pa. Super. Ct. 421.

86. U. S. Rev. St. § 3701, not violated by taxing, in hands of owner, checks or orders for interest on bonds, payable immediately on presentation. Hibernia Sav. & Loan Soc. v. San Francisco, 200 U. S. 310, 50 Law Ed.—.

NOTE: "The inability of the states to tax the official agencies of the Federal government, whether in the form of banks chartered under its authority, or of obligations issued by it as a means of providing a revenue, or for the payment of its debts. was applied in McCulloch v. Maryland, 4 Wheat. [U. S.] 316, 4 Law. Ed. 579, to a stamp tax upon notes of the United States bank; in Weston v. Charleston, 2 Pet. [U. S.] 449, 7 Law. Ed. 481, and in New York v. Tax Com'rs, 2 Black [U. S.] 620, 17 Law. Ed. 451, to stock issued for loans made to the government of the United States; and in the Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Com'rs), 2 Wall. [U. S.] 200, 17 Law. Ed. 793, to a tax laid on banks on a valuation equal to the amount of their capital stock, when their property consisted of stocks of the Federal government; in The Banks v. New York (New York ex rel. Bank of N. Y. Nat. Banking Ass'n v. Connelly), 7 Wall. [U. S.] 16, 19 Law. Ed. 57, to certificates of indebtedness of the United States, issued to the creditors of the government for supplies furnished in carrying on the Civil War; in Bank of New York v. New York County (New York ex rel. Bank of New York v. New York County), 7 Wall. [U. S.] 26, 19 Law. Ed. 60, to notes of the United States intended to circulate as money; and in Van Brocklin v. Tennessee (Van Brocklin v. Anderson), 117 U. S. 151, 29 Law. Ed. 845, to land purchased by the United States, for the amount of a direct tax laid thereon."—Brown, J., in Hibernia Sav. & Loan Soc. v. San Francisco [U. S.] 26 S. Ct. 266.

87. See 4 C. L. 1618.

88. Mich. Laws 1855, p. 305, § 9, provided

special act of incorporation does not create such an inviolable contract, where, by the constitution and statutes of the state, general or special acts creating corporations are subject to repeal or alteration.[89] Municipalities have no power to contract away or limit the taxing power.[90] Thus, contracts of exemption from taxation, made to encourage manufacturing in cities, must be expressly authorized or they are ultra vires,[91] and a grant of immunity from contribution to the expense of paving, to a street railway corporation, without consideration, does not create a contract right but only a revocable license,[92] personal to the first grantee.[93] A conditional grant of exemption is unenforceable at the instance of a grantee who has not performed the conditions.[94]

§ 4. *Place of taxation.*[95]—Realty is to be taxed in the district where located.[96] When a single tract is located in more than one district, it is sometimes taxed at the owner's place of residence.[97] Generally, the place of residence of the owner[98]

that a certain railroad company should pay an annual tax of 1% on the capital stock, paid in, in lieu of all other taxes, except penalties imposed on the company, to be estimated upon the last annual report. The statute was accepted by the company, which in reliance thereon made large expenditures and completed an unfinished road. It was held that a contract was created exempting the company from taxation other than that specified, which could not be impaired by subsequent legislation. Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 Law Ed.—. Where statutes under which a railroad was built provided for exemption of lands acquired by it for a certain term of years, a contract resulted with the state by reason of which taxes could not be legally laid on such railroad lands during the time named. Hence, a sale of land for taxes during such time transferred no title. Raquette Falls Land Co. v. Hoyt, 109 App. Div. 119, 95 N. Y. S. 1029.

89. Const. 1846, art. 8, § 1; Const. 1895, art. 8, § 1, and 1 Rev. St. pt. 1, c. 18, tit. 3, § 8, become a part of corporate charters. Pratt Institute v. New York [N. Y.] 75 N. E. 1119. The New York general tax law of 1896, repealing previous special acts granting exemption to certain corporations, is valid. Id.

90. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

91. Act 1880, p. 259, c. 169, authorizing the abatement of taxes levied on the property of manufacturing corporations actually used in manufacturing, does not authorize a contract to exempt for a term of years a plant of a corporation on condition of its removing to the city and operating for a certain number of years (Havre de Grace Real Estate & Power Co. v. Havre de Grace [Md.] 61 A. 662), nor does Act 1890, p. 175, c. 180, authorizing abatement of taxes on real estate used in manufacturing, and providing for confirmation of a contract of exemption, give power to confirm such a contract (Id.).

92. Corporation may be subjected to contribution by subsequent legislation. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

93. Grant of immunity from expense for paving did not pass to lessee of grantee corporation. City of Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

94. Contract to operate shoe factory at full capacity was not performed where part of building was used by a successor in interest for other purposes. Havre de Grace Real Estate & Power Co. v. Havre de Grace [Md.] 61 A. 662.

95. See 4 C. L. 1618.

96. In general, the location of land and not the residence of the owner determines where it shall be taxable. People v. Howell, 106 App. Div. 140, 94 N. Y. S. 488. Railroad property situated in several road and school districts, and unincorporated cities and towns, was properly divided up by the assessor and assessed with reference to such districts. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

97. A farm consisting of a single tract of land was situated partly within and partly outside a village, and the owner lived on the portion outside the village. Held it was assessable only in the tax district in which the owner resided, under Laws 1902, c. 200, § 10, and not by the village. People v. Gray, 109 App. Div. 116, 95 N. Y. S. 825. Certain lots held not adjacent to and occupied and connected with relator's dwelling house so as to permit an election as to which tax district his property should be assessed in (a boundary line running through the property), under Laws 1903, c. 305, and prior laws. People v. Jacobs, 106 App. Div. 614, 94 N. Y. S. 483. An owner of two contiguous lots of land, used as one tract, all situated in one tax district, has no absolute right to have it described as one tract in the town assessment roll, so that it shall be assessed for school purposes only in the school district where he resides. People v. Howell, 106 App. Div. 140, 94 N. Y. S. 488. The act of June 1, 1883 (P. L. 51), which provides that where a county line divides a tract of land it shall be assessed in the county in which the mansion house is situated, does not apply to a tract owned by a power company on which a power plant is located in one county and farm buildings in another. The power plant may be assessed in the county where located. Appeal of York Haven Water & Power Co. [Pa.] 62 A. 97.

98. The fact that a person was a lessee of a place of abode in New York during

is regarded as the situs of personalty for purposes of taxation,[99] but the maxim mobilia sequuntur personam is usually applied only to intangible personal property,[1] and tangible personal property is usually held to be taxable only in the state where it is permanently located and employed and where it receives protection.[2] Thus, personal property of nonresidents,[3] and the capital of foreign corporations employed within the state,[4] may be taxed therein. But the rule that personalty is taxable only at the domicile of the owner may be disregarded by the legislature, in its discretion, even as to intangible property.[5] Thus, in some states, bills receivable, obligations, or credits arising from business done in the state by a nonresident, are taxable in the state at the business domicile of the nonresident, or his agent or representative.[6]

winter months did not make him a resident there. People v. O'Donnel, 47 Misc. 226, 95 N. Y. S. 889. A presumption of residence in a tax district does not arise from the mere fact of payment of a tax where it appears that the person paying it was in fact, and claimed to be, a resident of another state. One who lived in New York winters said he was willing to pay a tax on a certain assessment, but that he was a resident of New Jersey. Held no presumption of residence in New York for taxation purposes arose. Id.

99. Logs which have been cut and hauled to a stream for shipment are personalty assessable only in the county of the owner's residence. Ky. St. 1903, § 4039 requiring the owner of standing timber on another's land to list the same in the county where located does not apply. Morgan v. Southern Lumber Co. [Ky.] 89 S. W. 120. Greater New York is not a single tax district: a tax on personalty must be levied in the borough where the owner resides. People v. O'Donnell, 96 N. Y. S. 297. The situs of a **chose in action** for purposes of taxation is at the domicile of the creditor. Code 1904, § 491, contemplates that the commissioner of revenue will call upon the owner of the credit at his domicile. Hurt v. Bristol [Va.] 51 S. E. 223.

Securities owned by a partnership are properly listed in the township wherein the managing partner resides. Barricklow v. Bowland, 3 Ohio N. P. (N. S.) 78. An attempt to place a part thereof on the tax duplicate of the township wherein the other partner resides may be enjoined. Id.

Bonds of a nonresident are not taxable in the state when merely left in the hands of a resident agent for collection and investment. Upson v. Davis, 110 Ill. App. 375.

1. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 Law Ed.—. The principle "mobilia sequuntur personam," in matters of taxation, does not embrace movable property in concrete form such as bills or notes or other paper taken in course of business, used and collected in the state where such business is done. Monongahela River Consol. Coal & Coke Co. v. Board of Assessors [La.] 39 So. 601.

2. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 Law Ed.—. Where movable property having no permanent situs in the state is employed therein, it is taxable in the municipalities where so used to the extent of the average amount kept therein. Average number of Pullman cars kept in Covington for repairs, etc., held taxable by that city. City of Covington v. Pullman Co. [Ky.] 89 S. W. 116. Resident of Kansas brought into the state, between March and September, cattle which he had bought with money already listed for taxation in his home city. The cattle were held not subject to taxes in Kansas under Gen. St. 1901, §§ 7519-7521 providing for assessment in certain cases of personalty brought into the state after March 1. Lingenfelter v. Ferguson [Kan.] 80 P. 48.

3. Personal property of a nonresident situated in the state is taxable therein. Ayer & Lord Tie Co. v. Keown [Ky.] 89 S. W. 116. Personal property of nonresidents is assessable in the county where it is situated. Ky. St. 1903, § 4020. City of Covington v. Pullman Co. [Ky.] 89 S. W. 116.

4. Corporation organized in France had an office in New York for the importation and sale of goods, and paid all the expenses of its New York business out of its local bank account, only the surplus being sent to France. Held the corporation was doing business in New York and its personalty there was taxable under Laws 1896, c. 908, § 7. People v. Wells [N. Y.] 76 N. E. 24.

5. The rule "mobilia sequuntur personam" is a fiction, not resting on any constitutional basis, and must give way before express laws destroying it in any given case, where constitutional requirements do not stand in the way. Metropolitan Life Ins. Co. v. Parish of Orleans' Assessors [La.] 39 So. 846.

6. Act No. 170 of 1898, which so provides, is valid. Metropolitan Life Ins. Co. v. Parish of Orleans' Assessors [La.] 39 So. 846. Credits or bills receivable are taxable as capital invested in the state within Tax Laws 1896, c. 908, § 7 (People v. Wells, 107 App. Div. 15, 95 N. Y. S. 100), even though they constitute proceeds of sales of goods in imported original packages, a tax on such proceeds not being one on imports contrary to Const. U. S. art. 1, § 10 (Id.). Corporation of Ireland maintained an office in New York for the importation and sale of its products in original packages, and took and held in New York notes for goods sold, the proceeds of which were in part sent to the home office in Dublin. Held the notes so taken and held for collection in New York were there taxable. People v. Wells [N. Y.] 77 N. E. 19. New Jersey corporation, having its principal place of business in Missouri, was engaged in business in Richmond county, Georgia, maintaining an agent of limited authority there, and selling goods through such agent. In the case of credit

The situs of stock of a foreign corporation for purposes of taxation is at the domicile of the owner of the stock,[7] and if legal title and the beneficial ownership are held by different persons, the stock is taxable at the domicile of the beneficial owner.[8] As to the county or tax district within the state at which corporate property should be taxed, the statutes must be consulted.[9]

sales, the notes and accounts were forwarded to the principal office and paid either there or through the Georgia office. Held the notes and accounts for the Georgia business were taxable in Richmond County. Armour Packing Co. v. Clark [Ga.] 52 S. E. 145. Money being in fact loaned in the state in the course of business done therein by the nonresident, it is taxable regardless of the manner of the loan, and the power to tax the loan is not affected by the fact that the evidences thereof are removed from the state until collection. Under Const. art. 233, the tax may be enforced by process against the resident representative. Metropolitan Life Ins. Co. v. Parish of Orleans' Assessors [La.] 39 So. 846. Credits arising from business done in the state by a nonresident corporation through a resident agent, the evidences of which are held by such agent in the state until collection, are taxable. Monongahela River Consol. Coal & Coke Co. v. Board of Assessors [La.] 39 So. 601.

NOTE. Situs of credits: "Credits have always been taxable at the domicile of the creditor (Kirtland v. Hotchkiss, 100 U. S. 491, 25 Law. Ed. 558), and not at that of the debtor. State Tax on Foreign-held Bonds, 15 Wall. [U. S.] 300, 21 Law. Ed. 179. But the tendency of recent decisions, as noted in Monongahela River, etc., Co. v. Board of Assessors [La.] 39 So. 601, is toward assigning to credits a situs apart from the creditor's domicile whenever such a construction is possible. Thus, if the credits are controlled by an agent domiciled in the same state as the debtor, they are taxable there. Bristol v. Washington Co., 177 U. S. 133, 44 Law. Ed. 701. Or if they consist of notes, bonds, etc., they are taxable where such are held. New Orleans v. Stempel, 175 U. S. 309, 44 Law. Ed. 174; Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 Law. Ed. 232. Similarly, other forms of intangible personal property, depending for their value upon the use of tangible property, are taxable where such tangible property is located. Adams Express Co. v. Ohio, 165 U. S. 194, 41 Law. Ed. 683; Id., 166 U. S. 185, 41 Law. Ed. 965. Cf. also 5 Columbia L. R. 50; 6 Columbia L. R. 190; Judson, Taxation §§ 408, 422, 427."—6 Columbia L. R. 281.

7. Central of Georgia R. Co. v. Wright [Ga.] 53 S. W. 207. The case of Wright v. S. W. R. Co., 64 Ga. 783, which held that the situs of stock in a foreign railroad corporation whose road was located outside of Georgia was in the state where the road was located, was the law of Georgia until Oct 20, 1885, when a statute was approved giving such stock held in Georgia a situs in Georgia for taxation. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

8. Stock of an Alabama corporation, beneficially owned by Georgia concern but held in trust in New York, held taxable in Georgia. Central of Georgia R. Co. v. Wright [Ga.] 53 S. E. 207.

9. Under Pol. Code § 3711, requiring corporate property to be assessed in the county where it is situated, and § 3720, relating to the assessment of live stock, where a corporation owned live stock in a county where the corporation's foreman and manager resided, and drove them into another county to be winter-fed, intending to take them back, the stock was assessable in the first county. Flowerree Cattle Co. v. Lewis and Clarke County [Mont.] 81 P. 398. The personal property of logging railroad companies, not engaged as common carriers, is, in Minnesota, taxable in the counties where such corporations maintain their principal places of business, though such property is kept and used in other counties. Gen. St. 1894, § 1516. State v. Iverson [Minn.] 106 N. W. 309. Since they are not "transportation" companies within the meaning of the statute providing for the taxation of the personalty of such companies at the place where it is usually kept. Gen. St. 1894, § 1517, held not applicable. Id. What is the principal business office of a corporation, and the situs of its property for taxation, is a question of fact (Detroit, etc., R. Co. v. Detroit [Mich.] 12 Det. Leg. N. 315, 104 N. W. 327), on which the fact that a certain place is named in the articles of such principal office is not conclusive (Id.). A street railroad company, operating a line from the village of Dearborn to the city of Detroit, named the village in its articles as the location of its principal office. The meetings of directors and stockholders were held there and the records were kept in this office. The officers lived in Detroit and performed most of their routine duties there. Under a statute providing that the property of a street railroad shall be taxed in the place where its principal office is located, held that the property was taxable in Detroit. Detroit, etc., R. v. Detroit [Mich.] 12 Det. Leg. N. 315, 104 N. W. 327.

Note: "The cases resolve themselves into the question as to how much business must be done at the place announced in the articles in order to make it the principal office. The fact that the directors and stockholders meet there is not sufficient. In the principal case there were several offices located at different places, all doing nearly the same amount of general business. In the former Michigan cases no business at all was done at the announced office. Transportation Co. v. Assessors, 91 Mich. 392, 51 N. W. 978; Teagan Transp. Co. v. Detroit [Mich.] 102 N. W. 273. But see City of Detroit v. Lothrop Estate, 136 Mich. 265, 99 N. W. 9. The courts usually hold that the designation in the articles will not be final upon the assessors. A contrary rule would seem to give a corporation power to evade taxation where its 'principal place of business' really is, by fixing

In New York, personalty held in trust is assessed at the place of residence of the trustees;[10] in Virginia[11] and Ohio,[12] where the property is situated and the beneficiary resides, regardless of the residence of the trustee. Credits belonging to a lunatic and held by his committee are taxable to the committee in the county of his domicile.[13]

The legal situs of a vessel engaged in commerce on the high seas, for the purpose of taxation, is in its home port.[14]

§ 5. *Assessment, rating, and valuation. A. Necessity for assessment.*[15]—A valid assessment is essential to a valid tax.[16]

(§ 5) *B. Assessing officers.*[17]—Property must be assessed by the officers designated by law; whether particular property is to be assessed by state or local officers depends upon the terms of the statute applicable.[18] The compensation of assessors

it at some other place, when no other taxpayer has this right or power. Milwaukee S. S. Co. v. Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353. The courts of New York have reached a different conclusion. Western Transp. Co. v. Scheu, 19 N. Y. 408. See note 56 Am. Dec. 523-537."—4 Mich. L. R. 244.

10. Under the New York statutory provision that every person shall be taxed in the tax district where he resides for all personal property owned by him or under his control as trustee or executor, each borough is a separate tax district. People v. O'Donnel [N. Y.] 75 N. E. 540, rvg. 106 App. Div. 526, 94 N. Y. S. 884. Hence, where personalty is assessed in a borough against two executors and trustees, one of whom is a resident of another, the assessment is invalid as to the latter and his half thereof should be cancelled. Id. Where property is held jointly by two trustees, one of whom is a nonresident, an assessment against the nonresident is illegal. People v. Wells, 182 N. Y. 314, 74 N. E. 878. Where an assessment is on the entire trust estate and against both trustees, it should be reduced one-half as against the resident trustee, under Tax Law § 8, providing that where trustees reside in different tax districts they must be assessed for equal proportions of the property. Id. To allow the whole amount to stand against the resident trustee on the ground that the property was undervalued would be improper, because equivalent to an increase in the assessment without notice. Id.

11. Code 1887, § 492. as amended by Acts 1897-98, c. 490, construed as imposing a tax on a trust fund on the place of residence of the cestui que trust, though the trustee is a nonresident, is not unconstitutional, since the tax is not against the trustee but is merely collected through him. Selden v. Brooke [Va.] 52 S. E. 632. Under Code 1887, § 492, as amended by Acts 1897-98, c. 490, a trust fund the income of which is to be paid to the cestui que trust during life, she being over 21 years of age and a resident, is taxable where she resides, though the trustee is a nonresident. Id.

12. Where a trust estate and the beneficiaries are in one state, and the office of trustee is there exercised, the trust estate is not taxable in another state of which the trustee is a resident. Trust estate not taxable in Ohio, under St. Ohio 1890, § 2731, merely because trustee resided there, when he was appointed in Connecticut, in which state the estate and beneficiaries were. Goodsite v. Lane [C. C. A.] 139 F. 593. Where it appears that a transaction whereby legal title to certain personalty was transferred to a nominal trustee was for the sole purpose of escaping taxation in the district where the property was located, the original owner retaining full control, a court of equity will not enjoin the county auditor from listing the property for taxation. Notes transferred by a trust instrument. Sisler v. Foster, 72 Ohio St. 437, 74 N. E. 639.

13. Though he was appointed by the corporation court of another city and county. Hurt v. Bristol [Va.] 51 S. E. 223.

14. Vessel held taxable in city and county of San Francisco where the managing owner resided, though the vessel had never been in California waters and was not registered there, but had been temporarily registered in Washington, and though some of the owners lived outside California. Construing Federal statutes. Olson v. City & County of San Francisco [Cal.] 82 P. 850.

15. See 4 C. L. 1620.

16. State v. Linney [Mo.] 90 S. W. 844. There can be no tax without a valid assessment. Moran v. Thomas [S. D.] 104 N. W. 212. Taxes by valuation cannot be apportioned without a valid assessment. Consolidated Gas Co. v. Baltimore [Md.] 61 A. 532.

17. See 4 C. L. 1620.

18. Under Const. art. 13, § 10, the state board of equalization has power to assess only "the franchise, roadway, roadbed, rails and rolling stock" of railroads operating in more than one county. All railroad property other than that specifically mentioned is assessable only by local authorities. San Francisco, etc., R. Co. v. Stockton [Cal.] 84 P 771. Under this constitutional provision, all improvements on the right of way, even though indispensable to the operation of the road, and all tangible property outside the right of way, are assessable by local authorities. Id. The term "roadway" includes only the continuous strip of land upon which the railroad is built. Id. Tracts of land used for cattle yards, switch yards, depots, etc., are not "roadway" and are locally assessable. Id. A section of land intended to be used as roadway but not so used at the time of assessment, the road not

is also statutory.[19] Mandamus will not lie to compel an assessor to place on the rolls lands which have previously been sold and not redeemed.[20] Mandamus will not issue to compel a county auditor, in Ohio, to transfer real estate on the tax list to the name of a purchaser, unless all the material facts necessary to put him in default are pleaded and proved.[21]

(§ 5) *C. Formal requisites.*[22] *Notice.*[23]—Notice and an opportunity to be heard at some stage of the proceedings is essential.[24]

The roll or list.[25]—The assessment roll must be prepared and returned as required by law. It then becomes a public document.[26] It must properly describe the property assessed[27] and must show the name of the true owner[28] or other person

having been built, is also locally assessable. Id. Under Sess. Laws 1901, p. 257, the state board of equalization is authorized to fix for taxation the valuation of railroad, telephone, and telegraph lines and property belonging thereto. McConnell v. State Board of Equalization [Idaho] 83 P. 494. It is the duty of the state board of assessors to assess the property of corporations employed in the railroad business and to make due return to parochial and municipal authorities, and the parish assessor cannot assess and value railroad property upon failure of the state board to perform its duty. Louisiana & A. R. Co. v. Bailey [La.] 40 So. 358. Newport News Charter § 86, imposing assessment duties on the commissioner of revenue, does not apply where the city assessment must follow a state assessment on the same property. West v. Newport News [Va.] 51 S. E. 206.

19. In Indiana a county assessor is not entitled to a per diem as county assessor while serving as a member of the board of review of assessments. Daily v. Daviess County Com'rs [Ind.] 74 N. E. 977. The county may recover from him sums paid in excess of the per diem for the maximum number of days fixed by law. Id. An assessor who makes the assessment of such persons as remove into his district between the last assessment and May 1st, or who have been omitted from the last assessment, and returns their names with the amount of state and county tax payable by each to the board of school directors of his district, under Act of May 8, 1854, § 35, P. L. 617, is entitled to compensation out of county funds. Hoak v. Lancaster County, 29 Pa. Super. Ct. 585.

20. Such lands not being included in comptroller's list to the assessor, and relator not having sought relief as provided for by law. State v. Richards [Fla.] 39 So. 152.

21. Dye v. State [Ohio] 76 N. E. 829. Vendee of coal underlying lands cannot compel auditor, by mandamus, to transfer coal interest to his name unless he presents proof of his title and of the value of the coal as compared with the value of the real estate as a whole. Id. An agreement between the parties is not competent evidence of such facts. Id. Where petition for mandamus did not allege that proof of the required facts had been presented to the auditor, it was insufficient. Id.

22. See 4 C. L. 1620.

23. See 4 C. L. 1622.

24. It is essential to the validity of an assessment law that it should provide an opportunity for the property owner to be heard as to the justice and validity of an assessment. A curative statute held to have only a prospective operation, thereby providing for a notice and hearing. Whitlock v. Hawkins [Va.] 53 S. E. 401. That an assessment is not returned within the time prescribed by law is not fatal to its validity, if it was returned in due season to allow persons affected an opportunity to be heard. Id. Claim of corporation that it had no notice of an increase in an assessment paid one year after the triennial assessment untenable where it appeared that a person representing the corporation and others had notice and met the county commissioners at a meeting where the assessment was discussed. Union Coal Co. v. Cooner, 27 Pa. Super. Ct. 95. The Michigan railroad tax law (Pub. Acts 1901, p. 241, No. 173), which provides for the assessment of railroad property by a state board of assessors at the average rate of other property in the state, is not invalid as making no provision for the equalization of railroad property with other property, since it names the time and place of the sessions of the assessing board, and gives to any company or person interested the right to be heard, and authorizes the board to correct the valuation. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —; Michigan Railroad Tax Cases, 138 F. 223. Again, the state constitution provides that all property shall be assessed at its cash value, and it will be presumed that this has been done by the officers charged with the duty to assess. Michigan Railroad Tax Cases, 138 F. 223. This legislation is not invalid because not providing for a hearing upon the rate, since it is fixed by the constitution and legislature, no discretion being vested in the state board of assessors. Hence a hearing before the state board could not change the result. Id.

25. See 4 C. L. 1620.

26. A completed assessment roll, returned as required by B. & C. Comp. § 3057, becomes a public document and is sufficient, though not formally certified or identified by the assessor. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

27. A proper description of land assessed is necessary to give a court jurisdiction of a proceeding to enforce the tax against it. Mayot v. Auditor General [Mich.] 12 Det. Leg. N. 279, 104 N. W. 19.

28. Description of owner as "O. R. & N.

legally liable for the taxes imposed.[29] Any description is good which would be sufficient in a deed of conveyance or contract to convey, and which affords a means of identification, and does not mislead, or is not calculated to mislead, the owner,[30] and extrinsic evidence is admissible to identify the property, explain ambiguities, and aid in the interpretation of the description.[31] A description in which abbreviations are used may be sufficient.[32] Unless several lots of a taxpayer are used together and as one piece of property, he is entitled to have each lot assessed separately,[33] but if the owner returns the property for taxation in bulk, he is estopped to claim the assessment in bulk illegal,[34] and the same rule applies when the city, in assessing unrendered property, adopts the rendition previously made by the owner.[35] The proper method of assessing lands under tide water beyond the exterior line for solid filling established by the riparian commissioners depends upon the right which has been acquired therein.[36] If a title has been acquired in such lands they should be included with lands back of the line for solid filling in a single description, or separately assessed by a distinct description.[37] If only a right has been acquired, appurtenant to the back lying land, the value of the right may properly be included in the assessment of the back lying land.[38] In West Virginia an undivided mineral interest in land is not subject to a separate assessment.[39]

Irregularities.[40]—An assessment is not invalidated by a mere irregularity[41] not shown to have been prejudicial to the taxpayer.[42] Acts or omissions of taxing

Co." sufficient where the owner was commonly known by such abbreviation. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352. Dam held to have been properly assessed to owner. Emery Lumber Co. v. Sullivan County, 28 Pa. Super. Ct. 451. Assessment of real estate in the name of a former owner, long since dead, invalidates subsequent proceedings, including tax deed to purchaser at sale. Kann v. King, 25 App. D. C. 182. Where several tracts belonging to same owner are listed under the owner's name, the name need not also be placed opposite each tract. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

20. Where property is assessed to the true owner the tax cannot be collected from a trustee. Neither Comp. Laws § 3826, providing for assessment to trustee, nor § 3922, relative to assessment errors, is applicable to such a case. Homer Tp. v. Smith [Mich.] 12 Det. Leg. N. 559, 105 N. W. 12.

30. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352. The proper test of a description is whether it is sufficiently definite to be identified by a competent person. Auditor General v. Fleming [Mich.] 12 Det. Leg. N. 605, 105 N. W. 71. Certain letters and figures on assessor's list held not to constitute a description of property, hence a sale of property for taxes was void. Moran v. Thomas [S. D.] 104 N. W. 212. Under Gen. Tax Law 1882, § 16, relating to description of lands in assessments, a description by lot was insufficient where there was no known plat of the land and no reference leading to means which would identify the land. Mayot v. Auditor General [Mich.] 12 Det. Leg. N. 279, 104 N. W. 19. Description of certain lots as in "Res. Add. Pend.," etc., and of railroad property as so many miles of "R. R. bed," or "R. of W.," or of one of two wire telegraph systems, held not void for uncertainty. Oregon R. & Nav. Co. v Umatilla County [Or.] 81 P. 352. Assessment simply describing land as .75 of an acre in a certain 40 acre tract is insufficient. State v. Linney [Mo.] 90 S. W. 844.

31. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

32. Description by lot number in "Newell's E. & C. plat" held sufficient where there was only one plat of the village in which the lot was situated. Auditor General v. Fleming [Mich.] 12 Det. Leg. N. 605, 105 N. W. 71.

33. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49. Under Code 1899, c. 29, § 36, town lots should be assessed separately. Duerr v. Snodgrass [W. Va.] 52 S. E. 531.

34, 35. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

36, 37, 38. Jersey City v. State Board of Assessors [N. J. Law] 63 A. 21.

39. Code W. Va. 1899, c. 29, §§ 25, 37, and Acts 1905, p. 303, c. 35, § 49. Barnes v. Bee, 138 F. 476.

40. See 4 C. L. 1622.

41. In the case of a general annual tax there is an obligation to pay, legal as well as moral, and a lien therefor, irrespective of the regularity of the assessment. Couts v. Cornell, 147 Cal. 560, 82 P. 194. The assessment as a whole of several contiguous town lots is a mere irregularity cured after deed, by statute in West Virginia. Code 1899, c. 31, § 25. Duerr v. Snodgrass [W. Va.] 52 S. E. 531. Where an assessment against a trustee gave decedent's name as "Goodwin" instead of "Godwin," this was a mere clerical error and was immaterial. People v. O'Donnell, 106 App. Div. 526, 94 N. Y. S. 884. That tax levy and subsequent proceedings treated land as "lots 1 and 2" of a certain quarter section, held a mere irregularity. Morrison v. Turnbaugh [Mo.] 91 S. W. 152.

officials which constitute mere irregularities and are of such a nature that the legislature might have dispensed with them by a prior statute may be cured by subsequent retroactive legislation.[43] Tax proceedings taken under unconstitutional acts may be validated by subsequent legislation.[44] A defective description cannot be cured by the voluntary act of the tax collector,[45] nor aided by a proper description in a petition to enforce the tax.[46] Such an irregularity may be waived by failure to urge it at the proper time,[47] but payment of taxes by the person to whom they are assessed under an erroneous description does not estop him from claiming that a similar, subsequent assessment is insufficient.[48]

Lists by taxpayers.[49]—Taxpayers are commonly required to make a return of their taxable property, and a penalty may be imposed for a default.[50] Where a taxpayer has furnished the assessor with a statement of his property, and the assessor, relying thereon, has assessed the property therein described against the person furnishing the list, such person will thereafter be estopped from denying the ownership of the property in an action to enjoin collection of the tax.[51] The Georgia statute, which provides for ample notice and opportunity to be heard so far as taxpayers who make the return required by law are concerned, is not unconstitutional because failing to provide any machinery for the correction of errors in the assessment of property of one who is in default, not having made the return required by law.[52] The provisions of this statute, regarding the procedure to be followed by the

42. An assessment of railroad ties belonging to a foreign corporation under the head of "Miscellany," held not to invalidate the assessment where the owner was not misled or prejudiced, knowing what property was meant. Ayer & Lord Tie Co. v. Keown [Ky.] 89 S. W. 116. Name of party assessed was given in tax list and certificate of delinquency as "Houston-Chamberlain-Howe Company," "Howe" being erroneously used for "Hardware." The company answered but did not show that it was misled or deceived. Held the error was merely clerical and was not available as a defense against the tax. State v. Houston-Chamberlin Hardware Co. [Minn.] 104 N. W. 835.

43. Wallapai Mining & Development Co. v. Territory [Ariz.] 84 P. 85. Thus the failure of the assessor to attach his oath or certificate to the assessment roll is a mere irregularity, curable by a subsequent law, no prejudice being shown. Assessment roll held admissible in evidence in action to collect tax, though not authenticated. Id. Omission of the seal of the city from the warrant of the mayor attached to the assessment roll cured by Laws 1903, c. 522, § 1, which is valid. City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n [N. Y.] 75 N. E. 692.

44. Act Oct. 19, 1903, "to validate taxes heretofore levied," is constitutional. Woolley v. Hendrickson [N. J. Law] 62 A. 278. The act validates all appropriations, taxes, and assessments made, levied and imposed under the general school laws of 1900 and 1902, which were declared invalid. Id. General school law of Oct. 19, 1903 (P. L. 1903, Sp. Sess. p. 5), and validating act passed same day, construed, and held not to disarrange pending proceedings for assessment and collection of taxes already ordered to be raised to meet school bonds maturing during school year, even in cases where boundaries of districts were changed, under §§ 32 and 34. Id. It is the evident intention of the act, shown by § 33, to postpone its operation as to adjustments between new and old school districts until the end of the then current school year. Id.

45. As by inserting correct description in tax deed. Gibbs v. Hall [Miss.] 38 So. 369.

46. State v. Linney [Mo.] 90 S. W. 844.

47. Where owner appeared before equalization board and objected to assessment as excessive, and obtained a reduction, but did not object to the description in the assessment roll, the assessment would not be set aside on a writ of review for a defective description. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

48. Mayot v. Auditor General [Mich.] 12 Det. Leg. N. 279, 104 N. W. 19.

49. See 4 C. L. 1622.

50. Where a taxpayer fails to sign and swear to his assessment schedule as required by Hurd's Rev. St. 1903, c. 120, par. 311, it is the duty of the board of review to add 50% to the fair cash valuation of the property as found by it and fix the assessment at the amount so found. Cummins v. Webber, 218 Ill. 521, 75 N. E. 1041. Revenue act § 49, prescribing a penalty for failure of a railroad to file a "statement" of its "railroad tract" with the county clerk, has no reference to the requirements of §§ 44 and 46 of the act, but only to § 41. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. The minimum penalty of $1,000 prescribed by the act is not unconstitutional as disproportionate to the gravity of the offense. Id.

51. Inland Lumber & Timber Co. v. Thompson [Idaho] 83 P. 933.

52. In case of defaulters the statute requires the taxing officer to make the assessment from the best information obtainable. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. Assessment against owner

comptroller general in case of failure of the taxpayer to make return, apply not only to cases where no return whatever is made, but also where property subject to taxation is withheld from the return.[53] The acceptance by the comptroller general of a return omitting taxable property does not bar the state from proceeding afterwards to collect the delinquent tax on the property omitted.[54] The fact that a domestic corporation owning foreign stock made annual statements showing the ownership of such stock, which statements were accessible to the comptroller general, does not bar the right of the state to collect taxes on the stock for years when it was not returned.[55] A statement made to the taxing officer, admitting ownership of certain property, but stating expressly that it was not intended as a return for taxation, cannot be treated as a return.[56]

(§ 5) *D. Valuation of taxable property.*[57] *In general.*—The practice varies as to the frequency of valuations upon realty.[58] Local assessors may be required to follow a state assessment,[59] or state officers may be required to use valuations made by local authorities,[60] but where this is not the case, it is the duty of assessors to exercise an independent judgment in placing a valuation upon property.[61] Assessing officers are vested with discretionary, quasi judicial power, with a proper exercise of which courts will not interfere,[62] but where the action of such officers is fraudulent or arbitrary, and is not the result of an exercise of that discretion with which they are vested by law, it is not final.[63] Thus, against such action a court of equity has power to grant the proper relief[64] if the facts required to give such court jurisdiction are made to appear.[65] An arbitrary assessment, not based on proper elements of valuation, is void.[66]

The fact that property is assessed upon a lower valuation than that of other similar property in the city is not decisive of the question of the justice of the tax, since its valuation as compared with all other taxable property in the city may still

of foreign stock which had not been returned held not shown to be excessive, and to show every jurisdictional fact necessary to allow comptroller general to proceed under the statute. Hence, due process of law was not violated. Id.

53, 54, 55. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

56. Comptroller general requested information as to foreign stock, and statement supplying some information was furnished, with a reservation. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

57. See 4 C. L. 1623.

58. In Minnesota real property is required to be assessed in even numbered years only, the assessment for odd numbered years being based on the valuation for the previous year. In re Payment of Real Estate Taxes in Pine County [Minn.] 105 N. W. 276.

59. In cities and towns the assessment of property for municipal taxation must be the same as the assessment for state taxes where there is a state assessment. Const. art. 8, § 128; Va. Code 1904, § 1033h. West v. Newport News [Va.] 51 S. E. 206. An ordinance imposing a certain tax on the "assessed value" of certain bank stock was not objectionable as not being on the market value, where there had been a state assessment of the same stock at the market value. Id.

60. Under Const. art. 14, § 11, the average rate of taxation of property to be assessed by the state board is to be determined by dividing the amount of ad valorem taxes levied on other property by the assessed valuation of such property as determined by the local authorities; the board cannot use a valuation fixed by itself. Attorney General v. State Board of Assessors [Mich.] 12 Det. Leg. N. 910, 106 N. W. 698.

61. Where city assessor took the list and values of railroad property for assessment for city purposes, as made by the executive council for the general railroad tax, the assessment was invalid. Chicago & N. W. R. Co. v. Cedar Rapids, 127 Iowa, 678, 103 N. W. 997.

62, 63. National Tube Co. v. Shearer [Del.] 62 A. 1093.

64. Bill to enjoin collection of municipal tax which alleged an excessive assessment with the fraudulent intent to compel payment by complainant of more than his just share of taxes, held to state a case for equitable relief. National Tube Co. v. Shearer [Del.] 62 A. 1093.

65. Proof held not to sustain allegations of fraud and arbitrary action by assessors, alleged to have resulted in an excessive assessment or valuation of property. National Tube Co. v. Shearer [Del.] 62 A. 1093.

66. Where the value of corporation property was arbitrarily inflated in the course of a capricious computation aimed to produce a certain valuation fixed in advance,

be too large.[67] The ratio to which the valuation of property, taxes upon which are sought to be abated, should be made to conform is the ratio between the assessed valuation of all taxable property in the city, real and personal, and the true value of such property.[68]

In some states the statute makes express provision for the deduction of debts from money and credits for taxation.[69]

In Indiana the valuation of the stock of a transient merchant must be made at the time and place such stock is offered for sale.[70] In Louisiana, in assessing the stock in trade of a mercantile company, the average amount of stock on hand during the preceding year should be taken.[71]

Valuation of corporate property, stock, and franchises.[72]—The valuation of the property of telephone or telegraph companies should include both the tangible and intangible elements of value.[73] The cash value of a railroad for purposes of taxation must be determined mainly by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in earning capacity.[74] The actual cost may be shown, this being, prima facie, the value,[75] but if it appears that the actual cost was in excess of the necessary cost, the necessary cost is the proper standard.[76] If the utility of the road, as shown by its net income, is less than its cost, its value must be determined by its utility alone.[77] What are necessary expenses of operation is a question of law on which opinion evidence is incompetent.[78] In Kentucky, railroads are assessed as entireties, all the property used by a company for railroad purposes, whether owned or leased, being assessed as one piece of property.[79] The assessing officers are under no duty of ascertaining whether property of a company is owned or leased, or whether it owns property which is used for purposes not authorized by law and the company's charter.[80] The Michigan constitutional amendment, and the statute pursuant thereto,

the assessment was invalid. Consolidated Gas Co. v. Baltimore [Md.] 61 A. 532.

67. Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia [N. H.] 61 A. 676.

68. Where an agreed ratio was that between the assessed and true value of property, similar to plaintiff's only, an abatement to conform to such ratio would be improper. Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia [N. H.] 61 A. 676.

69. An agreement binding obligors to pay a certain sum to a college, the sum being payable one year after the death of either of the obligors, made for the purpose of making other subscriptions binding, is a "debt" which may be deducted from moneys and credits for taxation purposes under Code 1897, § 1311. King v. Carroll [Iowa] 105 N. W. 705. Such an obligation does not constitute an "unpaid subscription," etc., within § 1311, which cannot be deducted. Id.

70. Acts 1901, c. 208. Simoyan v. Rohan [Ind. App.] 76 N. E. 176. On goods on which such a merchant has paid taxes in one county, he will not be taxed in another county the same year, but for additional goods he may be taxed. Id.

71. Under Acts 1898, No. 170, p. 350, § 7, it is improper to add the receipts for the year and divide by twelve. Swift & Co. v. Board of Assessors [La.] 38 So. 1006; Cudahy Packing Co. v. Board of Assessors [La.] 38 So. 1008.

72. See 4 C. L. 1623.

73. The value of the tangible property of an express, telephone, or telegraph company, apart from its gross receipts for the year prior to the time of the assessment, and its franchise, does not furnish the true value of its property for taxation. Such value should be ascertained from a consideration of all of the aforesaid items taken together, and by treating the corporation as a going concern. Nebraska Tel. Co. v. Hall County [Neb.] 106 N. W. 471. The Minnesota statute providing for the taxation of telegraph companies contemplates the assessment of the tangible and intangible property of such companies situated within the state, as a system or unit, and not merely the taxation of tangible items only. Laws 1891, p. 70, c. 8, amended by Laws 1901, p. 251, c. 180, construed. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567. The statute, so construed, is constitutional. Id. The cost price of the tangible property of a telegraph company, together with reasonable deduction for natural deterioration, is not a proper basis for the valuation of such property on general lists. Id.

74, 75, 76, 77, 78. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99.

79. Commonwealth v. Ingalls [Ky.] 89 S. W. 156. Railroad property is treated as an entirety for taxation purposes in Kentucky. Cumberland Tel. & T. Co. v. Hopkins [Ky.] 90 S. W. 594.

80. Commonwealth v. Ingalls [Ky.] 89 S. W. 156.

which require the legislature to provide a uniform rate of taxation for such corporate property as is to be assessed by the state board of assessors, and prescribe that such rate shall be the rate found by the state board to be the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes, is not subject to the objection that the rate is fixed by local legislative bodies and not by the legislature.[81] The mere fact that all the property in the state is taken into account in determining the average rate on railroad property is not such proof of injustice and inequality as to call for judicial interference.[82] Methods of determining the taxable value of shares of stock, assessed to the owners,[83] of the capital,[84] franchises,[85] or other property of corporations,[86] and methods of computing license or franchise taxes,[87] are treated in the notes.

81. The rate is in fact fixed by the legislature, being the average rate described; the duty of the state board is merely the clerical one of determining it by a mathematical calculation. Michigan Railroad Tax Cases, 138 F. 223, afg. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —.

82. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —.

83. In assessing shares of bank stock in New York, the value of the real estate of the bank must be included in ascertaining the value of the stock. Laws 1901, p. 1360, c. 550, § 2, requires all the corporate property to be considered in ascertaining the value of the stock. First Nat. Bank v. Board of Assessors, 182 N. Y. 460, 75 N. E. 306. The stock of a Montana trust deposit and security company is taxable to the owners at its full cash value, less the amount of taxable property of the company representing such stock. Daly Bank & Trust Co. v. Silver Bow County Com'rs [Mont.] 81 P. 950. It is held in Kentucky that shares of stock in national banks, when taxed under the statutes of that state, are subject to have deducted the value of nontaxable government bonds held by the bank. Marion Nat. Bank v. Burton [Ky.] 90 S. W. 944.

84. In New York, commissioners cannot place one valuation on a piece of real estate when assessing it as such and another when assessing it as part of the capital and surplus of a corporation. Statutes require appraisal at full value in each case. People v. Wells, 110 App. Div. 194, 97 N. Y. S. 47. Under Ky. St. 1903, § 4079, in determining the valuation of the capital stock of a corporation, the state board may accept the statement of the corporation made under § 4078 as the basis of value, or it may take other evidence. Hager v. American Surety Co. [Ky.] 90 S. W. 550.

85. In determining the value of the capital stock of a corporation, for the purpose of finding the value of its franchise, the state board may consider the sale price of the shares, may add the surplus to the capital, or may capitalize net earnings at six per cent, or may combine these processes or any of them. Hager v. American Surety Co. [Ky.] 90 S. W. 550. The correct process of determining the value of the franchise of a foreign corporation is to ascertain (1) gross receipts in the state from all sources; (2) proportion of state gross receipts to entire gross receipts; (3) such proportion of entire capital stock, less assessed value of property, equals value of franchise. Id. A valuation arrived at by finding a sum which at 6% would produce the net earnings in the state is erroneous. Id. Where the state board has fixed the valuation of a railroad franchise but has not apportioned to a taxing district through which the road runs the amount on which a local tax may be levied, the sole remedy of the district is by application to the board for such apportionment. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 91 S. W. 1137.

86. In Maryland the bonded indebtedness of a corporation cannot be added to the value of its property for purposes of taxation. Consolidated Gas Co. v. Baltimore [Md.] 61 A. 532.

87. New York: The franchise tax assessed against a corporation is computed upon the value of the property within the state in which the corporate capital is invested. In re Palmer's Estate [N. Y.] 76 N. E. 16. License fee is to be computed on basis of capital employed in the state and not on capitalization. People v. Miller, 105 App. Div. 326, 94 N. Y. S. 193. Value of trade mark owned by foreign corporation may be considered in determining the amount of capital stock employed in the state for the purpose of fixing the amount of its franchise tax. People v. Kelsey, 93 N. Y. S. 971. Surplus is not capital within § 182 of the franchise tax law. People v. Kelsey, 108 App. Div. 138, 96 N. Y. S. 42. Corporation's own estimate of value of its good will may be considered. State v. Miller, 105 App. Div. 326, 94 N. Y. S. 193. A corporation owned and managed an apartment house and the apartments were apportioned among the original stockholders under 50-year leases. Held, in assessing the franchise tax under Tax Law 1896, c. 908, § 182, the present rental value of the property should be considered. People v. Kelsey, 96 N. Y. S. 745. Under Tax Law §§ 181, 195, the comptroller has no authority, on his own motion, and after the expiration of more than one year from the time the amount of a license tax was determined, to increase the amount of such tax upon a corporation which has not increased its stock. People v. Kelsey, 93 N. Y. S. 971. The comptroller cannot review his own decision fixing a license tax by arbitrarily reassessing a fee al-

(§ 5) *E. Reassessment; omitted property.*[88]—In Michigan, boards of supervisors are authorized to reassess taxes which are rejected by the auditor general because of an erroneous or indefinite description,[89] but such reassessment by correction is not authorized where the original description is wholly void.[90]

Provision is usually made by statute for the assessment of property omitted in previous years.[91] An ordinance providing for the taxation of omitted property, though retrospective, is not invalid as an ex post facto law,[92] but if a penalty is imposed for such back taxes, it is void as to the penalty.[93] If such an ordinance provides for a hearing before the city council, it is not invalid for not allowing an appeal from the decision of that body,[94] nor is such an ordinance invalid as conferring judicial powers on the council.[95]

In Kentucky, provision is made by statute for the filing of statements of omitted property by revenue agents[96] who are compensated by penalties against the taxpayer.[97] When such a statement is filed, a summons is issued[98] and the taxability of the property determined in a legal proceeding. In such proceeding if it appears that the property is liable to taxation and has not been assessed, it must be assessed by the county court,[99] and if it is not liable, or if it has been assessed, the county

ready imposed and paid. People v. Miller, 105 App. Div. 326, 94 N. Y. S. 193.

New Jersey: Under the New Jersey law imposing a franchise tax on the amount of stock issued and outstanding, stock owned by the corporation issuing it may not be considered in determining the amount of the tax. Gen. St. p. 3335; P. L. 1901, p. 31 (Corporation tax act). Knickerbocker Importation Co. v. State Board of Assessors [N. J. Law] 62 A. 266. Where a corporation was liable to an annual charge of 1-10 of 1% on all amounts of stock issued and outstanding on Jan. 1 of each year, it was liable upon the amount outstanding at that time, though reduced prior to the date of maturity of the charge, July 1. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858. Where, under the statute, a charge on outstanding stock on Jan. 1 was not due and payable until July 1, it could not bear interest before the latter date. Id.

Maine: Where the statute imposing a franchise tax provides for a sworn return by the companies liable thereto, showing the amount of business done, such a return made in conformity with the statute cannot be disregarded by the assessors. Construing Rev. St. 1883, c. 6, § 55. State v. Boston & P. Exp. Co. [Me.] 61 A. 697. Under such a statute the prorating of the interstate business is to be made according to a fixed standard, and cannot be based on an equitable division of the gross receipts by assessors. The proportion between the length of the haul in the state to the length of the entire haul is the proper standard for prorating. Id.

88. See 4 C. L. 1624.

89. Description held sufficiently definite to warrant a correction by board. Auditor General v. Fleming [Mich.] 12 Det. Leg. N. 605, 105 N. W. 71. Reassessment held sufficient where recommendation referred to report and proceedings leading up to it, but did not set out such proceedings in full. Id.

90. Auditor General v. Fleming [Mich.] 12 Det. Leg. N. 605, 105 N. W. 71.

91. Where property has been omitted from a triennial assessment, such property may be included in an assessment made the following year, though there have been no improvements or additions made since the triennial assessment. Union Coal Co. v. Cooner, 27 Pa. Super. Ct. 95. A city of the fifth class has power to provide by ordinance for the collection of taxes on omitted property, such ordinance conforming to Ky. St. 1903, § 4241, relating to the recovery of such taxes. Muir's Adm'rs v. Bardstown, 27 Ky. L. R. 1150, 87 S. W. 1096.

92, 93, 94, 95. Muir's Adm'rs v. Bardstown, 27 Ky. L. R. 1150, 87 S. W. 1096.

96. Under Ky. St. 1903, § 4260, a revenue agent may cause an omitted license tax to be listed, independent of the auditor. Commonwealth v. Central Consumers' Co. [Ky.] 91 S. W. 711.

97. Where a state revenue agent filed statements of omitted property for taxation, but instructed the county clerk to delay issuing summons thereon until directed to do so, and in the meantime the county agent got out similar statements and had summons issued, the state agent and not the county officer was entitled to the penalty allowed by Ky. St. 1903, § 4241, as compensation for such services. Lucas v. Commonwealth [Ky.] 89 S. W. 292.

98. Ky. St. 1901, § 4241, requiring a county clerk to issue a summons within 5 days after filing of a statement of omitted property for taxation, is directory only and a summons issued thereafter is not void. Lucas v. Commonwealth [Ky.] 89 S. W. 292.

99. Commonwealth v. Reed [Ky.] 89 S. W. 294. Though the county court in Kentucky has jurisdiction to assess omitted property, it cannot assess railroad property for a turnpike district where the railroad commission has already assessed it, but the auditor has failed to certify as required by Ky. St. 1903, § 4102. Commonwealth v. Maysville & B. S. R. Co. [Ky.] 91 S. W. 1139. In a proceeding to compel the listing of omitted property by a corporation, under the Kentucky statute,

court should make an order to that effect.[1] A judgment listing property need not state the rate of taxation for the various past years, this being fixed by law,[2] but should properly describe the property.[3] If the order of the court determines that the property is not liable to assessment,[4] upon appeal therefrom, no appeal bond is required.[5] Upon appeal to the circuit court the trial is de novo, and if the circuit court reaches a different conclusion from the county court, the case should be remanded with directions to enter the judgment indicated.[6] The *Mississippi* statute authorizing the back assessment of property which has escaped taxation does not apply to property listed for taxation, the assessment of which was void.[7]

In Illinois, the board of review has sole power to assess omitted property and a county treasurer has no supervision over such board.[8] The power to tax embraces the right to adopt such regulations as may seem necessary and efficient to cause all assessable property to be listed.[9] Thus, the *Indiana* statute providing for the inspection of books by assessors in order to determine whether another person has omitted property from his list is held constitutional.[10] The sufficiency of an affidavit in a proceeding under this statute for an order authorizing an inspection of books must be judged in the light of the rule that tax laws are to be liberally construed in favor of the taxing power.[11] The order for inspection should not be broader than the affidavit.[12] The statute does not require notice of the proceeding to the person having the desired evidence in his possession.[13]

In Illinois, it is held that county boards have no power to employ tax ferrets to look up omitted property.[14] *In Ohio,* contracts with tax inquisitors have been upheld.[15] The compensation of such employes is largely regulated by statute.[16] *In*

the court cannot inquire into the items included by the state board in fixing the amount of the capitalization of the corporation. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 91 S. W. 672.

1. Under Ky. St. 1903, § 4241. Commonwealth v. Reed [Ky.] 89 S. W. 294. Recital that taxpayer had failed to list the property for the years mentioned, and judgment that it be listed for those years, held a judgment that it had been omitted. Sebree v. Nutter, 27 Ky. L. R. 1080, 87 S. W. 1072.

2. Construing Ky. St. 1903, § 4241. Sebree v. Nutter, 27 Ky. L. R. 1080, 87 S. W. 1072.

3. "Notes, mortgages, and cash," held sufficient description. Sebree v. Nutter, 27 Ky. L. R. 1080, 87 S. W. 1072.

4. Order so construed. Commonwealth v. Reed [Ky.] 89 S. W. 294.

5. By express provisions of Ky. St. 1903, § 4241. Commonwealth v. Reed [Ky.] 89 S. W. 294.

6. Commonwealth v. Reed [Ky.] 89 S. W. 294.

7. Adams v. Luce [Miss.] 39 So. 418.

8. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024.

9. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

10. Acts 1901, p. 109, c. 71, is not invalid as authorizing an unreasonable search (Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53), nor is the act invalid because not providing for compensation to banks for inspection of their books by assessors (Id.).

11. Affidavit by assessor held to sufficiently describe the books of which an inspection was sought and the omitted property sought to be discovered. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

12. Order for inspection held to follow affidavit and to be proper. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

13. No notice need be given bank of proceeding for an order for inspection of its books. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

14. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024.

15. A tax inquisitor is not a public officer but an employe, and the provision for his appointment rather than election is therefore not open to constitutional objection. State v. Gilfillan, 3 Ohio N. P. (N. S.) 153. Contracts entered into by county officers with tax inquisitors are not illegal because they stipulate for the payment of a percentage on real estate which the inquisitor causes to be returned for taxation; or because of a severable provision for the payment of a percentage to the inquisitor on penalties; or because they empower the inquisitor to compel the auditor to hold examinations of owners of omitted property at his request and in his presence; or because of the clothing of an inquisitor with an exclusive privilege; or because the contract possesses a prospective operation; or because the policy of making such contracts, or of paying so large a percentage for the work performed, does not meet with the full approval of the courts; or because of failure to enter the contracts in the minutes of the county commissioners as provided in § 878; or because an inquisitor who gave bond in accordance with the statute and the contract failed to sign the contract; or because there is no finding on the commissioners' record that they had reason to believe at the time the contract was made that there was property within the county

Iowa, a county cannot appeal from action of the county auditor or treasurer in refusing to assess omitted property found by a tax ferret employed by the county, nor can the tax ferret or his attorney take such an appeal when not authorized by his contract or by resolution of the county board.[17]

An assessing officer is not liable in a civil action for damages for an erroneous decision in the listing of property claimed by him to have been previously omitted.[18] The right of appeal from such assessment given by law is the exclusive remedy of the taxpayer,[19] even though it is alleged that the officer acted unlawfully and tortiously.[20]

§ 6. *Equalization, correction, and review.*[21]—While valuations by assessing officers are presumptively correct,[22] if legally and not arbitrarily made,[23] they are final only when no appeal is taken therefrom.[24] Provision is uniformly made by law for the review and correction of assessments by boards of equalization and by the courts.[25] The powers and jurisdiction of county and state boards of equalization,[26] as well as the procedure to obtain relief through them,[27] are largely controlled

which had been improperly omitted from taxation. Id.

16. A tax inquisitor is not entitled to a percentage on the fifty per cent penalty added by law, or to any percentage on penalties levied and collected as such, and where there is a provision in the contract for the payment of a percentage on penalties, it will be disallowed. State v. Gilfillan, 3 Ohio N. P. (N. S.) 154. An inquisitor is not excluded from furnishing evidence of omitted property to be listed in the name of a decedent, and may discover the existence of such property from inventories filed in the probate court, but his compensation will be limited to a percentage on taxes collected on property which should have been returned in the lifetime of the decedent. Id. An auditor is not bound to assume that the returns for taxation as made are false, and the inquisitor in this case is entitled to a percentage on taxes collected on additions made to the returns for preceding years of insurance companies. Id. Where the county commissioners enter into a contract with the prosecuting attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt from taxation, and by agreement a test case is tried, the defendants in other similar cases agreeing to abide the result, the percentage the attorney is to receive in the event of his securing a judgment is not limited by either law, justice, or equity to the amount involved in the test case. State v. Taylor, 3 Ohio N. P. (N. S.) 505. An allowance of $1,250 per annum, made by county commissioners to a prosecuting attorney, whereas § 845 limits the allowance to $250 for each case in which counsel is employed, will be upheld by a court only in the event of the number of cases exceeding five in a given year. Id. The discretion lodged with county commissioners in the matter of fixing fees to be paid for the collection of taxes in such cases will not be interfered with by a court where the fee is made contingent and is fixed at five per cent; and where two separate contracts have been entered into, and the parties refuse to treat the second as superseding the first, a court will not under the circumstances of this case decree differently. Id.

17. In re Treasurer of Woodbury County [Iowa] 105 N. W. 1023.

18. Treasurer acts judicially in overruling objection of taxpayer that taxes had already been paid. Stevens v. Carroll [Iowa] 104 N. W. 433.

19, 20. Stevens v. Carroll [Iowa] 104 N. W. 433.

21. See 4 C. L. 1625.

22. Assessments legally made are presumptively correct. Consolidated Gas Co. v. Baltimore [Md.] 61 A. 532. Burden is on persons attacking valuation before board of equalization to show error. Woods v. Lincoln Gas & Electric Light Co. [Neb.] 104 N. W. 931. The prima facie validity of an assessment of personal property for general taxation is not overcome by a well grounded claim of overvaluation. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567.

23. There are no presumptions in favor of an assessment made arbitrarily and capriciously. Consolidated Gas Co. v. Baltimore [Md.] 61 A. 532.

24. If no appeal is taken from the assessment of a tax, the decision of the taxing officials becomes final and conclusive. City of Philadelphia v. Pennsylvania Inst. for the Blind, 28 Pa. Super. Ct. 421.

25. See 4 C. L. 1625.

26. A city board of equalization, in reviewing an assessment, is authorized to contract for the supply of maps, abstracts, data, and information, as it requires to pass upon questions before it, and is not restricted to such evidence as the assessor is able or willing to furnish. Maurer v. Weatherby [Cal. App.] 81 P. 1083. The Arizona territorial board of equalization, in equalizing valuations throughout the territory, has power to raise the valuation of property in a county, though the aggregate valuation of property in the territory is thereby increased. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization [Ariz.] 84 P. 511. The board may increase or diminish the valuation of property in a county by classes; it is not required to act only on the aggregate valuation of all property in the county as a whole. Id. The territorial board may require a county board of supervisors to return any class of real property on the roll, such

by statute. Their orders, in matters wherein they have jurisdiction, are not reviewable collaterally,[28] and application to them for the proper relief is usually a condition precedent to the right of appeal to the courts,[29] unless their jurisdiction in the premises is attacked.[30] Boards of equalization cannot raise an assessment without evidence justifying the increase.[31] In equalizing valuations throughout a state or territory, a state or territorial board must fix and apply some uniform standard of valuation[32] which must be derived by some legal method from the valuations in the various counties.[33]

Notice[34] to the taxpayer affected is usually essential to the validity of action by boards of review.[35]

as patented mines, as a distinct or separate class. Id. Under Rev. St. 1901, pars. 3881, 3882, 3884, it is the duty of a county board, upon receiving a statement of the changes in assessments made by the territorial board of equalization, to note on the assessment roll, compute, and carry out to the proper column, the territorial tax, with any additions made by the territorial board. Territory v. Yavapai County Sup'rs [Ariz.] 84 P. 519. The county board may, under Rev. St. 1901, par. 973, require the tax collector to note on the duplicate assessment roll such changes as the board itself has not made. Id. In Nebraska a county board may correct an error of assessment or a gross injustice, whether the error or injustice be due to some act of the assessor or of the board itself. Laws 1905, p. 515, c. 112, amending Comp. St. 1903, c. 77, art. 1, § 121. State v. Grow [Neb.] 105 N. W. 898. The county board of equalization has, in Nebraska, jurisdiction to hear and determine contests as to the liability to taxation of property which the law requires county authorities to assess. State v. Drexel [Neb.] 107 N. W. 110. In Nebraska the state board of equalization and assessment have general direction and control of county assessors, but have no power to direct them in the valuation of property or in determining whether or not a particular item of property is assessable. Id. The conflict between § 2805 and the later act of May 10, 1902, terminates all the powers of city boards of equalization appointed under the prior section. State v. Godfrey, 6 Ohio C. C. (N. S.) 511.

27. The several owners of different tracts or lots of land may unite in a petition to the county board for relief from errors or injustice. State v. Grow [Neb.] 105 N. W. 898.

28. The order of a county board of equalization which has jurisdiction of the subject-matter and parties is not subject to review in a collateral proceeding. It is conclusive until set aside on error or appeal. State v. Grow [Neb.] 105 N. W. 898.

29. The sole remedy in the first instance of one who conceives that his property has been overvalued for taxation is to apply to the board of equalization to correct the error. Hall v. Moore [Neb.] 106 N. W. 785. A taxpayer who is subject to the jurisdiction of a board of review and who fails to appeal to such tribunal is not entitled to appeal to the courts for relief. Comp. Laws §§ 3851, 3853, 3899, provide for review by board. Traverse Beach Ass'n v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 746, 105 N. W. 768. An assessment of real estate was not objected to the first year but the taxes paid. The next year the valuation was based on the assessment for the prior year according to law. No objection was made before the county board of equalization, but in an action for judgment the defense was made that timber had been cut from the land since the first assessment, and that the second assessment was excessive. No attack was made on the original assessment. Held, no appeal having been made to the board of equalization to correct the assessment, the defense was not available in a court of law. In re Payment of Real Estate Taxes in Pine County [Minn.] 105 N. W. 276. Where a taxpayer is notified to appear before a board of review and show cause why his assessment should not be increased, and he fails to appear, he is not entitled to relief in equity against an increased assessment on the sole ground that the assessment is excessive and results in double taxation. Cummins v. Webber, 218 Ill. 521, 75 N. E. 1041.

30. Certiorari to review an assessment lies, though relator has not urged invalidity thereof before the commissioners, where the jurisdiction of the commissioners is attacked on the ground of relator's nonresidence. People v. O'Donnel, 47 Misc. 226, 95 N. Y. S. 889.

31. Maurer v. Weatherby [Cal. App.] 81 P. 1083.

32. Territory v. Yavapai County Sup'rs [Ariz.] 84 P. 519.

33. Territorial board has no power to assess independently but must act upon valuations supplied by counties. Territory v. Yavapai County Sup'rs [Ariz.] 84 P. 519.

34. See 4 C. L. 1627.

35. Under Ky. St. 1903, § 4250, which authorizes the county court to release from a tax a person not the owner who was erroneously assessed, and to have the property listed to the true owner, an order releasing one person and charging another, without notice to the latter, is void as to him. Garrett v. Creekmore [Ky.] 89 S. W. 166. The statutes (Acts 1901, §§ 53, 65, pp. 250, 254) and published notice by the clerk of the board of commissioners (§ 92, p. 269) constitute notice to the taxpayer of the meeting of the board of equalization and of his right to appear and object to assessments or action of the board in relation thereto. Inland Lumber & Timber Co. v. Thompson [Idaho] 83 P. 933. Under Sess. Laws 1901, p. 233, it is the duty of the board of equalization to order the assessor to list omitted property, and where such

Review by the courts.[36]—Mandamus lies to compel a board of review to consider an application for relief,[37] but not to compel a board to take any particular action,[38] since a proceeding for mandamus is proper only where there is no adequate remedy by appeal or certiorari.[39] As has been said, application to a board of review or other tribunal provided by law is a condition precedent to the right of appeal to the courts;[40] hence, where an appeal is taken, the court will consider only such objections as were raised before such tribunal.[41] Ordinarily, findings by boards of equalization or assessment will not be disturbed by the courts[42] unless they are so manifestly wrong that reasonable minds could not differ thereon,[43] or unless the tax officials have acted fraudulently or maliciously, to the substantial prejudice of the taxpayer,[44] or have made a mistake so gross as to be inconsistent with fair and honest judgment,[45] or have proceeded upon an erroneous rule of law,[46] or without jurisdiction.[47]

The word "assessment" as used in the Florida statute providing a summary

assessment is made before the final adjournment of the board, the taxpayer has an opportunity to be heard in regard thereto and the assessment is not void for want of such opportunity. Id. In Michigan, where the state board of assessors of railroad property, sitting as a board of review, has heard an application to reduce an assessment, no notice need be given of an increase in the assessment, since the statute does not provide for a rehearing. Pub. Acts Mich. 1901, p. 241, No. 173, § 8. Lake Shore & M. S. R. Co. v. Powers, 138 F. 257.

36. See 4 C. L. 1627.

37. Though application was late. People v. Wells, 110 App. Div. 336, 97 N. Y. S. 333.

38. Certiorari is remedy in such case. People v. Wells, 110 App. Div. 336, 97 N. Y. S. 333.

39. In Nebraska an appeal lies from the action of a county board (in deciding the valuation of particular property or whether it is assessable) to the district court, but not to the state board of equalization. State v. Drexel [Neb.] 107 N. W. 110. Hence, mandamus will not lie to correct errors of the county board in such matters. Id.

40. See first paragraph under this section.

41. On appeal from an order of a board of equalization in the matter of assessment of property, the cause must be tried on questions raised by the complaint before that tribunal. Nebraska Tel. Co. v. Hall County [Neb.] 106 N. W. 471. On an appeal from the action of a county treasurer in making an assessment on omitted property, a taxpayer is entitled to raise only such objections, not going to the jurisdiction, as were made before the treasurer. Code § 1373, and Laws 28th Gen. Assem. 1900, c. 50. Gibson v. Cooley [Iowa] 105 N. W. 1011.

42. Under a writ of review, errors and mistakes of judgment of a board as to the value of property that it is authorized to assess cannot be reviewed. Whether railway, telephone, or telegraph lines have been assessed at less than cash value by board of equalization. McConnell v. State Board of Equalization [Idaho] 83 P. 494. Neither can such writ be invoked to review the facts upon which the inferior tribunal acted, except to ascertain the fact of jurisdiction. Id. On certiorari to review action of the territorial equalization board, where the petition shows that the board treated patented mines as a distinct class of property, it will be presumed that county boards returned such property as a separate class so that the territorial board had the necessary information in the assessment rolls furnished. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization [Ariz.] 84 P. 511. In certiorari to review an assessment on land claimed to be held under leases, the court properly refused to consider the validity of the leases, notwithstanding a stipulation of the parties that they would consent to a reduction of the assessment if the leases should be held valid. In re Long Beach Land Co., 182 N. Y. 489, 75 N. E. 533. Same case below, 106 App. Div. 253, 94 N. Y. S. 282.

43. Field v. Lincoln Traction Co. [Neb.] 104 N. W. 931; Woods v. Lincoln Gas & Electric Light Co. [Neb.] 104 N. W. 931.

44. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567.

45. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567. Courts will vacate an assessment if it appears that property has been grossly overvalued as compared with the valuation of other like property. Assessment vacated where property in question was assessed at twice its market value, and its valuation was higher relatively than other similar corner lots. Dickson v. Kittitas County [Wash.] 84 P. 855. Finding that assessment of relators' property was 26% higher than that on other property of the same class, held sustained by the proof, and a claim that they were not injured because their assessment was not above the average of improved and unimproved property, held not sustained. People v. Feitner, 107 App. Div. 267, 95 N. Y. S. 10.

46. State v. Western Union Tel. Co. [Minn.] 104 N. W. 567.

47. Under a writ of review the court will consider only questions of law and whether the action taken was within the jurisdiction of the officer or body taking it. McConnell v. State Board of Equalization [Idaho] 83 P. 494.

remedy to have an assessment declared not lawfully made includes only the clerical act of extending in the assessment rolls the name of the party assessed, the description of the property, the value as fixed by the proper tribunal, the millage for various purposes, and the total amount of the tax.[48] The proceeding will not reach irregularities not relating to such act.[49] Certiorari lies, in New York, to review an alleged illegal assessment, though proceedings to enforce the tax have not been instituted.[50] A banking corporation is entitled to maintain a suit in behalf of its stockholders in relation to the assessment and taxation of its shares of stock.[51] The method of perfecting an appeal to the courts,[52] and the proper form of relief to be granted by them,[53] are treated in the notes.

§ 7. *Levies and tax lists.*[54]—Statutory provisions with regard to the levying of taxes by municipal authorities should be strictly followed.[55] Thus, levies must be made by the proper authorities[56] at the proper time,[57] and in the manner[58] and for such amounts[59] and purposes[60] as the law prescribes and allows. The purposes of a

48. Construing Rev. St. 1892, § 1542. Louisville & N. R. Co. v. Board of Public Instruction [Fla.] 39 So. 480.

49. Irregularities in publishing notices preliminary to calling an election for subdistrict school tax cannot be reached by proceeding under Rev. St. 1892, § 1542. Louisville & N. R. Co. v. Board of Public Instruction [Fla.] 39 So. 480.

50. People v. Wells, 182 N. Y. 314, 74 N. E. 873.

51. May apply for certiorari to review the assessment. First Nat. Bank v. Board of Assessors, 182 N. Y. 460, 75 N. E. 306.

52. Under Code Civ. Proc. § 311, a bill of exceptions of proceedings before a county board of equalization may be settled and approved by presiding officer of such board, but general provisions of the section as to time and notice to adverse party must be complied with. Field v. Nebraska Tel. Co. [Neb.] 104 N. W. 932; Field v. Lincoln Gas & E. L. Co. [Neb.] 104 N. W. 934. Code 1904, § 571, authorizes a person assessed for city or county taxes to apply for relief within 2 years. This limitation does not apply to a suit to vacate an assessment against the committee of a lunatic on the ground that he was assessed in a city which was not his domicile. Hurt v. Bristol [Va.] 51 S. E. 223.

53. Where, on certiorari, an assessment is annulled for irregularity in the proceedings, it is the duty of the court, under Rev. Pol. Code § 2225, to enter judgment for the amount of taxes found to be justly due, or to order a reassessment. Salmer v. Clay County Com'rs [S. D.] 105 N. W. 623. Where, pending certiorari to review a mandamus directing assessment of taxes on the assessment roll for 1903, the time when the tax could be spread on the 1904 roll elapsed, the supreme court, on sustaining the legality of the tax, will direct that the assessment be spread on the roll for 1905. Canal Const. Co. v. Schlickum [Mich.] 102 N. W. 737.

54, 55. See 4 C. L. 1629.

56. A tax list, made in conformity with the provisions of the statute, is prima facie evidence that a levy of taxes was made by the proper authorities, and is conclusive as against a claim of irregularities in making the levies. Holthaus v. Adams County [Neb.] 105 N. W. 632.

57. Hurd's Rev. St. 1903, c. 120, § 121, provides for tax levies by county boards at their September session. Held a levy on November 29th at a meeting pursuant to an adjournment of the September session was valid. Bowyer v. People [Ill.] 77 N. E. 91. Under Hurd's Rev. St. 1903, c. 34, § 27, authorizing an additional levy in excess of 75 cents per $100 upon a vote of the people therefor, such additional levy may be made by the board as soon as the vote is determined; it need not be postponed until the September meeting of the board. Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021.

58. In North Dakota a levy of state taxes by percentage is valid. Scott & Barrett Mercantile Co. v. Nelson County [N. D.] 104 N. W. 528.

59. The tax levy authorized by Const. art. 7, § 9, "for state purposes," is intended to cover the current and running expenses of maintaining and conducting the state government and operating and maintaining state institutions. Gooding v. Profitt [Idaho] 83 P. 230. Public or bonded indebtedness incurred under Const. art. 8, § 1, for internal improvements and the erection of public buildings and institutions, is not covered by art. 7, § 9, and a tax levy to pay interest on such indebtedness and bonds and to provide a sinking fund therefor is not within the limitation upon the tax rate imposed by art. 7, § 9. Id.

60. Assessment for certain bonds void where proceedings to issue bonds have been held invalid. Hellman v. Los Angeles, 147 Cal. 653, 82 P. 313. In Illinois, a school district which has issued and sold bonds for part of the cost of a school building may levy an annual tax, after construction of the building, not to exceed the statutory limit of taxation for building purposes, for the purpose not only of paying interest on the bonds, but also to create a sinking fund to pay the bonds at maturity. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734. A levy by school directors for building purposes, otherwise valid, is not rendered invalid by the fact that they enter into a contract for a building in excess of the

municipal levy must be correctly specified,[61] but if the levying ordinance expressly refers to the appropriation ordinance which contains such information, failure of the levy ordinance to state it is not fatal to the validity of the levy.[62] It is competent for the legislature to cure a defect in a levy arising from failure to specify the purposes of the tax,[63] unless the levy and tax have been held invalid by the state court of last resort.[64] A vote of the taxpayers upon a levy for a particular purpose is essential only when the law expressly requires it.[65]

Mandamus[66] lies to compel county officers, who are the instruments of the state for the assessment and collection of taxes, to levy a tax to pay township bonds, though the corporate existence of the township has been abolished by the state constitution and the township officers removed.[67] Such a proceeding is not a suit against the state, though the legislature has forbidden such county officers to exercise such power.[68] Municipal authorities need not levy annually the full amount of taxes allowed by law in order to meet outstanding warrants, but, in determining the amount to be levied, are vested with discretion and may consider the amount of cash on hand and the amount of outstanding, collectible taxes, as well as the amount of indebtedness;[69] hence, mandamus will not issue at the instance of a warrant holder to com-

constitutional tax limit. Id. A levy by school directors for building purposes, within the statutory limit, to make up the difference between the cost of a school building and the amount realized from the sale of bonds, is valid, where the election at which the building was authorized did not limit the cost to the amount of the bonds voted, nor specify the purpose for which the bonds were to be issued. Id. It is competent for the legislature to authorize a board of commissioners of a county indebted to the state for taxes to make a sufficient levy, not to exceed a rate specified, to meet such indebtedness. Sess. Laws 1905, p. 278, sustained, and held that it was duty of Nez Perce County to levy a tax for such purpose. Gooding v. Profitt [Idaho] 83 P. 230. Under Gloversville City Charter (Laws 1899, p. 612, c. 275), §§ 242, 70, where a judgment against a city was not included in the original estimate of expenses, it could and should have been included before ratification of the tax as extended. Hence, execution on the judgment would not be stayed for want of levy and collection of a tax therefor. Frederick v. Gloversville, 97 N. Y. S. 1105.

61. Assessment for "public school improvement bonds (1899)" invalid where bonds of 1889 were intended. Hellman v. Los Angeles, 147 Cal. 653, 82 P. 313. County levy of 75 cents on each $100 of taxable property, which does not specify particular purposes of the tax, is invalid. People v. Wisconsin Cent. R. Co., 219 Ill. 94, 76 N. E. 80. A tax levying ordinance should specify in detail each object and purpose for which the tax is levied. Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021. An order of a county court levying a special tax should state the purpose for which the levy was made. Failure to state the purpose held not aided by statement in chairman's report copied in the minutes of the court. Southern R. Co. v. Hamblen County [Tenn.] 92 S. W. 238. Where a levy by the fiscal court fails to "specify distinctly" the purpose of the tax, the tax is invalid, Const. § 180, being mandatory. Commonwealth v. United States Fidelity & Guaranty Co. [Ky.] 89 S. W. 251.

62. Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021.

63. Laws 1905, p. 359, held not to interfere with vested rights and to be a proper exercise of legislative authority. People v. Wisconsin Cent. R. Co., 219 Ill. 94, 76 N. E. 80. Const. art. 9, § 8, which provides that county authorities shall not levy a tax the aggregate of which shall exceed 75 cents on each $100 of taxable property, is a limitation upon the power of counties and not upon that of the legislature, hence the legislature could authorize a levy which did not specify the purposes of the tax, and could therefore cure a levy defective for failure to do so. Id.; Bowyer v. People [Ill.] 77 N. E. 91.

64. Legislature could not make tax enforceable when court had declared it invalid. Chicago, etc., R. Co. v. People, 219 Ill. 408, 76 N. E. 571.

65. In Illinois the statute does not require the cost of a school building to be built to be submitted to the voters of the district. Where a building has been authorized by vote of the people, the directors may make levies from time to time to build such a building as the vote directed, or, in the absence of such direction, as they in their discretion determine upon. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734. Where a municipality has legally incurred an indebtedness, no vote of the people on a levy to pay interest thereon is necessary, since Const. art. 10, § 12, requiring a levy to pay interest on debts and create a sinking fund is mandatory and self enforcing. Evans v. McFarland, 186 Mo. 703, 85 S. W. 873.

66. See 4 C. L. 1630.

67, 68. Graham v. Folsom, 200 U. S. 248, 50 Law. Ed. —.

69. Unpaid taxes are not barred by limitations and may be considered as assets. State v. Mutty [Wash.] 82 P. 118.

pel a levy of the full amount unless it appears that the aggregate of the amount on hand and outstanding taxes will be insufficient to meet the warrants.[70] It will be presumed in a proceeding for a writ of mandamus that appropriate levies for the municipal indebtedness fund have been made in prior years.[71]

The record[72] should show that each step required by law has been duly taken,[73] though an omission or defect in the record is not necessarily fatal to the validity of the levy.[74]

§ 8. *Payment and commutation.*[75]—Actual payment by any person discharges the lien of the taxes.[76] An offer to pay, which fails, through fault of the treasurer, must, to have the same effect as actual payment, be made by a person having an interest which would be lost by a sale.[77] The owner may prove the fact of payment though the treasurer is dead and though the books show no credit.[78] No laches can be imputed to an owner who, in paying taxes, or in redeeming after sale, pays the amount which upon his inquiry the treasurer demands.[79] Such payment is in legal effect equivalent to the actual payment of all that is due, and this notwithstanding a misapplication of the money paid by the treasurer, or failure to credit it properly.[80] Payment of taxes on land by one who has no color or claim of right to do so on his own behalf inures to the benefit of the owner if he elects to claim it,[81] but payment by one having an interest in the land does not inure to the benefit of another merely because the land was assessed to the latter while he was in possession.[82] Where a person pays taxes on land as the agent of the owner,[83] and, having allowed it to be-

70. State v. Mutty [Wash.] 82 P. 118.

71. This duty being imposed by Ball. Ann. Codes & St. §§ 1792, 1794, 1796. State v. Mutty [Wash.] 82 P. 118.

72. See 4 C. L. 1630.

73. Levy of additional tax held unauthorized where record of county board showed resolution therefor was "offered," but did not show its adoption. Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021. By Hurd's Rev. St. 1903, art. 8, § 1, a certified copy of a tax levy ordinance of a city or village must be filed with the county clerk. Filing of the original ordinance is not a compliance therewith. People v. Kankakee & S. W. R. Co., 218 Ill. 588, 75 N. E. 1063. Such noncompliance cannot be cured, on application for judgment for taxes, by allowing a certificate of authentication to be attached to the ordinance. Id. The point that no "certified copy" of the tax levy ordinance was filed with the county clerk is raised by the objection that the alleged tax levy ordinance was not certified by the county clerk. Id. In townships using the labor system for road and bridge taxes, under Road and Bridge Act § 119, the original levy certificate signed by the highway commissioners, must be filed with the county clerk. Under the cash system, § 16, the certificate is to be delivered to the town clerk, who certifies the items of levy to the county clerk to be extended as other taxes. Id.

74. Absence of itemized statement as basis for county levy held an irregularity cured by Rev. Codes § 1263. Scott & Barrett Mercantile Co. v. Nelson County [N. D.] 104 N. W. 528. B. & C. Comp. § 3085, requiring county court to levy a tax on all taxable property to defray county expenses, confers jurisdiction to levy the tax, and failure to enter the estimate required by § 3084 in the journal of the county court is not a jurisdictional defect. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352. The journal entry of an order levying a tax was signed by the commissioners before any attempt to enforce the tax was made, hence, the fact that it was not signed when a tax payer sought to set the assessment aside, by a writ of review, was not ground for its annulment. Id. Highway commissioners' certificate of levy of 40 cents per $100 for roads and bridges is sufficient, though not stating the amount required for each purpose or the total amount required. People v. Kankakee & S. W. R. Co., 218 Ill. 588, 75 N. E. 1063.

75. See 4 C. L. 1631.

76. And ends power to sell for nonpayment. Trexler v. Africa, 27 Pa. Super. Ct. 385. Where property has been assessed and the taxes paid, it cannot be reassessed in the name of another, though he is the true owner, and taxes collected again for the same year. Commonwealth v. Ingalls [Ky.] 89 S. W. 156.

77. Contract for purchase of land shows such interest. Trexler v. Africa, 27 Pa. Super. Ct. 385.

78, 79, 80. Trexler v. Africa, 27 Pa. Super. Ct. 385.

81. Siers v. Wiseman [W. Va.] 52 S. E. 460.

82. B. paid taxes on land for two years while in possession under a contract. The land was assessed to H. while he was in possession. Held payments by B. did not inure to the benefit of H. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671.

83. Person who had long paid taxes for owner, claiming no right of his own, and who allowed land to become delinquent,

come delinquent for a year, buys at the sale but takes no deed, and thereafter continues to pay in the name of the owner, a deed taken by his heirs, under such purchase, vests no title in them as against the person for whom the taxes were so paid.[84] Payment of taxes by such heirs, who cause the lands to be charged against them alone, inures to the benefit of the true owner,[85] and the latter will not forfeit his title to the state for failure to keep his land charged with taxes.[86] Payment by a tenant in common of taxes for the common property under an assessment in his name will render a sale of his co-tenant's interest for taxes in his name for the same year void.[87] No resolution of the directors is necessary to authorize a bank to pay taxes on its stock and enforce its lien therefor by deductions from dividends.[88] A claim for reimbursement for taxes paid on stock is an asset of the bank which it alone can collect.[89]

Taxes must be paid in the funds required by law.[90] Paving certificates of a city are not receivable for taxes levied to create a sinking fund for the redemption of and payment of interest on bonds of the city.[91] The objection that such certificates were received may be raised by the city in a suit to set aside the compromise settlement by which they were accepted.[92]

§ 9. *Lien and priority.*[93]—The time when taxes become a lien may be fixed by statute,[94] but there can be no real or effective lien until the amount of the taxes is ascertained and determined.[95] When the rate of taxes is fixed and the amount determined, the lien for such amount relates back and attaches as of the date specified in the statute.[96] The duration of tax liens is also statutory.[97] Sales to the municipality for subsequent taxes are not a waiver of the lien of a prior sale to the munici-

bought at sale but took no deed, and thereafter continued to pay in name of owner, held the agent of the owner. Siers v. Wiseman [W. Va.] 52 S. E. 460. Tax payments held to have been made by agents of owner so that limitations did not run against owner. Hall v. Semple [Tex. Civ. App.] 91 S. W. 248.

84, 85. Siers v. Wiseman [W. Va.] 52 S. E. 460.

86. No forfeiture under Code 1899, ch. 31, § 39, in such case. Siers v. Wiseman [W. Va.] 52 S. E. 460.

87. Snodgrass v. Jolliff [W. Va.] 53 S. E. 151.

88. Under Code 1873, § 819. Kennedy v. Citizens' Nat. Bank [Iowa] 104 N. W. 1021.

89. Stockholder cannot sue bank for share of amount due from shareholders for taxes paid. Kennedy v. Citizens' Nat. Bank [Iowa] 104 N. W. 1021.

90. Const. art. 11, § 4, providing that taxes shall be paid only in money, does not apply to cities of more than 10,000 population. City of Houston v. Stewart [Tex.] 13 Tex. Ct. Rep. 55, 87 S. W. 663.

91. City council held not authorized to provide for payment in such manner or to accept such certificates in a compromise. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

92. The city being the trustee of the bond holders. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

93. See 4 C. L. 1632.

94. In Michigan, city taxes become a debt when the assessment rolls are completed. City of Detroit v. Patten [Mich.] 12 Det. Leg. N. 980, 106 N. W. 884. Under Sess. Laws 1903, p. 73, c. 59, and the emergency clause, § 3, the lien for taxes on personal property attaches to the personal and real property of the person assessed immediately when such personal property is listed with the county assessor and he has placed a value thereon. Klickitat Warehouse Co. v. Klickitat County [Wash.] 84 P. 860. The moment property is listed and returned to the auditor it becomes charged with taxes, and its owner assumes the legal status of a tax payer. State v. Taylor, 3 Ohio N. P. (N. S.) 505. In Philadelphia, taxes are assessed prior to the beginning of the year and the whole tax is due at the beginning of the year. City of Philadelphia v. Penn. Inst. for the Blind, 28 Pa. Super. Ct. 421. A claim for taxes assessed and levied by a township subsequent to the passage of the act of June 4, 1901, P. L. 364, has no priority over a mortgage executed and recorded prior to the act, in the distribution of the proceeds of sale under a levari facias. Caner v. Bergner, 27 Pa. Super. Ct. 220.

95. Territory v. Perrin [Ariz.] 83 P. 361. Where personal property is sold after the assessment but before the levy of taxes upon it, the purchaser takes it subject to the lien of the taxes. Shanafelt v. Chandler, Reed & Co. [Iowa] 103 N. W. 976.

96. Territory v. Perrin [Ariz.] 83 P. 361.

97. Where, in New Jersey, the certificate of sale for taxes to the municipality has been recorded in the county clerk's office, the lien of subsequent taxes does not expire until the property is actually redeemed. Maginnis v. Borough of Rutherford [N. J.

pality,[98] and municipal authorities have no power to release property from such lien except upon payment in full.[99] A tax lien is not lost by failure of the county clerk to list lands in the county on which taxes for one or more years are delinquent.[1]

The lien of the state for general taxes is paramount to all other liens,[2] including the lien of special assessments.[3] Taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued prior thereto.[4] Real estate taken by a railroad corporation in condemnation proceedings is subject to the lien of taxes existing prior to such proceedings.[5] Personal property in the hands of an assignee for the benefit of creditors is to be used for unpaid taxes on the personal and real property of the assignor before the real property can be used.[6] Where a receiver of an insolvent corporation is appointed upon application of a mortgagee of personalty and no provision is made in the decree of appointment for priority of payment of a franchise tax to the state, the claim of the state for such tax is not superior to the lien of the subsequent mortgagee on the personalty.[7] A claim of a county against a bankrupt tax collector for taxes collected but not paid over is not a claim for "taxes due and payable" by the bankrupt so as to be entitled to priority, under the bankruptcy act, over claims of general creditors,[8] nor is such claim, considered as a debt due the county, given priority by any statute of Maryland.[9]

When taxes against real estate are past due and unpaid, the county by which they were levied may maintain a suit to restrain waste, where the acts complained of would reduce the value of the property to an amount insufficient to pay taxes.[10] The county need not first purchase the property at tax sale in order to maintain such suit.[11]

§ 10. *Relief from illegal taxes.*[12]—In some states collection of a tax will not be enjoined.[13] Elsewhere, the remedy by injunction is available, provided the complainant brings himself within some recognized head of equitable jurisdiction,[14] such as fraud.[15] In the absence of statutory provisions, a court of equity will not enjoin the collection of a tax upon the mere ground of illegality.[16] The Federal

Law] 63 A. 16. An action of ejectment by a tax deed holder, out of possession, does not, in Kansas, become barred by the two year statute of limitations while the land is vacant and unoccupied, nor while in possession of and occupied by tenants, agents, or employes of a nonresident owner. Tax lien, under such deed, sustained. Gibson v. Hinchman [Kan.] 83 P. 981.

98. Under Act March 14, 1879, and supplements thereto. Maginnis v. Borough of Rutherford [N. J. Law] 63 A. 16.

99. Maginnis v. Borough of Rutherford [N. J. Law] 63 A. 16.

1. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

2. Security Trust Co. v. Root, 72 Ohio St. 535, 74 N. E. 1077.

3. See article Public Works and Improvements, 6 C. L. 1143, where the subject of Special Assessments is treated.

4. Medland v. Van Etten [Neb.] 106 N. W. 1022.

5. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

6. Phoenix Brewing Co.'s Assignee v. Central Consumers' Co. [Ky.] 88 S. W. 1051.

7. Loring v. American Transp. Co., 138 F. 600.

8, 9. In re Waller, 142 F. 883.

10, 11. Lancaster County v. Fitzgerald [Neb.] 104 N. W. 875.

12. See 4 C. L. 1632.

13. Massachusetts rule. Webber Lumber Co. v. Shaw [Mass.] 75 N. E. 640.

14. Illinois Life Ins. Co. v. Newman, 141 F. 449. Injunction will lie against the collection of a tax levied under an unconstitutional law, which had not been declared unconstitutional at the time the levy was made, if it appears that contracts have not been entered into on the faith thereof. Kirkley v. Parker, 6 Ohio C. C. (N. S.) 371.

15. To entitle a complainant to relief from alleged excessive taxes, due to the undervaluation of other property, it must be made to appear that such undervaluation has been so habitual, systematic, and intentional as to amount to fraud. Michigan Railroad Tax Cases, 138 F. 223.

16. This is the rule in Federal courts even though the state court has statutory power to enjoin collection on the sole ground of illegality. Illinois Life Ins. Co. v. Newman, 141 F. 449. Where a board of equalization had jurisdiction to assess cattle, which were within the county, a court of equity would not enjoin collection of the tax. Crewdson v. Nefsy [Wyo.] 82 P. 1. Collection of a tax will not be enjoined on the ground that the assessment was increased without notice, unless it is made to appear that the assessment is excessive and that appellant has been substantially

circuit court has jurisdiction of a suit against a state auditor to enjoin collection of taxes upon railroads where the bill alleges that the state constitution and statute violate the Federal constitution, and that the auditor, acting under such constitution and statute, is about to deprive complainants of their property without due process of law.[17] Jurisdiction once acquired in such suit the court may retain it to administer relief on other grounds, though the state court could afford adequate remedy.[18] In Kentucky, where a taxpayer seeks to enjoin collection of a tax and a counterclaim is interposed for the taxes, the court has power to compel the complainant to pay the taxes into court.[19] A suit to enjoin the collection of taxes for one year is no bar to a suit to enjoin similar taxes for another year, since taxes for each year constitute a separate cause of action,[20] but a decree enjoining the collection of taxes because of a contract exemption from taxation is as controlling on future taxes as on the particular taxes to which the suit related.[21] In a suit to enjoin a tax sale on the ground that the assessment was excessive, facts showing such excessiveness must be alleged.[22] If the ground for such desired relief is that personalty should have been first proceeded against, the character and value of such personalty must be shown.[23] To warrant joinder of all the taxpayers in a county in a suit to enjoin a sale of lands bid in by the state for delinquent taxes, the grounds relied on must be common to all.[24] A suit by citizens and taxpayers to enjoin the sale of lands for taxes is a proper remedy to determine in which of two counties the lands are assessable.[25] Payment or tender of taxes justly due is a condition precedent to relief in a court of equity,[26] but this rule cannot be invoked to defeat injunctive relief in aid of a decree enjoining the collection of state taxes where all questions concerning the part of the tax not covered by the original decree were eliminated from the controversy.[27]

injured. People's Gas, Electric & Heating Co. v. Harrell [Ind. App.] 76 N. E. 318. Collection of a tax on omitted property will not be enjoined on the sole ground that the assessment was made under an unconstitutional statute, when it is not shown that it is unjust or inequitable, nor that the property was not omitted, nor that it was justly liable, nor that payment as sought to be enforced would not relieve plaintiff of taxes for that year. Correll v. Smith [Ill.] 77 N. E. 440.

17. Jurisdiction cannot be defeated on the ground that the suit is against the state or that no Federal question is involved. Michigan Railroad Tax Cases, 138 F. 223.

18. Federal court had jurisdiction to determine whether other property in state had been undervalued as compared with railroad property. Michigan Railroad Tax Cases, 138 F. 223.

19. City of Covington v. Pullman Co. [Ky.] 89 S. W. 116.

20. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251, Lumpkin, J., dissenting.

21. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. —.

22. A complaint in a suit to enjoin a tax sale on the ground that the assessment was excessive as compared with that of other similar property in the vicinity must allege the full cash value of the property involved. An allegation of "cash value," "fair value," or "true value," is insufficient. Humbird Lumber Co. v. Thompson [Idaho] 83 P. 941. An allegation that other property of similar character and value in the vicinity or county has been assessed at a less valuation than that of complainants is not sufficient to warrant a court of equity to grant relief. Id.

23. Alexander v. Aud [Ky.] 88 S. W. 1103.

24. Cause of action alleged, based on various grounds, held not common to all the taxpayers. Alexander v. Aud [Ky.] 88 S. W. 1103.

25. There was a dispute as to county line. Allison v. Hatton [Or.] 80 P. 101.

26. Original tax being justly due, and penalties being illegal, payment of the amount justly due was condition precedent to relief by enjoining collection from giving deed because of irregularity in description in assessment. Couts v. Cornell, 147 Cal. 560, 82 P. 194. One seeking to enjoin execution of a tax deed on the ground that a portion of the tax is invalid must, as a condition precedent to relief, pay or tender the valid portion of the tax. Grant v. Cornell, 147 Cal. 565, 82 P. 193. A tax certificate, valid on its face, is constructive notice of the lien of the tax, and a subsequent purchaser is in no better position than the original owner when seeking relief from the tax. He must pay the valid portion of the tax before he can have the execution of a deed enjoined. Id. Complainant in a suit to enjoin sale of lands bid in by the state must tender the amount of the unpaid taxes, since by Ky. St. 1903, § 4036, the purchaser has a lien on the land for his disbursements in case the sale is set aside. Alexander v. Aud [Ky.] 88 S. W. 1103.

27. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed.—.

In Louisiana, where a tax has been improperly enjoined, ten per cent attorney's fees must be allowed as statutory damages on the amount of the tax, penalties, and costs.[28]

Recovery back of payments.[29]—Illegal taxes paid under a sufficient protest[30] may be recovered back,[31] but taxes voluntarily paid cannot be recovered.[32] Payments are presumed to be voluntary until the contrary is made to appear.[33] The mere fact that a payment is made under formal protest does not render it involuntary.[34] A statute making it the duty of banks to collect taxes on its stock from the owners thereof and pay the same to the receiver of taxes is thereby made the agent of share owners only for the payment of legal taxes,[35] and an unathorized payment of an illegal tax out of dividends of a stockholder may be recovered back by the owner of the stock.[36] A payment of valid taxes cannot be recovered back merely because of an irregularity in the method of collection.[37] Illegal collection charges, not paid over by the collector to the township, cannot be recovered from the latter.[38] An action to recover illegal taxes must be brought within the time prescribed by statute.[39] Legality of the tax will be presumed and any illegality relied upon must be alleged[40] and proved.[41] A complaint in an action by a taxpayer, for himself and

28. Tulane University v. Board of Assessors [La.] 40 So. 445.

29. See 4 C. L. 1634.

30. Protest charging wllful overvaluation, favoritism, and omission of property from the roll by the supervisor, and refusal of the board of review to give relief, together with proof offered, held sufficient to raise issue of fraud and legality of assessment, in action to recover taxes paid under protest. Lingle v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 703, 105 N. W. 604.

31. Pol. Code pt. 3, tit. 9, § 3819, as amended by St. 1895, c. 218, which authorizes payment of taxes under protest and provides that such payment shall not be regarded as voluntary and may be recovered, applies to the collection of taxes in Los Angeles, under § 46 of its charter. Hellman v. Los Angeles [Cal.] 82 P. 313. One who owned all the bonds and controlled most of the stock of a corporation, which had no money or credit, could pay its taxes under protest and maintain an action of recovery in his own name, under Comp. Laws 1897, § 3876. Lingle v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 703, 105 N. W. 604. Payments made to prevent a sale, and others made under protest to redeem from a sale, with notice of intention to recover if the assessment should be held invalid, may be recovered after the assessment has been set aside by judicial decision. City of Denver v. Evans [Colo.] 84 P. 65.

32. Morris v. New Haven [Conn.] 63 A. 123. Payment without a levy or threat of levy or duress of any kind is voluntary. Lingle v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 703, 105 N. W. 604. Taxpayer paid taxes on more land than he owned, though a comparison of his deed with the assessment would have shown the mistake. He could not recover. Bateson v. Detroit [Mich.] 13 Det. Leg. N. 66, 106 N. W. 1104. Where taxpayer paid a tax which was properly assessed without appearing before a board of review and without any proceedings being taken to compel payment, and the only evidence of a protest was an indorsement on the tax roll and a statement in the tax receipt, be was not entitled to recover the amount paid. Traverse Beach Ass'n v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 626, 105 N. W. 30.

33. Town of Phoebus v. Manhattan Social Club [Va.] 52 S. E. 839.

34. Town of Phoebus v. Manhattan Social Club [Va.] 52 S. E. 839. Where plaintiff had appealed from the assessment, thus suspending all action and the authority of the collector, and no coercive measures were taken against her or her estate, though a bill inviting her to pay was sent, a payment, though under a formal protest, was voluntary and could not be recovered. Morris v. New Haven [Conn.] 63 A. 123.

35. Construing Tax Law § 24. Guaranty Trust Co. v. New York, 108 App. Div. 192, 95 N. Y. S. 770.

36. Bank paid taxes on stock owned by trust company, which was exempt from such tax, having paid the annual tax on trust companies. Guaranty Trust Co. v. New York, 108 App. Div. 192, 95 N. Y. S. 770.

37. As on ground that payment was under duress of levy under an invalid process. Godkin v. Doyle Tp. [Mich.] 12 Det. Leg. N. 968, 106 N. W. 882.

38. Godkin v. Doyle Tp. [Mich.] 12 Det. Leg. N. 968, 106 N. W. 882.

39. An action to recover illegal taxes paid under protest must, by Comp. Laws 1897, § 3876, be brought within 30 days after payment. Lingle v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 703, 105 N. W. 604.

40. Where complaint alleged fallure to serve notice of proposed increase in assessment, but did not allege that the published notice required by law was not given, proper notice was presumed. People's Gas, Electric & Heating Co. v. Harrell [Ind. App.] 76 N. E. 318. Complaint in action to recover taxes collected to meet bonds on the ground that the bond issue was illegal because not submitted to popular vote as required by the constitution of 1891, must show that the bonded debt was created, since such constitution was adopted. An

other taxpayers, to recover illegal taxes will be dismissed if it does not show the amount which plaintiff paid.[42] When a county has paid over taxes collected by it to creditors, an action by a taxpayer on behalf of himself and others to recover taxes paid by them will not lie.[43]

Refunding.[44]—The right of the state to collect from land taxes which it has refunded to the purchaser of an invalid certificate is clear and undisputed.[45] Such refunded taxes should be collected in the statutory manner, though mere irregularities will not subject a judgment therefor to collateral attack.[46] In Colorado, where real estate has been sold for personal taxes erroneously charged on the land, the county commissioners should refund to the purchaser the amount of the personal taxes.[47] Under the Colorado statute providing for repayment by a county to a purchaser where by mistake or wrongful act of the treasurer, clerk, or assessor, land has been sold on which no tax was due, there can be no recovery by a purchaser against a county unless the land sold was not taxable, or, by reason of a double assessment, the tax was not due.[48] The fact that the tax certificate has been declared void on other grounds is not ground for recovery.[49] Under the Washington statute, providing for a refund of road taxes upon presentation of a certificate by the road supervisor that the taxpayer assessed has done road work or had it done, a county may recover, in an action for money had and received, an amount refunded upon a fraudulent certificate, the road work certified to not having been done.[50] In such action the defendant, having voluntarily paid the tax, cannot attack its validity, the action not being one to recover a tax due.[51] Limitations will not begin to run against such action until the county has refunded the money and discovered the fraud.[52] The official who fraudulently issued the certificate is not a necessary party.[53] Under the Mississippi statute, providing that money paid by a purchaser at a tax sale shall be refunded if the sale was unauthorized, because the taxes were not due or the land was not liable, and creating a state board to audit claims of purchasers, such board has no power to decide that lands sold were not within the state, and a refund on that ground is not conclusive as against the state.[54]

allegation that the bonds were issued in 1894 is not sufficient. Hawkins v. Nicholas County [Ky.] 89 S. W. 484.

41. Where an ordinance and statute provided for assessment of property to owner on March 1, an amending ordinance making property assessable on May 1 was void, and taxes paid were held not recoverable, though taxpayer's statement referred to his ownership as of May 1, where it did not appear that he was not the owner on March 1. Wohlford v. Escondido [Cal. App.] 84 P. 56. The treasurer's tax receipt and record is not conclusive as to the time of payment, but this may be shown by other evidence. Lingle v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 703, 105 N. W. 604.

42. It will be presumed that his interest is too small to permit him to represent other taxpayers. Hawkins v. Nicholas County [Ky.] 89 S. W. 484.

43. Since, if there was a recovery, the taxpayers would be called on to pay the same. Hawkins v. Nicholas County [Ky.] 89 S. W. 484.

44. See 4 C. L. 1635.

45. Obst v. Ramsey County Com'rs [Minn.] 103 N. W. 893.

46. Refunded taxes were included in taxes for subsequent year, but were separately stated, instead of being lumped, the amount, description, name of owner, etc., being given for each year. Held such list, as published and entered in judgment book, was not invalid upon collateral attack. Obst v. Ramsey County Com'rs [Minn.] 103 N. W. 893.

47. Elder v. Chaffee County Com'rs, 33 Colo. 475, 81 P. 244.

48. Mills' Ann. St. § 3776. Elder v. Chaffee County Com'rs, 33 Colo. 475, 81 P. 244.

49. Certificate void because separate tracts assessed en masse and land sold for personal taxes. Elder v. Chaffee County Com'rs, 33 Colo. 475, 81 P. 244.

50. Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716. A railroad assessed contracted with a road supervisor to do the work, and he failed to do it, but fraudulently issued a certificate that it had been done. He was held the agent of the railroad company and not an official in making such contract, and the company was responsible for his fraud (Id.), nor would the county be estopped to bring such action by the certificate or the acts of the supervisor (Id.).

51, 52. Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716.

53. Road supervisor not necessary party.

§ 11. *Collection. A. Collectors; their authority, rights, and liabilities.*[55]—The term of office[56] and compensation[57] of tax collectors are matters of statutory regulation. Where a special contract with a collector is not authorized by law,[58] he is entitled only to legal compensation,[59] and the county may recover sums paid him in excess of such amount.[60] Collectors have only such authority as is given them by law.[61] A tax warrant issued to a collector continues in force until the whole tax is collected.[62] A surety on a collector's bond is not liable for failure of the collector to turn over money collected under an invalid levy,[63] but invalidity of the tax does not relieve the collector from liability to the county.[64]

Mandamus to compel collection of a tax lies only at the instance of one having a sufficient interest in the funds to be collected.[65]

(§ 11) *B. Methods of collection in general.*[66]—The method of collection is controlled by statute. There are, in general, two methods: summary proceedings against the person or property, and actions at law. Only express statutory authority will justify the use of either,[67] and authority to use any method must be

Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716.

54. Construing Ann. Code Miss. 1892, § 3831. Moore & McFerrin v. McGuire, 142 F. 787.

55. See 4 C. L. 1635.

56. Under Gen. Laws 1896, c. 39, § 19, a town collector of taxes holds office after expiration of the year for which he was elected, where his successor is not elected. Briggs v. Carr [R. I.] 63 A. 487.

57. Rev. St. 1892, § 1069, entitles county auditors to the graded per cent therein specified on the entire grand duplicate of the county, including moneys collected on levies made by school boards, and also to one per cent on the latter. State v. Lewis [Ohio] 76 N. E. 564. Certain statutes construed, and held that collectors in counties of the third class are entitled to 15% for collection of poll taxes. Alameda County v. Dalton [Cal.] 82 P. 1050. A forfeiture of the commissions of a tax collector under the Louisiana statute may be waived by the police jury and will be considered as waived when belated monthly settlements have been accepted, without protest or objection, for a series of years. Young v. Parish of East Baton Rouge [La.] 40 So. 768. Such an acceptance is equivalent to a voluntary payment of commissions. Id.

58. In Iowa, county supervisors have no power to employ a tax collector by special contract, providing for compensation above that provided by law. By Code § 1407, the treasurer has charge of collection matters (Massie v. Harrison County [Iowa] 105 N. W. 507), nor does Code § 491, under which supervisors may authorize employment of additional help in treasurer's office, authorize such contract (Id.).

59. Five per cent of taxes collected and paid over, under Code § 1407. Massie v. Harrison County [Iowa] 105 N. W. 507. Were such contract valid, however, the collector could recover only under its terms and would not be entitled to the statutory compensation in addition to that allowed by his contract. Petition by collector to recover statutory compensation dismissed, where he had received compensation allowed by his contract. Id.

60. Contract allowed 25% and statute allowed 5% to collector. Held, excess over 5% could be recovered. Massie v. Harrison County [Iowa] 105 N. W. 507.

61. In Kentucky a revenue officer has no authority to collect omitted license fees for the state unless directed by the auditor to bring suit (Commonwealth v. Central Consumers' Co. [Ky.] 91 S. W. 711), but where such officer sues, and prays for general relief, the court should hear evidence and cause the license taxes to be listed, if proper (Id.).

62. When a town treasurer has issued a warrant to collect a tax then payable to a person in actual possession of the office of tax collector, his authority is exhausted and he cannot be compelled to issue another warrant to another claimant of the office, since Gen. Laws 1896, c. 48, § 34, continues all warrants in force until the whole tax is collected. Briggs v. Carr [R. I.] 63 A. 487.

63. Commonwealth v. United States Fidelity & Guaranty Co. [Ky.] 89 S. W. 251. That the collector paid his premium on the bond after the surety knew its terms and conditions could not estop the surety to set up invalidity of the tax collected. Id.

64. Commonwealth v. United States Fidelity & Guaranty Co. [Ky.] 89 S. W. 251.

65. Under the Indiana statutes relating to county and township aid to railroads, though a road has been constructed and a township tax levied to raise a donation, the company has no such interest in the appropriation as to be entitled to mandamus to compel collection of the tax. Reviewing Indiana statutes and decisions on the question. State v. Clinton County Com'rs [Ind.] 76 N. E. 986.

66. See 4 C. L. 1637.

67. In the absence of statutes, no action at law will lie for the recovery of taxes whether on omitted property or otherwise. Shearer v. Citizens' Bank of Washington County [Iowa] 105 N. W. 1025. Laws 1903, c. 522, provides that taxes on city rolls may be collected by action, supplementary proceedings, or foreclosure of tax liens. Hence, the city may by action collect taxes previously levied. City of Rochester v. Rochester R. Co., 109 App. Div. 638, 96 N. Y. S. 152. Court of equity may grant relief authorized by Laws 1903, in action commenced prior

exercised in the manner prescribed.[68] It is competent for the legislature to provide, by retrospective legislation, a remedy and procedure for the collection of taxes already due.[69]

(§ 11) *C. Procedure in actions at law. Limitations.*[70]—Suits to enforce taxes must be brought within the limitation period.[71] The legislature has full power to fix a period of limitation to suits by a city to collect taxes,[72] except as to pending suits, with regard to which a reasonable time must be allowed.[73] Where a suit to collect taxes for a sinking fund for bonded indebtedness is barred as to the city, the right of the bondholder to enforce the taxes is also barred.[74] A statute authorizing the enforcement of taxes which at the time of the passage of the act were barred by limitations is unconstitutional,[75] and a tax judgment including taxes which have been so barred is to that extent void.[76] In Washington the statute of limitations is held not to run against the foreclosure of tax liens, since a tax lien cannot be satisfied or removed until the tax is paid.[77]

thereto, where pleadings permit, and the statute is in force when judgment is rendered. Id. Under Rochester City Charter, Laws 1880, c. 14, § 104, provides for an action by the city to foreclose an equity of redemption, after notice in which a deficiency judgment may be had against the owner of the land sold. Id. In Massachusetts a taxpayer who, having goods, refuses to exhibit them upon a demand by the tax collector, after a diligent search, may be lawfully arrested. In suit against a collector for assault and false inprisonment, whether be had made a diligent search for goods, prior to his demand, held for jury, the return on bis warrant to that effect being prima facie evidence thereof. Kerr v. Atwood, 188 Mass. 506, 74 N. E. 917. Under the Colorado statute authorizing an action of debt to recover personal property taxes when the remedy by distress and sale is not available, an action of debt will not lie unless it is made to appear that the property subject to the lien of the tax could not, by reasonable diligence, have been identified and proceeded against. Held that collector had not made proper effort to identify and seize property, and action of debt would not lie under 2 Mills' Ann. St. § 3771. Bergerman Bros. v. Beerbohm [Colo.] 81 P. 701. The act of 1874, regulating the manner of returning wild lands for taxes, authorizes the comptroller general to issue an execution against an unreturned lot of such land for the taxes of that year. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439.

68. In South Carolina, failure to proceed against the personalty of a defaulting taxpayer before sale of his realty renders a tax deed executed after such a sale of the realty null and void. Act 1880, §§ 9, 10. Johnson v. Jones [S. C.] 51 S. E. 805. In Kentucky, failure of the sheriff to proceed against personalty of a taxpayer does not render a sale of realty for taxes invalid. Under Const. § 171, and Ky. St. 1903, §§ 4019, 4021, 4143. Alexander v. Aud [Ky.] 88 S. W. 1103. Laws 1903, c. 522, validates certain taxes in the city of Rochester and provides a means of enforcement, but the remedy provided is not an additional one to those provided by city charter; it simply authorizes enforcement by the existing method of taxes validated by the act. City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n [N. Y.] 75 N. E. 692. The "foreclosure of tax liens" authorized by the curative act means liens created by the record of the list of lands sold in the county clerk's office, and not the lien created by the levying of the tax by the common council. Id.

69. Laws 1903, p. 148, No. 92, even if construed as not allowing redemption from execution sales as in other cases, do not violate Rev. St. 1901, § 63, prohibiting any local or special laws regulating judicial practice. Wallapai Mining & Development Co. v. Territory [Ariz.] 84 P. 85. The act does not deprive taxpayers of property without due process of law (Id.), nor is it void for uncertainty (Id.). A statute merely changing the method of procedure in the enforcement of taxes is available in the collection of taxes which became delinquent prior to the time the statute became effective. Laws 1903, p. 389, c. 73, is thus retroactive. Holthaus v. Adams County [Neb.] 105 N. W. 632. Since an appeal vacates the judgment appealed from and the cause stands in the appellate court as a pending action without judgment, the provision of § 3 of the Act of April 25, 1904, relating to joinder in suits for the sale of real estate for taxes, is applicable to suits pending at the time of its enactment and brought up on appeal subsequently thereto. Gibson v. Miller, 7 Ohio C. C. (N. S.) 96.

70. See 4 C. L. 1637, 1638; also matter under § 12A, Prerequisites to sale, 4 C. L. 1639.

71. The five year limitation statute applies to city taxes on omitted property which constitute a "liability imposed by statute." Muir's Adm'rs v. Bardstown, 27 Ky. L. R. 1150, 87 S. W. 1096.

72. Suit for taxes held barred as to taxes due four years before suit filed. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49. That the son and general agent of a taxpayer failed to bring suit to collect taxes, while city attorney, could not estop the taxpayer from setting up limitations. Id.

73, 74. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

75. Laws of 1881, p. 176, c. 135, is invalid.

An action to recover taxes on omitted property, in Iowa, must be commenced within five years from the time the taxes should have been assessed.[78] The running of the limitation statute cannot be delayed by failure of the county treasurer to give notice or make demand as required by law,[79] nor does the act of the treasurer in assessing omitted property amount to a judgment creating a new cause of action and thus avoiding the limitation statute.[80] In Georgia, neither the statute providing a bar for the state in certain cases, when the citizen would under like circumstances be barred,[81] nor the statute providing an equitable bar arising from lapse of time and laches of complainant,[82] nor the statute of limitations against actions on open accounts or implied contracts,[83] is applicable to a proceeding by the state to enforce payment of delinquent taxes on property not returned in former years; but the "dormant judgment act" of 1887 is held applicable, and a tax lien is held to be barred by failure to issue the tax execution within seven years from the date when such execution may be lawfully issued.[84] The statute was, however, held not to run against the state during the time that the comptroller general was enjoined by the Federal court from issuing any executions for taxes on the property in dispute.[85] In Louisiana, tax liens, privileges, and mortgages securing payment of taxes for years prior to the adoption of the constitution of 1898, lapse, by virtue of the provision of such constitution applicable, in three years after the adoption of such constitution.[86] The state constitution, as so construed, is held not to impair the obligation of contracts.[87]

Notice.—In tax lien foreclosure proceedings, due notice must be given persons interested[88] in the manner required by law. Thus, notices of delinquency, and the summons, writ, or other process, must be in the proper form,[89] and must be duly published[90] or otherwise served.[91]

Folsom v. Whitney [Minn.] 104 N. W. 140.

76. Folsom v. Whitney [Minn.] 104 N. W. 140.

77. State v. Mutty [Wash.] 82 P. 118.

78. Shearer v. Citizens' Bank of Washington County [Iowa] 105 N. W. 1025.

79. Code § 1374, construed. Shearer v. Citizens' Bank of Washington County [Iowa] 105 N. W. 1025.

80. Shearer v. Citizens' Bank of Washington County [Iowa] 105 N. W. 1025.

81. Civ. Code 1895, § 3777, being in derogation of common law, must be strictly construed, and does not apply to taxes. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

82. Civ. Code 1895, § 3775. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

83. A tax is not a debt within the meaning of such a statute. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

84. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. Candler, J., dissenting, holds that the act of 1887 (Pol. Code §§ 890, 891) interposes a bar to the enforcement of claims for taxes only after they have been placed in execution, and do not apply to the state's claim for taxes before an execution has been issued. Id., 53 S. E. 263-266.

85. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251.

86. By Const. 1898, § 186, tax liens, etc., for 1870 to 1876 lapse in three years after the adoption of the constitution. Rousset v. New Orleans [La.] 39 So. 596.

87. Rousset v. New Orleans [La.] 39 So. 596.

88. Publication of process directed to "H. E. Everts" held insufficient to support tax judgment against Henry E. Everts, a nonresident, known by the tax attorney to be owner. Evarts v. Missouri Lumber & Min. Co. [Mo.] 92 S. W. 372. Where at the time of tax proceedings the land in question was occupied by the owner as a homestead, a judgment and sale were void where service of process was on unknown owners by publication and the true owner did not appear. Crosby v. Terry [Tex. Civ. App.] 91 S. W. 652. In a proceeding by the holder of a certificate of delinquency, under the Washington statute, to foreclose, notice need be given only to the owner described in the certificate. That persons in possession and claiming to be owners were not notified, held immaterial. Rowland v. Eskland [Wash.] 82 P. 599. Where the owner's name was omitted from the summons in a tax foreclosure proceeding, and the names of strangers inserted, and neither the owner nor his grantees had any actual notice of the proceeding, the court had no jurisdiction and the tax deed pursuant to such proceeding was void. Anderson v. Turati [Wash.] 81 P. 557.

89. The statement of the amount of a tax and penalty in a published delinquent list is sufficient if such that a man of ordinary intelligence could determine the amount therefrom. Statement held sufficient though no dollar mark or decimal point was used, they being indicated at the head of the column. Salisbury v. Stenmoe [Minn.] 105 N. W. 416. A material variance between

Parties.—Suit, on behalf of the state or municipality, must be brought by the proper officer.[92] A mortgagee of real property is not a necessary party to an action against the owner of the fee to foreclose a tax lien.[93]

Pleading.[94]—In a suit to foreclose a tax lien, a complaint alleging that certain defendants owned the premises in fee simple, and that other defendants had or claimed some interest therein subordinate to the tax lien, is not objectionable, as to the defendants first named, as precluding any interest in the other defendants.[95] The complaint need not set out the assessment rolls, ordinances and proceedings, which are matters of public record.[96] A city in a suit to collect taxes is required to allege and prove facts showing prima facie a valid levy and assessment and that

the delinquent list and the notice for judgment and order of sale deprives the court of jurisdiction to proceed. Where notice gave description of property as located in "Herman & Krutz's Roseland Park Addition," and list as located in "Sherman & Krutz's," etc., the variance was fatal. Smythe v. People, 219 Ill. 76, 76 N. E. 82. In a proceeding to foreclose liens embraced in a certificate of delinquency issued 5 years after the date of delinquency, under Laws 1901, c. 178, § 3, a notice by publication to the person or persons appearing as the owner or owners upon the treasurer's rolls at the time the certificate is issued is sufficient, where the notice also runs to every person, firm, or corporation, known or unknown, having or claiming any interest in the premises. Spokane Falls & N. R. Co. v. Alutz, 38 Wash. 8, 80 P. 192. A citation or notice to a nonresident in a tax foreclosure proceeding, not complying with Gen. Laws 1897, c. 103, § 15, cannot support a judgment for taxes. Garvey v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 786, 88 S. W. 873. Though "E. Coulon" was used in assessment, summons to "Emil Coulon" was sufficient. Stoll v. Griffith [Wash.] 82 P. 1025. Summons by publication in suit to foreclose tax certificate held not to comply with Laws 1901, c. 178, requiring a direction to the owner to appear within 60 days after the date of the first publication, exclusive of the day of the first publication. Owen v. Owen [Wash.] 84 P. 606. Summons in tax foreclosure proceeding held to require defendants to appear within 60 days exclusive of the day of service, as required by law. Stoll v. Griffith [Wash.] 82 P. 1025. A summons in a tax foreclosure proceeding, which omits the owner's name as given in the tax rolls and list of delinquency, is insufficient. Sess. Laws 1901, c. 178, § 1. Anderson v. Turati [Wash.] 81 P. 557.

90. The court has no jurisdiction to enter judgment against a lot as to which there was no legal publication of the delinquent list. Lot not sufficiently described in delinquent list. Holmes v. Loughren [Minn.] 105 N. W. 558. In Missouri an unverified petition in a back tax suit alleging nonresidence of defendant is sufficient to support an order for publication of process. Evarts v. Missouri Lumber & Min. Co. [Mo.] 92 S. W. 372. Record of county board held to show designation by board of paper for publication of notice of petition under "Scavenger Act." State v. Cronin [Neb.] 106 N. W. 986. Revenue act § 186 requires copy of newspaper in which list of delinquent lands was published to be filed as part of the records of the "county court." The statute is mandatory and compliance therewith necessary to confer jurisdiction on county court to render judgment against delinquent lands. Nowlin v. People, 216 Ill. 543, 75 N. E. 209. Filing such copy in the office of the "county clerk" as the part of the records of his office is not a compliance with the statute. Id.

91. In Pennsylvania a scire facias sur municipal lien, not properly served, does not continue the lien beyond the time of its expiration. A writ was issued within 5 years after the claim was filed, but was returned with the filing of an affidavit that a registered owner was a nonresident or could not be found, as required by statute. An alias writ was served within 5 years after the filing of the first, but not within 5 years after filing of the claim. The second writ was invalid. City of Philadelphia v. Cooper, 212 Pa. 306, 61 A. 926. Service of a writ of scire facias personally on the registered owner in the statutory manner is sufficient without inquiry as to the title of such registered owner. Philadelphia v. Merritt, 29 Pa. Super. Ct. 433.

92. Laws 1905, p. 338, c. 141, § 5, requiring the attorney general, on request of the comptroller, to sue railroad corporations for taxes in the name of the state, and Laws 1905, p. 358, c. 148, requiring the same officer to prosecute such cases against certain other corporations, are valid. County and district attorneys cannot prosecute such cases. Brady v. Brooks [Tex.] 14 Tex. Ct. Rep. 163, 89 S. W. 1052. Under Comp. Laws 1897, §§ 2868, 2871, a village treasurer does not need authority from the county treasurer to bring suit to collect delinquent taxes, nor is it necessary for him to prove his authority to represent the village, as Laws 1897, § 762, requiring proof of attorney's authority when requested, does not apply. Village of Wayne v. Goldsmith [Mich.] 12 Det. Leg. N. 516, 104 N. W. 689.

93. Quaere, whether he is a proper party? Hall v. Moore [Neb.] 106 N. W. 785.

94. See 4 C. L. 1638, n. 94 et seq.

95. If other defendants had any interest it would be their duty to allege it by answer; if they had no interest, the judgment would not affect them. City of Port Townsend v. Trumbull [Wash.] 82 P. 715.

96. Motion to make more definite properly denied. City of Port Townsend v. Trumbull [Wash.] 82 P. 715.

the taxes were due and unpaid.[97] In Michigan a petition for sale of land for taxes is sufficient if substantially in the statutory form.[98] It should properly describe the lands to be sold.[99]

Evidence.[1]—It will be presumed that taxing officials have performed the duties prescribed by law,[2] and that an assessment was regularly made pursuant to a valid law.[3] The admissibility[4] and effect[5] of records are treated in the notes.

Judgment.[6]—If the court is without jurisdiction of a tax proceeding its decree is subject to collateral attack,[7] but if the court had jurisdiction the judgment cannot be collaterally attacked by one who was a defendant in that suit, and who was properly brought in by personal service or by publication,[8] nor can the title of a purchaser under such a judgment be defeated by showing that the taxes for which the judgment was rendered had been paid before institution of the suit, before rendition of judgment, or before sale.[9] Suppression of the fact that taxes had been paid is not such fraud in the procurement of the tax judgment as to render the same void, as against an innocent purchaser at the sale.[10] Objections which should have been raised in the foreclosure proceedings cannot be made the basis of collateral attack.[11] Decisions regarding default judgments,[12] the form of the decree,[13] and the time of entry,[14] are given in the notes.

97. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

98. Goodell v. Auditor General [Mich.] 12 Det. Leg. N. 947, 106 N. W. 890.

99. Description of lands in petition by auditor general for sale for taxes held insufficient. Jackson v. Mason [Mich.] 12 Det. Leg. N. 1038, 106 N. W. 1112.

1. See 4 C. L. 1637.

2. Presumed, in action to collect taxes, that delinquent lists were properly returned and certified, and that assessment was equalized by supervisors. Wallapai Mining & Development Co. v. Territory [Ariz.] 84 P. 85.

3. It will be presumed that an assessment was regularly made under a valid ordinance, and not under a subsequent void ordinance. Woblford v. Escondido [Cal. App.] 84 P. 56.

4. That assessment rolls show payment of taxes does not affect the admissibility or effect of the same as evidence when it is shown that the entry is void and of no effect because made pursuant to an invalid compromise settlement of the taxes. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

5. Under Houston charter, assessment rolls, or a statement made therefrom, signed and certified by the city assessor and collector, make a prima facie case in a suit to collect taxes. City of Houston v. Stewart [Tex. Civ. App.] 90 S. W. 49.

6. See 4 C. L. 1638, n. 97.

7. Mayot v. Auditor General [Mich.] 12 Det. Leg. N. 279, 104 N. W. 19. When county court has no jurisdiction to order a sale, the judgment for taxes is not conclusive evidence of the validity of the sale. Glos v. Collins, 110 Ill. App. 121.

8, 9, 10. Evarts v. Missouri Lumber & Min. Co. [Mo.] 92 S. W. 372.

11. Where the record shows a tax to be an apparent lien on land sold, the objection that the land is not in fact bound must be raised in the foreclosure proceedings, the judgment of foreclosure cannot be collaterally attacked on that ground. Property was assessed to the record owner, who thereafter conveyed an undivided half interest and paid half the taxes assessed. This was not notice of his conveyance, since he had a right to pay one-half. The remaining half became a lien on the land, the record not showing a case of partition between tenants whereby taxes become a lien only on the parts awarded each tenant. Moyer v. Foss [Wash.] 83 P. 12.

12. A person against whose property a default decree upon constructive service has been rendered under Cobbey's Ann. St. 1903, §§ 10644-10691, is not entitled as a matter of right to have the same opened up after the term, either under the provisions of Code Civ. Proc. § 82, or under the general equity powers of the court. State v. Several Parcels of Land [Neb.] 106 N. W. 663. An attorney who appeared voluntarily for defendants in default in a proceeding under the "Scavenger Act" may be disregarded and a default entered against each defendant. Several Tracts of Land v. State [Neb.] 106 N. W. 665.

13. Failure of judgment in tax foreclosure proceeding to contain a direction to the clerk to make out and enter an order of sale held not to invalidate it, since the statute does not prescribe the form of such judgment. Warner v. Miner [Wash.] 82 P. 1033. Where petition for taxes named defendant properly, as did order of publication of summons and proof thereof, the fact that the judgment and deed gave a wrong middle initial did not render the proceedings void and subject to collateral attack by one who bought from the former owner with knowledge of the tax title. Morrison v. Turnbaugh [Mo.] 91 S. W. 152.

14. Decree of sale held to have been made after five days from date of hearing as required by Pub. Acts 1893, p. 384, No. 206, § 66. Wolverine Land Co. v. Davis [Mich.] 12 Det. Leg. N. 440, 104 N. W. 648.

Costs.—Liability for costs is statutory.[15]

Appeals.[16]—Appellate procedure is controlled by statute.[17]

(§ 11) *D. Interest and penalties.*[18]—Taxes do not bear interest unless the statute so provides.[19] When collectible by suit, taxes bear interest from the time suit is brought.[20] The amount of penalties recoverable[21] and the mode of their recovery[22] depend also upon the statute. A back assessment on property omitted in former years cannot include penalties for such years.[23]

§ 12. *Sale for taxes. A. Prerequisites to sale.*[24]—It is essential to the validity of a tax sale that all the steps necessary to fix liability for the taxes have been duly taken as required by law,[25] and that such taxes are due and unpaid at the time of the sale.[26] Due notice of the sale must be given.[27]

15. In a suit to recover back taxes for the year 1890, in which no recovery was had because of double assessment, the county is liable for costs. Construing Laws 1891, c. 26, § 18, and c. 174, § 75. State v. Alexander [Tenn.] 90 S. W. 20.

16. See 4 C. L. 1639, n. 5.

17. Laws 1903, c. 59, § 4, requires an appeal in a tax foreclosure proceeding to be taken within 30 days after rendition of judgment. A dismissal is a final judgment within the meaning of this section. Harris v. Levy [Wash.] 81 P. 550. An appeal from an order denying a motion to vacate a judgment foreclosing a tax lien is controlled by the general statute of appeals, hence the bond required by Laws 1897, c. 71, § 104, as amended by Laws 1903, c. 59, § 4, in case of appeal from a judgment of foreclosure, need not be filed. Owen v. Owen [Wash.] 84 P. 606.

18. See 4 C. L. 1639, n. 6.

19. Henderson Bridge Co. v. Com., 27 Ky. L. R. 1104, 87 S. W. 1088. No interest on taxes in Georgia prior to act Nov. 11, 1889. Georgia R. & Banking Co. v. Wright [Ga.] 53 S. E. 251. No interest is recoverable on the 20% penalty allowed in the recovery of back taxes by a revenue officer, under Ky. St. 1903, §§ 4263, 4267. Licking Valley Bldg. Ass'n No. 3 v. Com. [Ky.] 89 S. W. 682.

20. Henderson Bridge Co. v. Com., 27 Ky. L. R. 1104, 87 S. W. 1088. In an action to recover an unpaid organization tax from a corporation, only 6% interest on the amount recovered from the date of filing the petition may be had. Ky. St. 1903, §§ 4170, 4174, allowing 10% from the time taxes on omitted property were due does not apply. Licking Valley Bldg. Ass'n No. 3 v. Com. [Ky.] 89 S. W. 682.

21. A county tax on a corporation franchise bears the 6% penalty imposed by Ky. St. 1903, § 4143. Henderson Bridge Co. v. Com., 27 Ky. L. R. 1104, 87 S. W. 1088. Acts 1902, p. 134, c. 80, § 10, fixes the penalty for nonpayment of privilege taxes as 10% of the amount, and the levee board cannot change the amount by order. S. Zemurray & Co. v. Bouldin [Miss.] 40 So. 15. The Shreveport city charter (Act No. 158, p. 305, § 14, of 1898), providing a penalty of 2 per cent per month on taxes unpaid from and after November 1 of the current tax year, does not violate Const. 1898, art. 233, since that article leaves the matter of penalties and date of delinquency to the legislature. Victoria Lumber Co. v. Rives [La.] 40 So. 382.

22. The penalty fixed by Acts 1902, c. 80, § 10, for nonpayment of a privilege tax, can be exacted only by judgment of a court from one convicted of a default. The tax collector cannot exact it. S. Zemurray & Co. v. Bouldin [Miss.] 40 So. 15.

23. Back taxes for 3 years assessed in 1903 by supplemental roll do not become delinquent until after the date of delinquency of the 1903 taxes. Victoria Lumber Co. v. Rives [La.] 40 So. 382.

24. See 4 C. L. 1639.

25. See discussion of such steps in preceding sections. It is essential to the validity of a sale that a tax was assessed by the proper authorities, was due for one whole year, and remained unpaid at the time of the sale. If several taxes were assessed, it is sufficient if only one was legally made and remained unpaid. Trexler v. Africa, 27 Pa. Super. Ct. 385.

26. A sale for taxes which have in fact been paid by the owner is void. Glos v. Shedd, 218 Ill. 209, 75 N. E. 887. A tax sale made in enforcement of taxes part of which have been paid is void. Such sale cannot be aided by the prescription law. Const. 1898, art. 233. Harris v. Deblieux [La.] 38 So. 946. Payment of all taxes had been made in one parish, but portion of tract also assessed in another parish was sold for nonpayment of taxes in such parish. The sale was wholly void. Booksh v. A. Wilbert Sons Lumber & Shingle Co. [La.] 39 So. 9. In North Dakota the auditor may include in the annual sale for delinquent taxes not only unpaid taxes for the next preceding year, but also for any preceding year, if for any reason the lands charged therewith have not been previously sold. Scott & Barrett Mercantile Co. v. Nelson County [N. D.] 104 N. W. 528. A tax sale for an excessive amount, as for all the taxes assessed when a part thereof has been paid, is void. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21.

27. Where paraphernal property of a married woman, duly recorded, was assessed in the name of the husband, and sold under such assessment without notice to the wife or husband, the sale was a nullity. Harris v. Deblieux [La.] 38 So. 946. Where names of state and county were omitted in description of land in notice to owners, the notice was insufficient and the sale invalid. Tucker v.

(§ 12) *B. Conduct of sale.*[28]—Statutes regulating tax sales must be strictly followed.[29] The sale should be at the place[30] and time[31] required by law. Only so much land should be sold as is necessary to realize the amount due,[32] but when the whole lot or tract assessed has been sold, it will be presumed that a sale of it was necessary,[33] and it is not necessary for the officer making the sale to certify in his return that it was necessary to sell the whole, or that he offered for sale a quantity less than the whole.[34] Tracts separately assessed should be separately sold.[35] While immediate payment in full is usually required, a slight delay in payment is not a matter of which the owner can complain.[36] That the bidder and the person to whom the certificate was issued were different persons does not invalidate a sale where it appears that both acted for the same principal.[37] An otherwise valid tax sale is not rendered invalid by an incorrect description in the tax deed. The deed is subject to correction.[38] To complete a purchaser's title, in Pennsylvania, when his bid exceeds the taxes and costs, he must give bond for payment of the surplus,[39] but where a statement made to the purchaser shows no surplus, his title is not lost by failure to enter such bond.[40] The mere fact that a purchaser paid by draft will not defeat his title where his deed recites payment of the bid and it is not shown that the amount was not received by the treasurer.[41]

(§ 12) *C. Return of sale and confirmation thereof.*[42]—The return of the sale should properly describe the property[43] and designate the purchaser,[44] and contain the other recitals required by law.[45] An order overruling a motion to deny

Van Winkle [Mich.] 12 Det. Leg. N. 658, 105 N. W. 607. Notice served on record owners of land being fatally defective, a valid notice to one owning a timber interest in the land is not sufficient to entitle a purchaser at the tax sale to possession. Id. Though the publication of notice of a tax sale can be proved only by the affidavit required by law, yet the fact that such affidavit was made and filed as required by law may be proved by parol. Parol evidence competent to prove Mills' Ann. St. § 3885 was complied with. Herr v. Graden, 33 Colo. 527, 81 P. 242. A notice of a tax sale published in a newspaper, legally designated and otherwise qualified to make such publication, is not illegal because of failure of the owner or manager to file with the county auditor an affidavit setting forth its qualifications as required by Laws 1890, c. 120, § 2. Blakemore v. Cooper [N. D.] 106 N. W. 566. Evidence insufficient to prove that property was not properly described in notice of tax sale. Id. The statutory provisions granting the landowner the right to object to the confirmation of sale, and defining the grounds of objection, afford him an opportunity to have the question of the validity of the tax determined before he is deprived of his property, but he may be required to wait until confirmation is applied for to litigate that question. State v. Several Parcels of Land [Neb.] 106 N. W. 663.

28. See 4 C. L. 1642.

29. Kann v. King, 25 App. D. C. 182.

30. Under Laws 1896, p. 129, c. 124, § 3, tax sales must be held in the district where the land is located. Cramer v. Sides [Miss.] 39 So. 693.

31. A sale on a day not appointed by law is void. Ross v. Royal [Ark.] 91 S. W. 178.

32. A sheriff is only authorized to sell so much of land as is necessary to satisfy the judgment for taxes. State v. Elliott [Mo. App.] 90 S. W. 122. A sheriff, selling land for taxes, is required to sell only so much thereof as will be sufficient to satisfy the whole of the taxes, interest, and commissions. Duerr v. Snodgrass [W. Va.] 52 S. E. 531.

33, 34. Duerr v. Snodgrass [W. Va.] 52 S. E. 531.

35. Sale void under Laws 1878, c. 3, § 39, where three separate and distinct tracts of land, not even contiguous, assessed to three different unknown owners were sold in lump for one bid. Morris v. Myer [Miss.] 40 So. 231.

36. Postponement of payment to a time immediately following sale held not such a violation of Code § 1426 as to invalidate sale. Farmers Loan & Trust Co. v. Wall [Iowa] 106 N. W. 160.

37. Farmers' Loan & Trust Co. v. Wall [Iowa] 106 N. W. 160.

38. Harding v. Auditor General [Mich.] 12 Det. Leg. N. 270, 104 N. W. 39.

39, 40, 41. Trexler v. Africa, 27 Pa. Super. Ct. 385.

42. See 4 C. L. 1643.

43. It is not essential to the validity of a tax deed that the same description of the land used in the delinquent list should be used in the return of the sale. Duerr v. Snodgrass [W. Va.] 52 S. E. 531. All that is required in either is a description sufficient to identify the land and give notice to the owner of the assessment or sale. Id.

44. Word "do" used for "ditto," when placed under name of purchaser and in same column, is sufficient to designate the purchaser in a return of a sale. Duerr v. Snodgrass [W Va.] 52 S. E. 531.

45. Failure of tax collector in district to

confirmation of a judicial sale and to set aside the sale is not final or appealable.[46] A decree confirming a tax title cuts off all inquiry as to the regularity and validity of the sale.[47] A finding by the court in a proceeding to confirm a tax title that petitioner paid the taxes for the three years preceeding the confirmation is final and conclusive, in the absence of proof of fraud practiced on the court.[48]

§ 13. *Redemption.*[49]—The owners of land, or persons having an interest therein, are usually given a right to redeem from tax sales,[50] the manner of claiming and exercising the right,[51] and the time within which it must be exercised,[52] depending upon the statute.

One seeking to redeem has the burden of proving such an interest in the land as will entitle him to that right.[53] Paper title is not indispensable.[54] One who holds under a donation deed and who has paid taxes for a number of years has a lien on the land constituting an interest therein such as entitles him to redeem.[55] One in possession under a claim of right by virtue of a deed may redeem from a tax sale though he does not prove that title passed by the deed.[56] The homestead interest of a minor is sufficient to entitle him to redeem the fee.[57] In a suit by the state to sell land as forfeited in the name of a certain owner, wherein the owner seeks to redeem and an adverse claimant resists redemption, the burden is upon such adverse claimant to prove his contention that the land in question was a part of an earlier grant of land to him from the state.[58]

One seeking to redeem must reimburse the purchaser at the sale,[59] but a tender of the amount due may be excused if it has previously been offered.[60] Where there is no tender of taxes and the value of improvements, the one seeking to redeem is not entitled to any rents until the holder under the tax sale has filed an answer

state with certainty, in his report to the recorder of deeds, the amount of taxes due on property sold, the cost of sale, or the amount for which sold, invalidates a tax deed issued under the sale. Kann v. King, 25 App. D. C. 182. A certified tax sale list which fails to show specifically and definitely the amount of each item of taxes, penalties, and costs, as required, among other things, by Acts 1899, p. 1136, c. 435, § 55, does not divest the owner's title and vest it in the state or a vendee of the state. Hamilton v. Brownsville Gaslight Co. [Tenn.] 90 S. W. 159.

46. Hall v. Moore [Neb.] 106 N. W. 785.

47. That a decree recited a sale on a day not authorized by law did not invalidate it. Boynton v. Ashabranner [Ark.] 91 S. W. 20.

48. Evidence that the owner paid the taxes held not ground for setting aside decree of confirmation, though it recited that petitioner had presented tax receipts. Boynton v. Ashabranner [Ark.] 91 S. W. 20.

49. See 4 C. L. 1645.

50. Const. art. 9, § 3, which grants the owner of real estate sold for nonpayment of taxes or assessments the right of redemption for two years from the date of the sale is self-executing, and a junior lien holder is not entitled to a decree for sale of such property without the right of redemption. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317.

51. No written application for redemption is necessary under Code 1896, § 4091. The right may be claimed by letter to the judge of probate inclosing the proper amount. Roach v. State [Ala.] 39 So. 685. Where tax sale was confirmed in 1895, owner could not, under existing law, redeem by paying taxes to the commissioner who made the sale. Gavin v. Ashworth [Ark.] 91 S. W. 303.

52. One seeking to redeem from a foreclosure sale based on a tax lien must bring his action therefor within two years from the date of the tax sale. Clifford v. Thun [Neb.] 104 N. W. 1052.

A minor has the right to redeem a homestead in which he has an interest until the expiration of two years after reaching his majority. Kirby's Dig. § 7095. Cowley v. Spradlin [Ark.] 91 S. W. 550.

53. Burden on one claiming under donation deed from state to prove title. Waterman v. Irby [Ark.] 89 S. W. 844.

54. Adverse possession for 10 years would be sufficient if shown. Roach v. State [Ala.] 39 So. 685.

55. Waterman v. Irby [Ark.] 89 S. W. 844.

56. Such a claimant is an "owner" within the meaning of the redemption statute. Hillis v. O'Keefe [Mass.] 75 N. E. 147.

57. Cowley v. Spradlin [Ark.] 91 S. W. 550.

58. State v. Lowe [W. Va.] 53 S. E. 116.

59. One seeking to redeem must pay purchaser all taxes and costs incurred, with interest, and the cash value of improvements made after two years from date of sale. Cowley v. Spradlin [Ark.] 91 S. W. 550.

60. A tender is excused in a suit to redeem where plaintiff proves that he offered defendant, by his agent, the sum which would be due at the expiration of the period of redemption. Hillis v. O'Keefe [Mass.] 75 N. E. 147.

denying the right to redeem.[61] Though taxes and the cash value of improvements must be paid by one seeking to redeem, it is error for the court to order a sale of the land to pay the amount ascertained to be due, and to fix a time within which the redemption must be made.[62] One seeking to redeem in a case where no proper notice was given of the expiration of the period of redemption need not show payment of the taxes,[63] but one not entitled to such notice cannot attack a tax deed on the ground of want of it.[64]

The right of a redemptioner who has taken the steps required by law is not affected by a delay of the tax official in issuing the certificate of redemption.[65] A purchaser at a mortgage foreclosure sale who redeems the land purchased from tax sales is entitled to be subrogated to the rights of the state as against a judgment creditor of the mortgagor who redeems from foreclosure.[66]

Mandamus lies to compel issuance of a warrant to the holder of a tax title for money paid in for redemption.[67]

Notice of the expiration of the period of redemption[68] must usually be given before the purchaser at the sale is entitled to a deed[69] or to possession,[70] or before the owner's equity of redemption can be foreclosed.[71] Statutory requirements control as to the length of the notice,[72] the contents thereof,[73] the manner of service,[74]

61. Cowley v. Spradlin [Ark.] 91 S. W. 550.

62. Terms of redemption are fixed by the statute and court cannot change them or limit rights thereby given. Waterman v. Irby [Ark.] 89 S. W. 844.

63. Iowa Loan & Trust Co. v. Pond [Iowa] 105 N. W. 119.

64. Ownership of tract not shown, hence no notice of redemption necessary as to such tract. Iowa Loan & Trust Co. v. Pond [Iowa] 105 N. W. 119.

65. Redemptioner paid the amount required. Roach v. State [Ala.] 39 So. 685.

66. Northern Inv. Co. v. Frey Real Estate & Inv. Co., 33 Colo. 480, 81 P. 300.

67. Under Laws 1899, p. 224, c. 208, amending Gen. St. 1894, § 1605, upon presentation of a certificate of tax sale, or an assignment thereof, a county auditor must issue a warrant to the holder for money paid in for redemption. That a warrant had been issued wrongfully to the original purchaser, who had assigned, is no defense to a mandamus proceeding to compel issuance of a warrant to the assignee. State v. Brasie [Minn.] 104 N. W. 962.

68. See 4 C. L. 1647.

69. Laws 1890, c. 132, which required service of notice to terminate right of redemption, is still in force as to sales made under that statute, and deeds issued without such notice are void. Blakemore v. Cooper [N. D.] 106 N. W. 566.

70. A notice to redeem is a condition precedent to the right to writ of assistance to gain possession of land under a tax deed. See Pub. Acts 1897, p. 294, No. 229. Williams v. Olson [Mich.] 12 Det. Leg. N. 560, 104 N. W. 1101.

71. The Rochester city charter requires a notice to be served upon the owner before his equity of redemption can be foreclosed. Curative act 1903 (Laws 1903, c. 522) construed, and held that such notice was not dispensed with as a condition precedent to foreclosure as provided for by the act. City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n [N. Y.] 75 N. E. 692.

72. Rev. St. 1899, § 1895, prior to the 1901 amendment, required notice of the expiration of the period of redemption at least 3 months before it expired. Held a notice dated less than one month before the expiration of such period, service of which is accepted on the last day thereof, is insufficient to warrant execution of deed. Matthews v. Nefsy, 13 Wyo. 458, 81 P. 305.

73. Where lots are separately described and sold, the notice of the sale must contain separate descriptions of each lot and the amount paid for each. Jackson v. Mason [Mich.] 12 Det. Leg. N. 1038, 106 N. W. 1112. Where notice of sale described lands as 944 acres as per plat instead of 9.44 acres, but subdivision was given and plat and county records referred to, the description was not fatally defective. Id. A notice to redeem by a purchaser who has received a single tax deed for taxes for several years need not show the amount of taxes for each year. Williams v. Olson [Mich.] 12 Det. Leg. N. 560, 104 N. W. 1101. The fact that such notice is addressed to persons named, describing them as owners, does not invalidate it. Id.

74. Statutes requiring holders of tax certificates to serve on the person in possession, and the one in whose name property is assessed, a notice of the sale and proceedings thereunder, and to file an affidavit concerning the service of such notice, is mandatory. Code § 1441. Grimes v. Ellyson [Iowa] 105 N. W. 418. The record as made up by the filing of the affidavit of service cannot be aided by evidence aliunde. Id. A sheriff may serve a notice to redeem by a deputy. Williams v. Olson [Mich.] 12 Det. Leg. N. 560, 104 N. W. 1101. Sheriff's return of service of notice to redeem is not conclusive. If denied, proper service must be proved by one seeking possession of land sold for taxes, and the owner may, in a proceeding by him, show that no proper service was made. Id.

and the persons by whom[75] and to whom[76] notice must be given. Notice is not essential when not possible.[77]

§ 14. *Tax titles. A. Who may acquire.*[78]—Deeds are usually issued to the purchaser at the sale or his heirs or assigns.[79] One who is under the obligation to pay taxes cannot, directly or indirectly, purchase at the sale, caused by his own default, and thereby acquire title to the property sold.[80] Thus, the purchase of the property by a life tenant, whose duty it is to pay the taxes, amounts in law only to a payment of the taxes.[81] As a general rule, if one co-tenant acquires title to the common property at a tax sale, the title so acquired inures to the benefit of the other co-tenants,[82] but this rule has no application where the alleged co-tenant, who purchases, claims adversely to the others at the time of the sale.[83] A married woman is not by reason of her relation to her husband prohibited from purchasing tax titles to property which he holds under a lease from a third person.[84] One who fraudulently has land assessed to himself, allows the taxes to become delinquent, and procures another to purchase for him at the tax sale, obtains no title, the land having also been assessed to the true owner who has regularly paid the taxes when due.[85] A purchaser at a tax sale of an entire tract of land, owned in separate parcels by himself and two others, one of whom, at the time of the purchase, contributes for that purpose more than the proportion which his land bears to the whole tract, with the understanding and agreement that, as to the parts owned by the purchaser and the party so contributing, the purchase shall operate as a redemption, acquires no title to the land of the party so contributing as against him.[86] One against whom taxes on land have been assessed and who has paid the same may nevertheless acquire a tax title under a sale of such land for taxes, and may claim the land by adverse possession thereunder.[87]

(§ 14) *B. Rights and estate acquired by purchaser at sale.*[88]—The purchaser at the sale acquires only the interest sold[89] and owned by the parties to the action for the taxes at the time of the decree of sale.[90] The sale itself transfers

75. Under Code § 1441, requiring the "holder of a certificate" to issue the redemption notice, where the purchaser at the sale assigned to a nonresident, and the purchaser's name was used in perfecting the title, and he was the party interested, notice in the name of the nonresident "holder" complied with the law. Nugent v. Cook [Iowa] 105 N. W. 421.

76. Under Code § 1441, notice must be served on the person in possession, though the property is assessed and taxed as "unknown." Grimes v. Ellyson [Iowa] 105 N. W. 418. Service on the real owner is not alone sufficient. Id. Notice need not be served on the personal representative of the person to whom the land was assessed, such person having died before expiration of the redemption period. Nugent v. Cook [Iowa] 105 N. W. 421. An assessment to "A. et al" is in legal effect an assessment to unknown owners (Berg v. Van Nest [Minn.] 106 N. W. 255), and the sheriff need not search the records for the true owner. If the lands are vacant and unoccupied, he may serve the notice on unknown owners by publication (Id.).

77. Where person, to whom land sold for taxes was assessed, had died, no publication of notice was necessary. Nugent v. Cook [Iowa] 105 N. W. 421.

78. See 4 C. L. 1648.

79. **Executors** are the "assigns" of their testators within the meaning of Laws 1891, c. 100, § 110, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns." Blakemore v. Cooper [N. D.] 106 N. W. 566.

80. See 4 C. L. 1648, n. 97.

Held not within rule: Defendants orally agreed to buy certain lands, subject to taxes, but failed to keep their agreement. Held they did not become obligated to pay the taxes and hence could acquire the state's tax title. Ball v. Harpham [Mich.] 12 Det. Leg. N. 303, 104 N. W. 353.

81. The life tenant cannot acquire independent title by becoming purchaser at the sale. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747.

82, 83. Stoll v. Griffith [Wash.] 82 P. 1025.

84. Kampfer v. East Side Syndicate [Minn.] 104 N. W. 290.

85. Turner v. Ladd [Wash.] 84 P. 866.

86. Frum v. Fox [W. Va.] 52 S. E. 178.

87. Carpenter v. Smith [Ark.] 88 S. W. 976.

88. See 4 C. L. 1648.

89. Where a sale is of the interest of a delinquent life tenant only, and the deed mentions only his interest, such deed does not convey the interest of the remaindermen. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

90. A decree in a personal action to enforce payment of levee taxes binds only the

to the purchaser the lien of the state for taxes,[91] which is paramount to all other liens,[92] but perfect title cannot be acquired until the period of redemption has expired, due notice thereof having been given.[93] Though under the laws of Georgia the officer making a tax sale executes a tax deed to the purchaser before the time for redemption has lapsed, yet the title acquired by such purchaser is not a perfect fee simple title, but an inchoate or defeasible title subject to the right of the owner to redeem within the time prescribed by the statute.[94] Although a tax deed issued before the time for redemption has expired, as allowed by law, is recorded, and contains no reference to the right of redemption, the public laws giving such right are sufficient notice thereof to persons dealing with the title, and are also notice of the nature of the title conveyed by the tax deed.[95] Thus, where a tax deed of wild land was recorded, but the owner redeemed and received the tax deed but did not take a reconveyance, and the purchaser at the tax sale conveyed to a third person after expiration of the period of redemption, such third person having no actual notice of the redemption by the owner, it was held that the owner's title was superior to that of the grantee of the purchaser at the sale.[96]

The title conveyed under a tax sale is not derivative but a new title, and the purchaser, if his deed is valid, takes free from any incumbrance, claims, or equities connected with the prior title.[97] A judgment for taxes against the apparent owner conveys a good title to the purchaser at the tax sale as against the true owner whose deed is not recorded,[98] but this rule has no application where there is no record title and no apparent owner other than the true owner in possession.[99] Thus, a suit against the owner in the name shown by the record gives the court jurisdiction regardless of a subsequent remarriage and change of name of such owner.[1] Where a judgment for delinquent taxes is regular on its face, and recites due service on unknown owners, a vendee of the purchaser at the sale, who purchases in good faith without notice of any irregularity, will be protected in his title as against a collateral attack, though service on unknown heirs was in fact insufficient.[2]

The doctrine of lis pendens does not apply to sales of land for taxes,[3] and the lien of a purchaser at a sale is not affected by the fact that at the time of the sale

parties thereto and their privies, and a sale thereunder passes only such title as the parties thereto had at the time of such decree and sale. Kirby's Dig. § 6321. Hence, mere proof of conveyance pursuant to such sale, without proof of title in the parties to the action is not sufficient to support ejectment. Wilson & Beall v. Gaylord [Ark.] 92 S. W. 26.

91. Rev. St. 1892, § 2880. Security Trust Co. v. Root, 72 Ohio St. 535, 74 N. E. 1077.

92. Rev. St. 1892, § 2838. Security Trust Co. v. Root, 72 Ohio St. 535, 74 N. E. 1077.

93. See 4 C. L. 1648, n. 5; also § 13 herein. Under Laws 1880, c. 14, the city of Rochester does not acquire title to lands bought in by it at tax sale until the owner's equity of redemption has been foreclosed, and until that time taxes may be assessed against the owner. City of Rochester v. Rochester R. Co., 109 App. Div. 638, 96 N. Y. S. 152.

94, 95, 96. Bennett v. Southern Pine Co., 123 Ga. 618, 51 S. E. 654.

97. Topliff v. Richardson [Neb.] 107 N. W. 114.

98. The tax collector need only look to the record to see who is the owner of the property. Wood v. Smith [Mo.] 91 S. W. 85. A purchaser at a tax sale, under a judgment for taxes, where the record owner is made the party defendant, acquires good title as against the holder of an unrecorded deed from such apparent owner. Evarts v. Missouri Lumber & Mining Co. [Mo.] 92 S. W. 372. Under Rev. St. 1899, § 9303, a suit for taxes against the record owner is sufficient. Schnitger v. Rankin [Mo.] 91 S. W. 122.

99. Homesteader showed deed to assessor, who copied description wrong and assessed to record owner, but true owner paid taxes. True owner was not divested of title by sale. Wood v. Smith [Mo.] 91 S. W. 85.

1. Schnitger v. Rankin [Mo.] 91 S. W. 122. Record showed title in name of married woman, but at time of suit she had remarried. Substituted service was had and her husband was not joined. Held judgment against such record owner was not invalid, the record of the proceeding not showing on its face that she was married. Id.

2. Service on unknown heirs in suit for delinquent taxes must be by publication for 8 weeks under Sayles' Ann. Civ. St. 1897, art. 1236. Williams v. Young [Tex. Civ. App.] 90 S. W. 940.

a suit is pending to foreclose and extinguish the title of the owner, to which suit the purchaser is not a party.[4]

A tax sale, in the absence of special legislation to the contrary, is subject to the rule caveat emptor,[5] and the purchaser has no recourse in case of eviction against the municipality under the authority of which the sale has been made, either for damages or reimbursement.[6] His only remedy is the right to reimbursement by the owner in case the latter succeeds in having the sale set aside.[7]

The Mississippi statute authorizing the holder of a tax title to have the same confirmed by filing a bill against all persons interested, known or unknown, does not authorize a suit by the holder of an admittedly void deed to fix a lien on the land for money paid at the sale and subsequently.[8] A purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by statute in North Dakota to enjoin foreclosure of a mortgage on the ground that the mortgage has become barred by limitations.[9]

(§ 14) *C. Tax deeds.*[10]—The duty of the official designated by law to execute a tax deed upon expiration of the period of redemption is a ministerial one enforceable by mandamus.[11] To convey title, a tax deed must sufficiently describe the land sold,[12] must contain the recitals, as to the preliminary tax proceedings,

3, 4. Security Trust Co. v. Root, 72 Ohio St. 535, 74 N. E. 1077.

5. Lindner v. New Orleans [La.] 40 So. 736. Purchaser at tax sale takes the chance that owner was not delinquent and property not legally assessed. Glos v. Collins, 110 Ill. App. 121.

6. Lindner v. New Orleans [La.] 40 So. 736.

7. Under Const. art. 233. Lindner v. New Orleans [La.] 40 So. 736.

8. Construing Rev. Code 1892, § 498. Moores v. Flurry [Miss.] 40 So. 226. Chancery court having no jurisdiction of such suit, § 2760 of the statutes, requiring actions for the recovery of real property sold under a decree of chancery to be brought within 2 years, did not apply, and a suit to remove a cloud more than two years after the decree in the proceeding above mentioned was not barred. Id.

9. Rev. Codes 1899, § 5845. Scott v. District Court of Fifth Judicial Dist. [N. D.] 107 N. W. 61.

10. See 4 C. L. 1644.

11. Duty of judge of probate under Code 1896, § 4074, is ministerial. Roach v. State [Ala.] 39 So. 685. Such officer cannot raise objections to the regularity of the tax proceedings when a deed is sought by the purchaser at the sale after the lapse of the required time. Id. In a mandamus proceeding to compel execution of a deed, a person claimed by the tax official to have redeemed is not a necessary party. The issue of redemption can be litigated between the purchaser and the official. Id.

12. Vital defects or omissions in the description of a tax deed cannot be remedied or supplied by parol evidence. Gibbs v. Hall [Miss.] 38 So. 369. A material variance between the description in the deed and that in the assessment roll under which the sale was made renders the deed void. Id. Tax deed containing description other than that given in assessment roll did not convey title. Matthews v. Nefsy, 13 Wyo. 458, 81 P. 305. Though lots are separately assessed and sold, they may be included in one deed. Jackson v. Mason [Mich.] 12 Det. Leg. N. 1038, 106 N. W. 1112. Tax deed describing property as "4,520 acres in 13, range 7, W. E. L. S." is wholly ineffective to pass title to any land in the township. Powers v. Sawyer [Me.] 62 A. 349. Tax deed describing property as "4,520 acres in 13, range 7, W. E. L. S." conveys no title and casts no cloud on the title of a tenant in common who seeks partition of the township either by bill in equity or by petition. Id. Description in tax deed as "east part of southeast quarter of section 30, 5 N. 4 E., containing 60 30-100," held too uncertain to pass title. Covington v. Berry [Ark.] 88 S. W. 1005. Description in deed as "E. pt. S. E. ¼ Sec. 30 5 N. 4 E., containing 63 acres," held insufficient and deed void. Id. Sale and deed void when description was "part E. ½ N. E. ¼ sec. 32 T. 12 S. R. 1 W." Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. The abbreviation "S. E. 4" used in description in tax deed will be interpreted as meaning "southeast quarter" when it is explicitly used in another part of the deed as the equivalent of such words. Kennedy v. Scott [Kan.] 83 P. 971. In the beginning a tax deed accurately described the tract of land and recited that it was bid off for the county. Subsequent recitals as to the assignment of the certificate and the conveyance referred to the description already given. Description held sufficient. Ham v. Booth [Kan.] 83 P. 24. A tax deed gave a full description of a single city lot, in the recital that it was subject to taxation, and in subsequent recitals as to sale, assignment of certificate and conveyance, merely referred to the description already given. It was held not void for an insufficient description, since it recited that the whole lot was sold, and this was the least quantity bid for the taxes charged against it. Gibson v. Hammerburg [Kan.] 83 P. 23.

required by law,[13] and must be executed in the statutory form.[14] A tax deed which meets these requirements is at least prima facie, and in some states conclusive[15] evidence of the regularity of the proceedings on which it is based,[16] and is prima

13. Unless the sale was made under a special law, the deed need not recite why the sale was held on the day named. Clarke v. Tilden [Kan.] 84 P. 139. Failure of tax deed to several tracts to show the separate amount for which each tract was conveyed renders the deed void on its face. Manker v. Peck [Kan.] 81 P. 171. Deed which gave only aggregate of amounts paid for several tracts and erroneously gave a total less than the true amount was void. Id. A tax deed is not void for failing to give the residence of the assignee of the certificate of sale, where such assignee is a foreign corporation, and the recital states that it is a corporation organized and existing under the laws of a designated state. Ham v. Booth [Kan.] 83 P. 24. If under the provisions of any statute the sale upon which a tax deed is based may have been legally made upon the day named in the deed, the deed will not be void on its face, if otherwise regular. Recitals of deed held to indicate an October sale under Gen. St. 1901, § 7657. Clarke v. Tilden [Kan.] 84 P. 139. Where a tax deed has been of record for more than five years, it will not be held void because of the omission of express recitals required by the statute, if the substance of such omitted recitals can be supplied by inferences fairly to be drawn from statements elsewhere made in the deed, by giving to the language employed a liberal interpretation to that end. Penrose v. Cooper [Kan.] 84 P. 115, rvg. 81 P. 489. Thus, in the case of a deed based on a certificate assigned by the county, and reciting that the property conveyed was bid off by the county treasurer, the omission of express recitals of the amount for which it was bid off, and that it was bid off for the county, may be supplied from statements that the property could not be sold for the amount against it, and that a tax sale certificate was issued by the county treasurer and assigned by the county clerk upon payment of an amount equal to the cost of redemption. Id. The omission of such a deed, which includes several distinct tracts, to recite that such tracts were offered for sale separately for the amount due against each, respectively, may be supplied by statements that the property was exposed to sale in conformity to the statute and that each tract could not be sold for the amount against it. Id. Where defendant in ejectment claims under a tax sale, his title must fail where there is nothing in the return of the sale or the deeds of the commissioners to identify the land as having been sold for taxes. Canole v. Allen, 28 Pa. Super. Ct. 244. A tax deed without the judgment and precept upon which it is based is not sufficient proof of paramount title. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747. Under Pol. Code §§ 3897, 3898, a deed to a purchaser from the state of lands acquired by the state for taxes is not required by law to recite facts showing how the state acquired title, and hence is not evidence of the vesting of the title of the original owner in the state, and the conveyance of that title to the state's grantee. County Bank of San Luis Obispo v. Jack [Cal.] 83 P. 705.

14. A substantial compliance with the form prescribed by statute for the execution of tax deeds is sufficient. Ham v. Booth [Kan.] 83 P. 24. Where a deed recites that it is executed pursuant to statutory authority, and that the official seal of the county is affixed, and the acknowledgment shows that its execution was an official act of the county clerk, the fact that the words of the seal recite that it is the seal of the county clerk does not make the deed void on its face because not bearing the county seal. Clarke v. Tilden [Kan.] 84 P. 139.

15. By Tax Law § 131, a tax deed is conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment were regular, and only proof of a jurisdictional defect will defeat a title so shown. Culnane v. Dixon, 94 N. Y. S. 1093.

16. In Arkansas the state land commissioner's deed of land forfeited for taxes is prima facie evidence that all necessary preliminary steps were taken and these steps need not be recited in the deed. Cracraft v. Meyers [Ark.] 88 S. W. 1027. A donation deed from the state, and a copy of a certificate of improvement held prima facie proof of forfeiture to the state by regular proceedings. Waterman v. Irby [Ark.] 89 S. W. 844. In Colorado a county treasurer's deed to a purchaser of a certificate of sale to the county is prima facie evidence of facts prior to and at the time of the sale, but not of acts which a cash purchaser is required to perform after the sale and as a condition precedent to his right to a deed. Cornahan v. Sieber Cattle Co. [Colo.] 82 P. 592. A tax deed is at least prima facie evidence that the grantee named therein was the purchaser or his successor in interest. Whether § 1444, which makes deed conclusive on this point, is constitutional, not decided. Farmers' Loan & Trust Co. v. Wall [Iowa] 106 N. W. 160. A tax deed which follows the form prescribed by statute is sufficient and is prima facie evidence that the tax proceedings were regular and that every step necessary to the validity of the deed was taken. Gibson v. Hammerburg [Kan.] 83 P. 23. A duly recorded tax deed to the state, made pursuant to Act No. 85, p. 130, of 1888, and showing on its face that all the statutory requirements have been observed, must be received as prima facie evidence of a valid sale. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682. The Michigan statutes, making an auditor's deed to unredeemed tax lands prima facie proof of the regularity of proceedings, are held not to have been repealed by the legislation of 1881 and 1882. Hoffman v. H. M. Loud & Sons' Lumber Co. [Mich.] 12 Det. Leg. N. 356, 104 N. W. 424. A properly executed and acknowledged tax deed is prima facie evidence that the necessary preceding steps in the tax proceedings were duly taken, and such deed cannot be defeated unless it is pleaded and proved that some essential act was omitted.

facie evidence of title in the holder.[17] Statutes which so provide are valid,[18] and a statute changing the rule cannot be made retroactive.[19] The common law rule of evidence must be applied to all tax conveyances when the statute has failed to prescribe any other.[20]

A tax deed issued under a sale for taxes for the year 1860, in one of the Confederate states, is void, for the reason that payment by the purchaser of taxes for two years following the sale was a condition precedent to the obtaining of a deed, and such taxes, being in aid of the Confederate government, were illegal.[21] It will be presumed, in the absence of a contrary showing, that the holder of the deed actually paid such taxes,[22] and since they were levied by a de facto government, they cannot be treated as having never been paid merely because of their illegality.[23]

(§ 14) *D. Remedies of original owner.*[24]—The remedies usually pursued are actions at law to recover the property sold or suits in equity to cancel the tax sale and deed or to remove clouds from title.[25] One bringing such action or suit must show himself free from laches,[26] and must allege and prove title in himself.[27] The grounds of invalidity of the taxes relied on must also be sufficiently alleged and proved.[28] Where grounds for cancellation are specified by statute, a statutory

A mere irregularity will not defeat the deed. O'Keefe v. Dillenbeck [Okl.] 83 P. 540. Where treasurer's deed recited that tax sale was conducted in the manner provided by law, this was sufficient to overcome a return made by him, though not required, reciting a sale of 160 acres in bulk instead of in 40 acre tracts. Stoll v. Griffith [Wash.] 82 P. 1025. No defect in a sheriff's affidavit to a list of sales of land for taxes will invalidate a tax deed made under Code 1899, c. 31. Day v. Fay [W. Va.] 52 S. E. 1013. Where defendant in ejectment relied on tax deeds, the fact that she set out in her answer all the steps required for the validity of her deed did not affect the presumption of validity created by Rev. St. 1898, § 1176, so as to require proof of the regularity of the proceedings as a condition precedent to the introduction of her deeds in evidence. Preston v. Thayer [Wis.] 106 N. W. 672.

17. Tax deed made prima facie case for plaintiff in ejectment. Rowland v. Eskland [Wash.] 82 P. 599. A purchaser at a tax sale has equitable title after confirmation of the sale with right to a deed, hence the fact that deed was issued by wrong person is immaterial in an ejectment suit by the owner. Gavin v. Ashworth [Ark.] 91 S. W. 303. A tax deed, executed when Rev. St. 1881, § 6480, was in force, is prima facie evidence of the regularity of the sale and prior proceedings and of a valid fee simple title. May v. Dobbins [Ind.] 77 N. E. 353. A tax deed to the state containing the proper and necessary recitals is prima facie evidence of absolute title in the state, which would cut off the lien of a prior mortgage, and the mortgagee cannot question the title of a grantee of the state on the ground that such grantee never completed the purchase from the state. Erie County Sav. Bank v. Clyde, 94 N. Y. S. 737.

18. It is competent for the legislature to change the common law rule by making a tax deed prima facie evidence of the regularity of proceedings of the officials and acts of the purchaser necessary to warrant issuance of a deed. Carnahan v. Sieber Cattle Co. [Colo.] 82 P. 592. It is competent for the legislature to make a tax deed conclusive evidence that the sale was conducted in the manner required by law. Code § 1444, part 3, is valid, and under it the deed is conclusive evidence that payment was properly made at the sale. Farmers' Loan & Trust Co. v. Wall [Iowa] 106 N. W. 160.

19. The assurance held out by the state to purchasers at tax sales under the revenue laws of 1890, as amended in 1891, that the tax certificates and tax deeds would be prima facie evidence of the regularity of tax proceedings, though relating to the remedy, constituted a substantial inducement to the purchase and entered into the contract with the state, so materially affecting its value that it cannot be taken away by subsequent legislation without affecting its value. Blakemore v. Cooper [N. D.] 106 N. W. 566.

20. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

21. Construing Miss. Rev. Code 1857, c. 3, art. 39, and art. 43. Day v. Smith [Miss.] 39 So. 526.

22. Such payment being required by law, it will be presumed that the de facto officials did their duty as required by the de facto government then in existence. Day v. Smith [Miss.] 39 So. 526.

23. Day v. Smith [Miss.] 39 So. 526.

24. See 4 C. L. 1650, Cancellation and quieting title.

25. A tax deed issued under a void sale should be cancelled as a cloud on title. Sale on assessment under Madison act (Laws 1888, p. 24, c. 9) is void. Scarborough v. Elmer [Miss.] 40 So. 69.

26. Plaintiffs in suit to cancel tax deed held not barred by laches where heirs of agent for payment of taxes had taken out deed under purchase by agent, and had claimed under deed 9 years, but without notice, and had held possession under such deed only 3 years before commencement of suit. Siers v. Wiseman [W. Va.] 52 S. E. 460.

ground for relief must be made to appear.[29] A sale under a judgment for taxes will be set aside for inadequacy of price, so gross as to shock the moral sense, where a valid judgment and sale divests the title of the owner.[30] A tax deed which has been of record for the limitation period will not be set aside because the consideration named is apparently excessive, if the excess can be accounted for by a liberal construction of the recitals of the deed.[31] Where the validity of a tax sale is attacked in a suit in equity before the deed to the purchaser is executed and recorded, and the regularity of the tax proceedings is put in issue by proper pleadings, the burden is upon the purchaser to show substantial compliance with the statutes.[32] This rule is not changed by the fact that the deed to the purchaser is recorded pending the suit.[33]

A state being a necessary party to a suit to set aside a tax deed in which it is grantee, such suit cannot be maintained in the absence of a statute authorizing suit against the state for that purpose.[34]

27. Allegations and proof of ownership under a deed and possession thereunder held sufficient to support bill to set aside a tax deed. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373. In a suit to set aside a tax deed, proof of possession under claim of ownership by virtue of a quitclaim, at the time of filing the bill, is sufficient. Proof that plaintiff's agents went on the land under a quitclaim deed, fenced it, and put up a "for sale" sign, the same day the bill was filed, held sufficient proof of ownership and possession. Glos v. Davis, 216 Ill. 532, 75 N. E. 208. In Illinois, one in whose name property has been assessed for taxes may object to judgment and sale for taxes without alleging or proving interest in the property. Chicago & E. I. R. Co. v. People, 218 Ill. 463, 75 N. E. 1021.

28. Allegations of complaint in action to set aside tax sale and deed held insufficient to show that there was no assessment. Scott & Barrett Mercantile Co. v. Nelson County [N. D.] 104 N. W. 528. An allegation in a pleading that a tax collector has certified certain facts gives rise to the presumption that the acts certified to have been done, and a pleading attacking the validity of a sale by the officer must show affirmatively the omission of some essential act. Ky. St. 1903, §§ 3760, 4030. Alexander v. Aud [Ky.] 88 S. W. 1103. Where a tax deed is sought to be set aside on the ground that the vendee therein was the agent of the former owner to pay the taxes on the land conveyed, the burden is on the party seeking to set aside such deed to prove such agency. Day v. Fay [W. Va.] 52 S. E. 1013. Where the state acquires title by a tax sale and failure of the owner of the land to redeem, and plaintiff, in an action of trespass, acquires the state's title, defendant claiming under the former owner and asserting that the tax sale was void because the assessment was against a dead man must prove the death of the person to whom the land was assessed prior to the assessment. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682.

29. Under Tax Law 1896, c. 908, § 132, which provides for cancellation of tax certificates or conveyances for defects in proceedings affecting the jurisdiction on constitutional grounds, failure of the assessors to sign the verification to the judgment roll is not ground for cancellation. Jackson v. Rowe, 106 App. Div. 65, 94 N. Y. S. 568; Id., 106 App. Div. 614, 94 N. Y. S. 574. Under Gen. Tax Law § 70, providing that no sales shall be set aside after confirmation except where the taxes are paid or the property was exempt where petitioner's attorney asked the county treasurer concerning delinquent taxes for the purpose of bringing suit and was told the taxes had been rejected, there was no estoppel by reason of which petitioners would be entitled to have a decree of sale set aside Bullock v. Auditor General [Mich.] 12 Det. Leg. N. 668, 105 N. W. 542. Under Gen. Tax Law § 98, a certificate that no taxes are charged against land, and payment of taxes due at time of presentation of the certificate, prevents a transfer of the property by the auditor general. Held, where the certificate was not presented, and no application made to withhold a conveyance, the certificate did not entitle the owner to redeem, after sale. Id. Under Comp. Laws § 3921, authorizing the auditor general to set aside a tax sale upon presentation to him of a certificate of no taxes charged against the land, such certificate having been given by the proper officer within the time for payment of taxes or redemption, where lands were sold in 1893, remained state tax lands until 1904, were then sold, and relator acquired original title in 1901, and a certificate that no taxes were charged against the land for the preceding 5 years, relator was not entitled to have the sale set aside. Welever v. Auditor General [Mich.] 12 Det. Leg. N. 1005, 106 N. W. 736.

30. State v. Elliott [Mo. App.] 90 S. W. 122.

31. As by assuming that statutory fees for the issuance and recording of the deed have been included. Kennedy v. Scott [Kan.] 83 P. 971. Where a tax deed states the total payments for subsequent taxes made by the holder of the tax sale certificate, but fails to show the amounts paid for separate years, the amount named in the deed as the consideration will not be deemed excessive if it can be accounted for by any apportionment of such taxes among the several years that is consistent with the recitals of the deed. Id.

The owner of land who seeks relief from a tax sale or deed on the ground of irregularities in the proceedings will be required to pay taxes justly due[35] and to reimburse the purchaser at the sale for proper payments made by him in acquiring the tax title,[36] and to pay the value of improvements made in good faith,[37] and a tender of the amount to which the purchaser is entitled is necessary to relieve plaintiff of costs;[38] but if the assessment or sale for taxes is absolutely void, reimbursement of the purchaser is not a condition precedent to relief.[39] The claimant of realty un-

32, 33. Columbia Finance & Trust Co. v. Fierbaugh [W. Va.] 53 S. E. 468.

34. So held where suit was brought against commissioner of land office and state comptroller. Sanders v. Saxton, 182 N. Y. 477, 75 N. E. 529.

35. In an action to quiet title brought against a tax deed holder whose deed was not recorded within six months after its issuance, and hence void, plaintiff must pay the taxes lawfully assessed against his land before he is entitled to a decree. Wagner v. Underhill [Kan.] 81 P. 177.

36. He must repay valid taxes paid by the purchaser after the sale. Glos v. Collins, 110 Ill. App. 121. One who seeks cancellation of a tax deed must do equity by reimbursing the purchaser for his outlay in payment of taxes and proper charges. Siers v. Wiseman [W. Va.] 52 S. E. 460. An owner of property, suing to remove a void tax deed as a cloud on his title, will be required to refund to a purchaser from the state the amount of taxes, with interest, paid by him, but not penalties or costs which the purchaser may have paid. Hamilton v. Brownsville Gaslight Co. [Tenn.] 90 S. W. 159. Where it is not made to appear that a tax is void on its face, an action to recover land sold for taxes cannot be maintained without payment or tender to the person claiming under the tax title, the amount of the tax, with interest, penalties, and costs, for which the land was sold. Moyer v. Foss [Wash.] 83 P. 12. Where a decree is entered upon a bill to set aside a tax deed, complainant need only pay to the holder of the tax title the amount paid at the sale, subsequent taxes and costs, with interest thereon from the date of the sale to the date of the decree. Woodard v. Glos, 113 Ill. App. 353. Where in suit to clear title of tax deed the complaint shows that defendant paid taxes and received a deed, and tenders money into court to reimburse defendant for all payments and statutory interest, equity will not decree a clear title until defendant has been reimbursed. Hole v. Van Duzer [Idaho] 81 P. 109. Where landowner seeks cancellation of tax deed on ground of assessment of separate tracts en masse, and that land was sold for personal taxes, the deed being void, plaintiff will be required to pay the purchaser the amounts paid out by him, and also statutory interest and penalties. Elder v. Chaffee County Com'rs, 33 Colo. 475, 81 P. 244. A holder of a tax deed conveyed to his wife an undivided one-third interest pending suit to set the deed aside. The decree provided that the owner should pay the amount due the purchaser into court for the benefit of such purchaser and his assigns. Held such decree proper as to the wife. Glos v. Ambler, 218 Ill. 269, 75 N. E. 764.

In ejectment against holder of tax title, though defendant's answer was stricken as frivolous, he could prove the expenditures which he was entitled to be repaid in case his deed should be set aside. Stephenson v. Doolittle, 123 Wis. 36, 100 N. W. 1041. In an action of ejectment by the holder of a tax deed, the defense that defendants were in adverse possession of the land when the tax lien was foreclosed, and that they had no notice of the foreclosure, is not available without a tender of the taxes justly due and paid by plaintiff. Rowland v. Eskland [Wash.] 82 P. 599.

37. One claiming under a tax title, not void on its face, is entitled to adduce proof of improvements made in good faith and have that issue determined. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

38. In order to throw costs on defendant in a suit to set aside a tax title, plaintiff must, before commencement of the suit, tender the whole amount paid at the tax sale, with subsequent taxes, costs, and interest, and keep such tender good by bringing the money into court. Tenders to one defendant and to counsel of the other held sufficient to warrant apportionment of costs between them. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373. A tender by a receiver appointed in a suit for an accounting against trustees, to the holder of tax deeds, inures to the benefit of the beneficiaries who are parties plaintiff in a suit to set aside the tax deeds. Glos v. Ambler, 218 Ill. 269, 75 N. E. 764. A tender before suit, and an allegation in the bill of willingness to pay any amount which shall be found due, kept good by paying into court the amount found due by the decree, stops interest on the amount and throws costs on defendant. Id.

39. Reimbursement of the purchaser at the tax sale is not a condition precedent to the vacation of an absolutely void tax deed. Code 1899, c. 31, § 25, does not require such payment where sale was unauthorized. Barnes v. Bee, 138 F. 476. Reimbursement to purchaser at void sale, taxes having been paid by owner, is not necessary in order to have tax deed set aside. Glos v. Shedd, 218 Ill. 209, 75 N. E. 887. The holder of a tax deed based on a sale for taxes assessed to one not the owner of the land sold, the owner having no notice, actual or constructive, of the sale, is not entitled to reimbursement. Posey v. Ducros [La.] 39 So. 26. The owner of property sold at an invalid tax sale is under no obligation to pay the purchaser assessments which he never owed and for which his property was not liable as a

der a voidable tax deed who has obtained a decree quieting title against the holder of an earlier tax deed, which is also voidable, upon being defeated in ejectment by the original owner, is not entitle to recover anything on account of taxes paid by the grantee in the first tax deed.[40]

Where a judgment and sale are set aside, it is error to give the purchaser a lien on the land for the amount of his bid, thereby including costs not properly chargeable to the owner.[41] As against such error, a motion to set the judgment aside, with a tender of proper costs and taxes, is the proper remedy.[42]

Limitations.[43]—Title by prescription under general limitation statutes is elsewhere treated.[44] There are in many states special limitation statutes prescribing the period within which proceedings attacking the validity of tax proceedings must be brought. Possession by the holder of the tax title for the period prescribed gives title and bars an action of recovery by the owner,[45] even though the tax deed under which the land is claimed is in fact void,[46] if such deed is valid on its face.[47] Such statutes begin to run only from the date of possession under the deed.[48] A valid assessment,[49] judgment,[50] and sale[51] are essential to the acquisition of title under these statutes. Being of a special character, they are applicable only in cases shown to be included within their terms.[52] In Colorado the recording of a subsequent

condition precedent to relief from the sale. Glos v. Collins, 110 Ill. App. 121.

40. Decree quieting title against defendant does not add his claim to that already possessed by plaintiff. Lockwood v. Meade Land & Cattle Co. [Kan.] 81 P. 496.

41. Where owner was on land but did not appear in suit, service being by publication, he was not chargeable with costs of citation, etc. Crosby v. Terry [Tex. Civ. App.] 91 S. W. 652.

42. Not a motion to retax costs. Crosby v. Terry [Tex. Civ. App.] 91 S. W. 652.

43. See 4 C. L. 1650, n. 30.

44. See Adverse Possession, 5 C. L. 45.

45. Open, continuous, adverse possession of land under a tax deed for the period within which an action against the purchaser at the sale must be brought for the recovery of the land, gives title. Kirby's Dig. § 5061, requires 2 years' possession. Carpenter v. Smith [Ark.] 88 S. W. 976. In Arkansas, two years open, continuous, exclusive, and adverse possession under a donation deed gives title. Sibly v. Gomillion [Ark.] 91 S. W. 22. Ejectment suit by owner is barred where 5 years have elapsed since confirmation of tax sale. Gavin v. Ashworth [Ark.] 91 S. W. 303. In Oklahoma, where a purchaser at a tax sale has gone into possession under a properly acknowledged and recorded tax deed, no action can be brought by the former owner or owners, or anyone claiming under them, unless within one year after the recording of the deed. O'Keefe v. Dillenbeck [Okl.] 83 P. 540. A tax deed is a "deed" within the meaning of Rev. St. 1895, art. 3342, and will support the 5 year limitation statute without proof of steps preliminary to sale. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

46. Carpenter v. Smith [Ark.] 88 S. W. 976; Ross v. Royal [Ark.] 91 S. W. 178.

47. A void tax deed, if valid on its face and taken in good faith, constitutes color of title under which absolute title may be acquired after the lapse of the limitation period. Under Mills' Ann. St. § 3904, complete title is acquired when tax title is not attacked for 5 years. Williams v. Conroy [Colo.] 83 P. 959. The Arkansas two year statute of limitations does not run under a tax deed void for uncertainty in the description. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21.

48. As so construed the 2 year statute is not unreasonable. Ross v. Royal [Ark.] 91 S. D. 178.

49. A statute requiring an action to recover land sold for taxes or to set aside a tax deed to be brought within three years after filing of the tax deed has no application to a case where the sale was void for want of an assessment. Such statutes cannot cure jurisdictional defects in the proceedings, as where there was no good description in the assessment. Moran v. Thomas [S. D.] 104 N. W. 212; Jackson v. Bailey [S. D.] 104 N. W. 268. One who claims title under a sale for delinquent taxes has the burden of proving that the taxes were duly assessed, that they were a charge on the land, and the necessary steps preliminary to the sale were duly taken. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698. Any such proof of tax deed will support 3-years limitation statute. Id.

50. A statute of limitations is not put in operation in favor of a party claiming under a tax sale unless there is a valid judgment. Statute limiting time for bringing suit to set aside sale held not operative. Holmes v. Laughren [Minn.] 105 N. W. 558.

51. Prescription does not run in favor of a tax title, against an owner in possession, where the tax deed is based on a sale for taxes assessed to one not the owner of the land, the latter having no notice, actual or constructive, of the sale. Posey v. Ducros [La.] 39 So. 26.

52. B. & C. Comp. §§ 3146, 3128, that an action to recover land sold for taxes shall be commenced within three years, do not apply to suits to quiet title or determine adverse claims. Mount v. McAulay [Or.] 83 P. 529. B. & C. Comp. § 3135, that no action to

deed to the same property within the limitation period does not alone bar the rights of the holder of the first tax deed.[53] The Louisiana prescription of three years against actions to annul tax sales is held applicable where the property in question was assessed to one who had no color of title and was sold without notice to the owner, the owner having never been in actual possession and having never paid taxes on the property.[54] The prescription law, so applied, is held not invalid as depriving the owner of his property without due process of law.[55]

(§ 14) *E. Acquisition of title by state and transfer thereof.*[56]—Provision is usually made for purchase and acquisition of title by the state or municipality where there is no other purchaser.[57] In the acquisition of such title,[58] and in the assignment thereof,[59] or in the sale of lands so acquired,[60] statutory provisions must be closely followed. Former owners of land held by the state, who petition for a sale thereof by the state, are estopped to assert an invalidity in the sale to the state as against the purchaser from the state.[61] The record in the county clerk's office of a certificate of sale for taxes to the municipality itself is notice to subsequent purchasers not only of the lien of the taxes for which the sale was had, but also of subsequent taxes assessed prior to the actual redemption of the property.[62] Where property has been forfeited or adjudicated to the state for nonpayment of taxes, and the state continues to assess the same property to the owner and collect taxes thereon for a series of years, equity will treat the transaction as a waiver of the prior supposed forfeiture or adjudication.[63]

set aside a tax sale, or quiet title to land, or remove a cloud, shall be brought unless within two years from the date of record of the sheriff's deed, is to be construed in connection with Laws 1901, pp. 72, 73, §§ 3, 4, and has reference only to lands bid in by counties at delinquent sales. Id.

53. Title of first holder having become absolute, he can attack title of holder of second deed within 5 years, though such deed was recorded before his title became complete. Williams v. Conroy [Colo.] 83 P. 959.

54. Const. 1898, art. 233. Terry v. Heisen [La.] 40 So. 461.

55. Terry v. Heisen [La.] 40 So. 461.

56. See 4 C. L. 1648, n. 4a et seq.

57. A tax sale to the state vests title in the state if the owner does not redeem within a year. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682.

58. Deed to commissioners after tax sale, properly acknowledged before a justice of the peace, is essential to title in the county. Canole v. Allen, 28 Pa. Super. Ct. 244.

59. Under 2 Mills' Ann. St. § 3888, a county clerk has no power to assign a certificate of sale to the county except within 3 years after the date thereof. Carnahan v. Sieber Cattle Co. [Colo.] 82 P. 592. In Nebraska, tax sale certificates owned by the state or any county or city cannot be legally sold for an amount less than that due thereon. [Laws 1903, p. 502, c. 75, § 26] (State v. Fink [Neb.] 104 N. W. 1059), and the amount due is to be determined by adding to the face of the certificate interest at the rate provided by the act § 27 of c. 75 of Laws 1903 (Id). In Kansas a county clerk is not authorized to issue a tax deed to the assignee of a tax sale certificate unless the assignment is indorsed thereon or attached thereto (Morris v. Bird [Kan.] 81 P. 185), and a tax deed issued to one other than the original holder of the tax sale certificate, that does not show an assignment to such person, is void on its face (Id.).

60. In Washington, county commissioners may require a sale of lands acquired by the county in tax foreclosure proceedings to be subject to confirmation by the board. Phillips v. Welts [Wash.] 82 P. 737. A purchaser at a tax sale by commissioners must show the several jurisdictional steps necessary to vest title in the commissioners, the public sale by the commissioners to himself, and the execution and delivery of deeds by the several officers. Canole v. Allen, 28 Pa. Super. Ct. 244. In New Jersey, land which has already been bought by a municipality at a tax sale need not be sold for subsequent taxes. Under act Feb. 24, 1882. Maginnis v. Borough of Rutherford [N. J. Law] 63 A. 16. Land sold for taxes was bid in by the state in 1848, but no deed issued until 1855. A sale by the county in 1852 was unauthorized, the levy thereof having been made before the redemption period had expired, and the sale and deed by the county being prior to acquisition of title by the state. Raquette Falls Land Co. v. Hoyt, 109 App. Div. 119, 95 N. Y. S. 1029.

61. Especially where the petition was more than 2 years after the first sale, and Tax Law 1896, c. 908, § 131, makes a conveyance by the comptroller conclusive after 2 years. Jackson v. Rowe, 106 App. Div. 65, 94 N. Y. S. 568; Id., 106 App. Div. 614, 94 N. Y. S. 574.

62. Since land bought by municipality at tax sale need not be sold for subsequent taxes under act Feb. 24, 1882. Maginnis v. Borough of Rutherford [N. J. Law] 63 A. 16.

63. Booksh v. A. Wilbert Sons Lumber & Shingle Co. [La.] 39 So. 9.

§ 15. *Inheritance and transfer taxes. A. Nature of, and power to impose.*[64]—The term "inheritance tax" is almost universally used to describe a tax on the right of succession, whether by operation of law, by will, or by grant.[65] This right of succession is not a natural right but a privilege granted by the state, and therefore subject to such restrictions and burdens as the state sees fit to impose.[66] It follows from what has been said that an inheritance tax is not a tax on property but on the transfer or right of succession;[67] hence, constitutional requirements of equality and uniformity do not apply in the manner in which they are applicable to ad valorem property taxes.[68] Thus, a state may legally exempt from the tax estates below a certain value, while taxing others,[69] may classify the taxable estates according to value and apply thereto a progressive rate,[70] may discriminate between blood relatives and strangers to the blood,[71] or may make no distinction between them or between lineal and collateral descendants.[72] Inheritance taxes are expressly authorized by some state constitutions,[73] but express authorization has been held unnecessary.[74]

The New York stock transfer stamp tax law is held valid, the tax imposed being on the transfer of property and not upon property.[75] The act does not violate constitutional requirements as to due process or equal protection of laws.[76] It applies

64. See 4 C. L. 1651.

65. The title of act of Mar. 6, 1901, "An act relating to the taxation of inheritances," etc., is broad enough to cover taxes on transfers by will or otherwise than by operation of law. In re White's Estate [Wash.] 84 P. 831.

66. Inheritance taxes are not taxes upon property but upon the transmission of property or the right to acquire property by will or descent, which is not a natural right but a privilege accorded by the state. In re Hickok's Estate [Vt.] 62 A. 724.

67. State v. Bazille [Minn.] 106 N. W. 93; In re Hull's Estate, 97 N. Y. S. 701. The inheritance tax is not a tax on property but a bonus or premium which the state exacts on the transmission of property by will or descent. Succession of Kohn [La.] 38 So. 898; Succession of Levy [La.] 39 So. 37. Laws 1901, p. 414, c. 54, as amended Cobbey's Ann. St. Supp. 1905, § 10,706, upheld, not imposing a property tax. State v. Vinsonhaler [Neb.] 105 N. W. 472. The transfer tax is imposed upon the right of succession to property by means of a will or through the statutes of descents and distribution. In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882.

68. State v. Bazille [Minn.] 106 N. W. 93. Collateral inheritance tax law held not to violate Const. c. I, art. 9, requiring all members of society to contribute their "proportion" of taxes. In re Hickok's Estate [Vt.] 62 A. 724.

69. Exemption of estates under $2,000 in value does not render tax invalid. In re Hickok's Estate [Vt.] 62 A. 724. Gen. Laws 1905, p. 427, c. 288, § 2, which provides for computation of an inheritance tax on the "excess" of the devise, bequest, etc., over $10,000, held to mean that the amount of the estate over the "exemption" of $10,000 is the basis for computation. State v. Bazille [Minn.] 106 N. W. 93. The statute, so construed, is valid. Id.

70. In Minnesota a tax is imposed only where the estate or property transferred exceeds $10,000 in value and is placed only on the excess, the rate being 1½ per cent for estates between $10,000 and $50,000, 3 per cent on estates between $50,000 and $100,000, and 5 per cent on estates over $100,000, $10,000 being in each case exempt. The statute is held valid. State v. Bazille [Minn.] 106 N. W. 93. The Nebraska statute does not impose a tax on the gross estate of a decedent but only upon the share received by each heir or devisee, and the rate being uniform as to each class of estates transferred, the statute is not invalid for lack of uniformity. State v. Vinsonhaler [Neb.] 105 N. W. 472.

71. Cal. Stat. 1893, p. 193, as amended by Cal. St. 1899, p. 10,—an inheritance tax law—which imposes an inheritance tax on brothers and sisters of a decedent but not on such strangers to the blood as the wife or widow of a son or the husband of a daughter, is not a denial of the equal protection of the laws as to such brothers and sisters. Campbell v. State of California, 200 U. S. 87, 50 Law. Ed. —.

Note: California has a new inheritance tax law (Cal. St. 1905, p. 341) differing materially from the one passed on in this case. —Ed.

72. Whether such distinctions shall be made is a matter resting in legislative discretion. State v. Bazille [Minn.] 106 N. W. 93.

73. Minnesota statute held authorized by constitutional amendment. State v. Bazille [Minn.] 106 N. W. 93.

74. It is held in Nebraska that the right of succession by will or inheritance may be legally taxed, though such right is not included in the subjects of taxation enumerated in the state constitution. Enumeration of subjects in Const. art. 9, § 1, is not exclusive. State v. Vinsonhaler [Neb.] 105 N. W. 472.

75. Laws 1905, c. 241, §§ 315-324, sustained, Ingraham, J., dissenting. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

only to transfers within the state and is not an attempt to regulate interstate commerce,[77] and it does not attempt to tax property outside the state by imposing a tax on a transfer within the state of stock of a foreign corporation owned by a nonresident.[78]

(§ 15) *B. Successions and transfers taxable, and place of taxation.*[79]—In general, all transfers or successions by will, by conveyance to take effect upon the grantor's death or made in contemplation of his death,[80] or by operation of law, upon death of the ancestor, are subject to the tax. As in the case of other taxes, exemptions will be strictly construed and not extended by inference or implication to property not clearly within the terms of the statute.[81] A statute exempting from a collateral inheritance tax property passing to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation, does not apply to foreign corporations.[82] This construction of the statute does not render it invalid.[83] The construction of various statutes and of statutory exemptions is further treated in the note.[84]

Inheritance tax laws are usually held to have only a prospective operation,[85] so that they have no application to transfers prior to their enactment,[86] and cannot affect rights previously acquired,[87] and this is held to be the rule whether the inter-

76, 77, 78. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

79. See 4 C. L. 1652-1654.

80. A conveyance, subject to an agreement by the grantee to reside on the land and care for the grantor as long as the latter should live, construed, and held the conveyance was not made in contemplation of the grantor's death, nor was the transfer one to take effect at or after his death, within the transfer tax law § 220, subd. 3. In re Hess' Estate, 96 N. Y. S. 990. Gifts are subject to the inheritance tax only when made in contemplation of the death of the donor. People v. Kelley, 218 Ill. 509, 75 N. E. 1038. Thus, where a trust deed which operates on delivery transfers property in trust but reserves a certain annual income to the grantors for their lives, the transfer is taxable only as to so much of the estate as is necessary to produce the income reserved. Id.

81. Succession of Kohn [La.] 38 So. 898.

82. Construing Acts 1896, p. 38, No. 46. In re Hickok's Estate [Vt.] 62 A. 724. Bequests to foreign corporations are not exempt from the inheritance tax under Act May 10, 1901, amending Act June 15, 1895, which exempts charitable bequests to corporations. In re Speed's Estate, 216 Ill. 23, 74 N. E. 809.

83. Act May 10, 1901, does not violate Const. art. 9, §§ 1, 2, requiring uniformity of taxation (In re Speed's Estate, 216 Ill. 23, 74 N. E. 809), nor does the statute, so construed, abridge the privileges and immunities of citizens of the United States, a corporation not being a "citizen" within the meaning of U. S. Const. art. 4, § 2, and 14th amend. § 1 (Id.).

84. Where legatees were nieces of testator and had lived with him at his expense for more than 10 years, but always called them "nieces" and they called him "uncle," it was held that he did not stand in the "mutually acknowledged relation of parent," so that the transfer to them was exempt under Tax Laws § 221. In re Deutsch's Estate, 107 App. Div. 192, 95 N. Y. S. 65. Under Shannon's Code §§ 724, 735, excepting from the inheritance tax property passing to the widow of the person dying seised or possessed thereof, where a nonresident left half the residue of his property to his widow, and she elected to take half of certain stocks in Tennessee, such property was not subject to the tax. Memphis Trust Co. v. Speed, 114 Tenn. 677, 88 S. W. 321.

A bequest for masses to be said for the testator and others is not exempt as a provision for funeral expenses. In re McAvoy's Estate, 98 N. Y. S. 437. Under the provisions of Act No. 45 of 1904, p. 102, excepting from the inheritance tax only such property as shall have borne its just proportion of taxes prior to the opening of the succession, **state and municipal bonds,** though exempt from other taxation, are not exempt from the inheritance tax (Succession of Kohn [La.] 38 So. 898), nor are **shares of stock** exempt, though the corporation may have been taxed on its property (Id.). **Bonds of the United States,** not having been taxed, are subject to an inheritance tax. Succession of Levy [La.] 39 So. 37.

85. The Ohio inheritance tax act, passed in 1904, has a prospective operation only, and applies only to rights arising upon a death which occurred subsequent to passage of the act. 97 Ohio Laws p. 398, construed. Eury's Ex'rs v. State, 72 Ohio St. 448, 74 N. E. 650.

86. A testator gave part of his property in trust to his son for life, remainder to his son's children, and died before the transfer tax law took effect. Held the children took under the grandfather's will, and the transfer tax law did not apply. In re Backhouse, 96 N. Y. S. 466. Where will devising certain estates was probated in 1865, the transfers were not subject to the inheritance tax imposed by Pub. Laws 1899, p. 284, No. 188. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 501, 104 N. W. 777.

87. In a will, taking effect before the

est acquired under a will is vested or contingent;[88] but where power to tax successions existed prior to a testator's death, and a statute imposing such a tax was enacted and became effective thereafter, but before the succession was closed, the succession was held liable to the tax,[89] and the statute, as so construed, held not invalid because retroactive and impairing vested rights of the legatees.[90] It is also held that property held in trust by provision made in a will becomes subject to an inheritance tax law, which has been enacted during continuance of the trust.[91]

Powers of appointment.[92]—In New York a power of appointment, when made, is deemed a transfer taxable in the same manner as though the property to which the appointment relates belonged absolutely to the donee of the power and had been bequeathed or devised by such donee by will.[93] The tax is upon the transfer made by the will exercising the power,[94] and the fact that an excessive inheritance tax was imposed upon the transfer of the estate by a prior will, which created the power of appointment before the statute relating to powers of appointment was passed, does not operate to relieve the transfer by the exercise of the power from the tax;[95] but where an attempt to exercise a power is ineffective and the right to the property is acquired under a former will, which took effect before the transfer tax law became effective, the right to acquire such property is not subject to the tax.[96] The

passing of the transfer tax law, A devised one-half of his estate to trustees for his daughter, to be held in trust during her life and at her death to go to her heirs-at-law, subject to a power of appointment by will in her. A's daughter, dying after the passing of the transfer tax law, devised the property in question in fee to her daughter, born before the death of A, and her only child. The surrogate imposed a transfer tax on the property. Held that the will of A's daughter transferred nothing to her daughter that was not given to the latter by A's will, which took effect before the passing of the transfer tax law, and consequently that the property and transfer were not subject to the tax. In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882. (Two justices dissenting.)

Note: A writer in the Michigan Law Review comments on the above case as follows: "An inheritance or transfer tax is one imposed on the succession to property, such succession being a privilege given by the state and not a natural right. In re Dow's Estate, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 509, 52 L. R. A. 433; United States v. Perkins, 163 U. S. 625, 41 Law. Ed. 287; State v. Alston, 94 Tenn. 674, 28 L. R. A. 178. A transfer tax cannot be imposed on the acquisition of property where the acquisition has taken place prior to the enactment of a taxing statute which contained nothing showing a direct intention to give it a retrospective effect. In re Pell's Estate, 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 540. The court did not agree on the point as to when the devisee's rights accrued. The majority of the judges held that the devisee, having a power of election to take either under her mother's appointment by will or under A's will, took under the latter an interest, either contingent or vested, in the estate on the death of A, which according to Brevoort v. Grace, 53 N. Y. 245, and In re Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782, is immune from legislative attack the instant it accrues even though it be contingent. The dissenting judges held that the estate did not vest in the devisee on the death of A (Hall v. La France Fire Engine Co., 158 N. Y. 570), but only on the exercise by her mother of the power of appointment, which created a new estate, dating from the time that such appointment became effectual and governed by the laws then in force."—4 Mich. L. R. 82. See, also, comment in 19 Harv. L. R. 121.

88. In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882.

89. Succession of Levy [La.] 39 So. 37.

90. Until the succession is closed the rights of the legatees are not vested and the succession remains subject to taxation. Succession of Levy [La.] 39 So. 37.

91. Hostetter v. State, 5 Ohio C. C. (N. S.) 337. Where distribution is delayed for many years, and an inheritance tax law becomes operative in the meantime, the shares are subject thereto. Id.

92. See 4 C. L. 1653; 2 C. L. 1840.

93. Laws 1896, c. 908, as amended by Laws 1897, c. 284. Will construed and held that daughter of testator was donee of power which she exercised necessarily, and that transfers to her children pursuant thereto were taxable under the transfer tax law. In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880.

94. In re Buckingham's Estate, 106 App. Div. 13, 94 N. Y. S. 130.

95. A will, probated in 1888, created a life estate and a trust estate and a power of appointment. The inheritance tax imposed was excessive, not being confined to the life estate. Held a transfer by will of the donee of the power, after the law of 1897 was passed, was taxable. In re Buckingham's Estate, 106 App. Div. 13, 94 N. Y. S. 130.

96. In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882.

donor and donee of a power both being residents, and the exercise of the power being by will of such resident donee, the beneficiary is liable to a tax though the property involved is outside the state.[97]

Place of taxation.[98]—Personal property transmitted by will is subject to the collateral inheritance tax at the place of the domicile of the decedent,[99] that being the situs of such property for the purpose of taxation of this nature.[1] The fact that the property is located in another state, where it is also subject to an inheritance tax, under the statute of such state, does not affect the right to impose such tax at the place of the decedent's domicile.[2] Where a testator gave his executors power to sell his real estate, if necessary, and a sale of real estate in other states became necessary to pay pecuniary legacies, such realty was equitably converted into personalty and was subject to the collateral inheritance tax in the state where administration and distribution of the estate was had.[3]

The transfer by will of a nonresident of property in the state is taxable.[4] Thus, in New York, all bonds, money and stocks of domestic corporations, and real estate actually in the state, and passing as part of the estate of a nonresident, are subject to the transfer tax.[5] In ascertaining the amount and value of property which passes and to which the tax attaches, all indebtedness to persons in the state may be deducted.[6] Debts due a nonresident by residents, the evidences of which are held

97. In re Hull's Estate, 97 N. Y. S. 701. A mother devised a share of an interest in real estate situated in New Jersey in trust for her son's benefit during his life, and gave him a power of appointment as to the remainder. Held a transfer by reason of the exercise of the power by the son was taxable in New York, he being a resident of the state at the time of his death. In re Hull's Estate, 97 N. Y. S. 701, rvg. 47 Misc. 567, 96 N. Y. S. 93.

98. See 4 C. L. 1653, Jurisdiction.

99. Domicile of testatrix was in New Jersey where her husband lived, though she maintained an establishment in New York where she spent most of her time, though the parties did not separate. In re Hartman's Estate [N. J. Eq.] 62 A. 560.

1, 2. In re Hartman's Estate [N. J. Eq.] 62 A. 560.

3. Under Act May 6, 1887 (P. L. 79). In re Vanuxem's Estate, 212 Pa. 315, 61 A. 876.

Note: "The collateral inheritance tax is regarded in Pennsylvania as a tax on property passing from the decedent and cannot be imposed on land outside the state. In re Handley's Estate, 181 Pa. 339; In re Bittinger's Estate, 129 Pa. 338. By the doctrine of equitable conversion, if the will either expressly or by implication directs real property outside the state to be converted into personalty, it is treated as personalty and subjected to the tax. Fahnestock v. Fahnestock, 152 Pa. 56; Hunt's & Lehman's Appeals, 105 Pa. 128. It is generally a question of construing the testator's intention as expressed by the will (Fahnestock v. Fahnestock, 152 Pa. 56; King v. King, 13 R. I. 501; Chew v. Nicklin, 45 Pa. 84), and the court, in the principal case, adopted what seems a reasonable construction, i. e. that, the legacies in each case being a certain sum of money and amounting in the aggregate to a sum much greater than the value of the personalty and realty in Pennsylvania, it was the testator's intention to have the realty outside the state converted into personalty to pay the legacies."—4 Mich. L. R. 228. For another view see 19 Harv. L. R. 201.

4. Husband, by will, exercised a power of appointment as to property within the state in favor of his wife, and she disposed of it by will probated in New Jersey, and the property was removed from the state before distribution of the wife's estate. Held the property going to her under the power of appointment was taxable. Laws 1887, c. 713, as amended by Laws 1891, c. 215. In re Lord's Estate, 97 N. Y. S. 553. The wife was made residuary legatee, and she having also died testate in another state, the husband's executor removed certain property from the state and turned it over to the wife's executor, and her will also disposed of this property. Held the transfer of such property under the wife's will was not taxable, it not being property in the state. Id. Under Pub. Acts 1899, p. 284, No. 188, "property," the transfer of which is taxable, includes all property or interest therein which it is within the power of the state to tax, whether situated within or without the state, and regardless of the policy of the state with reference to taxing such property for general purposes and under the general tax laws. In re Stanton's Estate [Mich.] 105 N. W. 1122. Certain property considered as within the state of Michigan and there taxable, though owner was a nonresident at the time of death. Id.

5. In re Burden's Estate, 47 Misc. 329, 95 N. Y. S. 972.

Shares of stock of a domestic corporation, held and owned by a nonresident decedent, represent a property interest within the jurisdiction of the state for purposes of taxation, and the transfer thereof is taxable. Shares of stock of New York corporation owned by resident of Illinois. In re Palmer's Estate [N. Y.] 76 N. E. 16.

by the nonresident outside the state, are not subject to the inheritance tax, in Iowa.[7]

(§ 15) *C. Accrual of tax.*[8]—In the case of estates of present enjoyment, the transfer tax accrues immediately upon the death of the testator.[9] This is also said to be the rule with reference to vested remainders,[10] though in some states a tax on the transfer of a remainder is demandable only when the remainderman comes into possession.[11] The latter rule does not prevent an effective earlier payment on behalf of the remainderman.[12] Where inheritance taxes are due and payable at the death of the testator, jurisdiction to impose the tax does not depend upon the probate of the will.[13] In Illinois, where an estate is devised in trust for a term of years to be then divided among the beneficiaries, the transfer of the entire estate is immediately taxable,[14] and the value of the precedent estate for years is not to be deducted.[15]

(§ 15) *D. Appraisal and collection.*[16]—Only the amount actually received by a legatee should be considered in computing the transfer tax.[17] Thus, where a residuary legatee's interest is subject to the purchase of certain annuities the amount paid therefor should be deducted.[18] Debts must be deducted from the aggregate value of the estate,[19] if such debts are paid out of assets in the state where the tax is imposed.[20] A claim owned by the estate, but which is in genuine litigation, cannot be considered in appraising the estate for the transfer tax.[21] Where a bond and mortgage owned by the estate has been deducted because merely indemnifying against a judgment, the judgment cannot be deducted as constituting an absolute liability.[22] Cases dealing with the rate of the tax[23] and the appraisal of corporate stock[24] are treated in the notes.

6. Where a decedent owed brokers and had pledged securities more than sufficient to pay the debt, and his widow directed the brokers to sell all the securities they held either as pledges or otherwise, the debt was regarded as paid by the pledged securities and other securities and realty of the decedent in New York was held subject to the transfer tax. In re Burden's Estate, 47 Misc. 329, 95 N. Y. S. 972.

7. Under Code § 1467. Gilbertson v. Oliver [Iowa] 105 N. W. 1002.

8. See 4 C. L. 1652, 1653.

9. Inheritance Tax Law § 3. In re Kingman's Estate [Ill.] 77 N. E. 135. See, also, In re Hartman's Estate [N. J. Eq.] 62 A. 560.

10. In re Kingman's Estate [Ill.] 77 N. E. 135.

11. Act May 6, 1887 (P. L. 79). In re De Borbon's Estate [Pa.] 61 A. 244.

12. Act May 6, 1887 (P. L. 79), making a tax on a remainder "payable" when the person liable comes into possession, does not prevent earlier payment, but means that the tax is only then "demandable." In re De Borbon's Estate [Pa.] 61 A. 244. Hence, where an executor, under a direction of the testator to pay the inheritance tax as soon as possible, pays the tax on the entire estate, the state cannot upon the death of a life tenant collect a tax from the remaindermen. Id.

13. Property passes upon death of the testator, and the tax may be assessed as of that date. In re Hartman's Estate [N. J. Eq.] 62 A. 560.

14. Inheritance Tax Law §§ 1, 2, 3. In re Kingman's Estate [Ill.] 77 N. E. 135.

15. In re Kingman's Estate [Ill.] 77 N. E. 135.

16. See 4 C. L. 1653.

17. In re Hutchinson's Estate, 105 App. Div. 487, 94 N. Y. S. 354.

18. Where annuities were purchased out of New York property of the testator only the remainder of the property in New York going to the residuary legatee was taxable. In re Hutchinson's Estate, 105 App. Div. 487, 94 N. Y. S. 354.

19. Memphis Trust Co. v. Speed, 114 Tenn. 677, 88 S. W. 321. In computing inheritance taxes the amount of debts must be deducted and the balance of the estate is subject to the tax, except that expressly exempted. Succession of Levy [La.] 39 So. 37. Where it was stipulated before the surrogate that there was a mortgage of $1,000 on certain property at the time of the transfer, which sum should be deducted from the appraised valuation, such amount should be deducted. In re Skinner's Estate, 106 App. Div. 217, 94 N. Y. S. 144.

20. Debts paid not deductible from property taxable to collateral legatees where it was not shown that they were paid with Tennessee assets. Memphis Trust Co. v. Speed, 114 Tenn. 677, 88 S. W. 321.

21. Estate was successful but litigation was not finally completed. In re Skinner's Estate, 106 App. Div. 217, 94 N. Y. S. 144.

22. In re Skinner's Estate, 106 App. Div. 217, 94 N. Y. S. 144.

23. Adopted child lived in testator's family for 30 years, being supported at testator's expense. She was held to sustain the actual relation of child to the testator, notwithstanding certain other facts shown, and her legacy was taxable only at the rate of 1% on the excess above $10,000. In re Davis' Estate [N. Y.] 77 N. E. 259.

Statutes control as to the powers and duties of the courts in matters of appraisal and collection,[25] as to appellate procedure,[26] as to the time within which suits for collection must be brought,[27] as to commissions,[28] penalties, and attorney's fees[29] for collection, as to interest on taxes over due,[30] and as to the disposition of temporary payments on account of the tax.[31]

§ 16. *License taxes.*[32]—License taxes are not taxes upon property but upon occupations or callings,[33] hence, constitutional provisions relating to property taxes have no application to taxes of this kind.[34] But if a tax is in fact on property, it will be so considered, though called a license tax.[35] States have undoubted power to classify trades or occupations for purposes of taxation and to impose different taxes

24. A decedent left 6,000 shares of stock in a close corporation, the stock of which was not on the general market, there having been only a few sales of small blocks in the local market. Held Laws 1891, c. 34, relative to the manner of ascertaining the market value of stocks left by a decedent, did not apply. In re Curtice's Estate, 97 N. Y. S. 444. In determining the value of shares of stock in order to compute a transfer tax, all the property of the corporation must be considered, and not merely the property employed within the state. In re Palmer's Estate [N. Y.] 76 N. E. 16.

25. In Massachusetts the probate court having jurisdiction of the estate has power to determine, subject to appeal, whether an inheritance tax is payable and the amount thereof. Bradford v. Storey [Mass.] 75 N. E. 256. Where notice to certain persons was of an appraisal for taxation of their father's estate, the surrogate had no power to fix a tax on property acquired under the will of their grandfather. In re Backhouse, 96 N. Y. S. 466. Laws 1896, c. 908, § 230, requires the surrogate, upon his own motion or upon application of any interested party, including the comptroller, to have the estate of a decedent subject to the transfer tax to be appraised by certain persons. This statute is held mandatory, and mandamus lies to compel the surrogate to act (Kelsey v. Church, 98 N. Y. S. 535), even though he has erroneously determined that he has no jurisdiction (Id.). An application by the state comptroller, upon affidavit setting out all the necessary facts upon information and belief, is sufficient to warrant the surrogate in proceeding under the statute. Id.

26. In New York the state comptroller may appeal from an order of a surrogate reversing an order assessing a transfer tax. In re Hull's Estate, 109 App. Div. 248, 95 N. Y. S. 819. An order of a superior court directing payment of an inheritance tax would be appealable under Code Civ. Proc. § 963, subd. 3, and also reviewable on appeal from the final distribution of the estate, hence, prohibition will not lie to prohibit a judge from making such order. Cross v. Superior Court of City and County of San Francisco [Cal. App.] 83 P. 815. The Pennsylvania statute relating to the appraisement for collateral inheritance tax gives a right of appeal which implies the giving of notice, hence the 30 days' limitation of the right of appeal begins to run only upon the giving of notice. In re Belcher's Estate [Pa.] 61 A. 252.

27. Act 1885, c. 54, which bars actions for taxes not brought within 5 years after January 1 of the year when they accrued, does not apply to inheritance taxes. Miller v. Wolfe [Tenn.] 89 S. W. 398. Section 19 of the inheritance tax law (Acts 1893, c. 174), providing that such taxes shall be sued for in 5 years or shall be presumed to have been paid and cease to be a lien as against a purchaser of the property, is a general limitation statute for inheritance taxes, and is not merely applicable to purchasers from persons liable for the taxes. Id. In Massachusetts, neither the general statute of limitations nor the special statute relating to actions against executors or administrators applies to an action to recover an inheritance tax. Bradford v. Storey [Mass.] 75 N. E. 256.

28. In Pennsylvania a county register of wills is entitled to a commission on an inheritance tax collected by him and paid to the state. By Act May 6, 1887 (P. L. 83), § 16, allowing registers to retain such percentage of such taxes as is allowed by the auditor general, which act repeals Act March 31, 1876 (P. L. 13), requiring commissions on such taxes to be paid into the county treasury. Allegheny County v. Stengel [Pa.] 63 A. 58.

29. Act No. 45 of 1904, p. 102, provides for no penalties and makes it the duty of the district attorney to enforce its provisions, hence a 10% fee for the attorney of the tax collector cannot be collected as a penalty. Succession of Kohn [La.] 38 So. 898; Succession of Levy [La.] 39 So. 37.

30. Under Rev. Laws c. 15, § 4, interest is payable after two years from the giving of bond by the executor, though part of the estate is given in remainder and the disposition of the rest is modified by agreement. Bradford v. Storey [Mass.] 75 N. E. 256.

31. In New York a temporary payment to the comptroller on account of a transfer tax is not the concern of the appraiser or surrogate, but is deductible from the amount finally found due, and if nothing be due, must be refunded. In re Skinner's Estate, 106 App. Div. 217, 94 N. Y. S. 144.

32. See 4 C. L. 1655. Also Licenses, 6 C. L. 436.

33. An occupation tax is not a tax on property or upon income, but upon the calling. Phillips v. Barnhart, 27 Pa. Super. Ct. 26. Laws 1904, c. 76, § 93, imposing a license tax on "trading cars," the amount of which is determined by the distance travel-

upon different classes, or to tax some without taxing others,[36] and legislative discretion in the matter will not be reviewed by the courts provided a classification adopted is not wholly arbitrary and unreasonable.[37] The requirements of equality and uniformity of taxation are satisfied if the license tax operates equally upon all members of the same class.[38] A tax on business done in the state is not a tax on interstate commerce, though the corporation required to pay it is engaged in such commerce.[39] The fact that public property which is leased is exempt from taxation does not exempt the lessee from a license tax on the business in which such property is used.[40] The business of giving trading stamps with articles sold, for which other articles may be obtained, cannot be legally subjected to an excise tax.[41]

Statutes imposing license taxes must designate the taxable objects with reasonable certainty.[42] The construction of license tax laws with reference to their

ed by the car, is a tax on the occupation, not on the car. S. Zemurray & Co. v. Bouldin [Miss.] 40 So. 15.

34. Constitutional provisions as to equality and uniformity apply only to ad valorem taxes for general purposes. Clarksdale Ins. Agency v. Cole [Miss.] 40 So. 228. Code Supp. 1902, § 1333d, requiring certain insurance companies to pay a license tax of 1% on gross receipts less certain deductions, does not violate Const. art. 8, § 2, which requires the property of corporations organized for pecuniary profit to be taxed the same as that of individuals. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

35. An annual tax of 25 cents per lineal foot on a street railway is not a license tax within Act March 7, 1901 (P. L. 40) art. 19, § 3, pars. 4 and 22, but a property tax, which a city of the second class has no power to lay. Pittsburgh Rys. Co. v. Pittsburgh, 211 Pa. 479, 60 A. 1077. The fact that it was designated a "license" tax by the ordinance did not affect its real nature. Id.

36. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —-. Such laws do not constitute class legislation. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. It is competent for the legislature to tax any occupation or calling according to its discretion. Clarksdale Ins. Agency v. Cole [Miss.] 40 So. 228. N. C. Pub. Laws 1903, c. 247, which imposes a tax on meat packing houses doing a local business in the state does not deny to such houses the equal protection of the laws, though persons selling meat packing house products in the state, and others packing vegetables and articles other than meats, are not taxed. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —-. A statutory exemption of the property of certain corporations not organized for pecuniary profit does not render invalid a license tax on mutual insurance companies in Iowa, since the license tax is not one on property and such corporations are not benevolent. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. An ordinance imposing a license tax on any person, firm, or corporation operating a steam ferry between certain points is not invalid for lack of uniformity, though there is in fact only one company operating such a ferry. Norfolk P. & N. N. Co. v. Norfolk [Va.] 52 S. E. 851.

37. Code Supp. 1902, § 1333d, classifying insurance corporations and exempting certain kinds from license tax, held valid. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. N. C. Pub. Laws 1903, c. 247, imposing a tax on "every meat packing house doing business in the state," does not discriminate against foreign houses. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —-.

38. License taxes are uniform if they are the same for all engaged in the same business. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817; Norfolk P. & N. N. Co. v. Norfolk [Va.] 52 S. E. 851. Code Supp. 1902, § 1333d, imposing a license tax on certain insurance corporations, does not violate equality requirements nor the 14th amendment to the Federal constitution. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. Laws 1904, c. 76, § 49, imposing a privilege tax on insurance agencies, applies equally to corporations and individuals, and uniformly to all members of each class provided for. Clarksdale Ins. Agency v. Cole [Miss.] 40 So. 228.

39. N. C. Pub. Laws 1903, c. 247, imposing a tax on "every meat packing house doing business in the state," being construed by the state court as applying only to local business done in the state, does not tax interstate commerce. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —-.

40. Ferries owned by a city and county were leased. Norfolk P. & N. N. Co. v. Norfolk [Va.] 52 S. E. 851.

41. St. 1904, p. 376, c. 403, § 1, held invalid. O'Keeffe v. Somerville [Mass.] 76 N. E. 457. The right to give trading stamps with articles sold, redeemable in trade, is not a "commodity" within Const. art. 4, § 1, and St. 1904, p. 376, c. 403, § 1, imposing a tax on businesses so conducted, is unconstitutional. Id.

42. Act of Cong. of July, 1902, § 7, par. 46, imposing a personal tax of $25 a year on "claim agents," is void for uncertainty, a "claim agent" not being defined in the act, and the words having no fixed or reasonably certain popular meaning. Lockwood v. District of Columbia, 24 App. D. C. 569. The portion of the act imposing the same tax upon "building and other contractors" is also unenforceable as to "other contractors." District of Columbia v. Chapman, 25 App. D. C. 95.

applicability in particular instances,[43] and the basis for computing the amount of the tax,[44] is treated in the notes.

Municipalities have only such power to impose license taxes as is expressly granted.[45] The fact that a state does not impose a license tax on a particular business does not prevent a municipality from imposing one.[46] Cities and towns of Kentucky may, if they choose, substitute for the ad valorem tax on personal property a tax based on incomes, licenses, or franchises for municipal purposes.[47] Power to impose taxes by the latter method includes power to make such classification of property as is necessary.[48] Such classification must be reasonable and the taxes imposed uniform,[49] and so adjusted that property subject thereto, and property subject to the ad valorem tax, will be equally taxed.[50]

§ 17. *Income taxes.*[51]—Where the account of a military officer discharged in 1862, after the passage of the Federal income tax law of that year, is presented under the act of 1901, appropriating money for arrears of pay of volunteers during the civil war, the accounting officers may deduct the amount of the income tax which

43. A corporation which resembled street railway corporations in all respects, except that it used steam power, held liable to the excise tax on earnings of street railway corporations imposed by Rev. Laws c. 14, §§ 44-46, to be applied to the repair and maintenance of the public ways. McDonald v. Union Freight R. Co. [Mass.] 76 N. E. 655. Owner of stock of rugs who traveled from place to place selling them, and hired a room in a furniture store to display them, where he managed a sale, was "transient merchant" within Acts 1901, c. 208, requiring such persons to obtain a license and pay a fee and taxes. A bill of the goods to the furniture company was held not genuine and title was not transferred thereby. Simoyan v. Rohan [Ind. App.] 76 N. E. 176. An electric light company is not a "manufacturer" within the proviso excepting certain pursuits from those upon which the legislature is authorized to impose license taxes, by Const. 1898, art. 229. State v. New Orleans Ry. & Light Co. [La.] 40 So. 597. Tanner manufactured leather in Virginia but sold it in Pennsylvania, though it was cut in the store where sales were made. Such sales were liable to the mercantile tax. Commonwealth v. Cover, 29 Pa. Super. Ct. 409. Manufacturer of cigars and smoking tobacco had a factory at Philadelphia and another factory at another place. All sales were made and books kept at the Philadelphia factory. Held he was not liable to the mercantile tax on sales made from the Philadelphia factory. Commonwealth v. Vetterlein, 29 Pa. Super. Ct. 294. A manufacturer who sells nothing but his own products and these only at the place of manufacture is not liable for the mercantile tax. Commonwealth v. Crum Lynne Iron & Steel Co., 27 Pa. Super. Ct. 508.

44. Under Laws 1904, c. 76, § 93, imposing a license tax on "trading cars," the distance a car may travel upon a given route upon payment of a certain fee is to be computed from the point where the car was first opened for business, and not from the point where it first entered the state. S. Zemurray & Co. v. Bouldin [Miss.] 40 So. 15.

45. Const. §§ 117, 168, 170, held not to repeal existing special charters of cities which authorized them to levy license taxes, nor to require such taxes to be levied under a general law. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817. Neither Code 1887, § 1042, nor Act March 23, 1871, both of which relate to license taxes in towns or cities, repeals Act Mar. 5, 1821, which gives the town of Fredericksburg power to assess a tax on inhabitants and property within its limits for the improvement, convenience, and well being of the town. Id. Social clubs are not exempted from taxation by municipalities by Acts 1902-03-04, pp. 155, 226, c. 148, cl. 144, requiring a payment of $2 per member, by clubs keeping liquors, to be made to the treasurer of the county or corporation where its club house is located, in lieu of all other taxes for selling liquor to members. Town of Phoebus v. Manhattan Social Club [Va.] 52 S. E. 839. The tax imposed by the act is a license tax within the meaning of Code 1904, § 1042, authorizing a city or town to impose a tax in addition to the state tax for the privilege of doing anything for which a "license tax" is required, hence a town in which a club is located may impose an additional tax. Id.

46. Norfolk P. & N. N. Co. v. Norfolk [Va.] 52 S. E. 851.

47. Taxation of the latter kind is not required but is permitted by Const. § 181, as amended, and Act March 18, 1904, pursuant thereto. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689.

48. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689.

49. Const. § 171, uniformity clause, applies to taxation under Const. § 181, as amended. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689. Ordinance imposing on merchants and manufacturers, in lieu of an ad valorem tax on their personalty, a tax based on the amount of sales or output, under a sliding scale, the rate decreasing as the amount of sales or output increases, is unconstitutional. Id.

50. Ordinance which would result in an ad valorem tax on national bank stock and a tax on the incomes, licenses, or franchises

accrued in 1862.[52] The travel pay and commutation of subsistence of the officer is subject to the tax to the extent of any surplus over and above the officer's actual traveling expenses, and where he failed to render an account thereof, to the whole extent of travel pay, and commutation of subsistence.[53]

§ 18. *Distribution and disposition of taxes collected.*[54]—The distribution of taxes among taxing districts or municipalities,[55] and the use of funds so received,[56] is controlled by statute. Cities authorized to impose both kinds of taxes may apportion a franchise tax between different objects in the same proportion as ad valorem taxes are divided.[57] Where taxes have been paid for school purposes without objection or protest, their use for such purposes will not be prevented by a merely technical objection to the manner of the levy.[58] That it may be proposed to divert a tax when collected to a purpose other than that authorized, and for which it was levied, is not a ground for refusing to enforce collection of the tax, if legally levied.[59] The West Virginia statute requiring an estimate to be made and spread upon the records of county courts before making the annual levy does not prevent the diversion of funds raised from the purposes named in the estimate to other proper purposes,[60] and the laying of a special levy for a particular purpose does not limit the expenditure for that purpose to the amount raised by such levy, if there are other proper funds.[61]

A county treasurer is not the agent of the county in collecting taxes for townships and towns, and the county is not answerable for his delinquencies in the col-

of state banks and trust companies, held to discriminate against national banks. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689. Ordinances imposing a tax on incomes, licenses, and franchises of merchants, manufacturers, banks, and trust companies at a fixed yearly rate, though the ad valorem rate on other property would vary from year to year, held void. Id.

51. See 2 C. L. 1842.

52, 53. Galm's Case, 39 Ct. Cl. 55.

54. See 4 C. L. 1656.

55. The New York mortgage tax law, which provides that one-half the money derived from the tax shall be held subject to the order of county boards, does not violate the section of the constitution requiring a two-thirds vote of both branches of the legislature to appropriate money for local purchases. Under Laws 1905, c. 729, § 307, the proceeds of the tax belonging to the counties never becomes state money, and is not within Const. art. 3, § 20. People v. Ronner, 95 N. Y. S. 518. In New York a county is not a "tax district" so as to be entitled to a share of the taxes collected on bank stock. Under Tax Law, art. 2, § 24, providing for distribution of bank stock taxes between the "town, city, village, school and other tax districts" in the counties where the stock is taxable. City of Utica v. Oneida County Sup'rs, 109 App. Div. 189, 95 N. Y. S. 839. The $2 on each $100 of premiums paid into the state treasury by foreign insurance companies does not belong to the school fund, not being a part of the tax on corporate franchises provided for by Ky. St. 1903, § 4370, subd. 5, nor a fine, forfeiture, or license under subd. 6. Fuqua v. Hager, 27 Ky. L. R. 46, 84 S. W. 325. When a county treasurer is enjoined from collecting taxes assessed by a school district, but such taxes are afterwards collected, the county may not retain a portion thereof as the school district's share of the expense of the litigation, the county treasurer being required by law to collect such taxes. Mineral School Dist. No. 10 v. Pennington County [S. D.] 104 N. W. 270. Under New York statutes a county treasurer has no authority to borrow money on the credit of the county to pay a state tax levied on the county, and charge the same to a town, when all the towns have paid their proportion of the state taxes. Hathaway v. Delaware County, 103 App. Div. 179, 93 N. Y. S. 436.

56. Money received from liquor licenses held properly used for street improvements, and it was not essential that identical money appropriated for that purpose should be kept on hand therefor. Hett v. Portsmouth [N. H.] 61 A. 596. In Arkansas no part of a county road tax collected outside of first class cities can be expended on their streets, but four-fifths of the tax collected in such cities is to be expended on the streets thereof. City of Texarkana v. Edwards [Ark.] 88 S. W. 862. Fund from county road tax belongs to the county and should be expended under direction of the county court, which must act with city authorities in improving a city street. Id.

57. George Schuster & Co. v. Louisville [Ky.] 89 S. W. 689.

58. Trustees of Schools v. School Inspectors, 115 Ill. App. 479.

59. People v. Peoria & E. R. Co., 216 Ill. 221, 74 N. E. 734.

60. Construing Code 1899, c. 39, § 29. Taylor v. County Court of Braxton County, 57 W. Va. 165, 50 S. E. 720.

61. Taylor v. County Court of Braxton County, 57 W. Va. 165, 50 S. E. 720.

lection of such taxes.[62] A warrant upon a county treasurer to pay tax funds to a town treasurer creates no liability against the county, but is merely the authority under which funds of the town are paid over.[63] Mandamus lies to compel a county treasurer to pay over to a town treasurer public funds belonging to the town to the custody of which the town treasurer is entitled,[64] provided the county treasurer has such funds in his possession.[65] A county treasurer who pays over to a town supervisor the town's share of railroad taxes, instead of investing the same for the benefit of the sinking fund to pay railroad bonds, as required by law, is liable to the town for the amount.[66] In a suit to recover the same, the defendant has the burden of proving a defense that the town had received the benefit of the money so paid over.[67] Such illegal payment cannot be validated by a subsequent curative statute.[68] In an action by a tax collector to recover alleged overpayments to a parish, he must prove payments as claimed by him to have been made.[69]

TELEGRAPHS AND TELEPHONES.

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.*[1]—The franchise rights of telegraph and telephone companies depend largely upon statute and must be exercised within the limits thereof.[2] In Ohio, telegraph and telephone companies get their right to use the public streets from the state, and the municipality may agree on the mode of use but cannot agree on the right to use, or grant or require special benefits, or fix charges beyond what may be necessary to restore the pavement to its former usefulness.[3] In that state the probate court may fix the mode of using the streets where the city and the company cannot agree,[4] but in such case it cannot exercise legislative functions or give directions for the use of

62, 63, 64. State v. Spinney [Ind.] 76 N. E. 971.

65. He cannot be compelled to pay over funds of the county. State v. Spinney [Ind.] 76 N. E. 971.

66. Under Laws 1892, c. 685, § 12. Town of Walton v. Adair, 97 N. Y. S. 868.

67. Evidence insufficient. Town of Walton v. Adair, 97 N. Y. S. 868.

68. Laws 1903, c. 515, attempting to validate such a payment, violates Const. art. 8, § 10, prohibiting the giving or loaning of money or credit in aid of an individual. Town of Walton v. Adair, 97 N. Y. S. 868.

69. Evidence insufficient. Young v. Parish of East Baton Rouge [La.] 40 So. 768.

1. See 4 C. L. 1657.

2. Little v. Central District & Printing Tel. Co. [Pa.] 62 A. 848.

3. Bates' Ann. St. §§ 3461, 3471. Farmer v. Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078.

4. **Requisites of petition:** A telephone company petitioning the probate court for the mode of using streets need not set out in the petition what streets it proposes to occupy, nor the character of the structures it proposes to erect (Fitzsimmons Tel. Co. v. Cincinnati, 2 Ohio N. P. [N. S.] 51), but the petition must show the specific questions of difference between the city and the company (Queen City Tel. Co. v. Cincinnati [Ohio] 76 N. E. 392). The petition must be reasonably certain (Id.), and incorporation of the company must be shown (Id.).

streets generally for the present and future,[5] nor does the statute authorize it to grant to a telephone company the right to put wires and apparatus under the streets without the consent of the city.[6] A board of county commissioners cannot grant privileges to a telegraph company except within the limitations of the statute under which they act.[7] Where a statute prohibits the use of highways by telegraph companies in such a way as to incommode the public no board can determine for all time the question of convenience,[8] and the same or subsequent board may order the removal of lines when necessity demands it.[9] In Kentucky the county court cannot authorize the construction of a telephone line without the consent of the fiscal court.[10] An ordinance granting the right to operate lines within the city limits under certain conditions for a specified period covers all territory included within the city limits by subsequent merger during that period.[11] The right given to telegraph companies by the Federal statute to erect their lines on post roads does not interfere with the right of the states or local authorities to regulate and control highways,[12] but it has been held that where a telegraph company has placed its line upon a public highway by consent of the local authorities, and has complied with the Federal law, it cannot be required without compensation to remove such line because of inconvenience to the public.[13] Quo warranto is the proper remedy to declare the forfeiture of the right of a corporation to exercise its franchise under a city ordinance,[14] but the fact that a telephone company fails to comply with its license to use the public streets does not warrant a forfeiture of its franchise.[15] In such case the license may be revoked for abuse.[16] One who signs a petition for a franchise to a telephone company on condition that service be furnished at a certain rate becomes a party to the contract with the city and may sue to enforce its provisions as to rates.[17]

Consideration.—While the transportation law of New York gives to telephone companies the right to use the streets of a city, it gives them no rights in public places outside of streets,[18] nor does it deprive the city of its police power,[19] and, accordingly, a contract by which a company secures the use of streets and other public places in consideration for service at certain rates is supported by a sufficient consideration.[20]

5. Queen City Tel. Co. v. Cincinnati [Ohio] 76 N. E. 392.

6. Bates' Ann. St. §§ 3461, 3471. Queen City Tel. Co. v. Cincinnati [Ohio] 76 N. E. 392.

7. Ganz v. Ohio Postal Tel. Cable Co. [C. C. A.] 140 F. 692.

8. Under § 3454, Bates' Ann. St (Ohio), the board had no power to grant to a company the right to maintain its line indefinitely at any particular place. Ganz v. Ohio Postal Tel. Cable Co. [C. C. A.] 140 F. 692.

9. The action of local authorities in ordering the removal of poles by reason of inconvenience to the public will not be interfered with by the courts unless an abuse of discretion is shown. Ganz v. Ohio Postal Tel. Cable Co. [C. C. A.] 140 F. 692. The fact that the inconvenience arose by reason of the subsequent location on the road of an electric railway by permission of the board is immaterial. Id.

10. Ky. St. 1903, §§ 4306, 4679. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126.

11. The original city ordinance held to govern where several towns and villages under whose ordinances defendant had previously operated became merged in the city. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

12. Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579). Ganz v. Ohio Postal Tel. Cable Co. [C. C. A.] 140 F. 692.

13. Nor could the authorities remove it. So held where the inconvenience arose because of a subsequent permission from the authorities to a railway company to operate electric cars on the highways. Ohio Postal Tel. Cable Co. v. Sandusky County Com'rs. 137 F. 947. And where such line is on a post road, a question is presented of which the Federal courts have jurisdiction. Id.

14, 15, 16. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

17. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

18. Laws 1890, p. 1198, c. 566, § 102. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

19. The city may determine the manner of running the lines, etc. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

20. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

License fees and taxes.[21]—Municipalities generally have the power to impose upon telegraph and telephone companies a reasonable charge for the occupation of the streets,[22] but a city has no power to impose upon a telephone company an occupation tax, as a revenue measure, in addition to a franchise tax already collected;[23] and where by statute a company has been granted the right to construct and operate its lines in highways or streets in consideration for services to the public, a municipality has no power to impose any tax or rental on its poles for the use of the streets.[24]

Transfers, line contracts, leases and mortgages.[25]—Contracts between different companies for their mutual benefit are not revocable at the will of one of the parties,[26] and a court of equity will decree specific performance of such contracts in order to preserve the status quo of the parties.[27]

§ 2. *Construction and maintenance of lines, and injuries thereby.*[28]—The use of highways by telegraph and telephone compauies is subordinate to their use by the public for the primary purpose of travel,[29] and this is so although the right to use the streets is given by statute.[30] Municipal authorities have the power of reasonable control and regulation of the use of the public streets by telephone companies,[31] and in proper cases may require a telephone company to place its lines underground,[32] provided there is no discrimination.[33] Local boards are often required to specify portions of highways where telegraph or telephone lines may be erected.[34] A grant to a telephone company to erect a line over and along certain property and

21. See 4 C. L. 1659.

22. See 4 C. L. 1660.

23. Const. §§ 174, 181. Ky. St. 1903, §§ 4096, 4077, 3637, subsec. 4. Cumberland Tel. & T. Co. v. Hopkins [Ky.] 90 S. W. 594. A telephone company had purchased from the city, at a stipulated price per year, the right to maintain a telephone exchange and to do a telephone business. Held the city could not impose an additional charge by an occupation tax. Id.

24. The fact that Acts Tenn. 1885, p. 120, c. 66, do not contain the words "free of charge" as did the Code of 1858, is immaterial. Ordinance of city of Memphis passed Dec. 20, 1894, and amended Feb. 25, 1902, held void. City of Memphis v. Postal Telegraph-Cable Co., 139 F. 707.

25. See 4 C. L. 1661.

26. The telegraph company agreed to furnish material and railroad company to furnish labor for a telegraph line and the contract was silent on the question of its termination. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849.

27. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849. The fact that the contract was continuous, and that the act of Congress of 1866 rendered nugatory a provision in the contract prohibiting the railway company from allowing any other telegraph company to build a line along its road, did not prevent specific performance. Id.

28. See 4 C. L. 1661. See, also, Electricity, 5 C. L. 1086.

29. Ganz v. Ohio Postal Tel. Cable Co. [C. C. A.] 140 F. 692. Telephone lines must be so constructed as not to interfere with public travel. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126. Where a telephone post was placed in a public highway and plaintiff was injured by driving against it the question whether it was an obstruction should have been left to the jury. Id.

30. Placing pole too near traveled portion. Act Apr. 29, 1874, § 33 (P. L. 92). Little v. Central District & Printing Tel. Co. [Pa.] 62 A. 848.

31. Village of Carthage v. Central New York Tel. & T. Co., 96 N. Y. S. 919.

32. Village held to have such power under its special charter authorizing its trustees to prevent the incumbering of streets, and under Village Laws 1897, p. 455, c. 414, § 340; § 89, subd. 9, p. 394; and § 141, p. 414, declaring the streets to be under the exclusive control of the trustees. Village of Carthage v. Central New York Tel. & T. Co., 96 N. Y. S. 919.

33. Where one of two telephone companies extended its lines without permission of the village trustees, the fact that the trustees required such extension to be placed underground without requiring the other company to place its wires underground does not prove discrimination, if the rival company made no extension. Village of Carthage v. Central New York Tel. & T. Co., 96 N. Y. S. 919, rvg. 48 Misc. 423, 96 N. Y. S. 917. In such case a preliminary injunction restraining the erection of lines pending the action to require the company to place the wires underground should not be vacated where the facts as to the propriety of such action are in dispute. Id.

34. In Illinois this duty devolves upon the highway commissioners. Laws 1903, p. 350, § 4. If the commissioners fail to specify and the company thereupon proceeds to erect its lines, it is bound to so place them as not to interfere with the use of the highway by the public. Interstate Independent Tel. & T. Co. v. Towanda [Ill.] 77 N. E. 456. Where a city council is required to designate the places in streets where a telephone company may place its poles, it cannot be required by mandamus to designate the

to place poles along the highway adjoining such property does not permit the erection of a line diagonally across the property.[35] The right of a telephone company to construct lines on private lands must be clearly and expressly granted.[36] The remedy against a telegraph company for erecting its line outside of its right of way is one for damages and not condemnation.[37] Where the bond of a telephone company is sufficiently broad to cover damages arising from the construction of lines on roads abutting on the lands of private owners, an injunction will not lie on behalf of a private owner to prevent such construction though the municipal authorities have not consented to the use of the roads.[38] A telephone wire stretched over the property of another without authority, but causing no obstruction, is not a nuisance which may be summarily abated by cutting the wire,[39] but an action of ejectment will lie for stringing telephone wires over one's land without permission, although the soil is not interfered with.[40] A license to a telephone company to attach wires to a building is revocable at the pleasure of the owner,[41] and in trespass for attaching wires to buildings without authority the measure of damages is the value of the use to the defendant.[42] The degree of care required in the placing of telegraph and telephone lines is commensurate with the dangers reasonably to be apprehended in each particular case.[43] Where it is not customary or practicable for a telephone company to maintain guard-wires to prevent injury, the company is not negligent for failure to so maintain them.[44] To warrant a recovery for injuries caused by the communication of electricity by telegraph or telephone wires, negligence must be shown or presumed.[45] The question whether a telephone company is negligent in failing to learn

streets in which such poles may be erected where the company has a right to use all the streets. Proceeding under Code Civ. Proc. § 1961, authorizing mandamus to compel duties enjoined by law. State v. Red Lodge [Mont.] 83 P. 642.

35. Zimmerman v. American Tel. & T. Co., 71 S. C. 528, 51 S. E. 243. Instruction that the contract was silent as to the location of the line held more favorable than appellant was entitled to. Id. Parol evidence showing an understanding that the line should not cross the property held not prejudicial. Id.

36. A telephone company has no right of eminent domain over the private lands of individual owners under Act Apr. 29, 1874, § 33, P. L. 73. Pennsylvania Tel. Co. v. Hoover, 24 Pa. Super. Ct. 96; Pfoutz v. Pennsylvania Tel. Co., 24 Pa. Super. Ct. 105.

37. Phillips v. American Tel. & T. Co., 71 S. C. 571, 51 S. E. 247. Instruction to jury to figure out the actual damages and then go to the question of punitive damages and figure that out, held not erroneous. Id.

38. Decree of injunction amended so as to include only private land. Pfoutz v. Pennsylvania Tel. Co., 24 Pa. Super. Ct. 105.

39. Defendant convicted under statute prohibiting willful cutting of telephone wire. McGowan v. State [Ala.] 40 So. 142.

40. So held under statute defining ejectment as an action to recover the immediate possession of real property. Code Civ. Proc. § 3343, subd. 20. Butler v. Frontier Tel. Co., 109 App. Div. 217, 95 N. Y. S. 584.

41. Revocation by sale to plaintiff. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

42. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. Fifty dollars held not unreasonable for stringing wires on plaintiff's building. Id. Evidence held sufficient to establish defendant's ownership of wires. Id. It was not necessary to show that defendant actually used the wires for telephone purposes while they were attached. Id.

43. The question of negligence in not properly insulating and guarding wires which came in contact because of the burning of a mill held proper for the jury. Horning v. Hudson River Tel. Co., 97 N. Y. S. 625. The failure to insulate or properly guard against the contact of the wires was the proximate cause of the injury and not the burning of the building. Id. In an action for injuries by electricity communicated by a telephone wire, instruction that it was a matter of common knowledge that electricity is conducted along such wires held proper. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924.

44. In the absence of custom or practicability, held proper not to submit to the jury the question of the company's negligence. Aument v. Pennsylvania Tel. Co., 23 Pa. Super. Ct. 610.

45. The mere fact that electricity, generated by an electric railroad company, escaped from its trolley wire to one of its span wires, thence to a telephone cable of a telephone company; thence to a telephone cable of another telephone company; thence to a gas pipe in a store building; thence to the lead connection with a gas meter in the basement, which was melted off, igniting the gas, setting fire to the floor above and damaging a stock of goods, does not render all or any of said companies liable in damages to the owner of the goods in the ab-

of breaks in wires and repair them depends upon the circumstances of each case.[46] Contributory negligence will defeat recovery.[47]

§ 3. *Telegraph messages. A. Duty and care.*[48]—The law imposes a public duty upon telegraph and telephone companies to promptly and correctly transmit and deliver messages,[49] and they are liable for a breach thereof to parties for whose benefit the particular message was sent.[50] As a general rule the party injured has the right to recover the damages arising.[51] An undisclosed principal of the sender of a message may sue in his own name for damages resulting from an erroneous transmission,[52] but a telegraph company is not liable to the sender for failure to deliver a message unless it is charged with notice of his interest either from the message itself or otherwise,[53] nor is it liable for negligence to the undisclosed principal of the

sence of proof of negligence on the part of one or more of said companies. Marsh v. Lake Shore Elec. R. Co., 7 Ohio C. C. (N. S.) 405. As between a telephone company and one with whom it has no contract relation, the mere fact of an accidental breaking of a wire in a severe storm raises no presumption of negligence on the part of the company so as to warrant a recovery for the killing of a horse. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610.

46. Where a break occurred in a great and unusual sleet storm, the company was held not negligent for failure to learn of and repair the break within an hour and a half. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610.

47. A charge that jury should consider whether plaintiff knew or ought to have known of the danger from an electric wire held proper, after a definition of what plaintiff ought to know. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924. Where plaintiff permitted a wire connected with the telephone ground wire and extending into a pump house to hang coiled up near a looking glass and there combed his hair in a storm, question of contributory negligence held proper for the jury. Id. Held not contributory negligence for plaintiff's employee to lead a horse through a pool of water in which a live wire had lodged. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610.

48. See 4 C. L. 1662.

49. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528.

50. Plaintiff held entitled to damages where in reliance on a telegram quoting the price of machinery he contracted to erect a plant for a city, and the telegraph company had made a mistake in the message (Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129), and where the sender's message is a mere estimate and not a contract with the addressee, the sender cannot be liable to the addressee, nor can the company be considered the agent of the sender for the purpose of transmitting the erroneous message (Id.). In such case, where defendant's evidence tends to show negligence in the author of the message, it is proper for plaintiff to show in cross-examination that the negligence was that of the operator in transmitting the message. Id.

51. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129.

52. Propeller Towboat Co. v. Western Union Tel. Co. [Ga.] 52 S. E. 766.

53. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 90 S. W. 714.

NOTE. To whom liable for negligence: "The telegraph cases are cited and exhaustively reviewed. But when the opinions in them are carefully read and analyzed, they recognize and affirm the rule that a company owes a duty and incurs a liability to those parties only of whose interest it has notice and for those injuries only which it might reasonably anticipate. The pertinent cases fall into four classes; (1) Those which assert a duty and liability to the undisclosed principal of the sender. Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Harkness v. Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; Leonard v. Telegraph Co., 41 N. Y. 544, 1 Am. St. Rep. 446; Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Western Union Tel. Co. v. Morris, 28 C. C. A. 56, 83 F. 992; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Western Union Tel. Co. v. Church [Neb.] 90 N. W. 878, 57 L. R. A. 905. (2) Those which recognize a duty and liability to a person who appears on the face of the telegram to be its beneficiary although neither its sender nor the addressee. Western Union Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Telegraph Co. v. McKibben, 114 Ind. 511, 14 N. E. 894. (3) Those which deny any duty or liability to those who do not appear from the message to have any interest in it. McCormick v. Western Union Tel. Co., 25 C. C. A. 35, 79 F. 449, 38 L. R. A. 684; Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 218, 13 S. W. 78, 18 Am. St. Rep. 37; Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Morrow v. Western Union Tel. Co., 21 Ky. L. R. 1263, 54 S. W. 853. (4) The decision which denies any liability to the undisclosed principal of the addressee. Lee v. Western Union Tel. Co., 51 Mo. App. 375. In the cases of the two latter classes the duty and liability are denied on the ground that the company received no notice from the telegrams of their probable existence, and hence could not have anticipated injuries to those who did not appear to be beneficiaries of the

addressee.[54] It does not guarantee that information sought by a voluntary office message will be received.[55] The question of reasonable care in handling messages is ordinarily one for the jury.[56] A telegraph company is not bound to open its place of business on Sunday, but if it does so it must observe reasonable hours.[57]

Transmission.[58]—The failure of a telegraph company to transmit a message is a breach of its contract and raises a presumption of negligence.[59] Where defects in the wire of a telegraph company are caused by its negligence, the company is not relieved of its duty to transmit messages with all reasonable dispatch,[60] nor is delay in transmission authorized because a sender assumes other risks in connection with the message.[61] The presumption is that the agent of a telegraph company for the reception of messages has power to bind the company as to the time for sending them.[62] The question whether delay in transmission was the proximate cause of an injury is one for the jury.[63]

messages or to be likely to incur the damages which were sought. In Western Union Tel. Co. v. Kerr [Tex. Civ. App.] 23 S. W. 564, 565, the court refused to permit the undisclosed principal of a sender to recover damages for mental anguish on the ground that such damages could not have been reasonably anticipated and were not the natural consequence of the negligence, although the right of such a principal to maintain the action for such damages as appeared from the telegram to be likely to result to her was conceded. The same ruling may be found in Pacific Exp. Co. v. Redman [Tex. Civ. App.] 60 S. W. 677. In Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, and Western Union Tel. Co. v. Church [Neb.] 90 N. W. 878, 57 L. R. A. 905, all the damages which the undisclosed principal of a sender may suffer are held to have been reasonably anticipated by the telegraph company and recoverable. In Western Union Tel. Co. v. Wood, 6 C. C. A. 432, 57 F. 471, 21 L. R. A. 706, the addressee of a telegram was denied damages for mental suffering and for a failure to attend to business before a person named in the message died, because the telegram did not indicate any relationship or business between the addressee and the deceased. A more extended review of cases would be futile. Suffice it to say that through them all the line of demarcation between legal injury and that damnum absque injuria for which courts may not grant relief is the answer to the question whether the message gave such notice of the interest and probable injury of the plaintiff that the company might reasonably have anticipated the latter as the natural and probable effect of its negligence."—Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 548.

54. Western Union Tel. Co. v. Sehriver [C. C. A.] 141 F. 538.

55. Plaintiff could not recover where he received a message intended for another party of similar name and the company undertook by office message to determine the party intended but for some unknown reason the information sought was not obtained, and he acted on the message received with as much knowledge as the company. Bowyer v. Western Union Tel. Co. [Iowa] 106 N. W. 748.

56. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 538. Evidence held substantial for the consideration of the jury where an operator, who received a message telephoned to him in the name of a bank and promising to honor checks, knew that the message was telephoned to him by either the beneficiary or the bank, but could not tell which one, but nevertheless transmitted the message without inquiry. Id. Evidence sufficient to show negligence. Western Union Tel. Co. v. Craige [Tex. Civ. App.] 90 S. W. 681.

57. Smith v. Western Union Tel. Co. [S. C.] 51 S. E. 537.

58. See 4 C. L. 1663.

59. Pleas that addressee lived outside free delivery limits, which fact was unknown to the receiving agent, held bad. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. One who merely receives messages from the senders and delivers them to the operator for transmission cannot testify that everything was done to get the message off. Id. Where the receiving agent testified to the exact minute when he received a message, he could be cross-examined as to when he received the first message the previous day. Id. Evidence held to support a finding of negligence in transmitting a message informing plaintiff's wife that her brother had been shot. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 91 S. W. 312.

60. Ruling as to admissibility of testimony held proper and remarks of court held not a charge on the facts. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913.

61. The assumption of the risk by the sender of a message that the agent at the point of destination will not be in his office does not authorize delay in transmission, or negligence on the part of the agent at that point, if in the office. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121.

62. So held, even to extent of disregarding office hours at point of destination. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121.

63. Under the evidence held that the question whether plaintiff's failure to reach his wife's deathbed was the proximate result of defendant's negligence in transmit-

Delivery.[64]—Telegraph and telephone companies are bound to exercise reasonable diligence in delivering messages and proof of delay raises a presumption of negligence.[65] The fact that the sender of a message is negligent in not giving the specific address of the sendee will not excuse a negligent failure to deliver,[66] but a mistake in a message caused by the agent of the addressee cannot be charged to the company.[67] A telegraph company is bound to exercise diligence in accordance with its reasonable rules regardless of holidays,[68] but it is not ordinarily bound to deliver messages outside of office hours.[69] A telegraph company is not bound to deliver a message in the country, and outside the point to which it is addressed, in the absence of knowledge by it of the residence of the addressee and an agreement express or implied to deliver at such residence,[70] and an unauthorized agreement to deliver at such point does not bind the company;[71] nor is a telephone company bound to deliver a message at a point beyond that indicated by the contract of transmission.[72] In order to recover damages for negligence in the delivery of a message there must be a breach of some duty.[73] The damages must have naturally and proximately resulted from the breach of duty,[74] and it must appear that but for the failure to deliver, the damages would not have resulted.[75] Where no purpose could have been served thereby, failure to notify the sender of the nondelivery of a message is not a ground for action.[76] Willful refusal to pay over money due on telegraph orders renders the

ting and delivering a message should have been submitted to the jury. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121.

64. See 4 C. L. 1663.

65. Forty hours unexplained. Du Bose v. Western Union Tel. Co. [S. C.] 53 S. E. 175. In Kentucky the rule applied in actions for damages against telegraph companies for nondelivery of messages applies equally to telephones. Cumberland Tel. & T. Co. v. Atherton [Ky.] 91 S. W. 257. Where defendant's witness testified that he had made many personal inquiries for the address on the message, cross-examination as to whether witness called up certain points by telephone was not improper on the ground that defendant could not deliver the message by telephone. Western Union Tel. Co. v. Craige [Tex. Civ. App.] 90 S. W. 681.

66. Evidence held to show that delay in delivering the message was not due to negligence on the part of the sender in not giving a specific address of the sendee. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528.

67. Failure to deliver caused by plaintiff's agent giving wrong name by telephone. Western Union Tel. Co. v. Gault [Ky.] 90 S. W. 610.

68. Where a rule fixed office hours on holidays from 8 to 10 A. M. and from 4 to 6 P. M., an instruction that if delay in delivering a message was due to observing the holiday, defendant was not liable, was properly refused. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528.

69. Death message after office hours on Sunday. Smith v. Western Union Tel. Co. [S. C.] 51 S. E. 537.

70. Western Union Tel. Co. v. McCaul [Tenn.] 90 S. W. 856. No notice or arrangement to deliver at a point 3½ miles from destination. McCaul v. Western Union Tel. Co., 114 Tenn. 661, 88 S. W. 325.

71. A mere messenger cannot bind the telephone company by agreement to deliver at a certain point beyond the place to which the message is addressed. Cumberland Tel. & T. Co. v. Atherton [Ky.] 91 S. W. 257.

72. Where the messenger made diligent search at a point 10 miles outside delivery limits, at which point the company had by special contract agreed to deliver, he was not bound to deliver at a point several miles from that place. Cumberland Tel. & T. Co. v. Atherton [Ky.] 91 S. W. 257.

73. Bowyer v. Western Union Tel. Co. [Iowa] 100 N. W. 748. Delivery of a message in good faith to a person of name similar to that of the addressee, where such person knew of the discrepancy, gives no cause of action in favor of such person. Id.

74. Failure to get employment not proximately caused by delay in delivering a message inquiring if plaintiff was ready to go to work. Wilson v. Western Union Tel. Co. [Ga.] 52 S. E. 153.

75. Western Union Tel. Co. v. T. H. Thompson Milling Co. [Tex. Civ. App.] 91 S. W. 307. Plaintiff received an offer of wheat requiring immediate acceptance and telegraphed his acceptance the next day, but the message was not delivered and thereafter the price of wheat advanced. Held error to refuse instruction that unless the deal would have been closed by the person offering the wheat, the finding should be for the defendant. Id. On the question of delay, plaintiff could testify, after stating his reasons therefor, as to his ability to cross a creek earlier than he did had the message been promptly delivered. Machen v. Western Union Tel. Co. [S. C.] 51 S. E. 697.

76. Under the evidence held no ground for recovery. Cumberland Tel. & T. Co. v. Atherton [Ky.] 91 S. W. 257.

company liable in all damages reasonably resulting,[77] and in such case the company is not relieved by merely remitting to the transmitting bank the amount received.[78]

Delivery to others for addressee.—Sending a telegram in care of a corporation constitutes it the agent of the addressee to receive the message,[79] and the telegraph company is bound to deliver to the corporation, although it did not get the name of any of its officers and although the addressee is not connected with the corporation.[80] Where a telegram is addressed in care of a person other than the addressee, the company need not deliver it to any other person.[81]

Spurious messages.—A telegraph company is bound to exercise reasonable care to receive and transmit only genuine and authorized messages.[82] This duty it owes to senders, to undisclosed principals of senders, to addressees, and to those who appear in the telegrams to be beneficiaries thereof,[83] but in the absence of facts or circumstances which would awaken inquiry in the mind of a person of ordinary prudence, a company is not bound to ascertain the identity or authority of one who presents a message for transmission,[84] whatever may be the mode of communication to the operator.[85] When facts or circumstances calculated to awaken inquiry come to the notice of the company or operator, reasonable care only requires the party receiving the notice either to investigate and ascertain the authority of the sender or to communicate the facts and circumstances and his inquiry to the addressee at or before delivering the message.[86] The action for damages arising from false representations in a spurious message is one of tort for breach of duty to transmit authorized messages only, and not an action on contract,[87] and, accordingly, a company is not liable for false representations to one to whom it owes no duty and whose injuries could not have been reasonably anticipated.[88] The liability of a telegraph company for misrepresentations in a telegram is not analogous to that of a common

77. Plaintiff being compelled to travel for 24 hours without food or funds, he was entitled to damages for physical suffering and mental anguish attendant thereon. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838. The cause was within the jurisdiction of the circuit court, though the amount of money withheld was below the jurisdictional amount of that court. Id. Finding that suffering was not self imposed not disturbed. Id.

78. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838.

79. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58.

80. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58. As against a general demurrer, an allegation of negligence in failing to deliver a message to plaintiff's wife includes the further allegation of failure to deliver to her authorized agent. Id.

81. Company not negligent for late delivery to the wife of the person in whose care the message was addressed where such person was outside delivery limits. Western Union Tel. Co. v. McCaul [Tenn.] 90 S. W. 856.

82. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533.

83. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538. Where a telegraph company negligently transmits a message, falsely representing that a certain bank will honor checks, the existence of a state of facts which would have created a cause of action against the bank had the telegram been genuine is not a condition precedent to the maintenance of an action against the telegraph company (Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522; Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533), but plaintiffs cannot recover if the bank had authorized the sender, or estopped themselves from denying his authority, to send the message complained of (Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533), nor if they failed to exercise ordinary care (Id.).

84. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522; Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533.

85. Spurious message to operater by telephone. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522; Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533.

86. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533; Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522.

87. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538.

88. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538. Where the telegraph company has derived no benefit from the false representations, the undisclosed principal of an addressee cannot recover by invoking the rule that where one of two innocent parties must suffer by the fraud of a third, the loss should fall upon the one making the injury possible. Id.

carrier for the loss of goods so as to render it liable as an insurer of the correct receipt and transmission of messages.[89]

(§ 3) *B. Injury and damages. Conflict of laws.*[90]—In an action for failure to deliver a telegram the law of the place where the contract was made controls.[91] The measure of damages for delay in delivering a message is not governed by the law of a foreign state from which it is sent.[92] In Arkansas, damages for mental anguish can be recovered by the receiver of a message even though such damages could not be recovered in the state whence the message came.[93]

General and special damages.—At common law a telegraph company is liable for all damages fairly and substantially caused by negligence in the transmission and delivery of messages,[94] but it is liable for such injuries only as could reasonably be considered within the contemplation of the parties under the circumstances.[95] Where it does not appear from the message itself that certain damages might flow from negligence in delivery, such damages cannot be recovered unless the company knew of the circumstances.[96] In Georgia the telegraph company is held to be the agent of the sender of a message, to whom, and not to the company, the addressee must look for damages from erroneous transmission.[97] Where damages are claimed because of wrongful delivery to a party other than the addressee, it must be shown that such delivery was the proximate cause of the injury.[98] Whether damages are too remote depends upon circumstances.[99] Damages for mental suffering are actual damages.[1]

89. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538.

90. See 4 C. L. 1665.

91. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

92. Hughes v. Western Union Tel. Co. [S. C.] 52 S. E. 107.

93. Where negligence occurred and injury was sustained in Arkansas, but damages could not be recovered in Missouri. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528.

94. McCarty v. Western Union Tel. Co. [Mo. App.] 91 S. W. 976; Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. This rule is not changed by statutes requiring telegraph companies to receive, transmit, and deliver messages with fidelity, speedily, and without mistakes. Code Iowa 1897, §§ 2161-2164. Id. In an action for the loss of a bargain in wheat, caused by the nondelivery of a message, the fact that plaintiff did not in fact purchase other wheat on the market held immaterial. Western Union Tel. Co. v. T. H. Thompson Milling Co. [Tex. Civ. App.] 91 S. W. 307.

95. Rupture of intestine not such injury as result of mental anguish from absence of father of sick person. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792, Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538. Telegraph company could not know that sender's mother left no property and that sender could not provide a decent burial. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 90 S. W. 714. Message and outside information held sufficient to apprise company that sender's brother was summoned to burial of the mother. Id. Message from a point distant from L.: "A died this A. M. Will be at L. to-morrow," held not to give notice justifying recovery by the sendee who lived near L., because she did not know where the remains were and could not attend the funeral, which occurred near L. Western Union Tel. Co. v. Kuykendall [Tex.] 89 S. W. 965.

96. As to necessity for a nurse. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792.

97. Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290.

98. Western Union Tel. Co. v. Barlow [Fla.] 40 So. 491. Where a telegram inquiring the price of fruit was delivered to a wrong party from whom plaintiff later bought the fruit with knowledge of a different name in his answer, he could not recover damages because the fruit was unsound. Id.

99. Damages held not too remote where a mortgagee received a false telegram, "Will pay Barnes draft for $3,500. Bank of Denison," and thereupon surrendered his security on cattle owned by Barnes. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. A draft by Barnes was not essential to the maintenance of the action. Id. The telegram was not too indefinite to justify plaintiff in acting on it. Id. The fact that sufficient security remained, immaterial. Id. Damages held too remote where telegraph company negligently failed to deliver to plaintiff a message requesting the price of land but containing no offer to buy. Bennett v. Western Union Tel. Co. [Iowa] 106 N. W. 13. Where one receives a false telegram stating that a bank will honor certain checks and thereupon advances money on such checks, the damages resulting are not too remote. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533. Damages held too remote where plaintiff was compelled to sell his household goods, etc., at a sacrifice because of the nondelivery of a telegram asking assistance for his sick son, who died later, causing plaintiff mental anguish. Gooch v.

Special damages may be recovered where a company knew or ought to have known that they would probably arise in case of negligence.[2] Only such damages as were caused by a company's negligence[3] or misrepresentations can be recovered.[4] Where damages claimed are too remote, a plaintiff is entitled to only the price of transmitting the message,[5] and when both legal damages and damages too remote are proven, but the amount of either is unknown, only nominal damages can be recovered.[6] Where a message is never delivered a sender is entitled to at least nominal damages.[7] The general rules as to the measure of damages apply.[8]

Mental anguish.[9]—For negligence in the transmission or delivery of messages, many jurisdictions now allow recovery for mental anguish independent of bodily or pecuniary injury where the message is for the benefit of plaintiff or concerns his domestic or social interests.[10] It is no defense to such actions that had a telegram been received plaintiff would have suffered other mental anguish,[11] or that the recipient was in fact relieved of anxiety during a delay.[12] To justify a recovery for mental anguish, however, it must appear that the company had notice, either from

Western Union Tel. Co. [Ky.] 90 S. W. 587. Damages not too remote where a lessee of a vessel was compelled to pay damages to the lessor for delay in loading it, caused by error in transmitting a message directing the vessel to proceed to a certain point. Propeller Towboat Co. v. Western Union Tel. Co. [Ga.] 52 S. E. 766. Compensatory damages cannot be recovered for incorrectly transmitting a mere proposal to sell. Richmond Hosiery Mills v. Western Union Tel. Co. 123 Ga. 216, 51 S. E. 290.

1. Western Union Tel. Co. v. Haley [Ala.] 39 So. 386.

2. Message inquiring as to condition of mother held sufficient to notify the company that unless answer was returned sender would undertake a journey, so as to entitle the cost of said journey to be recovered. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. In an action for failure to deliver a death message requesting a conveyance, plaintiff could show the amount of money he had with which to procure another conveyance. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. Where the addressee would have been bound to comply with an order for goods contained in a telegram, he may testify that he would have complied with the order if he had received it. Elam v. Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115. On the question of damages it is proper for the addressee of a message to testify as to what he would have understood a message not delivered to mean. Id. Rev. St. § 1259, providing that telegraph or telephone companies shall be liable in special damages for failure to properly handle messages, applies only to domestic corporations. McCarty v. Western Union Tel. Co. [Mo. App.] 91 S. W. 976. Where plaintiff had contracts binding him to deliver potatoes and ordered a quantity by telegram which was not delivered, he was entitled to recover the extra price which he was compelled to pay on the market. Elam v. Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115.

3. Where there was a delay in a message announcing a burial at 5 o'clock, plaintiff could not recover for sending a messenger to hurry the preparation for the funeral because of hot weather. Du Bose v. Western Union Tel. Co. [S. C.] 53 S. E. 175.

4. Nominal damages only could be recovered where plaintiffs, in reliance on a false telegram promising to honor checks for stock, incurred other items of expense also, and there was no proof of the amount paid for stock. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533. In an action to recover small amounts paid out at different times in reliance on a false message, plaintiff must prove each specific amount and general statements are not competent. Id.

5. Gooch v. Western Union Tel. Co. [Ky.] 90 S. W. 587.

6. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533.

7. Western Union Tel. Co. v. Haley [Ala.] 39 So. 386.

8. Where, through mistake in the transmission of a message, plaintiff supposed that his offer to sell mules at $135 had been accepted, and thereupon delivered the mules, but received only $130 for them according to the intended message, he was entitled to the $5 damages, $135 being the market price. McCarty v. Western Union Tel. Co. [Mo. App.] 91 S. W. 976. $1,100 held not excessive for failure to attend funeral of a son. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58.

9. See 4 C. L. 1666. See special article, post, p. 1678.

10. Powell's Case, 75 Tex. 26, 12 S. W. 534, criticised. Davvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

11. Defense that plaintiff would have suffered more by being present and seeing burial of her son. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58.

12. Telegram announcing serious illness of plaintiff's wife was received 28 hours late, of which fact plaintiff was informed before he left to see her. Held no defense that he was relieved of mental anxiety for 28 hours and that his wife recovered. Hamrick v. Western Union Tel. Co. [N. C.] 52 S. E. 232.

the face of the telegram or otherwise, of circumstances enabling it to foresee that such anguish would reasonably result from the negligence complained of.[13] No damages can be recovered for the suffering of the object of a plaintiff's concern in an action for mental anguish.[14] It must further appear that the injury was the natural and proximate result of such negligence,[15] that had the message been promptly delivered the injury would not have occurred,[16] and that ordinary care on the part of plaintiff could not have avoided it.[17] Contributory negligence will also defeat a recovery for mental anguish.[18] Where it is held that one cannot recover for mental anguish alone resulting from the failure of a company to deliver a message,[19] there can be no recovery for physical injuries resulting from such anguish.[20] A brother may recover for mental suffering caused by delay in delivering a message.[21] A statute rendering telegraph companies liable for mental anguish applies to any corporation doing a public telegraph business.[22]

Exemplary damages.[23]—Punitive damages may be recovered for wanton and willful negligence in delivering a message.[24] This rule applies also under statutes allowing recovery for mental anguish although the statute does not mention such damages.[25] A conscious failure to exercise due care in transmitting a message constitutes willfulness.[26]

13. Demurrer sustained where complaint failed to show that telegram was sent for plaintiff's benefit. Rogers v. Western Union Tel. Co. [S. C.] 51 S. E. 772. Telegram held sufficient in itself to show close relation between sendee and a party fatally shot, and this, with information given by the sender, held sufficient to authorize the introduction of evidence as to affection. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 91 S. W. 312. Where one could not attend the funeral of a relative because of a negligent delay on the part of a telegraph company in delivering the message announcing the death, damages for mental anguish could be recovered if the telegram showed a probability that he would have arrived in time and would have gone if the message had been promptly delivered, even if the time for the funeral had been fixed so that he could not have arrived in time when he did not know this fact. Hughes v. Western Union Tel. Co. [S. C.] 52 S. E. 107. Telegraph company charged with notice that addressee would probably desire to attend the funeral of her son, and the route she would have taken was not so improbable as not to be contemplated by the parties. Western Union Tel. Co. v. Ford [Tex. Civ. App.] 90 S. W. 677. Evidence that wife notified operator that husband would be worried unless he got the message held sufficient to constitute notice. Dayvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898. Plaintiff could not recover for absence of relatives from funeral of his wife where the message announcing the death did not show that it was intended they should come. Du Bose v. Western Union Tel. Co. [S. C.] 53 S. E. 175.

14. Dayvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

15. Du Bose v. Western Union Tel. Co. [S. C.] 53 S. E. 175; Rogers v. Western Union Tel. Co. [S. C.] 51 S. E. 773. Mental anguish from failure to see sister before her death and to accompany her remains for burial. Smith v. Western Union Tel. Co. [S. C.] 51 S. E. 537. A father could not recover because he was forced to bury his son in a strange place. Western Union Tel. Co. v. McCaul [Tenn.] 90 S. W. 856.

16. Charge that if jury believed the evidence they should return verdict for actual damages caused by failure to deliver telegram held error, where jury might have found that a physician could not have arrived even if message had been delivered. Western Union Tel. Co. v. Haley [Ala.] 39 So. 386. Evidence held to show that had message been delivered plaintiff would have taken a certain route to attend the funeral of her son. Western Union Tel. Co. v. Ford [Tex. Civ. App.] 90 S. W. 677. Evidence held sufficient to show that plaintiff would have attended funeral of son had she received message. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58.

17. Plaintiff held not entitled to damages for mental anguish because of failure to attend her father's funeral where she learned the facts at 11 o'clock P. M. Saturday, and two trains left Sunday morning which would have taken her to the funeral in time. Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315.

18. Held contributory negligence for plaintiff not to go three miles and borrow the fare sufficient to go and return from a funeral where she had 4 hours in which to traverse it by daylight in the city. Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315.

19, 20. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792.

21. Where defendant failed to deliver message summoning physician to attend sister. Western Union Tel. Co. v. Haley [Ala.] 39 So. 386.

22. Railroad company. Kirby's Dig. § 7947. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18.

23. See 4 C. L. 1669.

(§ 3) *C. Procedure.*[27]—A stipulation on printed forms for telegrams requiring claims for penalties or damages to be presented within sixty days from the time of filing the message is valid.[28] The sixty day exemption clause is binding upon an infant as well as upon an adult.[29] Such clause will be enforced unless waived,[30] and the fact that the action is one for mental anguish is immaterial.[31] Damages for mental suffering cannot be recovered for reasons not alleged in the complaint.[32] Other decisions as to pleadings,[33] evidence,[34] and instructions,[35] are referred to in the notes.

(§ 3) *D. Penalties.*[36]—Statutes imposing penalties for negligence or misconduct in connection with the transmission or delivery of messages are strictly con-

24. Delay of five days with no real attempt to deliver, question of punitive damages held properly submitted to the jury. Machen v. Western Union Tel. Co. [S. C.] 51 S. E. 697.

25. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18.

26. Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. Evidence held not sufficient to justify exemplary damages. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18.

27. See 4 C. L. 1669.

28. Broom v. Western Union Tel. Co., 71 S. C. 506, 51 S. E. 259; Western Union Tel. Co. v. Greer [Tenn.] 89 S. W. 327; Heald v. Western Union Tel. Co. [Iowa] 105 N. W. 588.

29. Infant failed to sue in 60 days. Western Union Tel. Co. v. Greer [Tenn.] 89 S. W. 327.

30. Where a telegraph company assured plaintiff that a message had never been received, it waived its right to insist that a claim for damages had not been presented within a certain time. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18.

31. Broom v. Western Union Tel. Co., 71 S. C. 506, 51 S. E. 259.

32. Petition held to restrict damages to anguish suffered before starting on journey to see brother. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 91 S. W. 812.

33. Where a notice of claim for damages for delay in delivering a message was not alleged in the complaint as required by Code § 2164, it was error, under a general denial, to permit plaintiff to prove it. Heald v. Western Union Tel. Co. [Iowa] 105 N. W. 588. In such case a motion to arrest judgment in favor of plaintiff should have been sustained where plaintiff failed to amend as allowed by Code § 3760. Id. A demurrer to the whole complaint in an action for failure to deliver a message held too broad, where mental anguish was not set up as a separate cause of action but merely as an element of damages, and it was sought to eliminate that feature. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. A petition for loss from error in transmitting a telegram may properly be amended to conform to a criterion of damages established by law after it was made. Western Union Tel. Co. v. J. B. Corso & Sons [Ky.] 89 S. W. 212.

34. Where the complaint charges negligence and willfulness in delaying a telegram, a nonsuit was properly refused on the whole case where there was evidence of negligence, although there was none of willfulness. Machen v. Western Union Tel. Co. [S. C.] 51 S. E. 697. In an action for mental anguish plaintiff could testify that on the death of his father he wished to be with his family. Id. In an action by a sister for mental anguish caused by failure to reach her brother before his death, the effect that the announcement of the brother's death, before the sister reached him, had upon her, held evidence of the anguish suffered. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 91 S. W. 812. In action for failure to pay money ordered by a telegram, evidence of the suffering of wife and children held admissible under proper instructions as showing why plaintiff did not relieve his own wants. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838. Testimony of sender's brother as to the state of feeling existing between his mother and plaintiff held competent. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 90 S. W. 714. Declarations of defendant's agent as to reason for delay held not admissible. Hamrick v. Western Union Tel. Co. [N. C.] 52 S. E. 232. Statements of receiving clerk and cashier in main office of company held not hearsay. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838. In an action against a telegraph company for failure to transmit and deliver a message, questions asking the sender whether he considered plaintiff liable for the charges and whether plaintiff ever paid witness for any messages except the one in question held objectionable. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121.

35. Under a pleading alleging that plaintiff was induced to refuse lemons shipped him, it was not error to submit to the jury the question whether he had been induced to leave them in care of the railroad company. Western Union Tel. Co. v. J. B. Corso & Sons [Ky.] 89 S. W. 212. In an action against a telegraph company for failure to deliver message in time to enable plaintiff to reach his dying son, a charge was properly refused which asked a verdict for defendant, unless the message could have been delivered in time to enable plaintiff to reach his son by train. Western Union Tel. Co. v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 45, 87 S. W. 1060. Where the court instructed the jury to find for defendant if defendant exercised ordinary care, it was not error to refuse to instruct that defendant was not an insurer. Id.

36. See 4 C. L. 1669.

strued.[37] The statute of Arkansas imposing a penalty for refusing to transmit messages applies only to a willful and negligent refusal.[38] The word "dispatches" as used in the Missouri statute has reference to a written dispatch, and a company is not liable for refusing to place a party in personal communication with another.[39] A clause exempting the telegraph company from damages or statutory penalties unless claims are presented within sixty days applies to actions for penalties as well as to actions for damages,[40] and the parties may agree that a message shall be subject to delays and thus waive a penalty in favor of an individual;[41] but a statute imposing penalties for delay in the "transmission" of messages has been held to include delay in delivery as well as in transmission;[42] and the words "discrimination" and "impartiality," as used in the Indiana statute do not imply intentional and positive wrongdoing as distinguished from negligence.[43] Under a statute imposing a penalty for failure to faithfully and promptly transmit messages, a company is liable where the points of receipt and destination are within the state, although part of the transmission was over the company's lines in another state.[44]

§ 4. *Telephone service.*[45]—Equity will not compel specific performance of a contract by a telephone company to furnish service at a rate which, by reason of increased cost of service, has become so low as to bankrupt the company, if continued.[46] Where a telephone company reasonably suspects that telephone service applied for will be used for illegal purposes, it may properly require the applicant to give assurance that he will not use it for such purposes and may deny service on failure to give such assurance.[47] Under a contract to furnish service at a certain rate provided subscribers use their own instruments, a company may still use its own instruments, if desired, but cannot make any extra charge on that account.[48]

§ 5. *Quotations and ticker service.*[49]—Where a telegraph company has furnished continuous quotations of prices of products on a board of trade for such a length of time as to make such quotations necessary for business in such products, it is bound to furnish such quotations on equal terms so long as it continues in that business,[50] but a telegraph company is not bound to furnish quotations intended to be used for gambling purposes.[51]

37. Eddington v. Western Union Tel. Co. [Mo. App.] 91 S. W. 438; Pollard v. Missouri & K. Tel. Co. [Mo. App.] 90 S. W. 121.

38. Kirby's Dig. §§ 7946, 7943, 7944, held not to apply where defendant negligently failed to know that it had an office at the point of destination and refused the message on that account. State v. Western Union Tel. Co. [Ark.] 88 S. W. 834.

39. Rev. St. 1899, § 1255. Pollard v. Missouri & K. Tel. Co. [Mo. App.] 90 S. W. 121.

40. Western Union Tel. Co. v. Greer [Tenn.] 89 S. W. 327.

41. Where a message was expressly accepted subject to delays owing to trouble with the wires, of which fact the sender was informed, plaintiff could not recover the statutory penalty where the operator exercised reasonable diligence. Rev. St. 1899, § 1255. Eddington v. Western Union Tel. Co. [Mo. App.] 91 S. W. 438.

42. Act April 8, 1885 (Laws 1885, p. 151, c. 48). Western Union Tel. Co. v. Braxtan [Ind.] 74 N. E. 985.

43. Act April 8, 1885 (Laws 1885, p. 151, c. 48). Western Union Tel. Co. v. Braxtan [Ind.] 74 N. E. 985. Held title sufficient to include § 3. Id.

44. Statute held not in conflict with Federal constitution relating to interstate commerce. Western Union Tel. Co. v. Hughes [Va.] 51 S. E. 225.

45. See 4 C. L. 1671.

46. Change from grounded to metallic circuits. Maryland Tel. & T. Co. v. Charles Simons' Sons Co. [Md.] 63 A. 314. Bill for injunction restraining company from charging more than rate fixed by an ordinance, and from refusing to continue service, held equivalent to bill for specific performance. Id.

47. Cullen v. New York Tel. Co., 106 App. Div. 250, 94 N. Y. S. 290. Evidence held to warrant suspicion. Id.

48. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

49. See 4 C. L. 1672.

50. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

51. Court refused to compel company to furnish quotations in violation of its contract with the board of trade requiring applicants to bind themselves not to use them for the purpose of conducting a bucket shop. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100.

§ 6. *Rates, tariffs, and rentals.*[52]—A court of equity can compel a telephone company to furnish service at a reasonable and just price and at uniform rates, and can prevent discrimination,[53] but the power to regulate telephone rates is not a power incidental to the government of a city,[54] hence a municipality cannot fix rates for telephone service unless authority to do so has been delegated to it by the state.[55] A bill in equity will lie to enjoin the enforcement of an unconstitutional ordinance fixing unreasonably low rates where a multiplicity of suits can thereby be avoided.[56] Where a telephone company has agreed not to increase its rates for a specified time, it cannot increase the rates during that time by reason of later improvements in the service.[57]

§ 7. *Offenses.*[58]

MENTAL SUFFERING AS AN ELEMENT OF DAMAGES IN TELEGRAPH CASES.

[Special Article by Oscar Hallam.*]

Reference should also be had to the appropriate section of the topic Telegraphs and Telephones,[59] and also to a previously published special article by the same author.[60]

§ 1. *Preliminary considerations.*—The doctrine of damages for mental pain resulting from the negligent failure of a telegraph company to seasonably deliver a message had its origin in the case of So Relle v. Western Union,[60a] decided in 1881. In that case, a verdict of $1,000 based upon mental suffering on account of delay in delivery to plaintiff of a telegram announcing the death of his mother was sustained. Since that time the courts of various states have dealt with such cases in large numbers. Some have followed the doctrine, others have repudiated it. The conflict is irreconcilable. It has simply been a question of taking opposite

52. See 4 C. L. 1672.

53. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101.

54. State v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41. Under the Constitution of 1875, § 16, art. 9, providing that certain cities may frame charters for their own governments, and the "Enabling Act" of 1887, §§ 50, 51, giving such cities exclusive control over highways, etc., and power to regulate corporate franchises in streets, etc., of such cities, a city has no power to regulate telephone rates. Id.

55. State v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41. A court of equity will not enforce by mandatory injunction an unauthorized contract fixing charges, even though the company solicited the contract and thereby obtained a mode of using the streets more beneficial to itself and more inconvenient to the public. Farmer v. Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078.

56. Where company would be subjected to prosecutions and fines. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. In such case complainant need not allege or prove that its own rates are reasonable. Id. Where the complaint charges that a rate fixed by an ordinance will deprive the company of profits, and of property without due process of law, the Federal courts have jurisdiction (Id.), and jurisdiction is not ousted because as a legal conclusion it is averred that the ordinance violates the state constitution (Id.).

57. Refusal to furnish improved service at old rates. People v. Chicago Tel. Co. [Ill.] 77 N. E. 245.

58. See 4 C. L. 1672.

59. See 6 C. L. 629; 4 C. L. 1666; 2 C. L. 1855.

60. See 6 C. L. 629.

60a. 55 Tex. 308.

* Judge of the District Court of Minnesota.

sides of the same proposition. The prevailing tendency was, at first, toward the doctrine.[61] In more recent years there has been a reaction, set in motion by the abandonment of the doctrine by the Indiana supreme court, upon recommendation of the court of appeals of that state, after an adherence to it for eleven years,[62] and the repudiation of the doctrine by the Federal courts in some of the states where it had been followed.[63] The doctrine is still substantially adhered to in Texas and has been followed in Iowa,[64] Kentucky,[65] Louisiana,[66] Nebraska,[67] Nevada,[68] North Carolina,[69] Tennessee,[70] the Federal court for one district of Texas,[71] and with some modification in Alabama.[72] It has been repudiated in Arkansas,[73] Dakota,[74] Florida,[75] Georgia,[76] Indiana,[77] Kansas,[78] Minnesota,[79] Mississippi,[80] Missouri,[81] New York,[82] Ohio,[83] Oklahoma,[84] South Carolina,[85] Virginia,[86] West Virginia,[87] Wisconsin,[88] and the federal courts for Georgia, Tennessee, Virginia, and one district of Texas.[89] It will accordingly be observed that the weight of authority is against it.

It may be well, at the outset, to note the nature and scope of the cases in which the doctrine has been followed. This suggests several considerations.

Is the action on contract or in tort? Many of the cases do not make it clear

61. Sutherland on Damages [3rd Ed.] § 97 (1892) reviews the situation as follows: According to the weight of authority and the tendency of late decisions, if a message delivered to a telegraph company apprises the agent who receives it, or he is otherwise informed, that it is of immediate importance to the party to whom it is addressed and relates to the illness, death or burial of some near member of his family, the negligent failure to deliver it makes the company liable to him for such mental distress as he may sustain, in consequence, or to the sender as may be endured by him, if the person who is summoned by it fails to arrive by reason of neglect to deliver it in time.

62. Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846, afg. 26 Ind. App. 213, 59 N. E. 416; Tyg Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583.

63. In the 4th Edition of Sutherland on Damages, the section above quoted has been revised, and the author says that "since 1893 the trend of judicial sentiment has changed."

64. Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72; Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281.

65. Chapman v. Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880; Western Union Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827.

66. Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91.

67. Western Union Tel. Co. v. Church [Neb.] 90 N. W. 878, 57 L. R. A. 905.

68. Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931, 65 L. R. A. 666.

69. Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669; Cashion v. Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493; Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Cogdell v. Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Green v. Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165.

70. Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574; Gray v. Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301.

71. Beasley v. Western Union Tel. Co., 39 F. 181.

72. Western Union Tel. Co. v. Wilson, 93 Ala. 32, 9 So. 414; Western Union Tel. Co. v. Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398; Western Union Tel. Co. v. Blocker, 138 Ala. 484, 35 So. 468.

73. Peay v. Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

74. Russell v. Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408.

75. Instructional Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

76. Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430; Giddens v. Western Union Tel. Co., 111 Ga. 824, 35 S. E. 638.

77. Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 1080, 54 L. R. A. 846.

78. West v. Western Union Tel. Co., 39 Kan. 93, 17 P. 807.

79. Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406.

80. Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859; Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152.

81. Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172.

82. Curtin v. Western Union Tel. Co., 42 N. Y. S. 1109.

83. Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689.

84. Butner v. Western Union Tel. Co., 2 Okl. 238, 37 P. 1087.

85. Lewis v. Western Union Tel. Co., 57 S. C. 525, 35 S. E. 556.

86. Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663.

87. Davis v. Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

88. Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973.

89. Chase v. Western Union Tel. Co., 44 F. 554, 10 L. R. A. 464; Western Union Tel. Co. v. Wood [C. C. A.] 57 F. 471, 21 L. R. A.

whether the action is to be considered one for breach of contract or in tort.[89] Some sustain the doctrine only where the action is upon a breach of contract,[90] others only on the theory that it is in tort,[90a] others again hold that it may be sustained on either theory,[91] and some of the courts opposed to the doctrine have treated the action as on contract and have based their opposition in some measure on the ground that mental suffering is not to be recognized as an element of damages in actions on contract.[92]

In one case[92a] it is said, "The action is not one of tort but on contract; its gist and gravamen being the breach of the contract. * * * The best test of this is the fact that such an action could not be maintained without pleading and proving the contract." That this is not a true test is demonstrated by another decision of the same court[92b] where it is said of an action by a passenger, ejected from a train, "it is evident that plaintiff could not have maintained the action at all without pleading and proving his contract with the defendant and its breach. * * * In that sense it is an action arising on contract. But it is not an action on the contract, properly so called. The gist or gravamen of it is a tortious act, which constituted a breach of contract. It is what is sometimes called an action for tort founded on contract. * * * In considering the measure of damages

706; Western Union Tel. Co. v. Sklar [C. C. A.] 126 F. 295; Alexander v. Western Union Tel. Co., 126 F. 445.

90. In Alabama, it is held that where the action is on contract, there may be a recovery for mental suffering, but if the declaration is in tort, there can be no recovery when it is not shown to have been accompanied by other damage resulting from the wrong. This is on the theory that "damages for mental suffering are not recoverable except where there is a right of recovery aside from such injuries." Blount v. Western Union Tel. Co., 126 Ala. 105, 27 So. 779; Western Union Tel. Co. v. Kirichbaum, 132 Ala. 535, 31 So. 607; Western Union Tel. Co. v. Blocker, 138 Ala. 484, 35 So. 468.

90a. The cases supporting the doctrine generally follow this line and hold that "it is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public." Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163. That the telegraph company owes to the public the duty to promptly deliver a telegram, irrespective of contract, and failure to deliver a message makes the company liable for mental anguish not as breach of contract but of public duty. Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746.

91. In Western Union Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, the court suggests both theories but adopts neither.

In Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938, it is said that if such action is for breach of contract, there is the same reason for recovery of damages without physical injury as in actions for breach of contract of marriage and the like, i. e., that in both cases the parties have notice that mental anguish will be the probable consequence of a breach of contract. If viewed as an action of tort there is the same ground of recovery of damages for mental anguish caused thereby as in action for seduction and the like, besides there is the further reason that the company has violated a public duty.

In Western Union Tel. Co. v. Moore, 76 Tex. 66, 12 S. W. 949, it is said, "It is true that the damages recoverable in actions of this character are limited to such as may reasonably be presumed to have been in the contemplation of the parties at the time the contract is made," and in Western Union Tel. Co. v. Brown, 71 Tex. 723, 10 S. W. 323, it was said that only such damages as might naturally result from a failure to receive the message will be considered as being within the contemplation of the parties. These observations are consistent only with the treatment of the action as one on contract, but in Western Union Tel. Co. v. Hamilton, 36 Tex. 390, 81 S. W. 1052, the action is clearly treated as in tort.

In Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1, the court justifies recovery on the ground of contract, but holds that the real nature of the action is tort and the true principle of recovery is that "he who is responsible for a negligent act must answer for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." The same court in the case of Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281, after stating the rule of damages in tort, held that under this rule damages for mental suffering may in such cases be recovered.

92. In Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, the court said, "the proposition relates simply to damages arising from a breach of contract."

92a. Francis v. Western Union Tel. Co., 53 Minn. 252, 59 N. W. 1078.

92b. Serwe v. Northern Pac. R. Co., 48 Minn. 78, 50 N. W. 1021.

and the elements of damage proper to be considered, the courts in this country have almost universally treated such actions as sounding in tort." This last case states the rule now generally followed in actions by passenger against carrier and under the analogy of such cases it is held that the failure of a telegraph company to deliver a telegram in ordinary commercial transactions constitutes a tort.[92c] It may fairly be said that the action to recover for failure to deliver a telegram is to be considered as an action in tort and the damages recoverable are to be determined on the principles applicable to tort actions.[93]

§ 2. *Who may maintain action. Sender.*—If the doctrine is to be sustained at all the sender may clearly maintain an action where he is the party aggrieved.[94]

Addressee.—Whether the addressee may maintain such an action is a more controverted question. The general rule is that the addressee of a telegram may sue for nondelivery, or delay in delivery, if it appear that he procured it to be sent or that he was to be benefited by the contract for sending the message, and this fact was made known to the company when it received the message for transmission either from the language of the message or otherwise.[95] In such case the telegraph company has been said to become the common agent of both parties.[95a] In most cases, however, the liability is regarded as in tort.[95b] In a leading case it is held that the addressee of a telegram may recover for mental suffering for a negligent delay in its delivery. In that case the message showed unmistakably that it was intended for the benefit of the plaintiff.[95c] In the So Relle case[95d] the plaintiff was the addressee of a telegram announcing the death of his mother. He sustained no contract relation with the company and the sender sustained to him no relation of agency. He was held entitled to recover. This much of the So Relle case was overruled by a later case[95e] in which it was held there could be no recovery by a father for delay in delivering to him a message announcing the death of the son's wife and child. The

92c. Western Union Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4.

93. This fact is recognized by many of the cases opposed to the mental suffering doctrine (Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080), and the arguments advanced in favor of the doctrine are met on that assumption.

94. Accordingly, it has been held that a wife about to be confined may recover for mental suffering on account of failure to deliver a message sent by her to her husband (Thompson v. Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427) and also for mental anxiety for delay in delivering a telegram sent in her behalf by her husband to a physician to attend her (Western Union Tel. Co. v. Church [Neb.] 90 N. W. 878; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598). In the last cited case it was held that the husband could not in such case recover for injury to his feelings. In other cases in the same state, however, it has been held that a father may recover for mental anguish, caused by witnessing the suffering of a sick child, where such anguish is caused by the negligent failure of the company to promptly deliver the father's message to a physician. Western Union Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229; Gulf etc., Tel v. Richardson, 79 Tex. 649, 15 S. W. 689. In Gulf, etc., R. Co. v. Levy, 59 Tex. 563, it was held that plaintiff, a son, might recover on account of mental anguish resulting from failure to deliver a telegram sent by him to his father announcing the death of plaintiff's wife and child and asking the father to come to his assistance, and in another state it was held that for delay in delivering a message by a husband to a physician which read "Come first train to see my wife, very low" the mental anxiety of the husband was a proper element of damage. Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419.

95. Western Union Tel. Co. v. Wood [C. C. A.] 57 F. 471, 21 L. R. A. 706; Frazier v. Western Union Tel. Co., 45 Or. 414, 78 P. 330, 67 L. R. A. 319; Webbe v. Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670; McPeek v. Western Union Tel. Co., 107 Iowa, 356, 78 N. W. 63; Fisher v. Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545; Ferero v. Western Union Tel. Co., 9 App. D. C. 455; Russell v. Western Union Tel. Co., 57 Kan. 230, 45 P. 598; Tobin v. Western Union Tel. Co., 146 Pa. 375, 23 A. 324.

95a. N. Y. & W. P. Tel. Co. v. Dryburg, 35 Pa. 298.

95b. Western Union Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, and cases supra.

95c. Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574. See, also, Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 103.

95d. So Relle v. Western Union Tel. Co., 55 Tex. 308.

95e. Gulf, etc., R. Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278.

court said of the So Relle case, "The opinion in that case does seem to maintain the proposition necessary to sustain this action; but we are of the opinion that it cannot be sustained upon principle, nor upon the authority of adjudicated cases." Although overruling the So Relle case the court did not repudiate the mental suffering doctrine, but did hold that recovery for mental suffering must be based upon some legal wrong to the plaintiff, that the action cannot be maintained independently of a right of action on other grounds for at least nominal damages, and that an addressee who had sustained no breach of contract nor any damage to his person, name or estate, could not maintain the action where the mental distress resulted from the breach of a contract made with and for the benefit of another, to which he is not a privy, nor where it resulted from a tort, through which some other person receives an injury personal to himself, for which damages may be given. In a still later case [95f] the court hews close to this line, but allowed recovery in view of the fact that the plaintiff, addressee, had procured the telegram to be sent to him. In a still later case in the same state the doors are thrown wide open and it is held that the question as to who may maintain such an action does not depend upon the payment of the fee or upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, but upon the question, who was in fact served and who is damaged.[95g] In Iowa it is held that the addressee may recover, though he made no contract with the defendant,[95h] and elsewhere it has been held that recovery may be had by an addressee for a husband's disappointment and suffering in being kept away from the bedside of his sick wife,[95i] for failure to deliver a telegram announcing the death of plaintiff's father,[95j] where plaintiff was prevented by delay in delivery of a telegram from reaching his mother's bedside before her death,[95k] and for failure to transmit money by telegraph to a wife for transportation of the body of her husband.[95l]

Third persons.—It has been held that where a telegraph message on its face discloses that it is sent for the benefit of a third person, the latter was entitled to sue for damages sustained by the company's delay in delivery.[96]

§ 3. *What relationship required.*—Where the doctrine prevails, it is generally held that relationship of some sort between the parties to the transaction is necessary to support a recovery. No very definite rule is anywhere laid down as to what degree of relationship is required. Any one in loco parentis is within the rule.[97] So is a grandparent,[97a] a second cousin,[97b] and a stepson,[97c] and it has even been held that a message announcing the illness of sender's wife to his sister's husband is within

95f. Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S. W. 351.

95g. Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857.

95h. Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1.

95i. Beasley v. Western Union Tel. Co., 39 F. 181; Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1040.

95j. Cogdell v. Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490.

95k. Western Union Tel. Co. v. Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433; Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419.

95l. Western Union Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385.

96. Whitehill v. Western Union Tel. Co., 136 F. 499, and recovery has been sustained on behalf of the wife of the sender for whose benefit the telegram was sent. Western Union Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598. Under the liberal doctrine of Western Union v. Adams, 75 Tex. 531, 12 S. W. 857, it was held in that case that recovery may be had for the benefit of the wife of the addressee for failure to deliver a telegram announcing that her brother was dying.

97. Bright v. Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841.

97a. Western Union Tel. Co. v. Crocker, 135 Ala. 492, 33 So. 45.

97b. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745.

97c. Western Union Tel. Co. v. Nations, 82 Tex. 539, 18 S. W. 709.

the rule.[97d] It has elsewhere been held that a stepson is not within the rule,[97e] nor uncle and niece,[97f] and that whether a brother-in-law is or not is a matter of proof. That mental anguish will not in such case be presumed and that plaintiff cannot recover unless he proves that at the time the message was delivered to the defendant, the latter was notified of the special tender relations existing between plaintiff and his brother-in-law. It is further said that "No doubt cases do exist in which the suffering of a friend is as great as that of a brother under like circumstances, but it is not the common and known result."[97g]

§ 4. *What notice to the company is necessary.*—The company must in some manner be advised of the significance of the telegram and the situation of the parties or there can be no recovery. Where compensation for mental suffering is sought, either the message must disclose or the sender must inform the company of facts rendering such a result probable.[98] The fact that a message, announcing the death or serious illness of a near relative, is delivered for transmission is held to be notice to the company that mental suffering will probably result to some person if it is not promptly transmitted.[99] But it has been held not necessary that the company should be apprised of the relationship of the parties, if it in plain terms announces the illness of some person.[100] Telegraph companies, it is said, are required to take notice of whatever the dispatch suggests and if further information is needed they must seek it or be held to possess all the knowledge such inquiries could have elicited.[1] All that is necessary is that the message should announce sufficient to inform the company that mental pain will result from nondelivery.[2] It is held sufficient if facts are shown which put the company on inquiry as to the real situation.[3]

§ 5. *Relieving anxiety.*—If anxiety exists because of the illness of a relative, it is generally held that its continuance as the result of negligent failure to deliver a message which would remove or alleviate it is not an element of damage,[4] but in another case it was held that failure to deliver a telegram which would have relieved

97d. Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163.

97e. Harrison v. Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772.

97f. Western Union Tel. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482.

97g. Western Union Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896. In another case it is said "We do not mean to say that damages for mental anguish may not be recovered from the absence of a friend if it actually results, but it is not presumed." Cashion v. Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493.

98. McAllen v. Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715; Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70; Western Union Tel. Co. v. Brown, 71 Tex. 723, 10 S. W. 323.

99. 3 Suth. Damages 975, and cases cited. Harrison v. Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772.

100. Postal Tel. Cable Co. v. Pratt, 27 Ky. L. R. 430, 85 S. W. 225; Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163.

1. Western Union Tel. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41.

2. Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961; Western Union Tel. Co. v. Nations, 82 Tex. 541, 18 S. W. 709, 27 Am. St. Rep. 914; Western Union Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896.

3. Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857; Western Union Tel. Co. v. Moore, 76 Tex. 66, 12 S. W. 949; Western Union Tel. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860; Western Union Tel. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25. A message reading "Billie is very low; come at once," held sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed. Western Union Tel. Co. v. Moore, 76 Tex. 66, 12 S. W. 949. And the company is liable though the relationship is not disclosed. Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160. And it was held, where a telegram reading, "Clara come quick, Rufe is dying," was sent to the husband of Clara, a sister of the sick man, that a recovery might be had for her benefit although the company was not apprised of the relationship or of the fact that "Clara" was the wife of the addressee, and testimony was admitted that she manifested anxiety by her words and acts while waiting for the train. Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857. See, also, Willis v. Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538.

4. Western Union Tel. Co. v. Reid, 27 Ky. L. R. 659, 85 S. W. 1171, 70 L. R. A. 289; Sparkman v. Western Union Tel. Co., 130 N. C. 449, 41 S. E. 881; Rowell v. Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534; Western Union Tel. Co. v. Giffin, 93 Tex. 530, 56 S. W. 744.

the anguish of parents on account of the absence, supposed death, and loss of their young child is an element of damage.[5] Mere "disappointment and regret" it is said are not a subject of recovery under the mental anguish rule.[6]

§ 6. *Physical conditions aggravating damages.*—If the action is in tort, it should follow that the company is liable for all damages flowing naturally from the wrong, although aggravated by circumstances of physical condition of which the company had no knowledge, within the rule that "a party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."[7]

§ 7. *Amount of damages recoverable.*—The damages recovered have in many cases been large.[8]

§ 8. *Reasons pro and con.*—The foregoing cases illustrate conditions which gave birth to the doctrine and also the difficulties in the way of its application. There are strong opinions on both sides of the question.

Thus, in one case,[9] the court said "A telegraph company is a quasi-public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If in matters of mere trade it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be because feelings or affections are only involved? If it negligently fails to deliver a message which closes a trade for $100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval."

5. Western Union Tel. Co. v. Womack, 9 Tex. Civ. App. 607, 29 S. W. 932. See, also, Akard v. Western Union Tel. Co. [Tex. Civ. App.] 44 S. W. 538.

6. Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

7. Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281. See also Brown v Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911; Stevens v. Dudley, 56 Vt. 158; Purcell v. St. Paul, etc., R. Co., 48 Minn. 134, 50 N. W. 1034. But see Spade v. Lynn, etc., R. Co., 168 Mass. 285, 47 N. E. 88; Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354. In Western Union Tel. Co. v. Hamilton, 36 Tex. 300, 81 S. W. 1052, this principle was carried as far as could be desired. The message read, "Come home at once, your wife is very ill, will have to operate." It was held that the company "should be held to know that the young, the old, the large, the small, and the infirm, may be, as they often are, involved in the subject-matter of messages transmitted, and that unusual results often will, and do naturally arise and flow from a want of proper care in their transmission and delivery," and that it was accordingly proper to take into consideration the fact that plaintiff's wife was a very large woman, and that decomposition was more rapid and embalming more difficult in case of large bodies, although the company had no knowledge of her peculiar size, citing Western Union Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490; McAllen v. Western Union Tel. Co., 70 Tex. 226, 7 S. W. 715. But see Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152.

8. Where a woman was unable for two days to remove the corpse of her husband on account of delay in forwarding money by telegraph, a verdict of $1,000 held not excessive. Western Union Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385. A verdict of $1,168 for delay in delivering dispatch concerning the arrival of corpse of plaintiff's wife was sustained. Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734. Verdict for $1,000 was sustained where a brother was unable to attend his sister's funeral because of company's negligence. Western Union Tel. Co. v. Rosentreter 80 Tex 406, 16 S. W. 25. Verdict for $2,000.40 was sustained for failure to deliver a telegram to husband of sister, where as a result of the delay the brother was buried before she arrived. Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857. Verdict for $1,975 was sustained where negligence of company in failing to deliver a telegram resulted in keeping from plaintiff knowledge of his father's death for a month, permitted deceased to be buried by strangers at public expense in a distant city, and denied plaintiff the right to see his father before interment, or to be present at his burial. Western Union Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613.

9. Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044.

In another,[9a] it is said that to hold that the defendant is not liable "would justify the conclusion that the defendant with impunity might have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case. * * * To such a result we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons. It is their prerogative to determine what messages they will present; and, so they are lawful, it is bound by law, upon payment of its toll, to transmit and deliver them correctly and promptly. It has no right to say what is important and what is not; what will be profitable to the receiver and what will not; what has a pecuniary value, and what has not; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy, when that is done its responsibility is ended. When it is omitted, through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse, one or both, subject alone to the proviso that the injury be the natural and direct consequence of the negligent act. That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether, for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage. Nor do we think the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature, is of very great moment. It is rather to be hoped that instances of such dereliction of plain, easy and important duty have not been very numerous in the past, and that they will seldom transpire in the future."

On the other hand, in an able dissenting opinion in this same case, it is said: "The reason why an independent action for such injuries cannot and ought not to be sustained is found in the remoteness of such damages. Such injuries are generally more sentimental than substantial. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority."

The United States circuit court for the Northern District of Texas repudiated the Texas doctrine and held damages for mental anguish resulting from simple negligence in the prompt delivery of a telegram are too uncertain, remote, and speculative to be recoverable. It was held that this was a question of general law on which a Federal court is not bound by the decisions of the state where the cause of action arises.[9b]

In Mississippi it was said: "We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which

9a. Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574.

9b. In Western Union Tel. Co. v. Wood, 57 F. 471, 21 L. R. A. 706.

the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity."[9c]

Likewise, in Minnesota the court said: "The difficulty is in the character of the damages. The injuries in such case are too hard to determine with any reasonable certainty, are more often assumed than real; and the suit is too liable to be wholly speculative. Damages for mental suffering open into a field without boundaries, and there is no principle by which the court can limit the amount of damages."[9d]

The opinion in a late Indiana case[10] is probably the strongest presentation of the negative of the proposition. Of the reasons given against the doctrine the following are very convincing: (1) There is no open or practicable manner by which the damages occasioned by a negligent act that causes only mental anguish can be assessed. It is not a question of difficulties purely. The parties have not an even chance. The mental anguish doctrine awards damages for a state of mind not provable by evidence open to both parties. (2) The mental anguish doctrine warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency.[11] (3) It gives freest hand in collecting compensatory damages to the plaintiff who is most moving in depicting an alleged psychical condition, and readiest to declare what he would have done under circumstances that never occurred. (4) It is a wrongful discrimination. Unless the addressee is a relative, there can be no legal mental anguish. "The Horatian heirs who have been itching for the ancestral estates may recover on the strength of this mourning raiment, while a David who misses the last look upon the face of his Jonathan gets nothing for his bleeding heart." And there is much force in the further suggestion that "the difficulties of navigation, without chart or compass, are understandable without experiment, but the experiences of the courts that uphold the mental-anguish doctrine probably outrun any mere a priori conjecture as to possibilities."

The doctrine is not without substantial reason to support it, but the difficulties in its practical application are such that in recent years it has not gained ground. On the contrary, the states which have recently considered the question for the first time have for the most part repudiated the doctrine.

TENANTS IN COMMON AND JOINT TENANTS.

§ 1. *Definitions and distinctions; creation of relation.*[12]—Gift,[13] conveyance,

9c. Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823.
9d. Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078.
10. Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674.
11. See cases cited in Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674. In Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1, plaintiff was allowed to say that he was desirous of attending his mother's funeral. This has been vigorously attacked, particularly in the foregoing case.
12. See 4 C. L. 1672.
13. A gift of land to a husband and wife

or devise, to two or more, creates a tenancy in common, unless a contrary intent is expressed.[14] A grantee of a tenant in common becomes a tenant in common.[15] A tenant by curtesy being entitled to the exclusive possession and occupancy of the land, against everybody as well as to the rents, issues, and profits arising therefrom during his life, is not a co-tenant with the heirs and remaindermen.[16, 17] In California a homestead cannot be created out of lands held in co-tenancy so as to come within the exemption laws.[18] In Montana, by statute,[19] the difference between estates in common and in severalty are almost entirely abolished, leaving only the duty to protect and preserve the estate of a co-tenant, and the right of partition.[20] At common law, dower rights might be held in common with the rights of other co-tenants.[21] A widow's dower interest does not attach to any particular part of a tenancy in common unless the same has been partitioned before her husband's death.[22]

Joint tenancy, whether in land or personalty, is not favored either in law or equity, and it will never be inferred where any other deduction can be fairly made.[23] A conveyance to several with words of survivorship creates a joint tenancy,[24] but a mere gift or conveyance to several does not, except they be husband and wife.[25] By a divorce a tenancy in entirety is destroyed and becomes a tenancy in common.[26]

§ 2. *Rights and liabilities between tenants.*[27] *Title and interests.*[28]—Lands owned in common may be so held as long as the tenants desire.[29] The interest of each tenant in common is an undivided interest in the whole,[30] and each is entitled,

jointly creates a tenancy in common which, though oral, is valid if followed by entry, occupation and the making of improvements. Karren v. Rainey [Utah] 83 P. 333.

14. Code § 2923. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Joint heirs are tenants in common. Schoonover v. Tyner [Kan.] 84 P. 124. The children who inherit a parent's interest in a parcel of land are co-tenants of the parcel. Paine v. Sackett [R. I.] 61 A. 753. A devise to the testator's widow, to be held for herself and the testator's son in trust, until she remarries, creates a joint estate whereby they become tenants in common, until she remarries, and creates a defeasible fee simple which on her failure to marry becomes absolute. Rohrbach v. Sanders [Pa.] 62 A. 27.

15. Schoonover v. Tyner [Kan.] 84 P. 124. One who buys the dower interest of a widow who is a co-tenant becomes such himself and his entry is amicable to the other co-tenants. Bloom v. Sawyer [Ky.] 89 S. W. 204. One who takes by deed from several tenants in common, which deed is improperly executed as to some of them, nevertheless takes the interest of those as to whom the deed is well executed. He will be a tenant in common, coming under Acts 1903, p. 71, No. 55, § 1, providing that a co-tenant recovering an undivided interest may take possession of the entire premises as against a stranger. Lamb v. Lamb [Mich.] 102 N. W. 645.

16, 17. Martin v. Castle [Mo.] 91 S. W. 930.

18. Following previous decisions without deciding as to their justness. Schoonover v. Birnbaum [Cal.] 83 P. 999.

19. Code Civ. Proc. 1895, § 592.

20. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145: Neither the statute of Anne nor the common law rule is in force in Montana. Id.

21, 22. Bloom v. Sawyer [Ky.] 89 S. W. 204.

23. Survivorship, which is an incident to joint tenancy, will seldom be presumed. Kelly v. Home Sav. Bank, 44 Misc. 102, 89 N. Y. S. 776. Joint tenancies are not favored in Illinois at present, as they were at common law, but it is not necessary to use the exact words of the statute to create a joint tenancy. Cover v. James, 217 Ill. 309, 75 N. E. 490.

24. A deed granting certain premises to two persons with remainder to the survivor on the death of either created a joint tenancy and not a tenancy in common. Cover v. James, 217 Ill. 309, 75 N. E. 490. A deed to a husband and wife, "and to the survivor of them and to their heirs and assigns forever," creates an estate in entirety. Joerger v. Joerger [Mo.] 91 S. W. 918.

25. The mere fact that money is placed in a bank in the name of two persons does not create a joint ownership with the right of survivorship. Mother and daughter (Kelly v. Home Sav. Bank, 44 Misc. 102, 89 N. Y. S. 776), but a contrary rule seems to hold in case of husband and wife (Id.).

In Oregon a grant to husband and wife jointly creates an estate in entirety, and upon the death of either spouse the survivor takes the whole estate. Oliver v. Wright [Or.] 83 P. 870.

26. Joerger v. Joerger [Mo.] 91 S. W. 918.

27. See 4 C. L. 1674.

28. See 4 C. L. 1674, n. 18 et seq.

29. Paine v. Sackett [R. I.] 61 A. 753.

30. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

equally with all the others, to the entire possession of the whole.[31] By virtue of this unity of interest, co-tenants sustain a fiduciary relation towards each other,[32] and neither will be permitted to deal with the property to the prejudice of his co-tenants.[33] A tenant in common cannot sell his interest in merely a parcel of the common premises,[34] but must dispose of his interest or some aliquot part thereof in the whole property.[35] They may contract with each other with reference to common property.[36] Co-tenants, obtaining a patent to common property from the United States, take title in trust for one entitled to a share but whose name accidentally or purposely has been omitted.[37] The paying of taxes by the tenant would be presumed to be on behalf of their co-owner.[38] Any title acquired by one co-tenant by actual conveyance, legal presumption, or otherwise, inures to the benefit of all.[39] In fact, any rights acquired by one against strangers,[40] or any acts in regard to the common estate, beneficial thereto, will be presumed to be for and will inure to the benefit of all.[41] This rule, however, is merely one of presumption.[42]

While redemption by one of two joint owners inures to the benefit of both, a stranger buying an equity of redemption at a foreclosure sale buys it for his own benefit,[43] and this is true even though he subsequently purchases the undivided interest of one of the joint owners.[44] Likewise, where a tenant in common claims adversely to his co-tenants, anything that he may do thereafter in purchasing outstanding titles or improving property is thereafter presumed to be done for his own benefit.[45]

Under a statute providing that a co-owner's share in mining property will be forfeited for failure to pay share of expenses on notice to him served personally or published 90 days,[46] the notice must contain his name, and one addressed to "whom it may concern" will not suffice.[47]

Possession.[48]—Entry and possession by one co-tenant is deemed the entry

31. Martin v. Castle [Mo.] 91 S. W. 930. Each tenant is entitled to the possession and occupation of the premises. McCrum v. McCrum [Ind.] 76 N. E. 415. The fact that one tenant in common has for a number of years had exclusive, but not hostile, possession, appropriating the rents and profits, would not deprive other tenants of their right of entry whenever they saw fit to assert it. Mecaskey v. Morris [Tex. Civ. App.] 89 S. W. 1085. But in Montana the co-tenant owner of mining property is entitled to have it remain in entirety until there is a partition. Code Civ. Proc. 1895, § 592. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

32, 33. Martin v. Castle [Mo.] 91 S. W. 930.

34. Where husband and wife owned 75 acres of land in common, 3½ acres being occupied as a homestead, wife could not devise her interest in the homestead. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

35. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

36. A contract permitting one tenant in common to erect a saloon on common property, provided a stipulated rent was paid to the other. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

37. Ballard v. Golob [Colo.] 83 P. 376.

38. Barrett v. McCarthy [S. D.] 104 N. W. 907. In case of patentee. Ballard v. Golob [Colo.] 83 P. 376. Consequently, a tax sale of the interest of one co-tenant for the same year is void. Snodgrass v. Jolliff [W. Va.] 53 S. E. 151.

39. Coleman v. Coleman, 71 S. C. 518, 51 S. E. 250. Outstanding incumbrance. Mahoney v. Nevins, 190 Mo. 360, 88 S. W. 731.

Tax title (Moragne v. Moragne [Ala.] 39 So. 161; Stoll v. Griffith [Wash.] 82 P. 1025), based by some courts upon the confidential relation existing between the co-tenants, others upon the ground that the obligation to pay taxes resting equally on all co-tenants, one tenant cannot be permitted to take advantage of his own remissness (Stoll v. Griffith [Wash.] 82 P. 1025), but some courts hold that a tenant in common, buying in a tax title for taxes which accrued before he acquired his interest in the land and which he was not obligated to pay, may thereby acquire title to the common property (Id).

40. Coleman v. Coleman, 71 S. C. 518, 51 S. E. 250.

41. Martin v. Castle [Mo.] 91 S. W. 930.

42. Rebutted by fact that a tenant in common disputed rights of co-tenant, claimed exclusive ownership, and permitted no joint possession. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6.

43, 44. Given v. Troxel [Ala.] 39 So. 578.

45. A co-tenant claiming adversely may purchase a tax title to perfect his own title. Stoll v. Griffith [Wash.] 82 P. 1025.

46. Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426].

47. Ballard v. Golob [Colo.] 83 P. 376.

48. See 4 C. L. 1674.

and possession of all[49] and inures to the benefit of all,[50] but this presumption of holding for benefit of co-tenants may be overthrown by facts.[51] The rule at common law was that, where one co-tenant occupied the common property, and took the whole profit, the other had no cause of action against him unless the acts of the occupant amounted to an ouster of his companion, or unless the occupant held under an agreement by which he became bailiff for the other as to his share.[52] The statute of Anne was enacted to give more suitable means of redress to a co-tenant to obtain his share of the rents and profits. By it, one co-tenant receiving more than his share of the rents and profits from another person, became a bailiff of the other co-tenant, but when he occupied and cultivated the ground himself, he could not be made to account for any part of them.[53] In the one case, ejectment lay in favor of the ousted co-tenant to admit him into joint possession, in the other, he had his action of account for his share of the rents and profits.[54]

Adverse possession.[55]—By reason of their unity of possession the general rule is that statute of limitations does not run as between tenants in common,[56] but if as a matter of fact the entry and the possession of one is adverse to the other, a right of action may be barred or title may be acquired under a statute of limitations.[57] The four elements of such adverse possession by a co-tenant are hostile entry,[58] adverse occupation,[59] ouster,[60] and actual or constructive notice to co-tenants.[61]

Hostile entry.—To be hostile, an entry by a co-tenant must be under a claim of ownership in severalty of either the whole or a part of the estate.[62] It is generally under a deed in severalty.[63] Such an entry would not be entry as a co-tenant.[64] Title by adverse possession under such entry will accrue at the end of the statutory period, regardless of the time when the deed is put on record or even if not recorded at all.[65] It is permissible to show the character of the entry and possession by declarations made during such adverse holding.[66] One may enter as a tenant in common and gain title by adverse possession for himself and his co-tenants against a third person.[67]

49. Schoonover v. Tyner [Kan.] 84 P. 124; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; Logan's Heir v Ward [W. Va.] 52 S. E. 398, Sparks v. Friedrich [Kan.] 82 P. 463; Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6. Constructively. McCrum v. McCrum [Ind.] 76 N. E. 415; Coleman v. Coleman [S. C.] 51 S. E. 250. Prima facie. Rohrbach v. Sanders [Pa.] 62 A. 27. In general. Joyce v. Dyer [Mass.] 75 N. E. 81; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.

50. McCrum v. McCrum [Ind.] 76 N. E. 415; Waterman Hall v. Waterman [Ill.] 77 N. E. 142.

51. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6.

52. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

53. 4 & 5 Anne, c. 16. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

54. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

55. See 4 C. L. 1674.

56. Steele v. Steele [Ill.] 77 N. E. 232.

57. Steele v. Steele [Ill.] 77 N. E. 232; Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.

58. Sparks v. Friedrich [Kan.] 82 P. 463.

59. Joyce v. Dyer [Mass.] 75 N. E. 81.

60. Eastman, Gardiner & Co. v. Hinton [Miss.] 38 So. 779.

61. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

62. Bloom v. Sawyer [Ky.] 89 S. W. 204. Entry under an unauthorized lease from a tenant in common was not such hostile entry as might ripen into adverse possession, as the character of the entry controls rather than the person with whom the lease is made. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

63. Even though from a co-tenant. Bloom v. Sawyer [Ky.] 89 S. W. 204; Eastman, Gardiner & Co. v. Hinton [Miss.] 38 So. 779. The entry by the grantee of one tenant in common, under a conveyance which purports to convey the whole estate without acknowledging the rights of the co-tenants, amounts to an ouster of the co-tenants and the possession of the grantee is adverse to them. Waterman Hall v. Waterman [Ill.] 77 N. E. 142.

64. Bloom v. Sawyer [Ky.] 89 S. W. 204. Entry not controlling, however, where subsequent conduct indicated a recognition of co-tenants' rights in land. Sparks v. Friedrich [Kan.] 82 P. 463.

65. Eastman Gardiner & Co. v. Hinton [Miss.] 38 So. 779.

66. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.

67. Bloom v. Sawyer [Ky.] 89 S. W. 204.

Adverse occupation.—As to co-tenants, the character of occupancy necessary to constitute adverse possession is very different from that obtaining in the case of strangers.[68] Open, notorious, and exclusive occupation, accompanied with open claims of title and improvements made, will establish adverse possession against a co-tenant,[69] wholly within the claimant's own right.[70] Again, it has been said the occupation of one tenant in common is adverse to a co-tenant where it is of such a character as to give notice to the co-tenant that his title is not acknowledged and that possession is adverse to him.[71] Mere occupation by a co-tenant cannot ripen into adverse possession, no matter how full and complete,[72] nor how long continued,[73] unless inconsistent with a tenancy in common.[74]

Possession under a deed from a co-tenant reserving mineral rights will not ripen into adverse possession as to these.[75] There is nothing in the relation of heirs which will prevent the possession of one from becoming hostile to the others.[76] Stronger evidence is required to prove adverse holding by a tenant in common than by a stranger.[77] The claim of exclusive right may be established by proof that one tenant in common has entered on the whole land and taken possession of and occupied the whole, claiming the profits for the legal period, without acknowledging the claim of his co-tenant.[78] While this would not afford a legal presumption, justifying the court in taking the case from the jury, still therefrom the jury should presume an actual ouster, though none be proved.[79] Where one takes possession of land under a deed, the terms of the instrument may be very important as indicating the character of the claim asserted.[80]

Ouster.[81]—To disseise a co-tenant there must be an ouster.[82] Many cases state that an actual ouster is necessary,[83] but according to some a constructive ouster suf-

68. Sparks v. Friedrich [Kan.] 82 P. 463.
69. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.
70. Schoonover v. Tyner [Kan.] 84 P. 124.
71. Waterman Hall v. Waterman [Ill.] 77 N. E. 142; Steele v. Steele [Ill.] 77 N. E. 232. Entering under color of title. Payment v. Murphy [Mich.] 12 Det. Leg. N. 595, 104 N. W. 1111. To be inferred from acts. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.
72. Sparks v. Friedrich [Kan.] 82 P. 463.
73. Joyce v. Dyer [Mass.] 75 N. E. 81.
74. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398. Where a tenant in common permitted a co-tenant to occupy the premises for many years, laying no claim to profits, never objecting to changes in the property, never remonstrating against an evident claim to the entire title, she will be held barred from asserting her title (Joyce v. Dyer [Mass.] 75 N. E. 81), but the mere reception of profits, payment of taxes, and making repairs, without more, will not sustain a claim of ouster or adverse possession (Rohrbach v. Sanders [Pa.] 62 A. 27). Payment of taxes by a tenant in common will be held to have been made for the benefit of all the tenants in common, and does not entitle him to the benefit of Rev. Code Civ. Proc. §§ 54, 55, declaring that one who pays taxes for 10 successive years, being in actual possession of the land under claim of color of title, or having color of title of land unoccupied, will constitute adverse possession. Barrett v. McCarty [S. D.] 104 N. W. 907.
75. Moragne v. Moragne [Ala.] 39 So. 161. Where one tenant in common conveyed to a co-tenant his interest in certain lands reserving mineral rights, the vendor may assume that the vendee in possession holds under the deed and does not claim adversely so as to obtain title by adverse possession to the minerals. Id.
76. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.
77. Waterman Hall v. Waterman [Ill.] 77 N. E. 142. Purchasing rights of co-tenant, evidence of nonadverse holding. Schoonover v. Tyner [Kan.] 84 P. 124. Where one, while claiming title under a deed purporting to have been executed by all the heirs of one deceased, though not in fact, makes search after others and purchases the rights of some of the real heirs, it will be strong evidence of not holding so adversely as to ripen into adverse possession against the real heirs or co-tenants. Sparks v. Friedrich [Kan.] 82 P. 463.
78. Rohrbach v. Sanders [Pa.] 62 A. 27. Where by will a widow and her son are made tenants in common and the son's interest is sold by sheriff, but the widow and her son continue to occupy the land and appropriate all the profits for more than 25 years, exclusively, the purchasers of the son's interest and their grantees never asserting their title, the latter will be barred by the statute of limitations. Id.
79. Rohrbach v. Sanders [Pa.] 62 A. 27.
80. Sparks v. Friedrich [Kan.] 82 P. 463.
81. See 4 C. L. 1674, n. 30.
82. McCrum v. McCrum [Ind.] 76 N. E. 415.
83. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; Eastman, Gardiner & Co. v. Hin-

fices,[84] and a leading author says that an ouster is necessary but does not differentiate the two.[85] A presumption of ouster arises on failure to assert title by a co-tenant for the statutory length of time after an attempted conveyance in severalty by a tenant in common.[86] Mere possession is not an ouster,[87] nor the taking of a tax deed to unimproved, wild land, without any exclusive residence upon and occupation of the same,[88] but entry under a deed in severalty would be,[89] likewise, long, exclusive, and uninterrupted possession by one, without any possession or claim for profits by the other.[90] However, the evidence necessary to establish ouster by a tenant in common must be clear, positive, and unequivocal.[91]

Notice.[92]—The co-tenant must have notice of the hostile claims and occupation before they can ripen into adverse possession.[93] Such notice may be actual or con-

ton [Miss.] 38 So. 779; Logan's Heirs v. Ward [W. Va.] 52 S. E. 398; Joyce v. Dyer [Mass.] 75 N. E. 81.

84. Denial of right to rent. McCrum v. McCrum [Ind.] 76 N. E. 415. A deed in severalty by one co-tenant. Eastman, Gardiner & Co. v. Hinton [Miss.] 38 So. 779. Denial of tenant's right to possession. McCrum v. McCrum [Ind.] 76 N. E. 415.

85. Tiffany, Real Property, p. 389. See, also, Steele v. Steele [Ill.] 77 N. E. 232; Waterman Hall v. Waterman [Ill.] 77 N. E. 142.

Note: It seems inaccurate to say that one can be actually ousted from a constructive seisin or to apply the term actual ouster alike to cases where there is physical force and where there is none. It seems better to use the term constructive in contradistinction to actual possession or to use the simple term ouster. [Editor.]

86. Coleman v. Coleman, 71 S. C. 518, 51 S. E. 250.

87. Sparks v. Friedrich [Kan.] 82 P. 463.

88. Barrett v. McCarty [S. D.] 104 N. W. 907.

89. Waterman Hall v. Waterman [Ill.] 77 N. E. 142.

90. Rohrbach v. Sanders [Pa.] 62 A. 27; Waterman Hall v. Waterman [Ill.] 77 N. E. 142. Erecting a building on a portion of land held in common by one of the tenants in common is such exclusive appropriation thereof to his own use as to amount to an ouster of his co-tenant. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.

Note: In 1818, one Thayer died intestate seised of certain real estate here in dispute, leaving a widow and three daughters, one of whom, Mary by name, is the great grandmother of the petitioner and through whom she claims. Mary was the owner of one undivided third subject to her mother's right of dower. In 1826 the husband of one of the daughters, and a third person, purchased the interest of the widow and the second daughter, receiving deeds therefor. These grantees, in 1829, conveyed the whole of the property by warranty deed, containing the usual covenants, and the wife joined in relinquishment of her right and claims. This deed, acknowledged by all three, was not recorded until August 22, 1902. Samuel Dyer, the father of defendant, and from whom he claims, entered into possession under this deed in 1835, and from that time until the present, the possession of father and son, respectively, has been open, peaceable, continuous, and exclusive. On June 2, 1886, Mary, then 86 years of age and a widow, conveyed by quitclaim deed to her son, petitioner's grandfather, "all right and title which I hold in said property." Held that the possession of the Dyers was such as to constitute an ouster and Mary's right was barred. Joyce v. Dyer [Mass.] 75 N. E. 81. While the conveyance to Samuel Dyer purported to convey the entire property, it did not convey the interest of Mary, and therefore Samuel Dyer became a tenant in common with her. The general rule is that the possession of one tenant in common, although exclusive, does not amount to a disseisin of the co-tenant, for his possession is to be taken as the possession of the co-tenant, and not adverse and therefore the co-tenant will not be barred by lapse of time. Alexander v. Kennedy, 10 Tex. 488, 70 Am. Dec. 358; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Coleman v. Clements, 21 Cal. 245. However, there may be an ouster of one tenant in common by the other and the possession thereafter becomes adverse, and if continued for a sufficient length of time, the right of the co-tenant out of possession may become barred. Rickard v. Rickard, 13 Pick. [Mass.] 251, 253; Doe v. McCreary, 2 Ind. 405; Bellis v. Bellis, 122 Mass. 414, 415. All the evidence in this case pointed to an actual ouster and indicated that the possession was not only exclusive but adverse. Dyer did not enter as a tenant in common but claimed the whole under the conveyance. Mary must be presumed to have had notice that the possession was adverse, for while the deed had not been recorded, she lived in intimacy with the Dyers and made no objections whatever to their acts of exclusive possession. At the time she attempted to convey her interest to her son by statute the deed was required to be delivered on the premises. Therefore, as the grantor was then disseised, the deed was of no effect even if she had an interest to convey. Sohier v. Coffin, 101 Mass. 179.—4 Mich. L. R. 246.

91. Schoonover v. Tyner [Kan.] 84 P. 124. A presumption of a grant cannot be raised to prove an ouster by one joint tenant, parcener, or tenant in common of another, or to prove a grant from one to another. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398.

92. See 4 C. L. 1674, n. 28 et seq.

93. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67; Eastman, Gardiner & Co. v. Hinton

structive.[94] "Actual adverse possession" is presumptive notice.[95] It is not notice of a hostile holding if a tenant in common claims to hold land adversely when there is no muniment of title on which to found the claim.[96]

Rents, profits, and proceeds.[97]—At common law a tenant in common could not have an accounting for rents and profits from the occupying tenant in the absence of an express contract, even though excluded from the common property.[98] Most states have abrogated the common-law rules by statutes.[99] A tenant in common occupying premises without denying the rights of her co-tenants, nor excluding them from the enjoyment of the property, is not obligated to pay rent in the absence of an express agreement,[1] nor to pay for the use and occupation of the premises,[2] but if he receives rent from a third person, he must account for it,[3] and if there is an agreement to pay rent, though no definite amount is mentioned, the rule is otherwise.[4] The exclusive use by one is a sufficient consideration to support his promise to pay rent at a stipulated rate.[5] However, where property is operated at a loss, a co-tenant is not entitled to an accounting for rents and profits.[6] One who sues for complete title but establishes only the rights of a tenant in common may recover to the extent of his rights proven in rent, lands, and contribution for taxes paid.[7] At the common law a co-tenant could work open mines and appropriate the proceeds so long as he did nothing amounting to an ouster or unlawful destruction of the common property,[8] but a co-tenant taking oil under a mistaken notion that he owned the entire tract, being innocent of fraud, must nevertheless account for the value of the oil after production and not in place.[9]

[Miss.] 38 So. 779; Logan's Heirs v. Ward [W. Va.] 52 S. E. 398; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; Barrett v. McCarty [S. D.] 104 N. W. 907.

94. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924. Need not be verbal or written. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67. A vendee of a tenant in common entering under adverse claims. Eastman, Gardiner & Co. v. Hinton [Miss.] 38 So. 779. By **conduct.** Steele v. Steele [Ill.] 77 N. E. 232. Presumed from exercise of exclusive rights. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67. Entry under a deed in severalty without warranties. Bloom v. Sawyer [Ky.] 89 S. W. 204.

95. Eastman, Gardiner & Co. v. Hinton [Miss.] 38 So. 779.

96. Where widow held under dower right and a life estate, a defense to an action for partition by a co-tenant was adverse possession. Held not to be notice of hostile holding to co-tenant. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6. One in possession under a deed purporting to convey a five-sixths interest in land cannot have such possession ripen into adverse title to the whole, though improvements were made, there being a lack of proper notice. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

97. See 4 C. L. 1677.

98. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

99. In **Virginia,** infants as well as adults protected. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

1. Lloyd v. Turner [N. J. Eq.] 62 A. 771.

2. McCrum v. McCrum [Ind. App.] 76 N. E. 415; Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913. Where the children of a co-tenant, who is liable to an accounting, assist in running a farm, they cannot on that account be held for use and occupation. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

In **Montana** a tenant can sue a co-tenant for use and occupation of farm or city property, or for rent received, without any agreement for the same. Under the statute Code Civ. Proc. 1895, § 592. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

3. McCrum v. McCrum [Ind.] 76 N. E. 415. After deducting all lawful expenses incurred in the care of the property, such as repairs, restorations, taxes, payment of interest on mortgages, insurance, etc. Lloyd v. Turner [N. J. Eq.] 62 A. 771. Rentals accruing under a special covenant in a void lease need not be accounted for by the co-tenant receiving them when they have nothing to do with the waste or injury to the land. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

4. Where an agreement existed and each co-tenant occupied a part of the premises, each was liable to the other. Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913.

5. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

6. Plaintiff and defendant as co-heirs entitled to a farm as tenants in common, where plaintiffs were put in possession of farm by defendant, and though on one or two occasions plaintiffs gave money to the defendant under the name of rent, no actual agreement to pay rent will be presumed nor will defendant be entitled to an accounting for rents and profits where the farm was run on a loss. Rose v. Cooley [N. J. Eq.] 62 A. 867.

7. Young v. Bigger [Kan.] 84 P. 747.

8. Now, by statute (Code Civ. Proc. 1895,

A tenant in common does not need to account for what the rental value of the premises might have been or should have been under proper management, but only for the actual amount received above his just share.[10]

Generally, the lien of a co-tenant for rents and profits takes precedence of other incumbrances,[11] but vendors' liens are superior to the liens of co-tenants arising subsequently,[12] nor will the rule be applied to every claim arising between co-tenants without regard to how it came to arise,[13] for an ordinary trust deed previously executed may take precedence of a co-tenant's lien for rents and profits under circumstances making it inequitable to give the latter lien priority,[14] and even a simple mortgage may under circumstances of peculiar negligence on the part of a co-tenant take precedence.[15]

Guardians must account for rents and profits, not as tenants in common but as guardians, where they are co-tenants with their infant wards,[16] and a guardian de facto is chargeable with an infant's share in the proceeds of joint property, whether he rents the same to strangers or occupies it himself.[17] The fact that an infant's interest in land was not definitely ascertained does not relieve the guardian from accounting therefor.[18] Where a partition has taken place, an infant is entitled to the proceeds from the part apportioned to himself, not merely a proportional part of the whole.[19]

Contribution.[20]—A tenant in common may require contribution from co-tenants for improvements made in good faith,[21] for the payment of taxes above the amounts of rent received,[22] for care of the property and collection of rents by one co-tenant,[23] for the purchase of an outstanding title or incumbrance,[24] for the purchase of dower and homestead rights,[25] and for expenses incurred in the prosecution or defense of a lawsuit for the benefit of the joint property;[26] but it is well settled that a tenant in common guilty of mala fides cannot recover for improvements put upon the prop-

§ 592), neither co-tenant may remove minerals without consent of other. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

9. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

10. McCrum v. McCrum [Ind.] 76 N. E. 415. Generally a co-tenant is bound to account only for the share of the crops actually harvested by him, but if he carelessly, negligently, or intentionally allowed his stock to eat up the crops, then the jury may determine what the fair value of the crops would have been. Id.

11. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 348.

12. Lien for share of rent inferior to vendor's lien. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 348.

13. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 348.

14. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 348. Where a co-tenant permitted another tenant pending litigation to appropriate the total rents and profits until his share was large enough to absorb the entire interest of the co-tenant, knowing that there were outstanding liens of the co-tenant's interests, whose security was thereby destroyed, the courts will look with disfavor on the co-tenant's lien when it seeks preference over the trust deed or mortgage and gives the latter priority. Id.

15. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 348.

16. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

17. Watts v. Watts' Ex'x [Va.] 51 S. E. 359. Under Code of 1887, § 3294 [Va. Code 1904, p. 1735], a guardian is liable as co-tenant. Id.

18, 19. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

20. See 4 C. L. 1675. See, also, Contribution, 5 C. L. 751.

21. Where a state court has adjudged certain parties entitled to an "unencumbered one-half interest" in certain real estate, in a subsequent suit for partition, matters relating to contribution for improvements, rents, and so forth, will be res adjudicata. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

22. Barrett v. McCarty [S. D.] 104 N. W. 907. The lien of contribution on a co-tenant's rights is valid against one acquiring the co-tenant's rights by quit claim deed for taxes previous to the acquisition of his rights. Young v. Bigger [Kan.] 84 P. 747.

23. A reasonable compensation. Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913.

24. Mahoney v. Nevins, 190 Mo. 360, 88 S. W. 731. Contribution pro rata. Mauzey v. Dazey, 114 Ill. App. 652.

25. Mauzey v. Dazey, 114 Ill. App. 652.

26. By statute in Kentucky [Ky. St. 1903, § 489] (Estill's Trustee v. Francis [Ky.] 89 S. W. 172), but not if the other tenant is making an independent defense or prosecu-

erty,[27] nor his grantee, who is not an innocent purchaser.[28] Equity requires contribution from tenants in common only to prevent injustice.[29]

Subrogation.[30]—Where the equity of the case would make it unjust to apply the doctrine of subrogation, the courts will refuse to apply it.[31]

Agency.[32]—An unauthorized leasing by one tenant of common property is not binding on his co-tenants,[33] whether of a part[34] or of the entire premises.[35] Under such a conveyance the grantee could only occupy the position of his grantor. Under no circumstances would his rights be greater,[36] and the grant would not even be valid against the grantor if its enforcement would be prejudicial to his co-tenants,[37] nor can one tenant in common by acquiescence change a peaceable into a hostile entry so as to bind her co-tenants.[38] Where one tenant in common has been in the habit of managing the joint property for his co-tenants, but on selling any has always consulted them, a sale without such consultation would not be binding, no written authority existing.[39] One tenant may orally ratify a sale authorized by a co-tenant and be bound thereby.[40] A tenant in common may be estopped from denying the validity of sale of his interest by a co-tenant.[41] Acceptance of the benefits of a lawsuit engaged in by one tenant in common for the joint property by a co-tenant amounts to a ratification thereof,[42] but a bill asking for an accounting for rent received under a lease by a co-tenant does not necessarily ratify the lease.[43]

Conversion.[44]—A refusal by one tenant in common to yield exclusive control to another tenant in common is not conversion.[45]

Trespass and waste.[46]—In West Virginia, by statute,[47] tenants in common, joint

tion (Id.). The mere fact that a co-tenant did not want the suit brought or defended, or that he remained inactive, will not relieve him from his share of the burden of the litigation so long as he accepts its benefits. Id.

27. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

28. A father bought the interest of his children in certain real estate, gave them a second mortgage for it, cancelled the mortgage, and later mortgaged premises to appellant, who with knowledge of facts foreclosed the mortgage, and upon an adjudication of the court declaring the children to be co-tenants, sued for contribution. Held that neither the father nor the society was entitled to contribution. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

29. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

30. See, also, Subrogation, 6 C. L. 1581.

31. Where rents, profits, and interest received compensate a tenant in common for outlay on improvements, doctrine of subrogation does not apply. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1.

32. See 4 C. L. 1676. See Special Article, 3 C. L. 131.

33. Walker v. Marion [Mich.] 12 Det. Leg. N. 890, 106 N. W. 400.

34. Such as an attempt to devise a co-tenant's interest in a portion used as a homestead. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

35. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

36, 37. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

38. The owner of an unassigned dower interest leased the entire premises, under which lease adverse holder entered, bought a tax title to same land, and claimed ownership thereon against other co-tenants on plea of acquiescence in the change of character of his title by lessor. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

39. A brother had managed property for his brother and sister; an attempt to sell without consulting sister, no written authority being given, though an understanding existed that he might make contract regarding property, was unauthorized and not binding on sister. Blackledge & Blackledge v. Davis [Iowa] 105 N. W. 1000.

40. A brother and sister owned a piece of land in common. The brother's agent sold the land and the sister orally agreed thereto. Held that she had ratified the contract. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35.

41. Where a sister countenanced negotiations for the sale of her interests in a tenancy in common by her brother, and without objection permitted the purchaser to expend several thousand dollars on improvements, she will be estopped from denying the validity of the sale. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35.

42. Estill's Trustee v. Francis [Ky.] 89 S. W. 172.

43. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

44. See, also, Conversion as Tort, 5 C. L. 753.

45. Exclusive control of a horse. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597.

46. See 4 C. L. 1677. See, also, Trespass, 4 C. L. 1698; Waste, 4 C. L. 1823.

47. Code of 1891, c. 92, § 2. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

tenants, and co-parceners, are made liable to one another for waste.[48] The ousted co-tenant may recover damages from his co-tenant on plea of trespass.[49]

Actions.[50]—No action of ejectment will lie against a co-tenant[51] unless his entry is hostile.[52] The royalties received by and due to a co-tenant are a proper measure of mesne profits in an action for ejectment and damages.[53] An ouster gives rise to a suit in trespass and damages.[54] A tenant in common, in suit to recover his rights, must generally allege a demand and refusal.[55] A co-tenant is not a necessary party defendant in an action to quiet title.[56] In Montana an action may be maintained for use and occupation, and in an action for an accounting must aver demand for a general accounting and a refusal, but may resort to any action most appropriate.[57]

Partition.[58]—Any tenant in common may ask for partition,[59] and where an ancestor is presumed dead,[60] ordinarily, it will not be refused at the suit of heirs unless it affirmatively appears that there are outstanding debts of the ancestor.[61] In a suit for partition, where the divorced wife claims the entire fee of a former tenancy in entirety on the ground that the land was purchased by her means, the burden of proof is on her.[62] Fraud in partition is a ground for redistribution.[63] A voluntary partition or division of lands by co-tenants may be established by any competent evidence.[64]

One who buys land from a tenant in common with notice of oral partition and acts thereunder cannot acquire more rights than his grantor had.[65] On oral partition, followed by actual occupation of the partitioned lands, and the execution of a deed by one co-tenant to the other to his share binds the latter, though he does not execute a deed to the former.[66] After the death of a co-tenant, her acts and declarations are admissible in evidence to show the character and extent of her possession under an oral partition.[67] Where lands are of such a character as to render division among claimants impracticable, they will be ordered sold.[68]

48. McNeely v. South Penn Oil Co. [W. Va.] 52 S. E. 480.

49. Bloom v. Sawyer [Ky.] 89 S. W. 204.

50. See 4 C. L. 1677.

51. Country Club Land Ass'n v. Lohbauer, 97 N. Y. S. 11.

52. Where a widow conveys her dower interest and her grantee conveys interest in severalty to entire estate, and the subsequent grantee likewise, the co-tenants of the widow may during her life maintain ejectment against the grantee under the last transfer on the ground that his entry is hostile. Bloom v. Sawyer [Ky.] 89 S. W. 204.

53. Moragne v. Moragne [Ala.] 39 So. 161.

54. In Kentucky, an action quia timet. Bloom v. Sawyer [Ky.] 89 S. W. 204. The erecting of a building on a tenancy in common being an ouster is ground for an action in trespass or the removal of the building by a co-tenant. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67.

55. One who sues for the entire estate instead of as a tenant in common, though he proves title to only a part interest, nevertheless does not come within Civ. Code § 597 [Gen. St. 1901, § 5084), requiring plaintiff to allege in his complaint that defendant denied his right. Young v. Bigger [Kan.] 84 P. 747.

56. Under Rev. St. 1898, § 2919. Karren v. Rainey [Utah] 83 P. 333.

57. Ayotte v. Nadeau, 32 Mont. 498, 81 P. 145.

58. See 4 C. L. 1677. See, also, Partition, 6 C. L. 897.

59. Paine v. Sackett [R. I.] 61 A. 752.

60. Where a co-tenant has not been heard from for more than 7 years, the common law presumption of death arises, and her interests in land will be partitioned on application. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

61. Chapman v Kullman, 191 Mo. 237, 89 S. W. 924. The court ought not to decree partition of lands to heirs until it is well satisfied that all debts and claims against the decedent have been finally settled, but where a woman had not been heard from for 16 years, and no claims against her had been raised, the courts will not refuse partition to her heirs. Id.

62. Land conveyed to husband and wife by tenancy in entirety. After divorce, suit for partition by husband. Joerger v. Joerger [Mo.] 91 S. W. 918.

63. Where a co-tenant buys an outstanding dower and homestead interest for $1,228, and distribution is made on a basis of an appraisal value of $2,221.38, this is such fraud as will warrant a court of equity in directing a redistribution. Mauzey v. Dazey, 114 Ill. App. 652.

64. Seawell v. Young [Ark.] 91 S. W. 544.

65. If grantor is estopped, then grantee likewise. Seawell v. Young [Ark.] 91 S. W. 544.

66, 67. Seawell v. Young [Ark.] 91 S. W. 544.

The doctrine in respect to allowing a charge for rents to figure in the partition of lands is founded entirely on conceptions of equitable adjustment.[69]

TENDER; TERMS OF COURT, see latest topical index.

TERRITORIES AND FEDERAL POSSESSIONS.

§ 1. *Political status.*[70]—Congress has power to grant land situated below high-water mark within a territory of the United States.[71] A resident of Porto Rico, who shows birth or naturalization in Porto Rico, need not show further evidence of United States citizenship to register with the U. S. Board of Labor Employment at the U. S. Navy Yard at Washington for employment.[72]

§ 2. *Organization and government.*[73]—The sidewalks of the city of Washington are the property of the United States and subject to the control of the municipal authorities of the District of Columbia,[74] who are required to repair and maintain them,[75] and are liable for damages arising from negligence.[76]

Congress has reserved to itself not only the power to legislate within the District of Columbia, but the power to enact municipal ordinances,[77] and the commissioners of the District have power to make only such police regulations as are authorized by congressional authority.[78] The acts of Congress authorizing the commissioners of the District of Columbia to make all reasonable and usual police regulations gives no authority to legislate.[79] Neither the board of school trustees nor the commissioners of the District of Columbia can incur any obligation in the absence of an appropriation by Congress providing for the payment of such obligation.[80]

An act of Congress charging the commissioners of the District of Columbia with the duty of supervising the construction of a street railway, incorporated under the act, renders the commissioners agents of Congress.[81]

§ 3. *Jurisdiction, powers, duties, and liabilities.*[82]

§ 4. *Local laws and practice; territorial courts.*[83]—Under the acts of Congress where the laws of the United States and the laws of Arkansas relative to punishment

68. Where there were several lots to be divided among 6 claimants. Joerger v. Joerger [Mo.] 91 S. W. 918.

69. Flach v. Zanderson [Tex. Civ. App.] 91 S. W. 318.

70. See 2 C. L. 1868.

71. Kneeland v. Korter [Wash.] 82 P. 608.

72. Rule V. of Civil Service Commission. United States v. Bowyer, 25 App. D. C. 121.

73. See 4 C. L. 1678.

74. Sidewalks extend from the curb line to the building line of the houses. Dotey v. District of Columbia, 25 App. D. C. 232.

75. District must remove snow and ice from the sidewalks. Coughlin v. District of Columbia, 25 App. D. C. 251.

76. The fact that a portion of the sidewalk is withdrawn from public travel and set apart for parking does not change the liability. Doty v. District of Columbia, 25 App. D. C. 232.

77. And it cannot be inferred that the District of Columbia has certain powers, because such powers are usually vested in municipalities. Coughlin v. District of Columbia, 25 App. D. C. 251.

78. A police regulation promulgated by the commissioners, requiring all adjacent lot owners to remove snow and ice from the sidewalks, no authority having been conferred by congress to make such a regulation, is void. Coughlin v. District of Columbia, 25 App. D. C. 251.

79. Act of Cong. Jan. 26, 1887, 24 Stat. at L. 368, chap. 48; Act of Cong. Feb. 26, 1892, 27 Stat. at L. 394. The imposing of a duty to remove snow and ice is legislative and not regulative. Coughlin v. District of Columbia, 25 App. D. C. 251.

80. 20 Stat. at L. 103, chap. 180. No authority to bind the municipality for extra services rendered in the public schools. Myers v. District of Columbia, 25 App. D. C. 132.

81. District of Columbia is not liable for their acts. Smith v. District of Columbia, 25 App. D. C. 370.

82, 83. See 4 C. L. 1678.

of an offense committed in the Indian Territory conflict, the laws of the United States must prevail.[84]

TESTAMENTARY CAPACITY; THEATERS; THEFT, see latest topical index.

THREATS.[85]

Under a statute which makes it an offense to maliciously threaten to accuse another of a "crime or offense," the indictment must state the crime or offense of which the defendant maliciously threatened to accuse the person named.[86]

TICKETS, see latest topical index.

TIME.[87]

The general method of computing time when an act is required to be done within a certain period from or after a specified time is to exclude the day named and include the last day of the period.[88] Where the last day of a period falls on Sunday, it is generally sufficient if the act required be done on Monday,[89] but when a statute requires an act to be done within a certain time, and the last day to perform falls on Sunday, it cannot be excluded unless the legislature manifestly so intended.[90] Where a statute provides that "at least" so many days or months must intervene between certain events, both terminal days are excluded.[91] Where time is given "until" a certain day, it expires on the preceding day.[92] The term "months" when used in a statute means calendar months in the absence of anything indicating that a contrary meaning is intended.[93] A calendar month is not uniform, but varies according to the Gregorian calendar.[94] A court will take judicial notice that "standard" or "railroad" time has long been universally adopted for designating time.[95] The legal fiction excluding fractions of a day does not apply when a statute provides for the record of the precise time in which an official act is done.[96] The

84. Act Cong. Feb. 15, 1888, c. 10, § 2, 25 Stat. 33. Act Cong. May 2, 1890, c. 182, § 33, 26 Stat. 96. Glover v. United States [Ind. T.] 91 S. W. 41.

85. See 4 C. L. 1679.

86. Code, § 4767. Where the indictment alleged that defendant threatened to accuse the prosecuting witness of being a disorderly person, there being no such offense under the penal code, no crime is charged. State v. Dailey, 127 Iowa, 652, 103 N. W. 1008.

87. See 4 C. L. 1680.

88. Bringing suit on insurance policy. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302; Simmons v. Hanne [Fla.] 39 So. 77. Where the court on April 11th required a bill of exceptions to be filed in 90 days, a filing on July 11th was too late. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068. Under § 5848, Rev. Codes 1895, a mortgage sale on the 40th day after the first publication held valid. Orvik v. Casselman [N. D.] 105 N. W. 1105.

89. Bill of exceptions presented on Monday. Duncan v. Moloney, 115 Ill. App. 523. Under Code Civ. Proc. § 940, requiring an appeal bond to be filed within five days after service of notice of appeal, the last day for filing held to be December 1st, where notice was served on Nov. 25th and the 30th was a holiday. Rauer's Law & Collection Co. v. Standley [Cal. App.] 84 P. 214.

90. Writ of error sued out Feb. 27, 1905, held not sued out within six months from Aug. 26, 1904, although the 26th day of Feb., 1905, was Sunday. § 1271, Rev. St. 1892. Simmons v. Hanne [Fla.] 39 So. 77.

91. Held the hours of terminal days could not be tacked so as to make required time. In re Gregg's Estate [Pa.] 62 A. 856.

92. Time expired Dec. 21, where time to sign bill of exceptions was given until the 22d. Heal v. State [Ala.] 40 So. 571.

93. Simmons v. Hanne [Fla.] 39 So. 77.

94. From 5 P. M. Oct. 8, to 8 P. M. Nov. 8, held not a calendar month under Act April 26, 1855 (P. L. 328), declaring void charitable bequests made within one calendar month from death of testator. In re Gregg's Estate [Pa.] 62 A. 856.

95. Two o'clock P. M. held to mean 2 o'clock in the afternoon standard time. Mortgage sale. Orvik v. Casselman [N. D.] 105 N. W. 1105.

96. A notice by a judgment creditor of his intention to redeem from a mortgage foreclosure held void where made prior to docketing of his judgment, although on

general rule that there are no fractions of a day does not apply where it is necessary to protect a completed or a vested right.[97]

TIME TO PLEAD, see latest topical index.

TOBACCO.

The Indiana anti-cigarette law has been construed as not intending to prohibit the act of smoking cigarettes or keeping them in possession solely for that purpose.[98] The purpose of the Nebraska act is to suppress the traffic in cigarettes, and not to forbid their use,[99] hence the word "manufacture," as used therein, refers only to the business of manufacturing cigarettes for traffic, and the statute does not prohibit the act of rolling cigarettes from one's own materials for one's own use.[1]

Cigarettes are a legitimate article of commerce and hence their importation in original packages for personal consumption involves interstate commerce, and cannot be prohibited by a state legislature,[2] nor do they become subject to state regulation on the termination of the transportation, nor while they are in the importer's possession for personal consumption.[3]

TOLL ROADS AND BRIDGES.

§ 1. *Franchises and rights of way, and acquisition by public.*[4]—Political subdivisions may maintain toll roads and bridges when so empowered by statute.[5] The life of a special franchise is limited by general law if not otherwise fixed.[6] A general ferry privilege granted to all municipal corporations does not derogate a special privilege granted.[7] Under the statute relating to the right of a toll road company to use the roads of the counties, consent of the county must be obtained before a toll road reverted to the county can be used.[8] In Louisiana the police jury has full and

the same day. Brady v. Gilman [Minn.] 104 N. W. 897.

97. Under § 33, Tariff Act July 27, 1897, c. 11, 30 St. 213 (U. S. Comp. St. 1901, p. 1701), the word "day" refers to the moment when the act took effect. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432.

98. Acts 1905, p. 82, c. 52. State v. Lowry [Ind.] 77 N. E. 728. Such was evidently not the intention of the legislature in view of the fact that act does not directly prohibit smoking (Id.), and in view of the title of the act, and the manner of its adoption (Id.). Words "keep or own" as used in the act do not show contrary intention, when read in connection with the rest of the act. Id. Statute, being criminal, will be strictly construed. Id.

99. Dempsey v. Stout [Neb.] 107 N. W. 235.

1. Complaint held not to charge the manufacture of cigarettes within the meaning of the act. Dempsey v. Stout [Neb.] 107 N. W. 235.

2. State v. Lowry [Ind.] 77 N. E. 728.

3. Keeping or owning of cigarettes in an unopened, original package does not violate the Indiana anti-cigarette law. Acts 1905, c. 52, p. 82. State v. Lowry [Ind.] 77 N. E. 728.

4. See 4 C. L. 1681.

5. Act No. 67 of Acts of 1855, authorizing the police jury of the parish of Lafourche and the town of Thibodaux to construct and maintain a toll bridge across the Bayou Lafourche, is still in force. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

6. An act incorporating a turnpike company with the privilege of collecting tolls, and providing that such company "may have continued succession," is controlled by the statute providing that when no limitation is provided, succession shall continue for 20 years. Laws 1850-51, p. 403; Laws 1871-72, p. 225; Rev. St. 1845, c. 34, art. 1, § 1; Rev. St. 1865, c. 62. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

7. Act No. 136, p. 228, of 1898, § 15; Acts 1855 and 1866. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

8. Rev. St. 1889, § 2697; Rev. St. 1899, § 1227. Authority granted by the county to construct an electric railway over and along an old gravel road confers no right to operate the toll road. State v. Louisiana, B. G.

plenary power over ferries and bridges as over public roads,[9] may prohibit the competing operation of free bridges or ferries,[10] and may enjoin the operation of a free ferry or bridge within prohibited distance as established by statute,[11] certain bridges established by municipalities being excepted.[12] The police jury's exclusive right to maintain toll bridges attaches to bridges excepted as soon as the charters of such bridges expire.[13]

Actions to enforce or question right.—In an action to determine a bridge company's right to its franchise and to collect tolls, it is error to grant an order pendente lite restraining defendant from collecting tolls,[14] but the remedy is in appeal, not by mandamus.[15] A petition to enjoin defendants from collecting tolls need not negative matters which constitute a defense.[16] One joint owner of a public toll bridge may maintain an action to enjoin an infringement of its privileges without joining the co-owner as party plaintiff.[17]

Acquisition by public.[18]—Under statutory authority, local divisions of the state may take toll bridges for free use.[19] On the expiration of the charter rights of a toll road company, the road vests in the public, and a subsequent conveyance by the company passes nothing.[20]

§ 2. *Public aid and immunities.*[21]

§ 3. *Establishment, construction, location, and maintenance.*[22]—To "establish" a toll bridge as used in statutes, ordinarily means to found, to create, to regulate.[23]

§ 4. *Right of travel and tolls.*[24]—An injunction will lie to restrain an unlawful collection of tolls for the use of a public road where there is no other full and adequate remedy at law.[25] An unlawful collection of tolls on a public highway

& A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

9. May convert a free bridge or road into a toll bridge or toll road or vice versa. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705. May operate a toll bridge. Id.

10. Validity of the ordinance of the police jury of the parish of Lafourche, prohibiting any one from operating a free ferry or bridge within three miles of any public toll bridge, upheld. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

11. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705. A free pontoon bridge, constructed and maintained by individuals without warrant or authority of law within a short distance of a public toll bridge, cannot be considered as a private ferry. Id.

12. Section 2743 of the Rev. St. and amendatory act of 1902, in excepting "bridges within the control of municipal corporations," refers to bridges exclusively within control of the municipality and over which the police jury has no jurisdiction. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705. The statutory proviso of par. 9, Act No. 202, p. 392 of 1902, that "no toll shall ever be collected on such bridges," refers only to bridges within the control of municipal corporations which have been surrendered to the police jury. Does not apply to bridges constructed by the parish. Id.

13. 9th par. Act No. 202, p. 392, of 1902. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

14, 15. State Road Bridge Co. v. Gage [Mich.] 12 Det. Leg. N. 1015, 106 N. W. 394.

16. A petition which alleges the right of free use of a road and the unlawful collection of tolls by defendants need not affirmatively charge that they are occupying without order of the court. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

17. Where a police jury and a municipality are joint owners of a toll bridge, the police jury need not join the municipality in an action to enjoin an infringement of its exclusive privilege to operate a bridge. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

18. See 4 C. L. 1681.

19. Regularity of amendment: The supplementary act of Pennsylvania for the acquiring by counties of bridges and the abolition of tolls is valid. Act May 3, 1878 (P. L. 41). Bridgewater Borough v. Big Beaver Bridge Co., 210 Pa. 105, 59 A. 697.

20. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

21, 22. See 4 C. L. 1681.

23. Par. 9 of Act No. 202, p. 392, of 1902, construed. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705.

24. See 4 C. L. 1682.

25. Quo warranto proceeding is insufficient, since relief can only be granted upon a final determination of the action. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153. The cause of action in favor of the individuals, arising upon the payment of the tolls, tends to a multiplicity of suits, and hence no ground for refusal of an injunction. Id.

is a public nuisance,[26] and will be restrained by an injunction in an action by the prosecuting attorney of the county.[27]

TORRENS SYSTEM, see latest topical index.

TORTS.[28]

§ 1. *Elements of a tort.*[29]—There must be a violation of a private right secured by law,[30] and in case of torts of omission, a corresponding violation of a duty,[31] but the fact that the act which caused the injury was violative of a city ordinance does

26, 27. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

28. Scope of topic: It is limited to the more general rules and excludes to the several tort topics matters specific to them.

29. See 4 C. L. 1682.

30. Where a gas company installed a meter under a contract giving them the right to enter and remove the same at any reasonable hour, and the company's agent forced a cellar door on being refused admittance by the plaintiff's wife, using no more force than was necessary, no tort was committed. Hitchcock v. Essex & H. Gas Co., 71 N. J. Law, 565, 61 A. 397. The prevailing party to a suit cannot maintain an action against defendant to recover attorney's fees. Seligman v. Rosenzweig, 98 N. Y. S. 221. A man has a right that his personal safety shall not be infringed by the negligent exercise of the rights of others. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

31. The law ipso facto imposes a duty upon one, who has undertaken to perform an act which if done negligently will be highly dangerous to third persons, to exercise due care. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330. An action will not lie against an officer for refusing the benefits of the exemption act in a suit commenced by attachment in which no execution was ever issued. Act of April 9, 1849 (P. L. 533). Blakeley v. Smith, 27 Pa. Super. Ct. 583.

NOTE. "Tort liability of contractor or vendor to parties not privy to the contract: It is stated as a general rule of law that a contractor or vendor is not liable to third parties for the negligent construction of a chattel after its completion or sale. Winterbottom v. Wright, 10 Mees. & W. 109. The inroads, however, made upon this doctrine by American decisions (Huset v. Case Threshing Mach. Co., 120 F. 865, 61 L. R. A. 303) give pertinence to a question of its real existence in this country. The principal reason urged in support of the rule in question is that a contractor or vendor owes no legal duty of care in the construction of his wares where there is no privity of contract. The American courts, however, early found such a legal duty owing to third parties where the chattels sold are imminently dangerous to human life. Thomas v. Winchester, 6 N. Y. 397; Devlin v. Smith, 89 N. Y. 470. The principle of these cases has been applied not only where the article is imminently dangerous in its normal state, but also where such imminent danger arises solely from defects in its construction. Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384, 63 L. R. A. 743. See 17 Harv. L. R. 274. Thus, in a recent case before the Kansas City Court of Appeals, a bridge company, which had turned over a bridge to county commissioners on a building contract, was held liable to the plaintiff for defects in the bridge which rendered it imminently dangerous to human life and of which the company had notice. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330. Nor need the defects even be such as imminently to imperil life; if at the time of completion or sale the contractor or vendor knows of the latent defect, he will be liable, although the danger be not extraordinary. Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 31 L. R. A. 220. An attempt has been made to explain this latter class of cases on the ground of deceit. But to hold that a vendor by the mere sale of a chattel known to be defective, makes, with intent to defraud, a false representation to every probable user of that chattel, and that such third party acts in reliance upon such representation, is such a strain upon actual facts as to call for a broader ground of liability to support the cases. Under the decisions, the legal duty of a contractor or vendor to use care in the construction of chattels seems to extend generally to third parties, except, perhaps, in the single case where the defective article is but slightly dangerous to life, and the vendor has no knowledge of its condition at the time of sale. Schubert v. Clark Co., 49 Minn. 331. The reasoning of American courts in these cases (Huset v. Case Threshing Mach. Co., 120 F. 865, 61 L. R. A. 303) shows a strong inclination to apply the basic principle of all liability for negligence—that where a person sustains such relations to society that danger to others will result from a failure to use due care in his activities, he owes the legal duty of such care to that class of persons likely to be injured by his failure to exercise it. The specific application of this principle would make a contractor or vendor liable to probable lawful consumers for

not necessarily enter into a determination whether a cause of action exists.[32] A destruction of a property right arising ex contractu may give rise to a tort.[33] Malicious interference with the business of another with an intent to injure such business is a tort.[34] Every one has an inherent right to the benefits of his contract,[35] and any interference with it unless justifiable gives a cause of action.[36] Under a statute authorizing a town to pay the damages to sheep caused by dogs, and then to proceed against the owner of such dog, such action against the owner is in tort, the town being subrogated to the rights of the sheep owner.[37] A tort cannot be malicious unless done "intentionally."[38]

All parties to a conspiracy to ruin one in his business are liable for all overt acts done pursuant to such conspiracy, whether active participants or not.[39] Every tort-feasor is presumed of law to know the tortious nature of his act.[40]

Negligence to be actionable need not be the sole or immediate cause of the injury, and if the injury would not have happened but for the negligence, and the circumstances are closely connected with the injury in the order of events, an action will lie.[41] A tort feasor cannot contend that the property injured belongs to someone other than the plaintiff, when such person has testified in the case and made no claim.[42]

the negligent construction of chattels, such liability being limited of course by the ordinary rules of 'natural and probable cause' and 'contributory negligence.' 1 Thompson, Negligence, §§ 821, 824; Clerk & Lindsell, Torts [3d Ed.] 442-453; 21 Am. & Eng. Enc. Law [2d Ed.] 461, 462. The most palpable case for such an extension of a vendor's liability would be in favor of a sub-vendee where the chattel is sold to a retail dealer for the express purpose of resale; but on principle the extension should obtain in favor of every probable, lawful user, and such an extension has, in fact, been recognized in the case of the guest of a vendee who had bought for his own use. Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 31 L. R. A. 220. Though logically applicable to injuries to property, the proposed rule will probably not be extended beyond personal injuries for some time to come, in view of the fact that it is growing out of exceptions established in cases of imminent danger to life. But see Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384, 63 L. R. A. 743."—From 19 Harv. L. R. 371.

32. An ordinance prohibiting the leaving of carts or wagons in the street does not conclusively make defendant liable for injury to a child received while playing in a cart so left, when such injury could not be reasonably foreseen. Lopes v. Sahuque, 114 La. 1004, 38 So. 810.

33. Applied where defendant company cut a telephone wire which had been strung on plaintiff's poles under a contract to furnish plaintiff telephone service. In re Cumberland Tel. & Tel. Co. [La.] 40 So. 590. Provosty, J., dissenting on the ground that defendant's cutting of its own wire to disconnect, without going on plaintiff's property, was not trespass.

34. Jones v. Barnum, 119 Ill. App. 475. See, also, special article following this topic. Conspiracy to prevent the use of plaintiff's bricks until he acceded to certain demands. Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47.

35. As a contract of employment. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603. See, also, special article following this topic.

36. A contract between a labor union and an employer, whereby the latter agrees not to retain anyone in his employ who is objectionable to the union, does not justify an interference by a representative of the union with the continuance in employment of a third person. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603. The fact that one is not a member of a union does not justify a union representative in interfering (Id.) and where the contract is one of employment, the fact that it is terminable at will does not affect the cause of action (Id.).

37. Town of Richmond v. James [R. I.] 61 A. 54.

38. An instruction defining malice "doing any act" injurious to another without just cause is erroneous for omitting the word "intentionally" before the word "doing." Haney v. Blandino [Tex. Civ. App.] 13 Tex. Ct. Rep. 967, 89 S. W. 1108.

39. An agreement not to use, etc., brick made by any person who does not subscribe to certain rules, made for the purpose of injuring the business of such person, is an illegal conspiracy. Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47.

40. A tortious act is no less so because at the time of commission there was no adjudicated case fixing the character of the act as tortious. News Pub. Co. v. Associated Press, 114 Ill. App. 241.

41. Where an elevator is negligently constructed so that there is a space between the cage and the door to the shaft, the fact that the boy injured was negligently shoved into the opening by another does not relieve the company. Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56.

42. Toledo, etc., R. Co. v. Farris, 117 Ill. App. 108.

Where two parties are each guilty of negligence contributing to an injury, the tort of one is no defense to the other.[43]

Where the facts and circumstances giving rise to the tort will support an action of a different nature, the tort may be waived and the latter remedy pursued.[44]

At common law the remedy by action for tort committed was confined to the joint lives of the injurer and the injured.[45]

§ 2. *What is an injury or wrong.*[46]—An individual or corporation engaged in the discharge of a governmental function is not responsible for tortious acts.[47] Judges of courts of superior jurisdiction are not liable in civil actions for their judicial acts even in excess of their jurisdiction, and many states extend this immunity to judges of inferior courts, where they have general jurisdiction over the subject-matter and in good faith decide that they have jurisdiction in the particular case, though erroneous.[48] A ministerial officer is not liable in tort for the service of a process valid upon its face, though in fact void.[49] In Illinois, highway commissioners are not liable in tort to an individual for the manner in which they have discharged their official duty.[50]

§ 3. *What is damage.*[51]—No recovery can be had for damages where there has been no wrong.[52]

§ 4. *Parties in torts.*[53]—Where a common duty rests upon two or more persons, one who is injured by a failure to perform such duty may sue all parties owing the common duty jointly, if he so elects.[54] Joint tort feasors are jointly and severally liable for the injury.[55] Where separate negligent acts of two or more, concurrent

43. Where defendant negligently caused water to accumulate at a certain place, it is no defense to an action for damages caused by such accumulation that some one else failed to keep a certain drain open. Toole v. Delaware, etc., R. Co., 27 Pa. Super. Ct. 577. Where two trains collide, it is no defense to one road that the other was also guilty of negligence when sued by an individual for injuries sustained. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558.

44. **Accounting:** Where a pledgee wrongfully sells the property, the pledgor may waive the tort and bring a suit for an accounting. Demars v. Hudon [Mont.] 82 P. 952.

Loan: Where one in possession of money of another wrongfully converts it to his own use, the conversion may be waived and the transaction treated as a loan. Courter v. Pierson [N. J. Law] 61 A. 81.

45. Jones v. Barmm, 119 Ill. App. 475. Right of action for malicious interference with business does not survive the defendant. Id.

46. See 4 C. L. 1684.

47. Municipality not liable for trespass of a horse used in its fire department, the maintenance of a fire department being a governmental function. Cunningham v. Seattle [Wash.] 82 P. 143. Board of education is not liable in its corporate capacity for torts in the absence of statutory provision. Board of Education v. Volk, 72 Ohio St. 469, 74 N. E. 646. Officers of the state agricultural society are not liable in tort for false imprisonment. Berman v. Cosgrove [Minn.] 104 N. W. 534.

48. A municipal judge having jurisdiction to enforce all ordinances is not liable if he erroneously attempts to execute a void ordinance where he acts in good faith. Rush v. Buckley [Me.] 61 A. 774.

49. A writ in legal form issued by a court having general jurisdiction of the subject-matter is a protection, though the ordinance upon which it is based is void. Rush v. Buckley [Me.] 61 A. 774.

50. Not liable even upon proof from which the jury might find negligence. Neville v. Viner, 115 Ill. App. 364.

51. See 4 C. L. 1684.

52. Where the act complained of is lawful in itself, there is no liability for injury resulting unless done in a manner or under circumstances which amount to a disregard of the rights of others. Norfolk & W. R. Co. v. Gee [Va.] 52 S. E. 572. Where a city in the exercise of its municipal power graded a street, using due care and diligence and not encroaching upon the property of the adjacent lot owner, no action can be maintained for any consequential damage to the property. Davis v. Silverton [Or.] 82 P. 16.

53. See 4 C. L. 1684.

54. Where a municipality and a telegraph company using a highway are both under a duty to keep such highway in repair, they may be sued jointly for neglect. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229.

55. A party who is obliged to pay a joint and several judgment cannot complain in equity that there was collusion between the judgment plaintiff and his co-tort feasor. Wanack v. Michels, 114 Ill. App. 631. Where a railroad company gives a city permission to take water from a certain private well, and enters into a contract requiring the city to indemnify it, it is a joint tort feasor and is liable for damage done. Couch v. Texas & P. R. Co. [Tex.] 90 S. W. 860. Where

in place and time, together cause the injury, each is jointly and severally liable for the whole injury.[56] One who negligently places in the hands of another or authorizes the use by another of a dangerous instrument under circumstances that he has reason to know is likely to result in injury is liable to one injured.[57] The rule that where two or more contribute by their wrongdoing to the injury of another, such injured person may recover from all of them in a joint action, or he may pursue one of them and recover from him, in which case the one thus compelled to respond is entitled to neither indemnity nor contribution from those who with him caused the injury, does not apply where the wrongdoer who was compelled to respond for the injury was not, as between the wrongdoers themselves, a wrongdoer at all, and recovery by the injured party from such a party is not a bar to an action by him against the other parties to the wrong.[58]

§ 5. *Pleading and procedure* as applied to specific torts is elsewhere discussed.[59] In an action for tort it is not necessary to allege and prove nonpayment of the damages,[60] such payment being an affirmative defense.[61] Where one is injured by an act of one of several joint tort feasors, it is not necessary in an action against one to prove that the particular defendant himself did the act which resulted in the injury.[62] In an action to recover damages for a tort, a counterclaim arising out of tort cannot be interposed.[63] It is not necessary that plaintiff prove all the allegations of the complaint.[64] The defense of justification in actions of tort must be specifically pleaded.[65] At common law, settlement with one joint tort feasor bars recovery against the others,[66] and where separate judgments are rendered against joint tort feasors, a satisfaction of one judgment is a satisfaction of all,[67] but the entry of judgment against one does not preclude plaintiff from proceeding against the others.[68] Where the original complaint alleged a tort committed by three joint tort feasors, it is not error to allow it to be amended so as to allege committal by only two.[69]

blasting is so negligently done as to cause injury to a house on an adjoining lot, all persons engaged therein are joint tort feasors. Page v. Dempsey [N. Y.] 77 N. E. 9. Where damage results to adjoining property from the construction of a building, the owner and the contractor are not tort feasors. Leppert v. Flaggs [Md.] 60 A. 450.

56. Where several riparian owners negligently remove water from a stream, thus causing injury to a lower riparian owner, they are jointly and severally liable, although the acts were independent, where it is difficult to prove the damage done by each. Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283. Where one is injured in a collision of two trains of different companies, due to concurrent negligence, the companies are jointly and severally liable. Chicago, etc., R. Co. v. Marshall [Ind. App.] 75 N. E. 973. Where several mine owners discharge refuse into a stream and damage results, one sued is liable for the total damage in the absence of proof of the damage caused by his acts. Upson Coal & Min. Co. v. Williams, 7 Ohio C. C. (N. S.) 293.

57. A parent who permits his twelve year old son, who is experienced in the use of fire-arms and has been habitually careful, to use a gun is not liable for the injury resulting, as he could not reasonably anticipate such injury. Palm v. Ivorson, 117 Ill. App. 535.

58. Northern Ohio R. Co. v. Akron Canal & Hydraulic Co., 7 Ohio C. C. (N. S.) 69.

59. See Negligence, 6 C. L. 748, and other tort topics.

60. A cause of action is fully stated when defendant's wrong and the resulting damage are alleged. Howerton v. Augustine [Iowa] 106 N. W. 941.

61. Under Code § 2629, must be pleaded and proved by defendant. Howerton v. Augustine [Iowa] 106 N. W. 941.

62. Where three men were engaged in shooting at a mark in violation of city ordinance and under circumstances which amounted to gross negligence, not necessary to prove who fired the shot which injured plaintiff. Benson v. Ross [Mich.] 13 Det. Leg. N. 7, 106 N. W. 1120.

63. Roberts v. Jones, 71 S. C. 404, 51 S. E. 240.

64. It is sufficient if enough are proven to show a cause of action. Chicago Union Traction Co. v. Shedd, 110 Ill. App. 400.

65. Where the declaration charges unlawful assault and battery, defendant can not prove self-defense under a plea of not guilty. Grabill v. Ren, 110 Ill. App. 587.

66. Gilbert v. Timms, 7 Ohio C. C. (N. S.) 253. This rule is not abrogated by the act of April 8 1857 (§§ 3162 to 3166, inclusive, Revised Statutes), for the relief of partners and joint debtors. Id.

67. Parks v. New York, 98 N. Y. S. 94.

68. Where a judgment against two joint tort feasors is reversed as to one, the entry of judgment against the other does not preclude plaintiff from proceeding against the

TORTIOUS INTERFERENCE WITH ANOTHER'S CONTRACT.

[CRITICAL NOTE.]

Interference with contract relations is involved in or is at base of several well known causes of action, such as the old action for enticement of servants founded on the English Statute of Laborers,[70] under some circumstances in actions for slander[71] and actions for deceit,[72] or for conspiracy to obstruct and ruin one's business,[73] or actions where there is some wrong to property rights.[74] There are also some statutes creating a liability either in respect to enticement of any servants, or particularly with reference to agricultural laborers. Some of these statutes impose criminal responsibility.[75]

The particular subject of this note is the tort liability for inducing a breach of contract relations when the predicate for the actions before mentioned does not exist. The cases hold, but not unanimously, that, for maliciously procuring plaintiff's employer to discharge him, an action lies.[76] It is not an essential that by discharge a legal right of servant against master be violated,[77] though there must be discharge.[78] There need be no agreed compensation or wages[79] but only a means of determining the value thereof.[80] Speculative loss of profits from the cutting off of prospects of an admittance to a partnership with the employer will not be reckoned as damages, but knowledge on defendant's part that such expectations existed may be shown on the question of exemplary damages,[81] whether there was or was not a fixed term of service.[82] That defendant, however, in order to coerce a discharge, withheld promised gratuities from the employer, or broke a contract with him, is immaterial to the employee's cause of action[83] except as evidence of malice.[84]

This doctrine is said to have originated in the case of Lumley v. Gye,[85] and is ably commented upon in several notes which follow.[86]

one as to whom the judgment was reversed. Parks v. New York, 98 N. Y. S. 94.

69. Olwell v. Skobis [Wis.] 105 N. W. 777.

70. See 16 A. & E. Enc. Law [2d Ed.] 1109.

71. See 16 A. & E. Enc. Law [2d Ed.] 1109; Lally v. Cantwell, 40 Mo. App. 44.

72. Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30. Actionable if done in fraud. Ashley v. Dixon, 48 N. Y. 430. Maliciously and deceitfully persuading parties not to accept a machine as agreed. Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869.

73. Lucke v. Clothing Cutters & Trimmers Assembly, 77 Md. 396, 26 A. 905, 39 Am. St. Rep. 421, 19 L. R. A. 408. Trade agreements not to use brick made by plaintiff. Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47.

74. Disturbing tenant's possession so as to cause him to abandon possession and landlord to lose rent. Aldridge v. Stuyvesant, 1 N. Y. Super. Ct. [1 Hall] 235.

75. See 6 C. L. 606, 607. 20 A. & E. Enc. Law. [2d Ed.] 182.

76. Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367. Not actionable if without force or fraud, though done maliciously. Chambers v. Baldwin, 11 Ky. Law Rep. 228, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545. No liability except where there are threats, violence, fraud, falsehood, deception or benefit to the person inducing the breach. Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. See, also, the cases cited hereafter of Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; May v. Woods, 172 Mass. 11; Moran v. Dunphy, 177 Mass. 485. Following Lumley v. Gye, 2 El. & B. 216, in holding the affirmative are Walker v. Cronin, 107 Mass. 555; Jones v. Stanly, 76 N. C. 355; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780. See later cases cited Torts, § 1, 6 C. L. 1700; 4 C. L. 1682; 2 C. L. 1875. See note to Chambers v. Baldwin, 11 L. R. A. 545, generally discussing the recognition of such a cause of action.

77, 78. Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367. Neither voluntarily quitting service because of such attempts nor the attempts themselves are actionable. Id.

79, 80, 81. Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

82. Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367. But it is error in a charge to ignore the fact that employment was for a "long time." Id.

83, 84. Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367. Coercing a discharge by threatening to exercise a legal right to terminate a contract with the employer is not actionable. The act done being legal, the motive is immaterial. Raycroft v. Tayntor, 68 Vt. 219, 35 A. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

85. 2 El. & Bl. 216, 75 E. C. L. 216, Big. Cas. Torts, 306.

86. From 4 Mich. L. R. 58, 138, by Prof.

"The 'right to contract' is gradually taking on more definite shape by the decisions of the courts in controversies between employers and employees, growing out of existing labor conditions, and arising from the various devices resorted to by one party or the other to secure and maintain a position of advantage over the other.

"The 'right to contract,' as it is sometimes termed, includes certain rights existing aside from the rights created by the contract, either as between the parties to the contract, or as to third parties. As between the parties to the relation, there are rights existing independent of the contract, or before it is entered into,—such as a right by each party not to be defrauded, or put under duress or undue influence, by the other. And as between the parties to the relation or proposed relation and third parties, there are certain rights of non-interference by such third parties, which have been difficult to define. These, of course, can conceivably take two forms: (1) Right to exemption from such interference as prevents or tends to prevent the formation of the contract; and (2) Right to exemption from such interference as induces or tends to induce a breach or termination of the contractual relation already entered into. These latter are usually divided into two classes: (A) Contracts of service, and (B) contracts other than for service; and the first of these may be divided into (a) contracts of service for a definite term, or (b) those terminable at the will of either party. The controversies have been largely concerning 1, A (b), and B.

"Judge Cooley in his work on Torts, p. 328, states the general principle underlying these rights as follows: 'It is part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third parties have any concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress. Thus if one is prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act.'

"One phase of the question—the right to have an existing contractual relation of service, though terminable at will, not disturbed by a third person without justifiable cause—has been carefully dealt with in a recent case."[87] Quoting Judge Knowl-

87. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603. See, also, ante, Torts, § 1, 6 C. L. The facts in this case were: "This is an action of tort, brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment." Plaintiff was a shoemaker employed by Goodrich & Co. under a contract terminable at will, and had been so employed for nearly four years. The defendant was the representative, and a member, of the Boot & Shoe Makers' Union. The evidence showed that he caused Goodrich & Co. to discharge the plaintiff greatly to his damage. Shortly before the discharge of the plaintiff, a contract was entered into between the Union and Goodrich & Co., which was signed by the defendant for the Union, and which stipulated that "the employer agrees to hire only members of the Union in good standing, and agrees not to retain any shoe worker in his employment after receiving notice from the Union that such shoe worker is objectionable to the Union on account of being in arrears for dues, or disobedience of Union rules or laws, or from any other cause." Plaintiff was not a member of the Union. Soon after the contract was made defendant demanded of Goodrich that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was not a member of the Union and that he persistently declined to join it after repeated suggestions that he should do so. At the close of the evidence the defendant asked that the jury be instructed that the contract with Goodrich & Co. was valid; that the defendant had a right to call the firm's attention to the fact that they were violating its terms by keeping the plaintiff employed, and insisting upon an observance of the contract even if the defendant knew such observance would result in plaintiff's discharge; that the contract was a justification of the defendant's acts; and that he could not be liable unless he used threats, intimidation, slander, or unlawful coercion

ton, who wrote the opinion—'The primary right of plaintiff [the discharged servant] to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right without lawful justification is malicious in law, even if it is from good motives and without express malice.'[88]

"As to the provisions of the contract by which the employer agreed not to keep in his employment any shoe worker that was objectionable to the Union for any cause, it is said, 'Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment by a third person who made the contract with his employer.[89] No one can legally interfere with the employment of another unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right. * * * If the plaintiff's habits or conduct or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason. * * * The only reason for procuring his discharge was his refusal to join the Union.' Is such an interference unlawful? Labor unions justify it as a kind of competition, either competition among laborers themselves, or competition between employers and employees. Of the first of these the court says: Such competition 'would justify a member of the Union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the newcomer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. * * * Inducing a person to join a union has no tendency to aid them in such competition. Indeed, the object of organizations of this kind is to prevent such competition, to bring all to equality and to make them act together in a common interest.'

"As to the second—the competition between employers and the employed,—in the strict sense, this is hardly competition. 'It is a struggle or contention of interests of different kinds which are in opposition, so far as the division of profits is concerned.' It permits 'reasonable efforts of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other.' The gain which a labor union may expect to derive from inducing others to join it 'is too remote to be considered a benefit in business such as to justify the inflicting of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of the industries

to or against plaintiff's employer, and thereby induced plaintiff's discharge. The court refused to give this charge, the defendant excepted, and plaintiff had judgment for $1,500.

88. Citing Walker v. Cronin, 107 Mass. 555-562; Plant v. Woods, 176 Mass. 492-498, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Allen v. Flood [1898] App. Cas. 1-18; Mogul Steamship Co. v. McGregor, 23 Q. B.

of the country. Employers would be forced to yield to all of their demands or go out of business. The attainment of such an object in the struggle with employers would not be competition but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine into unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract. * * * Labor unions cannot be permitted to drive men out of employment because they choose to work independently. * * * The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages.'[90] There has been a great variety of opinion and much conflict upon cases of this kind. In Allen v. Flood, A. C. 1, the House of Lords with an extraordinary conflict of views, and contrary to the opinion of the majority of the law judges called upon to advise them, held that 'persuading or inducing a man without unlawful means (in this case inducing a master to discharge two workmen not hired for a definite period of time, by informing the employer of the intention of all of the other workmen in the master's employ to strike), to do something he has a right to do, though to the prejudice of a third person, gives that person no right of action whatever the persuader's motive may have been.' The same view was held by the court of appeals of New York in a decision in which there was almost as great a variety of opinion.[91] In the later English cases, what was supposed to be the rule in Allen v. Flood has been considerably modified. In Quinn v. Leathem,[92] it is said, 'A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts to deal with him or continue in his employment, is, if it results in damages to him, actionable;' and in the later case of Giblan v. National Amalgamates, etc., Union,[93] Romer, L. J., said that 'a combination of two or more persons without justification, to injure a workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable,' —relying on Quinn v. Leathem. In the recent case of South Wales Miners' Federation v. Glamorgan Coal Co.,[94] the House of Lords has removed the doubt cast upon the case of Lumley v. Gye[95] by the statements of Lord Herschell, Lord Macnaghten, and Lord Shand, in Allen v. Flood,[96] by unanimously affirming the decision rendered in the Glamorgan Coal Co. case in the court of appeal,[97] and holding, in the language of the syllabus, 'it is unlawful, in the absence of legal justification, for persons to combine in procuring a breach of contract by others, and the absence of malice or sinister or indirect motive, and the desire, in discharge of a supposed duty, to benefit the persons induced to break their contracts, constitutes no defense to an action based on such procurement.' Lord Chancellor

Div. 598-613; Reed v. Friendly Soc. [1902] 2 K. B. 88-96; Giblan v. National, etc., Union [1903] 2 K. B. 600-617.

89. Curran v. Galen, 152 N. Y. 33, 46 N. E. 299, 57 Am. St. Rep. 496, 37 L. R. A. 802.

90. Citing Moran v. Dunphy, 177 Mass. 485-487, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115; Perkins v. Pendleton, 99 Me. 166-176, 38 A. 96, 60 Am. St. Rep. 252; Lucke v. Clothing Cutters' Ass'n, 77 Md. 396, 26 A. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408; London Guarantee Co. v. Horn, 101 Ill. App. 355, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185. See, also, Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

91. National Protective Ass'n v. Cumming, 170 N. Y. 315.

92. Quinn v. Lathem [1901] App. Cas. 495.

93. Giblan v. National Amalgamates, etc., Union [1903] 2 K. B. 600.

94. South Wales Miners' Federation v. Glamorgan Coal Co. [1905] App. Cas. 239, 74 Law J. K. B. 525.

95. Lumley v. Guy, 2 El. & B. 216, 22 Law J. Q. B. 463.

96. Allen v. Flood [1898] App. Cas. 1, 1 Mich. L. R. 28, 39.

97. Glamorgan Coal Co. v. South Wales

Halsbury, and Lords Macnaghten, James of Hereford, and Lindley, delivered opinions, each taking substantially the same view.[98] On the question of advice, Lord Halsbury says: 'The facts in this case show nothing in the nature of advice.' Lord James says: 'Can it be lawful to advise the unlawful breaking of a contract of service? * * * They (the defendants) initiated, they directed, and they gave orders, * * * they induced and procured the workmen to break their contracts. * * * The commission of an unlawful act places them in a very different position from that occupied by a person whose duty it is to offer advice to one who needs to be guided or protected.' Lord Lindley said: 'That there are cases in which it is not actionable to exhort a person to break a contract may be admitted. * * * But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity.' This shows a hesitancy to state a rule of liability as broadly as does Judge Cooley, for the 'active wrong,' where he says the wrongdoer 'is always responsible for the conduct which he counsels, advises or directs, and for whatever naturally results from his counsels.'[99] So, too, it perhaps hardly goes as far as Read v. Friendly Soc., etc.,[1] or Holmes, C. J., in Moran v. Dunphy,[2] where persuading by malevolent advice is equivalent to force or fraud. As to the word 'wrongfully,' Lord Lindley said: 'To break a contract is an unlawful act. * * * Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. * * * Non-lawyers are apt to think that everything is lawful which is not criminally punishable, but this is an entire misconception.' In the Glamorgan case[3] the miners' federation claimed there was a duty upon it to advise the workmen so as to protect their interests, and that it did so in good faith. To this Lord James replied: 'The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act;' and Lord Lindley said: 'A legal duty to do what is illegal, and known to be so, is a contradiction in terms.' As to 'maliciously,' it was admitted there was no hatred or ill will exercised or existing between the defendants and plaintiffs, and Lord James says it 'may be treated either as an unnecessary averment, or as being proved by inference drawn from the proof of the act being wrongfully committed;' and Lord Lindley says: 'When all that is meant by malice is an intention to commit an unlawful act and to exclude all spite or ill feeling, it is better to drop the word and so avoid all misunderstanding.' Lord Lindley also makes some pertinent and sensible remarks on the subject of combination: 'It is useless to try and conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without assistance.

Miners' Federation, 72 Law J. K. B. 893; Id. [1903] 2 K. B. 545 [2 Mich. L. R. 305].

98. The facts in South Wales Miners' Federation v. Glamorgan Coal Co. [1905] App. Cas. 239, 74 Law J. K. B. 525, were: The plaintiffs were mine owners; the defendants were the Miners' Federation and individual members of it; contracts for a definite term of service existed between certain members of the Federation and the mine owners; the Federation directed its members to observe certain "stop days," in order to decrease the output of coal, increase the price thereof, and indirectly increase their own wages; the defendants knew of the existence of the contracts of service. Plaintiffs alleged defendants, well knowing the terms and conditions of the contracts, wrongfully and maliciously procured and induced the workmen to break their contracts. The defendants denied this and alleged that they acted in the bona fide belief that the course of action advised by them would greatly benefit both the plaintiffs and defendants, and that the latter had reasonable justification and excuse for their acts. (For fuller statement of facts see 2 Mich. L. R. 305.) It was found that there was a combination to procure a number of persons to break the contract, that this was done, and serious damage resulted.

99. Cooley, Torts [2d Ed.] p. 65.

1. Read v. Friendly Soc. [1902] 2 K. B. 732.

Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and justified by this undeniable truth."[4] In the United States, it is often said that what one person may lawfully do, two or more may agree to do jointly without liability, but the cases are not entirely consistent with one another.[5] In Massachusetts these questions have in recent years been more fully and carefully considered by the supreme judicial court than in any of the other states, and the decision here commented upon[6] was already fairly involved in what has been said before."[7]

TOWAGE, see latest topical index.

TOWNS; TOWNSHIPS.

Matters common to all municipal corporations are elsewhere treated.[8]

§ 1. *Creation, organization, status, and boundaries.*[9]—A boundary line differing from the calls of the charter may be established by acquiescence.[10] In New

2. Moran v. Dunphy, 177 Mass. 485. See, also, May v. Wood, 172 Mass. 11.

3. South Wales Miners' Federation v. Glamorgan Coal Co. [1905] App. Cas. 239, 74 Law J. K. B. 525.

4. This, perhaps, was implied in Quinn v. Leathem [1901] App. Cas. 495, but has been considered inconsistent with Allen v. Flood [1898] App. Cas. 1.

5. See Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337; Jackson v. Stanfield, 137 Ind. 592, 615, 36 N. E. 345, 37 N. E. 14; Ertz v. Produce Exch., 79 Minn. 140, 79 Am. St. Rep. 433, 48 L. R. A. 90; Howard v. Youghiogheny, etc., Coal Co., 11 Wis. 545, 55 L. R. A. 828; National Protective Ass'n v. Cumming, 170 N. Y. 314, 88 Am. St. Rep. 648; West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341.

6. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603.

7. In Carew v. Rutherford, 106 Mass. 1, Judge Chapman held that a conspiracy against a person to obtain money from him which he was under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering his employment, or by threatening to do this so that he is induced to pay the money, is illegal, and actionable. In Walker v. Cronin, 107 Mass. 555, Judge Wells held on demurrer that a court alleging the defendant wilfully induced workmen to leave plaintiff's employment, and others who were about to enter it to abandon it, stated a cause of action. In May v. Woods, 172 Mass. 11, on 14, Mr. Justice Holmes, in dissenting to the ruling of the majority on a demurrer as to what were essential allegations in such cases, said, "I regard it as settled in this Commonwealth, and rightly settled, that an action will lie for depriving a man of custom, that is, possible contracts as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is effected simply from malevolence, and without some justifiable cause, such as competition in trade."—citing several earlier Massachusetts cases. In Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, it was held by Hammond, J. (Holmes, J. dissenting), that "a general scheme on the part of a labor union to compel the members of another union to desert it and become members of the former, and if necessary to that end to threaten employees and cause them to believe there would be trouble and strikes or boycotts if they continue, unless they abandon their own union and join the other, is unlawful and may be enjoined, and it is not material that no violence has been resorted to." And in Moran v. Dunphy, 177 Mass. 485, Holmes, C. J., himself said, "Maliciously procuring the discharge of a servant, whether accomplished by intimidation, slander or malevolent advice is actionable. Maliciously and without justifiable cause to induce a third person to end his employment, whether the inducement be false slanders or successful persuasion is an actionable tort." This is the same principle, though the reverse in application, as the decision in Berry v. Donovan, 188 Mass. 353, 74 N. E. 603. The opinion contains pretty full references to the cases upon the subject. For criticism of Allen v. Flood, see 1 Mich. L. R. 28, and for a short history of such actions, see 2 Mich. L. R. 305.

8. See Municipal Corporations, 6 C. L. 714.

9. See 4 C. L. 1685.

10. Where a line has been located, established, and treated for a long period of

Hampshire, disputed boundary lines between towns are established by the supreme court or a committee appointed for that purpose.[11] The decision of such committee is final[12] in the absence of legal error.[13] In Pennsylvania, in proceedings relative to the division of townships, the inhabitants have a natural right to a hearing before the commissioners.[14] It is the duty of the commissioners to view the proposed division line,[15] and, where they have reported in favor of division according to a line specifically described in the petition, their report cannot be objected to because of descriptive words added which do not produce a variance between the petition and report.[16]

§ 2. *General powers and exercise thereof.*[17]—A town or township is an institution of the state and possesses such powers as are expressly delegated to it or are to be reasonably implied therefrom,[18] and no others.[19] It may exercise police power within its territory.[20] Where a town ceases to exist, privileges granted by ordinances, which do not specify the period for which they are to exist, terminate.[21]

§ 3. *Property.*[22]

§ 4. *Contracts.*[23]—A town can make only such contracts as it is expressly granted power to make, or as are incident to powers granted, or are essential to the

years as the correct boundary between towns. Town of Bath v. Haverhill [N. H.] 63 A. 307. Evidence insufficient to justify a finding that a line had long been recognized and acquiesced in. Id.

11. It is the duty of the committee appointed under Pub. St. 1901, c. 52, § 6, to establish a disputed boundary between towns not only to determine the location of the line but to mark it upon the ground (Town of Bath v. Haverhill [N. H.] 63 A. 307), and having done so, upon a return of their report a motion for judgment thereon would raise the question whether there was legal error in their proceedings (Id.).

12. Under Pub. St. 1901, c. 52, § 6, the findings of a committee appointed to establish a disputed boundary line between towns is conclusive in the absence of legal error. Town of Bath v. Haverhill [N. H.] 63 A. 307.

13. If their conclusion involves error of law it may be rejected, or if sufficient facts appear to show the location of the legal boundary at the point in dispute, a decree may be made on the report. Town of Bath v. Haverhill [N. H.] 63 A. 307. Under Pub. St. 1901, c. 52, § 6, providing for the establishment of disputed boundary lines between towns, the decree pronounced by the court and not the findings of fact made by triers is the final decision. Id.

14. Under Act April 15, 1834, P. L. 537, it is the duty of the commissioners to give notice. Stowe Tp. Division, 23 Pa. Super. Ct. 285. Act April 28, 1899, P. L. 104, is not repugnant to Act April 15, 1834, P. L. 537, nor is there anything in the nature of a township of the first class which prevents division in the mode prescribed by general law. Id.

15. It is presumed that they have performed their duty unless the contrary appears from the record. Stowe Tp. Division, 23 Pa. Super. Ct. 285.

16. Stowe Tp. Division, 23 Pa. Super. Ct. 285.

17. See 4 C. L. 1686.

18. Under the Act of April 28, 1899, P. L. 104, a township of the first class **has power to fix the maximum rate of speed for automobiles** and bicycles. This power is not suspended by Act April 23, 1903, P. L. 268, permitting a maximum speed of 20 miles per hour outside of cities. Radnor Tp. v. Bell, 27 Pa. Super. Ct. 1. Ordinance fixing the maximum speed at 10 miles per hour held not unreasonable. Id. Under Rev. Codes 1899, § 1115a, relating to the purchase of road graders by township boards, the board **may purchase a grader or other road machinery** on its own motion without previous authorization or petition by the freeholders or voters. Bank of Park River v. Norton [N. D.] 104 N. W. 525. Under Rev. Codes 1899, § 1115a, providing that a township board may purchase road machinery "on credit or otherwise," the board may purchase such machinery and order payment out of the general fund in certain cases instead of by taxation. Id. Where under Rev. Laws c. 48, §§ 54, 56, county commissioners accept a relocated street, it has no effect upon the rights of the town to insist upon the work being done to the satisfaction of the selectmen. Town of Wellesley v. Norfolk County Com'rs [Mass.] 75 N. E. 725.

19. Under Comp. Laws §§ 2407, 2410, 2413, boards of respective townships into which a single township has been divided may not agree that one shall pay the other a sum of money spent on highways in one township in excess of what was spent in the other. North Allis Tp. v. Allis Tp. [Mich.] 12 Det. Leg. N. 657, 105 N. W. 139.

20. A township has power to make rules and regulations relative to the transfer to and from and the quarantine of patients in the contagious hospital of a city located within its boundaries. City of Allentown v. Wagner, 27 Pa. Super. Ct. 485.

21. Where a town is merged in a city, a license to occupy its streets for telephone purposes ceases and the territory falls within the ordinance of the city into which it is merged. People v. Chicago Telephone Co. [Ill.] 77 N. E. 245.

22. See 4 C. L. 1686.

23. See 4 C. L. 1686. See, also, Public Contracts, 6 C. L. 1109.

objects and purposes of the corporation.[24] A contract binding against it may be implied.[25] Its contracts must be based on a sufficient consideration.[26] Where a town voted a railroad aid subscription, the making of a contract to pay such subscription was not necessary to entitle the railroad to recover on compliance with the terms of the vote.[27] It is liable in damages for breach of its contracts.[28] Money paid a town under a contract which the council has no power to make is without consideration and may be recovered.[29] It is not relieved from liability on notes it is authorized to issue because the money raised for their payment has been expended for other purposes.[30]

§ 5. *Officers and employes.*[31]—A township trustee is but a special agent of the township with limited statutory authority.[32] Persons who deal with him as such agent are charged with notice of the extent of that authority.[33] The township cannot be bound by estoppel or otherwise by his acts beyond such limited authority.[34] A town is not liable for the negligence of its agent in doing an act in his capacity as a public officer in the performance of his duty,[35] nor for damage due to a dangerous condition resulting from such act and natural causes combined.[36] In Pennsylvania the system of accounting of township officers is entirely statutory and consists of a settlement in the first instance with the township auditors with a right of appeal to the common pleas.[37] Further appeal is allowed only as prescribed by law[38] and upon a question properly saved.[39] Where allowed it must be taken within the period prescribed,[40] in the absence of a showing that the settlement was procured by fraud.[41]

24. Under a power to conduct and maintain a poor farm it may not contract to furnish for a specified period a certain quantity of farm produce, whether it is produced on the poor farm or not. Staples v. Walmsley [R. I.] 61 A. 141.

25. Where town supervisors are required to provide for the support of the poor and have no regular physician to attend its paupers, and a pauper requires immediate medical attendance, a physician who renders such services may recover compensation from the town, though he had not been requested by the authorities to attend the patient. Robbins v. Homer [Minn.] 103 N. W. 1023.

26. The contribution of others to a railroad as a public work beneficial to the inhabitants of the town and the public is a sufficient consideration for a town subscription. Paige v. Rochester, 137 F. 663.

27. Paige v. Rochester, 137 F. 663.

28. Where it agrees to construct a highway in consideration of money advanced, and after payment of the sums agreed upon abandons the contract. Valley Falls Co. v. Taft [R. I.] 61 A. 41.

29. Valley Falls Co. v. Taft [R. I.] 61 A. 41.

30. A town authorized to expend a certain amount of money for a certain purpose and to issue its notes in payment thereof cannot avoid liability on a judgment on the notes by the fact that it has borrowed the full sum authorized and expended the money. McKie v. Rose, 140 F. 145.

31. See 4 C. L. 1687. See, also, Officers and Public Employes, 6 C. L. 841.

32. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63. Where a township trustee has money in his hands available for a specified use, he has not authority to plunge the township into debt. Id.

33. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63.

34. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63. Acts 1897, p. 222, c. 144, providing for the approval by an advisory board of warrants issued by township trustees, was not intended to enlarge their powers in respect to the issuing of warrants and render the township liable on a warrant approved by it but issued without authority. Id.

35. Highway agent repairing a highway under the directions of the town selectmen. Wheeler v. Gilsum [N. H.] 62 A. 597.

36. A town is not liable for a nuisance created by its highway agent who acting under the direction of the selectmen, for the purpose of draining a highway, negligently blows up ice in a river. Wheeler v. Gilsum [N. H.] 62 A. 597.

37. No appeal lies from the common pleas to the supreme court. Lower Merion Tp. v. Cline [Pa.] 61 A. 77.

38. Under Act May 11, 1901, P. L. 185, providing for appeals in such cases, the appellate court can consider only fatal defects or irregularities apparent on the face of the record proper, or some ruling or decision upon a question of law duly excepted to. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super. Ct. 35. Where an appeal is allowed nunc pro tunc by the common pleas under the Act of May 11, 1901, P. L. 185, after the statutory period has elapsed and the order allowing it is excepted to, the question is reviewable in the supreme court. Id., 28 Pa. Super. Ct. 39.

39. Under Act April 15, 1834, § 104, P. L. 537, relative to appeals from the settlement of accounts of township officers, an

§ 6. *Fiscal management.*[42]—A town may reimburse public officers for expenditures made in good faith in a matter in which the town has a corporate right, duty, or interest.[43] Appropriations can be made only where there are funds available.[44] In Illinois there are two complete codes of law applying to road and bridge taxes.[45]

§ 7. *Claims.*[46]—A board of town auditors may be compelled to perform duties imposed upon them by statute relative to the auditing and filing of claims.[47] A township is not liable for invalid charges made by its treasurer in the collection of a tax where it never received such charges.[48] Where bonds are issued for the purpose of funding outstanding warrant indebtedness, the warrants for the payment of which the bonds were issued become merged in the bonds and the funds realized from the sale of the bonds is a special trust fund for their payment which cannot be used for any other purpose,[49] and until such bonds are sold, payment of the warrants is necessarily suspended.[50] The proceedings in the court by which the validity of the warrants is determined, and the amount and terms of the bonds approved and authorized, is in the nature of a decree or judgment.[51] If the sale of the bonds should be unreasonably delayed and the payment of the warrants unreasonably postponed, any interested party may maintain an action to vacate the proceedings by which the bonding was authorized and to cancel the bonds,[52] but until such proceedings are taken, no action can be maintained upon the warrants.[53]

§ 8. *Actions by and against.*[54]—A town is within a statute providing that any person who has sustained injury by reason of breach of duty of a public officer may maintain action on his official bond where provision is not made by law for prosecution of actions on such bond.[55] Under statutes providing that a town shall pay for damage done by dogs and recover in an action on the case from the owner of the dog, it is essential to allege and prove that statutory requirements have been complied with.[56] Allegations not prescribed by the statute are improper.[57] The ac-

issue framed and submitted to the jury is not in all cases indispensable, and if no exception is taken to the refusal of an issue, the question cannot be raised on appeal by a mere general exception to the judgment. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super. Ct. 35.

40, 41. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super. Ct. 39.

42. See 4 C. L. 1687.

43. In Massachusetts, towns have an interest in shade trees in public places and may reimburse a tree warden for expenditures made in attempting to prevent the use of trees in highways for the support of guide boards. Hixon v. Inhabitants of Sharon [Mass.] 76 N. E. 909.

44. In mandamus to compel an advisory board of a township to make an appropriation for a certain purpose, it must appear from the complaint that there are funds from which the appropriation can be made. Advisory Board of Harrison Tp. v. State [Ind.] 76 N. E. 986.

45. Under Hurd's Rev. St. 1903, c. 121, § 119, in townships having the labor system, the original certificate of the highway commissioners must be filed with the county clerk, and under § 16, in townships having the cash system, the certificate is to be delivered to the town clerk who certifies the items of levy to the county clerk to be extended as other taxes. People v. Kankakee & S. W. R. Co., 218 Ill. 588, 75 N. E. 1063. A certificate of highway commissioners showing the percentage of levy for road and bridge tax, but not showing the total amount required nor the amount required for cash purpose is sufficient. Id.

46. See 4 C. L. 1688.

47. To make out and file with the town clerk the certificate and rejection of a claim as required by Laws 1890, p 1235, § 162, amended by Laws 1897, p. 619, c. 481. People v. Page, 105 App. Div. 212, 94 N. Y. S. 660. Certificate and abstract of allowed and disallowed claims held to constitute the abstract required by Laws 1890, p. 1235, c. 569, § 170, though filed with the town clerk and did not fulfill the requirements of § 162 relative to wholly rejected claims. Id.

48. Godkin v. Doyle Tp. [Mich.] 106 N. W. 882.

49, 50, 51, 52, 53. De Roberts v. Cross [Okl.] 82 P. 735.

54. See 4 C. L. 1689.

55. May sue on the bond of the county treasurer running to the county to recover money appropriated to the town which that official has not paid over. Town of Ulysses v. Ingersoll, 182 N. Y. 369, 75 N. E. 225.

56. That the council drew its order on the treasurer to the owner of sheep killed after he had brought himself within the terms of the statute providing for the recovery. Town of Richmond v. James [R. I.] 61 A. 54.

57. Gen. Laws 1896, c. 111, § 7, makes no provision for notice of the claim to the owner of the dog. Town of Richmond v. James [R. I.] 61 A. 54.

tion sounds in tort and not on contract.[58] Several towns may be joined only where they are jointly liable.[59]

TRADE MARKS AND TRADE NAMES.

§ 1. *Definition, and words or symbols available.*[60]—The function of a trade mark is to distinguish the products of a manufacturer or the objects of commerce, and to point out distinctively the origin or ownership of the article to which it is affixed,[61] while a name importing corporate existence may be a mere trade name.[62] No one can acquire the exclusive right to call any article by a common name which appropriately designates it,[63] although expressed in a foreign language,[64] but an arbitrary, composite name may constitute a valid trade mark,[65] and a geographical and a personal name combined in an original device are thus available.[66] As a general rule a color cannot be monopolized by adoption.[67] No one can acquire the right to use the arms of a state against the state itself, and a statute prohibiting such use is not invalid as against previous users.[68]

§ 2. *Acquisition, transfer, and abandonment.*[69]—Registration under the trade mark laws must be accompanied by a sufficiently definite description of the trade mark,[70] and will give no rights as against persons previously acquiring the right to use the same mark or name.[71]

The use of a distinctive name will confer rights upon the user, but such use must be exclusive[72] and distinctive,[73] and must be applied as a distinguishing mark

58. The town is subrogated to the rights of the owner of the sheep killed. Town of Richmond v. James [R. I.] 61 A. 54.

59. The commissioners of highways of two towns are not jointly liable for a bridge over a drainage ditch between the towns constructed by drainage commissioners under Hurd's Rev. St. 1903, c. 42, § 115, which provides that the cost of such bridges shall be paid out of the road and bridge tax. Union Drainage Dist. Com'rs v. Highway Com'rs of Towns of Virgil & Cortland [Ill.] 77 N. E. 71.

60. See 4 C. L. 1689.

61. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492.

62. "Artope & Whitt Company" held a trade name under the circumstances. Whitt v. Blount [Ga.] 53 S. E. 205.

63. "Mufflet" held not preclusive of the word "muffler" in connection with the manufacture and sale of goods. Hygienic Fleeced Underwear Co. v. Way [C. C. A.] 137 F. 592. The words "Elastic seam" or "Stretchiseam" held not available as a trade mark. Scriven Co. v. Girard, 140 F. 794.

64. "Brassiere," meaning brace, used in connection with a corset cover. De Bevoise Co. v. H. & W. Co. [N. J. Eq.] 60 A. 407.

65, 66. "Auburn Lynn Shoes" held a valid trade mark, Auburn being the name of a place and Lynn a surname. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499. See 6 Columbia L. R. 276.

67. Match tips. Diamond Match Co. v. Saginaw Match Co. [C. C. A.] 142 F. 727.

68. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

69. See 4 C. L. 1691.

70. A description, "a red or other distinctively colored streak applied to or woven in a wire rope," held too indefinite. Leschen & Sons Rope Co. v. Broderick & B. Rope Co., 201 U. S. 166, 50 Law. Ed. ——; Leschen & Sons Rope Co. v. Macomber & W. Rope Co., 142 F. 289. And see Dodge Mfg. Co. v. Sewall & Day Cordage Co., 142 F. 288.

71. Revere Rubber Co. v. Consolidated Hoof Pad Co., 139 F. 152. Stock of cigar labels which had been used merely as an attractive designation of any kind of cigars were purchased and used in other states by several manufacturers before plaintiff's adoption and registration thereof in New England. Held not to preclude acquisition of rights by plaintiff in New England. Cohen v. Nagle [Mass.] 76 N. E. 276.

72. A manufacturer cannot claim rights in a name used simultaneously by several. Complainants using a descriptive geographical trade name simultaneously with others, held not entitled to its exclusive use. Siegert v. Gandolfi, 139 F. 917. Where several persons had used a word upon goods prior to plaintiff, but had not used it in such a way as to give them a right of property therein, and had abandoned it, this did not prevent plaintiff from acquiring the right to use it as a trade name. Cohen v. Nagle [Mass.] 76 N. E. 276. The adoption of collated features disclosing a differentiation whereby a product is recognized by the public will be protected. Old elements used by

to goods of a particular style or quality;[74] and mere user without clear proof of adoption and use as such will not give exclusive right.[75]

The protection of a trade mark does not, in the absence of a restrictive contract, extend to the product of a tree, or of anything else which by the law of its nature is reproductive and derives its chief value from its innate vital powers, independent of the care and ingenuity of man.[76]

The right to the exclusive use of a trade name passes with the sale of the assets and good will of the business,[77] and is not assignable apart therefrom.[78] The right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another must be clearly shown,[79] yet by a valid transfer of stock in a company, a person equitably estops himself from questioning its right to the use of its corporate name, although the company is named after himself,[80] and although generally no person has the right to attach to his goods the surname of another dealer in similar goods, yet such a right may be lawfully acquired.[81]

§ 3. *Infringement and unfair competition.*[82]—The unauthorized simulation of the trade mark of a competitor,[83] in a manner calculated to deceive the unwary,[84] constitutes an infringement without other fraudulent intent shown.[85]

Unfair competition consists in deceiving the public into the belief that the goods of one party are the goods of another, accompanied by such acts and devices as are likely to do so, or such duplication in form and dress of the one by the other as will produce a confusion likely to bring this about.[86] There may be unfair competi-

others put with new ones to form a trade mark, held valid. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146.

73. There is nothing distinctive in a cigar band wider at one end than at the other. Regensburg v. Portuondo Cigar Mfg. Co. [C. C. A.] 142 F. 160.

74. A trade mark not affixed to goods until after their purchase for the consumer lacks the essential elements of equitable protection. Medlar & H. Shoe Co. v. Delsarte Mfg. Co. [N. J. Err. & App.] 61 A. 410. The prior use of a symbol upon one kind of goods, not denoting ownership or origin, will not prevent a subsequent appropriation of that symbol as a trade mark upon another kind of goods. Johnson v. Seabury [N. J. Eq.] 61 A. 5. The use of a particular name upon various kinds of goods, so that the name does not indicate any particular brand or kind of goods, will not be protected. Perlberg v. Smith [N. J. Eq.] 62 A. 442.

75. Capewell Horse Nail Co. v. Putnam Nail Co., 140 F. 670.

76. A nurseryman held not entitled to protection against others selling trees, the progeny of those sold by him under a registered name. Rannells v. Albaugh, 6 Ohio C. C. (N. S.) 627.

77. Kronthal Waters v. Becker, 137 F. 649.

78. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492. A contract purporting to license the use of a trade mark for goods is not a valid license where the only thing granted is the right to sell goods made by defendant, with which plaintiff has no connection, under a name previously used by plaintiff in connection with other goods. Lea v. Home Sew. Mach. Co., 139 F. 732.

79. Blanchard Co. v. Simon [Va.] 51 S. E. 222. Evidence held insufficient to show that defendant had divested himself of the right to use his own name. Id.

80. McFell sold his stock in McFell Electric Company and started a new business under the name of McFell Electric & Telephone Co. McFell Elec. & Tel. Co. v. McFell Elec. Co., 110 Ill. App. 182.

81. Hygienic Fleeced Underwear Co. v. Way [C. C. A.] 137 F. 592.

82. See 4 C. L. 1691.

83. A concern selling at retail under a given name held not entitled to enjoin another firm manufacturing and jobbing under a similar name. Regent Shoe Co. v. Haaker [Neb.] 106 N. W. 595. Prompt abandonment of trade mark and change of corporate name after suit brought, held an admission of infringement. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499.

84. Where ordinary attention cannot disclose any difference between trade names there is an infringement. Regent Shoe Co. v. Haaker [Neb.] 106 N. W. 595. Immaterial changes in the arrangement of the elements of a trade mark previously used by others will not legalize its use. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492. Use of a blue thread twisted into the strands of rope does not preclude another manufacturer from the use of a thread of another color. Dodge Mfg. Co. v. Sewall & D. Cordage Co., 142 F. 288.

85. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499.

86. Lamont, Corliss & Co. v. Hershey, 140

tion resulting from an unauthorized and improper use of trade names or symbols, although the plaintiff has no property right in them as a trade mark,[87] and where one person has acquired a valuable trade name by the long continued use of a word in a certain business, and he has acquired a right of property in such word, it is a fraud upon him for another to use the word in selling similar goods in such a way as to mislead the public.[88] Likewise it is a fraud on a person who has an established trade, and carries it on under a given name, that another person should assume the same name with a slight alteration, so as to induce people to deal with him in the belief that they are dealing with those who have given a reputation to the name in the particular line of business.[89] However, the manufacture and sale of a substance patented under a descriptive name is not unfair competition after the expiration of the patent thereon,[90] neither is using one's own name in his own business where the character and location of the business are shown, although the name had been used formerly in another business,[91] using an initial instead of the full name by a person entitled thereto.[92] Where there is no fraudulent intent shown or that purchasers have been deceived by defendant who did not adopt complainant's trade mark for the purpose of palming his goods off on the public, but the mark resulted incidentally in the manufacture of the goods, there is no unfair competition.[93] No one can appropriate a trade mark similar to that used by a rival dealer if the resemblance is such as to mislead the ordinary purchaser into the belief that his goods are those of his rival,[94] and two trade marks are substantially the same in law if the resemblance between them is so close that it deceives a customer exercising ordinary care in his dealing and induces him to purchase the goods of one manufacturer for those of another.[95] Exact similitude is not required,[96] and the person first in the field may require others to take the trouble of taking such reasonable precautions as are commercially practical to prevent their lawful names and advertisements from deceitfully diverting custom.[97] A person will not be allowed to resort to any arti-

F. 763; De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146; Hygienic Fleeced Underwear Co. v. Way [C. C. A.] 137 F. 592; Bates Mfg. Co. v. Bates Mach. Co., 141 F. 213. Selling a Block light with a "Gladiator" mantle to a customer who asked for a Block light held unfair competition. Block Light Co. v. Tappehorn, 2 Ohio N. P. (N. S.) 553. The use of old literature after change of trade mark without explicit statement of manufacturer's name held to be unfair competition. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499. Where appellee used the word "featherbone" on his boxes of manufactured goods after the expiration of the patent on "featherbone," and his boxes were unlike appellant's, held no unfair competition. Warren Featherbone Co. v. American Featherbone Co., 141 F. 513. Testimony held insufficient to show fraud in a suit for unfair competition where defendant used "E. Faber" instead of "Eberhard Faber." Von Faber-Castell v. Faber [C. C. A.] 139 F. 257. Unfair competition in simulating in shape and size of packages, and color and style of wrappers, held insufficient to warrant the granting of a preliminary injunction. Lamont, Corliss & Co. v. Hershey, 140 F. 763.

87. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499.

88. Cohen v. Nagle [Mass.] 76 N. E. 276.

89. McFell Elec. & Telephone Co. v. McFell Elec. Co., 110 Ill. App. 182.

90. Warren Featherbone Co. v. American Featherbone Co. [C. C. A.] 141 F. 513.

91. Blanchard Co. v. Simon [Va.] 51 S. E. 222.

92. Von Faber-Castell v. Faber [C. C. A.] 139 F. 257.

93. Capewell Horse Nail Co. v. Putnam Nail Co., 140 F. 670.

94. Walter Baker & Co. v. Puritan Pure Food Co., 139 F. 680; Revere Rubber Co. v. Consolidated Roof Pad Co., 139 F. 151.

95. "Auburn Lynn Shoes" and "Auburn Lynn Shoe Co." used as trade marks, held the same. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499; Kronthal Waters v. Becker, 137 F. 649. "Keystone" imitated by "Keystone Maid." Cohen v. Nagle [Mass.] 76 N. E. 276. "Regent Shoe Company" protected as against "Regent Shoe Manufacturing Company," which began business subsequent to Regent Shoe Company. Regent Shoe Mfg. Co. v. Haaker [Neb.] 106 N. W. 595. "Old Joe" whiskey infringed by the use of "Old Goe Whiskey." Eluthenthal v. Mohlmann [Fla.] 38 So. 709.

96. Chicago Landlords' Protective Bureau protected as against Landlords' Protective Department subsequently adopted. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21. Fraud held determinable from similarity of cards on which hooks and eyes were put up and sold. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146. In a suit to enjoin the sale

fice or contrivance in the use of his name for the purpose of deceiving the public as to the identity of his business or products,[98] but when clearly differentiated, similar trade marks may be used by different persons.[99] Imitation of a distinctive feature is essential to unfair competition.[1] It is not necessary to relief for the wrongful appropriation of a trade name that the intention of the person adopting the name was wrongful or fraudulent, and the absence of fraudulent intention is no defense.[2]

§ 4. *Remedies and procedure.*[3]—Injunction is available,[4] and is the only adequate remedy,[5] in cases of unfair competition, but it must appear that complainant is himself free from fraud[6] and otherwise clearly entitled to relief[7] before injunction will issue. Equitable relief may be denied on the ground of estoppel,[8] as by fraudulent imitation,[9] laches,[10] or admissions in the pleadings,[11] but the maxim

of goods where complainant's packages and labels had been simulated, evidence held sufficient to show unfair competition. Johnson v. Seabury [N. J. Eq.] 61 A. 5.

97. Defendant knew of complainant's earlier extensive advertising of similar goods and simulated his cards. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146.

98. Morton v. Morton [Cal.] 82 P. 664. Former member of corporation organized another company, manufactured and sold grates under a name likely to mislead, restrained. Gordon Hollow Blast Grate Co. v. Gordon [Mich.] 12 Det. Leg. N. 789, 105 N. W. 1118.

99. Virginia Hot Springs Co. v. Hegeman & Co., 138 F. 855; Hygienic Fleeced Underwear Co. v. Way [C. C. A.] 137 F. 592; Siegert v. Gandolfi, 139 F. 917. "White Swan" and "Swans Down" held sufficiently dissimilar as not to mislead an ordinary retail purchaser of flour. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492.

1. No unfair imitation in use of cigar band whose only similarity to complainant's is that it is wider at one end than at the other, the distinctive feature being the lettering, which was not imitated. Regensburg & Sons v. Portuondo Cigar Mfg. Co., 142 F. 160.

2. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21; Block Light Co. v. Tappehorn, 2 Ohio N. P. (N. S.) 553. Fraud inferred from the similarity of the dress of the goods. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146.

3. See 4 C. L. 1694.

4. Johnson v. Seabury [N. J. Eq.] 61 A. 5; People v. Rose, 219 Ill. 46, 76 N. E. 42; Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499. Chicago Landlords' Protective Bureau protected from representation that it was connected with Landlords' Protective Department. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21. A finding of intent to defraud the public held not necessary to the granting of an injunction but relevant and material on the question of damages. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499. An injunction order, based upon affidavits of one person ex parte upon information and belief, enjoining a receiver of a French court from the use of labels and trade marks in the manufacture of goods, such trade marks being used in France under the authority of law and not being used by complainant, his right thereto being denied, held too broad. Baglin v. Cusenier Co. [C. C. A.] 141 F. 497.

5. Regardless of the insolvency of the person committing the fraud. Morton v. Morton [Cal.] 82 P. 664.

6. He who seeks the aid of a court of equity in trade mark cases to enjoin infringement must not be guilty of false or misleading representations in respect to such trade mark or the business which is the subject thereof. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146; Siegert v. Gandolfi, 139 F. 917. Misrepresentation as to immaterial matters will not preclude the equitable relief to which a person is entitled in the use of his trade mark or trade name, representing that a trade name was copyrighted. Wormser v. Shayne, 111 Ill. App. 556. Advertising an article as patented when but a part of it was patented. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146. Retailers falsely advertised that they made shoes sold by them. Regent Shoe Co. v. Haaker [Neb.] 106 N. W. 595. Misrepresentations as to the right to use a trade mark, which misrepretations had been withdrawn 3 years before suit to enjoin unfair competition in the sale of goods was commenced, held not sufficient to bar recovery. Johnson v. Seabury [N. J. Eq.] 61 A. 5. False representations as to matters of opinion as distinguished from matters of fact. Moxie Nerve Food Co. v. Holland, 141 F. 202. A trivial, inaccurate reference to a patent for a hook, held not deceptive, hence evidence thereof immaterial. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 139 F. 146.

7. Lamont, Corliss & Co. v. Hershey, 140 F. 763. Did not appear that complainant was owner of trade name. Bates Mfg. Co. v. Bates Mach. Co., 141 F. 213.

Omission to state the fact of transfer in connection with the use of the trade mark will disentitle complainant to equitable relief. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492.

8. Saxlehner v. Eisner & Mendelson Co. [C. C. A.] 138 F. 22.

9. Moxie Nerve Food Co. v. Holland, 141 F. 202.

10. Virginia Hot Springs Co. v. Hegeman Co., 138 F. 855.

11. Piracy admitted in a supplemental bill. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492.

that plaintiff must come with clean hands has reference only to his conduct under consideration and the court will not examine the plaintiff's conduct in other matters.[12]

In a suit for an accounting and injunction, where there has been an aggravated and flagrant imitation of labels, and the bill alleges a threatened continuance of the injury, although the use of the infringing labels had been discontinued before suit was brought, a court of equity is not deprived of jurisdiction to afford adequate relief,[13] but a suit for unfair competition cannot be maintained when the party aggrieved has a remedy either in equity for specific performance or at law for breach of contract,[14] nor will mandamus lie for the issue of a franchise to a company to conduct business under a given name when such action would work a fraud upon another company and would be enjoined.[15]

Persons directing the action of a corporation in committing acts of unfair competition and infringement are joint tort feasors with the corporation.[16]

When upon an accounting, insolvency and transfer of the property of defendant corporation are shown, the objection that such proof is not within the scope of the pleadings, no supplemental bill having been filed, is untenable.[17] The profits recoverable in equity for unfair competition are the same as in cases of infringement of trade marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all profits made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor.[18]

Res judicata.—Where defendants were large stockholders in, and directed and controlled the affairs of, a company, and a final decree was rendered against the company for infringement of trade marks, this decree is binding upon defendants, and the evidence relating to their participation in the acts of the company is res adjudicata.[19]

§ 5. *Statutory registration, regulation, and protection.*[20]—The jurisdiction of the Federal courts depends solely upon the question whether a trade mark has been registered valid under the act of congress; they do not take jurisdiction on the ground of unfair competition,[21] and the act of congress in regard to copyrights does not apply to names or trade marks.[22] By filing a label in the United States patent office, no rights are obtained as against any person doing business in the same state.[23] A statute providing that no person shall use the arms or the great seal of the commonwealth for any advertising or commercial purpose is constitutional,[24] and makes the act prohibited a crime, although it provides no punishment for the offense, when

12. Block Light Co. v. Tappehorn, 2 Ohio N. P. (N. S.) 553.

13. Saxlehner v. Eisner, 140 F. 938.

14. When by contract a firm bound itself to stamp all its goods "not without its first name or at least with the initials of the first name," held no breach when the goods were stamped with the initial. Von Faber-Castell v. Faber [C. C. A.] 139 F. 257.

15. People v. Rose, 219 Ill. 46, 76 N. E. 42.

16, 17. Saxlehner v. Eisner, 140 F. 938.

18. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 62 A. 499. Where defendant fraudulently appropriated complainant's trade marks and labels, and complainant proves the fraud, infringement, and profits, he will not be compelled to prove the precise proportion of the infringer's gains attributable to the infringement. Saxlehner v. Eisner & Mendelson Co., 138 F. 22. Expense of selling competitive goods held properly chargeable to defendant's general selling account. Id.

19. Saxlehner v. Eisner, 140 F. 938.

20. See 4 C. L. 1696.

21. Act of March 3, 1881 (21 Stat. at L. 502, c. 138, U. S. Comp. Stat. 1901, p. 3401). Leschen & Sons Rope Co. v. Broderick & B. Rope Co., 201 U. S. 166, 5 Law. Ed. —.

22. 3 U. S. Compiled Stat. 1901, p. 3406. Wormser v. Shayne, 111 Ill. App. 556.

23. A retailer of shoes filed his label in the patent office and obtained letters patent. Perlberg v. Smith [N. J. Eq.] 62 A. 442.

24. St. of 1903, c. 195. Indictment under this act and evidence to show "use," held sufficient. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

another statute provides that the court shall impose sentence in such case;[25] but an act regarding labels and trade marks is unconstitutional wherein it purports to empower the party injured by a violation of the statute to fix, within the limits prescribed, the amount of the penalty to be exacted from the offender.[26] A statute inhibiting sales of goods not in original packages or under manufacturer's label or mark does not apply to such goods after being used in the manufacture of other articles.[27] By statute in Illinois the fraudulent use of another trade mark which has been properly filed is a criminal offense.[28]

TRADE SECRETS, see latest topical index.

TRADE UNIONS.

§ 1. *Nature of trade unions.*[29]—Private unincorporated societies like trade unions were not recognized at common law as having any legal existence apart from their members.[30] They are rated as partnerships, and to enforce a right either for or against them the name of every individual member must be set forth,[31] hence in some states there is no power to sue or be sued in the union name,[32] and without a special statute the common law rules as to unions prevail in full force.[33] In such states it is not error to refuse an injunction against a union.[34] In some jurisdictions they may now sue and be sued as unions, hence they as well as their members may be enjoined,[35] they may be fined for violating an injunction,[36] and may be guilty of a crime and fined for contempt of court.[37]

§ 2. *The union and the public.*[38]—Where there is a conflict between the obligations of a member to the union and to the public, the latter is paramount.[39] An employer has a perfect right to employ nonunion men when the union men are out on a strike,[40] and agreements to employ none but union labor have been held to be invalid.[41]

That labor has the right to organize as well as capital is now well established.[42]

25. St. 1903, c. 195. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

26. Act passed March 15, 1898 (P. L. p. 83), New Jersey. Cigar Makers' International Union of America v. Goldberg [N. J. Err. & App.] 61 A. 457.

27. Pen. Code N. Y. § 364, subd. 6. Statute held not to apply to the sale of a couch covered with patented leather. People v. Hoffheimer, 110 App. Div. 423, 97 N. Y. S. 84.

28. Chapter 140, Hurd's Rev. St. 1903. Vincendeau v. People, 219 Ill. 474, 76 N. E. 675. Section 2, ch. 140, Hurd's Rev. St. 1903, covers labels or trade marks on bottles, though not mentioned in the act. Id. Trade mark must have been filed pursuant to statute. Id. Indictment held sufficient. Id.

29. See 4 C. L. 1696.

30. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877.

31. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877. In **Pennsylvania** a cigarmakers' union is a beneficial society under a special law. Penn. act of 1876 (P. L. 53). Ehrlich v. Willenski, 138 F. 425.

32, 33, 34. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877.

35. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

36. The imposition of a fine of $1,000 on a union for flagrant and oft repeated violations of an injunction is not excessive. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

37. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Since by its impersonal nature a union cannot be arrested and imprisoned, it may be fined and the fine collected by sequestration of its property. Id.

38. See 4 C. L. 1697. See, also, Conspiracy, 5 C. L. 617; Injunction, 6 C. L. 6.

39. Schneider v. Local Union No. 60 [La.] 40 So. 700.

40. Atchison, etc., R. Co. v. Gee, 140 F. 153.

41. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

42. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176; Atchison, etc., R. Co.

Labor unions may strike peaceably,[43] and may persuade but not intimidate others to join them.[44] Picketing is sometimes sustained,[45] but under varying circumstances has been held illegal.[46] In some jurisdictions a peaceable boycott will be enjoined on the principle that acts, though legal when committed by one, if, when committed by many in agreement, they injure another or destroy his business, they become an unlawful conspiracy which the courts will enjoin.[47]

When members of a union agreed to prevent the employ of other men in their place by calling a strike, and by force, threats, intimidation, and picketing, they were guilty of a conspiracy.[48]

§ 3. *The union and its members.*[49]—The right of membership in a union is a property right.[50]

A union cannot require acts contrary to law or public policy from its members, hence the obligations which a union requires of its members are to be construed with reference to the purpose of the organization, and are binding on them only in so far as they are lawful and are to be attained by lawful means.[51]

Members of a union should exhaust the remedies within their organization before appealing to the courts,[52] but where a union has no means provided for remedying a wrong, and meets demands with futile correspondence and vexatious delay, the appeal to the courts is properly taken.[53]

A union may fine its members in accordance with its constitution and by laws.[54] It cannot transfer a fine from one member to another merely because the latter is

v. Gee, 140 F. 153. Labor may organize to any degree and for any purpose not against public policy. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

43. Members of a trades union may quit singly or in a body, with or without cause, without rendering themselves amenable to the charge of conspiracy. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. "All sensible and fair-minded people in this country agree that employes of any corporation can strike singly, collectively or as a union at any time whether they have a good reason for doing so or not." Atchison, etc., R. Co. v. Gee, 140 F. 153.

44. Persuasion accompanied by show of force is illegal. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

45. A union may appoint pickets or a committee to visit the vicinity of factories for the purpose of taking note of the persons employed and to secure, if it can be done by lawful means, their names and places of residence for purposes of peaceful visitation. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877. There may be a picketing that is legal, but accompanied by use of force and violence it is certainly invalid. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

46. Picketing by a union is unlawful by whatever name it may be called, and will be punished by fine and imprisonment. Atchison, etc., R. Co. v. Gee, 140 F. 153. The very presence of a large number of pickets, with the avowed purpose of preventing complainants' employees from remaining in its employ and those seeking employment to desist therefrom, was itself intimidation. Christensen v. People, 114 Ill. App. 40. The fact that pickets are serving under appointment and instruction from their union adds nothing to their rights and privileges as affecting third persons and the public. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877. Where a labor union sought to compel an employer to employ none other than union men, and, to carry out their purpose, established pickets at the entrance to complainant's place of business to dissuade customers from entering and dealing with him, an injunction was granted restraining such acts on the part of the union. Jensen v. Cooks' & Waiters' Union of Seattle [Wash.] 81 P. 1069.

47. Loewe v. California State Federation of Labor, 139 F. 71.

48. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

49. See 4 C. L. 1697. See, also, Fraternal Mutual Benefit Associations, 5 C. L. 1523.

50. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155.

51. Schneider v. Local Union No. 60 [La.] 40 So. 700. An order by a union directing certain of its members in their capacity as public officials to vote for a certain man for a public office is in violation of public policy and not binding on the members. Id.

52. Schneider v. Local Union No. 60 [La.] 40 So. 700; Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155. An appeal under a by-law of a union then in force, but subsequently changed, to conform to the rights of appeal in the general association was nevertheless such an exhaustion of remedies within the organization as warranted an appeal to the courts. Id.

53. Schneider v. Local Union No. 60 [La.] 40 So. 700.

54. Where a fixed sum is named as the fine for violation of several sections of by-

personally responsible for the payment.[55] A threat to suspend or expel, for nonpayment of a fine void ab initio, is duress and will make the payment of a fine under protest void.[56]

The courts are at variance as to the responsibility of the union for the violence of its members during a strike, some holding that when a union orders a strike, which results in violence by its members, it is no excuse that it counselled its members to be orderly and obey the law,[57] and others that because some members of a union disregard its orders and policy to strike peacefully, and intimidated, on their own initiative, other employes, is not sufficient to condemn the union as a body.[58]

The members of an unincorporated beneficial society, such as a labor union, in Pennsylvania are not individually liable for any breach of contract by the union. The remedy there is an action at law for damages or a suit in equity for specific performance against the union.[59]

TRADING STAMPS; TRANSFER OF CAUSES; TRANSITORY ACTIONS, see latest topical index.

TREASON.[60]

TREATIES.[61]

Treaties between nations should be given a "reasonable,"[62] although some courts favor a "liberal," construction.[63] Where a state constitution or laws are in conflict with a treaty, the treaty must prevail.[64] By treaty, the consuls of some countries have the exclusive right to be appointed administrators of the estates of their citizens deceased in the United States,[65] and such treaties come within the treaty making power of the president and senate.[66] The treaty of Dec. 11, 1871 (17 U. S. St. 928), between Germany and the United States, giving the consular officers of each country exclusive jurisdiction over controversies between the captains and crews of their respective vessels, does not exempt a German vessel from observing the provisions of section 24 of the act of Dec. 21, 1898, c. 28, 30 Stat. 763, prohibiting advance payments to seamen,[67] nor does it give the consuls jurisdiction where the seaman is not a bona fide member of the crew.[68]

The right of a citizen of the United States to invoke the jurisdiction of the national courts, if his case is cognizable in such courts, cannot be deprived by treaty.[69]

In pleading it is not necessary to make a formal claim of rights secured by a treaty.[70]

laws, it does not authorize the imposition of separate fines for each separate section violated. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155.

55, 56. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155.

57. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

58. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877.

59. Ehrlich v. Willenski, 138 F. 425.

60. No cases have been found during the period covered by this volume.

61. See 4 C. L. 1697. See, also, Ambassadors and Consuls, 5 C. L. 113; Extradition, 5 C. L. 1407.

62. No provision will be read into a treaty under the guise of construction not necessary to give effect to the intention expressed. The Neck, 138 F. 144.

63. In re Wyman [Mass.] 77 N. E. 379, citing Shanks v. Dupont, 3 Pet. [U. S.] 242, 7 Law. Ed. 666; Hauenstein v. Lynham, 100 U. S. 483, 25 Law. Ed. 628.

64. In re Wyman [Mass.] 77 N. E. 379; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.

65. Treaty of Dec. 6-18, 1832, with Russia, and the treaty of July 10, 1853, with the Argentine Republic. In re Wyman [Mass.] 77 N. E. 379.

66. In re Wyman [Mass.] 77 N. E. 379.

67. The Neck, 138 F. 144.

68. One never legally bound to serve for a specific voyage or period of time after leaving is not a member of the crew within the meaning of the treaty. The Neck, 138 F. 144.

69. The Neck, 138 F. 144.

TRESPASS.

§ 1. *Acts constituting trespass and right of action therefor.*[71]—Trespass to property is the unlawful and forcible[72] invasion of another's possessory rights,[73] and to maintain the action, plaintiff must have the actual possession or the right to immediate possession,[74] but a reversioner may maintain trespass on the case though not entitled to the possession where the injury to the inheritance is of a permanent character.[75] Actual possession as a general rule is sufficient to sustain an action for trespass as against a mere intruder,[76] but exclusive possession of public lands will not sustain an injunction to restrain trespass, though defendant asserts no interest.[77]

70. Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.

71. See 4 C. L. 1698.

72. One who comes into possession without force, as by purchase from one in possession, is not guilty of trespass. Plott v. Robertson [Ala.] 39 So. 771. An entry before commencement of condemnation proceedings and construction of water works by a city is a trespass. The statute authorizing an entry for the purpose of making survey, etc., does not give right to construct waterworks. Village of St. Johnsville v. Smith [N. Y.] 77 N. E. 617. Where the holder of a lien on crops secures a warrant for the seizure of such crops, knowing that the debt has been paid, he is liable in trespass. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

73. Removing of sidewalk in front of property. Jordan v. Thorp [Mich.] 105 N. W. 1113. Willful and negligent encroachment upon an abutting owner's property by the city in constructing sidewalks. Davis v. Silverton [Or.] 82 P. 16. Where a railroad company encroaches on adjoining lands, it is guilty of trespass, and it is immaterial that workmen did not know that they were trespassing. Wood v. New York, etc., R. Co. [N. Y.] 77 N. E. 27. Bricks, etc., thrown upon adjacent lot while building. McCahill v. Parker Co., 97 N. Y. S. 398. Where land has been sold for taxes and the period of redemption has expired, the tax debtor has no such interest as will sustain an action for trespass. Blake v. Grondin [Mich.] 12 Det. Leg. N. 353, 104 N. W. 423. Const. art. 16, § 5, providing that the water of every natural stream is property of the public and subject to the use of the people, and § 6, providing that the right to divert to beneficial uses shall never be denied, afford no defense for a trespass upon the land of another in pursuit of the right to fish. Hartman v. Tresise [Colo.] 84 P. 685.

74. Ramos Lumber & Mfg. Co. v. Labarre [La.] 40 So. 898; Vines v. Vines [Ala.] 40 So. 84. One who has parted with the title and possession of land cannot maintain trespass. Dyer v. Hartshorn [N. H.] 63 A. 231. Actual possession of a part of a tract of land carries possession of the whole as shown by the boundaries of the title. Mott v. Hopper [La.] 40 So. 921. Possession under homestead laws, especially where the application has been approved, is sufficient. Id. Actual possession if legal and peaceable is sufficient to maintain trespass, even as against the owner. Id. Where one gives the right of possession of his property to another by contract, he is liable for an interference. Rubio Canyon Land & Water Ass'n v. Pasadena & Mt. L. R. Co. [Cal. App.] 84 P. 846. A landlord is guilty of trespass if he enters the premises during the existence of the lease, but not after its expiration, unless he uses unnecessary force. Snedecor v. Pope [Ala.] 39 So. 318. Possession must be exclusive to sustain trespass, otherwise plaintiff must prove title. Ramos Lumber & Mfg. Co. v. Labarre [La.] 40 So. 898. A lessee has sufficient interest to maintain trespass. Bright v. Bell, 113 La. 1078, 37 So. 976. A railroad company which has surveyed, staked out, and adopted its location has sufficient possession to maintain trespass. Arizona & C. R. Co. v. Denver & R. G. R. Co. [N. M.] 84 P. 1018. Where telegraph or telephone poles are erected without the owner's consent, they may be removed. Purdam v. Cumberland Tel. & T. Co. [Ky.] 27 Ky. L. R. 1166, 87 S. W. 1071. A wife has such an interest in the homestead as will sustain an action of trespass if her possession be disturbed. Lesch v. Great Northern R. Co. [Minn.] 106 N. W. 955. A contingent remainderman, not having a right to possession, cannot maintain the action. Latham v. Roanoke R. & Lumber Co., 139 N. C. 9, 51 S. E. 780.

75. Cherry v. Lake Drummond Canal & Water Co. [N. C.] 53 S. E. 138.

76. Especially possession under color of title. Kunkel v. Utah Lumber Co. [Utah]

The presumption of ownership arising from possession of personal property cannot be disputed by one who does not connect himself with the title.[78] Negligence or the want of it is no element of trespass or of a defense.[79] One who wilfully drives his cattle upon the unenclosed premises of another is liable in trespass, though there would be no liability if they strayed upon it.[80] Under some statutes, trespass is the proper remedy to recover for the wrongful use and occupancy of land.[81] Trespass quare clausum fregit is not the appropriate remedy to recover for damage to property by bees.[82] Where trespass is committed by animals, the person in possession of them and not the owner is liable.[83]

In a suit to recover for a trespass committed, it is no defense that defendant is no longer trespassing,[84] nor that the damaged property lacked in conformity to some legal regulation regarding it.[85] Right of action may be lost by contract or a contract liability be substituted.[86]

It is a trespass to the person[87] to commit any assault or directly inflict any injuries.[88] In Missouri it is held that one maliciously annoying another by means of loud noises, etc., thereby injuring the health and business of the latter, is guilty of trespass.[89]

Right of entry and other matters in justification.[90]—Lawful entry may be under an easement[91] or a license,[92] and one who so enters is not liable in trespass[93] unless he exceeds his license.[94] Where the entry is with the consent of the person in possession, subsequent misconduct will not make defendant a trespasser ab initio,[95] but he becomes a trespasser from then on.[96] A license to be a justification must be given by one authorized to give it,[97] and where one acts under a license given by a party who cannot give such license, he is liable irrespective of good faith.[98]

81 P. 897. Rightful possession is sufficient though legal title is in another. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

Trespass to goods: Mere possession of goods. Rice v. Travis, 117 Ill. App. 644. The possession of crop grown by one on land held adversely is sufficient against a wrongdoer. Cullen v. Bowen, 36 Wash. 665, 79 P. 305.

77. Healy v. Smith [Wyo.] 83 P. 583. Especially is this so where a Federal statute makes it unlawful to take exclusive possession by erecting fences, etc. Clemmons v. Gellette [Mont.] 83 P. 879.

78. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

79. Where one in building upon his own premises permits bricks, etc., to fall upon adjoining property, he is liable irrespective of negligence. McCahill v. Parker Co., 97 N. Y. S. 398.

80. Not altered by Sess. Laws 1885. p. 220, providing that no recovery can be had for destruction of crops by animals unless inclosed by a lawful fence. Bell v. Gonzales [Colo.] 83 P. 639; Healy v. Smith [Wyo.] 83 P. 583.

81. Act of May 25, 1887. Allwein v. Brown, 29 Pa. Super. Ct. 331.

82. Petey Mfg. Co. v. Dryden [Del.] 62 A. 1056.

83. The agister and not the owner must respond for damages done by the cattle. Mott v. Scott [Colo.] 83 P. 779.

84. Where suit is to recover for damage done by smoke emitted from defendant's passing trains, it is immaterial that trains no longer pass. Baltimore Belt R. Co. v. Sattler [Md.] 62 A. 1125.

85. Recovery can be had for the willful destruction of fish traps, though plaintiff had not complied with the fish laws in maintaining them. Fowler v. Harrison [Wash.] 81 P. 1055.

86. Trespass on the case will not lie in favor of a city against a street railway company to recover the amount of a judgment rendered against it because of the railway's negligence, where the company has given a bond to hold the city harmless. City of Pawtucket v. Pawtucket Elec. Co., 61 A. 48.

87. See 4 C. L. 1700.

88. For treatment of this topic, see Assault and Battery, 5 C. L. 269; False Imprisonment, 5 C. L. 1413.

89. Shellabarger v. Morris [Mo. App.] 91 S. W. 1005.

90. See 4 C. L. 1700.

91. See Easements, 5 C. L. 1049.

92. See Licenses, 6 C. L. 436.

93. One who enters the offices of another for the purpose of making a complaint against an employe of the latter is not a trespasser though in the wrong place. Chicago City R. Co. v. Rosenberger, 110 Ill. App. 406.

94. License authorizing the erection of telephone poles along the highway, it is no protection where the line is constructed diagonally across the lot. Zimmerman v. American Tel. & T. Co., 71 S. C. 528, 51 S. E. 243.

95. Trespass quare clausum fregit will not lie against one who enters under con-

A city is not liable for a trespass committed while in discharge of a governmental function.[99] An officer who takes property under a writ of execution is not liable unless he takes property not authorized to be taken,[1] but if he wrongfully levies upon the property of a third person, trespass will lie.[2] Where an officer attempts to justify under a writ of replevin issued by a justice of the peace, he must show jurisdiction.[3]

Parties in the tort.[4]—Joint tort feasors are liable.[5] A principal is liable for the trespasses of his agent when committed in the course of his employment,[6] but not, ordinarily, for those of an independent contractor.[7] Where two or more are co-owners of the reversionary interest, the defendant when sued by one can require the co-owners to be joined as parties, but a general denial waives this right.[8] Members of a board charged with the care of streets who do not participate in or ratify a trespass committed by other members are not liable.[9]

§ 2. *Actions. A. At law.*[10]—*Actual possession or title* to unimproved lands must be shown,[11] but where a grantee has color of title and the acts done by the grantor were under the authority of the grantee, the grantee has such constructive possession as will sustain an action for trespass.[12] Ownership of land raises a presumption of ownership of timber growing thereon.[13] Where plaintiff seeks to establish his ownership to the land by adverse possession, he must establish all the elements which are necessary to give title.[14] A plea of title does not make the action one "to determine title to land,"[15] nor does the fact that the jury incorporated a finding as to title.[16]

Successive suits.—Where an action of trespass for cutting trees is determined

tract to complete a building, though he exceeds his license. Beers v. McGinnis [Mass.] 77 N. E. 768.

96. Snedecor v. Pope [Ala.] 39 So. 318.

97. Lunatic's committee can not give a license to cut timber upon land belonging to the lunatic. Scribner v. Young, 97 N. Y. S. 867.

98. Scribner v. Young, 97 N. Y. S. 866.

99. City is not liable for trespass committed by a fire horse. Cunningham v. Seattle [Wash.] 82 P. 143.

1. Seizure of exempt property creates no liability where the debtor has not complied with conditions necessary to make a valid exemption. Johnson v. Larcade, 110 Ill. App. 611.

2. Harris v. Nelson, 113 Ill. App. 487.

3. Must prove by a preponderance of evidence that the value of the property did not exceed the jurisdiction. Rice v. Travis, 117 Ill. App. 645.

4. See 4 C. L. 1700.

5. Where a railway company gave a city authority to use a well of a private person, and required the city to give a bond to indemnify it for all damages, it is a joint tort feasor. Couch v. Texas & P. R. Co. [Tex.] 90 S. W. 860. Where persons illegally enter upon and employ others to enter upon lands of another, they are joint trespassers. Bright v. Bell, 113 La. 1078, 37 So. 976. Evidence held insufficient to show such concert of action with his wife in excluding plaintiff from possession as will make defendant liable in trespass for mesne profits, the only evidence being that defendant made repairs for his wife. Pace v. Hoban, 27 Pa. Super. Ct. 574.

6. Where a wife, claiming title to certain premises, authorized her husband to do anything which he deemed necessary to protect her interest, she is liable for a trespass committed as her agent. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

7. St. Louis, etc., R. Co. v. Gillihan [Ark.] 92 S. W. 793. See, also, Agency, 5 C. L. 64; Master and Servant, 6 C. L. 521.

8. Cherry v. Lake Drummond Canal & Water Co. [N. C.] 53 S. E. 138.

9. Bright v. Bell, 113 La. 1078, 37 So. 976.

10. See 4 C. L. 1701.

11. Color of title is insufficient. Price v. Greer [Ark.] 88 S. W. 985.

12. Nor is this affected by the fact that the boundary line was in dispute, it appearing that no one else had actual or constructive possession. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

13. Where a statute provides a penalty for cutting trees recoverable by the owner, and defines "owner" to be the owner of the trees when one owns the timber and another the land, where there is no separate ownership, the owner of the land is the proper party. Brasher v. Shelby Iron Co. [Ala.] 40 So. 80.

14. Where notice is required, must prove such notice. Brasher v. Shelby Iron Co. [Ala.] 40 So. 80.

15. Where actions to determine title to land must be brought in the county where the land is located, the fact that the title to the land becomes involved in an action of trespass will not deprive a court of jurisdiction, though the land does not lie in that county. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439.

in favor of defendant, it becomes res judicata so that a second action cannot be maintained for trees cut since that suit was commenced involving the same points.[17]

A recovery in an action of replevin[18] or trover, with satisfaction, is a bar to a subsequent action of trespass for the same property.[19] Where two of three distinct trespasses have been barred by the statute of limitations, recovery can be had only on the last.[20]

Joint actions.—Under some statutes, where several trespassers are sued in trespass, the plaintiff may recover against all for the greatest damage done by any one,[21] or the action may be dismissed as to some and maintained as to others.[22]

There must be a community of interest in the subject-matter which is threatened to authorize the joinder of two or more plaintiffs in an action to enjoin a trespass.[23]

Where two joint tort feasors are joined as defendants, a nolle prosequi may be entered as to one who is discovered during trial to be a minor, and the verdict and judgment will stand as to the other.[24]

Pleading, issues, and proof.[25]—Plaintiff's possession must be clearly alleged,[26] and the description of the property alleged to have been trespassed upon must be sufficient to identify the premises.[27] Complainant need not deraign title,[28] and when a lease is pleaded as a basis for possession, it is not necessary to set out the entire contract.[29] Complaint must allege the time when the alleged trespass was committed,[30] and when a specific date is alleged without any continuance, recovery will be confined to a trespass committed on some one day,[31] and plaintiff may be compelled to elect a day on which the trespass will be proved.[32] Complaint must describe the act of violence so that issue may be joined thereon,[33] and issues having been joined, the proof must correspond[34] as respects possession, title[35] and place.[36] It is not necessary that plaintiff specifically allege that he claims some

16. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439.

17. Roper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 53 S. E. 134.

18. Harris v. Nelson, 113 Ill. App. 487.

19. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

20. Evidence of injury resulting from the two barred properly refused admission. Jackson v. Emmons, 25 App. D. C. 146.

21. Civ. Code 1895, § 3915. The jury may specify in their verdict the damage to be recovered from each, but the defendants can not demand such apportionment. Ivey v. Cowart [Ga.] 52 S. E. 436.

22. Ivey v. Cowart [Ga.] 52 S. E. 436.

23. The fact that the owner of land permits his neighbors' cattle to roam thereon does not create a community of interest. Healy v. Smith [Wyo.] 83 P. 583.

24. Crane v. Lynch, 27 Pa. Super. Ct. 565.

25. See 4 C. L. 1702.

26. Allegations of trespass, however numerous or continuous, is not an admission of possession by defendant where complaint specifically alleges possession in plaintiff. Arizona & C. R. Co. v. Denver & R. G. R. Co. [N. M.] 84 P. 1018.

27. Description as "312 South 19th Street, in the city of Birmingham" is sufficient. Snedecor v. Pope [Ala.] 39 So. 318.

Pleadings held sufficient: Complaint alleging ownership of a specific piece of land, its connection by pipes with the city water main, and destruction of such pipes by defendant, is good as against a general demurrer on the ground of uncertainty. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

28. An allegation of ownership and right to possession is sufficient. Price v. Greer [Ark.] 88 S. W. 985.

29, 30. Snedecor v. Pope [Ala.] 39 So. 318.

31. Not necessarily the day alleged. Snedecor v. Pope [Ala.] 39 So. 318.

32. Snedecor v. Pope [Ala.] 39 So. 318.

33. Snedecor v. Pope [Ala.] 39 So. 318. Complaint alleging an unlawful and wanton seizure of plaintiff's property by defendant held sufficient. Barfield v. Coker & Co. [S. C.] 53 S. E. 170. Complaint held sufficient alleging that plaintiff owned the land and that defendant without right dug a ditch thereon. McRae v. Blakeley [Cal. App.] 84 P. 679.

34. Snedecor v. Pope [Ala.] 39 So. 318.

35. Where complaint in trespass bases right of action upon ownership of the land, evidence of an assignment of cause of action by tenant to plaintiff is inadmissible. Mott v. Scott [Colo.] 83 P. 779.

36. Where pleading alleged a trespass to a boom in a creek, proof of trespass in a lake was not such a variance where it appeared that the lake was a part of the creek and the boom was across one side of the lake. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

or all the damages as punitive.[37] A petition setting up numerous and continuous trespassers to personal property states but one cause of action.[38] Where the trespasses constitute but one cause of action, it is unnecessary to specifically state the amounts of the various items.[39]

An answer which controverts a material allegation of the complaint is sufficient.[40] Matters of justification must be specifically pleaded.[41]

Under the general issue, title to the land may be determined.[42] A plea of liberum tenementum to a complaint charging trespass quare clausum fregit puts in issue the freehold within the meaning of the statute providing for an appeal to the supreme court.[43]

Where in trespass the title to the land is litigated under a plea of general issue, defendant may amend his plea after verdict to make it conform to the proof if necessary.[44]

Evidence.[45]—Evidence tending to show the nature of plaintiff's possession is admissible.[46] Where plaintiff attempts to prove possession under a statute, he must prove all facts necessary to invoke the statute.[47] Where both parties claim title under a common grantor, the plaintiff need trace his title no further than such grantor.[48] Proof of ownership of land raises a presumption of possession,[49] and upon further proof that defendant entered, establishes a prima facie case as the entry will be presumed to be wrongful.[50] Ownership may be presumed from circumstances.[51] Where plaintiff's title is referable to a deed, the execution of which is to be established by presumption, evidence tending to sustain or rebut such presumption is admissible.[52]

37. Sufficient if he makes a case by his pleadings and proof which will entitle him to punitive damages. Greeney v. Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

38. Not subject to a motion to divide and number. Habig v. Parker [Neb.] 107 N. W. 127.

39. Where the pleader elects to claim a named sum for any one or more items, he is limited to the amount claimed. Habig v. Parker [Neb.] 107 N. W. 127.

40. Plea which puts in issue plaintiff's possession or right of possession is good. Vines v. Vines [Ala.] 40 So. 84. Where complaint charges the cutting of trees in excess of those sold under a contract, an answer admitting that defendant cut trees but denying that he cut more than were conveyed is sufficient. Doell v. Schrier [Ind. App.] 75 N. E. 600. Where the complaint charges trespass for entering and tearing down a portion of the house, a plea alleging consent to enter upon the premises is demurrable, as it does not deny the gravamen of the trespass. Snedecor v. Pope [Ala.] 39 So. 318.

41. Thomas v. Riley, 114 Ill. App. 520. Where one attempts to justify under a license he must plead and prove the same. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. Where in trespass to premises described as "312 South 19th St." in a certain city, in tearing down a portion of the house, a plea that defendant had license to enter upon the "premises" described does not allege license to enter the "house." Snedecor v. Pope [Ala.] 39 So. 318.

42. Lyman v. Brown [N. H.] 62 A. 650.

43. Schwartz v. McQuaid, 115 Ill. App. 353.

44. Lyman v. Brown [N. H.] 62 A. 650.

45. See 4 C. L. 1702.

46. A will is admissible where plaintiff claims under it, though it might be held void if contested by the heirs. Cullen v. Bowen, 36 Wash. 665, 79 P. 305. A sheriff's deed on sale under execution, against one not shown to have had title, not sufficient proof of title. Phillips v. Beattyville Mineral & Timber Co. [Ky.] 88 S. W. 1058. Deeds indefinite as to boundaries are insufficient to establish title. Cheatham v. Hicks [Ky.] 88 S. W. 1093.

47. Under Act March 18, 1899 (Acts 1899, p 117, No. 60), providing that the possession of unimproved lands shall be deemed to be in the person who * * * pays taxes for seven successive years providing three payments be made after the passage of the act, it is necessary to prove such payments. Price v. Greer [Ark.] 88 S. W. 985.

48. Rogers v. Cuyler [Ky.] 89 S. W. 2.

49. McRae v. Blakeley [Cal. App.] 84 P. 679. Proof of ownership of land to which certain pipes are appurtenant is sufficient to establish ownership of the pipes. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

50. Leave or license must be proved by defendant. McRae v. Blakeley [Cal. App.] 84 P. 679. The fact that telephone wires were attached to the building before plaintiff became the owner does not raise the presumption that they were put there by license. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

51. Defendant's ownership of telephone wires will be presumed upon proof that there is no other telephone company in town. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

The burden is upon the plaintiff to prove all the elements of the trespass[53] and the extent of the injury,[54] but when he has made a prima facie case, the burden is on defendant to prove a justification.[55] An allegation in the complaint that the trespass was committed without plaintiff's consent does not shift the burden of proof from defendant to plaintiff.[56] Where the trespass is for telephone wires attached to plaintiff's house, it is not necessary for plaintiff to prove that defendant actually used the wires for telephone purposes.[57]

Instructions[58] *and jury questions.*[59]—A charge is too broad that calls for proof of a greater trespass than is in evidence,[60] but it is not error to charge liability for the full consequences of it if there is no evidence of injury other than to plaintiff.[61] Where there is evidence tending to show that the trespass was committed by one acting as agent for defendant, it is a question for jury.[62]

Verdict and judgment.[63]—Findings must correspond to the pleadings as to the place of trespass.[64] If a partial trespass only is established, the verdict and judgment must be according to that proved.[65]

A failure to recover against some will not defeat a recovery against the others.[66]

Costs.—A statute giving plaintiff an additional cost in an action of trespass must be limited to the intention of the legislators.[67]

(§ 2) *B. In equity.*[68]—Where a threatened trespass will result in an irreparable injury,[69] or portend frequent repetition,[70] or a multiplicity of suits, an injunction will issue restraining such trespass,[71] but it will not issue for a past trespass[72] unless the circumstances show an intention to continue,[73] or, it seems, where

52. Judgment in a former suit by the heirs of the owner who was alleged to have executed the deed. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324.

53. Cain v. Simonson [Ala.] 39 So. 571. Where plaintiff's title is put in issue, he must establish it by a preponderance of evidence. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. Where action is in trespass for destroying fences and permitting cattle to destroy the crops, error to admit contract whereby defendant undertook to repair fence in time to protect crops. St. Louis, etc., R. Co. v. Gillihan [Ark.] 92 S. W. 793.

54. Cain v. Simonson [Ala.] 39 So. 571. Where trespass consisted of cutting trees through an agent, a book showing the amount of timber delivered by the agent at a certain place is not admissible to rebut the amount of timber cut when it does not appear that all the timber was delivered at that place. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

55. Where defendant asserts that the property had become a public highway, he must prove the same. Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609.

56. Snedecor v. Pope [Ala.] 39 So. 318.

57. If defendant has abandoned the telephone wires, they must show such fact. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

58, 59. See 2 C. L. 1897.

60. Where there is no evidence that defendant moved more than a part of the house, it is error to charge that if the jury believe the evidence they must find that defendant moved the "house." Snedecor v. Pope [Ala.] 39 So 318.

61. Snedecor v. Pope [Ala.] 39 So. 318.

62. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

63. See 4 C. L. 1703, n. 85.

64. Findings held sufficient to show that the trespass was committed on land described in the complaint. Kelly v. Daley, 94 Minn. 253, 102 N. W. 858.

65. Where in a suit for trespass for cutting timber defendant asserts title to only two-thirds, it is error to render judgment for defendant for the entire amount. Browning v. Cumberland Gap Cannel Coal Co. [Ky.] 89 S. W. 267. Where, in an action of trespass to several tracts of unimproved land, plaintiff failed to prove title or possession to some, a verdict which fixes the gross value of the timber cut from all the tracts cannot stand. Price v. Greer [Ark.] 88 S. W. 985.

66. Ivey v. Cowart [Ga.] 52 S. E. 436.

67. Rev. St. 1898, § 2922. Includes only the reasonable expense of a surveyor and one assistant. Dunbar v. Montreal River Lumber Co. [Wis.] 106 N. W. 389.

68. See 4 C. L. 1703.

69. Where the trespasses on a railroad's location by another road will practically deprive plaintiff of the use of it, equity will enjoin the trespasses. Arizona & C. R. Co. v. Denver & R. G. R. Co. [N. M.] 84 P. 1018. An injunction will issue to prevent the removal of an article which has become so attached as to become a part of the realty. State Security Bank v. Hoskins [Iowa] 106 N. W. 764. Where reference books which are furnished only to subscribers and compiled at great expense are unlawfully levied upon, an injunction will lie to restrain sale. Sinsabaugh v. Dun, 114 Ill. App. 523.

70. Frequent acts of trespass, accompanied with a threat to continue, constitute a sufficient basis for an injunction. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439.

there is a continuing damage.[74] Where an injunction is claimed upon the ground of irreparable injury, the facts constituting such irreparable injury must be stated and proved.[75] but inconveniences and annoyance which result from continued and repeated trespasses which interfere with the free use of real property are sufficient to sustain an injunction, though nominal damages would be full compensation.[76] Where the defendant railway's entry is unlawful only because made in an improper place, equity will enjoin its use, but where conditions warrant, defendant's equities will be preserved.[77] Where one could not maintain an action for trespass if the act was committed, he cannot maintain an action for an injunction to prevent it.[78]

Where plaintiff fails to prove any title,[79] or fails to prove exclusive right to the entire premises as against defendant, an injunction will not issue.[80] In an action to restrain the cutting of timber by alleged trespassers in possession, plaintiff must recover on the strength of his own title,[81] but one who has been forcibly ousted from the actual possession has such possession as will enable him to maintain an action.[82]

A trustee of an express trust may, under statute in some states, maintain an action to restrain a trespass.[83]

§ 3. *Damages and penalties.*[84]—Defendant is liable only for damages which are the approximate result of his trespass.[85] Where trespass to real estate results in permanent injury, the depreciation in the market value of the property is the measure of damages,[86] but if the injury is reparable, the cost of repairing may be recovered, providing such cost does not exceed the diminution in market value.[87] Where diminution in the value of real estate is the measure of damages, it is proper to treat the body occupied and used as a unit, and compute the damage to it as

71. Where defendant through intimidation prevents plaintiff from enjoying land owned by him, injunction will issue on the ground of multiplicity of suits. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439.

72. O'Brien v. Murphy [Mass.] 75 N. E. 700.

73. The entering upon the premises of another and opening of a ditch already existing will not authorize the issuing of an injunction where there is no evidence of an intention to repeat. Hull v. Harker [Iowa] 106 N. W. 629. An injunction restraining trespass will not issue unless there is a showing of reasonable apprehension of such trespass. Proof of a past trespass is insufficient. Healy v. Smith [Wyo.] 83 P. 583.

74. Where defendant wrongfully constructed a ditch from 110 to 122 feet wide across plaintiff's land, plaintiff is entitled to an injunction compelling defendant to fill up the ditch. McRae v. Blakeley [Cal. App.] 84 P. 679.

75. Pence v. Carney [W. Va.] 52 S. E. 702.

76. O'Brien v. Murphy [Mass.] 75 N. E. 700.

77. As the right to remove track, etc. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

78. Clemmons v. Gillette [Mont.] 83 P. 879.

79. Lanier Hamilton Co. v. Hebard, 123 Ga. 626, 51 S. E. 632. Where a statute gives the owners of land fronting on any bay the right to plant oysters within prescribed limits, they may restrain interference therewith. Code 1896, c. 84. Cain v. Simonson [Ala.] 39 So. 571.

80. Will not lie against a tenant in common. Country Club Land Ass'n v. Lohbauer, 97 N. Y. S. 11.

81. Where plaintiff fails to establish title, it is immaterial whether a link in defendant's title was sufficiently proven, defendant being in possession. Taulbee v. Buckner's Adm'r [Ky.] 91 S. W. 734.

82. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

83. Civ. Code Prac. § 21. Not necessary to join the party for whose benefit it is brought. Goff v. Boland [Ky.] 92 S. W. 575.

84. See 4 C. L. 1704.

85. Where defendant tore down fence of plaintiff and repaired it to as good a condition as before, he is not liable for damages done by stock breaking through. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320.

Damages held not excessive: Where it appeared that 16 wires were attached to a stock fastened to the chimney of plaintiff's house and some of them were attached to another chimney, $50 damage is not excessive. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

86. Where the trespass resulted in the destruction of some springs, it was error to permit a witness to testify as to the value of the springs in themselves. Rabe v. Shoenberger Coal Co. [Pa.] 62 A. 854. Where soil is removed, it is not the value of the soil so removed but the damage done to the estate that regulates the recovery. Parrott v. Chicago G. W. R. Co., 127 Iowa 419, 103 N. W. 352.

87. Where the loss of a spring can be repaired by the piping from another, the cost

an entirety.[88] The measure of damages for destruction of crops is the market value as standing,[89] although it has been held that where trees are removed and manufactured into lumber, the plaintiff may recover the value of the lumber less the cost of manufacturing.[90] Where the premises trespassed upon could be put to no other use, the value of the use to defendant is the proper measure of damages.[91] Plaintiff may recover all reasonable costs incurred in reducing the damage as much as possible.[92] But in all cases plaintiff can recover only for the damages which he could not have prevented by use of reasonable diligence.[93]

In trespass for entering on the premises and removing a building, the question of damages is not affected by the fact that the land was mortgaged for more than its value.[94]

The damages recoverable by a tenant in a suit against the landlord for trespass are the injuries to the leasehold and not to the freehold.[95]

The recovery must correspond to the interest proved.[96] Where personal property is injured, the value of the property destroyed or the extent of the injury must be proved,[97] but a mere trespass without actual damage entitles plaintiff to nominal damages.[98]

The questions as to whether the damage was the direct result of the acts complained of, and the extent of those damages, are for the jury,[99] under the instructions of the court.[1]

Punitive damages.[2]—Punitive damages are recoverable only when the acts were done wantonly or maliciously, or with circumstances of aggravation.[3] By statute in some states exemplary damages may be recovered by the owner of a private park against one killing birds, fish, etc., therein.[4] Where the statute prescribes the amount of recovery for trespass committed by an officer executing a writ and plaintiff has declared on the statute, no additional punitive damages can be recovered.[5]

of such piping is the measure of damage. Rabe v. Shoenberger Coal Co. [Pa.] 62 A. 354.

88. Parrott v. Chicago G. W. R. Co., 127 Iowa 419, 103 N. W. 352.

89. May be determined by deducting from the market value of the harvested crop the cost of harvesting it. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320.

90. St. Paul v. Louisiana Cypress Lumber Co. [La.] 40 So. 906.

91. As where telephone wires are attached to the roof of a house. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

92. Where defendant's trespass consisted in the destruction of a boom and removal of some of the logs, the cost of watching the remainder until they could be removed to a place of safety is recoverable. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

93. Where defendant wrongfully tore down plaintiff's fence, and stock destroyed the crops, defendant not liable for the destruction of crops if by exercising reasonable care plaintiff could have repaired the fence. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320; Linn v. Hagan's Adm'r [Ky.] 92 S. W. 11.

94. Kunkel v. Utah Lumber Co. [Utah] 81 P. 897.

95. Snedecor v. Pope [Ala.] 39 So. 318.

96. Where the petition for destruction of crops alleges that plaintiff was the owner of the crop, and evidence shows that he owned only one-half but was authorized to recover for all, his recovery is limited to his interest. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320.

97. Snedecor v. Pope [Ala.] 39 So. 318.

98. As where flashboard projects an inch over on to the adjoining premises. Puroto v. Chieppa [Conn.] 62 A. 664. Evidence that defendant dug a ditch across plaintiff's property is sufficient to support a finding that plaintiff suffered damages. McRae v. Blakeley [Cal. App.] 84 P. 679.

99. Baltimore Belt R. Co. v. Sattler [Md.] 62 A. 1125.

1. Court should instruct as to the rules of damages applicable to the case. Baltimore Belt R. Co. v. Sattler [Md.] 62 A. 1125.

2. See 4 C. L. 1705.

3. Snedecor v. Pope [Ala.] 39 So. 318. Where members of a board charged with the embellishment of streets enter upon private property and willfully and against the owner's consent destroy a row of trees, they are liable to punitive damages. Bright v. Bell, 113 La. 1078, 37 So. 976.

4. Forest, Fish & Game Law (Laws 1900, p. 59, c. 20) § 203. Where one endorsed his summons in justice court, "action for a penalty," and in his complaint stated facts which entitle him to the statutory damages, held that act was under the statute. Rockefeller v. Lamora, 106 App. Div. 345, 94 N.

Multifold damages.[6]

§ 4. *Criminal liability.*[7]—It is no defense to a criminal prosecution for entering upon the property of another after warning that defendant had occasionally entered the land before the warning, especially where the complaining witness has had possession for several years.[8] A prosecution for trespass after warning does not involve the question of title, and evidence of title is inadmissible.[9] Under a statute which makes it an offense to willfully cut a telephone wire, the fact that it was strung over defendant's property without his consent, does not justify a cutting, especially where it does not obstruct the use of the property,[10] and the motive does not make any difference if done willfully.[11]

There is no criminality where the trespass was not willful.[12] Entry under a statute authorizing a railway company to enter lands for the purpose of making a survey for a proposed road is a "legal cause and good excuse" within the statute making it an offense to enter the lands of another after warning without legal cause and good excuse.[13] A license by a tenant to pass over the premises is a good defense to the criminal prosecution for "willful" trespass.[14]

An indictment under the penal code charging that the accused did enter upon the lands of A, the person entitled to the possession of the land for the time being, is not supported by evidence that A held the land as agent of B.[15]

§ 5. *Trespass to try title.*[16]—In trespass to try title, plaintiff must recover on the strength of his own title,[17] but the actual possession of the land by plaintiff is sufficient to maintain the action against one showing no right,[18] as it raises a presumption of title which is not destroyed by failure to connect with the sovereignty of the soil.[19]

Where one seeks to recover upon prior possession under claim of right, he must show possession of the particular tract.[20]

Y. S. 549. Forest, Fish & Game Law (Laws 1900, pp. 56, 57, c. 20) §§ 185, 188, providing a penalty for killing birds, etc., to be recovered in an action in the name of the people, has no application to an action brought by the owner of a private park under § 203. Id.

5. Where statute provides for a recovery of double the value of the property, it will be deemed to include punitive damages. Johnson v. Larcade, 110 Ill. App. 611.

6. See 4 C. L. 1705.

7. See 4 C. L. 1706.

8. Bentley v. State [Ala.] 39 So. 649.

9. Certificate of entry. Raiford v. State [Miss.] 39 So. 897. Bond for title from defendant's vendor, and a deed to the vendor from a third person, especially where they were never in possession. Bentley v. State [Ala.] 39 So. 649.

10. Crim. Code 1896 § 5623. Defendant liable for cutting a telephone wire strung over the R. R. right of way where it did not interfere with the operation of the road, though strung without the railroad's consent. McGowan v. State [Ala.] 40 So. 142.

11. McGowan v. State [Ala.] 40 So. 142.

12. As where defendant's employes cut over onto plaintiff's land not knowing the true boundary. Smith v. Saucier [Miss.] 40 So. 328.

13. State v. Simmons [Ala.] 40 So. 662.

14. Freeman v. Wright, 113 Ill. App. 159.

15. Jackson v. State [Ga.] 52 S. E. 155.

16. See 4 C. L. 1706.

17. In a contest for public lands it is not sufficient to show a defect in defendant's title, but plaintiff must establish his own right. Trevy v. Lowrie [Tex. Civ. App.] 14 Tex. Ct. Rep. 75, 89 S. W. 981.

Evidence insufficient to show title in plaintiff where it appeared that plaintiff's grantor received a grant of all the land in an original grant not previously conveyed, but it does not appear that the land in controversy was not so conveyed. Ball v. Carroll [Tex. Civ. App.] 92 S. W. 1023. Where plaintiff claims under a deed which purports to convey "that portion of an original tract which had not been previously conveyed," he must show that the property in controversy had not been previously conveyed. Ball v. Carroll [Tex. Civ. App.] 92 S. W. 1023. Where plaintiff shows that title to the property has passed from the state, a deed to himself, and possession under the deed prior to defendant's possession, he can recover unless defendant proves a superior title. Not necessary to deraign title from the government. Cook v. Spencer [Tex. Civ. App.] 14 Tex. Ct. Rep. 730, 91 S. W. 813. Plaintiff must prove title from the government or a superior title from a common source. Moore v. Kempner [Tex. Civ. App.] 14 Tex. Ct. Rep. 330, 91 S. W. 336.

18. Magerstadt v. Lambert [Tex. Civ. App.] 13 Tex. Ct. Rep. 410, 87 S. W. 1068.

19. Only rebutted when the title under which possession was taken is proven invalid. Kirby v. Boaz [Tex. Civ. App.] 14 Tex. Ct. Rep. 498, 91 S. W. 642.

The plaintiff in trespass to try title against one who was awarded the land by the commissioner of the general land office must come with clean hands.[21] One claiming under a purchaser at a foreclosure sale may recover without paying the purchase price paid by one who subsequently purchased from the original holder.[22]

A defendant who claims under a tax deed valid on its face is entitled to prove improvements under his plea of good faith and have his rights determined.[23] Where defendant admits plaintiff's ownership, but sets up possession under a contract, the burden is upon defendant to establish his plea by a preponderance of the evidence.[24]

Pleading and procedure.[25]—In trespass to try title in Texas, where plaintiff has not alleged his title specifically, he may prove any title except that of limitation.[26] Title by limitation must be specifically pleaded.[27] In founding a claim under the ten-year statute of limitations, the plaintiff must claim some definite tract.[28] Under a plea of not guilty, the defendant may prove an outstanding title in a third party superior to plaintiff's title.[29]

The evidence of particular titles such as those by adverse possession,[30] deed,[31] descent,[32] acquisition from the public domain,[33] or by other methods pertains to topics treating of such matters. Evidence which tends to show plaintiff's claim of title is admissible,[34] and where one of the parties relies on a particular title, any evidence which tends to establish such title is admissible.[35] Where plaintiff seeks to establish a title by raising a presumption of a grant, a deed of quitclaim from heirs is admissible although the parties who executed it could not execute a valid deed for the heirs.[36] Evidence of occupancy is immaterial where plaintiff claims under a purchase from the state.[37]

The instruction must conform to the issues and the evidence.[38] The court in charging the jury should not assume that a deed upon which one of the parties claims title is void simply because it is a deed from husband to wife.[39]

Where the evidence is sufficient to identify the portion claimed by defendant out of the tract described in the pleadings, a judgment may be entered thereon.[40]

20. Cook v. Spencer [Tex. Civ. App.] 14 Tex. Ct. Rep. 730, 91 S. W. 813.

21. Where plaintiff forcibly ejected defendant from an advance position in line at a sale of public lands, he can not complain of an irregularity in defendant's filing which gave the latter priority. Cobb v. Gooch [Tex. Civ. App.] 13 Tex. Ct. Rep. 682, 88 S. W. 401.

22. Club Land & Cattle Co. v. Wall [Tex.] 15 Tex. Ct. Rep. 212, 92 S. W. 984, rvg. 13 Tex. Ct. Rep. 677, 88 S. W. 534.

23. Lamoerida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698.

24. Freeman v. Slay [Tex.] 14 Tex. Ct. Rep. 976, 91 S. W. 6, rvg. 13 Tex. Ct. Rep. 664, 88 S. W. 404.

25. See 4 C. L. 1707.

26. Rev. St. art. 5250. Arthur v. Ridge [Tex. Civ. App.] 13 Tex. Ct. Rep. 449, 89 S. W. 15.

27. Moore v. Kempner [Tex. Civ. App.] 14 Tex. Ct. Rep. 330, 91 S. W. 336.

28. A claim of 160 acres out of 640 without specification is insufficient. Titel v. Garland [Tex.] 13 Tex. Ct. Rep. 335, 87 S. W. 1152.

29. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698.

30. See 5 C. L. 45.

31. See 5 C. L. 964.

32. See 5 C. L. 995.

33. See Public Lands, 6 C. L. 1126.

34. As payment of taxes, leases, etc. Staley v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 827, 92 S. W. 1017. Lease admissible to prove an allegation that defendant was a tenant of plaintiff. Camp v. League [Tex. Civ. App.] 92 S. W. 1062.

35. See Public Lands, 4 C. L. 1106; Adverse Possession, 5 C. L. 58.

36. Arthur v. Ridge [Tex. Civ. App.] 13 Tex. Ct. Rep. 449, 89 S. W. 15.

37. Smithers v. Lawrence [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606.

38. Where the reply alleged that the vendor had elected to cancel the sale and the evidence showed that the vendees had abandoned the same, a charge that if the vendees had surrendered the land to the vendor with the "mutual understanding" that the sale was canceled, plaintiff must recover, is proper. Staley v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 827, 92 S. W. 1017. Where the evidence showed an abandonment of a sale by vendees and the reply alleged a rescission by the vendor, a charge that vendees had "turned back" the land is not misleading. Id.

TRESPASS ON THE CASE; TRESPASS TO TRY TITLE, see latest topical index.

TRIAL.

Scope of article.[41]—Many important and really distinct matters of trial procedure are given separate treatment in Current Law. Thus the law relating to dockets, calendars, and trial lists,[42] continuance and postponement,[43] argument of counsel and the right to open and close the same,[44] examination of witnesses,[45] making of objections and taking of exceptions,[46] trial by jury,[47] questions of law and fact,[48] instructions,[49] directing verdict and demurrer to evidence,[50] discontinuance, dismissal, and nonsuit,[51] verdicts and findings,[52] has been excluded from this article, which includes principally only such matters as do not readily lend themselves to such separate treatment. The subjects of Evidence,[53] Pleading,[54] and Witnesses,[55] are also fully treated elsewhere. As to the hearing in equity, see article on Equity,[56] and for matters peculiar to criminal trials, see Indictment and Prosecution.[57]

§ 1. *Joint and separate trials.*[58]—Two or more suits involving the same facts may in the discretion of the trial court be consolidated for the purpose of trial,[59] but suits pending in different courts of different jurisdictions cannot be consolidated.[60] The matter of granting a separate trial to one of several defendants in proceedings under the eminent domain act rests in the discretion of the trial court.[61] Where, in an action at law, the answer interposes an equitable counterclaim, the issue arising on the latter should be heard and determined by the court before a trial of the legal issues, as if the counterclaim were a separate suit in equity.[62] A plain-

39. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38.
40. Cook v. Spencer [Tex. Civ. App.] 14 Tex. Ct. Rep. 730, 91 S. W. 813.
41. See 4 C. L. 1708.
42. See 5 C. L. 1039.
43. See 5 C. L. 659.
44. See 5 C. L. 253.
45. See 5 C. L. 1371.
46. See Saving Questions for Review, 6 C. L. 1385.
47. See Jury, 6 C. L. 316.
48. See 6 C. L. 1177.
49. See 6 C. L. 43.
50. See 5 C. L. 1004.
51. See 5 C. L. 1011.
52. See 4 C. L. 1803.
53. See 5 C. L. 1301.
54. See 6 C. L. 1008.
55. See 4 C. L. 1943.
56. See 5 C. L. 1144.
57. See 5 C. L. 1790.
58. See 4 C. L. 1709.
59. Where there are two actions pending in the same court, based on the same contracts, in which the plaintiff in one and defendants in the other and vice versa, each depending on the same evidence, the court may, in its discretion, compel their consolidation. Lehmann v. Webster & Co., 110 Ill. App. 298. Two actions against two defendants jointly to recover for injuries received in one accident, to which the same defense was interposed in both actions, and the establishment of the cause of action and the defense in both cases depended on the same evidence, may properly in the discretion of the trial judge be consolidated under Rev. St. U. S. § 921, though different amounts are claimed as damages. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. A party cannot complain of the consolidation of two suits to one of which he is a party where it appears that his rights can be fully protected in the consolidated action. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 504, 104 N. W. 780.
60. Shotter Co. v. Larsen [C. C. A.] 134 F. 705.
61. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.
62. Cotton v. Butterfield [N. D.] 105 N. W. 236.

tiff joining several causes of action may prove them separately so long as he keeps within the rules of practice and cannot be compelled to consolidate them under penalty that if he fails to do so a reference will be ordered.[63]

§ 2. *Course and conduct of trial.*[64]—To constitute a lawful trial, there must be a lawful term or session[65] of a duly constituted court,[66] and an issue duly joined[67] and properly brought on for hearing,[68] but after issue joined, the trial may proceed though a party defaults of appearance.[69] The presence of an official reporter is not essential to the constitution of the court,[70] and temporary absence of the judge is a mere irregularity.[71] Practice is governed by statutes in force at time of trial.[72] It is a general rule that irregularities in the course of judicial proceedings do not render them void.[73] It is within the discretion of the court whether he will suspend a trial and wait for a witness who has not been subpoenaed, but promised to be present.[74] Whether an interpreter shall be called is within the discretion of the court and its refusal is not error unless there has been an abuse of discretion.[75] Sequestration of witnesses[76] and demeanor of parties and witnesses in court and manifestations of suffering[77] or grief[78] are matters to be controlled by the trial judge in his discretion.

Argument and conduct of counsel[79] is the subject of a separate article.[80]

Remarks and conduct of judge.[81]—While the trial judge may properly stop and rebuke misconduct,[82] he must preserve entire impartiality of demeanor, and unjust

63. Moyer v. Nelliston, 96 N. Y. S. 485.

64. See 4 C. L. 1709.

65. Trial must be at a lawful term or session of court. Mattox Cigar & Tobacco Co. v. Gato Cigar Co. [Ala.] 39 So. 777.

66. See Courts, 5 C. L. 870.

67. When plaintiff refuses to join issue and proceed with trial, it is error to try the case on its merits, but a judgment of dismissal should be extended. Hartman v. Viera, 113 Ill. App. 216.

68. See Dockets, Calendars, and Trial Lists, 5 C. L. 1039. Hearing a cause on the wrong calendar when the party is not deprived of a full and fair hearing is not reversible error. Able v. Southern R. Co. [S. C.] 52 S. E. 962.

69. It is not an abuse of discretion to proceed to the trial of a cause where it is reached, though one of the parties and his counsel are absent, where no postponement has been granted or permission to be absent given. Linderman v. Nolan [Okl.] 83 P. 796.

70. If the appellant's attorney was present at the time of the trial of a cause and did not object to the absence of the official reporter, he cannot seek a new trial on that ground. It was his duty to call the trial court's attention, and if an order for his attendance was refused he should have had such fact preserved in the record by exception. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

71. Absence of judge when sealed verdict is received is a mere irregularity and may be authorized by stipulation. Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006. Where the attorneys in a civil action stipulate that a verdict may be received by the clerk in the absence of the presiding judge, the parties are bound thereby and a judgment entered thereon is valid. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

72. In re Commissioner of Public Works, 97 N. Y. S. 503.

73. "An irregularity may be defined as a failure to observe that particular course of proceeding which, conformably with the practice of the court ought to have been observed." Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

74, 75. Kozlowski v. Chicago, 113 Ill. App. 513.

76. The rule in reference to the sequestration of witnesses does not apply where the witness is a party, although there may be several parties on one side of the case. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916.

77. That plaintiff, in a personal injury suit, exhibited in the presence of the jury an appearance of great weakness, is not a ground for reversal, though witnesses for defendant testified that such appearance could be feigned and that on other occasions plaintiff did not have such appearance. The genuineness of such appearance is for the jury. Chicago & J. Elec. R. Co. v. Spence, 115 Ill. App. 465.

78. The fact that a woman in an action to recover damages for failure to deliver a telegram, preventing attendance at her son's funeral, appeared on the witness stand in deep mourning and gave way to her emotions while testifying as to circumstances of his death and funeral is not such misconduct as authorizes new trial. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 90 S. W. 58.

79. See 4 C. L. 1711.

80. See Argument and Conduct of Counsel, 5 C. L. 253.

81. See 4 C. L. 1710.

82. It is not error for the trial judge to correct the statement of counsel as to what the testimony of a witness was when he correctly states the substance of such testimony. State v. Lane [Or.] 84 P. 804. It is the duty

criticisms of counsel,[83] or questions,[84] or remarks[85] intimating his opinion on the facts, are ground for reversal.

§ 3. *Reception and exclusion of evidence.*[86]—A party cannot by a mere ingenuity in pleading, as for instance, by putting his answer in the form of an affirmative allegation, rather than a specific denial, deprive his opponent of the right to open and close, if the substantial effect of the pleading is to controvert the truth of the essential averments of the complaint. But the discretion of the trial court in such regard will not be interfered with, on appeal, unless an abuse of discretion prejudicial to the appellant is shown.[87] The party on whom rests the burden of the issue, if he so elects and there be no objection thereto, may proceed to offer evidence on all the issues in the case.[88] The court may allow a witness to give his testimony in narrative form and without the aid of questions.[89] The court should require that evidence be introduced in an orderly manner.[90] Since objection to evidence must be specific,[91] it should ordinarily be required to be offered in such form as to facilitate specific objection,[92] and must either appear admissible of itself or be accompanied by such an offer as will make its admissibility apparent.[93]

The order of proof[94] rests largely in the discretion of the trial court,[95] and ac-

of the court to avoid making remarks that may in any degree reflect on counsel, but when the conduct of an attorney is such as to provoke the judge, his making improper remarks will not constitute reversible error where they did not in any way indicate the court's views as to the merits of the case. Chicago City R. Co. v. Shaw [Ill.] 77 N. E. 139. May stop and rebuke improper argument. Finan v. New York, etc., R. Co., 97 N. Y. S. 859.

83. Remarks of court accusing counsel of lack of preparation held reversible error. Kleinert v. Federal Brewing Co., 107 App. Div. 485, 95 N. Y. S. 406. Remarks made by the trial judge in the hearing of the jury which tend to discredit the attorney of either of the parties, constitute grounds for a new trial and reversible error. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 90 S. W. 933.

84. Questions to a witness which insinuate that he is testifying falsely are erroneous when there is no evidence contradicting the witness. O'Donnell v. People of Illinois, 110 Ill. App. 250. The effect of testimony elicited by an improper question from the court is more effective to impress the jury than when in response to a question by counsel and hence error is more easily predicable thereon. Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458. A trial judge may propound questions to a witness in order to elicit pertinent facts, provided that he does so in a manner which will not indicate his opinion of the facts. Arkansas Cent. R. Co. v. Craig [Ark.] 88 S. W. 878.

85. It is reversible error for the trial judge to make any remarks in the presence of the jury calculated to increase or diminish the weight to be given to the evidence by the jury. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784. Any statement or remark by the trial judge which indicates his opinion as to weight of the testimony is erroneous. Kozlowski v. Chicago, 113 Ill. App. 513; Chicago City R. Co. v. Enroth, 113 Ill. App. 285. Remarks intimating an opinion on the merits and an intention to set aside a verdict opposed thereto held error. Corrigan v. Funk, 109 App. Div. 846, 96 N. Y. S. 910. Where the trial judge states in the presence of the jury that there is only one issue in the case, stating it, while as a matter of fact there are other material issues, the party prejudiced by such remark is entitled to a reversal though the court by its instructions gave such other issues to the jury. Chicago Junction R. Co. v. Pietrzak, 110 Ill. App. 549.

86. See 4 C. L. 1711.

87. Farmer v. Norton [Iowa] 105 N. W. 371.

88. Kibby v. Gibson [Kan.] 83 P. 968.

89. Horton v. State, 123 Ga. 145, 51 S. E. 287.

90. A defendant could not, on cross-examination of one of plaintiff's witnesses and against plaintiff's objection, stop in the cross-examination of the witness and introduce in evidence certain letters identified by the witness, which were admissible only as a part of defense. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

91. See Saving Questions for Review, 6 C. L. 1385.

92. A number of exhibits offered en masse are properly excluded. Dowie v. Priddle, 116 Ill. App. 184. The rule that where evidence is admissible for any purpose, its admission is not error, applies only when the objection is general and where on an offer the opposite party objects to it as being inadmissible for a certain purpose and the counsel offering does not disclaim that it is offered for that purpose or state for what purpose it is offered the objection should be sustained when not admissible for purpose stated. Burns v. Pennsylvania R. Co. [Pa.] 62 A. 845. Offer of evidence containing relevant and irrelevant evidence is properly rejected, when made as one offer. Mease v. United Traction Co., 208 Pa. 434, 57 A. 820.

93. An offer of evidence, not shown to be material is properly rejected. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017. And see Saving Questions for Review, 6 C. L. 1385.

94. See 4 C. L. 1711.

cordingly the reception of evidence out of order[96] or the scope permitted in rebuttal will rarely be reviewed,[97] and a like discretion is recognized as to the reopening of a case for further testimony.[98]

Timely objection must be made to improper evidence,[99] but where the inadmissibility of evidence becomes apparent only after it has been received[1] as where it was admitted on an assurance of other proof which was not supplied,[2] a motion to strike

95. In Ind. T. the statutes expressly provide that the trial court shall regulate the order of proof. Miller v. Springfield Wagon Co. [Ind. T.] 89 S. W. 1011. The order of proof is largely in the discretion of the trial court. Sheridan v. Patterson [Colo.] 82 P. 539.

96. McBride v. Steinweden [Kan.] 83 P. 822. A judge may receive evidence tentatively on promise of the party offering it to connect it so as to make it relevant, subject to its exclusion in case he fails to show its relevancy. Lanier, Hamilton & Co. v. Hebard, 123 Ga. 626, 51 S. E. 632; Loder v. Jayne, 142 F. 1010. Allowing the introduction in evidence by defendant of evidence in support of his defense after plaintiff has introduced evidence in rebuttal of evidence offered to support defense rest in the discretion of the trial court and is not reviewable. Southern Industrial Inst. v. Hellier [Ala.] 39 So. 163. It is within the discretion of the trial court to allow plaintiff to give at one time all his testimony, though at the time of its introduction its materiality to the case had not been shown, though subsequently made applicable to defendant. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. In Wisconsin contributory negligence is defensive matter, and in an action for negligence plaintiff cannot give testimony to show that he was free from contributory negligence as part of his case in chief. If in describing the injury the plaintiff incidentally gives testimony tending to show contributory negligence on his part, the court may in its discretion allow plaintiff as part of his case to show that he was free from contributory negligence so as to prevent a nonsuit. Owen v. Portage Tel. Co. [Wis.] 105 N. W. 924.

97. Chicago, etc., R. Co. v. Reuter, 119 Ill. App. 232; Hall v. Wagner, 97 N. Y. S. 570. Declarations of plaintiff's intestate shown by defendant may be disproved on rebuttal. Houston, etc., R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712. Where defendant's evidence tends to show that plaintiff wrote a letter at a certain time denial thereof is proper in rebuttal. Bazelon v. Lyon [Wis.] 107 N. W. 337. It is not necessarily reversible error to admit evidence in chief in rebuttal. The matter is vested in the sound discretion of the trial court. Only in case of abuse of discretion will a reversal be allowed. Louisville & N. R. Co. v. Board [Ky.] 90 S. W. 944; Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Pharr v. Shadel [La.] 38 So. 914; Olwell v. Skobis [Wis.] 105 N. W. 777. In Indiana where a party under oath denies the execution of a written instrument sought to be introduced in evidence against him the party offering it must as a part of his case in chief introduce all of his testimony as to its authenticity and cannot merely make a prima facie case and then rebut testimony tending to show its nonexecution by the party charged. Baum v. Palmer [Ind.] 76 N. E. 108. The court may in its discretion allow a party to introduce in rebuttal testimony which properly should have been introduced as part of his case in chief. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61.

98. Richards v. Meissner, 24 App. D. C. 305; Cincinnati, etc., R. Co. v. Cox [C. C. A.] 143 F. 110; Standard Supply & Equipment Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181; Jones v. Wright [Tex. Civ. App.] 92 S. W. 1010; In re Walker's Estate [Cal.] 82 P. 770; Parker v. Ricks, 114 La. 492, 38 So. 687; Door Cattle Co. v. Chicago & G. W. R. Co. [Iowa] 103 N. W. 1003; Graham v. M. Transp. Co. v. Young, 117 Ill. App. 257; Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983; Chicago N. W. R. Co. v. Jamieson, 112 Ill. App. 69. In an action to restrain the levying of an assessment for opening a road when all the evidence was in writing, it was not error for the court to let one of the parties introduce further written evidence several days after the trial had closed, such matter resting in the discretion of the court. Todd v. Crail [Ind.] 77 N. E. 402. Court held to have erred in refusing to admit an offer of evidence made by plaintiff after he had closed and before action was dismissed when the reception of it would have made a case for plaintiff, which up to the time of the offer he had not done. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 13 Tex. Ct. Rep. 579, 88 S. W. 449.

99. See Saving Questions for Review, 6 C. L. 1385.

1. Where exhibits are prima facie competent at the time they are received in evidence, a motion to strike out should be made where subsequently it appears that they are incompetent. Village of Grand Park v. Trah, 115 Ill. App. 291. Where the preliminary examination of a witness does not show that the testimony sought to be elicited was a privileged communication, an objection to the offer is properly overruled. Where it subsequently appears that it is inadmissible, it is the duty of counsel to move to strike out and not the trial judge on his own motion. Brown v. Moosic Mountain Coal Co. [Pa.] 61 A. 76. It is not error to refuse to strike out evidence which has been received and which was competent, merely because the party introducing it has more accurate evidence (as to measurements) in his possession. Harvey v. Chester [Pa.] 61 A. 118.

2. When evidence is received before the proper foundation for its admission is laid, on condition that such foundation shall be subsequently supplied, there should be a motion to strike in case there was no foundation laid. Chicago Terminal Transfer R. Co. v.

will lie. A trial court may of its own motion refuse to receive incompetent evidence, though not objected to and may of its own motion strike out such evidence.[3]

Cumulative testimony[4] may be limited[5] and mere repetition prevented.[6]

Stipulations[7] *or admissions*[8] may be received in lieu of evidence, and counsel is concluded by his admissions in open court.[9] Statements made by counsel in his opening are not to be received as evidence, but may be considered and have the binding force of admissions.[10]

Evidence admissible for one purpose only.[11]—Evidence admitted generally is before the jury for all purposes,[12] but where evidence is admissible for but a single purpose it should be so limited.[13]

§ 4. *Custody and conduct of the jury.*[14]—The court must keep the jury together in such manner as will best facilitate a fair verdict.[15] In some states it is allowable to excuse a juror for cause and either proceed with eleven[16] or supply another.[17] In other states the entire jury may be excused under such circumstances.[18]

Schlavone, 116 Ill. App. 335. When the court overrules objection and provisionally admits evidence, on the statement of counsel that he will subsequently supply a defect in the preliminary proof necessary to its admission, it is not for the judge on his own motion to determine whether such defect has been cured and strike out the testimony, without a request to that effect from the other party. Hix v. Gulley [Ga.] 52 S. E. 890.

3. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671.

4. See 4 C. L. 1714.

5. The court may in its discretion limit the number of witnesses whom it will allow to testify on each side as to particular fact where the testimony is cumulative. Clark Co. v. Rice [Wis.] 106 N. W. 231. The admission of cumulative evidence rests in the sound discretion of the trial court. Bruce v. Wanzer [S. D.] 105 N. W. 282. It is error for the court to refuse to hear cumulative testimony and then decide the question of fact for the adverse party. Brown v. Cohen, 96 N. Y. S. 116.

6. It is proper for the trial court to refuse to allow a witness to repeat his testimony. Camp v. League [Tex. Civ. App.] 92 S. W. 1062; Griswold v. Nichols [Wis.] 105 N. W. 815; Spinks v. Clark, 147 Cal. 439, 82 P. 45.

7. See Stipulations, 6 C. L. 1554; Submission of Controversy, 6 C. L. 1580.

8. Facts may be admitted. A case may be tried on a theory that a fact is assumed to exists, the legal effect of which alone is questioned. Having admitted the fact a party cannot afterwards complain that it was not proven. Matousek v. Bohemian Roman Catholic First Cent. Union [Mo.] 91 S. W. 538.

9. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

10. McMahon v. Lynn & B. R. Co. [Mass.] 77 N. E. 826.

11. See 4 C. L. 1716.

12. Where evidence is received it may be considered upon a point which counsel introducing it disclaimed an intention of proving thereby. Board of Sup'rs of Macomb County v. Lovejoy [Mich.] 13 Det. Leg. N. 51, 107 N. W. 276.

13. Straight Creek Coal Co. v. Haney's Adm'r, 27 Ky. L. R. 1117, 87 S. W. 1114. Where evidence is material and competent on one theory of the case on which the party offering it is proceeding but not on the theory on which the other is proceeding and the correctness of either theory depends on questions of fact, the evidence should be received and its effect limited by proper instructions according as the jury may determine such questions of fact. Radel v. Lesher, 137 F. 719. Where testimony offered is admissible for a certain purpose but not for another on which it has some bearing, the jury should be instructed not to consider it on the latter issue. McMerrow v. Dowell [Mo. App.] 90 S. W. 728. Where the court admits a document for a specified purpose only, other papers attached are not to be deemed in evidence where they are not relevant to the purpose for which the principal document was admitted. Security Trust Co. v. Robb [C. C. A.] 142 F. 78.

14. See 4 C. L. 1716.

15. That one of the parties to an action held private conversation with a juror and treated him to a drink while the jury were considering the case is ground for setting aside the verdict and granting a new trial. Buchanan v. Laber [Wash.] 81 P. 911. Misconduct known at the time cannot be objected to after verdict. Bernikow v. Pommerantz, 94 N. Y. S. 487. It is improper for a juror to communicate with his family by telephone without leave of court. Baizley v. Welsh, 71 N. J. Law, 471, 60 A. 59.

16. Chicago City R. Co. v. Brecher, 112 Ill. App. 106; Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

17. Sanford v. State [Ala.] 39 So. 370; In re Shinski, 125 Wis. 280, 104 N. W. 86.

18. A jury should be released from the consideration of a case when it appears that by reason of facts existing at the time the jury was impaneled, but unknown to the court or facts occurring afterwards, that members of the jury are biased and cannot act impartially. Questions asked a witness by a juryman indicated prejudice toward defendant. Sorenson v. Oregon Power Co. [Or.] 82 P. 10. A request to excuse all the jurors where one is excused after part of the evidence is in is addressed to the discretion of the court. Turner v. Territory [Okl.] 82

It is largely discretionary with the trial court what papers shall be taken out by the jury.[19]

Allowance of a view of premises by the jury,[20] allowance of microscopic examinations,[21] or compelling the production of movable property in court for inspection,[22] rests in discretion. It is immaterial whether the court orders a view at the request of one of the parties, or on its own motion, or at the request of a juror, if in the opinion of the court such a view is necessary or proper.[23]

TROVER; TRUST COMPANIES; TRUST DEEDS, see latest topical index.

TRUSTS.

This article does not treat of trust deeds, so called, given as security for a debt

P. 650. It is no ground for declaring a mistrial that a juror is fearful that he will be unable to keep an important engagement and may acordingly be unfitted for jury service. Morrison v. Dickey, 122 Ga. 417, 50 S. E. 178.

19. Any exhibit in evidence may be allowed to be taken out. Chicago & J. Elec. R. Co. v. Spence, 115 Ill. App. 465. It is discretionary to refuse to allow the jury to take out a map which is not exact. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235. No abuse of discretion for court to refuse to let jury take out with them a map which was before them during trial of an action for damages in falling into improperly guarded trench in street. Carty v. Boeseke-Dowe Co. [Cal. App.] 84 P. 267. In Illinois it is not error for the jury to take the pleadings to the jury room. Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845. The practice of allowing pleadings in civil actions to be taken to the jury room is not to be commended, but it is not reversible error. When appellant had an opportunity to prevent pleadings containing counts as to which demurrers had been sustained from going to the jury room and did not do so his formal exception to its bring done will not work a reversal. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. Where papers which should not properly go to the jury are sent to the jury room inadvertently and not through the connivance of the prevailing party, a verdict will not be set aside when it appears the papers were not read by the jury. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Where the jury took to the jury rooms exhibits which had not been received in evidence, a verdict will not be set aside, where imme-

or, more accurately, security deeds with power of sale,[1] or of charitable gifts[2] or of the construction of the trust as violating the laws of perpetuities and accumulations.[3] Trustees of bankrupts[4] and of incompetents[5] are also treated elsewhere.

§ 1. *Definitions and distinctions.*[6]—A trust is a right of property, real or personal, held by one party for the benefit of another,[7] and must be distinguished from fiduciary relations.[8] A trust executed is where the party has given complete directions for settling his estate, with perfect limitations;[9] an executory trust is where the directions are incomplete and are rather minutes or instructions for the settlement.[10] The distinction between express trusts and powers in trust is that in the former the trustee takes the legal title, which, however, does not pass to the trustee of a power.[11]

§ 2. *Express trusts. Nature and elements.*[12]—In order to have a valid trust there must be a designated beneficiary[13] or purpose,[14] an identified trust fund or estate[15] and a designated, competent trustee,[16] though, except where the trust is

diately on discovery of the fact the court admonished the jury not to regard it and it appears that the jury had agreed on a verdict before the exhibits came to their possession. Lewes v. John Crane & Sons [Vt.] 62 A. 60. In Rhode Island it is not proper to allow depositions to be taken to the jury room, but when by inadvertence a deposition is taken to the jury room, it is not reversible error where the testimony contained in the deposition relates to only one fact which could not have been forgotten by the jury. Fottori v. Vessela [R. I.] 61 A. 143. Generally it is recognized as a matter largely in the discretion of the trial court to permit the jury to take with them to the jury room exhibits which have been received in evidence. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Photographs which have been received in evidence may be taken to the jury room, though had the party objecting to its being taken out by the jury moved to have it stricken out such motion could have been properly granted. Chicago & J. Elec. R. Co. v. Spence, 115 Ill. App. 465.

20. Where a jury is permitted to view premises it is not error for a party to call their attention to an observable physical fact relevant to the issue on trial. Flint v. Union Water Power Co. [N. H.] 62 A. 788. It is not an abuse of discretion for the trial court to refuse a view of machinery referred to in the testimony when it appears that the jury could have understood its situation and operation from the oral testimony received. Shalgren v. Red Cliff Lumber Co. [Minn.] 104 N. W. 531.

21. In an action to recover damages caused by the construction of an elevated railroad in front of plaintiff's building, it was held that the court could in its discretion refuse to allow the jury to examine through a microscope dust collected by a magnet from the walls of the building and claimed to consist in part of steel dust caused by operation of road. Cotton v. Boston El. R. Co. [Mass.] 77 N. E. 698.

22. In an action to recover damages for injuries to personal property, the court may in its discretion refuse to compel plaintiff to produce the property for inspection of the jury where it appears that witnesses for defendant were allowed to inspect it before trial. Withey v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 511, 104 N. W. 773.

23. On request of juror. City of Louisville v. Caron [Ky.] 90 S. W. 604.

1. See Chattel Mortgages, 5 C. L. 574; Foreclosure of Mortgages on Land, 5 C. L. 1441; Mortgages, 6 C. L. 681.
2. See Charitable Gifts, 5 C. L. 566.
3. See Perpetuities and Accumulations, 6 C. L. 1003.
4. See Bankruptcy, 5 C. L. 367.
5. See Infants, 6 C. L. 1; Insane Persons, 6 C. L. 34, etc.
6. See 4 C. L. 1728.
7. Cyc. Law Dict. "Trust."
8. See Estates of Decedents (Executors and Administrators) 5 C. L. 1183; Infants, 6 C. L. 1, etc.
9. Morris v. Linton [Neb.] 104 N. W. 927. Evidence that donor had declared that she thought of letting plaintiff have the property, but that she had kept it on account of collecting the interest, and had stated to a witness that if anything happened to her the witness should see to it that plaintiff obtained the property, as it belonged to her, and that the donor retained possession of the property until her death, held not to establish an executed trust, essential to enable plaintiff to maintain an action at law to recover the alleged trust property. Botsford v. Burr [Mich.] 12 Det. Leg. N. 481, 104 N. W. 620.
10. Morris v. Linton [Neb.] 104 N. W. 927.
11. Train v. Davis, 98 N. Y. S. 816. See 4 C. L. 1730, n. 65.
12. See 4 C. L. 1728.
13. Filkins v. Severn, 127 Iowa 738, 104 N. W. 346. A trust "for the use * * * of the estate of C." held void for indefiniteness. Guental v. Guental, 98 N. Y. S. 1002; City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542; In re McKay, 143 F. 671.
14. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542; In re McKay, 143 F. 671. A bequest of $5,000 to an executor "to be expended by him as I have instructed him in my lifetime." held insufficient to create a trust. In re Keenan, 105 App. Div. 628, 94 N. Y. S. 1099.
15. City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542; In re McKay, 143 F. 671.

personal as to the trustee,[17] equity will not permit a trust to fail for want of a trustee,[18] and an actual delivery or legal assignment with the intention of passing title to the trustee as such.[19] A complete valid trust will be enforced regardless of whether it is supported by a consideration or not.[20]

While there must be some unequivocal act or declaration showing an intention to create a trust,[21] no particular form of words is necessary to create a trust,[22] it being sufficient if the expressions used unequivocally show the intention to create a trust.[23] Whether the trust be created by will or by deed, if it be lawful, and the

16. In re McKay, 143 F. 671. There must be a conveyance or transfer to a person capable of holding it. City of Austin v Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

17. See post, § 7.

18. In re McKay, 143 F. 671; Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187; Hiles v. Garrison [N. J. Eq.] 62 A. 865; Wilson v. Clayburgh, 215 Ill. 506, 74 N. E. 799; Landram v. Jordan, 25 App. D. C. 291; Wells v. German Ins. Co. [Iowa] 105 N. W. 123. Refusal to accept will not invalidate instrument. Id.

19. Where it is sought to create a trust in a fund on deposit, a delivery of the money or its equivalent for that purpose in the lifetime of the creator of the trust is an essential element. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. Where fund was in bank, delivery of bank book must have been made with that intent. Id. As against the grantor, the delivery of a trust instrument will be sufficient if made to the party beneficially interested. Wells v. German Ins. Co. [Iowa] 105 N. W. 123.

20. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629. Where the purpose of the trust is meritorious and the settlement of the trust has been perfected by the execution and delivery of a proper conveyance, no other consideration is required and the acceptance of the gift by the beneficiary is presumed. Lewis v. Curnutt [Iowa] 106 N. W. 914. An agreement by a husband to hold the proceeds of his wife's property in trust for her is based upon a valid consideration and will be upheld and enforced in equity. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597.

21. Nicklas v. Parker [N. J. Eq.] 61 A. 267.

22. Dawes v. Dawes, 116 Ill. App. 86; Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629; In re Heywood's Estate [Cal.] 82 P. 755; Howison v. Baird [Ala.] 40 So. 94; City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542. See 4 C. L. 1730, n. 79; 4 C. L. 1731, n. 86.

23. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629; In re Heywood's Estate [Cal.] 82 P. 755; City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542; Dawes v. Dawes, 116 Ill. App. 36; Witherington v. Herring [N. C.] 53 S. E. 303. Letters held sufficient to constitute a trust. Id. The intent of the settlor is what the courts look to. Lewis v. Curnutt [Iowa] 106 N. W. 914. See 4 C. L. 1730, n. 79; 4 C. L. 1731, n. 86.

Illustrations: Declaration by father that he held money for son held to create a trust. Dawes v. Dawes, 116 Ill. App. 36. A devisee of the legal title to property being charged with certain active duties in regard thereto and being obliged to pay certain parties portions of the income is regarded as a trustee. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Where depositor indorsed certificate of deposit to relative and housekeeper stating that he wanted her to have it, but never delivered it, held a trust. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629. A letter written by a widow to the brother of her deceased husband, that her home was a gift to her with a promise that when she was through with it, it should be given to the brother, held not to create an express trust. Loomis v. Loomis [Cal.] 82 P. 679. Mere delivery of money to another, the latter to use part in paying the depositor's debts and return the rest when demanded, held not to create a trust. Francis v. Gisborn [Utah] 83 P. 571. Life tenant agreeing to hold and invest the surplus income of the land for plaintiff's benefit in consideration of plaintiff's conveying his interest in a homestead to his wife held to create an express trust. Case v. Collins [Ind. App.] 76 N. E. 781. Where offer to give land for library building was accepted and deed contained no restrictions held city took title in trust for such purpose. Board of Trustees of School for Industrial Education v. Hoboken [N. J. Eq.] 62 A. 1. Stockholder in corporation taking transfer of patents to make an exchange and receive and distribute stock therefor held a trustee. Harrington v. Atlantic & Pac. Tel. Co., 143 F. 329. Where one before a sale agrees to buy land in his name for the benefit, in whole or in part, of another, who pays the purchase money or his aliquot part thereof, an express trust arises, enforceable in equity. In re Henderson, 142 F. 568. Express trust where husband paid for land, took it in the name of the wife, she agreeing to hold it as trustee. Johnson v. Ludwick [W. Va.] 52 S. E. 489. Where a contract between plaintiff and defendant provided that plaintiff should have an equal share in the rents and profits of certain land and that defendant should sell the property for the best price obtainable, the proceeds to be divided, defendant's position as to plaintiff was that of a trustee. Winder v. Nock [Va.] 52 S. E. 561. Where grantor of land agreed to hold certain property as a park held a trust. Elliott v. Louisville [Ky.] 90 S. W. 990. Evidence examined, and held to sustain a finding that a transfer of a fund in a bank to the defendant was intended for the benefit of the infant plaintiffs.

intent can be fairly ascertained from the examination of the instrument, the courts will uphold it.[24] To that end they will not be restrained by narrow and technical rules of construction; but if the intent of the grantor or donor be apparent, even though not expressed with technical nicety, the trust will not be avoided.[25] The word "trust" need not be used,[26] and being used is not conclusive.[27] Words of express condition in a deed are not inapt as introductory to a declaration of trust[28] and this is especially true where words of determination or reverter are omitted.[29] In determining such question, the whole clause in its form and scope must be considered.[30] The question whether a will is aptly expressed to create a trust is treated elsewhere.[31] It is essential that the settlor part with his interest as absolute owner.[32] Where paper is sent a bank for collection and there is no authority to mingle the proceeds with the other funds of the bank, there is a trust.[33] While it is not necessary that any beneficial interest pass to the trustee,[34] still a testamentary trust is not void because the trustees are among the beneficiaries thereof.[35] Neither notice to the cestui que trust[36] nor assent by the trustee[37] is essential to validity of trust. It is essential that there be no fraud or undue influence exercised in procuring the trust.[38] By statute in some states a person with whom or

Mann v. Shrive, 97 N. Y. S. 688. A grantor conveyed real estate to a trustee by warranty deed in the usual form and for the consideration of "one dollar and the execution of the trust hereby created," and as a part of the same transaction executed an instrument providing for the appointment of a trustee "to take and hold title" to the real estate "from and after my death and not before," and that at the grantor's death the trustee should take possession of the property and dispose of it in the manner prescribed, held that the deed and instrument created a trust; the words "from and after my death and not before" not limiting the authority given to the trustee "to take and hold title" to the property conveyed. Lewis v. Curnutt [Iowa] 106 N. W. 914. A grantor conveyed real estate to a trustee by a warranty deed, and as a part of the same transaction delivered to the trustee an instrument providing for the appointment of a trustee to hold the property "for and in behalf of" the grantor, and authorizing the trustee to do any act for carrying out the trust which the grantor "could do if present." Held that the trustee held the property in trust for the designated beneficiaries. Id.

24, 25. Lewis v. Curnuit [Iowa] 106 N. W. 914.

26. Dawes v. Dawes, 116 Ill. App. 36.

27. Business manager of a corporation held not a trustee though so designated. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

28. So held where words "on condition" and "on further condition" were used. MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027.

29, 30. MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027.

31. See Wills, 4 C. L. 1863.

32. Bank deposit in name of depositor as trustee for another held not to create a trust. Nicklas v. Parker [N. J. Eq.] 61 A. 267. But see infra, subd. "Bank deposits in trust."

NOTE. Right to revoke: The intention to or not to create a trust is the controlling element. Kelley v. Snow, 185 Mass. 288. Many courts hold that a mere deposit in trust for another without more raises an inference of a trust. Gafney's Estate, 146 Pa. 49; Robertson v. McCarty, 54 App. Div. 103. Others hold that some further act is necessary to evidence intent. Cleveland v. Hampden Sav. Bank, 182 Mass. 110; Marcy v. Amazeen, 61 N. H. 131, 60 Am. Rep. 320. Some jurisdictions go farther and hold that it may be a trust, even though the donor intends to retain control over it till his death. Martin v. Martin, 166 N. Y. 611; Miller v. Clark, 40 F. 15. But the general rule is that reservation of the power of revocation negatives the intention to create a trust. Providence Sav. Inst. v. Carpenter, 18 R. I. 287.—From 15 Yale L. J. 42.

The confusion in the authorities is due to a failure of the courts to distinguish between the inherent revocability of a testamentary disposition and the revocability stipulated for in a declaration of trust. See Providence Inst. v. Carpenter, 18 R. I. 287; Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486.—From 6 Columbia L. R. 57.

33. Where there has been no course of dealing between the parties and securities are sent to a bank to collect and remit, the money in the hands of the bank is a trust fund. National Life Ins. Co. v. Mather, 118 Ill. App. 491. A bank to which paper is forwarded for collection holds the funds so collected as a trust fund. Holder v. Western German Bank, 136 F. 90.

34. Lewis v. Curnutt [Iowa] 106 N. W. 914.

35. Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519.

36. Bank deposit. Littig v. Vestry of Mt. Calvary Protestant Episcopal Church [Md.] 61 A. 635.

37. Wells v. German Ins. Co. [Iowa] 105 N. W. 123.

38. Evidence held to show that trust deed was obtained by undue influence. Kane v.

in whose name a contract is made for the benefit of another is a trustee of an express trust.[39] In New York it has been stated that vested remaindermen have an "irrevocable trust" in the property.[40]

Validity of purpose.[41]—In many states, statutes abolish express trusts for all but specified purposes; constructions placed on such statutes are shown in the notes.[42] The trust having for its object the acquisition of lands, its validity is governed by the law of the state where such land is situated.[43] An attempted trust being an entire and complete scheme for the control and disposition of a part of the property, the invalidity of a portion renders the entire trust void,[44] though the rule is otherwise where a valid part of the trust is severable from the remainder without destroying the purpose of the settlor.[45]

Spendthrift trusts.[46]—In order to create a spendthrift trust certain prerequisites must be observed, to wit: First. The gift to the donee must be only of the income. He must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support and an equitable interest only in the income.[47] Second. The legal title must be vested in a trustee.[48] Third. The trust must be an active one.[49] It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed to-

Quillin [Va.] 51 S. E. 353. Business relations between parties to trust deed held not fiduciary and there was no ground for setting it aside. Kelly v. Ashforth, 47 Misc. 498, 95 N. Y. S. 1004.

39. Husband having houses erected on wife's property. Rev. St. 1899, § 541 construed. Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791.

40. Sears v. Palmer, 109 App. Div. 126, 95 N. Y. S. 1023.

41. See 4 C. L. 1730.

42. **California:** Under Civ. Code § 857, subd. 3, and § 863, a trust may be created to "manage" property and to collect the income, issues and profits thereof and pay them to specified persons. In re Heywood's Estate [Cal.] 82 P. 755. A will directing the testator's executrices to sell all of the real and personal property of the testator and invest the proceeds in real estate in a certain city and to pay the income thereof to devisees for life or during determinate periods of their lives, and disposing of the remainder by direct devises is valid under Civ. Code § 857, authorizing the creation of trusts to receive the rents and profits of real estate. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315.

New York: Trust to receive income and apply it to use of beneficiary held an express trust under Laws 1896, p. 571, c. 547. Train v. Davis, 98 N. Y. S. 816. Under Laws 1896, p. 571, c. 547, a trust to pay annuities may lawfully be created; that it is called an "annuity" is immaterial. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436 and cases cited. A bequest to an executor of a sum of money to be invested and to be paid over, together with the increase thereof to testator's son, or to his wife and children, at such times and in such sums and in such manner as the executors may deem best to the interests of such son creates a valid trust. In re Wilkin [N. Y.] 75 N. E. 1105.

43. Mount v. Tuttle [N. Y.] 76 N. E. 873.

44. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779.

45. Where an estate has been vested in trustees upon several independent trusts, one of which is legal though others may not be, the estate of the trustees will be upheld to the extent necessary to enable them to execute the valid trust though avoided as to the others. Landram v. Jordan, 25 App. D. C. 291; In re Heywood's Estate [Cal.] 82 P. 755. Trust to lease property and pay rentals to designated person held severable from trust to convey after his death to his children. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138.

46. See 4 C. L. 1730.

47. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66. Where a deed conveyed the title to the grantee on condition that the land should not be liable for any debts of the grantee then existing or which he might contract during a specified number of years and provided that the grantee should have no right to convey or incumber the land except by will for a specified number of years, held no spendthrift trust. Id.

48. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66. Where a deed conveyed the title to the grantee on condition that the land should not be liable for any debts of the grantee then existing or which he might contract during a specified number of years, and provided that the grantee should have no right to convey or incumber the land except by will for a specified number of years held no spendthrift trust. Id.

49. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66.

gether in the light of the circumstances.[50] The fact that a trustee is appointed and vested with the estate, and the beneficiary is given the income only, is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred.[51] A spendthrift trust is recognized in Missouri.[52]

Establishment by parol and extrinsic evidence.[53]—In order to establish an express trust by parol, the evidence must be full, clear, and satisfactory;[54] whether the evidence is sufficient is for the jury.[55]

Bank deposits in trust.[56]—While the courts have refused to lay down any arbitrary, inflexible rule, they substantially agree that something more is necessary with respect to deposits in banks than the mere opening of the account in the name of the depositor in trust for another.[57] In New York a deposit by one person of his own money, in his own name as trustee for another, standing alone, establishes a tentative trust merely.[58]

Construction.[59]—The construction of testamentary trusts is treated elsewhere.[60] Deeds of trust are to be construed according to the intention manifested in the instruments themselves when viewed in their necessary relation to the circumstances surrounding the parties.[61] A practical construction is of great weight.[62]

50. 26 Am. & Eng. Enc. of Law [2d Ed.] p. 141. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339. A devise of a fund in trust to invest the same and pay the income semi-annually to the cestui que trust until he is 40 years old, when he is to be paid the principal if testator's wife is then living, but, if not, the interest to be paid him for ten years thereafter, at which time the principal shall become his absolutely, held a spendthrift trust. Id.

51. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339.

52. Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66.

53. See 4 C. L. 1730.

54. Austin v. Wilcoxson [Cal.] 84 P. 417. Evidence held insufficient to show trust in certain money. Id. As to whether purchase at execution sale was for the benefit of the judgment debtor. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762. In order to create a parol trust there must be either an explicit declaration of trust or circumstances which show beyond reasonable doubt that this was her intention. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. Evidence held to show that one redeeming land held in trust for original owner. Carter v. Dotson [Ky.] 92 S. W. 600.

55. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762.

56. See 4 C. L. 1731.

57. Nicklas v. Parker [N. J. Eq.] 61 A. 267. Entry on bank books of an account by L., "M. * * * Church, subject to the order of L., trustee, $500," held to constitute a trust in favor of the church. Littig v. Vestry of Mt. Calvary Protestant Episcopal Church [Md.] 61 A. 635. See post, § 17, subd. Acts of settlor.

58. In re Bulwinkle, 107 App. Div. 331, 95 N. Y. S. 176, rvg. 42 Misc. 471, 87 N. Y. S. 250. See post, § 17, subd. Acts of settlor.

59. See 4 C. L. 1731, n 93-99.

60. See Wills, 4 C. L. 1863.

61. Jacob Tome Inst. v. Shipley [Md.] 62 A. 1042; Wright's Trustees v. Wright [Va.] 51 S. E. 151. Property conveyed for joint use and benefit of trustee and her children, held children were entitled to share profits jointly and equally with trustee. Id. That an advancement by one child to another was specifically referred to held not to give it priority over other advancements. Id.; Jacob Tome Inst. v. Shipley [Md.] 62 A. 1042. Where deed of trust gave property to trustees for one child, the property to descend on his death to his children free from the trust and the deed of trust made advancements to each child a charge on his share, advancements to the fourth child were a charge only on his equitable life estate and not on the share of his children. Id. "Judge of probate" held to mean probate court though followed by the words "for the time being." Carr v. Corning [N. H.] 62 A. 168. Trust deed providing that if wife died before husband, trustees should convey property to such persons as the wife appointed by will, devisees of wife held to take a fee simple estate. Moon's Adm'x v. Highland Development Co. [Va.] 52 S. E. 209. A conveyance to a trustee in trust for one for life and after the death of the life tenant to such children as the life tenant may leave living creates a trust only for the life estate. Smith v. McWhorter, 123 Ga. 287, 51 S. E. 474. Where the assets of a corporation were transferred to another corporation for consolidation purposes, stock of the latter company to be issued therefor and delivered to the president of the first named company in trust for its stockholders, the trust thereby created, if any, was to the stockholders collectively and an action to enforce the same could be commenced only by all the stockholders, and not by one individually. Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. S. 127. Where the property is conveyed to the trustee by an unconditional deed and by an accompanying instrument it is provided that the trustee shall not come into possession or control until after the settlor's death, held to create a life estate in the settlor and a remainder in the trustee for

Active and passive trusts.[63]—A trust is active when the interposition of the trustee is necessary to carry out its purpose, with respect to immediate or remote beneficiaries.[64] A trust is passive when the trustee has no duty to perform, or when the trust serves no purpose, or none that would not be equally served without it.[65] In California an express trust to convey real property is void,[66] but a trust to lease property, collect and pay rentals to a designated person, is valid.[67]

The instrument declaring or creating the trust and the sufficiency thereof.[68]—Whether a trust exists is to be ascertained from the intention of the parties, technical terms being unnecessary.[69] The written declaration of trust need not be executed and witnessed in the form prescribed for the making of a will.[70]

Necessity of writing.[71]—As a general rule an express trust in personalty need not be in writing[72] and in a few states the same is true of realty,[73] though the

the benefit of the cestuis que trust. Lewis v. Curnutt [Iowa] 106 N. W. 914. Where deed provided that upon a sale of the property the proceeds should be divided "equally between" the grantee and each of her children share and share alike, held the grantee having four children that upon a sale each was entitled to one-fifth of the proceeds. Jones v. Day [Md.] 62 A. 364.

62. Itemized statements of receipts and disbursements of mortgaged property held to constitute a practical construction of the trust agreement. Marquam v. Ross [Or.] 83 P. 852

63. See 4 C. L. 1731.

64. Trust for married woman held active. Slater v. Rudderforth, 25 App. D. C. 497. Trustee to convey legal title when directed by the beneficiary and if the latter dies without making such direction to deliver the property to the beneficiary's children, held trust was active. Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856. Trust to sell property and reinvest and pay the grantor the income and such part of the principal as the trustee deemed proper, and reserving a power of appointment for the remainder. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413. Rents and profits to be paid beneficiary for life, trustees having power to sell land, loan money, and invest same in land, held active trust. Mason v. Mason [Ill.] 76 N. E. 692. Where trustees were to hold possession, manage and lease property and pay over the net income to beneficiaries until they deemed it advisable to sell, held an active trust. Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519. Trust to pay debts, and for that purpose mortgage and sell the property, and to raise a fund for the support and education of family held an active trust. Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815. Conveyance of property in trust to pay the grantor such part of the income and of the body of the estate for his support as the trustee might deem proper, then to pay over to the grantor's devisees or heirs, after his death, such part of the trust estate as had not been consumed by him, reserving the right to dispose of the remainder by will, failing which the property was to pass under the statutes of descent and distribution, held an active trust. Coleman v. Fidelity Trust & Safety Vault Co. [Ky.] 91 S. W. 716.

65. A trust for the "use and benefit" of certain beneficiaries held passive. Gueutal v. Gueutal, 98 N. Y. S. 1002. Trust for married woman in order to exempt property from marital rights of husband held passive, a married woman's act being in force. Smith v. McWhorter, 123 Ga. 287, 51 S. E. 474. Where upon death of life beneficiary without children trustee was to convey to beneficiary's brothers and sisters, held upon the beneficiary's death without children the title vested in his brothers and sisters without a conveyance by the trustee. Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253. A trust for the use and benefit of a corporation for the purpose of having masses and prayers said for the testatrix's soul, held passive. In re Cooney's Will, 98 N. Y. S. 676. Where an active trust was created for the life of the beneficiary and at his death the principal to be paid his heirs, held the trust, if any, as to the heirs, was a dry trust. In re West's Estate [Pa.] 63 A. 407.

66. Trust to convey to certain children after death of life tenant. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138. See 4 C. L. 1730, n. 68, 69.

67. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138.

68. See 4 C. L. 1732.

69. See ante, this section, subd. Nature and elements

70. Lewis v. Curnutt [Iowa] 106 N. W. 914

71. See 4 C. L. 1732.

72. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597; Merrit, Allen & Co. v. Torrance [Iowa] 105 N. W. 585; Witherington v. Herring [N. C.] 53 S. E. 303; Dawes v. Dawes, 116 Ill. App. 36; Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629; Rapley v. McKinney's Estate [Mich.] 107 N. W. 101. Agreement made prior to time personalty became an existing, matured fund held void. Id. Proceeds of life insurance policy. Mee v. Fay [Mass.] 76 N. E. 229. In money represented by notes. Jones v. Day [Tex. Civ. App.] 13 Tex. Ct. Rep. 308, 88 S. W. 424. A trust, in a fund on deposit, for proper burial and the saying of masses may be created by parol. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. Trusts in personalty may be created, declared or admitted verbally and may be proved by parol evidence. Austin v. Wilcoxson [Cal.] 84 P. 417. A creditor of a failing corporation took its property under

statutes of most states require that an express trust of realty be evidenced by a written declaration, some statutes requiring the creation of the trust to be a written instrument, others requiring merely a written declaration.[74] This rule does not apply, however, as against creditors seeking to set aside conveyances as in fraud of their rights.[75] A third party has no standing to invoke a statute requiring the trust to be in writing.[76] In Minnesota a trust within the meaning of the statute of frauds is an obligation arising out of a confidence reposed in a person to whom the legal title to property is conveyed that he will faithfully apply the property according to the wishes of the creator of the trust.[77]

§ 3. *Implied trusts.*[78]—The tendency of the modern decisions, both in England and in this country, is to restrict the deducing of a trust from the expression by the testator of a wish, desire or recommendation regarding the disposition of property absolutely bequeathed.[79] Words of desire, request, recommendation, or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation, or confidence imperative upon the legatee, so that he should have no option to comply or to refuse

an agreement requiring him to sell the same, pay the debts and return the balance. Nearly all of the property received by defendant was personal, and the real estate was held by him as security for his claim. Held, that though the statute prohibits the admission of parol evidence to establish a trust in realty, parol evidence proving the agreement was admissible, the implied agreement growing out of the transaction not being different from the express one. Merrit, Allen & Co. v. Torrance [Iowa] 105 N. W. 585.

73. In West Virginia. In re Henderson, 142 F. 568. In Texas parol evidence is admissible to prove that a deed absolute on its face was executed and delivered on certain trusts not reduced to writing and which the grantor promised to perform. Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193, overruling former opinion 13 Tex. Ct. Rep. 240, 88 S. W. 381.

74. Alabama: Code 1899, § 1041. Jacoby v. Funkhouser [Ala.] 40 So. 291. Any instrument in writing signed by the party at the time of its creation, or subsequently, showing the nature, subject-matter, and objects of the trust with reasonable certainty, will suffice. Howison v. Baird [Ala.] 40 So. 94. Where one partner in a mine wrote the other partner asking the latter to assign to him the lease of the mine stating that he had no interest in the mine until the writer was paid back money advanced and then he had a half interest, held to create a trust. Id.

District of Columbia. McIntosh v. Green, 25 App. D. C. 456.

Illinois: A verbal trust imposed on a conveyance by a husband and wife to their son, that the son shall convey to his mother, is merely voidable and if executed by the son before the acquisition by third persons of equities arising out of the son's apparent ownership of the property, places an unimpeachable title in the wife. Gallagher v. Northrup, 215 Ill. 563, 74 N. E. 711, rvg. 114 Ill. App. 368.

Indiana. Bonham v. Doyle [Ind. App.] 77 N. E. 859.

Iowa. Heddleston v. Stoner [Iowa] 105 N. W. 56. Oral agreement by a mortgagee holding the property under a sheriff's foreclosure deed and a quit claim deed subsequently executed by the mortgagor, to reconvey to the latter on payment of the indebtedness, is within the statute prohibiting parol, express trusts in realty. Donaldson v. Empire Loan & Investment Co. [Iowa] 106 N. W. 192.

Kentucky: Voluntary parol trust in land is void. Wormald's Guardian v. Heinze [Ky.] 90 S. W. 1064.

Michigan: A parol agreement by the vendee of a purchaser at a mortgage foreclosure sale to hold title to the land for the benefit of and in trust for the mortgagor is void. Rapley v. McKinney's Estate [Mich.] 107 N. W. 101.

Missouri: Rev. St. 1899, §§ 3416, 3417. Wife agreeing to hold property conveyed her by her husband through a third person in trust for him. Crawley v. Crafton [Mo.] 91 S. W. 1027.

Oregon: Where several parties furnished the purchase price, deed being taken in one as trustee, held the rights of the parties were not affected by the fact that the declaration of trust was not executed until afterward. Sternfels v. Watson, 139 F. 505.

75. Andrews v. Scott, 113 Ill. App. 581.

76. Suit by trustee. Mallory v. Thomas [Kan.] 81 P. 194.

77. First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485. Mortgage of property; parol evidence held admissible to show that mortgagee was to apply property to payment of mortgagor's creditors. In Minnesota a mortgage is a mere lien. G. S. 1894, § 4213 construed. Id. See also, Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

78. See 4 C. L. 1733.

79. Burnes v. Burnes [C. C. A.] 137 F. 781.

to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made;[80] (2) unless the subject-matter is certain;[81] and (3) unless the beneficiaries are clearly designated.[82] When these three conditions exist a precatory trust may be created in favor of the parties recommended.[83] The test of the first condition of a precatory trust is the clear intention of the testator to imperatively control the conduct of the party to whom the language of the will is addressed by the expression of the wish or desire, and not to commit to his discretion the exercise of the option to comply or to refuse to comply with the wish or suggestion expressed.[84] Persons appointed as executors of a will become trustees thereunder by implication of law where the will imposes upon such executors duties other and further than the mere settlement of the estate.[85]

§ 4. *Constructive trusts. A. Trusts raised where property is held or obtained by fraud.*[86]—Constructive trusts are implied not from agreement,[87] but from actual or legal fraud on the part of the alleged trustee[88] rendering the creation of a trust necessary to protect the equities of an innocent party.[89] The trust attaches only to the property acquired by fraud.[90] The breach of an express trust to hold title

80. Burnes v. Burnes [C. C. A.] 137 F. 781. Where devisees were to hold property "absolutely as their own property" and it was stated that no request should be deemed a charge or incumbrance thereupon, a request that they adopt testator's children as their heirs and devisees held not to create a trust. Id.

81, 82, 83, 84. Burnes v. Burnes [C. C. A.] 137 F. 781.

85. Nangle v. Mullanny, 113 Ill. App. 457.

86. See 4 C. L. 1733.

87. Bill alleging a conveyance in trust held insufficient to show a trust by implication of law. Jacoby v. Funkhouser [Ala.] 40 So. 291

88. One who gains a thing by fraud is an involuntary trustee for the benefit of the person who would otherwise have had it. Rev. Codes 1899, § 4263. Currie v. Look [N. D.] 106 N. W. 131. Constructive trust where one obtains title to land by fraud and without consideration. De Leonis v. Hammel [Cal. App.] 82 P. 349. Husband obtaining wife's money by fraud and purchasing land with it held a trustee. Heinrich v. Heinrich [Cal. App.] 84 P. 326. A defeasance not being executed according to law, a deed absolute cannot be considered a mortgage and the grantee declared a trustee ex maleficio unless fraud is alleged. O'Donnell v. Vandersaal [Pa.] 63 A. 60. Sureties buying and selling for their own account real estate taken as security, held liable to their principal and co-surety for the profits of the entire transaction. Page v. Harper [Kan.] 84 P. 1024. Absolute and unconditional deeds by husband to wife held not to create a trust. Williams v. Williams, 94 N. Y. S. 1128. The act of one of two parties to an option for the purchase of land in obtaining title to a second contract, made after the termination of the first one, held not a fraud on the other. Commercial Bank v. Weldon [Cal.] 84 P. 171. Plaintiff's husband and another located a mining claim, a portion of which they sold to plaintiff's grantor. The assessment work not having been performed, plaintiff relocated the claim and obtained a patent from the United States therefor. Held no trust. Helstrom v. Rodes [Utah] 83 P. 730. Where a commissioner for the sale of real estate of an infant transferred proceeds of a sale to a third person, the latter became a constructive trustee holding the amount transferred to him for the benefit of the infant, and was not merely indebted to the commissioner for the amount so transferred. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009. Where a party procures a life tenant of real estate, to whom he has paid a small consideration, and her children, who are entitled to the remainder in fee, to convey the property to another who, in turn without consideration, conveys to the first person's wife, who holds it for his benefit, the wife, even in the absence of a showing of misrepresentation, will be assumed to hold the property as trustee for the children and be required to reconvey to them. Slater v. Rudderforth, 25 App. D. C. 497. One taking a deed for land knowing that another has a valid equitable title to the same land from the same vendor is held in equity as holding the legal title for the benefit of the first purchaser and equity will compel him to pass the legal title to such first purchaser. Reel v. Reel [W. Va.] 52 S. E. 1023. Plaintiffs held entitled to land which would have descended to them from their ancestor, had he had title thereto, defendants violating their agreement in procuring patent to land to allow plaintiffs to share therein. Coons v. Clay, 27 Ky. L. R. 1139, 87 S. W. 1078. Where one, for the purpose of defrauding creditors, has title to his land taken for his benefit in the name of another who furnishes the purchase money, there is no trust, he not having been overreached. Layne v. Layne [Ky.] 90 S. W. 555.

89. Plaintiff's hands must be clean. Employes fraudulently using for their own benefit a secret process used by their employer held not trustees, their employer having procured the process by fraud. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

90. Husband's separate deed to wife of their homestead on her promising to hold same for another after her death held not to

for another will not of itself constitute fraud on which a court of equity will build up a constructive trust.[91] Under certain circumstances one to whom the property of a decedent has passed by will, and perhaps by operation of law, takes the same subject to certain expressed agreements or contracts which constitute them trustees with respect to such property.[92] A depositee is not bound to see that funds properly withdrawn are properly applied,[93] hence in the absence of participation in the fraud[94] or notice thereof,[95] the mere intermingling of trust and individual funds by a trustee is insufficient to raise a trust against the depositee.[96]

One standing in a fiduciary relation with another and obtaining an advantage thereby becomes a trustee for the latter;[97] it is essential that the alleged trustee consents to assume the relation[98] and that confidence is reposed and betrayed.[99] This

create a trust. Loomis v. Loomis [Cal.] 82 P. 679.

91. Heddieston v. Stoner [Iowa] 105 N. W. 56.

92. Rule held not to apply in suit by donee against father of donor, it not being shown that the donor's property passed to his father. Graham v. Spence [N. J. Eq.] 63 A. 344. Where devisee takes the devise with the knowledge or consent that it is intended for a third person, a constructive trust arises. Smullin v. Wharton [Neb.] 106 N. W. 577.

93. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219.

94. Defendant company, permitting its officer to deposit and check out his own funds through the medium of the company's bank account held not liable as trustee for trust funds evidenced by a certificate of deposit and draft payable to the officer as guardian and so deposited and checked out by him. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219.

95. Defendant company, permitting its officer to deposit and check out his own funds through the medium of the company's bank account, held not liable as trustee for trust funds evidenced by a certificate of deposit and draft payable to the officer as guardian and so deposited and checked out by him. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219. Notice to agent as notice to principal, see Agency, 5 C. L. 64; Corporations, 5 C. L. 764; Partnership, 6 C. L. 911, etc.

Note: In considering these facts it must be borne in mind that certificates of deposit and drafts, unlike certificates of stock in corporation or promissory notes, are mere temporary representatives of value or credits. They do not bear interest. They are negotiable paper according to the law merchant. 2 Dan. Neg. Inst. §§ 1653, 1703, 1705. In the ordinary course of business such paper is uaed like currency to pass money presently from one person to another in business transactions, not to represent money more or less permanently invested with a view of producing income. Decisions relating to the transfer by trustees of certificates of stock, promiasory notes and similar papers afford little aid in a case of this kind.—From Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219.

96. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219.

97. Where a confidential relation exists between parties and the one having the influence over the other by reason of the relation avails himself thereof to obtain an advantage over the other, he becomes a trustee in equity. Bonham v. Doyle [Ind. App.] 77 N. E. 859.

Stepchildren held not in a confidential relation **with stepfather.** Bonham v. Doyle [Ind. App.] 77 N. E. 859.

Husband held **wife's** trustee as to property obtained by him by reason of the relation. Heinrich v. Heinrich [Cal. App.] 84 P. 326.

A **conservator of the money of an incompetent** who invests the money in land and takes title in himself, creates a trust in favor of his ward, who may follow the money into the land. Verble v. Dillow, 218 Ill. 537, 75 N. E. 1046. Where an **attorney for execution creditors** purchases land at a sheriff's sale for a less sum than the amount of the claims of his clients upon which it it is being sold, a "resulting" trust arises in favor of his clients. Whitman v. O'Brien, 29 Pa. Super. Ct. 208. An **officer of a corporation,** employed on a salary to sell its stock for the benefit of the corporation must account for all the proceeds thereof, such funds being trust funds. Camden Land Co. v. Lewis [Me.] 63 A. 523. A president of a corporation issuing, without authority, treasury stock to himself is regarded as holding the stock in trust for the corporation. Id. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf. Johnson v. Hayward [Neb.] 103 N. W. 1058. Evidence held sufficient to show the existence of such confidential relations as to make the purchase by defendant inure to plaintiff's benefit so as to entitle him to a conveyance. Morrison v. Hunter [Neb.] 105 N. W. 88.

98. Merely reposing confidence in another does not of itself create a trust, nor make a trustee of one in whom confidence has been reposed. To create a fiduciary relation by contract it is necessary that the consent of the trustee to assume that relation be expressed in the contract or be derived therefrom by necessary implication. State v. State Journal Co. [Neb.] 106 N. W. 434.

99. That corporation authorized its pres-

constructive trust does not depend upon the fairness or unfairness of the unauthorized disposition which the trustee attempts to make of the trust property, nor upon the existence of an intention to create a trust by the unauthorized transaction.[1]

A constructive trust is not within the statute of frauds.[2] The same rule as to the certainty of the property embraced applies to constructive as to express trusts.[3]

Burden of proof and evidence.[4]—The proof to establish the trust must be clear and convincing,[5] a mere preponderance of the evidence is insufficient.[6]

(§ 4) *B. Trusts by equitable construction in the absence of fraud.*[7]—When necessary to prevent injustice, equity will construct a trust, though there be no fraud.[8] The obligor in a bond for a deed holds the title as trustee for the obligee.[9] In the absence of any elements of fraud, gift, or payment of antecedent indebtedness, the mere fact that property is purchased at a price known to the vendor and vendee to be less than its true value does not constitute the vendee a trustee for the benefit of the vendor's creditors for the difference between such purchase price and value.[10] Equity will not imply a greater or a different trust than the circumstances, including the understanding and purpose of the parties, render necessary to protect the interests of a beneficiary who is innocent of wrong, especially when the trustee appears to have acted with fidelity and in accordance with the mutual purpose.[11]

§ 5. *Resulting trusts.—The general rule*[12] is that where the purchase money is paid by one person and the legal[13] title to the property is conveyed to another,

ident to act for it in the purchase of property does not create a trust, he purchasing the property in his own name and with his own money. Camden Land Co. v. Lewis [Me.] 63 A. 523. Assignment of legacy by son to father held not to create a trust. Chapman v. Ferns, 118 Ill. App. 116. The mere grant of licenses or permits to cut timber on certain described lands in the public domain does not make the cutting of timber on other lands by the licensees the act of trustees ex maleficio. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —, afg. [C. C. A.] 133 F. 274.

1. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

2. Tillar v. Henry [Ark.] 88 S. W. 573. May be created by parol. In re Henderson, 142 F. 568.

3. Designation of property in a will held sufficiently certain. Smullin v. Wharton [Neb.] 106 N. W. 577, rvg. 103 N. W. 288.

4. See 4 C. L. 1735.

5. Tillar v. Henry [Ark.] 88 S. W. 573; McNutt v. McNutt [Ark.] 88 S. W. 589. Evidence held insufficient to establish a constructive trust of land purchased at a foreclosure sale. Tillar v. Henry [Ark.] 88 S. W. 573. Evidence held insufficient to show that land standing in the name of a son was held in trust for his father. Layne v. Layne [Ky.] 90 S. W. 555.

6. McNutt v. McNutt [Ark.] 88 S. W. 589. Evidence held insufficient to justify setting aside an absolute deed and establishing a trust ex maleficio. Id. Uncontradicted proof of alleged false representations by deceased persons held insufficient. De Galindo v. De Galindo. 147 Cal. 77, 81 P. 279.

7. See 4 C. L. 1735.

8. Where money was deposited in a bank under the mistaken belief of the depositor that it belonged to a partnership between himself and decedent which was subsequently judicially declared never to have existed and that the money belonged to the decedent, held the bank was an involuntary trustee under Civ. Code §§ 2223, 2224, defining an involuntary trustee as one who wrongfully detains a thing or gains the same by fraud, accident, mistake or other wrongful act. First Nat. Bank v. Wakefield [Cal.] 83 P. 1076.

9. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626. The fact that the obligor may have been allowed to collect rents beyond the amount necessary to repay advances held not to necessarily negative claim on the part of the obligors that they had become vested with the full right and equitable title to the property on the previous surrender of the note given by the obligees. Id. It is a recognized rule that under an enforceable contract for the sale of land, especially where possession is given to the vendee and the only condition precedent to the transfer of the legal title is the making of a deferred payment, the vendor's interest in the land becomes in equity that of a mortgagee rather than owner, and he thereafter holds such title in trust to secure the promised payment. In re Strang's Estate [Iowa] 106 N. W. 631.

10. Rosenheimer v. Krenn [Wis.] 106 N. W. 20. Even if the contrary were true the sale of a farm worth $16,500 for $13,000 would be insufficient to constitute the vendee a trustee. Id.

11. Where land was deeded to an attorney to aid his bringing suit to have another deed declared a mortgage. Bartholomew v. Guthrie [Kan.] 81 P. 491.

12. See 4 C. L. 1736.

13. An action to declare a resulting trust cannot be maintained against one who has made final proof for government land and received a final receipt therefor, until he has received a patent from the government con-

a trust results in favor of the person furnishing the consideration.[14] In case a legacy or devise in trust elapses there is a resulting trust in favor of those who would otherwise have been entitled to the property.[15] A trustee dying, his heirs and devisees take the property charged with a resulting trust in favor of the beneficiary.[16] The beneficiary's hands must be clean,[17] although even if the trust arises out of complainant's fraud he is nevertheless entitled to relief if he is not obliged to disclose the fraud in making out his case.[18] The trust is not within the statute of frauds.[19]

By statute in some states, resulting trusts are abolished.[20] A mortgage of real estate is not a conveyance within the meaning of such statutes.[21]

veying title to the land in question. Hamilton v. Foster [Okl.] 82 P. 821. Where respondent purchased land with the money of third persons and in their name, and took no title, legal or equitable, in himself, complainant could not maintain a bill against respondent to enforce an agreement made by him to purchase the land for complainant. Dooly v. Pinson [Ala.] 39 So. 664.

14. In re Henderson, 142 F. 568; Lyons v. Urgalones [Mass.] 75 N. E. 950; Crosby v. Henry [Ark.] 88 S. W. 949. Rev. Codes 1899, § 3386. Currie v. Look [N. D.] 106 N. W. 131; Small v. Pryor [N. J. Eq.] 61 A. 564. Husband obtaining wife's property by fraud. Heinrich v. Heinrich [Cal. App.] 84 P. 326. Stranger to the transaction in whose name a chattel mortgage was taken in order that real mortgagee might act as notary held a trustee. Wells v. German Ins. Co. [Iowa] 105 N. W. 123. Where one purchased land on foreclosure sale taking title in another, held a trust was created. Davis v. Kerr [N. C.] 53 S. E. 519. Waiving right to insurance money that it might be used to pay incumbrances on land standing in the name of another held to raise a trust. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944. A married man purchasing property taking title in a woman, other than his wife, upon the understanding that when his wife obtained a divorce he would marry such other woman, held to create a resulting trust. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933. Where one buys land under executory agreement, and afterwards, before, however, legal title is passed, verbally agrees that if another will pay the purchase money he shall have the land, and the other does so, the trust is enforceable in equity. In re Henderson, 142 F. 568. Where land is purchased by one in his own name with the money of another, a resulting trust is created by implication of law, which follows the ownership of the money. Stevenson v. Smith, 189 Mo. 447, 88 S. W. 86. A deed conveying land to complainant's mother having been stolen or lost without registration, another deed was procured by the father, after the mother's death, to be executed to himself by the heirs at law of the grantor, held that by such conveyance the father held the land under an implied trust for the benefit of complainants, subject to the father's life estate as tenant by the curtesy. Norcum v. Savage [N. C.] 53 S. E. 289. Where a decedent purchased land during his lifetime and paid the major portion of the purchase price the balance being paid by the administratrix out of the funds of the estate, a conveyance to the administratrix inured to the benefit of the heirs. Julius Locheim & Co. v. Eversole [Ky.] 93 S. W. 52. Where on an exchange of property of a wife for real estate, the husband took title in his own name, without her authority, he holds under an implied trust for the benefit of her and her heirs. Siling v. Hendrickson [Mo.] 92 S. W. 105. Where property was held in trust for grantor and heirs and after his death the grantor's widow procured the trustee to convey the property to her and she reconveyed it, both she and her grantee having notice of the trust, held a resulting trust existed in favor of the other heirs. Catterson v. Hall [Ind. App.] 76 N. E. 889. As between a wife and creditors of her husband, the wife is entitled to have a resulting trust in real estate, the title to which is in her husband, in the absence of any estoppel, to the extent of her contribution toward the purchase price, and to the extent that her money had been used in repairs, taxes, etc. Mayer v. Kane [N. J. Eq.] 61 A. 374. A deed absolute on its face with a parol defeasance is not avoided by a statute abolishing a resulting trust. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561.

15. In favor of heirs at law and next of kin of testatrix. Varick v. Smith [N. J. Eq.] 61 A. 151. A testamentary trust being void, the testator's executor holds the property upon a resulting trust for those entitled under the statute of distribution. Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346. A charitable trust being incapable of execution, a resulting trust will arise in favor of the heirs at law of the testator. Columbian University v. Taylor, 25 App. D. C. 124.

16. Cutter v. Burroughs [Me.] 61 A. 767.

17. A trust cannot result in one of two persons for the benefit of the other, if they intended and agreed to obtain land from the government unlawfully and fraudulently. Keely v. Gregg [Mont.] 82 P. 27.

18. The trustee cannot defeat the trust because it is fraudulent as to third persons. A married man purchasing property taking title in a woman not his wife and whom he was engaged to marry as soon as he was divorced, held resulting trust though title was so taken to defeat wife's claim for alimony. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933.

19. Crosby v. Henry [Ark.] 88 S. W. 949; Dooly v. Pinson [Ala.] 39 So. 664.

20. See 2 C. L. 1933.

21. Gen. St. 1901, § 7880 construed. Hanrion v. Hanrion [Kan.] 84 P. 381, citing 2 C. L. 1933, n 4.

The consideration[22] must be furnished by or on behalf of the beneficiary,[23] and, if paid by one for him, he must incur an obligation to repay so that the consideration actually moves from him at the time.[24] The consideration must be adequate and substantial though it need not be money.[25] And where a part only of the purchase money is furnished by the beneficiary, the trust is for a proportionate share of the land bought.[26]

Presumption of gift or advancement.[27]—In the absence of evidence to the contrary, where the purchaser is under a legal, or in some cases even a moral obligation to support the grantee named in the deed, equity raises a presumption that the purchase is intended as a gift or advancement;[28] but this presumption is not conclusive[29] and may be overcome by clear and satisfactory proof;[30] the burden of proof being on the claimant,[31] the question being one of intent and consequently one of fact.[32] This presumption does not extend to a case where the one furnishing the consideration is engaged to marry the grantee as soon as the former's wife obtains a divorce.[33]

Property purchased with trust funds[34] may result.[35]

22. See 4 C. L. 1737.

23. McIntosh v. Green, 25 App. D. C. 456. Principal and agent. Dougan v. Bemis [Minn.] 103 N. W. 882. No trust where father purchased land with his own funds, taking title in the name of his infant son. Chapman v. Tyson [Wash.] 81 P. 1066. So held where parties agreed to buy land but one failed to furnish his share of the purchase price. Gloeckner v. Kittlaus [Mo.] 91 S. W. 126. Father held to be actual purchaser of property, title to which was taken in himself. Bendy v. Mudford [Ark.] 88 S. W. 999. No trust results in favor of a mother in a house purchased by her son with money absolutely given by her to him to enable him to make such purchase. Kennedy v. McCann [Md.] 61 A. 625.

24. Where lender took title to land as security held a trust resulted. Dooly v. Pinson [Ala.] 39 So. 664. Where a conveyance is made as security for a loan by the grantee to a third person, who is really the purchaser, a resulting trust is established in his favor. Miller v. Miller [Md.] 61 A. 210.

25. Where the grantee of a deed delivered in escrow forfeited all his rights thereunder, a grantee, with notice from the holder of the escrow before such forfeiture, is not a trustee of a resulting trust for the benefit of the original grantee. Whitmer v. Schenk [Idaho] 83 P. 775. Where one who has, by his own labor and at his own expense discovered a mine, but has not made a location thereof under the mining laws, afterwards discloses to another the location of such mine, in consideration of and in reliance upon an agreement or understanding between them to the effect that the mine, when located, shall be their joint property and such other person locates the mine in his own name and that of a third person a resulting trust arises. Stewart v. Douglass [Cal.] 83 P. 699. In an action to enforce a resulting trust of a half-interest in mining claims, the complaint alleged that in an interview plaintiff said that, if the claims were taken up, plaintiff would be entitled to a half-interest, therein, to which defendant agreed, and that plaintiff relied on such statements and representations and in consequence of such reliance conducted defendant to the mines, showed him their situation, and in pursuance thereof defendant wrongfully located the mines in the name of himself and another, and refused to allow plaintiff any interest therein, held sufficient. Id.

26. Stevenson v. Smith, 189 Mo. 447, 88 S. W. 86. Evidence held sufficient to show that a proportionate part of the purchase money was furnished by plaintiff's intestate. Id.

27. See 4 C. L. 1737.

28. Husband and wife. Rowe v. Johnson, 33 Colo. 469, 81 P. 268; Hayes v. Horton [Or.] 81 P. 386; Johnson v. Ludwick [W. Va.] 52 S. E. 489; Siling v. Hendrickson [Mo.] 92 S. W. 105; Hanks v. Hanks, 114 Ill. App. 526; O'Hair v. O'Hair [Ark.] 88 S. W. 945. Parent and child, a deed of gift. Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277. Father and child. Seed v. Jennings [Or.] 83 P. 872. Son furnishing money, title taken in mother. Irvine v. Irvine [Ky.] 89 S. W. 193.

29. Hanks v. Hanks, 114 Ill. App. 526.

30. Hayes v. Horton [Or.] 81 P. 386; Johnson v. Ludwick [W. Va.] 52 S. E. 489. Wife held trustee of property conveyed to her by her husband. Currie v. Look [N. D.] 106 N. W. 131.

31. Johnson v. Ludwick [W. Va.] 52 S. E. 489. Husband and wife. Rowe v. Johnson, 33 Colo. 469, 81 P. 268. Parent and child. Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277. To prove that she furnished the consideration. Husband and wife. Joerger v. Joerger [Mo.] 91 S. W. 918.

32. Johnson v. Ludwick [W. Va.] 52 S. E. 489.

33. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933.

34. See 4 C. L. 1738.

35. Trustee investing trust funds in realty taking title in himself the beneficiary may enforce his claim against the realty. Case v. Collins [Ind. App.] 76 N. E. 781. Where a party to whom money is intrusted for a given purpose diverts it from that purpose

Evidence to establish[36] a resulting trust must be clear and satisfactory,[37] its sufficiency being for the jury.[38]

§ 6. *The beneficiary. His estate, rights, and interest.*[39]—The beneficiary takes merely an equitable estate[40] limited by the terms of the grant[41] and is not entitled to the possession of the property.[42] A trust deed passes an interest to the beneficiary instantly upon its execution and delivery,[43] and this is true thought the grantor reserves a power of revocation,[44] and regardless of how far in the future the enjoyment of the benefit may be deferred;[45] but the beneficiary's right to the enjoyment of the benefit being contingent, he has no leviable interest in the property.[46] The beneficiary's interest is not affected by a reconveyance by the trustee.[47] The settlor may make the trust conditional,[48] and in such case the beneficiaries take cum onere,[49] but regard will only be had to stated conditions.[50] The refusal of a trustee of an active trust to accept the trust does not vest title to the trust fund in the cestui que trust.[51] Beneficiary may sue for damages to property by the construction of a highway.[52]

and secretly uses it in the purchase of land, taking title in his own name, the injured party, on discovering the fraud, may either sue at law to recover the money misused or may sue in equity to establish a resulting trust in his favor in the land purchased. Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000. Evidence held sufficient to show that the land in controversy was purchased by the trustee with trust funds. Id.

36. See 4 C. L. 1738.

37. Reed v. Sperry [Mo.] 91 S. W. 62; Crosby v. Henry [Ark.] 88 S. W. 949; Dooly v. Pinson [Ala.] 39 So. 664; Laughlin v. Leigh, 112 Ill. App. 119. Where mother gave son money and knowingly acquiesced in his taking title in himself held other children must establish trust by clear and satisfactory proof. Kennedy v. McCann [Md.] 61 A. 625; Davis v. Kerr [N. C.] 53 S. E. 519.

38. Sufficiency of evidence: Evidence held sufficient to show resulting trust. Crosby v. Henry [Ark.] 88 S. W. 949. Evidence held insufficient to show trust between husband and wife. Joerger v. Joerger [Mo.] 91 S. W. 918; Reed v. Sperry [Mo.] 91 S. W. 62. Evidence held insufficient to show that wife furnished purchase money. Small v. Pryor [N. J. Eq.] 61 A. 564. Evidence held insufficient to establish trust as between mother and son. Kennedy v. McCann [Md.] 61 A. 625. Evidence held insufficient to establish an alleged agreement by the purchaser of lands at judicial sale to purchase and hold lands for complainant and to convey them to her on the repayment of the purchase money. Dooly v. Pinson [Ala.] 39 So. 664.

39. See 4 C. L. 1739.

40. Hayward v. Rowe [Mass.] 76 N. E. 286. Resulting trust. Laughlin v. Leigh, 112 Ill. App. 119. A beneficiary has no such interest in land as to entitle him to maintain partition under Hurd's Rev. St. 1903, c. 106, § 1, authorizing persons interested in land held in joint tenancy or tenancy in common, to compel partition by bill in chancery. Mason v. Mason, 219 Ill. 609, 76 N. E. 692.

41. Where an owner of certain land held it in trust for a city for park purposes, held entitled, prior to the acceptance and improvement thereof, to receive the rents and profits arising from its use as a ball ground and was properly chargeable with state and county taxes thereon. Elliott v. Louisville [Ky.] 90 S. W. 990.

42. Mee v. Fay [Mass.] 76 N. E. 229.

43, 44. Lewis v. Curnutt [Iowa] 106 N. W. 914.

45. Lewis v. Curnutt [Iowa] 106 N. W. 914. That a conveyance creating a trust postpones the time when it shall become effective to a date in the future does not negative the idea that a present interest is created in the beneficiary. Code § 2917 provides that an estate may be created to begin in the future. Id.

46. Where a trust deed provided that after the payment of a certain mortgage and the death of C. the property should be held in trust for R. held prior to the payment of the mortgage and death of C., R. had no leviable interest in the property. Hill v. Fulmer [Miss.] 39 So. 53.

47. Lewis v. Curnutt [Iowa] 106 N. W. 914.

48. Subject to payment of his debts. Lewis v. Curnutt [Iowa] 106 N. W. 914.

49. Lewis v. Curnutt [Iowa] 106 N. W. 914. **The payment of the income** to the beneficiary being **discretionary** with the trustee the beneficiary has no vested interest therein. Dubois v. Barbour [R. I.] 61 A. 752.

50. A written declaration of trust containing a statement of certain conditions is an admission by the trustee of the performance by the cestui que trust of all the conditions precedent to his right to an equitable interest in the property other than those stated therein. Howison v. Baird [Ala.] 40 So. 94.

51. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339.

52. Yates v. Big Sandy R. Co. [Ky.] 89 S. W. 108.

NOTE. Cestui's right to bring action for damages to realty: If the beneficiary is in possession doubtless he, like any other possessor, may have trespass for an entry by a wrongdoer. Stearns v. Palmer, 10 Metc. [Mass.] 32. But except in the rare instances where it is presumed that the legal title has been surrendered to the beneficiary, he cannot maintain ejectment. Langdon v. Sherwood, 124 U. S. 74, 31 Law. Ed. 344. See Den v. Bordine, 20 N. J. Law, 394. Neither can he bring an action for dam-

Where trustees are to be merely depositaries, receiving money and immediately paying it over, the beneficiary can sue in his own name for breach of the contract.[53]

The statute of uses[54] which is a part of the law of almost all states operates to convey the legal as well as the equitable title to the beneficiary of a passive trust.[55]

Rights between beneficiaries.[56]—Mere knowledge of and consent to an unauthorized loan by a trustee, on part of a beneficiary, in the absence of fraud or collusion or the receipt of any of the money, is not sufficient to create a liability against him to reimburse his co-beneficiaries for such loss as may occur.[57]

Income and principal.[58]—The determination of whether stock dividends are income or capital depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution.[59] In other words, when a dividend based upon the earnings of a company is declared payable in stock, and the company has the power of so distributing it and this power is validly exercised, it will be treated as income and goes to the life tenant.[60] Under what has come to be known as the "Massachusetts rule" cash dividends upon corporate stock are ordinarily to be regarded as income and stock dividends as capital,[61] but this rule is not an absolute one and will yield when necessary to accomplish justice,[62] and the burden of so showing is on the party asserting its failure to so work out.[63] Where trustees in their discretion are authorized to draw upon the principal for the purpose of present necessities of the beneficiaries in case the income to which they are entitled under the trust is insufficient therefor, amounts so appropriated should be considered part of the income.[64] Where the principal has been invested in unproductive realty, the increase in the value thereof has been held to be income.[65]

Charges on income.[66]—Whether premiums paid for bonds are chargeable to the principal or income depends upon whether it is the intent of the settlor that the

ages to realty held in trust. Davis v. Charles River Co., 11 Cush. [Mass.] 506. Where a plaintiff held real estate under a contract of purchase, on which all payments had been made, so as to entitle him to a deed, in an action for damages to the land, the court, though recognizing the necessity of joining the legal owner, allowed cestui to recover on the ground that the defendant had failed to object at the proper time. F., E. & M. V. R. Co. v. Setright, 34 Neb. 253. But the principal case, which is not rested by the court on any statute, seems to go farther than any other. It disregards the true nature of the trust relation in suggesting that the rights of the cestui are here analogous to those of a lessee.—From 19 Harv. L. R. 307.

53. Contract to support. Recknagel v. Steinway, 105 App. Div. 561, 94 N. Y. S. 119.

54. See 4 C. L. 1739.

55. See Uses, 4 C. L. 1763.

56. See 2 C. L. 1936.

57. Blair v. Hampton, 98 N. Y. S. 109.

58. See 4 C. L. 1739.

59. Safe Deposit & Trust Co. v. White [Md.] 61 A. 295.

60. Safe Deposit & Trust Co. v. White [Md.] 61 A. 295. When the profits or surplus of a corporation, which it has earned or realized in the management of its business, are paid to the stockholders by way of dividends, whether such profits or surplus has been earned before or after the creation of the trust, so long as the amount that is actually distributed is actual surplus earned, or income or profits made, by the corporation in its business and distributed as such, it is income. Robertson v. De Brulatour, 98 N. Y. S. 15. Where corporate stock was devised in trust, held on a dissolution of the corporation and sale of all its assets, the value of the plant, equipment and materials, betterments, good will, patents, patent rights, licenses, trade-marks, rights, privileges and franchises and working capital constituted principal and the invested surplus, surplus cash capital and accumulated surplus earnings constituted "dividends, issues, and profits." In re Stevens, 98 N. Y. S. 28, afg. 46 Misc. 623, 95 N. Y. S. 297.

61. Stock dividend is principal. Billings v. Warren, 216 Ill. 281, 74 N. E. 1050.

62. Boardman v. Boardman [Conn.] 62 A. 339. Cash dividend declared after merger of two banks held income where price of stock was increased thereby and capital of bank was unimpaired. Id. Where a bank consolidated with other banks, and in so doing liquidated its affairs and used a part of the assets to pay for stock in the consolidated bank, a cash dividend of the remaining assets declared from the surplus and profit and loss accounts constitutes capital. Brownell v. Anthony [Mass.] 75 N. E. 746.

63. Boardman v. Boardman [Conn.] 62 A. 339.

64. Sterling v. Ives [Conn.] 62 A. 948.

65. Billings v. Warren, 216 Ill. 281, 74 N. E. 1050.

66. See 4 C. L. 1740. See infra next subdivision, Claims enforceable against trust funds or estate.

beneficiary shall have the full income or the remainderman the entire principal.[67] Where the remainderman, by investment of the capital of the trust, derives a material benefit, consisting of a very large increase in the estate, he is not entitled to call on the life tenant to create a sinking fund from the income to make good the premium on the bonds which wears away as the bonds mature.[68] A statutory stockholder's liability cannot be enforced against the beneficiary of the earnings of such stock where the bequest to him does not constitute a segregation of such stock.[69]

Claims enforceable against trust funds or estate.[70]—Authorized permanent improvements may be made a charge on the corpus of the estate.[71] An intention of the settlor to make his debts a charge on the estate may be inferred from circumstances.[72] The expenses of the trustee in defending a suit attacking the validity of the trust should be charged against the corpus of the estate.[73]

Rights of creditors and assignees of beneficiary.[74]—The beneficiary's interest[75] is assignable absolutely or as security.[76] As the beneficiary has only the legal title the aid of a court of equity is necessary to establish such lien.[77] An assignment of one's interest in a spendthrift trust for the support of one's family is not a charging or incumbering of it.[78] In New York the beneficiary of a trust to receive rents and profits cannot assign future income.[79] A probate or orphans' court being of limited jurisdiction, a provision allowing the beneficiary to sell the trust property with the consent and approbation of such court is void.[80] The constructions placed on specific assignments are shown in the notes.[81] Creditors of the beneficiary may, in equity, reach such of his interest as has become vested.[82] Whether a particular creditor of

67. In re Stevens, 98 N. Y. S. 28, afg. 46 Misc. 623, 95 N. Y. S. 297. Where specific securities are devised, with a direction to pay the income and interest of those securities, the beneficiary is entitled to all the interest, even though the payment of all the interest would tend to reduce the selling value of the securities. Robertson v. De Brulatour, 98 N. Y. S. 15.

68. In re Stevens, 98 N. Y. S. 28, afg. 46 Misc. 623, 95 N. Y. S. 297.

69. Potter v. Mortimer, 114 Ill. App. 422.

70. See 4 C. L. 1740. See ante prior subdivision, Charges on income.

71. Farm conveyed in trust, trustee having power to sell with beneficiary's consent held trustee had power to convey with beneficiary's consent, a part of the tract as compensation for the services of the grantee in securing the extension of a city park making the farm available for building purposes and greatly increasing its value. Smith v. Nones [Ky.] 89 S. W. 153.

72. Where the owner of a fund in a bank gave the bank written instructions to add defendant's name to her book without any restrictions to enable him to use and pay out the money she then had, or might have in the future, the transfer being intended for the benefit of third persons, the gift was subject to proper charges against it for the benefit of the donor, such as physician's services and funeral expenses and the donee is not liable to the beneficiaries for the amount so used. Mann v. Shrive, 97 N. Y. S. 688.

73. Steinway v. Steinway, 98 N. Y. S. 99.

74. See 4 C. L. 1740.

75. Where a deed creating a spendthrift trust gives the body of the estate at the death of the beneficiary to his next of kin, without any right of disposition in the beneficiary, the latter cannot assign to his wife any interest in the income of the trust fund which may accrue and be payable after his death. Wright v. Leupp [N. J. Eq.] 62 A. 464.

76. Mortgage held to create an equitable lien. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413.

77. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413. For the practice and procedure in enforcing such lien, see Foreclosure of Mortgages on Land, 5 C. L. 1441; and Liens, 6 C. L. 451.

78. Wright v. Leupp [N. J. Eq.] 62 A. 464.

79. Under Laws 1896, p. 572, c. 547, § 83, and Laws 1897, p. 508, c. 417, § 3. Though the trust is not a spendthrift trust. The rule applies whether the trust is in real or personal property. Stringer v. Barker, 110 App. Div. 37, 96 N. Y. S. 1052.

80. Thom v. Thom [Md.] 61 A. 193.

81. An assignment by a husband to his wife of one-half of the income of a trust fund as it may accrue and become payable, which provides that the wife shall support and maintain herself and the children of the parties without charge to the husband, and which makes no mention of the personal representatives of the wife, does not give the children any interest in the trust after the death of the wife. Wright v. Leupp [N. J. Eq.] 62 A. 464.

82. Beneficial interest may be reached in equity and appropriated to the payment of claims of judgment creditors. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413. Creditors cannot reach income in which the beneficiary has no vested interest. So held where payment of income was discretionary with trustee. Dubois v. Barbour [R. I.] 61 A.

the trustee is entitled to a preference, owing to peculiar circumstances, depends upon equitable rules and principles.[83] That one of a preferred class of creditors institutes suit against the trustee as such to enforce his claim does not entitle him to priority over the other creditors of the same class,[84] except, perhaps, for taxed costs and reasonable counsel fees.[85]

Representation of beneficiary by trustee.[86]—In the management of the estate the trustee is the representative of all the beneficiaries who take through him,[87] hence, as a general rule, the latter are not necessary parties defendant[88] or plaintiff.[89] As between the trust estate and a stranger, the statute of limitations runs as in other cases, and if the trustee is barred the cestui que trust is equally barred,[90] though this rule does not apply where the legal title to the land is in infant heirs of the trustee.[91]

§ 7. *The trustee.*[92] *Judicial appointment.*[93]—Suits for the appointment of trustees are equitable,[94] and any person interested absolutely or contingently in the funds in the hands of a trustee has sufficient interest in the fund to qualify him to petition for the appointment of a proper trustee or the removal of an improper one.[95] The suitability of a trustee is a fact that must be proved in every case before the court is authorized to make the appointment,[96] and consequently the fact that the settlor makes such approval necessary does not render the trust invalid.[97] Order of appointment cannot be made without notice to beneficiaries and remaindermen,[98] though lack of such notice may be waived;[99] but it has been held that failure to give such notice is not ground for dismissing the petition,[1] but the court should order the parties interested to be brought into court and then pass upon the merits of the application.[2]

In New York the statutory provisions for the appointment of a trustee of an express trust apply also to trustees of powers in trust,[3] and the supreme court has inherent power to execute a power in trust, and, in the absence of a trustee, it may take upon itself its execution.[4]

Who may be trustee.[5]—As a general rule a beneficiary of a trust cannot at the same time be the trustee thereof;[6] but where other trust duties are devolved upon

752. Creditors cannot reach income which does not vest in a cestui que trust until payment to him. Kelsey v. Webb, 94 App. Div. 571, 88 N. Y. S. 4.

83, 84, 85. Darling Bros. Co. v. Babcock [R. I.] 61 A. 46.

86. See 4 C. L. 1741.

87. Having the entire legal title, his acts, whether of an affirmative or neglectful character, are binding upon those who have interests in the estate in remainder. Mott v. Eno, 181 N. Y. 346, 74 N. E. 229. See, also, City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

88. See 4 C. L. 1741, n. 30 See, also, City of Austin v. Cahill [Tex.] 13 Tex. Ct. Rep. 321, 88 S. W. 542.

89. Trustee of express trust may sue in his own name without joining beneficiary. Rev. St. 1899, § 541 Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791.

90. Waterman Hall v. Waterman [Ill.] 77 N. E. 142. Where a right of entry is barred and rights of action lost by a trustee through adverse occupation, the cestui que trust is also concluded. Cameron v. Hicks [N. C.] 53 S. E. 728. Where the right of a trustee holding the legal title to the estate is barred by limitations all equitable estates dependent on the legal estate in the trustee are also barred, though the beneficiary in the trust is an infant. Watkins v. Pfeiffer [Ky.] 92 S. W. 562.

91. Cameron v. Hicks [N. C.] 53 S. E. 728.

92. See 4 C. L. 1741.

93. See 2 C. L. 1938.

94. So held though suit was also for the construction of a will. Hiles v. Garrison [N. J. Eq.] 62 A. 865.

95. In re Bartell's Will, 109 App. Div. 586, 96 N. Y. S. 579.

96, 97. Carr v. Corning [N. H.] 62 A. 168.

98. In re Wetmore, 98 N. Y. S. 952. Even if supreme court has inherent power to so do, the practice is bad. In re Bartell's Will, 109 App. Div. 586, 96 N. Y. S. 579.

99. Appointment of referee to take proof confirmed where remaindermen were subsequently made parties and asked that it be confirmed. In re Wetmore, 98 N. Y. S. 952.

1, 2. In re Bartell's Will, 109 App. Div. 586, 96 N. Y. S. 579.

3. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

4. Power to sell and distribute. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

5. See 4 C. L. 1741.

6. In re Bostwick, 110 App. Div. 329, 97 N. Y. S. 76; Jacoby v. Jacoby, 94 N. Y. S. 260.

trustees than those which merely relate to the performance of trusts for the benefit of a beneficiary, the beneficiary can act as trustee for the others interested in the estate.[7] The grantor may create himself trustee.[8] The statutes of California authorize the creation of trusts to receive the rents and profits of realty and pay or apply them to the use of any person for himself and family.[9] An alien's incapacity to hold lands being removed he may become a trustee.[10]

Qualification and acceptance of trust.[11]—Though a mere agreement to undertake a trust in the future without compensation is not obligatory, yet where the donee of a fund accepts it for the benefit of third persons, his undertaking will be sustained.[12]

De facto trustees.—The trustee dying and the guardian of a sole beneficiary taking up the office without appointment, he becomes a de facto trustee.[13]

Succession and judicial appointment of new trustee.[14]—Where one of two trustees dies, resigns or renounces the trust, the entire trust devolves upon the remaining trustee and so long as he continues to act there is no vacancy.[15] The declaration of trust not placing the power of appointment elsewhere, a court of equity will, in a proper case, upon due application, fill a vacancy.[16]

Bonds.[17]—As a general rule a trustee is required to give a bond.[18]

Resignation.[19]

Removal.[20]—Equity, by virtue of its general jurisdiction over the administration of trusts, has power to remove trustees for cause.[21] While a court of equity is reluctant to change the number of trustees from that designated by the creator of the trust, yet it may do so when, by reason of changed conditions in the estate, the

7. Life beneficiary held competent to act as trustee where personal property was to be held and preserved for the benefit of remaindermen. Robertson v. De Brulatour, 98 N. Y. S. 15.

8. So held where grantor of lands agreed to hold certain property as a park. Elliott v. Louisville [Ky.] 90 S. W. 990.

9. A provision for the payment of income to testator's grandchild is not void because testator's daughter, the grandchild's guardian, is made trustee. Civ. Code § 857, construed. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315.

10. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

11. See 4 C. L. 1741.

12. Mann v. Shrive, 97 N. Y. S. 688.

13. Cutter v. Burroughs [Me.] 61 A. 767.

14. See 4 C. L. 1741.

15, 16. Nangle v. Mullanny, 113 Ill. App. 457.

17. See 4 C. L. 1742.

18. Code Pub. Gen. Laws 1904, art. 16, § 221, providing for the filing of a bond before title passes has no application to a testamentary trust. Philbin v. Thurn [Md.] 63 A. 571.

19. See 2 C. L. 1939.

20. See 4 C. L. 1743.

21. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660. A trustee will not be removed merely because he **failed to keep a separate bank account** until some time after his appointment, where it appears that the income of the estate was small and was promptly paid over, that an account had been stated by the trustee and confirmed by the court, that the disbursement of the income had been approved by the cestui que trust, and that the security of the fund had been in no way impeached. Strickler's Estate, 28 Pa. Super. Ct. 455. The Act of June 3, 1893, P. L. 273, which gives to the surety of the trustee the right to compel the trustee to file a statement exhibiting the manner of investing the trust funds and which provides for the removal of the trustee in case of the irregular or improper investment of the trust funds, cannot be extended so as to give the surety the right to demand the removal of the trustee because the latter had **failed to keep proper books and render full accounts,** had invested trust funds in his own name and mingled them with his own funds and was wasting and mismanaging the estate. Id. The fact that a solvent trustee with ample bond **deposited part of the trust funds in a bank in his individual name** when his account was overdrawn and **did not keep any separate books of account** of his trusteeship, and the fact that his loaning of the fund was not done in accordance with approved business methods did not make it incumbent on the court to remove him, especially where the trustee considered that he was liable for interest on the whole sum received. Lowe v. Montgomery [Mo. App.] 92 S. W. 916. A trustee holding stock in a bank as a part of the trust estate **aided in the organization of a new and rival bank** and became a stockholder thereof. He was a large stockholder in the former bank and continued to remain so. Held that his acts did not show an intent to injuriously affect the property of the former bank and did not justify his removal. Id.

number designated by the creator has become excessive or insufficient.[22] Where an executor is appointed by will and he is by implication of law also trustee thereunder, a revocation of his appointment as executor operates, likewise, as a revocation of his appointment as trustee.[23] A bill for a removal must show the necessity thereof.[24]

§ 8. *Execution and administration of the trust. A. Nature of trustee's title and establishment of estate.*[25]—The trustee of an active trust[26] takes the legal title[27] to such estate as is necessary for the performance of the trust,[28] the unnecessary portion of an estate given a trustee becoming executed by the statute of uses.[29] The extent of the trustee's title is largely dependent upon the terms of the instrument creating the trust.[30] Every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors, and can be transferred or devised by him subject to the execution of the trust.[31] A trustee may sue a corporation to recover dividends declared upon corporate stock which he holds in trust,[32] but he does not represent legal estates in the trust property.[33] In the absence of substitutionary provisions in the instrument of creation, the trustee's title is inheritable and passes to his heirs at law, who hold as trustees until the court appoints a successor.[34] The trustee's estate terminates upon the completion of the trust.[35] Where a will devises land in trust for the purposes of a sale and division among the trustees and other beneficiaries, the trustees take a joint title, and their separate interests as beneficiaries are not merged with their interest as trustees.[36] The trustee does not hold adversely to beneficiary,[37] and in ejectment by a trustee his legal title will not prevail against the cestui que trust in lawful possession under the trust.[38] Except as to personal discretionary powers,[39] succeeding trustees are vested with all the rights and clothed with all the powers of the original trustees.[40] A substituted trustee becomes in equity the assignee of any rights of action possessed by the cestuis que

22. Barker v. Barker [N. H.] 62 A. 166.
23. Nangle v. Mullanny, 113 Ill. App. 457.
24. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.
25. See 4 C. L. 1743.
26. Passive trusts, see Uses, 4 C. L. 1763.
27. Hayward v. Rowe [Mass.] 76 N. E. 286; In re McKay, 143 F. 671; Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816. Represents legal interests. Mott v. Eno, 181 N. Y. 346, 74 N. E. 229. Resulting trust. Laughlin v. Leigh, 112 Ill. App. 119. A trustee with power to invest money and pay over the increase is entitled to receive the income from the investment, and thus take the legal title. In re Wilkin [N. Y.] 75 N. E. 1105.
28. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889; In re L'Hommedieu, 138 F. 606; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138. The estate of a trustee in real estate is commensurate with the powers conferred by the trust and the purposes to be effected by it. Olcott v. Tope, 115 Ill. App. 121, afd. 213 Ill. 124. Whenever a trust is declared whether there be or be not any technical words of conveyance, the trustee is held to be vested with whatever title is necessary to enable him to carry out the provisions of the trust. Lewis v. Curnutt [Iowa] 106 N. W. 914.
29. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889. See Uses, 4 C. L. 1763.
30. In a deed of trust executed prior to the act of 1879 (Code 1883, § 1280), conveying to S., trustee, or his survivors, land in trust for H. during his life, and, in the event of H. not leaving issue, empowering the trustee to make title to the premises to the heirs of G., but, in case of issue of H., then the trustee to make title to the heirs of H., the word "heirs" is not used in connection with the trustee's estate. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889. Construction of wills see Wills, 4 C. L. 1863.
31. Civ. Code §§ 864-866. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138. Trust to lease and pay rentals to one for life held to leave a legal estate in the settlor. Id.
32. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52, rvg. 103 App. Div. 453, 93 N. Y. S. 128.
33. Estates in remainder. Smith v. McWhorter, 123 Ga. 287, 51 S. E. 474.
34. Cameron v. Hicks [N. C.] 53 S. E. 728; Cutter v. Burroughs [Me.] 61 A. 767. An estate in fee simple being vested in the trustee. Delleney v. Winnsboro Granite Co. [S. C.] 51 S. E. 531.
35. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315.
36. Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519.
37. Elliott v. Louisville [Ky.] 90 S. W. 990.
38. Bucher v. Overlees [Ind. T.] 89 S. W. 1021.
39. See infra next subd.
40. Title to lease. Missouri & Ill. Coal Co. v. Reichert, 119 Ill. App. 148.

trustent for injuries done to the trust property before the substituted trustee's appointment.[41]

Receipt and establishment of estate.[42]—So far as their legal effect is concerned, the characteristic distinction between a will and a trust is that while the former becomes operative only at the death of the testator a trust passes an interest to the trustee and beneficiary instantly upon the execution and delivery of the writing by which it is created.[43]

(§ 8) *B. Discretion and general powers of trustees and judicial control.*[44]—The trustee's powers are not limited to those expressly conferred,[45] but extend to all means which are reasonable and proper to render general directions effectual,[46] and to all acts done in good faith for the manifest good of the estate.[47] Equity has jurisdiction upon a proper showing to enlarge the powers conferred upon trustees by the declaration of trust, but such enlargement will not be made except from necessity and then no further than the circumstances of the particular case urgently require.[48] Limitations on the powers of trustees are for the benefit of the cestui que trust and the preservation of the estate.[49] If trustees undertake to administer the trust without seeking the aid and protection of any court, they may exercise the discretion and execute the powers conferred on them by the instrument creating the trust, and equity will not interfere with them, so long as they act in good faith and with fair discretion.[50] But if, upon their application or that of their cestuis que trust with their assent, a court of equity, by an appropriate decree, assumes jurisdiction of the trusts and directs them to be executed under its direction and supervision, the authorities agree that the situation of the trustees is thereby changed so that they must thereafter secure the sanction or ratification of the supervising court for the successive steps of their administration of the trusts,[51] such as the selection of a depository for current cash balance.[52] And the orders of the supervising court as to discretionary matters are not subject to appeal.[53] While in the absence of arbitrary wrongdoing the court will not interfere with an exercise of discretion by the trustee,[54] still a trustee failing to exercise discretionary powers so as to accomplish the purpose of the trust, a court of equity will intervene.[55] A trustee cannot justify his failure to perform the duties of the trust by showing that no one asked him to perform them.[56] A power being coupled with active trust duties, it is imperative,[57] and the courts will not allow such a trust to fail of execution when by any possible means it can be executed by the court itself; and the court will act retrospectively and in the face of the greatest difficulties to accomplish this object.[58] There being several trustees, one of them has no power to act for them all.[59] A trustee has authority to pray for an

41. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.
42. See 4 C. L. 1743.
43. Lewis v. Curnutt [Iowa] 106 N. W. 914.
44. See 4 C. L. 1743.
45. Fidelity Trust Co. v. Hawkins [Ky.] 90 S. W. 249.
46. Kipp v. O'Melveny [Cal. App.] 83 P. 264.
47. Fidelity Trust Co. v. Hawkins [Ky.] 90 S. W. 249; 27 Am. & Eng. Ency. of Law [1st Ed.] 136.
48. Denegre v. Walker, 114 Ill. App. 234.
49. Fidelity Trust Co. v. Hawkins [Ky.] 90 S. W. 249.
50, 51, 52. Gottschalk v. Mercantile Trust & Deposit Co. [Md.] 62 A. 810.
53. So held as to determination of depositary of current cash balance. Gottschalk v. Mercantile Trust & Deposit Co. [Md.] 62 A. 810.
54. Discretion to pay income to life tenant or remaindermen. Dubois v. Barbour [R. I.] 61 A. 752.
55. In re Van Decar, 49 Misc. 39, 98 N. Y. S. 309. Where income was to be expended in behalf of beneficiary in the discretion of the trustee and beneficiary was sick, held entitled to entire income. Id.
56. Cotton v. Rand [Tex. Civ. App.] 92 S. W. 266.
57. Power to sell, and educate minor. Cutter v. Burroughs [Me.] 61 A. 767.
58. Cutter v. Burroughs [Me.] 61 A. 767.
59. Trustees who had loaned trust funds were entitled to recover the same from the borrower, although the latter had, without

assignment of dower.[60] He has no right to pass upon questions in which he is directly interested as beneficiary and involving an exercise of discretion.[61] Unless special confidence is reposed in the trustee as an individual,[62] discretionary powers pass to a substituted trustee.[63]

Judicial instructions.[64]—A trustee is entitled to the protection of a court of equity in executing the trust, and when real and serious doubts confront him as to his duty, is entitled to the advice of the court to guide him.[65] In instructing a trustee it is not proper for the court to pass upon an objection to parties.[66]

(§ 8) *C. Management of estate and investments.*[67]—The trustee is only required to exercise the care of an ordinarily prudent man.[68] It is his duty to invest the fund in safe interest-bearing securities, and not put it at risk by investment in a business of uncertain and precarious character.[69] Where the same persons are the executors and trustees of an estate they may act as trustees though they have not been discharged as executors and they have not formally transferred the estate from themselves as executors to themselves as trustees.[70] A trustee borrowing money on behalf

negligence on his part, repaid the loan before it was due to a single trustee by a check payable to that trustee alone, and had received from him a forged satisfaction piece of the mortgage securing the loan, where the trustee to whom payment was made embezzled the money paid to him. Vohmann v. Michel, 109 App. Div. 659, 96 N. Y. S. 309.

60. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814.

61. That removal would deny him privilege of so doing is no ground for retaining him. Barker v. Barker [N. H.] 62 A. 166.

62. Benedict v. Dunning, 110 App. Div. 303. 97 N. Y. S. 259. Power of sale as trustee deemed best. Hegeman's Ex'rs v. Roome, [N. J. Eq.] 62 A. 392.

NOTE. Trusts upon personal confidence: It is now a well settled rule of equity, that a trust will not be allowed to fail for want of a trustee. Perry [5th Ed.] § 267a and cases cited; Ames Cases Trusts, p. 230, n. 2. Even where a trust deed has failed to name a trustee, the court has inherent jurisdiction to appoint one. Dodkin v. Brunt, L. R. 6 Eq. 580; Ames, p. 226, and cases cited. In every trust, certain general powers, although not expressly mentioned in the instrument creating the trust, are conferred upon the trustees by implication, for the successful execution of the trust, Perry, § 473; e. g., the power to reserve trust lands, Lerow v. Wilmarth, 9 Allen [Mass.] 382, to make repairs, Sohier v. Eldredge, 103 Mass. 345, or to compromise debts due to the trust estate. Forshaw v. Higginson, 8 De Gex, M. & G. 827. Although these powers involve the exercise of discretion, they attach to the office, being connected with the management of the trust estate, and pass with the title to a subsequent trustee. They are to be distinguished from such special powers as lie in the personal confidence of the trustee named by the creator of the trust. The question is one of intention, to be ascertained from the nature and objects of the trust. Trust Co. v. Sutro, 75 Md. 361, 365. The doctrine is founded on reason and ancient authority that a discretion vested in the original trustee cannot be exercised by the court or by a new trustee; for example, a discretion to settle a fund upon marriage with the trustee's consent (Clarke v. Parker, 19 Ves. 1), or to pay over the income when the cestui's conduct should be satisfactory to the trustees (Walker v. Walker, 5 Madd. 424. See, also, Cochran v. Paris, 11 Grat. [Va.] 348, 356), or to pay an annuity unless circumstances render it inexpedient (French v. Davidson, 3 Madd. 396), or to increase an annuity in the trustees' discretion (Hull v. Hull, 24 N. Y. 647). For a similar reason a discretionary "power" not coupled with a duty, can be exercised only by the donee of the power. Coleman v. Beach, 97 N. Y. 545. A trust solely upon personal discretion terminates upon the death of the trustee. Gambell v. Trippe, 75 Md. 252, 32 Am. St. Rep. 388; Security Co. v. Snow, 70 Conn. 288, 66 Am. St. Rep. 107. Unless the discretion is expressly delegated, as e. g., to trustees "or their successors" (Lorings v. Marsh, 6 Wall. [U. S.] 337, 353, 18 Law. Ed. 802), or to "whoever shall execute" a will (Royce v. Adams, 123 N. Y. 402), or to the "trustees for the time being" (Bartley v. Bartley, 3 Drew. 384). So a trust to pay so much of the income and principal as the trustee should deem expedient, if ever, terminates upon the trustee's death, and there being no intention that the cestui should of necessity ultimately receive the entire fund, and no gift over, the testator died intestate as to the trust fund. Benedict v. Dunning, 110 App. Div. [N. Y.] 303; Hadley v. Hadley, 147 Ind. 423 in accord.—From 6 Columbia L. R. 348.

63. In re Wilkin [N. Y.] 75 N. E. 1105. As to amount necessary for education and maintenance of children of testator. Robinson v. Bonaparte [Md.] 61 A. 212.

64. See 4 C. L. 1744.

65. Stephenson v. Norris [Wis.] 107 N. W. 343.

66. Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71.

67. See 4 C. L. 1744.

68. Winder v. Nock [Va.] 52 S. E. 561.

69. Buying and running a farm held improper. Wieters v. Hart [N. J. Eq.] 63 A. 241.

70. Where will made same persons ex-

of himself and beneficiaries is a "borrower" or "debtor" within the meaning of usury laws.[71] Adding the word "trustee" to one's name in signing a contract without designating the beneficiary renders one liable personally and as trustee.[72]

Delivery of control to beneficiary.[73]—Where the trustees in accordance with the provisions of the declaration of trust convey to part of the beneficiaries their undivided interests, the trustees and such beneficiaries hold as tenants in common,[74] and thereafter the trustees or either of the grantees are entitled to ask for partition.[75]

Estoppel of beneficiaries to question acts.[76]—Free and voluntary[77] acquiescence of a beneficiary in the wrongful application of a trust fund releases the trustee and his bondsmen from liability to the beneficiary.[78] Except in the case of fraud or breach of trust,[78] the beneficiary cannot accept and retain the benefit of the trusteeship and at the same time repudiate the powers and title under which it was held and acts done thereunder.[80]

(§ 8) *D. Creation of charges, mortgage and lease of estate.*[81]—Advances made to meet the expenses of the trust are in the nature of debts of the trustee,[82] and the latter has implied power to pay the same.[83]

Power to lease.[84]—The exercise of a power to lease must be reasonable.[85]

Mortgages.[86]—As a general rule where necessary for the preservation of the estate the trustee may mortgage the property.[87] The power is frequently expressly given,[88] and a power to "take charge of, manage and control" property includes power to mortgage,[89] but not so as to a power to sell and convey real estate.[90] A trustee being authorized to execute mortgages to pay off incumbrances, such mortgages may

ecutors and trustees, and residuary estate was devised to trustees, held a loan of the residuary estate was the act of the parties as trustees. Vohmann v. Michel, 109 App. Div. 659, 96 N. Y. S. 309.

71. Earle v. Owings [S. C.] 51 S. E. 980.

72. Kidney v. Beemer, 27 Pa. Super. Ct. 558. See Contracts, 5 C. L. 664; Negotiable Instruments, 6 C. L. 777, etc.

73. See 4 C. L. 1745.

74, 75. Paine v. Sackett [R. I.] 61 A. 753.

76. See 4 C. L. 1745.

77. Where will and judgment of beneficiary were dominated by the trustee held consent by beneficiary did not work an estoppel as to improper investments. Wieters v. Hart [N. J. Eq.] 63 A. 241.

78. Estate of Koehnken, 6 Ohio C. C. (N. S.) 359.

79. Kessler & Co. v. Ensley Co., 141 F. 130.

80. Corporation deeding property to trustees to pay debts, allowing trustees to sell property, and with full knowledge of the sales accepting deeds to the remainder of the property cannot deny the title or authority of the trustees. Kessler & Co. v. Ensley Co., 141 F. 130.

81. See 4 C. L. 1745.

82, 83. Bartholomew v. Guthrie [Kan.] 81 P. 491.

84. See 4 C. L. 1745.

85. Ninety-nine year lease held valid, though persons not in esse might upon the happening of certain contingencies become interested in the premises. Denegre v. Walker, 114 Ill. App. 234.

86. See 4 C. L. 1746.

87. Where trustees were authorized to do all things necessary for the proper care of the property and given all necessary powers to accomplish the objects of the trust, held they had authority to mortgage the trust estate to secure money advanced to make a settlement with contestants of the will creating the trust, where an adjudication of invalidity would result in the beneficiaries of the trust receiving nothing. Fidelity Trust Co. v. Hawkins [Ky.] 90 S. W. 249. Where land subject to a judgment lien is conveyed to one in trust for herself and another and the trustee mortgages the land to secure money to redeem from an execution sale under the judgment, the interest of the beneficiary other than the trustee is subject to its proportionate share of the mortgage. Hentig v. Williams [Cal. App.] 82 P. 546.

88. Trust deed authorizing trustee to borrow money, execute notes and mortgage property to pay incumbrances, held he had power to mortgage part of the property direct to an incumbrancer to pay off the latter's incumbrance. Kipp v. O'Melveny [Cal. App.] 83 P. 264.

89. Ely v. Pike, 115 Ill. App. 284.

90. Mansfield v. Wardlow [Tex. Civ. App.] 14 Tex. Ct. Rep. 928, 91 S. W. 859. A holder of land certificates executed an instrument which recited that a third person had furnished money with which to buy the land and which stipulated that the patents should issue in the name of the holder, and that when the land had been sold on terms acceptable to the third person the holder should execute a deed and deliver it to the third person, who should collect the money on the sale and reimburse himself for the amount advanced, held not entitled to mortgage the land when the patents were received. Id.

be made direct to the incumbrancers.[91] An unauthorized mortgage given by a trustee is valid as to his individual interest in the property.[92]

Application of proceeds.[93]—Where the creator of the trust confides the application of the money to the discretion of the trustee, the mortgagee need not see to its application.[94]

(§ 8) *E. Sale of trust property.*[95]—The right of the trustee to sell the property depends upon the intention of the settlor,[96] the legal presumption being against the power.[97] A power to divide has been held to include a power to sell.[98] If a trustee being clothed with a power of conveying the legal title by the appointment and direction of the cestuis que trust, dies before its execution, the power is gone.[99] A mode of alienation being prescribed in the instrument it must be followed.[1] Where the consent of one of the beneficiaries of the trust to the exercise of a power of sale by the trustee is required, it is not necessary that such person should join in the deed by the trustee or endorse thereon a written approval of the sale and conveyance; but such consent may be evidenced by a written assent to the sale entered upon an application for leave to sell presented by the trustee to the court.[2] A will requiring a majority of testator's children to sign a request to sell, neither the trustee nor the party to whom the sale is to be made, though children of testator, should be counted.[3] In New York sales made by the trustees qualifying are valid.[4] The trustee should not sell without notice to all the beneficiaries.[5] A deed of bargain and sale made by a trustee as such, who has no interest in the premises conveyed otherwise than as trustee, will serve to execute a general power of private sale conferred upon him by the trust deed though the deed makes no reference to such power.[6] Where the trustees are also executors of decedent's property, and in their capacity as trustees have an absolute power of sale, the fact that they signed the deed as executors, instead of trustees, does not invalidate the sale.[7] While ordinarily a court of equity will give its sanction to a sale made by a trustee in the exercise of a discretionary power conferred under a deed or will,[8] still such sale must be for the advantage and interest of

91. Kipp v. O'Melveny [Cal. App.] 83 P. 264.

92. Sternfels v. Watson, 139 F. 505.

93. See 2 C. L. 1945, n. 9.

94. Ely v. Pike, 115 Ill. App. 284.

95. See 4 C. L. 1746. Sales to trustees or to others for him see post, § 11, Personal dealings with estate.

96. Dodson v. Ashley [Md.] 61 A. 299. Power to sell and reinvest held to empower trustees to sell the property for the purpose of reinvestment, subject to the limitations of the trust and the approval of the court under whose jurisdiction the estate was being administered. Bertron v. Polk [Md.] 61 A. 616.

97. Sternfels v. Watson, 139 F. 505.

98. Power to divide held to give power to sell, though subsequent provisions directed trustees to receive rents, profits and income and under certain contingencies convey real estate, if any, to certain persons. Varick v. Smith [N. J. Eq.] 61 A. 151. Trust to manage estate until youngest child came of age and then divide it, held power of sale gave right to sell, after youngest child became of age, in order to bring about a division. Dodson v. Ashley [Md.] 61 A. 299.

99. Cameron v. Hicks [N. C.] 53 S. E. 728.

1. Where there is a designation of the conditions upon which a trust estate is to be sold, the trustee is not authorized to convey any title except in the manner provided in the trust instrument. Mansfield v. Wardlow [Tex. Civ. App.] 14 Tex. Ct. Rep. 928, 91 S. W. 859. Where life beneficiary was married woman and deed provided that if during her life "she should desire any or all of said property conveyed in fee or otherwise, to convey the same according to her wishes, she joining in said conveyance as if she were feme sole, though her husband may be living, held deed by herself and husband after death of trustee was ineffectual to convey title. Cameron v. Hicks [N. C.] 53 S. E. 728.

2. Lee v. Giles [Ga.] 52 S. E. 806.

3. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

4. Under Code Civ. Proc. § 2642, providing that sales made by the trustees qualifying shall be valid, only one of three trustees qualifying he may sell the property though the will provides that the act of a majority of the three trustees in making conveyances should be binding. Draper v. Montgomery, 108 App. Div. 63, 95 N. Y. S. 904.

5. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856.

6. Lee v. Giles [Ga.] 52 S. E. 806.

7. Philbin v. Thurn [Md.] 63 A. 571.

8. Bertron v. Polk [Md.] 61 A. 616.

all the parties under the trust and the discretion reposed in the trustee must be fairly and reasonably exercised,[9] and a beneficiary cannot have a sale set aside in the absence of a showing of fraud or collusion, or that the property did not sell for its true value.[10] One purchasing at an unauthorized sale with knowledge of such fact holds the property subject to the trust.[11]

Application of proceeds.[12]—The trust attaches to the proceeds of the sale.[13] Purchasers under a discretionary power of sale are not required to see that the proceeds are invested according to the trust.[14]

(§ 8) *F. Payments or surrender to beneficiary.*[15]—Payments by the trustee are frequently made discretionary with him and if made in good faith will be sustained.[16] Where trustees are vested with discretionary powers as to the amount to be apportioned to beneficiaries there must be real and substantial differences of situation germane to the subject and calling for difference in treatment to justify discrimination in amount.[17] To make a valid decree for the management and distribution of the trust fund it is not necessary that the court should obtain jurisdiction of every person interested in it by making personal service upon each such as would be necessary for the maintenance of an adversary suit in personam.[18] On the final distribution of the fund the probate court has power, and it is its duty, to correct errors made in distributing other portions of the fund.[19]

§ 9. *Liability of trustee to estate and third persons.*[20]—The trustee[21] and all those knowingly aiding and assisting him[22] are personally liable for all fraudulent,[23] negligent,[24] and otherwise improper conduct of the former. A clause exempting a trustee from liability "for losses occurring without his own willful default" merely

9. Bertron v. Polk [Md.] 61 A. 616. Confirmation of a sale of corporate stock, regarded as a good investment, resulting in reduction of income of estate, refused. Id.

10. Mason v. Mason, 219 Ill. 609, 76 N. E. 692. A clandestine sale made at a low price to one of the beneficiaries will be set aside. Frederick v. Frederick, 219 Ill. 568, 76 N. E. 856. Purchase by trustees at three-fourths of appraised value held unsustainable. Johnson v. Buck [Ill.] 77 N. E. 163. Evidence held to show that price obtained at sale was adequate. Winder v. Nock [Va.] 52 S. E. 561. Sales to trustees or to others for their benefit, see post, § 11, Personal dealings with estate.

11. So held as to a purchaser at a private sale of corporate stock belonging to a trust estate, with knowledge of the order of the court directing the sale of the stock at the highest market price obtainable on a public stock exchange. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

12. See 4 C. L. 1747.

13. United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456.

14. Life tenant selling estate. Whitfield v. Burke [Miss.] 38 So. 550.

15. See 4 C. L. 1748.

16. Where a will creating a trust authorizes the trustee to invest the trust fund and to pay the same over, together with the increase thereof, to a son of testator, or to his wife or children, at such times and in such sums and in such manner as the executor as trustee may deem best, the trustee, acting in good faith, is entitled to pay any part of the principal trust fund to testator's son, but should be charged for any payment made by him in bad faith. In re Wilkin [N. Y.] 75 N. E. 1105.

17. Among beneficiaries whose circumstances are substantially the same there can be no just discrimination. Stephenson v. Norris [Wis.] 107 N. W. 343.

18. Minot v. Purrington [Mass.] 77 N. E. 630. Where one of the beneficiaries died leaving a son and a husband, and the son died the year after his mother and the father subsequently died, held personal service on administrator of father in connection with general publication gave the court jurisdiction. Id.

19. Minot v. Purrington [Mass.] 77 N. E. 630.

20. See 4 C. L. 1748.

21. Chaves v. Myer [N. M.] 85 P. 233.

22. All persons who knowingly take part or aid in committing a breach of trust are responsible for the money thus withdrawn from the trust estate and they may be compelled to replace the fund which they have been instrumental in diverting. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819. A person abetting a defaulting trustee becomes, by participation in the breach of trust, a trustee and amenable to the jurisdiction of a court of equity in a suit by a substituted trustee. Id.

23. Trustee fraudulently investing trust funds he is personally liable therefor. Chaves v. Myer [N. M.] 85 P. 233.

24. Every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. Safe

protects him from losses occurring through his carelessness or bad judgment,[25] and he is liable for knowingly permitting a co-trustee to misappropriate the funds of the estate.[26] A trustee refusing to perform unless paid a certain sum, a payment so made can be avoided[27] upon the trustee being put in statu quo,[28] or upon the benefit to be derived by him from the trust agreement being shown.[29] Equity will enforce a trust against the executor of a deceased trustee.[30] The estate of a trustee who has failed to account for an investment in real estate will be held liable in the sum originally realized therefrom, where that sum is definitely fixed and it is impossible to determine with precision the ultimate fate of the investment.[31] The fact that a substituted trustee holds the legal title to the trust estate and that he seeks to recover money due the trust estate does not deprive equity of jurisdiction to compel restoration, for the primary interest to be maintained is essentially equitable.[32]

§ 10. *Liability on trustee's bond.*[33]

§ 11. *Personal dealings with estate.*[34]—To be sustainable, personal dealings by the trustee with the estate must be fair and free from fraud,[35] such dealings being voidable at the election of the beneficiary[36] if he exercises the right with reasonable diligence.[37] The trustee is liable for all profits made in the transaction.[38] Unless permission is given by the court,[39] sales to the trustee or to others upon a secret arrangement for his benefit, or by him after he thus gets title, to purchasers with notice, or to his wife or relations, at a less price than he could have obtained from other buyers, are voidable at the election of the cestuis que trust.[40] They may resort to a court of equity either to compel a reconveyance upon payment of the purchase price, or to require the property to be resold, or upon their affirmation of the sale, if the trustee has sold it in excess of the price paid by him, he must account for the proceeds, or if unsold, they may charge him in his account for its actual value at the time of sale.[41] It is not essential that the sales be by the trustee.[42] The duty not to deal with trust property ceases on termination of the trust.[43]

§ 12. *Actions and controversies by and against trustees.*[44]—The trustee and

Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

25, 26. In re Mallon's Estate, 110 App. Div. 61, 97 N. Y. S. 23.

27, 28, 29. Teeter v. Veitch [N. J. Eq.] 61 A. 14.

30. Austin v. Wilcoxson [Cal.] 84 P. 417. Where a husband took the proceeds of his wife's property under an agreement to hold it in trust for her, she was, on his decease, entitled to the trust fund from the residue of his estate after the payment of his debts. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597, citing Long v. Deposit Bank, 28 Ky. L. R. 913, 90 S. W. 961. A claim against the estate of a trustee for trust funds is of the sixth class. Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756, afg. 116 Ill. App. 592. An infant's claim against a constructive trustee holding a fund for his benefit, is not a preferred claim against the trustee's estate. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009.

31. Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. —, rvg. 24 App. D. C. 573.

32. Safe Deposit & Trust Co. v. Cahn [Md.] 62 A. 819.

33. See 4 C. L. 1749.

34. See 4 C. L. 1750.

35. Purchase by trustees at three-fourths of appraised value held unsustainable. Johnson v. Buck [Ill.] 77 N. E. 163.

36. Skelding v. Dean [Mich.] 12 Det. Leg. N. 364, 104 N. W. 410.

37. Beneficiaries, adults, having consented to transaction at the time thereof, held four years delay, the trustee dying in the meantime, would bar disaffirmance. Skelding v. Dean [Mich.] 12 Det. Leg. N. 364, 104 N. W. 410.

38. Where trustee because of his position as trustee was enabled to purchase certain stock, held he must account for the profits thereof. Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756, afg. 116 Ill. App. 592.

39. Hayes v. Hall, 188 Mass. 510, 74 N. E. 935.

40. Hayes v. Hall, 188 Mass. 510, 74 N. E. 935. Where trustee procured third person to buy for the trustee's wife, evidence held insufficient to show breach of trust. Id. Purchase by trustees at three-fourths appraised value held unsustainable. Johnson v. Buck [Ill.] 77 N. E. 163.

41. Hayes v. Hall, 188 Mass. 510, 74 N. E. 935.

42. Where one of the assets of the estate was a second mortgage, held purchase at foreclosure sale of first mortgage was wrongful. Hayes v. Hall, 188 Mass. 510, 74 N. E. 935.

43. Marquam v. Ross [Or.] 83 P. 852.

44. See 4 C. L. 1750.

beneficiary may unite in bringing an action,[45] though the latter is not generally deemed a necessary party.[46] A foreign trustee may sue to recover any part of the trust estate,[47] and an additional title of executors may be disregarded.[48] Where an action is prosecuted against defendants as trustees, the court has power to turn the action into one against them individually;[49] in such case the summons, as well as the complaint, should be amended.[50] In a suit by the trustee against a third party, an allegation that plaintiff has taken title in himself for the benefit of another is sufficient.[51] Where plaintiff makes a trustee a party as such and alleges that he is interested in the subject of the action, it is within the discretion of the court, on its own motion, to require him to answer for the protection of his beneficiary.[52] Failure of the record to show that the trustees have given bonds will not defeat an action by them.[53]

§ 13. *Compensation and expenses.*[54]—A testamentary trustee is a devisee under the will[55] and though he may not deal with the property as fully as he may after distribution he is entitled to compensation for necessary services and expenses rendered before distribution.[56] Trustees are entitled to commissions on money borrowed on a mortgage and beneficially expended in restoring burned property.[57] The question of what is reasonable compensation to trustees depends largely upon the circumstances of each particular case and cannot be determined by any inflexible rule.[58] While in practice it is usually claimed and awarded as a commission, the rate is not determined by any established rule.[59] It may be graduated according to the responsibility incurred, the amount of the estate, and the extent of the services necessarily performed.[60] When an agreement creating an express trust provides that the trustee shall be compensated and fixes the compensation, if, by an express agreement, new duties are required to be performed by the trustee different in their nature from such as were required of him under the original agreement, a court of equity may allow reasonable compensation for the performance of such duties.[61] Unless he voluntarily makes good the losses resulting,[62] a trustee forfeits his right to compensation by mis-

45. Mallory v. Thomas [Kan.] 81 P. 194.
46. See ante § 6 subd. Representation of beneficiary by trustee.
47. Bateman v. Hunt, 46 Misc. 346, 94 N. Y. S. 861. Allegation that claim in suit passed to plaintiff as part of a trust estate under the will of his testator held sufficient. Id.
48. Bateman v. Hunt, 46 Misc. 346, 94 N. Y. S. 861.
49, 50. Southack v. Gleason, 98 N. Y. S. 859.
51. Mallory v. Thomas [Kan.] 81 P. 194.
52. Kaylor v. Hiller [S. C.] 52 S. E. 120.
53. Action on a lease held by testator. Missouri & I. Coal Co. v. Reichert, 119 Ill. App. 148.
54. See 4 C. L. 1751.
55. In re O'Connor's Estate [Cal. App.] 84 P. 317.
56. Attorney's fees in procuring distribution. In re O'Connor's Estate [Cal. App.] 84 P. 317.
57. Where transaction was an exercise of good judgment and its results were greatly beneficial to the estate. Gelbach's Estate, 29 Pa. Super. Ct. 446.
58. Tidball's Estate, 29 Pa. Super. Ct. 363. A charge of 5 per cent for collecting rents in addition to 5 per cent paid real estate agent for collecting same rent, sustained where realty consisted of 40 different properties all old and out of repair. Gelbach's Estate, 29 Pa. Super. Ct. 446. $200 commissions and $200 counsel fee held sufficien for the mere act of executing deeds unde a decree of the court to the persons en titled to the corpus of the estate. Tid ball's Estate, 29 Pa. Super. Ct. 363. Thre times the statutory commissions being a lowed held proper to refuse further com pensation. Herron v. Comstock [C. C. A. 139 F. 370. Where property was sold fc $4,000 commission of 2½ per cent held proj er. Jones v. Day [Md.] 62 A. 364.
59. Tidball's Estate, 29 Pa. Super. Ct. 36
60. Tidball's Estate, 29 Pa. Super. Ct. 36 A will charging the estate with the payme of such reasonable compensation to th trustees as they should deem just and proj er according to the time and attention the might severally devote to the affairs of th estate, only entitles them to such compensa tion as the law itself would allow or th court deem reasonable. Compher v. Brown ing, 219 Ill. 429, 76 N. E. 678.
61. Jarrett v. Johnson, 216 Ill. 212, 74 N E. 756.
62. Where a trustee has voluntarily mad good whatever loss has occurred in the in vestment of a trust fund, and had regu larly paid the whole income to the ben

management, and this is especially true where the mismanagement creates the necessity for the services for which compensation is claimed.[63] Failure to claim commissions at a proper time will not be deemed a waiver of the right thereto where at the time of accounting the trustee has sufficient accrued income in his hands to pay his commissions and the failure to claim them at the proper time was due to the fact that he did not know he was entitled to them.[64] The time when the trust is to be terminated is a proper time for determining the value of the services.[65] Commissions being compensation are not allowable until the services for which they are given are performed,[66] the general rule being that they are not earned until an accounting is had and an allowance made,[67] though this rule has been changed by statute in some states.[68] Where a federal court has taken jurisdiction of the settlement and distribution of a trust in a suit by a beneficiary, it also acquires jurisdiction to fix the compensation of the trustee.[69]

The expenses of administration are a proper charge on the entire estate.[70]

Attorney's fees and expenses.[71]—Litigation being necessary, reasonable counsel fees may be allowed,[72] but the expenses of adverse litigation are not a charge against the estate.[73] The cost of litigation, including attorney's fees, arising in connection with the administration of the trust, should first be charged against surplus income arising after the purpose of the trust has been fulfilled.[74] As a general rule the court has no power to allow and tax as costs the fees of the solicitor of the beneficiary.[75]

ficiary on semi-annual rests as provided in the will, he could not be deprived of commissions because of alleged mismanagement causing such loss. In re Haskin, 97 N. Y. S. 827, rvg. 49 Misc. 177, 98 N. Y. S. 926.

63. A trustee whose unexplained failure to collect rents from trust property and apply them and other trust funds actually collected by him on a note executed by his cestui que trust resulted in its nonpayment at maturity, cannot recover charges against the maker of the note to which under a contract the trustee became entitled on the nonpayment of such note Smith & Zimmer Co. v. Jacobson [Minn.] 107 N. W. 166.

64. In re Haskin, 97 N. Y. S. 827, rvg. 49 Misc. 177, 98 N. Y. S. 926.

65. Paine v. Sackett [R. I.] 61 A. 753. Claim held not barred by limitations while trustee was acting as such. Id.

66. Commissions to a **trustee holding securities to secure debentures of an insolvent corporation** are given as compensation, not only for the collection of such securities, but for the distribution of the proceeds, and will not be allowed on sums collected and remaining in the hands of the trustee until their distribution. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 143 F. 355.

67. Conger v. Conger, 105 App. Div. 589, 94 N. Y. S. 547, rvg. 99 App. Div. 625, 93 N. Y. S. 1151 on this point. Where the account of a trustee as presented and settled shows no annual settlements, and, though a transcript of his book entries was rendered the cestui que trust yearly, no balance was struck, and neither party regarded the settlements as final, or as an annual settlement, the trustee was entitled to commissions not on annual rests, but on the total amount received and paid out. Id.

68. Under Code Civ. Proc. § 3320, as amended, where specific personal property has been given to trustees, in trust to receive the rents and profits for the benefit of a life beneficiary, and such securities are received and held by the trustees, the trustees are entitled to one-half commissions for receiving it, immediately upon the receipt of the property, out of the corpus of the estate. Robertson v. De Brulatour, 98 N. Y. S. 15.

69. Is not bound by intervening orders of the probate court of the state in which administration of the will creating the trust has been granted. Herron v. Comstock [C. C. A.] 139 F. 370.

70. Where by agreement all but one of several trust funds have been turned over to the parties on accounting as to the one retained it will be assumed that the trustee held possession of the several trust funds that they might be charged with their proper share of administration expenses. In re Haskin, 49 Misc. 177, 98 N. Y. S. 926. Case reversed on other points in 97 N. Y. S. 827.

71. See 4 C. L. 1752.

72. Security deed. Mitau v. Roddan [Cal.] 84 P. 145.

73. Where suit for an accounting is brought against the administrator of the deceased trustee and is unsuccessfully defended on the ground that certain funds did not belong to the principal of the trust estate, the cost of defending the suit should not be paid out of the trust fund. Billings v. Warren, 216 Ill. 281, 74 N. E. 1050.

74. Robinson v. Bonaparte [Md.] 61 A. 212.

75. So held where beneficiary sued, praying to have the resignation of the original trustee accepted and a new one appointed, the declaration of trust providing for the appointment of a new trustee "by a court of chancery." Wilson v. Clayburgh, 215 Ill. 506, 74 N. E. 799.

§ 14. *Accounting, distribution, and discharge.*[76]—Accounting, and not assumpsit, is generally the proper way of obtaining a balance due from a trustee.[77] The right to an accounting is not an absolute one, but is based on equitable principles.[78]

Jurisdiction of accounting and distribution[79] is in a court of general equity powers.[80] A federal court may grant the relief.[81] Testamentary trustee in a preliminary accounting claiming an allowance for counsel fees in procuring distribution, the court does not lose jurisdiction of such item by passing upon the other items of account and declining such item for an alleged lack of jurisdiction to grant such allowance.[82] The Ohio statutes requiring trustees to account to the probate court do not confer on such court control over the property itself, but only authority to biennially settle the trustee's accounts,[83] consequently such jurisdiction does not attach where the subject-matter of the trust has been drawn into the possession and control of a Federal court by the filing of a bill for settlement and distribution by one of the beneficiaries of the trust.[84]

Interest[85] is properly allowed where it appears that the judgment is for money received by the defendant for the use of another and retained by him without the owner's knowledge.[86] Mesne profits, or rental value, does not ordinarily bear interest, at least until it becomes a liquidated sum.[87]

Credits and charges.[88]—The trustee improperly investing the fund is chargeable with the entire amount and interest less proper credits for the property actually purchased, permanent improvements thereon, etc.[89] A trustee is chargeable with rents and profits arising from the fund.[90] If an agent or person occupying a fiduciary relation toward an owner of property buys it in at a judicial sale, he is chargeable with the reasonable rental value of the property.[91] A trustee cannot en-

76. See 4 C. L. 1752.

77. So held where four persons contributed unequally to the trust fund but were to share equally in the profits. Burton v. Trainer, 27 Pa. Super. Ct. 626.

78. Children to whom their mother conveyed land claimed by other children to have been purchased with trust funds, in which all the children were equally interested, were not trustees of the funds invested in the purchase of the land, in such sense as to be under the duty of making a full and accurate accounting of such funds. Webb v. Webb [Iowa] 104 N. W. 438.

79. See 2 C. L. 1950.

80. The superior court, under its general equity jurisdiction, has authority to receive and pass upon their trustee's accounts as rendered and to make all proper orders and decrees. Hayes v. Hall, 188 Mass. 510, 74 N. E. 935.

81. Where the powers and duties of executors and trustees under a will are severable, and, prior to the filing of a bill in the Federal court by a beneficiary under the trust, the administration of the personal estate by the executors had ended, and nothing remained but the management and disposition of the trust real estate remaining unsold for the completion of the trust, the Federal court has jurisdiction to decree an accounting by the trustees and direct distribution and settlement of the trust. Herron v. Comstock [C. C. A.] 139 F. 370.

82. In re O'Connor's Estate [Cal. App.] 84 P. 317.

83. Ohio Rev. St. 1892, § 6328, construed. Herron v. Comstock [C. C. A.] 139 F. 370.

84. Herron v. Comstock [C. C. A.] 139 F. 370.

85. See 4 C. L. 1753.

86. Underwood v. Whiteside County Bldg. & Loan Ass'n, 115 Ill. App. 387.

87. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

88. See 4 C. L. 1753.

89. Where the trustee improperly invested the fund in a farm and thereafter procured the beneficiary to execute mortgages on the farm and turn the proceeds over to him, he was, on accounting, chargeable with the entire fund and interest from the time it came into his hands, together with the amount of the mortgages and entitled to be credited with the cost of the farm and the actual permanent improvements made thereon, the latter credit, however, to be made as of the date when the beneficiary went into possession of the farm; it appearing that the trustee had, prior to that time, conducted the business himself, and it further appearing that the business resulting in a loss, the trustee was not chargeable with the proceeds from the farm, nor entitled to credit for moneys paid out in carrying on the business. Wieters v. Hart [N. J. Eq.] 63 A. 241.

90. Where the naked legal title to real estate is held by persons receiving the rents and profits thereof, the beneficial owners on enforcing the trust are entitled to judgment for the rents and profits. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626.

91. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65.

force any claim against the trust property which he purchased after his appointment as trustee.[92]

Procedure on accounting.[93]—Only those against whom relief is sought are necessary parties.[94] Plaintiff is not bound by statements made in reports and letters attached to the complaint to show the trust relation.[95] The cause of action relating simply to money paid in by plaintiff, the complaint is not demurrable because asking relief against defendants personally and as trustees.[96] The burden is on the trustee to show what he did with the property while in his possession or charge.[97] The sufficiency of objections to raise specific questions,[98] and the effect of specific statements by the trustee,[99] are shown in the notes.

Costs and appellate expenses.[1]—An extra allowance of costs may be allowed the trustee.[2] The beneficiaries being divided into groups litigating against each other, an extra allowance of costs to them out of the estate is improper.[3]

Decree.[4]—A decree upon an accounting approving investments binds all parties to the proceeding even though the investment be unauthorized by law.[5] A beneficiary assenting to a proposed plan of distribution and to its being embodied in the final account, and such final account being allowed by the probate court, it will be regarded as a final settlement not only of matters appearing on the face of the account,[6] but also of those matters of which the beneficiary in the exercise of reasonable diligence could have known.[7]

§ 15. *Establishment and enforcement of trust and remedies of beneficiary. A. Express trusts. Jurisdiction.*[8]—The enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to the trustee, the order of payment over and his discharge from his trusteeship.[9]

Laches, limitations, and estoppel.[10]—Laches may be invoked against an express trust.[11] Limitations do not run against the beneficiary of an express trust until repudiation.[12]

92. So held where administrator, prior to his appointment had mortgaged property with his intestate and after appointment borrowed money and purchased mortgage. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

93. See 4 C. L. 1753.

94, 95, 96, 97. Biddle Purchasing Co. v. Snyder, 109 App. Div. 679, 96 N. Y. S. 356.

98. In a suit for an accounting, an objection to the allowance of compensation because of improper conduct held to sufficiently raise the question whether trustee was entitled to sum claimed in his account and disallowed by the master. Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756, afg. 116 Ill. App. 592.

99. In a suit for an accounting the trustee testifying that the whole value of the property received was $1,400 and in a supplemental statement charged himself with such sum as realized from the sale of machinery, and it was shown that he received other property of the value of $1,400, held proper to charge him therewith. Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756, afg. 116 Ill. App. 592.

1. See 4 C. L. 1753.

2, 3. Blair v. Hampton, 98 N. Y. S. 109.

4. See 4 C. L. 1753.

5. Certain beneficiaries held not liable to co-beneficiaries for unauthorized investments of trustee. Blair v. Hampton, 98 N. Y. S. 109.

6, 7. Barker v. Ensign [Mass.] 77 N. E. 719.

8. See 4 C. L. 1754.

9. Austin v. Wilcoxson [Cal.] 84 P. 417. Where a complaint alleged that a certain person delivered to a decedent a sum of money, to be held in trust for plaintiff and to be paid plaintiff at the death of decedent, and that defendant who was the executor, had taken possession of such sum of money and withheld it, and judgment was prayed that defendant deliver the money, the action could not be considered one in equity to declare and enforce a trust. Id. See ante, § 13, Compensation and expenses, and § 14, Accounting, distribution, and discharge; also, see post, § 17, Termination and abrogation of trust.

10. See 4 C. L. 1754. As barring beneficiary, see ante, § 6, subd. Representation of beneficiary by trustee.

11. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. Thirty-five years' delay, alleged trustee never having recognized interests of beneficiaries, held to bar trust, many of the beneficiaries and the alleged trustee being dead. Id. A complaint, seeking to enforce an express trust, which shows a great lapse of time without the assertion of any claim

Parties.[13]—The general rules as to parties apply.[14] The beneficial owners may sue to enforce the trust.[15] In an action relating to a trust deed in which there is a dispute between the beneficiaries, the beneficiaries, as well as the trustees, are necessary parties.[16]

Pleadings.[17]—Specific, definite facts showing the trust relation must be pleaded.[18] The bill must show that statutory requirements as to writing, signature, etc., have been complied with.[19] The general rules prohibiting variance between the pleadings and amendments[20] and the pleadings and proof[21] apply.

Evidence.[22]—Letters by the grantor to the grantee of the deed of trust being delivered with the deed and not altering, varying, or contradicting the terms thereof, may be considered.[23] A claim filed in the probate court by the alleged beneficiary showing merely a promise to give the property to him is admissible against him.[24]

Instructions must not be misleading.[25]

The judgment must conform to the issues raised.[26]

and long continued acquiescence by plaintiff in acts of the alleged trustee hostile to the claim, must state circumstances showing good faith and reasonable diligence on plaintiff's part, excusing the delay, or it will be presumed that such circumstances do not exist. Id. Where trustee repeatedly recognized obligation, held 30 years' delay would not bar right. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597. Thirteen years' delay after repudiation of trust to knowledge of beneficiary held to bar right. Williams v. Woodruff [Colo.] 85 P. 90.

12. Mullen v. Walton [Ala.] 39 So. 97; Elliott v. Louisville [Ky.] 90 S. W. 990; Dawes v. Dawes, 116 Ill. App. 36. Where by fraud of trustee nonresident infant beneficiary was kept in ignorance of trust and the trustee a few years before the action wrote the beneficiary that she had lost all the trust funds but would make it right in her will. Mullen v. Walton [Ala.] 39 So. 97. Where trustee repeatedly recognized obligation held 30 years' delay would not bar right. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597.

13. See 4 C. L. 1754.

14. Where lessee of railroad agreed to pay damages occasioned in operating the road, held whether or not income constituted a trust fund to pay such damages could not be determined in a suit to which the lessor was not a party. Huntington v. Newport News & M. V. Co. [Conn.] 61 A. 59. A corporation on which a demand to transfer shares of stock to complainant has been made and which has refused to comply with the demand, is a proper party defendant to a bill to compel such transfer brought against it and a co-defendant, who is alleged by the complainant to hold title in trust for him. Howison v. Baird [Ala.] 40 So. 94.

15. Trustee to hold property for a corporation; corporation transferred its title to a trustee for complainants, held complainants could sue first trustee. Teeter v. Veitch [N. J. Eq.] 61 A. 14.

16. Security deed. Mitau v. Roddan [Cal.] 84 P. 145.

17. See 4 C. L. 1755.

18. Bill for an accounting alleging that complainant delivered securities amounting to a sum stated to defendant "as trustee and depositary to hold and thereafter deliver and distribute the same as directed and authorized by the complainant, and that defendant received the securities and accepted the trust obligations to so deliver and make distribution thereof," is insufficient. Young v. Mercantile Trust Co., 140 F. 61.

19. Jacoby v. Funkhouser [Ala.] 40 So. 291. The declaration being required to be written, the complaint must allege that it was written. Bonham v. Doyle [Ind. App.] 77 N. E. 859.

20. Averment that parties were to be partners in trust property held not inconsistent with averment that they were to be equal owners thereof. Howison v. Baird [Ala.] 40 So. 94.

21. The assertion of a gift inter vivos and failure to establish the same does not prevent the party from showing a trust. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629. There is no such variance between the allegations of a bill seeking to charge with a trust certain property in the hands of the executor of the alleged trustee, and evidence that the latter had turned over the major portion of the property to one who was claimed to have had no authority to receive it, as requires a dismissal of the bill. Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. —, rvg. 24 App. D. C. 573.

22. See 4 C. L. 1755. Sufficiency of evidence, see particular place in topic treating of subject.

23. MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027.

24. Botsford v. Burr [Mich.] 12 Det. Leg. N. 481, 104 N. W. 620.

25. In a suit to establish a parol trust, an instruction held misleading as causing the jury to infer that there were circumstances sustaining the testimony of a witness. Botsford v. Burr [Mich.] 12 Det. Leg. N. 481, 104 N. W. 620.

26. The complaint merely asserting a lien on certain real estate to secure to plaintiffs their pro rata interest therein, a decree directing that the title to the property be vested in a new trustee appointed is objectionable, as not within the issues. Case v. Collins [Ind. App.] 76 N. E. 781.

(§ 15) *B. Implied trusts.*[27]

(§ 15) *C. Constructive trusts.*[28]—The enforcement of a trust may be had, as between proper parties, whenever it is required upon equitable considerations and is justified by the pleadings and proof in the case.[29]

Jurisdiction.[30]—In the absence of statutory regulations equity has exclusive jurisdiction to enforce a constructive trust,[31] and the fact that the property is that of a decedent does not give the probate court jurisdiction.[32]

Laches and limitations.[33]—Unreasonable delay amounting to laches will bar the right to enforce the trust.[34] Limitations run against constructive trusts,[35] from notice of fraud.[36]

Evidence.[37]—The general rules apply.[38]

Relief granted.[39]—The court should determine all facts necessary to establish the trust.[40] The trust being established the decree should impress it upon the property and require the holder of the legal title to convey to the beneficiaries.[41] The court should also, by said decree, retain jurisdiction of the cause for the purpose of affording other and further relief to the parties.[42] After entry of such relief, the court should permit the beneficiary, if he so desires, to amend his bill so as to ask for partition,[43] or a defendant having an interest may file a cross bill therefor.[44] If either of the parties should so seek a partition, the cause will then proceed as an ordinary suit for partition and accounting.[45] If no such amendment or cross bill is filed a receiver should be appointed and the cause referred to a master to take an account of rents and profits if such relief is prayed for by the bill.[48]

(§ 15) *D. Resulting trusts. Jurisdiction.*[47]—Equity has jurisdiction to enforce the trust.[48]

27, 28. See 4 C. L. 1755.

29. De Leonis v. Hammel [Cal. App.] 82 P. 349.

30. See 4 C. L. 1755.

31, 32. So held where executrix sold land belonging to the estate and invested proceeds in her own name. Goodwin v. Colwell [Pa.] 63 A. 363.

33. See 4 C. L. 1754.

34. Delay in the absence of injury held not to constitute laches. Hudson v. Cahoon [Mo.] 91 S. W. 72. The mere fact that the obligee in a bond for a deed refrained from demanding of the obligor a strict accounting for any rents he may have received beyond the advancements, for which he was entitled to reimbursement, and delayed for three years after the obligor quitclaimed the property to other persons to institute legal proceedings to acquire the full legal title, could not be charged to them as laches. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626.

35. Hudson v. Cahoon [Mo.] 91 S. W. 72. Nine years delay held not to bar suit to enforce trust in realty. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626. Code Civ. Proc. § 338, subd. 4, requiring actions for relief on the ground of fraud or mistake to be commenced within three years is inapplicable to an action to quiet title against a deed the grantee in which is charged with a constructive trust in favor of the grantor. De Leonis v. Hammel [Cal. App.] 82 P. 349.

36. Where agent filled his own name in as grantee in deed, held statute commenced to run on recordation of deed. Hudson v. Cahoon [Mo.] 91 S. W. 72. Where plaintiff claims land under a grant registered in 1884, and defendant under an earlier entry and grant registered in 1896, and shows no possession and no disability, his claim to have plaintiff declared a trustee is barred by limitations. Code, § 158, construed. McAden v. Palmer [N. C.] 52 S. E. 1034. Twenty years' delay after issuance and recordation of grant held to bar right. Frazier v. Gibson [N. C.] 52 S. E. 1035.

37. See 4 C. L. 1756.

38. Evidence of **prior similar acts** held admissible to show intent on the part of treasurer of company in depositing individual funds to the credit of the company. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 215.

39. See 4 C. L. 1756.

40. Where an administrator mortgaged separate parcels of real estate, some belonging to himself personally and others belonging to the estate, it was the duty of the court, in an action to establish an involuntary trust as to those parcels belonging to the estate and to compel a conveyance on payment of the liens which had been satisfied by defendant, to determine the amount necessary to redeem each separate parcel. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

41, 42, 43, 44, 45, 46. Stahl v. Stahl [Ill.] 77 N. E. 67.

47. See 4 C. L. 1756.

48. Filkins v. Severn, 127 Iowa 738, 104 N. W. 346; Columbian University v. Taylor, 25 App. D. C. 124.

Laches, limitations, and estoppel.[49]—The statute of limitations does not run so long as there is no adverse holding or repudiation of the trust.[50] The trust arising from fraud, limitation does not start to run until notice or discovery of fraud.[51] The complaint need not show when the trust resulted.[52] Where an involuntary trustee has acquired the apparent legal title to the property of the beneficiary under a mortgage foreclosure sale, such judgment and sale will not estop the beneficiary from establishing the trust.[53]

Parties.[54]—In Missouri a married woman may sue alone in equity to establish a resulting trust in her favor in land, her interest in which existed before the passage of the married woman's acts.[55]

Remedies.—The beneficiaries have a right to claim the benefit of the purchase and to demand a conveyance if they think fit to reimburse the sum actually paid, or an account for the profits in case of a resale.[56]

Pleading.[57]—A trust being established, it may be decreed under a general prayer for relief in a cross bill.[58]

Evidence.[59]—Widow may testify as to circumstances of purchase and source of money.[60]

§ 16. *Following trust property.*[61]—As between the beneficiary and trustee and all persons claiming under the trustee otherwise than by purchase for a valuable consideration without notice,[62] all property belonging to the trust, however changed or altered,[63] continues subject to the trust.[64] And as against such third parties this

49. See 4 C. L. 1756.

50. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933.

51. Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000.

52. Demurrer to bill to enforce a resulting trust on failure of charitable trust held properly overruled where it did not appear from the bill when the charitable trust came to an end. Columbian University v. Taylor, 25 App. D. C. 124.

53. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

54. See 4 C. L. 1756.

55. Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000.

56. Whitman v. O'Brien, 29 Pa. Super. Ct. 208.

57. See 4 C. L. 1756.

58. Small v. Pryor [N. J. Eq.] 61 A. 564.

59. See 4 C. L. 1756.

60. Is not excluded by Revision 1900, p. 363, excluding evidence of a party to a civil action as to any transaction with or statement by any testator or intestate represented in the action, where any party sues or is sued in a representative capacity. Small v. Pryor [N. J. Eq.] 61 A. 564.

61. See 4 C. L. 1757.

62. A transfer of the trust funds, the transferee having notice, does not pass title. Harrington v. Atlantic & Pacific Tel. Co., 143 F. 329. Transferee with notice of trust takes subject thereto. Smith v. Goethe, 147 Cal. 725, 82 P. 384. A purchaser from a trustee, with notice actual or constructive of the trust, holds as trustee for the beneficiary. Harris v. Brown [Ga.] 52 S. E. 610. An assignee of trust property has only his assignor's rights thereto. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

63. No change of form of property divests it of a trust. The substitute takes the nature of the original and stands charged with the same trust. United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456. Where a trustee uses the trust property in purchasing stock in a corporation organized to exploit such property, the cestui que trust is entitled to an interest in the stock equal to his previous interest in the trust property. Howison v. Baird [Ala.] 40 So. 94. When trust funds of a personal character have been changed into real estate, they can be followed, and the rights of the cestui que trust can be maintained, if the rights of third parties have not intervened. Camden Land Co. v. Lewis [Me.] 63 A. 523.

64. Jacobs v. Jacobs [Iowa] 104 N. W. 489. Trust funds deposited in building and loan association. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025. Rights of holders of void school bonds. Board of Trustees of Fordsville v. Postel [Ky.] 88 S. W. 1065. Property taken by a bank in payment of securities sent for collection and remittance. National Life Ins. Co. v. Mather, 118 Ill. App. 491. So held as against subsequent purchasers from mortgagee whose mortgage was unauthorized. Sternfels v. Watson, 139 F. 505. Where a testamentary trustee, under mistake as to his authority, has conveyed away a part of the assets of the trust estate, without consideration, there being no intervening equities, a court of chancery will compel its restitution in the body of the trust. Wentzel v. Chesley, 7 Ohio C. C. (N. S.) 181. When an agent deposits his principal's funds in a bank in the agent's individual name, the principal has the right to such funds as against the agent or the bank, and it is immaterial that the funds have been mingled with other funds of the agent. Packer v. Crary, 121 Iowa, 388, 96 N. W. 870.

right may be enforced by the trustee.[65] The fact that the beneficiary brings suit as administrator of the trustee to recover the funds does not preclude him from suing in his own name therefor.[66] The amount of the beneficiary's recovery is not the amount due him from the trustee but the amount wrongfully transferred by the trustee less proper expenditures.[67] The equitable remedy given a cestui que trust to follow trust funds into property in which they have been fraudulently invested by his trustee is not taken away by statutory provisions affording a remedy by attachment or garnishment; but the legal and equitable remedies are to be considered concurrent.[68] Nor is such equitable remedy defeated by the fact that the cestui que trust might sue the trustee and his bondsmen and enforce his claim by levy;[69] the rule being well settled that the defrauded party has his option either to hold the trustee personally liable or to follow his money into the property in which it has been reinvested.[70] Nor is the remedy of the defrauded cestui que trust to realize out of such property affected by the fact that the agreement between the trustee and the owner of such property which led up to the diversion of such funds was illegal, the cestui que trust not being a party to such agreement.[71] In actions to follow such trust property, the burden of proof is on defendant.[72] Laches will bar the right.[73] As to whether or not the beneficiary is entitled to a preference against an insolvent trustee's estate depends upon equitable rules, and Federal courts are not bound by the decisions of the state where the contract was made.[74]

Identification of fund.[75]—It is essential that the trust property can be identified in its altered or substituted form.[76] Identification is a question of fact,[77] and the burden is on the claimant to prove the identification[78] and to show the amount if less than the whole of the substituted property.[79] An earmark is not indispensable to enable a real owner to assert his right to property, or its product or substitute.[80] Evidence of substantial identity may be attached to the thing itself or may be extraneous.[81] In regard to money, substantial identity is not oneness of pieces of coin or of bank bills.[82]

65. Any person who receives property knowing that it is subject to a trust and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust, but also of the trustee to reclaim the property. Mansfield v. Wardlow [Tex. Civ. App.] 91 S. W. 859.

66, 67. Jacobs v. Jacobs [Iowa] 104 N. W. 489.

68, 69, 70, 71. Chaves v. Myer [N. M.] 85 P. 233.

72. Wentzel v. Chesley, 7 Ohio C. C. (N. S.) 181.

73. Where the holder of title to land on an express trust for himself and others has never denied the trust to his co-owners, they are not chargeable with laches, in failing to institute proceedings to recover their interests from adverse claimants through unauthorized conveyances by the trustee of which adverse claims they had no notice. Sternfels v. Watson, 139 F. 505.

74. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802.

75. See 4 C. L. 1757.

76. Special bank account. Italian Fruit & Importing Co. v. Penniman, 100 Md. 698, 61 A. 694. Trust funds held by a building and loan association. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025. Fund coming in hands of trustee in bankruptcy, the trustee of the funds having become bankrupt. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802. Factor failing to account held principal could not recover funds from bank. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123. Funds of wife invested by husband in stock. Hoopes v. Mathis [Tex. Civ. App.] 13 Tex. Ct. Rep. 463, 89 S. W. 36. Rights of holders of void school bonds. Board of Trustees of Fordsville v. Postel [Ky.] 88 S. W. 1065. Where public administrator deposited funds of several estates in one account in his own name, with the addition of the word "administrator." Raban v. Cascade Bank of Great Falls [Mont.] 84 P. 72. Trustee selling trust property, the proceeds in his hands are impressed with the same trust, and may be followed into his estate so long as distinguishable. Camden Land Co. v. Lewis [Me.] 63 A. 523.

77. Webb v. Webb [Iowa] 104 N. W. 438.

78. Webb v. Webb [Iowa] 104 N. W. 438. A creditor to whom a debtor has assigned certain accounts cannot recover money paid by the debtor to other creditors, without showing that such money was the identical money collected by the debtor from the parties owing the assigned accounts. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

79. Webb v. Webb [Iowa] 104 N. W. 438.

80, 81, 82. Packer v. Crary, 121 Iowa 388, 96 N. W. 870.

Bona fide purchasers[83] are protected against secret trusts and hence the beneficiary cannot follow the property into their hands.[84] In order to occupy the position of a bona fide purchaser the purchaser must have had neither actual nor constructive notice of the trust.[85] The word "trustee" following the name of the grantee in a deed is notice that he is not the owner of the property and is sufficient to put all subsequent purchasers from him on inquiry as to the existence and nature of the trust.[86] The legal presumption is that a trustee has no power of sale and a mortgagee of property which was conveyed to the mortgagor as trustee and all subsequent purchasers through him are bound to exercise reasonable diligence to ascertain whether or not the equitable owners of the property had authorized the execution of the mortgage.[87] Such diligence is not exercised where there is nothing of record, and they fail to make inquiry of the trustee himself and make no effort to do so; and the contingency that he might have denied the trust is no excuse for such failure.[88] A person dealing with a trust is chargeable with notice of the trust conditions,[89] and one taking trust property in violation of such condition takes it subject to the right of the trustee or cestui que trust to reclaim possession.[90]

§ 17. *Termination and abrogation of trust. Acts of the settlor.*[91]—In the absence of fraud, undue influence or mistake, a trust cannot be revoked by the grantor unless he reserves a power of revocation.[92] In New York a deposit by one person of his own money, in his own name as trustee for another, standing alone, establishes a tentative trust merely, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration.[93] A power of revocation not being exercised by the donor during his lifetime does not affect the trust.[94] So, also, a power to apply the principal of a trust to the use of the beneficiary merely renders the trust defeasible to the extent the power is exercised and does not invalidate the trust nor interfere with the vesting of the remainder.[95]

83. See 4 C. L. 1757.

84. Creech v. Creech [Ky.] 89 S. W. 720.

85. Building and loan association issuing certificate to one as executrix as such has notice of the trust character of the funds. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025. The fact that depositor in bank deposited to his personal account a check payable to himself as trustee held not to give the bank notice that he was acting dishonestly. Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024. Life tenant agreeing to hold and invest the surplus income of the land for plaintiff's benefit in consideration of plaintiff conveying his interest in a homestead to his wife, held to create an express trust enforceable against the wife who acquired possession of such surplus income with notice and claimed the right to appropriate the same to her own use. Case v. Collins [Ind. App.] 76 N. E. 781. See ante, first subd. this section.

86, 87, 88. Sternfels v. Watson, 139 F. 505.

89. Vohmann v. Michel, 109 App. Div. 659, 96 N. Y. S. 309.

90. Vohmann v. Michel, 109 App. Div. 659, 96 N. Y. S. 309. Where one trustee forged satisfaction of mortgage held failure of cotrustees to notify mortgagee of the forgery as soon as discovered did not estop trustees from suing. Id.

91. See 4 C. L. 1758.

92. So held where trust was voluntarily created for grantor's benefit. Coleman v. Fidelity Trust & Safety Vault Co. [Ky.] 91 S. W. 716. Where trustee agreed not to record deed of trust for a certain period, held trust could not be revoked by a letter from the grantor and life beneficiary stating that she revoked it to which the trustee replied that it could not be revoked. Bunten v. American Security & Trust Co., 25 App. D. C. 226. Bank deposit in trust held to show a trust with power of revocation. Littig v. Vestry of Mt. Calvary Protestant Episcopal Church [Md.] 61 A. 635.

93. Where named beneficiary had no knowledge of deposit and died before the depositor, and the depositor thereafter stated that the named beneficiary's children had money in the bank, and before the depositor's death the words indicating a trust in the bank book were obliterated, held no trust for children. In re Bulwinkle, 107 App. Div. 331, 95 N. Y. S. 176, rvg. 42 Misc. 471, 87 N. Y. S. 250. Saving bank deposits in the name of one other than the depositor as trustee, accompanied by a delivery of the pass-book held not to create an irrevocable trust. Lattan v. Van Ness, 107 App. Div. 393, 95 N. Y. S. 97.

94. Witherington v. Herring [N. C.] 53 S. E. 303.

95. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

The trustee[96] cannot, without the consent of the cestui que trust, change his relation to that of a debtor.[97]

Termination by consent.[98]—Equity will not compel the execution of the trust against the wishes of the persons beneficially interested,[99] hence all persons receiving or likely to receive a benefit from the trust being of full age and consenting, the trust may be terminated.[1] An administrator has no power to relieve an involuntary trustee of money belonging to the estate from his trust relation to the estate.[2]

Termination for failure or completion of purpose.[3]—Unless terminated by act of the parties or of a court of competent jurisdiction, the trust continues until its objects have been fully accomplished or rendered impossible.[4] When such time arrives the trust ceases.[5] A testamentary trust may be terminated as to certain property and continued as to the balance.[6] In Massachusetts the supreme court has jurisdiction in a proper case to terminate a testamentary trust.[7]

Union of equitable and future legal estate.[8]—If the equitable and legal estates meet in one person, the equitable estate is generally merged in the legal and the trust ends.[9] There must be an identity of person and present interest.[10]

TURNPIKES; ULTRA VIRES, see latest topical index.

UNDERTAKINGS.[10a]

UNDUE INFLUENCE; UNFAIR COMPETITION, see latest topical index.

UNITED STATES.

Scope of title.—The powers of the United States are nearly if not always raised in questions of constitutional law.[11] Its political power is investigated in the same class of questions, also in cases of treaties[12] or cases pertaining to territories and

96. See 4 C. L. 1759.
97. Bank to which funds were forwarded for collection. Holder v. Western German Bank [C. C. A.] 136 F. 90.
98. See 4 C. L. 1759.
99. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816. Where land is directed to be turned into money under a power and paid over to designated persons, and these persons are of lawful age, and, upon the sale of the land at once entitled to the money, they may elect to take the land, and when they have so elected, and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished and he cannot thereafter lawfully proceed to execute the power. Id.
1. In re Brooke's Estate [Pa.] 63 A. 411.
2. First Nat. Bank v. Wakefield [Cal.] 83 P. 1076.
3. See 4 C. L. 1759.
4. Trust for the use of trustee's wife and her children to inhabit the trust property and for their support and maintenance held not terminated until all the beneficiaries ceased to need a home on the trust property or arrived at age. Edwards v. Edwards [Ala.] 39 So. 82.
5. Will providing that upon a certain event the trustees shall convey the property to certain persons held it was their duty so to do. Paine v. Sackett [R. I.] 61 A. 753. And the trustees are entitled to have the conveyances so made and be relieved of the burden of the trust. Id.
6. Welch v. Trustees of Episcopal Theological School [Mass.] 75 N. E. 139. Where vested remainderman of entire estate was entitled to two-thirds of the income, the other third being paid a beneficiary for life, held trust could be terminated as to two-thirds of the property. Id.
7. Welch v. Trustees of Episcopal Theological School [Mass.] 75 N. E. 139.
8. See 4 C. L. 1759.
9. Beneficiary being made trustee, no trust. Jacoby v. Jacoby, 94 N. Y. S. 260.
10. The beneficiary of a spendthrift trust may have a vested remainder in the corpus of the estate and no merger be created. Moore v. Deyo, 212 Pa. 102, 61 A. 884.
10a. No cases have been found for this subject since the last article. See 4 C. L. 1760.
11. See Constitutional Law, 5 C. L. 619.
12. See Treaties, 6 C. L. 1697.

Federal possessions,[13] extradition,[14] and the like, which obviously command separate treatment. Property rights in the public domain are also treated elsewhere.[15]

§ 1. *Contracts.*[16]—The rules as to contracts in general[17] and the usual rules of construction and interpretation apply to contracts with the United States.[18] The United States is liable like an individual where it improperly interferes with the work of a contractor,[19] and is not relieved from liability because it suspends the contractor's work from motives of public consideration.[20] The finding of a commission under a contract providing that if changes are made in the plans or specifications affecting the cost of the work, the increased or diminished compensation should be fixed by a board appointed for that purpose, is conclusive.[21]

The bond of a government contractor given pursuant to the Federal statute conditioned that he shall pay for all material and services, protects persons who furnish material though it does not become part of the permanent structure,[22] but not persons who furnish equipments for carrying on the work.[23] Any person who furnishes labor or material subsequent to the execution of the bond is protected by it.[24] The United States is not a preferred creditor under such bond.[25] The act confers an independent right of action upon each creditor having a claim under the bond,[26] and a suit by one is not a bar to an action by another.[27] A bond in the language of the statute conditioned on the payment of all laborers and materialmen constitutes a covenant by the contractor to pay them.[28] An action on the bond is properly brought in the name of the United States as covenantee in the bond,[29] and may be enforced under the laws and practice, and in the courts of the state where the suit is brought.[30]

The United States has the same right to construct a canal as it has to construct a highway within territory over which it has exclusive jurisdiction.[31]

13. See Territories and Federal Possessions, 6 C. L. 1696.

14. See Extradition, 5 C. L. 1407.

15. See Public Lands, 6 C. L. 1126.

16. See 4 C. L. 1760. See, also, Public Contracts, 6 C. L. 1109.

17. Prior negotiations are merged into the written contract. Simpson v. U. S., 199 U. S. 397, 50 Law. Ed. —.

18. Contract for the supply of meat to the army in Cuba construed. Simpson v. U. S., 199 U. S. 397, 50 Law. Ed. —. Under a bond securing the performance of a contract providing that on default the United States might complete the work by contract a contract after default by the contractor for the "construction and completion" of the vessels contracted to be built is one for their completion. Construction and completion held to be substantially the same in meaning. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 F. 685. The word "constructed" as used does not imply other or different vessels than those originally contracted for. Id.

19. Houston Co.'s case, 38 Ct. Cl. 724.

20. Where it suspended work of removal of a bridge on the ground that it would be needed for greatly increased traffic during the war with Spain. Houston Co.'s case, 38 Ct. Cl. 724.

21. Conners v. U. S. [C. C. A.] 141 F. 16.

22. Bond given pursuant to Act Cong. Aug. 13, 1894, 28 Stat. 278. United States v. Henningsen [Wash.] 82 P. 171. A surety on the bond of a contractor required to furnish certain material not necessary in the work of construction is liable regardless of the Federal statute. Id.

23. The word "materials" in a government contractor's bond, conditioned as required by Act of Congress on his making payment for labor and materials, does not include equipments used in performing the contract. United States v. Jacoby [Del. Super.] 61 A. 871.

24. The bond need not designate the persons for whose benefit it is given. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 63 A. 581. Labor and materials used in the work whether furnished under the contract directly to the contractor or to a subcontractor are within the protection of the bond. United States v. American Surety Co., 200 U. S. 197, 50 Law. Ed. —.

25. Bond given pursuant to Act of Congress August 13, 1894, c. 280, § 1, 28 Stat. 278. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 F. 685.

26. Hence in an action by the United States it is not necessary to allege that there were no other persons having claims or that if there were that they had been paid. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 F. 689. In an action on the bond, it is not necessary to allege the exact date of abandonment of the contract where it appears that the new contract was awarded after the abandonment. Id. 137 F. 685.

27, 28, 29. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 63 A. 581.

30. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 63 A. 581. Under the statutes of Vermont a common-law action of covenant in which judgment for the amount due the use plaintiff may be assessed instead of an action under the statute in which judgment

§ 2. *Officers and employes.*[32]—The acts or omissions of officers, authorized to bind the United States or to shape its course of conduct as to a particular transaction, when they have acted within the purview of their authority, may in a proper case work an estoppel against the government.[33] A government is not liable for the tortious acts of its officers unless it authorizes[34] or ratifies them.[35] A subsequent ratification of the act of a public officer is equivalent to original authority.[36]

§ 3. *Claims.*[37]—The willful presenting of a false claim against the United States is, by statute, declared to be a criminal offense.[38] A contract for the prosecution of a claim against the United States which makes compensation for services rendered thereunder a lien upon the claim, is a violation of the rule forbidding an assignment in advance of allowance.[39] But such a provision does not invalidate a portion of the contract providing for the payment for such services of a sum equal to one-third of the amount allowed.[40] Claims against the United States do not bear interest unless it is given by stipulation or express statutory provision.[41]

§ 4. *Actions by and against.*[42]—When the United States comes into court to assert a property right, its rights are precisely the same as those of any other suitor.[43] The United States is not subject to be sued without its consent.[44] Actions against the United States must be brought within the limitation period prescribed.[45] Under the Tucker Act the United States district courts have jurisdiction to entertain petitions for a salvage award where the United States has benefited by the salvage service.[46]

is rendered for the penalty of the bond is an appropriate remedy for the enforcement of the bond. Id.

31. It has power to construct the Panama Canal along the right of way acquired by it. Wilson v. Shaw, 25 App. D. C. 510.

32. See 4 C. L. 1761. See, also, Officers and Public Employes, 6 C. L. 841.

33. Walker v. U. S., 139 F. 409. Where a marshal rendered accounts to the United States which have been audited and paid in accordance with custom with knowledge that the greater portion would be paid out by the marshal to deputies, the government cannot recover from the marshal years after his term has expired and when he is without remedy to recoup, though the accounts were paid unlawfully. Id.

34. Authorization cannot be inferred from the fact that a consular officer wrote the Secretary of State telling him what he meant to do and the Secretary made no reply. Washington L. & T. Co.'s case, 39 Ct. Cl. 152.

35. Ratification cannot be inferred from the fact that the Treasury paid to the injured party the money it received from a consular officer. Washington L. & T. Co.'s case, 39 Ct. Cl. 152.

36. Where the military governor of Cuba made an order which abolished a valuable franchise and the order was ratified by the United States, the liability for such act became thereby that of the United States as the government of Cuba. O'Reilly De Camara v. Brooke, 142 F. 858.

37. See 4 C. L. 1762.

38. Transmission by an Indian agent to the Commissioner of Indian Affairs of a false and fraudulent voucher held to constitute a violation of Rev. St. § 5438. Bridgeman v. U. S. [C. C. A.] 140 F. 577. Indictment for such offense held sufficient. Id. In an indictment for such offense it is not necessary to allege the date the claim was made and presented. Id. Where an Indian agent knowingly presented a false claim, the custom of such agents to forward accounts prepared by their clerks without reading them is immaterial. Id.

39, 40. Nutt v. Knut, 200 U. S. 12, 50 Law. Ed. —.

41. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174. No interest is recoverable under the Tucker Act on a gratuity. Bloodgood's case, 39 Ct. Cl. 69.

42. See 4 C. L. 1762.

43. Mountain Copper Co. v. U. S. [C. C. A.] 142 F. 625. When the sovereign comes into court to assert a pecuniary demand against a citizen, the court has authority and is under duty to withhold relief except on the terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject-matter between man and man. Walker v. U. S., 139 F. 409.

44. The rule that the United States cannot be sued without its consent prevents a state from suing to restrain the Secretary of the Interior and Commissioner of the General Land Office from allotting swamp lands within an Indian reservation. State of Oregon v. Hitchcock, 202 U. S. 60, 50 Law. Ed. —.

45. The statute of limitations, Act March 3, 1887, 24 Stat. 505, providing that actions must be brought against the United States within six years after the cause accrues runs against a right of a marshal to recover fees, and disbursements, from the time the service was rendered or disbursement made, and not from the expiration of his term. Walker v. U. S., 139 F. 409.

46. Act March 3, 1887, c. 359, §§ 1-7, 24 Stat. 505. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455.

UNITED STATES COURTS, see latest topical index.

UNITED STATES MARSHALS AND COMMISSIONERS.[47]

A marshal, under the statute of limitations, cannot recover from the United States for disbursements made or services performed, after six years, counting from the actual date of disbursing and performing, and not from the expiration of his term of office.[48] Likewise the United States may be barred by the statute of limitations,[49] or by estoppel from reopening its accounts with a former marshal,[50] or from recouping money paid under an error of law, but used honestly to recompense deputy marshals.[51] A disbursement by a marshal for bailiffs is neither "fees," "salary," nor "compensation,"[52] and accordingly suit therefor in the circuit court is allowable under the Tucker Act. The right of a marshal to reimbursement for fuel, lights and "other contingencies that may accrue in holding the courts" covers the hire of extra bailiffs put in charge of juries.[53] No suit on accounts can be brought against the United States by a commissioner until he has furnished his accounts to the district attorney who shall submit them for approval to the district or circuit court,[54] whence they shall be sent to the attorney general who will forward it to the treasury department,[55] and only after such an account has been acted on or has been neglected for six months, has the court of claims any jurisdiction.[56]

UNLAWFUL ASSEMBLY.[57]

USAGES; USE AND OCCUPATION, see latest topical index.

USES.[58]

In construing the statute of uses three rules are applied whereby conveyances are excepted from its operation, viz.: (1) Where a use was limited upon a use;[59] (2) where a copyhold or leasehold estate or personal property was limited to uses;[60] (3) where the trust is an active one.[61] The statute executes passive trusts.[62] What

47. See 4 C. L. 1763.

48. A bill for services including items both before and after the six-year limitation, will be dismissed only as to those barred. Walker v. U. S., 139 F. 409.

49. Walker v. U. S., 139 F. 409.

50. The United States will be barred by estoppel from reopening its accounts with its marshals, five years after they have left their office, where they were not guilty of any dishonesty or fraud and the United States merely acted under an error of law, especially where the marshal has placed himself in a position where he cannot save himself harmless. Walker v. U. S., 139 F. 409.

51. A counterclaim by U. S. for money paid under error of law disallowed. Walker v. U. S., 139 F. 409.

52. Act June 27, 1898, c. 503, 30 Stat. 494; 2 Fed. Stat. Ann. 81, U. S. Comp. St., 1901, p. 753. United States v. Swift [C. C. A.] 139 F. 225.

53. Rev. St. § 830. U. S. Comp. St. 1901, p. 639. United States v. Swift [C. C. A.] 139 F. 225.

54. Act Feb. 22, 1875 (18 Stat. L. 333). Summey v. U. S., 39 Ct. Cl. 199.

55. Act July 31, 1894 (28 Stat. L. 162).

56. Act July 27, 1898 (30 Stat. L. 495). Summey v. U. S., 39 Ct. Cl. 199.

57. No cases have been found during the period covered.

58. See 4 C. L. 1763.

59, 60. Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815.

61. Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815; Mason v. Mason, 219 Ill. 609, 76 N. E. 692; Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856; Slater v. Rudderforth, 25 App. D. C. 497.

62. Harkey v. Neville, 70 S. C. 125, 49 S. E. 218; Smith v. McWhorter, 123 Ga. 287, 51 S. E. 474; In re Cooney's Will, 98 N. Y. S. 676; Gueutal v. Gueutal, 98 N. Y. S. 1002. Except where the remainders are contingent there being a conveyance to trustees for the sole and separate use of a married woman and her heirs and she becomes discovert, the statute executes the use. Cameron v. Hicks [N. C.] 53 S. E. 728. Where upon death of life beneficiary without children trustee was to convey to beneficiary's brothers and sisters, held upon the beneficiary's death without children the title vested in his brothers

trusts are active and what are passive are treated elsewhere.[63] The provision of the New York statute of uses and trusts, declaring that every valid express trust shall vest the whole estate in the trustee, is, by settled construction, limited to the trust estate, and has no application to future legal estates in lands covered by the trust to take effect in possession on the termination of the trust.[64] The statute of uses will execute any unnecessary portion of an estate given a trustee.[65]

USURY.

§ 1. *Elements and indicia.*[66]—Usury is the taking of more for the use of money than the law allows; it is an illegal profit.[67] The subject pertains alone to obligations growing out of contracts and not to the matter of taxes, which do not rest upon contractual relations.[68]

There must be an intention to exact an excessive rate.[69] A fraudulent purpose to evade the usury laws is the true test,[70] and erroneously claiming more than is due,[71] or reserving excessive interest through mistake in fact, on the part of the lender, does not render the contract usurious.[72] Usury cannot be presumed,[73] and an unlawful intent cannot be imputed, so long as the acts of the parties admit of a lawful construction.[74] The good faith, purpose, and intent of such transactions are or-

and sisters without a conveyance by the trustee. Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253.

63. See Trusts, 6 C. L. 1736.

64. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

65. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

66. See 4 C. L. 1764.

67. Yarborough v. Hughes, 139 N. C. 199, 51 S. E. 904.

68. Nalle v. City of Austin [Tex. Civ. App.] 93 S. W. 141.

69. Where a person, in lieu of a loan of money sells to another an article at a price beyond its real value, that the vendee may sell it to obtain money to relieve his necessities, the contract is usurious or not, according to the intent of the parties. Barry v. Paranto [Minn.] 106 N. W. 911. Where a sum of money apparently in excess of the legal rate of interest was retained by the lender, it was competent to show that a part of it was received in payment of an independent claim and not reserved as interest. Patton v. Bank of Lafayette [Ga.] 53 S. E. 664. The taking of interest for a part of a year, computed on the principle that a year consists of 360 days, or 12 months of 30 days each, is not usurious, if such rule is resorted to in good faith and for convenience in computation. Id.

70. Brock v. French, 116 Ill. App. 15; Yarborough v. Hughes, 139 N. C. 199, 51 S. E. 904. A pretended sale of an interest in an estate, as a cover for a usurious transaction, is void. Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. S. 719. But an agreement for a loan is not rendered usurious because, after the borrower had delivered his note and received part of the money, the lender refused to deliver the balance unless the borrower would make a certain purchase. Zussman v. Woodbridge, 97 N. Y. S. 973.

71. Fidelity Loan Ass'n v. Connolly, 95 N. Y. S. 576.

72. Aldrich v. McClay [Ark.] 87 S. W. 813.

73. A complaint in an action on a note, alleging that defendant agreed and did assign to plaintiff certain shares of stock besides giving his note, did not necessarily show a usurious agreement as the assignment may have been as collateral security or otherwise lawful, which may be shown by parol evidence. Cameron v. Fraser, 94 N. Y. S. 1058.

74. Transaction between mother and son whereby the latter loaned her money and accounted for interest held not to be usurious. Lusk v. Smith [Kan.] 81 P. 173. Where the loan was to be repaid from the proceeds of collections and the interest charged was such that it might not exceed the legal rate, considering the uncertain time of payment, the contract was not deemed usurious.

dinarily questions of fact for the jury;[75] and the burden is always upon the party seeking to impeach the transaction to show guilty intent and that the contract was a cover for usury.[76] Whenever the lender stipulates for the chance of an advantage beyond the legal interest, the contract is usurious if he is entitled to have the money lent repaid with interest thereon at all events.[77] But the supreme court of the United States has held that when the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious.[78] Where an agreement is not affected with usury at its inception, it will not be invalidated by subsequent usurious transactions between the parties.[79]

There must be a loan or forbearance.[80]

The aggregate of the exactions must exceed the legal rate[81] to constitute usury. Where a fixed amount of dues and interest was paid per week, by a borrowing member of a building and loan association, and the dues were applied on the principal, thus reducing it while the interest payments continued the same in amount, the contract was clearly usurious.[82] If the debt on which it is complained usury is exacted may be wholly discharged, according to its terms, without reaching the usury, there is no usury since the debtor has the privilege of paying the lawful sum only.[83]

Discounts, bonuses, commissions and other deductions and charges.[84]—The most common devices for the securing of unlawful interest are charges against the bor-

Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. S. 719.

75. Barry v. Paranto [Minn.] 106 N. W. 911.

76. Lusk v. Smith [Kan.] 81 P. 173. Where a party agreed to purchase premises at a trustee's sale and convey the same to the grantor in the trust deed at a reasonable advance, and paid $1,475 therefor, held that the voluntary payment by the grantor of $2,115 for a reconveyance of the premises was not a usurious transaction in the absence of any showing of an intent to evade the usury statute. Yarborough v. Hughes, 139 N. C. 199, 51 S. E. 904. An instruction by the court, based on the theory that plaintiff made an honest mistake of fact in computing interest, and had no intent to exact usury, held not warranted by the facts in evidence. Slocumb v. Stewart, 123 Ga. 360, 51 S. E. 405.

77. Hungerford Brass & Copper Co. v. Brigham, 47 Misc. 240, 95 N. Y. S. 867. Stipulation that the payee of certain notes, drawing the highest legal rate of interest, should be entitled to the dividends on certain stocks, while he held them as security for his loan, held usurious, the fact that he received no such dividends being immaterial. Kammer v. Glenz, 118 Ill. App. 570.

78. Principle applied as the true test of the usurious character of building and loan associatton contracts. Whelpley v. Ross, 25 App. D. C. 207, citing Spain v. Hamilton, 1 Wall. [U. S.] 604, 17 Law. Ed. 619; Bedford v. Eastern Bldg. & L. Ass'n, 181 U. S. 227, 45 Law. Ed. 834.

79. An assignment of interests in an estate as security for a loan and collection charges. Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. S. 719; Nance v. Gray [Ala.] 38 So. 916.

80. See 4 C. L. 1765. There must be a loan either express or implied. Lusk v. Smith [Kan.] 81 P. 173.

81. See 4 C. L. 1765. The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law. Taylor v. Buzard [Mo. App.] 90 S. W. 126. Under Ballinger's Ann. Codes & St. § 3669, permitting 12 per cent per annum, a note at 10 per cent interest stipulating that, if the interest was not paid when due it should be added to the principal and the whole should bear interest at 12 per cent, was not usurious, although providing for interest on both principal and accrued interest after maturity of the note. Blake v. Yount [Wash.] 84 P. 625. In South Carolina, a note given at 10 per cent interest "annually from this date," draws that rate of interest only until maturity, when the statute fixes the rate at 7 per cent, and the exaction of 10 per cent after maturity is usury. Earle v. Owings [S. C.] 51 S. E. 980. An agreement which provided that the lender might at his option demand payment of the note given or cancel it and take the stock deposited as collateral security, together with accrued dividends, was usurious. Hungerford Brass & Copper Co. v. Brigham, 47 Misc. 240, 95 N. Y. S. 867.

Discount in lieu of interest: The discount of a note is not added to, but is in lieu of interest, when interest runs only from the maturity of the note. Lichtenstein v. Lyons [La.] 40 So. 454. Where the rates charged, whether as interest or discount do not exceed the lawful rate, the contract is not usurious. Id. Where three days of grace are allowed, it is lawful to include them in the computation of interest taken in advance in discounting a negotiable note. Patton v. Bank of La Fayette [Ga.] 53 S. E. 664.

82. Norman v. Warsaw Bldg. & Loan Ass'n [Ky.] 91 S. W. 695.

83. Taylor v. Buzard [Mo. App.] 90 S. W. 126.

84. See 4 C. L. 1765.

rower by way of commissions, fees for appraisals, views, examinations and renewals in connection with the loan.[85] A provision in a contract which bears the highest legal rate of interest, in the nature of a penalty for non-performance of the terms of payment, was held not to render the contract usurious;[86] and where an interest in an estate was assigned as collateral security for a loan, an agreement for the payment of collection charges to the lender was not usurious, although such charges were exorbitant and oppressive.[87]

The taint of usury is not removed[88] by the renewal of a contract infected therewith and the payment of the illegal interest to the date of renewal.[89] The assignment of a usurious debt and mortgage to an innocent purchaser does not remove the taint;[90] but where the debtor procured the assignment of such debt and mortgage to an innocent party who advanced money to pay the usurious debt on an agreement by the debtor to execute a new mortgage, on his failure to execute such new mortgage equity regarded the old one as its equivalent and held the land bound by it, notwithstanding the usury in the original debt.[91]

Usury statutes.[92]—The right of the legislature to prescribe a maximum rate of interest for the forbearance of money, and to attach penalties for disregard thereof, has been recognized and exercised from an early date.[93] Such statutes are enacted for the protection of the borrower on the theory that his necessities deprive him of freedom in contracting and place him at the mercy of the lender.[94] Such legislation is valid unless it imposes such arbitrary restrictions upon the individual and his business as are palpably foreign to the legitimate purposes of such laws.[95] The principle that the usury laws affect only the remedy and not the substance of contracts has no application to valid contracts made without the state.[96]

Conflict of laws.[97]—Contracts are governed by the usury laws of the state where the money is payable.[98]

85. State v. Cary [Wis.] 105 N. W. 792.

86. Contract for sale of a piano on monthly installments of $10, providing that, if payments did not amount to more than $3 per month, they should be applied as rent for the piano, and the purchaser's rights forfeited. Taylor v. Buzard [Mo. App.] 90 S. W. 126.

87. Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. S. 719.

88. See 4 C. L. 1765.

89. Lockwood v. Muhlberg [Ga.] 53 S. E. 92. Where the receiver of a loan association took four notes from a borrower as representing the balance due on a usurious contract with the association, payable to a third party, the notes constituted a merger of the old indebtedness but did not remove the taint of usury. Armor v. Bank of Loudon [Miss.] 39 So. 17.

90, 91. Lowe v. Walker [Ark.] 91 S. W. 22.

92. See 4 C. L. 1765.

93. State v. Cary [Wis.] 105 N. W. 792. Laws against usury are founded on principles of public policy that have been recognized for ages (Ex parte Berger [Mo.] 90 S. W. 759), and the legislature can regulate, or prohibit usury altogether (Id.).

94. State v. Cary [Wis.] 105 N. W. 792.

95. Laws 1905, p. 419, c. 278, amending Rev. St. 1898, § 1691, prohibiting more than 10 per cent interest on chattel mortgage loans, or more than 14 per cent in full for all charges, etc., in making the loan, is a valid exercise of the police power and not an unconstitutional interference with liberty of contract, or with personal liberty. State v. Cary [Wis.] 105 N. W. 792.

96. Bank v. Doherty [Wash.] 84 P. 872.

97. See 4 C. L. 1766.

98. A loan made by a foreign building and loan association through its local agent in Michigan, secured by mortgage on land in that state and providing for payments to such agent was a Michigan contract governed by the laws of that state. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707. Where the maker and payee of a note were residents of Montana, and the note was executed and made payable there, and the mortgage security was executed and delivered there, the contract, as to usury, was governed by the Montana statutes, although the mortgage covered land in Washington and was recorded there. Bank v. Doherty [Wash.] 84 P. 872. Ballinger's Ann. Codes & St. § 3671, providing that a contract for a greater rate of interest than allowed by law shall be void, has no application to a contract made in another state and bearing a rate of interest that is legal there. Id. Where a Maryland building and loan association loaned money to a citizen of Virginia, taking a mortgage on Virginia real estate, the contract was governed by Maryland laws. Middle States Loan, Bldg. & Construction Co. v. Miller's Adm'r [Va.] 51 S. E. 846. A contract to pay 6 per cent interest and taxes and insurance premiums, in addition to what the borrower undertook to

Usury laws as applied to building and loan contracts.[99]—Such associations in some states are relieved from the strict operation of the usury laws[1] upon compliance with the statutory provisions as to making their loans.[2] A rather strict compliance with law is required of building and loan associations, when they seek to obtain more than the legal rate of interest under the plea of subscriptions to stock, bonuses, bids for loans, fines, etc.;[3] but the statutory provisions as to competitive bidding for loans are sufficiently complied with, when an opportunity for bidding is given and priority or preference of loan is awarded to the highest bidder, even though but one is present.[4] It was not the purpose of the legislature to exempt such associations from the operation of the usury laws generally, upon any and all contracts howsoever made, but the exemption is restricted to interest, premium, fines and interest on such premiums as shall accrue "according to the provisions" of the law.[5] A corporation doing, in effect, a banking business, is not entitled to the benefit of such provisions and cannot enforce fines and premiums which, but for such laws, would be usurious.[6] It does not necessarily follow that the law against usury is violated by such associations, if a larger sum is reserved to be paid for a loan or for an advance, whichever it may be called, than the principal and interest of the amount advanced.[7] The charter privileges of such associations must be regarded in determining the question of usury.[8] A member who bids for a loan at a specified premium, his bid being ac-

pay when he became a member of the association and which he was bound to pay to mature his stock, was held not usurious under Maryland laws. Id.

99. See 4 C. L. 1766. See, also, Building and Loan Associations, 5 C. L. 478.

1. 1 Starr & C. Ann. St. 1896, p. 1050, c. 32, par. 118, providing that no interest, premiums, fines nor interest on premiums shall be deemed usurious, an association organized thereunder and complying with its requirements as to loans, may lawfully contract for greater compensation for the use of money, for interest and premium, than the legal rate of interest fixed by the general laws. Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569. But in Mississippi it was held where a borrower of a savings and loan association agreed to pay monthly $1.65 as premium, $2.50 as interest and $3 on stock, on a loan of $500, the interest rate was in excess of 10 per cent and usurious, as the taking of stock was merely a scheme to evade the usury law and the borrower in reality never was to acquire any stock. Armor v. Bank of Loudon [Miss.] 39 So. 17. And in Kentucky a contract for the payment of a fixed amount of dues and interest per week, the dues being applied to reduce the principal while the interest payment remained the same, was held to be clearly usurious. Norman v. Warsaw Bldg. & Loan Ass'n [Ky.] 91 S. W. 695.

2. Where the statute provided for the offering of money for bids in open meeting which could be dispensed with only by by-laws for that purpose and fixing the rate of interest and premiums, no such by-laws having been adopted, a loan made without such offering in open meeting and at a premium and rate of interest in excess of the rates authorized by law, was usurious. Sargent v. Home Bldg. & Loan Ass'n, 114 Ill. App. 393. Where a borrowing member did not obtain his loan as a result of competition in open meeting, but agreed to pay a premium fixed by the by-laws before the law authorized such procedure, such premium could not be enforced by foreclosure. Assets Realization Co. v. Heiden, 117 Ill. App. 458. Where the statutes require the borrower to be a stockholder in the association, a loan made to one not a stockholder would not be exempt from the implication of usury. Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569.

3. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707. Under Laws 1895, p. 165, c. 328, permitting discount interest at 3 per cent per month for the first 2 months and 2 per cent a month thereafter, with a charge of $3 for examination and drawing papers, a loan of $175 for 3 months, retaining $17, was not usurious, it being strictly within the terms of the statute. Fidelity Loan Ass'n v. Connolly, 95 N. Y. S. 576.

4. Laws 1891, p. 89, § 8. Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569.

5. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

6. Assets Realization Co. v. Heiden, 117 Ill. App. 458.

7. The supreme court of the United States having held that, when the promise to pay a sum above legal interest depends upon a contingency it is not usurious (Spain v. Hamilton, 1 Wall. 604, 17 Law. Ed. 619; Bedford v. Eastern Bldg. & Loan Ass'n, 181 U. S. 227, 45 Law. Ed. 834), that principle was applied as the true test of the usurious character of building and loan association contracts. Whelpley v. Ross, 25 App. D. C. 207.

8. Where the articles of association require all loans to be made upon competitive bidding, a loan made without compliance therewith, for more than the legal rate of interest, is usurious. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707.

cepted and the money loaned him in good faith, is estopped, after receiving the benefits of the transaction, to deny the validity of the loan on the ground of usury.[9]

§ 2. *The defense of usury.*[10]—This defense is personal to the borrower;[11] and a trustee, who borrows money for himself and his beneficiaries, may plead usury as a defense in behalf of himself and the beneficiaries.[12] A purchaser of real estate charged with a usurious debt, who assumes to pay it in consideration of his purchase, cannot defend against the usury;[13] but it has been held that such grantee may avail himself of the defense, where the mortgagee was a corporation assuming to be a loan association, but was in effect doing a banking business.[14] A person who borrows money from another to pay a usurious debt cannot avoid his obligation to the latter because of the taint of usury in the original debt;[15] but where a note is given in renewal of another, usury in the original transaction may be shown, upon a proper plea and between the original parties.[16] So long as any portion of the debt remains due, the defense of usury is available;[17] and a counterclaim for usury is available and effective as long as the right of action exists on the principal sum.[18] A person may be estopped to set up the plea of usury by his submission to an award of arbitrators,[19] or by his own fraudulent inducement of the contract,[20] or by participation in the benefits of the transaction.[21] Under charter authority to define by ordinance the powers and privileges of pawnbrokers, a city cannot authorize them to charge usury.[22]

Pleading and proof.[23]—This defense must be specially pleaded,[24] and the facts, wherein it is alleged that the usury consists, must be specifically alleged.[25] The re-

9. Broch v. French, 116 Ill. App. 15; Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569.

10. See 4 C. L. 1766.

11. Nance v. Gray [Ala.] 38 So. 916; Chenoweth v. National Bldg. Ass'n [W. Va.] 53 S. E. 559. In an action against a corporation to recover wages of one of its employes that had been assigned to plaintiff as security for certain notes, defendant could not defend on the ground that the notes were usurious. Thompson v. Interborough Rapid Transit Co., 96 N. Y. S. 416.

12. Earle v. Owings [S. C.] 51 S. E. 980.

13. On the principle that such defense is personal to the borrower. Chenoweth v. National Bldg. Ass'n [W. Va.] 53 S. E. 559. On the ground of estoppel. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707.

14. Assets Realization Co. v. Heiden, 117 Ill. App. 458.

15. Lowe v. Walker [Ark.] 91 S. W. 22.

16. Berry v. Kingsbaker, 118 Ill. App. 198.

17. Garlick v. Mutual Loan & Bldg. Ass'n of Joliet, 116 Ill. App. 311.

18. It is not barred in 3 years, as a penalty or forfeiture, under Code Civ. Proc. 1902. § 113. Earle v. Owings [S. C.] 51 S. E. 980.

19. Where defendant's indebtedness to plaintiff was submitted to arbitrators on the agreement that legal interest was to be computed on items of indebtedness from maturity, and defendant took no exceptions to the award by appeal (Code 1896. § 522) or otherwise, but gave his notes and mortgage therefor, he was estopped to set up as a defense against foreclosure, that the arbitrators had included usurious charges in their award. Hoffman v. Milner [Ala.] 38 So. 758.

20. Where the maker of a usurious note induces another to purchase it after maturity, representing a stated amount to be due thereon and promising to pay that sum later, he is estopped from pleading the usury, where the purchaser acts in good faith and without knowledge of the usury. Walker v. Hillyer [Ga.] 53 S. E. 313. Where the borrower, who was the lender's attorney, informed him that the contract drawn was "all right," the borrower was estopped to plead that the contract was usurious. Hungerford Brass & Copper Co. v. Brigham, 95 N. Y. Supp. 867. See 19 Harv. L. R. 454.

21. A member of a homestead loan association who bids for a loan is estopped, after the acceptance of his bid, the loan of the money to him in good faith and the receipt of the benefits of the transaction, to deny the validity of the loan on the ground of usury. Broch v. French, 116 Ill. App. 15; Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569. Where the grantee of land subject to a usurious mortgage has received as a part of the consideration the benefit of the amounts claimed to be usurious, the law estops him to set up usury (Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707); but where such amount has not been deducted from the purchase price, he is not estopped (Id.).

22. Code 1895 (Civ. Code § 2955; Pol. Code, § 755) confers no such authority upon municipalities. Lockwood v. Muhlberg [Ga.] 53 S. E. 92.

23. See 4 C. L. 1767.

24. Averments sufficiently definite. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

25. Under the Illinois statute. Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569. It must set up the usurious contract, specifying its terms and the par-

quirements of a plea of usury in Georgia are fixed by statute, where the purpose is either to recover back usury or set off the same against plaintiff's demand, the purpose being that the amount sought to be recovered or set off may be determined accurately from the allegations, without aid from extraneous sources.[26] A defense of usury common to husband and wife when pleaded by him inures to her benefit though not pleaded by her.[27] Where defendant pleaded the defense of usury specially and filed a notice of set-off therewith, his giving evidence in support of his plea of usury was a waiver of his notice of set-off.[28] That a contract is in fact usurious may be shown by parol evidence, although it is in writing.[29] The burden of proving the usury remains on defendant to the end.[30]

§ 3. *The effect of usury.*[31]—Contracts made in connection with the loaning of money, under a scheme whereby the lender or his agent receives payments of money or its equivalent in excess of the legal rate, have been held to be prohibited by the law and unenforceable.[32] Where certain funds coming to a bankrupt from his father's estate were claimed in part by virtue of specific liens or assignments, the assignee senior in time could recover no portion of the fund, if his assignment was usurious;[33] but, where he made no claim on the fund in controversy, but was brought into the case as a defendant, by the other assignees, the latter could not have the fund released from his claim, without returning to him the consideration received by the bankrupt.[34] Where a debt secured by mortgage of personal property is constituted in part of usury, the mortgagee is neither a purchaser nor creditor without notice within the meaning of the recording acts.[35]

Forfeitures.[36]

Application of usurious payments.[37]—Usurious payments are to be applied in reduction of the principal.[38]

§ 4. *Affirmative relief and procedure.*[39]—The practice has always prevailed in chancery to allow the complainant to have a discovery of the particulars of usurious transactions, on the condition that he submits to pay the debt with legal interest.[40] The statute of New York being to the contrary, the plaintiff cannot be required, as a condition to relief, to make restitution of the moneys actually received upon the loans adjudged usurious.[41] Where a borrowing member of a loan association had repaid in full an original loan tainted with usury, he was entitled to have his trust deed securing the loan canceled, even as against an innocent holder of his notes and security.[42]

ticular facts relied upon to bring it within the statutory prohibition (Rogers v. Morton, 46 Misc. 494, 95 N. Y. S. 49), and the amounts paid (Nance v. Gray [Ala.] 38 So. 916).

26. Civ. Code 1895, § 5090. Burnett v. Davis & Co. [Ga.] 52 S. E. 927.

27. As in proceedings involving homestead or dower rights. Lowe v. Walker [Ark.] 91 S. W. 22.

28. Berry v. Kingsbaker, 118 Ill. App. 198.

29. Campbell v. Connable, 98 N. Y. S. 231.

30. Ferguson v. Bien, 94 N. Y. S. 459. An instruction which may be taken to imply relief of defendant from that burden is erroneous. Id. Contention that a mortgage was usurious because the borrowers agreed to pay, in addition to the stipulated interest, as a bonus for the loan, $20,000 in cash and one-tenth of the mortgaged property, not sustained by proofs. Curtze v. Iron Dyke Copper Min. Co. [Or.] 81 P. 815.

31. See 4 C. L. 1767.

32. State v. Cary [Wis.] 105 N. W. 792.

33, 34. In re L'Hommedieu, 138 F. 606.

35. Code 1896, § 1009. Where defendant contended that plaintiff was not protected as a bona fide purchaser, because its debt was tainted with usury, exclusion of evidence of such fact was error. Morris v. Bank of Attalla [Ala.] 38 So. 804.

36, 37. See 4 C. L. 1768.

38. Where $10 as interest for one month was included in a note for $160 and $10 was paid as interest soon after, the sureties were entitled to a reduction of only $20 in a judgment against them and not for double that amount. Titterington v. Murrell [Tex. Civ. App.] 90 S. W. 510.

39. See 4 C. L. 1768.

40. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

41. Statute severely criticised. Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. S. 719.

42. Armor v. Bank of Loudon [Miss.] 39

Recovery of usury.[43]—An action to recover must be based on an actual payment of usurious interest.[44] Where the complaint in an action to recover usurious interest paid states the sum loaned, the amount retained as interest and for what time, from which it appears that there was an illegal rate of interest charged, it is sufficient although the rate of interest is not specifically stated.[45] Such actions may be barred by statute;[46] but, on a series of usurious transactions, the statute of limitations does not begin to run until they are all closed and a settlement made between the parties.[47]

Actions under statute.[48]—The requirements of a plea of usury, in Georgia, in an action to recover back usury paid, is fixed by statute, which provides that the amount sought to be recovered shall be determined accurately from the allegations, without aid from extraneous sources.[49]

Crimes and penalties.[50]—The legislature may make the violation of the usury laws a criminal offense.[51] Those who maintain a place where usurious rates of interest are taken, and the usury statutes habitually violated, may be indicted for keeping a disorderly house.[52] In the absence of express authority, a municipality cannot, by ordinance, impose a penalty upon money loaners for the exaction of usury.[53]

VAGRANTS.[54]

Vagrancy is variously defined by statute.[55] A city council having the power to

So. 17. Complaint to cancel a mortgage given to a building and loan association, held demurrable for failure to show a contract on a scheme different from that sanctioned by statute. Darr v. Guaranty Sav. & Loan Ass'n [Or.] 81 P. 565.

43. See 4 C. L. 1768.

44. Neither the discharge of a usurious note by a surety, by giving his own note therefor, nor the subsequent payment of the renewal note by the surety, gives the principal a cause of action against a national bank, under the federal statute. Lasater v. First Nat. Bank [Tex. Civ. App.] 13 Tex. Ct. Rep. 642, 88 S. W. 429.

45. Gilman v. Fultz [Ind. App.] 77 N. E. 746.

46. Under Ky. St. 1903, § 2517, actions to recover usury are expressly barred in one year from payment. Norman v. Warsaw Bldg. & Loan Ass'n [Ky.] 91 S. W. 695.

47. Shannon's Code Supp. p. 692 (Act Apr. 15, 1903), limiting actions for usury to 2 years, is prospective only. Slover v. Union Bank [Tenn.] 89 S. W. 399.

48. See 4 C. L. 1768.

49. Civ. Code 1895, § 5090. Burnett v. Davis & Co. [Ga.] 52 S. E. 927.

50. See 4 C. L. 1768.

51. Laws 1905, p. 419, c. 278, amending Rev. St. 1898, § 1691, so as to impose a fine of not less than $25 nor more than $300, or 6 months imprisonment, or both, for taking illegal interest on chattel mortgage loans, is valid. State v. Cary [Wis.] 105 N. W. 792. Rev. St. 1899, § 2358, making it a misdemeanor to take interest above 2 per cent per month, is not repugnant to Const. art. 2, § 30, and Const. U. S. Amdt. 14, § 1, guaranteeing due process of law. Ex parte Berger [Mo.] 90 S. W. 759. Nor is that statute obnoxious to Const. art. 4, § 53, prohibiting special or exclusive privileges or immunities, or to Const. U. S. Amdt. 14, § 4, guarantying equal protection, on the ground that, since the general law allows only 8 per cent per annum, it arbitrarily divides usurers into criminal and noncriminal classes. Id. The statute does not discriminate by applying only to those who take more than 2 per cent a month "by means of commissions or brokerage charges," but applies alike to all who exceed the specified limit directly or indirectly. Id. The act of 1898 (22 St. at Large p. 749), relative to usury being made applicable only to future contracts, the penalty of the act of 1882 (18 St. at Large, p. 35) applies to all contracts made prior to the act of 1898. Earle v. Owings [S. C.] 51 S. E. 980.

52. State v. Dimant [N. J. Sup.] 62 A. 286.

53. An ordinance imposing such a penalty is void to that extent. City Council of Augusta v. Clark & Co. [Ga.] 52 S. E. 881.

54. See 2 C. L. 1975.

55. Indictment which alleged that defendant being able to work and having no property, wandered about in idleness, held sufficient under a statute declaring one a vagrant who being able to work and having no property to support him wanders about in idleness. Gen. Acts 1903, p. 244. Vandiver v. State [Ala.] 40 So. 88. Under ordinances declaring vagrants persons who live by gambling, a charge is sufficient though no particular game is specified. Ordinance under Act 178, p. 368, of 1904. City of Shreveport v. Bowen [La.] 40 So. 859. But where draw poker is specified in the charge, the court will take judicial notice that it is a gambling game. Id. If any game is specified, it is immaterial what game it is, since any game may be played for money or other stakes thus making it gambling. Id.

restrain and punish vagrants may pass an ordinance declaring what acts shall constitute vagrancy, but such power must not be exercised unreasonably and must be limited to the generally accepted meaning and scope of the law relating to the subject.[56] The state must prove all the essential ingredients of the crime.[57] Under a statute declaring that able-bodied married men who shall neglect or refuse to support their families shall be deemed vagrants, a professional man cannot be declared a vagrant merely because his profession does not yield an income sufficient to support his family.[58] In Georgia a child under sixteen years of age cannot be convicted of vagrancy.[59]

VALUES; VARIANCE; VENDITIONI EXPONAS, see latest topical index.

VENDORS AND PURCHASERS.

§ 1. *The contract for the sale of land. A. General nature, requisites and validity.*[60]—A sale is a transmutation of title in consideration of money.[61] A contract for the sale of land is governed by the principles applicable to other contracts,[62] consequently it must be free from fraud[63] or mistake,[64] and if entered into by an agent he must have authority.[65] It is not essential to the existence of the contract that the vendor have title.[66] A contract forbidden by law may be valid as to a bona fide vendee.[67] A contract is not fully executed until possession is delivered.[68]

56. Minneapolis ordinance approved July 15, 1891 held void in so far as it attempts to punish as a vagrant one found trespassing on private premises without giving a good account to the court of his conduct, and upheld as to its other provisions. State v. McFarland [Minn.] 105 N. W. 187.

57. No proof that defendant had no property. Vandiver v. State [Ala.] 40 So. 88.

58. Wife held not entitled to divorce on the ground that husband was a vagrant. Rev. St. 1899, §§ 2228, 2921. Gallemore v. Gallemore [Mo. App.] 91 S. W. 406.

59. Acts 1905, p. 109 subsec. 8. Johnson v. State [Ga.] 52 S. E. 737.

60. See 4 C. L. 1769.

61. Authority in a broker to sell is not authority to make an exchange. Lucas v. County Recorder of Cass County [Neb.] 106 N. W. 217. One in possession under a contract for personal services and entitled to purchase on certain conditions is in as agent of the owner and not as vendee. National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450.

62. See Contracts, 5 C. L. 664.

63. Evidence tending to show title in a vendor held admissible on the question of his good faith in entering into the contract. Hardman v. Kelley [S. D.] 104 N. W. 272. And see Fraud and Undue Influence, 5 C. L. 1541.

64. Where the purchaser through an honest mistake not attributable to his own negligence believes he is buying more land than the agreement covers, the contract will not be enforced against him. Cawley v. Jean [Mass.] 75 N. E. 614. See, also, Mistake and Accident, 6 C. L. 678.

65. A contract signed by a person who is not an authorized agent of the owner cannot be enforced. Trau v. Sloan [Pa.] 62 A. 984. Contract for the sale of land construed and

Form of contract.[69]—No particular words or form is essential.[70] The contract if partly performed may be oral.[71] A contract may be read from correspondence,[72] a promise to sell,[73] a memorandum,[74] or a deed,[75] but a contract of sale will not be read from one creating an agency.[76]

Certainty and definiteness.—The contract must be definite and certain[77] as to time of performance[78] and price.[79]

Offer and acceptance.[80]—There must be an offer to sell, and such offer must be accepted according to its terms.[81] Where a contract is void under the statute of

held to have been executed by one individually and not as agent for the owner. Hardman v. Kelley [S. D.] 104 N. W. 272. See, also, Agency, 5 C. L. 64.

66. As where the paramount title is in the state, but he has made valuable improvement for which he is equitably entitled to compensation. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087.

67. Under a rule making it a misdemeanor for an owner to survey a plat and sell it in violation of the terms of the act, a violation of such act does not render void a sale to a bona fide purchaser. Thomas v. Cowin [Ala.] 39 So. 898.

68. Bridgewater v. Byassee [Ky.] 93 S. W. 35.

69. See 4 C. L. 1771, n. 70 et seq.

70. "I, Edward Gaule, hereby agree to sell and convey to James Foley all my interest in 320 acres of land at $14 per acre" construed and held a contract for the sale of an interest in the land at such price per acre. Ward v. Foley [C. C. A.] 141 F. 364. An instrument certifying that the owner of a tract of land has agreed to convey it to a certain person for a certain price, and containing a statement that "it is further noted" that such person is to pay such price and fixing the time of payment and conveyance is a mutually binding contract. Brownson v. Perry [Kan.] 81 P. 197. Where the purchaser accepts and acts upon it, his omission to sign is immaterial. Id. Writing construed and held to show a contract of sale to one in possession ostensibly as tenant. That upon payment of the purchase price he was to become the owner. Barfield v. Saunders [La.] 40 So. 593. Under an agreement by which one in possession ostensibly as tenant was to become the owner on payment of the purchase price, it is held that under the terms of the agreement the vendor could not sell to another after the first payment of the purchase price had been made. Id. A contract providing for the payment of the purchase price in instalments evidenced by notes and on payment of the notes a deed should be executed, and in case of default in payment all notes should become due and payments already made were to be considered as rent, is valid. Morris v. Green [Ark.] 88 S. W. 565.

71. See, also, post, Statute of frauds. **Evidence sufficient** to show that an oral contract was made. Veum v. Sheeran [Minn.] 104 N. W. 135; O'Brien v. Knotts [Ind.] 75 N. E. 594; Sprague v. Jessup [Or.] 83 P. 145. A contract by which one agreed to purchase a house and lot and give it to another in consideration of care and support during the life of the promisor may be enforced after his death. Ayers v. Short [Mich.] 105 N. W. 1115.

Evidence insufficient to establish an oral contract where the purchaser paid the purchase price and went into possession. Heddleston v. Stoner [Iowa] 105 N. W. 56. Evidence insufficient to establish a contract by an incompetent to convey or devise land in consideration of services. Hayden v. Collins [Cal. App.] 81 P. 1120.

72. Correspondence between vendor and vendee held to constitute a contract for the sale of land and not for an option. Hobart v. Frederiksen [S. D.] 105 N W. 168. Correspondence held to constitute a contract. Warner v. Marshall [Ind.] 75 N. E. 582.

73. An agreement to make a promise to sell is not a promise to sell within Civ. Code art. 2462. Kaplan v. Whitworth [La.] 40 So. 723.

74. Memorandum signed only by a party sought to be charged reciting receipt of payment for timber on certain lands held to constitute a contract of sale and not a mere option. Dennis Simmons Lumber Co. v. Corey [N. C.] 53 S. E. 300.

75. Instrument in form a deed construed to be a contract to convey a certain interest in lands when title thereto should be acquired by the vendor. Ames v. Kinnear [Wash.] 84 P. 629.

76. A contract by which one agrees to select government lands for another for which he is to be paid a certain sum per acre to be paid whenever he should deliver a deed from the person making the location, is not one of sale but one creating an agency. Farnum v. Clarke [Cal.] 84 P. 166.

77. A promise to convey land if the grantee would abandon her purpose of going abroad and remain in a certain city is a sufficiently definite consideration. The time they were to remain in such city being a reasonable time having reference to the nature of the contract. White v. Poole [N. H.] 62 A. 494. Receipt held not to constitute a valid contract, it being uncertain and containing no terms obligating the vendor to give a deed. Rosenblum v. Liener, 98 N. Y. S. 836.

78. Contract held not indefinite as to time of performance. Veum v. Sheeran [Minn.] 104 N. W. 135.

79. The terms as to price must be fixed and definite. Kaplan v. Whitworth [La.] 40 So. 723. Where the price per acre is fixed, and the only uncertainty is in the number of acres which can be ascertained by a survey, the price is definite. Howison v. Bartlett [Ala.] 40 So. 757. That a surveyor was not selected held not to render the contract indefinite. Id.

80. See 4 C. L. 1769 n. 45 et seq.

81. An offer to sell imposes no obligation until accepted according to its terms. Henry v. Black [Pa.] 63 A. 250. The offer must be

frauds, a party may insert any provisions in a contract subsequently drawn up and sent by him to the other party for execution.[82] If the other party inserts additional terms there is no contract until such terms are accepted.[83]

Mutuality.—The contract must be mutual,[84] but a contract not binding on the purchaser may bind the vendor though it is not an option.[85] A contract to sell by the real equitable owner is mutual,[86] and where a vendee has paid a portion of the purchase money and gone into possession, the fact that he did not sign the contract does not render it not binding on him.[87]

Construction.[88]—The contract will be construed to give effect to the intent of the parties.[89] The construction placed upon the contract by the parties is binding upon them.[90] Every part of the contract is to be given effect and if consistent a construction adopted that will attain that end.[91] The validity of the contract is to be determined by the law of the place where the land is situated.[92]

(§ 1) *B. Reformation and cancellation.*[93]—A contract may be reformed[94] or canceled[95] for fraud,[96] mistake, or accident.[97] A cause of action for reformation of the contract and for damages to the freehold by the vendor after its execution may be joined.[98]

(§ 1) *C. Statute of frauds.*[99]—As a general rule a contract to be enforceable must be in writing,[1] and if made by an agent, he must have written authority,[2] but it

accepted substantially as made. Frahm v. Metcalf [Neb.] 106 N. W. 227. A completed contract is not shown where the vendor accepts the price offered and expresses a willingness to close the deal at once, but afterwards submits additional proposals and leaves the matter open to the purchaser to make known his further wishes. Somerville v. Coppage [Md.] 61 A. 318.

82. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63.

83. Signing a contract with a builder for the construction of a house on the premises held not an acceptance of such terms. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63.

84. The vendor may withdraw from or repudiate a unilateral contract. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625. Where one obtains possession under an option to purchase on certain conditions which he fails to perform, the contract is unilateral and the vendor need not tender a deed before maintaining action to recover possession. Bruschi v. Quail Min. & Mill. Co., 147 Cal. 120, 81 P. 404. An agreement whereby one person binds himself to make another a bond for title, but which imposes no obligation on the other party, is not bilateral. This is not a promise to sell within Civ. Code art. 2462. Kaplan v. Whitworth [La.] 40 So. 723. A written contract by the terms of which A. agrees to pay B. a sum of money in consideration of his conveying to C. certain land is not on its face unenforceable for want of mutuality. Quinton v. Mulvane [Kan.] 81 P. 486.

85. An instrument executed by a landowner reciting that a person had paid $500 as earnest money to be applied as cash payment on the purchase price when abstracts were approved, and stipulating that the owner had agreed to sell is an agreement enforceable against the owner but not against the third person. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627.

86. Where a third person held the legal title subject to the orders of the equitable owner. Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145.

87. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345.

88. See 4 C. L. 1771.

89. In a contract conveying a certain number of acres "being my interest in," etc., "interest" means "part or share" and not the extent of the vendor's title. Brooks v. Halane, 116 Ill. App. 383.

90. Where a contract provided for dedication of a portion of the land, but not for acceptance of such dedication, but an accepted dedication was intended. McCormick v. Merritt [Iowa] 105 N. W. 428. The contemporaneous construction by vendor and vendee evidenced by giving of possession will fix the true meaning and intent of the parties. Town of Como v. Pointer [Miss.] 40 So. 260.

91. Brooks v. Halane, 116 Ill. App. 383.

92. Not by the law of the place where the contract is made. Dal v. Fisher [S. D.] 107 N. W. 534.

93. See 4 C. L. 1788, n. 22 et seq.

94. See Reformation of Instruments, 6 C. L. 1279. Evidence insufficient to show mistake in the execution of a contract warranting reformation. Clutter v. Strange [Wash.] 82 P. 1028.

95. See Cancellation of Instruments, 5 C. L. 500.

96. As to what constitutes fraud, see Fraud and Undue Influence, 5 C. L. 1541.

97. As to what constitutes, see Mistake and Accident, 6 C. L. 678.

98. The equitable issue is to be first tried by the court and the legal issue then submitted to the jury. Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121.

99. See 4 C. L. 1770. See, also, Frauds, Statute of, 5 C. L. 1550.

1. An oral contract to convey a life estate

is not essential that it be signed by both parties.[3] A party may be precluded from asserting the defense of the statute,[4] hence a vendee who sues to enforce a contract not signed by him waives the benefit of the statute;[5] but a vendor is not estopped to set up the statute because the vendee relies and acts upon the oral agreement.[6] A contract may be taken out of the operation of the statute by part performance.[7] What constitutes part performance depends on the circumstances of each particular case.[8]

(§ 1) *D. Options to buy or sell.*[9]—An option is a contract whereby one purchases the right for a certain time, at his election, to demand and receive or to deliver certain land at a certain price.[10] Until an option to purchase has been exer-

with certain exceptions, the vendee to pay the vendor a certain sum per year during her life is one for the sale of land. Miller v. Hart [Ky.] 91 S. W. 698. A parol agreement to purchase land at execution sale, resell it and after deducting the purchase price and expenses pay the balance to the execution defendant is within the statute of frauds. Bryan v. Douds [Pa.] 62 A. 828. A contract void under the statute of frauds should be rescinded upon equitable terms. Miller v. Hart [Ky.] 91 S. W. 698.

NOTE. Right of vendee to recover money paid under a contract within the statute of frauds. Where he is in possession: The fact that the vendee has been put in possession will not defeat his right to recover payments upon refusal of the vendee to execute a conveyance. Jellison v. Jordon, 68 Me. 373; Wyvill v. Jones, 37 Minn. 68, 33 N. W. 43. He cannot, however, if the vendor does not repudiate. Donaldson v. Waters, 30 Ala. 175. Nor can he maintain an action to recover it until he restores possession. Abbott v. Draper, 4 Denio [N. Y.] 51. And the amount of the benefits received will be deducted from the amount of the recovery. Richards v. Allen, 17 Me. 296; De Montague v. Bacharach, 137 Mass. 123. 72 N. E. 938. If he has materially affected the value of the premises by cutting timber, this may prove a bar to recovery. Gilley v. Burkholder, 41 Mich. 749, 3 N. W. 221. Some authorities hold that he can recover nothing for his labor and improvements on the property. Gillett v. Maynard, 5 Johns. [N. Y.] 85; Bidell v. Tracy, 65 Vt. 494. See, also, Shreve v. Grimes, 4 Litt. [Ky.] 220. **But see** McCampbell v. McCampbell, 5 Litt. [Ky.] 92, 15 Am. Dec. 48; Fox v. Longley, 1 A. K. Marsh. [Ky.] 388; Barnes v. Brown, 71 N. C. 507; Miller v. Metz, 103 Wis. 220, 79 N. W. 213.—See note to Durham v. Wick [Pa.] 105 Am. St. Rep. 795.

2. Dal v. Fischer [S. D.] 107 N. W. 534.

3. A verbal acceptance of a contract signed only by the vendor renders the contract mutual where the vendee notifies the vendor and offers to perform. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482.

4. A vendee may not set up the statute of frauds to a parol extension when the vendor tendered performance within the original period and granted the extension at the request and for the benefit of the vendee. Daniels v. Rogers, 108 App. Div. 338, 96 N. Y. S. 642. One who after giving an option recognizes the validity of the contract by agreeing to an extension of the time within which it may be taken advantage of thereby estops himself from claiming that the contract is within the statute of frauds. Alston v. Connell [N. C.] 53 S. E. 292. One who has cut timber under an oral contract of sale cannot defend an action for its value on the ground that the contract was unenforceable under the statute of frauds. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

5. Dennis Simmons Lumber Co. v. Corey [N. C.] 53 S. E. 300.

6. Where a vendee of a life estate acting in reliance on the oral contract purchases and pays for remainder interests. Miller v. Hart [Ky.] 91 S. W. 698.

7. Part performance shown. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35. Undisturbed possession under the contract together with the making of valuable improvements and payment of the purchase price. O'Brien v. Knotts [Ind.] 76 N. E. 594. Part performance of a contract to purchase land valuable as a quarry is shown where the purchaser has paid a portion of the purchase price and quarried stone the value of which cannot be reasonably ascertained. In re Fay's Estate [Pa.] 62 A. 991. Taking possession, making extensive and valuable improvements, and managing and controlling the premises. White v. Poole [N. H.] 62 A. 494. Possession together with payment of part of the price and tender of the balance is sufficient part performance. Sprague v. Jessup [Or.] 83 P. 145.

8. Sufficient part performance shown. Veum v. Sheeran [Minn.] 104 N. W. 135.

9. See 4 C. L. 1772.

10. See Cyc. Law. Dict. Option 645. Instrument reciting that one has an option to purchase certain land for a certain price, a certain sum paid down to be forfeited if the balance was not paid before a certain date creates a mere option. White v. Bank of Hanford [Cal.] 83 P. 698. An agreement to rent a farm "with the refusal of buying it next fall for the sum of $6 per acre, and providing that if the second party did not take the place, any buildings belonging to him should be paid for by the first party at a reasonable price, if they did not "trade," was held to rent the farm with the option of buying at the time and place stated. Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436. An instrument by which a beneficiary in a trust deed who purchased on foreclosure certified that he had purchased and bound himself at any time prior to a certain date to convey to whom the mortgagor should direct is an option. Alston v. Connell [N. C.] 53 S. E. 292.

cised, the person holding it has no title.[11] A contract which merely specifies how the vendee may acquire title is a mere option and does not pass the equitable title.[12] An offer of an option until accepted in accordance with its terms is governed by the same rules as an offer to sell and may be withdrawn at any time,[13] and where a written contract is contemplated no option is created until the writing is executed.[14] The conditions essential to the validity of any other contract must exist.[15] An option contract is converted into a contract of sale by an acceptance according to its terms[16] and within the time specified.[17] The acceptance must be unconditional.[18] An acceptance in terms varying from those of the offer amounts to a rejection of the offer.[19] The holder of an option to purchase who once rejects the offer cannot revive it by tendering an acceptance.[20] Time is necessarily of the essence of an option contract,[21] and if not taken advantage of during the period prescribed therein the person holding it loses all rights thereunder.[22] The option will be given effect[23] and continued in force[24] according to the legal import of its terms. An option is surrendered where the purchaser signifies his intention to surrender it and forfeit his rights, and the vendor thereupon takes possession.[25]

§ 2. *Condition, quantity, and description of lands. What land.*[26]—In determining whether the sale was by the acre, the deed will not control but the parties may go behind it and prove the contract of which the deed is intended as an expression.[27] The recital in a deed of the number of acres is not a warranty that the tract contains

An option to purchase though binding on the vendor and not on the vendee where extended for a consideration is enforceable within the time of the extension. Seyferth v. Groves & S. R. Co., 217 Ill. 483, 75 N. E. 522.

11. The land is subject to attachment by creditors of the vendor. Sheeby v. Scott [Iowa] 104 N. W. 1139.

12. Contract stating that the vendor had sold the land and received part of the price to be forfeited if the vendee failed to pay the balance within a fixed period. Sheeby v. Scott [Iowa] 104 N. W. 1139.

13, 14. Couch v. McCoy, 138 F. 696.

15. Evidence sufficient to show that the consideration for an option contract was paid. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695. An option procured by fraud is unenforceable. Grand Rapids, etc., R. Co. v. Stevens [Mich.] 13 Det. Leg. N. 86, 253, 107 N. W. 436.

16. Couch v. McCoy, 138 F. 696. A vendee after accepting an option, making tender of the price and demanding a deed and on being refused sued for specific performance is estopped to assert that the contract was not binding on him. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695.

17. A contract becomes mutual on the acceptance of an option within the time specified. Id. An option contract though unilateral in its inception becomes mutual on acceptance of the option within the time specified. Quinton v. Mulvane [Kan.] 81 P. 486.

18. Couch v. McCoy, 138 F. 696. An acceptance of an option to be good must be such as amounts to an agreement or contract between the parties. Henry v. Black [Pa.] 63 A. 250.

19. The negotiations are closed unless the offerer renews or assents to a modification. Henry v. Black [Pa.] 63 A. 250.

20. Henry v. Black [Pa.] 63 A. 250.

21. A tender or offer must be made within the time specified in the contract. Herman v. Winter [S. D.] 105 N. W. 457.

22. Contract limited to one year and providing that the owner of the premises might incumber the property to a certain amount and if the holder of the option purchased he would take subject to the incumbrance. Bennett v. Giles [Ill.] 77 N. E. 214.

23. Where a lease for one year provided that if the produce of the land should amount to more than taxes, insurance and rent, the excess might be applied in the purchase of the premises, the lessee was entitled to purchase any time within the year with funds not so derived. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763. Where the lease provided for a sale of the premises, but gave the lessee the preference as purchaser in case of sale, he could be deprived of his right to purchase only by a bona fide sale. A fictitious and collusive sale, at an alleged price beyond the value of the property, or an alleged gift by the owner to her son could not be relied upon to oust the lessee from his right to purchase. Ogle v. Hubbel [Cal. App.] 82 P. 217. And the lessee may show his ability and willingness to purchase the property at a fair market price and his ineffectual attempts to get the lessor to place a price upon it. Id.

24. Where it is provided that a lease shall continue in force from term to term after the expiration of the first term, "with all its provisions and covenants," that includes an option of purchase "at the end of said term," and such option will be renewed with the other provisions from term to term. Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. [Md.] 62 A. 633.

25. Evidence held to show a surrender and an acceptance thereof by the vendor. K. P. Min. Co. v. Jacobson [Utah] 83 P. 728.

26. See 4 C. L. 1776.

27, 28. Rich v. Scales [Tenn.] 91 S. W. 50.

so many acres.[28] But where the deed contains the equivalent of an express covenant that the tract contains a given number of acres, it will be treated as a warranty.[29]

Description.[30]—The contract must contain a description sufficiently definite to identify the land.[31] The description is sufficiently definite if the lands can be ascertained by the aid of such extrinsic evidence as is admissible under the rules of law.[32] Certainty to a common intent is all that is required,[33] and if a description can be made certain by proof of an extrinsic fact referred to in the contract, it is sufficient.[34] The description may be aided by the contemporaneous construction of the contract by the parties.[35] By statute in California, evidence of the circumstances under which the conveyance was made including the situation of the subject-matter and of the parties is admissible if the description is imperfect.[36]

What acreage or quantity.[37]—In a sale in gross an immaterial difference between the acreage mentioned in the contract and that actually contained in the tract will

29. Rich v. Scales [Tenn.] 91 S. W. 50.

Note: The principles by which to determine whether a contract is for a sale by the acre or in gross are summarized as follows in Benson v. Humphreys, 75 Va. 196:

"First. Every sale of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre.

"Second. The language 'more or less,' used in contracts for sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used, it rather repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity.

"Third. While contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof.

"Fourth. The burden of proof is always upon a party asserting a contract of hazard; for, the presumption always being in favor of a sale per acre, a sale in gross or contract of hazard must be clearly established by the facts.

"Fifth. Where the parties contract for the payment of a gross sum for a tract or parcel of land upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard.

"Sixth. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract, and all the facts and circumstances connected with it. But in interpreting such contracts the court, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre. See Watson v. Hoy, 28 Grat. [Va.] 698, where all the cases decided by this court and many others are carefully collected in the elaborate opinion of Judge Burks."

See, also, to the same effect, the subsequent cases of Cunningham v. Millner, 82 Va. 530; Trinkle v. Jackson, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; Boschens v. Jurgens, 92 Va. 756, 24 S. E. 390; Hull v. Watts, 95 Va. 10, 27 S. E. 829.—See Berry's Ex'x v. Fishburne [Va.] 51 S. E. 827.

30. See 4 C. L. 1777.

31. Too indefinite: A contract for the sale of a certain number of acres which are a part of a larger tract which does not specify from what part of the tract the land sold is to be taken. Brooks v. Halane, 116 Ill. App. 383. Where the land is so vaguely described that the writing furnishes no key to its identification, the contract cannot be enforced nor will an action for damages lie for its breach. Tippins v. Phillips, 123 Ga. 415, 51 S. E. 410.

32. Warner v. Marshall [Ind.] 75 N. E. 582; Farmer v. Sellers [Ala.] 39 So. 772; Howison v. Bartlett [Ala.] 40 So. 757. The contract is not void for uncertainty if the land intended to be described can be identified from the description by the aid of parol evidence. Hiskett v. Bozarth [Neb.] 105 N. W. 990. The description must be sufficient to fit and comprehend the property so that with the assistance of extrinsic evidence it may be applied to the land intended. Whiteside v. Winans, 29 Pa. Super. Ct. 244. Parol evidence is admissible to identify the premises referred to in a contract by which one person had rented another's place with an option to purchase. Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436. An obvious omission in the description may be read into it. In re Garnier's Estate, 147 Cal. 457, 82 P. 68.

33. Whiteside v. Winans, 29 Pa. Super. Ct. 244. Land is sufficiently described if the names of all owners of surrounding lands are given and it is also described as consisting of lots referred to by number. Id.

34. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

35. Where a vendor places his vendee in possession under certain boundaries or other descriptive terms, he will not afterwards be permitted to avail himself of any uncertainty or ambiguity in the terms employed. Town of Como v. Pointer [Miss.] 40 So. 260.

36. It may be shown that the vendee had occupied the premises for many years and improved them. In re Garnier's Estate, 147 Cal. 457, 82 P. 68.

37. See 4 C. L. 1776.

not defeat the contract.[38] The words "more or less" following a statement of the number of acres in a contract containing a description by metes and bounds are words of precaution,[39] but where a contract does not describe the land by metes and bounds or any ascertainable monuments, the words "more or less" do not weaken the statement as to quantity.[40] In a contract providing only for a sale of the vendor's right, title, and interest, a covenant to furnish an abstract showing perfect title clear of incumbrances does not enlarge the estate agreed to be granted.[41]

§ 3. *Title, deed, and incumbrances. What was sold.*[42]—Lands intended by the parties not to be included in the contract do not pass.[43] A contract for the sale of lands, and not an estate therein, though subject to certain restrictions contemplates a fee,[44] as also does one for a clear title.[45] A contract to convey land and the building thereon, giving the boundaries, is for the conveyance of the land within the boundaries and the building thereon, and not the building and the land under it.[46]

Sufficiency of that tendered.[47]—A purchaser cannot be required to accept land other than that he contracted to buy.[48] A contract which calls for an abstract showing a good title is not satisfied by anything less no matter what the vendor's real title may be.[49] A purchaser is entitled to a marketable title[50] unless he had notice of defects at the time the contract was made.[51] A marketable title means one free from reasonable doubt,[52] fairly deducible of record[53] and which does not invite or

38. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692.

39. Intended to cover some slight inaccuracy in the computation of the number of acres contained within the boundaries. Brooks v. Halane, 116 Ill. App. 383.

40, 41. Brooks v. Halane, 116 Ill. App. 383.

42. See 4 C. L. 1774.

43. Evidence held to show that certain property was not included in a sale of all the vendor's property. Allen v. Ellis, 125 Wis. 565, 104 N. W. 739.

44. A provision that the vendee shall take the property "subject to court yard restrictions and covenant as to buildings" is an implication that he is to receive a fee, Weiss v. Schweitzer, 47 Misc. 297, 95 N. Y. S. 923.

45. A contract requiring the vendor to furnish an abstract showing a clear title calls for a fee and is not complied with where the only title he has is a homestead entry without final proof. Day v. Mountin [C. C. A.] 137 F. 756.

46. Contract held not to include a bulkhead attached to the building but extending beyond the boundaries given. Cawley v. Jean [Mass.] 75 N. E. 614.

47. See 4 C. L. 1774, n. 97 et seq.

48. Where an agreement binds one to divide a tract of land into lots of several classes, a subscriber for a lot of one class is not obliged to accept a lot of another. Burton v. Main [Iowa] 105 N. W. 335.

49. Howe v. Coates [Minn.] 107 N. W. 397. Where a contract provides for a conveyance "by warranty deed with abstract showing good title" a title by adverse possession which cannot be shown by abstract is not sufficient though in fact good. Fagan v. Hook [Iowa] 105 N. W. 155.

50. "Good title" in a contract means "marketable title." Fagan v. Hook [Iowa] 105 N. W. 155. Contract construed and held to call for a marketable title. Howe v. Coates [Minn.] 107 N. W. 397. Under a contract for the exchange of lands, each party is entitled to a good title. Blackledge v. Davis [Iowa] 105 N. W. 1000. An agreement to convey real estate, "by a good and sufficient, full and covenant warranty deed," is satisfied by the tender of a good marketable title with warranty. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609. Evidence insufficient to show title in the vendor. Cawley v. Jean [Mass.] 75 N. E. 614.

51. A purchaser need not investigate facts that may affect the title which are not disclosed by the abstract furnished under the contract or actually known of by him. Whelan v. Rosseter [Cal. App.] 82 P. 1082. Ordinary building restrictions applicable to all the property in the neighborhood, of which a proposed purchaser has knowledge, cannot be classed as an incumbrance unless they affect the marketable quality of the title, and the presumption is that they are a benefit rather than a detriment to the property. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609.

52. Howe v. Coates [Minn.] 107 N. W. 397. A title open to reasonable doubt is not marketable and the court cannot make it so by passing upon an objection depending upon a disputed question of fact or a doubtful question of law in the absence of the party in whom is vested the outstanding right or claim. Id. The vendee is entitled to a title which will enable him to hold the land in peace and reasonably sure that no flaw will come up to disturb its marketable value. Metz v. Wright [Mo. App.] 92 S. W. 1125. A title is not marketable when so defective as to affect the value of the land or interfere with its sale. Howe v. Coates [Minn.] 107 N. W. 397.

Held unmarketable: Title through foreclosure proceedings held unmarketable because statutory requirements as to publication of summons were not complied with.

expose one holding it to litigation.[54] But a mere possibility of litigation does not render it unmarketable.[55] A title by adverse possession is marketable.[56] A purchaser of a title free from incumbrances is not required to accept a title subject to a lease,[57] mortgage of record,[58] easement,[59] party wall agreement,[60] lien for taxes,[61] special assessments,[62] lis pendens,[63] or building restrictions.[64] An easement in favor of the vendor which he is estopped to assert does not render the title unmarketable.[65]

Fink v. Wallach, 47 Misc. 247, 95 N. Y. S. 872. Title under foreclosure proceeding held unmarketable where persons who had a right to assail the validity of the mortgage were not made parties. Cook v. Sackett, 96 N. Y. S. 1085. Where a prior purchaser was not made a party to an action to foreclose a mortgage and so far as the abstract shows is still the owner with right to redeem, the abstract does not show good title. Fagan v. Hook [Iowa] 105 N. W. 155. A statute authorizing the recordation of affidavits explaining a defect in a chain of title does not authorize a vendor to indicate by affidavit the parol evidence available to establish it. Id.

Held marketable: Title through mortgage foreclosure held a marketable one. Hirth v. Zeller, 108 App. Div. 198, 95 N. Y. S. 747. A vendee cannot object to a mortgage not satisfied of record where it appears the mortgage debt has been due for a period greater than prescribed for maintaining action thereon, and it does not appear that any payments have been made within such period and the vendor gave evidence that the mortgage had been satisfied. Forbes v. Reynard, 98 N. Y. S. 710. Where the record shows a mortgage given by a guardian, the vendee cannot object because it is not shown that the guardian had accounted into court after payment of the mortgage as he may have accounted out of court after his ward obtained majority. Id. Where the vendor holds title through a corporation whose articles have been recorded as required by law, the failure of the register of deeds to index the record does not render the title unmarketable. Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. Where all liens against the land are payable presently and amount to less than is payable at delivery of the contract such liens being payable out of the purchase money at the time of execution of the deed do not render the title unmarketable. Id. Where a vendor's title depended on a decree under which a sale for taxes was made, an answer in a suit by him to compel performance putting in issue his title by reason of defects in a lien under which he bought states no defense. Finnegan v. Summers [Ky.] 91 S. W. 261.

53. A purchaser under a contract calling for a perfect title is entitled to a title fairly deducible of record, free from reasonable doubt and litigation. Whelan v. Rosseter [Cal. App.] 82 P. 1082. A purchaser will not be compelled to take a title when there is a defect in the record of it, which can be cured only by resorting to parol evidence. Howe v. Coates [Minn.] 107 N. W. 397.

54. Under a contract providing for a merchantable title, the vendee is not required to accept property the possession of which he may be required to defend by litigation. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371. Not where a suit involving the validity of building restrictions is pending. Whelan v. Rosseter [Cal. App.] 82 P. 1082.

55. Possibility of an action by a city to remove an encroachment onto the street held too remote to be regarded. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

56. Where the vendor has been in possession for the statutory period, paying taxes, etc., under color of title, he has a good title by adverse possession which he can convey. Beste v McGaugh [Del. Super.] 63 A. 28.

57. A lease is an incumbrance within a contract to sell free from incumbrances. Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145.

58. Under a contract calling for a perfect title the purchaser is not obliged to accept so long as an outstanding mortgage remains of record. Hobart v. Frederiksen [S. D.] 105 N. W. 168.

59. A light and air easement is an incumbrance though a building has been erected on the dominant estate without windows facing the servient one. Remsen v. Wingert, 98 N. Y. S. 388. Evidence insufficient to establish an easement in the premises sold in favor of an adjacent lot owned by the vendor. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

60. A party wall agreement is an incumbrance within a contract calling for a title free from incumbrances. Oppenheimer v. Knepper Realty Co., 98 N. Y. S. 204.

61. In Oklahoma land is assessed to the owner on the first day of January and the owner on such date is liable for the taxes for that year if he sells after such date without an agreement to the contrary. Rudd v. Dunlap [Okl.] 83 P. 431.

62. Where one corporation sells its property to another, to be free from all claims against the seller "or said property at the date of the transfer," a special tax levied to pay a debt incurred by the township in which the property was located before the transfer was made must be paid by the seller. Hudson Coal Co. v. Ogden, 212 Pa. 407, 61 A. 902.

63. Where it appears that notice of lis pendens concerning the land sold has been filed and an action is pending in which the validity of the vendor's title is assailed the title is prima facie unmarketable. Moulton v. Kolodzik [Minn.] 107 N. W. 154.

64. A purchaser may rescind because of building restrictions though the covenants concerning them do not run with the land since equity may enforce them. Whelan v. Rosseter [Cal. App.] 82 P. 1082.

65. An owner of adjacent lots who contracts to sell one free from incumbrances is estopped to assert an easement in favor

§ 4. *Price and payment.*[66]—The purchase price falls due when the conditions upon which it is to be paid are complied with,[67] and the vendor's right to it at such time cannot be postponed by subterfuge.[68] On the death of a vendor, his claim for the purchase money passes to his personal representative,[69] who may maintain action to recover it without joining the heirs at law.[70] A separate agreement to take and pay for a policy of title insurance though incorporated into the contract for the sale of the land does not make the amount a part of the purchase money.[71] Where no fraudulent purpose is involved, the vendee cannot be charged as a trustee for the vendor's creditors with the difference between the price and the known value of the premises.[72] A purchaser is entitled to an abatement of the price for failure of the vendor to perform a condition of the contract,[73] for damages to the premises caused by the vendor after the contract was made,[74] for sums paid by him in perfecting title,[75] for fraud[76] or breach of covenant.[77] Equity will enjoin the collection of the purchase money where the vendee is in possession under a conveyance with covenants of warranty, where the title is questioned by suit, prosecuted or threatened or where

of the premises retained. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

66. See 4 C. L. 1781, 1783.

67. Under a contract providing that the vendee should make a certain payment when the vendor perfected his title, the vendor is entitled to the payment upon obtaining a deed from the purchaser at a tax sale though the time to appeal from the tax judgment has not expired. Stoll v. Griffith [Wash.] 82 P. 1025. When a vendee sold the land to one who assumed his indebtedness to his vendor, the vendee agreeing to pay taxes and interest on a mortgage, and procured his vendor to execute a deed to the purchaser from him, the vendor's right to sue for the amount due him accrued on execution of the deed and was not defeated by subsequent failure of the vendee to pay taxes and interest. Farmers' Exch. Bank v. Crump [Mo. App.] 92 S. W. 724. Where an attorney for the purchaser retained a portion of the purchase price under an agreement to hold it until violations filed by the tenement house department had been removed, the vendor on removing such violations was entitled to the deposit. Eastern Crown Realty Co. v. Isaacs, 95 N. Y. S. 602. Contract construed and held an unconditional agreement to pay a certain sum as the payment. Williams v. Brooks [Idaho] 83 P. 610.

68. A vendee who assumes a mortgage under an agreement that he need not pay the purchase price until after he pays the mortgage cannot postpone the vendor's right to the purchase price by securing an extension of the time for payment of the mortgage and executing a new one without the vendor's knowledge or consent. Branch v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 14, 89 S. W. 813.

69, 70. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496.

71. Alexander v. Vidootzky, 97 N. Y. S. 992.

72. Rosenheimer v. Krenn [Wis.] 106 N. W. 20.

73. Where the vendor agreed to procure the acceptance of a dedication and the deed was made and the vendee took possession on the mutual understanding that acceptance was a formal matter only, and acceptance was refused until the proposed streets were graded up to the official grade, it was held that since neither party contemplated that the acceptance would involve the establishment of a grade, the vendor could recover on the purchase-money notes less the damages sustained by the vendee by reason of the failure to procure the acceptance. McCormick v. Merritt [Iowa] 105 N. W. 428.

74. Where pending an option the vendor cuts standing timber and the vendees gave immediate notice that they elected to exercise the option, they may deduct from the purchase price the deterioration in the value of the land caused by cutting the timber. McCowen v. Pew, 147 Cal. 299, 81 P. 958.

75. In an action for the purchase price the vendee should be credited with sums paid by him in perfecting his title. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496.

76. The vendee may have an abatement of the price for fraud and misrepresentation of the vendor in the sale. Williams v. Neal [Ala.] 40 So. 943; Kell v. Trenchard [C. C. A.] 142 F. 16, modifying 127 F. 596.

77. A purchaser under a deed containing full covenants of warranty who retains a portion of the purchase price as security against a lien upon the land may purchase the land at a proceeding enforcing the lien and in a suit by the vendor for the purchase money counterclaim for damages for breach of covenant though the judgment has in the meantime been reversed and the lien held unenforceable. Talbott v. Donaldson [Kan.] 80 P. 981.

Note: While a covenantee who purchases an outstanding title has the burden of proving that it is paramount to that acquired from his covenantor (Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Thomas v. Stickle, 32 Iowa 71), the fact that he purchased it will not affect his right to bring an action on his covenant (Whitney v. Dinsmore, 6 Cush. [Mass.] 124). Where the covenantor has suffered the property to be sold under a judgment after the covenantee has taken possession and the covenantee purchased the outstanding title in good faith, the covenantor will be estopped from denying the validity of the judgment even though it is

it is clearly shown to be defective.[78] Such injunction will not be granted unless the bill alleges facts showing a clear outstanding title in a stranger,[79] and the burden is on the plaintiff to show such outstanding title.[80] Purchasers who acquire notice of equities before paying the entire purchase price must account to the holder of such equities for the unpaid balance.[81] A purchaser who assumes a debt of the vendor as part of the purchase price cannot assert against it a defense personal to the vendor.[82] A grantee of land subject to a mortgage, who agrees with the grantor to pay said mortgage as part of the purchase price, after payment of the mortgage, is not entitled to be subrogated to the rights of the mortgagee as against the lienholders.[83] Attorney's fees provided for in purchase-money notes should be included in a judgment thereon.[84]

§ 5. *Time.*[85]—If time is of the essence of the contract, its conditions must be complied with within the period specified.[86] If time is not of the essence of a contract and no time is specified within which it must be completed, a reasonable time under the circumstances of the case will be implied,[87] hence under such a contract the vendor has a reasonable time within which to make the conveyance,[88] and the vendee has a reasonable time within which to pay the purchase price.[89] What constitutes a reasonable time depends on the circumstances of each case.[90] A provision making time of the essence will be construed to apply only to the provisions intended.[91] If time is not of the essence of the contract it may be enforced after the time

invalid and has been reversed. Smith v. Dixon, 27 Ohio St. 471. But this would not be the case if the covenantee voluntarily acquired an outstanding title which had vested previous to his purchase and possession. Cummings v. Holt, 56 Vt. 384. Greater protection is given to a covenantee who takes steps to keep another from acquiring an outstanding paramount title than to one who voluntarily buys an outstanding title after it has been acquired by another. Cain v. Fisher, 57 W. Va. 492, 50 S. E. 752, 1015.—See 4 Mich. L. R. 170.

78. Harvey v. Ryan [W. Va.] 53 S. E. 7. Where a vendee is in possession under a deed with covenants of general warranty and in an action of ejectment a stranger asserts title to and recovers the land and the vendee is evicted, equity will enjoin the collection of the purchase money due the vendor. Id.

79. Allegations of defects in title which do not show in what respect such defects exist, or facts which establish nothing more than that the title is doubtful will not support an application. Harvey v. Ryan [W. Va.] 53 S. E. 7.

80. Harvey v. Ryan [W. Va.] 53 S. E. 7.

81. Sparks v. Taylor [Tex.] 90 S. W. 485.

82. Cannot defend against usury. Chenoweth v. National Bldg. Ass'n [W. Va.] 53 S. E. 559.

83. Dieboldt Brewing Co. v. Grabski, 7 Ohio C. C. (N. S.) 221.

84. In an action by the vendor to recover possession of the land for nonpayment of the purchase-money notes, a judgment for him subject to the vendee's right to the land, on payment therefor, should require the vendee to pay the face of the notes together with attorney's fees stipulated for. Moore v. Brown [Tex. Civ. App.] 89 S. W. 310.

85. See 4 C. L. 1783.

86. Where time for performance is fixed at a certain hour, on a certain date, and the vendee appears ready to perform and waits an hour, he may recover what he has paid though the vendor was ready to perform at a later hour of the same date. Zirinsky v. Post, 98 N. Y. S. 132.

87. Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482. If the contract is silent as to the time within which it is to be performed the law infers that it is to be completed within a reasonable time. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627. Time is not of the essence so as to defeat the right of a vendee who has paid a portion of the purchase price and made improvements, to enforce the contract, where the delay can be compensated by the payment of interest. McWhorter v. Stein [Ala.] 39 So. 617.

88. White v. Poole [N. H.] 62 A. 494.

89. Veum v. Sheeran [Minn.] 104 N. W. 135. Where time is not of the essence of the contract and delivery of an abstract showing good title is a condition precedent to a deferred payment and such abstract had not been furnished on the day fixed for performance, the fact that the purchaser was not in a position on such day to make the deferred payment did not defeat his right to rescind on the vendor's subsequent failure to furnish good title. Fagan v. Hook [Iowa] 105 N. W. 155.

90. Where a vendor fails, for seven months after notice that the vendee has rescinded, to take steps to perfect his title, he cannot assert that he was not given a reasonable time to comply with the contract. Fagan v. Hook [Iowa] 105 N. W. 155. Under an agreement for the transfer of a perfect title which required the vendee to perform within 15 days, the vendors are not entitled to two or three months in which to perfect title. O'Neil v. Printz [Mo. App.] 91 S. W. 174.

91. Under an option providing that if not accepted within a specified time and a second

specified in the contract,[92] and a provision making time of the essence may be waived.[93] Where strict compliance with the terms of the contract as to time of performance is waived, a vendor is not entitled to rescission because the vendee failed to seasonably perform.[94] As to when time commences to run is to be determined from the terms of the contract.[95]

§ 6. *Conditions, covenants, and warranties.*[96]—A condition in a contract that the title shall be approved by attorneys must be performed[97] unless waived,[98] but such approval cannot be arbitrarily withheld,[99] and a contract which contemplates ratification by a court which sets aside the sale cannot be thereafter enforced on the ground that ratification is unnecessary.[1] A covenant to furnish an abstract is an essential part of the contract.[2] A complete abstract within the meaning of a contract requiring such a one to be furnished is one certified up to the date of its delivery.[3] Covenants to pay the purchase price and to execute the deed are mutual and dependent,[4] providing the contract is dual,[5] unless a contrary intent is clearly apparent,[6] and neither party can put the other in default without an offer to perform on his

payment made a certain sum should be forfeited, time is of the essence of the contract only as to the first two payments. Where the second payment was promptly made, the option was at an end, and the vendor could not insist on forfeiture for nonperformance by the vendee but could only retain sufficient to compensate him for breach of the contract. Davis v. Barada-Ghio Real Estate Co. [Mo. App.] 92 S. W. 113.

92. Hobart v. Frederiksen [S. D.] 105 N. W. 168.

93. A vendee who calls for additional evidence of title after the expiration of the time for performance thereby waives performance by the vendor within the time limited by the contract. Metz v. Wright [Mo. App.] 92 S. W. 1125.

94. His rights being fully protected by requiring the vendee to deposit in court the sum of the payment which had been postponed beyond the time for performance. Hurd v. Fleck [Colo.] 82 P. 485.

95. Under a contract requiring the vendee to point out defects in the title within seven days after being furnished with a complete abstract by the vendors, the seven days commence to run from the date a complete abstract is furnished and not from date of delivery of an incomplete one. Davis v. Fant [Tex. Civ. App.] 15 Tex. Ct. Rep. 8, 93 S. W. 193.

96. See 4 C. L. 1772, n 75 et seq.

97. A promise to sell upon condition that the title was approved by attorneys within a specified time is not binding if the title is not approved within such time. Flournoy v. Miller, 114 La. 1028, 38 So. 818.

98. A purchaser who is given a deed under a contract providing for approval of the title by his attorney, who after disapproval disposes of the property, thereby affirms the contract and renders himself liable for the purchase money. Parkhurst v. Dickinson [Wash.] 83 P. 895.

99. Where a city council authorized the purchase of land, title to be approved by the city attorney, such approval if arbitrarily withheld does not preclude the vendor from enforcing a contract entered into in accordance with the resolution. Lighton v. Syracuse, 98 N. Y. S. 792; Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692.

1. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115.

2. A covenant by the vendor in an option contract to furnish an abstract within the time limited by the option is not an independent one but an essential and material part of the contract, the performance of which is necessary to enable the vendee to intelligently exercise his option. Reynolds v. Lynch [Minn.] 107 N. W. 145. A provision in a contract calling for an abstract of title to be furnished with the deed cannot be ignored. Consolidated Coal Co. v. Findley [Iowa] 105 N. W. 206.

3. Davis v. Fant [Tex. Civ. App.] 15 Tex. Ct. Rep. 8, 93 S. W. 193.

4. A vendee cannot recover damages for the vendor's default without tendering the purchase price regardless of the vendor's failure to tender a deed conveying clear title. Davis v. Barada-Ghio Real Estate Co. [Mo. App.] 92 S. W. 113. A vendor who contracts to convey clear of incumbrances on payment of purchase price cannot insist on full payment before he pays off incumbrances. Id. A tender of performance by the vendor is a condition precedent to maintaining an action for the purchase price due. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332. Hence, in an action to foreclose a lien for the purchase money, failure to allege tender of a deed or offer to convey before bringing the action renders the complaint demurrable. Hunt v. Lake, 48 Misc. 570, 97 N. Y. S. 298.

5. Under a contract not signed by the vendee by which a vendor agrees to convey on a specified date on payment of the purchase price and where the vendee takes possession, on refusal of the purchaser to pay the price or restore possession without intimating that refusal was because no deed was tendered failure of the vendor to make such tender does not preclude him of his right to regain possession. Bowling v. Bowling [Miss.] 40 So. 871.

6. Under a contract providing that conveyance is only to be made upon demand after completed payment, the promise of pay-

part,[7] and where they are contemporaneous acts parol evidence is admissible to show the conditions upon which they were performed.[8] A requirement that the vendee give written notice of defects in the title within a specified time after being furnished with an abstract does not require written notice.[9] Under a contract to sell to three persons, the vendor may refuse to convey to two until proof has been made that the interest of the other has been eliminated.[10] A provision in the contract that no assignment shall be binding on the vendor unless approved by him, cannot be taken advantage of by a subsequent assignee of the contract as against a prior assignee.[11] Performance of the conditions of a contract may be waived.[12] Covenants in the contract do not merge into those in the deed.[13]

§ 7. *Demand, tender, and default.*[14]—On breach of the contract by the vendee, an oral demand for possession by the vendor is sufficient upon which to maintain an action.[15] Neither party can put the other in default without tender of performance of mutual and concurrent conditions,[16] but if one party is unable to[17] or has stated

ment is absolute and may be enforced without tender of conveyance. The duty to convey is neither a condition precedent nor an act which may be demanded concurrently. Collins v. Schmidt [Wis.] 105 N. W. 671.

7. Coles v. Meskimen [Or.] 85 P. 67. Under a contract providing for the payment of the purchase price upon execution of the deed, either party in order to put the other in default must make a tender. Claude v. Richardson, 127 Iowa 623, 103 N. W. 991. Where a contract provides for payment of the balance of the purchase money on execution of the deed, and if the purchaser fail to comply with the contract within 30 days, money paid should be forfeited, the vendor cannot insist on forfeiture without showing that within the specified period he tendered a deed. Loewenstein v. Armstrong, 27 Pa. Super. Ct. 543. Where owner of land executed a contract of sale but failed to deliver deed and demand payment, and the grantee failed to complete his payments, held grantor could not maintain ejectment. The Toledo, etc., R. Co. v. Turney, 7 Ohio C. C. (N. S.) 370, afd., without report 73 O. S. —.

8. McCormick v. Merritt [Iowa] 105 N. W. 428.

9. Davis v. Fant [Tex. Civ. App.] 15 Tex. Ct. Rep. 8, 93 S. W. 193.

10. Lilienthal v. Bierkamp [Iowa] 105 N. W. 695.

11. McPheeters v. Ronning [Minn.] 103 N. W. 889.

12. Under a contract providing for conveyance of a clear title on payment of the balance of the purchase price it is competent for the parties to waive such conditions by the vendee's failure to object to making payment because certain incumbrances have not been discharged and by failure of the vendor to insist on cash payment by failure to object to the vendee's offer to pay on the ground that the money was not tendered. Davis v. Barada-Ohio Real Estate Co. [Mo. App.] 92 S. W. 113. Where a contract for the purchase of real estate gives to the vendor a specified time within which to remove any objections which may be made to the title, the failure of the vendee to make any objection as to a matter of which he had knowledge and which might have been corrected, constitutes a waiver thereof. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609. A contract cannot be avoided by the vendor on the ground that a nominal consideration for an option was not paid where on tender thereof he stated that if he wanted anything he would take it all at once. Seyferth v. Groves & S. R. Co., 217 Ill. 483, 75 N. E. 522.

13. Where a contract provides for a deed of the premises and of the gas fixtures, etc., the covenants in the contract do not merge in those in the deed which does not mention the fixtures and the vendor is liable where they are removed by a third person. Wynne v. Friedman, 96 N. Y. S. 838. Evidence held to show that there was no merger of the contract into the execution of the deed and purchase-money notes so as to deprive the purchaser of the right to insist upon performance of the conditions of the contract. McCormick v. Merritt [Iowa] 105 N. W. 428. Right to demand full payment of the purchase price as provided by the contract. Bach v. Kidansky, 106 App. Div. 502, 94 N. Y. S. 752. A provision that certain lands be dedicated is not waived by the acceptance of a deed and execution of purchase-money mortgage prior to the acceptance of the dedication where done under belief that acceptance would be procured. McCormick v. Merritt [Iowa] 105 N. W. 428.

14. See 4 C. L. 1781.

15. Where one is in possession under a conditional option and fails to perform the condition, but puts another in possession with directions to resist entry by any person, an oral demand for possession by the owner is sufficient to entitle him to maintain action for possession. Bruschi v. Quail Min. & Mill. Co., 147 Cal. 120, 81 P. 404.

16. See ante, § 6. If time is not of the essence, a vendee is not in default because of mere failure to make final payment, until the vendor tenders a deed and demands payment. Coles v. Meskimen [Or.] 85 P. 67.

17. Where the purchaser is ready and able to perform at the time fixed but the vendor is not he cannot set up in an action to recover the purchase money paid that the purchaser did not offer to perform. Nelson v. Chingren [Iowa] 106 N. W. 936. Where the vendor is unable to convey the title called for by the contract, the vendee may recover money paid and damages without tendering

that he will not comply with the contract, the other is excused from making tender.[18] That the purchaser states at the time the contract is made that he does not know where he will obtain the money to make payment does not excuse the vendor from offering performance at the appointed time;[19] especially where before such time the purchaser informed him that he intended to abide by his contract.[20] The tender of performance must be sufficient in law[21] and made within the time specified in the contract,[22] but actual production of money may be waived.[23] A refusal of a tender on a specific ground is a waiver of other grounds.[24] A vendee need not tender a deed for execution by the vendor unless by the terms of the contract the preparation of the deed devolved upon him.[25] A vendee in default cannot recover a sum paid by him upon the contract price,[26] nor enforce delivery of the deed from a depository who holds from the vendor.[27] One in possession under a conditional option, the conditions of which he fails to perform, cannot retain possession indefinitely and refuse to pay the purchase price on the ground that the vendor cannot convey good title to part of the land.[28] A vendee in an unrecorded contract who has title and possession but has paid only a portion of the purchase money is not injuriously affected by the filing of a lis pendens.[29] But when he comes to pay the balance of the purchase money he may protect himself by any means permitted under the original or a subsequent contract, or by making payment into court.[30] If, however, vendor undertakes to enforce the provision of the contract making time of its essence, and the contract contemplates an examination of the title according to abstracts to be furnished by the vendor, the vendee may rescind and recover purchase money paid in case the vendor cannot deliver a marketable title.[31]

§ 8. *Forfeiture, rescission, and waiver. Forfeiture.*[32]—The grounds upon which a contract may be forfeited must be contained in the contract,[33] and a contract will not be extended by construction to include other grounds than those specified.[34] A stipulation that in case instalment notes for the purchase price of land were not paid at maturity, a certain sum as rent should be paid and the relation of landlord

performance on his part. Oppenheimer v. Knepper Realty Co., 98 N. Y. S. 204. A vendor who has no title at the time fixed for performance is not entitled to a reasonable time to cure defects in his title. Nelson v. Chingren [Iowa] 106 N. W. 936.

18. Where prior to the date on which payment was to be made the vendor repudiated his contract, the vendee can sue for the breach at once or wait until performance is exacted by the contract. Kuhlman v. Wieben [Iowa] 105 N. W. 445. A vendor may, until notified to the contrary, rely on notice given by the vendee that he will do nothing further to carry out the contract. Claude v. Richardson, 127 Iowa, 623, 103 N. W. 991. If a vendor gives notice that he will not carry out his contract, tender of the purchase money by the vendee is not a condition to a suit to enforce performance. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

19, 20. Nelson v. Chingren [Iowa] 106 N. W. 936.

21. Tender held sufficient under the statutes where the vendor was absent at the time. Herman v. Winter [S. D.] 105 N. W. 457.

22. Where a tenant has the option of purchasing at the expiration of the lease, he has the day following its expiration in which to make tender. Herman v. Winter [S. D.] 105 N. W. 457.

23. Where no objection was made at the time to a cashier's check tendered. Moulton v. Kolodzik [Minn.] 107 N. W. 154.

24. Refusal on the ground that the money was not derived from a certain source is a waiver of the right to assert that it was not good because conditional. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 762.

25. Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436. Under an option contract providing that the holder of the option should give notice of his determination to take advantage of it and that payment should be made on delivery of the deed, from the date of notice, it is the vendor's duty to execute a deed and hold it for delivery on payment of the purchase price. Consolidated Coal Co. v. Findley [Iowa] 105 N. W. 206.

26. Where delivery of the abstract in accordance with the terms of the contract was prevented by the act of the vendee. Cody v. Wiltse [Iowa] 106 N. W. 510.

27. White v. Bank of Hanford [Cal.] 83 P. 698.

28. Bruschi v. Quail Min. & Mill. Co., 147 Cal. 120, 81 P. 404.

29, 30, 31. Moulton v. Kolodzik [Minn.] 107 N. W. 154.

32. See 4 C. L. 1780, n. 55 et seq.; 4 C. L. 1783, n. 75 et seq.

33, 34. Bennett v. Glaspell [N. D.] 107 N. W. 45.

and tenant exist, was in the nature of a forfeiture reserved for the vendor's benefit,[35] and at his discretion he could dispense with or waive it.[36] Forfeitures are not favored,[37] and if possible such a construction of the contract will be adopted as will prevent a forfeiture,[38] but where clearly provided for will be given effect.[39] Relief from them will be granted if possible,[40] and a party may be estopped from asserting a forfeiture in accordance with the terms of the contract.[41] Default of itself does not work a forfeiture[42] unless time is of the essence of the contract;[43] and a provision authorizing the vendor to declare a forfeiture of the vendee's rights for default in making deferred payments does not authorize him to declare such forfeiture if he himself is unable to comply with the contract,[44] and where time is stated to be of the essence of the contract if the parties treat the time clause as waived, one of them cannot suddenly insist on forfeiture but must give reasonable, definite, and specific notice of his intention.[45]

Rescission.[46]—The contract may be rescinded for fraud,[47] or affirmed and an

35. Rose & Co. v. Woods [Ala.] 39 So. 581.

36. Where waived, the relation of vendor and vendee existed. Rose & Co. v. Woods [Ala.] 39 So. 581.

37. A technical forfeiture will not be enforced against a vendee if he offers to do equity in consideration of being restored to his contractual rights. Yeiser v. Portsmouth Sav. Bank [Neb.] 106 N. W. 784. A suit to foreclose a vendee's interest and to cancel a bond for a deed is a recognition that he has some rights in the premises which will not be cut off without giving him a reasonable time to comply with the contract. Higinbotham v. Frock [Or.] 83 P. 536. On foreclosure of a land contract under which a substantial payment has been made, the court may not fix an unreasonably short time within which to make the remaining payment in order to redeem under the contract. Dickson v. Loehr [Wis.] 106 N. W. 793. Equity will not decree a forfeiture of the vendee's rights but will leave the vendor to his remedy at law, if any. Higinbotham v. Frock [Or.] 83 P. 536.

38. Where a vendee retained a portion of the purchase price under an agreement that it was to be forfeited to him if the vendor did not "perfect a perfect or satisfactory title" within a specified time, the vendor is only bound to furnish a satisfactory title and not a perfect one and the vendee is relegated to the covenants in his deed for failure of title. Letchworth v. Vaughan [Ark.] 90 S. W. 1001.

39. Complaint by a vendor against a depository of forfeit money held to state a cause of action against the vendee. Peirson v. Pierce [Wash.] 84 P. 731. Where a vendor sues for a deposit made by the vendee on condition that it should belong to the vendor if the vendee failed to perform the terms of the contract and it appeared that the only reason for failure to perform was the vendee's inability to do so, the vendor was entitled to recover. Id.

40. Under Rev. Codes 1899, § 4970, one who has subjected himself to forfeiture by breaching the contract may, by making compensation, be relieved therefrom when the breach is not grossly negligent, willful, or fraudulent. Bennett v. Glaspell [N. D.] 107 N. W. 45.

41. Where the vendee is an illiterate and did not know of the provision for forfeiture and the vendor after forfeiture had been incurred according to the strict letter of the contract accepted payments of the purchase money, retained the vendee's notes, and permitted him to improve the land without notifying him of the forfeiture. Morris v. Green [Ark.] 88 S. W. 565.

42. A provision in a bond for title that on default in making deferred payments the vendor may declare the bond void and repossess himself of the land gives the vendor power to elect to put an end to the agreement after reasonable notice to the vendee and a default does not of itself terminate the contract or forfeit the vendee's rights. Higinbotham v. Frock [Or.] 83 P. 536.

43. Under an option contract of which time is of the essence requiring certain payments at certain dates default of the vendee in making payments entitles the vendor to forfeit his rights without notice. Commercial Bank v. Weldon [Cal.] 84 P. 171.

44. Where the contract called for a title free from incumbrances and at the time forfeiture was declared there was a mortgage on the premises. Higinbotham v. Frock [Or.] 83 P. 536.

45. Barlow v. McDowell, 118 Ill. App. 506.

46. See 4 C. L. 1786.

47. As to what constitutes fraud, see Fraud and Undue Influence, 5 C. L. 1541. Cecil v. Henry [Tex. Civ. App.] 15 Tex. Ct. Rep. 271, 93 S. W. 216; Smith v. Woodson [Ky.] 92 S. W. 980. A statement of the number of rooms in a building is so material that its falsity will justify the rescission of the contract though the vendor is able to make the building answer the description before the day of performance. Davis v. Scher [N. J. Law] 62 A. 193. Concealment of or misrepresentation as to the boundaries. Lainhart v. Gabbard [Ky.] 89 S. W. 10. A vendor is liable for false representations of his agent. Kell v. Trenchard [C. C. A.] 142 F. 16. The doctrine of caveat emptor does not apply to a deficiency in the represented acreage which is not open and patent to the observation of the purchaser. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. The doctrine of caveat emptor has no application in cases of actual fraud. Kell v. Trenchard [C. C. A.] 142 F. 16. A purchaser who assails a title

action for damages maintained.[48] As to whether damage is essential in such case there is a conflict of authority.[49] Inability of a party to perform,[50] entire or partial failure of consideration,[51] breach of covenant to furnish an abstract,[52] is ground for rescission, and a contract will be rescinded where to enforce it would be inequitable.[53] Rescission may be presumed from long abandonment of the land;[54] but that the vendor did not have title at the time the contract was made is not ground.[55] One who affirms the contract with full knowledge of facts which entitle him to rescind is not thereafter entitled to rescission;[56] but one is not estopped to rescind because with his knowledge the vendor disposes of the purchase money[57] or because he has assumed control of the property.[58] A vendee who seeks to recover payments made on the ground of fraud inducing the contract must first rescind the contract.[59] In order to rescind, the party seeking rescission should offer to do equity.[60] Upon rescission

bond for fraud or mistake has the burden of proof. Begley v. Combs, 27 Ky. L. R. 1115, 87 S. W. 1081. A vendor cannot rescind for lesion beyond moiety unless the proof shows a disparity between value and consideration of more than half. Bonnette v. Wise [La.] 38 So. 960. Where two promoters of a corporation while acting as directors of it fraudulently sold property to it at an excessive valuation, the fact that title stood in one before the transfer and that he had a half interest therein does not affect the right of the corporation to maintain a bill to rescind and for damages against the other. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653. A bill by a corporation to rescind a sale to it by its promoters on the ground of fraud and to recover damages, is not demurrable on the ground that there exists an adequate remedy at law. Id. A prayer for rescission and damages in a bill by a corporation against its promoters alleging a fraudulent sale of land to it, is not inconsistent. Id.

48. See Deceit, 5 C. L. 953.

49. A contract cannot be rescinded for fraudulent representations in procuring its execution unless damage is shown. Sonnesyn v. Akin [N. D.] 104 N. W. 1026. A contract induced by fraud may be rescinded without proof of damage. Greiling v. McLean's Estate [Wis.] 107 N. W. 339.

50. Where the vendor did not have title at the time the contract was made and there was a flaw in the title of those from whom he expected to obtain title. Smith v. Glenn [Wash.] 82 P. 605.

51. Rescission may be effected by a party when the consideration has wholly or partially failed through the act of the other party. Miller v. Shelburn [N. D.] 107 N. W. 51. The consideration of a contract for the sale of land in the vendee's favor is the title to be conveyed and if the vendor refuses to convey after full performance or offer to perform by the vendee, the consideration fails and is ground for rescission. Id. Where a vendor made no effort to cure defects in the title pointed out by a vendee, the admission of evidence of other defects in an action to recover earnest money is not error. Davis v. Fant [Tex. Civ. App.] 15 Tex. Ct. Rep. 8, 93 S. W. 193.

52. On breach by a vendor of his covenant to furnish an abstract, the vendee may rescind and recover money paid. Reynolds v. Lynch [Minn.] 107 N. W. 145.

53. Where the contract was made by an agent of the vendor and can be enforced only by making the purchaser pay for what he did not get or making the vendor liable for what he did not authorize his agent to sell, equity will rescind it. Begley v. Combs, 27 Ky. L. R. 1115, 87 S. W. 1081.

54. Where soon after a sale under which the vendor retained a lien the vendee abandoned the land and the vendor resumed possession and held it for 20 years, it is proper for the jury to find that the contract was rescinded and that the vendee had consented that the vendor take back the land. Staley v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 827, 92 S. W. 1017.

55. It is not ground for rescission that the vendor did not own the property but had only a contract to purchase it and failure of the vendee to have notice of this fact being his own fault. Barden v. Badham [Ala.] 38 So. 1029. A vendor may compel specific performance if he tender a good title perfected during pendency of the suit. Finnegan v. Summers [Ky.] 91 S. W. 261. That a vendor who contracts to sell land which he has contracted to purchase has not paid the entire purchase price is no defense to an action to compel his vendee to perform. His vendee may have a decree requiring a sufficient portion of the purchase price paid to the owner. May v. Getty [N. C.] 53 S. E. 75. Where the vendor sues on purchase-money notes and the vendee sets up defect in title which before suit was brought had been cured, the vendor is entitled to recover. Cornett v. Ault [Ga.] 53 S. E. 460.

56. Voluntarily accepts benefits under the contract. Bennett v. Glaspell [N. D.] 107 N. W. 45.

57. Where a purchase from an administrator is induced by fraud the purchaser is not estopped to rescind because with his knowledge the administrator has paid out the purchase money to satisfy liens against the property, the administrator being afforded protection. Greiling v. McLean's Estate [Wis.] 107 N. W. 339.

58. A purchaser is not estopped to rescind for inability of the vendor to convey a good title because of the fact that he has leased the property and listed it for sale where it does not appear that the vendor has been prejudiced. Fagan v. Hook [Iowa] 105 N. W. 155.

for nonpayment of the purchase price, the vendor must tender so much of the price as has been paid,[61] but no tender need be made where on adjustment of mutual rights nothing will be due.[62] A purchaser who is given a deed under a contract providing for approval of the title by his attorney must, in order to rescind on disapproval by his attorney, and escape liability for the purchase money, tender a deed of reconveyance.[63] Where the vendor refuses to perform after full performance or offer to perform by the vendee and the contract has been rescinded, purchase money paid may be recovered in an action for money had and received.[64] In such case notice of rescission is sufficient if there is nothing to be returned under the contract.[65] The right to rescind must be exercised within a reasonable time[66] or within the time prescribed by law.[67]

Rights of vendee after rescission.[68]—After rescission the vendee is entitled to recover what he parted with by virtue of the contract[69] and will be given a lien on the land therefor,[70] and is chargeable with rent while he held the land.[71] On rescission for fraud he may recover the increase in the vendible value of the property caused by permanent improvements made by him,[72] but one who purchases an option may be precluded from recovering the amount paid where the contract is rescinded because of the vendor's fraud.[73]

Abandonment is shown by acts plainly indicating an intention to repudiate the contract[74] or by acts inconsistent with a claim of rights under the contract.[75] A written contract may be waived or abandoned by parol.[76]

59. Sonnesyn v. Akin [N. D.] 104 N. W. 1026.

60. If sought by the vendor he must tender back the purchase price. Cecil v. Henry [Tex. Civ. App.] 15 Tex. Ct. Rep. 271, 93 S. W. 216. Where a purchaser takes possession and leases the property in reliance on the vendor's ability to perform in an action to rescind because of the purchaser's inability to furnish a good title delivery of the lease and rent received is a sufficient restoration of the property. Fagan v. Hook [Iowa] 105 N. W. 155. A vendee while in possession claiming title cannot maintain action against his vendor to recover a portion of the purchase price paid, and damages for breach of the contract. Before he can do so he must surrender possession and thus place himself as nearly as possible in statu quo. Nolde v. Gray [Neb.] 104 N. W. 165. Where a vendee after tendering the balance of the purchase money and refusal of the vendor to convey rescinds and recovers judgment for money paid and the increased value of the land which the vendor supersedes and appeals from, pending such appeal the vendor cannot recover possession. Gray v. Nolde [Neb.] 107 N. W. 224.

61, 62. Succession of Delaneuville v. Duhe, 114 La. 62, 38 So. 20.

63. Parkhurst v. Dickinson [Wash.] 83 P. 895.

64, 65. Miller v. Shelburn [N. D.] 107 N. W. 51.

66. Reynolds v. Lynch [Minn.] 107 N. W. 145.

67. A suit to rescind for mistake must be brought within the statutory period. In Kentucky within 10 years from the execution of the deed. Kendrick v. Burchett [Ky.] 89 S. W. 239.

68. See 4 C. L. 1789.

69. On rescission of contract for the exchange of personal property for land after the personal property has been delivered to the vendor and disposed of by him, he must pay its value as fixed by the contract and cannot show that it was not worth that much. Fagan v. Hook [Iowa] 105 N. W. 155. In an action by the vendee to recover the amount paid on an option contract after rescission for failure of the vendor to furnish abstracts within the time agreed, the contract is admissible. Reynolds v. Lynch [Minn.] 107 N. W. 145. In an action to recover purchase money paid after default by the vendor, testimony of the vendor that nothing had been paid is immaterial where he admits payment to his authorized agent. Lewis v. Williams [Tex. Civ. App.] 91 S. W. 247.

70. On rescission of a contract for equitable considerations, the vendee will be adjudged a lien for purchase money paid and the value of improvements and charged with rent while they held the land. Begley v. Combs, 27 Ky. L. R. 1115, 87 S. W. 1081.

71. Begley v. Combs, 27 Ky. L. R. 1115, 87 S. W. 1081.

72. Lainhart v. Gabbard [Ky.] 89 S. W. 10.

73. Where the purchaser allowed himself to be speculated upon. Kell v. Trenchard [C. C. A.] 142 F. 16.

74. Frequent and emphatic letters from the vendee to the vendor stating that he considered the contract rescinded and demanded return of the earnest money under threat of immediate suit constitute a repudiation of the contract. Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. A vendee who tells the vendor that he cannot procure the purchase price and if the vendor could make his money out of the land to do so and who thereafter leaves the state and never exercises acts of ownership over the property, thereby abandons his equities under the contract.

§ 9. *Interest in the land created by, and rights and liabilities under the contract.*[77]—A contract of sale does not destroy the unconditional ownership of the vendor,[78] and until a deed is executed, the legal title remains in him.[79] The principle that the vendor holds the title in trust for the vendee who holds the purchase money in trust for him applies only in equity.[80] The vendee, however, becomes vested with an interest in the land.[81] If he has paid a portion of the purchase price he has a mortgageable interest,[82] but payment of earnest money does not give him an interest subject to levy and sale on execution.[83] Whether he acquires a right to possession rests in the terms of the contract.[84] Where a sale to several entitles them to possession, notice to the lessee to quit is properly signed by one only.[85] An agreement to sell in the future does not pass the equitable title.[86] Neither a purchaser in possession under an oral contract nor his heirs can dispute the title while the purchase money remains unpaid.[87] Under a contract providing for the execution of a deed after a certain portion of the purchase price has been paid, the delivery of the deed relates back to the date of the contract.[88] In Texas a vendor who expressly reserves a lien for the purchase money has the superior title[89] which he may assign.[90] He has not, however, such an interest as is subject to sale on execution until he rescinds the contract.[91] On release of an expressly reserved lien, the superior title vests in the vendee and the vendor has nothing left but his lien for the purchase price.[92] Under

May v. Getty [N. C.] 53 S. E. 75. Evidence held to show abandonment of a contract. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63.

75. Where a son was in possession of his father's farm but after his death his wife took a lease of the farm from the father and agreed that her right to possession should cease at a certain date and did other acts inconsistent with ownership, she was held precluded from demanding the farm under an alleged parol contract between the father and son. Heddleston v. Stoner [Iowa] 105 N. W. 56.

76. Evidence held to show an abandonment by express terms followed by 10 years of silence concerning the same. Wisner v. Field [N. D.] 106 N. W. 38.

77. See 4 C. L. 1773.

78. Within the meaning of a fire policy covering the property. National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450.

79. If he dies before the deed is accepted by the vendee the legal title descends to his heirs subject to the vendee's right to accept a deed. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. And they are necessary parties to an action to compel the vendee to accept a deed. Id. Contract construed and held not to vest any present interest in the land in the vendee so as to entitle him to cut standing timber thereon. Phinney Land Co. v. Coolidge-Schussler Co. [Minn.] 105 N. W. 553.

80. Under the doctrine that what ought to be done has been done. Miller v. Shelburn [N. D.] 107 N. W. 51. Under an executory contract the vendee derives no interest in the land or in the title and may rescind in a proper case without a reconveyance. Id.

81. Cody v. Wiltse [Iowa] 106 N. W. 510. If time is not of the essence of the contract, the vendor cannot have his title quieted on breach thereof notwithstanding he gave notice that on failure to perform within a specified time he would claim a forfeiture. Id.

82. McWhorter v. Stein [Ala.] 39 So. 617.

83. May v. Getty [N. C.] 53 S. E. 75.

84. A vendee in a deed reserving a vendor's lien acquires the right to possession and the right to transfer his title and possession but purchasers from him hold in subordination to the lien though the deed is not recorded. Gilbough v. Runge [Tex.] 14 Tex. Ct. Rep. 993, 91 S. W. 566. Under a contract providing for the execution of a deed after payment of a certain portion of the purchase price and requiring the purchaser to pay taxes and keep up improvements and on default of payment he should hold as tenant at sufferance the purchaser is entitled to possession from the date of the contract. Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121. The vendor cannot maintain ejectment. Coles v. Meskimen [Or.] 85 P. 67.

85. Willis v. Weeks [Iowa] 105 N. W. 1012.

86. Sheeby v. Scott [Iowa] 104 N. W. 1139.

87. Tillar v. Clayton [Ark.] 88 S. W. 972.

88. Title is considered as having vested in the grantee as of the date of the contract. Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121.

89. He may sue to foreclose his lien or to recover the land on default of the vendee in payment of the purchase price (Branch v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 14, 89 S. W. 813), and where he sues to recover the land he need not refund purchase money already paid (Id.).

90. An assignee of purchase-money notes secured by a vendor's lien who takes a conveyance of the vendor's interest has the same right to recover the land on nonpayment of the notes as the vendor had. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021.

91. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021.

92. On failure of the vendee to pay the

a deed expressing as part of the purchase money the assumption by the vendee of vendor's lien notes owed by the grantor and reserving a lien for their payment, the superior title to the land remains in the grantor until the notes are paid,[93] and on failure of the grantee to pay such notes the vendor may convey the land to the holder of them.[94] But where the deed of such grantee recites a cash consideration only, failure of the grantee to pay the notes does not entitle the grantor and the holder of the notes to treat the deed as void but only entitles the holder to foreclose his lien.[95] Such vendee acquires all the rights of his vendor and may require payment of the notes before the superior right to the land vests in the prior grantee.[96]

The rights of the parties under the contract rest in its terms[97] and conditions,[98] and no rights are acquired except as appear from the contract.[99] A purchaser is not liable for an incumbrance unless he expressly or impliedly agrees to pay it.[1] A vendor may be entitled to rights under the contract though his title fails in whole[2] or in part.[3] A vendee cannot materially alter a contract and claim rights under it as altered.[4] Money paid on the contract cannot be recovered prior to the time for the delivery of a deed.[5] A vendor who after execution of a deed negligently causes injury to the premises is liable in damages.[6] A vendor can retain the legal title until reim-

price, the vendor cannot recover the land. Branch v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 14, 89 S. W. 813.

93, 94. Diffie v. Thompson [Tex. Civ. App.] 13 Tex. Ct. Rep. 240, 88 S. W. 381.

95. Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193.

96. Diffie v. Thompson [Tex. Civ. App.] 13 Tex. Ct. Rep. 240, 88 S. W. 381. The prior grantee is not entitled to possession as against the latter until the notes are paid. Id.

97. Where one conveyed his interest in land which had been sold under execution under a contract that the purchaser should redeem and reconvey a portion if the income satisfied the incumbrances, on accounting to determine whether the purchaser had been reimbursed, he is chargeable with taxes accruing and improvements made after he obtained possession (Clutter v. Strange [Wash.] 82 P. 1028), also with the expense of foreclosing a mortgage the object of which was to enable him to acquire land which the grantor had previously sold subject to mortgage (Id.), also to the value of a crop cultivated by them less the expense of producing it (Id.); and the fact that he was required to purchase an outstanding title did not relieve him from complying with his contract (Id.). A relinquishment by a vendor of his interest in crops reserved by a contract of sale in consideration of the cancellation of such contract vests in the vendee full title to the crops. Thurston v. Osborne-McMillan Elevator Co., 13 N. D. 508, 101 N. W. 892.

98. A purchaser under a contract providing that no timber shall be cut or removed from the premises until the contract has been complied with has no power to sell growing timber with permission to remove the same until the contract is fully completed. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771. A contract of sale to a cemetery company reciting a consideration of $1,000 and providing that the vendors are to plat the land and sell lots until they were fully paid, gives the vendor power to sell lots and retain the proceeds until paid in full, and the surplus land belonged to the cemetery company. Brann v. Falmouth Riverside Cemetery Co. [Ky.] 92 S. W. 579. Contract to sell land to three vendees construed and held that the vendor who purchased the interest of a third vendee could not assert title as against the other vendees. Ballard v. Anderson [Minn.] 103 N. W. 900.

99. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771.

1. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460. A promise by the purchaser to pay an incumbrance is not a covenant running with the land. Id. Evidence insufficient to show that a vendee assumed to pay a debt of the vendor. Moore v. Faris [Ky.] 92 S. W. 592,

2. When the vendor's title wholly fails and the paramount title is in the state but he has in good faith made valuable improvements, purchase-money notes are not wholly without consideration so that the right to compensation for improvements is not enforceable. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087. Where the vendor's title to the land has failed, he is entitled to recover the increased value of the land caused by improvements made by him with interest but not the full purchase price less the amount paid by the vendee to acquire the paramount title. Id.

3. Purchase-money notes are not rendered totally without consideration by failure of the vendor's title to the larger of two tracts sold. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087.

4. A vendee who materially alters a contract without the knowledge of the vendor may not recover purchase money paid on the ground that the premises do not conform to the contract as altered. Webster Realty Co. v. Thomas, 94 N. Y. S. 916.

5. Joseph v. Isaac, 48 Misc. 409, 95 N. Y. S. 532.

6. Vendor who negligently causes destruction of buildings by fire is liable to the vendee whether he holds under express contract or not. Kincheoloe v. Smith [Ky.] 91 S. W. 1145.

bursed money advanced under an agreement that it was to be repaid before execution of the deed.[7] Purchasers under an unenforceable oral agreement from holders of an equity of redemption, who have taken possession and made valuable improvements, are entitled in equity to compensation for them.[8] The assignment by the vendor of an executory contract for the sale of land as security for a debt vests in the assignee a lien upon the vendor's interest in the property, not exceeding the purchase money unpaid.[9] A bond for title conveys to the vendee rights superior to a judgment subsequently recovered against the vendor,[10] but a bond for a deed executed prior to the time the obligor acquired title from the United States cannot operate to pass any subsequently acquired title.[11]

The statute of limitations does not run against a vendor in favor of a vendee holding under a contract of sale,[12] nor does it run where the original possession of the holder was in privity with the rightful owner until an open disclaimer of holding under the contract is brought to the notice of the vendor,[13] but adverse possession does run.[14]

One who enters into possession under another looking to him for title cannot dispute the title of his vendor,[15] but a vendee in possession may purchase an outstanding title and when sued rely on his original title and set up defects in the outstanding title as against subsequent purchasers of it.[16] A vendee who procures his vendor to execute a deed to his vendee is estopped to set up his older deed against the purchaser from him.[17]

Taxes.[18]—A vendor is liable for taxes which become a lien prior to the execution of the deed,[19] though the contract is enforced from the date conveyance should have been made,[20] unless failure to complete the contract is because of inability of the vendor to perfect his title and the purchaser in possession has paid them,[21] or their payment has been assumed by the purchaser.[22] A vendee who purchases after his

7. When a vendee borrowed money on the indorsement of the vendor for the purpose of erecting buildings on the premises under an agreement that the money was to be repaid before execution of a deed his right to reimbursement is superior to the right of a grantee of the vendee to a conveyance of the legal title. Sands v. Stagg [Va.] 52 S. E. 633.

8. Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

9. Lamm v. Armstrong [Minn.] 104 N. W. 304.

10. Agreement by a purchaser of school land to convey it after the necessary three years occupancy held equivalent to a bond for title and prior to an attachment and judgment subsequently recovered against such purchaser. Haynie Mercantile Co. v. Miller [Tex. Civ. App.] 92 S. W. 262.

11. Turner v. Ladd [Wash.] 84 P. 866.

12. Tillar v. Clayton [Ark.] 88 S. W. 972. So long as the vendee in an executory contract looks to his vendor for title he cannot rely upon the statute of limitations as a bar to a suit to recover the purchase price. Bloom v. Sawyer [Ky.] 89 S. W. 204.

13. Tillar v. Clayton [Ark.] 88 S. W. 972.

14. Where a purchaser who did not have a deed conveyed to another who conveyed to a third person who paid in full for the land and held it for the statutory period, a suit by the original vendor for the purchase price was held to be barred. Bloom v. Sawyer [Ky.] 89 S. W. 204.

15. Haycraft v. Duvall [Ky.] 89 S. W. 543. A railroad company which began the occupation of land under an assignment of a written agreement with the owner cannot, by usurping rights prohibited by the agreement, be said thereafter not to be occupying under the agreement; nor do the rights of the railroad company under such an assignment rise higher than those of the original grantee. Collins v. Craig Shipbuilding Co., 7 Ohio C. C. (N. S.) 350.

16. Taulbee v. Buckner's Adm'r [Ky.] 91 S. W. 734.

17. Haycraft v. Duvall [Ky.] 89 S. W. 543.

18. See 4 C. L. 1779, n. 44 et seq.

19. After the execution of the contract but before the conveyance is completed. Mallory v. Gray [Iowa] 103 N. W. 1015.

20. A vendor who fails to make conveyance on the agreed date, and thereafter while in possession pays taxes which become a lien cannot when the contract is enforced from the date conveyance should have been made recover in equity the amount of such taxes from the vendee. Kissick v. Rees, 97 N. Y. S. 692.

21. A purchaser in possession under a sale not consummated because of inability of the vendors to perfect their title is not entitled to credit for taxes paid though the income from the land was insufficient to pay them. Wood v. Deskins [C. C. A.] 141 F. 500.

22. A grantee who assumes the payment of "existing incumbrances" is held to have assumed taxes and assessments. Whipple v. Geddis, 25 App. D. C. 333.

vendor has paid a special assessment on the premises is not entitled to the amount so paid where the proceeding by which the assessment was levied is subsequently declared void.[23]

Interest, rents, and profits.[24]—As a general rule, the vendor is entitled to interest on the purchase money from the time fixed for completion of the contract,[25] or from the time the vendee takes possession,[26] unless he is in default[27] or the purchaser has paid out money on his account,[28] and the vendee is entitled to rents and profits.[29] Where the vendor after payment of the purchase money repudiates the contract, the vendee is entitled to interest on the sum paid from date of payment.[30] Rents and profits accrued at the date of sale belong to the vendor.[31]

A sale of standing timber[32] to be measured and paid for each month before removal vests title in the vendee as the timber is cut.[33] A conveyance of standing trees and a right of entry do not give the grantee possession actual or constructive until he engages in felling the trees.[34]

§ 10. *Liability consequent on breach.*[35] *Rights of the vendor.*—That the purchaser repudiates the contract before arrival of time for performance does not relieve the vendor from showing ability to perform in order to recover forfeit money deposited by the vendee,[36] but he need not allege tender of performance.[37] That the vendor did not own a portion of the land is no defense to an action to foreclose the vendee's rights if he could have furnished title at the time for performance,[38] and that a vendor after execution of the contract mortgaged the premises with the consent of the

23. Smith v. Minneapolis [Minn.] 104 N. W. 227.

24 See 4 C. L. 1779.

25. A vendor selling under a contract that stipulates that he shall make a deed and that the first instalment of the purchase money shall be then paid and the purchaser takes possession at the date of the contract, is entitled to interest on the entire purchase money though he be in default in making the deed unless the purchaser set aside the purchase money for him, give notice of his readiness to pay, and does not use the money himself. Hoard v. Huntington & B. S. R. Co. [W. Va.] 53 S. E. 278.

26. A purchaser who takes possession and agrees to pay the purchase price when the acreage was ascertained and the deed executed is liable for interest from the date he takes possession. Ewell v. Jackson's Adm'r [Ky.] 88 S. W. 1047. When the vendee enters into possession he must pay interest for the profits he is receiving during the vendor's inability to make title. It would be unequitable for him to hold both possession and purchase money. In re Hershey's Estate [Pa.] 63 A. 296. Where a husband and wife contract to sell land and the husband offers but the wife refuses to convey and the purchaser takes possession but refuses to pay the purchase price until the wife executes the deed, and after the death of the husband the wife sues for specific performance the purchaser is liable for interest on the purchase money. Id.

27. A vendor who fails to execute and tender a deed as required by his contract is not entitled to interest on the purchase price while he remains in default. Consolidated Coal Co. v. Findley [Iowa] 105 N. W. 206.

28. A purchaser in possession in order to protect against trespassers under a contract requiring the vendor to make clear title contemporaneously with the payment of the purchase price, which they were unable to do for a number of years, is not liable for interest where it appears that taxes paid greatly exceeded the income. Wood v. Deskins [C. C. A.] 141 F. 500.

29. Where a contract and deed with full covenants of warranty is placed in escrow and the grantee pays the full purchase price with interest from date of the contract, he is entitled to rents accruing from such date. Scott v. Sloan [Kan.] 84 P. 117.

30. Not merely from the date he was entitled to a deed. Lewis v. Williams [Tex. Civ. App.] 15 Tex. Ct. Rep. 86, 91 S. W. 247.

31. A vendor who sells subject to a lease which entitles him to a certain per cent of the income when due is entitled to his rent for the month preceding the sale though the income was not collected until after the sale. Tremont & W. Hotel Co. v. Gammon [Tex. Civ. App.] 14 Tex. Ct. Rep. 125, 91 S. W. 337.

32. For full discussion, see Forestry and Timber, 5 C. L. 1489.

33. The vendor has a lien for the purchase money. Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432.

34. King v. Davis, 137 F. 222.

35. See 4 C. L. 1781.

36. Wells, Fargo & Co. v. Page [Or.] 82 P. 856.

37. Where the vendor is able to perform and the vendee repudiates the contract prior to the time for performance, in an action for breach of the contract, the vendor need not allege tender of performance. Wells, Fargo & Co. v. Page [Or.] 82 P. 856.

38. That the vendor did not own some of the property included in the contract is not defense to an action to foreclose it where it does not appear that he could not have fur-

vendee is no defense to an action at law to recover possession after default by the vendee in making payments.[39] Where the vendor does not elect to treat the vendee's repudiation of the contract as a breach, he must show ability to perform in order to defeat recovery of the earnest money.[40]

Rights of vendee.—After a vendee is once released because of inability of the vendor to perform, the obligation is not revived by an agreement between the vendor and a third person which enables him to perform.[41] If a vendor is unable or refuses to perform, the vendee may rescind and recover the purchase money paid[42] or maintain an action for damages for the breach,[43] and if through no fault of his he is unable to restore what he has received under the contract, he need not return it prior to suing for purchase money paid, but may offer to allow credit for the value of what he cannot restore.[44] If a vendor puts it beyond his power to comply with the contract, the vendee has an immediate cause of action against him,[45] and if he dies after breach no demand on his executor is necessary before maintaining action to recover purchase money paid.[46] If the vendor is unable to convey all the land called for by the contract, the vendee may recover the purchase price paid and establish and enforce a vendee's lien therefor.[47] A purchaser who deposits forfeit money as security for performance is entitled to recover it unless the vendor has a cause of action against him for default in performance,[48] but where he has paid money upon a contract and refuses to proceed, he cannot, except under exceptional circumstances, recover back the amount paid.[49]

In an action for breach of the contract it is not necessary to allege in terms that the claim is due and unpaid.[50]

Measure of damages.[51]—If the contract prescribes the damages recoverable on breach, no other measure can be recovered,[52] but such provision does not preclude the enforcement of a lien therefor,[53] and one who does not seek to exercise his option to terminate the contract and recover liquidated damages may keep it alive and recover damages for the breach irrespective of the amount fixed.[54] In some states

nished title to it if the vendee had tendered performance or that the vendee ever offered to or was able to perform. Dickson v. Loehr [Wis.] 106 N. W. 793.

39. Does not present an equitable cause for an accounting where the amount of the mortgage might be applied on the contract price or paid by the vendor. Gould v. Young [Mich.] 13 Det. Leg. N. 60, 107 N. W. 281.

40. Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

41. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115.

42, 43. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028.

44. Kean v. Landrum [S. C.] 52 S. E. 421.

45. Where the deed was not to be made until the vendor sold certain other lots but prior to such sale he sells the land described in the contract to another, the vendee may sue without waiting until he sells such other lots and without tendering the purchase money. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625. Where one co-owner contracts to sell the entire tract and while the contract is deposited in escrow acquires title to the whole, the purchaser on performance of the conditions becomes entitled to his rights under the contract. Naylor v. Stene [Minn.] 104 N. W. 685.

46. Kean v. Landrum [S. C.] 52 S. E. 421.

47. Weiss v. Schweitzer, 47 Misc. 297, 95 N. Y. S. 923.

48. Wells, Fargo & Co. v. Page [Or.] 82 P. 856.

49. Not because of a mortgage on the premises which the vendor had made arrangements to satisfy within the time allowed for perfecting title. Claude v. Richardson, 127 Iowa 623, 103 N. W. 991.

50. Grau v. Grau [Ind. App.] 77 N. E. 816. Complaint held to state a cause of action for breach of a contract to sell land. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028.

51. See 4 C. L. 1781, n. 63 et seq.

Note: Where a contract is made in one state for the purchase of land in another in an action for breach brought in the state where the land lies the law of the state in which the contract was made will govern the damages recoverable. Atwood v. Walker, 179 Mass. 514, 61 N. E. 58.—See note to Arentsen v. Moreland [Wis.] 106 Am. St. Rep. 963, for extensive note on the question of damages.

52. K. P. Min. Co. v. Jacobson [Utah] 83 P. 728.

53. A provision that if the vendor cannot make a marketable title he is to repay the amount received without further loss or damage merely limits the damages recoverable and does not preclude the vendee from

the measure of damages is prescribed by law.[55] The measure of damages when one fails to execute a contract is the value of the contract upon the date it should have been executed.[56] Where breach is caused by refusal or inability of the vendor to perform, the measure is the loss suffered by the vendee.[57] When one purchases land for another and agrees to convey it to him on payment of the purchase price the measure of damages for his refusal to do so is the value of the land at the time of tender of the purchase price with interest less any depreciation due to the action of the person entitled to the land.[58] A vendor who agrees, unconditionally, to convey certain land, is liable to the vendee for the value thereof on breach of such agreement.[59] A vendee who has paid more than the amount due may, on breach by the vendor, recover such excess with interest in addition to damages for the breach,[60] but a purchaser on recovering the difference between the land he purchased and what he thought he was purchasing cannot recover interest on such amount where he has had possession of the entire tract.[61] The measure recoverable by a vendee for false representations as to the rental value of the premises is the difference between the market value of the premises if the rents were as represented and their actual market value.[62] The measure for breach of the contract by the vendee is the difference between the contract price and the market value of the land with interest from date of breach.[63]

Deficient quantity or other partial failure of consideration.[64]—In a sale by the acre and not in gross, the vendee is entitled to an abatement of the purchase price for a deficiency in quantity,[65] especially if the acreage is misrepresented,[66] and that

enforcing a vendee's lien. Weiss v. Schweitzer, 47 Misc. 297, 95 N. Y. S. 923.

54. Wright v. Craig, 116 Ill. App. 493.

55. The measure of damages for breach of contract to convey land is prescribed by Rev. Civ. Code § 2298. Dal v. Fischer [S. D.] 107 N. W. 534.

56. Basis of valuation by a witness held erroneous. Bender v. Shatzkin, 48 Misc. 637, 96 N. Y. S. 203. Evidence held to warrant a verdict for $500. Id.

57. In this case the difference between the value of the land as contracted to be sold and its value after the removal of timber under a prior grant. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028. Where the vendor is unable to convey the title he contracted to convey in the absence of fraud, the purchaser is not entitled to recover damages beyond the money paid and interest and expenses resulting from the contract. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

58. Kean v. Landrum [S. C.] 52 S. E. 421.

59. Where one divided a tract of land into lots of several classes and adjusted the rights of a subscriber by agreeing to deed him a certain lot. Burton v. Main [Iowa] 105 N. W. 335. In an action for breach of contract, evidence as to what the vendee had contracted to sell the land for in case the deal went through is admissible on the credit to be given his testimony of the value of the land. Kuhlman v. Weiben [Iowa] 105 N. W. 445. Evidence that the vendee had agreed to sell to another for a certain price is admissible on the credit to be given such third person's estimate of the value of the land. Id.

60. Kean v. Landrum [S. C.] 52 S. E. 421.

61. Thrush v. Graybill [Iowa] 104 N. W. 472.

62. Ettlinger v. Weil [N. Y.] 77 N. E. 31. Evidence to prove the market value if the rent was as represented is competent but evidence as to the market value based on rent actually received is not where such amount is not based on the market value of the whole property. Id. Exclusion of expert testimony to show that the rental value was equal to or exceeded the representation is reversible error. Id.

63. Not the unpaid portion of the price with interest from the date it should have been paid. Smith v. Lander [Tex. Civ. App.] 13 Tex. Ct. Rep. 755, 89 S. W. 19.

64. See 4 C. L. 1776, n. 17 et seq.

65. Where the vendor represented the tract to contain a certain number of acres, the sale was held to be by the acre though the deed recited that the tract contained a certain number of acres, more or less. Berry's Ex'x v. Fishburne [Va.] 51 S. E. 827. Where land is sold by the acre, relief will be granted for either an excess or a deficiency. Rich v. Scales [Tenn.] 91 S. W. 50. In an action by the vendee to recover for a deficit in the acreage, evidence held to show that the sale was by the acre and not by the entire tract. Brooks v. Grief [Ky.] 90 S. W. 273. Where the number of acres is of the essence of the description if the tract contains a less acreage than specified, the vendee is entitled to a proportionate reduction in the price. Civ. Code 1895, § 3542, relative to sales by the entire tract or body, does not apply. Strickland v. Hutchinson, 123 Ga. 396, 51 S. E. 348.

66. Where a sale is by the acre and the number of acres is fraudulently represented by an agent of the vendor, he is liable for the price per acre for the difference. Lang v. Merbach [Minn.] 105 N. W. 415. If the deed recite the number of acres and it subsequent-

a vendee made declarations tending to estop him from claiming a rebate for a deficiency in the acreage as against an assignee of the purchase money bonds is no defense to the vendor's liability on his covenant of warranty;[67] but where the sale is in gross no compensation will be granted for either an excess or a deficiency.[68] If part of the land purported to be conveyed is in the adverse possession of another and the vendee have notice of such fact he cannot recover for a deficiency,[69] and a purchaser is not entitled to an abatement of the price because of a deficiency resulting from the fact that streets called as boundaries are shorter than recited in the deed.[70] If a deficiency arise because a portion of the land is held by a paramount title, relief may be had upon the covenant of seisin,[71] and if there has been an eviction, upon the covenant of warranty,[72] or the vendee may rescind either totally or partially and retain that which is good and recover compensation for the rest.[73] A vendee is not entitled to an abatement in price because of a prior sale of minerals where he learned of such sale shortly after the contract, but made no objection, has never been molested and has used the land so as to decrease its value to the vendor.[74]

§ 11. *Rights after conveyance.*[75]—Ordinarily the execution and acceptance of a deed concludes the contract and prior negotiations are extinguished.[76] But not where the executory contract embraces other obligations than those relating to the conveyance of real estate.[77] Nor will provisions in the deed be held to modify those in the contract if inserted under inequitable conditions,[78] or are without consideration.[79] A purchaser may enforce restrictive covenants which run with the land.[80] A grantee in a deed warranting the right to cut timber cannot, when such timber has been conveyed to another, voluntarily incur a penalty imposed for cutting timber belonging to another and hold his warrantor liable.[81] Under a deed reserving to the vendor the right to reacquire the property upon the happening of certain conditions he should not be denied such right when the conditions are fulfilled.[82]

§ 12. *Vendor's liens and their enforcement. A. Express.*[83]—A lien created by deed continues in full force until released of record, discharged by payment, or barred by limitations.[84] The lien attaches to all interest in the land conveyed,[85] and

ly be ascertained that there is an excess or deficiency so great as to justify an inference of fraud or mistake, relief may be granted. Rich v. Scales [Tenn.] 91 S. W. 50. If, however, the vendee inspected the land and obtained all he intended to buy or the vendor to sell he can have no relief though the deed purport to state the number of acres (Id.), unless the difference is so great as to shock the conscience of the court (Id.).

67. Berry's Ex'x v. Fishbourne [Va.] 51 S. E. 827.

68, 69, 70, 71, 72, 73. Rich v. Scales [Tenn.] 91 S. W. 50.

74. Johnson v. Green [Ky.] 92 S. W. 939.

75. See 4 C. L. 1790.

76. Wilson v. Wilson [Mo. App.] 92 S. W. 145.

77. Where the contract provided for payment in a stock of goods and required the vendee to assist in invoicing them, the deed was held not to abrogate the contract. Wilson v. Wilson [Mo. App.] 92 S. W. 145.

78, 79. Wilson v. Wilson [Mo. App.] 92 S. W. 145.

80. Purchasers who take subject to a restriction that the lands shall not be used except for certain purposes so long as the grantor or his successors see fit, may enforce such covenant as long as the owner sees fit to hold it in force. Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co. [N. J. Ch.] 62 A. 773.

81. Turner v. Lawson [Ala.] 39 So. 755.

82. Smith v. Ellis [Tex. Civ. App.] 87 S. W. 856.

83. See 4 C. L. 1795.

84. Hamilton's Ex'r v. Wright, 27 Ky. L. R. 1144, 87 S. W. 1093. A lien retained by deed to secure payment of the purchase money is not barred by the expiration of the statutory period if payments have been made within such period. Id. Maker of note held estopped to deny the holder's right to a vendor's lien where the note recited that it was given in payment for land and was a lien thereon and the maker did not deny the specific averment that it was secured by a lien. Id. One claiming under the sole heir of a vendee cannot recover without payment of a vendor's lien retained. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 677, 88 S. W. 534. The rights of an assignee of purchase-money notes secured by a vendor's lien to recover the land can be defeated only by payment of the notes. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021. Where it is admitted by the pleadings that purchase money notes had not been paid, a

is superior to all subsequently acquired rights.[86] A vendor loses his superior title under his lien by foreclosure and sale under it,[87] but not by merely bringing an action on the notes.[88] A vendor's lien reserved in an unrecorded deed is not lost where purchasers from the vendee take possession and improve the land but do not repudiate the title remaining in the vendor by virtue of his lien,[89] but is lost if the vendor's title fails.[90]

(§ 12) *B. Implied.*[91]—A vendor's lien exists in every case where the purchase money is not paid unless it be otherwise agreed between the parties[92] or waived[93] as by taking an independent security.[94] It attaches to all the land which is the subject of the contract,[95] but only to the interest contracted to be sold.[96] It is superior to homestead[97] or dower rights.[98]

judgment foreclosing the vendor's lien was held proper. Branch v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 14, 89 S. W. 813.

85. Where a deed reserved a vendor's lien and the purchaser sold mineral rights to one who transferred them to another, the mineral rights were subject to the lien. Tom's Creek Coal Co. v. Skeene [Ky] 90 S. W. 993.

86. Vendor's liens continued for the beneficiary of a deed of trust given to raise money to pay notes creating such liens are superior to the lien of a co-tenant on the grantor's share for rents wrongfully retained by such grantor. Flach v. Zanderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 540, 91 S. W. 348. Where purchase-money notes reserving a lien and reciting that if it should be ascertained that there was an excess in acreage, the vendee should pay for it, were assigned with all rights thereunder but not expressly carrying a lien on the excess, assignees of notes given for the excess have a prior lien on such tract, and assignees of the other notes have a prior lien on the tract less than the excess. Colquitt v. Sturm [Tex. Civ. App.] 14 Tex. Ct. Rep. 596, 91 S. W. 872.

87. A purchaser at foreclosure of the lien may recover from an assignee for the benefit of creditors of the vendor without paying the purchase price. Club Land & Cattle Co. v. Wall [Tex.] 15 Tex. Ct. Rep. 212, 91 S. W. 778. Is confined to such rights as his judgment gives him. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 677, 88 S. W. 534.

88. An assignee of purchase-money notes secured by a vendor's lien who sues to foreclose and after the plea of limitations is set up changes the action to one of trespass to try title does not by the action on the notes affirm the contract so as to deprive him of his right to assert his superior title. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021.

89. Gilbaugh v. Runge [Tex.] 14 Tex. Ct. Rep. 993, 91 S. W. 566. A vendor in a deed reserving a lien is not bound to inquire from purchasers from the vendee as to the right by which they claim the land nor to ascertain whether they know of his rights. Such purchasers must investigate the title of their vendor though his deed is unrecorded. Id.

90. A vendor cannot assert a lien retained by him where the title fails and the vendee is obliged to purchase an outstanding paramount title. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087.

91. See 4 C. L. 1793.

92. Cecil v. Henry [Tex. Civ. App.] 15 Tex. Ct. Rep. 271, 93 S. W. 216. Though a vendor gives an absolute deed reciting receipt of the purchase money yet if it was in fact not paid he has a lien as against the vendee and purchasers with notice from him. Id. Complaint on notes and to enforce a vendor's lien securing them alleging that the notes were given in payment for the land and that a lien was reserved by the deed and an answer by a third person not containing an express denial of the lien held to warrant judgment for the plaintiff on the pleadings. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993. Notes given on a settlement of all claims between a vendor and vendee held to be for a balance due on the land and that the vendee could not claim that the consideration of the notes was money due for personalty and for the land and that the lien was therefore lost. Nance v. Gray [Ala.] 38 So. 916. The vendor is entitled to a lien for a portion of the purchase price unpaid. Bach v. Kidansky, 106 App. Div. 502, 94 N. Y. S. 752. Where an administratrix sells property of the estate to pay a debt secured by a mortgage thereon to purchasers who pay nothing but buy for the benefit of another, the administratrix has a vendor's lien to the extent of the purchase price to which the creditor for whose benefit the land was sold is subrogated. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

93. The burden is on the vendee to show that the vendor has waived it. Cecil v. Henry [Tex. Civ. App.] 15 Tex. Ct. Rep. 271, 93 S. W. 216.

94. If the vendor takes an independent security, even the note of a third person, it is a waiver of his lien. Spence v. Palmer [Mo. App.] 90 S. W. 749.

95. Where one pays a judgment recovered in a suit foreclosing a vendor's lien under an agreement that he is to hold the lien until the land is conveyed to him he becomes subrogated to the vendor's lien which is not discharged by a conveyance of less land than was contemplated by the agreement. Brown v. Rash [Tex. Civ. App.] 13 Tex. Ct. Rep. 783, 89 S. W. 438.

96. On decreeing specific performance, the court may not, on the purchaser's failure to pay the purchase price, decree a lien on any interest he may have in the land except the interest the vendor contracted to

(§ 12) *C. Remedies.*[99]—A suit to enforce a vendor's lien may be sustained by proper proof with or without the purchase-money note[1] or deed.[2] A purchaser in possession under an oral contract has the burden to prove payment of the purchase price.[3] The widow and children of the vendee of land are not estopped from insisting, in an action to enforce vendor's lien notes and foreclose the lien by rescission of the contract and reclamation of the land, that they be allowed to pay off the notes, by reason of the fact that they objected to the establishment of the notes as a claim against the estate on the ground of payment and because they were not presented in time,[4] nor by the fact that they interposed the defense of administration pending to a previous suit to establish the debt and foreclose the lien in which plaintiff took a voluntary nonsuit.[5] An assignee of purchase-money notes is entitled to have the land sold in order to enforce the vendor's lien.[6] Where an answer in an action to enforce a vendor's lien contained a mere denial of the allegation of the lien set forth in the petition, a reply was unnecessary.[7] Supplemental pleadings may be filed in vacation.[8] One who establishes his vendor's lien is entitled to a decree of foreclosure on tender into court of a deed conveying to the vendee.[9] When a vendor sues to cancel his deed, he is not entitled to foreclosure of his lien on a prayer for general relief.[10] When vendor's lien notes provide for interest and attorney's fees, they should be allowed on foreclosure of the lien.[11] A decree may provide for the protection of purchasers from the vendee.[12] In Texas a vendor's lien when established in the district court against the estate of a decedent must be collected through the probate court.[13]

Only persons named in the statute may redeem from foreclosure of a vendor's lien,[14] and then only upon compliance with statutory conditions.[15]

sell. Van Norsdall v. Smith [Mich.] 12 Det. Leg. N. 478, 104 N. W. 660.

97, 98. Matney v. Williams [Ky.] 89 S. W. 678.

99. See 4 C. L. 1795, n. 80 et seq.

1. If the note is produced, a variance between the description contained therein and the description in the bill is immaterial. Nance v. Gray [Ala.] 38 So. 916. An alteration in the description contained in a vendor's lien note is not material since the note would be just as binding without a description. Id.

2. An assignee of purchase-money notes need not produce the deed in an action to foreclose the vendor's lien where its execution is admitted. Elmslie v. Thurman [Miss.] 40 So. 67.

3. Tillar v. Clayton [Ark.] 88 S. W. 972.

4. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504.

Note: A deed retaining a vendor's lien gives the vendee legal title, and the vendor an equitable claim, which follows the purchase money notes for their value. Gordon v. Rixey, 76 Va. 694, 700; Moore v. Lackey, 53 Miss. 85. In Texas, until payment, the situation as to title is reversed. Peters v. Clements, 46 Tex. 114, 123. The vendor has also an equitable lien, which follows the notes. Elmendorf v. Beirne, 4 Tex. Civ. App. 188. The vendor's legal title passes only by express conveyance (Hamblen v. Folts, 70 Tex. 132); but may not be disposed of to defeat the lien of the assigned note. Russell v. Kirkbride, 62 Tex. 455. Though a barred note extinguishes the lien (Hale v. Baker, 60 Tex. 217), the legal rights remain (Burgess v. Milllcan, 50 Tex. 397; White v. Cole, 97 Tex. 500). If the legal title and equitable lien vest in the same person, he may sue on the note and foreclose, or rescind the contract and recover possession of the land. Hale v. Baker, 60 Tex. 217; Stephens v. Mathews' Heirs, 69 Tex. 341, 344. But rescission is not granted if inequitable to the vendee. Hamblen v. Folts, 70 Tex. 132.—See 5 Columbia L. R. 479.

5. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504.

6. Elmslie v. Thurman [Miss.] 40 So. 67.

7. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993.

8. In a suit against makers and indorsers of purchase money notes and to enforce a vendor's lien, a cross petition of the indorsers who pay the note after judgment and become subrogated to the lien is not an amendment but a supplemental pleading in the nature of an interpleader and may be filed during vacation. Matney v. Williams [Ky.] 89 S. W. 678.

9. Tillar v. Clayton [Ark.] 88 S. W. 972.

10. Cecil v. Henry [Tex. Civ. App.] 15 Tex. Ct. Rep. 271, 93 S. W. 216.

11. Smith v. Ellis [Tex. Civ. App.] 87 S. W. 856.

12. In a suit to enforce a vendor's lien, it may be adjudged that the sale be subject to mineral rights which the vendee had conveyed and if the land did not bring enough to pay the debt the bid could be rejected and land and mineral rights sold together. Tom's Creek Coal Co. v. Skeene [Ky.] 90 S. W. 993.

13. A failure to pursue such remedy re-

§ 13. *Enforcement of the contract of sale.*[16]—A vendee may enforce performance so far as the vendor is able to perform,[17] but where the vendor is unable to convey all the premises agreed upon, he cannot compel acceptance of the portion he can convey.[18] Under a contract providing that if the vendor cannot make good title the contract shall be void, and the purchase money paid refunded, the remedy fixed is exclusive and on the happening of the condition the contract is void.[19] In such case the vendee is not entitled to performance to the extent of the vendor's ability.[20] A vendee who elects to pursue his remedy at law for damages[21] or who abandons his contract[22] cannot thereafter enforce specific performance. It is competent for the legislature to provide that when a vendor dies prior to executing a deed, the court may, upon verified petition by the vendee, authorize his personal representative to execute the conveyance.[23] Under a rule that where one bound by a written contract to convey real estate dies before making the conveyance his personal representative may be compelled to convey, the personal representative may not be compelled to carry out the terms of an oral contract.[24] Under a statute providing that a contract shall not be forfeited without notice to the vendee, no notice is necessary in order to maintain an action to enforce the contract.[25] Where a vendee resorts to equity to enforce his contract and an equitable defense is set up, it is within the province of the chancellor to say whether the contract was fair, just, and equitable.[26] Under a bill for specific performance which contains no prayer for a money decree, a money decree may be given under a prayer for general relief.[27] One not a party to the contract but holding void deeds from the vendor cannot be compelled to join in the conveyance.[28]

VENUE AND PLACE OF TRIAL.

§ 1. *The proper venue. A. The nature of the action.*[29]—The character of an action is generally determined from the complaint or prayer.[30]

sults in the loss of the debt. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 677, 88 S. W. 534.

14. A statute extending the right to a vendee of the debtor applies only to one who purchases prior to sale on foreclosure of the lien and not to one who purchases after such foreclosure. Wallace v. Markstein [Ala.] 40 So. 201.

15. Under a statute providing that a vendee who does not deliver possession on demand to a purchaser at foreclosure of a vendor's lien cannot redeem from such foreclosure, it must appear that a demand for possession by the purchaser had been made. A mere casual conversation held insufficient to constitute a demand. Henderson v. Hamrick [Ala.] 39 So. 918.

16. See 4 C. L. 1791.

17. Whiteside v. Winans, 29 Pa. Super. Ct. 244. If a vendor has any interest in land he contracts to convey, the vendee may enforce such contract to the extent of his interest. Farnum v. Clarke [Cal.] 84 P. 166.

18. North Avenue Land Co. v. Baltimore [Md.] 63 A. 115.

19. Schwab v. Baremore [Minn.] 104 N. W. 10. Where the wife of the vendor did not join in the contract and refused to execute the deed, it constituted such a defect in the title as to render the contract of no further force. Id.

20. Schwab v. Baremore [Minn.] 104 N. W. 10.

21. Where the vendor was unable to convey the title he contracted to and the vendee directed his attorney to refuse to accept the conveyance and requested payment of liquidated damages stipulated for. Sutton v. Miller, 219 Ill. 462, 76 N. E. 838.

22. A vendee who by positive and unequivocal acts abandons his contract cannot maintain a suit for specific performance. May v. Getty [N. C.] 53 S. E. 75. A vendee

(§ 1) *B. Local actions; actions concerning real estate.*[31]—Actions affecting[32] real property must usually be tried in the county where the land is situated. Under this rule, actions for injuries to real property must be tried in the county where the land is situated, except where a change may be ordered for special reasons;[33] and a suit to forcelose a mortgage,[34] or to partition land is properly brought where the land or some part of it is situated.[35] When the action is primarily one to establish a trust in land, the action is properly brought in the county where the land is situated even though an accounting is also requested as an incident thereto.[36] Where only the title to land is concerned and the court is called upon to act upon the person of the defendant only, equity may grant relief in any county where defendant is found;[37] but where the court is requested to act directly upon property, such property must be within the territorial jurisdiction of the court.[38] Actions of replevin as a rule must be tried where the property is located.[39] The trial of issues of fact must take place at the county seat unless trial at another place is expressly authorized by statute or agreed upon by the parties.[40] In most states certain actions have been localized by statute.[41]

suing to recover purchase money paid because of inability of the vendor to make a good title cannot obtain a decree for specific performance. Duke v. Stuart, 105 App. Div. 376, 94 N. Y. S. 235. Where the vendee on ascertaining that the vendor's title is defective unconditionally refuses to accept the only title he can convey, he cannot thereafter maintain an action for specific performance. Riley v. Allen [Kan.] 81 P. 186.

23. In re Garnier's Estate, 147 Cal. 457, 82 P. 68. Under such a statute, the executor or administrator has the same right to file a petition as an outside party and need not first resign his position in order to have his claim enforced. Id.

24. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334.

25. Suit to foreclose a vendee's interest under the contract. Clifton Land Co. v. Davenport [Iowa] 106 N. W. 365.

26. Bridgewater v. Byassee [Ky.] 93 S. W. 35.

27. Barlow v. McDoweli, 118 Ill. App. 506.

28. Reynolds v. Condon, 110 App. Div. 542, 97 N. Y. S. 1.

29. See 4 C. L. 1797.

30. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70. Action held local where complaint prayed for injunction restraining trespass and mining on Nevada lands and for the value of ore extracted. Id.

31. See 4 C. L. 1797.

32. A suit to enjoin the removal of a court house "may affect real estate" within § 3, c. 22, Hurd's Rev. St. 1903. Munger v. Crowe, 219 Ill. 12, 76 N. E. 50.

33. Code Civ. Proc. § 392. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70. Where the whole or any part of damages claimed is for injuries to the freehold, an action is local and must be tried in the county or state where the land is situated. Code Civ. Proc. § 392. Id.

34. Under Civ. Code Prac. § 62, an action to foreclose a mortgage on land, of which a person died seised may be brought in the county where the land is situated where none of the actions enumerated in §§ 65, 66, relative to estates of decedents, is pending. Galloway v. Craig [Ky.] 92 S. W. 320.

35. So held in suit brought after administration of the estate where the land of a decedent lay partly in the county where suit was commenced though other statutory provisions required actions to settle, distribute or partition estate of deceased persons to be brought where the personal representative qualified. Kirkley's Dig. §§ 6063, 6064. Cowling v. Nelson [Ark.] 88 S. W. 913.

36. Change of venue denied where accounting was only incidentally necessary to establish trust in lands. Code Civ. Proc. § 392. Hannah v. Canty [Cal. App.] 81 P. 1035.

37, 38. Munger v. Crowe, 115 Ill. App. 189.

39. A nonresident principal for whom the property was held could be sued in replevin with his agent in the county where the latter had actual possession. Central Nat. Bank v. Brooke [Kan.] 81 P. 498.

40. An **election contest** must be tried at the county seat. Bell v. Jarvis [Minn.] 107 N. W. 547. Where an election contest was tried at a place other than the county seat over the objection and exception of defendant, the case must be reversed although the decision of the lower court was sound on the merits. Id. Appellant did not waive the objection by taking part in the proceedings. Id.

41. The failure of a sheriff to seize property located in his own county constitutes a cause of action arising in that county within Code § 983, requiring certain actions to be tried where the cause of action arose. Packard v. Hesterberg, 40 Misc. 30, 96 N. Y. S. 72. Evidence held sufficient to show that the killing of hogs by defendant railroad occurred in the township where the suit was brought. Payne v. Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164. In an action on a contract to procure the purchase of timber the cause of action arose, at least in part, where the contract was made and performed. Peach River Lumber Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 684, 91 S. W. 387. The action was properly triable in the county where the cause of ac-

(§ 1) *C. Transitory actions.*[42]—As a general rule, transitory actions must be tried in the county or district where defendant resides.[43] The privilege of being sued at one's residence cannot be defeated by fictitious allegations to lay venue elsewhere.[44] In Kentucky, a single defendant in a civil action must be sued in the county wherein he resides or is summoned, unless he makes defense before objecting to the jurisdiction of the court.[45] But to entitle a plaintiff to serve the other defendants in such case, the defendant in the county where the action is brought must be a bona fide defendant with an interest adverse to plaintiff,[46] or he must be a necessary party.[47] An action may be brought where a necessary party defendant resides although the principal defendant resides in another county,[48] and the fact that a plaintiff in such case might have maintained an action against one of the defendants alone for part of the relief to which he is entitled does not authorize a change of venue.[49] An action to recover only the value of property severed from the freehold is transitory and may be brought where defendant can be served even

tion arose, at least in part, though defendant neither resided nor had an agent there. Id.

42. See 4 C. L. 1798.

43. The question of the residence of defendant is one of fact for the trial court, and depends upon a person's intentions as evidenced by his acts and declarations. Barfield v. Coker & Co. [S. C.] 53 S. E. 170. Where defendant had family in one county but worked and spent most of his time in another. Id. The statute provided that no inhabitant of the state should be sued outside the county of his domicile unless defendant resided outside the state or his residence was unknown. Held, the fact that defendant, a citizen of New York who had resided in a county in Texas for 14 months, also maintained a residence in New York where he had his family, did not deprive him of the right to be sued in the county of his residence in Texas. Statute construed. Taylor v. Wilson [Tex.] 15 Tex. Ct. Rep. 577, 93 S. W. 109. Acts 1900-01, p. 1854, giving the city court of Bessemer jurisdiction of personal actions the causes of which arise within certain limits whether the parties reside therein or not, did not limit the jurisdiction to causes arising within such limits but the court has jurisdiction when either of the parties resides there. Harris v. Alabama G. S. R. Co. [Ala.] 40 So. 267. Rev. St. 1895, art. 1208, providing for the bringing into a case of additional necessary or proper parties, does not authorize the joining of parties not domiciled in the county where the action is brought. Mugg v. Texas & P. R. Co. [Tex. Civ. App.] 91 S. W. 876. Acts 1903, p. 182, relating to the venue of actions for personal injuries does not apply to suits commenced prior to its passage. Harris v. Alabama G. S. R. Co. [Ala.] 40 So. 267.

44. Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 647, 88 S. W. 390.

45. In an action in one county by an assignee for the benefit of creditors, **to settle the affairs of a corporation,** wherein stockholders in other counties were made defendants, the assignee could not by amended petitions obtain personal judgments against such stockholders for individual debts due the corporation. Civ. Code Prac. §§ 78, 79, 65, Louisville Bldg. & Loan Ass'n v. Smith's Adm'r [Ky.] 90 S. W. 1080. The fact that the debtor might ultimately get some part of the estate as a stockholder is immaterial. Id. The fact that the claim was on notes given to protect the corporation from loss occasioned by alleged mismanagement on the part of the debtor did not confer jurisdiction. Id. Under Civ. Code Prac. § 78, providing that transitory actions may be brought where defendant resides or is summoned, an action on a note by a nonresident against a nonresident may be brought in the county where defendant is summoned. Bishop v. Jackson [Ky.] 91 S. W. 263.

46. State v. Bradley [Mo.] 91 S. W. 483; Railroad Commission of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193. An action against all the defendants was properly brought, by a beneficiary in a trust deed, in the county of the residence of the trustee, where the trustee was guilty of fraud in which certain of the other nonresident defendants participated. Sawyer v. First Nat. Bank [Tex. Civ. App.] 93 S. W. 151. Two attorneys had separate claims against a third for fees collected. Held, one of the two could not be made defendant so as to give jurisdiction of the third who resided in another county. Rev. St. 1899 § 562. State v. Bradley [Mo.] 91 S. W. 483.

47. Where A, B, and C prosecuted an action for which C collected the fee, held, B was not a necessary party in a suit by A against C for his share. State v. Bradley [Mo.] 91 S. W. 483. In a suit to set aside conveyances as frauduient, the bill prayed that certain grantees residing outside the county where the land was situated, be declared trustees for complainant, required an accounting, etc., held suit could be brought in the county of their residence, they being "material defendants" within the statute. Chisolm v. Wallace [Ala.] 40 So. 219.

48. In an action on a promissory note secured by a **pledge of stock** the maker was not entitled to a change of venue from the residence of the corporation to his own residence where the latter claimed an interest in the stock. Heilman v. Logan [Cal.] 82 P. 848.

49. Heilman v. Logan [Cal.] 82 P. 848.

though plaintiff may be compelled to prove the ownership of the land.[50] Congress has by various acts provided for the place of trial in Federal courts when defendants are residents of different districts in the same state.[51] General legislation as to the place of trial in the United States does not necessarily repeal previous special legislation not in accord with the general provisions.[52] In the absence of any act of Congress designating the tribunal in which suits brought by the United States in a Federal court may be instituted, the general grant of jurisdiction to the circuit court will control as to the place of trial.[53]

Distinct causes of action.[54]

(§ 1) *D. Special actions and proceedings and equitable proceedings.*[55]

Injunctions.[56]—The mere fact that an injunction is prayed against a resident defendant does not always give the right to require nonresident defendants to answer.[57] The relief sought against the resident defendant must be substantial.[58] In Georgia a suit against railroad commissioners to enjoin the enforcement of discriminating rates must be brought in the county where one or more of the commissioners reside.[59] An injunction affecting realty must be sought where the property is located.[60]

Actions affecting public officers.—Under statutes requiring actions against public officers for acts done in the performance of their duties to be tried in the county where the cause of action arose, the fact that an officer's co-defendants reside in another county does not give a right to sue in such other county.[61] "State Officers" required to be sued at the Capitol, are only the heads of state departments.[62]

(§ 1) *E. Suits against corporations.*[63]—The statutes of the several states generally make corporations suable in the county of their principal place of business[64]

50. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70.

51. Under the special act of March 2, 1887, relative to Federal jurisdiction in Illinois, plaintiffs, nonresidents, could bring a civil action in the northern district against two defendants one of whom resided in the southern district. Petri v. Creelman Lumber Co., 199 U. S. 487, 50 Law. Ed. —.

52. The special act of March 2, 1887 (24 St. at L. 442, c. 315, U. S. Comp. St. 1901, p. 345), § 4, giving the circuit court of one district in Illinois jurisdiction though one or more defendants reside in another district was not repealed by the general act of March 3, 1887, repealing all laws in conflict therewith (24 St. at L. 552, c. 373 corrected by Act Aug. 13, 1888; 25 St. at L. 433, c. 866; U. S. Comp. St. 1901, p. 508). Petri v. Creelman Lumber Co., 199 U. S. 487, 50 Law. Ed. —.

53. Judiciary Act Aug. 13, 1888, c. 866, § 1. 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715. The act requiring suits for infringement of patent to be brought where defendant has a place of business does not apply to aliens. Act March 3, 1897, c. 395. 29 St. 695 (U. S. Comp. St. 1901, p. 589). United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co., 133 F. 930.

54. See 2 C. L. 2002.

55. See 4 C. L. 1799.

56. See 2 C. L. 2003.

57. So held where injunction was sought against railroad commissioners and against resident railroad company interested with plaintiff. Railroad Commission of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193.

58. Held not substantial where resident defendant was interested with plaintiff in enjoining the enforcement of rates. Civ. Code 1895, § 5871. Railroad Com. of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193.

59. Where they are not a corporation, held immaterial that they had their office in another county. Railroad Com. of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193.

60. Injunction to restrain removal of court house affects realty within the meaning of the statute and must be sought where the court house is located. Munger v. Crowe, 115 Ill. App. 189. Injunction to restrain trespass and mining in another state. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70.

61. Fishburne v. Minott [S. C.] 52 S. E. 646.

62. State v. Chittenden [Wis.] 107 N. W. 500.

63. See 4 C. L. 1800.

64. A private domestic business corporation having its principal office in a given county cannot be sued in another county for a tort committed therein if it has no agency or place of business in such county. Code 1895, § 1900, construed. Tuggle v. Enterprise Lumber Co., 123 Ga. 480, 51 S. E. 433. A corporation having its plant and transacting most of its business in one county, although having its principal office in another county, may be compelled in mandamus by the court in the former county to permit a stockholder to inspect its books. Acts June 8, 1893 (P. L. 345) and March 19, 1903 (P. L. 32). Neubert v. Armstrong Water Co. [Pa.] 61 A. 123.

or where the cause of action arose[65] or where a contract was made.[66] In the latter case, an action on a contract to carry passengers, made with a railroad company in one county, is properly brought in such county against the company and a connecting carrier in another county.[67] Under statutes providing that suits against foreign corporations may be brought in any county where defendant has an office or where some person resides on whom process may be served, the court has no jurisdiction of an action in any other county.[68] In Texas a foreign corporation may be sued in contract in any county where the contract was made or broken as well as at the county of its principal place of business.[69] Under the Federal statute relative to jurisdiction, a corporation is an "inhabitant" only of the state under which it was incorporated and cannot be sued elsewhere without its consent.[70]

(§ 1) *F. De facto counties.*[71]

(§ 1) *G. Effect of improper venue.*[72]—Upon proper objection being made that an action is brought in the wrong county, the court is without jurisdiction to pass on the merits of the case,[73] and where a proper objection to venue cannot be timely made because of illness, a default judgment entered against a defendant will be set aside.[74] Where a judge is constitutionally disqualified, a judgment rendered by him is void though no provision for transfer is made.[75] Objection to the venue may be waived[76] by a general appearance,[77] or where it is not taken by demurrer or answer.[78] The right to have a mortgage foreclosed in the county where the property is located

65. In **Georgia** suits against railroad companies for injuries caused by its servants must be brought in the county where the cause of action arose if the company has an agent in that county. Code 1895, § 2334. Southern R. Co. v. Grizzle [Ga.] 53 S. E. 244. A foreign railroad company operating in this state, and its engineer, may be sued jointly in the county in which the cause of action arose though the residence of the engineer be in another county, the corporation having an agent in the county where the cause of action arose. Id. The corporation is a resident of such county within Civ. Code 1895, § 5872, relating to joint trespassers. Id.

66. But one of **several connecting carriers** of property under a bill of lading creating **separate contracts** between the shipper and each carrier cannot be sued for a separate default, in a county where it has no road or place of business. Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 647, 88 S. W. 390.

67. In whose behalf the contract was in part made and who subsequently ratified it by undertaking to perform. Civ. Code Prac. § 72. Southern R. Co. v. Cassell [Ky.] 92 S. W. 281. Civ. Code Prac. § 73, localizing certain actions does not apply to a contract to carry passengers. Id. Under Civ. Code Prac. § 73, allowing actions for injuries to be brought in the county where plaintiff resides if he resides in a county into which the carrier passes, the action may be brought where plaintiff resides if the carrier has a track through that county though it never operated trains thereon. Louisville, etc., R. Co. v. Sander's Adm'r [Ky.] 92 S. W. 937.

68. Where in a suit in one county the process was served on the agent in another. Ballinger's Ann. Codes & St. § 4854. Hammiel v. Fidelity Mut. Aid Ass'n [Wash.] 85 P. 35. The court having no jurisdiction of the subject-matter, the objection was not waived because defendant's appearance was general in form. Id.

69. American Cotton Co. v. Whitfield [Tex. Civ. App.] 13 Tex. Ct. Rep. 112, 88 S. W. 300, following Westinghouse El. & Mfg. Co. v. Troell, 70 S. W. 324.

70. United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715.

71, 72. See 4 C. L. 1800.

73. Railroad Commission of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193.

74. Though neither the justice court nor plaintiff's counsel had notice of the illness, where no negligence was shown. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870.

75. Where judge had been of counsel in the previous case it was so held although the statute did not make disqualification of a judge a ground for transferring the case to another county and though such disqualification was disclosed on motion to transfer to another county. Johnson v. Johnson [Tex. Civ. App.] 14 Tex. Ct. Rep. 85, 89 S. W. 1102.

76. It is not a waiver of the right to be sued in the county of one's residence where the plea of privilege could not be made because of illness on the day of trial. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870. A defendant in justice court is not required to file his plea of personal privilege to be sued in the county of his residence before the day of trial. Id.

77. Right to be sued in district of defendant's residence. Mahr v. Union Pac. R. Co., 140 F. 921. Objection that a change of venue was made to a county not in the same or next adjoining circuit held waived where the court had jurisdiction of the class of cases in question and objector went on with trial. Haxton v. Kansas City, 190 Mo. 53, 88 S. W. 714.

78. Burns' Ann. St. 1901, § 346. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973.

is a personal privilege which may be waived by a failure to assert it.[79, 80] The fact that an improper change of venue is made is not necessarily reversible error.[81]

§ 2. *When change is allowable, necessary, or proper.*[82]—Statutes granting a change of venue, being in furtherance of justice, should be liberally construed.[83] An application for a change of venue must, however, be made in time.[84] One is entitled as of right to a change of venue to the county where the statute requires an action to be brought and an affidavit of merits is not necessary in such case.[85] Where an action is brought against one who has no real interest in the suit, the real party in interest upon coming into the case is entitled to have the venue changed to the place of his residence.[86] The fact that all defendants in an action join in a motion for change of venue to the residence of one properly laid does not make such change necessary.[87] Where a bill is one to try a purely legal title, or is multifarious, a motion to dismiss for want of equity raises the question of venue.[88] A change of venue is generally allowed for the convenience of witnesses.[89] A garnishee is entitled to a change of venue where an impartial trial cannot be had or where the convenience of witnesses or the ends of justice require it.[90] The granting of a change of venue for the convenience of witnesses is largely within the discretion of the court,[91] and a change will not be reviewed unless such discretion is abused.[92]

79. Failure to assert for 80 days after general appearance held waiver. Burton v. Graham [Colo.] 84 P. 978.

80. The statutes of Utah (Rev. St. 1898, §§ 2928-2933), fixing venue, do not offend Const. art. 8, § 7, providing that all business arising in a county must be tried there unless changed. Snyder v. Pike [Utah] 83 P. 692.

81. Where the court had jurisdiction of the parties and there was no increase of cost or prejudice shown. Purcell Wholesale Grocery Co. v. Bryant [Ind. T.] 89 S. W. 662.

82. See 4 C. L. 1801.

83. State v. Superior Ct. of Spokane County [Wash.] 82 P. 875.

84. Should be made at the earliest moment. Thompson v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 131. Held too late after asking postponement of matter before court. Id. Under statute requiring a change of venue before trial, a hearing and determination of issues on a demurrer in justice court is a "trial." Rev. Codes 1899, § 6652. Walker v. Maronda [N. D.] 106 N. W. 296. The word "may" in sec. 6652, Rev. Codes 1899, relating to change of venue in justice court should be construed to mean "must" as regards duty to transfer when bias of the justice is alleged. Id. Application too late in justice court after demurrer argued and overruled. Id. Demand for change to county of defendant's residence was too late after appearance and demurrer or answer. Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200. Act 1879 (17 St. at Large p. 14) entitling a party to change of venue after answering did not prohibit a change before issue joined. Fishburne v. Minott [S. C.] 52 S. E. 646.

85. Packard v. Hesteberg, 40 Misc. 30, 96 N. Y. S. 72. Defendant was entitled to a change of venue as a matter of right where his unchallenged affidavit showed circumstances requiring that the action be brought where the maker of a note resided. George v. Kotan [S. D.] 101 N. W. 31.

86. So held in replevin against a marshal when defendants came in as real owners. Act March 1, 1895, c. 145, § 7 (28 Stat. 697). Purcell Wholesale Grocery Co. v. Bryant [Ind. T.] 89 S. W. 662. Under Code § 3500, providing for bringing actions growing out of the business of agencies in the county where the agency is located, in an action in such county to reform a contract for nursery stock, an application for a change to defendant's residence was properly denied. Goodrich v. Fogarty [Iowa] 106 N. W. 616. Where a verdict was rendered against one defendant and in favor of another the granting of a new trial continued the case as against both so as not to entitle the former to change of venue to the place of his residence. Barfield v. Coker & Co. [S. C.] 53 S. E. 170. In an action **to declare a trust in land** brought in the county where the land is situated, a change of venue to the place of defendant's residence will not be granted though an accounting is also requested as an incident to the action. Hannah v. Canty [Cal. App.] 81 P. 1035.

87. Suit was properly brought at either's residence. Heilman v. Logan [Cal.] 82 P. 848.

88. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

89. Where all the witnesses to an accident and to the extent of an injury, except plaintiff and his servant, resided in the county where the accident occurred, the venue should have been changed to such county. Holland v. New York City R. Co., 95 N. Y. S. 262. That the court calendars were congested in the proposed county held no ground for refusal in a clear case. Id. Plaintiff's offer to pay expenses of witnesses to place where suit was brought was unavailing. Id.

90. State v. Superior Court of Spokane County [Wash.] 82 P. 875, distinguishing Title Guarantee & Trust Co. v. Northwestern Theatrical Ass'n, 23 Wash. 517, and Miller v Mason, 51 Iowa, 239. No serious inconvenience held to result to plaintiff. Id.

91. Barfield v. Coker & Co. [S. C.] 53 S. E.

Prejudice of the judge is generally a ground for change of venue.[93] A party seeking a change of venue for disqualification of the judge must present facts showing such disqualification.[94] Under the statutes of Missouri an applicant for a change of venue cannot disqualify more than one judge by an affidavit of prejudice.[95] In some jurisdictions a defendant in a criminal case is entitled to a second change of venue upon reversal of the court to which the case had been previously transferred.[96] In Louisiana, if a case has not been tried within nine months from the date of a recusation, it must be transferred to an adjoining district.[97] The question of local prejudice is one of fact for the trial court.[98]

On appeal from inferior to superior courts.[99]—Statutes relative to change of venue in courts of record do not apply to cases there by appeal from justices of the peace.[1] Where an action has been improperly removed from an inferior to a superior court, a change of venue will not be granted in the superior court.[2]

§ 3. *Procedure for change.*[3]—The duty of a court to allow a change of venue in a proper case is imperative,[4] though he may in his discretion decide what is a reasonable notice such as the law requires,[5] but under statutes requiring reasonable notice of such change, what is reasonable notice must be left to the discretion of the court and such discretion will not be interfered with in the absence of abuse.[6] The change is usually made upon motion and affidavit of one of the parties.[7] The

170. Discretion properly exercised where suit in which a water company was plaintiff was changed. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729.

92. Under Ky. St. 1903, § 1096, addressing change of venue to the sound discretion of the court, such change will not be reviewed except in case discretion is abused. Drake v. Holbrook [Ky.] 92 S. W. 297. A ruling denying a motion for change of venue on the ground of convenience of witnesses is conclusive where the affidavit and counter affidavits are in conflict. Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200.

93. In contempt proceedings, the judge before whom the cause was to be heard could refuse to transfer the cause to another judge where there was no proof that an impartial trial could not be had before him though the contempt consisted of disobedience to his own orders. Back v. State [Neb.] 106 N. W. 787. Code Civ. Proc. § 396, providing for the trial of an action although "not commenced" in the proper county unless demand for change of venue is made at the time of appearance, does not apply to a change under § 397, on the ground of disqualification of the judge. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129. The provision in the statute granting a change of venue to some other county to which there is no valid objection does not apply to applications for change on account of the prejudice of judges. Starr & C. R. S. § 2, c. 146. City of Elgin v. Nofs, 113 Ill. App. 618. Held matter in discretion of court to call in another judge. Id.

94. Mere statements that opposing counsel is close friend of judge and enemy of applicant with conclusion that judge will be partial held insufficient. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129.

95. The statutes of Missouri applicable to the circuit court of the city of St. Louis providing that as regards change of venue said city is a county and that each division of the court therein is a separate court also requiring the cause to be sent to some other court of record in said city when change is taken for cause pertaining to only one judge; and to be sent to an outside county only when the cause disqualifies all judges (Rev. St. 1899, § 832) do not allow as of right a change of venue from the city of St. Louis to a county outside the city in case an application is based on grounds applicable to all the judges in the city, on the mere application and allegation that such is the fact. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577. The trial court alone could disqualify the other judges after hearing. Id.

96. Rev. St. 1898, § 4680, construed. State v. Williams [Wis.] 106 N. W. 286.

97. Not nine months from the date of order referring the question of accusation to another judge. Act 40 p. 39 of 1880. State v. Reid [La.] 39 So. 998.

98. A Protestant was not entitled to a change of venue in a suit against a Catholic eleemosynary institution on the ground that one-fourth of the population of the county were Catholics, where counter affidavits were filed. Smith v. Sisters of the Good Shepherd, 27 Ky. L. R. 1107, 87 S. W. 1083.

99. See 2 C. L. 2006.

1. Section 36, c. 146, of the Venue Act relative to change of venue where the action is brought in the wrong court of record, does not apply to actions appealed from justice courts to courts of record. Pennsylvania Co. v. Chicago, 113 Ill. App. 638.

2. Removed because erroneously assumed that title to realty was involved in action before justice of peace. McAlister v. Tindal [Cal. App.] 81 P. 1117.

3. See 4 C. L. 1802.

4, 5. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373.

6. Evidence held not to show abuse. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373.

7. In New York, the court cannot on its own motion change the place of trial of an

giving of notice of motion is needless where the filing of application makes change obligatory.[8] In Wisconsin the court has until the last day of the term to rule on a motion.[9] An application for leave to reply to a counter affidavit in a motion for change of venue and to submit further evidence on the ground of surprise, should be made at the time of hearing the motion.[10] The petition must be properly executed.[11] The affidavit should be regular in form, properly verified,[12] and served.[13] The burden is on the party seeking a change of venue to establish the ground thereof.[14] In Montana the filing of an affidavit for a change of venue of itself disqualifies the judge and terminates his general authority to act in a case.[15] In Wisconsin the county court endowed with like powers as the circuit court may order a change of venue to another county except in cases of disqualification of the county judge when it goes up to the circuit court.[16] It is reversible to deny such a motion for a supposed want of power which in fact exists and to ignore the merits.[17] Whether an order denying a change of venue should be set aside on the ground of surprise or lack of opportunity to reply to counter affidavits is within the discretion of the court.[18]

Mandamus.[19]—An application for mandamus to compel removal of a case will be dismissed where the time to remove has not yet arrived,[20] and mandamus will not lie to compel action on an application for a change of venue before the expiration of the time within which an order for a change must be made.[21] If a court

action for personal injuries brought in the county in which neither party resides. Code Civ. Proc. §§ 985, 986, 987. Phillips v. Tietjen, 108 App. Div. 9, 95 N. Y. Supp. 469, citing earlier authorities which seem to be in conflict. Under Code Civ. Proc. §§ 147, 403, a motion for change of venue on the ground that the action is not brought in the proper county may be made in chambers on four days' notice. Fishburne v. Minott [S. C.] 52 S. E. 646.

8. State v. District Ct., 32 Mont. 595, 81 P. 351.

9. State v. Goodland [Wis.] 107 N. W. 29.

10. Application was properly denied where no claim was made at original hearing. Cannon v. McKenzie [Cal. App.] 85 P. 130.

11. A petition for change of venue in condemnation proceedings, not joined in by all the defendants and not verified by one of the two defendants signing the same is properly denied. Starr & C. Ann. St. 1896, c. 146, par. 9. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510. An affidavit for a change of venue containing a mere naked declaration that the judge is prejudiced is insufficient. Griggs v. Corson [Kan.] 81 P. 471. In Michigan an affidavit in support of an application for a change of venue which follows the language of the statute in alleging local bias, etc., is valid. Act 309, p. 483, Sess. Laws, 1905, held to prescribe form of affidavit. Preston Nat. Bank v. Brooke [Mich.] 105 N. W. 757. The statute held constitutional as so construed. Id. The moving affidavit need not show that the cause for the change was not known to the accused at any term of court prior to filing the affidavit. State v. Williams [Wis.] 106 N. W. 286. An affidavit for change of venue on the ground that the action is brought in the wrong county need not show that a fair and impartial trial cannot be had in such county. Fishburne v. Minott [S. C.] 52 S. E. 646.

12. Verification of a counter affidavit that deponent was personally familiar with the matter stated and that the affidavit was true held sufficient. Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200.

13. The acceptance of service of an affidavit in support of a motion for change of venue and allowing the same to be read waives the right to object that it was not served with the notice of motion. George v. Kotan [S. D.] 101 N. W. 31.

14. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010.

15. Code Civ. Proc. §§ 615, 180, as amended by Acts 2d Ex. Sess. 1903, p. 9. State v. District Ct., 32 Mont. 595, 81 P. 351. Where, on affidavit filed, a judge ordered a change of venue to another county, a judge of a different department of the same court had no authority to entertain a motion to annul such order. Id. Upon filing of the affidavit the judge must change the place of trial or invite another judge. Id. No notice of application for change is necessary. Id.

16. Held error for county judge to deny application for want of power. Laws 1860, p. 364, c. 361; Rev. St. 1878, §§ 2466, 2462; Laws 1889, p. 20, c. 20. Sanders v. German Fire Ins. Co. [Wis.] 105 N. W. 787. Objection to ruling as made and to proceeding with trial till ruled on merits held not to constitute withdrawal of motion precluding review. Id.

17. Sanders v. German Fire Ins. Co. [Wis.] 105 N. W. 787.

18. Cannon v. McKenzie [Cal. App.] 85 P. 130.

19. See 2 C. L. 2008.

20. Where the issue of "recusation vel non" had not yet been tried. Act 40, p. 39, of 1880. State v. Reid [La.] 39 So. 998.

21. So held where court did not refuse to

without power or discretion to order a change of venue nevertheless makes the order mandamus to proceed with the trial is the proper remedy to correct such order.[22]

Prohibition.[23]—The writ of prohibition is granted only where the proceedings in an inferior court are in excess of or without jurisdiction.[24] It will lie to stop proceedings in a local action involving title to land situated in another state where many of the expenses in such action cannot be recovered as legal costs.[25] A petition for this writ on the ground of disqualification of the judge must allege facts showing such disqualification.[26] Prohibition will lie to prevent further proceedings where plaintiff has joined a mere nominal defendant for the purpose of obtaining jurisdiction in one county of the real defendant residing in another county.[27]

§ 4. *Results of change of venue.*[28]—Upon a change of venue being granted, a stay of proceedings in the original court necessarily follows.[29] A judge does not lose jurisdiction of a case by granting a change of venue upon an application not made pursuant to statute.[30]

VERDICTS AND FINDINGS.

§ 1. *Definitions and nature.*[31]—The purpose of a special verdict is to obtain from the jury the findings upon material, issuable facts, and the legal effect of such findings is exclusively for the court.[32] By a special verdict the jury find and state all the facts at issue and conclude, conditionally, that if upon the whole matter as thus found the court thinks plaintiff has a cause of action, then verdict is for plaintiff, otherwise for defendant.[33] Where the finding determines the whole issue, it is not a special finding.[34]

act but denied the motion for a change until another motion on a stay of proceedings could be disposed of. State v. Goodland [Wis.] 107 N. W. 29.

22. Appeal from court to which transferred held not adequate remedy. State v. Superior Ct. of Spokane County [Wash.] 82 P. 875.

23. See 2 C. L. 2008.

24. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129. Disqualification of a judge does not deprive the court of jurisdiction of a cause properly brought in the county. Id.

25. Action in California involving title to land in Nevada. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70.

26. Facts stated in the notice of motion cannot be considered. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129. That plaintiff's attorney is close friend of the judge and bears great animosity towards defendant, not sufficient. Id. The fact that a notice of motion for a change of venue under Code Civ. Proc. § 397, for disqualification of the judge was given did not deprive the trial court of jurisdiction to proceed with the case. Id.

27. State v. Bradley [Me.] 91 S. W. 483.

28. See 4 C. L. 1803.

29. Notice of motion for stay not necessary. Fishburne v. Minott [S. C.] 52 S. E. 646.

30. Court had power to vacate order and proceed with hearing. Salomon v. Chicago Title & Trust Co., 115 Ill. App. 194.

31. See 4 C. L. 1804.

32. Meyer v. Home Ins. Co. [Wis.] 106 N. W. 1087.

33, 34. Perdue v. Big Four Drainage Dist. of Ford County, 117 Ill. App. 600.

§ 2. *General verdicts.*[35]—A general verdict necessarily determines all of the material issues in favor of the party for whom such verdict is given.[36] It must be given a reasonable intendment,[37] must be construed in the light of the pleadings,[38] but must conform to the pleadings[39] and instructions thereon,[40] and must be responsive to the issues,[41] and must definitely determine the issues;[42] but as a general rule where the verdict can be made certain by reference to the pleadings or the admitted facts, and enough can be gathered from such sources to supply any apparent uncertainty, the court is inclined to favor the validity of the verdict,[43] and

35. See 4 C. L. 1804.

36. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611; Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116; Lindley v. Kemp [Ind. App.] 76 N. E. 798; Catterson v. Hall [Ind. App.] 76 N. E. 889; Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606; Cincinnati, etc., R. Co. v. Klump [Ind. App.] 77 N. E. 869. If any one of such findings be not supported by the evidence, the verdict cannot stand. Oakley v. Emmons [N. J. Law] 62 A. 996. Where the defendant enters a plea in abatement and a verdict is rendered against him, it constitutes a finding against the plea, especially where the court has charged that if the jury find in favor of the plea, they must find for defendant. Ellis v. Littlefield [Tex. Civ. App.] 93 S. W. 171. Right of plaintiff to ride in car with stock as a question of his contributory negligence. Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. Verdict for plaintiff in action for injuries from overflows caused by negligent construction of defendant's roadbed, held to include finding that the defendant had not complied with the statute requiring railroad companies in the construction of their roads to place culverts therein required for necessary drainage. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 14 Tex. Ct. Rep. 600, 91 S. W. 823.

37. Atkins v. Winter, 122 Ga. 644, 50 S. E. 487. Where, in an action for breach of contract, the jury found that defendant had contracted to purchase lumber from plaintiff as alleged, but that plaintiff had failed to comply with his part of the contract, the fact that the jury also unnecessarily answered a further issue that the lumber hauled by plaintiff for delivery under the contract was of the value of $5 only, the contract price being $20, was conclusive that the jury intended to find that plaintiff had not performed his part of the contract. Coxe v. Singleton, 139 N. C. 361, 51 S. E. 1019.

38. A verdict that executors should execute the will of the testator construed so as to authorize a judgment substituting appointees of the court for the executors. Atkins v. Winter, 122 Ga. 644, 50 S. E. 487.

39. A verdict for an amount in excess of the amount claimed in the pleadings is fundamentally erroneous. Houston & T. C. R. Co. v. Shults [Tex. Civ. App.] 90 S. W. 506. A verdict is not open to the objection that it does not conform to the pleadings because it is for an amount in excess of two counts in the declaration, where there were other counts which amounted to more than the amount of the verdict. First Nat. Bank v. Chandler [Ala.] 39 So. 822. Where the defense to an action on a note was that the note had been given for property which proved to be other than as represented by the plaintiff, a verdict that the plaintiff should take property back and that the notes should be canceled, was erroneous. Wootan v. Partridge [Tex. Civ. App.] 13 Tex. Ct. Rep. 39, 87 S. W. 356. A verdict will not be set aside if one or more counts in the declaration is sufficient to sustain it. Defendant should have moved for an instruction as to each of the counts not sustained, in order to avail itself of the want of sufficient evidence to sustain a part of the counts only. Shickle, Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444.

40. Where the court instructs the jury to find the value of the horse as of the time of trial, a verdict finding the value as of another date is irregular. Burke v. Graham, 106 App. Div. 108, 94 N. Y. S. 559.

41. Verdict upon an exception to the confirmation of paving assessments, held to sufficiently conform to the issues, although the verdict was that the property of the objectors was not assessed more than it would be "benefitted," without the use of the words "specially benefitted." McLannan v. Chicago, 218 Ill. 62, 75 N. E. 762.

42. Where the only question in issue was whether the claim sued on had been settled, a verdict that "we, the jury * * * find for the defendant that the plaintiff's claim sued upon has been settled," was sufficiently definite to authorize a judgment for the defendant. Kolleen v. Atchison, etc., R. Co. [Kan.] 83 P. 990. A verdict for $545, "with interest at 7% per annum" is not invalid for uncertainty as to amount, where such interest can be found by computation from the time when cause of action arose. Corcoran v. Halloran [S. D.] 107 N. W. 210. Where a claim in favor of a husband and one in favor of him and his wife are sued upon in the same action, the verdict should show the damages awarded upon each claim separately; and where damages are awarded generally the plaintiff may have the defect remedied by a motion for a new trial, or in arrest of judgment, or for a venire de novo. Spencer v. Haines [N. J. Law] 62 A. 1009. See Municipal court act, § 237, Laws 1902, p. 1560, c. 580. Sullivan v. New York City R. Co., 94 N. Y. S. 370.

As to damages or amount: In a suit upon a contract to cut hay at a certain price per bale, a verdict in favor of the plaintiff for a certain sum per bale, but which does not find the number of bales cut, is too uncertain as to the amount to sustain a judgment. Parker v. Stroud [Tex. Civ. App.] 87 S. W. 734. The failure of a verdict in detinue to assess the values of the several items of the property is not error where there was no evidence as to such separate values. Howard v. Deens [Ala.] 39 So. 346.

obvious clerical errors may be disregarded.[44] Where a verdict is clear upon the issue submitted, irregularity in form will not invalidate it.[45]

In reaching a general verdict, the jury may properly consider facts shown by the evidence, though not shown in the answers to special interrogatories.[46] The absence of a general verdict is not necessarily fatal.[47] A verdict of less than a full jury is a nullity unless authorized by a valid statute.[48] In Missouri a verdict may be rendered by nine of the jury.[49]

A statutory provision that the verdict must be in writing is directory,[50] and irregularities in a verdict which do not affect the substantial rights of the parties will be disregarded.[51]

§ 3. *Special interrogatories and verdicts. When proper.*[52]—In some states the submission of questions calling for special findings is within the discretion of the trial court,[53] but in others the court is required to submit special interrogatories whenever properly required by a party so to do.[54] But it is not error to refuse to submit special interrogatories which have already been submitted to the jury in the

43. Brown v. Gillett [Wash.] 81 P. 1002. Where judgment is demanded for a certain sum with interest from a certain date, and the date is not disputed, a verdict for the sum demanded with interest, but without specifying the amount of interest, is sufficiently certain. Id. In a suit upon a contract to cut hay at so much per bale a verdict for so much per bale, followed by an aggregate amount, is sufficient. Parker v. Stroud [Tex. Civ. App.] 87 S. W. 734. A verdict for "1,800" without specifying whether it was for $1,800 or 1,800 cents, held sufficient to sustain a judgment for $1,800, where the suit was for $2,000 and the verdict when read to the jury was for $1,800, and was assented to by them and so entered. Notwithstanding Code Civ. Prac. § 325, requiring verdict to be in writing. Kentucky Distilleries & Warehouse Co. v. Leonard, 27 Ky. L. R. 1055, 87 S. W. 809. A verdict for the "full amount claimed" is sufficient where a specific amount is claimed by the declaration. Sullivan v. New York City R. Co., 94 N. Y. S. 370. Mere informality in the form of a verdict which is perfectly intelligible will be disregarded. Meyer v. Purcell, 114 Ill. App. 472.

44. A verdict is not vitiated by the use, under certain circumstances, of the word "defendant" instead of "defendants." Verdict sustained where defendants were partners, relied on same defense, and referred to themselves as "defendant" in their own instructions. Ziegenhein v. Smith, 116 Ill. App. 80.

45. Where the only issue in an action of trover was the amount of damages, the other issues being admitted by default, a verdict which clearly assesses the damages is sufficient though in form one of assumpsit. Meyer v. Ross, 119 Ill. App. 485.

46. Action against railroad company by attendant of stock for injury sustained while riding in car with stock. Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014.

47. As where the answers to the special interrogatories are sufficient to sustain judgment, and no objection is made below on account of the absence of a general verdict. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

48. Laws 1899, p. 244, c. 111, unconstitutional. People v. Croot, 33 Colo. 426, 80 P. 1065.

49. The amendment of section 28, art. 2, of the state constitution, providing for a verdict by nine jurors, was self-operating and went into effect upon the official canvass of the vote on the day after the election. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889; Taussig v. St. Louis & K. R. Co., 186 Mo. 269, 85 S. W. 378.

Signature: Laws 1901, providing that the signature of the foreman alone is sufficient where the verdict is unanimous, but that if the verdict is merely by the constitutional majority all of those who agreed must sign the verdict, did not become operative until June 16, 1901; and hence a majority verdict signed by the foreman alone was sufficient until such statute became operative. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889.

50. The object of such provision is to bring to the mind of the court the finding of the jury, and when that object is accomplished the use of a written verdict is satisfied. Kentucky Distilleries & Warehouse Co. v. Leonard, 27 Ky. L. R. 1055, 87 S. W. 809.

51. Kentucky Distilleries & Warehouse Co. v. Leonard, 27 Ky. L. R. 1055, 87 S. W. 809.

52. See 4 C. L. 1804.

53. Hart v. Brierley [Mass.] 76 N. E. 286.

54. See Rev. St. 1898, § 2858. Olwell v. Skobis [Wis.] 105 N. W. 777. See Code, § 275. Root v. Coyle [Okl.] 82 P. 648. Although the questions submitted for special verdict are covered in a general way by the questions in issue, the court should nevertheless, when so requested, submit to the jury the particular physical facts directly put in issue by the pleadings. Olwell v. Skobis [Wis.] 105 N. W. 777. Omission to find on all material issues is ground for reversal. Stanley v. Flint, 10 Idaho, 629, 79 P. 815. In an action for injuries in which the question as to whether plaintiff fell over a wire was in issue, the submission of a special interrogatory as to whether the plaintiff could or ought to have seen the wire was proper, a particular instruction having already been given as to contributory negligence in not seeing wire. Buchholtz v. Radcliffe [Iowa] 105 N. W. 336. Special interrogatories as to ultimate material facts should be submitted

charge of the court,[55] or which are covered by interrogatories already submitted;[56] and where a certain issue will be material only in the event of a finding being made in a certain way, the failure to submit such issue is without prejudice where the finding is made some other way.[57] Where a party is called in to defend an action he cannot have a special finding as to matters between him and the defendant.[58] A statute authorizing the court to enter judgment in the absence of findings by the jury upon special issues is not unconstitutional.[59] A statute providing that in all trials by juries in civil proceedings, the jury may render a special or general verdict at their discretion, has no application to a suit in chancery where their verdict is but advisory.[60]

Requests for and submission of special issues or interrogatories.[61]—The court is not required to submit special interrogatories in the absence of a request therefor,[62] but may submit them of its own motion.[63] Special interrogatories must be submitted to the opposing counsel before argument.[64] A waiver of a general charge is not necessary to authorize the court to submit the case on special issues.[65]

Form and requisites of special interrogatories.[66]—Special interrogatories should be confined to such questions as are controverted and put in issue by the pleadings or as might properly have been put in issue by the pleadings.[67] They should not be directed to evidentiary facts,[68] nor should they require the jury to state the specific grounds of their findings,[69] nor call for mere cross-examination of the jury,[70] nor is it error to refuse to require the jury to answer special interrogatories where such inter-

to the jury where the evidence is such as to require their consideration. Held error to refuse to submit a special interrogatory requiring the jury to answer whether they found "that the placing of plaintiff's arm at the place he had it just prior and at the time it was hurt was the exercise of ordinary care on his part for his own safety." R. S. c. 110, § 58a. Lake St. El. R. Co. v. Fitzgerald, 112 Ill. App. 312.

55. Baxter v. Krainik [Wis.] 105 N. W. 803.

56. City of Lawton v. McAdams [Okl.] 83 P. 429.

57. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49.

58. Contractor to keep streets in repair called in to defend action against city, asked for finding as to whether the injury was caused by his negligence or that of the city. Harvey v. Chester [Pa.] 61 A. 118.

59. Rev. St. 1895, § 1331. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470.

60. 3 Starr & C. Ann. St. 1896, p. 3167. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

61. See 4 C. L. 1805.

62. Mueller v. Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67; Johnson v. St. Paul & W. Coal Co. [Wis.] 105 N. W. 1048. A refusal to submit interrogatories to the jury is not erroneous when there is no request that they be answered in case a general verdict is returned. Sullivan v. Franklin Bank, 6 Ohio C. C. (N. S.) 468; Baltimore, etc., R. Co. v. Moloney, 7 Ohio C. C. (N. S.) 437.

63. Rev. St. § 58a, c. 110. Power the same as its power concerning written instructions. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154.

64. See Code, § 3727. Submission, however, immediately after counsel had addressed the jury by formal phrase, so in time. Wilson v. Wapello County [Iowa] 105 N. W. 363.

65. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

66. See 4 C. L. 1805.

67. Revised statute 1898, § 258. Olwell v. Skobis [Wis.] 105 N. W. 777.

68. Baxter v. Krainik [Wis.] 105 N. W. 803; Olwell v. Skobis [Wis.] 105 N. W. 777; Chicago & A. R. Co. v. Brooks, 115 Ill. App. 5. The object of the statute is to elicit material facts, and not mere fragments or items of evidence; hence interrogatories that are calculated to mislead, confuse, or harass the jury, should not be submitted. City of Lawton v. McAdams [Okl.] 83 P. 429. Where the determination of the fellow-servant issue is material, a question which sets forth a test should be given upon request. Chicago & A. R. Co. v. Brooks, 115 Ill. App. 5. Upon an issue of contributory negligence, a question as to whether the plaintiff performed his work "as such work was usually performed by other men" was evidentiary only. Anderson v. Chicago Brass Co. [Wis.] 106 N. W. 1077. Where the ultimate fact is whether under all the circumstances shown by the evidence plaintiff exercised ordinary care, a special interrogatory "Could the plaintiff by the exercise of ordinary care have seen the crane coming in time to avoid it," is properly refused. Leighton & Howard Steel Co. v. Snell, 119 Ill. App. 199.

69. In an action for injuries alleged to have been caused by a defective machine, questions covering different phases of the evidence concerning the nature of the defects were improper. Montayne v. Northern Electrical Mfg. Co. [Wis.] 105 N. W. 1043.

70. In an action for injuries caused by an explosion of a tank, an interrogatory as to

rogatories do not relate to any fact necessarily involved in the findings of the general verdict.[71]

A special interrogatory should be single so as to admit of a single categorical answer.[72] Special interrogatories should not be submitted together, although the same instructions would be applicable for all.[73]

Form and requisites of special verdict.[74]—The form of a special verdict is very much in the discretion of the trial court.[75] But a special verdict which is but little more than a general verdict in sections is not sufficient.[76] A special verdict must be responsive to the interrogatories submitted,[77] must be definite,[78] and must find every material fact in issue.[79] In other words, a special verdict should be of such nature that nothing remains for the court but to draw from such facts the proper conclusions of law.[80] But it is not necessary that the answers of interrogatories framed by one party should affirmatively establish the claims of the other party.[81] Special verdict should present ultimate facts, not the evidence thereof.[82] Absence of a finding in a verdict which may be supplied by intendment may be regarded as merely technical error.[83] An immaterial variance between the findings and the pleadings is not fatal,[84]

what part of the tank exploded was properly refused. Horr v. Howard Paper Co. [Wis.] 105 N. W. 668.

71. Answers to interrogatories as to extra work in an action upon a contract for excavation of dirt. Root v. Coyle [Okl.] 82 P. 648. Where the issue is whether a certain tract was benefited, a question whether "any part" of plaintiff's land was benefited, is insufficient. Perdue v. Big Four Drainage Dist. of Ford County, 117 Ill. App. 600.

72. A question as to whether the plaintiff knew that the edges of certain sheets of brass which he was feeding to a machine were liable to contain slivers and rough edges was improper. Anderson v. Chicago Brass Co. [Wis.] 106 N. W. 1077.

73. See Rev. St. 1898, § 2858. Clark Co. v. Rice [Wis.] 106 N. W. 231.

74. See 4 C. L. 1806.

75. Olwell v. Skobis [Wis.] 105 N. W. 777; Baxter v. Krainik [Wis.] 105 N. W. 803.

76. Olwell v. Skobis [Wis.] 105 N. W. 777.

77. Where, in condemnation proceedings, the court submitted interrogatories as to the value per acre of the land appropriated, as to the value of the residue of the defendant's land at the time of the appropriation and as to the value of such residue after such appropriation, a verdict which simply found that the value of the land appropriated was a certain amount per acre, and that the value of the residue was a certain amount per acre, without any finding as to the amount of such residue, was not responsive. Kirby v. Panhandle G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281.

78. Nicholson v. Maine Cent. R. Co. [Me.] 61 A. 834. Finding that the property in controversy in action for breach of contract to sell, was "about" a certain value, insufficient. Schnull v. Cuddy [Ind. App.] 74 N. E. 1030. Where the jury found that the partition which gave away and killed plaintiff's intestate had not been constructed by defendant in a reasonably safe manner and was not maintained in a reasonably safe condition, that such condition was known by the defendant, and that such condition was the proximate cause of the death of the deceased, the word "condition" as used in the second, third, and fourth of such findings related to the unsafe condition at the time of the injury, and the findings were not subject to an objection for uncertainty. Mueller v. Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67.

79. Answers to interrogatories as to value of property held not sufficient to support the computation of damages. Schnull v. Cuddy [Ind. App.] 74 N. E. 1030. In action for deceit the jury found that the defendant made actionable misrepresentations to the plaintiff as to the amount of money in the treasury of a corporation, but made no findings from which the extent of such misrepresentation could be ascertained. Beare v. Wright [N. D.] 103 N. W. 632. The general rule will be satisfied if all the facts essential to a recovery which are controverted by the evidence are specially found in the verdict; so that the formal verdict may be sufficient, although it does not find separate facts which, although put in issue by the pleadings, were not controverted on the trial or were established by undisputed evidence. White v. Hines, 114 Mo. App. 122, 89 S. W. 349.

80. Where, in proceedings upon a writ entry, a special interrogatory is made as to whether the plaintiff's title is subject to an easement belonging to the defendant, a verdict of "Yes" without determining what part of the premises is subject to the easement, is insufficient. If the answer is "No," this will determine the controversy and will be sufficient. Nicholson v. Maine Cent. R. Co. [Me.] 61 A. 834.

81. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852.

82. Special verdict finding that services were requested by conduct need not set forth the conduct. Brown v. Ricketts, 6 Ohio C. C. (N. S.) 215. Probative facts or conclusions of law contained in the findings of a special verdict must be wholly disregarded by the court, when it comes to scrutinize the legal value of the facts found; and judgment will be granted only when determinative facts sufficient for its support remain, after the verdict has been stripped of all improper

but an admission in the pleadings must prevail over a finding to the contrary by the jury.[85] The failure of the foreman of a jury to sign a special finding is not such an irregularity as to affect any substantial right of parties to the cause,[86] and it is not error for the court to refuse to require the jury to make a specific finding more definite when such answer would have the same legal effect.[87]

Interpretation and construction.[88]—An answer to a special interrogatory will be construed in light of the instruction of the court given in connection with the submission of such interrogatory.[89] The use of the word "opinion" by a jury in a special finding is equivalent to a deliberate conclusion and judgment by the jury upon the evidence of the case.[90] Issues not covered by a special verdict will be presumed to have been found so as to sustain the finding made.[91] So, also, where parties fail to prepare and request an appropriate charge submitting a special issue, such issue, if not submitted, should be resolved in favor of the judgment.[92] Instances of the construction of particular findings are collated in the notes.[93]

§ 4. *Conflicts between verdicts and findings.*[94] *General verdict.*[95]—A verdict in favor of the plaintiff which awards a grossly inadequate sum is inconsistent.[96] So, also, a verdict for the defendant upon a counterclaim that the plaintiff promised the defendant to pay him a certain sum is inconsistent with a verdict for nominal damages in favor of the defendant.[97] Where an inconsistent verdict is rendered, one of the inconsistent parts cannot be treated as surplusage where it does not appear that if the jury had known of the inconsistency they would have omitted that part and returned the other.[98]

General verdict and special findings.[99]—Where the special findings are in irreconcilable conflict with the general verdict, the former must control,[1] but it is only

matter. Ginn v. Myrick, 3 Ohio N. P. (N. S.) 448.

83. In an action of debt on a penal bond, a finding for the plaintiff and assessment of damages is not a reversible error although the verdict should have stated the amount of the debt and damages. Pickett v. People, 114 Ill. App. 188.

84. Where there is an immaterial variance between the pleadings and the proof, the court may direct that the facts be found according to the evidence. Irby v. Philipps [Wash.] 82 P. 831.

85, 86. City of Cincinnati v. Johnson, 7 Ohio C. C. (N. S.) 167.

87. Where under an issue of contributory negligence the jury found that deceased because of "physical or mental ailment" was unable to move from the tracks it was not error to refuse to require the jury to find which it was. Electric R. Light & Ice Co. v. Brickell [Kan.] 85 P. 297.

88. See 4 C. L. 1807.

89. An issue, in a suit to foreclose a mechanic's lien, as to whether the contract had been strictly complied with, modified by the court so as to mean whether the contract had been substantially complied with. Burke v. Coyne, 188 Mass. 401, 74 N. E. 942.

90. City of Cincinnati v. Johnson, 7 Ohio C. C. (N. S.) 167.

91. Revised St. 1893 art. 1331. Judgment foreclosing lien against certain property notwithstanding that the verdict did not affirmatively state that a lien existed. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470.

92. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49.

93. A negative answer to a general question covering contributory negligence logically includes assumption of risk, in the absence of special questions as to that phase of contributory negligence. Johnson v. St. Paul & W. Coal Co. [Wis.] 105 N. W. 1048. A finding in an action for injuries that "such injury" ought to have been "foreseen" by a person of ordinary care, construed to mean that such an injury or an injury of like nature must have been apprehended or considered probable. Coolidge v. Hallauer [Wis.] 105 N. W. 568. A finding that the defendant in a divorce suit was addressed by her husband by a certain name, and that the name of the defendant as given by the marriage certificate was different, but that no fraud was practised in respect to the name of the defendant, and that no one was misled as to such name, and that the person from whom the divorce was granted was the person named in the marriage certificate, construed to mean that the defendant was known by two names, within the rule that where a person is known by two names he may be sued by either one. Kendrick v. Kendrick, 188 Mass. 550, 74 N. E. 598.

94, 95. See 4 C. L. 1807.

96. In action for professional services. Loewy v. Hirsch, 95 N. Y. S. 577.

97. Elmer v. Levin, 95 N. Y. S. 537.

98. Richardson & Co. v. Noble [Mich.] 107 N. W. 274.

99. See 4 C. L. 1807.

1. Bedford Quarries Co. v. Turner [Ind.

when the conflict is irreconcilable that the general verdict is overcome.[2] Such an-

App.] 75 N. E. 25. Hurd's Rev. St. 1903, p. 1408, c. 110, § 58c. Court of Honor v. Dinger [Ill.] 77 N. E. 557. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606. Burns' Ann. St. § 556. Catterson v. Hall [Ind. App.] 76 N. E. 889. One of the modes of testing the correctness of the general verdict is by facts specially found by answers to interrogatories. Therefore, if, when applying the facts so found by the jury to the facts which might have been proven under the issues, it clearly appears that the general verdict is based upon some other hypothesis or upon facts not within the issues, or the facts as specially found are inconsistent with or contradictory of material facts which must have been found to support the general verdict, in either case such verdict must yield, and the special findings control. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636. Where the plaintiff claims a certain item only on condition of the jury's finding in his favor upon a certain issue, a general verdict in his favor will not entitle him to such item where the finding is against him upon the special issue. Hildebrand v. Head [Tex. Civ. App.] 13 Tex. Ct. Rep. 599, 88 S. W. 438.

General verdict overcome by special findings: Special findings held to show that servant assumed risk of employment, and hence general verdict in his favor could not stand. Bedford Quarries Co. v. Turner [Ind. App.] 75 N. E. 25. Special findings held to show that defendant's servants were not guilty of negligence in blowing whistle while plaintiff was driving across track, and hence that a general verdict for plaintiff could not stand. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636. A special finding that the plaintiff was injured by the breaking of an axle was inconsistent with a general verdict based upon allegations of negligence in failure to inspect a wheel, and on account of defective cross ties, and running heavy trains over such defective track at a dangerous rate of speed. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606. A finding that the deceased did not intentionally place himself against a certain piece of machinery and a finding that he did not come in contact with it by accident, are either inconsistent with each other or show that they were necessary by reason of an absence of evidence, and in either case they are inconsistent with a general verdict for the plaintiff. Stratton v. Nichols Lumber Co. [Wash.] 81 P. 831. A special finding that plaintiff by the exercise of reasonable care could have avoided the accident is irreconcilable with a general verdict of guilty. Miller v. Chicago City R. Co., 110 Ill. App. 195.

2. Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116; Lindley v. Kemp [Ind. App.] 76 N. E. 798; Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811; Cincinnati, L. & A. Elec. St. R. Co. v. Klump [Ind. App.] 77 N. E. 869. Finding that plaintiff knew of a certain defect where it did not appear that he had such knowledge prior to the injury or of the danger. Henrietta Coal Co. v. Campbell, 112 Ill. App. 452. In order that a special finding shall control the general verdict, it must not only be inconsistent with it but they must be so irreconcilable that the conflict cannot be removed by any evidence admissible under the pleadings. Chicago City R. Co. v. White, 110 Ill. App. 23. A special finding that defendant's employe did not "willfully" injure plaintiff is not irreconcilable with a general verdict for plaintiff where the declaration contained counts of negligence. Id. Unless the answers to the interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, a motion for judgment upon the special verdict as against the general verdict will be denied. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611.

General verdict not overcome: In action for injuries sustained while traveling with stock. Plaintiff was traveling in car with stock. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. General verdict as to contributory negligence of passenger. Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116. Special findings as to whether an arrest and imprisonment were justified held not to overthrow a general verdict for false imprisonment. White v. Madison [Okl.] 83 P. 798. In action for damages for conspiracy to defraud plaintiff of property. Lindley v. Kemp [Ind. App.] 76 N. E. 798. In action by servant against employer for injuries, special findings held not to show contributory negligence or assumption of risk, as against general verdict for plaintiff. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Answers to special interrogatories in action against city for personal injuries, held not to show contributory negligence as against a general verdict in favor of the plaintiff. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. Special findings that the plaintiff was suffering with chronic laryngitis, but was in reasonably good health at the time his insurance policy was reinstated, held not inconsistent with a general verdict for the plaintiff. Court of Honor v. Dinger [Ill.] 77 N. E. 557. A finding that the accident was caused by a defective truck and by failure to make proper inspection was not inconsistent with an allegation that the accident was caused by the negligent operation of the train, so as to control a general verdict for plaintiff. Cincinnati, etc., R. Co. v. Bravard [Ind. App.] 76 N. E. 899. Answers to special interrogatories held not to show that the debt for which the note sued on was given was not a partnership debt, as against a general verdict for plaintiff against defendants as partners. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811. Findings that a party who was killed while committing an assault was not so far under the influence of liquor as to be incapable of forming an intent, that he went to the place where the crime was committed for the purpose of committing it, and that he came to his death by his own wrongful act, held not inconsistent with a general verdict against the defendant for selling him the liquor, there being nothing in the special findings to indicate that the intent to commit the assault was formed by the deceased before he procured the liquor. Mar-

swers, moreover, cannot be aided by presumptions,[3] while, on the other hand, every reasonable presumption must be indulged in favor of the general verdict,[4] and every reasonable hypothesis will be indulged for the purpose of reconciling the answers to special interrogatories with the general verdict of the jury;[5] but these presumptions must be confined to, and the jury's range of facts supporting such verdict must be found within, the facts properly provable under the issues.[6]

The failure of the jury to answer special interrogatories does not necessarily prevent a judgment from being entered upon a general verdict.[7] And where, upon exceptions to the sufficiency of the evidence to sustain the answer to proper interrogatories, it appears that any possible answers supposable would not necessarily have produced a material conflict with the general verdict, the exceptions will not be sustained.[8] Where special findings are inconsistent with the general verdict, but no complaint is made on this account in the lower court, and the action of the court in failing to enter judgment on the special findings is not complained of on appeal, the inconsistency in the findings is immaterial.[9]

Between special findings.[10]—In determining whether there is such a conflict the answers to the special interrogatories must be considered together.[11] Inconsistency in the answers to special interrogatories will not affect the general verdict.[12] And where the findings are contradictory or irreconcilable, the defeated party is entitled to the benefit of those most favorable to himself.[13] Particular findings construed with view of ascertaining whether they were in conflict will be found in the notes.[14]

tin v. Fisher [Mich.] 13 Det. Leg. N. 8, 107 N. W. 86. Where a deed claimed to have been executed in consideration of services rendered by the grantee is set aside by a verdict on the ground of want of mental capacity, a special finding in favor of the defendant as to the value of services alleged to have been rendered by him, could not, at the instance of the defendant, overcome the general verdict. Parker v. Ballard, 123 Ga. 441, 51 S. E. 465. In an action by a passenger against a railroad company to recover for injuries which it was claimed were caused by the negligence of the company in starting its train without giving him sufficient time to get off in safety, where the jury found generally for the plaintiff, a special finding that the train stopped the usual and ordinary length of time did not warrant the court in rendering judgment for the railroad company non obstante veredicto. Chicago, etc., R. Co. v. Wimmer [Kan.] 84 P. 378. A general verdict in a suit to quiet title which found that plaintiff's father purchased the property, paid a part of the consideration, had it conveyed to a trustee for himself and his heirs, but without intent to hinder or delay his creditors, and that after the death of plaintiff's father his widow procured the trustee to convey the property to her without consideration and that one of the defendants procured her to convey the property to him without consideration, and that such defendant knew that the property was held in trust, answers to special interrogatories that defendant did not know of the trust and that the jury did not know from the evidence whether plaintiff's father had any intention to defraud his creditors, did not overcome the general verdict. Catterson v. Hall [Ind. App.] 76 N. E. 889. In order to justify a judgment on the special findings notwithstanding the general verdict, the answers must make a case of such antagonism on some vital point as cannot be removed by any evidence admissible under the pleadings. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945.

3. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811; City of Jeffersonville v. Gray [Ind.] 74 N. E. 611.

4. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636; City of Jeffersonville v. Gray [Ind.] 74 N. E. 611; Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116; Lindley v. Kemp [Ind. App.] 76 N. E. 798; Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811. The general verdict covers all the issues in the case, and cannot be overthrown by findings of fact returned by the jury in answer to interrogatories, unless, after being re-enforced by the assumed proof of all favorable facts provable under the issues and all natural inferences arising from such facts, such verdict, in its relation to such special findings, is so incompatible and contradictory in some material point that both cannot possibly be true. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636.

5. City of Cincinnati v. Frey, 3 Ohio N. P. (N. S.) 627.

6. Lake Erie & W. R. Co. v. Fike [Ind. App.] 74 N. E. 636.

7. As where the answer could not have determined the right to recover. Hawley v. Bond [S. D.] 105 N. W. 464.

8. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852.

9. Capital Lumber Co. v. Barth [Mont.] 81 P. 994. See post, § 10, Objections and Exceptions.

10. See 4 C. L. 1808.

11. Catterson v. Hall [Ind. App.] 76 N. E. 889.

§ 5. *Separate verdict as to different counts, causes of action, or parties.*[15]—Where a complaint states two causes of action, and there is no evidence to support a verdict on one of the causes, a general verdict for the plaintiff is erroneous.[16] But a general verdict for a joint sum upon two causes of action tried as one will not be disturbed in the absence of proper objection in the trial court.[17] Nor will the failure of the verdict to dispose of one of the counts in the declaration be fatal, where the court grants a nonsuit as to such count.[18] A verdict "in favor of the plaintiff," in an action against two defendants, is a verdict against both defendants.[19] And in action against two defendants, a verdict against one defendant, without any finding as to the other, constitutes a mistrial;[20] but a finding, in such an action, that only one defendant is liable, is not outside of the issues, and will sustain a judgment against such defendant.[21] A separate verdict against one defendant alone cannot be sustained, however, where the gist of the action is an unlawful combination between two defendants.[22] So, also, where, in action against corporation and its servant, based solely upon negligence of the servant, a verdict exonerating the servant from negligence also exonerates the corporation.[23]

§ 6. *Submission to jury, rendition, and return.*[24]—The submission of issues of fact to a jury in an equitabde action is within the discretion of a trial court.[25] So, also, the trial court may submit issues separately.[26] The presumption is in favor of the proper submission of the issues;[27] but comments by the court upon submitting

12. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852.

13. Nickell v. Tracy [N. Y.] 77 N. E. 391.

14. A finding that the plaintiff knew certain facts in connection with his employment and ought to have known the danger resulting therefrom was inconsistent with a finding that he was not guilty of contributory negligence, assumption of risk being only a form of contributory negligence. Anderson v. Chicago Brass Co. [Wis.] 106 N. W. 1077. Findings that the plaintiff ought to have known of the danger which resulted in his injury, but that the defendant, his employer, ought not to have known of such danger, were inconsistent. Id. Where the jury found that the true consideration of a note which was acquired by the plaintiff was $300, but also found that the plaintiff had no knowledge when he acquired the note that its consideration was less than the amount stated on its face, which was $750, and that the plaintiff took the note upon representation that the amount for which the defendant was liable was stated on the face of the note, such findings were sufficient to sustain a judgment for the face value of the note. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470.

15. See 4 C. L. 1808.

16. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

17. When two causes of action against a defendant in favor of different plaintiffs are tried at one time as a result of the failure of the defendant to raise the objection to the misjoinder of the causes of action at a proper time, and a verdict for one sum in favor of both plaintiffs is rendered, and no objection is raised at the time the verdict is received, the irregularity in the form of the verdict is no sufficient reason for granting a new trial. The payment of the verdict as rendered to the parties jointly, or to their attorney of record, will discharge the defendant from liability to both of them on account of all matters alleged in the petition. Georgia R. & Banking Co. v. Tice [Ga.] 52 S. E. 916.

18. Where a petition contained two counts, and the jury was instructed to find for the defendant on one count, a verdict for the plaintiff on the other count, without any finding for the defendant on the other count, will be upheld, the instruction of the court being equivalent to a nonsuit as to the cause of action stated in the count referred to in such instruction. Mitchell v. St. Louis, etc., R. Co. [Mo. App.] 92 S. W. 111.

19, 20. McMahon v. Hetch-Hetchy & Y. V. R. Co. [Cal. App.] 84 P. 350.

21. Heinrich v. Heinrich [Cal. App.] 84 P. 326.

22. The defendant against whom no verdict was returned having had an entry of judgment made in his favor without the knowledge of the court, a subsequent order of the court setting aside the verdict and granting a new trial, upon a motion of the other defendant, operated to set aside the verdict as to both defendants and to grant a new trial as to both. Evans v. Freeman, 140 F. 419.

23. Stevick v. Northern Pac. R. Co [Wash.] 81 P. 999.

24. See 4 C. L. 1808.

25. Cochran v. Cochran [Minn.] 105 N. W. 135.

26. Lebensberger v. Scofield [C. C. A.] 139 F. 380.

27. In the absence of any showing in the record as to what questions were submitted to the jury or what the jury found, the appellate court will assume that the issues were properly submitted and that the

to a special inquiry may amount to taking the question away from the jury.[28] The court, in submitting special interrogatories, should not intimate to the jury the legal effect of their answers.[29] An instruction as to the form of the verdict, however, is permissible.[30] Admonitions as to the conduct of the jury upon separation need not be repeated after the submission.[31] The rights of the parties are to be determined as they existed at the time of the submission of the case to the jury, and neither party, therefore, is entitled to have notice or be present at the time of the signing and filing of the findings.[32] Nor will the fact that one of the parties is insane at the time the verdict is returned affect the validity of the verdict.[33] The absence of the trial justice and the jury when the verdict is received is a mere irregularity which the parties may waive.[34]

§ 7. *Amendment and correction.*[35]—The verdict of a jury in a suit in chancery is merely advisory.[36] Until judgment, the verdict is under the control of the court by virtue of common-law powers.[37] Where it appears during trial for a joint tort that one of the defendants is a minor, a nolle prosequi may be entered as to him after verdict.[38] Clerical[39] but not substantial errors[40] may be corrected, and matters appearing by record may be supplied.[41] There has been some modification as to

jury heeded the instructions. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

28. DeKremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525.

29. Meyer v. Home Ins. Co. [Wis.] 106 N. W. 1087. In such case the special verdict should be rendered by the jury entirely uninfluenced as to the final result of applications of the law as to the facts, and hence the instructions should be confined to an explanation of the questions of the special verdict, without informing the jury of the legal effect of their answers to the questions. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 106 N. W. 805.

30. A communication by telephone from the judge to the jury as to the form of their verdict is not fatal error. Whitney v. Com. [Mass.] 77 N. E. 516.

31. Where the jury, upon submission of civil case, are told that if they have not reached an agreement within an hour they may then separate for a definite period, and at the same time are given the statutory admonition with regard to their conduct during such separation, it is not necessary that the admonition be repeated before the separation actually takes place. Fields v. Dewitt [Kan.] 81 P. 467. Where, upon the submission of a civil case, the jury are instructed regarding their duties during any separation that may take place before their deliberations are concluded, and the attorneys for both parties afterwards assent to a proposal made by the court that the jury be permitted to separate for a definite time, the proposal being made under such circumstances and stated in such terms that the court is justified in understanding that the attorneys consent to the jury's being dismissed by the bailiff in the absence of the judge, the objection that the jury were not given an additional admonition before such separation is not available on review. Id.

32. Condemnation proceedings. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

33. Condemnation proceedings. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

34. Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006. Implied waiver. Terriberry v. Mathot, 97 N. Y. S. 21. Parties may agree for the receipt of the verdict by the clerk in the absence of the judge. Dubuc v. Lazell, Dailey & Co., 182 N. Y. 482, 75 N. E. 401.

35. See 4 C. L. 1810.

36. Bird v. Bird, 218 Ill. 158, 75 N. E. 760. Where the verdict of a jury in an equitable action found in favor of one of the parties, and added that each party pay one-half of the cost of suit, and no special exception was made to that part of the verdict, or reference made to it in the brief of counsel, the appellate court will treat it as being a mere recommendation to the presiding judge, which he may or may not follow in his discretion. Strickland v. Hutchinson, 123 Ga. 396, 51 S. E. 348.

37. May refuse judgment or set aside the verdict for any reason which appeals to his judicial discretion. Conrath v. Border, 27 Pa. Super. Ct. 15.

38. Verdict will stand as to the others. Crane v. Lynch, 27 Pa. Super. Ct. 565.

39. A mistake in filling in blanks furnished to the jury for their verdict may be corrected after the return of the verdict to the court. Whitney v. Com. [Mass.] 77 N. E. 516.

40. Where the defects in a verdict as to description of land are substantial and not merely formal, the verdict cannot be amended. Where the defects are such that the intention of the jury would have to be guessed at, no amendment can be made. Stephens v. Gunzenhauser, 27 Pa. Super. Ct. 417.

41. Where in an action of debt the verdict is for the plaintiff and assesses the damages but fails to state the amount of the debt, the court may amend by inserting the proper amount. Koehler v. King, 119 Ill. App. 6. Where in an action by the vendor to recover possession of real estate for default in payment the verdict fails to state

a venire de novo in the case of special verdicts, but the old rule remains the same as to a general verdict, and all the defects in the verdict which are apparent upon the face of the record may be corrected by a venire de novo.[42] Motions to modify, strike out, or add to a verdict are improper.[43] But when a jury returns a verdict which is incomplete on account of failure to embrace therein a finding on a material issue, it is not error for the court to call the attention of the jury to the fact and require them to return to their room and complete the verdict.[44] An agreement between the parties empowering the judge to sign the judgment after adjournment of the term will not authorize him to hear and determine a motion to set aside the verdict after such adjournment.[45]

§ 8. *Recording, entry, and effect of verdict; impeachment.*[46]—Defects in pleading may be cured by the findings.[47] A verdict will not be disturbed unless it is plainly erroneous.[48] Where the evidence upon which the verdict is based is conflicting[49] or where there is substantial evidence to support it, the verdict is conclusive of the facts found thereby.[50] A ruling of the court, therefore, which ignores an adverse finding of the jury is erroneous.[51] But the question as to whether there is any evidence to support the verdict proper to be submitted to the jury is a question of law or legal inference upon which an appellate court must pass,[52] and a verdict against unimpeached and conclusive evidence will not be allowed to stand.[53] There is a distinction, however, between the points of view from which the question of the suffi-

amount due complainants, the court may amend the verdict by including the proper amount. Gould v. Young [Mich.] 13 Det. Leg. N. 60, 107 N. W. 281.

42. Such remedy is available where the verdict on its face is so uncertain, ambiguous or defective that no judgment can be rendered thereon, or where the damages are not assessed on account of some material omission. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

43. Where any or all of the facts found are not sustained by sufficient evidence, or are contrary to law, or when facts should have been found, but were not, the proper remedy is a motion for a new trial. Tyler v. Davis [Ind. App.] 75 N. E. 3.

44. Lee v. Humphries [Ga.] 52 S. E. 1007.

45. Knowles v. Savage Son & Co. [N. C.] 52 S. E. 930.

46. See 4 C. L. 1811.

47. Indefiniteness in the description of defendant's property in suit to enjoin a nuisance. Major v. Miller [Ind.] 75 N. E. 159. Where in an action for injuries the complaint does not allege the amount of necessary expenditures and compensation for loss of time, but proof is heard upon such matters, any defect in the petition is cured by the verdict. Covington & C. Bridge Co. v. Hull [Ky.] 90 S. W. 1055.

48. Southern Ind. R. Co. v. Baker [Ind. App.] 77 N. E. 64.

49. Louisville & N. R. Co. v. Rhoads [Ky.] 90 S. W. 219; Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771; Southern R. Co. v. Holbrook [Ga.] 53 S. E. 203. In action on life insurance policy. Fidelity Title & Trust Co. v. Illinois Life Ins. Co. [Pa.] 63 A. 51. Verdict involving finding that when the plaintiff executed a release of damages for his injuries, he was not sufficiently conscious to be capable of executing such release. Galveston, etc., R. Co. v. Green [Tex. Civ. App.] 14 Tex. Ct. Rep. 611, 91 S. W. 380. In action for damages to crops and land caused by overflows. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 14 Tex. Ct. Rep. 600, 91 S. W. 823.

50. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771; McGue v. Rommel [Cal.] 83 P. 1000; Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 91 S. W. 375; Brown v. Weaver Power Co. [N. C.] 52 S. E. 954; Southern Co. v. Howard [Ga.] 52 S. E. 1038; James v. Ayer [Ga.] 53 S. E. 103; Carlton v. King [Fla.] 40 So. 191. Although the numerical weight of the testimony is decidedly against the verdict. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Where there is substantial evidence to support the theory that the plaintiff was not seriously injured, a verdict for nominal damages will not be disturbed. Locke v. Independence [Mo.] 91 S. W. 61. Verdict for plaintiff in action for damages caused by the negligent operation of the defendant's train. Sandy River Co. v. Sparks [Ky.] 91 S. W. 265. In action against commission merchant to whom plaintiff sent quantity of peanuts for storage and sale, evidence held sufficient to sustain finding that defendant failed to properly store and care for the nuts. Knowles v. Savage Son & Co. [N. C.] 52 S. E. 930.

51. Burke v. Coyne, 188 Mass. 401, 74 N. E. 942.

52. See Const. art. 4, § 8. Brown v. Weaver Power Co. [N. C.] 52 S. E. 954.

53. Dinan v. Supreme Council Catholic Mut. Ass'n [Pa.] 62 A. 1067. Where the jury is instructed that the plaintiff is required to establish a certain fact in order to entitle her to a verdict and there is no evidence tending to establish that fact, a verdict in plaintiff's favor will be set aside. Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316. The verdict of the jury will be set aside when clearly con-

ciency of the evidence will be regarded by a trial and an appellate court.[54] A verdict or other finding not followed by a judgment will not serve as an estoppel by res judicata.[55] Nor will a party be bound by answers to special interrogatories submitted by him, where there is no evidence to support such answers, where he challenges the sufficiency of the evidence both at the close of the plaintiff's testimony and at the close of all the testimony.[56] In a civil case, the affidavits of the jurors cannot be used as evidence to impeach their verdict,[57] nor can a verdict be impeached by written statements of several jurors that they did not fully understand the issues and the legal effect of their findings;[58] but the affidavits of the jurors may be received to support their verdict,[59] especially when such affidavits relate to extrinsic matters that do not pertain to the deliberations of the jury.[60]

§ 9. *Finding by court or referee.*[61] *Referee.*[62]—A reference may be had to a court commissioner to determine questions the determination of which is necessary to carrying out the decree.[63]

Findings by the court.[64]—In civil cases the court is authorized by statute to try cases without a jury where it is so agreed between the parties.[65] And in actions at law, where the case is submitted to the court without a jury, it is the duty of the court to make findings of fact.[66] Such findings constitute the real basis of the judgment,[67] and are just as essential, if properly requested, in an action at law when the same is dismissed, as where an affirmative judgment is entered.[68] But findings of fact, however, are not necessary in equitable actions,[69] nor where judgment is entered upon a stipulation,[70] nor where the case is submitted upon an agreed statement of facts,[71] nor where no request is made for such findings.[72] A demand for additional

trary to the evidence, and the supreme court will, in the exercise of its appellate jurisdiction over the law and the facts, render a final judgment on the merits of the cause. Gomez v. Tracey [La.] 40 So. 234. See Appeal and Review, 5 C. L. 121.

54. It is the duty of a trial judge to set aside the verdict of a jury unless he is satisfied that substantial justice has been done. An appellate court should not set aside a verdict unless it is manifest that injustice has been done. Linderman v. Nolan [Okl.] 83 P. 796. See Appeal and Review, 5 C. L. 121; New Trial and Arrest of Judgment, 4 C. L. 810. Where one of the grounds of a new trial is that the verdict was not sustained by the evidence, but the court does not declare upon which ground the motion is granted, the evidence being conflicting, the appellate court will not review the order granting a new trial. Graf v. Vermont Sav. Inv. Co. [Kan.] 83 P. 821.

55. Walden v. Walden [Ga.] 52 S. E. 323.

56. Larson v. Centennial Mill Co. [Wash.] 82 P. 294.

57. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590; Covington & C. Bridge Co. v. Hall [Ky.] 90 S. W. 1055. Affidavits of jurors showing misconduct of the jury. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 91 S. W. 375. As to what took place in the deliberations of the jury. Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864. Affidavits that the jurors misunderstood the law of the case or instructions of the court. Marcy v. Parker [Vt.] 62 A. 19.

58. Coxe v. Singleton, 139 N. C. 361, 51 S. E. 1019.

59. Covington & C. Bridge Co. v. Hull [Ky.] 90 S. W. 1055.

60. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590.

61, 62. See 4 C. L. 1812.

63. Decree requiring waterways to be restored to original condition. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587. See Reference, 4 C. L. 1257.

64. See 4 C. L. 1812.

65. Crew v. Heard [Ala.] 40 So. 337.

66. Ballinger's Ann. Codes & St. § 5029; 2 Hill's Code § 379. Slayton v. Felt [Wash.] 82 P. 173. The submission of an issue of fact to the court alone for trial is equivalent to the demand for a special verdict, which necessitates a finding on every material issue involved. McClung v. McPherson [Or.] 81 P. 567.

67. Judgment held supported by the findings. Roberts v. Hall, 147 Cal. 434, 82 P. 66; Mullin v. Boston El. R. Co., 185 Mass. 522, 70 N. E. 1021. Where there is no appeal from the judgment, the appellate court will not consider the sufficiency of the findings to support the judgment. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082.

68. Ness v. March [Minn.] 104 N. W. 242; Slayton v. Felt [Wash.] 82 P. 173. Except where the evidence adduced for the plaintiff would not have justified findings in his favor. Ness v. March [Minn.] 104 N. W. 242.

69. Slayton v. Felt [Wash.] 82 P. 173. Since equity cases are properly tried de novo on appeal, the failure of the trial court to make a finding of fact when so requested is not reversible error. Williams v. Husky [Mo.] 90 S. W. 425.

70. Pacific Pav. Co. v. Vizelich [Cal. App.] 83 P. 459.

71. Although findings of fact are not necessary where the case is submitted upon agreed statement of facts, the court may

findings of fact is in ample time if made before judgment is rendered on the findings already made.[73] In New York the court is not required to note on the margin of a request for findings of fact and conclusions of law what disposition he made of them.[74]

What may or what must be found.[75]—The findings of the court should cover all the material issues,[76] and must not leave any of the facts to be presumed or to be supplied by intendment, but must state all the facts which are deemed material, so that the court will have nothing further to do but to declare the law upon the subject.[77] The findings should be of the ultimate facts and not of the evidentiary facts.[78] Evidentiary facts need not and should not be found,[79] nor is it necessary to make findings upon matters not raised by the pleadings,[80] nor as to matters admitted by the pleadings,[81] nor upon matters which are fully covered by the findings made,[82] nor upon issues as to which there is no evidence,[83] nor as to immaterial matters.[84] So, where the action is dismissed as to one of the defendants, no findings are

nevertheless make such findings. It may adopt the agreed statement as its own findings or it may make findings therefrom to correspond with the issues to be determined. Towle v. Sweeny [Cal. App.] 83 P. 74.

72. Rev. St. 1899, § 695. Williams v. Husky [Mo.] 90 S. W. 425; Slayton v. Felt [Wash.] 82 P. 173. See post, this section, What may or must be found. A mere request to make findings in favor of a party is not alone sufficient. The further request must be made for such findings as the court may think the evidence warrants. Slayton v. Felt [Wash.] 82 P. 173. Hurd's Rev. St. 1903, providing for the presentation of propositions of law to the trial court does not provide for the submission of questions of fact. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

73. B. & C. Comp. § 134, providing that a party may ask for special findings at the close of the evidence, does not apply to a trial by the court alone. Burton v. Mullenary, 147 Cal. 259, 81 P. 544.

74. Not under Code Civ. Proc. § 1022, as amended. Mutual Milk & Cream Co. v. Tietjen, 34 Civ. Proc. R. 29, 89 N. Y. S. 391.

75. See 4 C. L. 1812.

76. Mitchell v. Jensen [Utah] 81 P. 165; Dinius v. Lahr [Ind. App.] 74 N. E. 1033. In a law case the appellate court cannot make findings of fact or draw deductions from such findings, or treat as found that which might have been found. Mitchell v. Jensen [Utah] 81 P. 165. The appellate court cannot look to the pleading to determine the facts which should have been stated in the special findings. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001. Failure of the court to make any finding upon an issue of res judicata is fatal error where a finding upon such issue might have changed the decision. Societa di Mutuo Socorso v. Mantel [Cal. App.] 81 P. 659. Where a special finding is silent as to a fact the existence of which is necessary to plaintiff's case, the presumption is that the facts were not established by the evidence and is equivalent to a finding upon that point against such party. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001.

77. Burgess v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568. Where parties are sought to be charged as partners on account of their connection with a defective corporation, it is necessary for the court to find what connection or relation such parties had with the corporation and what they had to do with the dealings carried on in its name. Mitchell v. Jensen [Utah] 81 P. 165. The court in entering a judgment of dismissal for want of service, should find the facts on which its action is based, and not merely that all the facts set out in the several affidavits are true. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

78. Doughtery v. Lion Fire Ins. Co. [N. Y.] 76 N. E. 4. It is the ultimate facts as found and not the evidentiary facts which support the conclusions of law. Dinius v. Lahr [Ind. App.] 74 N. E. 1033.

79. Fanning v. Murphy [Wis.] 105 N. W. 1056. Where the court finds the amount of the damages sustained by the plaintiff, the evidentiary facts showing such amount need not be found. Moody v. Peirano [Cal. App.] 84 P. 783.

80. Burton v. Mullenary, 147 Cal. 259, 81 P. 544. Laches. Glassell v. Glassell, 147 Cal. 510, 82 P. 42.

81. Lambert v. Lambert [Cal. App.] 81 P. 715; Miller v. Head Camp, 45 Or. 192, 77 P. 83.

82. Vestal v. Young, 147 Cal. 715, 82 P. 381; Lindemann v. Rusk, 125 Wis. 210, 104 N. W. 119. The court need not make findings upon the statute of limitations, where the findings made show the day when the cause of action accrued. Santos v. Sliva [Cal. App.] 82 P. 981.

83. Glassell v. Glassell, 147 Cal. 510, 82 P. 42. A judgment will not be reversed or a new trial granted for want of a finding upon an issue raised by allegations of an affirmative defense or made by a cross complaint, where there is no evidence in relation to such issue, and even where the record does not show the evidence given on a trial, it will not be presumed against the correctness of the judgment that any such evidence was given. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

necessary as to him.[85] In other words, the general rule will be satisfied if all the facts essential to a recovery which are controverted by the evidence are specially found, although there is no finding as to separate facts which, although put in issue by the pleadings, were not controverted on the trial, or are established by the undisputed evidence.[86] A party cannot complain of the failure to find the facts in the absence of a request for such findings.[87] So also, where the court omits to find in regard to a disputed item, but the respondent, upon argument, confesses the error and files a written release to the extent of such item, the error is cured.[88] In the absence of a showing to the contrary, the necessary findings to support the judgment will be presumed.[89]

The finding should be[90] stated separately from the conclusions of law.[91] So also, it is held in some states that in equity the findings of fact and law should be expressed in separate and numbered paragraphs so as to present each one independently and distinctly.[92] But it is held, on the other hand, that the statutory rule that the findings of fact and conclusions of law must be separately stated applies only to actions at law tried without a jury, and not to equitable or probate proceedings.[93] A finding of fact is none the less a finding of fact though stated as a conclusion of law.[94] Findings should never be put in the form of a résumé of the evidence, nor should findings include matters of argument in support of the conclusions.[95] A finding must be of the facts themselves and not of the legal conclusion drawn from them.[96] Findings stated in the same form as in the pleadings are sufficient.[97] The trial court

84. Where the complaint in an action to abate a nuisance and for damages alleged notice to the defendant and a request to abate, and claimed damages, upon all of which issues the defendant took issue, and the court found as to the damages, the other allegations were immaterial, especially where the defendant denied the existence of the nuisance. Meek v. De Latour [Cal. App.] 83 P. 300. Where, in an action to recover loan, the court finds that there is nothing due, a finding upon an issue of usury raised by the pleadings is unnecessary. Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293.

85. Where the plaintiff, in an action against two defendants, alleged that one of them was not sole owner of the property in controversy but that the other defendant claimed some interest therein, and the action was dismissed as to such claimant, it was not necessary to make finding as to his interest. Pacific Pav. Co. v. Vizelich [Cal. App.] 82 P. 82.

86. White v. Hines, 114 Mo. App. 122, 89 S. W. 349.

87. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. Where the case is tried by the court without a jury and there is no request for a special finding of facts and no such finding is made, the conclusions of the court upon the testimony is not reviewable on appeal. See Code 1896, §§ 3319-3321. Crew v. Heard [Ala.] 40 So. 337. In trespass to try title no finding was made as to whether the plaintiff's deed was impressed with a trust. Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193.

88. Santos v. Silva [Cal. App.] 82 P. 981.

89. Fallis v. Gray [Mo. App.] 91 S. W. 175.

90. See 4 C. L. 1813.

91. Ballinger's Ann. Codes & St. 5029; 2 Hill's Code, § 379. Slayton v. Felt [Wash.] 82 P. 173. Code, § 1022, amended by Laws 1903, p. 237, c. 85. Wander v. Wander, 97 N. Y. S. 586; Paris Transit Co. v. Alexander [Tex. Civ. App.] 90 S. W. 1119. Alaska Code Civ. Proc. § 209, requires that the findings of fact and conclusions of law must be separately stated without argument or reasons therefor, and must be entered in general only in the trial of issues in actions at law where a jury has been waived. Section 372, relating to actions of an equitable nature, provides that findings of fact upon all the material issues must be filed "together with" the conclusions of law thereon, but that such findings of fact and conclusions of law shall be separate from the judgment. Lindeberg v. Doverspike [C. C. A.] 141 F. 59.

92. Decree was not reversed, however, for failure to comply with this rule. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944.

93. In re Farnham's Estate [Wash.] 84 P. 602.

94. Paris Transit Co. v. Alexander [Tex. Civ. App.] 90 S. W. 1119; Dodson v. Crocker [S. D.] 105 N. W. 929; Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. Finding that defendant was negligent. Paris Transit Co. v. Alexander [Tex. Civ. App.] 14 Tex. Ct. Rep. 392, 90 S. W. 1119.

95. Fanning v. Murphy [Wis.] 105 N. W. 1056.

96. In an action to set aside a decree as obtained by fraud, a finding of fraud in general terms without specifying any fact upon which the conclusion was based, is insufficient to support a judgment. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231.

97. Findings which are a negation in the language of the allegations of the complaint are sufficient. Rauer's Law & Collection Co. v. Bradbury [Cal. App.] 84 P. 1007.

is not required to paragraph and number special findings.[98] Findings must be responsive to the issues,[99] and must be definite and certain.[1] Where the finding upon one issue necessarily defeats a cause of action, it is not necessary to make findings upon the other issues,[2] and where two separate defenses present a single issue of fact, one finding will suffice.[3] A finding which substantially conforms to the allegations of the complaint which are expressly admitted by the answers is sufficient.[4] So also, special findings which follow the theory of the complaint and substantially find all the material facts disclosed by the evidence are sufficient.[5]

Interpretation and construction.[6]—A finding of facts made by the court is in the nature of a special verdict, but is not considered so critically as a special verdict. Its sufficiency, however, is determined by the same general rules.[7] No inferences or intendments are allowed in the aid of special findings;[8] but findings of a trial court are to receive such construction as will uphold rather than defeat the judgment,[9] and facts will be presumed in support of a finding when their existence may be legally presumed from facts which are found, otherwise the presumption will not be made.[10] A general finding includes a finding upon all the issues in favor of the party for whom it is made;[11] but a special finding will control as against a general finding where there is a conflict.[12] On the other hand, the special findings may be supported

98. But courts frequently do this for the sake of convenience. Major v. Miller [Ind.] 75 N. E. 159.

99. Towle v. Sweeney [Cal. App.] 83 P. 74. Findings are not required on matters not in issue. Where the complaint alleged that defendant had sold the property and converted the proceeds to his own use, which allegations were not denied, it is not necessary to make a finding upon the question. McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036. A finding of fact outside of the issue is a mere nullity and will not sustain a judgment. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 83 P. 785. A finding held responsive to issue as to the preformance of a contract. Wyman v. Hooker [Cal. App.] 83 P. 79. The fact that the findings were to a small extent not within the issues raised by the pleadings will be regarded as immaterial. In proceedings to enjoin construction of a ditch. See Code Civ. Proc. § 470. Vestal v. Young, 147 Cal. 715, 82 P. 381.

1. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001. A statement in the opinion of the trial court in a suit to restrain the operation of a foundry, that the foundry had been owned and operated for more than twenty years, was sufficient under evidence showing that the foundry had been operated since 1872. Over v. Dehne [Ind. App.] 75 N. E. 664. A finding that defendant was wrongfully constructing a ditch across plaintiff's premises was a sufficient finding that the plaintiff was deprived of the free use and possession of his property without right, and would be permanently deprived thereof, so as to sustain an injunction. Vestal v. Young, 147 Cal. 715, 82 P. 381. Finding that decedent "was not of sound mind at the time he executed the will in dispute" held to justify refusal of probate. In re Selleck's Will, 125 Iowa 678, 101 N. W. 453.

2. Smith v. Dubost [Cal.] 84 P. 38.

3. Where two defenses turn upon the single question whether plaintiff or his predecessors have been seised or possessed of certain real estate within the last five years, a single finding that he has been so seised is sufficient. Baum v. Roper, 145 Cal. 116, 78 P. 466.

4. Barton v. Koon [S. D.] 104 N. W. 521.

5. Such findings are not subject to the objection that they are defective, uncertain or ambiguous or that they do not assess the damages or that they contain the evidence instead of the ultimate facts. Case v. Collins [Ind. App.] 76 N. E. 781.

6. See 4 C. L. 1814.

7. Burgess v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568.

8. Dinius v. Lahr [Ind. App.] 74 N. E. 1033; Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001.

9. A finding that $1,000 would compensate the plaintiff, held equivalent to a finding that he was damaged to the extent of $1,000. Griffin v. Pacific Elec. R. Co. [Cal. App.] 82 P. 1084. The appellate court will give to the findings of the trial court the most liberal construction the language used will permit in order to sustain a judgment founded thereon. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 P. 659. The appellate court is not bound to consider the opinion of the trial court, and such opinion cannot qualify or limit the findings of fact. Grand Central Min. Co. v. Mammoth Min. Co. [Utah] 83 P. 648.

10. Burgess v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568.

11. In suit against executor of a trustee, a general finding for defendant held equivalent to a finding that there was nothing in his hands to account for, and that the trustee had honestly and faithfully administered the trust. White v. Hines, 114 Mo. App. 122, 89 S. W. 349.

12. Cramer v. Munkres [Wyo.] 83 P. 374. Where a count in a declaration alleged that, according to a certain statute, after the insurance policy sued on had been in force

by the general finding.[13] Special findings which seem to be contradictory should be reconciled when it can be reasonably done,[14] and where there is a conflict between two special findings, the one which supports the general finding or the judgment will control.[15] The statement of facts in a general finding does not transform it into a special finding.[16] Surplus findings will be disregarded;[17] and so also findings of facts admitted by the pleadings.[18] Particular findings which have been construed are collated in the notes.[18a]

Signing, filing, and entering.[19]—It will be presumed in the absence of proof to the contrary that findings of fact and conclusions of law were made and filed as required by statute.[20] The opinion of the court setting out both the facts and conclusions of law upon which the decree is based is informal, but sufficient, though no other findings were filed in the lower court.[21] In proceedings on claims against the United States the court must file its written opinion setting out both the specific findings of fact and the conclusions of law.[22]

a certain number of years if there should be a default, the reserve of the policy should be applied to continue the policy, a finding that the replication to the plea to such count was not sustained by the evidence, was not a finding that there was no guarantee fund applicable to the extension of the insurance, so as to control a general finding in favor of the plaintiff. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

13. A contention that a decree is not supported by the special findings will not be sustained where there is a general finding at the end of the special findings which when standing alone is sufficient to support the decree. Jordan v. Jackson [Neb.] 106 N. W. 999.

14. A finding that defendant made no suggestion to deceased concerning the disposition of her property held to refer to the will of the deceased, and hence not to be in conflict with a finding that the defendant procured the making of a deed by the deceased. Stohr v. Stohr [Cal.] 82 P. 777.

15. Cramer v. Munkres [Wyo.] 83 P. 374.

16. After making general findings as to the amount of damages, the court itemized the damages, but the appellate court treated such damages as surplusage. Over v. Dehne [Ind. App.] 76 N. E. 883.

17. If the special findings, taken as a whole, when stripped of all extraneous matters, such as facts not sustained by sufficient evidence, without the issue, and contrary to law and legal conclusions, still contain facts properly found within the issues, upon sufficient evidence upon which to predicate the conclusions of law, such conclusions will be upheld and the surplus findings disregarded. Major v. Miller [Ind.] 75 N. E. 159. Where the court, after making a general finding as to the amount of damages, itemized the damages, such itemized findings were treated as surplusage, and hence the contention that the demands were not supported by the evidence could not be sustained. Over v. Dehne [Ind. App.] 76 N. E. 883.

18. Lambert v. Lambert [Cal. App.] 81 P. 715.

18a. In an action by a tenant who had never had possession, but who had paid rent to the defendant, wherein the plaintiff claimed that the lease was to be surrendered as soon as the defendant found a new tenant, and the defendant claimed that the plaintiff was bound for one month whether he occupied the premises or not, a finding that the premises were empty for one week from the beginning of the term, was equivalent to a finding that the new tenant's rent began to run after the expiration of such week. Fallis v. Gray [Mo. App.] 91 S. W. 175. A special finding that the director of public works "then determined that Chapel street pavement should be replaced" and "the city authorities then decided that these brick pavements required repairs," means that it was decided that the street was out of repair and not that repairs should commence then. City of New Haven v. Eastern Pav. Brick Co. [Conn.] 63 A. 517. A finding, in suit to set aside a mortgage as fraudulent, that the mortgagor was insolvent at the time the suit was brought did not raise a presumption of insolvency prior to that time. Dinius v. Lahr [Ind. App.] 74 N. E. 1033. A finding, in a suit to set a mortgage aside as fraudulent, that the mortgagee took the same with full knowledge of the claims of the plaintiff and other creditors and that the mortgage would render the mortgagor insolvent, was not a finding that the execution of the mortgage on the day thereof left the mortgagor insolvent and without property sufficient to save plaintiff's claim. Dinius v. Lahr [Ind. App.] 74 N. E. 1033. In action for breach of a contract to purchase a lien on condition that such lien was the "first claim" against certain property, a finding that certain taxes were prior "claims," was a sufficient finding upon the question as to whether the lien was the first claim, such finding being equivalent to a finding that the taxes constituted a "claim" within the meaning of the contract. Dodson v. Crocker [S. D.] 105 N. W. 929. A finding that the residence of a party is not at a particular place is a finding of fact, and not a conclusion of law. Pillsbury v. Streeter, Jr. Co. [N. D.] 107 N. W. 40. As to whether a finding is of law or of fact, see ante this section, The findings must be; and post, this section, Conclusions of law. As to construction of findings with a view of ascertaining whether they are sufficiently definite and certain, see ante this section, The findings must be.

The amendment of findings.[23]—Motions to modify findings and to find additional facts will not be considered.[24]

The effect of the findings.[25]—The findings of a court of law in a case tried without a jury have the conclusive effect of a verdict,[26] and will not be disturbed unless plainly erroneous.[27] Such findings will not be disturbed when there is evidence to support them,[28] nor where the evidence is conflicting.[29] The conclusiveness of the findings will not be affected by the incorporation therein of the evidence upon which such findings are based.[30]

Conclusions of law.[31]—It is the duty of the trial court to make conclusions of law,[32] and such conclusions are just as necessary in an action at law which is dismissed as where an affirmative judgment is entered;[33] but conclusions of law are not necessary in equitable actions;[34] nor will a judgment be reversed for want of conclusions of law in the absence of any request therefor.[35] The conclusions of law should not contain matters of argument in support thereof.[36] But they should be within the issues,[37] and should be stated separately from the findings of fact;[38] but where a conclusion of law is placed among the findings of fact, it does not lose its character as a conclusion of law.[39]

19. See 4 C. L. 1815.

20, 21. Lindeberg v. Doverspike [C. C. A.] 141 F. 59.

22. Tucker act § 7 (Stat. 506, U. S. Comp. St. 1901, p. 755). Under this statute the opinion of the court is not to be regarded as the usual opinion of the trial judge, the purpose of such opinion being to enable the public and the appellate court to find upon the record a formal statement of the findings of the circuit court both upon questions of law and fact and the reasons for such findings. Hyams v. U. S., 139 F. 997.

23. See 4 C. L. 1815.

24. Scott v. Collier [Ind. App.] 77 N. E. 666; Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741.

25. See 4 C. L. 1815.

26. Flegel v. Charles Koss & Bros. Co. [Or.] 83 P. 487; Burton v. Millenary, 147 Cal. 259, 81 P. 544; Rauen v. Prudential Ins. Co. [Iowa] 106 N. W. 198.

27. Fillebrown v. Haywood [Mass.] 77 N. E. 45.

28. Flegel v. Charles Koss & Bros. Co. [Or.] 83 P. 847; Lowe v. Walker [Ark.] 91 S. W. 22; Fallis v. Gray [Mo. App.] 91 S. W. 175. Finding as to execution of a deed. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. The findings of the district court that it is satisfied that the facts stated in an affidavit, on which an order of publication of a summons is requested, are true, will not be disturbed, where it fairly and reasonably appears that the facts stated in the affidavit show due diligence. Pittsburg v. Streeter Jr. Co. [N. D.] 107 N. W. 40. Where a finding of fact is based upon a letter, but it is impossible to separate the letter from the evidence upon which the letter is predicated, such evidence will be considered in support of the finding. Burgess v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568.

29. Red Wing Gold Min. Co. v. Clays [Utah] 83 P. 841; Frazler v. Shoup [Colo.] 83 P. 777; Pittsburg, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883; Paris Transit Co. v. Alexander [Tex. Civ. App.] 14 Tex. Ct. Rep. 392, 90 S. W. 1119. Finding that the defendant in a suit to abate certain structures erected in the street by the defendant had not been in adverse possession of the premises for a certain length of time. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. Finding that defendants had received the land in controversy from the plaintiff by parol gift and delivery of possession. Graham v. Bryant [Ky.] 91 S. W. 253.

30. Rausch v. Michel [Mo.] 91 S. W. 99. It is the conclusions, not the reasons, of the court which constitute a finding of fact, and it is the findings of fact, and not the process of reasoning employed by the trial court, which will be considered in determining the sufficiency of the evidence to support the findings. Rausch v. Michel [Mo.] 91 S. W. 99.

31. See 4 C. L. 1815.

32. Ballinger's Ann. Codes & St. § 5029; 2 Hill's Code § 379. Slayton v. Felt [Wash.] 82 P. 173.

33, 34. Slayton v. Felt [Wash.] 82 P. 173.

35. Slayton v. Felt [Wash.] 82 P. 173. Hurd's revised statutes 1903 page 1405. This section does not provide for the submission of questions of fact. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

36. Fanning v. Murphy [Wis.] 105 N. W. 1056.

37. The conclusion was that the title to the property in controversy should vest in trust for certain purposes, while the complaint went only to the extent of asserting a lien upon such property. Case v. Collins [Ind. App.] 76 N. E. 781.

38. Ballinger's Ann. Codes & St. § 5029; 2 Hill's Code § 379. Slayton v. Felt [Wash.] 82 P. 173; Wander v. Wander, 97 N. Y. S. 586; Paris Transit Co. v. Alexander [Tex. Civ. App.] 14 Tex. Ct. Rep. 392, 90 S. W. 1119; Lindeberg v. Doverspike [C. C. A.] 141 F. 59.

39. Conclusion as to statute of limitations. Towle v. Sweeney [Cal. App.] 83 P. 74. Where the court ruled and found as a matter of law that, upon the facts stated in the report of the case, the respondent had no right of way over any portion of the petitioner's land, the appellate court construed

Where there is a conflict between the conclusions of law and the judgment, the latter will control, being based upon the findings of fact, and not upon the conclusions of law.[40] But an appellate court which is limited in the scope of its review to questions of law will not reverse a judgment because it is based upon a mixed question of law and fact, where the conclusion of law is legally inferable from the facts proven.[41] The sufficiency of the evidence may be reserved as a question of law.[42]

Propositions of law under the Illinois practice are proper only in cases where the parties are entitled to a trial by jury and have waived it;[43] nor are they proper when the case is disposed of without trial.[44] Propositions of law neither granted nor refused are considered as refused.[45]

§ 10. *Objections and exceptions.*[46]—Exceptions to the findings or judgment are necessary except where errors of law appear on face of record.[47] Where no objection is made that the verdict is too indefinite to support the judgment, the question can be raised on appeal.[48] So, where no exceptions are taken to any of the court's conclusions of law on the special findings, such conclusion will not be reviewed on appeal.[49] An objection that the judgment does not conform to the verdict is a matter for motion in the lower court and cannot be made for the first time on appeal.[50] Exceptions to findings or failure to find must specify the particular finding that was made or refused concerning which the exceptions are taken,[51] and the appellate court will consider only such objections to the special findings as are particularly specified in the appellant's motion for a new trial.[52] Nor will the appellate court consider a ruling denying a motion to set a verdict aside, in the absence of exceptions to such ruling.[53] So also where no objection is made below on account of failure to make findings of fact and conclusions of law, the judgment will not be reversed on account of such failure.[54] Where the special findings recite the facts alleged in a pleading and an exception is taken to the conclusion of law, the appellate

such ruling as being upon a question of law and not as a finding of fact. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85.

40. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

41. Ruppert v. Zang [N. J.] 62 A. 998.

42. Rees v. Clark [Pa.] 63 A. 364. The appellate court will presume that the lower court's conclusions of law rest upon the facts sufficiently found, in the absence of a contrary showing. Major v. Miller [Ind.] 75 N. E. 159.

43. Not proper in a preliminary application for a writ of certiorari. Sampson v. Chestnut Tp. Highway Com'rs, 115 Ill. App. 443. Unless it was a case which was entitled to be tried by a jury and was submitted to the court by agreement. Clifford v. Gridley, 113 Ill. App. 164.

44. Rhodes v. Rhodes, 115 Ill. App. 335.

45. Practice Act, § 41. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75.

46. See 4 C. L. 1816.

47. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427. See ante § 4, General verdict and special findings; ante § 5, Separate verdict as to different counts, causes of action or parties. But in cases of defective exceptions, or in the absence of any exceptions to the findings of fact, the appellate court will examine any ruling of the trial court in excluding evidence where proper exception had been reserved to said ruling. Smith v. Glenn [Wash.] 82 P. 605; Bringgold v. Bringgold [Wash.] 82 P. 179. See Saving Questions for Review, 6 C. L. 1385.

48. Kolleen v. Atchison, etc., R. Co. [Kan.] 83 P. 990.

49. Question as to constitutionality of Laws 1869, p. 97, c. 46, relating to condemnation proceedings. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991.

50. Elmer v. Levin, 95 N. Y. S. 537.

51. A memorandum at the close of the proposed findings of fact and conclusions of law that "the above findings of fact, except so far as they are duplicated in findings signed, refused. Conclusions of law refused. Defendant excepts. An exception allowed" is not the definite exception required by Bringgold v. Bringgold [Wash.] 82 P. 179. Exceptions in the following language: "To each of which findings proposed by the defendants and given by the court, duly excepted to on the part of the plaintiffs; and to each of the findings proposed by the plaintiffs and given by the court were duly excepted to by the defendants; and the exceptions of the parties aforesaid are hereby allowed," held insufficient. Smith v. Glenn [Wash.] 82 P. 605. An exception in the following words "To the making of the foregoing findings of fact the defendants except and an exception is hereby allowed," is insufficient. Horrell v. California, O. & W. Homebuilders' Ass'n [Wash.] 82 P. 889.

52. Major v. Miller [Ind.] 75 N. E. 159.

53. Gendron v. St. Pierre [N. H.] 62 A. 966.

54. Slayton v. Felt [Wash.] 82 P. 173.

court will not pass directly upon the sufficiency of the pleading.[55] Where the case is tried by the court, special findings of fact made, conclusions of law stated on the findings, and judgment is entered in accordance with the findings and conclusions, the only question before the appellate court is the correctness of a conclusion of law.[56] The appellate court will not determine what might have been the effect of submitting the case upon a theory different from that upon which it was submitted.[57] The phrase "special verdict," as used in the praecipe and in the clerk's certificate to the transcript, is a sufficient designation of the answers to the interrogatories referred to by a statute, providing for the submission of special interrogatories.[58]

VERIFICATION.

Necessity.[59]—A statute which requires each pleading subsequent to a verified pleading to be verified implies that where a pleading is unverified, subsequent pleadings need not be,[60] but lack of verification when required may in some states confess the facts pleaded in the complaint.[61] By statute in some states if the instrument sued on is set out, specific verified denial is necessary to put the genuineness and execution thereof in issue, otherwise it is admitted.[62] Not even waiver of answer under oath will dispense with the necessity of verified denial of execution of instrument set out.[63] The statute requiring denial under oath of execution of instrument set up, applies equally to instruments set up in defense,[64] and the statute providing that special matters of defense need not be denied does not dispense with denial under oath when the defense is founded on a writing whose execution is questioned.[65] But the execution of an instrument sued on need not be denied under oath to avoid it for fraud, duress, mistake, or the like.[66]

In equity.[67]—Ordinarily where the original bill is verified, the amendment should also be.[68] However, the rule requiring verification of amendments is not a rigid and unbending one.[69] Answer to a bill praying for an injunction, to be given effect, must be made under oath.[70]

Form and positiveness.[71]—The grounds of belief need not be set forth in the

55. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001.

56. Dinius v. Lahr [Ind. App.] 74 N. E. 1033.

57. Oakley v. Emmons [N. J. Law] 62 A. 996.

58. Lindley v. Kemp [Ind. App.] 76 N. E. 798.

59. See 4 C. L. 1816.

60. Code Civ. Proc. § 523. Beglin v. People's Trust Co., 95 N. Y. S. 910.

61. Where the defendant filed an unverified answer to plaintiff's verified complaint, the plaintiff was entitled to judgment. Stockton Lumber Co. v. Blodget [Cal.] 84 P. 441.

62. Code Civ. Proc. § 447. Cutten v. Pearsall, 146 Cal. 690, 81 P. 25. Rev. Code 1892, § 1797. Brown v. British American Mortg. Co. [Miss.] 38 So. 312; Easley v. Boyd [Ala.] 39 So. 988. Burns' Ann. St. 1901, § 367, does not vary the common-law rule of burden of proof. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; McCormick v. Higgins [Ind. App.] 76 N. E. 775. Code 1904, § 3249, requires an affidavit to a plea of nonassumpsit on a note, and its absence is fatal. Chestnut v. Chestnut [Va.] 52 S. E. 348. Code 1899, c. 125, § 40. Genuineness of handwriting. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. Rev. St. 1895, art. 2318. State Nat. Bank v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 441, 88 S. W. 295.

63. Rev. Code 1892, § 1797. Elmslie v. Thurman [Miss.] 40 So. 67; Masonic Benefit Ass'n v. Simmons [Miss.] 38 So. 791.

64. Rev. St. 1895, art. 2318. State Nat. Bank v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 441, 88 S. W. 295.

65. Rev. St. 1895, § 1193. State Nat. Bank v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 441, 88 S. W. 295.

66. Texas Cent. R. Co. v. West [Tex. Civ. App.] 13 Tex. Ct. Rep. 552, 88 S. W. 426.

67. See 4 C. L. 1817.

68. Patterson v. Johnson, 114 Ill. App. 329.

69. Patterson v. Johnson, 114 Ill. App. 329. The true meaning of the rule is that an injunction issued on a bill will not be continued unless the judge can see from a sworn statement that the amendment will not prejudice the injunction. Id.

70. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572.

71. See 4 C. L. 1817.

verification where the pleading denies having any information on which to ground a belief.[72] It is no objection to a verification that it employs the phrase "stated to be alleged upon information and belief" instead of "stated upon information and belief."[73]

By whom.[74]—Ordinarily a verification must be made by the party in action himself.[75] Probably a joint plea should be verified by all the defendants in whose behalf it is filed.[76] There are also authorities to the effect that where the defendants are united in interest a joint pleading in behalf of such defendants need be verified by only one of them.[77] Certainly where a complaint is of such a nature as to affect each defendant separately, the answer should be verified by all.[78] But when it is unduly expensive or inconvenient or impracticable to procure verification of all the defendants and such fact is made to appear, the court may allow a joint plea to be verified by less than all the defendants.[79] A verification of an answer to a rule to show cause must be made by the claimant himself or the reason why made by another for him fully set forth.[80] An attorney may verify a pleading for his client,[81] and if so stated the same verification may be for himself as a party.[82] A reason why the attorney verifies is sufficiently apparent in a statement that the client is absent.[83] The attorney must verify of his own knowledge,[84] and he must so state.[85] Where a verification by an attorney is positive and not upon information and belief, his knowledge of the facts will be presumed without being specifically set forth in the affidavit, especially when the averments of the bill are direct and positive.[86] In many of the states, an officer of the corporation may verify for the corporation.[87]

Defects, objections, and amendments; waiver.[88]—A defective verification may be cured by leave of court.[89] A pleading, defectively verified, may, after notice, be treated as a nullity.[90] Where a plea is verified by a part of the defendants, the

72. American Audit Co. v. Industrial Fed. of America, 84 App. Div. 304, 82 N. Y. S. 642.

73. Parish v. Vance, 110 Ill. App. 50.

74. See 4 C. L. 1817.

75. Civ. Code 1895, § 4966, requiring that "petitions for a restraining order, injunctions, receiver or other extraordinary equitable relief, should be verified positively by the petitioner, or supported by other satisfactory proof" construed not to mean that petitioner only may verify, but verification by anyone, his attorney for instance, if positive, will be sufficient. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

76, 77. Computing Scale Co. v. Moore, 139 F. 197.

78. As where the question is whether the defendants are all members of a partnership. Computing Scale Co. v. Moore, 139 F. 197.

79. Computing Scale Co. v. Moore, 139 F. 197.

80. Horsuch v. Fry, 23 Pa. Super. Ct. 509.

81. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

82. A petition for certiorari filed by two plaintiffs one of whom is an attorney at law, is properly verified by an affidavit of the attorney made individually as an attorney for his co-plaintiff. American Bonding & Surety Co. v. Adams [Ga.] 52 S. E. 622.

83. Under a statute providing that a bill may be sworn to by an agent or attorney, provided the affidavit sets forth the reason why the complainant does not verify, it is sufficient if the affidavit states that the complainants are absent from the state. Code 1896, p. 1205, Rule 15. Kinney v. J. S. Reeves & Co. [Ala.] 39 So. 29.

84. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

85. A bill for an injunction verified by plaintiff's attorney, though positive in form, it not appearing from the verification that the attorney knew the contents of the bill, is fatally defective. Code 1899, c. 125, § 42. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

86. Kinney v. Reeves & Co. [Ala.] 39 So. 29.

87. Masonic Ben. Ass'n v. Simmons [Miss.] 38 So. 791; Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572; Stockton Lumber Co. v. Blodget [Cal.] 84 P. 441. The fact that an answer was verified by the president of the company answering did not invalidate it. Davis v. Baltimore & O. R. Co. [Md.] 62 A. 572. A complaint, verified by the "manager of the corporation plaintiff" is properly verified by an officer of the corporation. Stockton Lumber Co. v. Blodget [Cal.] 84 P. 441. The secretary-treasurer of a beneficial corporation being custodian of vouchers and records may verify an answer under a statute requiring a general officer to verify the answer of a corporation. Code 1892, § 534, Masonic Ben. Ass'n v. Simmons [Miss.] 38 So. 791.

88. See 4 C. L. 1817.

89. Verification not by proper party. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

technically proper course is to take a decree pro confesso as to the remainder.[91] After setting a plea down for argument, it is more proper to allow a defective verification to be amended than to permit a waiver to be disregarded and a decree pro confesso taken.[92] In the Federal courts, the great weight of authority is that objection to the omission of verification may be waived.[93] Want of verification will be deemed waived, unless objection is made to the pleading at the proper time.[94] Setting down a plea for argument waived objection to form of verification.[95]

VIEW; WAIVER, see latest topical index.

WAR.[96]

WAREHOUSING AND DEPOSITS.[97]

Definitions and elements.[98]—A warehouse is a place for storage of goods for hire.[99] It may be such though used for other purposes too.[1] An actual warehouse is not essential to the warehousing of goods.[2] They may be warehoused upon a parcel of ground, inclosed, or open, or partly so.[3] They may even be warehoused upon the owner's premises and without changing their location thereon from what it was before.[4] The only thing essential is that their possession be changed from that of their owner to that of the warehouseman,[5] and the test of a change of possession is whether the warehouseman has acquired exclusive control thereof.[6] To acquire exclusive control it is not necessary to place goods warehoused under lock and key. To place someone in custody who alone exerts control over them and prevents others from interfering with them is sufficient.[7] When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense.[8] Even if the goods had been in a place under the exclusive control of the warehouse without its knowledge,

90. Code Civ. Proc. § 528. Beglin v. People's Trust Co., 95 N. Y. S. 910.

91, 92, 93. Computing Scale Co. v. Moore, 139 F. 197.

94. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

95. Computing Scale Co. v. Moore, 139 F. 197.

96. No cases have been found for this subject since the last article. See 4 C. L. 1818.

97. As to bank deposits, see Banking and Finance, 5 C. L. 347; Carriers as warehousemen, see Carriers, 5 C. L. 507.

98. See 4 C. L. 1820.

99. Tennessee statutes define warehousemen to be persons who shall receive goods in store for hire, or who shall undertake to receive and take care of, or sell the same for other persons. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Rev. St. Ill. c. 114, par. 121, § 2. "Public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration." Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

1. One who owns and operates a warehouse in connection with a distillery is nevertheless a warehouseman coming within the statutes relating thereto. Commonwealth v. Walker [Ky.] 89 S. W. 180. One is sufficiently described as a warehouseman in an indictment in the words "a distiller with a distillery and warehouse known and commonly called bonded warehouse." Id. Ky. St. 1903, 2572a, construed to define a distiller as a warehouseman and making it a felony for any one but the distiller to issue a warehouse receipt. Id.

2. Love v. Export Storage Co. [C. C. A.] 143 F. 1. A public warehouse may mean any place whether owned or hired and if hired whether of the owner of the goods deposited or of a third person. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

3, 4, 5, 6, 7. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

they would still have been under its control.[9] However, though all the forms indicate a warehouse bailment, by a different understanding, a different relation would be created;[10] and certainly exclusive power of the warehouseman may so taper down that as a matter of law there finally would be no bailment.[11] A garage for automobiles is not a warehouse so as to give its keeper a lien on automobiles kept, for the reason that the possession of the automobiles is not exclusive and continuous.[12] Although the motive for warehousing may be for conveniences of pledging rather than storage it does not invalidate acts otherwise sufficient to constitute a warehousing.[13]

A "public" warehouse must be publicly advertised and serve the public at large.[14] Where a company holds itself out as a public warehousing concern, but has no local office or sign, no storage room exclusively its own, no regular agents except the employes of its depositors, and where the goods and premises are liable to be surrendered any time on surrender of receipts, no public warehouse exists.[15] The business of carrying on a warehouse is a part of the general commercial business of the country which may be carried on by corporations.[16]

Licensing and public regulation.[17]—Although a warehouse company fails to pay a statutory tax, it does not invalidate the receipts issued nor the contracts entered into.[18]

Warehouse receipts.[19]—Apart from statute, a warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee.[20] The object of storing goods and accepting a warehouse receipt in lieu thereof is that the owners of the goods so deposited may have some evidence of ownership easily and readily negotiable.[21] An agent may issue receipts for his own goods if known and approved by his superior.[22] Bills of lading and warehouse receipts are not negotiable in the same sense that bills and notes are, but their delivery with or without indorsement is constructive delivery of the property,[23] and the receipt by a public warehouseman on his own goods is just as negotiable as the receipt on the goods of a third person.[24] If the warehouse company has no possession of the goods, its receipts for them are nullities as against the real owners of the goods.[25] Hence, warehouse receipts are only quasi

8, 9, 10, 11. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

12. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673.

13. Love v. Export Storage Co. [C. C. A.] 143 F. 1; Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

14, 15. Security Warehousing Co. v. Hand [C. C. A.] 143 F. 32.

16. Coming within Civ. Code, § 393, subd. 25, providing that corporations may be formed for "the transaction of any mercantile, commercial, industrial, manufacturing, mining, mechanical, or chemical business. Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 P. 1036.

17. See 4 C. L. 1820.

18. Warehouse company liable to statutory fine. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

19. See 4 C. L. 1820.

20. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

21. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417. When a railroad company has placed cotton in a compress warehouse, and receives back its bills of lading in exchange for the compress receipts, the effect is merely a change of bailee. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

22. Where the secretary and manager of a warehouse corporation has been in the habit if issuing receipts to himself for stored hay, which were known to the directors and entered regularly on the books without any objection, he had authority to do so. Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686. And the same were ratified, where the directors approved of the books and secretary's report and the assignee of the receipt was given a certain rate for storage of the hay represented by the receipt. Id.

23. Though non-negotiable receipts were issued to the railroad and by it turned over to the bank, the bank was entitled to the possession of the property. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209. Laws 1860, c. 340, p. 346 (Amended c. 73, p. 96, Laws 1863), confers negotiability on warehouse receipts given for goods deposited with any warehouseman, wharfinger, vessel, boat, railroad company, or other person. Security Warehousing Co. v. Hand [C. C. A.] 143 F. 32.

24. By statute in Wisconsin. Security Warehousing Co. v. Hand [C. C. A.] 143 F. 32. In Wisconsin, by statute, an owner of grain and other named commodities can store them

negotiable securities, and the fact that a person takes a transfer of them in good faith gives him no right over the property on which they purport to be issued, if in fact the warehouseman had no custody or control over the property at the time of their issuance,[26] and in some states a warehouseman is forbidden by statute[27] to issue receipts for goods not bona fide received in store.[28] Under the laws of some states the negotiability and commercial value of such receipts is enhanced by the fact that they are incontestable by the warehouse company,[29] for the warehouseman is estopped to deny the actual receipt and possession of the goods represented by said receipt,[30] nor is he permitted to make any offset, claim or demand against a negotiable receipt when called on to deliver the goods, other than is expressed on the face of the receipt.[31]

The legal holder of warehouse receipts is the person entitled to possession of the goods whether he is the owner or not.[32] The transfer of a warehouse receipt in pledge is not a symbolical delivery, it is a real delivery, to the same extent as if the goods had been transported to another warehouse named by the pledgee.[33] Therefore it is common for warehousemen to give receipts to the order of the depositor, because by a receipt in that form the bailee assents in advance to becoming bailee for one who is brought within the terms of the receipt by an indorsement of the same.[34]

Contracts of warehousing in general.—In construing a parol contract for the care of goods by a warehouseman, it is proper to consider not only what was said but also what was done.[35]

Where a wife deposits her household goods in her husband's name, the warehouseman having no knowledge of her ownership is justified in treating them as belonging to her husband.[36]

Care and protection of goods stored.[37]—A warehouseman is bound only to the use of ordinary care[38] commensurate with the warehouseman's knowledge of the goods stored.[39] This requires the placing of goods in a proper and suitable place and the exercise of ordinary diligence and care in protecting from injury by the weather or

in his own elevator or storehouse and issue receipts on them. Id. In Wisconsin, one not the owner of a public warehouse (except a grain owner) cannot obtain a negotiable receipt for his goods, except by taking them to a public warehouse. Id.

25, 26. Whitney v. Wenman, 140 F. 959.

27, 28. Civ. Code, p. 779. Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686.

29. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417.

30. Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686. Warehouse receipts are conclusive evidence in the hands of a bona fide holder for value that the property has been received and that the holder of the receipt is entitled to the delivery thereof. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417. Though issued by mistake or carelessness. Id. In the absence of proof of fraudulent knowledge by a bona fide holder, evidence of the delivery of the goods to the original holder will be excluded. Id.

31. Act April 1, 1878, § 6 (Civ. Code, p. 779). Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686. Their value would be practically destroyed were private claims or agreements against the original holder good against them. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417.

32. Where a bank advanced money to purchase cotton and received as security the bills of lading which later were exchanged for compress receipts, the bank was entitled to the possession of the property although it sold the cotton for which it accepted a note but kept the compress receipts. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

33. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154. Evidence of actual delivery. Star Compress & Warehouse Co. v. Meridian Cotton Co. [Miss.] 39 So. 417. Goods may be pledged by transfer of a warehouse receipt. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154, cited with note in 15 Yale L. J. 39.

34. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

35. Phenix Nerve Beverage Co. v. Dennis & L. Wharf & Warehouse Co. [Mass.] 75 N. E. 258.

36. Stoddard v. Crocker [Me.] 62 A. 241.

37. See 4 C. L. 1821.

38. Charlotte Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

39. If a railway company, without knowing their contents, receives from a passenger trunks containing merchandise, the courts variously hold that the company is liable as an ordinary bailee, as a gratuitous bailee,

other causes.[40] Where there was a contract to store goods and prevent them from freezing, the fact that an employe of the depositor, having no authority, approved of the place of storage does not relieve the depositee,[41] and where it had notice that funds deposited with it by an administrator were so deposited by order of the court, it had sufficient notice to render it liable for the unauthorized payment of the funds.[42] Whether the owner of goods had such opportunity to become acquainted with the condition of storage in a warehouse as to charge him with notice is a question for the jury.[43] A safety deposit company is required at all times to exercise that degree of care which a prudent person would exercise to prevent unauthorized third persons from having access to boxes in vaults.[44]

Insurance.[45]

Damages.[46]

Charges and lien therefor.[47]—At common law a warehouseman has a lien on the goods for storage,[48] but, in the absence of a statute, he had no right to sell them, but only to hold them until the charges were paid.[49] Where a general provision grants a warehouseman the right of sale for charges and later a special law is enacted defining the rights of the depositor and warehouseman much more accurately and in some of its provisions repugnant to the former, the general provision is repealed by implication.[50] A bailee (warehouseman) asserting a lien for charges has technical possession of the goods.[51]

Trover and conversion.[52]—The owner of deposited goods may maintain an action for trover notwithstanding that they were deposited in another person's name.[53] If goods are attached in a warehouseman's hands he is bound to keep them as trustee and he could not be deemed guilty of conversion for so doing,[54] and if articles stored with warehousemen are so stored that he cannot separate the articles exempt under an attachment from the leviable ones he is not at fault for refusing to deliver the exempt property to the owner.[55] But it would not excuse him from delivering articles having a separate identity and easily distinguishable, which were clearly exempt from attachment.[56] Where the evidence discloses a demand by the owner of goods for them and an unreasonable delay by the warehouseman in delivering them, an action in conversion will lie.[57] It has been held, however, that a bailee,

or has no liability at all. Charlotte Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

40. Charlotte Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973. Where a railroad company left trunks containing merchandise on a platform for more than three days during which time it rained and spoiled the samples, they were liable on the ground of negligence. Id.

41. Phenix Nerve Beverage Co. v. Dennis & T. Wharf & Warehouse Co. [Mass.] 75 N. E. 258.

42. In re Rothschild, 109 App. Div. 546, 96 N. Y. S. 372.

43. Western & A. R. Co. v. Branan, 123 Ga. 692, 51 S. E. 650.

44. Guaranty Trust Co. v. Diltz [Tex. Civ. App.] 91 S. W. 596. Where a box in a safety deposit vault could not be opened except by two keys, one in care of company and other of depositor, and the depositor lost his and subsequently it was discovered that the box had been opened and money taken, the company is liable on the ground of negligence, notwithstanding that depositor lost his key. Id.

45. See 2 C. L. 2031.

46, 47. See 4 C. L. 1822.

48. Stoddard v. Crocker [Me.] 62 A. 241.

49. Stoddard v. Crocker [Me.] 62 A. 241. Rev. St. c. 141, §§ 1, 3, do not authorize a warehouseman to sell property, left in storage, for unpaid charges. Head v. Becklenberg, 116 Ill. App. 576.

50. Stoddard v. Crocker [Me.] 62 A. 241. Rev. St. 1883, c. 91, is broad enough to authorize sale for lien of warehouseman; under it, sale may be made at any time. It is the general provision and hence is repealed by Laws 1897, c. 304, and Revision 1903, c. 33, § 10, which authorizes a public warehouseman to sell goods held for storage, but only after one year has elapsed from last payment, being a specific provision. Id.

51. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

52. See 2 C. L. 2033.

53. Stoddard v. Crocker [Me.] 62 A. 241.

54, 55. Cornell v. Mahoney [Mass.] 76 N. E. 664.

56. Sewing machines. Cornell v. Mahoney [Mass.] 76 N. E. 664.

such as a warehouseman, of property to which there are adverse claimants might refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership.[58] Statutory conditions relied upon to exempt a warehouseman from a suit in replevin or conversion must be set forth in his answer in order to give him the benefit of them.[59] Whenever a demand is necessary to create a cause of action against a warehouseman for conversion, the demand must be reasonably made before limitation has run.[60]

Actions and procedure.[61]—The owners of goods may sue a railroad company through whose negligence the goods are burned in a warehouse, though the owners were stockholders of the warehouse corporation which had waived all claim for damages from destruction of warehouse by the acts of the railroad.[62] A law which relieves warehousemen from actions in replevin and conversion unless they claim some other interest in property than a lien for charges is unconstitutional.[63]

Crimes and penalties.[64]—In some states the issuance of a fraudulent receipt is a crime.[65] Where a statute makes it a crime to issue a warehouse receipt fraudulently without naming the crime, a general description of the offense in the indictment is sufficient.[66]

WARRANTS; WARRANTY, see latest topical index.

WASTE.[67]

Waste consists[68] in whatever does a lasting damage to the freehold or inheritance.[69] A lease of the superficies of the soil does not include minerals and their removal would be waste.[70] The right of estovers is part of the common law of Iowa[71] and is incident to a mere lease of farm land.[72] The cutting of trees is not permissible as estovers of house bote unless the trees are such and the local custom such as to sanction that use of them[73] but dead or fallen timber may be so used.[74]

In order to maintain an action to restrain waste, a complainant must either be in possession or must show a valid and subsisting title in himself to the premises.[75] Hence, under the modern law anyone having a reversion or remainder for life or years as well as any fee owner may sue for damages for waste.[76] One who has ac-

57, 58. Lissner v. Cohen, 97 N. Y. S. 227.

59. Decided under Laws 1902, p. 1775, c. 608, which has been declared unconstitutional. See Lissner v. Cohen, 97 N. Y. S. 227; Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580.

60. One who stored wheat in 1885 and it was converted in 1887, and no demand was made until 1897, held statute of limitations had run against it. Freeman v. Ingerson [Mich.] 12 Det. Leg. N. 866, 106 N. W. 278.

61. See 4 C. L. 1822.

62. Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 P. 1036.

63. Laws 1902, c. 608, p. 1775, held unconstitutional on the ground that it takes property without due process of law. Lissner v. Cohen, 97 N. Y. S. 227.

64. See 4 C. L. 1823.

65. In Kentucky for any one but the distiller to issue a warehouse receipt from his warehouse is a felony. Ky. St. 1903, § 2572a. Commonwealth v. Walker [Ky.] 89 S. W. 180.

66. Commonwealth v. Walker [Ky.] 89 S. W. 180. Ky. St. 1903, §§ 4772, 4775, construed to make fraudulent issuance of a warehouse receipt a crime. Id.

67. As to what are Fixtures, see 5 C. L. 1431, and see Special Article, 6 C. L. 388.

68. See 4 C. L. 1823.

69. The removal of a building or improvement permanently attached to the freehold is waste. Fixtures annexed to the realty by a tenant may not be removed. Davis v. Carsley Mfg. Co., 112 Ill. App. 112.

70. So oil. Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 P. 317. One leasing land for the purpose of erecting a tenement may not thereunder extract minerals or oil, nor would his assignee have any such rights. Id.

71, 72, 73, 74. Anderson v. Cowan, 125 Iowa, 259, 101 N. W. 92, 106 Am. St. Rep. 303 with note.

75. Adams v. Slattery [Colo.] 85 P. 87.

76. Latham v. Roanoke R. & Lumber Co., 139 N. C. 9, 51 S. E. 780. Reversioner in fee. Adams v. Slattery [Colo.] 85 P. 87.

Note: The common-law action of waste could be brought only by one who had an estate of inheritance following immediately

quired a good title to land by adverse possession may restrain an adverse claimant from committing waste.[77] It is well settled that one entitled to a contingent remainder cannot maintain an action to recover damages for waste,[78] but an injunction may issue to protect him.[79] A mortgagee or his trustee[80] or a lienor for purchase money may maintain a suit to restrain waste impairing the security[81] by invoking equity to prevent the injury actually committed or threatened,[82] or he may have an action on the case for damages, for an injury to his security by waste by mortgagee,[83] but for trivial acts of waste the courts will not interfere.[84] Although a proposed waste, if successful, would be profitable a mortgagee may object to losing in whole or in part a satisfactory security and accepting in its place one dependent on contingencies.[85] When taxes against real estate are past due and unpaid, the county by which the taxes were levied may maintain a suit to restrain waste, where the acts complained of would reduce the value of the property to an amount insufficient to pay the taxes.[86] In order to maintain such a suit, it is not necessary that the county should first become a purchaser of the property at a tax sale.[87] A county treasurer, as trustee of the state or a subdivision thereof, might bring and maintain such action.[88] An administrator or executor who has no estate in the premises except the right to lease is not injured by waste and cannot sue.[89]

upon the tenancy of him committing the waste (Co. Litt. 218b, Butler's note); and it was furthermore necessary that there be what was termed "privity" between the plaintiff and defendant (Co. Litt. 53b; 2 Inst. 301; Foot v. Dickinson, 2 Metc. [Mass.] 611; Bates v. Shraeder, 13 Johns. [N. Y.] 260, Finch's Cas. 460; Lander v. Hall, 69 Wis. 331; 1 Washburn, Real Prop. 118).

"At common law, the assignee of the tenant by the curtesy cannot be sued in waste. The action ought to have been brought against the tenant himself by the heir; and the books state that thereby he shall recover the lands against the assignee, for the privity which is between the heir and tenant by the curtesy. Walker's Case, 3 Coke, 23. So, if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed, and the grantee cannot have any action of waste, but only against the assignee, for between them is privity in estate, and between them and the tenant in dower, or the tenant by the curtesy, is no privity at all." Bates v. Shraeder, 13 Johns. [N. Y.] 260, Finch's Cas. 460. But an action on the case for waste may be brought by one having a reversion or remainder for life or years, as well as by one having a fee simple or fee tail (Greene v. Cole, 2 Saund. 253, note; McLaughlin v. Long, 5 Har. & J. [Md.] 113; Dozier v. Gregory, 46 N. C. 100), and there is, by some authorities, to sustain such action, no requirement of privity of estate (Chase v. Hazelton, 7 N. H. 171; Randall v. Cleaveland, 6 Conn. 328; Dickinson v. Baltimore, 48 Md. 583; Dupree v. Dupree, 49 N. C. 387, 69 Am. Dec. 757; Robinson v. Wheeler, 25 N. Y. 252. **Contra.** Bacon v. Smith, 1 Q. B. 345; Foot v. Dickinson, 2 Metc. [Mass.] 611). An action on the case cannot, however, be brought by one whose interest is merely contingent. Sager v. Galloway, 113 Pa. 500. So, where the statute provides for an action by the person having the next immediate estate of inheritance. Hunt v. Hall, 37 Me. 363. Generally, where there is a statutory provision as to waste, the persons entitled to bring the action are specified. 1 Stimson's Am. St. Law, § 1353. See Curtiss v. Livingston, 36 Minn. 380; Robinson v. Wheeler, 25 N. Y. 252. —From Tiffany, Real Prop. p. 576.

77. Cutting timber. Hall v. Bowman [Ky.] 90 S. W. 1051.

78. Latham v. Roanoke R. & Lumber Co., 139 N. C. 9, 51 S. E. 780.

79. But the interest of a contingent remainderman in timber will be protected by a court of equity by injunction. Latham v. Roanoke R. & Lumber Co., 139 N. C. 9, 51 S. E. 780.

80. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273; Davis v. Carsley Mfg. Co., 112 Ill. App. 112. Whether he be solvent or insolvent. Id.

81. Cutting of timber on land. Reynolds v. Lawrence [Ala.] 40 So. 576. When the mortgagee's security is upon the plant and franchises of a corporation engaged in quasi-public business of carrying passengers by means of the mortgaged premises and when it appears that the conduct of the mortgagor is likely to prevent or diminish the power to make profitable use of the premises mortgaged, a case for relief is made out. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

82, 83, 84. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

85. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273. Making a contract with a competitor which granted the competitor such rights and privileges on the premises of the mortgagor as might impair the value of the estate. Id.

86, 87, 88. Lancaster County v. Fitzgerald [Neb.] 104 N. W. 875.

89. Adams v. Slattery [Colo.] 85 P. 87. Injunction will not lie. Id.

At common law against a tenant who committed waste, the remedy was an action for waste; and later, an action on the case for waste and for injunction, and an action for forfeiture for waste would not follow unless a re-entry was preserved by the lease.[90] The remedy by injunction is now fully established and has practically superseded the old common-law remedy of action for waste and action on the case for damages. The injunction will be granted in all cases where the former common-law actions would lie.[91]

WATERS AND WATER SUPPLY.

[By Benj. W. Wood.]

The scope of this topic[92] includes the general law of waters and the use and supply thereof except as other topics below cited[93] cover necessary exclusions.

§ 1. *Definition and kinds of waters.*[94]—A natural watercourse is one in which water uniformly or habitually flows, having reasonable limits as to width.[95] It

90. Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 P. 317. Civ. Code § 1930, declares that waste is ground for rescinding the contract. Id.

91. Davis v. Carsley Mfg. Co., 112 Ill. App. 112.

92. See 4 C. L. 1824.

93. See Bridges, 5 C. L. 439; Ferries, 5 C. L. 1422; Navigable Waters, 6 C. L. 742; Riparian Owners, 6 C. L. 1313; Shipping and Water Traffic, 6 C. L. 1464; Wharves, 4 C. L. 1862.

94. See 4 C. L. 1824.

95. If surface water uniformly or habitually flows over a given course having reasonable limits as to width, the line of its flow is a watercourse. Hull v. Harker [Iowa] 106 N. W. 629.

is not necessary that the flow be sufficient to wear out a channel having well defined sides or banks.[96]

§ 2. *Sovereignty over waters and lands beneath.*[97]—The ownership of and dominion and sovereignty over lands covered by tide waters within a state is in such state.[98] The same doctrine as to the dominion and sovereignty over and ownership of lands under navigable waters of the Great Lakes applies, which obtains at common law as to lands under tide waters on the borders of the sea.[99] As between nations, the minimum limit is a marine league from the coast, and within these limits a state may define its boundaries on the sea and extend its sovereignty and jurisdiction to all places within such territorial limit.[1] As, therefore, by the treaty with Great Britain, the boundary line between the two countries is through the middle of Lake Huron and the boundary of Michigan coincides therewith the laws of that state so far as applicable extend over the whole of the waters of that lake within the state boundaries in the same manner as if they were tide waters extending only one league from shore.[2] It is the duty of the legislature to preserve the use of streams, title to the bed of which is in the state, to all persons and for all purposes.[3] The right of the public to use a public stream is not confined to fishing in and taking water and ice therefrom but includes the use of the stream for boating, skating, and other sports.[4] Though the state of New York has dominion over the waters of Niagara river and power to regulate the use and diversion thereof, it has no property or ownership in them within the constitutional provision prohibiting the appropriation of public property for private use without the assent of the legislature.[5]

§ 3. *Rights in natural watercourses.*[6]—Every proprietor of land on the banks of a natural stream has an equal right to have the water of the stream continue to flow in its natural course as it was wont to run without diminution in quantity[7] or deterioration in quality,[8] unless otherwise agreed upon by the parties,[9] or unless

96. Hull v. Harker [Iowa] 106 N. W. 629.

97. See 4 C. L. 1824.

98, 99, 1, 2. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

3. Board of Park Com'rs of Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203. Laws 1901, p. 131, c. 179, giving the park board jurisdiction over the Des Moines River in the city of Des Moines where city property abuts on the river and empowering such board to improve the bed of the river for boating, skating, and other sports, and to prohibit the taking of ice therefrom, is not as to other riparian owners a taking of property without due process. Id. Under Laws 1901, p. 131, c. 179, giving the park commissioners of Des Moines jurisdiction over the Des Moines river within specified limits, and providing that if a dam was built below an existing one it could prohibit the taking of ice from between the dams, it is held that they may prohibit the taking of ice above the existing dam. Id.

4. Board of Park Com'rs of Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203.

5. Niagara County Irrigation & Water Supply Co. v. College Heights Land Co., 98 N. Y. S. 4. Laws 1891, p. 483, c. 259, creating a corporation to construct a waterway from Niagara river to supply water to villages, gives the corporation no property of the state in the bed of the stream but merely gives it power to do what is necessary to carry out the provisions of the act. Id. Hence the assent of two-thirds of the legislature was not essential to its enactment under the constitutional provision requiring such assent to laws appropriating public property for private use. Id.

6. See 4 C. L. 1825.

7. A lower riparian owner has the right to the natural flow of the stream and an upper owner cannot divert water from the stream to such an extent as to deprive him of that right. New England Cotton Yarn Co. v. Laurel Lake Mills [Mass.] 76 N. E. 231. Where one shows himself entitled to an injunction against diversion of water from a stream which furnishes his only unfailing supply, the same should be granted without qualification since there is no adequate remedy at law. Stoner v. Patten [Ga.] 52 S. E. 894. A diversion of the water or the making the same noxious is a nuisance. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603.

8. See post, § 3, Nuisance and pollution. He has a right to have the water come down unheated and unpolluted. New England Cotton Yarn Co. v. Laurel Lake Mills [Mass.] 76 N. E. 231.

9. A contract between an upper and lower riparian owner by which the former acquired the right to turn all water used in condensing into the latter's condensing pond, held to absolve him from the duty of return-

inconsistent rights have been acquired by prescription.[10] This right exists notwithstanding he has never utilized the full flow,[11] and he cannot be deprived of it without his consent except by condemnation proceedings and the payment of compensation.[12] An upper riparian owner has a right to use the water for power[13] or other reasonable nonconsumptive use.[14] This involves the right to detain it long enough and discharge it in such manner as will make it useful.[15] But he has no right to detain or discharge it in an unreasonable manner.[16] The only rule is that the detention, discharge, and use must be reasonable under the circumstances of the particular case;[17] but outside of regions where appropriative rights in water are recognized,[18] he has no absolute right to take water from the stream for irrigation.[19] An upper owner has a right to construct artificial drains to discharge into a stream water which would naturally find its way there.[20] Riparian rights on a navigable stream do not depend on ownership of the bed of the stream.[21] The riparian owner's right to use waters of a navigable stream for irrigation is subject to the right of the state to improve its navigability,[22] and the state may so improve the river without compensating him for injury to such right.[23] A riparian owner on a navigable stream may place obstructions therein so long as rights of navigation are not interfered with.[24] Fish traps set in a navigable stream may not be wantonly destroyed.[25] The owner of upland may not trespass upon intervening land of a private owner for the purpose of reaching navigable water which lies beyond.[26]

ing the water to the stream, notwithstanding a provision in the contract that neither party waived riparian rights. New England Cotton Yarn Co. v. Laurel Lake Mills [Mass.] 76 N. E. 231.

10. The use of the water by a riparian proprietor in substantially the same manner for the statutory period with the knowledge of a lower owner raises a presumption of a right to continue to so use it. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603. One who maintains a dam for fifty years acquires a prescriptive right and its reconstruction in a non-negligent manner will not give a cause of action to a land owner claimed to have been injured by overflow. Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1.

11. Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. S. 698. Though diversion leaves him sufficient water for all the purposes for which he uses it. Id.

12. Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. S. 698.

13. Hazard Powder Co. v. Somersville Mfg. Co. [Conn.] 61 A. 519.

14. An upper riparian owner may divert water from the stream, use it in a reasonable manner, and return it without material diminution in quantity. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603.

15, 16. Hazard Powder Co. v. Somersville Mfg. Co. [Conn.] 61 A. 519.

17. Detention during the night and discharge evenly during the day held not an unreasonable use. Hazard Powder Co. v. Somersville Mfg. Co. [Conn.] 61 A. 519. The custom and usage of similar mills on the stream and on other streams in the locality is admissible on the question of reasonable use by an upper as against a lower riparian owner. Id.

18. See post, § 14.

19. The taking of water from a stream for irrigation is not an ordinary or natural use. Bigbam Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848.

20. Where a landowner constructs drains emptying into a natural watercourse but which do not draw any water into such course which would not naturally have found its way there at the place where the drains discharge it he is not liable to a lower owner along such course for damages for constructing such drains. Hull v. Harker [Iowa] 106 N. W. 629. A landowner who allows a ditch over his land to become obstructed so as to overflow his land cannot recover damages against an upper owner whose tile drains discharge into such ditch which, except for the obstruction, is the natural course for such water. Id.

21. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848.

22. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848. A canal forming a deep water channel between a navigable river and the sea is a practical improvement to which a riparian owner's right to use the water for irrigation is subservient. Id.

23. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 91 S. W. 848. A company authorized to construct a deep water canal between a navigable river and the sea will not be required at great expense to construct locks to prevent the water from becoming salty and thus destroying it for purposes of irrigation, to the injury of a riparian owner. Id.

24. Winsor v. Hanson [Wash.] 82 P. 710.

25. One who sets fish traps in a navigable river can recover for their malicious destruction though he has not fully complied with

Interference and obstruction.[27]—An upper riparian proprietor has as against a lower one the right to have the water flow from his land according to nature,[28] and a lower proprietor may not obstruct the flow so as to flood the lands of upper owners[29] or interfere with their systems of drainage,[30] and if he does so he is liable in damages for resulting injuries,[31] providing his act was the cause of the injury.[32] One who, for his own convenience, closes a natural watercourse and provides an artificial channel, must make such channel sufficient to carry the waters then carried by the natural channel and waters which may lawfully be turned into it.[33] The action for damages for injuries so caused must be brought within the limitation period[34] and in a court which has jurisdiction.[35] Damages recoverable depend on the character of the injury[36] whether temporary or permanent,[37] and the relief demanded

the law as to obtaining the right to maintain them. Fowler v. Harrison [Wash.] 81 P. 1055.

26. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134. See 15 Yale L. J. 198.

27. See 4 C. L. 1826.

28. Where a riparian owner sued to enjoin the construction of a dam by named individuals who answered that they were officers of a corporation and it appeared that petitioner's property would be injured, it was proper to grant an injunction though the corporation was not a party. Warner v. Maxwell [Ga.] 52 S. E. 809.

29. A lower owner may not place obstructions in the stream causing the water to back up and overflow the land of an upper owner. Winsor v. Hanson [Wash.] 82 P. 710. Complaint against a railroad company for obstructing the waters of a stream and causing them to flood land, held to state a cause of action. Chicago, B. & Q. R. Co. v. Mitchell [Neb.] 104 N. W. 1144.

30. Under the rule that one must so use his own rights as not to infringe upon the rights of others, a lower riparian owner may not dam the stream and thereby obstruct a drainage system lawfully maintained by upper owners to the injury of a crop lawfully brought into existence. Thomas v. Bolsa Land Co. [Cal. App.] 82 P. 207.

31. A railroad which so constructs a bridge across a stream as to cause ice and debris to accumulate and form a jam which backs up the water and floods adjacent land is liable for resulting injuries. Miller v. Buffalo & S. R. Co., 29 Pa. Super. Ct. 515. Evidence sufficient to show that damages to one's land by flooding was caused by the construction by a railroad company of an obstruction to a natural stream. Chicago, B. & Q. R. Co. v. Mitchell [Neb.] 104 N. W. 1144. Where a dam is negligently constructed, the owner is liable for damages from flooding caused by such obstruction, though there would have been an overflow to some extent had the obstruction not existed. Gulf, etc., R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 67, 88 S. W. 452. Where after institution of a suit for damages caused by flowage, the defendant removed a portion of the dam causing the flood, evidence of the time within which a subsequent flood subsided from the land held admissible as showing the action of the water in the creek when the dam was in and that the remaining portion contributed to the injury. Id. One who diverts water from its natural channel and causes it to be discharged on the land of another is liable in damages. Chicago, B. & Q. R. Co. v. Mitchell [Neb.] 104 N. W. 1144. Where a lower owner sues for a nuisance created by an upper, the question of negligence is immaterial. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603.

32. One who obstructs a watercourse is not liable for injuries caused by overflow unless the obstruction is the cause of the injury complained of. Gulf, etc., R. Co. v. McClerran [Tex. Civ. App.] 91 S. W. 653. In the absence of negligence in the construction of its road bed across a natural watercourse, a railroad company is not liable for damages to adjacent property by reason of a flood so unprecedented as to amount to an act of God. Chicago, etc., R. Co. v. Buel [Neb.] 107 N. W. 590. A riparian proprietor who has constructed dams in the usual manner and which resist usual freshets is not liable to a lower owner for injuries caused where the dam is broken by an extraordinary flood. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603.

33. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. A landowner injured by overflow of an artificial channel along a railroad right of way is not precluded from recovering because he constructed such channel on specifications from the railroad company. Id.

34. Where an injury to crops and land is caused by the negligent construction of a railway embankment which arrested and held the flood waters of a natural stream, a cause of action accrues at the date of the injury and not at the date the obstruction was constructed. Chicago, B. & Q. R. Co. v. Mitchell [Neb.] 104 N. W. 1144.

35. In a suit by several to enjoin the obstruction of a stream, the matter in dispute must exceed $2,000 as to each complainant to give the Federal court jurisdiction. Eaton v. Hoge [C. C. A.] 141 F. 64.

36. Where land is flooded through a continuing injury, the measure of damages is the rental value. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. Where crops are injured, the measure of damages is the difference in their value before and after the overflow. Chicago, B. & Q. R. Co. v. Mitchell [Neb.] 104 N. W. 1144.

37. The building by a railroad company of an embankment across the channel of a stream and diverting the waters thereof into an artificial channel which is insufficient to carry them is not an improvement of the character that requires one injured to treat

in the complaint.[38] The destruction of an obstruction in a navigable stream which is not and may only possibly become a nuisance at some future date may be enjoined.[39] Flooding of lands caused by the erection of a dam in the exercise of the police power is not a taking which requires compensation if such flooding can be prevented by dikes.[40]

Nuisance and pollution.[41]—A riparian owner has no right to unreasonably corrupt or pollute the waters of a stream to such an extent as to impair its purity,[42] and such act may be enjoined[43] in the absence of equities or qualifying circumstances which abrogate the general rule.[44] A municipal riparian owner is not estopped from exercising its right to prevent the pollution of the stream by the fact that it has been guilty of the same offense in discharging sewage into it.[45] To entitle one to enjoin the discharge into a stream of foul and noxious matter he must show

it as permanent and bring one action for all damages present and prospective. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626.

38. Petition for damages resulting from flooding land caused by insufficient drainage facilities through a railroad roadbed, held sufficiently broad to permit recovery for a deposit of mud on the land. Gulf, etc., R. Co. v. Harbison [Tex.] 90 S. W. 1097. Claim for damage caused by flooding land resulting from insufficient drainage facilities through a railroad roadbed, held not to show a claim based on the theory that injury resulted from a deposit of sediment. Id. Where because of insufficient drainage facilities through a railroad bed damage is caused by flowage, damages recoverable could not be reduced by showing that the value of the land was enhanced by the deposit thereon of sediment where the value of such benefit was not shown. Id. Where one injured by flowage was not seeking recovery on the ground that his land had been injured by sediment deposited there it is immaterial that sediment would not have injured but would have benefited the land. Gulf, etc., R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 67, 88 S. W. 452. Complaint against a railroad for damages caused by insufficient drainage facilities through its roadbed held sufficient to authorize the introduction of evidence as to the filling up of plaintiff's ditches with debris. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 91 S. W. 823.

39. Obstruction did not constitute a nuisance but at most there was a probability that it would sooner or later constitute a nuisance. Winsor v. Hanson [Wash.] 82 P. 710.

40. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —.

41. See 4 C. L. 1827.

42. The right to pollute the waters of a natural watercourse forms no part of the riparian rights of the abutting owners; and in order to prevent such pollution it is not essential that a municipality, or other riparian owner who is affected thereby, should condemn any right which such abutting owner may have or claim in the water. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450. Complaint by a lower owner against an upper one for polluting the waters of the stream held to state a cause of action. Muncie Pulp Co. v. Keesling [Ind.] 76 N. E. 1002.

43. A lower riparian owner may enjoin the pollution of the stream by an upper owner. Thropp v. Harpers Ferry Paper Co. [C. C. A.] 142 F. 690. The riparian owners along the Passaic river below the city of Paterson, but along tide water, may restrain the pollution of the stream by turning sewage therein unless the city shall elect to compensate them for their injury. Doremus v. Paterson [N. J. Err. & App.] 61 A. 396. Where a city seeks to enjoin the pollution of a stream from which its water supply is taken and at a trifling expense the offensive matter discharged into the stream by the defendant could be turned into another stream where it would injure no one, a preliminary injunction will be granted. Roaring Creek Water Co. v. Anthracite Coal Co., 212 Pa. 115, 61 A. 811.

44. Where waste water used in washing ore had been run into settling pools before being turned into the stream but on extending the operations the settling pools were abandoned and the water turned directly into the stream it was held that the owner of a pulp mill lower down injuriously affected could enjoin such action until it was shown that he could avoid the injurious effects by a reasonable expenditure. Thropp v. Harpers Ferry Paper Co. [C. C. A.] 142 F. 690. An upper owner will not be enjoined from carrying on an industry which pollutes the water of a stream to the detriment of a lower owner where the latter may remedy the evil at an ascertainable and reasonable expense and to enjoin the former would paralyze his industry. Salem Iron Co. v. Hyland [Ohio] 77 N. E. 751.

45. Hence, the collection by a municipality of an assessment to pay the cost of constructing a sewer to carry off sewage which otherwise would be drained into the stream cannot be enjoined merely because the municipality has also emptied its sewerage into the stream. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450. The fact that a municipality owning lands abutting on a stream has not taken wholly effective measures in all cases to prevent the pollution of the water thereof, which goes into its waterworks system, will not hinder or prevent it from taking measures, such as the building of a sewer, to divert the sewerage to another course; nor will such fact prevent the collection of an assessment levied against the property specially benefited by such sewer, to pay the cost

that his rights are thereby interfered with.[46] A municipality which adopts a natural watercourse as an open sewer is bound to keep the channel of the stream open and prevent the accumulation of filth.[47] One who diverts water from its course and which water subsequently becomes polluted and injures another is liable though the source of the pollution was beyond his control.[48] Upper owners who acting independently of each other are depositing filth in the stream are jointly liable,[49] and it is no defense to an action to restrain one, that others contributed to the nuisance.[50]

Damages recoverable for pollution[51] depend upon the character of the nuisance, whether permanent or temporary,[52] and the character and value of the land injured.[53] Sickness resulting[54] and destruction of fish in the stream are elements to be considered.[55] Where a claim for damages includes injury to health and trade and deprivation of the use of water, actual damages may be recovered irrespective of the value of the land.[56] The action must be brought within the limitation period.[57]

thereof. Hildebrand v. Toledo, 6 Ohio C. C. (N. S.) 450.

46. The discharge into the Mississippi river through an artificial canal of the sewage of Chicago with a large amount of pure water from Lake Michigan will not be enjoined at the instance of the state of Missouri on evidence that leaves doubtful whether disease germs survive the long journey and are the cause of sickness in that state. State of Missouri v. State of Illinois, 200 U. S. 496, 50 Law. Ed. —.

47. It is liable in damages for injuries done a riparian owner resulting from failure to do so. Glasgow v. City of Altoona, 27 Pa. Super. Ct. 55. In such case if injury to real property is permanent, the measure of damages is the cost of remedying the injury up to the value of the property. Id.

48. Where one diverts water from its natural channel by means of a culvert which fills up with minerals from a mine which are then washed onto adjacent land, the person who constructed the culvert is liable for injury caused though he did not own the mine. Illinois Cent. R. Co. v. Taylor [Ky.] 89 S. W. 121. Where waters are diverted from a stream and afterwards discharged onto land to its damage, a cause of action accrues at the date of the injury and not at the date of the diversion. Id.

49. A lower riparian owner may join in one action and enjoin all upper owners who, acting independently of each other, are polluting the stream by depositing filth therein. Warren v. Parkhurst, 105 App. Div. 239, 93 N. Y. S. 1009.

50. It is no defense to an action to restrain the pollution of a watercourse that other persons contributed to the nuisance complained of. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

51. See 4 C. L. 1828, n. 7, et seq.

52. Where complainants in a suit to restrain the pollution of a watercourse estimated their damages on the basis of the injuries being permanent, an answer admitting the nuisance should state whether it is perpetual or temporary and if the latter how long it is to continue. Doremus v. Paterson [N. J. Eq.] 62 A. 3. The measure of damages to a riparian owner, caused by the wash from mines poured into the stream above him, is the difference in the value of the land before and after the injury occurred, and not the depreciated rental value from the date of the occurrence of the injury; and it is consequently competent for a plaintiff in such a case to prove the nature and extent of the injuries complained of and the amount of loss sustained. Upson Coal & Min. Co. v. Williams, 7 Ohio C. C. (N. S.) 293. The measure of damage a lower owner is entitled to recover because of a continued nuisance consisting of the pollution of the stream by an upper owner is the depreciation in the rental value of his land to commencement of the suit. Muncie Pulp Co. v. Keesling [Ind.] 76 N. E. 1002. Complaint by a lower owner against an upper for polluting the waters of the stream held to show a continued nuisance rather than permanent injury to the property of the lower owner. Id. Where riparian lands are permanently injured by pollution of a stream, the damages recoverable should be based on such injury and not on the value of crops destroyed. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

53. Where a lower riparian owner sues for pollution of a stream it is competent to show what crops he raised and their value as tending to show the character of the land and its value. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762. In an action by a lower riparian owner for pollution of the stream he may show that nonriparian land owned by him was affected. Id.

54. In an action by a lower riparian owner for pollution of the stream it is competent to show that there was an odor from the stream and that the health of his family had been injuriously affected. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

55. In an action by a lower riparian proprietor for pollution of a stream, it is competent to show that fish in the stream had decreased though he had no title to such fish until caught. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

56. Glasgow v. Altoona, 27 Pa. Super. Ct. 55.

57. Under Code 1896, § 2801, subd. 6, a lower riparian proprietor can recover from an upper for polluting the stream only damages which accrued within one year prior to the commencement of the action. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762. Evidence of the condition of the stream prior to the twelve-month limitation period and subsequent to the commencement of the ac-

Diversion.[58]—A proprietor may change the course of a natural watercourse within the limits of his own land if he restores it to the original channel before the lands of another are reached,[59] provided he does not in so doing cast upon adjoining lands water which would not in the course of nature flow there.[60] He must also see that the water passes onto the lower land at the same point it would naturally reach it.[61] The fact that the flow of water will be thereby accelerated and debris carried onto the lower land which would not reach it if the water followed its natural course will not preclude him from exercising this right.[62] The state being the last riparian owner on tidal rivers has the right to the ultimate disposition of what remains of all waters naturally emptying into such streams after the transient rights of riparian owners have been exhausted,[63] and hence may insist upon the proper riparian user of such waters, and may regulate its diversion for commercial purposes.[64] Thus, it may restrain such diversion, and such restraint may be limited

tion is admissible for the purpose of showing the effect of the pollution on the plaintiff's land and in the river. Id. Under the rule that a lower riparian owner is limited in damages recoverable for pollution of the stream to such as accrued within one year prior to the commencement of the action, the fact that he had been as greatly injured for more than one year prior to beginning action as he was at the time action was brought does not preclude him from any recovery. Id.

58. See 4 C. L. 1827.

59. Fenton & T. R. Co. v. Adams [Ill.] 77 N. E. 531. A proprietor who proposes to change the course of a natural stream within the limits of his own land may do so if proprietors whose lands the waters would flow through in the state of nature if unmolested, do not object. Id.

60, 61, 62. Fenton & T. R. Co. v. Adams [Ill.] 77 N. E. 531.

63. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

64. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

Note: The decision is based upon the ground that the state, being the owner of the navigable portion of the river further down, was entitled to riparian rights. The Columbia Law Review says the case involves the larger principle of the right of the state by legislation to prevent taking water from the stream and transporting it to another state. On this question there is but little authority. Howell v. Johnson, 86 F. 556, doubts the existence of any property right in the state such as would entitle it to regulate the use of its non-navigable streams. See, also, Lamson v. Vailes, 27 Colo. 201. It has been suggested that the state could prevent the removal of the bed of a river from its jurisdiction by invoking the principle of state ownership of water propounded by its constitution. Bigelow v. Draper, 6 N. D. 152. But it would seem dangerous to found the state's right to control its non-navigable waters on the theory of state ownership, because of the difficulty of defining the nature of such property right. It is said that where the stream is navigable the state, by virtue of ownership of its bed, holds the water in trust for the public (Cobb v. Davenport, 32 N. J. Law, 369), but if the stream were non-navigable throughout its course and the bed subject to private ownership, the state would have no right to interfere as having any property right in the water. Tiedeman, Lim. of Police Power, § 125. Even where states have announced public ownership of non-navigable streams, such ownership is not construed so as to interfere with riparian rights (Bigelow v. Draper, 6 N. D. 152), and is also subject to the right of the Federal government to protect navigation below (United States v. Rio Grande Irrigation Co., 174 U. S. 690, 43 Law, Ed. 1136), and in view of the undivided sovereignty of the United States, it is doubtful if the state governments have any more property in the water of the state than in the land. But see McCready v. Virginia, 94 U. S. 391, 24 Law. Ed. 248. A far simpler basis on which to found the right of the state to control water within its boundaries is the police power. See State v. Wheeler, 44 N. J. Law 88; Vernon Co. v. Los Angeles, 106 Cal. 237; White v. Canal Co., 22 Colo. 191; Am. Exp. Co. v. Illinois, 133 Ill. 649.—See 6 Columbia L. R. 113.

Note: The doctrine is a novel one, that the state has the rights of a riparian owner through the ownership of the bed of the navigable portion of the stream. The words "riparian rights," suggest that ownership of the bank is a necessary element, and this view is supported by the English rule that these rights do not depend on ownership of the soil under the stream. Lyon v. Fishmongers Co., 1 App. Cas. 662. Riparian rights and restrictions, moreover, seem to have arisen from the benefit conferred by the stream upon the riparian tract. So a riparian owner may make a reasonable use of the water, such right of user being an incident to the soil and passing therewith. Union M. & M. Co. v. Ferris, 2 Sawy. [U. S. C. C.] 176. He is entitled to the natural flow save for a reasonable use by upper owners. Tyler v. Wilkinson, 4 Mass. [U. S. C. C.] 397. But he may not assign his rights in gross. Stockport Water Co. v. Potter, 3 H. & C. 300. Nor may he use the water beyond the riparian tract. Moulton v. Newburyport Water Co., 137 Mass. 163. In the present case none of the usual riparian benefits are conferred upon the bed of the stream and the reason for extending riparian rights to the owner thereof fails. The decision may, however, be supported on the ground of the state's right to object to improper interference with a nav-

to such persons as it may elect.[65] The meaure of damages a lower riparian owner may recover for diversion of water above his premises is the difference in their value before and after such diversion estimated as of the date of trial.[66]

Bridges and culverts.[67]—One who constructs a fill across a watercourse must put in a culvert sufficient to allow the passage of the volume of water ordinarily flowing in the stream at seasons of low or usual high water,[68] but extraordinary or unprecedented freshets need not be anticipated.[69] One who fails to provide adequate drainage facilities is liable in damages,[70] if the injury could not have been averted by the landowner injured.[71] In some states this duty is imposed by statute.[72] In Texas the drainage facilities through a railroad roadbed must be sufficient to drain the land in its natural lay[73] taking into consideration such future conditions as

igable stream even though such interference took place beyond the limits of the state or above the navigable portion. Cf. Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. [U. S.] 518, 14 Law. Ed. 249; United States v. Rio Grande Irrigation Co., 174 U. S. 690, 43 Law. Ed. 1136; Missouri v. Illinois & Chicago Dist., 180 U. S. 208, 45 Law. Ed. 497.—See 19 Harv. L. R. 216.

65. Act May 11, 1905 (P. L. 1905, p. 461), making it unlawful to transport the water of any fresh water river of the state through pipes to another state for use therein is valid. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710. Is not an interference with interstate commerce and does not violate contract obligations. Id.

66. Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. S. 698.

67. See 4 C. L. 1828.

68. A railroad company in constructing a fill over a watercourse must make provision for the passage of such amount of water as is known to flow in the stream in times of usual freshets and as might be reasonably expected to flow in time of flood shown by experience to be liable to occur. Price v. Oregon R. Co. [Or.] 83 P. 843. A railroad company which constructs a fill across a watercourse is bound to ascertain the character of the stream and how it had been affected by previous rain storms and would probably be affected by future conditions and provide a suitable culvert. Perrine v. Pennsylvania R. Co. [N. J. Err. & App.] 62 A. 702. But no duty rests on a landowner on the upper side of the fill to ascertain whether a suitable culvert had been constructed so as to preclude his recovery of damages caused by back water. Id. That such upper owner stacked his grain on a knoll that had never been submerged does not raise a conclusive presumption that the railroad company with the knowledge it had obtained should not have anticipated that the fill as constructed would be likely to flood the knoll. Id. In an action for damages caused by negligently constructing a fill over a stream, it was improper to charge that the size of another culvert through which the stream ran could be considered unless it was shown that such culvert was a standard of sufficiency. Price v. Oregon R. Co. [Or.] 83 P. 843. In an action for damages caused by an insufficient culvert in a railroad fill over a stream, it is incompetent to show that certain employes of the railroad company were informed as to the size of the culvert necessary without proof that such employes were agents of the company in constructing the fill. Id.

69. Where a landowner sought to recover damages for injuries sustained by back water caused by an insufficient culvert in a railroad fill across the channel of a stream, it was held for the jury whether the storm causing the flood was so unprecedented that in the exercise of ordinary care it could not have been anticipated. Price v. Oregon R. Co. [Or.] 83 P. 843.

70. A railroad company is liable for damages from flooding caused by its defective embankment. Shores v. Southern R. Co. [S. C.] 51 S. E. 699. But not for injuries caused by its lessee in removing an obstruction in a culvert. Id. A lessee of a railroad who builds an addition to a culvert which gives way and causes the water to back up and destroy crops is liable in damages. Id. Where one's property was injured by water turned back because of an insufficient culvert in a railroad fill across the channel of a stream and the water causing the damage was the continuous overflow of the stream it could not be regarded as surface water in determining the rights of the parties. Price v. Oregon R. Co. [Or.] 83 P. 843.

71. Where injuries were caused by obstruction of a railroad culvert if damages could have been relieved by ditches, it was held competent to show that it was difficult and expensive to construct them. Shores v. Southern R. Co. [S. C.] 51 S. E. 699.

72. Burns' Ann. St. 1901, § 5153, requiring a railroad crossing a stream to do so in such manner as to afford security to property, applies to a railroad using a culvert constructed by its predecessor. Graham v. Chicago, I. & L. R. Co. [Ind. App.] 77 N. E. 57.

73. Under Sayles' Ann. Civ. St. 1897, art. 4436, providing that a railroad bed shall not be constructed without first constructing such culverts as are required for the drainage of the land, a mandatory injunction directing the removal of a dam and the construction of necessary culverts is not indefinite for failure to point out what additional culverts would be necessary. Gulf, etc., R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 67, 88 S. W. 452. Under Rev. St. 1895, art. 4436, providing that a railroad company shall not construct a roadbed without first constructing necessary culverts, a complaint for damages to land because of insufficient culverts need not allege that necessary culverts were not put in. It being a matter of

might reasonably be foreseen,[74] and failure to do so is negligence,[75] but no greater drainage facilities need be provided.[76] An action for damages caused by flowage because of the construction of a railroad embankment across the channel of a stream must be brought within the statutory period.[77]

§ 4. *Rights in lakes and ponds.*[78]— Water rights acquired by a littoral proprietor from the United States are within the laws of a state subsequently erected which preserve existing rights in waters and this regardless of whether they were navigable.[79] Where it appears that the convenient use of property situated on a lake shore would be impaired and its value depreciated by an illegal obstruction between such property and the lake, injunction lies to abate such obstruction.[80] In Massachusetts title to islands in great ponds is in the state unless it has been granted away.[81]

§ 5. *Rights in subterranean and percolating waters.*[82]—All subterranean waters which do not exist in a known and well defined channel are deemed percolating waters.[83] The owner of land who explores for and produces percolating water is limited to a reasonable and beneficial use of it where to otherwise use it would deplete the supply of a valuable spring on neighboring land.[84]

§ 6. *Rights in tide waters.*[85]—The ownership of the bed of tidal rivers by the state, so far as the tide ebbs and flows, carries with it the ordinary property rights of riparian owners in the water covering it, whether fresh or salt.[86]

§ 7. *Rights in artificial waters.*[87]

§ 8. *Ice.*[88]—Where the bed of a stream is public property, the owners of

defense. St. Louis S. W. R. Co. v. Rollins [Tex Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099. As to whether certain culverts were sufficient certain expert witnesses held competent and evidence admissible. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 91 S. W. 823.

74. That adjacent timber land would be transformed into cultivated fields. St. Louis S. W. R. Co. v. Rollins [Tex. Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099; St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106.

75. Failure of a railroad company in constructing its roadbed to put in culverts necessary for draining the land as required by law is negligence. St. Louis S. W. R. Co. v. Rollins [Tex. Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099.

76. If conditions are changed by the acts of third persons so as to render drainage facilities otherwise sufficient, insufficient, the company is not liable for resulting damages. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106.

77. The cause accrues under Pub. Acts 1895, p. 297, c. 224, when a substantial injury begins. Stack v. Seaboard Air Line R. Co., 139 N. C. 366, 51 S. E. 1024.

78. See 4 C. L. 1829.

79. Madson v. Spokane Valley Land & Water Co. [Wash.] 82 P. 718. Owners of land covered in part by the arm of a non-navigable lake who permit the erection of a dam between their land and the body of the lake at great expense and cultivate a portion of the land drained are not estopped to deny the right to maintain such dam. Id.

80. Davies v. Epstein [Ark.] 92 S. W. 19.

81. In Massachusetts the title of a barren island in a great pond is in the state unless granted by the town in which it is located, the colony, province, or commonwealth. Attorney-General v. Herrick [Mass.] 76 N. E. 1045.

82. See 4 C. L. 1830.

83. Pence v. Carney [W. Va.] 52 S. E. 702. All subterranean waters are presumed percolating until it is shown that they exist in a known and well defined channel. Id.

84. Pence v. Carney [W. Va.] 52 S. E. 702. Temporary pumping to a reasonable extent of percolating water for a legitimate use and casting the water on the land is not such an unreasonable use as will sustain an injunction though the supply to a natural spring on adjoining land is temporarily decreased. Id.

Note: The tendency of the recent cases is to limit the owner to a reasonable and beneficial use of percolating water when the proper enjoyment of adjacent lands is liable to be interfered with. Bassett v. Manufacturing Co., 43 N. H. 569; Smith v. Brooklyn, 46 N. Y. S. 141; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 51 L. R. A. 695; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 64 L. R. A. 236; Stillwater v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 60 L. R. A. 875; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 64 L. R. A. 255; St. Amand v. Lehman, 120 Ga. 253.—See 4 Mich. L. R. 541.

85. See 4 C. L. 1831.

86. Line of demarkation between public and private waters is the point where the tide ebbs and flows, but this is not limited to the point where salt and fresh water meet, nor to water impregnated with salt. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

87. See 4 C. L. 1831.

88. See 4 C. L. 1832.

bordering land have no title to the ice which forms thereon as incident to their ownership of the bank,[89] hence, there can be no vested right to such ice because of improvements on the land or because of the length of time the riparian owner has harvested it.[90] The state may not deny the right to take ice from a public stream any more than it may interfere with the right to take water therefrom or fish therein.[91] But all such rights are subject to reasonable regulations.[92] Pond rentals if exacted are part of the expenses of harvesting ice under a contract obligating a party to pay all expenses of such harvest.[93]

§ 9. *Surface waters and drainage or reclamation.*[94] *Common-law rule.*[95]—Surface water is the common enemy of mankind and a landowner may fight it in any way he chooses providing he does so without working injury to his neighbor.[96] A proprietor may lawfully improve his property by doing what is necessary for that purpose, and unless negligent he is not liable to an adjoining proprietor for causing surface waters to flow onto his premises to his damage.[97]

Civil-law rule.[98]—By the civil-law rule, the owner of a dominant heritage has a natural easement over the land of the servient heritage for the flow of surface waters,[99] and he may accelerate and increase such flow[1] but cannot divert it so that it reaches the servient heritage at a place different from where it naturally would, or discharge there water which would not naturally reach such heritage.[2] The owner of the servient heritage cannot interfere with or divert the flow of the watercourses,[3] and the ground that good husbandry rendered the same necessary for the protection of his crops does not justify such action.[4] The owner of the servient heritage cannot obstruct the flow of surface waters on the ground that the course of natural drainage of ordinary surface water over his land was not necessary.[5] A license to the servient owner to construct a levee, on a certain line, given by an arbitration award is terminated by the destruction of such levee, and cannot be rebuilt by virtue of the award,[6] nor can such award be enlarged by parol.[7] Highway authorities cannot be compelled by adjoining owners to restrain surface water which naturally flows over the highway onto the land of such owners.[8] This is so though

89, 90, 91, 92. Board of Park Com'rs Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203.

93. Chariton Ice Co. v. Spring Lake Ice Co. [Iowa] 105 N. W. 1014.

94. See 4 C. L. 1832.

95. See 4 C. L. 1833.

96. A lower owner may not restrain an upper one from tiling his ditches without showing that such act would increase the flow of water to his premises. Plagge v. Mensing, 126 Iowa, 737, 103 N. W. 152.

97. Aldritt v. Fleischauer [Neb.] 103 N. W. 1084. As a general rule the legal possessor of land is not responsible for the harmful effect of rain water which he has diverted by changing the surface of his property. Kaufman v. Bergen Turnpike Co., 71 N. J. Law, 33, 58 A. 109.

98. See 4 C. L. 1832.

99. This rule prevails in Illinois. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

1. The owner of higher land is not only entitled to the natural flow of the water therefrom upon the lower but he may tile drain his higher land and thereby carry off water in the natural channel though the flow of water upon the lower land in such natural channel is thereby increased. Bickel v. Martin, 115 Ill. App. 367.

2. Where one landowner causes water to be discharged upon the land of another at a point where it would not have flowed in the state of nature and also discharges water thereon which would never reach his land in its natural course, the injured person is entitled to nominal damages though the result was beneficial to his land. Kennedy v. Murphy, 112 Ill. App. 607. By aiding in the construction of a ditch to carry off surface water one is not estopped to complain of its being deepened and tiled. Elliott v. Carter [Mich.] 12 Det. Leg. N. 169, 103 N. W. 600.

3. Cannot construct a levee to restrain the flow. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

4, 5, 6. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

7. A submission to arbitration of the right of the servient owner to construct a levee and an award thereon cannot be enlarged by parol to show a right to maintain such levee. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

8. Tower v. Somerset Tp. [Mich.] 12 Det. Leg. N. 983, 106 N. W. 874. Where an original surface watersluice had been obstructed by natural causes and the water wore another channel along the highway which was permitted to remain until after repeated efforts to protect the highway had failed, the new

such flow has for many years been diverted, where to allow it to resume its natural course would not result in injury to such owner.[9]

Natural drainage channels.[10]—Surface water which flows in a well defined course, be it ditch, draw, or swale, in its primitive condition, and seeks its discharge in a neighboring stream cannot be arrested by one landowner to the injury of a neighboring proprietor,[11] and what a private proprietor may not do neither can the public authorities,[12] except in the exercise of eminent domain.[13] Where one diverts water from its natural course so that it, with water which naturally flows in another direction, is discharged upon the land of his neighbor, the latter may obstruct the stream though in so doing he obstructs water which it is his duty to receive.[14] One who wrongfully casts surface water on the land of another cannot escape liability on the ground that another person demanded the waters on the opposite side of the injured person's premises, thus preventing their escape;[15] but where water diverted out of its natural course by one would not have caused injury except for the act of another, the person making the original diversion is not liable.[16]

Obstruction of surface waters.—A landowner may by prescription acquire the right to obstruct the natural flow of waters from upper land.[17]

Railroad companies in the construction of their roadbeds must provide adequate drainage facilities through them[18] and keep such facilities in repair,[19] and, if by reason of failure to do so adjacent land is flooded, the company is liable in damages.[20] One is not precluded from recovering by the fact that he dug drain-

channel could not be considered a neighborhood drain which the highway authorities were precluded from obstructing. Id.

9. Where a sluiceway for surface water was obstructed by natural causes and the water wore a new channel along a highway where it continued to flow for 10 years, some of it going over the highway and injuring it, the highway authorities are not estopped as against such lower owner to open the original sluiceway where it is not shown that damage will result to him. Tower v. Somerset Tp. [Mich.] 12 Det. Leg. N. 983, 106 N. W. 874.

10. See 4 C. L. 1834.

11. It matters not whether the water be the result of rain or snow or the water of springs. Roe v. Howard County [Neb.] 106 N. W. 587.

12. Roe v. Howard County [Neb.] 106 N. W. 587.

13. Roe v. Howard County [Neb.] 106 N. W. 587. It will not be presumed that commissioners appointed to assess damages to land over which water runs considered it necessary in the construction of the road to divert water naturally seeking an outlet in a draw and conduct it in an artificial ditch along the highway for a mile and there discharge it on the land of another or that such person was allowed damages for such disposition. Id.

14. O'Connor v. Hogan [Mich.] 12 Det. Leg. N. 272, 104 N. W. 29. A lower owner charged with obstructing a natural waterway or one gained by prescription may show, under a general denial, without special notice, that the way obstructed was created by the unlawful act of the upper owner. Id. A settlement of a controversy between an upper owner and a township board relative to the flowage of surface water in which such upper owner agreed to let the water flow in its natural course over the land of a lower owner, to which such lower owner is not a party, does not determine the natural channel as between the upper and lower owner. Id. Where an upper owner sues for the unlawful obstruction of a waterway his testimony that he told a third person that the water was doing him a lot of damage and more to the defendant sufficiently shows that the water was an injury to defendant. Id.

15. They being joint tort feasors. Campbell Turnpike Road Co. v. Maxfield [Ky.] 91 S. W. 1135.

16. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333.

17. The commencement of the time is from the date damage results or a cause of action accrues. Roe v. Howard County [Neb.] 106 N. W. 587. Evidence held to show that the owner of a servient heritage had not obtained the right by limitations to maintain a levee of certain dimensions. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

18. Where a railroad builds an insufficient culvert under its track and by reason thereof water is backed up over an abutter's land interfering with its use and destroying his crops, an actionable injury is shown. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

19. A railroad company which builds a ditch to collect water from its own land and the land of others and constructs a culvert to allow its escape, is liable if it allows such culvert to become obstructed so that the water is backed up on the land of an adjacent proprietor. Branson v. New York, etc., R. Co., 97 N. Y. S. 788.

20. Under Rev. St. 1899, § 1110, a railroad

age ditches toward the conduit where it is not shown that the flow of water to be discharged through the conduit was thereby augmented.[21] If the damages are original, the measure is the depreciation in the value of the land[22] and must be recovered in one action.[23] But where the injury is continuing or intermittent in character, the damages are continuous and one recovery is not a bar to separate actions for damages thereafter accruing from the same wrong.[24] If the injury is temporary, the measure of damages is the cost of putting the land in its prior condition[25] and no more,[26] and if crops are injured the measure is the value of such crops.[27] Limitations run against such cause of action from the time injury is done.[28]

A landowner has no right to collect surface water in a body[29] and discharge it upon the land of another[30] in increased quantities and at a place different from

which by its embankment holds back surface waters and floods land is liable in damages. Williamson v. Missouri, etc., R. Co. [Mo. App.] 90 S. W. 401. A railroad company which negligently subjects land to overflow so that it cannot be cultivated is liable to the owner who rented it out on shares. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Where it appears that by reason of an insufficient culvert put in by a railroad company surface water was backed up over the land of an adjoining owner and there was no evidence upon which to ascertain a proper measure of damages, the land owner was nevertheless entitled to nominal damages and to have the case go to the jury for that purpose. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

21. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. Where one sought to recover damages for injuries to his land by flooding caused by the putting in by a railroad company of an insufficient culvert under its track, the question whether certain ditches dug toward the culvert by the landowner augmented the flow of water to be discharged through the conduit is one of fact. Id.

22. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. Damages arising from the occasional flooding of land because of an insufficient culvert under a railroad track are continuous, not original. Id. But if an action therefor be tried on the theory that they are original, the parties will be bound thereby. Id. Where land is overflowed, the measure of damages is the difference in value just before and after the overflow occurred. Sanitary Dist. of Chicago v. Pearce, 110 Ill. App. 592. A warranty deed reciting the consideration executed shortly before the overflow occurred is admissible. Id.

23. Where surface waters are dammed so as to cause an injury to land that will continue indefinitely without change from any cause but human labor, the damages are original and there can be but one recovery measured by the decrease in the value of the land. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

24. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

25. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997.

26. The amount paid by a landowner for the removal of Johnson grass which grew as a result of a flood could not be recovered in the absence of proof that it was reasonable. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. One who constructs a ditch which discharges surface water on another's land is not liable for damages caused by water emptied into its ditch by lateral ditches constructed by strangers without his consent. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846.

27. Where a cotton crop is destroyed by flooding, the value of the lint and seed are elements of damage. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106. Where crops are injured by wrongful discharge on the land of accumulated surface water, the measure of damages is the difference between what the land would and what it did produce less the difference in the cost of producing and harvesting a full crop and the crop actually raised. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846. Where hay land is injured by flooding caused by an embankment which holds back surface water it is competent to show that one crop of hay was considerably injured and other crops practically destroyed. Sanitary Dist. of Chicago v. Alderman, 113 Ill. App. 23. Where by reason of an insufficient culvert constructed by one owner the land of an adjoiner is flooded, the value and condition of the crops on the land flooded and the extent to which they were injured are elements of damage. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

28. Where one constructs a ditch which unless properly attended to is liable to become obstructed, and damage caused thereby is intermittent, limitations run against actions to recover for such damage from the time it is done and not from the construction of the ditch. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846.

29. See 4 C. L. 1833.

30. A proprietor over whose land surface water flows in several channels may not collect it into a single channel and discharge it upon a lower proprietor to his damage. Humphreys v. Moulton [Cal. App.] 81 P. 1085. Where one constructs an embankment to retain surface water which in the course of nature flows evenly, and takes no precautions to strengthen the bank against storm, and water collected broke over such embankment and injured the premises of an adjoiner, the negligence in the manner of construction was the proximate cause of the injury. Cox v. Odell [Cal. App.] 82 P. 1086. A complaint

where it would reach such land according to nature.[31] A lower owner may protect himself against such act.[32] This rule applies to municipal corporations.[33] A county drain commissioner, who wrongfully enlarges an artificial drain to the injury of an adjoining township is personally liable,[34] but a county is not liable to an individual landowner for the negligent diversion of surface water in the improvement and construction of public highways,[35] and a township may not recover for injuries to its highways, bridges, and culverts caused by the enlargement of an artificial watercourse by adjoining townships and counties.[36]

Storm sewers[37] must be sufficient to carry off the ordinary and usual flow of surface water,[38] and due care must be exercised in their construction and maintenance,[39] but they need not be sufficient to carry off such quantity of water as results from extraordinary storms.[40]

for the collection and discharge of surface waters onto one's land averring that the parties owned separate tracts, plaintiff's tract adjoining defendant's on the east with a road extending along their northern boundary, sufficiently describes the land. Id. Where one seeks to recover damage for the retention and discharge of surface water onto his land, evidence as to the cost of putting his land in repair is admissible. Id.

31. A lower owner may enjoin the maintenance of a dike which obstructs the natural flow of surface water and casts it upon his lands in an increased quantity and at an entirely different place from where it originally flowed. Priest v. Maxwell, 127 Iowa, 744, 104 N. W. 344.

32. Where an upper owner builds a dike which casts surface water on the land of a lower owner in a greatly increased quantity and at a place different from where it originally flowed, the lower owner may maintain a dike to protect himself. Priest v. Maxwell, 127 Iowa 744, 104 N. W. 344.

33. **A city** is liable in damages where in improving a street it collects in an artificial channel large quantities of surface water for which it provides no outlet and the water is thrown onto the land of an abutting owner. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514. A township may clean out old waterways or drains to the depth they were originally excavated but cannot enlarge them and thereby cast larger quantities of water collected from an additional area during shorter periods on the highways, bridges, and culverts of an adjoining township. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587. Waterways are none the less artificial because in constructing them use is made of depressions and washed out channels which were insufficient to afford desired drainage. Id. A suit by a township to prevent the enlargement of artificial waterways constructed by other townships in other counties is properly brought in the county where complainant is located. Id.

34. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587.

35. Hopper v. Douglas County [Neb.] 106 N. W. 330. A county is not liable for injuries caused by the overflow of a ditch constructed by it. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333.

36. Merritt Tp. v. Harp [Mich.] 12 Det. Leg. N. 417, 104 N. W. 587.

37. See 4 C. L. 1834.

NOTE. Duties of municipal corporations with respect to surface water: In the absence of statute a municipal corporation is under no duty to provide for drainage of surface water for the benefit of its inhabitants. Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. 322; Alden v. Minneapolis, 24 Minn. 254; Waters v. Bay View, 61 Wis. 642, 21 N. W. 811; Carr v. Northern Liberties, 35 Pa. 324; Fair v. Philadelphia, 88 Pa. 309; Gould v. Booth, 66 N. Y. 62; Mills v. Brooklyn, 32 N. Y. 489; Union v. Durkes, 38 N. J. Law, 21. It is not bound to furnish drains to relieve a lot whether the water be its own or that flowing from other premises (Jordon v. Benwood, 42 W. Va. 312, 26 S. E. 266), nor to provide a sewer to abate a nuisance caused by water running from its streets along a natural depression over abutting property (Miller v. Newport News, 101 Va. 432, 44 S. E. 712). It is not, as a matter of law, its duty to enlarge a ditch constructed for drainage purposes after an alleged increase of the flow of surface water therein. Huntsville v. Ewing, 116 Ala. 576, 22 So. 984. A city which voluntarily constructs a sewer to carry off surface water is not bound to make it sufficient to carry off all surface water under all circumstances. Atchison v. Challiss, 9 Kan. 603. It is not bound to protect one who owns land below the level of the street (Aicher v. Denver, 10 Colo. App. 413, 52 P. 86; Americus v. Eldridge, 64 Ga. 524, 37 Am. Rep. 89), nor is it bound to construct surface drains of sufficient capacity to relieve private property of water naturally coming thereon (Dudley v. Buffalo, 73 Minn. 347, 76 N. W. 44). In the lawful exercise of its power to grade streets it is not bound to drain ponds of surface water which collects on private property below the grades established. Clark v. Wilmington, 5 Harr. [Del.] 243. It has, however, authority to provide for the drainage of surface water. Bohan v. Avoca, 154 Pa. 404, 26 A. 604.—See note to Johnson v. White [R. I.] 65 L. R. A. 250.

38. City of McCook v. McAdams [Neb.] 106 N. W. 988.

39. A city is liable in damages where because of its negligence in constructing and maintaining a storm sewer, it bursts, and injures adjacent property. Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334. A city which negligently permits a drain pipe to become obstructed thereby causing surface water to

One may not allow surface water to accumulate in pools and become stagnant[41] to the injury of adjacent proprietors,[42] and if he does so he is liable in damages[43] for injuries caused,[44] but for no other.[45]

Drainage of ponds.—A landowner may cut through the rim of a basin on his land at its lowest point so that the basin may be entirely drained and cause the water to pass therefrom onto the land of his neighbor,[46] but he has no right to cut through the rim at any other than the lowest point.[47]

§ 10. *Lands under water.*[48]—Until granted away, tide lands belong to the state where they are,[49] or, before erection of the state, to the Federal government.[50] A grant of a right to use tide water carries only a right to such use as is reasonably necessary,[51] but such right will be protected.[52] A grant of right to fill in tide flats will not be read from the mere enumeration of powers of a corporation.[53] In Louisiana the beds of navigable streams so long as they are covered by water belong to

flow onto adjacent land is liable for injuries caused. Town of Central Covington v. Beiser [Ky.] 92 S. W. 973.

40. A city must maintain a system of sewers and drains sufficient to carry off an ordinary and usual flow of surface water but not such quantity as results from extraordinary rain storms. City of McCook v. McAdams [Neb.] 106 N. W. 988. Evidence that injury was due to an extraordinary flood held admissible under the pleadings. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456. Where an abutting owner sued a city for damages caused by surface waters being thrown on his premises by a ditch, it was held error to refuse to admit evidence that the water was the result of extraordinary rains. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514. In constructing side ditches, culverts and outlets for surface waters, in improving a street, a city is required to provide for such water only as may reasonably be expected to fall and not for extraordinary rains. Id. In order that a flood be extraordinary it is not necessary that it be the greatest flood within memory. Its character is to be tested by the comparison with the usual volume of floods ordinarily occurring. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456. And even if with an extraordinary flood there is concurring negligence, the party chargeable is not liable if regardless of such negligence the injury would have occurred. Id.

41. See 4 C. L. 1835.

42. A railroad company which digs an excavation on its right of way which causes water which otherwise would pass off to gather in pools and become stagnant is liable in damages for injuries sustained regardless of the question of negligence. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 989. In an action against a railroad company for permitting stagnant water to stand on its right of way it is competent to show that the person injured notified the company's section boss of the pool, as showing notice to the company of the claim of injury. Id.

43. A railroad company which fails to construct necessary drainage facilities through its roadbed as the natural lay of the land requires is liable in damages for injuries sustained by reason of such failure. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 989.

44. A railroad company which by failure to construct adequate drainage facilities through its roadbed contributes to the creation of a nuisance consisting of stagnant pools is liable for such portion of the nuisance as it created. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 989.

45. A railroad company which constructs sufficient drainage facilities through its roadbed and does not obstruct the natural flow of the water is not liable for injuries from water naturally accumulating on its right of way. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 989.

46. Fenton & T. R. Co. v. Adams [Ill.] 77 N. E. 531. An owner may in the interests of good husbandry drain ponds of a temporary character which have no natural outlet, by means of an artificial channel into a natural drain on his own premises and through such drain over the land of another, though the flow over the land of the latter is thereby increased. Such action, however, must be free from negligence. Aldritt v. Fleischauer [Neb.] 103 N. W. 1084.

47. Fenton & T. R. Co. v. Adams [Ill.] 77 N. E. 531.

48. See 4 C. L. 1835.

49. Chicago Transit Co. v. Campbell, 110 Ill. App. 366; Town of West Seattle v. Seattle Land & Imp. Co., 38 Wash. 359, 80 P. 549. The title to a tide water bay is presumed vested in the state. Cain v. Simonson [Ala.] 39 So. 571.

50. Kneeland v. Korter [Wash.] 82 P. 608.

51. Code 1896, c. 84, granting to owners of land abutting on a bay the right to plant and gather oysters to a certain distance from the shore gives such owner no exclusive right to the use of such waters for all purposes but only such reasonable use for passage and freight as will enable him to plant and gather oysters not detrimental to other abutters who enjoy a like privilege. Cain v. Simonson [Ala.] 39 So. 571.

52. Persons entitled under Code 1896, c. 84, to plant and gather oysters in a bay in front of his land may enjoin unlawful and unnecessary sailing over their oyster bed. Cain v. Simonson [Ala.] 39 So. 571.

53. St. 1810, p. 136, c. 94, interpreted and held that it did not give a corporation power

the public.[54] Batture land formed within the limits of a municipal corporation is under the control and administration of the municipality,[55] and the ownership of riparian proprietors is subject to the right of the corporation to reserve and use such portion thereof as may be necessary for navigation, commerce, public highways, and streets.[56] It may convey such right but no greater estate.[57] Owners of land bounded on non-navigable lakes have no title to the submerged bed of such lake.[58] A grant of lands described by metes and bounds passes submerged lands within such bounds.[59]

§ 11. *Levees, dikes, seawalls, and other protective works.*[60]

§ 12. *Levees, drainage, and reclamation.*[61]—The drainage and reclamation of aqueous lands are treated of in a separate topic.[62]

§ 13. *Milling and power and other nonconsuming privileges; dams, canals, and races.*[63]—A lower riparian owner may not construct a dam in such manner as to injure the power rights of an upper owner,[64] and if he does he is liable in damages for injuries caused.[65] The mere tendency of an increased flow of water, at times, in its natural channel, does not of itself give a cause of action against the owner of a dam,[66] and where a dam has been constructed under Mill Acts in a lawful manner and the water is not discharged in a negligent manner no damages can be recovered because the current is deflected to the injury of lands along the bank.[67] If a mill dam will create a nuisance, its construction may be pro-

to fill in flats owned by it over which the tide ebbed and flowed. Scully v. Com., 188 Mass. 178, 74 N. E. 342.

54. The term "river" includes the bed of a stream up to its state of ordinary high water. Minor's Heirs v. New Orleans [La.] 38 So. 999.

55. Batture land is under the control and administration of the municipality. City of Shreveport v. St. Louis S. W. R. Co. [La.] 40 So. 298.

56. There is, however, no public servitude in favor of railroads. Minor's Heirs v. New Orleans [La.] 38 So. 999. Under Rev. St. 1870, § 318, a riparian proprietor may recover such portion of batture formed in front of his property as is not necessary for public use. Id.

57. A municipality may not grant the fee of batture land. It may grant its right subject to its power to so control the land as to enable the public to have access to the stream and enable its grantee to enjoy an easement of way granted. City of Shreveport v. St. Louis S. W. R. Co. [La.] 40 So. 298.

58. Wright v. Council Bluffs [Iowa] 104 N. W. 492.

59. The Andros patent of September 29, 1677, includes lands between high and low water mark. Coudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

60, 61. See 4 C. L. 1836.

62. See Sewers and Drains, 6 C. L. 1448.

63. See 4 C. L. 1837.

64. May not construct a dam in such manner that slush ice must necessarily form a jam that will set the water back on the wheel of an upper mill owner. Michigan Paper Co. v. Kalamazoo Valley Elec. Co. [Mich.] 12 Det. Leg. N. 342, 104 N. W. 387.

65. Where an upper owner sues for damages caused by the negligence of a lower owner in the management of his dam, evidence that he notified the lower owner of the injury at the beginning thereof is admissible on the question of such owner's negligence in not remedying the defects complained of. Michigan Paper Co. v. Kalamazoo Valley Elec. Co. [Mich.] 12 Det. Leg. N. 342, 104 N. W. 387. In an action against a lower owner for damages caused by his negligence in permitting an ice jam to form above his dam setting the water back on an upper owner's wheel, where the lower owner claimed that like jams had occurred prior to the construction of his dam, it is competent for the upper owner to show that a break in his dam caused him to shut down at the time of the prior jam on the question of whether the conditions were the same. Id. Where a mill owner is obliged to shut down because of negligence of a lower owner in the care of his dam, he is entitled to recover damages though it does not appear that he was required to cancel any orders because of the shut down. Id.

66. To so hold would prevent the improvement of inland navigation and paralyze the industries dependent on water power. Inhabitants of Durham v. Lisbon Falls Fibre Co. [Me.] 61 A. 177.

67. Such damage is damnum absque injuria. Inhabitants of Durham v. Lisbon Falls Fibre Co. [Me.] 61 A. 177. See, also, Brooks v. Cedar Brook, etc., R. Co., 82 Me. 17, 19 A. 87, 7 L. R. A. 460.

Note: The state is invested with the right of enacting such laws as give authority to improve the navigation and thus promote the interests of the public even though it may be an inconvenience to the private individual. Angell on the Law of Waters; Hollister v. Union Co., 9 Conn. 436. The present case applies this principle to the improvement of inland rivers. But the courts are not unanimous in so considering the matter. It has been held that one injured by the erection of a dam without his consent may recover notwithstanding the dam was duly authorized by law. Cain v. Hays, 4 Dana [Ky.] 338.

hibited.[68] Where waters in a natural stream are stored in a reservoir, the reciprocal rights of owners of mill privileges below the dam are the same as if the stream was left in its natural condition.[69] Where mill privileges at a dam are possessed in common but are subject to priorities between the owners, each must exercise his rights reasonably in view of the rights of the others.[70] The owner of a senior right is not required to reconstruct his mill so that a smaller amount of water will supply his requirements.[71] Several owners of junior power rights who acting independently, unlawfully appropriate the water to the injury of the owner of a senior right, are joint tort feasors.[72] Where the power of eminent domain is exercised in the construction of a dam, the measure of damages for land injured is the difference in its value just before and after the construction of the dam.[73] Due process is not denied an upper owner by giving lower owners the right to flowage where compensation is secured.[74] The right to maintain a dam carries the necessary right to flowage.[75] If such right is exceeded, the owner of the dam is liable[76] in damages for injuries caused[77] in an action properly

Also the privilege of erecting a dam over a watercourse is against common right and to uphold the grant of such a privilege the record must affirmatively show a compliance with all requisites of the statute. Martin v. Rushton, 42 Ala. 298.—See 15 Yale L. J. 150.

68. Under Va. Code 1904, p. 856, § 1353, the report of the commissioners on a petition for the establishment of a mill dam that the neighborhood will be annoyed by the stagnation of water is conclusive against the right of the applicant to establish the dam. Bishop v. Bagley [Va.] 51 S. E. 205. Where commissioners appointed under Va. Code 1904, p. 753, to investigate and report on an application for the establishment of a mill dam designated one of their number to write out the report and sign their names to it, their subsequent acknowledgment of the report in open court was a sufficient compliance with the law. Id.

69. Berry v. Hutchins [N. H.] 61 A. 550.

70. The owner of a subordinate privilege may not make unreasonable drafts nor can the owner of a preferential privilege have the water unreasonably stored for his benefit. Berry v. Hutchins [N. H.] 61 A. 550. Rights of each judicially determined. Id. A decree determining the relative priorities of power rights in the waters of a stream is evidence of such rights in a subsequent suit in which they are questioned but is not res judicata of a question of damages not adjudicated in such suit. Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283.

71. Where the owner of a senior power right was entitled to an eight-foot head, the owner of a junior right cannot defend against an unlawful appropriation by him of the water on the ground that the former might have reconstructed his mill so that a four-foot head would have supplied him. Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283.

72. If it is impossible to determine the injury caused by each, each is liable for the entire injury. Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283. Where it appeared that the owner of a senior power right was obliged to close his mill, the rental value of which was $25 to $30 per day for 167 days because of the unlawful appropriation of the water by the owner of a junior right, $4,000 was held not excessive damages. Id.

73. Brown v. Weaver Power Co. [N. C.] 52 S. E. 954. The fact that a railroad company owned an easement of way over the land should be considered in estimating the damages. Id.

74. Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 50 Law. Ed. —. Compensation in such case is sufficiently secured by a provision for recovery of damages sustained within three years with annual compensation for future injury, or in lieu thereof a gross sum to be computed by a jury and for the bringing of a new complaint in case of dissatisfaction. Especially since no easement or title is acquired in the upper lands and injunctive relief may be had if other remedies fail. Id.

75. Evidence insufficient to show as a matter of law that a flowage right had been interfered with in the construction of a highway. Schneider v. Brown Tp. [Mich.] 12 Det. Leg. N. 632, 105 N. W. 13. In an action under the Mills Act, Pub. St. 1882, c. 190, to have the extent of a right of flowage determined where there was nothing relative to the extent of the right in deeds under which it was claimed, the question is one of fact to be ascertained from evidence of the extent to which the right had been exercised. Forbes v. Byfield Woolen Co. [Mass.] 77 N. E. 51.

76. In an action for illegal flowage it is proper for a civil engineer to testify that water would percolate through the soil and that he dug a hole in the land and found that water stood in it on a level with the water in the river. Flint v. Union Water Power Co. [N. H.] 62 A. 788. The fact that he was allowed to testify implies a finding that he was qualified. Id. In an action for damages for flowage it was held proper during the view to call the attention of the jury to the height of water in a newly dug hole as compared with the height in the stream as bearing on the extent of the flowage. Flint v. Union Water Power Co. [N. H.] 62 A. 788.

77. In an action for illegal flowage, evidence that the plaintiff relied on the lowlands which could be cropped without fertilizing to keep up his upland and that his

brought.[78] The owner of a dam is liable for injuries caused by the breaking of the bank of his millrace if it is the result of negligence.[79]

§ 14. *Irrigation and water supply; common-law rights and the doctrine of appropriation.*[80] *A. Rights in the water.*[81] *Common-law rule.*[82]—An upper riparian owner who obstructs the flow of water to which a lower owner is entitled need not remove the obstruction to his own injury if he adopts other means of conveying the water to the person entitled to it.[83] Patentees whose patents were issued prior to the act of Congress providing for the appropriation of water do not acquire common-law rights as against prior appropriators.[84]

An appropriation[85] is an intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use.[86] As applied to settlers on public lands it is a grant by the general government of the right to its use from a non-navigable stream to the injury of all public land above the point of diversion which may be within or beyond the boundaries of the settler's claim.[87]

damages was a certain amount during the past six years was held admissible. Flint v. Union Water Power Co. [N. H.] 62 A. 788. Where it is sought to recover damages to property by the erection of a dam, the rights of the parties are to be determined by the ordinary stage of water and not by "low and minimum waters." Remington & Son Pulp & Paper Co. v. Watertown Water Com'rs, 96 N. Y. S. 975.

78. A complaint for flowage not inserted in a writ of attachment, may, under the statute be presented to the court in term time or be filed in the office of the clerk during vacation, but before it can be served there must be an order of service by the court in term time or by some justice thereof in vacation. The delivery of a copy of the complaint attested by the clerk of court by the sheriff to the respondent without such an order is not a sufficient service. Wyman v. Piscataquis Woolen Co. [Me.] 62 A. 655.

79. Under the testimony of this case, it was not error to refuse a request for a charge to the jury to the effect that, if they found the defendant was guilty of negligence, but that the plaintiff under all the facts and circumstances of the case, which were known or should have been known to him, did not exercise reasonable and ordinary care to prevent the breaking of the bank of his millrace and overflow of adjacent property, then negligence on his part contributed proximately to the injury, and he cannot recover from the defendant the damages in which he has been compelled to respond on account of their joint negligence. Northern Ohio R. Co. v. Akron Canal & Hydraulic Co., 7 Ohio C. C. (N. S.) 69. So also, it was not error to refuse a request to charge the jury to the effect that, if the plaintiff knew of acts on the part of the defendant which affected the safety of the mill-race, and himself took no steps to avoid the injury which resulted, he was guilty of such contributory negligence as would prevent his recovering from the defendant the damages assessed against him in another action. Id. And the defendant could ask for no stronger instruction than was given to the effect that, if the breaking of the plaintiff's millrace bank was caused by the joint or concurrent negligence of the plaintiff in not caring for the water and regulating its flow in the race and of the defendant in constructing a cofferdam therein, which improperly impeded and obstructed the flow of the water, then the verdict should be for the defendant. Id.

80, 81. See 4 C. L. 1839.

82. See 4 C. L. 1839 and ante §§ 3-6.

83. Harrington v. Demairs [Or.] 82 P. 14.

84. That patents to riparian lands were issued prior to the adoption of Act Cong. July 26, 1866 (14 Stat. 251) providing for the appropriation of water for irrigation purposes, did not confer on the patentees common-law rights as against prior appropriators. Twaddle v. Winters [Nev.] 85 P. 280.

85. See 4 C. L. 1840.

86. See Long on Irrigation, § 36. One who used water from a main irrigation ditch through a lateral since 1888 at which time the right to do so was decreed by a void probate decree, such use constituted an original appropriation from that date. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. Evidence sufficient to show one entitled to a certain amount of water by prior appropriation. Twaddle v. Winters [Nev.] 85 P. 280. On an issue of prior appropriation an admission by one party that his right to use the water was a subsequent one held sufficient to show a prior appropriation by the other when corroborated by a use for several years by such other of sufficient water to irrigate his land. Morgan v. Shaw [Or.] 83 P. 534. Where a water right was owned separate from land which was sold on execution, the fact that water was furnished to the purchaser for three years and that the execution defendant did not apply for water during such period did not operate to forfeit his interest and amount to a reappropriation by the purchaser. Cooper v. Shannon [Colo.] 85 P. 175.

87. Morgan v. Shaw [Or.] 83 P. 534. Where the common-law doctrine of riparian rights as modified by the rule of prior appropriation is recognized, when a prior settler on public land appropriates the water of a stream running through it, the stream is not flowing through public lands at the time of the diversion of the water thereof by a subsequent settler. Morgan v. Shaw [Or.] 83 P. 534.

The passive acceptance of water which flows into one's canal which was acquiesced in by the original owner when he did not wish to use it for his own purposes is not an appropriation.[88]

Who may appropriate.[89]—Water may be appropriated by any citizen who can devote it to a beneficial use.[90] An appropriator need not be the fee owner of the land upon which the water is used.[91]

What may be appropriated.[92]—Water subject to a prior appropriation cannot be appropriated until the right is abandoned.[93] Water of a spring which is the source of a creek the water of which is appropriated is not subject to appropriation though the means by which the water is conveyed from the spring to the creek are subterranean[94] or because the water in the spring is partly seepage from irrigated lands.[95] Percolating water cannot be appropriated under statutes relating to streams.[96]

Method of appropriating.[97]—One desiring to appropriate waters of a stream may do so by actually diverting the water and applying it to a beneficial use,[98] or he may pursue the statutory method by posting and recording his notice and prosecuting his work within the time and in the manner prescribed by statute,[99] and in the latter case his right will relate back to the date of posting his notice.[1] In such case the appropriation is initiated by posting the notice and an inchoate right thereby arises which may ripen into a complete appropriation upon final delivery of the water at the place of intended use.[2]

88. This is so whether the water comes from natural springs or from an artificial basin into which the owner collected percolating water. Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940.

89. See 4 C. L. 1839.

90. Under a rule that the use of waters in the streams of the state is a public one, every citizen has a right to divert and use it so long as he does not infringe upon the rights of one who has acquired a right by prior appropriation. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334.

91. A lessee may appropriate. Sayre v. Johnson [Mont.] 81 P. 389. A lessee or occupant of land may become the owner of a water right. Cooper v. Shannon [Colo.] 85 P. 175 (obiter).

92. See 4 C. L. 1840, n 59.

93. Where one purchased water rights in a spring and the ditches and flumes used for its conveyance, water which continues to flow through such artificial courses is not subject to appropriation unless abandoned. Gill v. Malan [Utah] 82 P. 471. Evidence that the waters of a creek sank at a point above a cienega and ran or seeped under the ground through the cienega and emerged into a creek again below not as percolating water but as an underground stream, sufficiently shows that the water in the cienega is part of the water of the stream. Cave v. Tyler, 147 Cal. 454, 82 P. 64.

94. Later appropriators cannot lawfully acquire rights to springs which constitute the source of supply of a creek simply because the means by which the water is conveyed by the springs to the creek are subterranean and not well defined. Clark v. Ashley [Colo.] 82 P. 588.

95. Later appropriators can acquire no rights to water in a spring which is the source of a creek the waters of which are appropriated because the volume of water in the spring was increased by seepage from irrigated lands above. Clark v. Ashley [Colo.] 82 P. 588. Laws 1899, p. 215, relative to rights in irrigation ditches has no retroactive effect. Clark v. Ashley [Colo.] 82 P. 588.

96. Percolating water oozing through the soil in an undefined channel is not within Ariz. Rev. Stat. 1887, par. 3199, § 1, par. 3201, § 3, providing for the appropriation of waters of streams. Howard v. Perrin, 200 U. S. 71, 50 Law. Ed. —.

97. See 4 C. L. 1840, n. 61 et seq.

98. Sand Point Water & Light Co. v. Panhandle Development Co. [Idaho] 83 P. 347.

99. Sand Point Water & Light Co. v. Panhandle Development Co. [Idaho] 83 P. 347. Evidence held to show that work was prosecuted with reasonable diligence. Id.

1. Sand Point Water & Light Co. v. Panhandle Development Co. [Idaho] 83 P. 347. One who posts and records notice and in all respects pursues the successive steps prescribed by Laws 1899, p. 380, is entitled to have his right relate back to the date of posting notice. Sand Point Water & Light Co. v. Panhandle Development Co. [Idaho] 83 P. 347. One who posted and recorded notice of intention to appropriate water under Sess. Laws 1899, p. 380, and within 60 days thereafter commenced work on his diverting system and continued such work with reasonable diligence, is entitled to have his right date from posting notice and it is superior to a subsequent appropriator claiming either under the statutory method or actual diversion. Id. The right of a settler on public land to use the waters of a stream running through it relates back to the initiation of its use, and not to the time his ditches were

Right to supply from water companies.—Under the rule that water appropriated for sale, rental, or distribution is a public trust, a user is entitled to a continued supply[3] upon compliance with the conditions upon which water is supplied.[4] A pledgee of water stock who is compelled to pay an assessment thereon may recover from the pledgor but cannot enforce payment by withholding water from the pledgor's land though the stock stands in his name on the corporation books.[5] But the pledgor cannot enhance the damages recoverable by further refusal to pay or passively allowing time to elapse in the unwarranted expectation that the pledgee would change his mind.[6]

Limit, measure, and extent of right.[7]—An appropriator can acquire a right to no more water than he can beneficially use,[8] but if he uses it without waste and in accordance with his appropriation he cannot be compelled to use it in a different manner.[9] He may use it on any lands owned by him,[10] but when his necessary use ceases he must restore the water to the stream whereupon it may be used by any person who needs it.[11] One interested in the water of a stream may enjoin the diversion of it to nonriparian lands if such diversion injuriously affects him[12] but not otherwise.[13] One injured by a wrongful appropriation may enjoin it though prior rights exhaust the supply of water.[14] The share of one who appropriates a specified amount does not depend on the average amount of water in the stream,[15] but he cannot increase the amount to which he is entitled by using an

completed, providing he prosecuted the work of digging them with reasonable diligence. Morgan v. Shaw [Or.] 83 P. 534.

2. Sand Point Water & Light Co. v. Panhandle Development Co. [Idaho] 83 P. 347.

3. Under the rule that water appropriated for sale, rental or distribution is a public trust and the rule that one within the flow of a ditch who has been furnished by an irrigation corporation with water is entitled to a continued use on the same terms as purchasers of land from the corporation, such corporations owe a public duty to furnish water irrespective of contract. Cozzens v. North Fork Ditch Co. [Cal. App.] 84 P. 342. Mills' Ann. St. § 570, requiring ditch companies to furnish water whenever they have a supply unsold, and § 2297, requiring them to sell to persons who have already purchased, have no application to a proceeding between individuals to which a ditch company is not a party to determine whether a sheriff's deed passed title to a water right. Cooper v. Shannon [Colo.] 85 P. 175.

4. Where a land owner's shares of stock in an irrigation company are sold under a void sale for nonpayment of assessments such owner is not entitled to enjoin the corporation from withholding water from his land until he pays subsequent assessments of which he received no notice. Curtin v. Arroyo Ditch & Water Co., 147 Cal. 337, 81 P. 982.

5. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073. Where a pledgor of water stock sues the pledgee for damages for directing the company to withhold water from the pledgor for refusal to pay an assessment, evidence as to what became of the water shut off except so far as it was delivered to the pledgee, is irrelevant. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

6. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

7. See 4 C. L. 1841.

8. Where it appears that an appropriator does not beneficially use the amount of water diverted into his canal because of wastage and seepage caused by defective maintenance and that there is enough water in the stream if economically used to supply him and other higher riparian owners, he may not enjoin the use of water by such owners. Court House Rock Irr. Co. v. Willard [Neb.] 106 N. W. 463.

Beneficial use. Use of water for **irrigating grazing lands** is a beneficial use within Civil Code § 1881, limiting appropriations to such purposes. Sayre v. Johnson [Mont.] 81 P. 389.

9. Nephi Irr. Co. v. Vickers [Utah] 81 P. 144. He is not required to furrow his land before irrigating it. Nephi Irr. Co. v. Vickers [Utah] 81 P. 144.

10. Southside Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107.

11. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334.

12. Santa Rosa Irr. Co. v. Pecos River Irr. Co. [Tex. Civ. App.] 92 S. W. 1014.

13. Gen. Laws 1888-1889, p. 100, c. 88, and Gen. & Sp. Laws 1893, p. 47, c. 44, providing for appropriation without compensation of water of a stream for irrigation of nonriparian lands are valid except so far as vested rights are concerned; hence are effectual against riparian lands owned by the state at the time of the appropriation and nonriparian lands whose owner has no interest in the water. Santa Rosa Irr. Co. v. Pecos River Irr. Co. [Tex. Civ. App.] 92 S. W. 1014.

14. He does not receive water until later than he otherwise would. Clark v. Ashley [Colo.] 82 P. 588.

15. One who appropriates a specified amount is entitled to it if such amount is

amount in excess of his appropriation.[16] The owner of a senior water right in an irrigation ditch cannot enlarge his use of the water to the injury of a junior right holder.[17] Appropriators of the water of a stream may join as parties plaintiff to have the rights of each determined.[18] Under the law of California where the common-law rule of riparian rights prevails, and the law of Nevada where the rule of prior appropriation prevails; whether or not the lands are riparian, riparian owners in California and appropriators lower down the stream in Nev da are equally protected in the rights given them by the laws of their respective states, both subject to the limitation that only a reasonable quantity for the use to which it is devoted shall be taken,[19] and when the volume is insufficient for the needs of all, each is to have a reasonable apportionment[20] to be determined by allowing each to appropriate the entire volume for a certain portion of the time.[21]

Title to a water right cannot be divested by mere noncompliance with the by-laws of an irrigation company.[22]

A water right may be acquired by adverse user or prescription.[23]—The rule that adverse possession of land vests title in the adverse holder applies to the prescriptive right to divert water.[24] In order to acquire a prescriptive right, the use must be open, notorious, exclusive, and adverse under a claim of right for the statutory period,[25] and to the detriment of the owner of the superior right.[26] A

ever in the stream during the irrigation season, and his ditch will carry it. Sayre v. Johnson [Mont.] 81 P. 389.

16. Sayre v. Johnson [Mont.] 81 P. 389.

17. Eaton v. Larimer & Weld Irr. Co. [Colo.] 83 P. 627. Where water is diverted from an irrigation ditch under a contract with the irrigation company limiting the rights of stockholders to the irrigation of specified lands, until such limitation is waived, a senior right holder cannot enlarge his use to the injury of a junior right holder. In a suit to restrain such use by a senior right holder, the complaint did not show that such limitation had been waived. Eaton v. Larimer & Weld Irr. Co. [Colo.] 83 P. 627.

18. Settlers along a stream who have acquired the right to use water therefrom as a common source, each owning his land and water right in his individual capacity have such a common interest in having the rights of respective appropriators determined, as to join as parties plaintiff under Rev. St. 1887, § 4101. Frost v. Alturas Water Co. [Idaho] 81 P. 996.

19. Anderson v. Bassman, 140 F. 14. One who has acquired a right to water of a stream flowing through public lands by prior appropriation in accordance with the laws of Congress, is protected in such rights by Rev. St. U. S. §§ 2339, 2340, as against subsequent appropriators, though the latter withdraw the water within the limits of a different state and the jurisdiction of the Federal courts to determine rights of the parties is not affected by the fact that their lands and the points of diversion are in different states. Anderson v. Bassman, 140 F. 14.

Note: One who has by priority of possession acquired rights under the law of a state to water of a stream flowing through public lands is protected in them against subsequent grantees of the Federal government even though the lands granted lie in a different state. U. S. Rev. St. §§ 2339, 2340. Howell v. Johnson, 89 F. 556. By the law of Nevada an owner by prior appropriation gains a paramount right to the quantity of water which he has appropriated to a beneficial use. Reno Smelting, etc., Works v. Stevenson, 20 Nev. 269; Bliss v. Grayson, 24 Nev. 422, 456. The California decisions adopt the common-law rule of reasonable user, that a riparian owner can take at any time for irrigation only his proportionate share determined by the number of other riparian owners applying the water to an equally beneficial use. Lux v. Hoggin, 69 Cal. 255; Union Mill Co. v. Dangberg, 81 F. 73. The present decision holds that the rights under the laws of the two states are identical and enforces the California rule. Such an interpretation of the Nevada law is questionable and finds explanation only in the desire to curtail the doctrine of appropriation so as to permit irrigation of the greatest possible area.—See 19 Harv. L. R. 475.

20, 21. Anderson v. Bassman, 140 F. 14.

22. Though by-laws of an irrigation company required written application for the water each year and that one entitled to purchase water should forfeit his right if he failed to pay for two years, such by-laws could not without affirmative action by the company of which the owner was notified, operate to vest title to the right in the company or another to whom the same amount of water was delivered. Cooper v. Shannon [Colo.] 85 P. 175. Whether a tenant at will is entitled to hold a water right is immaterial in a suit to quiet title to such right, since the fact that he was not would not vest such right in the owner of the land. Cooper v. Shannon [Colo.] 85 P. 175.

23. See 4 C. L. 1842.

24. Wutchumna Water Co. v. Ragle [Cal.] 84 P. 162.

25. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. Evidence insufficient to show

color of title based upon a government patent and mesne conveyances without paper title conveying water rights cannot prevail against a decree awarding such rights to another under a prior appropriation.[27] Ordinarily a lower riparian owner may not prescribe against an upper owner.[28] A tenant cannot acquire water rights by adverse use as against his landlord.[29]

The right of appropriation can be lost only by abandonment or adverse possession.[30]—The right acquired by appropriation may be lost by abandonment.[31] To constitute abandonment, there must be a concurrence of act and intent.[32] The mere intention to abandon if not coupled with the yielding up of possession or a cessation of user is not sufficient.[33] Nor will nonuser alone without an intention to abandon amount to an abandonment.[34] The question of abandonment is one of fact.[35] An abandonment of an old or dilapidated flume is not an abandonment of the right to divert or use water conveyed through such flume.[36] Failure of the owner of a water right to pay the irrigation company the stipulated price for carrying his water does not entitle another to contract with the company for carrying such water and thereby become the owner of the water right.[37]

that one had acquired the right by adverse possession to use all the waters of a stream. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. A right by prescription cannot be sustained where it appears that within the statutory period another had used the water under a judicial decree awarding it to him. Clark v. Ashley [Colo.] 82 P. 588. An upper appropriator who for the statutory period diverts a certain amount of water, thereby depriving a lower appropriator of the full amount appropriated by him acquires a right to such amount by prescription. Hubbs & Miner Ditch Co. v. Pioneer Water Co. [Cal.] 83 P. 253. Evidence held to show that one had acquired by prior appropriation and adverse user a right to a certain amount of water. Minnie Maud Reservoir & Irrigation Co. v. Grames [Utah] 81 P. 893. Opinion criticized in 6 Columbia L. R. 127.

Note: There can be no adverse user so long as the waters of the stream are sufficient for all. Anoheim Water Co. v. Semitropic Water Co., 64 Cal. 185. The burden is on one setting up title by adverse use to prove that his use was adverse to the prior appropriator, continuous and uninterrupted for the statutory period. Smith v. North Canyon Water Co., 16 Utah, 194; American Co. v. Bradford, 27 Cal. 361; Gould on Waters, § 332. A permissive use or an infringement of plaintiff's rights for the statutory period is not sufficient if there has been any acknowledgment of his rights or any act of ownership, however slight on his part. Ledu v. Jim Yet Wa, 67 Cal. 346.

26. A use does not become adverse until some superior right is infringed and the owner of it suffers deprivation. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. No adverse user can be initiated until the owners of the water right are deprived of the benefit of its use in such substantial manner as to notify them that their rights are being invaded. Clark v. Ashley [Colo.] 82 P. 588. So long as the use by one did not deprive the other of the quantity he was entitled to, or when such quantity was interfered with the latter forcibly prevented its use, the statute does not run. Anderson v. Bassman, 140 F. 14. No prescriptive right or right by adverse use can be established by the use of waters only when the original owner does not use them for his own purposes. Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940.

27. Clark v. Ashley [Colo.] 82 P. 588.

28. Where a stream flowed through certain sections and all the water therefrom was diverted at a point in one section by a canal which flowed through the other and the water used to irrigate lower lands, the canal to all purposes became the stream and the use of the water on the lower lands is not hostile. Santa Rosa Irr. Co. v. Pecos River Irr. Co. [Tex. Civ. App.] 92 S. W. 1014.

29. Gill v. Malan [Utah] 82 P. 471.

30. See 4 C. L. 1843.

31. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512. A priority in a right of way for an irrigation ditch and an appropriation of water for irrigation is lost by abandonment of the land irrigated and is not restored by the subsequent acquisition of other land not contemplated at the time of the appropriation. Rutherford v. Lucerne Canal & Power Co., 12 Wyo. 299, 75 P. 445.

32. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512. Certain declarations by a former owner of a priority to the effect that he then claimed to be the owner held admissible on the question of abandonment, to show that by disuser he did not intend to abandon. Central Trust Co. v. Culver [Colo.] 83 P. 1064.

33. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512.

34. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512. Where one permits water to flow through an artificial watercourse owned by him but makes no use of it, no abandonment is shown so as to render the water subject to appropriation. Gill v. Malan [Utah] 82 P. 471.

35. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512. Whether the right to divert water was abandoned by substituting an iron pipe for part of a flume, evidence as to the intent with which the substitution was made is competent. Id.

(§ 14) *B. Rights in ditches and canals.*[38]—Under the law of New Mexico the right of a landowner to have an original community ditch run through or near his land upon its ancient course is a property right secured by the mutual understanding by which the ditch was constructed upon such course.[39] By entering into an enterprise to construct a community ditch a landowner does not vest, in the majority interested in such ditch, power to change at will, to his damage, the ancient course of such ditch.[40] But such change could be effected only by his consent,[41] except where the maintenance of the ditch on its ancient course becomes a practical impossibility.[42] The mere fact that the expense or inconvenience connected with the use of an old ditch is greater than would be present upon some other course will not justify a change of the course.[43] The difficulties must amount to a practical prohibition of its further maintenance.[44] The exception does not rest upon the power to detract from property rights upon the ground of necessity but upon the ground that under the original understanding all parties are presumed to have consented in advance to a modification if it should become essential to the continued existence of the community enterprise.[45] The Colorado statute providing that ditches constructed for utilizing waste, seepage or spring waters shall be governed by the rules applicable to ditches constructed for the purpose of utilizing water from running streams, if valid, applies only to such waters before they reach a natural stream.[46] One claiming water under such statute has the burden of proving that the water claimed is of the character designated, and the quantity thereof.[47]

One entitled to a supply of water from a community ditch may restrain interference with his rights.[48] One owner along a community ditch may not turn the water on his land in such manner as to flood the land of another.[49] The usual rules of construction apply to contracts between users of water from a ditch,[50] and

36. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512.

37. Cooper v. Shannon [Colo.] 85 P. 175.

38. See special article Ditch and Canal Rights, 3 C. L. 1112.

39. Candelaria v. Vallejos [N. M.] 81 P. 589.

40. Candelaria v. Vallejos [N. M.] 81 P. 589. Where a community ditch is established and its original course adhered to for several years, a majority of the landowners interested in such ditch may not, as against the will of the minority, abandon the ancient main ditch and establish a new one at a different place. Id.

41. Candelaria v. Vallejos [N. M.] 81 P. 589.

42. While under the original community plan and under the corporation which succeeded it no power was vested in a majority to change at will the main ditch to the injury of the minority except by their consent, where the maintenance of the ditch becomes a practical impossibility, this rule does not obtain and the ditch may be changed to an extent sufficient to avoid such insuperable obstacle. Candelaria v. Vallejos [N. M.] 81 P. 589. Comp. Laws 1897, § 5, providing that the course of ditches or acequias already established shall not be disturbed does not render unalterable the course of community ditches where their continued existence upon the old course has become practically impossible. Id.

43. Candelaria v. Vallejos [N. M.] 81 P. 589.

44. Facts insufficient to warrant a change. Candelaria v. Vallejos [N. M.] 81 P. 589.

45. Candelaria v. Vallejos [N. M.] 81 P. 589.

46. After such waters reach a natural stream in whatever manner they inure to the benefit of appropriators from such stream. La Jara Creamery & Live Stock Ass'n v. Hansen [Colo.] 83 P. 644.

47. Evidence insufficient to establish a right to water under this statute. La Jara Creamery & Live Stock Ass'n v. Hansen [Colo.] 83 P. 644. Where the evidence is conflicting as to whether the water claimed is of the character designated or comes from a subterranean channel and there is no estimate of the quantity of seepage water, it cannot be claimed under this statute. Id.

48. A complaint in an action to restrain the maintenance of a check gate in a community irrigation ditch or lateral, alleging ownership or possession, use and cultivation of lands, under the ditch or lateral; that such ditch or lateral is their only means of supply; that the maintenance of the check gate conflicts with legal rights, is not demurrable. Wilson v. Eagleson, 10 Idaho, 755, 81 P. 434.

49. He cannot escape liability on the ground that the person damaged should have trespassed on his land and closed the opening in the ditch. Cody v. Lowry [Tex. Civ. App.] 91 S. W. 1109.

their rights and liabilities rest in the terms of such contract.[51] Under contracts by which the owner of a canal and users of water therefrom agreed to pay the expense of maintaining it in proportion to the water used by each, and reserving to the owner the right to develop waters in addition to the amount provided for to be conveyed by the canal to other lands, users from the original canal are not bound to bear any of the expense of maintaining an extension,[52] and the fact that such users paid a portion of such expense does not estop them from denying liability under the contracts nor constitute a conclusive construction of such contracts.[53]

Ditch rights of way.[54]—A statute providing for the condemnation of rights of way must afford due process to the landowner.[55] A private person invoking the power of eminent domain under a statute giving him such power must bring himself within its purview.[56] Where a right of way for a ditch is condemned, only such estate or interest is acquired as is reasonably necessary to accomplish the purpose in view,[57] and the owner of land across which a ditch right of way has been condemned has a right to a right of way across the condemned strip for the conveyance of water, subject to the superior easement in the land condemned.[58]

One who has acquired an easement for a ditch over public land has no right as against one who subsequently acquires title to change the line of such ditch.[59] Where it is determined that by reason of a right to maintain one ditch across the land of another there is no right to maintain another on a different line, the construction of the second ditch may be enjoined[60] regardless of the question of damage.[61]

Liability for damages caused in the use and construction of ditches.[62]—In

50. Contracts by which an owner of a canal and other persons using water therefrom agreed to pay the expense of maintaining the canal in proportion to the amount of water used by each construed and held to apply to the canal as originally constructed and not to a subsequent extension. Riverside Heights Water Co. v. Riverside Trust Co. [Cal.] 83 P. 1003.

51. Where the owner of a canal and persons using water from it agreed to pay for maintaining it in proportion to the amount of water used by each, where the owner constructed an extension, he and the persons served by it were held liable for such proportion of expense of maintaining the original canal as the water flowing through the extension bore to the entire amount flowing through the canal. Riverside Heights Water Co. v. Riverside Trust Co. [Cal.] 83 P. 1003. Rights under a contract by which ditch owners agreed upon the construction of another ditch, determined. Southside Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107.

52, 53. Riverside Heights Water Co. v. Riverside Trust Co. [Cal.] 83 P. 1003.

54. See 4 C. L. 1843.

55. A statute providing for the condemnation of land for irrigation ditches but making no provision for notice to the land owner of the time and place when he may be heard as to the amount of his damages, though notified of the appointment of appraisers is a deprivation of property without due process. Sterritt v. Young [Wyo.] 82 P. 946.

56. Mills' Ann. St. § 2257, does not authorize a private individual in a representative capacity and as trustee for the public to condemn private lands to make an artificial cnannel for a natural stream which has been obstructed which will enable him in his individual capacity to utilize an individual right. Ortiz v. Hansen [Colo.] 83 P. 964.

57. Under Rev. St. 1868, p. 130, c. 18, § 48, relative to condemnation of land for a ditch and providing for the taking of a fee, where a petition asks only for a right of way, an easement and not a fee is acquired. Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940.

58. Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940.

59. Vestal v. Young, 147 Cal. 721, 82 P. 383. An easement for an irrigation ditch acquired over public land under Rev. St. U. S. §§ 2339, 2340, gives no right after the land has become the property of a private owner to construct another ditch across such land on a different line. Vestal v. Young, 147 Cal. 715, 82 P. 381. In a suit to restrain one from changing the location of a ditch he had an easement to maintain, it was not error to refuse evidence as to the construction of the ditch on the land of another. Vestal v. Young, 147 Cal. 721, 82 P. 383.

60. Vestal v. Young, 147 Cal. 715, 82 P. 381.

61. It is immaterial that the land taken for the second ditch had no appreciable value. Vestal v. Young, 147 Cal. 721, 82 P. 383. The continuance of an action that obstructs a landowner in the free use and enjoyment of his land which if continued will ripen into an easement may be enjoined regardless of other damage. Vestal v. Young, 147 Cal. 715, 82 P. 381.

62. See 4 C. L. 1857.

Wyoming it is provided by statute that owners of a reservoir are liable for injuries resulting from leakage or overflow.[63] One who constructs a large basin in connection with an irrigation canal, and to guard his dams and works erected spills from the basin onto the land of an adjacent owner, is liable at common law for injuries thereby caused.[64] An owner who consents to the flooding of his land waives his right to recover damages until such consent is withdrawn.[65] Owners of an irrigation canal are not liable as insurers for injuries resulting to adjacent property by seepage and overflow, but only for negligence.[66] The owner of an artificial ditch through which water runs for irrigating and domestic purposes must not negligently allow water running therein to break through or escape onto the lands of another.[67] Where it is sought to recover damages caused by obstruction of a stream into which an irrigation system naturally drained and it does not appear that the owner of the drainage system was acting otherwise than wholly within his rights, it is presumed that he had title and right to maintain the drainage system.[68]

(§ 14) *C. Remedies and procedure.*[69]—Under the rule that water appropriated for sale, rental, or distribution is a public trust, mandamus lies to compel a company to furnish a user with water,[70] but mandamus will not lie to enforce a private contract for the supply of water though the person contracting to furnish it is a common carrier.[71] The question whether one has more water than is required to satisfy his needs[72] or whether a change in the point of diversion may be made[73] must be litigated in an appropriate proceeding and not by suit to quiet

63. An extension basin constructed in a plan for irrigation though referred to as a lake or reservoir constitutes a reservoir within Rev. St. 1899, § 974, making owners of reservoirs liable for damage resulting from leakage or overflow or floods caused by breaking of banks. Howell v. Big Horn Basin Colonization Co. [Wyo.] 81 P. 785. In an action for damages caused to land by water seeping through the banks of a canal, evidence held to show that the canal owing to its loose manner of construction was the source of the seepage and that leakage from a reservoir did not materially contribute to the injury. Id.

64. Regardless of a statute making owners of reservoirs liable for damages resulting from leakage or overflow. Howell v. Big Horn Basin Colonization Co. [Wyo.] 81 P. 785.

65. Where water comes onto one's land from spills in an irrigation reservoir and the landowner authorizes such flow instead of acquiescing in the reservoir owner's offer to construct a ditch to divert the water away. Howell v. Big Horn Basin Colonization Co. [Wyo.] 81 P. 785. Rev. St. 1899, §§ 901, 932, 933, 3069, requiring ditch owners to maintain embankments, etc., so as to prevent damages by water to adjacent premises, though not specifically requiring care in the construction of the bottom of the canal, do not exempt the owner from liability for negligence in that regard. Id.

66. Howell v. Big Horn Basin Colonization Co. [Wyo.] 81 P. 785. Evidence held to show negligence where a canal was constructed along a side hill and no care was taken to make the bank and bottom of the canal solid where built over a fill except to endeavor to tramp the earth with teams. Id.

67. Where a ditch overflowed because of failure to repair a defective headgate, the owner was held negligent and liable to one whose ripening fruit crop was injured. Bacon v. Kearney Vineyard Syndicate [Cal. App.] 82 P. 84. Where negligence in the care of an irrigation ditch was conclusively established, admission of immaterial evidence was held not to have prejudiced the ditch owner. Id.

68. Thomas v. Bolsa Land Co. [Cal. App.] 82 P. 207. Parties to a contract for cropping land each of whom has an interest in the growing crop are properly joined as plaintiffs in an action for destruction of the crop by an interference with the drainage system. Id.

69. See 4 C. L. 1840.

70. Cozzens v. North Fork Ditch Co. [Cal. App.] 84 P. 342. A petition for mandamus in such case, to compel the furnishing of the contract amount, must show that the company has water in sufficient quantity to supply the petitioner and to supply all other takers in compliance with the duty imposed by law on the company. Id.

71. One who has a private contract for a supply of water has an adequate remedy at law if the other party fails to comply with it and mandamus will not lie though it be conceded that the other party is a common carrier of water. State v. Washington Irr. Co. [Wash.] 83 P. 308.

72. Where a purchaser of land at sheriff's sale claims a water right as being appurtenant whether he has more water than is actually needed to irrigate the land cannot be litigated in a suit to quiet title to such water right. Cooper v. Shannon [Colo.] 85 P. 175.

73. In an action to quiet title to a water right, the court may not adjudge that a

title to water rights. Where water rights were purchased under deeds providing that when rights equal to the capacity of the system were sold, the title to the system should pass to the grantees of the rights, a cause of action to cancel a sale of rights in excess of the capacity of the system accrued at the time such deeds were made.[74]

In an action to procure a peremptory writ of mandate against a water master commanding him to distribute water from a different creek from that named in the decree under which he is a making distribution, all persons to be affected should be made parties.[75] Subsequent appropriators are necessary parties to a suit to enjoin the water commissioner from diverting water in a stream from the use of prior appropriators to their use.[76]

A decree awarding a water right should comply with the findings upon which it is made.[77] It should specifically define the respective rights and obligations of the parties to it[78] and protect all superior rights.[79] A water master, in allotting rights, is not required to look beyond a decree clear upon its face.[80] Under a contract providing that users of water from a canal should bear the expense of maintaining it in proportion to the amount of water used, a judgment fixing their rights on an extension is not erroneous because it based the rights on the amount flowing instead of the amount used.[81] Such judgment is not indefinite because failing to fix the place of measurement.[82] In Wyoming the order of a district court appointing a person to distribute the water of a partnership ditch is final.[83]

change in the point of diversion may be made. This can be done only in an appropriate proceeding under Sess. Laws 1899, p. 235, c. 105. Fluke v. Ford [Colo.] 84 P. 469.

74. Such action is barred in five years under 2 Mills' Ann. St. § 2912. Patterson v. Ft. Lyon Canal Co. [Colo.] 84 P. 807. Where the holders of such excess rights were in possession they were not trespassers so as to suspend the operation of the statute. Id.

75. Stethem v. Skinner [Idaho] 82 P. 451.

76. Squires v. Livesay [Colo.] 85 P. 181.

77. On a finding that one is the unqualified owner of a right to divert a certain amount of water from an irrigation ditch where there is no finding that such right had been exercised under any conditions a decree that the right should be exercised subject to conditions is unauthorized. Wutchumna Water Co. v. Ragle [Cal.] 84 P. 162.

78. A decree enjoining interference with a water right where it appeared that there was an implied right that the party restrained should have the use of the water during certain periods should specifically award such right to him. Twaddle v. Winters [Nev.] 85 P. 280. Where one testified that the irrigation closed October first and that he sometimes used water a little later, a perpetual injunction against interference with his rights should limit his right to use the water to October fifteenth. Id. Decree adjudging one entitled to all the water flowing from certain springs held sufficiently definite though not awarding it according to measurement where the amount of the flow was impossible of ascertainment. Elmer v. McCune [Utah] 81 P. 159. A decree awarding a prior appropriator 120 inches of water and a subsequent nonriparian appropriator 80 inches, the amount necessary for their beneficial use and that the surplus be allowed to flow down the stream, was as favorable to the later appropriator as he was entitled to. Seaward v. Duncan [Or.] 84 P. 1043.

79. A decree perpetually enjoining an irrigation company from preventing the flow of water through its canals upon the land of an appropriator of water subject to the payment of the company's reasonable charges and regulations should also make the service subject to prior rights of prior appropriators served by the company. Salt River Valley Canal Co. v. Nelssen [Ariz.] 85 P. 117.

80. Where a water decree is clear upon its face as to the stream from which diversion and distribution shall be made, a water master will not be required to look beyond the decree and examine the findings for directions. Stethem v. Skinner [Idaho] 82 P. 451.

81. Riverside Heights Water Co. v. Riverside Trust Co. [Cal.] 83 P. 1003.

82. The amount received at its head for use below is meant. Riverside Heights Water Co. v. Riverside Trust Co. [Cal.] 83 P. 1003.

83. Under Rev. St. 1899, § 910, amended by Sess. Laws 1903, p. 122, c. 93, providing that the decision of the district court on a hearing for the appointment of a person to distribute the waters of a partnership ditch shall be final, no appeal lies from the order of appointment of the district court. Mau v. Stoner [Wyo.] 83 P. 218. The provision of such act "The decision shall be final unless appeal is taken to the district court" means final in the sense that there shall be no further appeal. Id. This statute modifies the general provision of Rev. St. 1899, § 4249, as to appeal, so far as this particular proceeding is concerned. Id.

§ 15. *Irrigation districts and irrigation and power companies.*[84]—Irrigation districts are organized under statutes providing for their creation,[85] and in their organization all statutory provisions must be complied with.[86] Towns and villages may be included within their boundaries.[87] Persons owning land under the system of canals of an irrigation district become by operation of law members of it.[88] It may institute such judicial proceedings as are authorized by law,[89] and in such proceedings all questions necessary to the accomplishment of the end in view may be inquired into.[90] The validity of proceedings to establish an irrigation district is not subject to collateral attack.[91] Bonds must be issued in conformity to the law by which they are authorized.[92] A landowner who has waived his right to the use of water from a district is not liable on bonds issued by it.[93] Holders of bonds issued by an irrigation district are entitled to have money collected for the payment of interest thereon so applied[94] if available,[95] and mandamus will issue to compel the treasurer of an irrigation district to pay interest coupons on bonds issued by the district;[96] but the personal liability of the treasurer for interest on interest coupons attached to bonds issued by the district for failure to pay them on presentation, cannot be enforced by mandamus.[97] Interest is not collectible

84. See 4 C. L. 1845.

85. The title to Laws 1903, p. 150, relating to irrigation districts and providing for the organization thereof, etc., does not embrace more than one subject in violation of Const. art. 3, § 16. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499. Laws 1903, p. 15, relative to irrigation districts and the organization thereof is not in any particular violative of the state constitution. Id.

86. The Nampa & Meridian Irrigation district is a legally organized and existing district under the provisions of Laws 1903, p. 150. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499.

87. When lots and lands within a town or village will be benefited by irrigation under the system proposed for a district organized under Laws 1903, p. 150, such towns and villages may be included in the district. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499.

88. Where an irrigation district is formed under Laws 1884, p. 127, c. 49, the parties owning land under the system of canals become by operation of law members of the district, and title to the property of the corporation remained in them and cannot be transferred by the district or its trustees. Thompson v. McFarland [Utah] 82 P. 478.

89. Under the provisions of Laws 1903, p. 150, an irrigation district may institute proceedings in which the proceedings of the board and of the district providing for the issue and sale of bonds may be judicially examined, approved, and confirmed, whether or not any of said bonds have been sold. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499. Notice of the hearing for confirmation may be by posting and publication as provided in the act. Id.

90. Under Laws 1903, p. 150, in a proceeding to determine the validity of bonds issued by an irrigation district, the court may examine into all proceedings looking to the organization of such district and all other proceedings which may affect the validity of the bonds. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499. Provisions of Laws 1903, p. 150, relative to the issuance of bonds by an irrigation district held to have been complied with. Id. In such proceeding the court must disregard any error, irregularity, or omission, which does not affect the substantial rights of the parties. Id.

91. In a proceeding to recover land sold for nonpayment of irrigation taxes. Purdin v. Washington Nat. Bldg. Loan & Investment Ass'n [Wash.] 83 P. 723.

92. Bonds antedated and not signed by the person who was secretary at the time of their issue, as required by law, held void. Wright v. East Riverside Irr. Dist. [C. C. A.] 138 F. 313.

93. While Laws 1903, p. 150, contemplate a general plan for the purchase and construction of canals and works, a landowner within such district may, with consent of the district, waive his right to water from such district if no one will be injured, and in such case no part of the bond issue can be apportioned to his land. Nampa & M. Irr. Dist. v. Brose [Idaho] 83 P. 499.

94. Where bonds and interest coupons of an irrigation district had not been refunded, the right of the holder of the bonds to have money collected for the payment of interest coupons so applied could not be defeated by a transfer of the fund to other purposes. Hewel v. Hogin [Cal. App.] 84 P. 1002.

95. Where on a hearing of a petition to compel the treasurer of an irrigation district to pay interest coupons on bonds, it was contended that there was no evidence to show that there were available funds in the hands of the treasurer, evidence that an assessment had been levied for the purpose of paying interest on such bonds and others held to show that money in the hands of the treasurer was subject to the payment of such coupons. Hewel v. Hogin [Cal. App.] 84 P. 1002. It was not error to exclude parol evidence that the purpose of the assessment was different from that declared in the resolution adopted when the assessment was levied. Id.

96. It is a duty resulting from an office, trust, or station. Hewel v. Hogin [Cal. App.] 84 P. 1002.

on overdue interest coupons on bonds of an irrigation district, where no provision for such interest is made.[98] A decree by which members of a quasi public irrigation district are restrained from interfering with the ditches of the district becomes functus officio on dissolution of the district and the members are remitted to their original rights as landowners.[99] Irrigation companies are quasi public corporations with no powers except those granted expressly or by implication.[1]

§ 16. *Water companies and water supply districts.*[2]—A water company is not divested of its property rights in water because it transmits it to its customers through pipes belonging to another person.[3]

Water franchises.[4]—A contract by which a municipality grants a franchise to construct and operate a waterworks system is within its incidental powers.[5] It is an exercise of its business or proprietory powers and not a delegation of a governmental function.[6] It may place a reasonable time limit on the exercise of the rights conferred.[7] The invalidity of a portion of the contract which attempts to make such franchise exclusive does not preclude the enforcement of the valid portions.[8] A grant of a waterworks franchise is not to be construed by implication to divest the city of power to construct a system of its own,[9] and a construction by the city of a competing plant is not a taking of the company's property without due process nor a taking without just compensation,[10] nor is it an impairment of the obligation of its contract,[11] though the grant is exclusive as against any other person or corporation.[12] But if a wholly exclusive franchise is granted, the municipal-

97, 98. Hewel v. Hogin [Cal. App.] 84 P. 1002.

99. Thompson v. McFarland [Utah] 82 P. 478. A decree in favor of an irrigation district formed as authorized by Laws 1884, p 127, c. 49, restraining interference with the ditch belonging to such company does not survive the dissolution of the company under Rev. St. 1898, § 2920, declaring that an action does not abate by the death of a party if the cause survive. Id. Where damage if any in taking water from a ditch in violation of an injunction resulted to all landowners entitled to water therefrom, a proceeding for contempt for violation of such injunction cannot be maintained by the district in the absence of proof of actual or special damage. Id.

1. The Act of February 28, 1895 (Comp. Laws 1897, §§ 8-14), construed and held, that ditch corporations thereby created were involuntary quasi public corporations with no powers except those expressly conferred or impliedly necessary to the performance of statutory duties. Candelaria v. Vallejos [N. M.] 81 P. 589. This act does not confer upon the officers or majority interested in the ditches thereby incorporated power to change the ancient course against the consent of owners who would be injuriously affected. Id. An irrigation company may contract with an engineer to furnish plans for the construction of a proposed canal and from which the board of directors of the district may estimate the cost thereof and the amount of bonds to be voted therefor. Such work is preliminary to the work of construction and is not to be paid for out of the construction fund. Willow Springs Irr. Dist. v. Wilson [Neb.] 104 N. W. 165.

2. See 4 C. L. 1847.

3. New Jersey Suburban Water Co. v. Harrison [N. J. Err. & App.] 62 A. 767.

4. See 4 C. L. 1847.

5, 6. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

7. In the absence of a statutory limitation, the time fixed by the contract of a city granting a water works franchise for 30 years is not unreasonable. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

8. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

9. Knoxville Water Co. v. Knoxville, 200 U. S. 32, 50 Law. Ed. —. A contract by which a city grants a water company a franchise to lay its mains in the streets and furnish water to the inhabitants which the company agrees to do but containing no provision that the grant shall be exclusive or that the city will not construct a plant of its own does not by implication bind the city not to do so. Tillamook Water Co. v. Tillamook City, 139 F. 405. Contract granting a franchise and obligating the company to construct a system and maintain it for a term of years and binding the city to take and pay for water during such term. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67. There cannot be an implied contract in a grant of a franchise by a municipality that it will do nothing to impair or destroy the validity thereof or that it will not enter into competition with the grantee, such a restraint can be imposed only by express provision. Phoenix Water Co. v. City Council of City of Phoenix [Ariz.] 84 P. 1095.

10. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67.

11. Where the city does not contract not to construct a plant of its own, legislation authorizing it to do so does not impair the obligations of its contract. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67.

ity is precluded from constructing a competing system.[13] A provision in an ordinance granting a waterworks franchise that if the company failed to furnish pure water, the city might after a certain period after giving notice, be relieved from paying hydrant rentals, is valid as a provision for liquidated damages[14] and is not a provision for a forfeiture.[15] The acceptance of impure water by the city is not a waiver of such provision, where no preliminary test is provided for and the impurities were not known of at the time of the acceptance.[16] A water company may be ousted of its charter for furnishing impure and contaminated water.[17] Where a water company holds its franchise under a contract providing that the city might acquire its plant upon payment of its value determined by appraisers the company is not entitled to a temporary injunction in a suit by it to perpetually enjoin the city from taking steps to acquire the plant.[18]

Condemnation of property by water companies.[19]—Water companies are frequently authorized to exercise the power of eminent domain.[20] The ascertainment of the measure of compensation is regulated by statute.[21] A water company may lay its pipes in a public street without paying compensation to any one.[22]

Water boards and districts[23] have such powers as are conferred upon them by statute.[24]

12. The obligation of a contract by which a city gives a waterworks company an exclusive franchise as against any other person or corporation is not impaired where the city erects a system of its own under subsequent legislative authority. Knoxville Water Co. v. Knoxville, 200 U. S. 32, 50 Law. Ed. —. A bill by which a waterworks company seeks to enjoin the construction of a system by the city on the ground that it has a contract with the city by which it has exclusive privileges, the obligation of which will be impaired, raises a question for the Federal court regardless of the citizenship of the parties. Id.

13. An ordinance by which a city grants a franchise to construct and maintain waterworks, expressly stating that when accepted it should constitute a contract and measure the rights and liabilities of the parties, obligating the grantee to construct a plant according to plans furnished by the city and maintain the same for a specified period with a capacity sufficient to supply all the needs of the city and binding the city to take and pay for water during the term with an election to purchase at stated times upon specified conditions is when acted upon a contract and precludes the city from constructing a competing plant during the period it is in force. Farmers' Loan & Trust Co. v. Meridian, 139 F. 673.

14. Illinois Trust & Savings Bank v. Pontiac, 112 Ill. App. 545. Service of such notice upon the superintendent of the waterworks is service upon the company. Id. A claim that such notice had not been served is frivolous where it appears that it was received and acted upon. Id.

15, 16. Illinois Trust & Savings Bank v. Pontiac, 112 Ill. App. 545.

17. A water company maintained a line connected with a mill pond which received the sewage of a town, and at times of low water or when there was a fire, water from the pond was pumped into the mains of the company, and mixing with other water rendered it unfit for use. Held that a judgment of ouster was proper although the company had an agreement with the borough to maintain a connection with the mill pond. Commonwealth v. Potter County Water Co., 212 Pa. 463, 61 A. 1099.

18. The prosecution of the arbitration to determine the value of the plant does not create such a cloud on the company's title as entitles it to a temporary injunction. Eau Claire Water Co. v. Eau Claire [Wis.] 106 N. W. 679. Nor is it ground for such injunction that the company would be compelled to participate in the proceedings and devote time to ascertaining the fair valuation. Id. Nor that it would be compelled to incur expense in such proceedings. Id. Before proceeding with the arbitration, the city should give bond to indemnify the company for expenses incurred. Id.

19. See 4 C. L. 1848.

20. Burns' Ann. St. 1901, § 4833, giving authority to hydraulic companies to condemn land in order to erect dams is not void on the ground that the use is not a public one. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057.

21. Under Pub. St. Supp. 1895, c. 498, §§ 14, 15, giving one a right to trial by jury of the question of damages where his prope ty is taken for metropolitan water supply, the report of the commissioners finding that he was not entitled to damages could be disregarded in passing on his motion for a jury trial. Carville v. Commonwealth [Mass.] 75 N. E. 639. Where one whose property is taken for metropolitan water supply is dissatisfied with the determination of damages made by a commission he may claim a trial by jury of such question under the provisions of Pub. St. Supp. 1895, c. 488, §§ 14, 15. Id. The acceptance by the court of the commissioner's report finding that he was not entitled to damages did not, in the absence of waiver, preclude the allowance of a motion for a jury trial, where the motion was filed not later than the succeeding term after the report was filed. Id.

Public ownership.[25]—Municipal corporations may be authorized by law to acquire ownership of waterworks.[26]

Contracts for public supply.[27]—The question whether the construction and operation by a city of a system of waterworks determined upon in a lawful manner would be an economical and wise enterprise is not a matter for judicial inquiry.[28] Municipalities may contract with each other for water supply only when so authorized by statute.[29] Such a contract must be in writing,[30] and contain all the elements essential to the validity of any other contract.[31] Such a contract is not modified by an extension of the limits of the municipality supplied[32] and a wrongful use of water by such municipality may be enjoined.[33] In making a contract for the supply of water, the municipal authorities are charged with knowledge of the natural laws of water but not with a technical knowledge.[34] A city authorized to incur indebtedness for waterworks owned by it and to exchange water rights for rights acquired and owned by it may acquire water rights on condition subsequent.[35] A contract by a municipality to pay for water used by it may be implied.[36] A contract for a longer period than the city is authorized to contract for is binding until rescinded.[37] A company authorized to furnish water to the town and

22. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

23. See 4 C. L. 1848. Whatever may have been the legal status of the board of waterworks trustees, it was legislated out of office by Section 222 of the Municipal Code (1536-978 R. S.). Hutchinson v. Lima, 6 Ohio C. C. (N. S.) 529.

24. Laws 1883, p. 666, c. 490, § 2, authorizes commissioners to construct new aqueduct from some point on Croton river or lake to some point in New York city, with dam or reservoirs to retain the water. Held, they had power to build a reservoir out of the direct line between the beginning and end of the aqueduct. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

25. See 4 C. L. 1849.

26. Acts 1899, p. 568, c. 254, authorizing certain towns and cities to purchase waterworks subject to an existing mortgage which they were not authorized to assume is prospective only. Eddy Valve Co. v. Crown Point [Ind.] 76 N. E. 536.

27. See 4 C. L. 1850.

28. Phoenix Water Co. v. City Council of City of Phoenix [Ariz.] 84 P. 1095.

29. In P. L. 1897, p. 232, and P. L. 1897, p. 323, § 76, amended by P. L. 1899, p 159, the phrases, "any adjoining municipal corporation" and "any adjoining municipality" refer only to municipalities whose corporate territories are contiguous and municipalities not so situated are not authorized to contract with each other for a supply of water. Rehill v. Borough of East Newark [N. J. Law] 63 A. 81.

30. A contract between two municipalities for a supply of water for public and private use is within the statute of frauds. Jersey City v. Harrison [N. J. Err. & App.] 62 A. 765.

31. Where one town authorized the preparation of a contract for a supply of water from another and the latter accepted before the contract was presented to them it was held that no contract was created because the one prepared did not correspond to the terms of the resolution authorizing it and such resolution did not constitute a proposal that the latter could accept. Jersey City v. Harrison [N. J. Err. & App.] 62 A. 765.

32. Where one municipal corporation, as authorized by statute, contracted to furnish water to another throughout its district, the contract is not modified so as to require it to furnish water outside such limits by a statute extending the limits of the latter but containing no reference to the contract. Turners Falls Fire Dist. v. Millers Falls Water Supply Dist. [Mass.] 75 N. E. 630. It is doubtful whether the legislature may constitutionally increase the contractual obligation of a municipal corporation which has agreed to furnish water to another similar corporation by extending the boundaries of the latter into another town and providing that the contract should apply to the additional territory. Id.

33. Where one municipal corporation is unlawfully using water supplied it by another and it is impossible to determine how much is being so used or to interrupt such wrongful use without breaking the contract, relief may be granted by injunction. Turners Falls Fire Dist. v. Millers Falls Water Supply Dist. [Mass.] 75 N. E. 630.

34. They are charged with notice that where the top of the dam is but little higher than the hydrants in the higher part of town, the pressure there would be very weak but not with knowledge that the use of water as contemplated by the contract would reduce the level in the reservoir so that none would flow into such higher hydrants. Town of Boonton v. Boonton Water Co. [N. J. Ch.] 61 A. 390.

35. A contract by which a city exchanged water from its canal for other water suitable for domestic use upon condition that if it failed to furnish the exchange water the other party could use the rights he parted with during the period of default unless such default extended beyond a certain period, in which case it was optional with the other party to terminate the contract, is valid. State v. Salt Lake City [Utah] 81 P. 273.

36. Where a municipality receives and

its inhabitants for certain purposes can furnish it for no other to the detriment of those specified.[38] Covenants in a contract by which a water company agreed to furnish water to a town and its inhabitants are continuing in their nature and run with the waterworks.[39] Substantial compliance by the water company with the terms of the contract is all that is required.[40] It is a reasonable regulation to require a water company to obtain permission from the town council before laying its mains in the streets.[41] Where the order in which work shall be done is not prescribed in a contract granting a waterworks franchise, it is not a prerequisite to a suit by the company to compel the designation of streets upon which pipes shall be laid and the places where hydrants shall be placed that they show performance of the contract on their part by the purchase of machinery or otherwise.[42]

Breach and enforcement of public contract.[43]—Individual takers may enforce performance of a contract by which they are to be supplied.[44]

§ 17. *Water service and rates.*[45]—Water companies are quasi public in nature and are bound to supply water[46] at reasonable rates[47] and on equal terms to all who apply.[48] Especially is this so where the use of all water appropriated for sale, rental, or distribution, is declared to be a public one.[49] A city which is the equitable owner of a water plant may restrain actions against it for water furnished by the legal owner until equities are adjudicated.[50]

uses water though not under an express contract, an obligation to pay for it will be implied. New Jersey Suburban Water Co. v. Harrison [N. J. Err. & App.] 62 A. 490.

37. A contract by a city for a water supply which by its terms is to remain in force for a period longer than the city is authorized to contract for, is binding so long as no action is taken to rescind it. McGonigale v. Defiance, 140 F. 621.

38. A contract by which a company is to furnish water to a town for domestic purposes, extinguishment of fires, and for public and domestic purposes of the inhabitants, does not authorize it to furnish manufacturing and other commercial purposes to the detriment of the inhabitants of the town. Town of Boonton v. Boonton Water Co. [N. J. Eq.] 61 A. 390. A schedule of rates attached to a contract containing an item "special rates, including hydrants in hotel yards, stables, business and factory use," relates to the use for domestic purposes and does not authorize a sale of water to furnish power, to the detriment of the inhabitants. Id.

39. Are binding on a company to which the works are transferred, though not purporting to bind the original company's assigns. Town of Boonton v. Boonton Water Co. [N. J. Eq.] 61 A. 390. The assignee of a water contract takes it subject to a limitation therein as to the rates for which water is to be furnished. Robbins v. Bangor Ry. & Electric Co. [Me.] 62 A. 136.

40. It is no defense to an action by a water company to recover from a city under its contract that conditions of the contract were not complied with in all respects, where there was a general compliance, and the city has accepted benefits under the contract for several years without giving notice of an intention to rescind or forfeit for noncompliance with such conditions. McGonigale v. Defiance, 140 F. 621.

41. Beaver Valley Water Co. v. Conway Borough [Pa.] 62 A. 844. Under a rule requiring a water company to obtain a permit from the town council before laying its mains in the streets, application must be made to the council and not to the burgess. Id.

42. City of Gadsden v. Mitchell [Ala.] 40 So. 557. Where it is impossible for a waterworks company which is granted a franchise by a contract which gives the city power to designate the streets on which pipes shall be laid, to proceed without such designation, mandatory injunction is the proper remedy upon the city's refusal. Id.

43. See 4 C. L. 1851.

44. While a town is not the agent of its citizens and authorized to make contracts binding on them yet if as a consideration or as a mere inducement for the making of a hydrant contract, it agrees to supply the inhabitants at specified rates, the contractor is bound to fulfill the contract as to individual takers. Robbins v. Bangor Ry. & Electric Co. [Me.] 62 A. 136.

45. See 4 C. L. 1852.

46. Borough of Washington v. Washington Water Co. [N. J. Eq.] 62 A. 390; Long Branch Commission v. Tintern Manor Water Co. [N. J. Eq.] 62 A. 474.

Mandamus lies by an individual to compel a water company which is a public service corporation to supply him with water. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

47. See post, Water rates.

48. A city which owns its waterworks cannot arbitrarily select its patrons. City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803.

49. A beneficiary of such use may compel a water company to supply him with water. Petition for mandamus held to show that a water company was in control of a public use and that petitioner was a beneficiary of such use. Mahoney v. American Land & Water Co. [Cal. App.] 83 P. 267. If there was any defect in the petition it was held cured

Service contracts.[51]—A contract must be based on a consideration[52] and there must be a duty imposed on the company to supply him with water.[53]

Injuries from deficient supply or equipment, and negligence.[54]—A water company required by its contract with the municipality to furnish a certain pressure is liable for injuries by fire which result from failure to maintain such pressure.[55] Where sued for such loss it is competent for it to show what pressure it usually maintained,[56] also what pressure was necessary to throw water to the height required by its contract,[57] also that persons using faucets just before the fire had the usual pressure.[58] But a company under contract to furnish a city a sufficient supply of water for extinguishing fires is not liable to a citizen whose property is destroyed because of failure to furnish such supply.[59] A city which is granted a right of way over land and has legislative authority to lay and maintain a pipe line must use ordinary care in selecting the material for and in constructing the line, in the use of the same and in operating its pumps,[60] and is liable for negligence in carrying out the work.[61] One who seeks to recover from a borough for injuries sustained because of a leaky water main must show that the borough maintained the waterworks, that injury resulted from faulty or negligent construction of the pipe, or negligence in not preparing the same after notice or failure to use due diligence under the circumstances.[62] Punitive damages may be recovered under some circumstances.[63]

by the answer of the water company. Id. A petition to compel a water company to furnish water praying that the company be commanded to furnish him water so long as its regulations were complied with authorized a decree in conformity with the petition. Id.

50. A city entered into a contract for the construction of a water plant, water to be furnished at specified rates, and the city to have an option to purchase the plant within a year after completion. The contractor failed to complete the plant within the time specified and the city purchased water from a third person at a specified price. Later the third person turned over his supply to the contractor who commenced to furnish water from the incomplete system at rates specified in the contract. The city exercised its option. Held that since the city on exercising its option became the equitable owner but could not resist an action to recover for water furnished at the rates specified, such action would be restrained until the equitable questions were settled subject to the right of the contractor to interest on the purchase price less amounts paid him for water. Jersey City v. Jersey City Water Supply Co. [N. J. Eq.] 61 A. 714.

51. See 4 C. L. 1852.

52. A complaint by a private consumer against a water company for failure to comply with its contract to furnish him water must show that such contract was based on a consideration and was binding on the company at the time of the alleged breach. Spencer v. Bessemer Water Works Co. [Ala.] 39 So. 91.

53. A complaint by a private consumer against a water company for failure to furnish him water must show a contract between the water company and the municipality imposing a duty on the company to furnish such water. Spencer v. Bessemer Waterworks Co. [Ala.] 39 So. 91.

54. See 4 C. L. 1852.

55. Shelbyville Water & Light Co. v. McDade [Ky.] 92 S. W. 568.

56. Shelbyville Water & Light Co. v. McDade [Ky.] 92 S. W. 568. It was also competent to show that the employe running the works was ordered not to apply the direct pressure at the waterworks until he received orders from the manager in the city and that on this occasion the pressure was applied when ordered. Id.

57, 58. Shelbyville Water & Light Co. v. McDade [Ky.] 92 S. W. 568.

59. Peck v. Sterling Water Co., 118 Ill. App. 533. There being no legal obligation on the city to afford him fire protection, he is not privy to the contract by substitution. Blunk v. Dennison Water Supply Co., 71 Ohio St. 250, 73 N. E. 210. **But see** Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 Law. Ed. —, holding to the contrary.

60. City of Paris v. Tucker [Tex. Civ. App.] 93 S. W. 233. One injured by reason of a defective pipe has the burden to show negligence by the city. Id. Complaint for damages for injuries caused by a defective pipe held to warrant the recovery of damages prior to filing an amendment and for two years prior to filing the original complaint. Id.

61. Lockwood v. Dover [N. H.] 61 A. 32.

62. Morgan v. Duquesne Borough, 29 Pa. Super. Ct. 100.

63. In an action against a water company for injuries caused by a leaky reservoir which leaked from the date of its construction, and the conduct of the company showed that it considered it cheaper to pay damages for injuries caused than to make repairs, punitive damages may be recovered. Greeney v. Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

Rules and regulations of service; pipes, meters and consumption.[64]—A water company which is a public service corporation may adopt reasonable rules and regulations for the conduct of its business to which individual water takers must conform.[65] It may require payment for a reasonable time in advance.[66]

Water rates.[67]—Rates must be uniform, reasonable, and just,[68] and are to be fixed by a competent tribunal if no agreement can be reached.[69] The reasonableness of rates is determined by the right of the company to derive a fair income based upon the fair value of its plant at the time it is being used, taking into account the cost of maintenance or depreciation and current operating expenses and the right of the public to have no more exacted than the services in themselves are worth.[70] Water takers may be classified on reasonable grounds but not arbitrarily.[71] A charge to small customers is not necessarily unreasonable because in excess of what a large customer would have to pay for the same amount of water.[72] The quantity of water used and not the cost of the individual service are the principal elements for consideration in fixing the charges as between individual water takers or classes of takers.[73] A difference in price cannot be made according to the use made by the customer nor is a discrimination proper based on the value of the service to the customer.[74] Rates fixed by the contract under which the company acquires the right to lay its mains cannot be subsequently altered by the company,[75] but rates may be revised if no contract prevents.[76] Within these limitations it may change from an annual or flat rate to a meter rate.[77] In case of unnecessary waste a meter may be applied and reasonable meter rates charged.[78] Municipalities have power to prescribe reasonable rates,[79] and to correct extortionate ones.[80] Where maximum rates are fixed by the ordinance accepted by the company, rates not in excess of such maximum are binding on consumers[81] unless altered by the municipality under statutory authority.[82]

64. See 4 C. L. 1853.

65, 66. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

67. See 4 C. L. 1854.

68. City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803. Ordinance fixing maximum rates held to be unreasonable and therefore void. City of Chicago v. Rogers Park Water Co., 116 Ill. App. 200. A fiat directing the issuance of an injunction against a waterworks company construed and held not one against discrimination in rates. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011.

69. A water company which is the sole source of supply for a town is a quasi public company and is bound to supply water at reasonable rates to be fixed by a competent tribunal if no agreement can be reached. Borough of Washington v. Washington Water Co. [N. J. Eq.] 62 A. 390.

70. Rule for the establishment of rates applied and rates fixed. Long Branch Commission v. Tintern Manor Water Co. [N. J. Eq.] 62 A. 474.

71. Boarding houses and private families. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136. A house occupied as a place for keeping boarders though while prosecuting the business the occupant and his family live in the house, is not a "dwelling house containing a family" within a contract fixing the rate for such dwelling houses, but is a boarding house. Id.

72, 73, 74. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

75. Collection of rates in excess of those fixed will be enjoined at the instance of an individual user. Pond v. New Rochelle Water Co. [N. Y.] 76 N. E. 211.

76. A water company may revise or change its schedule of rates if no contract prevents, providing the new rates are reasonable and do not discriminate. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136. Under a statute which permits a municipality to make contracts for water supply for not to exceed 10 years the municipality may revise its contract as to rates at the end of every decade. Long Branch Commission v. Tintern Manor Water Co. [N. J. Eq.] 62 A. 474.

77, 78. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

79. A municipality has power where a water company is organized to supply certain municipalities under P. L. 1876 p. 318 (Rev. 1877 p. 1365), requiring consent in writing of the municipalities to be supplied, to impose terms as to rates to be charged for both public and private consumption. Long Branch Commission v. Tintern Manor Water Co. [N. J. Eq.] 62 A. 474.

80. Where a water company furnishes water to a municipality for public and private consumption the municipality, independent of statute, has power to protect inhabitants from extortionate rates. Long Branch Com-

If water rates due a city are not a lien on the property delinquent as against a subsequent purchaser,[83] one who purchases property after water rates have become delinquent and under protest and to prevent the water being shut off pays the amount claimed may recover it with interest in an action at law.[84] In Philadelphia there is no personal liability on owners of real estate for water rent.[85]

Remedy for nonpayment of charges.[86]—A water company may cut off water from a customer who neglects or refuses to pay reasonable rates,[87] but has no right to cut off water until arrearages due from a former owner are paid in the absence of a statute expressly authorizing it or making such arrearages a lien on the land;[88] but under a rule that for nonpayment of water rents the water may be shut off from the premises until arrears shall be fully paid, a grantee of premises cannot compel a city which owns the waterworks to furnish him with water until arrearages due by his grantor are paid.[89] A statute which renders the owner of premises liable for water furnished by a municipality to a tenant is not void as a taking of property without due process or making one person liable for the debts of another.[90] Where mandamus to compel a water company to refrain from refusing to furnish water would be ineffective as against lessees of the property and the deprivation of such supply involve the comfortable use of the property, relief by injunction may be granted.[91]

The shutting off of the public water supply for refusal of a borough to pay an unreasonable charge for past service may be enjoined,[92] and where a water company which is the sole source of supply threatens to shut off the water for refusal of the town to pay for past service which it asserts is reasonable and which the town asserts is unreasonable, a preliminary injunction will be granted pending the settlement of the question[93] upon compliance with proper conditions.[94]

mission v. Tintern Manor Water Co. [N. J. Eq.] 62 A. 474.

81. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011.

82. A constitutional provision giving the legislature full power to correct abuses and prevent unjust discrimination and excessive charges for public services gives the legislature power to delegate such authority to cities which may thereunder alter the rates in an ordinance under which the water company operates, such constitutional provision being self executing. Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 Law. Ed. —.

83. City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803.

84. City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803. A city which is compelled to repay water rates wrongfully exacted is liable for interest thereon. Id.

85. Theobald v. Sylvester, 27 Pa. Super. Ct. 362.

86. See 2 C. L. 2067.

87. Robbins v. Bangor R. & Elec. Co. [Me.] 62 A. 136.

88. McDowell v. Avon-by-the-Sea Land & Improvement Co. [N. J. Eq.] 63 A. 13.

Rules of a private water company that if rents remain unpaid for 10 days, water will be shut off and not turned on until such arrearages and the cost of turning on and off have been paid are unreasonable as applied to a grantee of the premises after the rents have accrued. Id. The mere fact that a suit is brought by an owner to restrain a water company from shutting off the water supply is not constructive notice to a grantee of the premises of the company's claim for arrears in water rents. Id.

A rule by a city owning its own waterworks that if rates which are charged against the premises are not paid water shall be shut off and not turned on until such delinquent charges are paid is as to a subsequent tenant who tenders payment for water to be furnished, unreasonable. Burke v. City of Water Valley [Miss.] 40 So. 820.

89. If such a rule is void, the amount paid to secure water may be recovered. Howe v. Orange [N. J. Eq.] 62 A. 777.

90. The obligation assumed by the owner who connects his premises with the city system is to maintain and pay for the same according to the prescribed rules and regulations. City of East Grand Forks v. Luck [Minn.] 107 N. W. 393.

91. McDowell v. Avon-by-the-Sea Land & Improvement Co. [N. J. Eq.] 63 A. 13.

92. Borough of Washington v. Washington Water Co. [N. J. Eq.] 62 A. 390. Equity may restrain the threatened cutting off of the water supply of a town for its refusal to pay an alleged unreasonable charge for past service and determine the reasonableness of the charge but cannot provide for recovery by the company of a reasonable charge. Id.

93. Borough of Washington v. Washington Water Co. [N. J. Eq.] 62 A. 390.

94. Upon payment into court of the sum prescribed by the court. Borough of Washington v. Washington Water Co. [N. J. Eq.] 62 A. 390.

Rates for irrigation and payment of charges.[95]—There rests upon an irrigation company which is a public service corporation, so long as it uses its franchise, a duty to render to the public, at reasonable rates, the service for which it was created.[96] Whether unreasonable rates are charged is a proper subject for judicial inquiry.[97] What is a reasonable rate is a question of fact to be proved as other facts are proved.[98] In determining what is such reasonable rate, the effect of the rate upon persons to whom service is rendered is as important a factor as is the effect thereof upon the profits of the corporation.[99] Where statutes do not prescribe a maximum lawful rate, if rates are exacted which in the light of all the circumstances are excessive, one who pays such rates under protest or under circumstances which do not amount to an acquiescence in the charge may recover the excess.[1]

§ 18. *Grants, contracts and licenses.*[2]—In the conveyance of water rights the formalities prescribed by law must be observed.[3] A transfer of a right to a certain amount of water of a stream is within the statute of frauds,[4] but may be taken from the operation of such statute by sufficient part performance.[5] A grantee of land becomes vested with a right to use water right appurtenant together with the means of using the same,[6] especially when the deed conveys appurtenances.[7] Where the deed does not specify the particular appurtenant right it may be established by extrinsic evidence.[8] A water right, though appurtenant to the land, is property and may be transferred either with or without the land.[9] Whether a deed of land conveys water rights depends on the intention of the grantor to be gathered from the terms of the deed or if the deed is silent from the presumption arising from circumstances and whether such right is or is not incident to and necessary to the bene-

95. See 4 C. L. 1854.

96, 97. Salt River Valley Canal Co. v. Nelssen [Ariz.] 85 P. 117.

98. Where maximum rate is not fixed by law. Salt River Valley Canal Co. v. Nelssen [Ariz.] 85 P. 117.

99, 1. Salt River Valley Canal Co. v. Nelssen [Ariz.] 85 P. 117.

2. See 4 C. L. 1855.

Note: In construing a grant of a water right the situation and circumstances of the parties may be considered. Strong v. Benedict, 5 Conn. 210. A grant from the state will be construed the same as one between private individuals though the remedy for its breach may not be the same. Com. v. Pennsylvania R. Co., 51 Pa. 351. A grant of a right to draw water as shall best convenience grantee must be exercised in a reasonable manner and so as not, by wantonness or negligence, unnecessarily to injure the grantor. Kaler v. Beaman, 49 Me. 207. A grantee of water power from a canal may not use more than the amount stated on the ground that the canal has a greater capacity than was estimated. Powers v. Perkins [Mich.] 9 Det. Leg. N. 516, 92 N. W. 790. Reference to a prior deed for a description of the right conveyed will limit the extent of the right to that described; it cannot be measured to the use to which the grantor has put it. Perry v. Binney, 103 Mass. 156. See note to Merrifield v. Canal Commissioners, 212 Ill. 456, 67 L. R. A. 375, for an exhaustive review of cases on grants of water rights.

3. The act of the Legislature of 1893 expressly requires that all formalities in the conveyance of real estate be observed in the conveyance of water rights. Cooper v. Shannon [Colo.] 85 P. 175.

4. Churchill v. Russell [Cal.] 82 P. 440.

5. Where one acquired public lands, made valuable improvements thereon on faith of an oral contract to convey him a certain amount of water and used such amount for 14 years. Churchill v. Russell [Cal.] 82 P. 440.

6. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. A deed of land "together with one-half interest in the Clear Fork irrigation ditch and one-half interest in the water belonging to said ditch or that is entitled to run through the same either by decree, appropriation, or ownership," held to pass 20 inches of water owned by the grantor as part of the appropriation of another ditch but which was diverted and used through Clear Fork ditch. Fluke v. Ford [Colo.] 84 P. 469.

7. Where one constructs a ditch in which water continually flows, which is a benefit to the land and subsequently conveys a portion of the land and exacts an additional consideration for the right to use the water of the ditch, the right to use water from the ditch is a quasi easement which passes as a "privilege and appurtenance." Fayter v. North [Utah] 83 P. 742. Parol evidence is admissible to show that "privileges and appurtenances" in a deed, includes a certain water right. Id.

8. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334. Parties who acquire separate parcels of land from the owner of a water right appurtenant to the land become vested with an interest in the water measured by the amount required by each whether or not they hold as co-tenants. Id.

9. Cooper v. Shannon [Colo.] 85 P. 175.

ficial enjoyment of the land.[10] The conveyance of appurtenant water rights to a corporation organized to hold them does not segregate them from the land,[11] even though the stock received in lieu of such rights is personal property for the purpose of transfer.[12] A transfer of utilities for conveying water does not pass water rights.[13] Water rights which are easements connected with the land pass in their entirety.[14] A purchaser of a water right takes free from equities of which he has no notice.[15] A reservation of a power right will be construed according to its terms and the intent of the parties,[16] but a grantor who excepts a certain amount of water is entitled to it.[17]

The usual rules of construction apply to grants of easements of flowage.[18] In determining the nature and extent of an easement of flowage created by express grant, recourse may be had to all the attendant circumstances at the time of making it in connection with the language of the grant.[19] A reservation by a lessor of a right to flood lands reserves the right to flood no greater area than is described in the lease.[20] Where a deed of a moiety of a tract of land included a flowage privilege, the reconveyance of the moiety extinguished the privilege.[21] A prescriptive easement

10. Cooper v. Shannon [Colo.] 85 P. 175. The right to have water delivered at a stipulated price is a valuable right and where a sheriff's deed of land does not purport to convey the water right there must be some intention to so convey found in the circumstances attending the conveyance. Id. Where a sheriff's deed did not purport to convey a water right though he had a right to levy on it but did not, neither his nor the purchaser's intention can control, and where no act of the judgment defendants indicated an intention that such right should pass, it does not. Id.

11. Under Civ. Code § 1131, a subsequent devise of the land carries with it the corporate stock representing the right as an appurtenant. In re Thomas' Estate, 147 Cal. 236, 81 P. 539. Civ. Code § 324, providing that a corporation organized to supply water may provide that water shall be furnished only to stockholders and that stock shall be appurtenant to lands when described in the certificates and pass as an appurtenant with a transfer of the land does not invalidate rights acquired in corporate stock made appurtenant to the land where the corporation was organized prior to the enactment of the statute. Id.

12. In re Thomas' Estate, 147 Cal. 236, 81 P. 539.

13. A conveyance of a ditch and flume with the privilege of running water through them does not constitute a grant of water but merely a right to convey water otherwise acquired through the flume and ditch. Twaddle v. Winters [Nev.] 85 P. 280.

14. Where an owner of land constructed a flume through it and thereafter subdivided it and sold it to several purchasers granting to each the right to use a designated quantity of water from the flume subject to reservations in his favor, the water rights reserved and granted were easements connected with the land and when the grantor parted with all his land he had no water rights though he had not granted the entire volume of the flume. Union Bag & Paper Co. v. Allen Bros. Co., 107 App. Div. 529, 95 N. Y. S. 214.

15. One who has a mere equitable right to a certain quantity of water from a stream cannot assert it as against a purchaser of the entire water right without showing that he took with notice. Churchill v. Russell [Cal.] 82 P. 440.

16. Deed reserving a right to use water power construed and held not to reserve any arbitrary right but one to be exercised with due regard to the exercise of the right conveyed. Berry v. Hutchins [N. H.] 61 A. 550.

17. Under a grant of a mill privilege, excepting the right to use water to run a grist mill by the machinery then in the mill or any that might be installed or substituted, the grantor was entitled to use enough water to run the mill in its condition at the time of conveyance and is not required to substitute wheels which will develop the same power with less water. Hutchins v. Berry [N. H.] 61 A. 554.

18. Conveyance of a right of flowage construed and held to pass only such rights as existed at the date the conveyance was executed. Flint v. Union Water Power Co. [N. H.] 62 A. 788. A grantee of land with the right to flood it held not to have the right to impound water on lands of the grantor for such purpose though the damage resulting would be less than if the land was flooded in the manner allowed by the deed. Nye v. Swift [Mass.] 76 N. E. 652.

19. Towaliga Falls Power Co. v. McElroy [Ga.] 53 S. E. 682. The easement of flowage gives to the owner of the water power the right to flood the land of subsequent purchasers from the grantor of the easement with notice of the grant only to the extent which would be consequential to the erection of a dam of the height in contemplation of the parties at the time of the grant. Id.

20. Stadler v. Missouri River Power Co. [C. C. A.] 139 F. 305.

in the water of a well may be acquired by use under a claim of right for the statutory period.[22] Such easement carries a right to pass to and fro over the well lot to get water.[23] Where a grantee of land with the right to use a designated quantity of water from a flume uses an amount in excess of his grant without objection for over 20 years and in reliance on the right to use such quantity had improved his premises at great expense, he is entitled to continue to use that amount.[24]

Under a lease from the state of the right to use water from a canal reserving to the state the right to direct where and in what manner the water is to be taken, the closing down of the dam in order to make repairs at a time the lessee was not using water is not in hostility to his rights.[25] Failure of the state to collect rents or declare a forfeiture for nonpayment thereof did not render use of the water by the lessee unlawful.[26] The right of forfeiture in such lease is to be strictly construed.[27] The lessee is liable for interest on overdue rents.[28]

A parol license[29] to construct an irrigation ditch becomes irrevocable after the licensee expends large sums of money in the work of construction.[30]

§ 19. *Torts relating to waters.*[31]—One may not negligently permit water confined in reservoirs[32] or otherwise[33] to escape to the premises of another, nor may he impound water on the premises of another[34] or divert its natural flow to his injury.[35] That the owner of land upon which water is directly thrown consents thereto is no defense where the water naturally finds its way to the premises of another and injures them.[36] Where negligence together with an extraordinary flood caused injury, if such injury is primarily the result of the negligence, the negligent person is liable.[37] Where two have contributed to an injury to land from

21. Forbes v. Byfield Woolen Co. [Mass.] 77 N. E. 51.

22, 23. McPherson v. Thompson [Ky.] 89 S. W. 195.

24. Union Bag & Paper Co. v. Allen Bros. Co., 107 App. Div. 529, 95 N. Y. S. 214.

25, 26. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

27. Where a lease from the state of the right to use water from a canal provided that for default in payment of the rent for one year the lease could be forfeited, the state could not for many years after a right of forfeiture accrued permit the use of water as if the right to use it existed and then insist on prior defaults as a forfeiture. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

28. Where a lease from the state of the right to use water from a canal provided that for default for one year in the payment of rent the lease could be forfeited and the state for many years neglected to enforce forfeiture, an assignee of the lease is liable for interest on each payment as it became due only after he commenced to use the water and not from the time of the first default. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

29. See 4 C. L. 1856, n. 50.

30. Stoner v. Zucker [Cal.] 83 P. 808.

31. Negligence in the construction and maintenance of irrigation ditches, see ante, § 14. See 4 C. L. 1857. See, also, ante §§ 3, 9.

32. Where water confined in a reservoir escapes because of the negligent construction or maintenance of such reservoir, adjacent owners whose lands are injured have a right of action for damages. Righter v. Jersey City Water Supply Co. [N. J. Law] 63 A. 6.

33. One who collects large quantities of rain water on his premises, and discharges it on the premises of another is liable for injury caused. Evidence held for the jury where it was alleged that a railroad company collected water in a ditch along its track from where it flowed onto land of another. Toole v. Delaware, L. & W. R. Co., 27 Pa. Super. Ct. 577.

34. Where one impounds water on another's land by constructing dams above and below it, damages may be recovered in an action at law. Nye v. Swift [Mass.] 76 N. E. 652.

35. One who diverts the natural flow of water to the injury of another notwithstanding the land flooded may have been subject to overflow in times of heavy rains prior to such diversion. City of Waukegan v. Weale, 118 Ill. App. 460. Where one constructs a ditch on land title to which is subsequently acquired by his wife and diverts the waters of a stream so that in times of freshet they flow upon land not previously reached by them, and the wife after acquiring title does nothing to remedy the trouble, both husband and wife are liable for injuries caused. Miller v. McGowan, 29 Pa. Super. Ct. 71.

36. Toole v. Delaware, L. & W. R. Co., 27 Pa. Super. Ct. 577.

37. Keats v. Gas Co. of Luzerne County, 29 Pa. Super. Ct. 480. Where injury resulted from flooding alleged to be caused by a dam, it is proper to admit evidence of the character of the flood as to the amount of rainfall and snow, and the temperature at the time of the flood. Id. Where injuries to land by flooding are caused during an extraordinary flood by a dam made by debris accumulated against a gas pipe, the owner of the pipe

the flow of water thereon, the tort of one is no defense to an action against the other.[38] Ordinarily no duty rests upon a municipality through whose boundaries a stream passes to keep it in a safe condition or free from obstructions not of its own causing.[39] This is so though such stream be used in connection with the sewer system under statutory authority.[40] The owner of a building must prevent water from the roof thereof from falling on and injuring adjacent land.[41]

The damages recoverable are limited to such as proximately results from the negligent act complained of.[42] The measure of damages for temporary injuries caused by flooding is the cost of restoring the land to its former condition together with compensation for loss of its use,[43] and for permanent injury it is the depreciation in the value of the land.[44] The measure of damages for the destruction of springs is the permanent depreciation in the value of the land.[45]

§ 20. *Crimes and offenses relating to waters.*[46]—In some states the pollution of streams is, by statute, made a crime.[47]

WAYS, see latest topical index.

WEAPONS.

§ 1. *The crime of carrying or pointing weapons.*[48]—The courts vary on the power of legislatures to regulate or prohibit the carrying of arms.[49] It has, however, been generally held, though not without exception, that the legislatures can regulate the mode of carrying deadly weapons;[50] and certainly, the right to bear arms does

may show that during extraordinary floods before the pipe was placed across the stream plaintiff's land was overflowed. Id.

38. Toole v. Delaware, L. & W. R. Co., 27 Pa. Super. Ct. 577.

39. O'Donnell v. Syracuse [N. Y.] 76 N. E. 738.

40. City held not liable to a property for injuries by flooding because of an extraordinary freshet. O'Donnell v. Syracuse [N. Y.] 76 N. E. 738.

41. He is liable where water from the roof falls against and injures the wall of an adjacent building. Davis v. Smith [N. C.] 53 S. E. 745. One who erects on his premises a pumping plant and tanks causing water to drip and run onto adjoining property creates a nuisance and is liable in damages for injury caused. Central Consumers Co. v. Pinkert [Ky.] 92 S. W. 957.

42. Where water of a stream was unlawfully diverted to the damage of another, he cannot recover damages for sickness in his family resulting from the use of well water made necessary by such diversion. Woodstock Iron Works v. Stockdale [Ala.] 39 So. 335. Nor can he recover for his own mental distress caused by such sickness. Id.

43. Keats v. Gas Co. of Luzerne County, 29 Pa. Super. Ct. 480. Evidence as to what it would cost to repair the injury two years after the flood held admissible in connection with other evidence. Id.

44. In trespass against a water company for damages for depreciation in the value of land caused by laying of a permanent water pipe, the measure of damages is the difference in the value of the land before and after the pipe was laid. Linton v. Armstrong Water Co., 29 Pa. Super. Ct. 172.

45. Where a mining company failed to leave sufficient support for the surface. Rabe v. Schoenberger Coal Co. [Pa.] 62 A. 854. Where several springs were destroyed and the loss of one was supplied by piping water from another, the measure of damages as to such spring is the cost of the piping. Id.

46. See 4 C. L. 1859.

47. The fine imposed by Gen. Laws 1886, c. 118, § 6, for polluting the Providence river by depositing in it material used in the manufacture of gas may be recovered by indictment under Gen. Laws 1896, c. 288, § 1. State v. Providence Gas Co. [R. I.] 61 A. 44. It is not necessary that the indictment allege the ownership of the property defiled. Id. Indictment for polluting the Providence River in violation of Gen. Laws 1896, c. 118, § 6, alleging the deposit therein of noxious substances held not void for indefiniteness. Id.

48. See 4 C. L. 1859.

49. City of Salina v. Blaksley [Kan.] 83 P. 619.

50. City of Salina v. Blaksley [Kan.] 83 P. 619. An ordinance leaving it to the discre-

not extend to every conceivable manner in which arms may be borne.[51] The right to carry concealed weapons is completely denied and may be entirely prohibited[52] on the ground that the habit of carrying concealed weapons is one of the most fruitful sources of crime;[53] hence conferring authority to carry them by legislative act upon some persons is no infringement of the rights of others not so authorized.[54] Such legislation is referable to the police power.[55] The provision in Section 4 of the Bill of Rights "that the people have the right to bear arms for their defense and security" refers to the people collectively.[56] It was intended to protect society rather than the individual.[57] It is essentially military in its character,[58] and the 2nd amendment to the Federal Constitution is proof that the right to bear arms is restricted to members of the militia, or some other military organization.[59] In states where it is held that a citizen has the constitutional right to bear such arms as are used in civilized warfare, it is placed on the ground that it was intended that the people should accustom themselves to arms so as to be familiar with them in case of need in times of war.[60] This argument is weakened, however, by the existence of an organized state militia.[61] It follows that in the absence of constitutional or statutory authority, no person has the right to assume the duty of protecting society by carrying weapons.[62] It is lawful to carry a pistol under certain constitutional[63] and statutory exceptions[64] relating to arresting officers,[65] travelers,[66] persons in actual and imminent danger of attack,[67] or authorizing mere transportation with no view to its use.[68]

§ 2. *Other public regulations concerning weapons.*[69]

§ 3. *Indictment and prosecution.*[70]—Whether a weapon is fired intention-

tion of the sheriff to grant or refuse permits to carry concealed weapons is constitutional and valid. Ex parte Luening [Cal. App.] 84 P. 445.

51. Ex parte Luening [Cal. App.] 84 P. 445.

52. Ex parte Luening [Cal. App.] 84 P. 445. In Colorado concealed weapons carried by one may be taken, confiscated by the county and sold for the benefit of the school fund. The facts and not the conviction work the forfeiture. One from whom a concealed weapon is wrongfully taken by a sheriff can nevertheless not recover against the sheriff, where by statute the fact of carrying concealed weapons per se works forfeiture to the county. McConathy v. Deck [Colo.] 83 P. 135. Carrying concealed weapons an offense and breach of the peace. Acts 1901, c. 4929, p. 57. Johnson v. State [Fla.] 40 So. 678.

53. Ex parte Luening [Cal. App.] 84 P. 445. The purpose of Pen. Code 1895, § 342, is to protect the public against the danger arising from allowing persons to carry deadly weapons to courts, election grounds, church, or other public gathering. Wynne v. State, 123 Ga. 566, 51 S. E. 636.

54, 55. Ex parte Luening [Cal. App.] 84 P. 445.

56. City of Salina v. Blaksley [Kan.] 83 P. 619.

57. City of Salina v. Blaksley [Kan.] 83 P. 619. The manner in which the people shall exercise this right to bear arms is found in Article 8 of the Constitution. Id.

58, 59, 60, 61, 62. City of Salina v. Blaksley [Kan.] 83 P. 619.

63. Jordan v. State [Miss.] 39 So. 895. The exception of militia muster grounds is for the purpose of allowing parades and gatherings where troops necessarily carry deadly weapons. Wynne v. State, 123 Ga. 566, 51 S. E. 636.

64. Wynne v. State, 123 Ga. 566, 51 S. E. 636.

65. Sheriffs, constables, marshals, policemen, or other arresting officers or their posses are excepted from the operation of laws prohibiting the carrying of concealed weapons. Wynne v. State, 123 Ga. 566, 51 S. E. 636.

66. One who returning from an alleged journey loiters at his mother-in-law's in the vicinity of his own home for an hour or more, drunk and disorderly, cannot claim the privilege of an exception in the statutes permitting the carrying of concealed weapons while on a journey. Ackerson v. State [Ark.] 89 S. W. 550.

67. A reasonable apprehension of attack at the time and place of carrying the concealed weapon will either justify it or mitigate the offense. Maxwell v. State [Ala.] 39 So. 382.

68. One who was seen with a pistol in his hand while sitting in a buggy, which he appeared to put in his pocket although on a subsequent search by officers no pistol could be found, may nevertheless be found guilty of carrying weapons. Prewitt v. State [Tex. Cr. App.] 92 S. W. 800. Carrying a pistol to a shop to have it repaired and returning home with it is not an unlawful carrying. Does not come within Pen. Code, art. 338. Mangum v. State [Tex. Cr. App.] 90 S. W. 31.

69. See 4 C. L. 1860.

70. See 4 C. L. 1861.

ally or negligently is generally a question for the jury.[71] In affidavits and indictments, the statute should generally be followed strictly,[72] but it is not a defect if more is stated than is called for.[73] Cases on questions of evidence will be found in the notes.[74] In an action for damages from injuries from the firing of a weapon, counsel may not in his address to the jury refer to another case where a boy was imprisoned for the negligent firing of a gun.[75] The fact that a person carried a gun to a house 2 or 3 days before a barbecue, and, on the day, left the crowd and returned to it with his gun, would justify a jury in finding that he had brought a deadly weapon to a public gathering contrary to statute;[76] but it has been held that coming into possession of a deadly weapon while at a public gathering is not the same thing as carrying a pistol to such a gathering.[77] Punishment may be by fine[78] or imprisonment, or both.[79] An instruction that if one carrying a pistol was not on his way home but going about town was guilty of violating the statutes in regard to weapons is not erroneous.[80]

§ 4. *Civil liability for negligent use of weapons.*—Whether a person who fires off a revolver intentionally or negligently is liable for the consequences depends upon the circumstances under which the shot is fired.[81] In order to recover for the killing of a child by a deadly weapon, it must appear that the death was caused by wrongful act.[82] Gross neglect is necessary to establish a liability in Louisiana.[83] Probably no case declares that where persons are gunning together voluntarily and lawfully each may be held responsible for every accident or mishap.[84] Where several jointly engage in an unlawful shooting whereby a third person is injured they are each liable without proof of which one actually fired the shot.[85]

71. Baxter v. Krainik [Wis.] 105 N. W. 803.

72. The failure of an affidavit to assert that the carrying of concealed weapons was "unlawfully" done was fatally defective. Jordan v. State [Miss.] 39 So. 895. Where the statute makes an exception in favor of such pistols as are used in the army or navy, an indictment is fatally defective which charges the accused with carrying a pistol not used "in the army and navy of the U. S." State v. Ring [Ark.] 91 S. W. 11.

73. No objection to an affidavit that it affirms that the accused carried concealed weapons instead of merely asserting that the affiant believes that the accused carried them as provided by the statutes. Holman v. State [Ala.] 39 So. 646.

74. Where one after getting a pistol instead of going home goes to the house of a third person, creates a disturbance, and makes demonstrations as if to shoot, held evidence sufficient to sustain a conviction of carrying a pistol. Nix v. State [Tex. Cr. App.] 91 S. W. 592. Evidence of what became of a pistol, and that witness had opportunity to observe the accused day and night and that he had no other pistol are admissible. Holman v. State [Ala.] 39 So. 646. Where on a charge of shooting into a dwelling house, the prosecution has established facts tending to show that the motive of the accused in doing the shooting was to get rid of a negro camp near the house, the defendant may show that a notice had been served upon the occupant of the house by the white people of the neighborhood that the negro camp must go. State v. Nugent [La.] 40 So. 581. Testimony that one drew a six-shooter, flourished it, said, "Let's shoot 'em up," put it back into his pocket, walked off and later shooting was heard in the direction in which he had gone, is insufficient evidence to permit the case to go to a jury on the charge of disturbing the peace of a town. Stanclift v. U. S. [C. C. A.] 139 F. 806.

75. Baxter v. Krainik [Wis.] 105 N. W. 803.

76, 77. Wynne v. State, 123 Ga. 566, 51 S. E. 636.

78. McConathy v. Deck [Colo.] 83 P. 135. Although the minimum fine for carrying concealed weapons is $50 under the Alabama statutes, in view of mitigating grounds, the jury may fine him less. Maxwell v. State [Ala.] 39 So. 382.

79. McConathy v. Deck [Colo.] 83 P. 135. A sentence of 12 months in the chain gang without the alternative of paying a fine, for carrying concealed weapons, is not excessive. Godwin v. State, 123 Ga. 569, 51 S. E. 598.

80. Smith v. State [Tex. Cr. App.] 90 S. W. 170.

81. Baxter v. Krainik [Wis.] 105 N. W. 803.

82. Siefker v. Paysee [La.] 40 So. 366.

83. Siefker v. Paysee [La.] 40 So. 366. Where evidence showed that defendant turned away from his companions to close his gun and one of them ran in front of it, whereat it suddenly exploded, owing to a defective shell, and killed him, no actionable negligence. Id.

84. Siefker v. Paysee [La.] 40 So. 366.

85. Benson v. Ross [Mich.] 13 Det. Leg. N. 7, 106 N. W. 1120. Three men shooting at a target, each liable for injury done by negli-

WEIGHTS AND MEASURES.[86]

A law requiring the state weighing of grain going into and coming out of public warehouses does not conflict with the Federal constitution.[87] The statute of Missouri providing for official weighing where state grain inspection is established does not authorize such weighing except where the law requires inspection,[88] even where the state inspectors do inspect the grain by permission of the board of trade,[89] and official weighing of grain is, therefore, not authorized except as to grain going into or coming out of public warehouses.[90] The fact that grain is required to be weighed by state weighers does not prohibit other persons interested from themselves weighing the same grain where there is no intrusion of the state office.[91]

WHARVES.

Wharves are public and private.[92]—The question whether a wharf has been dedicated to the public is for the jury,[93] but whether an ordinance operates as an abandonment of a wharf so dedicated is a question of law for the court.[94]

A municipality has no power, in the absence of a special legislative grant, to release a wharf dedicated to public use.[95] A wharf, although privately constructed and owned, may become so affected or impressed with a public interest as to be subject to public control and regulation.[96]

Uses of public wharves.[97]—Under a statute authorizing the commissioner of docks to lease wharves, piers, slips, etc., the commissioner is not authorized to lease for purposes not incidental to the use as a wharf.[98] The state of Louisiana being charged with the administration of the banks of the Mississippi river and having conferred on the board of commissioners of New Orleans full administrative power over the public wharves, the city of New Orleans could not authorize the construction of a railroad bed thereon without the consent of the board.[99]

Duty and care respecting wharf and injuries thereat.[100]—Under statutes in some states it is the duty of the city to keep public wharves in repair and it is liable if it fails to do so.[101] A dock owner must exercise reasonable diligence in ascertaining the condition of the berths, and if there is any dangerous obstruction, must remove it or give due notice to vessels about to enter.[102] In an action to re-

gent shot of one without proof of which one shot. Id.

86. See 4 C. L. 1861.

87. Nor with §§ 4, 30, art. 2, of the state constitution. State v. Goffee [Mo.] 91 S. W. 486.

88. The reference to § 7655 in § 7676, Rev. St. 1899, designates the manner of appointment and not the places where weighmasters shall be appointed. State v. Goffee [Mo.] 91 S. W. 486.

89, 90. State v. Goffee [Mo.] 91 S. W. 486.

91. It is doubtful whether quo warranto is the proper remedy against persons who themselves weigh such grain and refuse to permit the state weighers from weighing. State v. Goffee [Mo.] 91 S. W. 486.

92. See 4 C. L. 1862.

93, 94. Palen v. Ocean City [N. J. Law] 62 A. 947.

95. P. L. 1897, p. 69, § 48, par. 1, authorizing the city council to vacate "any street, road, highway or alley," does not confer power to vacate a wharf dedicated to the public. Palen v. Ocean City [N. J. Law] 62 A. 947.

96. Where wharves are constructed on the bank of a navigable stream at the termini of public highways, for the use of the public and are the only means of access to the river, although owned by an individual, they are subject to public control. Weems Steamboat Co. v. People's Steamboat Co., 141 F. 454.

97. See 4 C. L. 1862.

98. New York City Charter, § 825, p. 355 (Laws 1901, p. 346, c. 466) as amended by Laws 1902, p. 1777, c. 609. A lease of a marginal street for a flower stand is void. Vilias v. Featherson, 94 App. Div. 259, 87 N. Y. S. 1094.

99. Board of Com'rs for Port of New Orleans v. New Orleans & S. F. R. Co., 112 La. 1011, 36 So. 837.

100. See 4 C. L. 1863.

101. Burns' Ann. St. 1901, § 3541. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611.

cover for the negligence of a dock owner, plaintiff must show by a fair preponderance of evidence that defendant was negligent and that such negligence was the approximate cause of the injury.[103] Where both the wharfinger and the owner of the vessel contribute to the damage, the damage will be approximated in a suit at admiralty.[104]

WHITE-CAPPING, see latest topical index.

WILLS.

§ 1. *Right of disposal and contracts relating to it.*[1]—All interests, legal or equitable, in realty and personalty, which, unless otherwise disposed of, descend or devolve, on the death of testator, to his heirs or legal representatives, may be disposed of by him by will.[2] He cannot, however, so dispose of property which does not belong

102. Philadelphia & R. R. Co. v. Walker, 139 F. 855.

103. New York, S. & W. R. Co. v. Roney [C. C. A.] 138 F. 47.

104. New York, S. & W. R. Co. v. Roney [C. C. A.] 138 F. 47. An owner of a vessel was not guilty of contributory negligence in relying upon the assurance of the dockowner that the water was deep enough to admit the boat, especially where ice made it difficult to take soundings. Philadelphia & R. R. Co. v. Walker, 139 F. 855.

1. See 4 C. L. 1864.

2. In re Tinney's Estate, 99 N. Y. S. 159.

to him,[3] nor of property which the law gives to his widow on his death,[4] nor of the proceeds of insurance policies payable to others,[5] nor of his own dead body.[6]

Statutes in some states provide that devises or bequests for religious, benevolent, charitable, or scientific purposes are void in case testator dies within a specified time after the execution of the will.[7]

In Louisiana one cannot by will leave immovables, nor movables in excess of one-tenth part of the whole value of his estate, to one with whom he has lived in open concubinage.[8]

In many states a share of the estate is given to children born after the making of the will who are not mentioned or provided for therein.[9] One has the same right to disinherit his adopted children as his natural children.[10]

3. Where devisee took only a life estate in realty, one to whom he contracted to devise his interest therein by will took nothing either under the contract or the will made pursuant thereto. Hill v. Gianelli [Ill.] 77 N. E. 458.

4. See, also, Husband and Wife, 5 C. L. 1731. Laws 1899, c. 4730, p. 119, providing that homestead of one dying and leaving no children shall descend to his widow and shall not be the subject of devise by will, is not in conflict with Const. 1885, art. 10, § 4. Thomas v. Williamson [Fla.] 40 So. 831. Husband cannot devise realty owned by himself and his wife as tenants by the entirety, and it goes to his wife regardless of any attempt by him to make a different disposition of it by will. Young v. Biehl [Ind.] 77 N. E. 406. The widow cannot be deprived by any direction of testator who has revised his estate to others, subject to her dower rights, nor by any decree of court, of her right to have dower assigned, if she elects to exercise her rights. Shipley v. Mercantile Trust & Dep. Co. [Md.] 62 A. 814. In New Jersey a married woman may dispose of her personalty absolutely by will, even as against her husband. Gen. St. Vol. 2, p. 2014. In re Folwell's Estate [N. J. Err. & App.] 62 A. 414.

5. Member of fraternal order cannot bequeath proceeds of insurance policy, payable to his "widow or other heirs," to one to whom he was in form married while he still had a lawful wife from whom he had never been divorced, and who survived him, though by-laws of order provided that money shall go to "widow, heirs, or other legal representatives." Tutt v. Jackson [Miss.] 39 So. 420. Bequests of specific sums to wife and daughter to be paid out of life insurance made payable to them by the policy held not to create valid legacies payable out of the estate, testator's intention being merely to indicate his desire as to how insurance should be divided among beneficiaries named in policy. In re Tinney's Estate, 99 N. Y. S. 159.

6. There is no property in it, and it does not form a part of his estate. Herold v. Herold, 3 Ohio N. P. (N. S.) 405.

7. Fact that incorporated institutions, which are not sectarian under their charters, are under the supervision and control of the Order of Jesuits, does not render them sectarian within Rev. St. D. C. § 457, and Md. Bill of Rights § 34, invalidating gifts and devises for certain purposes unless made at least one month before testator's death. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg 24 App. D. C. 187. Certain orphan asylums held not sectarian institutions. Id. Laws 1848, p. 448, c. 319, § 6, making such gifts to corporations void if testator dies within two months after execution of the will applies only to gifts to corporations organized under that statute. In re Cooney's Will, 98 N. Y. S. 676. Under Act April 26, 1855, § 11 (P. L. 328) bequests or devises in trust for religious or charitable purposes are void unless made at least one calendar month before the death of testator. In re Gregg's Estate [Pa.] 62 A. 856. Statute must be literally read and strictly construed. Id. Calendar month is not one of any given number of days throughout the entire year, but varies in length according to the Gregorian calendar. Id. Charitable bequest in will executed Oct. 8, 1899, between hours of 3 and 5 P. M. held void where testator died Nov. 8, 1899, between 7 and 8 P. M., a calendar month in such case being 31 full days. Id.

8. Civ. Code art. 1481. Succession of Jahrans, 114 La. 456, 38 So. 417. Concubinage imports the maintenance of a status resembling marriage, mere illicit commerce being insufficient. Id. Concubinage must be open, and one maintained under the cloak of an innocent relation, and sought to be kept secret will not give rise to the incapacity pronounced by such article. Id. Will held valid. Id.

9. Ky. St. 1903, § 4847, provides that a will made by one having no children living, but who dies leaving a child, "wherein any child he might have is not provided for or mentioned," shall, except insofar as it provides for the payment of testator's debts, be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of 21, unmarried, and without issue. Logan v. Bean's Adm'r, 27 Ky. L. R. 1081, 87 S. W. 1110. This section is to be construed in connection with §§ 4842, 4848, in regard to pretermitted children. Id. Where will provided that, "if my wife has any children at my death, I desire that this will be the same," held that child born after execution of will was "mentioned" within the meaning of such statute. Id.

10. In the absence of an agreement on the part of an adopting parent to leave property to his adopted child, the adoption does not support a claim beyond the statutory provisions. Logan v. Lennix [Tex. Civ. App.] 13

The right to appoint testamentary guardians for minor children depends on the statutes of the various states.[11]

The legatee or devisee must be capable of taking and holding the devise or bequest.[12]

Contracts to devise or bequeath.[13]—One may make a valid agreement to dispose of his property in a particular way by will,[14] and such contracts may be enforced in equity after his decease against his heirs, devisees, or personal representatives,[15] provided they have all the essentials of an ordinary contract, are fair and equitable, and

Tex. Ct. Rep. 572, 88 S. W. 364. Sayles Ann. Civ. St. 1897, arts. 1, 2, places the adopted child on same footing as a legal heir in so far as adopting parent's property is concerned, and hence parent may disinherit him. Id. Instrument of adoption reciting that it was executed in consideration of love and affection for the child, and relinquishment of its possession and control by its parents, and providing that child should have all the privileges of a legal heir of the adopting parent, held not to place child in any more advantageous position than such an heir. Id.

See, also, Adoption of Children, 5 C. L. 41.

11. In the absence of statute a mother of minor children has no right to appoint a testamentary guardian for them, and a provision of a will attempting to do so is a nullity. Rev. St. 1892, § 2086, confers such power on the father alone, and mother has no such power or right from the common law, or otherwise. Hernandez v. Thomas [Fla.] 39 So. 641. Under Laws 1896, c. 272, p. 215, art. 5, §§ 50-54, a testator cannot appoint testamentary guardians of the persons or estates of his minor children, and an attempt to do so is void. Kellogg v. Burdick, 96 N. Y. S. 965.

12. See, also, Aliens, 5 C. L. 96; Charitable Gifts, 5 C. L. 566; Corporations, 5 C. L. 764; Associations and Societies, 5 C. L. 292. In order that a devise or bequest to a corporation for charitable purposes may be valid, the corporation must be endowed by law with capacity to receive, hold, and administer the gift. A bequest to a corporation, organized for the care of the sick, aged, infirm, and poor, "for the benefit and use of the Blessed Virgin Mary Purgatorial Fund" of the corporation's hospital, held invalid as not within the purposes of the corporation, there being no such fund existing, and the only possible object of such a fund being the saying of masses for the souls of the dead in purgatory. Johnston v. Sisters of the Poor of St. Francis, 98 N. Y. S. 525. An unincorporated voluntary association or society is incapable of taking a direct devise, and this rule is not changed by Laws 1893, p. 1748, c. 701. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433.

13. See 4 C. L. 1866.

14. Koslowski v. Newman [Neb.] 105 N. W. 295; Lewallen's Estate, 27 Pa. Super. Ct. 320. Contract to make mutual wills is as binding as any other contract. Wilson v. Gordon [S. C.] 53 S. E. 79.

Contract to devise homestead in consideration of services rendered to decedent and his wife, to which wife consents, is valid. Brandes v. Brandes [Iowa] 105 N. W. 499. Contract to devise land to plaintiff's parents at decedent's death in consideration of their care of him is enforceable after decedent's death, though land is a homestead. Soper v. Galloway [Iowa] 105 N. W. 399.

15. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249. Such a contract, upon performance by the other party, is irrevocable and enforceable upon the death of the promisor. Koslowski v. Newman [Neb.] 105 N. W. 295. Administrator is not entitled to possession of personalty as against one to whom testator agreed to bequeath it in consideration of services which were fully performed, in the absence of proof that there are creditors whose claims take precedence over that of defendant. Id. Decree of distribution directing that fund bequeathed by codicil be turned over to trustee held bar to suit by plaintiff, who was a party to the proceedings, for specific performance of contract between himself and testator whereby latter agreed to make no distinction between his children in his will. Phalen v. United States Trust Co., 100 App. Div. 264, 91 N. Y. S. 537.

NOTE. Specific performance: It seems to be generally accepted that a person may bind himself by a parol agreement to make a particular disposition of his property, both real and personal by will though as regards realty the authorities are not harmonious. Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Lamb v. Hinman, 46 Mich. 112, 8 N. W. 709. Such an agreement may be made in consideration of personal care and services such as are characteristic of the domestic relations. Leonardson v. Hulin, 64 Mich. 1, 31 N. W. 26; Laird v. Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420; Brown v. Sutton, 129 U. S. 238, 32 Law. Ed. 664. The remedy for a breach depends upon the nature of the services. If their value cannot be estimated, specific performance will be decreed, otherwise an action must be brought for damages. In many instances the denial of specific performance would accomplish a fraud (Winfield v. Bowen, 65 N. J. Eq. 636, 56 A. 728; Grant v. Bradstreet, 87 Me. 583, 33 A. 165), and equity will follow property fraudulently conveyed to a third party (McCullom v. Mackrell, 13 S. D. 262, 83 N. W. 255; Leonardson v. Hulin, 64 Mich. 1, 31 N. W. 26). Specific performance will not, however, be decreed unless the complainant shows by clear and convincing evidence, a complete contract properly executed on his own part (Spencer v. Spencer, 26 R. I. 237, 58 A. 766; Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324; Richardson v. Orth, 40 Or. 252, 66 P. 925; Rodman v. Rodman, 112 Wis. 378, 88 N. W. 218); nor if it would work a hardship as in case of a promise to give all one's property at death, made before marriage and

are definite and certain in their terms.[16] So, too, one rendering services under the promise and expectation that they will be paid for by testamentary provision may recover for the same on a quantum meruit if no such provision is made.[17] In such case plaintiff's cause of action accrues on the breach of the agreement.[18]

If in parol, the proof of such a contract must be clear and convincing,[19] the burden of establishing it being on the party claiming under it.[20]

there is a surviving wife without knowledge of such promise (Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L. R. A. 369; see, also, Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903). In Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200, the complainant failed in his proof. The decision is undoubtedly correct both in principle and on authority. Clawson v. Brewer, 67 N. J. Eq. 201, 58 A. 598; Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461; Briles v. Goodrich, 116 Iowa, 517, 90 N. W. 354.—3 Mich. L. R. 665.

16. Must be definite and certain, it must have the essentials of a contract, must be clearly established, and must be fair and equitable. Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140.

Must be a sufficient consideration: Under Civ. Code 1605, a benefit conferred to which promisor is already entitled is not a sufficient consideration to support a promise, and hence fact that wife had possession of, and paid premiums on insurance policy on life of husband out of her separate estate, and delivered it to him to enable him to have it changed into a paid up policy, constituted no consideration for his promise to dispose of the proceeds thereof by will in a certain manner in the absence of anything to show that she had a right to possession of the policy or was bound to pay premiums, or that she paid them on the faith of such promise. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249. Specific performance will not be denied because of the event that a relatively small consideration passed. Warner v. Marshall [Ind.] 75 N. E. 582. Like other enforceable contracts it must be founded upon a sufficient consideration. Promise by a father to give to his children at his death all property acquired by them from their mother held based on a sufficient consideration. Lewallen's Estate, 27 Pa. Super. Ct. 320.

A contract to make mutual wills, the one being the consideration for the other, must be definite and certain and must be established by clear and convincing evidence in order to be enforceable. Wilson v. Gordon [S. C.] 53 S. E. 79.

17. In re Funk's Estate, 98 N. Y. S. 934. Where deceased agreed to compensate claimant for services by leaving him a stock of goods but failed to do so. Shane v. Shearsmith's Estate [Mich.] 100 N. W. 123. Though contract is void under statute of frauds. Raycraft v. Johnston [Tex. Civ. App.] 93 S. W. 237.

18. The statute of limitations does not begin to run until the death of the deceased notwithstanding fact that services ceased before that time. In re Funk's Estate, 98 N. Y. S. 934. On promisor's death without performance. Raycraft v. Johnston [Tex. Civ. App.] 93 S. W. 237. If person rendering services could abandon contract at any time and recover on quantum meruit, she was not obliged to pursue such a course, and where she continued to perform until promisor's death, her cause of action did not accrue until then. Id.

19. Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200. Proof of contract to reimburse one by will for expenses incurred on trips taken as decedent's companion will be closely scrutinized and will only be sustained by strongest evidence. Apollonio v. Langley, 106 App. Div. 40, 94 N. Y. S. 274. Evidence should be given or corroborated in all substantial particulars by disinterested witnesses. Id. Loose declarations made to outside parties, indefinite understandings, suggested gratuities, anticipated benefactions, and testamentary intentions not carried out are insufficient to establish contract to pay for services at death, or to provide for compensation by legacy. Grossman v. Thunder, 212 Pa. 274, 61 A. 904.

Evidence sufficient to show contract. In re Funk's Estate, 98 N. Y. S. 934. That land was to go to plaintiff's parents at decedent's death in consideration of their care of him during his lifetime. Soper v. Galloway [Iowa] 105 N. W. 399. Between decedent and his wife and their daughter to devise land to latter in consideration for services rendered. Brandes v. Brandes [Iowa] 105 N. W. 499. To compensate claimant for services by leaving him stock of goods. Shane v. Shearsmith's Estate [Mich.] 100 N. W. 123. That niece was to receive compensation for her services, and she was not bound to wait until defendant's death and then sue for wages only in case she was not provided for by his will. Einolf v. Thompson [Minn.] 103 N. W. 1026.

Evidence held insufficient to show contract. Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200; Haberman v. Kaufer [N. J. Eq.] 61 A. 976; Grossman v. Thunder, 212 Pa. 274, 61 A. 904; Murphy v. Murphy, 24 Pa. Super. Ct. 547; Apollonio v. Langley, 106 App. Div. 40, 94 N. Y. S. 274. In any event plaintiff was not entitled to recover for clothing purchased by her under contract to reimburse her for expenses of journey. Id. To will property to defendant in consideration of services. Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140. To leave property to adopted child. Logan v. Lennix [Tex. Civ. App.] 13 Tex. Ct. Rep. 572, 88 S. W. 364. Evidence that testator had merely remarked that he would remember certain devisees, but which failed to indicate how, or the particular consideration for which this was to be done, held insufficient to show that devises to them were in pursuance of a contract so as to entitle them to have widow's dower set apart from other property. Brandes v. Brandes [Iowa] 105 N. W. 499.

Contract to make mutual wills: An agreement to make mutual wills devising realty may be shown by parol, where the wills were

If within the statute of frauds, the contract must be in writing, or must have been partly performed.[21]

As in the case of other contracts, plaintiff must show performance on his part, or that he was prevented from performing by the other party.[22]

§ 2. *Testamentary capacity, fraud and undue influence. A. Essentials to capacity.*[23]—In order to have testamentary capacity the testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property constituting his estate and which he intends to dispose of, and to recollect the objects of his bounty.[24] Capacity to contract[25] or for ordinary business is not the test.[26]

actually made and the party who undertook to revoke after the death of the other had received the full benefit of the provisions of the latter's will. Wilson v. Gordon [S. C.] 53 S. E. 79. Evidence held insufficient to show that wills made by two sisters, whereby each gave her property absolutely to the other with an alternative devise in case the devisee died during testatrix's lifetime, were mutual wills, made pursuant to a binding contract, and surviving sister had right to destroy her own will after accepting benefits under that of her sister. Id. On issue of an agreement to make mutual wills evidence of one of the parties, since deceased, given in probate court in establishing the will of the other is admissible as a declaration against her right to revoke her will. Id. Under rule that declarations in one's favor are admissible on cross-examination when part of a conversation is brought out in chief, where witness testified that one of the parties to an alleged contract to make mutual wills had told her that she had burned her will, held proper for her to state on cross-examination that she had told her in the same conversation that she had notified the other party to the contract of that fact. Id. Little if any consideration should be given to the testimony of those claiming the benefit of such a contract. Id.

20. One seeking to compel legatees to release charge of legacies on building which he claims testator agreed to leave him in fee, free from incumbrances, in consideration of services, has burden of proving that contract was made and was obligatory on him as well as on decedent. Haberman v. Kaufer [N. J. Eq.] 61 A. 976.

21. Lewallen's Estate, 27 Pa. Super. Ct. 320. An indivisible oral contract to devise realty and bequeath personalty is void under the statute of frauds. Dixon v. Sheridan, 125 Wis. 60, 103 N. W. 239. Evidence held insufficient to show an independent agreement presently transferring the personalty. Id.

Part performance: Oral contract between owner of land whereby it was to belong to third persons at his death in consideration of their caring for him during life, held not void under statute of frauds, where they fully performed. Soper v. Galloway [Iowa] 105 N. W. 399. One who has performed services on faith of promise may recover their reasonable value though contract is void. Raycraft v. Johnston [Tex. Civ. App.] 93 S. W. 237.

22. Daughter held entitled to land where she performed as far as possible and until deceased refused to receive further performance, and was at all times ready and willing to perform. Brandes v. Brandes [Iowa] 105 N. W. 499. Where plaintiffs' parents entered into contract with decedent whereby they were to have his land in consideration of caring for him during his lifetime and fully performed same until their death, and thereafter plaintiffs continued performance with decedent's acquiescence, held that they were entitled to the land on his death. Soper v. Galloway [Iowa] 105 N. W. 399. Contract of child to remain with and work for father during his lifetime in consideration of his willing her one-fourth of his property held to require her to remain with him until his death, unless prevented by him. Tussey v. Owen [N. C.] 52 S. E. 128. Contract held entire and indivisible so as to prevent recovery on implied contract for partial performance. Id. Evidence held insufficient to show that daughter was prevented from performing by her father. Id.

23. See 4 C. L. 1868.

24. May make valid will if he knows his property and the manner in which it is invested, and his relatives who are the objects of his bounty. In re Dole's Estate, 147 Cal. 188, 81 P. 534. The fundamental test is whether testator's mind and memory, were sound enough to enable him to know and understand the business in which he was engaged when he executed the instrument claimed to be his will. In re Nichols [Conn.] 62 A. 610. Instruction requiring testatrix to know what she was doing, the nature of her business, the nature and condition of her property, and to appreciate who were or should be the natural objects of her bounty, and her relations to them, and the manner in which she wished to distribute it, and the scope of the provisions of the will held erroneous as imposing too severe a test. Havens v. Mason [Conn.] 62 A. 615. Testator has capacity if his mind and memory are sufficiently sound to enable him to intelligently understand the business in which he is engaged when he executes the will. Todd v. Todd [Ill.] 77 N. E. 680. Ability to act "rationally in the ordinary affairs of life" properly erased from charge and ability to "comprehend disposition he was making" substituted. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Instruction in action to contest that jury might find testator competent if they should find among other things "that he had the capacity to know what he was doing and the effect of what he was doing," approved. Swygart v. Willard [Ind.] 76 N. E. 755. Instruction defining unsoundness of mind and monomania held proper. Id. In-

Capacity depends upon the condition of testator's mind when the will was made.[27] Mere feebleness of mind or body,[28] old age,[29] personal eccentricities,[30] the fact that testator was insane long prior to making his will and again became so long after making it,[31] or that he had previously suffered from melancholia,[32] or neurasthenia,[33] or delusions,[34] or that he committed suicide,[35] or that he had previously

struction that testator was required to possess mind and memory enough to know and grasp at the one time while making his will, the extent and value of his property, etc., approved. Id. Test is did he have sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to persons who might properly be his beneficiaries, and the scope and hearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in relation to them. In re Brannan's Estate [Minn.] 107 N. W. 141. Must have sufficient understanding to comprehend the nature of the transaction in which he is engaged, the nature and extent of his property, and to whom he desires to give it and is giving it, without the aid of any other person. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787. Instruction approved. King v. Gilson, 191 Mo. 307, 90 S. W. 367. Must have sufficient understanding and intelligence to transact his ordinary business affairs, and to understand the nature and character of his property, and the persons to whom he is giving it. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Where testator, though aged and infirm, understands the nature of the act he is performing, knows and can retain in mind the amount and character of his property, and who are or should be the objects of his bounty, and has a full understanding of the persons to whom and the purposes for which his devises and bequests are made, he is competent. In re Nelson's Estate [Neb.] 106 N. W. 326. Has sufficient capacity where he thoroughly understands the character of his property, remembers those who would naturally be the objects of his bounty, and is able to discriminate between them. Finding that testatrix had capacity held proper. Barker v. Streuli [N. J. Eq.] 61 A. 408. It is not necessary that testator should be possessed of his maximum strength of mind, or the degree of mental strength necessary to make a contract; but he should be able to remember his property, and the proper objects of his bounty, and to make a testamentary disposition of his property without suggestion. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484. If testator understands what he is doing at the time he executes the will, and has full knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he has sufficient capacity, notwithstanding his old age, sickness, debility of body, or extreme distress. In re Buren's Will [Or.] 83 P. 530.

25. Stametz v. Mitchenor [Ind.] 75 N. E. 579. One may be capable of making a will, though incapable of making a contract or managing an estate. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

26. Disposing capacity is test. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760.

27. Threlkeld v. Bond [Ky.] 92 S. W. 606.

28. Physical decrepitude and bad eyesight and the opinions of witnesses that testator was of unsound mind do not overcome the fact that he was able to properly transact ordinary business. Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480. Extreme bodily weakness will not alone invalidate the will. Masseth v. Masseth [Pa.] 62 A. 1076. Fact that testator was always of weak intellect furnishes no legal reason why he might not have had sufficient mental capacity to execute the will. Fact that he never fully understood family settlement, etc. In re Nichols [Conn.] 62 A. 610. Derangement of mental faculties does not incapacitate one from making a will if it does not render him unable to transact his ordinary business, and incapable of understanding the extent of his property, and of appreciating the natural objects of his bounty. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787. Mere defect of memory insufficient to show incapacity. Instruction approved. King v. Gilson, 191 Mo. 307, 90 S. W. 367. Evidence that testator took medicine for insomnia, and that he was mentally distressed by the idea that his mother's death was caused by her care of him, held not to tend to show incapacity. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565.

29. Old age alone is insufficient to invalidate the will. In re Dole's Estate, 147 Cal. 188, 81 P. 534. That testatrix was 96 raises no presumption of incapacity. In re Brower's Will, 98 N. Y. S. 438.

30. Fact that testator preferred to stay by himself, "seemed to be thinking or studying," or "talking to himself," etc., held of no probative force. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787.

31. Fact that he was insane prior to 1869 and again became so after appointment for conservator for him in 1903 held not to prevent finding that he had sufficient capacity in 1890. In re Nichols [Conn.] 62 A. 610.

32. Fact that testator had melancholia 20 years before he executed will held of no probative force where it was due to overwork, and was shown to have been cured and never to have reappeared. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787.

33. Fact that testator suffered from neurasthenia when in sanitarium before will was executed held not to show lack of capacity where he never manifested any serious symptom of that affection after his discharge. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565.

34. Where will was executed in 1899, evidence that testator was ill in 1890 and then had delusions held inadmissible, it appearing that he recovered from such illness and thereafter attended to business as usual. Hibbard v. Baker [Mich.] 12 Det. Leg. N. 384, 104 N. W. 399.

35. The mere fact that one commits suicide does not of itself warrant the deduction

committed crimes,[36] or that the will is unfair to his relatives,[37] or contains expressions which can only be understood by one familiar with a law to which it refers, where testator executed it in reliance on the assurance of counsel that it conformed to the instructions given,[38] do not of themselves necessarily show lack of capacity.

A will is invalid if at the time of its execution testator is suffering from an insane delusion,[39] or from monomania which prompts his action and affects his purpose and object in making a will.[40]

Primarily every person is presumed sane until the contrary is proved.[41] When unsoundness of mind is shown to exist and to be settled, a presumption then arises in favor of its continued existence.[42] Thus one who has been adjudged insane and

that his mind was unsound at the time, or prior thereto, or that he lacked testamentary capacity. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565. Nor does it raise an inference of insanity. Id.

36. Petty thefts many years before do not tend to prove incapacity. Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480.

37. The fact that testator gave the bulk of his estate to the university from which he graduated is no evidence of insanity. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787. On the issue of capacity, the fact that the will is unfair to testator's relatives may be taken into consideration. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Capacity not determined by whether or not he dealt justly under the circumstances with his relations. In re Sherwood's Will [Wis.] 105 N. W. 796.

38. Does not tend to show unsoundness of mind. Instruction that if terms of will were so indefinite that ordinary persons would not know what they meant, fact that testator executed it was evidence that she was of unsound mind, held erroneous. Havens v. Mason [Conn.] 62 A. 615.

39. Under evidence and issues held that court should have instructed that if deceased, at the time of executing the will, was under an insane delusion that his brother had grossly wronged him in business transactions and was of unsound mind on this subject, and by reason of such unsoundness of mind made a different disposition of his property than he otherwise would have done, the will was invalid, though he was sane on other subjects, but that to invalidate will on that ground deceased must not only have been mistaken, but must have been insane on the subject, and the will must have been induced by such insanity. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137. Where there was evidence that testator thought that brother whom he disinherited had injured him in the matter of a deceased brother's property, and it was the theory of contestant that the disinherited brother was the benefactor of his brothers, and that testator was acting under an insane delusion, held that testimony whether administration had been granted on the estate of the deceased brother, whether he had been assessed with any property, and whether a power of attorney from contestant to testator and his brother had been revoked, was admissible. Id. Where there was evidence that testator had been offended by what his brother, whom it was alleged that he had disinherited because of an insane delusion that he had wronged him, had testified to in bankruptcy proceedings on subject of testator's capacity, held that contestant should have been permitted to state what he had testified and that testator had testified to the same thing. Id. No belief that has any evidence for its basis is in law an insane delusion. Belief that he had appendicitis held not an insane delusion, where some of the physicians whom he consulted believed he had that disease and he was finally operated on for it, though he did not have it. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787. A delusion on the part of a testator does not constitute mental incapacity unless it is an insane delusion, and in determining whether a testator was suffering from such a delusion at the time he made his will, the testimony offered on the subject should be considered by the jury, that of experts not being allowed to outweigh absolutely that of laymen who had known the testator for years, and had business transactions with him, and frequently met and conversed with him. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484. The fact that testator was subject to delusions due to the habit of taking narcotics for the relief of pain is properly disregarded, where it appears that they were not continuous, and did not affect his mind as to matters involved in the making of the will. In re Masseth's Estate [Pa.] 62 A. 640.

40. Instruction approved. Swygart v. Willard [Ind.] 76 N. E. 755.

41. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013. All persons are presumed to be of sound mind until the contrary is proved. Todd v. Todd [Ill.] 77 N. E. 680. Under Illinois statute validity of will cannot rest on that presumption alone but must be accompanied by proof of capacity. Id. The law does not presume incapacity. Threlkeld v. Bond [Ky.] 92 S. W. 606.

42. Jury must find a continued and settled mental unsoundness before indulging in this presumption. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013. Instruction that if deceased was afflicted with senile dementia, affecting his capacity to make a will, presumption would be that it continued up to the time that will was made, and burden would then be on proponents to show its execution during lucid interval held erroneous, there being evidence tending to show that senile dementia was not necessarily a settled condition of the mind rendering the

placed under guardianship as such is prima facie incapable of making a will until such judgment is superseded.[43] But a will made by one mentally unsound during a lucid interval and when he has the power of intelligent comprehension is valid.[44] The burden of proving capacity in such case is, however, on the proponent.[45]

The condition of testator's mind before and after the execution of the will,[46] the mental condition of his blood relations in the ancestral line,[47] his physical condition after the execution of the will, when it tends to show his condition at the time of such execution,[48] the fact that he used intoxicants to excess,[49] and facts tending to show the reasonableness of the will,[50] may be shown. The admissions of one legatee as to incapacity are not binding on the others, and hence are inadmissible.[51]

The ordinary rules as to the admission of expert testimony apply,[52] the value and bearing of such evidence being for the jury.[53]

tator incapable of intelligently executing will. Id.

43. King v. Gilson, 191 Mo. 307, 90 S. W. 367. Appointment of conservator for testator in 1903 on ground that he was mentally incapable of suing to set aside certain conveyances, and finding that he had been incapable of managing business affairs of any consequence since 1872, held not conclusive as to his capacity to make a will in 1890, that question not having been within the issues or involved in the adjudication. In re Nichols [Conn.] 62 A. 610.

44. In re Brannan's Estate [Minn.] 107 N. W. 141. If at the time of the execution of the will his mental condition was such as to enable him to intelligently give directions for the disposition of his property, will is valid however feeble he may have been immediately before. Id. Presumption arising from an adjudication of insanity may be rebutted by proof that testator was of sound mind when the will was executed. Rule not changed by Rev. St. 1889, § 3682. Instructions approved. King v. Gilson, 191 Mo. 307, 90 S. W. 367.

45. Where testator had been adjudged insane. King v. Gilson, 191 Mo. 307, 90 S. W. 367. All that contestant is required to do in order to shift the burden of proof is to show that testator was suffering from a disease of the mind of a permanent and progressive nature amounting to unsoundness. Instruction held erroneous and misleading. In re Jones' Estate [Iowa] 106 N. W. 610.

46. Is only important in so far as it tends to show his mental condition at the very date of such execution. In re Dole's Estate, 147 Cal. 188, 81 P. 534. Is only a circumstance to be weighed with other facts in determining its condition at the time the will was made. Threlkeld v. Bond [Ky.] 92 S. W. 606. Where it appeared that testatrix was under guardianship as a person of unsound mind when will was executed and at her death, held that record of probate court on inquiry as to her sanity, in which a new trial was granted, showing that verdict of first jury was that she was of sound mind, was admissible. King v. Gilson, 191 Mo. 307, 90 S. W. 367.

47. Tends to establish fact in issue. In re Myer's Will [N. Y.] 76 N. E. 920, rvg. 100 App. Div. 512, 91 N. Y. S. 1104. But in order that evidence of diseases afflicting such relations and affecting their mental faculties may be admissible there must be evidence tending to show at least that such diseases are hereditary or transmissible. Evidence that mother and brother of testatrix were afflicted with paresis held inadmissible. Id. Fact that testator's father and grandmother had mental trouble held not to lead to inference of unsoundness of mind on his part, in absence of evidence tending to show any manifestations of derangement during his lifetime. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565. Hearsay statement of testator's father that his cousin had been insane held of no probative force, especially where there was no evidence of the nearness of the relationship, which was at most collateral, and the nature of the insanity or its cause was not developed. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787.

48. Is not admissible when such subsequent condition appears to have arisen from a new cause which was not in existence when the will was executed. Todd v. Todd [Ill.] 77 N. E. 680.

49. Swygart v. Willard [Ind.] 76 N. E. 755. Instructions as to effect of drunkenness held to have correctly stated and applied the law to the evidence upon the subject, and not to have invaded the province of the jury. Id. Where witness testified that he had taken a trip with testator, that he had never seen him intoxicated, and that he was of sound mind, held proper to allow proof in rebuttal that testator was drunk on such trip with the witness, testator's habit with respect to the use of intoxicants and its resultant effects upon his mind being involved. Id.

50. Evidence of the faithfulness of a beneficiary to the testator. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484.

51. Cannot be limited to party making them without injuriously affecting others. King v. Gilson, 191 Mo. 307, 90 S. W. 367. In a suit to establish a will, the admission of affidavit of one of proponents made in support of motion for new trial in proceeding to inquire into sanity of testatrix, at a time prior to the execution of the will, held reversible error. Id. Admissions and declarations of one legatee as to testator's want of capacity are inadmissible, in a proceeding to revoke probate. Since they cannot bind the other legatees and, as there can be only one decree, their admission would be prejudicial to the rights of such others. In re Myer's Will [N. Y.] 76 N. E. 920, rvg. 100 App. Div. 512, 91 N. Y. S. 1104.

Nonexperts are generally allowed to give an opinion, founded on their own observations, as to testator's sanity provided they detail the circumstances on which their conclusions are based.[54] They cannot, however, testify as to testator's capacity to make the will in question.[55] In some states they may only state their contemporary impressions as to the rationality or irrationality of the conversations or conduct testified to by them.[56]

The conclusions of the subscribing witnesses are admissible,[57] and prominence is justly given to their testimony.[58] In the opening of the case their evidence is usually confined to the appearance, conduct, and surroundings of the testator at the time

52. Medical expert held properly permitted to explain the distinctive peculiarities of a mind suffering from insane delusions (Swygart v. Willard [Ind.] 76 N. E. 755), the symptoms of dementia (Id.), upon a hypothetical statement of facts showing some form of mental unsoundness, to state under what class of unsoundness of mind testator should be placed (Id.), and to explain the effect on the nervous system, brain, and body, of the excessive use of intoxicants (Id.). An expert who has given a diagnosis of the case and indicated his treatment may be fully cross-examined as to testator's condition of both mind and body in order to test his credibility, the efficacy of his treatment and the effect thereof as tending to cure or alleviate the suffering and diseased condition which he says he reduced. In re Jones' Estate [Iowa] 106 N. W. 610. Held error to refuse to allow physician, who testified that when he called on testatrix shortly before execution of will, she had toxaemia, to answer a question as to whether her mind was affected thereby (Id.), and as to whether she was suffering from senile dementia while he was treating her (Id.). Expert cannot state the relative merits of the testimony of other experts. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137. Objection to question asked testator's physician as to why he allowed testator to go to sanitarium, held properly sustained, as it called for operation of witness' mind. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565. Question asked testator's physician as to what testator said to him about his health held improper. Id.

53. Held that evidence of experts, who testified that person suffering from conditions testified by testatrix's physician to have existed in her case, would not have sufficient mental capacity to make a will, should have gone to the jury. Byrne v. Byrne, 109 App. Div. 476, 96 N. Y. S. 375. Their testimony is not binding on the jury but is to be considered by them, like any other testimony, in connection with all the facts given in evidence and given such weight as they consider it entitled to receive. Instruction approved. King v. Gilson, 191 Mo. 307, 90 S. W. 367.

54. Where nonexpert had previously testified to acquaintance with testator for ten years, and as to his habits of using intoxicating liquors and other habits, held proper to allow witness to state that such habits had grown more pronounced in his later years. Swygart v. Willard [Ind.] 76 N. E. 755. Where witness stated that testator had grown more indecent, held proper to allow him to explain his meaning in using that word. Id. Witnesses held to have revealed a sufficient acquaintance with testatrix to justify the submission to the jury of the question as to the weight of their opinion of her sanity. Heaston v. Kreig [Ind.] 77 N. E. 805. Opinion must be limited to the facts and appearances detailed to the jury. Question held not to violate this rule. Swygart v. Willard [Ind.] 76 N. E. 755. If any material facts at all are stated by a nonexpert witness tending to show such knowledge and intimacy with the testator as to enable him to form an opinion of the latter's mental condition, it is the duty of the trial court to permit such opinion to be expressed and to go to the jury for what it is worth. Witness held competent. Id. The weight of such opinion depends upon the primary facts, and is exclusively for the jury. Id. Instruction as to weight to be given opinions of nonexperts held erroneous for failure to confine opinions to such as were based on matters detailed by witnesses who gave them as a basis for their conclusions. In re Jones' Estate [Iowa] 106 N. W. 610. May testify as to capacity at a time prior to the execution of the will. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013. A nonexpert, whose testimony shows only acts which are entirely consistent with sanity, and have no tendency to show insanity, cannot testify that in his opinion testator was incompetent. Hibbard v. Baker [Mich.] 12 Det. Leg. N. 384, 104 N. W. 399. A witness may express his opinion as to the unsound condition of testator's mind, based upon facts within his knowledge. May state facts, and then his opinion. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Mere statement of opinion that testator was not capable of self-control or self-government held inadmissible. Id.

55. Testimony of nonexperts that deceased was of unsound mind and incapable of intelligently transacting his business or disposing of his property at or about the time of the execution of the will is inadmissible. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013.

56. Cannot give their opinion. In re Myer's Will [N. Y.] 76 N. E. 920, rvg. 100 App. Div. 512, 91 N. Y. S. 1104. Held error to exclude question addressed to testator's agent as to whether her acts, which he had remembered and testified to, impressed him as rational or irrational. In re Brower's Will, 98 N. Y. S. 438. Ruling held not ground for reversal under Code Civ. Proc. § 2545, in view of fact that acts had been fully described, and of proponents' evidence. Id.

of the execution of the will, and their opinions based thereon.[59] Their cross-examination need not, however, be confined to what occurred at that time, but the contestants may seek to elicit facts indicating that the opinion of the witness is of little weight because of bias, that it is not a candid one, or that it is based wholly or in part upon his previous acquaintance or experience with testator rather than upon what he observed when the will was executed.[60] Declarations of the testator before or after the execution of the will are generally held to be admissible though not evidence of the facts therein stated.[61]

The question of capacity is one of fact[62] for the jury.[63] Cases dealing with the sufficiency of the evidence of capacity will be found in the note.[64]

(§ 2) *B. Constituents of fraud and undue influence.*[65]—In order to be undue, and to avoid the will, the influence exerted on testator's mind must be such as to destroy his free agency, and to substitute the will of another for his own,[66] and must

57. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

58. Are supposed, from the fact that they were present when the will was executed, to have had the means and opportunity of judging of the testator's capacity. In re Nichols [Conn.] 62 A. 610.

59. In re Nichols [Conn.] 62 A. 610.

60. Questions as to how long witness had been identified with testator in business, what opportunities he had for forming an opinion as to his mental soundness, and what his experience with him had been, held improperly excluded. In re Nichols [Conn.] 62 A. 610.

61. Declarations of testator, made subsequent to the execution of the will and in the absence of a child, that he had given property of a certain value to such child, are not evidence of that fact, but are competent to be considered on the issue of capacity. Instruction approved. Swygart v. Willard [Ind.] 76 N. E. 755. Trust deed made three years before will at time when testator was concededly of sound mind, and was probably not under the influence of others, held competent as a written declaration of decedent. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013. Instruction that it could only be considered on question of testator's capacity when he executed the will held erroneous. Id.

62. In re Brannan's Estate [Minn.] 107 N. W. 141.

63. Instruction in action to set aside will held erroneous as in effect charging jury that there was sufficient evidence to sustain finding of incompetency, the evidence in that regard being conflicting. Niemann v. Cordtmeyer, 97 N. Y. S. 670.

64. **Evidence held to show capacity.** Sayre v Trustees of Princeton University [Mo.] 90 S. W. 787; In re Nelson's Estate [Neb.] 106 N. W. 326; In re Buren's Will [Or.] 83 P. 530. To sustain finding of capacity. In re Nichols [Conn.] 62 A. 610; Heaston v. Kreig [Ind.] 77 N. E. 805; In re Brannan's Estate [Minn.] 107 N. W. 141; In re Brower's Will, 98 N. Y. S. 438; In re Masseth's Estate [Pa.] 62 A. 640; Hobson v. Moorman [Tenn.] 90 S. W. 152; In re Sherwood's Will [Wis.] 105 N. W. 796; Mueller v. Pew [Wis.] 106 N. W. 840. Preponderance of evidence held to be in favor of capacity. Todd v. Todd [Ill.] 77 N. E. 680.

Evidence held insufficient to show capacity. In re Simon's Will, 47 Misc. 552, 95 N. Y. S. 981.

Evidence held to show incapacity. To sustain finding of want of capacity. Swygart v. Willard [Ind.] 76 N. E. 755; In re Sheeran's Will [Minn.] 105 N. W. 677; In re Choate's Will, 96 N. Y. S. 380. To sustain finding that testator lacked capacity to revoke will. Schaaf v. Peters [Mo. App.] 90 S. W. 1037. To show that will was result of delusions. In re Egan's Will, 46 Misc. 375, 94 N. Y. S. 1064.

Evidence held insufficient to show incapacity. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565; Masseth v. Masseth [Pa.] 62 A. 1076. Evidence insufficient to warrant finding of incapacity. Hibbard v. Baker [Mich.] 12 Det. Leg. N. 384, 104 N. W. 399. To sustain finding of incapacity. Heyzer v. Morris, 110 App. Div. 313, 97 N. Y. S. 131. To sustain verdict of incapacity so that court was justified in granting nonsuit. In re Morey's Estate, 147 Cal. 495, 82 P. 57.

Evidence held to require submission of capacity to jury. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Question of capacity held for the jury under the evidence. Byrne v. Byrne, 109 App. Div. 476, 96 N. Y. S. 375.

Evidence insufficient to justify submission of issue to jury. In re Dole's Estate, 147 Cal. 188, 81 P. 534; Fethergill v. Fethergill [Iowa] 105 N. W. 377; Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110.

To require submission of issue. Threlkeld v. Bond [Ky.] 92 S. W. 606.

65. See 4 C. L. 1873.

66. Must amount to fraud or coercion. Hutcheson v. Bibb [Ala.] 38 So. 754. Must be such as to destroy or overcome free agency. Johnson v. Farrell, 215 Ill. 642, 74 N. E. 760. Must amount to such a degree of restraint and coercion as to destroy the free agency of testator. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Instruction not objectionable as isolating certain facts. Id. Must be such as subjects the will of the testator to that of the person exerting it, and makes the instrument express the purpose of the latter rather than that of the testator himself. Must be equivalent to moral coercion. Parker v. Lambertz [Iowa] 104 N. W. 452. Testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or volun-

be directly connected with the execution of the will, operating at the time it was made.[67] It may be exercised through threats or fraud.[68] It must not be merely the influence of affection or attachment,[69] nor the result of a desire on the part of the testator to gratify the wishes of one beloved, respected, and trusted by him.[70]

Neither solicitations[71] nor persuasion, argument,[72] suggestions or advice addressed to testator's understanding or judgment,[73] nor the fact that testator makes a different will from that which he at some former time expressed an intention to make,[74] is of itself sufficient to show undue influence. No presumption of undue influence arises from the fact that testator distributed his property unequally[75] or contrary to natural justice,[76] or that he was friendly and intimate with the person al-

tarily, and is subject to the will and purpose of another. Must be sufficient to destroy his free agency and substitute the will of another for that testator. In re Tyner's Estate [Minn.] 106 N. W. 898. Must be such as amounts to overpersuasion and coercion or force, destroying the free agency and will power of the testator. Instructions approved. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696. Undue influence is that which compels the testator to do that which is against his will from fear, the desire of peace, or some feeling which he is unable to resist. Morrison v. Thoman [Tex. Civ. App.] 86 S. W. 1069. Error in instruction as to what would constitute undue influence is harmless to contestant where evidence does not justify attack on will on that ground. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Where husband and wife execute mutual wills leaving to each other all of their community property, which is all the property they possess, pursuant to an agreement that if husband survives he will provide for her relatives by will, held that such agreement does not constitute undue influence, though it influences wife to make different disposition of her property than she had intended. Morrison v. Thoman [Tex. Civ. App.] 86 S. W. 1069. Instruction held erroneous. Id. Must be coercion and duress destroying testator's freedom of will and action. Mueller v. Pew [Wis.] 106 N. W. 840. Question is whether testator was impelled by undue influence to make a different will from what he would have made had he been left entirely alone and free to act according to his own judgment. In re Sherwood's Will [Wis.] 105 N. W. 796.

67. Parker v. Lambertz [Iowa] 104 N. W. 452. Statement of proponent before will was executed that he would see that contestant would get nothing more, held merely a declaration of intent, and not evidence even that he attempted to influence testator. In re Townsend's Estate [Iowa] 105 N. W. 110.

68. It may be exerted through threats, fraud, importunity, or the silent resistless power which the strong often exercise over the weak or infirm. In re Tyner's Estate [Minn.] 106 N. W. 898. Fact that party acting in bad faith for purpose of procuring execution of new will actually believed to be true some of the false representations whereby he exerted the undue influence held not to render will so procured valid. In re Arnold's Estate, 147 Cal. 583, 82 P. 252. Through fraud, as by designedly deceiving testator. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110, citing 4 C. L. 1873.

69. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696.

70. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696. The fact that the will is executed at the suggestion or request of the grantee or devisee, and is prompted by the influence which such person has acquired by business confidence or the showing of an affectionate regard, will not prove undue influence, unless the freedom of the testator's will has been in some way impaired or destroyed. Parker v. Lambertz [Iowa] 104 N. W. 452.

71. Unless the testator be so worn out with importunities that his will gives way. In re Tyner's Estate [Minn.] 106 N. W. 898. Neither advice nor solicitation, however earnest and insistent, will vitiate a will unless it be further shown that the freedom of the will was in some way impaired or destroyed thereby. In re Townsend's Estate [Iowa] 105 N. W. 110.

72. It is not sufficient that testator's reason is convinced by persuasion or argument if it is by his own will and intention that he carries that decision into effect. Mueller v. Pew [Wis.] 106 N. W. 840.

73. In re Tyner's Estate [Minn.] 106 N. W. 898; in re Townsend's Estate [Iowa] 105 N. W. 110.

74. In re Nelson's Estate [Neb.] 106 N. W. 326. A mere change of purpose is not of itself evidence of undue influence. Inquiry as to such change becomes relevant only when a basis of evidence of undue influence is laid, in which case it may have a strong corroborative bearing. In re Keisler's Estate [Pa.] 62 A. 108.

75. In re Townsend's Estate [Iowa] 105 N. W. 110; King v. Gilson, 191 Mo. 307, 90 S. W. 367. Not implied from disparity of gifts alone. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Fact that the will is inofficious, harsh, and unjust. In re Tyner's Estate [Minn.] 106 N. W. 898. Fact that no reason is shown why testator did not remember some of his relatives does not establish undue influence. Fethergill v. Fethergill [Iowa] 105 N. W. 377.

76. Is not persuasive. In re Sherwood's Will [Wis.] 105 N. W. 796. Fact that the will is unreasonable and unjust. In re Townsend's Estate [Iowa] 105 N. W. 110. The mere fact that the disposition of his property made by a parent among his children appears unreasonable or unjust will not

leged to have exerted the influence,[77] or was extremely fond of one for whom he made no provision,[78] or that certain legatees receive more than under a former will,[79] or from the existence of an opportunity to exert such influence,[80] though these facts may be considered in connection with other evidence,[81] nor does the fact that testator's agent employed a lawyer from another city to draw the will tend to show such influence on his part.[82]

Undue influence need not be shown by direct proof, but may be inferred from facts and circumstances.[83] It may be shown by the relation of the parties, the mental condition of the testator, and the character of the transaction.[84] The will itself,[85] evidence of testator's mental[86] and physical condition,[87] and of the financial condition of the person alleged to have exerted the influence,[88] that two former wills were substantially the same, and to explain the changes made by the later of the two,[89] and that shortly before the making of the will in dispute testator was still much interested in certain charitable institutions provided for in such former wills but not in the last one,[90] and evidence showing what part the party alleged to have exerted the influence took in the preparation of the will,[91] is admissible. So is evidence tending

alone establish undue influence. Parker v. Lambertz [Iowa] 104 N. W. 452. By statute in Georgia when testator bequeaths his entire estate to strangers to the exclusion of his wife and children the will should be closely scrutinized and probate refused upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing. Civ. Code 1895, § 3258. Credille v. Credille, 123 Ga. 673, 51 S. E. 628. This provision is not applicable where testator leaves property to son and son's wife and children, and it is error to give it in a charge under such circumstances in a suit to set aside a will. Id.

77. Not solely from this fact. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

78. Fact that deceased was extremely fond of contestant will not defeat will. In re Townsend's Estate [Iowa] 105 N. W. 110.

79. Does not establish undue influence. Fethergill v. Fethergill [Iowa] 105 N. W. 377.

80. From fact that beneficiary had special opportunities to exert undue influence over testator. In re Tyner's Estate [Minn.] 106 N. W. 898. It is not enough to show that there was an opportunity to exercise undue influence, but there must be evidence that it was exercised, and that it was instrumental in procuring the will. In re Townsend's Estate [Iowa] 105 N. W. 110. Opportunity and disposition to procure a will which is favorable to one of the legatees is not of itself sufficient evidence of undue influence. Fethergill v. Fethergill [Iowa] 105 N. W. 377.

81. When there is independent evidence tending to show acts of undue influence over testator to procure the will on the part of those who appear to have been preferred, the fact that the distribution of property is grossly unequal and unjust may be received to strengthen the evidence of undue influence. In re Tyner's Estate [Minn.] 106 N. W. 898.

82. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

83. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Bradford v. Blossom, 190 Mo. 110, 88 S. W. 721; Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696. Threats and fraud, since it is rarely susceptible of clear and direct proof. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110.

84. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Bradford v. Blossom, 190 Mo. 110, 88 S. W. 721.

85. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

86. Held proper to show reasons for testatrix's custom of having her agent prepare and sign, as her attorney in fact, checks used in paying current bills. In re Arnold's Estate, 147 Cal. 583, 82 P. 252. Evidence that deed by testatrix to her agent and his declaration of trust in her favor were read over to her when executed in 1902, and her statements at that time as to their purpose and effect held competent to show her failing memory and weakness of intellect in 1903 when will was made and when she appeared to have forgotten them and could not comprehend them. Id. In suit to set aside a will, evidence of testatrix's mental condition is properly excluded where it is admitted that she was of sound mind and memory. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

87. Since physical condition has much to do with mental condition. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Evidence of complaints of failing eyesight and other bodily ailments made three years before execution of will held admissible. In re Arnold's Estate, 147 Cal. 583, 82 P. 252.

88. Held error not to require husband of testatrix's daughter, who was principal legatee, to answer question as to how much property he owned shortly before the making of the will. In re Jones' Estate [Iowa] 106 N. W. 610.

89, 90. In re Arnold's Estate, 147 Cal. 583, 82 P. 252.

91. On issue of undue influence evidence that legatee who drew will, in speaking as to why no provision was made for creditors, said "Damn the creditors; we were not thinking about them when that will was made," held admissible for purpose of showing that such legatee was not a mere amau-

to show the motives of one alleged to have exerted undue influence in procuring the execution of a new will,[92] and his conduct and dealings with testator,[93] and evidence of the dealings of testator with his agent, where it is claimed that he was induced to revoke his former will and execute a new one by reason of false representations as to such agent's conduct.[94]

It is generally held that while the acts and declarations of the testator not constituting a part of the res gestae, and not made at the very time of the execution of the will in dispute, are inadmissible to show that the influence was exerted or that it affected his actions, they are admissible to show his mental condition, and consequent susceptibility to such influence.[95] Declarations made before the execution of the will, and which are in harmony with its provisions, are, however, sometimes admitted to contradict the theory of fraud or substitution,[96] or of undue influence.[97]

uensis in the preparation of the will. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137.

92. Evidence of feelings of party alleged to have exerted influence by making false representations as to honesty of testatrix's agent toward such agent and toward testatrix, held relevant on issue of fraud and undue influence, though motives and bad faith alone would not be sufficient proof thereof. In re Arnold's Estate, 147 Cal. 583, 82 P. 252.

93. Evidence that third person had not told party alleged to have exerted influence that trust deed to agent could not be revoked without latter's consent held admissible, where there was evidence that party had so stated to testatrix. In re Arnold's Estate, 147 Cal. 583, 82 P. 252. Evidence that deed to contestant was made absolute in form because intending purchaser objected to deed executed by attorney in fact held admissible. Id. Evidence that such contestant had told party alleged to have made false representations of the state of testatrix's affairs, and of his doings as her agent held admissible. Id.

94. Where it was claimed that testatrix was induced to revoke former will and execute new one by false representations that one of the contestants, who had been her business manager and trustee, had abused the trust reposed in him, evidence showing the extent and character of the estate committed to his charge, the reasons leading her to give him a power of attorney, and the general nature and character of the business done by him for her was admissible. In re Arnold's Estate, 147 Cal. 583, 82 P. 252.

95. Effect should be limited to question of his condition of mind. In re Arnold's Estate, 147 Cal. 583, 82 P. 252. Declarations of testator, made shortly after the date of the execution of the alleged will, to the effect that he had not made a will, and that if he had signed a paper purporting to be one, he did not know what he was doing, are admissible solely for purpose of showing his mental state when alleged will was executed, and whether he then had testamentary capacity, or was in a condition to be easily influenced, but are not admissible as evidence of the truth of the facts stated, nor to show fraud or undue influence, nor as evidence that he had revoked the will. Credille v. Credille, 123 Ga. 673, 51 S. E. 628. Declarations of testatrix made before or after she executed her will as to how she meant to leave her property are inadmissible to show undue influence or fraud. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Are properly excluded when it is admitted that testatrix was of sound mind when she made the will, though they might be otherwise admissible to show mental condition. Id. On an issue of undue influence mere declarations of the testator, whether made prior or subsequent to the execution of the will, amount to very little in the face of a prima facie showing of competency and lack of coercion, particularly where the will was prepared under his personal direction and remained under his control to the time of his death. Declarations are corroborative merely, and should be accompanied by independent proof before they are considered, and then they are chiefly pertinent to show his condition of mind. In re Townsend's Estate [Iowa] 105 N. W. 110. Declarations of the testator made before the execution of the will are incompetent as substantive evidence of undue influence but are admissible for the purpose of illustrating testator's mental capacity and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends. Hobson v. Moorman [Tenn.] 90 S. W. 152. Declarations of testator tending to show the exertion of undue influence over him are inadmissible, and even when admitted are not evidence of the facts therein narrated. Declarations that his wishes were opposed by his wife and that he could not act against her wishes. Mueller v. Pew [Wis.] 106 N. W. 840.

96. The fact that the provisions of the will correspond with testator's previous declarations as to his intentions is a circumstance going to contradict the theory of fraud or substitution. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

97. Are admissible by way of rebuttal to show his intention as to the disposition of his property upon ground that will made in conformity to such declarations is more apt to have been executed without undue influence than if its terms are contrary to such declarations. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. The declarations thus admissible are those in harmony with the provisions of the will actually made, and not

A witness cannot ordinarily express an opinion as to whether testator was easily influenced,[98] or that he was influenced in making the will,[99] though he may be permitted to do so where the facts upon which his conclusion is based are such that they cannot be fully detailed to the court as they appeared to him.[1] Declarations of a beneficiary against his interest are inadmissible where there are other beneficiaries.[2]

An inference unfavorable to the validity of the will may be drawn from the fact that the testator was dependent upon, or subject to the control of, the person in whose favor it was made.[3] Some courts hold that the mere existence of confidential or fiduciary relations between the testator and the beneficiary is not, in and of itself alone, sufficient to raise a presumption of undue influence in the making of the will that will avoid it in the absence of rebutting evidence.[4] Others hold that proof of the existence of such relations raises a presumption of undue influence which will be fatal to the gift unless rebutted by proof of free deliberation and spontaneity on the part of the testator and good faith on the part of the legatee or devisee,[5] and that this rule applies in case the gift is made to a relative of the

those opposed to such provisions. Id. Prior declarations of an intention contrary to the subsequent disposition cannot be shown to establish undue influence in respect to the disposition finally made. Parker v. Lambertz [Iowa] 104 N. W. 452.

98. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Statement of witness that testator's wife controlled his conduct in most matters held inadmissible. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262.

99. A question—Did you notice any signs of undue influence—is bad. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

1. Where witness testified to conversations between testator and his brother in relation to execution of will, and that testator deferred to brother in certain matters, held proper to permit contestant to ask him whether there was any act or statement on the part of the brother indicating coercion or an attempt to influence testator. In re Nichols [Conn.] 62 A. 610.

2. Declarations that the reason why heirs had not been remembered was because they had attempted to make him pay a note a second time. Fethergill v. Fethergill [Iowa] 105 N. W. 377.

3. From fact that plaintiff was confidential adviser of testatrix in respect to all her business affairs, and that she was dependent upon him and subject to his control in respect to them, that her physical and mental condition was such that she could be easily influenced, and that she had formed an intention of dying intestate, but that he, knowing her condition, took her to a scrivener and remained with her while she executed a will giving him substantially all her property. Edgerly v. Edgerly [N. H.] 62 A. 716.

4. In order to put burden of upholding validity on beneficiary, must, in addition to proof of such relations, be some evidence of coercion in its execution, or, in other words, that the will is not the will of testator. Hutcheson v. Bibb [Ala.] 38 So. 754. In a suit to set aside the will the burden of proving undue influence is on contestants to the end of the trial, and this is true notwithstanding the fact that a fiduciary relation is shown to have existed between the beneficiary and the testator. Instructions properly refused. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. When it is said that in such case the burden is shifted, all that is meant is that there is a necessity of evidence to answer the prima facie case thus made out or it will prevail, but the burden of maintaining the affirmative of the issue involved is still on the party alleging the fact constituting such issue, and this burden remains throughout the trial. Id.

5. Burden of rebutting presumption is on legatee or devisee. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696; Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Where the principal legatee was in no way related to testator, was his legal advisor, the draftsman of the will, procured the witnesses, and in so far as it appears was the only person who ever read or had possession of it, he must show affirmatively that testator had an intelligent knowledge of its contents. In re Bedell's Will, 107 App. Div. 284, 95 N. Y. S. 12. Evidence insufficient to sustain burden of doing so. Id. Where testator was of advanced years, and will was drawn by principal beneficiary who, though a layman, advised him in regard to it, and testator acted without independent advice, and contrary to previously expressed intentions, and will was unequal and unjust, held that burden was on proponent to show affirmatively that will was free, intelligent expression of testator's intention. In re Eckler's Will, 47 Misc. 320, 95 N. Y. S. 986. Evidence held insufficient to sustain burden. Id. Clerk of testatrix's attorney who drew will was principal beneficiary, and stood in position of peculiar confidence toward testatrix, held to be regarded as her attorney in determining question of fraud, and he was required to show that will expressed testatrix's true intention. In re Egan's Will, 46 Misc. 375, 94 N. Y. S. 1064. Evidence insufficient to sustain such burden. Id. Under Code Civ. Proc. § 2235 fact that one of residuary legatees, who was testator's attorney, drew the will, and that testator was old, feeble, and ill, raises technical

person standing in such relation to testator, or to a charity represented by him,[6] it being immaterial that the beneficiary is entirely innocent.[7] Some courts hold that, though undue influence will not be presumed, yet when such facts are proved as will authorize a jury to find the existence of undue influence,[8] or when the contestants have made a prima facie case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon proponents to show that the instrument is the will of testator.[9]

Undue influence is a question of fact[10] for the jury.[11] Where deceased was of sound mind and was not easily changed or influenced, the evidence of undue influence must be clear and convincing,[12] but in cases where incapacity and undue influence are both relied upon, and there is substantial evidence of the former, any evidence, however slight, tending to prove the latter, is freely admitted.[13] Cases dealing with the sufficiency of the evidence to show fraud[14] and undue influence[15] will be found in the notes.

presumption of undue influence, or at least requires proponents to show what actually did occur at time of execution of will and prior thereto. In re Morey's Estate, 147 Cal. 495, 82 P. 57. Evidence that there was no undue influence exerted, and that testator expressly affirmed will sometime after its execution when free from any possibility of undue influence, etc., held to overcome presumption. Id. Person standing in a confidential relationship must be shown to have been in some manner directly connected with the making of the will. Mere fact that he was in same room at the time is insufficient to shift burden. In re Barry's Will, 219 Ill. 391, 76 N. E. 577. Rule does not apply where such person takes nothing under the will. Confidential advisor of testatrix who procured lawyer to draw will, and was made one of two executors and trustees held not to be beneficiary. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. The fact that a confidential agent of testator drew the will or procured it to be drawn, and was made executor and trustee thereunder, may call for additional scrutiny as to the fairness of the transaction, but such facts do not alone invalidate the will where the other evidence shows that there was no fraud, or imposition, or attempt to exert undue influence. Id. Evidence held not to raise presumption of undue influence so as to throw burden of proof on proponent to show that none was exerted. In re Arneson's Will [Wis.] 107 N. W. 21.

6, 7. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

8. Bradford v. Blossom, 190 Mo. 110, 88 S. W. 721; Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

9. This means that a point is then reached where the contestant must prevail unless the proponent assumes the obligations of going forward with his evidence. In re Tyner's Estate [Minn.] 106 N. W. 898.

10. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696. The fact that an inference unfavorable to the validity of a will, which may be drawn when it appears that a person who was dependent upon or subject to the control of another makes a will in the latter's favor, may be rebutted by showing that the transaction was fair and honest, does not change the question of whether or not it has been rebutted from one of fact to one of law. Edgerly v. Edgerly [N. H.] 62 A. 716. Whenever facts that would sustain the will are put in evidence, together with other facts from which an inference unfavorable to its validity may be drawn, the question whether such unfavorable inference should be drawn, and if so whether it has been rebutted, are both questions of fact. Id. Evidence held to require submission of question of undue influence to jury. Id.

11. Instruction in action to set aside will held erroneous as in effect charging jury that there was sufficient evidence to sustain a finding of undue influence, the evidence in that regard being conflicting. Niemann v. Cordtmeyer, 97 N. Y. S. 670. Issue of fraud held properly submitted to jury where there were facts and circumstances shown from which they could find that testatrix's husband induced her to make the will in issue by a tacit agreement upon which she relied, but which he did not at the time intend to keep and perform. Morrison v. Thoman [Tex.] 89 S. W. 409. See, also, [Tex. Civ. App.] 86 S. W. 1069.

12. Where he was prosperous business man, with strong and vigorous mind. In re Townsend's Estate [Iowa] 105 N. W. 110. In case the testator was of sound mind, it is not sufficient to show that the circumstances are consistent with the hypothesis of its having been obtained by undue influence, but it must be shown that they are inconsistent with a contrary hypothesis. Instruction approved. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. The presumption in favor of the validity of a will executed with all the formalities required by law, and by a testator of full age and sound mind, is one of fact only and does not arise under circumstances which would justify a finding of undue influence. Edgerly v. Edgerly [N. H.] 62 A. 716.

13. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013. Evidence held to require submission of issue to jury. In re Jones' Estate [Iowa] 106 N. W. 610.

14. Evidence insufficient to show fraud: To show that will in favor of husband was procured by false or fraudulent promises, there being no evidence to establish an intention on his part not to comply with agreement to dispose of property as wife wished,

§ 3. *The testamentary instrument or act. A. Requisites, form, and validity.*[16] —A will may be defined as any instrument, executed with the formalities required by law, whereby a person makes a disposition of his property to take effect after his death.[17] A will is entitled to probate though it does nothing more than appoint executors of testator's estate.[18] So, too, a properly executed codicil is a final testamentary disposition, and, if sufficiently complete in itself to be capable of execution, will be given effect, though the will which it was intended to supplement is invalid because improperly executed.[19]

A will which is to become effective only upon the happening of a contingency is a contingent or conditional will,[20] and is annulled and revoked by the failure of the contingency to happen.[21] The will is conditional only if the contingency is referred to as the condition upon which the disposition is to become operative.[22] It is unconditional in case the event is referred to merely as giving the reason or inducement for making it.[23]

A testamentary disposition of property involves the act or will of a single individual only.[24] The distinguishing feature of a will is that it passes no present

conceding the existence of such an agreement. Morrison v. Thoman [Tex. Civ. App.] 86 S. W. 1069.

Evidence held to show fraud. Parker v. Lambertz [Iowa] 104 N. W. 452. To show that will was result of delusions fraudulently created or fostered by the principal beneficiary, and was, therefore, the result of fraud and undue influence. In re Egan's Will, 46 Misc. 375, 94 N. Y. S. 1064.

15. Evidence held sufficient to show undue influence. In re Tyner's Estate [Minn.] 106 N. W. 898. To sustain finding of undue influence. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696; Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

Evidence held insufficient to show undue influence. In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Parker v. Lambertz [Iowa] 104 N. W. 452; In re Townsend's Estate [Iowa] 105 N. W. 110; Hibbard v. Baker [Mich.] 12 Det. Leg. N. 384, 104 N. W. 399; Kneisel v. Kneisel [Mich.] 12 Det. Leg. N. 1029, 106 N. W. 1114; In re Nelson's Estate [Neb.] 106 N. W. 326; In re Glandt's Estate [Neb.] 107 N. W. 248; Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565; Masseth v. Masseth [Pa.] 62 A. 1076; Morrison v. Thoman [Tex. Civ. App.] 86 S. W. 1069; In re Sherwood's Will [Wis.] 105 N. W. 796. Evidence insufficient to sustain finding of undue influence. In re Keisler's Estate [Pa.] 62 A. 108. Court justified in granting nonsuit. In re Morey's Estate, 147 Cal. 495, 82 P. 57. Evidence held to sustain finding that will was not the result of undue influence. Hutcheson v. Bibb [Ala.] 38 So. 754; In re Nichols [Conn.] 62 A. 610; Heaston v. Kreig [Ind.] 77 N. E. 805; In re Brannan's Estate [Minn.] 107 N. W. 141; Barker v. Streuli [N. J. Eq.] 61 A. 408; Hobson v. Moorman [Tenn.] 90 S. W. 152; Mueller v. Pew [Wis.] 106 N. W. 840. Verdict that will was not result of undue influence held not clearly against the weight of the evidence. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Evidence held insufficient to authorize submission of issue to jury. Fethergill v. Fethergill [Iowa] 105 N. W. 377; Morrison v. Thoman [Tex.] 89 S. W. 409. See, also, 86 S. W. 1069. Evidence held insufficient to require submission of issue of undue influence to jury. Threlkeld v. Bond [Ky.] 92 S. W. 606; Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262.

Evidence held to require submission of issue to jury. In re Arnold's Estate, 147 Cal. 583, 82 P. 252; In re Jones' Estate [Iowa] 106 N. W. 610; Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110; Bradford v. Blossom, 190 Mo. 110, 88 S. W. 721; Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

Evidence held to justify submission of issue. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013.

16. See 4 C. L. 1877.

17. Heaston v. Kreig [Ind.] 77 N. E. 805.

18. Codicil. In re Emmons' Will, 96 N. Y. S. 506.

19. Codicil giving one legacy and appointing executors held entitled to admission to probate. In re Emmons' Will, 96 N. Y. S. 506.

20. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113.

21. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113. Where will recited that it was made "in case I die on my journey home from California" held that testatrix died on her journey where she died in another city where she was staying temporarily, before arriving home. Wells v. Chase [Wis.] 105 N. W. 799. Evidence held to sustain finding as to her residence. Id. Such a provision would not have defeated will had she died after arriving home. Id.

22. Holographic will consisting of letters held conditional on testator's death from a surgical operation, and inoperative where he survived. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113.

23. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113.

24. A received certain sum from B and gave latter a mortgage providing for payment to him of a certain sum per annum during life, and further providing that the intention of the parties was to secure to B the interest on the principal sum for life,

interest in the property, does not take effect until the maker's death, and is ambulatory and revocable by him during his lifetime.[25] An instrument which operates to pass some present interest is not testamentary in character,[26] even though the right to possession and enjoyment is postponed.[27] The question is one of intention[28]

and that in case such interest was paid as provided, such principal sum was "to remain to A, her heirs, etc." and upon the death of said B and payments of interest as aforesaid, this obligation is to become null and void. Held not to be an attempted testamentary disposition of B's property. Fiscus v. Wilson [Neb.] 104 N. W. 856.

25. In re Hall's Estate [Cal.] 84 P. 839; O'Day v. Meadows [Mo.] 92 S. W. 637. It is of the essence of a testamentary disposition of property that it be purely posthumous in operation, since during life the intent of the testator must continue ambulatory. Heaston v. Kreig [Ind.] 77 N. E. 805. Distinguishing feature is that it takes effect upon death. In re Emmons' Will, 96 N. Y. S. 506. In determining whether an instrument is a deed or a will the question is whether the maker intended any interest or estate whatever to vest before his death and upon the execution of the paper, or whether he intended that all the interest and estate should take effect only after his death. If former, it is deed, and if the latter, a will. McLain v. Garrison [Tex.] 13 Tex. Ct. Rep. 758, 89 S. W. 284. For former opinion see [Tex. Civ. App.] 88 S. W. 484. A will speaks, and is intended to speak, as of the death of the testator, and until that time the title, legal and equitable, remains unchanged in the testator, and he may sell, convey, and dispose of the same as fully as if no will had ever been made by him. No right, title, or interest of any kind in the thing devised or bequeathed passes to devisee or legatee until testator's death, and not then if it appears that he has otherwise disposed of the property during his lifetime. Lewis v. Curnutt [Iowa] 106 N. W. 914. Wills are ambulatory during the life of the testator, and are necessarily revocable, while deeds take effect upon delivery, and are operative and binding during the life of the grantor. Instrument is a deed if it cannot be revoked, defeated, or impaired, by the act of the grantor, but is a will if it is not to take effect until maker's death, and he has the unqualified power of revocation. McLain v. Garrison [Tex. Civ. App.] 13 Tex. Ct. Rep. 758, 89 S. W. 284. For former opinion see [Tex. Civ. App.] 88 S. W. 484. O'Day v. Meadows [Mo.] 92 S. W. 637. The distinction between a will and a trust is that the former becomes operative only at the death of the testator, while the latter passes an interest to the trustee and the beneficiary instantly upon the execution of the writing by which it is created. Lewis v. Curnutt [Iowa] 106 N. W. 914.

Instruments held testamentary in character: Instrument in form of a contract, Heaston v. Kreig [Ind.] 77 N. E. 805. Note regular in form, shown to have been given in consideration of promise by payee to "distribute" a certain sum after maker's death to a priest for masses, another sum to a sister, and to "keep" the balance. McCourt v. Peppard [Wis.] 105 N. W. 809. Though note recites present consideration, parol evidence is admissible to show that true consideration was promise to do something in future, and hence was testamentary. Id.

26. **Instruments held not to be testamentary:** Assignment of bonds to trustee charging him with the payment of the interest thereon to the donor for life and directing the delivery of the bonds to persons named on the donor's death, held to constitute an irrevocable disposition of the property passing title immediately. Robertson v. Robertson [Ala.] 40 So. 104. Paper in form of a deed, attested as such, and delivered to the party named as grantee, and in the granting, as well as in the habendum and tenendum, clause purporting to convey the title in praesenti, should not be construed as testamentary in character because it recites that the premises are to "remain the right and property" of the grantor "for and during her natural life," the purpose and effect of such recital being to reserve a life estate in the grantor. Sharpe v. Mathews, 123 Ga. 794, 51 S. E. 706. Deed to sister reserving to grantor a life estate in the land and providing that the consideration mentioned therein was to be deducted from the grantee's share of the grantor's estate, held to convey an immediate vested interest in remainder and not to be testamentary in character on the theory that it amounted to an attempted revocation of the residuary clause of a previous will so far as such realty was concerned. Seaton v. Lee [Ill.] 77 N. E. 446. Deed and another instrument held to pass present title. Lewis v Curnutt [Iowa] 106 N. W. 914. Fact that trust includes gifts which do not pass into the possession of the cestuis que trust is not conclusive against instrument being a deed and valid as such. Id. Fact that writings provided for payment of expenses of settling grantor's estate, thus rendering possible the entire exhaustion of the estate to the exclusion of the benficiaries, held not to show that a trust could not have been intended. Id. Power of revocation does not prevent present passing of title. Id. Where a grantor executed deeds with a testamentary purpose, and delivered them to his wife with the direction to keep them until he was done with them and then "deliver them to the girls," his action taken in connection with all the circumstances held to constitute a good delivery. Wissel v. Pierson, 7 Ohio C. C. (N. S.) 428.

27. O'Day v. Meadows [Mo.] 92 S. W. 637. Words "from and after my death" held to have no reference to time when title or interest should pass under deed, but to refer merely to time when trustee should have authority to take possession and proceed with active performance of the trust. Lewis v. Curnutt [Iowa] 106 N. W. 914.

Instruments held not testamentary: Instrument whereby husband, in consideration of $5 and love and affection, does "grant, bargain, sell, and convey" certain property to his wife, and providing that it is "to remain null and void during my lifetime, but

to be gathered from the instrument itself,[29] parol evidence being inadmissible to show a different intention from that expressed.[30] It affords no objection whatever to the testamentary character of an instrument that it contains provisions of a contractual nature,[31] nor is it material by what name the instrument is called.[32]

If testamentary in character the instrument must operate as a will, if at all.[33] If the paper is, on its face, equivocal, the presumption is against its being testamentary, unless it is made clearly to appear that it was executed animo testandi,[34] but a construction rendering it operative will be preferred to one rendering it ineffectual.[35]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*[36]—The right to dispose of one's property by will being purely statutory,[37] the statutory requirements as to the manner of its execution must be at least substantially complied with,[38] testator's intention being immaterial in this regard.[39]

to become of full force and effect immediately upon my decease without court process of any kind," and purporting to have been "signed, sealed and delivered" in the presence of the witnesses, held not a will but a deed transferring property in praesenti. In re Hall's Estate [Cal.] 84 P. 839. Deed by husband and wife whereby they, "in consideration of the sum of one dollar to them in hand paid" by the grantee, "hereby remise, sell and quitclaim" to him an estate in certain land commencing on the death of the husband and continuing during the wife's lifetime, held not to be testamentary in character. O'Day v. Meadows [Mo.] 92 S. W. 637. Instruments in the form of deeds, containing all the elements of deeds, granting and conveying to the grantee the interest described and concluding with usual habendum, tenendum, and warranty clauses, held deeds notwithstanding provisions that they were not to take effect until maker's death, in view of Rev. St. 1895, art. 632 (556), providing that an estate of inheritance to commence in futuro may be created by deed. McLain v. Garrison [Tex. Civ. App.] 88 S. W. 484; rehearing denied, 13 Tex. Ct. Rep. 758, 89 S. W. 284.

28. Whether an instrument is testamentary in character is to be determined, not necessarily from the language nor from the belief or understanding of the parties as to its legal effect, though these should be considered, but the circumstances surrounding the parties at the time of its execution are also to be taken into consideration, and from all the facts the court will determine whether the instrument was intended to have a post mortem effect. McCourt v. Peppard [Wis.] 105 N. W. 809.

29. Intention as gathered from the face of the instruments controls. McLain v. Garrison [Tex. Civ. App.] 88 S. W. 484, rehearing denied [Tex. Civ. App.] 13 Tex. Ct. Rep. 758, 89 S. W. 284. An intention that deeds shall be testamentary in character cannot be given effect as against their plain and unambiguous provisions. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110.

30. Where an instrument is in terms plainly a deed conveying a present interest, and there is nothing therein to indicate a testamentary intent, extrinsic evidence is not admissible to show the contrary. Deeds held unambiguous and hence not subject to probate as a testamentary disposition of property, though circumstances showed that they were so intended. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110. If the instrument contains every element of a valid will, and is incapable of operating in any other way, the animus testandi will be implied, and parol evidence is inadmissible to show a different intent. Heaston v. Kreig [Ind.] 77 N. E. 805.

31. Heaston v. Kreig [Ind.] 77 N. E. 805.

32. Heaston v. Kreig [Ind.] 77 N. E. 805; In re Emmon's Will, 96 N. Y. S. 506. Will have operation according to its legal effect irrespective of whether the maker calls it a deed or a will. McLain v. Garrison [Tex. Civ. App.] 13 Tex. Ct. Rep. 758, 89 S. W. 284. For former opinion see [Tex. Civ. App.] 88 S. W. 484.

33. McCourt v. Peppard [Wis.] 105 N. W. 809.

34. McLain v. Garrison [Tex. Civ. App.] 13 Tex. Ct. Rep. 758, 89 S. W. 284. For former opinion see [Tex. Civ. App.] 88 S. W. 484.

35. An instrument properly executed as a will will be construed as a will rather than as a contract where the latter construction would render it ineffectual. Heaston v. Kreig [Ind.] 77 N. E. 805.

36. See 4 C. L. 1878.

37. In re Pederson's Estate [Minn.] 106 N. W. 958.

38. In re Pederson's Estate [Minn.] 106 N. W. 958; In re Moore's Will, 109 App. Div. 762, 96 N. Y. S. 729, rvg. 46 Misc. 537, 95 N. Y. S. 61; In re Willing's Estate, 212 Pa. 136, 61 A. 812. A substantial compliance is sufficient. Garnett v. Foston [Ky.] 91 S. W. 668. In case of holographic will. Brogan v. Barnard [Tenn.] 90 S. W. 858. Fact that will is holographic does not dispense with substantial compliance with provisions of statute in regard to its execution, but it shows that testator understood its contents and that it expresses his wishes, and the necessity for exercising great care in considering evidence relative to execution does not exist to the same extent as it otherwise would. In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435.

39. Intention has no bearing on the question of publication. Failure to prove publication cannot be supplied by resorting to inference that testator knew he was executing his will, but desired to withhold that

In order to be incorporated into the will by reference, extrinsic papers must be described in clear and definite terms.[40] In New York no testamentary provision in other unexecuted or unattested papers can be incorporated into a will.[41] Whether a trust deed previously executed is a part of the will is a question of law for the court.[42]

The will must be executed animo testandi,[43] and testator must know its contents.[44] The fact that it was not read over to testator is immaterial where there is no doubt that it correctly expresses his intent.[45] A will prepared from instructions and directions given by him, and signed by him upon the assurance that it expresses his wishes, is void if the language incorporated therein does not, in legal effect, make the provisions intended by him,[46] but this rule does not render a will void for failure to incorporate therein provisions supplied by the statutes of inheritance.[47]

The manner of execution, being purely statutory, varies in the different states. The more common requirements are that the will must be in writing and signed by the testator, or by some other person for him, in his presence and by his express direction,[48] that he must sign or acknowledge his signature,[49] in the presence

knowledge from the witnesses. In re Moore's Will, 109 App. Div. 762, 96 N. Y. S. 729, rvg. 46 Misc. 537, 95 N. Y. S. 61.

40. Unsigned memorandum held no part of will which alluded generally to any "memorandum which I may leave." Minot v. Parker [Mass.] 75 N. E. 149.

41. Will which is invalid because attested by only one witness cannot be validated by, or incorporated into, a properly executed codicil subsequently made. In re Emmon's Will, 96 N. Y. S. 506.

42. In re Glass' Estate, 127 Iowa, 646, 103 N. W. 1013.

43. The animus testandi does not depend upon the maker's realization that the instrument he is making is a will, but upon his intention to create a revocable disposition of his property to take effect after his death. Heaston v. Kreig [Ind.] 77 N. E. 805. Testatrix directed that dwelling house should be appraised and that her son should have option to take it at appraised value. Later she signed a writing addressed to her son stating that she had bequeathed to him "the house I now live in for the sum of $10,000, as expressed in my will written by" M. Hold that the admission of such writing as a codicil was properly refused, there being nothing to identify the will proved as the one referred to therein, or the house, and the writing being merely a declaration as to a past act, and not of a present intention to make a testamentary disposition of the property. In re Bright's Estate, 212 Pa. 363, 61 A. 941.

44. The fact that the will was written in a language which testator did not understand is immaterial if it clearly appears that he was otherwise accurately informed of its contents and meaning in a language which he did understand. In re Arneson's Will [Wis.] 107 N. W. 21. Instructions calling attention of jury to question whether or not testatrix knew contents of will when she executed it, and fully understood its provisions, held not objectionable as calling attention of jury to ignorance or understanding of testatrix as an isolated fact, where bill alleged that she was illiterate, had no knowledge of value of her estate, and no understanding of contents of will. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Illiteracy of testatrix held not to justify setting aside will on ground that she did not know its contents in view of evidence of her clearness of mind, etc. Id. Evidence held to sustain finding that will was drawn according to the express wishes of testatrix and that she knew its contents. Barker v. Streuli [N. J. Eq.] 61 A. 408. Where testator is shown to have executed an instrument as his will, being in his right mind, and there is no evidence of fraud or imposition, it will be presumed that he was aware of its contents. Proof of testator's signature to the will is prima facie evidence of his having understandingly executed the same. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Is presumed that one signing an instrument understands its nature and contents. Todd v. Todd [Ill.] 77 N. E. 680. Instruction that jury should find against will if evidence on question whether testator understood nature and contents of will was evenly balanced held erroneous, there being no averment in the bill that testator did not know the nature of the will or what was in it. Id.

45. In re Masseth's Estate [Pa.] 62 A. 640.

46. In re Brannan's Estate [Minn.] 107 N. W. 141.

47. Not where property passes under the will in connection with the statute to persons to whom he intended it to go, as where residuary clause in favor of mother was omitted but properly passed to her under statute, it not having been disposed of. In re Brannan's Estate [Minn.] 107 N. W. 141.

48. Gen. St. 1894, § 4426. In re Pederson's Estate [Minn.] 106 N. W. 958. Wood v. Rhode Island Hospital Trust Co. [R. I.] 61 A. 757. Testator made copy of letter to attorney directing him to prepare codicil to his will so as to leave certain property to certain person, and indorsed envelope in which he placed it "copy of codicil to my will," but did not sign indorsement. Attorney refused to prepare codicil, but testator put copy in his desk, called beneficiary's attention to it,

of the statutory number of witnesses,[50] who must in most states be informed that the instrument is his will,[51] and who must sign as witnesses in his presence,[52] and, in some states, at his request.[53]

and told her that it made no difference and was all right. Held that copy was not a valid codicil, since it was not intended as such when made, and if indorsement was made later and intended as a publication, it was inoperative because not signed. In re Willing's Estate, 212 Pa. 136, 61 A. 812. Where will is not personally signed by testator by writing his name or making his mark it is void unless his name was so signed by his direction and in his presence. In re Pederson's Estate [Minn.] 106 N. W. 958. Direction need not be given in express words, but acts relied on to show such direction must be unambiguous and clearly indicate the necessary direction or request, and the act of signing must be in obedience to the direction thus conveyed. Id. Evidence held to sustain finding that will was not properly executed. Id. Where statute provided that will must be in writing "with the name of the testator subscribed thereto by himself or by some other person in his presence and by his direction," etc., held that will was sufficiently executed though testator's signature was written by another out of his presence, where it was subsequently read over to him, and he, being unable to write, made his mark in the presence of the witnesses. Garnett v. Foston [Ky.] 91 S. W. 668. The signature is that of the testator himself where he holds the pen, though his hand is guided by some other person. Is not a signature by some other person for him so as to require proof of express authority. Wood v. Rhode Island Hospital Trust Co. [R. I.] 61 A. 757.

49. Evidence held sufficient to sustain finding that will was signed by testator in the presence of the subscribing witnesses. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020. It is not necessary that the witnesses see testator sign the will or see his name thereon, or for him to acknowledge that he signed it, but it is sufficient if he acknowledges to them, either by words or acts that the instrument is his act and deed. In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

50. Under Rev. St. 1895, arts. 5335, 5336, will not written entirely by testator must be attested by two witnesses. McLain v. Garrison [Tex. Civ. App.] 88 S. W. 484. Witness who takes part in the physical act of writing her name by holding the pen while another writes it, and who does so animo testandi, in the presence of testator, and at his request, is an effectual subscribing witness, though she is able at the time to write her own name. In re Pope's Will, 139 N. C. 484, 52 S. E. 235.

51. The publication of the will is essential to its validity (In re Moore's Will, 109 App. Div. 762, 96 N. Y. S. 729, rvg. 46 Misc. 537, 95 N. Y. S. 61), and this is equally true in the case of a holographic will (Id.). Held error to admit will where only evidence as to publication was to the effect that testator told subscribing witnesses that instrument was not his will, but was merely a memorandum of his property which he expected to use in preparing a will in the future. Id. Publication is a declaration by the testator that the writing is his last will. Vernon v. Vernon [N. J. Eq.] 61 A. 409. Publication may be by words, or acts or signs which clearly and distinctly make known to the witnesses that the instrument to which they are requested to subscribe is the testator's will. Evidence of publication held sufficient. Id. Evidence held insufficient to show publication. In re Sarasohn's Will, 47 Misc. 535, 95 N. Y. S. 975.

Contra: In Illinois it is not necessary for the testator to state, or for the witnesses to know, that the instrument is a will. In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

52. A paper not attested by two witnesses in the presence of the testator is not a will. Standley v. Moss, 114 Ill. App. 612. "Presence" means conscious presence giving visual or other sensory knowledge of the attestation by the witnesses. Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182. Attestation by taking will from testator to adjoining room out of vision thence returning and acknowledging signatures is not in testator's "presence." Id. Attestation in same room with testator is good without regard to intervening objects which might or did intercept his view, where he could have seen had he looked. In re Brannan's Estate [Minn.] 107 N. W. 141. Evidence held to sustain finding of due execution. Id. Where the witnesses sign in the same room with testator and at his request, it is immaterial that his eyesight is so dim that he does not actually see the act of writing. In re Arneson's Will [Wis.] 107 N. W. 21.

NOTE. Meaning of "In the Presence of:" Where, after testator had signed his will in the presence of the attesting witnesses, they took it into another room and there signed it, being out of testator's sight at the time, and then returned to his room and read the will to him, showing him their signatures, with which he expressed satisfaction. Held, that the attestation was not "in the presence of" the testator. Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182. The decision is in line with the older cases holding that the words "in the presence of" should be strictly construed, the tests of the presence being vision and mental comprehension. 30 Amer. & Eng. Enc. of Law [2d Ed.] 598; 1 Jar. Wills, 120; 1 Underhill, Wills, § 196; Mendell v. Dunbar, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277; Boldry v. Parris, 2 Cush. [Mass.] 435. Thus, where testator is unconscious when the attestation is made, it is void. Sanders v. Stiles, 2 Redf. [N. Y.] 1. So when he cannot see the signing, even though it is in the same room and near him, it is not in his presence. Reed v. Roberts, 26 Ga. 441. But if testator can see the act, it is immaterial whether it occurs in his immediate presence or not. Shire v. Glascock, 2 Salk. 688; Drury v. Connell, 177 Ill. 43, 52 N. E. 368. In Michigan under almost identical circumstances with those of the principal case, it was held that the attestation was good on the ground that only a substantial compliance with the statute was necessary. Cook v. Winchester, 81

Proponent must show affirmatively that all the conditions required by the statute in the execution of the will were complied with,[54] particularly where there is no attestation clause;[55] but when it is established that testator affixed his signature to the instrument and that the persons whose names appear as subscribing witnesses signed a certificate declaring all the steps required by statute for due execution, there arises a strong presumption that such steps were taken which need not be suppported by affirmative memory of witnesses,[56] and which, to defeat the will, must be overcome by evidence to the contrary.[57] In case the subscribing witnesses testify against the due execution of the will, proponents may, if they can, show proper execution by other evidence, but they cannot supply a defect in the proof of due execution by proof that such witnesses had previously stated facts showing due execution.[58] One is a competent witness to testify to the execution of a will when he was competent at the time he attested it.[59] An attesting witness is not disqualified as a witness to prove the will by the fact that by the terms thereof he is appointed executor.[60] The court is not bound to accept the testimony of the subscribing witnesses that the will was executed by the deceased, even though it is not directly and expressly contradicted.[61] Admissions of the witnesses that they may be mistaken,[62] or that their memories may be poor, go only to their credibility.[63]

On the issue of whether the will is genuine or a forgery, any competent evidence tending to show either fact is admissible.[64]

Whether the will was properly executed[65] and whether or not it is a forgery[66] are questions of fact. Cases dealing with the sufficiency of the evidence to show due execution of the will,[67] and its genuineness,[68] will be found in the note.

Mich. 581, 46 N. W. 106, 8 L. R. A. 822. See, also, Cunningham v. Cunningham, 80 Minn. 180, 83 N. W. 58, 81 Am. St. Rep. 256, 51 L. R. A. 642; Sturdivant v. Birchett, 10 Grat. [Va.] 67; and Riggs v. Riggs, 135 Mass. 238. These cases have never been regarded favorably in this country on account of their tendency toward bringing about fraudulent practices. See note by Bigelow, 1 Jarman, Wills, 122, note 1. In the principal case, Cook v. Winchester, and Cunningham v. Cunningham, were cited and criticised. The decision in the principal case is purely technical, as the court regarded the circumstances as precluding any attempt at fraud. For a very complete note and collection of cases see note to Mandeville v. Parker, 31 N. J. Eq. 242.—4 Mich. L. R. 247.

53. Attesting witnesses need not make their attestation at the request of the testator. Standley v. Moss, 114 Ill. App. 612.

54. In re Arneson's Will [Wis.] 107 N. W. 21.

55. Must prove publication. Vernon v. Vernon [N. J. Eq.] 61 A. 409.

56. In re Arneson's Will [Wis.] 107 N. W. 21.

57. Evidence held not to overcome presumption. In re Arneson's Will [Wis.] 107 N. W. 21.

58. Where witnesses negative publication, evidence that they had previously, when not under oath, stated that it was duly published, held not available to show publication. In re Moore's Will, 109 App. Div. 762, 96 N. Y. S. 729, rvg. 46 Misc. 537, 95 N. Y. S. 61. Rule not changed by Code Civ. Proc. §§ 2618, 2620, 2622. Id. Probate need not necessarily be refused because one of the attesting witnesses testifies against the facts necessary to constitute a due execution. Code Civ. Proc. § 2620. In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435.

59, 60. Standley v. Moss, 114 Ill. App. 612.

61. In re McDermott's Estate [Cal.] 82 P. 842.

62. Admission of attesting witness on cross-examination that he might be mistaken as to due execution, but that his testimony was in accordance with his best recollection. In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435.

63. Admission of witness, testifying against due execution, on cross-examination that her memory is very poor must be considered in connection with her testimony. In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435.

64. Intention of testator in respect to proponent as to the disposition of his property is material. In re Burtis, 94 N. Y. S. 961, rvg. 43 Misc. 437, 89 N. Y. S. 441. It is competent to introduce the disputed will in evidence for comparison with other written documents in evidence which have been proved to be genuine, or to introduce forged papers where such papers will tend to show the evil purpose of the parties who may have forged the will in suit. Gurley v. Armentraut, 6 Ohio C. C. (N. S.) 156.

65. In re Sarasohn's Will, 47 Misc. 535, 95 N. Y. S. 975; In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435. Whether it was properly attested. In re Brannan's Estate [Minn.] 107 N. W. 141.

66. Evidence on issue of forgery of testator's signature held to require submission of that issue to a jury pursuant to Code Civ.

(§ 3B) 2. *Nuncupative and holographic wills. Nuncupative wills.*[69]—Nuncupative wills are generally required to be reduced to writing and offered for proof within a specified time after the speaking of the testamentary words.[70] In Louisiana a nuncupative will by private act is not invalid because written in the presence of the five attesting witnesses without formal dictation.[71] The presentation of such a will supplies or dispenses with dictation.[72] Presentation need not be manual, but the acknowledgment of the testator that the paper contains his last will implies the presentation provided by law, even though such acknowledgment is in response to a question.[73]

The burden of proving an alleged nuncupative will in proceedings for its probate is on proponent.[74]

Holographic wills.[75]—A holographic will is one which is entirely written by the testator.[76] In many states attestation may be dispensed with in the case of such wills.[77] Statutes sometimes require that such wills be found among testator's valuable papers after his death.[78] By valuable papers is meant such papers as are regarded by the testator as worthy of preservation, and as are, therefore, in his estimation, of some value.[79] It is not sufficient that the will be found among his valuable effects.[80]

(§ 3) *C. Revocation and alteration. Revocation in general.*[81]—A will can be expressly revoked only in the manner prescribed by statute,[82] and the law requires

Proc. § 2588. In re Burtis, 94 N. Y. S. 961, rvg. 43 Misc. 437, 89 N. Y. S. 441.

67. Evidence held sufficient. Heaston v. Kreig [Ind.] 77 N. E. 805; Threlkeld v. Bond [Ky.] 92 S. W. 606; In re Eldred's Will, 109 App. Div. 777, 96 N. Y. S. 435; In re Sheeran's Will [Minn.] 105 N. W. 677.

Evidence held insufficient: Evidence of execution and publication held so meager and unsatisfactory as to require further hearing. In re Schreiber's Will, 98 N. Y. S. 483.

68. Evidence held to sustain finding that will was not executed by deceased. In re McDermott's Estate [Cal.] 82 P. 842. Evidence held to show that will was executed by testatrix, and not to require finding that it was a fabrication and a forgery. Wright v. Flynn [N. J. Eq.] 61 A. 973.

69. See 4 C. L. 1883.

70. Under 1 Bal. Ann. Codes & St. § 4606, within six months. In re Sullivan's Estate [Wash.] 82 P. 297. Where will was proposed for probate and proof offered within statutory time, held that fact that court acquired no jurisdiction to admit will because of failure to serve proper citations did not deprive proponent of right to have petition and proofs considered, but the decree admitting the will being void, the court would hear matter as on original hearing. Id.

71. Civ. Code arts. 1581, 1582, 1649, construed. Succession of Reems [La.] 38 So. 930.

72, 73. Succession of Reems [La.] 38 So. 930.

74. Not shifted by void decree admitting it, afterwards reversed on appeal. In re Sullivan's Estate [Wash.] 82 P. 297.

75. See 4 C. L. 1884.

76. Letters directing disposition of writer's property held valid holographic will. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113.

77. Under Sayles' Ann. Civ. St. 1897, art. 5336, where a will is wholly written by testator, the attestation of the subscribing witnesses may be dispensed with. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113.

78. By statute in Tennessee a paper writing appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found after his death among his valuable papers, or lodged in the hands of another for safe keeping, will pass title to lands, if the handwriting is generally known by his acquaintances, and it is proved by at least three credible witnesses that they verily believe the writing, and every part of it, to be in his hand. Code 1858, § 2163, Shannon's Code § 3896. Brogan v. Barnard [Tenn.] 90 S. W. 858. All of the requirements of the statute must be complied with. Id.

79. Brogan v. Barnard [Tenn.] 90 S. W. 858. Holographic will found in box in decedent's store in which he kept stamps and stationery belonging to the post office held not found among his "valuable papers," where his deeds and notes were kept in a locked trunk in his house about 50 yards distant from his store. Id.

80. Word "effects" used in statute of North Carolina from which code provision was taken. Brogan v. Barnard [Tenn.] 90 S. W. 858.

81. See 4 C. L. 1885.

82. Under Gen. St. 1894, § 4030, if revoked by a written instrument, same must be executed in manner prescribed for execution of wills: In re Lindesmith's Estate [Minn.] 104 N. W. 825. Where writing in form of contract but claimed to be a revocation of an existing will, is clear, complete, and unambiguous, oral evidence of declarations made by decedent is inadmissible to show that he understood and intended it to be a revoca-

the same mental capacity to revoke as to make a will.[83] Wills may generally be revoked by canceling or destroying them.[84] The question whether cancellations were made animo revocandi is one of intention.[85] Cancellations or erasures made with ink are presumed to have been made animo revocandi,[86] and the same has been held true in the case of a clear and distinct erasure made with a pencil.[87] If a will shown to have been in testator's custody is found among his effects after his death canceled or defaced, it is presumed that he canceled or defaced it animo revocandi,[88] but if it was last in the custody of another, the party asserting revocation must show that it again came into testator's custody, or that it was mutilated or destroyed by his direction.[89] Whether alterations in a will were made by a legatee after its execution is a question of fact for the jury.[90] The cancellation of a part of the will does not affect the balance.[91] A will devising land in fee is not revoked by a subsequent conveyance of the land to the devisee.[92] In states where a married woman may make a will, it is generally held that marriage of a feme sole does not of itself operate to revoke her prior will,[93] but her subsequent marriage and the birth of issue will do so.[94]

tion of an existing will. Id. Can only be revoked in manner specified by 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42. In re Evans' Will, 98 N. Y. S. 1042. Will held not revoked where testatrix directed custodian to destroy it, and he falsely stated that he had done so, though in fact he had not. Id.

83. Schaaf v. Peters [Mo. App.] 90 S. W. 1037. And in order that such revocation may be effectual testator must have sufficient mind and memory to comprehend the nature of the act, and the effect it will have on the devolution of his property. Id.

84. Drawing black ink lines through words held sufficient to constitute a cancellation thereof under Civ. Code § 1292, subd. 2, if put there by testator or at his direction for that purpose, though such words were not entirely obliterated. In re Wikman's Estate [Cal.] 84 P. 212. Under Rev. St. 1899, § 4605, will may be revoked by burning. Schaaf v. Peters [Mo. App.] 90 S. W. 1037. Evidence held to show that line intersecting signature was made before will was signed. In re Glandt's Estate [Neb.] 107 N. W. 248.

85, 86. Hilyard v. Wood [N. J. Eq.] 63 A. 7.

87. In absence of any evidence other than the paper presented for probate, testator must be presumed to have intended pencil erasures to be as final as if done with ink. Hilyard v. Wood [N. J. Eq.] 63 A. 7. Evidence held to show that erasures by drawing pencil lines through portions of will were made animo revocandi. Id.; In re Hopkins' Will, 109 App. Div. 861, 96 N. Y. S. 933.

88. Erasures or cancellations in a will shown to have been in the exclusive possession of testatrix from the time of its execution until her death, and found among her effects, are presumed to have been made by her animo cancellandi. Lines drawn through provisions, where will was taken by testatrix immediately upon its execution, and was never shown to have been out of her possession, and after her death was found in drawer of which she gave key to physician who gave it to lawyer. Hilyard v. Wood [N. J. Eq.] 63 A. 7. Where it appears that the will was in the possession of testator from the time of its execution until his death, that immediately after his death it was found among his effects, and that when so found ink lines were drawn through certain portions of it, it will be presumed that cancellations were made by testator, animo revocandi. In re Wikman's Estate [Cal.] 84 P. 212. Evidence held to sustain finding that testator had possession and control of the will from the time of its execution until his death. Id. Evidence held to sustain finding that cancellations were made by testator with intention of revoking provision appointing appellant executrix. Id.

89. Evidence held to sustain finding that will found with lines drawn through signature had not been revoked, it not being where it was afterwards found when a search was first made for it. In re Hopkins' Will, 109 App. Div. 861, 96 N. Y. S. 933.

90. Instruction that anything done by legatee after the execution of the will would not invalidate it on the ground of undue influence or incapacity held proper, and not misleading as excluding from the jury the question as to whether legatee altered will after its execution, which was one of the issues in the case. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262.

91. Cancellation of certain legacies revokes them only, and will may be probated with them omitted. Hilyard v. Wood [N. J. Eq.] 63 A. 7.

92. Testator executed will devising land in fee. Subsequently he deeded land to devisee in trust for use and benefit of testator, his heirs and assigns. Held that under the will devisee took all the interest remaining in testator, and hence had a fee. Woodward v. Woodward, 33 Colo. 457, 81 P. 322. Where a will devises land in fee and testator subsequently conveys the same land to the devisee, one claiming under the devisee may rely on both the deed and the will to establish his title. Id.

93. Durfee v. Risch [Mich.] 12 Det. Leg. N. 793, 105 N. W. 1114.

94. By analogy to common-law rule in regard to its effect on will of a man, applicable under Comp. Laws § 9270, providing that nothing contained therein shall prevent revocation implied by law from subsequent changes in condition and circumstances of testator. Durfee v. Risch [Mich.] 12 Det. Leg. N. 793, 105 N. W. 1114. Rule not changed by Comp. Laws, § 9285, making pro-

Presumption from failure to find will.[95]—If a will, shown to have been made and left in testator's custody, cannot be found after his death, there is a presumption that he destroyed it animo revocandi,[96] and the burden is on the party seeking to establish the will to overcome such presumption by evidence which is strong, positive, and free from doubt.[97] Declarations of the testator made after the execution of the will are competent to strengthen or rebut this presumption.[98] So, too, the fact that the decedent's papers, including the will if there was one, fell under the control of contestants, who had powerful motives for suppressing it, may be taken into consideration on the question of revocation.[99]

By subsequent will or codicil.[1]—In the absence of an express provision therein to the contrary, a later will revokes a former one only in so far as the two are inconsistent, and in so far as they are consistent the two are to be taken together.[2] The declarations of the testator at the time of the execution of the second will are admissible to show that no revocation was intended.[3] A valid provision in the former will is not revoked by an invalid repugnant provision in the subsequent one.[4]

A will and a codicil must be taken and construed together as parts of one and the same instrument,[5] and the codicil will not be allowed to vary or modify the will unless such was the plain and manifest intent of the testator,[6] nor to disturb its

vision for children born after making of father's will. Id.

95. See 4 C. L. 1887.

96. Thomas v. Thomas [Iowa] 105 N. W. 403; Mitchell v. Low [Pa.] 63 A. 246. Presumption of revocation arises from nonproduction. Ewing v. McIntyre [Mich.] 12 Det. Leg. N. 535, 104 N. W. 787. Evidence held to require submission of question of revocation of alleged lost will to jury. Id.

97. Thomas v. Thomas [Iowa] 105 N. W. 403. Evidence held insufficient to overcome presumption. Id.

98. Ewing v. McIntyre [Mich.] 12 Det. Leg. N. 535, 104 N. W. 787; Gurley v. Armentraut, 6 Ohio C. C. (N. S.) 156.

99. Ewing v. McIntyre [Mich.] 12 Det. Leg. N. 535, 104 N. W. 787.

1. See 4 C. L. 1887.

2. Two wills and codicils taken together admitted as testator's last will. In re Pilsbury's Will, 99 N. Y. S. 62. The mere making of a subsequent will does not totally revoke a prior one in the absence of an express or implied provision therein to the contrary, or unless the two cannot stand together. Whitney v. Hanington [Colo.] 85 P. 84. Subsequent will revokes an earlier one only in so far as the two are inconsistent. Id. Two instruments each purporting to be testator's last will may be admitted to probate as together forming one last will and testament unless the circumstances under which the last was made prohibit such a course, or the two are so repugnant and inconsistent that they may not stand together. Id. First will devised estate to trustees to hold for a time in trust for the legatee with provisions for succession and remainder in event of legatee's death. Subsequent will devised same property to same party "according to the condition of a will now in existence." First will was found in hands of executor, and no other except second was found. Held that two wills were properly admitted as a single will. Id.

3. Conversation with testator at time of execution of second will, in which he stated that he had made a former will and desired this to agree with it, held admissible on issue of intention to revoke former will. Whitney v. Hanington [Colo.] 85 P. 84.

4. Where attempted execution of power of appointment in later will was invalid as unlawfully suspending absolute ownership of personalty, held that valid appointment in earlier will would control. In re Pilsbury's Will, 99 N. Y. S. 62.

5. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279; In re Sigel's Estate [Pa.] 62 A. 175. Provision in will that, in case legatees die in lifetime of testator leaving children, "legacies shall not lapse," but that all property bequeathed by "this instrument" shall go, etc., held applicable to legacies given by codicils in lieu of some of those in the will, particularly where will provided that codicils were to be construed as a part of it. In re Trust & Safe Deposit Co., 110 App. Div. 528, 97 N. Y. S. 405.

6. In re Sigel's Estate [Pa.] 62 A. 175. Codicil held not to modify will by providing for sale of certain lots and distribution of the proceeds. Marfield v. McMurdy, 25 App. D. C. 342. Gift to wife for life with remainder over in what was left at her death held enlarged into a fee by codicil. Hartring's Ex'x v. Milward's Ex'r [Ky.] 90 S. W. 260. Codicil disposing to others the "$2,000 given for the benefit of my sister" held to refer to the principal of $2,000 given in trust for her use of the income and not to $2,000 given her absolutely. Harlow v. Bailey [Mass.] 75 N. E. 259. Codicil providing that share of son should be paid to trustee who should pay income to son during life, and that at his death his share should be paid to his heirs, held to have altered provision of will that residue should be divided among all the children at a fixed future time, and to require distribution of son's share immediately on his death. Throp v. Throp [N. J. Eq.] 61 A. 377. Clause in will giving wife residue of estate absolutely on condition that she re-

provisions further than is necessary.[7] Where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intention to revoke or change it before they will be construed to have such an effect.[8] The disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to modify or revoke the former disposition can be fairly collected from the whole will.[9]

(§ 3) *D. Republication and revival.*[10]—A will which has been revoked can only be revived by a re-execution thereof or by a codicil executed in the manner prescribed for the execution of wills.[11] A substantial compliance with the statute is sufficient.[12] A will properly executed in form which has been revoked by operation of law, or which was executed while testator was incompetent or under restraint, may be revived and validated by the proper execution of a codicil referring to it, or executed for that purpose,[13] but a will which is invalid because not properly executed cannot be so revived by, or incorporated into, a properly executed codicil.[14] A codicil republishes the whole will as of the date of the codicil.[15]

The revocation of a will revoking a former one does not operate to revive the latter, but a republication is necessary.[16]

main unmarried, with devise over to children in case she remarried held superseded by codicil giving to wife absolutely certain realty acquired after will was made "together with all my other real and personal property wheresoever situate and not before devised or bequeathed in my said wills or codicils." "Not before devised or bequeathed" means not specifically devised or bequeathed, and widow took residue free from condition against remarriage. Mulry v. Mulry, 110 App. Div. 374, 97 N. Y. S. 309. Testator gave residue of his estate to his heirs at law, and later executed codicil giving to certain of his heirs specified sums "and no more." Held that such heirs were entitled to receive the legacies given them by the codicil and also to share in the residuary estate under the will, the words quoted applying only to the amounts mentioned in the codicil. In re Sigel's Estate [Pa.] 62 A. 175.

7. Dispositions of the will are not to be disturbed further than is necessary to give effect to codicil. In re Trust & Safe Deposit Co., 110 App. Div. 528, 97 N. Y. S. 405.

8. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279. Clear gift cannot be cut down by doubtful or ambiguous expressions in codicil. In re Sigel's Estate [Pa.] 62 A. 175; McGauly v. McGauly [Ala.] 39 So. 677. By the first paragraph of his will testator made an absolute devise of realty, in a part of which he owned an undivided interest and the balance of which he owned absolutely. By codicil he ratified and confirmed the will "except as the same shall be changed hereby," recited the devise of certain of the realty, describing it but omitting a description of that in which he owned only an undivided interest, and declared that he revoked "said devise and will," and gave the property to devisee for life, with remainder over. Held that will was altered only in regard to the property particularly described in the codicil, and devise of property in which testator owned only an undivided interest was not altered. Id.

9. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279. Recital in codicil that will provided that in case one of testator's daughters died without children her share should return back to testator's family, and provision that "in case one of my sons dies without children likewise his portion shall return back again" to such family, held not to show intention to take away or change power given children by will to use, own, sell, or mortgage property, as they pleased while they lived. Id.

10. See 4 C. L. 1888.

11. Ky. St. 1903, § 4834. P'Pool's Ex'r v. P'Pool's Ex'x [Ky.] 89 S. W. 687.

12. P'Pool's Ex'r v. P'Pool's Ex'x [Ky.] 89 S. W. 687. Under Ky. St. 1903, § 4828, providing that no will shall be valid unless in writing and subscribed by testator, and that, if not wholly written by testator, the subscription must be witnessed or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe in testator's presence, held that it was not necessary to the revival of a revoked holographic will that it be rewritten or resigned, but that it was sufficient to constitute a revival where testator had his signature witnessed by two persons who were not aware of the nature of contents of the instrument. Id.

13. In re Emmons' Will, 96 N. Y. S. 506.

14. Will attested by only one witness. In re Emmons' Will, 96 N. Y. S. 506.

15. Stone v. Forbes [Mass.] 75 N. E. 141. Execution by testatrix of codicil after the death of her husband held in effect to be a re-execution and publication of the will as of the date of the codicil, so that will should be construed as executed after husband's death. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44.

16. Dougherty v. Holscheider [Tex. Civ. App.] 13 Tex. Ct. Rep. 747, 88 S. W. 1113. Subsequent will held revoked by subsequent inconsistent holographic conditional will, though latter fails because the contingency on which it is to take effect never happens. Id. It is at least a declaration in writing within the meaning of Sayles' Civ. Ann. St. 1897, art. 5337. Id. Under Sayles' Civ. Ann.

§ 4. *Probating, establishing, and recording. A. Place of probate and jurisdiction and powers of courts.*[17]—The will of a resident of the state must ordinarily be proved originally as a domestic will, and, in so far as that state is concerned, cannot primarily be proved elsewhere, and brought into the state for purposes of secondary and ancillary administration,[18] though there seems to be some conflict of authority in this regard.[19] The will need not, however, be first probated in the state of testator's domicile,[20] and the fact that it has already been probated in a foreign state does not prevent the subsequent institution of a proceeding for its original probate as a domestic will in the state of the domicile.[21] Every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction, and the courts of a state may grant original probate upon wills of deceased nonresidents leaving property in such state,[22] but this exercise of original jurisdiction over the estates of nonresidents can affect only the property within the state, and the judgment admitting the will to probate is valid in other states only as to property within the jurisdiction of the court pronouncing the judgment.[23] On application for the probate of a foreign will,

St. 1897, providing that a will may be revoked by a subsequent will, codicil, or declaration in writing, etc., execution of such a subsequent will or writing has the effect of revoking the former will immediately upon its publication, regardless of what may thereafter become of it, and a republication is necessary to give effect to the former one. Id.

17. See 4 C. L. 1889.

18. Code Civ. Proc. § 1294, providing that wills must be proved and letters testamentary granted in the county of which decedent was a resident at the time of his death, in whatever place he may have died, fixes the place for all grants of original probate, while § 1322, relating to the probate of foreign wills, and providing that all wills duly proved and allowed in any other of the United States or in any foreign country may be allowed and recorded in the superior court of any county in which the testator shall have left any estate, does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. In re Clark's Estate [Cal.] 82 P. 760. These statutes require that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and, in so far as that state is concerned, it cannot primarily be proved elsewhere and brought into that state for purposes of secondary and ancillary administration. Id. Words "all wills," as used in § 1322, means "all foreign wills," and "foreign wills" means "all wills other than domestic ones." Id. Const. U. S. art. 4, § 1, requiring each state to give full faith and credit to the adjudications of sister states, does not deprive a state of any of its sovereign rights, of any of its rights of primary jurisdiction, nor of any of the rights of its subjects to have the will of a fellow-resident originally proved in the county of his residence. Id. Will has not been duly proved and allowed unless the proof has been taken in a court whose territorial jurisdiction includes testator's domicile. Id.

19. Will of a resident of Connecticut is properly proved in that state by an exemplified and authenticated copy of the will as previously proved in the surrogate's court of another state, and the proceedings of that court thereon. Appeal of Hopkins, 77 Conn. 644, 60 A. 657.

20. Neither at common law nor under Pub. St. 1901, c. 182, § 8, giving jurisdiction to judge of county in which deceased left property where he was resident of foreign state. Knight v. Hollings [N. H.] 63 A. 38.

21. In re Clark's Estate [Cal.] 82 P. 760.

22. In re Clark's Estate [Cal.] 82 P. 760. Probate court has jurisdiction to grant original probate of will of nonresident who leaves property in the state. In re Edelman's Estate [Cal.] 82 P. 962. "An exception to the rule that probate must be at the domicile of testator is made in favor of counties where he left property, especially land. Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815. Under the Statute of Wills, § 10 (ch. 148, Rev. St.), the will of one who resides in another state and leaves no property in this state except choses in action is not admissible to probate here. Upson v. Davis, 110 Ill. App. 375. Nor is it admissible under § 11, which applies only to domestic wills. Id. Nor has the probate court jurisdiction to admit it under the constitutional provisions relative to probate jurisdiction. Id. Choses in action are not property within meaning of such statutes. And the fact that they are in the hands of a resident agent for the purpose of collection of interest does not alter the rule. Id. Under Pub. St. 1901, c. 182, § 8, if deceased was not a resident of the state, judge of probate of any county in which he had estate has jurisdiction to admit will. Knight v. Hollings [N. H.] 63 A. 38.

23. In re Clark's Estate [Cal.] 82 P. 760. Where wills of nonresidents leaving property within the state are admitted to probate on original proceedings for the purpose of administering such property, it is the property within the state that constitutes the res, and proof of the will is allowed as a mere incident or means of determining its disposition, and decree is not binding as to the will itself in other jurisdictions where

the sufficiency of the proofs of foreign probate, and the question of the residence of the deceased, may always be inquired into.[24]

The powers of courts in the probate of wills and in subsequent actions to test their validity are fixed by statute, and vary in the different states.[25] In states where the probate court has exclusive jurisdiction of the probate of a will and has power generally to check and revise proceedings for probate tainted with mistake, fraud, or illegality, a court of equity will not entertain jurisdiction to set aside a will or the probate thereof.[26]

(§ 4) *B. Parties in will cases and the right to contest.*[27]—Any person interested may ordinarily propound a will for probate,[28] or contest its admission.[29] The fact that the widow is given a legacy in lieu of dower does not deprive her of her right to attack the will for any legal reason.[30] The executor is not a necessary party to an action to contest where there are no debts, and no personal property,[31] or where the estate has been fully settled and he has been discharged.[32] A defect of parties cannot be complained of by one whose rights are in no way affected thereby.[33] When proceedings are taken either on a caveat or for a review of the probate of a will, all the

deceased left property, nor upon the courts of the domicile. Id. Foreign probate where testator had realty will be recognized as foreign judgment if properly authenticated though testator resided elsewhere. Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815.

24. In re Clark's Estate [Cal.] 82 P. 760.

25. For powers of courts to construe wills, see § 5 G, post.

Georgia: A proceeding to require executor to probate in solemn form a will previously probated in common form must be instituted in the court of ordinary, since, under Civ. Code 1895, § 4232, that court has excusive jurisdiction of the probate of wills. Hooks v. Brown [Ga.] 53 S. E. 583. The superior court has no jurisdiction to set aside a will which has been admitted to probate. Id.

New Hampshire: Probate courts are courts of general jurisdiction on subjects to which they relate. Knight v. Hollings [N. H.] 63 A. 38.

26. Equity will not interfere where probate court has itself authority to relieve against fraud in the proceedings. Vincent v. Vincent [N. J. Eq.] 62 A. 700. Orphans' court is superior court of general jurisdiction in probate matters, and has control over its judgments and decrees by inquiring into the authority of its attorneys to appear, and hence probate will not be set aside at instance of one claiming that paper authorizing attorney to represent him was procured through fraud. Id.

27. See 4 C. L. 1889.

28. In re Jones' Estate [Iowa] 106 N. W. 610. Testator's administrator appointed in a foreign state to represent testator's interest as heir in the foreign state is a party interested in domiciliary probate and may intervene Code Civ. Proc. § 2617. In re Davis' Will, 182 N. Y. 468, 75 N. E. 530.

29. Code 1896, § 4287, providing that a will may be contested before probate by any person interested therein or by any person who, if testator had died intestate, would have been an heir or distributee of his estate, construed, and words "any person interested therein," held to include only such persons as take an interest in the estate under and by virtue of the will. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only]. Under Code Civ. Proc. § 1307, any person interested may appear in proceedings for probate and contest the will. State v. Superior Court [Cal.] 82 P. 672. Under this section it is a necessary condition to the right of any party to so appear that he shall have some interest in the estate which may be affected by the probate of the proposed will. Id. On petition to set aside probate of will, evidence held to show illegitimacy of daughter so that she was not entitled to contest the will, and an issue of devisavit vel non was properly refused. In re Wilkinson's Estate [Pa.] 62 A. 567. One contesting the admission of a will to probate must first establish his interest. In re Edelman's Estate [Cal.] 82 P. 962. A creditor cannot controvert the validity of the will, it being immaterial whether he receives payment from an executor or an administrator. Hooks v. Brown [Ga.] 53 S. E. 583.

30. Hence an action to contest in probate cannot be construed as an election to take dower if the will is set aside, or to take under the will if it is sustained. Flynn v. McDermott [N. Y.] 75 N. E. 931, afg. 102 App. Div. 56, 92 N. Y. S. 1123.

31. Gurley v. Armentraut, 6 Ohio C. C. (N. S.) 156.

32. Foley v. O'Donaghue [Ind.] 77 N. E. 352.

33. Testatrix executed codicil to her will directing a certain sum to be deducted from a bequest to one of her sons and its division among her other children. Later she executed a second codicil increasing the amount to be deducted and directing a further sum to be deducted and paid to her grandson. Son brought action to set aside probate of second codicil on ground of incapacity and undue influence and verdict was rendered in his favor. Held that grandson was a proper, but not a necessary party to such suit, and failure to join him did not require the granting of a new trial. Verdict was not, however, effectual as to him, and he was en-

parties in interest must be in court, either by citation or voluntarily.[34] An objection to permitting an executor, who has renounced his trust, to offer the will for probate, must be made when the application for probate is presented, or before final action thereon, by some person having a right, because of such renunciation, to himself offer it.[35]

(§ 4) *C. Duty to produce will.*[36]

(§ 4) *D. Probate and procedure in general.*[37]—Probate is not ordinarily necessary to pass title to the realty devised.[38] Probate cannot be refused because of the lack of a living legatee, devisee, or executor,[39] or because of the invalidity of the provisions of the will.[40] Where a will is executed in duplicate, both copies need not be proved and admitted to probate,[41] though the proponents of either duplicate may be required to produce the other.[42]

The necessity of notifying heirs[43] and legatees of the proceedings,[44] and the manner of such notification,[45] depends upon the statutes of the various states.

In some states the testimony of both subscribing witnesses must be taken unless one or both have died, or are absent from the state, or are incapacitated.[46] In New York probate will be refused where the surrogate is not judicially satisfied that the will was properly executed, or that it speaks the true intention of the testator, or that at the time of executing it he was in all respects competent to make a will and was not under restraint.[47] The probate court has a reasonable discretion as to advancing and postponing cases, which will not be interfered with unless abused.[48]

titled to legacy given by such codicil. Busse v. Schaeffer [Iowa] 103 N. W. 947.

34. Layton v. Jacobs [Del.] 62 A. 691.

35. Hooks v. Brown [Ga.] 53 S. E. 583. Where executor renounced, but later offered will for probate in common form and it was so probated, held that party in interest applying to have the executor cited to probate will in solemn form could not set up such renunciation as a bar to right of propounder to offer will in common form. Id.

36, 37. See 4 C. L. 1890.

38. Realty passes under the will from the death of the testator without probate. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

39. The will must nevertheless be probated. In re Davis' Will, 182 N. Y. 468, 75 N. E. 530.

40. Code Civ. Proc. § 2624 construed. In re Pilsbury's Will, 99 N. Y. S. 62. Will must be admitted if matters specified in § 2623 are proved, and surrogate has no power to construe it until after it is admitted. Id.

41. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565.

42. Contestants in suit to establish will held in no position to contend that proof was insufficient to establish identity of alleged duplicates, where they objected to introduction of one not proved, whereupon it was withdrawn. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565.

43. Appointment and appearance of guardian ad litem for minor heirs and beneficiaries held not a condition precedent to admission of will. In re Glandt's Estate [Neb.] 107 N. W. 248. Under Bal. Ann. Codes & St. § 4606, requiring a citation to be directed to the widow and next of kin in proceedings to probate a nuncupative will, and Id. § 6083, requiring citations to be served at least ten days before the term at which they are made returnable, except in certain cases, held that citation in proceedings for probate of a nuncupative will must be served at least ten days before time set for hearing and court has no jurisdiction where citation is not served, and is made returnable on the day it is issued. In re Sullivan's Estate [Wash.] 82 P. 297. Word "term" in the statute must be held to mean time, statutory terms having been abolished. Id.

44. Legatees need not be cited (Code Civ. Proc. § 2615) though they may appear at their election. In re Wohlgemuth, 110 App. Div. 644, 97 N. Y. S. 367.

45. Under Wills Act 1903, §§ 24, 25, the previous issuance and return of citation is not a necessary prerequisite to an order for publication of a notice of the presentation of the will for probate to heirs who reside or have gone out of the state, or who cannot be found on diligent inquiry. Whitney v. Hanington [Colo.] 85 P. 84. Affidavit for publication under § 25, alleging that minor heirs cannot after due diligence and inquiry be found in the state, held sufficient. Id. Further allegation on information and belief that they resided in a specified state held unnecessary to give court jurisdiction to issue order for publication. Id. Fact that notice of petition for probate, published under the direction of the county court, was published in a paper which did not circulate in the vicinity where plaintiff's wards resided, held not sufficient to impeach notice, nor to furnish grounds for setting aside probate. In re Glandt's Estate [Neb.] 107 N. W. 248.

46. In re Hagar's Will, 48 Misc. 43, 96 N. Y. S. 96.

47. In re Eckler's Will, 47 Misc. 820, 95 N. Y. S. 986.

48. Bibb v. Gaston [Ala.] 40 So. 936. Where, before time fixed for hearing appli-

In some states a will may be probated in common form without notice to anyone and upon the testimony of one subscribing witness,[49] and the court has no jurisdiction in such a proceeding to entertain a caveat by an objecting party, or to pass upon the issue of devisavit vel non attempted to be raised thereby.[50] The probate and record of a will in common form is not conclusive upon anyone interested in the estate adversely to the will,[51] but he may at any time within the statutory period require proof in solemn form, and interpose a caveat.[52] The usual mode of procedure in such case is for the complaining party to make application for a citation to issue calling on the propounder to prove the will in solemn form.[53] The only issue raised by such application is that of devisavit vel non,[54] and if probate in solemn form is refused the effect is to set aside the probate in common form and declare an intestacy.[55]

The probate proceeding is in the nature of a proceeding in rem,[56] and is binding on all parties entitled to participate who are brought in by due process of law.[57] It is not a suit inter partes until a sufficient and valid contest has been instituted.[58] The filing of the contest is in effect the commencement of the suit.[59] One desiring to contest the will in the proceedings for its probate is generally required to present a petition or statement of contest, which must state facts showing his right to contest,[60] and must allege one or more of the statutory grounds of contest.[61] The suffi-

cation for probate of a will, a second will of later date was offered for probate, held that it was not an abuse of discretion to continue the hearing as to the first will until the day set for the hearing of the second, to refuse on such day to hear the first until the second case was disposed of, and to further continue the first hearing pending an appeal from a judgment refusing to admit the second will. Id.

49. Civ. Code 1895, § 3281. Hooks v. Brown [Ga.] 53 S. E. 583. Notice need not be given to heirs not mentioned in will. Their rights are not contractual but are wholly dependent on statutes, and they are also put upon inquiry by the death of the ancestor and chargeable with notice of all facts concerning their rights that they would learn upon diligent inquiry. Knight v. Hollings [N. H.] 63 A. 38.

50. Can render no decision as to the validity of the will which can properly be made the subject of an appeal, and an appeal by consent to superior court from such a proceeding does not lie. Hooks v. Brown [Ga.] 53 S. E. 583.

51. Civ. Code 1895, § 3281. Hooks v. Brown [Ga.] 53 S. E. 583. The right to cite the executor of a will probated in common form to prove it in solemn form is not confined to the heirs at law, but is available to anyone interested in the estate. Id. Fact that Civ. Code 1895, § 3282 provides for notice only to heirs at law when will is proved in solemn form does not change rule. Id. A grantee, for value and before probate, of the sole heir of a decedent has the same right to attack the validity of the probate as his grantor would have had. Id.

52. Will become concluded if he delays an attack on probate more than seven years. Civ. Code 1895, § 3283. Hooks v. Brown [Ga.] 53 S. E. 583. When will was offered for probate in common form, written objections in form of caveat were filed. No judgment of probate was entered by court of ordinary, but parties entered into a written agreement that issue should be taken to superior court by appeal. Held that such agreement was a nullity, and an order by the superior court approving and allowing a settlement by the parties thereto was not binding upon anyone having an interest under or adverse to the will, and did not prevent the admission of the will to record at any time thereafter. Id. Under Pub. St. 1901, c. 187, § 9, an interested party may have the probate of a will in common form re-examined, and the will proved in solemn form within one year after probate, or, in case of disability, one year after it is removed. Knight v. Hollings [N. H.] 63 A. 38.

53. To set aside will probated in common form. Hooks v. Brown [Ga.] 53 S. E. 583.

54, 55. Hooks v. Brown [Ga.] 53 S. E. 583.

56. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only]; In re Wohlgemuth, 110 App. Div. 644, 97 N. Y. S. 367. Proceedings held not invalidated by fact that petitioner became insane and was committed to an asylum during their pendency, nor by court's failure to appoint another to act in his stead, where the petitioner had employed a reputable attorney, who continued to prosecute the proceedings in good faith, and no prejudice was shown to have resulted. McKsnna v. Garvey [Mass.] 77 N. E. 782.

57. Where all parties required to be cited are before court. In re Wohlgemuth, 110 App. Div. 644, 97 N. Y. S. 367.

58. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only].

59. For proceedings to contest will after its admission see § 49, post. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only].

60. Must state facts, not conclusions. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only]. Petition failing to negative facts which may be reasonably presumed to exist from those stated, and which would bar petitioner's right to contest, if true, is demurrable. Id. Petition of grandson pred-

ciency of the petition in these particulars is properly tested by demurrer.[62] In many states no answer or reply is necessary.[63] It is not error to require proponent to introduce his preliminary proof on his petition for probate before proceeding with the contest.[64] Grounds of contest not presented when a motion to dismiss the contest is made will not be entertained after an order of dismissal has been made.[65] The court of probate may take cognizance of transfers, releases, and extinguishments of heirship set up as defense by way of estoppel to contest.[66] A suit by the remainderman under a will probated in common to recover land from a grantee of testator's sole heir at law is properly enjoined pending the determination of an issue of devisavit vel non raised by the application of such heir to have the will probated in solemn form.[67] The same rule as in other civil cases applies in determining whether or not the evidence produced by contestant is sufficient to require the submission of the case to the jury.[68] In Maryland the orphans' court is bound to accept the conclusions of the jury, duly certified from a court of law, on trials of caveats of wills, as final, and to make them effective by proper orders,[69] and such an order is conclusive of all issues tried in the suit.[70]

In some states wills admitted to probate are required to be recorded.[71]

(§ 4) *E. Burden of proof on the whole case.*[72]—Generally speaking the law

icating his right to contest as a person interested on legacy left to his mother since deceased held demurrable for failure to allege facts negativing presumption that mother's husband was still living. Id. Statement of contest presented by the state merely alleging by way of conclusion that state is the only party entitled by law to the proceeds of the estate held insufficient to show that decedent died without heirs or that such heirs are nonresident aliens so as to give state a present or a future contingent interest in the property under Code Civ. Proc. §§ 670, 672, 1404. State v. Superior Ct. [Cal.] 82 P. 672. Petition filed by public administrator alleging that "deceased had no heirs residing in the state" held not to show an interest in the state. Id. Notice filed in probate proceedings addressed to public administrator and others claiming an interest purporting to be notice that state claimed entire estate on specified grounds, held not a pleading recognized by law and not to take the place of allegations showing state's interest which should have been contained in statement of contest. Id. In any event a notice that state claims property on ground that deceased left no surviving heirs is not an allegation of the fact that he left none. Id. Possibility that no heirs may appear and claim property within five years and that escheat proceedings may then be commenced under Code Civ. Proc. § 1269, and that no heir may then, or within 20 years after the judgment, appear to claim the property, and that the state may thereupon acquire absolute title under §§ 1271, 1272, does not constitute such an interest as will authorize state to maintain contest. Id.

61, 62. Henry v. Wirt [Ala.] 39 So. 711 [advance sheets only].

63. In re Jones' Estate [Iowa] 106 N. W. 610.

64. Proceeding on petition for probate is distinct from proceeding on a contest of the will. In re McDermott's Estate [Cal.] 82 P. 842.

65. In re Edelman's Estate [Cal.] 82 P. 962.

66. Separation agreement between husband and wife whereby they mutually release their interests in each other's property. In re Edelman's Estate [Cal.] 82 P. 962. Proponents who rely on such an agreement to prevent contest by husband are not required to prove its fairness before effect can be given it. Id.

67. Judge of superior court held not to have abused his discretion in enjoining suit. Hooks v. Brown [Ga.] 53 S. E. 583.

68. All evidence in favor of contestants must be taken as true, and all contradictory evidence disregarded, and case must be submitted if there is any substantial evidence tending to prove all facts necessary to make out contestant's case. In re Arnold's Estate, 147 Cal. 583, 82 P. 252.

69. Struth v. Decker [Md.] 62 A. 709.

70. Order ratifying verdict and dismissing caveat is conclusive on all issues submitted to jury and precludes caveators from framing new issues embracing questions covered by original ones. Struth v. Decker [Md.] 62 A. 709. Issues of fraud and that will did not carry out testamentary intentions as given by testator to draughtsman held practically the same as those previously passed upon. Id.

71. Under Rev. St. 1892, § 1814, requiring wills admitted to probate and the letters testamentary to be recorded, and § 1111, providing for the admission in evidence of certified copies of instruments required to be recorded, held that certified copies of will and probate proceedings were admissible in action of ejectment. Thomas v. Williamson [Fla.] 40 So. 831. Rev. St. 1892, § 1110, providing that certified copies of all wills and letters testamentary "heretofore recorded" in any public office of record shall be received as evidence in all courts of record in the state, applies only to wills recorded prior to its adoption. Id.

72. See 4 C. L. 1892.

presumes testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator. Hence it is usually held that the burden upon the whole evidence is on the party attacking the will to prove the contrary.[73] In some states, however, the burden is on proponent from first to last to establish such facts by a preponderance of all the evidence.[74] In others proponents are first required to furnish prima facie proof of the validity of the will, and the burden is then upon contestants to prove their allegations by a preponderance of all the evidence.[75]

In secondary proceedings to contest the validity of the will, the judgment or decree of the probate court admitting it to probate is generally held to be prima facie proof of its due execution and validity, and the burden of proving the contrary in such cases is, therefore, on contestants.[76]

Sufficiency of evidence and shifting of burden.[77]—The capacity of the testator,[78]

73. Burden of showing undue influence is on party asserting it. In re Tyner's Estate [Minn.] 106 N. W. 898.

74. See 4 C. L. 1892, n. 96. On an application for the probate of a will, the burden is on proponent to show that it was not procured by undue influence (Edgerly v. Edgerly [N. H.] 62 A. 716), and hence absence of all evidence tending to prove how the will was procured prevents its allowance (Id.). Unless there is evidence tending to sustain validity of will, verdict must be directed for objectors. Id.

75. Burden of proving proper execution is on proponent, particularly in view of Code Civ. Proc. § 2622, requiring surrogate to be satisfied as to such execution. In re Sarasohn's Will 47 Misc. 535, 95 N. Y. S. 975. Under Code Civ. Proc. § 2623, providing that "if it appears to the surrogate" that the will was duly executed, and that testator was competent and not under restraint, then it must be admitted to probate, the fact of competency and that testator was not under restraint must be established in the first instance by sufficient evidence by proponents, or the will cannot be admitted. Presumption of sanity is insufficient. In re Schreiber's Will, 98 N. Y. S. 483. Ordinarily proof of the factum of the will is sufficient to meet the burden always cast upon the proponent of showing that the instrument offered was in fact the will of the testator. In re Bedell's Will, 107 App. Div. 284, 95 N. Y. S. 12.

76. California: In an action to contest a will after its admission to probate it is presumed that testator was of sound and disposing mind, and the burden is on contestant to allege and prove the contrary. In re Dole's Estate, 147 Cal. 188, 81 P. 534.

Georgia: Upon the trial of an issue of devisavit vel non in a suit to set aside a will the burden in the first instance is upon the propounder of the alleged will to make out a prima facie case by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily. Credille v. Credille, 123 Ga. 673, 51 S. E. 628. When this is done the burden shifts to the caveators. Id.

Illinois: In a suit to set aside a will, where proponents furnish prima facie proof of its validity, the burden is on the contestants to show undue influence by a preponderance of the evidence. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. In a suit to set aside a will the burden is on the party asserting the validity of the will to prove capacity (Todd v. Todd [Ill.] 77 N. E. 680), but when such proof is made the law adds the presumption that all persons are of sound mind, and the evidence of want of capacity must be sufficient to neutralize both the evidence of capacity and the presumption of law (Id.). Instructions should give proponent the benefit of the presumption. Instruction held erroneous. Id.

Iowa: In a suit to set aside the will, there being no claim of general derangement of mind, the burden is on plaintiff to show that, at the very time of the execution of the will, testator was not of sufficient mental capacity to make it. Fethergill v. Fethergill [Iowa] 105 N. W. 377. In a will contest the burden of proving undue influence, and that it operated on the mind of testator at the very time the will was made to such an extent that the will was the result thereof, is upon the contestant. In re Townsend's Estate [Iowa] 105 N. W. 110; Parker v. Lambertz [Iowa] 104 N. W. 452.

Missouri: In a suit to establish the will, the burden of proving undue influence is upon those who assert it (King v. Gilson [Mo.] 90 S. W. 367), and this is true though testator was under guardianship for insanity when the will was made (Id.). Instruction held erroneous (Id.). In a suit to contest the burden of proving undue influence is on the party alleging it. Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696.

New York: In an action under Code Civ. Proc. § 2653a to determine the validity of the probate of a will, the burden of proving incapacity is on the contestant, since probate is prima facie evidence of its due execution and validity. Heyzer v. Morris, 110 App. Div. 313, 97 N. Y. S. 131. Plaintiff is only required to introduce the will and the decree admitting it, and it thereupon becomes incumbent on defendants to offer their evidence impeaching it. Carolan v. O'Donnell, 105 App. Div. 577, 94 N. Y. S. 171.

Texas: In a suit to set aside a judgment admitting a will to probate, the burden is on plaintiff to establish the invalidity of the will. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262.

77. See 4 C. L. 1893.

78. See § 2 A, ante.

the freedom of his will from fraud and undue influence,[79] and the due execution of the will,[80] must be fully proved, either by the presumptions favoring such facts, or from positive proof, or both, according to the strength of the opposing case. The constituent facts and evidence on which each of these may be based have already been discussed and need not be repeated.

(§ 4) *F. Establishment of lost will.*[81]—One seeking to establish an alleged lost will must prove by clear and satisfactory evidence its execution,[82] its contents,[83] and that it was unrevoked at testator's death.[84] The fact of the existence of a will unrevoked after the death of the testator can be established by presumption and circumstantial evidence, as well as by direct evidence.[85] When restored, a copy of the will becomes written evidence of the will, and takes the place of the lost instrument, standing in its stead for all practical purposes, as the will of the testator.[86]

(§ 4) *G. Judgments and decrees.*[87]—The judgments of courts to which the proof of wills is confided, while unreversed, are generally held to be as conclusive and binding as those of any other courts, and are not subject to collateral attack,[88]

79. See § 2 B, ante.

80. See § 3 B, ante.

81. See 4 C. L. 1893.

82. Evidence held insufficient. Michell v. Low [Pa.] 63 A. 246. Preponderance of evidence is sufficient. Evidence held sufficient to go to jury. Ewing v. McIntyre [Mich.] 12 Det. Leg. N. 535, 104 N. W. 787.

83. Evidence held insufficient. Michell v. Low [Pa.] 63 A. 246. A lost or destroyed will may be restored on proof of its loss or destruction, and of its contents. Schaaf v. Peters [Mo. App.] 90 S. W. 1037. On application for probate of alleged lost will held that question whether paper was original draft or memorandum thereof should have been submitted to jury, where it was shown that it was in scrivener's handwriting, that he never executed but the one will for testator, that it was found on floor near table where will was executed on day of its execution, and was in same condition when offered in evidence as when found. Ewing v. McIntyre [Mich.] 12 Det. Leg. N. 535, 104 N. W. 787. If it was such original draft, held that it was admissible to prove its contents. Id. Preponderance of evidence is sufficient. Evidence held sufficient to go to jury. Id. In a suit to probate and establish an alleged lost will the attorney who drew it is competent to testify to its provisions. Inlow v. Hughes [Ind. App.] 76 N. E. 763. In Indiana no will may be proved and established as lost or destroyed unless its provisions are clearly proven by two witnesses, or by a correct copy and the testimony of one witness. Under Burns' Ann. St. 1901, § 2779. Id. Evidence in suit to establish and probate lost will held insufficient to prove contents as required by this statute. Id. Declarations of the testator, made after the execution of the will, are admissible if at all, only by way of corroboration in the furnishing of the clear proof by two witnesses of the provisions of the will, as matters of fact within their knowledge, which is required by the statute. Id. The contents of a lost will, or of one which has been destroyed or canceled without testator's consent, cannot be shown until its execution has been proved by the testimony of two witnesses. Under Act April 8, 1833 (P. L. 249; 2 Purd. Dig. 2102), providing that a will must in all cases be proved by oaths or affirmations of two or more competent witnesses. Michell v. Low [Pa.] 63 A. 246.

84. Evidence must be positive and sufficient to overcome both the presumption of revocation by testator, and the presumption of innocence on the part of a third person charged with destroying the will. Michell v. Low [Pa.] 63 A. 246. Evidence held insufficient. Id. Burden of proof is on the proponents to satisfy the court that a "lost" will was in existence and unrevoked at the time of the death of the testator. Gibson v. Gibson, 6 Ohio C. C. (N. S.) 269.

85. Gibson v. Gibson, 6 Ohio C. C. (N. S.) 269. The word "lost," when used with reference to an alleged last will and testament in a probate proceeding, has some of the significance of "spoliated" or "destroyed." Id.

86. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

87. See 4 C. L. 1894.

88. **California:** Determination of the probate court as to residence of deceased at the time of his death is final in all collateral proceedings. In re Dole's Estate, 147 Cal. 188, 81 P. 534. Order admitting a foreign will to probate, even if erroneous, is not void on its face and subject to collateral attack because of an incorrect determination of the domicile of the deceased. Dunsmuir v. Coffey [Cal.] 82 P. 682; In re Dunsmuir's Estate [Cal.] 84 P. 657.

Colorado: Judgment admitting will can only be attacked by appeal or error for errors committed in exercising jurisdiction, where there is no error in assuming jurisdiction and no fraud was practiced in procuring such judgment. Camplin v. Jackson [Colo.] 83 P. 1017. Under Const. art. 6, § 23, 1 Mills' Ann. St. §§ 395, 1095, giving county court jurisdiction to determine whether the instrument offered for probate is the last will of deceased, it has authority to determine all pertinent facts, including the question whether or not the will is a forgery, and was properly executed and attested. Id. Errors committed in deciding any of such questions are errors in exercise of jurisdiction and not errors in assuming it. Id.

except for fraud or want of jurisdiction apparent on the face of the record.[89] So, too, such courts are usually regarded as courts of general jurisdiction in regard to probate matters, and are entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals of general jurisdiction.[90]

In North Dakota in county court the final decree consists of the findings of fact, conclusions of law, and statement of the relief awarded, and all these should be embodied in one document, signed by the judge, and filed.[91]

(§ 4) *H. Revocation of probate.*[92]—The power of the probate court to set aside its judgment admitting the will to probate depends on the statutes of the various states.[93]

Florida: Under Rev. St. 1892, § 1810, making the probate of wills of personalty conclusive, and of wills of realty prima facie, evidence of their validity, the manner of execution and attestation of a will admitted to probate cannot be attacked in a collateral proceeding. Thomas v. Williamson [Fla.] 40 So. 831. Prima facie evidence is such as in the judgment of the law is sufficient to establish the fact, and if unrebutted, remains sufficient for that purpose. Id.

Georgia: Where a will has been probated in common form, the judgment of probate cannot be collaterally impeached in the superior court by any proceedings attempting to raise the issue of devisavit vel non. Not in suit by remainderman under will to recover land from sole heir at law. Hooks v. Brown [Ga.] 53 S. E. 583.

Illinois: An order of a probate court admitting a will to probate is an adjudication of its validity as a testamentary instrument, and, until appealed from, is binding on all parties before the court as to all matters material to the issue involved. As to domicile of testatrix, where a finding in that regard is necessary to confer jurisdiction. Palmer v. Bradley, 142 F. 193. Cannot be collaterally attacked except for fraud or some disability whereby complainant might be legally relieved from binding force of order. Id.

Kentucky: The probate of a will by a court of competent jurisdiction is conclusive against the world, as a proceeding in rem, until reversed or vacated in a direct proceeding allowed for that purpose. Brooks v. Paine's Ex'rs [Ky.] 90 S. W. 600.

New Hampshire: The probate of a will is conclusive of its genuineness and validity until avoided by a direct proceeding. Cannot be collaterally attacked for failure to notify heir, which at most renders proceedings voidable. Knight v. Hollings [N. H.] 63 A. 38.

New York: Under Code Civ. Proc., § 2626, a decree of the surrogate admitting will to probate is, in so far as it relates to personalty, final and conclusive unless reversed upon appeal, or revoked by the surrogate, or unless an action to determine the validity of the will is brought under Id. § 2653a. In re Wohlgemuth, 110 App. Div. 644, 97 N. Y. S. 367. Decree admitting two holographic instruments as testator's last will cannot be collaterally attacked on proceedings for distribution on ground that instrument last executed was complete in itself and revoked the former one. Id.

89. The action of a probate court in assuming jurisdiction of a will and admitting it to probate may be collaterally attacked where lack of jurisdiction appears on the face of the record. Upson v. Davis, 110 Ill. App. 375.

90. Particularly where they are courts of record. Knight v. Hollings [N. H.] 63 A. 38. Will having been proved in common form, it must also be presumed that there was no contest. Pub. St. 1901, c. 187, § 6. Id. On petition to set aside and revoke probate it will be presumed that judge admitting will found that deceased was last an inhabitant of the county, or had estate therein at the time of his death, or both, such facts being necessary to give him jurisdiction under Pub. St. 1901, c. 182, § 8. Id. It will be presumed on a bill to compel distribution that all parties in interest were duly notified of a hearing in the probate court at which the will was set aside. Crockett v. Sibley [N. H.] 61 A. 469.

91. In re Lemery's Estate [N. D.] 107 N. W. 365. Where, in proceedings to probate will, county court made and filed findings and conclusions, and subsequently filed a separate document purporting to be the judgment, held that the latter should be regarded as a completion or amendment of the former, and both documents taken together constitute the final judgment. Id.

92. See 4 C. L. 1896.

93. **California:** In the absence of an application for relief on the ground of mistake, etc., made within one year as prescribed by Code Civ. Proc. § 473, an order admitting a foreign will cannot be set aside by the court which entered it except in a separate action, and any order purporting to vacate it is void for want of jurisdiction. Dunsmuir v. Coffey [Cal.] 82 P. 682. On prohibition to prevent the execution of an order appointing a special administrator and directing him to retake property previously distributed the court may consider the validity of a previous order annulling an order admitting the will to probate, on which the validity of the order appointing the administrator depends, and also whether the order admitting the will is void on its face. Id. An order granting a motion to vacate an order admitting a will to probate is erroneous and void, where such motion is not made within the time prescribed by Code Civ. Proc. § 473, and the order admitting the will is not void on its face. In re Dunsmuir's Estate [Cal.] 84 P. 657.

Colorado: In order to sustain a judgment

(§ 4) *I. Suits to contest.*[94]—In many states the validity of the will may be contested by a suit brought for that purpose within a specified time[95] after its admission to probate.[96] A court of equity has no inherent jurisdiction to entertain a bill for the contest of a will, and hence any jurisdiction conferred by statute must be construed in accordance with the terms therein employed.[97] The law in force at the time when the bill is filed governs as to the jurisdictional requirements.[98]

of the county court, and the district court on appeal, annulling a decree admitting the will in a proceeding commenced more than six months after the rendition of the judgment admitting the will, it must appear that the latter judgment was absolutely void. Camplin v. Jackson [Colo.] 83 P. 1017. Where a county court having jurisdiction of the subject-matter and the parties admits a will to probate, it is error for such court, in a proceeding started more than six months after the entry of the decree, to make an order vacating its previous judgment admitting the will, notwithstanding the fact that such serious error was committed in admitting the will as would have worked a reversal on appeal or error, it not being contended that there was any fraud in procuring the decree admitting the will. Id. It is also error for the district court, on appeal from the order vacating the order admitting the will, to annul the decree of probate. Id. Heirs at law expressly consenting to probate of will cannot, without any showing of fraud, have decree set aside where court had jurisdiction of persons and subject-matter. Id.

New Hampshire: The probate court may set aside its decree admitting the will to probate, provided sufficient cause is shown. Knight v. Hollings [N. H.] 63 A. 38. Such power is, however, equitable in its nature, and will only be exercised on a showing of some substantial ground therefor, such as fraud, accident, or mistake, rendering it against conscience to execute the decree, and of which plaintiffs were prevented from availing themselves by fraud or negligence on their part. Id. Plaintiffs held barred by laches where proceedings to revoke probate were not begun until more than 12 years after decree admitting will. Id.

94. See 4 C. L. 1896.

95. California: Code Civ. Proc., § 1330, does not give the right to contest a will after probate on the ground that court did not have jurisdiction, and objection that court did not have jurisdiction because deceased was not a resident of the county cannot be raised in such a proceeding, particularly when not pleaded. In re Dole's Estate, 147 Cal. 188, 81 P. 534.

Illinois: Hurd's Rev. St. 1903, c. 148, § 7, authorizing any person interested to file a bill in chancery to contest a will within one year after the probate of the same in the county court, and providing for the making up and trial of an issue of law in the circuit court, is not a statute of limitations, but merely a grant of jurisdiction to the circuit court, which can only be exercised in the mode and under the limitation prescribed. O'Brien v. Bonfield [Ill.] 77 N. E. 167. The time limited for filing the bill is jurisdictional and must be strictly construed. Id. In case of an appeal from the order of the county court admitting the will to probate and an affirmance by the circuit court, the probate of the will in the county court is not final and complete until a certified copy of the order of the circuit court admitting the will is filed in the county court, and hence the year in which the will may be contested does not commence to run until that time. Hurd's Rev. St. 1903, c. 148, §§ 7, 14, 18, construed. Id. Laws 1903, p. 355, limiting the time for filing bills to contest wills to one year, applies to wills probated previous to the time when such act went into effect. Clowry v. Nolan [Ill.] 77 N. E. 906. Must be instituted within statutory period. Benda v. Kalina, 119 Ill. App. 196.

Kansas: Under Gen. St. 1901, c. 117, § 20, action in district court to contest a will must be brought within two years after probate. Medill v. Snyder [Kan.] 81 P. 216. This provision is not affected by the provision of the general statute of limitations (Code Civ. Proc., § 23) that if an action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if plaintiff fails in such action otherwise than on the merits, and the time limited for the same shall have expired, the plaintiff may commence a new action within one year after such failure or reversal, the general statute being inapplicable to such a case. Id. Special statute is not a mere statute of limitations, and hence cannot be modified by general statute. Id.

Washington: Under 2 Bal. Ann. Codes & St. § 6110, action to contest must be instituted within one year from the probate of the will. In re Sullivan's Estate [Wash.] 82 P. 297. Where petition was filed within a year but was not properly verified and after expiration of year motion to strike was granted with leave to amend, as authorized by 2 Bal. Ann. Codes & St. § 4955, and amendment was subsequently made, held that contest was instituted within a year, court not having lost jurisdiction by granting motion and allowing amendment. Id. Where no valid decree admitting will is ever entered, contestants are not limited to one year from date of entry of a void decree. Id. Petition to contest was filed in time but plaintiffs subsequently instituted proceedings in the Federal court which restrained proponent from asserting any rights under the will. This decision was subsequently reversed. Held that proceedings in state court would not be dismissed for want of prosecution because of delay pending determination of suit in Federal court. Id.

96. By § 7 of the statute the admission of a will to probate by the probate court is a condition precedent to the right to file a bill in chancery to contest it. Henline v. Brady, 110 Ill. App. 75.

97. O'Brien v. Bonfield [Ill.] 77 N. E. 167. The right to contest a will in chancery after

The final settlement of the estate and the discharge of the executor is not a bar to proceedings to contest,[99] the orders approving the executor's report[1] and of final settlement not being res adjudicata of the validity of the will.[2] In such case, however, as to all acts which have been properly done in preparing the estate for settlement under the probated will, the contestant who delays must accept conditions as he finds them.[3]

The bill or complaint must allege the grounds of contest in accordance with the ordinary rules of pleading.[4] Plaintiff may propound for probate a later will claimed to have revoked the one whose probate is contested.[5] In such case the later will is the foundation of his cause of action, and is properly attached to the complaint as an exhibit.[6]

The practice is ordinarily the same as at law.[7] The issue involved is to be submitted to the jury as a new and original question, and determined exclusively by the evidence introduced.[8] The order admitting the will is not admissible.[9] Proponent makes out a prima facie case when he introduces the evidence of the witnesses of the will and puts the will in evidence.[10] In Illinois he is not bound to call the subscribing witnesses, though unexplained failure to do so might be a suspicious circumstance.[11] A subscribing witness may be called though his testimony in the probate court has been read in evidence.[12]

(§ 4) *J. Suits to establish.*—A proceeding to establish a will is one at law,[13] and the issues raised thereby are properly submitted to a jury.[14] Such an action under the Missouri statute has the same effect as if an appeal had been taken from the

probate is purely statutory. Benda v. Kalina, 119 Ill. App. 196.

98. A proceeding in chancery to contest a will after probate is as to jurisdictional requirements governed by the law in force at the time the bill is filed and not that in force at the time the will was probated. Benda v. Kalina, 119 Ill. App. 196.

99. Though contestant had notice and knowledge of the proceeding, and made no objection, and gave no notice of his intention to contest. Foley v. O'Donaghue [Ind.] 77 N. E. 352. The three-year period given by the statute in which to contest the validity of a probated will is not in the nature of a statute of limitations, but the right granted is a substantive one which it is the duty of the court to recognize without abridgment or exception. Id. Where the estate devised consists of both realty and personalty, and action is brought within prescribed time. Stuckwisch v. Kamman [Ind.] 77 N. E. 349. In the absence of anything in the answer going to show that the will gave the executor any control over the realty devised or affected thereby, it will be presumed on appeal that his final settlement applied only to the personalty, and had no relation to the realty. Id.

1. The filing of the final report of the executor in no way involves or tenders as an issue the validity of the will, and hence such issue is not determined and adjudicated by the judgment approving such report. Burns' Ann. St. 1901, §§ 2545-2547, 2557, 2558, relating to settlement of estates and discharge of executors construed. Stuckwisch v. Kamman [Ind.] 77 N. E. 349.

2. Since that question is not involved. Otherwise the statutes authorizing an action to contest within three years, and the settlement of the estate at the expiration of one year after notice of the granting of letters could not be brought into accord. Foley v. O'Donaghue [Ind.] 77 N. E. 352.

3. Burns' Ann. St. 1901, § 2412m. Assets may, in the absence of an intervening contest, be distributed under the will as if its provisions were wholly immutable. Foley v. O'Donaghue [Ind.] 77 N. E. 352.

4. Must allege that the attesting witnesses were incompetent, or facts which amount in substance to such an averment or the will will not be set aside on such ground. Standley v. Moss, 114 Ill. App. 612. Complaint alleging that a "contract" made by decedent was testamentary and denying its right to probate on grounds of undue influence and unsound mind is not to rescind contract but to contest probate. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

5, 6. Heaston v. Kreig [Ind.] 77 N. E. 805.

7. On trial of a will contest before a jury in chancery the practice is the same as at law and exceptions to the rulings of the court must be properly saved in order to have them reviewed on appeal. Henline v. Brady, 110 Ill. App. 75.

8. The trial is de novo and without regard to the fact that the will has been admitted to probate. Henline v. Brady, 110 Ill. App. 75.

9, 10, 11, 12. Henline v. Brady, 110 Ill. App. 75.

13. Proceedings under Rev. St. 1899, § 4622. Schaaf v. Peters [Mo. App.] 90 S. W. 1037. Action under Code Civ. Proc. § 2653a. Carolan v. O'Donnell, 105 App. Div. 577, 94 N. Y. S. 171.

14. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

probate court and in effect transfers the probate proceedings to the circuit court.[15] Hence in such case the judgment of the probate court is not conclusive.[16] In Iowa there is no statutory authority for a proceeding by those claiming under a will to have it established and confirmed.[17]

(§ 4) *K. Suits to set aside.*[18]—In an action of an equitable nature to set aside the probate of a will, the burden is on plaintiff to show that the county court was without jurisdiction to admit the will, or that some wrong was committed in the proceeding which amounted to a fraud prejudicial to his rights.[19] He must also show some valid cause for the contest of the will, and convince the court that the cause of contest is prima facie valid, or that sufficient grounds existed to refuse the probate.[20]

The New York statute provides for an action at law to determine the validity of a will after its admission to probate.[21] This act does not prevent the bringing of a suit in equity to set aside a will not yet admitted to probate, at least where the fact that plaintiff has an adequate remedy at law is not pleaded.[22] Suits in equity to set aside a deed and a will, both of which are alleged to have been wrongfully obtained by defendant and either of which would give him title to the property in dispute are properly joined and tried as one,[23] and this is true though the will has not yet been probated.[24]

Under the statute of Virginia a bill in equity may be brought to impeach a will admitted to probate.[25]

(§ 4) *L. Appeals.*[26] *Appeals from probate courts.*[27]—Appeals are generally allowed from all final orders or decrees of the court having jurisdiction of probate

15. Proceeding under Rev. St. 1899, § 4622, in circuit court, to establish will which probate court has previously refused to admit. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

16. Probate or rejection of a will is not a finality until after the five years allowed by the statute in which to bring the action in the circuit court, even though no appeal was taken therefrom. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

17. Defendant, in action to set aside will, set up that will had been duly probated and that it was the last will of deceased and fully expressed his desires as to the distribution of his property, and prayed judgment confirming the probate and establishing the will. Plaintiffs dismissed action before submission of case. Held that court had no jurisdiction to retain case and render judgment as prayed for by defendant on theory that allegations and prayer of answer were equivalent to a counterclaim, since there is no statutory authority for a proceeding by those claiming under a will to have it established and confirmed. Davis v. Preston [Iowa] 106 N. W. 151.

18. See 4 C. L. 1897.

19. Evidence insufficient. In re Glandt's Estate [Neb.] 107 N. W. 248.

20. Evidence held insufficient. In re Glandt's Estate [Neb.] 107 N. W. 248. Fact that will was admitted upon evidence of but one subscribing witness after guardian ad litem of minor heirs and beneficiaries had filed general denial and demanded proof of execution, held no ground for setting aside probate in absence of showing of prejudice. Id.

21. Under Code Civ. Proc., § 2653a, action to test validity of probate of will must be brought within two years after the admission of the will to probate, except that minors, persons absent from the state, etc., may bring such action within two years after the removal of the disability. Bell v. Villard, 48 Misc. 587, 97 N. Y. S. 244. Persons absent from the state means residents of the state who happen to be absent therefrom, and does not include a foreigner who is a permanent resident of a foreign country, and a nonresident of the state. Id.

22. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

23. Particularly where both are part of one scheme to obtain the property of the deceased. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

24. Realty passes under will from death of testator without probate. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

25. Code 1887, § 2544, providing for a bill in equity to impeach a will admitted to probate, on which bill a trial by jury shall be ordered to ascertain whether any, and if any, how much of what was offered for probate is the will of the decedent, does not undertake to prescribe the terms of the issue, and where bill attacked will as a whole and stated a case which, if true, avoided the whole of it, and answer accepted issue thus tendered and sought to sustain will as an entirety, held that issue framed for a finding for or against will as an entirety was not erroneous on theory that it should have permitted a finding sustaining a part of the will. Roland v. Roland [Va.] 52 S. E. 366.

26, 27. See 4 C. L. 1894.

matters,[28] and may ordinarily be taken by anyone interested,[29] or by anyone aggrieved thereby.[30] The jurisdiction of appellate courts,[31] the time within which an appeal must be taken,[32] and the method of perfecting it,[33] depend upon the statutes of the various states.

28. Orders held appealable: Order dismissing contest, heard and determined when will was offered for probate, held reviewable on appeal from subsequent order admitting will to probate. Code Civ. Proc., §§ 956, 963, 1307, 1312-1314, 1714, construed. In re Edelman's Estate [Cal.] 82 P. 962. Order vacating prior order dismissing petition to contest and ordering dismissal of the petition affects the substantial rights of proponent with respect to the extension of time within which petitioner may appeal, and is appealable. In re Sullivan's Estate [Wash.] 82 P. 297.

Orders held not appealable: An order revoking an order refusing to admit a will to probate is not appealable, it not being specified in Code Civ. Proc., § 963. In re Bouyssou's Estate [Cal. App.] 82 P. 1066. An order vacating an order appointing an administrator being appealable, and proceedings for appointment of an administrator and for probating a will being distinct, an order granting a "motion to vacate order refusing probate of will and appointing administrator" will be construed distributively and an appeal from such order will not be dismissed in so far as it relates to the revocation of such appointment, there being nothing in the bill of exceptions to show that the appointment did not proceed upon a separate record, or that it was dependent on order denying probate. Id. The ordinary, having no jurisdiction to entertain a caveat in proceedings to probate a will in common form, or to pass upon the issue of devisavit vel non attempted to be raised thereby, can render no decision which can properly be made the subject of an appeal, and an appeal by consent to the superior court from such a proceeding does not lie. Hooks v. Brown [Ga.] 53 S. E. 583.

29. Under Ky. St. 1903, § 4859, authorizing any person interested in the probate of a will to appeal to the circuit court from order of county court admitting will, held that general creditors of an insolvent, disinherited heir, who claim that the will was revoked by testator, may appeal from an order probating the will upon ex parte proceedings, where the heir refuses to do so. Brooks v. Paine's Ex'rs [Ky.] 90 S. W. 600.

30. Under Laws 1903, c. 27, p. 35, an heir at law is a party aggrieved, and may at any time within 30 days appeal from an order admitting a will to probate, though he did not appear at the hearing and take part in the proceedings. In re Sheeran's Will [Minn.] 105 N. W. 677. In case such heir dies after the entry of the order in the probate court and before the expiration of the time allowed to appeal, a special administrator may perfect the appeal within such time. Id.

31. Appeal will lie to supreme court from order refusing to admit will to probate on ground that freehold is involved though will does not in terms devise realty, where it appears from the record that testator owned realty which was devised by the residuary clause. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020.

32. County court may, in furtherance of justice, permit service of an amended notice of appeal to district court after expiration of statutory time for appeal, where the appeal was taken in good faith in the proper time, but by mistake the original notice was technically defective because of the omission of some of the necessary parties. Rev. Codes 1899, § 6259. In re Lemery's Estate [N. D.] 107 N. W. 365. Rev. St. 1898, § 4035, prohibiting the allowance of a petition for leave to appeal from a judgment admitting a will to probate after the expiration of the time within which an appeal is allowed as a matter of right without reasonable notice to the adverse party, and only permitting the allowance of the petition when it appears that justice requires a review of the case, contemplates a hearing if the adverse party desires it and that he may obtain a more definite statement of the material facts than that contained in the original petition if the court deems it necessary. In re Scaife's Will [Wis.] 105 N. W. 920. Hence the same liberal rules apply in the construction of such a petition as are applied in support of a pleading when challenged for insufficiency, and essential facts are deemed to be inferentially stated which are alleged according to their legal effect. Id. Statement that petitioners are heirs at law and near relatives of deceased and entitled to a distributive share of his estate if will should be set aside held to sufficiently show that petitioners were heirs at law and next of kin and entitled to appeal. Id. Where notice of appeal from judgment of county court admitting will to probate is filed within 60 days as provided by Rev. St. 1898, § 4031, the fact that the undertaking required by Id. § 4032 is not filed with such notice is not a fatal defect though it is not filed within the time limited for taking the appeal. In re Box's Will [Wis.] 106 N. W. 1063.

33. Notice: Where, pending proceedings for probate of a will and the appointment of an executor, the petitioner became insane and was committed to an asylum, but no suggestion for a stay of proceedings or for the appointment of a person to represent him was made to the court, held that the service of a notice of appeal from decree refusing probate on the attorney for petitioner who continued to prosecute the case was sufficient, under Rev. Laws, c. 162, §§ 11, 40, and Chancery Rule 22. McKenna v. Garvey [Mass.] 77 N. E. 782. A notice of appeal dated and served after the perfection of the decree, clearly indicating that appellant desired to appeal from the whole final decree, and describing the decree as one dated the day the findings and conclusions were filed, should be construed as a notice of appeal from the final decree, and not from findings and conclusions alone. In re Lemery's Estate [N. D.] 107 N. W. 365.

Bond: In an appeal to the circuit court from an order of the county court probating or rejecting a will, no appeal bond is necessary. Civ. Code Prac., §§ 700, 724, con-

An appeal to an intermediate court generally operates to suspend the operation of the order appealed from.[34] Objections to a party's right to contest probate cannot first be raised on appeal.[35] In Massachusetts probate appeals are on the equity side of the court and the practice is according to equity.[36]

A trial by jury of issues of fact is frequently provided for,[37] the verdict being conclusive in some states,[38] and in others merely advisory.[39] The right to render judgment notwithstanding the verdict,[40] and to a new trial, depends on the statutes of the various states.[41] There is no provision in Massachusetts for reporting the evidence taken before a jury from a justice to the full bench to review it.[42]

In Illinois on appeal to the circuit court from an order of the county court refusing to admit a will to probate, the parties seeking the probate of the will may support the same by any evidence competent to establish a will in chancery,[43] and, while they are required to produce the subscribing witnesses if alive and sane, and within the jurisdiction of the court,[44] they are not limited to,[45] or necessarily bound by their testimony,[46] but may prove the necessary facts by any competent evidence.[47]

strued. Garnett v. Foston [Ky.] 91 S. W. 668.

34. An appeal to the circuit court operates to suspend the operation of an order of the county court admitting the will to probate, and prevents the running of the time within which suit to contest must be commenced. O'Brien v. Bonfield [Ill.] 77 N. E. 167. The judgment of the county court refusing to admit the will is superseded by an appeal to the circuit court, and a dismissal of the petition in the latter court puts an end to the whole proceeding. Judgment of county court in such case is no bar to new proceeding. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020.

35. Proponents cannot raise objection that contestant is estopped to contest because he has elected to take under the will for first time in district court. In re Pederson's Estate [Minn.] 106 N. W. 958.

36. Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068.

37. **In Minnesota** whether jury trial shall be had on appeal to district court from order admitting will rests in sound discretion of the court. In re Bannan's Estate [Minn.] 107 N. W. 141.

In New York if on appeal it appears that the disposition by the surrogate of the questions of fact raised on an application for the probate of a will is not free from doubt, and his decision is not entirely satisfactory, such questions will be sent to a jury for determination. Code Civ. Proc., § 2588. In re Burtis, 94 N. Y. S. 961, rvg. 43 Misc. 437, 89 N. Y. S. 441.

38. In a probate appeal in Massachusetts, a jury finding is conclusive as at law. Stenographer's transcript has no place in hearing before court. Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068.

39. A verdict of a jury on an appeal to, and new trial in, the circuit court, after the admission of the will by the latter, is advisory merely, and no error can be predicated on a failure to submit the issues to a jury. Capacity and undue influence. Mueller v. Pew [Wis.] 106 N. W. 840.

40. When an issue is sent to a jury in a probate appeal in Massachusetts the court cannot on a revision of the evidence enter judgment notwithstanding the verdict; he must either render judgment according to it or set it aside. Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068.

41. Creditor attaching the interest of an heir on the theory that decedent died intestate who knows of proceedings in the probate court and the common pleas division for the probate of a will disinheriting the heir but takes no steps to become a party thereto, is not a "party" within the meaning of Gen. Laws 1896, c. 251, § 2, authorizing a new trial when it is made to appear by any party that judgment has been rendered by reason of accident, mistake, or any unforeseen cause, and is not entitled to relief against a judgment rendered under a compromise without notice to him. Seward v. Johnson [R. I.] 62 A. 569. Where evidence as to execution of will, its contents, and the capacity of testator was given, but contestants offered no evidence though represented in court, held that there was no default as to them or as to such creditor. Id. Creditors' failure to contest probate of the will held not the result of accident, etc. Id. Where heir had not been heard of for several years, and it was not known whether he was dead or alive, and creditor stated in his petition for a new trial that he was without the jurisdiction of the state and that his whereabouts were unknown, held that such creditor could not represent the heir in proceedings to procure a new trial. Id.

42. Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068.

43. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020. May so prove execution of will and sanity of testator. In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

44. In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

45. In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Senn v. Grusndling, 218 Ill. 458, 75 N. E. 1020.

46. Affidavits of subscribing witnesses in county court are admissible for purpose of contradicting their evidence against the will in the circuit court. In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

47. Ssnn v. Gruendling, 218 Ill. 458, 75 N. E. 1020.

Appeals in actions to contest or to set aside wills[48] are governed by the ordinary rules of appellate procedure as to parties,[49] the weighing of evidence by the appellate court,[50] and the like.

(§ 4) *M. Costs.*[51]—The allowance out of the estate of costs and expenses incurred by devisees in defending the will is generally discretionary.[52] A defendant in a suit to establish a will will not be allowed his costs and disbursements out of the estate where his defense is not meritorious.[53] Counsel fees may be allowed contestants except where the contest was without merit.[54] Whether an executor can be allowed credit in his account for expenses incurred in the successful defense of the will depends upon the circumstances of each particular case.[55]

The costs of an appeal by one filing a caveat will be taxed against him, where he had no reasonable cause for appealing.[56] The expense of transcribing and printing worthless evidence on appeal will not be allowed.[57]

(§ 4) *N. Recording foreign wills.*[58]—Statutes generally provide for the record of certified copies of foreign wills and of the proceedings admitting them to probate.[59] A will conveys no interest in lands in a state other than that of testator's domicile, in which it has not been probated, in favor of a remainderman as against one who has

48. See 4 C. L. 1894.

49. See, also, Appeal and Review, 5 C. L. 121.

Contestants in petition for revocation of probate, who are neither heirs at law of testator, nor in any way related to him, are not parties interested in the estate, and hence are not parties aggrieved by denial of their motion for a new trial within Code Civ. Proc. § 938. In re Ahtoldi's Estate [Cal.] 81 P. 278.

50. See, also, Appeal and Review, 5 C. L. 121.

Where evidence in suit to set aside will is conflicting as to undue influence, court of review will not disturb verdict of jury, which has been approved by trial court, unless verdict is clearly against weight of evidence. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Where there is evidence in suit to set aside a will showing that testator was not unduly influenced, finding of jury to that effect will not be set aside on appeal. Id. Verdict binding unless clearly against evidence. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. A suit to contest a will is an action at law, and hence the supreme court will not weigh conflicting evidence to determine whether the jury found against the weight of the evidence, though it will examine the record to see if there is any testimony to support the verdict. Sayre v. Trustees of Princeton University [Mo.] 90 S. W. 787. Will reverse judgment if there is no evidence. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. Verdict of jury in suit to establish is controlling on appeal. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

51. See 4 C. L. 1897.

52. Fact that some devisees and legatees refused to contribute to expense of contest held to furnish no reason for interfering with order refusing to allow executors sum set apart to reimburse those who did contribute. In re Scott's Estate [Cal. App.] 83 P. 85. Code Civ. Proc. § 1720, authorizing appellate courts to allow and order paid costs incurred in a will contest, refers only to costs incurred in such courts or by reason of an appeal, and does not authorize them to allow costs that superior court has discretion to disallow. In re Scott's Estate [Cal. App.] 83 P. 85.

53. Conceding that action to establish validity of will under Code Civ. Proc. § 2653a, is one in equity, held an abuse of discretion to allow defendant costs and disbursements payable out of the estate where verdict was directed for plaintiff on ground that the evidence was insufficient to go to jury on issues raised by defendant. Carolan v. O'Donnell, 94 N. Y. S. 171.

54. Allowance held proper. Hilyard v. Wood [N. J. Eq.] 63 A. 7. Laws 1901, c. 397, p. 569, authorizing allowance of attorney's fees to successful contestant applies to county court only, and does not authorize allowance by circuit court on appeal. In re Gertsen's Will [Wis.] 106 N. W. 1096.

55. Weir v. Weir, 7 Ohio C. C. (N. S.) 289. In a case where the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, such an allowance is not permissible, the hardship cast upon the legatee in making the defense against an attack which was perhaps not justified being only one of the burdens incident to the acquisition and ownership of property. Id.

See, also, Estates of Decedents, 5 C. L. 1183.

56. Costs of appeal taxed against one filing caveat on ground of lack of capacity, where she had no reasonable cause for appealing, capacity having been shown early in the taking of proofs submitted by her, and never afterwards having been doubtful. In re Wheaton's Will [N. J. Err. & App.] 63 A. 614.

57. In re Wheaton's Will [N. J. Err. & App.] 63 A. 614.

58. See 4 C. L. 1898.

59. Under Rev. St. 1898, § 3789, a will duly admitted to probate in another state and in the place of testator's domicile may be admitted to probate and recorded in Wisconsin by duly filing an exemplified copy of said will

acquired title by adverse possession.[60] The foreign probate is conclusive if made by a court of competent jurisdiction in accordance with the laws of the foreign state.[61] It will be presumed that a certified copy of the record contains an exact copy of the will.[62] In New York a foreign will devising realty in that state cannot be recorded unless it appears that it was executed in conformity with the New York statutes,[63] and the fact that the will has been so executed must be established in the manner pointed out by such statutes.[64]

§ 5. *Interpretation and construction.*[65]

Scope of section.—There are numerous rules applicable to interpretation which may be called general. To them the first subsection applies. The four subsections following indicate four general classes of objects to which the terms of a will are addressed.[66]

(§ 5) *A. General rules.*[67]—The expressed[68] intention of the testator,[69] to be

and of the record admitting the same to probate. In re Box's Will [Wis.] 106 N. W. 1063. Exemplified copy means a duplicate or transcript of the records or proceedings in the foreign probate court admitting such will to probate, duly authenticated under the seal of the court and duly certified to by the custodian of such records and proceedings, in view of Id. §§ 3790, 4140, 4145, and Rev. St. U. S. § 905, relating to mode of authentication and proof of records and judicial proceedings of courts of several states. Id. Court held to have no jurisdiction to admit will where no such authentication or certification. Id.

60. A will executed in Indiana by a resident of that state, devising lands in Ohio but not probated in Ohio for forty years after its execution, conveys no interest in said lands in favor of a remainderman as against the adverse claims of those who have held open and notorious possession for more than twenty-one years claiming title. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261. Such possession is adverse notwithstanding the fact that the warranty deed under which it was originally acquired from the devisee in said will recited the fact that the grantor held title by such devise. Such recital, while said will remains unprobated in Ohio, is not such notice to the one in possession as to prevent the statute of limitations from running in his favor. Id.

61. Under Rev. St. 1898, § 3790, providing that if on the hearing it shall appear to the court that the order or decree of the foreign court admitting the will to probate was made by a court of competent jurisdiction, the will shall have the same force and effect as if it had been originally proved and allowed in the same court. In re Gertsen's Will [Wis.] 106 N. W. 1096.

62. When the original will is lost and a certified copy of the record of said will in a foreign jurisdiction is offered in evidence and it further appears that said original record contains a marginal item and that a part of said marginal item as recorded was below the signature of the testator, the presumption is that said record is a true copy and a true reproduction in form of the will as originally signed by said testator, and unless this presumption is overcome by evidence, such will is by reason of said marginal item, invalid in Ohio to pass title to property in Ohio. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261.

63. Code Civ. Proc. § 2703, provides for the record of a foreign will devising realty in that state or any interest therein in the office of the surrogate in any county in that state where the will is duly executed in conformity with the laws of that state and has been admitted to probate in, and filed or recorded in accordance with the laws of, the place where decedent resided. In re Hagar's Will, 48 Misc. 43, 96 N. Y. S. 96.

64. Cannot be recorded where exemplified copy of proofs shows that only one subscribing witness was examined, without any explanation of the failure to call the other, the calling of both being necessary under the New York law except under certain circumstances. In re Hagar's Will, 48 Misc. 43, 96 N. Y. S. 96.

65. See 4 C. L. 1898.

66. These classes may be determined by their responsiveness to four questions: (1) What property was meant? (2) What persons were intended to take? (3) What estate was given? (4) How was it to be administered?

67. See 4 C. L. 1898.

68. Intent must be derived from will itself if possible. Platt v. Brannan [Colo.] 81 P. 755; Newlin v. Phillips [Del.] 60 A. 1068; Montgomery v. Brown, 25 App. D. C. 490; Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076; Cary v. Slead [Ill.] 77 N. E. 234; Garrison v. Day [Ind. App.] 76 N. E. 188; Gilmore v. Jenkins [Iowa] 106 N. W. 193; Stoors v. Burgess [Me.] 62 A. 730; Turner v. Burr [Mich.] 12 Det. Leg. N. 346, 104 N. W. 379; Metz v. Wright [Mo. App.] 92 S. W. 1125; Moore v. Matthews [N. J. Eq.] 61 A. 743; People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436, rvg. 44 Misc. 6, 89 N. Y. S. 706; In re Perry, 48 Misc. 285, 96 N. Y. S. 879; In re Wiley, 97 N. Y. S. 1017; Saul v. Swartz, 98 N. Y. S. 549; Freeman v. Freeman [N. C.] 53 S. E. 620; McNeal v. Pierce [Ohio] 75 N. E. 938. Intent as apparent from will when read in light of surrounding circumstances. Bulkeley v. Worthington Eccl. Soc. [Conn.] 63 A. 351. Clear and unambiguous language controls. Id. Effect should be given to intention as expressed when it is plain, and not contrary to law. McDevitt v. Hibben [Ill.] 77 N. E. 586. Real intent and meaning, if it can be derived from the instrument, and is

gathered from the whole will,[70] must govern when not in conflict with any rule of law or public policy,[71] and all technical rules of construction must yield to it.[72]

The form of the will is unimportant except as showing the intent.[73] Where the meaning is plain, there is no room for construction and none should be attempted.[74] Each will must be read and considered with reference to its peculiar provisions and to the circumstances attendant upon its making, and precedents are rarely of avail.[75]

lawful, mnst be given effect. Moran v. Moran [Mich.] 12 Det. Leg. N. 1010, 106 N. W. 206. The fact that testator was illiterate and unable to write his name, and that the will was not written by one learned in ths law does not change the rule. Freeman v. Freeman [N. C.] 53 S. E. 620.

69. In re Heywood's Estate [Cal.] 82 P. 755; Cruit v. Owen, 25 App. D. C. 514; Fulghum v. Strickland, 123 Ga. 258, 51 S. E. 294; Lindsay v. Wilson [Md.] 63 A. 566; Pitts v. Milton [Mass.] 77 N. E. 1028; O'Day v. O'Day [Mo.] 91 S. W. 921; In re Cooper's Will, 109 App. Div. 566, 96 N. Y. S. 562; In re Wiley, 97 N. Y. S. 1017; Mull v. Masten, 98 N. Y. S. 746; Central Trust Co. v. Egleston, 98 N. Y. S. 1055; In re Pillsbury's Will, 99 N. Y. S. 62; In re Holbrook's Estate [Pa.] 62 A. 368; In re Paulson's Will [Wis.] 107 N. W. 484. If ascertainable. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Object of construction is to arrive at testator's intention. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279; Burnes v. Burnes [C. C. A.] 137 F. 781. Civ. Code, § 1317. In re Bubrmeister's Estate [Cal. App.] 81 P. 752. In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to ths same, so far as it may be consistent with the rules of law. Civ. Code 1895, § 3324. Glore v. Scroggins [Ga.] 53 S. E. 690. All courts and others concerned in the execution of wills shall have due regard to the directions of the will, and the true intent and meaning of the testator in all matters brought before them. Rev. St. 1899, § 4650. O'Day v. O'Day [Mo.] 91 S. W. 921. Controls when legally ascertainable. In re Truman [R. I.] 61 A. 598. Cardinal rule is to ascertain and effectuate testator's intention. Freeman v. Freeman [N. C.] 53 S. E. 620. Court must first ascertain what dispositions testator intended to make of his estate, and then determine their validity. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945.

70. Montgomery v. Brown, 25 App. D. C. 490; Cruit v. Owen, 25 App. D. C. 514; Strawbridge v. Strawbridge [Ill.] 77 N. E. 78; Cary v. Slead [Ill.] 77 N. E. 234; Powell's Ex'r v. Crosby [Ky.] 89 S. W. 721; Gordon v. Smith [Md.] 63 A. 479; Crapo v. Price [Mass.] 76 N. E. 1043; Pitts v. Milton [Mass.] 77 N. E. 1028; Moran v. Moran [Mich.] 12 Det. Leg. N. 1010, 106 N. W. 206; Cole v. Lee [Mich.] 12 Det. Leg. N. 975, 106 N. W. 855; In re Davis' Estate [Minn.] 104 N. W. 299; O'Day v. O'Day [Mo.] 91 S. W. 921; Boggs v. Boggs [N. J. Eq.] 60 A. 1114; Moore v. Matthews [N. J. Eq.] 61 A. 743; Reed v. Longstreet [N. J. Eq.] 63 A. 500; Adams v. Massey [N. Y.] 76 N. E. 916; In re Donohue's Estate, 109 App. Div. 158, 95 N. Y. S. 821, rvg. 46 Misc. 370, 94 N. Y. S. 1087; Freeman v. Freeman [N. C.] 53 S. E. 620; Devenney v. Devenney [Ohio] 77 N. E. 688; Burnes v. Burnes [C. C. A.] 137 F. 781. All parts of a will are to be construed in relation to each other, and so as, if possibls, to form one consistent whole. Code § 1321. In re Buhrmeister's Estate [Cal. App.] 81 P. 752; In re Lux's Estate [Cal.] 85 P. 147. In ascertaining intention as to source from which payments under a trust shall be made, court should not restrict itself to an examination of the particular subdivisions directing such payments, but resort should be had to all ths provisions of the will tending to show testator's intention in that regard. In re Heywood's Estate [Cal.] 82 P. 755. Purpose of construction is to enforce intention as shown by the entire will. Powell's Ex'r v. Croshy [Ky.] 89 S. W. 721.

71. Intention must control if consistent with rules of law. Montgomery v. Brown, 25 App. D. C. 490; Crapo v. Price [Mass.] 76 N. E. 1043; In re Perry, 48 Misc. 285, 96 N. Y. S. 879; Bentley v. Ash [W. Va.] 53 S. E. 636. Intent to be ascertained and given effect if not contrary to some positive rule of law, or to public policy. Platt v. Brannan [Colo.] 81 P. 755; Cary v. Slead [Ill.] 77 N. E. 234. In Illinois the rule in Shelley's case is a rule of property, and where it applies controls notwithstanding the expressed intention of the testator that the ancestor shall take less than a fee. Rissman v. Wierth [Ill.] 77 N. E. 108. If violates no principle of law or rule of property. Gordon v. Smith [Md.] 63 A. 479. Given effect so far as it is consistent with law. Yoesel v. Rieger [Neb.] 106 N. W. 428.

72. Technical rules of construction will not be allowed to overthrow intention. Crapo v. Price [Mass.] 76 N. E. 1043. It is ths intention of the testator, and not rules of construction, which governs. Wheeler v. Long [Iowa] 105 N. W. 161. Where the intent of the testator clearly appears in the will itself, it is unnecessary to apply technical rules in order to determine the meaning intended. Todd v. Armstrong [Pa.] 62 A. 1114. All rules of construction yield to the actual intention when that is reasonably clear to the court. Richards v. Hartshorne, 110 App. Div. 650, 97 N. Y. S. 754. Technical rules yield to obvious intent gathered from whole will. O'Day v. O'Day [Mo.] 91 S. W. 921. Technical rules of construction may be disregarded when they stand in the way of the manifest intent of the testator. Metz v. Wright [Mo. App.] 92 S. W. 1125. The court has no power to construe the will so as to sliminate a clearly expressed intention. Boggs v. Boggs [N. J. Eq.] 60 A. 1114.

73. In re Holbrook's Estate [Pa.] 62 A. 368.

74. Mitchell v. Mitchell [Wis.] 105 N. W. 216.

A liberal construction should be adopted and all reasonable intendments indulged in with a view of sustaining the purpose which it is disclosed the testator had in view,[76] and this is particularly true in regard to provisions for testator's wife,[77] and charitable gifts.[78] A reasonable and sensible construction should be given to the language used,[79] words being taken in their ordinary and usual sense in the absence of anything showing a contrary intention,[80] but the intention must control the literal sense of particular words and expressions,[81] and the legal operation of words, however technical.[82] Words used more than once are presumed to be used in the same sense unless the context shows a contrary intention.[83]

Effect should, if possible, be given to every word and clause,[84] each term employed being given its full and natural meaning.[85] Of two contradictory provisions relating to the same subject-matter, the last controls,[86] but the inconsistency between

75. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989. Precedents are of some assistance, but too much reliance is not to be placed on them, for two wills are rarely, if ever, precisely alike. Platt v. Brannan [Colo.] 81 P. 755.

76. In re Heywood's Estate [Cal.] 82 P. 755.

77. To be liberally construed in her favor. Montgomery v. Brown, 25 App. D. C. 490.

78. Clauses making gifts to charitable institutions will be liberally construed, and they will be upheld unless there is some unsurmountable reason for holding them void. Crawford v. Mound Grove Cem. Ass'n, 218 Ill. 399, 75 N. E. 998.

79. In re Davis' Estate [Minn.] 104 N. W. 299.

80. Words not technical are interpreted in their ordinary and popular signification, but not always so. Platt v. Brannan [Colo.] 81 P. 755. Word "also" is generally used in the sense of "in like manner," or "in the same manner." Id. Testatrix gave to her husband "all my right, title and interest," in a certain lot "in which I own an undivided interest as tenant in common with my said husband. Also all of my right and interest" in certain other property, to have and to hold the same "during the term of his natural life," with a gift over after his death. Held that there was a single devise of the different tracts, and that husband took only a life estate in the first lot. Id. Freeman v. Freeman [N. C.] 53 S. E. 620. Where words used are plain and unambiguous they must be given their ordinary and usual meaning and cannot be controlled by conjecture. Travers v. Reinhardt, 25 App. D. C. 567. Words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Code Civ. Proc. § 1324. In re Jeffrey's Estate [Cal. App.] 82 P. 549. Language used to be given its ordinary meaning unless something shows different intention. Potts v. Shirley [Ky.] 90 S. W. 590; Hardy v. Roach [Mass.] 76 N. E. 720. The grammatical and ordinary sense of the words must be adhered to, unless such a course would lead to an absurdity or some repugnancy or inconsistency with the rest of the instrument. Gordon v. Smith [Md.] 63 A. 479. Unless, upon so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction arises, in which case ordinary meaning may be modified, extended, or abridged. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. Words "dower and thirds of my wife," to which certain gifts were made subject, held to mean third interest for life in realty and an absolute third interest in the personalty. Id.

81. Intention which can be collected with reasonable certainty from entire will, with aid of proper extrinsic evidence. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. The intention, when ascertained, prevails, regardless of inapt expressions and the dry words of the testament, unless prohibited by established rules of law. Burnes v. Burnes [C. C. A.] 137 F. 781.

82. Mills v. Tompkins, 110 App. Div. 212, 97 N. Y. S. 9, rvg. 47 Misc. 455, 95 N. Y. S. 962.

83. Nontechnical words. Platt v. Brannan [Colo.] 81 P. 755.

84. Newlin v. Phillips [Del.] 60 A. 1068; Montgomery v. Brown, 25 App. D. C. 490; Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279; Gordon v. Smith [Md.] 63 A. 479; In re Donohue's Estate, 109 App. Div. 158, 95 N. Y. S. 821. Words are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. Civ. Code § 1325. In re Buhrmeister's Estate [Cal. App.] 81 P. 752; In re Jeffrey's Estate [Cal. App.] 82 P. 549. Every word is to be given effect provided an effect can be given it not inconsistent with the general intent of the whole will taken together, and no word is to be rejected unless there cannot be a rational construction of the will with the word as it is found. Bently v. Ash [W. Va.] 53 S. E. 636; Olcott v. Tope, 115 Ill. App. 121; Sorenson v. Carey [Minn.] 104 N. W. 958. No words should be rejected or refused their sensible meaning in the place where employed, unless it be required to make sense for the context of the will. Cruit v. Owen, 25 App. D. C. 514. A construction making a part of the will ineffective will not be adopted unless absolutely necessary, but all the provisions will be construed in harmony when it can be done. Tyler v. Theilig [Ga.] 52 S. E. 606.

85. Cruit v. Owen, 25 App. D. C. 514.

86. Eckert v. Pennsylvania Trust Co., 212 Pa. 372, 61 A. 935; In re Buhrmeister's Estate [Cal. App.] 81 P. 752.

the two must be clear and irreconcilable,[87] it being the duty of the court, if possible, to read all provisions in pari materia together, so as to produce a harmonious whole.[88]

A disjunctive force may be given to a conjunctive word, or vice versa,[89] words and phrases may be transposed, provisions read in a different order from that in which they appear, provisions inserted or left out,[90] and words clearly omitted supplied when necessary to effectuate the intention of the testator as gathered from the context;[91] but the court cannot correct a mistake,[92] make a new will for the testator,[93] or add words merely to make the terms conform to an assumed intention.[94]

87. Eckert v. Pennsylvania Trust Co., 212 Pa. 372, 61 A. 935. Rule applies only to cases of invincible repugnancy where no general intent is deducible to control particular and substitutionary clauses. Doyle's Estate, 28 Pa. Super. Ct. 579. After giving a number of pecuniary legacies a testator directed that all his property be sold and the proceeds held for the support of his wife during life, the balance remaining to be divided among his children, held that the pecuniary legacies should be paid out of the proceeds of the sale of the estate, the balance to go into the trust fund created by the will. Id. Mere alternative provisions, one of which creates a trust if a child be born, and the other a different distribution if no child is born, are not in conflict, and one does not destroy the other. Tyler v. Theilig [Ga.] 52 S. E. 606. Devise in remainder to testator's heirs held not in conflict with subsequent alternative or conditional provision for children born after execution of the will. Id. Rule is never applied unless the last clause is as clear as the first, and cannot be reconciled therewith. Rule applies only where later provision is as plain and decisive as the earlier, when the real intention cannot be gathered from the general scope of the will or otherwise, and when the two provisions are wholly irreconciliable and cannot possibly stand together. Adams v. Massey [N. Y.] 76 N. E. 916.

88. Conflicting provisions will be held irreconcilably repugnant only as a last resort. Newlin v. Phillips [Del.] 60 A. 1068. All clauses harmonized if possible. Moran v. Moran [Mich.] 12 Det. Leg. N. 1010, 106 N. W. 206. Testator bequeathed to sons their respective shares of residue of the estate, "to hold the same to said sons respectively, their respective heirs," etc., subject during their minority to the provisions "hereinbefore and hereinafter contained." Subsequent paragraph provided that if any of his children died without leaving issue, or issue who should not reach age of 21, his share should go to the others. Held that two paragraphs construed together meant that if son died before 21 without issue, his share should go to other children, and on his reaching that age he took a fee simple title. Eckert v. Pennsylvania Trust Co., 212 Pa. 372, 61 A. 935. If there is no doubt as to the meaning of the earlier clause, while there is of the later so that either of two constructions is possible, that construction will be adopted which will give effect to both. Doubt as to meaning of later clause confirms the first. Adams v. Massey [N. Y.] 76 N. E. 916. Gift to wife for life held not converted into fee by subsequent clause giving her any other property "not herein otherwise disposed of that may be in my possession at the time of my decease." Id.

89. When evidence of such an intent is so unmistakable as to require it. Where will provided that no sale of farm should be made during lifetime of testator's daughters, who were beneficiaries of a trust, without their consent, "nor" unless it was necessary to pay debts, held that testator intended **"nor"** in the sense of **"or"** and that power of sale could be exercised with consent of daughters without reference to necessity to sell to pay debts. Reed v. Longstreet [N. J. Eq.] 63 A. 500. **"And"** will not be substituted for **"or"** where there is no expression of such controlling intention as to require this substitution. Travers v. Reinhardt, 25 App. D. C. 567. Where testator provided that in case any of his sons should die "without leaving a wife, or a child, or children living at his death," then estate should go to surviving sons, held that "or" would not be construed to mean "and," and that on death of brother leaving wife but no children, his share went to his heirs. Id. Not when intent would be defeated. Where testatrix gave property to infant daughter absolutely, provided that if she should die under age of 21, "or" without disposing of all of it, "or" without making a will, then it should go over to others, held that "or" could not be construed as "and" so as to make the contingencies coterminous, since, considering the incapacity of the infant to make a will or dispose of the property during minority an intent is disclosed to make only the contingency of her death applicable to the period of minority. In re Polley's Estate [N. J. Eq.] 62 A. 553. **"Or"** will be construed **"and"** if it was apparently so intended. Olcott v. Tope, 115 Ill. App. 121.

90. Only in aid of testator's intent and purpose, never to devise a new scheme, or make a new will. Leggett v. Stevens [N. Y.] 77 N. E. 874. Testator gave to widow a certain sum for her support, and provided that after her death what was left should "be equally divided between" his daughter if living, "if she has children to go to them; if not, to go to my nearest of kin," but named no other person who was to take the other half. Held that words directing equal division could not be transposed so as to make them refer to daughter's children, the will as a whole showing that such was not testator's intention. Id.

91. Olcott v. Tope, 115 Ill. App. 121. Where it is clear on the face of the instrument that testator has not acurately or clearly expressed his meaning by the words used, words may be supplied to effectuate the intention as gathered from the context. Where there is an insufficient description of

A construction giving effect to the whole will will be preferred to one nullifying a part of it,[95] a construction allowing both of two clauses to stand to one making them hostile to each other,[96] and a reasonable construction to one leading to an absurdity.[97] So, too, when the meaning of the language used is doubtful, it should not be so construed as to render one of its provisions inconsistent with testator's general intention.[98] A testator is to be considered as intending to benefit the object of his gift,[99] and if the language is equally capable of two constructions, that will be adopted which will preserve his right to dispose of his property as he pleased.[1] A general intent controls a particular one,[2] and in case the two are incompatible the latter may be considered to be in the nature of an exception.[3]

The law presumes that testator did not intend to disinherit the heir,[4] or to die intestate as to any of his property.[5] So, too, it is presumed that testator knew the law,[6] that his intention was lawful,[7] and that he chose the language employed in the instrument with a view to its ordinary legal signification.[8]

As to time.[9]—The will speaks and takes effect upon testator's death,[10] and its

property devised. Sorenson v. Carey [Minn.] 104 N. W. 958.

92. Held that devise of "undivided one-fifth" of certain tract to five daughters could not be construed as a devise of a fifth to each, though it was the result of a mistake by the scrivener. Gilmore v. Jenkins [Iowa] 106 N. W. 193.

93. Fulghum v. Strickland, 123 Ga. 258, 51 S. E. 294; Gilmore v. Jenkins [Iowa] 106 N. W. 193; Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945; People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436, rvg. 44 Misc. 6, 89 N. Y. S. 706.

94. When language used is plain and free from doubt. Gordon v. Smith [Ind.] 63 A. 479.

95. Steiff v. Seibert [Iowa] 105 N. W. 328. Will will not be held to contain void trust unless its invalidity is beyond question, and cannot be reasonably construed otherwise. In re Heywood's Estate [Cal.] 82 P. 755. Void trust to convey. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. Courts will never hold a bequest void for uncertainty unless compelled to do so. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, afg. 24 App. D. C. 187.

96. Potts v. Shirley [Ky.] 90 S. W. 590.

97. One leading to an absurdity will never be adopted when one founded in reason appears. In re Sander's Estate [Wis.] 105 N. W. 1064.

98. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279.

99. In re Jeffreys' Estate [Cal. App.] 82 P. 549.

1. In re Holbrook's Estate [Pa.] 62 A. 368.

2. The general intention must prevail even though it sets aside some particular portion of the will. When intention is plain from will taken as a while, court will endeavor to carry it out, and in doing so will, if necessary, disregard particular expressions and broaden restrictive provisions. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279.

3. Particular intent to create separate trust for wife. In re Title Guarantee & Trust Co., 46 Misc. 544, 95 N. Y. S. 59.

4. Adams v. Massey [N. Y.] 76 N. E. 916. Heir is never to be excluded on mere conjecture, though he may be excluded by a devise by implication, where it is apparent that it is necessary to sustain such a devise in order to give effect to the plain intention of the testator. Welsh v. Gist [Md.] 61 A. 665. The implication must be obvious, and not merely possible or probable. Id. Is not to be disinherited except by express words or necessary implication. Long v. Hill, 29 Pa. Super. Ct. 606. Yet if such intention is clearly manifest from the language of the will and not contrary to law, it will prevail. Olcott v. Tope, 115 Ill. App. 121. Presumption that testator intended property to go to his relatives and heirs rather than strangers to his blood is founded on presumed intention, and always yields to actual intention when it can be gathered from the entire will. Adams v. Massey [N. Y.] 76 N. E. 916. In doubtful cases, that construction is favored which consistently with the terms of the instrument will result in a distribution in conformity to the general rules of inheritance rather than one which will disinherit an heir at law. Lehman v. Lehman, 29 Pa. Super. Ct. 60.

5. See § 5 D, post, Property not effectually disposed of.

6. Rule that intent controls is governed by presumption that testator knew the law. Yoesel v. Rieger [Neb.] 106 N. W. 428. Gifts to widow will be presumed to have been made with knowledge of her right to reject the will and take under the law. Garrison v. Day [Ind. App.] 76 N. E. 188. It is conclusively presumed that gifts to relatives are made with knowledge of the statute to prevent lapses and its effect. Larwill's Ex'rs v. Ewing [Ohio] 76 N. E. 503. There is a legal presumption that when testator devises less than his whole estate he knows that the law gives the balance to his heirs. Adams v. Massey [N. Y.] 76 N. E. 916.

7. In re Holbrook's Estate [Pa.] 62 A. 363.

8. Yoesel v. Rieger [Neb.] 106 N. W. 428.

9. See 4 C. L. 1902.

10. Garrison v. Day [Ind. App.] 76 N. E. 188; Crapo v. Price [Mass.] 76 N. E. 1043; Robinson v. Harris [S. C.] 53 S. E. 755. In determining whether power of alienation is

validity must be determined by the facts existing at that time rather than those existing when it was executed.[11]

Extrinsic evidence[12] is not admissible to supply, contradict, enlarge, or vary the terms of the will, or to explain the testator's intention,[13] except where there is a latent ambiguity arising dehors the will as to the person or subject meant to be described.[14] The court may, however, put itself in the place of the testator at the time

unlawfully suspended. In re Lux's Estate [Cal.] 85 P. 147. Where the will gave complainant testatrix's right of action to recover certain property which she had been induced to convey through fraud, held that on allowance of the will complainant's title to the property related back to testatrix's death. Busiere v. Reilly [Mass.] 75 N. E. 958.

11. Provision for husband who predeceased testatrix need not be considered in determining whether devise for use of several persons contravenes rule against perpetulties. Graham v. Graham, 48 Misc. 4, 97 N. Y. S. 779.

12. See 4 C. L. 1902.

13. Parol evidence is only admissible for the purpose of affording light whereby what is in a will may be read, understood, and applied (Gilmore v. Jenkins [Iowa] 106 N. W. 193), and cannot be received to give the will operative elements, language, or provisions, not in it before (Id.). Not for purpose of changing a will, or for the purpose of making a new one. Id. No extrinsic evidence is admissible to show an intent independent of the language of the will. In re Donohue's Estate, 46 Misc. 370, 94 N. Y. S. 1087, rvd. on other grounds, 109 App. Div. 158; 95 N. Y. S. 821. Where there is no ambiguity, evidence is inadmissible to prove an intention different from that implied in the terms of the will. McNeal v. Pierce [Ohio] 75 N. E. 938. Inadmissible to show intent, where expressions of will are free from ambiguity. Bulkeley v. Worthington Eccl. Soc. [Conn.] 63 A. 351. Never admissible unless, in the opinion of the court, upon reading the words questioned in connection with the entire will, or upon applying them to the facts in the case, there arises an ambiguity or difficulty of construction. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. Not if language used affords the means for a reasonable interpretation and one generally harmonious. Turner v. Burr [Mich.] 12 Det. Leg. N. 346, 104 N. W. 379.

Extrinsic evidence inadmissible: Where the terms of a devise are clear and unambiguous on their face, parol evidence is inadmissible to show a mistake in the description of the property. Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076. Where testator devised "the southwest fractional quarter of section 24" etc., extrinsic evidence held inadmissible to show that he meant section 14, though he owned a tract in the latter section containing the number of acres stated in the will, and there was no other tract of that extent in the township specified, and he owned no land in section 24. Id. Where will gave "the undivided one-fifth" of certain tract of land to testator's five daughters, to show that each was to have a fifth of the whole tract. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Is not ambiguous, and since devises to two or more create an estate in common unless a contrary intent is expressed (Code § 2923), no words need be supplied to make it intelligible. Id. Declarations of the testator made after execution of will as to the meaning of words used. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. To explain meaning of words "subject to the dower and thirds of my wife." Id. Evidence of declarations of testatrix to scrivener tending to show that she did not intend to include husband in using the word "heirs." Turner v. Burr [Mich.] 12 Det. Leg. N. 346, 104 N. W. 379. Evidence as to conversation with testatrix in which she undertook to give suggestions or directions as to the disposition of the residue by the executor to whom it was left. Manson v. Jack [N. J. Eq.] 62 A. 394. Affidavit of scrivener who received instructions from testator in regard to the will held inadmissible to show that certain clause was intended as a disposition of personalty in a certain warehouse only. In re Donohue's Estate, 46 Misc. 370, 94 N. Y. S. 1087, rvd. on other grounds, 109 App. Div. 158, 95 N. Y. S. 821. Declarations made after execution of will, for purpose of construing bequest to trustees for charitable purposes which leaves the selection of the particular charity to them. Rothschild v. Goldenberg, 103 App. Div. 235, 92 N. Y. S. 1076. Where, by terms of will, it appears that intention was to confer a bounty, it is not competent to prevent a lapse by showing that legacy was given in payment of a debt. McNeal v. Pierce [Ohio] 75 N. E. 938. A memorandum among testator's private papers will not be received to explain a will wholly free from ambiguity. Best v. Berry [Mass.] 75 N. E. 743.

14. Parol evidence is admissible to explain a latent ambiguity in a will, where such evidence is necessary to enable the court to ascertain testator's intention. St. James Orphan Asylum v. Shelby [Neb.] 106 N. W. 604. Is admissible to remove a latent ambiguity arising dehors the will as to the person intended to be described. Where remainder was given to grandchildren of testator's children, and there were no such persons in existence, to show that testator's grandchildren were intended. In re Stocum's Will, 94 N. Y. S. 588. For the purpose of enabling court to identify person intended by testator, court may inquire into every material fact relating to person claiming to be interested in the will, and into circumstances of testator, and of his family and affairs. Id. Parol evidence is admissible to show that a gift to a charitable institution having no existence under the name used was intended for an existing organization. In re Paulson's Will [Wis.] 107 N. W. 484. A testamentary designation which is equally applicable to more than one person or thing raises a question of intention which is independent of construction, and permits an in-

he executed the will,[15] and to that end may take into consideration all the circumstances and conditions then existing.[16]

(§ 5) *B. Of terms designating property or funds.*[17]—Being subject to fair and untechnical construction, words will carry any property which in common use they import, restricted only by the intent,[18] even though technically they might

quiry as to testator's actual purpose. In re Welch's Will [Vt.] 61 A. 145. In such case the intention is to be gathered from the language of the will, aided by proof of the circumstances in which it was used. Cannot inquire further as to her purpose. Id. The ascertainment of the person intended in such case must be treated as a judgment of construction, and not as a mere finding of fact. Id. To explain latent ambiguities arising from mistaken or insufficient description of property where will is merely ambiguous, and not so indefinite or uncertain as to be void. Sorenson v. Carey [Minn.] 104 N. W. 958. To identify property described as "my farm consisting of about 95 acres situated in F. county." Id. To correct mistake in description of property, as where testator never owned S. W. ¼ of N. W. ¼ of a certain section of land which he devised, but did own S. W. ¼ of S. W. ¼. St. James Orphan Asylum v. Shelby [Neb.] 106 N. W. 604.

15. Cruit v. Owen, 25 App. D. C. 514; Lindsay v. Wilson [Md.] 63 A. 566; In re Davis' Estate [Minn.] 104 N. W. 299; Freeman v. Freeman [N. C.] 53 S. E. 620. Will must be considered from standpoint of testator when he executed it. Mull v. Masten, 98 N. Y. S. 746. The court may, and should as far as possible, put itself in the place of the testator when he made the will, and then, from a consideration of the instrument itself, of the relation of the testator to the parties affected by it, and of the circumstances and situation of the testator, and of the parties in interest at the time of its execution, endeavor to ascertain the actual intention and to effectuate it. Burnes v. Burnes [C. C. A.] 137 F. 781.

16. Bulkeley v. Worthington Eccl. Soc. [Conn.] 63 A. 351; Strawbridge v. Strawbridge [Ill.] 77 N. E. 78; Adams v. Massey [N. Y.] 76 N. E. 916. In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations. Civ. Code § 1318. In re Buhrmeister's Estate [Cal. App.] 81 P. 752. Will should be construed in light of circumstances surrounding testator when it was made. Manson v. Jack [N. J. Eq.] 62 A. 394; Gordon v. Smith [Md.] 63 A. 479; In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Evidence regarding all relevant facts surrounding testator at the time the will was made is admissible. Freeman v. Freeman [N. C.] 53 S. E. 620. May inquire into the condition of his family and amount and character of his property. Cruit v. Owen, 25 App. D. C. 514. The state of the property devised may be looked to. Olcott v. Tope, 115 Ill. App. 121. But surrounding circumstances cannot be inquired into for the purpose of importing into the will any intention not therein expressed. Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076. Rule does not permit the reading into the will of a provision as to which it is silent, or the adding thereto of a substantial bequest. Reinhard v. Reinhard, 3 Ohio N. P. (N. S.) 280.

17. See 4 C. L. 1904.

18. Devise of the "undivided one-fifth" of a tract to testator's five daughters, held to give them one-fifth collectively and not a fifth each. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Provision requiring consent of majority of them to a sale held not to show contrary intent. Id. Will held not to show intent to exclude sons from any further share in the estate, thus negativing idea that he intended to die intestate as to balance of tract and requiring different construction. Id. Provision giving "all moneys derived from my father's estate as my share of the same after my decease" to be equally divided among sons, the share of one to be given him "as soon as convenient" after the executors received the same, held to refer only to money so derived after testator's decease, and not to entitle sons to any money received by testator from his father's estate during his lifetime. Demarest v. Demarest [N. J. Err. & App.] 61 A. 569. An inference that land may have been included in a devise is rebutted by proof that it must have fallen into the intestate estate. Vendor of land failed to deliver deed to vendee during latter's lifetime, but after his death deeded other land to his heirs. They, on discovering this fact after the vendor's death, sued to recover the land originally sold, and, a part of it having been sold by the vendor to others, a decree was entered directing a conveyance of the remainder and payment of the value of that sold, and a cancellation of the vendor's deed. Vendor devised to plaintiff's grantors certain similar land, which was later sold to pay the debts of his estate, in a proceeding to which such devisees were parties, and to which sale the record did not show that they objected. Held that since the land surrendered by the vendee's heirs went to the vendor's heirs and not to his devisees, such facts were insufficient to establish any interest in such land in plaintiffs. Gwinner v. Michael, 103 Va. 263, 48 S. E. 895. Bequest to husband in trust for charitable purposes was void for indefiniteness, and he inherited the property under intestate laws. His will recited the provisions of his wife's will, and provided for the division of such property as he might receive thereunder among certain charitable institutions. Held that such provision was inoperative, since he did not receive under his wife's will any property to which it would apply. Hegeman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392. The term "dollars" means money, and cannot alone mean notes, bonds, or other evidences of indebtedness. Deven-

apply only to one class of property or to a specific thing,[19] or though that which is given as realty is in fact personalty, or vice versa.[20]

ney v. Devenney [Ohio] 77 N. E. 688. Where will gave son income on $1,000 for life, with remainder over, and provided that such sum should be paid to the son on his executing security for its return to the executor at his death, held that such provision was one for the payment of money only, and son could not compel delivery to him of securities in which executor had invested $1,000 in conformity with the provisions of the will. Id.

Errors in description of subject-matter will not avoid gift, if enough remains to show with reasonable certainty what was intended. St. James Orphan Asylum v. Shelby [Neb.] 106 N. W. 604.

Certainty: A provision that **"a sufficient sum** out of said fifth shall be aplied to the support and maintenance of my granddaughter" during her minority is not void as discretionary, since court could at any time ascertain the amount necessary for the purpose stated, and compel it to be devoted to such purpose. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. Bequest of sum **"not exceeding** $5,000," to be "equally divided between" two institutions, held not void for uncertainty as to amount, it being the intention to divide the sum named. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, 24 App. D. C. 187. Bequest of "a sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship," held not void for uncertainty as to amount, the intention being that the income of the full amount shall be applied if necessary, and of a less amount if not. Id. Gift to hospital of a sum sufficient to produce an annuity of $50, held not void for uncertainty of amount. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. "Grounds and buildings composing my livery stable property in Bloomington, Ill.," is definite. Lander v. Lander, 217 Ill. 289, 75 N. E. 487.

19. Bequest of "all my **books and papers"** held not to pass title to deposits in banks evidenced by bank books, where testator left a large number of other books, particularly as such an interpretation would have rendered other provisions of no effect. In re Jeffreys' Estate [Cal. App.] 82 P. 549. Will devised "the **lot** owned by me and situated on" a certain corner, "being 120 feet of lot 13" of a certain subdivision. Lot 13 was in fact only 108 feet deep, but was represented on an unofficial map, and generally understood by the public, to be 141 feet deep. Tract owned by testatrix included lot 13, was 120½ feet deep, and was occupied by her as an entirety, being covered by continuous buildings. Held that testatrix intended to devise entire tract owned by her without limitation to boundaries of lot 13. Lewis v. Sherman Bros. [Iowa] 104 N. W. 511. Gift of all **"money"** that remains after all debts are paid, held to include remainder of personalty consisting of mortgages, stocks, and bonds, it appearing that testatrix knew that there would be nothing left unless they were included. In re Blackstone's Estate, 47 Misc. 538, 95 N. Y. S. 977. The word **"legacy"** is primarily applicable only to personalty, but may refer to realty if the testator so intended, and similarly the word **"legatee"** may include "devisee." Lindsay v. Wilson [Md.] 63 A. 566.

"Devise" is the appropriate word to pass realty and **"bequeath"** to pass personalty, but realty may pass where the latter word alone is used if such is the apparent intention. Mills v. Tompkins, 110 App. Div. 212, 97 N. Y. S. 9, rvg. 47 Misc. 455, 95 N. Y. S. 962.

"Give, bequeath, and dispose of," held not to show intention not to pass fee. Ludlam v. Ludlam, 47 Misc. 232, 95 N. Y. S. 862.

20. Conversion of realty into personalty. See, also, Conversion in Equity, 5 C. L. 758.

Where realty is directed to be sold and the proceeds divided, the gift will be considered as one of money and not of land. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029. Partition by the takers will not lie. Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519. Gift of life estate to wife at her death to be sold and proceeds to be divided works conversion at testator's death. Nelson v. Nelson [Ind. App.] 75 N. E. 679. Land held given as personalty where legacies were charged and an imperative power of sale was conferred. Thissell v. Schillinger, 185 Mass. 180, 71 N. E. 300. Persons to whom the proceeds are to be distributed acquire no title under the will by electing to take the land, nor can such an election defeat the right of the widow to her distributive share of such proceeds. Bullock v. Bullock, 3 Ohio N. P. (N. S.) 190. Conversion takes place where it is absolutely necessary to sell realty in order to carry out the provisions of the will, though there is no imperative direction to sell. In re Vanuxem's Estate, 212 Pa. 315, 61 A. 876. Where will gave pecuniary legacies largely in excess of the value of the personalty, and gave executors a discretionary power of sale, held that land in foreign state which it was necessary to sell in order to pay such legacies in Pennsylvania was converted into personalty and legacies were subject to taxation in that state. Id. Necessity of a conversion to accomplish the purposes expressed being equivalent to an imperative direction to convert. Stake v. Mobley [Md.] 62 A. 963. Where testator gave pecuniary legacy, and then gave balance of estate, consisting largely of realty incapable of division in kind, to children in equal shares, and gave power of sale to executor, and personalty was insufficient to pay debts and such legacy, held that will operated as conversion. Id. There is no conversion where the same right devolves upon the same person whether the property be treated as money or land, and where no rights of third persons depend upon the conversion. In re Sheldon's Estate, 96 N. Y. S. 225. Direction to sell "for and toward the performance of this my last will" held not to work conversion where no sale was necessary to carry out the will. Id. Equity will not presume a conversion unless the purpose of testator will fail without it. Monjo v. Widmayer, 46 Misc. 352, 94 N. Y. S. 835. There should be an implication of a direction to convert so unequivocal and so strong as to leave no substantial doubt in the mind. Id. Discretionary power of sale, which has

All that is incident to a thing goes with it.[21] Since the will speaks as of testator's death, the properties then subject to his disposal are meant,[22] including powers,[23] such as fall within the terms of ownership which he used. After-acquired properties are ordinarily included.[24]

never been exercised and is unnecessary to effectuate testator's intention furnishes no argument in favor of a conversion. Id. Gift of power to devise property which was exercised by devising premises to named persons as tenants in common held not to give rise to conversion. Id. Where testatrix gave property to trustees to retain it in its then state of investment, or to convert it into money to be invested for the purposes of the trust and provided that they might postpone sale of all or any part of it for so long as they saw fit, and sale was not necessary to carry out provisions of the will, held no conversion. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. In order to work a conversion it must be the duty of the grantee of the power to sell in any event, and this duty is to be determined from the whole will, as where its purposes require such a sale. In re L'Hommedieu, 138 F. 606. Provision empowering executor "in his own discretion, at such time or times as he shall deem proper, to sell either at public or private sale, any or all of my real estate," held not to work a conversion. Id.

Time of conversion: When there is an imperative direction to sell, or a provision equivalent thereto, conversion takes place as from testator's death, unless the time is qualified in some way. Stake v. Mobley [Md.] 62 A. 963. In the absence of a contrary intent expressed or clearly implied, conversion takes place as from the date of testator's death. In re Miller's Will [Iowa] 105 N. W. 105. Hence benefit of this doctrine can be asserted only as to lands of which testator was seised at his death. Id. Thus where testator directed that land was to be sold and proceeds divided among certain legatees, but himself sold the land before his death, held that such legatees were not entitled to proceeds in his possession at the time of his decease. Id. Where will operates as a conversion as of date of testator's death, mortgage by heir of all his right, title, and interest in realty creates no lien thereon. Stake v. Mobley [Md.] 62 A. 963.

Conversion of personalty into realty: Where will directed sale of all testator's property, some of which was realty in other states, and the investment of the proceeds in realty in a certain city, held that property would be regarded as realty in that city, and validity of trusts would depend on laws of state in which it was situated. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315.

21. Under Civ. Code § 1311 providing that every devise of land conveys all the estate of the devisor, **water right appurtenant** to land, represented by shares of stock in water company, held to have passed to devisee of land. In re Thomas' Estate, 147 Cal. 236, 81 P. 539. Under Rev. Code 1892, §§ 1881, 1882, 1892, **rents** from testator's lands accruing during the year of his death, and crops remaining on his land at the time of his death, whether gathered or not, or matured or unmatured, are assets of the estate and pass to the executor, constituting a portion of the funds for payment of debts, etc., and do not go to the devisees of the land. Gordon v. James, 86 Miss. 719, 39 So. 18. Nothing short of a positive, unequivocal expression of the testator can avoid this statute. Id. Provision that in case testator died before Jan. 1, 1900, the rents due from a plantation were to be paid to his executors, held not to indicate that a different rule than that prescribed by such statute should apply, where testator died after that date. Id. A specific legacy of **stocks and bonds** carries with it dividends earned and declared after testator's death. Id.

22. In the absence of a contrary intention manifestly appearing in the will a devise of all testator's property carries all property owned by him at the time of his death, which he was then entitled to devise. In re Lux's Estate [Cal.] 85 P. 147. Will purported to dispose of all testator's property, "real, personal and mixed, and wheresoever the same may be," and recited that all the estate of which he was possessed was his separate estate except a certain lot, and that he had undertaken to dispose of all his separate estate, "and one-half of the community property." Testator's wife died after execution of will but before testator's death. Held that will was operative as to all property which testator was entitled to devise at time of his death, and hence passed title to all of the community property. Id. Under Code §§ 3270, 3271, providing for passing of after-acquired property, the will speaks as of the date of testator's death, and hence a devise of realty must be satisfied, if at all, by applying it to realty of which testator died seised. In re Miller's Will [Iowa] 105 N. W. 105. Hence if testator disposes of all his realty during his lifetime and has none at his death any devise thereof fails, not necessarily because of an ademption, but because testator leaves no property within the terms of the gift. Id. Proceeds of realty sold by testator during his lifetime held to pass under residuary clause and not to those to whom realty was devised. Id.

23. The intention to exercise a power of appointment by will must appear by a reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power. Will held not a valid exercise of power reserved to grantor in trust deed, particularly where power was conditional, and only to be exercised under circumstances which never arose. Thom v. Thom [Md.] 61 A. 193. A general residuary clause will well execute a general power even though the will antedates the power. Stone v. Forbes [Mass.] 75 N. E. 141. Especially when a codicil made after knowledge of the power republishes the will (Id.), and probably as to special powers the rule also applies (Id.); and the rule is of greater force where the testator

(§ 5) *C. Of terms designating or describing persons or purposes.*[25]—The particular intent governs technical and precise meanings in ascertaining what takers were meant,[26] and this rule is equally applicable where a purpose charitable or otherwise is fastened on a gift.[27] The purposes for which the gift is made[28] and the persons to take must be definite and certain, or capable of being made so,[29] but a mere misnomer or variation is not an uncertainty.[30]

had the use of the property to which the power related (Id.). "Over which I may then have any power" held to intend a power conferred after making will. Id.

24. At common law will of realty was held to speak as of the date of the will and after-acquired property did not pass, but this rule has been generally abrogated by statute Code, §§ 3270, 3271. In re Miller's Will [Iowa] 105 N. W. 105. Under Pub. Gen. Laws 1904, art. 93, § 329, providing that every will executed in due form of law after a specified date shall pass all the realty which testator had at the time of his death. Lindsay v. Wilson [Md.] 63 A. 566. Act does not apply where will shows contrary intention. Id. Will held to pass property acquired by testator as heir after its execution. Id. Fact that testator does not know when he makes the will that he will acquire such property is immaterial. Id.

25. See 4 C. L. 1906.

26. Where testator gave property in trust for his three "unmarried" daughters, naming them, and one of them was a widow when the will was made, held that the word "unmarried" would be construed to mean "not being married at the time in question," that is, when the will was made. Trenton Trust & S. D. Co. v. Armstrong [N. J. Eq.] 62 A. 456. Where will directed that money given to one for life should then be "divided between the above said nieces that has received no money," held that it should be divided between all the nieces, previously mentioned as a class, and not between those previously mentioned by name. In re Cunning, 49 Misc. 44, 98 N. Y. S. 312. Where will directed that remainder should be equally divided "among the schools and missionary societies mentioned in the above will," held that an ecclesiastical society organized for the spread of religion by the maintenance and support of a certain church of which testator had been a member and to which he had left a legacy, was not included in term "missionary societies," and was not entitled to share in such remainder. Bulkeley v. Worthington Ecclesiastical Soc. [Conn.] 63 A. 351. Where will provided that any property not specifically disposed of should be sold and the proceeds distributed and paid to "the legatees hereinbefore named" in proportion to the amounts theretofore given them, held that trustees, and not beneficiaries, were legatees of a trust fund theretofore provided for, and took legal title to trust's share of proceeds. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. Such legatees include all persons receiving specific legacies. Id. Fact that some of the legatees are societies or corporations does not of itself exclude them. Id. Does not include legatee who is to receive a sum sufficient to produce a specified annuity. Id.

27. Where testatrix directed that she be buried in a certain cemetery and that a monument be erected over her grave, and her body was so buried with her husband's consent and remained there for over a year, when her husband had it removed and cremated, held that executor was required to erect monument on spot where she had been buried, though her ashes were not returned to the grave. In re Koppikus' Estate [Cal. App.] 81 P. 732. Charitable trust will be sustained if testator sufficiently shows his intention to create a charity, and indicates its general nature and purpose, and describes in general terms the class of the beneficiaries, though there may be indefiniteness in the declaration and description and much is left to the discretion of the trustees. Columbian University v. Taylor, 25 App. D. C. 124. Provision for free education of young men to fit them for U. S. Naval Academy and making devise therefor in trust to incorporated institution of learning held to create a special charitable trust, which was not void for uncertainty, or incapacity of execution apparent on its face. Id. In a devise or bequest directly to a charitable corporation, the trusts need not be set out so specifically and definitely as if made to individuals, in order to make them valid, since the trusts and purposes for which such corporation is organized are set out in its charter. Carson v. Carson [Tenn.] 88 S. W. 175. Devise and bequest to trustees of church to be used in promotion of Christianity held valid. Id. A bequest for masses held not a provision for funeral expenses so as to be exempt from transfer tax. In re McAvoy's Estate, 98 N. Y. S. 437.

28. Held void for uncertainty: A direction that testatrix's grave be "cared for and kept in order for at least 20 years" after her death held invalid as too indefinite to be enforced. In re Koppikus' Estate [Cal. App.] 81 P. 732. Bequest of sum not to exceed $5,000 to be expended under the personal supervision of the trustees in purchase and erection of chime of bells, memorial window, etc., for a Catholic church in the District of Columbia to be designated by testator's mother, or in case she fails to do so, said trust to be carried out by the trustees, giving preference to church built by Jesuits, held void for uncertainty. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, afg. 24 App. D. C. 187. Bequest to trustee "for the purpose of making such distribution among religious, benevolent, or charitable objects as he may select," held void because too vague and indefinite to be enforced. Hegeman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392.

29. In no case will a bequest be deemed void for uncertainty as to the person to take, where person intended can be identified by any competent evidence. In re Stocum's Will, 94 N. Y. S. 588. Gift to "grandchildren" of testator's children, there being no such persons in existence, held to be intended for

The words heirs, issue, children, and the like, may be used as words of purchase, but more often the question is whether they are words of limitation. For the purpose of avoiding confusion and unnecessary repetition the cases construing them have been collected elsewhere.[31]

(§ 5) *D. Of terms creating, defining, limiting, conditioning, or qualifying the estates and interests created. Particular words and forms of expression.*[32]— The words "heirs,"[33] "heirs of the body,"[34] "children,"[35] "issue,"[36] "lineal descend-

testator's grandchildren. Id. Where it appeared that testator, a native of Germany, was known as Carl F. Theilig in that country, and as Charles F. Tyler in the United States, and that will was signed with both names, held that a devise in remainder to "the lawful heirs of Charles F. Tyler in the United States of America, or the lawful heirs of Carl F. Theilig, formerly of Noulitz, Saxon Altenberg," was not void as a devise in the alternative, the alternative expression being merely a means of identification. Tyler v. Theilig [Ga.] 52 S. E. 606. Direction to trustees to devote remainder, at death of life beneficiary, to creation of some charitable or educational institution in a designated city without restriction as to the character of such institution except that it should be nonsectarian, held valid under Laws 1893, p. 1748, c. 701, providing that no gift to charitable uses, otherwise valid, shall be deemed void by reason of uncertainty as to the beneficiaries. Rothschild v. Goldenberg, 103 App. Div. 235, 92 N. Y. S. 1076. Statute applies only to gifts in trust for such purposes and not to absolute gifts. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433.

Held void for uncertainty: Trust, for failure to name beneficiary. Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346. Gift "to be distributed" but not limited to "charitable or worthy" not extended to all of testator's "overlooked" relatives, and in no wise apportioned. Minot v. Parker [Mass.] 75 N. E. 149. Will gave widow a certain sum for her support and provided that what was left at her death should "be equally divided between his daughter," but named no other person who should take the other half. Testator's son was made residuary legatee after the payment of certain other legacies. Held that, though will showed an intention that other half should go to son, such intention could not be effectuated as he was not named and that as to such half the provision was void for uncertainty. Leggett v. Stevens [N. Y.] 77 N. E. 874.

30. Evidence held to show that legacy to testatrix's niece, Harriet Ellen Hubbard, was intended for Harriet Ella Field, whose name was Hubbard before her marriage, rather than Harriet Anna Hubbard. In re Welch's Will [Vt.] 61 A. 145. The mere misnomer of a charitable corporation will not invalidate a devise or bequest to it if it clearly appears who was intended thereby. Carson v. Carson [Tenn.] 88 S. W. 175. Devise and bequest to the "Board of Trustees of the Cumberland Presbyterian Church in the United States of America," held valid though correct corporate name was the "Trustees of the General Assembly of the Cumberland Presbyterian Church." Id. A bequest to "the trustees of St. Francis Hospital," there being no corporation of that name, may be properly paid to the "Sisters of the Poor of St. Francis," a corporation owning and controlling a hospital known as St. Francis Hospital. Johnston v. Sisters of the Poor of St. Francis, 98 N. Y. S. 525. Institution incorporated as "The President and Directors of Georgetown College" held entitled to property bequeathed to "Georgetown University in the District of Columbia," where there was no such corporation as the latter in the District, and charter of former provided that no misnomer should defeat bequest or devise to it. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, afg. 24 App. D. C. 187. Bequest of certain sum to be divided equally between "St. Vincent's and St. Joseph's Catholic Orphan Asylums in the city of Washington" held valid though correct corporate names of such institutions were "St. Vincent's Orphan Asylum" and "The Trustees of St. Joseph's Male Orphan Asylum," respectively. Id. Gift over to "Norwegian Home and Foreign Missionary Association" held intended for "The Home and Foreign Missions of the United Norwegian Lutheran Church of America." In re Paulson's Will [Wis.] 107 N. W. 484.

31. See § 5 D, post, Particular words and forms of expression.

32. See 4 C. L. 1907.

33. In its primary and technical meaning the word is used to express the relation of persons to some deceased ancestor, and, when used to point out devisees or legatees, that meaning should be given it unless it is clearly shown by legitimate evidence that testator used it in a different sense. Gerard v. Ives [Conn.] 62 A. 607. Where will devised property in trust to pay rents and profits to beneficiary for life and after her decease gave it to her "lawful heirs" forever, held that word "heirs" could not be construed as meaning either children of the life beneficiary or her lawful heirs living at testator's death. Id. Where will provided that on death of life tenant estate was to be divided among testator's "heirs," held that word "heirs" did not mean children, and that it was necessary to resort to statute of distribution to ascertain who were his heirs. Brantley v. Bittle [S. C.] 51 S. E. 561. "Issue" or "heir" of a son held not to include, under Massachusetts laws (St. 1876, p. 210, c. 213), one whom the son adopted as son. Blodgett v. Stowell [Mass.] 75 N. E. 138. Where testator devised residue to widow for life or during widowhood, with remainder after her death or remarriage to "my lawful heirs" according to the laws of inheritance in force in Georgia, held that the heirs referred to were testator's heirs other than the widow, and she took a life estate only, though otherwise she would have taken the

ants,"[37] "nearest blood relatives,"[38] "legal representatives,"[39] and "succession legiti-

remainder under the statute referred to and would thus have had the fee. Tyler v. Theilig [Ga.] 52 S. E. 606.

Is prima facie a word of limitation and will be so construed unless it is so plain as to preclude misunderstanding that testator intended to use it in other than its ordinary legal sense. Nesbit v. Skelding [Pa.] 62 A. 1062. Devise of realty to son "and his heirs after him" held to give him a fee. Id. Held not a word of limitation. McDaniels v. Hays, 6 Ohio C. C. (N. S.) 257.

Personalty: When personalty is given to persons described as heirs, it will pass to those entitled to personal estate under the statute of distribution. Throp v. Throp [N. J. Eq.] 61 A. 377. Thus where personalty is bequeathed in trust for son for life, and on his death to his "heirs," on his death leaving a widow and children, the widow is entitled to one-third thereof, and may compel the administrator c. t. a. and the trustee to account therefor. Id. In limitation to heirs of first taker, held to mean next of kin, and to include widow. In re West's Estate [Pa.] 63 A. 407. Where will provided that property was to be converted into money and that, after paying certain specific legacies, the residue was to be distributed among testatrix's "lawful heirs" held that it would be distributed according to statute of distributions, and husband was entitled to share. Turner v. Burr [Mich.] 12 Det. Leg. N. 346, 104 N. W. 379.

34. Are words of limitation unless will shows a different meaning. Watkins v. Pfeiffer [Ky.] 92 S. W. 562.

35. It is prima facie to be given its natural meaning, but a more extended meaning may be given it where such a course will prevent the testamentary disposition from becoming inoperative, or where the language of the will indicates such an intention. Dilts v. Clayhaunce [N. J. Eq.] 62 A. 672.

Is primarily a word of purchase, but it may be construed as a word of limitation equivalent to "heirs," where it appears from the will that it was used in that sense. Strawbridge v. Strawbridge [Ill.] 77 N. E. 78. Where testator devised residue of realty, upon death of life tenant, to be divided among his children naming them, and to their "children" forever, held that word "children" meant heirs, particularly as at time will was made two of testator's children had no children when will was made or at testator's death. Id.

Does not include grandchildren in the absence of something in the will showing a contrary intention. Pimel v. Betjemann [N. Y.] 76 N. E. 157, rvg. 99 App. Div. 559, 91 N. Y. S. 49. In a devise to children as a class is ordinarily to be construed as immediate offspring, and will not include grandchildren in the absence of something in the will showing a contrary intention. Fulghum v. Strickland, 123 Ga. 258, 51 S. E. 294. Testator gave wife life estate in property so long as she remained a widow, and provided that in the event of her remarriage the estate was to "immediately go to and be distributed or divided equally among the children of my two sisters and my brother, each of the above families to share equally, to have one-third of my property." Held that bequest was to the children of such sisters and brother as a class, that only the children took, and that the descendants of children who died before testator took nothing. Id. Phrase "each of the above families to share equally," held to indicate the plan of division, and not to enlarge meaning of word "children" so as to include grandchildren. Id.

Includes only legitimate children, unless illegitimate children are so described as to leave no doubt that they are to be included. Bealafeld v. Slaughenhaupt [Pa.] 62 A. 1113. Where testator left estate to wife for life, with remainder to "her children and mine," held that illegitimate child born to wife before her marriage, and of whom testator was not the father, took nothing. Id.

May include adopted child where such an intention sufficiently appears from expressions in the will and from the state of testator's family at the date of the will. In re Truman [R. I.] 61 A. 598. Gift to "children or issue" of deceased brother held to include child adopted under act of the legislature. Id.

Held to mean issue: Where estate was devised to daughter "and the heirs of her body," with a provision that in case she died without "children" the estate should go to others, word "children" held synonymous with "issue" or "heirs of the body." Watkins v. Pfeiffer [Ky.] 92 S. W. 562.

Held to mean "descendants." Dilts v. Clayhaunce [N. J. Eq.] 62 A. 672.

36. Prima facie means "heirs of the body," and will be construed as a word of limitation. Beckley v. Riegert, 212 Pa. 91, 61 A. 641; Todd v. Armstrong [Pa.] 62 A. 1114.

"Lawful issue" in its legal sense means descendants, in absence of anything in will or surrounding circumstances to show contrary intention. Phelps v. Cameron, 109 App. Div. 798, 96 N. Y. S. 1014. Will directed division of estate into equal parts, income from each to be paid to child for life, and on her death principal to be divided among her "lawful issue." Held that on death of daughter principal should be divided equally among her children and her grandchild. Id.

37. Held to mean "heirs of the body." Paine v. Sackett [R. I.] 61 A. 753. Devise in trust to pay income to children for life and, on death of any of them, to transfer and convey his share of the estate to his "lineal descendants," or if none, then to the survivors of testator's descendants, or to their lineal descendants, if any, descendants of any deceased child to take parent's share, and in case of death of all of testator's children then to testator's heirs, held that "lineal descendants" meant "heirs of the body" and that equitable estates in fee tail were given to the children, with contingent cross-remainders to the survivors or their descendants if either child died without issue. Id.

38. The words "my nearest blood relatives" generally mean such persons as take under the statutes regarding the distribution of estates of intestates, but they may be given any reasonably different meaning necessary to effectuate testator's intention. In re Sander's Estate [Wis.] 105 N. W. 1064. Intention to devise property to illegimates

ma,"[40] will be given their ordinary legal meaning unless a contrary intent appears.

Words of survivorship are generally held to refer to the time of testator's death unless a specific intent to the contrary appears.[41] A gift to a particular class of persons ordinarily is a gift to those coming within that description at testator's death, in the absence of anything showing a contrary intention.[42] A gift to one "so long as she may remain unmarried" is not a condition in restraint of marriage.[43]

is to be respected and effectuated the same as though they were legitimate. Id. Where testator left property to his "nearest blood relatives, if there be any," and must have known, or had reasonable ground to suppose, that he had no relatives other than the descendants of his illegitimate brother and sister, held that he intended such persons to take. Id.

39. Technically they mean executors and administrators, but may be held to mean heirs or next of kin. Davidson v. Jones, 98 N. Y. S. 265.

Held to mean executors and administrators. Alexander v. McPeck [Mass.] 75 N. E. 88.

Held to mean heirs in devise to wife for life with remainder to children, "or to their legal representatives." Davidson v. Jones, 98 N. Y. S. 265. In bequest to sister and in case of her death before that of testator to her heirs and legal representatives, held to mean "heirs," and to be treated as surplusage. In re Reisenberg's Estate [Mo. App.] 90 S. W. 1170.

40. Testator bequeathed remainder of his estate "in the character of fidei-commissum and that the other [shares] may [profit by] accretion, in case of death without succession legitima, by equal parts" to certain nieces and a foster child. Held that words "succession legitima" meant "issue" and not "lawful heirs," and foster child's share went to nieces on her death. De Rodriguez v. Vivoni, 26 S. Ct. 475, 50 Law. Ed.—.

41. Taylor v. Stephens [Ind.] 74 N. E. 980. To the end that the estate may vest at the earliest possible moment. Campbell v. Bradford [Ind.] 77 N. E. 849. Will gave realty to wife for life with remainder to testator's sons, and provided that "if either of them shall be deceased leaving children surviving them" then his share should go to such children, and if either died leaving no children the surviving son should inherit the whole. Held that death referred to was death during testator's lifetime and remainders were vested. Id. When the devise is of a fee absolute in the first instance, and the gift is immediate. Richards v. Bentz, 212 Pa. 93, 61 A. 613. Word "survivor" or "surviving," following a prior gift. Black v. Woods [Pa.] 63 A. 129. "Surviving" held to relate to the death of testator rather than to the death of the life tenant there being a special provision for such as should survive the latter, and a reference elsewhere to survivorship at that time. Ball v. Holland [Mass.] 75 N. E. 713. Provision that on death of widow, to whom use for life was given, realty should be sold, and proceeds divided among testator's "surviving" children, held, in view of other provisions indicating an intention that portions of the children's shares might be advanced to them during widow's life and that share of any child dying should go to survivors, to refer to children surviving testator and not merely to those surviving the widow. Boggs v. Boggs [N. J. Eq.] 60 A. 1114. Devise to wife for life and on her death to children or their heirs held to vest absolute title in such children as were living at time of testator's death, and the heirs of such as had predeceased him, the substituted gift to heirs being only intended to take effect in case child died before testator. Davidson v. Jones, 98 N. Y. S. 265. Testator directed trustees to pay balance of income to surviving children of his sister and of his brothers, and to S., M., F., and H., "and the surviving issue of any deceased child of said" sister or brothers, "and the surviving children of S., M., F. and C., having deceased before me, to be divided equally between them." Held that, where son of one of brothers survived testator, son's daughter was not, on his death, entitled to any part of the income. Howe v. Booth, 97 N. Y. S. 267. Where testator created trust to exist during lifetime of wife and sister, and provided that, on cessation of same, estate should go to "my nieces and nephews who may be living" and niece of wife, and issue of those who had died, held that nieces and nephews referred to were those living at testator's death, from which time will is presumed to speak. In re Woolsey's Estate, 49 Misc. 201, 98 N. Y. S. 936. Gift in trust for son to be conveyed on his death in fee to his issue, but in case he died without issue, "then to convey the same to my surviving children, share and share alike," held to refer to children surviving on death of testator. Black v. Woods [Pa.] 63 A. 129. Fact that direction to convey is expressed in a trust is immaterial, the question being one of substance rather than form. Id.

Held not to refer to death during testator's lifetime: Will directed that residuary estate should be divided equally among named nieces and nephews, and provided that the portions which certain of them "shall receive shall at their death revert to their children." Held that death referred to was not death during testatrix's lifetime, and nieces and nephews took life estate only. Powell's Ex'r v. Crosby [Ky.] 89 S. W. 721. Where will gave property in trust for daughter for life with direction that upon her death it should be equally divided among son and survivin- grandchildren, held only those took who survived life tenant. In re Stocum's Will, 94 N. Y. S. 588.

42. See Individual rights in gifts to two or more, post, this section.

43. Harlow v. Bailey [Mass.] 75 N. E. 259. A provision for the support of daughters as long as they continue unmarried and need support is valid, where the evident intention

The words "die without issue" ordinarily import an indefinite failure of issue,[44] unless the will shows a contrary intention.[45]

Ordinarily where there is a gift to one absolutely, and, in case of his death, or his death without issue, to another, the contingency referred to will be held to be his death during testator's lifetime;[46] but this does not apply where another point of time is mentioned to which the contingency can be referred, or where another provision of the will evidences a contrary intent.[47] "Die leaving no living issue"

is to provide support and not to restrain marriage. Trenton Trust & Safe Deposit Co. v. Armstrong [N. J. Eq.] 62 A. 456. Gift of income "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage," held a limitation in favor of the beneficiary during the period of her nonmarriage which was valid, and not a bequest for life upon condition of forfeiture in case of marriage, which would be void. In re Holbrook's Estate [Pa.] 62 A. 368.

44. "Dying without issue," when standing alone. Beckley v. Riegert, 212 Pa. 91, 61 A. 641. Devise over "should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant," held not to refer to failure of issue at death of first taker, but at some indefinite time in the future. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

45. Rule that "dying without issue" means an indefinite failure of issue always yields to an apparent intent on face of will that words were to have a more restricted meaning, and to be applied to descendants of a particular class, or at a particular time. Beckley v. Riegert, 212 Pa. 91, 61 A. 641; Todd v. Armstrong [Pa.] 62 A. 1114. Under devise to son for life, and if he should "die without lawful issue" then over, but if he had "lawful issue at the time of his death," then to him and his heirs forever, held that limitation over was after a definite failure of issue, and son took life estate and not an estate tail by implication. Beckley v. Riegert, 212 Pa. 91, 61 A. 641. Devise to daughter with provision that, if she should die unmarried, or having been married, "should die without issue born of her body," the estate should vest in her mother for life if living, or in daughter's husband for life, if living, and on failure of these, then over, held to import definite failure of issue, and the mother having died before the daughter, and the daughter having died without leaving living issue, her surviving husband took a life estate. Daughter did not take fee. Todd v. Armstrong [Pa.] 62 A. 1114. Where will gave property to wife for life, with power of disposal, all remaining at her death to be equally divided among her children, and gave sons their share absolutely, and codicil provided that "in case one of my sons dies without children," his share was to return to testator's family, held that death referred to was not death during wife's lifetime, but death at any, or an indefinite time. Pennsylvania Land Co. v. Justi [Ky.] 90 S. W. 279.

46. Daniels' Estate, 27 Pa. Super. Ct. 358; Hogg's Estate, 27 Pa. Super. Ct. 428. Where will devised realty to grandson "as his full property, which he shall take in possession immediately after my death," and also gave him certain personalty for which he was to make certain payments to his sister and others, and provided that if the grandson or his sister should "die without heirs, so shall that one's share of inheritance fall back to the other," held that the grandson took an absolute and indefeasible fee if he survived testator. Richards v. Bentz, 212 Pa. 93, 61 A. 613. Devise to daughter in fee, but if she should die "single, unmarried, and without issue," then over to mother and her heirs. Daughter having married and had children has fee though children all die. Cooper v. Leaman, 212 Pa. 564, 61 A. 1106. In any event having survived testatrix's mother she takes vested remainder in fee as her heir and her deed passes fee title. Id. An estate to A. and in case of her death without heir, then over, gives A. a fee if she survives the testator. Hogg's Estate, 27 Pa. Super. Ct. 428. Where use and income of half of residuary estate was given to son for life, with direction that after his death the property was to go to the son's son, but, in case the latter should die leaving no living issue, then to the daughter as an absolute estate, not to pass to her however until the death of testator's son, held that the provision for the issue of the grandson took effect only in case latter should die before testator, and on his surviving testator, grandson took an absolute title, subject only to father's life estate. Hull v. Holmes [Conn.] 62 A. 705. Where will directed that one share of property was to be paid to brother, if living, or, if not, to his issue, held that his issue were entitled to his share on his death before that of testatrix. Varick v. Smith [N. J. Eq] 61 A. 151.

47. Rule does not apply where another point of time is mentioned to which the contingency can be referred, or where a life estate intervenes, or where will shows a contrary intent. In re Wiley, 97 N. Y. S. 1017. "In case of the death of" any of the residuary legatees, property to be divided among survivors, referred to death before period of distribution. Id. Where there is a gift to children for life, and, as each child dies leaving issue, a gift of the share of the child so dying to the issue of that child, with a gift over to surviving sons and daughters of testatrix if the life tenant dies without issue, the surviving sons and daughters are the sons and daughters who survive the life tenant who dies without issue, unless there is something in the will showing a contrary intention. Dary v. Grau [Mass.] 77 N. E. 507. Testatrix gave six parts of her estate in trust to pay income to six named children in equal parts and directed that on the death of each of such children leaving issue his share of the corpus should be conveyed to such issue in equal shares in fee, but that in the event

is equivalent to "die leaving no surviving issue."[48] A limitation over to surviving takers on the death of any without issue does not impliedly attach to what the survivors take from the deceased one's share; hence such portions may be alienated,[49] and if children have been born and are deceased, the shares descend to their heirs.[50]

Gifts by implication.[51]—Since no particular form of expression is necessary to constitute a legal disposition of property,[52] a devise may be held to exist by implication where the context requires it,[53] but the probability of such an intent must be so strong as to leave no hesitation in the mind of the court, and permit of no other reasonable inference.[54] An erroneous recital in a will of a previous devise

of the death of any of the children without issue, his share of the corpus should be held by the trustees for the use of the "surviving" children to be equally divided between them, the shares devised in trust "to be held upon the like trusts and purposes herein already before declared, and finally to be conveyed, divided, and distributed among their issue as hereinbefore provided." Four children survived testatrix and left issue who survived the last of testatrix's children. Held that on the death of the last of testatrix's children the trust estate was properly divided into four equal parts, one part to be divided among the issue of each of the four children of testatrix who left issue. Id. Gift over to surviving children meant those surviving the several life beneficiaries dying without issue, and did not include children of testatrix who predeceased her, or their issue. Id. Provisions of a will held to disclose an intent on the part of the testator not to limit the meaning of "die without issue" to the death of the legatee during his own lifetime. Daniels' Estate, 27 Pa. Super. Ct. 358.

48. Hull v. Holmes [Conn.] 62 A. 705.

49. Will provided that on death of life tenant the estate was "to be equally divided among all my heirs, share and share alike," the child or children of any deceased parent taking the share to which the parent would have been entitled if living. Two of the heirs died during the continuation of the life estate without leaving children, and a third died after having conveyed all her interest in the estate, leaving children. Held that the shares which the latter heir took as one of the heirs of the other two were not subject to the provisions of the will, there being nothing to show an intention to create cross-remainders, and passed to her grantee to the exclusion of her issue. Brantley v. Bittle [S. C.] 51 S. E. 561.

50. Where will provided for a division of residuary estate into equal shares to be held in trust for testator's brothers and sisters, and at their death to be paid to their children, or if any of them died without children, to the remaining brothers and sisters or their issue, held that on the death of one of them without issue his share went to the surviving brothers and sisters and the descendants of those who were dead, the latter taking such share as the parents would have taken if living, and on the death of a sister leaving a son, her share went to him absolutely, and on his death passed under the law of descent and not under the will. Barret v. Gwyn [Ky.] 88 S. W. 1096.

51. See 4 C. L. 1909.

52. A direction that property be divided among certain persons is equivalent to a devise to them. Dilts v. Clayhaunce [N. J. Eq.] 62 A. 672.

53. A devise by implication will be sustained where it is apparent that it is necessary to do so in order to give effect to the plain intention of the testator. Welsh v. Gist [Md.] 61 A. 665. Where it is plainly manifest that testator intended to bequeath an interest which is not given by formal words, such words may be supplied by implication. Peabody v. Tyszkiewicz [Mass.] 77 N. E. 839. Where will gave certain sum in trust to pay over income to testatrix's daughter, and "upon" her decease to pay over the income to her child or children, and the issue of any deceased child in such shares as daughter should by will appoint, or, in default of appointment in equal shares, the issue of a deceased child taking the parent's share, held that children of daughter took vested interest for life contingent on their surviving the daughter, and trust was not terminated by daughter's death. Id. Further provisions that principal should remain in trust so long as law allowed and that when trust was terminated under limitation provided by law, a final distribution should be made to surviving children and their issue, the issue of a deceased child taking the parent's share, held not to cut down life estate previously given to daughter or children, and legal title must be held by trustee at least until death of one of such children. Id. Where estate was given in trust, the net income to be paid to the beneficiaries, "and at their deaths the principal to their heirs," held that words of direct gift to heirs would be implied. In re West's Estate [Pa.] 63 A. 407. The phrase "die leaving no living issue" is equivalent to "die leaving no surviving issue," and carries a plain implication in favor of any issue of the first taker who may survive him. Hull v. Holmes [Conn.] 62 A. 705. Where will gave widow use of rooms in a house devised to defendant and her board, etc., or use of rooms and an annuity to be paid by defendant at her election, held that, on her election to take the annuity, she was entitled to arrange rooms for housekeeping and could put in cook stove, etc. Begin v. Begin [Minn.] 107 N. W. 149.

54. In order that the heir at law may be excluded by a devise by implication, the implication must be obvious, and not merely possible or probable. Welsh v. Gist [Md.] 61 A. 665. A devise exists by implication

may operate as a devise by implication,[55] but not an erroneous recital of a gift by some other instrument.[56]

Quality of estate, whether legal or equitable, use, trust, or power.[57]—Full legal ownership may be implied from a use which is equivalent thereto,[58] or from a gift with words ordinarily indicative of a trust or beneficial ownership, or a power.[59]

when the testator uses words manifesting an intention to give by so strong a probability that the contrary intent cannot be supposed to have existed in his mind when he made the will. Metz v. Wright [Mo. App.] 92 S. W. 1125. Where trust for benefit of son so rested in personal discretion of trustee that it terminated at his death, and there was no direct gift to son, and no disposition of the property in case the trustee died before the son, and it was discretionary with trustee whether trust should be terminated during son's lifetime by paying over principal to him, held that there was no implied gift to son. Benedict v. Dunning, 110 App. Div. 303, 97 N. Y. S. 259.

55. A recital that testator has devised something in another part of the will when he has not done so. Noble v. Tipton, 219 Ill. 182, 76 N. E. 151. Clause reading "my son" naming him "I have given" certain personalty "and 120 acres of land, priced at $600," describing it, held to be a devise of such land to the son, though word "devise" was not used. Metz v. Wright [Mo. App.] 92 S. W. 1125.

56. Not though deed referred to was insufficient to pass title for want of delivery. Noble v. Tipton, 219 Ill. 182, 76 N. E. 151. Nor can recital aid in establishing that there had been a valid delivery of such deed. Id. The rule that a devise will not be implied from an erroneous recital of a deed has no application to such a recital followed by a declaration of testator's will to the same effect. Lander v. Lander, 217 Ill. 289, 75 N. E. 487.

57. See 4 C. L. 1910, n. 63 et seq.

58. Gift of use: Gift of realty to wife "for her occupancy or otherwise as she may deem best for the comfort and maintenance of the family" with furniture, etc., "to be disposed of or used as my wife may think best" held to give her a fee. Ludlam v. Ludlam, 47 Misc. 232, 95 N. Y. S. 862. Where testator bequeathed the residue of the personalty in trust to K. to pay premiums on policy of insurance on life of M., and if any money remained after paying premiums gave the "use, improvement, and enjoyment of the same" to said K., held that the residue of income after paying the premiums belonged to K. absolutely. State v. Sliney [Conn.] 62 A. 621. Where testator gave wife all his property "she to have full control of said property during her life," and then provided that "one-half of all property belonging to my estate at my wife's death" should go to one of his daughters in fee and the other half to his other daughter for life with remainder to her children, held that widow took only a life estate and was not authorized to dispose of fee. Hoefliger v. Hoefliger [Iowa] 107 N. W. 312.

Power of disposal: A gift of the unqualified power to dispose of the property is a gift of the property. Gift of residue to executor "to be disposed of as he shall think expedient" held an absolute gift. Manson v. Jack [N. J. Eq.] 62 A. 394. Residence while they live to husband, mother and children and power in husband to sell personalty and reinvest for their use held to give him no estate subject to debts, until perhaps when he shall have survived. Linn v. Downing, 216 Ill. 64, 74 N. E. 729.

Gift of income: Every person who, by virtue of any grant, devise or assignment, is entitled to the actual possession of lands and the receipts of the rents and profits thereof in law or in equity shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest. Gen. St. 1894, § 4276. In re Poseng's Estate [Minn.] 104 N. W. 137. This statute refers only to devises concerning which there are no limitations, and does not mean that every person who is by will entitled to possession of land and the receipts and profits thereof shall be deemed to have a legal estate therein. Cannot be invoked for the purpose of enlarging limitation imposed by the devise itself. Id. Where will gave husband rents and profits of realty "during his natural life," provided that he should pay taxes, insurance, etc., and further provided that such gift was an express condition that property should not be incumbered in any manner by him, held that he did not become vested with legal estate, but that interest and profits thereof were devised to him for life only. Id. A devise of the income of lands is, in effect, a devise of the lands. Devise of "the use, income, and occupancy" to children and their heirs forever. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Will gave "to W., my housekeeper, $500 to be in trust of my executor and put in savings bank, the income to be paid to her yearly," and authorized executor, if he thought best, to buy a house with the principal for her to occupy during her life. There was no residuary clause, and housekeeper died leaving principal unimpaired and unconverted by executor. Held that on trust becoming fully executed by her death, the legal title to the fund followed the equitable one, and fund became a part of her estate. Hayward v. Rowe [Mass.] 76 N. E. 286.

59. Bequest to unincorporated society to be used by it in such manner as it may deem most expedient for the advancement of spiritualism in a certain town, is an absolute gift to the society and not a gift in trust. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433. Where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate, and the devisee or legatee takes, not a simple power, but the property absolutely. Welsh v. Gist [Md.] 61 A. 665; Pedigo's Ex'x v. Botts [Ky.] 89 S. W. 164. But where the property is given expressly for life, and a

On the other hand a trust may be found without the artificial words of one,[60] and

power of disposition of the reversion is annexed, the first taker has but a life estate with the superadded power. Welsh v. Gist [Md.] 61 A. 665. The express limitation for life will control the operation of the power and prevent it enlarging the estate into a fee, and the residuum undisposed of by the life tenant will go to the remaindermen. Pedigo's Ex'x v. Botts [Ky.] 89 S. W. 164. Gift of realty and personalty held to have given widow life estate with unlimited power of disposition, with remainder, in residuum undisposed of by her in her lifetime, to children. Id. Residuary clause "all the rest of my estate I give her full control," held to give wife an absolute estate, and not merely a life estate, in the residue. Welsh v. Gist [Md.] 61 A. 665.

Effect of precatory words: Words of desire, request, recommendation, or confidence, addressed by testator to a legatee whom he has power to command, create a trust in favor of the parties recommended only when the intention to make such desire, etc., imperative upon the legatee, so that he shall have no option to comply or to refuse to do so, clearly appears from the whole will and the relation and circumstances of the testator when it was made, when the subject-matter is certain, and when the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be created in favor of the parties recommended. Burnes v. Burnes [C. C. A.] 137 F. 781. The test of the first condition of such a trust is the clear intention of testator to imperatively control the conduct of the legatee by the expression of the wish or desire, and not to give him a discretionary power to comply or refuse to comply with the wish or suggestion at his option. Id. Precatory or recommendatory words will create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject-matter of the trust is defined with sufficient certainty, and if the object is also certainly defined, and the mode in which the trust is to be executed. Civ. Code 1895, § 3162. Glore v. Scroggins [Ga.] 53 S. E. 690. Question whether words were meant merely by way of advice, or were intended as mandatory is one of intention. Central Trust Co. v. Egleston, 47 Misc. 693, 98 N. Y. S. 1055.

Precatory words held to create trust: Testator devised all his property to his children "in equal shares, share and share alike." By a later article he expressed a "desire" that a certain son should have use of a fruit ranch for 5 years at a specified annual rental to be paid to the other children and "directed" the latter to execute to him a lease of the premises. Held that provision in favor of son was mandatory and not mere expression of a wish or desire. In re Buhrmeister's Estate [Cal. App.] 81 P. 752.

Precatory words held not to create trust: Gift to wife of all testator's property for life "for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child may be equal," held not to create trust. Glore v. Scroggins [Ga.] 53 S. E. 690. Testator gave property in trust to pay income to his wife for life absolutely, "for her own use and to enable her to support, educate, and maintain our children," she not to be liable to account therefor in any manner, the same being given to her "absolutely to use and apply as she may deem best and proper," held that testator's son had no enforceable interest in income. Slater v. Slater, 46 Misc. 332, 94 N. Y. S. 900. "Desire" that trustee advance certain sums to wife held to be meant as direction to trustee. Central Trust Co. v. Egleston, 47 Misc. 693, 98 N. Y. S. 1055. Testator gave property to brothers "to be held and disposed of by them absolutely as their own property." He expressed a desire that they should adopt his children as their heirs so that they would share equally with their own children in their estates, etc., and further provided that nothing in the will, and no request, direction or bequest therein should be construed to create a charge or incumbrance upon any of the property bequeathed to such brothers. Held that will did not create trust in favor of children, either in estate of testator or the property of his brothers. Burnes v. Burnes [C. C. A.] 137 F. 781.

60. No particular form of expression is necessary to constitute a valid trust, but it is sufficient that, from the language used, the intention of the testator is apparent, and that the trust atempted to be created is consistent with the rules of law. In re Heywood's Estate [Cal.] 82 P. 755; Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1117, 47 Misc. 475, 95 N. Y. S. 945.

The character of a trust may be found in the provisions of the will construed with reference to the condition of parties. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339. Gift of income only and a trust may betoken a spendthrift trust. Id. It will not militate against the constitution of several trusts that the capital of the estate is to be kept together and administered as one fund for convenience, if it appears that the shares or interests of the beneficiaries are made, or clearly intended to be made, distinctly several. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1117, 47 Misc. 475, 95 N. Y. S. 945. Will held to create a single trust for lives of testator's three sons. Id.

Held to create trust: Gift to executors "to be distributed by them" but without accountability. Minot v. Parker [Mass.] 75 N. E. 149. Bequest to executor in trust to invest money and pay it over "together with the increase thereof" to son or to his wife and children "at such time or times and in such manner" as executor deems for son's best interest held to create valid trust and to give trustee same right to pay over principal as income. In re Wilkin [N. Y.] 75 N. E. 1105, rvg. 100 App. Div. 509, 91 N. Y. S. 1118. Where testator gave one a certain sum "to be expended by him as I have instructed him during my lifetime," and also gave him a certain other sum "for his personal use," held that first gift was intended to create a trust for some other object than the legatee's personal use, and being insufficient as a trust, was invalid. In re Keenan, 94 N. Y. S. 1099. Testator be-

such words may, if clearly so intended, import a power,[61] and will be so construed if there is a provision for the disposal of the unconsumed portion.[62] A gift subject to a surviving husband's "legal rights" gives him no title to personalty as against the executor.[63]

Estates or interests created.[64]—Words of inheritance are not necessary to carry a fee, but any words suffice which carry that intent.[65] So, too, no particular

queathed to wife and son the use of certain sums for life, directed his executors to pay such sums to a certain bank, and the bank to pay the income and principal to legatees according to the terms of the will. Held to create a valid express trust in personalty. In re McKay, 143 F. 671. Gift to son to lease realty and invest personalty and to receive rents, income, etc., thereof, and, after paying taxes, expenses, etc., to apply residue to support of wife, unmarried daughters, and minor children of testator, until minor daughters became of age, and then to distribute estate in specified manner, held to create an express trust under N. Y. real property law, § 76, subd. 3 (Laws 1896, p. 571, c. 547) of which wife and children were the beneficiaries. In re L'Hommedieu, 138 F. 606.

Held not to create trust: Testator devised property to trustees to invest, and directed them to divide income into five parts, one part to be paid to his wife and one to each of his children, and that at the death of each his share was to "go to," or "be distributed" or "transferred" or "paid" to certain persons on certain contingencies. Held that will showed intention to make direct devises to remaindermen, and did not create an invalid trust to convey to beneficiaries. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. Where no beneficiary was named held that trust could not be supported as for implied benefit of testator's sole heir, such an intention being in no way suggested by anything in the will. Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346. One gift to a person held absolute from the fact that it lacked qualifying words there being another gift to him in trust. Thissell v. Schillinger, 186 Mass. 180, 71 N. E. 300. To constitute a testamentary trustee it is necessary that some express trust be created by the will. Kellogg v. Burdick, 96 N. Y. S. 965. Provision appointing certain persons "to be guardians of the persons" of minor children, and certain others "to be joint guardians of the estates" of such children to receive, hold, and pay out all funds belonging to them, held not to create trust so as to make latter guardians trustees. Id.

For cases in regard to creation of resulting trusts by oral agreements between devisee and testator at time of making will, see Trusts, 6 C. L. 1727.

61. Gift to widow of the "use and improvement" of realty for life, with further provision that, if use and improvement should not be sufficient for her support and maintenance, she might sell so much of the realty as might be necessary for that purpose, held to give her life estate with limited power of sale. Bartlett v. Buckland [Conn.] 63 A. 350.

62. "All my estate, after paying debts, costs of administration, legacies, and bequests I give and bequeath and the free and liberal use thereof to my wife for and during her life and whatever remains at her death" over, construed to vest in the wife a right to the possession of the property and to control the same during her lifetime with full power of disposition at her discretion. Teel v. Mills, 117 Ill. App. 97. No additional power of disposal given to the devisee of a life estate, which evidently contemplates the possibility of a portion of the property remaining undisposed of and therefore subject to the devise of the remainder after the termination of the life estate, will convert the devise of a life estate into a fee simple. Steiff v. Selbert [Iowa] 105 N. W. 328. Where a life estate is given and the provisions as to an added power of disposal, no matter how broad, contemplate a possibility that a portion of the property may remain undisposed of under the power, the provision as to a remainder in such portion as may be undisposed of at the termination of the life estate is effective, and vests such remainder in the devisees named. Id. Devise to widow "during her lifetime" with an absolute power of disposal, with further provision that, in case any of the property remained after her death undisposed of by her, it should go to children, held to give widow a life estate only, with a vested remainder in children in so much of the property as she did not dispose of. Id. Gift of all testator's property to his wife "for her exclusive use and benefit during her life and after her death and funeral expenses are paid what remains to be equally divided between my children," held to give wife life estate only, even if she had implied power of sale. Haviland v. Haviland [Iowa] 105 N. W. 354.

63. His rights are purely equitable and not legal rights in wife's estate. In re Folwell's Estate [N. J. Err. & App.] 62 A. 414.

64. See 4 C. L. 1912.

65. A devise to one without the use of the words "heirs and assigns" gives him a fee simple estate of inheritance, unless the will reduces the estate to one less than a fee by express words, or by construction or operation of law. Hill v. Gianelli [Ill.] 77 N. E. 458; Boehm v. Baldwin [Ill.] 77 N. E. 454. Under Act Aug. 27, 1784, 3 Gen. St. p. 3763, a devise which omits the words "heirs and assigns" or "heirs and assigns forever" must be construed as passing an estate in fee, unless there are expressions in the will whereby it appears that the devise was intended to convey only an estate for life "and" no further devise be made of the devised premises after the death of the devisee. Morris v. Le Bel [N. J. Eq.] 63 A. 501. Though the two classes of excepted cases are connected by "and," held that the plain intent requires that word to be read as "or," and the statutory construction cannot be made either if the will shows an intention to convey only a life estate, or if there is no devise over after the

words are necessary to constitute a life estate.[66] An express limitation to life cannot be enlarged into a fee by words of doubtful meaning.[67] A devise or bequest

death of the first devisee. Id. Devise of land to one on condition that he shall not incumber it, nor have the power to sell it, but shall have the power to devise it by last will, held to show an intent to create life estate only. Id. Under Act April 8, 1833, § 9 (P. L. 250, Purd. 2103), the whole estate passes notwithstanding omission of words of inheritance, in the absence of evidence of a contrary intention. In re Brooke's Estate [Pa.] 63 A. 411. Devise in remainder to daughter held to pass fee. Id. Devise to son "and his heirs after him," held to give him fee. Nesbit v. Skelding [Pa.] 62 A. 1062. Provision in codicil giving wife a certain sum in lieu of a larger one given her by the will, to be set apart to her as provided in the will held to give her a fee, the gift being without qualification except as to the manner of selecting it. Hartring's Ex'x v. Milward's Ex'r [Ky.] 90 S. W. 260. Testatrix devised all her estate to two grandchildren equally to be their estate, not subject to the control of their husbands, and in case of the death of either her share to go to the survivor, and upon the death of the survivor without descendants the estate to go to others. Held that grandchildren took the property in fee with power to dispose of it as they saw fit, and there was a devise over of only so much as might be left in the hands of the survivor upon the death of both of them without issue. Irvine v. Putnam [Ky.] 89 S. W. 520. The rule is different where a life estate only, without power of disposition, is given to the first taker. Id. The presumption against intestacy, when applicable, may be relied on to support a contention that a gift asserted to be only one for life is in reality absolute, especially where there is no limitation over, and where the alleged intestacy would occur in the residuary clause. Welsh v. Gist [Md.] 61 A. 665. Testator gave certain land to his son "and his children provided he should have children by his wife," and then provided that if he and his wife should have no children, and he should die before his wife she should be entitled to one-third of the proceeds of the land so long as she remained his widow. He also stated at the end of the will that he had disposed of all his property so far as known to him, but there was no limitation over on failure of son to have issue. Held that son took fee though he had no issue. Boehm v. Baldwin [Ill.] 77 N. E. 454. Residuary clause "all the rest of my estate I give her full control," held to give wife an absolute estate. Welsh v. Gist [Md.] 61 A. 665.

66. Held life estates: Gift of property to widow "to be hers her natural life or widowhood," for the support of herself and children, the remainder to be distributed in a specified manner at her death or marriage. Walters v. Bristow [Ark.] 91 S. W. 305. Testator devised realty to wife for life, provided she did not remarry, and on her death or remarriage to all of his children then alive as tenants in common and in case of their death without issue then to testator's brothers and sisters. Widow did not remarry and children survived her. Held that realty being community property, half of it went to wife in fee, and she took a life estate in the other half, with remainder to surviving children. Pryor v. Winter, 147 Cal. 554, 82 P. 202. Gift of property to wife "during her lifetime or widowhood, for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child may be equal," held to give wife an estate for life or widowhood, with remainder to children. Glore v. Scroggins [Ga.] 53 S. E. 690. "During her natural life" gives life estate, and power of sale added in order if necessary to pay debts does not enlarge it. Nelson v. Nelson [Ind. App.] 75 N. E. 679. "Use and occupancy during life." Taylor v. Stephens [Ind.] 74 N. E. 980. Bequest of personalty to widow "to have to hold by her during her life, and at her death the same or whatever remains to be divided between my children," held to give her a life estate only, with an unlimited power of disposition added as a separate gift, and if she failed to exercise such power, the remainder passed to the children at her death. Webb v. Webb [Iowa] 104 N. W. 438. Devise with power to sell and reinvest proceeds and use income "so long as she remains unmarried." Harlow v. Bailey [Mass.] 75 N. E. 259. Testator devised to wife his "homestead consisting of 30 acres on the southeast corner of section 5." By a subsequent clause he devised to his son all his lands in sections 2 and 4, "reserving the right of my widow to occupy the homestead during her natural life." Testator had a homestead on section 2, but none and no 30 acres on section 5. Held that his intention was to give widow life estate in homestead, with remainder in fee to son. Thorn v. Scofield [Mich.] 13 Det. Leg. N. 37, 107 N. W. 100. Son held not to have done anything inconsistent with his right to claim fee. Id. Devise to one on condition that he shall not incumber it or sell it, but giving him power to dispose of it by will. Morris v. Le Bel [N. J. Eq.] 63 A. 501. Provision that three unmarried daughters, the survivors and the survivor of them, should have the use of property until they married held to have given them an estate for life, subject to defeat in case of their marriage. Graham v. Graham, 48 Misc. 4, 97 N. Y. S. 779. Testator gave property to trustee, who was to convey it to son on his arrival at the age of 25 "to be held by him as follows," and then provided that if son died before testator or after him without leaving lawful issue property was to go to nieces and nephews. He further provided that in case son died before reaching age of 25 without issue, property was to go to same nieces and nephews. Son reached age of 25. Held that he took a life interest in the property with remainder over to his issue and with limitation over by way of executory devise in case he died without issue. Webel v. Kelly, 97 N. Y. S. 1009.

67. Thus disinheriting the heir at law. Adams v. Massey [N. Y.] 76 N. E. 916. Gift of realty and personalty to wife for life, held not converted into fee by subsequent clause

over, though in terms made upon the marriage of the donee of the preceding estate, is limited on a life estate and is to be extended by implication so as to take effect on the determination of that estate by death.[68] Technical words, when used, will be given their technical meaning if no contrary intent be apparent.[69]

It is the general policy of the law to adopt such a construction as will give a fee,[70] or the largest possible estate,[71] in the first taker, so as not to tie up prop-

giving her "any other property not herein otherwise disposed of that may be in my possession at the time of my decease," to liquidate his debts, the balance, if any, to be at her sole disposal, where only small provision was made for testator's invalid daughter. Id.

68. Trenton Trust & Safe Deposit Co. v. Armstrong [N. J. Eq.] 62 A. 456. Will providing that, on death of widow, estate should go to three unmarried daughters "so long as they remain unmarried" and "in case they all marrying," then over, held to create an estate for life in daughters, subject to an earlier termination on the marriage of all of them, with remainders which vested on testator's death, and took effect in possession on determination of preceding estate, either by death or marriage of daughters. Id.

69. Estates tail: Devise in trust for use of daughter "and the heirs of her body" held to give her an estate tail, converted into a fee by the statute. Watkins v. Pfeiffer [Ky.] 92 S. W. 562. Fact that will further provided that in case she died without "children" estate should go to others held to show that words "heirs of her body" were not intended as words of limitation, the word "children" being used in sense of "issue," or "heirs of the body." Id. A limitation over to take effect on the failure of issue within a given time, will not give rise to an estate tail by implication in the first taker. Beckley v. Riegert, 212 Pa. 91, 61 A. 641.

Rule in Shelley's Case: Where an estate of freehold is given to one and in the same gift of conveyance an estate is limited either mediately or immediately to his heirs, either in fee or in tail, the word "heirs" is a word of limitation of the estate and not of purchase, and the first taker is entitled to the estate or interest imported by the limitation. Johnson v. Buck [Ill.] 77 N. E. 163. Devise to one "for life, and after his decease to his heirs (lawful) forever," gives first taker a fee simple under the rule. Pitchford v. Limer, 139 N. C. 13, 51 S. E. 789. Gift of personalty in trust for one to be paid at age 40 or on his dying before "it shall go to his heirs," held not within rule. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339. Gift over to "heirs" of personalty held not within rule where no present legal estate given ancestor. Id. Where will gave estate to testator's daughters and his grandson "and their heirs, share and share alike," held that the gift to the grandson was not within the rule, so as to render void a subsequent provision that his share should be held in trust and a limitation over by way of executory devise, since will did not purport to limit a remainder to his heirs, but conferred the estate immediately upon him. Johnson v. Buck [Ill.] 77 N. E. 163. If remaindermen take as purchasers under the testator, the particular estate is limited by the literal words of the will and the rule has no application, but if the remaindermen take as heirs to the donee of the particular estate, the first donee takes the fee, whatever words may be used to describe the estate given to him. In re Belcher's Estate [Pa.] 61 A. 252. Rule does not apply where testator gives life estates in severalty with no limitation over in fee to the heirs of any one of them, but with a contingent remainder in fee to such issue of the life tenants collectively as shall be living at the death of the last life tenant. Id. Rule does not apply where one of the estates sought to be carried out is equitable and the other is legal. Slater v. Rudderforth, 25 App. D. C. 497. Devise in trust until beneficiary reaches age of 16, when she is to have, hold, and enjoy property, and to take rents and profits for life, with remainder in fee to her lawful issue, held to give her life estate only. Id. Such a trust for a married woman is active and not passive, and hence she does not take legal title. Id. Does not apply where trust is created for benefit of life tenant and legal title is given to heirs in remainder. In re West's Estate [Pa.] 63 A. 407.

In Illinois the rule is one of property, and where it applies the expressed intention of the testator to the contrary can have no effect. Rissman v. Wierth [Ill.] 77 N. E. 108. Will gave residue of estate to wife "to hold and to have to her, my said wife, and to her heirs and assigns forever," but provided that if she remarried half of the estate should be sold and divided among named legatees. It was further provided that if wife should remain widow she was to have whole estate for her own support until her death, and, after her death the residue was to go to the same legatees. Held that the widow took the fee, and that on her death the property passed to her heirs. Rissman v. Wierth [Ill.] 77 N. E. 108.

70. Particularly in view of Rev. St. 1903, c. 30, § 13, providing that every estate in lands devised shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been devised by construction or operation of law. Strawbridge v. Strawbridge [Ill.] 77 N. E. 78.

71. Illinois statute gives largest possible estate. Boehm v. Baldwin [Ill.] 77 N. E. 454. Testator gave land to his son "and his children provided he should have children by his wife" and then provided that if son and his wife should have no children and he should die before his wife she should have one-third of the proceeds of the land so long as she remained unmarried. There was no limitation over on failure of issue. Held that son took life estate though he had no children. Id. Rule in Wild's case under which son would have taken an estate tail, since he had no

erty and suspend the power of alienation.[72] Provisions which standing alone would pass an absolute estate may be so restricted and limited by subsequent clauses as to pass a life estate only, or to impose conditions by which the estate may be entirely defeated upon certain contingencies,[73] provided the intent to do so appears in as clear and unmistakable language as that which expresses the absolute gift.[74]

Where the will creates a fee simple with absolute power of disposition, a remainder over,[75] or a condition in restraint of alienation, is void for repugnancy,[76]

children at testator's death, held inapplicable as being in conflict with statute. Id.

72. A restriction of alienation on the grant of a fee, being against the general rule of law, must be strictly construed. Devise of realty to daughter with provision that no part thereof should be sold until latter's death, but that it should be rented, etc., held not a restriction on the daughter's right to sell, but only a direction to the executors. Sanders v. Mamolen [Pa.] 62 A. 981. Testatrix devised part of her realty to her daughter with provision that no part thereof should be sold until after daughter's death, but that it was to be leased and the rents divided between her and another beneficiary. By codicil she provided that, if it should become necessary to sell realty prior to or after her death, daughter should be entitled to her portion annually until death of her husband, after which she was to receive the full amount of her share. Held that will was not intended to restrict daughter's power to sell, and that codicil gave power of sale with absolute right in daughter, after her husband's death, to receive the proceeds. Id.

73. Wheeler v. Long [Iowa] 105 N. W. 161. A devise of the fee may be restricted by subsequent words in the will and changed to an estate for life. Hill v. Gianelli [Ill.] 77 N. E. 468.

Illustrations: Devise of realty to one provided that after his death it should revert to testatrix's heirs at law, held to give first taker a life estate with remainder in fee to testatrix's heirs. Hill v. Gianelli [Ill.] 77 N. E. 458. Testatrix gave her entire estate to her daughter in general terms, but by subsequent paragraphs provided that if she should die before reaching the age of 18 the property should go to others, and that if she married before reaching that age, she should become entitled to "full control" of such property. Held that added clauses did not cut down fee to life estate, but merely prescribed valid condition that until devisee arrived at such age or sooner married her estate was determinable by her death. Wheeler v. Long [Iowa] 105 N. W. 161. The clearly expressed intention of testator to create an absolute estate determinable by death of the devisee until she arrives at a certain age or marries, will be enforced. Id.

74. Mull v. Masten, 98 N. Y. S. 746; Illensworth v. Illensworth, 109 App. Div. 399, 97 N. Y. S. 44. An estate conveyed or interest created in one clause of the will cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication. Montgomery v. Brown, 25 App. D. C. 490; Pitts v. Milton [Mass.] 77 N. E. 1028. Intention to cut it down must clearly appear. Richards v. Bentz, 212 Pa. 93, 61 A. 613; Hogg's Estate, 27 Pa. Super. Ct. 428; McDaniels v. Hays, 6 Ohio C. C. [N. S.] 257; Strawbridge v. Strawbridge [Ill.] 77 N. E. 78.

Estate held cut down by subsequent provisions: Absolute gift held cut down to beneficial interest for life, in so far as personalty was concerned, by subsequent direction that property was to be invested by executors for benefit of brother during his life and his wife and issue after his death. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44.

Estate held not cut down: Will gave realty to wife for life, with power to mortgage under certain circumstances, and by the next paragraph, without any limitation or qualifying clause, bequeathed to her his life insurance and all other property not otherwise disposed of. Two specific legacies were then given, after which it was provided that at the death of the widow all testator's property, real, personal, and mixed, should revert to brother and his heirs forever. Held that widow took life insurance absolutely. Montgomery v. Brown, 25 App. D. C. 490. Where will gave estate to wife "for the purpose of maintaining herself and our children, to her and her heirs forever," held that wife took a fee, and that no trust was created in favor of the children. Pitts v. Milton [Mass.] 77 N. E. 1028. Testator gave residue to son, his heirs and assigns, "except that in the event of his death without heirs by his present wife" she was to have use of it for life or so long as she remained his widow, and on her death or remarriage property was to go to others. Son's wife predeceased him and they never had any children. Held that son took a fee. Null v. Masten, 98 N. Y. S. 746.

75. Steiff v. Seibert [Iowa] 105 N. W. 328. A fee simple given in the first portion of a devise, with absolute power of disposition, cannot be limited or cut down by subsequent clauses and provisions of the will. Carson v. Carson [Tenn.] 88 S. W. 175. Devise over if property is not disposed of is void. Irvine v. Putnam [Ky.] 89 S. W. 520. Where absolute power of disposal is given in express and unequivocal terms, or clearly and unmistakably implied to the first taker. Montgomery v. Brown, 26 App. D. C. 490. If the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes. Newlin v. Phillips [Del.] 60 A. 1068. The power of disposition which will defeat an executory devise must, however, be a power given by the will itself, and not one attaching as a legal incident to the estate given by the will. Carson v. Carson [Tenn.] 88 S. W. 175. An absolute devise followed by the provision "and at his death I direct that after his fu-

but a provision creating a trust for its management and control for a limited period,[77] or a limitation over by way of an executory devise upon the happening of a specified contingency, is valid.[78] A devise with a gift over on certain contingencies is frequently held to give a defeasible fee to the first taker.[79]

neral expenses and just debts are paid the remainder of said tract to go," to others, held not to give such an absolute power of disposition as to defeat the devise over, but devisee took only a life estate. Id. If upon consideration of the whole will, it appears that it was not the intention of the testator to give the first taker such a right, such a construction will, if possible, be adopted as will harmonize the apparently repugnant provisions, and for this purpose the court may restrict or decrease the prior devise if necessary. Newlin v. Phillips [Del.] 60 A. 1068. Will held not to give wife a fee in the realty or the absolute ownership of the personalty, though the language used in the first paragraph was sufficiently broad to do so, there being no express power of disposal and the implied one being limited to what might be necessary upon emergency, and that the limitations over on the wife's death were valid. Id. Where testatrix gave all her residuary estate absolutely to her infant daughter, provided, however, that if she should "die before attaining the age of 21 years, or without disposing of the same or all of it, or without having made a last will" then over, held that power of disposal would not avoid gift over if first contingency, viz., death of the infant during minority, should happen, there being an intent disclosed, when taking into consideration the infant's inability to make a will or dispose of her property during minority, to make only the first contingency applicable to period of minority, and the others to infant's life after coming of age. In re Polley's Estate [N. J. Prerog.] 62 A. 553. Word "or" cannot be construed to mean "and" so as to make the contingencies coterminous. Id. Provision giving trustees of two minor legatees power to dispose of the realty only in case "it is absolutely necessary or unquestionably advisable," held not to nullify executory devise to survivor of the minors dependent on the death of the other before majority on ground of repugnancy. O'Day v. O'Day [Mo.] 91 S. W. 921. Where power of disposal is conditioned, as for the support of the first taker, it will not enlarge his estate, given in general terms, into a fee, or render limitation over of what remains invalid. Newlin v. Phillips [Del.] 60 A. 1068.

Provisions void for repugnancy: Devise to children and their heirs forever, with devise over "should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant," held void as an attempt to create a conditional fee or an estate in fee tail, so that children took an absolute fee. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Gift of money for life, remainder over of "what may be left," is absolute gift, remainder over being void. Martin v. Foskett [Mass.] 75 N. E. 709. Where will gave property to wife "to be hers absolutely," further provision "that if at her death any of the said property be still hers, then the residue still hers shall go to my, not her, nearest heirs." Moran v. Moran [Mich.] 12 Det. Leg. N. 1010, 106 N. W. 206.

76. The rule that where an estate has vested a condition in general restraint of alienation, or entirely repugnant to its nature, will be declared void, has no application where the condition in restraint of alienation is a condition precedent. Pitchford v. Limer, 139 N. C. 13, 51 S. E. 789.

77. Will gave fee to grandson with provision that it should vest in testator's three daughters or the survivor or survivors of them in trust for him until he reached the age of 25. Held that trust was valid, the fee vested in the grandson not being cut down or limited except so far as necessary to the creation of the trust for its management and control for a limited period. Johnson v. Buck [Ill.] 77 N. E. 163.

78. Where, after an absolute gift in fee, there is a subsequent limitation over upon the happening of a contingency, the two are not repugnant, and the gift over is valid. Provision that, "in case of the death of" any of the residuary legatees, property should be divided among survivors, held to vest property in legatees on testator's death subject to limitation over to survivors in case of death of any of them before period of distribution. In re Wiley, 97 N. Y. S. 1017.

79. Where will directed that on death of life beneficiary his share of the corpus should go to such persons as he might appoint, and in default of appointment to testator's heirs, held that the title vested in the heirs subject to be divested by a valid appointment, and remained in them if there was no appointment or no legal authority to make one. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. Testator devised realty to his wife "free from all charge or limitation, to her own proper use, benefit, and behoof," and then provided that in the event that he and his wife should die without children, he devised the property to F. in fee simple, such devise, however, in no way to limit his wife's interest. He further provided that, in case F. died before his wife, leaving no children, "then this devise shall revert and become a part and parcel of my general estate, subject to any disposition that my wife may make of the same." Held that widow took a fee simple determinable upon her death without issue, in which event F., if living, or her children, if she had previously died leaving children, would take a fee simple. Tyler v. Theilig [Ga.] 52 S. E. 606. In case of death of F. without issue prior to widow's death, property would revert to testator's general estate, subject to control of widow, and to her disposition by deed or will. Id. Devise to daughter with provision that if she shall die without issue living at her death it shall go to brothers and sisters held to give her defeasible fee, subject to be divested on her dying without issue. Hartring's Ex'x v. Milward's Ex'r [Ky.] 90 S. W. 260. Where will gave a share of the estate to niece, with a

In the case of personalty, the use of technical words of limitation of realty may signify a corresponding estate in the personalty, especially if the two are blended in one fund, but this is not necessarily the case.[80]

"Interest" and "income."[81]—The "dividends, issues, and profits" of securities means practically "income or earnings."[82] A gift of the interest on a certain sum is a gift of the annual income by way of interest on that sum.[83] Income embraces only the net profits after deducting all necessary expenses and charges.[84]

Interest or income does not include an increase in the value of the property itself,[85] or distribution of assets by corporations in liquidation.[86] Amounts drawn

provision that "if she should die without child" her portion should go to another, held that she took a defeasible fee, subject to be defeated in the event she should die without issue. Powell's Ex'r v. Crosby [Ky.] 89 S. W. 721. Where testator gave fee to his children, subject to a leasehold for a definite term of years, the share of any child dying without issue during such term to go to the survivors, but in case such child left issue his share to go to them, held that fee vested in children and grandchildren upon testator's death, burdened with leasehold estate, and subject to executory devises in favor of the survivors contingent upon the death of any of them during the continuance of the term without issue surviving, and upon the death of one of such children during such term leaving issue her estate in fee became absolute and passed to her issue. Yoesel v. Rieger [Neb.] 106 N. W. 428. Where will devised realty to widow for life with remainder to stepson in fee, with a provision that, if latter should die without issue, property should go to testator's brothers and sisters, held that stepson acquired a vested estate in fee, subject to be divested upon his death without issue. Dilts v. Clayhaunce [N. J. Eq.] 62 A. 672. Testator gave each of his three daughters a certain sum per month for ten years, at the end of which time his residuary estate was to be equally distributed among them. In case any daughter died prior to such distribution her issue was given her share, and in case any one of them died without issue her share was to go to daughters surviving at time of distribution. Held that each daughter took a base or qualified fee in one-third of the estate, subject to be defeated by her death prior to the time fixed for distribution. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Devise to wife and son to be held for herself and in trust for son, provided that if wife married again, the whole should go to the son in fee and the trust should terminate, held to give wife a defeasible fee simple in half the property, becoming absolute fee on her death without marrying again. Rohrbach v. Sanders [Pa.] 62 A. 27. Where an estate is given to one "for her benefit forever" and if she die before or after attaining the age of 21 without issue, then over, and circumstances show that the testator contemplated that the devise might take effect before the devisee attained majority, the devisee takes an estate defeasible on her death without issue at any period of her life. Daniels' Estate, 27 Pa. Super. Ct. 358.

80. The blending of real and personal estate in a testamentary disposition may in the absence of inconsistent provision indicate an intention to give the same interest in both and hence when the language employed is such as to create a fee in the realty the testator intends to make the gift of the personalty absolute. Long v. Hill, 29 Pa. Super. Ct. 606. But even terms expressing an absolute gift of the personalty will not create a fee in the realty when it appears that the intention of the testator is to give a less estate. Testator stated that he intended to dispose of his whole estate and gave his wife all his estate, real, personal and mixed, to be hers so long as she remained a widow. Executors were given power of sale. There was no residuary clause. Held the widow did not take a fee to the realty. Id.

81. See 4 C. L. 1917.

82. In re Stevens, 98 N. Y. S. 28, afg. 46 Misc. 623, 95 N. Y. S. 297. On dissolution of company the stock of which was given in trust to pay over the "dividends, issues, and profits" thereof, held that value of plant, equipment and materials, and its good will, patents, patent rights, licenses, trade-marks, rights, privileges, franchises, necessary working capital and betterments were to be regarded as principal as between beneficiary of trust and remaindermen. Id.

83. Bequest of the interest on a certain sum is a gift of the annual income by way of interest on that sum, and cannot be regarded as an annuity in an amount equal to the interest on such sum at the rate earned by testator's estate at the time of his death. Conklin v. Clark, 48 Misc. 432, 96 N. Y. S. 914. Gift of interest on a specified sum to one for life, the principal to go to her children on her death, is not an annuity. Bank of Niagara v. Talbot, 96 N. Y. S. 976.

84. Differs from an annuity in that the latter is a fixed amount to be paid absolutely and without contingency. Peck v. Kinney [C. C. A.] 143 F. 76. "Net income" held to include increment in value of nonproductive property investments. Billings v. Warren, 216 Ill. 281, 74 N. E. 1050.

85. In re Stevens, 98 N. Y. S. 28, afg. 46 Misc. 623, 95 N. Y. S. 297. On dissolution of corporation invested surplus, surplus cash capital, and accumulated surplus earnings held to constitute "dividends, issues, and profits" of stock as between life beneficiary of trust and remaindermen. Id. In the absence of an expressed intention to the contrary, the increase from natural causes in the value of the corpus held by a trustee is principal and not interest. Devenney v. Devenney [Ohio] 77 N. E. 688. Where will gave son the income on $1,000 for life and provided that such $1,000 should be paid to son on his executing security to the executor for its return to him on son's death, and such executor invested such sum in bonds in conformity with the provisions of the will, held that premium accruing on bonds did not be-

from principal by trustees for the support of the beneficiaries pursuant to a discretionary power conferred by the will are to be treated as income.[87] Property purchased with income goes with it.[88] A division of the profits of a business should include a part of them used in enlarging the plant.[89]

Whether a legatee of income is entitled to any part of the corpus from which it is derived,[90] and the length of time during which payments are to be made,[91] are questions of intention. One who has the right to use the principal as he may need it is the sole judge of such necessity.[92] One to whom the income of a designated portion of the estate is given for life is entitled to all income accruing thereon from and after the death of the testator, in the absence of anything showing a contrary intent.[93]

long to son, and executor would not be required to deliver bonds to him on his executing security for return of $1,000. Id.

86. As between the remainderman and the life tenant. Bulkeley v. Worthington Ecclesiastical Soc. [Conn.] 63 A. 351.

87. Where trustees were authorized to draw on principal in their discretion in case income was insufficient to support beneficiaries, held that amounts so appropriated should be treated as income, and that neither the recipients nor their representatives could be held accountable therefor. Sterling v. Ives [Conn.] 62 A. 948.

88. Will provided that, at death of trustee, all the property then remaining should go to testatrix's children then living, but if any of them should then be dead, the child or children of such a deceased child should take the share to which its parent would have been entitled if living, and further provided that in the final division of the property each child should be accountable for any portion of the estate previously set off to him by the trustee at any time after his majority in pursuance of powers previously granted the trustee. The will previously provided that the property was to be used and managed during trustee's lifetime for the benefit of testatrix's children. Held that a child of one of the children had no interest, contingent or otherwise, in a lot purchased by the trustee out of the income of the estate. Clisby v. Clisby [Ala.] 40 So. 344.

89. Testator directed that his business should be carried on for five years, and that so much of the net profits as could be spared without injury to the business should be divided yearly among his children, and when estate was closed up that capital should be distributed among them, his daughters' shares to be held in trust with remainder to their children. Held that total profits were to be divided as such among the children, though a part of them were used in enlarging the plant, thereby increasing the amount for which it was subsequently sold. In re Weschler's Estate, 212 Pa. 508, 61 A. 1091.

90. Where testator gave residue of estate to trustees to pay part of income to children for support of families with remainder over to grandchildren and authorized trustees, in case income should be insufficient, to appropriate so much of the principal of the estate or of a certain fund bequeathed to charity as might be necessary for that purpose, held that upon the death of one of such children neither the income nor the principal of his share could be reduced by appropriations in favor of the families of the other beneficiaries. Sterling v. Ives [Conn.] 62 A. 948. Where it is apparent from the terms of a bequest that a testator intended to bestow upon a legatee only an income, such legatee does not take the corpus from which the income is derived. Potter v. Mortimer, 114 Ill. App. 422. Testatrix gave certain shares of stock in trust to receive quarterly dividends thereon and to pay over to her son "so much thereof as shall be necessary in the judgment of" the trustee for his support. Held that income alone could be used for that purpose. In re Van Decar, 49 Misc. 39, 98 N. Y. S. 309. Where testatrix gave property in trust to pay income to husband for life or until remarriage and "in trust for all my children who shall attain the age of 25 years," etc., in equal shares, held that she intended to give children an interest in the principal. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Where testator gave property to his wife to be invested, she to have income and right to use principal as she might need it, and if at her death she should not have used up the principal, gave what remained to others, held that she took more than a life estate, and could use principal as necessity required. In re Trelease, 96 N. Y. S. 318.

91. Where testator bequeathed property in trust to pay certain portions of income to widow and for support of his children and their families, created a spendthrift trust for the benefit of the legatees, and authorized additions to income from principal if necessary to the support of the wife and children and their families, held that the provisions thus made for the family of any particular beneficiary became inoperative on the death of such beneficiary, the family intended being that of which he was and remained the head. Sterling v. Ives [Conn.] 62 A. 948.

92. In re Trelease, 96 N. Y. S. 318.

93. Until sum is set apart in accordance with provisions of will legatee is entitled to proportionate amount which income of amount specified bears to income of the entire estate. Bank of Niagara v. Talbot, 96 N. Y. S. 976. Where the estate is sufficient for the payment of debts and other charges, and

Legacies.[94]—A general legacy is one payable out of the general assets of testator's estate.[95] A specific legacy is a gift of a specified part of testator's personalty, distinguished from all others of the same kind.[96] A demonstrative legacy is a gift of a certain sum of money, stock, or the like, payable out of a particular fund or security, but differing from a specific legacy in that if the fund pointed out fails, resort may be had to the general assets of the estate.[97]

An annuity is a grant of a stated sum of money payable at the expiration of fixed consecutive periods, for a definite term or for life.[98] Whether a deficiency for one year in an annuity charged upon the net income of a fund can be made up from the income of subsequent years depends upon whether it is charged upon such income generally or upon income de anno in annum,[99] which is a question of intention.[1] The fact that the annuity is given to testator's wife in lieu of dower does not change the rule.[2] A gift of an annuity to a corporation without limitation or qualification as to its duration is, in the absence of anything to show a contrary intention, to be understood as a gift to it so long as it exists and fulfills the purposes designed by its charter.[3] Whether an annuity is to be charged on the corpus of the estate, or on the income only, is a question of intention.[4]

Advancements.[5]—In the absence of statute the law of advancements does not apply unless the ancestor dies wholly intestate.[6]

is so invested as to be productive of income from the death of testator. Conklin v. Clark, 48 Misc. 432, 96 N. Y. S. 914. Four per cent held reasonable rate to be paid from time of decedent's death, where executor failed to immediately invest principal, though estate was so invested by testator as to be drawing six per cent at time of his death. Id. A gift of income after testator's debts are paid and discharged does not, under such circumstances, authorize the withholding of all payments thereof until the last of testator's debts has been liquidated. Id.

94. See 4 C. L. 1918.

95. White v. White [S. C.] 53 S. E. 371.

96. May be satisfied only out of the particular thing. White v. White [S. C.] 53 S. E. 371. Legacies will not be declared to be specific unless the language of the will clearly shows that such was testator's intention. Id. Legacy of a sum sufficient to produce an annuity of $50 is not specific. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. Where will directed that shares of stock "should pass to and vest in my said children equally, share and share alike," held there was a specific bequest thereof, and the other personalty being sufficient to pay testator's debts, the title to the stock vested in the legatees so that guardian of infant legatees had power to sell shares bequeathed to them. Cabble v. Cabble, 97 N. Y. S. 773.

97. White v. White [S. C.] 53 S. E. 371. Where will directed executors to collect insurance policies "and from this said amount" to pay certain legacies, held that legacies were demonstrative. Id. In order to constitute a demonstrative legacy there must be a bequest in the nature of a general legacy which must point to a fund out of which payment is to be made. Bequest to daughter payable out of life insurance held not such a legacy where policy was, by its terms, payable to wife and daughters, since no fund existed as the property of testator. In re Tinney's Estate, 99 N. Y. S. 159.

98. See, also, Annuities, 5 C. L. 121. Differs from income in that the latter embraces only the net profits after deducting all necessary expenses and charges, while an annuity is a fixed amount to be paid absolutely and without contingency. Peck v. Kinney [C. C. A.] 143 F. 76. Essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount, and it is immaterial that the periods for the payment may be distributed through the year. Id. It is not necessary that it should be for the life of the individual beneficiary, but it may be fixed at a shorter period by words of limitation in the grant. Id. Provision that trustees should pay "from time to time as often as once in six months" from the trust estate, including accumulations of income as well as the corpus of the estate, at the rate of a specified sum per year, to widow and children or their descendants per stirpes, with provision for payment to survivors in case of death of child without issue, held to create annuity. Id.

99. If the former it may be, but otherwise not. Comstock v. Comstock [Conn.] 63 A. 449.

1. Where testator gave wife annuity to be paid at least semi-annually from the net annual income of a trust fund, and then appropriated to specific objects the whole of each year's excess income, held that annuity was not charged on net income generally, and that deficiencies could not be made up. Comstock v. Comstock [Conn.] 63 A. 449.

2. Comstock v. Comstock [Conn.] 63 A. 449.

3. Fact that it may continue perpetually is immaterial, where gift is for charitable purposes. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

4. Annuities held charged upon income and not upon the corpus. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

Support.[7]—Whether the trustee is to pay over the income directly to the persons for whose support a trust is created, or is to personally use and apply it for their benefit,[8] and the time when the support is to commence, are questions of intention.[9] The separate income of a beneficiary is not to be taken into consideration in determining how much of the income is necessary for his support.[10] Where property is given to one in trust for the maintenance of himself and his minor children, the court will not, except in case of absolute necessity, make a fixed division of the fund between the beneficiaries to stand during the trusteeship,[11] nor can the trustee's creditors reach his share until he becomes the sole claimant under the terms of the will.[12] A provision for maintenance requires more than the mere furnishing of food and clothing.[13]

Release of debts.[14]—The appointment of a debtor as executor does not release the debt unless a contrary intention is expressed in the will.[15] Testator may direct the deduction of debts owed him by a beneficiary, whether barred by limitations or not.[16]

5. See Estates of Decedents, 5 C. L. 1183.

6. Testator is conclusively presumed to have considered the advancements and the bequests made in the will collectively, and to have made distribution as he intended to make it. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Under statute providing for bringing advancements into hotchpot when given by an "intestate" to his heir, no property so given can be taken into account in the distribution of an estate where the ancestor leaves a will, though he may not have disposed of all his property thereby. Id.

7. See 4 C. L. 1920.

8. Where a testator directed that his executor sell his estate, invest the proceeds and pay the income to his son for the purpose of keeping up the property and to support his children, or if the executor so elect to use the money for that purpose himself, or divide it among the son and his children, one of such children has no standing to compel her father as trustee to pay to her a proportionate share of money paid him by the executor. No such intention disclosed by the will. Smith's Estate, 27 Pa. Super. Ct. 494.

9. Where will required executors and residuary legatees to "provide comfortable support" for his mother-in-law during her life, held that, in view of her advanced age, impoverished condition and helplessness, the manifest intention was that support was to begin immediately upon testator's death. Owens v. Waddell [Miss.] 39 So. 459.

10. Where a bequest in trust is made for a lunatic, the income or so much thereof as is necessary to be used for her support, remainder over, the committee of the lunatic is entitled to the entire income though the lunatic had a separate income from her individual estate. Minnich v. People's Trust, Savings & Deposit Co., 29 Pa. Super. Ct. 334.

11. In such case the court will not construe the will merely or chiefly with reference to the relation existing between the husband and his creditors in order to assist the latter, but its first concern will be to carry out testatrix's intention with reference to the other beneficiaries, and it will give its aid to the creditors only as a secondary consideration and only when it can be seen that such aid can be given without injury to such other beneficiaries. Linn v. Downing, 116 Ill. App. 454, afd. 216 Ill. 64, 74 N. E. 729. Provision giving certain allowance in trust to husband for maintenance of himself and the children held to be mandatory and to require him to apply same to use of children in such a manner as might be necessary, his discretion as to amount to be used and manner of use not being an arbitrary one, and that his interest could not be severed so as to render it subject to his debts. Id.

12. Though a support in a fixed sum be given to a husband for the lives of him and others jointly, his creditors cannot reach it even if in lieu of curtesy till the others predecease him and leave him sole claimant. Linn v. Downing, 216 Ill. 64, 74 N. E. 729, afg. 116 Ill. App. 454.

13. Linn v. Downing, 116 Ill. App. 454, afd. 216 Ill. 64, 74 N. E. 729.

14. See 4 C. L. 1920.

15. No such intention can be deemed to appear where the debt did not exist at the date of the execution of the will. Phillips v. Duckett, 112 Ill. App. 587.

16. Where will provided that all notes and obligations held by testator at time of his death on which beneficiary should be liable should be appraised at full amount due thereon, whether barred by limitations or not, and recited that it was testator's intention that no beneficiary should obtain any benefit by reason of any advancement made or assistance rendered him by testator before his death, held that amount due on notes given to testator by beneficiary who went through bankruptcy before testator's death should be charged against his share. Stephenson v. Norris [Wis.] 107 N. W. 343. Testatrix devised land to daughter with remainder to her children but provided that, in case certain notes given to her by her daughter were not paid within a year, executors should sell the premises and pay the notes, whether barred by limitations or not, loan balance of proceeds, and pay interest to daughter for life with remainder to children. Notes were not paid within a year, but daughter was discharged in bankruptcy. Held that discharge did not constitute payment of notes nor bar executor's right to

Cumulative legacies.[17]—Separate devises or bequests to the same persons will be deemed cumulative, unless a contrary intention appears.[18]

Vesting.[19]—The law favors the early vesting of estates,[20] hence the interest will, if possible, be deemed vested in the first instance,[21] or at the earliest possible moment,[22] and remainders will be held vested rather than contingent,[23] unless the language of the will clearly shows a different intention.[24]

sell the property under the will. In re Fussell's Estate [Iowa] 105 N. W. 503.

17. See 4 C. L. 1920.

18. Where in one paragraph testator gave son $1,000 if living "or if dead to go to his wife or widow, E. S.," and next paragraph read "$800 to E. S., $100 to her son F., $100 to her daughter M.," held that the will should be construed as giving E. S. an absolute legacy of $800 in addition to contingent one given by first paragraph, in view of surrounding circumstances. Gordon v. Smith [Md.] 63 A. 479. Advances to be made to wife by trustee for benefit of wife and sons during first year and a half after testator's death held to be in addition to separate provisions made for wife and sons during settlement of estate. Central Trust Co. v. Egleston, 47 Misc. 693, 98 N. Y. S. 1055. Gifts of royalties and proceeds of certain lands to charities held not cumulative on previous bequests to them, but merely directory of the method of paying such previous legacies. In re Handley's Estate, 212 Pa. 11, 61 A. 350. Legacies given to the same person by a will and a codicil will be regarded as cumulative. In re Sigel's Estate [Pa.] 62 A. 175. Separate devises, unless an express purpose to the contrary appears. Where will gave wife use of upper story of house for life, and codicil gave her whatever share of the estate she would be entitled to by law if testator had died intestate, held that devises were cumulative. Westgate v. Farris [Mass.] 76 N. E. 223.

19. See 4 C. L. 1920.

20. Sterling v. Ives [Conn.] 62 A. 948. Will be held vested when it can fairly be done without doing violence to the language of the will. Roberts v. Roberts [Md.] 62 A. 161.

21. Vesting at testator's death is favored when there is any doubt. Nelson v. Nelson [Ind. App.] 75 N. E. 679. To make estates contingent, must be plain expression to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for construction. Roberts v. Roberts [Md.] 62 A. 161. Presumption is that testator intended that his dispositions should take effect in enjoyment and interest at his death, and gifts will be regarded as vested at that time unless language of will by a fair construction makes them contingent. Davidson v. Jones, 98 N. Y. S. 265. Estates are to be regarded as vesting immediately on testator's death unless there is a clearly manifested intention to make them contingent upon a future event. Crapo v. Price [Mass.] 76 N. E. 1043.

22. Campbell v. Bradford [Ind.] 77 N. E. 849. Testator gave life estates in realty to his daughters with remainder to their children or issue, and provided that trustees should convey to the children or descendants of any child of his at her death the share of such deceased child of his. Held that on death of one of testator's daughters her share vested immediately in her child, without conveyance by trustees, so as to entitle child's husband to curtesy therein. Potts v. Shirley [Ky.] 90 S. W. 590. To be paid to son "if he survive me" otherwise over vests at once in son surviving. Alexander v. McPeck [Mass.] 75 N. E. 88. Testator bequeathed estate to wife for life and directed that after his death it should, without sale or appraisement, pass into the hands of his children, or such as should remain on the property for 25 years, unless they elected to divide it sooner, and that, at the expiration of 25 years, or at the time they elected to divide, the estate should be equally divided among all his children. Held that children took an ultimate fee simple in the property in remainder after the death of their mother, and that their interests were liable for their debts. Scott v. Patterson's Adm'r [Va.] 51 S. E. 848. Where an estate is given to a life tenant with remainder to the latter's children, it vests at once upon the birth of each child, subject to open and let in afterborn children, and this without regard to whether or not a child survives the life tenant. In re Wetherill's Estate [Pa.] 63 A. 406. Where testator gave estate to a friend for life, and after her death a certain sum to her niece for life, and on the latter's death "to her children, if she have any, and, if not, to her natural heirs," held that estates in remainder vested in niece's children when they were born, and where niece died before first life tenant, having had two sons, one of whom survived her, the administrator of the deceased son was entitled to half the estate in remainder. Id. Word "have" held not used in sense of "leave" so as to make remainders contingent. Id. Will created trust for benefit of three children and provided that on death of any of them his share of the income was to be paid "in like manner equally to or for the benefit of such surviving issue" until they arrived at the age of 21 respectively, and as they respectively attained that age gave to them respectively in equal portions the share of the principal set off for the use of their parent. It was further provided that, in case either of testator's sons died leaving a widow, one third of the income given to her husband should be paid to her for life, and that, upon her death leaving issue, such third part of income and principal "to go for the benefit of such issue in the same manner as the other two-thirds." Held that, on death of one of testator's children leaving a widow and children, his share of the income was payable to his widow and surviving issue until such issue respectively became of age (Sterling v. Ives [Conn.] 62 A. 948), and that each of such issue took a vested estate in his proportional share of

Words of contingency are so referred in time as to favor vesting,[25] and may be so read that remainders will accelerate.[26] The words "upon," "until," "after," "when,"[27] "surviving,"[28] and the like, do or do not postpone vesting according to

two-thirds of one-third of the principal of the trust fund (Id.). The phrase "in the same manner" held to designate the mode in which the recipients should be benefitted, and not to describe who such recipients were. Did not operate to send either income or principal to those in whose favor estates in other two thirds had already been created, but the recipients intended were the issue living at the widow's decease. Id.

23. Deemed vested on the death of the testator unless it plainly appears that he intended them to be contingent upon a future event. Minot v. Purrington [Mass.] 77 N. E. 630; Haviland v. Haviland [Iowa] 105 N. W. 354. Remainder is never to be considered contingent if it can be construed as vested consistently with testator's intention. Hayden v. Sugden, 48 Misc. 198, 96 N. Y. S. 681. Not in any case where it may be fairly construed as vested. Davidson v. Jones, 98 N. Y. S. 265. The law presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of that estate. Campbell v. Bradford [Ind.] 77 N. E. 849. Law favors such a construction as will avoid the disinheritance of remaindermen who die before the determination of the precedent estate. Davidson v. Jones, 98 N. Y. S. 265.

24. Vesting will not be helped out by rejecting harmonious parts of the will. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Though law favors vesting of estates, where it is clear from reading of entire will that testator intended to postpone vesting until period of distribution, that intention will be carried out. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029. Rule does not apply when such construction will defeat the intention of the testator as expressed in the will. Stoors v. Burgess [Me.] 62 A. 730. When the language used by testator is doubtful the court inclines to that construction which will make the remainders vested rather than contingent, but this rule will not be allowed to interfere with rule requiring court to ascertain and effectuate testator's intention, and remainders will be held contingent when it appears from whole will that testator so intended. Freeman v. Freeman [N. C.] 53 S. E. 620. Rule favoring vesting of estates is never applied when whole will shows a contrary intention. Richards v. Hartshorne, 110 App. Div. 650, 97 N. Y. S. 754.

25. See Particular words and forms of expression, ante, this section.

26. Since the remainder is only postponed in order to let in the life tenant, it takes effect immediately when the life estate is determined by a revocation, or by death, or by the renunciation of the widow, or by any other circumstance which puts the life estate out of the way. Cummings v. Hamilton [Ill.] 77 N. E. 264. Remainder not accelerated by life tenant conveying his interest to remaindermen. Id.

27. The words **"on," "when," "after,"** and other like expressions, used in a devise of a remainder following a life estate, do not afford sufficient ground in themselves for adjudging a remainder contingent, but, unless their meaning is enlarged by the context, will be held to relate merely to the time of enjoyment and not to the time of vesting. Devise to wife for life, "and on her decease" to children held to give latter vested remainders. Davidson v. Jones, 98 N. Y. S. 265. Will gave realty to wife for life and provided that **"at the death of"** his wife the property should go to his sons. Held that sons took vested remainders. Campbell v. Bradford [Ind.] 77 N. E. 849. "Desire that said lands be owned equally" by children "at the decease of" testator's wife vests at his death not the wife's. Taylor v. Stephens [Ind.] 74 N. E. 980. Rule that where life estate is given with remainder to take effect at, after, upon, or from the death of the first taker the remainder vests at testator's death, yields to expression of contrary intent manifested in the will. Hebberd v. Lesc, 107 App. Div. 425, 95 N. Y. S. 333. Testatrix devised land to daughter for life "and on her death" to her children, "but should she not leave any her surviving" then to a certain church. She also gave executors power to dispose of a part of property should they deem it necessary to the support of the life tenant, and directed that at life tenant's death whatever might be left should be divided among her children. Held that remainder did not vest until death of life tenant. Id. Where testator gave estate in trust to pay income to brother for life, and **"upon** his death" to transfer and deliver corpus to brother's children in equal shares, and to children of any who might be dead, grandchildren to take parent's share, or in case brother should die leaving no children or grandchildren, to children of testator's sisters, held that remainders did not vest until time for distribution. In re Keogh, 98 N. Y. S. 433, mdfg. 47 Misc. 37, 95 N. Y. S. 191 on other grounds. Where will provided that estate should be sold as soon as practicable and the proceeds divided among such of testator's children **"as may be living at that time,"** held that vesting was postponed to time of distribution. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029. Expression **"ultimately** to be divided among all" grandchildren held to postpone division and consequently vesting till all life tenants of income were dead and until takers attained specified ages if they had not already done so, and to include after-born. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. Testator's intention controls technical words and expressions and hence words **"upon," "until,"** and the like may be so explained and controlled by the context of the will as not to prevent immediate vesting. Hooker v. Bryan [N. C.] 53 S. E. 130. Where testatrix gave realty and personalty to her nephew "upon his becoming 21 years of age," and lent the same to her sister **"until"** that time, held that nephew took vested remainder, and that on his dying before reaching age of 21, the interest of the sister terminated and prop-

the sense in which they are used. Vesting is inquired of the creation of the estate or interest and not of possession or enjoyment, hence it is not postponed by words of futurity or contingency related to possession and enjoyment only, and the consequent uncertainty whether a taker may ever enjoy his estate in possession,[29] or whether it may not be divested does not prevent its vesting in interest, whether caused by the existence of a trust[30] or power,[31] a direction for an accumulation,[32]

erty passed at once to remainderman's heirs at law. Id.

28. See Particular words and forms of expression, ante, this section.

29. A vested remainder is one which takes effect in interest and right immediately on the death of the testator, though not taking effect in possession and enjoyment until the determination of the preceding particular estate. In re Kountz's Estate [Pa.] 62 A. 1103. Future estates are vested where there is a person in being who would have an immediate right to possession of land upon the ceasing of the intermediate or precedent estate. Laws 1896, p. 559, c. 547. In re Yerk's Estate, 94 N. Y. S. 1121. It is the present capacity of taking effect in possession if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder, that is, in the former the enjoyment is uncertain and in the latter the right to that enjoyment. In re Kountz's Estate [Pa.] 62 A. 1103. If upon the whole will it appears that the gift over is only postponed to let in some other interest, it will be held to be vested, though the time of enjoyment may be postponed. Barnes Cycle Co. v. Haines [N. J. Eq.] 61 A. 515. Where an absolute property in a fund is bequeathed in fractional interests in succession at periods which must arrive, the interests of the first and subsequent takers will vest together. Id.; Moore v. Matthews [N. J. Eq.] 61 A. 743.

Remainders held vested: Devise to wife for her exclusive use and benefit during her life and after her death and funeral expenses are paid what remains to be equally divided between my children." Haviland v. Haviland [Iowa] 105 N. W. 354. Testator bequeathed personalty in trust to pay income to daughters for their lives, provided that upon the death of a daughter the income that would have gone to her should go to her descendants, if any, according to the law of descents, and made the duration of the trust period coexistent with the life estate of the survivor of the daughters. Held that, where daughter died leaving one child, the income of the daughter's share earned during the time in which such child survived her mother belonged to her absolutely and was payable to her estate on her death. Potts v. Shirley [Ky.] 90 S. W. 590. Gift of residue to wife for life, and upon her death a certain part of the land included therein to his daughter for life, with direction to executor to sell land on daughter's death and divide proceeds among three named grandsons. In re Yerk's Estate, 94 N. Y. S. 1121. Gift in trust to pay income to husband for life until his remarriage and "in trust for all my children who shall attain the age of 25 years or marry under that age in equal shares." Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Where income from land was given to wife for life, and on her death to two other persons for their joint lives, and "on the death of" the latter the realty was given in fee to A. and H. in equal parts, held that A. and H. took a fee as tenants in common in equal shares, which vested immediately upon testator's death. Moore v. Matthews [N. J. Eq.] 61 A. 743. Clause appointing executor trustee and authorizing him to sell the realty held not to make devise over contingent. Id. Gift "from and after the death of" wife of property in which she was given life estate to "such child or children as I shall leave or have living at the time of my decease, and to their heirs and assigns forever." Barnes Cycle Co. v. Haines [N. J. Eq.] 61 A. 515. Where testator bequeathed residuary estate in trust to invest a certain part thereof and pay net income to grandson "until he shall attain the age of 25 years, at which time" principal was to be paid him, held that he took vested interest in principal. In re Middleton's Estate, 212 Pa. 119, 61 A. 808. Gift in trust to pay income to testator's wife until grandson became 25, and then or at his prior death to convey one-third to each of testator's two sons and their wives in equal shares or, if either son should be dead, to pay a specified sum to his wife and to convey the remainder to his grandson absolutely upon his becoming 25. In re Middleton's Estate, 212 Pa. 119, 61 A. 808.

30. The creation of a trust does not of itself prevent the creation of a remainder vesting at the death of testator. In re L'Hommedieu, 138 F. 606. Gift in trust to apply rents and profits to maintenance of wife and children until minor daughters died or became of age, when trust should cease and property be distributed among testator's children, the descendants of any deceased child to take the share the parent would have taken if living, the trustee being given a discretionary power of sale, held to give children a remainder vesting at testator's death. Id. It makes no difference as to the vesting whether the legal estate be devised to trustees who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arises. Roberts v. Roberts [Md.] 62 A. 161. Where testator devised and bequeathed residue to his wife for life in trust for the use and benefit of herself and children, author-

or a divesting condition.[33] Where the persons or the class who are to take in remainder,[34] or the happening of the contingencies on which they are to take,[35] or

ized her to sell any part of the realty, the proceeds to be invested upon the trusts of the will, or to lease the same, and gave her authority, in her discretion, to use so much of the principal as might be necessary for support of herself and children, and then gave all of his estate "remaining at the death of my wife" to children in equal shares in fee, children of a deceased child to "receive and have" the share its parents "would have been entitled to if living," held that the remainders vested at the death of testator. Roberts v. Roberts [Md.] 62 A. 161. Power to apply principal of trust to use of beneficiary does not interfere with vesting of remainder limited on trust, but merely renders it defeasible. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Where residue of estate was bequeathed to trustee to pay rents and income to son in such amounts and at such times as should, according to the judgment and discretion of the trustee, seem best, in sums not to exceed $10 at any one time, and on son's death to transfer all the property, interest and income "then in his hands or possession" to others, held that the son did not take a vested interest in the income during his life, and same could not be reached by creditors. Dubois v. Barbour [R. I.] 61 A. 752.

31. Power given to life tenant to use so much of the principal as might be necessary for support and education of children held not to make remainders contingent. Roberts v. Roberts [Md.] 62 A. 161.

32. Vesting is not negatived by a direction to accumulate income pending the time for division. It is only one circumstance. Bosworth v. Stockbridge [Mass.] 75 N. E. 712. Even when coupled with the fact that one or more of the shares will go to children of the first takers as a class. Id.

33. The fact that an estate is liable to be divested in whole or in part upon a contingency does not make it a contingent estate. Fact that life tenant is given power of disposition for certain specified purposes does not, but estates vest subject to power. Roberts v. Roberts [Md.] 62 A. 161. Will provided that on death of widow, to whom use for life was given, realty should be sold and proceeds divided among testator's surviving children. Held that each child surviving testator took a vested interest to come into possession upon widow's death. Boggs v. Boggs [N. J. Eq.] 60 A. 1114. Further provision that share of any child on his death was to be "inherited" by survivors held to make vested estate of each child liable to be divested by his death before the time of distribution. Id. Provision that shares of two of the children should be invested during their lives and the interest paid to them, held not to diminish their interest in the estate, but only to restrict the use of it for life and not to prevent their shares passing to the survivors on their death before the time of distribution. Id. Testator gave residue to his two daughters jointly during their lives, on the death of one her share to go to the other, and, on the death of the other, the whole estate "to be equally divided among all my heirs, share and share alike," the child or children of any deceased parent taking share the parent would have been entitled to if living. Held that heirs of testator living at his death took vested remainders, but if any such heir died during the continuance of the life estate, his interest would be divested and his children would take as executory devisees by substitution in preference to a grantee of such heir. Brantley v. Bittle [S. C.] 51 S. E. 561. Devise over in case of death of one of members of class given remainder does not negative present vesting. Taylor v. Stephens [Ind.] 74 N. E. 980.

34. Laws 1896, p. 564, c. 547, § 30. Richards v. Hartshorne, 110 App. Div. 650, 97 N. Y. S. 754. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take. Roberts v. Roberts [Md.] 62 A. 161. The fact that some of the remaindermen cannot be ascertained until after the termination of the life estate has a strong tendency to show that all the remainders are contingent. Crapo v. Price [Mass.] 76 N. E. 1043.

Remainders held contingent: Will devised realty in trust to collect rents, pay annuity to wife for life, and after paying expenses, etc., to pay balance to son, son's wife, and certain named grandchildren in equal shares. Distribution of income in case of divorce of son's wife or death of any of the grandchildren was provided for, and it was then provided that after death of testator's wife, his son, the death or marriage of the son's wife, and when all the named grandchildren reached the age of 21, the trust should terminate and the land vest in fee simple absolutely in such grandchildren and their descendants, descendants of any deceased child taking parent's share. Held that remainders to grandchildren were contingent. Brownback v. Keister [Ill.] 77 N. E. 75. Devise to wife for life "and at her death to be equally divided among my then living children or their heirs," held to give remainders to children and living issue of deceased children contingent on their surviving the life tenant. Scheirich v. Maxwell [Ky.] 89 S. W. 4. Testator bequeathed personalty in trust to pay income to daughters for their lives, provided that upon the death of a daughter the income which would have gone to her should go to her descendants according to the law of descents, made the duration of the trust coexistent with the life estate of the survivor of the daughters, and at the death of such survivor gave the personalty absolutely to grandchildren or their descendants in equal portions. Held that gift of corpus to grandchildren was contingent, only those living at the death of the survivor of the daughters being entitled to take. Potts v. Shirley [Ky.] 90 S. W. 590. Will gave sum to trustees to pay income to friend of testatrix for life, "and after her decease to pay, distribute and divide the said principal fund, however the same may then be invested, to and among the children" of the life tenant "and the issue

the shares which they are to have, are uncertain, there is a contingency to which vesting is postponed. A remainder directly over to others after the termination of a life estate will be deemed to vest at testator's death in the absence of anything

of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." Held that the remainders were contingent, the parties entitled to take being those who, at the death of the life tenant, were her children, and the issue of any deceased child by right of representation. Crape v. Price [Mass.] 76 N. E. 1043. Devise in trust to pay income to two persons, and on the death of the survivor to convey the land to their issue, or, if they have none, to a certain association. Richards v. Hartshorne, 110 App. Div. 650, 97 N. Y. S. 754. Where testator gave property to trustee to pay income, after payment of debts, etc., to his daughter for life, with direction that "upon her death" property should be divided among son and surviving grandchildren of children, held that title did not vest in remaindermen until death of life beneficiary, only those surviving at that time taking. In re Stocum's Will, 94 N. Y. S. 588. Testator gave each of his three daughters a certain sum per month for ten years, at the end of which time residuary estate was to be equally distributed among them. In case any of them died after the execution of the will and prior to such distribution her share was to go to her issue, and in case of death of any of them prior to such time without issue her share was to go to daughters surviving at time of distribution. Held that the estates created in favor of issue of daughters were contingent. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Where testator devised land to his daughter for life and provided that "after her death" it should go to her children and the children of such as were dead. Latham v. Roanoke, R. & Lumber Co., 139 N. C. 9, 51 S. E. 780. Where testator gave wife use of his property for life and provided that at her death it should be sold and the proceeds "equally divided among all my children that appears personally and claims their part, and this will shall disinherit all of said children that applies through an agent," held that gift was only to children living at time fixed for distribution. Freeman v. Freeman [N. C.] 53 S. E. 620. Under devise of realty to trustee to be held until grandson should be 21, proceeds to be divided equally between children of deceased son, the trust to be discharged and the realty to become the property of the "remaining" children jointly and equally when the grandson became 21 or died, held that each of testator's three granddaughters took a present vested estate in common in one-fourth of the land, with a remainder in one-third of a fourth contingent on the death of the grandson before reaching the age of 21. Smith v. Myers, 212 Pa. 51, 61 A. 573. Word "remaining" means "other" and not "then" surviving children, and does not make the fourth of each of the granddaughters contingent. Id. Gift in trust to pay income to children for life, and then to grandchildren, and after death of last child and ten years after youngest child became of age, to divide principal among grandchildren. In re Keuntz'e Estate [Pa.] 62 A. 1103. Where testator gave residue of his property to his nieces to their sole and separate use, free from control of their husbands, "said nieces to have the use and benefit of said property, half to each, for and during their natural lives, and then to their respective heirs to have their own half" and recited that what he meant to say was that "if either of these nieces should die without children, the share of the one so dying shall go to the surviver or the surviving children." Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

35. Remainder is contingent when limited so as to take effect upon a contingency which may never happen. Stoors v. Burgess [Me.] 62 A. 730. Legacies made payable on conditions which may never happen and placed in the possession and under the control of a trustee and subject to a condition precedent are contingent. In re Paulson's Will [Wis.] 107 N. W. 484. When a future time is named for the payment of a legacy, whether it is vested or contingent is a question of intention. Id. Where testatrix bequeathed sum to her son to be paid in 15 annual installments on condition that he attended certain church and provided that if he did not it should go to charitable institution, held that will did not vest absolute title in son, but that intention was that condition was to attach to gift and defeat it upon failure of son to perform and that possession and control of bequest should remain in executrix during period necessary to complete the trust. Id. A bequest to one when he arrives at the age of 21, or words of a similar meaning, is contingent. Shanley v. Herold, 141 F. 423.

Remainders held contingent: Where will gave property to husband for life, and then to testator's three children, naming them, and provided that, in case of the death of either of them prior to the death of testator or of the life tenant leaving a child or children, such child or children or its or their descendants should inherit the share "which would have vested in their parents." Cummings v. Hamilton [Ill.] 77 N. E. 264. Where will provided that grandchildren were to take in remainder only in case testater's daughter died before attaining age of 25 without issue, and his wife survived her. Stoors v. Burgess [Me.] 62 A. 730. Residuary bequest in fee, "should my daughter die under twenty-one years of age and without issue." Cutter v. Burroughs [Me.] 61 A. 767. Testator directed that residuary estate was to be equally distributed among his three daughters at the end of ten years, the share of any one of them dying after execution of will and before the time of distribution to go to her issue, and the share of anyone dying before such time without issue to go to the daughters surviving at the time of distribution. Held that each daughter took a future contingent estate by way of cross-remainder in the share of each of the others, in the event of their death without issue within the 10 year period, and on the further con-

showing a contrary intention.[36] A gift found in a direction to pay, convey, or divide, may show an intention to postpone vesting until the time of distribution.[37] There is no vesting when payment is postponed for reasons personal to the taker.[38] Where there are separate gifts of income and capital, the latter does not vest until the period of distribution.[39]

tingency that she herself survive that period. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Where testatrix left estate in trust to pay half of income to husband during joint lives of himself and son, and to former in prescribed proportions should son die first, and provided that after husband's death all of the estate and income should descend to son, that if son died before husband estate should remain intact and income be divided in specified proportions, and that after death of both husband and son estate should remain in trust and income be paid to son's children, held that son's estate was contingent on his surviving his father, and that it never vested where he predeceased him. Ritter v. Knerr [Pa.] 63 A. 605.

36. Provision that upon death of one for whom estate is held in trust for life the fee simple title to the property shall vest in grandson held to give latter a vested remainder in fee to come into possession and enjoyment upon termination of the life estate. Landram v. Jordan, 25 App. D. C. 291. As a general rule gift to one for life with remainder to his children gives a vested remainder to each of such children who is alive at testator's death. Crapo v. Price [Mass.] 76 N. E. 1043. This is true though such remainder is to a class and may open up to let in afterborn members up to time of distribution, or through issue of any remainderman dying during the continuance of the life estate are to take his share by right of representation. Id. Where will directed trustees after death of daughter to hold estate during lives of daughter's children and pay net income to them, held that life estates given to such children vested in them at testatrix's death, subject to open up to let in affer-born children. Minot v. Doggett [Mass.] 77 N. E. 629. Will gave income of part of residue to children of testator's deceased son during their lives, the share of any child dying without issue to go to the survivors, and directed that on the death of all the children, the corpus of the trust should be distributed among son's grandchildren, who were to take by right of representation and to receive their shares as they became of age, taking the income thereof in the meantime. Held that grandchildren took vested remainders, subject to open to let in after-born grandchildren. Minot v. Purrington [Mass.] 77 N. E. 630. Fact that accretions to shares of surviving life tenants coming from the death of two of them without issue were contingent did not prevent grandchildren taking vested interests therein since whole estate was to go to them ultimately. Id. Fact that after death of life tenant interest is to be paid to remainderman shows intention to create vested remainders. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

37. Vesting is suspended if futurity is annexed to the substance of the gift, as where the only gift is found in a direction to divide or pay at a future time. Richards v. Hartshorne, 110 App. Div. 650, 97 N. Y. S. 754. Will gave estate in trust to pay income to one for life, and provided "from and after the death of" the life tenant "I direct my executors and trustees to convey" estate and accumulations of interest to "my heirs at law and next of kin, whomsoever they may be." Held that gift over was contingent, being to heirs living at death of life tenant. In re Cooper's Will, 109 App. Div. 566, 96 N. Y. S. 562. Fact that there is no present gift to remaindermen but only a direction to pay and divide the principal among the remaindermen after the death of the life tenant indicates an intention that the remainders shall not vest until the period of distribution. Crapo v. Price [Mass.] 76 N. E. 1043. Where testator devised realty to widow for life with remainder to stepson in fee, and provided that if latter should die without issue, same should be divided among testator's brothers and sisters, and that in case any of them died their share should "descend to their children," held that provision in favor of brothers and sisters was in nature of an executory devise, which was descendible and transmissible. Dilts v. Clayhaunce [N. J. Eq.] 62 A. 672. The provision for the substitution of children for deceased parents does not require an implication that testator intended to limit his bounty to brothers and sisters who should survive the stepson and the children then living of such as had died, but the direction to divide indicates an intention that those who are to share are the brothers and sisters surviving on the death of the stepson. the children of any who had died leaving children, and the grantee, devisee, or heirs at law of any who had died leaving no child. Id. A gift which is only implied from a direction to pay is necessarily inseparable from the direction and must partake of its quality, so that if the one is future and contingent the other is also. In re Kountz's Estate [Pa.] 62 A. 1103. Gift in trust to pay income to children for life, with direction to divide principal among grandchildren at future period held to give latter contingent remainders. Id. Vesting is suspended where futurity is annexed to the substance of the gift, but not where the gift is absolute and the time of payment only is postponed. In re L'Hommedieu, 138 F. 606. Mere omission of technical words expressing a present gift do not necessarily prevent vesting at death of testator. Id. Direction to "distribute" held not to postpone vesting the language and surrounding circumstances not requiring such a construction. Id. Gift of proceeds to be divided among children at wife's death held vested. Nelson v. Nelson [Ind. App.] 75 N. E. 679.

38. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339.

39. Where there are separate gifts of income and capital, the latter does not vest until

Perpetuities[40] and void accumulations should not be found,[41] but terms necessarily leading to such a result will not be denied their intended meaning.[42]

the period of distribution. In re Kountz's Estate [Pa.] 62 A. 1103.

40. See 4 C. L. 1924.

41. Where trust is created for benefit of several, the shares and interests may be regarded as several, though the trust fund or corpus remains undivided, where it was clearly the intention that the interest and income given in equal shares were to constitute separate trusts under which rights of each beneficiary were to be separate and distinct in his share of income, and that property was to be kept in solido for mere convenience of administration or investment. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Rule against perpetuities does not apply to charitable trusts, and fact that annuity to charitable corporation may continue perpetually does not affect its validity. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Will speaks as of testator's death as to perpetuities. Will in execution of power left personalty in trust for testator's daughter during her minority and gave her principal on reaching majority. Trust provision was void as unlawfully suspending absolute ownership of personalty but daughter became of age before testator's death. Held that provision creating trust was inoperative, and principal vested in daughter immediately on testator's death. In re Pilsbury's Will, 99 N. Y. S. 62.

Provisions held valid: Provision creating trust to continue "during the life of my son, and of all of his children who are living at the time of my death," held not to violate Civ. Code § 715, prohibiting the suspension of the power of alienation for a longer period than during the continuance of lives in being at the creation of the condition or limitation, since will speaks as of date of testator's death and limitation or condition was created at that time. In re Lux's Estate [Cal.] 85 P. 147. Fact that, by reason of provision directing distribution of property among the children of the son living at termination of trust, children born after testator's death would receive a share, held not to prolong period of suspension. Id. Testatrix devised realty to one for life with remainder to testatrix's heirs at law, but only after the payment by them to the life tenant's heirs of the value of any improvements made by the life tenant. Held that the condition did not violate the rule against perpetuities since the heirs of testatrix who were to perform the condition were those living at testatrix's death, and since it was required to be performed by them during their lifetime, and hence during lives in being. Hill v. Gianelli [Ill.] 77 N. E. 458. Where will described such heirs as residents of Switzerland and treaty provided that citizens of the latter country who were unable to hold property in the United States by reason of the fact that they were aliens should have three years in which to dispose of it, held that since their interest in the property could only last three years a perpetuity was not created by gift to them, but their neglect to perform condition would only defeat their title. Id. Where will gave income to daughter for life and on her death to latter's children for life, held that equitable life estates in latter were not too remote since as to those living at testatrix's death they would vest at that time, and, as to one in ventre matris, at her birth, though subject to be divested as to those who did not survive their mother. Peabody v. Tyszkiewicz [Mass.] 77 N. E. 839. Will directed that part of testatrix's estate should be held in trust after daughter's death during lives of her children to pay income to such children, and that at the death of such children the corpus should be paid to daughter's grandchildren as they respectively attained the age of 21, such grandchildren to take by right of representation, and during their minority after the death of their parents to have income on share of capital which they would receive on arriving at 21. Held that grandchildren were not to be treated as members of one class to be considered together, but that the limitation over to each was to be considered by itself alone, and that shares of children of life tenant were to be considered separately, so that as to those of them who were living at testator's death the devise to the grandchildren was not too remote, though it was as to children born after testator's death. Minot v. Doggett [Mass.] 77 N. E. 629. Where will placed estate in trust for two lives, fact that it also provided for payment of annuity to third person did not prevent vesting so as to violate rule against perpetuities. Cole v. Lee [Mich.] 12 Det. Leg. N. 975, 106 N. W. 855. An entire estate may be held in trust for one beneficiary for life, and on his death may then be divided into shares, each of which may be held in trust for a second separate life, and it is not necessary that testator create a single trust in a single piece of property, but he may create separate trusts in undivided interests, the validity of each of which is dependent wholly on its own provisions. In re Mount's Will [N. Y.] 77 N. E. 999, afg. 107 App. Div. 1, 95 N. Y. S. 490. Testatrix gave property in trust to pay income to sister for life and provided that on her death the property should be divided into equal shares, one to be set apart for each child of a nephew then living or who might have died leaving surviving issue, the share of each child to be held in trust for him for life with remainder to his issue, and the share of each child who predeceased the sister leaving issue to vest absolutely in such issue on their arriving at age of 25. Held that as to share of child of nephew living at testatrix's death the suspension was only for two lives and validity of trust in favor of children then living was not affected by disposition in favor of children born thereafter. Id. Devise of property to wife and children "to be equally divided and equally shared among them after the youngest child of them shall have attained the age of 21 years and until such time and during his minority I desire that my said wife shall receive and have the sole use of" the income, held not to suspend power of alienation for more than

Possession and enjoyment[43] accompany a present vested legal estate. In the case of a future interest they await its vesting as a legal estate,[44] and in the case of a trust or equitable estate the beneficiary becomes entitled to possession when the trust is completed or the conditions on which testator made the right depend are satisfied.[45] In case of a life tenancy in consumable personalty or money, special conditions of possession to protect future interests may be found.[46]

two lives, the period of suspension terminating on arrival at majority or death of youngest child. Jacoby v. Jacoby, 94 N. Y. S. 260. Where testatrix devised property in fee, subject to life estates in daughters or the survivors or survivor of them while they remained unmarried, held that the power of alienation was not suspended since life tenants and remaindermen could jointly dispose of the fee. Graham v. Graham, 48 Misc. 4, 97 N. Y. S. 779. Will creating trust providing for semi-annual payments of income to life tenant without any provision that it should not be paid oftener, held to vest income in life tenant as it was paid in, so that income which had accrued at time of latter's death passed to his representatives, notwithstanding provision directing trustees on death of life tenant to transfer corpus of estate "and any income remaining in their hands" to remaindermen and not to create void accumulation. In re Keogh, 98 N. Y. S. 433, modifying 47 Misc. 37, 95 N. Y. S. 191 on other grounds.

42. Power of sale given trustees does not take trust out of statute where proceeds remain subject to trust. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Where estate could not be created by direct devise without violating rule, it cannot be created by intervention of power. Id. In applying rule as to suspension of absolute ownership of personalty, provisions of a will attempting to exercise a power of appointment conferred by will must be tested by reading them into the will conferring the power. In re Pilsbury's Will, 99 N. Y. S. 62. Under Laws 1897, p. 507, c. 417, § 2 (Gen. Laws c. 47, p. 3900) and Laws 1896, p. 583, c. 547, § 158 (Gen. Laws c. 46, p. 3824), period of suspension is to be computed from date of creation of power, and provision of will executing power suspending ownership for life of person not in being at creation of power is void. Id. The validity of the testamentary disposition is not to be determined by what occurs after testator's death, but by what might have occurred upon any possible contingency. Question whether trust for benefit of wife and others violates rule against perpetuities is not affected by fact that wife elects to take against the will. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436, rvg. 44 Misc. 6, 89 N. Y. S. 706. Trust to collect rents and pay income to beneficiaries for 30 years followed by words "thirty years after my death I give" corpus to same beneficiaries held harmonious and rejection of latter clause to avoid remoteness was wrong. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804.

Provisions held void: Devise in trust for life with remainder to heirs of beneficiary held void as to remainders under statute against perpetuities in force in 1871. Gerard v. Ives [Conn.] 62 A. 607. Trust to pay income to children for life then to grandchildren and to divide estate among grandchildren as the females should attain 21 years and the males 25 years is too remote. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. Laws 1896, c. 547, p. 571, § 76, subd. 3, authorizes trust to pay annuities, and calling it an annuity does not make interest of beneficiary assignable. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436, rvg. 44 Misc. 6, 89 N. Y. S. 706. An annuity chargeable upon a residuary estate does not prevent the vesting of the fee in possession, while a beneficial interest in a trust does. Id. Testator gave property to trustees to collect rents, etc., and out of net income to pay his wife a certain sum per annum for life, and after payment of such amount to divide the balance of the income among certain named persons until the death of two named daughters, and upon their death gave corpus to certain named persons. Held that provision for widow did not create an annuity independent of the trust, but was a part of it and gave her an unassignable beneficial interest, and hence trust was void because its duration was measured by three lives. Id. Attempted continuance of trust after death of husband and a daughter for benefit of daughter's husband by power of appointment of income, certain other powers, and alternative provisions in case of default in exercise of powers, held invalid as attempting to suspend power of alienation for more than two lives. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Testator directed that residuary estate was to be equally distributed among his three daughters at the end of ten years. In case any of them died after the execution of the will and prior to such distribution her share was to go to her issue, and in case of the death of anyone prior to such time without issue her share to go to daughters surviving at time of distribution. Held that the provision made for daughters by way of cross-remainders contravened rule against perpetuities since persons on whose survivorship the estate was limited to take effect could not be determined until ten years from death of testator, a period not measured by lives. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. A devise over limited upon an indefinite failure of issue is void for remoteness. Devise over "should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant to occupy and care for said property." Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Gift in trust to pay income to children for life, and after the death of last child, and 10 years after youngest grandchild became of age, to divide principal among grandchildren. In re Kountz's Estate [Pa.] 62 A. 1103. Will held to create single trust for three

Individual rights in gifts to two or more.[47]—At common law a legacy to two or more persons by name makes them joint tenants with right of survivorship[48] in the absence of words indicating an intention to confer distinct interests,[49] but this rule has been generally changed by statute.[50]

A gift to a class is a gift to those coming within that description at testator's death,[51] in the absence of anything showing a contrary intention,[52] and those surviving testator take the entire legacy.[53] Where the gift is coupled with a postponement of division, all those, and only those, answering the description at the time of division will share,[54] including after-born members of such class.[55] The fact that

lives of testator's sons. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945.

43. See 4 C. L. 1925.

44. See Vesting, ante, this section.

45. See Trust Estates and interests, post, this section, and, also, § 5 E. post.

46. See 2 C. L. 2141, n. 19, 20, and also Life Estates, Reversions, and Remainders, 6 C. L. 460.

47. See 4 C. L. 1925.

48. Will gave property in trust to pay over income to testator's "children and grandchildren now living or who may be living at the time of my decease, in equal shares and proportions" for the life of each of said children, and directed that "upon the death of the last surviving one of my children" the trustee should convey the estate "together with any income of the same remaining in his hands, to the heirs and legal representatives of my deceased children in equal shares," the latter to take by way of representation. Held that the gift of income to children and grandchildren was a gift to them as a class and not as tenants in common, and hence the share of a child dying without issue after testator and before the time of division went to the survivors. Meserve v. Haak [Mass.] 77 N. E. 377. Without words indicating contrary intention. Trenton Trust & Safe Deposit Co. v. Armstrong [N. J. Eq.] 62 A. 456. Gift in trust for three unmarried daughters so long as they remain unmarried, with remainder over in the event of "all marrying," held to make them joint tenants with right of survivorship, the word "all" applying only to so many of the class as remain capable of marrying, and the death of one not destroying the class because all cannot marry. Id.

49. "Equally and jointly" implies a tenancy in common, the former quoted word overcoming the latter. Taylor v. Stephens [Ind.] 74 N. E. 980. Joint tenancy is negatived by provision that shares of deceased members of a class of takers shall go to their children. Taylor v. Stephens [Ind.] 74 N. E. 980. Words "in equal shares and proportions" generally mean tenancy in common but they are not conclusive. Meserve v. Haak [Mass.] 77 N. E. 377.

50. A devise to two or more creates a tenancy in common unless a contrary intent is expressed. Code § 2923. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Unless expressly declared to be joint tenancy. Real Property Law, § 56. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Where testatrix devised property in fee, subject to use thereof by her three unmarried daughters, and the survivors and survivor of them, while they remained unmarried, held that three unmarried daughters became tenants in common with cross remainder for life. Graham v. Graham, 48 Misc. 4, 97 N. Y. S. 779.

51. Remainder to "my children." In re L'Hommedieu, 138 F. 606. Does not include persons dead before the making of the will, who, had they survived till that time, would have fallen within the description given such class. Gift to "children who shall have arrived at the age of 21 years." Pimel v. Betjemann [N. Y.] 76 N. E. 157, rvg. 99 App. Div. 559, 91 N. Y. S. 49. Testator devised land to sister and her own children and to his nephew and his children, share and share alike, as long as they live. Held that gift was immediate and vested in named persons and the children in esse at the death of testator to the exclusion of children born after that time. Robinson v. Harris [S. C.] 53 S. E. 755.

52. Testator bequeathed to wife the interest on certain mortgage for life, and provided that "at her death the said principal sum" of the mortgage "to be equally divided between my sons or their heirs." Held that sons meant were those living when will was made so that issue of sons who predeceased testator took parents' share. In re Smith's Estate, 97 N. Y. S. 321.

53. Davis v. Sanders, 123 Ga. 177, 51 S. E. 298. Civ. Code § 3330, providing that legacy to legatee who dies before testator or before the execution of the will shall not lapse but shall go to his issue, if any, living at testator's death, does not apply where the gift is to a class, and some member of the class survives testator. Id. Gift to named daughter and her children held a gift to a class, and where the daughter had two children, both of whom died before testator and one of whom left issue, held that daughter would take the whole legacy to the exclusion of such issue. Id.

54. See, also, ante this section, Vesting. When a legacy is given to a class, as grandchildren, the heirs of a grandchild who was living at the death of testator, but who dies before the time fixed for distribution, take nothing, but after-born grandchildren, living at the time of distribution, will share. Stoors v. Burgess [Me.] 62 A. 730. Where will provided that should testator's wife survive his daughter the latter dying without issue, she was to have whole income for life, and that "at her death" the estate was to be divided equally into two parts, one part "to be divided equally among the grandchildren of my

some of the individuals are named does not necessarily deprive the gift of its character as one to a class.[56]

Descendants of testator generally take per stirpes.[57] A direction to divide equally ordinarily requires a division per capita,[58] but where the takers are descend-

deceased father," held that only grandchildren living at the death of the wife were entitled to share. Id. Where testator left residuary estate in trust for daughter for life, and provided that "upon" her death property should go to "her heirs at law" in case she failed to make a will, held that gift over was to those who were her heirs at law at the time of her death, and not to those who would have been her heirs at the time of testator's death. Coffin v. Jernegan [Mass.] 75 N. E. 958. Will gave part of estate in trust for use of daughter during life, and provided that on her death it was to go to her children then living, or, in case there were none, then to testator's (misprinted "her" in N. Y. S.) heirs at law in such shares as they would take realty of which he should die possessed under the intestate laws. Held that on the death of the daughter after testator without issue, the property passed to persons who would have been testator's heirs at law had he died immediately after daughter. Beers v. Grant, 110 App. Div. 152, 97 N. Y. S. 117.

55. Vested gifts to a class to come into possession in future. Bosworth v. Stockbridge [Mass.] 75 N. E. 712. In the case of gifts to children or grandchildren the remainder will open to let in after-born members of the class. Minot v. Purrington [Mass.] 77 N. E. 630. Children. Minot v. Doggett [Mass.] 77 N. E. 629. Grandchildren. Stoors v. Burgess [Me.] 62 A. 730; Peabody v. Tyszkiewicz [Mass.] 77 N. E. 839. Where a devise is made to one and his children, and he has a child when the devise is made, such child will take an equal share with the parent, and the estate will open up and let in after-born children. Bently v. Ash [W. Va.] 53 S. E. 636. Testator devised realty in equal shares to his children, but provided in regard to the share of one of his daughters that "it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her husband," the same to be held and enjoyed by daughter and child or children as their separate property, and the husband not to have any control over it. Daughter had child living when will was made and at testator's death. Held that not only such child, but all children born to daughter thereafter took each in fee equally under the will with the daughter. Id.

56. Where one of the persons who are to take as a class is named, and the others are uncertain in number, to be ascertained in the future, the share of each dependent upon the actual number, the devise is to the class as a body of persons, and not as individuals, unless the will or the attendant circumstances require a different construction. Davis v. Sanders, 123 Ga. 177, 51 S. E. 298.

57. Testator gave estate to daughter in trust for his wife for life, and after her death in trust for his four daughters equally for life, and after their death in trust for the child or children of each of the daughters then living in fee simple, such child or children respectively to take the share of his, her, or their parent. It was then provided that if any daughter should die unmarried her share should "pass to her or their surviving sisters or sister for life equally; and upon her or their death shall vest in her or their child or children in the same manner, and for the same estate, as her or their original share or shares." Two of the daughters died unmarried, and a third thereafter died leaving children. Held that, the widow also having died, such children took their mother's entire share, and were entitled to half the net income of the estate, and equitable remainder of entire estate was in them and their heirs, subject to be opened to let in after-born children of other daughter. Cruit v. Owen, 25 App. D. C. 514. Where will provided that on death of daughter her share of principal of trust fund should be paid "to her lawful issue, share and share alike," held that the division should be made among the children of the daughter and the issue of deceased children taking per stirpes, and that the issue of a living child was not entitled to a share. Coates v. Burton [Mass.] 77 N. E. 311. Under will devising property to children or issue of deceased brother and providing that they should take per stirpes, the children or issue of any deceased child of such brother to take the "same share which their deceased parent would have taken if living," held that the children of a daughter of the brother who died before the will was made took only the share their mother would have taken had she survived testatrix. In re Truman [R. I.] 61 A. 598.

58. Where will provided that if wife survived daughter estate was to be divided into two parts on wife's death, one part "to be divided equally amongst the grandchildren of my deceased father," held that grandchildren living at death of wife took per capita. Stoors v. Burgess [Me.] 62 A. 730. Equality imports a gift to several as individuals. Hence representatives take. Best v. Berry [Mass.] 75 N. E. 743. Testator created trust in personalty, gave income to daughters for their lives, provided that upon the death of a daughter the income that would have gone to her should go to her descendants, if any, according to the law of descents, and made the duration of the trust period coexistent with the life estate of the survivor of the daughters, and then disposed of the personalty by giving it absolutely to his grandchildren, or their descendants, in equal proportions. Held that grandchildren, on the death of the survivor of the daughters, took per capita. Potts v. Shirley [Ky.] 90 S. W. 590. Where will directed division of balance of estate in equal portions among named persons, described as daughters of testator's deceased brothers, a named brother of testator, and the children of a certain deceased sister, naming them, held that

ants of testator and stand in different degrees of relationship they take per stirpes in the absence of anything showing a contrary intention.[59] Naming persons does not make the gift per capita where they are relatives standing in different degrees.[60] Where the gift is to persons standing in the same relationship and by alternation to those who constitute their descendants, the latter take per stirpes.[61]

Conditions.[62]—No precise words are necessary to create a condition, any words showing such an intent being sufficient,[63] but conditions are not favored, and, in the absence of express terms to that effect, will not be implied unless the intent is clear.[64] Whether a condition is precedent or subsequent is a question of intention.[65] If precedent, it must be complied with before the estate will vest.[66] If personal

legatees took per capita. Hardy v. Roach [Mass.] 76 N. E. 720. Where will provided that on death of life tenant the estate was "to be equally divided among all my heirs, share and share alike," the child or children of any deceased parent taking the share to which the parent would have been entitled if living, held that those answering the description of "heirs" at testator's death took per capita. Brantley v. Bittle [S. C.] 51 S. E. 561. Provision as to child of deceased parent taking parent's share held not intended to show proportions in which those answering description of heirs at testator's death should take, but to mean that the child or children should take the share of an heir who died after the testator and before the falling in of the life estate. Id.

59. Where will gave personalty in trust for daughter for life, and provided that upon her death the property should be divided equally among son and the surviving grandchildren of testator, held that division should be made per stirpes. In re Stocum's Will, 94 N. Y. S. 588.

60. A devise to A son of B; C son of D; E son of F; the ten children of G, naming them, and if any of the ten die before testator, their share to the survivors of such ten. All legatees were children of testator's brothers. Held that the estate should be divided into four parts and distributed per stirpes. Fleck's Estate, 28 Pa. Super. Ct. 466.

61. Where will gave estate in trust to pay income to brother for life, with provision that upon his death corpus was to go to brother's children in equal shares, the children of any deceased child to take the parent's share, or in case brother should die leaving no children or grandchildren, to children of testator's sisters, the child or children of each to take an equal portion thereof, held to show an intention to treat the child or children of each sister as a class and to divide the remainder equally among the classes. In re Keogh, 98 N. Y. S. 433, modifying 47 Misc. 37, 95 N. Y. S. 191.

62. See 4 C. L. 1926.

63. Bequests to employes "Provided these three named parties shall continue to manage and have charge of the business I am now engaged in," held to vest on testator's death, and not to be on condition precedent and dependent upon a continuation of the business. In re Davis' Estate [Minn.] 104 N. W. 299. Testator gave wife life use of realty and one-third of it in fee, but directed that, in case of her remarriage, she, as executrix, should sell the land, "and, after paying all the payments and satisfying all the provisions hereinbefore made," should herself take one-third of the proceeds and pay the other two-thirds to certain other persons. Held that, on her remarriage, she was not entitled to a life estate in the realty or its proceeds. Linzy v. Whitney, 96 N. Y. S. 1075. Provision giving legacy to son payable in 15 annual installments on condition that he should attend the regular meetings of worship of a certain church, when not sick in bed or unavoidably prevented, with bequest to missionary society if he did not try in good faith to comply therewith held not void for indefiniteness, but to require attendance at meeting for 15 years, and that if he defaulted the sum not already paid to him should be paid to society. In re Paulson's Will [Wis.] 107 N. W. 484.

64. Provisions as to support held not conditions which were required to be performed in every particular to prevent a forfeiture. Heaston v. Kreig [Ind.] 77 N. E. 805.

65. Provision giving widow use of remainder of estate in lieu of dower, subject to maintenance and education of certain persons, held not to impose conditions precedent to payment of bequest to her, but bequest was subject to performance of the conditions when she had received under the will the moneys which would enable her to perform. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Testator provided that his wife might retain a certain estate as a homestead and that she might purchase the same for not less than a specified sum, the estate so purchased to be subject to her disposal by will, or in case of her death intestate, to descend to her heirs at law. He further provided that, should she purchase it "and with the understanding that the estate thus acquired shall descend to the sons, one or all, whom she has brought forth," then a devise of another tract to such sons should be void, and the same should pass to a daughter. Held that the devise to the sons could only be annulled by the widow purchasing and providing in some manner that the estate should go to sons at her death, and was not annulled where she purchased and deeded the same in fee to a third person, and that she acquired and could convey the fee. Allen v. Howe [R. I.] 63 A. 559.

66. Where will provided that complainant was to receive his share of the estate "upon becoming married and settled in some legitimate and prosperous business," held that the limitation was binding and that he was not entitled to his share until he had complied therewith. Boggs v. Boggs [N. J. Eq.]

property is bequeathed upon condition, either precedent or subsequent, which becomes impossible of performance through no fault of the legatee, the legacy does not fail unless it appears that performance was the controlling motive for making the bequest.[67] Where a legacy is given to a daughter upon her marrying with the the approval of the widow, her marriage during testator's lifetime with his approval will be deemed a substantial compliance and entitles her to the legacy.[68] In case lands are devised on condition that the devisees make specified payments to named persons, the latter may waive payments in cash.[69]

Intent to require election[70] may be found from gifts in the alternative,[71] or where property is so disposed of that statutory rights are necessarily cut off by taking under the will,[72] or where testator disposes of property not his own, and also confers benefits on the owner thereof.[73] No election can be required so as to alter

60 A. 1114. Where will gave son privilege of selecting certain tract of land which was to belong to him in fee on condition that he reside on the place, and in case he decided not to take the property, held that the title to such tract never vested in him on his refusal to perform such condition, his estate being in the nature of an executory devise dependent on a contingency which did not occur, or, if an estate on condition, such condition was a condition precedent. Pitchford v. Limer, 139 N. C. 13, 51 S. E. 789. Where will gave certain sum to brother in case he should "pay" testatrix or her estate the amount of a certain note, held that he was entitled to legacy where testatrix assigned note to third person before her death. Morley v. Calhoun, 7 Ohio C. C. (N. S.) 285. The verb "pay" usually means to satisfy in money, but it has a much wider signification and includes the ideas of satisfaction and discharge in any manner. Id.

See, also, ante, this section, Vesting.

67. Morley v. Calhoun, 7 Ohio C. C. (N. S.) 285.

68. Saul v. Swartz, 98 N. Y. S. 549. Will provided that any daughter marrying with her mother's consent was to be paid a certain sum "being part of her said share in my estate," but provided that from such sum was to be deducted any sum which testator "may have charged against my said daughter on account thereof." Held that daughter who married before execution of will was entitled to difference between sum then paid her by testator and the amount specified. Id.

69. Where lands were devised to testatrix's heirs in remainder on condition that they pay the life tenant's heirs the value of any improvements made by him, held that the heirs of the life tenant could waive payment in cash for such improvements, and accept, in lieu thereof, a decree making the amount due them a lien on the property. Hill v. Gianelli [Ill.] 77 N. E. 458. Intention held to be that improvements should be paid for within a reasonable time. Id. Heirs of life tenant held to be the only persons who could complain in reference to time and manner of payment. Devisee of life tenant could not do so, and could not complain that heirship of those held to be owners of property was not proved. Id.

70. See 4 C. L. 1927. See, also, Election and Waiver, 5 C. L. 1078.

71. Will held to entitle widow to use of certain rooms in house devised to son and to certain benefits in the way of support, etc., or to the use of the rooms and to an annuity at her election, but not to both benefits and annuity. Begin v. Begin [Minn.] 107 N. W. 149.

72. Where testator intentionally attempts to dispose of land owned by himself and his wife as tenants by the entirety, and gives her other property in lieu thereof, and she voluntarily accepts the provisions of the will, she is estopped from asserting title to such lands. Young v. Biehl [Ind.] 77 N. E. 406. It is immaterial, in such case, whether testator erroneously believed the lands to be his own or knew that they were not. Id. The widow may take both a life estate under the will and her distributive share under the law unless the will clearly manifest a contrary intention, in which case she is required to elect between them. Can only take both when not inconsistent or incompatible with the terms of the will. Parker v. Parker [Iowa] 106 N. W. 8. Will held to show intent to give her a life estate in lieu of distributive share. Id. Where will made provision for contingency of widow's election, but fixed no time when it should be made, held that it could be made at any time before a final decree of distribution, unless widow had done something amounting to an estoppel. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315.

73. The doctrine of election properly arises when a testator manifests a clear intention to dispose of property not his own, and by other parts of his will from his own estate confers benefits upon the owner of that property. Walker v. Bobbitt, 114 Tenn. 700, 88 S. W. 327. In such case the owner is put upon his election, and if he accepts the benefits, is excluded or estopped from asserting claim to the property so disposed of. Id. This rule applies only in a case of property in which testator has no interest. If he has some interest of his own, more than mere possession, in the thing disposed of, he will be deemed by his use of general term, to have intended only a gift of his interest, and owner will not be put to an election between maintaining his former title and claiming the new benefits. Id. Wife held not put to an election where husband devised to her for life an entire tract owned by them by entirety, and fact that she took under will did not prevent her taking the remainder as survivor. Id.

the terms of an antenuptial agreement.[74] The share which a child receives under a will should not be deducted from his share of the property as to which deceased died intestate.[75]

Charges, exonerations, and funds for payment.[76]—Whether legacies are to be charged on the realty is always a question of intention.[77] Such a charge may be inferred from the making of bequests greatly exceeding the amount of personalty and which there is realty enough to pay.[78] Where the devisee of lands charged with

Where testator gave widow a life estate in lands belonging to her, together with personalty exceeding in value that to which she would have been entitled under the statute, with remainder over in realty and remaining personalty. Sorenson v. Carey, [Minn.] 104 N. W. 958. Where disposes of property belonging to wife in her own right and also makes provision for her by his will, she has the same right of election as other persons under similar circumstances, and such election may be made expressly or impliedly. Pence v. Life [Va.] 52 S. E. 257. Code 1887, § 2271, providing that a widow who fails to renounce provisions of husband's will is presumed to have elected to take under it, does not apply in such cases, but only provides how she must proceed in case she desires to reject provisions made for her out of property other than her own, and to take such interest in his lands as the law gives her. Id. Sale of her land by widow held to amount to an election, and purchaser took good title. Id. Where testator devised to his wife, with remainder to children, realty of which wife was a part owner, and she qualified as executrix, took possession of the land and remained in possession for nine years until her death, and children acquiesced in will for eight years, held that there was an election, and lands could not be sold to pay widow's debts after her death. Hoggard v. Jordan [N. C.] 53 S. E. 220.

74. Testator made antenuptial agreement whereby wife was to receive $4,000 with interest within six months after his death in lieu of dower. Will recited agreement and that testator had decided to increase the amount to $10,000, and directed executor to pay her that amount, "which said sums aggregating $10,000 are to be accepted by my wife in full satisfaction of dower." Held that $6,000 was a general legacy, the words quoted being of no legal effect since testator could not modify agreement by will. In re Bostwick's Estate, 49 Misc. 186, 98 N. Y. S. 932.

75. Where testatrix authorized trustee to pay over to her sons such part of the principal of the trust fund as he might, in his discretion, see fit, the amount paid over to one of the sons should not, on distribution of the estate after his death, be deducted from the share of the son's child in the property as to which testatrix died intestate. In re Ogden's Estate, 211 Pa. 247, 60 A. 785. Act of April 8, 1833 (P. L. 315) providing for the deduction from the share of a child of any amounts received by him by way of advancements or settlement applies only in case of intestacy and not to testamentary gifts. Id.

76. See 4 C. L. 1927.

77. Children held to take residuary estate on arrival at age subject to lien of widow for payment of amount provided for her support, and her right to use a certain house, and after the payment of certain legacies. McDevitt v. Hibben [Ill.] 77 N. E. 586. Where will devised realty to children and their heirs forever provided they should keep the property insured, pay taxes, etc., and pay certain annuities to a corporation, and that if testator's heirs and the heirs of the children should at any time cease to exist, the property should go to said corporation, held that, though the attempt to create a conditional fee or fee tail was void, and the children took the fee, they took it subject to a trust to pay such annuities. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647. Provision giving wife the interest on a certain sum so long as she lives and remains unmarried, "to be left secured on my real estate," held not to require legacy to be secured by mortgage on testator's realty, but to itself charge the payment of such interest on the land. Plum v. Smith [N. J. Eq.] 62 A. 763. Fact that land charged was sold under mortgage foreclosure proceedings, and thereby reduced to money, held not to relieve the resulting fund from the obligations imposed upon the land. Id. Cost of erecting monuments held not charged on land devised in remainder. Stark v. Byers [Pa.] 62 A. 371. Where testatrix, after making certain pecuniary legacies, devised residue of her estate to complainant, and personalty was insufficient to pay debts and such legacies, held that he took realty passing as residue, charged with payment of such legacies. Haberman v. Kaufer [N. J. Eq.] 61 A. 976. Will gave wife use of realty and one-third in fee, but provided that, in case of her remarriage, land should be sold, and that, "after paying all the payments and satisfying all the provisions hereinafter made," proceeds should go one-third to her and balance to others. One of the prior provisions was that testator's mother was to be given a home for life provided she lived in the house on testator's farm, but not otherwise. Held that widow was not entitled to compensation for care of mother, that being an incumbrance attached to life use of farm. Linzy v. Whitney, 96 N. Y. S. 1075. Where mother lived in house on farm until it was burned, when she went to live with one of her sons, held that latter was entitled to compensation for her care out of income of avails of farm which was sold on widow's remarriage. Id. Such support held a charge on proceeds of such sale. Id.

78. Thissell v. Schillinger, 186 Mass. 180, 71 N. E. 300.

certain debts refuses to accept the devise, so that the property goes to testator's heirs, such debts are charged on the shares of all of such heirs.[79] Whether contributions are to be made by several beneficiaries collectively or individually is a question of intention.[80]

Trust estates and interests.[81]—The trustee takes such an estate as the will defines or the terms of the trust require.[82] The kind of trust created,[83] its duration,[84]

79. Where son did not accept devise of lands charged with payment of his debts to testator, so that they passed to testator's heirs at law, held that debts became charged on the shares of all such heirs, and could not be restricted only to shares which went to son's children. Youngs v. Youngs, 102 App. Div. 444, 92 N. Y. S. 546.

80. Will held to require contributions of certain sums "to maintain the home" to be made by each son separately and not by all collectively. Central Trust Co. v. Egleston, 47 Misc. 693, 98 N. Y. S. 1055. In absence of express designation, and it not appearing from will as a whole that there was any other intention, advances directed to be made to wife by trustee during first year and a half for her benefit and that of sons held not chargeable against any specific beneficial interest elsewhere provided, but word "advance" is to be regarded as equivalent to "pay" and payment should be made from funds in trustee's hands. Id.

81. See 4 C. L. 1929.

82. Takes only such estate as is necessary for the performance of his trust, and it terminates when the trust ends. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. His estate in realty is commensurate with the powers conferred by the trust and the purposes to be effected by it. Olcott v. Tope, 115 Ill. App. 121. Limitation on powers of trustees given an absolute ownership denying general power to sell or mortgage held not to negative a legal title sufficient to sustain ejectment. Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815. The trustee takes only such estate as the purposes of the trust require. In re L'Hommedieu, 138 F. 606. Where estate was given in trust to son to collect income and apply residue, after payment of taxes, etc., to support of wife and children of testator, until two minor daughters became of age or died, and then to distribute estate in specified manner, held that the only estate which vested in him was one for the lives or minority of such daughters. Id. Quantity of trustee's estate was coincident with beneficial right of cestuis que trust, and when their right ceased, the purposes of the trust and the estate of the trustee ceased. Id. Was not extended by direction to distribute estate, since trust could not be created for purposes of distribution only, and while person acted as grantee of power to distribute, title was in distributees or heirs. Id. The trust not being one to sell, the mere grant of a discretionary power of sale does not enlarge trustee's estate, and grantee of power would sell as such and not as trustee. Id.

83. Under Civ. Code, § 857, providing for trustee to receive the income of real property and apply it to the use of any person for himself or his family, a provision directing income to be paid to daughter to be applied to support of granddaughter during her minority is valid. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315. Will held not to create invalid "trust to convey." In re Lux's Estate [Cal.] 85 P. 147. Testator gave realty and personalty in trust to "manage" same, and to collect income, and out of it "to pay" annuities to daughter and wife and provided that on the death of his wife half of the property "shall vest absolutely" in his daughter and the other half in certain other persons. In case his daughter should die before his wife without leaving children her share was to be "divided" among others. Any excess of income after paying annuities was to be used in improvement of unimproved property, or invested. Trustees were also authorized in their discretion to sell any part of the property and reinvest proceeds. Held to create valid trust to receive rents and profits of realty and pay them to beneficiaries as authorized by Civ. Code, § 857, subd. 3. In re Heywood's Estate [Cal.] 82 P. 755. Direction to "manage" property does not make trust one not authorized by § 857, though trust to manage is not specifically authorized by that section, since trustees are bound to manage property in any event for purpose of carrying out the trust. Id. Will held to show intent that annuities were to be paid from income alone, so that trust was not void because authorizing resort to the corpus. Id. Direction that property shall be "divided" does not make an invalid trust to divide, the will showing an intention to make direct devises in remainder. Id. Devise to widow in trust to be used by her until youngest child arrives at age of 21, when property is to be divided between widow and children, held void as trust since widow was both trustee and beneficiary, but widow, being entitled to possession, takes legal estate equivalent to her beneficial interest under Laws 1896, p. 570, c. 547, § 72. Jacoby v. Jacoby, 94 N. Y. S. 260.

Active or dry trust: A provision giving the trustees a full and unlimited discretionary power to pay or withhold from the beneficial life tenant any or all of the income of the fund, the legal title to which is to remain in the trustees during the continuance of the trust, creates an active, and not a dry or naked trust. Such a trust created for life of beneficiary will not be sooner terminated. Mason v. Rhode Island Hospital Trust Co. [Conn.] 61 A. 57. In such case the beneficial life tenant takes no absolute right to the income. Cannot alienate his interest or estate, and it is protected from his creditors. Id. The fact that the cestui que trust is given a naked power of appointment does not enlarge his estate. Id. Renunciation of an active trust in personalty does not vest full legal title in beneficiary. Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339. Gift of a sum in trust to pay income to

and the powers and duties of the trustee,[85] are questions of intention. The will may relieve the trustee from liability for losses occurring without his fault.[86]

legatee till 40 years old, then to pay principal on a certain contingency, otherwise not to pay it till 50, held not a dry trust vesting the principal presently. Id. Bequest to certain individuals in trust for use and benefit of a certain institution for purpose of having masses and prayers said for benefit of testatrix's soul held to be one directly to the institution. The trusteeship being a passive one, the bequest would, by analogy to the real property law (Laws 1896, p. 570, c. 547, §§ 73, 77), go directly to the beneficiaries, subject to the duty of saying such prayers and masses. In re Cooney's Will, 98 N. Y. S. 676. Testatrix left estate in trust to be kept intact until after the death of her husband, and to pay half the income to him during joint lives of her son and husband, and to latter in prescribed proportions should son die first. Will further provided that after the death of the husband, all of the estate and income should descend to son; that if son died before the husband, on the death of the latter, the income should be divided among testatrix's grandchildren; and that after death of husband and son the estate should remain in trust and income be paid to latter's children. Held that, where son died before father, on the death of the latter the estate passed to the son's children under a dry trust. Ritter v. Knerr [Pa.] 63 A. 605.

Spendthrift trusts: An equitable life estate under which the life tenant may have absolute rights may by appropriate language, be created by one for the benefit of another, which shall be inalienable by the latter, and beyond the reach of his creditors. Mason v. Rhode Island Hospital Trust Co. [Conn.] 61 A. 57. Provision prohibiting anticipation or incumbrance by legatee of his share of income, etc., held to create spendthrift trust. Sterling v. Ives [Conn.] 62 A. 948. Provision in spendthrift trust in favor of children that if "any person" conveyed his share of income so as to deprive himself of the benefit thereof, his right to such income should cease held not applicable to grandchildren to whom deceased child's share of income and, on their reaching the age of 21, of the principal also, was given in remainder. Id. Further provisions authorizing trustees in their discretion to withhold income in certain cases held also inapplicable to grandchildren, the death of any one of testator's children working a severance of his share. Id. Will directed payment of income to one during life, then to his children in equal parts and in case of the death of a child to his children if he had any, if not, to the survivors. The trustees were given full power of sale. The will also provided that the shares in the income should go to the persons designated and be nonassignable and not subject to attachment for debt. Held under the last clause a grandson of a deceased son was precluded from assigning his share of the income. Rockhill's Estate, 29 Pa. Super. Ct. 28.

84. Testator gave property in trust to pay net proceeds to his daughter "so long as" she remained "a married woman," and provided that if she should "survive" her present husband the premises should be conveyed to her absolutely and in fee, and that, "while she is the wife of her present husband," neither she nor any one for her should have the right to sell or dispose of the premises, or do anything which would deprive her of the benefit thereof. Held that she was entitled to a conveyance on her divorce from her husband. Cary v. Slead [Ill.] 77 N. E. 234. Will held to create trust to continue during lives of both his son and latter's wife. Cole v. Lee [Mich.] 12 Det. Leg. N. 975, 106 N. W. 855. Will held to create trust by terms of which income was to be divided equally between testator's widow, brother, and sister, and which was to continue as long as widow lived or remained unmarried. Hiles v. Garrison [N. J. Eq.] 62 A. 865. Residuary clause created trust to continue during lives of those two of his children who should be the youngest at the time of his death, for the purpose of meeting certain payments directed to be made by previous clauses; to set aside and separately invest a sum sufficient to give a specified annual income to wife for life, and on her death "to dispose of said sum as hereinafter directed in respect to the principal of my residuary estate;" to distribute the income of the trust estate among his children during the trust term; and to distribute the residue when the trust was ended. Held that separate trust was created for wife for term of her lifetime alone, and on her death principal and accumulated income was to be distributed in manner provided for distribution of principal of residuary estate. In re Title Guarantee & Trust Co., 46 Misc. 544, 95 N. Y. S. 59. Testatrix gave property to brother to be invested by executors "for his benefit during his natural life and for the benefit of his wife and issue after his death." Held that investment was to continue only during brother's life, and that wife and issue took absolutely on his death. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44. Where will bequeathed property in trust to pay income to beneficiaries during their lives "and at their death the principal to their heirs," held that trust terminated at death of beneficiaries. In re West's Estate [Pa.] 63 A. 407. Even if it could be regarded as continuing to the heirs for the purpose of paying over the principal to them, it was, as to them, a dry trust which, on the death of the first takers was immediately executed so as to vest legal title in heirs. Id.

85. For powers and duties of trustees as to sales, distribution, time of payment, etc., see § 5 E, post. Where will provided that on death of each of the children trustees should transfer and convey the same to his lineal descendants, held that trustees were bound to make the conveyance though the lineal descendants of the deceased child did not desire it. Paine v. Sackett [R. I.] 61 A. 753. So also, on the death of a child, the trustees could not be required to longer exercise the duties of trustees with respect to his share. Id.

Powers of appointment and beneficial powers of sale.[87]—A power of appointment can only be exercised under the circumstances[88] and in the manner prescribed by the will,[89] and in favor of the persons or class therein designated.[90]

Whether a life tenant has an absolute power of sale is a question of intention.[91] When such power is based upon and restricted by necessity, proof of the existence of the necessity at the time of the sale establishes the right to make it without an order of court.[92] Purchasers need not see to the reinvestment of the proceeds unless the will so provides.[93]

Cy pres doctrine: Where the will exhibits the intention that the donation shall be devoted generally to charity, or to some more or less particularly defined charity, and prescribes a particular mode or means whereby such purpose shall be carried out, the failure of such mode during testator's lifetime will not be allowed to defeat his general charitable purpose. Brown v. Condit [N. J. Eq.] 61 A. 1055. This rule, however, has no application, where, at the time of testator's death, it is impossible to carry into effect his actual charitable intent. Id. Where testatrix bequeathed residue of estate to "the hospital fund for sick seamen" at a certain navy yard, "care of W., chaplain," but W. was not chaplain of the navy yard, and died before testatrix, and there was no fund maintained for the benefit of such seamen, held that court could not, under cy-pres doctrine, give such bequest to another institution conducting similar work among sailors but of larger scope than that conducted by W. Id.

86. Trustee who, though knowing that his cotrustee had collected rents belonging to estate and converted them to his own use, permitted him to continue to collect rents, without attempting to control the receipts, held personally liable for subsequent misappropriations, notwithstanding provision in will exempting every trustee "from liability for losses occurring without his own willful default," since he intentionally disregarded rules regulating actions of prudent men in conducting their own business, the exemption clause referring merely to losses due to bad judgment or carelessness. In re Mallon's Estate, 110 App. Div. 61, 97 N. Y. S. 23.

87. See 4 C. L. 1930.

88. Where will gave daughter power of appointment in case she should die unmarried "and" without leaving lawful issue, held that the power was strictly limited and could not be exercised where she was married when she died. Beers v. Grant, 110 App. Div. 152, 97 N. Y. S. 117.

89. Execution of power held in strict conformity to power conferred. Stoors v. Burgess [Me.] 62 A. 730.

90. A devise to a wife for herself and children and to dispose to the children "as long as she remains unmarried" gives her no power to dispose of it otherwise than to children. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 170. Under a power by which the wife of testator is directed to provide for the children out of certain described property, the amount to be given each is discretionary and an equal division need not be made. Biggins v. Lambert, 115 Ill. App. 576. If the donee is given a right to distribute the property to "relations," his right of selection is not confined to the next of kin. Where testator gave property to wife for life and provided "previous to her death she may will or distribute to her relations or to my relations any property as she may choose or desire them to have," held that she was not bound to distribute it to his or her next of kin, but word "relations" meant blood kin of any degree. Levi v. Fidelity Trust & Safety Vault Co. [Ky.] 88 S. W. 1083. Power held a mere naked one to be exercised at the discretion of the donee. Id. Will held to give wife testamentary power of disposition over half the estate, subject only to limitation that it must be exercised for charitable or religious purposes. Stoors v. Burgess [Me.] 62 A. 730. Testator gave property to his wife for life, with power to devise it to any or all of their children or grandchildren or both "in such shares or proportions as to her shall seem best." Held that a devise by wife to children and grandchildren as tenants in common, the share of a granddaughter being charged with a debt of her father, and share of son with amount of his debt to testatrix, which debts were made part of her residuary estate, was valid exercise of power. Monjo v. Widmayer, 94 N. Y. S. 835.

91. Where testator gave his wife all his realty and personalty "for her own use and for the maintenance and education of my children during her natural life, and after her death all of said property then remaining" to be divided among children, held to give her unlimited power to sell and convey, particularly in view of provisions giving her such power as executrix. Wenger v. Thompson [Iowa] 105 N. W. 333.

92. Where widow was given life estate in land with limited power to sell in case the "use and improvement" thereof should be insufficient for her support. Bartlett v. Buckland [Conn.] 63 A. 350.

93. Will devised land to niece for her sole use, free from management, control, and debts of her husband, with a provision that if she sold it the proceeds must be invested in other realty and the title taken to her in the same manner, and that the purchaser must see to the reinvestment of the proceeds in the prescribed manner, and that no title should pass until this was done. Held that deed to land by niece and her husband passed no title to the grantee, where proceeds of sale were paid to husband and never reinvested as directed. Bell v. Bair [Ky.] 89 S. W. 732. Where daughter was given defeasible fee with power to sell and dispose of the property and reinvest the proceeds in other suitable property to be held on the same conditions, held that, where she joined in petition to sell estate, and tendered sufficient deed after the sale, the purchaser took good

Lapse, failure, and forfeiture.[94]—A trust may fail because in view of the circumstances it has become wholly impracticable,[95] and charitable gifts lapse where existing conditions make testator's purpose wholly impossible of accomplishment.[96] A gift to an institution lapses where there is no such institution in existence,[97] and a contingent remainder where the remainderman dies before the happening of the contingency.[98] An elective gift in lieu of another does not fail because it becomes impossible to elect.[99] Ordinarily a legacy or devise will lapse by the death of the legatee or devisee during testator's lifetime,[1] in the absence of a provision to the contrary,[2] but this rule does not apply to a legacy expressly given in payment of a debt.[3] For the purpose of preventing lapses, statutes in many states give the share of one so dying to his issue or heirs,[4] particularly in the case of gifts to testator's children, descendants, or relations.[5]

title, there being nothing in the will requiring him to see to the reinvestment of the purchase money, particularly where court retained control of such money to require its reinvestment. Hartring's Ex'x v. Milward's Ex'r [Ky.] 90 S. W. 260.

94. See 4 C. L. 1932.

95. As where it must have expired before it could be organized and would cost more than could be dispensed. Gift of income of $2,000 to one who lived but a month. Harlow v. Bailey [Mass.] 75 N. E. 259.

96. Charitable gifts lapse where conditions existing at time of testator's death make his actual charitable purpose impossible of accomplishment. Brown v. Condit [N. J. Eq.] 61 A. 1055. Bequest of residue to "the hospital fund for sick seamen" at a certain navy yard, "care of W. chaplain," held to have lapsed, where W. was not chaplain of the navy yard and died before testatrix, and there was no fund maintained for the benefit of such seamen. Id.

97. Where there is no such institution in existence, and was none at testatrix's death. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998.

98. Cutter v. Burroughs [Me.] 61 A. 767.

99. Where widow's right of election fails by reason of her death within a year the legacy given her in lieu of dower does not fail with it but right to collect legacy vests in her executor. Flynn v. McDermott [N. Y.] 75 N. E. 931, afg. 102 App. Div. 56, 92 N. Y. S. 1126.

1. Gift in trust to brother, if living, and, if not, then to his issue held to have lapsed where he died without issue during lifetime of testatrix, and trust resulted in favor of heirs at law and next of kin of testatrix. Varick v. Smith [N. J. Eq.] 61 A. 151. Except in so far as rule has been changed by statute, Legacy given to one not a descendant of testator who was, to testator's knowledge, dead when will was executed, lapses and does not pass to legatee's next of kin. Roberts v. Bosworth, 107 App. Div. 511, 95 N. Y. S. 239.

2. Where residuary estate was given in trust for three sisters, each share to be invested and rents and profits to be paid over to sisters respectively during their lives, on the death of any one of them her share to go to her children as she should appoint, and in default of any appointment such children to take equally, and if no children, the share to go to the sister's next of kin, held that the share of sister dying without issue before death of testatrix did not lapse, but passed to her next of kin. Varick v. Smith [N. J. Eq.] 61 A. 151.

3. McNeal v. Pierce [Ohio] 75 N. E. 938.

4. Civ. Code § 3330 providing that if a legatee dies before the testator, or if dead when the will is executed, but shall have issue living at the death of the testator, such legacy if absolute shall not lapse, but shall vest in the issue in the same proportion as if inherited directly from their deceased ancestor, does not apply where gift is to a class, and some member of the class survives testator. Davis v. Sanders, 123 Ga. 177, 51 S. E. 298. Under Code Pub. Gen. Laws 1904, art. 93, § 320, no devise shall lapse or fail of taking effect by reason of the death of the devisee in testator's lifetime, but it shall, in such case, have the same effect and operation in law to pass the estate devised as if the devisee had survived testator. Lindsay v. Wilson [Md.] 63 A. 566. Devise to husband who predeceased testatrix held to have passed to his sole heir at law. Id.

5. When a legacy or devise is given to a descendant of testator, or to a brother or sister of testator, or to a descendant of a brother or sister, and the devisee or legatee dies during testator's lifetime, leaving children or descendants of children who shall survive testator, the devise or legacy does not lapse, but vests in such children or descendants. Laws 1887, p. 63, c. 47, 3 Gen. St. p. 3763. Varick v. Smith [N. J. Eq.] 61 A. 151. This statute applies to will executed prior to its enactment, where testatrix dies subsequent thereto. Id. Where on death of sister, her share was to go to her children, and she predeceased testatrix leaving two children and a grandchild, the latter being a daughter of a son who predeceased his mother, held that the granddaughter was entitled to an interest in such share under the statute. Id. Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of testator, who shall die during testator's lifetime leaving a child or other descendant who shall survive testator, such devise or legacy shall not lapse, but the property shall vest in the surviving child or other descendant of the legatee or devisee as if the latter had died intestate after testator. 2 Rev. St. [1st Ed.] p. 66, pt. 2, c. 6, tit. 1, § 52. Pimel v. Betje-

Partial invalidity.[6]—Since it is the policy of the law to carry out the testamentary intention so far as possible, valid portions of the will will be allowed to stand and the invalid provisions alone cut off, where the two are distinct and separable, and testator's intention will not be subverted thereby.[7]

Residuary clauses.[8]—A residuary clause relates to the surplus of an estate after all debts and particular legacies are discharged.[9] No particular form of expression is necessary to constitute a residuary bequest or devise, anything showing an intention to pass all the property not otherwise disposed of being sufficient.[10] Residuary

mann [N. Y.] 76 N. E. 157, rvg. 99 App. Div. 559, 91 N. Y. S. 49. Statute applies to case where legacy is given to one who is dead when the will is executed. Id. Legacy given to one not a descendant of testator who was, to testator's knowledge, dead when will was executed, cannot be upheld as a gift to legatee's next of kin on theory that testator supposed it would go to them under the law. Roberts v. Bosworth, 107 App. Div. 511, 95 N. Y. S. 239. Effect of Rev. St. 1905, § 5971, is to prevent the lapsing of devises and bequests clearly made to a child or other relative of testator when such primary devisee dies before testator, but leaving issue which survives him, unless to give it that effect would be subversive of a dispositive intention clearly expressed in the will. Larwill's Ex'rs v. Ewing [Ohio] 76 N. E. 503. Where will making bequest to testator's sister made no disposition of the property in case she should predecease him, held that provision in codicil that testator had intentionally omitted several relatives and that he had decided to exclude from participation in his estate all persons not mentioned in will or codicil did not prevent statute from becoming operative on death of sister during testator's lifetime, and in such case her surviving child took her share. Id.

6. See 4 C. L. 1933.

7. Though effect cannot be given to the entire will or to certain entire provisions thereof, valid provisions which can be separated from the rest of the will without doing violence to testator's general intention will be given effect. Landram v. Jordan, 25 App. D. C. 291. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Void provisions will be cut off and disregarded where by so doing the main testamentary scheme and purpose of testator can be preserved and carried into effect. Such parts only should be eliminated as will cause the least disturbance of the testamentary scheme. In re Perry, 48 Misc. 285, 96 N. Y. S. 879. Void provision may be eliminated even if it is only a part of a sentence. Id.

Provisions held independent: Primary trust estate to pay income held not invalidated by direction to use excess of income in improving realty or to invest it, the latter provision, if invalid, being separable. In re Heywood's Estate [Cal.] 82 P. 755. Where an estate has been vested in trustees on several independent trusts, one of which is legal, though the others may not be, the estate of the trustees will be upheld to the extent necessary to enable them to execute the valid trust though avoided as to the others. Landram v. Jordan, 25 App. D. C. 291. Trust to pay income from certain property to one for life held separate from and independent of trust for remainderman, and hence not affected by invalidity of latter. Id. Neither the equitable life estate of one for whom the estate is given in trust, nor a vested remainder in fee is rendered void by an unlawful attempt to postpone the enjoyment or restrain the alienation of the fee, but such restraint alone will be avoided. Id. Where primary purpose of testatrix was to provide for sister and trust for her benefit was independent of every other provision, and not a part of any general plan or scheme, held that it would be separated from all directions for subsequent disposition of trust property and upheld as valid, regardless of whether such direction were valid or not. In re Mount's Will, 107 App. Div. 1, 95 N. Y. S. 490. Primary objects of testatrix's bounty being husband and children, held that remaining provisions whereby she attempted to provide for those who were to come after her daughters, and which contravened rule against perpetuities, could be disregarded. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Words quoted in provision that in event of death of one of testator's daughters without issue before the time of distribution, fixed at 10 years from testator's death, her share should go to daughters surviving "at the time of distribution or payments," eliminated. In re Perry, 48 Misc. 285, 96 N. Y. S. 879.

Dispositions held dependent: Residue falls into intestacy when residuary disposal is by an entire trust void in part. Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779. Devise of realty void for remoteness carries with it bequest of personalty the amount of the two being equal and the purpose being equality of division between legatees and devisees. Reid v. Voorhees, 216 Ill. 236, 74 N. E. 804. Whole will held to fail because of invalidity of indivisible trust for three lives of testator's sons. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945. Annuity for widow, being part of testator's scheme, held to fall with trust. Id. Bequest held to be so dependent upon attempted disposition of residuary estate as part of same testamentary scheme as to fall with it. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436, rvg. 44 Misc. 6, 89 N. Y. S. 706. Where contingent remainders given grandchildren were void under rule against perpetuities, held that preceding particular estate in trust to pay income to children and grandchildren was also void. In re Kountz's Estate [Pa.] 62 A. 1103.

8. See 4 C. L. 1933.

9. Garrison v. Day [Ind. App.] 76 N. E. 188.

10. Bequest of all personalty and realty

clauses should always receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate,[11] and where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, such legatee will take whatever may fall into the residue.[12] In the absence of statute, and unless otherwise specifically provided, all personalty not otherwise specifically disposed of,[13] and all void or lapsed legacies of personalty, fall into the general residuary fund.[14] This rule does not, however, apply where the legacies and the residuum are given to the same legatees, in which case lapsed legacies become intestate property.[15] There is a conflict of authority as to whether it applies to lapsed and void devises of realty, some courts holding that it does[16] unless the will shows a contrary intention,[17] and others that such property descends as in case of intestacy.[18]

to three persons named, share and share alike, held, in effect, a gift of all the residue of the estate after the payment of the debts and special legacies. Cronan v. Coll [N. J. Eq.] 60 A. 1092. Provision "subject to the advancements hereinbefore mentioned, I hereby will and direct that all my property and estate not hereinbefore disposed of by this will shall be divided and paid as follows," held to be general residuary clause. Garrison v. Day [Ind. App.] 76 N. E. 188. Gift to wife of "any other property not herein otherwise disposed of that may be in my possession at the time of my decease," held in view of the circumstances, not to be intended as a general residuary clause, and not to carry remainders in property previously given to wife for life. Adams v. Massey [N. Y.] 76 N. E. 916.

11. O'Connor v. Murphy, 147 Cal. 148, 81 P. 406.

12. Mills v. Tompkins, 110 App. Div. 212, 97 N. Y. S. 9, rvg. 47 Misc. 455, 95 N. Y. S. 962. Will recited that testator wished to dispose of all his personalty, and by later clause "gave and bequeathed" to his wife "all the rest, residue, and remainder of my property." Held that wife took realty belonging to testator. Mills v. Tompkins, 110 App. Div. 212, 97 N. Y. S. 9, rvg. 47 Misc. 455, 95 N. Y. S. 962.

13. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. Where a codicil revokes the provisions as to two only of three residuaries, provides otherwise for them and divides what then remains, the original residuary gift remains unchanged as to the third not revoked and the ultimate residue to be divided is the undisposed of two-thirds. Harlow v. Bailey [Mass.] 75 N. E. 259. Testator provided that remainders, etc., should go to "my residuary devisees, named in the ninth clause of this my will." By the eighth clause, after making certain specific bequests, he gave "all the personal effects belonging to me and on storage in" a certain warehouse to a certain person, and by the ninth clause gave "all the rest, residue, and remainder of my property, of every kind and character," to another person. Held that personalty not specifically bequeathed, and not in the warehouse passed under the ninth clause. In re Donohue's Estate, 109 App. Div. 158, 95 N. Y. S. 821, rvg. 46 Misc. 370, 94 N. Y. S. 1087. Will gave all testator's property with the exception of a certain sum to his wife in trust for certain purposes with remainder over, and gave residue of estate to her absolutely. Held that she took the excepted sum absolutely under residuary clause and not in trust. Mitchell v. Mitchell [Wis.] 105 N. W. 216. A general residuary bequest of personalty carries with it everything that falls into the residue after the making of the will by lapse, invalid disposition, or other accident. Leggett v. Stevens [N. Y.] 77 N. E. 874. Undisposed of half of remainder in sum given to widow for her support held to pass to general residuary legatee. Id.

14. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. Where bequest to found scholarship was adjudged invalid, held that fund provided for therein would pass under residuary clause. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, afg. 24 App. D. C. 187. Testatrix bequeathed "all the balance of the money now on hand and of which I die possessed after the payment of my just debts and the legacies mentioned herein" to certain persons. Held that two of such legacies which lapsed by reason of the death of the legatees during testatrix's lifetime fell into the general residuum. Woodroof v. Hundley [Ala.] 39 So. 907.

15. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998.

16. The devisees under a general residuary clause take all property described in a particular devise which for any reason fails to be effectual. Under Civ. Code, § 1332, providing that a devise of testator's real property passes all realty which he was entitled to devise at the time of his death not otherwise effectually devised. O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. Will devised and bequeathed "all the rest and residue of my property wherever situated" to wife and children in certain proportions, and subsequently attempted to create a trust in a portion of the realty included in the residue in favor of wife and one of such children until latter reached age of 18. Held that even if trust was invalid the realty became a part of the residue and did not pass as intestate property. Id. A general residuary clause carries with it any legacies or devises which for any reason have lapsed, or are void, or have been refused. Garrison v. Day [Ind. App.] 76 N. E. 188. Where widow elected to take against will, one-third of realty in fee devised to her held to pass under residuary clause. Id. Where testator devised prop-

Substitutions.[19]—Estates may be created to take effect in the alternative.[20] Clauses disposing of shares of legatees and devisees dying before a given period do not, without a positive and distinct indication of such an intention, extend to shares accruing thereunder.[21]

Property not effectually disposed of.[22]—Any property which the will does not attempt to dispose of,[23] or which is not effectually disposed of[24] and which does not fall into the residue,[25] passes to the heirs at law or next of kin as in case of intestacy. It will, however, be presumed that testator intended to dispose of all his prop-

erty in trust to pay income to his wife until his grandson should be 25, and then, or at his death before that time, to convey one-third to each of testator's sons and his wife in equal shares, or if either son should be dead, to pay his wife a certain sum, and the remainder to his grandson absolutely upon his attaining the age of 25, and one of the sons died before grandson leaving a wife, and grandson died before reaching age of 25, held that wife of deceased son was entitled to sum specified and that balance of son's share lapsed into residuum and passed to estate of grandson. In re Middleton's Estate, 212 Pa. 119, 61 A. 808.

17. Unless it is manifest from the provision of the will that testator intended to exclude a certain portion of his estate from the operation of the residuary clause. Must be manifest that in no event was such property intended to fall within the residuary clause, and it is not sufficient that it appear that testator simply intended to make a particular devise of a portion of his estate, which for some reason failed to be effectual. O'Connor v. Murphy, 147 Cal. 148, 81 P. 406.

18. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998.

19. See 4 C. L. 1935.

20. Gift of residuary estate to an established charity and another institution which testator wanted to establish, with provision that if he should not establish it the property should be divided between the established institution and his wife according to her will, held valid. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262.

21. But if there is a manifest intention that the entire subject of disposition shall remain in mass until the period of distribution and then be distributed among one and the same class of objects, then the accruing shares will be carried over to those objects, together with the original shares. Boggs v. Boggs [N. J. Eq.] 60 A. 1114. Where will, providing that proceeds of realty remaining unsold at death of testator's widow should be divided among testator's surviving children, clearly indicated an intention to separate children's respective interests, and to give them vested estates, held that the original share of any child dying during widow's life passed to the then surviving children, but the portions of shares accruing to any child by such survivorship passed at his death to his representatives, and not to the children surviving him. Id.

22. See 4 C. L. 1936.

23. Gilmore v. Jenkins [Iowa] 106 N. W. 193.

Held to pass as in case of intestacy: Undisposed of land, where testator devises property which he does not own. Godfrey v. Wingert, 110 Ill. App. 563. Residue not disposed of. In re Brannan's Estate [Minn.] 107 N. W. 141. Undisposed of corpus of fund after expiration of trust estate. Hiles v. Garrison [N. J. Eq.] 62 A. 865. Where testator gave wife an estate for life in realty and personalty and at her death gave two-thirds of what remained to a certain university, but failed to dispose of the other third, and university accepted from the executrix a sum less than such two-thirds in full satisfaction of the gift to it, held that balance of such two-thirds and the undisposed of one-third passed as in case of intestacy. Walker v. Bobbitt, 114 Tenn. 700, 88 S. W. 327.

24. Held to pass as in case of intestacy: Share of daughter of life tenant, dying without issue before death of life tenant, where will directed that estate should be held in trust for lives of children of life tenant to pay income to them, with remainder over to grandchildren on their arriving at age of 21, since shares of children were to be considered separately in reference to their disposition after their death. Minot v. Doggett [Mass.] 77 N. E. 629. Property given in trust for benefit of son, where trust so rested in personal discretion of trustee as to terminate on latter's death, and there was no direction as to disposition of the property in case trustee predeceased son, and no gift to son could be implied. Benedict v. Dunning, 110 App. Div. 303, 97 N. Y. S. 259. Property disposed of by void trust, there being no provision as to the ultimate disposition of the body of the estate. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945. Void charitable trust. Hegeman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392. Void charitable bequest. Moore v. Deyo, 212 Pa. 102, 61 A. 884. Property devised under trust which was invalid because no beneficiary was named. Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346. Trust contravening rule against perpetuities. In re Kountz's Estate [Pa.] 62 A. 1103. Lapsed charitable gift of residue. Brown v. Condit [N. J. Eq.] 61 A. 1055. A lapsed residuary devise goes to the heirs of testatrix who are next of kin of equal degree, living at the time of her death, or their descendants by right of representation. Cutter v. Burroughs [Me.] 61 A. 767. Realty devised to institution, where there is no such institution in existence and was none such at testator's death, notwithstanding that there is a general residuary clause. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998.

25. See Residuary clauses, ante this section.

erty,[26] and, if possible, a construction will be adopted which will prevent a partial intestacy.[27] Intestacy as to any part of the estate is to be determined as of the date of testator's death.[28] In New York accumulated surplus income not disposed of goes to those presumptively entitled to the next eventual estate.[29]

(§ 5) *E. Of terms respecting administration, management, control, and disposal.*[30]—Testator may delegate to another the power to name his executors, in which case the appointees will have exactly the same powers as if he had himself selected them.[31] In case testator designates the portion of his estate which is to be used for the payment of his debts, it alone may be resorted to for that purpose,[32] but income will not be accumulated to pay incumbrances where there is a gift of it and other provision is made for the payment of such incumbrances.[33] Whether interest on incumbrances and taxes on property given to the widow are to be paid out of income given to her or out of the general estate is a question of intention.[34]

26. Glore v. Scroggins [Ga.] 53 S. E. 690; Strawbridge v. Strawbridge [Ill.] 77 N. E. 78; Boehm v. Baldwin [Ill.] 77 N. E. 454; Long v. Hill, 29 Pa. Super. Ct. 606. Making of will raises presumption that testator intended to dispose of all of his estate. O'Connor v. Murphy, 147 Cal. 148, 81 P. 406; Welsh v. Gist [Md.] 61 A. 665; Mills v. Tompkins, 110 App. Div. 212, 97 N. Y. S. 9, rvg. 47 Misc. 455, 95 N. Y. S. 962. Is strengthened by rule favoring a construction preventing partial intestacy. Id. Where the residue is given, every presumption is to be made that no intestacy was designed. Welsh v. Gist [Md.] 61 A. 665. The presumption, when applicable, may be relied on to support a contention that a gift asserted to be only one for life is in reality absolute, especially where there is no limitation over, and where the alleged intestacy would occur in the residuary clause. Id. Presumption is founded on presumed intention, and always yields to the actual intention when it can be gathered from the entire will. Adams v. Massey [N. Y.] 76 N. E. 916. Presumption held neutralized by presumption against intention to disinherit heir. Id.

27. Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346; In re Blackstone's Estate, 47 Misc. 538, 95 N. Y. S. 977; In re Pilsbury's Will, 99 N. Y. S. 62. Will must, if possible, be so construed as to prevent partial intestacy. Civ. Code, § 1326. O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. A construction favorable to testacy will always obtain when the language used reasonably admits of it. In re Dunphy's Estate, 147 Cal. 95, 81 P. 315; In re Heywood's Estate [Cal.] 82 P. 755. Construction disposing of entire estate will be adopted if that meaning can be reasonably given it. Strawbridge v. Strawbridge [Ill.] 77 N. E. 78. "Children" construed as "heirs" for purpose of avoiding partial intestacy. Id. When will is subject to two constructions the one preventing partial intestacy should be adopted. Gilmore v. Jenkins [Iowa] 106 N. W. 193. The rule does not apply so as to favor a construction which will prevent intestacy as to a part of testator's property, where he concededly died intestate as to another part. Id. Will not be applied so as to construe a gift of the "undivided one-fifth" of the west half of a certain tract to testator's five daughters as a gift of an undivided fifth to each of them, where no disposition was made of east half. Id.

28. Moore v. Deyo, 212 Pa. 102, 61 A. 884.

29. Real Property Law § 53. In re Perry, 48 Misc. 285, 96 N. Y. S. 879.

30. See 4 C. L. 1937.

31. Provision that, on the death of "either" of the executors and trustees appointed by the will, the "survivor" should "appoint some other individual in the place of the deceased executor," who should have all the power of an executor and trustee as if originally named in the will, held not to give authority to the person so appointed by the survivor to appoint another trustee on the death of such survivor. In re Boning's Estate [Pa.] 63 A. 296.

32. Where he provides that debts are to be paid out of a certain fund it is error to charge them to the general estate. Phillips v. Duckett, 112 Ill. App. 587. Devise of land "with the distinct understanding that" the devisee "is to pay and assume any and all indebtedness due by me on account of purchase money of said place," exonerates the testator's personalty from its primary liability therefor. Gordon v. James, 86 Miss. 719, 39 So. 18. Debt constitutes no part of the indebtedness of the estate, and having been assumed by devisee before widow elected to take under the statute, held that her interest in the land was free from any incumbrance by reason thereof. Id. Where the will directs the payment of all testator's debts from the personalty, a devisee of realty, incumbered by testator after the execution of the will, is entitled to have the incumbrance discharged out of the personalty, though persons to whom pecuniary and specific legacies have been given will be thereby disappointed. French v. Vradenburg's Ex'rs [Va.] 52 S. E. 695.

33. Testator left farm in trust, to pay income, rents, and profits to daughters for life, with remainder to their children, gave trustee power of sale under certain conditions, and empowered him, if a mortgage which incumbered the farm was called in, to mortgage the farm to an amount not exceeding the incumbrance. Farm produced an income over the interest of the mortgage and the necessary expenses. Held that testator intended such income to be divided between daughters, and trustee was not bound to accumulate it for the ultimate payment

As a general rule pecuniary legacies become payable one year from the death of the testator, and bear interest only from that date,[35] in the absence of any provision in the will showing a contrary intention.[36] In Louisiana the universal legatee is, in the absence of forced heirs, invested with the ownership and seisin of the universal legacy from the moment of the death of the testator.[37] Shares given in trust should ordinarily be paid over to the trustees rather than to the beneficiaries.[38] A direction to distribute equally between children does not forbid the turning over of the share of one of them to an administrator, or to one legally entitled to receive it.[39] One entitled to a specified portion of the net income of the estate is entitled to have the estate held intact for the purpose of its payment.[40] A court of equity may make a selection of property which the will directs to be made by commissioners appointed by the county court.[41]

of the mortgage. Reed v. Longstreet [N. J. Eq.] 63 A. 500.

34. Will held to give widow net annual income of a specified sum in addition to the use of a house, or the rents and income thereof, so that interest on mortgage on house, taxes, etc., were payable out of the income of the residuary estate, and not out of widow's income. In re King [N. Y.] 76 N. E. 584.

35. See Estates of Decedents, 5 C. L. 1183.

36. Will giving certain sums in trust to pay the principal to beneficiaries in specified installments, and directing that "at every payment of principal there shall be added to such payment all the accrued interest on the whole principal unpaid up to the date of such payment," held not to require payment of interest from date of testator's death. Redfield v. Marvin [Conn.] 63 A. 120. Pecuniary legacy to be paid "out of my residuary estate upon final distribution," held, in view of the whole will, not to be payable until time fixed for division of residuary estate by trustees, and not at time of final settlement of estate in probate court. McDevitt v. Hibben [Ill.] 77 N. E. 586. Legacy in lieu of dower does not draw interest until a year from testator's death in the absence of anything in the will showing an intention that it shall become due and payable before that time. In re Martens, 106 App. Div. 50, 94 N. Y. S. 297. Where testator devised realty to wife and also gave her legacy, and will provided that provisions for her were in lieu of dower, held that she was not entitled to interest from testator's death, Id. Where will directed that legacies were to be paid "not later than the expiration of six years after my decease," held that they did not commence to bear interest until the expiration of that time. Bank of Niagara v. Talbot, 96 N. Y. S. 976.

37. Under the maxim "Le morr saisit le vif." Civ. Code arts. 940-942. Tulane University v. Board of Assessors [La.] 40 So. 445. Rule that property is owned by succession pending administration means only that it is so held for purposes of administration, and not that it is so held in hostility to or exclusion of the ownership and legal seisin of the universal legatee. Id. Though any taxes assessed against the succession are in effect assessed against the universal legatee, since the universal legacy is composed of what is left after all particular legacies, debts, and charges are paid, it does not follow that, where universal legacy is exempt, the particular legacies are also exempt, but the latter being in the hands of the succession representative for payment to the legatees, are properly assessed to the succession. Universal legatee does not pay the tax, but receives that much less under the will. Id. Hence if property of such legatee enjoys immunity from taxation, the property composing such legacy is exempt, and cannot be assessed to the succession while the succession is in the course of administration. Id.

38. Testator held to have left the disembarrassment of the estate from the widow's dower in the modes prescribed by the will to the discretion of the trustee to be exercised to the best interests of the cestuis que trust. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. Fund subject to power held payable to trustees appointed by donee for the appointees of the fund and not direct to appointees themselves. Stone v. Forbes [Mass.] 75 N. E. 141. Testator gave residuary estate to executors in trust to divide principal into as many parts as he should leave grandchildren, to collect and pay over income, and to pay over to each of said grandchildren one of the parts as they respectively became of age. Held that on settlement of accounts of surviving executor he should be required to turn over the whole residue to himself as trustee for the purpose of making division though two of the grandchildren were of age, the shares of the latter being payable after division. In re McCormick, 46 Misc. 386, 94 N. Y. S. 1071.

39. As where testator gave property to four children of his brother and appointed third person "to distribute the proceeds of the said property equally between them." Darlington v. Turner, 202 U. S. 195, 50 Law. Ed.—, rvg. 24 App. D. C. 573.

40. Where widow was entitled to one-third of the net income of the estate during life or widowhood, held that she was entitled to have the estate held intact for that purpose, and executor would not, at instance of remainderman, be required to sell the estate after giving widow satisfactory assurances. Marfield v. McMurdy, 25 App. D. C. 342.

41. Where will gave wife a certain sum to be selected from realty or personalty by commissioners, held that court of general equity jurisdiction had power to do what

Whether an executor[42] or trustee has a power of sale,[43] and the extent of such a power,[44] are questions of intention. A direction to divide an estate does not include a power to sell it,[45] but a power to partition realty does when the land is so situated that actual partition cannot be had.[46] An unexecuted power of sale given to the executor by the will for the purpose of distributing the proceeds in the manner provided is not revoked by an order of the court settling the estate and discharging the executor.[47] Devisees take subject to an express power of sale conferred on the executor,[48] which can only be defeated by a valid election on the part of all of them to take the realty in kind.[49] Trust powers may be implied by the fact that ordinary limitations of executorial power are negatived.[50] A power given executors to partition realty devolves upon the court if for any reason they are disqualified, or are unable or refuse to act.[51] Courts of equity have full power to authorize the conversion of property contrary to the provisions of a will, and differing from the purposes and plans of the testator, when necessary for the preservation of the estate.[52] Discretionary powers to sell,[53] or to apportion sums given to a class among its members,[54] or to pay

commissioners might have done, and election was properly made where she filed a pleading in a proceeding for the sale of the realty electing to take realty, it not appearing that she got any peculiar advantage, or that any one suffered any detriment thereby. Hartring's Ex'x v. Milward's Ex'r [Ky.] 90 S. W. 260.

42. Testatrix gave realty and personalty to certain persons to be divided among them in unequal shares, and provided that such shares should not be paid until donees should become of age, but in the meantime should be deposited in a bank on interest, and that her executor was "not to be prevented" from applying any share during the minority of the donee to his or her support and maintenance in his discretion. She then empowered executor to sell and dispose of estate as the law might require him to do. Held that executor had power of sale of both realty and personalty. Weber v. Waldeck [N. J. Eq.] 63 A. 495.

43. Will held to give trustees power to sell property of trust estate for purpose of reinvestment, subject to limitations of the trust, and the approval of the court. Bertron v. Polk [Md.] 61 A. 616. Will held to give trustees power to convert realty into money for the purpose of making a division among the beneficiaries of the trust. Varick v. Smith [N. J. Eq.] 61 A. 151.

44. Power to sell and reinvest personalty for the purpose of raising an income held not absolute or unqualified. Linn v. Downing, 216 Ill. 64, 74 N. E. 729. Provision ordering and directing executor to apply income to support and education of daughter, and ordering and directing sale of certain realty for that purpose if necessary, held to create an imperative power and trust duty, and not a mere naked and discretionary power to sell. Cutter v. Burroughs [Me.] 61 A. 767. Power held imperative where legacies were charged on land by implication whichever provision came first. Thissell v. Schillinger, 186 Mass. 180, 71 N. E. 300. Where realty was given to trustees with provision that no sale should be made during lifetime of beneficiaries without their consent, "nor" unless it was necessary to pay debts, held that testator intended "nor" in the sense of "or," and that power could be exercised without reference to necessity to sell to pay debts. Reed v. Longstreet [N. J. Eq.] 63 A. 500. Will directed payment of debts, expenses, etc., and authorized executrix "for that purpose" to sell such standing timber as might be sufficient therefor, "leaving to the good judgment of my executrix" what portions thereof to sell. Held that she had no authority to sell except for the purpose of meeting debts, etc. Linzy v. Whitney, 96 N. Y. S. 1075.

45. Glore v. Scroggins [Ga.] 53 S. E. 690.

46. O'Donaghue v. Smith [N. Y.] 77 N. E. 621, afg. 85 App. Div. 324, 83 N. Y. S. 398. As where power of sale given by will is revoked by codicil, but codicil states that testator does not intend to alter beneficial interests in land given by will, or trust therein created. Id.

47. Does not revoke power of sale given executor which directs him to sell the estate and distribute the proceeds among certain beneficiaries, where power has not been executed when such order is entered. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029.

48. Cronan v. Coll [N. J. Eq.] 60 A. 1092.

49. See Election and Waiver, 5 C. L. 1078.

50. Where testatrix gave realty and personalty to certain persons to be divided among them in unequal shares, provided that shares should not be paid until donees should become of age, but in the meantime should be deposited in the bank on interest, that executor was "not to be prevented" from applying any share during the minority of the donee to his or her support in his discretion, and then gave executor a power of sale, held that, as to the share of any minor, the executor was a trustee and was required to deposit his share at interest and had implied power to use it for support of minor in his discretion. Weber v. Waldeck [N. J. Eq.] 63 A. 495.

51. O'Donaghue v. Smith [N. Y.] 77 N. E. 621, afg. 83 N. Y. S. 398.

52. Must be some important and controlling reason for such action, it being insufficient that court may think some other plan better than that of testator. Johnson v. Buck [Ill.] 77 N. E. 163. Bill held not to state facts justifying sale of property. Id.

or withhold income or principal given to a beneficiary, must not be exercised arbitrarily, the discretion being a sound legal one.[55]

Testator may designate the kind of property in which funds are to be invested,[56] direct the employment of an accountant,[57] and fix the compensation of the trustee[58] or executor.[59]

Trustees need not qualify for a trust become functus officii.[60] Trustees should be appointed by the court in case none are appointed by the will,[61] or the will so directs.[62] Where only one of several trustees qualifies, he may exercise powers conferred by the will.[63] Giving powers to executors or their survivor negatives any power to

53. As a general rule a court of equity will give its sanction to a sale made by a trustee in the exercise of a discretionary power given by will, if it is fairly and reasonably exercised, having regard to the interest and character of the trust reposed in him. Bertron v. Polk [Md.] 61 A. 616. Exceptions to sale of stock upheld where, under will, proceeds would have to be invested so as to reduce income. Id.

54. Cannot be exercised arbitrarily, or through whim or caprice, but must be a sound legal discretion, its conclusions must be based on the application of the principles of right and justice to the facts, and the facts to be considered must be facts justly and legitimately bearing upon the comparative claims of the parties for recognition as recipients of the testator's bounty. Stephenson v. Norris [Wis.] 107 N. W. 343. In order to justify discrimination in amount as between beneficiaries there must be real and substantial differences of situation germane to the subject, and calling for differences in treatment. Discrimination among beneficiaries whose circumstances are substantially the same would be arbitrary and capricious. Id. Will giving shares of estate in trust directing trustees, upon happening of certain events, to pay to descendants of beneficiaries certain portions of the estate, "giving to each of said descendants such portion thereof as my said trustees shall deem best," held to give trustees broad discretion to apportion sums given to a class among its members equally or unequally, or to cut off one or more entirely. Id. Such discretionary power held wholly distinct from discretionary power given by another provision authorizing them to withhold for unfitness or unworthiness, and not to be limited by latter provision. Id.

55. Court will intervene when it appears that any trustee, however broad his discretion, is so administering his trust that it fails to accomplish the purpose for which it was created. Where trustee was directed to pay over to beneficiary so much of the income of certain stock as might, in his judgment, be necessary for his support, and it appeared that latter was sick and had no income except a pension, and that entire income and pension would be insufficient for his support, held that it would be an abuse of discretion for trustee to withhold any part of the income. In re Van Decar, 49 Misc. 39, 98 N. Y. S. 309. Will giving executor authority to pay over principal and increase of trust fund to certain persons, at such time or times and in such manner as such executor may deem best for their interests, held to give executor sound discretion in the premises, to be exercised according to his best judgment and in the best of faith, and not an absolute discretion. In re Wilkin [N. Y.] 75 N. E. 1105, rvg. 100 App. Div. 509, 91 N. Y. S. 1118. Where residue of estate was bequeathed to trustee to pay income to son in such amounts and at such times as should, according to the judgment and discretion of the trustee, seem best, in sums not to exceed $10 at any one time, and on son's death to transfer all the property, interest, and income then in his hands or possession, held that court would not interfere with exercise of trustee's discretion unless upon a showing of arbitrary wrongdoing amounting to a deprivation of the beneficiary of the benefits of the trust. Dubois v. Barbour [R. I.] 61 A. 752. Refusal to pay debts of beneficiary held not to warrant interference. Id.

56. Purchase of realty is a proper investment where will directs fund to be invested "on bond and mortgage, or in other property." In re Trelease, 96 N. Y. S. 318.

57. Executor held properly allowed amount paid accountant where his employment was suggested by the will. In re Arnton, 106 App. Div. 326, 94 N. Y. S. 471.

58. Provision in will charging estate with payment of such reasonable compensation to trustees "as they may deem just and proper according to the time and attention they may severally devote" to the affairs of the estate held to entitle them only to such sum as the law itself would allow, or as the court would determine to be reasonable. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

59. Where will gave executor certain sum annually in lieu of commissions "so long as he acts as executor of this will," held that he was entitled to such compensation beyond the period of administration, so called, particularly where will contemplated that executorship should last several years. Marfield v. McMurdy, 25 App. D. C. 342. Where will provides for payment of compensation out of the income generally, without any limitation, a deficiency of compensation in one year may be made up from the excess of income in succeeding years, particularly where no provisions of the will will be made to fail thereby. Id.

60. Trust for support of person already deceased. Harlow v. Bailey [Mass.] 75 N. E. 259.

61. Fact that no trustee is appointed will not prevent execution of trust. Hiles v. Garrison [N. J. Eq.] 62 A. 865.

62. Where will provided for appointment of trustee by circuit court in case testator's daughter should die, held that it was court's

appoint a substitute in case only one renounces.[64] Powers or trusts not resting in the personal discretion of a trustee or executor may be exercised or executed by substituted trustees or administrators.[65]

(§ 5) *F. Abatement, ademption, and satisfaction. Abatement.*[66]—As a general rule where the payment of debts is charged on the personalty either by the will or by operation of law, personal property at large must first be taken, then the residuary legacy, then general pecuniary legacies, then specific legacies, and lastly realty devised by the will.[67] In case, however, the will shows an intent to divide the estate equally, the share of each devisee or legatee will abate ratably, no distinction being made between realty and personalty.[68] Demonstrative legacies abate only ratably with specific ones if the fund out of which they are primarily payable exists as a part of testator's estate at his death, but if it does not so exist they abate pro rata with general ones.[69] Devises and bequests abate ratably to make up the share of the widow when she elects to take against the will.[70] Losses due to the insolvency of the

duty to do so on the happening of such contingency. Cruit v. Owen, 25 App. D. C. 514.

63. Where will appointed executor trustee and in case he should at any time cease to act, appointed two others to act in his stead, and executor resigned, one of the two others renounced, and the other was appointed trustee by the court, held that latter was entitled to exercise discretionary powers given as part of trust. In re Wilkin [N. Y.] 75 N. E. 1105, rvg. 100 App. Div. 509, 91 N. Y. S. 1118. Provision in will giving to trustees "and to any two of them" power to sell realty held intended to enlarge power of trustees rather than to restrict it, and not to render inapplicable Code Civ. Proc. § 2642, making sales by executors or trustees who qualify valid though others who do not qualify do not join, and deed by one trustee passed title where others did not qualify. Draper v. Montgomery, 108 App. Div. 63, 95 N. Y. S. 904.

64. Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385, afg. 113 Ill. App. 457.

65. Power conferred on husband as trustee to sell property "as he may deem best" held a personal trust which could not be exercised by substituted administrator. Hageman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392. Trust for benefit of son held to so rest in personal discretion of trustee that it terminated at latter's death. Benedict v. Dunning, 110 App. Div. 303, 97 N. Y. S. 259. Alternative devise to trustees to apply proceeds to maintenance and education of men preparing for the ministry, "to be selected by said trustees or any two of them," held not to repose personal confidence in trustees as to selection of beneficiaries, such power of selection pertaining to the office of trustee in any event, and hence charity was not limited to lifetime of trustees named, but was a permanent one, and was not rendered invalid by their death. Woodroof v. Hundley [Ala.] 39 So. 907. Court would appoint others. Id. Where testator gave property to trustees "to pay and see to the application of" a certain sum to a college to be used for the endowment for the prosecution of a certain line of research, held that there was no such personal trust as would defeat the bequest on the death or resignation of the trustees, but the court would appoint their successors. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed.—, afg. 24 App. D. C. 187. Same held true of bequest of income of certain sum to maintain a scholarship for the study of medicine, preferably in a named university, otherwise in some college in District of Columbia. Id. Trust powers conferred on an "executor" are construed as attaching to the office, conversely they attach to the person if he be a trustee though also an executor. Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385, afg. 113 Ill. App. 457.

66. See 4 C. L. 1939.

67. Gordon v. James, 86 Miss. 719, 39 So. 18. The doctrine of forced contribution does not apply against specific devisees in favor of specific legatees, as by statute it does among devisees, but specific legacies must be first obliterated before specific devises can be abated for the payment of debts, particularly in view of Code 1892, §§ 1881, 1893, making personalty the primary fund for payment of debts. Id.

68. Where it appears that testator intended, in the distribution of his property among his wife and children, to make them as nearly equal as possible, and devises and bequeaths his property specifically among them, and charges no specific property with the payment of his debts. O'Day v. O'Day [Mo.] 91 S. W. 921. Where will first directed payment of debts, then made specific gifts of realty and personalty to wife and children, and then gave all the remaining realty and personalty in equal shares to widow and children, no specific property being charged with payment of debts, and shares of children being substantially equal, held that entire residuary estate must first be disposed of to pay debts. Id.

69. O'Day v. O'Day [Mo.] 91 S. W. 921.

70. Devises and bequests abate ratably to make up the share of the widow when she elects to take under the statute. Gordon v. James, 86 Miss. 719, 39 So. 18. Under Code § 3279, providing that the amount allowed on any claim which it becomes necessary to satisfy in disregard of or in opposition to the will must be taken ratably from the interests of heirs, devisees and legatees, where testator gave his wife a life estate in six-tenths of his property with remainder over and gave the balance to others, and widow elected to take her dower, held that the

executor are borne equally by the whole estate.[71] Wills frequently provide that legatees shall take pro rata in case the estate is insufficient to pay legacies in full.[72] Legacies given in payment of debts,[73] or in lieu of dower,[74] do not abate, but a devise of land charged with the payment of the unpaid purchase money does.[75]

Ademption.[76]—A devise of realty is ordinarily adeemed by the sale or alienation of the property by testator during his lifetime.[77] So, too, a legacy is adeemed where testator, before his death, pays the full amount of it to the legatee in full satisfaction thereof.[78]

amount thereof should be deducted from the entire estate rather than from the part given to her for life, her use being immediately terminated on her election. Dillavou v. Dillavou [Iowa] 104 N. W. 432.

NOTE. Abatement to make up dower: Previous to the decision of Dillavou v. Dillavou [Iowa] 104 N. W. 432, the rule in Iowa has been as laid down in Hoskins v. Hoskins, 43 Iowa, 452, that the widow's dower should be deducted from the share set aside for her in the will. In the Hoskins case, which was cited and relied upon by the contestant in the Dillavou case, the estate was divided into moieties, one of which was given in fee to one daughter, the other to the widow for life with a remainder over to another daughter. The widow having elected to take her dower, the court held that it should be deducted from the moiety given to her in the will, and that the moiety given to the first daughter should not contribute. This was on the ground that the testator evidently intended to discriminate between the daughters. Aside from the fact, which the court in the Dillavou case says was manifestly overlooked, that the statute governs absolutely, it is difficult to see how the decision in the Hoskins case could have been reached. It stands alone in support of the proposition that the widow's dower should be taken from only part of the estate. While the amount of the dower is regulated by the statute it must be taken from the entire estate. 11 Am. & Eng. Enc. Law, p. 117. Darrington v. Rogers, 1 Gill [Md.] 403; Lilly v. Menke, 126 Mo. 190; Appeal of Heineman, 92 Pa. 95; Wallace v. Wallace's Ex'r, 15 W. Va. 722. And if advancements have been already made to the heirs or legatees they must be regarded as part of the estate for the purpose of computing the dower. Plympton v. Plympton, 6 Allen [Mass.] 178; Worth v. Atkins, 4 Jones Eq. [N. C.] 272.—See 4 Mich. L. R. 84.

71. Where will directed estate to be divided into equal shares to be held in trust for brothers and sisters, and on their death the principal to be paid to their children, and, after paying over a portion of such shares to a part of the children the executor became insolvent, held that the loss was to be borne by the whole estate, and that nothing more should be paid to those who had received partial payments until the others had received an equal amount. Barret v. Gwyn [Ky.] 88 S. W. 1096.

72. Direction in codicil for pro rata payment "of the sums given and bequeathed to sundry persons and institutions as enumerated in my will and codicil if there should not be sufficient money left from the salable portions of my estate to pay the full amounts of the sums" so given, held that all legacies, except specific bequests, and including legacies given out of trust fund abated pro rata in case there was not enough to pay them in full after paying debts, expenses, etc. Emmons v. Dow [Mass.] 77 N. E. 310. Where the estate proved insufficient to permit of the carrying of the provision for the widow and also payment of bequests to children and grandchildren, held that the children and grandchildren take pro rata under a subsequent clause providing that the sum remaining be divided pro rata among them. Moore v. Idlor, 6 Ohio C. C. (N. S.) 19.

73. Dower of widow electing to take against will should be set off from property other than that devised in consideration for services pursuant to contract by decedent, to which she consented. Brandes v. Brandes [Iowa] 105 N. W. 499.

74. If, at the time of the making of the will, the wife had an inchoate right to any dower out of the testator's estate. Legacy is not a voluntary bounty or favor in such case, but is based on a meritorious consideration. Plum v. Smith [N. J. Eq.] 62 A. 763. Will held to show an intent that legacy was to be in lieu of dower, though not expressly so stating. Id. Testator bequeathed to his wife, in lieu of dower, the interest on a certain sum which was charged on land. Sum was invested in a mortgage on all testator's land, which, default having been made in payment of interest, was foreclosed for sum insufficient to pay principal and interest. Held that legacy to widow would not abate so long as any portion of testator's realty or the proceeds thereof remained, and hence her administrator was entitled to preference over other legatees in payment of interest accruing before widow's death. Id.

75. One accepting a devise of land charged with the payment of, the unpaid purchase money is not a purchaser for value, but occupies the same position as the other devisees and legatees and his share must abate ratably to make up the share of the widow who elects to take against the will. Gordon v. James, 86 Miss. 719, 39 So. 18.

76. See 4 C. L. 1939.

77. Upon the sale of devised realty by the testator during his lifetime the proceeds thereof of which he may die possessed will not be substituted for the property itself, unless the will so directs. In re Miller's Will [Iowa] 105 N. W. 105. Sale or alienation by testator during his lifetime of devised property works revocation of devise, and it lapses. Hoffman v. Steubing, 49 Misc. 157, 98 N. Y. S. 706. Testator gave wife certain realty free of incumbrances and a sum of money which provisions were to be in lieu

Satisfaction of debts by legacies.[79]—A legacy to a creditor will not be deemed a satisfaction of the debt unless the will shows that testator so intended.[80] A gift "in consideration of" services is not an acknowledgment of a debt.[81]

(§ 5) *G. Proceedings to construe wills.*[82]—In the absence of statutory provisions to the contrary,[83] courts of equity have jurisdiction to construe wills[84] for the purpose of directing the executor or administrator in the performance of his duties,[85] or where a trust is involved,[86] or where such relief is incidental to the relief sought in suits of which they have jurisdiction.[87] There must, however, be a reasonable doubt as to the meaning of the language used,[88] and some equitable estate or interest must be involved.[89] The question whether a legatee or devisee takes for his own

of dower. During his lifetime he sold the realty, his wife joining in the conveyance, grantee giving a purchase money mortgage to testator's daughter by his direction. Held that widow was only entitled to the money bequest in lieu of dower and was put to an election whether she would take it or under the statute. She was not entitled to an equivalent of the proceeds of the sale of the realty nor to the amount of a mortgage thereon when it was sold. Id. Testator gave certain realty, "or the proceeds derived from the premises," and a certain trust fund to his daughter in remainder, if living on the happening of a certain contingency, or if not directed that the title to said property and the fund "or, in the event of the sale hereinafter had of said premises, then the proceeds derived from the same," to be paid to his grandchild. Testator sold the realty during his lifetime. Held that devise over was revoked but that proceeds of sale passed to devisee. Id.

78. Gallagher v. Martin [Md.] 62 A. 247.

79. See 4 C. L. 1940.

80. Not where will states some other motive or reason for making the gift. In re Arnton, 106 App Div. 326, 94 N. Y. S. 471. Not where legacy was larger than debt and will recited that it was made for purpose of repaying those who had been kind to testator during his illness. Id.

81. Legacy reciting that it is "in consideration of her care for" testator's mother and son held not to imply a debt, but a bounty, and not to be an acknowledgment of a legal obligation so as to remove the bar of limitations in an action for such services. McNeal v. Pierce [Ohio] 75 N. E. 938.

82. See 4 C. L. 1940.

83. Probate court has exclusive original jurisdiction to construe wills when such construction is necessary to the administration of the estate. Appleby v. Watkins [Minn.] 104 N. W. 301. Nothing short of an express statute will make the jurisdiction of the county court to construe wills exclusive so as to prevent circuit court from giving directions to trustees. Laws 1905, c. 163, p. 239, giving county courts jurisdiction to construe wills in proceedings brought solely for that purpose does not, and does not purport to abridge the powers of the circuit court in that regard. Stephenson v. Norris [Wis.] 107 N. W. 343.

84. The chancery court is clothed with the fullest jurisdiction to determine all matters relating to the administration of estates, and is always open for the hearing of a petition by anyone interested asking for the construction of the will of a decedent. Owens v. Waddell [Miss.] 39 So. 459.

85. An executor or administrator with the will annexed may ask and receive the aid and direction of a court of equity in the execution of his trust when his duty with respect thereto is a matter of doubt. Norris v. Beardsley [N. J. Eq.] 62 A. 425.

86. Court of equity held to have jurisdiction to construe will attempting to create trust. Filkins v. Severn, 127 Iowa, 738, 103 N. W. 346. The circuit court has plenary jurisdiction over actions for the construction of wills especially where trust powers are involved. Stephenson v. Norris [Wis.] 107 N. W. 343. It is not necessary in such cases that there should be an actual litigation begun or contest pending to justify the court in entertaining the action. Id. A trustee is entitled to the protection of the court in the execution of his trusts, and when real and serious doubts confront him as to his duty, is entitled to, and should ask for, the advice of the court to guide him. Case held proper one for exercise of such jurisdiction. Id.

87. The original jurisdiction of the district court over an action to quiet title to realty is not defeated by the fact that the construction of a will is necessarily involved in the inquiry. St. James Orphan Asylum v. Shelby [Neb.] 106 N. W. 604. Whenever the equitable relief sought in an action in the court of chancery involves the construction of a will, that court will construe the same so far as requisite to that relief. Such construction may be necessary in statutory suit to quiet title. Morris v. Le Bel [N. J. Eq.] 63 A. 501. A suit for the construction of a will and the appointment of a trustee to execute such trusts as it may be determined are thereby established, is properly brought in the court of chancery, since the relief sought is the appointment of a trustee, and the necessity for such appointment requires the construction of this will as an incident to the relief sought. Hiles v. Garrison [N. J. Eq.] 62 A. 865.

88. Executor or administrator cannot maintain a bill in equity to construe the will, when the case is clear, and there is no reasonable doubt as to his duty. Whether there is a reasonable doubt depends on circumstances of each case. Norris v. Beardsley [N. J. Eq.] 62 A. 425.

89. A bill to construe an ambiguous devise of land will not lie where no equitable estate or interest is involved. Not where matter in dispute is between rival claimants under conflicting legal titles. Norris v. Beardsley [N. J. Eq.] 62 A. 425. In any

benefit or upon some trust which is not in any way disclosed in or suggested by the will is not open for consideration.[99] Statutes prohibiting the bringing of actions against executors, or proceedings to compel distribution until the expiration of a certain time after the grant of letters, have no application to such suits.[91]

All other powers to entertain proceedings for the construction of wills depend on the statutes of the various states.[92] Statutory proceedings for construction may generally be maintained by parties in interest.[93] As a general rule there is no power to construe a will in anticipation of and in order to defeat probate.[94] Service of process is regulated by statute.[95] The petition must set out the whole will, even though the construction of only one item is sought.[96]

In construing wills the court will not decide questions which may never be presented by actual conditions and occurrences, and are of no present importance,[97] nor

event such a bill could not be entertained on behalf of an executor who is charged with no duty in respect to the land in dispute. Id. Court of equity has no jurisdiction of bill merely seeking opinion as to legal title to realty devised where executrix asks no instructions in regard to her duties, and no trust is involved nor equitable relief of any sort sought. Beard v. Beard [N. J. Eq.] 63 A. 25.

90. In suit by executor. Manson v. Jack [N. J. Eq.] 62 A. 394. Not in any event where the beneficiaries of the alleged trust, which is claimed to be void, are not parties. Id.

91. Where legatee was given comfortable support for life, held that she might file a petition in equity for the construction of the will and to fix the amount to be paid her without regard to Code 1892, § 1922, prohibiting the bringing of actions against an executor until six months after the date of his letters, or § 1961 authorizing a proceeding to compel distributien at any time after the expiration of 12 months from the grant of letters. Owens v. Waddell [Miss.] 39 So. 459.

92. Minnesota: The probate court has exclusive original jurisdiction to construe wills when such construction is necessary to the administration of the estate. Appleby v. Watkins [Minn.] 104 N. W. 301.

New York: Under Code Civ. Proc. § 2624, if party expressly puts in issue before surrogate the validity, construction, or effect of any disposition of personalty by will, he must construe it unless he refuses probate by reason of failure to prove matters specified in Id. § 2623. In re Pilsbury's Will, 99 N. Y. S. 62. Statute does not authorize construction before will is admitted. Id. Must determine it on decree if will is admitted. In re Stocum's Will, 94 N. Y. S. 588. While he has no power to pass on a devise of land he may construe a will and declare the validity of a trust embracing personalty. Realty and personalty were blended. In re Trotter's Will, 182 N. Y. 465, 75 N. E. 305. May determine all questions of construction, though disposal of proceeds of realty is involved, whenever it may be necessary in order to accomplish distribution on an accounting. In re Keogh, 47 Misc. 37, 95 N. Y. S. 191, modified on other grounds, 98 N. Y. S. 433.

93. Where testator gave legacies to widow for life with remainder to others, thus constituting her trustee for the remainder-men, held that the widow's executor had capacity to sue for a construction of the will of testator and for an accounting for the purpose of obtaining directions as to the distribution of the remainder of such legacies. Leggett v. Stevens [N. Y.] 77 N. E. 874.

94. In re Davis' Will, 182 N. Y. 468, 75 N. E. 530.

95. Service of process by publication on a non-resident defendant in a suit to construe a will is authorized under Code § 3534. Dillavou v. Dillavou [Iowa] 106 N. W. 949.

96. A petition in a cause brought under Rev. St. 1906, § 6202, to obtain the construction of one item only of a will, which does not set forth the entire will is bad on general demurrer. Devenney v. Devenney [Ohio] 77 N. E. 688.

97. In construing will on application for partial distribution on theory that primary trust created by the will is void court will not determine validity of provision as to disposal of excess income by trustees which is entirely independent of primary trust to pay income held to be valid, particularly where it does not appear that there is, or is likely to be, any such excess. In re Heywood's Estate [Cal.] 82 P. 755. Under a petition for instructions to testamentary trustees the court is not called upon to consider future conditions which may not arise in the form anticipated by the parties, or to give directions beyond what is required to enable the trustees to perform their present duties. Peabody v. Tyszkiewicz [Mass.] 77 N. E. 839. Executor or administrator cannot maintain a bill to construe gifts of personalty where the amount thereof is small and it does not appear that he has obtained, or can obtain, possession of any of it, or that after paying the expenses of administration, there will be anything left for distribution. Norris v. Beardsley [N. J. Eq.] 62 A. 425. Executor not entitled to directions as to the distribution of property which is not yet in his hands and in regard to which he is not then, and may never be, charged with any duty of distribution. Bill for construction for purpose of obtaining instructions as to proper disposition of money which it was alleged would come into complainant's hands as proceeds of sale of property in which testatrix was interested, held premature when brought before land had been sold or its proceeds had been paid to him. Id. Executor not

will a provision be construed at the instance of one whom it cannot possibly affect.[98] The court is not concerned with the widow's rights under an antenuptial contract purporting to set aside a certain sum as a marriage settlement, where at testator's death no specific property has been set aside for that purpose.[99]

The usual rules as to the conclusiveness of judgments[1] and as to the right to appeal therefrom[2] apply.

Costs[3] and attorney's fees are allowable as in other equitable cases.[4] The amount allowed is generally discretionary.[5] Allowances to guardians ad litem of in-

entitled to directions at a time when the parties entitled to take on such distribution cannot yet be ascertained. Id. Where property is given in trust for beneficiary during her life, and on her death to her children as she shall appoint, and in default of appointment to designated persons, held that court would not, during beneficiary's lifetime, direct the trustee as to his duty in case she should die without making such appointment. Varick v. Smith [N. J. Eq.] 61 A. 151. Code Civ. Proc. § 2624, requiring surrogate to construe dispositions of personalty in certain cases, does not deprive him of the discretion possessed by a court of equity to refuse to decide questions which may never be presented by actual conditions or occurrences. In re Mount's Will [N. Y.] 77 N. E. 999, afg. 107 App. Div. 1, 95 N. Y. S. 490. Surrogate held not to have abused his discretion. Id. Where testator gave property to trustees to pay income to wife for life, and thereafter to devote it to the creation of some charity or to pay it to some existing one, held that court would not select charity in suit to construe will before wife's death. Rothschild v. Goldenberg, 103 App. Div. 235, 92 N. Y. S. 1076. Evidence as to present intention of trustees in that regard, prior to wife's death, held incompetent. Id. Where will makes conditional alternative dispositions of a remainder after a trust presently in force, some of which may be valid and some void, and the disposition which will take effect cannot be ascertained until the time for carrying it into effect arrives, and there is no present necessity for determining the ultimate rights of the parties, the decree admitting the will will not adjudge the validity of such provisions. In re Mount's Will, 107 App. Div. 1, 95 N. Y. S. 490. Court will not construe will for purpose of determining proper distribution of deceased son's share, where time of distribution has not yet arrived, and there is no present necessity for any decision on the question and where there may be other interested parties in existence at the time for distribution who will be entitled to be heard. Saul v. Swartz, 98 N. Y. S. 549.

98. Will devised realty in trust to use income for a valid charitable purpose, and subsequently provided that a portion of such income should be used to keep up a certain graveyard excepted from such devise. Held that if the latter provision was valid it would simply reduce the amount of income applicable to the trust purposes, and if invalid it was of no effect, and whole income would go to trust, so that other devisees and legatees had no interest in question of its validity. Woodroof v. Hundley [Ala.] 39 So. 907.

99. Central Trust Co. v. Egleston [N. Y.] 77 N. E. 989, rvg. 96 N. Y. S. 1116, 47 Misc. 475, 95 N. Y. S. 945.

1. See Former Adjudication, 5 C. L. 1502; Judgments, 6 C. L. 214. Stout v. Stout [Va.] 51 S. E. 833.

2. See Appeal and Review, 5 C. L. 121. Trustees appointed to take charge of property and, after death of life beneficiary, to apply residue to some charity to be selected by them, are entitled to appeal from judgment, in suit to construe will, disposing of trust property in contravention of testator's intention. Rothschild v. Goldenberg, 103 App. Div. 235, 92 N. Y. S. 1076. Executor held aggrieved party within meaning of Rev. St. 1898, § 4031, and to have right to appeal from judgment construing will. In re Paulson's Will [Wis.] 107 N. W. 484. In suit to construe a will failure of defendants to serve notice of appeal on nonresident beneficiary, who stood on same footing as plaintiffs and had been joined as defendant, held to deprive appellate court of jurisdiction. Dillavou v. Dillavou [Iowa] 106 N. W. 949, rvg. 104 N. W. 432.

3. See 4 C. L. 1941. See, also, Costs, 5 C. L. 842. In action by heir at law seeking to have bequests and devises set aside, in which event property would have gone to heirs as intestate, where residuary devise was sustained and certain of the bequests set aside, held error to charge residuary devisees with any part of plaintiff's costs or attorney's fees, the action being in effect one to recover the property bequeathed and devised. Ky. St. 1903, § 889, construed. Trustees of Home for Poor Catholic Men v. Coleman [Ky.] 92 S. W. 342.

4. Where executor brought an action to construe will which attempted to execute powers conferred on testatrix by the will of her husband, and court decided that there was no valid execution of such powers, and appointed an administrator with the will annexed for the first estate, held that executor was entitled to reasonable attorney's fees. Ketchin v. Rion [S. C.] 51 S. E. 557. In an action by an executor to construe a will the court has no authority to make an allowance of attorney's fees to defendants, payable out of the estate, in addition to the taxable costs. Kronshage v. Varrell [Wis.] 107 N. W. 342. Laws 1901, c. 397, p. 569, relating to attorney's fees in will contests does not apply to actions to construe wills. Stephenson v. Norris [Wis.] 107 N. W. 343.

5. The question of the allowance of counsel fees in suits to construe wills is a judicial one resting largely in the discretion of the court to which it is presented. Watkins v. Bigelow [Minn.] 104 N. W. 683. The amount allowed must, however, be limited to a fair

fant parties should ordinarily be paid out of the shares of such infants rather than out of the general estate.[6]

§ 6. *Validity, operation, and effect in general.*[7]—The will speaks from the death of the testator, and title to property bequeathed passes at that time.[8] A fee may be limited upon a fee by way of executory devise in a will, though this cannot be done by deed.[9] A provision in the will of a married woman directing the erection of a monument over her grave is valid.[10] A will held void for want of capacity is void for all purposes.[11]

A provision making the payment of a legacy conditional on the regular attendance of the legatee at a certain church is not contrary to public policy,[12] nor does it violate the constitutional provision guarantying freedom of worship.[13] The mere fact that testator committed suicide shortly after the execution of his will is insufficient to warrant the inference that it was executed with suicidal intent so as to render it void as contrary to public policy.[14] A gift upon condition subsequent working a forfeiture in case of the marriage of the beneficiary is void as in restraint of marriage,[15] but a limitation in favor of a beneficiary during her nonmarriage is valid.[16] A codicil revoking a bequest in case the legatee presents a claim against the estate is not void on its face, but is only void in case such claim is presented.[17]

Estates taken by appointment come from the donor and not under a will by which the power is exercised.[18] The effect in New York of the exercise of a power to appoint by will to certain persons is to transmit their title from the donor to the donee and from the donee to the appointees.[19] The exercise of a special power is not to be regarded as nugatory merely because the appointment is greatly similar to what the donor's devise would have accomplished in case of nonexercise, the dissimilarity being in a material particular.[20] Administrative powers may be extinguished by family settlements which make them unnecessary.[21]

and reasonable compensation for the services rendered. Not discretionary in sense that court may allow more than such amount. Id. Allowance held excessive. Id. In suit to construe will, allowance to executors, widow, trustees, and guardians ad litem of infants, reduced. Rothschild v. Goldenberg, 103 App. Div. 235, 92 N. Y. S. 1076.

6. Stephenson v. Norris [Wis.] 107 N. W. 343. Allowance to guardian ad litem representing issue of deceased legatee in a suit to construe a bequest as between them and legatee's administrator. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44.

7. See 4 C. L. 1944.

8. Succession taxes are properly assessed as of date of death, regardless of fact that will has not been probated. In re Hartman's Estate [N. J. Eq.] 62 A. 560. Legacy left to bankrupt by testator who died on the same day that legatee filed a voluntary petition, but before such filing, held to have passed to trustee in bankruptcy. In re McKenna, 137 F. 611.

9. Limitation over after a fee in case of the death of the devisee without issue before attaining the age of 25 held valid. Johnson v. Buck [Ill.] 77 N. E. 163.

10. In re Koppikus' Estate [Cal. App.] 81 P. 732.

11. If, on trial in district court on appeal from order of probate court admitting will, it is established that will is void for want of capacity, it is void for all purposes, and cannot be held invalid as to personalty and valid as to realty. In re Sheeran's Will [Minn.] 105 N. W. 677. Hence administrator of heir at law taking appeal cannot complain if widow, as a result thereof, takes the realty. Id.

12. In re Paulson's Will [Wis.] 107 N. W. 484.

13. Const. art. 1, § 18. In re Paulson's Will [Wis.] 107 N. W. 484.

14. Roche v. Nason [N. Y.] 77 N. E. 1007, afg. 105 App. Div. 256, 93 N. Y. S. 565.

15. In re Holbrook's Estate [Pa.] 62 A. 368.

16. In re Holbrook's Estate [Pa.] 62 A. 368. See, also, Trenton Trust & Safe Deposit Co. v. Armstrong [N. J. Eq.] 62 A. 456; Harlow v. Bailey [Mass.] 75 N. E. 259.

17. In re Stocum's Will, 94 N. Y. S. 588.

18. Stone v. Forbes [Mass.] 75 N. E. 141.

19. Does not pass direct, and is a taxable transfer under donee's will. In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880. Under a father's will creating a trust with a power to his daughter to appoint her children and remainder to them if she failed to appoint, and her will making the appointment they took under her will, not under her father's. Id.

20. Hence appointment under power being an act necessary to transfer title could not be ignored in determining whence title came. In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880.

21. Cronan v. Adams [Mass.] 75 N. E. 101.

In Louisiana questions as to the transmission of the property from the deceased to those who are to take it under the will, and as to the terms of the latter are governed exclusively by the civil code, and the common law has no application.[22]

What law governs.[23]—At common law and as a general principle of international comity, the lex loci rei sitae governs the formal execution and validity of a will of realty.[24] This rule has, however, been changed by statute in some states so as to make valid a will of realty executed in accordance with the law of the place of testator's domicile.[25] As a general rule the validity of a will of personalty is to be determined by the law of testator's domicile,[26] and the same is true in regard to its interpretation[27] in the absence of a statute[28] or a provision of the will to the contrary.[29]

The property rights created by the will are judged in the Federal courts according to state laws.[30]

WINDING UP PROCEEDINGS; WITHDRAWING EVIDENCE; WITHDRAWING PLEADINGS OR FILES, see latest topical index.

WITNESSES.

[BY CHARLES A. JOHNSON.]

Scope of title.—This article treats of the competency of persons to give testimony in court and the rules of law relative to the credibility of witnesses, their im-

22. Tulane University v. Board of Assessors [La.] 40 So. 445.

23. See 4 C. L. 1943.

24. Lindsay v. Wilson [Md.] 63 A. 566. In Ohio lex rei sitae controls in the construction of a will executed in another state by a resident thereof devising lands in Ohio. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261. Where by a will executed in another state a testator devises land situated in Ohio to his daughter "during her natural life and at her decease to go to her lawful heirs," although under the rule prevailing in such other state such will would have conveyed a fee simple in accordance with the rule in Shelley's case, yet under the rule prevailing in Ohio, these words created only a life estate in such Ohio lands. Id.

25. Code Pub. Gen. Laws 1904, art. 93, § 327, providing that every will made outside the state shall be held valid therein if executed according to the law of the place where the same was made, or where testator was domiciled when it was made, or according to the laws of the state, applies equally to wills of realty and personalty. Lindsay v. Wilson [Md.] 63 A. 566. Holographic will executed according to laws of France by a citizen of Maryland domiciled in that country held to pass realty in Maryland, though not witnessed as required by the laws of that state. Id.

26. Under Ill. statute of wills (Hurd's Rev. St. 1903, c. 148) §§ 2, 9, will is valid to dispose of personalty having its situs in that state, wherever executed, either when exe-

peachment and corroboration, and the privileges of witnesses. The competency, materiality, and relevancy of testimony,[31] the manner of eliciting the same from witnesses,[32] and the qualification and examination of experts,[33] are elsewhere treated.

§ 1. *Capacity and competency of witnesses in general.*[34]—Possession or lack of personal knowledge of the facts in regard to which he is called to testify is sometimes applied as a test of the competency of the witness;[35] but it would seem that an objection, based on lack of personal knowledge of the witness, should be directed to the competency of the testimony, as that it is hearsay or opinion evidence,[36] and not to the competency of the witness, except where it is sought to qualify a witness to give expert or opinion evidence.[37] But lack of personal knowledge may, of course, be shown to affect the weight of evidence and the credibility of the witness.[38] That a witness is under the influence of a party is not a disqualifying circumstance.[39] An imbecile is not, in Iowa, necessarily incompetent; the question of his competency is for the court.[40] An objection to the competency of a witness should be made when

cuted in accordance with the requirements of such statute, or if executed and proved in accordance of the laws of the state where it is executed. Palmer v. Bradley, 142 F. 193.

27. The law of the place where the will is made and the testator is domiciled controls in the ascertainment of the persons who are to take personalty under the will, in the absence of a provision to the contrary. Who are meant by "heirs" in a gift to one, or her heirs. In re Reisenberg's Estate [Mo. App.] 90 S. W. 1170.

28. Code Pub. Gen. Laws 1904, art. 93, § 327, providing for the probate of a foreign will of a testator originally domiciled in Maryland, and that when so probated it shall be governed by and construed and interpreted according to the laws of that state regardless of the lex domicilii, unless testator shall expressly declare a contrary intention therein, does not require the court to give a foreign word or expression a different meaning from that given it in the country where the will was written. Lindsay v. Wilson [Md.] 63 A. 566. Merely means that after a will written in a foreign language has been translated, and the meaning of the words and terms used therein ascertained, the law of that state rather than that of testator's domicile is to control in construing and interpreting it. Id. French will attempting to dispose of all property of which testator could dispose at his death, and appointing wife sole legatee, held to pass realty in Maryland, the French word translated "property" including in France both realty and personalty, and the word translated "legatee" also designating one to whom realty passes by will. Id.

29. Fact that bequest to sister, and, in case of her death before testator, "to her heirs," recited that she resided in Germany held not to show an intention that German law should govern in determining who were her heirs. In re Reisenberg's Estate [Mo. App.] 90 S. W. 1170.

30. In determining whether a will creates an express trust so as to prevent fund bequeathed from passing to trustee in bankruptcy. In re McKay, 143 F. 671.

31. See Evidence, 5 C. L. 1301.

32. See Examination of Witnesses, 5 C. L. 1371.

33. See Evidence, 5 C. L. 1301.

34. See 4 C. L. 1944.

35. Witness held incompetent to testify to computations he not having made them, not knowing whether they were correct nor what items were included. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99. Alimony clerk in office of the commissioner of public charities and witness on a bond conditioned for payments for support of one convicted of abandoning his wife without adequate support is not competent to testify to what has been paid on the bond. Tully v. Lewitz, 98 N. Y. S. 829. An attorney who drew a lost will is competent to testify as to its provisions. Inlow v. Hughes [Ind. App.] 76 N. E. 763. In an action for trespass, consisting of the attaching of telephone wires to the roof of plaintiff's building, a former employe of defendant who had procured several thousand licenses for defendant for the use of roofs for telephone purposes and had procured the licenses for the terminal station in question, held competent to testify that the wires in question belonged to defendant. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. One who has had business correspondence with another is competent to testify as to the genuineness of a letter alleged to have been written by him though he never saw him write. State v. Goldstein [N. J. Law] 62 A. 1006. A witness testified that he knew accused's reputation for peace or violence and that it was good. On cross-examination he admitted he had never heard accused's reputation discussed. Held error to exclude all his testimony. Sinclair v. State [Miss.] 39 So. 522.

36. As to such evidence, see Evidence, 6 C. L. 1301.

37. As to expert and opinion evidence, and qualification of experts, see Evidence, 6 C. L. 1301.

38. Testimony of express agent that he had no independent recollection of the transaction and could only testify what his books showed; held admissible. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18.

39. The fact that the mother of one of the parties was 80 years old, lived with the party and consequently was under his in-

the witness is called,[41] and the party raising it has the burden of proving the witness incompetent.[42]

Children.[43]—The law fixes no precise age within which children are absolutely incompetent;[44] the question of their competency is one for the trial court,[45] the tests applied being their intelligence,[46] religious training,[47] moral sense,[48] and ability to understand the nature of an oath.[49]

Persons acting in official capacity at trial.[50]—In a prosecution in a superior court, a justice before whom defendant has previously been convicted of the same offense is competent to testify as to occurrences at the former hearing.[51] A juror at a previous trial is competent, when called as a witness in a subsequent trial, to testify to material, relevant facts coming to his knowledge while making a view of the premises involved.[52]

Persons convicted or accused of crime.[53]—The common-law disqualification for conviction of an infamous crime has been generally removed by statute.[54] Thus, in some states, one who has been jointly indicted with another and who has entered a plea of guilty is a competent witness for the state on the trial of his co-defendant.[55] But in Texas, one jointly indicted with another is incompetent as against his co-defendant.[56] Proof of conviction of crime is essential to render a witness incompetent in states where that ground of disqualification still exists.[57] Conviction of crime may be shown in many states to affect the credibility of a witness, though it cannot affect his competency.[58]

Statutory qualifications[59] or competency in particular cases[60] is discussed in the notes.

fluence held not to disqualify her. Timma v. Timma [Kan.] 82 P. 481.

40. Question of competency of imbecile (prosecutrix for rape under Code § 4758, her imbecility being charged in the indictment), held for court. State v. Crouch [Iowa] 107 N. W. 173.

41. Objection to competency should be made when witness is called and before his examination in chief or it is waived. Standley v. Mass, 114 Ill. App. 612. For general discussion, see Saving Questions for Review, 6 C. L. 1385.

42. Standley v. Mass. 114 Ill. App. 612.

43. See 4 C. L. 1945.

44. Clark v. Finnegan, 127 Iowa, 644, 103 N. W. 970; State v. Tolla [N. J. Err. & App.] 62 A. 675.

45. People v. Bradford [Cal. App.] 81 P. 712. Where a trial court examines a child as to its knowledge of the nature and sanctity of an oath and decides that it is competent, an appellate court will not interfere where it does not appear that such discretion has been flagrantly abused. Beebee v. State [Ga.] 53 S. E. 99.

46. Code Civ. Proc. § 1880 provides that children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, shall not be witnesses. People v. Bradford [Cal. App.] 81 P. 712.

47. A child of 9 said she knew it was wrong to tell a lie, and that if she did the judge or God could put her in jail; also that she had been to church and Sunday school. It was held that she was not a competent witness, not showing such a religious training and instruction as excited a hope of future reward to the good and fear of punishment to the wicked. Jones v. State [Ala.] 40 So. 947.

48. A child eight years of age who clearly comprehends the difference between truth and falsehood and his duty to tell the truth, is substantially qualified. Commonwealth v. Furman, 211 Pa. 549, 60 A. 1089. Boy of 7, of more than average intelligence who knew difference between truth and falsehood, competent. Clark v. Finnegan, 127 Iowa 644, 103 N. W. 970.

49. Children not shown to understand the nature of an oath are incompetent. Olson v. Olson [Iowa] 106 N. W. 758.

50. See 4 C. L. 1945.

51. State v. Bringgold [Wash.] 82 P. 132.

52. Hughes v. Chicago, etc., R. Co. [Wis.] 106 N. W. 526.

53. See 4 C. L. 1945.

54. As in Oklahoma. Wells v. Territory [Okl.] 81 P. 425.

55. State v. Knudtson [Idaho] 83 P. 226; Wells v. Territory [Okl.] 81 P. 425.

56. One jointly indicted with a defendant in a criminal prosecution and whose case after reversal of a judgment of conviction had not been retried, the venue thereof having been changed to a county different from that to which defendant's case was transferred, is not competent. Wilson v. State [Tex. Cr. App.] 90 S. W. 312.

57. Under Rev. St. 1892, § 1096, rendering persons convicted of certain crimes incompetent. Robinson v. State [Fla.] 39 So. 465.

58. See post, § 5 B 2.

59. See 4 C. L. 1946. In a prosecution for assault, it was shown that a witness for

§ 2. *Disqualification on ground of interest.*[61]—Interest in the event of the suit does not now render a person incompetent, though the fact of interest may be shown as affecting credibility.[62] But the contrary common-law rule remains in force in some states in actions of a particular kind.[63]

§ 3. *Disqualification of one party to transaction or communication, on death of the other.*[64]—Practically all the states have statutes which provide, in substance, that a party to an action, or a person interested in the event thereof, or a person from whom a party derives his interest, shall be incompetent to testify as to transactions or communications had with a deceased person, when the adverse party represents, or derives his interest from, the deceased.[65] In some states there are similar statutes disqualifying parties to transactions or communications with persons who have since become insane.[66] The manifest design of such statutes is to prevent living witnesses, who, being interested, have a motive for falsification, from taking advantage of the death or incompetency of the other party to a transaction or conversation, whereby contradiction of the witness with respect thereto is rendered impossible, and the construction placed by the courts on statutes of this character is largely controlled by this purpose.[67] Evasion of the statutes by indirect means will not be permitted.[68]

The adverse party, or party against whom the witness is offered, must represent the decedent, or derive his interest from the decedent.[69]—Thus, the statutes are usually applicable in proceedings by or against executors and administrators,[70] and

defendant had been convicted of an assault growing out of the same affair, and had not paid his fine and costs. He was held incompetent, though the sheriff had accepted a verbal promise of another to pay such fine and costs. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 935, 89 S. W. 270.

60. In a bastardy proceeding, the mother of a bastard is a competent witness to prove all the elements necessary to sustain the charge including nonaccess of the husband under Burns' Ann. St. 1901, §§ 990, 992, providing that in such proceeding she is a competent witness. Evans v. State [Ind.] 75 N. E. 651.

61. See 4 C. L. 1946.

62. The fact that an expert is entitled to a fee contingent on the result of the suit and is therefore interested goes to his credibility and not to his competency. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166. That a prosecuting witness is a detective does not per se render him incompetent in a prosecution under the intoxicating liquor law. Rector v. State [Tex. Cr. App.] 90 S. W. 41.

63. In Georgia, neither party to an action for breach of promise of marriage is a competent witness. The common-law rule in this respect was not modified by Civ. Code 1895, § 5272. Graves v. Rivers, 123 Ga. 224, 51 S. E. 318.

64. See 4 C. L. 1946.

65. Act of May 23, 1887 (P. L. 159), relative to the competency of interested persons where the party to the controversy is dead, applies to any civil proceeding, hence to a proceeding in the orphans court. In re Crossetti's Estate, 211 Pa. 490, 60 A. 1081.

66. Code § 4604, disqualifying a party to a conversation or transaction with a person who has since become insane, held not applicable where the only evidence of the incompetency of such person was that his mind and memory were clouded, and he was very weak physically. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626.

67. Gen. St. 1894, § 5660, referring to testimony having reference to conversations with a deceased person by one interested in the result of the action should be strictly construed upon the theory that its main object is to prevent possible fraud when one of the parties has been removed by death. Pitzl v. Winter [Minn.] 105 N. W. 673.

68. It is not permissible to state in the form of conclusions of fact the result of a conversation with a decedent. Pitzl v. Winter [Minn.] 105 N. W. 673. The rule that one cannot testify as to transactions with a deceased person cannot be evaded by indirect interrogatories (Telford v. Howell [Ill.] 77 N. E. 82), nor under a pretense of letting in corroborative testimony (Id.).

69. See 4 C. L. 1947.

70. In mortgage foreclosure suit, interested witnesses were incompetent to testify to transactions with deceased persons whose estates were involved. Ryan v. Shaneyfelt [Ala.] 40 So. 223. A married woman brought suit on a note against the maker's executor, and joined her husband as defendant, but alleged that he signed only as surety and not as co-maker. She was held incompetent in her own behalf, since her husband was really interested with her, and the executor was the sole adverse party. The proviso of Rev. St. 1899, § 4652, that a party may testify in such case if the contract in issue was made by a person still living and competent to testify was held inapplicable. Scott v. Burfeind [Mo. App.] 92 S. W. 175.

Statute held inapplicable: Sayles' Ann.

by or against heirs,[71] devisees, or legatees,[72] or other persons who derive their interest in the action from the deceased.[73]

Persons disqualified as witnesses[74] by statutes of this character, are, first, parties to the action, interested therein;[75] second, other persons not parties, interested in

Civ. St. art. 2302, relative to transactions with deceedents does not render incompetent, in an action by a trustee in bankruptcy to recover property fraudulently conveyed through the bankrupt's wife, one who had conversations with the wife, since deceased, he not being a party and the action not being brought against the defendant as executor. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524.

71. Heirs sued to cancel a tax deed issued under a sale against the ancestor. Holder of deed was incompetent to testify to agreement between him and such ancestor whereby he was to get title by a tax deed in consideration of payments made to the ancestor. Grimes v. Ellyson [Iowa] 105 N. W. 418. Under Sayles Rev. St. 1897, art. 2302, prohibiting testimony as to transactions with deceased persons, a defendant in an action by an heir for partition of notes is incompetent to testify as to transactions with plaintiff's ancestor. Jones v. Day [Tex. Civ. App.] 13 Tex. Ct. Rep. 308, 88 S. W. 424.

72. Under Rev. St. 1874, c. 51, § 2, providing that no party to any action shall be allowed to testify on his own motion or in his own behalf where the adverse party sues or defends as the heir of a decedent where a plaintiff claims title as legatee or devisee of her father and the defendant defends as heir of his mother, neither party is competent to testify against the other. Heintz v. Dennis, 216 Ill. 487, 75 N. E. 192.

73. The administrator of a deceased payee of a note transferred the note to the payee's widow who sued thereon. The maker was held incompetent to testify to a transaction with deceased claimed to constitute payment. Carpenter v. Stiggins [Ala.] 40 So. 216. Defendants in action to recover land claimed as representatives of plaintiff's deceased father, deriving title from the executor under his will. Hence, plaintiff was incompetent, under 2 Ball. Ann. Codes & St. § 5991, to testify to conditions of bond for title and other matters transacted between himself and his father. Reynolds v. Reynolds [Wash.] 84 P. 579. Under St. 1893, § 4212, no party may testify in his own behalf to any transaction or communication had personally by such party with a deceased person, when the adverse party is the assignee of such deceased person and the party acquired title to the cause of action immediately from such deceased person. Conklin v. Yates [Okl.] 83 P. 910. In action by grantor against successor in interest of deceased grantee to set aside the conveyance, the grantor cannot testify to oral or written transactions or communications had by him with the deceased grantee. St. 1893, § 4212. Id.

Statute held inapplicable: Where in ejectment, plaintiff claimed through several conveyances and the grantor in the first demise was dead, an objection to the testimony of a witness on the ground of the interest of such deceased remote grantor was held untenable. Doe ex dem. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. Partnership was dissolved by death of a member and distributee of deceased then became a member. In an action by the surviving partner against the distributee for an accounting, plaintiff was competent witness to testify to fact of partnership with deceased and terms of the agreement. Flynn v. Seale [Cal. App.] 84 P. 263. Hurd's Rev. St. 1903, c. 51, § 2, providing that when one sues or defends as heir or devisee no adverse party shall be allowed to testify does not apply to one who as grantee defends a suit by devisees of her grantor, to set aside the deed on the ground of mental incapacity of the grantor and undue influence. Seaton v. Lee [Ill.] 77 N. E. 446. Within the meaning of laws upon this subject an "assignee" is one who holds by the voluntary act of his assignor, not one who holds by operation of law or the judgment of a court, or through an executor's judicial sale and in spite of such assignor. Gen. St. 1901, § 4770, construed. Powers v. Scharling [Kan.] 81 P. 479. Rev. St. 1899, § 4652, providing that in actions where one of the original parties to the cause is dead the other shall not be competent to testify, does not render one incompetent to testify as to transactions with the other party to the suit who claims as assignee of the decedent and is attempting to enforce the contract for his own benefit. Weiermueller v. Scullin, 109 Mo. App. 193, 88 S. W. 1008. Where in an action on promissory notes, defendant was sought to be held as a member of the firm indorsing them, testimony of defendant that he had been engaged in business with his mother and brother, that prior to the execution of the notes the mother stated to defendant and his brother that if they wanted to continue the business it would have to be in her employ, and that she thereupon took out a license in her own name, held admissible though the mother was dead, there being nothing in the relation of the parties to bring the testimony within the prohibition of Code Civ. Proc. § 829. Bernstein v. Cahen, 48 Misc. 639, 96 N. Y. S. 209.

74. See 4 C. L. 1948.

75. Telford v. Howell, 119 Ill. App. 83. Under Code 1896, § 1794, a physician suing an executor for services rendered deceased, is incompetent to testify as to the number of visits paid deceased, and what he did for him. Duggar v. Fitts [Ala.] 39 So. 905. Under 16 Del. Laws, p. 708, c. 537, § 1, providing that in actions against an executor neither party is competent to testify against the other as to transactions with deceased unless called by the opposite party, one who brings action against a decedent's estate for services is incompetent to state the nature of his claim or whether he did any work for decedent for which the action is brought. Lodge v. Fraim [Del.] 63 A. 233.

the event of the action;[76] third, persons from whom a party derives his interest.[77] Under some statutes parties to contracts with a decedent are incompetent to testify

A defendant in an action by an administrator cannot testify as to transactions with decedent. Jones v. Purnell [Del.] 62 A. 149. In an action by an administrator of a grantor to cancel a deed on the ground that the deceased was mentally incompetent to make it, that it was procured by undue influence, and that the services which purported to be the consideration were never rendered, the grantee is incompetent to testify that the services were rendered, and to their character. Parker v. Ballard, 123 Ga. 441, 51 S. E. 465. Party in interest is incompetent in his own behalf as to any fact or transaction occurring in the lifetime of deceased relative where the representative of deceased is the adverse party; nor is such party competent as against minor heirs or adult heirs not present at the time of the occurrence of such facts or transactions. Hall v. Hall, 118 Ill. App. 544. Party in interest to a proceeding instituted under § 81 of the administration act is an incompetent witness in his own behalf, since the petitioner proceeds in a representative capacity. Mohlke v. People, 117 Ill. App. 595. Party to action incompetent to testify to transactions with two deceased persons. Code Civ. Proc. § 606. Gaar, Scott & Co. v. Reesor [Ky.] 91 S. W. 717. Payee of note and mortgagee of mortgage, both written in his handwriting, and signed with the mark of the debtor, who has died, cannot establish the validity of the note and mortgage by his own testimony. Clark v. Clark [Ky.] 91 S. W. 284. In a suit to determine the ownership of a life insurance fund, between an assignee of the policy and the administrator of deceased, the assignee is incompetent to testify that the assignment covered all the debts owed by deceased to assignee. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32. In a suit to construe a will a wife of the decedent cannot testify as to conversations in which he stated what her interest under the will would be. Shipley v. Mercantile Trust & Deposit Co. [Md.] 62 A. 814. One cannot establish by his own testimony a claim against a decedent's estate which originated during the decedent's lifetime. Rev. Code 1892, § 1740. Stanton v. Helm [Miss.] 39 So. 457. Under this statute where complainants in partition claimed an interest as heirs of a deceased son of the deceased owner and defendants as remote grantees of the owner, a defendant through whom others claimed could not by his own testimony show he was a remote grantee of the owner. Liverman v. Lee, 86 Miss. 370, administrator. Wilson v. Terry [N. J. Eq.] 38 So. 658. In action against an administrator, plaintiff was incompetent (Laws 1897, p. 245), to testify to an assignment to him of a claim against the decedent, with the latter's consent. Darais v. Doll [Mont.] 83 P. 884. Under Evidence Act (P. L. 1900, p. 363) § 4, an administrator who sues to have his absolute deed to his decedent, declared a mortgage, is incompetent to testify to transactions with decedent tending to show that the deed was a mortgage, on his own behalf and not on his behalf as administrator. Wilson v. Terry [N. J. Eq.] 62 A. 310. A plaintiff administrator is a party within the prohibition of the statute. Harvey v. Cullings, 48 Misc. 344, 96 N. Y. S. 638. In contest to determine ownership of money alleged to have been given by a decedent in his last illness to plaintiff, plaintiff was not a competent witness. Lavelle v. Melley, 27 Pa. Super. Ct. 69. Under Code Civ. Proc. 1902, § 406, in a suit against a husband for partition of lands claimed by him through his deceased wife he is incompetent to testify that he paid her a certain sum for her interest. Corbett v. Fogle [S. C.] 51 S. E. 884. Where the administrator sues to recover for the estate money in the hands of heirs, the latter cannot testify to transactions with deceased. Rev. St. 1895, art. 2302. Manchester v. Bursey [Tex. Civ. App.] 91 S. W. 817.

76. "Interested in the event thereof" means a direct and immediate pecuniary interest adverse to that of the party against whom his testimony was offered. Gen. St. 1894, § 5660, construed. Pitzl v. Winter [Minn.] 105 N. W. 673. Where, in action for wrongful death, plaintiff sues as administratrix, the motorman of defendant company, who would be liable to the company in the event of a recovery against it, is an interested witness and incompetent under the statute. Feitl v. Chicago City R. Co., 113 Ill. App. 381. Where both parties claim under a deceased person and by virtue of statute neither is competent to testify against the other, the plaintiff's husband is incompetent to testify in her behalf. Heintz v. Dennis, 216 Ill. 487, 75 N. E. 192. Plaintiff in ejectment could not show by her husband, who was also her agent, and who was interested by reason of his marital relations, any transaction or agreement between her and a remote vendor of the defendant, since deceased, relative to a boundary line. Hollingsworth v. Barrett [Ky.] 89 S. W. 107. Testimony of a witness interested in the event of an action of ejectment as to transactions or communications between him and a decedent from whom defendant derived title is incompetent regardless of the extent of the interest. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. On an issue of title to shares of stock claimed by plaintiff to have been transferred without authority to defendants, by one who obtained possession of them for plaintiff's testatrix, the person who made the transfer and under whom defendants claimed and who would himself be liable to defendants in case of failure of their title, held incompetent to testify for defendants to transactions with plaintiff's testatrix, under Code Civ. Proc. § 829. Hall v. Wagner, 97 N. Y. S. 570. In an action against a corporation for death of plaintiff's intestate, an employe, a stockholder is not competent to testify that he did not put deceased to work on the scaffold claimed to be defective. Andrews v. Reiners, 98 N. Y. S. 658. Under Act May 23, 1887 (P. L. 159) rendering incompetent any person whose interest is adverse to those of a decedent as

in regard thereto,[78] and usually an agent who makes a contract for his principal is incompetent to testify in regard thereto after the death of the other party.[79]

to any matter occurring prior to his death where on the death of a husband and wife the executor of the former claimed on the audit of the account of the administrator of the latter that a deposit in the wife's name was the property of the husband, a child cannot testify in support of the claim of her mother's administrator. In re Crossetti's Estate, 211 Pa. 490, 60 A. 1081.

Witness held not disqualified by interest: One not a party to a proceeding to compel payment of a decedent's debt and not interested in the claim is not incompetent to testify to transactions with the decedent under Code 1896, § 1794. Little v. Marx [Ala.] 39 So. 517. In ejectment there were three demises. The lesser in the first was dead and his representative was not a party. The lesser in the second had conveyed all his interest to the lessor in the third demise. Held that under Civ. Code 1895, § 5269, the lessor in the second demise was not incompetent as to transactions between himself and the lessor in the first demise on an issue between the lessor in the third demise and the tenant in possession. Priester v. Melton, 123 Ga. 375, 51 S. E. 330. In a suit by an administrator to recover certain funds, he intervened in his individual capacity claiming such funds were held in trust for him. His brothers and sisters, though heirs, were not disqualified to testify to declarations of the mother regarding such funds, since they were not interested in the intervention. Jacobs v. Jacobs [Iowa] 104 N. W. 489. Gen. St. 1901, § 4770, forbidding a party to testify in his own behalf in respect to transactions or communications with a deceased person does not render a maker of a note, not a party to a suit thereon, incompetent to testify that he was the maker of the note and defendant the surety and that the deceased payee had extended the time without the surety's knowledge. Koger v. Armstrong [Kan.] 83 P. 1029. Where an administrator sues on a note payable to his intestate, a defendant who testifies that he had been sued on the note and judgment had been rendered against him and that he no longer had any interest in the litigation, is competent to testify in favor of a co-defendant. Walker's Adm'r v. Turley [Ky.] 90 S. W. 576. One interested merely as a parent is not incompetent to testify as to a contract made by her child with a person since deceased. McMorrow v. Dowell [Mo. App.] 90 S. W. 728. In an action by a married woman to enforce specific performance of a contract to convey, against representatives of a deceased person, the husband of plaintiff is a competent witness in her behalf, since his interest is remote. Hiskett v. Bozarth [Neb.] 105 N. W. 990. St. 1893, § 4212, does not prohibit proof of transactions and communications had personally between a party to the suit and the deceased grantee of such person by disinterested witnesses, or other competent evidence other than that of a party to the suit. Conklin v. Yates [Okl.] 83 P. 910. Under Act May 23, 1887 (P. L. 158) providing that where any party to a thing or contract in action is dead and his right has passed to a party on the record who represents his interest, no remaining party to the thing or contract or any person whose interest is adverse to the deceased shall be competent, a guarantor on a note whose guarantee is solely between himself and the payee is not incompetent in an action by the executor against the maker, but he may testify as to payment of the note during the life of the payee where he had been discharged in bankruptcy after the guaranty was made. Pattison v. Cobb, 212 Pa. 572, 61 A. 1108. Under Code Civ. Proc. 1902, § 400, an agent though usually partial to his principal is not legally interested so as to render him incompetent to testify as to transactions or communications with a decedent where his principal sues the representative of such decedent. Kean v. Landrum [S. C.] 52 S. E. 421. Where an heir of one of the payees of a note sues for partition, a defendant who disclaims any interest may testify as to transactions with the plaintiff's ancestor. Jones v. Day [Tex. Civ. App.] 13 Tex. Ct. Rep. 308, 88 S. W. 424.

77. Under Code § 4604, if a right asserted by a claimant against a decedent's estate depends for its existence and validity upon a transaction between the deceased and a third person, the evidence of such third person is incompetent to prove such transaction, the statute disqualifying persons from whom a party derives his interest by assignment "or otherwise." McClanahan v. McClanahan [Iowa] 105 N. W. 833. Thus, where a claim arose out of a payment to decedent in trust for claimant, the person making the payment was incompetent to testify thereto. Id. A real estate agent wrongfully delivered a release of a mortgage without payment of the debt. In a suit to foreclose, the agent was not a party in interest, nor one through, under, or from whom either party derived his interest, so as to be incompetent to testify to transactions with the deceased mortgagor. Franklin v. Killilea [Wis.] 104 N. W. 993.

78. Rev. Code 1899, § 4652, providing that where one of the original parties to a cause of action is dead the other party may not testify in his own behalf or that of a party claiming under him, renders incompetent a parent who made a contract with a person since deceased for the rendering of services by her child to the decedent, in an action by the child against the estate to recover for services rendered under such contract. McMorrow v. Dowell [Mo. App.] 90 S. W. 728. A parent is not a party to an implied contract by a person, since deceased, to pay her child for services, and under Rev. St. 1899, § 4652, is not incompetent as a witness where the child sues the estate of the decedent on such contract. This is so though a waiver of her right to her child's earnings must be proved. Id. Evidence Act (P. L. 1900, p. 363), § 4, expressly renders incompetent the testimony of one seeking to enforce a contract between himself on one hand and a third person and a decedent on the other as to transactions between

Transactions and communications to which disqualification extends.[80]—The disqualification extends to all personal transactions between the witness and deceased,[81]

himself and the decedent, which resulted in the contract. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

79. See 6 C. L. 1950, n. 66. Under Civ. Code 1895, § 5269 subd. 5 in order to render incompetent the testimony of an agent or attorney of a sane or surviving party as to transactions with the insane or deceased adverse party at interest, the agency or confidential relationship must have existed at the time of the transaction testified about. Sanders, Swan & Co. v. Allen [Ga.] 52 S. E. 884.

Contra: An agent contracting on behalf of his principal with a person since deceased is a competent witness in behalf of his principal against the estate of the deceased person to prove the transaction. Brown v. Click [W. Va.] 53 S. E. 16.

80. See 4 C. L. 1951.

81. The word "transaction" as used in the Code, embraces every variety of affairs the subject of negotiations, actions, or contracts between the parties. Fitch v. Martin [Neb.] 104 N. W. 1072. Defendants to suit on note, payee of which is dead, cannot testify to transactions between themselves and the deceased payee out of which the note resulted. McAyeal v. Gullett, 105 Ill. App. 155. In partition against heirs, the complainant is incompetent to testify to the fact of her marriage to the deceased land owner. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. One who asserts that she is the widow of a deceased person is not competent to testify to the fact of marriage either directly or indirectly. Bowman v. Little [Md.] 61 A. 223. She is also incompetent to testify to collateral facts from which marriage could be inferred. Bowman v. Little [Md.] 61 A. 1084. A question to witness whether he owed a deceased person any money except the purchase price of land at the time he made a payment to him held not to call for the result of a conversation with a deceased party; hence admissible. Veum v. Sheeran [Minn.] 104 N. W. 135. In an action on a note by executors of the deceased payee, the defendant was incompetent to prove when and where note was given, and attendant circumstances, and whether note in suit was the only one given, and that he never had any other dealings with decedent. Regan v. Jones [N. D.] 105 N. W. 613. Testimony of a claimant to the possession of a note executed by decedent is, when given for the purpose of raising an inference of delivery from deceased to claimant, there being no proof of any other method of delivery, evidence of a transaction between claimant and decedent. In re Knibbs' Estate, 108 App. Div. 134, 96 N. Y. S. 40. On a judicial settlement of the accounts of an executor, testimony of the executor that a certain note was paid by him because he knew deceased's signature and all circumstances attending the note and had been told them by deceased in his lifetime is within the prohibition of Code Civ. Proc. § 829. In re Knibbs' Estate, 108 App. Div. 134, 96 N. Y. S. 40. A broker suing the representative of a deceased person for breach of warranty based on the fact that decedent assuming, without authority, to act as agent for another, employed the broker to procure a purchaser for the property, is incompetent to prove that he gave decedent notice that he had procured a purchaser. Bloodgood v. Short, 98 N. Y. S. 775. Code § 590 prohibiting parties in interest from testifying as to communications or transactions with deceased persons as against their personal representative applies where an administrator sues for caring for his intestate and offers to testify that the intestate was altogether helpless, that he gave him medicine, prepared his food and cared for him generally. Davidson v. Bardin, 139 N. C. 1, 51 S. E. 779. One who sues an administrator on an implied contract for services rendered his intestate is incompetent to testify that he rendered services and what was their reasonable value, as such testimony indirectly shows a transaction with a deceased person as to which he is incompetent under Revisal 1905, § 1631. Dunn v. Currie [N. C.] 53 S. E. 533. Where an administratrix is sued on the note of her intestate the plaintiff is precluded by Code § 590 from testifying that he demanded payment from the intestate during his lifetime. Davis v. Evans, 139 N. C. 440, 51 S. E. 956. In suit to recover for services rendered defendant's testator, plaintiff's testimony that during the period in controversy he worked on the public road and in the field attending to business of someone other than himself, and as to its value, though not expressly disclosing that such services were rendered to testator, held incompetent as disclosing a transaction between plaintiff and decedent in violation of Code, § 590. Stocks v. Cannon, 139 N. C. 60, 51 S. E. 802. Facts which constitute fraud on the part of a deceased person necessarily include personal transactions or conversations, with such deceased person. Conklin v. Yates [Okl.] 83 P. 910. Limitations being pleaded against a claim against an estate, the claimant cannot testify that deceased had made payments during her lifetime. Pierce v. Stitt [Wis.] 105 N. W. 479.

Statute held inapplicable: In an action for wrongful death caused by injuries received in a mill, a witness was competent to testify that he was constantly in and about defendant's mill up to a certain date, when he sold out his interest, such testimony not relating to any transaction or conversation with deceased, within Code 1896, § 1794. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. In a suit by a corporation against an executor the agent of the corporation is not incompetent to testify to his opinion as to the genuineness of the signature of the defendant's testator, his opinion being given as an expert and being based upon a comparison of the signature with other writings proved to be genuine. Patton v. Bank of Lafayette [Ga.] 53 S. E. 664. Testimony of party claiming land by grant from a decedent held competent so far as it did not

but not to transactions between witness and a third person[82] or between deceased and another in which the witness did not participate.[83] Transactions which did not occur during the lifetime of deceased are not, of course, within the rule.[84] In Ohio, the statute excludes evidence of facts which occurred prior to the decedent's death;[85] in Michigan, evidence relating to matters equally within the knowledge of deceased is excluded.[86] In Kentucky, a witness may testify in his own behalf concerning transactions with a decedent where he exhibits his books of original entry showing regular and chronological entries covering such transactions,[87] and may also testify to the correctness of such entries[88] provided the accounts are such as would be competent evidence at common law.[89]

Only testimony in favor of the interested party or witness is excluded[90] by the

relate to personal transactions with decedent. Foreman v. Archer [Iowa] 106 N. W. 372. Defendants claimed lands under deeds left by their father among his papers at his death. A brother of defendants was competent to testify that he had officed with decedent, that he had a private drawer in the safe, and that witness did not know of the contents of the drawer nor of the existence of the deeds. Shetler v. Stewart [Iowa] 107 N. W. 310. One who filed a claim against the estate of a deceased person for legal services performed under a yearly contract is not incompetent to testify to certain independent acts which he performed when the deceased had no personal connection therewith, and in which he did not participate. Fitch v. Martin [Neb.] 104 N. W. 1072. Evidence Act (Revision 1900), § 4, does not render incompetent the testimony of a widow who is seeking to establish a resulting trust in property held in her deceased husband's name. Small v. Pryor [N. J. Eq.] 61 A. 564. Where, in an action on a partnership contract, alleged to have been made between deceased defendant and B., the latter testified simply that deceased and himself had acquiesced in defendant's proposal, held defendant could deny the making of the contract with B., similar to that testified to by him. Code Civ. Proc. § 829, construed. Lefevre v. Silo, 98 N. Y. S. 321. In an action by plaintiff against an executrix to recover for services as an architect, plaintiff could testify that he made certain plans, etc., and to the value of his services, the fact that they were for testator being otherwise shown. Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367.

82. Testimony of deceased's wife that she paid certain bills for household expenses during deceased's last illness, although given in support of a claim of the wife for reimbursement for the money paid by her, is not testimony of a transaction or communication with a deceased person. In re Knibbs' Estate, 108 App. Div. 134, 96 N. Y. S. 40.

83. A party, claiming under a decedent, may testify to statements made by decedent to a third person in the presence of the party testifying. Foreman v. Archer [Iowa] 106 N. W. 372. Where plaintiff claimed title by parol conveyance from her father, her husband could testify to conversation between plaintiff and her father in which he did not participate. Smith v. Fry [Iowa] 103 N. W. 1002. Plaintiff could testify to conversation between her father and her husband, in which she did not participate. Id. Wife of defendant in suit by administrator to recover moneys was competent to testify to a conversation between decedent and defendant in which witness did not participate, the testimony not relating to transactions between decedent and the witness. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. Where a contract was made during a miscellaneous talk on different subjects one who participated in the conversation, but not in the contract, is not incompetent to testify as to the contract after the death of one of the parties. McMorrow v. Dowell [Mo. App.] 90 S. W. 728.

Contra: A party to an action or interested in the event thereof is not competent to testify to conversations with or admissions of a deceased party had with or made to a third party in his presence. In re Pederson's Estate [Minn.] 106 N. W. 958.

84. An administratrix who is the wife of a decedent is competent to testify as to where personal property belonging to her decedent was found after his death. Hartzell v. Hartzell [Ind. App.] 76 N. E. 439. Civ. Code Prac. § 606, prohibiting testimony of a witness for himself as to transaction with a person since deceased does not render one incompetent to testify as to occurrences subsequent to the death of one whose estate is involved. Huntsberry v. Smith's Adm'r [Ky.] 90 S. W. 601.

85. The operation of § 5242, relating to the competency of a party to testify, is not limited to transactions with the decedent, but to facts which occurred prior to his death; and testimony as to transactions with the agent of the decedent is, therefore, incompetent. Wehrmann v. Beech, 7 Ohio C. C. (N. S.) 367.

86. Testimony of complainant's wife, in suit for specific performance of contract between complainant and a decedent to convey realty, in regard to matters equally within the knowledge of the decedent, was incompetent. Ayers v. Short [Mich.] 12 Det. Leg. N. 183, 105 N. W. 1115.

87. Civ. Code Prac. § 606. Swafford's Adm'r v. White [Ky.] 89 S. W. 129.

88. Civ. Code Prac. § 606, subsec. 6. Clark v. Clark [Ky.] 91 S. W. 284.

89. The payee of a note cannot, after the maker's death, testify to correctness of a private account showing transactions closed by the note. Clark v. Clark [Ky.] 91 S. W. 284.

statutes under consideration.[91] Testimony for the estate or person representing or deriving his interest from the decedent is not barred.[92] But in some states, where it is held that the statute was not enacted for the sole benefit of the estates of decedents,[93] testimony of an interested party is excluded though offered for the benefit of the estate on behalf of the executor.[94]

Waiver or removal of disqualification.[95]—The disqualification created by the statutes under consideration is waived where the adverse party fails to make proper and timely objection,[96] or where such adverse party himself calls the interested witness[97] or other witnesses,[98] or goes on the stand himself[99] to testify to matters

90. See 4 C. L. 1949, n. 60.

91. Under Acts 1897, p. 53, the only circumstances under which the representative of a deceased person who is jointly sued with such representative will be incompetent to testify as to transactions with his deceased co-defendant are, when his evidence would tend to relieve or modify the liability of the party offered as a witness and tend to make the estate of the deceased primarily liable for the debt or default. Sanders, Swan & Co. v. Allen [Ga.] 52 S. E. 884. In an action on a life insurance policy by the administrator, wherein an assignee of the policy is made a party defendant, the assignee is competent to testify to transactions with deceased tending to show the policy invalid, such testimony being not for himself, but for the company. Bromley's Adm'r v. Washington Life Ins. Co. [Ky.] 92 S. W. 17. A defendant is competent to testify on behalf of a co-defendant in regard to transactions with a decedent represented by plaintiff. Under Civ. Code Prac. § 606, subsec. 2. Since a jury may find for one and against the other defendant. Schonbachler's Adm'r v. Mischell [Ky.] 89 S. W. 525.

92. Testimony of a legatee under a will that deceased told his wife to use her own money to pay household expenses and that she would be repaid for it, when given in support of the claim of the wife for reimbursement for the money advanced, is not evidence in behalf of the legatee. Code Civ. Proc. § 829 construed. In re Knibbs' Estate, 108 App. Div. 134, 96 N. Y. S. 40. Code, § 590 rendering incompetent against an administrator an interested person as to transactions with the decedent does not disqualify a witness for the administrator though he may be liable over to the defendant in the action if the administrator prevails. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781. Where a claim is presented in the ordinary way against the estate of a decedent the heirs, legatees and other interested persons are competent to testify in favor of the estate but incompetent to testify adversely to it. In re Crossetti's Estate, 211 Pa. 490, 60 A. 1081.

93. Gen. St. 1894, § 5660, is not for the sole benefit of representatives of a decedent, and its provisions cannot be waived by them at will. Pitzl v. Winter [Minn.] 105 N. W. 673.

94. Judgment debtor held incompetent in garnishment proceedings to testify for the executor as to conversations with testator relative to the application of a devise to extinguish a debt due the estate in case of the testator's death prior to its payment. Pitzl v. Winter [Minn.] 105 N. W. 673.

95. See 4 C. L. 1952.

96. Objection to competency of evidence does not go to competency of witnesses on ground of statutory disqualification by Rev. St. 1898, § 4069. Wells v. Chase [Wis.] 105 N. W. 799. Objection to competency of husband to testify to transactions with deceased wife waived where not raised until after testimony was given. Davis v. Hall [Iowa] 105 N. W. 122.

97. An executrix, suing as plaintiff, introduced the answers of defendants to interrogatories filed in the suit relating to transactions with the testator. This was held a calling of defendants as witnesses, under Code 1896, § 1794, and defendants could testify in regard to the same transactions. German v. Browne [Ala.] 39 So. 742. Where a party makes a witness of his adversary who otherwise would be incompetent because the matter in issue related to transactions with a decedent, the adversary becomes a competent witness to testify as fully as any other witness. Strode v. Frommeyer, 115 Mo. App. 220, 91 S. W. 167. Where a claimant against the estate of a decedent testifies in his own behalf as to matters occurring since the death of the decedent and is cross-examined as to matters occurring during the lifetime of the decedent, he becomes a competent witness for himself as to such matters. In re Clad's Estate [Pa.] 63 A. 542. Where a party to a suit, otherwise incompetent by the death of another, is called for cross-examination by the adverse party, and examined as to matters occurring in the lifetime of the decedent, he is thereby rendered a competent witness in his own behalf on all relevant matters. Mothes' Estate, 29 Pa. Super. Ct. 462. In a suit brought by an executor at the instance of a residuary legatee against defendant for an accounting, held that the residuary legatee being the real party in interest the introduction of defendant's evidence taken when a witness for the legatee, on exceptions to the executor's accounts, constituted a waiver of the executor's right to object that defendant was disqualified to testify as to the whole of the transactions referred to in such testimony. Cole v. Sweet, 98 N. Y. S. 625.

98. Hurd's Rev. St. 1903, c. 51, § 3, expressly provides that a plaintiff in an action against an administrator may testify as to certain of his own transactions and conversations with the decedent which have been testified to by witnesses called by the defendant but not as to other transactions not so testified to. Calkins v. Calkins [Ill.] 77 N. E. 102.

99. Plaintiffs, representatives of deceased, testifying to certain conversations between

within the protection of the statutes; but such waiver extends only to matters concerning which testimony has been introduced by the adverse party.[1] The introduction of decedent's testimony given on a former trial renders other evidence as to transactions with him competent, if offered at the proper time.[2] This rule does not of course, operate unless decedent's former testimony is offered in the subsequent case.[3]

§ 4. *Privileged communications, and persons in confidential relations. A. Attorney and client.*[4]—Confidential communications by a client to his attorney are privileged and cannot be testified to by the attorney[5] without the consent of the client.[6] The communication made, or knowledge gained, must be in fact confidential,[7] and made or gained in the course of the professional employment of the attorney. It follows that the relation of attorney and client must have existed at the time,[8] but it is not essential that any judicial proceeding should have been com-

deceased and defendant, defendant is entitled to testify concerning the same conversations. Hurd v. Fleck [Colo.] 82 P. 485.

1. Interrogatory asked when and by whom defendants were employed in a certain cause and their answer was that testator employed them, and the date of employment and the nature of the cause was stated. This was testimony relating to transactions with the decedent, and having been called for by the executrix, the persons called could testify in regard thereto. German v. Browne [Ala.] 39 So. 742. A party to a cause is incompetent to testify where the adverse party sues or defends in a representative capacity and where another person testifies for the adverse party, the interested witness can only testify to the same transaction or conversation. Symonds v. Caldwell, 112 Ill. App. 341. Parties in interest are incompetent when the adverse party defends in a representative capacity, though such representative may call such witnesses in behalf of the interest which he represents. Lennartz v. Estate of Peter Popp, 118 Ill. App. 31. Code Civ. Proc. § 2709, providing that, if a witness called for examination before the surrogate in an endeavor to discover assets of the estate is examined concerning any personal communication or transaction between himself and the decedent, an objection under § 829 to his testimony as to the same in future litigation is waived, does not entitle a witness who is examined by the surrogate to thereafter testify, in an action brought by him against the decedent's administrator, to all personal transactions and communications had between him and the decedent. Killian v. Heinzerling, 47 Misc. 511, 95 N. Y. S. 969.

2. Refusal to allow plaintiff to testify in a case where the administrator of defendant had been substituted was not rendered erroneous by the subsequent admission of defendant's testimony taken at a former trial, where the fact of the preservation of such testimony was unknown to the court at the time of the ruling and plaintiff's offer was not renewed. Harrington v. Butte & B. Min. Co. [Mont.] 83 P. 467.

3. Under Laws 1902, p. 718, c. 495, § 2, providing that in actions against administrators no party can testify as to transactions with the intestate unless called by the opposite party or unless the intestate's evidence shall already have been given in the same case, where a joint maker of a note died pending appeal in a suit for contribution on a retrial one who was not called by decedent's administrator is not competent where the decedent's testimony on the former trial is not offered in evidence. Keyser v. Warfield [Md.] 63 A. 217.

4. See 4 C. L. 1953.

5. See 4 C. L. 1953, n. 83; also cases following.

6. Under Code Civ. Proc., § 1881, subd. 2, the advice of an attorney to his client may be given in evidence by the consent of the client. Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512.

7. To impose upon an attorney the duty of not disclosing a communication from his client, it must be of a confidential nature and so regarded, at least by the client, at the time, and must relate to a matter which is, in its nature, private and properly the subject of confidential disclosure. In re Elliott [Kan.] 84 P. 750. An answer prepared to be filed by or on behalf of the client and read by the notary, with the client's consent, and the substance of which has been given by the client to a newspaper for publication, and which has been shown by the client to, and read by, another attorney appearing against him, and which has been used in a petition by the client against his own attorney is not privileged. Id. Attorney held competent to testify to matters done in open court and to statements made by client to the court. Foreman v. Archer [Iowa] 106 N. W. 372. Question to attorney whether he had advised his client concerning a paper identified by him did not call for a privileged communication. Nixon v. Goodwin [Cal. App.] 85 P. 169. Attorney held not incompetent to testify as to a conversation between husband and wife in his office, he at the time being attorney for the husband. State v. Cummings, 189 Mo. 626, 88 S. W. 706.

8. Statements of defendant to witness who was a notary public and justice, but not the attorney of defendant, as to ownership of property, held not privileged. Frederick v. State [Ala.] 39 So. 915. An affidavit by an attorney to the effect that a party came to the office and inquired for

menced.[9] Communications in the presence and hearing of a third person, are not privileged.[10] Where two or more persons employ the same attorney in the same business, communications made by them in relation to such business are privileged as to their common adversary but not inter se.[11] Communications to an attorney by two persons who employ him jointly to draw two wills of like import are not privileged as against persons claiming under one of such wills.[12]

A statement submitted by an agent to his principal, pursuant to a business rule, for the purpose of being laid before an attorney for his guidance in litigation, is privileged.[13] This is so though the party claiming the privilege is a corporation and obtained its information through the usual agencies of the corporation.[14]

The privilege accorded by the statute as to communications between attorney and client is the client's, and where he volunteers his own testimony as to such communications he thereby waives his privilege.[15] The fact that co-conspirators employ the same counsel does not preclude one from waiving the statutory privilege as to communications with counsel.[16]

(§ 4) *B. Physician and patient.*[17]—By statute in many jurisdictions, information acquired by a physician in his professional capacity for the purpose of treating or prescribing for the patient is privileged.[18] A state statute of this character relates only to the remedy and is of no effect in a Federal court in another state.[19]

another attorney saying he wished to employ him, and that when told that such attorney was not in town, the party went away and did not return until after judgment had been rendered in the case, was not inadmissible as involving privileged communications between affiant and the party. Baker v. Jackson [Ala.] 40 So. 348. When defendant took his brother to an attorney to employ him in the matter of the brother's assignment for creditors, statements made by the defendant to the attorney are not privileged. Code Civ. Proc. § 3163, subd. 2, construed. Mackel v. Bartlett [Mont.] 82 P. 795. The inhibition does not extend to communications between the attorney and persons having social or business relations with the client, and certainly not when the statement does not purport to be conveyed to the attorney from the client, but on the contrary is the representation of a witness as to his knowledge of the transaction. Statements made by wife of defendant to an attorney while endeavoring to retain him as counsel, he not being retained, were not privileged under Code Civ. Proc. § 1881, subd. 2. People v. Heart [Cal. App.] 81 P. 1018.

9. The privilege extends to every communication which the client makes to his legal adviser for the purpose of professional advice or aid upon the subject of his rights and liabilities, and it is not essential that any judicial proceeding in particular should have been commenced or contemplated. Rogers v. Daniels, 116 Ill. App. 515.

10. An attorney may testify to conversations between himself and client occurring with and in the presence of the **attorney for the adverse party.** Andrews v. Scott, 113 Ill. App. 581.

11. Brown v. Moosic Mountain Coal Co. [Pa.] 61 A. 76. An attorney who acts for both parties in negotiations or communications in the presence of both is competent for either as to such matters. Mitchell v. Mitchell, 212 Pa. 62, 61 A. 570.

12. Wilson v. Gordon [S. C.] 53 S. E. 79.

13. When the operatives of a street car report an accident for the information of the claim agent and for his use in case suit is brought against the company. Ex parte Schoepf [Ohio] 77 N. E. 276.

14. Ex parte Schoepf [Ohio] 77 N. E. 276.

15, 16. People v. Patrick, 182 N. Y. 131, 74 N. E. 843.

17. See 4 C. L. 1954.

18. Under Code Civ. Proc. subd. 4, § 1881, information acquired by a physician in order to treat and prescribe for the patient is privileged. Murphy v. Board of Police Pension Fund Com'rs [Cal. App.] 83 P. 577. Where a physician, testifying in an action on a life insurance policy, said that he acquired the information that the insured's mother and two sisters had died of consumption, prior to the making of an application for insurance which alleged that none of the family had consumption while attending such persons in his professional capacity, he could not testify thereto. Comp. Laws, § 10,181. Krapp v. Metropolitan Life Ins. Co. [Mich.] 12 Det. Leg. N. 1032, 106 N. W. 1107. Information acquired by physicians while attending patient and in such attendance held privileged. Perry v. John Hancock Mut. Life Ins. Co. [Mich.] 12 Det. Leg. N. 978, 106 N. W. 860. Burns' Ann. St. 1901, subd. 4, § 505, making inviolate matters communicated by a patient to his physician in the course of his professional business protects such confidential relations except where the patient consents to their disclosure by the physician. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560.

19. Doll v. Equitable Life Assur. Soc. [C. C. A.] 138 F. 705. Rev. St. U. S. § 721, providing that the laws of the several states shall be regarded as rules of decision in

The statutory privilege includes information gained by the examination of the patient[20] as well as information orally communicated by him.[21] Information acquired before the relation of physician and patient is established,[22] or not shown to have been imparted to enable the physician to treat the patient professionally,[23] is not privileged. A physician in charge of a railroad hospital, whose services are compensated by assessments upon the wages of the employes, acts professionally while examining an injured employe[24] and communications by the employe to such physician in the course of his examination are privileged.[25] Statutes prohibiting disclosure of information professionally acquired by physicians do not necessarily render incompetent a physician's certificate of death as evidence of the cause of death.[26] Such a statute is held to apply to a proceeding to which the patients are not parties, and though the patients are dead at the time.[27]

Waiver of privilege.[28]—The patient may waive the privilege, since it is for his benefit,[29] and waiver by the patient is operative as to persons claiming under the patient.[30] But the privilege cannot be waived in part and retained in part; being once waived, it ceases to exist, at least so far as the trial in question is concerned.[31] The privilege may in some cases be waived by the personal representative of the deceased patient.[32] In Indiana the executor of a patient may waive the privilege for the purpose of upholding an attempted testamentary disposition of the patient's property.[33] But in an action to revoke the probate of a will and probate a subsequent will in its stead, the executor named in the earlier will cannot waive the privilege.[34] In New York, a testator's physician may testify to his condition at a certain

trials at common law in the Federal courts does not apply to an objection to the competency of a witness under the disqualifying statute of a foreign state where the contract sued upon was made. Id.

20. Under Rev. St. 1899, § 4659. Smoot v. Kansas City [Mo.] 92 S. W. 363. Condition of plaintiff as found by physician held privileged. Lackland v. Lexington Coal Min. Co., 110 Ill. App. 634, 85 S. W. 397.

21. Smoot v. Kansas City [Mo.] 92 S. W. 363. Under Rev. St. 1899, § 4659, physician was incompetent to testify to what patient told him concerning her condition and for what disease he treated her. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. Where a question to a physician included all his visits, and a third person was present only at one visit, an objection was properly sustained. Murphy v. Board of Police Pension Fund Com'rs [Cal. App.] 83 P. 577.

22. Physician could testify whether he saw plaintiff spitting any blood, if at the time in question the patient had not submitted to an examination by the physician. Smoot v. Kansas City [Mo.] 92 S. W. 363.

23. Under Code Civ. Proc. § 834, admissions made by an injured person to her physician as to the manner in which the injuries were caused are not privileged, although they were made during the course of an examination of the injured person by the physician, unless it appears that the information she imparted to the physician was necessary to enable him to act in that capacity. Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. S. 512.

24. McRae v. Erickson [Cal. App.] 82 P. 209.

25. Statements so made held privileged though some did not relate to his treatment but to the manner in which the injuries occurred. McRae v. Erickson [Cal. App.] 82 P. 209.

26. Certificates of death are competent evidence of the cause of death under Comp. Laws, § 4617, making them presumptive evidence of facts therein stated, notwithstanding § 10,181, prohibiting physicians from disclosing information acquired in their professional capacity. Krapp v. Metropolitan Life Ins. Co. [Mich.] 12 Det. Leg. N. 1032, 106 N. W. 1107.

27. Code Civ. Proc. §§ 834, 836. In re Myer's Will [N. Y.] 76 N. E. 920.

28. See 4 C. L. 1955.

29. Heaston v. Kreig [Ind.] 77 N. E. 805.

30. Where a patient in an application for an insurance policy waives the privilege conferred by Burns' Ann. St. 1901, subd. 4, § 505, making inviolate matters communicated by a patient to his physician, such waiver is operative as to those who claim under him. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560.

31. Powers v. Metropolitan St. R. Co., 105 App. Div. 358, 94 N. Y. S. 184.

32. Testimony of a physician as to seller's condition at time of execution of bill of sale held admissible on the waiver of professional secrecy by plaintiff as executrix. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90.

33. Since the privilege is for the benefit of the patient. Heaston v. Kreig [Ind.] 77 N. E. 805.

34. Objection to testimony of physicians who treated testatrix on issue of mental capacity could not be waived by executor named in first will, whose wife was also a legatee thereunder. Heaston v. Kreig [Ind.] 77 N. E. 805.

time, in a suit to probate the will, where the contesting defendants waive the statutory prohibition.[35] The privilege is held to be waived where the patient himself calls the physician to testify.[36] Testimony by a patient merely describing his condition and stating that certain physicians treated him[37] or testimony as to complaints made by the patient to his physician[38] does not constitute a general waiver. In New York, in the absence of previous waiver by stipulation, the privilege can only be waived in open court on the trial of the action or proceeding.[39]

(§ 4) *C. Husband and wife. Confidential communications*[40] between husband and wife are privileged both at common law and under modern statutes,[41] but

35. Where in a suit to establish the validity of the probate of a will the contesting defendants waive the provisions of Code Civ. Proc. § 834, providing that a physician shall not be competent to testify as to information acquired in his professional capacity, the testator's physician called by the defendants may testify as to the physical condition of the testator at a certain time. Roche v. Nason [N. Y.] 77 N. E. 1007.

36. May v. Northern Pac. R. Co., 32 Mont. 522, 81 P. 328. Plaintiff by having the physician who attended him testify to the examination made immediately after the accident, and his then condition, waives his privilege, so that defendant may have the physician testify as to plaintiff's subsequent condition resulting from the accident. Powers v. Metropolitan St. R. Co., 105 App. Div. 358, 94 N. Y. S. 184.

37. May v. Northern Pac. R. Co., 32 Mont. 522, 81 P. 328.

38. Patient and his daughter testified as above in personal injury suit without waiving right to object to testimony of physician for defendant. Indianapolis & M. Rapid Transit Co. v. Hall [Ind.] 76 N. E. 242.

NOTE. What constitutes a waiver: "It has been held that where the patient directly attacks the physician, as by an action for damages for malpractice, he abandons the protection given by the statute, for he thereby challenges the physician to disprove the patient's contention as to the character of his injury or of the physician's treatment. Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442. It has also been held that where two or more physicians are employed at the same time, with respect to information gained at the same consultation, calling one of the physicians as a witness by the patient constitutes a waiver of the statutory prohibition as to the other or others (Morris v. Railway Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675), although this doctrine is disputed by respectable authority (Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790). Likewise it has been held that, where the patient calls the physician as a witness at one trial, this constitutes a waiver of the privilege as to that physician upon a second trial of the same case. McKinney v. Railroad Co., 104 N. Y. 352, 10 N. E. 544. But this doctrine has also been disputed in Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364, and Grattan v. Insurance Co., 92 N. Y. 274, 44 Am. Rep. 372. But so far as our investigation discloses, no court of last resort has ever held that the mere fact that the patient testifies generally concerning his condition constitutes a waiver of the privilege granted by the statute. In Marx v. Railroad Co., 10 N. Y. S. 159, the Supreme Court of New York held that where the patient assumes to tell all that took place between himself and the physician, this constitutes a waiver of the privilege; and in Treanor v. Railroad Co., 16 N. Y. S. 536, decided by the Common Pleas Court of New York City, it was also held that where the patient testifies without reservation as to his injuries and their effect upon him, this likewise constitutes a waiver of the privilege. But these cases were later disapproved, and in effect directly overruled, by the Supreme Court of New York in Fox v. Turnpike Co., 69 N. Y. S. 551, and Dunckle v. McAllister, 74 N. Y. S. 902, and by the Court of Appeals of New York in Morris v. Railroad Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675. In Highfill v. Railroad Co., 93 Mo. App. 219, it is said that where a patient goes on the stand and testifies as to what his physician found and said, he thereby waives the privilege under the statute. It may be safely said that the Missouri appellate court is now the only court asserting the doctrine announced by it."—From opinion in May v. Northern P. R. Co. [Mont.] 81 P. 333.

39. Code Civ. Proc. § 834, as amended by § 836. Where plaintiff in an action for injuries caused a commission to issue to take the testimony of her physician and plaintiff did not use the deposition on the trial held error to allow defendant to use it over plaintiff's objection. Clifford v. Denver & R. G. R. Co., 97 N. Y. S. 707.

40. See 4 C. L. 1956.

41. Facts obtained by one spouse in confidence from the other cannot be testified to in a court of law. Supreme Lodge Mystic Workers of the World v. Jones, 113 Ill. App. 241. Communications made by husband to wife, or vice versa, are, unless consent is shown, absolutely incompetent when offered to be shown by testimony of one of the spouses. Humphrey v. Pope [Cal. App.] 82 P. 223. When a divorced wife sues her former husband to recover possession of a note, neither party is competent to testify as to whether the wife gave the husband the note in consideration of services performed by him for her. Johnson v. Johnson's Committee [Ky.] 90 S. W. 964, following Buckel v. Smith's Adm'r, 26 Ky. L. R. 494, 82 S. W. 235. See 4 C. L. 1956, n. 20. On the prosecution of a husband for murder of his father-in-law a letter written by the decedent to the defendant's wife, and by her shown to her husband, is a confidential com-

the privilege extends only to marital communications which it would be contrary to public policy to permit to be disclosed.[42] A divorced spouse cannot testify to communications made while the marriage relation existed.[43] Neither the husband nor wife is precluded from testifying in a suit between strangers to facts coming to knowledge by means equally accessible to any person not standing in the relation of husband and wife.[44] The rule as to confidential communications does not render inadmissible, in a suit by the wife for the alienation of the husband's affection, testimony by her as to physical and verbal acts of the husband tending to show his affection for her and the subsequent loss or withdrawal thereof.[45] Voluntary confessions are not within the rule of privileged communications.[46] A letter written by a wife to her husband, which is produced and offered in evidence by the officers of the state in a prosecution of a third person has lost its character as a privileged communication.[47] A letter from an accused person to his wife, intercepted and never delivered to the wife, has been held competent evidence against the husband[48] but there are contrary holdings.[49]

Testimony for or against each other.[50]—At common law, neither spouse was permitted to testify for or against the other, and this is still the rule in some states by

munication. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341.

42. So held where Code § 4607 makes privileged "any communication" between husband and wife. Sexton v. Sexton [Iowa] 105 N. W. 314. In personal injury action by husband, wife may testify to the nature of his injury and its effect on him, no confidential communication being thereby disclosed nor marital confidence violated. Macon R. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569. An exclamation by a husband in the presence of his wife and mother-in-law, made immediately upon firing a shot which killed his father-in-law, is not a confidential communication as to which the wife is forbidden to testify on his prosecution for murder. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341. In action by husband for injuries to wife, he could prove by the wife that he employed a nurse for the children. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616.

43. A divorced woman is not competent to testify as to an agreement involving property rights of herself and husband entered into while the marriage relation existed. Pub. Laws p. 45, c. 1110, enacted 1903, permitting the husband and wife of either party in a civil case between them, involving their property rights to testify, apply only to suits involving property rights accruing after its passage. Hartley v. Hartley [R. I.] 61 A. 144.

44. Husband could testify to wife's general health. Supreme Lodge Mystic Workers of the World v. Jones, 113 Ill. App. 241.

45. Sexton v. Sexton [Iowa], 105 N. W. 314.

46. Confession of wife, charged jointly with husband, competent against him also. State v. Mann, 39 Wash. 144, 81 P. 561.

47. State v. Nelson, 39 Wash. 221, 81 P. 721.

48. Hammons v. State, 73 Ark. 495, 84 S. W. 718.

49. **NOTE. "The admissibility of letters passing between husband and wife, and offered by a third person** has frequently been before the courts, and the decisions are conflicting. Even those holding to the same view of the question sometimes present different reasons for the ruling. The following decisions are against the competency of the evidence, holding it privileged: Mercer v. State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63; Scott v. Commonwealth, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371; Seldon v. State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144; Bowman v. Patrick, 32 F. 368; Liggett v. Glenn [C. C. A.] 51 F. 381. The last case was not between husband and wife, but attorney and client, but the reasoning of it applies to the privilege between husband and wife as fully as between attorney and client. The following authorities declare the letter admissible, and not privileged in hands of the third person: State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 372; State v. Mathers, 64 Vt. 101, 23 A. 590, 33 Am. St. Rep. 921, 15 L. R. A. 268; Lloyd v. Pennie, 50 F. 4; Ohio cases (not accessible in the library) cited in note at page 97 of 23 Am. & Eng. Ency. Law [2d Ed.]. In Mahern v. Linck, 70 Mo. App. 380, the court of appeals evidently overlooked the fact that the supreme court in State v. Ulrich, 110 Mo. 350, 19 S. W. 656, had cited approvingly the Buffington and Hoyt Cases, and held that generally such letters were not admissible, but said they would be when accompanied with evidence that they had not been procured by the connivance of the wife, which doctrine would admit the letter here in question. The writers on evidence hold that the letter as presented in this case is admissible. Wharton on Criminal Evidence, § 398; Underhill on Criminal Evidence, § 187; 23 Am. & Eng. Ency. Law [2d Ed.] p. 97; notes to 1 Greenleaf on Evidence, § 254; note to Commonwealth v. Sapp, 90 Ky. 566,

virtue of statute,[51] though the scope of the rule has been very generally limited, and it now rests upon a different reason.[52] One who is interested in the event of the action is not incompetent merely because his wife is a party.[53] Under a statute allowing a party to call the adverse party for cross-examination, where a husband and wife are co-defendants, the wife may be examined by plaintiff but her testimony is competent only against herself.[54] The wife of a party who appears in an action merely as a next friend is competent to testify therein, regardless of whether such next friend is liable for the costs of the action.[55] In many states, a wife is a competent witness for the husband as to a business transaction wherein she acted as his agent,[56] but agency as to the particular matter in issue must be shown.[57] In Louisiana, in those personal actions of the wife which are under the control of and are brought by the husband, both husband and wife are competent witnesses;[58] but in actions for damages resulting from personal injuries to the wife, the testimony of the husband should be excluded.[59] In Kentucky, in an action against a married woman which might have been brought against her had she been unmarried, either the husband or wife may testify, but both cannot do so.[60] In New Jersey, a petitioner for divorce is a competent witness in his or her own behalf[61] except as to certain facts,[62] and a husband who brings an action for criminal conversation is a competent witness as to the

29 Am. St. Rep. 415, 9 L. R. A. 351. Buffington v. State, 20 Kan. 599, 27 Am. Rep. 193, is the leading case on the subject. The doctrine there is that the statute, which is substantially similar to section 2916, Sand. & H. Dig., limits the privilege to the husband or wife testifying for or against the other, but does not provide that other parties obtaining the communications shall not produce them; and that the privilege attached to letters extends only to them while in the possession or control of the husband or wife or their agents or representatives. "The authorities are practically agreed that, when a conversation between husband and wife is overheard, it may be testified to by the third party. 1 Greenleaf on Evidence, § 254; Com. v. Griffen, 110 Mass. 181; Fay v. Guynon, 131 Mass. 31; Allison v. Barrows, 3 Cold. [Tenn.] 414, 91 Am. Dec. 291; State v. Center, 35 Vt. 378; Griffen v. Smith, 45 Ind. 366. It is also held that a conversation is not privileged when made in presence of third persons. Reynolds v. State, 147 Ind. 3, 46 N. E. 31; Mainard v. Beider, 2 Ind. App. 115, 28 N. E. 196; Robb's Appeal, 98 Pa. 501. As the tendency of the rule is to prevent a full disclosure of the truth, it must be strictly construed. Satterlee v. Bliss, 36 Cal. 508; Foster v. Hill, 12 Pick. [Mass.] 98, 22 Am. Dec. 400; Gower v. Emery, 18 Me. 82."—From Hammons v. State [Ark.] 84 S. W. 718.

59. See 4 C. L. 1956.

51. In a suit to set aside an assignment of rights under an accident insurance policy, brought against the wife and husband, assignee and assignor, the husband is incompetent to testify to facts showing liability of the insurance company, this testimony being adverse to the wife. Weckerly v. Taylor [Neb.] 105 N. W. 254.

52. See 4 C. L. 1956, notes 27, 28, 29, 30.

53. Where nieces of a deceased claimed property as heirs in the absence of a will, the proponents of an alleged will had the burden of proving its existence. The husbands of the nieces had, therefore, prima facie a marital interest in the lands in dispute and were competent witnesses in the will contest. Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858.

54. Rev. St. 1899, §§ 4654, 4656. Strode v. Frommeyer [Mo. App.] 91 S. W. 167.

55. Illinois, etc., R. Co. v. Becker, 119 Ill. App. 221.

56. Lumbard v. Holdiman, 115 Ill. App. 458. Where an evidentiary fact is material as regards a party to an action, and the wife of such party acted as his agent in regard to the matter, her acts within the scope of her agency may be testified to by her. Schwantes v. State [Wis.] 106 N. W. 237. It is inconsistent to exclude the testimony of the wife on the ground that she is not shown to have acted as the agent of her husband and at the same time to condemn the husband upon the ground of his ratification of a contract held to have been made by the wife in his behalf. Shepherd v. Schomaker [La.] 39 So. 554.

57. Where it appeared that the wife of defendant was his agent in various transactions but not in the one in issue, she was an incompetent witness as to such transaction. Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360. In an action for damages for the killing of the horses of plaintiff, a married woman, by defendant, her husband, who testified that he was his wife's general agent for the transaction of all her business, was incompetent, under Kirby's Dig. § 3095. St. Louis, etc., R. Co. v. Courtney [Ark.] 92 S. W. 251.

58, 59. Martin v. Derenbecker [La.] 40 So. 849.

60. Proper to refuse to allow husband to testify, in action on note against the wife, where wife had already testified. Code Civ. Proc. § 606. Ditto v. Slaughter [Ky.] 92 S. W. 2.

61. Wood v. Wood [N. J. Eq.] 62 A. 429.

62. See 4 C. L. 1957, n 40.

fact of marriage.[63] In Georgia, one spouse cannot testify to the fact of adultery by the other in any proceeding instituted in consequence of such act.[64]

In criminal prosecutions[65] against one spouse the other is not usually a competent witness[66] though there are some statutory exceptions to this rule,[67] as where the offense by one is against the person of the other,[68] and in some states the common-law disqualification has been entirely removed.[69] Where the wife is by law incompetent against the husband, the fact that she sustained a personal injury by the same criminal act of the husband which caused the death of another, for which he is being prosecuted,[70] or the fact that the wife is the only witness to the crime,[71] does not render her competent. The wife being incompetent against her husband her declarations to a third party[72] or to him[73] are also incompetent against him. One not the legal wife of a defendant is competent, even though the relation of husband and wife was assumed.[74] Where the relation of husband and wife has been assumed, a second wife is not a competent witness to prove the fact of the first marriage,[75] since she cannot testify at all until the illegality of the second marriage has been

63. Rev. P. L. 1900, p. 363, § 5, recognizes and affirms such competency. Hill v. Pomelear [N. J. Err. & App.] 63 A. 269.

64. Under Civ. Code 1895, § 5272, which renders one spouse incompetent in an action or proceeding instituted against the other in consequence of adultery, where a husband sought a divorce on the ground of desertion, he could not, in a proceeding by the wife for alimony, testify to her act of adultery. Bishop v. Bishop [Ga.] 52 S. E. 743. The mere fact that such evidence is not objected to does not render it competent. Id.

65. See 4 C. L. 1957.

66. Wife of defendant in a criminal prosecution is not a competent witness against him. Hoch v. People, 219 Ill. 265, 76 N. E. 356; State v. Woodrow [W. Va.] 52 S. E. 545. Wife is not a competent witness for husband on issue of his sanity. Commonwealth v. Woelfel [Ky.] 88 S. W. 1061. Wife incompetent witness in prosecution of her husband for homicide. State v. Wilson [Del.] 62 A. 227.

67. By acts 1903, p. 32, the wife is a competent witness against the husband in a prosecution for abandoning his family. Wester v. State [Ala.] 38 So. 1010.

68. See 4 C. L. 1958, n. 43.

69. A wife is a competent witness against her husband in a prosecution for bigamy under a statute providing that in all criminal proceedings the husband or wife of the accused is a competent witness and may testify to the fact of her marriage. Richardson v. State [Md.] 63 A. 317.

70. In a prosecution against a husband for the murder of his infant child, though the pistol ball which killed the child in its mother's arms wounded the mother, the latter is incompetent. State v. Woodrow [W. Va.] 52 S. E. 545.

Note: "There is a strong dissenting opinion in the case of State v. Woodrow [W. Va.] 52 S. E. 545. It is a well recognized rule in criminal actions that the wife shall not be compelled to testify against her husband. An exception exists where the offense is alleged to have been committed by him upon her. It is difficult to determine exactly what offenses are included in this exception. Where the act is one of personal violence to the wife, she is a competent witness. Whipp v. State, 34 Ohio St. 87, 32 Am. Rep. 359. It has been held that the wife is competent where the husband is indicted for bigamy. State v. Sloan, 55 Iowa, 217. Also for adultery. Lord v. State, 17 Neb. 526. Contra, People v. Quanstrom, 93 Mich. 254; Compton v. State, 13 Tex. App. 271. In Bassett v. United States, 137 U. S. 496, 34 Law. Ed. 762, it was held that the wife was not a competent witness against her husband on trial for polygamy. The weight of authority seems to be that the offense in the main case was not upon the wife, within the meaning of the exception, and that the case was rightly decided."—4 Mich. L. R. 486.

71. State v. Woodrow [W. Va.] 52 S. E. 545.

72. Though made in his presence. State v. Richardson [Mo.] 92 S. W. 649. What husband heard wife say incompetent against him. Grabowski v. State [Wis.] 105 N. W. 805.

73. Grabowski v. State [Wis.] 105 N. W. 805. Court properly refused to accept waiver of incompetency, offered by accused, near close of testimony for defense. Id.

74. Where woman living with defendant was not his wife, he having another wife living, she was a competent witness against him, regardless of their confidential relations and her belief that she was in fact his wife. Young v. State [Tex. Cr. App.] 92 S. W. 841. Bigamous wife is competent. Hoch v. People, 219 Ill. 265, 76 N. E. 356. Testimony of mistress, who was the wife of another man, held competent. State v. Hancock [Nev.] 82 P. 95. Where a witness was claimed to be incompetent because she had married defendant two days before, but it appeared that she had been married before but her husband had left her 2 years before the second marriage and she did not know his whereabouts, she was held competent, her marriage to defendant being void. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 S. W. 840. Where a witness offered is alleged to be the wife of the accused and it is proven that the accused was previously married and that his wife by such prior marriage is still alive and undivorced, all presumptions in favor of the validity of the

shown by proof of the fact and validity of the first.[76] A woman who has been divorced from her husband is a competent witness against him, except as to a communication made by one to the other during marriage.[77] In a prosecution for living in adultery, the husband of defendant's paramour is a competent witness, where the paramour is not on trial nor charged with crime.[78]

(§ 4) *D. Miscellaneous relations.*[79]—Statutes prohibiting disclosure of confessions to a clergyman do not render a clergyman incompetent as to information not gained through a confession.[80]

§ 5. *Credibility, impeachment and corroboration of witnesses. A. Credibility in general.*[81]—The credibility of witnesses[82] and whether they have been successfully impeached[83] are questions exclusively for the jury. The jury may disregard the testimony of a witness who has willfully[84] sworn falsely[85] to a material fact[86] except in

marriage between the accused and the person offered are overcome, and such person is competent. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

75, 76. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

77, 78. State v. Nelson, 39 Wash. 221, 81 P. 721.

79. See 4 C. L. 1956.

80. Rev. St. 1893, § 4074, prohibiting disclosure of confessions to a clergyman without the consent of the person confessing, held not to apply to testimony of priest in arson case that he had read a letter to defendant, written to him concerning the fire, that she was much excited, and wrote a statement at his dictation. Colbert v. State, 125 Wis. 423, 104 N. W. 61.

81. See 4 C. L. 1958.

82. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Texas & P. R. Co. v. Skates [Tex. Civ. App.] 87 S. W. 1166. Improper to ask one witness if another is not mistaken in his testimony. Braham v. State [Ala.] 38 So. 919. Instruction erroneous because withdrawing from jury consideration of credibility of witnesses. Thomas v. Law, 25 Pa. Super. Ct. 19. Instruction in eminent domain proceedings held not to violate this rule that credibility is for jury. Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269. Credibility of witnesses is for jury, taking into consideration evidence directed thereto and also appearance of witness on the stand. Peterman v. Henderson [Ala.] 40 So. 756. Whether a witness has any interest in the outcome of a case, and whether such interest, if any there is, is such as to affect his testimony, is for the jury. Miller v. Territory [Okl.] 85 P. 239. The evidence of a prosecutrix in a bastardy proceeding need not be corroborated, but its weight is for the jury. Evans v. State [Ind.] 75 N. E. 651. The law indulges no presumption that an unimpeached witness testified truly. An instruction to such effect invades the province of the jury. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341. It is erroneous to instruct that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight greater weight and credit should be given to those whose means of information are superior. Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790. It is erroneous to instruct that a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not interested. Id.

83. Whether a witness has been impeached is a question of fact, not of law. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341. Effect of proof of contradictory statements on witness' credibility is for jury. Jones v. State [Ala.] 40 So. 947. An instruction as to the weight to be given the testimony of witnesses who have been impeached may specifically refer to such witness where only one is sought to be impeached. Stevens v. People, 215 Ill. 593, 74 N. E. 786.

84. Jury must believe witness has "knowingly and willfully" sworn falsely. Hughes v. Ferriman, 119 Ill. App. 169. Where written statement after an accident did not include an incident testified to by the writer on the trial, and he was otherwise discredited, the jury were warranted in believing him guilty of willful false swearing and in disregarding all his testimony. Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786.

85. It is not error where an instruction is asked telling the jury that they are the sole judges of the credibility of witnesses and may believe them or not, to modify the instruction so as to tell them that they cannot arbitrarily disregard the testimony of a witness unless they believe it untrue. State v. Legg [W. Va.] 53 S. E. 545. The doctrine falsus in uno falsus in omnibus does not apply to the testimony of a witness who has knowingly belittled or exaggerated a material fact about which he testified. Chicago, etc., R. Co. v. Kline [Ill.] 77 N. E. 229.

86. False testimony must relate to a material matter. Hughes v. Ferriman, 119 Ill. App. 169; Bennett v. Susser [Mass.] 77 N. E. 884. Instruction held erroneous. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Instruction erroneous because not requiring jury to find willfully false swearing as to a material matter before permitting them to disregard the entire testimony of a witness. Geringer v. Novak, 117 Ill. App. 160. Instruction erroneous because not permitting jury to believe a portion of witness' testimony, and not telling them that witness' false testimony must relate to some material matter. Bickerman v. Tarter, 115 Ill. App. 278. On a trial for murder an instruc-

so far as such witness has been corroborated by other credible evidence[87] or by facts and circumstances proven upon the trial,[88] and an instruction to this effect should be given on request where a witness has been wholly discredited[89] or has been contradicted as to a material point.[90] The giving or refusal of instructions on the credibility of witnesses is, however, largely discretionary with the trial court.[91]

Impeaching and discrediting in general.[92]—The extent to which cross-examination of a witness may be carried for the purpose of testing his credibility is a matter largely discretionary with the trial court.[93] Cross-examination of a party for the purpose of discrediting his evidence is governed by the same rules as that of any other witness,[94] though greater latitude is usually permitted in such case.[95] The impeachment of one witness does not operate to impeach other witnesses for the same party.[96] The more usual methods of impeaching or discrediting a witness are more

tion: "If you believe that a witness has willfully testified falsely as to any fact, you are authorized but are not bound to disbelieve the entire testimony of the witness," held not erroneous because omitting the word material. People v. Dinser, 98 N. Y. S. 314. An instruction should not direct the jury to disregard the testimony of a witness if certain facts are shown discrediting him, but should only authorize them to disregard his testimony if they find he has willfully sworn falsely as to a material matter. Funderburk v. State [Ala.] 39 So. 672. If it appears that an accomplice of defendant has willfully sworn falsely in regard to a material matter, his testimony, uncorroborated, cannot support a conviction. Jahnke v. State [Neb.] 104 N. W. 154.

87. Instruction erroneous because omitting proviso as to corroboration. Szymkus v. Eureka Fire & Marine Ins. Co., 114 Ill. App. 401. Instruction based on the hypothesis of other "credible witnesses" is erroneous. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Corroboration need not be by "witnesses," it may be by other credible "evidence." Hughes v. Ferriman, 119 Ill. App. 169. An instruction that "the testimony of one credible witness may be entitled to more weight than the testimony of many others if you believe such others are mistaken in their testimony or have knowingly testified untruthfully and are not corroborated by other credible witnesses, or by facts or circumstances proven," is erroneous. Tri-City R. Co. v. Gould, 217 Ill. 317, 75 N. E. 493. Though a witness has been impeached and has sworn falsely as to some material fact, his testimony as to other facts corroborated by other witnesses, must be considered (but not necessarily believed) by the jury. John Hancock Mut. Life Ins. Co. v. Powell, 116 Ill. App. 151.

88. A witness who has knowingly sworn falsely to a material matter may be wholly disbelieved except so far as corroborated by other credible evidence or by facts and circumstances proved. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547. Instruction held to state rule properly. Williamson Iron Co. v. McQueen [Ala.] 40 So. 306. Instruction held erroneous: "You may disregard the testimony of any witness if you believe the witness has testified falsely, and is not corroborated by other credible witnesses in the case." Hughes v. Ferriman, 119 Ill. App. 169.

89. Fields v. Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134.

90. Where a witness makes statements in material matters inconsistent with former statements the party against whom he testifies is entitled to an instruction that if the jury believe that the witness made inconsistent statements concerning such matters they may disregard his entire testimony or give it such weight as they think it entitled to. State v. Trail [W. Va.] 53 S. E. 17. Where there is a variance between the testimony of the complaining witness at the preliminary hearing and her testimony at the trial of a bastardy proceeding, it is error to refuse a requested instruction on such variance as affecting her credibility as a witness. Quinn v. Eggleston [Neb.] 106 N. W. 976.

91. Refusal of instruction that want of chastity of plaintiff could be considered by jury on her credibility not an abuse of discretion where general instruction on credibility of witnesses had been given. Beasley v. Jefferson Bank, 114 Mo. App. 406, 89 S. W. 1040. Refusal of instruction that entire testimony of witness could be disregarded if the jury believed he had willfully sworn falsely to a material fact, held not error. Id.

92. See 4 C. L. 1959.

93. As to cross-examination of witnesses in general, see Examination of Witnesses, 5 C. L. 1371. To what extent a witness may be cross-examined on collateral issues to test his honesty or credibility rests largely in the discretion of the trial court. Robinson v. Old Colony St. R. Co. [Mass.] 76 N. E. 190. Discretion not abused in ruling out an offer to show what a witness had said regarding his unwillingness to testify. Commonwealth v. Ezell, 212 Pa. 293, 61 A. 930. The evidence of detectives and informers is always carefully scrutinized by the courts, and the cross-examination allowed a person prosecuted by such witness is broad, especially when the witness claims to have induced the criminal act for the express purpose of prosecution. State v. Bryant [Minn.] 105 N. W. 974.

94. Schwantes v. State [Wis.] 106 N. W. 237.

95. Where one's case depends principally upon his own testimony, it is proper to show on cross-examination for the purpose of impeaching him that he had recovered a default judgment on the same claim which had

particularly discussed in succeeding paragraphs.[97] In general, the testimony of a witness may be discredited by proving facts contrary to those testified to by him[98] or tending to show such testimony improbable,[99] or by showing acts[1] or statements[2] of the witness, or other circumstances,[3] inconsistent with his testimony.[4] That a wit-

been set aside for fraud and collusion. Masters v. Seeley [C. C. A.] 138 F. 719.

96. Korter v. Gulf, etc., R. Co. [Miss.] 40 So. 258.

97. See § 5, subsecs. B, C, and D.

98. In determining the credibility of testimony of defendant in a criminal prosecution the fact, if it is a fact, that he has been contradicted by other and credible witnesses, is to be considered. Maguire v. People, 219 Ill. 16, 76 N. E. 67. Where witness denied giving a letter to another for plaintiff, the letter was admissible to contradict him. Davis v. First Nat. Bank [Ind. T.] 89 S. W. 1015. Where witness told the court he could not understand English sufficiently to testify, that statement could be contradicted by other witnesses. State v. Goodson [La.] 40 So. 771. A testator's son who testifies on an issue of his father's mental capacity may be contradicted by the testimony of any person cognizant of the facts covered by his testimony whether a party to the issue or not. Swygart v. Willard [Ind.] 76 N. E. 755.

99. Where the only person who could directly dispute the testimony of a witness is dead, close scrutiny should be given to it and the question of improbability should be taken into consideration in determining its credibility. In re Bailey, 98 N. Y. S. 725. In murder trial a witness for the state said that he saw the killing, and admitted that on the preliminary hearing he had said he did not see it, and he explained the inconsistency by saying he had been influenced by defendant's uncle and father. It was held proper for defendant to show by the witness that he had been arrested for the crime before the preliminary hearing. Snyder v. State [Ala.] 40 So. 978.

1. Evidence of acts done by witness while on a trip with an officer admissible to impeach testimony of witness as to purpose of trip and why officer went along. Vagts v. Utman, 125 Wis. 265, 104 N. W. 88. One accused of running a lottery testified in chief that he was never in the employ of a certain lottery company, and never authorized to do business for it. It was proper to show on cross-examination that he made a business of buying and selling lottery tickets of such company. State v. Miller, 190 Mo. 449, 89 S. W. 377. Where a witness denied the signing and execution of a written instrument, and that it was executed in duplicate, it was proper to ask him if he had not compared, with counsel, before the jury, a contract offered by plaintiff with a copy given his counsel by him. Mellini v. Duly [Miss.] 40 So. 546. Where witness denied making certain declarations in presence of third person, the fact that he did make them could be proved by such third person. Marris v. State [Ala.] 39 So. 608. A witness who on the stand denies having made a certain statement may be impeached by evidence that he did make such statement. State v. Forsha, 190 Mo. 296, 88 S. W. 746. Where in a personal injury action, a plaintiff's wife testifies that she had no conversation with a certain person relative to the actions of her husband, the testimony of such person to the contrary is competent by way of impeachment. McInnis v. Boston El. R. Co. [Mass.] 76 N. E. 911.

2. See, also, § 5 D. A witness who testifies to certain evidentiary facts which have a tendency to prove certain ultimate facts may be impeached by cross-examination as to whether he had made statements inconsistent with such ultimate facts and by proof that he made such statements. Johnson v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 362. Pleadings and testimony in other litigation may affect the credibility of a litigant as to testimony given in a particular case but should not ordinarily estop him from testifying. Ackerman v. Larner [La.] 40 So. 581. Where in an action on a life policy a witness testifies that he has known the insured all his life and had never seen him intoxicated, it is error to refuse to allow him to be cross-examined as to whether he had not talked with the beneficiary of the policy about having a complaint made against the insured for intoxication. Rossenbach v. Supreme Court I. O. F. [N. Y.] 76 N. E. 1085.

3. Where one setting fire to woods testified that after the fire got beyond his control he returned by a certain way to avoid being seen, held error to exclude evidence that the route was so covered with brush and debris as to be impassable. Sampson v. Hughes, 147 Cal. 62, 81 P. 292. A plaintiff in an action for damages to his building because of the maintenance of an elevated railway in the street who testifies that after the erection of the structure his building was worth from $7,000 to $10,000 may be impeached by evidence that he employed agents to sell it and named $17,000 as the price. Cotton v. Boston El. R. Co. [Mass.] 77 N. E. 698.

4. Statements must be in fact inconsistent with testimony or it is inadmissible. [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694; Clark v. Dalziel [Cal. App.] 84 P. 429. Impeaching matter must be in fact inconsistent with testimony or it is inadmissible. Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507. A witness who does not recognize certain buildings in the locality in which he resides from a photograph of them cannot be impeached by the admission of such photographs in evidence. Chicago, etc., R. Co. v. Kline [Ill.] 77 N. E. 229. It is not competent to contradict a witness by evidence entirely consistent with his testimony. One who testifies that he purchased property on a certain date cannot be contradicted by a deed of a later date. Roessler-Hasslacher Chemical Co. v. Doyle [C. C. A.] 142 F. 118. A statement of a wit-

ness has never been heard to make statements made on the stand is not a discrediting circumstance,[5] but previous silence of a witness concerning facts testified to may sometimes be shown.[6] Intoxication of the witness at the time of the events to which he testifies may be shown,[7] as may any other fact tending to show lack of knowledge or want of ability or an opportunity to learn the facts testified to.[8]

A party cannot impeach his own witness,[9] but if the party is surprised by the witness' testimony[10] he may inquire as to previous inconsistent statements to test

ness that she was asked at the first trial to point out the plaintiff, and did so, is not inconsistent with her statement that she knew plaintiff by sight. International & G. N. R. Co. v. Boykin [Tex.] 89 S. W. 639. In a prosecution for arson, declarations, made 10 days after the fire, by a witness who testified on the trial that he had used a brush and oil on the floor, to the effect that the oil was put on "for a purpose," does not contradict him or affect his credibility. People v. Brown, 96 N. Y. S. 957. Prior statements of a witness that a railroad running through certain land would damage it a certain amount cannot be received to discredit his testimony as to damages done to other lands by virtue of a railroad being run through them. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430.

Mere discrepancies in the testimony of a witness in different actions, of slight importance, and explained by the witness as mistakes in recollection, do not justify the court in wholly disregarding the testimony of the witness. Allen v. Ellis, 125 Wis. 565, 104 N. W. 739.

5. A witness cannot be impeached by testimony of a person that he never heard him make the statement he made on the stand, though he was present at the time of the circumstance testified about. Fields v. Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134. A witness not shown to have been present at the time certain conversations with a deceased person were had cannot for the purpose of contradicting witnesses who were present, testify that he had never heard the deceased make certain statements. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

6. Where a defendant in a prosecution for murder testifies that on the night before the homicide he was shot at under circumstances which led him to believe that deceased fired the shot he may be impeached on cross-examination by asking him why he did not report the shooting to the authorities. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. Where plaintiff's assignors claimed that a partial payment had been made within the period of limitations, held error for the court to refuse to permit defendant to cross-examine them with reference to why they had uniformly omitted to previously assert such partial payment. Lefkowitz v. Reich, 98 N. Y. S. 695. Where in an action by the trustee of a bankrupt to recover goods purchased from an agent of a creditor, the defendant testified that the agent told him that the goods belonged to the creditor, the trustee could show without laying foundation therefor that at a former trial the plaintiff in testifying as to the same occasion had not stated that the agent made such statement. Coolidge v. Ayers, 77 Vt. 448, 61 A. 40. The failure of a witness to deny a statement made in his presence and hearing cannot be shown to impeach his testimony unless he was under the duty to speak. Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694. The fact that a highway commissioner, who testified to a conversation between the parties to a suit concerning water rights, wherein defendant had said certain water flowed west, did not mention the conversation at the time of an agreement concerning the water between plaintiff and the township which was made in his presence, did not discredit his testimony, though the agreement assumed that the water flowed east. O'Connor v. Hogan [Mich.] 12 Det. Leg. N. 272, 104 N. W. 29.

7. Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553. That witness was intoxicated at time of event to which he testified may be shown. Morris v. State [Ala.] 39 So. 608.

8. Where it appeared that the prosecuting witness in a prosecution for violation of the local option law was unfriendly to the defendant and his recollection as to the time of sale and other facts was confused it is proper to show that he purchased liquor from other persons at about the time he purchased from defendant and drank it at the place he claimed to have drunk that purchased from defendant. Rutherford v. State [Tex. Cr. App.] 90 S. W. 172.

9. See 4 C. L. 1960. A party who voluntarily calls a witness so far vouches for the credibility of the witness that he will not be permitted deliberately to impeach him. State v. Stephens [La.] 40 So. 523. State cannot impeach a witness for the prosecution by showing that he was charged on affidavit as being an accessory before the fact to the crime in question. State v. Gallo [La.] 39 So. 1001. A party who is not surprised with the testimony of his own witness cannot impeach him. Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357. The state cannot impeach its own witnesses unless they have testified to something injurious to the state. Reyes v. State [Tex. Cr. App.] 88 S. W. 245. Where a party took the deposition of a person but failed to introduce it or the person making it, the party's testimony could not be objectionable as contradicting the party's own witness. King v. Phoenix Ins. Co. [Mo.] 92 S. W. 892.

10. Where witness told prosecuting attorney that he was mistaken as to facts stated by him before the grand jury, his testimony on the trial, different from his statements before the grand jury could not be discredited by the state by proof of his prior statements. Ware v. State [Tex. Cr. App.] 92 S. W. 1093. Evidence given by a

the witness' recollection and cause him to review what he has said[11] and may call other witnesses to prove that the facts are otherwise than as stated by the witness.[12] But if the sole purpose of such inquiry and other testimony is to discredit the witness, it is inadmissible unless the party has been entrapped by a hostile witness[13] and even then, to justify impeachment of the witness, it must appear that he has testified against the party calling him and in favor of the adverse party in some material matter.[14] A mere failure of a witness to testify as expected is not ground for impeachment by the party calling him.[15] Testimony of the adverse party, called as a witness, is not conclusive on the party calling him.[16] One who has impeached a witness testifying for the other side cannot introduce original testimony through him by calling him and refusing to vouch for him as a witness; he must put him on the stand as any other witness testifying originally on his behalf.[17]

A witness cannot be contradicted or impeached as to collateral matters,[18] whether such matters were brought out on the direct or cross-examination.[19] Collateral

witness at the examining trial cannot be introduced to impeach him where the testimony at the trial is substantially the same. Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357. Defendant's motorman made two written statements concerning accident, both favoring the defense, and made similar statements in a deposition taken by plaintiff. Later, he resigned his position, and still later, went to plaintiff's attorney and made contrary statements, and was taken to the place of trial by plaintiff but not used so that defendant could not use his deposition. Defendant put him on the stand, and he testified against it. It was held that a claim of surprise was well founded, and that defendant could contradict him by his deposition and written statements. Clancy v. St. Louis Transit Co. [Mo.] 91 S. W. 509.

11. State v. Stephens [La.] 40 So. 523. Where a witness unexpectedly gives testimony against the party calling him, such party may for the purpose of refreshing the memory of the witness ask him if he did not, on a particular occasion, make a contrary statement. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 90 S. W. 933.

12. State v. Stephens [La] 40 So. 523. One who calls a witness vouches for his credibility and cannot impeach him, though he may contradict his statements by other witnesses. Chicago, etc., R. Co. v. Roberts [Colo.] 84 P. 68. Though a party cannot impeach his own witness, he is not precluded from contradicting the witness by other witnesses. In re Bailey, 98 N. Y. S. 725. A party by introducing a witness is not concluded by his testimony given on cross-examination by the adverse party, when the party introducing him is surprised thereby; he may call other witnesses to prove the facts to be otherwise. Civ. Code Prac. § 596. Southern R. Co. v. Goddard [Ky.] 89 S. W. 675. Under Burns' Ann. St. 1901, § 515, providing that a party calling a witness may contradict him by other evidence and by showing that he made statements contradictory to his testimony, a defendant in a bastardy proceeding who calls a witness and asks him if he had not had intercourse with the relatrix on a certain date to which the witness replies "not that I know of" may testify that such witness made contradictory statements to him. Walker v. State [Ind.] 74 N. E. 614.

13, 14. State v. Stephens [La.] 40 So. 523.

15. Where a party introduces a witness who simply fails to prove a fact which he wishes to establish, it is not competent to prove that the witness has stated out of court that such is the fact. Threlkeld v. Bond [Ky.] 92 S. W. 606. A party may not impeach his own witness where he gave no testimony that was injurious to him but simply failed to recollect a fact. Willis v. State [Tex. Cr. App.] 90 S. W. 1100. Where one is given full opportunity in the absence of the jury to refresh the memory of his witness, he cannot further examine him in the presence of the jury for the purpose of laying a predicate to contradict him. Id. Where one party for the purpose of laying a foundation for impeachment asks a witness for the other about matters not brought out by such party, the witness becomes his own as to such matters and failure to elicit the desired answers is a failure of proof and other witnesses cannot be called to rebut his statements. Casey v. State [Tex. Cr. App.] 90 S. W. 1018.

16. A party who calls his opponent as a witness is not concluded by his testimony but may contradict him. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501. A party who calls a hostile witness or the adverse party does not thereby hold him out as entitled to credit where by statute he is entitled to impeach him in a particular manner. A contestant of a will who calls one charged with having exercised undue influence in the execution of such will does not hold him out as entitled to credit. Emerson v. Wark, 185 Mass. 427, 70 N. E. 482.

17. Williams v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 620, 87 S. W. 1155.

18. See 4 C. L. 1961. Funderburk v. State [Ala.] 39 So. 672; Hinson v. State [Ark.] 88 S. W. 947; Dillard v. U. S. [C. C. A.] 141 F. 303; Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507; Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694; Bell v. State [Miss.] 38 So. 795; Scott v. State [Miss.] 39 So. 1012. Not error to exclude impeaching evidence on unimportant, immaterial matter. Bialy v.

matters, within the meaning of this rule are such as the party would not be allowed to prove as a part of his own case.[20] The rule forbidding contradiction of a witness on collateral matters does not apply where the facts sought to be shown go to the credit or capacity of the witness to testify truly in the particular case, as distinguished from facts discrediting him generally.[21]

(§ 5) *B. Character and conduct of witnesses.* 1. *In general.*[22]—Proof of the general moral character of a witness is usually held incompetent,[23] but is admitted in some jurisdictions.[24] In Florida, the general character of a witness

Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149. Matters entirely irrelevant cannot be inquired into on cross-examination even for the purposes of impeachment. Schwantes v. State [Wis.] 106 N. W. 237. Questions relating to merely imaginary circumstances, without reasonable grounds to expect favorable answers, or to be able to impeach the answers, are improper. Id. A witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. Instruction held inaccurate but in this case harmless. Mann v. State [Ga.] 53 S. E. 324. Though witness denies making immaterial statements, he cannot be contradicted in regard thereto. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 115, 89 S. W. 816.

19. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. Even though a witness has testified to immaterial matter on his direct examination, a predicate for his impeachment on such matter cannot be laid on his cross-examination. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 756. Where witness is cross-examined as to collateral matters not testified to in chief, the cross-examiner is bound by the answers given and cannot impeach the witness in regard thereto. Moody v. Peirano [Cal. App.] 84 P. 783.

20. Bell v. State [Miss.] 38 So. 795. Questions on cross-examination are not relevant for purposes of impeachment unless it would be competent to prove the existence of the circumstance suggested by the question otherwise, upon a proper foundation being laid therefor, where one is required. Schwantes v. State [Wis.] 106 N. W. 237. Statements by witnesses for the state constituting links in the evidence against accused, could be attacked. State v. Rogers [La.] 38 So. 952. A witness testified that plaintiff had the reputation of being lazy and on cross-examination gave the name of the person who had told him so. Proof by such person that he had never made such statement to witness was not an attempt to impeach witness on a collateral matter. St. Louis S. W. R. Co. v. Bryson [Tex. Civ. App.] 91 S. W. 829. On an issue as to whether injuries were caused by the plaintiff's negligence or defendant's contributory negligence, the plaintiff's testimony that he had not been in the habit of stealing rides on the cars cannot be contradicted. Hot Springs St. R. Co. v. Bodeman [Ark.] 88 S. W. 960. Proof of a difficulty between prosecuting witness, in assault, and a third person, denied by witness, was incompetent impeaching evidence because irrelevant. Honeycutt v. State [Tex. Cr. App.] 92 S. W. 421. A testator's son who testifies on an issue of his father's mental capacity and states that the relations between himself and father had always been friendly is not impeached as to a collateral matter by evidence of particular instances of trouble between himself and his father. Swygart v. Willard [Ind.] 76 N. E. 755. Where it was attempted to be shown that plaintiff and her husband, who was acting for her, had acquiesced in the claim of a witness for defendant to ownership of stock in question, and the witness testified on his direct examination to conversations with plaintiff and her husband in relation to the stock, and on cross-examination that he showed the paper on which his claim was based to plaintiff's husband, testimony of the husband denying that he was shown the paper held not subject to the objection of contradicting the witness on a collateral matter. Hall v. Wagner, 97 N. Y. S. 570.

21. State v. Malmberg [N. D.] 105 N. W. 614.

22. See 4 C. L. 1961.

23. A witness cannot be impeached by evidence that he is a "cocaine fiend." Williams v. U. S. [Ind. T.] 88 S. W. 334. General reputation of defendant as a violent and turbulent man is inadmissible to affect his credibility. State v. Richardson [Mo.] 92 S. W. 649. A question asked of a witness on cross-examination as to whether he was not the notorious person who was tarred and feathered and run out of the county held properly excluded. State v. Mann, 39 Wash. 144, 81 P. 561. In Florida the general character of a witness not shown to have been convicted of any crime cannot be inquired into to affect his credibility, the only inquiry permissible being as to his character for truth and veracity. Baker v. State [Fla.] 40 So. 673.

Bad character of witness as to chastity cannot be proved. State v. Baudoin [La.] 40 So. 239. Want of chastity cannot be shown to affect credibility. Baker v. State [Fla.] 40 So. 673. It is not an abuse of discretion to exclude questions as to whether the witness had been an inmate of an assignation house 15 or 20 years prior to the trial. Cline v. Waters [Ky.] 90 S. W. 231. Reversible error to show on cross-examination of witness for defendant that she was mother of bastard child. Davis v. State [Miss.] 39 So. 522. In a prosecution for rape of a female under the age of consent it cannot be shown as affecting her credibility that she was pregnant at the time and had had intercourse with many different men. State v. Stimpson [Vt.] 62 A. 14.

24. The character of a witness may be considered in determining the weight and credibility to be given his testimony where each party contends that the testimony on

shown to have been convicted of a crime may be inquired into,[25] but in such cases the inquiry should be confined to general character and should not be extended to particular phases or traits of character.[26] Specific acts of wrongdoing, not amounting to crimes, conviction of which may be shown under the statute,[27] cannot usually be proven.[28]

The reputation of a witness for truth and veracity may, of course, be shown.[29] Proof thereof must not be too remote from the time of trial.[30] The reputation of a witness at a place other than his permanent domicile may be shown, provided he resided at the place in question long enough to have acquired a reputation for truth and veracity.[31]

behalf of the other is unreliable. Instruction approved though there was no evidence of character introduced. Harrison v. Lakenan, 189 Mo. 581, 88 S. W. 53. The general moral character of a defendant in a criminal prosecution who testifies in his own behalf may be assailed for impeaching purposes. State v. Woodward, 191 Mo. 617, 90 S. W. 90. The defendant in a criminal case assuming the character of a witness is subject to the rules applicable to any witness, and questions as to his past life and conduct which would impair his credibility are not improper. State v. Buffington [Kan.] 81 P. 465. Proof of character whether it relates to the accused or to witnesses is to be considered the same as any other evidence tending to show credibility, guilt, or innocence and is entitled to such weight as the jury deems just in connection with all other evidence in the case. State v. Collins [Del.] 62 A. 224. In a prosecution for seduction it is competent for the purpose of discrediting the prosecuting witness, to admit letters by her to a third person showing a vulgar and lascivious mind on her part. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242.

25. Rev. St. § 1097. Baker v. State [Fla.] 40 So. 673.

26. Such as want of chastity. Baker v. State [Fla.] 40 So. 673.

27. See post, § 5 B 2.

28. A witness cannot be impeached by evidence of particular wrongful acts other than conviction of a felony. Code Civ. Proc. § 2051. People v. Gray [Cal.] 83 P. 707. Evidence that a witness had been arrested for being drunk held inadmissible on issue of character of witness for truth, honesty and integrity. Id. A witness cannot be impeached by evidence of particular acts. Richardson v. State [Md.] 63 A. 317. Witnesses cannot be impeached by testimony not going to their general reputation but to specific conduct. Bringgold v. Bringgold [Wash.] 82 P. 179. The character of a witness cannot be assailed by evidence of specific acts occurring subsequent to the offense for which he was being tried. State v. Wertz, 191 Mo. 569, 90 S. W. 838. A witness who testifies on cross-examination as to the good character of a party cannot be asked on redirect examination if he has not heard of certain circumstances derogatory of his character. Coxe v. Singleton, 139 N. C. 361, 51 S. E. 1019. In a will contest, held error to permit contestant to be asked if he had upon his return from testator's funeral demanded of the custodians a redelivery of an unrecorded deed which he had executed and delivered to testator, and when he answered the question in the negative, to contradict him. Civ. Code § 597 construed. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137. Where in an action for fraud and conspiracy the defendant was asked on cross-examination whether he had ever been found guilty of a fraudulent transaction and replied in the negative, held that a record in a suit to which he was a party but to which plaintiff was not, to set aside a fraudulent conveyance, was inadmissible. Murray v. Moore [Va.] 52 S. E. 381.

Contra: It was competent, to discredit defendant's testimony explaining a transaction between the parties, to show by a witness that defendant had cheated witness out of money by false statements. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 724. Character evidence consisting of specific delinquencies occurring after the offense for which the witness is being tried can be introduced only for the purpose of affecting his credibility. State v. Wertz, 191 Mo. 569, 90 S. W. 838.

29. See, also 4 C. L. 1961. A defendant in a criminal prosecution who testifies in his own behalf may be impeached by evidence as to his character for truthfulness but the jury should be instructed to consider the evidence only for such purpose. Newman v. Commonwealth [Ky.] 88 S. W. 1089. Where the credibility of a witness is assailed by cross-examination, the rule in Connecticut is that the particular acts shown must be such as to indicate a lack of veracity. Shailer v. Bullock [Conn.] 61 A. 65. A witness is sufficiently impeached where 12 persons who know him testify that they would not believe him under oath. Gantz v. Kintzing, 212 Pa. 562, 61 A. 1105.

30. State v. Bryant [Minn.] 105 N. W. 974. Though there is a presumption against any sudden change in the character of a person who has reached the age of maturity. Id. When evidence of the reputation of a witness is received, relating to different times, the weight to be given such evidence is for the jury and does not depend wholly on the nearness in time of the evidence. Hardwick v. Hardwick [Iowa] 106 N. W. 639. There is no presumption that a person with a bad reputation in the past is reforming. Id.

31. State v. Rogers [La.] 38 So. 952. The reputation of a witness for truth and veracity at places where he formerly lived may be shown in connection with his reputation

(§ 5B) 2. *Accusation and conviction of crime.*[32]—Conviction of crime does not now, as at common law,[33] disqualify a person as a witness; but the fact of conviction may be shown as affecting credibility.[34] In some states only proof of conviction of a felony or an infamous crime[35] is admissible; in others conviction of a misdemeanor may be shown;[36] while in some the crime must be one involving moral turpitude.[37] Usually proof of accusation[38] or arrest for crime is inadmissible except in connection with proof of conviction.[39] But in some states proof that a witness has been charged with crime is competent.[40] A conviction must be proved by competent evidence.[41]

at his place of residence at time of trial, where he had recently changed his place of residence. Craft v. Barron [Ky.] 88 S. W. 1099.

32. See 4 C. L. 1962.

33. At common law, persons convicted of infamous crimes were disqualified as witnesses. Koch v. State [Wis.] 106 N. W. 531.

34. Modern statutes have removed the disqualification but permit the fact of conviction of crime to be shown as affecting credibility. Koch v. State [Wis.] 106 N. W. 531. Under Code Civ. Proc. § 2051, authorizing proof of conviction of a felony to impeach a witness, either by the evidence of the witness himself or by the record of his conviction, evidence is admissible, not only to show that the witness had been convicted of one of several felonies but also to prove the name of the particular felony or felonies of which he had been convicted. People v. Eldridge, 147 Cal. 782, 82 P. 442. Under Civ. Code Prac. § 597, which applies to criminal and civil actions alike, it may be shown on cross-examination of accused that he has been convicted of a felony. Farmer v. Commonwealth [Ky.] 91 S. W. 682. In a criminal prosecution the defendant may be recalled for the purpose of proving by him that he had been in the penitentiary. McQueen v. Commonwealth [Ky.] 88 S. W. 1047. Where accused becomes a witness he may be impeached by proof of conviction of crimes or misdemeanors under Code 1892, §§ 1743, 1746. Williams v. State [Miss.] 39 So. 1006. Under Rev. St. 1899, § 4680, the state, on a prosecution for crime, is entitled to ask the defendant on cross-examination as to his previous conviction for crime in another state. State v. Heusack, 189 Mo. 295, 88 S. W. 21. Under Rev. St. 1899, § 4680, providing that the conviction of a witness of crime may be proved to affect his credibility, either by the record or his own cross-examination a defendant who takes the stand on his own behalf may be asked as to any prior conviction. State v. Spivey, 191 Mo. 87, 90 S. W. 81. Rev. St. 1899, § 4680, providing that the prior conviction of a witness for crime may be proved to affect his credibility is not in conflict with § 2637 providing that a person is not incompetent as a witness because of being the one on trial, etc., but such fact may be shown to affect his credibility. Id. The credibility of a defendant in a criminal prosecution who testifies in his own behalf may be assailed by evidence of his prior conviction of crime. State v. Woodward, 191 Mo. 617, 90 S. W. 90. When a witness admits having pleaded guilty to a common assault, it may be shown, as affecting his credibility, that he pleaded guilty to a charge of assault with intent to kill. State v. Forsha, 190 Mo. 296, 88 S. W. 746. A defendant who offers himself as a witness may be asked on cross-examination whether he has been previously convicted of a like offense for the purpose of affecting his credibility. State v. Mount [N. J. Law] 61 A. 259.

35. Under Code 1896, § 1795, only proof of conviction of infamous crimes is competent on the issue of credibility. Williams v. State [Ala.] 40 So. 405. Hence a question whether witness was ever convicted of "a crime" in the city court of a certain city was too general. Id. In a prosecution for homicide it is not proper to impeach a witness for the state by admitting a docket entry of a justice of the peace showing that he had been convicted of carrying concealed weapons. State v. Powell [Del.] 61 A. 966.

36. Under Rev. St. 1899, § 4680, proof of a former conviction for a misdemeanor is admissible. State v. Heusack, 189 Mo. 295, 88 S. W. 21. In Wisconsin, conviction of a misdemeanor as well as of a felony may be shown. Rev. St. 1898, § 4073. Koch v. State [Wis.] 106 N. W. 531. Thus conviction of a violation of Rev. St. 1898, § 1561, making it a criminal offense to be found drunk in a public place, may be shown. Id. But conviction of a violation of a city ordinance cannot be shown. Id.

37. Arrest for gambling inadmissible, the offense not being one involving moral turpitude. Henderson v. State [Tex. Cr. App.] 91 S. W. 569. Proof of intoxication inadmissible. Tally v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 699, 88 S. W. 339.

38. Mere accusations of crime are not admissible. Wade v. State [Tex. Cr. App.] 90 S. W. 503.

39. Arrest for crime cannot be shown except in connection with proof of conviction. Koch v. State [Wis.] 106 N. W. 531. It is not competent by way of impeachment to ask a witness on cross-examination if he had ever been arrested for a crime, or if he was in attendance on court in custody of a sheriff under arrest for a crime, without any reference to whether or not witness had ever been convicted of a crime. State v. Bryant [Minn.] 105 N. W. 974.

40. It is competent to show that one being tried for homicide is under indictment for assault to murder. Lucas v. State [Tex. Cr. App.] 90 S. W. 880. A defendant in a criminal prosecution may be impeached on his cross-examination by showing that he has been charged with passing counterfeit money and is under bond to await the action

(§ 5) *C. Interest and bias of witnesses.*[42]—Interest in the event of the action[43] or in its prosecution[44] or any facts tending to show bias[45] such as hostility of a witness toward a party[46] may be considered as affecting the credibility of the witness. Where a party seeks to show ill-will or a motive for falsification, he has the right to show so much of the facts and circumstances as may be necessary to fairly inform the jury of the cause, nature, and extent of the alleged improper in-

of the grand jury. Childress v. State [Tex. Cr. App.] 90 S. W. 30. As affecting the credibility of a witness it may be shown that he had been charged with forgery. Willis v. State [Tex. Cr. App.] 90 S. W. 1100.

41. See, also, Evidence, 5 C. L. 1301. A foreign judgment properly authenticated is inadmissible to impeach a witness where it does not show a conviction of the witness of a felony. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. Record of conviction of "William S. Barker" prima facie proof of conviction of witness "William Barker." State v. Loser [Iowa] 104 N. W. 337. Record in disbarment proceedings against witness, who was an attorney, containing specific charges of criminal conduct and specific findings of the court thereon, admissible to affect his credibility. Lansing v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 912, 106 N. W. 692. Rev. St. 1898, § 4073, authorizes conviction to be shown to affect credibility. Evidence held sufficient to show identity of defendant with person named in another indictment and to render copy of conviction admissible. Colbert v. State, 125 Wis. 423, 104 N. W. 61.

42. See 4 C. L. 1963.

43. Where a plaintiff in a personal injury action testifies in his own behalf and in contradiction of other witnesses, the defendant is entitled to an instruction that in considering such evidence the jury should consider the fact that the witness was directly interested in the result of the suit. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. The interest of a witness in the result of a suit may be considered in determining his credibility, and, where there are circumstances inconsistent with the truth of his testimony, the jury is not obliged to believe him though he is not contradicted by other witnesses. Detwiler v. Cox, 120 Ga. 638, 48 S. E. 142. It is not error to ask a witness for defendant in a criminal prosecution any question likely to show his interest in the outcome. Thus, he may be asked concerning an affidavit for change of venue signed by him. Miller v. Territory [Okl.] 85 P. 239. In action by employe of corporation to recover for services, the fact that a witness was a director of the corporation and financially interested could be shown. McCowan v. Northeastern Siberian Co. [Wash.] 84 P. 614.

44. Evidence tending to show activity, interest, and bias on the part of a witness in the prosecution, should be admitted. Borck v. State [Ala.] 39 So. 580. It is proper to show that the prosecuting witness instituted the prosecution for the purpose of extorting money from defendant if she, the prosecuting witness, is first asked whether or not she had begun the prosecution for such purpose. People v. Delbos, 146 Cal. 734, 81 P. 131.

45. Where a husband and wife have been divorced testimony of the former tending to uphold a transfer of property by himself to the latter against claims of his creditors is not open to the suspicion attached to the testimony of interested parties. Davis v. Yonge [Ark.] 85 S. W. 90. The fact that a person may voluntarily come from another state and without process appear and testify in court does not impair his competency as a witness, nor necessarily deprive his testimony of probative force. Timma v. Timma [Kan.] 82 P. 481. Where the state's case in a prosecution for abortion rested principally on the testimony of a witness jointly indicted with the defendant, it was proper on cross-examination to ask him if he expected further prosecution or if he expected lighter punishment because of his testimony. Stevens v. People, 215 Ill. 593, 74 N. E. 786. On cross-examination of an impeaching witness it may be shown for whom he acted in obtaining his information, in order that the fact and manner of his interest may be shown. National Enameling & Stamping Co. v. Fagan, 115 Ill. App. 590. Evidence that attesting witness to will, produced after conveyance of land by her husband, who was one of testator's heirs, joined in such conveyance, is admissible as tending to impeach her. Savage v. Bowen, 103 Va. 540, 49 S. E. 668. Membership of a witness in the same labor union as the party for whom he is testifying may be shown to affect his credibility. People v. Cowan [Cal. App.] 82 P. 339. The testimony of a witness who purchases liquor on Sunday for the purpose of prosecuting the seller, while admissible, is to be weighed by the jury in the light of such fact. Borck v. State [Ala.] 39 So. 380. The per diem, which the prosecution has agreed to pay its witnesses in addition to the amount which they will receive from the state, is a proper subject of cross-examination. Volk v. Westerville, 3 Ohio N. P. (N. S.) 241. In a criminal case held error to refuse to allow defendant to show that a witness had stated that if he told what he knew defendant could not be convicted, but that he would not do it because it would clear defendant and implicate another. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153.

46. Proper to show unfriendly feeling between accused and witness on account of unpaid whisky bill. Sanford v. State [Ala.] 39 So. 370. In homicide case bad feeling of witness toward decedent may be shown. Morris v. State [Ala.] 39 So. 608. Bias of witness against prosecutrix in assault case may be shown. Funderbunk v. State [Ala.] 39 So. 672. The state of mind of a witness as to his friendship or hostility towards the parties is a proper matter for investigation. People v. Cowan [Cal. App.] 82 P. 339. Questions tending to disclose the animus or bias of a witness are proper. Hampton v. State

fluence.[47] While previous difficulties between a prosecuting witness and an accused may be shown, the details of such difficulties are inadmissible unless they are otherwise relevant.[48]

(§ 5) *D. Proof of previous contradictory statements.*[49]—Prior statements of witnesses inconsistent with their testimony upon material issues are always competent as impeaching evidence[50] when a proper predicate has been laid therefor.[51] Thus, oral or written statements out of court,[52] statements in letters,[53] affidavits,[54]

[Fla.] 39 So. 421. In action for an assault, defendant could show that witness for plaintiff was a former customer of defendant's, had ceased dealing with him and had at one time been ordered out of defendant's place of business. Salzman v. Mandel, 98 N. Y. S. 825. Defendant in a divorce suit may discredit plaintiff by proving on his cross-examination his declarations to the effect that he was trying to help plaintiff get a divorce, that he and defendant had disagreements in business and he was trying to get even with him by helping plaintiff. Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623. On cross-examination the examining party has an absolute right, within reasonable limits, to interrogate the witness as to specific facts and circumstances which tend to show ill-will or other motive for falsifying, though the witness has denied the existence of such motives. State v. Malmberg [N. D.] 105 N. W. 614. That defendant and witness belonged to opposing factions in the village and were rivals for the postmastership could be shown. Id. Unfriendly feeling of material witness toward a party may be shown either on his cross-examination or by the testimony of other witnesses. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805.

47. State v. Malmberg [N. D.] 105 N. W. 614.

48. Henderson v. State [Tex. Cr. App.] 91 S. W. 569.

49. See 4 C. L. 1964.

50. Jones v. State [Ala.] 40 So. 947; People v. Gray [Cal.] 83 P. 707; Cox v. State [Ga.] 52 S. E. 150; Stecher v. People, 217 Ill. 348, 75 N. E. 501; Robinson v. Old Colony St. R. Co. [Mass.] 76 N. E. 190; Bowles v. State [Miss.] 40 So. 165; Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Larkin v. Saltair Beach Co. [Utah] 83 P. 686.

51. See § 5 E, post. Sutton v. Wanamaker, 95 N. Y. S. 525.

52. Written statement, admitted by plaintiff to have been signed by him, and containing material admissions, admissible to impeach him. Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256. A witness having denied a conversation, error to refuse to allow examination of another witness in regard thereto, the point being material. Tuthill v. Smith, 88 N. Y. S. 942. Declarations of one suing as trustee, inconsistent with his testimony, may be shown to impeach him. Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694. Where physician testified that he had examined plaintiff for insurance and that he had found that he could not recommend him as perfect physically, his report to the insurance company, containing his questions and plaintiff's answers, was admissible. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 93 S. W. 130. Error to exclude contradictory statements of prosecutrix in rape case, proper foundation having been laid. State v. Hazlett [N. D.] 105 N. W. 617. In a prosecution for seduction evidence that prosecutrix stated to defendant's attorney after the alleged seduction that the defendant had raped her is admissible by way of impeachment. Nolen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 735, 88 S. W. 242. Where accused in a prosecution for murder testifies that up to within a few days before the homicide he and deceased had been friendly, evidence that he told persons about a year before that he had had trouble with some of his neighbors including deceased and was afraid that he would have to hurt some of them is admissible by way of impeachment. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. A testator's son who testifies as to facts tending to show his father's testamentary capacity and who denies having made contradictory statements may be impeached by evidence that he made contradictory statements at a certain time and place. Swygart v. Willard [Ind.] 76 N. E. 755. Where in an action against a street railway company a motorman testified that though he had been stung on the hand he had at the time of the accident one hand on the controller and the other on the brake and denied having stated that he did not have his hand on the brake, it is competent to impeach him by proving that he had stated that he was rubbing his hand at the time of the accident. Robinson v. Old Colony St. R. Co. [Mass.] 76 N. E. 190. Where witness in action to recover cows testified they never belonged to defendant, defendant could prove that witness had said he could not sell one of them because it belonged to defendant. Giddens & Co. v. Rutledge [Ala.] 40 So. 759. Papers containing conversation between witness and third person was identified by witness as having been previously read to him, and he said its contents were correct with certain exceptions. It was proper to have the third person testify that the witness had previously said that the paper was all correct. Alabama Great Southern R. Co. v. Clark [Ala.] 39 So. 816.

53. A relatrix in a bastardy proceeding who denies that she was alone with a witness, who the defense asserts is the father of the child, on the night the child is alleged to have been begotten and who denies that she ever had intercourse with any person other than defendant may be impeached by a letter written to defendant in which she admitted being alone with witness on the date in question and that twice before she had had intercourse with him. Walker v. State [Ind.] 74 N. E. 614.

54. Prior affidavit. Lederer v. Lederer,

and depositions,[55] have been held competent. Statements made under oath on a former trial[56] or at a coroner's inquest[57] are also competent. A prior statement of a witness which amounts only to an expression of opinion is not a proper predicate for impeachment.[58]

(§ 5) *E. Foundation for impeaching evidence.*[59]—A proper predicate must be laid for the introduction of impeaching evidence,[60] and this is usually done upon the cross-examination of the witness sought to be impeached.[61] A predicate for proof of inconsistent oral statements is usually laid by inquiring of the witness whether he made a certain statement,[62] specifying in such preliminary question the time and place of such statement, the person to whom made, and the language used.[63] If the witness then denies making the statement[64] or makes an evasive

108 App. Div. 228, 95 N. Y. S. 623. Affidavit made by witness on motion to dissolve restraining order held admissible only as impeaching evidence. Graham v. Smart [Wash.] 84 P. 824. A subscribing witness of a will who testifies in the circuit court may be contradicted by affidavits made in the county court. In re Barry's Will, 219 Ill. 391, 76 N. E. 577. In ejectment for a mining claim, a plaintiff who testifies that he has done the required amount of work on the claim in question may be contradicted by copies of affidavits filed by him in the land office, to the effect that the work in question was done on an entirely different claim. White River Min. & Nav. Co. v. Langston [Ark.] 88 S. W. 971. Witness had made statements in an affidavit, through an interpreter, contrary to his testimony on the trial, also given through an interpreter. The affidavit was held admissible to contradict the witness, though the interpreter was not sworn, the latter acting as the agent of both parties. Davis v. First Nat. Bank [Ind. T.] 89 S. W. 1015.

55. A witness may be cross-examined as to statements made by him in a deposition taken prior to the trial but not introduced. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379. Plaintiff could be cross-examined as to statements in deposition made by her though it was not used on the trial by her. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915.

56. Reading of official stenographer's report of defendant's testimony on former trial held proper. Mackmasters v. State, 83 Miss. 1, 35 So. 302.

57. Evidence of witness at coroner's inquest competent to impeach him where he admits signing it. Chicago City R. Co. v. Jordan, 116 Ill. App. 650; Kirk v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 108, 89 S. W. 1067.

58. Where witness in homicide case denied, under oath, that he had said "it was a cold-blooded murder" proof that he had made such statement was incompetent. Scott v. State [Tex. Cr. App.] 93 S. W. 112.

59. See 4 C. L. 1965.

60. Proof of contradictory statements held inadmissible, no predicate having been laid. Coker v. State [Ala.] 40 So. 516. Where the witness who made the statement is not identified, proof that one of two witnesses heard the other make it would not impeach either witness. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280. The hostility of a witness cannot be shown by his oral statements out of court unless a foundation is laid by inquiring of the witness on the stand with particularity of the time, place and occasion, whether he made the statements or not. State v. Barditti [Vt.] 62 A. 44. One witness should not be permitted to contradict the testimony of another witness by stating that the latter agreed with him in the matter, without first laying the proper foundation for such contradiction. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137. Where the uncontradicted evidence of a witness was that he had not read what purported to be copies of papers used in a suit in another state, that he did not know of the suit and that he thought they referred to a transaction different from that in issue in the case, the copies insufficiently authenticated, were inadmissible, either as impeaching or substantive evidence of the facts therein alleged. Keim v. Rankin [Wash.] 82 P. 169. Questions to a witness before a committing magistrate, which witness did not answer, cannot be made the predicate for impeachment. Crossland v. State [Ark.] 92 S. W. 776.

61. Foundation must be laid on cross-examination for proof of inconsistent statements. Code Civ. Proc. § 2052. People v. Gray [Cal.] 83 P. 707. Questions relating to the credibility of a witness are material and proper on the cross-examination and the testimony thus sought may form the basis for impeaching the witness. Vickery v. State [Fla.] 38 So. 907. It is proper on cross-examination to ask a question laying a proper foundation for proof of a statement which, if made by the witness, was inconsistent with his testimony. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590.

62. Where a witness testifies to a particular fact it is error to refuse to allow a question as to whether he had previously made affidavit to the contrary. Randell v. State [Tex. Cr. App.] 90 S. W. 1012. Where witness on a first trial said she knew plaintiff by sight, she cannot be impeached on the second trial at which her deposition used at the first, is introduced, by proof that when asked to point out plaintiff, she pointed out another person, no foundation for such impeachment having been laid by asking witness whether she had said a certain person was plaintiff. International, etc., R. Co. v. Boykin [Tex.] 89 S. W. 639.

63. Attention of witness must be called to these circumstances. Lerum v. Gening [Minn.] 105 N. W. 967. Persons present and

answer,[65] it is proper to show by other evidence that he did make it. If the witness does not deny making the statement, other proof of it is usually inadmissible.[66] Where a writing is offered to impeach a witness it should first be shown to counsel for the adverse party.[67] It should also be shown to the witness or read to him,[68] unless it be a written statement under oath in a judicial proceeding,[69] and the witness should be examined as to the portions of it intended to be used to impeach him.[70] It is then admissible if it contains statements inconsistent with the witness' testimony.[71] The authenticity and correctness of written impeaching evidence must, of course, be made to appear.[72]

Where the former testimony of a deceased or absent witness is introduced, or a showing is made for an absent witness, such evidence cannot be contradicted by declarations of the witness[73] even though such declarations were made subsequently to the examination of the witness, or if made before, were unknown to the party seeking to discredit the witness[74] since no foundation can be laid for such impeachment;[75] but this rule is not violated by the admission of inconsistent evidence not involving any declaration of the absent witness.[76]

The impeaching testimony must be confined to the predicate laid.[77]

(§ 5) *F. Corroboration and sustentation of witnesses.*[78]—When no attempt

circumstances of alleged statements not sufficiently shown to lay proper foundation for impeachment. Clark v. Daiziel [Cal. App.] 84 P. 429.

64. A proper predicate is laid by asking the witness if he did not make certain statements, and a denial by the witness that he made them. Jones v. State [Ala.] 40 So. 947.

65. Contradictory statements of a witness may be shown where, upon laying the foundation therefor, he practically admits having made them, but his answers are indefinite, uncertain and evasive and not more than a partial admission. Chicago City R. Co. v. Mattheison, 113 Ill. App. 246.

66. Where witness admitted making a statement there was no error in refusing to allow proof of it by another witness. Raines v. State [Ala.] 40 So. 932. A witness cannot be impeached by proof of prior statements the making of which he does not deny when testifying. State v. Hummer [N. J. Law] 62 A. 388.

67. Counsel for adverse party is entitled to see a letter before it is introduced. State v. Rogers [La.] 38 So. 952.

68, 69. Washington v. State [Ga.] 52 S. E. 910.

70. Where a witness admits having written a letter he cannot be contradicted as to statements therein unless first examined as to the portions of the letter used to impeach him. State v. Rogers [La.] 38 So. 952.

71. Where a witness does not directly deny having made statements contained in a writing, yet the writing may be admitted to impeach him if it contains statements contradicting his testimony, and he admits his signature thereto and that he read it before he signed it. Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547. A paper which has been shown a witness, read by him, and which he admits to have signed, may, within the discretion of the court, be permitted to be read upon his cross-examination, where it contains statements contradictory to his testimony. Chicago City R. Co. v. Mattheison, 113 Ill. App. 246. See, also, Evidence, 5 C. L. 1301.

72. The unverified minutes of the stenographer on a former trial are inadmissible to contradict a witness. Jaffe v. Pennsylvania R. Co., 97 N. Y. S. 1037. Where it is sought to contradict a witness by the minutes of the stenographer on a former trial the party against whom such evidence is offered is entitled to insist that the correctness of the minutes be properly proven and this involves the right to cross-examine whoever is produced to verify them. Id. Witness in murder case could not be impeached by transcript of testimony at inquest nor by stenographer's notes, where stenographer could not say that notes contained all the testimony given by the witness. State v. Martin [Or.] 83 P. 849.

73. When a showing has been admitted for an absent witness, the evidence so given cannot be contradicted by declarations of the absent witness. Funderburk v. State [Ala.] 39 So. 672. Where a witness on a former trial of an action is without the jurisdiction of the court at the time of the second trial thereof and his testimony on the first trial is received in evidence, it cannot be impeached. Lerum v. Geving [Minn.] 105 N. W. 967. On a subsequent trial the evidence of a deceased witness, taken at a second trial, cannot be impeached by showing that some of his statements on the witness stand at the first trial are inconsistent therewith, where, upon the second trial, his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies. Omaha St. R. Co. v. Boesen [Neb.] 105 N. W. 303.

74, 75. Lerum v. Geving [Minn.] 105 N. W. 967.

76. Funderburk v. State [Ala.] 39 So. 672.

77. Error to admit evidence of other matters than those referred to on cross-examination. St. Clair v. State [Tex. Cr. App.] 92 S. W. 1095.

78. See 4 C. L. 1967.

has been made to impeach a witness, evidence which is merely corroboratory of his testimony is inadmissible.[79] But where the credibility of a witness has been attacked by proof of statements out of court inconsistent with his testimony, other statements of the witness consistent with his testimony may sometimes be shown.[80] The mere fact that other witnesses have testified to a different state of facts will not, however, make competent such corroboratory evidence.[81] The party calling a witness sought to be impeached has the right to re-examine the witness to explain contradictory statements or circumstances proved against him.[82] Where the character of a witness has been attacked, proper evidence in rebuttal is, of course, com-

79. Green v. State [Tex. Cr. App.] 90 S. W. 1115. Where there was no attempt to impeach the witness, evidence of consistent statements was inadmissible to corroborate him. Kesserlin v. Hummer [Iowa] 106 N. W. 501. Cross-examination of a witness held not an attempt to impeach him. Commonwealth v. Tucker [Mass.] 76 N. E. 127. Where plaintiff in a personal injury action examined two physicians who testified that plaintiff's leg was broken, it was improper to ask a physician testifying for defendant, on the cross-examination, whether plaintiff's witnesses were not reputable physicians. Weitzel v. Fowler [Mich.] 13 Det. Leg. N. 90, 107 N. W. 451. A statement by a witness tending to show the confidence reposed in his integrity by his employer is irrelevant and inadmissible. Peters v. State [Ga.] 52 S. E. 147. A defendant in a criminal prosecution cannot introduce testimony to corroborate an unimpeached witness for the state. State v. Cato [La.] 40 So. 633.

80. St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428; Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357; Burch v. State [Tex. Cr. App.] 90 S. W. 168; Hudson v. State [Tex. Cr. App.] 90 S. W. 177; Craven v. State [Tex. Cr. App.] 90 S. W. 311. Where a witness is cross-examined for the purpose of impeaching him and of showing that his story was a recent fabrication created under the influence of counsel, a similar statement made previously may be shown in corroboration. Griffin v. Boston, 188 Mass. 475, 74 N. E. 687. Where a witness stated that he was present and saw the fatal shot fired and is impeached by evidence of contradictory statements, the party calling him may prove that he made statements that he was present, but could not prove such statements. Hicks v. State [Ind.] 75 N. E. 641. Where a witness is contradicted by way of impeachment by evidence of statements different from those made at the trial, the party by whom the witness was called may prove statements made about the time the contradictory statements are alleged to have been made in harmony with those made by the witness at the trial. Id. This rule, however, does not authorize the admission of all prior harmonious statements but only such as are in harmony with the part of his testimony which has been contradicted by the alleged contradictory statements given in evidence. Id. Where a witness has been sought to be impeached by contradictory statements, prior statements consistent with his testimony cannot be shown except for the purpose of showing a motive for the false statement, removed at the time of the trial, or of showing the contradictory statement to be a falsification of recent date. Chicago City R. Co. v. Matthieson, 113 Ill. App. 246. This is the rule even though the corroboratory statements sought to be proved were made under oath. Id.

Held incompetent: A witness, sought to be impeached by proof of contradictory statements cannot be supported by proof that he made elsewhere other statements consistent with his testimony on the stand. Cook v. State [Ga.] 53 S. E. 104. The impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony. People v. Turner [Cal. App.] 82 P. 397. Particularly is this the rule where there is nothing to show that the witness did not have the same motive or interest to deceive when he made the confirmatory statement that he may have had when he testified to the fact. Id.

81. Under Code Public General Laws 1904, § 3, art. 35, providing that it shall not be competent for a party to a cause who has been examined as a witness, when impeached to corroborate his testimony by proof of his own declarations made to a third person out of the hearing of his adversary, a plaintiff who testified to a certain fact which was contradicted cannot corroborate by evidence of his own declarations or statements to his wife. Maryland Steel Co. v. Engleman [Md.] 61 A. 314.

82. Where it was shown, to impeach a witness, that he had not divulged facts he was then testifying to, on a previous examination, he may show why such facts were omitted by him. Carwile v. State [Ala.] 39 So. 220. It is not error to permit a witness, who has made statements out of court at variance with his testimony given in the trial of a cause, to explain or give his reasons, if he has any, for making the contradictory statements. Baum v. State of Ohio, 6 Ohio C. C. (N. S.) 515. Where a written instrument signed by a witness is introduced to impeach him by showing that its contents are inconsistent with his testimony it is proper to show in rebuttal evidence of what transpired at the time the paper was signed in order to explain the inconsistency. Shreve v. Crosby [N. J. Err. & App.] 63 A. 333. Where a written statement has been introduced to impeach a witness, it is competent, where it is claimed that the statement was obtained by fraud and deception to show all

petent.[83] Thus, where conviction of a felony has been shown, the fact that the witness had been pardoned has been held competent.[84]

§ 6. *Privilege of witnesses.*[85]—By the fifth amendment to the Federal constitution, and by the several state constitutions and bills of rights, a person accused of crime cannot be compelled to be a witness or give evidence against himself.[86] The privilege has been held not to be violated by admitting statements of the accused after he had been duly warned,[87] nor by admitting articles unlawfully in possession of the accused and taken from him when arrested,[88] nor by admitting testimony of officers concerning articles worn by accused and voluntarily given up by him when arrested.[89] Where the accused takes the stand and testifies in his own behalf, he waives his privilege as to all matters legal and pertinent before the court.[90]

The constitutional provision under consideration not only protects an accused person from being made a witness against himself in a prosecution against him, but under it no witness in any legal proceeding can be compelled to give evidence that would tend to incriminate him. In order that a witness may be entitled to claim the privilege, it must appear from the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution.[91] That a fact

that was done and said at the time it was obtained. National Enameling & Stamping Co. v. Fagan, 115 Ill. App. 590. Though the fear of being convicted of crime will not excuse a witness for swearing falsely, yet, where upon a succeeding trial he admits the falsity of the former testimony and deposes to the contrary, attributing his perjury to the fear above set out, it may afford a moral explanation sufficient to account to the jury for the false testimony and where the explanation is satisfactory to the jury the witness may be believed with or without corroborating circumstances or evidence. Chandler v. State [Ga.] 53 S. E. 91.

83. Where evidence of reputation is erroneously admitted, the party whose character is assailed should be allowed to rebut it. Murray v. Moore [Va.] 52 S. E. 381. Where incompetent impeaching evidence is introduced it may be met by countervailing evidence and motion to have it stricken need not be made. State v. Speritus, 191 Mo. 24, 90 S. W. 459. The state laid a predicate for impeaching defendant on his cross-examination but the impeaching witness did not testify until the state put in its rebuttal evidence. It was held the defendant could then introduce proof of his good reputation for truth and veracity. Neill v. State [Tex. Cr. App.] 91 S. W. 791.

84. O'Donnell v. People, 110 Ill. App. 250. See, also, 2 C. L. 2184, n. 30; and contra. Gallagher v. People, 211 Ill. 158, 71 N. E. 842, 4 C. L. 1962, n. 11.

85. See 4 C. L. 1967.

86. A contempt proceeding is not a criminal case, within Const. art. 1, § 9, providing that no person shall be compelled in a criminal case to give evidence against himself. State v. Reilly [Wash.] 82 P. 287. Under Code 1899, c. 152, § 20, providing that in criminal prosecutions evidence shall not be given against the accused of any statement made by him as a witness upon legal examination does not apply where a justice without warrant of law takes the sworn statement of a person who at the time is not accused of the homicide but is afterward indicted, for the purpose of determining whether he will hold an inquest. State v. Legg [W. Va.] 53 S. E. 545. Game Laws, Laws 1900, p. 58, c. 20, § 193, providing that "no person shall be excused from testifying in any civil or criminal action or proceeding taken or had under this act upon the ground that his testimony might tend to convict him of a crime," does not relate to a party to criminal action. In re Birdsall, 96 N. Y. S. 462.

87. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

88. Lawrence v. State [Md.] 63 A. 96.

89. In prosecution for larceny of shoes, testimony of a witness describing the shoes worn by defendant when arrested was proper, where defendant was simply asked to take them off and did so, no threats being made or inducements offered before defendant removed them. Moss v. State [Ala.] 40 So. 340. If there was error in admitting such testimony, it was cured by defendant's subsequent statement that he was asked to take off his shoes and did so. Id.

90. Person accused of assault having testified in chief that he went into a pit and got a gun, a question on cross-examination as to where he got the pistol was proper. Miller v. State [Ala.] 40 So. 342. Defendant in prosecution for illegal sale of intoxicants having availed himself of the privilege of testifying given by Code 1895, § 5086, it was competent to prove by him that a license had been issued to him. Davis v. State [Ala.] 40 So. 663.

91. Rudolph v. State [Wis.] 107 N. W. 466. Grand jury was investigating liability of national bank employe for disappearance of cash from the vaults and a cash book of a broker was desired. Proceedings were pending against the broker in his own state as a party to a "bucket shop." Held, the possibility that the cash book would disclose a violation of the "bucket shop" law, or show that he was an abettor of the embezzler, jus-

concerning which a witness is questioned may become material in a criminal prosecution against him is not alone conclusive; the fact must be a necessary and essential part of the crime.[92] The statement of the witness that his answer will tend to criminate himself is not conclusive;[93] the question is one for the court to be determined in view of the circumstances of the particular case and the nature of the evidence sought to be elicited.[94] The privilege is waived where the witness testifies freely, and in such case his testimony may be used against him.[95]

Statutes providing that witnesses shall not be excused from testifying in certain cases and granting immunity from prosecution on account of any transaction concerning which they may testify[96] are as broad, as to the immunity granted, as the constitutional privilege of silence as to self-incrimination, but no broader.[97] Such statutes operate only when the witness testifies under real compulsion, other than compelling the witness to appear by a subpoena.[98] But it has been held that the statutory immunity may be claimed by one who has not been subpoenaed or sworn,[99] as in the case of persons who appear before the commissioner of corporations and testify in an investigation being made by him under direction of a resolution of Congress.[1] The Federal statute of 1903 providing that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under the anti-trust act and certain other statutes, is held to furnish sufficient immunity from prosecution[2] though it may not afford protection against prosecution in state courts for an offense disclosed.[3] The examination of witnesses before the grand jury concerning an alleged violation of the anti-trust act is a "proceeding" within the meaning of the act of 1903.[4] The

tified his refusal to produce the book or to make statements showing his possession of it. Ballmann v. Fagin, 200 U. S. 186, 50 Law. Ed. —. An officer of a bankrupt corporation who is under indictment in a state court for embezzlement of the funds of the corporation, cannot, on his examination before the referee, as against his claim of privilege, be required to state whether he misappropriated certain money of the corporation but may be compelled to state whether he has any of the corporate property in his hands or under his control. In re Hooks Smelting Co., 138 F. 954.

92. Rudolph v. State [Wis.] 107 N. W. 466. Under Laws 1901, p. 106, c. 85, no party or witness shall be excused from testifying in certain cases, but persons testifying are protected from prosecution for matters testified to. The fact that a person testified before a grand jury that he was an alderman but knew of no bribery or crookedness in public affairs, did not render him immune to a prosecution for bribery though proof that he was an alderman was essential to prove that crime. Id.

93, 94. Rudolph v. State [Wis.] 107 N. W. 466.

95. Where a person not under arrest makes a statement before the grand jury believing at the time that he is under suspicion of having committed the offense being investigated by that body, his statement may be used against him on his trial for such offense though he was not given the statutory warning. Smith v. State [Tex. Cr. App.] 90 S. W. 37.

96. An alderman who testified before the grand jury that he knew of no alderman having solicited or received money for votes, and that he had not received money for his vote, was held not to have testified to any transaction which would make him immune to a prosecution for bribery under Laws 1901, p. 106, c. 85. State v. Murphy [Wis.] 107 N. W. 470.

97. State v. Murphy [Wis.] 107 N. W. 470. Dodge, J., who writes the principal opinion, dissenting. The view of Judge Humphrey, of the Federal district court, is that the immunity granted by the act creating the department of Commerce and Labor is broader than the privilege. United States v. Armour & Co., 142 F. 808.

98. State v. Murphy [Wis.] 107 N. W. 470. Dodge, J., dissenting. A person is not compelled to give evidence against himself until he has been summoned and sworn as a witness and his rights are not infringed on his being required to appear before the grand jury in pursuance of a subpoena and be sworn. People v. Hummel, 96 N. Y. S. 878.

99. United States v. Armour & Co., 142 F. 808.

1. Persons who appeared before the commissioner of corporations in the "Beef Trust" investigation which the commissioner of corporations was directed to institute by the Martin Resolution of the House of Representatives of February 25, 1903, are entitled to the immunities granted by 27 Stat. 443 and 32 Stat. 827, 904. United States v. Armour & Co., 142 F. 808.

2, 3. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —; Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

immunity granted by the act is not rendered insufficient by the difficulty, if any, of procuring the testimony given before the grand jury, in order to sustain a plea of immunity.[5] The privilege against self-incrimination is purely personal to the witness and he cannnot claim it for another person,[6] nor for a corporation of which he is an officer or employe.[7] A corporation cannot claim the privilege where its agents are called upon for evidence.[8] A witness subpoenaed to testify in regard to violations of the Kansas anti-trust act cannot refuse to testify on the ground that the immunity granted by the act does not preclude use of his testimony in a prosecution under the Federal anti-trust act.[9]

4. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---; In re Hale, 139 F. 496.

5, 6. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---.

7. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---; McAlister v. Henkel, 201 U. S. 90, 50 Law. Ed. ---.

Note: "It is evident from its origin that the function of the privilege is to protect a person who is called to the stand to testify and that it is not intended to protect those who are not witnesses. State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; Commonwealth v. Shaw, 4 Cush. [Mass.] 594; New York Life Ins. Co. v. People, 195 Ill. 430; McElree v. Darlington, 187 Pa. 593, 63 Am. St. Rep. 592; Wigmore, Evidence, § 2196, p. 3136. Consequently the witness can set up his privilege only for his own protection and not for another's benefit. In re Moser [Mich.] 101 N. W. 588; Brown v. Walker, 161 U. S. 591, 40 Law. Ed. 819. This is also true where that other person is the principal or employer of the witness. Gibbons v. The Waterloo Bridge Co., 4 Price, 491; U. S. Exp. Co. v. Henderson, 69 Iowa, 40. Should not the rule be applied in accordance with the two cases last cited to an officer of a corporation, who, himself granted annesty by statute, refuses to answer questions put to him before a Federal grand jury on the ground that his answers will incriminate the corporation against which criminal proceedings are being taken? This question the Supreme Court of the United States has recently answered, in the affirmative in the cases of Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---, and McAlister v. Henkel, 201 U. S. 90, 50 Law. Ed. ---. In view of the historical reason for the existence of the privilege no other answer could be given."—6 Columbia L. R. 344.

8. The right to immunity from prosecution for violation of the Anti-Trust or Interstate Commerce Laws, because of evidence given before the Commissioner of Corporations or Interstate Commerce Commission is limited to the individuals who give evidence and cannot be claimed by corporations whose agents such individuals are. United States v. Armour & Co., 142 F. 808. See, also, Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---, and McAlister v. Henkel, 201 U. S. 90, 50 Law. Ed. ---.

Note: Following are comments on Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ---: "In England the principle 'nemo tenetur seipsum accusare' is merely a rule of evidence, but in the United States it is a constitutional right. Counselman v. Hitchcock, 142 U. S. 547, 35 Law. Ed. 1110. This constitutional right is, however, only an enactment of the common-law doctrine (See Wigmore, Ev., § 2252), and however differently expressed in the various constitutions, the same principle is enunciated by all. Counselman v. Hitchcock, 142 U. S. 547, at 584-586, 35 Law. Ed. 1110. The application of this principle to corporations involves two questions: first, is there anything in the nature of the privilege that makes it inapplicable to corporations? secondly, is there anything in the nature of a corporation that unfits it for the privilege?

"The privilege is in its nature personal, for no one can assert it except the one from whom the evidence is sought (New York Life Ins. Co. v. People, 195 Ill. 430), and that one must be the person who is in danger of incrimination. An agent, provided he himself is in no danger of incrimination, cannot refuse to testify for fear of incriminating his principal, even though the principal be a corporation (Gibbons v. Proprietors of Waterloo Bridge, 5 Price, 491), though there is at least one case to the contrary, holding that the agent on the stand is the corporation on the stand (Davies v. Lincoln Nat. Bank, 4 N. Y. S. 373). The Supreme Court, however, accepts the prevailing view, and if that is sound, it must follow logically that a corporation can never be a witness, with a possible exception in the case of a bill of discovery filed directly against it. In such a case it has been held that a corporation is entitled to the privilege against self-incrimination. Logan v. Pennsylvania R. Co., 132 Pa. 403. But bills of discovery apply only to civil cases (See Logan v. Pennsylvania R. Co., 132 Pa. 403), and it is, therefore, difficult to see how the corporation could assert the privilege in an investigation by the state, unless one adopts the apparently erroneous New York view that an officer on the stand represents the corporation. From the nature of the privilege, then, it is seen that the corporation may in one narrow class of cases be in a position to exercise it. While, then, in a civil suit, it would seem that there is no reason for treating the corporation differently from a natural person, yet, in an investigation by the state, there is a difference arising from the very nature of a corporation and of corporate rights. The corporation receives its rights from the state and can act only in a manner prescribed by its creator. It has special privileges and franchises and must account for their use, and it would be subversive of justice to say that it could refuse to do so on the ground that it had abused them. Therefore, although a corporation is held by the principal case within the protection of the Fourth

The constitutional protection against unreasonable searches and seizures cannot ordinarily be invoked to justify refusal of an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum issued in aid of a grand jury investigation of an alleged violation of the anti-trust act.[10] But if a subpoena is so sweeping as to the documentary evidence demanded as to amount to an unreasonable search and seizure, the corporation is entitled to immunity therefrom.[11] Refusal of corporate officers to produce documentary evidence cannot be justified on the ground that their possession of the evidence desired was not personal but that of the corporation.[12] The immateriality of evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the Federal circuit court, requiring them to answer questions put to them and to produce written evidence in their possession, on their examination before a special examiner.[13]

The fact that stolen property was returned to a person upon his solemn promise of secrecy and immunity from prosecution of the person who committed the larceny does not excuse such person, testifying before the grand jury, from disclosing the name of the person who returned the property,[14] even though it should be made to appear that the person who returned the property was the wife of the guilty party and could not be made to testify against him.[15]

A witness may not be required to disclose trade secrets.[16]

(Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——), and has been held within the protection by the clause in the Fifth forbidding double jeopardy, it would seem that its nature prevents it, as between it and the state, from receiving immunity from investigation and disclosure of its internal affairs."—19 Harv. L. R. 523.

"It is declared in the opinion that a corporation cannot set up the privilege against self-incrimination in refusing to produce its books, since "there is a clear distinction between an individual and a corporation." It may be questioned whether this was necessary to the decision, and whether the grounds stated are intended to make the proposition an unqualified one. But the language is express; and the ruling seems to be the first one of its kind in any jurisdiction.

"What does it teach, as to the practical method for going about to procure this sort of evidence against corporations, in the proceedings now so common? The prosecutor or investigator, it is obvious, has his choice at the outset between two modes. Either he may call upon the corporation directly for its documents, or he may demand them of an officer of the corporation. If he takes the latter course, he must inevitably give immunity to the officers personally, supposing that he is a prosecuting attorney, and he runs a great risk of producing the same effect, if he is an investigating commissioner, under the recent ruling in the Chicago Packers' Case (noticed elsewhere). But if he takes the latter course, demanding from the corporation directly, he avoids these disadvantages; for the corporation has no privilege to refuse (under Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——), and the officers, not having been personally subjected to the demand, cannot invoke their privilege, and, therefore, do not benefit by the immunity clause. Thus both the corporation and (most important) the officers remain liable to prosecution. Is not this the practical lesson to be drawn from these decisions?

"Yet it remains to ask whether the Court's opinion has not left a vital point still unnoticed. That point is this: The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration; did the supreme court, then, mean to say that a corporation was and is not within the privilege at common law? or did they mean to say merely that the Constitutional guarantee of it to all 'persons' does not include corporations? If they meant the former, then no immunity needs to be given to, nor can be claimed by, a corporation; and courts are free to exact everything from a corporation. But if they meant the latter, then the privilege stands, for corporations, until abolished by the legislature; hence, if the legislature has not abolished it, the corporation may still claim it; and hence also, if the legislature in abolishing it has chosen (unnecessarily, to be sure) to grant immunity as an inseparable gift annexed thereto, the corporation will get the immunity when forced to relinquish the privilege. The importance of this distinction in the current attempts to investigate corporate conduct is obvious. But we doubt whether any certain light upon it is to be found in Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——." Professor Wigmore in 1 Ill. L. R. 43.

9. Under Kan. Laws 1897, c. 265, § 10, only such questions as relate to transactions within the state are material in a hearing under the act; hence a prosecution under the Federal act based on testimony given in a state case, is too remote a possibility to warrant a refusal to testify. Jack v. State of Kansas, 201 U. S. 92, 50 Law. Ed. ——.

10. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——.

§ 7. *Subpoenas, attendance, and fees.*[17]—The compensation of witnesses[18] and liability therefor[19] and the mode of compelling their attendance[20] are statutory. A witness cannot be compelled to attend unless his compensation has been paid or tendered.[21] The production of documentary evidence is elsewhere treated.[22]

11. Subpoena held unreasonable. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

12, 13. Nelson v. U. S., 199 U. S. 372, 50 Law. Ed. —.

14. Witness properly fined for refusing to disclose name. Rogers v. State [Miss.] 40 So. 744.

15. Rogers v. State [Miss.] 40 So. 744.

16. Requiring one to disclose the names of men he uses to fraudulently obtain goods from another is not a trade secret. In re Park, 138 F. 421. An order requiring a witness to answer certain questions on cross-examination in interference proceedings in the Patent Office may be denied on the claim of the witness that they require him to disclose a secret process. Herreshoff v. Knietsch, 127 F. 492.

17. See 4 C. L. 1970.

18. One testifying as an expert in a criminal prosecution on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee. Main v. Sherman County [Neb.] 103 N. W. 1038. In Montana, a witness attending a trial is entitled to mileage and sums paid as mileage may be taxed as costs, though witness resided out of the county of trial and more than 30 miles from the place of trial. Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74.

19. Under the Indiana statutes where the state in a criminal prosecution in good faith procures the attendance of witnesses it will not lose its right to recover the costs of such witnesses because the subsequent conduct of the accused renders their attendance unnecessary. Where the defendant at first pleaded not guilty but at the time set for trial entered a plea of guilty the defendant is liable for the costs of all witnesses though the names of some of them were not indorsed on the indictment. Cameron v. State [Ind. App.] 76 N. E. 1021.

20. In New York children, when witnesses, may be committed to secure their attendance as witnesses. Code Cr. Proc. §§ 215, 218 and Pen. Code § 291, construed. People v. Society for Prevention of Cruelty to Children, 48 Misc. 175, 95 N. Y. S. 250. By statute (Rev. St. c. 51, § 36), the report of the master is made the basis for the order of attachment against one who willfully neglects to obey a subpoena issued by the master, and such report must contain the necessary elements to warrant the order for attachment. Hollister v. People, 116 Ill. App. 338.

21. Under Code Civ. Proc. § 3318, a witness cannot be compelled to attend unless he is paid mileage and the statutory per diem. In re Depue [N. Y.] 77 N. E. 798. And in a proceeding for contempt for not appearing it must be shown that those conditions were complied with. Id. An attachment for contempt for failure to obey a subpoena should not be ordered where it does not appear that the witness was paid or tendered his fees. Hollister v. People, 116 Ill. App. 338.

22. See Evidence, 5 C. L. 1301.

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USES.

USURY.

V

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